



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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In Re: Multi-Circuit Episcopal Church Property Litigation,
(CL 2007-0248724)

Letter Opinion on the Constitutionality of Va. Code § 57-9(A)

June 27, 2008

Judge Randy I. Bellows

Fairfax County Circuit Court

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LETTER OPINION

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Re: *In Re: Multi-Circuit Episcopal Church Property Litigation (CL 2007-0248724)*

Dear Counsel:

On April 3, 2008, the Court issued its letter opinion [hereinafter “57-9 Opinion”] on the applicability of Va. Code § 57-9(A) [hereinafter “57-9(A)”]. In that Opinion, this Court set forth the factual background of the present dispute in its entirety¹ and, in its legal analysis, concluded that the CANA Congregations had properly invoked 57-9(A).

¹ Because that factual background has been previously set forth in that April 3, 2008 opinion, the Court today dispenses with any recitation of the facts, except those facts that relate specifically to the constitutional issues before this Court.

Post-decision briefs regarding the constitutionality of 57-9(A)² have been filed by all parties, including amicus briefs from the Commonwealth, and from various churches and other parties [hereinafter “Church Amici”].³ On May 28th, 2008, this Court heard oral argument as to whether 57-9(A) violates the First Amendment to the United States Constitution.⁴ The Court has reviewed

² The one discrete constitutional issue raised in those briefs which the Court does not resolve in today’s opinion is the assertion by ECUSA/Diocese that 57-9(A) violates their rights under the Contracts Clause. Specifically, they assert that applying 57-9(A) to the instant dispute impairs their contractual rights by not giving appropriate weight and significance to the contractual relationships between the local congregations and the hierarchical church. Because the resolution of this issue may require an evidentiary hearing, the Court has previously separated the resolution of this issue from the resolution of all other constitutional issues. The Court would note, however, that the parties disagree—and this Court has not yet resolved—the question of whether the Contracts Clause issue applies to all the CANA Congregations or only to those with deeds pre-dating the 1867 enactment of 57-9.

³ These churches and parties include: the General Council on Finance and Administration of the United Methodist Church; the African Methodist Episcopal Zion Church; the African Methodist Episcopal Church; the Worldwide Church of God; the Rt. Rev. Charlene Kammerer, Bishop of the Virginia Annual Conference of the United Methodist Church; W. Clark Williams, Chancellor of the Virginia Annual Conference of the United Methodist Church; the Dioceses of Southern Virginia and Southwestern Virginia; Clifton Kirkpatrick, Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.); the General Conference of Seventh-day Adventists; the Rev. Dr. G. Wilson Gunn, Jr., General Presbyter National Capital Presbytery; Elder Donald F. Bickhart, Stated Clerk, Presbytery of Eastern Virginia; the Virginia Synod of the Evangelical Lutheran Church in America, the Metropolitan Washington D.C. Synod of the Evangelical Lutheran Church in America; the Virginia District Board—Church of the Brethren, Inc.; and the Mid-Atlantic II Episcopal District of the African Methodist Episcopal Zion Church.

⁴ If a statute satisfies the Establishment and Free Exercise Clauses of the U.S. Constitution, it is also consistent with the Virginia Constitution’s corresponding religious freedom provisions. See, e.g., Cha v. Korean Presbyterian Church of Washington, 262 Va. 604, 612 (2001) (holding that “[t]he Free Exercise Clause of the First Amendment to the Constitution of the United States and Article I, § 16 of the Constitution of Virginia do not permit a circuit court to substitute its secular judgment for a church’s judgment when the church makes decisions regarding the selection or retention of its pastor”); Habel v. Indus. Dev. Auth., 241 Va. 96, 100 (describing language in Article I, § 16 of the Constitution of Virginia as “analogous” to the Establishment Clause) (1991); Reid v. Gholson, 229 Va. 179, 190-91 (1985) (describing Article I § 16 of

the briefs and hearing transcript in their entirety. For the reasons stated below, the Court finds that the application of 57-9(A) to the instant dispute does not violate the First Amendment, nor does it violate the Equal Protection and Takings Clauses of the U.S. Constitution.

Summary

Each law enacted by the legislature “carries a strong presumption of validity.” City Council of the City of Emporia v. Newsome, 226 Va. 518, 523 (1984)). So strong is this presumption, that “[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely [a Court] may think a political branch has acted.” Vance v. Bradley, 440 U.S. 93, 97 (1979). As a corollary to this principle, “[t]he party challenging an enactment has the burden of proving that the statute is unconstitutional, and every reasonable doubt regarding the constitutionality of a legislative enactment must be resolved in favor of its validity.” Marshall v. Northern Va. Transp. Auth., 275 Va. 419, 428 (2008).

Set against this heavy presumption, ECUSA/Diocese’s various arguments against the constitutionality of 57-9(A) fail. Although ECUSA/Diocese assert that this Court has entered into the forbidden religious thicket—indeed, entangled and enmeshed itself in that thicket—this Court finds their arguments unpersuasive, not least because their arguments are predicated in no small measure on a characterization of this Court’s April 3rd opinion that bears only a passing resemblance to the opinion itself.⁵

the Constitution of Virginia and the First Amendment to the U.S. Constitution as containing equivalent “guarantees of religious freedom”); Mandell v. Haddon, 202 Va. 979, 989 (1961)) (holding that the law in question did not violate either Article I, § 16, of the Constitution of Virginia or the First Amendment to the Constitution of the United States).

⁵ That is, with one exception. Apparently because it believes this represents the most egregious example of this Court’s thicket intrusions, ECUSA’s counsel at oral argument quoted *verbatim* the Court’s concluding paragraph from its April 3rd opinion. That paragraph reads as follows:

ECUSA/Diocese argue that the historical evidence demonstrates that it is the “major” or “great” divisions within 19th-century churches that prompted the passage of 57-9, such as those within the Presbyterian and Methodist Churches. ECUSA/Diocese argue that the current “dispute” before this Court is not such a “great” division, and, therefore, this is yet another

reason why 57-9(A) should not apply. The Court agrees that it was major divisions such as those within the Methodist and Presbyterian churches that prompted the passage of 57-9. However, it blinks at reality to characterize the ongoing division within the Diocese, ECUSA, and the Anglican Communion as anything but a division of the first magnitude, especially given the involvement of numerous churches in states across the country, the participation of hundreds of church leaders, both lay and pastoral, who have found themselves "taking sides" against their brethren, the determination by thousands of church members in Virginia and elsewhere to "walk apart" in the language of the Church, the creation of new and substantial religious entities, such as CANA, with their own structures and disciplines, the rapidity with which the ECUSA's problems became that of the Anglican Communion, and the consequent impact—in some cases the extraordinary impact—on its provinces around the world, and, perhaps most importantly, the creation of a level of distress among many church members so profound and wrenching as to lead them to cast votes in an attempt to disaffiliate from a church which has been their home and heritage throughout their lives, and often back for generations. Whatever may be the precise threshold for a dispute to constitute a division under 57-9(A), what occurred here qualifies.

57-9 Opinion at 83.

Far from proving that the Court has improperly tread upon religious territory, this paragraph establishes that the Court has not. This paragraph summarizes six principal factual bases for the Court's finding of division: (1) numerous churches across the country have separated from ECUSA; (2) hundreds of church leaders have participated in these separations; (3) thousands of church members in Virginia have separated as well; (4) new religious entities have been established, with their own codes and procedures; (5) the dispute within ECUSA has spilled over into the Anglican Communion, as demonstrated by such objective criteria as the Church of Nigeria's revision of its Constitution; and (6) the decision by church members in Virginia to seek to disassociate from ECUSA and the Diocese was anything but a casual decision about a matter of little consequence to the members. If, as ECUSA suggests, a 57-9 division can be provoked by a disagreement over something as trivial as "the color of the carpet," see The Episcopal Church's Supplemental Br. On Constitutional Issues [hereinafter "ECUSA Br."] at 29, the disagreement that actually brought the parties before this Court—as objectively measured by the tangible acts taken by many church members to disaffiliate from the church that had been their home—was of a different quality entirely.

For the reasons stated below, the Court today holds that 57-9(A) does not violate the Free Exercise Clause, it does not violate the Establishment Clause, it does not violate the Equal Protection Clause and it does not violate the Takings Clause. Simply put, 57-9(A) was constitutional in 1867 when it became the law of the Commonwealth of Virginia, and it remains constitutional in 2008.⁶

Analysis

As a preliminary matter, this Court will not entertain a facial challenge to 57-9(A).⁷ Rather, the Court will consider only whether 57-9(A) is constitutional as applied to the specific private parties before this Court, and the specific facts presented by those parties. The opinion first sets forth a brief history of United States Supreme Court jurisprudence as it relates specifically to the law surrounding church property. The opinion next addresses each of the major arguments set forth by ECUSA/Diocese, and explains how each of those

Not one of these six findings is religious or ecclesiastical or involve the Court in church polity or doctrine. They are secular findings; indeed, in some cases, they are actual numerical findings, hardly the stuff of religious entanglement.

⁶ Once again, the Court emphasizes that when it refers to 57-9(A) as constitutional, it is not addressing the Contracts Clause attack on the constitutionality of 57-9(A).

⁷ Facial challenges to statutes are highly disfavored within our legal system, as confirmed by the U.S. Supreme Court just three months ago:

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

Washington State Grange v. Washington State Republican Party, ___ U.S. ___, 128 S. Ct. 1184, 1191 (2008) (citations omitted).

arguments fails to rebut the presumption that 57-9(A) is constitutional as applied by this Court.

I. History of U.S. Supreme Court’s Church Property Law Jurisprudence

A. Kedroff v. Saint Nicholas Cathedral

In 1952, the U.S. Supreme Court first considered whether a lower court’s resolution of a church property dispute contravened the First Amendment to the U.S. Constitution.⁸ In Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952) [hereinafter Kedroff], the particular dispute before the Court involved “[t]he right to the use and occupancy of a church in the city of New York”—the Saint Nicholas Cathedral. Id. at 95. In order to resolve the dispute, the Court was forced to determine essentially who was the “true” bishop. See id. at 96-97 (“Determination of the right to use and occupy Saint Nicholas depends upon whether the appointment of Benjamin by the [Moscow-controlled] Patriarch or the election of the Archbishop for North America by the convention of the American churches validly selects the ruling hierarch for the American churches.”) In deciding this question, the Court of Appeals of New York had applied Article 5-C of the Religious Corporations Law of New York.⁹ Id. at 97.

⁸ See Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevic, 426 U.S. 696, 730 (1976) (Rehnquist, J. dissenting) (“The year 1952 was the first occasion on which this Court examined what limits the First and Fourteenth Amendments might place upon the ability of the States to entertain and resolve disputes over church property.”) Although ECUSA specifically relies upon Watson v. Jones, 80 U.S. 679 (1872) to support its position, Watson does not provide the Court with helpful guidance in the resolution of the First Amendment issues currently before this Court. Watson stands for the proposition that when issues regarding church “discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest [authority within a hierarchical church] to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.” Id. at 727. However, Watson was based upon federal common law, a point ECUSA acknowledges. See ECUSA Br. at 3 (stating that Watson “was technically decided as a matter of federal common law”). Most significantly, the Virginia Supreme Court has expressly stated that it is not bound by the holding of Watson. See Norfolk Presbytery v. Bollinger, 214 Va. 500, 504 (1974) (“We are not bound by the rule of Watson v. Jones . . . for that case rested on federal law.”).

⁹ In order to justify its application of Article 5-C to the facts before it, the Court of Appeals of New York reasoned that “[s]ince certain events . . . indicated to [the Court of Appeals] that the Russian Government exercised control over the central church authorities and that the American church acted to protect its pulpits and faith from such influences . . . the Legislature’s reasonable belief in

The U.S. Supreme Court ultimately held that Article 5-C was constitutionally invalid, because it violated the Free Exercise Clause. *See id.* at 107-08. Specifically, the U.S. Supreme Court found it impermissible that the express language of the statute actually “regulate[d] church administration, the operation of the churches, the appointment of clergy, by requiring conformity to church statutes ‘adopted at a general convention (sobor) held in the City of New York on or about or between October fifth to eighth, nineteen hundred thirty-seven . . . ,’” and that the “statute [also] require[d] the New York churches to ‘in all other respects conform to, maintain and follow the faith, doctrine, ritual, communion, discipline, canon law, traditions and usages of the Eastern Confession (Eastern Orthodox or Greek Catholic Church)’” *Id.* at 107-08. In sum, the Court concluded that it was simply impermissible for the New York legislature to “[b]y fiat,” replace “one church administrator with another,” and to “prohibit[] the free exercise of an ecclesiastical right, the Church’s choice of its hierarchy.” *Id.* at 119. The Court thus reversed and remanded the case to the Court of Appeals of New York “for such further action as it deem[ed] proper and not in contravention of th[e] Kedroff opinion. *Id.* at 121.¹⁰

B. Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church

In Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) [hereinafter “Hull Church”], the U.S. Supreme Court held that the First Amendment does not “permit a civil court to award church property on the basis of the interpretation and significance the civil court assigns to aspects of church doctrine.” *Id.* at 441. In Hull Church, two local churches that were formerly part of the Presbyterian Church in the United States, “voted to withdraw from the general church and to reconstitute the local churches as an autonomous Presbyterian organization.” *Id.* at 442. At the trial court level, the case had been submitted

such conditions justified the State in enacting [Article 5-C] to free the American group from infiltration of . . . atheistic or subversive influences.” *Id.* at 108-09.

¹⁰ On remand, the Court of Appeals of New York essentially arrived at the same decision as it had previously, “holding that, by reason of the domination . . . of the Patriarch by the secular authority in the U.S.S.R.,” the Patriarch’s appointee therefore “could not under the common law of New York validly exercise the right to occupy the Cathedral.” Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190, 191 (1960). The U.S. Supreme Court unanimously reversed, holding that, even though, during this second round, the Court of Appeals of New York based its decision on common law, rather than on a statute, the inquiry as to who was the “true” leader of the church was still as constitutionally impermissible as it had been in Kedroff. *Id.* at 191.

to the jury, who were “instructed to determine whether the actions of the general church ‘amount to a fundamental or substantial abandonment of the original tenets and doctrines of the [general church], so that the new tenets and doctrines are utterly variant from the purposes for which the [general church] was founded.’”¹¹ Id. at 443-44. The jury held for the local churches, and the Supreme Court of Georgia affirmed that verdict. Id. at 444. The U.S. Supreme Court reversed. Id. In two key passages from its opinion, the Court fixed the boundary lines within which future Supreme Court jurisprudence would evolve. The Court clarified that “[i]t is obvious . . . that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment.” Id. at 449. The Court further states:

Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without “establishing” churches to which property is awarded. But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.

¹¹ This abandonment of the original doctrines and tenets of the faith included, as summarized by the Supreme Court of Georgia,

“ordaining of women as ministers and ruling elders, making pronouncements and recommendations concerning civil, economic, social and political matters, giving support to the removal of Bible reading and prayers by children in the public schools, adopting certain Sunday School literature and teaching neo-orthodoxy alien to the Confession of Faith and Catechisms, as originally adopted by the general church, and causing all members to remain in the National Council of Churches of Christ and willingly accepting its leadership which advocated named practices, such as the subverting of parental authority, civil disobedience and intermeddling in civil affairs”; also “that the general church has . . . made pronouncements in matters involving international issues such as the Vietnam conflict and has disseminated publications denying the Holy Trinity and violating the moral and ethical standards of the faith.”

Id. at 443 (quoting 159 S.E. 2d 690, 692 (Ga. 1968)).

Id. at 449. The Court held that the Georgia Supreme Court had in fact resolved the property dispute before it by resolving matters involving “religious doctrine and practice” in that

The departure-from-doctrine element of the implied trust theory which [the Georgia courts] applied requires the civil judiciary to determine whether actions of the general church constitute such a “substantial departure” from the tenets of faith and practice existing at the time of the local churches’ affiliation that the trust in favor of the general church must be declared to have terminated. This determination has two parts. The civil court must first decide whether the challenged actions of the general church depart substantially from prior doctrine. In reaching such a decision, the court must of necessity make its own interpretation of the meaning of church doctrines. If the court should decide that a substantial departure has occurred, it must then go on to determine whether the issue on which the general church has departed holds a place of such importance in the traditional theology as to require that the trust be terminated. A civil court can make this determination only after assessing the relative significance to the religion of the tenets from which departure was found. Thus, the departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role.

Id. at 449-50.

Thus, the Hull Church Court held that it violates the First Amendment when courts decide church property disputes based upon the courts’ or juries’ own opinion as to whether the church in question has substantially departed “from the tenets of faith and practice existing at the time of the local churches’ affiliation.” Id. at 450.

C. Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.

In Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367 (1970) [hereinafter Maryland & Va. Churches], the Court dismissed, “for want of a substantial federal question,” the “General Eldership” of the Church of God’s appeal of a Maryland Court of Appeals’ decision in favor of “two secessionist congregations.” Id. at 367.¹² The

¹² In deciding in favor of the two departing congregations,

appellants argued that the Maryland statutory provisions relied upon by the Maryland Court “as applied, deprived the General Eldership of property in violation of the First Amendment.” Id. at 367-68.

The U.S. Supreme Court rejected this argument in a per curiam opinion, holding that “the Maryland court’s resolution of the dispute involved no inquiry into religious doctrine.” Id. at 368. Justice Brennan wrote a concurrence in which he specifically states 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. Justice Brennan prescribed three different “approaches” that he believed each of the fifty States could permissibly choose in deciding how to resolve church property disputes. These include 1.) deferring to the decision of a majority of the members of a church with a congregational polity, or “within a church of hierarchical polity by the highest authority that has ruled on the dispute at issue, unless ‘express terms’ in the ‘instrument by which the property is held’ condition the property’s use or control in a specified manner”;¹³ 2.) the “neutral principles of law” approach, in which church property ownership may be resolved “by studying deeds, reverter clauses, and general state corporation laws,” for example;¹⁴ or 3.) “the passage of special statutes governing church property arrangements in a manner that precludes state interference in doctrine.”¹⁵

D. Serbian Eastern Orthodox Diocese for the U.S.A. and Canada v. Milivojevich

In Serbian Eastern Orthodox Diocese for the U.S.A. and Canada v. Milivojevich, 426 U.S. 696 (1976) [hereinafter Milivojevich], the U.S. Supreme Court held that judicial and legislative inquiries forbidden by the First

the Maryland Court of Appeals [had] relied upon provisions of state statutory law governing the holding of property by religious corporations, upon language in the deeds conveying the properties in question to the local church corporations, upon the terms of the charters of the corporations, and upon provisions in the constitution of the General Eldership pertinent to the ownership and control of church property.

Id. at 367 (citations omitted).

¹³ Id. at 368-69 (footnotes omitted).

¹⁴ Id. at 370.

¹⁵ Id.

Amendment include: 1.) questions regarding whether internal church proceedings regarding the suspension and removal of church leaders are “procedurally and substantively defective under [a particular church’s] internal regulations,” *id.* at 698, and 2.) the validity of a church’s “reorganization,” as, for example, a change in Diocesan boundaries. *Id.* at 708. In *Milivojevich*, a bishop of the American-Canadian Diocese of the Serbian Orthodox Church (referred to by the U.S. Supreme Court as the “Mother Church”) who had been defrocked by that Mother Church and then replaced by someone else, brought suit in an Illinois Circuit Court.¹⁶ The Supreme Court of Illinois ultimately “held that the proceedings of the Mother Church respecting [the defrocked bishop] were procedurally and substantively defective under the internal regulations of the Mother Church and were therefore arbitrary and invalid,” and in addition “invalidated the Diocesan reorganization into three Dioceses.” *Id.* at 698. Underlying this doctrinal dispute was the issue as to who would hold the church property in question, but as the *Milivojevich* Court emphasized, “th[e] case essentially involves not a church property dispute, but a religious dispute the resolution of which under [U.S. Supreme Court precedent] is for ecclesiastical and not civil tribunals.” *Id.* at 709.

The *Milivojevich* Court held that the Illinois Supreme Court had tread upon forbidden ground, since “[f]or civil courts to analyze whether [a church’s] ecclesiastical actions . . . are . . . ‘arbitrary’ must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question.” *Id.* at 713. The Court made clear that “this is exactly the inquiry that the First Amendment prohibits.” *Id.* at 713. The Court pointed out that the Illinois Supreme Court’s holding essentially “ordered the Mother Church to reinstate as Bishop one who espoused views regarded by the church hierarchy to be schismatic and which the proper church tribunals have already determined merit severe sanctions.”¹⁷ *Id.* at 720.

¹⁶ Upon removing the former bishop and then installing his replacement, the Mother Church promptly reorganized the former single Diocese into three separate ones. *Id.* at 698.

¹⁷ Justices William Rehnquist and John Paul Stevens dissented, presumably because they “[r]egard[ed] the Court’s approach as one of blind deference.” Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 Colum. L. Rev. 1843, 1859 (1998). Justices Rehnquist and Stevens protested that

[a] casual reader of some of the passages in the Court’s opinion could easily gain the impression that the State of Illinois had commenced a proceeding designed to brand Bishop Dionisije as a heretic, with appropriate pains and penalties. But the state trial

E. Jones v. Wolf

The most recent U.S. Supreme Court case to consider a church property dispute was Jones v. Wolf, 443 U.S. 595 (1979). Jones considered “a dispute over the ownership of church property following a schism in a local church affiliated with a hierarchical church organization,” the Presbyterian Church in the United States (“PCUS”).¹⁸ Id. at 597. The issue considered in Jones was

judge in the Circuit Court of Lake County was not the Bishop of Beauvais, trying Joan of Arc for heresy; the jurisdiction of his court was invoked by petitioners themselves, who sought an injunction establishing their control over property of the American-Canadian Diocese of the church located in Lake County.

The jurisdiction of that court having been invoked for such a purpose by both petitioners and respondents, contesting claimants to Diocesan authority, [the court] was entitled to ask if the real Bishop of the American-Canadian Diocese would please stand up.

Id. at 725-26 (Rehnquist, J., dissenting).

The dissent further declared that:

Unless civil courts are to be wholly divested of authority to resolve conflicting claims to real property owned by a hierarchical church, and such claims are to be resolved by brute force, civil courts must of necessity make some factual inquiry even under the rules the Court purports to apply in this case.

Id. at 726. Both Justice Rehnquist and Justice Stevens joined in the majority opinion in Jones v. Wolf, 443 U.S. 595 (1979), which this Court discusses next.

¹⁸ The Jones Court described the polity of the PCUS as follows:

The PCUS has a generally hierarchical or connectional form of government, as contrasted with a congregational form. Under the polity of the PCUS, the government of the local church is committed to its Session in the first instance, but the actions of this assembly or “court” are subject to the review and control of the higher church courts, the Presbytery, Synod, and General Assembly, respectively. The powers and duties of each level of the hierarchy are set forth in the constitution of the PCUS, the Book of Church Order, which is part of the record in the present case.

Id. at 597-98.

“whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve the [church property] dispute on the basis of ‘neutral principles of law,’ or whether they must defer to the resolution of an authoritative tribunal of the hierarchical church.” Id.

The relevant facts in Jones are as follows: At a congregational meeting of the Vineville Presbyterian Church of Macon, Georgia,¹⁹ held on May 27, 1973, the congregation voted 164 to 94 to separate from the PCUS. Promptly following this vote, the “majority immediately informed the PCUS of the action, and then united with another denomination, the Presbyterian Church in America.” Id. at 598.²⁰ Following this “schism within the Vineville congregation, the Augusta-Macon Presbytery appointed a commission to investigate the dispute and, if possible, to resolve it.” Id. The Presbytery

¹⁹ The Jones Court provides the following background regarding the particular church property in dispute:

The Vineville Presbyterian Church of Macon, Ga., was organized in 1904, and first incorporated in 1915. Its corporate charter lapsed in 1935, but was revived and renewed in 1939, and continues in effect at the present time.

The property at issue and on which the church is located was acquired in three transactions, and is evidenced by conveyances to the “Trustees of [or ‘for’] Vineville Presbyterian Church and their successors in office,” or simply to the “Vineville Presbyterian Church.” The funds used to acquire the property were contributed entirely by local church members. Pursuant to resolutions adopted by the congregation, the church repeatedly has borrowed money on the property. This indebtedness is evidenced by security deeds variously issued in the name of the “Trustees of the Vineville Presbyterian Church,” or, again, simply the “Vineville Presbyterian Church.”

In the same year it was organized, the Vineville church was established as a member church of the Augusta-Macon Presbytery of the Presbyterian Church in the United States (PCUS).

Jones v. Wolf, 443 U.S. 595, 597 (U.S. 1979) (citations omitted).

²⁰ The minority who had voted against separation from the PCUS, “remained on the church rolls for three years,” even though the minority had effectively “ceased to participate in the affairs of the Vineville church and conducted [its] religious activities elsewhere.” Id. at 598.

ultimately concluded that, despite the vote, the 94-member minority faction was in fact “the true congregation of Vineville Presbyterian Church,” and thus “withdr[ew] from the majority faction ‘all authority to exercise office derived from the [PCUS].” Id. Both the trial court and Supreme Court of Georgia disregarded the Presbytery’s decision, and instead decided that the majority faction of the Vineville Presbyterian Church should be awarded the property. Id. at 599.

Jones begins its analysis by emphasizing that “the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice,” and in addition “[a]s a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization.” Id. at 602 (citing Milivojevich, 426 U.S. at 710; Maryland & Va. Churches, 396 U.S. at 368; Hull Church, 393 U.S. at 449). The Jones Court emphasized, however, that the First Amendment does not require any kind of cookie-cutter approach that all 50 states must follow. Instead, Jones quotes Justice Brennan’s words from Maryland & Va. Churches, in which he declared 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 602 (quoting Maryland & Va. Churches, 396 U.S. at 368) (Brennan, J., concurring) (emphasis in original). Jones rejected the proposition, voiced by the Jones dissent, that “the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes” Id. at 605. The essential problem with the compulsory deference approach, as articulated by the Jones majority, is that

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

Id. at 605 (citations omitted).

The Jones majority also responded to the dissent's contention that "neutral principles" violated the Free Exercise rights of the PCUS, a hierarchical church: "[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. Jones sets forth several suggestions as to ways in which "the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property." Id. The suggested alternatives include "modify[ing] the deeds or the corporate charter to include a right of reversion or trust in favor of the general church," or altering "the constitution of the general church . . . to recite an express trust in favor of the denominational church." Id. The Jones majority believed that the "burden involved in [implementing any of the alternatives listed above] will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form." Id.

The Supreme Court ultimately remanded the case for further proceedings in order to determine "whether the Georgia neutral-principles analysis was constitutionally applied on the facts of th[e] case." Id. This was because the Georgia state courts that had thus far considered the case had "each concluded without discussion or analysis that the title to the property was in the local church and that the local church was represented by the majority rather than the minority." Id. at 607. Jones held that

[i]f in fact Georgia has adopted a presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means . . . this would be consistent with both the neutral-principles analysis and the First Amendment. Majority rule is generally employed in the governance of religious societies. Furthermore, the majority faction generally can be identified without resolving any question of religious doctrine or polity. Certainly, there was no dispute in the present case about the identity of the duly enrolled members of the Vineville church when the dispute arose, or about the fact that a quorum was present, or about the final vote.

Id. (citation omitted).

The Jones Court emphasized, however, that if a state adopts a presumptive rule of majority representation, there must also be an escape hatch, and that a "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. at 608 (emphasis added). Thus, Jones concludes with a remand to the Supreme

Court of Georgia, to essentially allow Georgia to “explicitly state[]” the actual law of Georgia in regard to the resolution of church property disputes. *Id.* at 608. The Court stated that “[i]f the Georgia Supreme Court adopts a rule of presumptive majority representation on remand, then it should also specify how, under Georgia law, that presumption may be overcome.” *Id.* at 608 n.5.²¹

Thus, *Jones* invests the States with broad discretion to resolve church property disputes. Its holding demonstrates a deference to—and respect for—an individual State’s prerogative to specify its own specific method of resolving church property disputes. In addition, *Jones* stands for the proposition that the First Amendment does not require a particular State’s civil court to defer to a hierarchical church’s view as to who has control over a particular piece of church property.²²

²¹ One scholar describes the *Jones* majority’s inquiry on remand as essentially asking the question whether:

the [Georgia] courts [had] merely adopted an ordinary, acceptable, legal presumption that, absent a contrary indication, a majority represents a voluntary religious association, or had the courts relied on laws and regulations of the Presbyterian Church to determine who represents the local church? The latter reliance could require civil courts to resolve debatable matters of church polity--the very difficulty that doomed the efforts of the Illinois courts in Serbian Eastern Orthodox Diocese. An ordinary presumption of majority rule, however, would be entirely appropriate.

Kent Greenawalt, Hands Off! Civil Court Involvement in Conflicts over Religious Property, 98 Colum. L. Rev. 1843, 1860 (1998).

²² Indeed, *Jones* was in fact a watershed case in church property law jurisprudence, as recognized by the dissent. Justice Powell, the author of that dissent, in fact complained that:

The schism in the Vineville church . . . resulted from disagreements among the church members over questions of doctrine and practice. Under the Book of Church Order, these questions were resolved authoritatively by the higher church courts, which then gave control of the local church to the faction loyal to that resolution. The Georgia courts, as a matter of state law, granted control to the schismatic faction, and thereby effectively reversed the doctrinal decision of the church courts. This indirect interference by the civil courts with the resolution of religious disputes within the church is no less proscribed by the

II.) 57-9(A), As Applied, is Constitutional.

In light of the above caselaw, the Court now turns to an analysis of the various arguments asserted by both ECUSA and the Diocese in their attempt to convince the Court that 57-9(A) is unconstitutional. For the reasons stated below, the Court is not persuaded by any of these arguments.

A.) 57-9(A), As Applied, Does Not Violate the Free Exercise Clause.²³

ECUSA/Diocese first argue that 57-9(A) violates the federal and state Free Exercise Clauses. (Suppl. Constitutional Br. of the Diocese of Virginia Pursuant to April 3, 2008 Order [hereinafter “Diocese Br.”] at 2.) They make several sub-arguments in support of this claim, each of which the Court addresses below.

1.) Application of Jones v. Wolf to the Instant Case

ECUSA/Diocese argue that the “holding” of Jones v. Wolf was that “amending a hierarchical church’s governing documents before a dispute [arises] [i]s sufficient to resolve property disputes in favor of the hierarchical

First Amendment than is the direct decision of questions of doctrine and practice.

Id. at 613 (Powell, J., dissenting).

The Jones dissent further protests that:

In essence, the Court’s instructions on remand therefore allow the state courts the choice of following the long-settled rule of Watson v. Jones or of adopting some other rule—unspecified by the Court—that the state courts view as consistent with the First Amendment. Not only questions of state law but also important issues of federal constitutional law thus are left to the state courts for their decision, and, if they depart from Watson v. Jones, they will travel a course left totally uncharted by this Court.

Id. at 616 (emphasis added).

²³ The Free Exercise Clause of the First Amendment to the United States Constitution reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” U.S. Const. amend. I. It was made applicable to the States by the Fourteenth Amendment. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000)

church and . . . civil courts [are] bound to follow the adopted provisions.” (Diocese Br. at 3-4.)²⁴ In other words, they argue that “applying section 57-9(A) as the Congregations suggest would override the property provisions in the Episcopal Church’s and the Diocese’s governing documents, and such provisions are binding on civil courts.” (Diocese Br. at 3.)

ECUSA/Diocese further put forward the following interpretation of Jones: They argue that Jones “involved two issues and a two-step analysis,” in that:

The first question in Jones v. Wolf was who owned the property, was it the property of the congregation or the property of the general church. And in that case, the Georgia Supreme Court looked at the constitution, the Book of Church Order for the Presbyterian Church, and found in there nothing like what is in our documents, found no trust in favor of the general church and, therefore, as its first step, the Georgia Supreme Court said based on neutral principles, the property belongs to the congregation.

But then there was a second step in Jones v. Wolf, because there were two competing groups of people, each claiming to be the congregation. And what the Court said in the second part of Jones v. Wolf—which is encapsulated under Roman numeral IV of that decision—is that when you have that issue—which is not an issue for most of these churches²⁵—when you have that issue, who is the

²⁴ ECUSA/Diocese further claim that they amended their governing documents to “provide that all real and personal property held by or for the benefit of any Church or Mission within the Diocese is held in trust for the Episcopal Church and the Diocese,” in order to specifically respond to what ECUSA/Diocese perceived to be the holding of Jones. See Diocese Br. at 3-4. That is, ECUSA/Diocese assert that Jones v. Wolf held that an express trust will always overcome a State’s presumption of majority rule. The problem with ECUSA/Diocese’s argument is that the Supreme Court of Virginia, in Green v. Lewis, 221 Va. 547 (1980), an opinion issued after the United States Supreme Court’s decision in Jones v. Wolf, specifically states: “As express trusts for supercongregational churches are invalid under Virginia law no implied trusts for such denominations may be upheld.” Id. at 555 (quoting Norfolk Presbytery v. Bollinger, 214 Va. 500, 507 (1980)). Thus, the Supreme Court of Virginia’s holding in Green v. Lewis does not square with ECUSA/Diocese’s interpretation of Jones v. Wolf’s holding.

²⁵ The Court notes that, to the extent that counsel for the Diocese suggest that Jones v. Wolf posed a situation utterly different from that involved in the instant case, the Court disagrees. Jones v. Wolf presents a scenario similar to the instant facts, an exception being that the PCUS—unlike ECUSA/Diocese—

true congregation, then you can look to a majoritarian presumption which is defeasible by the church having taken some steps in advance.

(Transcript from May 28th, 2008 Constitutional Issues Hearing at 19:7-20:6.) [hereinafter “Const. Tr.”]²⁶

As a preliminary matter, counsel for ECUSA/Diocese’s description of Jones’ holding as a “two-step” process is actually taken from the Jones dissent, not the Jones’ majority. Second, while it is true that—unlike ECUSA/Diocese—the PCUS in Jones did not have “any language of trust in favor of the general church” within its governing documents,²⁷ it is not accurate to characterize the “holding” of Jones as mandating that each of the 50 States must first check to see whether there is an express or implied trust within a church’s governing documents before turning to a presumption of majority rule. If that were truly the holding of Jones, it would have made no sense for the majority to declare, toward the conclusion of its opinion, that

any rule of majority representation can always be overcome, under the neutral-principles approach, either by providing, in the corporate charter or the constitution of the general church, that

did not have any language of express trust within its governing documents. Indeed,

[E]ven if Jones governed only disputes over which part of a congregation was entitled to the property, it would still govern here. Historically, Virginia law has not recognized denominational trust interests in congregational property Moreover, [ECUSA/Diocese] is not seeking to use the properties at issue for denominational activities; it has asserted the interests of “loyal” Episcopalians who voted against disaffiliation. . . . That is consistent with the Church’s canons, which do not assert outright ownership of congregational property, only a beneficial interest for congregational use. Thus, the underlying dispute here is effectively between different factions of the congregations.

(CANA Congregations’ Responsive Br. Pursuant to the Court’s June 6, 2008 Order at 10) (citations omitted).

²⁶ This argument regarding Jones’ supposed “two-step” analysis has also been presented in the Episcopal Church and Diocese of Virginia’s Opening Brief Pursuant to June 6, 2008 Order. See ECUSA/Diocese Opening 6/6 Br. at 16-19 (describing their theory as to Jones’ supposed “two-stage analysis”).

²⁷ See Jones, 443 U.S. at 601.

the identity of the local church is to be established in some other way, or by providing that the church property is held in trust for the general church and those who remain loyal to it. 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.

Jones, 443 U.S. at 608.

If the holding of Jones truly is what ECUSA/Diocese argue that it is, which is that the First Amendment requires each of the fifty States to have a rule of majority presumption that is always defeasible by language of express trust in a hierarchical church's governing documents, how then, can the line, "Indeed, the State may adopt any method of overcoming the majoritarian presumption" be explained? Under ECUSA/Diocese's reading of Jones, it cannot. ECUSA/Diocese's reading of Jones renders the foregoing sentence entirely meaningless. In addition, ECUSA/Diocese's reading of Jones would render meaningless two other sentences within Jones, in which Justice Blackmun, quoting Justice Brennan's Maryland & Va. Churches concurrence, states 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."

Id. at 602 (citation omitted).

In sum, ECUSA/Diocese misperceive the holding of Jones. The passage to which ECUSA/Diocese refer as Jones' "holding,"²⁸ simply provides

²⁸ That passage is as follows:

The neutral-principles approach cannot be said to "inhibit" the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods. Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. *At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property.* They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, *the constitution of the*

suggestions as to ways in which a State might allow a hierarchical church to overcome a presumption of majority rule. In short, Jones grants States the freedom to develop their own church property rules.

2.) 57-9(A) is a neutral law of general applicability.

ECUSA/Diocese next argue that 57-9(A) violates the Free Exercise Clause in that it “discriminates against hierarchical churches by allowing congregational majorities that have disaffiliated to take church property, when no such rule applies to secular voluntary associations.” (Diocese Br. at 10.) On this basis, they argue that 57-9(A) is not a neutral, generally applicable law, because “it ‘has no meaning within the secular context’ and ‘distinguishes churches and religious denominations from other groups in the broader context of Virginia law.’” (Diocese Br. at 12 (citing Falwell v. Miller, 203 F. Supp. 2d 624, 630 (W.D. Va. 2002); Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 533 (1993))). ECUSA/Diocese argue that “Section 57-9 lacks general applicability because it treats religious entities differently from secular entities ‘on account of religious status.’” (Diocese Br. at 12-13 (citing Falwell, 203 F. Supp. 2d at 631; Lukumi, 508 U.S. at 542-43)).

ECUSA/Diocese’s position assumes that the Free Exercise Clause somehow mandates that the legislature treat church property disputes identically to disputes involving secular voluntary associations. It does not. And the cases cited by ECUSA Diocese—Falwell and Lukumi—fail as well to support this proposition.

For example, the Falwell court held that Article IV, § 14(20) of the Virginia Constitution, which prohibited the incorporation of churches, violated the U.S. Constitution. Falwell, 203 F. Supp.2d at 626. But a state constitutional provision that imposes a blanket ban against incorporation for all churches and religious denominations is entirely distinguishable from 57-9(A), which is a law that simply imposes a presumption of majority rule, and applies only in the event that a religious body happens to experience a split.

As for Lukumi, that case in fact contradicts the position taken by ECUSA/Diocese. The Attorney General’s analysis in this regard is helpful. Quoting Lukumi, the Attorney General states that “a law that is neutral and of

general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.

Diocese Br. at 4 (citing Jones v. Wolf, 443 U.S. at 606 (emphasis added by the Diocese)).

general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” (Commonwealth’s Response to the Post-Decision Briefs [hereinafter “Commonwealth’s Resp.”] at 22 (quoting Lukumi, 508 U.S. at 531 (1993))). Therefore, “if section 57-9 is a neutral law of general applicability, then the Episcopal Church’s free exercise claim fails.” (Commonwealth’s Resp. at 22.)

Lukumi sets forth the standard for determining whether or not a law is “neutral” and/or “generally applicable.” Under Lukumi, neutrality refers to whether or not “the object of the law is to infringe upon or restrict practices because of their religious motivation.” (Commonwealth’s Resp. at 23) (quoting Lukumi, 508 U.S. at 533) (emphasis added). If a law does so restrict or infringe, then it is not neutral. Likewise, “[t]he related principle of ‘general applicability’ forbids the government from ‘impos[ing] burdens only on conduct motivated by religious belief’ in a ‘selective manner.’” (Commonwealth’s Resp. at 23) (quoting Lukumi, 508 U.S. at 543).

Applying these standards from Lukumi, the Attorney General argues: “Section 57-9 does not ‘refer to a religious practice without a secular meaning discernible from the language or context. It does not single out the Episcopal Church or hierarchical churches. Rather, the text refers simply to a means of holding church property. Thus, it is facially neutral.” (Commonwealth’s Resp. at 23) (citation omitted). Facial neutrality is not the end of the story, however, since a court must still “ask whether [a statute] embodies a more subtle or masked hostility to religion.” (Commonwealth’s Resp. at 23) (quoting St. John’s United Church of Christ v. Chicago, 502 F.3d 616, 633 (7th Cir. 2007)). Such subtle or masked hostility to religion may be detected by analyzing “the ‘historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the [act’s] legislative or administrative history.’” (Commonwealth’s Resp. at 23) (quoting Lukumi, 508 U.S. at 540.)

It cannot credibly be argued that either the historical background or legislative history leading up to the enactment of 57-9 demonstrates a “subtle or masked hostility to religion.” Rather, as this Court’s 57-9 Opinion makes clear, 57-9 appears to have been passed in light of the various splits that occurred within multiple different religious denominations from the early to mid-nineteenth century. Thus, 57-9 was likely passed with the “motiv[at]ion] to ensure prompt and peaceful resolutions of church property disputes.” (Commonwealth’s Resp. at 23.) The legislative history produced at trial indicates that one of the purposes of the passage of 57-9 was “to protect local religious 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.” 57-9 Opinion at 56 (citing Trial Tr. 224:1-8.) Thus, neither the historical context, nor the legislative history

indicate that 57-9 was motivated by any type of hostility to religion in general, and certainly not hostility directed specifically toward the Episcopal Church. In short, “[b]ecause the General Assembly was motivated by a non-discriminatory purpose—resolving property disputes quickly and peacefully when a denomination divided—§ 57-9 is neutral and generally applicable.” (Commonwealth’s Resp. at 24.)

Finally, ECUSA/Diocese argue that 57-9(A) violates the Free Exercise Clause because it treats church property differently from property of secular entities. Numerous other states, however, have laws regarding the disposition of church property. Indeed, many of them single out *specific religious denominations* for special treatment.²⁹ This argument also presumes (erroneously) that a State may not pass statutes specifically governing the resolution of church property issues. As Justice Brennan stated in his concurrence in Maryland & Va. Churches, states may in fact, pass “special statutes governing church property arrangements in a manner that precludes state interference in doctrine.” 396 U.S. at 370.

3.) The “Dumas Act” is distinguishable from 57-9.

In a further attempt to buttress their Free Exercise claims, ECUSA/Diocese argue that the fact that Alabama’s “Dumas Act,” which, over

²⁹ See, e.g. CANA Congregations’ Post-Decision Responsive Br. at 43, which cites N.Y. Relig. Corp. Law § 12 (2) (“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”); Md. Code, Corps. & Ass’ns § 5-333 (a) (“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 [of 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”); Md. Code, Corps. & Ass’ns § 5-326 (“All 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 [a]re subject to the discipline, usage, and ministerial appointments of the United Methodist Church”).

40 years ago, was held to violate the First Amendment,³⁰ necessitates that this Court likewise strike down 57-9. As a preliminary matter, this Court notes that the cases invalidating the Dumas Act pre-date Jones v. Wolf by about a decade. But even if these pre-Jones cases are still good law, a review of the Dumas Act demonstrates that it is in fact a drastically different statute from 57-9.

The Dumas Act, as passed by the Alabama legislature, specifically and explicitly singled out protestant churches.³¹ While that alone might not have doomed the statute, the Dumas Act was fatally flawed because it contained a “departure-from-doctrine” provision that was unconstitutional.³² Specifically, § 107 of the Dumas Act states:

Whenever as a result of action of the parent church or any of its authoritative subdivisions, or its law-making body, the majority group of any local church shall determine that there has been a change of social policies, within the meaning hereof, or that any act, declaration, law, policy, social creed or jurisdictional system of the parent church is contrary to the basic intent, understanding or basic assumption existing between the contributors, donors or grantors of the church property and the local church, or between such contributors, grantors or donors and any trustee of property held for the benefit of the local church or held by or for the use of the local church subject to the trust clause; and whenever such majority group shall find and determine that such act, declaration or policy of the parent church is not only contrary to such basic intent, understanding or assumption but that acquiescence therein would be contrary to the welfare of the local church or the peace, order, friendliness or good will within the membership of the local church, or be inconsistent with the effective and harmonious continuation of church work, or involve the church in public controversy, thereupon the majority group shall have the right without sacrifice or loss of any title, interest or matured equity or rights in property, funds or benefits, to set up a local church or unit independent of the authority of the parent church; the local

³⁰ See Goodson v. Northside Bible Church, 261 F. Supp. 99, 104 (S.D. Ala. 1966), aff'd 387 F.2d 534 (5th Cir. 1967); see also First Methodist Church of Union Springs v. Scott, 226 So. 2d 632, 640 (Ala. 1969).

³¹ See, for example, its definition of “Local church:” “Local church means any charge, church, parish or mission of the Protestant faith, whether or not incorporated, in any city, town, or county in Alabama” The Dumas Act, 58 Ala. Code § 104(b) (Supp. 1971).

³² See Hull Church, 393 U.S. at 449-50.

church or unit so set up shall be in corporate form as may be provided for under the laws of Alabama for the formation of church or non-profit charity corporations.³³

There is simply no comparison between the Dumas Act and 57-9,³⁴ as “section 57-9 contains no sect-specific language—it applies to any “congregation” attached to any “church or religious society,” and it contains no “departure-from-doctrine requirement.” (CANA Congregations’ Post-Decision Responsive Brief [hereinafter “CANA Br.”] at 24.)

4.) 57-9(A), considered with other provisions of the Virginia Code, preserves a hierarchical church’s ability to ensure that the faction loyal to the hierarchical church will retain the church property.

³³ The Dumas Act, 58 Ala. Code § 107 (Supp. 1971).

³⁴ § 57-9 states in its entirety:

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

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

Va. Code Ann. § 57-9 (2008).

ECUSA/Diocese's final argument related to the Free Exercise Clause is that 57-9(A)'s "supposedly 'conclusive' rule of decision removes hierarchical churches from determinations regarding property ownership, disregarding neutral principles as defined by the Supreme Courts of the United States and Virginia." (Diocese Br. at 18.)

In fact, ECUSA/Diocese could have, at any time within the past 140 years since 57-9 (or the predecessor thereto) was originally passed, re-titled their properties in the name of a Bishop or other ecclesiastical officer.³⁵ If they had done so, they could have permanently avoided any potential application of 57-9(A). ECUSA/Diocese protest that this 're-titling' argument dismisses as 'minimal' what would be a significant practical burden on the Episcopal Church and the Diocese." (Diocese Br. at 21.) They in fact argue that to place their Virginia properties in the name of an ecclesiastical officer, or to incorporate, would place a substantial burden upon their religious exercise. ECUSA/Diocese's argument becomes much less persuasive in light of the fact

³⁵ Other religious entities in Virginia, by this means, have entirely put themselves beyond the reach of 57-9(A). See Stipulations of Fact, ¶¶ 5-8, which state as follows:

5. Title to the real property of parishes (local congregations) in Virginia attached to the Roman Catholic Church is held in the name of the Bishop of the Diocese in which the parishes are located.

6. Title to the real property of parishes (local congregations) in Virginia attached to the Greek Orthodox Church in the Metropolis of New Jersey, which includes Greek Orthodox parishes in Virginia, is held in the corporate names of the parishes and no other, except as otherwise required by any applicable civil law.

7. Title to the real property of congregations in Virginia attached to the Foursquare Church is held in the name of the International Church of the Foursquare Gospel, a California religious corporation.

8. Title to the real property of congregations in Virginia attached to the Church of Jesus Christ of Latter-Day Saints (sometimes known as the Mormons) is held in the name of Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints, a Utah corporation sole, authorized to do business in Virginia.

that Bishop Lee already holds about 29 properties in his own name.³⁶ Thus, the Diocese itself regularly—and of its own free will—engages in the very practice which it simultaneously protests “substantially burdens” its free exercise of religion.³⁷

ECUSA/Diocese claim that the State is dictating to it a certain method of property ownership, and thus this violates the Free Exercise Clause. But the State is dictating no such thing. 57-9(A) leaves all denominations free to hold property in any manner they wish. However, if a religious society or church chooses to hold property by trustees in Virginia, then that religious society or church is subject to 57-9(A). However, 57-9(A) of course only applies in the limited circumstance in which there is a conflict within that religious society or church that leads to a division.

The Free Exercise Clause protects the free exercise of religion; it does not protect religious organizations from all administrative inconveniences that may arise from a religious organization’s compliance with neutral laws of general applicability. See Wisconsin v. Yoder, 406 U.S. 205, 215-16 (“[T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a “religious” belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.”).

Even more importantly, ECUSA/Diocese’s argument that re-titling would prove intolerably burdensome also proves problematic when one considers that the majority in Jones appears to disagree with ECUSA/Diocese’s “burden” argument. In fact, Jones expressly states that one way in which a religious

³⁶ Counsel for the Diocese testified that of these 29 properties, some are “mission congregations,” some are “full functioning churches,” and some are “parish houses.” (Const. Tr. at 33:8-21.)

³⁷ During the hearing on constitutional issues, counsel for the Diocese also argued that re-titling all their properties in Virginia in the name of an ecclesiastical officer would “breed suspicion. It would breed resentment. It would provoke the very kinds of departures that we have seen today. All of this would distract the Church from its mission, would disturb the peace of the Church.” (Const. Tr. 34:19-35:1.) This argument is unconvincing in light of the fact that ECUSA/Diocese concedes—indeed, they trumpet—the fact that they amended their governing documents after Jones v. Wolf in order to overcome a presumption of majority rule. Why the re-titling of deeds would be problematic when the amendment of governing documents is not problematic was not adequately explained.

organization can avoid the presumptive rule of majority representation is to modify its deeds, and describes any burden involved in making such a modification as “minimal.” See Jones v. Wolf, 443 U.S. at 606.

In short, Jones requires an “escape hatch.” And the Code of Virginia, by permitting church property to be held in the name of an ecclesiastical officer³⁸ or in corporate form,³⁹ satisfies that requirement. 57-9(A), as applied in the instant case, does not violate the Free Exercise Clause.

B.) 57-9(A), As Applied, Does Not Violate the Establishment Clause.

³⁸ Va. Code § 57-16(A) states:

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

Va. Code Ann. § 57-16 (A) (2008).

³⁹ Va. Code § 57-16.1 states:

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

Va. Code Ann. § 57-16.1 (2008).

ECUSA/Diocese argue that 57-9(A) violates the Establishment Clause, arguing that it 1.) violates the “neutrality rule,” as enunciated in Larson v. Valente, and that it also 2.) violates the “Lemon Test.”

1.) Larson v. Valente is inapplicable.

ECUSA/Diocese claim that 57-9(A) “fails to conform to the Establishment Clause’s⁴⁰ neutrality rule,” which they describe as “[t]he principle that ‘government should not prefer one religion to another, or religion to irreligion.’” (Diocese Br. at 23) (citing Board of Education v. Grumet, 512 U.S. 687, 703, 704 (1994)). In support of their position that 57-9(A) violates this so-called neutrality rule, ECUSA/Diocese cite Larson v. Valente, 456 U.S. 228 (1982). ECUSA/Diocese argue that the Larson Court “invalidated the fifty per cent rule⁴¹ as a facial discrimination among religious groups,” since the statute [struck down in Larson] was “not simply a facially neutral statute, the provisions of which happen[ed] to have a ‘disparate impact’ upon different religious organizations,” but instead made “explicit and deliberate distinctions between different religious organizations.” (Diocese Br. at 23-24 (citations omitted.)) According to ECUSA/Diocese, “Section 57-9(A) likewise ‘makes explicit and deliberate distinctions between different religious organizations,’ ‘grants denominational preferences,’” (Diocese Br. at 24) and thus should be struck down by this Court.⁴²

⁴⁰ The Establishment Clause reads: “Congress shall make no law respecting an establishment of religion” The Fourteenth Amendment applies the Establishment Clause to the States. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

⁴¹ The phrase “fifty per cent rule” refers to the Minnesota statute at issue in Larson, which “provided that only those religious organizations that received more than half of their total contributions from members or affiliated organizations would remain exempt from [certain state-imposed] registration and reporting requirements” Larson, 456 U.S. at 231-32.

⁴² Along these same lines, the Church Amici focus upon this Court’s observation regarding the “voting age” provision within 57-9, and appear to suggest that this “voting age” provision somehow violates the neutrality rule, and “violates the prohibition against denominational preferences.” (Church Amici Brief at 10.) The Church Amici state that “for the entirely illegitimate purpose of ‘protecting’ local congregations from ‘a hierarchical church’s constitution or canons, the statute erects unique rules of decision for church property disputes—rules that draw civil courts into a theological thicket” (Church Amici Brief at 4) (citing 57-9 Opinion at 48).

The Church Amici attach far too much import to the Court’s use of the word “protect” in reference to the voting age provision of 57-9(A). What the

ECUSA/Diocese's assertion that the fifty percent rule and 57-9 are somehow similar is wrong. As the Attorney General states in his brief:

the statute's text [in Larson] differentiated between religious sects based upon how much money they raised from their members. In sharp contrast to the statute at issue in Larson, the text of section 57-9 does not make explicit and deliberate distinction between religious sects. The text does not state hierarchical churches are subject to the law while non-hierarchical churches are not, but rather applies based upon the form in which churches choose to hold property. It does not require that some denominations be treated differently from other denominations. It applies equally to all religious sects. When there is no facial discrimination between religious denominations, Larson is inapplicable.⁴³

Court wrote is that 57-9(A) "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 canons." 57-9 Opinion at 48. The Court could have just as easily used the word "ensure" in place of "protect," and the resulting meaning would have been the same. As to why the "over 18" requirement is in 57-9(A) but not in 57-9(B), the Court does not know why. Conceivably, the General Assembly may have believed that congregational churches, with their tradition of local control and majority rule, did not need the General Assembly to set out a voting age requirement. Whatever the rationale, however, this small distinction between 57-9(A) and 57-9(B) is of no constitutional significance. At the end of the day, both provisions require a majority vote.

⁴³ During the constitutional issues hearing, counsel for the Diocese also seemed to suggest that, apart from the text of 57-9, the historical context in which the statute was passed itself suggests discrimination against certain religious denominations. Counsel stated:

During the first phase of this case, the Court was called upon to decide the meaning of several terms found in Section 57-9, and during the course of that argument, the Congregations made a point about the historical circumstances under which the original version of this statute was enacted. And surely, those circumstances were unique. The Bill of Rights did not apply to the States, Virginia had just lost our war for independence from the North, and the legislature was, perhaps understandably, less than sensitive to the constitutional rights of church hierarchies that appeared to be dominated by the North.

(Commonwealth's Resp. at 15-16) (citations omitted).

Further, as the CANA Congregations note, the holding in Larson turned heavily on the fact that “the legislative history [of the Minnesota statute at issue in Larson] evidenced an explicit intent to ‘get at’ the ‘Moonies’ but to protect the ‘Roman Catholic Archdiocese,” and thus “[i]t 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.” (CANA Br. at 42) (citations omitted). In contrast, the legislative history of 57-9 demonstrates no such hostility or animus toward a specific denomination or religious sect.

2.) 57-9(A) Does not Violate the Lemon Test.

Although ECUSA/Diocese argue that 57-9(A) violates the Lemon test, their arguments are not persuasive.⁴⁴ According to Lemon, a statute is constitutional if 1.) it has a secular purpose; 2.) its principal or primary effect neither advances nor inhibits religion; and 3.) it does not foster an excessive entanglement with religion. 57-9 easily meets these three requirements.

(Const. Tr. at 9:19-10:8). Evidence produced at trial, however, tends to negate the Diocese's apparent intimation that 57-9 was passed by the Virginia legislature in an attempt to “get at” church hierarchies “dominated” by the North. Specifically, an expert witness for the CANA Congregations during the 57-9 trial, confirmed that among the Methodist petitions that were filed in 1867 or soon thereafter, not all were petitions from congregations seeking to affiliate with the southern branch of the Methodist church. Dr. Irons testified that he located at least one congregation that voted to join the northern branch and subsequently filed the appropriate petition with the local circuit court. See 57-9 Opinion at 57 n.53.

⁴⁴ The so-called “Lemon test” is derived from Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The U.S. Supreme Court itself has frequently failed to apply Lemon. See, e.g. Commonwealth's Resp. at 12 (citing Van Orden v. Perry, 546 U.S. 677 (2005); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Capitol Square Review & Advisory Bd. v. Pinette; 515 U.S. 753 (1995); Rosenberger v. Rector & Visitors of Univ. Of Virginia, 515 U.S. 819 (1995); Lee v. Weisman, 505 U.S. 577 (1992); Marsh v. Chambers, 463 U.S. 783 (1983)). Nevertheless, Lemon appears to have been revived in McCreary County v. ACLU, 545 U.S. 844, 901 (2005), and likewise continues to be employed by the Supreme Court of Virginia. See, e.g. Va. College Bldg. Auth. v. Lynn, 260 Va. 608, 629 (2000). This Court therefore concludes that it should apply Lemon.

a.) 57-9(A) has a secular purpose.

Jones states that “[t]he State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively.” Jones, 443 U.S. at 602. The evidence indicates that the purpose of 57-9 was to provide a rule that would allow for peaceful conflict resolution upon the occurrence of church property disputes following a division in a church or religious society.⁴⁵ Clearly, then, 57-9 possesses a secular purpose.

b.) 57-9(A) does not have the “primary effect of advancing or inhibiting religion.”

ECUSA/Diocese argue that 57-9(A) “advances religion,” but their argument is without support in the record or the law. There are, in fact, specific criteria that must be applied in considering whether a statute meets this “primary effect” prong of Lemon. These include consideration of whether the statute “result[s] in governmental indoctrination,” and whether it “define[s] its recipients by reference to religion.” Agostini v. Felton, 521 U.S. 203, 234 (1997). In addition, government “advancement” of religion has been held to include such elements as “sponsorship, financial support, and active involvement of the sovereign in religious activity.” Walz v. Tax Commission of New York, 397 U.S. 664, 668 (1970). Given this, or for that matter, any similar criteria, 57-9(A) does not even come close to government “advancement” of religion. As the Attorney General states in his brief, “Section 57-9 neither advances nor inhibits religion. It does not differentiate between religious sects. Rather, it differentiates on how property is held. It does nothing to indoctrinate anyone in a particular religious belief. Rather, the statute exists only to resolve church property disputes fairly and efficiently.” (Commonwealth’s Resp. at 19.)

c.) 57-9(A) does not result in “excessive entanglement.”

ECUSA/Diocese argue that 57-9(A) violates this third prong of Lemon, in that, by applying 57-9(A) to this case and these facts, this Court has excessively entangled itself with religion in a manner forbidden by Lemon. Specifically, ECUSA/Diocese focus upon certain legal conclusions within this Court’s 57-9 Opinion, and claim that those conclusions hopelessly entangle this Court in the religious thicket. The Court addresses each of these arguments below.

⁴⁵ 57-9 Opinion at 56 (“The object of the statute was to protect local religious 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 . . .”).

i.) This Court’s Definition and Application of the Term “Branch” from 57-9(A) Did Not Require Inquiry into or Decisions Regarding Matters of Religious Doctrine or Polity.

Although they claim that several different aspects of this Court’s 57-9 Opinion caused the Court to descend into the religious thicket, ECUSA/Diocese focus most heavily upon the “branch” element of 57-9(A).⁴⁶ ECUSA/Diocese’s protestations to the contrary, however, the term “branch” as used within 57-9(A) does not take this Court into the religious thicket, and in fact does not even scratch its surface. A “branch” is “simply the logical corollary of [a] division.” (CANA Br. at 29 n.11.) A synonym for “branch” is “part,”⁴⁷ and indeed, the word “part” can be substituted in 57-9(A) without altering the statute’s meaning. In fact, it would make little sense for the statute to use the term “division” without also employing the word “branch,” or a similar synonym such as “part,” “fragment,” etc. to describe the entities that remain in the aftermath of a division.

This Court applied a broad definition to the term “branch,” defining the term as “a part of a complex body,” and “any arm or part shooting or extended from the main body of a thing.” 57-9 Opinion at 78.⁴⁸ It requires no

⁴⁶ See Diocese Br. at 29 (“In particular, the Court determined that CANA and the ADV shared sufficient theological relationships, history, and beliefs to constitute “branches” of the Episcopal Church and the Diocese.”); ECUSA Br. at 21 (“[T]he Court’s April 3 ruling determined, among other things, that CANA and ADV are ‘branches’ of the Episcopal Church, the Diocese of Virginia, and the Anglican Communion . . . the Court’s decision on this point has no secular basis.”).

Likewise, ECUSA/Diocese suggest that this Court’s reference to the Episcopal missionary diocese in Mexico, see 57-9 Opinion at 79, demonstrates that this Court applied an improper theological interpretation of “branch.” That is not so. The Court was simply addressing the fact that this particular hypothetical, as presented by ECUSA/Diocese, was entirely irrelevant. No part of the Court’s definition and application of the term “branch” turned upon the Court’s brief discussion of that hypothetical.

⁴⁷ See 57-9 Opinion at 78.

⁴⁸ As the CANA Congregations point out, Hoskinson v. Pusey, 73 Va. 428 (1879) demonstrates another historical division, the resulting “branches” of which bear a striking resemblance to the very parties before this Court. That particular division also suggests that this Court was correct in applying a broad definition of “branch:”

sophisticated theological or doctrinal analysis to apply this definition to the facts at hand—in fact, it requires no theological or doctrinal analysis at all, since “[t]he 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.” (CANA Br. at 30.) There has never been any dispute among the parties before this Court “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.” (CANA Br. at 30.)

In addition, the Anglican Communion component of the Court’s “branch” definition was no different from its definition of “branch” on the ECUSA and Diocese levels. In determining that CANA and the ADV are “branches,” (or “parts” or “fragments”) of the Anglican Communion (as they are of ECUSA and the Diocese) for purposes of 57-9(A), the Court simply considered evidence such as the following: 1.) the Articles of Incorporation and Bylaws of CANA⁴⁹ and ADV,⁵⁰ which are purely secular documents, state that CANA and ADV are part of the Church of Nigeria; 2.) the Church of Nigeria’s Constitution states that it is a member of the Anglican Communion,⁵¹ as does the Constitution of

There, [in Hoskinson] although MEC South predated the Baltimore Conference division (much as the Church of Nigeria predated the division in [ECUSA]), 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 [ECUSA]). 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”. And such divisions fit comfortably within the language of the statute, as it is common to refer to a “branch” [or “part”] that has broken off of one tree and been grafted onto another.

(CANA Br. at 35 n.19.)

⁴⁹ See Pls.’ Ex. 69, “August 2, 2005, Articles of Incorporation for the Convocation of Anglican Nigerians in America (CANA),” at 3.)

⁵⁰ See Pls.’ Ex. 70, “December 4, 2006, Articles of Incorporation for the Anglican District of Virginia, an Association of Churches,” at 1.)

⁵¹ See Pls.’ Ex. 137, “Constitution of the Church of Nigeria, Authenticated by the Primate, Archbishop & Metropolitan 9/20/1997” at 1.

the Anglican Consultative Council;⁵² and 3.) the opening sentence of ECUSA's Constitution and Canons states that it is a "constituent member of the Anglican Communion,"⁵³ and the Constitution of the Anglican Consultative Council likewise states that ECUSA is a member of the Anglican Communion.⁵⁴ No religious or doctrinal analysis was involved in the Court's review of this evidence, and ECUSA thus has no basis to assert that this Court's ruling "necessarily rests on its own view of the significance of the purely theological relationship between the entities involved." (ECUSA Br. at 22.)

Indeed, by repeatedly complaining that this Court has not attached ECUSA/Diocese's preferred theological, as opposed to the Court's own secular, definition to the term "branch," ECUSA/Diocese ironically appear to be attempting to draw this Court into the very thicket that they simultaneously argue this Court should avoid. But just as the Georgia courts were not constitutionally bound to adhere to the PCUS's view as to who was the "true"

⁵² See Defs.' Ex. 42, "The Constitution of the Anglican Consultative Council," at 451 (listing the Church of Nigeria (Anglican Communion) under the "Schedule of Membership").

⁵³ See Defs.' Ex. 2, "Constitution and Canons of the Episcopal Church in effect since January 1, 2007," at 1.

⁵⁴ (Defs.' Ex. 2 at 451) (listing the Episcopal Church under the "Schedule of Membership"); see also 57-9 Opinion at 22 (citing Resolution R-24sa of the 209th Annual Diocesan Council, in which the entire Council declared that they were "members of the worldwide Anglican Communion"); 57-9 Opinion at 23 (quoting Resolution R22s of the 210th Diocesan Annual Council, which reads "We in the Diocese of Virginia are members of the Anglican Communion . . . We desire to serve as a model of civility to the Anglican Communion for resolution of the present divisions by working together and honoring conscience through a process that is respectful and peaceful . . ."); 57-9 Opinion at 31 (quoting the Special Committee's Report, which states "we candidly and regretfully acknowledge that we may be entering a period in the history of the Anglican Communion when we . . . will be walking . . . apart."); 57-9 Opinion at 36 (quoting Bishop Guernsey's testimony that All Saints decided to join the Church of Uganda . . . because it wanted to remain a part of the Anglican Communion, "the worldwide church that [All Saints] understood that [it] always had been a part of"; 57-9 Opinion at 39 (quoting Archbishop Akinola's words that "the Church of Nigeria established CANA as a way for Nigerian congregations and other alienated Anglicans in North America to stay in the Communion . . . CANA is an initiative of the Church of Nigeria—and therefore a bonafide branch of the Communion.").

congregation in Jones,⁵⁵ so this Court is not constitutionally bound to adopt ECUSA/Diocese's view on the matter for purposes of determining the applicability of 57-9(A).⁵⁶ Nor does the plain text of the statute require theological or doctrinal analysis.

⁵⁵ See Jones, 443 U.S. at 598 ("In response to the schism within the Vineville congregation, the Augusta-Macon Presbytery appointed a commission to investigate the dispute and, if possible, to resolve it. The commission eventually issued a written ruling declaring that the minority faction constituted 'the true congregation of Vineville Presbyterian Church,' and withdr[jew] from the majority faction 'all authority to exercise office derived from the [PCUS].").

⁵⁶ Even though ECUSA claims that CANA and ADV should not be considered "branches" of the Anglican Communion, ECUSA's Presiding Bishop, the Rev. Katherine Jefferts Schori, referred to both CANA and the Church of Nigeria as, in fact, "branches" of the Anglican Communion. See, e.g. Pls.' Ex. 288A, "Videotape Deposition Designations of Bishop Katharine Jefferts Schori," at 54-55, in which ECUSA's Presiding Bishop states, in response to the question, "Did you refer to the rise of CANA as a further provocation?": "I don't recall exactly. We probably did talk about CANA and its interesting presence in the United States. I certainly did say something about the Episcopal Church's policy having no way of recognizing another branch of the Anglican Communion in our territory;" see also Pls.' Ex. 288A at 83 ("I told [Bishop Lee] that the National Church had an interest both in the financial compensation and that another branch of the Anglican Communion not be set up in our territory for reasons of mission strategy.").

Likewise, in other portions of her deposition, the Presiding Bishop referred to the CANA Congregations as setting up as other "parts" of the Anglican Communion. As this Court has stated previously within this letter opinion, "part" is a synonym for "branch" under this Court's definition of "branch":

Q. Did you not tell Bishop Lee to pull out of negotiations with the 11 congregations?

A. I told Bishop Lee that I could not support negotiations for sale if the congregations intended to set up as other parts of the Anglican Communion.

Q. But if the congregations had chosen to affiliate with other organizations, you would not have interfered with Bishop Lee's prerogative; would you?

A. Depending on what the mission's strategy, what the mission strategy said about where they were going, and provided that he negotiated a fair price.

ii.) This Court’s Definition and Application of the Term “Division” from 57-9(A) Did Not Require Inquiry into or Decisions Regarding Matters of Religious Doctrine or Polity.

As with the term “branch,” ECUSA/Diocese also argue that 57-9(A)’s requirement that a Court conclude that a “division” exists within a church or religious society “overrules important aspects of the Episcopal Church’s own polity and rules,” and therefore violates their First Amendment rights. (ECUSA Br. at 15.) But the same complaint could have been made by the PCUS against the U.S. Supreme Court that decided Jones, since the Jones Court referred to the withdrawal of a *single majority faction within a single congregation* as a “schism.” See Jones 443 U.S. at 598 (“In response to the *schism* within the Vineville congregation, the Augusta-Macon Presbytery appointed a commission to investigate the dispute and, if possible, to resolve it. The commission eventually issued a written ruling declaring that the minority faction constituted ‘the true congregation of Vineville Presbyterian Church,’ and withdr[ew] from the majority faction ‘all authority to exercise office derived from the [PCUS].’”) (emphasis added). In fact, Jones’ use of the term “schism” was itself explicitly more of a religious statement, and less neutral, than the precise, neutral term “division” as used in 57-9(A).

The elements of this Court’s definition of “division” as used in 57-9(A) include: 1.) a split or rupture in a religious denomination; 2.) the separation of a group of congregations, clergy, or members from the church; and 3.) the formation of an alternative polity that disaffiliating members could join. No aspect of any of these three elements requires a civil court to delve into, or make decisions regarding, aspects of a church or religious society’s polity or doctrine. None of these elements require decisions regarding who is the “true” bishop or ecclesiastical leader, which was held unconstitutional in Kedroff. Nor do any of these elements require a civil court to determine whether a denomination has substantially departed from the church doctrines or theological positions that were in effect at the time the original trust was created, which was held unconstitutional in Hull Church. Likewise, none of these elements require a civil court to determine whether a bishop was properly or improperly defrocked under a particular denomination’s internal rules, or whether a diocese was “properly” reorganized under a particular church’s rules and regulations, which was held unconstitutional in Milivojevich. Rather, the three elements that constitute this Court’s definition of the term “division” simply require a civil court to make neutral, objective observations and findings

(Pls.’ Ex. 288A at 62.) Thus, although the Court does not need to reach the issue, it would appear that CANA and ADV may in fact be “branches” of the Anglican Communion on the simple basis that this fact has been established as a party admission.

regarding whether there has been a split within a church or religious society that leads to a separation and corresponding formation of an alternative polity. Nothing in this definition requires a civil court to resolve or delve into *any* matter of religious/theological belief, doctrine, or practice.

iii.) This Court’s Definition and Application of the Term “Attach” from 57-9(A) Did Not Require Inquiry into or Decisions Regarding Matters of Religious Doctrine or Polity.

As with the terms “branch,” and “division,” ECUSA argues that this Court’s “ruling that the CANA congregations were (and are) “attached” to the Anglican Communion also necessarily and impermissibly rests on purely theological grounds.” (ECUSA Br. at 23.) First, it did not. Rather, the Court used secular definitions and objective facts to conclude that CANA is attached to the Anglican Communion. To the extent that ECUSA/Diocese’s real complaint is that the Court failed to adopt ECUSA/Diocese’s views on the matter of attachment, this Court is an independent fact-finder applying a secular statute to objective and ascertainable facts. Just as the United States Supreme Court did not automatically defer in Jones to the PCUS’ judgment as to the “true” owners of a church, this Court would abdicate its responsibility by simply and automatically adopting as its 57-9(A) findings the interpretation of 57-9(A) given by any party to this litigation.

iv.) This Court Did Not “Delve[] into the Religious Thicket and Independently Resolve[] Numerous Ecclesiastical Issues,” as Asserted by ECUSA.⁵⁷

As evidence of entanglement, ECUSA cites the length of this Court’s Background section within its 57-9 Opinion, stating that “the Court’s ruling displays a constitutionally prohibited ‘searching inquiry’ into numerous ecclesiastical matters,” in that “[t]he Court spends almost 40 pages on a recitation of the facts and evidence it deems relevant to this ruling.” (ECUSA Br. at 18.)

The length of the Court’s opinion is hardly proof of religious entanglement. On a matter of such moment to the parties, and given the need to make multiple factual findings, this Court was in fact obligated to provide “[a] proper perspective on the relationship of [the parties before it],” and in fact “the nature of this dispute require[d] some background discussion.” Milivojevich, 426 U.S. at 699.

⁵⁷ See ECUSA Br. at 18, where the headings include “The Court’s Ruling Delves into the Religious Thicket and Independently Resolves Numerous Ecclesiastical Issues,” and “The Court Conducted a Searching Inquiry into Purely Religious Documents and Relationships.”

ECUSA expresses similar dismay over the fact that this Court's 57-9 Opinion referenced "numerous" "purely religious documents," including "individual pieces of correspondence both among religious leaders, and between some of these clergy and their respective flock." (ECUSA Br. at 19.)

The Court is puzzled by these assertions, for some of the very cases ECUSA/Diocese cite in support of their legal positions contain references to the very same types of materials referenced by this Court. For example, in Milivojevich, the U.S. Supreme Court provides a lengthy background description of the strife and discord within the Serbian Orthodox Church and its American-Canadian Diocese. In that discussion, the U.S. Supreme Court refers to a "May 30 letter," which was an individual piece of correspondence between two religious leaders;⁵⁸ a "commission's report and recommendations;"⁵⁹ and a "circular" mailed from a member of the clergy to various parishes.⁶⁰ Likewise, in Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952) the U.S. Supreme Court quotes from a "Ukase"⁶¹ of the "Moscow Patriarchy," *id.* at 105.⁶²

⁵⁸ See Milivojevich 426 U.S. at 704 ("Dionisije . . . continued to officiate as Bishop, refusing to turn administration of the Diocese over to Firmilian; in a May 30 letter to Firmilian, Dionisije repeated this refusal, asserted that he no longer recognized the decisions of the Holy Assembly and Holy Synod, and charged those bodies with being 'communistic'");

⁵⁹ *Id.* at 705 ("On the basis of the commission's report and recommendations, which recited Dionisije's refusal to accept the decisions of the Holy Synod and Holy Assembly and his refusal to recognize the court of the Holy Synod or its competence to try him, the Holy Assembly met on July 27, 1963 and voted to remove Dionisije as Bishop.").

⁶⁰ See *id.* at 704 ("On May 25, 1963, he [the suspended bishop] prepared and mailed a circular to all American-Canadian parishes stating his refusal to recognize [his suspension].").

⁶¹ A "ukase" is a Russian/French word, defined as: 1 : a proclamation by a Russian emperor or government having the force of law 2 : **EDICT**. Merriam-Webster's Online Dictionary, <http://www.merriam-webster.com/dictionary/Ukase> (last visited June 24, 2008). As used in context within Kedroff, a "ukase" appears to be a written decree of the Moscow Patriarchy.

⁶² See Kedroff at 105 ("There came to the Russian Church in America this Ukase of the Moscow Patriarchy of February 14 or 16, 1945, covering Moscow's requirements for reunion of the American Orthodox Church with the Russian. It required for reunion that the Russian Church in America hold promptly an

In short, to describe a religious controversy, *even in detail*, is not to make a religious determination or a religious statement. Context, as much here as in any other situation, is critical, and for this Court to have dispensed with the background of this dispute—out of some fear that to do otherwise would open the Court to accusations of theological entanglement—would, yes, have made the opinion shorter, but at the substantial cost of making it impossible to understand the Court’s findings of fact and conclusions of law.

C.) 57-9(A), As Applied, Does Not Violate the Constitution’s Equal Protection Clause.⁶³

In considering whether a statute violates the Equal Protection Clause, the “general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). Along these same lines, “[l]aws are presumed to be constitutional under the equal protection clause for the simple reason that classification is the very essence of the art of legislation.” Moss v. Clark, 886 F.2d 686, 689 (4th Cir. 1989) (citation omitted). ECUSA/Diocese’s claim that 57-9(A) violates Equal Protection “is nothing more than a reframing of its Free Exercise claim.” (Commonwealth’s Resp. at 26.) But “[w]here a plaintiff’s First Amendment Free Exercise claim has failed, the Supreme Court has applied only rational basis scrutiny in its subsequent review of an equal protection fundamental right to religious free exercise claim based on the same facts.” (Commonwealth’s Resp. at 26) (citing Wirzburger v. Galvin, 412 F.3d 271, 282-83 (1st Cir. 2005); Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974); St. John’s, 502 F.3d at 638).

Thus, because ECUSA/Diocese’s Free Exercise Clause and Establishment Clause claims both fail, rational basis applies to 57-9(A), and ECUSA/Diocese cannot realistically argue that there is no conceivable rational basis for 57-9(A).⁶⁴ There are many different bases, all of which are rational,

‘all American Orthodox Church Sobor’; that it express the decision of the dioceses to reunite with the Russian Mother Church, declare the agreement of the American Orthodox Church to abstain ‘from political activities against the U.S.S.R.’ and so direct its parishes, and elect a Metropolitan subject to confirmation by the Moscow Patriarchy.”).

⁶³ That Clause mandates that “[n]o State . . . shall deny to any person within its jurisdiction of the equal protection of the laws.” U.S. Const. Amend. XIV, § 1.

⁶⁴ Under this rational basis standard, the party challenging a statute bears the burden “to negat[e] every conceivable basis which might support” the statute. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973); see also

upon which the 1867 General Assembly, as well as the subsequent legislatures which have repeatedly re-codified 57-9, could have decided to implement 57-9(A).⁶⁵ For example,

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 510 (1937) (“This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. . . . [C]ourts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.”) In addition, “a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some ‘reasonable basis,’ it does not offend the Constitution simply because the classification ‘is not made with mathematical nicety or because in practice it results in some inequality.” Dandridge v. Williams, 397 U.S. 471, 485 (1970) (citation omitted).

⁶⁵ At the hearing on the constitutional issues, counsel for the Church Amici attempted to argue that there was no rational basis for the legislature to have implemented a presumption of majority rule, stating “57-9 says that . . . we are going to ignore the rights of any beneficiary and instead apply a rule that’s no different from saying draw straws, flip a coin. That’s what the majority representation rule really is no different from.” (Const. Tr. at 256:11-257:1.) This assertion appears to ignore the following language from Jones regarding the “rationality” of employing a presumption of majority rule:

If in fact Georgia has adopted a presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means, we think this would be consistent with both the neutral-principles analysis and the First Amendment. Majority rule is generally employed in the governance of religious societies. See Bouldin v. Alexander, 15 Wall. 131 (1872). Furthermore, the majority faction generally can be identified without resolving any question of religious doctrine or polity. Certainly, there was no dispute in the present case about the identity of the duly enrolled members of the Vineville church when the dispute arose, or about the fact that a quorum was present, or about the final vote.

Jones v. Wolf, 443 U.S. 595, 607 (U.S. 1979) (emphasis added) Thus, the U.S. Supreme Court obviously disagrees with the Church Amici’s assertion that “the majority representation rule really is no different from [drawing straws or flipping a coin for the property]. To put it another way, flipping a coin is

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 [in cases in which it is held by trustees] 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.

(CANA Br. at 51.)

D. 57-9(A), As Applied, Does not Violate the Takings Clause.⁶⁶

A “[s]tate does not ‘take’ property when it adjudicates competing claims to title by private parties based on neutral legal principles.” (Commonwealth’s Resp. at 31.) An apt comparison is a divorce between two individuals—in such a scenario, a court’s “routine adjudication of property rights when a married couple divorces does not constitute a ‘taking’ in favor of one spouse.” (Commonwealth’s Resp. at 32.) Indeed, ECUSA/Diocese’s reasoning that 57-9 violates the Takings Clause is “entirely circular,” in that “[t]he Diocese *assumes* that it (and ECUSA) own the property at issue in this case, and then declares that section 57-9 would ‘take’ it from them. But the very purpose of section 57-9 is to settle . . . a dispute over who owns property held in trust for local congregations.” (CANA Br. at 55.)

The circular nature of ECUSA/Diocese’s argument is made clear upon an examination of relevant cases involving the Takings Clause, which, significantly, proceed from a presumption of ownership. For example, in Kelo v. City of New London, 545 U.S. 469 (2005), New London sought to condemn the properties of “the nine petitioners [who] *own[ed]* 15 properties.”⁶⁷ Id. at 475 (emphasis added). Likewise, in Texaco, Inc. v. Short, 454 U.S. 518 (1982), “the Indiana Legislature enacted a statute providing that a severed mineral interest that is not used for a period of 20 years automatically lapses and reverts to the current surface *owner* of the property, unless the mineral *owner* file[d] a

arbitrary, as our own Supreme Court of Virginia has recently had occasion to note. See Judicial Inquiry & Review Comm’n v. Shull, 274 Va. 657, 676 (2007) (“In tossing a coin to resolve a matter before him, [the judge] denigrated both the litigants and our justice system.”) Majority rule is not.

⁶⁶ This Clause states “nor shall private property be taken for public use, without just compensation.” U.S. Const. Am. V.

⁶⁷ One of the petitioners was born in the house on her property, and had lived there her entire life. Id. at 475.

statement of claim in the local county recorder's office.”⁶⁸ *Id.* at 518 (emphasis added).

57-9(A) does not violate the Takings Clause of the U.S. Constitution. Rather, it is a statute designed to resolve church property disputes. When a Court, pursuant to that statute, makes an adjudication, its decision—for or against either party—does not constitute a “taking.”

Conclusion

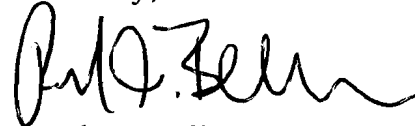
Today, this Court finds that 57-9(A), as applied, is constitutional. Specifically, this Court finds that the statute, as applied in the instant case, does not violate the Free Exercise or Establishment Clauses of the First Amendment, nor does it violate the Equal Protection Clause of the Fourteenth Amendment, nor does it violate the Takings Clause of the Fifth Amendment.

For 141 years, the Commonwealth of Virginia has had a statute available to congregations experiencing divisions for the purpose of resolving church property disputes. 57-9(A) did not parachute into this dispute from a clear blue sky. Its existence cannot have been a surprise to any party to this litigation, each of whom is charged with knowledge of its contents and, more significantly, its import. That the Commonwealth of Virginia, in enacting and reenacting a “division” statute, may be unique among our fellow states is of no considerable moment, for in a federalist system each State is free to determine its own path for the resolution of church property disputes within constitutional boundaries. Whether 57-9(A) would be constitutional absent the ability of a church to hold property in forms that would place such property beyond the reach of 57-9(A) is a hypothetical question which this Court need not address; the Code of Virginia most certainly does provide for such alternative forms of church property ownership. That the Diocese availed itself of this alternative ownership in some cases but chose not to do so in others (and not in the instant cases) does not turn a constitutional statute into an unconstitutional one. Nor is the statute rendered unconstitutional because it requires this Court to make factual findings in a matter involving religious organizations. It is not mere semantics to observe that there is a difference—a constitutionally significant difference—between a finding involving a religious organization and a religious finding. While it is true of course that 57-9(A) requires the Court to make factual findings involving religious entities, each of

⁶⁸ The U.S. Supreme Court upheld the statute against the Takings Clause challenge. *Id.* at 518.

those findings are secular in nature. Hence, for this and all the other reasons cited in this Opinion, 57-9(A) is constitutional.⁶⁹

Sincerely,

A handwritten signature in black ink, appearing to read "Randy I. Bellows". The signature is fluid and cursive, with a prominent initial "R" and a long, sweeping tail.

Randy I. Bellows,
Circuit Court Judge

⁶⁹ Whether it violates the Contracts Clause is a matter expressly reserved for a later date.