In the
Supreme Court of Virginia

RECORD NO. 09-0683

THE EPISCOPAL CHURCH,

Appellant,

v.

TRURO CHURCH *ET AL.*,

Appellees.

Reply Brief of Appellant

The Episcopal Church

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I. The Circuit Court Misinterpreted and Applied § 57-9(A).

Notwithstanding centuries of Virginia case and statutory law respecting the principles of church self-governance, the congregations insist that with § 57-9(A), the General Assembly chose to create an anomaly in the consistent fabric of Virginia law governing churches and impose irrebuttable rules of congregational governance with respect to some properties, in some denominations, in some circumstances. There is no reason to believe that Virginia actually adopted such an arbitrary and disruptive – not to mention unconstitutional – scheme.

A. The Methodist and Presbyterian "divisions" that prompted § 57-9(A)'s adoption occurred in accordance with Methodist and Presbyterian polities, respectively.

As the undisputed evidence at trial showed, the 19th Century "division" in the Methodist Church "occurred" after that Church's highest governing body adopted the 1844 Plan of Separation, dividing that national denomination into two branches: The MEC North and the MEC South. See JA 2681-84 (Mullin). The congregations claim that the Methodist Church division was never ratified by its Conferences. Such ratification was not required by either the Plan or the denomination's polity, however. JA 2679-81 (Mullin); Smith v. Swormstedt, 57 U.S. 288, 308-09 (1854) (rejecting argument that legal division of the church required the later

consent of the conferences); Brooke v. Shacklett, 54 Va. (13 Gratt.) 301, 324-25 (1856).[1]

Dr. Mullin explained that the 1837 Presbyterian division (into the "Old School" and "New School" Presbyterian Churches) occurred when the Presbyterian Church's highest governing body voted to exclude the presbyteries that formed the "New School" church. JA 2685-86. The north/south divisions of the New School and Old School churches (in 1857-59 and 1861, respectively) occurred when several presbyteries within those denominations withdrew, as they had the right and authority to do under those churches' polities. See JA 2686-89. The Old and New School governing bodies then struck the departing presbyteries from their rolls, thus acknowledging the presbyteries' ability to unilaterally withdraw under Presbyterian polity and confirming the profound impact of the withdrawals

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[1] This Court explained in Brooke that whether the Methodist Church had legally divided was a "question . . . of such public concernment, of such vast importance" that

> "[t]he zeal, ability and research of the most eminent men of the bar and of the church have been enlisted in its discussion. No fact or argument that could elucidate the subject remains to be stated or urged. Not only so, but the question has been decided by the Supreme court of Kentucky and by the Supreme court of the United States, upon such mature deliberation and with such unanimity, in each case, as to leave but little room for hesitating as to the propriety of regarding the question as settled. In each case the validity of the plan of separation was sustained. . . . [The Court] concur[s] in these decisions." Id. (citations omitted).

on the original denominations' own structures. Id. See also JA 1996, 2012-15 (Valeri).

The circuit court made no findings to the contrary. It agreed that the Methodist "division" occurred pursuant to its highest governing body's Plan of Separation. See JA 3921 (April 3 Op.) (discussing and citing Brooke v. Shacklett, 54 Va. (13 Gratt.) 301 (1856)). It noted Dr. Mullin's testimony that the Presbyterian divisions "were taken in accordance with official action by the church's governing authority," see JA 3917, and made no other findings at all on this issue.[2]

The congregations duck this dispositive point, and instead contend, as they have done throughout this litigation, that the Methodist and Presbyterian divisions were not "amicable" and, in the case of the Presbyterian divisions, did not take place pursuant to a "plan" adopted in advance by the church's governing body. We agree. That, however, goes only to show that contrary to the congregations' assertions, § 57-9 does serve a purpose and has been usefully applied *when a division occurs in accordance with denominational polity.* Indeed, *every one* of the 29 19th-

[2] The court stated in a footnote that "[o]n cross-examination, . . . Dr. Mullen [sic] acknowledged that the formal "Plan of Separation" [for the Presbyterian Church] was never ratified; nevertheless, by the 1850s, it had become a 'fait accompli.'" JA 3917 (April 3 Op. at n. 65). Dr. Mullin never claimed that the Presbyterian Church divisions occurred pursuant to any "Plan of Separation," however. See JA 2685-2689.

Century petitions the congregations proffered — the only known applications of § 57-9(A) — involved one of the Methodist or Presbyterian divisions just discussed. See JA 2096 (Irons). These included petitions from congregations within the "Baltimore Conference" of the Methodist Episcopal Church North, which had adhered to the Northern branch in the immediate wake of the 1844 division, and sought to change their affiliation to the Methodist Episcopal South in the late 1860s.[3]

B. The statutory language fully supports the Church's interpretation of "division."

The congregations suggest that interpreting "division" to refer to structural separations that occur in accordance with denominational polity is inconsistent with the statute's language. There is no basis for this position. "Division" has many common meanings. See Church Br. at 15-16.[4] All are consistent with the phrase "[i]f a division has heretofore

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[3] The congregations correctly point out that these congregations had no apparent right under the 1844 Plan of Separation to change their election in the 1860s. However, the MEC North did not intervene or challenge these later petitions, and the petitions themselves show that § 57-9(A)'s requirements were satisfied by the 1844 division of the MEC into its Northern and Southern "branches": None alleged that the "Baltimore Conference" had divided or elected to join a new branch of that entity. See JA 2093 (Irons).

[4] It is thus both unsurprising and irrelevant that the parties or their witnesses have occasionally used the term "division" in speaking of the current theological debate or congregations' departures. This shows only

occurred or shall hereafter occur." Defining "division" to respect all denominational polities does not "add words" to the statute any more than defining it as a "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." See JA 3934-35 (internal punctuation omitted).[5]

The congregations' claim that their definition of "division" is compelled by the presence of the word "branch" in § 57-9(A) is also misguided. Differences of opinion (theological "divisions") may not, as the congregations say, "without more, result in a 'branch.'" See Cong. Br. at 17. However, the statute's separate "branch" requirement itself ensures that §57-9(A) is only applied in cases involving "branches": It is not

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that "division" has many common meanings, and sheds no light on the General Assembly's intent in the specific context of § 57-9.

[5] The congregations argue that "division" in the 19th Century was "most commonly" used to refer to the separation of a few individuals from an existing church. However, no rule of statutory construction suggests that words with multiple meanings should be defined according to their "most common" meaning. Instead, words are to be interpreted in the light of their *context.* Moreover, the basis of the congregations' expert testimony on the "most common" meaning of division is questionable, given that the 19th Century documentary examples they proffered in fact referred almost exclusively to the divisions of either the Methodist or Presbyterian Churches. See Church Br. 25 & n.18. The congregations try to deny this, but in support can point only to their experts' general discussion of the numerous church splits that have characterized American church history. See Cong. Br. at 21.

necessary to also import that concept into the definition of "division." Indeed, *that* would fail to give independent significance to every word in the statute. See Cong. Br. at 37-38 (arguing that every term in a statute must be given independent meaning). In any event "divisions" that occur in accordance with a denomination's polity result in "branches" much more reliably than do the separation of a few congregations or individuals; thus, if anything, the presence of the word "branch" supports the Church's interpretation of "division," not the congregations'.

C. Defining "division" to refer to structural separations that occur in accordance with denominational polity does not ignore a "key difference" between § 57-9 and § 57-15.

The congregations point out that § 57-15 has been amended to require trustees petitioning for permission to "sell, encumber, . . . improve, . . . or exchange" land to show that the action is "the wish" of "the constituted authorities [of the church] having jurisdiction in the premises, or of the governing body of any church diocese," and to authorize transfers of property to church corporations "if the transfer is authorized in accordance with the church's or religious body's polity." However, those specific references to "the constituted authorities having jurisdiction in the premises," "the governing body of any church diocese," and church "polity"

were not added to § 57-15 until 1924, 1962, and 2005, respectively,[6] fifty years or more after the last known usage of § 57-9(A) (which, as noted, had only been applied in the case of "divisions" that in fact complied with denominational polity). And, even before 1924, Virginia law clearly and consistently respected churches' rights to self-governance. See Church Br. at 17-19. By amending § 57-15, the General Assembly was not changing its previous position on church self-governance, or silently signaling that the long-dormant § 57-9(A) should be interpreted to create a conflict with this Court's otherwise consistent treatment of churches.

D. The congregations' definition, not the Church's, plunged the court into an ecclesiastical thicket.

Taking note of and respecting a particular church's structure does not unconstitutionally entangle courts in religious issues; this Court (and others) have routinely done so. See Reid v. Gholson, 229 Va. 179, 189, 327 S.E.2d 107, 112 (1985) (questions of "internal governance" are "immune from judicial review"); Norfolk Presbytery v. Bollinger, 214 Va. 500, 502, 201 S.E.2d 752, 755 (1974) (courts must "look to the organizational structure of the church" when applying § 57-15); Brooke, 54 Va. (13 Gratt.) at 324-25 (holding, as necessary to its decision, that the

[6] See Norfolk Presbytery v. Bollinger, 214 Va. 500, 503 n.2; 201 S.E.2d 752, 755 n.2 (1974); 2005 Va. Acts Ch. 772; 1962 Va. Acts Ch. 516; 1924 Va. Acts Ch. 372.

Methodist Church's general conference "had the power to adopt the resolutions authorizing the division"). In this case, showing that a "division" of The Episcopal Church requires action of the General Convention was conclusively established with one exhibit and perhaps ten minutes of uncontradicted testimony. See Church Br. at 6 n.4. The congregations' efforts to prove a "division" under their definition, on the other hand, plunged the circuit court into five days of testimony, thousands of pages of exhibits, and an 83-page opinion detailing ecclesiastical relationships and theological disputes.

E. CANA and ADV are not "branches" of The Episcopal Church or the Diocese.

Studiously ignoring the fact that CANA is not only a constituent part of the Church of Nigeria, but *was formed by that denomination, two years before any of the Virginia congregations voted to leave* The Episcopal Church,[7] the congregations argue that CANA nevertheless is a "branch" of The Episcopal Church because many of its members are former Episcopalians. As the circuit court recognized, however, that fact cannot create a "branch" for purposes of § 57-9(A). See JA 3934 (April 3 Op.) ("[I]t is certainly true that no one considered the Episcopal Diocese in Mexico[,]"

[7] See JA 3881-83 (April 3 Op.) (summarizing Yisa testimony concerning formation of CANA); 2154-54 (Minns).

which was formed to minister to Catholics who had become disaffected from the Catholic Church, "to be a 'branch' of the Roman Catholic Church").[8] Therefore, the circuit court must be reversed.

The congregations deny that the circuit court's "branch" ruling ventured into the "thicket" or was impermissibly decided with "reference to questions of faith and doctrine,"[9] but the court's own words show otherwise: Although the Episcopal Diocese of Mexico "certainly" was not a branch of the Roman Catholic Church, that is because "the Roman Catholic Church and the Episcopal Church are not members of a common international religious society . . . . *In contrast, ECUSA, the Diocese, CANA, ADV, the Church of Nigeria, and the Church of Uganda, are all joined together by their . . . adherence to that historical strand of Christianity known as Anglicanism . . . .*" JA 3934 (emphasis added).

F. Section 57-9 cannot be satisfied by the Anglican Communion.

Events in the Anglican Communion cannot satisfy § 57-9(A) because the Anglican Communion (a) is neither a "church" nor a "religious society;" (b) does not exercise *any* control, direct or indirect, over parishes, see

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[8] As Dr. Douglas explained, "the Episcopal Church started a missionary venture in Mexico" when "Roman Catholics who were alienated from the Roman Catholic Church in Mexico sought a relationship with the Episcopal Church[,]" and at that time, most of the members of the Episcopal Diocese of Mexico were former Roman Catholics. JA 2543-44.

[9] Reid v. Gholson, 229 Va. 179, 187, 327 S.E.2d 107, 112 (1985).

Baber v. Caldwell, 207 Va. 694, 697-98, 152 S.E.2d 23, 26 (1967); and (c) is not an organization capable of structural "division" and in any event has not "divided" even under the circuit court's definition.

The congregations criticize the Church for relying "only" on its own experts concerning the nature of the Anglican Communion; however, they failed to proffer any witness of their own to contradict those conclusions. They similarly do not and cannot point to any evidence that the Anglican Communion "controls" its Provinces, let alone their parishes, and they ignore this Court's authority regarding the need for such "control" entirely. See id.[10] Finally, they claim that the Church of Nigeria's amendment of its own Constitution created a "division" of the Anglican Communion; they do not (and cannot) deny, however, that both The Episcopal Church and the Church of Nigeria remain part of the Anglican Communion, nor do they point to any "alternative polity" or organization that has formed as a result of the Church of Nigeria's actions. Thus, there has been no "separation of a group of congregations, clergy, or members from the [Anglican Communion], and the formation of an alternative polity that disaffiliating

[10] The congregations' own witnesses affirmed that the Communion has no such control. See JA 2434-37, 2460-61 (Yisa). See also JA 3864-65 (April 3 Op.).

members could join," as even the circuit court's expansive definition of "division" requires. See JA 3934-35 (April 3 Op.).

II. The Circuit Court Rendered § 57-9(A) Unconstitutional.

A. The Circuit Court's Interpretation of the Statute Violates Free Exercise Guarantees.

In their efforts to support its constitutionality, the congregations and their supporters characterize § 57-9 as a statute that gives churches "options" about how to structure themselves or hold property. However, § 57-9(A) says nothing about how property "may" be held or titled; those options are provided by other provisions of Chapter 57. Section 57-9(A), on the other hand, deals strictly and solely with issues of church governance. As interpreted by the circuit court, its sole purpose is to transfer to congregational majorities *decision-making authority* that their own denominations may deny them.[11] Applicable authority makes abundantly clear that this is unconstitutional. See e.g., Kedroff v. St.

[11] The congregations claim, misquoting the Church's opening brief, that the circuit court's ruling did not interfere with the Church's governance or structure in any way, and that § 57-9(A) does not "take sides" because the congregational vote may go either way. While the *congregations' unilateral departures* did not interfere with the Church's governance or structure (the point actually made in our brief, at 10), the circuit court's ruling certainly did: It allowed a few disgruntled congregations to legally "divide" the Church and the Diocese and then unilaterally determine the disposition of property restricted for the mission of the Church. Under the Church's own rules and structure, local congregations lack the authority to do either of these things.

Nicholas Cathedral, 344 U.S. 94, 119 (1952)(state may not, for civil law purposes, transfer ecclesiastical authority "from one church authority to another" or otherwise "interfere with [a] Church's choice of its hierarchy").

In Kedroff, the Court struck down a New York statute which provided that incorporated U.S. congregations of the Russian Orthodox Church would be governed by their U.S. district's own governing body, rather than by the Russian hierarchy. Contrary to the congregations' and their supporters' suggestions, the statute at issue did not purport to name or recognize any particular bishop or clerical leader, let alone require the Russian Orthodox Church to do so. Instead, the constitutional problem was the state's effort to dictate where, within the church hierarchy, decisions affecting local congregations (that would be respected by the courts) would be made.

Substantial other authority uniformly confirms this basic principle. See Church Br. at 37-41 (discussing Maryland & Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367 (1970); Goodson v. Northside Bible Church, 261 F.Supp. 99 (S.D. Ala. 1966), aff'd, 387 F.2d 534 (5th Cir. 1967); Sustar v. Williams, 263 So. 2d 537 (Miss. 1972); Jones v. Wolf, 443 U.S. 595 (1979); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); and First Born

Church of the Living God v. Hill, 481 S.E.2d 222 (Ga. 1997)). See also Reid v. Gholson, 229 Va. 179, 189, 327 S.E.2d 107, 113 (1985) ("[T]he civil courts will treat a decision by a governing body or internal tribunal of an hierarchical church as an ecclesiastical determination constitutionally immune from judicial review. To do otherwise would precipitate the civil court into the 'religious thicket' . . . even when the issue is merely one of internal governance . . .").

In the face of this authority, the congregations and their supporters argue that Jones permits the states to impose elements of congregational majority rule on any church, so long as it does not do so for all churches (i.e., so long as there is an "escape hatch").[12] No one offers any solution to the systemic difficulty this argument creates: If the states may, consistent with the Constitution, establish rules of church governance subject to state-specified "escape hatches", the state may also change the rules and/or the

[12] As we showed in our opening brief, the Church actually had no such escape hatch here because § 57-9(A) was not amended to apply only to "property held by trustees" until 2005. The congregations and *amici* now argue that § 57-9(A) has always stated that congregational votes are "conclusive" only with respect to "property held in trust." However, property held by ecclesiastical officers or corporations, as well as by court-appointed trustees, may be "held in trust." As *amici* the AAC *et. al* explain, a "trust 'is a fiduciary relationship with respect to property . . . subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons.'" AAC Br. at 8 (quoting Restatement (Third) of Trusts, § 2 (2003)). This accurately describes the position of an ecclesiastical officer holding title to church property.

"hatches" at any time. This is not a regime in which churches are free to establish their own polities and rules of governance, free from state interference. The Free Exercise Clause applies to *all* churches, and precludes the states from imposing rules of internal governance on *any* of them. See Kedroff, 344 U.S. 94 (ability to avoid statute did not render it constitutional).

In any event, Jones did not purport to "approve" state imposition of congregational voting rules, regardless of church polity. To the contrary, "presumptions" of congregational majority rule (applied to determine the identity of the local congregation, not whether property is restricted for the denomination's use) may be constitutional *only* if denominational rules and polity are nonetheless respected. The Court explained:

> "If in fact Georgia has adopted a presumptive rule of majority representation, . . . we think this would be consistent with both the neutral-principles analysis and the First Amendment . . . *[m]ost importantly, [because] any rule of majority representation can always be overcome, . . . 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." 443 U.S. at 607-08 (emphasis added).

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

In its opening brief, the Church showed that as interpreted by the circuit court, § 57-9(A) violates Establishment Clause guarantees under the analysis set forth in Larson v. Valente, 456 U.S. 228 (1982). See also Goodson, 261 F.Supp. at 104 (state statute imposing congregational voting rights under some circumstances unconstitutionally "expressed a preference to and aided those who profess a belief in a congregational structured church").[13] The congregations try to distinguish Larson on the ground that the statute at issue there made "explicit distinctions" among denominations. In fact, the two statutes explicitly distinguish among denominations in precisely analogous ways.

The state has *no* interest, let alone a compelling interest, in imposing a haphazard scheme of congregational voting on churches that applies only to some churches and some properties in some circumstances. As interpreted by the circuit court, § 57-9(A) is unconstitutional.

Conclusion

For the reasons stated above and in the other briefs filed by the appellants and their *amici*, the circuit court's decision must be reversed.

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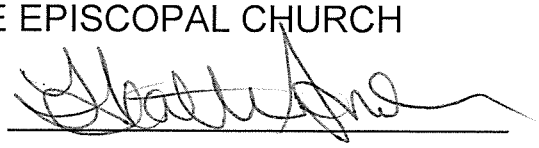
[13] The Church also noted that, although additional analysis under Lemon v. Kurtzman, 403 U.S. 602 (1971), aff'd, 411 U.S. 192 (1973) should be unnecessary, § 57-9(A) also fails that test. See Church Br. at 45 n.25; Diocese Br. at 43-46.

Respectfully submitted,

THE EPISCOPAL CHURCH

By: 

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I hereby certify that in compliance with Rule 5:26(d) and by agreement of counsel, copies of the foregoing Reply Brief were sent to all counsel named below on this 26th day of February, 2010.

Fifteen printed copies of this brief have been sent by Federal Express for filing in the office of the Clerk of this Court.

An electronic copy of this brief in Word format has been transmitted by e-mail for filing with the Clerk of this Court.

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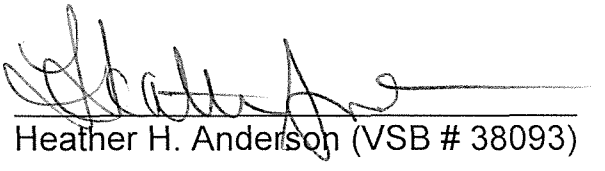
The Episcopal Diocese of Southern Virginia



Heather H. Anderson (VSB # 38093)