In the
Supreme Court of Virginia

RECORD NO. _____

THE EPISCOPAL CHURCH,

Appellant,

v.

TRURO CHURCH *et al.*,

Appellees.

PETITION FOR APPEAL

Heather H. Anderson (VSB # 38093)
handerson@goodwinprocter.com
Soyong Cho (VSB # 70896)
scho@goodwinprocter.com
Goodwin Procter LLP
901 New York Avenue, N.W.
Washington, DC 20001
Telephone: (202) 346-4000
Facsimile: (202) 346-4444
Counsel For Appellant The Episcopal Church

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

CONSTITUTIONS

STATE STATUTES

RULES OF COURT

"'The structure of our government has, for the preservation of civil liberty, ... secured religious liberty from the invasion of the civil authority.'" Watson v. Jones, 80 U.S. 679, 730 (1872) (citation omitted). "[R]eligious freedom encompasses the 'power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721-22 (1976) (quoting Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952). Nowhere has this principle been more emphatically affirmed than in Virginia. Reid v. Gholson, 229 Va. 179, 187, 327 S.E.2d 107, 111 (1985) ("The constitutional guarantees of religious freedom have no deeper roots than in Virginia....").

Since this country's earliest days, the founders and members of the Episcopal Church – as well as other churches – have created and maintained a hierarchical church polity and rules designed to protect the Church's continuity from the vicissitudes of changing congregational majorities. Thus, Episcopal parishes are formed by dioceses and may not unilaterally "disaffiliate" from the Church; nor are they empowered to legally "divide" the Church. Parish property, moreover, is expressly restricted for the mission of the Church and its dioceses. Courts around the country have consistently affirmed that Episcopal parish property remains with the

Church in the event of a dispute.[1]

The Circuit Court of Fairfax County, however, concluded that with Va. Code § 57-9(A), the General Assembly has eviscerated the structure and rules the Episcopal Church has established for itself, and for the Church in Virginia, substituted a congregational polity under which, in the event of a theological disagreement, local congregations may legally "divide" the Church and retain parish property for their own use. The circuit court's interpretation of § 57-9(A) is inconsistent with the statute's legal and historical context and all known prior applications. It is also unconstitutional. Indeed, the threat to religious liberty posed by this decision can hardly be overstated. If the legislature may regulate internal church governance as the circuit court held, then no denomination – be it hierarchical or congregational – is able to decide matters of church governance for itself, free from state interference. The Episcopal Church respectfully requests that this Court accept review of this case so that the

---

[1] See, e.g., Episcopal Church Cases, 198 P.3d 66 (Cal. 2009); Episcopal Diocese of Rochester v. Harnish, 899 N.E.2d 920 (N.Y. 2008); In re Church of St. James the Less, 888 A.2d 795 (Pa. 2005); Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Diocese of Conn., 620 A.2d 1280 (Conn. 1993); Bishop & Diocese of Colo. v. Mote, 716 P.2d 85 (Colo. 1986); Daniel v. Wray, 580 S.E.2d 711 (N.C. Ct. App. 2003); Episcopal Diocese of Mass. v. Devine, 797 N.E.2d 916 (Mass. App. Ct. 2003); Diocese of Southwestern Va. v. Buhrman, 5 Va. Cir. 497 (Clifton Forge 1977), pet. refused, Rec. No. 780347 (Va. June 15, 1978).

circuit court's errors may be corrected.

ASSIGNMENTS OF ERROR

1. The circuit court erred in interpreting and applying the term "division" in Va. Code § 57-9(A) and the statute itself to supersede the Episcopal Church's polity, because its interpretation ignores and conflicts with related Virginia statutory and case law, the principle of Constitutional avoidance, and the statute's past application.

2. The circuit court erred in holding that CANA and the ADV are "branches" of the Episcopal Church or the Diocese of Virginia (the "Diocese") for purposes of § 57-9(A), because CANA and the ADV were formed by the Church of Nigeria, and because the court's holding impermissibly rested on its own finding of "communion."

3. The circuit court erred in holding that the Anglican Communion satisfied § 57-9(A), because the Anglican Communion has not "divided," even under the court's definition of the term, and also is not a "church or religious society" to which the congregations were "attached."

4. The circuit court erred in holding that its interpretation of § 57-9(A) is consistent with the First Amendment to the United States Constitution and Article I, § 16 of the Virginia Constitution, because its interpretation both intrudes on matters at the core of internal church governance and

discriminates among religious dominations.

5. The circuit court erred in holding that Green v. Lewis, 221 Va. 547, 272 S.E.2d 181 (1980), does not apply to this case, because Green's holding, that claims of interest in church property must be resolved after consideration of deeds, general church rules, state statutes, and the course of dealing between the parties, applies to all such claims.

6. The circuit court erred in holding that the Church and the Diocese waived their right to argue that they and their congregations contracted around § 57-9(A), because the Church and the Diocese raised this defense in their answers and in briefing, and all parties recognized that this issue remained.

QUESTIONS PRESENTED

1. Should § 57-9(A) be interpreted consistently with related Virginia statutory and case law that respects the polity of hierarchical churches and with the principle of Constitutional avoidance? (Assignments of Error 1-3.)

2. Is § 57-9(A) unconstitutional if applied to supersede the polity and rules of a hierarchical church? (Assignment of Error 4.)

3. Does Green v. Lewis apply to church property disputes arising under § 57-9(A)? (Assignment of Error 5.)

4. Does a party waive the argument that an opposing party is

contractually precluded from invoking a statute when it raises the defense in its answer and explains it in briefing? (Assignment of Error 6.)

STATEMENT OF FACTS[2]

I. The Structure Of The Episcopal Church And The Diocese

The Episcopal Church is a hierarchical religious denomination with three tiers of governance. The "General Convention" is the highest governing body in the Church. It has adopted and amends the Church's Constitution and Canons.[3] These documents contain the law of the Church and are binding on all entities of the Church.

The Church is geographically divided into 111 "dioceses," including the Diocese of Virginia. Each diocese is governed by a diocesan Bishop and an Annual Council that adopts and amends a diocesan Constitution and Canons to supplement the Church's Constitution and Canons within that diocese.[4] It is undisputed that under the Church's law, only the General Convention has the authority to "divide" the Episcopal Church and to establish, divide, or release a diocese. Church Const. Art. V; Church

---

[2] Unless otherwise specified, citations to transcripts ("Tr.") are to the trial in this case held in November 2007, and references to exhibits are to exhibits admitted in the November 2007 trial.

[3] See TEC/EDV Exs. 1, 2 (Church's Constitution and Canons in effect in 2006 and 2007).

[4] See TEC/EDV Ex. 3 (Diocese's Constitution and Canons in effect in December 2006 and 2007).

Canon I.10; Tr. 841-43 (Douglas).[5]

At the lowest level of the Church's governing structure are its individual congregations, primarily "parishes." The leadership of a parish comprises its "rector" (a member of the clergy) and an elected governing board of lay persons called its "vestry." Church Canon I.13.2 leaves the "establishment of a new Parish ... to the action of the several Diocesan Conventions." Accordingly, Diocesan Canons 10.1 and 10.6 set forth the requirements for formation as a parish in the Diocese, including "acknowledg[ing] the jurisdiction of the Bishop ... of the Diocese," maintaining a "program of identifiable Episcopal services," and "shar[ing] in the support of the Episcopate of the Diocese."

Once formed, parishes may not unilaterally "disaffiliate" from the Church. Thus, clergy, as a condition of ordination, must execute a written declaration in which they "solemnly engage to conform to the Doctrine, Discipline, and Worship of the Episcopal Church." Church Const. Art. VIII. Likewise, Diocesan Canon 11.8 requires every vestry member to promise a "hearty assent and approbation to the doctrines, worship and discipline of The Episcopal Church." Church Canon I.17.8 mandates that every officer in the Church "well and faithfully perform the duties of that office in

[5] Dr. Douglas testified for the Church and the Diocese as an expert on the Episcopal Church and the Anglican Communion. Tr. 838.

accordance with the Constitution and Canons of this Church and of the Diocese in which the office is being exercised."

Church Canons I.7.3 and II.6.2 and Diocesan Canon 15.2 prohibit parishes from encumbering or alienating property without the consent of the Diocese. Church Canon II.6.1 requires that consecrated property be "secured for ownership and use by a Parish ... affiliated with this Church and subject to its Constitution and Canons." Church Canon III.9.5 establishes that the rector of each parish is at all times entitled to the use and control of parish property, subject to the Constitutions and Canons of the Church. Church Canon I.7.4 states that all real and personal property held by parishes is held in trust for the mission of the Church and the Diocese, and may be controlled by the parish only "so long as [it] remains a part of, and subject to, this Church and its Constitution and Canons." See also, Diocesan Canon 15.1 (reaffirming trust provision). Finally, Diocesan Canon 15.3 directs the Diocese "to take charge and custody" of any property that has ceased to be used by an Episcopal congregation.

II. The Anglican Communion

The Episcopal Church is a constituent member of the Anglican Communion, which is a fellowship of autonomous regional churches, or "Provinces," that trace their histories to the Church of England. Each

Province is recognized by the Archbishop of Canterbury as being "in communion" with him. The Anglican Communion has no hierarchical structure, no uniform Prayer Book, no Constitution or Canons, no legislative body, and no ecclesiastical or juridical authority over its member Provinces, let alone over individual congregations within those Provinces.

III. The Current Dispute

The Episcopal Church and the Anglican Communion have experienced numerous periods of theological disagreement and debate. Thus, over the past several years, a small minority of the Episcopal Church's more than 7,600 congregations, including the nine respondent congregations, have voted to leave the Church and join one of several other existing denominations, including the Church of Nigeria.[6] However, the General Convention has taken no action to divide either the Episcopal Church or one of its dioceses.

The Church of Nigeria, which itself began as a mission of the Church of England, formed a U.S. mission called "CANA" to minister to former Episcopalians and others and has taken other action purportedly to distance itself from the Episcopal Church. However, the Church of Nigeria,

---

[6] See, supra, n.1. Several of these congregations have attempted to retain parish property for their own use in association with their new church; none, with the exception of respondents here, has been permitted to do so.

the Episcopal Church, and all other Provinces of the Anglican Communion remain part of that same Communion.

STATEMENT OF THE CASE

In 2006 and 2007, the nine respondent congregations filed petitions pursuant to Va. Code § 57-9(A), which on its face provides a default mechanism for clarifying the duties of church trustees in the event of a "division" of a "church or religious society" to which a local congregation holding property through trustees is "attached." The Church and the Diocese opposed the § 57-9 proceedings and filed complaints seeking declarations that the property at issue is held for the mission of the Church and the Diocese. All cases were consolidated in the circuit court.

Following a five-day trial on specific issues concerning the applicability of § 57-9(A), the circuit court issued an opinion on April 3, 2008 ("April 3 Op."), holding that § 57-9(A)'s requirements of "division," "branch," "church or religious society," and "attached" had been met. On June 27, 2008, the court issued an opinion ("Const. Op.") holding that its interpretation of § 57-9 was constitutional, and also issued an opinion ("Five Questions Op.") holding that in a church property dispute under § 57-9, it need not engage in the analysis set forth in Green v. Lewis. Finally, on August 19, 2008, the circuit court ruled ("Waiver Op.") that the Church and

the Diocese had waived their right to argue that they and their congregations had contracted around the default rules of § 57-9(A). After a three-day trial on miscellaneous remaining issues, on January 8, 2009, the circuit court issued a final judgment granting the congregations' § 57-9(A) petitions and dismissing the declaratory judgment actions as moot, with the exception of an endowment fund related to one of the congregations.

ARGUMENT

I. The Circuit Court Erred In Interpreting § 57-9(A).

Section 57-9(A) states:

> "If a division has heretofore occurred or shall hereafter occur in a church or religious society, to which any such congregation whose property is held by trustees is attached, the members of such congregation over 18 years of age may, by a vote of a majority of the whole number, determine to which branch of the church or society such congregation shall thereafter belong."

As we show below, the circuit court (1) misinterpreted the term "division" and thus misapplied it to the Church and the Diocese, (2) erroneously held that CANA and its Virginia arm, the "ADV," are "branches" of the Church and the Diocese, and (3) erroneously held that the Anglican Communion had "divided," and is a "religious society" to which the congregations were "attached." Accordingly, the court erroneously held that § 57-9(A) applies to this case.

A. The Court Misinterpreted The Term "Division."

The circuit court interpreted the term "division" in § 57-9(A) to mean any "split" or "rupture in a religious denomination that involves the separation of a group of congregations, clergy, or members from the Church, and the formation of an alternative polity that disaffiliating members could join." April 3 Op. at 79-80. The circuit court erred.

"Division" has many common meanings: disagreement on theological (or other) issues; the existence of different denominations; the departure of a few people from an existing denomination; or the structural separation of a church body into two. Tr. 53-54, 113, 152-53 (Valeri); 178 (Irons).[7] Context, therefore, is critical to proper interpretation.

The relevant context for § 57-9 includes the larger body of Virginia law governing churches into which it is placed;[8] the historic events that prompted the enactment of this particular statute; and the situations in which § 57-9(A) has previously been applied. All of this context (as well as the principle of constitutional avoidance) confirms that "division" in § 57-

---

[7] Drs. Valeri and Irons testified for the congregations as experts on American religious history. Tr. 53, 176.

[8] See Wicks v. Charlottesville, 215 Va. 274, 276, 208 S.E.2d, 752, 755 (1974) ("Legislature is presumed to have known and to have had the common law in mind in the enactment of a statute"); Tobacco Growers Co-op Ass'n v. Danville Warehouse Co., 144 Va. 456, 466, 132 S.E. 482, 485 (1926) (related statutes must be construed in pari materia).

9(A) means a structural separation accomplished in accordance with the church's own polity, and resulting in two or more entities that may be legal successors to the formerly undivided church.[9]

1. The circuit court's interpretation of "division" is inconsistent with Virginia statutory and case law.

Virginia law has always respected the distinction between hierarchical and congregational churches and confirmed that a local congregation of a hierarchical church may not divert local church property to some other denomination in contravention of the hierarchical church's rules. Until now, § 57-9 has been applied consistently with this larger body of law.

Case law. Virginia courts both before and after the adoption of § 57-9 have consistently held that the right to use hierarchical church property depends on continuing membership in the denomination. In Brooke v. Shacklett, 54 Va. (13 Gratt.) 301, 311 (1856), this Court explained that when property has been conveyed to trustees for the use and benefit of a local congregation, the "purposes of the trust" require adherence to that church's rules and polity. Thus, in the event of a dispute within a hierarchical church, the faction adhering to the denomination was entitled to the use and control of the property. Id. at 321. The application

[9] As discussed below, the circuit court appeared to believe that a "division" meeting this description would have to be "amicable." It would not. A legal separation may well be bitter and rife with disputes over property.

of this general rule was complicated in Brooke itself, because the church at issue (the Methodist Episcopal Church or "MEC") had divided into two bodies, creating uncertainty as to which was the proper beneficiary of the existing trust. Only after concluding that the local congregation had been lawfully entitled to join the new "Methodist Episcopal Church South" under the MEC's "Plan of Separation" did the Court hold that it could use the property in connection with that new denomination. Id. at 324-25. The Methodist Episcopal Church South

> "by virtue of its organization under [the Plan of Separation], is now the lawful successor of the Methodist Episcopal church in respect to the disciplinary control and protection of the members of the church adhering to the south division. And such members have now the same right to enjoy the church property which was held by their societies before the division, in exclusion of those who repudiate the authority of the Methodist Episcopal church, south." Id. at 327 (emphases added).

In Gibson v. Armstrong, 46 Ky. 481, 524 (1847), a case on which the Brooke Court relied, the court similarly explained that a local congregation of the MEC could retain local church property after joining the Methodist Episcopal Church South because

> "the southern Church stands not as a seceding or schismatic body, breaking off violently or illegally from the original Church, and carrying with it such members and such rights only as it may succeed in abstracting from the other, but as a lawful ecclesiastic body, erected by the authority of the entire Church, with plenary jurisdiction over a designated portion of the original association, recognized by that Church as its proper successor and representative within its limits."

Had no lawful division occurred, the result would have been reversed. Id. at 527-28.

Virginia courts continued to apply the same denominational restrictions on local church property after the enactment of § 57-9. See Hoskinson v. Pusey, 73 Va. 428 (1879) (awarding property to members of MEC, where congregation had no right to change its denominational affiliation); Finley v. Brent, 87 Va. 103, 12 S.E. 228 (1890) (congregational majority could not take property from hierarchical denomination); Green v. Lewis, 221 Va. 547, 272 S.E.2d 181 (1980) (same); Diocese of Southwestern Va. v. Burhman, 5 Va. Cir. 497, 503 (Clifton Forge 1977), pet. refused, Rec. No. 780347 (Va. June 15, 1978) (deed to a "component of [the Episcopal Church] ... leads inescapably to the conclusion that the trustees cannot hold title to the subject property for persons or groups who are withdrawn from and not under the authority of The Episcopal Church").

Virginia statutes. Related statutory provisions also confirm Virginia's respect for religious freedom and internal church rules. Section 57-16.1 provides that local church corporations may hold property only "for any purpose authorized and permitted by the laws, rules, or ecclesiastic polity of the church or body." "In the case of a super-congregational church," § 57-15, which governs the sale, exchange, or encumbrance of church

property, "requires a showing that the property conveyance is the wish of the constituted authorities of the general church." Norfolk Presbytery v. Bollinger, 214 Va. 500, 503, 201 S.E.2d 752, 755 (1974). And § 57-9 itself, from its inception, has contained separate provisions governing hierarchical churches on the one hand (now § 57-9(A)), and congregational churches on the other (now § 57-9(B)) – a distinction that would be wholly unnecessary if the differing polities of each were not to be respected.

Constitutional requirements: Finally, the principle of constitutional avoidance supports the interpretation of § 57-9(A) proffered above. See infra Section II.

The legal context, in short, strongly suggests that the General Assembly did not intend the term "division" in § 57-9(A) to override or replace hierarchical church polity, but to be interpreted to accommodate that type of polity, consistent with the larger body of Virginia law.

2. Section 57-9 was prompted by and has been applied only to divisions accomplished in conformity with applicable church polity.

The meaning suggested by the legal context is confirmed by § 57-9's history and prior application. As the circuit court noted, § 57-9 was prompted by the profound structural divisions that occurred prior to the Civil War in the largest denominations of that era – Presbyterian, Methodist, and

Baptist. See April 3 Op. at 83. Those divisions were major historical events, fundamentally different from the proliferation of small, dissident denominations that have otherwise characterized American religious history. They also led to disputes and litigation in Virginia. See, e.g., Brooke, 54 Va. at 324. Each of these divisions also occurred in accordance with the denomination's own polity. See Tr. 1048-60 (Mullin).[10] The court made no findings to the contrary.

Methodist. The historical division of the MEC was effected pursuant to a formal Plan of Separation enacted by its 1844 General Conference. Smith v. Swormstedt, 57 U.S. 288, 304-305 (1854); Brooke, 54 Va. at 324-25.[11] See also April 3 Op. at 66 (in Brooke, the division was "formally recognized at the highest level of the hierarchy of the church").

Presbyterian. In 1837, the Presbyterian General Assembly voted to exclude several Synods and Presbyteries (which then organized the "New School"). Tr. 1055-56 (Mullin). The "New School" (in 1857-59) and the

---

[10] Dr. Mullin testified for the Church and the Diocese as an expert on American religious history and the Anglican Communion. Tr. 1028.

[11] The parties later argued over whether the division had been validly accomplished in litigation over control over particular pieces of property. As recognized in Swormstedt and Brooke, however, the Methodist division was validly accomplished in 1844 pursuant to the General Conference's plan, notwithstanding the northern conferences' later change of heart. See also Tr. 1050-54 (Mullin).

"Old School (in 1861), both later divided again: In each case, several presbyteries first withdrew, as they had the right and authority to do under Presbyterian polity. Tr. 1056-58 (Mullin). The respective General Assemblies then formally struck those presbyteries from their rolls, again significantly altering the original denominations. Tr. 162-164 (Valeri).

Baptist. In 1845, the Baptist Board of Foreign Missions also divided into two or more separate bodies by action of the congregations, in accordance with Baptist polity. Tr. 204-205 (Irons).

Because § 57-9 was adopted to address the issues caused by these historic divisions, it is not surprising that these are the divisions that have previously prompted the statute's use. Dr. Irons explained that of the 29 19th Century petitions he uncovered during his research, 25 involved congregations attached to the MEC that voted to join either the MEC (North) or the MEC (South).[12] Four were Presbyterian. See April 3 Op. at 57. There are no other known uses of § 57-9(A). If the Virginia General Assembly actually intended § 57-9(A) to have an impact any time a few congregations left one denomination to join a new one, that has gone unnoticed by generations of Virginians. See also April 3 Op. at 56 (§ 57-9

[12] These included congregations in the "Baltimore Conference" of the MEC, who originally adhered to the MEC (North) but sought to change that affiliation after 1861. See April 3 Op. at 55-56.

adopted "to protect local congregations who when their church divided were compelled to make a choice between the different branches of it.") (emphasis added).

3. The circuit court's interpretation is unsupported.

Ignoring the above context, as well as the constitutional issues discussed below, the circuit court rested its erroneous interpretation of "division" on (1) the fact that the historical divisions that prompted § 57-9 were not "amicable," (2) the court's belief that the term must mean the same thing in §§ 57-9(A) (hierarchical churches) and (B) (congregational churches), (3) the fact that the Diocese has used the term "division" when speaking of the theological debate and congregational votes involved in this case, and (4) the court's belief that the definition urged here would "make § 57-9(A) a nullity." April 3 Op. at 49, 50, 69, 71, 80-81.

First, whether the divisions that promoted § 57-9 were amicable is irrelevant: What matters is that they comported with each church's polity, as discussed above. Second, "division" indeed means the same thing in §§ 57-9(A) and (B): A structural separation of the applicable church in accordance with its polity. The facts underlying the division will look different in the case of a hierarchical church from that in a congregational church, because their polities are different. The statutory definition,

however, is constant. The Diocese's prior use of the term "division" is also of no moment. As noted at the outset, the term has many meanings, some of which do apply to this situation. See supra p. 11. That the Diocese or the Church used the term "division" in some other contexts unrelated to § 57-9 sheds no light on the General Assembly's intent in this different statutory context. Finally, requiring that a legally-cognizable "division" comport with the affected church's polity hardly renders the statute a nullity. Section 57-9(A) created an orderly procedure for clarifying the duties of trustees and the status of property in the event of a division in a hierarchical denomination that might legitimately alter the trustees' and the denomination's respective legal rights and obligations.[13] It has been usefully applied in precisely – and until now only – that circumstance.

B. The Congregations Have Not Joined A "Branch" Of The Episcopal Church Or The Diocese.

The circuit court further erred in holding that CANA and its Virginia component, the ADV, are "branches" of the Episcopal Church or the Diocese within the meaning of § 57-9(A). The circuit court defined "branch" to mean "a division of a family descending from a particular ancestor" or "[a]ny arm or part shooting or extending from the main body of a thing."

[13] Section 57-9 was originally enacted by 1866-67 Va. Acts 649 (Ch. 210) as an amendment to Chapter 77, § 9 of the Code of 1860, which governed the appointment of trustees (now found at § 57-8).

April 3 Op. at 78. However, CANA was founded as a mission of the Church of Nigeria. April 3 Op. at 26. The Church of Nigeria, in turn, originated as part of the Province of West Africa, a mission of the Church of England. Tr. 679-83 (Yisa).[14] The ADV is a part of CANA. Tr. 309-10 (Minns).[15] Under both the circuit court's stated definition and any other reasonable view, then, CANA and ADV are "branches" of the Church of Nigeria, not the Episcopal Church or the Diocese.

The circuit court apparently viewed CANA and ADV as "branches" of the Episcopal Church and the Diocese because many of their current members came from the Episcopal Church and because all of these entities view themselves as parts of the Anglican Communion. See April 3 Op. at 78-79. Neither fact justifies the circuit court's conclusion.

As the circuit court itself recognized, one church does not become a "branch" of another because it is joined by the latter's former members. See April 3 Op. at 79 (acknowledging that the Episcopal Church's Missionary Diocese of Mexico, which was principally comprised of former Roman Catholics – is not a "branch" of the Catholic Church but of the Episcopal

---

[14] Abraham Yisa, Registrar of the Church of Nigeria, testified as a fact witness for the congregations. Tr. 544.

[15] Martyn Minns, Missionary Bishop of CANA, testified as a fact witness for the congregations. Tr. 300.

Church). See also Tr. 92-93 (Valeri) (no "division" if individuals leave the Lutheran Church to join the Baptist Church).

Nor can these entities' claimed or actual status as parts of the Anglican Communion change the analysis. Even assuming that the Church of Nigeria, CANA, and the Episcopal Church are all in some sense "branches" of the Anglican Communion,[16] it does not follow that the Church of Nigeria or its subparts are branches of the Episcopal Church. Under this logic, the Virginia judiciary is not only a "branch" of the Commonwealth's government, but also a "branch" of both the General Assembly and the Executive Office of the Governor – and vice versa. The absurdities inherent in the circuit court's analysis are patent.

Moreover, by resting its finding of a "branch" (and thus the applicability of the statute) solely on the court's own finding of "communion" between the Episcopal Church and CANA (contrary to the parties' own views), the circuit court resolved this "church property dispute on the basis of religious doctrine and practice." Jones v. Wolf, 443 U.S. 595, 602 (1979). This is constitutionally forbidden. Id. See also Presbyterian Church v. Hull Mem'l Church, 393 U.S. 440, 449 (1969) ("First amendment

[16] There was no evidence that the "Anglican Communion" itself recognizes or includes CANA. All of the evidence was to the contrary. Tr. 363, 365 (Minns); 879-80, 990-91 (Douglas); 1039-40 (Mullin).

values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practices.")

C. The Congregations' Petitions Are Not Supported By The Anglican Communion.

Just as the circuit court erred in holding that the "division" and "branch" requirements of § 57-9(A) were met with respect to the Episcopal Church and the Diocese, it erroneously concluded that events in the Anglican Communion satisfied § 57-9(A).

"Division." The circuit court held that the Anglican Communion had "divided" because the Church of Nigeria had taken steps to distance itself from the Episcopal Church. April 3 Op. at 83. However, even under the court's definition, a "division" under § 57-9(A) must mean more than strained relations between members of an intact group. See April 3 Op. at 79-80 ("division" is "the separation of a group of congregations, clergy, or members from the church, and the formation of an alternative polity"). Here, both the Episcopal Church and the Church of Nigeria continue in communion with the Archbishop of Canterbury and otherwise remain part of the Anglican Communion. Tr. 865-67 (Douglas); Tr. 542 (Yisa). Nor has any parallel or alternative polity to the Anglican Communion formed. Thus, there has been no "division."

"Church or Religious Society." The statute further requires that the necessary "division" occur in a "church or religious society" to which the congregation is "attached." The court erred in its interpretation of these terms as well.

The circuit court declined to decide whether the Anglican Communion is a "church," but held that it is a "religious society," which it declared to be a "more general" entity than a church. However, there is no reason to think that the statutory term "religious society" is anything other than a synonym for "church." See Tr. 1031-33 (Mullin); In re Estate of Douglass, 143 N.W. 299, 300 (Neb. 1913) ("The terms 'church' and 'society' are used to express the same thing."); Va. Code § 20-23 (equating "religious denomination" and "religious society"). Indeed, "religious society" could not have referred to an international association of autonomous churches in 1867 when § 57-9 was adopted, as none then existed. Tr. 1033-35 (Mullin). In any event, the expert opinion was unanimous and uncontradicted: The Anglican Communion does not qualify as either a "church" or a "religious society." Tr. 844-46 (Douglas); 1034 (Mullin). The court ignored this.

"Attached." The circuit court also ignored this Court's prior ruling that the applicability of § 57-9(A) depends upon the presence of "control" over a

local congregation. See Baber v. Caldwell, 207 Va. 694, 697, 698, 152 S.E.2d 23, 26 (1967) (noting that § 57-9(A) "relates to churches, such as Episcopal and Presbyterian churches, that are subject to control by super-congregational bodies," and finding that § 57-9(A) did not apply there because "[n]o super-congregational body control[led the local church's] action") (emphasis added). See also Brooke, 54 Va. at 320 (membership in a church entails "a submission to its government") (citation omitted). It was undisputed that the Anglican Communion exercises no control over parishes. Interpreting the statute to apply to organizations that have no juridical authority over congregations (including not only the Anglican Communion, but such entities as the World Council of Churches, for example), would wreak havoc with ecclesiastical affairs and property rights throughout Virginia.

II. The Circuit Court Erred In Concluding That Its Interpretation and Application Of Section 57-9(A) Was Constitutional.

A. The Court's Decision Violated The Free Exercise Clause.

Despite the undisputed evidence that under Church law only the General Convention has the authority to divide the Episcopal Church or one of its dioceses, the circuit court held that § 57-9(A) vests that authority in individual congregations. The court also held that § 57-9(A) alone was conclusive of property ownership, despite the Church's own rules, under

which property of local Episcopal parishes is restricted for the mission of the Church. These holdings violated the First Amendment to the U.S. Constitution and Article I, section 16, of the Virginia Constitution.

1. Civil courts must defer to a hierarchical church on matters of internal governance.

The U.S. Supreme Court has consistently held that the First Amendment requires civil courts to defer to the church itself on matters of church polity and governance. In Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952), the Court considered a property dispute between the Soviet-based Russian Orthodox Church and a U.S.-based diocese. The New York Court of Appeals awarded the property to the U.S. group based on a state statute that purported to "bring all the New York churches, formerly subject to the administrative jurisdiction of the [Russian Orthodox Church] into an administratively autonomous metropolitan district." Id. at 97-98. The U.S. Supreme Court held that the statute was unconstitutional because

> "[b]y fiat it displaces one church administrator with another. It passes the control of matters strictly ecclesiastical from one church authority to another. It thus intrudes for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment.... [The statute] directly prohibits the free exercise of an ecclesiastical right, the Church's choice of its hierarchy." Id. at 119 (emphasis added); see also id. at 107.

In Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), the Court similarly held that the division of a diocese is a matter of internal governance protected from state interference. In Milivojevich, the general church had divided one of its dioceses into three and also removed the diocesan bishop. Id. at 703. The Illinois Supreme Court sided with the bishop in his suit to retain control of the property, holding that the general church lacked authority under its own rules to divide the diocese. Id. at 707. The Court reversed, explaining that the state court's ruling was unconstitutional because "the reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs." Id. at 721.

In Maryland & Virginia Eldership v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 370 (1970), Justice Brennan in concurrence similarly explained that any state statutes governing church property "must be carefully drawn to leave control of ecclesiastical polity, as well as doctrine, to church governing bodies."

Consistent with this authority, in Goodson v. Northside Bible Church, 261 F.Supp. 99 (S.D. Ala. 1966), aff'd, 387 F.2d 534 (5th Cir. 1967) (cited in Maryland & Virginia Eldership), the court addressed Alabama's "Dumas Act," which, similar to the circuit court's interpretation of § 57-9(A),

permitted a local congregation of a hierarchical church to withdraw from the general church with its property if 65% of the local congregation declared itself to be in disagreement with the general church. Id. at 100. The court held that this transfer of power to a congregational majority in contravention of hierarchical church rules was unconstitutional: "Under the First Amendment, the states are not permitted to so intrude on the internal affairs of a religious order. The court is not required, or constitutionally authorized, to pass on the wisdom of the [church's] structure and polity. The court is bound by the Constitution to protect it." Id. at 102. Moreover, "[b]y passage of the Dumas Act, Alabama has expressed a preference to and aided those who profess a belief in a congregational structured church. This it cannot do." Id. at 104.[17] See also First Methodist Church v. Scott, 226 So.2d 632 (Ala. 1969) (holding Dumas Act unconstitutional).

2. The Circuit Court Misapplied Jones v. Wolf.

Largely ignoring the above authority, which directly addresses the constitutionality of state statutes affecting church property, the circuit court

[17] Although the circuit court tried to distinguish Goodson on the ground that the Dumas Act purportedly contained a "departure from doctrine" element, in fact, the statute required only that the local congregation, not the courts, declare a disagreement with the parent church to trigger the statutory procedures. 261 F.Supp. at 100. Thus, neither the district court nor the Fifth Circuit relied on any departure-from-doctrine element in holding the statute unconstitutional.

held that its interpretation of the statute was constitutional under Jones v. Wolf, 443 U.S. 595 (1979). The circuit court misinterpreted Jones, which reaffirmed the Free Exercise protections just discussed.

In Jones, the U.S. Supreme Court considered the constitutionality of the specific "neutral principles of law" approach to deciding church property disputes adopted in Georgia, which looks to deeds, state statutes, corporate charters, and general church rules to determine whether property is restricted for the general church. Id. at 600. The Court held that this analysis passed constitutional muster, because it left churches free to order their own affairs in a manner that the courts must respect: The neutral principles approach is "flexible enough to accommodate all forms of religious organization and polity," because churches can "specify what is to happen to church property in the event of a particular contingency" through "reversionary clauses and trust provisions." Id. at 603 (emphasis added).[18] "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" by modifying the deeds or the corporate charter, or amending the

[18] See Episcopal Church Cases, 198 P.3d 66, 80 (Cal. 2009) (Jones "did not deny that free exercise rights require a secular court to defer to decisions made within a religious association.... Rather, the majority argued that the neutral principles approach is consistent with this requirement").

rules of the general church to recite an express trust in favor of the denomination. Id. at 606.

After concluding that none of the relevant materials contained any restriction in favor of the general church in that case, the Jones court went on to discuss a second issue – the identity of the local congregation holding (unrestricted) title to the property. 443 U.S. at 600, 602. In this regard, the Supreme Court indicated that a "presumption" of majority rule, "defeasible" upon a showing that the identity of the church was to be determined in some other way, could be constitutional. The Court further stated that any such presumption "can always be overcome, under the neutral-principles approach ... by providing that the church property is held in trust for the general church and those who remain loyal to it." Id. at 607-608.

The circuit court erroneously held that § 57-9(A) comported with Jones based in part on the statement in Jones that "the State may adopt any method of overcoming the majoritarian presumption." Const. Op. at 25. The circuit court, however, ignored the remainder of the Court's sentence, which says: "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...." 443 U.S. at 608 (emphasis added). The authority just discussed (see pp. 25-27) establishes that as

interpreted, § 57-9(A) does impair free exercise rights.

The circuit court also read Jones to require only a narrow "escape hatch" from a statutory "presumption" that congregational majorities control property. Const. Op. at 33. That is wrong for several reasons. First, under that reasoning, a majoritarian presumption rule is not "defeasible," as required by Jones, but only inapplicable in some (state-specified) circumstances. Second, such reasoning was directly rejected in Kedroff. Like the circuit court here, Justice Jackson in his dissent in Kedroff argued that the parties could avoid the New York statute by choosing not to incorporate. 344 U.S. at 128. The majority rejected that view. The ability to avoid the law altogether did not render its application constitutional.

Third, the circuit court's view subjects constitutionally protected free-exercise rights to the will of the legislature, thus affording churches no sphere of protection from state-established rules of internal governance. Although today § 57-9 applies only to churches that hold property through trustees, the legislature could establish a different distinction tomorrow. This is not freedom to establish internal governance "free from state interference," but only the theoretical ability to constantly adjust ecclesiastical polity and governance in deference to the differing regulatory choices of the 50 states.

Fourth, the circuit court's view does not accommodate the full flowering of the religiously-diverse society that the First Amendment guarantees, but only ensures that churches will have a choice of two or three state-specified alternatives. No court has ever suggested, let alone held, that the First Amendment may be defined so narrowly.

Finally, the circuit court's holding also imposes a substantial burden on religious denominations. Overriding the Church's and the Diocese's own specific rules governing the holding of property is hardly a "minimal" burden on religion. See Presbyterian Church, 393 U.S. at 450 (First Amendment prohibits courts from deciding the relative importance of doctrines to a particular religion). The burden involved with the circuit court's interpretation is also substantial in purely practical terms. See Episcopal Church Cases, 198 P.3d at 80 ("requiring every parish in the country to ratify [a denominational trust provision] – would infringe on the free exercise rights of religious associations.... It would impose a major, not a 'minimal,' burden on the church governance.") (emphasis in original).

B. The Circuit Court's Interpretation Of § 57-9(A) Violates The Establishment Clause.

As the U.S. Supreme Court declared in Larson v. Valente, 456 U.S. 228, 244 (1982), "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."

The Court thus struck down a statute that applied only to religious organizations deriving more than 50% their funds from non-members. Id. at 233. The Supreme Court held that the statute "clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents." Id. at 246-47.[19]

The circuit court held that § 57-9 did not discriminate among religious sects because "[t]he text does not state hierarchical churches are subject to the law while non-hierarchical churches are not." Const. Op. at 35. This, of course, was also true in Larson. As in Larson, § 57-9(A) applies based on stated criteria (whether property is held by trustees) that will apply to some denominations but not others. Section 57-9 also purports to override the polity only of hierarchical churches holding property through trustees: congregational church polity is respected and enforced. Moreover, the circuit court did not even consider whether a compelling state interest exists, or whether the statute is narrowly tailored to achieve that interest.

[19] Because § 57-9 discriminates among religions, it is not necessary to engage in additional analysis under Lemon v. Kurtzman, 403 U.S. 602 (1971). Larson, 456 U.S. at 252 ("the Lemon v. Kurtzman 'tests' are intended to apply to laws affording a uniform benefit to all religions, and not to provisions [like the 50% test at issue] ... that discriminate among religions.... [T]he Lemon test is not necessary to the disposition of the case before us."). In any event, the statute would not pass muster under that analysis. See id. at 251-55 (finding that statute failed Lemon analysis because it fostered excessive governmental entanglement with religion by burdening select denominations and "politicizing religion").

Indeed, there could be no compelling interest in superseding the polity of hierarchical religious organizations when they hold property through trustees, but not otherwise.

III. The Circuit Court Erred in Refusing to Apply Green v. Lewis.

Following its earlier precedent in Norfolk Presbytery v. Bollinger, 214 Va. 500, 210 S.E.2d 752 (1974), this Court held in Green v. Lewis, 221 Va. at 555, 272 S.E.2d at 185-86, that in analyzing a church property dispute, courts must engage in a "neutral principles" analysis similar, to that approved in Jones. The circuit court erred in refusing to apply Green to cases arising under § 57-9.

First, this Court has never hinted that a general church's right to establish "a proprietary interest ... which could not be eliminated by unilateral action of the congregation" depends on which Code section is invoked. Green, 221 Va. at 555, 272 S.E.2d at 185. Indeed, the parties in Green invoked § 57-9 in their pleadings. See Five Questions Op. at 3. Second, this Court's church property jurisprudence has consistently cited and relied on both §§ 57-9 and 57-15 in pari materia. Green, 221 Va. at 552-53, 272 S.E.2d at 184. Third, circuit courts have understood the holding and analysis of Norfolk Presbytery and Green to apply to church property disputes generally. See Buhrman, 5 Va. Cir. 497. Finally, the

Green analysis accommodates the rule that parties ordinarily may enter into contractual arrangements that supersede statutory default rules. See Bayview Loan Servicing, LLC v. Simmons, 275 Va. 114, 654 S.E.2d 898 (2008); Mahoney v. NationsBank of Virginia; 249 Va. 216, 455 S.E.2d 5 (1995); Board of Supervisors of Fairfax Co. v. Sampson, 235 Va. 516, 369 S.E.2d 178 (1988); Pettus v. Hendricks, 113 Va. 326, 74 S.E. 191 (1912).

IV. The Circuit Court Erred In Holding That The Episcopal Church And The Diocese Waived Their Right To Argue That The Parties Have Contracted Around Section 57-9.

The Church and the Diocese have consistently asserted that the congregations are contractually bound by the Church's and the Diocese's Canons, and that those provisions, not § 57-9, are dispositive here. Affirmative Defenses 2 and 3 in both the Church's and the Diocese's respective Answers raise this issue. Virginia authority does not require that "waiver" be specifically pleaded, compare Fed. R. Civ. P. 8(c) with Va. Sup. Ct. R. 1:4, 3:18, much less used to identify or plead the substantive point involved here: that the congregations have bound themselves to a different set of rules from § 57-9. Moreover, on August 31, 2007, the circuit court ordered the parties to file briefs addressing the relationship between the 57-9 actions and the declaratory judgment actions. The Diocese's and the Church's joint response (filed Sept. 10, 2007) clearly explained that if the

court were to determine that the statutory requirements of § 57-9(A) were satisfied, they would present evidence that "§ 57-9 ... may not be applied here, because the congregations and their leaders have legally bound themselves to an alternative structure and rules," and cited several Virginia cases holding that "parties may privately order their affairs in a manner that supersedes otherwise-applicable statutory provisions." Id. at 7-8 & n.5.

At a September 14, 2007 hearing, the circuit court and the parties agreed that some specific issues concerning the applicability of § 57-9(A) would be resolved in November 2007, and that the declaratory judgment actions, with remaining § 57-9-related issues, would be tried at a later time. 9/14/07 Hearing Tr. 38-41, 113-15. Finally, following the November 2007 trial, in response to an order from the bench (4/25/08 Hearing Tr. 102), the parties on April 30, 2008 submitted lists of remaining legal issues, all of which included this issue. This argument was not waived.

CONCLUSION

The Episcopal Church respectfully requests that this Court grant its Petition for Appeal. On the merits of the appeal, the Court should declare § 57-9(A) inapplicable and/or unconstitutional, dismiss the congregations' § 57-9 petitions with prejudice, and remand for consideration of the Church's and the Diocese's declaratory judgment actions.

CERTIFICATE

Pursuant to Va. Sup. Ct. Rule 5:17(e), I hereby certify that:

The appellant is the Episcopal Church. The names, addresses, and telephone numbers of its counsel are:

Heather H. Anderson, Esquire
Soyong Cho, Esquire
Goodwin Procter LLP
901 New York Avenue, N.W.
Washington, D.C. 20001
Telephone: 202-346-4000

The appellees are The Church at the Falls – The Falls Church; William W. Goodrich, Harrison Hutson and Steven Skancke, in their capacity as trustees for The Church at the Falls – The Falls Church; Truro Church; Tom Ball, Renate Eschmann, Jack Maier, Tony Niles, Warren Thrasher, Ted Wagner and Thomas Yates, in their capacity as trustees for Truro Church; Church of the Apostles; Pete Buck, George Keitt and Charles Young, in their capacity as trustees for Church of the Apostles; Church of the Epiphany; Murray Black, Fred Woodard and Marjorie Bell, in their capacity as trustees for Church of the Epiphany; St. Margaret's Church; Charles F. Martin, Gary Motsek and Michelle Wheeler, in their capacity as trustees for St. Margaret's Church; St. Paul's Church; William Latham, Bernard McDaniel and Macon Piercy, in their capacity as trustees for St. Paul's Church; Church of the Word, Gainesville; Church of Our

Saviour at Oatlands; Daniel R. Clemons, Kay Rugen Franke, and The Rev. Elijah Brockenbrough White, in their capacity as trustees for Church of Our Saviour at Oatlands; St. Stephen's Church; Howard L. York, George E. Kranda, James R. Hundley, Jane B. Wrightson, David G. Kilpatrick, Robert Reamy, and Susan C. Stubbs, in their capacity as trustees for St. Stephen's Church; and the Commonwealth of Virginia ex. rel. William C. Mims (as successor to Robert F. McDonnell), in his official capacity as Attorney General.

The names, addresses, and telephone numbers of appellees' counsel are:

Gordon A. Coffee, Esquire
Gene C. Schaerr, Esquire
Steffen N. Johnson, Esquire
Andrew C. Nichols, Esquire
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000

Counsel for Truro Church and associated trustees; Church of the Epiphany; Murray Black and Fred Woodard, in their capacity as trustees for Church of the Epiphany; Church of the Apostles and associated trustees; and The Church at The Falls – The Falls Church

George O. Peterson, Esquire
J. Jonathan Schraub, Esquire
Heather A. Jones, Esquire
Tania M.L. Saylor, Esquire
Sands Anderson Marks & Miller, P.C.
1497 Chain Bridge Road, Suite 202
McLean, Virginia 22101
(703) 893-3600
Counsel for Truro Church and associated trustees

Mary A. McReynolds, Esquire
Mary A. McReynolds, P.C.
1050 Connecticut Avenue, N.W., 10th Floor
Washington, D.C. 20036
(202) 426-1770
Counsel for St. Margaret's Church, St. Paul's Church, Church of the Epiphany, Church of the Apostles, St. Stephen's Church, and all associated trustees except Marjorie Bell

E. Andrew Burcher, Esquire
Walsh, Colucci, Lubeley, Emrich & Walsh, P.C.
4310 Prince William Parkway, Suite 300
Prince William, Virginia 22192
(703) 680-4664
Counsel for St. Margaret's Church; St. Paul's Church; Church of the Word, Gainesville; and associated trustees

James E. Carr, Esquire
Carr & Carr
44135 Woodridge Parkway, Suite 260
Leesburg, Virginia 20176
(703) 777-9150
Counsel for the Church of Our Saviour at Oatlands and associated trustees

R. Hunter Manson, Esquire
PO Box 539
876 Main Street
Reedville, Virginia 22539
(804) 453-5600
Counsel for St. Stephen's Church and associated trustees

Scott J. Ward, Esquire
Timothy R. Obitts
Robert W. Malone
Dawn W. Sikorski
Gammon & Grange, P.C.
8280 Greensboro Drive
Seventh Floor
McLean, Virginia 22102
(703) 761-5000
Counsel for The Church at The Falls – The Falls Church

James A. Johnson, Esquire
Paul N. Farquharson, Esquire
Scott H. Phillips, Esquire
Semmes Bowen & Semmes, P.C.
Suite 1400
25 South Charles Street
Baltimore, Maryland 21201
(410) 539-5040
Counsel for The Church at The Falls – The Falls Church

Edward H. Grove, III, Esquire
Brault Palmer Grove White & Steinhilber LLP
3554 Chain Bridge Road
Suite 400
Fairfax, VA 22030
(703) 273-6400
Counsel for William W. Goodrich, Harrison Hutson and Steven Skancke, in their capacity as trustees of The Church at The Falls – The Falls Church

Robert C. Dunn, Esquire
Law office of Robert C. Dunn
707 Prince Street
P. O. Box 117
Alexandria, Virginia 22313-0117
(703) 836-9000
Counsel for Marjorie Bell, in her capacity as trustee of Church of the Epiphany

Stephen R. McCullough, Esquire
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
Counsel for the Commonwealth of Virginia ex. rel. William C. Mims (as successor to Robert F. McDonnell), in his official capacity as Attorney General

I hereby certify that copies of the foregoing Petition for Appeal were sent by first-class mail to all counsel named above, and to Counsel for The Protestant Episcopal Church in the Diocese of Virginia, named below, on this 6th day of April, 2009.

Bradfute W. Davenport, Jr.
George A. Somerville
Mary C. Zinsner
Joshua D. Heslinga
Troutman Sanders LLP
Post Office Box 1122
Richmond, Virginia 23218-1122

A.E. Dick Howard
627 Park Street
Charlottesville, Virginia 22902
Counsel for The Protestant Episcopal Church in the Diocese of Virginia

Counsel for appellant desire to state orally to a panel of this Court the reasons why this petition for appeal should be granted, and to do so in person.

Heather H. Anderson (VSB # 38093)
Soyong Cho (VSB # 70896)
Goodwin Procter LLP
901 New York Avenue, N.W.
Washington, DC 20001
Telephone: (202) 346-4000
Facsimile: (202) 346-4444
Counsel For Appellant The Episcopal Church