VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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

Post-Trial Reply Brief for the Episcopal Diocese of Virginia

Bradfute W. Davenport, Jr. (VSB # 12848)
George A. Somerville (VSB # 22419)
Brian D. Fowler (VSB # 44070)
Troutman Sanders LLP
Post Office Box 1122
Richmond, Virginia 23218-1122
Telephone: (804) 697-1200
Facsimile: (804) 697-1339

Mary C. Zinsner (VSB # 31397)
Troutman Sanders LLP
1660 International Drive
Suite 600
McLean, Virginia 22102
Telephone: (703) 734-4334
Facsimile: (703) 734-4340

Counsel for the Protestant Episcopal Church in the Diocese of Virginia

CONTENTS

AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

INTRODUCTION

From the very beginning of these cases, through the § 57-9 phase and the appeal, and throughout litigation of TEC's and the Diocese's declaratory judgment claims, the Congregations have attempted to color, shade, and portray themselves in every possible way as congregational churches. The Court recognized this tendency as early as the August 10, 2007, hearing on the Congregations' demurrers to the declaratory judgment complaints. *See* Tr. 82 (Aug. 10, 2007) ("it almost seems that you are asking me to treat the churches here as congregational churches, not hierarchical churches. I understand that distinction in the law"); *id*. at 95 ("it appears to me that you're asking me to treat the Episcopal Church as if it was a congregational church and not a hierarchical church, subject to the hierarchy of the church").

The Congregations are wrong. The Episcopal Church and the Diocese are religious institutions; and the Episcopal Church is a hierarchical church both as a matter of law, as our Supreme Court and numerous other appellate courts have held, and as a matter of fact, as demonstrated by the record in these cases.

The Supreme Court's opinion remanding these cases for trial of the Diocese's and the Church's declaratory judgment actions repeatedly emphasized the hierarchical nature and polity of the Diocese and the Church:

- "These appeals arise from a dispute concerning church property between a hierarchical church and one of its dioceses in Virginia and a number of the diocese's constituent congregations." *Protestant Episcopal Church in the Diocese of Virginia v. Truro Church*, 280 Va. 6, 12, 694 S.E.2d 555, 557 (2010) (*Truro Church*).
- The Congregations "vot[ed] to disaffiliate from the church and affiliate with another polity." *Id*. at 12, 694 S.E.2d at 558 .

- "When used in reference to religious entities, the term 'polity' refers to the internal structural governance of the denomination." *Id.* at 12 n.1, 694 S.E.2d at 558 n.1.

- "We have previously held that Code § 57-9(A) applies to congregations of 'hierarchical churches,' that is 'churches, such as Episcopal and Presbyterian churches, that are subject to control by super-congregational bodies.'" *Id.* at 13, 694 S.E.2d at 558, quoting *Baber v. Caldwell*, 207 Va. 694, 698, 152 S.E.2d 23, 26 (1967) (footnote omitted).

- "It is not disputed that the entities involved in this litigation are part of a hierarchical church, although the parties differ on which entities compose that church." *Truro Church*, 280 Va. at 14, 694 S.E.2d at 558.

- "The Episcopal Church ('TEC') is a province of the Anglican Communion and the principal national church following the Anglican tradition within the United States…. The highest governing body of TEC is the triennial General Convention, which adopts TEC's constitution and canons to which the dioceses must give an 'unqualified accession.' Each diocese in turn is governed by a Bishop and Annual Council that adopts the constitution and canons for the diocese. Each congregation within a diocese in turn is bound by the national and diocesan constitutions and canons. The Protestant Episcopal Church in the Diocese of Virginia ('the Diocese') is one of the dioceses within TEC." *Id.* at 14-15, 694 S.E.2d at 559 (footnotes omitted).

- "Priests of TEC are 'canonically resident' within a specific diocese and may not function as priests in any other diocese of TEC without the permission of the local bishop." *Id.* at 15, 694 S.E.2d at 559.

- "[B]etween December 2006 and November 2007, 15 congregations voted to separate from the Diocese. As a result, 22 members of the clergy associated with these congregations

were deposed, or removed, from their pastoral duties in the Diocese by Bishop Lee." *Id*. at 16, 694 S.E.2d at 560.

- "While it is certainly possible that a division within a hierarchical church could occur through an orderly process under the church's polity, history and common sense suggest that such is rarely the case. To the contrary, experience shows that a division within a formerly uniform body almost always arises from a disagreement between the leadership under the polity and a dissenting group." *Id*. at 26, 694 S.E.2d at 566.

- "There was not, nor could there be, any serious dispute that, until the discord resulting from the 2003 General Convention, the CANA Congregations were 'attached' both to TEC and the Diocese because they were required to conform to the constitution and canons of TEC and the Diocese." *Id*. at 27, 694 S.E.2d at 566.

The Supreme Court's many references to the hierarchy of the Episcopal Church and its polity were not mere passing comments or *dicta*; indeed, polity served as the basis for the Court's finding that the Congregations had not satisfied the "branch" requirement of § 57-9(A): "While the branch joined may operate as a separate polity from the branch to which the congregation formerly was attached, the statute requires that each branch proceed from the same polity, and not merely a shared tradition of faith." *Id*. at 28-29, 694 S.E.2d at 567. The polity of the Church is relevant in the declaratory judgment actions as well, and it cannot be discarded or ignored simply because these Congregations want to pretend now that they were congregational churches with a congregational polity. Before their votes to disaffiliate and join a different church polity, the Congregations, their priests, and their members, were Episcopalian. They

were not Baptists, Unitarians, or any other congregational church.[1]

The Diocese and the Episcopal Church are not, as the Congregations suggest, asking this Court to engage in a deference to hierarchy approach to resolution of these cases. We are simply saying that polity must be considered and taken into consideration, just as the Supreme Court of Virginia considered the polity of the AME Zion Church in *Green v. Lewis.*

The record establishes conclusively that the Congregations recognized the governing authority of the Constitutions and Canons of the Church and the Diocese and conformed their conduct to the requirements of those "laws of the Church." Moreover, the vast bulk of the dealings between the parties, which are discussed in the Diocese Brief but ignored in the CANA Response, demonstrate this polity. Those facts include:

- Throughout their histories, the seven churches functioned as Episcopal churches and as parts of the supercongregational or hierarchical structure of the Diocese, as Lee Chapel did in *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980). Diocese Brief at 3-4, 25, 31.

- The churches used the name, customs, and policies of the Episcopal Church "in such a way that [each of the seven churches was] known, recognized, and accepted to be an [Episcopal] Church," as Lee Chapel did in *Green*, 221 Va. at 555, 272 S.E.2d at 186. Diocese Brief at 4, 23, 31; *id*. at 77-79 (TFC), 107-09 (Truro), 114, 124-25 (St. Paul's), 140-41 (St. Stephen's), 152, 160-61 (St. Margaret's), 173 (Apostles), 194 (Epiphany).

- The churches sent delegates every year or nearly every year to the Annual Councils of the

---

[1] Nor is the Church a franchisor or its member churches McDonald's restaurants (*cf.* CANA Response at 34-36), and the analogy is belittling and demeaning to all parties.

We refer to the second round of briefs as the "Church Response" and the "CANA Response." We continue to refer to the opening briefs as the "Diocese Brief," "TEC Brief," and "CANA Brief," as we did in the Church Response. The Diocese adopts the arguments in TEC's Reply Brief (the "TEC Reply").

Diocese (with exceptions where they were inactive or otherwise unable to do so), as Lee Chapel did in *Green*, 221 Va. at 555, 272 S.E.2d at 186. Diocese Brief at 5, 24, 31, & Exhibit A; *id*. at 73-74 (TFC), 99-102 (Truro), 120 (St. Paul's), 133, 136-37 (St. Stephen's), 157 (St. Margaret's), 171 (Apostles), 189-90 (Epiphany).

- The churches "by payment of their assessments and in numerous other supportive ways, contributed to this state, national, and international ecclesiastical organization, and they presumably benefitted from the association, spiritually and otherwise." *Green*, 221 Va. at 554, 272 S.E.2d at 185; *see also* Diocese Brief at 33; *id*. at 66 (TFC), 103-04 (Truro), 121 (St. Paul's), 141 (St. Stephen's), 149 n.48, 156-57 (St. Margaret's), 169 (Apostles), 191 Epiphany).

- Here there is more than the presumption of spiritual benefits recognized in *Green*. There also is abundant, uncontroverted evidence that these churches actually benefitted spiritually from their "association" with the Diocese and the Episcopal Church. Diocese Brief at 5, 12, 20, 33-34; *id*. at 70-71 (TFC), 98-99 (Truro), 119 (St. Paul's), 131, 132 (St. Stephen's), 151-52 (St. Margaret's), 162-63, 169-70 (Apostles), 188-89 (Epiphany). *See also* CANA Response at 36 ("[t]he purpose of [episcopal] visitations is spiritual").

- The churches recognized the authority of the Constitutions and Canons of TEC and the Diocese and conformed their conduct to those requirements, as enumerated in the Diocese Brief at 6 and elsewhere as cited below:

    - They followed the canons of the Church and the Diocese with respect to property, including requesting consent when required. *See* Diocese Brief at 11, 24, 35; *id*. at 60 (TFC), 83-86 (Truro), 115-16 (St. Paul's), 127 (St. Stephen's), 144-47 (St. Margaret's), 161, 164-67 (Apostles), 179-81, 193-94 (Epiphany).

    - They organized themselves as required by canon, by electing vestries, who

elected wardens, in all respects as required by canons. *See* Diocese Brief at 11, 24, 35; *id*. at 61 (TFC), 86 (Truro), 117 (St. Paul's), 128 (St. Stephen's), 147, 154-55 (St. Margaret's), 167-68 (Apostles), 181-82 (Epiphany).

- They recognized the authority of the Bishops of the Diocese and received official episcopal visitations, which included services of confirmation and reception. *See* Diocese Brief at 24-25, 35, & Exhibit B; *id*. at 74-75 (TFC), 95-97 (Truro), 113, 122 (St. Paul's), 126-27 (St. Stephen's), 157-58 (St. Margaret's), 171 (Apostles), 175, 176-77, 192 (Epiphany).

- They submitted annual parochial reports through the Diocese to the Episcopal Church. *See* Diocese Brief at 11, 25, 35; *id*. at 71 (TFC), 99 (Truro), 118 (St. Paul's), 138-39 (St. Stephen's), 153 (St. Margaret's), 168 (Apostles), 189 (Epiphany).

- They contributed to the Church Pension Fund on behalf of their clergy. *See* Diocese Brief at 25, 35-36; *id.* at 95 (Truro), 140 (St. Stephen's).

- They either obtained health insurance through the Diocese, as required (after 1994) by Diocesan canon, or obtained a partial exemption from the Diocesan Executive Board pursuant to that canon. *See* Diocese Brief at 25, 36; *id*. at 70 (TFC), 106-07 (Truro), 118 (St. Paul's), 129, 140 (St. Stephen's), 160 (St. Margaret's), 170 (Apostles), 193 (Epiphany); Tr. 2587-88 (discussing TFC's partial exemption).

- Their vestries all took oaths to "yield [a] hearty assent and approbation to the doctrines, worship and discipline of The Episcopal Church." *See* Diocese Brief at 36; *id*. at 75-77 (TFC), 104-06 & nn.33-34 (Truro), 116 (St. Paul's), 137-38 (St. Stephen's), 158-59

(St. Margaret's), 170 (Apostles), 193 (Epiphany).[2]

- They also obtained the consent of the Bishop as required in ecclesiastical matters, such as in remarriage of divorced persons. *See* Diocese Brief at 11, 25, 31; *id*. at 63 (TFC), 124 (St. Paul's). *See also* Tr. 2312-13 (Epiphany); PX-APOST-218-001, -020.

- Every rector or other clergy serving an Episcopal church has been ordained by an Episcopal Bishop and has sworn fidelity "to the Doctrine, Discipline, and Worship of the Episcopal Church." Diocese Brief at 10, 23-24, 31; TEC Brief at 7. The process leading to ordination is lengthy and detailed, and it is managed by the Diocese. Diocese Brief at 10, 33.

- The churches obtained numerous tangible or "secular" benefits from their association with the Church and the Diocese, including financial support; assistance in creation of the newer churches (St. Margaret's, Apostles, and Epiphany); assistance in recruitment of clergy; use of the Diocese's clergy compensation guidelines; assistance with the debt consent process, with preparation of audits and parochial reports, and with taxes, insurance, pensions, and web site hosting; educational programs and human resources assistance; access to the Church Pension Fund and to group health, dental and other insurance products, at more favorable terms than most individual churches could obtain on their own; preferential reservations and discounted rates for the use of its Roslyn and Shrine Mont facilities; management of investments through the Diocesan Trustees of the Funds; and loans from the Diocesan Missionary Society (DMS). Diocese Brief at 12-14, 19, 20-21, 36-37; *id*. at 64-66, 71-72, 77 (TFC), 89-90, 104 (Truro), 123-24 (St. Paul's), 130, 140 (St. Stephen's), 143 & n.46, 148-51, 157, 160 (St. Margaret's),

[2] The text quotes the current language of the vestry oath. *See* Diocesan Canon 11.8, PX-COM-003-022. The precise language has varied slightly over the years. *See, e.g.*, Diocese Brief at 75-76. As set out in the church-by-church Fact Summaries in the Diocese Brief, the record demonstrates that all of the churches' vestries subscribed to the oath as it was prescribed by Diocesan Canon from time to time. The Congregations have not suggested otherwise.

161, 162, 164, 169-70, 171-72 (Apostles), 174, 176, 184, 185-86, 191-92 (Epiphany).

The foregoing is merely a summary of many of the high points of the churches' participation in the life of the Diocese and the Church, drawn primarily from the Summary of Argument and statement of facts common to all seven churches in the Diocese Brief. The Congregations have overlooked or ignored all of those points in their Response. The list of examples could be multiplied at great length if points included only in the individual church facts sections were included.

The Congregations do not deny that the Episcopal Church is hierarchical. They simply try to ignore it; but they are attempting to evade the force and effect of numerous Canons of the Diocese and the Church – most prominently and obviously the trust canons, *i.e.*, the "Dennis Canon" and Diocesan Canon 15.1. Aside from their arguments that the Diocese and the Church did not satisfy common law trust requirements and that trusts for general churches are not recognized under Virginia law (despite Code § 57-7.1), however, they have not articulated any colorable basis for distinguishing the Canons which they did recognize and obey from those which they now seek to evade. We respectfully submit that there is no valid basis for such a distinction, either in the laws of the Church or in the laws of the Commonwealth of Virginia.

The Congregations' arguments in their Response, like those in their opening brief, also rely on various assumptions which are demonstrably contrary to the facts and/or the law. Those assumptions include the following:

- That the applicable deeds and other documents name "the Congregations" – as opposed to the *Episcopal churches* – as either legal title holders or beneficiaries. *See* CANA Response at 12, 16, 17, 19; Diocese Brief at 2, 26-27; Church Response at 8, 16-17, 77-78, 89. *Cf. id*. at 96 (discussing TFC Endowment Fund corporate documents). The legal title holders are all trustees,

not congregations, and not a single deed names a "congregation" as a beneficial owner.[3]

- That the Diocese and the Church enacted their Canons "unilaterally," without local church representation. *See* CANA Response at 2, 12, 13, 14, 71, 72; Church Response at 6.[4]

We have addressed many of the Congregations' arguments in our Response, and in some cases in the Diocese Brief as well. We shall not repeat our previous arguments, but we may reiterate the essential points briefly to provide context for our replies to the additional arguments made in the CANA Response. A few of the Congregations' arguments are new. We shall address those in as much detail as necessary. And many of their arguments contradict positions that they have previously asserted in this litigation. We shall address those as well.

The Congregations' arguments in their Response, on the other hand, fail entirely to respond to a number of legal arguments presented in the Diocese Brief and the TEC Brief. Some of those are noted at appropriate points in this Reply. We note here that the Congregations have offered no defense at all of their theory, articulated at trial, that the contractual relationships between the parties lack "mutuality" because the Court may not consider the Congregations'

---

[3] Counsel for the Congregations averred in his opening statement that counsel for the Diocese had "agree[d] in his opening that all the deeds conveyed title to the local congregations." Tr. 68. *See also* Tr. 69 ("Mr. Davenport concede[d] that all the conveyance of deeds here were to the local congregation"). Those allegations are not repeated in the Congregations' briefs, and they are inaccurate. *See* Tr. 31 (Mr. Davenport): "Neither the Diocese nor the Episcopal Church is specifically named as a grantee as such in any of [the deeds]. And although the exact wording of the deeds varies, each of them transfers property in trust to and for by the *Episcopal churches* that were constituent parts of the Episcopal Church and the Diocese. Nearly all the deeds specifically refer to the subject church as 'Episcopal.' And that was also the case in the case of [*Buhrman*]." (Emphasis added.)

[4] *Larkin v. Grendel's Den, Inc*., 459 U.S. 116 (1982), cited in CANA Response at 13, involved a legislative delegation of governmental regulatory (zoning) authority to private, nongovernmental entities. *Id*. at 122. *See also id*. at 125 (statute "conferr[ed] upon churches a veto power over governmental licensing authority"). There was no contractual or consensual aspect to that delegation and no question of property rights. The statute was held to violate the First Amendment Establishment Clause. *Larkin* has no conceivable application here.

evidence that the Church committed the first breach of the contract by "departing" from its traditional doctrines. *See* Diocese Brief at 54-56. That argument therefore is waived, and the Court should disregard or strike their "departure from doctrine" evidence in its entirety.

ARGUMENT

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

The Congregations' "neutral principles" argument follows the same erroneous pattern as their opening brief. Instead of addressing the entire tapestry of relevant evidence as a whole, as the Supreme Court did in *Green*, 221 Va. at 555-56, 272 S.E.2d at 186, they address separately each of the four factors identified in *Green* – and indeed, they address separately each component of each factor, such as the various state statutes, the various canons, and the categories of "course of dealing." They argue that none of those factors or components alone demonstrates contractual or proprietary interests in the properties that they occupy and hold. And then they conclude that their "divide and conquer" approach proves that there are no such interests. *See generally* CANA Response at 5-61; Church Response at 1-2.

A. Statutes

The Congregations argue each statute in isolation from all others and not in the context of the overall tapestry of the evidence. They are wrong, but we necessarily reply in kind.

Code § 57-15. The Congregations argue for a new interpretation of the Supreme Court's construction of § 57-15 in *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 201 S.E.2d 752 (1974). As previous briefs have pointed out, that case holds that "[i]n the case of a supercongregational church … Code § 57-15 requires a showing that the property conveyance is the wish of the constituted authorities of the general church." *Id.* at 503, 201 S.E.2d at 755. The Court repeated

that holding in *Green*, 221 Va. at 553, 272 S.E.2d at 184:

> "We construe Code § 57-15 to require that a church property transfer may be ordered only upon a showing that this is the wish of the duly constituted church authorities having jurisdiction in the premises…. [The statute] now contemplates that the general church, or a division thereof, or certain ecclesiastical officials may be the proper parties to approve such a property transfer. In determining the proper party to approve the property transfer, the trial court must look to the organizational structure of the church." [Quoting *Norfolk Presbytery*.[5]]

To reiterate: the Court said that a trial court "must look to *the organizational structure of the church*" to determine "the proper party to approve [a] property transfer." (Emphasis added.) And in the case of a supercongregational church, § 57-15 "now contemplates that the general church, or a division thereof, or certain ecclesiastical officials may be the proper parties to approve such a property transfer." *Id*.

The Congregations argue, however, that a court must look first to whether the authorities of the general church have established a proprietary interest and "that the general church's approval is required *only* if it can first 'establish a proprietary interest in the property.'" CANA Response at 5-6. That argument simply does not square with the holdings of *Norfolk Presbytery* and *Green*. Nor is it consistent with the Congregations' own reading of § 57-15 at an earlier stage of this litigation. *See* CANA Congregations' Reply Memorandum of Law on Scope of Hearing on Congregational Determinations Pursuant to Va. Code § 57-9 (filed Aug. 31, 2007) at

---

[5] As this Court has observed, the history of § 57-15, as described in *Norfolk Presbytery*,

> demonstrates a key difference between 57-9 and 57-15: just as 57-9 requires only a majority approval of the congregation in order for the court to determine ownership of property upon a division, 57-15 also originally required only congregational approval for a conveyance of property. However, 57-15 was affirmatively amended [by 1962 Va. Acts, c. 516, cited in *Norfolk Presbytery*, 214 Va. at 502 n.2, 201 S.E.2d at 754 n.2] to include the specific words: "constituted authorities," and "governing body of any church diocese." In contrast, 57-9 contains absolutely no reference to the governing authorities of a church.

Letter Opinion on the Applicability of Va. Code § 57-9(A) (April 3, 2008) at 74.

8: "Section 57-15's requirement of denominational approval … applies in cases such as *Norfolk Presbytery* and *Green*, where one or more congregations break away from a supercongregational church … without joining any branch." In view of the Supreme Court's decision, that describes these cases exactly.

The Congregations quote *Norfolk Presbytery* as holding that if a general church is unable to establish a proprietary interest, "'it will have no standing to object to [any] property transfer' under § 57-15." CANA Response at 6, quoting *Norfolk Presbytery*, 214 Va. at 503, 201 S.E.2d at 755. They are wrong. Standing is a jurisdictional issue, and it is an issue that the Court addressed in the next paragraph *after* holding that § 57-15 requires examination of "the organizational structure of the church" and proof of "the wishes of the constituted authorities of [a] general church," 214 Va. at 502, 503, 201 S.E.2d at 755. The Congregations' argument confuses two distinct concepts – a local church's burden of proving that a property transfer is the wish of the general church, under § 57-15, and the general church's standing to sue to prevent a conveyance that it does not approve. Proof of compliance with § 57-15 is required, even in an *ex parte* proceeding brought by trustees of a local church to obtain leave of court to sell, encumber, exchange or otherwise deal with church property. Proof of compliance with § 57-15 includes proof of the wishes of the duly constituted church authorities having jurisdiction in the premises. *Green*; *Norfolk Presbytery*. And that is true whether the general church has standing to object to the conveyance if the local church acts without its approval or not.[6] Needless to say, the

---

[6] The *Norfolk Presbytery* Court cited *Brown v. Virginia Advent Christian Conference*, 194 Va. 909, 76 S.E.2d 240 (1953), on the issue of "standing to object to the property transfer." 214 Va. at 503, 201 S.E.2d at 755. *Brown* highlights the distinction between standing to sue and the merits of a complaint of non-compliance with § 57-15:

> As stated by the trial judge in his written opinion, the church trustees failed 'to comply with the statutory provisions (§ 57-15, Code, 1950) * * * in

(footnote continued)

Congregations have not carried their burden of proving that it is the wish of TEC and Diocese that the properties be transferred to the CANA Congregations, which is precisely the relief that they seek in the first prayer for relief in their Amended Counterclaims.

Code § 57-16.1. The Congregations argue next that because § 57-16.1 does not use the words "denominations" or "dioceses," that statute's "reference to the rules of the 'church or body' that is incorporating refers to the rules of *that* entity, not of the diocese or denomination." CANA Response at 6-7. That argument misapprehends the content of § 57-16.1, in part due to selective quotation and in part due to the Congregations' persistent but misguided efforts to portray Episcopal churches as congregational rather than hierarchical (as noted in the Church Response at, *e.g.*, 3 & n.3, 89, and 94). Section 57-16.1 does not refer only to "rules" of a "church or body." It refers, twice, to "the laws, rules, or ecclesiastic polity" of an unincorporated church or religious body.[7] The Episcopal Church and the Diocese are unincorporated churches or religious bodies. The "ecclesiastic polity" of the Episcopal Church is undeniably hierarchical. *Truro Church*, 280 Va. at 13-15, 694 S.E.2d at 558-59; pages 1-4, *supra*. And the "laws" and "rules" of a member of any hierarchical institution include the laws and rules – here the Constitutions and Canons – of each higher level of the hierarchy, here the Diocese and TEC. In the context of a hierarchical church, the "laws" and "rules" of each subordinate institution *necessarily* include the laws and rules of superior levels in the hierarchy, and indeed each of the

---

> removing the church building from the lot, * * *'. The trustees should have secured an order from the court as provided by the statute before thus disposing of the property. But their failure to secure such an order does not give these plaintiffs, selected as they were, the right to maintain this action in tort.

194 Va. at 913, 76 S.E.2d at 242-43.

[7] Section 57-16.1 is consistent with Justice Brennan's admonition, in *Maryland and Virginia Eldership v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 370 (1970) (concurring opinion), that "special statutes governing church property arrangements …. must be carefully drawn to leave control of ecclesiastical polity, as well as doctrine, to church governing bodies."

local churches in these cases expressly incorporated those rules in their own governing documents. *See* TEC Brief at 15-16 (providing citations for all seven churches); Diocese Brief at 63-64 (TFC), 81-83 (Truro), 154-56 (St. Margaret's), 168 (Apostles), 177 (Epiphany); Section I.D.2 of the Argument, *infra*.[8]

Code § 57-7.1. We have addressed virtually all of the Congregations' arguments regarding § 57-7.1 (*see* CANA Response at 10-15) and need not repeat those arguments here. *See* Diocese Brief at 38-42; Church Response at 65-81. The Congregations, on the other hand, have not responded to our point that whether the trust interests expressed in the Dennis Canon and Diocesan Canon 15.1 are valid as such or not, those canons are a partial expression of the contractual relationships among the parties. *See* Diocese Brief at 28. *See also* Tr. 137 (Aug. 10, 2007), where the Court said: "Do I really need, for purposes of today, to resolve the issue of whether Norfolk is bad law, or the express trust/implied trust issue, given that the trust, at a minimum, is going to be relevant to the proprietary or contract question?"; and *id*. at 147: "the language in the canons is sufficient, taken with the deeds, taken with the constitution, to state a cause of action under a variety of different theories, including the contract and the proprietary theory."

The Congregations cite *Norfolk Presbytery* as noting that a 1962 amendment to the former Va. Code § 57-7 "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" but did not go

[8] The Congregations also argue that the laws and rules of TEC and the Diocese do not forbid local church incorporation. CANA Response at 7-8. That is true but irrelevant. The issue is not, as the Congregations would have it, whether § 57-16.1 or any other statute creates trust, proprietary, or contractual rights in TEC or the Diocese. *See* CANA Response at 9-10; Church Response at 12. The point is that Virginia statutes respect the autonomy of churches and the governance and property rules adopted by churches. *See generally* Church Response at 12-14.

"beyond this … to validate trusts for a general hierarchical church." *Norfolk Presbytery*, 214 Va. at 506-07, 201 S.E.2d at 757-58, cited (and quoted in part) in CANA Response at 11. That is accurate. (*See* former § 57-7, quoted in *Norfolk Presbytery*, 214 Va. at 506 n.3, 201 S.E.2d at 757 n.3.) It neglects the subsequent point, however, that when the General Assembly repealed § 57-7 and enacted § 57-7.1 in its place, it *removed* the limitation to residential purposes and now validates "*[e]very* conveyance or transfer of real or personal property … which is made to or for the benefit of *any church, church diocese, religious congregation or religious society*." (Emphases added.) Section 57-7.1, in other words, *does* go "beyond [the former § 57-7] … to validate trusts for a general hierarchical church."

We also note that § 57-7.1 is the very first authority that the Supreme Court cited in its directions to this Court concerning proceedings on remand. *See Truro Church*, 280 Va. at 29, 694 S.E.2d at 567. That was no accident and no "passing comment" (CANA Response at 39). If the Supreme Court had agreed with the Congregations' arguments that § 57-7.1 did not change the law, that it cannot be applied "retroactively," or that the Diocese has not complied with the requirements for establishing a denominational trust – arguments which they presented to that Court (*see* excerpts from the Congregations' Supreme Court brief, attached as Exhibit C) – then the Court would have said so, instead of citing that statute in its directions to this Court.

Code § 1-248. In a new argument, the Congregations rely on Va. Code § 1-248 as "confirm[ing] that, even where Virginia associations have been granted 'wide powers' by the legislature, 'these powers are limited by general law' …." CANA Response at 15.[9] There are

[9] The Congregations cite Code § 1-248, but they quote instead a predecessor statute, § 1-13.17, since repealed. *See* CANA Response at 15 n.2, quoting § 1-13.17 as quoted in *Unit Owners Ass'n v. Gillman*, 223 Va. 752, 763, 292 S.E.2d 378, 383 (1982). Section 1-248 does not track

(footnote continued)

several problems with that argument. Most obviously, under the Religion Clauses of the Virginia and United States Constitutions, a church is not an "association" that relies on the General Assembly to grant it "powers." The "powers" – more accurately, the interests – which TEC and the Diocese seek to enforce are primarily the products of the property deeds, the Canons of the Diocese and the Church, and the numerous and extensive dealings between the parties that are summarized in the Diocese Brief at 30-38 and 56-194. State statutes play a role; but under constitutional doctrines of free exercise and separation of church and state, they do not empower the Diocese or the Church. The role of the statutes is rather to give recognition and enforcement to the rules of churches, whatever they may be, and to remove various disabilities that attached to denominational churches at earlier stages in the history of Virginia law.

Second, the Congregations' argument that the Canons of the Diocese and the Church are contrary to federal or state law once again assumes the conclusion that it advocates, *i.e.*, that the Congregations are the sole owners of the properties at issue and that enforcement of the laws of the Church would "effectively work a forfeiture." CANA Response at 15; *see also id*. at 2, 3, 16, 21, 23, 29, and 36. *See* Church Response at 8-9. If the underlying premise were accurate, then perhaps the conclusion would follow; but the validity of the underlying premise is a central issue in the case. It cannot be resolved by implicit, *ipse dixit* assumptions by counsel that fail to take

---

the language of the former § 1-13.17. Section 1-248 is simply a straightforward declaration of the "[s]upremacy of federal and state law," as its caption states. It provides:

> The Constitution and laws of the United States and of the Commonwealth shall be supreme. Any ordinance, resolution, bylaw, rule, regulation, or order of any governing body or any corporation, board, or number of persons shall not be inconsistent with the Constitution and laws of the United States or of the Commonwealth.

Unlike the former statute quoted in the CANA Response , there is nothing in § 1-248 regarding "authoriz[ation]" of a person or persons to enact bylaws, rules, or regulations. And neither statute refers to "'wide powers,'" CANA Response at 15. That language is found in *Gillman*.

into account the entire body of relevant evidence and applicable law.

Finally, the Congregations rely on the Supreme Court's application of the former § 1-13.17 in *Gillman*. CANA Response at 15. *Gillman* is a condominium association case, as discussed in the Church Response at 9-10. "The entire condominium concept, and all pertaining to it, is … a statutory creation." *Gillman*, 223 Va. at 762, 292 S.E.2d at 383. Condominium associations, unlike churches, derive their powers entirely from the Condominium Act, which "is designed to and does permit the exercise of wide powers by an association of unit owners. However, these powers are limited by general law and by the Condominium Act itself." *Id.* at 763, 292 S.E.2d at 383. That is the context in which the *Gillman* Court cited and quoted § 1-13.17, and it has no conceivable application here.[10]

We also have answered the Congregations' "Retroactivity" argument (CANA Response at 16), for the most part, in a previous brief and need not repeat that discussion here. *See* Church Response at 70-71. The only new wrinkle is the Congregations' citation of *Diocese of Southwestern Va. v. Wyckoff* (Amherst Co. Nov. 16, 1979) (PX-CTREC-021), slip op. at 6, for the proposition that a statute "may be rendered inapplicable by 'constitutional infirm[ities] of applying it to the deeds in question which predate the passage of the statute.'" The Congregations fail to note that their quotation is from Judge Koontz's discussion of the potential applicability of Code § 57-9 to "deeds … which predate the passage of th[at] statute," *Wyckoff* at 6, an issue which was not decided in that case because "the statute was not followed …," *id.* In

[10] The Congregations' reading of *Gillman* as precluding enforcement of "associational rules that effectively 'fine [members],'" CANA Response at 30, is called into question by the recent decision in *Zinone v. Lee's Crossing Homeowners Ass'n*, ___ Va. ___, Record No. 101085 (Sept. 16, 2011), where the Court sustained amendments to a homeowners association's declaration of protective covenants that "impacted architectural controls on the individual property owners and the assessment of regular fees and fines collected by the Association, including fines imposed on Zinone for alleged violations of the Declaration as amended …." *Id.*, slip op. at 3.

all events, all force is drained from the Congregations' argument when it is recalled that TEC and the Diocese do not rely on state statutes as the *source* of their interests in local church property but merely as validating and enforcing the arrangements made within the Church itself.[11]

B. Deeds.

There is little if anything new in the Congregations' deed arguments, and we have answered those arguments before. We do not read the deeds, as the Congregations would have it, "as creating restrictive covenants or restraints on alienation." CANA Response at 17. That characterization once again assumes the conclusion, that the Congregations are beneficial owners of the property. To the contrary, we read the deeds as *identifying the beneficial owners* as *Episcopal churches* – and not as *congregations* at all. *See* Diocese Brief at 2, 26-27; Church Response at 8, 16-17, 77-78, 89. And "the legal title holders" are the trustees, *not* "the CANA Congregations," as the Congregations once again aver, again without citing the slightest basis or support for that assertion. *See* CANA Response at 19; Church Response at 8-9.[12]

The Congregations continue to read *Green* as holding that the general church was the grantee in an 1875 deed. CANA Response at 1, 18, 19, 77-78. That ignores the fact (as the Congregations argue elsewhere) that under Virginia law both in 1875, when the deed was given,

---

[11] Code § 57-9 is no longer directly at issue, but its careful distinction between hierarchical and congregational churches remains relevant. *See, e.g.*, The CANA Congregations' Reply Brief Pursuant to the Court's June 6, 2008 Order (filed June 26, 2008) at 3: "The General Assembly … distinguished between 'attached' congregations and 'entirely independent' ones, recognizing that *the interests of the denomination … would be implicated in cases under § 57-9(A)*." (Emphasis added.)

[12] Page 142 of the Diocese Brief inaccurately cited the earliest St. Stephen's deed, dated November 20, 1874, as DSTS-013-063. The 1874 deed is at DSTS-013-092 - 093. Page -093 of that exhibit should have been cited on line 9 of page 142 of the Diocese Brief instead of page -063. The deed at DSTS-013-063 is dated August 27, 1957. It should have been cited at the end of the St. Stephen's deed discussion, also on page 142. We regret the error.

and in 1980, when *Green* was decided, such deeds were construed as conveyances *only* for the benefit of the local church. *See* Diocese Brief at 26 n.8; TEC Brief at 35-36 n.10; Church Response at 15-16.

The Congregations appear to argue, for the first time, that *Diocese of Southwestern Va. of the Protestant Episcopal Church v. Buhrman*, 5 Va. Cir. 497 (Clifton Forge 1977), *pet. refused*, Rec. No. 780347 (Va. June 15, 1978), was wrongly decided. *See* CANA Response at 19 & n.4.[13] One flaw in that argument is the repeated description of the issue as the existence of "a use restriction," *id.* at 19, when that is neither the holding of *Buhrman* nor an argument presented by the plaintiffs in this case. Another is its mischaracterization of both *Buhrman*'s and *Norfolk Presbytery*'s treatment of *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872). The Court in *Norfolk Presbytery* referred generally to the same passage that Judge Stephenson quoted in *Buhrman*, 5 Va. Cir. at 501, but it *held* only that "the implied trust doctrine" of *Watson* is not constitutionally required and is not the law in Virginia. *See* 214 Va. at 504, 201 S.E.2d at 755-56; *Reid v. Gholson*, 229 Va. 179, 187 n.12, 327 S.E.2d 107, 112 n.11 (1985). The *Buhrman* Court relied on *Watson* for an entirely different proposition, *i.e.*, that it was "powerless to decide disputes involving church doctrine." 5 Va. Cir. at 502 (cited in CANA Response at 19 n.4 as "1977 WL 191134, at *3").[14] *Buhrman* did not find an implied trust; we do not seek findings of implied trusts; and the proposition for which *Buhrman* relied on *Watson* – that a circuit court may not "decide disputes involving church doctrine" – is both undeniable and

[13] The Congregations previously have cited *Buhrman* with apparent approval. *See, e.g.*, CANA Brief at 51-52, 55; Tr. 108.

[14] *See also* 5 Va. Cir. at 507, citing both *Watson* and *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), for the proposition that "it is most doubtful if" the Diocesan Executive Board's formal determination "that the St. Andrew's property has been abandoned within the context of church law" "is subject to review by this court."

undisputed in these cases. The Congregations are grasping desperately at straws.

The Congregations' final deed argument is that the Court must look no further than the deeds and after doing so should rule in their favor. CANA Response at 20. Their "'deed[s] alone'" argument (*id.*, quoting 19th Century cases) is answered in the Church Response at 14-15. *See also* CANA Congregations' Opening Brief Pursuant to the Court's June 6, 2008 Order (filed June 16, 2008) at 6 ("Courts in § 57-15 cases examine the deeds as part of a larger analysis to determine whether the denomination has a proprietary interest sufficient to invoke the statute")[15]; and *Episcopal Church in the Diocese of Connecticut v. Gauss*, ___ A.3d ___ , 2011 WL 4537297, at *11 n.14 (Conn. Oct. 11, 2011) (cited below as *Gauss*)[16]:

> Both *Watson* and *Jones* recognized that the fact that parish property is held in the name of the church is not dispositive of the ownership issue unless the deed expressly provides that the property is to be dedicated by way of a trust to the teachings of a specific religious doctrine. See *Jones v. Wolf*, supra, 443 U.S. 606; *Watson v. Jones*, supra, 80 U.S. (13 Wall.) 723-24…. Accordingly, the defendants' argument that the Diocese waived all claims to any right, title or interest in the property because it deeded the original property to "Bishop Seabury Church" in 1956, or because the Episcopal Church never conditioned its approval of that or any other property transaction on the inclusion of an express provision concerning its interest, has no merit.

C. The "constitution" of the general church

1. The contractual and proprietary force of the canon laws of the Diocese and the Church

We have answered the Congregations' argument, which is based on *Norfolk Presbytery* but ignores *Green*, that Virginia law does not recognize local churches' implied consents to be bound by the rules of the general churches of which they are part. *See* CANA Response at 20,

---

[15] The Congregations also argued that "*Green*'s multi-factor 'neutral principles' analysis was … grounded in § 57-15." The CANA Congregations' Reply Brief Pursuant to the Court's June 6, 2008 Order (filed June 26, 2008) at 1 (quoted at greater length *infra* at 28 n.22).

[16] The October 11 *Gauss* decision affirmed the previous *Gauss* decision cited in the Church Response at 51 n.35.

41, 44, 65; Church Response at 10. We have responded to their arguments under the conventional contract law concepts of mutuality and consideration. *See* CANA Response at 21-22; Church Response at 37-43. We have responded to their misguided attempt to attribute the writings of Messrs. White and Dykman (Apostles Exs. 290, 291, 292, and 372, cited in CANA Response at 22, 25, 28, 29, 30-31, 42) to the General Convention of the Church. *See* Church Response at 43-44.[17] And we have twice answered their arguments that the Canons of the Diocese and the Church are irrelevant because they are not parts of their respective "Constitutions." *See* CANA Response at 22-24; Diocese Brief at 29-30 & n.10; Church Response at 27-29. *See also* Tr. 69-70, 72-73, 94-95 (Aug. 10, 2007).[18]

The Congregations argue again that the Church's and the Diocese's trust canons are not embodied in a "legally cognizable form." CANA Response at 2, 14. The Connecticut Supreme Court recently rejected an identical argument in *Gauss*, 2011 WL 4537297, at *16:

> The defendants further claim that the neutral principles of law approach is meaningless if this court accepts "a denomination's self-serving declaration of trust," and that the United States Supreme Court has stated that courts may enforce only those trusts that are in "'legally cognizable form.'" They argue that reliance on a declaration such as the Dennis Canon would eradicate neutral principles of law …. We disagree for two reasons. First, the defendants omit the explanation that precedes the court's statement that a trust must be in a "legally cognizable form" in order to be enforceable. *Jones v. Wolf*, supra, 443 U.S. at 606. That statement, in its entirety, reads as follows: "Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At *any time before the dispute erupts*, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They

[17] The Congregations' attempt to attribute the "authoritative expression" statement found at Apostles_Ex_292.006 to TEC's General Convention (CANA Response at 28) is misleading at best. As that exhibit states, the quoted language was found in "the Foreword in Volume I of the 1981 Edition," not in any action of the General Convention.

[18] The Congregations say at 23 that TEC provides "notice to those affected by changes in [its] Pension Fund." That is a peculiar argument. The Canon which they cite as support, in footnote 5, only requires that notice of proposed changes be communicated to the Trustees of the Church Pension Fund, not to its beneficiaries.

> can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. *Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.*" (Emphasis added.) *Id. Jones* thus not only gave general churches explicit permission to create an express trust in favor of the local church but stated that civil courts would be *bound* by such a provision, as long as the provision was enacted *before* the dispute occurred. We also reject the view that the Dennis Canon represents a "self-serving declaration of trust" because, as we previously noted, Parish members agreed to be bound by the constitutions and canons of the Episcopal Church and the Diocese in 1956 when they affiliated with the Episcopal Church, and, as a result, their interests are in harmony with those of the Episcopal Church and the Diocese.

We also have responded to the Congregations' "legally cognizable form" argument, and we cited several cases supporting the proposition that the "legally cognizable" question addresses only whether examination of a church document would require inquiring into religious doctrine. *See* Church Response at 35-36. The Congregations in 2008 took precisely the same approach to a closely related issue, the meaning of the phrase "neutral principles of law, developed for use in *all* property disputes." *See* The CANA Congregations' Reply Brief Pursuant to the Court's June 6, 2008 Order (filed June 26, 2008) at 2. As the Congregations explained then, that phrase "simply means that the *principle* must be capable of application in all property disputes—*i.e.*, without consideration of doctrinal issues." *Id.* (emphasis added in Congregations' 2008 Reply Brief). We agree; and a document or "*principle*" which satisfies that criterion *is* in a "legally cognizable form."

In a new argument, the Congregations appear to say that even though the governing documents of a church or other voluntary association "*generally* constitut[e] a 'contract'" (CANA Response at 21; *see* TEC Brief at 21-25; Diocese Brief at 37 & n.12; Church Response

at 38-39),[19] a court nevertheless may hold that some aspects of that contract are not enforceable because they do not comply with contract law. The Congregations cite no case where a court has "blue-penciled" a contract, much less a contract comprising the canon laws of a church. But regardless of that, the Congregations' only attempt to invalidate parts of the admitted contract as "contrary to public policy or the law" (CANA Response at 21, citation and emphasis omitted) turns once again on the assumed conclusion that the properties are "'vested'" in the Congregations (and not in the Episcopal churches to which they formerly belonged) and that TEC and the Diocese seek "'forfeitures.'" (*Id.*)[20]

The Congregations' historical arguments regarding TEC's Canons (CANA Response at 24-26 & n.6) are answered in the TEC Reply at 7-15. The Diocese adopts TEC's responses.

We have answered the Congregations' argument that Virginia law does not recognize trusts for the benefit of denominational churches. *See* CANA Response at 26-27; Diocese Brief at 38-42; Church Response at 65-70. We have answered their argument that application of conventional principles of law applicable to private trusts defeats TEC's and the Diocese's trust claims. *See* CANA Response at 26-27; Diocese Brief at 28; Church Response at 73-85.

Continuing their "divide and conquer" approach, the Congregations argue once again that various other property-related Canons, viewed primarily in isolation, "do not create enforceable proprietary rights." CANA Response at 29; *see id.* at 29-32 ("Anti-alienation and debt canons"), 32-36 ("The vestry and rector canons"), 36-38 ("Visitation canon"), 38-39 ("Abandonment canon"). But by focusing on one or a few of the "trees" at a time, they again fail to see the

---

[19] *See also Linn v. Carson*, 73 Va. (32 Gratt.) 170, 183-84 (1879), holding that the Methodist Book of Discipline constituted a contract between a local church and its members.

[20] Hypothetical arguments that provisions of church law might be unenforceable because they would require violation of prohibitory provisions of regulatory statutes are neither analogous nor helpful. *See* CANA Response at 2, 40-41.

"forest" as a whole. They also overlook the fact that other courts have pointed to the same or similar provisions of general church law in support of their conclusions that a general church has a "trust" or other interest in local church properties under "neutral principles." *See, e.g., Green*, 221 Va. at 556, 272 S.E.2d at 186 (relying on provision of AME Zion Discipline requiring that all property transfers be approved by bishop); *Episcopal Church Cases*, 198 P.3d 66, 79, 80-81 (Cal.), *cert. denied*, 130 S.Ct. 179, 175 L. Ed. 2d 41 (2009) ("Other canons [*i.e.*, other than the Dennis Canon] adopted long before St. James Parish existed also contained substantial restrictions on the local use of church property"; Dennis Canon is "consistent with earlier-enacted canons that … impose substantial limitations on the local parish's use of church property and give the higher church authorities substantial authority over that property," citing "the prohibition of Canon II.6, section 2, against encumbering or alienating local property without the previous consent of higher church authorities"); *Bishop and Diocese of Colorado v. Mote*, 716 P.2d 85, 105-06 (Colo. 1986) (citing canonical prohibitions against encumbering or alienating local property and against removal or disposal of any dedicated and consecrated Church or Chapel without diocesan consent as "relevant in … showing the measure of control over local church property that is intended to be exercised by the general church"); *Rector, Wardens and Vestrymen of Trinity-St. Michael's Parish, Inc. v. Episcopal Church in the Diocese of Conn.*, 620 A.2d 1280, 1286-87 n.13 (Conn. 1993) (citing various canons pertaining to property and the business affairs of the Church, dioceses and parishes, including canons regarding business methods, parochial reports, and encumbrance or alienation, which "pervasively govern matters both spiritual and temporal within the Episcopal Church, its dioceses and parishes" and "strongly reflect the polity of the church as one in which the parish is the local manifestation of [the Church] to be used for its ministry and mission"); *Episcopal Diocese of Mass. v. DeVine*, 797

N.E.2d 916, 923-24 & n.21 (Mass. App.), *review denied*, 801 N.E.2d 803 (Mass. 2003) (citing encumbrance or alienation canons of TEC and diocese as supporting trust memorialized in Dennis Canon and concluding that the Dennis Canon "merely confirmed the preexisting relationship between [the Church], its subordinate dioceses, and the parishes thereunder"); *Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville*, 684 N.Y.S.2d 76, 81 (N.Y. App. Div. 1999) (citing encumbrance or alienation canon in support of conclusion that the Dennis Canon "expressly codifies a trust relationship which has implicitly existed between the local parishes and their dioceses throughout the history of the Protestant Episcopal Church"); *Episcopal Diocese of Ohio v. Anglican Church of the Transfiguration*, No. CV-08-654973 (Ohio Common Pleas Cuyahoga Co., April 15, 2011), slip op. at 8-9 (cited below as *Transfiguration*) (citing, *inter alia*, encumbrance or alienation canons, canons which "entitle the parish rector to control property subject, e.g., to church canons and the Bishop's directives," and canons requiring parishes to maintain insurance); *In re: Church of St. James the Less*, 888 A.2d 795, 809-10 (Pa. 2005) (citing encumbrance or alienation canons, among others, and concluding that the Dennis Canon "'merely codified in explicit terms a trust relationship' that was implicit in St. James' Charter") (citation omitted). *See also Convention of the Protestant Episcopal Church in the Diocese of Tenn. v. Rector, Wardens, and Vestrymen of St. Andrew's Parish*, No. 09-2092-11 (Tenn. Ch. Ct. Apr. 29, 2010), slip op. at 2, 10 (citing encumbrance or alienation canons and concluding that examination of deed, Articles of Incorporation, Articles of Association, and the Constitution and canons of the Church and the Diocese reveals a trust imposed upon the property for the benefit of the Diocese and the Church). The point was stated forcefully in the Connecticut Supreme Court's recent decision in *Gauss*, 2011 WL 4537297, at *13. After citing and describing the history of TEC's encumbrance or alienation canon, the court explained:

> after the original property was quitclaimed in 1956 to the Parish by the Missionary Society of the Diocese, the Parish sought approval from the Diocese *each and every time* it wished to purchase, finance or sell real property in succeeding years…. If Parish members believed that they had sole ownership and control over Parish property and could have entered into real property transactions *without* the approval of the Diocese because it had no interest in Parish property, there would have been no reason to seek the Bishop's permission and to conduct such transactions only *after* he granted approval. Accordingly, Parish members acted consistently as though the Diocese and the Episcopal Church held a trust interest in the property both before and after the Dennis Canon was enacted by the General Convention.

2. The Court should reject the Congregations' invitation to disregard the Supreme Court's decision.

In a brazen argument bespeaking desperation (or perhaps a misguided attempt at humor), the Congregations argue that this Court should ignore what they call a "passing comment" in the Supreme Court's decision in this case – that the churches "were required to conform to the constitution and canons of TEC and the Diocese." *Truro Church,* 280 Va. at 27, 694 S.E.2d at 566. *See* CANA Response at 39-40. The Supreme Court of Virginia does not idly drop "passing comment[s]" into its detailed formal opinions; and if it ever did so, it would not do so in a case of this importance or on an issue that is so central to this entire litigation, including the remand that it ordered in that very decision.

Nor can the Supreme Court's express holding be discarded as *dictum,* as the Congregations suggest. *See* CANA Response at 40 n.18. The Congregations state accurately that the Court's declaration, which the Congregations seek to evade, was made "in the context of [its] discussion of whether the Congregations were 'attached' to TEC and the Diocese for purposes of § 57-9." *Id.* The entire, relevant passage provides the full context of the holding:

> The circuit court next found that the CANA Congregations were "attached" to the Diocese and TEC. There was not, nor could there be, any serious dispute that, until the discord resulting from the 2003 General Convention, the CANA Congregations were "attached" both to TEC and the Diocese *because they were required to conform to the constitution and canons of TEC and the Diocese*. Accordingly, we agree that for purposes of Code § 57-9(A), *the CANA*

> *Congregations established* that they were previously "attached" to TEC and the Diocese.

280 Va. at 27, 694 S.E.2d at 566 (emphases added). The Court thus held (1) that it was the Congregations' burden to prove "attach[ment]" under § 57-9 and (2) that the Congregations carried that burden by establishing that "they were required to conform to the constitution and canons of TEC and the Diocese." *Id.* The Court obviously was aware that there was no "serious dispute" as to that issue, *id.*, but it did *not* hold that the issue was conceded and move on. It both explained *why* there was no serious dispute *and* addressed the issue on the merits. That was *not* a "passing comment" (or a *dictum*), as the Congregations would have it. It was a studied, deliberate holding of the Court that the Congregations had proved an element of their claims: that they were "attached" to TEC and the Diocese, for purposes of Code § 57-9(A), "because they were required to conform to the constitution and canons of TEC and the Diocese."[21]

The Congregations also argue that if the Court's holding is recognized as a holding, "it would be difficult to make sense of the Supreme Court's remand or its directive that this Court 'resolve this dispute under principles of real property and contract law.'" CANA Response at 40, quoting *Truro Church*, 280 Va. at 29, 694 S.E.2d at 567. But the remand is not nearly as mysterious as the Congregations profess to believe, for at least two reasons. First, our Supreme Court does not grant relief that no party requests, and in these cases no party requested that it enter final judgment for the Diocese or TEC. Second, the Court was well aware that the

---

[21] *Accord*, CANA Congregations' Opening Post-Trial Memorandum Concerning Application of Virginia Code § 57-9 (filed Dec. 21, 2007) at 59 & n.39 (relying on testimony that "congregations are attached to TEC 'because they function both under the Constitution and Canons of a Diocese, and the Diocese functions under the Constitution and Canons as set forth by the General Convention'" as proof of attachment for purposes of § 57-9); The CANA Congregations' Reply Brief Pursuant to the Court's June 27, 2008 Order (filed July 8, 2008) at 26 ("a denomination's rules [are] the very documents that 'attach' a congregation to a 'church or society' within the meaning of § 57-9").

contractual or proprietary interests analysis under *Green* requires consideration of statutes, deeds, and dealings between the parties, as well as the governing documents of the general church. *See id*. at 29, 694 S.E.2d at 567-68, citing (*inter alia*) *Green*. The record at that stage of the case did not reflect the dealings between the parties. To conclude with recognition of the churches' obligation to conform to the Constitutions and Canons would have been to short-circuit the required analysis (in much the same way as the Congregations divide-and-conquer approach attempts to do) – which is precisely why TEC and the Diocese asked the Court to remand the cases for trial instead of asking it to enter final judgment on appeal.

D. The dealings between the parties

We have answered the Congregations' argument that the *Green* Court's course of dealing analysis was based on the Discipline of the general church. *See* CANA Response at 43-44; Church Response at 44-47.[22] We have rebutted their argument that the weight of the course of dealing evidence favors their position. *See* CANA Response at 42-43, 45, 53-56; Church Response at 48-58. We also have emphasized that the course of dealing evidence in this case largely tracks, and in several respects goes well beyond, that presented in *Green*. *See* Diocese Brief at 3-6, 23-25, 30-38, and church-by-church Fact Summaries at 56-194. The Diocese's opening brief provides a detailed, point-by-point recitation of the congruence and harmony

[22] We note further that the Congregations' argument that the *Green* Court's course of dealing analysis was based on the AME Zion Discipline surfaced for the first time after the Supreme Court's 2010 decision. The Congregations previously understood *Green* as we continue to do now. *See, e.g.*, Memorandum in Support of Demurrers and Pleas in Bar (filed June 22, 2007) at 16; The CANA Congregations' Opening Brief Pursuant to the Court's June 6, 2008 Order (filed June 16, 2008) at 5. *See also* The CANA Congregations' Responsive Brief Pursuant to the Court's June 6, 2008 Order (filed June 23, 2008) at 1 (stating, after quoting *Green*'s listing of the four factors of neutral principles, that "[t]he 'neutral principles' analysis of *Green* was … based directly on § 57-15"); The CANA Congregations' Reply Brief Pursuant to the Court's June 6, 2008 Order (filed June 26, 2008) at 1 ("*Green*'s multi-factor 'neutral principles' analysis was … grounded in § 57-15"); *id*. at 2 ("The *Green* factors are based on § 57-15").

between the evidentiary records in this case and in *Green.* *See id.* The Congregations appear, however, to have overlooked much of those portions of our opening brief. *See* discussion at pages 4-8, *supra*.

The Congregations argue that under "neutral principles generally … 'course of dealing' evidence would not establish an enforceable contract." CANA Response at 44. That is just one more divide-and-conquer argument. The Diocese and the Church do not rely on the dealings between the parties alone, but as one of the four "neutral principles" factors recognized in *Green*. As explained at greater length in the TEC Reply, the Congregations' consistent adherence to and observance of the requirements of canon law, and in general their participation in the activities of the Diocese and the Church, demonstrates their assent to the "terms of the deal."

The Congregations also are wrong on the law. Virginia courts recognize "implied in fact" contracts based on conduct. *See, e.g.*, *Bankers Credit Serv. v. Dorsch*, 231 Va. 273, 275, 343 S.E.2d 339, 341 (1986) ("In order for an agreement to be binding, the parties must have assented to its terms. This assent, however, need not be communicated by express words but may be inferred from the conduct of the parties"); *National R.R. Passenger Corp. v. Catlett Volunteer Fire Co.*, 241 Va. 402, 407, 404 S.E.2d 216, 218-19 (1991) (affirming finding of an implied-in-fact contract based on "the ongoing [close working] relationship between Catlett and [Fauquier County]") (alterations in original); *Bay Point Condo. Ass'n, Inc. v. RML Corp.*, 57 Va. Cir. 295, 307-08 (Norfolk 2002) ("An implied contract is one not created or evidenced by the explicit agreement of the parties, but inferred by the law, as a matter [of] reason and justice from their acts or conduct, the circumstances surrounding the transaction making it a reasonable, or even necessary, assumption that a contract existed between them by tacit understanding") (quoting *Black's Law Dictionary* (7th ed. 1999)); *McKay Consulting, Inc. v. Rockingham*

Memorial Hospital, 665 F. Supp. 2d 626, 632 (W.D. Va. 2009) ("Virginia law recognizes that parties may enter into an implied-in-fact contract, which is formed not by express agreement, but rather by agreement inferred from the conduct of the parties").[23]

1. Vestry oaths

The Congregations advocate an interpretation of the oaths taken by all of their vestry members throughout almost the entirety of their histories[24] that would effectively read out of the oaths the vestry members' solemn avowal of a "hearty assent and approbation to the doctrines, worship and discipline of The Episcopal Church." *See* CANA Response at 46-47. Such rationalizations will not suffice. There can be no reasonable doubt that the oaths constituted solemn commitments to abide by the rules of the Church, and the Court should disregard the suggestion that many generations of Episcopal vestry persons did not take those commitments as seriously as the terms require.

Page 10 of the Diocese's opening brief cites the testimony of no fewer than twelve witnesses, including several CANA clergy,[25] that the "discipline" of the Church is found in the

---

[23] The Congregations rely on *Delta Star, Inc. v. Michael's Carpet World*, 276 Va. 524, 666 S.E.2d 331 (2008). CANA Response at 44 n.21. *Delta Star* was "governed by the Uniform Commercial Code – Sales, Code §§ 8.2-101 *et seq*. (the UCC)." 276 Va. at 526, 666 S.E.2d at 332. The Court held that the trial court erred in failing to apply the UCC's Statute of Frauds, Code § 8.2-201, to declare unenforceable a purported oral contract for the sale of goods. Its "course of dealing" ruling also was governed by Article 2 of the UCC, Code § 8.2-202, under which course of dealing is relevant only to explain or supplement the terms of a contract but cannot establish the existence of a contract. 276 Va. at 530-31, 666 S.E.2d at 335. That UCC holding has no application here.

[24] The vestry oath originated with the 1784 Act of Incorporation. *See* PX-COM-071-295. That Act was repealed in 1787; but the Diocesan Convention of 1787 imposed a similar requirement, *see id*. at -315, which was included (in a slightly more elaborate form) in the 1793 Diocesan Canons, *id*. at -354. Of these churches, only TFC existed before that time; and its Vestry subscribed to the required oath as early as 1785. *See* DX-FALLS-060-035 (*Near the Falls*).

[25] The twelve witnesses are CANA clergy Robert Rauh (Tr. 2330-31), John Yates (Tr. 2795), and Jeffrey Cerar (Tr. 3785); vestry or former vestry persons Dr. Alton Tucker (Tr. 397-98) and

(footnote continued)

Constitution and Canons and in the rubrics and the ordinal of the *Book of Common Prayer*. *See also* Diocese Brief at 138, quoting St. Stephen's vestry minutes reporting the Rev. Cerar's explanation that the term "discipline," in the vestry oath, "refers to the Constitution and canons of the Episcopal Church and the Diocese of Virginia, by which we are bound …." PX-SSH-137-002. The Congregations have offered no rebuttal to that evidence, and they have none.

We do not suggest that any conflicts in the evidence should be resolved by head-counting the witnesses. We respectfully suggest, however, that the Court should examine the evidence in light of the context and of all of the relevant circumstances. The context and circumstances include the fact that *all* of the Congregations' denials of the general understanding of the term "discipline" and the vestry oath came from witnesses who had every incentive to forget what they knew at an earlier time. The context and circumstances include the fact that even the Congregations' own clergy confirmed the general understanding. The context and circumstances include particularly the fact that the documentary evidence, PX-SSH-137-002, was created during the time when many members and clergy of the churches were growing increasingly estranged from TEC and the Diocese, but prior to the onset of litigation, and that it nevertheless favors the Diocese's and the Church's positions. *Cf.* Diocese Brief at 34 n.11 and cases cited; *Gauss*, 2011 WL 4537297 at *15 ("we are unaware of any case in this or other jurisdictions in which a court has concluded that a parishioner's subjective intent based on what he or she personally believed or was told regarding ownership of parish property is relevant to the disposition of a church property dispute").

Ellen Kirby (Tr. 749-51); and Episcopal clergy Richard Lord (Tr. 4266-67), David May (Tr. 4505-06), John Ohmer (Tr. 4562-63), Edward Miller (Tr. 4630-31), Oren Warder (Tr. 4647), Paul Johnson (Tr. 4660), and former St. Margaret's Rector Sara Chandler Maypole (Tr. 4669-70).

The Congregations argue, however, that the Court must ignore the vestry oaths entirely because they refer to Holy Scriptures and other "thoroughly spiritual materials." CANA Response at 46-47, citing *Jones v. Wolf*, 443 U.S. 595, 604 (1979). But *Jones* does not say what the Congregations want it to say, *i.e.*, that the First Amendment compels civil courts to disregard any document that has "religious significance" or includes "'religious precepts.'" CANA Response at 47, quoting *Jones*. What *Jones* says is that civil courts must scrutinize such documents "in purely secular terms" and may not "*rely on* religious precepts." 443 U.S. at 604 (emphasis added). A more complete quotation from *Jones*, providing context, makes the point clear:

> *The neutral-principles method*, at least as it has evolved in Georgia, *requires a civil court to examine certain religious documents*, such as a church constitution, for language of trust in favor of the general church. *In undertaking such an examination*, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust. In addition, there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.

Id. (emphases added). That instruction applies fully here, and we have not in any way asked the Court to violate it. It is the Congregations, not the Diocese or the Church, which emphasize the religious aspects of the oath and the rubrics and ordinal of the *Book of Common Prayer*. *See* CANA Response at 46-47. We merely ask the Court to do what *Jones* says it should do, *i.e.*, to scrutinize the oath – and all of the evidence in the case – in purely secular terms and "not to rely

on religious precepts."[26]

2. Congregational governing documents

The Congregations offer a series of rationalizations for avoiding the express recognitions of the hierarchical authority of TEC and the Diocese and of the binding force of canon law that were embodied in their own governing documents. The Court should disregard those documents, say the Congregations, because "the Congregation" made no statement binding itself to the canons, made such statements but not in governing documents, made no statement specific to property, amended the statement in the run-up to disaffiliation and litigation, or did not deliver copies of pertinent documents to TEC or the Diocese. CANA Response at 47. We discuss below their church-by-church efforts to avoid the clear import of their own pre-separation declarations, but first we respond to their common arguments:

- In Episcopal churches, congregational votes or approvals are required only for a very limited set of actions (such as election of vestries and encumbrance or alienation of real property, *see* Diocesan Canons 11.3, 11.5, and 15.2, PX-COM-003-021 - 022, -027). With those few exceptions, and subject to the Constitutions and Canons (which require Diocesan approval of various actions), vestries have full authority over the temporal aspects of church or parish business. *See*, *e.g.*, TEC Canon I.14.2, PX-COM-001-055 ("Except as provided by the law of

[26] The Congregations understood the point at an earlier stage of this litigation. *See* CANA Congregations' Opposition to Motion in Limine to Exclude Evidence of Doctrinal or Theological Disputes and Disagreements, filed October 31, 2007, at 5-6:

> No doubt TEC and the Diocese would like to invoke the religious terminology in these documents as a basis for asking the Court to ignore their secular legal significance…. But many of the documents contain admissions or other acknowledgements that there is a division in the denomination, and they may not be excluded simply because they also contain references to theological concepts and principles. The Court is capable of seeing the difference, as *Jones* and other decisions confirm. [Footnotes omitted.]

the State or of the Diocese, the Vestry shall be agents and legal representatives of the Parish in all matters concerning its corporate property and the relations of the Parish to its Clergy"); Diocesan Canon 12.6, PX-COM-003-024 ("Each Vestry, as the constituted agents of the Church, shall transact all its temporal business"). That authority includes promulgation of governing documents.

- The point is not that each of the churches included "statement[s] specific to property" in their governing documents, although some of them did.[27] The point, as stated in the Diocese Brief at 36 and quoted in the CANA Response at 47, is that the Congregations provided specifically in governing documents and other official pronouncements that they were bound and governed by canon law. And of course the Supreme Court has held likewise. *Truro Church*, 280 Va. at 15, 27, 694 S.E.2d at 559, 566. (To the extent that it might conceivably have some relevance, we note that the Congregations have not cited any instances in which a church acknowledged its duty to adhere to canon law but attempted to carve out an exception for matters related to property. And we are aware of none.)

- The Court should give no weight at all to the fact that the Congregations amended their governing documents in the run-up to separation (and to the ensuing litigation, which they anticipated, *see* PX-APOST-101). It is a genuine irony in this case that Congregations which wrongly accuse TEC and the Diocese of "unilaterally" enacting canon laws nevertheless claim that their own unilateral attempts to negate existing contractual commitments should be given force. The existence of a trust (or a proprietary or contractual interest in local church property)

[27] *See* PX-FALLS-078-074 (Dennis Canon reprinted in TFC Vestry Handbook); PX-EPIPH-002-012 (express statement of Diocese's trust interest) (quoted in Diocese Brief at 178). *See also* Diocese Brief at 144-46 (citing St. Margaret's newsletters quoting Diocesan Canon 15 trust provisions, deeds, and other documents expressly recognizing Diocese's ownership interest).

forecloses "the possibility of the withdrawal of property from the parish simply because a majority of the members of the parish decide to end their association" with the general church. *Bishop and Diocese of Colo. v. Mote*, 716 P.2d 85, 108 (Colo. 1986) (property held in trust for general church even after a majority of the congregation voted to amend local church's articles of incorporation to delete all provisions recognizing the authority of the general church and diocese). *Accord, Rector, Wardens and Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Georgia, Inc.*, 699 S.E.2d 45, 54-55 (Ga. App. 2010), *cert. granted*, 2011 Ga. LEXIS 53 (2011) ("Christ Church next contends that even if its 1918 charter accepted the trust obligation, the 2006 charter amendments, removing all accession to the Diocese of Georgia and the National Episcopal Church, effectively negated it. This argument is flawed…. Christ Church cannot amend its way out of an already existing trust. Changes to corporate documents cannot sever the strands of the trust that attached to parish property"). *See also Presbytery of Hudson River v. Trustees of First Presbyterian Church and Congregation of Ridgeberry*, 895 N.Y.S.2d 417, 426 (N.Y. App. Div. 2010) (rejecting argument that no trust in favor of general church existed after amendments to local church's certificate of incorporation: "Although the amended certificate of incorporation does contain explicit language of ownership by Ridgebury Church, it is clear on this record that this language was inserted to bolster the Church's position in contemplation of the controversy at issue here. Thus, the self-serving nature of the amended certificate of incorporation renders it of little significance in the determination of the instant dispute"). Indeed, the very nature of the Congregations' argument once again asks the Court to treat them as if they were congregational churches, and of course they are not.

- Delivery of local church governing documents to general church authorities should not be

an issue. Governing documents are a part of the course of dealing, and as such they are an element of the contractual relationships between the parties; but they are not deeds or gifts and therefore need not be delivered. The point is that the Congregations' governing documents recognized the hierarchical authority of TEC and the Diocese and the binding force of canon law, not that they conveyed some interest to TEC or the Diocese.

The Congregations rely on *Presbytery of Donegal v. Calhoun*, 513 A.2d 531, 536-37 (Pa. Commw. 1986), which, they say, held that a congregation was not bound by its own charter "when the language was self-imposed and not the result of any agreement with the denomination and when the denomination was not even aware of the provision." CANA Response at 47-48. That case is distinguishable on several grounds. First, the local church also was not aware of its own charter provision at issue (and it "was one of many in the charter of which the church was unaware, and had failed to follow") until after it separated from the Presbytery. 513 A.2d at 536, 537. The churches at issue here, through their vestries, wardens, clergy, and other leaders, were aware of and followed their governing documents and the laws of the Diocese and the Church. *See* Diocese Brief at 5-6, 11, 24-25, 35-36; *id*. at 59-64, 71, 75-77 (TFC), 81-87, 99, 104-06 & nn.33-34 (Truro), 115-18 (St. Paul's), 127-29, 133-35, 137-39 & n.43 (St. Stephen's), 143-48, 153, 154-56, 158-59 & n.51, 160 (St. Margaret's), 161-62, 164-68, 170-71 (Apostles), 178-83, 189, 193-94 (Epiphany). There is no evidence to the contrary, and the Congregations' haste to "clean up" their governing documents prior to separation demonstrates that they were well aware. Second, in *Donegal* "the language was completely self-imposed, and was not the result of any agreement with the denomination, nor of any obligation imposed by it." 513 A.2d at 536. No one has argued or could argue that adherence to the canon laws of the Diocese and the Church was not an obligation of these churches.

Further, *Donegal* is an outlier at best. Many other cases take a different approach to similar issues. *See, e.g., Bishop and Diocese of Colorado v. Mote*, 716 P.2d at 104 ("an intent on the part of the local church corporation to dedicate its property irrevocably to the purposes of PECUSA was expressed unambiguously in the combination of the 1955 articles of incorporation, the local church bylaws, and the canons of the general church, to which the local church acceded in its articles at the time this dispute arose in 1976. This construction is reinforced by the conduct of the relevant officials of the local and general church"); *Episcopal Diocese of Mass. v. DeVine*, 797 N.E.2d 916, 925 (Mass. App. 2003) ("the trust in favor of the Diocese arises under the provisions of the bylaws of St. Paul's and the canons of PECUSA and the Diocese, rather than under any recorded instrument"); *Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.)*, 255 P.3d 645, 661 (Or. App. 2011) (amended articles "express the intention of the congregation and its leadership that all property held by the church is held in trust for [general church]" even though they were never filed with the Secretary of State; no discussion of whether articles were provided to the general church); *In re: Church of St. James the Less*, 888 A.2d 795, 808-10 (Pa. 2005) (relying on local church charter in holding that church had agreed to hold its property in trust for the diocese); *Grace Church and St. Stephen's v. Bishop and Diocese of Colorado*, No. 07 CV 1971 (El Paso Co., Colo., Dist. Ct. March 24, 2009) ("*Grace Church*"), Order at 26 ("the founding documents, various bylaws, relevant canons of the general church and consistent parish loyalty to the Diocese over most of its 135 year existence demonstrate a **unity of purpose** on the part of the parish and of the general church that reflects the intent that all property held by the parish would be dedicated to and utilized for the advancement of the work of [TEC]"); *St. James Church, Elmhurst v. Episcopal Diocese of Long Island*, No. 22564/05 (N.Y. Sup. March 12, 2008) ("*Elmhurst*"), slip op. at 22-23, 30 (discussing

local church's charter and corporate documents; holding that church's incorporation for express purpose of being "in communion of the Protestant Episcopal Church, in the State of New York," as well as its "conduct and interaction with the Diocese and Episcopal Church," established church's "acceptance of the hierarchical church's principles and policies including its Constitution, Canons, and Diocesan Canons"); *Transfiguration*, slip op. at 6-8 (discussing local church governing documents).[28]

We now address the Congregations' church-by-church arguments for ignoring their governing documents, in the same order as asserted in their Response:

Apostles. Apostles argues that its 1998 Vestry Handbook, PX-APOST-005, cited in TEC Brief at 15-16, is not "a set of corporate articles, a constitution, or bylaws adopted by the congregation." CANA Response at 48. That proves nothing. Neither Apostles nor any of the other Congregations can be heard to suggest that a document titled "Vestry Handbook" (or "Vestry Manual" or other similar designation) is inconsequential or could have been disregarded at will. Just as the Constitutions and Canons of TEC and the Diocese are among the documents which state "the rules, regulations, and doctrines, governing and controlling the operation of the church" (*Green*, 221 Va. at 549, 272 S.E.2d at 181, quoted in Church Response at 28), a vestry

[28] *Donegal* was decided after *Presbytery of Beaver-Butler v. Middlesex Presbyterian Church*, 489 A.2d 1317 (Pa. 1985), *cert. denied*, 474 U.S. 887 (1986) (cited in CANA Response at 73-74), but before *St. James the Less*, and in *Donegal* the lower appellate court relied extensively on *Beaver-Butler*. It is at least questionable whether *Beaver-Butler* (and *Donegal*) remain valid authority after *St. James the Less*. *See, e.g.*, A. Lyons, Here is the Church, Now Who Owns the Steeple? A Revised Approach to Church Property Disputes, 15 *Wm. & Mary Bill Rts. J.* 963, 977 (2007) ("the *St. James* court has shown that the *Beaver-Butler* view of neutral principles is no longer valid law"), 979 ("[i]t is not credible to believe that *Beaver-Butler* remains viable under any factual distinction ..."), 981("the only conclusion is that there has been a change in the relevant law"). *But cf. dictum* in *Connor v. Archdiocese of Philadelphia*, 975 A.2d 1084, 1097 (Pa. 2009), a defamation/infliction of emotional distress action ("This Court recently reaffirmed *Beaver-Butler* in resolving the church property dispute presented in *In re Church of St. James the Less*").

handbook or manual is among the documents which state the rules and other precepts governing the operation of a local church.

Apostles cites the TEC Brief at 15-16, but it appears to have overlooked the exhibits and other evidence cited in the Diocese Brief at 168. Those exhibits include a series of vestry manuals or handbooks among a variety of other documents which demonstrate, in a variety of ways, that Apostles fully understood that it was bound by national and Diocesan Canons. The language of several of the vestry handbooks further demonstrates that they were indeed intended and understood as "governing documents" in every sense of those words. *See*, *e.g.*, PX-APOST-213-008 (Apostles' December 1982 "Vestry and Vestry Committees Organization, Responsibilities and Procedures": "The Church of The Apostles shall be governed by a Vestry in accordance with the Canons of the Diocese of Virginia"); PX-APOST-235-008 (1984 revision of the same document, containing identical language). Provisions which are intended merely as suggestions are not stated in mandatory terms.

Apostles also asserts that its 1998 Vestry Handbook "says nothing about Apostles being bound by the canons …." CANA Response at 48. Again it overlooks the Diocese Brief, which points out at 170 that the 1998 handbook (among others) emphasized to vestry members that by taking the canonical vestry oath they "submit[ed] to the authority of the Church." *E.g.*, PX-APOST-005-010. Submission to the authority of the Church undeniably includes (among other things) submission to the laws of the Church as embodied in its Constitutions and Canons. And as noted above, recognition of that authority is embodied in a variety of ways in the Apostles documents cited in the Diocese Brief at 168.

The Falls Church. TFC makes a similar argument, that its 1999 Vestry Handbook is not a governing document. That argument is answered generally just above.

TFC refers to its explicit statement of subjection to the Constitutions and Canons of the Church and the Diocese as an "isolated sentence on the 85th page of a vestry handbook." CANA Response at 49. It does not say, however, how many similar statements or what placement would suffice, in its view; and it would not be appropriate for a civil court to decide that some parts of a church's vestry handbook are important and some are not. But in all events, that reference betrays a shocking ignorance of the record as a whole, particularly in the light of its former Senior Warden's cross-examination at the trial. As the former warden, Thomas Wilson,[29] acknowledged, and as PX-FALLS-078 demonstrates, TFC's 1999 Vestry Handbook is riddled with quotations and citations to the Constitutions and Canons of TEC and the Diocese. *See* Tr. 3002-08; PX-FALLS-078-031 - 081, -085 - 093. Indeed, that handbook not only includes the entire Constitution and Canons of the Diocese, PX-FALLS-078-033 - 070; Tr. 3002-03; it also includes selected excerpts from the Canons of the national church – including the Dennis Canon, whose force and effect the Congregations now seek so ardently to avoid. PX-FALLS-078-074; Tr. 3003-04. So much for TFC's denigrating reference to an "isolated sentence" in its own vestry handbook.

TFC also relies on William Deiss's testimony that a 1990 letter to Bishop Lee from TFC's Senior Warden, William Goodrich, was "'a gentleman's way in Virginia to say no'" to Bishop Lee's reminder that local church property "is held in trust for the Episcopal Church and the Diocese of Virginia." DX-FALLS-035-002 (Bishop Lee's letter, dated July 20, 1990); *see*

[29] Mr. Wilson was one of TFC's leaders in its movement to secede. He also, after the vote, led a clumsy, indeed ham-handed (and unsuccessful), effort to compel TFC trustees Harrison Hutson and William Goodrich to convey the property to TFC. *See* Tr. 4251-53, 4303-05. Mr. Goodrich, having declined to do so, described Mr. Wilson's response as demonstrating an "animated visage, and seemingly consistent with anger" and characterized his approach as "intimidation." Tr. 4305. Mr. Hutson's reaction to this effort by Mr. Wilson and others (who included Rector Yates and Mr. Deiss) was, appropriately, "outrage." Tr. 4252.

CANA Response at 49, quoting Tr. 2549. They also quote Mr. Goodrich's testimony that his response referred to "'legal issues that could possibly affect the enforceability or the applicability of the Diocesan Canon.'" *Id*., quoting Tr. 4352. They neglect, however, to refer to Mr. Goodrich's gentle but emphatic disagreement with Mr. Deiss's testimony that his letter was "a gentleman's way … to say no." *See* Tr. 4301 ("I love Bill, but I don't agree with that"). Likewise, they fail to note Mr. Goodrich's testimony that to the best of his recollection, he did not share a draft of the response letter with the Vestry (which included Mr. Deiss). Tr. 4297-98. They also overlook an earlier (January 9, 1988) letter from Bishop Lee to TFC's Vestry, which similarly pointed out that "[i]n the Episcopal Church, all church property is held in trust for the diocese." PX-FALLS-349. There is no evidence that TFC ever responded to that letter in any way.[30]

Truro. Truro, like its fellows, cites an exhibit (PX-TRU-002) that is mentioned in TEC's Brief at 16 but overlooks a much longer set of citations in the Diocese Brief at 81-83. Truro's primary argument is that nothing in the bylaws cited in the TEC Brief specifically confirms the property interests of TEC and the Diocese in property held by the local church. CANA Response at 50. That is true, but it misses the point. Truro might as well have argued that none of its documents cited in the Diocese Brief states expressly that Truro is bound and governed by the canon laws of the Church and the Diocese; but the clear understanding of that rule is implicit in every page and passage cited in the Diocese Brief. There is no other possible explanation for Truro's (and the other churches') meticulous attention to those rules.

[30] Mr. Deiss is a long time member and lay leader of TFC, a former vestryman, and has served as its paid parish administrator since 1995. Tr. 2428, 2430, 2433. It was Mr. Deiss who analogized membership in the Church to membership in a "club." Tr. 2544. The analogy is inelegant but nevertheless useful; members of a club must abide by its rules. *See* Diocese Brief at 79-80 and authorities cited.

St. Stephen's. St. Stephen's had fewer local governing documents than the other churches, but its November 2005 amended By-Laws, PX-SSH-004 – which were adopted two years after Bishop Robinson's consecration and at a time when the church's progressive estrangement from TEC and the Diocese was well under way – provide unmistakably that "St. Stephen's Episcopal Church … is a church organized under the Constitution and Canons of the Episcopal Church in the USA … and of the Diocese of Virginia." *Id*. at -001.

St. Stephen's argues that the congregation did not adopt the By-Laws, that it did not send the By-Laws to the Diocese, that its Vestry adopted new bylaws in December 2006 (one day before commencement of its separation vote), and that none of its governing documents states that local church property is subject to canon laws. CANA Response at 50-51. Most of those arguments are answered above. As to congregational approval, the By-Laws themselves explain that "[t]he Episcopal Church has a delegatory and representative form of government. All affairs of the church are conducted by the elected representatives of the Congregation, namely, the Vestry, with two exceptions" (including congregational approval of most real property transactions, as provided by Diocesan Canons (cited as "DIO" in the St. Stephen's By-Laws)). PX-SSH-004-003 (cited in the TEC Brief at 16 but not mentioned in the CANA Response; *see id*. at -001 for explanation of abbreviations). Indeed the St. Stephen's By-Laws contain many citations to the Constitutions and Canons of TEC and the Diocese and to a "Diocesan Clergy Manual." *See id.* The Vestry's governing authority with respect to "all [of the local church's] temporal business" – which necessarily includes the authority to enact church by-laws – is provided by canon law. Diocesan Canon 12.6, PX-COM-003-024 - 025. And given that "[e]ach congregation … is bound by the national and diocesan constitutions and canons" (*Truro Church*, 280 Va. at 15, 694 S.E.2d at 559), the absence of specific reference to the property canons in a

local church's by-laws is a matter of no consequence. That is all the more true when the local church by-laws manifest such a clear understanding of hierarchical authority as the St. Stephen's By-Laws do, and it is even more clearly true when the Rector has repeatedly described the nature of that authority to the congregation in a long series of written and oral communications. *See* Diocese Brief at 134-35.

St. Margaret's. St. Margaret's admits that its local Constitution states that the church was "guided and directed by the Constitution and Canons" of the Diocese. CANA Response at 51, quoting PX-STMARG-002-001. A series of St. Margaret's Constitutions, Policies and Procedures, Organization and Polices, and other local governing documents do all of that and more, as discussed in the Diocese Brief at 154-56 (but overlooked in the CANA Response). In fact, the same (2003) St. Margaret's Constitution cited in the CANA Response also provided that the church was organized under a rector and a Vestry "[t]o comply with the Constitution and Canons" of the Diocese. PX-STMARG-002-001.

St. Margaret's points out that its Constitution provided for its trustees to hold legal title to property and under the control of its Vestry. CANA Response at 51. That provision was in full and strict compliance with Diocesan Canons 12.6 and 15.1, PX-COM-003-024 - 025, -027. St. Margaret's other arguments are answered above.

St. Paul's. St. Paul's only argument is that it enacted new by-laws in 2006, replacing 2005 by-laws which provided that its Vestry and Trustees served "subject to these bylaws and the Constitution and Canons of the Episcopal Church and the Diocese of Virginia …." PX-STPAUL-002-001;[31] *see* CANA Response at 51-52. That argument is answered above.

[31] That provision, and a number of others in the churches' by-laws and other governing documents (*see* citations in Diocese Brief at 63-64 (TFC), 81-83 (Truro), 154-56 (St.

(footnote continued)

Epiphany. Epiphany's arguments – that denominational trusts are not valid in Virginia (notwithstanding Code § 57-7.1), that its bylaws were not sent to TEC or the Diocese, and that it enacted new by-laws during its separation vote – are all answered above.

Epiphany has not responded, however, to the fact that it submitted a petition for admission to the Diocese as a church which "acknowledge[d] and accept[ed] the doctrine, worship, and discipline of [TEC] and the jurisdiction of the Bishop or Ecclesiastical Authority of the Diocese of Virginia." PX-EPIPH-001-001, quoted in Diocese Brief at 174-75. One might have thought that point worth mentioning, in light of the Congregations' repeated attempts to distinguish *Buhrman* by reference to the local church petition in that case; but it appears to have escaped Epiphany's notice.

3. Pastoral appointments

The Congregations offer a selective reading of parts of the record as a ground for distinguishing this case from *Green*. *See* CANA Response at 53-54, citing, *inter alia*, Diocese Brief at 31-32. They have not responded to the fact that many of their vestries submitted their choices of clergy to the Diocesan Bishop for approval, over periods of many years:

The Falls Church: *See* Diocese Brief at 67 (letters dimissory and license for clergy from other dioceses; Diocesan vetoes of proposed clergy and removal of a priest) (TFC); *see also id*. at 66, citing DX-FALLS-060-069 (*Near the Falls*) (Bishop appointed deacon to be in charge of TFC and Zion (now Truro)); DX-FALLS-060-084 (new rector called "with the approval of the Bishop"); *id.* at -089 - 090 (Register instructed to request Bishop's permission to call a new rector); PX-FALLS-044-097 (Vestry voted to request Bishop's permission to call a new

---

Margaret's), 168 (Apostles), 177 (Epiphany), and in TEC Brief at 15-16 (all seven churches)), was consistent with Diocesan Canon 11.10, PX-COM-003-022 ("The Vestry may adopt by-laws not inconsistent with Diocesan or National Canons").

rector);[32] DX-FALLS-203-168 (same), -172 (call extended after Bishop "signified his acquiescence"), -293 (Register directed to request Bishop's approval of a call and to notify the elected priest as soon as reply received); DX-FALLS-208-116 (Vestry voted to call a rector after being advised that the Bishop would approve that call); DX-FALLS-209-014 (Senior Warden's report that "[t]he Vestry cannot select anyone they choose" as a rector, because "[t]he Canons require the Bishops' approval of the selection"); DX-FALLS-210-067 (Rector reported that he had obtained Bishop's approval to call a Curate "as required by the Canons"); DX-FALLS-217-072 (Rector announced that call of Assistant Minister had been approved by Bishop); PX-FALLS-017-142 (Rector's letter inviting a priest to become his Assistant, "with the knowledge and approval of The Bishop of Virginia"); PX-FALLS-019-133 (Rector to "solicit the Bishop's approval" to call an assistant if the candidate was interested); DX-FALLS-224-015 ("When the Vestry finds the person it wishes to call, the Bishop is advised and consulted prior to issuance of the call").[33]

Truro: *See* Diocese Brief at 92-94, citing, *inter alia*, TRU145.091 (Register to ask Bishop's consent to call a new rector); TRU145.124 (new rector to be called, "Bishop Brown having given his consent"); TRU146.115 (telegrams asking Bishops' permission to call a rector; wardens directed to extend formal call "if and when approval is received from the Bishops");

---

[32] PX-FALLS-044-097 is cited in the Diocese Brief at 66 as a "*see also*" following a citation to "PX-FALLS-201-250, -328." The latter citation was in error; the correct cite is to DX-FALLS-201, not PX-FALLS-201. We do not fault TFC for failing to respond to an inaccurate citation; and in general, we choose not to chastise the Congregations for not addressing, in their opening brief or Response, arguments that are not presented in our opening brief (as they have done).

[33] The Congregations cite testimony that TFC Rector John Yates did not meet the Bishop until several months after he was hired. CANA Response at 53-54. They neglect to observe, however, that the Bishop had to (and did) accept the Rev. Yates' letter dimissory from the Diocese of Pittsburgh before he could be employed as rector by TFC. *See* PX-FALLS-213 and PX-FALLS-214; TEC Canon III.9.4, PX-COM-001-083 - 084.

TRU172.001 - 002 (call "must be made by the Vestry and approved by the Bishops before it is issued"); *id*. at .025 (Rector asked that assistant rector selection not be announced "pending formal approval of Bishop Hall"); and PX-TRU-166 (Rector's letter offering Associate Rector position after receiving Bishop Lee's "consent to issue this call to you"). *See also* TRU178.032 (voting to invite an interim rector "with the understanding that he would not be a candidate for Rector, in keeping with diocesan policy").[34]

St. Stephen's: *See* Diocese Brief at 131, citing, *inter alia*, PX-SSH-148-026 (*Lavished with God's Grace*) ("the vestry with the bishop's approval called Mr. Shelton as permanent rector"); PX-SSH-105-002 ("Jeffrey [Cerar] reported that Bishop Lee assigned Chris Ditzenberger as St. Stephen's assistant rector beginning July 1"), PX-SSH-264-001 ("A search was conducted for a new Deacon to serve in training to be Assistant Rector. The Bishop was good enough to let us have Chris Ditzenberger"), and PX-DEP-008-019 (the Rev. Cerar's agreement that Bishop Lee assigned Mr. Ditzenberger as St. Stephen's assistant rector and testimony that "We asked the bishop's permission to have a deacon who works for a bishop, and he came to serve with us"); PX-SSH-124-001 ("Father Cerar reported that Bishop Lee has approved Joe Murphy's call to St. Stephen's and St. Mary's"); PX-SSH-183-001 (Letter of Agreement, stating, "[t]he Bishop of Virginia appoints the Rev. Jeffrey O. Cerar to lead St. Mary's Church, Fleeton and St. Stephen's Church, Heathsville as pastor, worship leader, and teacher …"); PX-SSH-192-002 (letter to the Rev. Joseph Warren, stating, "Bishop Lee has approved this Call"); and Tr. 3746-48 (Bishop's consent to make priest-in-charge the Rector a

[34] The Congregations acknowledge that the Diocese "once assigned deacons to St. Paul's and Truro" but asserts "that these assignments took place in the 19th century …. In more recent years …, the Congregations have selected their own deacons." CANA Response at 54. That is irrelevant. It also is not entirely accurate. *See* Diocese Brief at 91, citing TRU179.015. The Congregations apparently overlooked that citation and exhibit.

year ahead of schedule). *See also* PX-SSH-190-003 (Interim Rector Agreement providing "that The Rev. Mr. Jones will not be a candidate for Rector of St. Stephen's Episcopal Church-Heathsville in accordance with Diocesan policy").

St. Paul's: *See* DSTP-008-347 (Vestry decided to extend a call "provided this action meets with the approval of our Bishop …"); DSTP-008-355 (Register to write to Bishop "in regard to getting his permission to call a minister" to fill a vacancy); DSTP-008-457 (Registrar read a copy of his letter to Bishop Gibson "notifying him of our efforts to secure Mr. Buxton as Rector for our Parish and Bishop Gibson's reply thereto stating his willingness to receive Mr. Buxton should we be successful in securing him").

St. Margaret's: *See* Diocese Brief at 149-50, citing PX-STMARG-023-001 (Vestry approved motion to "nominate Mr. Peter Booke to the Bishop of the Dioces [*sic*] of Virginia as the choice for appointment as Priest in Charge") and PX-STMARG-412 (invitation to Mr. Booke "to be our vicar…. subject to the approval of the Bishop[s] of the Diocese[s] of Virginia and … Pennsylvania"); PX-STMARG-447 (letter requesting Bishop's concurrence in calling new rector); PX-STMARG-448 (letter requesting Bishop's concurrence in calling Assistant Rector); PX-STMARG-521-001 - 002 (Rector-elect to be notified telephonically and called formally only after Bishop's telephonic and formal approvals); PX-STMARG-523-017, -018 (Search Committee requested Bishop's position regarding divorced clergypersons and assistance with evaluations of out-of-Diocese candidates); PX-STMARG-527 (letter to Diocesan Bishop noting that rector nomination "has previously been concurred in by Bishop Lewis" and requesting "your speedy consideration of this nomination"); PX-STMARG-529 (noting Bishop's consent to call); PX-STMARG-603 ("The Role of the Bishop" includes approving the Vestry's call to a new Rector, prior to announcing the call to the congregation). *See also* PX-STMARG-518 (cited in

Diocese Brief at 149) ("in accord with Diocesan policy," an Interim Rector "may not be considered for the permanent position of Rector"); PX-STMARG-604-005 (same).

The newer churches (**Apostles and Epiphany**) have much shorter histories and have been served by fewer clergy in those years. *See* Diocese Brief at 163-64 (Apostles) and 173-74, 175, 184 (Epiphany). Apostles' first clergyman, the Rev. Kenneth Sowers, served "under the direction of Bishop Chilton" and at his suggestion. PX-APOST-397-001. Diocesan Bishop Peter Lee arranged for Apostles' current Rector, the Rev. David Harper, to "function as the interim rector of the Church of the Apostles as the agent of those who hold canonical charge i.e., the Bishop and the Vestry" during the one year waiting period required by Canons of TEC. PX-APOST-419-001; *see* PX-APOST-421; Diocese Brief at 164. Bishop Lee ultimately accepted a letter dimissory and issued a formal call to the Rev. Harper, "subject to the requirements of the Canons of The Episcopal Church." PX-APOST-163; PX-APOST-425. And Epiphany's Rector, the Rev. Robert Rauh, was admitted to canonical residency in the Diocese by letters dimissory accepted by Bishop Lee. *See* Diocese Brief at 184 and exhibits cited.

The record shows further that when any of the seven churches needed to employ new clergy, their leaders cooperated fully with Diocesan authorities and that they solicited and gratefully accepted Diocesan assistance. Examples include:

The Falls Church: DX-FALLS-205-073 (Vestry minutes describing "the letter which the Wardens had written to the Bishop asking for suggestions, and Bishop Goodwin's reply"); *id.* at -078 (describing a second, similar exchange); DX-FALLS-208-053 (Wardens authorized to notify the Bishop of the Vestry's acceptance of Rector's resignation and to "make the appropriate request of the Bishop in the matter of a possible successor"); *id*. at -069 (reporting Bishop's response and describing meeting of Bishop with TFC search committee); *id*. at -070

(Senior Warden (Mr. Spelman, *see id*. at -041) and "Preliminary Inquiry Committee" chair (Mr. Hubbell, *see id*. at -056) "suggested that it had been considered desirable for the Vestry to explore further" five candidates named by the Bishop "before turning to any candidates not on the Bishop's list"); *id*. at -081 (reporting meeting of Bishop with committee and "certain Vestrymen" and Bishop's comments on rector candidates); *id*. at -111 (subsequent meeting of Bishop and committee); *id*. at -124 (reporting that vestrymen had met with Bishop on four occasions during search process); *id*. at -131 (reporting yet another meeting of Vestry with Bishop); DX-FALLS-218-045 (appointment made for Wardens to confer with Bishop); *id*. at -062 (reporting letter to Bishop "giving the parish's requirements for a new rector and requesting names of candidates the Bishop might propose"); PX-FALLS-146-002 (describing rector search process); PX-FALLS-147 (letter to Bishop requesting suggestions for rector candidates); DX-FALLS-223-129 (Bishop opened meeting with prayers and spoke to Vestry concerning a replacement for departing Rector); *id*. at -134 (Bishop's assistant to aid and advise search committee in its deliberations); DX-FALLS-224-108 (Search Committee following a plan recommended by Bishop and approved by the Vestry); DX-FALLS-283-033 (Search Committee acting "[w]ith advice and counsel from the Bishop of the Diocese"). *See also* Diocese Brief at 66-67, describing the Bishops' assistance in TFC's recruitment of the Rev. Joseph Hodges Alves, Jr., as its Rector.

Truro: *See* Diocese Brief at 92-94; parenthetical explanations of numerous record citations are provided there.

St. Stephen's: PX-SSH-017 (Vestry minutes reporting meeting with Bishop regarding "the necessary action to be taken for St. Stephens to go on an independant [*sic*] status"; committee reported that "we had [Bishop's] blessing and assurance of any help that the Diocese

could offer"); PX-SSH-021 (secretary instructed to write to Bishop "informing him of our actions to date and requesting the names of additional prospective candidates"); PX-SSH-031 (describing exchange of letters with Bishop); PX-SSH-078-001 (Senior Warden reported on plans for conference call with Bishop to receive guidance on procedures for finding a new rector; further discussion on annual goals and objectives "postponed until guidance is received from the Bishop"); PX-SSH-079 (minutes of meeting of St. Stephen's and St. Mary's Vestries with Bishop to discuss transitional period and search process after departure of Rector); PX-SSH-080-001 (Senior Warden "reported that Bishop Matthews had moved quickly to identify a candidate priest-in-charge and to line up supply priests for March 24 through mid-June"); PX-SSH-081-002 (describing Bishop's "invaluable" assistance); PX-SSH-202a-008 (letter to Bishop reporting proceedings in accordance with his suggestions and requesting additional recommendations); PX-SSH-202b (letter thanking Bishop for his "assistance and understanding … and especially for [his] help in locating a rector"); PX-SSH-263-001 (Senior Warden's annual report: St. Stephen's employed candidate (the Rev. Jeffrey Cerar) recommended by Bishop Matthews; and "[d]uring April - June, while we were waiting for our new minister, Bishop Matthews kept us supplied with extremely capable priests for our morning services. We all felt blessed to have had such a fine cadre of priests made available to us, and grateful that Bishop Matthews took such good care of us"); PX-SSH-322 (letter to Bishop reporting Rector's retirement and requesting "any assistance that you or your office can give us in securing a rector"); PX-DEP-008-046 - 047 (the Rev. Cerar's agreement, based on St. Stephen's records, that the church sought assistance from a Bishop or Bishops of the Diocese when it need to employ a new rector).

St. Paul's: DSTP-007-276 - 277 (Bishop attended Vestry meeting to provide consultation and advice as to the selection of a Rector); DSTP-008-416 (Committee appointed to

call a Rector extended call to a priest recommended by the Bishop); *id*. at -438 (Registrar instructed to communicate with Bishop Brown regarding the fitness of one candidate for the Parish, with Bishop Gibson regarding another, and with "Dr. Green of the Seminary" regarding a third); *id*. at -449 - 450 (voting to call either of two candidates recommended by the Bishops); *id*. at -531 - 532 (same; noting that the Vestry "felt it incumbent upon us" to consider candidates recommended by the Bishops first); *id*. at -467 (Registrar instructed to write to Bishop Brown and Dr. Green regarding the fitness and availability of a candidate and to extend a call without further notice to the Vestry if the replies were favorable); *id*. at -488 - 489 (committee appointed to consult with Bishop; committee reported that it had met with the Bishop and succeeded in having him designate a Minister-in-Charge for a year).

St. Margaret's: PX-STMARG-057-001 ("Mr. Lynn wrote Bishop Hall asking for help and guidance, with informational copies going to Bishop Chilton, Bishop Gibson, and Fr. Booke"); PX-STMARG-058-001 (minutes of Bishop's meeting with Vestry); PX-STMARG-259-002 ("Alton [Tucker, the Senior Warden] has been in contact with the Bishop's office regarding our situation with [the Rector's] marriage and the church's pending move"); PX-STMARG-267-002 (describing the Diocese's "in-depth credit, legal and Bishop-to-Bishop check" on the final list of 4-6 candidates and observing that "when a name comes forward to the Vestry we can be well assured that the candidate is a safe one"); PX-STMARG-520-001 (Search Committee to meet with Bishop to discuss nominees).

Apostles and Epiphany: *See* discussion *supra* at 48.

The above examples are drawn from the exhibits cited in the Facts Summaries section of the Diocese Brief with respect to each of the churches, except St. Paul's. They provide a representative but not exhaustive sample. They are all ignored or overlooked in the CANA

Response.

4. Personal property

The Congregations argue that Dr. Bond's testimony that there was "'no sanction'" for a local church's failure to pay its assessments or apportionments, during the many decades that the Diocese operated with a mandatory assessment system, "confirm[s]" that their "contributions to the denomination have always been voluntary." CANA Response at 55, quoting Tr. 1099. They do not say what other evidence Dr. Bond's testimony supposedly "confirm[ed]," but in all events their argument is misleading at best. These cases deal with relationships within a church, not an association of businesses trading at arm's length and each in furtherance of its own economic interests. Relationships within a church are driven and characterized by mutual trust, devotion, piety, the "bonds of affection" (*see, e.g.*, DX-FALLS-130-005 (Windsor Report); DX-FALLS-126-007, -009 (Reconciliation Commission report); Tr. 1592 (Dr. Julienne) ("many bonds of family and affection")), and mutual commitment to a common cause – a cause which has its ultimate accomplishment in a world beyond this one. As the Congregations have noted before, "the spiritual components … predominat[e]" in the relationships within a church. CANA Brief at 45. We agree; and the Congregations should not be heard to cheapen and demean the close personal and spiritual relationships that long existed between their churches and the Diocese, prior to eruption of the divisions which gave rise to this litigation.[35]

[35] Further, the Congregations have cited no evidence of the frequency or extent to which any of their churches ever fell short of meeting their assessments. They cite only Dr. Bond's testimony that it happened "[f]rom time to time." Tr. 1100, quoted in CANA Response at 55. They omit Dr. Bond's testimony that "by the end of the period" (*i.e.*, by 1950, *see* Tr. 882-84, 891), "a number of these congregations … [were] meeting their amounts and sometimes going over." Tr. 1100.

In all events, in relationships characterized by mutual commitment, trust, and affection, such as these, it should be no surprise that no heavy hand of enforcement was clamped on churches

(footnote continued)

The Congregations' argument also overlooks the fact that even under the "voluntary" Virginia Plan for Proportionate Giving by Parishes (*see* PX-COM-196-036), financial support for the Diocese was a condition of maintaining the status of a full-fledged "church." *See* Diocesan Canon 10.1, PX-COM-003-019 (defining "church" as, *inter alia*, a group of people which "shares in the support of the Episcopate of the Diocese") and Tr. 217 (Bishop Jones' testimony that "the support of the Episcopate … means pledging money to the Diocese"). *See also* Tr. 1877-80, 2029-30, 2592-94, 2746, 3018-19, 3103-07, 3159-61 (testimony of the Rev. Jones, Mr. Deiss, the Rev. Yates, Mr. Wilson, and the Rev. Harper, that St. Paul's, TFC, and Apostles arranged to continue giving to support the Diocese, after 2002, 2004, and 1996, respectively (*see* DX-FALLS-241-272 and Apostles_Ex_381, cited in Mr. Deiss's and the Rev. Harper's testimony), in a manner that would avoid supporting TEC); Tr. 3311-15, 3321-22 (Mr. Rooney) & Apostles_Ex_096.002 (same).

5. Truro Instruments of Donation

Truro argues again that the two Instruments of Donation, given in 1934 and 1974 – by which (among other things) it "appropriate[d] and devote[d]" the buildings to the worship and service of Almighty God according to the provisions of the Episcopal Church and "certif[ied]" that the buildings and grounds were "secured from danger of alienation from those who profess the Doctrine, Discipline and Worship of the Church," except as provided by its laws and canons – have "only symbolic significance." CANA Response at 56. Truro also avers that it is "aware of no authority holding that an instrument of donation is legally cognizable …," *id.* It neglected to take account of the decisions in *Grace Church* and *Elmhurst*, which were cited in and

---

which occasionally found themselves in such financial difficulty that they were unable fully to meet their obligations to the general church.

submitted with TEC's opening brief.

The *Grace Church* court rejected an argument that is indistinguishable from Truro's argument here, "that the Instrument of Donation was purely ceremonial and has no legal significance under Colorado law." The court "conclude[d] that the document means what it says: that Grace Church gave up any right to 'dispose' of the building unless the Bishop first authorized that disposition." *Grace Church*, slip op. at 10. *See also id*. at 11: "The Instrument of Donation clearly relinquishes the right to dispose of the property without Diocesan consent."

The *Elmhurst* court concluded, after conducting a neutral principles analysis, that the real and personal property of the local church was held in trust for TEC and the diocese. *Id*., slip op. at 31. The court did not indicate how much weight any of the various neutral principles factors carried in its analysis, but it clearly recognized the effect of the instrument of donation given in that case. The first factor that it examined was "[t]he relevant deeds and other documents," *id.* at 20; and after finding that the deeds contained no specific indication of a trust, the court continued:

> It is undisputed that at the time the 1849 church was consecrated as an Episcopal church on the property that was conveyed in 1761, St. James' representatives signed an Instrument of Donation in which they pledged that the building would be used solely for the purposes of conducting religious services "according to the provisions of the Protestant Episcopal Church in the United States of America" and further pledged that the property would not be put to any use inconsistent with the Instrument of Donation…. Therefore, although ownership of this property was not specifically ceded to the Episcopal Church or the Diocese, the use of this property as Anglican Church is clearly inconsistent with the Instrument of Donation.

Id. at 21. The Instruments given by Truro to the Diocese contain the same operative language and more (*see* Diocese Brief at 110) and embody the same commitments. Whether they are effective between the parties as deeds of gift or not, they are an important aspect of the dealings between the parties; and Truro should not be allowed to evade its solemn commitments by

arguing that they were merely "symbolic." It is using the properties in a manner that undeniably is "inconsistent with the terms and true meaning of [the two] Instrument[s] of Donation" (PX-TRU-003-001; PX-TRU-004-001), and a court of equity should find that intolerable.[36]

Turning to the series of legal arguments that Truro asserts for refusing to give effect to the Instruments (*see* CANA Response at 57-61):

- There is no legal requirement that unrecorded deeds, easements, or other dispositive instruments be notarized. And there is no doubt as to which "house[s] of worship" were the subjects of the donations; Truro itself identifies those facilities. *See* CANA Response at 56.

- An instrument which conveys a beneficial interest does not require the signatures of the holders of legal title (the trustees). *See, e.g.*, 3 *Scott and Ascher on Trusts* § 14.5 (5th ed. 2006) ("Unless the terms of the trust provide otherwise, a beneficiary can transfer the beneficial interest without the consent of, or notice to, the trustee"); *Restatement (Second) of Trusts* § 136 (1959) ("Notice to or the consent of the trustee is not essential to the transfer of his interest by the beneficiary of a trust, unless it is otherwise provided by the terms of the trust"); *Restatement (Third) of Trusts* § 51 cmt. (d) (2003). The Instruments of Donation were executed by the Rector and the Register, the latter on behalf of the Vestry. Subject to the Constitutions and Canons, the Rector and the Vestry together have full authority over both the spiritual and the temporal attributes of an Episcopal church. *See* TEC Canons I.14.2, III.9.5(a), PX-COM-001-055, -084; Diocesan Canon 12.6-7, PX-COM-003-024 - 025.

- Truro offered no evidence why the Instruments were not recorded, but it relies on non-

[36] Truro does not attempt in any way to deny that it is presently violating "the terms and true meaning" of the Instruments of Donation and has been doing so for nearly five years. It argues only, on a series of technical, legal grounds, that the Instruments should be denied any legal force or effect. *See* CANA Response at 57-61.

recordation to support its position. As stated in the Diocese Brief at 110-11, recordation is of no moment as between the parties. The Diocese was protected against alienation of these consecrated properties without its consent (*see* TEC Canons I.7.3 and II.6.2, PX-COM-001-045, -066, and Diocesan Canon 15.2, PX-COM-003-027), and therefore it had no need for the additional protection against bona fide purchaser claims that recordation would confer.

- The issue is not transfer of title, as Truro again suggests, *see* CANA Response at 58. The issue is Truro's explicit, solemn recognition of a beneficial interest "which has implicitly existed between the local parishes and their dioceses throughout the history of the … Church." *Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville*, 684 N.Y.S.2d 76, 81 (N.Y. App. Div. 1999); *see* testimony and authorities cited in Church Response at 36-37.[37]

The remainder of Truro's arguments are sufficiently answered in our earlier briefs (*see* Diocese Brief at 110-12; Church Response at 63-65) and require no further response here.

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

The Congregations' only responses to TEC's and the Diocese's trust arguments are included in their neutral principles argument, at 24-28. We have replied to those arguments

[37] Truro cites excerpts from the Rule 4:5(b)(6) deposition of Diocesan Secretary Henry Burt. CANA Response at 58 n.28. Even putting aside the impropriety of asking the Secretary to render legal opinions, Truro does not include the entire exchange. *See* Burt deposition at 104-05, DX-CANA2011-003-035:

> Q All right. Is it the Diocese's contention that this instrument of donation signed in 1934 gives the Diocese an ownership interest in Truro Church's property?
>
> A I believe these instruments of donation provide a basis for trust, proprietary and contractual rights, in part, yes.
>
> Q You can't identify any specific language for each of those particular categories, though, can you? I mean, can you give me -- tell me which one's proprietary, which one's contractural, which one's trust?
>
> A I believe that they support -- I believe the language likely supports all three claims.

supra at 14-15.

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

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

We have answered the Congregations' "standing" argument, which is reiterated in their Response at 62-63. *See* Church Response at 85-88.

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

This issue would be presented only if the Court first determines that TEC and the Diocese have no trust, proprietary, or contractual interests in the properties and therefore that the local churches are the sole beneficial owners. The issue that would be presented in that circumstance, as it was in *Jones v. Wolf*, 443 U.S. at 606-10, is the "identity" of the local church. The Congregations' arguments seem oblivious to the context, as they focus on matters that might arguably be relevant to the dispute between the Congregations and the Church but are utterly irrelevant to the question "who is the local church?" *See* CANA Response at 63-65.

In *Brooke v. Shacklett*, 54 Va. (13 Gratt.) 301 (1856), for example, there was no argument that the property was held for the benefit of the general church, and the Court did not address that issue. The first issue in *Brooke* – the issue addressed in the pages of the opinion that are cited in the CANA Response – was whether the deed in question should be construed as given for the benefit of the local church, and therefore was validated by statute; or whether it was given "for the benefit of the 'Methodist Episcopal church in the United States as an aggregate body or sect,' to the exclusion of any peculiar rights of property in the land conveyed, in such local society or congregation," *id.* at 314, and therefore was void. The deed was given to trustees "[i]n trust that they shall erect and build … a house or place of worship for the use of the members of the Methodist Episcopal Church …." *Id.* at 302; *see id.* at 314 (paraphrasing the

deed). It was in precisely that context, and only in that context, that the Court held that the property was held for the use of the members of the local church. The Court explained its reasoning as follows:

> the house or place of worship to be erected is to be for the use of the *members* of the Methodist Episcopal church, &c.; and as the members of the local society are necessarily members of the Methodist Episcopal church, in the sense in which the term is used in the deed, *it follows that the land is conveyed for the benefit, to some extent at least, of the local society or congregation*."

Id. at 315, quoted *in part* in CANA Response at 64 (second emphasis added). The issue in that part of the opinion therefore was *not* which *faction* of the local church was the beneficial owner under the deed, as the Congregations argue. The issue was whether the local church was the beneficial owner under the deed at all. Thus, as stated in the Diocese Brief at 44, the Court first determined that the property belonged to the local church.

At a later point in the opinion, however, the Court addressed the question which faction of the local church held beneficial title following the separation of the southern and northern branches of the general church. That is the portion of the opinion that is quoted in the Diocese Brief at 44; and it is ignored entirely in the CANA Response, presumably because in *that* portion of the opinion – the portion that is pertinent to the "identity" issue in these cases – the Court looked *solely* to the rules and acts of the Church and not to the deed at all. That portion of the opinion begins at the foot of page 319, immediately following the Court's conclusion that "[t]he deed [was] valid" and therefore that it had "jurisdiction." It continues to the end of the opinion, at page 328; and the word "deed" does not even appear at any point in that discussion.

The same is true of *Hoskinson v. Pusey*, 73 Va. (32 Gratt.) 428 (1879). The Court "look[ed] to the deed alone" to determine that "the *cestuis que trust* under the deed in question, the beneficiaries entitled to the control and use of the 'Harmony' church building" were "those who are members of the congregation or local society, and, as such, members of the Methodist

Episcopal Church." *Id.* at 431. But when it went on to the question which faction of the divided church could properly claim to be identified in those terms, it looked solely to the rules and actions of the general church. *See id.* at 432-38. And in fact, it reached a conclusion opposite to that in *Brooke* – in *Hoskinson*, awarding the property to the adherents of the northern church, and in *Brooke*, to the southern faction – not because of any differences in the deeds[38] but because application of the rules and acts of the general church to the different circumstances of the two local churches dictated different results.[39]

The Congregations concede (or at least "assum[e]") "that denominations may define their members for purposes of *ecclesiastical law*" but argue that civil courts "need not defer" to such determinations for purposes of "*civil property law*." CANA Response at 66, citing *Jones v. Wolf* – where, they say, a general church's identification of the "true congregation …. did not deter the Court from ruling against the faction loyal to the hierarchical church." *Id*. (CANA Response at 66) (internal quotation marks omitted); *see also id*. at 41 n.19. That is at best an incomplete and therefore misleading description of *Jones*. The Supreme Court in that case *did not* "rul[e] against the faction loyal to the hierarchical church" on the "identity" issue. It sustained the Georgia courts' conclusion that the local church owned the property, and then it remanded the case to the Georgia courts to determine whether the majority or the minority faction represented the local church under state law. *See Jones* 443 U.S. at 606-10. It even pointed out that a state court could not "usurp the function of the commission appointed by the Presbytery, which already has

---

[38] *See Hoskinson*, 73 Va. at 431: "The deed is the same in substance as the deed in *Brooke & others* v. *Shacklett*, 13 Gratt. 301, and the construction must be the same."

[39] The Congregations also cite *Finley v. Brent*, 87 Va. 103 (1890). In *Finley*, unlike *Brooke* and *Hoskinson* (and unlike *Wyckoff, see infra* at 63-66), "both sides … claim[ed] under the deed creating a trust." 87 Va. at 105. In that context, of course, the Court was "called on to construe and enforce this trust," and it naturally and properly "look[ed] to the terms of the deed creating the trust." *Id.*

determined that petitioners represent the 'true congregation' of the Vineville church," and it therefore concluded that "if Georgia law provides that the identity of the Vineville church is to be determined according to the 'laws and regulations' of the [general church], then the First Amendment requires that the Georgia courts give deference to the presbyterial commission's determination of that church's identity." *Id.* at 609.[40]

The most that can be said based on *Jones*, therefore, is that the First Amendment does not compel state courts to effectuate denominational decisions regarding the identity of local churches where property rights are at issue. It is a question of state law. And the law of Virginia, as discussed above and in our previous briefs, is that civil courts recognize the powers and prerogatives of ecclesiastical authorities and give effect to their determinations.[41]

Nor are we advocating *Watson* deference under another name, as the Congregations suggest. *See* CANA Response at 65-66. Our argument merely recognizes the proper sphere of ecclesiastical authorities, as Virginia courts repeatedly have done. *See Brooke*; *Hoskinson*; *Cha*

---

[40] The Court also pointed out, of course, that if the Georgia courts instead "adopted a presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means," that would be consistent with both the neutral-principles analysis and the First Amendment – *provided* that "any rule of majority representation can always be overcome, under the neutral-principles approach, either by providing, in the corporate charter or the constitution of the general church, that the identity of the local church is to be established in some other way, or by providing that the church property is held in trust for the general church and those who remain loyal to it." 443 U.S. at 607-08.

[41] *See, e.g.*, *Truro Church*, 280 Va. at 15, 694 S.E.2d at 559 ("The highest governing body of TEC is the triennial General Convention, which adopts TEC's constitution and canons …. Each diocese in turn is governed by a Bishop and Annual Council that adopts the constitution and canons for the diocese. Each congregation within a diocese in turn is bound by the national and diocesan constitutions and canons"); *Reid v. Gholson*, 229 Va. at 188-89, 327 S.E.2d at 113 ("One who becomes a member of [a hierarchical] church, by subscribing to its discipline and beliefs, accepts its internal rules"); *Brooke*, 54 Va. at 320 ("To constitute a member of any church, two points at least are essential … a profession of its faith and a submission to its government"). *See also* Diocese Brief at 27-28, 43-44, 45; TEC Brief at 3-4, 19-24, 32 & n.9; Church Response at 12-14, 90-91.

v. Korean Presbyterian Church, 262 Va. 604, 612, 553 S.E.2d 511, 515 (2001); *Judicial Comm'n of PCA Korean Capital Presbytery v. Kim*, 56 Va. Cir. 46 (Fairfax 2001). The Congregations again risk misleading the Court by their incomplete quotation from *Norfolk Presbytery*, 214 Va. at 503, 201 S.E.2d at 755. They say that the *Norfolk* Court "specifically rejected the denomination's claim that it should defer to 'the ecclesiastical law of the general church.'" CANA Response at 65, quoting *Norfolk*. *See also id*. at 4. But what the *Norfolk* Court actually said, in context, was simply that the First Amendment does not compel a court to refrain from adjudicating a church property dispute. *See Norfolk*, 214 Va. at 503, 201 S.E.2d at 755:

> Each party contends … that regardless of statutory provisions, it must prevail under the constitutional principle of separation of church and state. The Trustees contend that judicial review of the congregation's decision to become autonomous would abridge the congregation's right to free exercise of religion and would establish the Presbytery as a state supported church. The Presbytery asserts that a ruling in favor of Grace Covenant would be an impermissible establishment of the local church and a prohibited interference in the ecclesiastical law of the general church. We reject both of these contentions, for there is no constitutional prohibition against the resolution of church property disputes by civil courts, provided that the decision does not depend on inquiry into questions of faith or doctrine.

The Congregations invoke *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), as a scarecrow, intended to banish every concept that might be thought tainted by some kinship to it. But *Watson* retains vitality – even in Virginia – in several respects, as TEC has shown. *See* TEC Brief at 50-52 & n.14. Our Supreme Court did not reject all aspects of the *Watson* decision, only its "implied trust" holding. *See Norfolk Presbytery*, 214 Va. at 503-04, 201 S.E.2d at 755-56. Indeed, the United States Supreme Court has repeatedly accorded constitutional significance to some aspects of the *Watson* decision. In *Presbyterian Church v. Hull Church*, 393 U.S. 440, 446 (1969), and again in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976), the Court pointed to the following holding of *Watson* as having a "clear constitutional ring":

> "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. *All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it*. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. *It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for*."

Hull Church, 393 U.S. at 446, and *Milivojevich*, 426 U.S. at 710-11 (first emphasis added here, second emphasis added in *Milivojevich*). To the same effect (absent the constitutional overtones) is *Norfolk Presbytery*, 214 Va. at 505, 201 S.E.2d at 756, citing with approval "*Presbytery of Seattle, Inc. v. Rohrbaugh*, 79 Wash. 2d 367, 485 P.2d 615 (1971), *cert. denied*, 405 U.S. 996 (1972), *reh. denied*, 406 U.S. 939 (1972), where no appeal was taken by the local congregation from an adverse ruling by the Presbytery and this ruling was upheld by the civil court which found that trustees held pursuant to a trust defined by the general church constitution."[42]

As applied to these cases, the rule that the decisions of church authorities are "binding in all cases of ecclesiastical cognizance" precludes judicial review of the decision of the Annual Council to recognize the TFC, St. Margaret's, St. Stephen's, and Epiphany Episcopal congregations as continuing the Episcopal congregations that existed before December 2006.[43]

---

[42] Judge Stephenson also relied on *Rohrbaugh* in addressing the "identity" issue in *Buhrman*, 5 Va. Cir. at 503-04.

[43] *See, e.g.*, *Masterson v. Diocese of Northwest Texas*, 335 S.W.3d 880, 891 (Tex. App. 2011):

> the Former Parish Leaders' contention that the congregation's vote transformed Good Shepherd into an Anglican parish overlooks the fact that Good Shepherd remains an entity that is recognized by the Episcopal Church and that it continues to assert ownership of the church property held in its name.

(footnote continued)

That rule also bars judicial review of the Executive Board's determination that the properties "ha[ve] been abandoned within the context of church law," as stated in *Buhrman*, 5 Va. Cir. at 507, and of the Bishop's and Standing Committee's decision to inhibit and then depose (remove) the CANA clergy from their positions in the Episcopal Church.

The Congregations also labor mightily to find something in *Wyckoff* to support their position. *See* CANA Response at 67-68. They say that "[b]oth sides claimed to be beneficial owners of the property under the deeds," "the issue was which of the competing factions had the superior claim to be beneficiaries under the deeds," and "[t]he court resolved the issue primarily by reference to the deed's language." *Id.* at 67, citing *Wyckoff*, slip op. at 7. But none of that is accurate. The court actually determined, based on the deeds, "that title to the property in question immediately prior to the May, 1978 congregational vote of the Ascension Episcopal Church, Amherst was in the duly appointed trustees for the benefit of that congregation." *Wyckoff*, slip op. at 4. And aside from noting that deeds are part of the neutral principles analysis under *Norfolk Presbytery*, *see id.* at 5, and acknowledging the *secessionists' argument* that they were "in fact the local episcopal congregation as contemplated by the language of the two deeds

---

> Thus, the essence of the dispute before us can be seen as an inherently ecclesiastical question: which parishioners – the loyal Episcopalian minority or the breakaway Anglican majority – represent Good Shepherd, in whose name the disputed property is held? It is not within the jurisdiction of this Court to decide such an issue, which is inextricably linked with matters of church discipline, membership, and faith. Instead, we are bound by the decisions of the highest church judicatories within the Episcopal Church hierarchy to which the matter has been carried.

Accord, e.g., *New v. Kroeger*, 84 Cal. Rptr. 3d 464, 485 (Cal. App. 2008): "we must defer to the acts of the representatives of the Episcopal Church in determining who were the true members of the church, and, under canon law, who were the lawful directors of the Parish corporation. These are matters of 'credentials and discipline' and 'polity and administration.' … We must defer to the Episcopal Church's decision on this ecclesiastical matter, even if it incidentally affected control over church property."

in question," *id.* at 7, the court said nothing more about the deeds in its opinion. The court certainly did not resolve the dispute "primarily by reference to the deed's language," as the Congregations say.

After determining that title was in trustees for the benefit of the Episcopal congregation, as noted above, the *Wyckoff* court immediately went on to explain that "[t]he whole thrust of the [secessionists'] evidence in this case does not seriously contest this beneficial use in the local congregation but rests rather on other gounds [*sic*] to be addressed later." *Id.* at 4. It then turned to determination of the effect of the congregational vote, finding it "obvious and uncontested that members of the congregation had the right to withdraw from the Episcopal Church and to transfer their allegiance to any other church." *Id.* at 4-5. But it was "also obvious that in so doing even a majority could not thereby require the minority to transfer their allegiance or be put out of existence as a church entity. Logic and common sense then dictate that the vote in question resulted in a divided congregation *some of whom remained loyal to and constituted the Ascension Episcopal Church, Amherst*." *Id.* at 5 (emphasis added). In short, the deeds provided that the property was held for the benefit of the local Episcopal church, and that appears not even to have been an issue in the case. The issue was not "which of the competing factions had the superior claim to be beneficiaries under the deeds," CANA Response at 67, but the effect of the congregational vote to leave the diocese and The Episcopal Church. Nor did the court resolve the issue "primarily by reference to the deed's language," *id*. It addressed the effect of the congregational vote by determining, first, that the local Episcopal church was not "put out of existence" by the vote and, second, that the loyalist faction constituted that church.

Beyond that point, the court's primary focus was on the constitution and canons of the diocese and the Church:

> Using this neutral principles dictate, this Court has found no provision of the constitution or canons of the general church or the diocese which permit a vote of even the majority of the local congregation to alienate the real property of the church without the written consent of the Bishop acting with the advice and consent of the Standing Committee of the Diocese. In fact, Canon 21 expressly prohibits such alienation.

Wyckoff, slip op. at 6. So too here. The court then determined that the congregational vote did not comply with Code § 57-9, *id.* at 6-7, and concluded that "[t]he net result,

> based on the constitution and canons of the church and the state statutes is that the effect of the congregational vote in May, 1978 on the title to the real property in question was that title remained exactly where it was prior to the vote, that is, in the trustees for the benefit of the local protestant episcopal congregation.

Id. at 7. So too here.

Having thus determined by application of neutral principles (which include the deeds, of course, but the court's focus was on "the constitution and canons of the church and the state statutes") that the local Episcopal church was the beneficial owner, the court turned next to the question that is most relevant to the "identity" issue in this case, responding to the secessionists' argument "that those who have transferred allegiance to the Anglican Catholic Church are in fact the local episcopal congregation as contemplated by the language of the two deeds in question." *Id.* The court rejected that argument, again invoking "neutral principles of law" but without relying on the deeds as a ground for decision:

> The result of the May, 1978 congregational vote did not and could not extinguish that part of the Protestant Episcopal congregation known as Ascension Episcopal Church, Amherst remaining loyal to the Diocese of Southwestern Virginia and the National Episcopal Church. The vote may well have indicated that fifty-nine members of that congregation transferred their allegiance to the Anglican Catholic Church which is unquestionably a separate entity. Nothing, however, has occurred under neutral principles of law to transfer the title and control of the property in question from the beneficial use of the remaining congregation of the Ascension Episcopal Church Amherst.

Id. at 7-8.

In short, the Congregations' argument exaggerates the influence of the deeds on the

Wyckoff decision, overlooks its neutral principles analysis, and fails entirely to confront the court's discussion of the "identity" issue for which *Wyckoff* is cited in the Diocese Brief at 43-44, the TEC Brief at 52-53, and ostensibly but not actually in the CANA Response at 67-68.

A recent decision in the *Transfiguration* case cited above and in previous briefs employs virtually the identical analysis. The local church argued in that case "that for title purposes, they somehow remained the same entities upon the unapproved disaffiliation, and thus remained in the same shoes, as it were, as the original Episcopal parishes." *Episcopal Diocese of Ohio v. Anglican Church of the Transfiguration*, No. CV-08-654973 (Ohio Common Pleas Cuyahoga Co., Journal Entry No. 2 (Sept. 29, 2011) (original all caps format altered for readability). The court "reject[ed] this apparent argument that there was merely a name change to 'Anglican,'" reasoning that "the plaintiff Episcopal parishes pledged adherence to Church doctrines, its Constitution, and myriad Canons. The defendant Anglican parishes are, as plaintiffs put it, 'different entities entirely.'" *Id.*[44]

The Diocese adopts TEC's responses to the Congregations' arguments regarding the out-of-state cases cited in the TEC Brief. *See* CANA Response at 69-77; TEC Reply at 46-57.

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

There is little in the Congregations' feeble response in support of their counterclaims that has not been answered already or that merits further attention now. We note, however, that their attempted limitation of *Little v. Cooke*, 274 Va. 697, 652 S.E.2d 129 (2007), to cases involving breaches of fiduciary duty (CANA Response at 78) fails, for reasons stated in the Diocese Brief at 52-53. We also note that the Congregations' own evidence demonstrates the wisdom of the

[44] The Omnibus Opinion and Order referenced in the cited Journal Entry is the April 15, 2011, *Transfiguration* decision that we have cited above and in previous briefs.

Little Court's holding that evidence of the value of property at a date three months after a claim arose was irrelevant as a matter of law. Apostles introduced an appraisal which valued the Braddock Road property at an estimated $1.8 million as of February 10, 2011. Apostles_ Ex_052.003. At trial, on May 24, 2011, Philip Rooney (Apostles' treasurer, Tr. 3305), testified that "[t]he value of the Braddock Road property has decreased to about $1.7 million right now." Tr. 3350. That is a $100,000 (5.5%) decline in the value of that property in a mere 3½ months. Given recent trends in real estate values in Virginia (and elsewhere), that surely is not an isolated occurrence. Mr. Rooney's testimony simply confirms, as a matter of fact, what *Little* holds as a matter of law – that evidence of a property's value at a date remote from the accrual of a claim for its value is speculative and irrelevant. (The Congregations' counterclaims fail for numerous reasons, as discussed in previous briefs. Their failure to prove damages is just one of them.)

Another recent decision in the *Transfiguration* case is relevant, however, to an argument made in support of the Congregations' counterclaims in their opening brief. Citing evidence that after 2003 they allowed their members to specify that their financial contributions should be withheld from the Diocese or the Church, the Congregations argued that granting ownership of bank accounts to the Diocese and the Church would "dishonor the donors' express desire that their money *not* go to the denomination." CANA Brief at 160.[45] The Anglican churches in the

[45] The Congregations overstated the facts in support of that argument. They stated that "[b]y the time each Congregation voted to disaffiliate in 2006 or early 2007, any funds in the Congregation's bank accounts consisted of funds contributed after the curtailment of donations and by members who had expressed a desire that their money *not* go to the Diocese." CANA Brief at 159-60. As far as we can determine, there is no evidence that *all* of the contributors to *any* of the CANA churches ever expressed such a desire. *But cf.* Tr. 2950-51 ("very, very few" TFC members affirmatively designated part of their contributions to go to the Diocese), 3318-19 (Mr. Rooney unaware of any Apostles congregants who asked to have a portion of their contributions go to the Diocese after late 2003), 3710 (St. Stephen's Vestry's policy was "that people could not restrict their pledges").

Transfiguration case made a similar argument. Citing "donation restrictions from 2004 forward (i.e., parishioners' designations that donations must be used for the parish alone, with nothing turned over to the Diocese or the Episcopal Church)," they argued "that 'construing a trust on these gifts violates the clear intent of the donors.'" *Episcopal Diocese of Ohio v. Anglican Church of the Transfiguration*, No. CV-08-654973 (Ohio Common Pleas Cuyahoga Co., Journal Entry No. 1 (Sept. 29, 2011) (original all caps format altered for readability). The court rejected that argument for reasons stated in its Omnibus Opinion and Order (the April 15, 2011, *Transfiguration* decision), "which found an express trust in favor of the Episcopal Church and the Diocese on all real and personal property of the parishes." Thus, "the supposedly restricted donations tendered before the disaffiliation were given to Episcopal parishes that answered to the Diocese, and plaintiffs do not seek donations made after the disaffiliation." *Id.* The facts are the same in these cases, and the same conclusion should follow.

CONCLUSION

Another trial court faced with an Episcopal church property dispute began its opinion as follows:

> It is tempting to conflate a litigation file's size with its complexity. This case presents that enticement. Nevertheless, despite the sheer volume of submissions from the parties – dozens of pages of cross-motions for summary judgment and supplemental authority, and thousands of pages of appendices – this case is straightforward. For the reasons discussed below, the Court finds and concludes that Plaintiffs are entitled to partial summary judgment, and Defendants must therefore "surrender the church keys." The church property in question is held in trust for the benefit of Plaintiffs Episcopal Diocese of Ohio and The Protestant Episcopal Church in the United States of America.

Transfiguration, slip op. at 1 (April 15, 2011).

We respectfully submit that the same conclusions, *mutatis mutandis*, should apply equally here. Despite the sheer volume of this record, and whether the conclusion is phrased in

terms of trust, contractual, or proprietary interests, the properties at issue are and always have been held and should be used only to further the mission of the Episcopal Church and the Diocese of Virginia. The Court should enter a judgment for the Church and the Diocese which directs and requires the defendant Trustees to convey and transfer the legal title to the properties to the Bishop of the Diocese; orders each defendant Congregation to account for its use of all such property since the dates of their secession from the Diocese and the Episcopal Church; and dismisses the Congregations' counterclaims with prejudice.

Respectfully submitted,

Dated: October 14, 2011

THE PROTESTANT EPISCOPAL CHURCH
IN THE DIOCESE OF VIRGINIA

By: _____
Of Counsel

Bradfute W. Davenport, Jr. (VSB # 12848)
George A. Somerville (VSB # 22419)
Brian D. Fowler (VSB # 44070)
Troutman Sanders LLP
Post Office Box 1122
Richmond, Virginia 23218-1122
Telephone: (804) 697-1200
Facsimile: (804) 697-1339

Mary C. Zinsner (VSB # 31397)
Troutman Sanders LLP
1660 International Drive
Suite 600
McLean, Virginia 22102
Telephone: (703) 734-4334
Facsimile: (703) 734-4340

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were sent by electronic mail to all counsel of record, including those named below, on this 14th day of October, 2011, pursuant to the Stipulated Amended Pretrial Scheduling Order and post-trial briefing/procedures Order:

Gordon A. Coffee (gcoffee@winston.com)
Gene C. Schaerr (gschaerr@winston.com)
Steffen N. Johnson (sjohnson@winston.com)
Andrew C. Nichols (anichols@winston.com)
William Y. Durbin (wdurbin@winston.com)
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
Counsel for Truro Church, Church of the Epiphany, Church of the Apostles, The Church at The Falls – The Falls Church, and associated individuals

George O. Peterson (gpeterson@petersonsaylor.com)
Tania M. L. Saylor (tsaylor@petersonsaylor.com)
Peterson Saylor, PLC
4163 Chain Bridge Road
Fairfax, VA 22030
Counsel for Truro Church and certain associated individuals

Mary A. McReynolds (marymcreynolds@mac.com)
Mary A. McReynolds, P.C.
1250 Connecticut Avenue, N.W.
Second Floor
Washington, D.C. 20036
Counsel for St. Margaret's Church, St. Paul's Church, Church of the Epiphany, Church of the Apostles, St. Stephen's Church, and associated individuals

E. Andrew Burcher (eaburcher@pw.thelandlawyers.com)
Walsh, Colucci, Lubeley, Emrich & Walsh, P.C.
4310 Prince William Parkway, Suite 300
Prince William, Virginia 22192
Counsel for St. Margaret's Church, St. Paul's Church, and Church of the Word

R. Hunter Manson (manson@kaballero.com)
PO Box 539
876 Main Street
Reedville, Virginia 22539
Counsel for St. Stephen's Church and associated individuals

Scott J. Ward (sjw@gg-law.com)
Timothy R. Obitts (tro@gg-law.com)
Gammon & Grange, P.C.
8280 Greensboro Drive, Seventh Floor
McLean, Virginia 22102

James A. Johnson (jjohnson@semmes.com)
Paul N. Farquharson (pfarquharson@semmes.com)
Scott H. Phillips (sphillips@semmes.com)
Semmes Bowen & Semmes, P.C.
25 South Charles Street, Suite 1400
Baltimore, Maryland 21201

Tyler O. Prout (tprout@semmes.com)
Semmes, Bowen & Semmes
1577 Spring Hill Road, Suite 200
Vienna, Virginia 22182
Counsel for The Church at The Falls – The Falls Church and certain associated individuals

Thomas C. Palmer, Jr. (tpalmer@thebraultfirm.com)
Brault Palmer Grove Steinhilber & Robbins LLP
3554 Chain Bridge Road, Suite 400
Fairfax, VA 22030
Counsel for certain trustees of The Church at The Falls – The Falls Church (Episcopal)

Robert C. Dunn (rdunn@robdunnlaw.com)
Law Office of Robert C. Dunn
707 Prince Street
P. O. Box 117
Alexandria, Virginia 22313-0117
Counsel for Marjorie Bell, trustee of Church of the Epiphany (Episcopal)

E. Duncan Getchell (DGetchell@oag.state.va.us)
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
Counsel for the Commonwealth of Virginia ex rel. Kenneth T. Cuccinelli, in his official capacity as Attorney General

David Booth Beers (dbeers@goodwinprocter.com)
Mary E. Kostel (mkostel@goodwinprocter.com; mkostel@episcopalchurch.org)
Goodwin Procter
901 New York Avenue, N.W.
Washington, D.C. 20001

Heather H. Anderson (handersonlaw@gmail.com)
Heather H. Anderson, P.C.
P.O. Box 50158
Arlington, VA 22205
Counsel for the Episcopal Church

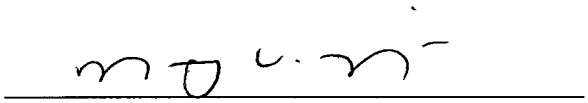

EXHIBIT C

Record No. 090682

In the Supreme Court of Virginia

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA, APPELLANT

v.

TRURO CHURCH, *ET AL.*, APPELLEES

BRIEF FOR APPELLEES CANA CONGREGATIONS

GORDON A. COFFEE (VSB #25808)
gcoffee@winston.com
GENE C. SCHAERR
gschaerr@winston.com
STEFFEN N. JOHNSON
sjohnson@winston.com
ANDREW C. NICHOLS (VSB #66679)
anichols@winston.com
Winston & Strawn LLP
1700 K Street N.W.
Washington, D.C. 20006
(202) 282-5000 (telephone)
(202) 282-5100 (facsimile)

Counsel for Truro Church and its Trustees The Falls Church, Church of the Apostles, and Church of the Epiphany

SCOTT J. WARD (VSB #37758)
sjw@gg-law.com
Gammon & Grange, P.C.
8280 Greensboro Drive, 7th Floor
McLean, VA 22102
703-761-5000 (telephone)
703-761-5023 (facsimile)

Counsel for The Falls Church

GEORGE O. PETERSON (VSB #44435)
gpeterson@sandsanderson.com
TANIA M. L. SAYLOR
tsaylor@sandsanderson.com
Sands Anderson Marks & Miller
1497 Chain Bridge Road, Suite 202
McLean, VA 22101
703-893-3600 (telephone)
703-893-8484 (facsimile)

Counsel for Truro Church and Trustees

MARY A. MCREYNOLDS
marymcreynolds@mac.com
Mary A. McReynolds, P.C.
1050 Connecticut Ave., N.W., 10th Fl.
Washington, D.C. 20036
(202) 429-1770 (telephone)
(202) 772-2358 (facsimile)

Counsel for Church of the Apostles, Church of the Epiphany, St. Margaret's Church, St. Paul's Church, and St. Stephen's Church

Additional counsel listed on inside cover

JAMES A. JOHNSON
jjohnson@semmes.com
PAUL N. FARQUHARSON
pfarquharson@semmes.com
SCOTT H. PHILLIPS
sphillips@semmes.com
Semmes, Bowen & Semmes, P.C.
25 South Charles Street, Ste. 1400
Baltimore, Maryland 21201
(410) 539-5040 (telephone)
(410) 539-5223 (facsimile)

Counsel for The Falls Church

JAMES E. CARR (VSB #14567)
northvajim@aol.com
Carr & Carr
44135 Woodbridge Parkway, Ste. 260
Leesburg, VA 20176
703-777-9150 (telephone)
703-726-0125 (facsimile)

Counsel for Church of Our Savior at Oatlands

E. ANDREW BURCHER (VSB #41310)
eaburcher@thelandlawyers.com
Walsh, Collucci, Lubeley, Emerick & Walsh, P.C.
4310 Prince William Pkwy., Ste. 300
Prince William, VA 22192
703-680-4664 ext. 159 (telephone)
703-680-2161 (facsimile)

Counsel for Church of the Word, St. Margaret's Church, St. Paul's Church, and their Related Trustees

R. HUNTER MANSON (VSB #05681)
manson@kaballero.com
P. O. Box 539
876 Main Street
Reedville, VA 22539
804-453-5600 (telephone)
804-453-7055 (facsimile)

Counsel for St. Stephen's Church

TABLE OF CONTENTS

on this issue—entered after much briefing—should be affirmed.

II. The Circuit Court Correctly Held That The Diocese Could Not Be The Beneficiary Of Trusts In Ordinary Congregational Property.

The Diocese (but not ECUSA) also appeals the ruling that Virginia does not recognize denominational trusts in congregational property. Br. 15-20. *Norfolk* and prior cases held that "trusts for supercongregational churches are invalid" (214 Va. at 507, 201 S.E.2d at 758), and the Diocese concedes that, prior to 1993, Virginia law barred such trusts. Br. 15. Nonetheless, it says a 1993 statutory amendment silently overruled these cases.

As explained below, the Diocese's view is foreclosed by a long line of precedent, by the legislature's statement that the 1993 amendment was "declaratory of existing law," and by post-1993 opinions of this Court and the Attorney General—which the legislature is deemed to be aware of—stating that § 57-7.1 validates only trusts for local churches. But in any case, the circuit court's holding on this issue was unnecessary to the outcome. If the law changed in 1993, that change could not be applied retroactively to deprive the Congregations of property rights under pre-1993 deeds. The Diocese also has not complied with the requirements for establishing a trust even if denominational trusts *are* valid. And § 57-9 provides a "conclusive" resolution of *all* competing claims of beneficial ownership—and would thus apply even if the Diocese had a beneficial interest.

A. The Diocese's assertion that denominational trusts are valid in Virginia is foreclosed by fourteen decisions of this Court and a 1996 opinion of the Attorney General.

At least ***14*** rulings of this Court issued between 1832 and 1995 hold that § 57-7.1 (or its predecessors) allow trustees to hold most church property *only* for congregations.[10] JA 4180-82. The Court held to this view even after the legislature added the terms "church" and "diocese" to § 57-7 (and "church" and "denomination" to §§ 57-15, 57-16).[11] Thus, when ECUSA passed the Dennis Canon in 1979, its effort to name itself a beneficiary of congregational property was invalid under Virginia law. Still, the Diocese says its trust interest was validated in 1993, when § 57-7.1 replaced § 57-7 and modernized its archaic language. But as the trial court held, 160 years of case law cannot have been *silently overruled* by a law stating: "'this act

---

[10] *Gallego's Ex'rs. v. Attorney General*, 30 Va. 450, 461-62 (1832); *Brooke v. Shacklett*, 54 Va. 301, 312-13 (1856); *Hoskinson v. Pusey*, 73 Va. 428, 431 (1879); *Boxwell v. Affleck*, 79 Va. 402, 407 (1884); *Davis v. Mayo*, 82 Va. 97, 102 (1886); *Finley v. Brent*, 87 Va. 103, 106, 12 S.E. 228, 229 (1890); *Fifield v. Van Wyck's Ex'r*, 94 Va. 557, 560, 27 S.E. 446, 447 (1897); *Globe Furniture Co. v. Trustees of Jerusalem Baptist Church*, 103 Va. 559, 561, 49 S.E. 657, 658 (1905); *Moore v. Perkins*, 169 Va. 175, 179-81, 192 S.E. 806, 808-09 (1937); *Maguire v. Lloyd*, 193 Va. 138, 144, 67 S.E.2d 885, 889-90 (Va. 1951); *Norfolk*, 214 Va. at 503; *Green*, 221 Va. at 555, 272 S.E.2d at 185; *Reid v. Gholson*, 229 Va. 179, 187 n.11, 327 S.E.2d 107, 112 n.11 (1985); *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.*, 249 Va. 144, 152, 452 S.E.2d 847, 851-52 (1995).

[11] Since 1962, some property can be held in trust for a diocese. *Norfolk*, 214 Va. at 506-07, 2d S.E.2d at 757-58 (§ 57-7 was expanded to cover residences conveyed to benefit a "diocese," but "not . . . beyond this").

is declaratory of existing law.'" 1993 Acts, ch. 370. JA 4181 (letter op.).

The Diocese asserts that the "declaratory of existing law' language "suggests that the prior statute was incorrectly limited." Br. 19. But "[w]hen the General Assembly acts in an area in which one of its appellate courts already has spoken, it is presumed to know the law as the court has stated it and to acquiesce therein, and if the legislature intends to countermand such appellate decision it must do so explicitly." *Weathers v. Com.*, 262 Va. 803, 805, 553 S.E.2d 729, 730 (2001). All the more so where the legislature wishes to overrule not one, but ***14***, prior rulings of this Court.

Even since 1993, the Court has cited *Norfolk* as holding that "§ 57-7.1 validates transfers . . . for the benefit of local religious organizations." *Asbury*, 249 Va. at 152, 452 S.E.2d at 851. The Diocese says § 57-7.1 was not at issue in *Asbury* (Br. 19 n.9), but that is incorrect. The Court had to confirm "that the Trustees," who sought to assert the congregation's rights, "[we]re proper parties," and standing turned on § 57-7.1. *Id.* at 152, 452 S.E.2d at 852. Citing § 57-7.1, the Court found that the trustees could only have been trustees for the congregation, which established standing.[12]

---

[12] *Id.* ("Code § 57-7.1 validates transfers, including transfers of real property, for the benefit of local religious organizations. *See Norfolk Presbytery v. Bollinger*, 214 Va. 500, 506, 201 S.E.2d 752, 757-58 (1974) (construing former Code § 57-7).").

Thus, the analysis of § 57-7.1 was necessary to the decision.

Moreover, in 1996 the Attorney General opined that § 57-7.1 "encompasses property held for the benefit of a local congregation, as opposed to property held by a larger hierarchical body." 1996 Va. Opp. Atty. Gen. 194 (Apr. 4, 1996). The legislature "'is presumed to have knowledge of the Attorney General's interpretation of statutes, and [its] failure to make corrective amendments evinces legislative acquiescence.'" *Tazewell County. Sch. Bd. v. Brown*, 267 Va. 150, 163, 591 S.E.2d 671, 677 (2004). The legislature amended § 57-7.1 in 2005 (2005 acts, ch. 772), but none of its changes reflect disagreement with the Attorney General's opinion—or with *Asbury*. Thus, denominational trusts remain invalid in Virginia.

B. Even if Virginia law permitted denominations to hold beneficial interests in local congregational property, that would not change the result.

Setting aside the 1993 revision, there are three independent grounds for affirmance on this issue. *First*, even if denominational trusts were now valid, the Diocese has not complied with the requirements for establishing such a trust. Under Virginia law, only the settlor—who holds title—may establish a trust.[13] As the South Carolina Supreme Court recently held—in

[13] Va. Code § 55-544.01 (a trust's terms are governed by "the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as

reasoning applicable here—"[i]t is an axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another or transfer legal title to one person for the benefit of another." *All Saints Parish Waccamaw v. Protestant Episcopal Church*, 685 S.E.2d 163, 174 (S.C. 2009). Thus, "neither [a notice of interest recorded by a diocese] nor the Dennis Canon has any legal effect." *Id.*

The Diocese is effectively asserting the right to create a trust by means not available to secular associations or local congregations. The Diocese has disclaimed any "conveyance," which is needed to satisfy § 57-7.1. Br. in Opp. to Demurrers (7/13/07) at 23 (appellants "do not allege a 'conveyance' (or a contract to convey)"). Nor does the Diocese hold title to the subject properties. The only basis for its alleged interest is an internal *canon*. But a putative *beneficiary* cannot unilaterally create a trust, and the "trusts" that the Diocese asserts—in contrast to those of the Congregations—are not embodied in the deeds, land records, or any trust instruments reflecting the settlors' intent. JA 1345-1444 (deeds). Thus, even if denominational trusts were valid, the Diocese could not establish one.

Second, even if § 57-7.1 had changed the law prospectively, it could

---

may be established by other evidence that would be admissible in a judicial proceeding"); Va. Code § 55-544.05(B), (C) (charitable trusts).

not be applied to pre-1993 conveyances or retroactively implement a canon passed 14 years earlier—when even the Diocese acknowledges that Virginia did not permit denominational trusts.[14] Br. 15. "[T]he phrase 'declaratory of existing law' is not a statement of retroactive intent." *Bemer v. Mills*, 265 Va. 408, 414, 519 S.E.2d 159, 161 (2003). Further, that any new aspects of § 57-7.1 were at most prospective is confirmed by differences between the prior law (§ 57-7)—which validated *both* conveyances "which hereafter shall be made" *and* conveyances "which, since January 1, 1777, *ha*[*ve*] *been* made"—and the current law (§ 57-7.1), which says only that a conveyance "which *is* made ... *shall be* valid." (Emphasis added). *Cf.* Va. Code § 57-16(C) (deeds to ecclesiastical officers "made prior to March 18, 1942 ... are hereby ratified and declared valid"). Finally, applying § 57-7.1 retroactively to create a new beneficial interest in the Congregations' properties would violate the Contracts Clause. *Finley*, 87 Va. at 108.

Third, even if the Diocese had a beneficial interest, that would not eliminate the Congregations' beneficial interest, and § 57-9 would still provide a "conclusive" answer to the question of "title" and "control." As noted, § 57-9 presumes a dispute between competing groups, each asserting a

[14] The vast majority of the property at issue was acquired prior to 1993. JA 1345-1444 (deeds).

superior beneficial interest in the subject property. JA 3910-11, 3936, 3938 (discussing the disputes that preceded enactment of § 57-9). Thus, even if the Diocese were a second beneficiary of the trusts at issue, § 57-9 would still resolve the question of ownership as between the Diocese and the Congregations—the parties named as beneficiaries in the deeds.[15]

C. Virginia law on denominational trusts is constitutional.

The Diocese also seeks to portray Virginia's rule on denominational trusts as unconstitutional and reflective of a historic "bias against hierarchical churches." Br. 15. But statutory distinctions not designed to disadvantage particular faiths need only be "rationally related to [a] legitimate purpose" (*Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987)), and the Diocese ignores several legitimate reasons for Virginia's rule.

First, a rule barring additional entities from asserting a beneficial interest in congregational property serves the interest of avoiding clouds on title to local real estate. The legislature may reasonably have thought that prospective purchasers (or those injured on the property) should be able to

[15] The competing claimants are not limited to those in the congregation. Part B of the statute governs disputes within a congregation. Part A, however, governs divisions in a denomination and grants voting rights to congregations "attached" to such denominations. If Part A were read to resolve only intra-congregational disputes, it would add nothing to Part B. But courts may not "read[] any legislative enactment in a manner that will render any portion of it useless." *Natrella v. Board of Zoning Appeals*, 231 Va. 451, 461, 345 S.E.2d 295, 301 (1986).

Respectfully submitted,

/s/ Gordon A. Coffee

GORDON A. COFFEE (VSB #25808)
gcoffee@winston.com
GENE C. SCHAERR
gschaerr@winston.com
STEFFEN N. JOHNSON
sjohnson@winston.com
ANDREW C. NICHOLS (VSB #66679)
anichols@winston.com
Winston & Strawn LLP
1700 K Street N.W.
Washington, D.C. 20006
(202) 282-5000 (telephone)
(202) 282-5100 (facsimile)

Counsel for Truro Church and its Trustees The Falls Church, Church of the Apostles, and Church of the Epiphany

SCOTT J. WARD (VSB #37758)
sjw@gg-law.com
Gammon & Grange, P.C.
8280 Greensboro Drive, 7th Floor
McLean, VA 22102
703-761-5000 (telephone)
703-761-5023 (facsimile)

JAMES A. JOHNSON
jjohnson@semmes.com
PAUL N. FARQUHARSON
pfarquharson@semmes.com
SCOTT H. PHILLIPS
sphillips@semmes.com
Semmes, Bowen & Semmes, P.C.
25 South Charles Street, Ste. 1400
Baltimore, Maryland 21201
(410) 539-5040 (telephone)
(410) 539-5223 (facsimile)

Counsel for The Falls Church

GEORGE O. PETERSON (VSB #44435)
gpeterson@sandsanderson.com
TANIA M. L. SAYLOR
tsaylor@sandsanderson.com
Sands Anderson Marks & Miller
1497 Chain Bridge Road, Suite 202
McLean, VA 22101
703-893-3600 (telephone)
703-893-8484 (facsimile)

Counsel for Truro Church and Trustees

MARY A. MCREYNOLDS
marymcreynolds@mac.com
Mary A. McReynolds, P.C.
1050 Connecticut Ave., N.W., 10th Fl.
Washington, D.C. 20036
(202) 429-1770 (telephone)
(202) 772-2358 (facsimile)

Counsel for Church of the Apostles, Church of the Epiphany, St. Margaret's Church, St. Paul's Church, and St. Stephen's Church

E. ANDREW BURCHER
eaburcher@thelandlawyers.com
Walsh, Collucci, Lubeley, Emerick & Walsh, P.C.
4310 Prince William Pkwy., Ste. 300
Prince William, VA 22192
703-680-4664 ext. 159 (telephone)
703-680-2161 (facsimile)

Counsel for Church of the Word, St. Margaret's Church, St. Paul's Church, and their Related Trustees

JAMES E. CARR (VSB #14567)
northvajim@aol.com
Carr & Carr
44135 Woodbridge Parkway, Ste. 260
Leesburg, VA 20176
703-777-9150 (telephone)
703-726-0125 (facsimile)

Counsel for Church of Our Savior at Oatlands

R. HUNTER MANSON (VSB #05681)
manson@kaballero.com
P. O. Box 539
876 Main Street
Reedville, VA 22539
804-453-5600 (telephone)
804-453-7055 (facsimile)

Counsel for St. Stephen's Church

Counsel for Appellees

Dated: February 1, 2010