Record No. 090683

In the Supreme Court of Virginia

THE EPISCOPAL CHURCH, APPELLANT

v.

TRURO CHURCH, ET AL., APPELLEE

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

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GLOSSARY

4/3 Op.	Letter Opinion on the Applicability of Va. Code §57-9(A) (April 3, 2008)
5/12 Op.	Letter Opinion (May 12, 2008)
Const. Op.	Letter Opinion on the Constitutionality of Va. Code § 57-9(A) (June 27, 2008)
Five Qs Op.	Letter Opinion on the Court's Five Questions (June 27, 2008)
Contracts Cl. Op.	Letter Opinion (August 19, 2008)
Waiver Op.	Letter Opinion (August 19, 2008)
12/19 Op.	Letter Opinion (December 19, 2008)
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

STATEMENT OF FACTS AND PROCEEDINGS BELOW

In 2006, eleven congregations ("CANA Congregations"), facing a widening split in the Diocese of Virginia ("Diocese"), the U.S. Episcopal Church ("ECUSA"), and the Anglican Communion, began deliberating over whether to remain affiliated with ECUSA and the Diocese. Months later, pursuant to a written "protocol for departing congregation" ("protocol") negotiated with representatives of the Diocese and drafted by its chancellor, members of these congregations voted on that issue. Prior to the votes, Diocesan officials (including the bishop) addressed the congregations in person, by videotape, or by letter, noting that "American Christianity has been punctuated over the years by frequent divisions, with one group choosing to separate," but urging them to "reject the tempting calls to division." 4/3 Op. 34. Nevertheless, overwhelming majorities of each congregation voted to affiliate with the Convocation of Anglicans in North America ("CANA") and the Anglican District of Virginia ("ADV"), which are affiliated with the Anglican Communion through the Church of Nigeria.

Pursuant to the protocol, the Diocese and the CANA Congregations appointed teams to negotiate any property disputes created by the votes. The Diocese later advised, however, that ECUSA's new Presiding Bishop opposed such negotiations. The Presiding Bishop told the Diocese that

she was amenable to a settlement with congregations who disaffiliated to become Roman Catholic, Baptist, or Methodist—or even those who wished to sell their property for "secular purposes," like a "saloon"—but could not support property negotiations with congregations who affiliated with "another branch of the Anglican Communion." Const. Op. 41 n. 56.

Pursuant to Va. Code § 57-9, nine of the congregations filed reports with local circuit courts detailing the results of the votes and identifying the branches the congregations had voted to join.[1] ECUSA and the Diocese ("the denomination" or "appellants") intervened, with the congregations' consent, and filed answers. Soon thereafter, ECUSA and the Diocese filed separate declaratory judgment suits against the congregations and their vestries, rectors, and trustees. They alleged that the individual defendants had improperly taken control of the congregations' property.[2] While acknowledging that the real estate deeds were titled in the name of trustees for the local congregations, ECUSA and the Diocese alleged that, under church canons adopted in 1979, the property was held in trust for them.

A panel of three circuit court judges appointed by this Court granted a motion to consolidate the § 57-9 petitions and declaratory judgment actions

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[1] Two other congregations had no real estate and filed no §57-9 petitions.

[2] With respect to Church of the Word, the complaint addressed only personal property.

before a single judge. A member of that panel, Randy I. Bellows, was then designated to oversee the consolidated cases. In May 2007, after consolidation, ECUSA and the Diocese agreed that the application and interpretation of § 57-9 were "discrete, key issues" that the court should resolve first. In November 2007, after several months of discovery, the court conducted a five-day trial. Before and at trial, ECUSA and the Diocese contended that a "division" under § 57-9 required approval of denominational authorities and that CANA and ADV were not "branches" of ECUSA, the Diocese, or the Anglican Communion. They further alleged that any contrary reading of § 57-9 would violate the First Amendment and the Contracts Clause.

The parties each submitted three rounds of post-trial briefs regarding the applicability and constitutionality of § 57-9. On April 3, 2008, the court issued an 83-page opinion exhaustively analyzing the historical background of § 57-9; the meaning of the terms "division," "branch," "attached," and "religious society"; whether ECUSA, the Diocese, or the Anglican Communion had divided; and whether CANA or ADV constituted branches of those entities within the meaning of § 57-9. The court held that § 57-9 applied, finding the evidence of division "not only compelling, but overwhelming." 4/3 Op. 3. As the court stated, "[t]he only way [it] could find a 'division' *not* to exist among the pertinent entities" was "to define the term so narrowly and

restrictively as to effectively define the term out of existence." *Id.*

In an accompanying order, the court requested additional briefing on the question whether § 57-9, as applied, violated the federal and state religion clauses. The court gave ECUSA and the Diocese leave to raise other constitutional challenges, after which they invoked the Takings and Due Process Clauses and the parties submitted two more rounds of briefs addressing all constitutional issues except the Contracts Clause.

The circuit court permitted *amici curiae* and the Attorney General both to submit briefs and to participate in a full-day hearing on the constitutional issues. On June 27, 2008, the court issued a 43-page opinion holding that § 57-9, as applied here, is constitutional. The court explained, among other things, that (1) "each" of its own "factual findings" was "secular"; (2) § 57-9 "applies equally to all religious sects" and is not motivated by "animus toward a specific denomination"; (3) § 57-9 is constitutional under *Jones v. Wolf*, 443 U.S. 595, 607-08 (1979), which permits state courts to resolve property disputes in "hierarchical" churches based on "a presumptive rule of majority representation," if there is a "method of overcoming the majoritarian presumption"; and (4) ECUSA is not substantially burdened by § 57-9, since it does not apply to property held by church officers, and the Diocese "regularly" holds properties in that form. Const. Op. 20, 32, 35-36, 48.

In August 2008, after briefing, the court issued a 14-page opinion rejecting the claim that § 57-9, as applied, violates the Contracts Clause. As the court held, that clause protects only "preexisting" contracts—any contracts entered into after § 57-9's adoption are subject to it—and neither ECUSA nor the Diocese had any contractual rights when the statute was adopted. Contracts Cl. Op. 4-6. Appellants did not appeal this ruling.

ECUSA and the Diocese then raised several other issues relating to the meaning of other terms in § 57-9 and whether the court had to address every factor set out in *Green v. Lewis*, 221 Va. 547 (1980), as well as the requirements of § 57-9. On June 27, 2008, after three rounds of briefing, the court resolved those issues in an 11-page opinion holding that *Green* "is not a case interpreting or applying § 57-9(A)," but rather § 57-15, and that reading *Green* to require identical analysis under § 57-9 would "deprive [§ 57-9] of its independent meaning." Five Qs Op. 4, 12.

ECUSA and the Diocese next sought to raise two new affirmative defenses. As relevant here,[3] in July 2008 they moved to amend their answers to assert that the congregations had "contracted away" or "waived"

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[3] Appellants also moved to amend their complaint to assert that § 57-9 violated the Virginia Religious Freedom Restoration Act, Va. Code § 57-2.02. The circuit court denied this motion in a 9-page opinion, holding that amendment would be futile because the act governs only litigation in which a public entity was a defendant. That ruling has not been appealed.

their right to invoke § 57-9. After three more rounds of briefing and a hearing, the court denied leave to amend in a 14-page opinion holding that, while the denomination couched its motion as one to "clarify" its earlier answers, it actually raised a new defense. The court held that the congregations would be "severely prejudiced" were it to consider a waiver defense after a five-day trial, extensive pre- and post-trial briefing, and several hearings on § 57-9's applicability and constitutionality. Waiver Op. 16, 8-15.

ECUSA and the Diocese then stipulated that approving the § 57-9 petitions would moot their declaratory judgment suits as to property covered by the petitions. The court thus turned to whether the votes conducted by the congregations were fair and what property should be subject to § 57-9. In September 2008, the denomination stipulated that the congregations' votes were valid and that, based on the court's rulings, most of the real and personal property was subject to § 57-9. Nevertheless, the denomination contested whether The Falls Church Endowment Fund and three parcels were held by trustees for the benefit of particular congregations.

On December 19, 2008, after three days of trial and two series of briefs, the court issued a 20-page ruling resolving those issues. The court ruled in favor of ECUSA and the Diocese on the endowment fund—which is held by a separate corporation and fell outside § 57-9's reference to prop-

erty "held by trustees"—but held for the congregations on the three parcels. The court entered a final judgment, the terms of which were negotiated by the parties, on January 8, 2009. ECUSA and the Diocese appealed.

ARGUMENT

I. The Circuit Court Rightly Rejected The View That The Term "Division" Varies From Polity To Polity And Applies Only To Denominationally-Approved Divisions.

More than 140 years ago, the General Assembly, acting in the wake of decades of property-related conflicts triggered by denominational and congregational splits,[4] decided that congregations could resolve such conflicts by a vote of their members. Under the statute now codified at Va. Code § 57-9(A),[5] congregations "attached" to denominations may conduct a vote of their members in the event of a "division" in the denomination. Similarly, under subpart (B) of § 57-9, "independent" congregations may vote to determine property ownership in the event of a "division" in the congregation. In both cases, members may decide which branch of the fractured body to join, and judicial approval of the vote quiets title as to ownership of congregational property held by trustees. The statute does not apply, however, to property held by church officers under § 57-16, or to prop-

[4] As ECUSA's expert admitted at trial, "There are all sorts of separations going on in the 19th Century." Tr. 1102.

[5] The text of Va. Code § 57-9 is set forth in its entirety in the addendum to this brief.

erty held in corporate form under § 57-15(B)—forms of ownership routinely used by Virginia denominations including the Diocese.

As shown below, the circuit court's conclusion that § 57-9's terms are satisfied here is compelled by the text, structure, history, and purpose of the statute. ECUSA's and the Diocese's own use of § 57-9's key terms, "division" and "branch," in both written statements and testimonial admissions, further confirms that the circuit court properly interpreted the statute.

A. The text, structure, history, and purpose of § 57-9, as well as the relevant case law, uniformly confirm that § 57-9 is not limited to consensual "divisions."

The circuit court held a five-day trial on the applicability of § 57-9. It heard undisputed expert testimony on the ordinary meaning of the terms "division" and "branch" at the time of the statute's enactment, and extensive expert testimony and documentary evidence concerning the statute's historical context. 4/3 Op. 49-63. Citing dictionary definitions (from 1867 and today), the historical record, and other sections of Title 57, the court defined "division," according to its "plain meaning," as a denominational split that "involve[s] the separation of a group of congregations" from a denomination and "the formation of an alternative polity that disaffiliating members c[an] join." 4/3 Op. 80; *id.* at 46-49. Applying this definition, the court found a "division" at the ECUSA, Diocesan, and Anglican Communion levels—

each of which independently satisfies the statute. *Id.* at 81-83.

ECUSA argues that the circuit court erred in rejecting its view that a "division" is only a "division" if it is "accomplished in accordance with the church's own polity." ECUSA Pet. 12; *see also* Diocese Pet. 15. As they put it in their opening statement: a "division of the Episcopal Church occurs only when the General Convention says it occurs." Tr. 757. But this argument cannot be squared with the text of § 57-9—which, in contrast to other provisions of Title 57, makes no reference to denominational approval—or with its history. And engrafting a "denominational approval" requirement onto § 57-9 would render it a "nullity," since churches in consensual divisions "would simply approve divisions and amicably divide up their property without intervention from secular institutions of government." 4/3 Op. at 81.

Text. Although "the popular, or received import of words, furnishes the general rule for the interpretation of statutes," *Lawrence v. Craven Tire Co.*, 210 Va. 138, 140-41 (1969), ECUSA does not argue that its reading of "division" is consistent with § 57-9's text. That is not surprising. Section 57-9 refers to divisions having "occurred," not to their being "approved." As Judge Bellows held, "'division' has no modifiers—the words 'formal' or 'approved by the hierarchy,' or 'approved by the constituent authorities of the church . . .' do not appear in either section 57-9(A) or (B)." 4/3 Op. 80.

Despite amending and reenacting § 57-9 over the years, the General Assembly made only minor changes, *id.* at 49 n. 37, and did not restrict its scope or require defering to denominations. This stands in contrast to amendments to provisions such as § 57-15, which "also originally required only congregational approval for a conveyance of property," but which "was *affirmatively amended* to include the specific words: 'constituted authorities,' and 'governing body of any church diocese.'" 4/3 Op. 74; *see also* § 57-16.1 (church corporations may hold property "for any purpose authorized and permitted by the laws, rules, or ecclesiastic polity of the church or body"). Thus, the court rightly ruled that "57-9 contains absolutely no reference to the governing authorities of a church," and that nothing in its text limits it to consensual divisions. This alone warrants denying review.

History. Similarly, the historical context of § 57-9 flatly contradicts the view that "divisions" were carried out consistent with denominational polity. At trial, the CANA Congregations introduced testimony from two historians, who cited numerous 19th century newspaper articles, pamphlets, and religious journals showing that the term "division"—particularly when used with "branch"—was most commonly used to describe the separation of a group of congregations from one denomination to form an alternate polity. 4/3 Op. 49-57. While ECUSA's historian offered evidence as to how some (but

not all) historians defined "division," he conceded "he 'd[id] not know what the public usage' of the term division would have been in the 19th century." *Id.* at 62 n.65; Tr. 1100, 1135. The court thus "found the opinions of the CANA experts to be" both "more persuasive and convincing" and "tied directly to the particular and pertinent historical record relevant to the instant case." 4/3 Op. 63. By contrast, "significant opinions offered by ECUSA-Diocese experts did not appear to be so tethered; rather, they appeared to be expressions of opinion based on the experts' general knowledge." *Id.*

ECUSA suggests (at 16) that some of the best-known Methodist and Presbyterian splits that preceded enactment of § 57-9 were in accordance with those denominations' polities. The historical evidence below paints a different picture. As ECUSA's expert admitted, the 1844 Methodist "plan of separation" was not "ratified" and "broke down soon after its enactment." Tr. 1158 (Mullin). It was thus irrelevant to the 1860s split in the Baltimore Conference of the Methodist church—which affected much of Virginia. Tr. 203 (Irons). As this Court noted in *Hoskinson v. Pusey*, that division and the related congregational votes "w[ere] not based on any claim of right under the plan of separation devised in 1844." 73 Va. 428, 437-38 (1879).

This fact, and the fact that the 1844 plan of separation was limited to churches in "border societies," are among the many facts that explain why

appellants misunderstand the significance of *Brooke v. Shacklett*, 54 Va. 301 (1856). *See Hoskinson*, 73 Va. at 438-39 ("the congregation" . . . was not a 'border society,' within the meaning of the resolution of 1844, as was the case in *Brooke & others v. Shacklett*, and hence had no authority under these resolutions to determine by a majority of its members its adherence to the church south"). As this Court's near-contemporaneous summary of the history confirms, § 57-9 was enacted in part because the 1844 plan did *not* cover Virginia congregations in the Baltimore Conference.

Similarly, the Presbyterian split into Old and New School branches in the 1830s was not pursuant to any approved plan. Tr. 58, 62-64 (Valeri). Moreover, when the Old and New School branches experienced divisions of their own in the 1850s and 60s, those breaks were not approved by denominational authorities. Tr. 71-75, 82-83, 88 (Valeri). As ECUSA's expert testified (and the court held), an attempted consensual plan of separation was "[n]ever ratified" and "broke down on certain political issues," but that did not prevent the "division" from becoming "a fait accompli." Tr. 1154-55 (Mullin); 4/3 Op. 62 n.65 (quoting excerpt of testimony). Indeed, ECUSA admitted below that "the great divisions in the Presbyterian Church did not take place pursuant to a plan agreed upon in advance." 1/11/08 Br. 11.

The Baptists also suffered divisions, but there was no evidence that

they were "in accordance with Baptist polity." ECUSA Pet. 17. In fact, the testimony cited by ECUSA supports the opposite conclusion—that the Baptists divided on many occasions, none of them amicable. Tr. 205 (Irons).

Given the expert testimony at trial (much of it undisputed), there is no basis to ECUSA's assertion that each of the Presbyterian, Methodist, and Baptist divisions "occurred in accordance with the denomination's own polity," and that "[t]he court made no findings to the contrary." ECUSA Pet. 16. To the contrary, the court found that "if the history of division within churches ... in the United States informs this Court of anything, it is that division is frequently nonconsensual and contested and takes place without the approval or affirmation of the hierarchy." 4/3 Op. 81.

Precedent. The court decisions addressing § 57-9 likewise do not support the claim that any division under the statute must be consensual or denominationally approved. The evidence at trial included 29 circuit court orders, entered shortly after 1867, approving congregational votes under the statute. CANA Exhs. 95-98, 117-20. None of these orders—one of them secured by the legislative sponsor of § 57-9, John Baldwin, representing a Methodist congregation in Augusta County—suggested that the congregation acted with approval of denominational authorities or pursuant to denominational polity. Tr. 245, 287 (Irons). Moreover, the court found the

testimony concerning these orders "to be especially helpful to the Court in understanding the early history of 57-9." 4/3 Op. 63.

Similarly, neither case heard by this Court in the period after § 57-9's enactment suggested that a "division" had to comply with a denomination's polity. *See Hoskinson*, 73 Va. at 437-38 (finding instead that the congregation did not follow the circuit court approval process); *Finley v. Brent*, 87 Va. 103 (1890) (finding the law invalid under the Contracts Clause, as applied retroactively, to a party that had vested rights under a pre-statute (1860) deed). Indeed, as the passages from *Hoskinson* quoted above confirm, those 19th century cases suggest the opposite.

Finally, as this Court has noted in analyzing § 57-9(B), the type of "division" that is a "prerequisite to relief under 57-9" occurs when the parties "separate from the body of their church, and . . . rend it into groups." *Reid v. Gholson*, 229 Va. 179, 192 (1985). As the trial court recognized (4/3 Op. 74), "division" means the same thing for purposes of § 57-9(A).

Purpose. It is for good reason that the text, structure, and history of § 57-9—as well as the case law—all point in the same direction: The statute would serve no meaningful purpose if limited to consensual "divisions." As the circuit court explained, if "divisions" were consensual, "there would be little need for a division statute, for churches would simply approve divi-

sions amicably and divide up their property without intervention from secular institutions of government." 4/3 Op. 81. This would be true in any denomination, but it is especially true in the Episcopal Church, "since the record shows that, according to ECUSA's canons, the only 'divisions' that are allowed are essentially geographic"—and that "an ECUSA congregation is not allowed to decide which diocese to join." *Id.* at 80. ECUSA says that, under its reading of § 57-9, the law provides an "orderly procedure for clarifying the duties of trustees." Pet. 19. But that does not distinguish § 57-9 from § 57-15, much less explain the purpose of the voting provisions. In short, "[t]he only way this Court could find a 'division' *not* to exist among the pertinent entities" is "to define the term so narrowly and restrictively as to effectively define the term out of existence." 4/3 Op. at 3. And the Court may not read § 57-9 so as to "make 57-9(A) a nullity." *Id.* at 81.

B. ECUSA's use of the term "division" outside of court confirms that the circuit court properly interpreted it.

The circuit court also made factual findings that "ECUSA and Diocese leaders have in the past used the term 'division' themselves to describe the very situation before this Court." 4/3 Op. 80. For example, the Diocese's bishop wrote to the congregations on the eve of their votes, acknowledging:

> American Christianity has been punctuated over the years by frequent *divisions*, with one group choosing to separate because they believed the separated group might be more pure than their former

> identity. That has not been characteristic of the way we Anglicans have dealt with differences.
>
> I encourage you when you vote, to vote for the unity and mission of the church, therefore remaining one with your diocese, and reject the tempting calls to *division* . . . .

4/3 Op. 34 (emphasis added). Other testimony and documents showed that ECUSA's own General Convention described as a "division" the 1873 separation—in defiance of ECUSA polity—of a small group of Episcopal ministers and individuals who left to form the Reformed Episcopal Church. Tr. 105-07 (Valeri). Their actions were denounced by ECUSA and the bishop who led the disaffiliation was stripped of all authority. Tr. 107-08. In 1874, a journal from a church convention criticized the group for violating church canons and characterized what transpired as a "schism" and a "division." Tr. 108-110; 139; CANA Exh. 5. A century later, ECUSA described the disaffiliations leading to the formation of the Reformed Episcopal Church as a "division," despite the fact that those disaffiliations were in conflict with church polity. Tr. 112; CANA Exh. 6. The denomination's own words thus confirm that the court correctly defined "division."

II. The Circuit Court Properly Held That CANA And ADV Qualified As "Branches" Within Under Va. Code § 57-9.

ECUSA's challenge to the circuit court's interpretation of "branch" is equally misguided. Section 57-9 provides that in the event of a "division," congregations may vote on which "branch" to join. Citing ordinary diction-

aries, the circuit court defined "branch" as "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." 4/3 Op. 78.[6] That is, "[a] 'branch' is 'simply the logical corollary of [a] division,'" and "describes the entities that remain in [its] aftermath." Const. Op. 38. Having found that ECUSA, the Diocese, and the Anglican Communion had each experienced "divisions," the court found that CANA, ADV, and the Church of Nigeria are respective "branches" of those entities. 4/3 Op. 78. Each of these three findings independently satisfies § 57-9.

The circuit court's reading of "branch" is consistent not only with dictionary definitions, but with the historical record. As the evidence showed, the entities created in the wake of the historical divisions—*e.g.*, the Cumberland Presbyterian Church, Methodist Episcopal Church South, and Reformed Episcopal Church—were described as "branches" of their "mother" churches despite their disaffiliations. *Id.* Indeed, ECUSA's expert admitted that a "branch" is "an extension that grows out of an earlier body," but "it does not necessarily have to be legally connected." 4/3 Op. 62 (quoting Tr. 1038-39 (Mullin)). Not surprisingly, ECUSA no longer argues that CANA and ADV are not "branches" because "CANA/ADV was neither created by

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[6] The Diocese truncates the first definition and omits the second. Pet 17.

nor is it a part of the Episcopal Church or the Diocese." 1/21/07 Br. 26.

Given the undisputed meaning of the "branch" requirement, there is no question that it is satisfied. As the circuit court noted, "[t]here has never been any dispute . . . 'that the members of CANA and ADV were previously attached to the Episcopal Church, that these organizations were established specifically to form a new denominational home for those separating from the Episcopal Church, or that they are made up almost entirely of former Episcopal congregations, clergy, and members.'" Const. Op. 39 (citation omitted). Extensive undisputed proof supported this finding.[7] In fact, ECUSA's Presiding Bishop, the Diocese's bishop, and their expert admitted it. Schori Dep. Desig. 77-78; Lee Dep. Desig. 117-118; Tr. 902 (Douglas).

ECUSA nonetheless challenges the court's factual finding that CANA

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[7] All of CANA's bishops, and the great majority of its 100 or so clergy, were former ECUSA clergy (the balance were newly ordained and had no prior affiliation). 4/3 Op. 35; Tr. 320-22 (Minns). More than 10,000 of CANA's 12,000 members came directly from ECUSA, and most of those who left ECUSA and joined CANA left as entire congregations. 4/3 Op. 35; Tr. 324.

All of ADV's 20 Virginia congregations are led by former ECUSA clergy, and virtually all of its 7,500 members came from ECUSA congregations in the Diocese. 4/3 Op. 36. The Diocese derides ADV as "small" (Pet. 15), but the 15 congregations who left the Diocese *en masse* to form ADV constituted roughly 20% of the Diocese's average Sunday attendance. CANA Exh. 132. ADV has more members than the Reformed Episcopal Church, which, ECUSA has admitted, grew out of a "division." 4/3 Op. 81 (noting that "in the year since its formation, ADV alone is already 25 percent larger than the Reformed Episcopal Church is even today").

and ADV qualified as branches of ECUSA and the Diocese. Pet. 19-24.[8] According to ECUSA, because CANA is affiliated with the Anglican Church of Nigeria and was founded in cooperation with that entity, it is a "branch" of that entity rather than ECUSA. Pet. 20. ECUSA (like its *amici*) notes that the Church of Nigeria pre-dates the divisions, and states that "one church does not become a 'branch' of another because it is joined by the latter's former members." *Id.* But this contention glosses over the relationships between the entities and the events that led to creation of CANA and ADV.

In 2003, decisions at ECUSA's general convention triggered conflict both within ECUSA and the Diocese and in the broader Anglican Communion. 4/3 Op. 11-26. CANA was thus established to provide an alternative polity for Episcopalians who desired to leave ECUSA while maintaining an affiliation with other parts of the Communion. 4/3 Op. 26-30. CANA's corporate charter encompasses all U.S.-based Anglicans who wish to "br[eak] away from the Episcopal Church." 4/3 Op. 35. Similarly, the division in the Diocese led to the formation of ADV, in 2006, "to provide a structure for the Episcopal and pastoral oversight for the[] various congregations" disaffiliating from the Diocese. Tr. 319 (Minns); CANA Exh. 70; 4/3 Op. 36.

That CANA and ADV are related to other parts of the Anglican Com-

[8] Neither Appellant appeals the circuit court's finding that CANA and ADV were branches of the Anglican Communion.

munion through the Church of Nigeria—which amended its constitution to disaffiliate from ECUSA—does not change the fact that the congregations and clergy who formed CANA and ADV came from ECUSA and the Diocese, not the Church of Nigeria. CANA and ADV remain distinct entities, incorporated under U.S. law. And as ECUSA has admitted, each was created to serve former Episcopalians. Schori Dep. Desig. 77-78; Lee Dep. Desig. 117-118; Tr. 902 (Douglas); CANA Exhs. 69-70; Tr. 308, 310.

As noted, the Church of Nigeria restructured its polity in response to the division—ending its relationship with ECUSA. It was this legal disaffiliation that the circuit court relied on in finding a division at the Anglican Communion level. Const. Op. 39-40. And, contrary to ECUSA's suggestion (Pet. 21), the court held that, for purposes of § 57-9, the Church of Nigeria was a branch of the divided Anglican Communion, not of *ECUSA*.

ECUSA's argument is also foreclosed by the statute's most common use shortly after its adoption: the division in the Baltimore Conference of the Methodist Episcopal Church. Although the Methodist Episcopal Church split into northern (MEC) and southern (MECS) branches in the 1840s, the Baltimore conference did not divide or separate from MEC until the 1860s. As Judge Bellows recognized, citing this Court's decision in *Hoskinson*:

> [A]lthough MEC South predated the Baltimore Conference division (much as the Church of Nigeria predated the division in TEC), a new

> Conference was created as a result of that division to receive those leaving MEC (much as CANA and ADV were created to receive those congregations leaving TEC). Thus, the most typical use of §57-9 involved congregations from one church (MEC) joining a new religious society (the Southern Baltimore Conference) affiliated with MEC South, a "preexisting church."

Const. Op. 39 n.48 (citations omitted). ECUSA conceded below, moreover, that this use of the statute—the way in which it was successfully used by its sponsor and 25 congregations—satisfied § 57-9. 1/11/08 Br. 14.

Finally, ECUSA asserts that the trial court deemed CANA a "branch" of ECUSA based on a finding of "communion" between the two, and thus "resolved this church property dispute on the basis of religious doctrine." Pet. 21. ECUSA fails to identify where the court made such a finding. It did not. As the court made clear, applying its definition of branch "requires no theological or doctrinal analysis at all." Const. Op. 39. Whether "CANA and ADV currently share any theological similarities to the Episcopal Church is irrelevant to whether they 'descended from' or 'extended from' that Church, and the Court need not (and did not) resolve any such questions to find the branch requirement satisfied." *Id.* (citations omitted). Thus, the court did not deem CANA a "branch" of ECUSA because those entities were "in communion," but rather because CANA represented "the separation of a group of congregations . . . from ECUSA and the formation of an alternate polity that disaffiliating members could [join]." 4/3 Op. 82.

III. The Circuit Court Rightly Found That The Anglican Communion Is A Religious Society That Experienced A Division.

Nor is there any basis for this Court to review the circuit court's findings with respect to the Anglican Communion. At trial, ECUSA's Presiding Bishop "referred to both CANA and the Church of Nigeria as . . . 'branches' of the Anglican Communion." Const. Op. 41 n. 56. Thus, ECUSA challenges only the court's rulings that the Anglican Communion "divided," that it qualifies as a "religious society," and that the CANA Congregations were "attached to" it. None of these factual findings merits review, particularly since the court's rulings on the Anglican Communion issues were yet a third independent ground for decision.

Division. ECUSA says there is no "division" in the Communion because no "parallel polity" has been formed. Pet. 22. But this ignores the court's detailed findings that a division and an alternate polity resulted from the Church of Nigeria's amendment of its constitution. This "changed the legal relationship between the Church of Nigeria" and other Provinces of the Anglican Communion, particularly ECUSA, and resulted in severance of all financial and relational ties with ECUSA. 4/3 Op. 82-83, 27-28.[9]

[9] ECUSA's expert conceded that these changes "altered the relationship between the Church of Nigeria and the Episcopal Church," constituted "the most severe action one province could take to disassociate itself from an-

Church or Religious Society. ECUSA also contests the trial court's ruling that the Anglican Communion is a "religious society," suggesting that "religious society" and "church" are synonymous. Pet. 23. But that reading contravenes the rule that "every word of a statute must be given meaning." *McLean Bank v. Nelson*, 232 Va. 420, 427 (1986). Further, while ECUSA cites the conclusory assertions of its experts (Pet. 23), the court's thorough analysis of the *substance* of that testimony confirms that the Anglican Communion is a religious "society." 4/3 Op. 75-76 (citing Tr. 908-11).

Attached. ECUSA also contests the court's ruling that the congregations were "attached" to the Communion, arguing that this means that the society must exercise direct control over the congregation. Pet. 23-24. It is undisputed, however, that the CANA Congregations were formerly attached to both the Diocese *and* ECUSA (4/3 Op. 77)—and that the attachment to ECUSA was mediated through the Diocese, not direct. Tr. 872:6-14 (Douglas). Thus, as the court found, the CANA Congregations were "attached" to the Communion just as they were attached to ECUSA. 4/3 Op. 5.

IV. The Circuit Court Correctly Held That § 57-9 Does Not Burden ECUSA's Religion Or Discriminate Among Religious Denominations Under The Federal Or State Religion Clauses.

The circuit court also properly concluded that § 57-9, as applied here,

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other province," and "evidence[d] a division of the Anglican Communion." Tr. 950-51, 993-94, 960 (Douglas).

is constitutional under the federal and state religion clauses. *Jones v. Wolf*, 443 U.S. 595 (1979); Const. Op. 17-33; Br. in Opp. to Diocese Pet. 13-17.

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

The circuit court also correctly held that § 57-9 does not require the same analysis as is applied under § 57-15. *Green v. Lewis*, 221 Va. 547 (1980), "is not a case interpreting or applying § 57-9(A)," and reading it to require identical analysis would "deprive [§ 57-9] of its independent meaning." Five Qs Op. 4, 12. *See* Br. in Opp. to Diocese Pet. 7-8.

VI. The Circuit Court Correctly Held That ECUSA And The Diocese Were Too Late In Asserting A Waiver Defense.

Finally, there is no reason for this Court to review ECUSA's challenge to the circuit court's refusal to allow them to assert a waiver defense late in these proceedings. In July 2008, 18 months after answering the § 57-9 petitions, ten months after trial on § 57-9's applicability, and three months after the court found § 57-9 to apply, ECUSA moved to amend its answers to assert that the congregations had waived the right to invoke § 57-9. Claiming that it raised the defense earlier, ECUSA (but not the Diocese) says the court erred in finding the defense waived. Pet. 34.[10] This claim lacks merit.

This Court should not examine, let alone disturb, the trial court's find-

[10] ECUSA has not challenged the circuit court's finding that if the defense had not been raised, the motion to amend was untimely.

ing of waiver. After considering three sets of briefs on the issue and chronicling the history of the case, the court concluded that ECUSA was advancing a new theory—one that should have been raised at a much earlier juncture. Waiver Op. 8. As the court recognized, the defense that ECUSA's canons are legally binding is different from the claim that the congregations affirmatively agreed not to invoke § 57-9. Waiver Op. 5. Thus, ECUSA was attempting to add a third front to whether § 57-9 applies. *Id.* at 15.

This third front was not disclosed before trial. In May 2007, the court took letter briefs and held a lengthy conference to discuss the issues in the case and the order in which they should be resolved. As the court correctly held, neither ECUSA's briefs nor its statements at the hearing claimed "that a component to be considered in the application and interpretation of 57-9 was whether the CANA Congregations had contractually given up their rights to invoke the statute in the first place." *Id.* at 10. Further, ECUSA's answer to a later interrogatory that asked it to identify "all factual and legal basis for [its] contention that the congregations' petitions do not comply with Va. Code § 57-9" said nothing about waiver or "contracting around" the statute. *Id.* at 10-11. If it meant to assert waiver, ECUSA told no one.

CONCLUSION

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

Respectfully submitted,

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Dated: April 29, 2009

ADDENDUM

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

A. If a division has heretofore occurred or shall hereafter occur in a church or religious society, to which any such congregation whose property is held by trustees is attached, the members of such congregation over 18 years of age may, by a vote of a majority of the whole number, determine to which branch of the church or society such congregation shall thereafter belong. Such determination shall be reported to the circuit court of the county or city, wherein the property held in trust for such congregation or the greater part thereof is; and if the determination be approved by the court, it shall be so entered in the court's civil order book, and shall be conclusive as to the title to and control of any property held in trust for such congregation, and be respected and enforced accordingly in all of the courts of the Commonwealth.

B. If a division has heretofore occurred or shall hereafter occur in a congregation whose property is held by trustees which, in its organization and government, is a church or society entirely independent of any other church or general society, a majority of the members of such congregation, entitled to vote by its constitution as existing at the time of the division, or where it has no written constitution, entitled to vote by its ordinary practice or custom, may decide the right, title, and control of all property held in trust for such congregation. Their decision shall be reported to such court, and if approved by it, shall be so entered as aforesaid, and shall be final as to such right of property so held.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of April, 2009, a copy of the foregoing Brief in Opposition to the Petition for Appeal of the Episcopal Church was sent by electronic mail and first class U.S. mail, postage pre-paid, to:

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