

**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 2007-525 0,  
 ) CL 2007-5362,  
 ) CL 2007-53 63,  
 ) CL 2007-5364,  
 ) CL 2007-5682,  
 ) CL 2007-5683,  
 ) CL 2007-5684,  
 ) CL 2007-5685,  
 ) CL 2007-5 686,  
 ) CL 2007-5902,  
 ) CL 2007-5903, and  
 ) CL 2007-11514

**MOTION FOR LEAVE TO JOIN BRIEF OF *AMICI CURIAE***

COME NOW, 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 Virgina District Board—Church of the Brethren, Inc.; and the Mid-Atlantic II Episcopal District of the African Methodist Episcopal Zion Church, who collectively move this Court for permission to join the *amici curiae* brief on the issue of the constitutionality of Virginia Code Section 57-9A, which the Court accepted for filing on April 25, 2008, and in support thereof state as follows:

## INTRODUCTION & SUMMARY

On April 25, 2008, the Court granted entities and officials associated with four religious denominations leave to file a brief, as amici curiae, on the question whether Virginia Code § 57-9 violates the free exercise and establishment clauses of the First Amendment to the United States Constitution. With this motion, institutions and officers affiliated with several additional denominations seek leave to join that previously filed brief.

The movants have varying reasons for lending their support to the *amicus* brief. Some (including the Presbyterian and Church of the Brethren entities) long ago amended their governing documents to include trust and related provisions that were designed to “ensure that . . . the faction loyal to the hierarchical church will retain the church property” in the event of a “division.” *Jones v. Wolf*, 443 U.S. 595, 606 (1979). Having been assured by the United States Supreme Court that “civil courts will be bound to give effect” to such provisions, *id.*, the Presbyterian and Church of the Brethren judicatories (like the Methodist *amici*) have an obvious interest in the Court’s evaluation of the constitutionality of a state statute that utterly disregards “the result indicated by the parties,” *id.*, and opts instead for a an irrebuttable rule that a congregational majority will always control the outcome.

Other groups (namely, the Lutheran synods) seek to join the *amicus brief* in order to emphasize and protect the integrity of ecclesiastical voting procedures that were designed precisely to apply when local church members wish to disaffiliate and retain the church property. Free exercise rights are clearly infringed when a state statute “defers completely” to voting rules established by “independent” churches, but “shows no such deference” to the faith-based rules adopted to establish “voting rights” in Lutheran congregations.

Finally, the movants also include a denomination whose local congregations cannot possibly invoke § 57-9, but that nonetheless endorses the overarching points addressed in the

previously filed *amicus* brief. Specifically, the General Conference of Seventh-day Adventists is not directly threatened by § 57-9, since legal title to local church property in the Seventh-day Adventist Church is held directly at the regional level, not by local trustees. Still, such denominations recognize the ultimate and very real danger posed to all religious groups if the legislature is permitted to resolve property rights by reference to inherently religious criteria, much less to “defer” to the rules of some religious groups but not others. As James Madison understood, “freedom for all religion . . . naturally assume[s] that every denomination [will] be equally at liberty to exercise and propagate its beliefs,” and that “such equality would be impossible in an atmosphere of official denominational preference.” *Larson v. Valente*, 456 U.S. 228, 245 (1982) (emphasis added).

For these reasons, and based on the statements of interest set forth in more detail below, the Movants respectfully request leave to join the *amicus* brief previously filed on behalf of the institutions and officers affiliated with The United Methodist Church, the African Methodist Episcopal Church, the African Methodist Episcopal Zion Church and the Worldwide Church of God.

#### STATEMENTS OF INTEREST

##### *Amici Affiliated with the Evangelical Lutheran Church of America*

The Evangelical Lutheran Church in America (“ELCA”) is the largest Lutheran denomination in the United States, with 4.7 million members organized into 10,470 congregations. The ELCA is a member church in the Lutheran World Federation, a federation of Lutheran churches in 78 countries with a membership of over 68.3 million worldwide.

The Virginia and Metropolitan Washington D.C. Synods are two of the 65 Synods in the ELCA. The Virginia Synod has 166 congregations located throughout most of Virginia. The Metropolitan Washington D.C. Synod has 75 congregations in the Washington metropolitan

area, 35 of which are located in Arlington, Fairfax, Loudoun and Prince William counties, as well as the cities of Alexandria, Fairfax and Falls Church. The vast majority of the ELCA congregations in Virginia are unincorporated and their property is held by trustees appointed pursuant to Virginia Code § 57-8. Accordingly, the Virginia and Metropolitan Washington D.C. Synods would be directly affected by this Court's ruling on the constitutionality of Virginia Code § 57-9A.

The ELCA is organized neither as a hierarchical church in the Roman Catholic tradition, nor as a congregational church in the Baptist tradition. Rather, it understands itself as one church in which the congregations, synods and church-wide organizations are “interdependent partners sharing responsibly in God’s mission.”<sup>1</sup> The ELCA constitution defines this relationship in the following terms:

The Church exists both as an inclusive fellowship and as local congregations gathered for worship and Christian service. Congregations find their fulfillment in the universal community of the Church, and the universal Church exists in and through congregations. This church, therefore, derives its character and powers both from the sanction and representation of its congregations and from its inherent nature as an expression of the broader fellowship of the faithful. In length, it acknowledges itself to be in the historic continuity of the communion of saints; in breadth, it expresses the fellowship of believers and congregations in our day.<sup>2</sup>

As interdependent partners in one church, ELCA congregations are not free to leave the church on their own volition. Instead, if a congregation desires to leave the ELCA, it must follow a detailed procedure, which is set forth in both the ELCA constitution and all its ‘ELCA Constitution, Chapter 5 - Principles of Organization - Section 5.01 (1987, as amendment 8-2007) 2 Chapter 3—Nature of the Church - Section 3.02 (1987, as amended 8-2007) congregations’

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<sup>1</sup> ECLA Constitution, Chapter 5- *Principles of Organization* – Section 5.01 (1987, as amendment 8-2007)

<sup>2</sup> *Id.* Chapter 3 – *Nature of the Church* – Section 3.02 (1987, as amended 8-2007)

constitutions.<sup>3</sup> This procedure includes: (a) the adoption of a resolution by a two-thirds (2/3) majority of the voting members present at a legally called and conducted meeting, (b) formal notification of the synodical bishop, (c) a mandatory consultation period of at least 90 days, (d) written notification by mail to all voting members of the congregation, and (e) a second vote, at a legally called and conducted meeting, at which a two-thirds (2/3) majority of the voting members present approve leaving the ELCA.

In addition, if the congregation was formerly a member of the Lutheran Church in America (a predecessor body of the ELCA), or if it was founded by the ELCA, then in addition to the above outlined procedures, approval of the synod council is necessary for the congregation to leave the ELCA. If the congregation desires to take its property with it, and it is joining a non-Lutheran church body, then that congregation must also receive synod council approval regardless of its past denominational history before taking the congregational property with it.

The ELCA's polity and governing documents also recognize four different types of membership in its congregations, to wit: (1) Baptized Members, (2) Confirmed Members, (3) Voting Members, and (4) Associate Members.<sup>4</sup> Each classification has different requirements, but only "Voting Members" are entitled to vote on the question of a congregation leaving the ELCA. In addition, there is no age requirement to be a "Voting Member," and many ELCA congregations in Virginia have Voting Members who are under the age of 18.

The foregoing requirements are not merely "procedural" in nature; rather, they reflect the ELCA's theological understanding of "Church." In addition, they reflect over 388 years of Lutheran history and tradition in America. Unlike many other protestant denominations in the

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<sup>3</sup> *Id.* Chapter 9 – *Congregations* – Section 9.62; Model Congregation Constitution Chapters 6&7 (1987, as amended 8-2007)

<sup>4</sup> ECLA Model Constitution Chapter 8 – *Membership* (1987, as amended 8-2007)

United States, the ELCA is the product of a long, gradual unification of a large number of ethnic-based Lutheran denominations. These predecessor bodies reflected a wide variety of Scandinavian, German, Slovak and Baltic church organizational traditions, ranging from the very congregational-oriented Lutheran Free Church (Norwegian), to the very hierarchical-based Augustana Evangelical Lutheran Church (Swedish). For these churches to unite into a single denomination, many compromises and accommodations had to be made, many of which are reflected in the foregoing policies and procedures regarding a congregation's termination of its relationship with the ELCA.

Virginia Code § 57-9A overrides and disregards the express polity, doctrine and organizational structure of the ELCA and the theological understanding and historical tradition they represent. In their place, this statute substitutes its own set of rules. These rules are not content neutral, but rather reflect a particular view or bias of how a church should be organized and structured. Under these rules, the congregation is the supreme entity and it alone by a "vote of a majority of the whole number, determine[s] to which branch of the church or society such congregation shall thereafter belong."

Section 57-9A discriminates against religious denominations such as the ELCA, because the statute's mandatory rules impact most severely denominations that have an "interdependent partnership"-type model of church structure. Under current Virginia law, totally "independent" congregations and purely "hierarchical" are not subject to the state-imposed voting rules outlined in § 57-9A. Under § 57-9B, voting rights in "independent" congregations, such as many Baptist churches, are determined in accordance with the congregation's own constitution, practice or custom. Similarly, hierarchical churches that follow the Roman Catholic model can avoid the state interference posed by § 57-9A by having a denominational officer hold title to a

congregation's property. But the ELCA has not made either of those choices, because they are not consistent with their theologically based understanding of what it means to be a single, unified, interdependent "Church."

Since January 6, 2001, The Episcopal Church (USA) and the ELCA have been in a relationship of "full communion." Under the terms of this relationship, both denominations retain their autonomy and structures, but agree to work together for joint mission and witness in the world. In accordance with procedures established in "Called to Common Mission," clergy and laity may move freely between the two denominations. Currently, the Virginia Synod has one joint ELCA/Episcopal/Presbyterian parish, and is engaged in many cooperative activities with the local Episcopal diocese.

Because of the ELCA's "full communion" relationship with The Episcopal Church (USA), this Court's ruling on the constitutionality of Virginia Code § 57-9A could affect the future ability of the Virginia Synod and its congregations to participate in common ministries with the Virginia Diocese of The Episcopal Church, especially in the realm of jointly operated parishes.

For the foregoing reasons, the Virginia and Metropolitan Washington, D.C. Synods have a substantial interest in the outcome of these cases and, accordingly, seek leave to join the brief previously filed on behalf of the other *amici* religious institutions.

***Amici Affiliated with the Presbyterian Church (U.S.A.)***

Clifton Kirkpatrick, Stated Clerk of the General Assembly, is the senior continuing officer of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 2.3 million members in more than 11,200 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. It is organized through an ascending series of organizations known as church sessions, presbyteries, synods, and,

ultimately, a general assembly. Through its antecedent religious bodies, the Presbyterian Church (U.S.A.) has existed as an organized religious denomination within the current boundaries of the United States since 1706. The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

Rev. Dr. G. Wilson Gunn, Jr., General Presbyter, is the senior administrative officer in the National Capital Presbytery. The National Capital Presbytery is the ecclesial Presbyterian body that contains 109 congregations, with more than 34,000 members. Fifty-one of those congregations are located in the Virginia counties of Loudoun, Fairfax, Arlington, Prince William and Fauquier.

Elder Donald F. Bickhart, Stated Clerk, is the elected official of the Presbytery of Eastern Virginia responsible for carrying out ecclesiastical functions. The Presbytery of Eastern Virginia is the ecclesial Presbyterian body that contains congregations in the southeastern and "Eastern Shore" parts of Virginia. There are a total of 64 congregations, with approximately 17,896 members, Presbytery of Eastern Virginia.

The aforementioned Presbyteries do not claim to speak for all Presbyterians within their bounds, nor are their pronouncements binding on the membership of each of their congregations. However, the Presbyteries' statements are considered worthy of the respect and prayerful consideration of all the presbytery's members.

The previously filed *amicus* brief is consistent with the Constitution of the Presbyterian Church (U.S.A.) and policy of the General Assembly of the Presbyterian Church (USA)



regarding the First Amendment of the U.S. Constitution. The General Assembly and various Presbyteries of the Presbyterian Church (U.S.A.) have long and vigorously defended the principle of denominational interests in local church property. It is central to Presbyterian Church Order that local churches hold their property in trust for the larger Presbyterian Church. By 1981, both predecessor denominations had trust language in their Church Constitutions. In Presbyterian Church Order, the Presbytery is the entity which directly holds the beneficial interest in local church property. Under Presbyterian Order, only a Presbytery can decide whether to release a congregation with its property.

#### *Amici Affiliated with the Church of the Brethren*

The Church of the Brethren was founded in Germany in 1708 and has been operating in the United States since the 1740s. There are more than 1,000 congregations operating in 38 states, with especially strong concentrations in Pennsylvania, Maryland, Virginia, Ohio and Indiana.

Church of the Brethren congregations are organized geographically by “districts.” As indicated in the Church’s 2008 Manual of Organization and Polity, a “district enables the member congregations to do together what they cannot do separately and helps them to carry out in better fashion their major functions.” 2008 MANUAL OF ORGANIZATION AND POLITY, Ch. III, § I. The Virginia District Board—Church of the Brethren, Inc. encompasses 94 congregations, fellowships and meeting points in Virginia, North Carolina and West Virginia.

Under the polity of the Church of the Brethren, legal title to church property is held at the congregational level, but the purpose of property ownership is not merely to serve the needs or desires of the local church members, but rather “to aid in teaching and disseminating the gospel of Jesus Christ according to the beliefs, practices, and doctrines of the Church of the Brethren as set forth and promulgated from time to time by Annual Conference.” *Id.*, Ch. VI, § I. Thus,

“[f]or the sake of uniformity and continuity in the ownership of Church of the Brethren property, all property held by or for the use of a congregation, whether legal title is lodged in a corporation, a trustee or trustees, an unincorporated association or any other capacity, and whether the property is used in programs of the congregation or retained for the production of income, is held, in trust, nevertheless, for the use and benefit of the Church of the Brethren.” *Id.*

Furthermore, the Church of the Brethren’s written policies expressly provide for the destiny of local church property in the event of a “division.” In the first place, Church of the Brethren polity makes clear that the “relationship of a congregation to a district of the Church of the Brethren can be severed only by action of district conference,” not by the unilateral vote at the local church level. *Id.*, Ch. VI, § I.D.4. Thus, when “there is a *division* within the membership of a particular congregation,” *id.* (emphasis added), Church of the Brethren polity requires the parties to “make every effort to effect a reconciliation within the congregation.” *Id.* However, if a reconciliation cannot be achieved, and the congregation “attempts by either majority or unanimous vote to withdraw from the Church of the Brethren district in which it is located,” then the congregation’s property shall come under “the control of the *district* board and may be held for the designated purposes or sold or disposed of in such a manner as the district board, in its sole discretion, may direct.” *Id.*, Ch. VI, § I.D.3.

Church of the Brethren polity is clear that the purpose of these provisions is not to exert total hegemony over local church congregations or their property. If that were the objective, that might have been achieved by requiring that the district boards hold legal title to local church property in the first instance. But that is not the model in the Church of the Brethren, any more than it is for many of the other *amici*. The Church of the Brethren believes that effective ministry can be enhanced by vesting congregations with legal title and wide latitude in deploying

their places of worship and other properties. Thus, consistent with long-established and well-understood rules that control resolution of purely secular property disputes, the Church of the Brethren has made the faith-based decision to adopt trust clauses and related provisions that give the district board rights “to take control . . . of congregational property . . . solely for the purpose of assuring that the property or its proceeds are not diverted from use for the Church of the Brethren.” *Id.*, Ch. VI, § I.D.6.

***Amici Affiliated with the African Methodist Episcopal Zion Church***

The Rt. Rev. Warren M. Brown is the Presiding Prelate for the Mid-Atlantic II Episcopal District of the African Methodist Episcopal Zion Church (“AME Zion Church”). Bishop Brown presides as Bishop over three “Annual Conferences” that have AME Zion congregations located in Virginia, namely: the Virginia Conference, the East Tennessee Conference, and the Philadelphia- Baltimore Conference. The Virginia Conference has 45 congregations, with a total of approximately 4,850 members. The East Tennessee Conference has nine congregations located in Virginia, with a total of approximately 200 members. And there are five Virginia-based congregations in the Philadelphia-Baltimore Conference, with approximately 500 members enrolled in those churches.

As indicated in the previously filed *amicus* brief, the AME Zion Church’s rules of local church ownership are very similar to those adopted by The United Methodist Church. That is, under the AME Zion Church’s *Book of Discipline*, all local church real property is required to be held in trust for the denomination as a whole, and the denomination’s rights attach even if no trust language appears in the pertinent deeds if the congregation has signaled its assent to the denomination’s rules by accepting the bishop’s pastoral appointments, or by using the name, customs and polity of the AME Zion in such a way as to be known in the community as part of the denomination. AME Zion and its Virginia Conference have previously defended these

provisions as being effective, in Virginia, to protect a denomination's rights in local church property, notwithstanding that a simple majority of the local church have opted to leave the denomination and form their own, "independent" polity. See *Green v. Lewis*, 221 V. 547, 272 S.E.2d 181 (1980).

Bishop Brown also notes that the AME Zion Church and four other major Methodist denominations—The United Methodist Church, The African Methodist Episcopal Church, The Christian Methodist Episcopal Church and The Union American Methodist Episcopal Church—participate in an organization known as the Commission on Pan-Methodist Cooperation and Union. All of these denominations, and several others that regard John Wesley as their founder or spiritual father, can trace their lineage to the Methodist Episcopal Church, which organized in Baltimore in 1784. Through the Commission on Pan-Methodist Cooperation and Union, these denominations recognize themselves as "members of the family of Methodism," who are "called to move toward union by redefining and strengthening our relationships in Jesus Christ." *Pan-Methodist Commission: Mission*, <http://www.gccuic-umc.org/panmeth/mission.htm>. In that sense, and borrowing the phraseology of the Court's April 3 Letter Opinion, the Methodist denominations might be seen as "joined together by their common membership in the [Commission on Pan-Methodist Cooperation and Union], by their adherence to that historical strand of Christianity known as [Methodism], and by their shared desire to be a part of that particular branch of Christianity whose adherents call themselves [Methodists]." Letter Op. at 79. If participation in such a "religious society" is a factor in determining whether a congregation may invoke § 57-9(A), then the interests of historically Methodist denominations are clearly implicated, and that provides an additional reason for the annual conferences of the AME Zion Church that operate in Virginia to join the previously filed *amicus* brief.

## **The General Conference of the Seventh-day Adventist Church**

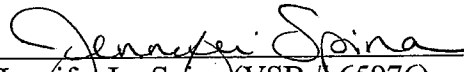
The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church, which represents nearly 41,000 congregations, with more than 10 million members worldwide. Historically, the Seventh-day Adventist Church settled the general question of property ownership long ago, in a manner that leaves the denomination free of any risk that its congregations might invoke § 57-9(A). That cannot happen because, as outlined in Seventh-day Adventist constitutions, bylaws and policies, church properties are owned in fee simple by regional church corporations, not by local congregational entities or trustees.

The fact that the Seventh-day Adventist congregations cannot invoke § 57-9(A), however, does not mean that the denomination has no interest in Court's resolution of the constitutional issues raised in the previously filed *amicus* brief. The Seventh-day Adventist Church well understands the need for vigilant enforcement the free exercise and establishment clause in all cases. It is a good thing that the Seventh-day Adventist Church will never see its rules supplanted by § 57-9(A), but it will be a far more lasting assurance of religious liberty if the Court upholds the general and unassailable principles that (a) civil courts can never adjudicate "civil" rights by undertaking first to resolve fundamentally religious questions, or (b) by adopting rules of decision that discriminate between religious groups.

## CONCLUSION

For the all of the foregoing reasons, the Movants respectfully request leave to join the *amici curiae* brief which the Court accepted for filing on April 25, 2008, and urge the Court to rule that Virginia Code § 57-9 cannot constitutionally be employed to resolve church property disputes in the Commonwealth of Virginia.

Respectfully submitted,

  
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Dated: May 15, 2008

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were sent by electronic mail to all counsel named below and by first-class mail to the lead counsel at each firm (indicated with an asterisk below), on this 15th day of May, 2008:

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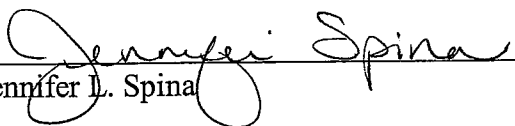
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