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April 8, 2009

By Hand

The Honorable Patricia L. Harrington
Clerk, Supreme Court of Virginia
100 North Ninth Street
Richmond, Virginia 23219

Re: The Protestant Episcopal Church in the Diocese of Virginia, Appellant, v. Truro Church, et al., Appellees, Record No. _____

Dear Ms. Harrington:

Please find enclosed for filing in the above-captioned appeal an original and seven copies of a Brief of *Amici Curiae* in Support of Petition for Appeal, filed on behalf of the General Council on Finance and Administration of The United Methodist Church, Gradye Parsons, Stated Clerk of the General Assembly of The Presbyterian Church (U.S.A.), The African Methodist Episcopal Zion Church, The African Methodist Episcopal Church, the Rt. Rev. Charlene Kammerer, Bishop of the Virginia Annual Conference of The United Methodist Church, the Rev. Dr. G. Wilson Gunn, Jr., General Presbyter National Capital Presbytery, Elder Donald F. Bickhart, Stated Clerk, Presbytery of Eastern Virginia, and the Metro DC Synod of the Evangelical Lutheran Church in America.

Pursuant to Rule 5:30(a)(2), I represent that all parties to the appeal have consented to the filing of this brief, so no motion for leave is required under Rule 5:30(a)(3).

Thank you very much for your cooperation. Please let me know if you have any questions or need any further information.

Very truly yours,

Michael J. McManus

MJM

Established 1849

In the
SUPREME COURT OF VIRGINIA

RECORD NO. _____

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA,

Appellant,

v.

TRURO CHURCH, *et al.*,

Appellees.

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR APPEAL

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The General Council on Finance and Administration of The United Methodist Church, Gradye Parsons, Stated Clerk of The Presbyterian Church (U.S.A.), The African Methodist Episcopal Zion Church, The African Methodist Episcopal Church, the Rt. Rev. Charlene Kammerer, Bishop of the Virginia Annual Conference of The United Methodist Church, the Rev. Dr. G. Wilson Gunn, Jr., General Presbyter National Capital Presbytery, Elder Donald F. Bickhart, Stated Clerk, Presbytery of Eastern Virginia, the Virginia Synod of the Evangelical Lutheran Church in America, and the Metro DC Synod of the Evangelical Lutheran Church in America (collectively, "*Amici*") submit this brief in support of the Petition for Appeal filed by Appellant Protestant Episcopal Church in the Diocese of Virginia.[1]

SUMMARY

The *Amici* urge the Supreme Court of Virginia to grant the appeal in these seminal cases, and to reverse the Circuit Court's judgment that Va. Code § 57-9 can be invoked to allow majorities in each appellee congregation to retain the congregation's property even while choosing to

[1] The Amici are submitting an identical brief in support of the Petition for Appeal filed by The Episcopal Church, which seeks review of the same Circuit Court decisions.

withdraw from The Episcopal Church and the Protestant Episcopal Church in the Diocese of Virginia.

Without discounting any of the other arguments made by the Appellant, the *Amici* focus in this brief on the following arguments:

1) There is no indication—and it belies the historical context in which the statute was passed to conclude—that Va. Code § 57-9 was intended to apply when a majority of the members of a congregation withdraws from one denomination and joins another, pre-existing denomination that was not established as a result of the "division" that led the majority to withdraw.
2) However it may be interpreted, using Va. Code § 57-9 to resolve church property disputes violates the Free Exercise Clause of the First Amendment of the United State Constitution, because
    a. the statute is not "generally applicable,"
    b. the statute is not "neutral," and
    c. the statute does not serve a compelling state interest by the least restrictive means.

QUESTIONS PRESENTED

1. Does Va. Code § 57-9 apply when a majority of a congregation's members vote to secede from one denomination and join another that—

while sharing a common religious ancestry—is not a "branch" of the congregation's former denomination and was not established as a result of the "division" that prompted the majority to secede?

2. Is a statute both "generally applicable" and "neutral" under *Employment Division v. Smith*, 494 U.S. 872 (1990)—or does it qualify as a "neutral principle of law" of the sort approved in *Jones v. Wolf*, 443 U.S. 595 (1979)—when the statute

   a. restricts the property rights of religious associations alone;

   b. discriminates between religious organizations; and

   c. cannot be interpreted or applied without conducting a searching inquiry into matters of religious polity and practice?

3. Does Va. Code § 57-9 represent the least restrictive means for Virginia to achieve its interest in the peaceful resolution of church property disputes?

STATEMENT OF THE CASE

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

STATEMENT OF INTEREST OF THE *AMICI*

The *Amici* are well-suited to emphasize the points outlined above. Several of them are "hierarchical" denominations, whose property interests

are most at risk if the constitutionality of § 57-9 is affirmed. Many have adopted provisions in their governing documents that the U.S. Supreme Court has recognized not only as perfectly legitimate mechanisms for protecting a hierarchical church's interest in local church property, but as mechanisms which civil courts are "bound" to enforce, even in states that have adopted the "neutral principles" approach to resolving church property disputes. *Jones*, 443 U.S. at 606.

For example, trust provisions of the type that are imperiled by the Circuit Court's interpretation of § 57-9 have been used by Methodist denominations since long before denominations were assured, in *Jones*, that such provisions would be all that was required to protect a denomination's interest in local church property.[2] More than 250 years ago, John Wesley caused trust clauses to be inserted in deeds as a means of reinforcing the *doctrine* that bishops, not local churches, control the

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[2] The Methodist *Amici* include the General Council on Finance and Administration of the United Methodist Church ("GCFA"), which is the national agency charged with protecting the legal interests of the eight million member United Methodist denomination, including the provisions of United Methodist Book of Discipline, which require all local church property be held in trust for the denomination as a whole. The African Methodist Episcopal Zion Church and the African Methodist Episcopal Church are distinct, autonomous denominations, but each has adopted the doctrines and discipline established by John Wesley, including the principle that local church property is held in trust for the denomination as a whole.

appointment of pastors. John Leo Topolewski, *Mr. Wesley's Trust Clause: Methodism in the Vernacular*, in METHODIST HISTORY, vol. XXXVII, no. 3, pp. 144-45 (Yrigoyen, Jr., Charles, ed. 1999). For Wesley, maintaining the bishops' appointment prerogative helped reinforce the crucial Methodist principles of "connectionalism" and "itineracy." *Id.* Yet, if the local church trustees had unfettered control of the church property, that control could extend to the pulpit as well, giving the local church the ability to exclude the bishop's pastoral appointments.

Similarly, in reliance upon the Supreme Court's holding in *Jones*, the Presbyterian Church (U.S.A.) and its related judicatories long ago amended their governing documents to include provisions to "ensure that . . . the faction loyal to the hierarchical church will retain the church property" in the event of a "division." *Jones,* 443 U.S. at 606.[3] Having been assured by the

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[3] The Presbyterian *Amici* include Gradye Parsons, the Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.), a national Christian denomination with nearly 2.3 million members in more than 11,200 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. It is organized through an ascending series of organizations known as church sessions, presbyteries, synods, and, ultimately, a general assembly. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. The principles expressed in this brief are consistent with the Constitution of the Presbyterian Church (U.S.A.) and policies of the General Assembly of the denomination regarding the First Amendment of the U.S. Constitution. The General

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U.S. Supreme Court that "civil courts will be bound to give effect" to such provisions, *id.*, the Presbyterian *amici* are vitally interested in the Court's evaluation of the constitutionality of a state statute that purports to supplant "the result indicated by the parties" before any "division" occurred. *Id.*

Other groups (namely, the Lutheran synods) have joined this brief to emphasize and protect the integrity of ecclesiastical voting procedures that were designed precisely to apply when local church members wish to

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Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

Elder Donald F. Bickhart, Stated Clerk, is the elected official of the Presbytery of Eastern Virginia, responsible for carrying out ecclesiastical functions. The Presbytery of Eastern Virginia is the ecclesial Presbyterian body that contains 63 congregations in the Southeastern and Eastern Shore parts of Virginia and includes 17,824 members in its congregations. Similarly, the Rev. Dr. G. Wilson Gunn, Jr., General Presbyter, is the senior administrative officer in the National Capital Presbytery. The National Capital Presbytery is the ecclesial Presbyterian body that contains 109 congregations, 51 of which are in the Virginia counties of Loudoun, Fairfax, Arlington, Prince William and Fauquier, and the cities therein. The National Capital Presbytery includes more than 34,000 members in its congregations. Neither of these Presbyteries claims to speak for all Presbyterians within their bounds, nor are their pronouncements binding on the membership of their congregations. However, their statements are considered worthy of the respect and prayerful consideration of all the presbytery's members.

disaffiliate and retain the church property.[4] Free Exercise rights are clearly infringed when a state statute, as the Circuit Court acknowledged in this case, "defers completely" to voting rules established by "independent" churches, but "shows no such deference" to the faith-based rules adopted to establish "voting rights" in Lutheran congregations. *In Re: Multi-Circuit Episcopal Church Property Litigation*, 2008 Va. Cir. LEXIS 22 ("Applicability Op.") at *97 (April 3, 2008).

Finally, all of the *Amici* have joined this brief because they recognize the ultimate and real danger posed to *all* religious groups if the legislature is allowed to resolve property or contractual rights by reference to inherently religious criteria, much less to "defer" to the rules of some religious groups but not others. As James Madison understood, "freedom for *all* religion . . . naturally assume[s] that every denomination [will] be

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[4] The Evangelical Lutheran Church in America ("ELCA") is the largest Lutheran denomination in the United States, with 4.7 million members organized into 10,470 congregations. The Metro DC Synod is one of the 65 Synods in the ELCA. The Metro DC Synod has 75 congregations in the Washington, D.C. metropolitan area, 35 of which are located in Arlington, Fairfax, Loudoun and Prince William counties, as well as the cities of Alexandria, Fairfax and Falls Church. As interdependent partners in one church, ELCA congregations are not free to leave the church on their own volition. Instead, if a congregation desires to leave the ELCA, it must follow a detailed procedure, which is set forth in both the ELCA constitution and in its congregations' constitutions, and which differs markedly from the simple majority vote of adult members dictated by Va. Code § 57-9.

equally at liberty to exercise and propagate its beliefs," and that "such equality would be impossible in an atmosphere of official denominational preference." *Larson v. Valente*, 456 U.S. 228, 245 (1982).

For these reasons, and based on the arguments set forth in more detail below, the *Amici* respectfully support the Petition for Appeal and urge the Court to reverse all judgments based on Va. Code § 57-9.

ARGUMENT

I. The Circuit Court Misinterpreted Va. Code § 57-9

The context in which Va. Code § 57-9 was enacted cannot be overemphasized. Our nation—not yet a century old—had recently endured a long and terrible war, which literally split the country in two, while leaving more Americans dead than any war before or since. Long after the war ended, many of the nation's bedrock institutions—including and especially its churches—remained deeply torn. The debate over slavery had divided some of the nation's largest and most well-established religious denominations into two or more "branches." In 1844, for example, the Methodist Episcopal Church "South" split from the Methodist Episcopal Church, which had been established just after the country itself was founded. That rupture was not healed until nearly a century later, in 1939.

It was in *that* context—when many local congregations had no choice but to make an election between different branches of the denominations to which they had always belonged—that the General Assembly enacted Va. Code § 57-9. Given that context, many of the *amici* might well accept that one of the General Assembly's motivations was to promote "quick" and "peaceful" resolutions of local church "property disputes" "when a denomination divided." *In Re: Multi-Circuit Episcopal Church Property Litigation*, 2008 Va. Cir. LEXIS 85 ("Constitutionality Op.") at *48-49 (June 27, 2008).

It does not follow, however, that the General Assembly intended for § 57-9 to apply in the situation presented in the instant cases. However one might quantify the "discord" within the Episcopal Church—which resonates throughout much of Christendom, and which no secular court should purport to measure—the Circuit Court's application of § 57-9 is unquestionably far different from what General Assembly envisioned in the aftermath of the Civil War. In that exceptional era of our national history, the General Assembly undoubtedly intended to allow local churches to vote to attach themselves to a *newly developed* "branch" of the *same* denomination from which the congregation was voting to secede. That is, the Legislature was aiming to have the property follow the majority when it

voted to join a "branch" that (1) developed *as a result of* the "division" mentioned in the statute; and (2) would thereafter serve as the *denominational* "church" to which the majority would henceforth be "attached." Thus, for example, a Methodist congregation might opt to remain in the Methodist Episcopal Church, or to join the Methodist Episcopal Church "South," a newly developed denomination that arose as a consequence of the discord over the slavery question, and that had its own denominational polity, including bishops to provide episcopal oversight, and to ordain and appoint pastors to local congregations.

The Circuit Court, however, has applied the statute in a decidedly different circumstance. The congregations involved in this case have not attached themselves to a denomination that branched-off from the Episcopal Church. On the contrary, a majority of each of them has simply withdrawn from one denomination and joined another—namely, the Church of Nigeria—which was established as an autonomous denomination well before, and entirely independently of, the "division" that prompted the withdrawal from the Episcopal Church.

It may be that the Episcopal Church and the Church of Nigeria are in some sense "branches" of a common religious tradition known as Anglicanism. But nothing in the record suggests that the General

Assembly enacted § 57-9 to allow congregations to hop from one such pre-existing "branch" to another whenever doctrinal divisiveness arises, thereby giving unhappy majorities license to span the globe and select among ready-made denominations that now seem to provide a better theological or doctrinal fit. On the contrary, the General Assembly wrote the statute to apply in singular circumstances—arising for the first time as a result of a singular war—when national denominations were literally "dividing" into two or more newly formed "branches," giving congregations no recourse but to choose one branch or the other.

If the Circuit Court's interpretation is affirmed, no one should pretend that § 57-9 will continue to be rarely invoked. Until now, one might have sought to justify § 57-9 (wrongly, but at least with a straight face) as a sensible mechanism for resolving title disputes in those relatively rare occasions when a denomination has been ripped into two and its Virginia congregations must choose which road to follow. In that circumstance, schism is an unalterable reality, and the statute arguably comes into play only after the fact, as a means of determining which faction will keep the property.

In contrast, as interpreted by the Circuit Court, § 57-9 threatens to become a *commonly employed* device that *facilitates* schism.

Denominational divisiveness is not rare. Sadly, it is all too common. What is less common is for discord to become so widespread and pronounced that an existing denomination actually "divides"—roughly in half, like the country itself during the Civil War era—such that each of the resulting "branches" has a reasonably legitimate claim to being a successor denomination. In other circumstances, establishing an entirely new denomination is a daunting task, and the sheer magnitude of the effort (among other factors) surely impels parishioners to seek to reconcile their differences and regard schism as a last resort.

That stands to change if the Circuit Court's interpretation of § 57-9 is sustained. If § 57-9 may be invoked not only when a defecting congregation votes to join a newly formed denomination that branches off as a result of the "division" in question, but also when a division prompts a congregation to simply hop from one branch to another—each within a "family tree" of pre-existing denominations—the statute will inevitably facilitate defections. After all, just as there are numerous Anglican denominations, there are scores of autonomous "Methodist" denominations in the United States and around the world,[5] and the same can be said of

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[5] Among the *amici* alone, there is The United Methodist Church (founded in 1784) and two "branches"—the African Methodist Episcopal

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the Presbyterian,[6] Lutheran[7] and other major religious traditions. Within all of these traditions, each denomination might conceivably be seen as a "branch" of a common religious "trunk," but can it plausibly be concluded that the General Assembly intended to authorize Virginia congregations to

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Church and the African Methodist Episcopal Zion Church—both of which were established before 1800. Other essentially "Methodist" denominations include the Christian Methodist Episcopal Church, the Union American Methodist Episcopal Church, the Free Methodist Church, the Evangelical Methodist Church, and numerous Methodist and Wesleyan denominations in other countries, including the Methodist Church of Great Britain, the Methodist Church in Ireland, and The Methodist Church in Malaysia.

[6] Presbyterian denominations include the Presbyterian Church (U.S.A.), the Presbyterian Church in America, the Presbyterian Church in Canada, the Cumberland Presbyterian Church, the Evangelical Presbyterian Church, The Associate Reformed Presbyterian Church, the Orthodox Presbyterian Church, the Reformed Presbyterian Church, the Bible Presbyterian Church, the Westminster Presbyterian Church in the United States, and the Reformed Presbyterian Church in the United States, not to mention virtually countless denominations in the United States and abroad that fall within the "Reformed" or "Congregational" traditions.

[7] Lutheran denominations include the two largest in the United States, the Evangelical Lutheran Church of America ("ELCA") and the Lutheran Church—Missouri Synod, but also the Wisconsin Evangelical Lutheran Synod, the Church of the Lutheran Confession, and countless Lutheran denominations around the world. Many participate in international Lutheran associations, such as the Lutheran World Federation, the members of which include the ELCA, the Church of Sweden, the Evangelical Lutheran Church of Finland, the Evangelical Lutheran Church of Denmark, the Evangelical Lutheran State Church of Hanover and the Church of Norway.

move themselves and their property to any such "branch" whenever a civil judge can be persuaded that a "division" of sufficient "magnitude" has occurred?

There is nothing in the record to suggest that the General Assembly acted with any such intent in enacting Va. Code § 57-9. Such an interpretation—i.e., reading the statute as essentially blessing the *realignment* of congregations and their property within *pre-existing* denominations—conflicts with the clear import of the statute's terms and the extraordinary historical context in which the statute was enacted.

II. Va. Code § 57-9 Violates the Free Exercise Clause

The foregoing discussion should not be interpreted to suggest that the *amici* believe § 57-9 passes constitutional muster if it is properly interpreted. On the contrary, the amici submit that the statute violates the Free Exercise Clause of the United States Constitution even if narrowly construed.

The *amici* reach this conclusion primarily by focusing on two decisions by the United States Supreme Court. One is *Jones v. Wolf*, *supra*, which directly addresses civil court resolution of church property disputes. The other is *Employment Division v. Smith*, 494 U.S. 872 (1990), which did not involve church property, but which establishes a clearly

discernable, irreducible floor for a state statute to withstand scrutiny under the Free Exercise Clause.

In *Jones*, the Court held that it was constitutionally permissible for states to resolve church property disputes by applying "neutral principles" of trust or property law that would control the outcome in a purely secular case. *Jones*, 443 U.S. at 602-03. Similarly—albeit in a different context—the Supreme Court held in *Smith* that Free Exercise rights are normally not implicated by the application of "neutral" laws of "general applicability." *Smith*, 494 U.S. at 880.

The common theme of these decisions is that, subject to some important caveats,[8] churches and other religious actors may generally be required to play by the same rules as everyone else. But the flip-side is equally true, as cases both before and after *Smith* have emphasized. The flip-side—which now stands as an irreducible baseline test for constitutional validity under the Free Exercise Clause—is that governmental regulations cannot impose a burden on religion except:

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[8] For example, although neutral principles of trust and property law may be used to resolve "church property disputes," the First Amendment simultaneously "requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." *Jones*, 443 U.S. at 602.

(1) as the incidental effect of a law that is both "neutral" and "generally applicable," *Church of the Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 531-32 (1993); or

(2) when the regulation in question is the "least restrictive means of achieving some compelling state interest." *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 718 (1981).

The Supreme Court has more recently summarized the Free Exercise test in *Lukumi* as follows:

> In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is *neutral and of general applicability* need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. [citation to *Smith* omitted]. Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. *A law failing to satisfy these requirements must be justified* by a *compelling governmental interest* and must be *narrowly tailored to advance that interest*.

Lukumi, 508 U.S. at 531-32 (1993).

As explained below, Va. Code § 57-9 fails this test on every count. It is not a law of "general applicability," but applies solely to church property disputes. It is not "neutral," in that it (a) deprives church associations of a method of property ownership that is freely available to secular

associations; (b) discriminates between religions; and (c) cannot be applied without forcing civil courts to conduct searching and probing inquiries into quintessentially religious matters. Finally, the statute does not remotely qualify as the least restrictive means of achieving a valid governmental interest.

A. Va. Code § 57-9 is Not a Law of "General Applicability"

Section 57-9 is not "generally applicable." By its express terms, it applies solely in the context of resolving property disputes involving "churches" and "religious societies." For that reason alone, it was incumbent upon the defecting congregations or the Commonwealth to establish that the statute is the least restrictive means of achieving a compelling state interest. As explained below (*see* § II.C), no such showing is possible.

It was error for the Circuit Court to accept the Attorney General's conclusion that § 57-9 is "generally applicable" on the ground that the General Assembly was " 'motivated by a non-discriminatory purpose—resolving property disputes quickly and peacefully when a denomination divided . . . .' " *Constitutionality Op.*, 2008 Va. Cir. LEXIS 85, at *48-49.

Although "neutrality" and "general applicability" can be related,[9] and a legislature's "motive" might sometimes shed light on whether a statute is neutral,[10] it does not follow that pure motives can convert a law that plainly applies solely to church property disputes into a law of "generally applicability." As Justice Scalia, the author of *Smith*, explained in his concurring opinion in *Lukumi*:

> The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted[.] . . . Nor, in my view, does it matter that a legislature consists entirely of the purehearted, if the law it enacts in fact singles out a religious practice for special burdens.

Lukumi, 508 U.S. at 558-59 (Scalia, J., concurring).

Nor is it responsive to observe that "other states . . . have laws regarding the disposition of church property[,]" many of which "single out *specific religious denominations* for special treatment." *Constitutionality Op.*, 2008 Va. Cir. LEXIS 85, at *49 (emphasis in original). As the Supreme Court explained in *Lukumi*, cases that address "governmental efforts to *benefit* religion" deal "with a question different" from cases where legislation is said "to *disfavor* . . . religion." *Lukumi,* 508 U.S. at 532

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9 *Lukumi,* 508 U.S. at 531.

10 *Id.,* 508 U.S. at 532, et seq.

(emphasis added). Whereas legislation that favors religion (such as by providing an exemption from generally applicable laws) is typically addressed under the Establishment Clause, "the *Free Exercise Clause* is dispositive" in cases that challenge a legislative *burden* imposed on churches or religious conduct. *Lukumi,* 508 U.S. at 532. *See also Smith*, 494 U.S. at 877 (the "free exercise of religion means" government may not "impose special disabilities on the basis of religious views or religious status") (*citing McDaniel v. Paty*, 435 U.S. 618 (1978), *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953), *and Larson*, 456 U.S. at 245). *Cf. id.*, 494 U.S. at 890 (the First Amendment allows, but does not require, religious exemptions from neutral laws of general applicability).

There is no question that § 57-9—regardless of motive or design—"disfavors" certain church organizations. In Virginia, secular voluntary associations may appoint trustees who can be obliged to hold the association's property for particular purposes, without risk that a simple majority of the association's members may exploit inevitable instances of dissension in the ranks and divert the association's property by the simple expedient of forming a new "branch" to which a seceding majority becomes "attached." Under § 57-9, unincorporated *religious* associations have no such option. Rather, to ensure the continued dedication of their property to

particular purposes or beliefs, they alone must either convert themselves into corporations, or convey title to some "higher" religious authority.

The Free Exercise Clause forbids Virginia from drawing such distinctions, and it does so regardless of whether a civil judge thinks the burden of complying with the distinction is onerous or slight. That is a chief and irremediable flaw of § 57-9: it limits the property ownership options for unincorporated religious associations but not for their secular counterparts.[11] On that basis alone, the statute violates the Free Exercise Clause of the First Amendment and cannot lawfully be applied to resolve church property disputes in Virginia.

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[11] The rule against laws that uniquely restrict religious organizations may be traced to John Locke, whose writings are generally regarded as stating the minimum assurance of the constitutional protection of free religious exercise. See Michael McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1430-37, 1443-49 (1990). As Locke put it: "Whatsoever is lawful in the commonwealth, cannot be prohibited by the magistrate in the church." Locke, "A Letter Concerning Toleration," 35 Great Books of the Western World 13 (Robert Hutchins ed. 1952). This is the "flip-side" previously mentioned; just as *Jones* and *Smith* hold it is generally permissible to apply neutral laws to religious actors, those same decisions, if anything, reinvigorate the longstanding principle that the State may not impose a unique regulatory burden on churches alone.

B. Va. Code § 57-9 is Not "Neutral"

This same distinction—that is, imposing constraints on religious associations alone—compels the conclusion that § 57-9 is no more "neutral" than it is "generally applicable." But the statute fails the neutrality test in two other important ways: (1) it discriminates on its face between different religions; and (2) applying its terms will inevitably draw civil judges into constitutionally forbidden, inherently religious terrain.

1. The Statute Discriminates Among Churches

The Circuit Court recognized that the express terms of § 57-9 "reflect a determination by the Virginia legislature to protect the voting rights of any local congregation *which is subject to a hierarchical church's constitution or canons*." *Applicability* Op., 2008 Va. Cir. LEXIS 22 at *97 (empha sis added). Furthermore, the trial court recognized that, whereas § 57-9 "*defers completely* to the *independent* church's constitution, ordinary practice, or custom," *it "shows no such deference" to a hierarchical denomination's rules, practices or customs*. *Id.* (emphasis added).

It should go without saying that Virginia has no legitimate governmental interest in establishing "voting rights" for church members, let alone imposing state-authored voting regulations on some churches, while "deferring" to another church's own "customs." Such prejudice violates the

"clearest command of the Establishment Clause," which "is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244. The same prohibition against "denominational preferences," moreover, "is inextricably connected with the continuing vitality of the Free Exercise Clause." *Id.* at 245. Thus, under binding Free Exercise precedent, no state law can plausibly be construed as "neutral" when its express terms discriminate between religions. *Lukumi,* 508 U.S. at 532. By displacing only certain churches' voting rules, the State selectively "lend[s] its power to one or the other side in controversies over religious authority," which is strictly forbidden by the Free Exercise Clause. *Smith*, 494 U.S. at 877.

2. Va. Code § 57-9 Impermissibly Requires Civil Judges to Engage in a Searching Inquiry Into Quintessentially Religious Matters.

In 1979, when it upheld the constitutionality of applying "neutral principles" to resolve church property disputes, the U.S. Supreme Court reassured churches that civil courts would *not* be permitted even to conduct a searching *inquiry* into—never mind *resolve*—questions of church administration, church polity or church governance. *Jones*, 443 U.S. at 602, 605. Rather, implementation of the "neutral principles" approach was required to be "*completely* secular in operation." *Id.* at 603 (emphasis

added). Indeed, the Court explained, that was among the "primary advantages" of the approach. Since the method would rely "*exclusively* on objective, well-established concepts of *trust and property law* familiar to lawyers and judges," proper use of the method would "free civil courts *completely* from entanglement" not merely "in questions of religious *doctrine*," but from inquiry into matters of religious "*polity* and *practice*" as well. *Id.* (emphasis added).

In this vein, the "neutral principles" approach approved in *Jones* was entirely in-keeping with a principle that the Supreme Court has recognized time and time again, namely, that disputes involving matters of church *polity and administration*—no less than matters of dogma and doctrine—are infused with religious significance. Indeed, a denomination's choice of a particular polity is a reflection of its *belief* that "religious activity derives meaning in large measure from participation in a larger religious community[,]" which is "an organic entity not reducible to a mere aggregation of individuals." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). *See also Reid v. Gholson*, 229 Va. 179, 189, 327 S.E.2d 107, 113 (1985) (a church's "internal governance" depends "upon matters of faith and doctrine").

Thus, the principle that the First Amendment " 'commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine' . . . applies with equal force to church disputes over church polity and church administration." *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976). In short, it matters not if the Circuit Court refrained from passing upon a question of pure religious "dogma," for the Constitution is violated if application of § 57-9(A) requires a "searching inquiry" into matters of "church polity" alone. *Serbian*, 426 U.S. at 723. *See also Bowie v. Murphy*, 271 Va. 127, 133, 624 S.E.2d 74, 78 (2006) ("issues of church governance . . . are unquestionably outside the jurisdiction of the civil courts").

The express terms of § 57-9 leave no doubt that civil courts cannot conscientiously apply the statute without conducting an intensely religious inquiry. As the Circuit Court acknowledged at the outset of its opinion regarding the applicability of the statute,

> This matter requires the resolution of four questions:
>
> First, what are the definitions of "*church*" and "*religious society*," as those terms are used in 57-9(A), and *do either of these terms apply to the Protestant Episcopal Church in the Diocese of Virginia [hereinafter "Diocese"], the Protestant Episcopal Church in the United States of America, [hereinafter "ECUSA"] or to the Anglican Communion*?
>
> Second, what is the definition of "*attached*," as that term is used in 57-9(A), and does the term apply to the congregations

that are the plaintiffs in this litigation [hereinafter "CANA Congregations"], in that they are *"attached" to the Diocese, the ECUSA, or the Anglican Communion*?

Third, what is the definition of "*branch*," as that term is used in 57-9(A), and are any of the following entities--the *Convocation of Anglicans in North America [hereinafter "CANA"], the American Arm of the Church of Uganda, the Church of Nigeria, or the Anglican District of Virginia [hereinafter "ADV"]-- "branches" of the Diocese, the ECUSA, or the Anglican Communion*?

Fourth, and perhaps most importantly, what is the definition of "*division*," as that term is used in 57-9(A), and *has such a "division" occurred in a "church or religious society*" to which the CANA Congregations were *attached*?

Applicability Op., 2008 Va. Cir. LEXIS 22 at *2-3 (emphasis added).

The mere recitation of these dispositive questions bears no resemblance to "objective, well-established concepts of trust and property law familiar to lawyers and judges," which the Supreme Court approved in *Jones v. Wolf*. *Id.*, 443 U.S. at 603. On the contrary, far from being "completely secular in operation," *id.*, the terms of § 57-9 compelled the Circuit Court to conduct a five-day trial, probing deeply into the ecclesiastical structures and relationships of a wide array of religious entities, in order to determine which of them "qualifies" as a "church" or "religious society," whether any of them has experienced "discord" of a "magnitude" sufficient to give rise to a "division," and whether any such

"division" caused the original "church" to grow a "branch," which formed an "alternative polity," to which the defecting congregation became "attached."

Indeed, § 57-9 is so hopelessly infused with religion that the Circuit Court took the unfathomable step of receiving and weighing testimony from experts on church polity and church history, precisely "to assist the Court in its obligation to *interpret* 57-9." *Applicability Op.*, 2008 Va. Cir. LEXIS 22 at *130 (emphasis added). When the very *meaning* of a statute cannot be ascertained without consulting experts on *religion*—much less weighing the "sincerity" and "good faith" of those experts, and determining which were most "persuasive and convincing" (*id.*)—that is a sure sign that the statute fails the test of "free[ing] civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Jones*, 443 U.S. at 603.[12]

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[12] The Circuit Court's reliance on expert religious testimony cannot be dismissed as inconsequential. The record shows that the parties' dueling experts provided testimony on, among other things, American religious history (Dr. Valeri, Union Theological Seminary); Virginia church history (Dr. Irons, Elon University); Episcopal Church polity and the Anglican Communion (Dr. Douglas, Episcopal Divinity School); and Anglican history (Dr. Mullin, General Theological Seminary Episcopal Church). The Circuit Court's mere summary of the experts' expositions on these essentially religious matters spans more than 30 pages in the Lexis version of the Court's letter ruling—spanning centuries, crossing continents, and recounting in detail the organizational workings and relationships among multiple Anglican, Methodist, Presbyterian, and other denominations and

(Continued)

In short, by any measure, § 57-9 is the furthest thing from the sort of "generally applicable" or "neutral" principle that the constitution allows Virginia's courts to employ to resolve church property disputes. Instead, the statute provides a discriminatory rule of decision that was developed solely for churches; that distinguishes religious associations from their secular counterparts; that favors some denominations over others; and that forces civil judges to engage in a "searching and therefore impermissible inquiry into church polity." *Serbian*, 426 U.S. at 723.

C. Va. Code § 57-9 Does Not Serve a Compelling State Interest By the Least Restrictive Means

Once it is understood that § 57-9 is neither "generally applicable" nor "neutral," the statute cannot withstand challenge under the Free Exercise Clause unless it represents "the least restrictive means of achieving some compelling state interest." *Thomas,* 450 U.S. at 718. *See also Lukumi,* 508 U.S. at 531-32 (a "law failing to satisfy [the neutrality and general applicability] requirements must be justified by a compelling governmental

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(Continued)

their respective dioceses, divisions and parishes or congregations—again, all "to assist the Court" in evaluating whether the doctrinally-rooted discord within the Episcopal Church and the Anglican Communion produced the ecclesiastical "facts" needed to establish the fundamentally religious criteria outlined in § 57-9. *Applicability Op.*, 2008 Va. Cir. LEXIS 22 at *98-130.

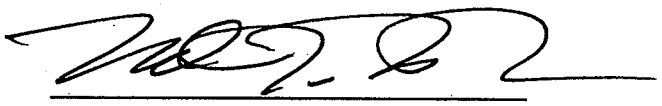
interest and must be narrowly tailored to advance that interest"). Neither the Commonwealth nor the Appellee congregations can make that case.

Section 57-9's deep and preferential encroachment into the religious arena is completely unnecessary to serve any legitimate state interest. The *Amici* accept that the Commonwealth has a "legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively." *Jones*, 443 U.S. at 602. But it is fully within Virginia's power to achieve that interest by joining the scores of other states who manage quite well by resolving *all* church property disputes in accordance with the straightforward application of truly neutral principles of trust and property law familiar to lawyers and judges by their frequent use in the secular realm. That is the methodology that was endorsed by the holding in *Jones*, and that is the methodology that Virginia's courts have applied in other contexts—apparently without any detriment to the Commonwealth's interests. *See Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980); *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 201 S.E.2d 752 (1974).

CONCLUSION

For all of the foregoing reasons, the *amici* urge the Court to grant the Petition for Appeal and review and reverse any judgment in the Congregations' favor based on Va. Code § 57-9.

Respectfully submitted,



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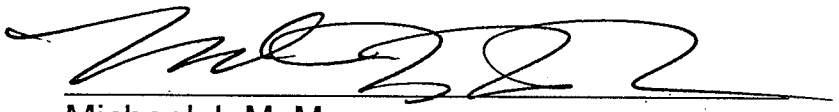

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