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June 16, 2008

VIA HAND-DELIVERY

Fairfax County Circuit Court
ATTENTION: Robin Brooks
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

RE: *Multi-Circuit Episcopal Church Property Litigation*, (Circuit Court of Fairfax County, CL-2007-0248724);

In re: Truro Church; (Circuit Court of Fairfax County; CL 2006-15792);

In re: Church of the Apostles; (Circuit Court of Fairfax County; CL 2006-15793);

In re: Church of the Word, Gainesville; (Circuit Court of Prince William County; CL73464) (Circuit Court of Fairfax County; CL 2007-11514);

The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Epiphany, Herndon (Circuit Court of Fairfax County; CL 2007-1235);

The Protestant Episcopal Church in the Diocese of Virginia v. Truro Church (Circuit Court of Fairfax County; CL 2007-1236);

The Protestant Episcopal Church in the Diocese of Virginia v. Christ the Redeemer Church (Circuit Court of Fairfax County; CL 2007-1237);

The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Apostles (Circuit Court of Fairfax County; CL 2007-1238);

The Episcopal Church v. Truro Church et al. (Circuit Court of Fairfax County; CL 2007-1625);

Dear Ms. Brooks:

I am enclosing for filing in the above-styled case an original, CANA Congregations' Opening Brief Pursuant to the Court's June 6, 2008, Order, plus twenty-one (21) copies of the one-page cover sheets to be placed in the file for the above-styled cases.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

SANDS ANDERSON MARKS & MILLER, PC

George O. Peterson

cc: Seana C. Cranston, Law Clerk to the Honorable Randy I. Bellows (via hand-delivery)
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VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

In re:	)	
Multi-Circuit Episcopal Church	)	**Civil Case Numbers:**
Litigation	)	CL 2007-248724,
	)	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 CANA CONGREGATIONS' OPENING BRIEF PURSUANT TO THE COURT'S JUNE 6, 2008, ORDER

The Falls Church, Truro Church, Church of Our Saviour at Oatlands, Church of the Apostles, Church of the Epiphany, Church of the Word, St. Margaret's Church, Christ the Redeemer Church, St. Stephen's Church, Potomac Falls Church, and St. Paul's Church (collectively, "CANA Congregations"), by their counsel, hereby file this opening brief in response to the Court's June 6, 2008, Order.

1. **Did the Supreme Court of Virginia, in *Green v. Lewis*, hold that a trial court presiding over a 57-9(A) petition must consider the factors set out in *Green v. Lewis*, in addition to making the determinations actually set out in 57-9(A)? Does the holding of *Green v. Lewis* apply only to proceedings under 57-15, or does it apply to proceedings brought under 57-9 as well?**

The Virginia Supreme Court's decision in *Green v. Lewis*, 221 Va. 547 (1980), does not address any claim under Va. Code § 57-9, let alone provide a square holding as to the meaning of that statute. Accordingly, the Court in *Green* could not (and did not) decide whether trial courts resolving disputes under § 57-9(A) would need to consider the "factors" set forth in its opinion. As this Court observed in its April 3 Opinion, "there is no controlling case law on point with the issues confronting this Court." April 3 Op. 63. *Green* is no exception.

At oral argument on May 28, 2008, counsel for the Episcopal Church and the Diocese relied (for the first time) on copies of the circuit court petitions filed in *Green.* Counsel for the Episcopal Church argued at some length that "it is a fact that Green versus Lewis is a 57-9 case." Tr. 50:11-12.[1]

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[1] *See* May 28, 2008 Tr. Pages 49:15 to 50:12:

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MS. ANDERSON: It is true it has not discussed that issue. I would point out, however, Your Honor, that the -- actually, we have recently learned that the Supreme Court's decision in Green versus Lewis -- that case actually was filed as a 57-9 case, and I have here the petition which I prepared as an exhibit.

THE COURT: Okay. I'll take that.

MS. ANDERSON: So that is a case in which the

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parties came before the Court, the Circuit Court, on the basis of petitions pursuant to 57-9. And, of course, not only was that case decided in accordance with the principles that the Supreme Court in that case -- in that 57-9 case, that's one of the occasions in which it announced this is how these cases are to be decided.

It's true that there's a discussion in the case of the sort that the Court just identified about how to

We have now had an opportunity to review the petitions that opposing counsel handed out on May 28, 2008, as well as additional materials from the circuit court record in *Green*. Although each of the petitions contains one (and only one) reference to § 57-9, Plaintiff Green's petition simply cited the statute as a basis for invoking the court's equitable jurisdiction. *See* Petition (of Wesley J. Green) ¶ 3 (seeking an order to "restrain the defendants from using the property or entering the premises"). Neither petition contains any allegation (or denial) that (1) a "division" had occurred in the AME Zion Church with which the congregation was affiliated, or (2) the congregation voted to affiliated with a "branch" of the divided body. There is no evidence in these documents that the Circuit Court of Chesterfield County addressed or resolved any disputed claims of right under § 57-9(A).

Nor did it. Last week we obtained a copy of the circuit court's opinion in *Green*, and § 57-9 appears nowhere in that document: the sole authority cited therein is *Norfolk Presbytery*. *See* Exhibit A . Nor does the circuit court's order in *Green* contain any citation of § 57-9. *See* Exhibit B. We have no way of knowing whether our opposing counsel, in obtaining certified copies of the petitions in *Green*, also obtained and reviewed copies of the circuit court's opinion and order in that case. But even viewed charitably, the Episcopal Church's and the Diocese's attempt to portray *Green* as a § 57-9 case by pointing the Court to the initial pleadings (and nothing more) is at best misleading.

In any event, regardless of what occurred at the trial level, *Green* was not litigated under § 57-9 before the Virginia Supreme Court—which is what matters most for purposes of Question 1 in this Court's June 6, 2008, Order. Before that Court, the congregation's trustees—the parties

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9 reconcile in determining whether Jones versus Wolf should
10 apply to division and branch, et cetera. It is not really
11 clear how that is, but, nevertheless, it is a fact that
12 Green versus Lewis is a 57-9 case.

who logically would have invoked § 57-9—did not so much as *cite* § 57-9. *See* Exhibit C (Mem. of Appellee, in No. 781388). Moreover, the brief for Pastor Green, which asserted the interests of denominational officials, contained only a passing reference to § 57-9. *See* Exhibit D at 16 (Mem. of Appellant, in No. 781388). Neither brief contains any discussion of the key statutory terms in § 57-9, the relationship between § 57-9 and § 57-15, or the elements that must be satisfied for a congregational vote under § 57-9(A) to be "conclusive as to the title to and control of any property held in trust for such congregation."

That is not surprising, since it was undisputed in *Green* that the congregation became "independent" and "free from any affiliation" with a religious denomination. 221 Va. at 549. As this Court's April 3 Opinion recognizes, a "division" under § 57-9(A) involves the separation of a group of congregations from a denomination and the formation of an alternative polity (or "branch") that disaffiliating members can join. Op. 78, 80. *Green* involved neither the separation of a group of congregations from a denomination nor the formation of an alternative polity. Presumably that is why the congregation in *Green* did not press a claim under § 57-9(A). But in any event, the Court there did not discuss the requirements of § 57-9(A).[2]

It follows that the holding of *Green* applies at most to § 57-15 proceedings in which a single congregation becomes independent from its denomination, not to § 57-9(A) proceedings. And this makes perfect sense: If congregations that disaffiliated from their denomination had to receive denominational approval even when they otherwise satisfied the requirements of § 57-9(A), then § 57-9(A) would be deprived of any independent meaning. Such an interpretation is foreclosed under Virginia law. *See Natrella v. Board of Zoning Appeals*, 231 Va. 451, 461

[2] The same is true of the congregation in *Norfolk Presbytery v. Bollinger*, which became "independent and autonomous" of its former denomination. 214 Va. at 501. As the congregation there stated in its brief before the Virginia Supreme Court: "§ 57-9 is not involved in this case." Appellee's Br. 14, No. 8241 (attached as Exhibit E).

(1986) ("[t]he rules of statutory interpretation argue against reading any legislative enactment in a manner that will render any portion of it useless, repetitious, or absurd").

As this Court has recognized (Op. 80), "[t]he word 'division' has no modifiers—the words 'formal' or 'approved by the hierarchy,' or 'approved by the constituent authorities of the church . . . .' do not appear in either section 57-9(A) or (B). Interpreting § 57-9(A) to require the congregation to satisfy § 57-15 "would make 57-9(A) a nullity, for if division is defined as requiring the consent of the hierarchy, all the hierarchy need do to defeat the invocation of 57-9(A) is refuse to recognize or approve the division." Op. 81. Indeed, if a congregation had its denomination's blessing to disaffiliate, "there would be little need for a division statute, for churches would simply approve divisions and amicably divide up their property without intervention from secular institutions of government." Op. 81. Thus, for the same reason that it makes little sense to read a "denominational approval" requirement into § 57-9(A), it makes little sense to subject § 57-9(A) to the independent requirements of § 57-15, which by its terms governs "transfers" in the *absence* of any division.[3] The Episcopal Church and the Diocese simply object to the balance struck by the General Assembly in enacting *both* § 57-15 and § 57-9(A).

It is also inaccurate to read *Green* as holding that, even in the absence of a valid § 57-9 claim, the denomination automatically wins under § 57-15 if it does not approve of the congregation's departure from the denomination. If that were so, the Court in *Green* could simply have said: Approval of the denominational authorities was not given—end of case. There would have been no need to look at any governing documents, course of dealing, or deeds. The Court chose to go further, however, ruling for the minority of the congregation only after concluding that *all* of these factors favored those who remained affiliated with the denomination.

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[3] *See also* CANA Congregations' Mem. in Opposition to the Post-Trial Opening Br. of the Episcopal Church and the Diocese 9-11 (discussing *Green* and *Norfolk Presbytery* in depth).

The Court in *Green* followed its earlier holding in *Norfolk Presbytery*. Construing § 57-15, the Court there held that if the "Presbytery is unable to establish a proprietary interest in the property, it will have no standing to object to the property transfer." 214 Va. at 503. The Court there also flatly rejected the Presbytery's assertion that its rules governed its right to control the property. *See id.* (rejecting the notion "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"). Read together, *Green* and *Norfolk Presbytery* stand for the proposition that, even under § 57-15, a denomination does not automatically prevail because it is hierarchical or claims a right to the property under its ecclesiastical proclamations. Rather than expanding denominational rights, those decisions constrain those rights under § 57-15, holding that denominations may prevent a local congregation from disaffiliating only by carrying the heavy burden of establishing, under state property and contract, law, a proprietary interest in its property.

Section 57-9(A) and § 57-15 therefore contain distinct requirements and apply in different circumstances: 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. By contrast, in § 57-9 cases—cases where a division has occurred—courts examine the deeds to determine whether the property is held in trust, as required by the statute. If the deed is in the name of an ecclesiastical officer for the denomination or an incorporated entity, the congregation cannot invoke § 57-9; if the property is held by trustees, the congregation may invoke the statute. Ownership under § 57-9, however, primarily turns on the existence of a division and the outcome of the congregation's vote, not on the factors discussed in *Green*.

2. **Has the court in its April 3, 2008 opinion already resolved the issue described in Question 1 above, as asserted by the CANA Congregations?**

The question of the relationship between § 57-9(A) and § 57-15 was fully briefed by the parties in both their post-trial briefs and their supplemental briefs,[4] and the Court's April 3 Opinion resolves that question.

Citing both *Norfolk Presbytery* and *Green*, which contain similar language concerning § 57-15, the Court's April 3 Opinion rightly recognized that reading § 57-9(A) to require that divisions be approved by the general church would ignore "a key difference between 57-9 and 57-15." Op. 73-74 & n.76. As the Court explained:

> 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* 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.

Op. 74) (emphasis in original) (footnote omitted). Therefore, this Court has directly addressed the relationship between § 57-9 and § 57-15, concluding that it would make no sense as a matter of statutory interpretation to graft the requirements of § 57-15 onto § 57-9.

In addition, although the Court has not resolved the *constitutional* aspect of this issue, it has received extensive briefing on that subject as well. The Episcopal Church and the Diocese have argued at length that the First Amendment requires the Court to apply the specific neutral principles frameworks discussed in *Jones v. Wolf*, 443 U.S. 595 (1979), and in *Green*, and ultimately to defer to their internal canons. Diocese Supp. Br. 18-22; ECUSA Supp. Br. 24-27. But as we have explained, *Jones* was addressing the neutral principles approach "as it ha[d] evolved in Georgia" (442 U.S. at 604); the Court there was not purporting to say that there is a single

[4] *See* ECUSA/Diocese Opening Post-Trial Br. 13-15, 40-47; ECUSA/Diocese Post-Trial Opp. Br. 7-9; CANA Post-Trial Opp. 9-11; ECUSA/Diocese Reply 4-6; ECUSA/Diocese Supp. Const. Br. 18-22; CANA Post-Decision Responsive Br. 25-28.

"neutral principles approach" for all States and for all time. To the contrary, the Court in *Jones* recognized that the phrase "neutral principles approach" describes a genus, not a species: Some States might choose to adopt the "formal title" doctrine; other States might choose to adopt a default rule of majority ownership; still other States might choose to defer to trust clauses in denominational constitutions. 443 U.S. at 602-603 & n.3. Provided the civil courts need not resolve doctrinal questions and there is some means of ordering the parties' affairs to achieve denominational and congregational ownership, the "neutrality" criterion is satisfied, and the First Amendment is not violated. *See* CANA Post-Decision Responsive Br. 26-27, 8-19.

Similarly, *Green* was addressing the "neutral principles" that apply under § 57-15 when a single congregation departs from a denomination in the *absence* of a division. Section 57-9 provides a different neutral principle—a presumptive rule of majority ownership of property, defeasible upon a showing that the property is held other than by trustees—that applies when an organized group of congregations separates from its denomination and forms a new polity. That approach is fully consistent with the First Amendment, under which "'a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.'" *Jones*, 443 U.S. at 602; *see also* I *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America Otherwise Known as The Episcopal Church* 301 (1981) (E. White and J. Dykman, eds.) ("[*Jones*] gives great weight to the actions of controlling majorities, and would appear to permit a majority faction in a parish to amend its parish charter to delete all references to the Episcopal Church, and thereafter to affiliate the parish—and its property—with a new ecclesiastical group"). Although the Episcopal Church and the Diocese urge that the First Amendment requires application of the specific factors set forth in *Green v. Lewis*, the U.S. Supreme Court's decision in *Jones* forecloses that assertion.

3. **What is the meaning of the phrase "if the determination be approved by the court" as that phrase is used in 57-9(A)? Specifically, once this court determines that 57-9(A) has been properly invoked, is the "approval" limited to a review of the vote taken or does it permit, or even require, as ECUSA and the Diocese assert, that the court examine various other considerations, including those set forth in *Green v. Lewis*?**

As explained above, the Virginia Supreme Court in *Green* and *Norfolk Presbytery* did not analyze the requirements of § 57-9(A). In addition, that provision would be stripped of any independent meaning if the outcome were dependent on whether the denomination could establish a proprietary interest in the properties at issue under § 57-15. This Court therefore need not engage in an in depth analysis of the "proprietary interest" factors relevant to *Green*'s § 57-15 analysis. *See* 221 Va. at 555. Rather, § 57-9 provides an independent framework for resolving disputed questions of ownership of church property in the event of a denominational division.

This Court has already determined that the CANA Congregations have properly invoked § 57-9(A) and satisfied its core requirements: the "division," "branch," "church or religious society," and "attached" elements of the statute. It follows that once this Court determines that § 57-9 is constitutional, the only questions that remain are whether the property at issue is held by trustees and whether the CANA Congregations' votes were properly conducted.

That conclusion follows from the statute's plain text. In the event of a "division," § 57-9(A) permits congregations to "determine" by majority vote which branch of the church or religious society to affiliate with. The statute further provides that "if the determination be approved by the court, it shall be so entered in the court's civil order book, and shall be conclusive as to the title to and control of any property held in trust for such congregation." To be sure, the statute uses the word "if"—and thus contemplates that a congregation might not be able to satisfy the requirements of the statute. But whether the petition will be approved does not turn on whether the congregation complies with requirements found in *other* provisions of the Code (such as § 57-15) or the common law; rather, approval of the congregation's petition depends upon

whether the congregation satisfied the requirements *of § 57-9(A)*—the "division," "branch," "church or religious society," "attached," "trustee," and majority voting requirements of the statute.

The logical conclusion of the Episcopal Church's and the Diocese's argument is essentially that this Court could make every finding required by § 57-9 in favor of the CANA Congregations, yet still refuse to grant the CANA Congregations' § 57-9 petitions based on factors *not* contained in that provision. That position finds no support in the law and, not surprisingly, the Episcopal Church and the Diocese could provide no authority to support it at the hearing on May 28, 2008. Since all but the "trustee" and majority voting elements of § 57-9 have been satisfied, they are all that remain for the Court to determine upon sustaining the statute's constitutionality.

4. What is the meaning of the phrase "shall be conclusive as to the title to and control" of the property in question, as that phrase is used in 57-9(A)?

Section 57-9(A) is designed to definitively resolve all disputes over the ownership and use of congregational property in cases involving a division in a religious denomination. That is the only reasonable interpretation of § 57-9's requirement that an order approving a congregation's determination to join a branch of a divided denomination "shall be conclusive as to the title to and control" of the property in question. In Virginia, "the popular, or received import of words, furnishes the general rule for the interpretation of statutes." *Lawrence v. Craven Tire Co.*, 210 Va. 138, 140-41 (1969) (quotation omitted). Moreover, when interpreting undefined statutory terms, courts examine the terms' ordinary meaning "[a]t the time of enactment of the statute." *Lewis v. Com.*, 184 Va. 69, 72 (1945). Just as these principles govern the meaning of the other terms in § 57-9(A), they govern the meaning of "conclusive." And "conclusive" means just what it says—definitive and final.

In 1867, the leading American dictionary defined "conclusive" as "[b]elonging to a close or termination; *putting an end to debate or question.* Syn.—Final; ultimate; decisive; definitive."

Noah Webster, *A Dictionary of the English Language* 498 (1872) (preface dated 1867) (emphasis added).[5] Today's dictionaries likewise define "conclusive" as "of, relating to, or being a conclusion"; "*putting an end to debate or question* especially by reason of irrefutability," and list as synonyms "decisive, determinative, definitive." *Merriam-Webster's Online Dictionary* (emphasis added).[6] In addition, § 57-9(A) is "conclusive" not only on issues of "title" (legal ownership) of the property at issue, but also on issues of its "control" (beneficial ownership).

It is difficult to imagine a more forceful way for the General Assembly to have provided that, where the requirements of § 57-9 are satisfied as to a piece of congregational property, a court need not (and may not) do anything further to "put[] an end to debate" over its ownership and control.[7] Language confirming the "conclusive" effect of compliance with the statute is notably absent from other sections of Title 57 of the Code, including § 57-15.

5. What is the meaning of the phrase "congregation whose property is held by trustees," as that phrase is used in 57-9(A)? Specifically, is Mr. Hurd correct when he asserted at oral argument on May 28, 2008 that the phrase "congregation whose property is held by trustees" is not simply a reference to the property that is the subject of the 57-9(A) petition but, rather, requires the Court to make an initial determination, prior to the Court's consideration of the validity of the vote, as to "who" owns the property at issue?

At oral argument on May 28, 2008, counsel for the Diocese raised a (new) statutory argument. Tr. 13-14. Notwithstanding (1) the parties' agreement on what issues need to be tried in November 2007 to determine the applicability of § 57-9, (2) the Court's conclusion that the CANA Congregations have satisfied the core statutory requirements of § 57-9, and (3) the lack

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[5] Available at http://quod.lib.umich.edu/cgi/t/text/pageviewer-idx?c=moa;cc=moa;idno=ajd2897.0001.001;q1=conclusive;size=l;frm=frameset;seq=183.

[6] Available at http://www.merriam-webster.com/dictionary/conclusive.

[7] The goals of legal peace and certainty stemming from the finality, and preclusive effect of an adjudication of property rights were reflected in common law principles well known to the drafters of the Virginia division statute. *E.g., Morriss v. Coleman*, 40 Va. 478 (1843) (quiet title action).

of any previous disagreement that the statute is substantively the same as in 1867 (Op. 49 n.37), Mr. Hurd argued that a 2005 amendment adding the phrase "whose property is held by trustees" to § 57-9 requires the Court—before considering the validity of the Cana Congregations' votes—to conduct a separate analysis to determine who owns the property at issue.

The Episcopal Church and the Diocese have waived this newfound argument by failing to raise it in the November 2007 hearing on the applicability of the statute and earlier post-trial briefing. Although the Episcopal Church and the Diocese have certainly alleged a trust interest in the property, at no point prior to or during trial did they allege that the CANA Congregations could not invoke § 57-9 because they lacked *any* colorable claim to the property. But even if the Court were to consider it, the argument is simply the latest iteration of the Diocese's and Episcopal Church's unsupportable position that § 57-9(A) applies only where they would otherwise have no claim.

Section 57-9 is designed to provide a "conclusive" answer to the question of ownership, and it presumes that ownership will be disputed. Indeed, as the Court's April 3 opinion recognized (Op. 55-56, 81, 83), the testimony at trial illustrated that frequent and often bitterly contested disputes over church property provided the backdrop for the enactment of § 57-9. If it were settled that *either* the majority of the congregation or the group that remained affiliated with the denomination owned the property at issue, there would be no need for the statute. Because any reading of § 57-9 that renders it a nullity is untenable (*Natrella*, 231 Va. at 461), it follows that the phrase "whose property is held by trustees" simply describes the type of property to which the statute applies.

Two other factors make this especially clear. First, the phrase "whose property is held by trustees" was added to § 57-9 in 2005 as part of a broader amendment to several sections of Title 57 of the Virginia Code. *See* 2005 Va. Acts ch. 772 (approved Mar. 26, 2005). The impetus for

these statutory amendments was the fact that, since *Falwell v. Miller*, 203 F. Supp. 2d 624 (W.D. Va. 2002), churches in Virginia had been free to incorporate. The most significant 2005 changes were the addition of § 57-16.1, which permits churches to hold property in corporate form, and § 57-15(B), which permits churches that hold property in trustee form to transfer their property to a corporation.

The balance of the 2005 changes were largely stylistic or conforming changes, designed to clarify that certain other sections remained applicable to churches whose properties were still held by trustees. *See id.* Indeed, the very same phrase "whose property is held by trustees" was added not only to § 57-9(A) and (B), but to § 57-13 (suits by members against trustees to compel proper application of property) and § 57-14 (suits by members to have land sold or mortgaged). Viewed in context, the addition of the phrase "whose property is held by trustees" to § 57-9(A) was plainly designed to confirm that the statute applies only to property held by trustees, not to property held by an incorporated entity or, for that matter, an ecclesiastical officer.

Second, Virginia has a long history of not recognizing denominational trust interests. In more than ten decisions since 1832, the Virginia Supreme Court has reaffirmed that church property used for religious purposes may be held by trustees *only* for the benefit of local congregations.[8] As the Court put it in *Norfolk Presbytery*: "As express trusts for supercongregational churches are invalid under Virginia law no implied trusts for such denominations may be upheld." 214 Va. at 507. *accord Green*, 221 Va. at 555.

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[8] *Gallego's Ex'rs. v. Attorney General*, 30 Va. 450 (1832); *Brooke v. Shacklett*, 54 Va. 301, 312-13 (1856); *Hoskinson v Pusey*, 73 Va. 428, 431 (1879); *Boxwell v. Affleck*, 79 Va. 402, 1884 WL 5061, at *3 (1884); *Davis v. Mayo*, 82 Va. 97, 1886 WL 2979, at *3 (1886); *Finley v. Brent*, 87 Va. 103 (1890); *Fifield v. Van Wyck*, 94 Va. 557 (1897); *Globe Furniture Co. v. Trustees of Jerusalem Baptist Church*, 103 Va. 559, 561 (1905); *Moore v. Perkins*, 169 Va. 175, 179-81 (1937); *Maguire v. Lloyd*, 193 Va. 138, 144 (Va. 1951); *Norfolk Presbytery*, 214 Va. at 503; *Green*, 221 Va. at 555; *see also Reid v. Gholson*, 229 Va. 179, 187 n.11 (1985).

Although Virginia over time has expanded the types of property that may be held in *express* trust for a denomination, it has not expanded that rule to congregational property generally. *See Norfolk Presbytery*, 214 Va. at 506-07 (explaining that in 1962 the legislature expanded the scope of § 57-7.1 to include property conveyed for the benefit of a "church diocese" for certain residential purposes, but "has not gone beyond this ... to validate trusts for a general hierarchical church"). The Episcopal Church and the Diocese say all this changed in 1993, when the General Assembly amended § 57-7 and recodified it as § 57-7.1 But the Church and the Diocese are wrong: In adopting those changes, the General Assembly expressly provided "[t]hat this act is declaratory of existing law." 1993 Acts, ch. 370. The Episcopal Church's and the Diocese's view would therefore require the Court to hold that the General Assembly implicitly overruled more than 160 years of Virginia Supreme Court precedent by adopting a statutory amendment that was "declaratory of existing law." *Contra Horner v. Department of Mental Health*, 268 Va. 187, 193 (2004) (language "such as the words 'declaratory of existing law,' indicates that the General Assembly enacted the amendment as a clarification of existing law").[9]

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[9] Not surprisingly, even since 1993, the Virginia Supreme Court has cited *Norfolk Presbytery* for the proposition that "Code § 57-7.1 validates transfers, including transfers of real property, for the benefit of *local* religious organizations." *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.*, 244 Va. 144, 152 (1995) (emphasis added). And in 1996, the Virginia Attorney General cited *Norfolk Presbytery* and *Moore* in explaining that "the provisions of [§ 57-7.1 that] relate to property held 'for the benefit of any church, church diocese, religious congregation or religious society,'" although "not defined," "encompass[] property held for the benefit of a *local* congregation, *as opposed to* property held by a larger *hierarchical* body." 1996 Va. Op. Atty. Gen. 194, 1996 WL 384493 (Apr. 4, 1996) (emphasis added); *see Tazewell County School Bd. v. Brown*, 267 Va. 150, 163 (2004) ("'the General Assembly is presumed to have knowledge of the Attorney General's interpretation of statutes, and [its] failure to make corrective amendments evinces legislative acquiescence'").

Even if the 1993 amendment had changed the law prospectively, it would not apply to property conveyed before 1993, *see Berner v. Mills*, 265 Va. 408, 414 (2003) ("the phrase 'declaratory of existing law' is not a statement of retroactive intent"); and a review of the deeds confirms that virtually all of the property at issue here was conveyed to trustees for the CANA Congregations before the 1993 amendment. *See* Exhibit F (Praecipe Indexing Documents Filed Pursuant to Order on Motions Craving Oyer, filed on June 15, 2007).

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The Episcopal Church's and the Diocese's arguments are but a series of attempts to strip § 57-9 of any independent force. They say that approval of a § 57-9(A) petition requires permission from denominational authorities under § 57-15; but § 57-9(A) provides its own framework for resolving church property disputes in the event of a denominational division, and it gives no indication that Court's should *also* apply the § 57-15 "transfer" framework. The Church and the Diocese also say that the specific "neutral principles" framework discussed in *Jones v. Wolf* must be applied in every case; but the Court there was addressing *Georgia* law, and its decision gave States wide latitude concerning the specific *types* of neutral principles approaches that they might choose to adopt. And notwithstanding the November trial, the purpose of which was to litigate the applicability of § 57-9(A), the Church and the Diocese say that the phrase "whose property is held by trustees" requires the Court to conduct yet another independent analysis to determine who owns the property at issue. But as we have shown, § 57-9 is designed to provide a "conclusive" rule for resolving competing claims to congregational property held in trust, and the statute would serve no purpose if it applied only where ownership was entirely undisputed.

As the Court recognized in its April 3 Opinion, Virginia law may not be read so as to "make 57-9(A) a nullity." Op. 81. For the same reason, the Court should reject the Episcopal Church's attempts to graft onto the neutral principles embodied in § 57-9(A) additional requirements that have no basis in that statute or the Constitution.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of June, 2008 a copy of the foregoing CANA Congregations' Opening Brief Pursuant to the Court's June 6, 2008, Order, was sent by electronic mail and first-class mail, postage prepaid, to:

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