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January 11, 2008

**VIA HAND-DELIVERY**

Fairfax County Circuit Court  
ATTENTION: Robin Brooks  
4110 Chain Bridge Road  
Fairfax, Virginia 22030-4009

RE: *Multi-Circuit Episcopal Church Property Litigation*, (Circuit Court of Fairfax County, CL-2007-0248724);

*In re: Truro Church*; (Circuit Court of Fairfax County; CL 2006-15792);

*In re: Church of the Apostles*; (Circuit Court of Fairfax County; CL 2006-15793);

*In re: Church of the Word, Gainesville*; (Circuit Court of Prince William County; CL73464) (Circuit Court of Fairfax County; CL 2007-11514);

*The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Epiphany, Herndon* (Circuit Court of Fairfax County; CL 2007-1235);

*The Protestant Episcopal Church in the Diocese of Virginia v. Truro Church* (Circuit Court of Fairfax County; CL 2007-1236);

*The Protestant Episcopal Church in the Diocese of Virginia v. Christ the Redeemer Church* (Circuit Court of Fairfax County; CL 2007-1237);

*The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Apostles* (Circuit Court of Fairfax County; CL 2007-1238);

*The Episcopal Church v. Truro Church et al.* (Circuit Court of Fairfax County; CL 2007-1625);

*In re: Church at the Falls, The Falls Church*; (Circuit Court of Fairfax County; CL 2007-5249);

*The Protestant Episcopal Church in the Diocese of Virginia v. The Church at The Falls – The Falls Church* (Circuit Court of Arlington County Case No. 07-125)(Circuit Court of Fairfax County; CL 2007-5250);

*The Protestant Episcopal Church in the Dioceses of Virginia v. Potomac Falls Church* (Circuit Court of Loudoun County Case No. 44149)(Circuit Court of Fairfax County; CL 2007-5362);

*In re: Church of Our Savior at Oatlands;* (Circuit Court of Fairfax County; CL 2007-5363);

*The Protestant Episcopal Church in the Diocese of Virginia v. Church of Our Saviour at Oatlands* (Circuit Court of Loudoun County Case No. 44148)(Circuit Court of Fairfax County; CL 2007-5364);

*In re: Church of the Epiphany;* (Circuit Court of Fairfax County; CL 2007-556);

*The Protestant Episcopal Church in the Diocese of Virginia v. St. Margaret's Church* (Circuit Court of Prince William Case No. CL 73465)(Circuit Court of Fairfax County; CL 2007-5682);

*The Protestant Episcopal Church in the Diocese of Virginia v. St. Paul's Church, Haymarket* (Circuit Court of Prince William County Case No. CL 73466)(Circuit Court of Fairfax County; CL 2007-5683);

*The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Word* (Circuit Court of Prince William County Case No. CL 73464)(Circuit Court of Fairfax County; CL 2007-5684);

*In re: St. Margaret's Church;* (Circuit Court of Fairfax County; CL 2007-5685);

*In re: St. Paul's Church, Haymarket;* (Circuit Court of Fairfax County; CL 2007-5686);

*The Protestant Episcopal Church in the Diocese of Virginia v. St. Stephen's Church* (Circuit Court of Northumberland County Case No. CL 07-16)(Circuit Court of Fairfax County; CL 2007-5902); and

*In re: St. Stephen's Church;* (Circuit Court of Fairfax County; CL 2007-5903).

Letter to Clerk of the Court  
January 11, 2008  
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Dear Ms. Brooks:

I am enclosing for filing in the above-styled case an original CANA Congregations' Memorandum in Opposition to the Post-Trial Opening Brief of The Episcopal Church and The Diocese, plus twenty-one (21) copies of a one-page covers sheet to be placed in the file for the above-styled cases.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

SANDS ANDERSON MARKS & MILLER, PC

A handwritten signature in black ink, appearing to read "G. O. Peterson", with a stylized flourish at the end.

George O. Peterson

cc: Seana C. Cranston, Law Clerk to the Honorable Randy I. Bellows (via hand-delivery)  
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**VIRGINIA:**

**IN THE CIRCUIT COURT FOR FAIRFAX COUNTY**

**In re:  
Multi-Circuit Episcopal Church  
Litigation**

)  
) **Civil Case Numbers:**  
) CL 2007-248724,  
) CL 2006-15792,  
) CL 2006-15793,  
) CL 2007-556,  
) CL 2007-1235,  
) CL 2007-1236,  
) CL 2007-1237,  
) CL 2007-1238,  
) CL 2007-1625,  
) CL 2007-5249,  
) CL 2007-5250,  
) CL 2007-5362,  
) CL 2007-5363,  
) CL 2007-5364,  
) CL 2007-5682,  
) CL 2007-5683,  
) CL 2007-5684,  
) CL 2007-5685,  
) CL 2007-5686,  
) CL 2007-5902,  
) CL 2007-5903, and  
) CL 2007-11514

**CANA CONGREGATIONS' MEMORANDUM IN OPPOSITION  
TO THE POST-TRIAL OPENING BRIEF  
OF THE EPISCOPAL CHURCH AND THE DIOCESE**

Truro Church, The Falls Church, Church of the Apostles, Church of the Epiphany, Church of Our Saviour at Oatlands, Church of the Word, St. Margaret's Church, Christ the Redeemer Church, St. Stephen's Church, St. Paul's Church, and Potomac Falls Church (collectively, the "CANA Congregations") and various associated defendants respectfully submit this

post-trial memorandum of law in opposition to the post-trial opening brief of the Episcopal Church and the Diocese of Virginia.<sup>1</sup>

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<sup>1</sup> (CL 2007-1236; CL 2007-1238; CL 2007-1235; CL 2007-1237; CL 2007-5683; CL 2007-5682; CL 2007-5684; CL 2007-5362; CL 2007-5364; CL 2007-5250; CL 2007-5902; and CL 2007-5903).

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## INTRODUCTION

The overriding theme of the opening post-trial brief of the Episcopal Church (“TEC”) and the Diocese of Virginia (“Diocese”) (collectively, “the Church”) is that the terms “division” and “branch” within the meaning of Virginia Code § 57-9 must be interpreted “in accordance with [each] denomination’s own rules and polity.” The Church does not make any serious attempt to reconcile this interpretation with the *text* of § 57-9—which refers only to divisions having “occurred,” and says nothing about denominational approval. Nor does the Church grapple with the *history* of § 57-9, which confirms that several Presbyterian congregations and dozens of congregations in the Methodist Baltimore Conference—the division of which, the Virginia Supreme Court recognized, was not consensual—successfully invoked the statute. Moreover, the Church has yet to explain what *purpose* § 57-9 would serve if limited to consensual divisions, which involve no property disputes.

Lacking any argument based on the statute’s text, history, or purpose, the Church claims that § 57-9 violates *the Constitution* by “obliterating the distinction between congregational and hierarchical churches” and “restructuring the Episcopal Church.” But § 57-9 does not interfere with church governance. The statute merely provides a presumption that the neutral principle of majority rule will govern a church’s *property ownership*. The statute applies only to property held by trustees, and a hierarchical church can avoid its operation here simply by directing congregations to transfer title to the bishop—a form of ownership used by the Diocese itself. Section 57-9 is thus consistent with *Jones v. Wolf*, 443 U.S. 595 (1979), and there is no basis for any suggestion that § 57-9 substantially burdens the Church’s religious exercise. Indeed, it is the Church’s reading of § 57-9 that raises constitutional concerns. By its lights, § 57-9 would mean something new in every case. The result would be inconsistent rulings based on different polities

and the very denominational discrimination that the Church decries. The CANA Congregations' reading of § 57-9 avoids these difficulties, and is fully consistent with the First Amendment.

**I. The Position That A "Division" Must Be Accomplished In A Manner Consistent With The Affected Denomination's Polity Lacks Any Support In The Text, Structure, History, Or Purpose of Virginia Code § 57-9, And Would Require The Courts To Apply The Statute Differently In Every Case.**

The central argument of the Church is that a "division" within the meaning of § 57-9 is "a structural division of the denomination accomplished in accordance with that denomination's own rules and polity" and "resulting in the creation of two or more entities which might properly be viewed as legal successors to the formerly undivided church." TEC Br. 2, 5.<sup>2</sup> Although a division need not be "amicable," the Church says, it does "require appropriate action of the regularly constituted body empowered to effect or recognize a structural division"—which here is "the General Convention of the Episcopal Church." TEC Br. 1, 5. Any other reading of § 57-9 would "interfere[e] in matters of internal church governance." TEC Br. 2.

As explained in our opening brief, such a reading finds no support in the text, grammar, or structure of § 57-9, none of which points to approval by higher ecclesiastical authorities or suggests that the outcome depends on the "polity" of the denomination involved. In addition, such a reading is foreclosed by the undisputed historical evidence presented at trial, and by the Church's public use of the term "division" outside of court. Such a reading would also effectively render § 57-9 meaningless, since consensual "structural" divisions require no judicial resolution of disputed issues of ownership and TEC's own experts admit that TEC-approved divisions create no "branch" and provide no opportunity for congregational votes. CANA Br. 13-30.

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<sup>2</sup> Throughout this brief, the opening post-trial briefs of the CANA Congregations and of TEC and the Diocese will be cited as "CANA Br." and "TEC Br.," respectively.

Perhaps aware of these difficulties, the Church attempts to change the subject—to shift the focus from a specific analysis of the text and structure of § 57-9 to the broad “legal context surrounding § 57-9,” to “trust and voluntary association principles,” to “closely related statutory provisions,” and to “constitutional considerations.” Br. 6-7, 12. These vague and general points, however, fail to cast any doubt on the specific analysis of § 57-9 set forth in our opening brief.

None of the decisions on which the Church relies even applied § 57-9(A). Moreover, in arguing that § 57-9 “has harmoniously co-existed with” the rest of Virginia law (TEC Br. 6), the Church’s analysis essentially presumes that § 57-9 has no meaning independent of other provisions of the Virginia Code, in contravention of settled principles of statutory interpretation. Perhaps most importantly, the meaning and scope of § 57-9 would, under the Church’s view, vary from denomination to denomination. This view not only makes no sense as a matter of statutory interpretation—absent express indications to the contrary, the meaning of a legislative enactment does not vary from context to context or private party to private party—but would also take the Court into the heart of the doctrinal “thicket” that the Church has urged the Court to avoid.

**A. Virginia Precedent Does Not Support the Position that Virginia Code § 57-9 Applies Only to Denominationally Approved or “Structural” Divisions, and It Is Undisputed that the 29 Court Decisions Applying the Statute Shortly After Its Adoption Involved Divisions that Were Not Approved by Denominational Authorities.**

The Church failed to rebut the undisputed evidence at trial that congregations have successfully invoked the division statute in at least 29 cases in which denominational division was unapproved by denominational authorities. CANA Br. 25-28. Citing *Brooke v. Shacklett*, 54 Va. 301 (1856), *Hoskinson v. Pusey*, 73 Va. 428 (1879), and more recent decisions such as *Norfolk Presbytery v. Bollinger*, 214 Va. 500 (1974), and *Green v. Lewis*, 221 Va. 547 (1980), the Church argues that “Virginia courts in the periods both before and after the adoption of § 57-9 consistently have held that individuals’ only right to use church property depends on their con-

tinuing membership in the applicable denomination.” TEC Br. 6-7. None of these cases, however, supports the claim that § 57-9 applies only to denominationally approved divisions.

**1. Brooke v. Shacklett**

*Brooke* pre-dated the division statute by eleven years and involved only a single division, the 1840s split of the Methodist Episcopal Church (“MEC”) pursuant to its 1844 “Plan of Separation,” which itself predated the statute by 23 years. Even assuming, *arguendo*, that *Brooke* turned on whether the congregation’s separation from MEC was approved by MEC or consistent with its polity, that decision would in no way mean that *the statute* was intended to be so limited.

*First*, § 57-9 provides congregational voting rights far broader than did the MEC Plan of Separation. The statute applies to all “divisions” that may “occur,” not simply to “structural” divisions, and not simply to divisions in the MEC. The statute as originally phrased is especially clear in this regard: “whereas divisions *have occurred in some churches or religious societies* to which such religious congregations have been attached, and *such divisions may hereafter occur.*” Act of 1866-67, Ch. 210, pp. 649-50 (emphasis added). Moreover, the 1844 Plan of Separation allowed only churches in border areas to decide which branch to join (54 Va. at 326-27), whereas § 57-9 gives *all* congregations the right to vote.<sup>3</sup> That § 57-9 grants broader voting rights than those set forth in the MEC Plan of Separation eviscerates the notion that the General Assembly intended to require hierarchical approval for any congregation to proceed under the statute, or was designed simply to codify *Brooke*.

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<sup>3</sup> The General Assembly’s recognition that “divisions have occurred in some churches” and that further “divisions may hereafter occur”—together with its repeated recodification of the statute with only minor changes—demonstrates the irrelevance of TEC’s and the Diocese’s observation that “all known uses of § 57-9” involved Presbyterian and Methodist congregations. TEC Br. 18-19. *See also Finley v. Brent*, 87 Va. 103 (1890) (involving a dispute between the Methodist Episcopalians and the much-smaller Methodist Protestants).

*Second*, the 1842 deed in *Brooke* contained numerous clauses restricting the property's use to a "house or place of worship for the use of the members of the Methodist Episcopal Church in the United States of America, according to the rules and discipline which from time to time may be agreed upon and adopted by the ministers and preachers of the said church at their general conferences in the United States of America." 54 Va. at 302, 314.<sup>4</sup> Indeed, after reviewing the extensive trust language in the deed, the Court explained that if Virginia permitted denominations to obtain trust interests in congregational property, it would have concluded as a matter of "first impression" that the denomination was the owner. *Id.* It was only against the backdrop of this language—which, notably, the Church fails to quote—that the Court stated that "[t]he primary object of the whole transaction must necessarily have been to provide and secure a place of worship according to the [denomination's] discipline." TEC Br. 7 (citing 54 Va. at

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<sup>4</sup> "By deed bearing date the 3d day of June 1842, John C. Davis and wife, in consideration of ninety dollars, conveyed to Benjamin Brooke, George W. Shacklett and three others, a lot in the town of Salem in the county of Fauquier, ***upon the following trusts: In trust that they shall erect and build, or cause to be erected and built thereon, a house or place of worship for the use of the members of the Methodist Episcopal church in the United States of America, according to the rules and discipline which from time to time may be agreed upon and adopted by the ministers and preachers of the said church at their general conferences in the United States of America; and in further trust and confidence***, that they shall at all times forever hereafter, permit such ministers and preachers belonging to said church as shall from time to time be duly authorized by the general conferences of the ministers and preachers of the said Methodist Episcopal church, or by the annual conferences authorized by the said general conference, to preach and expound God's holy word therein. ***And in further trust and confidence***, that as often as any one or more of the trustees herein before mentioned shall die or cease to be a member or members of the said church, according to the rules and discipline as aforesaid, then and in such case it shall be the duty of the stationed preacher or minister (authorized as aforesaid) who shall have the pastoral charge of the members of the said church, to call a meeting of the remaining trustees as soon as conveniently may be; and when so met, the said minister or preacher shall proceed to nominate one or more persons to fill the place or places of him or them whose office or offices has or have been vacated as aforesaid: provided, the person or persons so nominated shall have been one year a member or members of the said church immediately preceding such nomination, and be at least twenty-one years of age . . . ". 54 Va. at 302-03; *accord id.* at 314.



317). At most, therefore, *Brooke* stands for the proposition that in the absence of § 57-9, courts will give great weight to the language of the relevant deeds in deciding church property disputes.

*Third*, as explained in our opening brief (at 16-19), it is undisputed that the Methodist Episcopal congregations that filed § 57-9 petitions after enactment of the statute were *not* acting pursuant to the 1844 Plan of Separation. Those congregations belonged to the Baltimore Conference, which voted to remain in MEC in the 1840s but divided in the 1860s when MEC changed its position on slavery. The court orders granting their petitions made no reference to any denominational approval, and TEC's historical expert acknowledged that the 1844 Plan of Separation "broke down soon after its enactment in 1844," well before the Baltimore Conference divided. Tr. 1158:6-15 (Mullin); *accord* Tr. 243:17-19 (Irons) ("Q \* \*\* what relevance, if any, did the 1844 plan of separation have in 1867? A None."); Tr. 202:22-203:17 (same).

Indeed, the Virginia Supreme Court has rejected the argument that the Baltimore Conference and its member congregations, having in 1845 declared its allegiance to MEC, had a right under the 1844 Plan of Separation to disaffiliate from MEC in 1861 and join MEC South. As the Court recognized in *Hoskinson v. Pusey*, 73 Va. 428, 436 (1879), the Plan provided only for early determinations by border conferences that wished to reaffiliate with MEC South, and it did not "provide for a further disintegration to take place in some emergency that might arise in the indefinite future." Thus, "[t]he action at Staunton in 1861, after the lapse of fifteen years from the adoption of the resolutions in Baltimore, was not based on any claim of right under the plan of separation devised in 1844, but, as has been seen, in the alleged 'unconstitutional action' of the general conference at Buffalo, in May, 1860." *Id.* at 437-38. Moreover, "the congregation, although within the territorial limits of the Baltimore Conference, which was a border conference, was not a 'border society,' within the meaning of the resolution of 1844, as was the case in

*Brooke & others v. Shacklett, and hence had no authority under these resolutions to determine by a majority of its members its adherence to the church south.”* *Id.* at 438-39 (emphasis added). The Virginia Supreme Court’s near-contemporaneous summary of this history both confirms the testimony at trial and forecloses any suggestion that § 57-9 was enacted in furtherance of MEC’s 1844 Plan of Separation. Indeed, it was enacted precisely because the Plan of Separation did *not* permit Virginia congregations in the Baltimore Conference to disaffiliate from MEC.

Similarly, it is undisputed that the Presbyterian congregations that filed petitions under the division statute to reaffiliate with the Southern Old School Presbyterians (PCUS) were not invoking a denominationally approved plan of separation. Professor Mullin acknowledged that the split that created the PCUS was a “division” that was not denominationally approved,<sup>5</sup> and there is no evidence in any of the court orders approving the PCUS congregations’ votes that the PCUSA (the Northern branch) approved the separation. *See also Central Univ. of Ky. v. Walters’ Exrs.*, 90 S.W. 1066, 1066 (Ky. 1906) (“[a] schism in the Presbyterian Church of the United States of America resulted in about 1865 in the withdrawal of a considerable number of its members, who subsequently organized themselves into a separate body”; “[a]fter the division,” “the Presbyterian Church of the United States” was “called the ‘Southern Presbyterian Church’”). In short, the suggestion that § 57-9 merely codified *Brooke* cannot be squared with history.

## 2. **Hoskinson v. Pusey**

Notwithstanding that *Brooke* does not support its position, the Church asserts that Virginia courts “appl[ied] . . . the same denominational restrictions on conveyances for religious purposes *after* the enactment of [§ 57-9].” TEC Br. 10. Citing *Hoskinson*, it says that when faced with a post-1867 dispute involving two factions of a MEC congregation, the Court simply

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<sup>5</sup> Tr. 1155:18-1156:17, 1157:19-1158:1; *accord* Tr. 87:7-90:4 (Valeri); CANA Br. 16-18.

asked: ““Who, then are the *cestuis que trust* under the deed in question, the beneficiaries entitled to the control and use of the . . . church building?”” TEC Br. 10 (quoting 73 Va. at 431). Indeed, it claims that, “[a]s there had been no division of the hierarchical church that might affect the trustees’ obligations (as there had been in *Brooke*), the Court [in *Hoskinson*] affirmed a decree awarding the property to the members of the denomination named in the deed.” *Id.*

The Church’s argument overlooks critical portions of the Court’s opinion in *Hoskinson*. The Court there did not reach the question whether there had been a division under § 57-9 because the congregation failed to comply with the statute’s procedural requirements. The Court noted that it was “not clear, from the evidence, whether this [vote] of the congregation was had before or after the passage of the act referred to,” that “there was “no evidence that the determination of the congregation manifested by the vote was reported to the circuit court of Loudoun county, approved by that court, and so entered on its minutes,” and that a “claim of title, based on proceedings under the statute, [was] not made by the [congregants] in their answer to the bill.” 73 Va. at 440. Stating that “[c]ompliance with these requirements is essential to the effect given by the statute,” the court concluded that it could not apply the statute. *Id.* Yet the Church, in suggesting that “there had been no division” in *Hoskinson* (Br. 10), neglects to mention the Court’s findings in this regard.

As noted above, moreover, the Court in *Hoskinson* provided a lengthy explanation of the Baltimore Conference division, concluding that MEC’s 1844 Plan of Separation did *not* authorize congregations in that Conference to separate from MEC. 73 Va. 438-39. Were the Church correct that § 57-9 applies only to denominationally authorized divisions, there is every reason to think that the Court would have relied on this fact as a basis for disqualifying the congregation

from invoking § 57-9. The fact that the Court did not do so confirms that it did not view denominational approval of the division as a requirement for invoking the statute.<sup>6</sup>

### 3. **Norfolk Presbytery v. Bollinger and Green v. Lewis**

The modern cases cited by the Church, *Norfolk Presbytery v. Bollinger*, 214 Va. 500 (1974), and *Green v. Lewis*, 221 Va. 547 (1980), likewise do not support the view that a § 57-9 “division” requires denominational approval. In those cases, single congregations voted to become “independent” and “free from any affiliation” (*Green*, 221 Va. at 550), or “independent and autonomous” (*Norfolk Presbytery*, 214 Va. at 501). Thus, neither congregation could have satisfied § 57-9’s requirement that it vote to join a “branch of the church or society,” and neither congregation invoked § 57-9.<sup>7</sup> Not surprisingly, the Court did not address the meaning of a denominational “division” in those circumstances.<sup>8</sup>

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<sup>6</sup> The Court in *Hoskinson* noted that if “the statute had been complied with in every particular,” it would have had to resolve “the question . . . whether the act does not encroach upon vested rights in putting it in the power of a majority of the members of the congregation to shift the title and use of the property without the consent and against the will of the minority,” and the “further question, how the operation of the statute is affected, if at all, by the provision of the state constitution on ‘church property,’ art. 11.” *Id.* at \*8. The Court’s reference to “vested rights,” however, was simply to note the possibility that application of the statute could implicate the Contracts Clause as applied to pre-1867 deeds such as those before the Court. *See Finley v. Brent*, 12 S.E. 228, 228 (Va. 1890) (invalidating application of § 57-9 to divest a party of vested rights under an 1860 deed); *Weaver v. Graham*, 450 U.S. 24, 29-30 (1981) (“Evaluating whether a right has vested is important for claims under the Contracts or Due Process Clauses, which solely protect pre-existing entitlements”). The two pre-1867 deeds here, which involve only The Falls Church, do not create any property interest in TEC or the Diocese. Indeed, one of them pre-dates both TEC and the Diocese. *See* CANA Congregations’ Reply Memorandum Regarding the Scope of the § 57-9 Hearing 18-20. The state constitutional provision referenced by the Court (Article 11) was repealed in 1902. *Compare* Va. Const. (1870) *with* Va. Const. (1902).

<sup>7</sup> *See* Appellee’s Br. in *Norfolk Presbytery v. Bollinger*, Va. No. 8241, at 14 (“§57-9 is not involved in this case”); Br. of Appellee in *Green v. Lewis*, Va. No. 781388 (failing to cite § 57-9).

<sup>8</sup> The same is true of the Circuit Court’s decision in *Diocese of Southwestern Virginia v. Buhrman*, 5 Va. Cir. 497 (Clifton Forge 1977), which in any event is not binding on this Court.

At most, therefore, *Norfolk Presbytery* and *Green* mean that Va. Code § 57-15 requires a single congregation to obtain denominational approval to become independent of a church that is able to establish a proprietary interest in the subject property. *Norfolk Presbytery*, 214 Va. at 503; *Green*, 221 Va. at 553. Indeed, to read § 57-15 as limiting the application of § 57-9 solely to churches that were always “independent of any other church” would amount to an implied repeal of Part A of the division statute. But “[a] later act does not by implication repeal an earlier act unless there is such a clear, manifest, controlling, necessary, positive, unavoidable, and irreconcilable inconsistency and repugnancy, that the two acts cannot . . . be reconciled” (*Country Vintner, Inc. v. Louis Latour, Inc.*, 272 Va. 402, 413 (Va. 2006)), and that is not so here.<sup>9</sup> Rather, § 57-9 settles property ownership where a court recognizes a “division” in a broader “church or religious society,” as evidenced by multiple disaffiliations and the formation of a new “branch.” Section § 57-15, by contrast, applies to “transfers” of property by a single congregation, in the *absence* of a “division.” See Tr. 93 (Valeri) (“a single congregation cannot form a polity or begin to form an alternative polity”).

Both *Norfolk Presbytery* nor *Green* acknowledged that § 57-9 “recognizes a distinction between an autonomous congregation and one which is part of a super-congregational or hierarchical denomination in providing for the determination of property rights upon a division.” *Norfolk*, 214 Va. at 502; accord *Green*, 221 Va. at 553. What is more, *Norfolk Presbytery* and *Green* were quoting *Baber v. Caldwell*, 207 Va. 694 (1967), which expressly observed that *Episcopal* churches are not governed by the same phrasing in § 57-9 as are independent churches:

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<sup>9</sup> See also *Washington v. Commonwealth*, 272 Va. 449, 455 (Va. 2006) (“When a given controversy involves a number of related statutes, our rules of statutory construction direct that those statutes be read and construed together in order to give full *meaning, force, and effect* to each” (emphasis added)).

We hold that the Level Green Christian Church is entirely independent of any other church or general society within the meaning of § 57-9. *The first sentence of the section relates to churches, such as Episcopal and Presbyterian churches, that are subject to control by super-congregational bodies.* The Level Green Christian Church is excluded from this category because it is autonomous. *The third sentence of the section relates to the other category, autonomous or entirely independent churches.* The Level Green Christian Church falls in that category, as did the Primitive Baptist Church of Martinsville which was the subject of *Cheshire v. Giles*.

*Id.* at 698. Given this passage and the fact that *Baber* involved an autonomous church governed by Part B of the statute (*id.* at 695), the Court's statement there, in *Norfolk Presbytery*, and in *Green*—that “Virginia law recognizes the right of a majority of the members of a divided congregation to control the use of the church property if the church, in its organization and government, is a church or society entirely independent of any other church or general society” (*id.*)—should not be read to suggest that § 57-9 is available *only* to congregational churches.

In the end, there is no basis to the Church's bald assertion that the statute “has been consistently applied[] to address only a situation in which a church or religious society is structurally divided into two, in accordance with its own polity.” TEC Br. 6. No Virginia case interpreting § 57-9 has held that a division must be a “consensual” or “structural” separation carried out pursuant to the denomination's directives. None of the cases that the Church relies upon even applied § 57-9(A), and it is undisputed that the 29 judicial decisions applying the statute shortly after its adoption involved divisions that were not approved by denominational authorities. Indeed, the evidence at trial was essentially undisputed that *none* of the myriad 19th century divisions was approved or ratified by denominational authorities. CANA Br. 15-23. The Church is thus attempting to engraft onto § 57-9 a limitation has no statutory, judicial, or historical support.

**B. The Argument that the Meaning of “Division” Is Indeterminate Ignores the Text and Structure of § 57-9, Which Confirm that Alternative Definitions Are Implausible.**

Faced with the implausibility of the view that divisions require denominational approval, the Church argues for deference to its polity on the grounds that “division” is an “unworkable” and “ambiguous term with no set meaning in common parlance.” TEC Br. 15. This is nothing more than an attempt to minimize the damage of their expert’s concession that he knew nothing about the ordinary usage of “division” in the 19th century and could offer only a “distinctive,” “technical,” and “narrow” “historian’s” view. See CANA Br. 23-25. Not surprisingly, the Church cites no case law to support its claim that, when a statutory term has more than one definition, the term’s most common usage is irrelevant.

To the contrary, it is settled that, in Virginia, “the popular, or received import of words, furnishes the general rule for the interpretation of statutes” (*Lawrence v. Craven Tire Co.*, 210 Va. 138, 140-41 (1969)), or that courts examine statutory terms’ ordinary meaning “[a]t the time of enactment of the statute” (*Lewis v. Com.*, 184 Va. 69, 72 (1945)). That a statutory term may have many definitions, moreover, does not relieve the court of its duty to ascertain the most common and sensible reading of that term. Indeed, “many words in the English language . . . have various meanings” and “numerous definitions,” but Virginia courts must choose among such definitions based on common usage and “the context in which the[] [words] are employed.” *Great Atlantic & Pacific Tea Co. v. City of Richmond*, 183 Va. 931, 947 (1945); see *Floyd v. Com.*, 31 Va. App. 193, 199 (1999) (choosing among “several definitions” of a term based on its “common and ordinary meanings” and explaining that “words and phrases used in a statute should be given their ordinary and usually accepted meaning unless a different intention is fairly manifest”).

The Church claims that the meaning of “division” is indeterminate because the witnesses at trial acknowledged other possible definitions: (1) “internal strife,” “theological disagreement,” or “difference of opinion”; (2) a synonym for branch; (3) a division in the entire body of Christ; and (4) a denominationally approved administrative subdivision of an entity, such as a diocese, into two new entities. TEC Br. 15-16. But these definitions are far less plausible than the definition that we have advocated, particularly when considered in light of their statutory context. See *Whitmer v. Graphic Arts Mut. Ins. Co.*, 242 Va. 349, 353 (1991) (when choosing among “several definitions,” courts must “construe . . . words in the context in which they are used”).

The first alternative—“internal strife”—not only is more subjective than defining division based on disaffiliating congregations and the formation of a new polity, but also is untenable in light of § 57-9’s grammatical structure. The statute provides that when a “division” occurs, congregations may vote to join a “branch” of the church that has divided. Without more, “internal strife” does not result in the creation of a “branch.” Tr. 78:20-79:16, 54-55 (Valeri). As Professor Irons explained, because “branch” is used in the same sentence as division, it necessarily follows that “the division in that case would be the separation and the branch would be one of the resulting jurisdictions.” Tr. 180:8-16. The Church fails to take account of these grammatical problems in asserting that the meaning of “division” is hopelessly subjective.

The second alternative definition—division is a “synonym for branch”—is likewise untenable. The statute draws a distinction between a “division” and a “branch” and it would make little sense to read the statute to say that “if a [branch] has heretofore occurred,” congregations may vote to “determine to which branch of the church or society such congregation shall thereafter belong.” *Roe v. Commonwealth*, 271 Va. 453, 458 (Va. 2006) (“We have repeatedly stated that when the General Assembly uses two different terms in the same act, it is presumed to mean



two different things.”). Rather than equating “branch” and “division,” it is far more natural to read a branch as some that *results from* a division.

The third alternative definition—a division in the entire body of Christ—could require the Court to make theological judgments in resolving what constitutes a division or a separate branch of the body of Christ, or (to avoid that problem) cover all theological disputes in the various streams and sub-streams of Christianity. Such a reading, moreover, would be broader than the actual use of the statute in the 19th century.

The final alternative definition—a denominationally approved administrative or structural subdivision of an entity, such as a diocese, into two new entities—suffers from all of the problems noted above and in our opening brief (at 29-30). Here, we note only that if “division” were limited to administrative redistricting, the statute would never apply to TEC because, when TEC “divides” up a diocese, it does not permit congregations to vote to determine which diocese to join and the resulting dioceses are not considered “branches.” Thus, the statute would never have any application to Episcopal churches under such a definition of “division.”

In sum, there is no basis for any suggestion that the Court must simply throw up its hands in the face of multiple definitions of “division” and defer to the Church’s internal governance. The testimony on the ordinary 19th century meaning of “division” is undisputed, and that testimony is amply supported by the text, structure, history, and logical meaning of the statute.

**C. The Suggestion that the General Assembly Was “Prompted” to Enact Virginia Code § 57-9 Only by Its Concern with “Major” or “Structural” Divisions Is Foreclosed by the Text and Structure of the Statute as well as Professor Mullin’s Own Testimony.**

Unable to mount an argument based on the statute’s text or any precedent, the Church claims to have divined “what prompted the Virginia legislature to adopt § 57-9.” TEC Br. 17. Citing Professor Mullin’s testimony (and nothing else), they say that the 1867 General Assembly

must have had in mind “major historical events” involving “the largest denominations of that era—Presbyterian, Methodist and Baptist—[which] experienced structural divisions in accordance with the denominations’ own rules and politics,” not “small, separatist denominations that had previously characterized American religious history.” TEC Br. 16-17. These arguments are both irrelevant in light of the statute’s clear text and unconvincing on their own terms.

It is not entirely clear what TEC and the Diocese mean by “structural divisions”—a term Professor Mullin *never* used. If a “structural” division is one approved by denominational authorities, then their argument fails for the many reasons stated above and in our opening brief (at 13-30). But if “structural” division means a “major” or “great” division or one that “impacted large numbers of Virginians and led to . . . civil disputes over title,” neither the statutory text nor the testimony at trial supports such a limitation. And in any event, such a reading would be satisfied by the division here, which is of national and even international magnitude.

*First*, the Church’s argument anachronistically presumes that § 57-9 was meant to apply only to divisions that had already occurred, and only to a small portion of those to boot. But as we have explained, the statute’s text uses the term “division” without any modifier, and it was written to apply both to divisions that had already “occurred” and those that would “hereafter occur.” The General Assembly could not have known in 1867 how big future church splits would be, or whether the passage of time would judge those splits to be “major historical events.” (Nor can courts know that today.) Nonetheless, the legislature determined to adopt a statute applicable to all “divisions,” and the statute has been recodified numerous times with only minor, stylistic changes. Thus, the text itself forecloses the Church’s argument.

*Second*, given the nature of divisions, it is only natural that the statute would be invoked by a minority of the former church or diocese. Those in the majority can typically direct the de-

nomination as they wish, even if they wish to make a “radical change,” and they are unlikely to separate from it as long as it generally reflects their “sentiment[s].” Tr. 1224 (Beers). Thus, the very structure of § 57-9 presupposes that it will be invoked by those who constitute a dissenting, minority, or relatively small faction in the church. Historically, moreover, the new branch would typically be smaller than the old branch. Tr. 1038:20-1039:6 (Valeri).

*Third*, even assuming the General Assembly’s “intent” could somehow differ from the text of § 57-9 (and it does not), the Church did not establish any such intent. The Church introduced no formal legislative documents or contemporaneous accounts to support the claim that divisions in just three denominations “prompted” the statute’s enactment. Br. 17. Indeed, Professor Mullin relied almost entirely on secondary sources (none of which were shown to the Court or the CANA Congregations), testified to positions that conflicted with his prior public statements and writings, and all but abandoned his theses on cross-examination. CANA Br. 16-25. For example, he conceded that the 1844 MEC Plan of Separation broke down well before the Baltimore Conference division, and that the 1860s split of the PCUSA and PCUS was not consensual, yet he deemed these “major” divisions. Moreover, he readily admitted on cross examination that “you see the word division used in common parlance to describe other, smaller separations.” Tr. 1153:1-4.

By contrast, the CANA Congregations’ experts based their conclusion that the term “division” was most often used to refer to the separation of a group of congregations who formed a new polity on an exhaustive review of primary source materials—including secular newspapers, religious journals or serials, sermons, pamphlets, tracts, records of official denominational conventions, court records, and other publications that were “widely available” in Virginia. Tr. 53, 56, 68, 69:9-70:6, 87, 99 (Valeri); Tr. 176-177, 190, 197, 213-215, 223, 225-245 (Irons). These

sources are a far more reliable basis for making a conclusion about the meaning of the term “division” than is unfounded speculation about what “prompted” enactment of the statute.

*Fourth*, TEC’s position that a division must be a “major” event to satisfy the statute conflicts with its own witnesses’ testimony (and its oft-stated position throughout the litigation<sup>10</sup>) that size is irrelevant to the existence of a division under § 57-9. For example, TEC expert Ian Douglas acknowledged that “there’s no numerical requirement for a division.” Tr. 900:14-17. And when asked whether it would “constitute a division” if “95 percent of the congregations in a hierarchical church voted to leave the church,” David Beers, TEC’s chancellor, responded that it would not, because “the parishes still remain, dioceses still remain and the National Church still remains.” Tr. 1223:20-1225:6. According to TEC’s own witnesses, then, the fact that some divisions were “major historical events” is legally irrelevant.

*Fifth*, TEC’s position cannot be squared with the more objective perspective stated in *An Episcopal Dictionary of the Church*, which is published by TEC’s official publishing house and posted on its website. See CANA Br. 11-12. That dictionary treats “schism” and “division” as synonyms, and it describes the division that created the Reformed Episcopal Church as “the earliest *significant schism* from the Episcopal Church,” in contrast to the “*smaller schisms* from [the Church] in the later twentieth century over Prayer Book revision and the ordination of women.” CANA Exh. 5 (emphasis added). Inasmuch as the division here is already far larger than the division that created the Reformed Episcopal Church, it is “significant” by the Church’s own standards. Indeed, the division that led to this dispute has prompted the reaction of Anglican bishops across the nation and around the globe. See CANA Br. 49-54. History can be judged only with the passage of time, of course, but there is every reason to believe that history will look back

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<sup>10</sup> See, e.g., Tr. 39:2-10 (Nov. 9, 2007) (pre-trial conference).

upon this period in the Episcopal Church and the Anglican Communion as a watershed period characterized by division. *See, e.g.*, CANA Exh. 61 (Windsor Report).

*Finally*, it bears remembering that numerous Diocesan officials and committees admitted the existence of a division in the period prior to the CANA Congregations' votes. We will not again recite all of these admissions here (*see* CANA Br. 36-38, 44-47), but the fact that officials and committees of the Diocese have acknowledged the division in numerous ways confirms that it was more than sufficient to satisfy the statute.

**D. Under the Interpretation of "Division" Advanced by the Episcopal Church and the Diocese, the Meaning of the Statute Would Vary from Case to Case and Denomination to Denomination, thus Requiring the Courts to Delve into the Polity of Each Church Before the Court.**

As explained above, the Church's insistence that § 57-9 applies only to denominationally approved divisions finds no support in the statutory text, structure, history, or purpose. But the view that a division is only a "division" if "accomplished in accordance with that denomination's own rules and polity" (TEC Br. 2) would also mean that the statute's meaning and scope varied from denomination to denomination. In each and every case, the courts would have to divine a potentially new interpretation of "division," based on a time-consuming review of the particular polity of the affected church.

The Church introduced no evidence that the General Assembly intended to impose such a burden on the courts. There is no express textual indication that courts should defer to denominational authorities in determining whether there has been a division.<sup>11</sup> The meaning of legislative enactments does not generally vary from dispute to dispute, and private parties rarely get to

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<sup>11</sup> *Cf.* Va. Code § 57-7.1 ("conveyance . . . shall be used for the . . . purposes of the . . . religious society . . . as determined by the authorities which, under its rules or usages, have charge of [its] administration"); Va. Code §§ 8.01-400, 19.2-271.3, 20-26, 24.2-703.1 ("accredited religious practitioner" means a person who has been . . . accredited by a formal religious order").

decide how a statute applies to them; indeed, that is part of what it means to be governed by the rule of law, not men. *Robertson v. Bd. of Supervisors of Fairfax County*, 60 Va. Cir. 95, 107 n. 15 (2002) (“The meaning of a statute . . . cannot vary from case to case”). To the contrary, courts apply statutes based on the *common* meaning of words, and the Church’s view that the denomination gets to define the reach of the statute finds no support in ordinary principles of statutory construction.

Indeed, the Church’s denomination-specific reading of §57-9 would take the Court right into the “thicket” that it has repeatedly urged the Court to avoid. Applying the law properly to the many Methodist groups would require an accurate understanding of each of those group’s polities, applying it to Presbyterian groups an understanding of their polities, and so on. As discussed below, the Church’s concerns about secular analysis of polity are overstated, but if they were valid, they would apply with even greater force to its own reading of § 57-9. It makes far more sense to interpret § 57-9, which is based on the neutral principle of majority rule, to apply whenever a group of congregations disaffiliates from a denomination and forms a new polity.

**II. The Episcopal Church’s Interpretation Of The “Branch” Requirement Of Virginia Code § 57-9 Is Foreclosed By The Church’s Own Authorities, By History, By The Testimony Of Its Own Expert, And By Common Sense.**

The Church’s interpretation of the “branch” requirement is equally misguided. Both sides agree that the meaning of branch “[f]lows” from the meaning of division. TEC Br. 25. But since a “division” in the Church’s view requires denominational approval, it says “a ‘branch’ of a church or religious society must be either a part of that church or society or a new organization resulting from a division accomplished by the proper authorities of the church or society pursuant to its polity.” *Id.* “CANA and ADV” are not “branches,” the argument goes, because they “are part of the Church of Nigeria,” which “has a distinct and separate polity” and “is not affli-

ated with the Episcopal Church or the Diocese.” TEC. Br. 2. But this reading of “branch” is foreclosed by TEC’s own authorities, history, its own expert’s testimony, and common sense.

**A. The Historical Context of Virginia Code § 57-9 Belies the Crabbed Definition of “Branch” Advanced by the Church.**

To begin with, the Virginia Supreme Court in *Brooke*—which according to the Church is the only Virginia case involving a legitimate “division”—recognized that the body created by the division was “a separate ecclesiastical connection,” “a distinct organization . . . to be known by the style and title of the *Methodist Episcopal Church South*.” 54 Va. at 323. Although MEC South was a new “branch” of the formerly undivided denomination, it would have been nonsensical to say that the Southern branch, which had deliberately broken off from MEC, nonetheless remained “a part of that church or society.” TEC Br. 2. *Brooke* thus confirms that the existence of a “separate and distinct polity” (TEC Br. 2) is not merely *consistent* with the concept of a “branch”; it is a branch’s essential defining characteristic. Not surprisingly, the term “branch” in § 57-9 is not modified by the term “affiliated,” and in this context it makes more sense to think of a “branch” as an offshoot, or as a branch that has broken off of the tree, than as a subdivision.

That a branch will be a “separate and distinct” entity follows, of course, from the fact that a division involves the “renunciation of [the existing denomination’s] authority.” Tr. 55 (Valeri). The Church can point to no historical example of a “division” in which (a) the newly created entity remained affiliated with the mother church, and (b) congregations were permitted to vote on whether to join the new entity or remain affiliated with the mother church. There is none, which is why it was undisputed at trial that the term “branch” was most commonly understood to refer to an entity with a common origin, but no current connection, to the mother church. See CANA Br. 30-33. Indeed, TEC’s own bishops used the term “branch” in reference to both the split involving the Protestant Episcopal Church in the Confederate States and the split involving the Re-

formed Episcopal Church. Tr. 108:5-110:9 (Valeri); Tr. 1107-08 (Mullin); Tr. 214-15 (Irons); CANA Br. 31-33.

The Church's suggestion that a "branch" may not be a "separate and distinct polity" (Br. 2) is also inconsistent with the testimony of their own expert, Professor Mullin. He testified on direct examination that "a branch is seen as an extension that grows out of an earlier body or another body of a Christian communion," "and it does not necessarily have to be legally connected. So we would talk about the Episcopal Church being a branch of the Church of England, even though it is legally autonomous, but it flowed out of the Church of England." Tr. 1038:20-1039:6. Consistent with this testimony, Professor Mullin gave no example of a division—even under his admittedly "distinctive," "narrow," and "technical" use of the term<sup>12</sup>—that did not involve the formation of a *separate* entity.

**B. CANA and ADV Are No Less Branches Because They Are Affiliated With the Church of Nigeria.**

Lacking any historical argument to support their definition of "branch," the Church resorts to the claim that the affiliation of CANA and ADV with the Church of Nigeria, another province in the Anglican Communion, precludes a finding that they are "branches." TEC Br. 27. "[A] 'new organization or polity' must be formed," it says, and "[l]ogic dictates that one existing church and its component part . . . does not become a 'branch' of a second, separate church simply because some dissenting members of the second decide to join it." TEC Br. 27.

The fact that the Church of Nigeria predated the division, however, does not mean that CANA and ADV, having affiliated with it, are not branches. CANA and ADV did not relinquish their separate existence upon affiliating with the Church of Nigeria; they remain legally cogniza-

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<sup>12</sup> Tr. 1125-1126; Tr. 1122:6-11; Tr. 1124:19-1125:15.



ble entities, incorporated under U.S. law, and that separate existence arose as a result of the division in TEC. CANA Exhs. 69-70; Tr. 308, 310 (Minns).

It is undisputed that CANA and ADV were new, separate entities formed in the wake of TEC's 2003 General Convention to receive the many Episcopal congregations and clergy leaving the Church, and that the CANA Congregations voted specifically to join CANA and ADV. *See* CANA Br. 38-40, 47-49. Indeed, TEC's own witnesses acknowledged that CANA and ADV were created to serve former members of TEC. *See* Tr. 902:2-5 (Douglas); Lee Dep. Designation 117:18-118:3; Schori Dep. Designation 77-78.<sup>13</sup> It is also undisputed that, as a matter of the common 19th century understanding, the important point is whether the new entity had common "historical origins" with the former church and was composed primarily of "people who belong[ed] to the original group." Tr. 94:14-21, 98 (Valeri). CANA and ADV both qualify as "branches" under this understanding of the term. CANA Br. 38-40, 47-49.

Finally, contrary to the Church's suggestion (TEC Br. 28-29), the Virginia Senate's inaction on S.B. 1305, a recent bill to amend § 57-9, does not alter this conclusion. Senate Bill 1305, introduced in the 2005 Session of the Virginia Senate, would have expanded § 57-9 to allow congregations to join not just a "branch of the church or society" that has divided, but also "a different church, diocese, or society; or . . . to be independent of any church, diocese, or society." Br. 28. The Church contends that the failure of S.B. 1305 to gain passage shows that "the suggestion

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<sup>13</sup> The Church's assertion (at 26) that "most of [CANA's] priests were Nigerians ordained in the Church of Nigeria" is incorrect. *See* Tr. 320-22 (Minns) (all of CANA's bishops are former TEC clergy, 80 of CANA's 100 clergy were formerly affiliated with TEC, and most of the balance were newly ordained); Tr. 698 (Allison) (all 20 of ADV congregations are led by former TEC clergy). In any event, even those members of CANA who are Nigerian expatriates "were former Episcopalians," "who had broken away from the Episcopal Church." Tr. 311-12 (Minns). From its inception, both CANA and ADV were envisioned as new structures for former Episcopalians. *See* CANA Opening Br. 38-42, 47-49.

that a ‘branch’ under § 57-9 may consist of a separate, preexisting denomination has been rejected by the General Assembly.” *Id.* But it is reading too much into the inaction on S.B. 1305.

First, courts have recognized that legislative bills get introduced, amended, voted down, or (as here) withdrawn, for a host of reasons. *See, e.g., Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159, 170 (2001) (“A bill can be proposed for any number of reasons, and it can be rejected for just as many others.”). Because of the difficulty in scrutinizing those reasons, courts will ascribe significance to legislative inaction or silence in only the most limited circumstances—when the meaning of a statute is sufficiently well-established that silence or inaction can be viewed as an affirmation of prior interpretations of the law or, conversely, as rejection of any change in the law. *See Crook v. Commonwealth*, 147 Va. 593, 601 (Va. 1927) (failure to pass bill “an indication” of statute’s meaning, where, in another case, Court already issued “very able and illuminating opinion . . . express[ing] fully our views on . . . construction of the statute”); *Commonwealth v. County Bd. of Arlington*, 217 Va. 558, 564-65 (Va. 1977) (General Assembly’s refusal over four non-consecutive years to allow counties to collectively bargain established intent where General Assembly adopted resolution rejecting such bargaining 30 years earlier, and Attorney General repeatedly characterized prohibition as “inflexibl[e]”); *Tabler v. Bd. of Supervisors*, 221 Va. 200 (Va. 1980) (General Assembly’s refusal over four non-consecutive years to adopt legislation granting local authorities, in diverse circumstances, power to regulate confirmed lack of legislative intent to allow such regulation). That is not the case here, where there has been no decision interpreting § 57-9(A) or repeated attempts to amend the statute for a specific purpose.

Even if legislative inaction had the significance ascribed to it by the Church, the Senate’s inaction on S.B. 1305 would shed no light on the meaning of § 57-9. Senate Bill 1305 did not

purport to codify the CANA Congregations' interpretation of § 57-9. The bill instead would have expanded the scope of the statute by providing additional options for congregations beyond joining a branch of the church or society that divided. In particular, under the bill's language, such congregations could become independent of any denomination (the situation presented in *Norfolk Presbytery and Green*).

At most, then, the Senate's inaction on S.B. 1305 indicates a disinclination to broaden the scope of § 57-9. It says nothing about the statute's applicability to the circumstances presented here, and it does not support the Church's effort to narrow the statute's scope.

**C. Applying The CANA Congregations' Definition Of "Branch" Would Not Require Any Impermissible Inquiry Into Doctrine.**

Finally, the Church argues that the CANA Congregations' interpretation of the "branch" requirement is untenable because the new group must have a "sufficiently similar polity to the original church," which "requires a civil court impermissibly to delve into theological issues to determine whether a breakaway group is similar enough in polity and faith to qualify their departure as a 'division' of a church." Br. 6 (citing Tr. 55, 94-95). But this argument mischaracterizes Professor Valeri's testimony and wrongly assumes that considering a group's self-identification as a polity with common roots necessarily involves doctrinal analysis. Of course, it is difficult to understand how the Church could object to judicial analysis of "polity," since—under its reading of § 57-9—the meaning of "division" would vary from case to case depending on each denomination's polity. But even if such a "branch" analysis were constitutionally problematic, the appropriate remedy would not be to strike down the statute, but rather to interpret the "branch" requirement to avoid such analysis. *See Heckler v. Matthews*, 465 U.S. 728, 739 n. 6 (1984) ("ordinarily extension [of a statute], rather than nullification, is the proper course").

As a review of the passages cited by the Church confirms, Professor Valeri testified on direct examination that a “branch” is “an alternative structure” or “alternative polity” resulting from a division and “claim[ing] some affiliation with the genetic origin of the original group and consist[ing] of people who belong to the original group.” Tr. 55, 94; *accord id.* at 95 (“They claim, for example, to revere the same sacred texts or organize themselves in the basic similar polities, that is Diocese or Presbyteries” or “conferences”). Similarly, Professor Valeri testified on cross examination that “the difference between a division and a departure” is that, in the latter case, “individuals might just leave, depart, but if they leave in a group” and “form themselves into a new group and *claim to have certain continuities with the previous . . . group that they left, then that distinguishes a division from a mere departure.*” Tr. 131:2-15 (emphasis added). Although the “specifics look different from denomination to denomination,” the central characteristics of a branch are thus continuity of personnel and a “claim” to be heir of the tradition. Tr. 95, 103.

Here, there is no question that those who have broken off from TEC identify themselves as Anglicans (as do members of TEC) and claim to be authentic members of the Anglican Communion (as do members of TEC). The members of CANA and ADV “claim, for example, to revere the same sacred texts” (Tr. 95), by worshipping according to the Book of Common Prayer, as do TEC congregations (Tr. 95, 305, 328, 330-31; TEC-Diocese Exh. 1 at 1, 8). Moreover, they claim to have adopted a form of combined clergy-lay governance similar to TEC’s (Tr. 302-327 (Minns)). Whether or not the members of CANA and ADV are better (or worse) Anglicans as a theological matter is not something the Court need resolve. The Court can take cognizance, on a purely secular basis, of the fact that their members came from TEC and self-identify as An-

glicans. Indeed, for the Court to *deny* that they are authentic Anglicans would raise the very same concerns as it would for the Court to *make* that conclusion.<sup>14</sup>

The focus of the “branch” analysis is therefore on how the new and old polities characterize themselves and each other, not on whether the Court agrees with those characterizations. *See Reid v. Gholson*, 229 Va. at 192 (discussing the creation of a division through actions to “rend [the church] into groups, each of which . . . characterizes the other as apostate,” etc.). As Diocesan Bishop Peter Lee himself put it in his letter to the CANA Congregations on the eve of their votes: “American Christianity has been punctuated over the years by frequent divisions, with one group choosing to separate because they believed the separated group might be more pure than their former identity.” CANA Exh. 68.

The Church’s reaction to the formation of CANA and ADV further confirms that it views them as competing Anglican branches. Perhaps most telling was the testimony of TEC Presiding Bishop Schori, who proclaimed that TEC dioceses may settle property disputes with congregations that leave to become “Roman Catholic,” or “Baptist,” or “Methodist,” but not “if the congregations intended to set up as other parts of the Anglican Communion.” Schori Dep. Designation 60, 62, 64, 70-71, 83. TEC “cannot encourage other parts of the Anglican Communion to set up shop within its jurisdiction” and “invite people to leave TEC” to join another “branch,” she explained, because those actions put them “in competition with the Episcopal Church” and are “confusing to parishioners” both “within the Episcopal Church and those outside of the Episcopal Church.” Schori Dep. Designation 54-56, 62-64, 77-78. According to her, it is “exceedingly inappropriate” and “injurious” to TEC to have bishops of “another branch of the Anglican

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<sup>14</sup> As a practical matter, the old and new branches of a church will never be exactly the same anyway, because the formation of the new group entails the renunciation of the authority of the mother church and the rejection of some component of its doctrine or practice.

Communion in our territory.” Schori Dep. Designations 54-57. Indeed, such incursions “violate[] [TEC’s] integrity as a church.” Schori Dep. Designations 64, 77:22-78:4. Similarly, Professor Douglas has publicly stated that if former Episcopal churches “choose to affiliate with another Anglican church around the world,” “then that sets up a dynamic of competing churches.” Tr. 904. For this reason, too, the Court need not rely solely on evidence from the CANA Congregations to conclude that CANA and ADV are sufficiently “similar” to TEC and the Diocese to constitute a branch within the meaning of § 57-9.<sup>15</sup>

Even if the Court had to engage in a limited appraisal of the new polities to determine whether CANA and ADV were “branches,” however, such consideration would be nothing like the doctrinal analysis that the Supreme Court held impermissible in cases such as *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969), and *Serbian Eastern Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976). The Congregations’ interpretation of § 57-9 would not require anything approaching forbidden “matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. 393 U.S. at 450. Nor would it require courts, as in *Milivojevic*, to determine matters of church law, such as whether a bishop was properly defrocked or had the moral fitness to serve as a church leader. 426 U.S. at 707-08. Instead, courts would take an approach akin to the Supreme Court’s approach in *Milivojevic*, when it determined that “the Serbian Orthodox Church is a hierarchical church and the American-Canadian Diocese, involved here, is part of that Church.” 426 U.S. at 725 (White, J., concurring). Such “basic issues are for the courts’ ultimate decision, and the fact that church au-

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<sup>15</sup> See also Tr. 74 (Valeri) (“when you send” an “unauthorized missionary” into the “territory . . . of an existing church, it is a de facto statement of the illegitimacy of the current ministry in that location,” but this was a “common” aspect of 19th century divisions and branches).

thorities *may* render their opinions on them does not foreclose the courts from coming to their independent judgment.” *Id.* (emphasis added).

By contrast, the Church’s whole theory of this case is that § 57-9 requires an inquiry into whether a separation was accomplished in a manner consistent with its rules and polity. If the Virginia courts were to take the Church up on this offer, they would have to engage in such an analysis every time they applied § 57-9, and the outcome would differ depending on the denomination’s particular views on what it means to “lawfully divide.” That is precisely the kind of issue that *Hull Church* and *Milivojevich* placed off limits, and would take the courts far deeper into doctrine and governance than would a straightforward ruling that § 57-9 applies to all divisions, whether or not denominationally approved, that result in formation of a new polity. It would also provide little certainty to future parties seeking to structure their affairs in response to the law.

**In Addition to the Divisions in The Episcopal Church and in the Diocese, The Division in the Anglican Communion Provides Another Independent Basis for Approving the Congregations’ § 57-9 Petitions.**

There is no dispute that TEC and the Diocese each constitute a “church or religious society” and that the Congregations were “attached” to the Diocese and to TEC within the meaning of §57-9. Consequently, a correct understanding of the terms “division” and “branch”, as explained above, compels the conclusion that the Congregations’ §57-9 petitions should be approved. With regard to the Anglican Communion, though, TEC and the Diocese dispute not only the existence of a “division” and of a “branch” but also dispute that the Anglican Communion is a “church or religious society” and that congregations can be “attached” to it. They offer a variety of counter-arguments, based primarily upon the opinions of their missiologist Prof. Douglas, none of which are convincing.

**D. The Anglican Communion Is Capable of Dividing and Forming Branches.**

The Church initially contends that the Anglican Communion is too inchoate to be capable of division. Br. 38 (citing Tr. 862, 964 (Douglas)). But the Church does not explain how it can be “a constituent member” of the Anglican Communion, as the Preamble to its Constitution proclaims (TEC-Diocese Exh. 2 at 1), if the Communion is so amorphous. The concept of membership itself connotes being part of a structured organization.

The Church’s references to an “intact whole” (at 38) indicate that it is really arguing that the Anglican Communion does not have a single hierarchical structure, culminating with a General Convention, that can declare the entity to be divided. This argument, however, is but a variation on the theme that a division cannot exist unless formally effectuated by official action of the highest judicatory. Moreover, the argument ignores the reality that the division in the Anglican Communion has been effectuated by the actions of specific Provinces of the Communion (such as the Church of Nigeria) that have ended their relationships with TEC, another branch of the Communion. Such actions are fully consistent with the 19th century history that resulted in § 57-9, where divisions were most often effectuated by the unilateral actions of members, not by official action of the highest judicatories of the church or religious society being divided. *See, e.g.*, Tr. 82-84 (Valeri).

The Church also contends that even if the Anglican Communion could divide, it has not done so because all of its Provinces remain in communion with the See of Canterbury and continue to send representatives to the Anglican Consultative Council and other Anglican functions. TEC Br. 38. This assertion, however, ignores the extensive evidence of legal and practical division in the Anglican Communion that has been effectuated by the actions of individual Provinces to separate themselves from TEC. CANA Br. 49-54. Ultimately, TEC’s position requires embracing the belief that all of these concrete legal and practical actions, and indeed “division” it-



self, are entirely in the eye of the beholder and incapable of objective definition. Tr. 943:10-944:21, 947:6-949:12 (Douglas). That may be consistent with Professor Douglas's view of what "sounding like an Anglican" means, Tr. 922-24 (Douglas), but it is not a proper basis for judicial interpretation of a secular statute.<sup>16</sup> In any event, even Professor Douglas ultimately admitted that the Church of Nigeria's and other Provinces' actions were "the most severe action[s] one province could take to disassociate itself from another province"—"the most severe declaration it could do," Tr. 993-94, and were unprecedented in the Anglican Communion prior to 2003, *see* Tr. 999-1000. "If one church or the other functioned as if they had no relationship with another church in the Anglican Communion," that would "evidence a division of the Anglican Communion." Tr. at 960:4-10 (Douglas). That is exactly what has happened.

Finally, the Church maintains that the CANA Congregations have not joined a cognizable "branch" of the Anglican Communion. Their first reason—that there has been no "division," and thus can be no "branch"—is addressed above. Their second reason—that CANA and ADV have not been formally recognized as "branches" by the Communion's "Instruments of Unity"—ignores the fact that the CANA Congregations are attached to ADV and CANA, and that ADV and CANA are affiliated with the Church of Nigeria. TEC Br. 40. Through their affiliation with ADV and CANA, the Congregations are also attached to the Church of Nigeria. *See* Tr. 363-64, 372-74 (Minns); Tr. 639-40 (Yisa). All parties acknowledge that the Church of Nigeria is a branch of the Anglican Communion. Even TEC's Presiding Bishop, who testified with full awareness of the legal significance of her terminology, repeatedly referred to CANA as a

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<sup>16</sup> Contrary to TEC's and the Diocese's assertions, the CANA Congregations do not in any way ask the Court to resolve the nature of *religious* "communion" in the Anglican Communion. In reality, it is the Church that seek to draw the Court into determinations of the meaning of religious "communion," offering as evidence the testimony of a priest regarding his ecclesial and missiological understanding of a form of "communion" that he asserts can never be broken. *See* Tr. 935:9-937:17 (Douglas).

“branch” of the Anglican Communion. See Schori Dep, Designations at 54-56, 79, 83. Thus, the Congregations have affiliated with a “branch” within the meaning of §57-9.

**E. The Anglican Communion is a “church” or a “religious society” within the meaning of Virginia Code § 57-9.**

The Church contends (at 34-35) that the Anglican Communion cannot be a “church” because it does not have a common liturgy or creed. But this argument glosses over the fact that the Provinces of the Anglican Communion do have common core beliefs, reflected not only in the liturgy of the Book of Common Prayer, which is used throughout the Communion, but also in resolutions adopted at their Lambeth Conferences. CANA Br. 55-58. Indeed, as the Windsor Report recognized, it was the decision of TEC to deviate from a 1998 Lambeth Conference resolution that led to the division in the Communion. CANA Exh. 61 (Windsor Report) at 77, 50-60.

The Church similarly claims that the Anglican Communion does not meet the fourteen criteria for recognizing a “church” referenced in *Spiritual Outreach Soc’y v. Comm’r*, 927 F.2d 335 (8<sup>th</sup> Cir. 1991). TEC Br. 34-35. These fourteen criteria were developed by the Internal Revenue Service in the late 1970s to distinguish the term “church” as used in the Internal Revenue Code from other religious organizations described in the Code that are not “churches” for tax purposes.<sup>17</sup> But since the Code was not enacted until the 20th century and the fourteen criteria were not articulated by the IRS until 1978,<sup>18</sup> the criteria can hardly be considered probative of the General Assembly’s understanding of the terms “church” and “religious society” in 1867.

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<sup>17</sup> See *Spiritual Outreach Society*, 927 F.2d at 338 (“Deciding what constitutes a church for federal tax purposes is not an easy task”) (italics added). See also Robert Louthian & Thomas Miller, *Defining “Church”—The Concept of a Congregation*, 1994 IRS Continuing Professional Education (“CPE”) text, Topic A.

<sup>18</sup> See Address by Jerome Kurtz, Commissioner of Internal Revenue, P.L.I. Seventh Biennial Conference on Tax Planning (Jan. 9, 1978), reprinted in *Fed. Taxes (P-H)* ¶ 54,820 (1978).

After attempting to import late-twentieth century IRS tax analysis into § 57-9, the Church next contends that the term “religious society” cannot refer to the Anglican Communion because the Communion did not exist in 1867, when § 57-9 was adopted. TEC Br. 36. Of course, this ignores the fact that the first Lambeth Conference was held in 1867 (TEC Br. 31 n.17; Tr. 850-851), and the resolutions adopted at that Conference refer repeatedly to the “Anglican Communion,” and to the various provinces that constitute “branches of the Anglican Communion,” in a manner that indicates they have existed prior to the Conference.<sup>19</sup> But in any event, there is no reason to think that simply because a specific church or religious society may not have existed when the statute was adopted, it may never qualify for relief under § 57-9. Indeed, it would be anomalous for the statute to anticipate future divisions by referencing divisions that may “hereafter occur” but not future churches or religious societies.

The Church further asserts that the General Assembly used the term “religious society” as a synonym for “church” out of respect for denominations that objected to the application of the term, such as the Quakers. TEC Br. 36. But this argument is supported only by the assertion of Professor Mullin. The Church introduced no contemporaneous evidence supporting the notion that the General Assembly viewed the terms as synonyms, and such a notion flies in the face of the usual rule of statutory construction that different terms in the same statute are intended to have distinct meanings. *Roe, supra*, at 458. The Nebraska case cited by the Church on this point is irrelevant: It says only that “society” *may* be used synonymously with “church”—where, as

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<sup>19</sup> See, e.g., 1867 Lambeth Conference Resolution 1 (referring to “all archbishops and metropolitans, and all presiding bishops of the Anglican Communion”); Resolution 4 (referring to “the several branches of the Anglican Communion”); Resolution 6 (referring to “the whole Anglican Communion”); and Resolution 8 (referring to “any synod of the Anglican Communion”), available online at <http://www.lambethconference.org/resolutions/1867/>. Nineteen bishops from the United States attended the 1867 Conference. See <http://www.lambethconference.org/resolutions/index.cfm>.

there, the word “society” is part of the name of the church. It does not hold that “society” is *necessarily* synonymous with “church,” which would be the settled rule of statutory construction that each word has meaning. *In Re Estate of Douglas*, 94 Neb. 280, 284, 143 N.W. 299, 300 (1913).

The evidence at trial established that the Anglican Communion is a fellowship, association, or society of churches. CANA Br.56-58.<sup>20</sup> It is not a “looser . . . federation” or “voluntary association,” but rather a stronger and more closely related “family of churches.” Tr. 912:19-21, 916:4-918:17 (Douglas). Accordingly, the Anglican Communion is a “religious society” within the common understanding of the term and the meaning of § 57-9.

**F. The CANA Congregations were “attached” to the Anglican Communion within the meaning of Virginia Code § 57-9.**

Nor is there any merit to the Church’s argument that the CANA Congregations are not “attached” to the Anglican Communion. The common understanding of “attached,” both in 1867 and today, is simple: to be “connected” in some way. CANA Br. 58-59. Seeking to avoid the common understanding, the Church asserts that the term “attached” requires evidence of binding legal control of the congregation by the church or religious society to which it is “attached.” Thus, the Church contends that the absence of evidence that a congregation is “under authority of a constitution and canons that are agreed upon polity of a church” demonstrates that the congregation is not “attached.” TEC Br. 37 (citing Tr. 863, 871, 872, 968 (Douglas)).

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<sup>20</sup> See, e.g., Tr. 1029:14-18 (Mullin) (“the Anglican Communion . . . is a Fellowship within the Holy Catholic and Apostolic Church of churches in communion with the Archbishop of Canterbury.”); Tr. 916:4-918:17 (Douglas) (the Anglican Communion is an association and fellowship of churches); Tr. 846:2-10 (Douglas) (the Anglican Communion is “a family of churches”); Tr. 908:21-910:4 (Douglas) (the Anglican Communion is an enduring group whose members have developed organized patterns of relationships through their shared history and other interactions with one another).

This definition of “attached”—and the position that the CANA Congregations were not attached to the Anglican Communion—are based upon the testimony of Professor Douglas. But by Professor Douglas’s own admission, his testimony does not afford *any* basis for interpreting Virginia Code § 57-9. Professor Douglas acknowledged that this definition of “attached”—as requiring binding legal control—was not based upon any dictionary, Tr. 968:20-22, any historical source, Tr. 969:1-4, or any statutes or case, Tr. 971:20-972:1. He conceded that it is not a legal definition in any sense, but rather only “an ecclesial structural missiology definition,” Tr. 971:16-19, that would apply only to TEC and the Anglican Communion. Tr. 970:22-971:28. But Virginia statutes, even ones involving religious organizations, do not take their meaning from “ecclesial structural missiology.”

The Church concedes that the CANA congregations were formerly “attached” to the Diocese and, indirectly through the Diocese, to TEC. The Church further acknowledges that TEC was a member of the Anglican Communion. The fact remains that the CANA Congregations are now “attached” to the Communion through CANA and the Church of Nigeria, just as they were previously attached through the Diocese and TEC. Based upon Professor Douglas’ definition, the Church says it was impossible for the CANA Congregations to have been attached to the Anglican Communion through their attachment to TEC and the Diocese because the Anglican Communion does not have a legally binding constitution and canons similar to those adopted by TEC or by the Diocese. But this ignores the fact that TEC’s Constitution expressly recognizes the common liturgy, rules of worship, and doctrine shared, with minor variances, throughout the Anglican Communion.<sup>21</sup> The Church’s argument is therefore unavailing.

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<sup>21</sup> TEC-Diocese Exh. 2 at 1 (defining the Anglican Communion as “a *Fellowship* within the One, Holy, Catholic, and Apostolic Church, of those duly constituted Dioceses, Provinces, and

**III. TEC And The Diocese Have Not Raised Any Doubt Concerning The Constitutionality Of Virginia Code § 57-9, Let Alone Overcome The Statute's Strong Presumption Of Constitutionality.**

As shown above, the interpretation of Virginia Code § 57-9 offered by TEC and the Diocese is wholly implausible: it is inconsistent with the statute's text, structure, history, logic, and purpose; it would require a different statutory analysis in every case, based on the particular polity of the divided denomination; and it would ultimately render the statute meaningless, since consensual divisions involve no disputed issues of property ownership or congregational votes.

Recognizing the weaknesses of their statutory arguments, TEC and the Diocese attempt to bend this Court's reading of the statute by warning that their interpretation must be preferred "to avoid the serious constitutional issues that would arise if § 57-9 were interpreted as the congregations propose." Br. 13-15; *accord id.* at 46-47. But even if our reading of § 57-9 posed a constitutional difficulty, "avoidance of a difficulty will not be pressed to the point of disingenuous evasion," *Rust v. Sullivan*, 500 U.S. 173, 191 (1991).

In any event, the Church has failed to show that our reading raises "serious" questions regarding the statute's constitutionality, let alone to overcome its "strong presumption of constitutionality." *City Council v. Newsome*, 226 Va. 528, 523 (1984). Section 57-9 embodies the neutral principle of presumptive majority rule, and hierarchical churches can avoid its application by taking the minimal step of directing congregations to transfer title to a corporation or the bishop—a form of ownership routinely used by the Diocese and other churches. There is no basis to the claim that § 57-9 "interfere[s] with" or "overrule[s]" the Church's authority (TEC Br. 13, 14), or for application of "the 'constitutional doubts'" canon—"the last refuge of . . . an interpretive lost cause." *Reno v. Flores*, 507 U.S. 292, 314 n.9 (1993); *accord Jones v. United*

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regional Churches in communion with the See of Canterbury, *upholding and propagating the historic Faith and Order as set forth in the Book of Common Prayer*" (emphasis added)).

*States*, 529 U.S. 848, 857 (2000) (avoidance appropriate only to avoid “grave and doubtful” constitutional questions). Section 57-9 is fully consistent with the First Amendment.

**A. Virginia Code § 57-9 Does Not Violate The Free Exercise Clause.**

The Church’s free exercise claim rests on the premise that § 57-9 unduly interferes with the “polity” of the Church. The Church states the point in various ways, but it boils down to the idea that the Court must defer to its canons because applying § 57-9 “would obliterate the distinction between congregational and hierarchical churches” and “transform Virginia’s statutory church property scheme into one where a congregation’s vote overrides all other considerations, regardless of the church’s nature, rules, and ecclesiastical government.” TEC Br. 13. A ruling against the Church, TEC says, would “restructure the Episcopal Church” by “allow[ing] the Congregations unilaterally to ‘divide’ the Episcopal Church and the Diocese.” TEC Br. 40.

In fact, a straightforward application of § 57-9 here would do no such thing. The statute merely provides a *presumption* that the neutral principle of majority rule will govern a narrow aspect of a church’s operations (property ownership) in a limited circumstance (a division) that is identifiable on a secular and neutral basis (the disaffiliation of a group of congregations who form a new polity). Moreover, § 57-9 applies *only* to property held by congregational trustees. Thus, a hierarchical church may avoid the statute entirely by directing congregations to hold title in corporate form or to transfer title to the bishop—a form of ownership frequently used by the Diocese itself and other denominations that all agree are “hierarchical.” There is no basis for any suggestion that § 57-9 inhibits, let alone *substantially* burdens, the Church’s religious exercise.

Section 57-9 is therefore constitutional under *Jones v. Wolf*, 443 U.S. 595, 607-08 (1979), which held that a State may “adopt[] a presumptive rule of majority representation” for resolving church property disputes—even in cases involving “hierarchical” denominations—so long as the State also provides a “method of overcoming the majoritarian presumption” through legal ar-

rangements made before a dispute over ownership erupts. If TEC and the Diocese had the authority they purport to have, they could have avoided this dispute by taking the minimal step of directing their member congregations to transfer title. *Jones* therefore forecloses the Church's claim that its strained reading of § 57-9 is constitutionally compelled.

Indeed, the effect of a ruling for the CANA Congregations would not be to "restructure" TEC, but to recognize a "division" between those who wish to remain in TEC and those who have altogether left the denomination. The CANA Congregations' position would not disturb TEC's existing "polity"; it would simply sever or "divide" off from TEC those congregations and members that have voted to leave. We develop these points below.

**1. *Jones v. Wolf* strongly supports the constitutionality of Virginia Code § 57-9.**

Invoking its internal canons and the U.S. Supreme Court's decision in *Jones*, TEC advances the sweeping contention that "the General Assembly cannot impose rules on the church contrary to those established by the Episcopal Church and Diocese themselves." Br. 42-44. *Jones* is indeed the most recent word from the U.S. Supreme Court on matters of church property, but it squarely rejects any view that this Court must defer to TEC's internal canons instead of applying the presumptive principle of majority rule set forth in Va. Code § 57-9.

*Jones* arose when the majority of a Presbyterian church voted to withdraw from one denomination (the Presbyterian Church in the United States (PCUS)) and to affiliate with another (the Presbyterian Church in America (PCA)). The internal authorities of PCUS ruled that the minority was "the true congregation," but the Georgia Supreme Court declined to recognize this decision. 443 U.S. at 607. Instead, it ruled that under "neutral principles of law," the majority faction represented the local congregation to whom the property was deeded. *Id.* at 600-01.



The PCUS obtained review in the U.S. Supreme Court, arguing (as TEC and the Diocese argue here (Br. 13, 45)) that it would violate the First Amendment for a State to provide that majority rule governed even a limited aspect of a hierarchical church's affairs (church property). Describing the issue as "whether civil courts . . . may resolve [a church property] dispute on the basis of 'neutral principles of law,' or whether they must defer to the resolution of an authoritative tribunal of the hierarchical church," the Court rejected the denomination's argument:

If in fact Georgia has adopted a presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means, we think this would be consistent with both the neutral-principles analysis and the First Amendment. Majority rule is generally employed in the governance of religious societies. Furthermore, the majority faction generally can be identified without resolving any question of religious doctrine or polity. . . . Most importantly, any rule of majority representation can always be overcome, under the neutral-principles approach, either by providing, in the corporate charter or the constitution of the general church, that the identity of the local church is to be established in some other way, or by providing that the church property is held in trust for the general church and those who remain loyal to it. *Indeed, the State may adopt any method of overcoming the majoritarian presumption, so long as the use of that method does not impair free-exercise rights or entangle the civil courts in matters of religious controversy.*

*Id.* at 597, 607-08 (emphasis added; footnote & citation omitted). The Court went on to hold that the Georgia Supreme Court on remand should simply "specify how, under Georgia law, [the majority] presumption may be overcome." *Id.* at 608 n.5.

There can be no question after *Jones* that a State may "adopt[] a presumptive rule of majority representation" to resolve church property disputes—even in cases involving hierarchical churches—so long as it provides a "method of overcoming the majoritarian presumption." *Id.* at 607-08. Nonetheless, quoting all but the final (italicized) sentence in the block quotation above, TEC and the Diocese baldly assert that "[t]o 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 canon law provision such as those described above, on the other, would be to

defy both the Supreme Court's holding that 'the civil courts will be bound to give effect' to such provisions and to eviscerate [*Jones*]." TEC Br. 45.

The sentence omitted from TEC's quotation (at 45), however, is the central holding of the case, and it affirms that a State has broad discretion in determining the *means* by which a hierarchical denomination may overcome the presumption that property ownership will follow the congregation's majority. The State's options are not limited to the two possibilities noted by the Court in dictum, and the State may, but need not, recognize provisions in a church's constitution or charter as sufficient to create a property interest. Rather, "the State may adopt *any method* of overcoming the majoritarian presumption, *so long as the use of that method does not impair free-exercise rights or entangle the civil courts in matters of religious controversy.*" 443 U.S. at 608. As explained in the following section, that is exactly what Virginia has done here, and Virginia's approach in no way substantially burdens or "inhibits" the Church's religious exercise.<sup>22</sup>

2. **The undisputed record evidence confirms that the Episcopal Church and the Diocese are not substantially burdened by the application of Virginia Code § 57-9, which may be avoided by adopting other forms of property ownership that the Church and other denominations routinely use.**

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<sup>22</sup> Even if a State chose to recognize the assertion of a property interest in the church's *constitution or charter* (and Virginia has not), that would not mean that it was required to recognize such an assertion in church *canons*—particularly where (as here) the church has both a constitution and canons and the means for amending the canons at issue is far less onerous than the means for amending the constitutions at issue. Whereas the Church's canons may be amended in a single General Convention or Annual Diocesan Council, constitutional amendments require two readings at consecutive sessions of those bodies. Compare TEC-Diocese Exh. 1 (TEC Const. & Canons), Art. XII and TEC-Diocese Exh. 3 (Diocese Const. & Canons), Art. XIX (constitutional amendment procedures) with TEC-Diocese Exh. 1, Title V, Canon 1, § 1 and TEC-Diocese Exh. 3 at 30 (canonical amendment procedures). Thus, if TEC or the Diocese were to propose a new *constitutional* provision concerning property ownership, member congregations would have an intervening 3-year period (in the case of TEC) or 1-year period (in the case of the Diocese) to determine whether to disaffiliate before the new rule could be voted on and take effect.

In approving the “neutral principles” approach to resolving church property disputes, the Court in *Jones* specifically rejected the view that compulsory deference to church authorities is “necessary in order to protect the free exercise rights ‘of those who have formed the association and submitted to its authority.’” 443 U.S. at 605-06 (citation omitted). As the Court explained:

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.

*Id.* at 606. The Court thus emphasized that as long as congregations and denominations have an opportunity to order their relations in response to the law, the fact that they must alter documents or adopt different forms of ownership does not unduly burden their religion. “We cannot agree,” the Court concluded, “that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved.” *Id.* at 605.

Virginia law provides a number of means by which hierarchical churches may order their relations to secure a right to congregational property, and is fully in accord with the teaching of *Jones*. Under § 57-9, in the limited circumstance when a “church or religious society” experiences a “division,” the property at issue follows the congregation’s majority. But § 57-9 is available only to congregations “whose property is held by trustees,” and a hierarchical church may avoid its application simply by adopting other forms of ownership, as many such churches do.

For example, Va. Code § 57-16 provides that a hierarchical church’s “duly elected or appointed bishop . . . shall have power to acquire by deed, devise, gift, purchase or otherwise, any real or personal property.” This method of ownership is expressly permitted by Diocesan Canon 15.4, which provides that “[t]he Bishop, or Ecclesiastical Authority, is hereby authorized to ac-

quire by deed, devise, gift, purchase or otherwise, any real property for use or benefit of the Diocese.” TEC-Diocese Exh. 3. at 28. Moreover, the Journal of the 210th Annual Council of the Diocese of Virginia confirms that the Bishop of the Diocese holds at least 29 properties in his own name, some 16 of which appear to be worshipping parishes or missions. See CANA Exh. 148 at 0331-0337 (“Properties Held”); see also CANA Exh. 147 at 0344-349 (Journal of the 209th Annual Council of the Diocese) (“Properties Held”). The fact that the Church routinely holds property used for congregational worship in a manner that would avoid application of § 57-9 forecloses any suggestion that its exercise of religion is inhibited or “substantially burdened” by the statute. See *Hernandez v. Commissioner*, 490 U.S. 680, 699 (pre-*Smith* free exercise test requires showing that “government has placed a substantial burden on [religion]”).

Assuming, *arguendo*, that the Church has the hierarchical authority it claims to have, it could avoid disputes like this simply by directing their member congregations to “modify the deeds” at issue “before the dispute erupts”—what *Jones* describes as a “minimal” step to “ensure . . . that the faction loyal to the hierarchical church will retain the church property.” *Id.* at 606. Indeed, a number of hierarchical churches in Virginia have done just that. For example, title to the real property of Roman Catholic and Mormon congregations is held by bishops (see Stipulation of Fact ¶¶ 5, 8), and title to the real property of Greek Orthodox and Foursquare churches, among others, is held by corporations (*id.* ¶¶ 6-7). Because none of this property is held by trustees, § 57-9 is not triggered. But having neglected to take the “minimal” step that other hierarchical churches have taken, the Church may not insist that *the Constitution* requires recognition of their canons. *Id.* To the contrary, *Jones* makes clear that Virginia may adopt a presumption in favor of ownership by the congregants, who typically provide the resources that enable churches to function, and that “the State may adopt any method of overcoming the majoritarian

presumption” that allows hierarchical churches to reach their desired result and avoids judicial resolution of doctrinal issues. 443 U.S. at 608. *Jones* does not grant TEC a free-exercise right to retain any property a congregation may have acquired while an Episcopal parish, *without* complying with the legal norms established by the State for ensuring such retention. As the Court stated, “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 (emphasis added). The Church ignores the significance of this important proviso as well.

Instead, the Church repeatedly claims deference on matters of “polity,” but this is merely an attempt to blur the line between disputes over church property and genuine disputes over polity. To be sure, “the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine or practice,” and “the Amendment requires that civil courts defer to the resolution of issues of *religious doctrine or polity* by the highest court of a hierarchical church organization.” *Jones*, 443 U.S. at 601 (emphasis added). But “the First Amendment does not dictate that a State must follow a particular method of resolving *church property* disputes. Indeed, a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.” *Id.* at 602 (first emphasis added).

*Jones* thus distinguished between matters of “religious doctrine or polity” and “church property issues,” holding that the latter may be resolved by *any* method the State chooses, as long as it avoids judicial resolution of doctrine and provides hierarchical churches with a reasonable opportunity to acquire control over congregational property “before the dispute erupts.” *Id.* at 606. Section 57-9 does just that, and in a neutral way. As the Virginia Supreme Court explained in *Reid v. Gholson*: “the right to reasonable notice, the right to attend and advocate one’s

views, and the right to an honest count of the votes . . . are neutral principles of law, applicable not only to religious bodies, but to public and private lay organizations and to civil governments as well. Courts must apply them every day, and can do so without any danger of entering a ‘religious thicket.’” 229 Va. 179, 189-90 (1985). So too here.<sup>23</sup>

Even TEC’s official reporters have fairly interpreted the import of *Jones*. The *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America Otherwise Known as The Episcopal Church* (1981), whose authors (E. White and J. Dykman), are designated by the Church, say the following about *Jones*:

*Jones v. Wolf* decided . . . that States, consistent with the First and Fourteenth Amendments, could resolve disputes over the ownership of church property by adopting a ‘neutral principles of law’ approach and are not required to adopt a rule of compulsory deference to religious authority in resolving such disputes where no issues of doctrinal controversy is involved.

This approach gives great weight to the actions of controlling majorities, and would appear to permit a majority faction in a parish to amend its parish charter to delete all references to the Episcopal Church, and thereafter to affiliate the parish—and its property—with a new ecclesiastical group.

Vol. I, at 301.

TEC’s other, pre-*Jones* authorities are not to the contrary. Both *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), and *Serbian East Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), involved the question whether a hierarchical church is entitled to deference on issues

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<sup>23</sup> *Jones* makes clear that a hierarchy may not simply invoke the magic words “governance” or “polity” to insulate itself from having church property issues resolved by neutral principles such as majority rule. Rather, the court need only “take special care to scrutinize [religious documents, such as a church constitution] in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust.” *Id.* at 604. The Court found that “the promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application” and that “[t]hese problems . . . should be gradually eliminated as recognition is given to the obligation of States, religious organizations, and individuals [to] structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.” *Id.* at 603-04 (citations and quotations omitted).

involving its choice of ecclesiastical *leaders*. *Kedroff*, for example, involved a New York law that purported to strip oversight of a Russian Orthodox cathedral from a prelate appointed by the Russian Orthodox Patriarch in Moscow. Explaining that the question was “the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America,” the Court held that “[t]his controversy . . . is strictly a matter of ecclesiastical government” to be decided by “the church judicatories to which the matter has been carried.” 344 U.S. at 113, 115; *see also id.* at 113 (describing the case as one involving “questions of discipline, or of faith, or ecclesiastical rule”). The Court held that the New York law violated the First Amendment because it “regulates church administration, the operation of the churches, [and] the appointment of clergy, by requiring conformity to church statutes.” *Id.* at 107. In sum, *Kedroff* is not principally about who owned the church property (a question that may be decided by neutral principles), but about the state’s inability to choose the ecclesiastical *leader* of the congregation that occupies such property (a question of ecclesiology). This basic distinction may explain why the Court’s opinion in *Jones* does not so much as cite *Kedroff*.<sup>24</sup>

Similarly, *Milivojevich* arose when authorities in the Serbian Eastern Orthodox Church “defrocked” a bishop because he no longer possessed the “fitness to serve as Bishop.” 426 U.S. at 698, 702. The Bishop refused to recognize his removal and filed suit seeking “to have himself declared the true Diocesan Bishop.” *Id.* at 707. The state courts held that the Bishop’s removal was “arbitrary,” but the Supreme Court reversed. Although the Court examined church polity insofar as necessary to ascertain where authority over discipline lay, it condemned the lower

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<sup>24</sup> TEC and the Diocese suggest (Br. 14) that *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), was compelled by the First Amendment.” If that assertion were correct, the Court in *Jones v. Wolf* presumably would have felt itself bound to follow or distinguish *Watson*, but it did not even cite that pre-*Erie* federal common law decision. Thus, as the Virginia Supreme Court recognized even before *Jones v. Wolf*, in *Norfolk Presbytery*, 214 Va. at 504, Virginia is “not bound by the rule of *Watson*” or the notion of “implied consent to [hierarchical church] government.”

court's finding that defrocking the Bishop was arbitrary. Questions involving "the conformity of the members of the church to the standard of morals required of them" are "strictly and purely ecclesiastical"—and thus beyond civil courts' jurisdiction. *Id.* at 714.

*Kedroff* and *Milivojevich* thus involve deference to hierarchical decisions concerning who is the rightful ecclesiastical *leader* of member congregations or dioceses, as opposed to decisions about property ownership. The same can be said of TEC's other authority. See *Bowie v. Murphy*, 271 Va. 127, 135 (2006) (permitting a deacon's defamation claim against a pastor and church members to go forward on the grounds that it involved only allegations regarding whether the defendants committed an assault and did not "mix with 'ecclesiastical decisions regarding the appointment and removal' of church officials"). In short, the Church effectively equates its ability to organize itself as it wishes with its desire to own property in the legal form it wishes. But § 57-9 affects only the latter and thus poses no serious constitutional question.

The weakness of the Church's reading of §57-9 is evidenced by the space they devote to arguing that the natural reading of § 57-9 violates the First Amendment. And the fact that, in presenting this argument, they omit reference to the most critical sentence in the holding of *Jones* is equally telling. In the end, their view reflects a failure to come to grips with the fact that hierarchical denominations do not receive automatic deference when it comes to issues of property ownership. But as *Jones* makes clear, the First Amendment in no way bars application of Va. Code § 57-9(A) to denominations such as the Church, which—if it indeed has the hierarchical authority it purports to have—could have avoided this dispute by taking the minimal step of directing their member congregations to transfer title to the bishop or a corporation.

3. **The Supreme Court's decision in *Employment Division v. Smith* confirms the constitutionality of Virginia Code § 57-9.**



The U.S. Supreme Court's more recent free exercise decisions, and especially *Employment Division v. Smith*, 494 U.S. 872 (1990), further support the "neutral principles" analysis adopted in *Jones* and applied in Virginia cases such as *Reid*. 229 Va. at 189-90. *Smith* held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U.S. at 879. As the Court later explained, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993).

These cases confirm the constitutionality of § 57-9. Section 57-9's codification of a presumptive rule of majority representation, which is applicable not only to all denominations but to secular organizations as well, confirms that the statute is both "neutral" and "generally applicable." As the Virginia Supreme Court explained in *Reid*, the right to "reasonable notice" and "an honest count of the votes" are "neutral principles of law, applicable not only to religious bodies, but to public and private lay organizations and to civil governments as well. Courts must apply them every day, and can do so without any danger of entering a 'religious thicket.'" 229 Va. at 189-90. Thus, the analysis in *Smith* and its progeny confirms that § 57-9 passes muster under the Free Exercise Clause.

**B. Virginia Code § 57-9 Does Not Violate the Establishment Clause.**

In their final argument, the Church claims that our reading of § 57-9 "would violate the First Amendment principle of governmental neutrality between religions," by (1) "preferring churches with congregational forms of government over hierarchical churches whose property is held by trustees," and (2) "by preferring hierarchical churches whose property is *not* held by trustees over those that use trustees to hold title." TEC Br. 4. Citing *Larson v. Valente*, 456 U.S.

228 (1982), they claim that the statute embodies denominational discrimination and is subject to strict scrutiny. But even if strict scrutiny does not apply, they claim that the statute violates the so-called *Lemon* test. TEC Br. 49-52. These arguments likewise lack merit.

1. **Virginia Code § 57-9 does not discriminate among religions based on the manner in which they hold property, and the Bishop of the Diocese in fact holds title to congregational property in the form that it says is unconstitutionally favored by the statute.**

*Larson* involved a law that initially had exempted all charitable organizations from various registration and reporting requirements, but was amended to restrict that exemption to groups that received at least 50 percent of their donations from members. 456 U.S. at 230-32, 239. Noting that the legislative history evidenced an intent to “get at” the “Moonies” but to protect the “Roman Catholic Archdiocese,” the Court held that the amendment’s “explicit and deliberate distinctions between different religious organizations” had the “express design” of “religious gerrymandering” and effecting a “denominational preference.” *Id.* at 245, 246 n.3, 254-55.

*Larson*, however, rejected the argument that a statute’s mere “disparate impact” led to strict scrutiny (*id.* at 246 n.23 ), and later Supreme Court precedent (not cited by TEC and the Diocese) confirms that *Larson* requires strict scrutiny only where “the law *facially* differentiates among religions.” *Hernandez*, 490 U.S. at 695 (emphasis added). “[W]here a statute is neutral on its face and motivated by a permissible purpose,” there is “no justification for applying strict scrutiny.” *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987); accord *Droz v. Commissioner*, 48 F.3d 1120, 1124 (9th Cir. 1995) (holding that *Larson* applies only to “facially discriminatory” laws, not to laws merely “involv[ing] disparate treatment of different religious sects”). Indeed, if a statute’s disparate impact led to strict scrutiny, few church property statutes would survive constitutional review, since virtually all such statutes have potentially different impacts on different churches. See also *Gillette v. United States*, 401 U.S. 437, 452 (1971) (“a

claimant alleging ‘gerrymander’ must be able to show the absence of a neutral, secular basis for the lines government has drawn”).

Section 57-9 is neutral on its face; it makes no distinctions among religious denominations of the sort at issue in *Larson*; and there is no evidence that it was adopted with an “express design” of “religious gerrymandering” or effecting a “denominational preference.” 456 U.S. at 245, 255. What is more, religious denominations hold properties in a variety of ways, and some denominations (including the Diocese itself) hold property in more than one form, including forms outside the statute’s reach. These undisputed facts preclude any finding that Virginia has effected an establishment of religion by singling out the Church for disfavored treatment.

The stipulation of fact cited by the Church is instructive in this regard. First, it shows that the congregations of several other denominations hold title in the name of trustees, thus undermining any suggestion that the statute was designed to discriminate against TEC and the Diocese. *See* Stipulation ¶¶1-4 (Episcopalians, Presbyterians, Methodists, and Lutherans). In addition, however, the Stipulation, which is non-exhaustive, shows that the form of property holdings varies not only among but within religious denominations. *See* Stipulation ¶¶1-10.

Most importantly, the stipulation confirms that only *some* portion of the property used for worship by congregations affiliated with the Diocese is held by trustees. *See* Stipulation ¶ 1. As discussed above, title to a substantial amount of congregational property in the Diocese is held by Bishop Lee. CANA Exh. 148 at 0331-0337; CANA Exh. 147 at 0344-349. Depending on which congregation’s property is at issue, then, it might or might not be subject to § 57-9(A).

But even if the Episcopal Church (1) were the *only* denomination whose congregations held property in the name of trustees, and (2) *all* property of Diocesan affiliate were held in this manner, that would not mean § 57-9 was unconstitutional. The statute would remain neutral on

its face and there would be no evidence that it was designed to target Episcopalians. *Most importantly*, the Diocese could claim no injury from the statute because it could always avoid its application by directing its member congregations to hold title in the name of the Bishop. This latter fact alone distinguishes this case from *Larson*, where members of the only ones affected by the law (the “Moonies”) were religiously compelled to engage in “door-to-door and public-place proselytizing and solicitation of funds to support the Church.” 456 U.S. at 234. The Moonies were not free, as is the Diocese, to alter their practice to avoid the force of the law. As the Court observed, such an alteration would have “den[ied] [the Church’s] members their ‘religious freedom.’” *Id.* at 234. In contrast to *Larson*, § 57-9 does not compel the Diocese to do, or desist from doing, any religious practice; rather, the law applies only to churches that fail to take the “minimal step” of securing title.

As to the Church’s suggestion that the statute “prefer[s] churches with congregational forms of government over hierarchical churches whose property is held by trustees” (TEC Br. 49), that argument ignores the fact that the presumption of majority rule (which, again, may be overcome by adopting other forms of ownership) under Part A is entirely consistent with Part B of the statute, which deals with congregational churches. Specifically, Part B provides for voting to resolve property ownership in the case of a “division” 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.” Va. Code § 57-9(B). The Church does not explain how this amounts to discrimination against hierarchical churches, and thus has failed to carry its heavy burden of establishing § 57-9’s unconstitutionality.

2. **Virginia Code § 57-9 has a secular purpose and effect, and minimizes church-state entanglement, consistent with the *Lemon* Test and the values of the First Amendment.**

Although the U.S. Supreme Court has never applied the *Lemon* test to a church property dispute, the Church asserts that the Court should apply it here and invalidate Virginia Code §57-9 for its lack of a “secular purpose,” for its “primary effect” of advancing religion, and for excessively entangling the state with religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). Section 57-9, however, has both a secular purpose and effect, and it minimizes rather than increases state entanglement with religion.

*First*, § 57-9 has a secular purpose: resolving church property disputes on a neutral basis, which minimizes the courts’ involvement in doctrine and internal church affairs. *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 354 (D.C. 2005) (“[T]he neutral principles approach avoids prohibited entanglement in questions of religious doctrine, polity, and practice . . . . The neutral principles approach is thereby completely secular in operation.”). “[D]emocratic” principles are “neutral principles of law, applicable not only to religious bodies, but to public and private lay organizations,” and “[c]ourts must apply them every day and can do so without any danger of entering a ‘religious thicket.’” *Reid*, 229 Va. at 189-90. Moreover, the Church’s theory is far more likely to involve courts in difficult issues of doctrine and polity, for all the reasons discussed above. The statute thus satisfies *Lemon*’s “secular purpose” prong.<sup>25</sup>

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<sup>25</sup> TEC suggests that the statute lacks a secular purpose based on an 1867 statement from Virginia House Speaker John Baldwin, sponsor of the statute, that “the object of the statute was ‘to protect local congregations who when their church divided were compelled to make a choice between the different branches of it, and to allow them in some such cases to take their property with them.’” Br. 51 (citing Tr. 223-24). According to TEC, “the reference to ‘some such cases’ is an acknowledgment that the statute treats different religions differently, and that also is not a legitimate secular purpose.” Br. 51. The reference to “some such cases,” however, was simply an acknowledgment that “in some such cases” the congregational votes to separate might fail, leaving those congregations (and their property) in the mother church. But even if that were not so, the statute would still have a secular purpose (discussed in the text), which is all that is re-

*Second*, there is no basis to the contention that § 57-9 has a “primary effect” of advancing religion because it “would advance congregational governance” and “retard and inhibit hierarchical governance.” Br. 52. States have a substantial interest in resolving church property disputes according to neutral principles. And had the Church taken the “minimal step” of directing member congregations (over whom it asserts broad authority) to adopt another form of ownership, the parties would not be here. *Jones*, 443 U.S. at 606. The “primary effect” of § 57-9 is simply to resolve property ownership based on majority rule in the event of a division.

*Third*, § 57-9 would not create “excessive governmental entanglement with religion” by “impos[ing] a church governance rule by state legislation.” TEC Br. 52. As explained above, the statute applies only to property, and it may easily be avoided by adopting alternative forms of ownership (something the Bishop demonstrably knows how to do). Based on the application of a neutral principle, majority rule, the statute simply recognizes the “division” from TEC of those who no longer wish to be associated with it, leaving the rest free to exercise their religion without state involvement. *Reid*, 229 Va. at 189-90. Ironically, § 57-9 would excessively entangle this Court with religion only if it were misinterpreted, as the Church suggests, to vary with each denomination’s polity. Moreover, the resulting differences in application would look far more like discrimination among members of different faiths than anything here.

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quired. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (a statute must be motivated “wholly by religious considerations” to violate secular purpose prong).

CONCLUSION

WHEREFORE, the CANA Congregations and various associated defendants, by counsel, respectfully request that this Court make factual findings that the CANA Congregations have satisfied the "division," "branch," "church or religious society," and "attached" requirements of Va. Code § 57-9; that, upon approval of the CANA Congregations' determination to separate from TEC and join CANA, this approval be "entered in the court's civil order book" (§ 57-9), and that the Court grant such additional relief as the case may require and the Court deems just.

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Respectfully submitted,

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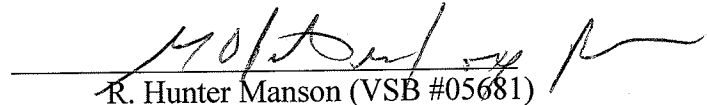
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**VIRGINIA:**

**IN THE CIRCUIT COURT FOR FAIRFAX COUNTY**

<b>In re:</b>	)	
<b>Multi-Circuit Episcopal Church</b>	)	<b>Civil Case Numbers:</b>
<b>Litigation</b>	)	CL 2007-248724,
	)	CL 2006-15792,
	)	CL 2006-15793,
	)	CL 2007-556,
	)	CL 2007-1235,
	)	CL 2007-1236,
	)	CL 2007-1237,
	)	CL 2007-1238,
	)	CL 2007-1625,
	)	CL 2007-5249,
	)	CL 2007-5250,
	)	CL 2007-5362,
	)	CL 2007-5363,
	)	CL 2007-5364,
	)	CL 2007-5682,
	)	CL 2007-5683,
	)	CL 2007-5684,
	)	CL 2007-5685,
	)	CL 2007-5686,
	)	CL 2007-5902,
	)	CL 2007-5903, and
	)	CL 2007-11514

**CANA CONGREGATIONS' MEMORANDUM IN OPPOSITION TO THE POST-TRIAL  
OPENING BRIEF OF THE EPISCOPAL CHURCH AND THE DIOCESE**

This acts as a one-page cover sheet reference pleading to the complete CANA Congregations' Memorandum in Opposition to the Post-trial Opening Brief of The Episcopal Church and The Diocese, filed in CL 2007-248724 (the omnibus case file), on January 11, 2008. The CANA Congregations' Memorandum in Opposition to the Post-trial Opening Brief of The Episcopal Church and The Diocese and this corresponding one-page reference pleading applies to the Omnibus case number: CL 2007 – 248724 and the following cases:

1. *In re: Truro Church*; (Circuit Court of Fairfax County; CL 2006-15792);
2. *In re: Church of the Apostles*; (Circuit Court of Fairfax County; CL 2006-15793)
3. *In re: Church of the Word, Gainesville*; (Circuit Court of Prince William County; CL73464) (Circuit Court of Fairfax County; CL 2007-11514);

4. *The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Epiphany, Herndon* (Circuit Court of Fairfax County; CL 2007-1235);
5. *The Protestant Episcopal Church in the Diocese of Virginia v. Truro Church* (Circuit Court of Fairfax County; CL 2007-1236);
6. *The Protestant Episcopal Church in the Diocese of Virginia v. Christ the Redeemer Church* (Circuit Court of Fairfax County; CL 2007-1237);
7. *The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Apostles* (Circuit Court of Fairfax County; CL 2007-1238);
8. *The Episcopal Church v. Truro Church et al.* (Circuit Court of Fairfax County; CL 2007-1625);
9. *In re: Church at the Falls, The Falls Church;* (Circuit Court of Fairfax County; CL 2007-5249);
10. *The Protestant Episcopal Church in the Diocese of Virginia v. The Church at The Falls – The Falls Church* (Circuit Court of Arlington County Case No. 07-125)(Circuit Court of Fairfax County; CL 2007-5250);
11. *The Protestant Episcopal Church in the Dioceses of Virginia v. Potomac Falls Church* (Circuit Court of Loudoun County Case No. 44149)(Circuit Court of Fairfax County; CL 2007-5362);
12. *In re: Church of Our Savior at Oatlands;* (Circuit Court of Fairfax County; CL 2007-5363);
13. *The Protestant Episcopal Church in the Diocese of Virginia v. Church of Our Saviour at Oatlands* (Circuit Court of Loudoun County Case. No. 44148)(Circuit Court of Fairfax County; CL 2007-5364);
14. *In re: Church of the Epiphany;* (Circuit Court of Fairfax County; CL 2007-556);
15. *The Protestant Episcopal Church in the Diocese of Virginia v. St. Margaret's Church* (Circuit Court of Prince William Case No. CL 73465)(Circuit Court of Fairfax County; CL 2007-5682);
16. *The Protestant Episcopal Church in the Diocese of Virginia v. St. Paul's Church, Haymarket* (Circuit Court of Prince William County Case No. CL 73466)(Circuit Court of Fairfax County; CL 2007-5683);
17. *The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Word* (Circuit Court of Prince William County Case No. CL 73464)(Circuit Court of Fairfax County; CL 2007-5684);
18. *In re: St. Margaret's Church;* (Circuit Court of Fairfax County; CL 2007-5685);


19. *In re: St. Paul's Church, Haymarket*; (Circuit Court of Fairfax County; CL 2007-5686);
20. *The Protestant Episcopal Church in the Diocese of Virginia v. St. Stephen's Church* (Circuit Court of Northumberland County Case No. CL 07-16)(Circuit Court of Fairfax County; CL 2007-5902); and
21. *In re: St. Stephen's Church*; (Circuit Court of Fairfax County; CL 2007-5903).

For the complete CANA Congregations' Memorandum in Opposition to the Post-trial Opening Brief of The Episcopal Church and The Diocese, please see the omnibus case file, CL 2007 – 248724.

Dated: January 11, 2008

Respectfully submitted,

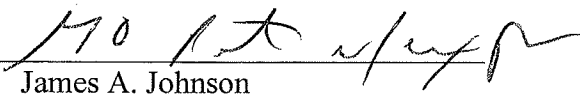
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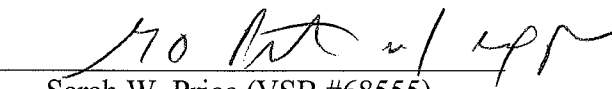
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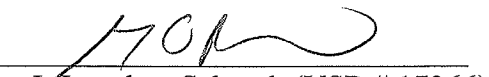
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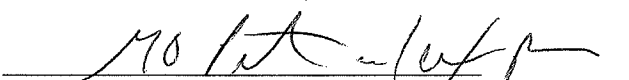
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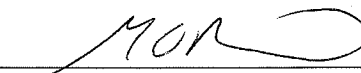
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