

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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

**THE EPISCOPAL CHURCH AND THE DIOCESE OF VIRGINIA'S
REPLY BRIEF PURSUANT TO JUNE 6, 2008, ORDER**

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1. Did the Supreme Court of Virginia, in *Green v. Lewis*, hold that a trial court presiding over a 57-9(A) petition must consider the factors set out in *Green v. Lewis* ...?

The Supreme Court in both *Norfolk Presbytery* and *Green v. Lewis* considered both § 57-9 and § 57-15, *in pari materia* and together with the common law, to resolve “a dispute between the congregation ... on the one part and the general church on the other.” *Green*, 221 Va. 547, 548, 272 S.E.2d 181, 181. *Norfolk Presbytery* was brought under § 57-15. *Green* applied the same analysis to a case brought under § 57-9. This Court should do likewise.

The Congregations argue that *Green* was a § 57-15 case because it “extensively discussed § 57-15.” Response at 1. *Green*’s discussion of § 57-9 was equally “extensive” – it cites both statutes twice. See 221 Va. at 553, 272 S.E.2d at 184. *Green* was explicitly brought under § 57-9, and it did not involve the subjects of § 57-15 – transfers and encumbrances. Neither did the circuit court mention § 57-15. There is simply no basis for limiting *Green* to § 57-15.

The Congregations argue that the Court should ignore *Green* (and *Norfolk Presbytery*, *Buhrman* and *Cave Rock*) because each “involved a single congregation that became ‘independent.’” Response at 1, 3. That was irrelevant to the courts’ respective uses of the neutral principles analysis to decide those disputes, each between a denomination and a local congregation that had voted to disaffiliate. It thus provides no basis for exempting this dispute from the same necessary analysis.¹ The Court also should decline the invitation to make property interests depend on whether a congregation joins a “branch” or seeks religious independence. As the Attorney General cogently warned in 2005, that would discriminate among religions by “giv[ing] an incentive for one choice only – joining a branch ... – while giving a disincentive for the other choices.” Diocese’s Supplemental Constitutional Brief (filed April 23, 2008), Ex. A at 2.

¹ What is unlawful for one congregation is unlawful for two or for many in combination; repeated application of an unconstitutional rule does not make it constitutional.

The Congregations also wrongly argue, again, that the Church's and Diocese's position deprives § 57-9(A) of meaning. Even in a super-congregational church, a congregation may hold all interests in the property where it meets. *See, e.g., Jones v. Wolf*, 443 U.S. 595, 601 (1979). In such a case, § 57-9(A) provides prompt, legal recognition to a congregational vote, resolving the competing claims of the congregation's members and avoiding the procedural problems that could occur if no such mechanism were available. The statute is not meaningless simply because, as its own terms confirm, it applies only to a congregation's *own* property interests.

Implicitly conceding that a congregation may be unable to avail itself of § 57-9 as a result of past statements or actions, the Congregations argue at length that there is insufficient evidence that they have actually "waived" the "statutory right" purportedly established by § 57-9. Their argument is both wrong and premature.² At the outset, it mischaracterizes § 57-9 to state that it creates a "statutory right." It cannot be supposed that the General Assembly concerned about individual "rights" would have drafted a statute that applies haphazardly to some congregations and not others – even within the same denomination. In any event, States may not constitutionally establish a "right" to congregational control of property. The Attorney General has properly cited a very different statutory purpose: to provide a mechanism for resolving disputes.

Even if § 57-9 were intended to establish individual rights, the cases on which the

² The Congregations suggest that "waiver" is an affirmative defense that must be pled specifically, but there is no Virginia rule, statute or case that so indicates. *Compare* Fed.R. Civ.P. 8(c). *See also, e.g.,* Va. Code § 8.01-377; *Graves v. National Cellulose Corp.*, 226 Va. 164, 167-68, 306 S.E.2d 898, 900 (1983) (variance between pleadings and proof immaterial if no surprise)). We pled that the rules of the Church do not permit the Congregations to use § 57-9 to take the property at issue. *See, e.g.,* Diocese's Answer to Truro (filed Jan. 23, 2007) at 5 (Defenses 2 & 3, alleging that rules of Church and Diocese do not allow a parish to vote to disaffiliate or divert property away from Church and Diocese); Church's Answer to Truro (filed Jan. 31, 2007) at 3-4 (same). We have consistently and repeatedly explained that they were bound by those rules and had given up their rights to take the property. There has been no failure of pleading that now would preclude proof on that same issue.

Congregations rely do not purport to establish a standard applicable to all statutory procedures. They also make clear that such “waivers” may occur through unequivocal conduct. *See Virginia Dynamics Co. v. Payne*, 244 Va. 314, 318, 421 S.E.2d 421, 423 (1992) (stating the standard applied to a “statutorily created right to file a subsequent action for rent”); *McMerit Construction Co. v. Knightsbridge Development Co.*, 235 Va. 368, 374, 367 S.E.2d 512, 516 (1988) (“lien waivers ... [have] to be express or established by clear implication”). Moreover, there is no authority for the proposition that *any* statutory “right” must be referenced by Code section before it may be deemed waived. Even under the Congregations’ authorities, repeatedly and expressly agreeing to a denominational rule that contradicts the statutory procedure is sufficient.

In any event, the precise standard that will be applied to determine whether the Congregations may invoke § 57-9 in the face of their past commitments was not the subject of this briefing. The standard, and the factual question whether that standard has been met, are not now before the Court and cannot be decided in a vacuum, without consideration of the evidence that will be presented at the October trial. The Congregations’ effort to have the Court interpret and weigh some of our expected evidence in advance of its introduction, and to resolve this issue without a trial or even a motion for summary judgment, is improper.

2. Has the Court in its April 3, 2008, opinion already resolved the issue described in Question 1 above, as asserted by the CANA Congregations?

The passage on which the Congregations rely dealt with whether § 57-9(A) requires denominational approval or recognition of a “division.” It did not consider or decide whether the Court is required to apply the four-factor “neutral principles” analysis of *Green*. And “graft[ing] the requirements of § 57-15 onto § 57-9,” Response at 7, is simply the wrong issue.

3. What is the meaning of the phrase “if the determination be approved by the court” as that phrase is used in 57-9(A)?

As we have explained, § 57-9(A) does not state that a “division,” “branch,” “attachment,”

and voting procedures alone matter. *Green* is binding on this Court, and its “neutral principles” analysis can and must be used to determine “whose property” is at issue. *See* § 57-9(A). The Congregations offer no alternative method to make that determination. They simply ignore it.

4. What is the meaning of the phrase “shall be conclusive as to the title to and control” of the property in question, as that phrase is used in 57-9(A)?

The Congregations persist in ignoring the language of § 57-9(A), under which only the Court’s approval is “conclusive” and only for property “held in trust *for such congregation.*” Under this language, the court must determine not only title but also beneficial ownership. The Congregations’ assertion that § 57-9(A) exists to resolve “competing trust claims” is pure fiction. Section 57-9(A) provides a mechanism for resolving claims among the congregants, who are permitted to vote, regarding the future use of the congregation’s own property in the event of a “division.” It does not purport to “resolve” third party claims to that property by the unconstitutional method of eliminating them without a hearing.

5. What is the meaning of the phrase “congregation whose property is held by trustees,” as that phrase is used in 57-9(A)?

Ignoring the statutory language and the Church’s and the Diocese’s discussion of it, the Congregations focus solely on *Jones v. Wolf*, which they continue to misread. (The Congregations do now acknowledge, contrary to their argument on May 28, that the *Jones* analysis is in two parts – one addressing ownership of church property as between the general church and the local congregation and the other addressing identification of the congregation. *See* Response at 9.) The *Jones* Court ordered a remand because Georgia’s rules for the second stage of the two-stage analysis were not defined. *See* 443 U.S. at 606-10. It most certainly *did not* “overrul[e] the denomination’s ‘written ruling’” regarding the “true congregation,” Response at 9. It held that churches must be able to *overcome* “any rule of majority representation,” *even with respect to the identity of the local congregation*, and that they may do so via their governing documents, 443

U.S. at 607-08; and it directed the Georgia courts to address that point on remand, *id.* at 608 n.5.³

The First Amendment protects freedom of religion, and *Jones* is a case about religious rights, not states' rights. *Jones* upholds the freedom of churches to make property arrangements that provide a rule of decision for civil courts, including trust provisions in governing documents. *See id.* at 603-04, 606, 607-08. *Jones* gave states no license to ignore those rules, and the First Amendment prohibits them from doing so.

Reply to the Attorney General

The Commonwealth claims that the Court can apply the rule of constitutional avoidance “only if the CANA Congregation’s construction *actually results* in a finding of unconstitutionality.” Commonwealth Brief at 3. That would make the rule meaningless. The Commonwealth’s own authority confirms that “[t]he canon is not a method of adjudicating constitutional questions by other means.... Indeed, one of the canon’s chief justifications is that it allows courts to *avoid* the decision of constitutional questions.” *Clark v. Martinez*, 543 U.S. 371, 381 (2005). *Accord, e.g., Crowell v. Benson*, 285 U.S. 22, 62 (1932) (“if a serious doubt of constitutionality is raised ... this Court will first ascertain whether a construction of the statute is fairly possible by which *the question may be avoided*”) (emphases added); *Marshall v. N. Va. Transportation Authority*, 275 Va. 419, 428, 657 S.E.2d 71, 75 (2008) (“We also interpret statutes in a manner that avoids a constitutional question whenever possible”).

³ The Congregations also contend that congregational majority rule is no “less ‘neutral’” with respect to the general church than to congregational factions. Response at 9. That is wrong. Majority rule may be a generally applicable method of determining the identity of a particular group; it is not generally – or ever – used to address third-party claims to an interest in property.

Respectfully submitted,

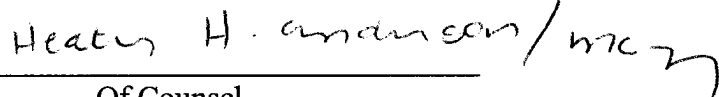
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