V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

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

CANA CONGREGATIONS'
POST-TRIAL REPLY BRIEF

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INTRODUCTION

Aware that their claims cannot withstand scrutiny under neutral principles of law, TEC and the Diocese now argue that hierarchical churches are immune from such principles. According to them, our interpretation of the law "erroneously assumes … that traditional contract principles apply to hierarchical organizations like the Church." Br. 41. As the Virginia Supreme Court held in *Norfolk*, however, "'neutral principles of law'" are principles "'developed for use in *all* property disputes.'" 214 Va. at 504 (emphasis added); *accord Jones*, 443 U.S. at 603 ("neutral principles" are "objective, well-established concepts of trust and property law familiar to lawyers and judges"). Further, both *Norfolk* and *Green* explained that courts deciding church property disputes must consider "the language of the deeds and the constitution of the general church … in the application of neutral principles of law." *Green*, 221 Va. at 555 (quoting *Norfolk*, 214 Va. at 507). *Norfolk* and *Green* were among the cases cited by the Supreme Court in remanding this case to be "resolve[d] … under principles of real property and contract law." *Truro Church*, 280 Va. at 29. And as the record reflects, other Virginia denominations—in contrast to TEC and the Diocese—routinely take steps to conform with those principles by insisting on appropriate language in the deeds or the governing documents of the congregation.

Once it is understood that a neutral-principles analysis requires consideration of ordinary principles of contract, property, trust, and associations law, it is evident that judgment must be entered for the CANA Congregations. For example, TEC and the Diocese do not deny that their canons—the centerpiece of their case—may not be enforced against the denomination. CANA Opening Br. 58-63. According to the undisputed Rule 4:5(b)(6) testimony of TEC's chief legal officer, only the denomination has a right to enforce the canons; "an individual parish" does not —it can only seek to *change* them "at the ballot box," and even if successful it would lack any remedy for breach. DX-CANA2011-0009-00029. The notion of such a one-way contract is for-

eign to contract law. "[T]here 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 896. Indeed, plaintiffs cite no case holding that an association—religious or secular—may enforce rules against members who lack any comparable right. Nothing in *Green* suggested that this was valid, and such a theory has no purchase under Virginia law.

TEC and the Diocese likewise discount *Gillman*, suggesting that it resolved "[n]o similar issue" because it involved "a condominium association." Br. 9, 10, 93. Yet it was *they* who first invoked *Gillman*, citing it in a section entitled: "Virginia authority addressing church property disputes under neutral principles of law." Br. in Opp. to Demurrers 8, 12 (filed July 13, 2007). That *Gillman* involved a condominium association did not deter plaintiffs from citing it as the leading case holding that "a voluntary association's constitution" is "a contract between the association and its members." *Id*. at 12. To be sure, they have since stopped citing it. But the cases they invoke today confirm *Gillman*'s central tenet—that the "rules and regulations" of an "unincorporated voluntary association" may not "transgress the bounds of reason, common sense, or fairness, nor contravene public policy or the laws of the land." *Bhd. of Locomotive Eng'rs v. Folkes*, 201 Va. 49, 58 (1959) (Br. 31 n.25). Thus, there can be no question that the powers of TEC and the Diocese are "limited by general law." *Gillman*, 223 Va. at 763.

Plaintiffs' rules purport to transfer beneficial ownership of all real and personal property of member congregations, regardless of who holds title or paid for the property. But as *Gillman* confirms—post-*Green*—the governing statute must expressly *authorize* rules that "encumber[]" property, and even then courts will apply a "test of reasonableness to determine the[ir] validity." *Id*. at 763-65, 767. Rules that work a "forfeiture" fail that test. *Id*. at 763. Moreover, the notion that the legality of the association's rules is governed by "'deference" to its "documents"—or by

respect for an "autonomous," "'self-governing community'" or "democracy," "exercised in accordance with the private consensus of the unit owners"—has been roundly rejected. *Id*. at 762-63, 766. Remarkably, however, TEC and the Diocese assert that affiliated congregations have no more right to object to the canons than to object to being "bound by the laws of the United States and the Commonwealth by virtue of our representative form of government." Br. 7; *see also id*. ("the absence of congregational votes to 'assent' to or 'ratify' the canons of the Church is immaterial" (citation omitted)). That is not the law. TEC is not "a law unto itself" (*Smith*, 494 U.S. at 890), and courts deciding church property cases under neutral principles need not "defer to the resolution of an authoritative tribunal of the hierarchical church," or to its "'laws and regulations.'" *Jones*, 443 U.S. at 597, 609. Indeed, the Virginia Supreme Court has expressly rejected the rejected the view "that those who unite themselves with a hierarchical church do so with an implied consent to its government." *Norfolk*, 214 Va. at 504.

TEC and the Diocese are similarly dismissive of neutral principles of "real property" law. *Truro Church*, 280 Va. at 29. Unable to distinguish longstanding precedent holding that, absent express language to the contrary, a title holder may change the use of its property and reaffiliate with another entity, plaintiffs say our citation of this body of law "attempt[s] to evade the issue … as articulated in *Green* and *Norfolk*." Br. 27. Contrary to plaintiffs' assertion, however, *every* Virginia case that grants property to a denomination relies on deed language restricting use of the local property to those worshipping in affiliation with the denomination. In *Green*, for example, "[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. *Wyckoff* and *Burhman* involved

similar deed language,[1] as did prior cases in which property was granted to the minority wing of a congregation. *E.g.*, *Finley*, 87 Va. at 104; *Hoskinson*, 73 Va. at 431.

If this Court were to rule for plaintiffs in the absence of any such deed language, it would be the first court in Virginia to do so. Despite plaintiffs' urging, there is no justification to imply restrictions into the deeds here. As Virginia deeds involving congregations across the denominational spectrum confirm, "it would have been easy" to restrict the properties here to worship in affiliation with plaintiffs, had the grantors here intended to do so. *See Scott*, 274 Va. at 218. But so long as "property [i]s not conveyed upon condition that the beneficiaries in the deed should retain the then name of their [association], or that they should associate themselves with, or become subject to, the orders and regulations of the [general association]," local affiliates of general associations may disaffiliate with their property. *Davis*, 82 Va. at 105.

When it comes to statutory and trust law, plaintiffs again invoke § 57-7.1. They now address its language that "this act is declaratory of existing law" (1993 Acts., ch. 370), arguing that it merely "signals a clarification … that the prior statute was incorrectly limited." Br. 66. As plaintiffs more candidly stated in their opening briefs, however, "[b]efore 1993, Virginia statutes did not validate trusts for general churches." Diocese Br. 39; *accord* TEC Br. 36. They were right the first time, as their later argument depends upon the untenable view that a statute passed

[1] *See Wyckoff*, Slip Op. 2-3 (involving a 1847 deed that conveyed land "to erect a new brick church for the use and benefit of the Protestant Episcopal Church," "upon this special trust and this special confidence, however, that they the said (grantees) … shall and will forever have and hold the said piece or parcel of land with all the improvements and appurtenances thereunto belonging for the use and benefit of the Protestant Episcopal Church as they the said (grantees) … shall deem most likely to promote the interest of the said church" and an 1860 deed that conveyed land "for the same use and for the same purposes and upon the same conditions and upon the same trusts" as set forth in the 1847 deed); Apostles Ex. 298.0003 (*Buhrman* Complaint ¶ 6) (deed language restricting the property to "use[] as a place of worship by the Episcopal Congregation of Clifton Forge Parish"); *see* CANA Opp. 67-68 (discussing *Wyckoff*); CANA Opp. 19-20 (discussing *Buhrman*).

to declare "existing law" in fact "clarified" that 14 Supreme Court decisions were wrong.

In any event, it would make no difference if § 57-7.1 applied. Under black-letter rules of trust law that plaintiffs recognize, only those with title may create a trust in property. *E.g.*, *Leonard*, 221 Va. at 588; *All Saints*, 685 S.E.2d at 174. Here, however, plaintiffs admittedly are not "named as a grantee as such in any of [the deeds]." Tr. 31:13-16. They assert the right to declare a trust in property by passing canons, where no one has conveyed an interest to them and no deed reflects the alleged trust. That assertion of authority cannot be squared with neutral principles of Virginia trust law.

Notwithstanding their desire to avoid rigorous application of neutral principles, plaintiffs do not hesitate to invoke such principles when they believe it would be to their advantage. *E.g.*, Br. 9, 31 n.25, 39, 79-80, 92 (invoking the law of voluntary associations). When faced with unfavorable law, however, plaintiffs either insist that such law may not be applied to a "hierarchical" church or complain that the particular rule they dislike was not discussed in *Green*.[2]

Unfortunately for plaintiffs, however, whether they are "hierarchical" is irrelevant under a neutral principles analysis. The denominations in *Norfolk*, *Green*, and *Jones* were "hierarchical," but that received no special weight in the Court's decisions. *Norfolk*, 214 Va. at 504; *Green*, 221 Va. at 549; *Jones*, 443 U.S. at 597. Nor is there any basis to plaintiffs' suggestion that, if *Green* or *Norfolk* did not discuss a particular limitation of contract or property law, then it does not apply. The CANA Congregations are not barred from raising arguments not raised (let alone not rejected) in *Norfolk* and *Green*. They are free to raise any argument based on "real

[2] *E.g.*, Br. 41 ("traditional contract principles" do not "apply to hierarchical organizations like the Church"); *id*. at 27 (criticizing our arguments concerning "restrictive covenants" on the basis that they were not articulated in *Green*); *id*. at 38 ("the Congregations erroneously assume that conventional contract law principles apply to the types of contractual interests identified in *Norfolk Presbytery* and *Green*"); *id*. at 39 n.31 (responding to our showing that mutual assent is lacking here by arguing that "[t]he Supreme Court did not conduct any such inquiry in *Green*").

property and contract law" that is supported by *this* record. *Truro Church*, 280 Va. at 29. And, as demonstrated below, consideration of the record here—which, after a seven-week trial, looks quite different from the record in those cases—requires entry of judgment for the Congregations.

ARGUMENT

I. TEC And The Diocese Have Not Carried Their Burden Under *Norfolk* And *Green*, Which Require Rigorous Analysis Of Each Factor Set Forth In Those Decisions In Light Of Neutral Principles Of Real Property And Contract Law.

As demonstrated in our prior briefs, analysis of each *Norfolk-Green* factor confirms that the CANA Congregations are entitled to judgment. Plaintiffs have failed to make their case under any Virginia statute (a point they all but admit). The deeds overwhelmingly favor the Congregations. Plaintiffs' constitutions do not address property ownership, and their canons are not enforceable for a host of reasons, including their lack of a mutual remedy and the fact that they assert a denominational trust. Moreover, the course of dealing between the parties, to the extent even relevant here, powerfully shows that the Congregations alone exercised dominion over the property—withholding financial support from the Diocese and excluding others, including diocesan officials, from their property at their discretion. Indeed, as this Court has held concerning one of the CANA Congregations—in language applicable to the others—"it is the … vestry that … 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) (discussion of The Falls Church's 2-acre parcel) (not appealed).

Faced with compelling adverse evidence on each factor listed in *Norfolk* and *Green*, TEC and the Diocese urge the Court not to look closely at any given factor. Citing an excerpt from a passage from *Green* in which the Court summarized the various factors in its analysis (221 Va. at

555),[3] plaintiffs say the Court there "did not examine the four elements in isolation from one another"—that the "analytical method" of "address[ing] separately each of the four elements of 'neutral principles'" is "contrary to" *Green*. Br. 1. By their lights, *Norfolk* and *Green* permit them to present a "tapestry of facts" that, while not sufficient to satisfy any particular *Norfolk-Green* factor, together creates a whole that somehow is greater than the sum of its parts. Br. 4.

Plaintiffs prefer "pointillism" (*id.*) because it avoids the realism of a rigorous analysis of each factor, under which their arguments cannot withstand scrutiny. But nothing in *Green* suggests that a denomination need only satisfy one of the factors identified by the Court, or that a showing that is insufficient as to each individual factor can add up to a preponderance of the overall evidence. If only one factor need be satisfied, the Court there could have stopped its inquiry after concluding that the deed was the genesis of the contractual obligation. 221 Va. at 556. Instead, the Court addressed each of the various factors—analyzing § 57-15, discussing the deed in eight places, and considering the "course of dealing" because the denomination's "constitution" specifically provided that such dealing evidenced the congregation's consent to be governed by a proprietary interest. 221 Va. at 553-556. Indeed, insofar as the denomination in *Green* was found to have satisfied every factor (*id*. at 555-56), *Green* does not govern a case where (as here) the opposite is true, or even a case in which the factors conflict. In any event, plaintiffs' effort to avoid the rigors of *Norfolk* and *Green*—under which they bear "the burden of proving a violation by the [congregation] of either 'the express language of the deeds or a contractual obligation to the general church'" (*Green*, 221 Va. at 555 (quoting *Norfolk*, 214 Va. at 507))—should be rejected.

[3] Plaintiffs' quotation (Br. 1) omits from this passage one of the *Green* factors—Virginia's "own statutes." 221 Va. at 555.

A. As TEC and the Diocese all but admit, their assertion of proprietary rights in the CANA Congregations' properties lacks any basis in Virginia's statutes.

We begin with a simple point that merits emphasis: Plaintiffs rely on the means of establishing a proprietary interest that is most clearly unlawful in Virginia. CANA Opening Br. 14-16. Their canons rest on their unilateral assertion of a denominational trust—a concept that both 14 Virginia Supreme Court rulings and black-letter principles of trust law render facially invalid. Indeed, the Dennis Canon was adopted just five years after the Supreme Court reiterated this rule in *Norfolk*, and Diocese Canon 15.1 was adopted just three years after the Court reaffirmed it in *Green*. Plaintiffs' efforts to avoid this difficulty are unconvincing.

1. Va. Code §57-7.1

a. Denominational trusts remain invalid in Virginia.

TEC and the Diocese principally seek support for a unilateral denominational trust in Va. Code § 57-7.1, suggesting that our reading thereof "refuse[s] to come to grips with [§ 57-7.1's] plain language," which refers to "church diocese[s]." Br. 65. But the prior statute, § 57-7, likewise used the term "diocese," and plaintiffs continue to ignore *Norfolk*'s holding that certain church property could be held in trust for dioceses even *before* § 57-7.1 was adopted. 214 Va. at 506-07 & n.3 (discussing § 57-7); *see* CANA Opp. 11; CANA Opening Br. 15 & n.5. Thus, § 57-7.1's reference to "dioceses" does not signal an expansion of the statute—especially given that "th[e] act is declaratory of existing law." 1993 Acts., ch. 370.

Plaintiffs no longer ignore the "declaratory of existing law" language. Instead, they now say this language is "ambiguous" and merely "signals a clarification … that the prior statute was incorrectly limited." Br. 66. That view is untenable. As plaintiffs earlier observed, "[b]efore 1993, Virginia statutes did not validate trusts for general churches." Diocese Br. 39; *accord* TEC Br. 36 (adopting the Diocese's argument); TEC Br. 2 (discussing *Norfolk* and the "then-existing

bar on denominational trusts"); TEC Br. 25 n.3 ("the law has since changed"). By their own admission, therefore, "clarifying" the law would simply have confirmed that denominational trusts were *invalid*.

Even apart from plaintiffs' more candid earlier statements, however, a legislature does not "clarify" that ***14*** Supreme Court decisions are "incorrect" by use of language stating that a statute is "declaratory of existing law." The "existing law" that the General Assembly here was "declaring" was not plagued by ambiguity.[4] Not surprisingly, the only support that plaintiffs cite for their novel reading of this language is a situation in which the General Assembly was responding to *one* intermediate appellate court decision. Br. 66 (discussing a statute enacted "to clarify the law in the light of *Lee v. Lee*, 12 Va. App. 512 (1991)"). Given the extensive body of precedent at issue here, by contrast, any reading of § 57-7.1 that validated denominational trusts could only be viewed as *changing* existing law, not *declaring* or *clarifying* it.

Plaintiffs suggest that reading § 57-7.1 to preserve a bar on denominational trusts would reflect "hostility" to religious denominations. Br. 12. But they ignore our explanation (CANA Opp. 13-14) that there are several valid reasons for Virginia's rule. It promotes clarity of beneficial title, decreases the risk of disputes among different classes of beneficiaries, ensures that third parties dealing with the property may rely on the terms of the deed without regard to unrecorded documents, and recognizes a presumption of ownership at the level that typically provides fund-

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[4] *E.g.*, *Norfolk*, 214 Va. at 505 ("By decisions for many years we have held that a trust for indefinite beneficiaries, if the named trustee is an individual or unincorporated body, is invalid unless expressly validated by statute."); *id.* at 506-07 ("The 1962 amendment to § 57-1, Acts 1962, c. 516, broadened the scope of religious trusts to include property conveyed or devised for the use or benefit of a church diocese for certain residential purposes. The General Assembly has not gone beyond this, however, to validate trusts for a general hierarchical church and such trusts would be invalid" (citing *Brooke* and *Hoskinson*); *id.* at 507 ("express trusts for supercongregational churches are invalid under Virginia law"); *Green*, 221 Va. at 555 (same); CANA Opp. 10.

ing to purchase the property and the labor to improve and maintain it. Letter Op. on Constitutionality of Va. Code § 57-9(A) at 46-47 (June 27, 2008). The bar on denominational trusts thus serves secular and neutral objectives, and in any event the Diocese and grantors can easily avoid the rule by placing title in an officer under Va. Code § 57-16. *Id*. at 32.

Plaintiffs cite the "presumption" that statutory enactments are intended to effect a change in the law (Br. 66-67), but that is only a presumption, and they cite no case applying it where the law at issue states: "This act is declaratory of existing law." 1993 Acts., ch. 370. In any event, the 1993 amendment to Title 57 had the benefit of modernizing the somewhat archaic language of § 57-7, and of validating prior precedent, which are valid legislative purposes. Plaintiffs also invoke the rule that courts should read a law so as not to "render[] any portion of [it] useless." Br. 69 (quotation omitted). Yet the phrase "[t]his Act is declaratory of existing law" is a part of the statute too, and plaintiffs' reading would "render it useless."

Concerning *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc*., 249 Va. 144, 152 (1995), plaintiffs say the Court there "held … that § 57-7.1 'validates transfers … for the benefit of local religious organizations,'" but "did *not* hold that §57-7.1 does *not* validate transfers for the benefit of denominational churches, and it had no occasion to reach that question." Br. 65. As plaintiffs acknowledge, however, the "only issue" there was "whether the trustees had standing to represent the congregation," so the fact that the parties did not invoke § 57-7.1 (Br. 65 & n.45) is irrelevant. The Court had an obligation to satisfy itself of its jurisdiction, and plaintiffs' status as trustees for the congregation would *not* have satisfied the Court of standing, or that all necessary parties were before it, if the trustees had been acting *for the denomination*. In any event, *Asbury* is just one of a host of decisions to the same effect, and the General Assembly cannot reasonably be thought to have overruled those decisions.

b. Even if § 57-7.1 had changed the law, plaintiffs have failed to satisfy the requirements for creating a denominational trust.

Even if a denominational trust *could be* valid under Virginia law, plaintiffs have not established that one exists here. Via canon law, TEC and the Diocese have declared themselves to be the beneficiaries of a trust in congregational property. As a matter of Virginia trust law, however, this has no effect—and plaintiffs do not attempt to suggest otherwise. Indeed, they expressly acknowledge the rule that only the title-holding party may convey a trust interest: "Determining whether an express trust exists under Virginia law," they explain, "requires an assessment of intent, *as manifested by the settlor's words and conduct*." Br. 75 (emphasis added).

Consistent with this bedrock principle (though with little else in the law or record), plaintiffs propose two theories by which they supposedly were given a trust interest by someone other than themselves: (1) "the original grantors conveyed the properties" not to the Congregations, they argue, but to "the Episcopal Church and the Diocese or local units thereof"; or (2) the Congregations, as beneficial owners of the properties, declared a denominational trust in favor of plaintiffs by assenting to the canons. Br. 77-81. Neither theory withstands scrutiny.

As to plaintiffs "original grantors" theory, plaintiffs depend entirely on the "circumstance" that most (but not all) of the deeds "were for established Episcopal churches or for Episcopal churches in the process of formation," and the fact that many (but not all) of the deeds use the term "Episcopal." Br. 77-78. There is, however, no colorable argument that a trust interest in plaintiffs' favor was even permissible in Virginia prior to 1993. Plaintiffs neither address this problem, nor provide any argument or authority for the proposition that an interest that is null when purportedly conveyed can *spring* into existence decades or centuries later after a change in the law. 90 CJS Trusts § 85 ("The law in effect at the time of the creation of the trust governs its validity, and for this purpose a trust is regarded as created when the beneficiary becomes entitled

to its benefits"); *McGehee v. Edwards*, 268 Va. 15, 19-20 (2004) (applying law at the time trust is executed to determine meaning); CANA Opening Br. 20-22 (discussing retroactivity as a matter of statutory interpretation). Moreover, for reasons set forth previously and addressed again in Part I.B below, plaintiffs take nothing from the use of the word "Episcopal." In the deeds where this term was used, it is part of the description of the Congregation beneficiary; it does not bring into the mix a whole other beneficiary (the denomination), or implicitly impose a condition of perpetual affiliation (which would not be a trust interest in any event). Nor have plaintiffs explained why, if the word "Episcopal" had such import, the Diocese omitted it from deeds when conveying property to Apostles and St. Margaret's. Apostles Ex. 033.000; DSTM-003-0019.

Plaintiffs' second theory—that the Congregations transferred their beneficial interest to TEC and/or the Diocese—fares no better. Plaintiffs fail to point to any "explicit declaration" of an express trust by the Congregations "or circumstances which show *beyond a reasonable doubt* that a trust was intended" in their favor. *Executive Comm. of Christian Ed. & Minsterial Relief v. Shaver*, 146 Va. 73, 79 (1926) (emphasis added). Instead, they contend that the Congregations transferred equitable title "by complying with and assenting to TEC's and the Diocese's Constitutions and Canons," and they point to "other manifestations of intent to conform to the discipline and rules of the Church and the Diocese." Br. 79-80. Intent to conform to the discipline while a member of the denomination, however, is *not* the same thing as an intent to transfer a property interest as a matter of civil law.

Plaintiffs emphasize that Virginia law requires no formal instrument and no magic words to create a trust. Br. 74-75. That may be, but the intention to do so must be "plainly manifest, and *not derived from loose and equivocal expressions of parties*, made at different times and upon different occasions." *Shaver*, 146 Va. at 81 (emphasis added). "The donor need not say in

so many words, 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning." *Id.* (citation omitted); *see also Ingles v. Greear*, 181 Va. 838, 840 (1943) (requiring "explicit, clear and convincing evidence that the declaration of trust relied upon is unequivocal"). Here, plaintiffs cannot point to any action or statement by any Congregation that shows anything more than a desire to faithfully adhere to the canons—which they understood as spiritual guidelines—*while a member of the denomination*. That is a far cry from the "unequivocal" intent, manifest "beyond a reasonable doubt" to transfer a property interest, as required by Virginia law.

Finally, plaintiffs dispute our showing that the court petitions and orders appointing the trustees do not name any beneficiaries except the Congregations. *See* CANA Opening Br. 18-19 & n.9. They first argue that the petitions and orders show that the beneficiary is the "church," not the "congregation." Br. 82. But if plaintiffs mean to say that the references to "church" mean TEC or the Diocese, as opposed to the Congregation, they are wrong. To cite but one example, The Falls Church's June 30, 1988, petition defines "church" to mean "The Falls Church Episcopal"—*i.e.*, the Congregation, not TEC or the Diocese. DX-FALLS-0029-000001. Second, plaintiffs argue that these documents "do not affect or resolve underlying rights in the property," and are not equivalent to deeds or otherwise part of the neutral principles analysis. Br. 83-84. Plaintiffs mistake our argument, which is that the supposed trust interest does not exist. If it did, one would expect some indication of that in the petitions and court orders.

In short, plaintiffs' supposed trust interest lacks any of the normal civil law trappings, and plaintiffs have not pointed to any unequivocal evidence establishing beyond a reasonable doubt that any Congregation intended to create a trust in their favor. Even if a denominational trust were legally cognizable under § 57-7.1, therefore, plaintiffs have not satisfied the neutral and

generally applicable requirements for proving that such a trust exists. Given the likelihood of appeal, we urge the Court to make specific findings on this issue.

c. In all events, § 57-7.1 may not be applied retroactively.

Nor do plaintiffs offer any persuasive argument that § 57-7.1—even if it altered the law and were satisfied—applies retroactively. Citing § 57-7.1's language that certain trusts "shall be valid," plaintiffs seek support for their interpretation in an isolated dictionary reference to "validate" that describes a particular validation as "operating 'retrospectively.'" Br. 70. The word "validate," however, is not found in the statute; the General Assembly chose the phrase "shall be valid." Under standard grammar, and Virginia Supreme Court precedent, that phrase relates to conduct "in the future." *See Arey v. Lindsey*, 103 Va. 250, 48 S.E. 889, 891 (1904) (interpreting the phrase "shall be valid," in a statute providing that no special legislative acts for the purpose of altering the corporate limits of cities "shall be valid," "to forbid special acts in the future").

This is all the more clear when one compares the language of § 57-7.1 with the language of former § 57-7 (which validated *both* conveyances "which hereafter shall be made" *and* conveyances "which, since January 1, 1777, ha[ve] been made") and with the current language of § 57-16(C) (deeds to ecclesiastical officers "made prior to March 18, 1942 … are hereby ratified and declared valid"). CANA Opening Br. 21; *see Indus. Dev. Auth. v. Bd. of Supervisors*, 263 Va. 349, 353 (2002) ("when the General Assembly includes specific language in one section of an act, but omits that language from another section, we presume that the exclusion of the language was intentional"); *Lillard v. Fairfax Cty. Airport Auth.*, 208 Va. 8, 13 (1967) ("statutes *in pari materia* … are not to be considered as isolated fragments of law, but as a whole"). Plaintiffs offer no answer to this point. But if any doubt about the meaning of § 57-7.1 remained, precedent would require resolving it against retroactive application. *Berner*, 265 Va. at 413 ("a statute is always construed to operate prospectively unless a contrary legislative intent is manifest"); *id.*

at 414 ("the phrase 'declaratory of existing law' is not a statement of retroactive intent"); CANA Opening Br. 21 (collecting cases).

2. Va. Code §§ 57-8, -15, and -16.1

Aware that their position is squarely foreclosed by 14 Virginia Supreme Court decisions —the "existing law" that § 57-7.1 reaffirmed—plaintiffs turn to other statutory theories. Citing out-of-context snippets from several provisions in Title 57, plaintiffs assert that Virginia statutes now generally "respect" the "property arrangements made by churches, *whatever they may be*." Br. 12-13 (emphasis added) (citing Va. Code §§ 57-7.1, 8, and -15). But as we have explained, the particular language of these statutes forecloses this sweeping position. CANA Opp. 5-15. In contrast to § 57-15, for example, neither § 57-16.1 nor § 57-8 contains any reference to "dioceses" or "denominations," and § 57-16.1 specifies that church corporations may not hold property for any purpose "prohibited by the law of the Commonwealth"—which includes both the ban on denominational trusts and various other legal limitations that invalidate plaintiffs' canons.

As to § 57-15, plaintiffs assert that "[t]he Congregations recognize (at least implicitly) that the 1924 and 1962 amendments to Va. Code § 57-15 ('to refer to religious denominations,' CANA Brief at 143) were effective to provide 'that the general church, or a division thereof, or certain ecclesiastical officials may be the proper parties to approve … a [church] property transfer,' *Norfolk Presbytery*, 214 Va. at 502." Br. 65. As a review of the cited pages confirms, however, we said no such thing. What we did say is that, if a denomination is "unable to establish a proprietary interest," it "will have no standing to object to [any] property transfer" by a disaffiliating congregation under § 57-15. *Norfolk*, 214 Va. at 503. One searches plaintiffs' brief in vain for any discussion of this critical passage from *Norfolk*. *See* Br. 12-14 (discussing relevant Virginia statutes without mentioning this passage); *id*. at 85-88 (discussing standing without mentioning this passage). Where the denomination cannot carry this burden, property transfers under

§ 57-15 require only the approval of the *congregation*. CANA Opp. 5-6. That follows from the text of § 57-15, which refers to the approval of the congregation, diocese, denomination, or relevant "constituted authorities" in the *disjunctive*—confirming that, absent a proprietary interest in the denomination, only congregational approval is required.

Because the A.M.E. Zion Church was able to prove a proprietary interest in *Green*, § 57-15 required denominational approval of any transfer of the congregation's property. TEC and the Diocese are therefore incorrect in stating that "no statute applied," and that "the Court mentioned … § 57-15 only to demonstrate the contrast between congregational and hierarchical churches on the matter of control of local property." Br. 13. As discussed below, however, the Court's conclusion that § 57-15 applied was based principally on its finding that "the contractual obligation which the A.M.E. Zion Church assumed ha[d] its genesis in the 1875 deed." 221 Va. at 556. Indeed, the balance of the Court's analysis focuses principally on whether the denomination had satisfied that contractual obligation. *Id*. Here, by contrast, the deeds overwhelmingly favor the Congregations, and § 57-15 does not apply.

3. Plaintiffs' argument that their assertion of a proprietary interest requires no explicit statutory authorization is unfounded.

Rather than grapple with the specific text and requirements of "the statutes of Virginia" —*Norfolk-Green*'s first prong (214 Va. at 505)—plaintiffs seek to avoid statutes altogether. In their view, the "flaw" in our "statutory analysis is th[e] assumption that unless a specific statute (Va. Code § 57-7.1 or § 57-15) *grants* rights and interests to general churches, the Congregations prevail." Br. 12. Plaintiffs' position, however, assumes that no statutory authorization is required because the private-law arrangements that "they deem appropriate" (Br. 13) "reflect the intention of the parties" and are otherwise "embodied in … legally cognizable form." *Jones*, 443 U.S. at 603, 606. As discussed below, that is not so. But in any event, several aspects of Vir-

ginia law confirm that the expansive power that plaintiffs assert over member congregations requires explicit statutory authorization.

First, plaintiffs forget that, "[b]y decisions for many years," the Virginia Supreme Court "ha[s] held that a trust for indefinite beneficiaries, if the named trustee is an individual or unincorporated body, is invalid unless expressly validated by statute." *Norfolk*, 214 Va. at 505 (citing *Gallego's Ex'rs. v. Attorney Gen.*, 3 Leigh (30 Va.) 450 (1832); *Fifield v. Van Wyck*, 94 Va. 557 (1897); *Moore v. Perkins*, 169 Va. 175 (1937)). Thus, under the longstanding rule of *Gallego's Executor*, the bar on denominational trusts—including the trust that plaintiffs' canons purport to create—derives from a more general prohibition on trusts for unincorporated parties. As a result, recognition of such trusts requires express statutory authority.[5]

Second, and more generally, the Virginia Supreme Court has confirmed since *Green* that the "powers" of associations such as TEC and the Diocese are "limited by general law." *Gillman*, 223 Va. at 763. Sounding much like TEC and the Diocese here, the association in *Gillman* contended that its right to pass rules that "encumbered th[e] property" of members or "exact[ed] forfeitures for violation of bylaws and regulations" derived from "'the deference to the condominium documents' that appears throughout the Condominium Act." *Id*. at 762, 763, 765. Citing Va. Code § 55-79.80(c)—which provided that the Act's grant of powers "shall not be construed to prohibit the grant, by the condominium instruments, of other powers and responsibilities to the unit owners' association"—the association asserted "that there is no limitation inherent in the Condominium Act on the powers that may be created by the condominium documents." *Id*. at 762. The Court, however, would have none of this.

[5] In the text, plaintiffs assert that Va. Code §§ 55-544.05 and 55-544.09 "allow[] charitable and non-charitable trusts with indefinite beneficiaries." Br. 22-23. As plaintiffs later state in a footnote, however, "Code §§ 55-544.05 and 55-544.09 are part of the Uniform Trust Code, which does not apply to trusts under Title 57 (*see id*. § 55-541.02(A)(4))." Br. 23 n.21.

Explaining that it "f[ou]nd no language in the Condominium Act which *authorizes* the executive or governing body of a condominium to levy fines, impose penalties, *or exact forfeitures*," the Court unanimously held that rules having that effect were invalid. *Id*. at 763 (emphasis added). The Court rejected the notion that the association, which indisputably held "wide" statutory authority over its members' property, was a "self-governing community" or "democracy." *Id*. at 762, 763. The fact that "[t]he power exercised by the Association is contractual in nature and is the creature of the condominium documents to which all unit owners subjected themselves in purchasing their units"—"a power exercised in accordance with the private consensus of the unit owners"—was irrelevant. *Id*. at 766.

4. Plaintiffs offer no convincing answer to *Gillman*, which they have previously invoked as relevant "Virginia authority" relating to "church property disputes under neutral principles of law."

Noting that *Gillman* involved "a condominium association" and "the power to impose a fine," plaintiffs glibly assert that "[n]o similar issue is presented here." Br. 9, 10, 93. But plaintiffs themselves first invoked *Gillman*, citing it in a section entitled "Virginia authority addressing church property disputes under neutral principles of law." Br. in Opp. to Demurrers 8, 12 (filed July 13, 2007). The fact that *Gillman* involved a condominium association did not deter plaintiffs from invoking it as the leading case for the proposition that "a voluntary association's constitution" is "a contract between the association and its members." *Id*. at 12. To be sure, they have since stopped citing the case. But in any event, their argument overlooks the fact that the association there, acting pursuant to duly enacted rules, not only "*fined* the Gillmans"; it "encumbered their property"—which the Court viewed as an attempt to "exact forfeitures." *Gillman*, 223 Va. at 763, 765. That, in substance, is what TEC and the Diocese attempt here.

In fact, plaintiffs' rules go much further: They purport to transfer beneficial ownership of *all real and personal property* of member churches, regardless of who holds title or purchased

the property. Plaintiffs cannot hide behind labels any more than the association in *Gillman* could label their fines "assessments." *Id*. at 764. If a $25/day charge for violating a bylaw constituted a "fine," so too does a rule transferring ownership of property worth over $50 million. Indeed, the Court in *Gillman* quoted a definition of "fine" explaining that the term "'may include a forfeiture or penalty recoverable in a civil action.'" *Id*. at 764 (quoting *Black's Law Dictionary* 569 (5th ed. 1979)). Thus, it is the *substance* of an association's rules that matter, and plaintiffs cannot avoid the conclusion that their rules effect a forfeiture of member congregations' property by labeling those rules as mere "canons addressing property matters." Br. 93.

If anything, the fact that *Gillman* involved a condominium association confirms that this is a much easier case. The very purpose of a condominium association is to govern *property*, and the members of such associations cannot be surprised to be subjected to rules—recorded in the master deed—affecting their units. The main purpose of religious denominations, by contrast, is spiritual. A denomination might or might not pass rules relating to property—some do, some don't—but in any case it is spiritual concerns, not property, that brings the association together. Thus, members of religious denominations are, if anything, *more* justified in expecting that denominational rules affecting their property will be reasonable—particularly where they funded the purchase of the property and the deeds do not suggests that the denomination owns it.

Just as importantly, the bases for the Court's decision in *Gillman*—the *absence* of express authority in the governing statute; Va. Code § 1-248 (then codified at § 1-13.17); the "test of reasonableness to determine the validity of association regulations" (223 Va. at 767); and the Constitution—apply as fully to TEC and the Diocese as to secular condominium associations. Indeed, the very cases that plaintiffs invoke for the proposition that associational rules can create a contract recognize that the "rules and regulations" of an "unincorporated voluntary association"

may not "transgress the bounds of reason, common sense, or fairness, nor contravene public policy or the laws of the land." *Folkes*, 201 Va. at 58 (cited at Br. 31); *see also Gottlieb v. Economy Stores*, 199 Va. 848, 856 (1958) (an association's constitution "will be enforced" only insofar as it is "not immoral or contrary to public policy or the law") (cited at TEC Br. 23); *Bradley v. Wilson*, 138 Va. 605, 612 (1924) (same) (cited at Br. 92). Allowing TEC and the Diocese to enjoy the "sweet" of this jurisprudence (association rules create a contract) without the "bitter" (such rules have limits) is unsupportable, and in fact would create a discriminatory system that unconstitutionally favored religious denominations over any other entity, secular or religious. *See* CANA Opening Br. 124-130.

5. Plaintiffs' out-of-court admissions confirm that a statute or deed is necessary—and that canons are insufficient—to secure a proprietary interest in congregational property.

In light of the limitations that generally applicable law impose on associations' adoption of rules that purport to affect members' property rights, it comes as little surprise that, outside of court, plaintiffs repeatedly admit that, absent "legislative action," their canons are "not sufficient to prevent … alienation" of congregational property. Apostles Ex. 290.0007 (emphasis added). When adopting the anti-alienation canons, for example, TEC formally directed that its 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 TEC's control. Apostles Ex. 376.0002. More recently, in 1981, when the topic was addressed by TEC's "Standing Commission on Constitution and Canons of the General Convention," TEC 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. 292.0002–0003, 292.0008. As Professor Mullin acknowledged, TEC's official commentary has repeatedly "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; *accord* Tr. 1275:7-10 (Mullin); Apostles Ex. 291.0004-291.0006 (1954 edition of official annotated commentary on constitution and canons). Plaintiffs should not be permitted to advance a different position now.

Plaintiffs attempt to avoid these admissions (and several others) concerning the effect of their canons by arguing that the admissions "were never adopted by the General Convention, and as such are not binding on the Church." Br. 43. The significance (and irony) of this statement should not be overlooked. Insofar as the Court finds that statements in the official annotated version of the constitution and canons "are not binding on the Church" because they "were never adopted," the same standard should be applied to *the CANA Congregations'* actions. *See* Letter Op. 10 (Aug. 19, 2008) ("forming a contract requires *mutual* assent and the communication of that assent" (quotation omitted)). As we have explained, the Congregations did not affirmatively agree to the trust canons, let alone to grant the denomination a proprietary interest in their properties. CANA Opening Br. 46-55.

Yet when it comes to the actions of the Congregations, plaintiffs press a different standard. They protest that the Congregations "remained part of the [denomination]" after the "trust canons" were adopted "without so much as a word of protest"—"[t]he silence is deafening." Br. 32. This argument from "silence" is particularly irrelevant under Virginia law, given that plaintiffs' canons asserted a *facially invalid* denominational trust. Not surprisingly, plaintiffs cite no authority for the proposition that one must object to the assertion of a property right that is void. The cases they cite addressing a congregation's failure to object to their canons either involved affirmative acts to grant the denomination a legally cognizable interest (*St. James the Less*, 888 A.2d at 797-98) or jurisdictions that recognized denominational trusts (*e.g.*, *Harnish*, 899 N.E.2d

at 925; *Episcopal Church Cases*, 198 P.3d at 83-84; *Daniel v. Wray*, 580 S.E.2d 711, 718 (N.C. App. 2003); *Rector, Wardens & Vestrymen*, 699 S.E.2d at 53). This case involves neither.

In any event, plaintiffs' statement that they "never adopted" the admissions of their official canon law reporters cannot be squared with the record. Beginning with the 1924 edition of the commentary, the General Convention "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). As the first edition of the annotated version of the constitution and canons states, it was published "due to the request of the House of Deputies, as expressed in resolutions thereof in the General Conventions." Apostles Ex. 290.0002; *accord* Tr. 1267:5-8 (Mullin) (acknowledging that "the 1924 edition" was "published by order of the House of Deputies").

TEC's official endorsement only became stronger with the second edition of the commentary, published in 1954. As that edition states, not only did the General Convention direct "publication of [this] new annotated edition of the constitution and canons" (Apostles Ex. 291A.0002); it was "published after review by a joint committee of General Convention" (*id*. at 291A.0001); *accord* Tr. 1268:10-18 (Mullin). Indeed, even that understates TEC's involvement. The General Convention adopted an extensive process for its preparation and review: It was drafted "under the authority of General Convention"; 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 commentary states, "pursuant to the mandate of the General Convention [the joint com-

mittee] has reviewed the proofs of this new annotated edition of the Constitution and Canons *and has approved the text*." Apostles Ex. 291A.0003 (emphasis added).

TEC's adoption of the third edition, published in 1981 after the death of White and Dykman, is still clearer. That edition was copyrighted in the name of the Church's corporate entity, published by its own publisher, and "revised and updated by the Standing Commission on Constitution and Canons of the General Convention." Apostles Ex. 292.0002–0003.[6] What is more, the 1981 edition expressly states that "the 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*." Apostles Ex. 292.0006 (emphasis added). It is a mystery to us how plaintiffs can state that they "never adopted" the admissions in their annotated constitution and canons. They *made* them.

And those admissions are damning. To cite just a few of the greatest hits, plaintiffs have admitted through these official commentaries 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;
- A canon "provid[ing] 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 … could only have moral weight." *Id.*;
- "[T]he Church's property canons are not sufficient by themselves to secure an interest in parish property"; "[w]hether [the canons] are enforceable in the courts depends upon the specifics of the legislation in effect." Tr. 1269:4-12 (Mullin (discussing the commentary));

[6] TEC Canon I.1.2.n.3.iv imposes on the Standing Commission on Constitution and Canons an affirmative duty to, among other things, "[c]onduct a continuing and comprehensive review and update of the authorized 'Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States in America otherwise known as The Episcopal Church.'" TEC-24-000019.

- "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;
- "A 'neutral principles of law' 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.

Where presented with such evidence, other courts have relied on these admissions. 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." *E.g.*, *Bjorkman*, 759 S.W.2d at 586.

Plaintiffs nonetheless attempt to dismiss these admissions on the basis that they relate only to "the legal effect of Church Canons," and are "not statements of fact." Br. 44. Virginia does not limit such admissions to "statements of fact." *See* Charles E. Friend, *Law of Evidence in Virginia* § 18-38 (citing McCormick, *Evidence* § 264 (3d ed. 1984) ("neither opinion nor conclusions of law should prevent the statement from being used as a party admission")); *Southern Passenger Motor Lines v. Burks,* 187 Va. 53, 60 (1948) (statement of legal fault was admissible as *res gestae*); and *Gammon v. Hyde,* 199 Va. 918, 925 (1958) (statement of legal fault was an admissible as admission against interest). Nevertheless, in contrast to the case that plaintiffs cite, the admissions here do not pertain to what the law requires. *Cf. Cofield v. Nuckles*, 239 Va. 186, 194 (1990) (upholding exclusion of testimony that a party involved in a motor vehicle accident "belie[ved] that he was 'not supposed to be' driving in the curb lane at the time of the accident" on the basis that the party's belief "does not make such action illegal") (cited at Br. 44). Nor are the admissions an attempt to dictate to the courts what the law must be. Rather, the admissions pertain to the intended scope and meaning of TEC's own canons, as expressed by the General Convention; they are the Convention's own "authoritative expression of the meaning of the Con-

stitution and Canons." Apostles Ex. 292.0006. And if the General Convention, acting outside of the heat of litigation, wishes to publicly and officially disclaim to the world any legal effect of certain canons, there is no reason why courts should not hold them to it. Although TEC's litigating position here is that its interpretation of the rules of its General Convention is entitled to deference from the Court, any such deference is far more warranted when the interpretation would ameliorate the impact of a rule on affiliated parties, rather than strip those parties of vested property rights. *See Wickline*, 205 Va. at 169 (contracts will be read to "give the right of forfeiture" only where there is "no room for any other construction").

6. Plaintiffs' claims inevitably depend in substantial part upon the retroactive application of a statute to alter the CANA Congregations' vested property rights.

Plaintiffs do not dispute that Virginia statutes may not be applied retroactively to alter a congregation's vested rights in property. Br. 36-37, 70-71. Rather than challenge the prohibition on retroactivity, plaintiffs suggest that "this is not a case of retroactive application" because "the Dennis Canon merely formalized, in trust language, a relationship that has *always* been understood as the rule in the Church." Br. 36 (emphasis added). Among other difficulties, this argument glosses over the distinction between retroactive application of *canons* and retroactive application of *statutes* (both are problematic, but for distinct reasons). CANA Opening Br. 135; *Ark. 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"). In addition, it ignores their admission that the canon was not "declaratory of existing law," but rather a response to *Jones v. Wolf*. Apostles Ex. 292.0012; *see* CANA Opening Br. 74. Still more im-

portantly, however, plaintiffs do not answer a critical question: *When* did their interest become legally cognizable and take effect *under Virginia law*?

The answer cannot be: Upon adoption of Dennis Canon or Diocesan Canon 15.1, which allegedly memorialized the trust that plaintiffs assert.[7] As noted above, they have admitted that, "[b]efore 1993, Virginia statutes did not validate trusts for general churches." Diocese Br. 39; *accord* TEC Br. 2, 25 n.3, 36. Thus, these canons were facially invalid upon their adoption. The only means by which plaintiffs can seek enforcement of the canons is to argue that the prohibition on denominational trusts was repealed in 1993, and that this retroactively shifted the beneficial interest in the properties at issue from the Congregations to plaintiffs.

Nor can the answer be: Upon the formation of the denomination, or even upon the adoption of the anti-alienation canons in the 1870s. As plaintiffs admit, "Virginia law did not give legal recognition to unincorporated associations" until well into the 20th century. Br. 22 (citing Va. Code § 8.01-15, the first version of which took effect in 1919[8]); DX-FALLS-0413-000002, 0413A-0001 [transcription] (Diocese's petition to the General Assembly, noting that unincorporated religious denominations were not "capable of taking and holding property of the smallest amount. They can neither take what is given nor acquire by purchase").

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[7] Plaintiffs assert that the Dennis Canon and Diocese Canon 15.1 just made explicit what was implicit in the anti-alienation canons. If this were true (*see* Tr. 1228:13-16 (Mullin) ("Q The Church's various property and anti-alienation canons, for example, are based on a trust concept? A Yes.")), it would only confirm that the anti-alienation canons too are an invalid attempt to assert a denominational trust. The notion that the Dennis Canon and Diocese Canon 15.1 did nothing more than "elucidate[]" or make "explicit" what was found in earlier canons, however, cannot be squared with the fact that the former did not purport to govern either unconsecrated real property or personal property—as plaintiffs admit. Br. 48 (noting that these canons do not apply "to unconsecrated property"); Tr. 1229:19-1231:22 (Mullin). Thus, even if all of plaintiffs' canons are "based on a trust concept," the later ones are far broader in scope.

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

As we have explained, plaintiffs' canons are legally unenforceable for a host of reasons—a point they have admitted many times outside of court. But even setting aside these difficulties, the canons certainly cannot have taken effect *before plaintiffs had legal standing to enter into contracts and hold property interests*. Even then, moreover, the statute granting them legal status did not purport to operate retroactively, and Virginia continued to refuse to recognize denominational trusts. *E.g.*, *Moore*, 169 Va. at 177-182; *Norfolk*, 214 Va. at 506.

The fact that unincorporated associations could not generally hold property during the 19th century did not preclude the then-existing CANA Congregations from doing so. Under statutory authority first adopted in 1842 (and two 1746 conveyances vested in TFC's vestry), trustees could hold property for the benefit of the local congregation. *Brooke*, 54 Va. at 310-11.[9] Accordingly, the CANA Congregations that existed before 1919 could and did have vested rights in their property. It follows that, even if plaintiffs' canons were otherwise valid (and they are not), settled precedent would bar the Court from applying later-enacted statutes—whether statutes that gave TEC and the Diocese legal standing to enter contracts and hold property, or statutes that (according to plaintiffs) validated denominational trusts, or both—to deprive the Congregations of vested rights in their own property. CANA Opening Br. 20-22, 135-41.

Finally, even assuming, *arguendo*, that plaintiffs at some point acquired the right to claim an interest in the CANA Congregations' property, such standing could not be applied to property that The Falls Church owned prior to its affiliation with the denomination in 1836. *See First Presbyterian Church of Schenectady v. United Presbyterian Church*, 464 N.E.2d 454, 463 (N.Y.

[9] DX-FALLS-002 (1746 deed); DX-FALLS-003 (1852 Deed); DX-FALLS-004 (1918 Deed); TRU001 (1874 deed); TRU002 (1882 deed); DSTP Exs. 297, 297A (St. Paul's 1900 deed); DSTP Exs. 293, 293A (St. Paul's 1904 deed); DSTP Ex. 294 (substitute deed, dated 1993, for lost deed to St. Paul's historic church, thought to have been built in 1801); DSTS Exs. 5, 15-00098-00099 (St. Stephen's 1874 deed).

1984) (holding that local church did not lose its property, which it had held for 200 years, upon affiliation with a denomination).

Plaintiffs dispute the relevance of *Schenectady*, asserting that the court never indicated when the parcels at issue were acquired. Br. 18. It would be charitable to describe this argument as glib. The denomination in *Schenectady* specifically argued that, "in the absence of a specific understanding or agreement preserving a separate entity and expressing an intention to withhold property, it is presumed that the local church intended to dedicate the property to the purposes of the larger body by voluntarily merging itself with it." 464 N.E.2d at 462. This argument would make little sense unless it was referring to property held by the congregation *prior to* affiliation. Indeed, nothing in the court's discussion of the argument indicated that the property at issue was acquired after affiliation or that the theory was limited to such property. Thus, the court's holding—and in particular its rejection of the argument that a 200-year association with a denomination somehow strips a congregation of its property rights (*id*. at 463)—rings equally loud here, where it is undisputed that The Falls Church historical parcel has been held by its vestry for even longer. PX-COM-0060-009 (*Near The Falls* history) (1969 statement of Bishop of Diocese, citing his thankfulness "for the two hundred years of faithful and fruitful service rendered by The Falls Church," which "has always continued to be a vigorous and vital parish church, teeming with Christian worship and missionary zeal, changing and growing with the times"); *see also* PX-COM-0073-014 (1837 Diocesan Journal) (characterizing the "venerable edifice" of The Falls Church as "belonging to this congregation"); PX-COM-0152-035 (1914 Diocesan Journal) (admitting that The Falls Church was one of fifteen colonial churches "cared for by the well organized congregations which own them"); Tr. 1112:6-1113:9 (Bond).

B. Under principles of real property law, references to the "Episcopal" identity of a grantee congregation are insufficient to bar a congregation from reaffiliating with another religious denomination, and no Virginia church property case has ruled for a denomination absent deed language designating use of the property at issue to worship in affiliation with the denomination.

Since the early 1800s, grantors and religious denominations in Virginia have been able to secure church property to members of a particular denomination by employing deed language restricting the property's use to such persons. *See Brooke*, 54 Va. at 302 (1842 deed conveying property in trust to 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"); *id.* at 317 (analyzing which parties were beneficiaries "under the deed, and according to the rules and discipline therein referred to"). Today, as then, such "use restrictions" are routinely employed by denominations across the theological spectrum—by Methodists, Presbyterians, Lutherans, Pentecostals, Baptists, and Episcopalians, including the Diocese itself. *See*, *e.g.*, Apostles Exs. 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 335, 336, 337, 338, 339, 343, 347, 348, 357 (examples of deeds containing such clauses). Moreover, no Virginia court has granted property to either a denomination or a congregation's minority wing in the absence of deed language designating the property for use by adherents to a specific denomination.[10]

[10] *See Green*, 221 Va. at 549, 553, 555 (involving a use restriction); *accord Finley*, 87 Va. at 104; *Hoskinson*, 73 Va. at 431; *Boxwell*, 79 Va. at 408; *Wyckoff*, Slip Op. 2-3 (involving a 1847 deed that conveyed land "to erect a new brick church for the use and benefit of the Protestant Episcopal Church," "upon this special trust and this special confidence, however, that they the said (grantees) … shall and will forever have and hold the said piece or parcel of land with all the improvements and appurtenances thereunto belonging for the use and benefit of the Protestant Episcopal Church as they the said (grantees) … shall deem most likely to promote the interest of the said church" and an 1860 deed conveying land "for the same use and for the same purposes and upon the same conditions and upon the same trusts" as the 1847 deed); Apostles Ex. 298.0003

Nor is this surprising. Under a long line of Virginia precedent, deed language designating property for a specific use must be express, and any "substantial doubt or ambiguity is to be resolved in favor of the free use of property and against restrictions." *E.g.*, *Scott*, 274 Va. at 213, 217; CANA Opening Br. 35-36 (citing cases). This formidable body of law forecloses plaintiffs' argument from "silence"—that, unless a deed conveys property "regardless of what denomination [a congregation] might affiliate with," reaffiliation is prohibited. Br. 21 n.19. It also puts to rest plaintiffs' request that the Court *presume* a use restriction because the grantors here "had to have known that they were conveying property … to Episcopal churches" that were "bound by the general Church rules." *Id*. at 16. Indeed, the principle that restrictive covenants must be unambiguous applies with extra force where "it would have been easy" to restrict the property's use. *Scott*, 274 Va. at 218. As confirmed by cases from *Brooke* to *Green*—and the Diocese's own practices when dealing with other properties—such is the case here. And even apart from the extensive law governing restrictive covenants, plaintiffs' admission that "[t]here is no clear extrinsic evidence of grantor intent" (Br. 16) confirms that they have not carried their burden of proving a proprietary interest under the deed. *Green*, 221 Va. at 555; *Norfolk*, 214 VA. at 507.[11]

The Virginia courts' consistent reliance on use restrictions in church property cases thus accords with "principles of real property … law." *Truro Church*, 280 Va. at 29.[12] Yet plaintiffs

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(Complaint ¶ 6) (*Buhrman* deed language restricting the property to "use[] as a place of worship by the Episcopal Congregation of Clifton Forge Parish").

[11] Plaintiffs attempt to turn the lack of evidence as to grantor intent on its head, arguing that "[t]here is no evidence that the original grantors intended that the properties be held in trust for the benefit of congregations that were independent or part of another denomination." Br. 77. But given that plaintiffs bear the burden of proof (*id.*) and the fact that use restrictions will not be read into a deed, this lack of evidence eviscerates, not bolsters, plaintiffs' position.

[12] A use restriction is a form of restrictive covenant. *See Black's Law Dictionary* 1429 (9th ed. 2009) (defining "restriction" in relevant part as "[a] limitation (esp. in a deed) placed on the use or enjoyment of property. See *restrictive covenant* … ."); *id*. at 421 (defining "restrictive cove-

admit that, for all but "two of the deeds" here, their position that the deeds limit the property to denominational use is an argument "by implication." Br. 16 n.14; *see id*. at 21 n.19 ("only a couple of the deeds in question elaborate on the purposes and conditions of the conveyance"). That admission is fatal to the vast majority of their claims. *See Green*, 221 Va. at 556 ("the contractual obligation which the A.M.E. Zion Church assumed has its genesis in the 1875 deed").

Applying neutral principles, several state supreme courts have declined to construe references to the identity of a congregation in a deed as reflecting an intent to restrict the congregation's title or rights to the property. In *Arkansas Annual Conference of AME Church, Inc. v. New Direction Praise and Worship Center, Inc.*, for example, the Arkansas Supreme Court addressed property conveyed by "[a] deed indicat[ing] that [the grantor] intended to create a trust for *Sand Hill AME Church*." 291 S.W.3d 562, 569 (Ark. 2009). Despite this explicit reference to the church's African Methodist Episcopal affiliation, the court unanimously held that "[n]othing in the language of the deed suggests that [the grantor] had the intention of creating a trust in favor of either the National AME or the Arkansas AME." *Id*. The Pennsylvania and South Dakota Supreme Courts have reached the same conclusion. *Presbytery of Beaver-Butler*, 489 A.2d at 1324-25 (deeds reflected conveyances to "Middlesex Presbyterian Church"; court nevertheless concluded that "[r]ecord title to all of the real and personal property in dispute in this case has been exclusively in [the congregation] at all relevant times"); *Foss*, 342 N.W.2d at 223 (conveyances to the "Ebenezer Presbyterian Church of Lennox" did not indicate any interest or trust right in the denomination). Indeed, even when the grantor was the denomination itself, courts have not suggested that the conveyance carried an implied restrictive covenant. *Episcopal*

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nant" in relevant part as "[a] private agreement, usu. in a deed or lease, that restricts the use or occupancy of real property … and the uses to which the property may be put").

Church Cases, 198 P.3d at 71 (noting that the congregation held record title to property that originally was conveyed by the "Bishop of the Protestant Episcopal Church in Los Angeles").

1. Plaintiffs' assertion that the CANA Congregations' position is based on "record title alone" mischaracterizes the Congregations' position, the meaning of "record title," and the governing law.

Aware that their arguments are foreclosed by ordinary principles of real property law, plaintiffs mischaracterize our position as an argument that "Virginia law … look[s] at record title alone." Br. 15. Even in addressing the deeds, we have argued that the Court can and should look *beyond* the holder of record title to determine whether the grantor imposed limitations on the *use* of the subject properties. CANA Opening Br. 29-38; CANA Opp. 18-19. That is consistent with the approach of a host of Virginia cases, including *Norfolk*, which held only that courts are not limited to "considering only the record title." 214 Va. at 505.

As the Virginia Supreme Court has explained, "'record title' is generally used to describe ownership of a particular parcel of real property *by the person in whose name title appears in the official deed records*, in contrast to one who claims ownership through unrecorded documents." *High Knob Assoc. v. Douglas*, 249 Va. 478, 483 (1995) (emphasis added) (citing *Black's Law Dictionary*); *see also* Tr. 2422:10-2423:1 (Schrantz) (explaining that language not in capital letters is not "part of the name of the grantee"). Thus, any legal approach that gives weight to use restrictions as well as the record owner is *not* one that "consider[s] only the record title." *Norfolk*, 214 Va. at 505.

Deeds are generally the predominant consideration in real property disputes (CANA Opening Br. 22), and according them such weight here is consistent with both the Virginia Supreme Court's mandate that this Court apply normal principles of "real property" law (280 Va. at 29) and the fact that "'neutral principles'" are principles "'developed for use in *all* property disputes.'" *Norfolk*, 214 Va. at 504 (emphasis added). Nonetheless, we have not made our case

based solely on the deeds. We have addressed each *Norfolk-Green* factor, arguing that, *if* plaintiffs are "unable to establish a proprietary interest" under § 57-15, they "will have no standing to object to [any] property transfer" by the CANA Congregations. *Norfolk*, 214 Va. at 503 (emphasis added).

2. The deed was central to the Court's holding in *Green*, which referred to the deed eight times, described it as the "genesis" of the denomination's proprietary interest, and listed it as the first factor supporting the Court's decision.

Nor do plaintiffs' other deed-related arguments withstand scrutiny. For example, citing *Green*'s analysis of factors such as the denomination's constitution and the dealings between the parties, TEC and the Diocese dispute that the deed was "so central" to that decision. Br. 15. Yet the Court in *Green* referred to the deed eight times (221 Va. at 549, 553, 554, 555, 556), and it listed "the language of the deed" as the first reason for concluding that the denomination had a proprietary interest. *Id*. at 556. Even more significantly, the Court held that "the contractual obligation which the A.M.E. Zion Church assumed has its genesis in the 1875 deed." *Id*. at 556. It is therefore evident that some indicia of ownership rooted in the deed was necessary to the balance of the Court's analysis. And, as noted above, no Virginia court has granted church property to a denomination without relying on deed language restricting use of the subject property to those worshiping in affiliation with that denomination.

In keeping with their effort to downplay the deed language here, plaintiffs assert that an "overwhelming majority of other state courts have taken the same view of deeds in Episcopal church property cases." Br. 15 n. 13. In not one of those cases, however, did the court hold that the deed language was of little significance under a neutral principles analysis. In most of them, the court did not even apply neutral principles, but rather a deference-to-hierarchy approach. *E.g.*, *Tea*, 610 P.2d at 184; CANA Opp. 69-76. Further, where the courts did apply "neutral prin-

ciples," whether in the main or as an alternative ground for decision, the deed language was overcome only by the congregation relinquishing control over its property in its governing documents. For example, in *Masterson v. Diocese of Northwest Texas*, 335 S.W.3d 880, 883, 891 (Tex. App. 2011), the court, addressing "neutral principles" in the alternative to *Watson v. Jones* deference, noted that the congregation had (1) filed articles pledging to hold office in accordance with denominational canons and (2) adopted bylaws agreeing that if the congregation was dissolved by the Diocese, the congregation's property "shall be delivered and conveyed to the [Diocese]." Here, of course, none of the Congregations agreed to any similar provision in their articles or other governing documents.

Plaintiffs also lack any serious answer to our showing that, in contrast to *Green*, TEC and the Diocese admittedly are not "named as a grantee in any of [these deeds]." Tr. 31:13-16 (plaintiffs' opening statement). They assert that, "under the law in effect at the time [of *Green*], the deed was ineffective to convey any title to the general church." Br. 15. But that is difficult to square with *Green*'s observation that "the A.M.E. Zion Church [was] the grantee in the deed" (221 Va. at 555)—an observation that neither the parties nor the lower courts are free to ignore.

More importantly, plaintiffs ignore the deed language in *Green* that indisputably *was* central—the language restricting the property to "the purpose of erecting an A.M.E. Church of Zion (to be known as Lee Chapel), not a church of some other denomination, or an independent church." *Id*. at 553. This use restriction weighed heavily in the Court's analysis. *Id*.[13] And as we have shown, such use restrictions are not oddities unknown to the public. Grantors including the Diocese have been including such restrictions in deeds for at least 170 years. *See Brooke*, 54

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[13] *See also id*. at 555 ("the property ha[s] been conveyed to trustees of that church to establish an A.M.E. Zion Church thereon"); *id*. at 549 ("[t]he real estate involved consists of a one acre lot … conveyed by deed … to the Trustees of the African Methodist Episcopal Church of Zion for the purpose of erecting an A.M.E. Church of Zion to be known as Lee Chapel").

Va. at 302 (1842 deed containing a use restriction); Apostles Ex. 333, 334 (1986 and 1988 deeds from the Diocese including such restrictions).[14] Here, however, plaintiffs do not dispute that only two of the 42 deeds contain language even arguably similar to the use restrictions found in cases from *Brooke* to *Green*. Br. 16 (citing only TRU000.002 and DSTS-013-063 as "deeds that explicitly elaborate on the purpose or use of the conveyance").

3. In contrast to *Green*, TEC and the Diocese are not grantees in any of the deeds here, and deed language describing a congregation as "Episcopal," without more, does not create a use restriction or support a proprietary interest under neutral principles of real property law.

TEC and the Diocese protest that they do not "concede" that legal title to the properties here resides in the Congregations. Br. 8. As noted, however, plaintiffs admit that "[n]either the Diocese nor the Episcopal Church is specifically named as a grantee" in the relevant deeds. Tr. 31:13-16 (plaintiffs' opening statement); *see also* Letter Op. 16 (Dec. 19, 2008) ("there is a clear record of admissions by ECUSA and the Diocese recognizing TFC's ownership of this property [the two-acre parcel]").[15] Thus, they are left to argue that, when a deed grants property to trustees of an "Episcopal" church, that word necessarily implies that the property was granted to those in the congregation who wish to worship in accordance with the denomination's rules.

This argument, however, has no purchase in neutral principles states such as Virginia. To begin with, it places far too much weight on the word "Episcopal"—a descriptive term that does

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[14] Plaintiffs seek to distance themselves from these deeds by arguing that the lawyer who "prepared the two deeds" acted "alone." Br. 34. But this misses the point. Whether the lawyer acted for the Diocese or the St. Aiden's congregation, the existence of these use restrictions confirms the lesson of the many others like them—that it "would have been easy" for the Diocese, as grantor, to have requested such language in the deeds, or in the deeds of other member congregations.

[15] The Diocese earlier stipulated that as to St. Stephen's 1874 Deed "[t]here is no factual dispute about how title has been held since the date of the Deed. Since the date of the Deed, legal title has been vested in the trustees of St. Stephen's Church." DSTS Ex. 15-00099-00100, ¶6. The Court held that the St. Stephens 1874 Deed parcel constitutes "property held in trust for such congregation" Letter Op. at 8 n.5 (Dec. 19, 2008).

not rise to the level of a use restriction, and could just as well refer to a "Methodist Episcopal," "African Methodist Episcopal," "Reformed Episcopal," or any other church having bishops. *Cf.* Apostles Ex. 308 (United Methodist Church constitution beginning with "Episcopal Greetings" from the bishop). Not surprisingly, plaintiffs cite no Virginia authority for the proposition that, apart from deed language restricting use to a particular denomination's members, civil courts defer to the denomination in deciding who constitutes the congregation. If such an approach were the law, it would permit denominations to circumvent the entire *Norfolk-Green* framework simply by declaring the majority to be "inactive." CANA Opening Br. 143-153; CANA Opp. 3-4, 61-68. The CANA Congregations' identity is thus determined not by deferring to the hierarchy, but by generally applicable law. *See infra* at 79-83 (addressing the identity issue).

4. Plaintiffs' extensive efforts to dismiss *Davis v. Mayo* are unpersuasive.

In light of the foregoing, it is not surprising that plaintiffs attempt—on every ground they can concoct—to avoid the clear impact of *Davis v. Mayo*, 82 Va. 97 (1886). Each of their attempts is unconvincing.

First, plaintiffs say *Davis* is distinguishable on the grounds that it involved an unlawful detainer action. It is true that issues of title are not *always* resolved in such actions. But as the Court there explained, the case ultimately turned on the proper reading of the deed—"Who, in this proceeding, are the representatives of the beneficiaries in that deed?"—and the answer was controlled by the deed's specific terms. 82 Va. at 103. Specifically, the Court found it dispositive that the deed conveyed property to the local affiliate (the "Springfield Division" of the Sons of Temperance) *without* requiring that the affiliate remain a part of the general association (the "Grand Division" of the Sons of Temperance) or otherwise restricting the property to use under the general association's rules. *Id.* at 106. CANA Opening Br. 34-35. The fact that the local organization's name, as it appeared in the deed, referred to the general organization ("the Sons of

Temperance") was insufficient to confer rights on the general association or its loyalist faction. Moreover, the Court rejected the defendants' claims that the general association's rules were controlling—or even relevant—in determining the identity of the beneficiaries under the deed. 82 Va. at 105-06.

Second, noting that *Davis* has mainly been cited in later unlawful detainer cases, plaintiffs say it is irrelevant to church property disputes. But plaintiffs ignore that *Davis*, a property case involving a voluntary association, expressly relied on several church property cases—including leading authorities such as *Brooke* and *Hoskinson*, and others including *Boxwell*, *Wade v. Hancock and Agee*, 76 Va. 620 (1882); *Allen v. Paul*, 24 Gratt. 332 (1874); and an out-of-state case, *Cahill v. Bigger*, 8 B. Mon. 211, 47 Ky. 211 (1847). *See* 82 Va. at 102, 104, 105-06. Thus, the Court in *Davis* was keenly aware that church property disputes are often particular manifestations of disputes between voluntary associations, and that its reasoning would likely be applied in such contexts. Moreover, plaintiffs do not hesitate to rely on non-church property cases when it suits them. *E.g.*, Br. 9, 31 n.25, 39, 79-80, 92 (invoking the law of voluntary associations).

Third, plaintiffs attempt to diminish *Davis* by noting that the Court remanded the case for further proceedings rather than entering final judgment for the local group. In so doing, however, the Court foreclosed the argument of the general association and its collaborating minority faction that the minority was the proper representative of the intended beneficiaries under the deed. *See* 82 Va. at 105-06. The Court's final remand directions were also quite clear that the case below was to be decided using the jury instructions that the plaintiffs had requested (82 Va. at 106), leaving little doubt as to the outcome.

Fourth, plaintiffs dismiss *Davis* on the basis that they are not claiming "judicial powers" (82 Va. at 103)—just enforcement of their purported contractual rights under their internal rules.

Br. 19-20. But that is no different from the argument of the general association and the loyalist minority faction in *Davis*, who sought to enlist the courts to enforce their purported interests under general association rules against property deeded to trustees for the local association. Indeed, the chief officer of the general association and the loyalist faction he helped organize actually obtained court orders appointing trustees to hold the local association's property for them. 82 Va. at 102. Similarly, plaintiffs here invoke the Court's jurisdiction seeking to transfer properties held by trustees for the Congregations to plaintiffs, or a declaration that the trustees hold the property for the benefit of the newly-established "continuing congregations" recognized by plaintiffs as being compliance with plaintiffs' rules. As the Court in *Davis* recognized, a general association's rules provide no basis for judicial relief, absent deed language expressly restricting the property's use to those affiliated with the association.

Fifth, plaintiffs distort our reading of *Davis* as being that courts may consider only the record title to church property and nothing else. Br. 21. But as we explained above, that is not our position. *Davis* simply confirms that, under neutral principles of Virginia property law, deed language designating property for a specific use must be express, and a general association's rules—or its recognition of a minority local faction—are ineffective to alter such language, or otherwise to transfer an interest in such property.

Sixth, plaintiffs attempt to minimize *Davis* by suggesting that it holds only that changing an association's name does not alter legal or beneficial title. Br. 21. But *Davis* involved more than a name change; it involved a general association's authority to use its rules and its recognition of a minority faction to assert ownership and control of a local affiliate's property. The local association's name change occurred only *after* the general association revoked the local body's charter, organized a minority faction, and asserted control over the local property, and only after

the majority of the local body had voted to reject those actions and continue their operations. 82 Va. at 101-03. If anything, therefore, *Davis* presented an even *stronger* argument than plaintiffs offer here for recognizing and enforcing the rules of the general association. Indeed, for purposes of its analysis the Court in *Davis* accepted as fact that the local association was subordinate to the general association and that the actions of the general association in revoking its charter and asserting ownership and control of its property were in accordance with the general association's rules. *Id*. at 101-02. But that did not deter the Court from holding that the local affiliates could disaffiliate with its property, so long as "[t]he property [i]s not conveyed upon condition that the beneficiaries in the deed should retain the then name of their division, or that they should associate themselves with, or become subject to, the orders and regulations of the [general association]." *Id*. at 105.

Finally, in a last-ditch effort to dismiss *Davis*, plaintiffs say it is "no longer good law" on account of changes in the law concerning "legal recognition" for "unincorporated associations" and "trusts with indefinite beneficiaries." Br. 22-23. But even assuming the validity of a conveyance in trust for indefinite beneficiaries, plaintiffs would still have to contend with the formidable body of law requiring more extensive language to create a restrictive covenant. And, of course, the law concerning trusts for unincorporated religious associations has *not* changed: As explained above, absent express statutory authority, trusts for indefinite religious beneficiaries remain invalid, and the General Assembly has never extended § 57-7.1 to denominations. Indeed, *Davis* followed a number of the very cases that both sides have cited as precedent here. 82 Va. at 102 (citing *Brooke*, *Hoskinson*, *Wade*, and *Boxwell*). In short, *Davis* has not been superseded, particularly as it relates to church property. But the fact that plaintiffs go to such lengths to suggest otherwise is telling evidence that it forecloses their claims.

* * * * *

In the end, plaintiffs have no compelling answer to our arguments based on the deeds, which rightfully enjoy predominant weight in matters involving real property. Plaintiffs dismiss settled principles of real property law as an "attempt[s] to evade the issue … as articulated in *Green* and *Norfolk*." Br. 27. But as we have shown, Virginia's church property cases from *Brooke* to *Green* track the presence (or absence) of deed language restricting the congregation to worship in affiliation with a particular denomination. Moreover, the Virginia Supreme Court in this very case required resolution of the ownership question based on "principles of real property and contract law" (*Truro Church*, 280 Va. at 29)—which requires application of rules "'developed for use in *all* property disputes.'" *Norfolk*, 214 Va. at 504 (emphasis added). If this Court were to rule that TEC and the Diocese had a proprietary interest in the absence of deed language restricting use of the property to members of the plaintiff denomination, it would be the first Virginia court to do so. So long as "property [i]s not conveyed upon condition that the beneficiaries in the deed should retain the then name of their division, or that they should associate themselves with, or become subject to, the orders and regulations of the [general association]" (*Davis*, 82 Va. at 105), the CANA Congregations should enjoy the same rights as secular entities to unfettered use and alienability of property that they purchased, improved, and maintained.

C. Plaintiffs have not proven a proprietary right under their constitution and canons, which are subject to neutral principles of contract law barring enforcement of associational rules that purport to forfeit members' property.

Faced with our showing that a host of black-letter contract law doctrines bar enforcement of their canons, TEC and the Diocese retort that "traditional contract principles" do not "apply to hierarchical organizations like the Church." Br. 41; *accord id.* at 39 ("the Congregations erroneously assume that conventional contract law principles apply to the types of contractual interests identified in *Norfolk Presbytery* and *Green*"). Nothing in *Green*, *Norfolk*, or *Truro Church*,

however, suggests that only some standard contract rules apply, or that such rules apply only when they favor the denomination. Rather, both *Norfolk* and *Green* held that in determining whether "a hierarchical church" has "contractual rights in church property held by trustees of a local congregation," the trial court must consider "the language of the deeds and the constitution of the general church … *in the application of neutral principles of law*." *Norfolk*, 214 Va. at 507 (emphasis added); *accord Green*, 221 Va. at 555; *see also Truro Church*, 280 Va. at 29. Thus, the Court in *Norfolk* and *Green* did not suggest that provisions in a denomination's constitution were legally cognizable without regard to whether they comply with the limitations of contracts or associations law. To the contrary, "'neutral principles'" are those "'developed for use in *all* property disputes.'" *Norfolk*, 214 Va. at 504 (emphasis added).

The legal principles that we invoke are standard principles that apply to contracts and voluntary associations generally. Plaintiffs cannot claim surprise in hearing arguments based on theories of mutual assent, mutual obligation, mutual remedy, consideration, and enforceability of an association's rules. Indeed, as noted above, plaintiffs do not hesitate to invoke neutral principles when they perceive an advantage in so doing. *E.g*., Br. 9, 31 n.25, 39, 79-80, 92 (invoking the law of voluntary associations). Yet their own authorities recognize that the "rules" of an "unincorporated voluntary association" may not "transgress the bounds of *reason, common sense, or fairness, nor contravene public policy or the laws of the land*." *Folkes*, 201 Va. at 58 (emphasis added) (cited at Br. 31 n.25); *accord Gottlieb*, 199 Va. at 856 (cited at TEC Br. 23); *Bradley*, 138 Va. at 612 (cited at Br. 91). Before turning to the specifics of our arguments, however, we address a more fundamental issue—plaintiffs' failure to address congregational property in their "constitution," as required by *Norfolk* and *Green*. 214 Va. at 507; 221 Va. at 555.

1. *Norfolk* and *Green* consider only denominational constitutions, which in TEC's and the Diocese's case do not address ownership of member congregations' property.

It is undisputed that neither TEC nor the Diocese has adopted a constitutional provision that relates to congregational property. It is also undisputed that, had plaintiffs adopted the Dennis Canon and Diocese Canon 15.1 as part of their constitutions, affiliated congregations would have had one- to three-year waiting periods in which to decide whether to disaffiliate before the provisions took effect. Instead, the Dennis Canon took effect immediately, and Diocese Canon 15.1 took effect within weeks.

a. According to plaintiffs, there is an "obvious inconsistency between the … argument that in the Episcopal Church, only the 'Constitution' is relevant, and [our] recognition that the Methodist and A.M.E. Zion 'Disciplines' and the Presbyterian 'Book of Order' are the 'constitutions' of those churches." Br. 28. Not so. The A.M.E. Zion and Methodist "disciplines" *are* the constitutions of those denominations, and the same is true of the "Book of Order" for the Presbyterians. The canons of TEC and the Diocese, by contrast, are *not* the constitutions of those entities. The canons of TEC and the Diocese are distinct (and subordinate) documents with distinct substance and distinct processes for amendment. CANA Opening Br. 40-43; CANA Opp. 22-24. The denomination in *Green* had no analogous canons or bylaws.

b. Plaintiffs also argue that *the First Amendment* precludes civil courts from applying procedural requirements to a denomination's rules affecting property (Br. 31), but this misunderstands our argument. We are not suggesting that plaintiffs' canonical processes are not valid for *ecclesiastical* purposes; we are maintaining that the lack of advance notice fails to comply with secular civil law. And the U.S. Supreme Court has rejected the notion that courts deciding property cases under *civil* law must "defer to the resolution of an authoritative tribunal of the hierarchical church," or to its "'laws and regulations.'" *Jones*, 443 U.S. at 597, 609.

The requirement that a denomination amend its constitution is no more problematic than a requirement that a secular entity amend its articles rather than its bylaws. As *Jones* recognized, "[a] neutral principles approach cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral principles of state law governing the manner in which churches own property, hire employees, or purchase goods." 443 U.S. at 606. And if *substantive* provisions affecting these aspects of churches' operations do not violate free exercise, then a secular *procedural* requirement—which merely imposes a notice requirement and a waiting period before rules affecting property ownership take effect—cannot possibly be unconstitutional.

Indeed, if plaintiffs' view were the law, civil courts would be compelled to apply plaintiffs' canons, but could not inquire whether they were invalidly adopted (*e.g.*, whether someone rigged the vote). That would be deference-to-hierarchy with a vengeance, and it is not the law. "[C]ivil courts" are "bound to give effect to the result indicated by the parties" only if "*it is embodied in some legally cognizable form*." *Id.* (emphasis added). And deciding what is "legally cognizable" entails applying neutral rules—including procedural rules requiring notice, and rules requiring that provisions addressing church property be embodied in the denomination's most fundamental organizing document: its "constitution." *E.g.*, *Green*, 221 Va. at 555.

c. The rule of *Norfolk* and *Green* that only church *constitutions* warrant consideration is not avoided by providing advance notice of canons; that is simply one reason why plaintiffs' failure to adopt relevant constitutional provisions has concrete effects. On the notice issue, plaintiffs dispute that New York's advance notice requirement governs TEC, a New York voluntary association, but not on the basis that New York has no such requirement. Rather, they say that if such a requirement "did apply," then we would have to "contend with" New York cases that "applied the Dennis Canon." Br. 29.

To be sure, Virginia law determines the ultimate issue of ownership, but the same is not true of the validity of TEC's rules under secular law addressing governance.[16] Further, not *one* of the New York cases that plaintiffs cite addressed the argument that New York law mandates advance notice of association rules, particularly where those rules affect members' property. CANA Opening Br. 42 & n.32. The cited cases at most say that civil courts should not consider whether TEC's own *internal* rules were valid and satisfied. *See Episcopal Diocese of Rochester v. Harnish*, 11 N.Y.3d 340, 349-50 (2008) (not citing secular law, assuming validity of Dennis Canon, and requiring civil courts to defer to result of hierarchical church legislative process); *Diocese of Central New York v. Rector, Church Wardens, and Vestrymen of the Church of Good Shepherd (Shepherd I)*, 880 N.Y.S.2d 223, 223 (N.Y. Sup. 2009) (viewing the validity of the canon's adoption as a "purely ecclesiastical or religious concern[]" and not citing secular law); *St. James Church, Elmhurst v. Episcopal Diocese of Long Island*, No. 22564/05 (N.Y. Sup. March 12, 2008), slip op at 25-26 (following case law requiring court to interpret Dennis Canon only in secular light). The same is true of plaintiffs' non-New York authorities.[17]

In any event, the same result obtains under Virginia law. Advance notice and a reasonable waiting period is compelled by the fact that, as plaintiffs' cases put it, the "rules" of a "voluntary association" may not "transgress the bounds of reason, common sense, or fairness, nor contravene public policy or the laws of the land." *Folkes*, 201 Va. at 58; *see also Gillman*, 223

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[16] *See Williams v. 5300 Columbia Pike Corp.*, 891 F. Supp. 1169, 1182 (E.D. Va. 1995) (applying Virginia law and stating that "[i]n general, the internal affairs of a corporation are governed by the law of the state of incorporation").

[17] *Episcopal Church Cases*, 198 P.3d 66, 83-84 (Cal. 2009) (rejecting defendants' argument that TEC did not properly adopt Dennis Canon under its own rules because claim was a "question[] regarding 'religious doctrine or polity' on which [the court] must defer to the greater church's resolution" without considering governing associations law) (citations omitted). *cf. In re Church of St. James the Less*, 888 A.2d 795, 808 (Pa. 2005) (finding Dennis Canon to be valid because it was enacted according to the Episcopal Church's internal procedures, but without considering governing associations law).

Va. at 767 (applying a "test of reasonableness to determine the validity of association regulations"). That fairness calls for reasonable advance notice and an opportunity to disaffiliate is obvious given the value of the property involved—a point confirmed by plaintiffs' willingness to give notice to those affected by canonical changes to their pension fund, where far less is at stake. PX-COM-0001-047 (Canon I.8.9) ("The General Convention reserves the power to alter or amend this Canon, but no such alteration or amendment shall be made until after the same shall have been communicated to the Trustees of The Church Pension Fund and such Trustees shall have had ample opportunity to be heard with respect thereto.").

There is no dispute that TEC did not provide advance notice of the Dennis Canon. In an effort to downplay this fact, plaintiffs point to a small blurb in the *Virginia Churchman* noting after-the-fact that TEC had adopted the Dennis Canon. Br. 4 n.4. The article was not exactly prominently placed. Rather than on the cover—which featured articles on adoption of the 1979 Book of Common Prayer and on "Ordaining Gays Is Held To Be Inappropriate"—the blurb that plaintiffs point was buried on the lower portion of the final column page 18. PX-COM-0273-0001, -0016. But in any case, the law requires reasonable *advance* notice of associational rules.

Although the Diocese provided some advance notice, there can be no dispute that it did not provide sufficient notice to permit meaningful congregational deliberation on Diocese Canon 15.1. PX-DEP-006-0039 (Causey Dep. Desig.) (stating that proposed regulations would generally be "out by January 1" for a "council at the end of … January"); PX-COM-0250-001 (convention held Jan. 28-30, 1983); PX-COM-0250-221 (proposed amendment undated). But even if the notice provided here *were* reasonable (and it is not), it would not change the fact that plaintiffs failed to address property in "the constitution of the general church," as required by Virginia precedent. *See Green*, 221 Va. at 555 (quoting *Norfolk*, 214 Va. at 507). Nor would it change

the fact that plaintiffs' alleged canon-based contractual interest violates several strands of neutral contract law requirements—a subject to which we now turn.

2. Plaintiffs' property-related canons are unenforceable under a host of standard contract law and associations law doctrines.

Even if the substance of plaintiffs' canons were found in their constitutions, their attempt to establish a proprietary interest would fail. As the Virginia Supreme Court has explained, "the constitution of the general church should be considered by the trial court *in the application of neutral principles of law*." *Norfolk*, 214 Va. at 507 (emphasis added); *accord Green*, 221 Va. at 555. In other words, provisions relating to property in a denomination's constitution are not automatically enforceable; they must satisfy the neutral requirements of Virginia's civil law. Plaintiffs' canons fail that test—which is why they so strenuously argue that "conventional" and "traditional contract principles" do not "apply to … the Church." Br. 41, 38.

a. Plaintiffs' canons suffer from a lack of mutual remedy, which renders them enforceable under Virginia contract law.

1. Perhaps the most remarkable instance of plaintiffs' claim of immunity from ordinary contract law is their answer to our showing that any "contract" here is characterized by a lack of a mutual remedy for breach. CANA Opening Br. 58-63. Plaintiffs do not dispute the premise of this argument—that only *they* may enforce the constitution and canons.[18] Nor do they deny that, outside of cases involving "a hierarchical organization" (Br. 41), "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*, 195 Va. at 896.

[18] Nor could they, given their chief legal officer's binding testimony that 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) (Rule 4:5(b)(6) deposition).

Instead, plaintiffs say the "fundamental flaw" in our view is its "erroneous[] assum[ption] … that traditional contract principles apply to hierarchical organizations like the Church, ignoring the body of case law holding that the governing rules of a hierarchical organization—even a secular one—are binding on its members." Br. 41. Even assuming, however, that the rules of a general association can create a binding contract, plaintiffs cite no case holding that such rules are enforceable where only *the association*—and not its *members*—has a right to enforce them and a remedy for breach. We are aware of no such authority. *Contra Wildes v. Juneau County Humane Soc'y*, 751 N.W.2d 902 (Wis. App. 2008) (bylaw prohibiting members from suing association was invalid as contrary to public policy).

Nor should that be surprising. Imagine an argument that a union may sue members for breach of a contractual duty to pay union dues, but members may not sue the union for breach of the association's contractual duties to pursue grievances against an employer. It is fanciful at best to think that the courts would treat associational rules as a mutual and enforceable contract in such circumstances. *E.g.*, *Folkes*, 201 Va. at 58 (cited at Br. 31 n.25) (holding that the "rules and regulations" of an "unincorporated voluntary association" (there a union) may not "transgress the bounds of reason, common sense, or fairness"). "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*." 4A *Michie's Jurisprudence*, Contracts § 2, at 404 (emphasis added).

Although mutuality of remedy is a standard contract law requirement, plaintiffs disparage our mutual remedy argument on the basis that "[t]he existence or lack of mutuality is not a factor identified in *Green*." Br. 43. That point might be relevant if the congregation had raised such an argument, and the Court had rejected it. But the congregation did *not* raise it, and the Court did *not* reject it. A court's silence concerning an argument not raised does not imply that the argu-

ment was rejected. Arguably (or superficially) similar cases often come out differently based on a key factual difference or a new argument. The Congregations are free to raise any argument supported by the record, and the record here—unlike the record in *Green*—contains undisputed evidence that an "individual parish" lacks the "ability to force the Diocese to abide by the constitution and canons." DX-CANA2011-0009-00029 (Beers). That is fatal to plaintiffs' case.

Plaintiffs also suggest that, if our mutual remedy argument "had any weight," then the cases in which they have prevailed would have come out the other way. Br. 42. To our knowledge, however, in none of those cases did the congregation raise a lack of mutual remedy defense, much less point to evidence like that here, where binding testimony candidly admitted that a congregation has no ability to enforce any provision of the denomination's governing documents—confirming the one-sided nature of the alleged contract. All of plaintiffs' authorities were decided on the basis of either deference-to-hierarchy or trust law theories, not *contract* law, so the congregation had no occasion to press, and the court to consider, the defense. *See, e.g.*, *Graves*, 417 A.2d at 24 ("In the absence of express trust provisions, we conclude that the hierarchical (*Watson*) approach should be utilized in church property disputes in [New Jersey]"); *Tea*, 610 P.2d at 184 ("the courts of [Nevada] should defer to the decision of responsible ecclesiastical authorities, under the internal discipline of the organization to which the local congregation has voluntarily subjected itself"); *Mote*, 716 P.2d at 108 ("the facts specifically found by the trial court or otherwise uncontroverted establish that a trust has been imposed upon the real and personal property of St. Mary's Church for the use of the general church" (Colorado)).

2. The balance of plaintiffs' answer to our mutual remedy point sounds in First Amendment law. Br. 42-43. Noting that "Virginia courts do not defer to one party's judgment about whether the other party breached a contract," plaintiffs accuse us of "effectively asking the Court

to rely on *the Congregations' own judgment* that [they] have breached ecclesiastical commitments." Br. 42, 43 (emphasis in original). Plaintiffs have mischaracterized our argument.

At the outset, plaintiffs are mistaken to suggest that our mutual remedy argument depends on the First Amendment's bar to judicial resolution of doctrinal questions, let alone on a finding that spiritual components of the parties' relationship were breached. As we have explained, "the First Amendment jurisdictional bar on civil courts deciding doctrinal issues" provides "a *separate and independent* reason why the canons suffer from lack of mutuality." CANA Opening Br. 63 (emphasis added). Our principal argument rests on the undisputed fact that—*regardless* of the nature of any obligations imposed by the constitutions and canons—an "individual parish" lacks the "ability to force the Diocese to abide by the[m]." DX-CANA2011-0009-00029. *See* CANA Opening Br. 58-63.

The First Amendment simply provides an independent reason, apart from this undisputed evidence, for concluding that the alleged contract here suffers from a lack of mutuality. It is undisputed that plaintiffs' constitutions and canons embody spiritual commitments.[19] It is also undisputed that *Hull Church* bars the Court from deciding whether, as the Congregations believe, plaintiffs breached those commitments. Thus, we are not "effectively asking the Court to rely on *the Congregations' own judgment* that [they] have breached ecclesiastical commitments." Br. 42. We are stating that, insofar as TEC and the Diocese wish to advance a *contract* theory—as

[19] PX-COM-0001-009 (preamble to TEC's constitution, defining 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-0276-0103 (Diocesan Annual Council Journal, stating that "[t]he 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 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."); Tr. 1334:5-8, 1289:4-1290:13 (Mullin); Tr. 2642:4-8 (J. Yates); CANA Opening Br. 63-65.

they repeatedly say (*e.g.*, Br. 38, 42)—the law precludes them from enforcing a contract that the Congregations cannot enforce against them. And just as "Virginia courts do not defer to one party's judgment about whether the other party breached a contract" (Br. 43), so too do Virginia courts not enforce a contract that only "one party" can be found to have breached. "Both parties must be bound or neither is bound." *Town of Vinton*, 195 Va. at 896.[20]

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[20] In a footnote, and without citation of any authority or record evidence, plaintiffs state that "[i]t is not clear whether the Congregations simply do not wish to use the ecclesiastical dispute resolution processes or believe that they have attempted to use them and not received the desired result." Br. 42 n.32. The import of this argument is not clear, but we note that TEC and the Diocese have no "ecclesiastical dispute resolution process" for issues related to property or to congregational disputes with the denomination. The only such process they have relates to discipline of clergy. *See* PX-COM-0001-115 to -173 (Title IV of TEC canons); *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America otherwise known as The Episcopal Church* (1981 Edition), vol. 1, at 123 ("The constitutional authority to establish an ultimate Court of Appeal, granted to the General Convention in the fifth paragraph of the Article, such court to be 'solely for the review of the determination of any Court of Review on questions of doctrine, faith, or worship,' has not yet been exercised."); *id*. at 125 ("The fifth paragraph of Article IX, governing the establishment of an ultimate Court of Appeal, still remains without implementation in canonical enactment."); *see also* Lloyd J. Lunceford et al., *A Guide to Church Property Law: Theological, Constitutional and Practical Considerations* 133-34 (Reformation Press 2006) ("There are courts in the Episcopal Church, but their function by canon is limited to church discipline of bishops, priests and deacons. The church courts have no authority over parish disputes with the diocese or the ECUSA. The General Convention and the diocesan conventions are legislative bodies, but there are no judicial bodies." (footnote omitted)).

If plaintiffs are suggesting that the belief that the denomination breached its spiritual commitments to them is not sincere, but simply "their current litigating position" (Br. 42 n.32), that is unsupported by the record. As undisputed evidence confirms, the Congregations firmly, graciously, and repeatedly told denominational leaders of their failure to uphold the historic faith. *E.g.*, TRU027 (Aug. 12, 2003, letter from Truro wardens to Bp. Lee); DX-FALLS-0172(Oct. 4, 2005, letter from TFC vestry to Bp. Lee); DX-FALLS-0355 (Dec. 20, 2005, letter from TFC wardens to Bp. Lee); DCOE Exs. 427, 432 (June 20 and August 26, 2003, Letters from Epiphany rector to Bp. Lee); Tr 4114:19-4115:2 (Brown); DSTM Exs. 551, 552 (March 10, 1990 & May 11, 1991, Letters from St. Margaret's vestry to Bp. Lee); Tr. 3712:20-3714:2; DSTS Exs. 78-01210; 121 (June 2, 2004, St. Stephen's Church Comment to Diocesan Task Force on Giving; June 10, 2004 Letter from St. Stephen's Rector to Diocesan Officer; September 17, 2005 Letter from St. Stephen's Rector to Bp. Lee transmitting vestry's "Clear Choice" Statement; March 26, 2006, Letter from St. Stephen's vestry to Bp. Lee).

b. Plaintiffs have failed to demonstrate that the CANA Congregations assented to grant them a proprietary interest.

The central issue in this case is whether the CANA Congregations agreed as a matter of contract law to grant plaintiffs a proprietary interest in the Congregations' property. "[F]orming a contract requires mutual assent and the communication of that assent" (Letter Op. 10 (Aug. 19, 2008) (quotation omitted)), and "[i]t is essential to a bargain that each party manifest assent *with reference to the manifestation of the other*." *Restatement (Second) of Contracts* § 23 (emphasis added); *see also St. James the Less*, 888 A.2d at 807-08 (TEC's rules may "not deprive the member of vested property rights without the member's explicit consent").

How congregations can manifest the requisite assent has been shown in other cases. In *Burhman*, the members of the congregation signed a petition in which they "solemnly promise[d] and declare[d] 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" and "solemnly engage[d] and stipulate[d] that all real estate consecrated as a church or chapel of which the said parish is or may become possessed, shall be secured against alienation from the Protestant Episcopal Church in the Diocese of Southwestern Virginia, unless such alienation is in conformity with its Canons." Apostles Ex. 298.0008–0009 (Complaint Ex. A). In *St. James the Less*, the congregation (1) adopted articles of incorporation declaring that its purpose was to worship God "according to the faith and discipline of [TEC]," and to hold its property "for the work of the [Diocese]," (2) expressly agreed that, if it ever dissolved, its property would be placed in trust for the Diocese, and (3) prohibited any amendments to its articles without Diocesan consent. 888 A.2d at 808-10.

The CANA Congregations, by contrast, made no such agreements, pledges, or representations. No Congregation had its members sign a stipulation that the Congregation's consecrated

real estate would be secured against alienation from the denomination. No Congregation agreed in its articles of incorporation to forfeit its property if it left the denomination, or not to amend its governing documents without the Diocese's consent.

In an effort to obscure the reality that the Congregations made no contractual promises with respect to their property, plaintiffs fall back on their favorite canard—that by joining a supposedly "hierarchical church" they committed themselves to whatever rules the denomination might pass, even those that impinged on the Congregations' property rights. Br. 3. Yet *Norfolk* rejected the assertion "that those who unite themselves with a hierarchical church do so with an implied consent to its government." *Norfolk*, 214 Va. at 504. Moreover, if the result in this case hinged solely on what canons plaintiffs chose to promulgate, no neutral principles analysis would have been necessary—the Supreme Court could have given effect to the Dennis Canon, then a part of the record, and ordered a remand to enter judgment for plaintiffs. CANA Opp. 39-42.

Plaintiffs also point to actions of the Congregations that plaintiffs say "manifested an understanding that [the Congregations] were bound by the Canons of Dioces[e] and the Church." Br. 3. For example, plaintiffs cite an 1836 constitution under which attendance at a Diocesan Convention was deemed to signify ratification of any future canons that might be passed. Br. 3 (citing Diocese Br. 57-58). From that, plaintiffs argue that The Falls Church agreed to later-enacted property canons. But the 1836 constitution spoke of the congregation be bound by future canons "in ecclesiastical concerns." PX-COM-71-625. Nothing in the 1836 Constitution suggested that The Falls Church was relinquishing its temporal authority over its property by sending a delegate to the Diocesan Convention. *E.g.*, Tr. 1045:2-1046:13 (Bond); PX-COM-0074-022 (1836 and 1837 canons).

Turning to Truro, plaintiffs point to a 1998 vestry handbook as "the best indication of Truro's awareness of the Constitution and Canons." Br. 3 (citing Diocese Br. 81). All that the vestry handbook says, however, is that each vestry member should "read, or at a minimum, review the Constitution and Canons for the Episcopal Church" in order to "perform effectively." PX-TRU-028-003. Nothing in the handbook alerted the vestry that somewhere in the 169 pages of the Constitution and Canons lurked a provision that purported to alter Truro's property rights, much less that Truro had assented to such provisions.

Plaintiffs also point to the CANA Congregations' compliance with canons requiring Diocesan consent, noting that several of these canons dealt specifically with property. *Id*. at 3, 51-52. The national and Diocesan canons are replete with consent provisions, however, some of which involve property and several of which do not. *E.g*, PX-COM-0001-061 to 062 (TEC Canon I.19) (requiring Bishop's consent for remarriage of divorcee); PX-COM-0001-064 to 065 (TEC Canon II.3) (requiring TEC's consent for use of alternative liturgy); PX-COM-0001-065 (TEC Canon II.4) (requiring Bishop's consent for use of foreign language Book of Common Prayer in any congregation worshiping in other than the English language). Yet nothing in those canons put the CANA Congregations on notice that the consequence of seeking consent would be the loss of dominion over their property. As we have explained, the canons neither bar disaffiliation nor assert any claim of ownership, and a contract will not be read to effect a forfeiture of property unless it "give[s] the right of forfeiture in terms so clear and explicit as to leave no room for any other construction." *Wickline*, 205 Va. at 169. CANA Opp. 29-30. Nor can plaintiffs point to a single document in which a Congregation agreed that its compliance with any consent provisions in the canons would constitute assent to the grant of a proprietary interest in the Congregation's property.

The fact that a consent provision involved property would not itself have alerted a congregation that its compliance with the canon would have ownership consequences. A homeowner may be bound by rules of a neighborhood association that require the association's consent before the homeowner can change the color of her front door or put up a fence. But neither the existence of the rule nor the homeowner's compliance with the rule means that the neighborhood association has obtained a proprietary interest in her house.

Neither plaintiffs nor the CANA Congregations saw legal significance in the canonical consent provisions. As the evidence at trial demonstrated, the Congregations viewed compliance with the canons, including those affecting property, as an ecclesiastical obligation, not a contractual duty. Tr. 3639:1-12 (Cerar) (describing his "understanding that the role of Episcopal Church and Diocese of Virginia constitutions and canons play in the life of a congregation" as "prescribing the way in which the church works together to carry out the mission assigned to us by Christ" and not as "legally enforceable"); Tr. 4100:1-14 (Brown) (describing "the role of church constitutions and canons" as "spiritual guides that help the church order its life so it is pleasing to God."); Tr. 2556:13-2557:10 (Deiss) (explaining that, "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"). While plaintiffs now argue that the consent provisions manifest a contractual relationship extending to property, the head of the Diocese's own Standing Committee has stated otherwise. Like the CANA Congregations, he has characterized the consents under the canons as arising from a shared faith, not from a contractual commitment: "We are not affiliated to each other by contractual commitments that have a beginning and an end, escape and penalty clauses and the like. … The requirements of various consents, the testimonials and approvals, the mechanisms for order and discipline—all these are

means by which we affirm that the Church is one body, sharing one baptism, proclaiming one faith in our one Lord who is God and Father of all." PX-COM-0276-0103. To hold that ambiguous canonical provisions work a forfeiture, in circumstances where the Diocese's own leading spokesperson characterizes those provisions as spiritual in nature, is untenable. *Wickline*, 205 Va. at 169 (noting the "well defined rule[]" that contracts are "construed strictly against forfeiture"); CANA Opening Br. 81 n.48 (collecting authorities).

To bolster their argument that the Congregations intended to cede control over property, plaintiffs point to situations where some (but not all) Congregations supposedly signaled their consent to such control. For example, plaintiffs point to statements in which St. Margaret's ostensibly characterized the Diocese as the owner of the Congregation's property. Br 3 (citing Diocese Br. 145). Once again, however, plaintiffs are overreaching. In the deed they cite, the Bishop did not sign as a grantor because the Diocese had a proprietary interest in the land. *See* PX-STMARG-546-001. Rather, he signed because the property was still subject to a mortgage held by the Diocesan Missionary Society. DSTM Ex. 5; PX-STMARG-976. The DMS security interest also mistakenly led a third party to identify the "Episcopal Diocese of Virginia, Department of Missions" as the owner on certain zoning applications to the county. PX-STMARG-583-001; PX-STMARG-596-001. Such mistakes do not a proprietary interest make.

With respect to Church of the Apostles, plaintiffs note documents authored by Rev. Harper, discussing the Diocese's claim to the congregation's property. Br 3 (citing Diocese Br. 164). But as Rev. Harper explained at trial, these statements merely reflected his knowledge of the canonical claim and do not reflect any agreement by the Congregation (or its vestry) to that claim. Tr. 3123:16-3126:4. Indeed, the Apostles vestry and congregation strongly objected to the notion that the Diocese had a claim to the Congregation's property (Tr. 3128:5-3136:1), and

explored ways to avoid it. Apostles Ex. 105; PX-APOST-0055-004, 005; Tr. 3111-27 (discussing putting property in name of 501(c)(3) corporation.). This resistance to Diocesan control over Apostles' property was not limited to the years preceding disaffiliation; it dated back to Apostles' formation. Tr. 3079:1-9 ("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. Q Did you consider Apostles to be holding the Pickett Road property in trust for the national Church of [sic] the Diocese? A No way") (McGowan).

Unable to show affirmative consent, plaintiffs attempt to argue consent through silence. They note that the Congregations were aware of the Dennis Canon and Diocese Canon 15, and failed to object to them. Br. 3-4. But silence does not equate with consent. "A party's silence … is insufficient to show its intention to be bound by the terms of a contract." *Phillips v. Mazyck*, 273 Va. 630, 638 (2007). Moreover, the Congregations were under no duty to object to canons purporting to assert a denominational trust, in violation of Virginia law. The facial invalidity of the canons also forecloses any claim that plaintiffs reasonably relied on the Congregations' silence. Not surprisingly, our research unearthed no case in which a party was deemed to have a duty to object to an unlawful act.

c. TEC and the Diocese have failed to establish that the adoption of their property-related canons was supported by additional consideration, as required by Virginia law.

It is a bedrock principle of contract law that contractual obligations must be supported by consideration. As the Virginia Supreme Court held in *Southern Ry. Co. v. Willcox*, "[i]t is a fundamental principle of the law of contracts that every simple promise or agreement, in order to be enforceable, must have a consideration to support it for, however strongly a man may be bound in conscience to fulfill his engagements, the law recognizes not their sanctity, nor supplies any means to compel their performance, except when founded upon a sufficient consideration." 98

Va. 222, 35 S.E. 355, 356 (1900); *see also* CANA Opening Br. 55-56. The issue here is whether TEC and the Diocese, upon passing their property-related canons, provided any consideration for their unilateral declarations of a trust interest in the CANA Congregations' properties. Put another way: What did plaintiffs give in exchange for acquiring a proprietary interest in real and personal property worth more than $50 million?

The record contains undisputed evidence that TEC and the Diocese did nothing beyond what they had previously done (CANA Opening Br. 56-57), and plaintiffs remain unable to point to any consideration. The only item they can think of—featured prominently in a footnote—is their provision of group health insurance in the 1990s. Br. 39 n.30. But this ostensible "consideration" was not given in exchange for the Dennis Canon or Diocese Canon 15.1. Indeed, it was provided *more than ten years later*. In addition, even setting aside the fatal irregularity of providing consideration a decade after the fact, the Congregations offered unrefuted testimony that group health insurance was not a benefit to them, but a detriment. Tr. 2478:10-2480:21.

Unable to point to any additional benefit given to the Congregations in exchange for imposing a trust on their property, plaintiffs argue that additional consideration was not required. Br. 40. In support, they cite an employment case in which the Virginia Supreme Court held that continued employment provided the consideration for imposition of a covenant not-to-compete. *Id*. (citing *Paramount Termite Control Co. v. Rector*, 238 Va. 171 (1989)). Extrapolating from that decision, plaintiffs reason that the Congregations' continued affiliation with the denomination provided the necessary consideration for new contract terms. Br. 40. For two fundamental reasons, plaintiffs are mistaken.

First, the Virginia Supreme Court has not extended the notion of a continued relationship providing consideration outside the employment context, and for good reason. If plaintiffs' logic

were accepted, any party seeking modification of a contract could argue that its willingness to remain in the contractual relationship provided consideration for the desired modification—even if, as here, the alleged modification was one-sided in its favor. But the Virginia Supreme Court has never so held. To the contrary, it has repeatedly affirmed that a contract modification requires consideration. *See Seward v. New York Life Ins. Co.*, 154 Va. 154, 168 (1930) ("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."); 4A *Michie's Jurisprudence*, Contracts, § 45 at 513 (2007) ("As a rule, a consideration must be shown for the modification of a contract."); *id*. § 34 at 449 ("[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.").

Second, the reason why continued employment provided consideration for a covenant not-to-compete in *Paramount* is that the relationship was otherwise terminable at will. Because an employer generally has the right to fire an employee at any time, the Court viewed the employer's willingness to continue the employment relationship as sufficient consideration for imposition of the restrictive covenant. *See Paramount*, 238 Va. at 176. Here, however, plaintiffs have not alleged that the Congregations' continued affiliation with the denomination was at will, with either party being free to end the affiliation at any time. Indeed, they have argued to the contrary, insisting that the Congregations could not leave the denomination. Thus, *Paramount* is inapposite, and plaintiffs' failure to establish that they gave additional consideration in exchange for the adoption of their canons defeats their claims.

d. Under *Jones v. Wolf*, what is "legally cognizable" is determined by the neutral requirements of state law.

Plaintiffs do not dispute (nor could they) the requirement that their canons be "embodied in some legally cognizable form." *Jones*, 443 U.S. at 606. Rather, they say the "only documents … that are *not* 'legally cognizable'" are those "that require 'inquiry into religious doctrine.'" Br. 35 (quoting *Jones*, 443 U.S. at 603). Because the canons here "require no such inquiry," the argument goes, they are necessarily "legally cognizable." Br. 35. This argument is untenable.

In reaffirming that religious documents are *not* legally cognizable as a matter of *constitutional* law, the U.S. Supreme Court in *Jones* was not comprehensively prescribing what sorts of private arrangements *are* legally cognizable as a matter of *state property* law. Rather, the thrust of *Jones* is that States have considerable latitude to establish the requirements for creating legally cognizable property interests, provided there is some means for the parties to mutually arrange their affairs to achieve either denominational or congregational ownership of property. 443 U.S. at 602-606. No contrary view could make sense of *Jones*' explanation that neutral principles "rel[y] exclusively on objective, well established concepts of trust and property law," or of its holding that civil courts need not defer to "the 'laws and regulations'" of a "hierarchical church." *Id*. at 603, 607, 609. Nor can plaintiffs' view be squared with the notion that "neutral principles" are those "developed for use in all property disputes." *Norfolk*, 214 Va. at 504; *Jones*, 443 U.S. at 599. In short, an absence of religious doctrine in a denomination's property canons does not automatically render them legally cognizable; they must satisfy the neutral requirements of Virginia "real property and contract law." *Truro Church*, 280 Va. 89.

e. The assertion of TEC and the Diocese that the enforceability of their canons is "law of the case" is unfounded.

Aware of the foregoing difficulties with their canons, plaintiffs again appeal to a passing reference in the Virginia Supreme Court's § 57-9 opinion in hopes of establishing that the bind-

ing nature of each canon is "the law of the case." Br. 2. But as we have explained, the cited statement cannot bear such weight. CANA Opp. 39-42. Were plaintiffs' reading of the Court's opinion correct, there would have been no need for any remand and no need for application of "principles of real property and contract law." 280 Va. at 89. But as we have shown, particular provisions of an otherwise valid contract may be unenforceable. CANA Opp. 40-41; *accord Folkes*, 201 Va. at 58 (even where the rules of an "unincorporated voluntary association" otherwise constitute a contract, those rules may not "transgress the bounds of reason, common sense, or fairness, nor contravene public policy *or the laws of the land*" (emphasis added)) (cited at Br. 31 n.25). Moreover, the cases holding that associational rules constitute a contract did not involve a record like that here, where it is undisputed that there is no mutuality of remedy, consideration, or assent to a denominational proprietary interest.

D. TEC and the Diocese have not demonstrated that course-of-dealing evidence is relevant under *Green*, but that evidence nonetheless shows that the CANA Congregations exercised exclusive dominion over their property, including the right to exclude denominational officials from the premises and the right to withhold donations from the denomination in their discretion.

1. Course-of-dealing evidence is irrelevant where there is no constitutional provision outlining the circumstances in which such evidence establishes consent to grant a proprietary interest.

TEC and the Diocese have also failed to establish a proprietary interest based on evidence relating to the parties' course of dealing. Plaintiffs do not dispute that, outside of circumstances like *Green*'s, course-of-dealing evidence is irrelevant "to the existence of an enforceable contract." *E.g.*, *Delta Star, Inc. v. Michael's Carpet World*, 276 Va. 524, 531 (2008); *see also Norfolk*, 214 Va. at 507 (explaining, without mentioning course-of-dealing evidence, that a denomination "has the burden of proving that the [congregation] violated either the express language of the deeds or a contractual obligation to the general church"). Moreover, as shown in our prior briefs, the Court's analysis of course-of-dealing evidence in *Green* closely tracked the "indica-

tions" in paragraph 434 of the denomination's constitution—which set forth the specific means by which a congregation would evidence consent to be bound by a denominational proprietary interest. *E.g.*, CANA Opening Br. 86 (chart detailing the parallel language in the consent provisions of the A.M.E. Zion Church's constitution and the Court's analysis). The canons here contain no parallel consent provisions.

In response, plaintiffs say that the Court in *Green* did not expressly "relat[e] or compar[e] the provisions of ¶ 434 of the Discipline to its analysis of the dealings between the parties." Br. 45. But that is not a credible argument. For example, the Discipline in *Green* stated that a congregation's "intent" to grant the denomination a proprietary interest could be "shown by … 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." 221 Va. at 554 n.2. On the very next page, the Court found "that the name, customs, and policies of the A.M.E. Zion Church have been used in such a way that Lee Chapel is known, recognized, and accepted to be an A.M.E. Zion Church." *Id*. at 555; *see also* 221 Va. at 556 (citing, among other factors, "the Discipline of the A.M.E. Zion Church and the relationship which has existed between the central church and the congregation," as supporting a "find[ing]" of a proprietary interest). Are plaintiffs seriously suggesting that these statements were not "related" to one another, or that the Court just happened to choose virtually identical phrasing in conducting its analysis?

Equally unconvincing is plaintiffs' observation that "the text … to which footnote 2 … is appended[] addresses a completely different issue." Br. 45. Even if true, it would hardly be remarkable for the Court to elaborate on the significance of this paragraph of the denomination's constitution on the next page. But as a review of the text confirms, page 554 of the Court's opinion discussed circumstances that would evidence a denominational interest in the absence of "a

specific trust provision clause" in the relevant "deeds and conveyances." 221 Va. at 554. The footnote simply elaborated on the nature of those circumstances. Then, on the following page, the Court went on to make a finding that those conditions existed. *Id*. at 555. There is nothing at all "mysterious" (Br. 55) about our citation of page 555.

Citing *Green*'s reference to a host of facts—*e.g.*, "the local church's participation as 'an integral part' … of the general church, by sending delegates to 'various conferences,'" its use of denominational "Sunday School materials, hymnals, and other literature," its use of denominational rites, its payment of assessments, and its receipt of spiritual benefits—plaintiffs insist that the Court there relied on many course-of-dealing factors not mentioned in paragraph 434 of the A.M.E. Zion Church's Discipline. Br. 46. Not so. Without exception, however, the factors that plaintiffs cite relate to the congregation's "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*." 221 Va. at 554 n.2 (emphasis added). The fact that the Discipline did not spell out each and every relevant "custom" does not mean that the customs cited by plaintiffs were beyond paragraph 434's scope.

It cannot be denied that factors such as these are the ordinary incidents of being a part of a religious denomination. None of them ordinarily supports creation of a proprietary interest. Moreover, the Court in *Norfolk*—which *Green* reaffirmed (221 Va. at 553-555)—expressly rejected the view that congregations "who unite themselves with a hierarchical church do so with an implied consent to its government." 214 Va. at 504. While plaintiffs are more fond of citing *Green*, this Court is bound by both *Green* ***and*** *Norfolk*. And the only meaningful way to reconcile these aspects of the two decisions is to hold that—absent a constitutional provision stating that a congregation expresses consent to a proprietary interest by taking specific steps granting

such consent—the congregation's intent to grant a proprietary interest must be explicit. Indeed, any other approach would transform Virginia into a deference-to-hierarchy state.

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

In any event, the course-of-dealing evidence overwhelmingly favors the CANA Congregations. It is undisputed that the CANA Congregations alone exercised day-to-day management of and dominion over the property, admitting or excluding others, including diocesan officials, in their discretion. In addition, it was the CANA Congregations who bore principal if not exclusive responsibility for the conduct and content of their services and the selection of their clergy. The Congregations exercised total control over their bank accounts and other personal property, giving tens of millions of dollars to support the denomination and, in their discretion, cutting off such support. In each of these critical respects, the record here looks quite different from the record in *Green*. *E.g.*, 221 Va. at 551-52 (contributions to the denomination were mandatory, and the denomination set the amount); *id*. at 549 ("Pastors are appointed by the bishops, and … a local congregation could not refuse to accept a pastor"); CANA Opening Br. 91-93 (summarizing testimony, not present in *Green*, that the Congregations could and did exclude denominational officials from the premises). Indeed, this Court has already made findings on such issues concerning one of the Congregations (The Falls Church). Letter Op. 15 n.10 (Dec. 19, 2008) ("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."); *see also id*. at 16 ("ECUSA and the Diocese concede, as they must, that TFC did in fact manage and administer the property for the past 150 years and more"). The Court should make similar findings concerning the rest.

a. Dominion, management, and control

Notwithstanding *Green*'s explanation that "[a] proprietary right is a right customarily associated with ownership, title, and possession"—"a right of one who exercises dominion or control over a thing or property, of one who manages and controls"—plaintiffs question whether "dominion or control is even a legitimate issue." Br. 48. Plaintiffs' concern with application of ordinary rules governing dominion and proprietary rights is perhaps unsurprising given how little actual involvement they had with the property. CANA Opp. 36-38. The notion that annual visits and such constitute an exercise of "dominion" or establish a "proprietary interest" finds no support in neutral principles of law. *See Quatannens*, 268 Va. at 366 (equating "absolute dominion" with "actual possession," which "might be accomplished 'by residence, cultivation, improvement, or other open, notorious and habitual acts of ownership'").

Plaintiffs are thus resigned to arguing that the Court in *Green* "did not find … that the general church possessed or exercised any dominion or control over Lee Chapel or its bank accounts," other than "its 'requirement that all property transfers be approved by the bishop.'" Br. 48 (quoting 221 Va. at 556). But that is not so. To begin with, the denomination exercised control over the bank accounts by setting mandatory assessments at amounts of its choosing. 221 Va. at 551 (the congregation "objected to the assessments which were levied and which the local congregation was required to meet," finding them "excessive"). More importantly, however, the denomination "assumed" a "contractual obligation" in the "deed," and the Court made a specific finding that the denomination fulfilled that deed-based obligation: "The A.M.E. Zion Church had assumed its responsibility, fulfilled its obligation, and exercised dominion, control, and supervision over Lee Chapel, albeit not always in accordance with the wishes of the members of the local church." *Id*. at 556. Accordingly, there were several grounds upon which the Court relied in

finding the exercise of dominion and control, and plaintiffs are wrong to suggest that the Court made no such finding. Br. 48.

Aware of this difficulty, plaintiffs argue that "the deed was ineffective as a matter of law to convey title to the general church." Br. 48. But as we have explained, that not only ignores the fact that the deed *also* imposed a use restriction favoring denominational members (221 Va. at 553), it is not what the Court said. After defining a "proprietary interest" as a right of one who exercises "dominion" and "manages and controls," the Court's very next sentence stated: "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. It is therefore plain that the deed—and the denomination's exercise of obligations assumed under the deed—were central to the Court's finding that the denomination exercised "dominion" and "control" over the property, resulting in a proprietary right. The evidence here, by contrast, overwhelmingly shows that the deeds do not grant the denomination such an interest, and that the CANA Congregations alone managed, controlled, and exercised dominion over their properties.

b. Financial support and the alleged benefits of affiliation

1. Plaintiffs acknowledge the "disproportionate" amounts of money that the Congregations voluntarily gave the denomination. Br. 53. Nor is this surprising, given that the Congregations willingly gave the denomination more than $10 million in the last 20 years alone. Nonetheless, plaintiffs say that "*Green* forecloses [our] money flow arguments," noting that the Court there found that the absence of financial support from the denomination to the congregation was "not dispositive." Br. 54 (quoting *Green*, 221 Va. at 556). That argument lacks merit.

Plaintiffs quote a passage from *Green* stating that "[a] proprietary interest or a contractual obligation does not necessarily depend upon a monetary investment." Br. 54 (quoting 221 Va. at 556). But as this passage indicates, there may be cases in which a monetary investment *is* a pre-

requisite for a finding of a proprietary interest. As the Court states in the very next sentence—which plaintiffs do not address—"[t]he contractual obligation which the A.M.E. Zion Church assumed ha[d] its genesis in the 1875 deed." 221 Va. at 556. Read in context, therefore, *Green* confirms that, absent a deed or written agreement with the congregation, the extent of financial contributions (or lack thereof) will be instructive as to whether the denomination has a legally cognizable interest in disputed church property. CANA Opening Br. 114.[21] It follows that plaintiffs, lacking such rights, must show consideration under ordinary principles of contract law to justify the award of over $50 million of real and personal property to them.[22]

Unable to meet that burden, plaintiffs argue that the normal state of affairs in denominations is for money to flow "upward, from individuals to local churches to denominations." Br. 56. But there is no record support for that proposition, and it ignores the fact that the Diocese receives substantial donations independently of its congregations. Indeed, every yearly journal contains detailed instructions on the various Diocesan entities to which contributions can be directed. PX-COM-0241-008; CANA Opening Br. 25. But even if one accepts plaintiffs' claim at face value, it does not justify why they should be entitled to *both* substantial donations from the Congregations *and* to ownership of property that the Congregations purchased, improved, and maintained.

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[21] Moreover, the flow of money in *Green* is also distinguishable in that contributions to the denomination were "required." 221 Va. at 551.

[22] Plaintiffs state that we misrepresented *Jones* on page 114 of our opening brief. Br. 54 n.38. But the quotation of *Jones* was accurate, and it was cited only because the language referring to "legally cognizable" interests comes from that case. *See* 443 U.S. at 606. Plaintiffs' criticism is an attempt to detract attention from the substantive point that we made before citing *Jones*—that *Green* casts doubt on the existence of a proprietary interest where the denomination lacks a contractual interest based on the deeds and provides no substantial financial support to the congregation. That point remains valid, and plaintiffs do not even attempt to answer it.

2. Plaintiffs also charge us with having "[b]uried" our "acknowledg[ment]" of "certain Diocesan contributions" in our "proposed findings," thus "minimizing historic assistance." Br. 54. They insist that their assistance was "significant," but that argument does not withstand scrutiny —particularly in light of their expert's admissions on cross. We detailed these admissions and the other weaknesses in Professor Bond's testimony in our opening brief (at 119-121), and plaintiffs' response brief does not take account of them. *See* Br. 54-55.

Here it suffices to note that in many cases Professor Bond could not even *quantify* the sporadic and meager amounts given to the Congregations. Where he did state an amount, it was trivial, and he did not attempt to compare it with the value of the properties or the amounts given to the same funds in the same time frame by the Congregations receiving assistance. Thus, his assertions that the amounts involved were "significant" is based on nothing more than his own say-so. *See, e.g.,* Tr. 1090:11-16 (Bond) (the "grand total" provided by the Bruce fund to the CANA Congregations was "$325 or $350 over the entire life of these congregations"). Not surprisingly, plaintiffs do not suggest that the Diocese's gifts create some sort of constructive or resulting trust. And whatever amounts were given to these Congregations, they did not deter the Diocese from later acknowledging 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. Plaintiffs ignore this evidence from their own Annual Council journal.

3. Plaintiffs admit that "[t]he Diocese did not contribute any money directly to Apostles," but suggest that the Diocese "sold the Pickett[] Road 'Meeting Place' property to [Apostles] for reimbursement of [the Diocese's] own investment, and even that reimbursement was initiated by Apostles, not by the Diocese." Br. 56 n.40. Plaintiffs fail to note, however, that an

oil tank sat on the adjacent lot (as it does today), and that the Diocese accordingly deemed the lot less than desirable for use as a church planting location. PX-APOST-0289-003 (discussing unsuitability of parcel); Tr. 3072:1-3073:16 (MacGowan); PX-APOST-306; PX-APOST-321; PX-COM-0207-042; CANA Proposed Findings ¶¶ 755-62. Indeed, the Diocese had attempted for several years to have the property rezoned and sold for industrial use, but failed. *Id.* ¶ 759. Moreover, it was well known that the Diocese was strapped for cash, and Apostles—which was motivated to help alleviate the Diocese's financial distress —made the purchase proceeds available to the Diocese quickly. *Id.* ¶ 762. In short, any suggestion that the Diocese was doing Apostles a favor in selling this parcel for the cost of its investment is not supported by the record. Here again, plaintiffs do not suggest that they should be entitled to some sort of constructive or resulting trust. Indeed, the deed conveyed the property to Apostles "free from all encumbrances." Apostles Ex. 33. Under these circumstances, Apostles' purchase of the property was more of a gift *to* the Diocese than *from* it.

In sum, to the extent there was any denominational support to the Congregations, it was a proverbial drop in the bucket in relation to the value of the properties, the monies expended by the Congregations in acquiring, improving, and maintaining the properties, and the money that was flowing from the Congregations back to Richmond during the same time period.

4. Facing a losing hand under a purely secular analysis, plaintiffs trumpet the spiritual benefits that the CANA Congregations derived from affiliation with the denomination. Br. 56. On the one hand, they tout those benefits as "immeasurable" (Br. 100); on the other, they claim that the Court is barred from weighing them (Br. 58). According to plaintiffs, the Court instead must presume that the CANA Congregations benefited from the affiliation. *Id.*

Plaintiffs are missing the point. The CANA Congregations do not deny that they received some spiritual benefits from being part of the denomination. But they more than paid for such benefits through tens of millions of dollars in donations to the Diocese. At no point did they hear, much less agree to, the notion that the price they would pay for spiritual benefits would be not just donations, but also loss of dominion over their property.

More fundamentally, plaintiffs continue to ignore the issue of what additional benefits, spiritual or otherwise, the CANA Congregations received in exchange for plaintiffs' unilateral assertion of a trust interest in 1979 and 1983. With that step, plaintiffs asserted ownership over property worth more than $50 million. Yet, they cannot identify any further benefits that they conferred on the Congregations in exchange for that assertion of ownership. As the undisputed testimony at trial showed, the benefits before and after those years was the same. CANA Opening Br. 56-57.

Plaintiffs have suggested that the trust canons merely confirmed an already-existing proprietary interest. Br. 36. Assuming that were true (which it is not),[23] plaintiffs fail to identify when the proprietary interest supposedly arose. This is not simply an historical exercise—it is critical to the question of what they offered in return for the acquisition of the proprietary interest. There is no legitimate dispute that plaintiffs had no claim to the older property during the 19th century, as this Court previously held. Letter Op. 12-16 (Aug. 19, 2008). So the question arises: On what date did plaintiffs acquire a proprietary right in the Congregations' property. Despite having submitted 300 pages of post-trial briefs, plaintiffs never answer that basic question. But even if forced at oral argument to identify a specific date—and the act giving rise to

[23] As noted above, there is a fundamental disconnect in this argument, given that the Dennis Canon and Diocese Canon 15 are broader than the anti-alienation canons. Whereas the former purport to cover all property, the latter only covers consecrated realty.

the acquisition of the alleged interest—plaintiffs cannot show any further benefits, spiritual or otherwise, that were extended to the Congregations in exchange for the alleged property right.

E. Plaintiffs' cases from other jurisdictions have generally followed a deference-to-hierarchy approach or relied on either state statutes recognizing a denominational trust or express congregational acts granting the denomination a proprietary interest.

As with its initial brief, TEC continues to claim that "nearly every court in the nation" has come to the conclusion that "local church property must remain in the Church and the Diocese." Br. 4. Courts ruling in favor of the denomination, however, have almost always done so because they either (1) followed a deference-to-hierarchy or implied trust theory, as opposed to a "neutral principles" analysis, or (2) relied on state statutes that gave legal effect to the Episcopal Church's unilateral assertion of a trust interest. CANA Opp. 69-72. By contrast, courts employing a true "neutral principles" approach generally have ruled in favor of local churches in disputes with allegedly hierarchical denominations over local property. *Id*. at 72-76.

Just three weeks ago, for example, a Louisiana appeals court rejected the Presbyterian Church's argument that it could take ownership of a disaffiliating congregation's property based on a trust provision in the denomination's constitution. After first holding that the trust provision was inapplicable to the congregation, the court further held that the provision was not enforceable under Louisiana law. In language that echoes points made by the CANA Congregations, and refutes the position taken here by plaintiffs, the court stated:

> Although the Court [in *Jones v. Wolf*] opined that a trust in favor a general church could be created by the constitution of the general church being made to recite an express trust provision in favor of the denominational church, the Court noted 'the civil courts will be bound to give effect to the result indicated by the parties, *provided it is embodied in some legally cognizable form*.' Jones, 443 U.S. at 606 (emphasis added). We are not persuaded by the Presbytery's contention that the requirement of a 'legally cognizable form' was met simply by the PCUSA's amending its constitution.

Carrollton Presbyterian Church v. Presbytery of S. La. of the Presbyterian Church (USA), No. 2011 CA 0205, Op. at 10 (La. Ct. App., Sept. 14, 2011). Applying neutral principles—namely, the requirements of Louisiana's Trust Code—the court found those requirements had not been satisfied by the denomination's unilateral declaration of a trust interest. *Id*. The court further upheld an injunction issued by the trial court that enjoined the denomination from attempting to take over control of the local property by using its ecclesiastical authority to dissolve the congregation. *Id*. at 11-14.

II. Judicial Enforcement Of The Canons Of TEC And The Diocese Would Violate The United States and Virginia Constitutions.

A. The Religion Clauses of the First Amendment and the Virginia Constitution

1. For the most part, plaintiffs do not take issue with the federal and state religion clause principles that we set out in our opening brief (at 124-135). They do not deny, for example, that the Establishment Clause bars states from "vesting in the governing bodies of churches" a "unilateral" power over other parties' property interests. *Larkin v. Grendel's Den*, 459 U.S. 116, 117, 127 (1982). In fact, they do not cite *Larkin*. Nor do they dispute that the burden of complying with neutral, generally applicable Virginia property law is "minimal," such that a rule permitting a denomination to create a trust by passing canons cannot be justified as a religious "accommodation." Plaintiffs simply deny that, if their legal theories were adopted, they would be receiving anything like special treatment under the law. Br. 91. As explained above, that view cannot be reconciled with a fair reading of the neutral requirements of Virginia's contract, property, trust or associations law.

The length to which plaintiffs must go to support their assertion is telling. For example, recognizing that it would be problematic if denominations alone could pass rules that alter ownership of their members' property, plaintiffs suggest that "a court *would* enforce" an automobile

association's rule "declaring that members' cars are held in trust for the association"—provided the rule was simply the product of "democratic processes." Br. 92 (emphasis added). But as we have shown, associational rules are not automatically valid if democratically enacted. *Gillman* rejected the association's claim that, absent a *prohibition* in the relevant acts, it was free to function as a "'self-governing community'" or "democracy" "in accordance with the private consensus of the unit owners." *Id*. at 762-63, 766. Rules that affect property require express statutory authority—a sensible protection of the rights of the minority—and even then are subject to a "test of reasonableness" that rules effecting a forfeiture flunk. *Id*. at 763-65, 767. It follows that plaintiffs are asserting rights enjoyed by no other entity, secular or religious—in violation of fundamental principles of free exercise and disestablishment. CANA Opening Br. 124-30.

Plaintiffs suggest that our argument is really a quarrel with *Green* and § 57-7.1. Br. 91. But as we have shown, *Green* turned principally on the deed's language restricting use of the property to worship in affiliation with the denomination (221 Va. at 553, 549, 555)—an analysis consistent with neutral principles of property law. Further, the Court in *Green* reaffirmed the ban on denominational trusts, and the congregation there did not raise any constitutional arguments, so the Court had no occasion to consider any First Amendment issues. By contrast, as part of its basis for rejecting denominational trusts and the denomination's deference-to-hierarchy argument, the Court in *Norfolk* cited Virginia's longstanding commitment "to maintain the separation of church and state and to prevent the establishment of any religion." 214 Va. at 505. Permitting a denomination to establish such a legally enforceable property right simply by passing canons would undermine those constitutional values.

2. As to our showing that the First Amendment bars the Court from relying the vestry affirmations to establish a contract, plaintiffs assert that they "do not in any way rely on religious

expressions in those declaration; they rely on the affirmations of fidelity to the Church and its discipline." Br. 93. At the outset, we note that, in response to the Court's questioning, plaintiffs previously disclaimed relying on *any* aspect of the vestry affirmations as creating a contract:

> THE COURT: … I have to tell you that my understanding right now of Mr. Davenport's position is not that he's arguing that the vestry oath is a contract, but rather, it's a reflection of the hierarchical nature of the Episcopal Church. That's what I think—do I have that right, Mr. Davenport?
>
> MR. DAVENPORT: Yes.

Tr. 1436:2-8. Plaintiffs have not explained their change in position. But even setting aside their about-face, the problem is two-fold: "Discipline" is an undefined and ambiguous term with spiritual connotations, and the portion of the affirmation relating to discipline *cannot be separated* from the balance of the affirmation—which, notably, plaintiffs refuse to quote in its entirety.[24]

Plaintiffs act as though the "discipline" is synonymous with the constitution and canons, and with canons pertaining to property in particular. But the only definition of the term relates to *ecclesiastical* discipline of *clergy*, not vestry members, and these provisions of the canons certainly do not relate to property. CANA Opp. 46. Even more importantly, the term "discipline" has theological import, and it is sandwiched with commitments to the "doctrine" and "worship" of the Church. As Professor Mullin admitted, "[t]here is no bright line" that "separates" the Church's "doctrine and discipline"; they "overlap." Tr. 1294:22-1295:9.

This Court could not interpret the affirmations without determining that "discipline" is a purely secular term, contrary to the testimony of both the Congregations' witnesses and plain-

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[24] The affirmation states: "I do believe the Holy Scriptures of the Old and New Testament to be the Word of God, and to contain all things necessary to salvation; and I do yield my hearty assent and approbation to the doctrines, worship and discipline of The Episcopal Church; and I promise that I will faithfully execute the office of Vestry member of ________ Church, in Region ________, in the County (or City) of ________, according to my best knowledge and skill." PX-COM-0003-022 (Diocese Const., Canon 11, § 8).

tiffs' expert. CANA Opp. 45-46. The Court would also have to find that the balance of the affirmation is *not* subject to its opening phrase: "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"—a deeply entangling judgment, to say the least. CANA Opening Br. 131-33. Contrary to plaintiffs' assertion (Br. 93), such a judgment is quite unlike *Green*'s consideration of religious ceremonies such as baptisms. The ceremonies there were recognized in only secular terms, as evidence that the congregation followed the denomination's "customs." 221 Va. at 553-55 & n2.

Plaintiffs ignore all of this, but it is fatal to the notion that the Court can rely on the affirmations while holding to its obligation to free itself "*completely* from entanglement in questions of religious doctrine, polity, and practice." 443 U.S. at 603 (emphasis added).

B. Contracts Clause

Plaintiffs do not dispute (nor could they) that a deed conveying property to a congregation is a "binding contract," or that it "violat[es] … 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." *Finley*, 87 Va. at 108; *see also* Pl. Br. in Opp. to Demurrers 29 (filed July 13, 2007) (citing *Finley* and explaining that "it would be unconstitutional to interpret or apply [Virginia statutory law] to alter existing rights and obligations or trusts established in governing deeds"). Instead, they say the Contracts Clause is not implicated, because our arguments "assume" that (1) "the 'trust' interests described in the Dennis Canon … w[as] new in 1979," and (2) their claims "rise or fall solely on their trust claims, ignoring the fact that … *Green* recognized a general church's contractual … interest" based on a deed dated 1875. Br. 95. On both scores, plaintiffs are mistaken.

As to the suggestion that plaintiffs' trusts were not "new" as of 1979, that view is hard to square with TEC's official (out-of-court) view that the Dennis Canon was *not* "declaratory of

existing law," but rather a response to *Jones*. Apostles Ex. 292.0012 (annotated constitution and canons). It is also hard to square with the text of the canons, which before 1979 did not refer to a "trust" or purport to reach "personal" or "unconsecrated property." But even more fundamentally, plaintiffs are discussing retroactive application of *canons*. The issue is retroactive application of *statutes*. And as we have shown, plaintiffs cannot explain how or when their canons became *enforceable* in Virginia apart from the operation of a statute—whether the statute that gave them legal standing to hold property or the statute that, they say, validated their claim of a denominational trust. *Supra* at __.

Nor is there any merit to the notion that, because the denomination in *Green* had rights under an 1875 deed, our Contracts Clause defense is barred by that decision. To our knowledge, the congregation there did not raise a Contracts Clause defense. Thus, there was no need for the Court to consider whether retroactive application of § 57-15 (or any other statute) raised constitutional concerns, and the Court did not do so. In short, *Green* does not speak to the Contracts Clause defense here, let alone require rejecting it. And *Finley*, which plaintiffs themselves have invoked, validates that defense as to deeds vested in the Congregations prior to adoption of the relevant statutes.

C. Due Process

Few principles are better settled than the rule that due process requires giving a party fair notice of the requirements of the law before applying that law to deprive the party of its property. CANA Opening Br. 44 n.35, 141 (collecting authorities). There can be no question that, if plaintiffs' canons were enforced here, the Congregations would be deprived of such notice.

Here is why. Denominational trusts are not valid in Virginia. Fourteen Virginia Supreme Court decisions have so held, and the General Assembly declared those decisions to be "existing law" in 1993. Indeed, plaintiffs have admitted that this was the law "[b]efore 1993." Diocese Br.

39; *accord* TEC Br. 2, 25 n.3, 36. Yet it is undisputed that "[t]he Church's various property and anti-alienation canons … are based on a trust concept." Tr. 1228:13-16 (Mullin). To give the canons the force of law, therefore, would be to enforce a purported trust that the General Assembly and the Virginia courts have repeatedly confirmed is facially invalid.

Plaintiffs offer no serious response. They make light of our argument on the basis that one of the cases that we cited (*Connecticut v. Doehr*, 501 U.S. 1, 4 (1991)) involved an ex parte pre-deprivation hearing and an as-applied challenge. Br. 95. But they ignore the point of the citation—that due process requires *notice*—and the host of other authorities that we cited to establish the application of that principle to circumstances such as these. CANA Opening Br. 44 n.35, 141. Under those authorities, "[e]lementary 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 this "basic protection" is "implicated by civil penalties." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-75 & n.22 (1996) (citations omitted).[25] Accordingly, plaintiffs have failed to answer our showing that applying the canons to work a forfeiture of property vested in the CANA Congregations would violate due process.

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[25] *Accord Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) ("There can be no doubt that a deprivation of the 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).

III. *Norfolk-Green* And Other Virginia Supreme Court Decisions Foreclose The "Identity" Theory Of TEC And The Diocese, Both As A Matter Of Standing And On The Merits.

A. Plaintiffs lack standing under *Norfolk* and *Green*, and cannot overcome that difficulty by retreating to representative standing cases.

Like their opening brief, plaintiffs' response brief fails to acknowledge that, "[i]f … the [denomination] is unable to establish a proprietary interest in the property" of the disaffiliating congregation, "*it will have no standing to object to* [*any*] *property transfer*" by that congregation. *Norfolk*, 214 Va. at 503 (emphasis added). Yet it follows from this holding that, if TEC and the Diocese lack a cognizable interest in the properties at issue, judgment must be entered for the Congregations. *Id.*; *Green*, 221 Va. at 555.

Rather than address governing precedent, plaintiffs spend pages pressing arguments based on a representative standing theory, contending that the Diocese's executive board is the proper party to assert their claim. Br. 86-88. But as they ultimately acknowledge (Br. 87), even their own leading case was "careful to emphasis that its holding was 'limited to instances where representational standing is provided for by statute requiring Article III standing to seek judicial review of an action by a state agency under delegatory authority from the federal government," and did not authorize representative standing "under any circumstances other than those presented by the facts of th[at] case." *Philip Morris USA Inc. v. Chesapeake Bay Found., Inc.*, 273 Va. 564, 580 (2007). Other cases are to the same effect. *E.g., W.S. Carnes, Inc. v. Board of Supervisors*, 252 Va. 377, 383 (1996) ("An individual or entity does not acquire standing to sue in a representative capacity by asserting the rights of another, unless authorized by statute to do so."); *Pearsall v. Va. Racing Comm'n*, 26 Va. App. 376, 383 (Va. Ct. App. 1998) ("Virginia recognizes representational standing only when it is specifically authorized by the legislature.").

Here, the Virginia Supreme Court has expressly held that the applicable statute (§ 57-15) *denies* standing to the denomination—unless and until it establishes a proprietary interest in the disputed property. *Norfolk*, 214 Va. at 503. Moreover, plaintiffs have offered no answer to our showing that, if they could avoid this difficulty simply by declaring their few loyalists to be the "active" congregation—or by declaring property "abandoned" for ecclesiastical purposes—the neutral principles requirements of *Green* and *Norfolk* would effectively be obliterated.

Plaintiffs' other efforts to establish standing are equally misguided. Citing *Cha v. Korean Presbyterian Church*, 262 Va. 604 (2001)—a minister's lawsuit alleging wrongful termination, tortuous interference with contract, and defamation by his church—plaintiffs say "the First Amendment guarantees hierarchical churches the right to determine the identity of their leaders and members." Br. 86. But *Cha* was not a church property case; it involved the First Amendment's "ministerial exception," which protects church decisions as to selecting clergy. *See* 262 Va. at 607, 611-12. Moreover, plaintiffs (again) assert this position without attempting to reconcile it with *Jones v. Wolf*. *See* CANA Opp. 66. Sounding much like plaintiffs here, the congregation's minority wing there "earnestly submit[ted] that the question of which faction is the true representative of the [local] church is an ecclesiastical question that cannot be answered by a civil court"—"[a]t least" not "in a case involving a hierarchical church, like the PCUS, where a duly appointed church commission has determined which of the two factions represents the 'true congregation.'" 443 U.S. at 607. But that did not deter the Court from ruling against "the faction loyal to the hierarchical church." *Id*. at 606. So far as *property ownership* is concerned, civil courts need not "defer to the resolution of an authoritative tribunal of the hierarchical church," or to its "laws and regulations"—even where the issue is the identity of the congregation *Id*. at 597, 609. Similarly, the Virginia Supreme Court in *Norfolk* rejected the denomination's argument

that the Court was required to defer to an ecclesiastical court's determination as to whether the congregation could disaffiliate with its property. *Norfolk*, 214 Va. at 503. In short, the First Amendment provides no support for plaintiffs' novel standing theory.

B. The "identity" theory of TEC and the Diocese cannot be reconciled with Norfolk, or with the prior Supreme Court decisions that plaintiffs invoke, and amounts to an appeal for deference to hierarchy.

Should the court find standing, however, plaintiffs' "identity" theory fares no better on the merits. As we have explained, plaintiffs' argument mischaracterizes the holdings of *Brooke*, *Hoskinson*, and *Finley*, which considered the identity of the congregation only because the deed called for identification of the "members" of the church. *Brooke*, 54 Va. at 315 (analyzing who constituted "members of the Methodist Episcopal church, in the sense in which the term is used in the deed"); *Finley*, 87 Va. at 104 (answering the question, "Who … are the beneficiaries entitled to the trust estate?" under "the deed in question," "[l]ooking to the deed alone"); *Hoskinson*, 73 Va. at 431 ("[l]ooking to the deed alone"); *see also Boxwell*, 79 Va. at 407 ("[l]ooking to the deed alone"). Plaintiffs nonetheless continue to insist that the CANA Congregations had no existence "separate and distinct" from them (Br. 89), but this argument is an appeal for deference to hierarchy by another name, and it fails at several levels.

First, even apart from their existence as corporations (discussed below), Virginia law has *always* treated religious congregations as entities separate and distinct from the denominations with which they are affiliated. *E.g.*, *Brooke*, 54 Va. at 313-14 (relying on this distinction as the basis for validating a deed conveying property in trust for members of the religious congregation); *Norfolk*, 214 Va. at 503 (rejecting arguments for deference). Indeed, the whole premise of *Norfolk* and *Green* is that the court should inquire whether there is a contractual arrangement between legally distinct entities—the congregation and the church. One does not enter a contract with oneself. Moreover, plaintiffs continue to ignore our showing that "the position of the Pres-

bytery" in *Norfolk* "[was] that Grace Covenant Church, as a congregation, has otherwise ceased to exist; they don't exist anymore." DX-PRAEC-006-0027 (Joint App. in *Norfolk*). The Court rejected that notion, treating the congregation as a separate entity and ruling that Virginia courts need not defer to "the ecclesiastical law of the general church." 214 Va. at 503.

Second, plaintiffs' argument ignores the reality, established by a wealth of record evidence, that the CANA Congregations functioned as independent legal entities. Day in and day out, they publicly held themselves out as having independent authority—purchasing insurance, dealing with vendors, granting easements, pursuing zoning applications, and engaging in a host of other activities, all of which would have been ultra vires if the Congregations lacked the ability to operate independently of the denomination pursuant to direction from their vestries and members. CANA Opening Br. 93-94. Nothing in the record, moreover, supports the notion that in conducting their affairs the Congregations were acting "on behalf of" or as "agents for" TEC or the Diocese—a point confirmed by the fact that the denomination never assumed responsibility for their debts or contracts. CANA Opp. 33-34 (rebutting plaintiffs' agency theory).

Third, the Protocol treated the Congregations not as indistinguishable from the Diocese or TEC, but as separate and distinct entities, governed by the majority of their vestries and congregations, with whom the Diocese was negotiating at arms length. DX-FALLS-0173.

Fourth, as a historical matter, the concept of an Episcopal parish predates the denomination and its dioceses, and the vestries of parishes and congregations exercised the same broad authority before the denomination was formed as they exercise today—a point plaintiffs' expert admitted. CANA Opening Br. 149; CANA Opp. 32-33. Moreover, as both sides' experts confirmed, there is no evidence that the authority exercised by Virginia parishes over their property,

or their legal independence in general, was ceded to the denomination. Tr. 1010:13-1011:22 (Bond); Tr. 3500:15-3502:14, 3510:3-3511:22, 3520:13-3521:4 (Curtis); CANA Opp. 33.

Fifth, plaintiffs have acknowledged both the holdings of cases such as *Brooke* and the fact that they lacked legal standing—and the ability to enter contracts or hold property—until the General Assembly enacted a law granting them that ability. Br. 22 ("Virginia law did not give legal recognition to unincorporated associations" until well into the 20th century (citing Va. Code § 8.01-15, the first version of which took effect in 1919[26]); DX-FALLS-0413-000002, 0413A-0001 [transcription] (Diocese's petition to the General Assembly, noting that unincorporated religious denominations were not "capable of taking and holding property of the smallest amount. They can neither take what is given nor acquire by purchase"). It follows that, if they were correct that affiliated congregations had no "separate and distinct" existence, then *no entity* was able to hold much of the property at issue. And, of course, once Va. Code § 8.01-15 took effect, congregations and denominations—both of which are voluntary associations—had legal standing.

Sixth, plaintiffs' own canons disclaim the notion that the meaning of "parish" or "congregation" for internal ecclesiastical purposes has any bearing on the ownership of affiliated congregations' property. Although TEC Canon 13, entitled "Of Parishes and Congregations," does not define "parish or congregation"—let alone state that such entities have a perpetual existence, without regard to the wishes of their members—it *does* say that "[t]his Canon shall not affect the legal rights of property of any Parish or Congregation." PX-COM-0001-055 (Canon 13, § 3(c)). Indeed, the Dennis Canon itself, while purporting to alter the beneficial ownership of congregational property, preserves "the power and authority of the Parish, Mission or Congregation otherwise existing over property so long as the particular Parish, Mission or Congregation remains a

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[26] Code of Virginia, Vol. 2, at ____ (1919) (noting that "[t]his section is new.").

part of, and subject to, this Church"—which suggests that a congregation, qua congregation, can indeed disaffiliate. PX-COM-001-045.

Seventh, TEC admitted in 1981, after adoption of the Dennis Canon, that 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. This too confirms that a parish has a distinct existence from the denomination, and that the parish may disaffiliate by majority vote.

Finally, the Virginia Nonstock Corporation Act, under which the CANA Congregations are organized,[27] confirms that the Congregations are distinct entities governed by majority control. Va. Code § 13.1-849. Specifically, "[t]he vote of a majority of the votes entitled to be cast by the members present or represented by proxy at a meeting at which a quorum is present shall be necessary for the adoption of any matter voted upon by the members, unless a greater proportion is required by this Act or the articles of incorporation." *Id*. Nothing in the Congregations' corporate articles (or even plaintiffs' canons) requires a different rule. CANA Opp. 7-9 (plaintiffs' constitutions and canons do not require diocesan approval of congregation's incorporation or amendment of governing documents); *see also Jones*, 443 U.S. at 606-609 (civil courts need not defer to the "laws and regulations" of a "hierarchical church" in determining the identity of the local congregation, and rejecting appeals for deference on "the question of … which of the two factions represents the 'true congregation'"); Letter Op. on Constitutionality of Va. Code § 57-9(A) at 46 (quoting *Jones*' observation that "[m]ajority rule is generally employed in the

[27] DX-FALLS-0356B (The Falls Church articles); TRU290 (Truro articles); DCOE Ex. 498 (Epiphany articles); DSTM Ex. 1 (St. Margaret articles); DSTP Ex. 1 (St. Paul's articles); DSTS Exs. 1 & 2 (St. Stephen's articles and amended articles); Apostles Ex. 26 (articles).

governance of religious societies"). Indeed, plaintiffs have not disputed that, outside of disputes over property and the identity of the congregation, majority rule governs the identity and decision-making of the congregation.[28]

The South Carolina Supreme Court's decision in *All Saints* is instructive in this regard. There the Episcopal Church argued, and the trial court agreed, "that the congregation was part of a hierarchical organization," warranting "defer[ence] to the Diocese's ecclesiastical authority's determination" as to the "true" officers and members of "All Saints Parish, Waccamaw, Inc." 685 S.E.2d at 174. The South Carolina Supreme Court unanimously reversed, however, holding that the identity of the congregation and its vestry turned on "whether the Articles of Amendment approved by the members of All Saints Waccamaw, Inc. on January 8, 2004 were adopted in compliance with the South Carolina Non–Profit Act." *Id.* Noting that "nothing in the All Saints Parish, Waccamaw, Inc. 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 found that the amendments were "lawfully adopted." *Id.* at 174, 175. They were duly "approved by the board … while still in good standing with the Diocese," and "by the members of All Saints Parish, Waccamaw, Inc. by two-thirds of the votes cast." *Id.* at 175. Accordingly, the amendments "compli[ed] with the South Carolina Non–Profit Act," and effectively severed the corporation's legal ties to the ECUSA and the Diocese." *Id.* at 174. The same result is warranted here, under neutral principles of Virginia law.

[28] Plaintiffs' own canons reflect that principle. *See* PX-COM-0003-027 (Canon 15, § 1), 0003-23 (Canon 11, § 13). Moreover, their canons expressly disclaim the notion that who constitutes a "parish" for purposes of TEC's ecclesiastical law has any bearing on ownership of real property.

Without citation of authority, plaintiffs attempt to draw a distinction between "Episcopal Churches" and "congregations (groups of people)." Br. 8. But as the Court held in *Norfolk*, "the words 'church', 'religious congregation', or 'religious society', as used in the statute [§ 57-7], … mean the local congregation rather than a larger hierarchical body." 214 Va. at 506 (following *Brooke* and *Maguire v. Loyd*, 193 Va. 138 (1951)).

IV. If The Episcopal Church And The Diocese Receive Title To And Possession Of The CANA Congregations' Properties, The Congregation's Counterclaims Should Be Granted.

In *Green*, the denomination sought a declaration that the congregation could not unilaterally extinguish the denomination's rights in the property. Here, plaintiffs take that a step further, demanding that title to all of the CANA Congregations' property be put in the Bishop's name, but refusing to compensate the Congregations for the resulting extinguishment of their interests in the property. Unwilling to acknowledge that they seek relief well beyond that requested in *Green*, Plaintiffs take a different tack. Specifically, they attack the CANA Congregations' unjust enrichment claim on the basis that plaintiffs never promised to pay the Congregations for the property that they now demand be put in the name of the Bishop. In support, they cite a number of cases, none of which involves a situation akin to this.

In *Poindexter v. Jolliff*, 2001 WL 55718 at *2 (Va. App. Jan. 23, 2001), for example, whether there was an implied promise to pay was not even at issue. Rather, the court's ruling was based on its conclusion that the defendant had not benefited from the plaintiffs' actions. Similarly, in *In re All Pending Chinese Drywall Cases*, 80 Va. Cir. 69 (2010), the issue was whether the plaintiff could use an unjust enrichment theory to recover tort damages. The court held that, while the drywall suppliers and installers may have had an obligation to pay damages for defective drywall, they did not receive any benefit from the homeowner other than the compensation they received in connection with the installation. Thus, the court could properly conclude that forcing the drywall suppliers and installers to disgorge all profits derived from the transaction could not be justified on an unjust enrichment theory.

The Congregations here, by contrast, did not choose to confer a benefit on plaintiffs. To the contrary, they are resisting conferring any benefit. It is plaintiffs who are seeking to extract a benefit from the Congregations by extinguishing the Congregations' ownership and possessory

rights in property they purchased, improved, and maintained. Given the involuntary nature of the benefit conferred, the situation is more akin to that presented in *Beale, Wright, Balfour & Davidson v. Western Talley Corp.*, 22 Va. Cir. 245, 247 (Va. Cir. Ct. 1990), where the court permitted an attorney not permitted to withdraw from a representation to recover fees from his clients, despite the lack of an express contract or one implied by the parties' conduct, because the law "provide[d] a remedy by quasi contract … for the purpose of bringing about justice and avoiding an unjust enrichment." (citations omitted).

Plaintiffs further argue that considering whether they would be unjustly enriched by compensating the CANA Congregation for the value of the realty and personal property would throw the Court into the constitutional "thicket." Br. 100. Contending that that the Congregations received many supposedly tangible and intangible benefits during the period of their affiliation, plaintiffs claim that such benefits are "immeasurable"—at least by the Court, which thereby prevents the Court from assigning a dollar figure to the extent of any unjust enrichment. *Id*.

Plaintiffs' argument might have some force if the CANA Congregations were seeking the return of the more than $10 million they donated to the Diocese in the 20 years preceding disaffiliation. But the Congregations are not asking for such a refund. They are asking that they be compensated for the value of the property they are being asked to forfeit. Plaintiffs have never claimed that they contributed any material amount towards the acquisition, improvement, and maintenance of the Congregations' property. Indeed, TEC specifically denied making any such contributions. CANA Opening Br. 155-58. Nor have plaintiffs claimed that they provided the Congregations some form of spiritual benefit that made the acquisition, improvement, and maintenance of the property possible.

Aside from demonstrating that giving plaintiffs ownership of the Congregations' property would confer a windfall on plaintiffs, the CANA Congregations advanced further grounds to justify the unjust enrichment claim as to their bank and investment accounts. Specifically, at no point did the Diocese ever purport to exercise dominion over those accounts. The Congregations were free to use such funds as they saw fit, manifesting their dominion by curtailing and in many cases eliminating donations from those accounts to the Diocese. In addition, giving plaintiffs ownership of such accounts would violate donor intent, given the notice to congregants that their funds would *not* go to the Diocese unless expressly requested. *Id.* at 159-60.

In response, plaintiffs contend that money is fungible, and that the Congregations failed to trace the movement of money from donors to specific accounts. Br. 101. Setting aside the inherent tension between those two assertions, the CANA Congregations did introduce evidence sufficient to trace the source of funds. Specifically, several witness testified that given the turnover in fund accounts, any monies existing at the time of disaffiliation were donated well after the Congregation advised its members that it had ceased giving to the denomination. *See, e.g.,* Tr 3338:12-3339-14 (explaining that Apostles' funds in 2006 necessarily were donated after 2003, when Apostles cut off funding to the Diocese).

Plaintiffs last urge the Court to deny the CANA Congregations any relief because they, as alleged rule-breakers, deserve no sympathy. Br. 101. But the Congregations are not asking for sympathy; they are asking for compensation to reflect the actual dollars they put in their real property and bank accounts. And contrary to plaintiffs' claim, that courts have not awarded such relief in other cases means nothing, since other cases hinged on trust and deference to hierarchy theories, not contract theories. A congregation that knowingly and lawfully holds property in

trust for a denomination improves the property at its peril; however, a congregation holding property under a claim of right has the right to compensation for improvements.

CONCLUSION

For the foregoing reasons, and those stated in our opening and opposition briefs, 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.

Dated: October 14, 2011

Respectfully submitted,

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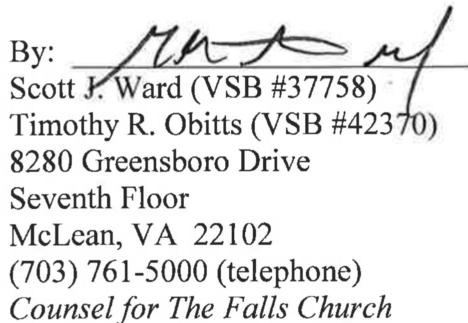

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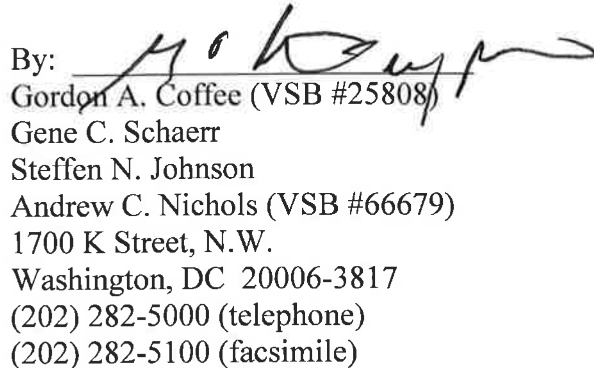

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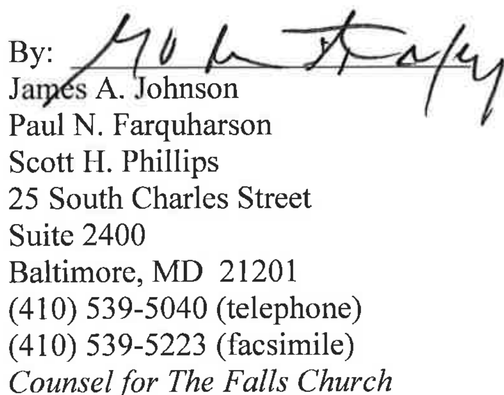

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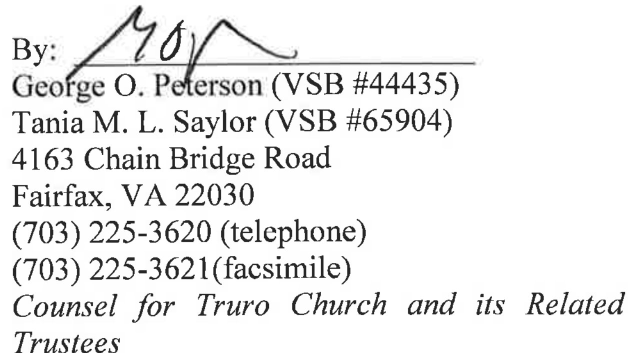

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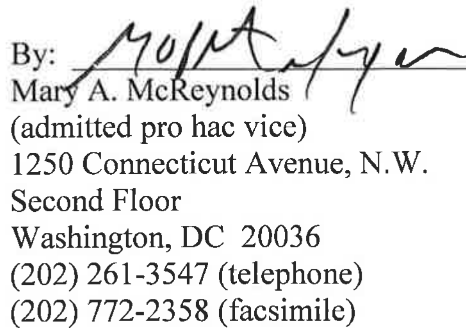

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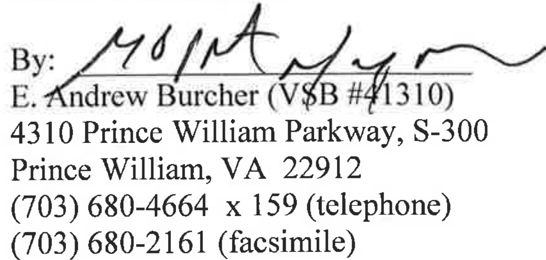

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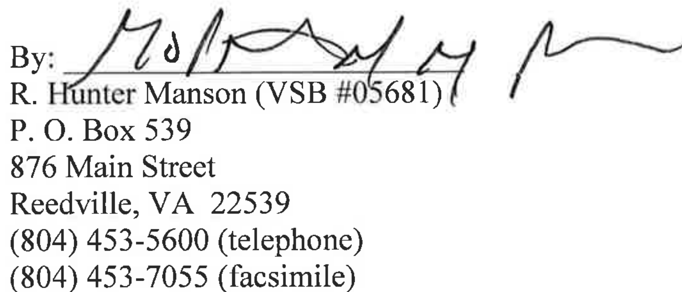

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