VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

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

THE CANA CONGREGATIONS' POST-DECISION RESPONSIVE BRIEF

The Falls Church, Truro Church, Church of Our Saviour at Oatlands, Church of the Apostles, Church of the Epiphany, Church of the Word, St. Margaret's Church, Christ the Redeemer Church, St. Stephen's Church, Potomac Falls Church, and St. Paul's Church (collectively, "CANA Congregations"), by their counsel, hereby file this post-decision brief responding to the April 23 brief of ECUSA and the Diocese.

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INTRODUCTION

For more than 140 years, the Commonwealth of Virginia has provided that, when a religious denomination experiences a "division," the question of who owns property held by the trustees of member congregations will be resolved by the neutral principle of majority rule *if* the denomination and its local member congregations have not made certain other legally binding arrangements. As the General Assembly has recognized, applying such a rule does not require civil courts to answer the question whether the denomination at issue has materially changed its doctrine, or to declare which branch of the divided church is the "true" branch. Rather, the court need only determine whether a division has occurred—whether an organized group of congregations and clergy has separated from its mother church and established a new polity—and whether the congregations whose property is at issue have voted to join the new polity (or "branch"), or to remain with the mother church. That is the procedure set forth in Virginia Code § 57-9, which applies to religious denominations in which property is held by trustees, but *not* to denominations in which congregational property is held by denominational officers (such as bishops), or to denominations in which local church property is held in corporate form.

To read the briefs of the Episcopal Church and the Diocese of Virginia, one would think that in enacting § 57-9, the Commonwealth had provided that the protections of the Religion Clauses of the First Amendment and the Virginia Constitution do not apply to religious denominations in church property disputes. Their briefs suggest that § 57-9 implicates the maxim that the right to the free exercise of religion protects not only individuals, but the "communal" exercise of denominations. And they maintain that the default rule of majority ownership embodied in §57-9 not only gravely interferes with the "polity" and "autonomy" of hierarchical churches,

but discriminates among denominations on what they say is a constitutionally impermissible basis—whether the property of their member congregations is held by trustees, or by others.

For all of the rhetoric in their briefs, however, the Episcopal Church and the Diocese of Virginia have not established that § 57-9 meaningfully interferes with, or "burdens," their religious exercise, let alone that it discriminates among denominations on a religious basis. Section 57-9 merely establishes a *presumptive* rule of majority ownership, and a genuinely hierarchical denomination may avoid this rule by making arrangements, before a dispute erupts, to place title to local church properties in the name of a denominational officer or in corporate form. It is undisputed that many denominations in Virginia (and elsewhere) have availed themselves of these alternative forms of ownership, placing their member congregations' properties outside the reach of the statute. The neutral availability of these alternative means of holding property forecloses any suggestion that the statute discriminates among different faiths. Indeed, the Diocese itself uses these alternative forms of ownership for numerous properties, including many that are used for religious worship. The Church and the Diocese insist that it would unconstitutionally interfere with their "governance" and "polity" to be required to take the same steps more broadly. The Free Exercise Clause, however, does not exempt them from compliance with neutral, secular legal requirements that facilitate protection of their asserted interests and to which they have no religious objection. The Free Exercise Clause protects the free exercise *of religion*; it does not permit denominations to claim immunity from neutral laws by raising objections based on considerations of convenience.

Resolution of this dispute, therefore, does not require a departure from the broad principles of religious freedom articulated in the briefs of the Episcopal Church and the Diocese. To the contrary, the CANA Congregations emphatically *agree* that the United States and Virginia

Constitutions provide substantial protection for communal religious exercise, whether of denominations or congregations. Moreover, they support a robust view of the principles of church autonomy and church polity, including the principle that genuinely ecclesiastical determinations, whether matters of doctrine or governance, are entitled to protection under the Free Exercise Clause. They also wholeheartedly endorse the principle that the Constitution does not permit States to discriminate invidiously among denominations—or any other religious bodies—on a religious basis.

The parties' disagreement, then, is over whether these principles are actually implicated in this case. They are not. The Episcopal Church and the Diocese of Virginia continue to function as in the past, with the same leaders, with the same geographic regions, and with the same form of government. And while state law must be "flexible enough to accommodate all forms of religious organization and polity"—whether hierarchical, congregational, or something in between—the United States Supreme Court has ruled that "the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes. 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.'" *Jones v. Wolf*, 443 U.S. 595, 602, 603 (1979) (citation omitted). Section 57-9, as interpreted by this Court, easily meets those requirements, and is therefore constitutional.

I. Section 57-9 is fully consistent with the Free Exercise Clause of the First Amendment.

As explained at length in our post-trial opposition brief (filed Jan. 11, 2008) ("CANA Post-Trial Opp."), Virginia's adoption of a neutral principle—a presumption of majority rule—to govern the ownership of congregational property in the event of a denominational division is fully consistent with the First Amendment. In *Jones v. Wolf*, 443 U.S. 595 (1979), the Supreme

Court confirmed that States may adopt *any* reasonable method for resolving church property disputes, including a presumptive rule of majority ownership, provided the method requires no resolution of doctrinal issues and grants the parties some means of arranging their affairs, in advance of a dispute, to provide for either denominational or congregational ownership. Section 57-9 satisfies these requirements. CANA Post-Trial Opp. 35-47.

This Court's April 3, 2008, ruling only confirms that conclusion. Under the Court's reading of § 57-9, "divisions" and "branches" are cognizable on a secular basis; § 57-9 addresses only property ownership and does not interfere with church governance, leadership, or any aspect of religious doctrine or ritual; and § 57-9 leaves open several means by which hierarchical churches may secure ownership of congregational property. Among other things, such churches may avoid the application of § 57-9 by directing that title to congregational property be placed in the name of a denominational officer (pursuant to § 57-16), or by directing that member congregations legally incorporate and transfer title to the incorporated entity (pursuant to § 57-16.1). Thus, there is no basis to the claim that the statute, "by legislative fiat," "eliminates the possibility of overcoming the congregational majority and insuring 'that the faction loyal to the hierarchical church will retain the church property.'" Diocese Supp. Br. 18; *see also* Br. of *Amici Curiae* 2 (asserting that § 57-9 leaves hierarchical churches "powerless" to enforce their hierarchy in property matters). Rather, § 57-9 embodies only secular, neutral principles, and it does not inhibit, let alone substantially burden, the religious exercise of ECUSA or the Diocese. Accordingly, even under the most generous interpretation of the Free Exercise Clause, § 57-9 cannot possibly be unconstitutional. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 404 (1964) (claimant must establish a "burden upon the free exercise of religion"); *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) (a statute may violate free exercise if it "unduly burdens the free exercise of relig-

ion"); *cf. Employment Div. v. Smith*, 494 U.S. 872, 883 (1990) (even under pre-*Smith* law, a party alleging a free exercise violation must demonstrate that the law "substantially burden[s] a religious practice").

In response to our argument that § 57-9 does not burden (let alone substantially so) their religious exercise, ECUSA claims that it violates the First Amendment for a State to "tell a church how to order its affairs in the ownership and management of properties devoted to entirely religious uses, rather than permitting churches to make their own decisions on such matters." *Id.* Indeed, ECUSA goes so far as to claim that "[d]ecisions about which of the entities or officers within a church's hierarchical structure should hold what property and for what purposes, *like decisions about how church rules should be adopted or leaders selected, goes to the heart of a church's organization and polity*." *Id.* (emphasis added). *Accord* Diocese Supp. Br. 21. As explained below, however, this argument is misplaced for several reasons.

A. ECUSA and the Diocese cannot establish a substantial burden on their religious exercise from having to make secular property arrangements to which they have no religious objection and which they have historically made for numerous other properties used for worship.

As an initial matter, the Church's position that § 57-9 unconstitutionally interferes with its religious exercise is foreclosed by *Jones*' holding that "the State may adopt any method of overcoming the majoritarian presumption," unless the method requires resolving "matters of religious controversy" or precludes the parties from making legal arrangements, before the dispute erupts, to provide for denominational ownership. 443 U.S. at 608. As the Court there recognized, "[t]he 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." *Id.* at 606.

But even assuming, *arguendo*, that the religious exercise of *some* religious denomination might be burdened by having to comply with a neutral rule concerning how to secure ownership rights in local church property, the Episcopal Church cannot establish such a burden here. Diocesan Canon 15.4 provides that "[t]he Bishop, or Ecclesiastical Authority, is hereby authorized to acquire by deed, devise, gift, purchase or otherwise, any real property for use or benefit of the Diocese. Property so acquired shall be held and transferred by the Bishop or the Ecclesiastical Authority of the Diocese in accordance with the provisions of Section 57-16 of the Code of Virginia." ECUSA-Diocese Exh. 3. at 28. The Diocese's own canons therefore expressly provide for use of the ownership procedure set forth in Va. Code § 57-16. Moreover, it is undisputed that Bishop Lee holds at least 29 properties in his own name, some 16 of which are used by worshipping congregations. *See* CANA Exh. 148 at 0331-0337 (Journal of the 210th Annual Council of the Diocese) ("Properties Held"); *see also* CANA Exh. 147 at 0344-349 (Journal of the 209th Annual Council of the Diocese) ("Properties Held"); Stipulation of Fact ¶ 1 (filed Dec. 6, 2007) (noting that not all property of Episcopal congregations in Virginia is held by trustees). Thus, ECUSA and the Diocese routinely hold property in at least one of the various ways that would have avoided application of § 57-9.

The fact that ECUSA and the Diocese have no *religious* objection to holding property in their bishop's name precludes them from establishing a substantial burden on their faith, let alone a free exercise violation. As the Supreme Court explained in *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972), "to have the protection of the Religion Clauses, [free exercise] claims must be rooted in religious belief,"' not in "philosophical and personal" considerations. The Church's objection to making alternative arrangements appears to be based on nothing more than a stated

desire to avoid the inconvenience occasioned by those arrangements, but the Free Exercise Clause protects only the free exercise *of religion*.

In contrast to ECUSA, a number of hierarchical churches in Virginia have availed themselves of the opportunity to order their affairs in a manner that places them outside the scope of § 57-9. For example, title to the real property of Roman Catholic and Mormon congregations is held by bishops (*see* Stipulation of Fact ¶¶ 5, 8 (Dec. 6, 2007)), and title to the real property of Greek Orthodox and Foursquare churches, among others, is held by corporations (*id.* ¶¶ 6-7). Because none of this property is held by trustees, § 57-9 is not triggered.[1]

These various means of avoiding application of § 57-9 likewise foreclose the *amici*'s assertion that the statute "leave[s] no room for denominations and local church to provide in advance—in their organizational documents, deeds, or elsewhere—that the parent church has an interest in local church property that cannot be unilaterally expunged by a simple majority of local church members." Br. of *Amici Curiae* 11. And having neglected to take the minimal step that other hierarchical churches have taken, the Episcopal Church may not insist that *the Constitution* requires recognition of their canons, particularly when they have no religious objection to holding property in other ways. As explained in detail below, *Jones* simply does not grant the Church a free-exercise right, regardless of its religious beliefs about property ownership, to retain any property a congregation may have acquired while an Episcopal parish, *without* complying with the legal norms established by the State for ensuring such retention. Undoubtedly that is why the official reporters of the Church's constitution have recognized that "[*Jones*] gives great weight to the actions of controlling majorities, and would appear to permit a majority fac-

[1] Similarly, at least some of the property of Presbyterian, Methodist, and Lutheran congregations is held in member congregations' corporate name (the balance is held by trustees), and thus is outside the scope of the statute's reach. *Id.* ¶¶ 2-4.

tion in a parish to amend its parish charter to delete all references to the Episcopal Church, and thereafter to affiliate the parish—and its property—with a new ecclesiastical group." I *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America Otherwise Known as The Episcopal Church* 301 (1981) (E. White and J. Dykman, eds.).

Indeed, ECUSA's reading of the Free Exercise Clause is breathtakingly broad. For example, suppose state law provided that denominations may be beneficiaries of trust interests in congregational properties, but that such beneficial interests must be recorded on the deeds at the county courthouse. According to ECUSA, it would be unconstitutional to enforce this neutral requirement against a denomination that objected to recording title of particular congregational properties "devoted entirely to religious uses" (ECUSA Supp. Br. 10), even if the denomination cited no religious objection to such recordation and, to the contrary, publicly recorded the titles of *other congregational properties devoted to religious uses*. Precedent provides no support for a view of the Free Exercise Clause that permits denominations to be so selective, on grounds of convenience rather than religious belief, about whether they will comply with neutral, secular legal requirements that are designed to facilitate protection of their asserted interests.

B. *Jones v. Wolf* can only be read to support the constitutionality of Va. Code § 57-9.

Lacking any precedent to support its assertion that our reading of *Jones* is "nonsense," the Church offers a number of other arguments in an effort to avoid the holding of that decision. Diocese Br. 5-6. None of these arguments is persuasive.

First, the Church seizes upon the *dictum* in *Jones* indicating that "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." Once again, however, the Church omits to quote the following sentence, which states: "Indeed, the State may adopt any method of overcoming the majoritarian presumption, so long as the use of that method does not impair free exercise rights or entangle the civil courts in matters of religious controversy." 443 U.S. at 608. Thus, *Jones* may *permit* States to defer to a hierarchical church's constitution, but it does not *require* that States do so.[2]

Several other aspects of the Court's opinion make clear that *Jones* does not create a "constitutional dictate" (Diocese Supp. Br. 5) to enforce the Church's internal canons. To begin with, the Court acknowledged that it "[could] not declare what the law of Georgia is," and in a footnote to its statement that a State "may adopt any method of overcoming the majoritarian presumption," the Court directed the Georgia Supreme Court on remand to "specify how, under Georgia law, [the majority] presumption may be overcome." *Id.* at 609, 608 n.5. If *Jones required* recognizing trust provisions set forth in the constitution of the general church, the Court presumably would not have given the Georgia courts complete discretion to specify how a hierarchical church could overcome the presumption of majority rule.

In addition, the Court in *Jones* observed that "*if Georgia law provides* that the identity of the [local] church is to be determined according to the 'laws and regulations' of the PCUS, *then* the First Amendment requires that the Georgia courts give deference to the presbyterial commission's determination of that church's identity." *Id.* at 609 (emphasis added). The Court did not

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[2] This reading of *Jones* is further confirmed by the fact that States are free to resolve church property disputes solely on the basis of the formal title doctrine, which does not take into account denominational canons and the like. *See Milivojevich*, 426 U.S. at 723 n.15; *Maryland & Va. Eldership v. Church of God at Sharpsburg*, 396 U.S. 367 (1970) (Brennan, J., concurring) ("Under the 'formal title' doctrine, civil courts can determine ownership by studying deeds, reverter clauses, and general state corporation laws").

say that state courts were required to defer to the "laws and regulations" of the denomination, as ECUSA and the Diocese claim here.

Furthermore, in addition to the passages cited above, the Court in *Jones* reiterated that "'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.'" 443 U.S. at 602 (citation omitted). Similarly, the Court explained that "a presumptive rule of majority representation," if "defeasible by *some other means*," "would be consistent with both the neutral principles analysis and the First Amendment." *Id.* at 607 (emphasis added). The Court further noted that, even under *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 722-23 (1872), which otherwise would have granted greater deference to hierarchical churches, "regardless of the form of church government, it would be the 'obvious duty' of a civil tribunal to enforce the 'express terms' of a deed, will, or other instrument of church property ownership," even if contrary to the wishes of the hierarchy. 443 U.S. at 603 n.3. And, of course, the Court's statement that "civil courts will be bound to give effect to the result indicated by the parties" was immediately followed by the proviso "provided it is embodied in some legally cognizable form." *Id.* at 606.

ECUSA and the Diocese say that we "misunderstand [the 'legally cognizable'] phrase," because "the *Jones* Court explained exactly what would not be legally cognizable"—language in the deeds, corporate charter, or constitution of the church that "incorporates religious concepts in the provisions relating to the ownership of property" or that otherwise "would require the civil court to resolve a religious controversy." Diocese Br. 9 (citing *Jones*, 443 U.S. at 604). But they are wrong. In reaffirming that religious writings are *not* legally cognizable as a matter of *constitutional* law, *Jones* was not comprehensively prescribing what sorts of private legal arrange-

ments *are* legally cognizable as a matter of *state property* law. Rather, the entire thrust of *Jones* is that States have wide latitude to establish rules for the governance of church property disputes, provided there is some means for the parties to arrange their affairs to achieve the various possible desired results, including denominational ownership of property.[3] And given the nature of the remand in *Jones*, it is evident that the only "necessary and essential" aspect of the Court's holding was its conclusion that "the State may adopt any method of overcoming the majoritarian presumption, so long as the use of that method does not impair free exercise rights or entangle the civil courts in matters of religious controversy." 443 U.S. at 608.

Second, ECUSA and the Diocese argue that altering the manner in which title is held by Episcopal congregations would involve more than a "minimal" burden on religious denominations under *Jones*, 443 U.S. at 606. According to them, making such adjustments would amount to a "cumbersome, massive undertaking," and therefore that the most that a denomination may be required to do after *Jones* is to adopt a canon or constitutional provision. Diocese Br. 6; *see also id.* at 21 ("'re-titling'. . . would be a significant practical burden on the Episcopal Church and the Diocese"); ECUSA Supp. Br. 6 (suggesting that requiring anything more than amendment of church governing documents would involve more than "'minimal' effort").

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[3] By quoting various passages from *Jones* out of context, ECUSA and the Diocese attempt to minimize the degree to which States have freedom, under the First Amendment, not to defer to the internal documents of a hierarchical church. For example, they quote *Jones* for the proposition that "[t]he neutral principles method . . .requires a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church," but omit from this quotation the phrase "at least as it has evolved in Georgia." *See* ECUSA Br. 6 n.3 (quoting 443 U.S. at 604). Similarly, they quote the sentence from *Jones* noting that "any rule of majority representation can always be overcome" 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" without quoting the following sentence, which says that "the State may adopt any method of overcoming the majoritarian presumption, so long as the use of that method does not impair free-exercise rights or entangle the civil courts in matters of religious controversy." *Id.* (quoting 403 U.S. at 607-08).

Here again, ECUSA and the Diocese badly misread *Jones*, which makes clear that one option available to States is to require hierarchical churches to "modify the deeds" to "ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property." 443 U.S. at 606. Indeed, *Jones* goes on to state that "[t]he burden involved in taking such steps will be minimal." 443 U.S. at 606. Thus, a state law requiring ECUSA and the Diocese to take steps that they consider an "administrative inconvenience" does not and cannot amount to a substantial burden on their free exercise of religion. *See Yoder*, 406 U.S. at 215-16.[4]

Indeed, if ECUSA and the Diocese have the hierarchical authority they assert, it is not even clear that they personally would have to re-title the properties of member congregations. Rather, they could have avoided this litigation by passing a constitutional provision directing *congregations* to transfer title to a diocesan officer, or even a provision directing that congregations legally incorporate themselves and transfer title to the incorporated entity. Any violations of such rules could have been dealt with by appropriate disciplinary action. But having failed to take such steps "[a]t any time before the dispute erupts" *Jones*, 443 U.S. at 606—and ECUSA and the Diocese have had several decades to do so under Va. Code § 57-16, which was enacted in 1942—ECUSA and the Diocese cannot now complain that civil law does not completely defer to and implement their church canons.

Third, ECUSA and the Diocese argue that our reading of *Jones* ignores the law of voluntary associations, under which, they say, their canons amount to a binding contract to which the CANA Congregations agreed. Diocese Br. 7-8. But even setting aside various other limitations

[4] The Church's own *amici* acknowledge as much. *See* Br. of *Amici Curiae* 5 (the First Amendment protects hierarchical churches where "their choice of such a polity is not motivated by purely 'administrative' concerns").

that Virginia law places on rules governing voluntary associations,[5] contracts are subject to governing statutory law. "[The] law of the [jurisdiction] where the contract is made" is "incorporated with the contract," "constitutes the law of the contract so formed, and must govern it throughout"—"whether [that law] affects its validity, construction, or discharge." *Ogden v. Saunders*, 25 U.S. 213, 264-65 (1827); *accord Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 429-30 (1934) ("the laws which subsist at the time and place of the making of a contract" merely "enter into and form a part of it"). Any post-1867 contracts must therefore be deemed to incorporate the division statute. Indeed, in the eyes of the law, it is as though any such contract begins with the words: "Subject to the requirements of Virginia Code § 57-9 and other provisions of the Virginia Code, ..." Thus, there is no merit to the suggestion that this Court must automatically defer to any contract created by the canons.

Fourth, in response to our argument that the Church has not amended its constitution, but only its canons, ECUSA and the Diocese argue that the decision "where to locate such a [denominational trust] provision" is an "ecclesiastical decision," and that "[a] church must have the autonomy, free from oversight by state legislatures and civil courts, to decide which of its provisions belong in which of its governing documents." Diocese Br. 8.

This argument is absurd, and ECUSA and the Diocese cite no authority in support of it. A State may legitimately distinguish between different types of governing documents on a secular basis. For example, the State might distinguish between the constitution and canons on the basis that the constitution, like a charter or articles of incorporation, is a legally necessary organizing document, whereas the canons, which are more akin to bylaws, are not. *Cf., e.g.*, Va.

[5] The Diocese's own authority, *Unit Owners' Ass'n v. Gillman*, 223 Va. 752, 762-66 (1982), recognizes that "[an association's] powers are limited by general law," that there are "inherent" limitations on an association's powers, and that these principles apply with particular force where the association seeks to "encumber[] [the members'] property."

Code § 13.1-819(E) (providing, subject to limited exceptions, that "whenever a provision of the articles of incorporation is inconsistent with a bylaw, the provision of the articles of incorporation shall be controlling"). Similarly, the State might distinguish between the two documents on the basis that one is more difficult to amend than another.[6] ECUSA and the Diocese do not contend that it would interfere with their *religious* exercise to be required to amend their constitution; once again, their position appears to be that they simply cannot be inconvenienced by having to comply with mundane requirements of civil property law. Evidently the Church believes that a State could not require a hierarchical body to secure an interest in congregational property by amending its articles of incorporation rather than its bylaws, as that would place the State "squarely into the religious thicket." Diocese Br. 8. But that view finds no support in precedent. And in any event, *Jones* does not even require that States automatically give effect to a provision in a church *constitution*; States may instead adopt a neutral principle providing that any denominational trust interest must be reflected "in the *deeds*." 443 U.S. at 602, 606, 608.[7]

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[6] As explained in our opposition brief (at 39 n.22), the Church's canons may be amended in a single General Convention or Annual Diocesan Council, but constitutional amendments require two readings at consecutive sessions of those bodies. *Compare* TEC-Diocese Exh. 1 (ECUSA Const. & Canons), Art. XII and TEC-Diocese Exh. 3 (Diocese Const. & Canons), Art. XIX (constitutional amendment procedures) *with* TEC-Diocese Exh. 1, Title V, Canon 1, § 1 and TEC-Diocese Exh. 3 at 30 (canonical amendment procedures).

[7] It is our position that, among other things, ECUSA failed to adopt Canon I.7.4 (the "Dennis Canon") in accordance with the (non-doctrinal) mandate that canonical changes be adopted in the identical form by both houses of the General Convention. *See* ECUSA-Diocese Exh. 1 (ECUSA Const. Art. I, § I and Canon V.1 (and Joint Rules of Order Rule III, Section 14(b))). In response, ECUSA and the Diocese argue that "civil courts are not in the business of policing the actions of a hierarchical church's authorities to see if those authorities followed their own rules." Diocese Br. 10. This position is breathtakingly broad: the Court not only must defer to its canons, but may not inquire whether, under secular criteria, they were validly adopted. But nothing turns on this issue for purposes of determining whether § 57-9 is applicable, constitutional, or conclusive. Even assuming, *arguendo*, that the Dennis Canon was validly adopted, § 57-9 is conclusive.

C. The argument that applying the principle of presumptive majority rule under § 57-9 would interfere with the "polity" of the Episcopal Church or subject it to "congregational governance" is foreclosed by *Jones* and rests on a mischaracterization of this Court's interpretation of the statute.

Jones also disposes of the Church's arguments that Virginia law unconstitutionally interferes with its "polity" by "impos[ing] on a hierarchical church a form of governance by majority rule." ECUSA Br. 7; *accord* Diocese Supp. Br. 15 ("§ 57-9(A) applies to hierarchical churches a principle of congregational governance"). The same objection was raised there, but the Court held that Georgia could apply majority rule rather than defer to "the 'laws and regulations' of the PCUS," provided the "rule of majority representation" was avoidable "by some other means." 443 U.S. at 609, 607. As explained in our opposition brief (at 36-37, 42-43), *Jones* distinguished between matters of "religious doctrine or polity" and "church property issues," holding that the latter may be resolved by *any* method the State chooses, as long as it avoids judicial resolution of doctrine and provides hierarchical churches with a reasonable opportunity to acquire control over congregational property "before the dispute erupts." *Id.* at 606.

1. Nonetheless, the Church continues to blur the line between disputes over church property and genuine disputes over polity. For example, ECUSA asserts that, "by governmental fiat," the Court's interpretation of §57-9 allows "individual congregations to divide the Church or any diocese thereof." ECUSA Supp. Br. 15, 16; *accord* Diocese Supp. Br. 18-19. These arguments, however, rest on a fundamental mischaracterization of this Court's interpretation of the term "division." The Court's ruling does not "restructure" any of the Church's dioceses, conclude that the Church misapplied its own "division" canons, or rule that ECUSA has to accommodate within its ranks, or recognize the legitimacy of, any entity such as CANA or ADV. Nor does this Court's decision interfere with the Church's ability to choose its Episcopal leaders or discipline its ministers, as it has done in the wake of the CANA Congregations' disaffiliations. To the con-

trary, this Court's decision simply recognizes a fact-based "division" between those who have chosen to remain in the Church and those who have chosen to leave it, resolving a question of property ownership in favor of the latter. The Court's ruling does so, moreover, on a secular basis: by defining a "division" as the separation of a group of congregations and clergy from their denomination to form another polity, and by defining "branch" as the newly formed polity. Op. 78-80, 11 n.10.

In no way is this an interference with the "polity" of the Episcopal Church. The Church's dioceses continue to function as in the past, within the same geographic regions and with the same leaders and form of government. Thus, the Court's application of § 57-9 does not "substitute [the Commonwealth's] own rules of governance and structure for those established by [the Church] itself" or "interfere in [its] internal workings." ECUSA Supp. Br. 1, 2. Rather, the Court's decision simply severs or "divides" off the property of those congregations and members that have chosen to leave, by applying what all concede is a neutral principle—majority rule. As the Virginia Supreme Court held in *Reid v. Gholson*, 229 Va. 179, 189-90 (1985), "the right to reasonable notice, the right to attend and advocate one's views, and the right to an honest count of the votes . . . are neutral principles of law, applicable not only to religious bodies, but to public and private lay organizations and to civil governments as well. Courts must apply them every day, and can do so without any danger of entering a 'religious thicket.'" *See also Jones*, 443 U.S. at 607 ("Majority rule is generally employed in the governance of religious societies," and "the majority faction can generally be identified without resolving any question of religious polity").[8] These are the neutral principles of law that § 57-9 embodies. And, of course, even the

[8] For example, parishes in ECUSA are governed by an elected lay vestry. *See* ECUSA Canon I.13, I.14 (ECUSA-Diocese Exh. 1). Members of various diocesan and national councils and the like in ECUSA are also elected. *See* ECUSA Const., Art. II, § 1; ECUSA Canon I.1(a), (c) (Dio-

resolution of the property issues under § 57-9 could have been avoided if ECUSA and the Diocese had more broadly availed themselves of statutes that would have secured their alleged claim of ownership—statutes that they have routinely relied upon to secure the title to other properties used for worship.

2. Once it becomes clear that the Church is mischaracterizing the sense in which this Court has found a "division" in ECUSA, the Diocese, and the Anglican Communion, the Church can find no support for its position in *Milivojevich*'s discussion of the reorganization of the Serbian Orthodox Church in North America. That case arose when the Illinois Supreme Court invalidated the Serbian Orthodox Church's decision to reorganize its American-Canadian Diocese into three dioceses on the basis that the reorganization "was '"in clear and palpable excess of [the Mother Church's] own jurisdiction."' 426 U.S. at 721. The Illinois court had "premised this determination on its view that the early history of the Diocese 'manifested a clear intention to retain independence and autonomy in its administrative affairs while at the same time becoming ecclesiastically and judicially an organic part of the Serbian Orthodox Church,' and its interpretation of the constitution of the American-Canadian Diocese as confirming this intention." *Id.* The Illinois court had thus "substituted its interpretation of the Diocesan and Mother Church constitutions for that of the highest ecclesiastical tribunals in which church law vests the authority to make that interpretation." *Id.* The Supreme Court reversed, holding that the provisions at issue "were not so express that the civil courts could enforce them." *Id.* at 723.

Here, by contrast, the Court has not substituted its interpretation of church documents for that of ECUSA or the Diocese; indeed, it has not interpreted those provisions at all. *Milivojevich* might be relevant if the CANA Congregations were seeking to reverse a decision of ECUSA to

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cese level); ECUSA Const., Art. I-II (General Convention, House of Bishops, and House of Deputies).

reorganize the Diocese based on an argument that ECUSA had misinterpreted its own constitution to permit such a reorganization, or if they were asking the Court to rule that the Church had wrongly refused to subdivide itself under canon law. But they are not making any such arguments: it is their position that the neutral principle of majority rule in § 57-9 is conclusive even assuming, *arguendo*, that the Church's governing documents mean what ECUSA and the Diocese say they mean. It is the CANA Congregations' position that those documents are not dispositive but rather are subject to civil law.

* * * * *

In summary, *Jones* confirms that the First Amendment would permit Virginia to adopt a statute providing that ownership of church property is governed solely by the deeds, or a statute providing that majority rule governs ownership of all congregational property held by trustees *even in the absence of a division.* To be sure, civil courts must take care not to resolve doctrinal questions, and hierarchical churches must have some means of securing ownership of congregational property that does not require them to cease functioning as a hierarchical polity. But there are many "neutral principles" by which state courts may resolve church property disputes, and Virginia applies the neutral principle of majority rule quite narrowly: Section 57-9 merely provides a *presumption* that the neutral principle of majority rule will govern a narrow aspect of a church's operations (ownership of property held by trustees) in a limited circumstance (a division) that is identifiable on a secular and neutral basis (the disaffiliation of a group of congregations who form a new polity). Op. 79-81. The Episcopal Church effectively equates its ability to organize itself as it wishes with its desire to own property in the legal form it wishes, but it is free to continue functioning with the identical form of governance that it has now, and the statute would not apply to the Church at all if it simply adopted a different form of ownership. That is

not an interference with hierarchical polity. It is one of many constitutional approaches to resolving church property issues under *Jones*.

D. The other authorities cited by ECUSA and the Diocese are inapposite.

Unable to distinguish *Jones*, ECUSA and the Diocese devote much of their brief to discussing other, pre-*Jones* authorities. They largely ignore our explanation why these cases do not require invalidating § 57-9, however, and in all events these cases must be read in light of *Jones*.

1. For example, ECUSA makes sweeping statements about its right to autonomy in light of cases such as *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), claiming that "it would ... lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed." ECUSA Br. 3. In contrast to their previous briefs, ECUSA and the Diocese no longer suggest that *Watson* was compelled by the First Amendment; they acknowledge that it "was technically decided as a matter of federal common law" (ECUSA Supp. Br. 3). Indeed, the only discussion of *Watson* in *Jones v. Wolf* was the Court's observation that *Watson* recognized "that, regardless of the form of church government, it would be the 'obvious duty' of a civil tribunal to enforce the 'express terms' of a deed, will, or other instrument of church property ownership"—a statement that makes it difficult to contend that *Watson* requires enforcement of church canons over the terms of a deed. *Jones*, 443 U.S. at 603. Moreover, the Virginia Supreme Court has expressly held that Virginia is "not bound by the rule of *Watson*" or the notion of "implied consent to [hierarchical church] government" that it embodies. *Norfolk Presbytery*, 214 Va. at 504. And in any case, this Court's application of § 57-9 does not "reverse" a decision of any internal "tribunal" of ECUSA, let alone on any matter of "ecclesiastical cognizance." 80 U.S. at 729.[9]

[9] Neither the ECUSA constitution nor its canons provides an internal mechanism for resolution of disputes over the continued affiliation or identity of a parish, or disputes over property, in the

2. Nor do ECUSA and the Diocese offer any serious answer to our discussion of *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), and *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960), where the ownership of the property at issue turned on the question whether a hierarchical church is entitled to deference on its choice of ecclesiastical *leaders*. Those cases involved a New York law and common law ruling, respectively, that purported to strip oversight of a Russian Orthodox cathedral from a prelate appointed by the Russian Orthodox Patriarch in Moscow. Explaining that the question was "the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America," the Court in *Kedroff* held that "[t]his controversy . . . is strictly a matter of ecclesiastical government" to be decided by "the church judicatories to which the matter has been carried." 344 U.S. at 113, 115; *see also id.* at 113 (describing the case as one involving "questions of discipline, or of faith, or ecclesiastical rule"); *Kreshnik*, 363 U.S. at 191 ("the [common law] decision now under review rests on the same premises which were found to have underlain the enactment of the statute struck down in *Kedroff*"). The Court went on to hold that the New York law violated the First Amendment because it "regulates church administration, the operation of the churches, [and] the appointment of clergy, by requiring conformity to church statutes." *Id.* at 107. Thus, *Kedroff* is not principally about who owned the church property (a question that may be decided by neutral principles), but about the state's inability to choose the ecclesiastical *leader* of the congregation that occupies such property (a question of ecclesiology). No such issue is implicated here.

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event of a disagreement or separation between the parish and the denomination. *See, e.g.*, L. J. Lunceford, ed., *A Guide to Church Property Law* 133-134 (2006) ("There are courts in the Episcopal Church, but their function by canon is limited to church discipline of bishops, priests and deacons. The church courts have no authority over parish disputes with the diocese or the ECUSA." (Footnote omitted)).

The Church nevertheless cites the Supreme Court's statement that the case involved the "right to use and occupancy of a church in the city of New York" (344 U.S. at 95), and on that basis claims that it is "not accurate" to say that *Kedroff* and *Kreshnik* are principally about the selection of ecclesiastical leaders. Post-Trial Reply 20 n.17. But there was no dispute in those cases that, whoever was rightfully the ruling hierarch of the archdiocese of North America, was also entitled to use of the property, and the Court's decisions turned on the fact that choosing the hierarch was beyond the state's authority under the First Amendment. Thus, it is misleading to suggest that the decisions speak directly to questions concerning the scope of state authority over church property. Here again, moreover, the Court's opinion in *Jones* does not so much as cite *Kedroff*.

3. We have already addressed *Milivojevich*'s holding that civil courts may not invalidate the reorganization of a church diocese based on the conclusion that under church canons such a reorganization "was 'in clear and palpable excess of [the Mother Church's] own jurisdiction.'" 426 U.S. at 721 (citation omitted). The remaining issue in that case arose when authorities in the Serbian Orthodox Church "defrocked" a bishop because he no longer possessed the "fitness to serve as Bishop." *Id.* at 698, 702. The Bishop refused to recognize his removal and filed suit seeking "to have himself declared the true Diocesan Bishop." *Id.* at 707. The state courts held that the Bishop's removal was "arbitrary," but the Supreme Court reversed. Although the Court examined church polity insofar as necessary to ascertain where authority over discipline lay, it condemned the lower court's finding that defrocking the Bishop was "arbitrary." Questions involving "the conformity of the members of the church to the standard of morals required of them" are "strictly and purely ecclesiastical"—and thus beyond civil courts' jurisdiction. *Id.* at 714.

Thus, *Milivojevich*, like *Kedroff* and *Kreshnik*, principally involved deference to hierarchical decisions concerning who is the rightful ecclesiastical *leader* of member congregations or dioceses, as opposed to decisions about property ownership. Those decisions have no relevance here.

4. ECUSA next cites *Maryland & Va. Eldership v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1969) (per curiam), which arose from Maryland Court of Appeals' decision applying that State's "neutral principles" doctrine. ECUSA Supp. Br. 4. Explaining that "the Maryland court's resolution of the dispute involved no inquiry into religious doctrine," the Court dismissed the case for failing even to raise "a substantial federal question." 396 U.S. at 369. ECUSA cites Justice Brennan's concurrence for the proposition that States must "scrupulously avoid intrusion into ecclesiastical affairs." ECUSA Supp. Br. 4. And that is no doubt true. But Justice Brennan was principally concerned with judicial inquiry into doctrine. He recognized that state courts could "resolve[] disputes over religious property by applying general principles of property law," and he expressly approved "the 'formal title' doctrine,' [whereby] civil courts can determine ownership by studying deeds, reverter clauses, and general state corporation laws." *Id.* at 370 & n.4. He also acknowledged that states could pass "special statutes governing church property arrangements in a manner that precludes state interference in doctrine. *Id.* at 370. And it was he who first observed that "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." *Id.* at 368, quoted in *Jones*, 443 U.S. at 602 (citation omitted).

5. ECUSA also cites *Northside Bible Church v. Goodson*, 387 F.2d 534 (5th Cir. 1967), and *First Methodist Church of Union Springs v. Scott*, 226 So. 2d 632 (Ala. 1969) (ECUSA Supp. Br. 7-8), decided some 40 years ago, but those cases do not cast any doubt on § 57-9.

First, both cases pre-date *Jones*, which confirmed that States may "adopt[] a presumptive rule of majority representation" for resolving church property disputes—even in cases involving "hierarchical" denominations—so long as there is some "method of overcoming the majoritarian presumption" through legal arrangements made before an ownership dispute erupts. *Id.* at 607-08. As explained above, a hierarchical church can avoid § 57-9 here by arranging for congregations to place title in the name of a denominational officer—an arrangement often used by the Diocese—or in corporate form. To the extent that *Goodson* and *Scott* would invalidate a rule of presumptive majority control in church property matters, they are no longer good law. Indeed, the principal decision cited in the Alabama cases (*see Scott*, 226 So. 2d at 640; *Goodson*, 387 F.2d at 537)—*Kedroff*, which, as we have explained, involved state interference with a denomination's choice of ecclesiastical *leaders*—was not so much as *cited* in the Court's opinion in *Jones*, and the decisions in those two cases did not consider whether a rule of majority representation was a neutral principle or whether the rule was avoidable by making alternative legal arrangements—*i.e.*, whether the law imposed any substantial burden on denominations' religious exercise.

Second, the Alabama statute addressed in *Goodson* and *Scott*—the Dumas Act, Ala. Code, Title 58, §§ 104-113—expressly limited its application to "Protestant churches" and required the Court to find that the parent church had engaged in a "substantial and material change in or departure from the discipline, social creed, jurisdictional system, authoritative pronouncements or other church law relating to the social standards, practices or policies of the parent

church or its affiliated institutions, as the same existed at the time of affiliation or merger of the local church with the parent church, and which change is contrary to the way of life of the majority group." *See id.* §§ 111, 104(a), 104(g);[10] *Scott*, 226 So. 2d at 634-35. Indeed, the trust clause language in the statute was virtually a *verbatim* quotation of the Methodist Church's Discipline, the statute applied only to trust clauses "inserted in a deed or instrument," and "it [was] conceded by all parties herein [that] control of the Union Springs property was conveyed to the hierarchy of The Methodist Church subject to the trust." *See Scott*, 226 So. 2d at 634, 640; *Goodson*, 387 F.2d at 538. Thus, the statute at issue not only was an egregious example of facial statutory discrimination among religions (*see Goodson*, 387 F.2d at 538 ("The Dumas Act operates only on protestant denominations of Christian faith" and disfavors "a particular sect of Christians," the "Methodist Church")), but required the civil courts to engage in a departure-from-doctrine analysis, in contravention of *Presbyterian Church v. Hull Church*, 393 U.S. 440, 445 (1969).

By contrast, § 57-9 contains no sect-specific language—it applies to *any* "congregation" attached to *any* "church or religious society"—much less a departure-from-doctrine requirement. And applying Va. Code § 57-9 here would not restructure the Church or interfere with its polity, but simply provide for majority control over property in the case of a "division" between those who wish to remain in the Church and those who have chosen to leave the denomination to form a new polity. *Jones* makes clear that this approach is constitutional, and to the extent they suggest otherwise, *Scott* and *Goodson* are no longer good law.

6. ECUSA also cites *Reid v. Gholson*, 229 Va. 179 (1985), which involved the question

[10] A copy of The Dumas Act, Act 70 approved by the Alabama legislature in 1959, was attached as Exhibit A to the CANA Congregations' Response to Motion for Leave to File Notice of Additional Authorities (filed Feb. 14, 2008). A copy of the codification of The Dumas Act, Ala. Code, Title 58 §§ 104-113, was attached as Exhibit B to the same filing. The Dumas Act was automatically repealed when it was not included in the 1975 recodification of the Alabama Code. *See* Ala. Code, 1975, § 1-1-10.

whether civil courts could appoint a commissioner to oversee the voting process in a congregational church to ensure that it was conducted properly. ECUSA Supp. Br. 7-8, 14. ECUSA focues on dictum from *Reid* to the effect that hierarchical churches have a right to "establish their own rules for discipline and internal government" and have "internal tribunals to decide internal disputes arising in matters of discipline and internal government." *Id.* at 189. As a general matter, this rule is correct. But the rationale for this rule is that internal governance issues may "depend[] upon matters of faith and doctrine." *Id.* at 189. And as we have explained, this Court's interpretation of § 57-9 does not interfere with the polity, structure, or doctrine of the Episcopal Church; the statute affects property only, and apart from that question the Church continues to function as it did before this dispute erupted. Moreover, even § 57-9's effect on property could have been easily avoided by the Church had it taken the minimal steps—steps wholly independent of its form of governance—to secure an ownership interest in the properties at issue. The important aspect of *Reid*, therefore, is its explanation that "the right to reasonable notice, the right to attend and advocate one's views, and the right to an honest count of the votes . . . are neutral principles of law, applicable not only to religious bodies, but to public and private lay organizations and to civil governments as well. Courts must apply them every day, and can do so without any danger of entering a 'religious thicket.'" *Id.* at 189-90. So too here.

E. The Episcopal Church's argument that this Court's interpretation of Virginia Code § 57-9 disregards ordinary "neutral principles" analysis is an attempt to relitigate the statutory issues and rests on a misunderstanding of the neutral-principles doctrine.

ECUSA and the Diocese also maintain that the Court's interpretation of § 57-9 "disregards 'neutral principles' entirely." Diocese Supp. Br. 18. Quoting *Jones*, they argue that applying neutral principles "involves consideration of 'the language of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in

the constitution of the general church concerning the ownership of church property," Diocese Supp. Br. 18 (quoting 443 U.S. at 603), none of which, they say, "matters" under the Court's analysis. *Id.* at 19; *accord* ECUSA Supp. Br. 24 (the Court's interpretation would "override the specifications in the applicable property deeds, the Church's undisputed rules governing local church property, and all of the other evidence concerning the course of dealing between the parties"). For two reasons, this argument is without merit.

First, the Church's view assumes that there is but one monolithic set of "neutral principles" that applies in every State that adopts a neutral principles approach to resolving church property disputes. But that is not so. A "neutral principle" is any principle that is "secular in operation, yet flexible enough to accommodate all forms of religious organization and polity." *Jones*, 443 U.S. at 603. To be sure, the Court's opinion in *Jones* observed that "the neutral principles method, *at least as it has evolved in Georgia*, requires a civil court to examine certain religious documents, *such as* a church constitution." 443 U.S. at 604 (emphasis added); *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 504 (1974) ("neutral principles" are "developed for use in all property disputes" and "do not involve inquiry into religious faith or doctrine"). But the Court was merely addressing one example of the neutral principles method; it was not purporting to set out a comprehensive list of the different factors that all States following a "neutral principles" approach must apply. It would be constitutional, for example, for a State to resolve church property disputes solely by looking at the deeds, or under the "formal title" doctrine. *Jones*, 443 U.S. at 603 n.3; *Maryland & Va. Eldership v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 370 & n.4 (1969) (Brennan, J., concurring) (state courts may "resolve[] disputes over religious property by applying general principles of property law," including "the 'formal title' doctrine,' [whereby] civil courts can determine ownership by studying deeds, reverter clauses, and general

state corporation laws"). Similarly, it is constitutional for Virginia to apply the neutral principle of majority rule in the limited circumstance of a denominational division.

Second, it is inaccurate to say that the various other factors that ECUSA and the Diocese identify—deed language, state church property laws, and provisions in the governing documents of the local church or the denomination—are necessarily irrelevant under the Court's interpretation. For example, the deeds are relevant to determining whether the property is held in trust for the congregation. But neither is it accurate to suggest that all these factors have *equal* relevance, or that the relevance of provisions in the congregations' and denominations' governing documents are not themselves *subject to* state property statutes. It is well settled, for example, that private contractual agreements are subject to governing law—and thus that any contract or trust claim ECUSA or the Diocese might assert here is limited not only by § 57-9, but by the entirely of the Virginia Code. *See* Part I.B, *supra.*; CANA Opening Post-Decision Br. 5-7. ECUSA and the Diocese may not like it that § 57-9 is "conclusive" in cases where the parties have not taken steps to adopt alternative property arrangements, but that does not make it unconstitutional.

Similarly, citing *Green v. Lewis*, 221 Va. 547, 553 (1980), ECUSA and the Diocese suggest that any award of property to the CANA Congregations here must, under any proper "neutral principles" approach, be "the wish of the constituted authorities of the general church" under Va. Code § 57-15. ECUSA Supp. Br. 25; Diocese Supp. Br. 19. But neither *Green* nor *Norfolk Presbytery* involved any claim under § 57-9 (Op. 71 n.74), and the Court rightly recognized that reading § 57-9 to require denominational approval of divisions would ignore "a key difference between 57-9 and 57-15." Op. 74. As the Court explained:

> Just as 57-9 requires only a majority approval of the congregation in order for the court to determine ownership of property upon a division, 57-15 also originally required *only congregational approval* for a conveyance of property. However, 57-15 was *affirmatively amended* to include the specific words: 'constituted au-

> thorities,' and 'governing body of any church diocese.' In contrast, 57-9 contains absolutely no reference to the governing authorities of a church." Op. 74.

Op. 74. Thus, this Court's April 3 ruling did not apply § 57-9 "regardless of any other consideration," including "applicable state statutes." ECUSA Supp. Br. 24, 25. Rather, it considered those aspects of state law and held that they were not dispositive. (Indeed, the Church's attempt to relitigate the Court's statutory analysis is not even properly within the scope of this briefing, which is focused constitutional issues.) Accordingly, there is no basis to the suggestion that the Court ignored relevant "neutral principles" in interpreting § 57-9, let alone that the Constitution requires consideration of a fixed set of factors in any such "neutral principles" analysis.

II. The Court's interpretation of Virginia Code § 57-9 does not require resolution of doctrinal questions.

Faced with *Jones*' approval of rules under which congregational majorities in hierarchical churches presumptively own local church property, ECUSA and the Diocese resort to arguments that the Court's interpretation of § 57-9 necessarily requires, and rests on, the resolution of ecclesiastical questions and doctrinal issues. ECUSA Supp. Br. 10, 14; Diocese Supp. Br. 29-31. As explained below, these arguments are misguided. To be sure, the Court's summary of the record is lengthy (reflecting the fact that there were several days of trial), and some of the record contains testimonial evidence providing background on the theological differences between the parties that led the CANA Congregations to disaffiliate and form a new polity. But none of this testimony formed the basis of the Court's legal rulings: the Court was careful both to interpret *and* apply the statute's terms on a secular basis. *See, e.g.,* Op. 11 n.10 (emphasizing that "no statement, expression or comment in this opinion is intended by the Court to express a view on the substance or the merits of the matters giving rise to the division").

A. The Court adopted a secular definition of the "branch" requirement and applied it in a secular manner.

ECUSA and the Diocese contend that this Court's interpretation of § 57-9's "branch" requirement "rests on explicitly religious grounds" and "has no secular basis." ECUSA Supp. Br. 21.[11] The Court, however, was careful both to define the term "branch" on a secular basis and to apply it in a secular manner. As the Court explained, a "branch" is "'a division of a family descending from a particular ancestor'" or "'[a]ny arm or part shooting or extended from the main body of a thing.'" Op. 78 (quoting *Merriam-Webster's Online Dictionary*, http://www.meriam-webster.com/dic-tionary/branch (visited Mar. 31, 2008); and Noah Webster, *A Dictionary of the English Language* (1872) (preface dated 1867)). In other words, a "branch" is simply an organized group of congregations that has "split apart from [its] parent denomination." Op. 78.

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[11] ECUSA and the Diocese raise other constitutional objections to this Court's interpretation of the "division" requirement (*e.g.*, that it interferes with their polity), but they do not dispute that this Court adopted a secular interpretation of "division." As the Court recognized, a "division" is a split that "involve[s] the separation of a group of congregations, clergy, or members from the church, and the formation of an alternative polity that disaffiliating members could join." Op. 79-80. This definition does not require resolution of doctrinal matters; it requires only that the Court examine whether congregations and clergy have disaffiliated in sufficient numbers to establish a new polity, and that a new polity has been established. Applying this definition, moreover, the Court did not inquire into the significance or validity of the theological considerations that led to the division. *See, e.g.*, Op. 11 n.10. Rather, the Court based its holding on a straightforward examination of the fact that organized groups of congregations and clergy had formally disaffiliated from ECUSA and the Diocese and set up new denominational structures such as CANA, ADV, and the American arm of the Anglican Church of Uganda. Op. 81-82.

Similarly, at the Anglican Communion level, the Court based its conclusion that a "division" had occurred on objective facts of a type that civil courts routinely assess. The Court focused on the "separation and the formation of an alternative polity," which it found "satisfied by the Church of Nigeria's historic alteration of its constitution, which allowed for the formation of CANA," "cut all financial and relational ties" with ECUSA, and "altered the Church of Nigeria's relationship with the rest of the Anglican Communion." Op. 83. A judicial determination that a religious body has altered its constitution to disaffiliate from another religious entity does not involve any unconstitutional inquiry into religious doctrine. *Jones*, 443 U.S. at 602-04.

The "branch" requirement of § 57-9, of course, is simply the logical corollary of the division requirement, and likewise requires no resolution of doctrinal issues.

This is plainly a secular definition—one consistent with the popular understanding of the term—and it requires no theological inquiry to determine that CANA and ADV "descended from" or "extended from" ECUSA and the Diocese, respectively. Indeed, there is no dispute that the members of CANA and ADV were previously attached to the Episcopal Church, that these organizations were established specifically to form a new denominational home for those separating from the Episcopal Church, or that they are made up almost entirely of former Episcopal congregations, clergy, and members. Op. 81-83. The degree to which the members of CANA and ADV currently share any theological similarities to the Episcopal Church is irrelevant to whether they "descended from" or "extended from" that Church, and the Court need not (and did not) resolve any such questions to find the "branch" requirement satisfied. Accordingly, there is no basis to any assertion that resolving the "branch" issue "necessarily entangles government and religion." Diocese Supp. Br. 31.

Not surprisingly, then, ECUSA and the Diocese do not suggest that the Court engaged in a forbidden doctrinal analysis in concluding that CANA and ADV are "branches" of ECUSA and the Diocese, respectively, under the Court's definition.[12] Rather, their argument that the Court waded into the "religious thicket" focuses on the Anglican Communion component of the case, and in particular on the Court's statements concerning entities that might *not* qualify as

[12] At the ECUSA and Diocesan levels, the Episcopal Church's stated objection to the conclusion that "CANA and ADV are 'branches' of the Episcopal Church and the Diocese" is that it implicates "the core of church polity." ECUSA Supp. Br. 20. But as we have explained, ECUSA and the Diocese continue to function with the same polity, in the same manner, and with the same geographic boundaries as in the past, albeit with fewer members and less property. ECUSA asserts that the Court's decision affects how CANA and ADV "relate to" the Episcopal Church and finds "relationships that the entities themselves disavow (*id.* at 19-20), but the Church is not required to recognize those entities as *legitimate* or to accommodate them within its own ranks. Indeed, the assertion that the Court's recognition of CANA and ADV as branches interferes with their "polity" seems to presume that the Court adopted *the Church's* definition of "branch"—as an entity that has *not* split off from the Church.

"branches." We consider in turn their Anglican Communion arguments, which relate only to one of three independent bases on which the CANA Congregations have satisfied the "branch" requirement.

1. First, ECUSA argues that the Court's conclusion that CANA and ADV are "branches" of the Anglican Communion within the meaning of §57-9(A) is impermissible because the Court "find relationships that the entities themselves disavow." ECUSA makes this argument in three different ways,[13] but repetition does not make it convincing. The factual premise for all of these assertions is the same oft-cited testimony of Professors Mullin and Douglas. *See, e.g.*, ECUSA Supp. 16 (citing Tr. 879:4-880:8 (Douglas); Tr. 1039:20-1040:4 (Mullin); *id.* 17-18 (without citation); *id.* 19 (contrasting Letter Op. at 76-79 with Tr. 1039:7 to 1040:19 (Mullin)). This argument fails for multiple reasons, quite apart from the fact that the Anglican Communion aspect of the Court's opinion was one of several independent bases for the Court's ultimate conclusion, and therefore unnecessary to the decision.

For one thing, ECUSA ignores the fact that the Court's conclusion that the "branch" requirement is satisfied at the Anglican Communion level is based on legal and structural relationships that are cognizable based entirely upon non-doctrinal criteria. These judicially cognizable criteria include the admitted legal affiliations of (1) CANA and ADV with the Church of Nigeria (as set forth in their respective Articles of Incorporation and Bylaws and in the Constitution of the Church of Nigeria),[14] (2) the Church of Nigeria with the Anglican Communion (as set forth

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[13] *See* ECUSA Supp. 16 (the "Anglican Communion's instruments have disapproved the formation of CANA and the ADV, and do not consider them as *bona fide* parts of the Communion.); *id.* at 17 (the "Anglican Communion's instruments of communion do not acknowledge the legitimacy or permit the participation of CANA or the ADV."); *id.* at 19-20.

[14] *See, e.g.*, Op. 26 (citing CANA Trial Exh. 69 (CANA Articles of Incorporation), Op. 36 (citing CANA Trial Exh. 70 (ADV Articles of Incorporation setting forth ADV's legal and structural relationship to CANA and the Church of Nigeria)). It would be difficult for ECUSA to ar-

in its Constitution and that of the Anglican Consultative Council),[15] and (3) ECUSA with the Anglican Communion (as set forth in its Constitution and that of the Anglican Consultative Council).[16] These structural relationships are also amply evidenced by the testimony of Church of Nigeria Registrar Abraham Yisa.[17] Such factual conclusions are well within the permissible ambit of *Jones*, which simply holds that courts "must take special care to scrutinize the [evidence] in purely secular terms, and not to rely on religious precepts [therein]." 443 U.S. at 604.

Further, ECUSA's claim that the relationships recognized by the Court are "disavowed" by the entities themselves mischaracterizes the evidentiary record. It distorts the testimony of Professors Douglas and Mullen, who did not make the actual statements in ECUSA's brief set forth above. *See* ECUSA Br. 16-19. Rather, as the cited portions of the transcript demonstrate, Professors Douglas and Mullen testified only that the Bishops of CANA and ADV had not received invitations to the upcoming 2008 Lambeth Conference from the Archbishop of Canterbury. *See* Tr. 879:4-880:8 (Douglas); Tr. 1039:20-1040:19 (Mullin).

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gue that these documents are not legally cognizable, as such documents are routinely filed with state agencies in accordance with state laws.

[15] *See, e.g.*, CANA Trial Exh. 137 (pre-2005 Church of Nigeria Constitution), and CANA Trial Exh. 138 (post-2005 Church of Nigeria Constitution).

[16] *See, e.g.*, ECUSA-Diocese Trial Exh. 42 at 3-4 (ACC Constitution identifying member provinces); Tr. 937:1-15 (Douglas) (referring to schedule of members in ACC Constitution). ECUSA asserts that, in contrast to much of the CANA Congregations' evidence, its own Constitution and Canons and the Constitution of the Anglican Consultative Council are properly cognizable by a secular court because they are "documents with secular as well as ecclesiastical purpose," ECUSA Supp. 18. Of course, the same reasoning applies no less to the Constitution of the Church of Nigeria and to the Articles of Incorporation and Bylaws of CANA and ADV, but ECUSA is conspicuously silent with regard to those legal documents.

[17] Registrar Yisa is the highest ranking lawyer in the Church of Nigeria (Tr. 544-45), and he testified about the legal structure of the Anglican Communion and of the Church of Nigeria. *See, e.g.*, Op. 27-28; Tr. 582-86; 590-97 (Yisa). He is not a priest, like Professor Douglas, who testified about his "missiological" understanding of secular legal terms, without the benefit of having reviewed the relevant legal documents. *See* Op. 60 & n.59; ; Tr. 942-42, 968-72 (Douglas).

ECUSA's claim also ignores substantial other evidence that was not only non-doctrinal, but also more credible and more directly relevant to the Court's conclusions. This includes (among other things) the testimony of Registrar Yisa, the CANA Board Chair and the only current member of the Anglican Consultative Council who testified at trial, that CANA and ADV are in fact "branches" of the Anglican Communion through their attachment to the Church of Nigeria. Tr. 623-24, 639-40, (Yisa); *accord* Tr. 363-64, 372-73 (Minns). Moreover, the Court's conclusions are supported by the admissions of ECUSA's own official representatives, most tellingly, by ECUSA's Presiding Bishop, Katharine Jefferts Schori, who, despite knowledge of the legal significance of her terms, repeatedly referred to CANA (as well as the Church of Nigeria) as another "branch of the Anglican Communion." *See* Jefferts Schori Dep. Des. at 53-55, 62-63, 66, 72, 78-80, and 83.

2. ECUSA next argues that the Court's determination that the "branch" requirement is satisfied at the Anglican Communion level "depends entirely on the Court's own infusion of legal significance into the purely historic and religious 'bonds of affection' that exist among the provinces of the Anglican Communion," which "cannot[] be used to affect the legal rights and obligations of secular entities. ECUSA Supp. Br. 20, 22. This argument presumes, however, the accuracy of ECUSA's characterization of the "relationship[s] between the entities involved" as "religious" and "purely theological." *See* ECUSA Supp. Br. 18, 20, 22. As the Court's opinion recognized, however, that characterization cannot be squared with the evidentiary record. As explained above, the Court's findings regarding the relationships among the provinces of the Anglican Communion were based upon constitutions, articles of incorporation, and bylaws—the types of materials that ECUSA elsewhere concedes are cognizable by a secular court without risk of intrusion into doctrinal matters. *See* ECUSA Supp. Br. 18 (acknowledging that constitutions

and bylaws are cognizable and that some facts were "clearly expressed in documents with secular as well as ecclesiastical purpose").

3. ECUSA further contends that the affiliation of CANA and ADV with the Church of Nigeria makes CANA and ADV the "equivalent of the Episcopal Church's missionary diocese of Mexico," which precludes any finding that the branch requirement is satisfied. ECUSA Supp. Br. 22. At the outset, this is principally a statutory argument, not a constitutional one, and thus is beyond the scope of these briefs. But in any event, the argument is misplaced for several reasons.

As an initial matter, ECUSA's argument mischaracterizes the Court's ruling as *adopting* rather than *describing* the position stated by Professor Douglas regarding the Episcopal Diocese of Mexico. *See* Op. 79 ("The Court does wish to address the example that ECUSA/Diocese set forth in support of their position as to the meaning of 'branch'"). Moreover, ECUSA's argument manipulates the term "denominations" so as to describe ECUSA, the Church of Nigeria, and the Anglican Communion as though they have always been entirely unconnected. But this ignores significant evidence that even ECUSA acknowledges is properly cognizable. ECUSA Supp. Br. 18. Most importantly, the ACC Constitution on its face demonstrates (1) that both the Church of Nigeria and ECUSA have been members of the Anglican Communion represented on the Anglican Consultative Council, *see* ECUSA-Diocese Trial Exh. 42 at 3 (Schedule of Members), and (2) that the Roman Catholic Church has never been a member of, nor otherwise attached to, the Anglican Communion, *see id.* at 1, §2(f) (distinguishing between "the Anglican Communion"

and "the Roman Catholic Church, the Orthodox churches, and other churches"). The Court can take cognizance of these facts on a secular basis using the Episcopal Church's own evidence.[18]

Any constitutional component of the Episcopal Church's argument concerning its Mexican diocese is not entirely clear (*see* Diocese Supp. Br. 29 n.22; ECUSA Supp. Br. 23-24), but if the Church is suggesting that the "branch" requirement would require making theological distinctions between Anglican and Roman Catholic (or other non-Anglican) entities, or would discriminate against a hypothetical group of congregations that left the Episcopal Church to become Catholic (or non-Anglican), those suggestions are misplaced. To begin with, the Court need not resolve questions concerning the applicability of the statute to a Catholic branch, because those facts are not presented by this case—both secularly cognizable documents and the groups self-identification make clear that the branches here are "Anglican"[19]—and the Court's discussion of

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[18] In fact, the more relevant analogy is to the division in the Baltimore Conference of the Methodist Episcopal Church, as described by Professor Irons and in *Hoskinson v. Pusey*, 73 Va. 428 (1879), which bears extraordinary resemblance to the division before the Court. *See* Post-Trial Reply Brief 9. There, although MEC South predated the Baltimore Conference division (much as the Church of Nigeria predated the division in TEC), a new Conference was created as a result of that division to receive those leaving MEC (much as CANA and ADV were created to receive those congregations leaving TEC). Thus, the most typical use of §57-9 involved congregations from one church (MEC) joining a new religious society (the Southern Baltimore Conference) affiliated with MEC South, a "preexisting church" (ECUSA Opp. 21). And such divisions fit comfortably within the language of the statute, as it is common to refer to a "branch" that has broken off of one tree and been grafted onto another.

[19] *See, e.g.,* ECUSA-Diocese Trial Exh. 42 at 3 (ACC Constitution Schedule of Members); *id.* at 1, §2(f) (distinguishing between "the Anglican Communion" and "the Roman Catholic Church, the Orthodox churches, and other churches"); ECUSA-Diocese Trial Exh. 2 at 58 (TEC Canons, Title I, Canon 20, *Of Churches in Full Communion*, listing those churches that are "in communion" with ECUSA). The Church's assertion also likely conflicts with legally cognizable evidence about the Roman Catholic Church, but that is beyond the scope of the evidence presented at trial. The Diocese's quotation (at 29 n.22) of the ECUSA Constitution conveniently omits the limiting language of the Preamble, which in reality states that the Anglican Communion is "a *Fellowship within* the One, Holy, Catholic, and Apostolic Church" (emphasis added), and that it is composed only "of those duly constituted Dioceses, Provinces, and regional Churches in communion with the See of Canterbury." *See* ECUSA-Diocese Exh. 1, at 1. If the Diocese means to suggest that there is no valid legal distinction between the Anglican Commun-

Catholics was not necessary to its opinion.[20] But as the Court's definition of "branch" confirms, the question here is simply whether the new polity "descended from" or "extended from" the mother church (Op. 78), which simply asks whether the branches originated in the mother church and requires no doctrinal analysis. *See* Tr. 55, 94 (Valeri) (explaining that a "branch" is "an alternative structure" or "alternative polity" that "claims some affiliation with the genetic origin of the original group and consists of people who belong to the original group"); CANA Post-Trial Opp. 24-26.

4. ECUSA and the Diocese also maintain that the Court's conclusion that the members of CANA, ADV, ECUSA, and the Church of Nigeria share "'common membership in the Anglican Communion' is a disputed doctrinal issue" and "contravenes Anglican doctrine and the conclusions of Anglican Communion authorities." Diocese Supp. Br. 29 n.22, 30; ECUSA Supp. Br. 23 (arguing that the "attached" inquiry "rests on purely theological grounds"). Here again, this conclusion is not necessary to the Court's ultimate conclusion, and in any event the Church's

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ion and the Roman Catholic Church (among others) because the Anglican Communion is part of the broader "One, Holy, Catholic and Apostolic Church," that would come as some surprise both to the Roman Catholic Church and to the Anglican Communion.

[20] Moreover, to the extent that ECUSA and the Diocese are claiming that the statute is underinclusive because it would be unavailable to a group that separated from the Church to become Catholic, they lack standing to make such a claim. Standing to raise constitutional claims of discrimination is limited to parties that have been subjected to such discrimination, and only a party that had been excluded as a "branch" would qualify. *See Allen v. Wright*, 468 U.S. 737 (1984) (standing to raise discrimination claims is limited to those who have been subjected to discrimination). Moreover, even if a hypothetical party with standing raised this issue, and the Court were concerned that the statute might be underinclusive, the appropriate remedy would not be to strike down the statute, but rather to interpret the "branch" requirement to apply to such a group. *See Heckler v. Matthews,* 465 U.S. 728, 739 n.6 (1984) (where the claimant alleges that a statute is constitutionally underinclusive, "ordinarily extension [of a statute], rather than nullification, is the proper course"); *Yamaha Motor Corp., U.S.A. v. Quillian*, 264 Va. 656, 665 (2002) ("[W]hen the constitutionality of a statute is challenged, we are guided by the principle that all acts of the General Assembly are presumed to be constitutional. Therefore, 'a statute will be construed in such a manner as to avoid a constitutional question wherever this is possible.'" (internal citations omitted)).

argument mischaracterizes the Court's analysis and ignores the substantial non-doctrinal evidence, discussed above, that objectively shows the relationship between these entities and the Anglican Communion. The Court's conclusion on this point was that the CANA Congregations were attached to the Anglican Communion through their former affiliation with ECUSA, and are now attached to the Anglican Communion through their new affiliation with the Church of Nigeria. *See* Op. 77. As the Court noted, it is undisputed that (1) the CANA Congregations were "attached" to the Diocese and to ECUSA (Op. 77); (2) as provided in the ECUSA Constitution, ECUSA is "a constituent member of the Anglican Communion" (Op. 5 (citing ECUSA-Diocese Ex. 2)); and (3) the Church of Nigeria is a constituent member of the Anglican Communion.

ECUSA attempts to buttress its argument by claiming that from a secular legal perspective, the CANA Congregations were no more "attached" to the Anglican Communion than they were to the Roman Catholic Church. But that flies in the face of the constitutions, articles, and bylaws of the churches involved. All of these documents reflect the relationships among the branches of the Anglican Communion and among the congregations. *E.g.*, Preamble to ECUSA Constitution (the Church "is a constituent member of the Anglican Communion") (ECUSA-Diocese Exh. 1). Indeed, ECUSA's attack on the Court's factual findings rings particularly hollow in the face of Professor Douglas' descriptions of the many attachments among Provinces, dioceses, churches, and individuals within the Anglican Communion that are "very hard to sever." Tr. 931-33, 935-37, 950-55.

B. Precedent confirms that the Court's factual inquiries in this case did not excessively entangle the Court in religious inquiries.

The Episcopal Church acknowledges that the First Amendment "does not preclude a civil court from identifying or acknowledging relevant elements of church polity altogether," ECUSA

Supp. Br. 12. Yet that is all that was accomplished in this Court's letter opinion, and a review of relevant authorities confirms this.

For example, in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), a university argued that it was not subject to the National Labor Relations Act because it was a religiously operated institution. The court rejected the NLRB's conclusion to the contrary, because it depended on extensive and intrusive scrutiny of the "purpose of the [university's] operations, the "involvement of the religious institution in the daily operation of the school," and the "degree to which the school has a religious mission and curriculum"—in short, whether the school was "*sufficiently* religious." 278 F.3d at 1339, 1343 (emphasis in original). Instead, the D.C. Circuit considered "bright-line" questions of, among other things, "how the university held itself out . . . and whether it was affiliated with . . . an entity, membership of which is determined, at least in part, with reference to religion." *Id.* at 1343-44, 1344. As applied, the court found that the university was not subject to the Act, because it did hold itself out as a religious institution, and "easily satisfie[d]" the requirement that it be "religiously affiliated," because it was "sponsored by, its campus is owned by, and control is ultimately reserved to," a religious entity. *Id.* at 1344, 1345.

So too here. This Court merely acknowledged the undisputed facts that the congregations formerly held themselves out as Episcopal and were affiliated with TEC and the Diocese, but now hold themselves out as part of the Church of Nigeria and are affiliated with that church, which is a constituent part of the Anglican Communion. *See* Part II.A, *supra*. The Court did not declare that any particular wing of the Church was the "true" wing or resolve any question as to who was the congregations' rightful bishop. By relying on "bright-line," *University of Great*

Falls, 278 F.3d at 1344, "elements of church polity," ECUSA Supp. Br. 12, the Court's decision avoided any question of the substance of faith or doctrine.

The church property cases cited by ECUSA and the Diocese do nothing more than reinforce the permissibility of this approach. Thus, in *Turbeville v. Morris*, 26 S.E.2d 821 (S.C. 1943), the court refused to consider "whether or not the unification [of three branches of Methodism] was *validly made under church law*." *Id.* at 826 (emphasis added). And in *Galich v. Catholic Bishop of Chicago*, 394 N.E.2d 572, 579 (Ill. App. Ct. 1979), the court refused to "*substitute[e] its decision* on the spiritual needs of the bishop" by "ordering him to maintain . . . a [local] church" to which he held title. (emphasis added). *Accord Fortin v. Roman Catholic Bishop of Worcester*, 625 N.E.2d 1352, 1355 (Mass. 1994) (refusing to evaluate alleged promise by Bishop to keep parish open, but considering plaintiffs' property interest in parish under neutral principles). Again, this Court did not substitute its decision for that of ECUSA or the Diocese, but simply recognized the undisputed facts that the CANA congregations had disaffiliated with ECUSA and the Diocese and affiliated with the Church of Nigeria.[21]

The Church's church employment cases, by contrast, are simply irrelevant to the matter at hand, which does not involve an employment decision. ECUSA Supp. 12-13. In *Cha v. Korean Presbyterian Church of Washington*, 262 Va. 604, 611, 553 S.E.2d 511, 514 (2001), for example, the court refused to consider whether a church pastor wrongly lost his job, because "the right to choose ministers without government restriction underlies the well-being of religious community" and "[a]ny attempt by government to restrict a church's free choice of its leader thus constitutes a burden on the church's free exercise rights." 262 Va. at 611, 553 S.E.2d at 514

[21] *Cf. also Corporation of the Presiding Bishop v. Amos,* 483 U.S. 327, 337 (1987) (Brennan, J., concurring) (cautioning against court inquiry into whether "certain functions" of church are "integral to its mission"); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality) (rejecting as "offensive" inquiry into whether school is "pervasively sectarian").

(quoting *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167 (1985)).[22] This "per se" sphere of protection for disputes involving church employees (commonly known as the "ministerial exception") simply does not exist in disputes involving church property. *See, e.g., E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 48 F.Supp.2d 505, 511 (E.D.N.C.1999) (contrasting *Jones v. Wolf* "neutral principles" analysis of church property disputes, where under the First Amendment "circumstances [may] warrant intrusion," with "ministerial exception" employment cases under *Rayburn*, where the First Amendment will "foreclose any intrusion" if the employee's duties are religious).

Finally, cases involving the application of the religion clauses and statutes such as the Religious Land-Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc, and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 200bb, often involve factual inquiries into matters related to religion—such as whether a particular belief is religious (versus political), whether it is sincerely held, and whether a particular land use is religious (versus purely charitable). Yet no court has found that the various protections are themselves unconstitutional just because they sometimes require courts to consider religion-related factual issues. This, too, confirms the correctness of this Court's approach.

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[22] *Accord Minker v. Baltimore Annual Conference of Untied Methodist Church*, 894 F.2d 1354, 1356-57 (D.C. Cir. 1990) (holding that "determination of whose voice speaks for the church is *per se* a religious matter") (quotation omitted); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 363 (8th Cir. 1991) (same); *Hutchinson v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986) (same); *Leavy v. Congregation Beth Shalom*, 490 F. Supp.2d 1011, 1022 (N.D. Iowa 2007) (same); *Wollman v. Poinsett Hutteran Brethren, Inc.*, 844 F. Supp. 539, 543 (D. S.D. 1994) (refusing to decide "who is the true Senior Elder" of church at issue); *cf. Westbrook v. Penley*, 231 S.W.3d 389, 400 (Tex. 2007) (refusing to consider plaintiff's professional negligence claim against pastor for disciplinary actions, which would have required analyzing how an ordinarily prudent pastor would have disciplined, to prevent "chilling effect on churches' ability to discipline members").

III. Section 57-9 does not unconstitutionally discriminate among religions or between religious denominations and secular associations, and any conclusion that it did so would require invalidating the vast majority of state church property laws.

Lacking any convincing argument that this Court's interpretation of § 57-9 requires resolution of doctrinal issues, and having failed to fully avail themselves of the opportunity to order their affairs so as to avoid the presumption of majority rule under the statute, ECUSA and the Diocese retreat to the claims that § 57-9 unlawfully discriminates among religious denominations and between religious denominations and voluntary secular associations. Diocese Supp. Br. 23-26; *see also* Br. of *Amici Curiae* 10 (contending that the statute embodies a "denominational preference"). These arguments are baseless, and if adopted would cast doubt on a host of lawful statutes, including virtually every church property law.

A. Section 57-9 does not express any denominational preference, and any disparate impact that the statute imposes on different religious denominations is attributable only to the Episcopal Church's own choice concerning how to hold property.

Notwithstanding the fact that the properties of Episcopal congregations in the Diocese are held not only by trustees for the congregations, but also by the bishop of the Diocese, the Church advances the claim that § 57-9 unconstitutionally discriminates against the Episcopal Church and other denominations "by giving congregational majorities the power to control property that is held in the name of trustees but granting no similar power where property is held differently." Diocese Supp. Br. 24. According to the Church, such a rule violates the command of *Larson v. Valente*, 456 U.S. 228, 244 (1982), that "one religious denomination cannot be officially preferred over another." Diocese Supp. Br. 24. The CANA Congregations embrace that general principle as enthusiastically as the Church does. But it has no application here.

1. *Larson* involved a Minnesota law that initially had exempted all religious charitable organizations from various registration and reporting requirements, but was amended to restrict

that exemption to groups that received at least 50 percent of their donations from members. 456 U.S. at 230-32, 239. The statute thus directly regulated "door-to-door and public-place proselytizing and solicitation of funds." 456 U.S. at 234. Moreover, the legislative history evidenced an explicit intent to "get at" the "Moonies" but to protect the "Roman Catholic Archdiocese." *Id.* at 254-55. It was against this backdrop that the Court held that the amendment's "explicit and deliberate distinctions between different religious organizations" had the "express design" of "'religious gerrymandering'" and effecting a "denominational preference"—warranting application of strict scrutiny. *Id.* at 245, 246 n.3.

As explained in our post-trial opposition brief (at 47-48), however, subsequent cases make clear that, to justify application of strict scrutiny, the law at issue must do more than make "explicit and deliberate" distinctions that happen to have a disparate impact on different religious denominations. The Church does not respond to these cases—other than to say that "*Larson* remains good law" (Post-trial Reply 23 n.20)—but they confirm that *Larson* requires strict scrutiny only where "the law *facially* differentiates among religions." *See Hernandez v. Commissioner*, 490 U.S. 680, 695 (1989) (emphasis added); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987) ("[W]here a statute is neutral on its face and motivated by a permissible purpose," there is "no justification for applying strict scrutiny"); *Droz v. Commissioner*, 48 F.3d 1120, 1124 (9th Cir. 1995) (*Larson* applies only to "facially discriminatory" laws, not to laws merely "involv[ing] disparate treatment of different religious sects"); *see also Gillette v. United States*, 401 U.S. 437, 452 (1971) ("a claimant alleging 'gerrymander' must be able to show the absence of a neutral, secular basis for the lines government has drawn").

For example, the Supreme Court in *Hernandez* did not apply strict scrutiny in reviewing the Church of Scientology's challenge to the IRS definition of "charitable contribution," despite

the fact that this definition imposed "disproportionately harsh tax status to those religions that raise funds by imposing fixed costs for engaging in certain religious practices." 490 U.S. at 695. The basis for the government's differential treatment of Scientology was not any *religious* discrimination—the statute did not "differentiate among sects"—but the fact that, in contrast to ordinary religious donations, Scientologists' payment for religious auditing sessions was viewed as a "*quid pro quo*." *Id.* at 695. The Court distinguished *Larson*, both on the ground that the statute in *Hernandez* "appl[ied] . . . to all religious entities" and on the ground that it was not motivated by "animus" or "hostility," as with Minnesota's effort to "get at" the Moonies. *Id.* at 696.

Indeed, if a statute's disparate impact led to strict scrutiny, few church property statutes would avoid such review, since virtually all such statutes have potentially different impacts on different churches. Perhaps that is why ECUSA's supplemental constitutional brief, in contrast to that of the Diocese, does not advance this argument. If it were accepted, it would cast doubt on numerous statutes that ECUSA invokes in other property litigation.[23] The same can be said of statutes in other States that protect the rights of the Church's *amici*.[24]

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[23] *See, e.g.*, N.Y. Relig. Corp. Law § 12 ("The trustees of an incorporated Protestant Episcopal church shall not vote upon any resolution or proposition for the sale, mortgage or lease of its real property, unless the rector of such church, if it then has a rector, shall be present, and shall not make application to the court for leave to sell or mortgage any of its real property without the consent of the bishop and standing committee of the diocese to which such church belongs"); *id.* § 13, 15, 16, 40-49 (imposing particular requirements only on "Protestant Episcopal" churches); Md. Code, Corps. & Ass'ns § 5-333 ("This part applies to every religious corporation formed in this State by a parish or separate congregation that is in union with or intending to apply for union with the convention of the Protestant Episcopal Church in the Diocese of Maryland . . . ."); *id.* § 5-335 ("[a] parish" in the "Protestant Episcopal Church, Diocese of Maryland" "may not be subdivided into a new parish or added in whole or in part to any existing parish unless approved by a majority vote of the vestry of each parish affected by the subdivision or addition").

[24] *See, e.g.*, Md. Code, Corps. & Ass'ns § 5-326 ("[a]ll assets owned by any Methodist Church, . . . whether incorporated, unincorporated, or abandoned," "[s]hall be held by the trustees of the church in trust for the United Methodist Church" and "subject to the discipline, usage, and ministerial appointments of the United Methodist Church").

The Church seeks to avoid the force of *Hernandez* by arguing that § 57-9 is "facially discriminatory" because it "applies *only* to property held by congregational trustees." Post-Trial Reply 22-23; Diocese Supp. Br. 24 (arguing that the statute is invalid because "[i]t prefers hierarchical churches whose property is not held by trustees over those that use trustees to hold title"). But discrimination between different *forms of property ownership* is not discrimination on the basis of *religion*, and the fact that the Church must resort to such an argument confirms that it is relying on a "disparate impact" theory that both *Larson* and more recent decisions have rejected. *Larson*, 456 U.S. at 246 n.23; *Hernandez*, 490 U.S. at 695-96.

2. The Church also fails to answer our argument that the members of the Unification Church —the only faith affected by the law at issue in *Larson*—were powerless to avoid that law without changing the very essence of their religious exercise. The members of that faith were religiously compelled to engage in "door-to-door and public-place proselytizing and solicitation of funds to support the Church." 456 U.S. at 234. They were not free, as is the Diocese, to alter their practices to avoid the force of the law under review. As the Court observed, such an alteration would have "den[ied] [the Church's] members their 'religious freedom." *Id.* at 234.

In contrast to *Larson*, § 57-9 does not compel the Diocese to engage in, or desist from engaging in, any religious practice; rather, the law applies only to churches that fail to take the "minimal step" of putting title in a form to which the statute does not apply—something that the Diocese routinely does for numerous properties under its existing canons. *See supra* Part I.A. As discussed above, title to a substantial amount of congregational property in the Diocese is held by Bishop Lee. CANA Exh. 148 at 0331-0337; CANA Exh. 147 at 0344-349; *see also* Stipulation of Fact ¶ 1 (filed Dec. 6, 2007). Under the Church's theory, then, § 57-9 unconstitu-

tionally discriminates both in favor of, and against, the Church, depending upon which property is at issue.

The Stipulation of Fact cited by the Church is illuminating because it shows that at least some congregations in several other denominations hold title in the name of trustees, thus undermining any suggestion that the statute was designed to discriminate against ECUSA and the Diocese. *See* Stipulation of Fact ¶¶ 1-4 (Dec. 6, 2007) (Episcopalians, Presbyterians, Methodists, and Lutherans). In addition, however, the Stipulation, which is non-exhaustive, shows that the form of property holdings varies not only *among* but *within* religious denominations. *See id.* ¶¶ 1-10. Accordingly, the stipulation confirms that there is no significant hurdle to prevent genuinely hierarchical churches from taking steps, before a dispute erupts, to secure title in a manner that conforms to the shared expectations of congregations and denominational authorities.

But even if (1) the Episcopal Church were the *only* denomination whose congregations held property in the name of trustees, and (2) *all* property of its Diocesan affiliate were held in this manner, that would not mean § 57-9 is unconstitutional. The statute would remain neutral on its face, and it makes no distinctions among religious denominations of the sort at issue in *Larson*. There is no evidence that § 57-9 was designed to "target" Episcopalians or with an "express design" of "'religious gerrymandering'" or effecting a "denominational preference." *Larson*, 456 U.S. at 245, 255. And the Diocese could claim no injury from the statute because it could always avoid its application—as other denominations have done—by directing its member congregations to hold title in the name of the Bishop or some other diocesan officer, or even in corporate form. In sum, that the Diocese itself holds many religious properties in forms outside the statute's reach precludes any finding that Virginia has effected an establishment of religion by singling out the Church for disfavored treatment.

B. Section 57-9 does not unlawfully discriminate between religious denominations and secular associations.

Not content to argue that § 57-9 discriminates *among* religions, the Diocese now claims that § 57-9 unlawfully "discriminates against some religions—such as the Episcopal Church—as compared to voluntary secular associations." Diocese Supp. Br. 25; *see also id.* at 10-13. The Diocese advances this theory under both the Free Exercise Clause and the Equal Protection Clause, calling it "beyond credible dispute" that "religion is a suspect classification." *Id.* at 26. And it ultimately maintains that any church property statute that "treats religion distinctively and unequally" is subject to strict scrutiny. Diocese Supp. Br. 13, 26; *see also* Br. of *Amici Curiae* 9 (maintaining that § 57-9 is constitutionally problematic because it "applies solely in the context of resolving church property disputes"). These arguments fails for several reasons.

First, and most fundamentally, the Supreme Court has never suggested that strict scrutiny applies to statutes that deal specifically, and exclusively, with the subject of religion in general or church property in particular. To the contrary, the Court has explained that "where a statute is neutral on its face and motivated by a permissible purpose," there is "no justification for applying strict scrutiny"; "the proper inquiry is whether [the legislature] has chosen a rational classification to further a legitimate end." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987). Moreover, Justices across the ideological spectrum have recognized that "'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.'" *Jones*, 443 U.S. at 602 (quoting *Maryland & Va. Churches*, 396 U.S. at 368 (Brennan, J., concurring)).

And for good reason. If the Diocese were correct that all statutes that single out church property for special treatment were subject to strict scrutiny, States would have to justify every

jot and tittle of whole titles their respective codes (*e.g.*, Title 57 of the Virginia Code) as necessary to serve a compelling governmental interests. Indeed, if the Diocese were correct, all religious *exemptions* from generally applicable laws would likewise have to pass strict scrutiny. *But cf. Amos, supra.* That view would transform the Free Exercise and Equal Protection Clauses into a judicial wrecking ball, and is not the law. Indeed, such a view would invalidate the very statutes (e.g., § 57-15) that ECUSA and the Diocese have been invoking in this case as the basis for recognition of their trust claims.[25]

Second, the Diocese's claim that Virginia "enforces the rules of voluntary associations as contractually binding" but "applies a different rule to hierarchical churches" (Diocese Supp. Br. 10-12) is unsupportable. To begin with, as the Diocese's own authorities recognize, Virginia law recognizes various limits on the ability of an association to adopt rules that interfere with members' property interests. *See Gillman*, 223 Va. at 762-66 (recognizing "inherent," "general law," and specific statutory limitations on associations' powers, particularly to "encumber[] [the members'] property"). But more importantly, ECUSA and the Diocese can point to no authority holding that any contracts created by the rules of a secular association are not subject to statutory

[25] Moreover, if the Diocese's view were the law, provisions such as the Title VII provision permitting religious (but not secular) organizations to consider faith in hiring would be unconstitutional, *see* 42 U.S.C. § 2000e-1, as would statutes such as the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.*, and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1. Current doctrine, however, suggests the contrary. *Amos*, 483 U.S. at 338-40 (upholding the Title VII exemption); *Cutter v. Wilkinson*, 544 U.S. 709, 724-26 (2005) (unanimously sustaining RLUIPA against an establishment challenge).

We note that ECUSA's brief does not contain the Diocese's sweeping argument that § 57-9 violates free exercise and equal protection principles for singling out church property for special treatment. That may be because such a ruling would invalidate many of the statutes that ECUSA relies upon to protect its interests. *See* supra nn. 23-24. As ECUSA is likely aware, there are many valid secular reasons, including the unique equitable considerations involved in church property disputes, for legislatures to treat church property as a distinct topic. Depending on how they view those equities, different States may adopt different default rules for determining ownership. But the variation among the States in this regard is permitted by current Supreme Court doctrine. *E.g., Jones*, 443 U.S. at 602-08.

laws in effect when those rules are enacted. Just as the rules of a condominium association, for example, are subject to the limitations set forth in the Condominium Act, so too are the rules of a religious association subject to the limitations set forth in title 57 of the Virginia Code pertaining to religious organizations. Thus, it is not true that Virginia "applies a different rule" concerning the enforceability of any contracts for hierarchical churches than it applies to "secular associations": contracts in both contexts are subject to governing law. As discussed above, moreover, the fact that different statutory rules may apply to religious entities does not trigger heightened scrutiny, particularly in the arena of church property.

Third, the fact that there is no "division statute" for secular associations does not mean that the law discriminates against them, or that majority rule is not the ordinary default rule for governance of such associations under Virginia law. To the contrary, as the Virginia Supreme Court recognized in *Reid v. Gholson*, "the right to reasonable notice, the right to attend and advocate one's views, and the right to an honest count of the votes . . . are neutral principles of law, *applicable not only to religious bodies, but to public and private lay organizations and to civil governments as well.*'" 229 Va. 179, 189-90 (1985). It is therefore misleading to suggest that § 57-9 grants some special privilege to the CANA Congregations that other private organizations do not enjoy.[26]

But in any event, a claim of "discrimination" between two parties presumes that those parties are similarly situated but for their status, and the Diocese has pointed to no voluntary

[26] The Virginia Non-Stock Corporation Act, under which most churches incorporate, is filled with provisions providing for decisionmaking by majority rule. *See*, *e.g.*, Va. Code § 13.1-822 (providing for organizing meeting pursuant to majority vote by directors); *id.* § 13.1-849 (providing default of majority rule in the requirements for voting by members of non-stock corporations); *id.* § 13.1-860(C) (providing for removal of directors by majority vote); *id.* § 13.1-868 (providing that, absent a contrary provision in the articles of incorporation or bylaws, a quorum consists of a majority of directors, and that when a quorum is present a majority of those directors present may conduct business).

secular membership organization with similar characteristics to a religious denomination—characteristics that would make the secular organization analogous to an organization whose members hold significant amounts of real property paid for by their own local members and used for corporate purposes.

For this reason, among others, the Diocese's position finds no support in *Falwell v. Miller*, 203 F. Supp. 2d 624, 630 (W.D. Va. 2002). According to the Diocese, *Falwell* demonstrates that § 57-9 must be subjected to strict scrutiny because, like the Virginia Constitution's prohibition on the incorporation of churches struck down in that case, the statute lacks facial neutrality and general applicability. Diocese Supp. 12-13. But the prohibition on incorporation was capable of being applied equally, to both religious and secular corporations. It is not clear that the same is true of § 57-9: To what kind of secular association would the division statute apply? The Diocese provides no convincing answer, and in any case the Supreme Court has made clear that States may enact statutes dealing solely with the subject of church property.

The Diocese's reliance on *Falwell* is also misplaced because § 57-9 does not "impose special disabilities on the basis of religious views" or on any other basis. *Id.* at 630. Indeed, the law does not impose disabilities at all—it simply provides a vehicle for churches to resolve property disputes in the event they are divided. As we have explained, § 57-7 does not burden the Diocese's religious exercise because it could have avoided this dispute simply by requiring member congregations to place title to their properties in the name of the diocesan bishop, and it has no religious objection to doing so. A statute can place no "prohibition" on the free exercise of religion if it does not burden religion at all.

In short, § 57-9 is not discriminatory, it does not burden the Diocese's religious exercise, and States may enact statutes that apply to church property but not other types of property. For all these reasons, *Falwell* has no application here.

IV. Virginia Code § 57-9, as applied by this Court, has a secular purpose and effect, and minimizes church-state entanglement, consistent with the *Lemon* Test and the values of the First Amendment.

Nor is there any merit to the argument by the Diocese (but not ECUSA or the *amici*) that the Court should apply the *Lemon* test here and invalidate Virginia Code § 57-9 for its lack of a "secular purpose," for its "primary effect" of advancing religion, and for excessively entangling the state with religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). Diocese Supp. Br. 27-31. As interpreted by this Court, § 57-9 has both a secular purpose and effect, and it minimizes rather than increases state entanglement with religion.

First, § 57-9 has a clear secular purpose: resolving church property disputes on a neutral basis, which minimizes the courts' involvement in doctrine and internal church affairs. *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 354 (D.C. 2005) ("[T]he neutral principles approach avoids prohibited entanglement in questions of religious doctrine, polity, and practice . . . . The neutral principles approach is thereby completely secular in operation."). "[D]emocratic" principles are "neutral principles of law, applicable not only to religious bodies, but to public and private lay organizations," and "[c]ourts must apply them every day and can do so without any danger of entering a 'religious thicket.'" *Reid*, 229 Va. at 189-90. This purpose alone satisfies *Lemon*'s "secular purpose" prong, as a statute must be motivated "wholly by religious considerations" to violate secular purpose prong. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984).

The Diocese suggests that § 57-9 lacks a secular purpose based on the Court's statement that the statute "appears to reflect a determination by the Virginia legislature to protect the voting rights of any local congregation which is subject to a hierarchical church's constitution or can-

ons," (Op. 48), and on an 1867 statement from Virginia House Speaker John Baldwin, sponsor of the statute, that the statute was designed "'to protect local congregations who when their church divided were compelled to make a choice between the different branches of it, and to allow them in some such cases to take their property with them." Diocese Supp. Br. 27 (citing Tr. 223-24). But neither of these statements suggests that the *purpose* of § 57-9 is, as the Diocese claims, " to favor congregations over the hierarchical churches to which they belong or for [to] interfere[e] with or forestall[] the application of a hierarchical church's governing documents." *Id.*

To be sure, the Virginia General Assembly may have wished to create a presumption in favor of ownership at the local level, because of its recognition that property is generally managed from the local level, or it may have believed that a presumption of local majority ownership was appropriate given that most (if not all) funding for local churches, even in denominations, comes from the local level. These are just some of the secular purposes that might be served by § 57-9, without any desire on the legislature's part to "favor" the local congregations over the hierarchy.[27]

Second, there is no basis to the contention that § 57-9 has a "primary effect" of advancing religion because it "promote[s] control over property by congregational majorities" and thus advances "congregational governance" over hierarchical control. Diocese Supp. Br. 29. To begin with, States have a substantial interest in resolving church property disputes according to neutral principles. Had the votes gone the other way, the Congregations and their properties would have remained a part of the denomination. And had the Church taken the "minimal step" of directing member congregations (over whom it asserts broad authority) to adopt another form of owner-

[27] Speaker Baldwin's reference to "some such cases"was simply an acknowledgment that "in some such cases" the congregational votes to separate might fail, leaving those congregations (and their property) in the mother church. But even if that were not so, the statute would still have a secular purpose, which is all that is required.

ship, the parties would not be here. *Jones*, 443 U.S. at 606. The "primary effect" of § 57-9 is simply to resolve property ownership based on majority rule in the event of a division in cases in which the parties have not availed themselves of the means provided by Virginia law to resolve those disputes in some other way.

Third, this Court's interpretation of § 57-9 does not create any "unconstitutional entanglement" with religion. Diocese Supp. Br. 29-31. We have already explained why this Court's analysis of the "branch" requirement does not create any such entanglement. Moreover, the statute applies only to property, and it may easily be avoided by adopting alternative forms of ownership (something the Bishop demonstrably knows how to do). Based on the application of a neutral principle, majority rule, the statute recognizes the "division" from the mother church of those who no longer wish to be associated with it, leaving the rest free to exercise their religion without state involvement. *Reid*, 229 Va. at 189-90.

Ironically, moreover, § 57-9 would excessively entangle this Court with religion only if it were misinterpreted, as the Episcopal Church had suggested, to vary with each denomination's polity. In addition, the resulting differences in application would look far more like discrimination among members of different faiths than the Court's interpretation of the statute, under which the statute would potentially be available to all congregations, regardless of denominational affiliation, that break off from their mother church in a division to form a new branch.

For all these reasons, the Diocese has failed to establish any violation of the *Lemon* test.

V. The Religion Clauses of the First Amendment and the Virginia Constitution protect the communal exercise of not only religious denominations, but religious congregations.

We close our discussion of the federal and Virginia religion clauses where ECUSA and the Diocese began theirs—with the observation that the First Amendment protects "communal" religious exercise, and the practices of those who "exercise their religion through religious or-

ganizations." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 341 (Brennan, J., concurring); *see* ECUSA Supp. Br. 2; Diocese Supp. Br. 2. We embrace the proposition that the First Amendment safeguards the polity of religious denominations, and the principle of church autonomy, and the principle that genuinely ecclesiastical determinations, whether matters of doctrine or governance, are entitled to protection under the Free Exercise Clause. As one of their authorities puts it, the "basic freedom" to exercise one's religion "according to the dictates of [one's] 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).

Contrary to the broad assertions in the briefs of ECUSA and the Diocese, however, these communal free exercise rights extend not only to denominations, but to their member congregations, and they do not exempt *either* denominations or congregations from having to take reasonable steps to secure their property interests, before a dispute erupts, under provisions of law that do not meaningfully interfere with such entities' religious exercise. To the contrary, States have wide latitude to adopt "default rules" on the ownership of church property when the parties have failed to make alternative arrangements in conformity with applicable law. Some States may prefer to adopt default rules that favor denominations in that situation, deferring to their assertion of an interest in congregational assets unless the congregation has taken specific measures to overcome that assertion. Other States, by contrast, may prefer to adopt default rules that favor congregations, choosing to recognize that they generally fund the construction of church property and are more directly accountable for its maintenance, unless the denomination has taken specific measures to overcome that rule. In either instance, state law must be "flexible enough to accommodate all forms of religious organization and polity," whether hierarchical, congrega-

tional, or something in between. *Jones*, 443 U.S. at 603. "But the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes. 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.'" *Id.* at 602 (citation omitted).

For 141 years, in Virginia Code § 57-9, Virginia has recognized that it is particularly appropriate to adopt a default rule favoring ownership by congregational majorities in the circumstance of a denominational division. That rule is only a presumptive rule, and a hierarchical denomination may overcome the presumption by making arrangements, before a dispute erupts, to place title to local properties in the name of a denominational officer or in corporate form. Many denominations have availed themselves of these forms of ownership, placing their member congregations' properties outside the reach of the statute. But while ECUSA and the Diocese use that form of ownership for numerous properties, including many used for religious worship, they insist that it would interfere with their "governance" and "polity" to be required to take the same steps more broadly. Unfortunately for ECUSA and the Diocese, however, the Free Exercise Clause does not exempt denominations from compliance with neutral, secular legal requirements that are designed in part to facilitate protection of their asserted interests and to which they have no religious objection.

VI. Section 57-9 Does Not Effect A "Taking."

For the first time in these cases, the Diocese (but not ECUSA) also argues that "application of [§ 57-9] to these cases would . . . take the property of the Diocese and the Episcopal Church for purely private purposes, without a public use, and without payment of just compensation." Diocese Supp. Br. 35. There will be "no disputing" this conclusion, the Diocese argues,

"[o]nce it is established that the Diocese and the Episcopal Church have property interest in the lands and buildings at issue in these cases, as will be done" at trial this fall. *Id.* at 35.

The fatal flaw here—and the likely reason this argument is being raised at this late hour, at the tail end of a supplemental brief—is that this argument is entirely circular. The Diocese *assumes* that it (and ECUSA) own the property at issue in this case, and then declares that § 57-9 would "take" it from them. But the very purpose of § 57-9 is to settle, in the event of a denominational or congregational division, a dispute over who owns property held in trust for local congregations. Once the CANA Congregations have successfully invoked the statute, ownership is conclusively established in their favor and the Diocese has no property interest to be taken. Indeed, the Diocese effectively concedes this point by noting that the "taking" will become indisputable only "once it is established that the Diocese and [TEC] have property interests in the lands and buildings at issue." Diocese Supp. Br. 35. Because the statute exists to resolve who owns the property in the first instance, the statute, having done its work, cannot effect a taking.

By contrast, in every case cited by the Diocese, there was no dispute that the party claiming a taking originally held the property right at issue. In *Kelo v. City of New London*, for example, the City "propose[d] to use the power of eminent domain . . . from unwilling *owners*." 545 U.S. 469, 472 (2005) (emphasis added). Likewise, in *Hodel v. Irving*, the statute "completely abolished" the right of "*owners*" of fractional interests in land from passing on those interests to their descendants. 481 U.S. 704, 717 (1987) (emphasis added). And in *Loretto v. Teleprompter Manhattan CATV Corp.*, the ordinance at issue authorized a "permanent physical occupation of property . . . without regard to whether the action . . . [had] only minimal economic impact on the *owner*." 458 U.S. 419, 435 (1982) (emphasis added). *Accord Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937) ("*One person's property* may not be taken for the benefit of an-

other private person without a justifying public purpose.") (emphasis added); *Missouri Pacific Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) (invalidating "taking of *private property of the railroad corporation*") (emphasis added). The Diocese thus errs in concluding that "application of § 57-9(A) [here] would constitute a taking as defined by both *Hodel* and *Loretto* and similar cases," Dioc. Supp. Br. 36. Unlike in those cases, § 57-9 does not "take" the undisputed "property of one group of private persons." *Id.* at 36.

And even if § 57-9 purported to take undisputed property rights, it could not have done so here because ECUSA and the Diocese had nothing to take. As we have explained elsewhere, Virginia has never recognized denominational trusts, and none of the documents allegedly creating a contractual interest in ECUSA and the Diocese was executed before enactment of § 57-9. Conversely, any contract post-dating the statute must be deemed to incorporate the statute. Thus, there can be no "taking" as to *post-1867* property interests, which were limited at creation by the statute; and there can be no "taking" as to *pre-1867* property interests because, as a matter of fact and law, none existed.

Finally, if the Diocese were correct that § 57-9 effects a taking, all statutes resolving disputed property rights would effect takings. To cite just one example, Virginia's adverse possession statute, which bars the right to recover real property after 15 years of "actual, hostile, exclusive, visible, and continuous possession," would effect a taking of the property. *Kim v. Douval Corp.*, 259 Va. 752, 529 S.E.2d 92 (2000); Va. Code § 8.01-236 ("No person shall . . . bring an action to recover, any land unless within fifteen years next after the time at which the right to make such entry or bring such action shall have first accrued"); *see also id.* § 57-17 ("[w]henever any church . . . has been in the undisputed possession, for a period of 25 years or more, of any real estate . . . the church, after giving notice once a week for four successive weeks . . . may file

a petition[,] [and if it approves the petition, the court] may appoint a special commissioner to make conveyance of such real estate to the church"). What is more, by ignoring the distinction between a statute that *settles* title and statute that *takes* title, the Diocese's reading of the Takings Clause would throw into doubt vast sections of Title 55 of the Virginia Code, which governs "property and conveyances." Fortunately, their reading of that Clause is not the law.

In sum, the Diocese's takings argument lacks any support in logic or law, and therefore should be rejected.

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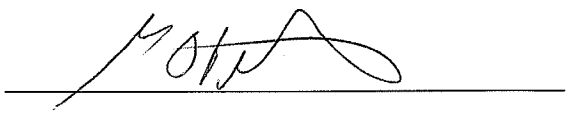

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