VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

In re:	)	Civil Case Nos.
	)	CL-2007-0248724,
MULTI-CIRCUIT	)	CL-2006-15792,
EPISCOPAL	)	CL-2006-15793,
CHURCH PROPERTY	)	Cl-2007-556,
LITIGATION	)	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,
	)	CL-2007-11514

THE COMMONWEALTH'S RESPONSE TO THE POST-DECISION BRIEFS

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THE COMMONWEALTH'S RESPONSE
TO THE POST-DECISION BRIEFS

The Commonwealth of Virginia, upon relation of Robert F. McDonnell in his official capacity as Attorney General of the Commonwealth, pursuant to this Court's Orders of February 26, 2008 and April 3, 2008, submits its response to the Post-Decision Briefs.[1]

INTRODUCTION

Although "the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes,"[2] *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church,* 393 U.S. 440, 449 (1969), "the First

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[1] The Commonwealth has moved to intervene for the limited purpose of defending the constitutionality of *Virginia Code* § 57-9 ("§ 57-9"). This Court deferred ruling on the Motion, but granted amicus curiae status to the Commonwealth. Now that this Court has ruled that § 57-9 is applicable and, thus, must determine the constitutionality of § 57-9, the Commonwealth requests that this Court grant its Motion to Intervene.

By challenging the constitutionality of § 57-9, the Episcopal Church is asking this Court to overturn the results of the democratic process. The People's elected representatives enacted legislation and the People's elected Governor signed that legislation into law. If this Court is going to contemplate invalidate the results of the democratic process, then the Commonwealth should have the independent ability to seek or oppose review of that decision by the Supreme Court of Virginia. The independent ability to seek or oppose appellate review is accomplished only if the Commonwealth is a party.

[2] Most importantly, the First Amendment prohibits civil courts from resolving church property disputes because of religious doctrine and practice. *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976). As a corollary to this commandment, the First Amendment requires that civil courts defer to the resolution of issues of religious doctrine by the highest court of a hierarchical church organization. *Id*. at 724-25.

Amendment does not dictate that a State must follow a particular method of resolving church property disputes." *Jones v. Wolf*, 443 U.S. 595, 602 (1979). Indeed, "a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Maryland & Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.,* 396 U.S. 367, 368 (1970) (Brennan, J., joined by Douglas & Marshall, JJ., concurring) (emphasis in original). In addition to the "polity approach" of *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872), courts may use a "neutral principles approach". *Jones*, 443 U.S. at 603-10 (1979). [3] In the years since *Jones*, many States have adopted neutral principles as the method of resolving church property disputes. *See Presbytery of Beaver-Butler of United Presbyterian Church in U.S. v. Middlesex Presbyterian Church,* 489 A.2d 1317, 1321-1322 *(*Pa. 1985) (listing cases).

While the Episcopal Church and the Diocese of Virginia (collectively "Episcopal Church") and their amici now concede that Virginia can mandate that church property disputes be resolved using the neutral principles approach, they nevertheless assert that *Virginia Code* § 57-9 ("§ 57-9")[4] is unconstitutional.

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[3] *See also In re Church of St. James the Less*, 888 A.2d 795, 804-05 (Pa. 2005) (describing the two approaches set out in *Jones*).

[4] That statute provides:

> 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

Ignoring the clear text, blurring the distinction between intentional discrimination and disparate impact, advocating hypothetical claims of parties not before the Court, and twisting existing constitutional doctrine, they insist that § 57-9 infringes upon the rights of "hierarchical churches" in violation of both the Virginia and National Constitutions.[5]

> 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.

Virginia Code § 57-9.

[5] The Supreme Court of Virginia has held that the Virginia Constitution is co-extensive with the National Constitution's Religious Clauses. *Cf. Virginia College Bldg. Auth. v. Lynn*, 260 Va. 608, 626, 538 S.E.2d 682, 691 (2000) (Virginia courts have "always been informed by the United States Supreme Court Establishment Clause jurisprudence in [construing] Article I, § 16."). A statute that is consistent with the United States Constitution is consistent with the Virginia Constitution. *See, e.g. Cha v. Korean Presbyterian Church of Washington*, 262 Va. 604, 612, 553 S.E.2d 511, 515 (2001); *Habel v. Indus. Dev. Auth.*, 241 Va. 96, 100, 400 S.E.2d 516, 518 (1991); *Reid v. Gholson*, 229 Va. 179, 187-88, 327 S.E.2d 107, 112 (1985); *Mandell v. Haddon*, 202 Va. 979, 989, 121 S.E.2d 516, 524 (1961).

The Episcopal Church and amici are simply wrong. The text of § 57-9 does not distinguish between Christianity and other religions or between the Episcopal Church and other Christian denominations. Nor does it distinguish between denominations that use a hierarchical form of government and those that use other forms of government. As the Episcopal Church concedes, "[h]ierarchical denominations hold local church property by a variety of means, including in the name of trustees, in congregations' corporate names, in the name of the Bishop of the Diocese, and in the name of the mother church or its Presiding Bishop." *Diocese Supplemental Const. Br.* at 24 (parentheticals omitted). Similarly churches that use other forms of government may choose to hold property by a variety of means, including in the name of trustees. Rather, § 57-9 simply mandates a method of resolving church property disputes if the church property is held by trustees. Its application may be avoided simply by choosing a different means of holding property. As long as churches are allowed to choose among a variety of methods of holding property, § 57-9 does not establish religion, inhibit the free exercise of religion, violate equal protection, or impair contracts that existed prior to 1867. Rather, it provides a straightforward mechanism to determine how certain church property disputes should be resolved. Section 57-9 is constitutional as applied to the Episcopal Church in this litigation.

SUMMARY OF ARGUMENT

First, the constitutional inquiry is limited to whether § 57-9 is constitutional as applied to the Episcopal Church in this litigation. The Episcopal Church cannot pursue the claims of other hierarchical churches. Moreover, this Court should not entertain a facial challenge to § 57-9.

Second, § 57-9 is consistent with the Establishment Clause. This Court is not obligated to apply the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Because § 57-9 does not result in unconstitutional favoritism for certain denominations, it complies with the Establishment Clause. If this Court does apply the *Lemon* test, then the CANA interpretation is valid. Section 57-9 has a secular purpose, does not advance or inhibit religion, and does not result in excessive entanglement.

Third, § 57-9 is consistent with the Free Exercise Clause. Section 57-9 is a neutral law of general applicability. The free exercise of religion does not exempt the Episcopal Church from compliance with a neutral law of general applicability.

Fourth, § 57-9 is consistent with the Equal Protection Clause. Because the Episcopal Church's Free Exercise Clause claim fails and because § 57-9 does not distinguish between religions, rational basis scrutiny applies. The Episcopal Church cannot meet its burden to refute every conceivable rational basis.

Fifth, § 57-9 is consistent with the Contracts Clause. Because the Contracts Clause prohibits the impairment of existing contracts, it is inapplicable to any trust agreement that was formed after the § 57-9 was enacted. With respect to those trust

agreements that were created prior to § 57-9's enactment, § 57-9 does not substantially impair the agreements. To the extent that it does substantially impair the agreements, § 57-9 a reasonable method of accomplishing the significant and legitimate public purpose.

Finally, the application of § 57-9 to this litigation does not constitute a governmental taking of property without just compensation. A State does not "take" property when it adjudicates competing claims to title by private parties based on neutral legal principles. The government is not required to compensate the one branch of a denomination for the loss of church property that when the denomination divides and a local congregation chooses to join a different branch of the denomination.

LEGAL STANDARD TO BE APPLIED

Because the determination of the constitutionality of a legislative act is "the gravest and most delicate duty that [the judiciary] is called upon to perform," *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981),[6] "[e]very law enacted by the General

[6] Under the doctrine of constitutional avoidance, "constitutional questions should not be decided if the record permits final disposition of a cause on non-constitutional grounds. One of the most firmly established doctrines in the field of constitutional law is that a court will pass upon the constitutionality of a statute only when it is necessary to the determination of the merits of the case." *Keller v. Denny*, 232 Va. 512, 516, 352 S.E.2d 327, 329 (1987) (internal quotation omitted). *See also Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Although this Court's April 3, 2008 decision resolved all non-constitutional questions concerning the applicability of § 57-9, the Episcopal Church has sought to introduce *new* non-constitutional questions into the case.

Assembly carries a strong presumption of validity. Unless a statute clearly violates a provision of the United States or Virginia Constitutions, we will not invalidate it." *City Council of City of Emporia v. Newsome*, 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984).[7] "Judicial review of legislative acts must be approached with particular circumspection because of the principle of separation of powers, embedded in the Constitution.") *Ames v. Town of Painter,* 239 Va. 343, 349, 389 S.E.2d 702, 705 (1990).[8] "[T]he Constitution is to be given a liberal construction so as to sustain the enactment in question, if practicable." *Johnson v. Commonwealth,* 40 Va. App.

Specifically, the Episcopal Church wishes to amend its Answers and add an affirmative defense that § 57-9 contradicts *Virginia Code* § 57.2-02 ("§ 57.2-02").

If this Court allows the Episcopal Church to amend its Answers and assert this new affirmative defense and if this Court concludes that one private party can assert a § 57.2-02 claim against another private party, then the doctrine of constitutional avoidance requires this Court to resolve the statutory issue—whether § 57-9 contradicts § 57.2-02—before addressing the constitutional issue.

[7] *See also In re Phillips,* 265 Va. 81, 85-86, 574 S.E.2d 270, 272 (2003); *Bosang v. Iron Belt Bldg. & Loan Ass'n*, 96 Va. 119, 123, 30 S.E. 440, 441 (1898). *Cf. Vance v. Bradley*, 440 U.S. 93, 97 (1979) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process . . . and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.").

[8] "The wisdom and propriety of the statute come within the province of the legislature." *City of Newport News v. Elizabeth City County,* 189 Va. 825, 831, 55 S.E.2d 56, 60 (1949). "Undoubtedly, there are two sides to the question as to the wisdom or expediency of the legislative Act." *Id.* at 836, 55 S.E.2d at 62. "In a determination of the constitutional validity of a general statute, political, economic and geographical situations have no place. Such situations bring up questions of public welfare and conveniences which invoke the wisdom and policy of the legislature in their determination, within reasonable limits." *Id.* at 839, 55 S.E.2d at 64. Rather, "courts are concerned only as to whether the determination of the legislature has been reached according to, and within, constitutional requirements." *Id.*, 55 S.E.2d at 64.

605, 612, 580 S.E.2d 486, 490 (2003) (citation omitted).[9] "The party challenging an enactment has the burden of proving that the statute is unconstitutional, and every reasonable doubt regarding the constitutionality of a legislative enactment must be resolved in favor of its validity." *Marshall v. Northern Virginia Transportation Auth.,* 275 Va. 419, 428, 657 S.E.2d 71, 75 (2008).[10]

ARGUMENT

I. THE CONSTITUTIONAL INQUIRY IS LIMITED TO WHETHER § 57-9 IS CONSTITUTIONAL AS APPLIED TO THE EPISCOPAL CHURCH IN THIS LITIGATION.

A. The Episcopal Church May Not Raise the Claims of Other Hierarchical Churches.

Although the Episcopal Church may challenge the constitutionality of § 57-9 as applied in *this* litigation, *see County Court v. Allen,* 442 U.S. 140, 154-55 (1979), the Episcopal Church may not raise the constitutional claims of others not before the Court. As a general proposition, "where a statute is constitutional as applied to a litigant, the litigant has no standing to challenge the statute on the ground that it may be unconstitutional on its face, that is, as applied to a third person in a hypothetical situation." *Esper Bonding Co. v. Commonwealth*, 222 Va. 595, 597,

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[9] *See also Virginia Soc'y of Human Life, Inc. v. Caldwell*, 256 Va. 151, 156-57, 500 S.E.2d 814, 816 (1998); *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 52-53, 392 S.E.2d 817, 820 (1990); *Eaton v. Davis*, 176 Va. 330, 339, 10 S.E.2d 893, 897 (1940).

[10] *Hess*, 240 Va. at 53, 392 S.E.2d at 820); *Blue Cross of Virginia v. Commonwealth,* 221 Va. 349, 358-59, 269 S.E.2d 827, 832-33 (1980).

283 S.E.2d 185, 186 (1981). While "judicial power includes the duty 'to say what the law is,'" *Sanchez-Llamas v. Oregon,* 126 S.Ct. 2669, 2684 (2006), the judiciary must not "frustrate the expressed will of Congress or that of the state legislatures," *Barrows v. Jackson*, 346 U.S. 249, 256-57 (1953), by passing on the constitutionality of "hypothetical cases thus imagined." *United States v. Raines*, 362 U.S. 17, 22 (1960).[11] Therefore, to the extent that the Episcopal Church is seeking to raise the claims of other hierarchical churches, it is forbidden from doing so.

B. This Court Should Not Entertain a Facial Challenge to § 57-9.

It is unclear whether the Episcopal Church is asserting that § 57-9 is facially unconstitutional or merely unconstitutional as applied to this litigation. The distinction is crucial. In a facial challenge, the Episcopal Church must demonstrate "that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745 (1987).[12] If the facial challenge is successful,

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[11] *See also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975) ("[W]hen considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program."). *Cf.* John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, 4-5 (1982) (noting that the existence of judicial review reflects a fundamental distrust of the democratic process).

[12] Of course, in some First Amendment contexts, *federal* courts allow litigants to bring a facial challenge alleging overbreadth. In a facial challenge alleging overbreadth, the law is invalidated in *all* applications because it is invalid in *many* applications. *Virginia v. Hicks,* 539 U.S. 113, 118-19 (2003) ("The showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep,' suffices to invalidate *all* enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.'"(citations omitted). *See also Virginia v. Black*, 538 U.S. 343, 375 (2003) (Scalia, J., joined by Thomas, J., dissenting) (similar explanation of overbreadth).

then § 57-9 is declared "invalid *in toto*" because it is "incapable of any valid application." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982).

To the extent that the Episcopal Church is bringing a facial challenge, this Court should decline to entertain it.[13] As the United States Supreme Court recently explained:

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of "premature interpretation of statutes on the basis of factually barebones records." Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither "'anticipate a question of constitutional law in advance of the necessity of deciding it'" nor "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that "'[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'"

Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184, 1191 (2008) (citations omitted).[14]

Essentially, a facial challenge alleging overbreadth is a way to obtain an advisory opinion regarding *all* applications of a statute.

[13] If the litigation cannot be resolved on non-constitutional grounds, then this Court must entertain the as-applied challenge.

[14] *See also Younger v. Harris,* 401 U.S. 37, 52 (1971) (Facial challenges alleging overbreadth "are fundamentally at odds with the function of the federal courts in our constitutional plan. The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision.").

II. SECTION 57-9 IS CONSISTENT WITH THE ESTABLISHMENT CLAUSE.

While the Establishment Clause[15] applies to the States,[16] *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947), the States still retain substantial sovereign authority to make policy in areas that affect religious organizations and activities.[17] *Locke v. Davey,* 540 U.S. 712, 718-19 (2004). Indeed, the judiciary is reluctant "to attribute unconstitutional motives to the states particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983).[18] Even if some policy makers were motivated by a desire to promote religion, "that alone would not invalidate [the statute] because what is relevant is the legislative *purpose* of the

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[15] U.S. CONST. amend. I (Establishment Clause).

[16] Prior to the adoption of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 1 (Due Process Clause), the Establishment Clause and the Free Exercise Clause, like other provisions of the Bill of Rights, limited only the National Government. *See Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833). Thus, the States were free to do whatever they wished with respect to religion, subject only to the commands of their own State Constitutions.

[17] For example, although the Establishment Clause does not prohibit the indirect funding of religion, *see Zelman v. Simmons-Harris,* 536 U.S. 639, 652 (2002) (school choice vouchers may be used at private religious schools); *Zobrest v. Catalina Foothills Sch. Dist.,* 509 U.S. 1, 13-14 (1993) (disabled student at private religious school could receive special education services); *Witters v. Washington Dep't of Servs. for the Blind,* 474 U.S. 481, 487 (1986) (State could provide funds for the education of blind student studying for the ministry), the Free Exercise Clause does not require that the States indirectly fund religious education or activity. *See Locke*, 540 U.S. at 720-25.

[18] *See also Edwards v. Aguillard*, 482 U.S. 578, 586 (1987) (Court "is normally deferential to a [legislative articulation] of a secular purpose.").

statute not the possibly religious *motives* of the [policy makers] who enacted the [statute]." *Board of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) (O'Connor, J., joined by Rehnquist, C.J., White & Blackmun, JJ., announcing the judgment of the Court) (emphasis original).

A. This Court Is Not Obligated to Apply the *Lemon* Test.

The United States Constitution "does not say that in every and all aspects there shall be a separation of Church and State." *Zorach v. Clauson*, 343 U.S. 306, 312 (1952), but simply mandates "a freedom from laws instituting, supporting, or otherwise establishing religion." Phillip Hamburger, SEPARATION OF CHURCH AND STATE 2 (2003). When interpreting the Establishment Clause, "[t]here is 'no single mechanical formula that can accurately draw the constitutional line in every case.'" *Myers v. Loudoun Co. Pub. Schs.*, 418 F.3d 395, 402 (4th Cir. 2005).[19] Although the three-part *Lemon* test "occasionally has governed the analysis of Establishment Clause cases over the past twenty-five years," *ACLU Nebraska Found. v. City of Plattsmouth*, 419 F.3d 772, 776 (8th Cir. 2005) (en banc), the factors identified in *Lemon* serve as "'no more than helpful signposts'" in Establishment Clause analysis. *Van Orden*, 545 U.S. at 686 (Rehnquist, C.J., joined by Scalia, Kennedy & Thomas, JJ., announcing the judgment of the Court); *Hunt v. McNair*, 413 U.S. 734, 741 (1973). Indeed, the *Lemon* test frequently is ignored by the Supreme Court.[20] The

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[19] *See also Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring).

[20] *See, e.g., Van Orden*, 545 U.S. at 6861 (Rehnquist, C.J., joined by Scalia, Kennedy & Thomas, JJ., announcing the judgment of the Court); *Zelman*, 536 U.S. 639 (2002); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Capitol Square*

Fourth Circuit, in upholding the constitutionality of Virginia's statute requiring the daily recitation of the Pledge of Allegiance, *Virginia Code* § 22.1-202, refused to apply the *Lemon* test. *See Myers*, 418 F.3d at 402-05 (Williams, J., announcing the judgment of the Court) (relying on history); *id.* at 409 (Duncan, J., concurring) (relying on dicta and authority suggesting that the Pledge is not religious); *id.* at 409-10 (Motz, J., concurring) (relying on dicta).[21]

B. Section § 57-9 Does Not Result In Unconstitutional Favoritism for Particular Denominations.

The Establishment Clause must be viewed "in the light of its history and the evils it was designed forever to suppress" *Everson*, 330 U.S. at 14-15, and must not be interpreted "with a literalness that would undermine the ultimate constitutional objective as illuminated by history." *Walz v. Tax Comm'n of New York,* 397 U.S. 664, 671 (1970). Examining the "statutes and common law of the founding era," *Virginia v. Moore*, 128 S.Ct. ___, ___, 2008 WL 1805745 at *3 (2008), that constitutional objective is clear:

> 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. Neither can force nor influence a person to go or to remain away from church against his will or force

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Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); *Lee v. Weisman*, 505 U.S. 577 (1992); *Marsh v. Chambers,* 463 U.S. 783 (1983). ,

[21] *See also ACLU Nebraska Found.,* 419 F.3d at 778 n.8 (declining to apply the *Lemon* test). *But see ACLU of Kentucky v. Mercer County*, 432 F.3d. 624, 635 (6th Cir. 2005), *rehearing denied*, 446 F.3d 641 (6th Cir. 2006) (questioning the applicability of the *Lemon* test, but ultimately concluding that the *Lemon* test must be applied).

> him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance.

Everson, 330 U.S. at 15-16.[22] "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite." *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968).

However, the Establishment Clause's mandate of neutrality is not absolute. Because the State is not required "to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice," *Board of Educ. v. Grumet,* 512 U.S. 687, 705 (1994), the State may extend benefits to religion that

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[22] The Establishment Clause "does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises … as to have meaningful and practical impact." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., joined by Harlan, J. concurring). It permits "not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion." *County of Allegheny v. ACLU,* 492 U.S. 573, 670 (1989) (Kennedy, J., joined by Rehnquist, C.J., White & Scalia, JJ., concurring). Indeed, "there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments." *Van Orden* 545 U.S. at 692. (Scalia, J., concurring).

"We are a religious people whose institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313. "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Schempp*, 374 U.S. at 213. Consequently, the Supreme Court has explicitly "approved certain government activity that directly or indirectly recognizes the role of religion in our national life." *ACLU Nebraska Found.*, 419 F.3d at 777.

are not extended to non-religion. *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). Similarly, while the State may not designate "a particular religious sect for special treatment," *Grumet*, 512 U.S. at 706-07, there is no requirement that a State's policies have the *same impact* on all religious sects. *Varner v. Stovall*, 500 F.3d 491, 499 (6th Cir. 2007). Thus, a neutral definition of conscientious objector that has the effect of favoring Quakers and Mennonites is constitutional. *Gillette v. United States,* 401 U.S. 437, 454 (1971). Similarly, the Establishment Clause does not prohibit a neutral definition of the clergy communications privilege even though that definition has a disparate impact on some denominations. *Varner*, 500 F.3d at 499.

Section 57-9 does not contradict these principles. Section 57-9 does not single out a particular denomination or form of church government for special treatment. Even if § 57-9 were to have a disproportionate impact on the Episcopal Church, that disparate impact would not be unconstitutional. Indeed, the Supreme Court explicitly has recognized that States may adopt neutral principles as a means of resolving *all* church property disputes for *all* religious sects. *Jones*, 443 U.S. at 607.

Contrary to the assertions of the Episcopal Church, *Larson v. Valente*, 456 U.S. 228 (1982), does not command a different result. *Larson* did not involve a neutral statute that had a disparate impact on some denominations. *Id.* at 247 n.23. Rather, it involved a statute that "makes explicit and deliberate distinctions between different religious organizations." *Id*. Specifically, the statute's text differentiated between religious sects based upon how much money they raised from

their members. *Id.* at 230. In sharp contrast to the statute at issue in *Larson*, the text of § 57-9 does not make explicit and deliberate distinctions between religious sects. The text does not state hierarchical churches are subject to the law while non-hierarchical churches are not, but rather applies based upon the form in which churches choose to hold property. It does not require that some denominations be treated differently from other denominations. It applies equally to all religious sects. When there is no facial discrimination between religious denominations, *Larson* is inapplicable. *Hernandez v. C.I.R.*, 490 U.S. 680, 695 (1989).

Moreover, in the years since *Larson*, the Court has repeatedly upheld facially neutral statutes that have a disparate impact on certain religious sects. In the Free Exercise context, the Court has upheld a statute of general applicability that criminalizes the religious activities of some sects. *Employment Div. v. Smith,* 494 U.S. 872, 879 (1990). In the Establishment Clause context, the Court has upheld a facially neutral religious policy that, in its implementation, benefits a single denomination. *Marsh,* 463 U.S. at 793-95 (legislative prayers always offered by Presbyterian clergy).[23] It also has upheld neutral statutes and policies that benefit only those sects with the resources to start a school, *Zelman,* 536 U.S. at 652, or a student publication. *Rosenberger,* 515 U.S. at 842-45. In sum, *Larson* is limited to situations where the statute *explicitly* differentiates between religious sects. *Hernandez*, 490 U.S. at 695.

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[23] *See also Simpson*, 404 F.3d at 285-86.

C. Section 57-9 Complies with the *Lemon* Test.

If this Court concludes that it is necessary to apply the *Lemon* test, then § 57-9 satisfies the test. Under the *Lemon* test, a statute is constitutional if (1) it has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive entanglement with religion. *ACLU Nebraska Found.*, 419 F.3d at 475.

1. There is a Secular Purpose.

The requirement that the law serve a "secular legislative purpose" does not mean the law's purpose must be unrelated to religion.[24] *See Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos,* 483 U.S. 327, 335 (1987) (recognizing that the government may sometimes accommodate religious practices without violating the Establishment Clause). "[T]hat would amount to a requirement that the government show a callous indifference to religious groups, and the Establishment Clause has never been so interpreted." *Id.* Rather, the objective of the "secular legislative purpose" requirement is to "prevent the relevant governmental decision maker—in this case Congress—from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Id.* Although "[t]he eyes that look to purpose belong to an

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[24] The Sixth Circuit concluded that *McCreary County* altered the *Lemon* test so that the secular purpose had to be predominant. *Mercer County*, 432 F.3d at 630 n.5. *See also McCreary County v. ACLU*, 565 U.S.844, 901 (2005)) (Scalia, J., dissenting) ("[T]he [*McCreary County* majority] replaces *Lemon's* requirement that the government have 'a secular … purpose' with the heightened requirement that the secular purpose 'predominate' over any purpose to advance religion.").

'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *McCreary County,* 545 U.S. at 862, a policy "that is motivated in part by a religious purpose" may still satisfy the first part of the *Lemon* test. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).[25] This is "a fairly low hurdle." *Brown v. Gilmore*, 258 F.3d 265, 276 (4th Cir. 2001). Indeed, the Supreme "Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations." *Lynch v. Donnelly,* 465 U.S. 668, 680 (1984). Thus, "the first prong of the *Lemon* test to be contravened 'only if [the action] is entirely motivated by a purpose to advance religion.'" *Lambeth v. Board of Comm'rs,* 407 F.3d 266, 270 (4th Cir. 2005).[26]

Applying these standards, § 57-9 has a secular purpose. "The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and

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[25] *See also McCreary County*, 545 U.S. at 864-65 (when assessing the purely objective purpose of a government's funding or involvement in religion, the courts have traditionally been deferential to state legislative decisions); *Lemon*, 403 U.S. at 613 (recognizing legitimate state concern to maintain minimum school standards and considering the effort by the respective legislatures to include precautionary provisions in program given their understanding that the programs involved could "intrude upon … the forbidden areas under the Religion Clauses").

[26] *See also Wallace,* 472 U.S. at 56.

in providing a civil forum where the ownership of church property can be determined conclusively." *Jones*, 443 U.S. at 602.[27]

2. Section 57-9 Does Not Have the Primary Effect of Advancing Religion.

"For a law to have forbidden 'effects' under *Lemon,* it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Amos,* 483 U.S. at 337. Evaluation of the primary effect prong turns on (1) whether government defines recipients by reference to religion; and (2) whether the government's action results in indoctrination. *Agostini v. Felton*, 521 U.S. 203, 234 (1997). Evidence of the impermissible government advancement of religion includes "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz,* 397 U.S. at 668.[28]

Section 57-9 neither advances nor inhibits religion. It does not differentiate between religious sects. Rather, it differentiates on how property is held. It does nothing to indoctrinate any one in a particular religious belief. Rather, the statute exists only to resolve church property disputes fairly and efficiently.

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[27] *See also Presbyterian Church*, 393 U.S. at 445. *Cf. Mueller*, 463 U.S. at 395 (State has "secular purpose of ensuring that the State's citizenry is well educated"); *Wolman v. Walter*, 433 U.S. 229, 240 (1977) ("There is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education."); *Everson*, 330 U.S. at 7 ("It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose.").

[28] *See also Madison v. Riter,* 355 F.3d 310, 318 (4th Cir. 2003), *cert. denied sub nom. Bass v. Madison*, 545 U.S. 1103 (2005).

3. There Is No Excessive Entanglement.

The excessive entanglement inquiry often is coextensive with the primary effect inquiry. *See Zelman* 536 U.S. at 668 (O'Connor, J., concurring). In other words, because § 57-9 does not have the primary effect of advancing or inhibiting religion, there is no excessive entanglement.

Moreover, any entanglement between the State and religious sects is minimal. Adjudicating a property dispute is not excessive entanglement. At most, the judiciary has to judge the validity of a local congregation's vote as to which branch they wish to join. *Cf. Mueller,* 463 U.S. at 403 (no excessive entanglement from requirement that state officials examine textbooks to determine if they qualify for tax deduction so that deductions for sectarian books could be disallowed). Such a minimal judicial review does not constitute excessive entanglement. *Agostini*, 521 U.S. at 233 (administrative cooperation, by itself, is insufficient to create excessive entanglement).

Indeed, the neutral principles approach embodied by § 57-9 minimizes the State's involvement in church property disputes. As the Supreme Court explained:

> The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general-flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or

> doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.

Jones, 443 U.S. at 603-04.

In sharp contrast, under the polity approach articulated in *Watson,* a State's "civil courts must defer to the authoritative resolution of the dispute within the church itself." *Jones*, 443 U.S. at 605. Thus, "civil courts review ecclesiastical doctrine and polity to determine where the church has placed ultimate authority over the use of the church property." *Id.* "After answering this question, the courts would be required to 'determine whether the dispute has been resolved within that structure of government and, if so, what decision has been made.'" *Id.* However, this approach is often constitutionally problematic. As the U.S. Supreme Court explained:

> civil courts would always be required to examine the polity and administration of a church to determine which unit of government has ultimate control over church property. In some cases, this task would not prove to be difficult. But in others, the locus of control would be ambiguous, and "[a] careful examination of the constitutions of the general and local church, as well as other relevant documents, [would] be necessary to ascertain the form of governance adopted by the members of the religious association." In such cases, the suggested rule would appear to require "a searching and therefore impermissible inquiry into church polity." The neutral-principles approach, in contrast, obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes.

Id. at 605 (citations omitted). Nevertheless, while expressing disapproval of the polity approach, the Supreme Court did not repudiate this approach and some States continue to use it. *See Presbytery of Beaver-Butler,* 489 A.2d at 1322 n.4 (listing cases).

III. SECTION 57-9 DOES NOT VIOLATE THE FREE EXERCISE CLAUSE.

Although the Free Exercise Clause[29] is applicable to the States, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith,* 494 U.S. at 879.[30] Thus, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[31] *Church of the Lukumi Babalu Aye, Inc v. City of Hialeah*, 508 U.S. 520, 531 (1993). Thus, if § 57-9 is a neutral law of general applicability, then the Episcopal Church's free exercise claim fails.[32]

"In order to determine whether a law is neutral, as the Court used the term in *Smith,* we must examine the object of the law." *St. John's United Church of*

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[29] U.S. CONST. amend. I (Free Exercise Clause).

[30] *See also United States v. Lee,* 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring).

[31] Prior to *Smith*, any governmental policy that substantially burdened the free exercise of religion was invalid unless the State could show a compelling governmental interest. *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963). Thus, the Amish could refuse to send their older children to school even though state law required attendance of children below the age of sixteen in school. *Wisconsin v. Yoder,* 406 U.S. 205, 214-15 (1972).

[32] If this Court concludes that § 57-9 is not neutral and generally applicable, then this Court must determine if § 57-9 "is justified by a compelling interest and is narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 533. Section 57-9 meets that standard.

Christ v. City of Chicago, 502 F.3d 616, 631 (7th Cir. 2007), *pet. for cert filed*, No. 07-1127 (March 3, 2008). "[A] law is not neutral" if "the object of the law is to infringe upon or restrict practices because of their religious motivation." *Lukumi,* 508 U.S. at 533. The related principle of "general applicability" forbids the government from "impos[ing] burdens only on conduct motivated by religious belief" in a "selective manner." *Id.* at 543. "Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531.

"We begin, as *Lukumi* instructs, with the text" of § 57-9. *St. John's*, 502 F.3d at 632. Section 57-9 does not "refer to a religious practice without a secular meaning discernible from the language or context." *Lukumi,* 508 U.S. at 533. It does not single out the Episcopal Church or hierarchical churches. Rather, the text refers simply to a means of holding church property. Thus, it is facially neutral. "Even if a law passes the test of facial neutrality, it is still necessary to ask whether it embodies a more subtle or masked hostility to religion" *St. John's*, 502 F.3d at 633. Central to this inquiry is the "historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the [act's] legislative or administrative history." *Lukumi,* 508 U.S. at 540. As this Court's comprehensive examination of the history and original meaning of § 579 demonstrates, *see Opinion of April 3, 2008* at 46-63, § 57-9 was not motivated by anti-religious or anti-Episcopal animus. Rather, it was motivated to ensure prompt and peaceful resolutions of church property disputes.

Moreover, that § 57-9 is limited to "a church or religious societies" does not alter the analysis. As long as the legislature has a non-discriminatory purpose, a statute that singles out religion is considered neutral and generally applicable.[33] Because the General Assembly was motivated by a non-discriminatory purpose—resolving property disputes quickly and peacefully when a denomination divided—§ 57-9 is neutral and generally applicable. "Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property." *Presbyterian Church*, 393 U.S. at 449.

IV. SECTION 57-9 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause[34] "is essentially a direction that all persons similarly situated should be treated alike," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985), and enforces the principle that "the Constitution neither knows nor tolerates classes among its citizens." *Romer v. Evans*, 517 U.S. 620, 623

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[33] *See St. John's*, 502 F.3d at 636-37; *World Wide Street Preachers Fellowship v. Town of Columbia*, 245 Fed. Appx. 336, 344 (5th Cir. 2007) (unpublished); *KDM ex rel. WJM v. Reedsport School Dist.,* 196 F.3d 1046, 1048 (9th Cir. 1999); *Strout v. Albanese,* 178 F.3d 57, 65 (1st Cir. 1999). *But see Shrum v. City of Coweta, Okla.,* 449 F.3d 1132, 1144 (10th Cir. 2006); *Blackhawk v. Pennsylvania,* 381 F.3d 202, 209 (3rd Cir. 2004) ; *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1233-34 (11th Cir. 2004);*Fraternal Order of Police Newark Lodge No. 12 v. City of Newark,* 170 F.3d 359, 366 (3rd Cir. 1999); *Kissinger v. Board of Trs.,* 5 F.3d 177, 179 (6th Cir. 1993).

[34] The Equal Protection Clause provides that "[n]o State … shall deny to any person within its jurisdiction of the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (Equal Protection Clause).

(1996). "The "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer,* 334 U.S. 1, 22 (1948). The "general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440.[35] "Laws are presumed to be constitutional under the equal protection clause for the simple reason that classification is the very essence of the art of legislation." *Moss v. Clark,* 886 F.2d 686, 689 (4th Cir. 1989) (citation omitted).

This general rule gives way in those rare instances when statutes infringe upon fundamental constitutional rights or utilize "suspect" or "quasi-suspect" classifications. *Cleburne*, 473 U.S. at 440-41.[36] Thus, courts "apply different levels of scrutiny to different types of classifications." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). "Classifications based on race or national origin … and classifications affecting fundamental rights … are given the most exacting scrutiny." *Id.* Some classifications are subjected to "intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy." *Id*. All other classifications are subjected to "rational basis" review, which requires that "a statutory classification must be rationally related to a legitimate governmental purpose." *Id.*

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[35] *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981).

[36] *See also City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626-27 (1969).

A. Rational Basis Scrutiny Applies to Section 57-9.

1. If There Is No Violation of The Free Exercise Clause, Rational Basis Scrutiny Applies.

The Episcopal Church's Equal Protection claim is nothing more than a reframing of its Free Exercise claim. "Where a plaintiff's First Amendment Free Exercise claim has failed, the Supreme Court has applied only rational basis scrutiny in its subsequent review of an equal protection fundamental right to religious free exercise claim based on the same facts." *Wirzburger v. Galvin,* 412 F.3d 271, 282-83 (1st Cir. 2005).[37] Because the Episcopal Church's Free Exercise Claim fails, rational basis scrutiny applies to its equal protection claim.

2. Statutes That Distinguish Between Religion and Non-Religion Are Subjected to Rational Basis Scrutiny.

Although the Supreme Court has suggested that *all* religious classifications are suspect classifications, *Dukes,* 427 U.S. at 303,[38] it has applied strict scrutiny only where the statute discriminates among various religions or denominations. *St. John's*, 502 F.3d at 638.[39] Because § 57-9 does not discriminate facially between denominations or between forms of church government, it is subjected to rational basis review.

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[37] *See also Johnson v. Robison,* 415 U.S. 361, 375 n.14 (1974); *St. John's*, 502 F.3d at 638.

[38] The mention of religion in *Dukes* is dicta, *Taylor v. Johnson,* 257 F.3d 470, 473 n.2 (5th Cir. 2001) and, thus, not binding in future cases. *Central Virginia Cmty. Coll. v. Katz,* 546 U.S. 356, 363 (2006).

[39] *See also Amos*, 483 U.S. at 339.

3. The Possibility that § 57-9 will Have a Disproportionate Impact on the Episcopal Church does not Justify Strict Scrutiny

Moreover, the possibility that § 57-9 may have a disproportionate impact on the Episcopal Church does not alter the analysis. The Equal Protection Clause prohibits intentional discrimination, not disparate impact. *Washington v. Davis*, 426 U.S. 229, 250-52 (1976). Indeed, as explained above, while the State may not designate "a particular religious sect for special treatment," *Grumet*, 512 U.S. at 706-07, there is no requirement that a State's policies have the *same impact* on all religious sects. *Varner*, 500 F.3d at 499. Nor could the law be otherwise.

Indeed, when confronted with Establishment Clause or Free Exercise claims concerning statutes with a disproportionate impact on particular sects, the Court has consistently upheld the statutes. As explained above, in the Free Exercise context, the Court has upheld a statute of general applicability that criminalizes the religious activities of some sects. *Smith,* 494 U.S. at 879. In the Establishment Clause context, the Court has upheld a facially neutral religious policy that, in its implementation, benefits a single denomination. *Marsh,* 463 U.S. at 793-95 (legislative prayers always offered by Presbyterian clergy).[40] It also has upheld neutral statutes and policies that benefit only those sects with the resources to start a school, *Zelman,* 536 U.S. at 652, or a student publication. *Rosenberger,* 515 U.S. at 842-45.

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[40] *See also Simpson*, 404 F.3d at 285-86.

B. The Episcopal Church Cannot Negate Every Conceivable Rational Basis.

Under the deferential rational basis standard, the Episcopal Church bears the burden "to negat[e] every conceivable basis which might support" the legislation. *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973).[41] Further, the State has no obligation to produce evidence to support the rationality of the statute, which "may be based on rational speculation unsupported by any evidence or empirical data." *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 315 (1993). Rather, "a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge v. Williams,* 397 U.S. 471, 485 (1970).[42] Indeed, "a legislative choice is not subject to courtroom fact-finding," and "equal protection [analysis] is not a license for the courts to judge the wisdom, fairness, or logic of the legislative choices." *Beach Commc'ns, Inc.,* 508 U.S. at 307, 313. Thus, legislation is valid even though there may be an imperfect fit between means and ends. *Heller v. Doe,* 509 U.S. 312, 321 (1993).

The Episcopal Church cannot meet this heavy burden. Indeed, if this proceeding were a federal court challenge to § 57-9, the Episcopal Church's Equal

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[41] *See also Mitchell v. Comm'r of the Soc. Sec. Admin.,* 182 F.3d 272, 274 (4th Cir. 1999).

[42] *See also Lindsley v. Natural Carbonic Gas Co*., 220 U.S. 61, 78 (1911).

Protection claims would be dismissed summarily. *See Giarratano v. Johnson,* 521 F.3d 298, ____, 2008 WL 771503 at *3-5 (4th Cir. 2008).

V. TO THE EXTENT THAT THE LITIGATION INVOLVES AGREEMENTS FORMED PRIOR TO THE ENACTMENT OF SECTION 57-9, SECTION 57-9 DOES NOT VIOLATE THE CONTRACTS CLAUSE.

The Contracts Clause[43] was made part of the Constitution to remedy a particular social evil—the state legislative practice of enacting laws to relieve individuals of their obligations under certain contracts—and thus was intended to prohibit States from adopting "as [their] policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 439 (1934). The prohibition against impairing the obligation of contracts is not to be read literally. *W.B. Worthen Co. v. Thomas,* 292 U.S. 426, 433 (1934).

In determining whether § 57-9 impairs contracts that existed prior to its enactment, this Court must apply a three-step analytical inquiry. John E. Nowak & Ronald D. Rotunda, CONSTITUTIONAL LAW § 11.8 (7th ed. 2004). First, has the enactment of § 57-9 "operated as a substantial impairment of a contractual relationship[?]" *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244 (1978). "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the

[43] U.S. CONST. art I. § 10, cl. 1. The provision provides "No State shall … pass any … Law impairing the Obligation of Contracts …."

impairment is substantial." *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). Second, "[i]f the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 411-12 (1983). Third, the finding of a significant and legitimate public purpose is not, by itself, enough to justify the impairment of contractual obligations. A court must also satisfy itself that the legislature's "adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Keystone Bituminous Coal Ass'n v. DeBenticus,* 480 U.S. 470, 506 (1987). However, except where the State itself is a party to the contract, the judiciary should "'properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" *Energy Reserves Group, Inc.,* 459 U.S. at 413.

Section 57-9 easily survives this scrutiny. First, § 57-9 does not substantially impair existing contracts. The Episcopal Church can readily avoid the application of § 57-9 simply by ensuring that the Church property is held in a different manner. Second, assuming that § 57-9 does constitute a substantial impairment, the Commonwealth has a significant and legitimate public purpose—the peaceful and orderly resolution of church property disputes when a denomination is divided.

Third, § 57-9 is a reasonable method of accomplishing the significant and legitimate public purpose.

VI. THE APPLICATION OF § 57-9 TO THIS LITIGATION DOES NOT CONSTITUTE A GOVERNMENTAL TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION.

The Fifth Amendment prohibition on the government taking private property without just compensation is applicable to the States *See Keystone Bituminous Coal Ass'n*, 480 U.S. at 481 n.10. The Episcopal Church contends that if § 57-9 results in the CANA Congregations being able to keep their church property, then § 57-9 violates the Fifth Amendment.

The critical premise of the Episcopal Church's argument is that the State will "take" their property and then turn it over to a private party—the CANA Congregations. This premise is fundamentally wrong. A State does not "take" property when it adjudicates competing claims to title by private parties based on neutral legal principles.

Although it is not a church property case, the reasoning in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) disposes of the Episcopal Church's arguments. The state statute at issue in *Short* provided that a severed mineral interest that went unused for a period of 20 years automatically reverted to the present surface owner of the land. To avoid this reversion, the owner of the mineral rights was required to file a statement of claim in the local county recorder's office before the lapse of the 20-year period. *Id.* at 518. The former owner of mineral interests, whose rights had been "extinguished" by operation of the statute, argued that this measure

constituted a "taking." *Id.* at 530. The Court rejected this argument. The Court first noted that a State can "condition the permanent retention of [a] property right on the performance of reasonable conditions that indicate a present intention to retain the interest." *Id.* at 529. As the U.S. Supreme Court explained:

> In ruling that private property may be deemed to be abandoned and to lapse upon the failure to its owner to take reasonable actions imposed by law, this Court has never required the State to compensate the owner for the consequences of his own neglect. We have concluded that the State may treat a mineral interest that has not been used for 20 years and for which no statement of claim has been filed as abandoned; it follows that, after abandonment, the former owner retains no interest for which he may claim compensation. It is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right; there is no "taking" that requires compensation. The requirement that an owner of a property interest that has not been used for 20 years must come forward and file a current statement of claim is not itself a "taking."

Id. at 530.[44] For that matter, a routine adjudication of property rights when a married couple divorces does not constitute a "taking" in favor of one spouse. Similarly, the government is not required to compensate the one branch of a denomination for the loss of church property that when the denomination divides and a local congregation chooses to join a different branch of the denomination.

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[44] *See also Montoya v. Gonzales*, 232 U.S. 375, 378 (1914) ("no taking of property without due process of law" occurred when specific statute dispossessed original owner in favor of subsequent user if no claim was brought by original owner within 10 years).

CONCLUSION

For the reasons stated above, § 57-9 is constitutional as applied in this litigation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 9th day of May 2008, the original of THE COMMONWEALTH'S RESPONSE BRIEF TO THE POST-DECISION BRIEFS has been sent via overnight delivery to Office of the Clerk of the Circuit Court of Fairfax County and that a copy has been mailed by first class, postage prepaid, U. S. Mail to counsel listed below:

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