V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

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

CANA CONGREGATIONS'
CORRECTED OPENING POST-TRIAL BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

On review of this Court's earlier judgment under Va. Code § 57-9, the Virginia Supreme Court directed this Court to decide "the control and ownership of the property held in trust and used by the CANA Congregations … under principles of real property and contract law." *Protestant Episcopal Church in Diocese of Virginia v. Truro Church*, 280 Va. 6, 29 (2010). Notwithstanding the position of The Episcopal Church ("TEC") and the Diocese of Virginia ("Diocese"), the Supreme Court did not suggest that plaintiffs' canons—which purport to unilaterally declare a "trust" in Episcopal congregations' property—resolved the issue of ownership. Rather, the Court cited decisions such as *Norfolk Presbytery v. Bollinger*, 214 Va. 500 (1974), and *Green v. Lewis*, 221 Va. 547 (1980), which held that "trusts for a general hierarchical church" are "invalid" in Virginia, and that courts must resolve property disputes such as this by "'application of neutral principles of law.'" *Norfolk*, 214 Va. at 507; *Green*, 221 Va. at 555.

TEC and the Diocese have long professed that this case ought to be governed by "neutral principles." But they have not come to terms with the corollary of that proposition—that "neutral principles" are principles "'developed for use in *all* property disputes,' and which do not involve inquiry into religious faith or doctrine." *Norfolk*, 214 Va. at 504. Under the neutral principles framework established by *Norfolk* and *Green*, congregations "who unite themselves with a hierarchical church" do *not* "do so with an implied consent to its government." *Id*. at 504. To the contrary, it is *the denomination* that bears the burden of proving a "proprietary interest" in properties held by congregations. *Id*. at 507; *Green*, 221 Va. at 555. The denomination must carry this burden by "proving a violation by the [congregation] of either 'the express language of the deeds or a contractual obligation to the general church.'" *Green*, 221 Va. at 555 (quoting *Norfolk*, 214 VA. at 507). This inquiry, of course, is precisely the one that civil courts make "under principles of real property and contract law." *Truro Church*, 280 Va. at 29.

I. After 22 days of trial, the testimony of 67 witnesses, and the introduction of several thousand exhibits, the evidence conclusively establishes that plaintiffs have not met their burden under *Norfolk* and *Green*.

It is the CANA Congregations who fulfilled the responsibilities "customarily associated with ownership, title, and possession." *Green*, 221 Va. at 555. It is the CANA Congregations who funded the acquisition, improvement, and maintenance of their properties. It is the CANA Congregations who "exercise[d] dominion" over, and "manage[d] and control[led]," the properties (*id*.), including by deciding whether third parties would have access to the properties or Diocesan representatives could come and visit. *See also Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 443 (1982) ("The right to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.").

Unlike in *Green*, where the denomination was "the grantee" and "the contractual obligation which the [denomination] assumed ha[d] its genesis in the … deed" (*id*. at 556), here "[n]either the Diocese nor the Episcopal Church is specifically named as a grantee as such in any of [the deeds]." Tr. 31:13-16 (plaintiffs' opening statement). Moreover, in contrast to *Green*, the Congregations here exercised autonomy over their personal property. They *voluntarily* gave plaintiffs more than ten million dollars in recent decades and *withheld* donations at will—facts wholly inconsistent with the notion that their property was held in trust for the denomination. In short, the CANA Congregations exercised broad autonomy over their real property, their personal property, and every other area of their operations.

In hopes of overcoming this evidence, plaintiffs rely heavily on church canons unilaterally adopted after conveyance of many of the subject properties. These canons were enacted without the standstill periods or two-reading requirements that apply to constitutional changes,

and in violation of applicable state law notice requirements. Unlike the general church constitution in *Green*—which spelled out specific means by which member congregations would be deemed to consent to a denominational proprietary interest—plaintiffs' constitutions are silent on the entire topic. Even their canons do not designate means for a congregation to confirm that the denomination's assertion of a trust is consensual. Moreover, Virginia precedent provides no support for the proposition that church canon law overcomes the absence of denominational rights under the applicable statutory framework and governing deeds.

In any event, plaintiffs' canons do not create a "legally cognizable" contract. *Jones v. Wolf,* 443 U.S. 595, 606 (1979). The canons fail to reflect "the result indicated by the *parties*" (*id*. (emphasis added)) —the most basic test of mutuality. It is undisputed that the Congregations never voted to assent to, or ratify, plaintiffs' property canons (or any other denominational interest). Even if they had, moreover, the canons would fail for lack of consideration, as plaintiffs offered no benefit in exchange for the trust interest they purported to declare in the Congregations' properties.

Even if these requirements were met, the canons would fail for lack of a mutual *remedy* for breach. As TEC's chief legal officer admitted in binding Rule 4:5(b)(6) testimony, an "individual parish" lacks the "ability to force the Diocese to abide by the constitution and canons"; the parish's only remedy is to attempt to effect change "at the ballot box." DX-CANA2011-0009-00029 (Beers). But under settled Virginia law, "there must be absolute mutuality of engagement, so that each party has the right to hold the other to a positive agreement. Both parties must be bound or neither is bound." *Town of Vinton v. City of Roanoke*, 195 Va. 881, 888 (1954). The hope of remedying the denomination's breach of its canons at "the ballot box" does not satisfy these black-letter legal requirements.

In all events, Virginia law prohibits associations such as TEC and the Diocese from enforcing rules that result in forfeiture or encumbrance of their members' property. *Unit Owners' Ass'n v. Gillman*, 223 Va. 752 (1982). For all these reasons, it is unsurprising that plaintiffs' own official annotations of their Constitution and Canons would admit that "a canon," "however expressed," has "no legal force" as a means of "secur[ing] the property of [an affiliated] Community from being alienated from the Church in case the Community should officially sever its connection with the Church." Apostles Ex. 372.0004.

II. If Virginia law were interpreted to permit plaintiffs to unilaterally establish rights in the CANA Congregations' properties, such a result would violate the United States and Virginia Constitutions.

The Free Exercise Clause invalidates laws that "impose special disabilities on the basis of … religious status" (*Employment Div. v. Smith*, 494 U.S. 872, 877 (1990)); the Establishment Clause precludes States from "vesting in the governing bodies of churches" any "unilateral and absolute" power over third parties' property (*Larkin v. Grendel's Den*, 459 U.S. 116, 117, 127 (1982)); and the Virginia Constitution prohibits the Commonwealth from "confer[ring] any peculiar privileges or advantages on any sect or denomination" (Va. Const. art. I, § 16). If adopted, however, plaintiffs' theory would make a mockery of these principles. It would allow religious denominations the "peculiar privilege" of establishing property rights by means not available to any other person or entity in Virginia. They alone would hold "unilateral power" to designate themselves as beneficial owners of others' property, or to declare such property "abandoned," without regard to whether their interests are embodied in "legally cognizable form." *Jones*, 443 U.S. at 606. Indeed, if plaintiffs' conception of "neutral principles" were correct, then no local church could ever affiliate with a denomination without risking the loss of its property, as the

denomination at any point might pass a rule declaring ownership of congregational property. Such a legal regime would greatly discourage denominational affiliation, to the detriment of religious freedom and choice. Thankfully, the federal and state constitutions' religion clauses prohibit that result.

In addition, however, enforcing plaintiffs' canons would violate the Contracts Clauses as applied to properties acquired by the Congregations before 1993, when § 57-7.1 was enacted. As plaintiffs acknowledged in the § 57-9 proceedings, "it would be unconstitutional to interpret or apply [Virginia statutory law] to alter existing rights and obligations or trusts established in governing deeds." Br. in Opp. to Demurrers and Pleas in Bar at 29 (filed July 13, 2007). They were correct. The Virginia Supreme Court decision they cited in support, *Finley v. Brent*, held that a deed conveying property to a congregation's trustees is "a valid and binding contract," and that it is "beyond the legislative power" to read a state statute to "deprive[] the cestuis que trusts named therein, and created by the trust, of their property rights," or to "convey[] the right to dispose of this property to others." 87 Va. 103, 108-09 (1890). Reading § 57-7.1 as plaintiffs now request, however, would have just that effect. None of the deeds names them as beneficiaries, much less as grantees. Yet they seek to transfer "the right to dispose of this property to others than those to whom it was granted"—to themselves. *Id*. In the case of properties conveyed before 1993, such a result would violate the Contracts Clauses.

III. Because plaintiffs are unable to carry their burden under *Norfolk* and *Green*, the CANA Congregations are entitled to judgment. *Norfolk*, 214 Va. at 503; *Green*, 221 Va. at 555. If plaintiffs cannot show a proprietary interest, they lack standing to object to the Congregations' continued use of their properties. The issue of the identity of the congregation becomes moot. Indeed, the denomination in *Norfolk* raised a similar claim, arguing that a denominational court

should decide who was the rightful owner and possessor of the congregation's property, and that a contrary ruling would unlawfully interfere with the denomination's ecclesiastical law. The Supreme Court rejected this argument, finding that civil courts have the authority to resolve such property disputes, and ultimately declaring: "If . . . the [denomination] is unable to establish a proprietary interest in the property, *it will have no standing to object to* [*any*] *property transfer*." 214 Va. at 503 (emphasis added).

Even if plaintiffs had standing to raise this issue, Virginia law would require resolving it in the CANA Congregations' favor. Before Va. Code § 57-15 was amended to refer to denominations, the Virginia Supreme Court resolved property disputes between factions of congregations and other associations based on the deeds. *Finley*, 87 Va. at 107; *Davis v. Mayo*, 82 Va. 97, 1886 WL 2979 (1886); *Brooke v. Shacklett*, 54 Va. 301, 310-20 (1856); *Hoskinson v. Pusey*, 73 Va. 428, 431 (1879). Absent deed language expressly restricting use of the property to persons affiliated with a general association, the majority had full rights to the property.[1] Thus, if plaintiffs lack a proprietary interest under § 57-15, the case is over.

Neutral principles of corporations law compel the same result.[2] Further, even if the Court considered plaintiffs' theory that only they may create and disband Episcopal "parishes," their

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[1] *Compare*, *e.g.*, *Davis*, 1886 WL 2979, at *5 (ruling for a majority faction that changed its name and became independent where "[t]he property was not conveyed upon condition that the beneficiaries in the deed should retain the then name of their division, or that they should associate themselves with, or become subject to, the orders and regulations of the Grand Division, or any other body; and, consequently, they were left free to change the name of their division whenever they might see fit to do so"), *with Finley*, 87 Va. at 104 (ruling for a congregational minority based on "the deeds alone," where the deed conveyed the land "for the sole and exclusive use and benefit of religious congregations of regular orthodox Methodist Protestants" and "for no other use or purpose whatever").

[2] *E.g.*, *All Saints Parish Waccamaw v. Protestant Episcopal Church*, 685 S.E.2d 163, 174-75 (S.C. 2009) (holding that the congregation "effectively severed the corporation's legal ties to [TEC] and the Diocese" where the majority's "adoption of the Articles of Amendment complied with the requirements of [state corporations law]"); *From the Heart Ministries, Inc. v. African*

canon on "Parishes and Congregations" by its terms does not affect property: "This Canon shall not affect the legal rights of property of any Parish or Congregation." PX-COM-0001-055.

TEC and the Diocese cannot avoid these difficulties by declaring properties "abandoned" under their canons. Virginia law provides an objective secular test for deciding whether church property "may be regarded as abandoned"—namely, whether the "congregation has become extinct or has ceased to occupy such property as a place of worship." Va. Code § 57-15. As evidenced by the CANA Congregations' active use of the properties, that test is not satisfied here. Not surprisingly, no Virginia case lets denominations declare contested property in active use "abandoned." *Cf. Brown v. Virginia Adventist Christian Conference*, 194 Va. 909, 913 (1953).

Moreover, the statutory language of abandonment is found in § 57-15(A), the very statute at issue in *Norfolk* and *Green*. Thus, if plaintiffs' position were correct, denominations could circumvent their burden of proving a proprietary interest under § 57-15 simply by unilaterally declaring property abandoned. All that would be necessary to establish ownership would be a duly passed declaration, regardless of what is provided in the governing statutory framework, deeds, or denominational constitution. That is not the law.

IV. Finally, if the Court were to rule that plaintiffs possessed a proprietary interest in any of these properties, equity would require granting the CANA Congregations' counterclaims. In *Norfolk* and *Green*, the denominations sought rulings that they had proprietary interests that the congregations could not be eliminate. Here, plaintiffs do not merely assert a proprietary interest; they seek to transfer the titles, to extinguish all interests of the Congregations, and to evict them.

Methodist Episcopal Zion Church, 803 A.2d 548, 569 (Md. 2002) (citing the local church's "amendment of its charter to remove any reference to the A.M.E. Zion church and to vest its trustees with even greater authority to control the property of the church" as "evidence that may be construed to suggest that [the local church] did not, in fact, consent to the trust provisions [in the denomination's constitution]").

Diocese Compl. at 12. Yet plaintiffs have not explained how, if they succeeded in unilaterally asserting rights in the subject properties, that would extinguish the Congregations' interests.

If the Court found that plaintiffs had satisfied *Green* and *Norfolk*, equity would support compensating the CANA Congregations for their contributions to their properties. Courts in equity have the power of "shaping" the "remedy" "so as to fit the changing circumstances of every case and the complex relations of all the parties." *Turner's Adm'r v. Citizens' Bank Of Norfolk*, 111 Va. 184 (1910). This includes the power to prevent unjust enrichment. *Richardson v. Richardson*, 242 Va. 242, 246-47 (1991). And if the Congregations were not compensated for what they spent in acquiring, improving, or maintaining those properties, worth roughly $65 million dollars, granting plaintiffs the relief they seek would plainly unjustly enrich them.

The CANA Congregations acquired the overwhelming majority of their land without help from plaintiffs—typically in arms-length deals with third parties, or as gifts from their members. Nor did TEC or the Diocese make any material contribution toward the properties' improvement. It was the Congregation that planned, oversaw, and funded the construction and expansion of the sanctuaries, classrooms, and offices. The Falls Church and Truro Church alone spent over $20 million on improvements in recent decades, with no assistance from plaintiffs. Similarly, Epiphany spent $7.9 million to build and expand its building, which the Diocese assisted by making a $500,000 *loan*—at market rates. In sum, the financial benefits of affiliation ran one way.

This is to say nothing of the personal property—more than $10 million given to the Congregations by faithful donors. Indeed, every CANA Congregation cut back or terminated its donations to plaintiffs after the 2003 General Convention, by asking members either to earmark funds for the Diocese or contribute to the Diocese directly. Under these circumstances, granting plaintiffs ownership of the bank accounts would not only confer a windfall on plaintiffs; it would

dishonor the donors' express desire that their money *not* go to the denomination. Thus, in the event that the Court grants plaintiffs relief, it should offset that relief by granting the CANA Congregations' counterclaims.

We develop these points in depth below. Relevant factual support in addition to that cited herein is provided in the CANA Congregations' Proposed Findings of Fact for their Opening Post-Trial Brief.

ARGUMENT

I. Plaintiffs Have Failed To Establish A Proprietary Interest Under The Neutral Principles Framework Of *Norfolk Presbytery v. Bollinger* And *Green v. Lewis*.

The Virginia Supreme Court has rejected the view "that those who unite themselves with a hierarchical church do so with an implied consent to its government and take title to local church property subject to an implied trust for the general church." *Norfolk*, 214 Va. at 504. Accordingly, to establish ownership of congregational property, religious denominations in Virginia bear the "burden of proving" some other "proprietary interest" in the property. *Id*. at 507; *accord Green*, 221 Va. at 555; *id*. at 555 (denominations bear the "burden of proving that the [congregation and its trustees] have violated either the express language of the deeds or a contractual obligation to the general church" (quoting *Norfolk*, 214 Va. at 507)); *id*. (a "proprietary right" is one "customarily associated with ownership, title, and possession," "a right of one who exercises dominion over a thing or property, of one who manages and controls"). Civil courts conducting this inquiry must "look to [Virginia's] own statutes, to the language of the deed conveying the property, to the constitution of the general church," and—where called for by the constitution's express terms—"to the dealings between the parties." *Green*, 221 Va. at 555.

In *Green*, the lone case in which the Virginia Supreme Court has found a religious denomination to have proven a proprietary interest, each of these factors cuts in the denomination's favor. Here, by contrast, as explained below, each factor cuts the other way.

Virginia Statutes. Aware that church canons are not legally cognizable without the backing of civil law—a point they have repeatedly admitted outside of court—plaintiffs say that their canons, which purport to declare that congregational property is held in trust for the denomination, are made enforceable by Va. Code § 57-7.1. But as this Court has twice held, § 57-7.1 does not validate denominational trusts. And those rulings are compelled by ***14*** Virginia Supreme Court decisions spanning 180 years.[3]

Furthermore, even if § 57-7.1 otherwise authorized denominational trusts, plaintiffs have not satisfied the neutral requirements for establishing them. To cite one obvious reason, parties cannot unilaterally assert that the property of others is held in trust for their benefit; only those with title can act as *settlors*. Yet plaintiffs admit that they lack title to any of the subject properties. And even if § 57-7.1 were satisfied and had changed the law going forward, it could not be applied retroactively to validate conveyances made before its adoption in 1993. The great majority of the deeds conveying property here, however, pre-date the statute.

Deeds. In *Green*, "the A.M.E. Zion Church [was] the grantee in the deed," and the donor expressly restricted use of the property to "the purpose of erecting an A.M.E. Church of Zion … , not a church of some other denomination." 221 Va. at 553, 555. Here, by contrast, plaintiffs

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[3] *Gallego's Ex'rs. v. Attorney General*, 30 Va. 450, 461-62 (1832); *Brooke v. Shacklett*, 54 Va. 301, 312-13 (1856); *Hoskinson v. Pusey*, 73 Va. 428, 431 (1879); *Boxwell v. Affleck*, 79 Va. 402, 407 (1884); *Davis v. Mayo*, 82 Va. 97, 102 (1886); *Finley v. Brent*, 87 Va. 103, 106 (1890); *Fifield v. Van Wyck's Ex'r*, 94 Va. 557, 560 (1897); *Globe Furniture Co. v. Trustees of Jerusalem Baptist Church*, 103 Va. 559, 561 (1905); *Moore v. Perkins*, 169 Va. 175, 179-81 (1937); *Maguire v. Lloyd*, 193 Va. 138, 144 (1951); *Norfolk*, 214 Va. at 503; *Green*, 221 Va. at 555; *Reid v. Gholson*, 229 Va. 179, 187 n.11 (1985); *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.*, 249 Va. 144, 152 (1995).

admit that "[n]either the Diocese nor the Episcopal Church is specifically named as a grantee as such in any of the[] [deeds]." Tr. 31:13-16. That some of the congregation were described as "Episcopal" in a conveyance is insufficient to prevent the property from being retained by a congregation after disaffiliation. Indeed, cognizant of the need to have specific deed language subjecting property to denominational control, both other denominations and the Diocese itself employ use restrictions and reverter clauses to that end. Yet, despite being the grantor in several cases, the Diocese never added such clauses to the relevant deeds here.

The Denomination's Constitution. The general church's constitution in *Green* set forth detailed means by which affiliated congregations would be deemed to express their consent to be governed by that denomination's proprietary interest in their properties. The constitutions of TEC and the Diocese, by contrast, are silent as to church property. Instead, plaintiffs rely on church *canon law*, adopted without the standstill periods or two-reading requirements that apply to constitutional amendments, and in violation of the notice requirements of secular law. Even their canon law does not spell out the means by which a congregation may consent to denominational ownership. Moreover, much of plaintiffs' canon law was adopted between 1979 and 1983, long after many of the CANA Congregations acquired their properties, and it may not be applied retroactively.

In any event, as their own canon law reporters have repeatedly admitted—over a period of many decades, in official documents that bind plaintiffs—"a canon," "however expressed," has "no legal force" as a means of "secur[ing] the property of [an affiliated] Community from being alienated from the Church in case the Community should officially sever its connection with the Church." Apostles Ex. 372.0004. As the Massachusetts Supreme Court has held, "[t]he canons of the Protestant Episcopal Church … do not affect the legal title to the property held by

these defendants under the deeds above mentioned. Titles to property must be determined by the laws of the Commonwealth. The canons are matters of discipline, and cannot be enforced by legal process." *Sohier v. Trinity Church*, 109 Mass. 1, *23 (1871). Not surprisingly, therefore, as TEC admitted in 1981—after the adoption of the Dennis Canon—the "neutral principles" approach "gives great weight to the actions of controlling majorities, and would appear to permit a majority faction in a parish to amend its parish charter to delete all references to the Episcopal Church, and thereafter to affiliate the parish—and its property—with a new ecclesiastical group." Apostles Ex. 292.0012. That is what the CANA Congregations did here.

Plaintiffs' admissions that their canons are legally unenforceable are not surprising, as the canons do not begin to satisfy the neutral requirements of civil contract law. Most importantly, the record is clear that the CANA Congregations have never voted to assent to, or ratify, the conveyance of a proprietary interest to plaintiffs. In addition, the canons are not supported by valid consideration; they simply purported to impose a new unilateral obligation on the Congregations, without providing additional services or benefits in return. Moreover, the canons suffer from lack of mutuality, as undisputed testimony confirms that only TEC or the Diocese may seek to redress any alleged breach of the canons in civil court. Finally, even if plaintiffs' canons otherwise qualified as an enforceable contract, Virginia law prohibits associations such as TEC and the Diocese from enforcing rules that encumber their members' property or penalize the exercise of their property rights.

Course of Dealing. *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. But if Virginia law were to require considering it, such evidence would favor the CANA Congrega-

tions. To be sure, plaintiffs' bishops occasionally visited the Congregations' properties, and provided input on certain issues. But it was the CANA Congregations who purchased, designed, built, improved, maintained, mortgaged, zoned, leased, managed, insured, possessed, used, and worshiped at the properties. TEC and the Diocese can show no substantial financial contributions to the Congregations' property acquisition, improvement, or maintenance, or other congregational expenses. In fact, plaintiffs cannot demonstrate any material financial support for the operations of the Congregations. By contrast, the Congregations gave tens of millions of dollars to plaintiffs to fund denominational activities.

The CANA Congregations had not only financial autonomy, but operational autonomy. They selected their own rectors and staff, designed their own liturgies, ministries, and music, set their own service schedules, chose their own Sunday school curricula, education materials, and forms of worship, trained their youths, and commissioned their own missionaries—all with little or no involvement of TEC or the Diocese. Thus, it is the CANA Congregations, not TEC or the Diocese, who have "managed and controlled," and exercised "dominion" over, the subject properties. *Green*, 221 Va. at 555.

A. Plaintiff have failed to carry their burden of establishing a proprietary interest under the first *Norfolk/Green* factor: Virginia statutes.

Aware that the first neutral principles factor set out in *Norfolk* and *Green* is "the statutes of Virginia" (*Norfolk*, 214 Va. at 505; *see Green*, 221 Va. at 555), plaintiffs point to Va. Code § 57-7.1, a 1993 law that validates certain conveyances to trustees of religious entities. Tr. 47-57 (opening statement) (invoking § 57-7.1). Plaintiffs evidently construe this statute as giving legal effect to their canons, which either purport to impose a trust or, in plaintiffs' view, embody trust principles. Tr. 1228:13-16 (Mullin) ("Q The Church's various property and anti-alienation can-

ons, for example, are based on a trust concept? A Yes."). But for several independent reasons, Virginia law forecloses plaintiffs' argument that § 57-7.1 validates their canons.

First, following 14 decisions of the Virginia Supreme Court, this Court has twice ruled that § 57-7.1 does not legalize denominational trusts. Plaintiffs can show no reason to revisit these rulings. ***Second***, and equally important, even if denominational trusts were valid, plaintiffs have not satisfied the neutral requirements for establishing them. For example, it is black-letter law that putative *beneficiaries* cannot unilaterally assert trusts in property held in others' names; only title holders can act as *settlors*, and plantiffs lack title to the properties at issue. ***Third***, even if § 57-7.1 had changed the law going forward, it could not be applied retroactively to validate pre-1993 conveyances—to the great majority of the property at issue.

In short, plaintiffs rely on the single means of attempting to secure a proprietary interest that is most clearly unlawful in Virginia.

1. This Court's rulings that § 57-7.1 does not legalize denominational trusts are compelled by 14 Virginia Supreme Court decisions and a 1996 opinion of the Attorney General.

As plaintiffs acknowledge (Tr. 54:18-55:2), "[t]he parties fully briefed and argued the issues of the validity of denominational trust[s] in the Code Section 57-9(A) context," and this Court twice ruled that § 57-7.1 does not validate denominational trusts. *See* Letter Op. on the Court's Five Questions 11-14 (June 27, 2008); Letter Op. 12-16 (Aug. 19, 2008). There is no basis for revisiting these considered rulings.

Even if this Court were inclined to take a fresh look at the issue, however, it would find support for its prior rulings in ***14*** Virginia Supreme Court decisions[4] holding that § 57-7.1 or its

[4] *Gallego's Ex'rs. v. Attorney General*, 30 Va. 450, 461-62 (1832); *Brooke v. Shacklett*, 54 Va. 301, 312-13 (1856); *Hoskinson v. Pusey*, 73 Va. 428, 431 (1879); *Boxwell v. Affleck*, 79 Va. 402, 407 (1884); *Davis v. Mayo*, 82 Va. 97, 102 (1886); *Finley v. Brent*, 87 Va. 103, 106 (1890); *Fifield v. Van Wyck's Ex'r*, 94 Va. 557, 560 (1897); *Globe Furniture Co. v. Trustees of Jerusalem*

predecessors allow trustees to hold most church property only for congregations.[5] The Supreme Court held to this view even after the legislature added the terms "church" and "diocese" to § 57-7, and even after it added the terms "church" and "denomination" to §§ 57-15 and 57-16. The Supreme Court's repeated decisions span a 180-year period. Accordingly, when plaintiffs passed the Dennis Canon in 1979, Diocesan Canon 15 in 1983, and even their debt-related canons in the late 19th century, their purported efforts to designate themselves as beneficial owners of congregational properties were invalid under Virginia law.

Plaintiffs say things changed in 1993, when § 57-7.1 replaced § 57-7 and modernized its archaic language. But as this Court has recognized, 180 years of case law cannot have been *silently overruled* by a law stating: "this act is declaratory of existing law." 1993 Acts, ch. 370. *See* Five Questions Op. 13-14.

Even since 1993, the Virginia Supreme Court has cited *Norfolk* as holding that "§ 57-7.1 validates transfers . . . for the benefit of local religious organizations." *Asbury*, 249 Va. at 152. Plaintiffs argue that § 57-7.1 was not at issue in *Asbury* (Tr. 47-49), but that is not correct. The Court there had to confirm "that the Trustees," who sought to assert the congregation's rights, "[we]re proper parties," and standing turned on § 57-7.1. *Id*. at 152. Citing § 57-7.1, the Court found that the trustees could only have been trustees for the congregation, which established their standing.[6] Thus, the analysis of § 57-7.1 was necessary to the decision.

Baptist Church, 103 Va. 559, 561 (1905); *Moore v. Perkins*, 169 Va. 175, 179-81 (1937); *Maguire v. Lloyd*, 193 Va. 138, 144 (1951); *Norfolk*, 214 Va. at 503; *Green*, 221 Va. at 555; *Reid v. Gholson*, 229 Va. 179, 187 n.11 (1985); *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc*., 249 Va. 144, 152 (1995).

[5] Since 1962, some property can be held in trust for a diocese. *Norfolk*, 214 Va. at 506-07 (§ 57-7 was expanded to cover residences conveyed to benefit a "diocese," but "not . . . beyond this").

[6] *Id*. ("Code § 57-7.1 validates transfers, including transfers of real property, for the benefit of local religious organizations. *See Norfolk Presbytery v. Bollinger*, 214 Va. 500, 506 (1974) (construing former Code § 57-7).").

What is more, in 1996 the Attorney General opined that § 57-7.1 "encompasses property held for the benefit of a local congregation, as opposed to property held by a larger hierarchical body." 1996 Va. Opp. Atty. Gen. 194 (Apr. 4, 1996); Five Questions Op. 13-14. The legislature "is presumed to have knowledge of the Attorney General's interpretation of statutes, and [its] failure to make corrective amendments evinces legislative acquiescence." *Tazewell County. Sch. Bd. v. Brown*, 267 Va. 150, 163 (2004). The legislature amended § 57-7.1 in 2005 (2005 acts, ch. 772), but none of its changes reflects disagreement with either the Attorney General's opinion or *Asbury*. Thus, denominational trusts remain invalid, as the Court earlier ruled.

2. Even if denominational trusts were otherwise valid in Virginia, plaintiffs have not satisfied the neutral and generally applicable requirements for creation of such trusts.

Even if denominational trusts were now enforceable in Virginia, plaintiffs have not satisfied the rules for establishing them. In fact, plaintiffs have not suggested otherwise. By plaintiffs' lights, if § 57-7.1 gives effect to denominational trusts, it evidently makes no difference whether plaintiffs have otherwise established a valid trust under Virginia law. But nothing in § 57-7.1 indicates that it was intended to create new trust rules applicable only to denominations. Moreover, "neutral principles" are principles "developed for use in *all* property disputes" (*Norfolk*, 214 Va. at 504 (emphasis added)), and they embody "objective, well-established concepts of trust and property law familiar to lawyers and judges." *Jones,* 443 U.S. at 599, 603. Plaintiffs' canons do not satisfy the legal requirements that govern the creation of trusts. And given the likelihood of appeal, we urge the Court to make specific findings in this regard.

First, under Virginia law only the settlor—the party with title—may create a trust interest in property. "An express trust is based on the declared intention of the trustor." *E.g.*, *Leonard v.*

Counts, 221 Va. 582, 588 (1980).[7] Thus, as the South Carolina Supreme Court has unanimously held—in reasoning equally applicable in Virginia—"[i]t is an axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another or transfer legal title to one person for the benefit of another." *All Saints Parish Waccamaw v. Protestant Episcopal Church*, 685 S.E.2d 163, 174 (S.C. 2009).

Similarly, in *Arkansas Annual Conf. of AME Church, Inc. v. New Direction Praise and Worship Ctr., Inc.*, 291 S.W.3d 562 (Ark. 2009), the Arkansas Supreme Court unanimously rejected the denomination's argument that its constitution created an enforceable trust interest in the congregation's property.[8] Citing Arkansas trust law, the Court explained that there could be no such trust where "the 1971 deed indicates that [the grantor] intended to create a trust for *Sand Hill AME Church,* which he was authorized to do pursuant to Arkansas trust law," and "[n]othing in the language of the deed suggests that [he] had the intention of creating a trust in favor of either the National AME or the Arkansas AME. Neither the National AME nor the Ar-

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[7] *Accord Peal v. Luther*, 199 Va. 35, 37 (1957) ("an express trust is based on proof of the declared intention of the trustor"); Va. Code § 55-544.01 (a trust's terms are governed by "*the settlor's intent* regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding" (emphasis added)); *id*. § 55-544.05(B), (C) (charitable trusts).

[8] *Id*. at 436 (AME Discipline: "1. For the security of our meeting houses and the premises belonging thereunto, let the following plan of a deed of settlement be brought into effect in all possible cases wherever the law will permit it in a State. 2. If necessary, each Annual Conference may make such modifications in the deed as may be required by the laws of any State, so as to firmly secure the premises to the African Methodist Episcopal Church. 3. No personal or real property whatsoever of the A.M.E. Church in any foreign district or parts thereof shall be purchased, disposed of, sold, or otherwise encumbered except by the written consent of the presiding bishop and trustees elected by the Annual Conference in which the property is located. 4. The incorporation of all our churches, where the law will permit it, should be attended to as soon as possible. And in every corporation of the A.M.E. Church the pastor shall be president of the corporation and of the board of trustees, and the method of electing trustees shall be the same as prescribed in the Book of Discipline. Every pastor shall see that the provision is a part of the articles of incorporation. Also included in Section 2 is a form for a trust deed for local church property that provided the property was to be held in trust for the use of the members of the National AME under the rules of the *Book of Discipline.*" (paragraph breaks omitted)).

kansas AME had an ownership interest in the property at the time of the conveyance, and neither was a party to the transaction." *Id*. at 438. In short, an express trust cannot be created by the declaration of the would-be beneficiary, and it follows that "neither [a notice of interest recorded by a diocese] nor the Dennis Canon has any legal effect." *All Saints*, 685 S.E.2d at 174; *see also From the Heart Ministries, Inc. v. African Methodist Episcopal Zion Church*, 803 A.2d 548, 570-71 (Md. 2002) ("The creation of a trust depends upon the intention of the settlor.").

Second, if there were any trust agreements here, they would be reflected in the court petitions and orders appointing the trustees. Without exception, however, those petitions and orders, entered in several cases over the course of a century (or more), do not name any beneficiaries except the Congregations.[9] Similarly, the deeds name trustees only for the Congregations, not for the Diocese—in contrast to the deeds for certain other Episcopal congregations in Virginia. *Cf.* Apostles Ex. 004.0007 (deeding land to "BRADFUTE W. DAVENPORT, JR. A. C. EPPS AND H. MERRILL PASCOE, as TRUSTEES for the Episcopal Protestant Church in the Diocese of Virginia, whose address is 8317 Centerville Road, Manassas, Virginia 22111"); Apostles Ex. 340.0001 (deeding property to both congregational trustees and "A.C. EPPS, H. Merrill PASCO and Bradfute W. DAVENPORT, Jr., as Trustees of the Diocese of Virginia (Protestant Episcopal)").

Plaintiffs offered no evidence that any CANA Congregation trustee signed a trust agreement besides the court petitions, let alone one stating that the trustee held the property for plaintiffs' benefit. Even plaintiffs' witnesses admitted as much. *See* Tr. 4322:20-4323:6 (Goodrich)

[9] Apostles Exs. 37 (Petitions and Orders), 38 (Order); DCOE-523 (Petition and Order), 453 (Order), 470 (Order); DSTM-039-00101 – 104, 00187 – 192, 001096 – 197, 00203 – 207, 00211 – 214, 00236 – 237, 00253; DSTP-298, 300; DSTS-041-00359 (Order), -00454 – 476 (Petitions and Orders), -00481 (Order), -00482 (Petition), -00483 (Order), -00495 (Order), -00509 (Order), -00522 (Petition), -00532 (Order), DSTS-146 (Order); DX-FALLS-064-0001; DX-FALLS-065-00001 & 00005; DX-FALLS-031; DX-FALLS-049; TRU198, 203, 204.

("Q. You didn't sign a trust agreement on their [the Diocese's or TEC's] behalf, did you? A. Correct."); Tr. 4407:20-4408:2 (Keith) ("Q. You've never seen a written document from anyone at Truro Church, either the vestry or any trustees conveying a trust interest to the Episcopal-Church of the Diocese? A. I have not."). The record is even devoid of evidence that the trustees told *plaintiffs* that the trustees were holding for the denomination's benefit. And the trustees certainly never told the civil courts or notified the public via the land records that they served as trustees for TEC or the Diocese. As Falls Church trustee Harrison Hutson admitted:

> Q. * * * Over the years when the trustees filed petitions asking the court for authority to do something at that property, they always identified themselves as trustees of The Falls Church, didn't they?
>
> A. Yes.
>
> * * *
>
> Q. * * * Over all those years when you were filing petitions and getting orders, petitions by you and orders to you as trustee for The Falls Church, you never filed a document in the land records or in the court records in which you identified yourself as trustee for The Falls Church—for the Episcopal Church or the diocese, did you?
>
> A. I'm not aware of it.

Tr. 4261:8-16 (Hutson). Similarly, trustee William Goodrich—an experienced lawyer who drafted a number of The Falls Church's petitions—informed the courts only that he was trustee for The Falls Church.[10] Remarkably, he defended his failure to inform the courts of his purported role at trustee for TEC or the Diocese on the basis that "I don't know that I can go along with the premise . . . that there is a need to tell the Court in connection with petitioning under Section 57-15 that we are trustees for three different entities." Tr. 4338:12-22.[11] Likewise, the

[10] For both Hutson and Goodrich, *see* DX-FALLS-029, 054 (court petitions); DX-FALLS-011, 012, 055 (deeds signed or received); DX-FALLS-031, 046, 049 (court petitions); DX-FALLS-048 (signed declaration of easement); DX-FALLS-047 (signed deed of trust).

[11] Attorney John Keith, as Trustee for Truro Church, testified that he never sought the consent of either the Diocese or TEC when acting with respect to Truro Church's property. Tr. 4412:18-

Diocese's own Memorandum of Lis Pendens, filed after this litigation began, identifies Hutson, Goodrich and Steven Skanke only as Trustees for The Falls Church (Episcopal), without mention of any trust relationship with either TEC or the Diocese. DX-FALLS-056; *see also* Letter Op. 16-17 (Dec. 19, 2008) (citing the lis pendens and various other admissions of TEC and the Diocese that The Falls Church's historic 2-acre parcel is held in trust for the congregation).

Third, § 57-7.1 requires a "conveyance." But plaintiffs expressly disclaim having received a "conveyance," or any reliance on such a theory. Br. in Opp. to Demurrers (7/13/07) at 23 (plaintiffs "do not allege a 'conveyance' (or a contract to convey)"). Nor is this surprising, given that they are not named as grantees and lacked the ability to transfer title themselves.

In sum, plaintiffs did not do the things that Virginia law requires to establish a trust. They are asserting the right to create a trust by means not available to secular associations, local congregations, or any other private party. But Virginia law does not permit plaintiffs, putative beneficiaries who lack legal title to the properties at issue, to declare a trust for themselves via canon law. Thus, even if § 57-7.1 permitted plaintiffs to hold beneficial interests in local congregational property, that would not change the result, and we urge this Court to so hold.

3. Even if Va. Code § 57-7.1 had changed the law prospectively, it could not be applied retroactively to validate pre-1993 conveyances or canons asserting a denominational trust.

Plaintiffs acknowledge, as they must, that until at least 1993 Virginia did not recognize denominational trusts.[12] But even if § 57-7.1 had changed the law going forward, it could not be

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4413:2 (J. Keith). One is left to wonder how the Diocese and TEC's purported trust interest in the property could so easily be extinguished.

[12] Tr. 51:3-7 (opening statement) (arguing that § 57-7.1 "replaces 57-7 and the local trust principle that was imbedded in 57-7 and cases that came before it"); Tr. 53:19-54:1 (opening statement) (arguing that § 57-7.1 "reversed Virginia's historical [position]" on "denominational trust[s]"); *see generally Norfolk*, 214 Va. at 503 ("trusts for supercongregational churches are invalid"); *Green*, 221 Va. at 555; *Reid v. Gholson*, 229 Va. 179, 187 n.11 (1985).

applied to validate pre-1993 conveyances or canons. That retroactive application would unlawfully deprive the CANA Congregations of property rights that were vested under pre-1993 deeds. This is so as a matter of both statutory interpretation and constitutional law.

As a matter of statutory analysis, it is a "fundamental principle[] of statutory construction that retroactive laws are not favored, and that a statute is always construed to operate prospectively unless a contrary legislative intent is manifest." *Berner v. Mills*, 265 Va. 408, 413 (2003); Va. Code § 1-239. "[T]he general rule is that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or suits and especially vested rights, unless the intention that it should so operate is expressly declared. . . . Words of a statute ought not to have retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise defined." 17 *Michie's Jurisprudence*, Statutes § 73, at 493, 495 (2006).

Here, the text points *against* retroactive application. For example, "the phrase 'declaratory of existing law' is not a statement of retroactive intent." *Berner*, 265 Va. at 414. Further, consider the differences between § 57-7.1 and the prior law, § 57-7. Section 57-7 validated *both* conveyances "which hereafter shall be made" *and* conveyances "which, since January 1, 1777, *ha*[*ve*] *been* made." (Emphasis added.) Section 57-7.1, by contrast, states only that a conveyance "which *is* made ... *shall be* valid." (Emphasis added.) *Cf. Seaburn's Ex'or v. Seaburn*, 56 Va. (15 Gratt.) 423, 1859 WL 4575, at **4-6 (1859) (emphasizing the significance of "dropping the words 'devise or dedication'" in an earlier version of § 57-7). That is language of prospective application, not retroactive effect, as confirmed by other provisions of Title 57 still on the books. *See* Va. Code § 57-16(C) (deeds to ecclesiastical officers "made prior to March 18, 1942 … are hereby ratified and declared valid").

In addition, applying § 57-7.1 retroactively to recognize an additional beneficial interest in the CANA Congregations' properties would deprive the Congregations of vested property rights, in violation of the Contracts Clauses of the U.S. and Virginia Constitutions. *E.g.*, *Finley*, 87 Va. at 108. We develop this point in detail below.

B. The 42 deeds at issue in this case confirm that TEC and the Diocese have no proprietary interests in the properties at issue, and secure those properties to the CANA Congregations.

The next issue under *Norfolk* and *Green* is whether plaintiffs have carried "the burden of proving a violation by the [defendants] of . . . the express language of the deeds." *Green*, 221 Va. at 555 (quoting *Norfolk*, 214 Va. at 507). After Virginia statutes, the deeds are foremost in importance among the *Green* factors, particularly given the Virginia Supreme Court's mandate that this Court analyze plaintiffs' claims "*under principles of real property and contract law*." *Truro Church*, 280 Va. at 29.

As the U.S. Supreme Court has explained, "even in *Watson v. Jones*"—a common law deference-to-hierarchy case that plaintiffs have invoked—"the Court stated that, regardless of the form of church government, it would be the 'obvious duty' of a civil tribunal to enforce the 'express terms' of a deed, will, or other instrument of church property ownership." *Jones*, 443 U.S. at 603 n.3 (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 722-23 (1871)). Virginia law is in accord with this statement: "Where the terms of a deed are not ambiguous, [the court] look[s] no further than the four corners of the instrument under review." *E.g.*, *Harkleroad v. Linkous*, 281 Va. 12, 20 (2011). All presumptions favor the legal title holders, *Matthews v. W. T. Freeman Co., Inc.*, 191 Va. 385, 395 (1950), which plaintiffs concede are the CANA Congregations. And any trust that purports to "controvert a duly executed and recorded deed" must be proven by "clear and convincing" evidence. *Kellow v. Bumgardner*, 196 Va. 247, 256 (1954) (citations omitted).

Plaintiffs have not carried their burden of establishing any interest under the deeds. In sharp contrast to (1) the deed at issue in *Green*, (2) myriad Virginia deeds subjecting congregational property to the control of the denomination, and (3) several deeds conveying interests in congregational property to the Diocese, the 42 deeds at issue grant no interest or control to TEC or the Diocese. Moreover, as the many deeds in the record confirm, Virginia denominations—including the Diocese—know full well how to secure a proprietary interest in congregational property. Indeed, the Diocese's Annual Council Journals give explicit instructions as to how one conveys property to the Diocese. Yet one searches those same journals in vain for any suggestion that conveying property to an affiliated congregation grants the Diocese a property interest. Furthermore, deeds to properties of other congregations in the Diocese either title the properties in the name of the Diocese's bishop or include express use restrictions subjecting the properties to the Diocese's constitution and canons. That plaintiffs here failed to use these ordinary means of securing an interest in the properties at issue is telling—and should be dispositive.

1. The 42 deeds at issue here contrast sharply with the deed in *Green*, which granted the denomination proprietary rights.

The 42 deeds at issue bear little resemblance to the deed in *Green*. There, "[t]he grantors conveyed the property to 'Trustees of the A.M.E. Church of Zion,'" "for the purpose of erecting an A.M.E. Church of Zion (to be known as Lee Chapel), not a church of some other denomination, or an independent church." 221 Va. at 553; *accord id*. at 549. As the Court observed, the "express language of the deed" both granted the property at issue to the A.M.E. denomination and restricted its use to worship under that denomination's auspices: "Here the A.M.E. Zion Church *is the grantee* in the deed, the property having been conveyed to trustees of that church to establish an A.M.E. Zion Church thereon." *Id*. at 555 (emphasis added). Absent such language, the denomination would not have gotten to first base in establishing a proprietary interest. *See*

221 Va. at 556 ("the contractual obligation which the AME Zion Church assumed has its genesis in the 1875 deed"). And that becomes even clearer when one takes account of the application of neutral principles of law, which grant deeds great weight and resolve any ambiguities concerning ownership in favor of the title holder.

In contrast to the deed in *Green*, the deeds here convey no interest to TEC or the Diocese. All 42 deeds are in the name of trustees (or the vestry) of the *Congregations*. As Mr. Davenport admitted in his opening statement: "There are 32 deeds, I believe, in this case. Neither the Diocese nor the Episcopal Church is specifically named as a grantee as such in any of them." Tr. 31:13-16. Setting aside the fact that we count 42 deeds, the record otherwise confirms that Mr. Davenport was correct.[13]

Some of the property at issue was conveyed before TEC or the Diocese even existed,[14] which itself forecloses any suggestion that the donor intended to grant them an interest. As the New York Court of Appeals recognized in *First Presbyterian Church of Schenectady v. United Presbyterian Church*, 464 N.E.2d 454, 463 (N.Y. 1984), a denominationally-declared property interest cannot be applied to property that the congregation acquires prior to affiliation, even where that affiliation spans 200 years. *Id*.

Moreover, none of the CANA Congregations' properties is titled in the name of the bishop or trustees of the Diocese—in contrast to other Episcopal properties in Virginia.[15] None of

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[13] There are 42 deeds at issue. *See* Apostles Exs. 33-35; DCOE-497; DSTM-004, 005; DSTP-293 – 297; DSTS-005 – 012; DX-FALLS-0001 – 0012; TRU001, TRU002, TRU006 – TRU012, TRU015; PX-TRU-0515.

[14] DX-FALLS-0001; DX-FALLS-0002 (deeding Falls Church historic 2-acre parcel to "the … Vestry of Truro parish and their successors"); *see generally* Letter Op. 14-18 (Dec. 19, 2008) (concluding "that the vestry of the TFC is the legal successor of the vestry of Truro parish").

[15] *Cf., e.g.*, PX-COM-0246A-0191 – 0198 (2006 Annual Council Journals (Properties Held)); Apostles Ex. 345 (deeding property to Diocesan Bishop Peter Lee); Apostles Ex. 4.0007 (deeding property to "BRADFUTE W. DAVENPORT, JR. A. C. EPPS AND H. MERRILL PAS-

the deeds, including for properties conveyed by the Diocese, contains any reverter clause or reversionary interest providing that, in the event of the congregation's disaffiliation from the denomination, the property transfers to plaintiffs. And at least one of the deeds conveying property from the Diocese itself includes a covenant warranting that the property was "free from all encumbrances."[16]

As explained below, these factors not only distinguish the properties here from those at issue in *Green*; they distinguish the properties here from the practices of a host of other denominations—across the theological spectrum and including hierarchical denominations—and from the routine practices of the Diocese itself.

The Diocese's Annual Council Journals are instructive in this regard. For at least two decades, those Journals have invited benefactors to give property to one of "three legal titles":

> Gifts of property of every description, real, personal or mixed, may be made to the Diocese of Virginia by using any of the following three legal titles:
>
> **1) the Protestant Episcopal Church in the Diocese of Virginia;**
> **2) the Bishop of Virginia of the Protestant Episcopal Church in the Diocese of Virginia;**
> **3) the Trustees of the Protestant Episcopal Church in the Diocese of Virginia.**

PX-COM-0241-008. Notably, the Diocese does not encourage its donors to simply make a gift to affiliated congregations; such gifts must be conveyed to one of the designated *diocesan* entities. This too confirms that there is a material difference between property titled in the name of the Diocese and property titled in the name of the CANA Congregations' trustees.

COE, as TRUSTEES for the Episcopal Protestant Church in the Diocese of Virginia, whose address is 8317 Centerville Road, Manassas, Virginia 22111"); Apostles Ex. 340.0001 (deeding property to both congregational trustees and "A.C. EPPS, H. Merrill PASCO and Bradfute W. DAVENPORT, Jr., as Trustees of the Diocese of Virginia (Protestant Episcopal)").

[16] Apostles Ex. 33.0002; *see id*. at 0001 (conveying property from "THE DIOCESAN MISSIONARY SOCIETY OF VIRGINIA" to "MALCOLM S. JONES, GEORGE R. YOUNTS AND WILLIAM M. PETERSON, as Trustees for The Church of the Apostles").

2. The 42 deeds at issue here contrast sharply with deeds securing the interests of other denominations, and with deeds to other properties in which the Diocese has secured a proprietary interest.

Religious denominations in Virginia have several means of securing proprietary interests in congregational property. And these means are not only routinely used by other denominations, such as the Methodists, Presbyterians, Lutherans, Mormons, Baptists, Pentecostals, and Catholics; they are routinely used by the Diocese itself. Plaintiffs nonetheless failed to use these practices here. Indeed, their practices here stand out among religious denominations as reflecting the least possible effort to secure a legally cognizable interest in congregational property. In short, plaintiffs' approach appears to be: Pass a canon and hope for the best.[17]

First, as this Court has recognized (Letter Op. on Constitutionality of Va. Code § 57-9(A) at 32 (June 27, 2008)), denominations have long been free to place title to congregational property in the name of denominational officers such as bishops. Va. Code § 57-16. The Catholic Church, for example, holds property in the name of its bishops.[18] Similarly, the Mormon[19] and Lutheran[20] churches routinely hold property in the name of denominational officials.

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[17] The various legitimate means for securing an interest in property all require the specific consent of the grantor or the congregation. If recognized by the Court, plaintiffs' method would allow them to take property without the grantor's or the owner's specific consent.

[18] DX-FALLS-0197-00001-00007 (Stipulation of Fact) ¶ 5 ("Title to the real property of parishes (local congregations) in Virginia attached to the Roman Catholic Church is held in the name of the Bishop of the Diocese in which the parishes are located"); Apostles Ex. 351 (conveying property to "THE MOST REVEREND WALTER F. SULLIVAN, BISHOP of the CATHOLIC DIOCESE OF RICHMOND, VIRGINIA . . . and his successors in office"); Apostles Ex. 360 (conveying property to "MOST REVEREND PETER L. IRETON, Bishop of the Catholic Diocese of Richmond or his successor in Office").

[19] DX-FALLS-0197-00001-00007 (Stipulation of Fact) ¶ 8 ("Title to the real property of congregations in Virginia attached to the Church of Jesus Christ of Latter-Day Saints (sometimes known as the Mormons) is held in the name of Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints, a Utah corporation sole, authorized to do business in Virginia"); Apostles Ex. 355 (conveyance from "ANDREW P. GASSER, PRESIDENT OF THE WINCHESTER VIRGINIA STAKE OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS" TO THE "CORPORATION OF THE PRESIDING BISHOP OF THE

As this Court has noted, "the Diocese itself regularly[] and of its own free will" holds property in the name of its bishop, a duly appointed officer. Letter Op. on Constitutionality of Va. Code § 57-9(A) at 32 (June 27, 2008). As Diocesan Canon 15.4 provides, "[t]he Bishop, or Ecclesiastical Authority, is hereby authorized to acquire by deed, devise, gift, purchase or otherwise, any real property for use or benefit of the Diocese. Property so acquired shall be held and transferred by the Bishop or the Ecclesiastical Authority of the Diocese in accordance with the provisions of Section 57-16 of the Code of Virginia." PX-COM-0003-028. The Diocese uses this authority: The bishop holds at least 29 properties in his own name, some 16 of which are used by worshipping congregations. Const. Op. at 33.[21] In sum, plaintiffs routinely hold property in a manner that would secure a proprietary interest in congregational property. *See also* Tr. 1246:8-20 (Mullin) (plaintiffs' expert's admissions that, after 1979, "some dioceses chose other means of purporting to subject congregational property to the controls of the denomination," "[t]here was variance in the method chosen," and "[s]ome dioceses, in fact, required property to be put in the name of the bishop or Diocesan 19 corporation").

Second, religious denominations in Virginia can avail themselves of reverter clauses (a special limitation or condition subsequent applicable to the grantee's title, *see* Restatement of Property §§ 44-45 (1936)) that grant them a reversionary interest that vests if and when a mem-

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CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a Utah corporation sole, authorized to do business in Virginia"); Apostles Ex. 354.0001 (conveying property to "FRANK E. RAMSEY AND HIS DULY APPOINTED SUCCESSORS IN OFFICE AS PRESIDENT OF THE RICHMOND VIRGINIA CHESTERFIELD STAKE OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS").

[20] Apostles Ex. 335.0001 (conveying property to RICHARD T. HINZ, President of the Southeastern District of the Lutheran Church–Missouri Synod").

[21] *See* PX-COM-0245A-0391 – 0399 (Journal of the 210th Annual Council of the Diocese) ("Properties Held"); DX-FALLS-0197-00001-00007 (Stipulation of Fact ¶ 1) (noting that not all property of Episcopal congregations in Virginia is held by trustees).

ber congregation decides to disaffiliate from the denomination. The Church of God, for example, has developed a form deed containing a reverter clause providing:

> If the local congregation at the place described above shall at any time cease to function, or exist, or act contrary to Church of God polity, or separate from the Church of God (Cleveland, Tennessee), then said trustees shall hold title to said real estate including personal property for the Church of God (Cleveland, Tennessee) generally in the state where said real estate is located; and said trustees shall convey the said real estate upon demand to the State Board of Trustees of the Church of God (Cleveland, Tennessee) in said state, which said state board shall be authorized to either use said real estate and personal property, or the proceeds derived from the sale of same (said state board being authorized to sell and convey the said real estate and personal property at any time after title is vested in it), for the use and benefit of the Church of God . . . .

Apostles Ex. 349.0001 (deed). The Church of God routinely uses this clause in deeds in Virginia. *E.g.*, *id*; *accord* Apostles Ex. 352.0002; Apostles Ex. 353.0002; Apostles Ex. 344.0002 ("In the event this corporation shall cease to exist, or depart from the rules, regulations, tenets, and teachings of the Church of God, Cleveland, Tennessee, and otherwise, the assets of the corporation shall revert to the State Trustees for the Church of God in the State of Virginia.").

Similarly, the A.M.E. Zion Church, the prevailing denomination in *Green*, has secured its interests via reversionary clauses in situations where property is conveyed to a congregation as opposed to the denomination. As one representative deed provides, "[t]he 46th Quadrennial Session of the General Conference directs that the right of any local church as a whole, or in part, to withdraw from The A.M.E. Zion Church is not recognized and does not exist." Apostles Ex. 356.0004. That deed goes on to state that "[w]henever, hereafter a particular congregation shall cease to function or exist, or is formally dissolved in accordance with the provisions of the *Discipline*, or become extinct by reason of the dispersal of its members, the abandonment of its work, or cause, such property as it may have, whether real, personal, intellectual, tangible or intangible, shall be held in trust by the local Board of Trustees, and, used, and applied for such uses, purposes, and trusts as the Annual Conference, within whose bounds the local church is

situated, may direct, limit, and appoint, or such property may be sold or disposed of in accordance with the provisions of the *Book of Discipline*." *Id*. This deed post-dates *Green* by some 27 years—which suggests that, even today, the denomination doubts the efficacy of relying on course-of-dealing evidence and the general church's constitution.

Likewise, certain Baptist denominations use deeds providing that "[i]n the event the entire membership of said Church should renounce these practices and doctrines [of missionary Baptists, as believed in and practiced by the Mount Vernon Baptist Association of Virginia, and the Southern Baptist Convention or their successors], or in case its house of worship and/or land upon which it is situated as above set forth, be abandoned or shall cease to be used as a house or place of Baptist worship, *then all of the land and improvements thereon shall immediately revert to the Board of Trustees of Mount Vernon Baptist Association, LTD, its successor or assigns*." Apostles Ex. 330.0003 (deed) (emphasis added). And, outside of Virginia, Episcopal dioceses employ the same approach. Apostles Ex. 369.0015 (Article XI, § 1) (Diocese of West Missouri constitution).

None of the deeds here, by contrast, contains any such reverter clause in favor of the Diocese or TEC.[22]

Third, and even more commonly, denominations in Virginia employ deed language to restrict the use of congregational property to worship under a particular denomination's auspices.

Methodist Use Restrictions. The most prominent example of a denomination employing such "use restrictions" is the United Methodist Church, whose constitution (aka the Book of Discipline) contains an entire 40-page chapter governing church property and mandating specific language for inclusion in all deeds of affiliated congregations. Apostles Ex. 308.0035–308.0073;

[22] The property gifted from Mary Curran to Truro Church does contain a reverter clause, but in favor of her Estate, not the Diocese or TEC. DX-TRU012.

id. at 308.0036 ¶ 2503 ("*Trust Clauses in Deeds*"). The Methodist constitution provides that, except where reverter clauses require otherwise, "all written instruments of conveyance by which premises are held or hereafter acquired for use as a place of divine worship or other activities for members of The United Methodist Church shall contain the following trust clause":

> *In trust, that said premises shall be used, kept, and maintained as a place of divine worship of the United Methodist ministry and members of the United Methodist Church; subject to the* Discipline, *usage, and ministerial appointments of said Church as from time to time authorized and declared by the General Conference and by the annual conference within whose bounds the said premises are situated. This provision is solely for the benefit of the grantee, and the grantor reserves no right or interest in said premises.*

Apostles Ex. 308.0036.

As land records across Virginia confirm, Methodist congregations comply with this directive. *See* Apostles Exs. 325, 328, 329, 331, 332, 336, 337, 338, 343 (deeds containing such clauses). Indeed, in one case the parties filed a corrected deed because the Methodist Board of Missions, the grantee, "omitted to provide therein for a trust provision required by the United Methodist Church" and "the said parties wish[ed] to include the trust provision in the deed." *See* Apostles Ex. 328.0001. Use restrictions are routinely employed by other Methodist denominations as well.[23] And the Virginia Supreme Court has long enforced such restrictions in favor of factions of the congregation that remain affiliated with the denomination specified in the restriction. *E.g.*, *Finley*, 87 Va. at 107; *Hoskinson*, 73 Va. at 431.

Presbyterian Use Restrictions. The Methodists are not alone. The Presbyterian Church (U.S.A.) likewise secures its property interests by employing use restrictions in the deeds of af-

[23] *See* Apostles Ex. 347 (deed containing similar provision restricting property "for the use of the ministry and membership of the Methodist Episcopal Church South, subject to the usage Discipline, and appointments of the said Church"); Apostles Ex. 357 (similar provision restricting property "for the use of the ministry and membership of the . . . Colored Methodist Episcopal Church").

filiated congregations. As with the Methodists, the Presbyterians devote a chapter of their church constitution (the Book of Order) to church property. Land records from across Virginia confirm that the deeds of local Presbyterian congregations routinely acknowledge a proprietary interest in the general church, in keeping with this constitution. Typically, such deeds state that "[t]he premises herein conveyed shall be used, kept, maintained and held in trust by the grantee for Divine Worship and other purposes of the ministry of First Presbyterian Church, Richmond, Virginia, *as a particular church belonging to the Presbytery of the James (or its legal successors), subject to the Provisions of the Constitution of the Presbyterian Church (USA).*" Apostles Ex. 327.003 (1/24/07 deed); *accord* Apostles Exs. 324, 326, 348 (all containing similar language). Thus, both the Methodist and Presbyterian deed provisions not only specify that the property is restricted to worship under the denomination's auspices, but also expressly reference the constitution of the general church as a document to which the property is subject.

Lutheran Use Restrictions. In a similar vein, Lutheran churches in Virginia include deed language restricting use of congregational property to worship under denominational control. The Lutheran Church–Missouri Synod, for instance, restricts the use of church properties to "permitted religious purposes of the . . . Southeastern District of The Lutheran Church–Missouri Synod," and to use "as a location for a house for the meeting of societies or committees of the church or others for the transaction of business connected with the church and for use in furtherance of the affairs of the church diocese." Apostles Ex. 335.0001; *see also* Apostles Ex. 339.0001–0004 (subjecting the property of a Lutheran congregation to "the corporate bylaws" of the "Board of American Missions of the Lutheran Church in America").

Baptist Use Restrictions. Likewise, Virginia land records reveal Baptist deeds restricting use of congregational property "for the use and benefit of those of the membership, even though

they may be a minority, who adhere to, cooperate with and conform to the doctrines and practices of missionary Baptists, as believed in and practiced by the Mount Vernon Baptist Association, the Baptist General Association of Virginia, and the Southern Baptist Convention or their successors." Apostles Ex. 330.0002–0003. Thus, even denominations that all agree are congregational secure the denomination's interest by employing deed language creating a use restriction.

A.M.E. Zion Church Use Restrictions. Not surprisingly, the land records reveal use restrictions in deeds of congregations affiliated with the A.M.E. Zion church. As one representative deed provides, "such property as [the local congregation] may have, whether real, personal, intellectual, tangible or intangible, shall be held in trust by the local Board of Trustees, and, used, and applied for such uses, purposes, and trusts as the Annual Conference, within whose bounds the local church is situated, may direct, limit, and appoint, or such property may be sold or disposed of in accordance with the provisions of the *Book of Discipline*." *Id*. Here again, this deed —which long post-dates *Green*—suggests that the denomination viewed deed restrictions as preferable to relying on "course of dealing" evidence and the general church's constitution. That should come as little surprise, given the centrality of the deed to the Court's analysis in *Green*. *See* 221 Va. at 549, 553, 554, 555, 556 (seven references to the deed).

Episcopal Use Restrictions. The same would appear to be true of plaintiffs, at least judging by Virginia deeds restricting properties to use for worship under plaintiffs' control. For example, in 1986 the Bishop of the Diocese conveyed property to St. Aidan's Episcopal Church in Fairfax County. Although the Dennis Canon had been on the books for seven years, and Diocese Canon 15.4 for three, the Diocese nonetheless subjected the conveyance to the following proviso: "To have and to hold the same in trust nevertheless for the use and benefit of the congrega-

tion of St. Aidan's Episcopal Church *in accordance with the canons of the Episcopal Church in the Diocese of Virginia*." Apostles Ex. 333.0002 (emphasis added).

The very next year (1987) the Diocese conveyed property to Church of the Epiphany, a defendant here. Rather than use the St. Aidan's deed as a template, the Diocese conveyed this congregational property without any use restriction. DCOE-497-02643. Yet the following year (1988), the Diocese reverted to its former ways, conveying another property to St. Aidan's Episcopal Church subject to a use restriction. Apostles Ex. 334.0002. Indeed, the Diocese modified its prior use restriction in a manner evidently designed to strengthen it: "To hold *and administer* the same in trust nevertheless for the use and benefit of St. Aidan's Episcopal Church in accordance with the canons of the Episcopal Church in the Diocese of Virginia." *Compare id*. (emphasis added) *with* Apostles Ex. 333.0002.

3. Deed language identifying the grantee congregation as "Episcopal" does not, without more, establish a proprietary interest in favor of the Episcopal Church or the Diocese.

Here, unable to cite specific conveyances, reverter clauses, or use restrictions, plaintiffs rely principally on the fact that certain deeds at issue identify as "Episcopal" the congregation to whom the property is deeded.[24] For several reasons, such language does not relinquish any property right to the denomination.

[24] Only two of the 42 deeds here contain language that arguably sounds in terms of any sort of use restriction. The first, an 1874 replacement deed to one Truro parcel, restricts use of the property to "the following purpose": "for the use of the members & congregation of the Protestant Episcopal Church of the Diocese of Virginia worshipping & to worship in the building on said lot known as & called Zion Church; subject to the Constitution, canons & regulations of the Protestant Episcopal Church of the Diocese of Virginia." TRU001.0002. The second, an 1874 deed to one St. Stephen's parcel, provides that the property is conveyed "in trust nevertheless and for the sole use and benefit of the religious society and congregation known as the Protestant Episcopal Church for the purpose of erecting a house for divine worship and such other houses as said congregation may need, and, said church or house for divine worship when so built shall be used and enjoyed by said religious society or congregation according to the laws and canons of said church not inconsistent with the laws and constitution of Virginia." DSTS-005-00032.

To begin with, several of the instruments of conveyance here contain *no* reference to the fact that the grantee congregation is "Episcopal."[25] In fact, the Diocese itself conveyed property to the CANA Congregations without including such language.[26] And if the presence of the term "Episcopal" without more has such critical significance, it is hard to understand why the Diocese would not consistently include such a term in its own conveyances to affiliated congregations.

In any event, plaintiffs' reliance on the inclusion of the word "Episcopal" is foreclosed by *Davis v. Mayo*, 82 Va. 97, 1886 WL 2979, at *5 (1886). There, the Virginia Supreme Court addressed a dispute between two factions of a local body of the Sons of Temperance, both claiming to be beneficiaries under a deed granting property "for the use and benefit of the Springfield Division, No. 167, Sons of Temperance" and "under [its] control." *Id.* at *2. Use of the property there had been uncontested until the defendant Mayo, "claiming to be acting as the Grand Worthy Patriarch of the Grand Division of Sons of Temperance of Virginia," "declar[ed] that the charter of the division had been revoked" and "assumed to organize a Division of Sons of Temperance" called by the original name. *Id*. In response, "a majority of the members of the old division … changed the name of their division to 'Springfield Division, No. 167, *Independent* Sons of Temperance,'" and reelected the previous entity's trustees as their own. *Id*. When the matter

[25] *E.g.*, DX-FALLS-0006-000001 (conveying property to "H. J. SPELMAN, ALBERT M. LESTER and LAWRENCE W. HARRISON, Trustees of The Falls Church, Falls Church, Virginia"); DX-FALLS-0007-000001 (same); Apostles Ex. 033.0001 (conveying property to "MALCOLM S. JONES, GEORGE R. YOUNTS AND WILLIAM M. PETERSON, as Trustees for The Church of The Apostles, Fairfax County, Virginia"); DSTM-003-0019 (conveying property to "J. DEAN MOSHER, B. EARL PLIPPO and JAMES M. YINGLING, Trustees of St. Margaret's Church, Dettingen Parish, Prince William County, Woodbridge, Virginia").

[26] *See* Apostles Ex. 033.0001 (conveying property from "THE DIOCESAN MISSIONARY SOCIETY OF VIRGINIA" to "MALCOLM S. JONES, GEORGE R. YOUNTS AND WILLIAM M. PETERSON, as Trustees for The Church of The Apostles, Fairfax County, Virginia"); DSTM-003-0019 (conveying property from "THE RIGHT REVEREND ROBERT F. GIBSON, JR. BISHOP OF THE DIOCESE OF VIRGINIA" to "J. DEAN MOSHER, B. EARL PLIPPO and JAMES M. YINGLING, Trustees of St. Margaret's Church, Dettingen Parish, Prince William County, Woodbridge, Virginia").

landed in court, members of the Mayo contingent argued that their faction, which bore the original name, owned the property. The trial court agreed.

The Virginia Supreme Court reversed, however, rejecting the argument that the majority's decision to become independent and to change its name took them outside the scope of the deed. As the Court explained, "[t]he property *was not conveyed upon condition that the beneficiaries in the deed should retain the then name of their division, or that they should associate themselves with, or become subject to, the orders and regulations of the Grand Division, or any other body; and, consequently, they were left free to change the name of their division whenever they might see fit to do so*." *Id*. at *5 (emphasis added). In other words, absent express provisions in a deed clearly restricting use of property to those affiliated with a particular association, a deed reference to the name of that association is insufficient to divest the majority of the local affiliate's members of their property upon disaffiliation from the general association.

Davis disposes of plaintiffs' reading of the deeds here. Plaintiffs earlier seemed to agree. *See* ECUSA-Diocese Response Br. Pursuant to Court's June 27, 2008, Order 9 (filed July 8, 2008) (reading *Davis* as holding that "changing the name of an entity does not affect its property rights").

More generally, the notion that a deed's identification of a congregation by its formal name and affiliation restricts that congregation from changing that name and affiliation is akin to an argument for a restrictive covenant or restraint on alienation, which under Virginia law "[is] not favored and must be strictly construed." *E.g.*, *Traylor v. Holloway*, 206 Va. 257, 259 (1965). This is particularly true when there are readily available means of stating clearly that real property is not to be used for purposes (or entities) other than those specified in the deeds. *E.g.*, *Scott v. Walker*, 274 Va. 209, 213, 218 (2007); *Schwarzschild v. Welborne*, 186 Va. 1052, 1058

(1947); *Burdette v. Brush Mountain Estates, LLC*, 278 Va. 286, 297-99 (2009). Even "[a] declaration of the use to which the granted premises are to be applied does not ordinarily import a condition or limitation, but only in cases in which a reverter or forfeiture is expressly provided and in cases to which the intent to create a grant on condition or limitation is plain is the grant held to be one on condition or limitation." *Roadcap v. County School Bd. of Rockingham County*, 194 Va. 201, 206 (1952) (declining to reach the issue of whether a school was abandoned where the grantors failed to include in "the premises or granting clause such words as 'as long as said land is used as a location for a public school' or 'until a failure to provide public school facilities thereon' or 'while the said lot is used as a public school location.'").

In *Scott*, for example, the Virginia Supreme Court held that deed language restricting use of property to "residential purposes" did not preclude its "rental … on a nightly and/or weekly basis" or other "temporary or transient use[s]." *Id*. at 212, 213. Noting that covenants restricting the use of property "are to be construed most strictly against the grantor and persons seeking to enforce them, and substantial doubt or ambiguity is to be resolved in favor of the free use of property and against restrictions," the Court emphasized that "[t]he restrictive covenant does not by express terms prohibit the short-term rental of the [property]." *Id*. at 213, 217. Moreover, if the restrictive covenant at issue had been intended to bar the actions complained of, "it would have been easy to say so, and it would not likely have been left to the uncertainty of inference." *Id*. at 217 (quoting *Schwarzschild*, 186 Va. at 1058). Thus, "[i]n the absence of language expressly or by necessary implication prohibiting nightly or weekly rentals," that use was lawful. *Id*.; *see also Burdette*, 278 Va. at 297-99 (deeds' "subject to" language operated only as phrase of qualification and notice, and did not create affirmative rights; instrument of conveyance was required to grant an express easement).

This reasoning applies here. Nothing about a deed that identifies the religious affiliation of a grantee congregation "expressly or by necessary implication" restricts use of the transferred property to worship under specific denominational auspices or rules. Further, the widespread use of reverter clauses and use restrictions serving such a restrictive purpose confirms that "it would have been easy to say" that use of the property for worship in affiliation with another denomination was prohibited, if that was the grantor's intent.

Indeed, the notion that deed language identifying the grantee by affiliation, without more, precludes that grantee from changing its affiliation without losing its property would quite plainly be a non-starter in other contexts. Suppose, for example, that a grantor conveyed property to "WWTV, a local affiliate of the Fox Broadcasting Company." Absent language subjecting the conveyance to some sort of condition subsequent—*e.g.*, "provided however, that if WWTV ever terminates its affiliation with FOX, the property shall revert to the grantor"—no one would think to suggest that the local TV station would lose its property upon reaffiliating with, say, CBS.

Finally, it merits emphasis that deed language identifying a congregation as "Episcopal" or "Lutheran" or "Catholic" serves to distinguish such congregations from others bearing similar names. One need only thumb through the Yellow Pages to see that churches of different denominations often bear the same name (*e.g.*, "St. Paul's Church"). Here, expert testimony confirmed that parentheticals and other language identifying a denominational affiliation "make it easier … to run title examination[s]," since "[t]here were quite a few churches in these jurisdictions and many of them have similar names." Tr. 2412:14-19 (Schrantz).[27] But as the case law

[27] In fact, one of the former "Episcopal" churches here, "The Falls Church," is located "just across the street" from "The Falls Church Presbyterian Church," and there was testimony that the public sometimes confused these churches. Tr. 2412:19-2413:7 (Schrantz) ("In this case there's a local church which was originally Lewinsville Church and went for many years by the name of Presbyterian Church in Falls Church. In 1952, they started using the name The Falls Church

and common sense confirm, it is untenable to read deeds identifying a congregation as "Episcopal" as creating a use restriction, particularly when the language serves another plausible purpose.

* * * * *

In summary, the practices of a wide variety of Virginia denominations—including, most notably, the Diocese itself—confirm that plaintiffs had ample ways to secure proprietary interests in the CANA Congregations' properties via the deeds. Had there been an agreement to grant plaintiffs a proprietary interest, they could have insisted that the Congregations place title in the name of the bishop, as has been done with numerous other properties used for congregational worship, or in the name of other Diocesan entities. Plaintiffs could have insisted on modification of the deeds to grant them a reversionary interest, should the Congregations ever disaffiliate. Or they could have employed use restrictions subjecting the property to a requirement that it be used only for worship under denominational auspices, as they have done in other cases—even after adoption of the Dennis Canon and Diocese Canon 15.4. Indeed, if it was obvious to various Methodist, Presbyterian, A.M.E. Zion, Lutheran, Baptist, and Church of God denominations—and to an experienced real estate lawyer who drafted the St. Aidan's Episcopal Church deeds—that such language is a necessary and appropriate means of protecting the general church's interest,

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Presbyterian Church and it's fairly close in location to The Falls Church (Episcopal Church)."); Tr. 2446:7-17 (Deiss) (explaining that "from time to time" there is "confusion among people between The Falls Church Presbyterian Church and The Falls Church Episcopal," which are "one block away" from each other). As CANA expert Kenneth Schrantz testified, "you would see them both at the same time in the indexes [in the land records]." Tr. 2413:8-12. Not surprisingly, therefore, grantors began using a parenthetical identifying The Falls Church as "Episcopal" in the early 1960s, "the same time that … the Presbyterian Church was calling itself The Falls Church Presbyterian Church." Tr. 2414-2415 (Schrantz); DX-FALLS-450, 451, 455, 456. According to Mr. Schrantz, this was likely done "to avoid confusion." Tr. 2416:6-11 (Schrantz).

then it should have been obvious to the Diocese, a sophisticated real estate holder represented by a number of large law firms.

C. The constitutions of TEC and the Diocese do not assert any interest in the property of affiliated congregations, and the canons of TEC and the Diocese are not, by their own admission, legally cognizable.

The next factor under *Norfolk* and *Green* is whether, under "application of neutral principles of law," plaintiffs have carried "the burden of proving a violation" of "the constitution of the general church." *Green*, 221 Va. at 555 (quoting *Norfolk*, 214 Va. at 507); *Green*, 221 Va. at 555 ("we look . . . to the constitution of the general church"); *see also Jones*, 443 U.S. at 606 (referencing "the constitution of the general church"). But the constitution of both TEC and the Diocese are silent on the issue of property ownership; and for a host of reasons the canons at issue are not "embodied in some legally cognizable form." *Jones*, 443 U.S. at 606. Indeed, plaintiffs themselves—through their General Convention, designated canon law reporter, and expert witness—have admitted that the canons have no legal force.

1. Only constitutional provisions may create a trust interest.

By plaintiffs' lights, they secured ownership of the property of 7,000 parishes in 50 States simply by (unilaterally) passing church canons. Under governing precedent, however, only "the constitution of the general church" is legally relevant to the issue of property ownership. *Green*, 221 Va. at 555; *Norfolk*, 214 Va. at 507; *Jones*, 443 U.S. at 606. Nowhere does any precedent of the Virginia or U.S. Supreme Court reference creating property interests through church canon law, or day-to-day internal rules, as opposed to the church's constitution.

Here, the constitutions of TEC and the Diocese do not even speak to property ownership, let alone establish a proprietary interest in the CANA Congregations' properties. Moreover, the record demonstrates that TEC was aware of this distinction, but ignored it, upon its 1979 adoption of the Dennis Canon.

a. Important substantive differences distinguish the processes for amending the TEC and Diocese constitutions from the processes for amending their canons.

The difference between plaintiffs' constitutions and canons is not just a matter of labels. Under both TEC's and the Diocese's constitution, amendments cannot take place at one General Convention or one Annual Council. Rather, both constitutions impose a two-reading requirement for constitutional amendments. *See* PX-COM-0001-017 (TEC); PX-COM-0003-011 (Diocese). This is vital in practice, as it gives congregations a three-year (TEC) or one-year (Diocese) waiting period to decide whether to remain affiliated before the amendment takes effect.

Specifically, in TEC's case, constitutional amendments must initially be proposed at a General Convention, with written notice then given to dioceses.[28] Indeed, the canons themselves require that, "whenever any alteration of the Book of Common Prayer or of the Constitution is proposed," the secretary of the convention of every Diocese must "give notice thereof to the Ecclesiastical Authority of the Church in every Diocese, as well as to the Secretary of the Convention of every Diocese, and written evidence that the foregoing requirement has been complied with shall be presented by the Secretary to the General Convention."[29] Then, at the second con-

[28] PX-COM-0001-017 (TEC constitution, Article XII) ("No alteration or amendment of this Constitution shall be made unless the same shall be first proposed at one regular meeting of the General Convention and be sent to the Secretary of the Convention of every Diocese, to be made known to the Diocesan Convention at its next meeting, and be adopted by the General Convention at its next succeeding regular meeting by a majority of all Bishops, excluding retired Bishops not present, of the whole number of Bishops entitled to vote in the House of Bishops, and by an affirmative vote by orders in the House of Deputies in accordance with Article I, Section 5, except that concurrence by the orders shall require the affirmative vote in each order by a majority of the Dioceses entitled to representation in the House of Deputies.").

[29] This provision, Canon I.1.1, states in full: "It shall be the duty of the Secretary of the House of Deputies, whenever any alteration of the Book of Common Prayer or of the Constitution is proposed, or any other subject submitted to the consideration of the several Diocesan Conventions, to give notice thereof to the Ecclesiastical Authority of the Church in every Diocese, as well as to the Secretary of the Convention of every Diocese, and written evidence that the foregoing requirement has been complied with shall be presented by the Secretary to the General Convention

vention three years later, the amendment must be adopted by a majority of the whole number of Bishops entitled to vote (as opposed to those present), and by an affirmative vote by orders in the House of Deputies. PX-COM-0001-017. By contrast, amendments to TEC canons require only one reading and a simple majority vote. PX-COM-0001-175 (Canon V.1.1).[30] As plaintiffs' Professor Mullin admitted in response to the Court's questioning, "the constitutional amendment has to be passed by two successive General Conventions. A canon can be passed by one General Convention." Tr. 1243:6-9. Similarly, amendments to the Diocese's constitution must be passed *twice*, at consecutive Annual Councils, before they can take effect.[31]

Had TEC and the Diocese amended their constitutions, therefore, the CANA Congregations would have had the benefit of a significant standstill period to determine whether to part ways with the denomination before the amendments' effective date. Plaintiffs extend the courtesy of notice to those affected by changes to the Church Pension Fund. *See* PX-COM-0001-047 (Canon I.8.9) ("The General Convention reserves the power to alter or amend this Canon, but no

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at its next session. All such notices shall be sent by certified or registered mail, with the Secretary's certificates to be returned. The Secretary shall notify all diocesan Secretaries that it is their duty to make known such proposed alterations of the Book of Common Prayer, and of the Constitution, and such other subjects, to the Conventions of their respective Dioceses at their next meeting, and to certify to the Secretary of the House of Deputies that such action has been taken." PX-COM-0001-020.

[30] PX-COM-0001-175 (TEC Canon I.1.1) ("Sec. 1. No new Canon shall be enacted, or existing Canon be amended or repealed, except by concurrent Resolution of the two Houses of the General Convention. Such Resolution may be introduced first in either House, and shall be referred in each House to the Committee on Canons thereof, for consideration, report, and recommendation, before adoption by the House; *Provided*, that in either House the foregoing requirement of reference may be dispensed with by a three-fourths vote of the members present.").

[31] PX-COM-0003-011 (Diocese constitution, Article XIX) ("The Constitution may be amended in the following manner only, namely: At any regular meeting of the Council a proposed amendment shall be referred to the appropriate committee, and report thereon shall be presented by that committee and the amendment shall be considered by the Council. If approved by the Council, it shall again be considered at the next regular meeting of the Council and, if again approved, shall become effective immediately upon its adoption unless otherwise provided therein.").

such alteration or amendment shall be made until after the same shall have been communicated to the Trustees of The Church Pension Fund and such Trustees shall have had ample opportunity to be heard with respect thereto."). Under the approach they took here, by contrast, all congregations were deprived of any opportunity to consider the effect of plaintiffs' asserted "trust" interest. Moreover, plaintiffs' adoption of the Dennis Canon without advance notice to member congregations was not only fundamentally inequitable; it renders the canon unenforceable under the law of voluntary associations.[32]

TEC's General Convention was fully conscious of the requirement that the denomination amend its *constitution*, yet ignored that mandate when it adopted the Dennis Canon. The original resolution that led to the Dennis Canon, submitted by Canon Walter Dennis himself, cited *Jones v. Wolf* and acknowledged that it referred to "an explicit recitation in the *constitution* . . . of the general church." TEC Ex. 0040-0001 (emphasis added) (third "whereas" clause). In its haste to pass something, however, TEC ignored this requirement and enacted only a canon, even then suspending the usual rules and making it effective *immediately*. TEC-0041-0001 ("The Bishop of Kentucky moved that the Resolution be amended to make the Resolution effective upon en-

[32] New York law, which governs TEC as a New York-based association, requires notice *before* an association amends its rules, especially rules pertaining to property. *Croughan v. New York Mut. Benevolent Soc.*, 179 A.D. 211, 215, 166 N.Y.S. 161, 163 (1st Dep't 1917) (where members have "the right to vote on changes in the fundamental rules of the society, ordinary fair dealing required that the members should first be notified of any such intended changes, so as to have the opportunity to make their wishes known"); N.Y. Relig. Corp. Law § 5 (McKinney 2005) (requiring "written notice, embodying such by-laws or amendment," to be "openly given at a previous meeting and also in the notices of the meeting at which the proposed by-laws or amendment is to be acted upon"). Although plaintiffs suggest that minimal notice was provided for Diocesan Canon 15.4, the authority for that canon derives from the Dennis Canon. PX-COM-0001-045 (Canon I.7.5) ("Sec. 5. The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action."). As plaintiffs' official canon law reporter confirms, the Dennis Canon "gives power to diocesan conventions to make provision by local canon for the encumbrance or alienation of real property, differing from that prescribed by this canon, and so adapt the process to local law." *See* Apostles Ex. 292.0008. Thus, the Dennis Canon's legal enforceability for lack of notice extends to Diocesan Canon 15.4.

actment.").[33] Accordingly, plaintiffs cannot carry their "the burden of proving a violation" of the denomination's "constitution." *Green*, 221 Va. at 555 (quoting *Norfolk*, 214 Va. at 507).

b. Other TEC dioceses, like other denominations, address church property in constitutional provisions rather than canons.

Any notion that having to adopt a *constitutional* provision is inconsistent with TEC's polity or is overly burdensome cannot be squared with the practices of other TEC dioceses. For example, the constitution of the Episcopal Diocese of West Missouri provides:

> With respect to a Congregation, upon admission into union with the Diocese it will convey all of the right, title or interest it has in or to any property, real, personal, and mixed, absolutely, to "The Diocese of West Missouri." All such property shall thereafter be held by the Diocese. In case of the dissolution, abandonment, or inability to function of such Congregation or its withdrawal, expulsion or suspension from the Diocese, whatever trust may have been created in fact or in law, by such conveyance shall thereupon and at once cease and the property so conveyed to "The Diocese of West Missouri" shall thereafter be held by it for the benefit of the Diocese. With respect to a Parish, in the case of the dissolution, abandonment or inability to function of such Parish or in the event of its withdrawal, expulsion or suspension from the Diocese, all its property, real, personal, or mixed, shall thereupon, without any act of such Parish or Congregation, at once devolve upon and become the property of "The Diocese of West Missouri," a corporation, to be held for the benefit of the Diocese.

Apostles Ex. 369.0015 (Article XI, § 1). In fact, the constitution of this diocese goes on to state that parishes and congregations may affiliate only "when they shall have presented to the Convention evidence of their compliance with [the foregoing requirements]." *Id*. (Article XI, § 2).

Similarly, the constitution of the Episcopal Diocese of Texas provides that "[t]he title to all real estate acquired for use of the Church in this diocese, including Parishes and Missions, as well as institutions of a diocesan character, shall be held subject to control of the Church in the Diocese of Texas acting by and through the Church Corporation known as 'Protestant Episcopal

[33] Typically, canons take effect on January 1 of the year following their adoption. PX-COM-0001-176 (Canon V.1.6).

Church Council of the Diocese of Texas.'" Apostles Ex. 368.0013.[34]

It is no answer to say that the canons of TEC and the Diocese are entitled to equal weight because plaintiffs themselves view both as governing documents. Whatever merit that argument might have in a case where a denomination has no constitution, but rather only a set of canons, it has little force where the denomination has both a constitution *and* canons. Canon law is "[a] body of law developed within a particular religious tradition," and ecclesiastical law is "[t]he body of law derived largely from canon and civil law and administered by the ecclesiastical courts." *Black's Law Dictionary* 234-35, 589 (9th ed. 2009). To be legally cognizable, canon law must satisfy the requirements of *civil law*.

Indeed, it would violate due process, on account of lack of notice, if civil courts were to treat denominational canons and constitutions as synonymous, particularly where a denomination employed both documents. The effect of enforcing plaintiffs' canons would be to deprive the CANA Congregations of valuable property to which they hold title, and which they (not plaintiffs) have maintained and improved over decades or even hundreds of years. Such a deprivation of property by the civil courts would require unequivocal notice, and such notice is not remotely provided by the governing precedents—which reference only constitutional provisions—much less by the relevant denominational constitutions, which say nothing suggesting that the denomination asserts any right to congregational property.[35]

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[34] *Accord* Apostles Ex. 368.0014 (providing that, subject to limited exceptions not pertinent here, "property hereafter acquired for use of the Church in the Diocese, including Parishes and Missions, shall be vested in the Protestant Episcopal Church Council of the Diocese of Texas").

[35] *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-75 & n.22 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose"; and "the basic protection against 'judgments without notice' afforded by the Due Process Clause is implicated by civil penalties" (citation omitted)); *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) ("There can be no doubt that a deprivation of the

2. Even apart from plaintiffs' failure to amend their constitutions, plaintiffs' canons are not "embodied in some legally cognizable form" under *Jones v. Wolf*, and thus do not create enforceable contract rights.

Quite apart from plaintiffs' failure to amend their constitutions, the subject canons are not embodied in "legally cognizable form," as specified by the U.S. Supreme Court. *Jones*, 443 U.S. at 606. We have already explained why the canons do not create cognizable property rights or a legally cognizable "trust"—which is all they purport to create. But even setting aside the governing deeds and the fact that plaintiffs' canons are framed as a unilateral trust, those canons do not establish enforceable *contractual* rights in the CANA Congregations' properties. As explained below, the canons fail several independent tests of legal cognizability under neutral principles of contract law:

- The CANA Congregations have never voted to assent to, or ratify, either the conveyance of a proprietary interest to plaintiffs or the specific canons at issue.
- Plaintiffs' property canons were not supported by valid consideration.
- Even if the canons were otherwise a valid contract, they would suffer from a lack of mutuality of remedy, rendering them unenforceable.
- For independent reasons, the spiritual components of the relationship between the parties predominates, and the absence of any remedy for what the Congregations view as breach of those aspects of the canons renders them unenforceable.
- Even if plaintiffs' canons otherwise qualified as a contract, Virginia law prohibits TEC and the Diocese from enforcing rules that encumber, or require the forfeiture of, their members' property.

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right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language"); *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 130 S. Ct. 2592, 2615-16 (2010) (Kennedy, J., concurring in part and concurring in the judgment) ("When courts act without direction from the executive or legislature, they may not have the power to eliminate established property rights by judicial decision. . . . State courts generally operate under a common-law tradition that allows for incremental modifications to property law, but 'this tradition cannot justify a carte blanch judicial authority to change property definitions wholly free of constitutional limitations'" (citing Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 Utah L. Rev. 379, 435)).

In view of the foregoing, it is unsurprising that TEC's General Convention and officially designated canon law reporters have repeatedly admitted that their internal church canons have only moral force, and no legal effect. The CANA Congregations thus understandably viewed the canons as having only spiritual significance—as rules to be respected to ensure uniformity and spiritual consistency while part of the association, but in no way granting the denomination a civil law ownership interest upon disaffiliation.

a. The evidence establishes that the CANA Congregations did not assent to grant TEC or the Diocese a proprietary interest of any kind.

The first and most basic reason that the canons here do not create a contractual interest in the CANA Congregations' property is that the Congregations never agreed to grant any such interest to plaintiffs. Under settled contract law, "[i]n order that there may be an agreement, the parties must have a distinct intention common to both and without doubt or difference. . . . If any portion of the proposed terms is not settled, or no mode is agreed on by which it may be settled, there is no agreement." *Smith v. Farrell*, 199 Va. 121, 128 (1957) (quoting 17 C.J.S., *Contracts* § 31, at 359). In a similar vein, *Jones* confirms that the U.S. Supreme Court views mutual agreement as foundational to the application of neutral principles: "[T]he *parties* can ensure, if *they* so desire, that the faction loyal to the hierarchical church will retain the church property. *They* can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church." *Jones*, 443 U.S. at 606 (emphasis added). As this Court earlier recognized, in keeping with these principles, "forming a contract requires *mutual* assent and the communication of that assent." Letter Op. 10 (Aug. 19, 2008) (quotation omitted).

Further, "an[] essential element of a valid contract is certainty and completeness," such that "the contract embraces all the material terms" and "each one of those terms is expressed in a sufficiently exact and definite manner." *Id*. at 127-28 (quoting M.J., *Contracts* § 27, at 359). If

"one or more material terms have been entirely omitted," or the contract "embrace[s] all the material terms, but one of them is expressed in so inexact, indefinite or obscure language that the intent of the parties cannot be sufficiently ascertained to enable the court to carry it into effect," then the contract fails for incompleteness or uncertainty. *Id*. at 128. The record here, however, shows that the CANA Congregations did *not* assent to the proprietary interest that plaintiffs are asserting, let alone with completeness and certainty.

Even the Diocese's own canons provide that the real property of a congregation may not be "alienated, sold, exchanged, encumbered or otherwise transferred for any purpose without," among other things, "*the consent of the congregation in a meeting called for that purpose*." PX-COM-0003-027 (Canon 15, § 1), 0003-23 (Canon 11, § 13) (emphasis added). And if there were any doubt as to whether the CANA Congregations assented to grant plaintiffs a proprietary interest, it would need to be resolved against plaintiffs, who bear the burden of establishing any contractual interest (*Green*, 221 Va. at 555) and drafted the alleged "contract." *American Realty Trust v. Chase Manhattan Bank, N.A.*, 222 Va. 392, 403 (Va. 1981) ("it is a familiar legal maxim that ambiguous contractual provisions are construed strictly against their author").

Representatives of the CANA Congregations without exception testified that they never granted TEC or the Diocese any proprietary interest in the properties at issue. No witness of the plaintiffs offered testimony to the contrary. The testimony of Rev. Yates of The Falls Church, who became rector in June 1979, before adoption of either the Dennis Canon or Diocesan Canon 15, is representative:

> Q. Dr. Yates, since you became rector of The Falls Church in 1979, did you regularly attend vestry meetings?
>
> A Yes.
>
> Q You regularly attended meetings of the congregation?
>
> A Yes.

Q During all of those years, did the vestry ever adopt a resolution or sign a document which contained an agreement that The Falls Church held its property in trust for the Episcopal Church or the Diocese?

A No.

Q Similarly, in all of those years did the congregation ever adopt a resolution or sign some agreement to that effect?

A No.

Q I guess, finally, did either one of them, the vestry or congregation, ever agree that the Episcopal Church or the Diocese would have an ownership interest in the property?

A No.

Tr. 2632-2633 (J. Yates).[36]

[36] *Accord* Tr. 3928:11-18 (Miller, St. Margaret's) ("Q Except for the deeds of trust securing the Diocesan loans that we talked about on the first property, which have been repaid, did St. Margaret's vestry, trustees, or congregation at any time vote to give a property, trust, or contractual interest in St. Margaret's property to either the Diocese of Virginia or the Episcopal Church? A No."); Tr. 3929:17-3930:2 (Miller, St. Margaret's) ("Q Except for the deeds of trust securing the Diocesan loans which have been repaid, have you seen in St. Margaret's record any written deed, trust instrument, or contract signed by the St. Margaret's vestry, warden, or trustees, giving either the Diocese of Virginia or the Episcopal Church a property, trust, or contract interest in St. Margaret's property? A No."); Tr. 2094:5-19 (Black, Epiphany) ("Q Except for the July 19th, 1988 Deed of Trust that has since been released, did the Epiphany vestry, trustees, or congregation at any time vote to give a property, trust, or contract interest in Epiphany property to either the Episcopal Church or the Diocese of Virginia? A No. Q Except for the July 19, 1988 Deed of Trust that has been released, have you seen in Epiphany's records any written deed, trust instrument, or contract signed by the Epiphany vestry, wardens, or trustees giving either the Episcopal Church or the Diocese of Virginia a property, trust, or contract interest in Epiphany's property? A No."); Tr. 1853:17-21 (Jones, St. Paul's) ("Q During your tenure as St. Paul's rector and prior to the disaffiliation vote, did your congregation ever vote to convey any type of property interest to the Episcopal Church? A No."); Tr. 1854:6-11, 1855:16-20, 1856:1-22, 1857:1-15, 1858:12-19, 1859:5-22, 1860, 1861-62:1-3 (similar testimony as to St. Paul's vestry); Tr. 1857:21-1858:7, 1860:5-14, 1861-62 (similar testimony as to St. Paul's trustees); Tr. 3838:12-3839:9 (Wrightson, St. Stephen's) ("Q To your knowledge, has any St. Stephen's Church trustee ever conveyed any proprietary interest in St. Stephen's church property to either the Episcopal Church or the Diocese of Virginia? A Not that I'm aware. Q Directing your attention to the period prior to the vote and during your period of membership at St. Stephen's, did the St. Stephen's Church vestry, trustees, or congregation at any time vote to give a property, trust, or contract interest in St. Stephen's Church property to either the Episcopal Church or the Diocese of Virginia? A No. Q Have you seen in St. Stephen's records any written deed, trust instrument, or contract signed by St. Stephen's Church's vestry, wardens, or trustees giving either the Episcopal Church or the Diocese of Virginia a property, trust, or contract interest in St.

Similarly, the CANA Congregations' witnesses testified that they had never agreed to abide by the Dennis Canon or Diocesan Canon 15. Here again, the testimony of Rev. Yates of The Falls Church illustrates the point:

Stephen's Church's property? A No."); Tr. 3689:1-16 (Cerar, St. Stephens) ("Q. Directing your attention to the period prior to the vote, did St. Stephen's Church vestry, trustees or congregation at any time vote to give up [a] property, trust or contract interest in St. Stephen's Church property to either the Episcopal Church or the Diocese of Virginia? A. Not during my tenure. And as far as I have been able to determine from the records of the church, not at any other time. Q. And have you seen in St. Stephen's records any written deed, trust instrument or contract signed by the St. Stephen's Church vestry[,] wardens or trustees giving either the Episcopal Church or the Diocese of Virginia a property[,] trust or contract interest in St. Stephen's Church property? A. No."); Tr. 3079:1-5 (MacGowan, Apostles) ("Q While you attended Apostles, did the congregation ever hold a vote to give the Diocese or the national Church an interest in the Apostles property? A No."); Tr. 3134:20-3135:1 (Harper, Apostles) (Q "Had the congregation voted to give the Diocese ownership of any of Apostles' property? A Not at all. Q In your view, did the congregation concede any claim by the Diocese or national Church to the Braddock Road property? A No. Q In your view, did the congregation concede any claim by the Diocese or national Church to the Pickett Road property? A No. Q In your view, did the congregation intend to fight to protect its property rights should a dispute with the Diocese arise in the future? A Indeed they did."); Tr. 3358:6-17 (Rooney, Apostles) ("Q Was there ever a congregational meeting where Church of the Apostles agreed to give the Diocese of Virginia an interest in its Pickett Road property? A Not that I'm aware of. Q And its Braddock Road property? A No. Q The same for the national Church, was there ever a meeting where Church of the Apostles said the national Church has an interest in any of its properties? A No."); Tr. 1568:5-1568:20 (Julienne, Truro) ("Q Did you believe by signing this affirmation that you were binding yourself to the Constitution and Canons of the Episcopal Church? A No. Q Do you believe that by signing this document you were binding the congregation of Truro Church to the Constitution and Canons of the Episcopal Church? A No. Q Do you believe that by signing this document you were transferring title of Truro Church's property to the Diocese or the Episcopal Church? A No. Q Do you believe by signing this document that you were giving interest in Truro Church's property of the Diocese or the Episcopal Church? A No."); Tr. 1700:8-1701:7 (T. Yates, Truro) ("Q Did you acquaint anything within this vestry declaration as being akin to promising to—I'm sorry—assenting to the Constitution and Canons of the Episcopal Church? A No, it doesn't seem to read that way to me. Q Do you believe you were being—agreeing to be personally bound by the Constitution and Canons of the Episcopal Church by making this declaration? A No. Q Did you believe you were binding the congregation to the Constitution and Canons of the Episcopal Church by making this declaration? A No. Q Do you think you were conveying a property interest in Truro Church by making this declaration? A Property as in Truro Church's property? Q Yes. A No."); Tr. 4707:20-4708:2 (plaintiff witness Keith) ("Q. You've never seen a written document from anyone at Truro Church, either the vestry or any trustees conveying a trust interest to the Episcopal Church of the Diocese? A. I have not.").

Q While you were rector of The Falls Church and regularly attending the vestry meetings and congregation meetings, did the vestry or the congregation ever affirmatively agree to this Dennis Canon?

A No, sir.

* * *

Q While you've been rector of The Falls Church, has the vestry and congregation—or congregation ever affirmatively agreed to Diocese Canon 15?

A No, sir.

Tr. 1294:20-1295:3, 1295:13-17.[37]

While the Congregations understood the canons as rules to be respected as an ecclesiastical matter while they remained affiliated with the denomination, they believed the canons were subject to both the authority of scripture and civil law. The testimony of Rev. Cerar of St. Stephen's is representative:

Q. And what is your understanding that the role of Episcopal Church and Diocese of Virginia constitutions and canons play in the life of a congregation?

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[37] In addition to the testimony collected in note 36, see Tr. 1854:6-11 (Jones, St. Paul's) ("Q . . . During your tenure as St. Paul's rector and prior to the disaffiliation vote, did the St. Paul's congregation ever expressly acknowledge that the Diocesan Canon 15 version of the Dennis Canon applied to St. Paul's Church property? A No."); Tr. 1852:6-11, 1853:11-16 (similar testimony as to St. Paul's vestry); Tr. 1852:6-11, 1853:11-16 (same as to St. Paul vestry); Tr. 3079:6-9 (MacGowan, Apostles) ("Q Did you consider Apostles to be holding the Pickett Road property in trust for the national Church of the Diocese? A No way."); Tr. 2546:12-17 (Deiss, The Falls Church) ("Q . . . [D]id the vestry accept that it was holding property in trust for the Diocese? A No. Q Did it accept that the Diocese had any proprietary interest in the property? A No."); Tr. 2556:9-11 (Deiss, The Falls Church) ("Q Have you found any record of the vestry or the congregation agreeing to the Dennis Canon? A No."); Tr. 2615:22-2616:17 (Deiss, The Falls Church) ("Q Mr. Deiss, Mr. Somerville asked you about things in which you participated, Annual Council, things like that; is that right? A Yes. Q And in the context of those participations, did you ever see that as an agreement that the Episcopal Church and the Diocese would have some interest in The Falls Church's property? A No. Q And even after the 1990 exchange of letters, was it your understanding that by continuing in the Episcopal Church and the Diocese that The Falls Church was agreeing that the Episcopal Church and the Diocese had an interest in The Falls Church's property? A No. I always thought, and it's reflected in the other conversation, that the civil law about property ownership need to be figured into the equation."); *see also* Tr. 2560 (statement of Mr. Davenport: "There's no record of who voted for and who voted against the passage of it [Diocese Canon 15].").

A. I understand the canons as prescribing the way in which the church works together to carry out the mission assigned to us by Christ.

Q. And do you understand the constitutions or canons of either the Episcopal Church of[sic] [or] the Diocese of Virginia to be legally enforceable in a civil course [sic] [court]?

A. No, I do not.

Tr. 3639:1-12 (Cerar).[38]

The absence of any congregational agreement to convey a proprietary interest to TEC or the Diocese here contrasts sharply with the actions of the congregation in *Diocese of Southwestern Va. v. Buhrman*, 5 Va. Cir. 497 (Clifton Forge 1977), which plaintiffs are fond of citing. There, as a canonical condition of elevation from "an Organized Mission of the Diocese" to "a Parish of the Church in the Diocese," "the members of the mission church" signed a written petition in which they did "solemnly promise and declare that the said Parish shall be forever held under the Ecclesiastical Authority of the Diocese of Southwestern Virginia and in conformity with the Constitution and Canons of the Diocese." Apostles Ex. 298.0003 (Complaint ¶ 6), 298.0008 (Complaint Ex. A). The same members also did "promise for ourselves and our successors obedience and conformity at all times, so help us God," and "solemnly engage and stipulate 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."

[38] *Accord*, *e.g.*, Tr. 4100:1-14 (Brown) ("Q And to what authority in the Church are you bound? A First and foremost and above all, the Holy Scriptures, the Bible, and also after that comes reason and tradition. Q In the 38 years of your ministry to several congregations in several dioceses, have you ever once preached or taught on the subject of church constitutions or canons? A No, I have not. Q What, if any, understanding do you have of the role of church constitutions and canons? A They're spiritual guides that help the church order its life so it is pleasing to God."); Tr. 2431:22-2432:20 (Deiss); Tr. 3162:8-13 (Harper); Tr. 1758:19-22 (Jones) ("Q. What, if any, understanding do you have as to the law of the church? A. The law of the church is the Holy Scriptures, God's word, the Old and New Testaments.").

Apostles Ex. 298.0008–0009 (Complaint Ex. A). Indeed, this "statement of conformity with Canon 13, Section 2" was signed by some 63 individuals, including the vicar. *Id*.

If an agreement other than a deed might bear on ownership of congregational property, it would look like the signed written agreement in *Buhrman*. In fact, at the outset of this case, in opposing the CANA Congregations' demurrers, plaintiffs said of *Buhrman*: "We anticipate the evidence in this case will reflect similar commitments." Br. in Opp. to Demurrers and Pleas in Bar 10 n.6 (filed July 13, 2007). But the evidence is now in, and there is no such agreement.

Absent such an express agreement, the canons cannot justify the seizure of the CANA Congregation's property. *See Norfolk*, 214 Va. at 504 (rejecting argument "that those who unite themselves with a hierarchical church do so with an implied consent to its government and take title to local church property subject to an implied trust for the general church"). As the Pennsylvania Supreme Court has held, the rules of an association such as the Episcopal Church may "not deprive the member of vested property rights without the member's explicit consent." *In re Church of St. James the Less*, 585 Pa. 428, 448 (2005) (ruling against the congregation because its property rights were not vested and a trust provision favoring TEC was found in a congregational charter that could be amended only with diocesan consent, which was not obtained).[39]

[39] *See also From the Heart Ministries*, 803 A.2d at 570-71 (reversing summary judgment for a hierarchical denomination where the constitution contained a "requirement that places held or hereafter acquired by a local church, for the purpose of worship or parsonage, be held in trust for A.M.E. Zion denomination"; rejecting the argument that where "the local fails to deed the local church property in trust to the national denomination, the court need only resort to the church [constitution] to resolve the property dispute" and holding that "it is necessary to consider other documentation or circumstances to determine whether the local church has consented to the provision in the [constitution] providing for the reversion of that property"); *Mt. Olive African Methodist Episcopal Church of Fruitland, Inc. v. Board of Incorporation of the African Methodist Episcopal Church, Inc*., 703 A.2d 194, 204 (Md. 1997) (granting summary judgment to local church, notwithstanding trust provisions in denominational constitution and stating: "it is not enough to consider simply the form of the church government, the constitution or other authoritative sources pertinent to the parent church's claim to the property"; "it is also necessary that

In hopes of overcoming this difficulty, at least as to Truro, plaintiffs point to certain "instruments of donation" that officials of the congregations signed as part of liturgical worship services. *See* PX-TRU-0003; PX-TRU-0004. But plaintiffs never viewed these instruments as having legal significance, as evidenced by their failure to record them in the land records or to seek similar instruments from the other CANA Congregations.

As other courts have recognized, such an instrument has only ecclesiastical significance: It is executed "[i]n accordance with ecclesiastical ritual practice," is a "religious instrument which pertains to ecclesiastical and spiritual matters," "and can in no way be interpreted to be a conveyance of title to property." *Board of Managers of Diocesan Missionary v. Church of Holy Comforter*, 628 N.Y.S.2d 471, 475 (N.Y. Sup. 1993). Similarly, as the Kentucky Supreme Court held in a case involving an instrument nearly identical to that here, such a document is an "unenforceable instrument," not a "conveyance"; it no more conveys a legal interest in property than does giving an honored visitor a "key to the city." *Bjorkman v. Protestant Episcopal Church of Diocese of Lexington*, 759 S.W.2d 583, 586 (Ky. 1988); *id*. at 587 ("Moreover, evidence was presented that PECUSA did not regard this instrument as having any legal effect, and the autonomy with which St. John's conducted its affairs through the years bears testimony to this. Further, . . . the absence of a reversionary clause renders it unenforceable as an instrument creating an express trust.").[40] We are aware of no contrary authority.

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there be provided evidence of the consent of the local church to that provision"); *cf. Babcock Mem. Presbyterian Church v. Presbytery of Baltimore of the United Presbyterian Church,* 464 A.2d 1008, 1011 (Md. 1983) (finding consent where local church's charter declared that it should "forever remain a Presbyterian Church in accordance with the Standards of the Presbyterian Church of the United States").

[40] As the Court suggested in questioning plaintiffs' counsel during trial, the notion that the instrument of donation is akin to an "unrecorded deed of gift," for example, is inconsistent with the fact that the Diocese took on no responsibility to maintain the building or pay the mortgage after 1934.

These rulings make perfect sense, given the religious terminology used in the instruments and their place as part of an actual worship service. The instruments refer only to the "spiritual jurisdiction" of the bishop; they speak of separating the church from "unhallowed, worldly and common uses"; and they do not refer to any specific interest in any specific property. PX-TRU-0003-001; *accord* PX-TRU-0004-001; Tr. 966:10-13 (Court observing that "the request is for the bishop to place this under the spiritual jurisdiction, which typically is language we wouldn't see in a deed"). In fact, the instruments are literally "part of a service in the Book of Common Prayer"—"the rubrics in the consecration service." Tr. 958:10-13, 958:22-959:1 (Bond). This liturgy begins with the reading of Scripture, followed by prayer. *See* TEC-37-0000310-11 (Book of Common Prayer liturgy for "The Form of Consecration of a Church or Chapel"). The instrument of donation is then presented to the bishop, who gives a spiritual address to the congregation and nowhere references the denomination, let alone its canons or any donation of property. *Id*. This is followed by several more prayers, readings of Scripture, and the final invocation. TEC-37-0000312-13. Not surprisingly, plaintiffs' expert Professor Bond admitted on cross that, as a non-liturgist, he was unable to address the significance of the instruments of donation concerning which he testified on direct:

> Q Yesterday you were asked by Judge Bellows—let me ask you—this is Judge Bellows asking you a question yesterday: "Let me just ask you, Dr. Bond, this language in the instrument of donation, is this a standard document from the time period with that precise language or was it -- was this is in your experience a uniquely written document?"
>
> * * *
>
> Q Your answer was I'm not—"I'm not a liturgist." Do you recall that?
>
> A Yes.
>
> Q You would agree with me, then, that an instrument of donation is a liturgical document?
>
> A It's associated with the liturgy.

Q You wouldn't have any cause to be able to interpret it since you're not a liturgist, correct?

A No.

It would therefore come as a surprise to anyone attending a consecration to learn that she had just witnessed an enforceable contract agreement in which the congregation's property had been conveyed to plaintiffs. And, of course, the congregation itself did not agree to convey anything in a duly convened meeting, as required by plaintiffs' own canons, and as in *Buhrman*.

b. Plaintiffs' canons also fail to establish a contractual interest because they are not supported by valid consideration.

The notion that the canons here constitute a legally cognizable contract is also foreclosed by the requirement of "consideration." Consideration is "a benefit to the party promising, or to a third person at his request, or an inconvenience, loss, or injury, or the risk of it, to the party promised." *White v. Alleghany Mountain Corp*., 159 Va. 394, 402 (1932) (quotations omitted). Further, it is axiomatic that "[a]n agreement by one to do what he or she is already legally bound to do is not a good consideration for a promise made to that person." 4A *Michie's Jurisprudence*, Contracts § 34, at 449 (2007). "The general rule is that a new promise, without other consideration than the performance of an existing contract in accordance with its terms, is a naked promise without legal consideration therefor and unenforceable." *Seward v. New York Life Ins. Co*., 154 Va. 154, 168 (1930).[41] Similarly, "where the parties to a contract seek to modify it by a subsequent agreement by which one of the parties assumes no obligations or releases nothing, the promises by the other are without consideration and the original agreement is not affected."

[41] *Accord* 17A Am. Jur. 2d Contracts § 135 (May 2011) ("A promise to do that which the promisor is already legally bound to do, or the performance of an existing legal obligation, does not usually constitute consideration, or sufficient consideration, for a contract. Such obligation may be imposed by the law, or be required under contract. Doing or promising to do that which one is already bound to do is not a legal detriment" (footnotes omitted)).

4A *Michie's Jurisprudence*, Contracts § 54, at 513. Applied here, these principles foreclose any conclusion that plaintiffs' canons constitute a contract.

Upon adoption of their property canons, TEC and the Diocese did nothing beyond what they had previously done to perform under any prior agreement between the parties. They provided no further "benefit to [the CANA Congregations]," and they took on no "inconvenience, loss, or injury" to themselves. *White*, 159 Va. at 402. Any new benefit ran solely to plaintiffs, and any detriment was borne entirely by the CANA Congregations.

The evidence on this point is undisputed. As Dr. Yates of The Falls Church explained:

Q Let me ask you about the Episcopal's Dennis Canon. It's dated 1979, I'll represent that to you.

Beginning in 1979, did the Episcopal Church begin providing any services or benefits to The Falls Church which were over and above services or benefit provided prior to 1979?

A No.

Q Now let's look at 1983, and I'll tell you that the Diocese Canon 15 is dated 1983. In 1983, did the Diocese begin providing any services or benefits to The Falls Church which were over and above services or benefits it had provided prior to 1983?

A Not to my knowledge.

Q You met with Bishop Lee a few times over the years?

A Yes.

Q During your meetings with Bishop Lee, did he ever tell you that The Falls Church had received any benefit from these canons, the Dennis Canon or Canon 15?

A No.

Tr. 2695:20-2696:17 (Yates). Plaintiffs offered no evidence to the contrary.

Similarly, there is no evidence that TEC or the Diocese agreed to provide additional services, or to take on additional risks or liabilities, upon adoption of the anti-alienation canons in the late 1800s. To the contrary, it was Professor Mullin's testimony that, whatever services or benefits plaintiffs provided to affiliated congregations remained the same throughout the history

of the Episcopal Church. *See* Tr. 1193-94, 1229:19-1232:14. As he put it, those who adopted the anti-alienation canons stated: "We are simply doing what has been done in the consecration service," which according to Mullin dated to the late 1700s. Tr. 1193:7-1194:14, 1192-93. The record is thus devoid of evidence that plaintiffs' alleged proprietary interest was supported by anything other than their continued performance of whatever contractual duties they had prior to adoption of the property canons. But as we have demonstrated, "[a]n agreement by one to do what he or she is already legally bound to do is not a good consideration for a promise made to that person." 4A *Michie's Jurisprudence*, Contracts § 34, at 449.

The Virginia Supreme Court's decision in *Seward* is instructive. There a party (Nunn) owned real property on which there was an $8,500 mortgage with New York Life (secured by a first deed of trust) and a $2,925 debt to Seward (secured by a second deed of trust). 154 Va. at 158-59. When Nunn defaulted on his debt to Seward, Seward bought the property for $10,000. *Id.* at 160. The deed for that sale recited that $1,500 cash would go to the trustees on the second deed of trust, that $8,500 was due to New York Life, and that Seward assumed the first deed of trust. *Id*. New York Life, therefore, later contended that Seward was personally required to pay it the balance on the notes under the first deed of trust. The Court disagreed. It acknowledged that Seward had acquired Nunn's equity of redemption under the first deed of trust (extinguishing Nunn's rights) and took the property subject to that deed of trust (so New York Life was not wiped out). But since Seward received nothing in exchange for the recited promise to assume the obligation to pay the balance under the first deed of trust, New York Life failed to carry its burden to show consideration; Seward's promise was "a naked promise without legal consideration" and was "unenforceable." *Id*. at 168.

So too here. For plaintiffs to obtain any additional interest in the CANA Congregations' property, concession of that interest by the Congregations required consideration beyond that previously provided by plaintiffs. Yet the undisputed testimony is that there was no such exchange of consideration here.

c. Plaintiffs' canons likewise fail to create an enforceable contract because they fail to satisfy the requirements of mutual obligation and mutual remedy.

Even if the canons were properly viewed as creating a contract, they would not be enforceable. Plaintiffs' canons are characterized by a lack of mutuality—of obligation and of remedy. In practice, plaintiffs have no enforceable duties to affiliated entities such as the CANA Congregations. If affiliated congregations believe that TEC and the Diocese have not lived up to their canonical duties, all the congregations can do is appeal to plaintiffs and seek to bring about a change to the canons. But this may or may not succeed, and plaintiffs effectively remain the sole arbiters of breach. Yet, a "contract" that one party gets to enforce, or whose lone remedy for breach is to try to *change* the contract and hope for the best, is unknown to Virginia contract law.

It is a black-letter "rule of law" that "where the consideration for the promise of one party is the promise of the other party there must be absolute mutuality of engagement, so that each party has the right to hold the other to a positive agreement. Both parties must be bound or neither is bound." *Vinton*, 195 Va. at 888 (quoting *Am. Agricultural Co. v. Kennedy*, 103 Va. 171, 176 (1904)).[42] Similarly, it is fundamental to the enforceability of a contract that each party have a remedy for the other's breach, whether specific performance or payment of damages. 1 *Re-*

[42] *Accord Capps v. Capps*, 216 Va. 378, 381 (Va. 1975); *Smokeless Fuel Co. v. W.E. Seaton & Sons*, 105 Va. 170, 173-74 (1906); *Sabet v. Eastern Virginia Med. Auth.*, 611 F. Supp. 388, 396 (E.D. Va. 1985).

statement (Second) of Law—Contracts § 8 (1979) (defining an "unenforceable contract" as "one for the breach of which neither the remedy of damages nor the remedy of specific performance if available, but which is recognized in some other way as creating a duty of performance, though there has been no ratification"). The concepts of mutuality of obligation and remedy are well settled under Virginia law. *See also* 4A *Michie's Jurisprudence*, Contracts § 2, at 404 ("To be a contract, [an agreement] must respect property or some object of value *and confer rights which may be asserted in a court of justice*."). But the canons fail the basic test of mutuality, as evidenced by the testimony of TEC's own experts and chancellor.

The explanation of David Beers, TEC's chief legal officer, is representative. As he elaborated at a Rule 4:5(b)(6) deposition, individual congregations affiliated with the denomination may protest an alleged violation of the Church's rules, but ultimately they lack (1) any means of challenging the denomination's conclusion that it acted in a manner consistent with those rules, or even (2) any internal remedy for other matters. According to Mr. Beers, the sole recourse of a congregation is to attempt to get the constitution and canons changed. DX-CANA2011-0009-00029 (Designation of Dep. Of David B. Beers 117:19-118:18 (Oct. 23, 2007) (Rule 4:5(b)(6) deposition)). When asked whether "an individual parish ha[s] any ability to force the Diocese to abide by the constitution and canons of the Diocese," Mr. Beers responded: "***normally, no, an individual parish except at the ballot box probably does not have the authority to enforce any of the church's rules on the Diocese***." *Id*. (emphasis added).[43] Under the legal principles cited above, that fact renders any "contract" between the parties unenforceable.

[43] As Mr. Beers stated in full:

> Q Does an individual parish have any ability to force the Diocese to abide by the constitution and canons of the Diocese?
>
> A Parishes—members of parishes have the right to discipline clergy—I mean to initiate proceedings to discipline clergy. So they would have the right to try to force

Both of plaintiffs' experts expressed the same understanding that congregations lack any remedy for a breach of plaintiffs' constitution and canons. For example, Professor Mullin stated:

> Q Now, under your reading of the canons, even if the Episcopal Church failed to keep its canonical obligations to the congregation, the congregation could not, as recourse, leave the Episcopal Church, correct?
>
> A The congregation or the parish is the creation of the larger church.
>
> Q I didn't quite hear an answer to my question, though. So as recourse, they could not leave the Episcopal Church in that circumstance, correct?
>
> A They could leave as individuals.
>
> Q But as a congregation they could not, correct?
>
> A But if you consider congregations to be a group of individuals, they can.
>
> Q As an institution, the congregation could not leave in that circumstance, correct?
>
> A The institution could not leave.
>
> Q The congregation's only recourse in that situation is to seek a change in the Constitution and Canons through the Church's internal processes, correct?
>
> A Correct.

Tr. 1297:2-1292:3 (Mullin).

Professor Bond likewise testified that, even assuming *arguendo* that dioceses have a right to withdraw from the Episcopal Church, congregations would lack such a right and could seek to remedy any grievances with the denomination only by attempting to effect a change in the constitution and canons:

> the Bishop to do X or Y or not do X or Y by starting a proceeding claiming that he was in violation of the church's rules by not doing what he's doing or by doing what he shouldn't be doing.
>
> Q And with whom would the—I'm sorry. I didn't mean to cut you off.
>
> A I was trying to think of another example, and that would be true of—well, principally the Bishop. Of course, there are other clergy on the staff, which same disciplinary process—a similar disciplinary process could be initiated. But—but I think in the—well, I don't know in what sense you mean, but ***normally, no, an individual parish except at the ballot box probably does not have the authority to enforce any of the church's rules on the Diocese***. (Emphasis added.)

Q Now, even if the Diocese has such a right [to withdraw from the denomination], I take it you would say that the congregations within the Episcopal Church have no implied right of withdrawal; is that right?

A That would be correct.

Q And the only remedies that congregations have are to seek a change in the Constitution and Canons; is that correct?

A As far as I know.

Tr. 1110:1-9; *accord id*. at 1111:1-6 (Bond) ("Q . . . Just to repeat my question, Professor Bond, you would continue to say that the only remedies that congregations have are to seek a change in the Constitution and Canons even with this language in front of you [regarding Diocese of Virginia's reserved rights of withdrawal]? A Yes, I believe so.").

Several of plaintiffs' own witnesses similarly testified that the only options for those who believe the denomination has acted contrary to its rules is to seek to *change* the rules or leave the church. The direct testimony of Rev. Miller is illustrative of this admission:

Q What would you do if you found yourself in profound disagreement, yourself now, with a policy adopted by the General Convention?

A I would probably try to find some other people who agreed with me, and I would find a way to—find a way to go to our Diocesan Council, which you have to start there, really. *And I would try to find a way to get a resolution or whatever the appropriate mechanism would be to have a vote—to bring it to a vote at our Diocesan Council and try to change whatever the policy was*, and then send that up. We often send resolutions that are meant to be passed on to General Convention, and I would, you know, if I got—if enough people voted that, it would go forward, and then General Convention would reconsider it.

But that's the process I would use. If that failed, I would either live with it and disagree with it, or I guess in the most extreme case, I would resign and leave the Church. . . .

Trial Tr. 4642:5-43:2 (emphasis added). Likewise, Rev. Warder testified that one must respond to such a circumstance by undertaking "[t]o work hard to change it, to become part of the electoral process, to make your voice known, to gather with others, and to make the changes." Tr.

4654:2-4 (Warder). And if these efforts "to change the system, which is slow to change," fail, then the aggrieved party "would be the one who would have to leave." Trial Tr. 4654-56.

In a similar vein, plaintiff witness Rev. Rick Lord testified that any disagreement with the denomination's actions would be addressed only by "pastoral conversation," and if that led nowhere then the rector or congregation simply had to live with the canons:

> Q. If you ever found yourself unable in good conscience to remain a church—a priest in the Episcopal Church, what options would be available to you?
>
> A. Well, I would seek, first of all, the—direct conversation with my bishop, a pastoral conversation to explore the disagreements. If they came to such an intensity that I couldn't practice my ministry in good conscience, I would ask the bishop for direction and how I would be able to either renounce my orders of ministry or how I might be relieved of my responsibilities.
>
> Q. Let me assume the same—ask the same question but assume that you were at that time serving a congregation which unanimously or by an overwhelming majority shared the same view that in good conscience they could no longer be part of the Episcopal Church. In your opinion what options would be available to that congregation?
>
> A. The options would be of the same nature, that the wardens and the vestry would need to be in direction communication about that conflict with the bishop seeking pastoral guidance about how it could be resolved.
>
> Q. And if it could not be resolved?
>
> A. If it could not be resolved, then they'd be bound by the canons of the church. . . .

Tr. 4272:6-4273:12 (Lord); *see also* Tr. 4277:18-4278:3 (cross examination of Rev. Lord) ("if there is a doctrinal position adopted by the Episcopal Church with which a congregation disagrees, the recourse of the congregation is to speak to the bishop"); Tr. 4665:1-12 (Rev. Johnson) (explaining that he would "talk with my bishops" and ultimately either "stay or resign").

Contrary to plaintiffs' views, a "contract" under which a party aggrieved by breach may do nothing more than enter into "conversation" with the other contracting party is not "legally cognizable" within any reasonable understanding of that term. *See Miller v. SEVAMP, Inc.*, 234 Va. 462, 465 (1987) ("Notions of fundamental fairness underlie the concept of mutuality");

Busman v. Beeren & Barry Invs., LLC, 69 Va. Cir. 375, 2005 WL 3476681, *2-3 (Va. Cir. Ct. Fx. Cnty. Dec. 12, 2005) (finding contract void where contract for sale of condominium permitted buyer to terminate at any time prior to closing with no penalty). Nor is there any binding agreement if a party's only remedy for an alleged breach is to ask the other party to "change" the terms of the agreement and hope that such change will be effectuated at "the ballot box" (and not simply result in further breaches of the revised agreement). As the Virginia Supreme Court has repeatedly held, "[b]oth parties must be bound or neither is bound." *E.g.*, *Vinton*, 195 Va. at 888 (quotation omitted). And since plaintiffs cannot be bound for any failures on their part to abide by the canons, neither can the CANA Congregations be bound.

d. Plaintiffs' canons are independently unenforceable for lack of a mutual remedy on account of the First Amendment jurisdictional bar on civil courts deciding doctrinal issues.

There is a separate and independent reason why the canons suffer from lack of mutuality: The contractual duties of the denomination, if any, were fundamentally spiritual, and the First Amendment precludes civil courts from ruling that the denomination failed to honor them. *See generally Presbyterian Church v. Hull Church*, 393 U.S. 440, 451 (1969). That is, although the CANA Congregations believe that plaintiffs breached their duties under the Constitution and Canons, and disaffiliated on that basis, they lack any civil law remedy for that alleged breach. And if the court may remedy only breaches alleged and shown by plaintiffs, that means there is no mutuality of remedy—rendering the contract unenforceable under secular law. *Vinton*, 195 Va. at 888 ("Both parties must be bound or neither is bound.").

1. At the outset, there can be no question that plaintiffs' constitution and canons embody mutual spiritual commitments. The very first paragraph of the Preamble to TEC's Constitution defines the Church in theological terms—as part of a body committed to "upholding and

propagating the historic Faith and Order as set forth in the Book of Common Prayer." PX-COM-0001-009.

The testimony was undisputed in this regard. As plaintiffs' expert Professor Mullin testified, the Book of Common Prayer that plaintiffs have committed to uphold "is a thoroughly religious book" containing "the rites for Episcopal services," "prayers and collects for different periods in the church calendar," "baptismal rituals and marriage services and all 150 psalms," and "the fundamental religious beliefs of the church." Tr. 1289:4-1290:9-13. Even more importantly, Professor Mullin acknowledged that the basis for *all* of plaintiffs' authority, including that found in the Constitution and Canons themselves, is spiritual:

> Q Professor Mullin, you would acknowledge that all temporal and spiritual authority of the Episcopal Church is based on the scriptures, correct?
>
> A The scriptures and the creeds.

Tr. 1334:5-8.

In a slightly different vein, the head of the Diocese's standing committee recently explained, in a speech to the Annual Council, that the relationship between the congregations and the Diocese reflected in the Church's rules is fundamentally spiritual, not contractual:

> ***The Church is not an association or a club of like-minded persons. We are not affiliated to each other by contractual commitments that have a beginning and an end, escape and penalty clauses and the like.***
>
> The Church is the living, breathing Body of Christ created by God for the sake of the world. It encompasses the quick and the dead across the ages. The Church is enfleshed in all cultures and peoples, bound together by the indissoluble bond of our baptism into the death and resurrection of Jesus the Christ.
>
> Therefore we belong together. We all have need of each other in order to function as a body, in order to be the Body of Christ. ***The requirements of various consents, the testimonials and approvals, the mechanisms for order and discipline—all these are means by which we affirm that the Church is one body, sharing one baptism, proclaiming one faith in our one Lord who is God and Father of all.***

PX-COM-0276-0103 (emphasis added).

The CANA Congregations' testimony was of a piece with this evidence. For example, when asked "was it your understanding that the Episcopal Church and the Diocese had any obligation to The Falls Church," Rev. John Yates of The Falls Church testified: "I think their obligation was to exercise biblical leadership in the church." Tr. 2642:4-8.

2. Nor is there any question that the CANA Congregations' beliefs that these spiritual commitments were breached prompted their disaffiliation from the denomination. Here again, the testimony was undisputed. For example, as Rev. Yates of The Falls Church testified:

> Q Dr. Yates, . . . why did The Falls Church and you disaffiliate from the Episcopal Church and the Diocese?
>
> A Because the bishops departed from the biblical teaching of the church.
>
> Q A departure from scripture, in your mind?
>
> A Yes.
>
> Q Did you consider that to be a fundamental breach in the agreement between the Episcopal Church, the Diocese, The Falls Church, and you?
>
> A Yes.

Tr. 2693:6-16. Similarly, Rev. Harper testified:

> Q Let me turn now forward to 2006. What led Apostles down the road to consider disaffiliation?
>
> A Yes.
>
> Q What led Apostles?
>
> A That was following the 2003 General Convention.
>
> Q Did you have a belief that the Episcopal Church had failed to honor part of its constitution?
>
> A I did.
>
> Q What part of the constitution was that?
>
> A In the preamble to the Episcopal Church's constitution, they pledged their commitment to uphold the historic faith of the Anglican Church.
>
> Q Without going into exquisite detail, did you believe that the Episcopal Church had failed to honor the historic faith?
>
> A Completely.

Tr. 3143:9-3144:3; *accord* Tr. 3162:8-13 (Harper on cross-examination by Mr. Somerville). And Rev. Cerar of St. Stephen's testified to the same effect:

> Q. And could you summarize the events that took place at that General Convention that relate to the decision of St. Stephen's to disaffiliate from the Episcopal Church?
>
> A. There were three actions of that General Convention which led to our decision to disaffiliate. The first and most significant was the rejection of a resolution that would have affirmed the authority of the holy scripture as the basis for decisions and actions of the Episcopal Church. The second was the approval of the consecration of a man as bishop who was a partner in homosexual. And the third was a resolution that held that the blessing of same-sex relationships was a valid part of the life of the church. . . .
>
> * * *
>
> Q. And the actions of General Convention 2003 that you just described, what understanding of those actions did the St. Stephen's congregation exhibit that was formed a part of the decision to disaffiliate?
>
> A. I can't speak for every member of the congregation obviously because there was a division of opinion on that. But it was in all of our discussions and decision-making this was the fact that these three actions were considered to be a departure from the traditional positions of the church was instrumental in our decision to disaffiliate.

Tr. 3706-3708 (Cerar); *see also* Tr. 4114:19-4115:2 (Brown) ("[T]he Episcopal Church had wandered from the foundation of our belief system, which is the ancient teachings of the Anglican Church and the Bible").

3. As explained at trial (Tr. 2656:16-2658:5), we are not asking the Court to rule that the denomination here has departed from its doctrine. We acknowledge that *Hull Church* bars such findings.[44]

Indeed, it is because the Court cannot make such a finding that the CANA Congregations lack a remedy. Put simply, the CANA Congregations believe that any contractual aspects of the

[44] For that reason, among others, the relief sought in plaintiffs' motion to strike should be denied. *See* Bench Br. on Objection to Departure From Doctrine Evidence, handed up at trial on May 2, 2011.

relationship were fundamentally spiritual, and were breached. Yet those claims may not be remedied by any secular civil court.[45] And since "[b]oth parties must be bound or neither is bound" (*Vinton*, 195 Va. at 888), this precludes plaintiffs from claiming that the CANA Congregations breached their canons.

This does not mean, of course, that plaintiffs are without means of establishing a proprietary interest in the property of affiliated congregations. It simply means that they must satisfy the requirements of some other body of civil law, whether "real property [or] contract law." *Truro Church*, 280 Va. at 29. In other words, they must rely on a source other than their canons. But as we have shown, they are unable to do so.

e. As TEC's General Convention and officially designated canon law reporters have admitted, the canons have no force under civil law.

In view of the foregoing, it should come as little surprise that plaintiffs, through official representatives and acts of the General Convention, have long recognized that the canons have no legal force. As the Kentucky Supreme Court has held, "the official commentary in the annotated constitution for PECUSA indicates that the [canonical] restrictions on transfer are of moral value only and without legal effect." *Bjorkman*, 759 S.W.2d at 586. That is why, in 1871, upon adoption of the anti-alienation canons, TEC formally directed dioceses to "take such measures as may be necessary, by State legislation, or by recommending such forms of devise or deed or subscription," to place congregational property under plaintiffs' control. Apostles Ex. 376.0002.

But even since then—even after adoption of the Dennis Canon—plaintiffs' General Convention and officially designated canon law reporters have acknowledged the canons' lack of

[45] As the Court has recognized, "parsing [plaintiffs'] canons and rules" itself "would risk placing this Court in the midst of the very religious thicket about which ECUSA/Diocese has frequently warned the Court." Letter Op. 11 n.18 (Aug. 19, 2008).

force under civil law. These admissions further preclude enforcement of plaintiffs' canons. *Barr v. S.W. Rodgers Co.*, 33 Va. App. 273, 279 (Va. App. 2000) ("Declarations made by a party to litigation when offered through someone other than the declarant, though hearsay, are admissible in Virginia as party admissions. *See Goins v. Commonwealth,* 251 Va. 442, 461 (1996). The party admission rule includes not only statements made by the party himself or herself, but also statements of other persons who stand in close relationship to the party. *See* Charles E. Friend, *Law of Evidence in Virginia* § 18-41 (5th ed. 1993). Thus, an agent's statements may be admitted against his or her principal if the agent made the statements while acting within the scope of employment and the agent had authority to make such statements on behalf of the principal.").

White's 1898 Treatise and the Actions of the 1871 General Convention. Plaintiffs' expert, Professor Mullin, initially testified that the question of property ownership was settled in plaintiffs' favor by the early 1880s. But as he admitted on cross, the leading authority on canon law in the Episcopal Church took quite a different view. Tr. 1259:17-1260:2; Tr. 1201-02. Edwin Augustine White, who by Mullin's admission was "an authoritative source on Episcopal canons in the late 19th century" (Tr. 1258:9-14), rejected Mullin's position in a book entitled *American Church Law: Guide and Manual for Rector, Wardens and Vestrymen of the Church Known in Law as 'The Protestant Episcopal Church in the United States of America*.'" Apostles Ex. 289.0001. The authoritative position of White—who, unlike Mullin, was actually a lawyer and an "expert in canon law" (Tr. 1275:11-19)—was that "[a]lthough the Canons of the Church require the consent of the Bishop and the Standing Committee to the alienation of the real property of the corporation, the Courts have decided that, to have any legal effect, it must also be a provision of the Statute Law. 'Titles to property must be determined by the laws of the State.'" *Id.* (quoting *Sohier v. Trinity Church*, 109 Mass. 1).

The Massachusetts Supreme Court case cited by White in support of this statement could not be clearer in this regard: "The canons of the Protestant Episcopal Church, which are referred to in the bill, requiring the defendants to obtain the consent of the bishop and standing committee, for removing, taking down, or otherwise disposing of a church, *do not affect the legal title to the property held by these defendants under the deeds above mentioned*. Titles to property must be determined by the laws of the Commonwealth. *The canons are matters of discipline, and cannot be enforced by legal process*." *Sohier*, 109 Mass. 1, *23 (emphasis added).

White's analysis was published some 30 years after adoption of the anti-alienation canons, and some 15 years after the date when, according to Professor Mullin, the issue of property ownership in the denomination was settled. Tr. 1201:11-1202:6. As noted, when adopting the anti-alienation canons, TEC formally recommended that dioceses "take such measures as may be necessary, by State legislation, or by recommending such forms of devise or deed or subscription," to place congregational property under ECUSA's control. Apostles Ex. 376.0002. And as Professor Mullin ultimately admitted, "there are repeated references to securing ownership by deeds" in "the debates surrounding these [anti-alienation] canons [adopted in 1871]." Tr. 1260:13-1261:14. It is difficult to explain this focus on deeds as anything other than a recognition that canons were not enough to secure denominational ownership.

TEC's Official 1924 Treatise on the Constitution and Canons. In the early 1900s, TEC's General Convention recognized Mr. White's authority on canon law and elected him "chair of the House of Deputies on canons." Tr. 1261:15-17. Further, the General Convention later "passed resolutions calling for the creation of a commentary on the Constitution and Canons" and "designated White to author it." Tr. 1261:18-1262:2 (Mullin). The first edition of this official treatise was published in 1924, "due to the request of the House of Deputies, as ex-

pressed in resolutions thereof in the General Conventions." Apostles Ex. 290.0002; Tr. 1267:5-8 (Mullin) (acknowledging that "the 1924 edition of White's commentary" was "published by order of the House of Deputies"). And it is relevant in a number of critical respects.

First, White's official treatise openly acknowledges that the TEC anti-alienation canons adopted in the late 1800s were insufficient to prevent a disaffiliating congregation from retaining its property. As the treatise explains, the canons were adopted in response to the outcome of a case involving the rector of Christ Church in Illinois, who left TEC for the Reformed Episcopal Church, "took the property of Christ Church with him, and the Courts sustained the transfer, holding that there was no law to prevent it." Apostles Ex. 290.0007. But as White explains, TEC's 1871 General Convention "recognized that while this [adoption of the anti-alienation canons] was as far as the Convention could legislate in the matter, ***it was not sufficient to prevent such alienation,*** and the Convention therefore adopted the resolution, recommending that the several Diocesan Conventions take steps to procure ***legislative action*** by which such alienation could be prevented." *Id*. (emphasis added). Thus, by the acknowledgment of TEC's designated canon lawyer and its General Convention, the canons here are subject to state law and have only moral force.

Second, the 1924 edition of White's treatise discussed an earlier TEC canon (Canon 25) that, much like the Dennis Canon, purported to assert a trust interest in the property of affiliated "Religious Communities."[46] As that canon stated: "It shall be provided in the Constitution of a religious community that real estate and endowments belonging to the community shall be held

[46] We hasten to note the limited scope of this canon, which applies only to affiliated "Religious Communities"—not full-fledged parishes or congregations. Tr. 1263:7-1267:8 (Mullin). Insofar as Canon 25 expressly refers to a "trust," and yet did not apply to full-fledged parishes, the only reasonable inference is that, as of 1924, TEC asserted no trust interest in any properties apart from those of affiliated "religious communities."

in trust for the community as a body in communion with this Church." Apostles Ex. 372.0002 (Canon 25 § VI). The canon further provided that "no change in the Rule or Constitution [of the affiliated entity] shall be made without [the Bishop's] approval." *Id*. (Canon 25 § I).

As Mr. White's official treatise explains, however, even explicit canonical provisions such as these have only moral value and are insufficient to establish a legally cognizable interest in the property of local affiliates:

> It is also required that the Constitution shall provide that real estate and endowments belonging to the Community shall be held in trust for the Community as a body in communion with the Church. *It would seem to be the intention of this provision to secure the property of the Community from being alienated from the Church in case the Community should officially sever its connection with the Church. If that is the intention thereof, it is very imperfectly expressed,* ***and in any event it could only have moral weight. However expressed in a canon it would have no legal force.***

Apostles Ex. 372.0004 (emphasis added). As Mr. White's official treatise recognizes, therefore, "a canon," "however expressed," has "no legal force" as a means of "secur[ing] the property of [an affiliated] Community from being alienated from the Church in case the Community should official sever its connection with the Church." *Id*. That, of course, is exactly what the CANA Congregations have done.

The Dennis Canon goes no further than former Canon 25 (indeed, in many respects it is narrower). And as Professor Mullin was compelled to admit, Mr. White held this view as to all of TEC's canons:

Q It was White's position that no matter how the canons were worded, they had no legal force, correct?

A Correct.

Q They had only moral weight, correct?

A That was White's distinctive position.

Q White's commentary took the same position concerning the anti-alienation canons, did he not?

A Yes.

Tr. 1266:16-22 (Mullin).

TEC's Official Annotated 1954 Edition of the Constitution and Canons. Three decades later, TEC's General Convention again directed "publication of a new annotated edition of the constitution and canons." Apostles Ex. 291A.0002; *accord id*. at 291A.0001 (title page stating that the book was "published after review by a joint committee of General Convention"); Tr. 1268:10-18 (Mullin) (acknowledging that "[t]his commentary was then published at the General Convention's direction"). And as Professor Mullin admitted, this official commentary "again reiterate[d] the view that the Church's property canons are not sufficient by themselves to secure an interest in parish property," and that "[w]hether [the canons] are enforceable in the courts depends upon the specifics of the legislation in effect." Tr. 1269:4-12 (Mullin).

Indeed, TEC's official 1954 annotated commentary readily admits that "[t]he power of the General Convention over the disposition of real property *is questionable*, *governed as it is by the law of the state* in which it is situated."; "[t]he law will differ in different jurisdictions and each case which arises must be decided according to the law of the situs of the property." Apostles Ex. 291.0004-291.0005 (emphasis added). Nowhere does this official commentary hint at anything like the position plaintiffs now press—that the canons govern in *every* jurisdiction without regard to state law. In a similar vein, the official 1954 commentary again highlights the 1871 General Convention resolution directing the "Diocesan Conventions to take such measures as may be necessary, by State legislation or by recommending such forms of devise or deed or subscription as may secure the Church buildings, grounds or other property, real and personal, . . . to protect such . . . property from the claims of those would abandon the doctrine, discipline or worship of the said church." Apostles Ex. 291.0006.

The 1954 annotated commentary does not simply reflect the views of an individual canon lawyer. The General Convention adopted detailed procedures for preparation and review of this document: Mr. Jackson A. Dykman, a leading canon lawyer (Tr. 1275:11-19) (Mullin), was designated to write a draft "under the authority of General Convention" (Apostles Ex. 291A.0004); and "galley proofs of the manuscript" were "prepared for each member of [a newly designated Joint Committee to Supervise Publication of a New Annotated Edition of the Constitution and Canons], thus affording each member the opportunity to make his own study of the material prepared by the annotator and to prepare suggestions for correction, clarification, and improvement." Apostles Ex. 291A.0004–0005. As this official two-volume commentary states, "pursuant to the mandate of the General Convention [the joint committee] has reviewed the proofs of this new annotated edition of the Constitution and Canons and has approved the text." Apostles Ex. 291A.0003. Accordingly, the edition's view that canons are insufficient to create cognizable property interests constitutes the view of TEC itself.

TEC's Official 1981 Edition of the Annotated Constitution and Canons. In 1981, building on the 1924 and 1954 editions, TEC published the most recent edition of its *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America otherwise known as The Episcopal Church*. Apostles Ex. 292.0001-292.0003; Tr. 1272:20-1273:1 (Mullin). No longer is any individual identified as author, except insofar as the first and second editions' authors (White & Dykman) are acknowledged. The 1981 edition was copyrighted in the name of the Church's corporate entity (The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America), published by its own publisher (Church Publishing Incorporated), and "revised and updated by the Standing Commission on Constitution and Canons of the General Convention"—whose members in-

clude Walter Dennis, for whom the "Dennis Canon" is named. Apostles Ex. 292.0002–0003. "[T]he General Convention directed the editing, updating, publication and sale of [this] edition," and intended it "as an authoritative expression of the meaning of the Constitution and Canons of the Episcopal Church as they exist at this time." Apostles Ex. 292.0006; DX-CANA2011-0009-00085 (Dep. of David B. Beers 476:14-22 (Oct. 23, 2007) (Rule 4:5(b)(6) deposition)) ("White & Dykman is published under the auspices of what we call a Standing Commission, which is an elected—appointed—body of priests, other clergy and laity. And this particular Standing Commission is called the Standing Commission on Constitution and Canons. And . . . they provide some inducement for the publication of editions of White & Dykman"). And once again, this official commentary contains critical admissions concerning the canons.

First, TEC's 1981 commentary rejects the notion that the Dennis Canon was simply declaratory of TEC's existing canon law. Rather, as the commentary explains: "Although considered by some to be declaratory of existing law, Sections 4 and 5 of this canon were adopted by General Convention in 1979 in response to the . . . invitation contained in the decision in *Jones v. Wolf*." Apostles Ex. 292.0012; *accord id*. (noting that *Jones v. Wolf*, together with the actions of disaffiliating parishes in the wake of the 1976 General Convention, "made clear the need for action by the General Convention"). This is not surprising, given that the word "trust" appeared nowhere in the property canons concerning parishes and congregations until 1979.

Second, TEC's official 1981 commentary on the canons reiterated that "[t]he power of the General Convention over the disposition of real property is questionable, governed as it is by the law of the state in which it is situated." Apostles Ex. 292.0008; *accord id*. ("State laws control the conveying and encumbering of real estate, and each case which arises must be decided according to the law of the situs of the property."); Tr. 1275:7-10 (Mullin) (admitting that "the

1981 edition of White & Dykman again states the position that the enforceability of the canons will turn on state law"). Indeed, as the commentary explained, "[t]his is recognized by the exception at the end of the section that gives power to diocesan conventions to make provision by local canon for the encumbrance or alienation of real property, differing from that prescribed by this canon, and so adapt the process to local law." Apostles Ex. 292.0008. The General Convention thus acknowledged that, even after 1979, canons are subject to the requirements of civil law, which varies from state to state. And yet the Diocese here, while adopting a local canon, chose the means of attempting to secure an interest in parish property that was most clearly *prohibited* by Virginia law.

Third, TEC's official 1981 commentary expressly acknowledged that a genuine "neutral principles" approach does not preclude a congregation from voting to disaffiliate from the denomination, while retaining its property:

> *Jones v. Wolf* deci[ded] … that States, consistent with the First and Fourteenth Amendments, could resolve disputes over the ownership of church property by adopting a 'neutral principles of law' approach and are not required to adopt a rule of compulsory deference to religious authority in resolving such disputes where no issue of doctrinal controversy is involved.
>
> ***This approach gives great weight to the actions of controlling majorities, and would appear to permit a majority faction in a parish to amend its parish charter to delete all references to the Episcopal Church, and thereafter to affiliate the parish—and its property—with a new ecclesiastical group***.

Apostles Ex. 292.0012 (emphasis added). Indeed, the CANA Congregations did just what TEC admitted was possible after *Jones*. And their right to retain the properties that they built and maintained is recognized under neutral principles of law.

f. Even if plaintiffs' canons otherwise amounted to a contract, Virginia law prohibits associations from passing rules that encumber their members' property or penalize their members' property rights.

Even if plaintiffs' property canons otherwise constituted a contract (which they do not), they would be unenforceable. Virginia law does not permit voluntary associations to encumber or assert an ownership interest in members' property by passing rules, let alone without publicly recording such an interest. *Unit Owners' Ass'n v. Gillman*, 223 Va. 752 (1982); Va. Code § 1-248; *Davis v. Mayo*, 82 Va. 97, 1886 WL 2979 (1886). Moreover, the law abhors forfeitures of interests in real property, *e.g.*, *Davis v. Wickline*, 205 Va. 166, 169 (Va. 1964), and enforcing the canons in the manner requested by plaintiffs would effect a forfeiture of the CANA Congregations' interest in properties that they acquired, improved, and maintained. Applied here, these neutral principles confirm that plaintiffs' canons are not enforceable. Indeed, enforcing plaintiffs' canons would not merely be following legal principles "developed for use in all property disputes." *Norfolk*, 214 Va. at 504. It would effectively give plaintiffs' *more favorable* treatment than is accorded to secular associations (or congregations).

In *Gillman*, the Virginia Supreme Court addressed whether a Fairfax County condominium association could "fine [members] and encumber[] their property" for violating rules relating to the parking of vehicles duly adopted by the association. 223 Va. at 765. The governing statute expressly provided for "the right of assessment and the right to lien," and the bylaws expressly permitted the association to "[l]evy fines [of up to $25/violation] against Unit owners for violation of the Rules and Regulations." *Id*. at 759 (quoting the relevant statute and bylaws). Moreover, the bylaws were "recorded with the master deed," could be "amended from time to time," and were "accepted by the [members] as binding" upon joining the association. *Id*. at 757, 758. Thus, asserting that it was a "self-governing community" vested with statutory authority,

the association argued that its bylaws entitled it to encumber the property of rule violators, and that "every unit owner purchased subject to this power." *Id*. at 763, 766. The Court, however, unanimously disagreed.

While acknowledging that the governing statute and bylaws "permit the exercise of wide powers by an association," the Court held that "these powers are limited by general law" and that "no language in the [statute] … authorizes the executive or governing body of a condominium *to levy fines, impose penalties, or exact forfeitures for violation of bylaws*." *Id.* at 763 (emphasis added); *accord id*. at 762 (rejecting the argument that "there is no limitation inherent in the Condominium Act on powers that may be created by the condominium documents"). In support, the Court cited Va. Code § 1-248 (then codified at § 1-13.17), which "provides that '[w]hen … any … number of persons[] are authorized to make … bylaws, rules, regulations … it shall be understood that the same must not be inconsistent with the Constitution and laws of the United States or of this State.'" *Id*. at 763 (elipses in original).

Applying these principles, the Court found the association's imposition of $25 dollar fines—totaling $20,500 for multiple infractions—to violate both constitutional and statutory limitations on the powers of associations and the "test of reasonableness" that governs "the validity of association regulations." *Id*. at 767. The Court rejected the notion "that it was ever the intent of the General Assembly that the owner of units in a condominium be a completely autonomous body, or that such would be permitted under the federal and state constitutions." *Id*. at 763. Noting that enforcing the association's rules would "encumber[] [the members'] property," the Court deemed it "clear that the Gillmans were being punished, not assessed," which was "impermissible." *Id*. at 766. *See also Skeen v. Indian Acres Club, Inc*., 27 Va. Cir. 167, 1992 WL 884662 (1992) (applying *Gillman* to a property owners' association); *Fairfax County*

Redevelopment and Housing Authority v. Shadowood Condominium Ass'n, 2011 WL 2560008 (Va. Cir. Ct. May 12, 2011) (applying *Gillman* to invalidate certain associational rules).

As *Gillman* confirms, associational rules imposing what amounts to a penalty on members' property rights requires express statutory authorization. Moreover, rules that effectively work a forfeiture are even then subject to constitutional and reasonableness limitations. *See also* 4A *Michie's Jurisprudence*, Contracts § 43, at 473 ("A contract will not be construed so as to inflict unreasonable hardship, unless its terms clearly impose it."); 6 Am. Jur. 2d, Associations and Clubs § 6 ("*bylaws or rules cannot be enforced when they compel a citizen to lose his rights in accumulated assets* or to forgo the exercise of other rights which are constitutionally inviolable") (emphasis added).

In many respects, this case is more extreme than *Gillman*. *First*, the fine at issue in *Gillman* was a mere $25/day per infraction, amounting to a total of just $20,500 on a commercial entity, and only 26 members were potentially affected. 223 Va. at 756, 759, 765. Here, by contrast, the purported penalty for disaffiliation is the loss of all of real and personal property of seven congregations, all nonprofit entities. If the Virginia Supreme Court viewed a $25/day commercial charge as a penalty or forfeiture, it would unquestionably view the CANA Congregations' loss of tens of millions of dollars of real property in that light. At a bare minimum, the Court would not view such rules as reasonable, given the one-sided flow of financial benefits from the Congregations to plaintiffs and the fact that the Congregations exercised dominion over the property and bore day-to-day responsibility for its maintenance, improvement, and operation.

Second, the *statute* in *Gillman* expressly authorized the association to regulate condominium property and gave it the right to a lien for unpaid assessments. Here, by contrast, no statute authorizes hierarchical churches to adopt rules that unilaterally impose a denominational trust on

congregational property. *Cf*. Cal. Corp. Code § 9142(c)(2) ("No assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law … [u]nless, and only to the extent that, the articles or bylaws of the corporation, or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide"); N.Y. McKinney's Relig. Corp. Law § 42-a (providing that "the vestry or trustees of any incorporated Protestant Episcopal parish or church" are "subject always to the trust in which all real and personal property is held for the Protestant Episcopal Church and the Diocese thereof in which the parish, mission or congregation is located").

Third, in *Gillman* the association's constitution and bylaws were, by law, "recorded with the master deed," and "the master deed conveyed the units to the [members] with the express understanding that the rules, regulations, and bylaws of the Association were subject to amendment." *Id*. at 766. Here, by contrast, the vast majority of the deeds contain no indication that the properties at issue are subject to canons that may at any moment alter ownership, much less for property that the congregation already holds.

The testimony of the CANA Congregations' witnesses confirms the basic unfairness of a denomination's attempt to unilaterally assert an ownership interest on its members' property, let alone retroactively. As Mr. Bill Deiss of The Falls Church explained in response to the Court's questioning:

> THE COURT: Well, was it your understanding, Mr. Deiss, that a congregation had to agree or adopt a national canon or a constitutional amendment or change in the constitution of the national Church for it to be enforced on the Diocese or enforced on a congregation? Because it would seem to be implied in the question that Mr. Johnson's asking you, whether there's any reference to the church agreeing to the canon, and I just wonder what your take on that is.
>
> THE WITNESS: I think it was hard for me—when I saw this and heard of the Dennis Canon, it's hard for me as a person, and I think generally as a vestry, to understand where a contract can be put on your property without your acknowledging it if the trustees were really for The Falls Church. So it's sort of like a one-sided

> agreement for claims that the other side has automatically given up its property ownership. That was just very hard to understand. I'm not an attorney. I'm an engineer. It's just hard to see that equation balance.

Tr. 2556:13-2557:10 (Deiss). Other witnesses expressed a similar view.

Davis v. Mayo, 82 Va. 97, 1886 WL 2979 (1886), is again instructive. As discussed (at 34-35), that case involved a dispute between warring factions of a Sons of Temperance chapter, both claiming to be beneficiaries under a deed granting property "for the use of said Springfield Division, Sons of Temperance" and "under [its] control." *Davis*, 1886 WL 2979, at *2. Unable to assert that this deed language precluded the majority wing from disaffiliating with the chapter's property under a new name, the minority wing argued that ownership was governed by the ruling of the Grand Division, the general association. The Supreme Court, however, disagreed. After noting that it did not "distinctly appear from the record what were the exact relations existing between the Grand Division and the original Springfield Division, Sons of Temperance," the Court explained why the Grand Division nonetheless could not bind the Springfield Division:

> [A]ssuming that the voluntary relation of superior and inferior existed between them, and that the action of Mayo was pursuant to a previous and regular order of the Grand Division, still ***the proposition cannot be maintained that the effect of his action was 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 *4 (emphasis added). *Davis* thus confirms that a general association's rules purporting "to transfer the title to the property . . . from those in whom it was at that time vested" is legally ineffective. *Id*. Conveying an enforceable interest in property held by trustees required execution of a deed and a circuit court order pursuant to an application from lawfully appointed trustees. *Id*.[47]

[47] The relief sought by plaintiffs is not meaningfully different from that sought in *Davis*—an order "restrain[ing] and enjoin[ing] [defendants] from further use and occupancy" of the property

That any contract created by plaintiffs' canons should not be read to create an enforceable proprietary interest is confirmed by black-letter Virginia law on forfeitures. As the Virginia Supreme Court has repeatedly held, "[t]he law does not favor forfeitures. . . . [E]very required formality must be strictly observed." *First Nat. Bank of Martinsville and Henry County v. Roy N. Ford Co., Inc.*, 219 Va. 942, *2 (1979).[48] Moreover, it is "the settled principle of both law and equity that contractual provisions for forfeiture . . . will not be enforced if the result of a forfeiture will be unconscionable." *Galvin v. S. Hotel Corp.*, 154 F.2d 970, 973 (4th Cir. 1946) (applying Virginia law); *see also In re Univ. Cafeteria, Inc.*, 47 B.R. 404, 406 (W.D. Va. 1985) ("To compel a forfeiture in this case [of contractual ambiguity] would work an injustice.") (applying Virginia law). As both *Gillman* and the testimony of the Congregations' witnesses confirm, these principles apply forcefully here. Thus, even if the canons are viewed as creating a contract, they are unenforceable under neutral principles of association and contract law.

D. Plaintiffs' "course of dealing" evidence is not legally relevant under the circumstances of this case but, even if considered, would weigh in favor of the CANA Congregations.

According to plaintiffs, *Green* also requires consideration of all "dealings between the parties" (221 Va. at 555), whether those dealings relate specifically to the creation of property rights, or more generally to whether the CANA Congregations held themselves out as Episcopal congregations. The Court in *Green*, however, analyzed "course of dealing" evidence only be-

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at issue, and directing defendants to "transfer control of such property to the Bishop." Diocese Compl. Prayer for Relief ¶¶ (c), (e); *see also* TEC Compl. Prayer for Relief ¶ (3) (same).

[48] *Accord Wickline*, 205 Va. at 169 (citing the "well defined rule[] of construction that … breach of covenant to sustain forfeiture is construed strictly against forfeiture. The instrument must give the right of forfeiture in terms so clear and explicit as to leave no room for any other construction"); *Matthews v. Codd*, 150 Va. 166, 171 (Va. 1928) ("Courts of equity look with disfavor upon forfeitures") (applying statute that governs reversion of land); *Johnston v. Hargrove*, 81 Va. 118, 1885 WL 4162, *2 (Va. 1885) ("forfeitures are never favored in the law"); *RW Power Partners, L.P. v. Va. Elec. and Power Co.*, 899 F.Supp. 1490, 1496 (E.D.Va. 1995) ("the law abhors a forfeiture") (applying Virginia law).

cause, unlike here, the denomination's constitution referenced certain factors as evidencing consent to creation of a denominational proprietary interest. Outside that context, to give weight in determining ownership to factors such as whether a congregation uses denominational literature or receives visits from bishops would greatly complicate the ownership determination and introduce uncertainty into the law of church property—contrary to ordinary "principles of real property and contract law." *Truro Church*, 280 Va. at 29. And even if such "course of dealing" evidence were more generally relevant, it would weigh heavily in the Congregations' favor here.

1. "Course of dealing" evidence is not legally relevant apart from situations in which the denominational constitution spells out specific steps that evidence express congregational consent to be bound by a denominational proprietary interest, as in *Green*.

As explained in our motion in limine (filed April 11, 2011) and reiterated at trial (*e.g.*, Tr. 139-157, 1507-1509), general evidence concerning the "course of dealing" between plaintiffs and the CANA Congregations is not legally relevant in this case.[49] Factors such as a member's use of a general association's literature and visits by the association's officers do not create enforceable proprietary interests under "neutral principles of law," which are "developed for use in all property disputes." *Norfolk*, 214 Va. at 504. Rather, "neutral principles" analysis entails "resolv[ing] a dispute over church property by considering the statutes of Virginia, the express language in the deeds and the provisions of the constitution of the general church." *Id*. at 505.

Apart from *Green*, no Virginia Supreme Court church property decision has considered "course of dealing" evidence legally relevant. Moreover, the Court in *Green* itself reviewed such evidence only because the denomination's constitution spelled out specific steps that evidenced the congregation's consent to be governed by a denominational proprietary interest. 221 Va. at

[49] *See, e.g.*, April 26, 2011, Order at 10-11; May 12, 2011, Order at 3; May 26, 2011, Order at 1-2 (all overruling but preserving CANA Congregations' course of dealing objections).

555. Reading *Green* more broadly to allow a contractual interest to be based solely on a congregation's participation in denominational activities would effectively reverse *Norfolk*, which rejected any rule under which "those who unite themselves with a hierarchical church do so within an implied consent to its government." *Norfolk*, 214 Va. at 504. Here, the course of dealing evidence to which plaintiffs point relates principally to the ordinary incidents of being part of a denomination—engaging in some measure of shared activity and expression of shared beliefs. Moreover, plaintiffs' reading of *Green* would introduce great complexity and subjectivity into the law of church property, by forcing congregations and denominations to weigh whether their involvement with the day-to-day operation of the church is sufficient to secure a proprietary interest. *See Shirley v. Shirley*, 259 Va. 513, 519 (2000) (acknowledging "public policy favoring certainty of title to real property"); *Sovran Bank, N.A. v. Creative Industries, Inc.*, 245 Va. 93, 96 (1993); *Harris v. Scott*, 179 Va. 102, 109 (1942); *Butcher v. Creel's Heirs*, 50 Va. (9 Gratt.) 201, 203 (1852) (all noting the importance of reasonable certainty to real property ownership).

In *Green*, the A.M.E. Zion Church's Discipline (constitution) declared that the affiliated congregations would manifest their intent to be legally bound by a denominational proprietary interest by engaging in three specified actions, termed "indications." 221 Va. at 554 & n.2. The first of those indications was "the conveyance of the property to the trustees of the local African Methodist Episcopal Zion Church or any of its predecessors." *Id*. The second was "the acceptance of the pastorate of ministers appointed [by the denomination]." *Id*. And the third was "use of the name, customs, and policy of the African Methodist Episcopal Zion Church in such a way as to be thus known to the community as a part of this denomination." *Id*. The Court's analysis reveals that its conclusion—that the congregation's actions evidenced consent to a denomina-

tional property interest—directly tracked these indications of congregational consent.[50] Indeed, in stark contrast to this case, every factor in *Green* weighed in the denomination's favor.

For example, tracking the first indication, the Court repeatedly underscored that "[t]he grantors conveyed the property to "Trustees of the A.M.E. Church of Zion," "for the purpose of erecting an A.M.E. Church of Zion." *Id*. at 553; *id*. at 555, 556 ("the A.M.E. Zion Church [was] the grantee in the deed"; "[t]he contractual obligation which the A.M.E. Zion Church assumed has its genesis in the 1875 deed"). Tracking the second indication, the Court repeatedly emphasized that the congregation used pastors designated by the denomination. *Id*. at 549, 550, 552, 553. And tracking the third indication the Court found—in language that is nearly a verbatim quotation of the A.M.E. Zion Discipline—that "the name, customs and policies of the A.M.E. Zion Church have been used in such a way that Lee Chapel is known, recognized, and accepted

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[50] One of the largest denominations in Virginia, the United Methodist Church, has a consent provision similar to the A.M.E. Zion Church's. The UMC constitution, the Book of Discipline, first calls for restrictions on a congregation's use of its property to be set forth in deeds. Apostles Ex. 308.0036. The UMC constitution also adds:

> 6. However, the absence of a trust clause stipulated in §§ 1, 2, 3, 4, or 5 above in deeds and conveyances executed previously or in the future shall in no way exclude a local church or church agency, or the board of trustees of either, from or relieve it of its connectional responsibilities to The United Methodist Church. Nor shall it absolve a local church or church agency or the board of trustees of either, of its responsibility and accountability to The United Methodist Church, including the responsibility to hold all of its property in trust for The United Methodist Church; provided that the intent of the founders and/or a later local church or church agency, or the board of trustees of either, is shown by any or all of the following:
>
> *a)* the conveyance of the property to a local church or church agency (or the board of trustees of either) of The United Methodist Church or any predecessor to The United Methodist Church;
>
> *b*) the use of the name, customs, and polity of The United Methodist Church or any predecessor to The United Methodist Church in such a way as to be thus known to the community as a part of such denomination; or
>
> *c*) the acceptance of the pastorate of ordained ministers appointed by a bishop or employed by the superintendent of the district or annual conference of The United Methodist Church or any predecessor to The United Methodist Church. *Id*. at 0037-38.

to be an A.M.E. Zion Church." *Id*. at 555. The Court elsewhere discussed the specific facts supporting that finding: the congregation's use of hymnals and other literature provided by the denomination; the performance of baptisms, marriages, and funerals using the denomination's Discipline; and attendance by members of the congregations at various denominational conferences. *Id*. at 553-55. The following chart illustrates the parallels between the A.M.E. Zion discipline and the Supreme Court's findings:

LANGUAGE OF A.M.E. ZION DISCIPLINE IN *Green v. Lewis*, 221 Va. 547 (1980)	**LANGUAGE OF COURT'S ANALYSIS IN *Green v. Lewis*, 221 Va. 547 (1980).**
"[T]he intent and desire of the founders and/or the later congregations and boards of Trustees is shown by any or all of the following indications: (a) the conveyance of the property to the trustees of the local African Methodist Episcopal Zion Church or any of its predecessors";	"The grantors conveyed the property to 'Trustees of the A.M.E. Church of Zion. The conveyance was for the purpose of erecting an A.M.E. Church of Zion (to be known as Lee Chapel), not a church of some other denomination, or an independent church." 221 Va. at 553; *accord id*. at 555, 556.
(b) the use of the name, customs, and policy of the African Methodist Episcopal Zion Church in such a way as to be thus known to the community as a part of this denomination:	"[W]e find that the name, customs, and policies of the A.M.E. Zion Church have been used in such a way that Lee Chapel is known, recognized, and accepted to be an A.M.E. Zion Church. All religious services and ceremonies conducted by the pastors of that church have followed its Discipline. The literature used by the church and by the Sunday School came from the publishing house of the A.M.E. Zion Church. The various conferences to which the membership of Lee Chapel's congregation sent delegates were all organized and held under the direction of the A.M.E. Zion Church." 221 Va. at 555.
(c) the acceptance of the pastorate of ministers appointed by a bishop of the African Methodist Episcopal Zion Church, or employed by the presiding elder of the district in which it is located." 221 Va. at 554 n.2 (paragraph breaks inserted).	"Pastors are appointed by the bishops, and it was testified that a local congregation could not refuse to accept a pastor." 221 Va. at 549; *accord id*. at 553.

Only against the backdrop of these specific constitutional provisions did the Court view the parties' course of dealing as evidencing "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.* at 555-56.

Nowhere did the Court in *Green* suggest that "course of dealing" evidence could itself establish an enforceable contractual interest in the congregation's property. Generally applicable Virginia law is to the contrary. *E.g.*, *Delta Star, Inc. v. Michael's Carpet World*, 276 Va. 524, 531 (2008) ("[T]he trial court erred in finding that the parties' course of conduct established the existence of an enforceable contract."). And even in the context of *Green*'s consideration of the denomination's constitution, the deed remained the paramount consideration in the Court's analysis. *See Green*, 221 Va. at 556 ("The contractual obligation which the A.M.E. Zion Church assumed has its genesis in the 1875 deed."). That, of course, is in keeping with generally applicable "principles of real property and contract law." *See Truro Church*, 280 Va. at 29; *supra* at 33 (explaining that deed language is generally dispositive of real property disputes).

Many of plaintiffs' exhibits and much of their witnesses' testimony at trial related to how the CANA Congregations operated while affiliated with the denomination. As the foregoing analysis shows, however, *Green* did not suggest that these aspects of the congregation's relationship with its denomination were relevant to all church property disputes—a ruling that would transform Virginia from a "neutral principles" state to an "implied consent" or deference-to-hierarchy state. *Contra Norfolk*, 214 Va. at 504. The "course of dealing" factors in *Green* were relevant only because the denomination had a contract interest based on the deeds, and because a provision in the Discipline specified that certain actions by the founding and later congregations would constitute consent to subject the local property to the Discipline.

The only potentially pertinent "course of dealing" evidence relates to specific interaction between the parties regarding ownership of the CANA Congregations' properties. Thus, for example, TEC and the Diocese could have attempted to introduce a petition such as the one signed

by the congregation in *Buhrman*, in which the congregation expressly committed to the following, in conformity with a canon of the Diocese of Southwestern Virginia:

> Parish shall be forever held under the Ecclesiastical Authority of the Diocese of Southwestern Virginia, and in conformity with the Constitution and Canons of the Diocese of Southwestern Virginia the authority of which we do hereby recognize.
>
> …
>
> Furthermore, we solemnly engage and stipulate 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.

5 Va. Cir. 497, ** 2, 5; *see supra* at 51-52 (discussing *Buhrman*). Alternatively, TEC and the Diocese might have introduced evidence that they contributed some substantial portion of the tens of millions of dollars that the CANA Congregations have spent to purchase, improve, and maintain their properties.

But despite their predictions that "the evidence in this case will reflect similar commitments,"[51] plaintiffs have no such evidence, and must attempt to rely on exhibit after exhibit showing that the CANA Congregations used Episcopal prayer books, hung an Episcopal shingle outside their sanctuaries, were visited by Episcopal bishops, and participated in Diocesan activities. Such evidence has no relevance under the neutral principles factors articulated in *Norfolk* and *Green*, and should not be considered in the Court's analysis of ownership. Indeed, to do so would introduce needless complexity and uncertainty into an area of law—property ownership—where certainty is ordinarily deemed critical. And it would contravene the U.S. Supreme Court's ruling in *Jones* that agreements between congregations are entitled to civil court enforcement only if "embodied in some legally cognizable form." 443 U.S. at 606.

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[51] *See* Br. in Opp. to Demurrers and Pleas in Bar 10 n.6 (filed July 13, 2007).

2. To the extent that consideration of "course of dealing" evidence is warranted, that evidence weighs heavily in the CANA Congregations' favor.

Insofar as Virginia law takes cognizance of "course of dealing" evidence, plaintiffs' have failed to carry their burden of establishing a proprietary interest. In fact, the record on this issue cuts in the Congregations' favor. They not only exercised dominion over the properties at issue by purchasing, designing, building, improving, maintaining, mortgaging, zoning, leasing, managing, insuring, possessing, using, and worshiping at them. They gave tens of millions of dollars to the Diocese, receiving a pittance in return. They selected their own rectors and staff. They chose their own Sunday school curricula, education materials, and forms of worship. They designed their own liturgies. They set their own service schedules. They secured copyrights and licenses for their worship music. They ran their own day schools. They designed and carried out their own ministries and outreach. They operated their own youth programs. And they commissioned their own missionaries—all with little or no involvement of TEC or the Diocese.

To be sure, the Congregations used Episcopal hymnals and the Book of Common Prayer (materials for which they paid standard rates), were occasionally visited by Episcopal bishops, respected Diocesan standards for incurring debt, and received occasional spiritual input from denominational bishops. But as plaintiffs' counsel has admitted, the "day-to-day responsibility" for "management, payment, and so forth related to the property" are handled by "the vestry and the local church" (Tr. 964 (statement of J. Heslinga)),[52] and "the use of local church property … has always been committed to the local churches." Tr. 1057 (statement of M. Kostel).[53] Indeed, as

[52] Tr. 964 (Heslinga: "the Constitution and Canons also clearly delegate day-to-day responsibility, management, payment, and so forth related to the property to the vestry and the local church.").

[53] Tr. 1057:22-1058:5 (Kostel: "the use of local church property … has always been committed to the local churches. That's not inconsistent with the church's view that what is prohibited is

this Court has already found concerning one of the CANA Congregations, "it is the TFC[] vestry that for more than 150 years has governed the property in question, raised funds to upgrade the property, repaired the property, financed additions to the property and decided how the property was to be used." Letter Op. 15 n.10 (Dec. 19, 2008); *see also id*. at 16 ("ECUSA and the Diocese concede, as they must, that TFC did in fact manage and administer the property for the past 150 years and more").[54] The same is true of the other CANA Congregations.

In sum, the "course of dealing" evidence discussed below confirms that those practices "customarily associated with ownership, title, and possession"—the practices "of one who manages or controls" (*Green*, 221 Va. at 555)—were exercised not by the Diocese or TEC, but by the Congregations.

a. The CANA Congregations exercised day-to-day management of and dominion over the properties at issue.

It is difficult to overstate the extent to which the CANA Congregations exercised dominion over the properties at issue. To begin with, the very core of the concept of "dominion" is "control, possession," *Black's Law Dictionary* 560 (9th ed. 2009), and it was the Congregations who possessed and controlled the properties. No aspect of the management of those properties was outside of their responsibility. TEC and the Diocese, by contrast, failed to exercise dominion over the properties, let alone in the way that the term "dominion" is ordinarily understood. *E.g*., *Quatannens v. Tyrrell*, 268 Va. 360, 366 (2004) (equating "absolute dominion and enjoyment of the property" with "actual possession" (quoting *Taylor v. Burnsides*, 42 Va. (1 Gratt.)

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taking property outside of the church without the church's permission, but the use, the day-to-day use, that's not an issue.").

[54] This binding ruling was not appealed, and is part of the law of the case. *Searles v. Gordon's*, 156 Va. 289, 294-96 (1931).

165, 190 (1844)). This Court should not countenance plaintiffs' attempt to enjoy the "sweet" of property ownership without the "bitter" of the related responsibilities.

1. The list of ways in which the CANA Congregations exercised the duties "customarily associated with ownership, title, and possession" is extensive. For example, it is undisputed that, day in and day out, the Congregations alone:

- decided who could and could not enter the premises (Tr. 1761:21-1762:10 (Rev. Jones); Tr. 4100:15-4101:9 (Brown); Tr. 3142:7-3143:8 (Harper); Tr. 2437 (Deiss); Tr. 2696-99 (J. Yates); DSTM-532 (policy regarding use of St. Margaret's Church);

- determined whether to permit outside groups to use or lease the premises, and if so under what terms and circumstances (Tr. 3453:17-3456:19 (LeMasters); Tr. 1669:4-1672:3 (Julienne); Tr. 1812:14-1813:3 (Rev. Jones); TRU 054.001; Apostles Exs. 42-44, 51; DX-FALLS-0201-00017-18 (Vestry Minutes, May 21, 1874) ("Resolved that hereafter this church shall not be used for any extra parochial purpose, except upon some extraordinary occasion and then only upon obtaining the unanimous consent of the vestry"); Tr. 2293:19-22(Rauh); DSTM-532 (policy regarding use of St. Margaret's Church);

- granted easements on their properties (Tr. 3142:7-13 (Harper); Apostles Exs. 40, 58; Tr. 1719:19-22 (T. Yates); Tr. 2346:1-3 (Reiter); 3690:6-3691:5 (Cerar); DX-FALLS-460; Tr. 4260:15-4262:8 (Hutson); DX-FALLS-024, 048; DSTS Ex. 41-00336; DX-TRU209 and DX-TRU220; and

- set the times when their properties would be open for worship services and other programs (*e.g.*, Tr. 1454:21-1455:3 (Fetsch).

Consider, for example, the representative testimony of Rev. David Harper of Apostles:

Q Let me turn back to the Pickett Road property. Has Apostles granted any easements on that property?

A Yes.

Q Did Apostles seek the consent of the Diocese before granting those easements?

A No.

Q Has Apostles allowed outsiders to use The Meeting Place?

A Yes.

Q Did Apostles seek the consent of the Diocese before allowing those outsiders to come inside?

A No.

Q Are there any other actions that Apostles has taken with respect to The Meeting Place, that is, the Pickett Road property, without the consent of the Diocese?

A Yes. We, for example, allowed the Fairfax post office, which is right across the road from us, to use our parking lot during the week for their postal delivery staff. We're just being good neighbors. We allow the homeowners association from a neighboring development to use our property. We do let groups in, yes.

Tr. 3142:7-3143:8 (Harper). By contrast, there is no evidence that any representative of the Diocese ever granted or refused anyone permission to enter the CANA Congregations' premises—a fundamental aspect of the exercise of dominion over property. *Loretto*, 458 U.S. at 443 ("The right to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."); *Custis Fishing & Hunting Club, Inc. v. Johnson*, 214 Va. 388, 393 (1973) (club did not establish adverse possession of pond where it failed to exclude neighbor, despite club's exclusion of others).

2. Plaintiffs make much of the fact that their bishops made occasional visits to the Congregations to perform confirmations or, less often, ordinations. But even setting aside the fact that such visits do not amount to exercising "dominion" or "management and control" in the traditional sense of those terms, there was testimony at trial that, before this litigation, Bishop Jones admitted that "[the] rector had control of [congregational] property and could admit or deny anyone access to the church or to worship of the church, including a bishop." Tr. 1874:13-1875:13 (Rev. Jones); *see also id*. at 1875:13 (noting that Bishop Jones "repeated that and affirmed that"). That testimony was supported by the testimony of Rev. Yates, who explained:

Q How did that come about that the bishop came?

A Well, normally the vestry and I would issue an invitation to the bishop to visit.

Q Did the bishop of the Diocese ever come without an invitation?

A No.

Q Did—in your view, was asking the bishop to come and having the bishop come an agreement to give the Diocese or the Episcopal Church an ownership interest in The Falls Church property?

A No.

Tr. 2497:13-2498:2. Indeed, as Bishop Jones acknowledged, "[i]f a bishop wants to meet with a vestry, [he] would … have to be invited." Tr. 318:9-15 (Bp. Jones). As he stated, the relationship is generally "open and cordial," but "[t]echnically, a bishop cannot intrude on a meeting of the vestry and force his way into a meeting of the vestry without an invitation by the rector." *Id*.

3. That only the CANA Congregations' exercised actual dominion over the properties at issue becomes even clearer when one considers the efforts they undertook when improving their properties. *See Quatannens*, 268 Va. at 366 (equating "absolute dominion" with "actual possession," which "may be accomplished 'by residence, cultivation, improvement, or other open, notorious and habitual acts of ownership'"). For example, the Congregations and their vestries and building committees alone:

- "chose the architecture of [their] building[s]" and the interior design (Tr. 1119:2-13) (Bond); Tr. 1452:1-21 (Fetsch); Tr. 1638:13-1639:5 (T. Yates); Tr. 2454:5-22 (Deiss); Tr. 3684:14-3685:2 (Cerar); Tr. 3925:4-16 (Miller);
- worked with "architectural" and "engineering firm[s]" and "land attorney[s]" incurring (and repaying) the expenses of obtaining the necessary drawings, designs, and plans to engage in new construction or improvements (Tr. 3912:3-16) (Miller); Tr. 1455-56 (Fetsch); Tr. 2451:8-12 (Deiss); Tr. 3342:17-3343:2 (Rooney); Tr. 3913 (Miller); Tr. 3925:4-16 (Miller); DX-TRU146.0020; DX-TRU152.0013; DX-TRU160.0008;
- conducted "competitive bidding" for, and oversaw, architectural and construction and other firms (Tr. 1455:14-18 (Fetsch); Tr. 2093:18-2094:4 (Black); Tr. 2454, 2455 (Deiss); Tr. 3684:14-3685:2 (Cerar);
- hired surveyors and "prepared and submitted … site plan[s]" for approval of governmental authorities (Tr. 1453:7-11) (Fetsch); Tr. 3911:8-3914:4 (Miller); Tr. 2340:14-2341:8) (Reiter); Tr. 3342:17-3343:2 (Rooney);
- "work[ed] with the board of county supervisors" as needed to obtain requisite approvals, special use permits, zoning variances, and the like (Tr. 3910:16-3911:13, 3913:14-3914:4 (Miller); Tr. 2340:14-2341:8 (Reiter); Tr. 3141:7-17. 3173:19-3174:10 (Harper); Tr. 1453:13-15 (Fetsch); Tr. 3916:3-11 (Miller); and

- "had to deal with parking issues" when "[l]ocal businesses were concerned that expanding could lead to parking problems" (Tr. 1454:7-20 (Fetsch));

4. And, of course, the Diocese and TEC undertook no financial obligation to pay for the exercise of these responsibilities. As plaintiffs' witness William Fetsch admitted in testimony that was illustrative of what was said throughout trial:

> Q Now, when you get to the end and it's time to build the project, it had to be financed, right?
>
> A That's correct.
>
> Q And I think the loan was 3.6 million dollars, at least the upper limit of it?
>
> A Yes, 3.604 or 08, something like that.
>
> Q And it was the congregation who borrowed the money, right?
>
> A Yes.
>
> Q It was the congregation which signed the note promising to repay?
>
> A I think it was the trustees, but I could be wrong on that.
>
> Q And it was paid by the congregation, right?
>
> A Yes.
>
> Q * * * At no time did the Episcopal Church and the Diocese promise to pay anything for that building, right?
>
> A That's a complex question.
>
> Q Well, were the Episcopal Church and Diocese on the note? Did they sign the note promising to repay?
>
> A No.
>
> Q Did the Episcopal Church and the Diocese write a check saying, well, here's some money for—to pay for the mortgage?
>
> A No.

Tr. 1457:15-1458:21.[55]

[55] *Accord* Tr. 3097:12-18 (Harper) ("Q Did the Diocese or national Church, that is, the Episcopal Church, contribute any money toward the expansion program? A No. Q From where did the money come to pay for the expansion? A From donations from our members."); Tr. 2441-42 (Deiss) (the properties were purchased by "The congregation of The Falls Church"); Tr. 2523-25 (Deiss) (The Falls Church congregation paid $15,900,000 on expansion and capital improvements to the properties); Tr. 1459 (Fetsch) (admitting that The Falls Church's properties, where not donated, were purchased by the congregation); Tr. 566:4-9 (Bp. Jones) (explaining

Nor did the Diocese undertake to buy casualty insurance for the CANA Congregations' properties or indemnify the Congregations' trustees. Rather, the Diocese indemnifies only trustees that it appoints on *its own* behalf and insures only property "over which *the Diocese* has control." PX-COM-0003-028, -029 (Canon 15, § 7) (directing the Diocese to indemnify trustees appointed by the Diocese for its property); *id*. at 030-031 (Canon 19(g)) (emphasis added) ("All buildings and tangible personal property, *over which the Diocese has control*, shall be kept adequately insured in such amount and with such insurers as the Executive Board may determine.").

5. It is no answer to say that, in some circumstances, the CANA Congregations obtained the Diocese's approval to incur debt or to encumber property. To begin with, in many instances the Congregations did *not* consult with the Diocese before taking such actions. *E.g*., Tr. 3140:18-3141:6 (Harper); Apostles Exs. 39, 41 (Order and Petition for Leave to Encumber Church Property), 45 (opinion letter and mortgage agreement), 57 (resolution to purchase property and incur debt), 59 (resolution to refinance); Tr. 3680:3-7 (Cerar): DSTS-090-01428 (vestry authorization to incur debt); 041-00484 (deed of trust); Tr. 1820:2-22 (Jones); DSTP-009-00671 (Vestry authorization of loan); TRU146.0040 (1933 secured loan to build the historic chapel,

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that "a loan by a mission congregation, either to DMS or to a commercial institution, would have to be signed by the bishop," but that "[a] loan to a congregation with full parish status would be a loan that would be made with the trustees of that particular congregation"); Tr. 2355:17-2356:13, 2340:14-2341:21 (Reiter); DCOE-042; Tr. 3140:13-3141:6, 3142 (Harper); Tr. 3445:15-3446:18 (LeMasters); Tr. 1664:13-18 (T. Yates); Tr. 3684:10-13 (Cerar) ("Q. And how was the construction of the new parish hall funded? A. It was funded by contributions from St. Stephen's members and friends."); Tr. 3678, 3680, 3696 (Cerar); Tr. 2090:16-2091:1 (Black); Tr. 3905:2-9; DSTM-336, Tr. 3926:15-17 (Miller) (describing how St. Margaret's paid $912,000 for the construction of its new parish hall and paid the acquisition and development costs of $1.7 million in connection with its plan to build a new church); PX-SSH-0117; PX-SSH-0117; Tr. 3695:22; Tr. 3686:1-6;Tr. 3684:10-13 (Cerar) (testimony and documents showing the $615,276 and $9,500 cost of parish hall construction and a new church roof was funded by members of the congregation and friends of St. Stephen's); Tr. 1813:4-10; Tr. 2131:15-18 (Jones; Ryan) (no evidence that TEC or DVA contributed to the acquisition, improvement or maintenance of any St. Paul's property).

without permission sought from Diocese); 2443:6-2445:7, 2450:15 to 2452:20 (Deiss); DX-FALLS-0016, 0017, 0018, 0019, 0020A, 0020B, 0021A, and 0021B. In addition, when approving such encumbrances, the Diocese frequently acknowledged that the property was that of the congregation.[56]

But in any event, nothing in plaintiffs' anti-alienation or debt canons asserts that the denomination has an ownership interest—trust or otherwise—in the properties of affiliated congregations. To the contrary, plaintiffs' own expert acknowledged that these canons were passed in an effort to avoid a repeat of the post-Civil War-era "scandal" of "large churches" that "went bust and were put up for sale by sherriff[s]." Tr. 1193:17-1194:2 (Mullin). Similarly, Rev. Yates testified that he understood the canons as containing only "legal jargon or spiritual language that somehow said we were stewards of the property for God; that we had to—we were responsible to uphold the reputation of the Episcopal Church in the way we held our property." Tr. 2573:10-19 (J. Yates). Insofar as these canons say something about the parties' "course of dealing," then, it is that TEC and the Diocese wish to safeguard the denomination from reputational harm that may occur if an affiliated congregation defaults on its debts.

[56] *E.g.*, PX-COM-0190-053 (1951 Diocese Annual Council Journal) (Standing Committee "recommended permission to the Bishop to allow the encumbering of the church property of St. Luke's Church, Wellington Villa, and The Falls Church, Falls Church, Virginia."); PX-COM-0191-067 to -068 (1952 Diocese Annual Council Journal) (Standing Committee "gave advice and consent to the Bishop for … the request of Truro Church, Fairfax, Fa., to encumber its property"); PX-COM-0213-068 (1974 Diocese Annual Council Journal) ("Bishop Gibson gave consent to the sale of St. Margaret's Church property in Woodbridge, Virginia."); *see also* PX-COM-0207-038 (1968 Diocese Annual Council Journal) (Executive Committee Report) ("One of the functions of the Executive Committee, acting through its Committee on Program and Budget, is to consider request from Churches to encumber *their property* to secure loans." (emphasis added)); PX-TRU-0048-005 (Minutes of the Board of the Department of Christian Stewardship of the Diocese of Virginia) (noting that the Board approved Truro's request to incur debt in 1957 "for the specific purpose of erecting a church on property now owned by that church.").

That the canons apply only when a congregation incurs a certain *ratio* of debt to annual receipts, or to certain categories of property, further confirms that this reputational interest—and not a beneficial ownership interest—is what undergirds the anti-alienation canons. PX-COM-0001-045, 066 (TEC Canon I.7.3, 4; Canon II.6); PX-COM-0003-027–028 (Diocese Canons 14, 15). But in any event, the existence of a canonical requirement for approval of debt does not justify reading ambiguous canons to work a forfeiture, and it pales in importance when compared with the CANA Congregations' efforts in servicing such debt.

6. That TEC and the Diocese did not view themselves as owners or otherwise bear the responsibilities of ownership is further reflected in their failure to publicly record any interest in the Congregations' properties. For example, the relevant county land records contain no liens, trust agreements, or any other documents reflecting any claim of a Diocesan ownership interest. Tr. 2404-06 (Schrantz); Apostles Exs. 382, 383; DCOE-001; DSTM-040, 041; DSTP-311; DSTS-041; DX-FALLS-0057; TRU243. Nor have plaintiffs ever asserted any interest in the properties in UCC filings submitted to the Secretary of State. *See* Apostles Exs. 384-90 (relating to each of the seven CANA Congregations). Prior to commencing these lawsuits, plaintiffs did not avail themselves of any of the standard secular methods by which parties give notice to the world of their interests in property.

What is more, in those cases where the Diocese filed a deed of trust to secure a mortgage on a property, it represented to the world that it had no interest other than that of *lender*. *E.g.*, DCOE-479. It did not assert any trust or proprietary interest. *Id*. And when, upon payment of a note by a Congregation, the Diocese released a lien on such properties, it reserved no cognizable interest whatsoever. *E.g.*, DCOE-483-02568. As stated in one representative release, executed by the Diocesan Missionary Society and filed with this Court's clerk: "The undersigned holder of

the above mentioned Note secured by the above mentioned Deed of Trust, does hereby certify that the same has been paid in full to the person entitled and authorized to receive the same, and the lien thereby created and retained is hereby released." *Id*.

In short, no person reviewing the land records or standard commercial databases of the Commonwealth of Virginia before this suit would have had any inkling that TEC and the Diocese were claiming an interest in the CANA Congregations' properties, much less that plaintiffs purported to exercise dominion over them.[57] Indeed, one examining the financial dealings between the parties would conclude that plaintiffs had no interest in the Congregations' properties.

b. The CANA Congregations bore principal responsibility for the conduct and content of their religious services.

The CANA Congregations' dominion over the properties at issue is further confirmed by their control over the conduct, styles, content, format, and timing of their many worship services. TEC and the Diocese made much at trial of the fact that bishops would visit the Congregations to perform confirmations or ordinations, and of the fact that many services conducted by the Congregations use Episcopal liturgical materials or hymnals, or the Book of Common Prayer. As noted above, however, the participation of bishops was relatively infrequent, and they came at the Congregations' invitation. Further, any congregation is free to use the Episcopal Church's liturgy and hymnals—and certainly the Book of Common Prayer—which are publicly available, contain material from a wide variety of Christian traditions, and are routinely used by congregations in other traditions.

[57] Only after this suit was filed did the Diocese file any Memorandum of Lis Pendens in the land records. *See*, *e.g.*, DX-FALLS-0056.

Moreover, the Congregations routinely conducted services using other materials, styles, and liturgies, and chose Sunday school and other worship and educational materials having no connection to TEC. Consider, for example, the testimony of Rev. Rauh of Epiphany:

> Q Did you select hymns and songs from other sources?
>
> A Yes, we bought copyrights for other worship music that we used to project on the screen and also printed in our worship booklets which we created for use on Sunday worship.
>
> Q Did you use the Book of Common Prayer liturgy in your church services?
>
> A Yes.
>
> Q Did you also create your own liturgies?
>
> A Yes.
>
> Q Did you seek the permission of either the Episcopal Church or the Diocese of Virginia before choosing your own music, spoken liturgy or worship services?
>
> A No.

Tr. 2292:1-16.

Similarly, Rev. Cerar of St. Stephen's testified that he "on a number of occasions did specially designed liturgies for funerals under special circumstances. We had a number of worship events with other denominations, Methodist and Baptist congregations, in which we would use a different kind of liturgy than specified in our Book of Common Prayer. Our prayer and praise services are unique liturgies." Tr. 3700:18-3701:13.[58] Some of the worship services of the CANA Congregations were "not an Episcopal service" at all, but reflected other Christian components. Tr. 1889:3-11 (Rev. Jones).

The same is true of the CANA Congregations' Sunday school and Christian education offerings. For example, Rev. Jones of St. Paul's testified that the "children's ministry and other

[58] *Accord id*. ("We also for our 125th anniversary celebration in 2006 we used the 1879 Book of Common Prayer for the liturgy" and "did a Seder in 2004, developed principally from the Haggadah" but "modified that to incorporate a Eucharistic meal."); Tr. 1888:1-13 (Rev. Jones) (the congregation will "have different prayers" and "variety" and that "there are other elements that we've included which are not in the Episcopal Prayer Book or used in Episcopal liturgy").

Christian educational materials that we have used during my tenure at St. Paul's … represent different publishers, none of them Episcopal, none of them either national, Episcopal, or Diocesan Episcopal materials," and including "Lutheran" and "interdenominational publishing firms." Tr. 1882:10-21. When asked "[w]hat, if any, Sunday school material supplied by the Episcopal Church or the Diocese of Virginia have you used at St. Paul's Church during your tenure as rector"?, he responded: "None." Tr. 1883:10-15. And when asked, "Did you seek the permission of either the Episcopal Church or the Diocese of Virginia to use these non-Episcopal Sunday school and other related educational materials?", or non-Episcopal music, he responded: "No." Tr. 1883:4-9, 1887:2-7. This testimony too was representative.[59]

As to the use of Episcopal hymnals and the Prayer Book, there was undisputed testimony that "the Episcopal Church hymnal" contains "many, many composers and lyrics … that are not Episcopal," and in any event the hymnal is but "one of our musical resources for the development and planning and execution of our worship." Tr. 1883:18-1884:18 (Rev. Jones).[60]

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[59] *E.g.*, Tr. 2291 (Rauh) ("Q Did you select and/or prepare your own Sunday school materials? A Yes. Q Did you use Sunday school materials supplied by the Episcopal Church or the Diocese of Virginia? A No, we did not."); Tr. 2462:8-11 (Deiss) ("Q Sunday school materials, did The Falls Church use only the Episcopal Sunday school materials? A No, they look around to other vendors and develop their own curriculum."); Tr. 4110:11-15 (Brown) ("Q During your tenure at St. Margaret's and prior to the disaffiliation vote, did you ever use Sunday school materials supplied by the Episcopal Church? A No, I did not."); Tr. 4209:4-7 (Mathewes-Green) ("Q. And did you use materials from the Episcopal Church for Sunday school? A. We did not. Q. During the same period what about your adult education? … A. Well, I pretty much structured those myself from existing materials. I didn't use any official church materials.").

[60] *Accord* Tr. 1883:22-1884:5 (Rev. Jones) ("There are many, many resources we've had, both hard copies and online resources, where we've drawn music from these materials to put them into our worship booklet for Sunday mornings, which we publish each week, a 24-page or 20-page booklet"); Tr. 1886:18-22 (Rev. Jones) (St. Paul's used "Songs of Praise," a "compilation of songs from many sources, not Episcopal in a design or focus"); Tr. 1884-85 (most of the music in the hymnal was not composed by Episcopalians); Tr. 4110:16-22 (Brown) ("In that same time period, what, if any, use have you [at St. Margaret's] made of the Episcopal Church hymnal? A We use it from time to time but not at all services. Q In this same time period did you select hymns and songs from other sources? A Yes, we did."); Tr. 4208:17-4209:1 (Mathewes-

Moreover, congregations outside the Episcopal Church likewise use Episcopal hymnals and the Book of Common Prayer. *E.g.*, Tr. 2429-30 (Deiss). The testimony of Bill Deiss, parish administrator of The Falls Church, is instructive:

> Q Let's look at the materials used by The Falls Church just before the vote. Falls Church used the Episcopal hymnals?
>
> A Yes.
>
> Q The hymns in there aren't exactly unique to the Episcopal Church, are they?
>
> A No.
>
> Q You heard some of those in Jakarta, didn't you?
>
> A Yes.
>
> Q How about the Book of Common Prayer, did The Falls Church use the Episcopal Church's Book of Common Prayer?
>
> A Yes, still do.
>
> Q Again, the prayers and services aren't exactly unique to the Episcopal Church, are they?
>
> A You'll see them around the Anglican communion.
>
> Q Right. In fact you ran into some of those in Jakarta with the Australian parish?
>
> A Yes.

Tr. 2461:5-2462:7. Rev. Neil Brown of St. Margaret's gave similar testimony concerning the Book of Common Prayer, explaining that "the material in it is not necessarily proprietary to the Episcopal Church," and that "parts of the service are printed word for word in the Roman Catholic missal, and they can be found in other sources as well," including the Bible. Tr. 4111:9-22; *see also* Tr. 4111:1-8 (Brown) (explaining that St. Margaret's "created [its] own service booklets" and used the Book of Common Prayer "from time to, but not at all services" and "[w]e have

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Green) ("Q. And for that same time period what about the music liturgy? A. The music was drawn from a variety of sources. We had the 1982 hymnal. We used it, but we also used also a variety of other sources, other hymnals and other printed popular Christian songs for worship.").

some services that don't use it at all").[61] And, of course, the CANA Congregations received no special discount when purchasing these materials by virtue of their affiliation with the Episcopal Church. Tr. 2463:4-9 (Deiss).

c. The CANA Congregations exercised full dominion over their bank accounts and personal property, contributing to the Diocese voluntarily and at times withholding contributions—facts that are fundamentally at odds with the notion of a proprietary interest in the denomination.

Another central component of the course of dealing relates to dominion over the personal property, and in particular over the expenditure and contribution of money. The CANA Congregations exercised unfettered discretion in this regard, which is hard to square with the notion that the property was held in trust for someone other than themselves. Day in and day out, they alone decided how to spend congregational funds; set the amount of their clergy and staff salaries and benefits; determined how and where to invest for long-term needs; and designated the amounts and recipients of congregational outreach monies—all without any notable denominational input, let alone control. Moreover, the amounts that the CANA Congregations voluntarily contributed to the denomination dwarfed the occasional gifts from the Diocese—which were nearly always unrelated to the property of the Congregations (as opposed to some specific ministry effort), and were never presented as reflecting any sort of contractual commitment. In sum, the CANA Congregations gave far more to the denomination than they received from it.

Several aspects of the record warrant discussion in this regard. ***First***, the CANA Congregations were not required to make monetary contributions to the denomination. *E.g.*, Tr. 202:9-11 (Bp. Jones) (explaining that that "[the Diocese's annual] budget … is funded by the voluntary

[61] *Accord* Tr. 4208:11-16 (Matthewes-Green) ("Q … [W]hat liturgy did you use? A. We used liturgies from the Book of Common Prayer, but we also had additional services that were not strictly in the Book of Common Prayer.").

pledges of the various churches in the Diocese"). They did so of their own volition, setting the amounts and at times ceasing donations altogether or restricting the designees to which those monies could be forwarded.[62] As one representative witness from St. Margaret's testified:

> Q During your vestry and finance committee service in the period prior to the vote, what, if any, autonomy did St. Margaret's have with respect to its personal property and donated funds?
>
> A We had full autonomy.
>
> Q During that same period, what, if any, consent did St. Margaret's seek from the Episcopal Church or the Diocese regarding the expenditure of congregation funds?
>
> A None that I'm aware of.

Tr. 3980:3-12 (Clark). Similarly, as Diocesan Bishop Jones admitted, the Diocese has no means of compelling affiliated congregations to contribute financial support:

> Q Now, when a congregation fails to make a pledge to the Diocese, there's no way for the Diocese to extract that delinquent pledge from the congregation; is that correct?
>
> A We understand that to be a voluntary pledge. Some congregations pay more than they pledge. Some congregations pay less. Sometimes congregations may be unable to make that pledge, but we treat it in the same way that the congregation would treat a pledge to a congregation. We would not make an effort to, quote—those were your words—to "extract" a pledge.

Tr. 357:9-358:2.[63] This practice, which is "a matter of Diocesan canon," stands in contrast to the practice of other TEC dioceses, as "most every Diocese at the Episcopal Church has a mandatory

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[62] *E.g.*, Tr. 701:4-9 (Kerr) ("Q Did there come a time after the year 2000, say, when all or some of the churches that are involved in this litigation stopped or reduced the voluntary contributions that they were making to the Diocese under the Virginia Plan? A Yes, sir."); Tr. 1557:7-1558:5 (Julienne); Tr. 1878-81 (D. Jones); Tr. 2298:5-2299:15 (Rauh); Tr. 4465:9-15 (Wakeham); Tr. 2705:7-16 (J. Yates); Tr. 2639:7-2541:17 (Deiss); Tr. 3305:16-22 (Rooney).

[63] *Accord id*. at 358:7-22 (Bp. Jones) (acknowledging that "there's no way for the treasurer of the Diocese to extract a delinquent pledge from a congregation"); Tr. 698:20-699:3 (Kerr) ("Q And are funds provided ... to the Diocese by churches through the Virginia Plan, is that a voluntary plan? A It is. It is a completely voluntary system of contributions."); *id*. at 701:9-12 (Kerr) (acknowledging that "the Diocese has never sued a congregation for its pledge"); PX-STPAUL-0176-003 ("Currently there is no enforcement system within our current Diocesan giving scheme. Although the current canons provide that a parish financially support the Diocese by

requirement for giving to the Diocese." Tr. 560:13-561:6 (Bp. Jones). It also stands in contrast to *Green*, where "the local congregation was required to meet" "the assessments which were levied." 221 Va. at 551.[64]

The fact that the CANA Congregations exercised discretionary authority over the personal property is fundamentally at odds with plaintiffs' contention that it was held in trust for them. Money held in trust may not be spent without regard to the interests or wishes of each and every beneficiary. *Patterson v. Old Dominion Trust Co.*, 139 Va. 246, 257 (1924) ("In the management of trust property, a trustee should always conduct himself with strict neutrality, favoring none of the parties . . . ; and should also preserve and protect the trust fund for the benefit of all interested in the distribution thereof."). There is no evidence that any congregation sought permission from TEC or the Diocese before withholding money from them.[65] Not surprisingly, the

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making monthly payments, we are not aware of any parish having been the subject of disciplinary action as a result of failing to make such payments. The adoption of the Virginia Plan in 1957 was in part a reaction against the assessment system previously in force.").

[64] *See also id*. at 549 ("The A.M.E. Zion Church is financed by assessments, called 'general claims,' which are paid by the members of the local churches to the 'Connection,' meaning the central or general church.").

[65] In fact, the Diocese assisted one congregation in structuring donations to the Diocese so that no corresponding amount would go to the national church. As Rev. Harper explained:

> Q * * * What did you understand Mr. Charlton to be telling you?
>
> A That our gifts would not be applied to the budget of the Diocese and, therefore, would not be reported as our giving to the Diocese in the way that unrestricted giving would.
>
> Q So the Diocese was offering Apostles a mechanism to avoid sending money to the national Church?
>
> A Yes. When I first spoke to the bishop, seeking a way to give directly to the budget, he was unwilling to entertain that notion, and so then I spoke at—with the bishop's knowledge, to Dr. Charlton, and it was he who offered us this alternative way of giving.
>
> Q Did you actually speak to Dr. Charlton?
>
> A Indeed I did.

Congregations did not view their contributions to the Diocese as reflecting any denominational proprietary interest. *E.g.*, Tr. 2697:5-2700:5 (J. Yates).

Second, notwithstanding the voluntary nature of their Diocesan contributions, the CANA Congregations gave generously—in overwhelming amounts that dwarfed what they received in return. Consider, for example, the following figures, which reflect only a portion of the Congregations' financial support of the Diocese (data for many years are not available):

CONGREGATION	CONTRIBUTIONS TO DIOCESE	CONTRIBUTIONS—REAL DOLLARS	TIME PERIOD
The Falls Church	$4,360,146	$8,824,390	1950-2006[66]
Truro Church (Zion)	$4,152,040.53	$9,066,683.62	1953-2006[67]
Apostles	$2,389,872.78	$4,046,332.11	1968-2003[68]
St. Margaret's	$444,791.40	$737,842.18	1966-2005[69]
Epiphany	$337,871	$453,318	1986-2006[70]

Q It;'s Dr. Charlton, as opposed to mister?

Q * * * Did Dr. Charlton ever indicate to you that he needed permission from the Episcopal Church to help Apostles withhold funds from the Episcopal Church?

A No, he did not.

Q Did he ever state that Apostles' money somehow belonged to the national Church?

A Never.

Tr. 3107:7-3108:11; *see also* Apostles Ex. 381 (related correspondence).

[66] DX-FALLS-0073C-000001; Tr. 2525:21-2526:6 (Deiss).

[67] TRU293; Tr. 4463:15-4464:9 (Wakeham).

[68] Apostles Ex. 089A; Tr. 3322-24 (Rooney). Church of the Apostles was founded in 1968. *See, e.g.*, PX-APOST-0290.

[69] DSTM-070A; DX-FALLS-0073A; Tr. 3978:3-19; Tr. 3982:4-10 (Clark).

[70] DCOE-041; DX-FALLS-0073A; Tr. 2377:21-22; Tr. 2378:1-22; Tr. 2379:1-3 (Reiter). Church of the Epiphany was founded in 1986. *See, e.g.*, DCOE-438.

St. Paul's	$179,748.40	$336,419.37	1967-2005[71]
St. Stephen's	$105,661	$135,948	1987-2005[72]
TOTAL	$11,970,161	$23,600,933	

The total over this period—nearly $12 million in financial support—significantly understates the Congregations' actual giving, since data for a number of years are not available. But even ignoring that, in the 20 years before the 2003 General Convention alone, the Congregations gave more than $10 million to the Diocese.[73] In some cases the Congregations' gifts were a half million or a few hundred thousand dollars annually—a point the Diocese's own records and witnesses confirm.[74] As Diocesan Secretary Henry Burt acknowledged:

> Q Would you not agree that The Falls Church and Truro were among the biggest contributors in the entire Diocese of the entire 180-some-odd congregations to the Diocese?
>
> A Yes, I would agree that they were among the very top.
>
> THE COURT: Could I ask you, Mr. Burt, whether they were at the very top or were there churches that contributed during that time frame, from '84 to 2003, were there churches that contributed more than those two churches?
>
> THE WITNESS: I don't know the answer to that, Your Honor. I do know that the—at one point the Truro Church, I think in 1986, their single contribution of about a half million dollars there as representative. But whatever their contribution was, made up an enormous percentage of our budget and then it went down from there.

Tr. 1178:17-1179:12 (Burt); *accord* Tr. 708:9-09:1 (Kerr) (acknowledging that the CANA Congregations' contributions were sometimes 10-15 percent of the Diocesan budget).

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[71] DSTP-354-04656; DX-FALLS-0073A; Tr. 2165:14-18; Tr. 2168: 17-22; Tr. 2169:1-6 (Sisson).

[72] DSTS-057A; DX-FALLS-0073A; Tr. 3704:1-22; Tr. 3705:1-11 (Cerar).

[73] *See* Table A.

[74] Tr. 367:2-12 (Bp. Jones) ("[w]hen John Howe was rector of Truro Church Fairfax and Bishop Lee was bishop of the Diocese of Virginia, the giving of Truro Church exceeded $300,000 a year at least in one year and was one of the leading pledges of the Diocese"; "in my earlier days of the Diocese, I remember The Falls Church being very generous toward the budget of the Diocese of Virginia").

Table A: CANA Congregations' Contributions to Diocese (1984-2003)

	Truro	The Falls Church	Apostles	St. Margaret's	Epiphany	St. Paul's	St. Stephen's	TOTAL
1984	$208,853.81	$93,200.00	$145,747.33	$13,902.00	N/A	$11,632.00	N/A	$473,335.14
1985	$200,326.76	$110,000.00	$120,000.00	$16,000.00	N/A	$10,577.47	N/A	$456,904.23
1986	$333,203.00	$122,664.00	$120,000.00	$18,080.00	$22,000.00	$12,966.14	N/A	$628,913.14
1987	$387,136.00	$156,150.00	$120,000.00	$18,080.00	$5,000.00	$12,599.00	$1,160.00	$700,125.00
1988	$352,171.00	$156,150.00	$120,000.00	$15,603.00	$6,483.00	$10,699.00	$1,160.00	$662,266.00
1989	$321,000.00	$156,150.00	$120,000.00	$16,080.00	$7,500.00	$12,155.00	$1,160.00	$634,045.00
1990	$233,367.00	$140,535.00	$130,000.00	$14,400.00	$11,250.00	$13,178.00	$1,302.00	$544,032.00
1991	$262,395.00	$146,000.00	$149,600.00	$14,400.00	$11,250.00	$970.26	$1,200.00	$585,815.26
1992	$278,422.00	$133,200.00	$149,660.00	$14,400.00	$12,750.00	$3,197.54	$1,200.00	$592,829.54
1993	$301,696.00	$140,920.00	$128,334.00	$18,900.00	$17,000.00	$2,413.00	$1,500.00	$610,763.00
1994	$208,000.00	$155,000.00	$122,157.00	$19,400.00	$16,500.00	N/A	$2,625.00	$523,682.00
1995	$175,000.00	$145,000.00	$108,657.00	$21,500.00	$20,000.00	$3,685.00	$3,000.00	$476,842.00
1996	$125,000.00[s]	N/A	$85,000.00	$24,400.00	$21,604.00	$4,738.00	$3,400.00	$264,142.00
1997	$116,000.00[t]	$187,884.00	$69,000.00	$24,975.00	$20,604.00	N/A	$3,750.00	$422,213.00
1998	$120,000.00[u]	$206,836.00	$77,977.00	$21,000.00	$20,000.00	N/A	$6,090.00	$451,903.00
1999	$125,000.00	N/A	$68,000.00	$24,150.00	$21,000.00	N/A	$8,282.00	$246,432.00
2000	$135,000.00	$209,581.00	$68,000.00	$21,600.00	$21,000.00	$5,656.00	$10,218.00	$471,055.00
2001	$135,000.00	$182,200.00	$60,000.00	$21,600.00	$20,910.00	$6,011.83	$12,775.00	$438,496.83
2002	$135,000.00	$179,688.00	$60,000.00	$19,748.00	$25,020.00	$10,079.27	$19,195.00	$448,730.27
2003	$140,000.00	$305,335.00	$55,000.00	$18,292.00	$25,000.00	$7,492.89	$19,245.00	$570,364.89
Total	**$4,292,570.57**	**$2,926,493.00**	**$2,077,132.33**	**$376,510.00**	**$304,871.00**	**$128,050.40**	**$97,262.00**	**$10,202,889.30**[75]

[75] The Falls Church (DX-FALLS-0073C); Apostles (Apostles Ex. 89 (1989-2003); PX-COM-0224-115; PX-COM-0226-121; PX-COM-0227-179; PX-COM-0228-188; PX-COM-0229-176); St. Margaret's (DSTM-070); Epiphany (DCOE-041); St. Paul's (DSTP-354); St. Stephen's (DSTS-057A); Truro (PX-COM-0224-115; PX-COM-0226-121; PX-COM-0227-179; PX-COM-0228-188; PX-COM-0229-176; PX-COM-0230-176; PX-COM-0231-193; PX-COM-0232-172; PX-COM-0233-183; PX-COM-0234-159; PX-COM-0235-176; PX-COM-0236-192; PX-COM-0237-185; PX-COM-0237-185; PX-COM-0238-184; PX-COM-0239-170; PX-COM-0240-201; PX-COM-0241-197; PX-COM-0242-303; PX-COM-0243-282).

In addition, "it was customary to take up special offerings to give to [bishops of the Diocese] for their discretionary fund" or their "personal use"—"gifts and offerings" made when a bishop visited—that were "separate and apart from the normal amount you gave to the Diocese." Tr. 2699:19-2701:5 (J. Yates).[76] Those gifts frequently amounted to thousands of dollars, and in one case totaled $149,000. Tr. 2700:2-5 (J. Yates); Tr. 2476:19-22 (Deiss); *see also* Tr. 320:21-321:2 (Bp. Jones) ("Q How about The Falls Church? A I've not provided direct aid to The Falls Church. I've received generous offerings from The Falls Church.").

By contrast, the grand total of funds that the Congregations received from the Diocese—*for any purpose and over the entire life of the relationship, which in some cases spans over two centuries*—was no more than $132,000.[77] And when the Diocese did make a gift, it was nearly always to support a specific ministry of the Congregations, or to fund an individual scholarship or part of an individual congregant's mission trip.[78] The Diocese's contributions were rarely re-

[76] *Accord* Tr. 319:3-11 (Bp. Jones); Tr. 2165:6-13 (Sisson); Tr. 2297:16-2298:1 (Rauh); Tr. 2531:15-21 (Deiss).

[77] DSTM-070 ($53,402); DCOE-041 ($48,867); DSTS-057A ($2,500); PX-APOST-274 ($1,000); Tr. 2531 (Deiss) ($10,000 to The Falls Church); Tr. 1089:20-1090:10 (Bond); PX-COM-260-015, 016, 046 (Bruce Fund Minutes) ($125 to The Falls Church); Tr. 1089:9-13 (Bond) ($100 to Truro).

[78] *E.g.*, Tr. 2701:12-22 (J. Yates) (noting that he received "a few hundred dollars" to support doctoral studies that were not required for his service as a rector); Tr. 2531:1-21 (Deiss) (noting that the only contribution to any Falls Church ministry reflected in church records since 1873 was "a contribution of $10,000 from the bishop's discretionary fund, I believe in 1996, to the Fellows Program," but also noting that The Falls Church has "given money to the bishop's discretionary fund over the years," in addition to the normal contributions); Tr. 1890:13-1892:10 (D. Jones) (discussing a $300 voucher than a confirmand received for a personal mission trip); Tr. 3702:1-3703:9 (Cerar) (discussing two or three youths who received "scholarships to attend Shrine Mont camps" of "maybe $150 each" and a $2,500 contribution for "medical expenses" and a $2,500 contribution to support a St. Stephen's deacon, shared with another congregation); PX-STMARG-1125; Tr. 4052:19-4053:8 (discussing a $5,000 gift from Bishop Lee to support the ministry of the deacon Rev. Fred Hoffman).

lated to the purchase or improvement of the Congregations' properties,[79] and were never presented or understood as evidencing any sort of proprietary interest. *E.g.*, Tr. 2702:12-20 (J. Yates). Moreover, some congregations received no contributions of any sort from the Diocese. DSTP-354; Tr. 1894:1-7 (D. Jones).

Third, and more generally, the CANA Congregations had complete discretion concerning the ministry and outreach efforts to which they contributed financial support. The testimony of Ernie Wakeham, former treasurer of Truro Church, is representative:

> Q. … Who made the decision on where Truro's outreach dollars would go?
>
> A. That's a decision made by the vestry of Truro.
>
> Q. Did the Diocese or the Episcopal Church have any say in where Truro Church's outreach dollars went?
>
> A. No.
>
> Q. And who made the decision on how much outreach would be spent by Truro Church?
>
> A. Again that would be part of the budget process and that would be determined by the vestry.
>
> Q. And did the diocese or the Episcopal Church have any say in how much Truro spent in outreach?
>
> A. No.
>
> Q. Where did the money come from for the outreach?
>
> A. These come out of our regular operating budget which would be primarily contributions from parishioners.

Tr. 4462:17-4463:14 (Wakeham).[80] In short, the CANA Congregations uniformly chose both the amounts and designees of those supported by congregational funds.

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[79] *See* Tr. 3677:14-19 (Cerar) (Diocese contributed $3,500 for remodeling of parish house).

[80] *See also*, *e.g.*, Tr. 1865:21-1866-5, 1889-90 (D. Jones); Tr. 1781-85 (D. Jones); Tr. 2293:19-22, 2296:11-14 (Rauh); Tr. 3329:9-3332:15 (Rooney); Tr. 4104:15-4106:7 (Brown); Tr. 4209:15-4210:9 (Mathewes-Green); Tr. 4461:8 (Wakeham) (explaining that, from 1996 to 2006 alone, "the total that Truro Church spent on outreach was $14,074,698," including "support of lots of missionaries, dioceses in foreign countries as a part of our international programs, national programs here in the United States, local programs here in the Fairfax County area," in-

Fourth, these contribution numbers exclude amounts that the CANA Congregations spent on maintenance and improvement of their properties—needs that they addressed at their discretion, and for which they bore total financial responsibility.[81] Between 1991 and 2010 alone, for example, the Congregations spent at least $16 million on upkeep.[82] The Falls Church alone spent nearly $6.4 million on maintenance over that period, Epiphany over $3.2 million, Apostles over $2.3 million, and Truro over $1.5 million.[83] If the period is extended back to 1950, The Falls Church spent $8.135 million on maintenance, or $12.9 million in today's dollars. Tr. 2521:5-2522:7 (Deiss): DX-FALLS-0073A-00001. By contrast, the amount contributed to maintenance by the Diocese or TEC was $0.[84]

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cluding for example "to help build an eye clinic in Uganda," "to things like the Lam (ph) center where we provide a place for homeless people to come, get a meal, to get some counseling and wash their clothes and such"); Tr. 1539:9-15, 1541:18-1543: (Julienne) (the congregation was "spending approximately 1 million dollars per year" on its "own missions program, outreach program," that changes in giving to the Diocese "would serious impact" those gifts, and that "the vestry would have a discussion as to how much we should give to the Diocese").

[81] *E.g.*, Tr. 2518:16-2519:4 (Deiss) ("Q Mr. Deiss, who's maintained the property over the years and performed necessary repairs? A The vestry. Q And the congregation? A And the congregation. Q How long has the congregation maintained the property? A As long as the records that I've been able to review show. Q 1873? A 1873."); Tr. 3339:17-3343:2 (Rooney); DSTP-355-04657.

[82] *See* Table B.

[83] *See id.*

[84] *E.g.*, Tr. 2521:9-13 (Deiss) ("Q. And that [maintenance expense] was all spent by the congregation? A. Yes. Q. No contributions from the Diocese or Episcopal Church? A. No.").

Table B: CANA Congregations' Maintenance Expenses (1991-2010)

	The Falls Church	Epiphany	Apostles	Truro	St. Margaret's	St. Stephen's	St. Paul's	TOTAL
1991	$135,338.00	$125,612.00	N/A	N/A	$52,634.00	$12,400.00	N/A	
1992	$156,586.00	$136,563.00	N/A	N/A	$52,692.00	$11,200.00	N/A	
1993	N/A	$101,152.00	N/A	N/A	$68,747.00	$13,000.00	N/A	
1994	N/A	$117,454.00	N/A	N/A	$63,070.00	$13,224.00	N/A	
1995	$227,436.00	$104,909.00	N/A	N/A	$61,975.00	$14,900.00	N/A	
1996	N/A	$131,677.00	N/A	N/A	$73,433.00	$20,386.00	$41,681.00	
1997	$103,189.00	$107,332.00	N/A	N/A	$76,124.00	$20,789.40	$6,523.00	
1998	$134,507.00	$110,851.00	N/A	N/A	$56,378.00	$19,045.00	N/A	
1999	$135,870.00	$111,772.00	$108,178.00	N/A	$65,348.00	$18,917.00	N/A	
2000	$356,484.00	$114,120.00	$74,133.00	N/A	$62,513.00	$19,711.00	$47,306.00	
2001	$354,155.00	$97,578.00	$190,144.00	N/A	$59,842.00	$28,607.35	$42,135.00	
2002	$401,706.00	$112,822.00	$342,722.00	N/A	$35,952.00	$35,548.81	$36,686.00	
2003	$360,293.00	$118,069.00	$144,888.00	$161,610.00	$48,403.00	$35,749.96	$48,423.00	
2004	$425,813.00	$92,184.00	$197,145.00	$157,923.00	$60,543.00	$84,414.36	$44,122.00	
2005	$465,307.00	$86,697.00	$182,940.00	$235,855.00	$46,034.00	$60,481.66	$40,095.00	
2006	$513,834.00	$191,721.00	$217,587.00	$209,549.00	$64,782.00	$42,943.96	$41,630.00	
2007	$600,421.00	$211,528.00	$265,150.00	$215,360.00	$81,247.00	$44,139.22	$43,735.00	
2008	$639,440.00	$452,998.00	$242,030.00	$215,420.00	$94,982.00	$35,339.29	$45,342.00	
2009	$654,325.00	$446,274.00	$171,274.00	$168,302.00	$127,057.00	$47,354.33	$61,703.00	
2010	$706,416.00	$234,535.00	$172,408.00	$224,852.00	$83,491.00	$43,818.43	$56,805.00	
Total	**$6,371,120.00**	**$3,205,848.00**	**$2,308,599.00**	**$1,588,871.00**	**$1,335,247.00**	**$621,969.77**	**$556,186.00**	**$15,987,840.77**[85]

[85] The Falls Church (DX-FALLS-0073A); Epiphany (DCOE-030); Apostles (Apostles Ex. 134A (1999-2010)); Truro (TRU268.0002-3 (2003-2010)); St. Margaret's (DSTM-560); St. Stephen's (DSTS-054 (1991-2000); DSTS-055 (2001-2010)); St. Paul's (DSTP-355A (1991-1999); DSTP-371A (2000-2010)).

Similarly, the CANA Congregations alone initiated and financed improvements of their property, and these improvements were substantial.[86] Since 1950, for example, The Falls Church spent $15.9 million to expand and improve its property ($26.6 million in today's dollars). Tr. 2524:16-22 (Deiss); DX-FALLS-0073B-000001. Neither the Diocese nor TEC contributed a dime.[87] The same is true of the other CANA Congregations' improvements.[88]

Fifth, the CANA Congregations exercised discretion concerning what benefits and salaries to pay their clergy and other staff. The testimony of Bill Deiss, parish administrator of The Falls Church, is representative:

> Q And all of those—who hired all of those employees?
>
> A The management of The Falls Church.
>
> Q The vestry?
>
> A The vestry.
>
> * * *
>
> Q Who negotiated salaries for all of these employees?
>
> A We did.
>
> Q Who paid for all of these employees' salaries?
>
> A Falls Church.
>
> Q Who provided their compensation packages and benefits?
>
> A Falls Church.

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[86] *E.g.*, Tr. 2193:4-16 (Jones) ("Q And any improvements undertaken prior to the vote by the members of St. Paul's Episcopal Church were voluntarily undertaken; is that right? A Yes."); Tr. 3340-47 (Rooney) (Apostles spent $1,338,000 on construction, apart from land acquisition costs, $4,318,358 on improvements/ maintenance); Apostles Ex. 134A, Apostles Ex. 136; DSTP-355A (St. Paul's spent $255,900.43 on improvements and capital expenditures between 1967 and 2005); Tr. 3904:16-17, 3905:2-9, DSTM-336, 520 (in 1988-89, St. Margaret's built a new parish hall costing $912,000; it paid for that construction in part with a $480,000 loan from Piedmont Federal Savings and Loan Bank and the rest from "cash generated by the congregation"); Tr. 3926:15-17 (including the purchase price of the Cross Lane property, the total cost expended on the effort to move St. Margaret's church has been "about $2.7 million").

[87] Tr. 2450-56 (Deiss); Tr. 2633-35 (J. Yates).

[88] *See, e.g.*, Apostles Ex. 013.0032-37; Tr. 3096:7-3097:4, 3135:2-20, 3172:17-3173:2 (Harper); DX-TRU268.0001 (chart showing $4,847,040 in acquisition and improvements costs of real property prior to disaffiliation).

Q Who sent W-2s to the government for them?

A The Falls Church.

Q All right. Now, with respect to the clergy there, did the Diocese provide salary guidelines for the clergy?

A Yes, they do provide salary guidelines.

Q And did The Falls Church follow those guidelines?

A Not exactly because at The Falls Church we have our own salary administration plan for all lay and clergy employees, and we follow that.

Tr. 2459:5-2460:9. Similarly, Rev. Cerar of St. Stephen's testified:

Q. And how did St. Stephen's establish the salaries of the staff prior to the vote?

A. We did inquiries of other congregations who had similar positions and determined what other people were paid so that we could offer a fair, reasonable salary.

Q. And did either the Episcopal Church or the Diocese of Virginia play any role in the hiring or decision-making with respect to salaries of St. Stephen's staff?

A. No.

Tr. 3672:15-3673:2.[89]

Sixth, the CANA Congregations had full control over how much of the congregational funds to invest for long-term needs, and where such investments should be made. The testimony of Rev. Jones of St. Paul's is representative:

Q During your tenure as rector of St. Paul's and prior to the disaffiliation vote, what, if any, process did St. Paul's Church follow with respect to decisions regarding the management of investment funds?

A The investment funds were managed by the vestry. They made the decisions regarding how money would be invested, where it would be put in terms of the investment monies of the church.

[89] *Accord* Tr. 2285:8-2286:10 (Rauh) ("Q How does Epiphany fill its paid staff positions? A We create a position description. Along with the vestry we set a line item for the salary. We then conduct a search and an interview along with the use of our employee handbook which we've created; and upon hiring, we have a six-month probationary period for the new hire, and we give them also a copy of the employee handbook. Q What role does the Episcopal Church of the Diocese play in the process you just described? A None."); *accord* Tr. 1790:3-1791:2, 1793:13-1794:14 (Rev. Jones); Tr. 2630:10-12 (J. Yates); Tr. 3095:22-3096:6 (Harper); Tr. 3953:9-3954:12 (Miller); *see also, e.g.*, Tr. 541:1-9 (Bp. Jones) (acknowledging that congregations are contractually responsible for payment of interim rector's salaries); Tr. 1462 (Fetsch) (acknowledging that The Falls Church did not adhere to the Diocesan guidelines for compensation of clergy).

Tr. 1827:11-18 (D. Jones); *accord* Tr. 2144:17-21 (Sisson); Tr. 2536:16-2637:6 (Reiter); Tr. 3695:7-13 (Cerar); Tr. 3337:2-22 (Rooney); Tr. 2434-35 (Deiss); Tr. 736:2-7 (Kerr, acknowledging that parishes including "Truro and Apostles did not use the investment management services" of the Diocese). Thus, whether the personal property at issue was directed to outreach, investment, or other needs, it was the CANA Congregations that determined whether and how to spend it.

* * * * *

We are not suggesting that a denomination must necessarily make a financial contribution to an affiliated congregation's property to establish a proprietary interest. In *Green*, for example, the absence of a financial contribution was "not dispositive" because "[t]he contractual obligation which the A.M.E. Zion Church assumed ha[d] its genesis in the 1875 deed." 221 Va. at 556. In the absence of a deed or written agreement with the congregation, however, the extent of financial contributions (or lack thereof) is instructive as to whether a denomination has a "legally cognizable" interest in disputed church property. *See Jones*, 443 U.S. at 606.

Furthermore, the CANA Congregations exercised substantially broader control over their finances than did the local congregation in *Green*. Contributions to the denomination there were *mandatory*, and the A.M.E. Zion Church set the amount. 221 Va. at 551-52. Here, by contrast, the CANA Congregations controlled whether, when, and how much to give, not only to the Diocese and TEC but to each and every ministry to which they contributed. Such unfettered discretion over the congregation's property cannot be reconciled with the notion that it was held for the benefit of anyone other than the congregation.

d. The CANA Congregations exercised principal if not exclusive control over the appointment of their own clergy.

Another "course of dealing" factor that distinguishes *Green* involves selection of clergy. Under the Methodist tradition embodied in the A.M.E. Zion Church Discipline, the denomination

"suppl[ies] ministers for the congregation": "Pastors are appointed by the bishops, and … a local congregation could not refuse to accept a pastor." 221 Va. at 549, 552. Thus, "all pastors of Lee Chapel [were] installed by the Conference and their appointment accepted by the local congregation." *Id*. at 550; *id*. at 553 ("[t]he general church supplied the ministers"). Indeed, as noted (at 83-85), "acceptance of the pastorate of ministers appointed by a bishop of the African Methodist Episcopal Zion Church" was one of the constitutionally-specified means by which a congregation demonstrated consent to grant a property interest to the general church. *Id*. at 554 n.2.

Here, by contrast, the search for and hiring of clergy, negotiation of their salary and benefits, and evaluation of their performance are all initiated and handled by the local congregation and its vestry, not by the Diocese. The testimony of Rev. John Yates of The Falls Church illustrates the point:

Q When did you first become rector?

A June of 1979.

Q And how did that come about?

A I was approached by the vestry of The Falls Church, and they said they would like to talk to me about becoming a rector of their church.

Q And were you looking for a position at that time?

A Lord, no. My wife had just given birth to twins, and we had five children seven and under, and I was very happy at St. Stephen's Church in Pittsburgh.

Q Well, how did The Falls Church get your name, then?

A Several friends gave my name to the search committee.

Q How was your salary determined?

A We determined that in discussions between myself and the vestry.

Q What was the involvement of the Episcopal Church or the Diocese in you being chosen and hired as rector of The Falls Church?

A There was no involvement that I know of.

Q Did you meet with the bishop of the Diocese?

A I did eventually meet with Bishop Hall, yes.

Q Was that before you were hired or after?

A No, it was sometime later, a few months later.

Q It was an employment interview?

A No. Actually, Bishop Hall wanted to ask if our church would make a significant financial contribution to the venture and mission.

Q Did you arrange for that?

A Yes.

* * *

Q Once you were hired as rector, who evaluated your work?

A The vestry.

Tr. 2629-2631 (J. Yates).[90] Similarly, the evidence showed that the Rev. Canon Clayton Matthews, the representative "from the diocesan office" who served as "deployment officer" (TRU 179.007; Tr. 1182:18-1183:10 (Burt)), admitted that the Diocese's suggested process for selection of a rector "is 'advisory,' i.e. flexible at the discretion of the vestry." TRU 179.007. When asked whether he agreed with this statement, Diocesan Secretary Burt testified: "I agree that the vestry has control over that process." Tr. 1183:16-1184:1 (Burt). He further admitted that "there were vestries that chose not to [use the process]." Tr. 1184:4-6.

Not surprisingly, there is no evidence of the Diocese having attempted to reject a choice of the Congregations concerning whom they wished to hire as their rector. Likewise, lower-level clergy are hired by the vestry and rector, typically without any involvement of (let alone control by) diocesan representatives.[91] This factor too, therefore, distinguishes the case from *Green* and confirms that the CANA Congregations exercised dominion over their property and worship.

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[90] *Accord* Tr. 1789:3-1791:2 (Rev. Jones) (call to serve as rector and compensation were negotiated by senior warden, vestry, and other congregational officials, without regard to Diocesan views); Tr. 2284:16-2285:1 (Rauh) (call to rector came from congregation's search committee based on recommendation of former parishioners); Tr. 372:5-11 (Bp. Jones) (acknowledging that clergy benefits are "paid for as part of the compensation package of the member of the clergy by the congregation that hires that member of the clergy"); Tr. 3095:22-3096:6 (Harper) (after completion of licensing arrangement between New Zealand Anglican jurisdiction and Diocese, vestry made hiring decision and negotiated salary without involvement of Diocese).

[91] Tr. 2460:14-2461:8 (Deiss) (hiring of clergy was directed by connections at congregational level and TEC and Diocese played no role in hiring them); Tr. 1792:19-1794:14 (Rev. Jones); Tr.

e. The additional "benefits" of affiliation that plaintiffs cite were typically paid for by the Congregations, and do not establish a proprietary interest in the denomination.

Faced with the fact that the CANA Congregations exercised all the usual responsibilities "customarily associated with ownership, title, and possession" (*Green*, 221 Va. at 555), plaintiffs are compelled to point to a hodgepodge of the ordinary incidents of denominational affiliation as evidencing a proprietary interest. But to the extent that the Congregations even received these alleged benefits, they paid for them—often at prices higher than required to purchase comparable services elsewhere. And in any event, such aspects of denominational affiliation do not establish a proprietary interest.

1. Consider, for example, use of the Diocese's Shrine Mont and Roslyn retreat centers. At trial, plaintiffs made much of the availability of these retreat centers for occasional use by the Congregations. It is undisputed, however, that the Congregations paid to use those facilities, including expenses for room and board.[92] Further, Shrine Mont is an "independent entity" (Tr. 1556-67), and both Shrine Mont and Roslyn are available to entities outside the denomination (Tr. 677:5-8, 679:22-680:2 (Burt)). As Bishop Jones acknowledged, "anyone can go to Shrine Mont" (Tr. 550:2-5). *Accord* Tr. 2471:6-9 (statement of Mr. Somerville).

Indeed, The Falls Church and Truro Church have continued to rent Shrine Mont after disaffiliation for seniors and vestry retreats and the like. Tr. 2473:12-13 (Deiss); Tr. 3450:4-8 (Le-

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316 (Bp. Jones) (acknowledging that "a director of Christian education" "would be a person hired by the rector and reporting to the rector").

[92] Tr. 714:20-715 (Kerr) ("The entities such as Roslyn, Shrine Mont, and Trustees of the Funds, are not compensated in any way by the 90 percent [of Diocesan funds received from affiliated congregations]. Those are paid by congregations."); Tr. 550:14-19 (Bp. Jones) ("14 Q Shrine Mont isn't free for Episcopalians, is it? A No. Q You charge for staying at Shrine Mont, correct? A Yes."); Tr. 2469:2-4 (Deiss) ("Q When The Falls Church went to Shrine Mont, did they pay something for that benefit? A They pay basically room and board."); Tr. 2474:14-2475:15 (Deiss) (explaining that The Falls Church used Roslyn for vestry retreats, received "room and board" for "a price" that was "comparable" to that available at other facilities); Tr. 1460:21-1461:1 (Fetsch).

masters). It was not until after disaffiliation that Shrine Mont adopted a "new policy that reprioritized reservations" to favor Diocesan affiliates. Tr. 4708:13-4709:13 (Moomaw); PX-COM-0281.0007. Even then, the difference between rates paid by affiliated and unaffiliated entities is minimal ($9.50 per double occupancy for nightly rentals) or nonexistent ("no difference between the Diocesan rate on a weekly rate and the standard rate"). Tr. 4712:1-11 (Moomaw); Tr. 678:6-7 ("camps are all charged at the same cost"). And the testimony showed that other available retreat centers offered "comparable price" and amenities. Tr. 2475:9-18 (Deiss).

2. Plaintiffs also touted at trial the investment services they offered congregations, including participation in the Church Pension Fund. Tr. 673:8-675:16, 693:13-698:3 (Kerr). As the Diocese's own Task Force acknowledged in a lengthy report, however, "[l]arge parishes, for the most part, do not use these services, as they have the resources to use more convenient local services." PX-STPAUL-0176-011; *accord* Tr. 736:2-5 (Kerr) (admitting that "large parishes such as Truro and Apostles did not use the investment management services"). And as for Diocesan loans, the Diocese's treasurer admitted that any "loans to the CANA congregations that were made from the Diocesan Missionary Society" were "made at competitive commercial rates of interest" and "paid off" by the Congregations. Tr. 715:9-18 (Kerr). These are not the sort of benefits that warrant recognition of a proprietary interest, much less under principles of equity.

3. To the extent that the CANA Congregations participated in plaintiffs' health insurance program, this imposed a net cost. As Bill Deiss of The Falls Church testified, that congregation "switched from the healthcare plan in the Diocese to the Kaiser Permanente," getting "the same coverage … at lower rates"—a $30,000 annual savings. Tr. 2478:10-2479:12. At the Diocese's request, to facilitate "a larger group" and a "lower" rate, The Falls Church rejoined the Diocesan plan for newly hired employees, but this resulted in additional expenses, not benefits. *Id.*; Tr. 2480:10-21; *see also* Tr. 3375-76 (Rooney) (Diocesan health plan resulted in no savings).

The same is true of plaintiffs' "property casualty insurance program," which The Falls Church left "because it was costing too much money"—it "shopped generally again like we did with healthcare and found out we could get the same and sometimes additional coverage for less money." Tr. 2484:5-2485:2 (Deiss).

And, of course, it was the Congregations, not TEC or the Diocese, who paid the premiums for any insurance program in which they participated. Tr. 667:6-12 (Kerr) ("Q Who pays the premiums on the health and dental insurance plan? A Those invoices are sent to our churches on a monthly basis. My office receives payments back from the churches. So how we interpret that is the churches are paying for the cost of the insurance."); Tr. 4120:17-4121:2 (Brown) (explaining that St. Margaret's did not participate during Brown's tenure). In fact, even the alleged Diocesan benefits not funded by direct congregational fees are typically funded by monies that ultimately come from the Congregations' voluntary contributions. Tr. 372:5-373:2 (Bp. Jones); Tr. 713:20-715:8 (Kerr).

4. Through Professor Bond, the Diocese also offered vague testimony about various 19th century denominational programs that provided financial support to Episcopal congregations. But as Professor Bond admitted on cross, the amounts involved were at most trivial.

The Bruce Fund. For example, Truro and St. Paul's each received "a one-time grant of $100" from "the Bruce Fund"; and "over the entire 30-year period from 1876 to 1906" when the Fund was functioning, The Falls Church received "three grants that added up to about $125" or "at most $150." Tr. 1089:9-1090:14 (Bond). The "grand total" provided by this fund to the CANA Congregations, therefore, was "$325 or $350 over the entire life of these congregations." Tr. 1090:11-16. In today's dollars, that amount remains nominal.

Piedmont and Rappahannock Convocations. Professor Bond further testified that, in the late 1800s, a few CANA Congregations received aid from the Piedmont or Rappahannock Con-

vocations, which "tried to help provide funding for clergy." Tr. 916:14-18. As he admitted, however, he did not take account of the contributions of those congregations to the very same funds. Tr. 1092:17-21 ("Did you—you didn't conduct any research to determine the total amount of all contributions made by the four churches that you've talked about here over the years, did you? A No, I haven't."). Professor Bond thus could not say whether the few CANA Congregations were net beneficiaries of, or net donors to, the Convocations.

Nor did Professor Bond "identify the specific amounts of any funds given by those convocations to any of these four churches." Tr. 1091:7-13 (Bond). And for good reason. The Falls Church received no more than $125 dollars from these funds, and Truro no more than $100 from the Bruce Fund. Tr. 1089:9-13 (Bond). Moreover, whatever contributions were made to these churches, those contributions did not deter the Diocese from later acknowledging in an Annual Council Journal that "the Colonial Churches of the Diocese," including The Falls Church, "belong absolutely to the parish in which they are located" and are "cared for by the well organized congregations *which own them*." PX-COM-0152-035 (emphasis added); PX-COM-0150-025.

Diocesan Missionary Society and Nationwide Campaign Funds. Professor Bond's analysis of the Diocesan Missionary Society funds[93] and the nationwide campaign fund likewise fail to identify the specific amounts involved or the congregations' own contributions.[94] But as he admitted, "churches receiving aid were expected to contribute [to the DMS]"—they "would give back to the [DMS]"—so they were effectively receiving money from funds that they supported.

[93] Tr. 1092:22-1093:4 ("Q And I take it you didn't conduct research to determine the total amount of all congregations these churches made to the Diocesan Missionary Society over the years, did you? A No, I haven't done that.").

[94] Tr. 1096:15 ("Q Professor Bond, did you research how much money any of these churches contributed to the nationwide campaign? A I haven't researched the amounts that the congregations have contributed to the Diocese—Q In any form — A — or the nationwide campaign. I've seen that they have contributed, but I haven't researched the amounts in any systematic way"); Tr. 1095:13-15 (Bond) ("Q Did you research whether St. Paul's contributed any funds to the nationwide campaign? A No, I did not.").

Tr. 1092:8-16. Indeed, while Professor Bond acknowledged that St. Paul's received only "$166 per year for a total of $500 over that three-year period" in the early 1920s, he was unaware that "that in 1921, St. Paul gave $1,625 to the nationwide campaign," and that "in that three year period they paid a total of $3,174 to the nationwide campaign." Tr. 1095:16-22 (Bond). Similarly, St. Stephen's contributed to this fund and received nothing in return. *See* Tr. 1096:1-13 (Bond) (St. Stephen's gave $1948 to the nationwide campaign over its three-year lifespan, receiving nothing in return).

In short, Bond's testimony does not reflect the careful and thorough research of an objective historian. But in any event, the full record confirms that even in the 19th century the CANA Congregations were giving to the denomination more than they received. Moreover, the modest amounts on which plaintiffs focused contrast sharply with the more substantial amounts received by another congregation concerning which there was testimony at trial—Christ Church in Glen Allen, Virginia. As the rector of that congregation explained, the Diocese "helped us directly with $100,000 to be born in the first place, plus additional assistance over the years as we needed it." Tr. 4666:13-22 (Johnson). In other words, the Diocese "gave [Christ Church] $100,000 of seed money to get off the ground." Tr. 4667:1-3 (Johnson).

f. Undisputed "course of dealing" evidence also reveals that the CANA Congregations' affiliation with TEC and the Diocese was more of a burden than a benefit.

The course of dealing evidence not only demonstrates that the CANA Congregations bore the responsibility for managing and controlling their properties; it shows that their affiliation with the denomination had certain detrimental effects on the Congregations, particularly in terms of lost membership, lost financial support, strained relationships with other Anglican entities, and having to devote time and resources to denominational turmoil.

The testimony of Rev. Rauh of Church of the Epiphany is representative:

Q What, if any, disadvantages did Church of the Epiphany experience as a result of affiliation with the Episcopal Church and the Diocese of Virginia?

A We lost members with respect to controversial decisions that were made public after General Convention. We also lost contributions and, in particular, new members who were inquiring as to the denominational affiliation were discouraged from joining.

Tr. 2296:21-2297:7 (Rauh).[95]

To minimize the loss of membership and financial support, the CANA Congregations had to take steps to permit restricted giving and to distance themselves from the denomination.[96] Even plaintiffs' witnesses acknowledged "times when we have suffered as a result of being part of a larger church," and "los[ing] some members over [TEC's decisions at General Convention]." Tr. 4570:16-17, 4571:3-7 (Ohmer).

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[95] *Accord* Tr. 3100:3-7 (Harper) (Q Did some members leave despite your efforts? A Indeed they did. Q To what extent was their departure related to their unhappiness with the national Church? A It was directly related."); Tr. 1898:14-1899:2 (Rev. Jones) (discussing the "loss of some members of the congregation" and the "turmoil going on regarding decision of the national Church and the Diocese of Virginia"; "people left because of these decisions of the national Church"); Tr. 3933:2-9 (Miller) (discussing loss of members due to denomination's actions); Tr. 3326:18-3327:14 (Rooney) (explaining that "I do know of many, not many, but several families who did not stay at Church of the Apostles because Church of the Apostles was Episcopalian, and they said to me that they—as much as they loved our church, the fact that we were Episcopalian was too strong an argument for them to say that they felt like they had to leave"); Tr. 3709:15-3710:21 (Cerar) (discussing loss of membership and changes of giving); Tr. 3711:7-3712:19 (Cerar) (discussing the turmoil in the congregation caused by the denomination's actions); Tr. 2485, 2517-18 (Deiss) (Episcopal brand was not helpful; The Falls Church's revenues increased dramatically ($1,500,000 per year) after disaffiliation); Tr. 1554:19-1555:5 (P. Julienne discussing basis for statement in August 18, 2003 letter to Bishop Lee at DX-TRU029.001.).

[96] *See also*, *e.g.*, Tr. 3099:5-3108:11 (Harper) (discussing departures and remaining members' desires to withhold their donations from TEC); Tr. 2196:17-2198:7 (Michalowski) (explaining that St. Paul's addressed "reservations about giving money to the Episcopal Church" by permitting members to "write SPO on our checks, which stood for St. Paul's only, and that none of our money would go outside the church to the Diocese or the national Church"); DX-TRU029.001 (letter from Paul Julienne to Bishop Lee advising the diocesan pledge was being placed in escrow "to fulfill [the Vestry's] responsibility as good stewards to our parish while we asset the full damage of the decisions taken by you and the Virginia deputation to General Convention.")

Others explained that affiliation with the denomination created "difficulty with our mission partnerships abroad," requiring the congregation "to assure [the mission partners] that our congregation disassociated itself from the actions of the 2003 General Convention." *E.g.*, Tr. 3708:6-20 (Cerar). In short, affiliation was if anything a burden to the CANA Congregations in recent years.

* * * * *

In summary, the "course of dealing" evidence unequivocally shows that the CANA Congregations exercised full dominion over their properties, demonstrating that dominion in every component of the management and control of the property and bearing financial responsibility for the activities undertaken on site. When Diocesan bishops visited the properties, they did so at the Congregations' invitation and undertook none of the risks and responsibilities of ownership, let alone the practical responsibilities of management. To the extent that the Court may consider "course of dealing" evidence, therefore, it confirms that the rightful owners of the properties at issue are the CANA Congregations.

II. Enforcement Of Plaintiffs' Canons Would Violate The United States And Virginia Constitutions.

As we have shown, reading plaintiffs' canons to create enforceable proprietary interests finds no support in any neutral principle of "real property and contract law." *Truro Church*, 280 Va. at 29. Even if that were not so, however, plaintiffs' claims would be barred by the U.S. and Virginia Constitutions. Granting their canons legally dispositive weight would violate not only principles of free exercise and disestablishment, but also the Contracts Clause (as applied to pre-1993 conveyances), basic notions of due process, and the Equal Protection Clause.

A. Reading Virginia law to permit religious denominations to unilaterally assert an ownership interest in congregational properties would violate the Religion Clauses of the First Amendment and the Virginia Constitution.

1. First, plaintiffs' claim is barred by the First Amendment's Free Exercise Clause, which invalidates laws that "impose special disabilities on the basis of religio[n]" or "religious status" (*Employment Div. v. Smith*, 494 U.S. 872, 877 (1990)), and the protections for religious freedom found in the Virginia Constitution, which bars the Commonwealth from "confer[ring] any peculiar privileges or advantages on any sect or denomination" (Va. Const. art. I, § 16).

There can be no question that plaintiffs are asserting far greater rights than those enjoyed by any other entity in Virginia. No other beneficiary may declare an "express trust" in real property which it does not own. No other entity may enforce a "contract" for which it offered no consideration. No other entity may enforce a "contract" without having to worry that the contract will be enforced against it.

No other association may, as a penalty for disaffiliation or violation of the association's rules, encumber members' property. Indeed, such a rule would be laughable in the context of any other voluntary association. Imagine, for example, if an automobile owners' association passed a rule declaring that "all automobiles held by or for the benefit of any member are held in trust for this automobile association. The existence of this trust, however, shall in no way limit the power and authority of the member otherwise existing over such automobile so long as the particular member remains a part of, and subject to, this association and its duly enacted rules." *Cf.* PX-COM-0001-045 (Dennis Canon). As *Gillman* makes clear, such a rule would not get to first base under neutral principles of Virginia law. 223 Va. at 766; Va. Code § 1-248. Yet plaintiffs assert the right to enforce such unilateral rules without regard to civil law, and retroactively—even against entities that enjoyed a distinct legal existence and owned their property before the denomination's founding. In their view, the Episcopal Church is "a law unto itself." *See*

Smith, 494 U.S. at 890; *see id*. at 886 (noting that "a private right to ignore generally applicable laws[] is a constitutional anomaly").

The necessary corollary of granting religious denominations like plaintiffs such preferential treatment, of course, would be singling out congregations who affiliate with them for particularly *disfavored* treatment. The Free Exercise Clause and Equal Protection Clauses prohibit that. As the U.S. Supreme Court has repeatedly held, the state may not "impose[] special disabilities on the basis of religious status," *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993) (quoting *Smith*, 494 U.S. at 877, and citing *McDaniel v. Paty*, 435 U.S. 618 (1978)). A law that discriminates in that manner is "invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 532, 533; *see id*. at 546 ("A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."). Moreover, the text of the Virginia Constitution, which bars the state from "confer[ring] any peculiar privileges or advantages on any sect or denomination (Art. I, § 16), could hardly be more apposite.

Plaintiffs' theory, if adopted, would violate both the requirement of religious neutrality and the requirement of general applicability. The Free Exercise Clause "'forbids subtle departures from neutrality,'" and "the effect of a law in its real operation is strong evidence of its object." *Id*. at 534, 535 (citation omitted). Moreover, a statute's "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Id*. at 542. Yet plaintiffs' theory, if adopted, would not even satisfy "the minimum requirement of neutrality"—"that [the] law not discriminate on its face" (*id*. at 533)—as their reading of the law explicitly favors denominations over every other association and entity in Virginia, and explicitly

disfavors only those affiliated with denominations. Nor is the legal principle that plaintiffs advocate generally applicable, as it is limited in scope to religious denominations.

Laws that fail the test of religious neutrality or general applicability "survive strict scrutiny only in rare cases," and this is not such a case. The government has no compelling interest in permitting denominations, qua beneficiaries, to unilaterally assert ownership of congregational property to which they lack title. Moreover, plaintiffs' theory does not avoid entanglement in religious doctrine and practice; it exacerbates it. And even if the legal regime that plaintiffs advocate somehow satisfied a compelling governmental interest, it would not be narrowly tailored to that end. Other legal means, such as securing rights by a congregational agreement or by deed language, effectively ensure that denominational interests are respected and that church property rights are determined without a searching inquiry into religious doctrine and practice.

A rule under which religious denominations may unilaterally assert ownership interests in affiliated congregations' properties by enacting canon law cannot be justified as a governmental "accommodation" of religion. *See generally Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335-38 (1987); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). Accommodations serve a "permissible legislative purpose" only if they "alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 335, 336. That standard cannot be met here, since denominations that wish to secure rights in congregational property can easily do so by use of appropriate deed language.

As this Court has held, "*Jones* [*v. Wolf*] expressly states that one way in which a religious organization can avoid [a default rule under state property law] is to modify its deeds, and describes any burden involved in making such a modification as 'minimal.'" Letter Op. on Consti-

tutionality of Va. Code § 57-9(A) at 32-33 (June 27, 2008);[97] *Jones*, 443 U.S. at 606 ("The burden involved in taking such steps will be minimal."). Unfortunately for plaintiffs, the desire to remove a government-imposed "burden" on religion that is merely "minimal," as opposed to "significant" or "substantial," cannot justify a religious "accommodation." *Amos*, 483 U.S. at 336; *Texas Mo.*, 489 U.S. at 14 (plurality op.) (discussing the requirement that accommodations "remov[e] a significant state-imposed deterrent to the free exercise of religion"); *id*. at 18 n.8 (noting that the tax exemption for religious periodicals "does not remove a demonstrated and possibly grave imposition on religious activity sheltered by the Free Exercise Clause").

Further, the doctrine of religious accommodation will not justify laws that impose "substantial economic burdens" or other "significant burdens" on non-beneficiaries of the accommodation. *Estate of Thornton v. Caldor, Inc*., 472 U.S. 703, 709-10 (1985) (invalidating law providing for mandatory Sabbath day off because it contained "no exception when honoring the dictates of Sabbath observers would cause the employer substantial economic burdens or when the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers"); *Texas Mo*., 489 U.S. at 14 (plurality op.) (an accommodation "not required by the Free Exercise Clause" is invalid if it "burdens nonbeneficiaries markedly"); *id*. at 18 n.8 (invalidating a tax exemption for religious periodicals in part because "it burdens nonbeneficiaries by increasing their tax bills by whatever amount is needed to offset the benefit bestowed on subscribers to religious publications"). Here, the CANA Congregations would bear an extraordinary burden if plaintiffs' view were the law; they would lose

[97] *Accord id*. at 32 ("the Diocese itself regularly—and of its own free will—engages in the very practice which it simultaneously protests 'substantially burdens' its free exercise of religion"); *id.* ("The Free Exercise Clause . . . does not protect religious organizations from all administrative inconveniences that may arise from a religious organization's compliance with neutral laws of general applicability"); *id*. at 32 n.37 ("Why re-titling the deeds would be problematic when the amendment of governing documents is not problematic was not adequately explained [by plaintiffs' counsel].").

extensive property titled in their own names and purchased, improved, and maintained with their own money. The First Amendment does not justify such impositions on non-beneficiaries of the accommodation. Thus, the favoritism of religious denominations that would be effected if plaintiffs' view became the law would violate the Free Exercise Clause.

2. Enforcing plaintiffs' canons would also violate the Establishment Clause, which bars the state from "vesting in the governing bodies of churches" a "unilateral and absolute" power over other parties' exercise of property rights. *See generally Larkin v. Grendel's Den*, 459 U.S. 116, 117, 127 (1982). If Virginia law allowed plaintiffs, who lack title to the properties at issue, to create beneficial ownership interests in those properties simply by passing canons—*i.e.*, without satisfying generally applicable law—such a regime would be unconstitutional. *See id.*; *see also Caldor*, 472 U.S. at 709-10 (invalidating law providing for mandatory Sabbath day off because it contained "no exception when honoring the dictates of Sabbath observers would cause the employer substantial economic burdens or when the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers"). In fact, in explaining why "Virginia has never adopted the implied trust doctrine to resolve church property disputes," the Virginia Supreme Court in *Norfolk* cited "[t]he Constitutions of Virginia," which "reflect the determination of our citizens from early days to maintain the separation of church and state and to prevent the establishment of any religion." 214 Va. at 505; *see also Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 734 (1976) (Rehnquist, J., dissenting) (criticizing "blind deference" even to ecclesiastical decisions of hierarchical churches as creating "serious problems under the Establishment Clause").

The U.S. Supreme Court's decision in *Larkin* is instructive. There the Court struck down a law that allowed churches, simply by filing a notice with the authorities, to keep liquor licenses from being granted to establishments within 500 feet of their property. 459 U.S. at 117. The

Court acknowledged both the state's "valid interest" in insulating churches "from certain kinds of commercial establishments, including those dispensing liquor," and the fact that this "veto power" over liquor licenses was also held by every "school, public or private." *Id*. at 124, 117 n.1 (citations omitted). Nevertheless, the Court invalidated the law because it "substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications" for third parties and their property. *Id*. at 127. By delegating churches "standardless" power in an area generally subject to governmental control, such a regime violated the Establishment Clause. *Id*. at 125; *see also id*. at 126-27 (explaining that "the core rationale underlying the Establishment Clause is preventing 'a fusion of governmental and religious functions,'" and that "[t]he Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions."). If the theory of plaintiffs here were adopted, however, it would present an even clearer violation of the Establishment Clause than did the zoning statute in *Larkin*.

First, the statute there merely permitted churches to restrict one manner in which nearby landowners could use their property (as a liquor establishment); other uses remained beyond the churches' veto power. Here, by contrast, TEC and the Diocese assert the right to *transfer beneficial ownership* of congregational properties to themselves. That is a far greater imposition on a party's property rights than is the loss of income from one type of forbidden sales.

Second, in contrast to the statute in *Larkin*, no other entities in Virginia, including secular associations, have the authority to pass rules that encumber their members' property or transfer the beneficial interest therein to the association. In *Larkin*, the authority of churches to exercise control over the granting of liquor licenses was at least was shared with all schools, public or

private. Here, TEC and the Diocese assert a right shared by no one. They are seeking preferential rather than equal treatment.

Third, plaintiffs assert the right to enact canons affecting property rights (1) without regard to whether a positive statutory enactment gives them the force of law, and (2) without complying with the requirements of real property and contract law that ordinarily govern the creation of proprietary interests. Thus, not only is the denomination's exercise of power "unilateral and absolute" and "standardless" (*Larkin*, 459 U.S. at 127); but congregations lack even any statutory notice that such power might be exercised.

For all these reasons, should the Court find that plaintiffs have satisfied their burden under *Norfolk* and *Green*, it would need to hold that enforcing plaintiffs' canons would violate the Establishment Clause. *See also Norfolk*, 214 Va. at 505.

3. More generally, plaintiffs' position threatens both to excessively entangle courts in matters of religious polity and practice, and to pigeonhole denominations into one of two polar-opposite categories—purely congregational churches and churches in which the denominational leadership is free to assert ever-increasing authority, whatever the understanding of the church's founders or the specific intent of affiliated congregations. To avoid this difficulty, *Jones* wisely commended the "neutral principles" approach. That approach, which Virginia has adopted, embodies legal rules that are "completely secular in operation" and "relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges"—and "thereby promises to free civil courts *completely* from entanglement in questions of religious doctrine, polity, and practice." 443 U.S. at 603 (emphasis added).

As *Jones* makes clear, "the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice." *Id*. at 602. Yet this is the direct result of plaintiffs' theory. Under their reading of *Green*, property ownership turns on "reli-

gious practices" such as bishops' performance of confirmations, and on the types of services the congregations perform, without regard to the significance of these acts under civil law. Such practices are an undisputed part of plaintiffs' "ritual and liturgy of worship," and the First Amendment compels civil courts to give them "no consideration." *Jones*, 443 U.S. at 602 (quoting *Maryland & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 368 (Brennan, J., concurring)). Not surprisingly, the parties dispute the significance of these religious rituals. *See supra* at 64-65 (explaining that the Congregations did not understand such practices to convey any property interest to the denomination). It is beyond this Court's jurisdiction to resolve such disputes, and the "neutral principles" approach does not call for such resolution—it simply asks whether the denomination's asserted interest reflects the intent of "the parties" and is embodied in "legally cognizable form." *Jones*, 443 U.S. at 606.

In addition, *Jones* underscores that "[t]he neutral principles approach … obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes." *Id*. at 605. Yet, as this Court earlier recognized, the "significant parsing of [plaintiffs'] canons and rules" entailed in plaintiffs' position "risk[s] placing this Court in the midst of the very religious thicket about which [they] ha[ve] frequently warned the Court." Letter Op. 11 n.18 (Aug. 19, 2008). That risk has materialized.

For example, plaintiffs have made much of the fact that members of the Congregations' vestries made the following personal declaration upon assuming that role:

> I do believe the Holy Scriptures of the Old and New Testament to be the Word of God, and to contain all things necessary to salvation; and I do yield my hearty assent and approbation to the doctrines, worship and discipline of The Episcopal Church; and I promise that I will faithfully execute the office of Vestry member of _____ Church, in Region _____, in the County (or City) of _____, according to my best knowledge and skill.

PX-COM-0003-022 (Diocese Const., Canon 11, § 8); *e.g.*, Tr. 229:6-230:22 (Bp. Jones), 397:1-398:18 (Tucker), 749:1-751:8 (Kirby) (discussing the declaration); *see also* PX-COM-0001-015

(TEC Const. art. VIII) (clergy declaration: "I do believe the Holy Scriptures of the Old and New Testaments to be the Word of God, and to contain all things necessary to salvation; and I do solemnly engage to conform to the Doctrine, Discipline, and Worship of the Episcopal Church."). According to plaintiffs, this personal declaration evidences an agreement to abide by their constitutions and canons, which they say are an implicit part of their "discipline." Tr. 18-19 (opening statement of Mr. Davenport).

Notably, however, the first phrase in this declaration contains an explicit commitment to the authority of the Holy Scriptures, and the CANA Congregations' witnesses testified that they understood the balance of the declaration to be subordinate to this commitment.[98] Moreover, the declaration nowhere refers to either the constitution or canons of TEC or the Diocese, and "discipline" itself is a word fraught with religious significance. Tr. 1567:16 to 1567:20 (P. Julienne) ("Q. Focusing on the words 'doctrine, worship and discipline,' did you [equate] any of those words with the Constitution and Canons of the Episcopal Church? A. In no way whatsoever. It certainly doesn't say that here.") As plaintiffs' expert Professor Mullin admitted, "[t]here is no bright line" that "separates" the Church's "doctrine and discipline"; they "overlap." Tr. 1294:22-1295:9. Indeed, even according to plaintiffs the "discipline" includes both "the Book of Common Prayer," "a thoroughly religious book," and the "Ordinal," which is "the service for ordaining ministers as bishops, priests and deacons" and contains "scriptures and prayers and other rites." Tr. 1290:11-13, 1294:22-1296:1 (Mullin). What is more, the declaration's reference to

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

"discipline" is sandwiched between its reference to "doctrine" and "worship," which themselves are inherently religious concepts.[99]

As *Jones* warned, when the law "requires a civil court to examine certain religious documents, such as a church constitution," it "must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust." 443 U.S. at 604. Nor should courts be in the business of parsing the agreements that a denomination and local churches reach between themselves in order to determine precisely what sort of polity the church has. That constitutes just the sort of "searching and therefore impermissible inquiry into church polity" the Supreme Court has condemned. *Jones*, 443 U.S. at 605 (*quoting Milivojevich*, 426 U.S. at 723). But given the religious significance of terms such as "discipline," and the fact that the vestry declarations embody a commitment to "the Holy Scriptures," this Court cannot interpret these provisions without violating these constitutional prohibitions. It follows that the Court cannot interpret this provision to impose civil law obligations.

The inevitable effect of plaintiffs' view of the law would be to discourage denominational affiliation, to the detriment of religious freedom and choice. Few churches are purely "congregational" or "hierarchical." Most fall somewhere in between, or off the spectrum altogether. Yet plaintiffs' approach would effectively reduce our rich and varied world of religious denominations to two categories—one including purely independent churches and one including denominationally affiliated churches. Congregations in the latter category would have no means

[99] The only definition of "discipline" found anywhere in plaintiffs' constitution and canons does not purport to govern the conduct of vestry members or trustees, but rather only clergy. See PX-COM-0001-164 (TEC Canon IV.15, relating to clergy discipline); Tr. 1293:22-1294:10 ("Q * * * There are no provisions in Title IV for discipline of the vestry, are there? A No. Q There are no provisions in Title IV for discipline of congregational trustees, are there? A Not to my knowledge. Q There's nothing in Title IV that refers to church property, is there? A I don't know. Title IV—Q You can't point to anything specific? A No, no, no.").

of protecting themselves from the loss of their property. Rather, any denomination could always begin to redefine itself to assert greater control over member congregations' bricks and mortar—simply by passing rules. *See* Kent Greenawalt, *Hands Off! Civil Court Involvement In Conflicts Over Religious Property*, 98 Colum. L. Rev. 1843, 1851 (1998) (discussing how an approach that defers to denominational rules "effectively restricts the options of church members either to keeping final authority in local congregations or to leaving ultimate decisions about authority to superior tribunals"). But a rule that forces any and every church that is in some sort of association with other churches to accept the pronouncements of a denominational body, whether or not the church actually recognizes the authority of that body in that sphere, is not a rule friendly to Free Exercise.

Indeed, if plaintiffs' view of "neutral principles" were correct, then no local church could ever affiliate with a denomination without risking the loss of its property. Even where, as here, the denomination was founded on principles opposed the centralization of authority and the vesting of temporal power in the hands of the denomination and its bishops,[100] plaintiffs' view would permit the denomination, at any point, to pass a rule unilaterally asserting ownership of congregational property. Such a rule would not foster religious freedom; it would discourage the choice

[100] As Professor Mullin admitted, the founding of The Episcopal Church was marked by "a strong opposition to any form of centralized government." Tr. 1267:14-20. The official reporter of TEC's constitution and canons took a similar view. *See* Apostles Ex. 372.0005 (1924 edition of White's treatise) ("The American Nation and the American Church both began their national life at precisely the same time. In the beginning, one was a Confederation of independent States, and the other, to some extent, a Confederation of independent Dioceses. In both cases, there was a strong opposition to any form of centralized government. In each case, there was as little of executive authority provided for as conditions would permit. But the parallel between the Nation and the Church ceases soon after the beginning of each. Gradually, there was either granted to the executive branch of the National Government, or else assumed by it, additional power and authority, until, today, we have one of the strongest forms of centralized governments in the world. But the Church did not keep pace with the Nation in this matter. The Church began her National life with practically no executive head, and with no central governing power, save only the General Convention, meeting once in three years, and whose functions were chiefly legislative, not executive.").

to affiliate with those of similar spiritual beliefs for fear of losing the congregation's practical livelihood. This, in part, is why the retroactive application of state statutes, and even denominational canons, is so pernicious. *See Arkansas Presbytery of Cumberland Presbyterian Church v. Hudson*, 40 S.W.3d 301, 309-10 (Ark. 2001) (refusing to apply "the [general] church constitution, amended in 1984" to "impose[] a trust in favor of the National Church upon property previously held by the local congregations"; applying "the church constitution in place at the time of the 1968 and 1977 conveyances," because "[w]e have long held that parties to a conveyance have a right to rely upon the law as it was at that time").

A genuine "neutral principles" approach, by contrast, permits the parties to structure their relationship around the neutral default rules of state property law, and in a manner that respects the intent of *all* parties, not just the denomination. *Jones*, 443 U.S. at 606. That is the approach of *Norfolk*, *Green*, and *Jones*, and this Court should apply it—not an approach of deference-to-hierarchy by another name.

B. Judicial recognition of the claims of TEC and the Diocese would violate the Contracts Clause as applied to properties obtained by the CANA Congregations before adoption of Va. Code § 57-7.1 in 1993.

As we have shown, plaintiffs have failed to carry their burden under *Norfolk* and *Green*; and even if they had met that burden, enforcing their canons would violate the religion clauses of the U.S. and Virginia Constitutions. In addition, however, enforcing plaintiffs' canons would violate the federal and state Contracts Clauses as applied to properties obtained by the CANA Congregations before 1993. The Congregations have vested rights in those properties, and state law may not be applied retroactively to strip or dilute those rights. *See generally* U.S. Const. art. I, § 10; Va. Const. art. I, § 11; *Finley*, 87 Va. at 108-09; *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 248-50 (1978) (state statutes that "operate[] as a substantial impairment of a contractual relationship" must, among other things, be "necessary to meet an important general so-

cial problem" not a "narrow class" of interests, and "effect simply a temporary alteration of the contractual relationships of those within its coverage"); *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189, 195-98 (1936) (laws affecting contract rights of withdrawing members of association "must be confined to purposes reasonably connected with the public interest as distinguished from purely private rights," and "must not be arbitrary or oppressive").

1. Plaintiffs themselves previously invoked the Contracts Clauses, recognizing that those clauses prohibited applying the division statute so as to deprive any party of property rights that vested before the statute's adoption in 1867.[101] In support, they cited *Finley v. Brent*, which held that the statute could not be retroactively applied to strip members of a congregation of rights under a deed executed in 1860. 87 Va. at 108. As *Finley* explained, a deed conveying property to a religious congregation's trustees is "a valid and binding contract," and it is "beyond the legislative power" and "in violation of the [Contracts Clauses]" to read a statute to "deprive[] the cestuis que trusts named therein, and created by the trust, of their property rights," or to "convey[] the right to dispose of this property to others." *Id*.; *see also id*. at 109 ("the beneficiaries . . . can be no others than such as the deed provides for").

2. Plaintiffs' position here runs headlong into *Finley*. They are not "the cestuis que trusts named [in the deeds]," let alone grantees. *Id*. at 108. Rather, the grantees and beneficiaries are the Congregations, who by virtue of their deeds have vested contract rights in the properties. *Id*. Plaintiffs thus seek to "deprive[] the [named] cestuis que trusts … of their property rights," and they assert "the right to dispose of this property to others than those to whom it was

[101] *E.g.*, TEC/DVA Opposition Brief Pursuant to July 16, 2008, Order (filed Aug. 4, 2008) at 6 ("The parties appear to agree that according to applicable case law, legislative action may violate the Contracts Clauses when it impairs 'preexisting' or 'past' contracts. In other words, the Contracts Clauses protect rights and obligations in contracts that existed prior to the effective date of the 1867 predecessor statute to 57-9."); TEC/DVA Response Brief Pursuant to the Court's June 27, 2008, Order (filed July 2, 2008) at 23-24; TEC/DVA Opening Brief Pursuant to July 16, 2008, Order (filed July 28, 2008) at 11-12.

granted"—to themselves. *Id*. The asserted statutory basis for this claim? Section 57-7.1—a law adopted in 1993, well after most of the properties here were conveyed to the Congregations.[102] But as plaintiffs earlier argued—citing *Finley*—"it would be unconstitutional to interpret or apply [Virginia statutory law] to alter existing rights and obligations or trusts established in governing deeds." Br. in Opp. to Demurrers and Pleas in Bar at 29 (filed July 13, 2007). That principle governs here.

Plaintiffs admit that, even under their reading of Virginia law, § 57-7.1 "reversed Virginia's historical [position]" on "denominational trust[s]." Tr. 53:19-54:1 (opening statement). In the 19th century the Diocese petitioned the General Assembly to grant them property rights because, as the Diocese then described Virginia law, "no Christian denomination is capable of taking and holding property of the smallest amount. They can neither take what is given nor acquire by purchase." DX-FALLS-0413-000002, 0413A-0001 [transcription]; Tr. 3546:11-20 (Curtis). And throughout the 20th century, the Virginia Supreme Court repeatedly reaffirmed that denominational trusts were not valid—that, unless property was held by denominational officers, deeds granting property rights to religious entities would not be read to create denominational rights. *E.g.*, *Moore*, 169 Va. at 177-182 (discussing the historical evolution of Virginia statutory law on this issue and rejecting the argument "that subsequent amendments enlarged the term ' religious congregation' to include the whole denomination"), *see supra* n. 3.

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[102] *See supra* (explaining that § 57-7.1 should not be applied retroactively as a matter of statutory interpretation); Apostles Ex. 33 (April 20, 1971); DCOE-497 (Aug. 25, 1987); DSTM-005 (July 26, 1963); DSTP-293 (April 21, 1904), 293A (transcription of same), 294 (July 28, 1993) (replacement deed for St. Paul's historic parcel), 297 (Jan. 18, 1900), 297A (transcription of same); DSTS-005 (Nov. 20, 1874), 006 (Aug. 27, 1957), 007 (Jan. 12, 1967), 008 (April 14, 1967), 009 (Dec. 21, 1967), 010 (Oct. 18, 1972); DX-FALLS-0001 (March 19, 1746), 0002 (March 20, 1746), 0003 (Dec., 16, 1852), 0003A (transcription of same), 0004 (Oct. 1, 1918), 0005 (Oct. 29,. 1953), 0006 (Feb. 27, 1956), 0007 (Sept. 15, 1956), 0008 (Aug. 30, 1963), 0009 (Dec. 15, 1986); TRU001 (Dec. 3, 1874), 002 (Dec. 1, 1882), 006 (May 19, 1952), 007 (July 3, 1956), 008 (Jan. 4, 1982), 009 (March 2, 1992), 011 (March 15, 1987), 012 (April 26, 1991).

Plaintiffs are thus compelled to argue that the law changed when the legislature adopted § 57-7.1, which they say grants them beneficial ownership of properties conveyed not only *after* but *before* 1993—including, in one case, a parcel vested in the congregation before TEC or the Diocese even *existed*.[103] We have already explained why this is untenable as a matter of statutory interpretation. But if that were not so, the Contracts Clause would forbid retroactive application of Virginia statutory law to dilute such vested property rights—as plaintiffs have effectively admitted. Br. in Opp. to Demurrers and Pleas in Bar at 29 (filed July 13, 2007) (citing *Finley*, 87 Va. at 108). At a minimum, "the Court should construe the statute to avoid" this "constitutional question." *Id*.

3. *Finley* definitively answers the question whether applying § 57-7.1 to grant plaintiffs rights not reflected in the deeds would "operate[] as a substantial impairment of a contractual relationship." *Spannaus*, 438 U.S. at 244. Nor can that impairment be justified as an exercise of the police power, as "[§ 57-7.1] was not even purportedly enacted to deal with a broad, generalized economic or social problem," and there is certainly "no showing in the record" that it "[is] necessary to meet [such] an important general social problem." *Id*. at 247. Nor could there be, as the statute applies only to "a narrow class" of property and, if read as plaintiffs suggest, would make religious denominations "a favored group" with the ability to create proprietary interests by means not available to others. *Id*. at 242, 248-49. Indeed, none of the conditions that the U.S. Supreme Court has found necessary to justify substantial impairments of contract rights exists here. *See id*. at 242 (explaining that prior statutes were upheld where "the state legislature had declared in the Act itself that an emergency need for the protection of homeowners existed," "the state law was enacted to protect a basic societal interest, not a favored group," "the relief

[103] DX-FALLS-0001 (historic two-acre parcel), DX-FALLS-0002 (same).

was appropriately tailored to the emergency that it was designed to meet," "the imposed conditions were reasonable," and "the legislation was limited to the duration of the emergency").

Treigle v. Acme Homestead Ass'n, 297 U.S. 189 (1936), which the Court reaffirmed in *Spannaus* (438 U.S. at 243), is likewise instructive. The Court there struck down a statute that altered the withdrawal rights of the members of a building and loan association on the basis that the statute unconstitutionally "deprive[d] withdrawing members of a solvent association of existing contract rights, for the benefit of those who remain." 297 U.S. at 198.

Under the pre-statute contract, members were entitled to receive their investment and share of the profits upon withdrawal. *Id*. at 191. But the legislature then passed a law allowing associations to subordinate their payments to disaffiliating members to the associations' expenses related to the "operating expenses, maintenance, and improvement of repossessed property, payment of obligations, and creation of cash reserves for future dividends," and (to a lesser extent) the claims of later-withdrawing members. *Id*. at 192. Emphasizing that this law "does not purport to deal with any existing emergency and the provisions respecting the rights of withdrawing members are neither temporary nor conditional," but simply "alter the rights of the withdrawing members as between themselves and as against continuing members," the Court invalidated the statute. *Id*. at 197. As the Court recognized, laws affecting the contract rights of withdrawing members "must be confined to purposes reasonably connected with the public interest as distinguished from purely private rights," and "must not be arbitrary or oppressive." *Id*. Section 57-7.1, as read by plaintiffs, fails these tests: It serves no emergency purpose; it is permanent rather than temporary; it simply alters the arrangement of private rights among the association and its members; and it unreasonably deprives affiliated congregations of properties that they paid for and to which they hold title. *Treigle* thus confirms the common sense of *Finley*—that reading a Virginia church property statute to "deprive[] the [named] cestuis que trusts … of

their property rights," or to transfer "the right to dispose of this property to others," violates the Contracts Clauses. *Finley*, 87 Va. at 108.

4. This Court rejected plaintiffs' Contracts Clause claim because the Clauses protect only "vested rights," which plaintiffs lack.[104] The same historical factors that foreclosed plaintiffs from establishing such rights, however, further *support* the CANA Congregations' Contracts Clause claims. Whereas plaintiffs lacked vested rights, the Congregations possess such rights—in some cases, rights dating to the 18th century. Accordingly, if the Court were to find that TEC and the Diocese carried their burden of establishing proprietary rights under *Green*, the Contracts Clauses would require invalidating the application of plaintiffs' canons to properties obtained by the CANA Congregations before 1993.

C. Given Virginia's longstanding prohibition on denominational trusts, reading Virginia law to grant TEC and the Diocese an interest in the CANA Congregations' property would violate the notice requirement of due process.

As discussed above, at least 14 Virginia Supreme Court decisions applying Virginia statutory law hold that denominational trusts are invalid in Virginia. That remains the case after the 1993 adoption of Va. Code § 57-7.1, which was "declaratory of existing law." To make matters worse, moreover, plaintiffs have repeatedly admitted that their canons relating to church property, however phrased, have only moral force.

For the Court to enforce plaintiffs' canons in these circumstances would violate the most fundamental principles of due process. Plaintiffs have framed their alleged proprietary interest in the very terms—a denominational "trust"—that the Virginia courts have declared time and again

[104] Letter Op. 6, 12-13 (Aug. 19, 2008) (it is "black-letter constitutional law that the Contracts Clause has only a retrospective application"; "[i]t is a historical and legal fact that … Virginia law in effect in 1867 did not permit denominations such as the Episcopal Church or the Diocese of Virginia to acquire interests in property"); *id*. at 13 (in 1867, "denominations were … without a 'legal existence' in Virginia," and "[n]o 19th century Virginia case finds *any* denomination or diocese—entities that lacked legal standing and the ability to contract—to have had *any* enforceable interest in property" (quotations omitted)).

are invalid under the governing statutes. The CANA Congregations thus lacked any reason to believe that such claims might be legally cognizable, and if this Court were to enforce them, the Congregations would be deprived of their properties without reasonable notice, in violation of the Due Process Clause. *Connecticut v. Doehr*, 501 U.S. 1, 15 (1991) (attachment of property without prior notice or hearing violates due process); *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (government failure to afford reasonable notice of the kinds of conduct that will result in deprivations of liberty and property "violates the first essential of due process of law.").

III. Because TEC And The Diocese Lack Proprietary Interests In The Properties At Issue, Final Judgment Must Be Entered For The CANA Congregations.

As we have shown, plaintiffs are unable to carry their burden of establishing a proprietary interest under the *Norfolk-Green* framework. The CANA Congregations are therefore entitled to judgment. *Norfolk*, 214 Va. at 503; *Green*, 221 Va. at 555.

At trial, however, the Court asked that the parties brief the "additional question" of who constitutes the congregation, even if the Court "ultimately conclude[s] that the property does not in the first instance belong to [plaintiffs]." Tr. 1504:20-1505:4. Thus, we explain below why the CANA Congregations, and not the (sometimes hypothetical) and tiny minorities worshipping in accordance with plaintiffs' constitutions and canons, are the rightful congregational owners of that property. At the outset, however, we question the necessity of such an inquiry, because plaintiffs lack standing to raise this issue under *Norfolk* and *Green*. Nor can they circumvent the requirements of those cases by declaring the properties "abandoned" under their canons.

A. Absent a proprietary interest, plaintiffs lack standing to challenge the CANA Congregations' use or disposition of the properties at issue.

Under *Norfolk* and *Green*, "[i]f the [denomination] does have a proprietary interest in the [disputed] property," plaintiffs are "entitled to a permanent injunction against [its] conveyance" to other parties. *Norfolk*, 214 Va. at 503. "If, however, the [denomination] is unable to establish

a proprietary interest in the property, *it will have no standing to object to* [*any*] *property transfer*." *Id*. (emphasis added). Therefore, if (as we contend) TEC and the Diocese have failed to establish a proprietary interest under § 57-15, the inquiry stops there.

Nowhere in *Norfolk* or *Green* did the Court suggest that any additional questions had to be answered should the denomination be found to lack a proprietary interest. Indeed, in *Norfolk*, "the position of the Presbytery [was] that Grace Covenant Church, as a congregation, has otherwise ceased to exist; they don't exist anymore."[105] But the Court there specifically rejected the denomination's claim that the Court was constitutionally required to effectuate an ecclesiastical court's determination as to whether the congregation could disaffiliate with its property. *Norfolk*, 214 Va. at 503.

The denomination's insistence that it should determine who the true congregation was, and whether the property had been abandoned by that congregation under denominational rules, were viewed as irrelevant to the right of the congregation to sell the property. So too here. If plaintiffs cannot demonstrate a proprietary interest, they cannot object to the CANA Congregation's disaffiliation or subsequent use of the property. Indeed, if the plaintiffs cannot prove a proprietary interest, the Court has no jurisdiction to address the "additional question" of who constitutes the Congregation. *Andrews v. American Health & Life Ins. Co.*, 236 Va. 221, 226 (1988) ("Standing to maintain an action is a preliminary jurisdictional issue"). Judgment should therefore be entered on behalf of defendants.

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

B. The CANA Congregations are the rightful congregational owners of the properties at issue.

Should the Court reach the question of whether the CANA Congregations, as opposed to others who wish to worship in affiliation with plaintiffs, are the rightful owners of the properties at issue, that question should be resolved in the CANA Congregations' favor.

1. Before Va. Code § 57-15 was amended to refer to religious denominations,[106] the Virginia Supreme Court resolved property disputes between different factions of congregations and other voluntary associations by reference to the deeds. *E.g.*, *Davis*, 1886 WL 2979, at *5; *Finley*, 87 Va. at 107; *Boxwell v. Affleck*, 79 Va. 402 (1884); *Brooke v. Shacklett*, 54 Va. 301, 310-20 (1856); *Hoskinson v. Pusey*, 73 Va. 428, 431 (1879); *see also Heth v. Richmond, F. & P. R.. Co.*, 4 Gratt. 482, 1848 WL 2784, at *18 (Va. 1848) ("The *cestuis que trust* must claim the land by virtue of th[e] deed, or they have none"); *Johnston v. Zane's Trustees*, 1854 WL 3122, at *9 (Va. Aug. 26, 1854) (rejecting a claim because it was "utterly excluded by the very terms of the deeds"). Indeed, the Court in *Brooke* devoted six full pages of its opinion to a painstaking clause-by-clause analysis of "[t]he deed under consideration." *Id*. at 314-19. Thus, if plaintiffs cannot satisfy § 57-15's proprietary interest requirement, ownership turns on the deeds.

Once again, *Davis v. Mayo* is instructive. As noted (at 34-35), in that case two factions of a local chapter of an association both claimed rights under a deed granting property "for the use and benefit of the Springfield Division, No. 167, Sons of Temperance." 1886 WL 2979, at *2. One faction, led by Mayo, "claim[ed] to be acting as the Grand Worthy Patriarch of the Grand Division of Sons of Temperance of Virginia," "declar[ed] that the charter of the division had been revoked," and "organize[d] a Division of Sons of Temperance" called by the original name. *Id*. The other faction, comprising "a majority of the members of the old division,"

[106] *See Norfolk*, 214 Va. at 502 n.2 (discussing the history of amendments to the statute).

"changed the name of their division to 'Springfield Division, No. 167, *Independent* Sons of Temperance,'" and reelected the original entity's trustees as its own. *Id*. The Virginia Supreme Court ruled for the majority, holding that "[t]he property *was not conveyed upon condition that the beneficiaries in the deed should retain the then name of their division, or that they should associate themselves with, or become subject to, the orders and regulations of the Grand Division, or any other body; and, consequently, they were left free to change the name of their division whenever they might see fit to do so*." *Id*. at *5 (emphasis added). The same principle should govern here.

In *Finley*, by contrast, the Court sided with the minority faction of a Methodist Protestant congregation—a faction that had voted against reaffiliation with the Methodist Episcopal Church South (MECS)—because the deed conveyed the property "for the sole and exclusive use and benefit of religious congregations of regular orthodox Methodist Protestants" and "for no other use or purpose whatever." 87 Va. at 104. Following *Brooke*, *Hoskinson*, and *Boxwell*, the Court explained: "Who, then, are the *cestuis que trust* under the deed in question—the beneficiaries entitled to the trust estate? *Looking to the deed alone*, the answer would be those who are members of the congregation or local society, and, as such members of the Methodist Protestant Church." *Id*. at 107 (emphasis added). As the contrast between *Davis* and *Finley* confirms, absent deed language expressly limiting use of the property to worship according to specific denominational auspices, the majority of the congregation had full rights to the property. And only two of the deeds here even arguably contain language similar to that at issue in *Finley* and the cases it followed. *See supra* at 34 n.24.[107]

[107] *Cf. Brooke*, 54 Va. 302, 303 (conveying use of the property subject to three trust clauses: (1) requiring that the beneficiaries build "a house or place of worship for the use of the members of the Methodist Episcopal church in the United States of America, according to the rules and discipline which from time to time may be agreed upon and adopted by the ministers and preachers of the said church at their general conferences in the United States of America"; (2) requiring

2. Even before their incorporation, the CANA Congregations had a "separate and distinct" existence from plaintiffs under Virginia law. *E.g.*, PX-COM-0072-007 (Diocesan Journal reflecting admission of The Falls Church as a "separate and distinct Church from the Parish Church of Fairfax Parish"); Letter Op. 15-16 (Dec. 19, 2008) (finding that TFC was a "'separate and distinct church' … with its own vestry"). For example, they enjoyed the right to conduct lawful business, to sue and be sued, and to hold property by trustees.[108] Pursuant to majority vote, they routinely exercised authority over their properties under § 57-15.[109] And even apart from Title 57, the default rule under Virginia law is that unincorporated associations, like other entities having lawful authority to act, may operate by majority rule. Va. Code § 1-222 ("Majority authority. Whenever authority is conferred by law to three or more persons, a majority of such persons shall have the power to exercise such authority, unless otherwise provided."). And,

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the beneficiaries to "forever hereafter, permit such ministers and preachers belonging to said church [MEC] . . . to preach and expound God's holy word therein"; and (3) providing elaborate rules requiring the trustees to be "members of the [MEC] church," and directing that any surplus from any sale of the property be used to benefit the local society of MEC members); *id*. at 317 (analyzing which parties were beneficiaries "under the deed, and according to the rules and discipline therein referred to"); *Hoskinson*, 73 Va. at 431 ("The deed is the same in substance as the deed in *Brooke*"); *Boxwell*, 72 Va. 402 (same).

[108] Va. Code § 8.01-15 ("All unincorporated associations or orders may sue and be sued under the name by which they are commonly known and called, or under which they do business, and judgments and executions against any such association or order shall bind its real and personal property in like manner as if it were incorporated."). Indeed, both plaintiffs are unincorporated associations who have exercised the right to conduct business and to file suit.

[109] Apostles Exs. 56-59; PX-APOST-0311; Tr. 1810:12-1812:3, 1813:11-14, 1813:20-1814:11, 1816:4-10; DSTP-296 (St. Paul's never sought Diocese approval before purchasing property); DSTM-039-00153; PX-STMARG-0139-001 (grant of rights of way, easements, and sale of St. Margaret's rectory without diocesan approval); DCOE-520 (reflecting agreement regarding Epiphany's consideration to Diocese for acquisition of church property); DX-TRU205 (1908 Petition to sell real property); DX-TRU206 (1913 Petition to sell real property; DX-TRU005 (1921 deed reflecting petition filed); DX-TRU207.0001-0002 (1939 Order to sell property); DX-TRU212.0001 (1960 Petition to sell property); DX-TRU223a (2003 Petition to sell real property).

of course, the Diocese dealt with the Congregations as separate entities in a host of transactions, and in negotiation of the Protocol.[110]

Moreover, it is undisputed that the Diocese and TEC, unincorporated associations, lacked statutory authority to hold property in Virginia in the 19th century, leading the Diocese to complain to the General Assembly that "no Christian denomination is capable of taking and holding property of the smallest amount. They can neither take what is given nor acquire by purchase." DX-FALLS-0413-000002, 0413A-0001 [transcription]; Tr. 3546:11-20 (Curtis). The case law suggests that this state of affairs continued until the passage of Va. Code § 57-16, in 1942. *E.g.*, *Moore*, 169 Va. at 177-182 (discussing the historical evolution of Virginia statutory law on this issue and rejecting the argument "that subsequent amendments enlarged the term 'religious congregation' to include the whole denomination"), *see supra* n.3. It follows that, if the CANA Congregations affiliated with the Diocese for the first 150 years of its existence were not legally distinct entities with the rights over property, *no one* was authorized to control many of the properties at issue.

3. The Congregations' incorporation, prior to disaffiliation from plaintiffs, did not diminish their legal authority over the property, or result in the creation of two congregations—one incorporated and one unincorporated, the latter remaining affiliated with plaintiffs after the votes. Rather, as stated in representative articles of one of the Congregations, under the heading, "*Existing Unincorporated Association Being Incorporated*": "The name of *the existing unincorporated association that is being incorporated* hereby is The Falls Church, also known as The Falls Church (Episcopal), which was established as a church in the Commonwealth of Virginia

[110] PX-APOST-0319A; PX-APOST-320; DX-FALLS-0459 (Standstill Agreement); DSTP-511 - 516 (regarding temporary investment management by Diocese, and return to the congregation, of St. Paul's Cemetery Fund); DSTM-039-00097; Tr. 3944:3-13 (Diocese requested and subsequently declined to exercise right of first refusal as to St. Margaret's church property).

in A.D. 1732. Following its incorporation, the Corporation will also *continue to operate under and use, to the fullest extent permitted by applicable laws, the name 'The Falls Church'*, as it has done since A.D. 1757." DX-FALLS-356C-000004 (emphasis added).[111] From that point, the Congregations' authority was governed by their corporate articles, and nothing therein restricted their right to retain their property upon deciding, by majority vote, to disaffiliate from plaintiffs.[112]

The fact that the Congregations incorporated several months before disaffiliation does not diminish the validity of their decision to do so. There is no evidence that the incorporations were not duly approved; the Diocese did not prohibit incorporation or require approval of any governing documents; and of course churches could not incorporate before the *Falwell v. Miller* ruling. 203 F. Supp. 2d 624 (W.D. Va. 2002). Further, a private corporation may be created for the transaction of any lawful business or to conduct any legitimate object or purpose. *News-Register Co. v. Rockingham Pub. Co.*, 118 Va. 140 (1915) (two corporations could enter into a partnership, even though corporations lack power to enter into a partnership unless expressly authorized, because both corporations' charters were validly amended to authorize the partnership, the amendment did not authorize anything malum in se, or anything prohibited by the Virginia Constitution or statutes). And "[t]he sufficiency of the motive inducing incorporators to apply for a

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[111] *See also* Apostles Ex. 377; DCOE-498; DSTM-001; DSTP-0001; DSTS-001; DX-FALLS-0356B, 0356C; TRU290.

[112] *See* Va. Code § 8.01-279(B) (entity's allegation of ownership or control of property does not require proof unless contesting party submits affidavit putting ownership or control in issue); *see also* Va. Code § 57-16.1 ("Whenever the laws, rules, or ecclesiastic polity of an unincorporated church or religious body provide for it to create a corporation to hold, administer, and manage its real and personal property, such corporation shall have the power to (i) acquire by deed, devise, gift, purchase, or otherwise, any real or personal property for any purpose authorized and permitted by the laws, rules, or ecclesiastic polity of the church or body, and not prohibited by the law of the Commonwealth and (ii) hold, improve, mortgage, sell, and convey the same in accordance with such law, rules, and ecclesiastic polity, and in accordance with the law of the Commonwealth."). Va. Code § 57-16.1 does not require transference of property after incorporation.

certificate of incorporation is immaterial." 4B *Michie's Jurisprudence*, Corporations § 17, at 118 & n.16.

The South Carolina Supreme Court's decision in *All Saints*, which held that a parish validly disaffiliated from TEC by amending its corporate articles, is instructive. As the court there recognized, the legality of disaffiliation "turn[ed] on … whether the Articles of Amendment approved by [the local parish] were adopted in compliance with the South Carolina Non-Profit Act." *All Saints*, 685 S.E.2d at 174. Upon finding that the amendments were duly approved under that statute—and that "nothing in the [parish's] by-laws or the Constitutions and Canons of the ECUSA or Diocese requires third-party approval for amendments to the congregation's corporate charter"—the court unanimously held that "adoption of the Articles of Amendment complied with the requirements of [South Carolina law]" and "effectively severed the corporation's legal ties to [TEC] and the Diocese." *Id*. at 174-75; *id*. ("the members of the majority vestry" of the disaffiliated parish were "the true officers of All Saints Parish, Waccamaw, Inc."). So too here. *Accord From the Heart Ministries*, 803 A.2d at 568-69 (reversing grant of summary judgment to denomination and stating: although the "initial charter, by stating as part of its purpose, 'to engage in any other lawful activity in accordance with the Discipline of the African Methodist Episcopal Zion Church,' acknowledged From the Heart's affiliation with A.M.E. Zion" the local church "was permitted by [applicable corporate law] to … amend[] its charter to delete that reference and to expand its corporate powers"); *id*. at 569 (citing the local church's "amendment of its charter to remove any reference to the A.M.E. Zion church and to vest its trustees with even greater authority to control the property of the church" as "evidence that may be construed to suggest that [the local church] did not, in fact, consent to the trust provisions [in the denomination's constitution]").

4. At trial, plaintiffs asserted that the Congregations were "parishes," and that such entities were a creation of the Episcopal Church that could not disaffiliate or dissolve without the denomination's permission. Tr. 3195:9-13, 3197:3-11 (statement of Mr. Beers). This position cannot be squared with history or with plaintiffs' own canons, let alone secular law. As to history, Professor Mullin admitted that "the Constitution and Canons of the national Church do not define what a parish is," and "parishes existed before there was a General Convention of the Episcopal Church" and "before there was a Protestant Episcopal Diocese of Virginia." Tr. 1280:12-22, 1281:4-9. In fact, "it was parishes who came together to form the Diocese of Virginia, not the other way around," and the Church's canons "rely on a pre-existing definition" of the term. Tr. 1281:4-12 (Mullin); *see also* Tr. 1281:2-3 (Mullin) ("the definition of parish differs from Diocese to Diocese").[113] Nothing in the historical record indicates that the parishes that came together to form the Diocese, or those who later joined it, thereby gave up their existence as legally distinct entities.

As to canon law, plaintiffs' own canons disclaim the notion that the meaning of "parish" for internal ecclesiastical purposes has any bearing on the ownership of affiliated congregations' property. TEC Canon 13, entitled "Of Parishes and Congregations," does not define "parish," let alone state that such entities have a perpetual existence, without regard to the wishes of their members; it states only that "[e]very Congregation of this Church shall belong to the Church in the Diocese in which its place of worship is situated," and it goes on to leave determination of the establishment of new parishes and their boundaries to Diocesan discretion. PX-COM-0001-054 (TEC Canon 13, §§ 1-3). But whatever significance these rules have for internal purposes,

[113] As Plaintiffs' expert Professor Bond admitted, The Falls Church was one of the parishes that founded the Diocese (Tr. 1109:3-6), but there is no evidence that any of those parishes relinquished, delegated, or ceded their authority over property to the Diocese. Tr. 1010:13-1011:22 (Bond); Tr. 3500:15-3502:14, 3510:3-3511:22, 3520:13-3521:4 (Curtis).

the canon concludes as follows: "This Canon shall not affect the legal rights of property of any Parish or Congregation." PX-COM-0001-055 (Canon 13, § 3(c)). Thus, by plaintiffs' admission, the existence vel non of a parish for ecclesiastical purposes is irrelevant to whether the parish can disaffiliate and keep its property under civil law. *Cf. Episcopal Diocese of Rochester* v. *Harnish*, 899 N.E. 2d 920, 925 (N.Y. 2008) (declining to review the Diocese's extinction determination on the basis that it was a "non-reviewable ecclesiastical determination").

In sum, whether analyzed under the deeds, association law, corporate law, or canon law, the Congregations remained rightful owners of their property upon disaffiliating from plaintiffs.

C. TEC and the Diocese cannot unilaterally create ownership rights in the CANA Congregations' properties by declaring them "abandoned."

Unable to avoid these difficulties, plaintiffs resort to arguing that they acquired ownership of the CANA Congregations' properties by declaring the properties "abandoned" under their canons. But that view cannot be squared with the objective secular meaning of "abandoned," or with the undisputed facts—which confirm that the properties are occupied by vibrant congregations. Further, plaintiffs no more have standing to unilaterally declare property "abandoned" than they have standing to object to the Congregations' retention of their property after disaffiliation. The statutory language of abandonment is found in § 57-15(A), the very provision invoked by the denominations in *Norfolk* and *Green*. Accordingly, under *Norfolk* and *Green*, plaintiffs lack standing to declare property abandoned unless they can first establish a proprietary interest therein, *Brown*, 194 Va. at 913, and that is certainly so where ownership is disputed by a congregation occupying the premises.

No Virginia cases permit denominations to declare *contested* property "abandoned"; and if plaintiffs' position were the law, denominations could circumvent their burden of proving a proprietary interest in congregational property under *Norfolk* and *Green* simply by unilaterally declaring such property abandoned. That would be deference-to-hierarchy with a vengeance,

and it finds no support in Virginia law. *Contra Norfolk*, 214 Va. at 504 (rejecting a deference approach in favor of neutral principles of law).

1. We begin with the text of § 57-15(A). After the first paragraph of that section, which was at issue in *Norfolk* and *Green*, § 57-15(A) states that appropriate trustees may seek relief from the courts "[w]hen such religious congregation *has become extinct* or *has ceased to occupy such property* as a place of worship, *so that it may be regarded as abandoned property*." (Emphasis added.) *See also* Va. Code § 57-11 (using identical language). The statute thus provides an objective secular test for determining whether congregational property "may be regarded as abandoned"—whether "such religious congregation has become extinct or has ceased to occupy such property as a place of worship." It cannot be disputed that the CANA Congregations are not "extinct." http://www.merriam-webster.com/dictionary/extinct (defining "extinct" as "no longer active <an *extinct* volcano>" (definition 1b)); *Black's Law Dictionary* 664 (9th ed. 2009) (defining "extinct" as "[n]o longer in existence or use").[114] Nor have they "ceased to occupy [the] property as a place of worship." Indeed, plaintiffs' objection to the Congregations' continued use of their properties is what prompted plaintiffs' lawsuit. The court need go no fur-

[114] Tr. 3070:19-3071:2 (MacGowan); Tr. 2734-35 (J. Yates) (after disaffiliation, The Falls Church remained a healthy, lively congregation, as before the vote); Tr. 2464-68 (Deiss) (after the vote, everything continued just as before the vote); Tr. 2294:7-2295:16 (Epiphany has continued virtually unchanged since disaffiliation: "Anyone before that period coming in now would not recognize any difference."); Tr. 3965:13-3967:21 (Since the vote, except for an expansion of mission activities, a reduction in vestry size and the elimination of one poorly attended worship service, St. Margaret's has made no changes in its governance, worship, liturgy, vestments, adult education, mission, staff or other church operations); Tr. 1933:12-21; Tr. 1935; Tr. 1936:14-22; Tr. 1937:5-11 (Except for a larger staff, St. Paul's liturgy, music, vestments, education curriculum, outreach, mission, governance and church operations are virtually unchanged since the vote); Tr. 3738:15-3739; 3720:1:15 (Since the vote, except for minor corrections to bylaws, three more Bible study groups, and a sizeable increase in the congregation's operating budget, St. Stephen's has made no changes to its method of electing vestry, worship, liturgy, vestments, adult education, outreach, mission, congregation size, staff or other church operations).

ther to resolve the issue of abandonment, which must be proved by "clear and convincing evidence." *See School Bd. of Scott County v. Dowell*, 190 Va. 676, 685 (1950).[115]

2. The structure of § 57-15 and Virginia Supreme Court precedent further confirm that plaintiffs may not unilaterally declare congregational properties abandoned. The language of "abandoned property" that plaintiffs must satisfy is found in the very same provision of the Virginia Code that was at issue in *Norfolk* and *Green*. And as the Court there held, "[i]f … [the denomination] is unable to establish a proprietary interest in the property, it will have no standing to object to the property transfer." *Norfolk*, 214 Va. at 503 (citing *Brown*, 194 Va. at 909); *accord Green*, 221 Va. at 555.

There is no reason to think that a denomination has greater rights to declare property abandoned under the second paragraph of § 57-15(A) than to prevent a property transfer under its first paragraph. In fact, the case *Norfolk* cited as support for the proposition that the denomi-

[115] Other aspects of the text confirm that the General Assembly was focused on whether anyone who has traditionally used the property still exists. *See* Va. Code § 57-15(A) (stating that "the petition may be filed either by the *surviving* trustee or trustees, *should there be any*, or by any one or more members of such congregation, *should there be any*") (emphasis added). Moreover, Virginia precedent involving abandonment in other contexts confirms that the standard cannot be met here. *Compare Dowell*, 190 Va. at 684-86 (finding a school abandoned where: "[t]he overall picture and the conduct of the school board definitely tends to lead one to the conclusion that the property will not be used for school purposes in the future"; the board voluntarily relinquished possession with an intent to end ownership; the property was unoccupied for two years and fell into disrepair; the would-be owner repaired, remodeled, and improved the property at great personal expense and with notice to and without protest from the school board; and the deed vested the school's trustees with only "a base, qualified or terminable fee," such that the property could revert to the prior owner upon abandonment for school purposes), *with Roadcap v. County School Bd. of Rockingham County*, 194 Va. 201, 203, 206 (1952) (not reaching the issue of abandonment under a deed providing that "if the public free school system now in force in Virginia ever becomes extinct, then the lot" would pass to certain named trustees to "hold the said property in trust for neighborhood school purposes," because the grantors failed to include in "the premises or granting clause such words as 'as long as said land is used as a location for a public school' or 'until a failure to provide public school facilities thereon' or 'while the said lot is used as a public school location.' . . . [T]he mere declaration of the use to which the granted premises are to be applied does not ordinarily import a condition or limitation, but only in cases in which a reverter or forfeiture is expressly provided and in cases to which the intent to create a grant on condition or limitation is plain is the grant held to be one on condition or limitation.").

nation's standing depends on whether it can establish a proprietary interest (*Brown*) involved a challenge to the razing of an abandoned church building. The Court did not hold that the denomination had a vested right to control the physically abandoned property. Indeed, the plaintiffs lost their claim for monetary damages from the denomination only because they "neither alleged nor proved that they constituted the congregation." *Brown*, 194 Va. at 913. The implication was that if the plaintiffs could have established that they represented the congregation, their rights would have been superior to the denomination's. *Id*. Thus, religious denominations must have a proprietary interest in congregational property before declaring it abandoned under § 57-15. And as we have shown, they have failed to carry their burden of proving such an interest.

3. Finally, we urge the Court to consider the implications of plaintiffs' position on abandonment. If Virginia law permitted denominations to declare congregational property abandoned without regard to its actual physical occupancy by a congregation, they could easily do an end-run on their burdens under *Norfolk* and *Green*. All that would be necessary to establish ownership would be a duly passed declaration. There would be no need to consider the governing statutory framework, the deeds, or the denomination's constitution. Such a rule would effectively convert Virginia to a deference-to-hierarchy state—a position the Virginia Supreme Court has explicitly rejected. *Norfolk*, 214 Va. at 504. Thus, plaintiffs' abandonment theory should likewise be rejected.

IV. If TEC And The Diocese Are Given Title To, And Possession Of, The CANA Congregations' Properties, They Must Compensate The CANA Congregations For The Congregation's Contributions To The Properties.

In *Norfolk* and *Green*, the denomination sought a declaration that it had a proprietary or contractual interest in the congregation's property that could not be eliminated through the unilateral action of the congregation. Here, by contrast, plaintiffs do not merely seek a declaration that they have an interest in the CANA Congregations' properties; rather, they ask the Court to

restrain the Congregations from further use of their properties and to order the Congregations and their trustees to convey control of the properties to the Bishop. *See* Diocese Compl., at 12. In short, they seek to extinguish all interests of the Congregations in the properties and to evict them from the premises. Yet plaintiffs have not explained how, even if they succeeded in unilaterally asserting additional beneficial interests in the properties at issue, that extinguished the undisputed prior beneficial interests of the Congregations.

Plaintiffs say their canons entitle them to ownership and possession of the CANA Congregations' properties as a matter of equity rather than law. Indeed, they have disclaimed seeking any legal remedy. "The Diocese and the Church are seeking equitable relief—an order decreeing their trust, proprietary and contractual interests and restraining further interference with their use of the property—precisely because they have no adequate remedy at law." Pl. Memo. Regarding Jury Trial and Scheduling Issues at 5 (filed Nov. 24, 2010).

Having invoked equity, plaintiffs must accept the principle that even if this Court found plaintiffs to have a proprietary interest in the CANA Congregations' properties, the Court would have discretion in fashioning the final relief to be awarded. The Court's equitable powers include the ability to give the CANA Congregations the relief sought in their counterclaims—to compensate them for their contributions to the properties whose ownership plaintiffs seeks.

First, Virginia trial courts are accorded wide leeway in fashioning equitable relief. "The court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties." *Turner's Adm'r v. Citizens' Bank Of Norfolk*, 111 Va. 184 (1910). "In the administration of remedies, an equity court is not bound by the strict rules of the common law, but adapts its relief and molds its decrees to satisfy the requirements of the case. The absence of precedents, or novelty in incident, presents no obstacle to the exercise of its jurisdiction." *Roanoke Engineering Sales Co., Inc. v. Rosen-*

baum, 223 Va. 548, 556 (1982) (allowing prospective enforcement of covenant despite lack of Virginia precedent on point).

Second, a court's discretion in equity includes ensuring that a remedy does not unjustly enrich one party at the expense of another. *Richardson v. Richardson*, 242 Va. 242, 246-47 (1991) (imposing constructive trust to prevent unjust enrichment of party if he were allowed to retain title to land); *Ricks v. Sumler*, 179 Va. 571, 577 (1942) ("It is a general rule of law that he who gains the labor or acquires the property of another must make reasonable compensation for the same."). For example, the Virginia Supreme Court recently affirmed the proposition that a joint tenant who improves property is entitled to compensation for the improvements from the other joint tenants. *De Benveniste v. Aaron Christensen Family, LP*, 278 Va. 317, 323 (2009). As the Court explained, this rule "is founded on the desire of the court to do justice and to prevent unjust enrichment of one cotenant at the expense of the other." *Id*.

In this case, granting plaintiffs ownership and possession of the CANA Congregations' property would unjustly enrich them if the CANA Congregations were not compensated for the amounts they spent in acquiring, improving, and maintaining their property.[116] As the evidence at trial demonstrated, the CANA Congregations acquired the vast bulk of their land without any assistance from plaintiffs. In most cases, the Congregations purchased the land from third parties in arms-length transactions or received parcels as gifts or bequests from members of the Congregations.[117] In the case of Apostles, the congregation bought its first parcel of land from the Dio-

[116] While in all cases the acquisition, improvement and maintenance costs exceed the value of the properties, the CANA Congregations agreed earlier this year to limit their claim to the fair market value of the property. This stipulation was reflected in a February 8, 2011 agreed order.

[117] *See* Apostles Exs. 33 – 35; DSTM-005; DSTP-293 – 297; DSTS-005 – 012; DX-FALLS-0001 – 0012; TRU001, TRU002, TRU006 – TRU012, TRU015; PX-TRU-0515.

cese, but not at any discount.[118] Indeed, Apostles agreed to pay approximately $12,000 for a parcel that the Diocese itself had described as unsuitable for a church site (being next to an oil tank farm) because the Diocese was in financial distress. PX-APOST-0289-003 (discussing unsuitability of parcel); Tr. 3072:1-3073:16 (MacGowan); PX-APOST-306; PX-APOST-321; PX-COM-0207-042. With respect to Epiphany, an arm of the Diocese gave land to Epiphany, but in return Epiphany had to agree to fund future Diocesan missions. DCOE-497; DCOE-520.

Consistent with their lack of help in acquiring the land, TEC and the Diocese typically contributed nothing towards its improvement. It was left to each Congregation to plan, oversee, and fund the construction and expansion of sanctuaries, classrooms, and offices. For example, the Falls Church spent $15,900,000 from 1950 to 2010 for capital improvements to its property, with no assistance from plaintiffs. Tr. 2523-25. Apostles spent $2.9 million to build and later expand its Meeting Place, on both occasions without financial help from plaintiffs. Tr. 3346:8-18 (Rooney); Apostles Ex. 134A. Epiphany spent $7.9 million to build and expand its building, which the Diocese assisted by making a $500,000 *loan*—at market rates (DCOE Ex. 483-02568, -02570; Tr. 2341:18-22; Tr. 2080:1-22; Tr. 715:8-16). St. Margaret's has expended some $3.8 million acquiring and improving its property (DSTM Exs. 75, 197, 336, 39-00266-68, 390-00263, 520, 521, 559, 562; Tr. 3901:12-21; Tr. 3902:18-22; Tr. 3904:16-17; Tr. 3905:2-9; Tr. 3912:10-3913:11; Tr. 3916:12-16; Tr. 3926:15-17). St. Paul's has expended some $287,825 acquiring and improving its property (DSTP Exs. 9-00671, 12-01406, 295, 296, 297, 297A, 355A, 460-06090; Tr. 1802:2-15; Tr. 1806:13-19; Tr. 1810:12-1812:3-11; Tr. 1813:20-1814:1; Tr. 1817:17-1818:3; Tr. 1820:16-22; Tr. 2128:16-19; Tr. 2129:21-2130:8). St. Stephen's has expended some $764,353 acquiring and improving its property (DSTS Exs. 5, ¶¶3-5, 6, 7, 12, 53,

[118] Apostles later purchased land on Braddock Road for $2.9 million using solely its own funds. Apostles Ex. 134A

92; PX-SSH-17; PX-SSH-0097b; PX-SSH-0117; Tr. 3674:18-3675:3; Tr. 3676:11-15; Tr. 3677:6-3678:1; Tr. 3678:10-3679:1; Tr. 3681:19-3682:3; Tr. 3282:18-3683:1; Tr. 3683:5-11; Tr. 3684:10-13; Tr. 3686:1-13; Tr. 3695:14-3696:20).

Nor have plaintiffs funded any material part of the maintenance of the CANA Congregations' properties. From 1950 through 2010, The Falls Church spent $8,135,000 on maintenance of its property, again without any help from plaintiffs. Tr. 5/18/11 at 2518-22; DX-FALLS-0073A. Truro likewise spent millions of dollars on maintenance in a similar time period, also without the benefit of any assistance from the Diocese or TEC. In an even shorter time frame, from 1999 though 2010, Apostles spent more than $2 million of its own money on maintenance. Apostles Ex. 134A. Between 1988 and to 2010, expressed in 2010 dollars, Church of the Epiphany expended $4.8 million in ownership costs, including mortgage interest. DCOE-030; DX-FALLS Ex. 73A. From 1968 through 2010, St. Margaret's expended $3.16 million in 2010 dollars on ownership costs. DSTM-069, 560; DX-FALLS Ex. 73A. Between 1967 and 2010, St. Paul's expended $741,721 in ownership costs expressed in 2010 dollars. DSTP-355A, 371A, DX-FALLS Ex. 73A. Between 1942 and 2010, St. Stephen's expended $634,279 in ownership costs expressed in 2010 dollars. DSTS-054, 055; DX-FALLS Ex. 73A.

The most the Diocese can muster is that it provided some financial support to a few of the older Congregations in the late 19th and early 20th century. Professor Bond made much of this support in his direct testimony, but failed to actually identify the amounts involved. Tr. 1088-89. Cross-examination showed those amounts to be modest, if not immaterial. For example, the Bruce Fund gave Truro a one-time grant of $100 in 1873. Tr. 1089. St. Paul's received a similar amount, while The Falls Church was the recipient of $125 or $150. Tr. 1089-190. The Falls Church received another $125 during the 1890s from the Piedmont Convocation and unspecified amounts from the Diocesan Missionary Society, but those amounts were partly, if not totally,

offset by amounts that The Falls Church donated to the Piedmont Convocation. Tr. 1092. Indeed, plaintiffs' expert never investigated whether the total amount received by St. Paul's, Truro, St. Stephens, and The Falls Church to the Piedmont Convocation, Diocesan Missionary Society, and national campaign exceeded the amounts the four congregations contributed by those congregations. Tr. 1092-96.

In short, the evidence at trial was overwhelming that the total value of the property in dispute is attributable solely to the financial contributions of the CANA Congregations. That value is not insignificant—the total value of the real property that plaintiffs seek to have forcibly transferred to the Bishop is more than $60 million:

Congregation	**Appraised Fair Market Value**
The Falls Church	$26.5 million
Truro	$14.7 million
Epiphany	$9.5 million
St. Margaret's	$5.9 million
Apostles	$5.1 million
St. Paul's	$2.0 million
St. Stephens	$1.2 million
Total	**$64.9 million**

Under these circumstances, if plaintiffs are given the relief they seek, the only equitable result is to direct them to compensate CANA Congregations for their property contributions. That amount should be equal to the fair market value of the property. Alternatively, the court should impose a constructive trust against the properties to ensure payment of those amounts should ownership be vested in plaintiffs.

The same result is warranted for the CANA Congregation's personal property. As shown at trial, all funds used to acquire tangible personal property came from members of the Congre-

gations and not from plaintiffs.[119] The members also provided the funds for the Congregations' bank and investment accounts. Giving plaintiffs ownership of the personal property would essentially confer on them a windfall of more than $10 million, broken out as follows:

Congregation	**Amount of Personal Property/Bank and Investment Funds**
The Falls Church	$4.9 million
Apostles	$1.7 million
Epiphany	$1.2 million
Truro	$1.0 million
St. Paul's	$.6 million
St. Stephens	$.6 million
St. Margaret's	$.4 million
Total	**$10.4 million**

In the case of the bank accounts, awarding plaintiffs ownership of any portion of the accounts would be especially inequitable. As explained at trial, all of the CANA Congregations curtailed or terminated their donations to the Diocese in response to the actions of the denomination at its 2003 General Convention.[120] Each Congregation then either (1) asked individual members to designate whether a portion of their donations should be earmarked for the Diocese, (2) recommended that members contribute directly to the Diocese, or (3) determined through the vestry to curtail the congregation's contributions to the Diocese. By the time each Congregation voted to disaffiliate in 2006 or early 2007, any funds in the Congregation's bank accounts consisted of funds contributed after the curtailment of donations and by members who had expressed

[119] *See, e.g.,* Tr. 3338:22-3339:14 (Rooney); PX-DEP-030-0053 – 0054, 0074 – 0075 (Designation of Dep. Of Philip J. Rooney 53:16-54:16, 74:16-75:14 (March 15, 2011)).

[120] *See, e.g.,* Tr. 435-36 (Tucker) (St. Margaret's congregation was offered the opportunity to designate that no portion of their tithe go to the Diocese); Tr. 1482 (Fetsch) (The Falls Church congregation stopped giving money to the Diocese from 2003 to 2006); Tr. 1546-48 (Julienne) (Truro established a "Truro only" fund after 2003); Tr. 3316-20 (Rooney) (Apostles ceased giving to the Diocese entirely); Tr. 2297:8-15, 2379:4-2382:22, 3980:13-3981:11 (Epiphany); DCOE-041, DCOE-524; Tr. 4112:20-4113:4, 3980:13-3981:11 (St. Margaret's); Tr. 1878:1-18, Tr. 1880:14-15 (St. Paul's), DSTP-354; Tr. 3698:10-3699:1 (St. Stephen's).

a desire that their money *not* go to the Diocese. Under these circumstances, granting plaintiffs ownership of the bank accounts would not only confer a windfall on plaintiffs; it would also dishonor the donors' express desire that their money *not* go to the denomination.

CONCLUSION

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

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