# In the
# SUPREME COURT OF VIRGINIA

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**RECORD NO. _____**

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**THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA,**

*Appellant,*

**v.**

**TRURO CHURCH, *et al.*,**

*Appellees.*

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# PETITION FOR APPEAL

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## SUMMARY

This case is about religious liberty. It directly affects the constitutional right of churches to order their own affairs. The primary issues are the following questions of first impression: (1) whether Va. Code § 57-9(A), an 1867 statute which the lower court held imposes a congregational majority rule requirement on hierarchical churches, overrides the "neutral principles" rule for resolving property disputes between congregations and denominations adopted in *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980), and *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 201 S.E.2d 752 (1974); (2) whether property may be held in trust for hierarchical churches under Va. Code § 57-7.1; and (3) whether §§ 57-9(A) and 57-7.1, as construed below, are constitutional.

Numerous decisions of this Court emphasize the distinction between congregational churches (those "entirely independent of any other church or general society"), such as the Baptist Church, and hierarchical churches, such as the Episcopal and Roman Catholic Churches. *See*, *e.g.*, *Green*, 221 Va. at 553, 272 S.E.2d at 184, and cases cited therein. Congregational churches are "not subject to any external control" and "are governed by the will of the majority." Hierarchical churches, on the other hand, "may, and customarily do, establish their own rules for discipline and internal

government"; and "member[s] of such a church, by subscribing to its discipline and beliefs, accep[t] its internal rules." *Reid v. Gholson*, 229 Va. 179, 188-89 & n.13, 327 S.E.2d 107, 112-13 (1985).

The Circuit Court limited the "neutral principles" rule adopted in *Green* and *Norfolk Presbytery* to cases under Va. Code § 57-15; and it held that § 57-9(A) gives a congregational majority that leaves a hierarchical church the power to take real and personal property used by the congregation, overriding both the general church's internal laws and its interests in such property under applicable law. That construction of § 57-9(A) obliterates the fundamental distinction between congregational and hierarchical churches. It also ignores both Va. Code § 57-7.1, under which church property may be held in trust for any religious entity, and language in § 57-9(A) which plainly means that it only applies to property in which a hierarchical church does not have a property interest. Further, § 57-9(A), as interpreted below, is not neutral, and it entangles civil courts in religious matters, contrary to bedrock principles of religious freedom in the Virginia Statute of Religious Freedom, codified at Article I, Section 16 of the Virginia Constitution; in the First Amendment to the United States Constitution; and in the jurisprudence of this Court and the United States Supreme Court.

In sum, § 57-9(A) imposes a principle of congregational polity on

hierarchical churches. However salutary majority rule may be for civil governance or secular institutions, a state cannot impose that rule on a church that has adopted different principles of governance. The court below held that § 57-9(A) requires that rule. The United States and Virginia Constitutions forbid the Commonwealth from imposing that requirement on the Episcopal Church and the Diocese.

## ASSIGNMENTS OF ERROR

1. The Circuit Court erred as a matter of law by holding that a court considering a Va. Code § 57-9(A) petition may disregard the "neutral principles of law" analysis required by *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980), and *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 201 S.E.2d 752 (1974), to determine ownership of church property, and need not determine whether property is congregationally-owned. That holding was error because § 57-9(A) applies only to property "held in trust for such congregation" and this Court's decisions require the use of "neutral principles of law" to resolve disputes between a general church and congregations over the ownership and control of church property.

2. The Circuit Court erred as a matter of law by holding that church property may not be held in trust for a diocese or hierarchical church and by rejecting a constitutional challenge to that statutory interpretation. That

holding was error because Va. Code § 57-7.1 allows any religious entity to hold property in trust and because the Virginia and Federal Constitutions' Religion Clauses forbid discrimination in the right to hold property in trust.

3. The Circuit Court erred as a matter of law by holding that the requirements of Va. Code § 57-9(A) were satisfied in these cases. That holding was error because the court adopted erroneous and entangling definitions of the statutory terms "division," "branch," and "attached," leading the court to err by holding that a "division" has occurred in the Anglican Communion, the Episcopal Church (the "Church" or "TEC"), and the Diocese of Virginia (the "Diocese"); that all relevant entities were "branches" of and "attached" to the Anglican Communion; and that the Convocation of Anglicans in North America ("CANA") and Anglican District of Virginia ("ADV") are "branches" of the Church and the Diocese.

4. The Circuit Court erred as a matter of law by holding that Va. Code § 57-9(A) is constitutional, because § 57-9(A), as construed by that court, violates the Religion Clauses of the State and Federal Constitutions.

5. The Circuit Court erred as a matter of law by construing § 57-9(A) to override a general church's rights and interests in church property, while denying the opportunity to prove such interests. That was error because such an override would violate the Virginia and United States Constitutions'

Takings and Due Process Clauses, and a litigant must be allowed to prove the property interests that are the basis for such a constitutional challenge.

6. The Circuit Court's ruling that a prior order in a different case approving a petition to transfer property precluded challenges to the transfer was error as a matter of law, because Rule 1:1 does not apply.

## QUESTIONS PRESENTED

1. Must a court addressing a petition under Va. Code § 57-9(A) apply the "neutral principles of law" analysis required by this Court's decisions or otherwise determine whether the property at issue is held in trust for the petitioning congregation as required by § 57-9(A)? (Assignment of error 1.)

2. May property be held in trust for a diocese or hierarchical church, under Va. Code § 57-7.1? (Assignment of error 2.)

3. If Virginia statutes do not allow holding property in trust for a diocese or hierarchical church, does that violate the Virginia and United States Constitutions? (Assignment of error 2.)

4. Have the Anglican Communion, the Church, and the Diocese "divided," within the meaning of § 57-9(A)? (Assignment of error 3.)

5. Have the appellee Congregations voted to join a "branch" of the "church or religious society" to which they were "attached," within the meaning of § 57-9(A)? (Assignment of error 3.)

6. Does § 57-9(A), as construed below, violate the Religion Clauses of the Virginia and Federal Constitutions? (Assignment of error 4.)

7. If § 57-9(A) eliminates any interests of a general church, does that violate the Takings and Due Process Clauses of the Virginia and Federal Constitutions, and may a trial court refuse to allow a general church to prove the factual basis for such a challenge? (Assignment of error 5.)

8. Does Rule 1:1 bar consideration in a new action, with different parties, of issues decided in a previous action? (Assignment of error 6.)

## STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Nine formerly Episcopal congregations (the Congregations) filed petitions in five Circuit Courts under Va. Code § 57-9(A). First enacted in 1867, the statute now provides:

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

The Diocese intervened in those cases and filed cases against the same Congregations and two others, and TEC filed a single action against all eleven Congregations, seeking judgments affirming the trust, proprietary, and contract rights of the Diocese and the Church. The cases were consolidated in the Fairfax County Circuit Court under the Multiple Claimant Litigation Act, Va. Code §§ 8.01-267.1, *et seq.* Claims against the two churches that did not file § 57-9(A) petitions were settled and dismissed.

By agreement, the Circuit Court first considered aspects of § 57-9(A). It held a five-day trial, taking evidence on the meaning of certain terms in the statute and their application. In an 82-page opinion, the Circuit Court interpreted those terms and held that the statute applied. Later it held, *inter alia*, that § 57-9(A) is constitutional and overrides any denominational interests arising under the "neutral principles" approach. Following another trial, on issues regarding several specific properties, the Circuit Court entered a final judgment approving the § 57-9(A) petitions and dismissing the Church's and Diocese's declaratory judgment actions as moot (except in regard to an endowment fund related to one of the Congregations).

## STATEMENT OF FACTS

The Episcopal Church is a hierarchical religious denomination. *E.g.*, *Dixon v. Edwards*, 290 F.3d 699, 716 & n.23 (4th Cir. 2002), and cases

cited therein. Its governing body is its General Convention, which comprises a House of Deputies (consisting of both clergy and lay persons) and a House of Bishops. The General Convention has enacted and from time to time amends the Church's Constitution and Canons, which are binding throughout the Church.[1] The Church is divided geographically into 111 dioceses, and it has 7,600 congregations and 2.3 million members. Dioceses likewise are governed by constitutions and canons, which must include an unqualified accession to the Church's Constitution and Canons.

The Diocese is governed by its Bishop, its Executive Board and Standing Committee (each of which includes both clergy and lay persons), and its Annual Council (which includes clergy and lay delegates from each congregation in the Diocese). The Annual Council has enacted and from time to time amends the Diocese's Constitution and Canons. The Diocesan Constitution provides that each of its approximately 200 congregations "shall be bound by the Constitution and the Canons adopted

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[1] *See*, *e.g.*, Nov. 2007 TEC/Diocese Ex. 3 (Art. XVII); Tr. (Nov. 2007) at 395, 507-08, 1200. The Congregations' own governing documents recognized that the Church's rules are binding. *E.g.*, Nov. 2007 TEC/Diocese Ex. 10 at 1 (St. Paul's Bylaws), Ex. 16 (Truro By Laws), Ex. 25 at 0160 (The Falls Church Vestry Manual). The Congregations' leaders also took oaths to adhere to the rules of the Church. *See* TEC/Diocese Ex. 1 (Art. VIII), Ex. 3 (Canon 11.8); Tr. (Nov. 2007) at 339-40, 345-46, 393-94, 449-50, 506-07, 702-03. *See also* n.13, *infra*. (Pursuant to Rule 5:17(c)(3), record citations are provided with reference to facts that may be disputed.)

in pursuance hereof." Congregations may be either "churches" (also called "parishes") or "missions," depending on certain ecclesiastical criteria. Each church is governed by a vestry, elected by its congregation, and a rector (chief pastor), elected by the vestry with the advice of the Bishop.

The Anglican Communion is a fellowship of 38 autonomous regional or national churches ("provinces"), including TEC and the Church of Nigeria, with a common ancestry in the Church of England. Each province has a chief bishop or "primate." The primates meet from time to time and issue communiqués, which are not binding on provinces. The Archbishop of Canterbury is "first among equals" among the primates. He issues invitations to the Lambeth Conference, a gathering of bishops that meets every ten years and adopts non-binding resolutions. He also presides over the Anglican Consultative Council, another "instrument of unity." No Anglican Communion official or entity can bind or govern provinces.

There has been disagreement and discord within the Anglican Communion, the Church, and the Diocese regarding theological issues, dating back at least to the 1970's. By January 2007, each of the Congregations had voted to "sever its denominational ties with The Episcopal Church and the Diocese" and to join CANA, a mission of the Church of Nigeria, and the ADV; and by November 2007, approximately

100 congregations had left TEC. Ltr. Op. (April 3, 2008) at 82. The Congregations also voted to retain possession of the properties, contrary to the Constitutions and Canons of the Diocese and the Church.

## ARGUMENT

### I. The Circuit Court erred as a matter of law by holding that a court considering a § 57-9(A) petition may disregard the "neutral principles of law" analysis required by this Court's decisions and need not otherwise determine whether property is held in trust for a petitioning congregation as required by § 57-9(A). (Assignment of Error 1.)

This Court twice has held that, in resolving property disputes between a hierarchical church and a local congregation, a court must apply "'neutral principles of law, developed for use in all property disputes'" and that Virginia law protects a hierarchical church's interests in local church property. *Norfolk Presbytery*, 214 Va. at 504, 507, 201 S.E.2d at 756, 758 (citation omitted); *Green*, 221 Va. at 555, 272 S.E.2d at 185-86.

In this case, however, the Circuit Court held that the neutral principles analysis is irrelevant in a case arising under Va. Code § 57-9(A) and limited "neutral principles" to cases under Va. Code § 57-15. There is no basis in this Court's case law for that limitation. Further, by its terms, § 57-9(A) applies only to "property held in trust for such [petitioning] congregation." Based on an incorrect interpretation of current law, *see* § II, *infra*, the Circuit Court simply *assumed* that the properties were "held in trust for such

congregation[s]." It did not require the Congregations to prove their interests, nor did it allow the Diocese to establish its interests under the neutral principles analysis. That was error.

## II. Property may be held in trust for a hierarchical church or denomination, under Virginia law. (Assignment of Error 2.)

In *Norfolk Presbytery*, 214 Va. at 505-07, 201 S.E.2d at 757-58, this Court construed and applied Va. Code § 57-7 to hold, as prior cases had, that the General Assembly had not validated trusts for a hierarchical church and therefore that such trusts were invalid. Section 57-7 has since been repealed and replaced by § 57-7.1, which validates trusts for any religious entity. The Federal and Virginia Constitutions also require recognition of trusts for denominations. The Circuit Court's refusal to do so was error.

Former § 57-7 is quoted at length in *Norfolk Presbytery*, 214 Va. at 506 n.3, 201 S.E.2d at 757 n.3. It provided, in substance, that conveyances of land for the use or benefit of a religious congregation as a place for public worship or burials, for use as a residence for a minister, bishop, or other clergyman, or "in furtherance of the affairs of any church diocese," would be valid, "subject to the limitation of § 57-12." *Id.*[2] A line of cases extending from *Brooke v. Shacklett*, 54 Va. (13 Gratt.) 301 (1856),

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[2] Section 57-12 "limit[ed] the amount of land which may lawfully be held by church trustees." *Norfolk Presbytery*, 214 Va. at 507, 201 S.E.2d at 758.

through *Norfolk Presbytery*, decided in 1974, held that former statutes did not validate trusts for general churches. As we now explain, each of the reasons for those holdings has been swept away by § 57-7.1 and by other legislation, judicial decision, or amendment to the Constitution of Virginia:

- The uses of property authorized by § 57-7 were limited and local, such as "must belong peculiarly to the local society." *Brooke*, 54 Va. at 313. By contrast, § 57-7.1 provides that "*Every* conveyance or transfer of real or personal property ... which is made to or for the benefit of *any* church, *church diocese*, religious congregation or religious society ... shall be valid." (Emphases added.) Enactment of § 57-7.1 abrogated § 57-7's restrictions of such conveyances to particular uses.

- Section 57-7 referred only to trusts controlled by "local functionaries." *Moore v. Perkins*, 169 Va. 175, 180-81, 192 S.E. 806, 809 (1937). Under § 57-7.1, however, property conveyed for the benefit of a religious body without a specific statement of purpose "shall be used for the religious and benevolent purposes of the church, church diocese, religious congregation or religious society as determined" by the proper authorities "under its rules or usages." Such authorities may be "the general church, or a division thereof." *Green*, 221 Va. at 553, 272 S.E.2d at 184.

- When *Norfolk Presbytery* was decided, the Constitution of Virginia

"prohibited ... incorporating any church or religious denomination." *Norfolk Presbytery*, 214 Va. at 505, 201 S.E.2d at 757 (citations omitted). That prohibition was held unconstitutional in *Falwell v. Miller*, 203 F.Supp.2d 624, 632 (W.D. Va. 2002). The General Assembly responded by providing for incorporation of churches, *see* Code § 57-16.1, and the Constitution of Virginia was amended in 2006 to delete the offending provision.

- The former statutory limits on church property ownership were evidence of a "restrictive legislative intent" inconsistent with validation of trusts for non-local religious groups. *Norfolk Presbytery*, 214 Va. at 507, 201 S.E.2d at 758, citing Code § 57-12, *supra*. Section 57-12 has since been repealed, 2003 Va. Acts, ch. 813, and now there are no such limits.

Virginia law, in short, has been dramatically transformed since this Court last visited the issue of trusts for hierarchical churches, in *Norfolk Presbytery*, and § 57-7.1 now specifically validates such trusts.[3]

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[3] *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.*, 249 Va. 144, 152, 452 S.E.2d 847, 851-52 (1995), is not to the contrary. The one relevant sentence states one thing that § 57-7.1 does; it does not express § 57-7.1's limits. The meaning of § 57-7.1 and its application to super-congregational entities was not before this Court, as the lack of citations to § 57-7.1 or *Norfolk Presbytery* in the briefs in *Asbury* shows.

The Congregations argued below that because 1993 Va. Acts, ch. 370, which enacted § 57-7.1 and repealed § 57-7, stated that it was "declaratory of existing law," § 57-7.1 validates only trusts for local churches. That is erroneous. The plain meaning of § 57-7.1 (unlike § 57-7) validates trusts

*(footnote continued ...)*

Even without these statutory changes, constitutional law compels the conclusion that trusts for general hierarchical churches are valid. That is so because States may neither discriminate among religions nor disfavor religion generally. *See, e.g.*, VA. CONST., Art. I § 16 ("the General Assembly shall not ... confer any peculiar privileges or advantages on any sect or denomination"); *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005). Section 57-7.1's predecessors denied hierarchical churches a right granted other kinds of religious institutions and comparable secular institutions – the right to hold property in trust. Those statutes were not challenged on constitutional grounds; but such discrimination is unconstitutional, and a construction that raises such questions should be avoided. *See, e.g.*, *Va. Society for Human Life, Inc. v. Caldwell*, 256 Va. 151, 156-57 & n.3, 500 S.E.2d 814, 816-17 & n.3 (1998). The Circuit Court rejected this constitutional argument without explanation. That was error.

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for any religious entity, and courts must hew to that meaning. *E.g.*, *Woods v. Mendez*, 265 Va. 68, 75, 574 S.E.2d 263, 267 (2003). "Declaratory of existing law" signals a clarification, showing that the prior statute was incorrectly limited. *See, e.g.*, *Horner v. Dep't of Mental Health*, 268 Va. 187, 193, 597 S.E.2d 202, 206 (2004); BLACK'S LAW DICTIONARY 1448 (8th ed. 2004) (defining a "declaratory statute"); *Bryson on Virginia Civil Procedure* § 12.02 n.14 (4th ed. 2005) (1992 Va. Acts ch. 564 – which was "declaratory of existing law" – was designed "to clarify the law in the light of Lee v. Lee," 12 Va. App. 512, 404 S.E.2d 736 (1991); in fact, ch. 564 effectively overruled *Lee v. Lee*).

## III. The Circuit Court erred as a matter of law by holding that the requirements of Va. Code § 57-9(A) were satisfied in these cases. (Assignment of Error 3.)

The Circuit Court erred by interpreting § 57-9(A) to apply to the Anglican Communion. The Anglican Communion is a fellowship of 38 autonomous regional and national churches. It is not "a church or religious society, to which any such congregation ... is attached," § 57-9(A), and therefore § 57-9(A) does not apply to it. That statute cannot be construed as applying to an entity that is not a church or religious society, whose membership does not include congregations, and which has no power to control either its provinces or their congregations.[4]

As applied to the Episcopal Church, the Circuit Court's interpretation treats a mere separation of a small minority that form or join an alternative polity as a "division," ignoring church polity and rules and vesting control

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[4] The Circuit Court held that the Anglican Communion is a "religious society" and that the Congregations are "attached" to it because they "were in an association with the Anglican Communion through their former affiliation with [TEC]." Ltr. Op. (April 3, 2008) at 75-77. That contradicts *Norfolk Presbytery*, 214 Va. at 502, 201 S.E.2d at 755 (§ 57-9(A) applies to congregations which are "part of a supercongregational or hierarchical denomination"), and *Baber v. Caldwell*, 207 Va. 694, 698, 152 S.E.2d 23, 26 (1967) (§ 57-9(A) "relates to churches, such as Episcopal and Presbyterian churches, that are *subject to control* by super-congregational bodies") (emphasis added). (Section 57-9(A) uses "religious society" as a synonym for "church" in deference to groups such as the Society of Friends (or "Quakers"), who object to being called "churches.")

solely in local majorities. That interpretation cannot be reconciled with modern Virginia law, which distinguishes between congregational and hierarchical churches and considers churches' rules and polity.[5]

The Circuit Court's interpretation also puts civil courts in the constitutionally untenable position of dissecting communications among church leaders, holding pastoral acts and resolutions against hierarchical churches in subsequent property disputes, and relying upon theological concepts like "walking apart" and "impair[ment]" of "the fabric" or "bonds" of "communion." *See, e.g.*, Ltr. Op. (April 3, 2008) at 4, 12-15, 19-25, 26, 29, 31; *Board of Mgrs. v. Church of the Holy Comforter*, 628 N.Y.S.2d 471, 475 (S.Ct. 1993), *aff'd mem.* (on opinion below), 623 N.Y.S.2d 146 (App.Div. 1995) ("the phrase 'in communion with' is an ecclesiastical and religious term and has no legal or secular meaning"); pages 32-33, *infra*.[6]

The court reasoned that TEC, the Diocese, CANA, ADV, and the

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[5] *See Reid v. Gholson*, 229 Va. at 188-89, 327 S.E.2d at 112-13; *Green*, 221 Va. at 553, 272 S.E.2d at 184 (§ 57-9 exemplifies "the distinctions ... 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 503, 201 S.E.2d at 755 (applying Va. Code § 57-15); Va. Code §§ 57-7.1, 57-16.1.

[6] The Circuit Court's reliance for its "division" finding on the Church of Nigeria's constitutional amendment (providing that it is "in communion" only with Anglican churches that adhere to certain doctrines) exemplifies impermissible reliance on and reference to questions of faith and doctrine.

Church of Nigeria are "joined together" by "common membership in the Anglican Communion," by "adherence to that historical strand of Christianity known as Anglicanism, and by their shared desire to be a part of that particular branch of Christianity whose adherents call themselves Anglicans." Ltr. Op. (April 3, 2008) at 79. That analysis again depends on "reference to questions of faith and doctrine" and thus plunges into "the 'religious thicket,'" which is constitutionally forbidden. *Reid v. Gholson*, 229 Va. at 189, 187, 327 S.E.2d at 113, 112 (quoting *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 719 (1976).[7]

The Circuit Court also erred by holding that CANA and ADV are "branches" of TEC or the Diocese. The Circuit Court defined "branch" as "'a part of a complex body ....'" Ltr. Op. (April 3, 2008) at 78. That definition does not apply to the relationship between CANA and ADV, on the one hand, and TEC and the Diocese on the other. Indeed, CANA and ADV are part of the Church of Nigeria, which views itself as not even being "in communion" with TEC.

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[7] Those conclusions also ignore undisputed evidence that Anglicans organize by geography and national boundaries, that "border crossings" or "interventions" such as CANA violate Anglican doctrine and traditions, and that the Archbishop of Canterbury and other Anglican authorities have refused to recognize CANA and other such groups as branches of the Communion. *See, e.g.*, Tr. (Nov. 2007) at 284, 362-66, 396-97, 875-76, 879-80, 996-97, 1222-23; Congregations' Exs. 61 at 59, 185A at 1.

## IV. Va. Code § 57-9(A), as construed by the Circuit Court, violates the Religion Clauses of the Virginia and United States Constitutions. (Assignment of Error 4.)

### A. As construed by the Circuit Court, § 57-9(A) violates the Free Exercise rights of hierarchical churches to self-governance.

The First Amendment to the United States Constitution (which also applies to the states, *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, that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience ...." Application of § 57-9 in a manner that would effectively restructure the Church, allowing congregations unilaterally to "divide" TEC and the Diocese and divest them of their interests, violates these bedrock principles. The statute should be construed to avoid such constitutional impediments. Alternatively, it must be held unconstitutional.[8]

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[8] The only statutes similar to § 57-9(A) were struck down years ago. *See Sustar v. Williams*, 263 So.2d 537 (Miss. 1972) (invalidating a statute that allowed a two-thirds majority of local beneficiaries to obtain "complete control and authority" over trust property contributed by the local beneficiaries where a court found "a deep-seated and irreconcilable hostility or tension" between the local beneficiaries and those with authority over the trust); *Goodson v. Northside Bible Church*, 261 F.Supp. 99 (S.D. Ala. 1966) (striking down a statute that allowed a 65% majority of a local church "in disagreement" with the parent church to sever its connection with the parent church and retain possession and ownership of local church property), *aff'd*, 387 F.2d 534 (5th Cir. 1967) (cited with approval in *Maryland and Virginia Eldership v. Church of God at Sharpsburg, Inc.*, 396

*(footnote continued ...)*

"[R]eligious 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.'" *Serbian*, 426 U.S. at 721-22 (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)). Indeed, church governance *is* a doctrinal matter. *E.g.*, *Reid*, 229 Va. at 189, 327 S.E.2d at 113 (citing *Serbian*, 426 U.S. at 724-25, and *Green*). And under "the religion clauses of the Constitution of the United States and the Constitution of Virginia ... issues 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). *See Cha v. Korean Presbyterian Church*, 262 Va. 604, 611, 553 S.E. 2d 511, 514 (2001).[9]

Under the Constitutions and Canons of the Diocese and the Episcopal Church – the laws of the church – parishes are part of and are bound to their local dioceses and the larger Church. Parishes are bound by the Constitution, Canons and "discipline" of the Church, as a condition of formation and recognition as a constituent part of the Church. *See* n.1,

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U.S. 367, 370 n.5 (1970) (Brennan J., concurring)); *First Methodist Church of Union Springs v. Scott*, 226 So.2d 632 (Ala. 1969) (also invalidating the statute struck down by the federal courts in *Goodson*).

[9] "[T]here is no constitutional prohibition against the resolution of church property disputes by civil courts," however, "provided that the decision does not depend on inquiry into questions of faith or doctrine." *Norfolk Presbytery*, 214 Va. at 503, 201 S.E.2d at 755.

*supra*; *see also Reid*, 229 Va. at 188, 188-89, 327 S.E.2d at 113 ("[o]ne who becomes a member of [a hierarchical church], by subscribing to its discipline and beliefs, accepts its internal rules and the decisions of its tribunals"); *Brooke*, 54 Va. at 320 (membership in a church entails "a profession of its faith and a submission to its government").

Numerous canonical provisions confirm the interests of the Diocese in church properties. TEC's Canon II.6(1) requires consecrated real property to be "secured for ownership and use by a Parish, Mission, Congregation, or Institution affiliated with this Church and subject to its Constitution and Canons." Diocesan Canons 14 and 15.2 require Diocesan approval for certain indebtedness and property actions. Diocesan Canon 15.1 provides that "[a]ll real and personal property held by or for the benefit of any Church or Mission ... is held in trust for The Episcopal Church and the Diocese." TEC Canon I.7(4) (the "Dennis Canon") is similar.

The notion that a congregational majority may remove a parish from the Church and take parish property is contrary to the Church's rules, which constitute an enforceable contract. *See* n.13, *infra*. A State may not enact a statute that imposes rules on churches, and only churches, that disregard the churches' rules. The "basic freedom" to practice religious beliefs according to the dictates of conscience "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). *See also Norfolk Presbytery*, 214 Va. at 507, 201 S.E.2d at 758 (our courts have the power "to prevent a hierarchical church from being deprived of contractual rights in church property held by trustees of a local congregation").

This principle also protects the right of individuals to worship as they choose. That right includes, and indeed it depends upon, the ability to join a hierarchical denomination and know that local majorities will not be able to subvert denominational rules. *See Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 341 (1987) (Brennan, J., concurring) ("'Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] [C]lause'") (citation omitted; bracketed alterations in Justice Brennan's opinion).

TEC's "Dennis Canon" was enacted in response to *Jones v. Wolf*, 443 U.S. 595 (1979), which held that civil courts may resolve church property disputes on the basis of "neutral principles of law." *Id.* at 604.[10]

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[10] *See, e.g., Episcopal Diocese of Massachusetts v. Devine*, 797 N.E.2d 916, 923 n.20 (Mass. App. 2003). The Dennis Canon "'merely codified in

*(footnote continued ...)*

Four dissenters argued in *Jones* 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,'" to protect constitutionally-guaranteed free exercise rights. *Id.* at 604-05 (quoting dissent, *id.* at 614); *see id.* at 605-06; dissenting opinion, *id.* at 618. The Court responded:

> 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). *Accord*, *id.* at 607-08. A church's ability to overcome a "rule of majority representation," *id.* at 607, and "ensure ... that the faction loyal to the hierarchical church will retain the church property,"

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explicit terms'" – terms suggested by *Jones v. Wolf* – a trust relationship that was already a part of Episcopal polity. *In re Church of St. James the Less*, 888 A.2d 795, 810 (Pa. 2005) (quoting *Rector, Wardens & Vestrymen v. Episcopal Church*, 620 A.2d 1280, 1292 (Conn. 1993)); *Episcopal Diocese of Massachusetts v. Devine*, 797 N.E.2d at 923-25 & nn.20-21, and cases cited therein.

*id.* at 606, by amending its governing documents, thus was essential to the Court's conclusion that application of "neutral principles" would not violate the First Amendment. To hold that church property disputes will be governed by "neutral principles," on the one hand, but that a "rule of majority representation" *cannot* be overcome by provisions such as the canon laws described above, on the other, would be to defy the Court's holding that "the civil courts will be bound to give effect" to such provisions. Such reasoning also would eviscerate the basis for the holding that the neutral principles approach does not "'inhibit' the free exercise of religion."

The Circuit Court held that its construction of § 57-9 did not violate the First Amendment because the statute provides an "'escape hatch'" – it allows a hierarchical church to protect its interests in church property by requiring that all property be conveyed to and held by a bishop or minister under Va. Code § 57-16. There are numerous flaws in that holding:

(1) Diocesan Canon 15.2 requires the vestry (governing body) of each church to "elect Trustees ... to hold title" to real and personal property. A State may not tell a church how to hold title to properties dedicated to religious uses – a matter in which churches are vitally interested and in which the State has no legitimate interest at all – on pain of risking the loss of those properties if it adopts another method of its own

choosing. To do so would violate the doctrine of unconstitutional conditions. *See, e.g., Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996); *Sherbert v. Verner*, 374 U.S. 398, 403-06 (1963).

(2) The "escape hatch" theory would require the Diocese either to remove property authority from lay persons or somehow to restructure its polity to preserve lay involvement. A State may not force a church to rearrange authority within the Church. *See, e.g., Kedroff*, 344 U.S. at 119.

(3) The "escape hatch" rationale ignores the practical and religious burden imposed – here, to require hundreds of congregations to instruct their trustees to convey property to Diocesan authorities – and the resulting disruption. *Cf. Episcopal Church Cases*, 198 P.3d 66, 80 (Cal. 2009) ("requiring every parish in the country to ratify [a] change" to a church's constitution "would infringe on the free exercise rights of religious associations to govern themselves as they see fit"). Such a mandate would breed suspicion and resentment and likely provoke the kinds of departures at issue here, disturbing the peace of the Church, distracting it from its mission, and reducing its ability to promote its faith and doctrine.

(4) The Circuit Court's ruling treats *Jones v. Wolf* as a constitutional "bait and switch." *Jones* holds that if "the constitution of the general church [is] made to recite an express trust in favor of the denominational church....

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." 443 U.S. at 606.[11] The Circuit Court dismissed that holding as "simply provid[ing] suggestions as to ways in which a State might allow a hierarchical church to overcome a presumption of majority rule." "Constitutionality" Ltr. Op. (June 27, 2008) at 25-26. The Diocese and the Episcopal Church did just as the Supreme Court said – they amended their governing documents, long before this dispute erupted, "to recite an express trust in favor of the denominational church." They are entitled to the result dictated by those amendments and the ruling in *Jones v. Wolf*.[12]

The Free Exercise Clause requires that "special statutes governing church property arrangements .... be carefully drawn to leave control of ecclesiastical polity, as well as doctrine, to church governing bodies." *Maryland and Virginia Eldership v. Church of God at Sharpsburg, Inc.*, 396

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[11] The Congregations argued in the Circuit Court that trust provisions in a church's governing documents are not "embodied in [a] legally cognizable form." *Jones v. Wolf* does not permit that conclusion. *See* 443 U.S. at 607-08 ("any rule of majority representation can always be overcome, under the neutral-principles approach ... by providing, in the corporate charter or the constitution of the general church ... that the church property is held in trust for the general church and those who remain loyal to it").

[12] Numerous courts have applied the Church's property canons and resolved property disputes in its favor. *See Episcopal Church Cases*, 198 P.3d 66, 82 (Cal. 2009), and cases cited; *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920 (N.Y. 2008); cases cited in n.10, *supra*.

U.S. 367, 370 (1970) (Brennan, J., concurring); *see also, e.g.*, *Serbian*, 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'"); *Reid*, 229 Va. at 189, 327 S.E.2d at 113 ("a decision by a governing body or internal tribunal of an hierarchical church" is "constitutionally immune from judicial review," because "the resolution of internal government disputes depends upon matters of faith and doctrine").

As interpreted below, § 57-9(A) imposes a principle of congregational governance – local majority rule – on hierarchical churches. *See, e.g., id.* at 188-89, 327 S.E.2d at 113 (quoted *supra* at 1-2). Interpreting § 57-9(A) to override Church laws violates the Diocese's right "to decide for [itself], free from state interference, matters of church government as well as those of faith and doctrine." *Serbian*, 426 U.S. at 722. *See Kedroff*, 344 U.S. at 122 (Frankfurter, J., concurring) ("[I]t is not a function of civil government ... to assure rule to any religious body by a counting of heads").

### B. As construed by the Circuit Court, § 57-9(A) violates the principle of governmental neutrality toward religion.

Both the Federal Free Exercise and Establishment Clauses and their Virginia counterparts embody the principle of governmental neutrality toward religion. *See, e.g., Church of Lukumi Babalu Aye v. City of Hialeah*,

508 U.S. 520, 531-32 (1993) (Free Exercise); *Larson v. Valente*, 456 U.S. 228, 244-46 (1982) (Establishment). Article I, § 16 of the Constitution of Virginia states explicitly that the General Assembly shall not "confer any peculiar privileges or advantages on any sect or denomination."

That "government should not prefer one religion to another" is "a principle at the heart of the Establishment Clause." *Board of Education v. Grumet*, 512 U.S. 687, 703 (1994). *Accord, e.g., McCreary County*, 545 U.S. at 860: "the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion'".

As interpreted below, § 57-9(A) discriminates (1) among hierarchical churches based on whether they hold property by trustees; (2) between congregational churches and hierarchical churches that hold property by trustees; and (3) between secular organizations and hierarchical churches that hold property by trustees. Hierarchical churches that choose not to hold property by trustees are not burdened by § 57-9(A); they can retain property and enforce their canon laws when congregational majorities leave the denomination. Congregational churches likewise suffer no interference with their own rules; § 57-9(B) incorporates principles of congregational polity by providing that majorities determine property ownership in cases of division. Secular organizations are governed by their

own rules and by-laws, forming enforceable contracts between the organizations and their members.[13] Only hierarchical churches which hold property by trustees are singled out by § 57-9(A) for disparate treatment.[14]

Section 57-9(A), as interpreted below, is not a neutral statute of general applicability within the meaning of *Employment Division v. Smith*, 494 U.S. 872 (1990). It suffers from the same infirmity as Virginia's constitutional prohibition on incorporation of churches, which was invalidated by *Falwell*, 203 F.Supp.2d 624: it "lacks facial neutrality" because it "has no meaning within the secular context" and "distinguishes churches and religious denominations from other groups in the broader context of Virginia law." *Id.* at 630. It also imposes burdens only on hierarchical churches with certain polities and rules. Such matters of "internal governance" "depen[d] upon matters of faith and doctrine," *Reid*, 229 Va. at 189, 327 S.E.2d at 113, and the State may not selectively impose such

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[13] *See, e.g., 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"); 6 AM.JUR.2D, *Associations and Clubs* §§ 21, 24 (2007); *Liggett v. Koivunen*, 34 N.W.2d 345, 350 & n.8 (Minn. 1948) (citing cases).

[14] The parties stipulated (on Dec. 6, 2007) that hierarchical churches in Virginia hold property by a variety of means, including in the name of trustees, in the congregation's corporate name, in the name of a diocesan bishop, and in the name of the mother church or its Presiding Bishop.

burdens. *See, e.g., Lukumi*, 508 U.S. at 543: "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause."

*Larson v. Valente* invalidated a portion of a statute that required charitable organizations to register with the State and file "extensive annual report[s]" but exempted religious organizations that received more than half of their total contributions from members or affiliated organizations (the "fifty per cent rule"). 456 U.S. at 231-32. The Court held as follows:

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id.* at 244. A state law granting a denominational preference is treated as "suspect," and a court must "apply strict scrutiny in adjudging its constitutionality." *Id.* at 246. "The fifty per cent rule ... clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents." *Id.* That law was "not simply a facially neutral statute, the provisions of which happen to have a 'disparate impact' upon different religious organizations. On the contrary," the statute made "explicit and deliberate distinctions between different religious organizations." *Id.* at 247 n.23.

That holding in *Larson* describes § 57-9(A), as interpreted by the

Circuit Court. The Virginia statute, so interpreted, likewise makes "explicit and deliberate distinctions between different religious organizations" and "grants denominational preferences." It discriminates among religious groups based on methods of holding property, just as the statute invalidated in *Larson* discriminated based on sources of property.

A court therefore must "tur[n] to a strict scrutiny analysis, an exercise which usually sounds the death knell for constitutionally suspect laws." *Falwell*, 203 F.Supp.2d at 631. 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. There is no governmental interest, much less one that is "compelling," in imposing a rule of majority representation only on hierarchical churches that hold property by trustees. Indeed, the essence of religious freedom is that the State stay out of such matters. Nor is § 57-9(A) narrowly tailored. It affects not only churches that have no applicable internal rules or in which local majority decision-making is consistent with the church's polity, but also churches that do have such rules and in which local majorities alone do not make property decisions. It cannot withstand strict scrutiny.

### C. As construed by the Circuit Court, § 57-9(A) violates the United States Supreme Court's three-part Establishment Clause test.

In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), the U.S.

Supreme Court gleaned the following test from its prior cases: a statute "must have a secular legislative purpose," "its principal or primary effect must be one that neither advances nor inhibits religion," and it "must not foster 'an excessive government entanglement with religion.'" That test has been criticized, but the U.S. Supreme Court and this Court continue to use it. Section 57-9(A), as construed below, fails that test.

First, the Circuit Court found, based on the Congregations' own evidence, that § 57-9(A) "appears to reflect a [legislative] determination ... to protect the voting rights of any local congregation which is subject to a hierarchical church's constitution or canons." Ltr. Op. (April 3, 2008) at 48. The State has no legitimate interest in creating (or "protect[ing]") "voting rights" for local congregations or overriding hierarchical church canon laws. Its only legitimate interest is to provide a forum for the peaceful resolution of disputes. *Jones v. Wolf*, 443 U.S. at 602. The Circuit Court's finding confirms that § 57-9(A) lacks a valid, secular legislative purpose that is both "genuine ... and not merely secondary to a religious objective." *McCreary County*, 545 U.S. at 864. That finding, by itself, dooms § 57-9(A).

Second, the statute's "principal or primary effect" is to promote control over property by congregational majorities, a principle of congregational governance. The "neutral principles" rule provides a neutral way to deter-

mine whether a general church has interests that are not subject to separatist congregations' will. Section 57-9(A) enacts a one-sided rule of decision that gives local majorities the power to override both canon law and general churches' trust and contractual interests, advancing the interests of local majorities and overriding the interests of such groups as the Episcopal Church, the Diocese, and local minorities of loyal Episcopalians.

Third, the trial of this case and the Circuit Court's findings of fact demonstrate that § 57-9(A) fosters excessive government entanglement with religion. The court heard testimony for five days regarding the nature of the Anglican Communion; the relationships among the Anglican Communion, the Episcopal Church, the Diocese, the Church of Nigeria, the "American Arm of the Church of Uganda," CANA, and the ADV; and their polities, practices, and systems of governance. That "'searching and therefore impermissible inquiry into church polity,'" *Jones*, 443 U.S. at 605 (quoting *Serbian*, 426 U.S. at 723), was both intrusive and entangling.

The court then found that CANA and the ADV share sufficient theological relationships, history, and beliefs with the Episcopal Church and the Diocese to constitute "branches" of those bodies. That is an ecclesiastical judgment that a civil court cannot and should not make. *See, e.g.*, *Reid*, 229 Va. at 187, 327 S.E.2d at 112 ("where church property and

civil rights disputes can be decided *without reference to questions of faith and doctrine*, there is no constitutional prohibition against their resolution by the civil courts") (emphasis added). As the Attorney General's Office has stated, referring to § 57-9, "a court decision over what is or is not a branch of an original denomination *necessarily* entangles government and religion." Letter to Sen. William C. Mims (Feb. 1, 2005) (included in Ex. B to Jan. 17, 2008, Post-Trial Reply Brief) (emphasis added).

## V. The Circuit Court's errors in regard to "neutral principles" and trusts threaten further constitutional violations and simultaneously and improperly deny the Diocese the chance to establish such violations. (Assignment of Error 5.)

The Circuit Court created a legal Catch 22: on the very same day, it *both* dismissed the following constitutional arguments as *assuming* that the Diocese has property interests *and* denied the Diocese any opportunity to establish its interests. "Constitutionality" Ltr. Op. at 47; "Five Questions" Ltr. Op. at 6-11 (June 27, 2008). If the Diocese has property interests under the "neutral principles" approach, or if the property is held in trust for the Diocese (as is and constitutionally must be allowed by Virginia law), *see* §§ I & II, *supra,* application of § 57-9(A) as construed below takes those interests, without just compensation, in violation of both the Virginia and United States Constitutions. *E.g.*, *Hodel v. Irving*, 481 U.S. 704, 712-18 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419,

426, 433 n.9 (1982).[15]

The Virginia and United States Constitutions require "due process" and "just compensation" for takings of property interests and allow takings only for a "public use." VA. CONST., Art. I, § 11; U.S. CONST., Amendments V and XIV; *see Kelo v. City of New London*, 545 U.S. 469, 472 n.1 (2005) (Fifth Amendment Takings Clause applies to the states). There is no public use (or "public purpose," *id.* at 479-80) in giving a general church's property rights to congregations, and such a "purely private taking" is unconstitutional. *Id.* at 477-78 & n.5 (citing *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241, 245 (1984); *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403, 417 (1896); and *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798)).

Transferring the Diocese's property interests to the Congregations, pursuant to § 57-9(A), cannot conceivably serve a "public use," as required by the Virginia Constitution, Art. I, § 11, and defined in Code § 1-219.1(A). Either the statute should be construed to avoid such problems or the

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[15] The Circuit Court's claim that the Diocese assumed a property interest is inexplicable. The Diocese sought – and was denied – the opportunity to prove its interests. *E.g.*, Diocese's Supplemental Constitutional Brief (April 23, 2008) at 35 ("Once it is established that the Diocese ... ha[s] property interests ... as will be done at the trial scheduled for October 2008, there can be no disputing the fact that application of § 57-9(A) would work a taking").

Diocese must be allowed to prove its interests to establish the violation.[16]

## VI. The Circuit Court erred as a matter of law by holding that a prior order in a different case precluded consideration of challenges to deeds transferring the property of Christ the Redeemer Episcopal Church to Truro Church. (Assignment of Error 6.)

On September 29, 2006, the Circuit Court entered an order in a previous, *ex parte* proceeding, of which the Diocese had no notice, authorizing Christ the Redeemer Episcopal Church to convey property with an assessed value of $1.2 million, Tr. (Oct. 14, 2008) at 67, to Truro Church. The court held in this case that Rule 1:1 bars the Diocese, which was not a party to that proceeding, from challenging the ensuing conveyances. That was error. Rule 1:1 applies only to "further proceedings within the very suit in which a final judgment has been entered." *Niklason v. Ramsey*, 233 Va. 161, 164, 353 S.E.2d 783, 785 (1987). It does not bar a showing that the 2006 conveyances were invalid.

## CONCLUSION

The judgments for the Congregations should be reversed and final judgments entered for the Diocese, and the cases should be remanded for further proceedings on the Diocese's suits for declaratory judgments.

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[16] Evidence addressing three of the four "neutral principles" factors identified in *Green* – the deeds, the statutes, and the governing documents of the Church and the Diocese – is in the record. "[T]he dealings between the parties," 221 Va. at 555, 272 S.E.2d at 186, have yet to be shown.

Respectfully submitted,

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## CERTIFICATE

Pursuant to Va. Sup. Ct. Rule 5:17(e), I hereby certify that:

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I hereby certify that copies of the foregoing Petition for Appeal were sent by electronic mail and first-class mail to all counsel named above, and to counsel for the Episcopal Church, named below, on this 7th day of April, 2009.

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Counsel for appellant desire to state orally to a panel of this Court the reasons why this petition for appeal should be granted, and to do so in person.

Bradford W. Davenport, Jr.

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# ADDENDUM

## STATUTES AND CONSTITUTIONAL PROVISIONS AT ISSUE IN THIS APPEAL

**United States Constitution, Amendment I.**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**United States Constitution, Amendment V.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**United States Constitution, Amendment XIV, § 1.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Virginia Constitution, Art. I §§ 11, 16.**

**Section 11. Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases.**

That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be

taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

**Section 16. Free exercise of religion; no establishment of religion.**

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; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other. No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities. And the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please.

**Va. Code § 1-219.1 (Limitations on eminent domain), subsection A.**

The right to private property being a fundamental right, the General Assembly shall not pass any law whereby private property shall be taken or damaged for public uses without just compensation. The term "public uses" mentioned in Article I, Section 11 of the Constitution of Virginia is

hereby defined as to embrace only the acquisition of property where: (i) the property is taken for the possession, ownership, occupation, and enjoyment of property by the public or a public corporation; (ii) the property is taken for construction, maintenance, or operation of public facilities by public corporations or by private entities provided that there is a written agreement with a public corporation providing for use of the facility by the public; (iii) the property is taken for the creation or functioning of any public service corporation, public service company, or railroad; (iv) the property is taken for the provision of any authorized utility service by a government utility corporation; (v) the property is taken for the elimination of blight provided that the property itself is a blighted property; or (vi) the property taken is in a redevelopment or conservation area and is abandoned or the acquisition is needed to clear title where one of the owners agrees to such acquisition or the acquisition is by agreement of all the owners.

**Va. Code § 57-7. What transfers for religious purposes valid. (Repl. Vol. 1969). (Repealed, 1993 Va. Acts, ch. 370)**

Every conveyance, devise, or dedication shall be valid which, since the first day of January, seventeen hundred and seventy-seven, has been made, and every conveyance shall be valid which hereafter shall be made of land for the use or benefit of any religious congregation as a place for public worship, or as a burial place, or a residence for a minister, or for the use or benefit of any church diocese, church, or religious society, as a residence for a bishop or other minister or clergyman who, though not in special charge of a congregation, is yet an officer of such church diocese, church or religious society, and employed under its authority and about its business; and every conveyance shall be valid which may hereafter be made, or has heretofore been made, of land as a location for a parish house or house for the meeting of societies or committees of the church or others for the transaction of business connected with the church or of land as a place of residence for the sexton of a church, provided such land lies adjacent to or near by the lot or land on which is situated the church to which it is designed to be appurtenant; or for use in furtherance of the affairs of any church diocese, and the land shall be held for such uses or benefit and for such purposes, and not otherwise. And no gift, grant, or bequest hereafter made to such church diocese, church or religious congregation, or the trustees thereof, shall fail or be declared void for insufficient designation of the beneficiaries in, or the objects of, any trust annexed to such gift, grant, or bequest in any case where lawful trustees of

such church diocese, church or congregation are in existence, or the church diocese, or the congregation is capable of securing the appointment of such trustees upon application as prescribed in the following section (§ 57-8); but such gift, grant, or bequest shall be valid, subject to the limitation of § 57-12; provided, that whenever the objects of any such trust shall be undefined or so uncertain as not to admit of specific enforcement by the chancery courts of the Commonwealth, then such gift, grant, or bequest shall inure and pass to the trustees of the beneficiary church diocese or congregation, to be by them held, managed, and the principal or income appropriated for the religious and benevolent uses of the church diocese or congregation, as such trustees may determine, by and with the approval of the vestry, board of deacons, board of stewards, or other authorities which, under the rules or usages of such church diocese, church or congregation, have charge of the administration of the temporalities thereof.

Provided that any devise of property after January one, nineteen hundred fifty-three, for the use or benefit of any religious congregation, wherein no specific use or purpose is specified shall be valid. (Code 1919, § 38; 1954, c. 268; 1956, c. 611; 1962, c. 516.)

**Va. Code § 57-7.1. What transfers for religious purposes valid.**

Every conveyance or transfer of real or personal property, whether inter vivos or by will, which is made to or for the benefit of any church, church diocese, religious congregation or religious society, whether by purchase or gift, shall be valid.

Any such conveyance or transfer that fails to state a specific purpose shall be used for the religious and benevolent purposes of the church, church diocese, religious congregation or religious society as determined appropriate by the authorities which, under its rules or usages, have charge of the administration of the temporalities thereof.

No such conveyance or transfer shall fail or be declared void for insufficient designation of the beneficiaries in any case where the church, church diocese, religious congregation or religious society has lawful trustees in existence, is capable of securing the appointment of lawful trustees upon application as prescribed in § 57-8, is incorporated, has created a corporation pursuant to § 57-16.1, or has ecclesiastical officers pursuant to the provisions of § 57-16.

(1993, c. 370; 2005, c. 772.)

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

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

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

(Code 1919, § 40; 1972, c. 825; 2005, cc. 681, 772.)

**Va. Code § 57-12. Quantity of real and personal estate trustees may hold (as amended by 1973 Va. Acts, ch. 515). (Repealed, 2003 Va. Acts, ch. 813)**

Such trustees shall not take or hold at any one time more than four acres of land in a city or town, nor more than two hundred fifty acres outside of a city or town and within the same county; provided that the city or town council of any city or town may by ordinance authorize such trustees to take and hold in such city or town not exceeding fifty acres of land at any one time if such acreage is to be devoted exclusively, and is subsequently

so devoted, to a church building, chapel, cemetery, offices exclusively used for administrative purposes of the church, a Sunday-school building and playgrounds therefor, and parking lots for the convenience of those attending any of the foregoing, and a church manse, parsonage or rectory; and provided further, that the trustees of a church diocese may take or hold not more than two hundred fifty acres in any one county at any one time; and they shall not take nor hold money, securities or other personal estate to the extent that such taking or holding causes the money, securities or other personal estate held at the time of taking by such trustees to exceed in the aggregate, exclusive of the books and furniture aforesaid, the sum of five million dollars; provided, that where two or more religious congregations, churches or religious societies shall merge or consolidate, such religious congregation, church or religious society so merged or consolidated, shall have three years' time within which to dispose of its land in excess of that which it is permitted to hold under this section.

Land taken or held outside of a city or town shall always be considered as such for the purposes of this article although such land later becomes part of a city or town through annexation or otherwise.

Nothing herein contained shall affect the validity of any land within a city or town legally acquired by a church to be exclusively used for a church manse, parsonage or rectory between June thirtieth, nineteen hundred fifty-four and June twenty-seventh, nineteen hundred sixty-four, provided the total amount of land owned by a church within a city or town does not exceed twenty acres. (Code 1919, § 43; 1926, p. 867; 1930, p. 687; 1952, c. 433; 1954, c. 309; 1958, c. 423; 1962, cc. 41, 516; 1964, c. 493; 1966, c. 308; 1973, c. 515.)

**Va. Code § 57-15. Proceedings by trustees or members for similar purposes, exception for certain transfers.**

A. The trustees of such a church diocese, congregation, or church or religious denomination, or society or branch or division thereof, in whom is vested the legal title to such land held for any of the purposes mentioned in § 57-7.1, may file their petition in the circuit court of the county or the city wherein the land, or the greater part thereof held by them as trustees, lies, or before the judge of such court in vacation, asking leave to sell, encumber, extend encumbrances, improve, make a gift of, or exchange the land, or a part thereof, or to settle boundaries between adjoining property by agreement. Upon evidence being produced before the court 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, extend encumbrances, make a gift of, or improve the property or settle boundaries by agreement, the court shall make such order as may be proper, providing for the sale of such land, or a part thereof, or that the same may be exchanged, encumbered, improved, or given as a gift, or that encumbrances thereon be extended, and in case of sale for the proper investment of the proceeds or for the settlement of such boundaries by agreement.

When any such religious congregation has become extinct or has ceased to occupy such property as a place of worship, so that it may be regarded as abandoned property, the petition may be filed either by the surviving trustee or trustees, should there be any, or by any one or more members of such congregation, should there be any, or by the religious body which by the laws of the church or denomination to which the congregation belongs has the charge or custody of the property, or in which it may be vested by the laws of such church or denomination. The court shall either (i) make a decree for the sale of the property or the settlement of boundaries between adjoining properties by agreement, and the disposition of the proceeds in accordance with the laws of the denomination and the printed acts of the church or denomination issued by its authority, embodied in book or pamphlet form, shall be taken and regarded as the law and acts of such denomination or religious body or (ii) at the request of the surviving trustees and after notice in accordance with law to all necessary parties, make such order as may be proper providing for the gift of such property to any willing local, state or federal entity or to a willing private, nonprofit organization exempt from taxation under § 501 (c) (3) of the Internal Revenue Code, provided the court finds that (a) the property includes a historic building or landmark so designated by the Commonwealth and (b) the purpose of such gift is historical preservation of the property.

The court may make such order as to the costs in all these proceedings as may seem proper.

B. As an alternative to proceeding under subsection A, (i) the trustees of a church or religious body that incorporate may transfer the title to the real and personal property of the church or religious body held by them to the incorporated church or religious body; and (ii) the trustees of a church or religious body that do not incorporate under subdivision (i) hereof may

transfer title to the real and personal property of the church or religious body held by them to a corporation created pursuant to § 57-16.1 without, in either instance, obtaining court permission if the transfer is authorized in accordance with the church's or religious body's polity. If no petition seeking to set such a transfer aside is filed within one year of the recordation of the trustees' deed transferring title to the real estate, or the date of the transfer of any personal property, it shall be conclusively presumed that the transfer was made in accordance with the church's or religious body's polity insofar as a good faith purchaser or lender is concerned.

C. No transfer made pursuant to subsection A or B shall operate as a transfer for purposes of a provision contained in any note or deed of trust that purports to accelerate an indebtedness upon a transfer of title. Any such transfers of real estate shall be entitled to the exemptions set forth in § 58.1-811.

D. Any transfer of real or personal property made pursuant to subsection B, and any similar transfer made pursuant to subsection A after April 23, 2002, shall be deemed to assign to the incorporated church or religious body, or the corporation created pursuant to § 57-16.1, as the case may be, the beneficial interest in every policy of insurance of every kind, type, and description, relating to the property transferred, contemporaneously with the transfer, and the transferee shall have all of the rights and obligations of the transferor relating thereto.

(Code 1919, § 46; 1924, p. 535; 1938, p. 179; 1962, c. 516; 1974, c. 138; 1983, c. 542; 1993, c. 370; 1998, c. 258; 2005, c. 772.)

**Va. Code § 57-16. Property held, etc., by ecclesiastical officers.**

A. How property acquired, held, transferred, etc. - Whenever the laws, rules or ecclesiastic polity of any church or religious sect, society or denomination commits to its duly elected or appointed bishop, minister or other ecclesiastical officer, authority to administer its affairs, such duly elected or appointed bishop, minister or other ecclesiastical officer shall have power to acquire by deed, devise, gift, purchase or otherwise, any real or personal property, for any purpose authorized and permitted by its laws, rules or ecclesiastic polity, and not prohibited by the laws of Virginia, and the power to hold, improve, mortgage, sell and convey the same in

accordance with such laws, rules and ecclesiastic polity, and in accordance with the laws of Virginia.

B. Transfer, removal, resignation or death of ecclesiastical officer. - In the event of the transfer, removal, resignation or death of any such bishop, minister, or other ecclesiastical officer, the title and all rights with respect to any such property shall pass to and become vested in his duly elected or appointed successor immediately upon election or appointment, and pending election or appointment of such successor, such title and rights shall be vested in such person or persons as shall be designated by the laws, rules, or ecclesiastical polity of such church or religious sect, society or denomination.

C. Validation of deeds, etc. - All deeds, deeds of trust, mortgages, wills or other instruments made prior to March 18, 1942, to or by a duly elected or appointed bishop, minister or other ecclesiastical officer, who at the time of the making of any such deed, deed of trust, mortgage, will or other instrument, or thereafter, had authority to administer the affairs of any church or religious sect, society or denomination under its laws, rules or ecclesiastic polity, transferring property, real or personal, of any such church or religious sect, society or denomination, are hereby ratified and declared valid. All transfers of title and rights with respect to property, prior to such date from a predecessor bishop, minister or other ecclesiastical officer who has resigned or died, or has been transferred or removed, to his duly elected or appointed successor, by the laws, rules or ecclesiastic polity of any such church or religious sect, society or denomination, either by written instruments or solely by virtue of the election or appointment of such successor, are also hereby ratified and declared valid.

D. Insufficient designation of beneficiaries or objects of trust. - No gift, grant, bequest or devise made on or after March 18, 1942, to any such church or religious sect, society or denomination or the duly elected or appointed bishop, minister or other ecclesiastical officer authorized to administer its affairs, shall fail or be declared void for insufficient designation of the beneficiaries in, or the objects of, any trust annexed to such gift, grant, bequest or devise; but such gift, grant, bequest or devise shall be valid; provided, that whenever the objects of any such trust shall be undefined, or so uncertain as not to admit of specific enforcement by the courts of the Commonwealth, such gift, grant, bequest or devise shall be held, managed, and the principal or income appropriated, for the religious and benevolent uses of such church or religious sect, society or

denomination by its duly elected or appointed bishop, minister or other ecclesiastical officer authorized to administer its affairs.

E. Rights and remedies cumulative. - The rights created and the remedies provided in this section shall be construed as cumulative and not exclusive.

F. No implied repeal of other provisions. - This section shall not be so construed as to effect an implied repeal of any other provisions of this chapter.

(1942, p. 382; Michie Code 1942, § 38a; 1962, c. 306; 1966, c. 308; 2005, cc. 681, 772.)

**Va. Code § 57-16.1. Property of unincorporated church held by corporation.**

Whenever the laws, rules, or ecclesiastic polity of an unincorporated church or religious body provide for it to create a corporation to hold, administer, and manage its real and personal property, such corporation shall have the power to (i) acquire by deed, devise, gift, purchase, or otherwise, any real or personal property for any purpose authorized and permitted by the laws, rules, or ecclesiastic polity of the church or body, and not prohibited by the law of the Commonwealth and (ii) hold, improve, mortgage, sell, and convey the same in accordance with such law, rules, and ecclesiastic polity, and in accordance with the law of the Commonwealth.

(2005, cc. 772, 928.)

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