IN THE SUPREME COURT OF VIRGINIA

Record No. 090682

The Protestant Episcopal Church in the Diocese of Virginia,

Appellant,

v.

Truro Church, *et al.,*

Appellees.

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF APPELLEES

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INTRODUCTION

Amicus agrees wholeheartedly with The Episcopal Church's embrace of the constitutional principle that governments must allow churches to organize themselves as they see fit. But in their zeal to protect hierarchical prerogatives, The Episcopal Church, the Diocese of Virginia, and their *amici* (collectively, "ECUSA") forget that there are more than two ways to organize a church. The Constitution protects not just classic hierarchies like the Roman Catholic Church and classic congregational churches like Quakers or Baptists. It also protects the many shades of grey in between, like Lutherans or Presbyterians who reject both models, or non-Christian religions that are not part of the hierarchical–congregational continuum at all.

The Virginia Code is constitutional because it does just that. It gives Virginia churches a range of options for holding property, and thus accommodates every sort of church polity, including ECUSA's. Thus, far from being unconstitutional, the Virginia Code is constitutionally preferable to ECUSA's approach.

INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. It has represented Buddhists, Christians, Hindus, Jews, Muslims, Native

Americans, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. The Becket Fund has also represented religious organizations with virtually every sort of religious polity, including "congregational," "hierarchical," trustee-led, and other churches.[1]

In the trustee-led category, for example, The Becket Fund represented the nation's oldest Hindu temple in a property dispute involving control over the temple. *See Hindu Temple Soc'y of N. Am.* v. *Supreme Court of N.Y.*, 335 F. Supp. 2d 369, 374 (E.D.N.Y. 2004). In the "hierarchical" category, The Becket Fund represented a Roman Catholic bishop and diocese in a dispute with a former Catholic school teacher—a case raising important First Amendment questions about the extent to which civil courts can consider religious doctrine. *Curay-Cramer* v. *Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 141 (3d Cir. 2006). And in the "congregational" category, The Becket Fund represented a Baptist organization in a dispute with one of its missionaries—a case addressing the scope of the First Amendment's ministerial exception. *Int'l Mission Bd.* v. *Turner*, 977 So. 2d 582 (Fla. Dist. Ct. App. 2008).

[1] This brief uses the term "church" broadly to refer to religious organizations of all different traditions, including non-Christian traditions.

The Becket Fund thus has an interest in this case *not* because it represents any particular religious organization or type of polity, but because it seeks an interpretation of the First Amendment that will promote the maximum of religious liberty for *all* religious organizations and *all* types of polity.

ARGUMENT

I. Virginia Code § 57-9 is constitutionally permissible under *Jones* v. *Wolf*.

The central constitutional question in this case is how state property law can accommodate a variety of denominational forms and changes within churches, while minimizing state interference in church polity. To answer that question, this Court must address the meaning of the "neutral principles" approach of *Jones* v. *Wolf*, 443 U.S. 595, 603 (1979).[2]

The Episcopal Church, the Diocese of Virginia, and their *amici* (collectively, "ECUSA") acknowledge that *Jones* allows states to adopt default rules such as § 57-9 to govern church property disputes. But in ECUSA's view, in cases involving hierarchical churches, civil courts are constitutionally "bound to give effect" to church canons—meaning internal church rules adopted at a denominational level—regardless of any contrary civil property

[2] Because the religious freedom provisions of the Virginia Constitution parallel those of the Federal Constitution, this brief does not address them separately. *See Va. Coll. Bldg. Auth.* v. *Lynn*, 260 Va. 608, 626, 538 S.E.2d 682, 691 (2000).

or trust laws. Diocese Br. 31; ECUSA Br. 43 ("[S]tate-created rules [like § 57-9] may not supersede contrary church rules."). Thus, no matter what the property deeds, trust instruments, or state property and trust rules may say about local property control, a hierarchical church has a constitutional right at all times to amend its canons at the denominational level (without complying with the legal formalities of trust or property law) to create a trust in favor of itself. Diocese Br. 31; ECUSA Br. 43-44. In other words, church canons must be given precedence over ordinary principles of state property and trust law. But *Jones* v. *Wolf* holds precisely the opposite.

As explained below, although *Jones allows* states to enforce church canons when resolving a property dispute, it does not *require* them to do so. Instead, *Jones* not only allows states to adopt default rules like § 57-9, but also to adopt "*any* method of overcoming [those rules], so long as the use of that method does not impair free-exercise rights or entangle the civil courts in matters of religious controversy." 443 U.S. at 608 (emphasis added). In other words, states are not constitutionally required to give legal effect to church canons in property disputes; instead, they need only ensure that (a) civil courts avoid deciding matters of religious doctrine, and (b) churches have a reasonable means of overcoming default property rules and expressing their chosen polity in a legally cognizable form. Vir-

ginia law (including § 57-9) satisfies both of these conditions and is therefore constitutional under the First Amendment and *Jones*.

A. Under *Jones* v. *Wolf*, a law governing church property disputes is constitutional if it (1) ensures that civil courts do not decide religious questions and (2) gives churches flexibility to express their polity in a legally cognizable form.

ECUSA's interpretation of *Jones*—under which courts are constitutionally required to enforce church canons—rests on two fundamental errors.

1. First, in arguing that civil courts must enforce church canons, ECUSA conflates questions of *church doctrine and governance* (where civil courts must defer to hierarchical authorities) with questions of *civil property or trust law* (where they need not). Typical questions of doctrine and governance are, "Did the denomination depart from its doctrine?" or "Who is the true diocesan Bishop?"[3] Typical questions of civil property or trust law are, "What language, writings, or acts are necessary to create a property interest under state law?" or "Has the party to this dispute done what is legally required under state law to create a property interest?" Although questions of doctrine, governance, and civil property law may be closely related, they are different, and the Constitution treats them differently.

[3] *See Presbyterian Church in the U.S.* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969) (departure from doctrine); *Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976) (true diocesan bishop).

In disputes over doctrine and governance, states have no legitimate interest. Whether a church says "there are twenty gods, or no God," or whether a church says the Pope is authoritative or not, no government interest is at stake—"[i]t neither picks [anyone's] pocket nor breaks [anyone's] leg." Thomas Jefferson, *Notes on the State of Virginia* 165 (Frank C. Shuffelton ed., Penguin Books 1999) (1782). Moreover, even if states had an interest in theological disputes, they "do not have the competence" to resolve them. *Milivojevich*, 426 U.S. at 714 n.8. Thus, the Supreme Court has repeatedly made clear that civil courts "must defer to the resolution of . . . doctrinal issue[s] by the [church's] authoritative ecclesiastical body." *Jones*, 443 U.S. at 604. Any government interference with church doctrine or ecclesiastical structure is strictly prohibited.

By contrast, on the question of what civil property or trust laws will govern church property disputes, states have several vital interests. As *Jones* explained, "[t]he State has an obvious and 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. Moreover, states have an interest in ensuring that church property rights are clearly defined in a "legally cognizable" and secularly understandable form (*id.* at 606)—not only for the sake of future purchas-

ers, lenders, or tort claimants, whose rights will be affected by who owns church property, but also for churches themselves, which benefit from having clear property rights. *See* Part II.D, *infra*. Thus, where "no issue of doctrinal controversy is involved," "the First Amendment [does not] require[] the States to adopt a rule of compulsory deference." *Id.* at 605.

To be sure, questions of doctrine, governance, and civil property law can be intertwined. That is the lesson of cases like *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952), and *Milivojevich*. *Milivojevich* involved a dispute over control of an Orthodox diocese and its property. There, the questions of *civil property law* were undisputed: control over the property was vested in the legal title holder named in the deed, and the deed named the Diocesan Bishop. 426 U.S. at 709. The disputed question was *who was the rightful Bishop*—more specifically, whether one bishop had been improperly defrocked and replaced by another. *Id.* This, the Court explained, was "at the core of ecclesiastical concern" and must be resolved not by the court, but by the "the final church judicatory in which authority to make the decision resides." *Id.* at 717, 720. Thus, as the Court explained, "this case essentially involves *not* a church property dispute, but a religious dispute the resolution of which under our

cases is for ecclesiastical and not civil tribunals." *Id.* at 709 (emphasis added).

Similarly, in *Kedroff*, there was "no problem of title," which was vested in a religious holding corporation. 344 U.S. at 96 n.1. The question was whether a state law could dictate which church authority—the Moscow Patriarch or a North American convention—"validly selects the ruling hierarch" for the corporation. *Id.* at 96-97. This, the Court said, was "strictly a matter of ecclesiastical government" and beyond the power of a court to enforce. *Id.* at 115. Here, unlike *Kedroff* and *Milivojevich*, there is no interference with ecclesiastical government. ECUSA's bishops remain the same, ECUSA's dioceses remain the same, and ECUSA is not required to recognize the departing congregations in any way.

Jones, too, recognized that, although questions of doctrine and questions of civil property law might be intertwined, they are still distinct: "[T]here may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property." 443 U.S. at 604. In such a case, if "the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court *must defer* to the resolution of *the doctrinal issue* by the authoritative ecclesiastical body."

Id. (emphasis added). But where "no issue of doctrinal controversy is involved," "the First Amendment [does not] require[] the States to adopt a rule of compulsory deference." *Id.* at 605. In short, on questions of church polity or doctrine, deference is required; on questions of civil property law, it is not.[4]

2. ECUSA's second major error is to assume that *Jones* itself requires states to enforce trust provisions in church constitutions. Specifically, ECUSA relies on passages in *Jones* mentioning recitations of a "trust in fa-

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[4] Other state courts have recognized this distinction. *See, e.g.*, *All Saints Parish Waccamaw* v. *Protestant Episcopal Church in Diocese of S.C.*, 685 S.E.2d 163, 445 (S.C. 2009) (distinguishing civil law disputes over church property, in which deference to hierarchy is not required, from disputes over "religious law or doctrine masquerading as a dispute over church property," in which courts "must defer to the decisions of the proper church judicatories in so far as it concerns religious or doctrinal issues").

See also Presbytery of Beaver-Butler of United Presbyterian Church in U.S. v. *Middlesex Presbyterian Church*, 489 A.2d 1317, 1320-21 (Pa. 1985) ("All disputes among members of a congregation, however, are not doctrinal disputes. Some are simply disputes as to meaning of agreements on wills, trusts, contracts, and property ownership. These disputes are questions of civil law and are not predicated on any religious doctrine. While it is true that parties may agree to settle their disputes according to their own agreed fashion, the question of what they agreed to, or whether they agreed at all, are not doctrinal and can be solved without intruding into the sacred precincts.").

Cf. Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 Colum. L. Rev. 1843, 1859 (1998) ("In *Jones v. Wolf*, . . . the Court indicated that civil courts need not defer to higher church authorities if they instead rely on authoritative documents that can be interpreted without invoking religious understandings.").

vor of the general church," 443 U.S. at 606, arguing that these passages mean that states are *constitutionally required* to give dispositive legal effect to such recitations. *See* Diocese Br. 29-31 (citing 443 U.S. at 606, 607-08).

That is not what *Jones* says. As the context of these passages makes clear, *Jones permits* states to give legal effect to such language, but it does not *require* them to do so. The Court mentioned trust language several times because the controlling state law (Georgia's) required the consideration of such language. As the Court explained, "The neutral-principles method, *at least as it has evolved in Georgia*, requires a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church." 443 U.S. at 604 (emphasis added). Thus, because an important question under Georgia's law at the time of *Jones* was "whether there was any basis [in the church constitution] for a trust in favor of the general church," *id.* at 600, the neutral-principles method required Georgia courts to consider ecclesiastical trust provisions.

But the neutral principles approach "as it has evolved in Georgia" is not the only possible neutral principles approach. *Id.* at 604. Under *Jones*, other states may adopt different neutral principles of law: "Indeed, '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 (quoting *Maryland & Va. Churches* v. *Sharpsburg Church*, 396 U.S. 367, 368 (1970) (Brennan, J., concurring)).

So, for example, a state may choose to settle church property disputes based solely on secular legal documents (such as deeds, trust instruments, and articles of incorporation), without giving any special attention to internal church documents. *See Maryland & Va. Churches*, 396 U.S. at 370 (approving of "the 'formal title' doctrine"); *Waccamaw*, 685 S.E.2d at 174 (S.C. 2009) (Dennis Canon "had no legal effect on the title to the congregation's property"). Alternatively, a state might make internal church documents dispositive in certain contexts defined by state law. (For example, under Va. Code § 57-16, when a church holds property through an ecclesiastical officer, the officer has power to mortgage or sell the property only "in accordance with [the church's] laws, rules and ecclesiastic polity.") Or a state might give conclusive legal effect to internal church documents, finding that those documents create a valid trust under state law (as ECUSA urges). *See In re Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009). In short, states have authority under *Jones* to determine what language, writings, or acts are required to put property relationships in a "legally cognizable form." *Jones*, 443 U.S. at 606.

ECUSA errs by arguing that one constitutionally *permissible* approach to this question (giving decisive legal effect to church canons) is constitutionally *required*. Such a reading of *Jones* slips in a mandatory constitutional rule of compulsory canon enforcement under the guise of "neutral principles of law."

3. While *Jones* gives states discretion to adopt different property regimes, it confines that discretion within two constitutional bounds. First, as mentioned above, civil courts cannot "resolv[e] church property disputes on the basis of religious doctrine and practice." 443 U.S. at 602. Rather, in any matter of "doctrine or polity," civil courts must defer to the "highest court of a hierarchical church organization." *Id.*

Second, if a state adopts specific rules for resolving church property disputes—such as a presumption that the majority of a congregation's members represents the congregation—those rules must be merely *default rules* that churches can work around without burdening their free exercise rights. *Jones*, 443 U.S. at 607. That is, the law must be flexible enough that a church has a reasonably available means to express its internal, religious structure—including how it wants internal property disputes resolved—in a "legally cognizable form." *Id.* at 606. So, for example, if the state adopts a presumption of majority representation, it must give the church a "method

of overcoming the majoritarian presumption . . . [that] does not impair free-exercise rights." 443 U.S. at 608. If the state makes it unduly burdensome to work around the state's default rules—if, for example, the church has a sincere religious objection to the working around those rules, or if the church must pay draconian taxes to do so—the state's rules will be unconstitutional.

These, then, are the constitutional requirements: (1) civil courts cannot decide doctrine, and (2) churches must have flexibility to express their polity in a legally cognizable form. Beyond these requirements, "the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes." 443 U.S. at 602.

4. This reading of *Jones* is confirmed by the wide variety of state property regimes that have evolved in *Jones*'s wake. *See* Mark Strasser, *When Churches Divide: On Neutrality, Deference, and Unpredictability*, 32 Hamline L. Rev. 427, 454 (2009) (discussing divergent approaches); Greenawalt, 98 Colum. L. Rev. at 1894-1901 (same). While ECUSA emphasizes a handful of cases that have given church canons dispositive legal effect, ECUSA Br. 1 n.1, 40-41; Diocese Br. 25 n.14,[5] several state su-

[5] ECUSA places great weight on *Goodson* v. *Northside Bible Church*, 261 F.Supp. 99 (S.D. Ala. 1966), and *Sustar* v. *Williams*, 263 So.2d 537 (Miss. 1972). ECUSA Br. 40-41; Diocese Br. 25 n.14. But both cases pre-date

preme courts have taken the opposite approach, rejecting the claim that church canons create a legally enforceable trust interest under state law.

Waccamaw, for example, involved a local parish that withdrew from the Episcopal Church by amending its corporate charter. 685 S.E.2d at 169 (S.C. 2009). In the ensuing property dispute, the Episcopal Church claimed ownership of the property on two grounds: (1) that church canons created a legally enforceable trust interest on behalf of the denomination; and (2) that even if the local congregation owned the property, the court must defer to ECUSA's decision on which faction represented the "true" congregation. *Id.* at 174.

The South Carolina Supreme Court unanimously rejected both arguments. *Id.* at 174-175. First, the Court held that ECUSA's canons could not create a valid trust interest under state law because legal title was vested in the congregation—not ECUSA. Under "axiomatic principle[s] of [trust] law," the Court explained, "a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another." *Id.* at 174. The

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Jones and do not discuss whether the challenged statute gave churches flexibility to work around the default rule. Indeed, *Sustar* emphasized that the statute controlled "without regard to the wording of the habendum clause of the deed" and could not be invoked unless a court determined that there was "church doctrinal 'deep seated disagreement'"—an obviously impermissible inquiry for a secular court. 263 So.2d at 543. These cases therefore shed no light on the proper constitutional inquiry under *Jones*.

Dennis Canon, therefore, "had no legal effect on the title to the congregation's property." *Id.*

Second, the court rejected ECUSA's claim that the "true officers" of the non-profit corporation must be determined by deferring to ECUSA authorities. *Id.* Instead, the court held that the relevant question was "whether the Articles of Amendment [which removed the congregation from the Episcopal Church and led to the election of the majority vestry] were adopted in compliance with the South Carolina Non-Profit Act" (which they were). *Id.* Although the Non-Profit Act provided an escape hatch—allowing the Diocese "to gain approval power over amendments to the [congregation's] charter"—ECUSA had never attempted to use it. *Id.* at 175. Thus, the amendments adopted by a two-thirds vote of the congregation were valid, and the majority vestry constituted the "true officers" of the corporation. *Id.* Several other state supreme courts have reached a similar result.[6] ECU-

[6] *See, e.g.*, *Ark. Presbytery of Cumberland Presbyterian Church* v. *Hudson*, 40 S.W.3d 301, 309-10 (Ark. 2001) (trust provision in denomination's constitution did not create an interest in local property); *From the Heart Church Ministries, Inc.* v. *African Methodist Episcopal Zion Church*, 803 A.2d 548, 569-570 (Md. 2002) ("[W]here there is no clear provision in the deed to local church property calling for the holding of the property in trust for the parent church," mere recitation of trust in church constitution is not sufficient to create a property interest.).

SA's position suggests that all of these state supreme courts have misunderstood the Constitution.

B. Virginia Code § 57-9 gives churches flexibility to express their polity in a legally cognizable form.

The Virginia Code (including § 57-9) satisfies the first constitutional requirement of *Jones* by giving churches, including ECUSA, ample flexibility to express their organizational structure in a legally cognizable form. Under the Virginia Code, churches have multiple options for holding title.

One way is for churches to place title in the name of a congregation's trustees under § 57-9. Those trustees hold title for the benefit of the local congregation and have power, after petitioning the circuit court, to improve, mortgage, or sell the property. *See* Va. Code Ann. § 57-15. In the event of a "division" like the one here, title and control of the property may be settled by a majority vote of the congregation. Va. Code Ann. § 57-9(A).

As the Circuit Court explained, however, the Virginia Code provides a readily available "escape hatch" from the default operation of § 57-9. JA 4152. Any religious group in Virginia can remove itself from the scope of § 57-9 simply by holding title in one of two other forms. First, under § 57-16, churches can place title in the name of a "duly elected or appointed bishop, minister or other ecclesiastical officer." That officer will then have power to improve, mortgage, or sell the property "in accordance with [the

church's] laws, rules and ecclesiastic polity, and in accordance with the laws of Virginia." *Id.* In the event of a division like the one here, the denomination will retain control of the property because the denomination decides who fills the role of ecclesiastical officer. *See* Va. Code Ann. § 57-16(B); *Milivojevich*, 426 U.S. at 709 (identity of the rightful bishop is "a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals"). This is how the Roman Catholic Church holds property in Virginia, and how ECUSA holds some 29 of its properties in Virginia. JA 3843, 4150-51.

Second, under § 57-16.1, churches can hold title in the name of a corporation created by the church. The corporation will then have power to improve, mortgage, or sell the property "in accordance with [the church's] law, rules, and ecclesiastic polity, and in accordance with the law of the Commonwealth." *Id.* In the event of a division like the one here, the denomination can ensure that it retains control of the property because it can create the corporation, establish its rules, and confine its operation within the "law, rules, and ecclesiastic polity" of the church. *Id.* This is how the Foursquare Church and Church of Jesus Christ of Latter Day Saints hold property in Virginia. *See* JA 3843, 4150 & n.35. The Seventh-day Adventist Church

likewise avoids the application of § 57-9 by holding title in the name of regional corporations. *See* United Methodist *Amici* Br. 7.

In short, ECUSA could have avoided the application of § 57-9 and retained complete control over all local property by doing one of two things: holding title in the name of the bishop, or holding title through a church holding corporation. These two options gave ECUSA ample flexibility to express its chosen polity in legally cognizable form. ECUSA's decision not to use these options was a decision to be governed by § 57-9.

ECUSA offers two objections on this point. First, it claims that these options were not "actually available" until the Virginia legislature amended the Code in 2005. ECUSA Br. 42-43; Diocese Br. 33. According to ECUSA, until 2005, § 57-9 applied to *all* church property regardless of whether it was titled in trustees, in an ecclesiastical officer, or in corporate form. *Id.*

That is wrong. Section 57-9 has always been limited to property held by trustees. The original 1867 statute, which ECUSA appends to its brief, states that, in the event of a division, a majority vote would be "conclusive as to the title to and control of *any property held in trust* for [the] congregation"—not to property held in other forms. ECUSA Br. Ex. 1 (emphasis added). Similarly, every version of the statute since 1867 has been limited to property "held in trust" for a congregation.

The 2005 amendments, far from changing the scope of § 57-9, merely codified in § 57-16.1 the right of churches to hold property in corporate form, which was recognized in 2002 in *Falwell* v. *Miller*, 203 F.Supp. 2d 624 (W.D. Va. 2002).[7] The amendments also clarified that other sections of the code (including §§ 57-9, 57-13, and 57-14) did not apply to property held in corporate form. *See* JA 4179-82. Thus, even though the option to hold property in corporate form is a relatively recent development, ECUSA has long had the option to avoid § 57-9 by placing title in an ecclesiastical officer. *See, e.g.*, Va. Code Ann. § 38a (1941) (allowing churches to hold property in the name of an ecclesiastical officer and using substantially the same language as the current § 57-16(A)).

Second, ECUSA claims that holding property in the name of an ecclesiastical officer or in corporate form would "substantially burden[]" its religious exercise. ECUSA Br. 44; Diocese Br. 31-33. According to ECUSA, holding property in the name of the bishop would force the Diocese "to remove

[7] Virginia's rule prohibiting churches from holding property in corporate form was a relic of Madisonian and Jeffersonian hostility to the incorporation of churches. *See* Madison's Veto Message, 22 Annals of Cong. 982, 982-93 [1811] (Joseph Gales, ed. 1834). Until after the Civil War, the corporate form was not generally available to any organization but required special legislation, and was reserved for corporations performing a public function. *See* Michael W. McConnell, John H. Garvey & Thomas C. Berg, *Religion and the Constitution* 289-90 (2d ed. 2006).

property authority from lay persons," undermining its desire for "lay involvement" in governance. Diocese Br. 32. Similarly, asking congregations to transfer title to an ecclesiastical officer might "breed suspicion and resentment, disturbing the peace of the Church." *Id.* at 33.

If these assertions of a religious burden were supported by the record, this Court would be bound to give them serious consideration. But in this case, ECUSA's claim of a religious burden is completely refuted by the record. First, it is undisputed that the Roman Catholic Church, the Foursquare Church, and the Church of Jesus Christ of Latter Day Saints have all avoided any burden imposed by § 57-9 by holding property in the name of an ecclesiastical officer or in corporate form. JA 3843, 4150 & n.35. Similarly, the Seventh-day Adventist Church—one of ECUSA's own *amici*—asserts that § 57-9 "poses no significant threat" to it because the Church "conclusively settled the question of local church property ownership more than a century ago, by requiring that fee simple title to all church properties be held by . . . church corporations, not local congregations." United Methodist *Amici* Br. 7.

But most importantly, ECUSA already holds 29 of its own properties in the Diocese of Virginia in the name of an ecclesiastical officer under § 57-16—completely removing those properties from the reach of § 57-9. JA

3843, 4150-51. ECUSA cannot prove that holding property in an ecclesiastical officer burdens its religious exercise when it already widely uses that very method of ownership. The Virginia Code thus gives ECUSA ample flexibility to express its polity in a legally cognizable form.[8]

Finally, when ECUSA claims that asking congregations to place title in an ecclesiastical officer might "breed suspicion and resentment," Diocese Br. 33, it merely confirms that many congregations have understood all along that they have a degree of control over church property. If ECUSA had the control it alleges, there would be no suspicion or resentment. ECUSA's assertion thus unintentionally confirms that allowing denominations to make property changes through canons, rather than changing the legal documents in accordance with state property and trust law, creates a potential end-run around existing property understandings within the church.

[8] In an appropriate case, a church might be able to show that using an "escape hatch" was unconstitutionally burdensome—either because the church's religious beliefs prevented it from using the escape hatch, or because the practical burden of using the "escape hatch" proved to be more than *de minimis*. *See*, *e.g.*, Rachel Gordon, *Board backs city over archdiocese in tax matter*, S.F. Chron., Dec. 1, 2009 at C-1 (Catholic archdiocese assessed $14.4 million in property taxes for transferring title between different Catholic entities). But such a claim is foreclosed where, as here, the church has already repeatedly availed itself of the escape hatch without any difficulty.

C. Virginia Code § 57-9 ensures that civil courts do not decide religious questions.

Section 57-9 also allows civil courts to resolve property disputes without deciding questions of religious doctrine or polity. Although ECUSA disputes this point, Diocese Br. 23; ECUSA Br. 31; United Methodist *Amici* Br. 14-20, it never attempts to define what, exactly, constitutes a prohibited question of doctrine or polity. For example, how can a court secularly apply ECUSA's definition of "division" (deciding whether the separation was "accomplished in accordance with a hierarchical church's own polity," ECUSA Br. 15), if it cannot apply the Circuit Court's definition (deciding whether a "group of congregations, clergy or members" left the church and formed an alternative organization, JA 3934-35)? ECUSA offers the Court no principle for deciding what questions are off limits.

The quintessential example of a *doctrinal* question is the one presented in *Presbyterian Church in U.S.* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969). There, state law deprived the general church of its trust interest in local property if its actions constituted "a 'substantial departure' from the tenets of faith and practice existing at the time of the local churches' affiliation." 393 U.S. at 450. This, the Supreme Court held, was unconstitutional because it forced the court to resolve "matters at

the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion." *Id.*

The quintessential example of a *polity* question is the one presented in *Milivojevich*. There, as explained above, the state court's resolution of the property dispute turned on whether a defrocked bishop had been removed in accordance with church law. 426 U.S. at 709. This, the Supreme Court held, was a question of polity "at the core of ecclesiastical concern" and could not be resolved by the court. *Id.* at 717.

As interpreted by the Circuit Court, § 57-9 requires no resolution of such inherently religious questions. Each of the statute's key terms—"division," "branch," "attached," and "church or religious society"—has an objective, secular meaning and can be applied without reference to theology or ecclesiology. JA 4157-64.

For example, based on the historical record, the court defined "division" as a split in a religious denomination involving (1) "the separation of a group of congregations, clergy or members from the church," and (2) "the formation of an alternative polity that disaffiliating members could join." JA 3934-35. To determine whether these conditions were present, the Circuit Court did not need to examine any doctrinal questions (such as the theological reasons for the separation) or ecclesiastical questions (such as

whether the separation violated church rules). Rather, it relied on evidence that any secular outsider could grasp: namely, that a number of congregations, clergy, and members had left the Episcopal Church and joined new legal organizations (ADV and CANA). JA 3935-38.

By contrast, under ECUSA's definition of "division"—which includes only separations "accomplished in accordance with a hierarchical church's own polity" (ECUSA Br. 15)—a court arguably *would* need to resolve a question of polity: namely, whether the separation complied with church law. That question is analogous to the quintessential church polity question ruled off limits in *Milivojevich*: namely, whether the removal of the diocesan bishop complied with church law. 426 U.S. at 709. While looking for a speck in the Circuit Court's eye, ECUSA has missed the beam in its own.

The court also defined "branch" in secular terms as "a part of a complex body" or "any arm or part shooting or extended from the main body of a thing." JA 4157. More simply, a branch is "the logical corollary of [a] division"; it "describe[s] the entities that remain in the aftermath of a division." *Id.* Thus, the "branch" inquiry was based on the same sort of evidence as the "division" inquiry: (1) Was the new organization (the "branch") formed as a result of a division? (2) Was the new organization populated by former members of the original organization? The first question—whether a new

organization broke off from the old one—is not ecclesiological; it can be resolved by looking at legal documents such as the articles of incorporation or bylaws, as the Circuit Court did here. JA 4158-59. And the second question—whether the new organization is populated by former members of the old organization—is not inherently doctrinal; in fact, that question is undisputed here. *Cf. Jones*, 443 U.S. at 607 ("Certainly, there was no dispute in the present case about the identity of the duly enrolled members of the Vineville church."). In short, while there is much talk in ECUSA's briefs about the precise relationship among CANA, the Diocese of Virginia, The Episcopal Church, and the Anglican Communion, none of that is relevant under § 57-9. Under the Circuit Court's interpretation, a "branch" is either of the entities that remain in the wake of a "division," regardless of the theological relationship between those entities.[9]

Nor do the terms "attached" or "church or religious society" require the court to make religious determinations. The Circuit Court found that "the CANA Congregations were attached to the Diocese and ECUSA" before

[9] Nor is there any constitutional problem with the Circuit Court's conclusion that CANA and the ADV are "branches" of the Anglican Communion. ECUSA Br. 31. That fact can be established solely by examining the legal relationship (not the theological relationship) among the parties: the articles of incorporation and bylaws of CANA state that it is part of the Church of Nigeria, and the constitution of the Church of Nigeria states that it is a member of the Anglican Communion. JA 3894-95.

the division because ECUSA conceded the point, JA 3932; it found that all three were "attached" to the Anglican Communion based on statements to that effect in their articles of incorporation, bylaws, and constitutions. *Id.* And it found that the Anglican Communion was a "religious society," broadly defined, because it is a voluntary association of what everyone agrees are "churches." JA 3930-31. None of this required the court to resolve ecclesiastical or theological issues.

Finally, ECUSA's *amici* complain that the Circuit Court waded into a religious thicket by "receiv[ing] testimony from, of all things, experts on church polity and church history," and by "compar[ing] the present-day discord in the Anglican Communion with the 'great divisions' within 'the Methodist and Presbyterian churches that prompted the passage of 57-9.'" United Methodist *Amici* Br. 17-19. But this argument confuses an inquiry into "the historical context in which [§ 57-9] was codified" (which is permitted) with the resolution of theological questions (which is not). JA 3904. Nothing in the Constitution prohibits courts from considering the historical context in which religious disputes (or statutes) arose. Indeed, in some cases, basic principles of statutory interpretation require such an inquiry. *Cf. Kedroff,* 344 U.S. at 100-06 (devoting almost one-quarter of the opinion to a discussion of the church polity issues giving rise to the dispute).

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In sum, § 57-9 ensures that (1) churches have flexibility to express their polity in a legally cognizable form, and (2) courts avoid questions of doctrine. It thus satisfies the constitutional requirements established in *Jones*.

II. Virginia Code § 57-9 is constitutionally preferable to ECUSA's proposed rule of compulsory canon enforcement.

Section 57-9 is not only constitutionally permissible, however; it is also constitutionally preferable to ECUSA's approach. Under ECUSA's approach, civil courts would be constitutionally required, without exception, to enforce the canon laws of any "hierarchical" church. As explained below, such a rule would produce four pernicious consequences:

(a) It would render longstanding principles of trust law unconstitutional;

(b) It would undermine religious liberty by pressuring churches into a false choice between "hierarchical" or "congregational" organization;

(c) It would invite entanglement by forcing civil courts to base their decisions on canon law; and

(d) It would undermine important state and private interests in maintaining clear property rights.

A. ECUSA's proposed rule would render longstanding principles of trust law unconstitutional.

Most states (including Virginia) subscribe to certain basic principles of trust law. For example, in order to declare a trust, one must have legal title to the putative trust property; one cannot declare oneself to be a benefici-

ary of a trust in someone else's property. *See* Restatement (Second) of Trusts § 18 cmt. a (1959) ("[O]ne who has no interest in a piece of land cannot effectively declare himself trustee of the land . . . ."); George T. Bogert, *Trusts* § 9 at 20 (6th ed. 1987) ("In order to create an express trust the settlor must own or have a power over the property which is to become the trust property . . . ."); Va Code Ann. § 55-544.01(2) ("A trust may be created by . . . [d]eclaration *by the owner* of property that the owner holds identifiable property *as trustee* . . . .") (emphasis added). These principles provide clear rules for the creation and transfer of property interests.

But under ECUSA's proposed rule, church canon law displaces these basic principles of trust law. Indeed, states would be constitutionally required to recognize any trust declared by a church's canon law, even if such a trust were declared in blatant disregard of the state law of trusts. Here, for example, Virginia would be constitutionally required to give legal effect to a *unilateral declaration* of trust made by a *trust beneficiary* that *lacked legal title*. No longer could the state decide property ownership based on the publicly recorded deed, the articles of incorporation, and basic principles of trust (as it does for other property). Instead, the state would be required to enforce the church's internal canons.

B. ECUSA's proposed rule would undermine religious liberty by pressuring churches into a false choice between organizing either "hierarchically" or "congregationally."

The second problem with ECUSA's approach is that it would undermine religious liberty by forcing churches into one of two overly simplistic categories. At the outset of any church property dispute, a civil court would first have to categorize the church as either "hierarchical" or "congregational"; then, if the church is "hierarchical," the court would have to enforce the church's ecclesiastical laws related to property disputes (such as trust provisions in the church constitution).

Deciding property disputes in this way would be at odds with how many churches organize in practice. As explained below, many churches use elements of both hierarchical and congregational governance (or neither). *See infra* Subpart 1. Moreover, deciding property disputes based on a "hierarchical"–"congregational" dichotomy subtly pressures churches toward one of those two extremes, thus undermining their free exercise of religion. *See infra* Subpart 2. The neutral principles approach of the Virginia Code, by contrast, solves this problem by creating more options for churches to organize themselves in accordance with their beliefs. *See infra* Subpart 3.

1. Many churches organize in a way that defies categorization as either "hierarchical" or "congregational."

The distinction between "congregational" and "hierarchical" churches, set forth 138 years ago in *Watson* v. *Jones*, 80 U.S. 679 (1871), is unhelpful because it fails to reflect the wide diversity of religious polities in the United States. Under *Watson*, a church is "congregational" if the local church is "strictly independent of other ecclesiastical associations." *Id.* at 722. It is "hierarchical" if the local church is related to an organization with "a general and ultimate power of control [that is] more or less complete." *Id.* The problem is that congregations can relate to the general church in a multitude of ways—many of which render the congregation neither "strictly independent" from the general church nor subject to "control [that is] more or less complete" (whatever "more or less complete" might mean). *Id.*

The hierarchical category is typified by the Roman Catholic Church. Although local congregations ("parishes") may have autonomy on some issues, on most issues they are subject to ascending levels of authority such as priests, bishops, and (ultimately) the Pope. *See Codex Iuris Canonici*, 1983 Code cc.204, §1-207, §2. Doctrine, liturgy, and public outreach are subject to top-down control; clergy and staff are appointed, removed, disciplined, and paid by superior bodies; and title to local property is typically held by higher authorities.

The "congregational" category is typified by Quakers or independent Baptists. These groups, as *Watson* says, are "strictly independent of other ecclesiastical associations." 80 U.S. at 722. There are no religious bodies connecting individual congregations. In property disputes, they are treated like any other voluntary association.

The difficulty comes with the many religious organizations that fall somewhere in between (or completely outside) these two extremes. "Mainline" Protestant denominations—such as Methodists, Presbyterians, and Lutherans—are one example. In fact, one of ECUSA's *amici*, the Evangelical Lutheran Church in America, emphasizes that it "is organized neither as a hierarchical church . . . nor as a congregational church," but as a church in which all levels are "*interdependent* partners sharing responsibility in God's mission." United Methodist *Amici* Br. 4-5 (emphasis in original). Many of these denominations have regional or national bodies that exercise some measure of control over local congregations. Thus, courts often classify them as hierarchical. But the amount of control and the issues they control vary dramatically.

The Presbyterian Church (U.S.A.) ("PC(USA)"), for example, has multiple levels of governance. Congregations are governed directly by a "Session," which consists of the pastor and congregationally elected elders. The

Session sends delegates to a regional Presbytery; the Presbytery sends delegates to a Synod; and above the Synod is the nationwide General Assembly. Despite this multi-tiered structure, the highest adjudicative body in the PC(USA) has emphasized that, "[w]hile the *Book of Order* refers to a higher governing body's 'right of review and control over a lower one' (G-4.0301f), these concepts *must not be understood in hierarchical terms*, but in light of the shared responsibility and power at the heart of Presbyterian order (G-4.0302)."[10]

Moreover, this multi-tiered structure gives little insight into how the church and its members intend to hold property. Indeed, Presbyterian churches take different positions on precisely this question. The PC(USA) includes in its constitution a provision stating that all property of local congregations is held in trust for the denomination.[11] But the Presbyterian

[10] *Johnston* v. *Heartland Presbytery*, Permanent Judicial Comm'n Remedial Case 217-2, 7 (2004) (quoting *The Book of Order: The Constitution of the Presbyterian Church (U.S.A.) Part II* (2009)) (emphasis added), available at http://www.pcusa.org/gapjc/decisions/pjc21702.pdf.

[11] *The Book of Order: The Constitution of the Presbyterian Church (U.S.A.) Part II*, §§ G-8.0201, G-8.0601 (2009) available at http://www.pcusa.org/oga/boo/fog_ch8.htm#g80000 ("All property held by or for a particular [*i.e.* local] church, . . . whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of a particular church or of a more inclusive governing body or retained for the production of income, is held in trust nevertheless

Church in America ("PCA"), with a structure nearly identical to that of the PC(USA), includes in its constitution just the opposite.[12] As one commentary has noted, "the mere outward presbyterial form—*i.e.*, a series of assemblies—does not necessarily import a functional hierarchy." Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 Harv. L. Rev. 1142, 1160 (1962).

Other religious groups defy categorization within a hierarchical–congregational taxonomy at all. For example, many non-Christian religious organizations do not have Christian notions of an "assembly" of believers or "membership"—both tacit assumptions of the hierarchical–congregational dichotomy. Willard G. Oxtoby, *The Nature of Religion*, *in World Religions: Eastern Traditions* 486, 489 (Willard G. Oxtoby, ed., 2001).

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for the use and benefit of the Presbyterian Church (U.S.A.)."). We express no opinion as to the legal effect of these provisions in the event of split.

[12] *See The Book of Church Order of the Presbyterian Church in America* (6th ed. 2007) §§ 25-9, 25-10, *available at* http://www.pcaac.org/BCO%202007%20Combined%20for%20Web.pdf ("All particular [i.e. local] churches shall be entitled to hold, own and enjoy their own local properties, without any right of reversion whatsoever to any Presbytery, General Assembly or any other courts hereafter created, trustees or other officers of such courts. . . . [T]he Church as a whole promises never to attempt to secure possession of the property of any congregation against its will, whether or not such congregation remains within or chooses to withdraw from this body.").

Hindu temples, for example, typically do not have "members." Instead there are "devotees" of the particular deity enshrined at the temple, and devotees worship individually rather than communally.[13] The temple is operated by caretakers or trustees, without the involvement of any members. *See*, *e.g.*, *Venigalla* v. *Nori*, 892 N.E.2d 850, 853 (N.Y. 2008) (holding that "membership" election for Hindu temple should never have been held because temple was operated by a self-perpetuating board of trustees).

Similarly, Islamic mosques typically do not have members or congregations in the Christian sense. *See, e.g.*, Helen R. F. Ebaugh & Janet S. Chafetz, *Religion and the New Immigrants* 49 (2000). In some areas, immigrant mosque communities have evolved from an initial congregational model to a "hybrid" model. *See id.* at 53 (clergy of 41 independently-incorporated Houston mosques came to be appointed by lay board of central governing body). And Sikh temples ("gurdwaras") may also have an arrangement neither "hierarchical" nor "congregational" in nature. *See, e.g.*, *Singh* v. *Singh*,

[13] *See* Michael D. Coogan & Vasudha Narayanan, *Eastern Religions: Origins, Beliefs, Practices, Holy Texts, Sacred Places* 85 (2005) ("In most temples, worship is traditionally not congregational . . . . The closest thing to a religious congregation in Hinduism is when people gather together to listen to a religious teacher—although in most cases, this will take place in a public hall rather than in a temple—or to sing traditional religious songs at home and in other public places.")

9 Cal. Rptr. 3d 4, 19 n.20 (Cal. Ct. App. 2004) (describing "congregational" Sikh temple with "hierarchy regarding doctrinal issues").

Certain Hasidic Jewish groups, too, defy the "congregational" or "hierarchical" pigeonholes. Often a Grand Rabbi, without exercising formal control over any particular legal entity, has complete control over all spiritual matters. *See*, *e.g.*, *Congregation Yetev Lev D'Satmar, Inc.* v. *Kahana*, 879 N.E.2d 1282, 1289 (N.Y. 2007) (Smith, J., dissenting) ("It can be argued . . . that the Brooklyn Congregation, however unlike the Catholic or Presbyterian church in its structure, is hierarchical in the relevant sense, because there is a single decisionmaking body whose authority all adherents have agreed to accept: the Grand Rabbi.").

Given the religious diversity of the Commonwealth, which includes all of these non-Christian groups and many more, the "hierarchical"–"congregational" dichotomy is often too crude to be useful. As the California Supreme Court observed in a dispute involving a Rosicrucian church: "The basic question in a controversy such as this should be the ownership of civil and property rights . . . . A classification based on a formula is not of much assistance, especially when we have, as we do here, an anomalous arrangement." *Rosicrucian Fellowship* v. *Rosicrucian Fellowship Nonsectarian Church*, 245 P.2d 481, 489 (Cal. 1952). "Anomalous arrangements"

have become the rule, not the exception, in an increasingly diverse Commonwealth.

Finally, making matters even more complex, it is virtually impossible to understand church polity merely by examining documents such as the church constitution, canons, and bylaws. One must be intimately familiar with how those laws operate in practice. As one scholar of church governance puts it, "the constitutions of church groups vary widely in how, and the extent to which, they provide the definitive clue to the governance patterns of those groups." Edward LeRoy Long, *Patterns of Polity: Varieties of Church Governance* 3 (2001). Some are hortatory but widely ignored in practice; some are purely aspirational; some are adopted against the will of a large minority of local congregations or individual members and may not reflect the desires of those constituencies.

Nor is it enough simply to say that, by joining a denomination, a congregation impliedly "consents" to abide by all of the denomination's rules. Different denominations have very different attitudes toward affiliation and disaffiliation. Some are formed by breaking away from another religious body; others are combinations of existing churches. Some stress permanence and may expect millennia to pass without any division; others may expect that individual congregations will come and go. Indeed, some reli-

gious traditions do not believe that individual congregations have the capability to "consent" to being part of the broader church. "Consent" is thus a highly complex matter that courts are ill-equipped to resolve. When it comes to property, some congregations may decide to join a new denomination fully intending to consent to every denominational canon, while others may intend to consent only to those denominational canons that are made legally binding under state law.[14]

All of these points—the fact that most churches are not "hierarchical" or "congregational" as defined in *Watson*; the fact that a church's governing structure often says little about how it intends to hold property; and the fact that church constitutions and canons may not accurately reflect church polity in practice—counsel strongly against an attempt to resolve property disputes by first categorizing a church as either "hierarchical" or "congregational" and then enforcing the ecclesiastical canons of a hierarchical church. As one commentator has noted, such an attempt is ultimately an "exercise in arbitrariness." Strasser, 32 Hamline L. Rev. at 473.

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[14] *See, e.g.*, Greenawalt, 98 Colum. L. Rev. at 1874 ("[T]he idea that members give implied consent to whatever the hierarchy does is not tenable for many members of many churches."); A.M. Adams and W.R. Hanlon, Jones v. Wolf*: Church Autonomy and The Religion Clauses of the First Amendment*, 128 U. Penn. L. Rev. 1291, 1331-32 (1980).

2. ECUSA's proposed rule would pressure churches toward one of two organizational extremes.

Resolving property disputes based on the hierarchical–congregational dichotomy is not only arbitrary, it also interferes with free exercise rights by pressuring churches toward organizational extremes. Some churches may want to adopt a hierarchical structure on the vast majority of issues, but still grant congregations ultimate control over local property. There may be good reasons for such local control: it could encourage local congregations to take better care of their property, or it could serve as a useful check on the risk that the denomination will drift from its doctrinal moorings. But a constitutional rule that requires courts to defer to a denomination's assertion of control over local property (as with the rule advocated by ECUSA) would stop some churches from organizing in this way.

Take, for example, the Presbyterian Church in America (PCA). As noted above, courts often deem the PCA "hierarchical" based on its multiple levels of governance, including the local session, regional presbyteries and synods, and national General Assembly. But the PCA includes in its constitution a provision granting local congregations complete control over their property, including in the event of disaffiliation. *See supra* note 12.

Assume, however, that at some point in the future, the PCA's General Assembly reverses course and, contrary to the will of a large minority of

congregations, amends its constitution to assert that all local property is held in trust for the denomination.[15] What will happen in the event of a later division and subsequent dispute over church property?

According to ECUSA, notwithstanding the fact that many local PCA congregations hold title in their own name and never expressly consented to the new constitution, civil courts would be constitutionally bound to give effect to the trust provision in the PCA's constitution. Thus, under ECUSA's view, even if the PCA fully intends, *ex ante*, to give local congregations control over their property, and existing local congregations join the denomination on that assumption, the U.S. Constitution would *prevent* the PCA from making that aspect of "congregational" governance binding on itself because civil courts would be bound to enforce future choices of the "hierarchical" denomination. In short, ECUSA's binary categorization acts as a one-way ratchet, subtly pressuring churches toward a more "hierarchical" form of governance: Any hierarchical aspects of governance must be enforced by civil courts as a matter of constitutional law, while any congre-

[15] Such changes in position are not far-fetched. For example, in *Comm'n of Holy Hill Cmty. Church* v. *Bang*, No. B184856, 2007 WL 1180453, at *1 (Cal. Ct. App. 2007), notwithstanding its constitutional commitment to local property control, the PCA denomination attempted to control the property of a local, breakaway congregation.

gational aspects of governance can be canceled by the denomination on a moment's notice.[16]

3. The "neutral principles" approach of Virginia law leaves churches free to organize how they wish.

By contrast, the neutral principles approach of Virginia law (including § 57-9) gives churches a range of options as to how they can hold property, thus accommodating every sort of church polity. First, a church like the PCA can bind itself to local property control simply by titling property in the local congregation's trustees under § 57-9. There will be no risk that the denomination can sweep all local property into its control merely by amending the church constitution to assert a unilateral trust. Rather, § 57-9 allows some congregations to decide to affiliate with a national denomination while still reserving control over their property in the event of a split. There is no reason the Constitution should be construed to prohibit states from creating such an option.

Second, if a church does not want such an arrangement, Virginia law allows it to organize in a more purely hierarchical or congregational form. A

[16] *See* Greenawalt, 98 Colum. L. Rev. at 1851 (noting that a hierarchical–congregational dichotomy "effectively restricts the options of church members either to keeping final authority in local congregations or to leaving ultimate decisions about authority to superior tribunals, even though some churches may prefer a more complex form of organization, with a division of national, regional, and local authority.").

classically hierarchical church like the Catholic Church can ensure denominational control simply by titling property in the appropriate ecclesiastical officer (or by titling property in corporate form). Virginia law requires only that such a choice be embodied in a "legally cognizable form"—namely, in accordance with property or trust forms available under state law. *Jones*, 443 U.S. at 606.

Accordingly, there is no merit to the suggestion that § 57-9 undermines religious liberty by encouraging church splits. It merely recognizes that church splits occur, and enables all churches to decide ahead of time what will happen in that event. Of course, some congregations will be more likely to leave a denomination if they can take their property with them. But denominations can easily foreclose that possibility by placing title in an ecclesiastical officer (§ 57-16) or in corporate form (§ 57-16.1).

By contrast, ECUSA's proposed rule of compulsory canon enforcement would create incentive problems that could never be remedied. *Ex ante*, a rule of compulsory canon enforcement discourages congregations from deciding to affiliate with a denomination because they risk a change in canons and loss of property if they do. *Ex post*, once the canons have been changed, a rule of compulsory canon enforcement pressures disaffected congregations to remain within a denomination because they would lose

their property if they departed. Moreover, denominations cannot protect against these incentives because, under ECUSA's approach, canon enforcement would be constitutionally mandated. For example, even if a church sought to place title in local congregations, and adopted canons confirming local control (like the PCA), congregations would always be at the mercy of the hierarchy, which could change the canons and assert control at any time. Thus, while ECUSA is commendably concerned that state law not encourage church splits (which § 57-9 does not do), it seems oblivious to the equal need of the state not to discourage them (which ECUSA's approach would do).

C. ECUSA's proposed rule would invite entanglement by forcing civil courts to base their decisions on canon law.

The third problem with ECUSA's approach is that it entangles civil courts in religious questions by forcing them to resolve property disputes on the basis of ecclesiastical law.

In any given church property dispute, there will typically be three types of evidence of ownership: (1) legal documents (such as the deed, corporate charter, state laws governing trusts, and any formal trust agreements); (2) church governance documents (such as the church constitution and canons); and (3) evidence of church practice (such as who typically controls

the property and how the church constitution and canons are applied in practice). *Cf.* Greenawalt, 98 Colum. L. Rev. at 1886 (listing possibilities).

When § 57-9 applies—that is, when the secularly defined preconditions of a "division," "branch," majority vote, *etc.* are satisfied—property disputes can be resolved entirely on the basis of the legal documents. Here, for example, the deed is in the name of the congregation's trustees, and a straightforward application of Virginia trust law demonstrates that there is no valid trust agreement in favor of the denomination. In the absence of a showing that Virginia law provides no easily available "escape hatch"—and there is no such showing here—the secular legal documents completely settle the dispute. This is the "neutral principles" approach at its best.

According to ECUSA, however, resolving this dispute solely on the basis of the legal documents is unconstitutional. Instead, the Constitution obligates a civil court to do two things: first, it must determine whether the Episcopal Church is "hierarchical" (which, as discussed above, is no easy task); second, having concluded that the church is hierarchical, it must give legal effect to any ecclesiastical provision (such as the Dennis Canon) regarding control over property. In short, no longer does the property dispute turn on legal documents; it turns instead on church canons and evidence of how the church operates in practice.

As the Court explained in *Jones*, this kind of approach can create entanglement problems:

> Under [an] approach [of compulsory deference], civil courts would always be required to examine the polity and administration of a church to determine which unit of government has ultimate control over church property. In some cases, this task would not prove to be difficult. But in others, the locus of control would be ambiguous, and "[a] careful examination of the constitutions of the general and local church, as well as other relevant documents, [would] be necessary to ascertain the form of governance adopted by the members of the religious association." [Dissent at 619-620]. In such cases, the suggested rule would appear to require "a searching and therefore impermissible inquiry into church polity." [*Milivojevich*, 426 U.S. at 723]. The neutral-principles approach, in contrast, obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes.

443 U.S. at 605.

Even assuming the canons were clear in this case, and the "task would not prove to be difficult," *id.*, Virginia courts are bound to face cases in which the canons are ambiguous. Adopting ECUSA's proposed rule would thus mire Virginia courts in religious questions.

Finally, in the context of disputes over property (as opposed to disputes over doctrine and governance), ECUSA's rule of compulsory canon enforcement actually undermines the purposes that hierarchical deference is usually supposed to serve. In disputes over church doctrine and governance, civil courts have no secular means of resolving the dispute. In that situation, a rule of hierarchical deference serves the essential purpose of

preventing courts from opining on religious questions. In disputes over property, by contrast, civil courts may be quite capable of resolving the dispute on the basis of secular legal documents, such as deeds and trust agreements. ECUSA's rule, however, would *prevent* courts from doing so, forcing them instead to rely on internal religious documents. Far from preventing entanglement, then, ECUSA's rule of compulsory canon enforcement invites it.

D. ECUSA's proposed rule would undermine state and private interests in clear property rights.

The fourth problem with ECUSA's approach is that, by making property ownership turn on canon law instead of state trust law, it would undermine state and private interests in clear property rights. If property ownership turned on canon law, it would be difficult for potential purchasers or lenders to know who really owns the property. Even if the deed were in the name of the local congregation with no apparent encumbrances, the local congregation would have difficulty demonstrating clear title. This, in turn, could limit the congregation's ability to sell the property or secure a loan to expand its facilities. Although laws protecting *bona fide* purchasers might alleviate some difficulty (*see*, *e.g.*, Va. Code Ann. § 55-96), not all purchasers would be willing to leave the fate of their property interest to a court's interpretation of those laws. *See, e.g.*, *Shaheen* v. *County Of Mathews*, 265 Va. 462,

476-81, 579 S.E.2d 162, 171-74 (2003) ("prudent inquiry" for *bona fide* purchasers is not limited to the facts disclosed within recorded instruments).

Maintaining clear property rights may also be important when a church is sued for a tort or breach of contract. In such a suit, the scope of recovery may turn on whether the local congregation or the national denomination owns the property. If property rights turned on internal church canons, courts (and in some cases even juries) would be unable to ascertain the extent of liability without interpreting those canons. Moreover, when it suited the denomination's interests, the denomination might be tempted to revise its canons to revoke previously created trust interests, thus attempting to avoid tort liability or evade creditors. States thus have every reason to encourage churches to record existing ownership interests in publicly available (and secularly understandable) documents.

Finally, Virginia's parol evidence rule from the property-law context provides a useful analogy. As this Court has explained, in a dispute over a deed, extrinsic evidence is inadmissible when the deed is "unambiguous on its face." *Utsch* v. *Utsch*, 266 Va. 124, 129, 581 S.E.2d 507, 509 (Va. 2003). This rule is essential for eliminating uncertainty in property rights:

> If [there were no parol evidence rule], no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of

> the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself.

Id. at 130, 581 S.E.2d at 509-10 (quoting 11 Richard A. Lord, *Williston on Contracts* § 33.1, at 556 (4th ed. 1999)) (citation omitted). Allowing church canons to trump the language of the deed and the application of state trust law is like allowing parol evidence "to contradict or vary the plain language of the instrument itself." *Id.* It severely undermines state and private interests in having clear property rights.

* * * * *

In sum, ECUSA's rule of compulsory canon enforcement produces a number of problems, rendering it inferior to the neutral principles approach embodied in the Virginia Code. This is not to say that ECUSA's approach is constitutionally forbidden. This Court need not address that. Under *Jones*, ECUSA's approach, too, might be constitutionally permissible (if carefully applied). But as the problems inherent in that approach show, the Circuit Court's application of Va. Code Ann. § 57-9 is not only equally permissible, but also constitutionally preferable.

III. Virginia Code § 57-9 is neutral under *Larson* v. *Valente*.

Citing *Larson* v. *Valente*, 456 U.S. 228 (1982), ECUSA also claims that § 57-9 is unconstitutional because it treats "hierarchical churches that hold

property by trustees" worse than other types of churches. Diocese Br. 38-40; ECUSA Br. 45-46. This argument is wholly without logical foundation.

First ECUSA ignores the key fact that, under Virginia law, all churches, whatever their typology, have a variety of ways they can hold property. It is not discrimination to enforce whatever property regime they have selected. In *Larson*, by contrast, there was no way for churches affected by the fifty percent rule to avoid it. As the Supreme Court explained, churches affected by the rule were either "new and lacking in a constituency," and thus unable to raise a majority of funds from members, or they had religious reasons to "favor public solicitation over general reliance on financial support from members." 456 U.S. at 246 n.23. Here, Virginia law provides ready alternatives for any church that wants to avoid § 57-9, including holding title in an ecclesiastical officer (§ 57-16) or in corporate form (§ 57-16.1). Thus, far from forcing churches into a category that imposes a disadvantage on them (like the fifty percent rule in *Larson*), the Virginia Code gives religious organizations a range of options and allows them to choose how they will be treated.

An appropriate analogy would be if the law challenged in *Larson* granted an exemption to any church that filed a form requesting one (much like churches must file forms to obtain a tax exemption under Va. Code § 58.1-

609.11). Surely a church that neglected to file a form could not claim the law was unconstitutional simply because it "discriminated" against churches that neglected to file forms and in favor of churches that did. So, too, ECUSA cannot claim discrimination merely because it declined to "file a form" by taking advantage of the alternatives under Virginia law.

Second, ECUSA's neutrality argument implicitly assumes that *its* proposed approach to resolving property disputes would be more neutral than Virginia's existing system. Not so. Under ECUSA's approach, the law governing church property disputes would vary depending on whether a church was "congregational" or "hierarchical." For example, if a loose association of "congregational" churches adopted a canon unilaterally asserting a trust interest in local property, the association's canon would be unenforceable because, under ECUSA's approach, "congregational" churches are subject to all of the typical state laws governing voluntary associations (including the state law of trusts). But if a "hierarchical" church adopted *the very same canon*, ECUSA's approach would compel civil courts to enforce it, regardless of the state law of trusts. And, unlike § 57-9, a church could not avoid ECUSA's rule unless it fundamentally changed its polity from a "congregational" to "hierarchical" form (or vice versa).

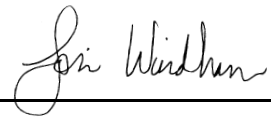
In short, far from "discriminating" or "creating traps for churches," Diocese Br. 31, the Virginia Code *accommodates* churches by providing a variety of options for holding property. The First Amendment does not prohibit such accommodation; it encourages it.[17]

CONCLUSION

For the foregoing reasons, this Court should conclude that the Virginia Code, including the Circuit Court's application of § 57-9, is constitutional.

[17] ECUSA's arguments under *Employment Division* v. *Smith*, 494 U.S. 872 (1990), and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), are unavailing for essentially the same reasons. Diocese Br. 40-43 (*Smith*); 43-46 (*Lemon*). Because § 57-9 satisfies the constitutional standard set forth in *Jones*, this Court need not evaluate it under *Smith* or *Lemon*, which do not apply to church property disputes. In any event, many states have specific laws regarding property ownership by churches, and a state's effort to accommodate a variety of denominational forms does not run afoul of *Smith*. Moreover, the purpose and effect of the Virginia Code is to enable believers to form a wide variety of church polities, and it does so without involving courts in any doctrinal or ecclesiastical questions, thus satisfying *Lemon*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to Va. Sup. Ct. Rules 5:5(b) and 5:26(d), I hereby certify that on this 1st day of February, 2010 fifteen printed copies of the foregoing brief were mailed postage prepaid to the Clerk of the Court by U.S. Postal Service certified mail. Exact electronic copies in PDF and Word formats were also tendered to the Court at the following email address: scvbriefs@courts.state.va.us.

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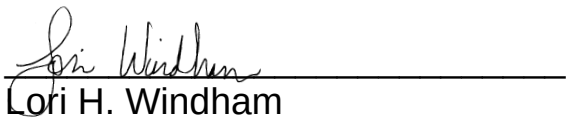

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