IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 090682

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA,

Appellant,

v.

TRURO CHURCH, *et al.*,

Appellees.

BRIEF OF APPELLANT

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GLOSSARY

ADV	Anglican District of Virginia
CANA	Convocation of Anglicans in North America
Congregations	the nine Appellee congregations (*see* n.1)
Dennis Canon	The Episcopal Church Canon I.7(4)
Diocese	The Protestant Episcopal Church in the Diocese of Virginia, also known as the Episcopal Diocese of Virginia or as the Diocese of Virginia
Religion Clauses	The Free Exercise and Establishment Clauses of the Constitution of Virginia and the First Amendment to the United States Constitution
TEC or the Church	The Episcopal Church, also known as the Protestant Episcopal Church in the United States of America (sometimes referred to by the older acronym “ECUSA”)

SUMMARY

This case concerns the right of churches to control their own affairs without government intrusion. Specifically, it involves the statutory and constitutional right of the hierarchical Episcopal Church to establish and enforce its internal rules governing church property. In contravention of that right, the Circuit Court held that a 140-year-old Virginia statute allows a congregation to control property by majority vote, granted ownership of properties held by nine formerly Episcopal churches to their local majorities, and refused to recognize the interests of the Episcopal Church ("TEC" or the "Church") and the Diocese of Virginia ("Diocese") under applicable law. For many reasons, that judgment should be reversed.

This Court repeatedly has emphasized the distinctions in governance and property ownership between congregational churches, such as Baptist churches, and hierarchical churches, such as the Roman Catholic Church, including differences with respect to "determination of property rights." *Green v. Lewis*, 221 Va. 547, 553, 272 S.E.2d 181, 184 (1980). Congregational churches are "not subject to any external control" and "are governed by the will of the majority." *Reid v. Gholson*, 229 Va. 179, 188 n.13, 189, 327 S.E.2d 107, 113 & n.12 (1985). Hierarchical churches, on the other hand, "establish their own rules for discipline and internal government"; and

"member[s] of such a church, by subscribing to its discipline and beliefs, accep[t] its internal rules." *Id*. at 188-89, 327 S.E.2d at 113. Congregations in hierarchical churches, "such as Episcopal and Presbyterian churches, … are subject to control by super-congregational bodies." *Baber v. Caldwell*, 207 Va. 694, 698, 152 S.E.2d 23, 26 (1967).

The Circuit Court construed Va. Code § 57-9 as obliterating the distinctions between congregational and hierarchical churches, by holding that § 57-9(A) gives congregational majorities the power to expropriate property used by the congregations where there is a "division" in a church. The court thus read the statute as overriding both the general church's internal rules and its interests in such property under applicable law.

The court also held, despite the clear language of Va. Code § 57-7.1, which validates trusts "for the benefit of any church, church diocese, religious congregation or religious society," that § 57-7.1 does not permit the Church or the Diocese to hold beneficial title to church property.

The Circuit Court also misinterpreted § 57-9(A) as applicable. Among other things, it refused to apply the "neutral principles" approach to church property disputes, which this Court adopted in *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 504-05, 201 S.E.2d 752, 756-57 (1974). "Neutral principles," in the jurisprudence of this and other courts, is shorthand for an

analysis that avoids constitutional issues by applying to church property disputes principles of law used in resolving other property disputes. *Id*.

Moreover, the Circuit Court dismissed the United States Supreme Court's express holding – that a hierarchical church may protect its property interests by amending its governing documents "to recite an express trust in favor of the denominational church" – as mere "suggestions as to ways in which a State might allow a hierarchical church to overcome a presumption of majority rule." JA 4145.

As construed by the Circuit Court, § 57-9(A) is not neutral, within the meaning of either the "neutral principles" approach or the principle of governmental neutrality toward religion embodied in the Free Exercise and Establishment Clauses (the "Religion Clauses") of the Constitutions of Virginia and the United States. It entangles civil courts in religious matters, contrary to bedrock principles of religious freedom in the Virginia Statute of Religious Freedom, codified at Article I, Section 16 of the Virginia Constitution; in the First Amendment; and in the jurisprudence of this Court and the United States Supreme Court. And it imposes principles of congregational polity (governance) on hierarchical churches. Whatever the place of majority rule in civil governance or secular institutions, the United States and Virginia Constitutions forbid the Commonwealth from imposing

that rule on the Diocese and the Church.

In short, § 57-9(A), as construed below, is unconstitutional.

ASSIGNMENTS OF ERROR

1. The Circuit Court erred as a matter of law by holding that a court considering a Va. Code § 57-9(A) petition may disregard the "neutral principles of law" analysis required by *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980), and *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 201 S.E.2d 752 (1974), to determine ownership of church property, and need not determine whether property is congregationally-owned. That holding was error because § 57-9(A) applies only to property "held in trust for such congregation" and this Court's decisions require the use of "neutral principles of law" to resolve disputes between a general church and congregations over the ownership and control of church property.

2. The Circuit Court erred as a matter of law by holding that church property may not be held in trust for a diocese or hierarchical church and by rejecting a constitutional challenge to that statutory interpretation. That holding was error because Va. Code § 57-7.1 allows any religious entity to hold property in trust and because the Virginia and Federal Constitutions' Religion Clauses forbid discrimination in the right to hold property in trust.

3. The Circuit Court erred as a matter of law by holding that the

requirements of Va. Code § 57-9(A) were satisfied in these cases. That holding was error because the court adopted erroneous and entangling definitions of the statutory terms "division," "branch," and "attached," leading the court to err by holding that a "division" has occurred in the Anglican Communion, the Episcopal Church (the "Church" or "TEC"), and the Diocese of Virginia (the "Diocese"); that all relevant entities were "branches" of and "attached" to the Anglican Communion; and that the Convocation of Anglicans in North America ("CANA") and Anglican District of Virginia ("ADV") are "branches" of the Church and the Diocese.

4. The Circuit Court erred as a matter of law by holding that Va. Code § 57-9(A) is constitutional, because § 57-9(A), as construed by that court, violates the Religion Clauses of the State and Federal Constitutions.

5. The Circuit Court erred as a matter of law by construing § 57-9(A) to override a general church's rights and interests in church property, while denying the opportunity to prove such interests. That was error because such an override would violate the Virginia and United States Constitutions' Takings and Due Process Clauses, and a litigant must be allowed to prove the property interests that are the basis for such a constitutional challenge.

6. The Circuit Court's ruling that a prior order in a different case approving a petition to transfer property precluded challenges to the

transfer was error as a matter of law, because Rule 1:1 does not apply.

QUESTIONS PRESENTED

1. Must a court addressing a petition under Va. Code § 57-9(A) apply the "neutral principles of law" analysis required by this Court's decisions or otherwise determine whether the property at issue is held in trust for the petitioning congregation as required by § 57-9(A)? (Assignment of error 1.)

2. May property be held in trust for a diocese or hierarchical church, under Va. Code § 57-7.1? (Assignment of error 2.)

3. If Virginia statutes do not allow holding property in trust for a diocese or hierarchical church, does that violate the Virginia and United States Constitutions? (Assignment of error 2.)

4. Have the Anglican Communion, the Church, and the Diocese "divided," within the meaning of § 57-9(A)? (Assignment of error 3.)

5. Have the appellee Congregations voted to join a "branch" of the "church or religious society" to which they were "attached," within the meaning of § 57-9(A)? (Assignment of error 3.)

6. Does § 57-9(A), as construed below, violate the Religion Clauses of the Virginia and Federal Constitutions? (Assignment of error 4.)

7. If § 57-9(A) eliminates any interests of a general church, does that violate the Takings and Due Process Clauses of the Virginia and Federal

Constitutions, and may a trial court refuse to allow a general church to prove the factual basis for such a challenge? (Assignment of error 5.)

8. Does Rule 1:1 bar consideration in a new action, with different parties, of issues decided in a previous action? (Assignment of error 6.)

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Nine formerly Episcopal congregations (the "Congregations")[1] filed petitions in five circuit courts under Va. Code § 57-9(A), a statute first enacted in 1867 (before adoption of the Fourteenth Amendment, and long before it was construed as incorporating the Religion Clauses of the First Amendment) and seldom used since that time. Section 57-9(A) 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

[1] The Congregations are The Church at the Falls – The Falls Church, in Arlington County; Truro Church, Church of the Apostles, and Church of the Epiphany, Herndon, in Fairfax County; St. Margaret's Church, Woodbridge, St. Paul's Church, Haymarket, and Church of the Word, Gainesville, in Prince William County; Church of Our Saviour at Oatlands, in Loudoun County; and St. Stephen's Church, Heathsville, in Northumberland County.

> 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.[2]

The Diocese and TEC intervened in those cases and filed cases against the Congregations and two others, seeking declaratory judgments affirming their trust, proprietary, and contract rights in the properties used by the Congregations. A three-judge panel appointed by this Court consolidated the cases in the Circuit Court of Fairfax County under the Multiple Claimant Litigation Act, Va. Code §§ 8.01-267.1, *et seq*. The cases against the two churches that did not file § 57-9(A) petitions were settled and dismissed.

The Circuit Court first considered certain aspects of § 57-9(A). During a five-day trial, the court took evidence on the meaning of terms in the statute and their application. In an 82-page opinion, it interpreted those terms and held that the statute applied. JA 3853. After further briefing and argument, it held, *inter alia*, that § 57-9(A) is constitutional and that it overrides and renders moot denominational rights and interests. JA 4120, 4179. After another trial regarding certain properties, the Circuit Court

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[2] Va. Code § 57-9(B), which is not directly at issue in this case, applies only to congregational churches. Section 57-9(B) incorporates conventional principles of congregational polity by providing that intra-church property disputes are resolved by congregational majority votes. Section 57-9(A) imposes the same principle of congregational polity on hierarchical churches, overriding conventional principles of hierarchical church doctrine and governance.

entered a final judgment approving the § 57-9(A) petitions and dismissing TEC's and the Diocese's declaratory judgment actions as moot. JA 4900.

STATEMENT OF FACTS

As the Circuit Court held, the Episcopal Church's form of government is hierarchical. JA 3911 n.51; *see Dixon v. Edwards*, 290 F.3d 699, 716 & n.23 (4th Cir. 2002), and cases cited therein. The Church's governing body is its General Convention, which comprises a House of Bishops (consisting of current and retired bishops) and a House of Deputies (consisting of both clergy and lay persons). *E.g.*, JA 2505-07. The Church is divided geographically into 111 dioceses, and it has more than 7,100 congregations and approximately 2.2 million members. JA 3004-08.[3]

The Church's General Convention has enacted and from time to time amends its Constitution and Canons, to which dioceses must give an "unqualified accession." JA 915.[4] *See*, *e.g.*, JA 1268. Dioceses likewise are governed by constitutions and canons, which supplement and may not conflict with the Church's Constitution and Canons. National and diocesan constitutions and canons are governing documents which bind the Church

[3] The Diocese's territory includes roughly the northern third of the State.

[4] The citation is to TEC's Constitution. Two versions of TEC's Constitution and Canons are in the record – one in effect through December 31, 2006, and the other thereafter. There are no differences material to this appeal.

and all of its constituent parts, including congregations. JA 961, 1274. They are the "law of the Church." JA 2230-32, 2337-39, 2666, 2792, 2793.[5]

The "order, government, and discipline" of the Diocese is vested in its Bishop and Annual Council (which includes clergy and lay delegates from each congregation in the Diocese), assisted by its Standing Committee and Executive Board (which include both clergy and lay persons). JA 1269-70, 1273, 1275, 1278-79, 2788-91, 3584-85. The Diocesan Constitution provides that each of the Diocese's approximately 200 congregations "shall be bound by the Constitution and Canons adopted in pursuance hereof." JA 1274. Congregations are either "churches" (also called "parishes") or "missions," depending on certain ecclesiastical criteria. *See, e.g.*, JA 1282-83. The Constitution and Canons of TEC and the Diocese provide that each church is governed by a vestry, elected by the congregation, and a rector (chief pastor), selected by the vestry with the advice of the Bishop. JA 956, 985-86, 1284-88; *see also* JA 1289-90.

The Anglican Communion is not a church. It is a world-wide family or

[5] The Congregations' own governing documents recognized that the Church's and the Diocese's rules are binding. *E.g.*, JA 3651 (St. Margaret's), 3657 (Epiphany), 3668, 3677 (St. Stephen's), 3688 (Truro), 3694 (The Falls Church); *see also* JA 3641, 3707, 3711, 3721. In addition, the Congregations' leaders were required to – and did – take oaths to adhere to the rules of the Church. JA 917, 1285, 2183-84, 2189-90, 2285-86, 2335-37, 2478-80; *see also* JA 2218, 2220, 2229-30.

fellowship of 38 autonomous regional or national churches (or "provinces"), including TEC and the Church of Nigeria, with a common ancestry in the Church of England. *E.g.*, JA 2347-50, 2513, 2529-30, 2659-61, 2916-20, 2923-26, 2929. Each province has a chief bishop (or "primate"). TEC's primate is its Presiding Bishop. The primates meet from time to time to confer and build relationships and occasionally issue communiqués, which are not binding on member churches. JA 2525-27. The Archbishop of Canterbury is "first among equals" among the primates. JA 2514. He issues invitations to the Lambeth Conference, a gathering of bishops that meets every ten years and sometimes adopts non-binding resolutions. JA 2517-20, 2927. He also presides over the remaining "instrument of communion," the Anglican Consultative Council, whose resolutions also are not binding on member churches. JA 2516-17, 2520-24. No Anglican Communion official, entity, or instrument of communion can bind or govern member churches. *See*, *e.g.*, JA 2461, 2905.

There has been disagreement and discord within the Anglican Communion, TEC, and the Diocese regarding theological issues for many years, dating back at least to the 1970's. JA 3790, 3797-3801, 3840. Since 2003, much of that discord has focused on matters related to human sexuality. The discord has not led to any structural changes in TEC or the

Diocese.

By January 2007, each of the Congregations had voted to "sever its denominational ties" with TEC and the Diocese and to join CANA, which is a missionary initiative of the Church of Nigeria and has about 60 congregations and 12,000 members, and the ADV. *E.g.*, JA 429, 431 (Truro), 2149-50, 2168. Overall, approximately 100 congregations left TEC. JA 3937. The Congregations also voted to "retain" the properties at issue, contrary to the Church's and the Diocese's Constitution and Canons, and excluded continuing Episcopal congregations from their church homes.

ARGUMENT

I. The Standard of Review

All errors assigned on appeal are errors of law. Assignments of error 3 and 4 involve mixed questions of law and fact. Assignment of error 3 challenges only the legal components of the decision below. This Court's review therefore is *de novo*. *E.g.*, *Palace Laundry, Inc. v. Chesterfield County*, 276 Va. 494, 498, 666 S.E.2d 371, 374 (2008). For assignment of error 4, the Court must conduct an "independent examination of the entire record" to ensure that the judgment does not violate constitutional rights. *The Gazette, Inc. v. Harris*, 229 Va. 1, 19, 325 S.E.2d 713, 727-28 (1985); *see also*, *e.g.*, *United States v. Friday*, 525 F.3d 938, 949-50 (10th Cir.

2008), *cert. denied*, 129 S. Ct. 1312 (2009), and cases cited therein (the independent review standard applies to factual components of Free Exercise and Establishment Clause issues); *New Life Baptist Church Academy v. Town of East Longmeadow*, 885 F.2d 940, 941 (1st Cir. 1989) (Breyer, J.), *cert. denied*, 494 U.S. 1066 (1990) ("'First Amendment questions of "constitutional fact" compel … *de novo* review'") (citations omitted).

We begin with the statutory issues, in keeping with the principle of avoiding unnecessary adjudication of constitutional issues. *See*, *e.g.*, *Bell v. Commonwealth*, 264 Va. 172, 203, 563 S.E.2d 695, 715-16 (2002).

II. The Circuit Court erred as a matter of law by holding that a court considering a § 57-9(A) petition may disregard the "neutral principles of law" analysis, because both § 57-9(A) and this Court's decisions require determining whether property is held in trust for the congregation. (Assignment of Error 1.)

This Court twice has held that Virginia law protects a hierarchical church's interests in property used by congregations and that in property disputes between a hierarchical church and a majority of a congregation, a court must apply "'neutral principles of law, developed for use in all property disputes.'" *Norfolk Presbytery*, 214 Va. at 504, 507, 201 S.E.2d at 756, 758 (quoting *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969)); *Green*, 221 Va. at 555, 272 S.E.2d at 185-86 (following *Norfolk Presbytery* and stating that such disputes are decided by "look[ing] to our own statutes,

to the language of the deed conveying the property, to the constitution of the general church, and to the dealings between the parties").

In this case, however, the Circuit Court limited the neutral principles analysis to cases under Va. Code § 57-15 (which governs encumbrances on and transfers of church property) and held that it does not apply in cases under § 57-9(A). JA 4174. That was error. This Court's decisions apply to all property disputes between local majorities and denominations.[6] Furthermore, § 57-9(A) applies, by its terms, only to "property held in trust for such [petitioning] congregation." Based on an incorrect interpretation of current law, *see* § III, *infra*, the court held that the properties could only be held in trust for the Congregations. *See* JA 4180-82. It did not require the Congregations to prove that they alone held beneficial interests, nor did it allow the Diocese to complete its proof of its interests under the analysis mandated by *Norfolk Presbytery* and *Green*. The Circuit Court ignored the predicate question of whom the property is "held in trust for," which must be decided to determine whether § 57-9(A) applies at all. That was error.

[6] Virginia courts have resolved cases arising under § 57-9 by applying the "neutral principles" analysis. *See Trustees of Cave Rock Brethren Church v. Church of the Brethren*, No. 1802, 1976 Va. Cir. LEXIS 58 at 8-13, JA 4021, 4027-30 (Botetourt Co. June 30, 1976) (Stephenson, J.); *see also* JA 4012, 4015 (*Green v. Lewis* pleadings, citing § 57-9).

III. Under modern Virginia law, property may be held in trust for a hierarchical church or denomination. (Assignment of Error 2.)

Ancient Virginia church property law, now repudiated, reflected religious biases. Lawmakers formerly sought both to restrict church power and to protect religious purity through property restrictions. *E.g.*, JA 4214-15, 4218, 4226-28; *Maguire v. Loyd*, 193 Va. 138, 149-50, 67 S.E.2d 885, 892-93 (1951) (quoting an 1832 case's discussion of the General Assembly's "hostility," "jealousy," and "fearful[ness]" with respect to religious incorporation and property and finding no doubt that the Assembly "intended to restrict" the power of churches). Anti-Catholic hostility also played a role. *See* JA 4217, 4227-28. Today, judicial decisions (such as *Falwell v. Miller*, 203 F.Supp.2d 624 (W.D. Va. 2002), invalidating the ban on church incorporation) and revisions to statutes (such as the repeal of Va. Code § 57-7 and enactment of Va. Code § 57-7.1) have returned Virginia much more nearly to the core constitutional principles of religious freedom advocated by our founding fathers Thomas Jefferson and James Madison. *See*, *e.g.*, JA 4223-24.

The former bias against hierarchical churches was reflected in § 57-7.1's predecessors, most recently Va. Code § 57-7, which this Court construed as not validating trusts for hierarchical churches. *See Norfolk Presbytery*, 214 Va. at 505-07, 201 S.E.2d at 757-58; *Moore v. Perkins*,

169 Va. 175, 180-81, 192 S.E. 806, 809 (1937); *Brooke v. Shacklett*, 54 Va. (13 Gratt.) 301, 313 (1856). Those former statutes provided that only conveyances of land for the use or benefit of any congregation or diocese, as a place for public worship or burials or for use as a residence for clergy, would be valid, "subject to the limitation of § 57-12." Va. Code § 57-7, quoted in *Norfolk Presbytery*, 214 Va. at 506 n.3, 201 S.E.2d at 757 n.3.[7]

In 1993 the General Assembly repealed § 57-7 and enacted § 57-7.1, sweeping away the reasons for that past construction. 1993 Va. Acts, ch. 370. In addition, since 1993, the General Assembly has enacted other legislation, a federal court has invalidated the Virginia Constitution's ban on church incorporation, and the people have amended the Constitution by deleting that provision – all demonstrating that Virginia's former bias against hierarchical churches, manifested in § 57-7, now is largely gone (save, sadly, for the Circuit Court's construction of §§ 57-7.1 and 57-9):

- The plain language of § 57-7.1 differs in important ways from that of the former § 57-7. *See* JA 1493-94. First, the uses of property authorized by § 57-7 were limited and local, such as "must belong peculiarly to the local society." *Brooke*, 54 Va. at 313. In contrast, § 57-7.1

[7] Section 57-12 "limit[ed] the amount of land which may lawfully be held by church trustees." *Norfolk Presbytery*, 214 Va. at 507, 201 S.E.2d at 758.

provides that "*[e]very* conveyance or transfer of real or personal property … made to or for the benefit of *any* church, *church diocese*, religious congregation or religious society … shall be valid." (Emphases added.) The former restrictions to particular uses – places for worship, burial, or ministers' or bishops' residences – are gone.

- Second, § 57-7 only validated trusts controlled by "local functionaries." *Moore*, 169 Va. at 180-81, 192 S.E. at 809. In contrast, § 57-7.1 provides that property conveyed for the benefit of a religious body without a specific statement of purpose "shall be used for the religious and benevolent purposes of the *church*, *church diocese*, religious congregation or religious society *as determined appropriate by the authorities which, under its rules or usages*, have charge of the administration of the temporalities thereof." (Emphases added.) Such authorities may be "'the general church, or a division thereof.'" *Green*, 221 Va. at 553, 272 S.E.2d at 184 (quoting *Norfolk Presbytery*).

- In *Norfolk Presbytery*, this Court found that the statutory limits on church property ownership in Code § 57-12, *see* n.7*, supra*, "evidence[d]" a "restrictive legislative intent" inconsistent with validation of trusts for non-local religious groups. 214 Va. at 507, 201 S.E.2d at 758. The General Assembly has since repealed § 57-12, 2003 Va. Acts, ch. 813, and now

there are no such limits, evidencing an intent to allow all religious trusts.

- When *Norfolk Presbytery* was decided, in 1974, the Constitution of Virginia "prohibited … incorporating any church or religious denomination." 214 Va. at 505, 201 S.E.2d at 757 (citations omitted). That prohibition was held unconstitutional in *Falwell v. Miller*, 203 F.Supp.2d 624, 632 (W.D. Va. 2002). In response and, in the General Assembly's own words, "to modernize laws governing churches," the General Assembly enacted Va. Code § 57-16.1, which specifically allows incorporation of churches and explicitly defers to a church's "laws, rules, or ecclesiastic polity." 2005 Va. Acts, ch. 928 (p.1734); *see id.*, ch. 772. In 2006, the people of Virginia voted to amend the Constitution to delete the ban on incorporation.

Virginia law, in short, has been dramatically transformed since this Court last visited the issue of trusts for hierarchical churches, in *Norfolk Presbytery*. Section 57-7.1 now specifically validates such trusts.

The Congregations argued below that because 1993 Va. Acts, ch. 370, which enacted § 57-7.1 and repealed § 57-7, stated that it was "declaratory of existing law," § 57-7.1 also validates only trusts for local churches.[8] That is erroneous. The plain meaning of § 57-7.1 (unlike § 57-7) validates trusts for any religious entity, and courts must hew to that

[8] The Circuit Court noted that language without comment. JA 4181 n.12.

meaning. *See*, *e.g.*, *Woods v. Mendez*, 265 Va. 68, 75, 574 S.E.2d 263, 267 (2003). Further, "declaratory of existing law" does not necessarily mean that prior case law was correct; rather, it signals a clarification. *See* BLACK'S LAW DICTIONARY 1543 (9th ed. 2009) (a "declaratory statute" is "[a] law enacted to clarify prior law by reconciling conflicting judicial decisions or by explaining the meaning of a prior statute"); *Bryson on Virginia Civil Procedure* § 12.02 n.14 (4th ed. 2005) (1992 Va. Acts, ch. 564 – which was "declaratory of existing law" – was enacted "to clarify the law in the light of Lee v. Lee," 12 Va. App. 512, 404 S.E.2d 736 (1991); in fact, ch. 564 effectively overruled *Lee v. Lee*). Here, the clarification suggests that the prior statute was incorrectly limited.[9]

Even aside from these many developments since *Norfolk Presbytery* was decided in 1974, constitutional law requires that trusts for hierarchical churches be held valid on an equal basis with trusts for local congregations

[9] The Circuit Court read the statement in *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.*, 249 Va. 144, 152, 452 S.E.2d 847, 851 (1995), that "Code § 57-7.1 validates transfers, including transfers of real property, for the benefit of local religious organizations," as construing § 57-7.1 identically to § 57-7. JA 4181. That sentence states one thing that § 57-7.1 *does*; it does not express § 57-7.1's *limits*. *Asbury* does not address whether § 57-7.1 *also* validates trusts for non-local religious entities, such as "church diocese[s]," in accordance with its plain meaning. The meaning of § 57-7.1 and its application to non-local religious entities was not at issue in *Asbury*, as the lack of citations to § 57-7.1 or *Norfolk Presbytery* in the briefs in *Asbury* (*see* JA 4715-4877) shows.

and congregational churches. Article I, § 16 of the Virginia Constitution provides that "the General Assembly shall not … confer any peculiar privileges or advantages on any sect or denomination." *See also*, *e.g.*, *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) ("the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion'"); § V, *infra*.

Predecessors to § 57-7.1 denied hierarchical churches a right granted to other kinds of religious entities and to comparable secular institutions – the right to hold property in trust. Such discrimination is unconstitutional, and a construction of a statute that raises such questions should be avoided. *See*, *e.g.*, *Clark v. Martinez*, 543 U.S. 371, 380-82 (2005); *Va. Society for Human Life, Inc. v. Caldwell*, 256 Va. 151, 156-57 & n.3, 500 S.E.2d 814, 816-17 & n.3 (1998). "[A] finding of ambiguity is not a prerequisite" for application of the constitutional avoidance rule. "To the contrary, we may construe the plain language of a statute to have limited application if such a construction will tailor the statute to a constitutional fit." *Id*. at 157 n.3, 500 S.E.2d at 817 n.3. The Circuit Court rejected this argument without explanation. *See* JA 4180-82. That was error.[10]

[10] "[T]he General Assembly is presumed to have knowledge of decisions of the United States Supreme Court on constitutional issues that bind

(footnote continued)

IV. The Circuit Court erred as a matter of law by holding that the requirements of Va. Code § 57-9(A) were satisfied in these cases. (Assignment of Error 3.)

The Anglican Communion is not "a church or religious society, to which any such congregation … is attached." Va. Code § 57-9(A). The Anglican Communion is a fellowship of 38 autonomous regional and national churches. Its membership does not include congregations, and it has no power to control member churches or their congregational subparts. *See* pages 10-11, *supra*. Section 57-9(A) therefore does not apply to it.[11]

As applied to TEC and the Diocese, the Circuit Court's interpretation treats the separation of a small minority that form or join an alternative polity as a "division," ignoring the Church's hierarchical polity and rules and vesting control solely in local majorities. That interpretation cannot be reconciled with modern Virginia church property case law and statutes,

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actions of the states when enacting statutes that potentially invoke such issues." *Va. Soc'y for Human Life*, 256 Va. at 157, 500 S.E.2d at 817. This bolsters the argument for construing §§ 57-7.1 and 57-9(A) so as to avoid violating the Religion Clauses of the Virginia and Federal Constitutions.

[11] *See Norfolk Presbytery*, 214 Va. at 502, 201 S.E.2d at 755 (construing § 57-9(A) as applying to "super-congregational or hierarchical denomination[s]"); *Baber v. Caldwell*, 207 Va. at 698, 152 S.E.2d at 26 (explaining that § 57-9's first sentence, now § 57-9(A), "relates to churches, such as Episcopal and Presbyterian churches, that are *subject to control* by super-congregational bodies") (emphasis added). "Religious society" does not negate the control requirement; it apparently was used as a synonym for "church" out of respect for groups such as Society of Friends (or "Quakers") who object to being called "churches." *See* JA 2660, 2661-62.

which distinguish between congregational and hierarchical churches and consider churches' rules and polity.[12] *See City of Virginia Beach v. Board of Supervisors*, 246 Va. 233, 236-37, 435 S.E.2d 382, 384 (1993) (in determining the ordinary meaning of words in a statute, courts should consider "the context in which they are used," which includes "the language of other statutes" – such as §§ 57-7.1, 57-15 and 57-16.1 – "dealing with closely related subjects"); *Tobacco Growers' Co-op. Ass'n v. Danville Warehouse Co.*, 144 Va. 456, 466, 132 S.E. 482, 485 (1926). The Circuit Court's interpretation also raises grave constitutional questions, at best (*see* § V, *infra*), and therefore it should be avoided. *E.g.*, *Va. Society for Human Life*, 256 Va. at 156-57 & n.3, 500 S.E.2d at 816-17 & n.3.

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[12] *See Reid v. Gholson*, 229 Va. at 188-89, 327 S.E.2d at 112-13 (emphasizing the distinctions between congregational and hierarchical churches); *Green*, 221 Va. at 553, 272 S.E.2d at 184 (§ 57-9 exemplifies such distinctions "where a determination of property rights is involved"); *Norfolk Presbytery*, 214 Va. at 503, 201 S.E.2d at 755 ("In the case of a super-congregational church … § 57-15 requires a showing that the property conveyance is the wish of the constituted authorities of the general church"); *Diocese of Sw. Va. of the Protestant Episcopal Church v. Buhrman*, 5 Va. Cir. 497, 502 (Clifton Forge 1977) (Stephenson, J.) ("the will of a majority within the local church or parish does not decide property rights" in a hierarchical church), *pet. refused*, Rec. No. 780347 (Va. June 15, 1978); Code § 57-7.1 (if a conveyance does not state a purpose, the proper authorities "under [the church's] rules or usages" determine the property's use); Code § 57-16 (a church's "laws, rules, or ecclesiastic polity" determine when church officials may acquire, hold, or transfer church property); Code § 57-16.1 (church corporations may act only in accordance with "the laws, rules, or ecclesiastic polity of the church").

The Circuit Court's interpretation also puts civil courts in the constitutionally untenable position of dissecting correspondence between religious leaders, applying pastoral acts and resolutions against hierarchical churches in subsequent property disputes, and relying on theological concepts like "walking the way of the Cross together, but apart" and the "impair[ment]" and status of the "fabric" or "bonds" of "communion," in finding a "division." *See*, *e.g.*, JA 2637-39, 3859, 3867-70, 3873-81, 3884, 3886; *Board of Mgrs. v. Church of the Holy Comforter*, 628 N.Y.S.2d 471, 475 (S.Ct. 1993), *aff'd mem.* (on opinion below), 623 N.Y.S.2d 146 (App. Div. 1995) ("the phrase 'in communion with' is an ecclesiastical and religious term and has no legal or secular meaning").

The Circuit Court reasoned that TEC, the Diocese, CANA, ADV, and the Church of Nigeria are "joined together" by "common membership in the Anglican Communion," by "adherence to that historical strand of Christianity known as Anglicanism, and by their shared desire to be a part of that particular branch of Christianity whose adherents call themselves Anglicans." JA 3934. That analysis again depends on "reference to questions of faith and doctrine" and thus plunges into "the 'religious thicket,'" which is constitutionally forbidden. *Reid v. Gholson*, 229 Va. at 187, 189, 327 S.E.2d at 112, 113 (quoting *Serbian Eastern Orthodox*

Diocese v. Milivojevich, 426 U.S. 696, 719 (1976).[13]

The court also erred by holding that CANA and ADV are "branches" of TEC and the Diocese. The court defined "branch" as "'a part of a complex body ….'" JA 3933. There is no such relationship between CANA and ADV, which are part of the Church of Nigeria, and TEC or the Diocese. Unless all churches are "branches" of each other, a group's decision to join a different church does not make it a branch of the group's former church.

V. Va. Code § 57-9(A), as construed by the Circuit Court, violates the Religion Clauses of the Virginia and United States Constitutions. (Assignment of Error 4.)

A. As construed by the Circuit Court, § 57-9(A) violates the Free Exercise rights of hierarchical churches to self-governance.

The First Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment, *Everson v. Board of Education*, 330 U.S. 1, 8 (1947), states that "Congress shall make no law … prohibiting the free exercise [of religion]." Article I, § 16 of the Constitution of Virginia provides, similarly, that "all men are equally entitled

[13] Indeed, the hazards of entering the religious thicket are further underscored by the Circuit Court's ignoring uncontradicted evidence that Anglicans organize by geographical boundaries, that groups such as CANA violate Anglican doctrine and traditions, and that the Archbishop of Canterbury and other Anglican authorities have not recognized CANA as part of the Communion. *See*, *e.g.*, JA 2206-10, 2541-42, 2545-46, 2641-42, 2800-01, 2901, 2941, 2956; *see also* JA 2232-33.

to the free exercise of religion, according to the dictates of conscience …."

The Circuit Court's application of § 57-9 effectively restructures the Church, allowing congregations unilaterally to "divide" the Church and the Diocese and to divest them of their interests, in violation of these bedrock constitutional principles. The statute should be construed to avoid such constitutional impediments. Alternatively, it must be held unconstitutional.[14]

"[R]eligious freedom encompasses the 'power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Serbian*, 426 U.S. at 721-22 (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)). Indeed, church governance *is* a doctrinal matter. *E.g.*, *Reid v. Gholson*, 229 Va. at 189, 327 S.E.2d at 113 (citing *Serbian*, 426 U.S. at 724-25, and *Green v. Lewis*). And under the Religion Clauses of the

[14] The only statutes similar to § 57-9(A) were struck down years ago. *See Sustar v. Williams*, 263 So.2d 537 (Miss. 1972) (invalidating a statute that allowed a two-thirds majority of local beneficiaries to obtain "complete control and authority" over trust property where a court found "a deep-seated and irreconcilable hostility or tension" between the local beneficiaries and church authorities); *Goodson v. Northside Bible Church*, 261 F.Supp. 99 (S.D. Ala. 1966) (invalidating a statute that allowed a 65% majority of a local church "in disagreement" with a general church to sever the connection and take local church property), *aff'd*, 387 F.2d 534 (5th Cir. 1967) (cited with approval in *Maryland and Virginia Eldership v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 370 n.5 (1970) (Brennan J., concurring)); *First Methodist Church of Union Springs v. Scott*, 226 So.2d 632 (Ala. 1969) (also invalidating the statute struck down in *Goodson*).

Virginia and Federal Constitutions, "issues of church governance … are unquestionably outside the jurisdiction of the civil courts." *Bowie v. Murphy*, 271 Va. 126, 133, 624 S.E.2d 74, 78 (2006).[15] *See also*, *e.g.*, *Kedroff*, 344 U.S. at 107 (legislation transferring control of church property from one hierarchy to another violates the Free Exercise Clause).[16]

TEC's and the Diocese's Constitutions and Canons – the laws of the church – provide that parishes are part of and bound to their local diocese and the Church. JA 1274; *see* JA 2800-01, 955. Parishes are bound by the Constitution and Canons, the "discipline" of the Church. JA 1274; *see* JA 2230-32, 2337-39, 2666, 2792-93. Clergy and members of vestries must take oaths to uphold and abide by the laws of the church. *See* n.5, *supra*. The Congregations' own governing documents, prior to their secession plans, recognized the Church's rules. *Id. See also Reid*, 229 Va. at 188-89, 327 S.E.2d at 113 (hierarchical churches "establish their

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[15] The Constitution allows civil courts to resolve church property disputes, "provided that the decision does not depend on inquiry into questions of faith or doctrine." *Norfolk Presbytery*, 214 Va. at 503, 201 S.E.2d at 755.

[16] In *Kedroff* the Court "held that the right conferred under canon law … to the use and occupancy of the St. Nicholas Cathedral in New York City … was 'strictly a matter of ecclesiastical government,' and as such could not constitutionally be impaired by a state statute … purporting to bestow that right on another." *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 190-91 (1960) (*per curiam*). *Kreshik* in turn held that the courts could not impair such rights by application of state common law.

own rules for discipline and internal government," and "[o]ne who becomes a member of such a church, by subscribing to its discipline and beliefs, accepts its internal rules"); *Brooke*, 54 Va. at 320 (membership in a church necessarily entails "a profession of its faith and a submission to its government").

Numerous canonical provisions confirm the interests of the Diocese in local church properties. TEC's Canon II.6(1) requires consecrated real property (property dedicated for worship and other ministry) to be "secured for ownership and use by a Parish, Mission, Congregation, or Institution affiliated with this Church and subject to its Constitution and Canons"; and TEC Canon II.6(2) provides that a parish may not alienate or encumber any consecrated property without the consent of the Diocese. JA 967. Diocesan Canons 14 and 15.2 require Diocesan approval for certain indebtedness and property actions. JA 1290. Diocesan Canon 15.1 provides that "[a]ll real and personal property held by or for the benefit of any Church or Mission … is held in trust for The Episcopal Church and the Diocese." *Id.* TEC Canon I.7(4) (the "Dennis Canon") is similar. JA 946.[17]

[17] Each of the Congregations either participated in the enactment of the Diocese's canons or was formed after they were in effect. *See* JA 1269, 1275-76 (each congregation votes in the Diocese's Annual Council). None of the Congregations objected in any way to any of the Diocese's or TEC's

(footnote continued)

The notion that a congregational majority may remove a parish from the Church and take parish property is contrary to the Church's rules – rules by which the Congregations agreed to be governed, and which constitute an enforceable contract. *See Wallace v. Hughes*, 115 S.W. 684, 691 (Ky. 1909) ("religious organizations are merely voluntary associations, whose constitutions and laws are in their ultimate result, so far as civil tribunals are concerned, in the nature of contracts between the members"); n.26, *infra*. A state may not enact a statute that imposes rules on churches, and only churches, that override the churches' own rules and the contractual agreements that they embody. "Each person's right to believe as he wishes and to practice that belief according to the dictates of his conscience … is fundamental to our system," and "[t]his basic freedom is guaranteed not only to individuals but also to churches in their collective capacities." *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

The right of individuals to worship as they choose includes, and indeed it depends upon, the ability to establish or join a hierarchical church

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canons before they began to move toward secession. *Cf.*, *e.g.*, *In re Church of St. James the Less*, 833 A.2d 319, 324-25 (Pa. Commw. Ct. 2003), *aff'd in relevant part*, 888 A.2d 795 (Pa. 2005) (ruling in favor of the Episcopal Church where the congregation "waited twenty years after the adoption of the Dennis Canon to take action inconsistent with it").

and know that local majorities will not be able to subvert its rules. *See Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 341 (1987) (Brennan, J., concurring) ("'Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] [C]lause'") (citation omitted; bracketed alterations in Justice Brennan's opinion); *Episcopal Church Cases*, 198 P.3d 66, 82 (Cal. 2009) ("Respect for the First Amendment free exercise rights of persons to enter into a religious association of their choice ... requires civil courts to give effect to the provisions and agreements of that religious association").

TEC enacted the "Dennis Canon" in direct response to an invitation extended in *Jones v. Wolf*, 443 U.S. 595 (1979).[18] The Supreme Court held in *Jones* that civil courts, consistent with the First and Fourteenth Amendments, may resolve church property disputes on the basis of

[18] *See*, *e.g.*, *Episcopal Diocese of Massachusetts v. Devine*, 797 N.E.2d 916, 923 n.20 (Mass. App.), *review denied*, 801 N.E.2d 803 (Mass. 2003). The "Dennis Canon" did not establish a new principle of Episcopal polity. It "'merely codified in explicit terms'" – terms suggested by *Jones v. Wolf* – a trust relationship that was already a part of its polity. *In re Church of St. James the Less*, 888 A.2d 795, 810 (Pa. 2005) (quoting *Rector, Wardens & Vestrymen v. Episcopal Church*, 620 A.2d 1280, 1292 (Conn. 1993)); *accord*, *Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville*, 684 N.Y.S.2d 76, 81 (App. Div. 1999); *Episcopal Diocese v. Devine*, 797 N.E.2d at 923-25 & nn.20-21, and cases cited therein.

"neutral principles of law." *Id*. at 604. Four dissenting Justices argued that "whenever a dispute arises over the ownership of church property, civil courts must defer to the 'authoritative resolution of the dispute within the church itself,'" to protect constitutionally-guaranteed free exercise rights. *Id*. at 604-05 (quoting the dissent, *id*. at 614); *see id*. at 605-06 (quoting the dissent, *id*. at 618).[19] The Court responded to that argument as follows:

> The neutral-principles approach cannot be said to "inhibit" the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods. Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. *At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property*. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, *the constitution of the general church can be made to recite an express trust in favor of the denominational church*. The burden involved in taking such steps will be minimal. And *the civil courts will be bound to give effect to the result* indicated by the parties, provided it is embodied in some legally cognizable form.

Id. at 606 (emphases added). *Accord*, *id*. at 607-08. A church's ability to overcome a "rule of majority representation," *id*. at 607, and "ensure … that the faction loyal to the hierarchical church will retain the church property,"

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[19] "Normally, the dissent would not be of great significance …. But the majority responded," and "[t]he dissent is important to give context and meaning to [that] response." *Episcopal Church Cases*, 198 P.3d at 79-80.

id. at 606, by amending its governing documents, thus was essential to the Court's conclusion that application of a "neutral principles" rule would not violate the First Amendment. To hold that church property disputes will be governed by "neutral principles," on the one hand, but that § 57-9's "rule of majority representation" *cannot* be overcome by provisions such as the canon laws described above, on the other, would be to defy the Court's holding that "the civil courts will be bound to give effect" to such provisions and to eviscerate the basis for the holding that the neutral principles approach does not "'inhibit' the free exercise of religion."

The Circuit Court held that its construction of § 57-9 did not violate the First Amendment because the statute provides an "'escape hatch'" – it allows a hierarchical church to protect its property interests by requiring that all property be conveyed to and held by the bishop under Va. Code § 57-16. JA 4150-52. There are numerous flaws in that holding:

(1) Virginia has no conceivable interest in creating traps for churches, from which they need means of "escape." States are supposed to stay out of church life. The notion that the Commonwealth may impose any rule on churches, so long as it allows some possibility that the church can reorder its affairs and "escape," is anathema to religious freedom.

(2) Diocesan Canon 15.1 requires the vestry (governing body) of

each church to "elect Trustees … to hold title" to real and personal property. A State may not tell a church how to hold title to properties dedicated to religious uses – a matter in which churches are vitally interested and in which the State has no legitimate interest at all – on pain of risking the loss of those properties if it adopts another method of its own choosing. To do so would violate the doctrine of unconstitutional conditions. *See*, *e.g.*, *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674-75 (1996); *Sherbert v. Verner*, 374 U.S. 398, 403-06 (1963).

(3) At all levels of its polity, lay involvement in governance is a feature that distinguishes TEC (even from other Anglican churches). *See, e.g.*, JA 911-12, 913, 914-15, 922, 934-35, 938, 946, 955, 956, 967, 968, 1021, 1273, 1275-76, 1278-79, 1282-88, 1290. The Diocesan Canons' trustees requirement accommodates that principle. The "escape hatch" theory would require the Diocese either to remove property authority from lay persons or somehow to restructure its polity to preserve lay involvement. A State may not force a church to rearrange authority within the church. *See*, *e.g.*, *Kedroff*, 344 U.S. at 119.

(4) The Circuit Court's "'escape hatch'" rationale ignores the practical and religious burden imposed on churches, and the resulting disruption, in requiring hundreds of congregations to instruct their trustees to convey

property to Diocesan authorities. Such a mandate would breed suspicion and resentment, disturbing the peace of the Church, distracting it from its mission and reducing its ability to promote its faith and doctrine. *Cf*. *Presbyterian Church v. Hull Church*, 393 U.S. at 449 (explaining that it is "[b]ecause of th[e] hazards" of "inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern" that the First Amendment "commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine"). Further, the supposed "escape hatch" is illusory; as interpreted below, § 57-9 invites congregations to assert that statute rather than comply with such a directive (or any other denominational requirement).

(5) The court ignored the fact that until 2005, when the "division" was well under way (*see* JA 3859), § 57-9(A) was not limited to property "held by trustees," meaning that the "escape hatch" was not available.

(6) Perhaps most importantly, the Circuit Court's holding treats *Jones v. Wolf* as a constitutional "bait and switch." The Supreme Court held, specifically and explicitly, that if "the constitution of the general church [is] made to recite an express trust in favor of the denominational church…. the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form." 443 U.S.

at 606.[20] The Circuit Court dismissed that holding as "simply provid[ing] suggestions as to ways in which a State might allow a hierarchical church to overcome a presumption of majority rule." JA 4144-45.[21] The Diocese and the Church did just as the Supreme Court said – they amended their governing documents, long before the current dispute erupted, "to recite an express trust in favor of the denominational church." Those amendments and the ruling in *Jones v. Wolf* mandate a judgment in their favor, as numerous other courts have concluded.[22]

The Free Exercise Clause requires that "special statutes governing

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[20] The Congregations argued below that trust provisions in a church's governing documents are not "embodied in [a] legally cognizable form." *Jones v. Wolf* does not permit that conclusion. *See* 443 U.S. at 607-08 ("any rule of majority representation can always be overcome, under the neutral-principles approach … by providing, in … the constitution of the general church … that the church property is held in trust for the general church and those who remain loyal to it"). It is only documents that require "'inquiry into religious doctrine'" that are not "legally cognizable." *See id*. at 603 (quoting *Maryland and Virginia Eldership*); *id*. at 604 (citing *Serbian* and *Presbyterian Church v. Hull Church*).

[21] The Circuit Court also erred by applying a portion of the *Jones* opinion that dealt *only* with "the identity of the local church," 443 U.S. at 607 – the only issue to which the "presumption of majority rule" properly applies – to the separate issue of ownership of property held by local congregations.

[22] *See Episcopal Church Cases*, 198 P.3d 66, 82 (Cal. 2009), and cases cited; *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920 (N.Y. 2008); cases cited in n.18, *supra*. *Cf*. *First Presbyterian Church v. United Presbyterian Church*, 464 N.E.2d 454, 460 (N.Y. 1984) (the neutral principles approach "provides predictability so that religious organizations may order their affairs to account for its application").

church property arrangements …. be carefully drawn to leave control of ecclesiastical polity, as well as doctrine, to church governing bodies." *Maryland and Virginia Eldership v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 370 (1970) (Brennan, J., concurring). *See also*, *e.g.*, *Serbian*, 426 U.S. at 721-22, quoting *Kedroff*, 344 U.S. at 116: "religious freedom encompasses the 'power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine'"; *Reid v. Gholson*, 229 Va. at 189, 327 S.E.2d at 113:

> [T]he civil courts will treat a decision by a governing body or internal tribunal of an hierarchical church as an ecclesiastical determination constitutionally immune from judicial review. To do otherwise would precipitate the civil court into the "religious thicket" of reviewing questions of faith and doctrine even when the issue is merely one of internal governance, because in such churches the resolution of internal government disputes depends upon matters of faith and doctrine.

Section 57-9(A), as interpreted by the Circuit Court, imposes a principle of congregational governance – local majority control – on hierarchical churches. *See*, *e.g.*, *id*. at 188-89, 327 S.E.2d at 113 ("Hierarchical churches may, and customarily do, establish their own rules for discipline and internal government.... Congregational churches, on the other hand, are governed by the will of the majority"); *Wisconsin Conf. Bd. of Trustees v. Culver*, 627 N.W.2d 469, 476 n.8 (Wis. 2001) ("deference to the majority is a concept appropriate for a case involving a church with a

congregational, rather than a hierarchical, polity"). "[I]t is not a function of civil government under our constitutional system to assure rule to any religious body by a counting of heads." *Kedroff*, 344 U.S. at 122 (Frankfurter, J., concurring). Section 57-9(A), as interpreted by the court below, overrides the Church's own clear, well-established property rules, as discussed above. In so doing, it also violates the churches' right "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Serbian*, 426 U.S. at 722.

These arguments have even greater force under the religious liberty provisions of Virginia's Constitution. Federal precedents may be "helpful" in interpreting Article I, § 16 (*e.g.*, *Habel v. Industrial Development Authority*, 241 Va. 96, 100, 400 S.E.2d 516, 518 (1991)); but interpretation of Article I, § 16 should not be restricted by federal court interpretations of the First Amendment. The drafters of Virginia's Constitution emphasized the importance of our Bill of Rights as an independent bulwark of freedom:

> That most of the provisions of the Virginia Bill of Rights have their parallel in the Federal Bill of Rights is, in the judgment of the Commission, no good reason not to look first to Virginia's Constitution for the safeguards of the fundamental rights of Virginians. The Commission believes that the Virginia Bill of Rights should be a living and operating instrument of government and should, by stating the basic safeguards of the people's liberties, minimize the occasion for Virginians to resort to the Federal Constitution and the federal courts.

Commission on Constitutional Revision, *The Constitution of Virginia* 86 (1969). This Court has quoted that passage in endorsing the principle that the Virginia Constitution should be an independent source of constitutional decisions. *Richmond Newspapers v. Commonwealth*, 222 Va. 574, 588, 281 S.E.2d 915, 922-23 (1981). *See* I Howard, *Commentaries on the Constitution of Virginia* 303 (1974) (hereinafter Howard, *Commentaries*):

> So many of the milestones of religious liberty, such as Jefferson's Bill for Religious Liberties and Madison's Memorial and Remonstrance, have sprung from Virginian sources that it is not surprising if the Virginia courts see Virginia's religious guarantees as having a vitality independent of the Federal Constitution.

Independent interpretation of the free exercise and anti-establishment provisions of Article I, § 16 is particularly appropriate given that those provisions of the Virginia Constitution were in place before the federal Constitution and Bill of Rights were even adopted.[23] *Cf*. *Reid*, 229 Va. at 187, 327 S.E.2d at 111 ("The constitutional guarantees of religious freedom have no deeper roots than in Virginia, where they originated …").

Freedom of religion includes the right to join a hierarchical church and

[23] James Madison proposed the free exercise language included in Virginia's first Constitution in 1776. Thomas Jefferson drafted the Bill for Establishing Religious Freedom, which was enacted as a statute in 1786 and is now part of Article I, Section 16 of the Constitution of Virginia. *See, e.g.*, Commission on Constitutional Revision, *The Constitution of Virginia* 100-01 (1969); Howard, *Commentaries* 290, 292.

be governed by its rules. Section 57-9(A), as construed below, violates that fundamental constitutional right.

B. As construed by the Circuit Court, § 57-9(A) violates the principle of governmental neutrality toward religion.

The principle of governmental neutrality toward religion is embodied both in the Free Exercise and Establishment Clauses of the Virginia Constitution and in their Federal counterparts. *See*, *e.g.*, *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (Free Exercise); *Larson v. Valente*, 456 U.S. 228 (1982) (Establishment).[24] Article I, § 16 of the Constitution of Virginia states explicitly that the General Assembly shall not "confer any peculiar privileges or advantages on any sect or denomination."

That "government should not prefer one religion to another" is "a principle at the heart of the Establishment Clause." *Board of Education v. Grumet*, 512 U.S. 687, 703 (1994). *Accord*, *e.g.*, *McCreary County*, 545 U.S. at 860 ("The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion'") (citations omitted). *Cf*.

[24] The Establishment Clause mandates governmental neutrality toward religion, and the Free Exercise Clause enforces neutrality by forbidding governmental actions that burden only religion. *See, e.g.*, *Falwell v. Miller*, 203 F.Supp.2d at 631 n.6 (invalidating Virginia's church incorporation ban, a burden based on "religious *status*"). Section 57-9(A) applies to, and imposes burdens on, only certain religious groups.

Brooke, 54 Va. at 317-18 (denouncing the idea that the General Assembly acted with "the design of making a most unjust and invidious discrimination" against congregations whose ministers are assigned by hierarchical bodies "and in favor of those who have the selection of their own pastors").

Section 57-9(A), as interpreted below, violates this constitutional principle. It discriminates (1) among hierarchical churches based on whether they hold property by trustees;[25] (2) between hierarchical and congregational churches that hold property by trustees; and (3) between secular organizations and hierarchical churches that hold property by trustees. Hierarchical churches that have chosen not to hold property by trustees (such as the Roman Catholic Church) are not burdened by § 57-9; they are able to retain property and enforce their canon laws when local majorities leave the church. Congregational churches (such as Baptists) likewise suffer no interference with their own rules; § 57-9(B) incorporates basic principles of congregational polity by looking to congregational majorities in congregational disputes. Secular organizations are governed by their own rules, which are enforceable as contracts between

[25] The parties stipulated that hierarchical churches in Virginia hold property by a variety of means, including in the name of trustees, in the congregation's corporate name, in the name of a bishop of the Diocese, and in the name of the mother church or its Presiding Bishop. JA 3842-44.

organizations and their members.[26] But hierarchical churches that hold property by trustees are singled out by § 57-9 for disparate treatment.

Section 57-9(A) also is not a neutral statute of general applicability within the meaning of *Employment Division v. Smith*, 494 U.S. 872 (1990). Like Virginia's prohibition on church incorporation, which was invalidated by *Falwell*, 203 F.Supp.2d 624, it "lacks facial neutrality" because it "has no meaning within the secular context" and "distinguishes churches and religious denominations from other groups in the broader context of Virginia law." *Id*. at 630. It imposes burdens only on hierarchical churches with certain polities and rules, which are matters of "internal governance" that "depen[d] upon matters of faith and doctrine." *Reid v. Gholson*, 229 Va. at 189, 327 S.E.2d at 113. The Commonwealth may not selectively impose such burdens. *See*, *e.g.*, *Lukumi*, 508 U.S. at 543: "The principle that government, in pursuit of legitimate interests, cannot in a selective manner

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[26] *See*, *e.g.*, *Unit Owners Ass'n v. Gillman*, 223 Va. 752, 766, 292 S.E.2d 378, 385 (1982); *Gottlieb v. Economy Stores, Inc.*, 199 Va. 848, 856, 102 S.E.2d 345, 351 (1958) ("The constitution and by-laws adopted by a voluntary association constitute a contract between the members, which, if not immoral or contrary to public policy, or the law, will be enforced by the courts"); 6 AM.JUR.2D, *Associations and Clubs* § 21 (2007) ("it is generally held that the constitution and bylaws of an association constitute the contract between the members and the association and govern and limit the rights and liabilities of both members and association") (footnotes omitted); *Liggett v. Koivunen*, 34 N.W.2d 345, 350 (Minn. 1948) (citing cases).

impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause."

In *Larson v. Valente*, 456 U.S. 228 (1982), the U.S. Supreme Court invalidated a part of a statute that required charitable organizations to register with the State and file "extensive annual report[s]" but exempted religious groups that received more than half of their total contributions from members or affiliates (the "fifty per cent rule"). The Court held the fifty per cent rule invalid as discriminating among religious groups.

The *Larson* Court began with the proposition that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id*. at 244. "[W]hen we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Id*. at 246. It held that "[t]he fifty per cent rule … clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents." *Id*. That law was "not simply a facially neutral statute, the provisions of which happen to have a 'disparate impact' upon different religious organizations. On the contrary," the statute made "explicit and deliberate distinctions between different religious organizations." *Id*. at 247 n.23.

That holding in *Larson* describes § 57-9(A), as interpreted by the Circuit Court. Section 57-9(A), so interpreted, likewise "grants denominational preferences" and makes "explicit and deliberate distinctions between different religious organizations." It discriminates among religious groups based on methods of holding property, just as the statute invalidated in *Larson* discriminated based on sources of property.

The Attorney General's Office has identified yet another denominational preference in § 57-9(A), which further demonstrates that the statute is constitutionally infirm. *See* JA 3850:

> [Section 57-9(A)] provides protection only in the event that the congregation wants to join a branch of the same denomination. There is no statutory option if the congregation desires to join a different denomination or to become independent. Consequently, the law as it stands gives an incentive for one choice only – joining a branch of the original denomination – while giving a disincentive for the other choices – joining another denomination or becoming independent.[27]

A court therefore must "tur[n] to a strict scrutiny analysis, an exercise which usually sounds the death knell for constitutionally suspect laws." *Falwell*, 203 F.Supp.2d at 631. Under that standard, a statute "must be invalidated unless it is justified by a compelling governmental interest …

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[27] Senator Mims, who is now the Attorney General, agreed that § 57-9 has "constitutional deficiencies." JA 3849.

and unless it is closely fitted to further that interest." *Larson*, 456 U.S. at 247. It "must advance governmental 'interests of the highest order,' *and* must be narrowly tailored in pursuit of those interests." *Falwell*, 203 F.Supp.2d at 631, quoting *Lukumi*, 508 U.S. at 546.

There is no governmental interest, much less one "of the highest order," in imposing local majority rule only on hierarchical churches that hold property by trustees, nor in inducing separating congregations to join only a branch of the same denomination. Indeed, the essence of religious freedom is that the State must stay out of such matters. Nor is § 57-9(A) narrowly tailored. It affects not only churches that have no applicable internal rules or in which local majority decision-making is consistent with the church's polity, but also churches (such as the Diocese and TEC) that do have such rules and in which local majorities alone do not make property decisions. It cannot withstand strict scrutiny.

C. As construed by the Circuit Court, § 57-9(A) violates the United States Supreme Court's three-part Establishment Clause test.

In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), the Supreme Court distilled from its precedents the following test for statutes challenged under the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion …; finally, the statute must not foster

'an excessive government entanglement with religion.'" (Citations omitted).[28] Section 57-9(A) fails that test.

First, the Circuit Court found as a matter of fact, based on the Congregations' own evidence, that § 57-9(A) "appears to reflect a [legislative] determination … to protect the voting rights of any local congregation which is subject to a hierarchical church's constitution or canons." JA 3903; *see* JA 3911. That finding, by itself, dooms § 57-9(A). The Commonwealth has no legitimate interest in creating (or "protect[ing]") "voting rights" for congregations of hierarchically-governed churches or in overriding hierarchical churches' rules, just as it should not enact laws based on hostile or paternalistic feelings about religious institutions. *See* page 15, *supra*. Its only legitimate interest is to provide a forum for the peaceful resolution of disputes. *Jones*, 443 U.S. at 602; *see Corporation of the Presiding Bishop*, 483 U.S. at 335 ("*Lemon*'s 'purpose' requirement aims at

[28] The U.S. Supreme Court and this Court have continued to use that test. In *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), for example, Justice Scalia's concurrence lamented the Court's "invocation of the *Lemon* test," comparing it to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." *Id*. at 398. The six-justice majority responded that "Justice Scalia's evening at the cinema" did not address "the reality that there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled." *Id*. at 395 n.7. *See also*, *e.g.*, *McCreary County*, 545 U.S. at 859; *Virginia College Bldg. Auth. v. Lynn*, 260 Va. 608, 628, 538 S.E.2d 682, 692 (2000).

preventing the relevant governmental decisionmaker … from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters"). The finding below confirms that § 57-9(A) lacks a valid, secular purpose that is both "genuine … and not merely secondary to a religious objective." *McCreary County*, 545 U.S. at 864.

Second, the statute's "principal or primary effect" is to promote congregational majority control over church property, a principle of congregational church governance. The "neutral principles" approach of *Norfolk Presbytery* and *Green* provides an impartial way to determine whether a general church has rights and interests that are not subject to separatist congregations' will. Section 57-9(A) enacts an entirely one-sided rule of decision that gives denominational minorities that hold local majorities the power to override canon law, advancing local majorities' interests and overriding the trust, proprietary, and contractual interests of such groups as TEC, the Diocese, and local minorities of loyal Episcopalians. It is not "neutral," in any sense of the word.

Third, the trial and the court's findings of fact show that § 57-9(A) fosters excessive government entanglement with religion. The court heard testimony for five days regarding the nature of the Anglican Communion; the relationships among the Anglican Communion, the Episcopal Church,

the Diocese, the Church of Nigeria, the "American Arm of the Church of Uganda" (JA 3857), CANA, and the ADV; and their polities, practices, and governance. *See* JA 3892-95; page 23, *supra*. That "'searching and therefore impermissible inquiry into church polity,'" *Jones*, 443 U.S. at 605 (quoting *Serbian*, 426 U.S. at 723), was both intrusive and entangling.

The Circuit Court then found that CANA and the ADV share sufficient theological relationships, history, and beliefs with TEC and the Diocese to constitute "branches" of those bodies. JA 3933-34. That is an ecclesiastical judgment that a civil court cannot and should not make. *See*, *e.g.*, *Reid v. Gholson*, 229 Va. at 187, 327 S.E.2d at 112 ("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 the civil courts") (emphasis added). As the Attorney General's Office has stated, however, "a court decision over what is or is not a branch of an original denomination *necessarily* entangles government and religion." JA 3850 (emphasis added).

VI. The Circuit Court's errors in regard to "neutral principles" and trusts threaten further constitutional violations and simultaneously and improperly deny the Diocese the chance to establish such violations. (Assignment of Error 5.)

The Circuit Court created a legal Catch 22: on the very same day, it *both* dismissed the following constitutional arguments as *assuming* that the

Diocese has property interests *and* denied the Diocese any opportunity to finish establishing its interests. JA 4166, 4174-82. If the Diocese has property interests under the "neutral principles" approach, or if property is held in trust for the Diocese (*see* § III, *supra*), then application of § 57-9(A) as construed below takes those interests, without just compensation, in violation of both the Virginia and United States Constitutions. *E.g.*, *Hodel v. Irving*, 481 U.S. 704, 712-18 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 433 n.9 (1982) ("a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve" and "without regard to whether the State, or instead a party authorized by the State, is the occupant").[29]

The Virginia and United States Constitutions require both "due process" and "just compensation" for takings of property interests and allow takings only for a "public us[e]." VA. CONST., Art. I, § 11; U.S. CONST., Amendments V and XIV; *see Kelo v. City of New London*, 545 U.S. 469, 472 n.1 (2005) (the Fifth Amendment Takings Clause applies to the states).

[29] The Circuit Court's claim that the Diocese "*assume[d]*" a property interest (JA 4166, quoting Congregations' brief) is inexplicable. The Diocese sought – and was denied – the chance to finish *proving* its interests. *E.g.*, JA 3943 ("Once it is established that the Diocese ... ha[s] property interests … as will be done at the trial scheduled for October 2008, there can be no disputing the fact that application of § 57-9(A) would work a taking").

There is no public use (or "public purpose," *id*. at 480) in giving a general church's property rights to congregations. "'[O]ne person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.'" *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984) (citation omitted).

Article I, § 11 of the Constitution of Virginia imposes an even higher bar. Article I, § 11 prohibits "any law whereby private property shall be taken or damaged for public uses, without just compensation" and provides that "the term 'public uses' [is] to be defined by the General Assembly." That definition is provided in Va. Code § 1-219.1(A) (which is quoted in the Addendum). Transferring the Diocese's property interests to the Congregations, pursuant to § 57-9(A), cannot serve a "public use" within § 1-219.1(A). Applying § 57-9(A) therefore would violate Article I, § 11.

Such a "purely private taking" (*Midkiff*, 467 U.S. at 245) is beyond the Commonwealth's power and therefore also would violate the Fourteenth Amendment and Article I, § 11, which prohibit deprivations of property without due process of law. *See Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) (cited in *Kelo*, 545 U.S. at 477-78): "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law,

and is a violation of" the Fourteenth Amendment. *See also Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (quoted in, *e.g.*, *Kelo*, 545 U.S. at 478 n.5).

The Court should construe § 57-9(A) to avoid such constitutional problems. If it cannot, then it should hold that § 57-9(A) unconstitutionally divests the Diocese of its property interests. Alternatively, the Court should remand the case to allow the Diocese to finish addressing the *Green v. Lewis* factors and thereby to prove the constitutional violation.[30]

VII. The Circuit Court erred as a matter of law by holding that a prior order in a different case precluded consideration of challenges to deeds transferring the property of Christ the Redeemer Episcopal Church to Truro Church. (Assignment of Error 6.)

On September 29, 2006, the Circuit Court entered an order in a previous, *ex parte* proceeding, of which the Diocese had no notice, authorizing Christ the Redeemer Episcopal Church (CTR) to convey its property to Truro Church. JA 4655. The Circuit Court held in this case that Rule 1:1 bars the Diocese, which was not a party to the 2006 proceeding, from challenging the ensuing conveyances (to Truro Church, by a deed

[30] Three of the four "neutral principles" factors identified in *Green* – the deeds, the statutes, and the governing documents of the Church and the Diocese – are addressed in the record. *See* JA 910-1300, 1488-92. "[T]he dealings between the parties," 221 Va. at 555, 272 S.E.2d at 186, have not been fully tried; but sufficient evidence has been adduced – without contradiction – to show that the Diocese's canons are controlling. *See* pages 26-28 & nn. 5, 17, *supra*; JA 3629, 3635, 3638, 3722, 3724, 4309-16.

dated December 13, 2006, JA 4595-96, and to Truro Church's trustees by a "deed of correction" dated December 21, 2006, JA 4598-99). JA 4883.

That was error. Rule 1:1 applies only to "further proceedings within the very suit in which a final judgment has been entered." *Niklason v. Ramsey*, 233 Va. 161, 164, 353 S.E.2d 783, 785 (1987). If a new case arises, involving one or more different parties, Rule 1:1 does not apply, even if the later case "directly impact[s] upon" the case in which the previous final order was entered. *Id*. It therefore does not bar a showing that the 2006 conveyances were invalid.

CONCLUSION

The judgments for the Congregations should be reversed and final judgments entered for the Diocese, and the cases should be remanded for further proceedings on the Diocese's suits for declaratory judgments.

Respectfully submitted,

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CERTIFICATE

Pursuant to Va. Sup. Ct. Rule 5:27, I hereby certify that on this 21st day of December, 2009:

Fifteen printed copies of this brief and of the accompanying Joint Appendix have been transmitted by hand for filing in the office of the Clerk of this Court.

Fifteen electronic copies of this brief, in PDF and Word formats, and of the accompanying Joint Appendix, in PDF format, have been transmitted by hand for filing with the Clerk of this Court by hand, on CD.

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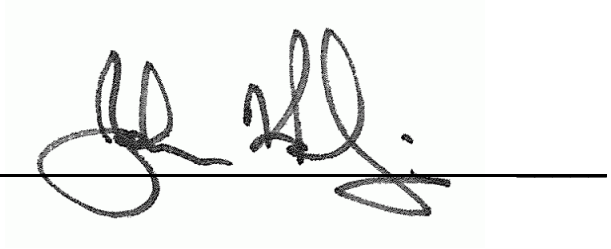

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ADDENDUM

STATUTES AND CONSTITUTIONAL PROVISIONS AT ISSUE IN THIS APPEAL

United States Constitution, Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Virginia Constitution, Art. I §§ 11, 16.

Section 11. Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases.

That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be

taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

Section 16. Free exercise of religion; no establishment of religion.

That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other. No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities. And the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please.

Va. Code § 1-219.1 (Limitations on eminent domain), subsection A.

The right to private property being a fundamental right, the General Assembly shall not pass any law whereby private property shall be taken or damaged for public uses without just compensation. The term "public uses" mentioned in Article I, Section 11 of the Constitution of Virginia is

hereby defined as to embrace only the acquisition of property where: (i) the property is taken for the possession, ownership, occupation, and enjoyment of property by the public or a public corporation; (ii) the property is taken for construction, maintenance, or operation of public facilities by public corporations or by private entities provided that there is a written agreement with a public corporation providing for use of the facility by the public; (iii) the property is taken for the creation or functioning of any public service corporation, public service company, or railroad; (iv) the property is taken for the provision of any authorized utility service by a government utility corporation; (v) the property is taken for the elimination of blight provided that the property itself is a blighted property; or (vi) the property taken is in a redevelopment or conservation area and is abandoned or the acquisition is needed to clear title where one of the owners agrees to such acquisition or the acquisition is by agreement of all the owners.

Va. Code § 57-7. What transfers for religious purposes valid. (Repl. Vol. 1969). (Repealed, 1993 Va. Acts, ch. 370)

Every conveyance, devise, or dedication shall be valid which, since the first day of January, seventeen hundred and seventy-seven, has been made, and every conveyance shall be valid which hereafter shall be made of land for the use or benefit of any religious congregation as a place for public worship, or as a burial place, or a residence for a minister, or for the use or benefit of any church diocese, church, or religious society, as a residence for a bishop or other minister or clergyman who, though not in special charge of a congregation, is yet an officer of such church diocese, church or religious society, and employed under its authority and about its business; and every conveyance shall be valid which may hereafter be made, or has heretofore been made, of land as a location for a parish house or house for the meeting of societies or committees of the church or others for the transaction of business connected with the church or of land as a place of residence for the sexton of a church, provided such land lies adjacent to or near by the lot or land on which is situated the church to which it is designed to be appurtenant; or for use in furtherance of the affairs of any church diocese, and the land shall be held for such uses or benefit and for such purposes, and not otherwise. And no gift, grant, or bequest hereafter made to such church diocese, church or religious congregation, or the trustees thereof, shall fail or be declared void for insufficient designation of the beneficiaries in, or the objects of, any trust annexed to such gift, grant, or bequest in any case where lawful trustees of

such church diocese, church or congregation are in existence, or the church diocese, or the congregation is capable of securing the appointment of such trustees upon application as prescribed in the following section (§ 57-8); but such gift, grant, or bequest shall be valid, subject to the limitation of § 57-12; provided, that whenever the objects of any such trust shall be undefined or so uncertain as not to admit of specific enforcement by the chancery courts of the Commonwealth, then such gift, grant, or bequest shall inure and pass to the trustees of the beneficiary church diocese or congregation, to be by them held, managed, and the principal or income appropriated for the religious and benevolent uses of the church diocese or congregation, as such trustees may determine, by and with the approval of the vestry, board of deacons, board of stewards, or other authorities which, under the rules or usages of such church diocese, church or congregation, have charge of the administration of the temporalities thereof.

Provided that any devise of property after January one, nineteen hundred fifty-three, for the use or benefit of any religious congregation, wherein no specific use or purpose is specified shall be valid. (Code 1919, § 38; 1954, c. 268; 1956, c. 611; 1962, c. 516.)

Va. Code § 57-7.1. What transfers for religious purposes valid.

Every conveyance or transfer of real or personal property, whether inter vivos or by will, which is made to or for the benefit of any church, church diocese, religious congregation or religious society, whether by purchase or gift, shall be valid.

Any such conveyance or transfer that fails to state a specific purpose shall be used for the religious and benevolent purposes of the church, church diocese, religious congregation or religious society as determined appropriate by the authorities which, under its rules or usages, have charge of the administration of the temporalities thereof.

No such conveyance or transfer shall fail or be declared void for insufficient designation of the beneficiaries in any case where the church, church diocese, religious congregation or religious society has lawful trustees in existence, is capable of securing the appointment of lawful trustees upon application as prescribed in § 57-8, is incorporated, has created a corporation pursuant to § 57-16.1, or has ecclesiastical officers pursuant to the provisions of § 57-16.

(1993, c. 370; 2005, c. 772.)

Va. Code § 57-9. How property rights determined on division of church or society.

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.

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.

(Code 1919, § 40; 1972, c. 825; 2005, cc. 681, 772.)

Va. Code § 57-12. Quantity of real and personal estate trustees may hold (as amended by 1973 Va. Acts, ch. 515). (Repealed, 2003 Va. Acts, ch. 813)

Such trustees shall not take or hold at any one time more than four acres of land in a city or town, nor more than two hundred fifty acres outside of a city or town and within the same county; provided that the city or town council of any city or town may by ordinance authorize such trustees to take and hold in such city or town not exceeding fifty acres of land at any one time if such acreage is to be devoted exclusively, and is subsequently

so devoted, to a church building, chapel, cemetery, offices exclusively used for administrative purposes of the church, a Sunday-school building and playgrounds therefor, and parking lots for the convenience of those attending any of the foregoing, and a church manse, parsonage or rectory; and provided further, that the trustees of a church diocese may take or hold not more than two hundred fifty acres in any one county at any one time; and they shall not take nor hold money, securities or other personal estate to the extent that such taking or holding causes the money, securities or other personal estate held at the time of taking by such trustees to exceed in the aggregate, exclusive of the books and furniture aforesaid, the sum of five million dollars; provided, that where two or more religious congregations, churches or religious societies shall merge or consolidate, such religious congregation, church or religious society so merged or consolidated, shall have three years' time within which to dispose of its land in excess of that which it is permitted to hold under this section.

Land taken or held outside of a city or town shall always be considered as such for the purposes of this article although such land later becomes part of a city or town through annexation or otherwise.

Nothing herein contained shall affect the validity of any land within a city or town legally acquired by a church to be exclusively used for a church manse, parsonage or rectory between June thirtieth, nineteen hundred fifty-four and June twenty-seventh, nineteen hundred sixty-four, provided the total amount of land owned by a church within a city or town does not exceed twenty acres. (Code 1919, § 43; 1926, p. 867; 1930, p. 687; 1952, c. 433; 1954, c. 309; 1958, c. 423; 1962, cc. 41, 516; 1964, c. 493; 1966, c. 308; 1973, c. 515.)

Va. Code § 57-15. Proceedings by trustees or members for similar purposes, exception for certain transfers.

A. The trustees of such a church diocese, congregation, or church or religious denomination, or society or branch or division thereof, in whom is vested the legal title to such land held for any of the purposes mentioned in § 57-7.1, may file their petition in the circuit court of the county or the city wherein the land, or the greater part thereof held by them as trustees, lies, or before the judge of such court in vacation, asking leave to sell, encumber, extend encumbrances, improve, make a gift of, or exchange the land, or a part thereof, or to settle boundaries between adjoining property by agreement. Upon evidence being produced before the court that it is

the wish of the congregation, or church or religious denomination or society, or branch or division thereof, or the constituted authorities thereof having jurisdiction in the premises, or of the governing body of any church diocese, to sell, exchange, encumber, extend encumbrances, make a gift of, or improve the property or settle boundaries by agreement, the court shall make such order as may be proper, providing for the sale of such land, or a part thereof, or that the same may be exchanged, encumbered, improved, or given as a gift, or that encumbrances thereon be extended, and in case of sale for the proper investment of the proceeds or for the settlement of such boundaries by agreement.

When any such religious congregation has become extinct or has ceased to occupy such property as a place of worship, so that it may be regarded as abandoned property, the petition may be filed either by the surviving trustee or trustees, should there be any, or by any one or more members of such congregation, should there be any, or by the religious body which by the laws of the church or denomination to which the congregation belongs has the charge or custody of the property, or in which it may be vested by the laws of such church or denomination. The court shall either (i) make a decree for the sale of the property or the settlement of boundaries between adjoining properties by agreement, and the disposition of the proceeds in accordance with the laws of the denomination and the printed acts of the church or denomination issued by its authority, embodied in book or pamphlet form, shall be taken and regarded as the law and acts of such denomination or religious body or (ii) at the request of the surviving trustees and after notice in accordance with law to all necessary parties, make such order as may be proper providing for the gift of such property to any willing local, state or federal entity or to a willing private, nonprofit organization exempt from taxation under § 501 (c) (3) of the Internal Revenue Code, provided the court finds that (a) the property includes a historic building or landmark so designated by the Commonwealth and (b) the purpose of such gift is historical preservation of the property.

The court may make such order as to the costs in all these proceedings as may seem proper.

B. As an alternative to proceeding under subsection A, (i) the trustees of a church or religious body that incorporate may transfer the title to the real and personal property of the church or religious body held by them to the incorporated church or religious body; and (ii) the trustees of a church or religious body that do not incorporate under subdivision (i) hereof may

transfer title to the real and personal property of the church or religious body held by them to a corporation created pursuant to § 57-16.1 without, in either instance, obtaining court permission if the transfer is authorized in accordance with the church's or religious body's polity. If no petition seeking to set such a transfer aside is filed within one year of the recordation of the trustees' deed transferring title to the real estate, or the date of the transfer of any personal property, it shall be conclusively presumed that the transfer was made in accordance with the church's or religious body's polity insofar as a good faith purchaser or lender is concerned.

C. No transfer made pursuant to subsection A or B shall operate as a transfer for purposes of a provision contained in any note or deed of trust that purports to accelerate an indebtedness upon a transfer of title. Any such transfers of real estate shall be entitled to the exemptions set forth in § 58.1-811.

D. Any transfer of real or personal property made pursuant to subsection B, and any similar transfer made pursuant to subsection A after April 23, 2002, shall be deemed to assign to the incorporated church or religious body, or the corporation created pursuant to § 57-16.1, as the case may be, the beneficial interest in every policy of insurance of every kind, type, and description, relating to the property transferred, contemporaneously with the transfer, and the transferee shall have all of the rights and obligations of the transferor relating thereto.

(Code 1919, § 46; 1924, p. 535; 1938, p. 179; 1962, c. 516; 1974, c. 138; 1983, c. 542; 1993, c. 370; 1998, c. 258; 2005, c. 772.)

Va. Code § 57-16. Property held, etc., by ecclesiastical officers.

A. How property acquired, held, transferred, etc. - Whenever the laws, rules or ecclesiastic polity of any church or religious sect, society or denomination commits to its duly elected or appointed bishop, minister or other ecclesiastical officer, authority to administer its affairs, such duly elected or appointed bishop, minister or other ecclesiastical officer shall have power to acquire by deed, devise, gift, purchase or otherwise, any real or personal property, for any purpose authorized and permitted by its laws, rules or ecclesiastic polity, and not prohibited by the laws of Virginia, and the power to hold, improve, mortgage, sell and convey the same in

accordance with such laws, rules and ecclesiastic polity, and in accordance with the laws of Virginia.

B. Transfer, removal, resignation or death of ecclesiastical officer. - In the event of the transfer, removal, resignation or death of any such bishop, minister, or other ecclesiastical officer, the title and all rights with respect to any such property shall pass to and become vested in his duly elected or appointed successor immediately upon election or appointment, and pending election or appointment of such successor, such title and rights shall be vested in such person or persons as shall be designated by the laws, rules, or ecclesiastical polity of such church or religious sect, society or denomination.

C. Validation of deeds, etc. - All deeds, deeds of trust, mortgages, wills or other instruments made prior to March 18, 1942, to or by a duly elected or appointed bishop, minister or other ecclesiastical officer, who at the time of the making of any such deed, deed of trust, mortgage, will or other instrument, or thereafter, had authority to administer the affairs of any church or religious sect, society or denomination under its laws, rules or ecclesiastic polity, transferring property, real or personal, of any such church or religious sect, society or denomination, are hereby ratified and declared valid. All transfers of title and rights with respect to property, prior to such date from a predecessor bishop, minister or other ecclesiastical officer who has resigned or died, or has been transferred or removed, to his duly elected or appointed successor, by the laws, rules or ecclesiastic polity of any such church or religious sect, society or denomination, either by written instruments or solely by virtue of the election or appointment of such successor, are also hereby ratified and declared valid.

D. Insufficient designation of beneficiaries or objects of trust. - No gift, grant, bequest or devise made on or after March 18, 1942, to any such church or religious sect, society or denomination or the duly elected or appointed bishop, minister or other ecclesiastical officer authorized to administer its affairs, shall fail or be declared void for insufficient designation of the beneficiaries in, or the objects of, any trust annexed to such gift, grant, bequest or devise; but such gift, grant, bequest or devise shall be valid; provided, that whenever the objects of any such trust shall be undefined, or so uncertain as not to admit of specific enforcement by the courts of the Commonwealth, such gift, grant, bequest or devise shall be held, managed, and the principal or income appropriated, for the religious and benevolent uses of such church or religious sect, society or

denomination by its duly elected or appointed bishop, minister or other ecclesiastical officer authorized to administer its affairs.

E. Rights and remedies cumulative. - The rights created and the remedies provided in this section shall be construed as cumulative and not exclusive.

F. No implied repeal of other provisions. - This section shall not be so construed as to effect an implied repeal of any other provisions of this chapter.

(1942, p. 382; Michie Code 1942, § 38a; 1962, c. 306; 1966, c. 308; 2005, cc. 681, 772.)

Va. Code § 57-16.1. Property of unincorporated church held by corporation.

Whenever the laws, rules, or ecclesiastic polity of an unincorporated church or religious body provide for it to create a corporation to hold, administer, and manage its real and personal property, such corporation shall have the power to (i) acquire by deed, devise, gift, purchase, or otherwise, any real or personal property for any purpose authorized and permitted by the laws, rules, or ecclesiastic polity of the church or body, and not prohibited by the law of the Commonwealth and (ii) hold, improve, mortgage, sell, and convey the same in accordance with such law, rules, and ecclesiastic polity, and in accordance with the law of the Commonwealth.

(2005, cc. 772, 928.)