VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In re:	)	**Case Nos.:** CL 2007-248724,
Multi-Circuit Episcopal Church Litigation	)	CL 2006-15792,
	)	CL 2006-15793,
	)	CL 2007-556,
	)	CL 2007-1235,
	)	CL 2007-1236,
	)	CL 2007-1237,
	)	CL 2007-1238,
	)	CL 2007-1625,
	)	CL 2007-5249,
	)	CL 2007-5250,
	)	CL 2007-5362,
	)	CL 2007-5363,
	)	CL 2007-5364,
	)	CL 2007-5682,
	)	CL 2007-5683,
	)	CL 2007-5684,
	)	CL 2007-5685,
	)	CL 2007-5686,
	)	CL 2007-5902,
	)	CL 2007-5903, and
	)	CL 2007-11514

THE EPISCOPAL CHURCH'S AND THE DIOCESE'S BRIEF IN OPPOSITION TO THE SUPPLEMENTAL BRIEFS OF THE CONGREGATIONS AND THE CHURCH OF OUR SAVIOUR AT OATLANDS

Bradfute W. Davenport, Jr. (VSB # 12848)
George A. Somerville (VSB # 22419)
Joshua D. Heslinga (VSB # 73036)
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

Heather H. Anderson (VSB # 38093)
Adam Chud (*pro hac vice*)
Soyong Cho (VSB # 70896)
Goodwin Procter
901 New York Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 346-4000
Facsimile: (202) 346-4444

Counsel for the Episcopal Church

CONTENTS

AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Two supplemental briefs have been submitted by the CANA Congregations, one jointly by all of the Congregations and one by the Church of Our Savior at Oatlands ("COSO") alone. Only the COSO brief purports to address the First Amendment issues related to Va. Code § 57-9 that have been briefed and that are currently set for hearing on May 28.

COSO's suggestion that a ruling in favor of the Episcopal Church and the Diocese in this case would impair its members' individual rights to the Free Exercise of religion fundamentally misconstrues the nature of both the First Amendment's Free Exercise guarantee and church property litigation. To the contrary, as the Church and the Diocese have shown in previous briefing, it is precisely to protect *all* citizens' Free Exercise rights that the First Amendment commands respect for the polities and rules established by different religious denominations.

In contrast to the COSO brief, the CANA Congregations' joint brief does not mention issues of religious freedom but looks ahead to the constitutional and other issues set for trial in October. The Congregations essentially argue that this Court should foreclose discovery and trial of the Church's and the Diocese's declaratory judgment claims (which they treat as co-extensive with the Contracts Clause issues) because, they assert, the Church and the Diocese "will not be able" to establish any Contracts Clause violations. Their brief assumes, although it does not attempt to show, that if § 57-9(A) applies and is constitutional, the Court should not consider any other law or evidence before blindly accepting the Congregations' "determinations."

Those issues are encompassed in the lists of issues that the parties have recently submitted in accordance with the Court's instructions at the April 25, 2008, hearing, and none of them has been set for briefing or hearing at this point. Nor, in the Church's and the Diocese's view, should these issues be treated or decided in this context, as an afterthought to the Free

Exercise and Establishment issues currently before the Court. Nevertheless, because the CANA Congregations have now raised them, the Church and the Diocese provide a preview of their responses on each point. Both the Congregations' arguments concerning the Contracts Clauses and the premise of their Contracts Clause discussion – that § 57-9(A) itself precludes the Court from examining and considering other facts or law that bear on the property interests at issue here – are unfounded.

I. The Church of Our Saviour at Oatlands misconstrues the nature of the First Amendment and fails to appreciate that enforcing the rules of the Episcopal Church and the Diocese actually furthers individual rights.

COSO argues that a ruling in favor of the Episcopal Church and the Diocese in this case would somehow deprive its individual members (or at least the majority that have joined CANA) of "their" property and force them to support a denomination with which they now disagree, thus depriving them of constitutional and statutory rights to the free exercise of religion.

COSO's argument is based on an erroneous premise. The individual members of COSO who no longer subscribe to the beliefs of the Episcopal Church *have* no vested interests in the property of a local Episcopal church. *See, e.g.*, *Bouldin v. Alexander*, 82 U.S. 131, 139 (1872) ("withdrawal from a church and uniting with another church or denomination is a relinquishment of all rights in the church abandoned") (punctuation omitted); *Diocese of Southwestern Va. v. Buhrman*, 5 Va. Cir. 497, 508 (Clifton Forge 1977), *pet. refused*, Record No. 780347 (Va. June 15, 1978) ("The court holds, therefore, that the withdrawn trustees ... have no further right or interest in the subject property, [and] that neither they nor the others who have renounced The Episcopal Church have any proprietary or possessory rights in said property").

COSO's arguments reflect a similarly fundamental misunderstanding of the Free Exercise guarantee and of church property litigation. Church property litigation determines rights in

property. If the Court determines that the Episcopal Church and the Diocese have rights and interests that COSO may not unilaterally overcome, the Court is not penalizing, diminishing, or compelling COSO to support the Episcopal Church and the Diocese. Rather, the Court is merely protecting the trust, contract, and proprietary rights of the Episcopal Church and the Diocese, as well as the Free Exercise rights of the Church and all of its members. If the law were otherwise, courts could never decide church property disputes in favor of a hierarchical church. No court has adopted such a proposition, and COSO's arguments are foreclosed by *Jones v. Wolf*, 443 U.S. 595 (1979), and *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980), among *many* other decisions. The members of COSO are free to support whatever religion they choose. They may not, however, unilaterally void past contractual relationships with the Episcopal Church and the Diocese and claim Episcopal parish property for their own.

The Episcopal Church is and always has been hierarchically structured, and it has always required that parish property be used only in accordance with the mission of the Church. This polity and these rules are closely related to, and reflect, the Church's theology. Over the years, the individual members of COSO joined the Church with this understanding. *See Green v. Lewis*, 221 Va. at 186, 272 S.E.2d at 555-56 ("It is reasonable to assume that those who constituted the original membership ... and those members who followed thereafter, united themselves to a hierarchical church ... with the understanding and implied consent that they and their church would be governed by and would adhere to the Discipline of the general church").

In this country each person has the right to worship as he or she chooses, of course. The right to worship as one chooses, however, does not include either the "right" unilaterally to override or disregard the established polity and rules of a religious denomination with which one has associated or the "right" to divert property donated to and held by one denomination for the

use of another. To the contrary, the right to worship how one chooses includes, and indeed depends upon, the ability to establish or join a hierarchical denomination like the Episcopal Church and know that local majorities will not be able unilaterally to subvert the rules of the denomination that apply for the benefit of all members. Those rules were established by the individuals that make up the Church, and judicial respect for such rules is necessary to ensure religious freedom. *See Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 341 (1987) (Brennan, J., concurring) ("'Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] [C]lause'") (citation omitted; bracketed alterations in Justice Brennan's opinion).

II. The Congregations' arguments regarding the Contracts Clauses are premature and misunderstand the Church's and the Diocese's claims, the facts, and applicable law.

Treating the Episcopal Church's and the Diocese's declaratory judgment claims as wholly coextensive with the Contracts Clause issues, the Congregations argue that the Contracts Clause claims need not be set for trial (or even vetted through discovery) because "ECUSA and the Diocese will not be able to establish a Contracts Clause violation in the application of § 57-9 to any of the properties at issue." CANA Congregations' Opening Post-Decision Brief ("Congregations' Brief") at 4. In effect, they seek summary judgment without having made an appropriate motion.

As discussed in Section III below, and as we will further demonstrate if necessary in future briefing, it will be necessary to try the declaratory judgment cases as to all of the Congregations for reasons wholly apart from the Contracts Clause issues. Specifically as to the Contracts Clauses, however, the Congregations' contention that the Episcopal Church and the Diocese will not be able to prove these claims is both premature and incorrect.

Despite the absence of an evidentiary record (or the full discovery needed to produce one), the Congregations assert that the Episcopal Church and the Diocese will not be able to establish contractual interests in the property at issue here, for three reasons: (1) only two churches have pre-1867 deeds, which they claim do not support the Church's or the Diocese's interests;[1] (2) Virginia did not recognize any "denominational interests" in church property prior to 1867; and (3) the current canons on which the Episcopal Church and the Dioceses rely were adopted after 1867. Congregations' Brief at 4. The Congregations' arguments rest on an erroneous view of the facts and the law.

A. The Congregations' attempt to limit the Court's inquiry to deeds should be rejected.

The Episcopal Church and the Diocese have consistently asserted that our claims to a "contractual or proprietary" interest in the property at issue will be proven, under applicable Virginia statutes and case law, through the deeds, the Constitutions and Canons of the Church and the Diocese, and the course of dealing between the parties. *See Green v. Lewis*, 221 Va. at 555, 272 S.E.2d at 185-86; *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 507, 201 S.E.2d 752, 758 (1974). Ignoring this authority, the Congregations argue that the Court should limit its inquiry to the language of the deeds alone. They cite no authority for the proposition that the Contracts Clauses protect only contracts that appear in deeds, however, and there is none.[2] The

---

[1] According to the Congregations' Brief, only the Falls Church has pre-1867 deeds. The Congregations conceded in court on April 25, 2008, however, that another pre-1867 deed, related to St. Paul's Church, has been found.

[2] The Congregations suggest that *Finley v. Brent*, 87 Va. 103 (1890), supports the proposition that the Contracts Clause protects only contracts based on deeds. Congregations' Br. at 11. It does not. The contract at issue in *Finley* was established through a deed. 87 Va. at 104 ("The bill was filed by the appellants to construe a deed ... and to enforce the same ...."). Nothing in *Finley* suggests, however, that other types of contracts that may be established in other cases would not be equally protected.

Contracts Clauses protect against the impairment of *any* valid contractual obligation or relationship. This protection unquestionably extends to the contractual relationship that exists between a voluntary association – including a religious institution – and its members.

The constitution and by-laws of a voluntary association form a contract between the association and its members. *See* Diocese Brief at 10-12. In *National Collegiate Athletic Association v. Miller*, 795 F. Supp. 1476 (D. Nev. 1992), *aff'd*, 10 F.3d 633 (9th Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994), the district court squarely held that such a contractual relationship between the NCAA, a voluntary association, and its member institutions was entitled to protection under the Contract Clause and that a statute that imposed "minimum" disciplinary standards inconsistent with the NCAA's internal rules and procedures violated the Contracts Clause. *Id.* at 1486-87. *See also Nat'l Collegiate Athletic Ass'n v. Roberts*, 1994 U.S. Dist LEXIS 21576 at *4, 1994 WL 750585 (N.D. Fla. 1994) (same).

The Episcopal Church and the Diocese have such contractual relationships with the congregations here, and a number of those contractual relationships began prior to 1867. For example, Truro Episcopal Church had formed as Zion Protestant Episcopal Church by 1843. Likewise, St. Paul's Episcopal Church, Haymarket had formed by 1836. St. Stephen's Episcopal Church, Heathsville does not appear to have organized formally before 1867, but meetings of Episcopalians at Heathsville and the Diocese's regular efforts to start that congregation certainly pre-date that year. Moreover, three other congregations – Church of the Apostles, Church of the Epiphany, and Potomac Falls Church – are "plants" of Truro Church and The Falls Church[3] and may be bound by the contractual obligations of their parent as privies.

---

[3] *See* Potomac Falls Church's Answer, Grounds of Defense, and Counterclaim to the Complaint Filed by the Diocese at 10 (Grounds of Defense ¶ 12) (filed Sept. 17, 2007) (describing itself as a

(footnote continued ...)

In sum, whether the current members of those congregations use property deeded before 1867 or not, the Court needs to take evidence and make findings regarding the formation and history of the Congregations. This evidence will be developed during discovery and presented at the October 2008 trial. The Congregations' suggestion that all such discovery and evidence may be ignored is incorrect.

B. The Congregations' arguments regarding the pre-1867 deeds are unfounded.

Even if protected contractual interests were limited to those founded on deeds alone, the Congregations' characterization of the deeds they discuss is wrong; and an evidentiary record must be developed to interpret the deeds at issue, once all relevant deeds have been identified and brought before the Court.

In an effort to show that certain pre-1867 deeds do not support the Church's and the Diocese's claims,[4] the Congregations wrongly assert that the two 1746 deeds now associated with The Falls Church "conveyed property to the vestry for the congregation of The Falls Church (then directly under the Church of England) for 'such use as the said vestry shall think proper.'" Congregations' Brief at 7. That is not what those deeds say. The deed dated March 19, 1746, actually provides:

> This Indenture made the 19th day of March in the year of our Lord one thousand seven hundred and forty-six Between John Trammell of Truro parish in Fairfax County of the one part and *the Vestry of the said parish of Truro in Fairfax County* of the other part Witnesseth that the said John Trammell for and in

---

(footnote continued:)

"church plant operating under the authority of The Falls Church"); Epiphany Report of Congregational Determination (filed Jan. 16, 2007) ¶ 4 ("Epiphany Church was established in 1986 as a church plant of Truro Church"); Apostles Report of Congregational Determination (filed Dec. 18, 2006) ¶ 4 ("Apostles Church was established in 1968 as a church plant of Truro Church, Fairfax, Virginia").

[4] The Congregations do not discuss the language of the pre-1867 St. Paul's Church deed they have now identified. *See* n.1, *supra*. They have not yet produced the newly discovered deed.

> consideration of five Shillings Sterling to him in hand paid by *the said Vestry* ... hath granted bargained and sold and by these presents doth grant bargain and sale unto *the said Vestry of Truro parish* a certain parcel of Land containing two Acres Scituate and being in the parish and county aforesaid where the upper church nave[?] is to be laid off[?] in Such manner as the said Vestry shall think proper ... To have and to hold the said Tract or parcel of Land and all and Singular other the premises hereby granted with the appurtenances unto *the said Vestry of Truro parish and their Successors* ...

Ex. 12 to the Praecipe Indexing Documents Filed Pursuant to Motion Craving Oyer (filed June 15, 2007) (emphases added) (attached hereto as Exhibit A, together with a transcription). The deed of the following day is also to the "Vestry of Truro parish" and is otherwise similar, but not identical. *See id.* (attached as Exhibit B, together with a transcription). "The Falls Church" does not appear in either, nor does any reference to use by the congregation, nor "such use as the said vestry shall think proper," a misquote.[5]

The Congregations' arguments also overlook the historical context and ignore the difference between historical parishes, on the one hand, and churches or congregations on the other. In 1746, Virginia had an established church. Colonial Virginia parishes were not individual churches but geographical units whose physical boundaries were determined by the Virginia House of Burgesses (similar in size and with boundaries that often corresponded to Virginia counties). Vestries were local units of government responsible for not only ecclesiastical but also certain governmental functions within the boundaries of their parish. Most vestries, including the "Vestry of Truro parish," had responsibility for multiple congregations and church buildings. Vestries financed the expenses of the parish through an annual tax levied throughout the parish for the use and benefit of the entire parish. Consequently, the 1746 land

[5] This is not the first time that the Congregations have provided an inaccurate description of the contents of relevant deeds to the Court. *See* Brief in Opposition to Demurrers and Pleas in Bar (filed July 13, 2007) at 5 n.4 and Ex. A (correcting the errors in the Congregations' Memorandum in Support of Demurrers and Pleas in Bar (filed June 22, 2007) at 6 & Ex. 1).

purchase and church building was financed by all of the people within the bounds of the parish, not just those who were members of that particular congregation. Historical evidence will be required to interpret the 1746 deeds.

The Congregations appear to assume, without reference to historical evidence or law, that the present congregational majority of The Falls Church is the successor to the "Vestry of Truro parish." A record must be developed on this point. To illustrate the need, the Episcopal Church and the Diocese note as follows. In 1765, the legislature divided Truro Parish, and the Vestry of Fairfax Parish succeeded to the property that was the subject of the 1746 deeds. Disputes arose after disestablishment regarding whether entities within the Episcopal Church had succeeded to title and could convey good title to properties formerly held by the established Vestries. Indeed, in an 1824 decision, the United States Supreme Court rejected the objection of "a Vestry ... chosen de facto, by persons purporting to belong to the Falls Church" and determined that the Vestry of a different Episcopal church, Christ Church in Alexandria, "is, in succession, the regular Vestry of the parish of Fairfax." *Mason v. Muncaster*, 22 U.S. (9 Wheat.) 445, 457, 469 (1824).[6] The Congregations offer a misleading and incomplete portrayal of the 1746 deeds in order to encourage the Court to avoid even inquiring into any of the above matters. The Court cannot and should not accept such an invitation.

---

[6] The Supreme Court reached its decision in *Mason* after a review of facts and evidence that is instructive in several respects. For example, the decision recognizes that local Episcopal entities were often interdependent and jointly administered, *see* 22 U.S. at 456; that churches operated "under the direction and authority of the General Episcopal Church of Virginia" and that vestries were elected according to "the canons of that church, made in conformity with the laws of Virginia, and never repealed," *id.* at 459; that the General Assembly provided that "all religious societies might, according to the rules of their sect, appoint, from time to time, trustees to manage their property" and that the Episcopal Church subsequently "adopted general regulations on this subject," *id.* at 460; and that "new Episcopal societies are not admitted to be formed within the bounds of existing parishes, without the consent of the proper ecclesiastical authority," *id.* at 464.

With respect to the 1852 deed, also associated with the Falls Church, the Congregations' assertions flout basic principles of document interpretation, both generally and regarding church property in particular. The deed is to certain individuals as "Trustees of the Episcopal Church, known and designated as the 'Falls Church' in Fairfax County, ... and their Successors." Ex. 12 to Praecipe Indexing Documents (reattached hereto as Exhibit C, together with a transcription). The Congregations say that the deed's reference to "the Episcopal Church" "simply describes The Falls Church and clarifies that the deed was conveying property to the Church," as opposed to "Falls Church," the City. Congregations Brief at 8.[7]

Under the Congregations' interpretation, the denominational identification is meaningless – one could remove the word "Episcopal" entirely, and exactly the same purpose would be achieved. As a general matter of document construction, the Congregations' interpretation is therefore impermissible. *See, e.g., TM Delmarva Power, LLC v. NCP of Va., LLC*, 263 Va. 116, 119, 557 S.E.2d 199, 200 (2002) ("no word or clause in a contract will be treated as meaningless if a reasonable meaning can be given to it, and parties are presumed not to have included needless words in the contract").

With respect to church property, a deed's recognition of a denominational affiliation is an important part of the identification of the grantee that limits for whom the property may be held:

> In one of the deeds the conveyance was made to the church trustees "for the erection of a church building to be used as a place of worship by the Episcopal

[7] Although the Church and the Diocese believe the Congregations' interpretation of the 1852 deed can be rejected as a matter of law, for the reasons stated herein, accepting it would require an evidentiary record because it is based on the history of Falls Church as a locality, a matter not before the Court. For example, Falls Church did not become a township, let alone an independent city, until long after the deed was drafted. *See* the City of Falls Church, "About Falls Church" ("Falls Church became a township in 1875 and an independent city in 1948..."), *at* http://www.fallschurchva.gov/Content/CultureRecreation/AboutFallsChurch.aspx?cnlid=529 (last visited May 5, 2008).

> Congregation of Clifton Forge Parish." The other deed contains no statement of purpose, but the conveyance was made to named "Trustees of St. Andrew's Episcopal Church of Clifton Forge, Virginia." *It is evident that the designated cestui que trust in each deed was a unit or component of the Protestant Episcopal Church in the United States of America within the then existing diocese.* It cannot be successfully questioned that the abbreviated and commonly accepted name for that church is and always has been "The Episcopal Church." Therefore, *a reasonable interpretation of these deeds leads inescapably to the conclusion that the trustees cannot hold title to the subject property for persons or groups who are withdrawn from and not under the authority of The Episcopal Church.*

Burhman, 5 Va. Cir. at 503 (emphases added; footnote omitted). *See also Green v. Lewis*, 221 Va. at 553, 272 S.E.2d at 184:

> Concerning the status of Lee Chapel, a reference to the original deed discloses that Lee Chapel has been an A.M.E. Zion Church for more than 100 years. The grantors conveyed the property to "Trustees of the A.M.E. Church of Zion." The conveyance was for the purpose of erecting an A.M.E. Church of Zion (to be known as Lee Chapel), not a church of some other denomination, or an independent church. And this is what occurred.

(A copy and transcription of the *Green v. Lewis* deed is attached as Exhibit D).

The Congregations have argued previously that *Green v. Lewis* is distinguishable based on the language of the deed. That supposed distinction falls apart under close scrutiny – both the 1852 deed regarding The Falls Church and the 1875 deed in *Green v. Lewis* were to "Trustees of [name of hierarchical church]," with later reference to the local part of that hierarchical church expected to use the property.[8] Beyond that, however, *Green v. Lewis* contradicts other arguments critical to the Congregations' case: (1) that this Court must, in interpreting deeds,

---

[8] *Green v. Lewis* shows that references to the local part of the hierarchical church expected to use the property do not change the effect of a denominational specification. In addition to referring to the name of that local part ("a A.M.E. church of Zion to be known as Lee's Chapel"), the *Green v. Lewis* deed also referred to the two grantors and the A.M.E. Church of Zion as being "all of the County of Chesterfield." Ex. D. The Supreme Court of Virginia held nonetheless that the hierarchical church ("the A.M.E. Zion Church") "is the grantee in the deed, the property having been conveyed to trustees of that church to establish an A.M.E. Zion Church thereon." 221 Va. at 555, 272 S.E.2d at 186.

ignore modern Virginia law and apply cases that interpreted former statutes as not allowing trusts for supercongregational churches, and (2) that Virginia law in the 1800s did not recognize denominational interests. If the Congregations' arguments were correct, the 1875 deed in *Green* could not have been a valid deed to the denomination. Yet, that is precisely how the Supreme Court of Virginia construed the deed.[9]

The principle that a deed's recognition of a denominational affiliation restricts for whom the deeded property may be held stretches back to at least the 1870s. *See Hoskinson v. Pusey*, 73 Va. (32 Gratt.) 428, 431-32 (1879) (emphasis added):

> Who, then, are the *cestuis que trust* under the deed in question, the beneficiaries entitled to the control and use of the "Harmony" church building? *Looking to the deed alone, the answer would be, those who are members of the congregation or local society, and, as such, members of the Methodist Episcopal Church.* According to the test applied in *Den v. Bolton*, 18 N.J.L. 210, cited with approbation in the opinion of Judge Daniel in *Brooke & others v. Shacklett*, *supra* [54 Va. (13 Gratt.) 301 (1856)], "to constitute a member of any church, two points at least are essential, without meaning to say that others are not so, a profession of its faith and a submission to its government."

The *Hoskinson* Court analyzed the evidence regarding which of the two groups of local members satisfied the test of continued adherence to the denomination that the deed referenced:

> Although a question is raised in the record as to the membership of the appellees, *the evidence satisfies me that they are, and some of them have been for many years, members of the Methodist Episcopal Church.... They profess its faith, receive the pastors assigned by it, and submit to its discipline and government. On the other hand, it is not pretended that the appellants, and those they represent, are members of that church. They neither recognize its authority, nor submit to its government, but deny and resist both.* The proof is clear, and the fact

---

[9] The Congregations recognize that *Green* "conclud[ed] that the property at issue was titled in the name of trustees for the national church, not trustees for the local congregation" but fail to appreciate the resulting fatal flaw in their argument that "[t]hroughout Virginia's history, and until at least ... 1993 ... church property used for religious purposes could be held by trustees *only* for the benefit of local congregations, not for the benefit of a general church or diocese." Memorandum in Support of Demurrers and Pleas in Bar (filed June 22, 2007) at 16, 9 n.4. *See also* Congregations' Brief at 9-10.

> is not disputed, that they are and claim to be members of another and distinct organization, the Methodist Episcopal Church South, recognizing its authority, submitting to its government, and asserting for themselves, and the ministers assigned by this church, a claim to the exclusive use of the church building.

Id. at 432 (emphasis added). The Court affirmed the decree in favor of those who adhered to the Methodist Episcopal Church, the denominational affiliation recognized in the deed. *Id.* at 444.

C. Virginia recognized denominational interests prior to 1867.

The Congregations next argue that the Episcopal Church and the Diocese could not possibly have any rights or interests in property existing prior to 1867 because Virginia law at that time did not recognize "denominational interests" in church property. *See* Congregations' Brief at 9. That argument recycles their demurrer and plea in bar briefing from last summer, *see* Memorandum in Support of Demurrers and Pleas in Bar at 9 n.4 (filed June 22, 2007), and it should be rejected again – for the reasons discussed in the preceding section and for those that follow as well.

In *Brooke v. Shacklett*, 54 Va. (13 Gratt.) 301 (1856), the Supreme Court of Virginia distinguished the *conveyance* of property to a local religious congregation from the *holding* of property by a local congregation that belongs to a hierarchical church. After validating the deed at issue and holding that title was secured in the local congregation,[10] the Court went on to explain that the congregation nonetheless was bound by the government of the hierarchical denomination, thus vindicating precisely the same type of "denominational interest" in property that the Church and the Diocese seek to establish here:

> "…. To constitute a member of any church, two points are essential … a profession of its faith and a submission to its government." [Citation.]

[10] The Court explained that if the deed were not a valid conveyance, then it would have had no jurisdiction over the case. 54 Va. at 309-10.

> The local society ... is not a separate and independent society making its own laws, but is one of a large number of local societies belonging ... to the Methodist Episcopal church in the United States.... If at any time ... a controversy had arisen among the members of the [local] society ... in respect to the occupancy of the house ... the dispute must have been determined by enquiring not which of the two parties constituted a majority, or represented the wishes of a majority, but ... which of the two parties was acting in conformity with the discipline of the church and submitted to its lawful government.

Id. at 320-21. The Court in *Brooke* thus recognized that a local congregation of a hierarchical church generally is restricted by the discipline and government of the hierarchical denomination, and that once in possession of property a local congregation also is restricted by the hierarchical denomination in the use and holding of that property.

Similar denominational interests in church property were recognized and enforced in *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980), which also involved a 19th century congregation and deed, and in *Buhrman*, 5 Va. Cir. 497. *See also Norfolk Presbytery*, 214 Va. at 508, 201 S.E.2d at 758 (Virginia did not recognize an "implied trust theory" at that time, but "this does not mean that our civil courts are powerless to prevent a hierarchical church from being deprived of contractual rights in church property held by trustees of a local congregation").

This restriction on the holding and use of property, which the Virginia Supreme Court has recognized since at least 1856, is precisely what is at issue in this litigation.

The Congregations urge the Court to reject the possibility of a denominational interest in local church property under outdated law because current law even more strongly refutes their position. While the General Assembly once may have been fearful or jealous of denominations – limiting their property holdings and banning their incorporation, for example – the General Assembly now defers to the "laws, rules, or ecclesiastic polity" of "an unincorporated church or religious body" in defining the powers of a corporation created by that body with respect to property. Va. Code § 57-16.1. In the past, Virginia courts interpreted the Commonwealth's

former religious trusts statute as refusing to recognize trusts for non-local religious groups, but the General Assembly now has removed all grounds for a restrictive statutory interpretation, clarifying the validity of "[e]very conveyance or transfer of real or personal property ... made to or for the benefit of any church, church diocese, religious congregation or religious society." Va. Code § 57-7.1. Courts have invalidated some of the legal relics on which the Congregations' arguments rest. *See, e.g.*, *Falwell v. Miller*, 203 F. Supp. 2d 624, 632 (W.D. Va. 2002) (invalidating Virginia's ban on church incorporation, a feature of Virginia law noted in *Norfolk Presbytery*, 214 Va. at 505, 201 S.E.2d at 757, as support for the Court's construction of former Code § 57-7 to exclude trusts for supercongregational entities). And the General Assembly itself has disposed of others. *See, e.g.*, 2003 Va. Acts ch. 813 (repealing the limit on church property holdings created long ago).

Furthermore, for the Court to accept the Congregations' invitation to turn back the clock and expand already outdated Virginia law to preclude not only denominational "trusts," but any denominational "interest," would be unconstitutional. The more that the Congregations argue that 19th century Virginia law preferred local religious groups over denominations or dioceses,[11] in fact, the more they demonstrate that such law was and is fundamentally inconsistent with both Article I § 16 of the Constitution of Virginia and the First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment. *See* Diocese Brief at 27-28 (based on the evidence, § 57-9 had an improper purpose), 28 n.21 (other statutes and case law of that era also may have had impermissible purposes), 10-14, 23-26, and 28-29 (as

[11] *See* Congregations' Brief at 10 ("there can be no dispute that in 1867, church property used for religious purposes could be held by trustees only for the benefit of local congregations, not for the benefit of a denomination of diocese").

interpreted by the Congregations, § 57-9 is not neutral or generally applicable and impermissibly favors some religious groups over others).

D. The evidence will show that the rules and polity of the Episcopal Church and the Diocese have always restricted the use and control of local Church property.

Finally, the Congregations argue that the Church and the Diocese cannot establish evidence of a proprietary interest in any property acquired before 1867 because the earliest "current" canon referenced in the complaints, Canon II.6, was adopted in 1868. The Congregations again are wrong.

At the outset, the Congregations question the binding nature of the Church's Canons by pointing to various comments in the expository paragraphs of Edwin Augustine White, *Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America* (1924) ("White & Dykman"), as supposedly revealing the Episcopal Church's "official view" that canons cannot be legally enforced. Congregations' Brief at 12.[12] That suggestion is wholly unfounded. As the published case law from around the country – and

---

[12] The Congregations argue that statements in the White & Dykman treatise are "party admissions." Congregations' Brief at 13 & n.9. We believe they are wrong, and thus that evidentiary issue will have to be tried. In any event, the Congregations' attempt to establish a highly fact-based relationship – agency – through a footnote in briefing on wholly different issues is a distraction. Even if the statements in White & Dykman are "party admissions," and thus survive a hearsay objection, that does not make them a verity. The Congregations' footnote does not address the widespread and consistent body of case law in which courts, at the urging of the Episcopal Church or its dioceses, have given effect to the property provisions of the Constitution and Canons. Nor does the Congregations' footnote address the uncontradicted testimony – the admissions – of their own officers and ecclesiastical officials that the Constitutions and Canons are binding on congregations and their leaders, who must "well and faithfully perform the duties of their office" in accordance with them. TEC/Diocese Ex. 1, Canon I.17(8); *accord* Tr. 395-96 (Guernsey), 507-09 (Yates). *See also* TEC/Diocese Ex. 1, Art. VIII (ordination oath); Tr. 339-40 (Minns) (same), 393-94 (Guernsey) (same), 506-07 (Yates) (same); TEC/Diocese Ex. 3, Canon 11.8 (vestry oath); Tr. 345-46 (Minns) (same), 449-50 (Julienne) (same), 702-03 (Allison) (same).

indeed, this litigation – demonstrates beyond dispute, the Episcopal Church and its dioceses have consistently sought to enforce their interests in local parish property, and the civil courts have consistently agreed.[13] Indeed, more recent editions of White & Dykman make clear that the Church's 1979 trust canons were adopted by the General Convention precisely to ensure that the Episcopal Church's historic trust interest would be enforced by the civil courts, in accordance with the direction provided by the Supreme Court in *Jones v. Wolf*. *See* I White & Dykman, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America* (R. Royce, Ed. 1981) at 301-02 (the 1979 General Convention adopted what is now Canon I.7(4) and (5) in response to the Supreme Court's "invitation" in *Jones v. Wolf*, "lend[ing] further support" to the reasoning of courts which have held that property held by seceding churches reverts to the diocese because of specific language in church charters and diocesan canons). The 84-year-old quote on which the Congregations principally rely, regarding the "legal force" of Canon II.6 (which prohibits the alienation of consecrated church property without the consent of the bishop), is not to the contrary: Whether that canon alone would be adequate to invalidate a conveyance vis-à-vis an innocent third party purchaser is

---

[13] *See, e.g., Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85, 108 (Colo. 1986) (upholding the Church's trust interest based on canons pre-dating I.7(4)); *Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Episcopal Church in the Diocese of Conn.*, 620 A.2d 1280, 1292 (Conn. 1993) (Canon I.7(4) "merely codified in explicit terms a trust relationship that has been implicit in the relationship between local parishes and diocese since the founding of [the Church]"); *Episcopal Diocese of Mass. v. DeVine*, 797 N.E.2d 916, 923 (Mass. App. 2003) (enforcing Canon I.7(4)); *Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville*, 684 N.Y.S.2d 76, 81 (App. Div. 1999) (Canon I.7(4) "expressly codifies a trust relationship which has implicitly existed between the local parishes and their dioceses throughout the history of the ... Church"); *Daniel v. Wray*, 580 S.E.2d 711, 718 (N.C. App. 2003) (Canon I.7(4) required disaffiliating parish members to relinquish possession and control of parish property); *In re Church of St. James the Less*, 888 A.2d 795, 810 (Pa. 2005) (Canon I.7(4) is enforceable where the parish historically had been subject to numerous national and diocesan canons restricting its control of property).

indeed questionable. Such considerations, however, are irrelevant here. The Canons are binding rules of this voluntary association, enforceable against its members.

Nor is it of any moment that the earliest "current" canon on which the Church and the Diocese rely was adopted in 1868. As noted previously, the Episcopal Church's and the Diocese's claims to a "contractual or proprietary" interest in the property at issue do not rest on *any* single source, but will be proven, under applicable Virginia statutes and case law, through the deeds, the Constitutions and Canons of the Church and the Diocese, and the course of dealing between the parties. *See Green v. Lewis*, 221 Va. at 555, 272 S.E.2d at 185-86. From the founding of the Episcopal Church in the United States, it was understood that a local church's entitlement to property depended on its affiliation with the larger Church. Demonstrating this, Diocesan Canon I.7, which was adopted in 1793 and cited in the Episcopal Church's Complaint at ¶ 42, stated that "[t]he vestries respectively, with the Minister, ... shall hold and enjoy all glebes, lands, churches, looks, plate, and other property *now belonging or hereafter accruing to the Protestant Episcopal Church*, within their respective parishes ...." (emphasis added). Similarly, former Diocesan Canon I.10 stated: "No sale of such property, as is the nature of principle or stock, *belonging to the Episcopal Church in any Parish*, shall be made without the consent of the convention." *Id.* (emphasis added).

The Congregations assert that pre-1867 canons are irrelevant because such canons have been changed or superseded over the years. To the contrary, these 1793 canons, together with substantial other documentary and expert evidence that the Church and the Diocese will present at trial, will show that the polity and rules respecting parish property now reflected in Canons I.7(3), I.7(4), II.6, and III.9(5), among others, have been part of the Church since its inception. For example, the 1852 deed to The Falls Church grants property to Trustees of the Episcopal

Church, as embodied in the local church called the Falls Church. That deed embodies the well established principle of Episcopal polity, expressed in former Diocesan Canon I.7, that the Church's dioceses and churches are integral and inseparable parts of the Church and are regional and local extensions of the Church. The same principle is expressed in the formal name of the Diocese: The Protestant Episcopal Church in the Diocese of Virginia. In the Episcopal Church, a local church cannot exist independently of its diocese and the Church,[14] much the same way that the County of Fairfax does not exist independently of the Commonwealth of Virginia and the United States. The County of Fairfax is a distinct (but not separate) legal entity, with its own spheres of delegated responsibility; but the County is still an integral and inseparable part of both the Commonwealth and the United States and subject to the laws of both.

In sum, while the format of the Episcopal Church's rules have changed over the course of several centuries, their substance and force has not.

None of this evidence, of course, is before the Court at this time, and the related issues are not ready for decision. At the October trial, the Episcopal Church and the Diocese will present expert and documentary evidence of the nature of the relationships among the Episcopal Church, the Diocese and their parishes prior to 1867. For present purposes, however, the Congregations' suggestion that the Contracts Clauses cannot be implicated here, because the

---

[14] In contrast, in congregational denominations, a principal tenet of the faith is the predominance of the local church above all else. *E.g.*, *Bland v. W. Va. Annual Conf. of the United Methodist Church*, 198 S.E.2d 812, 827 (W.Va. 1972). Thus, local congregations are fully autonomous and decide for themselves their religious doctrine, organization and government. *See id.* Local congregations may join other congregations under the umbrella of a national organization in achieving common goals, but the association is always subordinate to the wishes of the local church, which is free to come and go as it pleases. *Id. See also Baber v. Caldwell*, 207 Va. 694, 697 152 S.E.2d 23, 26 (1967) ("Congregational autonomy was a major tenet of the founders of the Christian Church," a denomination with a congregational polity). The Episcopal Church does not adhere to this religious belief, and accordingly its polity does not permit or recognize the unilateral withdrawal of local churches.

earliest current Canon reflecting the Church's historic interest in Church property was adopted in 1868, can and must be rejected.

III. The October trial will be required as to all of the Congregations regardless of the scope of the Contracts Clause issues.

The Congregations' suggestion that the Court may dispense with the October trial, based solely on a premature analysis of the Contracts Clauses, also assumes erroneously that there will be no *other* reasons to hold that trial. In this the Congregations are again mistaken. As the Church and the Diocese have consistently maintained, even in the absence of the Contracts Clause issues, the Court will have to consider the legal argument and evidence that will be presented in the context of the declaratory judgment cases in order to resolve this litigation.[15]

A. The Episcopal Church and the Diocese have maintained consistently that fully adjudicating § 57-9 requires addressing the declaratory judgment actions.

The Congregations argue that the Diocese's and the Episcopal Church's position on the effect of § 57-9(A) has changed, reaching back to the initial scheduling conference letters of May 11, 2007. *See* Congregations' Brief at 3 n.2. Contrary to the Congregations' suggestion, however, those letters do not state, or even suggest, that resolution of the matters set for hearing in October might dispose of the need for trial on the declaratory judgment actions. To the contrary, the letters explicitly recognize that there is overlap between the 57-9 and declaratory

---

[15] As described herein, the declaratory judgment actions will have to proceed against all of the Congregations, regardless of the outcome of the § 57-9 actions. We note, however, that two of the congregations urging the Court to simply ignore those claims, Christ the Redeemer and Potomac Falls Church, did not even file § 57-9 petitions. The Virginia Supreme Court has made clear that compliance with § 57-9's terms is a necessary predicate to its application. *See Hoskinson v. Pusey*, 73 Va. 428, 439 (1879) ("It is a sufficient answer [to a claim based on what is now § 57-9] that it does not appear by the record that the provisions of the statute have been fully complied with..... [T]here is no evidence that the determination of the congregation manifested by the vote was reported to the circuit court ....").

judgment actions,[16] and they do not discuss the precise contours of that relationship. Nor do they contain any list – much less an exhaustive one – of the issues that must be adjudicated to determine the interpretation and application of § 57-9(A) or specify which issues would remain in the event that certain statutory predicates, such as "division" and "branch," were found to have been satisfied.

Those issues have been discussed, however, in briefing that the Court requested and in the parties' submissions since the trial. On August 31, 2007, the Court ordered the parties to respond to four questions directed at the nature of the relationship between § 57-9 and the declaratory judgment actions. The responses were the only pre-trial briefing on that issue. The Episcopal Church and the Diocese made clear at that time that the § 57-9 petitions could not be resolved in favor of the congregations without examining the claims in the declaratory judgment actions. The Church and the Diocese explained that if this Court decided the specific issues set for trial in November 2007, then § 57-9(A) would be just one of the Virginia statutes that this Court should consider in resolving these church property disputes under the "neutral principles" approach:

> If the Court were to rule that the statutory predicates of "division" and "branch" are present here, on the other hand, then the merits of the § 57-9 actions would be inextricably entwined with the merits of the Declaratory Judgment actions. The Court would then have to consider, in conjunction with the merits of the Declaratory Judgment actions, whether in view of the developed evidentiary record concerning the deeds to the property, the Church's and the Diocese's Constitutions and Canons, the course of dealings between the parties, and in view of all applicable law – including but certainly not limited to § 57-9 – the congregations may unilaterally alienate Episcopal parish property from the Church through a majority vote.

---

[16] *See, e.g.*, Letter from Bradfute W. Davenport, Jr. (May 11, 2007) at 2 ("There is no question that the cases involve similar procedural and substantive issues").

The Diocese of Virginia's and the Episcopal Church's Response to August 31, 2007, Order of the Court (filed Sept. 10, 2007) ("Four Questions Brief") at 2. That is exactly what has happened, and all that has happened, as a result of the Court's April 3, 2008, Opinion and Order.

The Church and the Diocese also explained that the November 2007 trial would not resolve all constitutional issues and suggested that remaining constitutional issues "should be tried simultaneously with the Declaratory Judgment actions":

> The Church and the Diocese submit that the same facts and law that will establish their trust, contractual and proprietary rights in the subject property asserted in the Declaratory Judgment actions will also establish that the churches may not use § 57-9 to alienate property from the Church and the Diocese and that the statute as applied to those facts would be unconstitutional, should it become necessary to reach those issues. [Four Questions Brief at 3-4.]

Thus, the Church and the Diocese have consistently maintained that "[t]he Court cannot decide the 57-9 actions in favor of the congregations without considering the full range of evidence and law that will be applicable to the Declaratory Judgment actions." *Id.* at 5; *see also* Motion for Leave to Proceed with Discovery, Motions Practice, and Scheduling in the Declaratory Judgment Actions (filed Nov. 30, 2007) at 3-4 ("the CANA congregations' assertions regarding the impact of a ruling in their favor in the 57-9 actions are not and cannot be correct"); the Episcopal Church's Supplemental Brief on Constitutional Issues ("Episcopal Church Brief") (filed April 23, 2008) at 24-25 ("there is nothing in [§ 57-9] that is either inconsistent with or would appear to override the Virginia Supreme Court's direction that to resolve a church property dispute, the Virginia courts are to consider the deeds to the property, the rules of the general church involved, and the course of dealing between the parties *in addition* to any applicable state statutes"). The Congregations' argument that the Church and the Diocese have changed their position is mere wishful thinking.

B. Religious entities retain the right to arrange their property affairs other than as provided in § 57-9(A).

Consistent with Virginia Supreme Court authority, § 57-9(A), if it applies and is constitutional, must be construed *in pari materia* with other, related statutes in Title 57 and other neutral principles factors. *See Green v. Lewis*, 221 Va. at 552-53, 272 S.E.2d at 184 (discussing § 57-9 in conjunction with § 57-15 and reading § 57-9 as supporting the Court's construction of § 57-15); *Norfolk Presbytery v. Bollinger*, 214 Va. at 507, 201 S.E.2d at 758 (in applying neutral principles of law, evidence of contractual or proprietary rights requires consideration of deeds and constitution of general church in addition to state statutes). *See also* Four Questions Brief at 5 ("The Court cannot decide the 57-9 actions *in favor of the congregations* without considering the full range of evidence and law that will be applicable to the Declaratory Judgment actions..."). There is nothing in § 57-9(A) that is inconsistent with the Supreme Court's directive in *Norfolk Presbytery* and other cases; to the contrary, the votes described in § 57-9(A) purport to be "conclusive as to the title to and control of" property only "*if* the determination be approved by the Court." Such approval may not be given regardless of other considerations. *Cf. Norfolk Presbytery*, 214 Va. at 501, 507, 201 S.E.2d at 753, 758 (reversing Circuit Court's decision to "approve" a petition under § 57-15 without considering rules and potential interest of hierarchical church).

In addition, other Virginia Supreme Court authority confirms that parties ordinarily may order their own private affairs through various contractual arrangements, and those contractual arrangements will supersede any statutory rule that may otherwise apply. *See* Four Questions Brief at 7-8 & n.5; Episcopal Church Brief at 26-27; *see also* subsection 1, *infra*. For these reasons – and quite apart from the constitutional issues that have been raised – the declaratory

judgment actions as to all congregations will have to be tried and resolved, regardless of the Court's rulings on § 57-9(A).

1. Section 57-9(A) does not impose a mandatory rule.

The Congregations claim, without any legal support, that § 57-9(A) establishes a voting "right" that would necessarily supersede the Church's and the Diocese's claims. The plain language of § 57-9(A) shows that the so-called "right" to vote is only permissive ("members ... may ... vote") and establishes that the vote may impact property rights only "if" – and not "when" – the circuit court decides to approve the congregational "determination." The Supreme Court of Virginia has required application of "neutral principles" in resolving church property disputes. That approach must be employed in the 57-9 approval analysis.

There is nothing in the statute that precludes an individual from donating property to or for a congregation or parish of the Episcopal Church, and no other, through appropriate language in a deed. *See, e.g., Burhman*, 5 Va. Cir. at 503 ("It is evident that the designated *cestui que trust* in each deed was a unit or component of the Protestant Episcopal Church in the United States of America within the then existing diocese").

Similarly, nothing in § 57-9(A) precludes a hierarchical church and its members from establishing a church structure under which a local congregation may *not* unilaterally withdraw or by majority vote decide the use of property. Indeed, the Virginia Supreme Court has recently rejected a similar argument with respect to a different statute. In *Bayview Loan Servicing, LLC v. Simmons*, 275 Va. 114, 654 S.E.2d 898 (2008), the Supreme Court of Virginia considered a case involving a deed of trust executed in 1998. The deed of trust provided that the note holder was required to provide pre-acceleration notice of any breach of the deed prior to any acceleration of the indebtedness. *Id.* at 118, 654 S.E.2d at 899. But Va. Code § 55-59.1(A), enacted in 1979 –

nearly twenty years before the parties entered into the contract – provided that a "written notice of proposed sale ... shall be deemed an effective exercise of any right of acceleration contained in such deed of trust." *Id.* at 119, 654 S.E.2d at 900. The holder argued that the statute superseded the contractual provisions regarding written notice and acceleration. *Id.* at 119-20, 654 S.E.2d at 900-01. The Court disagreed. It held that although a notice of sale "*could* act as the exercise of the 'right of acceleration' under the Deed of Trust, *Code § 55-59.1(A) does not establish a statutory mandate as to whether such 'right of acceleration' is in existence and capable of being exercised by the foreclosure notice. Such a determination remains a matter of contract between the parties.*" *Id.* at 121, 654 S.E.2d at 901 (emphases added). In other words, despite the "shall" language used in the statute, the contract signed twenty years later governed, and under that contract the note holder did not have the right to take advantage of the statutory procedures. *See id.* at 121-22, 654 S.E.2d at 901. *See also, e.g., Jampol v. Farmer*, 259 Va. 53, 58, 524 S.E.2d 436, 439 (2000) (permissive statute providing that terms of a certificate of deposit "may" be amended according to statute did not preclude parties from amending terms in an alternate manner); *Board of Supervisors v. Sampson*, 235 Va. 516, 520-22, 369 S.E.2d 5, 7-8 (1988) (contract term setting time for initiating lawsuit controlled, notwithstanding statutory right to bring suit under longer statute of limitations).

Likewise, the parties to this litigation entered into contractual relationships that do not give the Congregations the right to divert property from the Episcopal Church through the unilateral action of a congregational majority, and § 57-9(A) "does not establish a statutory mandate as to whether such [rights are] in existence and capable of being exercised" through a congregational vote. These matters "remai[n] a matter of contract between the parties." *Bayview*, 275 Va. at 121, 654 S.E.2d at 901.

2. If a "waiver" analysis applies, discovery and evidence are needed regarding whether the Congregations have waived the right to assert § 57-9(A).

The Congregations have asserted that § 57-9(A) establishes a "right" to governance by congregational majority in some circumstances, and that such a "right" could only be given up through an express waiver. The Church and the Diocese do not agree that waiver is the required analysis here – certainly the authorities described above do not speak in terms of a "waiver" of statutory "rights." In any event, however, it is well settled that "a party may waive by contract any right conferred by law or contract." *E.g.*, *Gordonsville Energy, L.P. v. Virginia Elec. & Power Co.*, 257 Va. 344, 355-356, 512 S.E.2d 811, 818 (1999) (citing *Roenke v. Virginia Farm Bureau Mut. Ins. Co.*, 209 Va. 128, 135, 161 S.E.2d 704, 709 (1968), and *Woodmen of the World Life Ins. Soc. v. Grant*, 185 Va. 288, 299, 38 S.E.2d 450, 454 (1946)).

Contrary to the Congregations' suggestion, waivers need not be express or in writing. *See, e.g.*, *Roenke*, 209 Va. at 135, 161 S.E.2d at 709 ("Waiver applies to any right conferred by law or contract.... *[T]he owner of such right may waive it expressly, either in writing or by parol, and impliedly by inconsistent conduct*; that is to say, a covenanter may by his conduct so lull his covenantee into security as thereby to estop himself from the exercise of a right for which he had contracted") (emphasis added; citation omitted).

Assuming that a "waiver" analysis is required or appropriate here, discovery and an evidentiary record are needed before the Court can rule on whether the Congregations have waived any "rights" that § 57-9(A) might otherwise have given them.

3. The Free Exercise Clauses guarantee religious entities the right to arrange their relationships and determine property rights without the interference of the state.

The Free Exercise Clauses protect the autonomy of religious organizations. *E.g.*, *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 721-22 (1976) ("religious freedom encompasses the 'power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine'") (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *Reid v. Gholson*, 229 Va. 179, 189, 327 S.E.2d 107, 113 (1985) ("the civil courts will treat a decision by a governing body or internal tribunal of an hierarchical church as an ecclesiastical determination constitutionally immune from judicial review. To do otherwise would precipitate the civil court into the 'religious thicket' of reviewing questions of faith and doctrine even when the issue is merely one of internal governance, because in such churches the resolution of internal government disputes depends upon matters of faith and doctrine"). *See also* Diocese Brief at 2-3, 15-17; Episcopal Church Brief at 2-9.

Jones v. Wolf made clear that religious organizations' autonomy includes the right to determine property matters, even where the state presumes rule by a majority. 443 U.S. at 606. Thus, where an arranged private rule of decision exists, the state may not displace it with majority rule. *See id.* at 607-08 ("Most importantly, 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"). Even if the Contract Clauses fail to protect the right of religious organizations to arrange their affairs with respect to property ownership, the Free Exercise Clauses do provide such protection.

CONCLUSION

For the reasons stated in the briefing of the Church and the Diocese, the Court should hold Va. Code § 57-9(A) unconstitutional. Even if the Court finds that § 57-9(A) passes muster under Va. Code § 57-2.02, the First Amendment, and Art. I §§ 11, 16 of the Constitution of Virginia, however, the Court will still have to finish adjudicating the 57-9 actions and resolve the declaratory judgment actions, including the accounting and all other relief sought therein, by conducting the October 2008 trial.

Respectfully submitted,

THE PROTESTANT EPISCOPAL CHURCH
IN THE DIOCESE OF VIRGINIA

By: _____
Of Counsel

Bradfute W. Davenport, Jr. (VSB # 12848)
George A. Somerville (VSB # 22419)
Joshua D. Heslinga (VSB # 73036)
Troutman Sanders LLP
Post Office Box 1122
Richmond, Virginia 23218-1122
(804) 697-1200
fax: (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

THE EPISCOPAL CHURCH

By: Heather H. Anderson /mcz
Of Counsel

Heather H. Anderson (VSB # 38093)
Adam Chud (*pro hac vice*)
Soyong Cho (VSB # 70896)
Goodwin Procter
901 New York Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 346-4000
Facsimile: (202) 346-4444

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were sent by electronic mail to all counsel named below and by first-class mail to the lead counsel at each firm (indicated with a asterisk below), on this 9th day of May, 2008:

* Gordon A. Coffee, Esquire (gcoffee@winston.com)
Gene C. Schaerr, Esquire (gschaerr@winston.com)
Steffen N. Johnson, Esquire (sjohnson@winston.com)
Andrew C. Nichols, Esquire (anichols@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, Esquire (gpeterson@sandsanderson.com)
J. Jonathan Schraub, Esquire (jjschraub@sandsanderson.com)
Heather A. Jones, Esquire (hjones@sandsanderson.com)
Sands Anderson Marks & Miller, P.C.
1497 Chain Bridge Road, Suite 202
McLean, Virginia 22101
Counsel for Truro Church and certain associated individuals

* Mary A. McReynolds, Esquire (marymcreynolds@mac.com)
Mary A. McReynolds, P.C.
1050 Connecticut Avenue, N.W., 10th 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, Esquire (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

* James E. Carr, Esquire (NorthVaJim@aol.com)
Carr & Carr
44135 Woodridge Parkway, Suite 260
Leesburg, Virginia 20176
Counsel for the Church of Our Saviour at Oatlands and associated individuals

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

* Scott J. Ward, Esquire (sjw@gg-law.com)
Timothy R. Obitts (tro@gg-law.com)
Robert W. Malone (rwm@gg-law.com)
Gammon & Grange, P.C.
8280 Greensboro Drive
Seventh Floor
McLean, Virginia 22102
Counsel for The Church at The Falls – The Falls Church and certain associated individuals, Christ the Redeemer Church, and Potomac Falls Church

* James A. Johnson, Esquire (jjohnson@semmes.com)
Paul N. Farquharson, Esquire (pfarquharson@semmes.com)
Scott H. Phillips, Esquire (sphillips@semmes.com)
Sarah W. Price, Esquire (sprice@semmes.com)
Semmes Bowen & Semmes, P.C.
250 West Pratt Street
Baltimore, Maryland 21201
Counsel for The Church at The Falls – The Falls Church and certain associated individuals

* Edward H. Grove, III, Esquire (egrove@thebraultfirm.com)
Brault Palmer Grove White & Steinhilber 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, Esquire (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)

* William E. Thro, Esquire (WThro@oag.state.va.us)
Stephen R. McCullough, Esquire (SMccullough@oag.state.va.us)
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Counsel for the Commonwealth of Virginia ex. rel. Robert F. McDonnell, in his official capacity as Attorney General

* Thomas E. Starnes, Esquire (ThomasStarnes@andrewskurth.com)
Jennifer Spina, Esquire (JenniferSpina@andrewskurth.com)
Andrews Kurth LLP
1350 I Street, N.W.
Washington, D.C. 20005

Counsel for amici curiae General Council on Finance and Administration of the United Methodist Church; African Methodist Episcopal Church; African Methodist Episcopal Zion ("A.M.E. Zion") Church; Worldwide Church of God; the Rt. Rev. Charlene Kammerer, Bishop of the Virginia Annual Conference of the United Methodist Church; and W. Clark Williams, Chancellor of the Virginia Annual Conference of the United Methodist Church