VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

In re:	)	Civil Case Nos.
	)	CL-2007-0248724,
MULTI-CIRCUIT	)	CL-2006-15792,
EPISCOPAL	)	CL-2006-15793,
CHURCH PROPERTY	)	Cl-2007-556,
LITIGATION	)	CL-2007-1235,
	)	CL-2007-1236,
	)	CL-2007-1237,
	)	CL-2007-1238,
	)	CL-2007-1625,
	)	CL-2007-5249,
	)	CL-2007-5250,
	)	CL-2007-5362,
	)	CL-2007-5363,
	)	CL-2007-5364,
	)	CL-2007-5682,
	)	CL-2007-5683,
	)	CL-2007-5684,
	)	CL-2007-5685,
	)	CL-2007-5686,
	)	CL-2007-5902,
	)	CL-2007-5903,
	)	CL-2007-11514

BRIEF OF THE COMMONWEALTH

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BRIEF OF THE COMMONWEALTH

The Commonwealth of Virginia, upon relation of Robert F. McDonnell in his official capacity as Attorney General of the Commonwealth, submits this brief in support of the constitutionality of *Virginia Code* § 57-9 ("§ 57-9").[1]

INTRODUCTION

Although "the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes,"[2] *Presbyterian Church v. Hull Church*, 393 U.S. 440,

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[1] That statute provides:

> A. 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.
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> B. If a division has heretofore occurred or shall hereafter occur in a congregation whose property is held by trustees which, in its organization and government, is a church or society entirely independent of any other church or general society, a majority of the members of such congregation, entitled to vote by its constitution as existing at the time of the division, or where it has no written constitution, entitled to vote by its ordinary practice or custom, may decide the right, title, and control of all property held in trust for such congregation. Their decision shall be reported to such court, and if approved by it, shall be so entered as aforesaid, and shall be final as to such right of property so held.

Virginia Code § 57-9.

449 (1969), "a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Maryland & Va. Churches v. Sharpsburg Church,* 396 U.S. 367, 368 (1970) (Brennan, J., joined by Douglas & Marshall, JJ., concurring) (emphasis in original).

The Episcopal Church and the Diocese of Virginia (collectively "Episcopal Church") implicitly deny the ability of the States to choose a particular approach for resolving church property disputes. The Episcopal Church insists that local church property disputes involving hierarchical denominations must be resolved by deferring to national and regional church leaders. *See Episcopal Church Br*. at 5-39. In effect, the Episcopal Church contends this Court must utilize the Polity Approach articulated in *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872). More importantly, the Episcopal Church contends that if § 57-9 requires an approach other than deference to national and regional church leaders, then § 57-9 is unconstitutional as applied to hierarchical denominations.[3] *Episcopal Church Br*. at 40-53. Because the "doctrine of constitutional doubt" requires this Court "to interpret statutes, if possible, in such fashion as to avoid grave constitutional questions," *Federal Election Comm'n v. Akins,* 524 U.S. 11, 32 (1998), the Episcopal Church insists that this Court must adopt its interpretation of § 57-9. Put another way, the Episcopal Church believes that, when there is a property dispute involving a

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[2] Most importantly, the First Amendment prohibits civil courts from resolving church property disputes because of religious doctrine and practice. *Serbian Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 710 (1976). As a corollary to this commandment, the First Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization. *Id*. at 724-25.

[3] Implicit in the Episcopal Church's argument is the view that § 57-9 requires one methodology to resolve church property disputes involving hierarchical denominations and a different methodology to resolve church property disputes involving congregational or Presbyterian denominations.

hierarchical denomination, the National and Virginia Constitutions *require* deference to regional and national church leaders.[4]

The United States and Virginia Constitutions do not require that local church property disputes involving hierarchical denominations be resolved by deferring to national and regional church leaders. In addition to the Polity Approach of *Watson,* courts may use a Neutral Principles Approach. *Jones v. Wolf*, 443 U.S. 595, 603-10 (1979). Indeed, the Supreme Court of Virginia, in a pre-*Jones* case that did not involve § 57-9, rejected the Polity Approach and embraced the Neutral Principles approach. *See Norfolk Presbytery v. Bollinger*, 214 Va. 500, 505, 201 S.E.2d 752, 756-57 (1974). The interpretation of § 57-9 advocated by the congregations affiliated with the Convocation of Anglicans in North America (collectively "CANA") reflects Neutral Principles Approach explicitly approved in *Jones*.[5] Moreover, the CANA interpretation of § 57-9 is consistent with both the Establishment Clause[6] and the Free Exercise Clause. [7]

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[4] The Supreme Court of Virginia has held that the Virginia Constitution is co-extensive with the National Constitution's Religious Clauses. *See Virginia College Bldg. Auth. v. Lynn*, 260 Va. 608, 626, 538 S.E.2d 682, 691 (2000) (Virginia courts have "always been informed by the United States Supreme Court Establishment Clause jurisprudence in [construing] Article I, § 16."). A statute that is consistent with the United States Constitution is consistent with the Virginia Constitution. *See, e.g. Reid v. Gholson*, 229 Va. 179, 187-88 327 S.E.2d 107, 112 (1985); *Jae-Woo Cha v. Korean Presbyterian Church*, 262 Va. 604, 612, 553 S.E.2d 511, 515 (2001); *Mandell v. Haddon*, 202 Va. 979, 989, 121 S.E.2d 516, 524 (1961); *Habel v. Indus. Dev. Auth.*, 241 Va. 96, 100, 400 S.E.2d 516, 518 (1991).

[5] Although the Commonwealth believes that CANA's interpretation of § 57-9 is both textually and historically accurate, it does not address either the meaning of § 57-9 or its application to the facts in this case. Rather, the Commonwealth addresses only the issue of whether the CANA's interpretation of § 57-9 is consistent with the Virginia and United States Constitutions. Because CANA's interpretation of § 57-9 is constitutional, the doctrine of constitutional doubt is inapplicable. If this Court chooses to accept CANA's interpretation, there is no constitutional problem.

[6] U.S. CONST. amend. I (Establishment Clause).

[7] U.S. CONST. amend. I (Free Exercise Clause).

SUMMARY OF ARGUMENT

The Commonwealth's argument is simple. If this Court believes that CANA's interpretation of § 57-9 is correct, there is no constitutional impediment to adopting and applying that interpretation. CANA's interpretation of § 57-9 is constitutionally sound for three reasons.

First, the Constitution does not require Virginia courts to resolve church property disputes involving hierarchical denominations by deferring to regional and national church leaders. Indeed, when resolving church property disputes involving hierarchical denominations, the Constitution permits both the Polity Approach urged by the Episcopal Church and the Neutral Principles Approach embodied in CANA's interpretation of § 57-9. Moreover, the Supreme Court of Virginia, in a case that did not involve § 57-9, has rejected the Polity Approach and embraced the Neutral Principles Approach.

Second, CANA's interpretation of § 57-9 is consistent with the Establishment Clause. This Court is not obligated to apply the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Because CANA's interpretation does not result in unconstitutional favoritism for certain denominations, it complies with the Establishment Clause. If this Court does apply the *Lemon* test, then the CANA interpretation is valid. Section 57-9 has a secular purpose, does not advance or inhibit religion, and does not result in excessive entanglement.

Third, CANA's interpretation of § 57-9 is consistent with the Free Exercise Clause. Section 57-9 is a neutral law of general applicability. The free exercise of religion does not exempt the Episcopal Church from compliance with a neutral law of general applicability.

LEGAL STANDARD TO BE APPLIED

Because the determination of the constitutionality of a legislative act is "the gravest and most delicate duty that [the judiciary] is called upon to perform," *Rostker v. Goldberg,* 453 U.S. 57, 64 (1981), certain principles must be applied.

First, "[e]very law enacted by the General Assembly carries a strong presumption of validity. Unless a statute clearly violates a provision of the United States or Virginia Constitutions, we will not invalidate it." *City Council v. Newsome,* 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984).[8] "Judicial review of legislative acts must be approached with particular circumspection because of the principle of separation of powers, embedded in the Constitution." *Ames v. Town of Painter,* 239 Va. 343, 349, 389 S.E.2d 702, 705 (1990). Moreover, the construction of a constitutional provision by the General Assembly "is entitled to consideration, and if the construction be contemporaneous with adoption of the constitutional provision, it is entitled to great weight." *Dean v. Paolicelli,* 194 Va. 219, 227, 72 S.E.2d 506, 511 (1952).[9] "The wisdom and propriety of the statute come within the province of the legislature." *City of Newport News v. Elizabeth City County,* 189 Va. 825, 831, 55 S.E.2d 56, 60 (1949). "Undoubtedly, there are two sides to the question as to the wisdom or expediency of the legislative Act." *Id.* at 836, 55 S.E.2d at 62. "In a determination of the constitutional validity of a general statute, political, economic and geographical situations have no place. Such situations

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[8] *See also In re Phillips,* 265 Va. 81, 85-86, 574 S.E.2d 270, 272 (2003); *Bosang v. Iron Belt Bldg. & Loan Ass'n,* 96 Va. 119, 123, 30 S.E. 440, 441 (1898). *Cf. Vance v. Bradley,* 440 U.S. 93, 97 (1979) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process . . . and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.") (footnote omitted).

[9] *See also City of Roanoke v. James W. Michael's Bakery Corp.,* 180 Va. 132, 142-43, 21 S.E.2d 788, 792-93 (1942) (noting that contemporaneous construction of constitutional provision by General Assembly is entitled to great weight).

bring up questions of public welfare and conveniences which invoke the wisdom and policy of the legislature in their determination, within reasonable limits." *Id.* at 839, 55 S.E.2d at 64. Rather, "courts are concerned only as to whether the determination of the legislature has been reached according to, and within, constitutional requirements." *Id.*, 55 S.E.2d at 64.

Second, under the doctrine of constitutional avoidance, "constitutional questions should not be decided if the record permits final disposition of a cause on non-constitutional grounds. One of the most firmly established doctrines in the field of constitutional law is that a court will pass upon the constitutionality of a statute only when it is necessary to the determination of the merits of the case." *Keller v. Denny*, 232 Va. 512, 516, 352 S.E.2d 327, 329 (1987) (internal quotation omitted).[10] "[T]he Constitution is to be given a liberal construction so as to sustain the enactment in question, if practicable." *Johnson v. Commonwealth*, 40 Va. App. 605, 612, 580 S.E.2d 486, 490 (2003) (citation omitted).[11]

Third, under the doctrine of constitutional doubt, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,'" this Court is "obligated to construe the statute to avoid such problems." *I.N.S. v. St. Cyr*, 533 U.S. 289, 300 (2001). However, this doctrine is invoked only where a statutory interpretation raises grave or serious constitutional questions.

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[10] *See also Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

[11] *See also Virginia Soc'y of Human Life, Inc. v. Caldwell*, 256 Va. 151, 156-57, 500 S.E.2d 814, 816 (1998); *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 52-53, 392 S.E.2d 817, 820 (1990); *Eaton v. Davis*, 176 Va. 330, 339, 10 S.E.2d 893, 897 (1940).

ARGUMENT

I. THE CONSTITUTION DOES NOT REQUIRE VIRGINIA COURTS TO RESOLVE CHURCH PROPERTY DISPUTES BY DEFERING TO NATIONAL AND REGIONAL CHURCH LEADERS.

A. The Constitution Permits Multiple Methods of Resolving Church Property Disputes.

"[T]the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes." *Jones*, 443 U.S. at 602. In *Jones*, which is the United States Supreme Court's most recent pronouncement on the subject of civil courts resolving church property disputes, the Court identified *two* possible approaches to resolving property disputes without violating the First Amendment. *See In re Church of St. James the Less*, 888 A.2d 795, 804-05 (Pa. 2005) (describing the two approaches set out in *Jones*).

First, under the Neutral Principles Approach, a civil court may settle "a local church property dispute on the basis of the language of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property." *Jones*, 443 U.S. at 603.[12] This approach minimizes the State's involvement in church property disputes.[13] As the Court explained:

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[12] *See also Presbyterian Church*, 393 U.S. at 440; *Maryland & Va. Churches*, 396 U.S. at 370. (Brennan, J., joined by Douglas & Marshall, JJ., concurring).

> The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general-flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.

Id. at 603-04. In the years since *Jones*, many States explicitly have adopted neutral principles as the method of resolving church property disputes. *See Presbytery of Beaver-Butler of United Presbyterian Church in U.S. v. Middlesex Presbyterian Church* , 489 A.2d 1317, 1321-22 (Pa. 1985) (listing cases).

Second, under the Polity Approach articulated in *Watson*, a State's "civil courts must defer to the authoritative resolution of the dispute within the church itself." *Jones*, 443 U.S. at 605. Thus, "civil courts review ecclesiastical doctrine and polity to determine where the church has placed ultimate authority over the use of the church property." *Id.* "After answering this question, the courts would be required to 'determine whether the dispute has been resolved

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[13] In a variation of the Neutral Principles Approach, a State may adopt "a presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means . . ." *Jones*, 443 U.S. at 607. In other words, a State could adopt a rule that the local congregation's wishes will be respected unless it can be shown that: (1) "the corporate charter or the constitution of the general church" mandates that "the identity of the local church is to be established in some other way," *id.* at 607-08; or (2) "the church property is held in trust for the general church and those who remain loyal to it." *Id*. at 608. Of course, the Neutral Principles Approach does not *require* that the Court defer to the church polity. Such a requirement would transform the Neutral Principles Approach into the Polity Approach.

within that structure of government and, if so, what decision has been made.'" *Id.* However, this approach is often constitutionally problematic. As the Supreme Court explained:

> 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." In such cases, the suggested rule would appear to require "a searching and therefore impermissible inquiry into church polity." 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.

Id. at 605 (citations omitted). Nevertheless, while expressing disapproval of the Polity Approach, the Supreme Court did not repudiate this approach and some States continue to use it. *See Presbytery of Beaver-Butler,* 489 A.2d at 1322 n.4 (listing cases).

B. The Supreme Court of Virginia Has Rejected the Polity Approach And Embraced Neutral Principles.

Although either the Polity Approach or the Neutral Principles Approach is constitutionally permissible, the Supreme Court of Virginia effectively has rejected the Polity Approach. *Norfolk Presbytery*, 214 Va. at 505, 201 S.E.2d at 756-57. *Norfolk Presbytery* involved a dispute over property between a Presbyterian regional governing body ("Presbytery") and a local Presbyterian congregation that wished to leave the denomination. *Id.* at 501, 201 S.E.2d at 754. The Presbytery insisted that the Presbyterian Church in the United States[14] was hierarchical and that a local congregation's property was held in an implied trust for the

[14] In 1983, the Presbyterian Church in the United States and the United Presbyterian Church merged to form the Presbyterian Church (U.S.A). This denomination is separate and distinct from the Presbyterian Church in America and the Evangelical Presbyterian Church.

benefit of the hierarchical church.[15] *Id.* at 504, 201 S.E.2d at 755-56. More significantly, the regional body contended that the Constitution "prohibited interference in the ecclesiastical law of the general church." *Id*. at 503, 201 S.E.2d at 755. In other words, the regional body was advocating the Polity Approach and the resulting implied trust doctrine.

While the Court ultimately concluded that the regional body "made sufficient allegations … to have a determination made whether it had a proprietary interest in the property," *Id*. at 507, 201 S.E.2d at 758, it rejected emphatically the regional body's arguments regarding deference to the policy and the resulting implied trust doctrine. Dismissing the idea that courts may consider only the deeds in resolving property disputes, the Court found that "it is proper to resolve a dispute over church property by considering the statutes of Virginia, the express language in the deeds and the provisions of the constitution of the general church." *Id.* at 505, 201 S.E.2d at 756-57. Moreover, "Virginia has never adopted the implied trust doctrine to resolve church property disputes." *Id.* at 505, 201 S.E.2d at 757. In sum, the Court rejected the Polity Approach urged by the Presbytery and, instead, adopted the Neutral Principles Approach. *See Bowie v. Murphy*, 271 Va. 127, 135, 624 S.E.2d 74, 79-80 (2006).

C. Section 57-9 Embodies the Neutral Principles Approach.

To be sure, *Norfolk Presbytery* did not consider the impact of § 57-9. However, § 57-9 embodies the Neutral Principles approach embraced by the Supreme Court of Virginia in *Norfolk*

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[15] Although the Supreme Court of Virginia did not question the Presbytery's assertion that the Presbyterian Church in the United States was hierarchical, such an assertion may well be incorrect. The Presbyterian form of church government is fundamentally different from the Congregational form of church government and the Episcopal form of church government. In the Presbyterian form of government, the local congregation, presbytery, synod, and general assembly each has its own sphere of responsibility and the ability to act as a check upon the other governing bodies.

Presbytery and approved by the Supreme Court of the United States in *Jones.* By its very terms, § 57-9 relies on neutral, secular principles to resolve church property disputes. The Virginia courts do not inquire into religious doctrine or which faction of the denomination represents the "true church." Such inquiries would be unconstitutional. *Serbian Orthodox Diocese,* 426 U.S. at 710. Rather, the judicial role is limited to ensuring the congregational vote was conducted properly—a simple inquiry that does not involve religion at all.

There will be some instances—such as this case—where national and regional leaders insist that there is no "division" within the denomination and/or that there are no resulting branches. In those instances, the court has to determine if a division has taken place, but such an inquiry is straightforward according to the evidence. There is no need to for the judiciary to inquire into matters of religious doctrine. The inquiry is entirely secular.

II. THE CANA INTERPRETATION OF § 57-9 IS CONSISTENT WITH THE ESTABLISHMENT CLAUSE.

While the Establishment Clause applies to the States,[16] *Everson v. Board of Educ*., 330 U.S. 1, 17-18 (1947), the States still retain substantial sovereign authority to make religious policy.[17] *Locke v. Davey,* 540 U.S. 712, 718-19 (2004). Indeed, the judiciary is reluctant "to

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[16] Prior to the adoption of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 1, the Establishment Clause and the Free Exercise Clause, like other provisions of the Bill of Rights, limited only the National Government. *See Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833). Thus, the States were free to do whatever they wished with respect to religion, subject only to the commands of their own State Constitutions.

[17] For example, although the Establishment Clause does not prohibit the indirect funding of religion, *see Zelman v. Simmons-Harris,* 536 U.S. 639, 652 (2002) (school choice vouchers may be used at private schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13-14 (1993) (disabled student at private religious school could receive special education services); *Witters v. Washington Dep't of Servs. for the Blind,* 474 U.S. 481, 487 (1986) (State could provide funds for the education of blind student studying for the ministry), the Free Exercise Clause does not

attribute unconstitutional motives to the States particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute." *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983).[18] Even if some policy makers were motivated by a desire to promote religion, "that alone would not invalidate [the statute] because what is relevant is the legislative *purpose* of the [statute] not the possibly religious motives of the [policy makers] who enacted the [statute]." *Board of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) (O'Connor, J., joined by Rehnquist, C.J., White & Blackmun, JJ., announcing the judgment of the Court) (emphasis original).

A. This Court Is Not Obligated to Apply the *Lemon* Test.

The United States Constitution "does not say that in every and all aspects there shall be a separation of Church and State." *Zorach v. Clauson*, 343 U.S. 306, 312 (1952), but simply mandates "a freedom from laws instituting, supporting, or otherwise establishing religion." Phillip Hamburger, SEPARATION OF CHURCH AND STATE 2 (2003). When interpreting the Establishment Clause, "[t]here is 'no single mechanical formula that can accurately draw the constitutional line in every case.'" *Myers v. Loudoun Co. Pub. Schs.*, 418 F.3d 395, 402 (4th Cir. 2005).[19] Although the three-part *Lemon* test "occasionally has governed the analysis of Establishment Clause cases over the past twenty-five years," *ACLU Nebraska Found. v. City of Plattsmouth*, 419 F.3d 772, 776 (8th Cir. 2005) (*en banc*), the factors identified in *Lemon* serve as

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require that the States indirectly fund religious education or activity. *See Locke*, 540 U.S. at 720-25.

[18] *See also Edwards v. Aguillard*, 482 U.S. 578, 586 (1987) (Court "is normally deferential to a [legislative articulation] of a secular purpose.").

[19] *See also Van Orden*, 125 S. Ct. at 2868 (Breyer, J., concurring).

'no more than helpful signposts'" in Establishment Clause analysis. *Van Orden*, 125 S. Ct. at 2861 (Rehnquist, C.J., joined by Scalia, Kennedy & Thomas, JJ., announcing the judgment of the Court); *Hunt v. McNair*, 413 U.S. 734, 741 (1973). Indeed, the *Lemon* test frequently is ignored by the Supreme Court.[20] The Fourth Circuit, in upholding the constitutionality of Virginia's statute requiring the daily recitation of the Pledge of Allegiance, *Virginia Code* § 22.1-202, refused to apply the *Lemon* test. *See Myers*, 418 F.3d at 402-05 (Williams, J., announcing the judgment of the Court) (relying on history); *id.* at 409 (Duncan, J., concurring) (relying on *dicta* and authority suggesting that the Pledge is not religious); *id*. at 409-10 (Motz, J., concurring) (relying on *dicta*).[21]

B. The CANA Interpretation of § 57-9 Does Not Result In Unconstitutional Favoritism for Particular Denominations.

The Establishment Clause must be viewed "in the light of its history and the evils it was designed forever to suppress" *Everson*, 330 U.S. at 14-15, and must not be interpreted "with a literalness that would undermine the ultimate constitutional objective as illuminated by history." *Walz v. Tax Comm'n of New York,* 397 U.S. 664, 671 (1970). That constitutional objective is clear:

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[20] *See, e.g., Van Orden*, 125 S. Ct. at 2861 (Rehnquist, C.J., joined by Scalia, Kennedy & Thomas, JJ., announcing the judgment of the Court); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); *Lee v. Weisman*, 505 U.S. 577 (1992); *Marsh v. Chambers*, 463 U.S. 783 (1983).

[21] *See also ACLU Nebraska Found.*, 419 F.3d at 778 n.8 (declining to apply the *Lemon* test). *But see ACLU v. Mercer County*, 432 F.3d, 624, 635 (6th Cir. 2005), *rehearing denied*, 446 F.3d 641 (6th Cir. 2006) (questioning the applicability of the *Lemon* test, but ultimately concluding that the *Lemon* test must be applied).

> Neither a state nor the Federal Government can set up a church. Neither can pass laws, which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance.

Everson, 330 U.S. at 15-16.[22] "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite." *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968).

However, the Establishment Clause's mandate of neutrality is not absolute. Because the State is not required "to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice," *Board of Educ. v. Grumet*, 512 U.S. 687, 705 (1994), the State may extend benefits to religion that are not extended to non-religion. *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). Similarly, while the State may not designate "a particular religious sect for special treatment," *Grumet*, 512 U.S. at 706-07, there is no

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[22] The Establishment Clause "does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises … as to have meaningful and practical impact." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., joined by Harlan, J. concurring). It permits "not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion." *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., joined by Rehnquist, C.J., White & Scalia, JJ., concurring). Indeed, "there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a non-proselytizing manner, venerating the Ten Commandments." *Van Orden v. Perry*, 125 S. Ct. 2854, 2864 (2005) (Scalia, J., concurring).

"We are a religious people whose institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313. "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Schempp*, 374 U.S. at 213. Consequently, the Supreme Court has explicitly "approved certain government activity that directly or indirectly recognizes the role of religion in our national life." *ACLU Nebraska Found.*, 419 F.3d at 777.

requirement that a State's policies have the *same impact* on all religious sects. *Varner v. Stovall*, 500 F.3d 491, 499 (6th Cir. 2007). Thus, a neutral definition of conscientious objector that has the effect of favoring Quakers and Mennonites is constitutional. *Gillette v. United States,* 401 U.S. 437, 454 (1971). Similarly, the Establishment Clause does not prohibit a neutral definition of the clergy communications privilege even though that definition has a disparate impact on some denominations. *Varner*, 500 F.3d at 499. [23]

CANA's interpretation of § 57-9 does not contradict these principles. Section 57-9 does not single out a particular denomination for special treatment. While Neutral Principles may have a disparate impact on hierarchical denominations, that disparate impact is not unconstitutional. Indeed, the Supreme Court explicitly has recognized that States may adopt a Presumption of Majority as a means of resolving *all* church property disputes for *all* religious sects. *Jones*, 445 U.S. at 607.

Contrary to the assertions of the Episcopal Church, *Larson v. Valente*, 456 U.S. 228 (1982), does not command a different result. *Larson* did not involve a neutral statute that had a disparate impact on some denominations. *Id.* at 247 n.23. Rather, it involved a statute that "makes explicit and deliberate distinctions between different religious organizations." *Id*. Specifically, the statute's text differentiated between religious sects based upon how much money they raised from their members. *Id.* at 230. In sharp contrast to the statute at issue in *Larson*, the text of § 57-9 does not make explicit and deliberate distinctions between religious sects. The text does not state that congregational and Presbyterian churches are treated differently from hierarchical churches. It does not require that some denominations are treated

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[23] Indeed, in some instances, the State may overtly favor some denominations. *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d. 276, 285-86 (2005) (local legislative body could limit persons who gave prayers to those who were Jews and Christians).

differently from other denominations. It applies equally to all religious sects. When there is no facial discrimination between religious denominations, *Larson* is inapplicable. *Hernandez v. C.I.R.*, 490 U.S. 680, 695(1989)

Moreover, in the years since *Larson*, the Court has repeatedly upheld facially neutral statutes that have a disparate impact on certain religious sects. In the Free Exercise context, the Court has upheld a statute of general applicability that criminalizes the religious activities of some sects. *Employment Division v. Smith*, 494 U.S. 872, 879 (1990). In the Establishment context, the Court has upheld a facially neutral religious policy that, in its implementation, benefits a single denomination. *Marsh*, 463 U.S. at 793-95 (legislative prayers always offered by Presbyterian clergy).[24] It also has upheld neutral statutes and policies that benefit only those sects with the resources to start a school, *Zelman*, 536 U.S. at 652, or a student publication. *Rosenberger*, 515 U.S. at 842-45. In sum, *Larson* is limited to situations where the statute explicitly differentiates between religious sects. *Hernandez*, 490 U.S. at 695.

C. The CANA Interpretation of § 57-9 Complies with the *Lemon* Test.

If this Court concludes that it is necessary to apply the *Lemon* test, then the CANA interpretation of § 57-9 satisfies the test. Under the test, a statute is constitutional if (1) it has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive entanglement with religion. *ACLU Nebraska Found.*, 419 F.3d at 475.

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[24] *See also Simpson*, 404 F.3d. at 285-86.

1. There Is a Secular Purpose.

The requirement that the law serve a "secular legislative purpose" does not mean the law's purpose must be unrelated to religion.[25] *See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327, 335 (1987) (recognizing that the government may sometimes accommodate religious practices without violating the Establishment Clause). "[T]hat would amount to a requirement that the government show a callous indifference to religious groups, and the Establishment Clause has never been so interpreted." *Id.* Rather, the objective of the "secular legislative purpose" requirement is to "prevent the relevant governmental decision maker—in this case Congress—from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Id.* Although "[t]he eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *McCreary County v. ACLU,* 125 S. Ct. 2722, 2734 (2005), a policy "that is motivated in part by a religious purpose" may still satisfy the first part of the *Lemon* test. *Wallace v. Jaffree,* 472 U.S. 38, 56 (1985).[26] This is "a fairly low hurdle." *Brown v. Gilmore,* 258 F.3d 265, 276 (4th Cir. 2001). Indeed, the Supreme "Court has

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[25] The Sixth Circuit concluded that *McCreary County* altered the *Lemon* test so that the secular purpose had to be predominant. *Mercer County*, 432 F.3d at 630 n.5. *See also McCreary County*, 125 S. Ct. at 2757 (Scalia, J., dissenting) ("[T]he [*McCreary County* majority] replaces *Lemon's* requirement that the government have 'a secular … purpose' with the heightened requirement that the secular purpose 'predominate' over any purpose to advance religion.").

[26] *See also McCreary County*, 125 S. Ct. at 2736 (when assessing the purely objective purpose of a government's funding or involvement in religion, the courts have traditionally been deferential to state legislative decisions); *Lemon*, 403 U.S. at 613 (recognizing legitimate state concern to maintain minimum school standards and considering the effort by the respective legislatures to include precautionary provisions in program given their understanding that the programs involved could "intrude upon … the forbidden areas under the Religion Clauses").

invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). Thus, "the first prong of the *Lemon* test to be contravened 'only if [the action] is entirely motivated by a purpose to advance religion.'" *Lambeth v. Board of Comm'rs*, 407 F.3d 266, 270 (4th Cir. 2005).[27]

Applying these standards, § 57-9 has a secular purpose. "The 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.[28]

2. Section 57-9 Does Not Have the Primary Effect of Advancing Religion.

"For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337. Evaluation of the primary effect prong turns on (1) whether government defines recipients by reference to religion; and (2) whether the government's action results in indoctrination. *Agostini*, 521 U.S. 203, 234 (1997). Evidence of the impermissible government advancement of religion includes "sponsorship, financial support, and active involvement of the

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[27] *See also Wallace*, 472 U.S. at 56.

[28] *See also Hull*, 393 U.S. at 445. *Cf. Mueller*, 463 U.S. at 395 (State has "secular purpose of ensuring that the State's citizenry is well educated"); *Wolman v. Walter*, 433 U.S. 229, 240 (1977) ("There is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education."); *Everson*, 330 U.S. at 7 ("It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose.").

sovereign in religious activity." *Walz*, 397 U.S. at 668. [29]

Section 57-9 neither advances nor inhibits religion. It does not differentiate between religious sects. It does nothing to indoctrinate any one in a particular religious belief. Rather, the statute exists only to resolve church property disputes fairly and efficiently.

3. There Is No Excessive Entanglement.

The excessive entanglement inquiry often is coextensive with the primary effect inquiry. *See Zelman*, 536 U.S. at 668 (O'Connor, J., concurring). In other words, because § 57-9 does not have the primary effect of advancing or inhibiting religion, there is no excessive entanglement.

Moreover, any entanglement between the State and religious sects is minimal. At most, the judiciary has to judge the validity of a local congregation's vote as to which branch they wish to join. *Cf. Mueller*, 463 U.S. at 403 (no excessive entanglement from requirement that state officials examine textbooks to determine if they qualify for tax deduction so that deductions for sectarian books could be disallowed). Such a minimal judicial review does not constitute excessive entanglement. *Agostini*, 521 U.S. at 233 (administrative cooperation, by itself, is insufficient to create excessive entanglement). Indeed, the Supreme Court explicitly has recognized that States may use the Neutral Principles Approach, such as § 57-9, to resolve church property disputes. *Jones*, 443 U.S. at 603-05.

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[29] *See also Madison v. Riter*, 355 F.3d 310, 318 (4th Cir. 2003), *cert. denied sub nom. Bass v. Madison*, 125 S. Ct. 2536 (2005).

III. THE CANA INTERPRETATION DOES NOT VIOLATE THE FREE EXERCISE CLAUSE.

Although the Free Exercise Clause is applicable to the States, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith,* 494 U.S. at 879.[30] Thus, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[31] *Church of the Lukumi Babalu Aye, Inc v. City of Hialeah*, 508 U.S. 520, 531 (1993). "Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property." *Presbyterian Church*, 393 U.S. at 449. Section 57-9 is a neutral statute of general applicability, which does not violate the Free Exercise Clause.

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[30] *See also United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring).

[31] Prior to *Smith*, any governmental policy that substantially burdened the free exercise of religion was invalid unless the State could show a compelling governmental interest. *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963). Thus, the Amish could refuse to send their older children even though state law required attendance of children below the age of sixteen in school despite the clear language of Wisconsin's mandatory school attendance policy. *Wisconsin v. Yoder,* 406 U.S. 205, 214-15 (1972).

CONCLUSION

For the reasons stated above, regardless of how this Court interprets § 57-9, the statute is constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 10th day of January 2008, the original of the BRIEF OF THE COMMONWEALTH has been sent via overnight delivery to Office of the Clerk of the Circuit Court of Fairfax County County and that a copy has been mailed by first class, postage prepaid, U. S. Mail to counsel listed below:

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