Record Nos. 090682 & 090683

In the Supreme Court of Virginia

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA, APPELLANT

v.

TRURO CHURCH, ET AL., APPELLEES

THE EPISCOPAL CHURCH, APPELLANT

v.

TRURO CHURCH, ET AL., APPELLEES

BRIEF OF *AMICI CURIAE* THE AMERICAN ANGLICAN COUNCIL, PRESBYTERIAN LAY COMMITTEE, AND ASSOCIATION FOR CHURCH RENEWAL, IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST

Pursuant to Rule 5:30 of the Rules of the Supreme Court of Virginia, the American Anglican Council, Presbyterian Lay Committee, and Association for Church Renewal submit this brief as *Amici Curiae* in support of the Appellees, Truro Church *et al.*, collectively known as the CANA Congregations. Each of the *Amici*, given its mission, has a strong interest in seeing that Virginia courts remain free to apply the Commonwealth's neutral rules for resolving church-property disputes, which here produce a result no different from that which ordinary trust law would and which accomplish that result through the reasonable and longstanding default mechanism of a majority vote. Virginia law thereby properly protects the rights of local congregations of a denomination during a division of that denomination.

The American Anglican Council, founded in 1996, is a non-profit corporation that is a network of individuals (lay and clergy), parishes, dioceses and ministries who affirm biblical authority and Christian orthodoxy within the Anglican Communion. To that end, the Council seeks to build up and defend "Great Commission" Anglican churches in North America and worldwide through advocacy and counsel, leadership development, and equipping the local church. The Council regularly assists Anglican churches in distress who are the subject of litigation by The Episcopal Church and its

dioceses. Consistent with this practice and purpose, it has a keen interest in the Appellee CANA Congregations', and local congregations like them throughout Virginia and the nation, retaining their properties.

The Presbyterian Lay Committee is a non-profit corporation, established in 1965, whose mission includes informing Presbyterians about issues facing the Presbyterian Church (United States of America) and equipping local congregations—and their members—in their interaction with the regional and national entities of the denomination. The Committee regularly reports on judicial decisions concerning church property issues and publishes a legal guide regarding disaffiliation and related property-ownership issues: "A Guide to Church Property Law: Theological, Constitutional and Practical Considerations." As a regular *amicus curiae* throughout the nation, the Committee speaks for members concerned with, among other things, the preservation of traditional Presbyterian polity, and the property rights of the local churches that purchased the property in their own name. The Committee thus has a strong interest in this matter.

The Association for Church Renewal is a non-profit corporation founded in 1996 as an outgrowth of cooperative meetings dating back to 1979 among leaders representing "renewal" movements in the "mainline" Protestant denominations. It serves as an ecumenical umbrella for over

thirty renewal organizations from ten different denominations, strengthening, encouraging, defending, and coordinating the work of those who are calling their churches back to their biblical and historic Christian faith. The Association carries out this work of reformation through publications, a news service, and the providing of resources. It has a particular interest in the increasingly international character of renewal efforts, as the flourishing churches that the mainline denominations of the West founded decades or even centuries ago—such as the Anglican Church of Nigeria, at issue here—offer brave and faithful leadership to their wayward and atrophying "parents."

STATEMENT OF THE CASE

The *Amici* adopt and incorporate by reference the Statement of the Case set forth in the Briefs of the Appellees.

STATEMENT OF THE FACTS

The *Amici* adopt and incorporate by reference the Statement of the Facts set forth in the Briefs of the Appellees.

ARGUMENT

The fundamental claim of the Episcopal Church and the Diocese of Virginia ("Diocese") (collectively, "Appellants") in this case is that they each have a cognizable "trust" interest in the properties of the CANA Congregations, even though the properties are titled to trustees for the benefit of

those local congregations. Given the division that has occurred in the Episcopal Church and Diocese, the longstanding background law of Virginia, codified at Virginia Code § 57-9, resolves these competing beneficial claims through the default rule of a majority vote of each congregation, as the circuit court correctly held. But the Episcopal Church and Diocese contend that, if this is so, Section 57-9 is unconstitutional because it does not employ a neutral principle of law.

One way to assess this constitutional argument (although far from the only way, as the circuit court and CANA Congregations show) is to consider how the Appellants' alleged trust interests in the congregations' properties would fare if one applied Virginia's secular trust law—"neutral principles of [trust] law, developed for use in all property disputes." *Reid v. Gholson*, 229 Va. 179, 188, 327 S.E.2d 107, 112 (1985) (internal quotation marks omitted); *see Jones v. Wolf*, 443 U.S. 595, 599 (1979) (same). That is, assume that the entities are not religious organizations subject to Title 57, but rather are secular and subject to Title 55. Indeed, given that Title 57 does not specifically address how religious trusts are created, Virginia's secular law on trust formation, which largely codifies the common law, may even apply. *See* Va. Code Ann. § 55-541.02(B) (noting permissibility of court's determining "that application of the policies, procedures or rules of

the Code is appropriate to resolution of particular issues" even if Title 57 otherwise applies).

The Constitution of course would not *require* Virginia to apply its secular law, or else much of Title 57, not just Section 57-9, would be unconstitutional. As the circuit court recognized in upholding Section 57-9, a State may, within broad limits set by the First Amendment, accommodate its laws to the particular problems that arise in church-property disputes. *See*, *e.g.*, *Jones*, 443 U.S. at 602, 607-08. That includes adopting laws specifically governing the holding of church property. *E.g.*, *Maryland & Va. Churches v. Sharpsburg Church*, 396 U.S. 367 (1970) (per curiam); *see id.* at 368 (Brennan, J., concurring) ("[A] State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters. . . ."). Neither the Episcopal Church nor the Diocese seriously contends otherwise, as they point to other provisions of Title 57 in making their arguments and effectively are asking the civil courts to enforce the church law of a denominational hierarchy.

But whatever the outer limits of a State's authority to resolve church-property disputes with laws specific to churches, it is at least the case that the Constitution does not *require* a State to grant to a denominational body *greater* authority under the civil law than it would have if it were a secular

body. Yet that is what the Episcopal Church and Diocese seek here. They seek to have a court directly enforce against the CANA Congregations a *denomination's* canons that declare a trust interest *for its own benefit* in those congregations' properties. As explained below in Part I, such a claim would be frivolous if brought by a secular body and evaluated under general Virginia trust law. It follows that, as explained in Part II, it cannot be unconstitutional under *Jones v. Wolf* for Virginia to deny the Episcopal Church and Diocese rights that it also would deny to any secular party claiming such an interest in property legally owned by another. Moreover, that Virginia uses Section 57-9's default rule of majority vote of the local congregation as the means of reaching the same result here that secular law would produce is eminently reasonable and constitutional, as explained in Part III.

I. The Trust That the Episcopal Church and Diocese of Virginia Assert Bears No Resemblance to Trusts Legally Cognizable Under Virginia's Secular Trust Law.

The "trust" that the Episcopal Church and Diocese posit is unrecognizable under long-established Virginia trust law, failing the most basic requirements of that law. They cannot claim that the deeds of the CANA Congregations' properties convey that property other than for the benefit of the local congregations. Thus, the grantors of those properties did not cre-

ate the trust interests that the Appellants claim. Nor has the Episcopal Church or Diocese alleged any act *by the CANA Congregations* creating any trust interest that would transfer to the Appellants properties held for the congregations' benefit.

Instead, the Episcopal Church and Diocese—alleged *beneficiaries* of these trusts—focus on their own canons: a national canon adopted in 1979 and known as the Dennis Canon, and a substantially identical diocesan version authorized by the Dennis Canon. *See* Episcopal Church ("TEC") Canon I.7.4-5; Diocese ("DVA") Canon 15.1; *see generally* JA 910-1344 (TEC and DVA constitutions and canons). The Dennis Canon unilaterally decrees that the trustees holding property for the benefit of a local congregation also hold it for the benefit of the Episcopal Church and Diocese. Translated into secular trust law, the Appellants are arguing that an organization may create a trust interest in property legally owned by another and render itself the beneficiary of the trust.

That would be a frivolous argument under the trust law by which Virginia courts resolve disputes alleging secular trust interests. Virginia recognizes three basic forms of trusts: express, resulting, and constructive trusts. *Old Rep. Nat'l Title Ins. Co. v. Tyler* (*In re Dameron*), 155 F.3d 718, 722 (4th Cir. 1998) (citing *Leonard v. Counts*, 221 Va. 582, 588-89, 272

S.E.2d 190, 194-95 (1980)). As we show, the trust theory of the Appellants here is not legally cognizable under any of these three forms. Put differently, the Episcopal Church and Diocese seek the right to unilaterally declare a self-executing trust for their own benefit even though no secular organization could make such a claim upon a property owner or the courts of the Commonwealth.

A. An express trust for someone's benefit may only arise when the owner of property—the *settlor*, not the beneficiary—plainly manifests an intention to create it, which did not happen here.

1. A trust "is a fiduciary relationship with respect to property, arising from a manifestation of intention to create the relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons." Restatement (Third) of Trusts § 2 (2003) ("Restatement"). Under the longstanding law of Virginia, express trusts arise when a party—known as the "trustor" or "settlor"—affirmatively "declare[s]" an intention that certain of its property be held in trust for the benefit of another. *See*, *e.g.*, *Leonard*, 221 Va. at 588, 272 S.E.2d at 194 ("An express trust is based on the declared intention of the trustor."); *Peal v. Luther*, 199 Va. 35, 37, 97 S.E.2d 668, 669 (1957) (explaining that "an express trust is based on proof of the declared intention of the trustor").

Under the Uniform Trust Code (the "Code") as adopted in Virginia, *see* Va. Code Ann. §§ 55-541.01 *et seq*., a trust may be created (1) by "*[t]ransfer of property to another person as trustee* during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death"; or (2) by "*[d]eclaration by the owner* of property that the owner holds identifiable property as trustee." *Id.* § 55-544.01 (emphases added).[1] Thus, to qualify as a "settlor" of a trust under the Code—"a person . . . who creates, or contributes property to, a trust"—an individual or entity must be the source of the trust property. *Id.* § 55-541.03. If more than one individual or entity contributes property to a trust, "each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion." *Id.*

Beyond the requirement to contribute property, the creation of a trust also depends on five other conditions, one of which is that "[t]he settlor indicates an intention to create the trust." *Id.* § 55-544.02(A)(2).[2] As the Re-

[1] A trust also may be created by "[e]xercise of a power of appointment in favor of a trustee." *Id.*

[2] The five conditions are as follows: "A trust is created only if: 1. The settlor has capacity to create a trust; 2. The settlor indicates an intention to create the trust; 3. The trust has a definite beneficiary or is: a. A charitable trust; b. A trust for the care of an animal, as provided in § 55-544.08; or c. A trust

statement elaborates: "In order to create a trust the settlor, alone or together with the trustee, must *properly manifest an intention* to create a relationship that constitutes a trust . . . ." Restatement § 13 cmt. A (emphasis added). A proper "manifestation of intention requires an *external expression of intention* as distinguished from undisclosed intention." *Id.* (emphasis added).

Moreover, the settlor's external expression of his intention to create a trust must be clear. Words must "*unequivocally* show an intention that the legal estate was vested in one person, to be held in some manner or for some purpose on behalf of another." *Broaddus v. Gresham*, 181 Va. 725, 731, 26 S.E.2d 33, 35 (1943) (emphasis added; internal quotation marks omitted). The intention to create a trust for some beneficiary "must be *plainly manifest*, and *not derived from loose and equivocal expressions* of parties, made at different times and upon different occasions." *Executive Comm. of Christian Educ. & Ministerial Relief v. Shaver*, 146 Va. 73, 81, 135 S.E. 714, 716 (1926) (emphases added; internal quotation marks omitted). Thus, in the absence of the settlor's creating a written trust instru-

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for a noncharitable purpose, as provided in § 55-544.09; 4. The trustee has duties to perform; and 5. The same person is not the sole trustee and sole beneficiary." Va. Code Ann. § 55-544.02(A).

ment, the Code recognizes an orally created trust only if established "by clear and convincing evidence." Va. Code. Ann. § 55-544.07.

2. The Episcopal Church's and Diocese's argument that the CANA Congregations' properties are held in trust for the benefit of the denomination thus fails for at least two basic and independent reasons under secular Virginia trust law: First, the Appellants do not allege that they were the settlors of the alleged trusts at issue. Rather, they focus on their canons, not on any transfer or declaration by the Episcopal Church or Diocese as legal owners of the relevant property. Second, the CANA Congregations also could not be the settlors. They have not manifested an intention to impose trust interests on their properties for the benefit of the Episcopal Church and the Diocese, and they certainly have not done so "unequivocally" or "plainly" in any way that might suffice under the secular law. Thus, the Appellants must claim that the *Appellants*, even though not proper settlors, somehow created the trust, for *their own benefit*, in the property of *another*. Such a claim is not credible under secular trust law.

With regard to the first issue, under the publicly recorded deeds of the properties at issue, title is held by trustees for the local churches. *E.g.*, DVA Compl. ¶¶ 5, 31(d). Indeed, that is a premise of Appellants' claim, because the canons by their terms depend on the encumbered properties' be-

ing “held by or for the benefit of” the local congregations. TEC Canon I.7.4 (Dennis Canon); *see* DVA Canon 15.1 (same). The Episcopal Church and the Diocese claim to be *additional* beneficiaries. Therefore, the Episcopal Church’s and the Diocese’s actions, whatever they might be, cannot by their own force have placed the properties at issue in trust.

Rather than being proper settlors, the Episcopal Church and the Diocese seek to be the beneficiaries of their purported trusts, but it follows from the law just explained that a beneficiary cannot unilaterally create a trust in property legally owned by another. The South Carolina Supreme Court, applying ordinary trust law, recently and unanimously recognized this simple point in the same context. The court set out as “an axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another or transfer legal title to one person for the benefit of another.” *All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of S.C.*, 385 S.C. 428, 449, 685 S.E.2d 163, 174 (2009). The South Carolina court found it to be obvious that the Dennis Canon “had no legal effect on the title to” the property of the local congregation at issue. *Id.*

Second, if no action of the Episcopal Church and the Diocese could have validly created an express trust in the CANA Congregations’ proper-

ties, then only the local churches could have been the settlors, and only their actions could have created an express trust for the benefit of Appellants. That would have required each of the CANA Congregations to manifest an intention to do so in a trust instrument, or at least by clear and convincing evidence of an oral manifestation of intention.

But the congregations did nothing of the sort. They did not include the Episcopal Church and the Diocese as beneficiaries in the deeds to the properties that they purchased; they signed no trust agreement; nor are they alleged to have otherwise expressly stated an intention to create a trust interest in their properties for Appellants' benefit.

Rather, the Appellants' theory boils down to the Dennis Canon and its diocesan derivative, and the claim that these unilateral declarations encumbered the CANA Congregations' property. But under secular trust law, these manifestations of the intentions of the would-be beneficiaries are not proper manifestations of the intentions of the CANA Congregations as settlors.

At the most basic level, the enactments of the canons were not actions by the CANA Congregations themselves. Rather, they were actions by the Episcopal Church and then by its Diocese as authorized by the Episcopal Church. *See* TEC Canon I.7.5. Indeed, at the national level, the

General Convention of the Episcopal Church, which creates the Episcopal Church's canons, does not even include representation of congregations; rather, it represents only dioceses, through their bishops and deputies. *See* TEC Const., art. I.2 & I.4. The Diocese's legislature, its Council, consists of all clergy canonically resident in the Diocese (whether or not tied to a particular congregation), numerous *ex officio* members, and the lay representatives of each of dozens of congregations. *See* DVA Const., art. III.1. The actions of such bodies cannot be said to manifest an intention of any particular congregation. Nor have the CANA Congregations otherwise affirmatively assented to the Dennis Canon or its diocesan derivative.

Thus, the plaintiffs are reduced to essentially arguing that the CANA Congregations plainly manifested an intention to encumber their property by *in*action—by failing to withdraw from the denomination and its activities. But continued association and participation is not the type of "plainly manifest" intention that the law requires for encumbering one's property with a trust. *Executive Comm.*, 146 Va. at 81, 135 S.E. at 716. It is—at best—"loose and equivocal," and thus insufficient. *Id.* The Appellants seek to turn trust law on its head, using what amounts to a purported *lack* of manifestation of an intention *not* to have one's property encumbered as somehow affirmatively manifesting an intention that it *be* encumbered.

Among other things, the Appellants' argument would still require disassociation *after* the canon had taken force. Neither the Episcopal Church nor the Diocese declared their trust interests by amending their constitutions, which as to both Appellants would have required affirmative votes at two separate General Conventions or diocesan Councils before it was approved, and thus at least theoretically allowed a period in which to opt out—three years in the case of the Episcopal Church and a year in the case of the Diocese. *See* TEC Const., art. XII; DVA Const., art. XIX. Instead, they used canons, and the General Convention specially provided that the Dennis Canon would take immediate effect, contrary to its usual procedure.[3] *See* TEC Canon V.1.6. So it is not clear how continued association followed by departure in 2006 could differ materially from departure the year after enactment. Under the Appellants' theory, the legal effect would have been the same, which confirms the irrelevance of continued association.

[3] An ecclesiastical organization's unilateral assertion of a trust interest via a constitutional amendment would, however, similarly fail to meet Virginia's secular criteria for creating a trust, because it still would not plainly manifest an intention of any individual congregation—there still would not be an *affirmative act* by each *settlor* to encumber its property. In any event, the dubiousness of the Episcopal Church and Diocese's approach here is evident from their avoidance of *Jones*'s recognition that it is necessary for a denomination's interest in property to be in a "legally cognizable form" before a civil court might be bound to give it effect. 443 U.S. at 606. *E.g.*, TEC Br. 39; DVA Br. 3.

That is, even failure to opt out when given a true opportunity cannot be the basis for imposing a trust under the secular law. The Episcopal Church and Diocese's argument is no different than if the Rotary Club's governing body adopted a bylaw granting itself a beneficial interest in all of its members' properties, and then claimed that the members somehow manifested an intention to agree to the encumbrance if they did not quit the club. Or if the Chamber of Commerce's board voted to encumber the property of all businesses that continued their membership. Or if a yacht club not only set the rules for its races but also seized members' boats. Or if one's employer adopted an internal policy creating a trust in the homes of all employees who did not quit. Or even if a local congregation adopted a bylaw giving itself a trust interest in all continuing members' property. Indeed, the logical end of Appellants' argument is that a denomination could unilaterally take a trust interest in the homes of its congregations' continuing members, by the same means that Appellants used for the properties of those members' congregations here.

Yet in none of these situations would the secular law recognize a manifestation of intention by the purported settlor. Such organizations might expel members unwilling to affirmatively encumber their property, but

could not plausibly claim an interest in it by members' failure to withdraw on their own.

This Court has in fact rejected the theory that an organization's internal rules can require forfeiture of a member's property. In *Unit Owners Ass'n of BuildAmerica-1 v. Gillman*, 223 Va. 752, 292 S.E.2d 378 (1982), which the Diocese cites without any explanation, *see* DVA Br. 40 n.26, this Court addressed whether a condominium association could fine a member on the basis that it passed internal rules giving itself this power and owners purchased condominiums subject to those rules. Noting that no statute authorized the association to collect such fines and that enforcing the rule would encumber the member's property, this Court held that the action was impermissible. *Gillman*, 223 Va. at 763-65, 292 S.E.2d at 383-84. *Gillman* stands for the proposition that under neutral, secular principles of law, a rule imposing what amounts to a financial penalty requires express statutory authorization.

All the more does this holding apply here. In *Gillman*, a statute expressly authorized the association to regulate condominium property (but not to levy fines); the association's rules were recorded with the deeds; and the fine was merely $25 a day. *Id*. at 759, 763, 766, 292 S.E.2d at 381, 383, 385. Here, the canons were adopted with no statutory authority; were

not recorded with the deeds of the property at issue; and purport to deprive the local churches of all real and personal property. A secular organization may not create an express trust in the manner that Appellants purport to have done here.

B. A resulting trust arises only when the law presumes the intention to create a trust, and Virginia's secular trust law presumes no such intention under the facts here.

The second type of trust interest that Virginia's secular law recognizes is a resulting trust, and the Episcopal Church and Diocese allege no facts that would create that sort of trust either. Unlike an express trust, which depends on a settlor's expressly declared intention, a resulting trust depends on a presumed intention, an inference of law from the circumstances. *Leonard*, 221 Va. at 588, 272 S.E.2d at 194. As this Court recently explained: "A resulting trust is an indirect trust that arises from the parties' intent or from the nature of the transaction and does not require an express declaration of trust." *1924 Leonard Rd., L.L.C. v. Van Roekel*, 272 Va. 543, 552, 636 S.E.2d 378, 383 (2006).

Virginia's secular trust law presumes the intention to create a trust in the absence of the settlor's declaration only in specific circumstances. As this Court further explained: "For a resulting trust to arise, the alleged beneficiary must [1] pay for the property, or assume payment of all or part

of the purchase money before or at the time of purchase, *and* [2] have legal title conveyed to another without any mention of a trust in the conveyance." *Id.* (numbers and emphasis added); *see also Leonard*, 221 Va. at 588, 272 S.E.2d at 195 ("[S]uch a trust arises when prior to the purchase one person binds himself to pay purchase money and stands behind his commitment, but title is conveyed to another."). Furthermore, "[a] resulting trust can only arise from the parties' original transaction, at the time that transaction occurs, and at no other time." *1924 Leonard Rd.*, 272 Va. at 552, 636 S.E.2d at 383. Therefore, "[t]he doctrine generally, if not universally recognized is, that when a conveyance of real estate is made to one person, and the consideration paid by another, it is presumed that the party advancing the money intended a benefit to himself, and accordingly a resulting trust is raised in his behalf." *Smith v. Smith*, 200 Va. 77, 80, 104 S.E.2d 17, 21 (1958) (internal quotation marks omitted).

The Episcopal Church and the Diocese allege no facts to meet this standard. They would need to have been a third party to a CANA Congregation's purchase of its property from someone else and paid for it at the time of conveyance of legal title to that CANA Congregation. As to none of the CANA Congregations is this the case. Instead, again, the Episcopal Church and Diocese argue that their own canons, not any monetary contri-

bution at the time of a congregation's purchase from another, created their beneficial interests in the property. Thus, no resulting trust could exist.

C. A constructive trust requires fraud or similar wrongdoing in connection with a property transaction, which did not happen here.

The final type of trust under Virginia's general, secular trust law is a constructive trust. But the Episcopal Church and the Diocese likewise present no viable theory of this type.

"Constructive trusts arise, independently of the intention of the parties, by construction of law; being fastened upon the conscience of him who has the legal estate, in order to prevent what otherwise would be a fraud." *Leonard*, 221 Va. at 589, 272 S.E.2d at 195 (internal quotation marks omitted). The focus of the law and the cases is on (1) fraud or some analogous wrongdoing, (2) in connection with the obtaining of legal title to property. A constructive trust will arise "whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments or through undue influence, duress, taking advantage of one[']s weakness or necessities," or some other analogous circumstance. *Michie's Jurisprudence of Virginia and West Virginia*, Trusts and Trustees § 48, at 125 (2009). The idea is to impress a trust "on whoever acquires property rights by the commission of a wrong," that is, by "fraud, actual or construc-

tive." *Id.* at 126. A constructive trust "suggests a dishonest transaction." *Id.* § 49, at 128. *See generally id.* § 50 (collecting categories of illustrative cases); *Leonard*, 221 Va. at 589-90, 272 S.E.2d at 195-96 (similar).

As strenuously as the Appellants assert their trust interests, they do not assert them through claiming that the CANA Congregations obtained their properties through fraud or similar wrongdoing. Nor could they. The argument would have to be for some sort of fraud by inaction or silence, just as with the flawed argument, discussed above, that one could somehow plainly manifest an intention to create an express trust encumbering one's property by not disassociating from a group that announces the creation of one for its own benefit, even though trust law does not allow it to do this.

Not only is any such theory implausible on its own, but one also would, if evaluating the equities, have to consider the inaction in the context of (among other things) relevant background Virginia law at the time the congregations obtained their property. The longstanding rule has been that neither an express nor an implied trust for the benefit of a religious denomination is permissible, as this Court reiterated both before and after enactment of the canons at issue here. *E.g.*, *Reid*, 229 Va. at 187 n.11, 327 S.E.2d at 112 n.11; *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 505-07,

201 S.E.2d 752, 757-78 (1974). The reasons, this Court explained, were (1) that such trusts were subject to the general rule "that a trust for indefinite beneficiaries, if the named trustee is an individual or unincorporated body, is invalid unless expressly validated by statute," and (2) that the General Assembly had validated such trusts by statute only to the extent that they were in favor of a diocese "for certain residential purposes." *Id*. at 505-06, 201 S.E.2d at 757-58. Thus, even in the absence of a division that would trigger the also-longstanding provisions of Virginia Code § 57-9, there was no reason for any congregation to think that the Episcopal Church or Diocese could enforce a unilaterally declared trust in local church property in the civil courts. It was at least neither fraudulent nor otherwise deceptive to obtain property in reliance on this law and this Court, and thus consider it unencumbered.

The same logic applies to this day. No court has rejected the longstanding rule as articulated in *Norfolk Presbytery*, *Reid*, and many other cases.

The Diocese does contend that Virginia Code § 57-7.1 changed this rule in 1993 notwithstanding that the General Assembly stated that it was declaratory of existing law. Even assuming for the sake of argument that the Diocese were correct (which it is not, as discussed below in Part II),

and also that Section 57-7.1 were somehow relevant to trusts allegedly created before 1993—the Dennis Canon having been adopted over a decade before—it would not matter here for purposes of the secular law of constructive trusts.

First, no one before now has recognized the change that the Diocese alleges. Rather, both this Court and the Attorney General have somehow overlooked it in discussing that statute. *See Trs. of Asbury United Methodist Church v. Taylor & Parrish, Inc.*, 249 Va. 144, 152, 452 S.E.2d 847, 851-52 (1995); 1996 Op. Va. Att'y Gen. 194, 1996 WL 384493 (Apr. 4, 1996). Even if they were both wrong, it would hardly involve wrongdoing (much less fraud) for a congregation to conduct its affairs in reliance on these authorities' continued recognition of longstanding law, and thus to obtain property without any concern for the trust interests unilaterally announced by the purported beneficiaries of their trusts.

Second, Section 57-7.1 (like the law of constructive trusts) requires a "conveyance or transfer" of property. Yet the Appellants disclaim having received any conveyance. Br. in Opp. to Demurrers and Pleas in Bar 23 (July 13, 2007) (stating that the Episcopal Church and Diocese "do not allege a 'conveyance' (or a contract to convey)"). So there was no reason for

the CANA Congregations to consider that statute relevant even if they did disagree with both this Court in *Asbury* and the Attorney General.

Thus, the Appellants could not establish a constructive trust either, just as they could not establish an express or resulting trust. Under the secular trust law of Virginia, they therefore have no ground to complain that a civil court has declined to enforce their alleged trust interests in the properties of the CANA Congregations by failing to enforce the canons of the Episcopal Church and Diocese.

II. To Decline to Recognize an Alleged Denominational Trust That Would Not Exist Under Secular Law Is Constitutional Under *Jones v. Wolf*, and a Contrary View Would Itself Raise Constitutional Questions.

Because the judgment of the circuit court leaves the alleged trusts of the Episcopal Church and Diocese no worse off than the secular law of trusts would, they hardly have grounds to complain that they have been discriminated against in violation of the First Amendment of the federal Constitution. Indeed, their position actually creates constitutional issues.

A. Section 57-9 as applied here is well within the wide latitude that *Jones* grants states in adopting rules governing church-property disputes.

In *Jones v. Wolf*, the Supreme Court addressed "whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution,

may resolve [church property disputes] on the basis of 'neutral principles of law,' or whether they must defer to the resolution of an authoritative tribunal of the hierarchical church." 443 U.S. at 597. The Court held not only that the neutral principles of law approach was constitutional but also that "a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters." *Id*. at 602. One rule the Court endorsed was "[m]ajority rule," but it added that "any rule of majority representation can always be overcome under the neutral-principles approach," such as by language in the corporate charter or the general church constitution "providing that the church property is held in trust for the general church." *Id.* at 607-08.

The Episcopal Church and the Diocese argue that *Jones* therefore *requires* this Court to allow the language of church canons to overcome both Virginia's rule prohibiting denominational trusts and the majoritarian default rule in Section 57-9. They overlook the immediately following sentence of *Jones*: "Indeed, the State may adopt any method of overcoming the majoritarian presumption, so long as the use of that method does not impair free-exercise rights or entangle the civil courts in matters of religious controversy." *Id.* at 608. Recognizing this, the circuit court correctly rejected the argument of the Episcopal Church and Diocese, explaining:

> If the holding of *Jones* truly is what ECUSA/Diocese argue that it is, which is that the First Amendment *requires* each of the fifty States to have a rule of majority presumption that is *always* defeasible by language of express trust in a hierarchical church's governing documents, how then, can the line, '[i]ndeed, the State may adopt any method of overcoming the majoritarian presumption' be explained? Under ECUSA/Diocese's reading of *Jones*, it cannot.

Letter Op. on the Constitutionality of Va. Code § 57-9(A), at 25 (June 27, 2008) ("Const. Op."). In other words, *Jones* cannot both give States leeway to mitigate a majoritarian presumption however it pleases *and*, at the same time, require States to give effect in every instance to a denomination's governing documents. All the more is that the case where, as here, the denomination's governing documents would have no legal effect on member's property if the denomination were a secular organization.

While *Jones* requires that courts provide a means for the parties prior to a dispute to provide for denominational control of property, the Court also held that the State could adopt "*any* one of various approaches," and remanded for the State of Georgia to clarify its approach. 443 U.S. at 602, 609-10. As examples of possible approaches, the *Jones* Court suggested creating provisions in the corporate charter or general church constitution as *possible* ways in which a State may allow a hierarchical church to overcome majority rule. *Id.* at 607-08. However, the Court made clear that others might exist. *See id.* at 602 ("[T]he First Amendment does not dictate

that a State must follow a particular method of resolving church property disputes."). Section 57-9 is just such a means. Virginia allows a hierarchical church to avoid majority rule by holding property in the name of an ecclesiastical officer, or in corporate form. As the circuit court recognized—and Appellants stipulated—a number of hierarchical churches in Virginia hold property in ways that avoid Section 57-9. *See* Const. Op. 31 & n.35.

In the words of the circuit court, *Jones* "simply provides suggestions as to ways in which a State *might* allow a hierarchical church to overcome a presumption of majority rule." It "grants States the freedom to develop their own church property rules." *Id.* at 25-26. Therefore, *Jones* grants States wide latitude in governing property disputes, and Virginia's statutory scheme is within that latitude, particularly given the trust interest that the Episcopal Church and Diocese posit here.

B. Even if *Jones* required some ability to have civil courts enforce denominational canons, it would not here, because the canons at issue are not in a "legally cognizable form."

Even if this Court were to accept the Episcopal Church's and Diocese's argument that *Jones* requires the State to adhere to the church canons, *Jones* makes clear that for any canon to possibly be enforceable, it must be "embodied in some legally cognizable form." 443 U.S. at 606. However, the alleged trust interests asserted by the Episcopal Church and

Diocese are not in legally cognizable form under Virginia law. For this reason as well, the Appellants' constitutional argument fails.

First, the Dennis Canon would not qualify as a trust under Virginia Code § 57-7.1 because the beneficiary is a denomination, rather than a congregation. Second, as shown above in Part I, there is no legally cognizable trust under general rules of trust law.

As to the first point, in Virginia a denomination cannot be the beneficiary of a trust, with the exception of a trust "for certain residential purposes" of a diocese. *Norfolk*, 214 Va. at 506, 201 S.E.2d at 758.[4] The Episcopal Church and the Diocese argue that this longstanding rule has been overruled by the enactment of Virginia Code § 57-7.1 in 1993. Not so. Only two years after the passage of Section 57-7.1, this Court concluded that "§ 57-7.1 validates transfers, including transfers of real property, for the benefit of *local* religious organizations." *Trs. of Asbury United Methodist Church*, 249 Va. at 152, 452 S.E.2d at 851-52 (emphasis added) (citing *Norfolk*, 214 Va. at 506, 201 S.E.2d at 757). As the circuit court in this case pointed out, "Since its original enactment in 1993, [Section 57-7.1]

[4] *See*, *e.g.*, *Gallego's Ex'rs v. Att'y Gen*., 30 Va. 450, 461-62 (1832); *Hoskinson v. Pusey*, 73 Va. 428, 431 (1879); *Davis v. Mayo*, 82 Va. 97, 102 (1886); *Globe Furniture Co. v. Trs. of Jerusalem Baptist Church*, 103 Va. 559, 561, 49 S.E. 657, 658 (1905); *Maguire v. Loyd*, 193 Va. 138, 144, 67 S.E.2d 885, 889-90 (1951); *Reid,* 229 Va. at 187 n.11, 327 S.E. 2d at 112 n.11.

has been interpreted to validate transfers of real property for the benefit of *local* congregations." Letter Op. on the Court's Five Questions, at 13 (June 27, 2008). Moreover, as already noted, the Appellants disclaim reliance on a conveyance. Therefore, the Dennis Canon, which designates the denomination as a beneficiary, does not satisfy Section 57-7.1.

Second, as discussed in Part I above, no settlor has manifested an intention to create a trust. Significantly, no document or action plainly manifests an intention by owners of property to confer a trust interest on the Episcopal Church or the Diocese. The "trust" they claim is not "legally cognizable" in Virginia *even if* a denomination could be a beneficiary. Virginia law does not recognize the imposition of unilateral trusts on other parties' property, even if the other parties are members of the same voluntary association. *Cf. Gillman*, 223 Va. at 763, 292 S.E.2d at 383. The Episcopal Church and Diocese claim no other basis on which their attempted unilateral imposition of a trust might be legally cognizable under Virginia law.

Indeed, far from sanctioning unilateral, self-executing trusts, *Jones* makes clear that the congregation and the denomination can agree to arrangements other than congregational control of property, *but such steps must be mutual*. The Court states:

> At any time before the dispute erupts, the *parties* can ensure, if *they* so desire, that the faction loyal to the hierarchical church

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

Jones, 443 U.S. at 606 (emphases added).

Consistent with *Jones*, in Virginia, the parties may take a simple, mutual step that ensures that the original branch of the hierarchical church retains control of property by simply placing the property in the name of the denomination's bishop, minister, or other ecclesiastical officer. That option was available to the parties long before the dispute in this case. *See* Va. Code Ann. § 57-16 (enacted in 1942). Multiple denominations in Virginia hold property in this manner; yet the Episcopal Church and the Diocese chose not to follow that course, one that, as *Jones* envisions, would have required affirmative action by the local congregations to encumber their property.

Whatever means a State might provide for allowing property to go with the original denominational branch upon a division, it is clear from the *Jones* Court's use of the plural "parties" that the Court, consistent with background law, envisioned a mutual decision. This decision—by both congregation *and* denomination—must occur *before*

congregational property rights would be transferred. The Court's use of the plural demonstrates that the national and local parties should work cooperatively—not unilaterally—in the modification of documents if property rights are to be transferred.

C. Indeed, treating a church hierarchy's canons as "self-executing" could raise countervailing Establishment Clause concerns.

Subsequent to *Jones*, the Supreme Court has recognized that the Establishment Clause is implicated if governments delegate to religious institutions authority over the rights of third parties. Thus, not only was the circuit court's decision here readily consistent with the Establishment Clause, but the position of the Appellants could also *create* a constitutional issue.

In *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982), the Court rejected a state law that gave churches a veto over neighboring applications for liquor licenses, because the law "vest[ed] discretionary governmental powers in religious bodies." The Court held that in passing this law, the Massachusetts legislature granted churches a special benefit—the "power to veto certain liquor license applications." *Id.* at 122. The Court determined that the measure violated the Establishment Clause because it advanced religion by allowing churches to act as government land-use regulators. *Id.* at 119-20.

The same problem could arise when churches are granted unique authority to establish themselves as beneficiaries of unilaterally declared property trusts. Virginia has made the choice to avoid it, and, given *Larkin*, hardly violates the Constitution in doing so. In this instance, a trust of this nature would supplant Virginia's well-developed trust law and offer any purportedly hierarchical churches—and no other organizations—the power to revoke the property rights of any subordinate parish. Correspondingly, as indicated above in Part I.A, it is inconceivable that the special rights that a denomination seeks here would be extended to secular organizations. *Cf. Gillman*, 223 Va. at 764-65, 292 S.E.2d at 384 (noting constitutional issues in case in which secular condominium association sought to fine a member).

Not only could such a power of a hierarchical church usurp governmental authority, but it also would open the door to the *Larkin* Court's fear that "[t]he churches' power . . . could be employed for explicitly religious goals." *Id.* at 125. Here, that would be the goal of imposing its religious views on a dissenting congregation. Granting hierarchical religious bodies such untrammeled authority over property rights poses this exact risk, especially when the local churches have not expressly yielded such authority. The power to decide who owns property—a core power of civil govern-

ment—would be vested in religious bodies. As then-Justice Rehnquist sternly warned, that power could readily be employed for hierarchies' own particular purposes, such as to enforce their orthodoxy and stifle dissent. *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 726-27 (1976) (Rehnquist, J., dissenting).

The result in *Larkin* would no doubt have been different if the churches' veto power had been included in local covenants, conditions, and restrictions that were voluntarily agreed upon by the surrounding property owners, just as an express trust is. Under those circumstances, the churches would have enjoyed veto power under neutral principles of contract law. But nothing of the sort has happened here.

In sum, allowing religious organizations to unilaterally declare trusts in their own favor may well unconstitutionally delegate governmental authority to religious institutions. This delegation would also amount to a grant of power to religious denominations that no other organizations enjoy over their members. Such delegation and preferential treatment, which Appellants seek here, at the very least raises a problem under the Establishment Clause.

III. It Is Eminently Reasonable for a State, as a Default Rule, To Allow Congregations In a Divided Denomination To Decide Their Affiliation By Majority Vote, as Section 57-9 Does.

As discussed above, *Jones* sanctions the resolution of church property disputes using neutral principles of law. Virginia's approach is the embodiment of neutral principles, producing the same result here as secular law would produce and also avoiding an issue under the Establishment Clause.

Virginia's scheme avoids questions of religious doctrine and canon law by looking first to the title of the property to determine if it is titled in the name of a bishop or other denominational officer; failing that, the law defers to a majority vote of the congregation. Virginia's default deference to the determination of the congregation not only is neutral under any credible reading of *Jones*, but it also is eminently reasonable because consistent with American traditions of majority democratic rule and local control of local issues. Section 57-9 is a reasonable balance of competing interests that is consistent with history and tradition. Moreover, far from discriminating against hierarchies in the name of majority rule and local control, Section 57-9 merely, and reasonably, enables the majority to determine *between* competing hierarchies of a divided denomination.

A. Virginia's default rule is consistent with the American tradition of majority democratic rule.

While the Virginia General Assembly could choose to adopt some other default rule—majority rule is not constitutionally required—the Court should not invalidate the Legislature's reasonable choice to use a majority rule. There can be a no more facially neutral rule than one which harkens—as does Section 57-9—to such a deep-seated element of our jurisprudential and social heritage. *E.g.*, *Jones*, 443 U.S. at 607 ("Majority rule is generally employed in the governance of religious societies.").

In *Jones*, the United States Supreme Court broadly held that "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." 443 U.S. at 602 (internal quotation marks omitted). *Jones* expressly rejected "compulsory deference" to the denomination over the congregation. *Id.* at 605.

In fact, *Jones* clearly approved of majority rule so long as there are means whereby the parties—the congregation and the denomination—can mutually agree to denominational ownership. *Id.* at 603-04, 608 & n.5. Here, the Virginia statute provides an appropriate means. Because Section 57-9 is restricted to situations where the property is "held by trustees," denominations and congregations can easily sidestep congregational ma-

jority rule by placing ownership of church property with a denominationally controlled corporation or an officer of the denomination. Va. Code Ann. § 57-9(A); *see id.* § 57-16. In this case, however, the Episcopal Church and Diocese made no such timely effort.

While *Jones* requires that state law be "flexible enough to accommodate all forms of religious organization," *see* 443 U.S. at 603, courts must have some means of deciding who owns property when there is a church division. Majority vote of the congregation is a reasonable means of resolving such disputes. *See* Const. Op. 37 ("The evidence indicates that the purpose of 57-9 was to provide a rule that would allow for peaceful conflict resolution upon the occurrence of church property disputes following a division in a church or religious society."); *Jones*, 443 U.S. at 607 ("[T]he majority faction generally can be identified without resolving any question of religious doctrine or polity.").

Either side can seek to persuade the other. Within a congregation there is likely to be a difference of opinion as to which branch of a dividing denomination the congregation and its property should go with. Thus majority rule hardly preordains the result. The majority may vote to go with the original denominational branch, as it did in some of the votes immediately after the enactment of what now is Section 57-9. The Appellants—arguing

that majority rule is not neutral—might as well argue that Virginia legislative elections are not neutral because the population can choose to vote out the party in power.

B. Virginia's default rule also is consistent with the American tradition of allowing local control of issues which most affect local individuals.

When church property is held in trust for the benefit of a local congregation, it is reasonable for Virginia to allow the local congregation to determine which branch of a dividing denomination to follow. Deference to local control is consistent with American traditions. It also provides a simple default rule for easily deciding property disputes according to the will of the body that in most cases will be responsible for the invariably local task of maintaining and operating the property in question.

For example, in our federal system, the United States Constitution presumes the existence of state governments and retains a large degree of autonomy for them. *E.g.*, U.S. Const., amends. X & XI. This centuries-old tradition of dividing power is reflected in the almost-as-old Section 57-9. In fact, the United States Supreme Court has "emphasized the importance" of local control over local issues. *See City of Rome v. United States*, 446 U.S. 156, 201 n.12 (1980) (Powell, J. dissenting). Local control encourages citizen participation and produces a more responsive government. As

Justice O'Connor suggested, "[i]f we want to preserve the ability of citizens to learn democratic processes through participation in local government, citizens must retain the power to govern, not merely administer their local problems." *FERC v. Mississippi*, 456 U.S. 742, 790 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part).

Similarly, the Fourth Circuit addressed the tradition of local control in *Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County*, 205 F.3d 688 (4th Cir. 2000). There, it noted:

> [W]hen the federal government commandeers state and local legislative processes to carry out its own goals, not only is the federal power aggrandized and the state power enslaved, but also the lines of separation are blurred, causing a loss of accountability to the people and confusion by them. When a local legislative body acts under a standard imposed by the federal government, even if the federal standard is comparable in effect to state standards, a significant risk arises that the citizens of the community will not know whether the legislative act is the product of Congress or of their local legislature. This confusion inevitably frustrates a normal democratic response.

Id. at 701. Local control of local issues is thus pervasive throughout our federal system and a reasonable guide informing Virginia's creation of Section 57-9 as its default rule.[5]

[5] The "federalist structure of joint sovereigns preserves to the people numerous advantages." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Among other things, "It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it al-

C. Virginia's default rule does not discriminate against hierarchical churches but rather resolves disputes *between* two hierarchies upon a denomination's division.

Moreover, Section 57-9 is not, as Appellants would have it, a means of aggrandizing congregational churches over denominational ones. On the contrary, when a denomination divides, courts cannot avoid resolving property disputes between adherents of competing hierarchies. Section 57-9 provides a reasonable and easily applied default rule for doing so. This section is *not* discriminatory against hierarchical churches. In fact, under Section 57-9, the winning side *will be* a hierarchical church, as here with the CANA Congregations' attachment to the Anglican District of Virginia and the Convocation of Anglicans in North America, among other entities. The question under Section 57-9 is this: Which of two hierarchical branches will a congregation choose? When property is placed in trust for the benefit of a local congregation (as here), it is appropriate for the local congregation to determine with which of the two hierarchies it will go.

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lows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Id.* (citing Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491-1511 (1987)). Allowing congregational control of property—where a church has not taken the opportunity to establish different control in a legally cognizable way—is likely to yield analogous benefits for congregations continuing after a denominational division.

In a time of division, Section 57-9 confers upon the Episcopal Church and Diocese the same opportunity to obtain the property as it does CANA and ADV. Whichever side obtains a majority can secure the property. It is for the individual congregants to sway each other to join one side of the dispute—not for the courts to give effect to the legally un-cognizable canon law of one side.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of February, 2010, fifteen copies of the foregoing Brief of *Amici Curiae* in Support of Appellees were filed with the Clerk of Court by certified mail, and that three copies were sent by first-class mail, postage prepaid, to the parties and *amici* listed below. An electronic copy was also sent to the Court and the parties and *amici* below.

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