

# In the Supreme Court of Virginia

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THE FALLS CHURCH (ALSO KNOWN AS THE CHURCH AT THE FALLS—THE FALLS CHURCH), DEFENDANT-APPELLANT

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA  
AND THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA,  
PLAINTIFFS-APPELLEES

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## REPLY BRIEF FOR APPELLANT THE FALLS CHURCH

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## **GLOSSARY**

Diocese	The Protestant Episcopal Church in the Diocese of Virginia
DVA Br.	Brief of Appellee Protestant Episcopal Church in the Diocese of Virginia
TEC	The Protestant Episcopal Church in the United States of America
TEC Br.	Brief for Appellee-Cross Appellant The Episcopal Church
TFC or Church	The Falls Church
TFC Br.	Opening Brief for Appellant The Falls Church
7/13/07 Br.	Plaintiffs' Brief in Opposition to Demurrers and Pleas in Bar (filed July 13, 2007)
8/12/11 Br.	CANA Congregations' Corrected Opening Post-Trial Brief (filed Aug. 12, 2011)
9/16/11 Br.	CANA Congregations' Post-Trial Opposition Brief (filed Sept. 16, 2011)
10/18/11 Br.	CANA Congregations' Corrected Post-Trial Reply Brief (filed Oct. 18, 2011)

## INTRODUCTION

Plaintiffs never acknowledge this Court's ruling that their claims must be tested "under principles of real property and contract law." *Truro*, 280 Va. at 29. By their lights, "intrachurch disputes are not resolved based on the legal principles used to resolve other disputes" (TEC Br. 29), and "conventional contract law principles do not apply" (DVA Br. 27). Yet they do not reconcile these views with *Norfolk's* holding that "neutral principles" are those "developed for use in all property disputes." 214 Va. at 504.

Plaintiffs insist that this case is just like *Green*. But many of TFC's points were not raised in *Green*—so the Court had no occasion to consider them—and plaintiffs fail to grapple with critical factual distinctions between the cases. For example, unlike here, the denomination's contractual right in *Green* "ha[d] its genesis in the ... deed"—which restricted the property to "the purpose of erecting an A.M.E. Church of Zion (to be known as Lee Chapel), not a church of some other denomination"—and the local church and its property did not pre-date the denomination. 221 Va. at 553, 556.

Further, when TFC joined the denomination, the canons provided that "all ... property now belonging or hereafter accruing to [affiliated] churches" would be held "for the benefit of the congregation." A5912a. Plaintiffs also ignore their admission that "the Colonial Churches," including TFC, "belong

absolutely” to “the well organized congregations which own them.” A6081. And unlike the local church in *Green*, which was “required” to support its denomination (221 Va. at 551), TFC’s contributions to plaintiffs were “completely voluntary” (A7379-80). These differences warrant reversal here.

**I. TFC owns its property under Virginia property and contract law.**

**A. Plaintiffs have not carried their burden under property law.**

1. **Deeds.** Below, plaintiffs admitted they are not “named as a grantee as such in any [TFC deeds].” A7033. Now, however, they assert that TFC falsely “assum[es] that it is the owner of the[se] properties.” DVA Br. 1. This view is contrary to the complaints, which alleged not that plaintiffs were owners but that they had “trust, proprietary and contract rights” in the “property of *The Falls Church*.” A207 (emphasis added). In fact, plaintiffs *lis pendens* named TFC and its trustees as “record title holder” (A239), and their complaint sought an order directing TFC’s trustees—appointed by TFC’s vestry—“to transfer the legal title” (A207). As the trial court held in an unappealed ruling following a trial involving TFC’s original property, “there is a clear record of admissions ... recognizing TFC’s ownership.” A186.

2. That no TFC deed refers to plaintiffs, let alone as grantees, takes this case far outside *Green*, which cited the deed eight times. 221 Va. at 549, 553-56. Plaintiffs attempt to downplay that the property in *Green* was

granted to “Trustees of the A.M.E. Church of Zion,” *i.e.*, the denomination. They insist the deed there *must have* “grant[ed] the property for the benefit of the local congregation,” as “general churches could not hold either legal title or beneficial interests in property.” DVA Br. 26. Yet *Green* stated that “the A.M.E. Zion Church is the grantee in the deed,” and the Court did not speak of the property being held by or for anyone else. 221 Va. at 554-55.

In any event, the deed in *Green* further restricted the local church’s property to “the purpose of erecting an A.M.E. Church of Zion (to be known as Lee Chapel), not a church of some other denomination.” *Id.* at 553. Such restrictions were enforceable then, as now. But TFC’s 11 deeds have no such restrictions—in contrast to the deeds of other churches below, other Episcopal churches affiliated with the Diocese, churches in other Virginia cases (*e.g.*, *Brooke v. Shacklett*, 54 Va. 301, 314 (1856)), and scores of Methodist, Presbyterian, and other Virginia churches. TFC Br. 16-20; see Amicus Br. of Relig. Org. A-2 (the Methodists first required specific deed language for “all local church properties more than 250 years ago”). TFC’s deeds restrict neither the *persons* who may use TFC’s property nor the *manner* in which the congregation may use it. The deeds convey TFC’s properties for the benefit of TFC as an organization, not for the benefit of certain members, let alone those members submitting to TEC’s control.

3. Plaintiffs next maintain that the trial court “found” as a “fact” that a “reasonable grantor would have understood that ... the local church was bound to use ... the property in accordance with [plaintiffs’] rules.” DVA Br. 23-24. But this is not a finding of “fact.” It is a legal assumption, and it violates the rule that grantor intent is irrelevant where the deed is clear. *Camp v. Camp*, 220 Va. 595, 597-98 (1979). Plaintiffs seek to rewrite clear deeds by implying a use restriction, but deeds are “strictly” construed “in favor of the free use of property.” *Scott*, 274 Va. at 213; TFC Br. 16.

4. Still more extreme is plaintiffs’ position as to TFC’s 1746 property. A246-48. Ignoring Virginia’s history, plaintiffs urge that TEC “is the successor to the Church of England.” DVA Br. 24 n.13. But they did not appeal the trial court’s ruling, following a trial, that “the vestry of the TFC is the legal successor of the vestry of Truro parish,” the named grantee. A186.

5. ***Dominion***. Plaintiffs do not deny that, under neutral law, dominion requires “residence, cultivation, improvement, or other open notorious and habitual acts of ownership.” *Tyrrell*, 268 Va. at 366. Nor do they explain their failure to appeal an earlier ruling, after a trial, that “TFC’s vestry ... for more than 150 years has governed the property in question, raised funds to upgrade the property, repaired the property, financed additions to the property and decided how the property was to be used.” A185 n.10.

Plaintiffs contend that the denomination’s “only source of dominion ... in *Green* was its ‘require[ment] that all property transfers be approved by the bishop.’” DVA Br. 27. Not so. The denomination imposed mandatory “assessments” on the congregation, which “could not refuse to accept a pastor” appointed by the bishop. 221 Va. at 549, 551. In these ways the denomination “exercised dominion, control, and supervision.” *Id.* at 556.

**B. Plaintiffs have not carried their burden under contract law.**

Plaintiffs’ contract theories also lack merit. Indeed, their main point is that “conventional contract law principles do not apply.” DVA Br. 27.

1. ***Express consent.*** In plaintiffs’ view, TFC gave express consent to plaintiffs’ later claim of *property* rights when, in 1836, it acceded to “canon[s] which shall be framed ... for the government of this church in *ecclesiastical* concerns.” DVA Br. 31 (emphasis added). But “a specific provision of a contract governs over one that is more general” (*Condo. Servs. v. First Owners’ Ass’n*, 281 Va. 561, 573 (2011)), and an 1836 canon “respecting property” stated that TFC’s leaders “shall hold all glebes, lands, parsonage houses, churches, books, plate, or other property *now belonging or hereafter accruing* to [affiliated] churches ... *for the benefit of the congregation.*” A5912a (emphasis added). TFC also retained the right to “make such rules ... for managing [its] affairs and temporal concerns, ... as [it] shall think

most conducive to its interest.” *Id.* Thus, while plaintiffs held certain “ecclesiastical” authority, “temporal” authority, at issue here, remained with TFC.

Nor do “vestry manuals satisfy any need for an express writing.” DVA Br. 28. Plaintiffs cite no authority holding that statements in internal church manuals (A6630) create contracts, let alone where not communicated to the other contracting party. See *Mazyck*, 273 Va. at 636. The manuals do not address property ownership, much less embody any promise in “legally cognizable form.” *Jones*, 443 U.S. at 606.<sup>1</sup> This stands in marked contrast to *Buhrman*, where, to obtain admission as a parish, the members signed a “promise” that “forever” secured “all real estate consecrated as a church ... against alienation from the Protestant Episcopal Church.” A2259-60.

2. **Consent by conduct.** Plaintiffs next point to TFC’s “conduct” as to the consent canons. DVA Br. 28. But those canons do not assert ownership, let alone call for “forfeiture” upon disaffiliation, and only an “explicit” contract can authorize that sanction. *Wickline*, 205 Va. at 169. Plaintiffs also ignore their admissions that the canons “have no legal force” (A2347),<sup>2</sup>

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<sup>1</sup> The vestry declarations are even more vague; they refer only to plaintiffs’ “doctrine, discipline, and worship.” Plaintiffs ignore our showing that the only definition of “discipline” pertains to discipline of clergy. TFC Br. 27 n.15.

<sup>2</sup> TEC incorrectly says it “never adopted” the views in its annotated canons. Br. 25. Its own document says “[TEC’s] General Convention” intended them “as an authoritative expression of the meaning of [its] ... Canons.” A2216.

do not “bar[] disaffiliation” (A7714), and are not “contractual commitments” (A6218); TFC Br. 34-35. Not surprisingly, long after the consent canons passed, plaintiffs admitted in writing that “the Colonial Churches,” including TFC, “belong absolutely to the parish” and are “cared for by the well organized congregations which own them.” A6081; see *also* A6078.

In fact, the one time when plaintiffs suggested that they *owned* TFC’s property (via a denominational trust), TFC took issue, citing “the eighteenth century conveyances to which [TFC’s] Trustees trace their title” and noting that the canons were “subsequently-adopted.” A4716 (1990 letter). Thus, plaintiffs wrongly state (DVA Br. 30 n.17) that “for 23 years” after the trust canons passed, TFC never objected. But in any event, TFC had no duty to object to a facially invalid trust. *Camp v. Bruce*, 96 Va. 521, 524 (1898).

3. ***Unilateral canons.*** Aware that “[a] contract involves a bilateral exchange” (*Peacock*, 267 Va. at 20), plaintiffs insist that their canons are not “unilateral.” TFC attended Diocesan council, they contend, and congregations “take their very identity from ... the larger church.” DVA Br. 27.

But TFC did not “take its identity from” plaintiffs. TFC predates their creation. In fact, plaintiffs could not hold property in the 1800s, so if TFC lacked independent status, *no one* held its property. Further, TFC through its vestry has always dealt autonomously with third parties. Plaintiffs have

long recognized this autonomy—their own canons state that having “parish” or “congregation” status “shall not affect the legal rights of property of any Parish or Congregation.” A5703.<sup>3</sup> And *Norfolk* rejected the view that a congregation’s identity is governed by the denomination’s rules. TFC Br. 37.<sup>4</sup>

4. ***Mutual remedy.*** On mutual remedy, plaintiffs cite cases holding that a contract does not lack mutuality just because one party’s duties are conditional on the other’s performance. DVA Br. 30-31. But the problem is not that plaintiffs’ duties are conditional. It is that no civil court can decide whether plaintiffs breached them, because they are entirely *spiritual*. Plaintiffs admit this, and it renders any contract unenforceable. TFC Br. 29.

5. ***Consideration.*** In reply to our showing of no consideration, plaintiffs maintain only that TFC “benefitted from [denominational] association.” DVA Br. 28. But this misses the point: “[A] new promise” requires “other consideration than the performance of an existing contract” (*Seward*, 154

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<sup>3</sup> TFC’s incorporation did not alter its autonomy. Its articles state that “the existing unincorporated association that is being incorporated hereby is The Falls Church, also known as The Falls Church (Episcopal), which was established as a church in A.D. 1732.” A5051. And in contrast to the governing documents of other congregations below (A144-45), TFC’s articles do not refer to plaintiffs or subject TFC to their authority. A5048-51.

<sup>4</sup> Plaintiffs’ public acts confirm that they are legally separate from congregations with whom they do business, and know how to observe legal formalities. For example, when the Diocese lends money to congregations, it records legally cognizable security interests in their property. PX-EIPH-0059.

Va. at 168), and TFC received no *additional* benefit upon adoption of the consent or trust canons. Again, plaintiffs do not dispute this. TFC Br. 30.

6. ***Enforceability.*** Plaintiffs ignore that otherwise binding contracts might have unenforceable terms. They urge that “canons are no different ... from the rules of other voluntary associations” (DVA Br. 7-8), but an association is not a “fully self-governing democracy.” *Gillman*, 223 Va. at 762. Its rules may not “encumber [members’] property” or work a “forfeiture.” *Id.* at 763, 765. Nor may an association’s rules “transfer the title to [members’] property.” *Mayo*, 82 Va. at 103; see Becket Fund *Amicus* Reply Br. 5-8.

Plaintiffs say *Gillman* is “irrelevant” because it involved a “forfeiture.” DVA Br. 26 n.14. But this case does too: The trial court transferred title to plaintiffs. A4. Nor can plaintiffs dismiss *Gillman* as a “condominium association case.” *Id.* Indeed, it was they who first invoked *Gillman*, citing it in a section entitled: “Virginia authority addressing church property disputes under neutral principles.” 7/13/07 Br. 8, 12. But in any event, *Gillman* is not alone. As *Mayo* held, local affiliates who hold title may disaffiliate with their property so long as “[t]he property was not conveyed upon condition that the beneficiaries in the deed should retain the then name of their division, or that they should associate themselves with, or become subject to, the [association’s] orders and regulations.” 82 Va. at 105. So too here.

7. **Course of dealing.** Unable to satisfy “conventional contract law,” plaintiffs devote 13 pages to discussing the parties’ “dealings.” DVA Br. 27, 10-22. But neither *Norfolk* nor the contract law recognizes contracts based on parties’ “dealings,” and plaintiffs’ effort to downplay how closely *Green’s* analysis tracked the A.M.E. Zion constitution is not credible. TFC Br. 31-33.

Plaintiffs say *Green* “said nothing relating or comparing the provisions ... of the Discipline to its analysis of the dealings between the parties.” DVA Br. 19. But as our chart showed (Br. 32), the Court’s analysis tracked the Discipline nearly verbatim. This cannot have been mere coincidence.

Contrary to plaintiffs’ assertion (DVA Br. 20), *Green’s* analysis of the parties’ dealings did not “include[] numerous matters that had nothing to do with [the constitution],” such as “sending delegates” to conferences and using denominational “Sunday School materials, hymnals,” “literature,” and “services.” The constitution stated that “use of [the denomination’s] name, customs, and policy ... in such a way as to be thus known to the community as a part [of it]” would reflect the intent to grant the denomination property rights. 221 Va. at 554 n.2. These ordinary incidents of denominational affiliation do not otherwise convey property rights under neutral law.<sup>5</sup>

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<sup>5</sup> TEC’s portrayal of the law essentially ignores cases that reject its views, including six that require denominations to satisfy ordinary civil law, *OPC, Inc.*, 973 N.E.2d at 1108-13 (rejecting trust); *accord All Saints*, 685 S.E.2d

**C. Virginia statutory law does not support plaintiffs' claim.**

Plaintiffs' statutory analysis likewise falls short. Quoting *Norfolk*, they say §57-15 requires their approval of transfers of the property. DVA Br. 22. But plaintiffs omit the qualification that “[i]f [the denomination] is unable to establish a proprietary interest,” it will “have no standing to object to [any] transfer.” 214 Va. at 503. Section 57-15 does not provide that interest; it must derive from property or contract law, which plaintiffs cannot satisfy.

Plaintiffs also invoke §57-16.1, the church incorporation law, arguing that its reference to “the laws, rules, or ecclesiastic polity of the church or body” subjects TFC to denominational rules. But unlike §§ 57-14, 57-15, and 57-16A, §57-16.1 does not refer to “dioceses” or “denominations”; the

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at 172; *Carrollton Presbyterian Church*, 77 So. 3d at 981; *Heartland Presbytery*, 364 S.W.3d at 583; *Church of God v. Graham*, 54 F.3d 522, 525-26 (8th Cir. 1995); cf. *Hope Presbyterian*, 291 P.3d at 722 (ruling for denomination under state “trust laws”); and several holding that references to denominational affiliations in deeds do not create denominational rights, *Arkansas Annual Conf.*, 291 S.W.3d at 569; *Presbytery of Beaver-Butler*, 489 A.2d at 1324-25; *Foss*, 342 N.W.2d at 223. In other cases that TEC cites, the congregation affirmatively granted the denomination trust interests (which are not available in Virginia). E.g., *St. James the Less*, 888 A.2d at 809-10; *Bishop of Colo. v. Mote*, 716 P.2d 85, 108 (Colo. 1986). Still other cases do not apply neutral principles, *Tea v. Protestant Episcopal Church*, 610 P.2d 182, 184 (Nev. 1980); *Daniel v. Wray*, 580 S.E.2d 711, 716-18 (N.C. App. 2003); *Episcopal Diocese of Mass. v. DeVine*, 797 N.E.2d 916, 921-92 (Mass. App. 2003), or involved distinct statutes, *Episcopal Church Cases*, 198 P.3d 66, 81, 85-86 (Cal. 2009) (statute imposed trust); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E. 920, 923-24 & nn. 7-8 (N.Y. 2008) (same). See Becket Fund *Amicus* Reply Br. 3-5.

relevant rules are those of the *incorporating* “church or body.” And in any case, nothing in plaintiffs’ rules—unlike those of other dioceses—subjected TFC’s articles to denominational approval. TFC Br. 11 n.4.

Finally, plaintiffs ignore §1-248, which the Court applied in *Gillman* to bar associations from enforcing rules that alter members’ property rights.

**II. The trial court relied on retroactive enforcement of Va. Code §57-15 in ruling for plaintiffs, and TFC fully preserved that point.**

Plaintiffs admit they could not hold property in the 1800s, when their consent canons passed. DVA Br. 26. But they do not say how those canons took effect, other than by retroactively applying §57-15. True, the trial court did not use the word “retroactive,” but it relied on the 1904 changes to §57-15. A100 n.36. And as *Finley* held, it is “beyond the legislative power” to “convey[] the right to dispose of ... property to others.” 87 Va. at 108.<sup>6</sup>

In plaintiffs’ view, TFC accepted future canons, regardless of their legal validity, upon joining the denomination in 1836. DVA Br. 8-9 & n.3. But as we have noted, the provision they cite spoke only to “ecclesiastical concerns,” and the 1836 canon “respecting property” committed all property—even property “hereafter accruing” to TFC—to “the congregation.” A5912a.

Lacking any answer, plaintiffs assert waiver. DVA Br. 35. But each

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<sup>6</sup> See also *Diocese of Sw. Va. v. Wyckoff*, Slip Op. 6 (Amherst Cty. Nov. 16, 1979) (Koontz, J.) (noting the “constitutional infirm[ities] of applying [a law] to ... deeds ... which predate the passage of the statute”).

TFC post-trial brief raised retroactivity. TFC’s first brief focused on §57-7.1, which, unlike §57-15, was cited in plaintiffs’ opening statement. A7051-56. But when plaintiffs’ invoked §57-15, TFC discussed it, stating: “[E]ven if *the provisions of Title 57* that plaintiffs invoke were applicable, they could not be applied retroactively to strip [TFC] of property rights that were vested under deeds that pre-date *any applicable statute.*”<sup>7</sup> There is no waiver.

**III. Even under their canons, plaintiffs lack any proprietary interest in TFC’s unconsecrated property.**

Plaintiffs dismiss as “immaterial” that unconsecrated property is “‘ex-empt’ ... from the canon that requires diocesan consent to sell or encumber real property.” DVA Br. 37. They cite the trial court’s statement that such property “‘can only be sold in accordance with [Diocesan canonical] procedures’” (*id.*), but ignore that the canons leave this matter to congregations—and that TFC sold unconsecrated property in its discretion. TFC Br. 44.<sup>8</sup>

Faced with their canons’ limits, plaintiffs argue waiver. Yet they admit that TFC stressed “the distinction between consecrated and unconsecrated

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<sup>7</sup> 9/16/11 Br. 16; see *id.* at 5 (discussing § 57-15 and stating that “Virginia statutes may not be applied retroactively to disturb vested property rights”); 10/18/11 Br. 26 (“settled precedent would bar the Court from applying later-enacted statutes ... to deprive [TFC] of vested rights in [its] own property.”).

<sup>8</sup> Nor did TFC “abandon” its property. DVA Br. 37 n.22. Under Va. Code §57-11, property is “abandoned” if a church “become[s] extinct” or “cease[s] to occupy” the property. Neither applies here. And if denominations could avoid §57-15 by declaring property “abandoned,” *Norfolk’s* requirement that they prove proprietary rights under neutral law would be obliterated.

properties, in briefs,” at “trial,” and in its “opening statement.” DVA Br. 36. The issue, they contend, is that TFC made no “*argument*” to this effect. *Id.*

In fact, TFC argued below that the canon “can’t stand for the proposition that somehow they have a dominion over every single shred of paper, every bank account that [TFC] own[s]. ... It doesn’t cover unconsecrated property.” A7066. TFC’s post-trial briefs likewise stated that the canon did not apply. A9132 & n.9. Moreover, it is plaintiffs who “had the burden of pro[of]” (*Green*, 221 Va. at 555), and their case for unconsecrated property rested on their (unenforceable) trust canons. There is no waiver.

#### **IV. Plaintiffs did not prove an interest in TFC’s personal property.**

As to the personal property, plaintiffs assert that “ownership ... should ... be determined under the same rules as [the] real property.” DVA Br. 37. But that is exactly our point—the trial court never required them to prove proprietary rights in TFC’s personalty. Citing Va. Code §57-10, it held that TFC’s funds followed its realty (A156), ignoring undisputed proof that TFC had total control over its funds, withholding donations from plaintiffs at will, and that TFC’s donors intended not to support plaintiffs. TFC Br. 45-48.

Plaintiffs contend that no separate proof was needed because *Green* did not distinguish between realty and personalty. DVA Br. 37. But *Green* did not address personal property. Neither the trial court’s order (A6221-

28) nor this Court's opinion identified what, if any, personal property was at issue, and neither the Court nor the parties cited §57-10.<sup>9</sup>

Nor could reasonable donors have known that gifts to TFC could be seized by plaintiffs. DVA Br. 38. Plaintiffs admit that the funds here were given after 2003, when TFC's members were first made aware that none of their donations would be shared with plaintiffs. DVA Br. 39 n.24; A8204-05. Indeed, the Diocese's own public reports reflect this cutoff of donations. A3104. And plaintiffs' own witness, a TFC member, admitted knowing he had to make separate gifts to support the denomination. A7867-69.<sup>10</sup>

Plaintiffs say awarding them \$2.7 million of TFC's funds does not violate donor intent because the donors were not *personally ordered* to pay plaintiffs. DVA Br. 40. But this is a distinction without a difference—the donors' gifts now belong to the very parties they did not wish to support.

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<sup>9</sup> Nor is it correct that the parties here “understood” that “the decision would control both realty and personalty,” or that “TFC never suggested anything to the contrary until had it had lost.” DVA Br. 37-38. TFC's opening statement stressed that the consent canons only applied to realty, and that TFC exercised dominion over its accounts by deciding what to give plaintiffs. A7066-67. TFC's briefs likewise discussed at length the proof that plaintiffs lacked dominion over TFC's funds and other personalty. 8/12/11 Br. 102-14. By contrast, plaintiffs never asserted that the personalty followed the realty until TEC cited §57-10 in one sentence of its final reply brief. A9137.

<sup>10</sup> It is also undisputed that TFC's members prompted this cutoff. In 2003, TFC advised plaintiffs of “the clearly expressed views of [its] congregation” that TFC's funds not be forwarded. A4724. As the Diocese noted, “many pledgers restricted gifts ... to assure no money went to [plaintiffs].” A6885.

Finally, plaintiffs argue that their canons trump donor intent. DVA Br. 41-42. But that view lacks support in either law or equity. At no point before 2007 did plaintiffs react to TFC's cutoff of donations by claiming TFC's funds or telling TFC's donors that their restrictions were voidable or could be trumped by a declaration, made *after* disaffiliation, that TFC's property had been "abandoned." Rather, a 2004 Diocesan task force publicly stated that "to override donor restrictions while keeping the money, is fraud." A6898. That conclusion is equally true today. See Donor *Amicus* Br. 1-17.

**V. The trial court gave plaintiffs broader relief than they requested.**

Contrary to the Diocese's assertion (Br. 42), neither complaint alleged ownership of property given after TFC's 2006 vote to disaffiliate. In fact, plaintiffs disavowed any such claim in 2008,<sup>11</sup> and in their post-trial briefs.<sup>12</sup>

Plaintiffs offer no coherent defense of the trial court's ruling that TFC could keep only gifts made after plaintiffs *sued*, many weeks after the vote. DVA Br. 43. TFC ceased being an Episcopal church as of disaffiliation, not

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<sup>11</sup> As the full quote reveals, this was not, as plaintiffs assert (DVA Br. 42), merely a discussion of the property subject to TFC's §57-9 petitions: "I think we're in agreement that the money that they've received due to contributions since the time that they disaffiliated, and whatever purchases that they may have made with that, [TEC] and the Diocese haven't made a claim on that property. There is no current dispute as to that." A6990.

<sup>12</sup> Below, quoting a case where the court noted that "plaintiffs do not seek donations made after the disaffiliation," the Diocese stated: "The facts are the same in these cases, and the same conclusion should follow." A9142.

when plaintiffs sued, and no reasonable donor would think otherwise.

Plaintiffs likewise attempt to renege on their prior representations regarding maintenance costs. Their counsel stated in open court that using assets to maintain the contested real estate was “fine”; her objection was to the use of funds for legal fees or rector salaries. A6985. Although the trial court did not attempt to reconcile this concession with its ruling (A8641-43), plaintiffs now maintain that maintenance costs were the “approximate equivalent of the property’s rental value.” DVA Br. 43. But the trial court nowhere said they were equivalent (A157 n.85), and plaintiffs introduced no evidence as to the rental value of TFC’s various parcels.

#### **VI. Plaintiffs have no rights under Virginia Code §57-7.1.**

When Va. Code §57-7.1 was passed, **13** rulings of this Court—dating from 1832 to 1985—had declared denominational trusts invalid.<sup>13</sup> Plaintiffs admit that the law barred such trusts until 1993. DVA Br. 44. But they insist that the legislature then changed the law, and did so retroactively.

What plaintiffs cannot explain is how a law stating, “this statute is declaratory of existing law” (1993 Acts, ch. 370), could overrule **13** precedents of this Court. They dismiss this statutory text as “clarif[ying]” the law (DVA

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<sup>13</sup> *Norfolk*, 214 Va. at 505-07 (citing six other cases); *Boxwell v. Affleck*, 79 Va. 402, 407 (1884); *Mayo*, 82 Va. at 102; *Finley*, 87 Va. at 106; *Globe Furn. v. Trustees of Jerusalem Baptist Church*, 103 Va. 559, 561 (1905); *Green*, 221 Va. at 555; *Reid v. Gholson*, 229 Va. 179, 187 n.11 (1985).

Br. 45 n.28), but the many cases on the books foreclose that view.<sup>14</sup>

Ultimately, however, this Court need not decide whether §57-7.1 silently overruled 13 cases. Even if §57-7.1 validated denominational trusts, it would not help plaintiffs. They read §57-7.1 *both* as allowing denominations to hold trust interests *and* as giving retroactive effect to their canons, which declare plaintiffs to be beneficial owners of local property. TEC Br. 38-39. At most, however, §57-7.1 validates a “conveyance” or “transfer” of trust interests to denominations—something plaintiffs disclaim. 7/13/07 Br. 23 (plaintiffs “do not allege a ‘conveyance’ (or a contract to convey)”).

Unlike some States’ laws, §57-7.1 does not purport to validate a denomination’s declaration of a trust in local property.<sup>15</sup> Nor does §57-7.1 modify the rule that “an express trust is based on the declared intention of the trustor,” not a putative beneficiary. *Counts*, 221 Va. at 588.<sup>16</sup> Plaintiffs are not settlors—they lack title—and no one conveyed to them any trust in-

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<sup>14</sup> *Lee v. Lee*, 12 Va. App. 512 (1991), which plaintiffs cite for the view that this text “clarified” prior law, involved *one intermediate appellate decision*.

<sup>15</sup> N.Y. McKinney’s Relig. Corp. Law § 42-a (declaring property to be held in trust for TEC); Md. Code §5-334 (subjecting religious corporations to TEC’s canons, trust claim); Cal. Corp. Code §9142(c)(2); TFC Br. 36 n.18.

<sup>16</sup> Numerous courts have relied on this black-letter rule of trust law in declining to enforce denominations’ unilateral declarations of trust interests in local church property. *E.g.*, *All Saints*, 685 S.E.2d at 174 (it is “axiomatic” that “[an] entity must hold title to property in order to declare that it is held in trust for the benefit of another.”); *OPC, Inc.*, 973 N.E.2d at 1107 n.8; see TFC Br. 24 n.13, 38 n.19; Becket Fund *Amicus* Reply Br. 4-5 & n.3.

terest. Thus, their position finds no support in §57-7.1.<sup>17</sup>

In fact, plaintiffs' failure to satisfy neutral trust law exposes the fallacy in their claim of unconstitutional discrimination. "[A]ny notion of discrimination assumes a comparison of substantially similar entities." *GMC v. Tracy*, 519 U.S. 278, 298-99 (1997). But plaintiffs are *not* similarly situated to others who create trusts in Virginia. Nor do they seek equal treatment. They are putative *beneficiaries* asserting trusts in *other parties' properties* via *canon law*—without securing the other parties' agreement or publicly recording an interest. Secular entities lack that right. TFC Br. 35-37.<sup>18</sup>

Finally, even if §57-7.1 had validated plaintiffs' unique brand of "trust," it could not be applied retroactively. *First*, this Court applies "the law in effect at the time the trust is executed" (*McGehee*, 268 Va. at 19), and plaintiffs' 1979 and 1983 trust canons pre-date §57-7.1 (1993). *Second*, the text points *against* retroactivity. "[T]he phrase 'declaratory of existing law' is not

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<sup>17</sup> Plaintiffs seek to avoid this difficulty by arguing that *Jones* requires enforcing their trust canons. DVA Br. 48-49. But as many courts have held (TFC Br. 38 n.19), denominational trusts need be enforced only if embodied in "legally cognizable form" under "well-established concepts of trust ... law familiar to lawyers and judges." *Jones*, 443 U.S. at 606, 603.

<sup>18</sup> TEC and the Diocese are thus unlike the plaintiffs in *Falwell v. Miller*, 203 F. Supp. 2d 624, 628 (W.D. Va. 2002), who sought to incorporate via the same process that others follow. Plaintiffs seek *more favorable* treatment.

In any case, the bar on denominational trusts serves compelling interests: It promotes clarity of beneficial ownership, and ensures that third parties may rely on the deed's terms without regard to unrecorded canons.

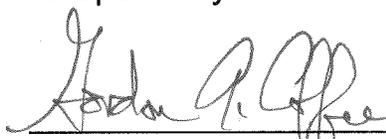
a statement of retroactive intent.” *Berner*, 265 Va. at 414. And while §57-7 validated *both* conveyances “which hereafter shall be made” *and* those “which ... *ha[ve] been* made,” §57-7.1 states only that a conveyance “which *is* made ... *shall be* valid.” (Emphases added.) *Third*, it is unconstitutional for laws to “deprive[] the *cestuis que* trusts named [in deeds], and created by the trust, of their property rights.” *Finley*, 87 Va. at 108. Thus, plaintiffs’ cross-assignment should be rejected.

### **CONCLUSION**

Had plaintiffs wished to secure an interest in TFC’s property via “real property [or] contract law” (*Truro*, 280 Va. at 29), they had several options. They could have secured deeds “forever” restricting the property to “use of the members ... of the [denomination] worshipping ... subject to [its] ... canons” (A110)—language found in church deeds across Virginia. They could have sought to place title in their bishop’s name, as they have done for 29 other churches, and as other hierarchical churches do. TFC Br. 18. Or they could have sought a contract committing TFC’s property to “be forever held ... in conformity with [their] Canons,” as in *Buhrman*. A2259-60.

But having failed to place their interests in “legally cognizable form” (*Jones*, 443 U.S. at 606), plaintiffs may not insist that neutral principles of law “do not apply.” DVA Br. 27. The ruling below must be reversed.

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February 11, 2013

## CERTIFICATE

Pursuant to Va. Sup. Ct. Rule 5:26, I hereby certify that:

This brief complies with the requirements of Rule 5:26.

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