VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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

POST-TRIAL REPLY BRIEF FOR THE EPISCOPAL CHURCH AND THE DIOCESE

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Introduction

In their quest to have this Court redefine the rules and structure of the Episcopal Church, transform Virginia church property law, and ignore constitutional requirements, the Congregations' Opposition brief continues to misconstrue or ignore the applicable law, the Church's and the Diocese's arguments, and even their own evidence. As we show below, the Congregations fail to refute that for purposes of § 57-9, (1) a "division" must be accomplished pursuant to the affected church's own polity; (2) CANA is not a "branch" of the Episcopal Church or the Diocese; and (3) events in the Anglican Communion are wholly irrelevant. Their Petitions therefore must be dismissed.

I. The Church and the Diocese have properly defined "division."

The Congregations first attack the definition of "division." They attempt to bolster a hollow "text, history, and purpose" theme with a futile effort to undermine the undisputed evidence that it was the great denominational divisions of the 19th Century that prompted § 57-9; a discussion of statutory "structure" and applicable law that actually avoids relevant consideration of either of those topics; and the mistaken assertion that the Church and the Diocese propose a "different definition" for each case that would require lengthy forays into church polity. Each of those arguments fails.

A. The Congregations' "text, history, and purpose" arguments rest on a key mistake.

The Congregations continue to argue that the "text, history, and purpose" of § 57-9(A) support their petitions. *See* CANA Congregations' Corrected Memorandum in Opposition (Cong. Opp.) at 1-21. It is now clear, however, that each part of that argument rests on the same erroneous assumption: that the major divisions of the Methodist and Presbyterian denominations were "unauthorized." That simply is not true. *See* Post-Trial Opening Brief for the Episcopal

Church and the Diocese (TEC-Diocese Brief) at 16-18; TEC-Diocese Opposition at 10-16; Tr. 1048-59. In each instance, the denomination divided into recognizably different entities in accordance with denominational polity and by action of its governing body. None of the divisions was effected through the unilateral departure of a few individuals or congregations. In 116 pages of briefing, the Congregations ignore this fact.

B. The "great divisions" of the 19th Century prompted enactment of § 57-9.

The undisputed evidence also showed that it was the great divisions in the Methodist and Presbyterian (and Baptist) Churches that prompted the enactment of § 57-9. *See, e.g.*, Tr. 1061-62 (Mullin); TEC-Diocese Brief at 16-17 and cases cited. The Congregations belittle Dr. Mullin's testimony on this point, *see* Cong. Opp. at 14-18, but they have no basis for doing so.[1] Dr. Mullin's uncontradicted opinion regarding a matter of 19th Century religious history is plainly instructive as to the proper interpretation of that history, particularly as it is consistent with the Congregations' own evidence. The Congregations' experts' testimony focused on the great divisions as exemplifying the "most common meaning" of "division" as that term was used in the 19th Century, and their documentary evidence referred exclusively to those divisions. Tr. 155-58 (Valeri), 182-84, 189-95, 204-06 (Irons); *see also* Tr. 1056-64 (Mullin). The Congregations' evidence also indicates that those are the only "divisions" to which § 57-9 has actually been applied. *See* TEC-Diocese Brief at 18-19.

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[1] The Congregations argue that it would be impractical or unjustified to require courts to find that a *future* division is "great" or "major" before applying the statute. *See* Cong. Opp. at 15. The Church and the Diocese have never proposed that the statute be interpreted in that way. Dr. Mullin explained that the pre-1867 divisions in the Methodist and Presbyterian churches were indeed "great" and "major" historical events. Tr. 1063-64. That is undisputed. The significance of that fact is that it supports and provides content for his opinion that these events prompted § 57-9. *See also* TEC-Diocese Brief at 17 (citing cases).

C. The Congregations' discussion of "the structure" of § 57-9 is limited to the language of § 57-9(A).

The Congregations claim that the "structure" of § 57-9(A) supports them; but their discussion of "structure" focuses solely on the presence and meaning of both "division" and "branch" in the statute, Cong. Opp. at 12-14; and as explained above, their understanding of those terms is premised on a factual error. *See* § I(A), *supra*. The Congregations continue to ignore the actual structure of the statute as a whole, as well as related statutes and relevant case law. *See, e.g., Alston v. Commonwealth*, 274 Va. 759, 769, 652 S.E.2d 456, 462 (2007) ("statutes are not to be considered as isolated fragments of law.... [T]hey should be so construed as to harmonize the general tenor or purport of the system and make the scheme consistent in all its parts and uniform in its operation, unless a different purpose is shown plainly or with irresistible clearness") (citation omitted); TEC-Diocese Opposition at 7-9 & cases cited. These considerations support the Church and the Diocese. *Id.*; TEC-Diocese Brief at 6-13.[2]

Harmonizing a statute with its legal context hardly renders it superfluous, as the Congregations argue, Cong. Opp. at 3, but rather is an established and logical goal of statutory interpretation. As we have shown, the Church's and the Diocese's interpretation of § 57-9 is required by the statute's legal context, both before and after its enactment:

- Virginia law has always recognized a distinction between hierarchical and congregational denominations (*see* TEC-Diocese Brief at 11-13);

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[2] The cases on which the Congregations rely also confirm that the statute's purpose guides the interpretation of terms in the statute according to their ordinary meaning. *See Lawrence v. Craven Tire Co.*, 210 Va. 138, 141, 169 S.E.2d 440, 442 (1969) ("the words of a statute should receive their ordinary acceptance and significance, where such construction is consonant, and not at variance, with the purpose of the statute, and does not thwart or defeat the same") (quotation marks and citations omitted); *Great Atlantic & Pacific Tea Co. v. City of Richmond*, 183 Va. 931, 947, 33 S.E.2d 795, 802 (1945) (drawing conclusions about the meaning of terms in an ordinance "from the intent and purpose of the ordinance").

- Section 57-9 likewise has always contained separate provisions for hierarchical and congregational churches (*see id.* at 10-11; TEC-Diocese Opposition at 2-3);

- Virginia law has never permitted a majority of a local congregation of a hierarchical denomination to transfer property in violation of denominational rules and government (*see* TEC-Diocese Brief at 6-13; Va. Code § 57-15);

- Virginia law enforces trusts in favor of the local members of a hierarchical church and recognizes no rights of individuals or a group of individuals disaffiliating from the hierarchical denomination (*see* TEC-Diocese Brief at 6-11); and

- Section 57-9 was enacted as part of a statute that provided for the appointment of trustees and is meant to address uncertainty where the denomination identified in the deed has been legally divided into "branches" that may be legal successors to the original entity's rights or obligations (*see* TEC-Diocese Opposition at 17 & n.13).

Thus, interpreting "division" for purposes of § 57-9(A) as one that is accomplished by the hierarchical church at issue in accordance with its own polity, rather than solely by departing individuals in contravention of the church's polity, would complement and be consistent with all other aspects of Virginia church property law. The Congregations' interpretation would turn this larger body of law on its head.

D. <u>The Congregations' discussion of Virginia cases is misguided.</u>

As just noted, the Congregations have not – and apparently will not – address the overwhelming body of Virginia statutory and case law contrary to their position. Their opening brief ignored the topic entirely, and the argument in their Opposition is limited to a largely irrelevant discussion of *Brooke v. Shacklett*, 54 Va. (13 Gratt.) 301 (1856), *Hoskinson v. Pusey*, 73 Va. 428 (1879), *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 201 S.E.2d 752 (1974), and

Green v. Lewis, 221 Va. 547, 272 S.E.2d 181 (1980).

First, the Congregations point out, none of those cases applied § 57-9(A). Cong. Opp. at 3-4, 8, 9. The Church and the Diocese have never suggested otherwise. The Congregations ignore, however, that the case law is nevertheless probative of the meaning of the statute. *See* § I(C), *supra*. The cases show that Virginia enforces trust restrictions on congregations that are attached to hierarchical churches; that trustees hold property for the benefit of members of a hierarchical church who submit to the church's rules and government; and that where a lawfully accomplished division results in branches that each have a legitimate claim on the property used by a congregation, the congregation may join one of those branches without violating the principles that normally govern property disputes. *See* TEC-Diocese Brief at 6-11.

Second, the Congregations appear to argue that § 57-9 was not intended to "codify" *Brooke* or to replicate the Methodist Episcopal Church's 1844 plan of separation. Cong. Opp. at 4. The Church and the Diocese again are not making that argument. Indeed, it is not necessary that a "division" be accomplished pursuant to any pre-arranged "plan." It need only be accomplished consistently with the church's polity and rules. TEC-Diocese Opposition at 9-12. The Congregations' insistence that § 57-9 "grants broader voting rights" than did the Methodist plan, Cong. Opp. at 4, merely assumes the Congregations' position. There is no reason to believe that the General Assembly intended to deny churches the ability to order their internal affairs when a division was necessary, or that a § 57-9 petition that was shown to have violated the Methodist Church's plan of division should or would have been approved. *See* TEC-Diocese Opposition at 14.[3]

[3] Indeed, under the Congregations' interpretation, a hierarchical church has no power to control whether a "division" occurs, and a "division" that divests it of its interest in local congregational

(footnote continued ...)

Third, the Congregations suggest that the *Hoskinson* Court must have believed that a 1861 "division" in the Baltimore Conference of the Methodist Church had occurred, or it would have explicitly mentioned the lack of a "division" in rejecting the congregation's argument under the predecessor to § 57-9. The Congregations ignore the fact that the lack of a division – *i.e.*, a legally-cognizable split in the church affecting the church's and the congregational majority's respective rights to property – was the basis for the Court's rejection of the congregation's case. *See Hoskinson*, 73 Va. at 435-38 (concluding that the 1844 separation was the only relevant division and disregarding the later actions of the Baltimore Conference); *see also* TEC-Diocese Brief at 10 & n.3; TEC-Diocese Opposition at 14 & n.10.

Finally, the Congregations state that *Norfolk Presbytery* and *Green* "should not be read to suggest that § 57-9 is available *only* to congregational churches." Cong. Opp. at 11. We agree, and in fact we offer an interpretation that gives meaning to both subsections of the statute, unlike the Congregations. *See* TEC-Diocese Opposition at 2-3.

E. The Church's and the Diocese's interpretation would not apply varying definitions of "division" or require a time consuming polity review and is no more than § 57-9 demands.

The Congregations wrongly claim that the meaning of "division" under the Church's and the Diocese's interpretation would vary from denomination to denomination and would burden the courts with "a time-consuming review of the particular polity of the affected church." Cong. Opp. at 18. In fact, the definition of "division" the Church and the Diocese have offered does not vary depending upon the church. In all cases, it is a structural division accomplished

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(footnote continued:)

property can be foisted upon it by the acts of a few disgruntled individuals. Virginia certainly has no interest in encouraging divisions and property disputes by making the statute so easily applicable through the acts of a few individuals.

pursuant to the church's rules and polity. The facts underlying the "division" will vary, as they will under any other definition that might be applied, but the definition remains constant.

The Congregations' assertion that the Church's and the Diocese's definition would burden the courts with "time consuming review[s]" of church polity is not only wrong, but in this case, laughable. The relevant aspects of the Episcopal Church's polity in this case were established through one document – the Church's Constitution and Canons (TEC-Diocese Ex. 1) – and perhaps ten minutes of testimony. Tr. 838-44 (Douglas), 1220-25 (Beers). The Congregations have never disputed these facts. The Congregations' efforts to prove a division through other means, on the other hand, have been somewhat more involved.

The Congregations' position on this point also is foreclosed by applicable authority, which makes clear that courts can and do consider issues of polity as necessary to decide cases properly before them. *See Reid v. Gholson*, 229 Va. 179, 188, 327 S.E.2d 107, 112-13 (1985) (argument "requires analysis in light of the distinction between hierarchical and congregational churches"); *Green v. Lewis*, 221 Va. at 549, 556, 272 S.E.2d at 181-82, 186 (recognizing hierarchical church's interest by looking to "rules, regulations, and doctrines, governing and controlling the operation of the church" and "the relationship ... between the central church and the congregation"); *Brooke*, 54 Va. at 324-25 (holding that General Conference of Methodist Episcopal Church had authority to adopt plan of division and had done so). Indeed, the Congregations concede the point a few pages later, arguing that a "limited appraisal of ... polities" is permitted and that courts may determine that a church "is a hierarchical church" and that a particular entity "is part of that church." Cong. Opp. at 27, quoting *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 725 (1976) (White, J., concurring).

The authorities also explain how courts are to avoid the "thicket" while taking polity into

account: in the event of a dispute regarding what a hierarchical church's polity requires or permits, courts must defer to the church's resolution. *Milivojevich*, 426 U.S. at 713 ("civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law"); *Jones v. Wolf*, 443 U.S. 595, 602 (1979) ("the [First] Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity" by the highest authority of a hierarchical church); *Cha v. Korean Presbyterian Church of Washington*, 262 Va. 604, 611, 553 S.E.2d 511, 514 (2001) ("it is well established that a civil court may neither interfere in matters of church government nor matters of faith and doctrine"); *Reid v. Gholson*, 229 Va. at 189, 327 S.E.2d at 113 ("the 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.... even when the issue is merely one of internal governance"). That guidance is unnecessary here, however, because the relevant elements of the Church's rules and polity are undisputed: all parties agree that under the Church's own rules, a "division" requires the action of the Church's General Convention; and all parties agree that no such action has occurred. *E.g.*, Tr. 841-43 (Douglas); TEC-Diocese Ex. 6 at 6 (Congregations' Response to Request for Admission 15).

By its terms, § 57-9 centers on questions of polity and governance. "[O]bjective, well-established concepts of trust and property law," *Jones*, 443 U.S. at 603, do not reveal whether a church has "divided," whether an ecclesiastical entity is a "branch" of another such entity, whether a local religious group is independent or "attached" to a hierarchical church, or indeed whether an entity is in fact a "church or religious society." Church rules and polity can and do answer these questions. The two options are clear and the ultimate conclusion is unavoidable:

either Virginia courts may look to the rules and polity of a religious organization to answer the questions that they must answer to interpret and apply § 57-9 (as the Church and the Diocese argue), or the statute requires an impermissible inquiry into polity. In the former, the evidence is undisputed and in favor of the Church and the Diocese. In the latter, § 57-9 is unconstitutional and the Congregations' petitions must fail.

II. The Congregations have not joined a "branch" of the Episcopal Church or the Diocese.

Turning to § 57-9's "branch" requirement, the Congregations claim that CANA is a "separate" polity that satisfies their own definition, that this Court should disregard the General Assembly's recent failure to adopt their interpretation of § 57-9, and that their definition of "branch" would not require any impermissible ecclesiastical determinations. Again the Congregations' arguments fail.[4]

A. The Congregations do not satisfy their own definition of "branch."

According to the Congregations' experts, a "branch" is a "new organization or polity" meeting certain other criteria, Tr. 94 (Valeri), 275, 277 (Irons); and *every* example of a historical "branch" that the Congregations have proffered involved such a "new polity." *None* involved a constituent part of an existing, independent denomination such as the Church of Nigeria.

In a futile effort to fit the facts of this case to their own definition and evidence, the Congregations suggest that CANA and ADV were somehow independently-formed and later "affiliated" with the Church of Nigeria. Cong. Opp. at 21-22. That is simply untrue. CANA has never had any "separate existence," *id.* at 21. It was created by the Church of Nigeria as a "missionary initiative," *see* Tr. 306 (Minns), 592-93, 609-12 (Yisa); Congregations' Ex. 14, with

[4] The Congregations also argue yet again that a "branch" for purposes of § 57-9(A) need not remain part of the "divided" church. We agree. *See* TEC-Diocese Brief at 25.

clergy ordained in the Church of Nigeria. Tr. 596-97 (Yisa).[5] Its Articles of Incorporation explain that it "operate[s] as a convocation or association of Anglican churches in North America as *part of the Church of Nigeria*." Congregations' Ex. 69 at 3 (emphasis added).[6] The Congregations did not form a new denomination or polity. They left the Episcopal Church and joined an existing component part of the Church of Nigeria, which has existed as a separate Province since 1979. Tr. 542, 643-44, 680-81. The Congregations have failed to establish an essential requirement of a "branch" under their own definition.

B. <u>The General Assembly's rejection of SB 1305 is probative.</u>

The Congregations attack the Episcopal Church's and the Diocese's reliance on the General Assembly's failure to enact SB 1305 as evidence that CANA cannot qualify as a "branch" of the Episcopal Church under § 57-9. Cong. Opp. at 22-24. They suggest that courts should give weight to rejected bills only in the rarest of situations, but the cases they cite do not support this narrow rule of statutory interpretation. In *Tabler v. Board of Supervisors*, 221 Va. 200, 202, 269 S.E.2d 358, 360 (1980), the Supreme Court stated that "[i]n determining legislative intent, we have looked *both* to legislation adopted and bills rejected by the General Assembly." (Emphasis added.) Nothing in *Tabler* or any other case cited by the Congregations restricts that inquiry as they suggest. The Virginia Supreme Court in fact has placed significant weight on the failure of the Legislature to enact a single bill. *Crook v. Commonwealth*, 147 Va. 593, 601, 136 S.E. 565, 568 (1927); *see also City of Virginia Beach v. Christopoulos Family*, 54

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[5] The Congregations attempt to gloss over this fact as well, asserting that these clergy were operating within the Episcopal Church. Cong. Opp. at 22 n. 13. If these clergy had recently been operating in the United States, indeed they would have been doing so under the supervision of the applicable Episcopal bishop. Mr. Yisa's testimony that they were nevertheless clergy of the Church of Nigeria is fully consistent with that fact.

[6] ADV in turn is a part of CANA. *See* Congregations' Ex. 70 (ADV is under the "ecclesiastical jurisdiction of [CANA], a missionary diocese of the Church of Nigeria"); Tr. 309-10 (Minns).

Va. Cir. 95, 97-98 (Virginia Beach 2000) (same).

The Congregations also misrepresent the bill's significance, asserting that it would have "expanded the scope" of § 57-9 only by allowing "congregations [to] become independent of any denomination." Cong. Opp. at 24. That is inaccurate. SB 1305 also would have expanded the scope of the statute by permitting such congregations to "join another church," as the CANA congregations have done here. TEC-Diocese Ex. 28.

C. The Congregations' interpretation of "branch" would require ecclesiastical determinations.

Finally, the Congregations deny that their definition of "branch" would embroil the Courts in impermissible ecclesiastical determinations, arguing essentially that courts can (and should) simply defer to a breakaway group's "self-identification" as a "branch" of its former church. Cong. Opp. at 24-26.[7] Deference is due only to the extent that the duly constituted authorities of a church are speaking about its *own* doctrine or polity, however. There is no support – and the Congregations point to none – for the proposition that a court should defer to *CANA's* (or the Congregations') interpretation of *the Episcopal Church's* polity.

In any case, even the Congregations' "self-identification" cuts against them. The Congregations claim in their briefs that CANA's polity is sufficiently similar to the Episcopal Church to constitute a "branch" of that church, but the evidence establishes that they actually consider themselves to be so different that they cannot even have a relationship of "communion" with the Episcopal Church. Tr. 335-36 (Minns), 584-86, 591-93 (Yisa); Congregations' Ex. 13. CANA and ADV are operating in violation of the core Anglican principle of territorial integrity,

[7] The Congregations' brief is inconsistent on this point. On the one hand, they suggest that if the departing congregations "self-identify as Anglicans," that is the end of the inquiry, Cong. Opp. at 25-26; but on the other hand they also suggest that the inquiry is "on how the new and old polities characterize themselves and each other," *id.* at 26.

a fundamental principle of Anglican and Episcopal polity, Tr. 876 (Douglas), 1222-23 (Beers), TEC-Diocese Ex. 70 at 163-66 (Presiding Bishop), and have chosen the ecclesiastical authority of a bishop who is not recognized by the Anglican Communion. Tr. 879-80 (Douglas). Therefore, the Congregations plainly do not "self-identify" as a group that is so similar to the Episcopal Church that it could be considered a "branch" thereof.

IV. The Congregations' petitions cannot be approved based on events in the Anglican Communion.

In the absence of any evidence or testimony to support the application of § 57-9 to the Anglican Communion, the arguments in the Congregations' Opposition are merely variations on the purely linguistic arguments they made in their opening. They fare no better than their predecessors.

A. The Anglican Communion cannot divide.

To counter the extensive evidence regarding the amorphous nature of the Anglican Communion, the Congregations point solely to the preamble of the Episcopal Church's Constitution, which states that the Episcopal Church is a "member" of the Anglican Communion, and argue that "membership itself connotes being part of a structured organization." Cong. Opp. at 29. That argument (ironically) ignores common parlance, which flatly refutes the Congregations' position. In addition to the Anglican Communion, the Episcopal Church also is a member of the "Church Catholic" and the "Body of Christ." Tr. 969, 911 (Douglas). Individual Episcopalians are similarly "members" of those groups – and of "the human race." "Membership" plainly does *not* necessarily connote a "structured organization."

B. The Congregations have not proven a "division."

Even under the Congregations' broad definition of "division" as the "separation of a group of congregations, clergy, or members from their former denomination in sufficient

numbers to establish a new polity or governmental structure," Cong. Mem. at 6 (caption; capitalization altered), there has been no division of the Anglican Communion. No Province or group of individuals has separated from the Anglican Communion, no "competing polity" to the Anglican Communion has been formed, and all Provinces continue to participate in the Anglican Communion's instruments of unity. Tr. 865-66 (Douglas).

Apparently acknowledging these facts, the Congregations nevertheless claim that there is "extensive evidence of legal and practical division in the Anglican Communion ... effectuated by the actions of individual Provinces to separate themselves from TEC." Cong. Opp. at 29. The Congregations' witnesses, however, used the word "legal" only to refer to the *non*-legal concepts of "communion," or "bonds of affection." Tr. 665-67 (Yisa). *See* Tr. 963 (Douglas) (the Church of Nigeria and the Episcopal Church have never had a legal relationship). In the end, the Congregations attempt to divine a "division" in the Anglican Communion based solely on evidence of internal disagreement, a definition that the Congregations elsewhere disclaim as the proper meaning of "division" in § 57-9. Cong. Opp. at 13 ("internal strife" cannot equal a "division"). Even if the Court could constitutionally adjudicate what "communion" means, the facts fail to show a division in it.

C. <u>Va. Code § 57-9 does not apply to the Anglican Communion.</u>

The Congregations argue that the Anglican Communion is a "church" because the Provinces have "common core beliefs." Cong. Opp. at 31. The Court may not constitutionally inquire into or rule on the similarity of religious beliefs and doctrine. The evidence nevertheless shows that the Anglican Communion is a family of autonomous churches, each with its own theological views. *See* TEC-Diocese Brief at 32-36. The Anglican Communion does not speak with any one voice. *Id.*

There is even less merit to the Congregations' *ipse dixit* assertion that because the

Anglican Communion is a fellowship or association of churches, it is a "religious society" within the common meaning of the term. The Congregations offered no evidence regarding the meaning of "religious society" in 1867 or at any other time, and the evidence submitted decisively refutes their position. *See* TEC-Diocese Brief at 36.

The Congregations challenge Dr. Mullin's testimony that "religious society" could not have referred to international associations of independent churches in 1867 because none then existed, on the ground that the first Lambeth Conference was held in that year. There is no evidence that the Virginia General Assembly was aware of that conference when it enacted § 57-9, let alone that it would have considered such a meeting to be a "religious society." Indeed, the uncontradicted evidence was that there was no indication that the 1867 Lambeth Conference would be anything more than a one-time meeting. Tr. 1035 (Mullin).[8] As Dr. Mullin testified, the term "religious society" was common in the middle of the 19th Century; but it could not have referred to associations of independent churches, because no such associations existed in 1867. Tr. 1031-34. *Cf. Lewis v. Commonwealth*, 184 Va. 69, 72-73, 34 S.E.2d 389, 390 (1945) (statutory reference to common carriers did not include buses because buses did not

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[8] The Congregations rely on Lambeth Resolutions from 1867, which allegedly use the term "Anglican Communion," to argue that the Anglican Communion must have existed prior to 1867. Cong. Opp. at 19. Those resolutions are not in evidence. Indeed they were not even listed on the Congregations' exhibit list, and the Congregations' attempt to rely on them now is improper. In any event, if they were considered, the resolutions would support the Church and the Diocese, not the Congregations. There is no dispute that some of the provinces of the Anglican Communion (including, of course, the Episcopal Church) existed before 1867. The use of the term "Anglican Communion" to describe that fact only confirms that the "Anglican Communion" is not an "organization" in any structural sense and therefore it is not a "church or religious society" within the meaning of § 57-9.

If we are to go outside the trial record, then it also should be recognized that the 1867 Lambeth Conference took place in September. *See, e.g.*, "Lambeth Conferences," 16 Encyclopedia Britannica (1911) at 111, *available at* http://encyclopedia.jrank.org /KRO_LAP/LAMBETH_CONFERENCES.html. The statute at issue was enacted in February, so the General Assembly could not have had the resolutions in mind when it enacted the statute.

exist when statute was enacted). In any event, it was undisputed that even today, associations of autonomous churches are not referred to as "religious societies." Tr. 1034 (Mullin).

Finally, the Congregations also (and strangely) appear to question whether "church" and "religious society" are actually synonyms, asserting that this "argument" is "supported only by the assertion of Dr. Mullin." Cong. Opp. at 32. In fact, commonly used dictionaries and numerous contemporaneous cases show likewise. *See Webster's Third Int'l Dictionary (Unabridged)* 404 (defining "church" as "6: a body of worshipers: a religious society or organization ..."); *Brooke*, 54 Va. at 313 (the use of real property, by its terms, "must belong peculiarly to "the *local society*, '*the religious congregation*'" at or near the locality) (emphasis added); *Finley v. Brent*, 87 Va. 103, 107, 12 S.E. 228, 229-30 (1890) ("Who, then, are the *cestuis que trust* under the deed in question--the beneficiaries entitled to the trust estate? Looking to the deed alone, the answer would be those who are members of *the congregation or local society*, and, as such, members of the Methodist Protestant Church"); *Gibson v. Armstrong*, 46 Ky. 481, 481 (1847) ("This record presents a contest between two portions of the former congregation of members of the Methodist Episcopal Church at Maysville, each claiming, as a distinctly organized *society or congregation*"); *In re Estate of Douglass*, 143 N.W. 299, 300 (Neb. 1913) ("The terms 'church' and 'society' are used to express the same thing, namely, a religious body organized to sustain public worship") (all emphases added).

V. Acceptance of the Congregations' interpretation of Va. Code § 57-9 would compel a conclusion that the statute violates the Free Exercise Clauses of the United States and Virginia Constitutions.

The Congregations and the Attorney General argue that § 57-9 is a "neutral law of general applicability." Cong. Opp. at 46; Commonwealth Brief at 20 (both quoting *Employment*

Division v. Smith, 494 U.S. 872, 879 (1990)).[9] That just blinks at reality. Under the Congregations' interpretation, § 57-9 is neither neutral nor general. A law that applies *only to churches* is not a law of "general applicability." *Compare Smith* (sustaining constitutionality of a state statute criminalizing use of peyote, as applied to sacramental use by members of Native American Church) *with Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), also cited in Congregations' Brief at 46 (invalidating a city ordinance prohibiting "sacrifice" of animals in a "ritual"). Section 57-9 also is not "neutral." It discriminates on its face among hierarchical churches, depending on whether they hold property by trustees; and it discriminates between congregational churches and hierarchical churches that hold property by trustees. *See also Falwell v. Miller*, 203 F. Supp. 2d 624, 629-31 (W.D. Va. 2002) (holding that "the concepts of neutrality and general applicability are interrelated" and that a provision in the Virginia Constitution failed both tests: it "lack[ed] facial neutrality" because it "plainly refer[red] to 'a religious practice'" and "impose[d] special disabilities on the basis of ... religious status").

It is facially absurd to say that § 57-9's "presumptive rule of majority representation ... is applicable not only to all denominations but to secular organizations as well." Cong. Opp. at 46. Section 57-9 applies only to churches. There is no similar statute applicable to secular organizations, nor does Virginia law permit the majority of a local entity attached to a larger organization to repudiate their organizational ties but retain organizational property, if that would violate the organization's constitution or other rules. *See* TEC-Diocese Brief at 11 n.4. Likewise, nothing in § 57-9 applies to churches that do *not* hold property by trustees – including, for example, the Roman Catholic, Greek Orthodox, Foursquare, and Latter-Day Saints Churches.

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[9] Our response to arguments asserted by the Attorney General is not a waiver of our opposition to the Commonwealth's intervention as a party. We do not object to his participation as an *amicus curiae*, so we address his arguments here.

See Stipulation filed Dec. 6, 2007, ¶¶ 5-9.

The Congregations' central argument, however, appears to be that application of their interpretation of § 57-9(A) would not interfere with denominational polity. *See* Cong. Opp. at 35, 36, 42. That is true, they say, because a hierarchical church is not obligated to hold property by trustees – it "may avoid the statute entirely" by taking the allegedly "minimal step" of requiring congregations to retitle all property in the name of the bishop." *Id.* at 36.[10] The Congregations' argument, in other words, is that a State may tell a church how to order its affairs in the ownership and management of consecrated properties – properties devoted entirely to religious uses – on pain of losing such properties if it adopts another method of its own choosing; and that that does not violate the Free Exercise Clause. The argument rebuts itself. Requiring a church to hold all property in the name of a bishop is no less problematic than imposing a rule vesting control of property in congregational majorities. The State has no legitimate interest in dictating methods of property ownership or control to churches, and churches have every interest in making those decisions themselves. *See* TEC-Diocese Brief at 41.[11]

The Congregations and the Attorney General rely on *Jones v. Wolf*, *supra*, 443 U.S. 595, but they both disregard a critical portion of the holding in *Jones* – that "the constitution of the

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[10] The Congregations point out that titling property in the name of a corporation would have the same impact. That claim rings hollow, as Virginia did not permit churches to incorporate before this dispute arose or before 2003. Moreover, the Congregations' "minimal step" would in fact require a fundamental shift in the Episcopal Church's and the Diocese's polity and amendment of their canons, not to mention the practical burden of incorporating hundreds of individual parishes in Virginia and determining the status of and/or re-titling each piece of property that they hold. Finally, if the states have the authority that the Congregations claim they do, this effort may well be for naught: Virginia could just amend § 57-9 to require some *other* form of property ownership at any time – and this pattern could be replicated in different permutations in all 50 states.

[11] Indeed, as discussed in § VI(B), *infra*, the Congregations' interpretation of § 57-9 would merely create a morass of arbitrary distinctions in which no State could possibly have an interest.

general church can be made to recite an express trust in favor of the denominational church.... And the civil courts will be bound to give effect to the result indicated by the parties." *Id.* at 606; *see also* page 21 *infra*. The Attorney General ignores that statement entirely.[12] The Congregations mention it only to argue that this Court may disregard the clear direction of a United State Supreme Court opinion by the transparent expedient of calling it "dictum." Cong. Opp. at 39. "[T]he State may, but need not, recognize provisions in a church's constitution or charter as sufficient to create a property interest," they say. *Id.* That simply will not do. *Nothing* in *Jones* suggests that a State "may, but need not" enforce such provisions. The language of *Jones* is both straightforward and mandatory.[13]

In the same vein, the Congregations emphasize that under *Jones*, provisions governing disposition of property must be "embodied in some legally cognizable form." Cong. Opp. at 42,

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[12] The Attorney General does recognize that *Jones* held that "[t]hrough appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency," Commonwealth Brief at 8; but he steadfastly fails to address the implications of that holding.

[13] In the alternative, the Congregations ask the Court to make a distinction between trust provisions in a church's constitution and similar provisions in its canons. Cong. Opp. at 39 n.22. To erect such a hierarchy of canon law would be to jump squarely into the "religious thicket." A church must have the autonomy, free from oversight by state legislatures and civil courts, to decide which provisions of its laws belong in various compilations of such laws. The only rationale that the Congregations offer to support such a distinction is that in the Episcopal Church, the constitutional amendment process would give them time "to determine whether to disaffiliate before the new rule could be voted on and take effect." *Id.* That argument ignores the numerous earlier canons that similarly restrict the use of parish property, and in any event it fits poorly in the mouths of congregations that remained in the Episcopal Church for more than 27 years after the Church enacted the "Dennis Canon" in 1979. *Cf., e.g., In re Church of St. James the Less*, 833 A.2d 319, 324-25 (Pa. Commw. Ct. 2003), *aff'd in relevant part*, 888 A.2d 795 (Pa. 2005) (ruling in favor of the Episcopal Church where the congregation "waited twenty years after the adoption of the Dennis canon to take action inconsistent with it"); *Daniel v. Wray*, 580 S.E.2d 711, 718 (N.C. App. 2003) ("the entire [parish] congregation had adhered to the Constitutions and Canons of PECUSA and the Diocese for nearly fifty years"); *Crumbley v. Solomon*, 254 S.E.2d 330, 333 (Ga. 1979) (applying the same rationale in a case involving the Methodist Church).

quoting *Jones*, 443 U.S. at 606 (emphasis omitted). They resolutely refuse to recognize, however, that under *Jones* a trust provision in a church's canon law *is* "legally cognizable." In any objective reading of *Jones*, that is unmistakable. *See* page 21 *infra*.[14]

The Congregations quote E. White and J. Dykman, *The Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States* (1981). Cong. Opp. at 43. The remainder of the quoted passage, which they omit, explains that the Episcopal Church enacted Canon I.7(4) (the "Dennis Canon") in response to the Supreme Court's invitation in *Jones* and that it should change the result in cases decided adversely to the Church. *See* Exhibit A (attached).

The Congregations claim that *Jones* allows a state to impose a presumption of local congregational majority rule on a hierarchical church, so long as the state also dictates some set of terms ("*any method*") by which a hierarchical church can overcome the presumption. Cong. Opp. at 37-39; *see also* Commonwealth Brief at 8 n.13 & 10-11.[15] That argument misinterprets and misapplies *Jones v. Wolf*, for numerous reasons.

First, neither *Jones* nor any other case has ever suggested that a state may impose a "presumption" of local congregational majority rule *to determine whether a hierarchical church has "divided,"* as the Congregations seek to do here. To the contrary, this is a pure question of church polity, into which the states may not intrude in any respect.

Second, § 57-9 is *not* an example of the four-factor "neutral principles" analysis permitted by *Jones*. Under *any* interpretation, it is a "special statut[e] governing church property

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[14] The same rule applies to secular associations. *See* TEC-Diocese Brief at 11 n.4.

[15] Both the Congregations and the Attorney General repeatedly incant the words "presumptive rule of majority representation" or other, similar formulations, as if they were some sort of exorcistic ritual that sweeps all other issues away. As *Jones* makes clear, however, express trust provisions in a church's canon law overcome any such presumption.

arrangements."[16] *Maryland and Virginia Eldership v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 370 (1970) (Brennan, J., concurring). The Supreme Court has made clear that "[s]uch statutes *must be carefully drawn to leave control of ecclesiastical polity*, as well as doctrine, *to church governing bodies*." *Id.* (emphases added). Under the Congregations' interpretation of § 57-9, however, local congregations and civil courts would seize control of essential polity issues and decisions from church governing bodies.

Third, *Jones* confirms that the neutral principles approach also is subject to the principle that a hierarchical church has the constitutional right to organize and govern itself as it sees fit. "[T]he [First] Amendment *requires that civil courts defer to the resolution of issues of* religious doctrine or *polity*" by the highest authorities of a hierarchical church organization. *Jones*, 443 U.S. at 602 (emphases added); *see also Milivojevich,* 426 U.S. 696; *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952).[17] "*Subject to these limitations*, however, the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes." *Id.* (emphasis added). As discussed above, the issues presented by § 57-9 are issues of governance and polity. The Church's governing documents set forth how divisions occur, and the Congregations' theory is inconsistent with those rules. *See* Tr. 841-43; TEC-Diocese Brief at 21-23. On these facts, this Court must defer on the division issue or interpret § 57-9 in a way

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[16] The Attorney General states as much. *See* Commonwealth Brief at 19 (§ 57-9 "exists only to resolve church property disputes fairly and efficiently").

[17] The Congregations characterize *Kedroff* and *Milivojevich* as involving only the selection of clergy, as opposed to disputes over property. That is not accurate. The Supreme Court recognized in very first sentence of *Kedroff* that "[t]he right to use and occupancy of a church in the city of New York is in dispute." 344 U.S. at 95. Similarly, the *Milivojevich* Court began by recognizing that "[t]he basic dispute is over control of the Serbian Eastern Orthodox Diocese for the United States of America and Canada (American-Canadian Diocese), its property and assets." 426 U.S. at 698. Indeed, the litigation in *Milivojevich* began with cross-complaints seeking control of property. *Id.* at 707.

that does not interfere with the polity of the Episcopal Church. *See* 443 U.S. at 602; *Reid*, 229 Va. at 188-89, 327 S.E.2d at 113.

Fourth, when applying the neutral principles approach, *Jones* made clear – not once, as discussed above, but *four times* – that civil courts must give effect to property ownership provisions in hierarchical church governing documents. 443 U.S. at 603 ("Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency"), 604 ("The neutral-principles method, at least as it has evolved in Georgia, requires a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church"), 607-08 ("Most importantly, any rule of majority representation can always be overcome, under the neutral-principles approach ... by providing, in the corporate charter or the constitution of the general church ... that the church property is held in trust for the general church and those who remain loyal to it"), and 606:

> *At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property.* They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. *Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church.* The burden involved in taking such steps will be minimal. *And the civil courts will be bound to give effect to the result indicated by the parties*, provided it is embodied in some legally cognizable form.

(Emphases added.)

Fifth, § 57-9 does not, under the Congregations' theory, establish a "presumption" that the Church and the Diocese have an opportunity to rebut. Contrary to their current position, the Congregations have otherwise asserted that if § 57-9 applies, it is "conclusive."[18]

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[18] The Church and the Diocese do not agree with that position, of course: even if § 57-9 would apply as a default rule, in accordance with *Jones* and ordinary contract law principles, the parties

(footnote continued ...)

Finally, the Congregations rely on a discussion that does *not* concern how a court determines property ownership, but how a court determines who constitutes the local congregation. The Supreme Court noted that in *Jones*, unlike previous cases, "the local congregation was itself divided between a majority ... who sought to withdraw from the PCUS, and a minority ... who wished to maintain the affiliation." 443 U.S. at 607. Thus, the Georgia courts faced the problem of determining "which faction is the true representative of the [local] church." *Id. That* is the question to which a state may apply "the ordinary presumption that, absent some indication to the contrary, a voluntary religious association is represented by a majority of its members." *Id.* But there as well, the state's rules must yield to church rules providing "that the identity of the local church is to be established in some other way." *Id.* Thus, the Congregations fundamentally misunderstand and misconstrue even the passages in *Jones* on which they rely.

VI. Acceptance of the Congregations' interpretation of Va. Code § 57-9 would compel a conclusion that the statute violates the Establishment Clauses of the United States and Virginia Constitutions, both facially and as applied

A. Under the Congregations' interpretation, § 57-9 fails the Establishment Clause's governmental neutrality test.

It is absurd to say that § 57-9(A) is "neutral on its face" and does not discriminate among religions; but that is the thrust of the Congregations' and the Attorney General's Establishment Clause arguments. *See* Cong. Opp. at 47-48; Commonwealth Brief at 13-16. Indeed the Congregations elsewhere acknowledge that § 57-9(A) is facially discriminatory. *See* Cong. Opp.

(footnote continued:)
must be permitted to rebut that presumption by showing that they have privately ordered their affairs in another manner. For present purposes, however, the Congregations cannot claim both that § 57-9 is "conclusive" and that it merely establishes a "rebuttable presumption."

at 36 ("§ 57-9 applies *only* to property held by congregational trustees")[19], 40 ("§ 57-9 is available only to congregations 'whose property is held by trustees'").

Presumably recognizing the obvious weakness of that argument, the Congregations and the Attorney General go on to erect a straw man and knock it down: the statute does not violate the Establishment Clause's neutrality principle, they say, because it does not "singl[e] out the [Episcopal] Church for disfavored treatment" and because Presbyterians, Methodists and Lutherans are treated similarly. Cong. Opp. at 48. *See* Commonwealth Brief at 15 ("Section 57-9 does not single out *a particular denomination* for special treatment" and "a disparate impact on hierarchical denominations ... is not unconstitutional") (emphasis added).

None of that confronts the Establishment Clause neutrality principle. That is made most clear, perhaps, by the Attorney General's immediately subsequent effort to distinguish *Larson v. Valente*, 456 U.S. 228 (1982).[20] He states correctly that the statute invalidated in *Larson* "differentiated between religious sects based upon how much money they raised from their members." Commonwealth Brief at 15.[21] "In sharp contrast," he continues, § 57-9 "does not make explicit and deliberate distinctions between religious sects" – by which he means that its "text does not state that congregational and Presbyterian churches are treated differently from

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[19] That statement is inaccurate. Section 57-9 applies to churches or religious societies "to which any such congregation whose property is held by trustees is attached." Such properties may be held by either congregational or denominational (diocesan) trustees, and in fact the latter is true of Church of the Word, one of the 57-9 plaintiffs. *See* Ex. 1 to Church of the Word's Petition for Approval.

[20] *Larson* remains good law. *See, e.g., Hernandez v. Commissioner*, 490 U.S. 680, 695 (1989) ("Our decision in *Larson* .... supplies the analytic framework for evaluating petitioners' contentions"). And the Supreme Court continues to recognize that when, as here, "laws discriminat[e] *among* religions," those laws are subject to strict scrutiny. *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987).

[21] The statutory distinction at issue in *Larson* turned on the percentage of funds raised from members, not "how much money they raised" from members in an absolute sense.

hierarchical churches." *Id.* *See also* Cong. Opp. at 48, quoted above.

The obvious problem with that proposed distinction is that it is no distinction at all. The statute at issue in *Larson* was "neutral on its face" by the Congregations' and the Attorney General's tests: the text did not single out the "Moonies" for different treatment, just as the text of § 57-9 does not single out the Episcopal Church for disfavored treatment. The statute invalidated in *Larson* discriminated among religious groups based on their sources of funds, just as § 57-9 discriminates based on their methods of holding property. The fact that the Episcopal Church is not the only member of the disfavored class proves nothing. The law discriminates among denominations on its face, and the Congregations have stipulated that some religious denominations are burdened by the statute and others are not.[22]

The "disparate impact" argument was rejected in *Larson*, where the state Attorney General argued that the fifty per cent rule "does not grant [denominational] preferences, but is merely 'a law based upon secular criteria which may not identically affect all religious organizations.'" 456 U.S. at 247 n.23. The Supreme Court held that because the statute's terms "ma[de] explicit and deliberate distinctions between different religious organizations," it was fundamentally different from the disparate impact cases. *Id.* Section 57-9 also makes explicit and deliberate distinctions. Under the Congregations' theory of the case, § 57-9 makes a local congregational majority's vote the sole consideration as to property ownership, but only for hierarchical churches whose property is held by trustees. *See* Cong. Opp. at 35, 36, 40-41

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[22] The Congregations appear to suggest that *Larson* turned on evidence of legislative intent to discriminate against one religious group ("the 'Moonies'") while protecting others. Congregations' Brief at 47. They do not actually assert that argument, however, and for good reason: nothing in the Court's neutrality principle analysis supports it. Legislative intent was an issue only in the *Larson* Court's discussion of application of the "secular legislative purpose" element of the *Lemon* test. 456 U.S. at 254-55.

(arguing that the Church and the Diocese could avoid the statute by holding all property in the name of the Bishop). Like the fifty per cent rule, that is an explicit and deliberate distinction that makes the statute apply to some denominations (for example, Episcopalians and Presbyterians) but not to others (such as Lutherans and Roman Catholics).[23]

B. The Congregations' interpretation of § 57-9 reflects no legitimate state interest.

As shown above, the Congregations' interpretation of § 57-9 facially discriminates among religious groups, and thus it can survive only upon a showing of a compelling state interest sufficient to overcome the required strict scrutiny. In fact, however, the version of the statute the Congregations (and the Attorney General) support would serve no purpose at all.

The Attorney General argues that § 57-9's secular purpose is to facilitate peaceful, fair, and efficient resolution of church property disputes. Commonwealth Brief at 18, 19. That contention fails to recognize that Virginia has a well-developed body of statutory and case law to deal with all such disputes. *See, e.g.*, Va. Code § 57-15; *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181; *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 201 S.E.2d 752; *Diocese of Southwestern Va. v. Buhrman*, 5 Va. Cir. 497, 503 (Clifton Forge 1977), *pet. refused*, Rec. No. 780347 (Va. June 15, 1978). As noted previously, it is likely that § 57-9 was not intended to serve the purpose that the Congregations say it does. *See* TEC-Diocese Opposition at 17 n.13.

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[23] The Attorney General also relies on *Gillette v. United States*, 401 U.S. 437 (1971), which "rejected an Establishment Clause attack upon 6(j) of the Military Selective Service Act of 1967 ... which afforded 'conscientious objector' status to any person who, 'by reason of religious training and belief,' was 'conscientiously opposed to participation in war in any form.'" *Larson*, 456 U.S. at 247 n.23. *See* Commonwealth Brief at 15. *Larson* rejected the same argument that the Attorney General presses here: "Section 6(j) 'focused on individual conscientious belief, not on sectarian affiliation.' [*Gillette*, 401 U.S.] at 454.... As we noted in *Gillette*, 'the critical weakness of petitioners' establishment claim' arose 'from the fact that 6(j), on its face, simply [did] not discriminate on the basis of religious affiliation.' 401 U.S., at 450. In contrast, the statute challenged in the case before us focuses precisely and solely upon religious organizations." 456 U.S. at 247 n.23. Section 57-9 does the same.

Overriding the rules and polity of hierarchical churches by imposing majority rule does not constitute a secular purpose and is an impermissible primary effect.

On the Congregations' theory of the case, moreover, § 57-9 does not even apply to many, if not most, such church property disputes, and would appear to serve no legitimate state purpose whatsoever. The Congregations claim that the General Assembly arbitrarily imposed a scheme of majority rule upon some denominations (but not others), and even with respect to some congregations but not others within the same denomination. *See* Cong. Opp. at 40-41. The applicability of the statute, in their view, will depend upon such random factors as whether a congregation's property is held by trustees and whether one congregation or two voted to leave a particular denomination (presumably within some unspecified period of time). *See id.*; TEC-Diocese Brief at 20 & n.7. Finally, under the Congregations' interpretation, a hierarchical church has no power to control whether a "division" occurs, and a "division" that divests it of its interest in local congregational property can be foisted upon it by the acts of a few disgruntled individuals. *See id.* The statute would thus actually *create* disputes, rather than avoiding or "peacefully resolving" them. Certainly Virginia has no interest in such an arbitrary, haphazard, and disruptive scheme. *See, e.g., Wallace v. Hughes*, 115 S.W. 684, 694 (Ky. 1909) (a statutory interpretation such as the Congregations press here "would encourage partisan strife in congregations and in general church organisms, for the purpose of unjustly getting possession of church property, and would endanger the peace and effective social force of all church unions – a position which the State and its law ought not to occupy").

The Attorney General's Office has recognized in the past – based in part on consultation with the same State Solicitor General who signed the Commonwealth's Brief in this case – that

> As presently in effect § 57-9 has potential constitutional problems ....

> Additionally § 57-9, as currently written, may force the courts to determine if the denomination a congregation seeks to join is actually a branch of the original denomination or a new denomination.... [A] court decision over what is or is not a branch of an original denomination *necessarily entangles* government and religion. Constitutional principles dictate the least possible involvement of the state in church matters.

Exhibit B (attached) (emphasis added). We agree and have taken those exact positions throughout this litigation. The Attorney General's past opinion flatly contradicts his current position and that of the CANA Congregations. *See* Commonwealth Brief at 19 ("There Is No Excessive Entanglement"); Cong. Opp. at 24, 27-28.[24]

C. *Lemon v. Kurtzman* remains good law.

The Attorney General argues that "the *Lemon* test frequently is ignored by the Supreme Court" and lower courts and that this Court need not apply it. Commonwealth Brief at 12-13. The Supreme Court has rejected that exact argument. In *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), Justice Scalia concurred in the judgment but lamented the Court's "invocation of the *Lemon* test," comparing it to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." *Id.* at 398. The six-justice majority responded that "Justice Scalia's evening at the cinema" did not address "the reality that there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled." *Id.* at 395 n.7. The Supreme Court continues to invoke and apply the *Lemon* test. *See, e.g., McCreary County v. ACLU*, 545 U.S. 844, 859 (2005); *Larson v. Valente*, 456 U.S. at 251-55 (alternative ground for

[24] As noted previously, *see supra* n.8, the Church and the Diocese object to the improper citation of materials outside the record in these post-trial briefs. Due to the late attempt to intervene by the Attorney General, however, the Church and the Diocese had no earlier opportunity to seek admission of this letter, unlike the Congregations and the extra-record materials that they cite.

decision). It is the Supreme Court's prerogative, not that of the Attorney General or lower courts, to overrule or disregard its precedents. *E.g.*, *United States v. Hatter*, 532 U.S. 557, 567 (2001).

The Church and the Diocese agree, and *Larson v. Valente* recognized, that the neutrality principle analysis discussed above more naturally applies to a case such as this. 456 U.S. at 252. Applying the *Lemon* test to the interpretation of § 57-9 advanced by the Congregations nevertheless raises serious constitutional questions and, if necessary, the conclusion that the statute is unconstitutional. *See* TEC-Diocese Brief at 51-53.

CONCLUSION

The Congregations have failed to carry their burden of proof on any element of their case. Their § 57-9 Petitions and Pleas in Bar must be denied.

Respectfully submitted,

THE PROTESTANT EPISCOPAL CHURCH
IN THE DIOCESE OF VIRGINIA

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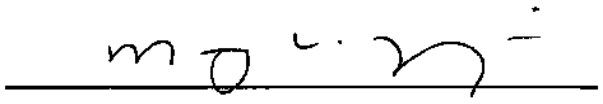
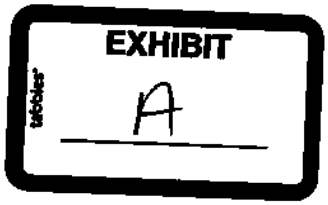


ANNOTATED CONSTITUTION AND CANONS

for the Government of the Protestant Episcopal Church in the United States of America otherwise known as The Episcopal Church

Adopted in General Conventions
1789-1979

Church Publishing Incorporated, New York



In 1979, two developments made clear the need for action by the General Convention. First, following the 1976 adoption of the new (Proposed) Book of Common Prayer and the canonical changes permitting the ordination of women as priests, dissident groups in several parishes attempted, in effect, to secede from the Episcopal Church and take parish property with them.

Second, the United States Supreme Court in *Jones v. Wolf*, 443 U.S. 595, 61 L. Ed. 2nd 775 (1979), decided in July, 1979, in a five to four decision, that states, consistent with the First and Fourteenth Amendments, could resolve disputes over the ownership of church property by adopting a "neutral principles of law" approach and are not required to adopt a rule of compulsory deference to religious authority in resolving such disputes where no issue of doctrinal controversy is involved.

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

Although considered by some to be declaratory of existing law, Sections 4 and 5 of this canon were adopted by General Convention in 1979 in response to the following invitation contained in the decision in *Jones v. Wolf*:

> At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. *Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church.* (Emphasis added.) 443 U.S. at 606.

In *Barker v. Protestant Episcopal Church in the Diocese of Los Angeles*, 171 Cal. Reptr. 541 (2d DCA), *cert. denied*, 70 L.Ed 2d 163 (1981), the intermediate Court of Appeals in California permitted three

Supp. 162, 617 (D.Kan. 1976); *Paradise Hills Church, Inc. v. International Church of the Foursquare Gospel*, 467 F. Supp. 357, 360-61 (D. Ariz. 1979); *Colin v. Iancu*, 267 N.W.2d 438, 82 Mich. App. 521 (1978). *See also Diocese of Southwestern Virginia, etc., et al. v. Buhrman, et al.* (Clifton Forge, Virginia Court Case No. 1748, November 18, 1977, *aff'd*, June 15, 1978); *Bishop & Diocese of Colorado, et al. v. Mote, et al.* (Denver County, Colorado District Court Case No. C-75959, January 21, 1980); *Protestant Episcopal Church, etc. et al. v. Tea, et al.* (Clark County, Nevada District Court Case No. A165130, April 30, 1980).

seceding Episcopal Churches to take their property with them, finding no express trust which would bind the property to the diocese or national Church. The property of a fourth seceding church was held to revert to the diocese because of an express provision to that effect in its charter and in some recently adopted canons that were not applicable to the others. The records in all four cases were made before the 1979 amendments to this canon and the result might have been otherwise in the first three cases had these provisions been in effect before the dispute arose.

The California court in *Barker* rejected the "hierarchical theory" as a means in itself of resolving property disputes between a local congregation and its denomination. Other courts continue to apply that "hierarchical theory" to the Episcopal Church; see, for example, *Protestant Episcopal Church in the Diocese of New Jersey et al. v. Graves et al.*, Supreme Court of New Jersey, Union County, Chancery Division Docket No. C-422-77 (February 10, 1978), relying chiefly on *Kelly v. McIntire*, 123 N.J. Eq. 351. The Court in *Graves* ruled in favor of the diocese.

Recent cases influenced by *Jones v. Wolf, supra*, hold that a determination of hierarchical status is but the first step in the analysis and that, once that determination is made, one must move on to see if the dispute can be resolved by reference to "neutral principles of law" found in documents of independent legal significance such as deeds, charters, by-laws, canons, etc. This was the approach taken by the California court in *Barker* with respect to the one seceding church whose property was held to revert to the diocese because of specific language in its charter and in diocesan canons. The same approach was used in the Diocese of Southeast Florida in which the diocese also prevailed: *Rt. Rev. James L. Duncan v. Rev. Peter Watterson*, In the Circuit Court for the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County, No. 77-3926 CA (L) 01 K (Feb. 1979). The 1979 amendments to this canon lend further support to that reasoning.

SENATE OF VIRGINIA

BILL MIMS
33rd SENATORIAL DISTRICT
PART OF FAIRFAX AND LOUDOUN COUNTIES
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LEESBURG, VIRGINIA 20178

COMMITTEE ASSIGNMENTS:
COURTS OF JUSTICE
EDUCATION AND HEALTH
LOCAL GOVERNMENT
RULES
TRANSPORTATION

February 3, 2005

The Honorable John H. Watkins
General Assembly Building

Enclosed please find a letter from the Attorney General's office that highlights the constitutional problems with Virginia's existing statutes relating to church property, and supports the proposed reforms in S.B. 1305. Also enclosed is a fact sheet prepared by supporters that you may wish to use when responding to constituents. Also, as you know, I have prepared an amendment to S.B. 1305 which clarifies that churches can state their intentions regarding property matters through trust agreements without having to change their deeds.

In addition to the need to correct the constitutional deficiencies in the existing statutes, there is a practical need for the clarifications proposed by S.B. 1305. Presently, church property is owned by local trustees in most instances – your friends and neighbors who volunteer their services for their local congregation. In many churches – Baptist, Catholic, and Methodist, for example – the direction to these local trustees is very clear. In others, it is confusing and convoluted, and unfortunately these volunteer trustees are place in untenable situations when a property controversy erupts. The most important practical implication of S.B. 1305 is that it gives clear guidance to trustees and state court judges – specifically, if the denomination has a clear statement, either in the deed or in a trust agreement, that it owns the property then it does so; otherwise, the local congregation owns it. This was once the law of Virginia, but it was changed early last century and confusion and disputes have grown since then.

Without the clarifications included in S.B. 1305, there is a risk that our current statutes will be declared unconstitutional by a state or federal court – as our constitutional prohibition of church incorporation was in 2003. If that happens, we may have to deal with these issues on an emergency basis, rather than through our regular processes.

Thank you for your thoughtful consideration of S.B. 1305, and please let me know if I can respond to any questions at this time.

Sincerely,

Bill

Bill Mims

EXHIBIT
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B

COMMONWEALTH of VIRGINIA

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February 1, 2005

The Honorable William C. Mims
General Assembly Building
Richmond, Virginia 23219

Re: Senate Bill 1305

Dear Senator Mims:

You have asked us to examine the constitutionality of your proposed Senate Bill 1305 and the existing statute regarding the division of church property. I have conferred with William E. Thro, State Solicitor General, and we have determined that your bill – if enacted - would strengthen the existing law.

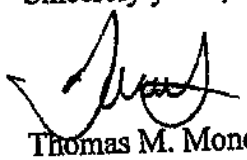
As presently in effect §57-9 has potential constitutional problems. The current language provides protection only in the event that the congregation wants to join a branch of the same denomination. There is no statutory option if the congregation desires to join a different denomination or to become independent. Consequently, the law as it stands gives an incentive for one choice only – joining a branch of the original denomination – while giving a disincentive for the other choices – joining another denomination or becoming independent.

Additionally §57-9, as currently written, may force the courts to determine if the denomination a congregation seeks to join is actually a branch of the original denomination or a new denomination. While adjudicating the property interests of any unincorporated association – to include a church - involves an examination of its internal workings, a court decision over what is or is not a branch of an original denomination necessarily entangles government and religion. Constitutional principles dictate the least possible involvement of the state in church matters.

Your proposed legislation, by contrast, provides for a dissatisfied congregation to make more than one particular choice. If enacted, a court will be able to more readily apply "neutral principles of law" based upon the source of legal title to real estate. The possibility of excessive entanglement is significantly reduced.

With my kindest regards, I remain

Sincerely yours,



Thomas M. Moncure, Jr.
Senior Counsel to the
Attorney General

Support Senate Bill 1305

SB 1305 amends section 57-9 and 57-15 of the Code of Virginia pertaining to the disposition of church property following a division within the congregation or church.

The statutes currently in effect date back to the mid-nineteenth century, are antiquated and ambiguous. The statutes give courts no guidance on when a division has occurred within a church and are riddled with ambiguity with regard to how and upon whose behalf a proprietary interest is established. As a result, courts trying to apply these statutes often must interpret church practice, rules, canonical law and at times even doctrine. For example, in 1967 the Supreme Court of Virginia ruled, following a long line of precedent, that the majority of a congregation could not "divert the use of property to the support of new and conflicting doctrines." *Baber v. Caldwell*, 207 Va. 694, 695-696 (1967).

Whatever else the separation of church in state may mean, it certainly must stand for the proposition that interpreting religious doctrine and the tenets of faith are outside the jurisdiction of the courts of the Commonwealth of Virginia. Sadly, that is not the case under the law today.

SB 1305 would amend the law to take courts out of the business of interpreting church doctrine and return them to the business of interpreting secular law. It does this in two ways:

1. It creates a conclusive presumption that a division has occurred when, by a majority vote of members over the age of 18, 10 congregations or 10 percent of all congregations within a denomination (whichever is less) vote to determine to which branch of the denomination they wish to belong, to belong to a different church, diocese, or religious society, or to become independent.

2. Where a division has occurred, the disposition of the property is determined by who is named in the deed or, if there is an express trust agreement, who is the beneficiary under the trust.

These rules are simple, straightforward, and fair. In interpreting them, courts are applying well understood principles of property law and have no occasion to delve into questions of church governance or doctrine.