Record No. 090682 and 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 ON BEHALF OF THE COMMONWEALTH IN RESPONSE TO THE PETITIONS FOR APPEAL

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BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

The Office of the Attorney General of the Commonwealth of Virginia submits this Brief on behalf of the Commonwealth of Virginia.

PRELIMINARY STATEMENT

The Commonwealth's role in this case is limited. The Commonwealth intervened in the trial court for the limited purpose of defending the constitutionality of *Virginia Code* § 57-9.[1] Therefore, the arguments in this brief are limited to those issues. The Commonwealth takes no position whether the Court should grant or deny review on any assignments of error not raising constitutional challenges to the statute.

The trial court correctly concluded that § 57-9 is constitutional as applied to this litigation. Therefore, there is no need for this Court to grant review as a matter of error correction. Nor is the Commonwealth aware of

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[1] *Virginia Code* § 57-9(A) provides that:

> 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.

other pending or threatened litigation. Under these circumstances, review as to the constitutionality of § 57-9 should not be granted.

STATEMENT OF THE CASE

In 2006 and 2007, nine congregations ("the CANA Congregations") in Northern Virginia filed petitions under *Virginia Code* § 57-9(A). Those petitions alleged that (1) a division had occurred in the Episcopal Church over certain theological issues and the Church had 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 a lawsuit, claiming control of the disputed property. The cases were consolidated in the Circuit Court of Fairfax County.

After the Episcopal Church and Diocese challenged the constitutionality of § 57-9, the Commonwealth intervened for the purpose of defending the statute.

Following extensive briefing and argument, the circuit court first determined that § 57-9(A) applied in this situation. 04/03/08 Opinion. Again following extensive briefing and argument, the court issued a

detailed memorandum opinion concluding that the statute was constitutional. 06/27/08 Opinion. The Court heard additional evidence regarding certain residual property and other issues, and ultimately entered final judgment in favor of the Congregations.

STATEMENT OF FACTS

The Episcopal Church is organized as a hierarchical denomination and is a part of the world wide Anglican Communion. The Anglican Communion is composed of regional churches that historically are linked to the Church of England. A number of local churches have voted to leave the Episcopal Church and to join other churches. In the case at bar, the nine churches in Northern Virginia voted to join the Convocation of Anglicans in North America (CANA). CANA is a mission of the Church of Nigeria. The Church of Nigeria is a member of the Anglican Communion.

The Episcopal Church operates under the Church's Constitutions and Canons. Church Canon I.7.4 provides that church property is held in trust for the mission of the Church and the Diocese, and may be controlled by a local parish "so long as [it] remains a part of, and subject to, this Church and its Constitution and Canons."

As the parties stipulated, hierarchical churches in Virginia hold property in many different ways. Some place the property in the name of

trustees, others in the congregation's corporate name or in the name of the diocesan bishop, while others hold property in the name of the mother church or its presiding bishop. Stipul. of Dec. 6, 2007.

ARGUMENT

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), this Court has long adhered to the principle that "[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, [this Court] will not invalidate it." *City Council 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 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 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. "[C]ourts are concerned only as to whether the determination of the legislature has been reached according to, and within, constitutional requirements." *Id.* "[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).

Finally, this Court will review *de novo* a lower court's construction of a statute. *See Parker v. Warren*, 273 Va. 20, 23, 639 S.E.2d 179, 181 (2007).

I. THE CONSTITUTION DOES NOT REQUIRE VIRGINIA COURTS TO RESOLVE CHURCH PROPERTY DISPUTES BY DEFERRING TO CHURCH CANONS.

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

Although "the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes," *Presbyterian Church v. Hull 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." *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 would effectively 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 church canons. *See Episcopal Church Pet*. at 25-30; *Diocese Pet.* at 18-21. 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. *Episcopal Church Pet*. at 27-28. Put another way, the Episcopal Church believes that, when there is a property dispute involving

a hierarchical denomination, the National and Virginia Constitutions *require* courts to resolve the dispute based on church canons and church doctrine.[2]

While a State can adopt the polity approach of *Watson,* 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, 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 adopted by the circuit court reflects neutral principles of law approach explicitly approved in *Jones*. Moreover, the circuit court's interpretation of § 57-9 is consistent with both the Establishment Clause[3] and the Free Exercise Clause. [4]

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[2] This Court has held that the Virginia Constitution is coextensive 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); *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). Neither the Episocopal Church nor the Diocese contend otherwise.

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

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

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. "[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. *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 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. For example, in *Maryland & Va. Churches,* the Court approved of a neutral principles analysis "settling 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." 393 U.S. at 368.[5] This approach minimizes the State's involvement in 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

[5] *See also Presbyterian Church*, 393 U.S. at 440.

> 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 of United Presbyterian Church in U.S. v. Middlesex Presbyterian Church*, 489 A.2d 1317, 1321-22 (Pa. 1985) (listing cases).

Under the alternative 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 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. (citations omitted). 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. 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 754. 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 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 of law approach. *Cf. Bowie v. Murphy*, 271 Va. 126, 135, 624 S.E.2d 74, 79-80 (2006).

C. Section 57-9 embodies the neutral principles of law approach.

To be sure, *Norfolk Presbytery* did not consider the impact of § 57-9. However, § 57-9 embodies the neutral principles of law approach embraced by this Court in *Norfolk 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. Under this statute, 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 v. Milivojevich,* 426 U.S. 696, 710 (1976).

The default principle of majority vote in § 57-9 is a neutral principle. 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 on the basis of 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 Diocese and the Episcopal Church contend that under *Jones v. Wolf*, courts employing the neutral principles of law approach must defer to church canons when those church canons provide that the property is held in trust for the Denomination. *Episcopal Church Pet.* at 22; *Denomination* Pet. at 29. While Georgia's version of "neutral principles" under review in *Jones* required Georgia courts to examine the constitution of a church as part of the 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*, where the Courts evolved a neutral principles jurisprudence to adjudicate church property disputes, Virginia benefits from a statute that provides a default rule. *Jones* cannot be read to suggest that neutral principles *compel* deference to church canons. Indeed, that is the very opposite of what the *Jones* decision contemplates. As the circuit court correctly found, *"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 specific method of resolving church property disputes." 06/27/08 Opinion, p. 21.

D. Application of trust principles in this area is problematic.

Application of ordinary trust principles in this area presents unique challenges. The terms of a trust are governed by "the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding." *Virginia Code* § 55-544.01. First, with respect to the wishes of members of the church who donated property that is administered by the trustees of the local church, it is often difficult to discern whether the members who donated the property intended to benefit the local congregation or the denomination at large. Furthermore, although the denomination recently has modified its canons, it is problematic as a matter of trust law that the declaration of trust made in church canons is made by a putative *beneficiary* of the trust rather than by the settler or settlors. Trusts are administered based on the intent of the settlor, not by the beneficiary. *Virginia Code* §§ 55-544.03; 55-544.05(B). Therefore, the amendments to the national church constitutions provide little justification

for construing a trust in the hierarchy's favor. Finally, disputes over the intent of the settlor of the trust necessarily embroil the courts into theological disputes. Rather than plunge into this morass, the General Assembly prudently established an alternative rule in this context–and one that is straightforward enough to circumvent should a denomination choose to do so.

II. THE CIRCUIT COURT'S INTERPRETATION OF § 57-9 IS ENTIRELY CONSISTENT WITH THE ESTABLISHMENT CLAUSE.

The Establishment Clause of the First Amendment applies to the States, *Everson v. Board of Educ*., 330 U.S. 1, 17-18 (1947). In reviewing statutes, the judiciary should be reluctant "to 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).

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). Although the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) "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*), it does not apply to every Establishment Clause issue. *See Van Orden v. Perry*, 545 U.S. 677, 681 (2005) (noting that the factors identified in *Lemon* serve as 'no more than helpful signposts'" in Establishment Clause analysis) (Rehnquist, C.J., joined by Scalia, Kennedy & Thomas, JJ., announcing the judgment of the Court); *Hunt v. McNair*, 413 U.S. 734, 741 (1973). The Court has noted that it has "repeatedly emphasized its unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch v. Donnelly,* 465 U.S. 668, 679 (1984).

Contrary to the assertions of the Episcopal Church, *Larson v. Valente*, 456 U.S. 228 (1982) does not command a different result. In *Larson*, churches that received more than half of their total contributions from members or affiliated organizations were exempt from registration and reporting requirements. *Id.* at 231. The Court ultimately held that this statute represented an impermissible denominational preference and did not pass strict scrutiny. *Id.* at 255. First, unlike *Larson*, the statute at issue here does not make classifications among religions. *Id*. In *Larson*, the statute's text differentiated between religious sects based upon how much money they raised from their members. *Id.* at 230. The text of § 57-9 does not state that congregational and Presbyterian churches are treated

differently from hierarchical churches. 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). Second, the legislative history in *Larson* revealed that the rule at issue was drafted with the explicit intention of burdening or favoring selected religious denominations, particularly the "Moonies." *Larson*, 456 U.S. at 254. That is not the case here. In analyzing the history of the statute, the circuit court found no impermissible motive. 06/27/08 Opinion p. 31-32.

The Episcopal Church and the Diocese contend that avoiding the application of the statute would place an excessive burden on them. *Episcopal Church Pet.* at 31; *Diocese Pet.* at 24. As the circuit court observed, however, the Diocese has already repeatedly engaged in the practice of titling property in the name of the bishop, thereby obviating the application of the statute as to those properties. 06/27/08 Opinion, p. 31-32. Furthermore, although the Diocese and the Episcopal Church contend that rearranging its property to avoid the application of the statute presents an insurmountable burden, in *Jones* the Court described the re-titling of deeds to avoid the Georgia majoritarian presumption as a "minimal" burden. *Jones*, 443 U.S. at 606. The circuit court correctly found that

Virginia law permits a hierarchical denomination to avoid the majority presumption by permitting church property to be held in corporate form or held by an ecclesiastical officer. 06/27/08 Opinion p. 32-33. Therefore, it does not violate the Establishment Clause.

Even if § 57-9 has a disparate impact on some religious organizations, that does not create an Establishment Clause problem if the disparate impact results from the application of neutral criteria. *Gillette v. United States*, 401 U.S. 437, 452 (1971); *McGowan v. Maryland*, 366 U.S. 420, 442-44 (1961). In the years since *Larson*, the Court repeatedly has 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 Div., Oregon Dep't of Human Resources 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). In sum, *Larson* is limited to situations where the statute explicitly differentiates between religious sects. *Hernandez*, 490 U.S. at 695.

The *Lemon* test does not apply in this context. *Lemon* involved the expenditure of state funds to church affiliated schools. 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 dissent contend that the *Lemon* test should be applied. *Id.* at 610-621.

Assuming the *Lemon* test applies, 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 775. As applied to this litigation, § 57-9 easily meets the standard. Section 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.

Second, "[f]or 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." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327, 337

(1987) (emphasis in original). 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 of the City of New York,* 397 U.S. 664, 668 (1970). Section 57-9 neither advances nor inhibits religion. It does not differentiate between religious sects. Instead, it provides a mechanism for adjudicating claims when there is a division. It does nothing to indoctrinate anyone in a particular religious belief. Rather, the statute exists only to resolve church property disputes fairly and efficiently.

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. Determining whether a church has been "divided" or is a "branch" of another church is a practical rather than a theological exercise. *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 v. Felton*, 521 U.S. 203, 233 (1997) (administrative cooperation, by itself, is insufficient to create excessive entanglement). Indeed, the Supreme Court explicitly has recognized that States may use the neutral principles of law approach, such as § 57-9, to resolve church property disputes. *Jones*, 443 U.S. at 603-05.

III. SECTION 57-9 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 (citation omitted). "[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." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Thus, if § 57-9 is a neutral law

of general applicability, then the Episcopal Church's free exercise claim fails.[6]

"In order to determine whether a law is neutral, as the Court used the term in *Smith,* [a court] must examine the object of the law." *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 631 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 2431 (2008). "[A] law is not neutral" if "the object of the law is to infringe upon or restrict practices because of their religious motivation." *Lukumi,* 508 U.S. at 533. The related principle of "general applicability" forbids the government from "impos[ing] burdens only on conduct motivated by religious belief" in a "selective manner." *Id.* at 543. "Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531.

"We begin, as *Lukumi* instructs, with the text" of § 57-9. *St. John's*, 502 F.3d at 632. Section 57-9 does not "refer[] to a religious practice without a secular meaning discernible from the language or context." *Lukumi,* 508 U.S. at 533. It does not single out the Episcopal Church or hierarchical churches. Rather, the text refers simply to a means of holding

[6] If this Court concludes that § 57-9 is not neutral and generally applicable, then this Court must determine if § 57-9 "is justified by a compelling interest and is narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 533. Section 57-9 meets that standard.

church property. Thus, it is facially neutral. "Even if a law passes the test of facial neutrality, it is still necessary to ask whether it embodies a more subtle or masked hostility to religion." *St. John's*, 502 F.3d at 633. Central to this inquiry is the "historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the [act's] legislative or administrative history." *Lukumi,* 508 U.S. at 540. The circuit court noted that "[i]t cannot credibly be argued that either the historical background or legislative history leading up to the enactment of 57-9 demonstrates a 'subtle or masked history to religion.'" Opinion of June 27, 2008, p. 27-28, 36. As the court found, § 57-9 was motivated to ensure prompt and peaceful resolutions of church property disputes. Opinion of June 27, 2008, p. 27.

Moreover, the fact that § 57-9 is limited to "a church or religious societies" does not alter the analysis. As long as the legislature has a non-discriminatory purpose, a statute that singles out religion is considered neutral and generally applicable.[7]

[7] *See St. John's*, 502 F.3d at 636-37; *World Wide Street Preachers Fellowship v. Town of Columbia*, 245 Fed. Appx. 336, 344 (5th Cir. 2007) (unpublished); *KDM ex rel. WJM v. Reedsport School Dist*., 196 F.3d 1046, 1048 (9th Cir. 1999); *Strout v. Albanese*, 178 F.3d 57, 65 (1st Cir. 1999). *But see Shrum v. City of Coweta, Okla.*, 449 F.3d 1132, 1144 (10th Cir. 2006); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3rd Cir. 2004);

IV. THE APPLICATION OF § 57-9 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 Episcopal Church contends that if a court awards the property to the CANA Congregations based on § 57-9, then this statute violates the Fifth Amendment.

The foundational premise of the Episcopal Church's argument is that the State will "take" their property 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 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." 06/27/08 Opinion, p. 47. 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, bankruptcy, and equitable

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Kissinger v. Board of Trs. of Ohio State Univ., 5 F.3d 177, 179 (6th Cir. 1993).

distribution are but a few 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 and awards the property to one of the parties. The assignment of error relating to an alleged taking is without merit and should be refused.

CONCLUSION

The circuit court's conclusions regarding the constitutionality of § 57-9 as applied to this litigation are correct. This Court should not grant review on those grounds.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on this 28th day of April, 2009, seven copies of this **BRIEF IN OPPOSITION TO THE PETITIONS FOR APPEAL** have been filed in the Office of the Clerk of the Supreme Court of Virginia and one copy has been mailed by first class, postage prepaid, U.S. Mail to counsel listed below:

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