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 OPENING BRIEF FOR THE EPISCOPAL CHURCH AND THE DIOCESE

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INTRODUCTION

The 57-9 trial, while a fascinating juxtaposition of faith and history, can be summed up in three words: failure of proof. The Congregations wholly and utterly failed to sustain their burden of proving the applicability of Va. Code § 57-9(A) to this case.

Whether § 57-9(A) applies to the eleven congregations that were formerly a part of the Episcopal Church and the Diocese of Virginia ("Diocese") and have severed those ties and become a part of the Church of Nigeria turns on four undefined terms in the statute: "division," "branch," "church or religious society," and "attached." Interpretation of those terms requires the Court to consider more than just expert witnesses' opinions about "commonly understood" meanings of these terms in the mid-1800s. The Court also must consider (1) the polity and governing documents of the Episcopal Church and the Diocese; (2) relevant case law; (3) the legislative policies and intent expressed in Title 57, Chapter 2 as a whole; and (4) constitutional constraints on both the Court and the General Assembly. If the Court decides that § 57-9(A) applies, it then must decide whether applying the statute in the manner the Congregations seek would violate the Free Exercise or Establishment Clauses of the First Amendment of the U.S. Constitution or the corresponding religious freedom provisions in Article I, § 16 of the Constitution of Virginia.

The considerations identified above and the evidence presented at trial establish that there has been no "division" in the Episcopal Church or the Diocese within the meaning of § 57-9(A); and similarly that the congregations have not joined a "branch" of either the Episcopal Church or the Diocese within the meaning of that statute. Undisputed evidence establishes that only the General Convention of the Episcopal Church has the authority to divide either the Church or the Diocese and that it has not done so. However, Virginia law confirms that a legally cognizable

"division" affecting property rights, as described in § 57-9(A), must be a structural division of the denomination accomplished in accordance with that denomination's own rules and polity. Well established principles of constitutional law also require this Court to avoid interfering in matters of internal church governance, and § 57-9(A) must be construed in a way that avoids conflict with constitutional requirements. That should be the end of the matter. But even if a division may occur, within the meaning of § 57-9(A), without official action of the General Convention, the evidence demonstrates that no such division has occurred. The witnesses agreed that a division must be structural, and there is no evidence of any structural division of either the Episcopal Church or the Diocese – merely the secession of a small group of congregations.

The evidence also demonstrates that the Congregations have not joined a "branch" of either the Episcopal Church or the Diocese, within the meaning of § 57-9(A). The Congregations contend that a group of individuals may *sever all ties* with a denomination and yet join a "branch" *of that denomination* within the meaning of the statute. That argument fails to respect church polities and rules, it contradicts the language of the statute, it flies in the face of the very concept of severing ties, and it makes no sense. The Congregations have joined CANA and ADV, which are part of the Church of Nigeria. The Church of Nigeria has a distinct and separate polity, and it is not affiliated with the Episcopal Church or the Diocese. There is simply no credible argument that parts of the Church of Nigeria are branches of the Episcopal Church or the Diocese.

Nor have the congregations established that events in the Anglican Communion as a whole may support their petitions. This much is clear from the face of the statute and is confirmed by controlling case law: § 57-9(A) uses the term "congregation" to refer to local churches and "church or religious society" to refer to higher level entities to which congregations

are "attached." *E.g.*, *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 502, 201 S.E.2d 752, 755 (1974). In other words, § 57-9(A) addresses churches characterized by a hierarchical relationship between congregations and a higher-level entity. The existence of a hierarchical "church or religious society" to which congregations are "attached" therefore is necessary for application of the statute. It also is a prerequisite to the finding of both a "division" and a "branch," because § 57-9(A) applies only to "a division ... in a church or religious society" to which a congregation "is attached" and only to votes to join a "branch" of that "church or society."

The evidence demonstrates that the Anglican Communion is not a "church or religious society" to which congregations are "attached," within the meaning of the statute. The evidence showed that the terms "church" and "religious society" are essentially synonyms within the meaning of the statute, and that the Anglican Communion is not a "church or religious society" under § 57-9(A) because it is not a hierarchical institution and has no power to control the actions of its member "provinces" (the 38 regional or national churches that comprise its membership) or subordinate entities (such as dioceses and individual congregations) that belong to those provinces. The absence of any power to control individual congregations also means that congregations are not "attached" to the Anglican Communion, under § 57-9(A), as demonstrated by *Baber v. Caldwell*, 207 Va. 694, 152 S.E.2d 23 (1967). It is undisputed, on the other hand, that the Congregations were "attached" to the Episcopal Church and the Diocese, a "church or religious society," until they voted to sever their ties with those institutions.

The evidence also does not support the Congregations' allegation that there has been a "division" in the Anglican Communion, within the meaning of § 57-9(A). Again, the evidence demonstrates that the Anglican Communion is not a church or religious society in any

organizational sense and therefore that it is not capable of "division" within the meaning of the statute. Even if it were, moreover, the Congregations' evidence demonstrates, at most, a broken or impaired relationship of "communion" between the Episcopal Church and some foreign provinces. That fails to demonstrate a "division" of the Anglican Communion for at least two reasons: (1) it relies on a purely ecclesiastical and religious concept ("communion") with no secular or legal meaning, and the United States and Virginia Constitutions prohibit this Court from delving into such matters; and (2) a broken or impaired relationship between the Episcopal Church and some foreign provinces, however defined, does not establish a "division" of the Anglican Communion itself.

Finally, acceptance and application of the Congregations' interpretation of § 57-9(A) would violate several constitutional norms. It would violate the Free Exercise Clauses of the First Amendment and the Constitution of Virginia by overriding the Constitutions and Canons of both the Episcopal Church and the Diocese, contrary to the express directions of the U.S. Supreme Court in *Jones v. Wolf*, 443 U.S. 595 (1979). It would violate the First Amendment principle of governmental neutrality between religions, both by preferring churches with congregational forms of government over hierarchical churches whose property is held by trustees and by preferring hierarchical churches whose property is *not* held by trustees over those that use trustees to hold title. It would impose principles of congregational governance on hierarchical religious institutions, the Diocese and the Episcopal Church, in violation of the Free Exercise Clauses of the First Amendment and the Constitution of Virginia; and it would violate the three-part Establishment Clause test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

ARGUMENT

I. There has been no "division" within the meaning of § 57-9(A) in the Episcopal Church or the Diocese.

Section 57-9(A) states, in relevant part,

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

It is undisputed that the Congregations were "attached" within the meaning of § 57-9(A) to the Episcopal Church and the Diocese, a "church or religious society," prior to the votes to disaffiliate. *See* TEC/Diocese Ex. 6 at 3 (Congregations' response to Request for Admission 4); TEC/Diocese Ex. 5 at 4 (Congregations' answer to Interrog. 4).[1] Insofar as the Congregations' petitions are based on events in the Episcopal Church and the Diocese, then, the only issues concern the proper interpretation of the terms "division" and "branch." The applicable law and the evidence establish that these statutory terms cannot be applied to the facts of this case.

The legal and historical context in which § 57-9 was adopted and the evidence presented at trial establish that a "division" within the meaning of the statute must be an institutional division in a "church or religious society," accomplished pursuant to that church or society's rules and polity, and resulting in the creation of two or more entities which might properly be viewed as legal successors to the formerly undivided church. Contrary to the Congregations' characterization of this definition, it does not require an "amicable" separation; it does, however, require appropriate action of the regularly constituted body empowered to effect or recognize a structural division under the church's polity.

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[1] The only congregation that does not admit being attached to the Episcopal Church and the Diocese is Christ the Redeemer Church, which did not file a 57-9 action.

The Congregations' experts argue, however, that a "division" in a hierarchical church need not comport with that church's own rules or result in a new entity that might properly be viewed as a legal successor to the formerly united church, but can be accomplished merely by the unilateral withdrawal of a small number of individuals, so long as the secessionists eventually form a new group that has a sufficiently similar polity to the original church. Tr. 55, 94-95. That interpretation is untenable. It is inconsistent with trust and voluntary association principles that have guided church property disputes before and after the enactment of § 57-9, and it unconstitutionally interferes in issues of church organization and polity. It also requires a civil court impermissibly to delve into theological issues to determine whether a breakaway group is similar enough in polity and faith to qualify their departure as a "division" of a church.

A. The legal context surrounding § 57-9 supports the Church's and the Diocese's interpretation.

Throughout its history, the laws of Virginia have recognized and respected the distinction between hierarchical and congregational churches and confirmed that under various legal principles, a local congregation of a hierarchical church may not divert local church property to some other denomination or purpose. Since its adoption in 1867, what is now § 57-9 has harmoniously co-existed with and complemented these aspects of Virginia law, and it should continue to do so. The applicable cases, statutes, and constitutional considerations all confirm that § 57-9 was not intended to, and did not, radically alter Virginia's legal treatment of church organizations or their rights concerning property. The statute should be interpreted as it has consistently been applied: to address only a situation in which a church or religious society is structurally divided into two, in accordance with its own rules and polity.

1. Virginia law has always recognized restrictions on congregations' control over church property.

Guided by trust and voluntary association principles, Virginia courts in the periods both

before and after the adoption of § 57-9 consistently have held that individuals' only right to use church property depends on their continuing membership in the applicable denomination and that they cannot breach the trust under which property dedicated to a particular denomination is held. These general principles, crafted specifically to apply to religious institutions and further refined by First Amendment constraints, continue to guide church property disputes today. *See, e.g.*, *Green v. Lewis*, 221 Va. 547, 556 272 S.E.2d 181, 186 (1980).

Prior to enactment of § 57-9, the Virginia Supreme Court explained in *Brooke v. Shacklett*, 54 Va. (13 Gratt.) 301 (1856), that the statute validating conveyances for religious purposes[2]

> in substance declare[d], that where any lot or parcel of land has been heretofore, or shall be hereafter, conveyed to one or more trustees for the use and benefit of any religious congregation as and for a place of public worship, the same and all improvements thereupon shall be held by such trustee or trustees, and their successors, *for the purposes of the trust, and not otherwise*....

Id. at 311 (emphasis added). In the case of a hierarchical church, moreover, it was recognized that the "purpose of the trust" required adherence to that church's rules and polity. Where a deed conveys property to the local congregation of a hierarchical denomination, "[t]he primary object of the whole transaction ... must necessarily have been to provide and secure a place of worship according to the [denomination's] discipline for the local society of that denomination, by and for which contributions were made, and which was expected to attend worship on the premises." *Id.* at 317 (citation and quotation marks omitted). Thus, local congregations were identified by their submission to superior judicatories pursuant to the laws of the denomination. Indeed, the Supreme Court of Virginia has repeatedly held that membership in a church necessarily entails

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[2] *See* current version at § 57-7.1, which replaced former § 57-7, the successor to the statute cited in *Brooke*.

"a profession of its faith and a submission to its government." *Id.* at 320 (citation and quotation marks omitted); *Reid v. Gholson*, 229 Va. 179, 188, 189, 327 S.E.2d 107, 113 (1985) (hierarchical churches "establish their own rules for discipline and internal government" and "[o]ne who becomes a member of such a church, by subscribing to its discipline and beliefs, accepts its internal rules and the decisions of its tribunals").

Brooke also made clear that in the event of a dispute between two competing factions in a local congregation of a hierarchical church, the faction adhering to the hierarchical denomination (that is, the faction qualifying as the beneficiary of the trust in the deed) would ordinarily be entitled to the use and control of the property. In such a case,

> the dispute must [be] determined by enquiring, not which of two parties constituted a majority, or represented the wishes of a majority, of the members of the society, but which of two preachers had been appointed and assigned to the society *in accordance with the law of the church; which of the two parties was acting in conformity with the discipline of the church, and submitting to its lawful government.*

54 Va. at 321 (emphasis added). *Brooke* thus made clear that trustees holding title to property for a congregation of a hierarchical church were bound to use the property for the mission of that denomination, regardless of the potentially contrary wishes of the current congregation.

Application of this rule was complicated in *Brooke* itself, however, where the hierarchical church at issue (the Methodist Episcopal Church) had divided itself into two bodies, creating uncertainty as to which was the proper beneficiary of the existing trust. To answer that question, the Court first considered the validity of the Methodist Church's division. Only after concluding that the Church had validly divided pursuant to its "Plan of Separation" and that the local congregation at issue had been entitled to join the Methodist Episcopal Church South pursuant to that Plan, *see id.* at 324-25, did the Court go on to hold that the local congregation was also entitled to take its property. Accordingly, the Methodist Episcopal Church South:

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

Id. at 327 (emphasis added). It was this lawful division, and no other circumstance, that justified the modification of trustees' duties.

Other courts held similarly. In *Gibson v. Armstrong*, 46 Ky. 481 (1847), a case on which the *Brooke* Court heavily relied, the court explained that the local congregations of the Methodist Episcopal Church in the Kentucky Conference could retain local church property after joining the Methodist Episcopal Church South because

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

Id. at 524 (emphases added). The court further explained that "[t]he one united Methodist Episcopal Church referred to in the deed ... having ceased to exist by division into two Churches of distinct territorial jurisdiction, there is in fact no such Church as is contemplated in the deed ...." *Id.* at 503. Had no lawful division occurred, however,

> we think, [there would] be no serious question as to the correctness of a construction which would make the deed applicable to any changes which the Church might authorize, with the effect of securing the property to the local society preserving its proper relations in obedience to such change, to the exclusion of any organized portion of it, which opposing the change, might refuse obedience to the authority of the Church, and throw off the appropriate relations of the society.

Id. at 504. This is the legal context in which § 57-9 was adopted.

2. The Virginia cases continued to recognize the same restrictions after the adoption of what is now § 57-9.

Contrary to the Congregations' suggestion that § 57-9 drastically altered the legal framework reflected in *Brooke* and *Gibson*, Virginia courts continued to apply the same denominational restrictions on conveyances for religious purposes after the enactment of that statute. In *Hoskinson v. Pusey*, 73 Va. 428 (1879), the Virginia Supreme Court was again confronted with two factions of a Methodist Episcopal Church congregation claiming the right to control local church property. The Court asked

> Who, then are the *cestuis que trust* under the deed in question, the beneficiaries entitled to the control and use of the ... church building? Looking to the deed alone, the answer would be, those who are the members of the congregation or local society, and, as such, members of the [hierarchical denomination]. According to the test applied in *Den v. Bolton*, 18 N.J.L. 210, cited with approbation in the opinion of Judge *Daniel* in *Brooke & others* v. *Shacklett*, *supra*, "to constitute a member of any church, two points at least are essential, without meaning to say that others are not so, a profession of its faith and a submission to its government."

Id. at 431-32. As there had been no division of the hierarchical church that might affect the trustees' obligations (as there had been in *Brooke*), the Court affirmed a decree awarding the property to the members of the denomination named in the deed.[3]

Similar case law post-dating the enactment of § 57-9 is available in abundance. *See, e.g.*, *Bouldin v. Alexander*, 82 U.S. 131, 139 (1872) ("withdrawal from a church and uniting with another church or denomination is a relinquishment of all rights in the church abandoned") (punctuation omitted); *Finley v. Brent*, 87 Va. 103, 106, 12 S.E. 228, 229 (1890) (where majority of congregation left to join a different denomination and attempted to take property with them,

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[3] After reaffirming the validity of the Methodist plan of separation, 73 Va. at 435, the Court concluded that, unlike in *Brooke*, the Plan of Separation gave that congregation "no authority ... to determine by a majority of its members its adherence to the church South." *Id.* at 439.

held, "[t]hese Christians could change their religious beliefs, had the right to go to any denomination to which their belief or choice led, and they could take with them all the property which belonged to them; but they were without power to change the character of the trust in question"); *Clay v. Crawford*, 183 S.W.2d 797, 800 (Ky. 1944) ("the local church is irrevocably bound to the parent body *except as its law may permit division or severance*") (emphasis added). *See also Diocese of Southwestern Va. v. Buhrman*, 5 Va. Cir. 497, 503 (Clifton Forge 1977), *pet. refused*, Rec. No. 780347 (Va. June 15, 1978):

> It is evident that the designated *cestui que trust* in each deed was a unit or component of the Protestant Episcopal Church in the United States of America within the then existing diocese.... Therefore, a reasonable interpretation of the deeds leads inescapably to the conclusion that the trustees cannot hold title to the subject property for persons or groups who are withdrawn from and not under the authority of The Episcopal Church.

Thus the general rule articulated in *Brooke* and reaffirmed in subsequent authorities was that the members of a local congregation of a hierarchical denomination cannot by majority vote divert property dedicated to that denomination for use by a distinct and separate denomination.[4]

3. Virginia statutes express a legislative policy of respect for the rights of hierarchical churches.

As demonstrated above, in cases both before and after the enactment of what is now

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[4] These rulings were (and are) consistent with and incorporate principles governing other voluntary associations, under which an association's constitution, rules, and by-laws are an enforceable contract between the association and its members. *See, e.g., Grand Lodge of Improved Benevolent & Protective Order of Elks of the World v. Grand Lodge, Improved, Benevolent & Protective Order of Elks of the World*, 50 F.2d 860, 864 (4th Cir. 1931) (dissident members of fraternal association "had a right to withdraw and organize a new order; but they had no right if they did so ... to hold themselves out as a branch of that order" and were not entitled to take intellectual property and goodwill of abandoned association); *Unit Owners Ass'n v. Gillman*, 223 Va. 752, 766, 292 S.E.2d 378, 385 (1982); *Gottlieb v. Economy Stores, Inc.*, 199 Va. 848, 856, 102 S.E.2d 345, 351 (1958) ("The constitution and by-laws adopted by a voluntary association constitute a contract between the members, which, if not immoral or contrary to public policy, or the law, will be enforced by the courts") (citations omitted).

§ 57-9, the Supreme Court of Virginia had made clear that respect for the polity and governance of churches was the law of the Commonwealth. The General Assembly has consistently reinforced that key principle, expressed clearly and explicitly in Title 57, Chapter 2. The distinction between congregational and hierarchical organizations is a key organizing principle in Virginia's church property statutes and is evidenced by, *inter alia*, the two distinct subsections of § 57-9. *See, e.g., Reid v. Gholson*, 229 Va. at 188-89, 327 S.E.2d at 112-13; *Norfolk Presbytery*, 214 Va. at 502-03, 201 S.E.2d at 755.

Closely related statutory provisions also reflect Virginia's continued sensitivity to the distinction between hierarchical and congregational churches. Section 57-16.1 provides that if local congregations choose to incorporate – as the Congregations have done – those corporations may hold, administer, and manage church property only "for any purpose authorized and permitted by the laws, rules, or ecclesiastic polity of the church or body." Section 57-15 provides that "[u]pon evidence being produced ... that it is the wish of the congregation, or church or religious denomination or society, or branch or division thereof, or the constituted authorities thereof having jurisdiction in the premises, or of the governing body of any church diocese" to sell, exchange, encumber, or take other specified actions regarding property, "the court shall make such order as may be proper." "In the case of a super-congregational church ... § 57-15 requires a showing that the property conveyance is the wish of *the constituted authorities of the general church*." *Norfolk Presbytery*, 214 Va. at 503, 201 S.E.2d at 755 (emphasis added). Thus, a transfer of property to a different denomination can only be legally effected under § 57-15 if it has been approved by the appropriate hierarchical judicatories.

Virginia courts addressing church property disputes therefore ask first whether the church is hierarchical or congregational. *E.g., Reid v. Gholson*, 229 Va. at 188-89, 327 S.E.2d at 113;

Green v. Lewis, 221 Va. at 553, 272 S.E.2d at 184 (noting "the distinctions, enunciated in Code § 57-9, between an autonomous congregation and one which is part of a supercongregational or hierarchical denomination where a determination of property rights is involved"); *Norfolk Presbytery*, 214 Va. at 502, 201 S.E.2d at 755 ("In determining the proper party to approve the property transfer, the trial court must look to the organizational structure of the church. *See* Code § 57-9 ..."). In hierarchical churches, application of "neutral principles" focuses on "the constituted authorities of the general church." *Id.* at 503, 201 S.E.2d at 755. "Congregational churches, on the other hand, are governed by the will of the majority." *Reid v. Gholson*, 229 Va. at 189, 327 S.E.2d at 113.

To hold that a minority of individuals or congregations can create a "division" sufficient for application of § 57-9(A), by voting to split from the hierarchical church to which they were attached and affiliate with some other denomination, would obliterate the distinction between congregational and hierarchical churches. It would transform Virginia's statutory church property scheme into one where a congregation's vote overrides all other considerations, regardless of the church's nature, rules, and ecclesiastical government. The legislative policy of Virginia as expressed in Title 57, Chapter 2, like the case law discussed above, confirms that § 57-9 does no such thing.

4. Virginia's treatment of church property disputes is consistent with constitutional requirements.

Finally, and as discussed in more detail in Sections IV and V below, the principles governing church organizations and property rights established in Virginia law as discussed above are consistent with the state and federal Constitutions and thus avoid serious constitutional issues that would arise if § 57-9 were interpreted as the Congregations propose.

The federal and state Constitutions require that civil courts and legislatures alike refrain from interference with the polity of a hierarchical church. *E.g.*, *Maryland and Virginia*

Eldership v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 370 (1970) (Brennan, J., concurring) ("special statutes governing church property arrangements .... must be carefully drawn to leave control of ecclesiastical polity, as well as doctrine, to church governing bodies") (citing *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952)). *See also Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976) ("[T]he [First] Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. This principle applies with equal force to church disputes over church polity and church administration") (citation and quotation marks omitted); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960) (*per curiam*) (courts may not impair ecclesiastical property rights by application of common law).

Pursuant to the rule of constitutional avoidance, § 57-9 must be construed to avoid the constitutional questions that otherwise would be presented by reading the statute as purporting to overrule "the constituted authorities of the general church." *Norfolk Presbytery*, 214 Va. at 502, 201 S.E.2d at 754.[5] *See Presbyterian Church v. Hull Church*, 393 U.S. 440, 447-48 (1969):

> In *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), the Court converted the principle of *Watson* [*v. Jones*, 80 U.S. (13 Wall.) 679 (1872)] ... into a constitutional rule. *Kedroff* grew out of a dispute between the Moscow-based general Russian Orthodox Church and the Russian Orthodox churches located in North America over an appointment to St. Nicholas Cathedral in New York City. The North American churches declared their independence from the general church, and the New York Legislature enacted a statute recognizing their administrative autonomy. The New York courts sustained the constitutionality of the statute and held that the North American churches' elected hierarch had the right to use the cathedral. This Court reversed, finding that *the Moscow church*

[5] "The canon [of 'constitutional avoidance'] is not a method of adjudicating constitutional questions by other means.... Indeed, one of the canon's chief justifications is that it allows courts to avoid the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (citations omitted).

had not acknowledged the schism, and holding the statute unconstitutional. [Emphasis added.]

Here, as in *Kedroff*, "the constituted authorities of the general church" have not enacted or recognized any division in the church, and § 57-9 may not constitutionally be construed to override their decisions and the Church's governing documents.

B. The evidence at trial supports the interpretation mandated by the legal context.

The Congregations contend that § 57-9 overturns these well-settled principles and permits individual members of a local congregation to terminate their affiliation with a hierarchical denomination and then have this Court transfer property, in which they would normally have no claim, to another denomination. The Congregations have not cited any case law in support of that contention. Rather, against the consistent weight of authority set forth above, the Congregations have pressed a definition of "division" that would equate division with separation or secession – any instance in which a group breaks away off from an existing church and forms a new one (provided that the new one is sufficiently similar to the church they leave) – on the ground that this was supposedly the most common meaning in "common parlance" in 1867. The evidence does not support that effort, however, for several reasons.

1. "Division" is an ambiguous term with no set meaning in "common parlance."

First, as the evidence established, in common parlance, "division" may be used to describe many things, depending upon the context: the existence of theological disagreement or difference of opinion (*e.g.*, Tr. 457); the existence of different denominations (*e.g.*, Tr. 152-53); the departure of a few people from an existing church or denomination (*e.g.*, Tr. 78); or the structural separation of a church body into two (*e.g.*, Tr. 1062-63). The Congregations' experts agreed, confirming the ambiguity of the term. Dr. Valeri offered five definitions of the word "division." Along with the Congregations' preferred definition of division as separation, *see* Tr.

55, Dr. Valeri acknowledged that the term also was used (2) to mean "internal strife or division as in our church is having a quarrel or division over a particular issue" (Tr. 54); (3) as a synonym for branch (Tr. 113); (4) to describe "an official administrative ecclesiastical move to take one entity and create two, such as the division of the Diocese of Virginia into the Dioceses of Eastern Virginia and Western Virginia" (Tr. 113); and (5) in talking about the entire body of Christ being divided (Tr. 152). Dr. Irons gave four definitions, overlapping with those above and including "internal conflict or discord within a religious body." Tr. 178, 274.

The Court therefore cannot rely simply on "common parlance" to interpret the statute. Some basis for selecting among common uses of the term "division" must be found. Given that the context for the term "division" in this case is a statute purporting to address or affect legal rights and obligations of trustees holding title to church property, that term should be defined in § 57-9 as it otherwise was (and is) in a similar legal context. As demonstrated above, the term "division" in that context referred to the structural division of a denomination pursuant to the denomination's own rules and polity. The evidence, moreover, leads to the same conclusion.

2. The undisputed evidence showed that the events that prompted § 57-9 were the major denominational divisions in the Methodist, Presbyterian, and Baptist Churches.

The evidence showed that prior to the Civil War the largest denominations of that era – Presbyterian, Methodist and Baptist – experienced structural divisions in accordance with the denominations' own rules and polities. Tr. 1049-50, 1053-54 (Methodist); 1054-56 (Presbyterian); 1059-60 (Baptist).[6] Those divisions were major historical events, fundamentally different from the proliferation of small, separatist denominations that had previously

[6] Dr. Irons denied that the Methodist plan of separation was ever ratified. Tr. 193. He was mistaken, as Dr. Mullin explained. Tr. 1049-51. The Supreme Courts of Virginia and the United States also have disagreed with Dr. Irons. *See Brooke*, 54 Va. at 324-25.

characterized American religious history. As Dr. Mullin explained, the denominational divisions in "the Presbyterians in 1837, and the Methodists in 1844, and then the Baptists in 1845" were significant events of national scope: "persons who were not even particularly concerned about them as churches saw that their breaking being of tremendous significance. The classic example is John Calhoun's famous speech before the Senate in 1850 where he talks about the ties that bind together the nation are various, and the churches are one of them. And the breaking of these things is a sign of the breaking up of the nation." Tr. 1060. *See also, e.g., Humphrey v. Burnside*, 67 Ky. 215, 225-26 (1868) ("[t]he separation of the Methodist Episcopal Church into two Methodist Episcopal Churches ... has been the subject of much discussion, in which the whole community, more or less, felt an interest, and was an event that connected itself with, and formed a part of, the history of the country, of which no well-informed man could be ignorant; and from its notoriety, courts would take judicial notice of it without proof"); *Brooke*, 54 Va. at 324 (describing the issue of whether the Methodist General Conference of 1844 had the power to authorize the division as "one which has been deemed for some years past of such public concernment, of such vast importance in its bearing on the rights, interest and feeling of a large portion of the community, as to have been made the subject of the fullest examination"). These true denominational divisions also impacted large numbers of Virginians and led to uncertainty and civil disputes over title to church property. *See, e.g., id.*; Tr. 219-20, 1047-48.

Given the significance of these denominational divisions and the property issues that resulted from them, Dr. Mullin testified that in his expert opinion, these structural divisions were what prompted the Virginia legislature to adopt § 57-9. Tr. 1062. As he explained, "[t]he small separations that were part of the religious landscape of the United States in the 19th Century were always occurring.... It was these major divisions that were the things that were troubling to

larger society." *Id.* The Congregations failed to offer any evidence to the contrary.

3. The 19th Century documents containing the term "division" all referred to structural divisions of the Methodist, Presbyterian and Baptist denominations discussed above.

Although they expressed no opinion concerning the actual motivation for the adoption of § 57-9 in 1867, the Congregations' experts claimed that, at that time, the term "division" was "most commonly" used to refer to situations in which a few people left an existing denomination to form a new one. That claim, however, is belied by the numerous documents presented at trial. In fact, all of the examples of the word "division" that the Congregations' experts discussed at trial involved the "great divisions" of the Presbyterian, Methodist and Baptist churches. *See* Tr. 1061-64 (Mullin) (uses of "division" referred to divisions in the major denominations: Presbyterian Church in 1837, Methodist Episcopal Church in 1844 and Baptist churches in 1845). Moreover, this fact comports with Dr. Valeri's own pre-trial notes and work. As he admitted upon cross examination, all of the most illuminating examples of uses of the term "division" he had uncovered during his research similarly involved the divisions in the Presbyterian, Methodist, and Baptist denominations. Tr. 155-58.

At the same time, even if the term "division" was sometimes used to refer to the disagreement resulting in the separation of a small group from an existing denomination to form a new one, the evidence showed that in the whole, these events were described in other terms. Tr. 1160-62; *see also* Tr. 164 (Dr. Valeri "read lots of documents that described these events in different ways").

4. All known uses of § 57-9 involved Presbyterian and Methodist divisions.

Finally, it is significant that all actual, contemporaneous uses of what is now § 57-9(A) involved divisions in the Presbyterian and Methodist churches. Dr. Irons discussed the § 57-9 petitions he uncovered during his research (Congregations' Exs. 96-98, 118-20). He explained

that of the 29 congregations filing petitions, 25 were congregations attached to the Methodist Episcopal Church that voted to join either the Methodist Episcopal Church or the Methodist Episcopal Church South. Tr. 242-43. The other four congregations were Presbyterian. *Id.* at 243, 1058. None was Episcopal. Tr. 265, 273. If the Virginia General Assembly intended § 57-9(A) to have an impact not only in the event of a structural division of a denomination, as in the Methodist and Presbyterian Churches, but also any time a few individuals left one denomination to form or join another one, that has gone unnoticed by generations of Virginians.

C. <u>The Congregations' definition is unworkable.</u>

The applicable legal context and the historical evidence both demonstrate that a "division" for purposes of § 57-9 must be defined as a structural separation of a church or religious society into two, accomplished pursuant to the church's own polity and rules. The loose definition proposed by the Congregations also must be rejected because it provides no principled means of determining when a "division" has actually occurred. The Congregations argue only that some unspecified number of individuals (or entities) must withdraw and establish a group with a polity sufficiently similar to that of the undivided church to qualify as a "branch" of that church. Tr. 91-95, 147, 275.

That definition is untenable. First, a civil court cannot constitutionally make a determination that two polities are similar enough to be a branch, because such an inquiry would leap headlong into the "religious thicket" that the courts must take care to avoid. As the U.S. Supreme Court explained in *Jones v. Wolf*, 443 U.S. at 602, any resolution of a church property dispute may not "entangle the civil courts in matters of religious controversy." *See also Serbian Eastern Orthodox*, 426 U.S. at 709-10 ("First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice"); *Norfolk Presbytery*, 214 Va. at 503, 201 S.E.2d at 755 ("there

is no constitutional prohibition against the resolution of church property disputes by civil courts, provided that the decision does not depend on inquiry into questions of faith or doctrine"); *Reid v. Gholson*, 229 Va. at 187, 327 S.E.2d at 112; *Green v. Lewis*, 221 Va. at 552, 272 S.E.2d at 184. Yet the need to determine in every case whether various new policies are sufficiently similar to the old to qualify as a "branch" would plainly require just such an ecclesiastical exercise. *See, e.g.*, TEC/Diocese Ex. 68 (Anderson Dep.) at 74-78.

The Congregations' definition of division also rewrites the statute to equate division with secession. Their experts would require nothing more than the departure of a small group of disgruntled individuals who somehow remain associated with each other.[7] The Congregations' fact witnesses further blurred the line, both as to the need for more than one congregation and as to the need for formation of a new polity. For example, the Reverend John Yates testified that he understood "division" to mean "[a] congregation leaving the Episcopal Church and joining some other body." Tr. 498; *see also* TEC/Diocese Ex. 68 (Anderson Dep.) at 50 ("division is present when a parish makes a decision or the majority of a parish makes the decision to leave"). In sum, the Congregations' only answer to the line-drawing problem posed by their suggested definition of division was to erase the line completely.

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[7] Dr. Valeri's definition of a "division" requires the departure of no more than three ministers or two congregations. Tr. 78 (describing the Cumberland Presbyterian division as one by three ministers), 81 (other Presbyterian separatists were "very small groups"), 92 ("There's no stated size, but the operating principle seems to be that groups of three feel qualified to form themselves into new units"), 142 ("it is my opinion that there must be enough, that is more than one group, because it has to form, begin to constitute itself with a different polity, which I explained requires more than a single congregation. So there must be more than one. There must be a group there in some sense. The specific size of that group isn't defined anywhere"). Professor Irons agreed. Tr. 185-86 (describing the Reformed Methodist Church division as "a terrifically small group"), 187 (the AME Zion Church begun by only two congregations).

D. The evidence showed that neither the Episcopal Church nor the Diocese has "divided."

At trial, the evidence was unambiguous and uncontradicted that the Constitution and Canons of the Episcopal Church are the law of the Church. Tr. 395 (Guernsey), 507-08 (Yates), 1200 (Lee).[8] They define how the Church is organized and governed, and they bind all Church members and bodies.[9]

As the Presiding Bishop's Chancellor David Beers explained, this Church law, consistent

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[8] The Congregations' own governing documents also reflect their understanding that they operated under and were required to act in accordance with the Constitutions and Canons of the Episcopal Church and the Diocese. *See* TEC/Diocese Ex. 10 at 1 (St. Paul's Bylaws, 2005) ("The Vestry and Trustees shall be agents and legal representatives of the Church ... subject to these bylaws and the Constitution and Canons of the Episcopal Church and the Diocese of Virginia, and the Code of Virginia, as amended"); Ex. 11 at 1 (St. Paul's By-Laws) (same); Ex. 12 at 1 (St. Margaret's Constitution) ("St. Margaret's Episcopal Church in Woodbridge, Virginia, is guided and directed by the Constitution and Canons of the Protestant Episcopal Church in the Diocese of Virginia"); *id.* ("To comply with the Constitution and Canons of the Protestant Episcopal Church in the Diocese of Virginia, and to accomplish the stated purpose, St. Margaret's Episcopal Church shall be organized under a rector and a Vestry. The Vestry has the authority to modify the lineup of duties and responsibilities ... as long as the changes are not in conflict with the Constitution and Canons of the Diocese"); Ex. 13 at 2, (Epiphany Bylaws) ("The Parish is a constituent part of the Diocese of Virginia of the Protestant Episcopal Church in the United States of America, and is subject to the *Canons of the Protestant Episcopal Church in the Diocese of Virginia*"); Ex. 14 at 1 (St. Stephen's By-Laws, 2005) ("1. AUTHORITY. St. Stephen's Episcopal Church, Heathsville, Virginia is a church organized under the Constitution and Canons of the Episcopal Church in the USA (ECUSA) and of the Diocese of Virginia"); Ex. 15 at 1 (St. Stephen's By-Laws, 1994) (same); Ex. 16 (Truro By Laws) ("In accordance with the canons of the Diocese of Virginia ..."); *id.* ("a. Canonical Requirement: To serve on the Vestry, the canons require ..."); Ex. 25 at TFC-0160 (The Falls Church Vestry Manual) ("The Falls Church is subject to the constitution and canons of the national church (the Protestant Episcopal Church in the United States of America) and of the Diocese (the Protestant Episcopal Church in the Diocese of Virginia)"); Ex. 36 at EDV0008290 (Apostles' Vestry Handbook) ("This Handbook is consistent with the canons of the Diocese of Virginia ..."); *id.* at EDV0008294 (citing Canon 11 § 6, of the Diocesan Constitution and Canons in answering the question of who is qualified to serve on the Vestry).

[9] See, for example, the ordination and Vestry oaths. TEC/Diocese Ex. 1, Article VIII (ordination oath); Tr. 339-40 (Minns) (same), 393-94 (Guernsey) (same), 506-07 (Yates) (same); TEC/Diocese Ex. 3, Canon 11.8 (vestry oath); Tr. 345-46 (Minns) (same), 449-50 (Julienne) (same), 702-03 (Allison) (same).

with its polity, expressly provides that the structural division of the Church or one of its dioceses requires the action of the Church's General Convention. Tr. 1220-21; *see also* Tr. 842 (Douglas). Article V, § 1 of the Episcopal Church Constitution defines how a division can occur within the Church or a diocese and which authority may divide the Church: "A new Diocese may be formed, *with the consent of the General Convention* and under such conditions as the General Convention shall prescribe by General Canon or Canons, (1) *by the division of an existing Diocese* ...." TEC/Diocese Ex. 1 at 5 (emphases added). Pursuant to the constitutional mandate, Canon I.10 then governs the formation, division and reunion of dioceses. TEC/Diocese Ex. 1 at 45. Specifically, Canon I.10(3), *id.*, which prescribes the method for "division of existing diocese," makes clear that both the diocesan governing body and the General Convention of the Church must act for a division to be effective:

> Whenever one Diocese is about to be divided into two Dioceses, the Convention of such Diocese shall declare which portion thereof is to be in the new Diocese, and shall make the same known to the General Convention before the ratification of such division.

Canon I.11(3)(f) applies similar requirements to a "division" of the Church that would result in the formation of a separate church, or "province":

> At the request of the Convention of a Missionary Diocese, supported by the presentation of relevant facts and a reasonable plan, the General Convention may by joint Resolution (1) permit the Diocese seeking autonomy to unite with another Province, or Regional Council having metropolitical authority, of the Anglican Communion, or (2) permit the Diocese seeking autonomy but not planning to unite with another Province or Regional Council, to unite with no less than three (3) other viable Diocese at the same time which are geographically contiguous, or so located geographically as to be considered of the same region, for the purpose of establishing a new Province, or new Regional Council having metropolitical authority, of the Anglican communion.

TEC/Diocese Ex. 1 at 47-48; *see* Tr. 1220-22 (Beers). In accordance with Episcopal polity and Anglican tradition, under which no more than one Anglican bishop should exercise jurisdiction

in a particular territory,[10] the Episcopal Church's rules contemplate that such "divisions" would occur on a geographic basis. *See* Tr. 1222-23 (Beers). As Beers explained, however, the Church's General Convention has the authority to effect some other type of "division," should it choose to do so. Tr. 1223.

It is also undisputed that the General Convention has taken no action to divide the Church or the Diocese of Virginia in connection with the current theological disagreements. TEC/Diocese Ex. 6 at 6-7 (Congregations' responses to Requests for Admission 15 & 16); *see also* Tr. 842. No structural division of any kind, and particularly no division consistent with the polity and rules of the Episcopal Church, has occurred in either the Episcopal Church or the Diocese. Tr. 841-44. The Episcopal Church and the Diocese remain intact and whole.

In fact, with respect to division in the Episcopal Church and the Diocese, the evidence showed only two things – neither of which constitutes a legally cognizable division:

First, the Congregations' evidence showed the secession of a small minority of the Episcopal Church. For the reasons set forth at length above, however, the term "division" in § 57-9 does not and cannot stretch to encompass such an occurrence. As Dr. Douglas testified, "a congregation or a people can choose to leave a parish or leave the Episcopal Church, but that does not fundamentally constitute a division or a departure of a parish or from the wider Episcopal Church." Tr. 843.

Second, the Congregations demonstrated the existence of differences of opinion in the Episcopal Church and the Diocese on matters of religious doctrine and theology. Those "divisions" are not new – rather, today's events reflect differences of opinion that date back fifty years and have had various flash points over the years. *See, e.g.*, TEC/Diocese Ex. 67 (column

[10] Tr. 875-76, 879-80 (Douglas); *see also* Tr. 284 (Irons).

by Truro Senior Warden Jim Oakes stating that Truro's vote was "the result of a serious division building within the denomination over the past half-century concerning the role of Jesus in salvation and the interpretation and use of Scripture"); TEC/Diocese Ex. 68 (Anderson Dep.) at 40 (the "division" in the Episcopal Church is a departure from doctrine, truth, and Christianity) and 28-32 (discussing the history of the "division" – including such matters as refusal to discipline controversial bishops, dating back to the 1960s, and the ordination of women and a new prayer book in the 1970s). This Court cannot determine that there has been a division in the Episcopal Church or the Diocese based on theological disagreement without entering (and indeed, settling down and making itself comfortable) in the "religious thicket."[11]

Notably, documents emphasized by the Congregations fail to demonstrate anything more than theological disagreement. For example, the reference to "bitter divisions" in the report of the Diocesan Reconciliation Commission, in January 2005 (Congregations' Ex. 15 at 1), cannot possibly mean what the Congregations contend.[12] The Congregations' interpretation of the report of the Diocesan Special Committee (Congregations' Exs. 67 & 126) also does not fit the document and further invites the Court to base a legal decision on purely ecclesiastical words.[13]

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[11] The Congregations also introduced evidence to show that the theological disagreements are serious. *See, e.g.*, Tr. 409-10 ("profound" differences), 427-29 (a "Level 5 conflict"). The Court may not base a property decision on how central or important a theological dispute is, however, because that necessarily requires an inquiry into the dispute to distinguish theological "divisions" from mere "disagreements."

[12] The Congregations' preferred definition of division requires "separation of a group out from an existing denomination." Tr. 55 (Valeri); *see also* Tr. 178 (Irons). But Bishop Guernsey testified that South Riding Church was the first congregation to leave the Diocese, in November 2005, ten months *after* the Reconciliation Commission published its report. Tr. 387-88. Therefore, the much-ballyhooed reference to "bitter divisions in parts of our Diocese" in that report can only refer to theological disagreements. This is just one illustration of the dangers of cherry-picking a form of the word "division" out of religious documents.

[13] The report refers to "divisions within our diocese." Fr. Yates attempted to recast that phrase as a reference to congregations *outside* the Diocese leaving, Tr. 513, but that is not consistent

(footnote continued ...)

In sum, the Congregations failed to prove a legally-cognizable division in the Episcopal Church or the Diocese.

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

Just as the Congregations have failed to show that there has been a "division" in the Episcopal Church or in the Diocese within the meaning of § 57-9(A), they have similarly failed to show that they are now attached to a "branch" of either of those entities.

A. A "branch" must result from a "division" as defined above.

Flowing as it does from a "division" in a church or religious society, as defined above, a "branch" of a church or religious society must be either a part of that church or society or a new organization resulting from a division accomplished by the proper authorities of the church or society pursuant to its polity. *See* Tr. 1003-04 (Douglas), 1038-39 (Mullin). *See also, e.g.*, Merriam-Webster's Collegiate Dict. 138 (10th ed. 1995), "branch" definition 3 ("a part of a complex body: as ... c (1): a division of an organization (2): a separate but dependent part of a central organization").[14]

(footnote continued:)
with the unambiguous wording of the document. Later on that page, the report refers to "walking the way of the Cross together but apart," a phrase that is purely ecclesiastical, and thus, one that this Court cannot constitutionally interpret. On the third page, where the report states that "the division ... may cause some to 'walk apart,'" the Congregations' interpretation again does not fit. If "division" centers on individuals or congregations leaving, as the Congregations suggest, then the division *is* people "walking apart." This passage makes sense only if it refers to theological disagreements, which did cause the Congregations' departure.

[14] That definition also is consistent with the concept of a "branch" as used in the ecclesiastical context, which has its roots in common biblical references that very likely were well known to members of the General Assembly in 1867. Dr. Douglas and Dr. Mullin both referenced a definition of branch that is consistent with the Bible at John 15:5 ("I am the vine, ye are the branches: He that abideth in me, and I in him, the same bringeth forth much fruit: for without me ye can do nothing"). Tr. 873, 1004, 1038. (The quotation is from the King James Version of the Christian Bible, which was used almost universally in the 19th Century.)

It is undisputed that CANA is not a "branch" of the Episcopal Church or the Diocese under those definitions. To the contrary, the Church of Nigeria was originally a part of the Province of West Africa, which was founded as a mission under the jurisdiction of the Church of England. Tr. 679-83. The Church of Nigeria was established as an independent province in 1979, by the General Synod of the Province of West Africa. Tr. 542, 643-44, 680-81. CANA, in turn, was founded as a "convocation and mission" of the Church of Nigeria. Tr. 612. It was incorporated in 2005, as the Convocation of Anglican Nigerians in North America, "to provide ... pastoral oversight for [expatriate] Nigerian clergy and congregations," and most of its priests were Nigerians ordained in the Church of Nigeria. Tr. 311-12, 593, 596-97, 611; Congregations' Ex. 69. *See also* Tr. 623 (Yisa) (CANA "is a part of the Church of Nigeria"). The ADV, similarly, is "a District of CANA," although some of its members are affiliated with the Church of Uganda and not with the Church of Nigeria or CANA. Tr. 309, 332 (Minns). The evidence is undisputed that CANA/ADV was neither created by nor is it a part of the Episcopal Church or the Diocese; and as discussed below, that should be the end of the matter.

The Congregations' primary argument appears to be that CANA and ADV are branches of the Episcopal Church and the Diocese because those entities are "offshoots" of the Episcopal Church and the Diocese. Congregations' Scope Memorandum at 19. *See also* Tr. 18, 23. As the Court observed during the trial (Tr. 615), however, that word does not appear in the statute, and evidence (and arguments) regarding its meaning are not helpful.[15]

The Congregations' position, more generally, appears to be that any entity (sufficiently

[15] Indeed, the word "offshoot" itself has a variety of meanings, rendering its use in argument doubly unhelpful. *See, e.g.*, Merriam-Webster's Collegiate Dict. 138 (10th ed. 1995) at 807, defining "offshoot" as "a collateral or derived branch, descendant, or member: outgrowth"; as "a lateral branch (as of a mountain range)"; and as "a branch of a main stem esp. of a plant."

close in polity) that results from a "division" as they define it – *i.e.* the departure of a few individuals from an existing denomination – should be viewed as a "branch" of the denomination those members left. That argument fails for several reasons.

B. CANA is not a "branch" of the Episcopal Church or the Diocese even under the Congregations' evidence.

First, CANA is not a "branch" of the Episcopal Church or the Diocese even under the Congregations' generous definition of that term. As the Congregations' own evidence demonstrates, at a minimum, a "new organization or polity" must be formed. Tr. 94 (Valeri), 275 (Irons).

Logic dictates that one existing church and its component part – here, the Church of Nigeria and its mission, CANA – does not become a "branch" of a second, separate church simply because some dissenting members of the second church decide to join it. The Roman Catholic Church or one of its dioceses would not become a branch of the Episcopal Church if a group of Episcopal parishes left the Episcopal Church and joined the Roman Catholic Church or a Roman Catholic Church diocese. TEC/Diocese Ex. 68 (Anderson Dep.) at 74-75. So, too, the Church of Nigeria, CANA and the ADV are not branches of the Episcopal Church merely because some congregations that formerly belonged to the Episcopal Church have joined the Church of Nigeria, CANA and the ADV. As discussed above, the Church of Nigeria was founded in 1979. Tr. 542, 643-44. CANA was incorporated in 2005, as the Convocation of Anglican Nigerians in North America, "to provide ... pastoral oversight for [expatriate] Nigerian clergy and congregations." Tr. 311, 593, 596-97, 611; Congregations' Ex. 69. If an existing entity that is joined by some of a church's former congregations thereby becomes a "branch" of that church, then the term is devoid of any meaning or content. Indeed, it is likely under that definition that virtually every Christian denomination in America would be a "branch" of every other such

denomination. The General Assembly could not have intended such an absurd result.

Accordingly, the evidence included *no* references to a pre-existing denomination joined by dissident members of another church or religious society as a "branch" of that church or society. To the contrary, the one analogous example that was discussed at the trial – the Episcopal Missionary Diocese of Mexico, which the Episcopal Church formed to minister to Roman Catholics who were disaffected with the Roman Catholic Church – was *not* considered a "branch" of the Catholic Church but of the Episcopal Church, which had formed it. Tr. 877-78. *See also* Tr. 92-93 (Valeri) (confirming that if individuals left the Lutheran Church to join the Baptist Church, that would not be a division but "merely a transfer or departure").

The evidence included *no* references to a pre-existing denomination joined by dissident members of another church or religious society as a "branch" of that church or society. To the contrary, the one analogous example that was discussed at the trial – the Episcopal Missionary Diocese of Mexico, which the Episcopal Church formed to minister to Roman Catholics who were disaffected with the Roman Catholic Church – was *not* considered a "branch" of the Catholic Church but of the Episcopal Church, which had formed it. Tr. 877-78. *See also* Tr. 92-93 (Valeri) (confirming that if individuals left the Lutheran Church to join the Baptist Church, that would not be a division but "merely a transfer or departure").

Finally, the suggestion that a "branch" under § 57-9 may consist of a separate, pre-existing denomination has been rejected by the General Assembly, and this Court should not rewrite the statute to accomplish that result. *See* SB 1305 (2005), TEC/Diocese Ex. 28. SB 1305 would have expanded the statute to apply to congregational votes determining "*(i)* to which branch of the church or society such congregation shall thereafter belong; *(ii) to belong to a different church, diocese, or society; or (iii) to be independent of any church, diocese, or*

society." (Emphases in original, indicating added language in the proposed legislation.) SB 1305 failed to pass. *See* TEC/Diocese Ex. 27. The General Assembly left the statute as it was, applicable only to congregational votes to join a "branch of the church or society" to which the congregations were attached before those votes and *not* applicable to votes "to belong to a different church, diocese, or society." "This is an indication of the legislative policy in Virginia." *Crook v. Commonwealth*, 147 Va. 593, 601, 136 S.E. 565, 568 (1927).

C. The Congregations' proposed definition of "branch" is unworkable.

Second, even aside from the absence of any new church or denomination that might qualify as a "branch" in this case, the Congregations' broad definition of "branch" is unworkable. Section 57-9 is aimed at clarifying legal rights to property in the event of a structural division in a denomination that might create some genuine doubt as to which of two or more entities holds legal rights and obligations formerly held by the unified church. A court thus must have some principled means of distinguishing what is a "branch" from what is not. The Congregations' definition, however, would encompass new churches, new parts of existing churches, new religious organizations or associations of any type, and virtually any other form of religious organization that might be imagined, so long as it is formed or joined by a few of the mother church's former members. That is effectively no restriction or distinction at all.

The Congregations' experts suggested that the definition of a "branch" for purposes of § 57-9 may be limited by a requirement that the polities of the resulting churches be sufficiently similar. As noted above, however, the need to determine whether a competing polity is close enough to constitute a "branch" or whether a breakaway group is sufficiently large to constitute such a polity would impermissibly entangle courts in a religious thicket. *See* Section I.C, *supra*.

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

Prior to trial the Congregations suggested that there is a "division" within the Anglican Communion within the meaning of § 57-9(A). They failed to pursue that issue at trial, however, calling not a single expert to establish the elements of any such claim. Thus, the evidence at the trial demonstrates without contradiction that the Congregations failed to satisfy their burden of proof and in fact cannot establish any element required under § 57-9(A). As discussed below, the Anglican Communion is not a "church or religious society" within the meaning of § 57-9(A); local Congregations are not "attached" to the Anglican Communion; the Anglican Communion has not divided; and CANA and ADV are not branches of the Anglican Communion.

A. The Anglican Communion and its instruments.

The nature of the Anglican Communion is not disputed. It is described in detail in the testimony of the Church's and the Diocese's experts and in the reports accompanying the Congregations' § 57-9 Petitions. *See* Tr. 844-67, 871-72, 908-14, 935-37, 958-59, 987-88 (Douglas), 1029-31 (Mullin). *See also* Report of Congregational Determination Pursuant to Va. Code § 57-9, CL 2006-15792 (Truro Church) (hereinafter "Report"), ¶¶ 8-11 (describing the Anglican Communion). The Anglican Communion is a fellowship of 38 autonomous provinces (national or regional churches) that trace their respective roots to the Church of England. Tr. 846 (Douglas), 1029 (Mullin); Report ¶ 8. Each province is recognized by the Archbishop of Canterbury as being "in communion" with him[16] and participates in various "instruments of communion": the Lambeth Conferences, the Anglican Consultative Council ("ACC"), and the

[16] The Archbishop of Canterbury (the Primate of the Church of England) is regarded as "first among equals" among the Primates of the Anglican Communion. Tr. 847 (Douglas); 551 (Yisa).

Primates' Meetings.[17] Tr. 849-60; Report ¶ 9.

As Dr. Douglas explained, each instrument of communion has its own purpose in the wider Anglican Communion and is independent of every other instrument – "they do not function in any kind of hierarchical or interrelated way." Tr. 861-62.[18] The Anglican Communion thus has no hierarchical structure, no Constitution and Canons or similar governing documents, no legislative body, no primate, and no ecclesiastical or juridical authority over its member provinces. Nor does it form local congregations or admit them to membership.

B. <u>The Anglican Communion has no hierarchical polity as § 57-9(A) requires.</u>

As noted above, it is apparent on the face of the statute, and confirmed by authoritative case law decisions, that § 57-9(A) uses the term "congregation" to refer to local churches, and "church or religious society" to refer to higher level entities to which congregations are "attached." The statute thus contemplates a hierarchical relationship between congregations and a higher-level entity in an institutional structure. *See Norfolk Presbytery*, 214 Va. at 502, 201 S.E.2d at 755: § 57-9 "recognizes a distinction between an autonomous congregation and one which is *part of a super-congregational or hierarchical denomination* in providing for the

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[17] The Lambeth Conference is a meeting of the bishops of the provinces of the Anglican Communion, held at the invitation of the Archbishop of Canterbury (usually every ten years, since 1867), for discussion and enactment of non-binding resolutions. Tr. 850-52 (Douglas). The ACC was organized in 1971 and includes both lay and clerical representatives of the provinces in the Anglican Communion. It also provides a forum for discussion and non-binding expressions of policy. Tr. 853-57 (Douglas). The Primates' Meeting is a regular meeting of the Primates or heads of the Communion's provinces that first came together in 1979 and usually convenes every two to three years for consultation. Tr. 858-59 (Douglas). The Primates often issue non-binding "communiqués" at the conclusion of their meetings, which describe the "mind of the meeting." Tr. 860 (Douglas).

[18] Abraham Yisa described the Anglican Communion in hierarchical terms, Tr. 551-52, but he also acknowledged the independence of member provinces, Tr. 645-48. He is not, in any event, an expert on the Anglican Communion (and did not know basic facts like the number of provinces, Tr. 667, or location of the Southern Cone, Tr. 601), and was simply mistaken. Tr. 838 (Douglas). As noted above, the Congregations did not put forth an Anglican Communion expert.

determination of property rights upon a division of a church or congregation"; *Baber v. Caldwell*, 207 Va. at 698, 152 S.E.2d at 26: § 57-9(A) "relates to churches, such as Episcopal and Presbyterian churches, that are *subject to control by super-congregational bodies*."[19] (Emphases added.) *See also Green v. Lewis*, 221 Va. at 552-53, 272 S.E.2d at 184; *Buhrman*, 5 Va. Cir. at 502 ("In the case of a supercongregational or hierarchical church ... the will of a majority within the local church or parish does not decide property rights. Such a church is subject to the constituted authorities of the general church").

Resolution of the question whether the Anglican Communion is a "church or religious society," within the meaning of § 57-9(A), therefore first turns on whether the Anglican Communion is a higher level entity in a super-congregational or hierarchical structure, which includes local congregations as members and by which such congregations are subject to control.

As plaintiffs or petitioners, the Congregations bear the burden of proof. Their case on these points, however, is characterized by a total failure of proof. The simple, undeniable fact is that the Anglican Communion does not control its 38 autonomous provinces, much less congregations that belong to those provinces.[20] *See, e.g.*, Congregations' Ex. 61 (Windsor Report) at 14-15 (¶ 16), 23 (¶ 42), 52 (¶ 128), 68-69; Tr. 517-20, 851-53, 856-57, 860. At the most basic level, the Anglican Communion does not exist as an entity which can exert control – it has no polity or governing structure to enable it to do so.

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[19] The decision in *Baber v. Caldwell* turned on this very point. The trial court found that the subject church was not entirely independent of any other church or general society and enjoined the majority faction from interfering with the minority group's right to control church activities and property. The Supreme Court of Virginia reversed, finding that the church was autonomous and "[n]o super-congregational body control[led its] action," 207 Va. at 697, 152 S.E.2d at 26, and therefore that the congregational majority's decisions governed.

[20] The Congregations recognize that parishes are not members of the Anglican Communion; rather, as they rightly note, "[t]he Anglican Communion is a fellowship of those duly constituted Diocese, provinces, and regional churches ...." Report ¶ 8.

In the Anglican Communion,

> each autonomous church has the unfettered right to order and regulate its own local affairs, through its own system of government and law. Each such church is free from direct control by any decision of any ecclesiastical body external to itself in relation to its exclusively internal affairs (unless that external decision is authorized under, or incorporated in, its own law).

Congregations' Ex. 61 at 35-36 (¶ 78). *See also* TEC/Diocese Ex. 6 at 9 (Congregations' Responses to Diocese's and Episcopal Church's Requests for Admissions 26-27, admitting that the Anglican Communion exercises no juridical authority over its autonomous provincial members). Abraham Yisa, the Registrar of the Church of Nigeria and Chairman of CANA's Board of Trustees, testified that the Church of Nigeria has its own General Synod (its legislative body) and that its actions do not require approval and cannot be overruled by any other "Anglican" entity. Tr. 645-48.[21] CANA Bishop-elect Anderson similarly recognized that each province develops its own set of rules. TEC/Diocese Ex. 68 at 62-63. Indeed, the primates of the Anglican Communion are "cautious of any development which would seem to imply the creation of an international jurisdiction which could override [their] proper provincial autonomy." TEC/Diocese Ex. 19 at 2 (¶ 10).

Thus, resolutions of the ACC or the Lambeth Conference or communiqués from Primates' Meetings are not binding on any province unless that province, through its polity, adopts the resolution. Tr. 852-60 (Douglas), 679 (Yisa). Only one of the Anglican

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[21] Counsel for the Congregations stated in opening that "Registrar Yisa will explain that the Anglican Communion is a church and a religious society and that Anglican parishes are through their Dioceses and provinces attached to the Anglican Communion." Tr. 28. The Congregations failed to deliver on that promise. Yisa was never called, offered or qualified as an expert witness (on anything); he did not "explain" that the Anglican Communion is a church or a religious society; and to the extent that he testified that Anglican parishes are attached to the Anglican Communion, through their Dioceses and provinces, that testimony did not address the element of control necessary to demonstrate attachment within the meaning of § 57-9.

Communion's "instruments of communion" – the Anglican Consultative Council (ACC) – has any governing document at all, and a cursory review of that document merely confirms that the ACC's role is entirely advisory. *See* TEC/Diocese Ex. 42 at 1.

Because the Anglican Communion exercises no control over the autonomous provinces or individual parishes, it is not a hierarchical or super-congregational church. Under binding Virginia authority, therefore, § 57-9(A) is simply not applicable.

C. The Anglican Communion is not a "church or religious society."

In addition to the fact that the Anglican Communion is not a hierarchical body, as § 57-9(A) requires, the Anglican Communion also is not a "church or religious society" under the statute. Dr. Douglas testified, for example, that "[i]n an organizational sense," the Anglican Communion is "not a global church" but is instead "a family of churches, 38, if you will, regional and national churches that share a common history of their understanding of the church catholic through the See of Canterbury." Tr. 844, 846. Dr. Mullin confirmed that the Anglican Communion is not a church or religious society in any organizational sense. Tr. 1029, 1030-31.

Dr. Mullin explained that a "church" is a "group of Christians which agree to … follo[w]… rules of worship" such as following a common liturgy, and rules concerning ordination, ordering, and discipline. Tr. 1030.[22] *See generally, e.g., In re Estate of Douglass*, 94 Neb. 280, 284, 143 N.W. 299, 300 (1913) (citing "Webster" as "defin[ing] the word 'church' as a body of Christian believers holding the same creed, observing the same rights and acknowledging the same ecclesiastical authority"); *Spiritual Outreach Soc'y v. Commissioner,*

[22] Dr. Mullin observed that the term church also can be used in the narrow sense to define a local congregation, or a broad sense to define the universal "church Catholic" in which all Christians participate. Section 57-9(A), however, clearly deals with organizations, larger than an individual congregation, which would be capable of division. The only possible definition intended by the statute is the one identified above.

927 F.2d 335 (8th Cir. 1991) (relying on "fourteen criteria which the Internal Revenue Service uses as a framework for its decisions" as "a guide, helpful in deciding what constitutes a church," and specifically (1) a distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any other church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11) regular congregations; (12) regular religious services; (13) Sunday schools for religious instruction of the young; and (14) schools for the preparation of its ministers).

The Anglican Communion entirely lacks most of those characteristics. As Dr. Douglas testified, the "presentation of the Anglican Communion as some kind of global whole or global Anglican church is a misnomer at best and a misrepresentation at worst ...." Tr. 863. The Anglican Communion has no governing structure of any kind; it has no means of control over either congregations or provinces; and it has no common prayer book or common liturgy. Tr. 654, 1030-31. Its members are its 38 autonomous provinces. Tr. 1039. *See also* Congregations' Ex. 70 at 1 (ADV Articles of Incorporation) (describing the Anglican Communion as "a Fellowship comprising ... Dioceses, provinces, and regional churches ...."); TEC/Diocese Ex. 1 at 1 (Episcopal Church Constitution Preamble) (same). The Anglican Communion does not form or admit individual congregations or parishes, baptize or confirm members or ordain clergy. Each of these responsibilities is borne by the individual provinces and their dioceses. The evidence thus establishes that the Anglican Communion is "a communion of churches, not of individuals," and is not itself a "church." Tr. 1029-31, 1033.

Nor is the Anglican Communion a "religious society." There is no reason to think that

the General Assembly in 1867 used the term "religious society" as anything other than a synonym for "church," out of respect for those religious denominations that prefer to be known as religious societies rather than churches – the Society of Friends (the Quakers), for example. *See* Tr. 1031-33 (Mullin). Neither Dr. Valeri nor Dr. Irons nor any other witness testified to the contrary. *See generally In re Estate of Douglass*, 94 Neb. at 284, 143 N.W. at 300 ("The terms 'church' and 'society' are used to express the same thing, namely, a religious body organized to sustain public worship"); *see also* Va. Code §§ 20-23 (orders authorizing "a minister of any religious denomination ... in regular communion with the religious society of which he is a reputed member" to perform marriage ceremonies), 20-26 (marriages between persons "belonging to any religious society which has no ordained minister").

Even if the General Assembly intended to use the term "religious society" in § 57-9(A) other than as a synonym for "church," the Anglican Communion would not qualify. As Dr. Douglas explained, a religious society also can be a "voluntary association of individuals who come together generally for some missiological or mission driven reason." Tr. 844-45. The Anglican Communion does not fit this description either. Dr. Douglas and Dr. Mullin were qualified as experts on the history and mission of the Anglican Communion, Tr. 838, 1028, and both testified that they had never heard the Anglican Communion referred to as a religious society. Tr. 845-46, 1034. There was no evidence to the contrary. Indeed, the evidence is undisputed that the Virginia General Assembly could not have intended the term "religious society" to refer to an international "communion" or association of independent churches like the Anglican Communion, as none existed in 1867 when § 57-9 was adopted. Tr. 1033-35 (Mullin).

D. <u>Parishes are not "attached" to the Anglican Communion.</u>

In many ways, the terms "attached" and "church or religious society" are interrelated, as both, at their core, deal with the relationship and bond between a congregation and its

denomination. The evidence that shows (or fails to show) that a church denomination exerts control over a congregation also demonstrates the "attachment" (or lack thereof) of that congregation to the larger church. Thus, attachment connotes a "[b]elonging to, under the authority of a set of Constitution and canons that are agreed-upon polity of a church." Tr. 872 (Douglas); *see also* Tr. 1036 (Mullin) (the term "attachment" refers to the "rules of worship, of order and of ministry ... that bind that individual congregation"). As Dr. Douglas explained, attachment "implies an organizational framework by which a body agrees to and participates with and under a set of guidelines, rules in a larger body." Tr. 968.[23] The definitions articulated by Drs. Douglas and Mullin are consistent with the holding of the Supreme Court of Virginia in *Baber v. Caldwell, supra.*

Under this framework, parishes cannot be "attached" to the Anglican Communion. As discussed above, the Anglican Communion does not control provinces, let alone parishes. Rather, as Dr. Douglas explained, local congregations of the Episcopal Church are attached to a Diocese and "also in certain key ways to the National Church, but they are not attached to the Anglican Communion." Tr. 1035-36. The documentary and testimonial evidence presented during the hearing overwhelmingly demonstrated that the relationship between a parish and a Diocese and the Episcopal Church, which can logically and usefully be described as one of "attachment," is fundamentally different from the relationship between a parish and the Anglican Communion. *See, e.g.*, TEC/Diocese Ex. 7, 9, 10, 11, 12, 13 ¶ 1.02, 15, 68 at 22; Tr. 345-46 (Minns); 393-96 (Guernsey) Tr. 1036-37 (Mullin); 506-09 (Yates). The same term simply

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[23] *See also* Tr. 863, 871 (Douglas): "presentation of the Anglican Communion as some kind of global whole or global Anglican church is a misnomer at best and a misrepresentation at worst ...." An individual church therefore "cannot be attached to the Anglican Communion because ... the Communion doesn't exist in that kind of reality."

cannot be used to define both relationships.

E. The Anglican Communion has not divided and CANA is not a branch of the Anglican Communion.

Because the Anglican Communion is not a "church or religious society" to which congregations are "attached," § 57-9(A) simply does not apply to any "division" of the Anglican Communion that may occur or to any "branch" of the Anglican Communion that may exist, however those terms may be defined. Nevertheless, the evidence further shows that the Anglican Communion has not "divided" and that CANA is not a "branch" of the Anglican Communion.

First, and most fundamentally, the Anglican Communion cannot divide because, as discussed above, it lacks a polity or structure to do so. As Dr. Douglas explained, "it really wouldn't be possible for the Anglican Communion to divide because that presupposes some kind of intact whole that somehow will be broken by some action." Tr. 862. In fact, Dr. Douglas noted that to divide, the Anglican Communion would first have to construct an "Anglican Church Global" that could be divided. Tr. 964. The Congregations presented no evidence to the contrary.

Even assuming the Anglican Communion could divide in some recognizable way, it has not. The evidence established that the Episcopal Church continues "in communion" with the Archbishop of Canterbury, Tr. 865, and otherwise remains a full part of the Anglican Communion. As Dr. Douglas explained, no Instrument of Communion can expel a province from membership in the Anglican Communion. Tr. 935-36. In any event, the Episcopal Church continues to participate in each of the Instruments. Its bishops have been invited to the 2008 Lambeth Conference, and indeed Dr. Douglas of the Episcopal Church is a member of the Archbishop's Design Committee for that conference. Tr. 365-66, 865, 994-95, 1202. Its Presiding Bishop continues to attend Primates' Meetings, and in fact she was recently elected to

the Joint Standing Committee of the Primates and the ACC. Tr. 866. Its representatives continue to participate in the ACC. Tr. 869. The Church of Nigeria similarly continues to affirm its own membership in the Anglican Communion. Tr. 623, 665 (Yisa).

Thus, as Bishop-elect Anderson recognized, each of the 38 provinces remains in communion with the See of Canterbury, even if those relationship are strained to some degree. TEC/Diocese Ex. 68 at 44. While the Diocese and the Episcopal Church concede that some provinces and primates are unhappy with the Episcopal Church and have made statements of "broken" or "impaired" communion, this simply establishes, at most, a strained relationship between the provinces and does not evidence a division of the Anglican Communion itself.[24] With respect to "broken" or "impaired" "communion," the Congregations ask the Court to resolve what Anglican leaders themselves cannot – the nature of the religious "communion" between autonomous Anglican entities worldwide. *See generally* Tr. 863, 871, 947-48, 922-23, 992-93. "Communion" is a purely ecclesiastical and religious concept with no secular meaning. Its definition is not a justiciable matter.

Because there has been no division of the Anglican Communion, there are no "branches" of the Anglican Communion to which the Congregations might choose to belong. Rather, the Congregations joined CANA and the ADV. As the Congregations' own witnesses explained, however, "CANA is not claiming to be a branch of the Communion directly, but through its relationship with the Church of Nigeria. It's not a separate branch, it's connected through that church." Tr. 364 (Minns). *See* Tr. 372-73 (Minns), 623 (Yisa); Congregations' Exs. 13, 14, and 70; TEC/Diocese Ex. 1 at 1. Moreover, because CANA and ADV are incursions into another

[24] Mr. Yisa testified that certain activities no longer take place between the Episcopal Church and the Church of Nigeria. Tr. 591-92. He confirmed, however, that these activities are not necessary elements of "communion." Tr. 666-70.

already established province, the Anglican Communion looks at them "with somewhat of a dim view in the wider communion." Tr. 879 (Douglas); *see* Tr. 1039-40 (Mullin). Their Bishops therefore have not been recognized by the Archbishop of Canterbury and have not been invited to the next Lambeth Conference. Tr. 879-80 (Douglas), 365 (Minns), 396-97 (Guernsey).[25]

In short, CANA and ADV arguably are branches of the Church of Nigeria, but they are not branches of the Anglican Communion.

IV. 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 First Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment, *Everson v. Board of Education*, 330 U.S. 1, 8 (1947), states that "Congress shall make no law ... prohibiting the free exercise [of religion]." Article I, § 16 of the Constitution of Virginia provides similarly, but at greater length:

> That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience ....

For the reasons stated in this section, application of § 57-9 in a manner that would effectively restructure the Episcopal Church and allow the Congregations unilaterally to "divide" the Episcopal Church and the Diocese and divest them of their interests would violate these bedrock constitutional principles. As shown above, the statute should be construed to avoid such constitutional impediments; alternatively, however, it must be held unconstitutional.

It is beyond dispute that the First Amendment protects the right of religious organizations

[25] The Church of Nigeria may be described as a "branch" of the Anglican Communion, though obviously not one that has resulted from a "division" of that body. Moreover, for the reasons just described, it is not clear that CANA and ADV are really a part of that "branch" of the Anglican Communion as far as the Archbishop of Canterbury is concerned.

to be governed by their own rules. "[I]ssues of church governance ... are unquestionably outside the jurisdiction of the civil courts." *Bowie v. Murphy*, 271 Va. 127, 133, 624 S.E.2d 74, 78 (2006). "Each person's right to believe as he wishes and to practice that belief according to the dictates of his conscience ... is fundamental to our system," and "[t]his basic freedom is guaranteed not only to individuals but also to churches in their collective capacities." *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

As the Supreme Court stated in *Serbian Eastern Orthodox*, 426 U.S. at 721-22 (quoting *Kedroff*, 344 U.S. at 116), "religious freedom encompasses the 'power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *See also, e.g., Jones v. Wolf*, 443 U.S. at 602; *Hull Church*, 393 U.S. at 446 (quoting *Watson v. Jones*, 80 U.S. at 728-29); *Kedroff*, 344 U.S. at 107 (legislation transferring control of church property from one hierarchy to another unconstitutionally prohibits the free exercise of religion);[26] *Kendysh v. Holy Spirit Byelorussian Autocephalic Orthodox Church*, 683 F. Supp. 1501, 1512 (D. Mich. 1987), *aff'd mem.*, 850 F.2d 692 (6th Cir.), *cert. denied*, 488 U.S. 994 (1988) ("Even while utilizing the 'neutral principles analysis,' this Court must use strict deference when the relevant documents raise ecclesiastical matters. Deference

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[26] In *Kedroff* the Court "held that the right conferred under canon law upon the Archbishop of the North American Archdiocese of the Russian Orthodox Greek Catholic Church, as the appointee of the Patriarch of Moscow, to the use and occupancy of the St. Nicholas Cathedral in New York City ... was 'strictly a matter of ecclesiastical government,' and as such could not constitutionally be impaired by a state statute ... purporting to bestow that right on another." *Kreshik*, 363 U.S. at 190-91. *Kreshik* in turn held that the courts could not impair such rights by application of common law.

Kedroff was decided at the height of the Cold War and resulted in the Communist-controlled Russian Orthodox Church regaining control of church property in New York, contrary to the will of the democratically elected New York legislature and the local parishioners. That shows the strength and vitality of the constitutional principles involved here.

requires a recognition of the hierarchy's governing statutes").

As already discussed, the Constitution and Canons of the Episcopal Church and the Diocese – the laws of the church that are binding upon all church members, *see* § I.E, *supra* (citing Tr. 395 (Guernsey), 507-08 (Yates), 1200 (Lee)) – do not allow the unilateral action of a parish to "divide" the Diocese or the Episcopal Church. Rather, the Episcopal Church has established a structure under which dioceses and parishes are inextricably bound to the larger Church. As the Church's Constitution and Canons make clear, Dioceses form and can be divided or reunited *only* by action of the General Convention. TEC/Diocese Ex. 1 (TEC Const.) Art. V, Canon I.10, Canon I.11. In turn, local parishes and missions are formed and become a part of the Church by action of their diocese. *See* TEC/Diocese Ex. 1 (TEC Const) Canon I.13(2); Ex. 3 (Diocese Const) Canon 10.

Once created, a parish (and a diocese) is a creature of and exists only as part of the diocese and the Episcopal Church. Tr. 1233-34 (Beers). It has pledged to accede to the Constitution, Canons, and Discipline of the Church as a condition of its formation and recognition as a constituent part of the larger Church. TEC/Diocese Ex. 3, Canon 10.1, 2. *See, e.g.*, TEC/Diocese Exs. 7, 8 (pg. 3913); *Brooke*, 54 Va. at 320 ("to constitute a member of any church, two points at least are essential, without meaning to say that others are not so, a profession of its faith and a submission to its government"). Its officers are individually bound to "well and faithfully perform the duties of their office" in accordance with those authorities and requirements. TEC/Diocese Ex. 1, Canon I.17(8). *See also id.*, Article VIII (ordination oath); Tr. 339-40 (Minns) (same), 393-94 (Guernsey) (same), 506-07 (Yates) (same); TEC/Diocese Ex. 3, Canon 11.8 (vestry oath); Tr. 345-46 (Minns) (same), 449-50 (Julienne) (same), 702-03 (Allison) (same). And, while congregants of course can leave the Church whenever they wish,

the Church's canons make clear that only the General Convention can structurally "divide" either the Church itself or one of its dioceses. TEC/Diocese Ex. 1, Canon I.10(3), I.11(3)(b); *see also* Tr. 842-44 (Douglas), 1220-21 (Beers). Such divisions cannot be effected either by a diocese or a parish (or group of parishes) acting alone. *Id.*

Similarly, and reinforcing the above described principles and polity, numerous other canonical provisions establish the interest of the Episcopal Church in local church properties. For example, Canon II.6(1), requires that consecrated real property (that is, parish property dedicated for worship and other ministry) be "secured for ownership and use by a Parish, Mission, Congregation, or Institution affiliated with this Church and subject to its Constitution and canons." Canons II.6(2) and I.7(3) further restrict the holding and use of parish property and preclude an local parish from alienating or encumbering any real property, consecrated or unconsecrated, without the consent of the Diocese. Further tying local parish property to the larger Church's mission, Canon III.9(5)(a)(2) provides that it is the ordained Episcopal rector of each parish who is at all times entitled to the use and control of parish property "for the purpose of the office," subject to and consistent with the Episcopal Church's Book of Common Prayer, the Church's Constitution and Canons, and the direction of the diocesan bishop under Canon III.9(5)(a)(1).

Episcopal Church Canon I.7(4), which is sometimes called the "Dennis Canon," confirms:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

TEC/Diocese Ex. 1 at 37. Canon 15.1 of the Diocese of Virginia is similar, and in pertinent part

it is essentially identical:

> All real and personal property held by or for the benefit of any Church or Mission within this Diocese is held in trust for The Episcopal Church and the Diocese of Virginia. The Vestry of every Church and, when authorized by the Bishop, the Vestry Committee of a Mission, shall elect Trustees for appointment pursuant to law to hold title to such property.

TEC/Diocese Ex. 3 at 27.

The notion that a parish of the Episcopal Church may, by majority vote of its leadership or membership, remove the parish itself from the body of the Church, cause the Church to "divide," and retain the parish's property and infrastructure for their own use in association with some other group is inconsistent and cannot coexist with the above-described rules. And as the applicable authorities make clear, the General Assembly cannot impose rules on the church contrary to those established by the Episcopal Church and Diocese themselves. *See* Sections I(A)(4) and pp.40-41, *supra*.

The "Dennis Canon" was enacted in response to an invitation extended by the U.S. Supreme Court in *Jones v. Wolf*, *supra*, 443 U.S. 595, which held that civil courts, consistent with the First and Fourteenth Amendments, may resolve church property disputes on the basis of "neutral principles of law." *Id.* at 604. Four dissenting Justices argued that "whenever a dispute arises over the ownership of church property, civil courts must defer to the 'authoritative resolution of the dispute within the church itself'" (*id.* at 604-05, quoting dissenting opinion, *id.* at 614), "to protect the free exercise rights 'of those who have formed the association and submitted themselves to its authority'" (*id.* at 605-06, quoting dissenting opinion, *id.* at 618). The Court responded to that argument as follows:

> The neutral-principles approach cannot be said to "inhibit" the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods. Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. *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.

Id. at 606 (emphases added). Reiterating this important point, the Court again explained (at 607-08):

> If in fact Georgia has adopted a presumptive rule of majority representation, *defeasible upon a showing that the identity of the local church is to be determined by some other means*, we think this would be consistent with both the neutral-principles analysis and the First Amendment.... *Most importantly, any rule of majority representation can always be overcome*, under the neutral-principles approach, either *by providing, in the corporate charter or the constitution of the general church*, that the identity of the local church is to be established in some other way, or by providing *that the church property is held in trust for the general church and those who remain loyal to it.* [Emphases added.]

As those passages demonstrate, the ability of a hierarchical church to overcome a "rule of majority representation" and "ensure ... that the faction loyal to the hierarchical church will retain the church property" was essential to the *Jones* Court's conclusion that application of a "neutral principles" rule would not violate the First Amendment. To hold that church property disputes will be governed by "neutral principles," on the one hand, but that § 57-9's "rule of majority representation" *cannot* be overcome by canon law provisions such as those described above, on the other, would be both to defy the Supreme Court's holding that "the civil courts will be bound to give effect" to such provisions and to eviscerate the entire basis for its holding that the neutral principles approach does not "'inhibit' the free exercise of religion."[27]

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[27] As discussed in *Jones*, 443 U.S. at 601-02, in *Carnes v. Smith*, 236 Ga. 30, 222 S.E.2d 322, *cert. denied*, 429 U.S. 868 (1976), the Georgia Supreme Court (whose decision was affirmed in *Jones*), applying "neutral principles," enforced an express trust provision in a hierarchical church's constitution and awarded property to the parent church.

(footnote continued ...)

Ultimately, of course, it is not necessary for this Court to decide whether § 57-9 violates the national or state Constitutions. That question would be presented only if the Court finds that the Congregations' construction of the statute is the only construction available, and it is not. Statutes must "'be construed in such a manner as to avoid a constitutional question wherever this is possible.'" *Virginia Society for Human Life, Inc. v. Caldwell*, 256 Va. 151, 157, 500 S.E.2d 814, 816-17 (1998) (quoting *Eaton v. Davis*, 176 Va. 330, 339, 10 S.E.2d 893, 897 (1940)). "[A] finding of ambiguity is *not* a prerequisite for applying a narrowing construction to preserve a statute's constitutionality. To the contrary, we may construe the plain language of a statute to have limited application if such a construction will tailor the statute to a constitutional fit." *Id.* at 157 n.3, 500 S.E.2d at 817 n.3 (emphasis added). This is an essential, fundamental rule of statutory construction, grounded in the doctrine of separation of powers and the principle of judicial restraint. *See, e.g., Harris v. United States*, 536 U.S. 545, 556 (2002) ("the canon's goal of eliminating friction with our coordinate branch"); *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991).

Jones, Kedroff and *Kreshik*, among other authorities, establish that neither the General

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(footnote continued:)

> Indeed, there is a strong presumption that where there is a hierarchical polity and the governing constitution provides that all property ultimately resides with the national church, a "neutral principles" analysis will result in the property being held in trust by the local for the national church. One commentator has written:
>
> > The fact that the local church's charter or other documents contained provisions inconsistent with hierarchical control of local property or was amended to have this significance, and the fact that the church property in question was paid for entirely out of funds raised by the local congregation, and not with any financial help from the denomination, have been held to have no effect on the rule that the parent body of a hierarchical church has the right to control local church property.
>
> *Kendysh v. Holy Spirit Byelorussian Autocephalic Orthodox Church*, 683 F. Supp. at 1512 (quoting 52 A.L.R.3d at 335).

Assembly nor the courts may constitutionally substitute their own rules of church organization and governance for those established by the Church and the Diocese themselves. Similarly, neither the General Assembly nor the courts may constitutionally divest the Diocese or the Episcopal Church of the trust, contractual or proprietary rights conferred by the laws of the Church. Section 57-9(A) must be construed in a way that avoids either of those results. That construction is described above, and is in fact the most logical construction available in light of the legal and historical context. Thus, there has been no "division" in any "church or religious society" to which the Congregations were "attached," CANA/ADV are not "branches" of the Episcopal Church or the Diocese, and the statute implicitly recognizes the validity of denominational trust interests created by canon law. Alternatively, however, if the Court determines that § 57-9 *cannot* be construed in a way that avoids these constitutional issues, then § 57-9 must be held unconstitutional for the reasons stated above.

V. 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.

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion." Article I, § 16 of the Constitution of Virginia states that "the General Assembly shall not prescribe any religious test whatever, or *confer any peculiar privileges or advantages on any sect or denomination.*" (Emphasis added.)

The First Amendment's Establishment Clause forbids laws that favor some religious groups over others. As stated in *Everson*, 330 U.S. at 15, for example, "[t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions,

or prefer one religion over another."

The principle that "government should not prefer one religion to another, or religion to irreligion" is "a principle at the heart of the Establishment Clause" and "well grounded in our case law." *Board of Education v. Grumet*, 512 U.S. 687, 703, 704 (1994). *Accord, e.g., McCreary County v. ACLU*, 545 U.S. 844, 860 (2005): "The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion'" (citations omitted).

Virginia courts have seldom construed or applied Article I, § 16; but when they have done so, they have looked to the United States Supreme Court's construction of the Establishment Clause as a guide. *See, e.g., Habel v. Industrial Development Authority*, 241 Va. 96, 100, 400 S.E.2d 516, 518 (1991) ("We have not had occasion to construe [Article I, § 16] in the context of the issues raised in this case. However, we find the Supreme Court's construction of the Establishment of Religion Clause of the First Amendment ... helpful and persuasive in this case in construing the analogous state constitutional provision"). The plain language of Article I, § 16, quoted above, mandates incorporation of the neutrality principle of federal law. *Cf. Brooke v. Shacklett*, 54 Va. at 318 (denouncing the suggestion that the General Assembly acted with "the design of making a most unjust and invidious discrimination" against congregations which receive their ministers by assignment of hierarchical bodies "and in favor of those who have the selection of their own pastors").

In *Larson v. Valente*, 456 U.S. 228 (1982), the Supreme Court applied the neutrality principle and invalidated a portion of a statute that required charitable organizations to register with the State and file "extensive annual report[s]." All religious organizations initially were exempt, but in 1978 the legislature amended the Act to limit the exemption to religious

organizations that received more than half of their total contributions from members or affiliated organizations (the "fifty per cent rule"). The Supreme Court held that the fifty per cent rule was invalid as a facial discrimination among religious groups.

The Court began with the proposition that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id.* at 244. "[W]hen we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Id.* at 246. *Accord, e.g., Employment Division v. Smith*, 494 U.S. 872, 886 n.3 (1990) ("Just as we subject to the most exacting scrutiny laws that make classifications based on race ... so too we strictly scrutinize governmental classifications based on religion").)

The *Larson* Court held that "[t]he fifty per cent rule ... clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents." 456 U.S. at 246. "Section 309.515, subd. 1(b), is not simply a facially neutral statute, the provisions of which happen to have a 'disparate impact' upon different religious organizations. On the contrary, § 309.515, subd. 1(b), makes *explicit and deliberate distinctions between different religious organizations*." *Id.* at 247 n.23 (emphasis added).

If interpreted as the Congregations would like, § 57-9, like the statute at issue in *Larson*, would make "explicit and deliberate distinctions between different religious organizations" and thus "gran[t] denominational preferences" of two sorts: it would prefer churches with congregational forms of government over hierarchical churches whose property is held by trustees (as discussed at greater length in section V.B, *infra*); and it would prefer hierarchical churches whose property is *not* held by trustees over those that use trustees to hold title.

This is not a theoretical distinction. The parties have stipulated that hierarchical

denominations in Virginia hold local church property by a variety of means, including in the name of trustees, in the congregation's corporate name, in the name of the Bishop of the Diocese, and in the name of the mother church ("the International Church of the Foursquare Gospel, a California religious corporation") or its Presiding Bishop ("the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints, a Utah corporation sole"). Stipulation filed Dec. 6, 2007. Section 57-9 applies only to hierarchical churches whose property is held by trustees, including the Episcopal Church. It does not apply at all to the Roman Catholic Church, the Greek Orthodox Church, the Foursquare Church or the Church of Jesus Christ of Latter-day Saints, among others. The Congregations' version of the statute would thus discriminate among religious groups, both facially and as applied, by giving congregational majorities the power to control property that happens to be held in the name of trustees but granting no similar power where property is held differently.

The Court therefore must "tur[n] to a strict scrutiny analysis, an exercise which usually sounds the death knell for constitutionally suspect laws." *Falwell v. Miller*, 203 F. Supp. 2d 624, 631 (W.D. Va. 2002). Under that standard, a statute "must be invalidated unless it is justified by a compelling governmental interest ... and unless it is closely fitted to further that interest." *Larson*, 456 U.S. at 247 (citations omitted). There is no governmental interest, much less one "of the highest order," in applying a statutory "rule of majority representation" only to those hierarchical churches that hold local church property by trustees, and that should be the end of the matter.

B. Under the Congregations' interpretation, § 57-9 fails the three-part *Lemon v. Kurtzman* test.

Finally, if § 57-9 were construed as the Congregations would like, it would also have to be invalidated as unconstitutional under the Supreme Court's three-part test set forth in *Lemon v.*

Kurtzman, 403 U.S. 602, 612-13 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion ...; finally, the statute must not foster 'an excessive government entanglement with religion.'" (Citations omitted). The Congregations' construction of the statute does not pass that test.[28]

First, according to the Congregations' own evidence, § 57-9 does not have a secular legislative purpose. Its sponsor, House Speaker John Baldwin, was the lawyer for at least one Methodist separatist congregation which filed a petition in the Circuit Court of Augusta County to obtain an order declaring the congregation's interest in local church property. Tr. 221, 223. The Congregations' own evidence is that the object of the statute was "to protect local religious congregations who when their church divided were compelled to make choice between the different branches of it, and to allow them in some such cases to take their property with them ...." Tr. 223-24. In addition, the reference to "some such cases" is an acknowledgement that the statute treats different religions differently, and that also is not a legitimate secular purpose.[29]

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[28] As the Court stated in *Larson*, the neutrality analysis laid out above is the one that is most directly applicable to statutes that discriminate among religions. 456 U.S. at 252. *Larson* also recognized, however, that the same concerns that motivate the neutrality analysis also motivate the separate analysis laid out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), for state actions that benefit all religions. 456 U.S. at 252. The Court in *Larson* therefore went on to invalidate the statute before it under the *Lemon* test as well. The same result should obtain here.

[29] Indeed, it is not clear that Virginia's church property statutes have always had legitimate, neutral purposes with respect to their treatment of hierarchical churches. The Supreme Court of Virginia has stated that certain provisions were enacted for the purpose of restricting such churches. *See Maguire v. Loyd*, 193 Va. 138, 149, 67 S.E.2d 885, 893 (1951) ("In the light of the historical background, the constitution, and the legislative enactments, it is clear that the economic and resulting political power of churches was what was sought to be limited"). *See also id.* at 149, 67 S.E.2d at 892 (quoting as "very pertinent" a passage from *Gallego's Ex'rs v. Attorney General*, 30 Va. (3 Leigh) 450 (1832), that refers to the General Assembly's "hostility," "jealousy," and "fearful[ness]" with respect to religious incorporation, religious institutions' accumulation of possessions, and the granting of privileges to religious entities).

Under the Congregations' interpretation, moreover, the statute would impose principles of congregational governance on hierarchical churches, by allowing congregational majorities to override denominational canon laws. Therefore, it also fails the second part of the *Lemon v. Kurtzman* test. Permitting congregations belonging to hierarchical denominations that hold property in the name of trustees (as discussed above) to leave the denomination and take church property, by congregational majority votes, would advance congregational governance in violation of the Establishment Clause. It also would specifically retard and inhibit hierarchical governance; in a denomination like the Episcopal Church, the power to enforce decisions of the hierarchy depends in part on the ability to enforce church rules and maintain control of church assets, including property. By legislative fiat, § 57-9 would thus impose congregational majority rule on churches which are hierarchical in constitution and put them at risk of losing valuable church property (in the case of the CANA Congregations, infrastructure which the Diocese has been building for centuries) to the whim of congregational majorities.

Finally, adoption of the Congregations' interpretation of § 57-9 would create excessive governmental entanglement with religion. Its manifest purpose would be to impose a church governance rule by state legislation. The statute instead should be construed as recognizing denominational trust interests created by canon law, to avoid constitutional impediments, as discussed above. If it is not construed in that fashion, however, then it fosters excessive governmental (*i.e.*, judicial) entanglement with religion by directing the courts to impose principles of congregational governance on hierarchical religious institutions.

Section 57-9 was enacted immediately following the Civil War, a time of rebuilding following decades of political, social and religious turmoil and four long years of intense military hostilities. There was substantial evidence at trial of the impact of the war on Virginia's

churches. The war implicated issues of faith and morality, and the debates over these issues resonated throughout Virginia's churches. By enacting § 57-9, the General Assembly eased the hurdles faced by certain Virginia congregations (such as the one represented by Col. Baldwin) seeking succession rights to valuable church property in the rebuilding years, after the denominations to which they had previously been attached had divided by actions of their governing bodies. The Augusta County petitions were filed *ex parte*, without intervention by the national churches, Tr. 264; and the Circuit Court "uniformly" granted the petitions while declining to address a challenge to the constitutionality of the statute. Tr. 223, 259, 262.

This is not 1867. It is not a time of domestic war and rebuilding, and the Commonwealth is not facing a pressing need for legislation which provides churches with a procedure for resolving property succession rights following the radical, structural division of its three most prominent denominations. The Episcopal Church is not a congregational church. It is an intact hierarchical church, with Constitutions and Canons which prohibit a congregation from voting to sever its ties from a diocese and the Episcopal Church and retain church property. If it is construed as allowing congregational majorities to impose their decisions on hierarchical churches to which they belong, therefore, § 57-9 unconstitutionally imposes principles of congregational governance on the Diocese and the Episcopal Church and violates the Establishment Clauses of the First Amendment and Article I, § 16.

CONCLUSION

The Congregations have failed to carry their burden of proof on any, much less every, element of their case under Va. Code § 57-9(A). The record demonstrates that there has been no "division" in the Episcopal Church or the Diocese, within the meaning of the statute, and that the Congregations have not joined a "branch" of the Episcopal Church or the Diocese. The record

also demonstrates that the Anglican Communion is not a "church or religious society" to which individual congregations are "attached"; and that even if that were not so, there is no "division" in the Anglican Communion, nor have the Congregations joined a "branch" of the Anglican Communion, within the meaning of § 57-9(A). Their interpretation of the statute would render it unconstitutional. Their entire case, in short, is deficient. Their § 57-9 Petitions and Pleas in Bar therefore must be denied.

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