IN THE

Supreme Court of Virginia

RECORD NO. 090682

THE PROTESTANT EPISCOPAL CHURCH
IN THE DIOCESE OF VIRGINIA,
Appellant,

v.

TRURO CHURCH, *et al.*,
Appellees.

REPLY BRIEF *AMICUS CURIAE* OF THE EPISCOPAL DIOCESE OF SOUTHWESTERN VIRGINIA AND THE EPISCOPAL DIOCESE OF SOUTHERN VIRGINIA IN SUPPORT OF APPELLANT

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Amici The Episcopal Diocese of Southwestern Virginia and The Episcopal Diocese of Southern Virginia submit this reply brief in support of the Appellants, The Protestant Episcopal Church in the Diocese of Virginia ("Diocese") and The Episcopal Church ("TEC").

ARGUMENT

I. THE APPELLEES AND THEIR *AMICI* ARGUE FOR A RULE THAT CANNOT BE RECONCILED WITH THIS COURT'S PRECEDENTS OR WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT.

The appellees and their *amici* assert a "neutral principles" analysis that simply cannot be squared with this Court's decisions in *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 201 S.E.2d 752 (1974), and *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980). According to appellees, Code § 57-9 establishes a "neutral principle" of majority rule, so that if church property is held by trustees a majority vote conclusively establishes the disposition of the property. In their view, nothing in the church's governing documents can establish any interest in the property on the part of a hierarchical church, nor can it ever affect the disposition of the property. *E.g.*, Appellees' Brief (Record No. 090682) at 20 (asserting that statements in church's governing documents are of "no legal effect").

Contrary to this logic, this Court explained in *Norfolk Presbytery* that the First Amendment requires that church property disputes "be

adjudicated according to 'neutral principles of law, developed for use in all property disputes.'" *Id.* at 504, 201 S.E.2d at 756. It then articulated the "neutral principles" analysis to be applied under Virginia law:

> We hold that it is proper to resolve a dispute over church property by considering the statutes of Virginia, the express language in the deeds *and the provisions of the constitution of the general church.*

Id. at 505, 201 S.E.2d at 756-57 (emphasis added). And in *Green* this Court held that a hierarchical church's governing documents could provide it with a contractual/proprietary interest which "could not be eliminated by the unilateral action of the congregation." 221 Va. at 555, 272 S.E.2d at 185.

The appellees'/*amicis*' arguments, therefore, implicitly ask this Court to overrule *Norfolk Presbytery* and *Green* by declaring that the governing documents of the church (which the congregations had a role in crafting and to which they pledged their adherence, as discussed below) have no legal effect. But prior decisions of this Court "will not be treated lightly or ignored, in the absence of flagrant error or mistake." *Pulliam v. Coastal Emergency Servs., Inc.*, 257 Va. 1, 10, 509 S.E.2d 307, 312 (1999)

(quoting *Selected Risks Ins. Co. v. Dean*, 233 Va. 260, 265, 355 S.E.2d 579, 581 (1987)). Neither ground could be asserted here.[1]

The appellees/*amici* also cannot square their position with the United States Supreme Court's clear statements in *Jones v. Wolf*, 443 U.S. 595 (1979), that a church

> can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church.... And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.

Id. at 606.[2]

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[1] In light of this authority, the appellees' reliance on *All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of South Carolina*, 685 S.E.2d 163 (S.C. 2009), is misplaced. Unlike this Court, the South Carolina Supreme Court dismissed the potential legal effect of church governing documents. It also appears to have misunderstood the relationship of Episcopal parishes to their dioceses and the Church, as well as the general rules governing voluntary associations and charitable trusts, and failed to address the constitutional implications of its decision. In any event, this Court (and the highest courts of virtually every other state to address the issue) have taken a markedly different approach.

[2] Indeed, The Episcopal Church adopted the "Dennis Canon" in direct response to the United States Supreme Court's decision in *Jones*, so as to "ensure . . . that the faction loyal to the hierarchical church will retain the church property" in the event of a dispute. 443 U.S. at 606. *See Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 924 (N.Y. 2008) (confirming that "Dennis Canon" was adopted in response to *Jones*).

II. THE DENNIS CANON (AND THE CORRESPONDING DIOCESAN CANON 15.1) MERELY CONFIRMED THE PREEXISTING INTEREST OF THE DIOCESE AND THE EPISCOPAL CHURCH IN PARISH PROPERTY.

The appellees/*amici* argue that no trust could be created (and/or that no beneficial property interest could arise) in favor of the Diocese or TEC because the congregations, as the "owners" of the property, were required to grant the interest.[3] This argument improperly assumes that the congregations had sole ownership of the property prior to the adoption of the "Dennis Canon" (and the corresponding Diocesan Canon 15.1) and it ignores the role that the congregations played in formulating, adopting and pledging adherence to the Canons of the Diocese and TEC. It also ignores the law applicable to voluntary associations and charitable trusts.

A. The Appellees and Their *Amici* Incorrectly Assume That The Congregations Had Sole Ownership of the Property.

The appellees/*amici* assume the very issue in dispute by asserting that the property at issue is "congregational property" and that the Diocese and TEC can have no interest in the property unless the congregations

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[3] The evidence relating to the interest of the Diocese and TEC in the property was never fully developed, because the Circuit Court wrongly held that the Diocese and TEC could not have a trust interest in the property as a matter of law, and then improperly prevented the Diocese and TEC from litigating the issue of their contractual/proprietary interests in the property. TEC Opening Brief at 46-50; Diocese Opening Brief at 14, 46-47 & n. 29.

expressly grant such an interest. They argue that the adoption of the "Dennis Canon" (and the corresponding Diocesan Canon) thus constitute an improper declaration of a trust interest by the beneficiary of the trust rather than the grantor.

But even before the adoption of the "Dennis Canon," this Court had recognized in *Norfolk Presbytery* that a hierarchical church could have an interest in church property held by trustees appointed by a local congregation. Thus, even when Virginia only recognized trusts in favor of local congregations, its courts nonetheless recognized that hierarchical churches could have enforceable rights in church property that could not be destroyed by the "unilateral" action of a local congregation.

The "Dennis Canon" and the corresponding Diocesan Canon 15.1 thus were not original declarations of a trust interest, but rather were an express statement of the property interest which the Diocese and TEC had always been understood to hold in church property.[4]

B. The Appellees and Their *Amici* Fundamentally Misstate the Nature of the Relationship Between Congregations, the Diocese and the General Convention of TEC.

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[4] Courts around the country have agreed that the "Dennis Canon" merely stated pre-existing policy. *Episcopal Church Cases,* 198 P.3d 66, 81-82 (noting that "a strong argument exists that Canon I.7.4 merely codified what had long been implicit" and citing numerous cases which it found "persuasive, especially in the aggregate").

The appellees/*amici* suggest that the Diocese and TEC Church have sought to impose a trust on "congregational property" by a "unilateral" declaration against the will of the congregations. In fact, the congregations participated in the creation of the trust and have repeatedly confirmed it.

The congregations are constituent parts of the Diocese and TEC. Parishes and missions elect delegates to the Diocesan Annual Council, which among other things considers and acts on proposed amendments to the Diocesan Canons. (Diocesan Constitution, Article III, JA 1269-70, describing composition of Annual Council.) Each diocese then elects delegates to TEC's General Convention, which among other things considers and acts on proposed amendments to TEC's Canons. (TEC Constitution, Preamble & Article I, JA 911-12.) Seven of the nine appellee congregations were represented at the Annual Council in 1983 when the Diocese of Virginia adopted its Canon 15.1. *See* JA 1274 (both parish and mission congregations represented at Annual Council). The other two joined after the Canon was already in place. (JA 3629, 3633, 4310.)

i. Members of a Voluntary Association Can Agree On the Rules Which Will Govern Their Affairs, and There Is No Unfairness In Enforcing Those Rules.

Churches, like other voluntary associations, may adopt rules governing their own internal affairs, and those rules are fully enforceable as between the members. As this Court has stated, "The constitution and by-laws adopted by a voluntary association constitutes a contract between the members, which, if not immoral or contrary to public policy, or the law, will be enforced by the Courts." *Bradley v. Wilson*, 138 Va. 605, 612, 123 S.E. 273, 275 (1924).

No unfairness occurs in enforcing the Diocesan Constitution and Canons, and the TEC Constitution and Canons, to which the congregations agreed to be bound. The congregations received all the benefits of affiliation with the Diocese and TEC – both in terms of services provided by the Diocese and TEC, and in terms of their affiliation with the Protestant Episcopal Church in the United States of America (the oldest organized church in Virginia) and its vast public recognition and resources. In exchange, they agreed to be bound by certain rules including those establishing a trust interest on the part of the Diocese and TEC in church property. *See Green v. Lewis*, 221 Va. at 553-54, 272 S.E.2d at 184-85.

Unit Owners' Ass'n v. Gillman, 223 Va. 752, 292 S.E.2d 378 (1982), upon which appellees/amici rely, is not to the contrary. The limitation on the ability of the condominium association in *Gillman* to levy fines on its

members stemmed from the fact that the condominium association was purely a creature of statute, having only the powers granted by the General Assembly – powers which did not include the power to levy fines. *Id.* at 763-64, 292 S.E.2d at 383-84. But there is no *legal* impediment under Virginia law to a member's granting or acknowledging that a voluntary association has a trust interest (or a contractual/proprietary interest) in property. *Gillman* thus offers no basis for invalidating provisions of the Constitution or Canons of the Diocese or TEC, but rather confirms that the relationship between the voluntary association and its members is "contractual in nature and is the creature of the [organizational rules] to which all [members] subjected themselves" when joining the association. *Id.* at 766, 292 S.E.2d at 385.

ii. The Congregations Have, By Their Actions, Repeatedly Confirmed The Trust.

The congregations not only participated in the church's internal rule-making, but they repeatedly reaffirmed their agreement to the provisions of the Constitution and Canons of the Diocese and the Constitution and Canons of TEC. Several of the congregations agreed in writing to be bound by the Constitution and Canons of the Diocese and of TEC when they joined the Diocese. (*E.g.*, JA 3651, 3657, 3668, 3677, 3688, 3694,

4408.)[5] As a part of their ordination vows, the clergy serving in each of the congregations pledged to "conform to the Doctrine, Discipline, and Worship of the Episcopal Church." (TEC Constitution, Article VIII, JA 917.) The vestry members of each of the parishes subscribed an oath which included a pledge of "hearty assent and approbation to the doctrines, worship and discipline of The Episcopal Church." (Diocese Canon 11, Sec. 8, JA 1285.)

The congregations, therefore, took acts over many years by which they acknowledged and agreed to be bound by the Constitution and Canons of the Diocese and TEC, including the provisions relating to church property, and did so years before the current dispute erupted. *See Episcopal Church Cases*, 198 P.3d 66, 79-83 (Cal.), *cert. denied*, 130 S.Ct. 179 (2009).

iii. Enforcement Of The Trust Poses No Substantial Problems Under Virginia Law.

The enforcement of the trust in favor of the Diocese and TEC is fully consistent with Virginia law and poses no substantial problems.

The appellees' *amici* raise concerns that enforcement of the trust will cause difficulty and confusion. (*See* Becket Fund *Amicus* Brief at pp. 45-

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[5] *See also* JA 4270-71(deed stating that conveyance of property is "subject to the Constitution, canons & regulations of the Protestant Episcopal Church of the Diocese of Va.").

46.) But these concerns rest on a misunderstanding of Virginia law. Virginia deems the trustees to hold legal title to the property, *Trustees v. Taylor & Parrish, Inc.*, 249 Va. 144, 152, 452 S.E.2d 847 (1995), so no difficulty arises in determining the record owner of the property. The Diocesan Canons and the TEC Canons require approval of the Bishop, with the advice and consent of the Standing Committee, in order for church property to be sold or encumbered; but the requirement to obtain this approval is on the part of the *trustees* in the exercise of their duties to the beneficiaries, regardless of the identity of those beneficiaries. It should be of no concern to third parties whether the approval must come from the local congregation or from other duly constituted church authorities.[6]

Virginia Code § 57-11 makes the trustees proper parties in a suit involving the property they hold in trust, and this Court has recognized that the trustees are proper parties in a suit over a contract relating to the property. *Taylor & Parrish, Inc.*, 249 Va. at 151-52, 452 S.E.2d at 851-52. In short, the "difficulties" suggested by the appellees' *amici* are no different

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[6] Indeed, a church trustee must always have consent from the beneficiaries of the trust in order to convey real property held in trust. The trustees hold legal title to the property but "have no power of their own volition, and in their capacity as trustees, to either alien or encumber such real estate." *Globe Furniture Co. v. Jerusalem Church*, 103 Va. 559, 561, 49 S.E. 657, 658 (1905).

if the Diocese or TEC is the beneficiary of the trust than if the property were held in trust solely for the local congregation.

Finally, the hypotheticals posited by the American Anglican Council at page 16 of its *amicus* brief are precisely the opposite of what occurred here. In this case, the congregations agreed, as a condition of being a part of the Diocese and TEC, that the hierarchical church would have an interest in church property. The hypotheticals either omit or ignore this crucial step. If members of the Rotary Club (or the Chamber of Commerce or the yacht club) agree by contract that the larger organization has an interest in property used by the group (regardless of how it is titled), and that the group's chosen governing officials must approve any transfer of the property, no Virginia rule of law would permit a majority of the members to vote to leave the organization, affiliate with a different organization – and *take the property with them* to the detriment of the remaining, loyal members of the organization.[7]

III. THE TRUST IN FAVOR OF THE DIOCESE AND THE EPISCOPAL CHURCH IS CONSISTENT WITH VIRGINIA CODE § 57-7.1.

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[7] Neither the appellees, nor their amici, have identified any rule of law in Virginia that resolves property disputes generally by "majority rule." Nor has the Commonwealth, in defending the constitutionality of Code § 57-9(A), been able to identify any such rule.

Virginia Code § 57-7.1 expressly provides that:

> Every conveyance or transfer of real or personal property, whether inter vivos or by will, which is made to or for the benefit of any church, *church diocese*, religious congregation or religious society, whether by purchase or gift, shall be valid.

(Emphasis added.) None of the appellees' briefs explains how this language can be squared with the Circuit Court's holding that Virginia would only recognize a trust in favor of a local congregation. Nor did the Circuit Court do so.

In *Norfolk Presbytery*, this Court stated that,

> By decisions for many years we have held that a trust for indefinite beneficiaries, if the named trustee is an individual or unincorporated body, is invalid unless expressly validated by statute.

Norfolk Presbytery, 214 Va. at 505, 201 S.E.2d at 757. When the General Assembly adopted Code § 57-7.1 in 1993, it "expressly validated" trusts in favor of a "church diocese" or a "religious society" – entities which had previously been considered indefinite beneficiaries.[8]

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[8] The last paragraph of Code § 57-7.1 removes any doubt over whether the General Assembly intended to validate trusts in favor of such groups by stating that such trusts cannot "fail or be declared void for insufficient designation of the beneficiaries" so long as the diocese or religious society "has lawful trustees in existence, is capable of securing the appointment of lawful trustees upon application ... is incorporated, ... or has ecclesiastical officers...." Va. Code § 57-7.1.

The congregations took actions both before and after July 1, 1993 (the effective date of the statute) to acknowledge TEC's and the Diocese's trust interest in the property. Moreover, the statute is "declaratory of existing law" (1993 Acts of Assembly, Ch. 370) in that it validated *as a matter of trust law* the interests of a "church diocese" or "religious society" which this Court had already recognized as enforceable contractual/ proprietary interests.

IV. CODE § 57-9(A) CAN APPLY ONLY TO PROPERTY HELD IN TRUST SOLELY FOR A CONGREGATION. IT CANNOT APPLY WHERE, AS HERE, THE DIOCESE AND TEC HAVE AN INTEREST IN THE PROPERTY.

The Circuit Court improperly construed Code § 57-9(A) to apply to any church property held by trustees, without regard to the beneficiaries of the trust. (Indeed, the Circuit Court held that the statute applied even to property titled in the name of Diocesan Trustees and expressly held in trust for the Diocese. (*See* JA 4454,4886-87.)) The appellees/*amici* repeat this error of construction in their arguments.

Code § 57-9(A) in fact applies only to property that is solely controlled by a congregation – i.e., "held in trust *for such congregation.*" (Emphasis added.) As this Court explained in *Green v. Lewis*, § 57-9 merely codifies "the right of a majority of the members of a divided congregation to control the use of the church property *if the church, in its organization and*

government, is a church or society entirely independent of any other church or general society." 221 Va. at 552-553, 272 S.E.2d at 184 (emphasis added). The Circuit Court was required, therefore, to determine whether the property was "held in trust for [a] congregation," or whether it was held in trust for others.

The fallacy of the Circuit Court's construction – and of the arguments of the appelles and their *amici* – is revealed by analysis of the purported "escape hatch" advanced. The Circuit Court, the appellees and their *amici* all argue that the Diocese and TEC could avoid application of Code § 57-9(A) by titling property in the name of the Bishop. But if church property were in fact titled in the name of the Bishop, there could be no serious argument that the Bishop was holding the property for his or her *personal* use. Rather, the Bishop would be holding the property *in trust* for the Diocese and TEC. The Bishop would, accordingly, be acting as a *trustee.* Since the Circuit Court, the appellees and their *amici* all argue (wrongly) that Virginia will only recognize a trust in favor of a local congregation, and not in favor of a church diocese or a hierarchical church generally, their position would undoubtedly be that church property held in the name of the Bishop, but used by a local congregation, is property "held in trust for such congregation" and therefore subject to Code § 57-9(A). (Certainly they

would have made this argument before the statute was amended in 2005, because prior to that time it referred only to "property held in trust.")[9]

The Circuit Court erred by failing to ascertain whether the property was held solely for the benefit of the congregations, or whether others had an interest (whether a trust interest or a contractual/proprietary interest) in it. By holding that Code § 57-9(A) applies to any church property held by trustees, the Circuit Court violated the language of the statute, as well as this Court's instructions in *Norfolk Presbytery* and *Green*. As a result, the Circuit Court wrongly permitted the property interest of the Diocese and TEC to be "eliminated by the unilateral action of the congregation[s]." *Green v. Lewis*, 221 Va. at 556, 272 S.E.2d at 186.

Respectfully Submitted,

THE EPISCOPAL DIOCESE OF SOUTHWESTERN VIRGINIA

By _____

Respectfully Submitted,

THE EPISCOPAL DIOCESE OF SOUTHERN VIRGINIA

By _____

[9] In any event, a rule requiring churches – and only churches – to utilize an "escape hatch" in order to preserve their property interests is not "neutral" and thus violates the First Amendment.

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CERTIFICATE

Pursuant to Va. Sup. Ct. Rule 5:29, I hereby certify that on this 1st day of March, 2010:

Fifteen printed copies of this brief have been transmitted by hand for filing in the office of the Clerk of this Court.

Fifteen electronic copies of this brief, in PDF and Word formats, have been transmitted by hand for filing with the Clerk of this Court, on CD.

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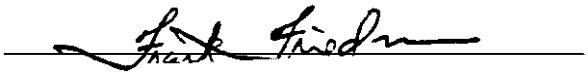
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