Record No. 090682 & 090683

IN THE
SUPREME COURT OF VIRGINIA

THE PROTESTANT EPISCOPAL CHURCH
IN THE DIOCESE OF VIRGINIA

AND

THE EPISCOPAL CHURCH

Appellants,

v.

TRURO CHURCH ET AL.,

Appellees.

On Appeal from the Circuit Court for Fairfax County

BRIEF OF THE COMMONWEALTH EX REL. CUCCINELLI

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BRIEF OF THE COMMONWEALTH OF VIRGINIA Ex rel. CUCCINELLI

The Commonwealth of Virginia ex rel. Kenneth T. Cuccinelli in his official capacity as Attorney General submits its Brief.

INTRODUCTION

The Commonwealth intervened in this case for one purpose—to defend the state and federal constitutionality of *Virginia Code* § 57-9(A) as applied to this litigation.[1] That statute provides:

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

[1] Whenever a party is challenging the constitutionality of a statute or regulation and the Commonwealth, an official of the Commonwealth, or a state agency is not a party to the litigation, it is appropriate for the Virginia courts to allow the Commonwealth to intervene for the limited purpose of defending the constitutionality of the statute or regulation at issue. Indeed, in federal court, such intervention is a matter of right. *See* 28 U.S.C. § 2403(b).

Virginia Code § 57-9(A). The statute by its very terms is limited to situations where a congregation's property is held in trust. If a congregation's property is held by a corporation, *Virginia Code* § 57-16.1, the local bishop, or the some other ecclesiastical officer, *Virginia Code* § 57-16, the statute does not apply. Thus, at least since 1942, with the adoption of *Virginia Code* § 57-16, denominations have had perfect liberty to avoid the application of the statute simply by changing the method of holding church property.

This ability to avoid the application of § 57-9(A) effectively resolves all of the constitutional claims of the Episcopal Church and the Protestant Episcopal Church in the Diocese of Virginia ("Diocese"). First, the Commonwealth is not establishing a religion or even mandating that all church property disputes be decided in a particular way. Instead, § 57-9(A) provides that if a church voluntarily chooses to hold property by trustees, then property disputes will be resolved in a particular way. Second, the Commonwealth is not burdening the free exercise rights of the appellants. Nothing in the Episcopal Church's theology requires that church property be held by trustees and the Episcopal Church and Diocese frequently utilize other methods of holding property. *App*. 4151, 4151 n.37, 4167. Third, the Commonwealth is not taking private property without just

compensation. Rather, § 57-9(A) simply establishes a default rule for the resolution of church property disputes when the property is held by trustees. In this sense, it is indistinguishable from a statute distributing the property of an intestate decedent. Just as a person may write a will and avoid the intestate decedent statute, a church may change the method of holding property and avoid § 57-9(A).

QUESTIONS PRESENTED

The Commonwealth takes no position as to any issues unrelated to the constitutionality of § 57-9(A). Therefore, the Commonwealth's Brief addresses only the following questions:

1. Does the Virginia and/or National Constitution require courts to resolve church property disputes by deferring to church law?

2. As applied to this litigation, does § 57-9(A) violate the Free Exercise Clause of the First Amendment?

3. As applied to this litigation, does § 57-9(A) violate the Establishment Clause of the First Amendment?

4. As applied to this litigation, does § 57-9(A) result in a taking of private property by the Commonwealth without just compensation?

STATEMENT OF THE CASE

The Episcopal Church is a "province" in the world wide Anglican Communion—a religious body of Christians historically linked to the Church

of England. *See, e.g.*, *App*. 2347-50, 2513, 2529-30, 2659-61, 2916-20, 2923-26, 2929. The Diocese is a local organizational unit of the Episcopal Church, covering approximately the northern third of the Commonwealth. Brief of the Diocese at 9 n.3

The Truro Church, Church of the Apostles, Church of the Epiphany, Church at the Falls–The Falls Church, Church of Our Saviour, Church of the Word, St. Margaret's Church, St. Paul's Church, and St. Stephen's Church, (collectively "CANA Congregations") are local congregations in northern Virginia.

In 2006 and 2007, the CANA Congregations filed petitions under *Virginia Code* § 57-9(A). *App.* 1-548, 1445-87. Those petitions alleged that (1) a division had occurred in the Episcopal Church over certain theological issues and the Episcopal Church has split into two branches; (2) that the membership of each of the nine congregations had voted to join the branch that espoused the more traditional theological view; and (3) as a result of the division and the subsequent vote, title and control of the property occupied by the individual congregations should be vested in the individual congregations. The Episcopal Church and the Diocese also filed lawsuits, claiming control of the disputed property. *App*. 647-819. A three-judge panel appointed by this Court transferred and consolidated all cases in the

Circuit Court of Fairfax County. S*ee App*. 3895 (acknowledging the transfer and consolidation).

After the Episcopal Church and Diocese challenged the constitutionality of § 57-9(A), the Commonwealth, on July 18, 2008, was permitted to intervene to defend the statute. *App*. 4183 (order granting intervention).

The trial court ordered extensive briefing and heard argument on a variety of legal issues, rendering three major opinions during the course of the proceedings.

First, on April 3, 2008, the circuit court determined that § 57-9(A) applied to this litigation. *App*. 3853-3938.

Second, on June 27, 2008, the trial court held that § 57-9(A) is constitutional as applied to this litigation. *App*. 4120-4168. As this is the only opinion addressing the constitutionality of § 57-9(A), it is the only opinion addressed by the Commonwealth.

Third, following a trial on remaining issues in October of 2008, the circuit court issued an opinion resolving all remaining statutory and factual issues. *App*. 4878-99. The trial court entered a detailed final order on January 9, 2009. *App*. 4900-26.

The Petitions for Appeal followed. *App*. 4927-29 (Diocese); 4930-31 (Episcopal Church).

STATEMENT OF FACTS

The Commonwealth's role is limited to defending the constitutionality of § 57-9(A) as applied to this litigation, and only a few facts are relevant to those issues.

Like the other provinces in the Anglican Communion, the Episcopal Church uses an hierarchical, rather than a congregational or Presbyterian, form of church government. *See App.* 3911 n.51. Although the Episcopal Church regularly holds property in a variety of forms, *App*. 4151, 4151 n.37, 4167, the property of the CANA Congregations is held by trustees.

In response to actions of the Episcopal Church at its 2003 General Convention, the CANA Congregations left the Episcopal Church and joined the Convocation of Anglicans in North America ("CANA"), a mission of the Anglican province of Nigeria. *App*. 3866-95.

STANDARD OF REVIEW

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) (citation omitted), "[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, [the Supreme Court of Virginia] will not invalidate it." *City Council of City of Emporia v. Newsome*, 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984).

"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). "The party challenging the enactment has the burden of proving its unconstitutionality, and if a reasonable doubt exists as to the constitutionality, the doubt must be resolved in favor of its validity." *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 53, 392 S.E.2d 817, 820 (1990).

ARGUMENT

I. THE VIRGINIA AND NATIONAL CONSTITUTIONS DO NOT REQUIRE THAT COURTS RESOLVE CHURCH PROPERTY DISPUTES BY DEFERRING TO CHURCH LAW.

A. The Virginia Constitution's Religion Clause Is Coextensive With the First Amendment Religion Clauses.

The Commonwealth's constitutional heritage is a primary source of human liberty. George Mason's 1776 Declaration of Rights influenced and informed the Declaration of Independence, the Bill of Rights of every other American colony, France's Declaration of the Rights of Man, and, ultimately, the American Bill of Rights. Like the Magna Carta, our Declaration of Rights directly or indirectly inspired every democratic nation with a written constitution. The 1786 Statute of Religious Freedom, together with the writings of Madison and Jefferson, formed the foundations of American religious freedom. *Everson v. Bd. of Educ.*, 330 U.S. 1, 11-13 (1946). *See also id*. at 33-42 (Rutledge, J., dissenting).

Given this rich constitutional heritage, there may be times when it is appropriate for this Court to begin its constitutional analysis by looking at the Virginia Constitution, rather than the United States Constitution. Indeed, such a practice is the norm in some States. *See New Hampshire v. Zidel,* 940 A.2d 255, 257 (N.H. 2008). Moreover, just as courts strive to avoid constitutional questions, they should strive to avoid federal constitutional questions. By focusing initially on state constitutional issues, state courts may be able to avoid the federal constitutional issues.

Yet, whatever the appeal of focusing initially on the Virginia Constitution, such an approach is useful only if the Virginia Constitution

provides different protections than those provided by the National Constitution. With respect to religious freedom, there is no substantive difference. This Court has "always been informed by the United States Supreme Court Establishment Clause jurisprudence in [construing] Article I, § 16." *Virginia College Bldg. Auth. v. Lynn*, 260 Va. 608, 626, 538 S.E.2d 682, 691 (2000). "Virginia courts, in interpreting section 16, follow the federal approach closely." 1 A.E. Dick Howard, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 296 (1974). Thus, this Court has consistently held that a statute that is consistent with the First Amendment religion clauses is consistent with the religion clause of 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); *Habel v. Indus. Dev. Auth*., 241 Va. 96, 100, 400 S.E.2d 516, 518 (1991); *Mandell v. Haddon*, 202 Va. 979, 989, 121 S.E.2d 516, 524 (1961). Because the Virginia religion clause is coextensive with the First Amendment religion clauses, resolution of the state constitutional claims depends upon resolution of the federal constitutional claims. Furthermore, no argument that the Virginia Constitution gives greater protections to the larger church than does the Federal Constitution was made or preserved below.

B. The National Constitution Does Not Require That Church Property Disputes Be Resolved By Deferring to Church Law.

Although "the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes," *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church,* 393 U.S. 440, 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." *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.,* 396 U.S. 367, 368 (1970) (Brennan, J., joined by Douglas & Marshall, JJ., concurring) (emphasis in original). While a State can adopt the polity approach of *Watson v. Jones,* 80 U.S. (13 Wall.) 679 (1872), a State may instead choose to employ a "neutral principles of law" approach. *Jones v. Wolf*, 443 U.S. 595, 603-10 (1979). Indeed, this Court, in a pre-*Jones* case that did not involve § 57-9(A), rejected the polity approach and embraced the neutral principles of law approach. *See Norfolk Presbytery v. Bollinger*, 214 Va. 500, 505, 201 S.E.2d 752, 756-57 (1974). The interpretation of § 57-9(A) adopted by the circuit court reflects neutral principles of law approach explicitly approved in *Jones*. Moreover, the circuit court's interpretation of § 57-9(A) is consistent with both the First

Amendment Free Exercise Clause and the First Amendment Establishment Clause.

1. The National Constitution Permits Multiple Methods of Resolving Church Property Disputes.

In *Jones*, 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. In so doing, the *Jones* court found that "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. *See also In re Church of St. James the Less*, 888 A.2d 795, 804-05 (Pa. 2005) (describing the two approaches set out in *Jones*). Nonetheless, *Jones* did identify and describe the neutral principles approach as permissible and constitutional.

First, under the neutral principles of law approach, a civil court may settle a church property dispute independently of any inquiry into church doctrine based on objective principles of law. By way of example, the United States Supreme Court endorsed Georgia's neutral principles approach in *Jones* precisely because it minimizes the State's involvement

in ecclesiastical affairs while resolving church property disputes. As the Court explained:

> 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.

Jones, 443 U.S. 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 v. Middlesex Presbyterian Church*, 489 A.2d 1317, 1321-22 (Pa. 1985) (collecting cases).

Second, under the alternative polity approach first articulated in *Watson,* a State's civil courts may still "defer to the 'authoritative resolution of the dispute within the church itself.'" *Jones*, 443 U.S. at 605 (citation omitted). Under this approach, "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 within that structure of government and, if so, what decision has been made.'" *Id.* (citation omitted). However, this approach is often constitutionally problematic. As the Supreme Court explained:

> [C]ivil 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. (citations omitted) (alterations in original). While expressing doubts that the polity approach would always prove constitutionally satisfactory, the Supreme Court did not categorically reject it, and some States continue to use it. *See Presbytery of Beaver-Butler,* 489 A.2d at 1322 n.4 (collecting cases).

2. This Court Has Rejected The Polity Approach And Embraced The Neutral Principles Of Law Approach.

Although either the polity approach or the neutral principles of law approach is constitutionally permissible, this Court 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 753-54. The Presbytery insisted that the Presbyterian Church in the United States was hierarchical and that a local congregation's property was held in an implied trust for the benefit of the hierarchical church. *Id.* at 504, 201 S.E.2d at 755-56. More significantly, the Presbytery 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 this 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 emphatically rejected the regional body's arguments regarding deference to ecclesiastical polity and the validity of the resulting implied trust doctrine. *Id.* 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 of law approach. *See*, *Bowie v. Murphy*, 271 Va. 126, 135, 624 S.E.2d 74, 79-80 (2006) ("We have previously explained that 'where church property and civil rights disputes can be decided without reference to questions of faith and doctrine, there is no constitutional prohibition against their resolution by civil courts.'") (quoting *Jones* and *Reid v. Gholson*, 229 Va. at, 187, 327 S.E.2d 103, 111-12 (1985) (citing *Jones*, 443 U.S. at 595).

3. Section 57-9(A) Satisfies The Neutral Principles Of Law Approach.

To be sure, *Norfolk Presbytery* did not construe § 57-9(A). However, § 57-9(A) is consistent with the neutral principles of law approach embraced by this Court in *Norfolk Presbytery* and approved by the United States Supreme Court in *Jones.* By its very terms, § 57-9(A) relies on neutral, secular principles to resolve church property disputes. Under this

statute, the Virginia courts do not inquire into religious doctrine or determine which faction of the denomination represents the "true church." In fact, such inquiries would be unconstitutional. *Serbian E. Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 710 (1976). This limitation explains why church property disputes are treated differently from disputes in other voluntary groups.

The default principle of majority vote in § 57-9(A) is a neutral principle which provides a secular rule of decision to guide trustees when an hierarchical church has suffered a division. Majority vote does not become an inherently religious principle simply because some religious denominations, such as Baptists, employ this principle in aspects of their church doctrine. Our political and corporate elections, decided by majority vote, are not rendered religious exercises simply because some faiths embrace the idea of a majority vote.

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 does not require a court to examine the correctness of church doctrine. The judicial inquiries required under § 57-9(A) involve no

questions of theology or ecclesiology, only historical and structural questions. The reviewing court makes a factual inquiry that is structural in nature, implicating no question of religion *qua* religion.

While Georgia's version of "neutral principles" under review in *Jones* admitted the possibility of an implied trust and required Georgia courts to examine the constitution of a church as part of their review under neutral principles, the United States Supreme Court observed that this was simply the way the neutral principles method had evolved in Georgia. *Jones*, 443 U.S. at 604. Unlike *Jones*, under which the Georgia courts had been left to devise a judicially neutral principles jurisprudence to adjudicate church property disputes, Virginia benefits from a statute that provides a default rule. *Jones* does not suggest that neutral principles *compel* deference to church canons. Indeed, that is the very opposite of what the *Jones* decision contemplates. *"Jones* invests the States with broad discretion to resolve church property disputes. Its holding demonstrates a deference to–and respect for–an individual State's prerogative to specify its own particular method of resolving church property disputes." *App*. 4140 (letter opinion).

4. Section 57-9 (A) Displays no Animus Against Hierarchical Churches.

As demonstrated above, the terms "division" and "branch" in *Virginia Code* § 57-9(A) require no ecclesiastical or theological enquiry. Because of this, it does not matter what self-understanding the Episcopal Church or the Diocese have concerning these points. Instead, the meaning of these terms is informed by history. Dr. Charles Irons gave cogent testimony, credited by the trial court, that the patron of the original version of § 57-9(A) was responding to nonconsensual splits experienced by Methodists, and to a lessor degree by Presbyterians, and that the act was contemporaneously applied to such a division. App. at 3909-12. Not only does this establish that "division" is a non-theological concept, it demonstrates that "branch" simply means the competing bodies created by the division, another purely secular concept.

Notwithstanding the arguments of the Episcopal Church, the Diocese, and their amici, § 57-9(A) is actually solicitous of the polity of hierarchical churches. Under § 57-9(B), which applies to "a church or society entirely independent of any other church or general society," any congregational dispute can potentially trigger the statute. In contrast, under § 57-9(A), no controversy or dispute that does not result in actual division can trigger the

statute. This is perfectly consistent with the neutral principles approach, while the alternative of deciding which branch is that "true" church whose canons should govern is not proper for a civil court. The unnuanced rule championed by the Episcopal Church and the Diocese that the canons of the largest branch should automatically supply the rule of decision finds no support in *Jones*. On the contrary any such rule would collapse the neutral principles approach into a unitary polity rule.

II. SECTION 57-9(A) IS ENTIRELY CONSISTENT WITH THE FREE EXERCISE CLAUSE.

The Opening Brief of the Episcopal Church contends that § 57-9(A) violates the Free Exercise Clause. Br. of the Episcopal Church at 35-41. The authorities upon which this argument rest are clearly inapposite because they involve direct civil judicial review of who is in charge of a denomination, *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 119 (1952) (The statute "[b]y fiat ... displaces one church administrator by another"), or the question whether an hierarchal church has followed its own canons, *Milivojevich*, 426 U.S. at 721 ("[T]he reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs"), or involve statutes which altered the canonical relationship between an hierarchical

church and its congregations in a fashion which the church could not avoid through any action of its own. *Goodson v. Northside Bible Church*, 261 F. Supp. 99 (S.D. Ala. 1966), ***aff'd***, 387 F.2d 534 (5th Cir. 1967) (statutory right to disaffiliate by congregational vote); *First Methodist Church v. Scott*, 226 So. 2d 632 (Ala. 1969) (same); *Sustar v. Williams*, 263 So. 2d 537 (Miss. 1972) (same). Direct efforts to govern churches by civil statute that cannot be avoided by making arrangements under neutral principles of property law may violate the Free Exercise Clause, *See First Born Church of the Living God v. Hill*, 481 S.E.2d 222 (Ga. 1997), but § 57-9(A) carefully avoids any intrusion of that sort.

The Episcopal Church also accuses the trial court of misapplying *Jones* because the Episcopal Church denies that there was "an 'escape hatch'" in 2003-05 when the dispute arose. Br. of the Episcopal Church at 41-43. The theory is that prior to the 2005 amendments, § 57-9(A) applied to all local church property however held. This is demonstrably false. While the phrase "whose property is held by trustees" was added in 2005, the actual machinery of the statute previously required that the results of a vote "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" was located. *Virginia Code* § 57-9(A). And since 1942, well before the dispute

arose, hierarchical churches have been authorized to hold property in the name of a bishop or other church official. So, at least as of that date, the Diocese and Episcopal Church on their own authority could have conditioned the provision of episcopally ordained clergy – a defining characteristic of the Episcopal Church – on title to local property being placed in the bishop.

The Episcopal Church, however, insists that it is not actually good enough to have a practical escape hatch; instead, it argues that it must be given the power to escape the operation of the statute by its own legislation however it holds its property. Br. of the Episcopal Church at 43-44. Once again the Episcopal Church seeks to collapse the *Jones* neutral principles approach into a unitary polity rule. Furthermore, the vague and *ipse dixit* assertions of undue burden, Br. of the Episcopal Church at 44-45, do not rise to constitutional dimensions under *Jones*. *Jones*, 443 U.S. 606 (the burden of available alternatives including retitling characterized as "minimal").

The Free Exercise arguments of the Diocese generally duplicate those of the Episcopal Church, but two aspects of that discussion invite separate attention. First, the Diocese concedes that "[t]he Constitution allows civil courts to resolve church property disputes, 'provided that the

decision does not depend on inquiry into questions of faith or doctrine.'" Br. of the Diocese at 26 n.15. This concession should be dispositive because, as demonstrated above, § 57-9(A) invites no such inquiry.

The second point worthy of notice is that the Diocese argues even more explicitly than the Episcopal Church that it reads the statement in *Jones* respecting amending "the constitution of the general church ... to recite an express trust in favor of the denominational church," not as a mere example of what could be done under Georgia law, but as an essential, irreducible requirement of the Free Exercise Clause. Br. of the Diocese at 30-31. This position cannot be harmonized with the language in *Jones* that "the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes" leaving it free to "'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 litergy of worship or the tenents of faith.'" *Jones*, 443 U.S. at 602 (citation omitted). This means that if, as the Diocese says, the so-called Denis Canon, purporting to bind the property of local churches to the larger church, was adopted in reliance on this reading of *Jones,* Br. of the Diocese at 29, it was based upon a mistaken reading of that case as it relates to the law of Virginia. It also means that Virginia's default,

defeasible majoritarian rule is free of constitutional doubt so that there is no occasion for employing the doctrine of Constitutional avoidance.

III. SECTION 57-9(A) IS ENTIRELY CONSISTENT WITH THE ESTABLISHMENT CLAUSE.

The Episcopal Church devotes two pages to the argument that § 57-9(A) violates the Establishment Clause because § 57-9(A) is supposedly less favorable than § 57-9(B) to the chosen polity of a covered denomination. Br. of the Episcopal Church at 45-46. In fact, § 57-9 is a unitary statute and the subsections are an artifact of codification. *See*, 1972 Va. Acts ch. 825. The law applies the same rule in the event of a division across all polities although, if anything, the statute gives more practical protection to an hierarchical church than to a congregational one because it is more difficult for a division to occur in the larger polity.

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(A) does not make explicit and deliberate distinctions between religious sects. The text does not state hierarchical churches are subject to the law while non-hierarchical churches are not, but rather applies based upon the form in which churches choose to hold property. It does not require that some denominations be treated 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).

With respect to the applicability of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to the facts of this case, the primary position of the Episcopal Church is that it does not apply. Br. of the Episcopal Church at 45 n.25. The position of the Diocese is that the *Lemon* test applies and that § 57-9(A) violates all three prongs of that test. Br. of the Diocese at 43-46. The Diocese also argues that § 57-9(A) "violates the principle of governmental neutrality toward religion" contrary to both the Free Exercise and Establishment Clauses. Br. of the Diocese at 38-43. All of these arguments of the Episcopal Church and the Diocese depend upon allegations of hostility and non-neutrality addressed and refuted above. They confuse as well the distinction between forbidden non-neutrality and a permissible disparate impact. While the State may not designate "a

particular religious sect for special treatment," *Bd. of Educ. v. Grumet*, 512 U.S. 687, 706 (1994), there is no requirement that a State's policies have the *same impact* on all religious sects. *Varner v. Stovall*, 500 F.3d 491, 498-99 (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 498-99. In the Free Exercise context, the Court has upheld a statute of general applicability that criminalizes the religious activities of some sects. *Employment Div., 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 v. Chambers,* 463 U.S. 783, 793-95 (1983) (legislative prayers always offered by Presbyterian clergy). It also has upheld neutral statutes and policies that benefit only those sects with the resources to start a school, *Zelman v. Simmons-Harris,* 536 U.S. 639, 652 (2002). Finally, *Lemon* is not applied in church property cases and would not be violated in this case if it were applied.

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

The United States Constitution "does not say that in every and all respects 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. Sch*., 418 F.3d 395, 402 (4th Cir. 2005) (citation omitted). *See also Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring). 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 "'no more than helpful signposts'" in Establishment Clause analysis. *Van Orden*, 545 U.S. at 686 (Rehnquist, C.J., joined by Scalia, Kennedy & Thomas, JJ., announcing the judgment of the Court) (citation omitted); *Hunt v. McNair*, 413 U.S. 734, 741 (1973). Indeed, the *Lemon* test frequently is ignored by the Supreme Court. *See, e.g., Van Orden*, 545 U.S. at 686 (Rehnquist, C.J., joined by Scalia, Kennedy & Thomas, JJ., announcing the judgment of the Court);

Zelman, 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,* 463 U.S. 783.

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). *See also ACLU Nebraska Found.,* 419 F.3d at 778 n.8 (declining to apply the *Lemon* test). *But see ACLU of Ky. v. Mercer County*, 432 F.3d. 624, 635 (6th Cir. 2005), *rehearing denied*, 446 F.3d 651 (6th Cir. 2006) (questioning the applicability of the *Lemon* test, but ultimately concluding that the *Lemon* test must be applied).

Furthermore, the *Lemon* test does not apply in the church property context. *Lemon* involved the expenditure of state funds to church affiliated schools. *Lemon*, 403 U.S. at 607. Notably, in *Jones v. Wolf*, decided after *Lemon*, the Court did not apply the *Lemon test*. *Jones*, 443 U.S. at 597-610. Nor did the *Jones* dissent contend that the *Lemon* test should be

applied. *Id.* at 610-621. (Powell, J., joined by Burger, C.J., and Stewart & White, J.J., dissenting).

B. Section 57-9(A) Complies with the *Lemon* Test in any Event.

Were this Court to apply the *Lemon* test, then § 57-9(A) would satisfy it. Under the *Lemon* 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.

1. The Statute Serves a Secular Purpose

Jones itself teaches that "[t]he State has an obvious and legitimate purpose 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.

The secular purpose prong presents "a fairly low hurdle." *Brown v. Gilmore*, 258 F.3d 265, 276 (4th Cir. 2001) (citation omitted). Indeed, the Supreme Court "has 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 [is] contravened 'only if [the

action] is "entirely motivated by a purpose to advance religion.'" *Lambeth v. Bd. of Comm'rs,* 407 F.3d 266, 270 (4th Cir. 2005) (citations omitted) (alteration in original). *See also Wallace v. Jaffree,* 472 U.S. 38, 56 (1985).

2. Section 57-9(A) 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." *Corp. of the Presiding Bishop v. Amos,* 483 U.S. 327, 337 (1987) (emphasis in original). 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 v. Felton*, 521 U.S. 203, 234 (1997). Evidence of the impermissible government advancement of religion includes "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n,* 397 U.S. 664, 668 (1970). Section 57-9(A) neither advances nor inhibits religion. It does nothing to indoctrinate anyone in a particular religious belief. The statute exists only to resolve thorny church property disputes fairly and efficiently once triggered by an objectively determined event: division.

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(A) does not have the primary effect of advancing or inhibiting religion, there is no excessive entanglement.

Certainly adjudicating a property dispute under § 57-9(A) is not excessive entanglement. At most, the judiciary has to judge the existence of the division and the local congregation's vote as to which branch they wish to join. *Cf. Mueller v. Allen,* 463 U.S. 388, 403 (1983) (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 neutral principles approach embodied by § 57-9(A) minimizes the State's involvement in church property disputes. As noted above, the neutral principles approach has the advantage of being "flexible"

and "completely secular in operation." *Jones*, 443 U.S. at 603. In sharp contrast, under the polity approach articulated in *Watson,* civil courts must embroil themselves in "a searching and therefore impermissible inquiry into church polity." *Id*. at 605 (citation omitted).

IV. THE APPLICATION OF § 57-9(A) TO THIS LITIGATION DOES NOT CONSTITUTE A GOVERNMENTAL TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION.

The Fifth Amendment prohibition on the government taking private property without just compensation is applicable to the States. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 481 n.10 (1987). The Virginia Constitution contains a similar provision. *See* Va. Const. art. I, § 11. The Diocese contends that if a court awards the property to the CANA Congregations based on § 57-9(A), there is a taking of property without just compensation. *Br*. of the Diocese at 47-49.

The foundational premise of this argument is that the State will "take" the property of the Diocese and then turn it over to a private party—the CANA Congregations. This premise fundamentally is wrong. A State does not "take" property when it *adjudicates* competing claims to title by private parties based on neutral principles contained in a presumptively valid statute. Moreover, as the circuit court noted, this argument is circular: it assumes that the Diocese owns the property, and that the adjudication of

the title to the property results in a "taking." *App*. 4166. Ownership of the property is the very question at issue.

The Commonwealth has enacted a wide variety of statutes governing disposition of property. Adverse possession and equitable distribution are but two obvious examples. Even though the property might be formally titled in one of the litigants, the State does not "take" the property when it adjudicates the dispute over ownership using neutral principles and awards the property to one of the parties.[2]

CONCLUSION

For the reasons stated above and in the brief of the CANA Congregations, this Court should **AFFIRM** the circuit court's conclusions regarding the constitutionality of § 57-9(A) as applied to this litigation.

Respectfully submitted,

[2] Because there was no taking the Diocese's arguments concerning a separate due process violation associated with the alleged taking are meritless. *Br*. of the Diocese at 48-49. Moreover, if this case reflects anything, it is an overflowing abundance of due process.

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CERTIFICATE OF SERVICE

I certify that on this 29st day of January, 2010, fifteen copies under each record number of this Brief have been filed in the Office of the Clerk of the Supreme Court of Virginia and two copies have been mailed by first class, postage prepaid, U.S. Mail to counsel listed below, and an electronic copy of the Brief has been filed with the Clerk of the Supreme Court of Virginia by e-mail at scvbriefs.@courts.state.va.us.

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