Record Nos. 090682

In the Supreme Court of Virginia

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA, APPELLANT

v.

TRURO CHURCH, ET AL., APPELLEE

CANA CONGREGATIONS' BRIEF IN OPPOSITION TO PETITION FOR APPEAL OF THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA

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ADV	The Anglican District of Virginia
CANA	The Convocation of Anglicans in North America
Diocese	The Protestant Episcopal Church in the Diocese of Virginia
ECUSA	The Episcopal Church in the United States

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition for appeal challenges a longstanding policy judgment of the General Assembly—that when a denomination experiences a "division," ownership of congregational property held by trustees should be resolved by the neutral principle of majority rule. Applying this rule does not require courts to say whether a denomination changed its doctrine, or which body is the "true" church. Rather, they need only make secular determinations—whether a group of congregations has separated from the denomination (in a "division") to form a new polity (a "branch"), and whether the votes were proper. That procedure, found in Va. Code § 57-9, applies *only* to property held by trustees, *not* to property held by corporations or church officers—forms of ownership routinely used by the denomination here.

The nine appellees here ("CANA Congregations") are among a broad group of congregations and dioceses who have responded to recent events in the Episcopal Church ("ECUSA") and Diocese of Virginia ("Diocese") by voting to divide from the denomination. Invoking § 57-9, appellees reported their votes in various circuit courts. Unhappy with the results of the votes, ECUSA and the Diocese intervened to challenge § 57-9 and its constitutionality. The circuit judge appointed to hear the consolidated cases, Randy I. Bellows, rejected those challenges in several painstaking opinions

issued after a trial, multiple hearings, and more than 20 rounds of briefing.

ECUSA and the Diocese offer no credible reason to review these rulings, let alone to overturn them. Their main assertion is that a "division" can satisfy § 57-9 only if approved by the denomination. But this view finds no support in the text of § 57-9—which, in contrast to other parts of Title 57, does not refer to denominational approval. Nor can this view be reconciled with the undisputed historical evidence, including 29 court orders applying the statute shortly after adoption. That well-documented evidence confirms both that the circuit court's reading of § 57-9 is supported by the contemporaneous understanding of "division," and that many congregations successfully invoked the statute without denominational approval.

Just as importantly, the Diocese's reading of § 57-9 "would make 57-9(A) a nullity." 4/3 Op. 81. As the trial court noted, if "divisions" were consensual, "there would be little need for a division statute, for churches would simply approve divisions amicably and divide up their property without intervention from secular institutions of government." *Id.* The Diocese's reading would be especially inappropriate in a case where the denomination's own officers admitted the existence of the "division," and that the congregations joined a "branch." *Id.* at 83; Const. Op. 41-41 n.56.

Lacking any argument based on § 57-9, the Diocese claims that this

case should be governed by the "neutral principles" factors that apply under § 57-15. *See Norfolk Presbytery v. Bollinger*, 214 Va. 500 (1974); *Green v. Lewis*, 221 Va. 547 (1980). But § 57-9 itself reflects a neutral principle—majority rule exercised through a vote. And as the circuit court explained:

> *Norfolk* demonstrates a key difference between 57-9 and 57-15: just as 57-9 requires only a majority approval of the congregation in order for the court to determine ownership of property upon a division, 57-15 also originally required *only congregational approval* for a conveyance of property. However, 57-15 was affirmatively amended to include the specific words: "constituted authorities," and "governing body of any church diocese." In contrast, 57-9 contains absolutely no reference to the governing authorities of a church.

4/3 Op. 74. *Norfolk* and *Green* both arose when single congregations became "independent" and "free from any affiliation." *Green*, 221 Va. at 550; *Norfolk*, 214 Va. at 501. Thus, neither congregation voted to join a "branch of the church," as required by § 57-9, or pressed any § 57-9 claim. Not surprisingly, neither decision addresses the meaning of "division."

The complaint that the trial court did not analyze this case under each *Norfolk/Green* factor also rests on a false premise. Title has never been at issue; the dispute is over the rightful *beneficiary* for whom the trustees hold that title. But the point of § 57-9 is to provide a neutral means—a majority vote—for resolving competing claims to property held in trust in the case of a division. Adjudicating which party had a superior interest "*prior* to determining whether a congregation has satisfied the requirement of 57-9(A)"

would "deprive [§ 57-9(A)] of its independent meaning." Five Qs Op. 12.

Nor does the fact that § 57-9 embodies different neutral principles from § 57-15 render it unconstitutional. In *Jones v. Wolf*, 443 U.S. 595 (1979), the Court held that a State may resolve church property disputes—even those involving "hierarchical" denominations—based on "a presumptive rule of majority representation," so long as the State provides some "method of overcoming the majoritarian presumption" through legal arrangements made "before the dispute erupts." *Id.* at 606, 608. State law must be "flexible enough to accommodate all forms of religious organization[s]," 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 doctrin[e].'" *Id.* at 602, 603.

As the circuit court held, § 57-9 easily passes muster under *Jones*: It requires only secular analysis, and permits hierarchical churches to avoid majority rule by arranging, before any disputes erupt, to place title to local churches in a denominational officer or a corporation. "*Jones* expressly states that one way in which a religious organization can avoid the presumptive rule of majority representation is to modify its deeds, and describes any burden involved in making such a modification as 'minimal.'"

Const. Op. 32 (quoting 443 U.S. at 606). And it was stipulated that many denominations in Virginia have availed themselves of these alternative forms of ownership, placing congregational property beyond § 57-9's reach.

Indeed, the denomination here *itself* uses such alternative ownership forms for 29 religious properties. As Judge Bellows put it: "the Diocese itself regularly—and of its own free will—engages in the very practice which it simultaneously protests 'substantially burdens' its free exercise." Const. Op. 32. Thus, in noting that "[h]ierarchical churches that choose not to hold property by trustees are not burdened by 57-9(A)" (Pet. 27), the denomination effectively concedes that § 57-9 does not burden its religious exercise.

The Diocese tries to recast this dispute by arguing that § 57-9 implicates its right "to order [its] own affairs" (Pet. 1) and "discriminates" against it because (some of) its congregations' property is held by trustees. But as the circuit court recognized, this falsely equates a denomination's ability to organize itself as it wishes with its desire to hold property in the form that it wishes. "[A]t any time within the past 140 years," ECUSA and the Diocese "could have permanently avoided any potential application of 57-9(A)" by "re-titl[ing] their properties." Const. Op. 31. They continue to function with the same leaders, geographic regions, and form of government. The effect of the ruling below is not to "restructure" their polity, but to award *property*

to congregations that voted to join another branch. And the fact that the congregations here chose a new branch over the old one is a function of a democratic process, not any statutory bias against denominations.

In the end, this case is governed by the settled principle that "[t]he wisdom and propriety of [a] statute come within the province of the legislature," even if "there are two sides to the question." *City of Newport News v. Elizabeth City County*, 189 Va. 825, 831, 836 (1949). The fact that appellants object to the outcome of the votes cannot justify voiding a longstanding (and repeatedly reenacted) statute. Thus, review should be denied.

I. The Circuit Court Properly Refused To Engraft Onto § 57-9 The Same Factors That Apply Under § 57-15.

The Diocese first contends that the trial court erred in not applying the same "neutral principles" articulated in *Norfolk* and *Green* "to cases arising under § 57-9," and that it compounded this error when it "*assumed* that the properties were 'held in trust for such congregations'" without allowing the Diocese to prove its interest. Pet. 10-11. This argument lacks merit.

1. The circuit court did not "assume" any congregational interest. For most of the subject property, the denomination did not dispute ownership. Rather, the complaints acknowledged that the property belonged to the local congregation (ECUSA Compl. ¶¶ 2, 9-20; Diocese Compl. ¶ 2) and that title was vested in congregational trustees (ECUSA Compl. ¶ 20-22). Their

contention was not that the congregations' trustees did not own the property, but rather that the property had to be used for the denomination's benefit. ECUSA Compl. ¶¶ 67-69; Diocese Compl. ¶ 27 (St. Stephens).

For the few parcels where the congregation's ownership interest was disputed, the court adjudicated the dispute. For example, it took evidence and briefing on whether: (1) title to a historic parcel was held by trustees for The Falls Church congregation, (2) a corrective deed of conveyance to Truro Church was valid, and (3) trustees for Church of the Word held their land for the congregation's benefit. 10/20, 12/19 orders. For the remaining parcels, the Diocese stipulated—based on the deeds and the prior court orders—that they were subject to § 57-9. The court "assumed" nothing.

2. The circuit court did not need to consider every factor set out in *Green* and *Norfolk* for analyzing whether a denomination has a proprietary interest sufficient to invoke *§ 57-15*. As the court noted after reviewing the full record in those cases, they "did not involve invocation of 57-9(A)" or any "alleged 'division.'" Five Qs Op. 6. Nor did the Court in either case purport to apply § 57-9. That is not surprising, as both cases involved single congregations that became "independent" (*Green*, 221 Va. at 550; *Norfolk*, 214 Va. at 501)—congregations that could not have met § 57-9's requirements.

As the circuit court further noted, "57-15 was *affirmatively amended* to

include the specific words: 'constituted authorities,' and 'governing body of any church diocese.' In contrast, 57-9 contains absolutely no reference to the governing authorities of a church." 4/3 Op. 74 (emphasis in original). The legislature thus chose to treat cases involving one congregation that becomes "independent" of a denomination differently from cases involving denominational "divisions" and new "branches." That is perfectly valid.

Accordingly, the court was not obligated to analyze *both* whether the congregations satisfied § 57-9 *and* the extent of any diocesan proprietary interest under its canons (which purport to unilaterally override the trust found in the deeds). But even assuming the Diocese had such an interest, the point of § 57-9 is to provide a neutral mechanism—a vote—for resolving competing claims to property. If courts had to separately decide which party had a superior beneficial interest, that would render the vote irrelevant and "deprive [§ 57-9] of its independent meaning." Five Qs Op. 12.

3. The Diocese's objection to the fact that § 57-9 supersedes its purported interest also ignores that there are two sides in any church property dispute, and that § 57-9 overrides the interests of whatever side loses the vote. If the congregations had voted to remain affiliated with ECUSA, that would have extinguished the interests of the dissenters. All beneficial own-

ership interests—not just the Diocese's—are subject to § 57-9's operation.[1]

II. The Circuit Court Correctly Held That The Diocese Could Not Be The Beneficiary Of Trusts In Ordinary Congregational Property.

The Diocese also appeals the ruling that Virginia does not recognize diocesan trusts in congregational property. Pet. 11. *Norfolk* and prior cases held that "trusts for supercongregational churches are invalid" (214 Va. at 507), but the Diocese says a 1993 statutory amendment overruled these cases. This view overlooks both a long line of precedent and the legislature's statement that the amendment was "declaratory of existing law." But in any case, the court's holding was unnecessary to the outcome, as § 57-9 is designed to provide a "conclusive" resolution of *all* claims of beneficial ownership—and would apply even if the Diocese had a beneficial interest.

1. At least *fourteen* decisions of this Court issued between 1832 and 1995 hold that § 57-7.1 (and its predecessors) permit trustees to hold most church property *only* for congregations.[2] Five Qs Op. 12-14.[3] The Diocese

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[1] As the court held, because all of the denomination's alleged contractual rights post-date enactment of § 57-9, any impairment of those rights would be constitutional. Contracts Cl. Op. 6; *cf. Finley v. Brent*, 87 Va. 103 (1890) (involving an 1860 deed). The denomination has not appealed that ruling.

[2] *Gallego's Ex'rs. v. Attorney General*, 30 Va. 450, 461-62 (1832); *Brooke v. Shacklett*, 54 Va. 301, 312-13 (1856); *Hoskinson v. Pusey*, 73 Va. 428, 431 (1879); *Boxwell v. Affleck*, 79 Va. 402, 407 (1884); *Davis v. Mayo*, 82 Va. 97, 102 (1886); *Finley v. Brent*, 87 Va. 103, 106 (1890); *Fifield v. Van Wyck's Ex'r*, 94 Va. 557, 560 (1897); *Globe Furniture Co. v. Trustees of Jerusalem Baptist Church*, 103 Va. 559, 561 (1905); *Moore v. Perkins*, 169

says this changed in 1993, when § 57-7.1 replaced § 57-7. Yet this Court has repeatedly held that ordinary congregational property may not be held in trust for denominations, even in the face of prior amendments adding the terms "church" and "diocese" to § 57-7 (and "church" and "denomination" to §§ 57-15 and 57-16). The 1993 amendments may have modernized § 57-7's archaic language, which dated to 1842. But as the circuit court held, 175 years of case law were not *silently overruled* by a law stating, "'this act is declaratory of existing law.'" 1993 Acts, ch. 370. Five Qs Op. 13.[4]

2. Even since 1993, the Court has cited *Norfolk* as holding that "§ 57-7.1 validates transfers . . . for the benefit of local religious organizations." *Asbury*, 249 Va. at 152. The Diocese says *Asbury* is irrelevant because § 57-7.1 was not at issue. Pet. 13 n.3. But the *Asbury* trustees' standing

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Va. 175, 179-81 (1937); *Maguire v. Lloyd*, 193 Va. 138, 144 (Va. 1951); *Norfolk*, 214 Va. at 503; *Green*, 221 Va. at 555; *Reid v. Gholson*, 229 Va. 179, 187 n.11 (1985); *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.*, 249 Va. 144, 152 (1995).

[3] Since 1962, certain property could be held in trust for dioceses. *Norfolk*, 214 Va. at 506-07 (in 1962, § 57-7 was expanded to cover residential property conveyed for the benefit of a "church diocese," but "not . . beyond this"). The Diocese thus overstates the scope of the ruling below. Pet. 11.

[4] Remarkably, the Diocese says this language "show[s] that the prior statute was *incorrectly* limited." Pet. 13 n.3. But "[w]hen the General Assembly acts in an area in which one of its appellate courts already has spoken, it is presumed to know the law as the court has stated it and to acquiesce therein, and if the legislature intends to countermand such appellate decision it must do so explicitly." *Weathers v. Com.*, 262 Va. 803, 805 (2001).

turned on § 57-7.1, and the Court had to confirm "that the Trustees," who sought to assert the congregation's rights, "[we]re proper parties." *Id.* at 152. The Court cited the fact that, under § 57-7.1, the trustees could *only* have been trustees for the congregation, to find that they had standing.[5]

3. As the circuit court noted (Five Qs Op. 13), in 1996 the Attorney General explained that § 57-7.1 "encompasses property held for the benefit of a local congregation, as opposed to property held by a larger hierarchical body." 1996 WL 384493 (Apr. 4, 1996). "'[T]he General Assembly is presumed to have knowledge of the Attorney General's interpretation of statutes, and [its] failure to make corrective amendments evinces legislative acquiescence.'" *Tazewell County. Sch. Bd. v. Brown*, 267 Va. 150, 163 (2004). Thus, the restrictions on denominational trusts remain valid.[6]

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[5] *Id.* ("acquisition and ownership of property by churches are matters governed by statute, in accordance with Article IV, § 14 of the Constitution of Virginia. Code § 57-7.1 validates transfers, including transfers of real property, for the benefit of local religious organizations. *See Norfolk Presbytery v. Bollinger*, 214 Va. 500, 506 (1974) (construing former Code § 57-7).").

[6] Even if § 57-7.1 had changed the law prospectively, it would not apply to pre-1993 conveyances, at issue here. *Berner v. Mills*, 265 Va. 408, 414 (2003) ("the phrase 'declaratory of existing law' is not a statement of retroactive intent"). That any new aspects of § 57-7.1 were at most prospective is confirmed by the textual differences between (1) § 57-7, which validated *both* conveyances "which hereafter shall be made" *and* conveyances "which, since January 1, 1777, *ha*[*ve*] *been* made"; and (2) § 57-7.1, which says only that a conveyance "which *is* made ... *shall be* valid." *Cf.* Va. Code § 57-16(C) (deeds to ecclesiastical officers "made prior to March 18, 1942 ... are hereby ratified and declared valid").

4. Alternatively, the Diocese says it is unconstitutional to read § 57-7.1 to restrict denominational trusts. Pet. 14. But statutory distinctions not designed to disadvantage particular faiths need only be "rationally related to [a] legitimate purpose." *Corp. of Pres. Bp. v. Amos*, 483 U.S. 327, 339 (1987). As the trial court noted, the "General Assembly may have wished to create a presumption in favor of ownership at the local level, because of its recognition that property [in cases in which it is held by trustees] is generally managed from the local level, or it may have believed that a presumption of local majority ownership was appropriate given that most (if not all) funding for local churches, even in denominations, comes from the local level." Const. Op. 46. Regardless, the Diocese is not burdened by the rule, since it can put title in an officer—as it routinely does. Const. Op. 32.

5. Finally, even if Virginia law permitted denominations to hold beneficial interests in congregational property, that would not change the result. Section 57-9 is designed to provide a "conclusive" answer to the question of ownership, and it presumes that every case will present a dispute between different groups claiming to be the beneficiary. *See* 4/3 Op. 55-56, 81, 83 (discussing the property disputes that preceded enactment of § 57-9). Thus, if Virginia law recognized the Diocese as a potential beneficiary of the trusts at issue, § 57-9 would still resolve the question of ownership

as between the Diocese and the CANA Congregations.

III. The Circuit Court Correctly Determined That Virginia Code § 57-9's Requirements Were Satisfied In This Case.

The Diocese also challenges the trial court's interpretation and application of § 57-9. Since its main points were also raised in ECUSA's petition, the congregations address them in response to that petition. Opp. to ECUSA Pet. 7-23. Here, we simply note that the application of § 57-9's requirements, without more, is not worthy of this Court's time and resources.[7]

IV. Section 57-9 Neither Burdens Appellants' Religious Exercise Nor Discriminates Among Denominations, And Thus Satisfies The Federal And State Religion Clauses.

Unable to show that § 57-9 applies only to "divisions" it approves, the Diocese says the court's reading of § 57-9 burdens its faith, discriminates among churches, and foists "congregational governance" on "hierarchical churches"—all in violation of the First Amendment. Pet. 26. As the circuit court observed in its 49-page opinion, these "arguments are predicated . . .

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[7] One point raised solely by the Diocese is that the court's finding that the Anglican Communion is divided required it to delve into intra-church communications and to "rely on theological concepts like 'walking apart' and "impairment' of the 'fabric' or 'bonds of communion.'" Pet. 16. But as the court noted, it cited these communications only to provide background, as the U.S. Supreme Court has done in similar cases, and to show that church officers themselves referred to "divisions" in the Anglican Communion. Const. Op. 44-45 (Const. Op. 45 ("to describe a religious controversy, *even in detail*, is not to make a religious determination"); 4/3 Op. 82. The court relied on objective criteria—*e.g.*, the amendment to the Church of Nigeria constitution—to show the formation of an alternate polity. 4/3 Op. 83.

on a characterization of [the] Court's . . . opinion that bears only a passing resemblance to the opinion itself." 4/3 Op. 8.

A. The circuit court correctly held that *Jones v. Wolf* does not require deference to a denomination's canons.

Any assertion that § 57-9 burdens religious exercise is foreclosed by *Jones*, which held that States "may resolve [church property] dispute[s] on the basis of 'neutral principles'" and need not "defer to the resolution of an authoritative tribunal of the hierarchical church" or to "the 'laws and regulations' of the [denomination]." 443 U.S. at 597, 609. There, a congregation voted to leave the Presbyterian Church in the United States (PCUS) to affiliate with another denomination. An internal PCUS tribunal had ruled that the PCUS-affiliated minority was "the true congregation," but the Georgia courts held that the majority represented the congregation. *Id.* at 598, 600-01. The Court disagreed that it was unconstitutional for a State to let majority rule presumptively govern this part of a hierarchical church's affairs:

> If . . . 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; citation omitted).

Under *Jones*, state law must be "flexible enough to accommodate all forms of religious organization[s]," but States may use a default rule of majority ownership to resolve church property disputes—even in cases involving "hierarchical" churches—if there is a "method of overcoming the majoritarian presumption" by arrangements made "before the dispute erupts." *Id.* at 603, 606, 608. *Jones* thus does not require States to defer to denominational canons, and Judge Bellows rightly held that § 57-9 is constitutional.

B. Having to make secular property arrangements that it routinely makes does not substantially burden the Diocese.

Jones addressed whether it burdened a denomination's religion to be required to take steps to avoid a default rule of majority ownership. And as the circuit court noted, "*Jones* expressly states that one way in which a religious organization can avoid the presumptive rule of majority representation is to modify its deeds, and describes any burden involved in making such a modification as 'minimal.'" Const. Op. 33 (quoting 443 U.S. at 606).

The record is especially clear that § 57-9 does not burden *this* denomination's religious exercise. The statute does not apply to property

held by corporations—as evidenced by a ruling below in favor of the Diocese[8]—or by church officers, under § 57-16. The Diocese's canons expressly authorize such holdings.[9] Moreover, it is stipulated that not all property of Episcopal congregations in Virginia is held by trustees. Dec. 6, 2007, Stip. ¶ 1. Thus, as the circuit court observed:

> [ECUSA and the Diocese] argue that to place their Virginia properties in the name of an ecclesiastical officer, or to incorporate, would place a substantial burden on their religious exercise. ECUSA/Diocese' argument becomes much less persuasive in light of the fact that Bishop Lee already holds about 29 properties in his own name. Thus the Diocese itself regularly—and of its own free will—engages in the very practice which it simultaneously protests "substantially burdens" its free exercise of religion.

Const. Op. 31-32. As Judge Bellows recognized, "[t]he free exercise clause protects the free exercise of religion; it does not protect religious organizations from all administrative inconveniences." *Id.* at 32. Indeed, the Diocese *concedes* that "[h]ierarchical churches that choose not to hold property by trustees are not burdened by §57-9(A)." Pet. 27. And since it

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[8] 12/19 Op. 12-13 (assets in The Falls Church Endowment Fund are "held by a corporation," and "are not held by its trustees," and "this form of corporate ownership takes the Endowment Fund wholly beyond the reach of . . . section 57-9(A)"). The Falls Church has not appealed this ruling.

[9] Diocese Canon 15.4 ("The Bishop, or Ecclesiastical Authority, is hereby authorized to acquire by deed, devise, gift, purchase or otherwise, any real property for use or benefit of the Diocese. Property so acquired shall be held and transferred . . . in accordance with the provisions of Section 57-16 of the Code of Virginia.").

too "choose[s] not to hold property by trustees," this concession is fatal.[10]

The Diocese's burden argument is further undermined by the fact that several hierarchical churches in Virginia have placed property outside the scope of § 57-9 without undue difficulty. For example, the property of Catholic and Mormon congregations is held by bishops, and the property of Greek Orthodox and Foursquare churches, among others, is held by corporations. Dec. 6, 2007, Stip. ¶¶ 5-8.[11] None of this property is held by trustees, so § 57-9 is not triggered. Had the Diocese taken this approach more broadly, § 57-9 would not apply. But the fact "[t]hat the Diocese availed itself of this alternative ownership in some cases but chose not to do so in others (and not in the instant cases) does not turn a constitutional statute into an unconstitutional one." Const. Op. 48.

C. Section 57-9 does not interfere with the "governance" or "polity" of the ECUSA or the Diocese.

Unable to distinguish *Jones*, the Diocese seeks to recast this as a

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[10] CANA Exh. 148 at 0331-0337 (Journal of the 210th Annual Council of the Diocese) ("Properties Held"); CANA Exh. 147 at 0344-349 (Journal of the 209th Annual Council of the Diocese) ("Properties Held").

[11] Also, many Presbyterian, Methodist, and Lutheran congregations' properties are held corporately, and are outside the scope of § 57-9. *Id.* ¶¶ 2-4.

Indeed, the form of property holdings varies not only *among* but *within* religious denominations (*id.* ¶¶ 1-10), thus confirming that nothing prevents genuinely hierarchical churches from taking steps, before a dispute erupts, to put title in a form that conforms to the shared expectations of the parties.

case about its "polity," and to portray § 57-9 as imposing "congregational governance—local majority rule—on hierarchical churches." Pet. 25. But this blurs the line between disputes over property and genuine disputes over polity. The statute merely provides a default rule that the neutral principle of majority rule will govern a narrow aspect of a church's affairs (property ownership) in a limited circumstance (a division) that is identifiable on a secular basis (the disaffiliation of congregations who form a new polity)—*if* the property is held by trustees. Hierarchical churches may avoid § 57-9 by directing congregations to put title in other forms—forms they routinely use.

The circuit court's ruling does not "restructure" any diocese or provide that ECUSA must recognize the legitimacy of entities such as CANA or ADV. Nor does the ruling interfere with the denomination's ability to choose Episcopal leaders or discipline clergy. It continues functioning as in the past, with the same regions, leaders, and form of government.

D. The Diocese's other authorities are inapposite.

The Diocese's other authorities, which Judge Bellows carefully analyzed (Const. Op. 11-16, 28-30), are not to the contrary. In *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), ownership of the property turned on whether a hierarchical church is entitled to deference in choosing ecclesiastical *leaders*. Explaining that the question was "the power of the Su-

preme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese," the Court held that "[t]his controversy . . . is strictly a matter of ecclesiastical government." 344 U.S. at 113, 115. The law there "regulate[d] church administration, the operation of the churches, [and] the appointment of clergy, by requiring conformity to church statutes." *Id.* at 107. Thus, *Kedroff*—which was not even *cited* by the *Jones* majority—is not principally about who owned the church property. Rather, "to resolve the dispute, the Court was forced to determine essentially who was the 'true' bishop." Const. Op. 11. There is no such issue here.

Similarly, in *Serbian Orthodox Diocese v. Milivojevich*, a state court reviewed a hierarchical church's decision to reorganize a diocese, reversing that decision as "arbitrary" and "procedurally and substantively defective under the [church's] internal regulations." 426 U.S. 696, 698 (1976). The Supreme Court reversed, holding that the court had "substituted its interpretation of the [church] constitutions for that of the [tribunal]" on provisions that "were not so express that the civil courts could enforce them." *Id.* at 721, 723. While "the issue as to who would hold the church property" was "[u]nderlying this doctrinal dispute," the Court "emphasized[] [that] 'the case essentially involves not a church property dispute, but a religious dispute.'" Const. Op. 16 (quoting *Milivojevich*, 426 U.S. at 709). The ruling

below, by contrast, rests not on church rules but on secular legal principles.

The Diocese also cites *Northside Bible Church v. Goodson*, 387 F.2d 534 (5th Cir. 1967), and *First Methodist Church v. Scott*, 226 So. 2d 632 (Ala. 1969), pre-*Jones* cases involving Alabama's "Dumas Act." Diocese Pet. 18 n.8. But as Judge Bellows held, that act both "explicitly singled out protestant churches" and had "a departure-from-doctrine provision that was unconstitutional" under *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969). Const. Op. 29. "There is simply no comparison between the Dumas Act and 57-9, as 'section 57-9 contains no sect-specific language—it applies to *any* 'congregation' attached to '*any*' 'church or religious society,' and it contains no 'departure-from-doctrine' requirement." *Id.* at 30.[12]

E. Section 57-9 does not discriminate among religions or between religious denominations and secular associations.

Although title to many Episcopal properties are held not by trustees, but by the bishop (or corporations), the Diocese says § 57-9 applies "only [to] hierarchical churches holding property through trustees" and thus "discriminates among religious groups based on methods of holding property." Pet. 30. According to the Diocese, such "deliberate distinctions between

[12] The Diocese also invokes *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), a pre-*Erie* federal common law case that deferred to a hierarchical church tribunal's resolution of a property dispute. But as this Court has held, Virginia is "not bound by the rule of *Watson*" or the notion of "implied consent to [hierarchical church] government." *Norfolk*, 214 Va. at 504.

different religious organizations" violate the rule that "one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244, 247 n.23 (1982). But discrimination among different forms of *property ownership* does not amount to *religious* discrimination.

1. *Larson* involved a law that initially exempted all faiths from charitable solicitation reporting rules, but was amended to exempt only groups receiving at least half of their donations from members. *Id.* at 230-32. As Judge Bellows noted, "the legislative history . . . evidenced an explicit intent to 'get at' the 'Moonies' but to protect the 'Roman Catholic Archdiocese,'" and "[i]t was against this backdrop that 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'—warranting . . . strict scrutiny." Const. Op. 36 (citations omitted). "[T]he legislative history of 57-9 demonstrates no such hostility or animus toward a specific denomination." *Id.*

To justify applying strict scrutiny, a law must do more than make "explicit and deliberate" distinctions having a disparate impact on some faiths; *Larson* requires strict scrutiny only if "the law *facially* differentiates among religions," or at least appears deliberately designed to do so. *Hernandez v. Comm'r*, 490 U.S. 680, 695 (1989) (emphasis added); *Amos*, 483 U.S. at

339 ("strict scrutiny" does not apply if "a statute is neutral on its face"). As Judge Bellows held, § 57-9 "does not make explicit and deliberate distinction[s] between religious sects. The text does not state [that] hierarchical churches are subject to the law while non-hierarchical churches are not, but rather applies based on the form in which churches choose to hold property. ... When there is no facial discrimination between religious denominations, *Larson* is inapplicable." Const. Op. 35.

2. The Diocese also argues that § 57-9 favors "secular" groups. Pet. 28. Yet this "assumes that the Free Exercise Clause somehow mandates that the legislature treat church property disputes identically to disputes involving secular voluntary associations. It does not." Const. Op. 26.[13] The Supreme Court has never suggested that strict scrutiny applies to laws that deal solely with the topic of religion in general or church property in particular. "[W]here a statute is neutral on its face and motivated by a permissible purpose," "the proper inquiry is whether [the legislature] has chosen a ra-

[13] *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which the Supreme Court has never applied to church property, does not invalidate § 57-9. Section 57-9 serves many secular purposes: it "allows for peaceful conflict resolution" (Const. Op. 37); it avoids ambiguities of trust law on display when (as here) multiple parties assert beneficial interests; and it provides a rule that civil courts can readily administer. Further, it minimizes the "entanglement" that would inhere in applying a different definition of "division" to every case, depending on the particular polity of the denomination before the court. *Id.* at 40 (noting that the view of the Diocese would "draw this Court into the very thicket that they simultaneously argue this Court should avoid").

tional classification to further a legitimate end." *Amos*, 483 U.S. at 339.

In any case, Virginia does not permit secular voluntary associations to assert ownership over members' property by passing a rule—let alone without publicly recording that interest in the deeds. Rather, "[an association's] powers are limited by general law," as well as "inherent" limitations—particularly where it seeks to "encumber[] [the members'] property." *Unit Owners' Ass'n v. Gillman*, 223 Va. 752, 762-66 (1982). Thus, just as the rules of a condominium association are subject to the limitations set forth in the Condominium Act, so too are the rules of a religious association subject to the limitations set forth in Title 57. The Diocese can point to no authority holding that any contracts created by the rules of a secular association are not subject to statutory laws in effect when those rules are enacted.

Finally, that there is no "division statute" for secular associations does not mean that the law discriminates in favor of them. To the contrary, "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.*'" *Reid v. Gholson*, 229 Va. 179, 189-90 (1985). Thus, § 57-9 does not grant a special privilege to the

CANA Congregations that other private organizations do not enjoy.[14]

V. The Circuit Court Rightly Ruled That § 57-9 Effects No "Taking."

Although § 57-9 resolves only competing ownership claims of *private* parties, the Diocese says § 57-9 "takes" its property "[i]f the Diocese has property interests . . . or if the property is held in trust by the Diocese." Pet. 33. This contention *assumes* the Diocese had a property interest to be taken. But as the circuit court recognized, the argument is "entirely circular." *Id.* Legal title is held by trustees for the CANA Congregations, and "the very purpose of section 57-9 is to settle . . . a dispute over who owns property held in trust for local congregations"—over who is the *beneficial* owner. Const. Op. 47. The Diocese thus ignores the difference between a law that settles title and one that takes title. But "[a] state does not take property when it adjudicates competing claims to title by private parties based on neutral legal principles." *Id.* If it did, all statutes resolving disputed property rights would effect a "taking."

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[14] According to the Diocese, *Falwell v. Miller*, 203 F. Supp. 2d 624, 630 (W.D. Va. 2002), demonstrates that § 57-9 must satisfy strict scrutiny because, like the Virginia Constitution's ban on the incorporation of churches struck down there, § 57-9 lacks facial neutrality and general applicability. Pet. 28. But § 57-9 does not "impose special disabilities on the basis of religious views" or on any other basis. *Id.* at 630. Indeed, the law does not impose disabilities at all—it simply provides a vehicle for churches to resolve property disputes in a division, and it applies only to property held by trustees. *See* Const. Op. 26-28.

VI. The Circuit Court Properly Held That The Diocese Was Precluded From Directly Attacking A Final Order In Another Case.

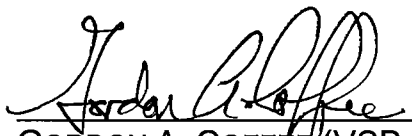
The Diocese says the circuit court erred in refusing to revisit a final order entered on September 29, 2006 by another judge in a different case. That order authorized another congregation to transfer a parcel of property to appellee Truro Church. But as the court recognized, the Diocese waited "well over 21 days"—indeed, over *two years*—to challenge that order. 12/19 Op. 6-7; see 1/8/09 Final Order 8, ¶ II.J. Thus, while the Diocese was not a party to the order, the court rightly held that it "lacked jurisdiction to modify, vacate or suspend [it]" under Rule 1.1. 12/19 Op. 6.

Niklason v. Ramsey, 233 Va. 161 (1987), is not to the contrary. This Court held there that the judgment entered by the trial court did not violate Rule 1:1, even though it impacted an earlier judgment, because it involved different parties and different issues. *Id.* at 164. Here, the Diocese was not requesting relief on different issues that would only collaterally impact the earlier order. The court instead found that "ECUSA and the Diocese are making 'a direct attack on the September 29, 2006 final Order'" and "'specifically seek[ing] to have the order modified vacated or suspended—actions which are prohibited by Rule 1:1.'" 12/19 Op. 6 (citation omitted).

CONCLUSION

For the foregoing reasons, the petition for appeal should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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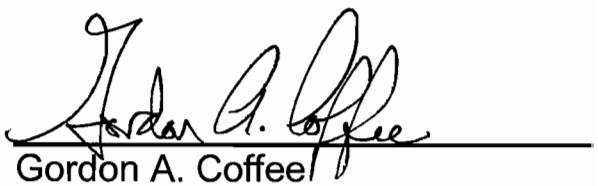

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