IN THE
Supreme Court of Virginia

RECORD NO. 090683

THE EPISCOPAL CHURCH,

Appellant,

V.

TRURO CHURCH, *et al.*,

Appellees.

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

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STATEMENT OF INTEREST

The Episcopal Diocese of Southwestern Virginia and The Episcopal Diocese of Southern Virginia (collectively, "Diocesan *amici*"), pursuant to Rule 5:30 of the Rules of the Supreme Court of Virginia, submit this Brief *Amicus Curiae* in support of the Appellants, The Protestant Episcopal Church in the Diocese of Virginia and The Episcopal Church.[1]

The Diocesan *amici* are each Dioceses of the Protestant Episcopal Church in the United States of America ("The Episcopal Church"), a hierarchical religious denomination, and as such are each part of the level of governance below the General Convention of The Episcopal Church.[2] Each has a Bishop who is the ecclesiastical and administrative head of his Diocese.[3] Each is composed of individual parishes whose vestries appoint

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[1] The appeal of the Diocese of Virginia is Record No. 090682, and the appeal of The Episcopal Church is Record No. 090683. These *amici* are submitting an identical brief in each case. References to the appellants' briefs refer to the opening Brief of Appellant filed in each of the appeals.

[2]The Episcopal Diocese of Southern Virginia was formed in 1892 through a division of the Diocese of Virginia. The Episcopal Diocese of Southwestern Virginia was formed in 1919 when it was split off from the Episcopal Diocese of Southern Virginia. Each division occurred, and each diocese was formed and recognized, as specified under the Constitution of The Episcopal Church in effect at the time.

[3]The Bishop of the Episcopal Diocese of Southwestern Virginia is The Rt. Rev. Frank Neff Powell. The Bishop of the Episcopal Diocese of Southern Virginia is The Rt. Rev. Herman "Holly" Hollerith, IV.

Trustees to hold title to parish property for the benefit of the Diocese and The Episcopal Church, all in accordance with the Constitution and Canons of The Episcopal Church, their own Diocesan Constitutions and Canons[4], and Virginia Code §§ 57-7.1 and 57-8. Accordingly, the Diocesan *amici* have a compelling interest in this case because of its potential effects on their current and future arrangements and decisions concerning the titling of, and control over, real property located within each Diocese.

The Diocesan *amici*, between them, have nearly 180 parishes, located across an area covering nearly two-thirds of the Commonwealth. The ruling below wholly fails to recognize and respect the polity governing parishes of the Diocesan *amici* in addition to the parishes of the Diocese of Virginia. Rather, the Circuit Court's decision unlawfully intrudes into church affairs by requiring the Diocesan *amici* to amend their Constitutions and Canons to specify a different method of titling property, and then to direct each parish to comply with that requirement and to communicate with each parish's vestry

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[4]Each Diocese requires parish vestries to appoint trustees to hold title to real property. Canon 17 of the Canons of the Episcopal Diocese of Southwestern Virginia; Canon XVIII of the Canons of the Episcopal Diocese of Southern Virginia. *See also* Canon 21 of the Canons of the Episcopal Diocese of Southwestern Virginia and Canon XXVII of the Canons of the Episcopal Diocese of Southern Virginia (each prohibiting a vestry from alienating any real property without the consent of the Bishop and the Standing Committee of the Diocese).

and trustees to ensure compliance. This burdensome process would be inconsistent with the principles and polity of The Episcopal Church and would deprive the Diocesan *amici* of using a property arrangement that is available to all other voluntary associations in the Commonwealth.

The Circuit Court reached its conclusions by relying on case law interpreting a statute that has been repealed, leading it to a result that conflicts with the statutes now in effect (which expressly recognize a trust in favor of a "church diocese" and thereby make Code § 57-9(A) inapplicable to the property at issue). Moreover, Code § 57-9(A) itself is an unconstitutional intrusion on religion. This Court should, accordingly, reverse the Circuit Court's rulings.

STATEMENT OF THE CASE

The Diocesan *amici* adopt the "STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW" contained in the Appellant's Brief filed by The Protestant Episcopal Church in the Diocese of Virginia ("Diocese of Virginia") and the "STATEMENT OF THE CASE" contained in the Apellant's Brief filed by The Episcopal Church. The Diocesan *amici* agree with all of the grounds for reversal of the Circuit Court's judgment as set forth in the briefs of the Diocese of Virginia and The

Episcopal Church. As particularly pertinent to this Brief, the Diocesan *amici* add the following:

The Circuit Court repeatedly held that Virginia law does not, and will not, recognize a trust in favor of a church diocese or in favor of The Episcopal Church. (J.A. 4142, 4181-82, 4886.) Although stating that it based its conclusion, at least in part, on Virginia law in effect in 1867, the Circuit Court plainly held that this law remains unchanged: "Thus, 57-7.1 did not change the policy in Virginia, which is that church property may be held by trustees for the local congregation, not for the general church." (J.A. 4182.)

This conclusion is contradicted by the plain language of Virginia Code § 57-7.1, which specifically validates a trust in favor of a "church diocese" and thus provides that such trusts *are not* too indefinite to be enforced under Virginia law.

The Circuit Court impermissibly expanded Virginia Code § 57-9(A) to embrace property held in trust *for a church diocese.* Rejecting the appellants' argument that, by its plain language and meaning, the statute applies only to "property held in trust for [a] congregation," the Circuit Court dismissed the quoted statutory language as "simply a reference to the property at issue." It thus concluded that the identity of the beneficial owner of the property is irrelevant. (J.A. 4180.)

As discussed below, a proper interpretation of the applicable statutes, recognizing and validating the trust in favor of the Diocese of Virginia and The Episcopal Church, would have avoided the application of Code § 57-9(A) – and the related constitutional issues – altogether.

ASSIGNMENTS OF ERROR

The Diocesan *amici* believe that all of the Assignments of Error contained in the Appellant's Brief filed by the Diocese of Virginia, and in the Appellant's Brief filed by The Episcopal Church, are meritorious. In this Brief, however, the arguments of the Diocesan *amici* relate primarily to Assignment of Error Nos. 1, 2 and 4 contained in the Appellant's Brief filed by the Diocese of Virginia, and to Assignment of Error Nos. 1, 4, 5 and 6 contained in the Appellant's Brief filed by The Episcopal Church. The decision of the Diocesan *amici* to focus on these issues in no way reflects disagreement with any of the other issues or arguments raised in the Petitions for Appeal.

QUESTIONS PRESENTED

I. Did the Circuit Court Err in Ruling That a Trust in Favor of a Church Diocese (Or Of a Hierarchical Church) is Too Indefinite to Be Enforced Under Virginia Law, Ignoring the Plain Language of Virginia Code §57-7.1? (Diocese of Virginia Assignment of Error Nos. 1 & 2; The Episcopal Church Assignment of Error Nos. 1, 5 & 6)

II. **Did the Circuit Court Err in Failing to Conduct the Analysis Required Under *Green v. Lewis* and, as a Result, Improperly Applying Code § 57-9(A) to Real Property That Is In Fact Held in Trust for the Diocese of Virginia and The Episcopal Church?**
(Diocese of Virginia Assignment of Error Nos. 1 & 2; The Episcopal Church Assignment of Error Nos. 1, 5 & 6)

III. **By Applying Different Rules to Congregational and Hierarchical Churches, and Invalidating the Governing Rules of Hierarchical Churches (Alone Among Voluntary Associations) Where Real Property is Titled in the Name of Trustees, Does Virginia Code § 57-9 Violate Article 1, Section 16 of the Constitution of Virginia and the First Amendment to the Constitution of the United States?**
(Diocese of Virginia Assignment of Error No. 4; The Episcopal Church Assignment of Error No. 4)

STATEMENT OF FACTS

The Diocesan *amici* adopt the Statement of Facts contained in the Appellant's Brief filed by the Diocese of Virginia and the Statement of Facts contained in the Appellant's Brief filed by The Episcopal Church.

ARGUMENT AND AUTHORITIES

I. THE TRIAL COURT ERRED IN HOLDING THAT VIRGINIA DOES NOT RECOGNIZE A TRUST IN FAVOR OF A CHURCH DIOCESE OR A HIERARCHICAL CHURCH.

A. Code § 57-7.1 Expressly Validates a Trust in Favor of a "Church Diocese."

The Circuit Court's ruling that a trust in favor of a church diocese (or of a hierarchical church) is too indefinite to be enforced under Virginia law ignores the plain language of Virginia Code § 57-7.1.

The Circuit Court based its ruling on this Court's decisions in *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980) and *Norfolk Presbytery v. Bollinger,* 214 Va. 500, 201 S.E.2d 752 (1974).[5] (*See* J.A. 4142, 4181.) But the Circuit Court relied on language construing Virginia Code § 57-7, a statute repealed by the General Assembly in 1993. As this Court noted, the now-repealed Code § 57-7 validated trusts for the benefit of a church diocese only for certain limited, specified purposes. *Norfolk Presbytery*, 214 Va. at 506, 201 S.E.2d at 757. As this Court explained the now-repealed language:

> The 1962 amendment to § 57-7, Acts 1962, c. 516, broadened the scope of religious trusts to include property conveyed or devised for the use or benefit of a church diocese for certain residential purposes. The General Assembly has not gone beyond this, however, to validate trusts for a general hierarchical church and such trusts would be invalid.

Norfolk Presbytery, 214 Va. 500 at 506-507, 201 S.E.2d at 757-58.

With the repeal in 1993 of Code § 57-7 and the enactment of Code § 57-7.1, the General Assembly purposefully recognized the validity of trusts in

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[5]This Court in subsequent opinions has referred to the *Norfolk Presbytery* case as *Presbytery v. Grace Covenant Church. E.g., Green v. Lewis*, 221 Va. 547, 553, 272 S.E.2d 181, 184 (1980).

favor of a church diocese for general church purposes.[6] Current Code § 57-7.1 states:

> **§ 57-7.1. What transfers for religious purposes valid.** — Every conveyance or transfer of real or personal property, whether *inter vivos* or by will, which is made to or for the benefit of any church, *church diocese*, religious congregation or religious society, whether by purchase or gift, shall be valid.
>
> Any such conveyance or transfer that fails to state a specific purpose shall be used for the religious and benevolent purposes of the church, *church diocese*, religious congregation or religious society as determined appropriate by the authorities which, under its rules or usages, have charge of the administration of the temporalities thereof.

Virginia Code § 57-7.1 (emphasis added).[7] The new statute plainly "went beyond" old Code § 57-7 by recognizing trusts for a church diocese, a constituent part of a hierarchical church.

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[6]As noted above, a "church diocese" is a constituent part of a hierarchical church, and the Diocese of Virginia and the Diocesan *amici* comprise part of the first level of governance below the General Conventio of the Episcopal Church. The Canons of The Episcopal Church provide that property is held in trust for The Episcopal Church and the Diocese in which the property is located. *See* Section I.C, *infra*. Whether or not this Court chooses to read the language of Code § 57-7.1 to authorize a trust in favor of The Episcopal Church, this Court and the United States Supreme Court have recognized that property provisions in a hierarchical church's governing documents can establish enforceable rights not subject to the will of a congregational majority. *Green v. Lewis*, 221 Va. 547, 553, 272 S.E.2d 181, 184 (1980); *Jones v, Wolf*, 443 U.S. 595, 602-04 (1979).

The Circuit Court simply read the words "church diocese" out of the current statute. That is impermissible. *Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984) ("The rules of statutory interpretation argue against reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd. On the contrary, it is well established that every act of the legislature should be read so as to give reasonable effect to every word . . . ."); *Hubbard v. Henrico Ltd. P'ship,* 255 Va. 335, 340, 497 S.E.2d 335, 338 (1998) ("[E]very part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary."). Here, the effective result of the Circuit Court's ruling is that the terms "church," "church diocese," "religious congregation" and "religious society" set out in the statute would all mean the same thing – a local congregation. Neither this Court's decision in *Norfolk Presbytery*, which construed an earlier and now-repealed statute, nor its decision in *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.*, 249 Va. 144, 452 S.E.2d 847 (1995) (also relied upon by the Circuit Court), which did not involve the validity or enforceability of a trust in favor of a church diocese, supports the Circuit Court's construction of the statute.

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[7]Effective July 1, 2005, the statute was amended slightly to remove the phrase "subject to the provisions of § 57-12" at the end of the first paragraph, as Code § 57-12 had been repealed.

Notably, none of the decisions cited and relied on by the Circuit Court interpreted the phrase "church diocese" to mean a local congregation. Rather, they construed the meaning of the phrases "church," "religious congregation" and "religious society." *See Norfolk Presbytery*, 214 Va. at 506, 201 S.E.2d at 757; *Moore v. Perkins*, 169 Va. 175, 181-82, 192 S.E. 806, 809 (1937). Manifestly, however, this Court understood the phrase "church diocese" to mean a larger territorial constituent of a hierarchical church – distinct from a "church," "religious congregation" or "religious society." *Norfolk Presbytery*, 214 Va. at 506-07, 201 S.E.2d at 757-58. When the General Assembly included the phrase "church diocese" in the enactment of Code § 57-7.1 it was presumed to know that the phrase meant something different than a local congregation. *Dodson v. Potomac Mack Sales & Service, Inc.*, 241 Va. 89, 94, 400 S.E.2d 178, 180 (1991) ("We assume legislative familiarity with Virginia case law when the legislature enacts a statute which might impact upon that law.").[8]

[8]The phrase "church diocese" has a settled legal meaning, in that a "diocese" is "A territorial unit of the church, governed by a bishop, and further divided into parishes." BLACK'S LAW DICTIONARY (8TH ED. 2004). As this Court has pointed out, "[I]f a term has a known legal definition, that definition will apply unless it is apparent that the legislature intended otherwise." *Chappell v. Perkins*, 266 Va. 413, 420, 587 S.E.2d 584, 588 (2003).

B. The Diocese of Virginia Satisfies the Criteria of Code § 57-7.1, So that by Statute the Trust in Its Favor Cannot Fail for Indefiniteness.

The third paragraph of Code § 57-7.1 removes any argument that a trust in favor of a "church diocese" is too indefinite to be enforceable under Virginia law:

> No such conveyance or transfer shall fail or be declared void for insufficient designation of the beneficiaries in any case where the church, church diocese, religious congregation or religious society has lawful trustees in existence, is capable of securing the appointment of lawful trustees upon application as prescribed in § 57-8, or has ecclesiastical officers pursuant to the provisions of § 57-16.

So long as the church diocese has trustees lawfully appointed to hold title for its benefit, or is capable of appointing trustees to hold title for its benefit, the trust cannot fail for indefiniteness.

In this case, trustees were lawfully appointed by the vestry of each of the parishes, pursuant to Code § 57-8 and Diocese of Virginia Canon 15, to hold the real property for the benefit of the Diocese of Virginia and The Episcopal Church as specified in the Constitutions and Canons of both entities, so there were lawful trustees in existence.[9] *See* Section I.C, *infra.* In

[9]Until July 1, 2005, Virginia Code § 57-8 specifically provided for the appointment of trustees "on the application of the proper authorities of such church diocese...." Effective July 1, 2005, the statute was amended to
cont'd. to next page...

holding that the trust interest of the Diocese of Virginia and The Episcopal Church was too indefinite to be enforced under Virginia law, the Circuit Court simply failed to note – and failed to apply – statutory language which directly contradicted its conclusion.

C. The Record Evidence Establishes The Trust in Favor of The Diocese of Virginia and The Episcopal Church.

Code § 57-7.1 compels the conclusion that a trust in favor of a church diocese is valid and enforceable under Virginia law. Here, the trust in favor of the Diocese (and The Episcopal Church) was clearly established on the record evidence. As The Episcopal Church points out in its Brief, the Canons of The Episcopal Church provide that:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located.

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eliminate specific references to a "church diocese" and a "religious congregation," and to refer instead to the proper authorities of an "unincorporated church or religious body...." 2005 Va. Acts, ch. 772. This Court, notably, has previously affirmed a trial court's determination that a church diocese is a "religious body" as that term was used in prior Code § 58-12. *Cudlipp v. City of Richmond*, 211 Va. 712, 713, 180 S.E.2d 525, 526 (1971). *See also* Va. Code § 57-15 ("The trustees of such *church diocese*...in whom is vested the legal title to such land held for any of the purposes mentioned in § 57-7.1, may file their petition in the circuit court....) (emphasis added).

Canon I.7.4 of the Canons of The Protestant Episcopal Church in the United States of America. (J.A. 946, 1120.) Diocesan Canon 15.1 likewise confirms this trust. *See* Brief of the Diocese of Virginia at 27.[10] And other Diocesan and Church Canons also implement and reflect this historic trust interest. *See* Brief of The Episcopal Church at 8-9.

Each of the appellee congregations was represented at the Annual Councils which enacted the Diocesan canons confirming the trust interest, or was formed after those canons were already in effect. (*See* J.A. 1269, 1275-76, confirming that each congregation votes in the Diocese's Annual Council). The clergy and vestry of the appellee congregations acknowledged oaths agreeing to abide by the Canons of the Episcopal Church and the Diocese. (J.A. 917, 1087 – Constitution of The Episcopal Church, Article VIII; J.A. 1285, 1324 – Canon 11, Section 8 of the Canons of the Diocese of Virginia, requiring every vestry member to promise a "hearty assent and approbation to the doctrines, worship and discipline of The Episcopal Church."; J.A. 961, 1135-36 – Canon I.17.8 of the Canons of The Episcopal Church, requiring that every officer in the church "well and faithfully perform the duties of that

[10]This is in accordance with Canon I.7.5 of the Canons of The Episcopal Church, which provides that, "The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action, but no such action shall be necessary for the existence and validity of the trust."

office in accordance with the Constitution and Canons of this Church and of the Diocese in which the office is being exercised.") These acts of the appellee congregations' clergy and vestry (as well as acts of the congregations as a whole) evidenced both compliance with, and acknowledgement of the validity of, the Canonical provisions. *See* Brief of the Diocese of Virginia at 10 n.5.

Other Courts have held the provisions of The Episcopal Church Canons, and similar Diocesan Canons, legally sufficient to create a binding trust in favor of the Diocese and The Episcopal Church. *E.g., In re Episcopal Church Cases*, 198 P.3d 66 (Ca. 2009), *cert. denied*, 130 S.Ct. 179 (2009); *Diocese of Rochester v. Harnish*, 899 N.E.2d 920 (N.Y. 2008); *In re Church of St. James the Less*, 888 A.2d 795 (Pa. 2005); *Daniel v. Wray*, 580 S.E.2d 711 (N.C. Ct. App. 2003); *Episcopal Diocese of Mass. v. DeVine*, 797 N.E.2d 916 (Mass. App. Ct. 2003).[11] In so doing, several of these courts have held that a congregation's acquiescence in, and conduct consistent with, the trust provisions of the canons is sufficient to confirm the existence of the trust. *See, e.g., Diocese of Rochester v. Harnish*, 899 N.E.2d at 925 (finding it

[11]The Episcopal Church cites additional cases at page 1, note 1 of its Appellant's Brief.

"significant, morever, that All Saints never objected to the applicability or attempted to remove itself from the reach of the Dennis Canons in the more than 20 years since the National Church adopted the express trust provision").

D. The Commonwealth's Assertion That Application of Trust Principles to Religious Associations is Somehow "Problematic" is Incorrect and in Any Event Provides No Basis for Invalidating the Trust.

In its brief at the Petition Stage, the Commonwealth argued that Code § 57-9(A) is justifiable because application of trust principles to religious associations is somehow "problematic" and "presents unique challenges." (Commonwealth's Brief in Opposition to Petition for Appeal at 14-15.) This is simply incorrect. Settled principles of charitable trust law apply to religious associations just as to other charitable or benevolent organizations. Moreover, principles applicable to voluntary associations, including churches, dictate that the organization's rules – its polity – are binding upon its members.

Virginia Code § 55-544.01 expressly recognizes that a trust may be created by "Declaration by the owner of property that the owner holds identifiable property as trustee" or by "Exercise of a power of appointment in favor of a trustee." Here, evidence establishes both of these grounds. *See* Section I.C., *supra.* Courts in other jurisdictions, as cited above, have had no

difficulty applying the law of charitable trusts to religious associations in general or to The Episcopal Church and its dioceses in particular.

Nor can the purported "difficulty" in applying trust principles to religious organizations justify a rule imposing a congregational polity and an absolute decree of majority rule for ownership of property. At bottom, the Commonwealth appears to be arguing that the Courts of the Commonwealth should simply ignored an essential step of the inquiry under Code § 57-9(A) – the determination of the beneficial owner of the property – because it is "too much trouble." To the contrary, under "neutral principles" analysis the courts must resolve disputes over the ownership of church property held in trust just as they resolve property disputes involving other voluntary associations. *Watson v. Jones*, 80 U.S. (13 Wall) 679, 714 (1871) ("Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints."). The Commonwealth's argument also flies in the face of the United States Supreme Court's instruction in *Jones v. Wolf,* 443 U.S. 595, 606 (1979) ("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.*" (emphasis added)); and of this Court's instructions in *Norfolk Presbytery* and *Green v. Lewis*, expressly requiring the courts to determine, as a matter of contractual and property rights, whether the parties intended for the hierarchical church to have an interest in the property. *Norfolk Presbytery*, 214 Va. at 502, 201 S.E.2d at 754-55; *Green v. Lewis*, 221 Va. 547, 553, 272 S.E.2d 181, 184 (1980). The inquiry commanded by these decisions is the same inquiry conducted under trust law principles.

* * *

The Circuit Court's refusal to consider and recognize the trust interest of the Diocese of Virginia and The Episcopal Church in the church property at issue cannot be squared with the plain language of the applicable statutes, with the decisions of the United States Supreme Court, or with the decisions of this Court. Whether the analysis is characterized as one of trust law, or one of contract and property rights law[12], the Circuit Court was required to

[12] *See* Brief of The Episcopal Church at 46-49 (arguing that the Circuit Court erred in failing to consider the *Green v. Lewis* factors and in holding that the Diocese of Virginia and The Episcopal Church had waived their rights to argue that the parties "contracted around" Code § 57-9).

undertake that analysis before it could determine whether Code § 57-9 applied at all.

II. CODE § 57-9(A) HAS NO APPLICATION HERE, BECAUSE THE PROPERTY AT ISSUE IS NOT CONGREGATIONALLY-OWNED.

Once the trust interest of the Diocese of Virginia and The Episcopal Church is recognized, Code § 57-9(A) is rendered wholly inapplicable to the dispute here. That Code Section provides:

> If a division has heretofore occurred or shall hereafter occur in a church or religious society, *to which any such congregation whose property is held by trustees is attached*, the members of such congregation over 18 years of age may, by a vote of a majority of the whole number, determine to which branch of the church or society such congregation shall thereafter belong. Such determination shall be reported to the circuit court of the county or city, wherein the property *held in trust for such congregation* or the greater part thereof is; and if the determination be approved by the court, it shall be so entered in the court's civil order book, and shall be conclusive as to the title to and control of any property *held in trust for such congregation*, and be respected and enforced accordingly in all of the courts of the Commonwealth.

(Emphases added.) As the Diocese of Virginia and The Episcopal Church argued below, and argue in their briefs here, Code § 57-9(A) applies only to property that is congregationally-owned – i.e., property that is "held in trust for [the petitioning] congregation." But the property here was not held by the trustees "for the benefit of [the petitioning] congregation[s]." Rather, the

trustees expressly hold title for the use and benefit of the Diocese of Virginia and The Episcopal Church. Code § 57-9(A), therefore, has no application to the dispute.

This proper construction of the statute comports with three well-established legal principles. First, it limits the ability of a local congregation to take action contrary to the governing documents and rules of the hierarchical church to which it agreed to be bound. This Court recognized the unfairness of such actions in *Norfolk Presbytery,* 214 Va. at 507, 201 S.E.2d at 758.[13]

Second, this construction comports with this Court's decision in *Green v. Lewis*, 221 Va. 547, 553, 272 S.E.2d 181, 184 (1980), in which the Court made clear that:

> We construe Code § 57-15 to require that a church property transfer may be ordered only upon a showing that this is the wish of the duly constituted church authorities having jurisdiction in the premises. . . . [The statute] now contemplates that the general church, or a division thereof, or certain ecclesiastical officials may be the proper parties to approve such a property transfer. *In determining the proper party to approve the property transfer, the trial court must look to the organizational structure of the church.*

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[13]Indeed, in *Norfolk Presbytery*, this Court made clear that, even though Virginia law would not recognize a trust in favor of a hierarchical church at that time, "[T]he language of the deeds and the constitution of the general church should be considered by the trial court in the application of neutral principles of law" in determining ownership of the property. 214 Va. at 507, 201 S.E.2d at 758.

(Emphasis added) (quoting *Norfolk Presbytery*, 214 Va. at 502, 201 S.E.2d at 754-55).

Third, and most significantly, this construction would permit the Court to avoid altogether the Constitutional issue presented in this case. *See Eaton v. Davis*, 176 Va. 330, 339, 10 S.E.2d 893, 897 (1940) ("[A] statute will be construed in such a manner as to avoid a constitutional question wherever this is possible.").[14]

III. CODE § 57-9 IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT APPLIES ONLY TO CHURCH PROPERTY HELD BY TRUSTEES, AND THEN DISCRIMINATES BETWEEN HIERARCHICAL CHURCHES AND CONGREGATIONAL CHURCHES.

Article I, Section 16 of the Constitution of Virginia provides, in pertinent part, that, "[T]he General Assembly shall not…confer any peculiar privileges or advantages on any sect or denomination." Va. Con. Art. 1 § 16. Moreover, "Respect for the First Amendment free exercise rights of persons

[14] The construction of Code § 57-9 argued for by these *amici* would in no way render the statute superfluous. To the contrary, the statute would still apply in circumstances where the property at issue was in fact held in trust for the local congregation, rather than for the larger hierarchical church. And, as The Episcopal Church explains in its brief, the statute could continue to apply in situations where the hierarchical church in fact "divided" into two separate branches in accordance with its polity, with individual congregations then permitted to choose which of the two branches – each of which would be legally recognized as the successor to the original hierarchical church – it desired to join. Brief of The Episcopal Church at 27-28.

to enter into a religious association of their choice, as delineated in *Jones v. Wolf, [*443 U.S. 595 (1979)]...requires civil courts to give effect to the provisions and agreements of that religious association." *Episcopal Church Cases*, 198 P.3d at 82.

Code § 57-9, as interpreted by the Circuit Court, runs afoul of both of these rules. As this Court has previously noted, Code § 57-9 distinguishes between hierarchical churches and congregational churches. *Baber v. Caldwell*, 207 Va. 694, 698, 152 S.E.2d 23, 26-27 (1967). As a part of this distinction, it applies a different rule of decision for each. The Circuit Court noted that the statute "defers completely to the independent church's constitution, ordinary practice, or custom" in resolving the dispute over ownership of the property, but "shows no such deference" to the constitution or rules of a hierarchical church. (J.A. 3903.) But the United States Supreme Court has made clear that the "principle of denominational neutrality...'is absolute.'" *Larson v. Valente*, 456 U.S. 228, 246 (1982) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968)). A law that applies different rules to different religious denominations, as Code § 57-9 does, "must be invalidated unless it is justified by a compelling governmental interest" and "is closely fitted to further that interest." *Larson*, 456 U.S. at 247.

Under this test, Code § 57-9 cannot stand. The Circuit Court's characterization of the statute as one that favors congregational churches over hierarchical churches – and that therefore is not "neutral" or of "general applicability" is inescapable. *See Falwell v. Miller*, 203 F. Supp.2d 624, 629-31 (W.D. Va. 2002). Merely providing a mechanism for the resolution of church property disputes does not equate to a "compelling interest" on the part of the Commonwealth in imposing the rule of Code § 57-9(A) (as interpreted by the Circuit court), and it is difficult to discern what "compelling interest" the Commonwealth could be furthering by establishing *different* rules for different forms of religious bodies and establishing a different rule for church property than for property held by other forms of voluntary associations.

Even the argument that the statute seeks to impose some principle of "majority rule" fails the test of neutrality, for several reasons. First, as noted above, the statute applies different rules to different religious denominations. Second, no such principle of "majority rule" is imposed on other voluntary associations. To the contrary, this Court has expressly held that the rights of all members of a voluntary association are found in the association's constitution and rules: "The constitution and by-laws adopted by a voluntary association constitutes a contract between the members, which, if not

immoral or contrary to public policy, or the law, will be enforced by the Courts." *Bradley v. Wilson*, 138 Va. 605, 612, 123 S.E. 273, 275 (1924) (quoting *Kalbitzer v. Goodhue*, 44 S.E. 264, 266 (W. Va. 1903); *see Gottlieb v. Economy Stores, Inc.*, 199 Va. 848, 856, 102 S.E.2d 345, 351 (1958) (same); *Amalgamated Clothing Workers of America v. Kiser*, 174 Va. 229, 235-36, 6 S.E.2d 562, 564 (1940) ("The constitution [of a voluntary association] not only constitutes the contract between a member and the association but it also constitutes the contract between a member or members and other members."). Virginia has no statute invalidating the constitution and other governing documents of *secular* voluntary associations, and instead imposing a principle of majority rule for ownership of the association's property. Only religious voluntary associations – indeed, only hierarchical religious organizations – are singled out for such treatment.

Third, the statute applies *only* where property is titled in the name of trustees – raising additional constitutional questions. In other cases, in which congregational property is held in other forms, Code § 57-9(A) does not apply at all.[15] In such cases, presumably, the court would look to "neutral

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[15]Indeed, the Circuit Court in this case held that funds in the respondent/appellee The Falls Church endowment fund were not covered by Code § 57-9 because the funds were not titled in the name of Trustees. (J.A. 4889-90.)

principles" – including the language of the deeds, the constitution of the general church and the dealings between the parties, *Green v. Lewis*, 221 Va. at 555, 272 S.E.2d at 185-86 – to determine ownership. There is no principled basis on which those governing documents and rules can be enforced in one case and not in the other[16], just as there is no principled basis on which the governing documents and rules of a congregational church can be enforced while those of a similarly-situated hierarchical church are ignored.

CONCLUSION

For all of the foregoing reasons, the Diocesan *amici* respectfully urge the Court to reverse judgment below; to recognize the trust interest of the Diocese of Virginia and The Episcopal Church in the property at issue; to hold that Virginia Code § 57-9(A) is wholly inapplicable (or, alternatively, that it is unconstitutional); and to grant final judgment in favor of the Diocese of Virginia and The Episcopal Church.

[16]Notably, Virginia law also does not place other voluntary associations at risk of having their governing documents and rules invalidated, and thereby losing their property, merely because their property is titled in the name of trustees.

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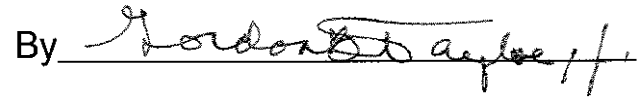
By 

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