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

SUPPLEMENTAL CONSTITUTIONAL BRIEF OF THE DIOCESE OF VIRGINIA PURSUANT TO APRIL 3, 2008, ORDER

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INTRODUCTION

The evidence is undisputed that the law of the Episcopal Church and the Diocese of Virginia is contained in their Constitutions and Canons. There is nothing in that law that allows a majority of a congregation to leave the church and take property with it. Such a notion is completely alien to that law and the polity of the Episcopal Church.

Va. Code § 57-9 is the only source of this majoritarian impulse. It was enacted shortly after the Civil War, at a unique time in our nation's history and when the protections of the federal Bill of Rights did not yet apply to the States. Today, the statute cannot stand. The Commonwealth of Virginia has no right or business interfering with the Episcopal Church, or any other church, in this manner. As set forth below, application of § 57-9 to these cases would violate the Constitutions of both Virginia and the United States.

ARGUMENT

Since 1867, the year that Virginia's "division statute," now Va. Code § 57-9, was enacted, it has been apparent that the law raises constitutional questions. *See* Tr. 268-70 (Irons) (discussing Congregations' Ex. 48);[1] *Hoskinson v. Pusey*, 73 Va. 428, 440 (1879) (noting but not deciding constitutional questions); *Finley v. Brent*, 87 Va. 103, 108, 12 S.E. 228, 230 (1890) (holding that applying § 57-9 violated the federal and state Contracts Clauses); Letter from Thomas M. Moncure, Jr., Senior Counsel to the Attorney General, to Sen. William C. Mims (Feb. 1, 2005) (attached as Ex. A) (concluding, after discussions with the current State Solicitor General, that "[a]s presently in effect § 57-9 has potential constitutional problems"). With the 1868 adoption of the Fourteenth Amendment – and its subsequent incorporation of the First

[1] Professor Irons testified that he had seen an original court record reflecting the contents of Ex. 48, an 1867 article about court proceedings involving the original division statute. Tr. 265-66.

Amendment – the constitutional problems have been compounded.

The Court has held that the Congregations have satisfied a number of § 57-9(A)'s prerequisites. The Court should now hold that application of § 57-9(A) to this litigation is unconstitutional for each of the following reasons.[2]

I. Section 57-9(A) violates the federal and state Free Exercise Clauses.

The First Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment (*see, e.g., Everson v. Board of Education*, 330 U.S. 1, 8 (1947)), states that "Congress shall make no law ... prohibiting the free exercise [of religion]." Article I, § 16 of the Constitution of Virginia provides similarly, at greater length.

A. The right of free exercise applies to churches collectively, as well as individuals.

The free exercise guarantee applies to churches in their collective capacities as well as to individuals. *See, e.g., Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986) ("Each person's right to believe as he wishes and to practice that belief according to the dictates of his conscience ... is fundamental to our system," and "[t]his basic freedom is guaranteed not only to individuals but also to churches in their collective capacities"). *See also, e.g., Jones v. Wolf*, 443 U.S. 595, 602 (1979); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 721-22 (1976) ("religious freedom encompasses the 'power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine'"); *Presbyterian*

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[2] This supplemental brief clarifies and summarizes the Diocese's constitutional contentions in light of the Court's Letter Opinion and is crafted to present the Diocese's arguments independently, without requiring the Court to follow an array of cross-references to previous filings. Pursuant to the Court's Order, this supplemental brief also introduces the constitutional issues that are not the subject of the May 28, 2008, hearing. *See* Order (April 4, 2008) at 2.

Church v. Hull Church, 393 U.S. 440, 446 (1969) (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1872)); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 107 (1952) (legislation transferring control of church property infringes upon the free exercise of religion).[3] Respect for the principle that "religious organizations have an interest in autonomy in ordering their internal affairs" is an important part of Free Exercise Clause doctrine and, in fact, "furtherance of the autonomy of religious organizations often furthers individual religious freedom as well." *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 341, 342 (1987) (Brennan, J., concurring).

B. Applying § 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.

The evidence was undisputed that the Constitution and Canons of the Episcopal Church and the Diocese 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. TEC-Diocese Ex. 1 at 37 & Ex. 2 at 40 (Canon I.7(4)); TEC-Diocese Ex. 3 at 27 (Canon 15.1).

The United States Supreme Court held in *Jones v. Wolf* that amending a hierarchical church's governing documents before a dispute was sufficient to resolve property disputes in favor of the hierarchical church and that civil courts would be bound to follow the adopted

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[3] In *Kedroff* the Court "held that the right conferred under canon law upon the Archbishop of the North American Archdiocese of the Russian Orthodox Greek Catholic Church, as the appointee of the Patriarch of Moscow, to the use and occupancy of the St. Nicholas Cathedral in New York City ... was 'strictly a matter of ecclesiastical government,' and as such could not constitutionally be impaired by a state statute ... purporting to bestow that right on another." *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 190-91 (1960). *Kreshik* in turn held that the courts could not impair such rights by application of common law. *Kedroff* was decided at the height of the Cold War and resulted in the Communist-controlled Russian Orthodox Church regaining control of church property in New York, contrary to the will of the democratically elected New York legislature and the local parishioners, demonstrating the strength and vitality of the constitutional principles involved here.

provisions:

> 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 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.*

443 U.S. at 606 (emphases added). *See also Kedroff*, 344 U.S. at 120-21 ("Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls. This under our Constitution necessarily follows in order that there may be free exercise of religion").[4] The Episcopal Church and the Diocese did precisely what the United States Supreme Court said – amending the governing documents decades before the current property dispute erupted.[5] They are now entitled to the benefits of

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[4] As courts have uniformly concluded, "[t]he Episcopal Church is hierarchical." *Dixon v. Edwards*, 290 F.3d 699, 716 (4th Cir. 2002); *accord, e.g., Baber v. Caldwell*, 207 Va. 694, 698, 152 S.E.2d 23, 26 (1967) (*dictum*); *Diocese of Sw. Va. of the Protestant Episcopal Church v. Buhrman*, 5 Va. Cir. 497, 502-03 (Clifton Forge 1977); *Protestant Episcopal Church v. Graves*, 417 A.2d 19, 24 (N.J. 1980), *cert. denied*, 449 U.S. 1131 (1981); *Daniel v. Wray*, 580 S.E.2d 711, 718 (N.C. App. 2003); *Bennison v. Sharp*, 329 N.W.2d 466, 472 (Mich. App. 1982); *Tea v. Protestant Episcopal Church*, 610 P.2d 182, 183 (Nev. 1980). The evidence at trial on that point was uncontradicted and compelling. *See, e.g., infra* at 6-7; Tr. 838-41 (Douglas); TEC-Diocese Ex. 3 at 11 (Art. XVII); *see generally* Letter Opinion at 5-7 (describing the structure of the Episcopal Church and the Diocese).

[5] Numerous courts have applied the Episcopal Church's governing documents in resolving property disputes in the Church's favor. *See, e.g., In re Church of St. James the Less*, 888 A.2d 795 (Pa. 2005) (property canons held enforceable under neutral principles of law); *Episcopal Diocese of Mass. v. Devine*, 797 N.E.2d 916, 923-25 (Mass. App. 2003) (canons established a trust in parish property in favor of the Diocese and the Church); *Daniel v. Wray*, 580 S.E.2d 711, 718 (N.C. App. 2003) (national canons "clearly established a form of governance impliedly assented to by [the parish] that precluded the seceding vestry from taking control of the [church] property"); *Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville*, 684

(footnote continued ...)

those amendments and of the ruling in *Jones v. Wolf*.

Application of § 57-9(A), as interpreted by the Congregations, to these cases would be unconstitutional because it would override the property provisions of the canons of the Episcopal Church and the Diocese and contradict the constitutional dictate of *Jones v. Wolf*. The Congregations have attempted to avoid this result in six ways, all of which are unavailing.

First, the Congregations attempt, erroneously, to dismiss the *Jones v. Wolf* passage as dicta. The question in *Jones* was "whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve the 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." 443 U.S. at 597. The Court held that the "neutral principles" approach is permissible. *See id.* at 604. The passage quoted above was stated in response to the dissenting opinion, which argued that "a rule of compulsory deference is necessary in order to protect the free exercise rights 'of those who have formed the association and submitted themselves to its authority.'" *Id.* at 605-06 (quoting dissent). The Court explained, in response, that the neutral principles method would not "somehow frustrate the free-exercise rights of the members of a religious association," *because* under that 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..." *Id.* at 606 (quoted more fully above). The passage on which we rely, in short, was necessary and essential to the Court's holding that

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N.Y.S.2d 76 (App. Div. 1999) (enforcing the Episcopal Church's canonical rights to parish property upon the disaffiliation of a congregation); *Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Episcopal Church in the Diocese of Conn.*, 620 A.2d 1280 (Conn. 1993) (same); *Bishop & Diocese of Colorado v. Mote*, 716 P.2d 85 (Colo.) (same), *cert. denied*, 479 U.S. 826 (1986); *Protestant Episcopal Church v. Graves*, 417 A.2d 19 (N.J. 1980) (same), *cert. denied*, 449 U.S. 1131 (1981); *Tea v. Protestant Episcopal Church in the Diocese of Nevada*, 610 P.2d 182 (Nev. 1980) (same).

the neutral principles approach does not violate the Free Exercise Clause.

Further, the idea that states are free to ignore property provisions in hierarchical church governing documents flatly contradicts *Jones*'s straightforward and mandatory language and the Court's repeated endorsement of religious organizations clarifying the ownership of property through internal action. *See* 443 U.S. at 603 ("Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency"), 606 (quoted *supra*), and 607-08 ("Most importantly, any rule of majority representation can always be overcome, under the neutral-principles approach ... by providing, in the corporate charter or the constitution of the general church ... that the church property is held in trust for the general church and those who remain loyal to it"). To hold that a hierarchical church cannot overcome § 57-9's congregational majority rule by property provisions in its governing documents would be both to defy the Supreme Court's statement that "the civil courts will be bound to give effect" to such provisions and to eviscerate the entire basis for its holding that the "neutral principles" approach does not inhibit the free exercise of religion.

Second, the Congregations argue that references in the above passage to "the parties" suggest that each congregation must approve amendments to a hierarchical church's governing documents in order for them to be binding on that congregation. That argument must fail, for numerous reasons:

(1) It is akin to suggesting that unless the Board of Supervisors of Fairfax County approves acts of Congress, those statutes are not binding in Fairfax County. It fundamentally distorts the nature of a multi-level, hierarchical system of government.

(2) It would convert the "minimal" burden of *Jones v. Wolf* into a cumbersome, massive undertaking. *See* pages 21-22, *infra*.

(3) It ignores well-settled law regarding the rules of a voluntary association, which are contractual in nature and binding on members. *See* section I.C, *infra*.

(4) It disregards the fact that *the Congregations have agreed*, repeatedly, to be bound by the Canons of the Diocese and the Episcopal Church. Episcopal churches accede to the Constitution, Canons, and Discipline of the Church and the diocese of which they are a part as a condition of formation and recognition as a constituent part of the larger Church. TEC-Diocese Ex. 3 at 11 (Art. XVII) ("Every Congregation within the Diocese of Virginia, however called, shall be bound by the Constitution and the Canons adopted in pursuance hereof"); *see also, e.g.*, *Reid v. Gholson*, 229 Va. 179, 188-89, 327 S.E.2d 107, 113 (1985) ("One who becomes a member of [a hierarchical] church, by subscribing to its discipline and beliefs, accepts its internal rules and the decisions of its tribunals"); *Brooke v. Shacklett*, 54 Va. (13 Gratt.) 301, 320 (1856) ("to constitute a member of any church, two points at least are essential, without meaning to say that others are not so, a profession of its faith and a submission to its government").[6] *Cf.* TEC-Diocese Exs. 1 & 2 at Art. V § 1 (diocesan accession). Congregational officers are individually bound to "well and faithfully perform the duties of their office" in accordance with those authorities and requirements, TEC/Diocese Exs. 1 & 2 (Canon I.17(8)), and the leaders of the Congregations repeatedly signed oaths to uphold the doctrine, discipline, and worship of the Episcopal Church. *See id.* at Art. VIII (ordination oath); Tr. 339-40 (Minns) (same), 393-94 (Guernsey) (same), 506-07 (Yates) (same); TEC/Diocese Ex. 3 at Canon 11.8 (vestry oath); Tr. 345-46 (Minns) (same), 449-50 (Julienne) (same), 702-03 (Allison) (same). Moreover, each of the Congregations either participated in the 1983 Annual Council that adopted the property

[6] This is the same rule of law that is applied to all voluntary associations. *See* section I.C, *infra*.

provision in Diocesan Canon 15.1[7] or joined the Diocese after such canon had been adopted. *See*, *e.g.*, TEC-Diocese Exs. 7 (Church of the Epiphany, applying for church status in 1986) & 8 (Church of the Word, applying for church status in 1987).

Third, the Congregations argue that the Supreme Court meant to distinguish between an otherwise identical provision in a church's constitution and one in its canons. Under their interpretation, one would be enforced and the other ignored in a civil court based solely on the ecclesiastical decision as to where to locate such a provision, or the mere label attached to a document in which it appears.[8] For a civil court to erect such a hierarchy in church law would be to jump squarely into the "religious thicket." A church must have the autonomy, free from oversight by state legislatures and civil courts, to decide which provisions of its laws belong in which of its governing documents. For a government to dictate how church law should be arranged would result in unconstitutional entanglement. The Congregations' argument also ignores the numerous earlier canons that similarly restrict property use. *See* pages 15-16, *infra*. In any event, the proposed distinction fits poorly in the mouths of congregations that remained in

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[7] *See*, *e.g.*, TEC-Diocese Ex. 3 at 6 (Art. III, providing for lay representation at Annual Council for each church in the Diocese and for the membership in Annual Council of all clergy resident in the Diocese), 12 (Canon 2 §§ 1 & 2, clarifying that both churches and missions are represented at Annual Council by lay delegates)

[8] The Congregations make much of the fact that the Constitution of the Episcopal Church can only be amended by action at consecutive General Conventions, while Canons can be amended at one General Convention. The only rationale they offer to support a distinction between the Constitution and Canons is that this requirement would give them time "to determine whether to disaffiliate before the new rule could be voted on and take effect." CANA Congregations' Memorandum in Opposition (filed Jan. 11, 2008) at 39 n.22. In light of the actual amounts of time that have passed (and the numbers of General Conventions and Annual Councils that have occurred), the "time" argument is specious in this litigation. *See* n.9 and accompanying text, *infra*. Moreover, that constitutional amendments require action of consecutive General Conventions is a rule of the Episcopal Church, not a precept of constitutional law. It could be changed by the Episcopal Church at any time without violating any tenet of federal or Virginia law. There is no evidence that other churches with "constitutions" have similar provisions – nor that every church even has a governing document referred to as a "constitution."

the Episcopal Church for more than 27 years after the Church enacted Canon I.7(4) in 1979 and in the Diocese for more than 23 years after the Diocese enacted Diocesan Canon 15.1 in 1983,[9] let alone those congregations that joined after the adoption of both provisions.

Fourth, the Congregations misunderstand the final phrase of the above passage from *Jones*, arguing that provisions like Episcopal Church Canon I.7.4 and Diocesan Canon 15.1 are not "legally cognizable." The *Jones* Court explained exactly what would not be legally cognizable and the result in such an instance:

> [T]here may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.

443 U.S. at 604. *See also Md. and Va. Eldership v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 370 (1970) (Brennan, J., concurring) (neutral principles "may not be relied upon if their application requires civil courts to resolve doctrinal issues. For example, provisions in deeds or in a denomination's constitution for the reversion of local church property to the general church, if conditioned upon a finding of departure from doctrine, could not be civilly enforced"). Such descriptions do not apply to Episcopal Church Canon I.7(4) and Diocesan Canon 15.1. Those provisions require no doctrinal interpretation and are plain and unmistakable in their meaning and effect.

Fifth, the Congregations have suggested that Episcopal Church Canon I.7.4 was not

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[9] *See, e.g., In re Church of St. James the Less*, 833 A.2d 319, 324-25 (Pa. Commw. Ct. 2003), *aff'd in relevant part*, 888 A.2d 795 (Pa. 2005) (ruling in favor of the Episcopal Church where the congregation "waited twenty years after the adoption of the Dennis canon to take action inconsistent with it"); *Daniel v. Wray*, 580 S.E.2d 711, 718 (N.C. App. 2003) ("the entire [parish] congregation had adhered to the Constitutions and Canons of PECUSA and the Diocese for nearly fifty years"); *Crumbley v. Solomon*, 254 S.E.2d 330, 333 (Ga. 1979) (applying the same rationale in a case involving the Methodist Church).

properly adopted and therefore should be disregarded. As a factual contention, that is inaccurate. *See, e.g., In re: Church of St. James the Less*, 888 A.2d 795, 808 (Pa. 2005). As a legal contention, it is inconsequential, for at least two reasons. First, civil courts are not in the business of policing the actions of a hierarchical church's authorities to see if those authorities followed their own rules. *See, e.g., Serbian Eastern Orthodox*, 426 U.S. at 713 ("no 'arbitrariness' exception – in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations – is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law"). Second, even without Episcopal Church Canon I.7.4, other canons would impose similar restrictions on property used by congregations, including Diocesan Canon 15.1 (about which the Congregations have not contended and cannot contend that any irregularity exists).

Sixth, the Congregations suggest that the Church should have altered deeds rather than its governing documents. That contention ignores the fact that *Jones v. Wolf* recited specific *alternative* ways in which a hierarchical church could act to overcome a presumption of majority representation. 443 U.S. at 606 ("Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church") (quoted more fully *supra* at 3). The Episcopal Church and the Diocese implemented one of those alternatives. The civil courts are bound to give effect to the result.

C. Section 57-9(A) discriminates against hierarchical churches by allowing congregational majorities that have disaffiliated to take church property, when no such rule applies to secular voluntary associations.

Virginia, like other states, recognizes and enforces the rules of voluntary associations as

contractually binding on their members. *See, e.g., Unit Owners Ass'n v. Gillman*, 223 Va. 752, 766, 292 S.E.2d 378, 385 (1982); *Gottlieb v. Economy Stores, Inc.*, 199 Va. 848, 856, 102 S.E.2d 345, 351 (1958) ("The constitution and by-laws adopted by a voluntary association constitute a contract between the members, which, if not immoral or contrary to public policy, or the law, will be enforced by the courts") (citations omitted); *Bradley v. Wilson*, 138 Va. 605, 612, 123 S.E. 273, 275 (1924); 6 AM. JUR. 2D, *Associations and Clubs* § 5 (2007). A voluntary association's members are presumed "to have known and assented to the provisions of its charter and bylaws ... and cannot object to the enforcement thereof on the ground that he or she is deprived of any legal or constitutional right." *Id.* § 7; *accord, Amalgamated Clothing Workers v. Kiser*, 174 Va. 229, 236-37, 6 S.E.2d 562, 565 (1939):

> A person applying for membership in a fraternal benefit association is charged with the duty of acquainting himself with its constitution and by-laws; and, in the absence of fraud, is conclusively presumed to know the qualifications for membership ... and the limitations thereby imposed upon the power and authority of its officers, and upon its subordinate lodges and their officers as its agents. The same rule, of course, applies to persons who have become members.

Accordingly, principles of voluntary association law do not allow groups of members that have disaffiliated from an association to continue to use and control organizational property in violation of the rules of the association. *E.g.*, 6 AM. JUR. 2D, *Associations and Clubs* § 25 (2007) (footnotes omitted):

> The property rights of members of an association upon the withdrawal of a member generally depend upon the provisions of the constitution and bylaws. Usually, a member who abandons the association thereby renounces any interest in the property, and those who remain and succeed such member are entitled to his or her interest.... The rule also obtains as to seceding or expelled members of an association or society.

If there is a split in a voluntary association, funds and property may not be diverted to another organization or purpose, even if the current majority wants to do so. *E.g.*, 6 AM. JUR. 2D,

Associations and Clubs § 24 (2007) ("In the event of a schism, the funds of an unincorporated association continuing in existence may not be diverted from the organic purpose for which such funds were raised, even though such diversion is favored by a majority").[10] As interpreted by this Court, § 57-9(A) applies a different rule to hierarchical churches, overriding their rules and allowing diversion of property to another organization by vote of a congregational majority.

Section 57-9(A) is neither neutral nor generally applicable. It lacks neutrality 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." *Falwell v. Miller*, 203 F. Supp. 2d 624, 630 (W.D. Va. 2002); *accord*, *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context").[11] Section 57-9 lacks general

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[10] *Accord*, *Liggett v. Koivunen*, 34 N.W.2d 345, 350 & n.9 (Minn. 1948) (quoting C.J.S. and citing cases):

> The general rule is that:
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> > "In the absence of provisions in the constitution or by-laws giving members an individual interest in the assets of a voluntary association, members who withdraw thereby lose their rights to associate property, title to which stays in the members remaining in the association, and the rule applies whether membership is terminated by the member's own act or omission or by the act of the society. This rule applies even where a number of members secede in a body, and although they constitute a majority, and organize a new association. In such case the remaining members, and only they, are entitled to the entire funds and property of the association, so long as they continue to keep it alive and adhere to its purposes."

See also, e.g., *DeBruyn v. Golden Age Club of Cheyenne*, 399 P.2d 390, 392-93 (Wyo. 1965) (same). *Cf. Grand Lodge of Improved Benevolent & Protective Order of Elks of the World v. Grand Lodge, Improved, Benevolent & Protective Order of Elks of the World*, 50 F.2d 860, 864 (4th Cir. 1931) (members of fraternal association "had a right to withdraw and organize a new order; but they had no right, if they did so, ... to hold themselves out as a branch of [the original] order" and were not entitled to take intellectual property and goodwill of abandoned association).

[11] Facial neutrality is not the end of the story, although the Court need go no further in the case of § 57-9(A). "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Lukumi*, 508 U.S. at 534.

applicability because it treats religious entities differently from secular entities "on account of religious status." *Falwell*, 203 F. Supp. 2d at 631; *see Lukumi*, 508 U.S. at 542-43 ("All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice. The Free Exercise Clause 'protect[s] religious observers against unequal treatment,' and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation") (citation omitted). The related neutrality and general applicability inquiries show that § 57-9(A) treats religion distinctively and unequally, a result fundamentally at odds with the federal and state free exercise guarantees. *See, e.g., id.* at 543 ("The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause").

Because § 57-9(A) is not neutral and generally applicable, it "must survive strict judicial scrutiny; *i.e.*, the challenged laws must advance governmental 'interests of the highest order,' *and* must be narrowly tailored in pursuit of those interests." *Falwell*, 203 F. Supp. 2d at 631 (quoting *Lukumi*, 508 U.S. at 546). The Congregations and the Attorney General have not shown either the requisite compelling interest or narrow tailoring. Nor can they. The Commonwealth has no legitimate interest, compelling or otherwise, in the outcome of church property disputes. For the Commonwealth to assert an interest in promoting decision-making by congregational majorities – particularly within a hierarchical church, and contrary to that church's rules – itself violates the First Amendment. "[I]t is not a function of civil government under our constitutional system to assure rule to any religious body by a counting of heads." *Kedroff*, 344 U.S. at 122 (Frankfurter, J., concurring). *See* sections II.A - C, *infra*; *see also Reid*

v. Gholson, 229 Va. at 187, 327 S.E.2d at 112 (in cases "concerning the civil and property rights of religious bodies and church members.... there is a danger that the power of the state may be called upon to aid a faction espousing a particular doctrinal belief, or to 'become entangled in essentially religious controversies'") (quoting *Serbian Eastern Orthodox*, 426 U.S. at 709). Moreover, by imposing rule by a congregational majority even where a church has already created a rule of decision for property disputes, the statute is overbroad, not narrowly tailored.

The statute also is underinclusive. The Attorney General has argued that § 57-9 advances the Commonwealth's "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." Commonwealth Brief at 18 (filed Jan. 11, 2008) (quoting *Jones v. Wolf*, 443 U.S. at 602). He has not explained, however – nor can he – why the same interest does not apply to hierarchical churches whose property is not held by trustees, nor why that interest applies only to certain churches and not to other hierarchical, voluntary associations (such as lodges, unions and fraternities) as well. This under-inclusiveness is fatal, both because it establishes that the statute fails the narrow tailoring standard and because it demonstrates that the asserted State interest is not compelling. *See Lukumi*, 508 U.S. at 546-47:

> [E]ven were the governmental interests compelling, the ordinances are not drawn in narrow terms to accomplish those interests.... [A]ll four ordinances are overbroad or underinclusive in substantial respects. The proffered objectives are not pursued with respect to analogous nonreligious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree. The absence of narrow tailoring suffices to establish the invalidity of the ordinances.
>
> Respondent has not demonstrated, moreover, that, in the context of these ordinances, its governmental interests are compelling. Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest 'of the highest order' ... when it leaves appreciable

damage to that supposedly vital interest unprohibited." [Citations omitted.]

D. Section 57-9(A) imposes principles of congregational governance on hierarchical churches and, as interpreted by the Congregations, interferes with hierarchical churches' governance and polity.

The Free Exercise Clause requires that "special statutes governing church property arrangements .... be carefully drawn to leave control of ecclesiastical polity, as well as doctrine, to church governing bodies." *Md. and Va. Eldership*, 396 U.S. at 370 (Brennan, J., concurring); *see also, e.g., Serbian Eastern Orthodox*, 426 U.S. at 721-22 ("religious freedom encompasses the 'power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"); *Reid v. Gholson*, 229 Va. at 188-89, 327 S.E.2d at 113.

As interpreted by this Court, § 57-9(A) applies to hierarchical churches a principle of congregational governance – decision-making by the vote of a local majority. *See, e.g., Reid v. Gholson*, 229 Va. at 188-89, 327 S.E.2d at 113 ("Hierarchical churches may, and customarily do, establish their own rules for discipline and internal government.... Congregational churches, on the other hand, are governed by the will of the majority"). In the process, say the Congregations, § 57-9(A) overrides the rules and polity of the Episcopal Church.[12]

The Episcopal Church and the Diocese have clear rules governing property. These rules include provisions enacted pursuant to the Supreme Court's opinion in *Jones v. Wolf*, 443 U.S. 595, 606 (1979). *See* section I.B, *supra*. Numerous other canonical provisions also regulate properties used by congregations. For example, Episcopal Church Canon II.6(1) requires that

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[12] The Court identified another respect in which § 57-9(A) overrides the rules and polity of hierarchical churches – with respect to the voting age. *See* Letter Opinion at 48. Notably, the Court concluded that the legislature intended to defer "completely" to independent churches but to show "no such deference" to other churches. *Id.* Facial discrimination between churches, like that the Court identified, is another constitutional defect in § 57-9. *See* section II.A, *infra*.

consecrated real property (that is, property devoted entirely to religious uses) be "secured for ownership and use by a Parish, Mission, Congregation, or Institution affiliated with this Church and subject to its Constitution and Canons." TEC-Diocese Ex. 1 at 58 & Ex. 2 at 62. Episcopal Church Canons I.7(3) and II.6(2) further restrict the holding and use of property and preclude a congregation from alienating or encumbering any real property, consecrated or unconsecrated, without the consent of the Diocese. TEC-Diocese Ex. 1 at 37, 58 & Ex. 2 at 39, 62. Diocesan Canon 14.1 requires the approval of the Bishop and the Standing Committee before any congregation may incur indebtedness above certain monetary thresholds. TEC-Diocese Ex. 3 at 27. Diocesan Canon 15.2 requires the Bishop's approval for the alienation, sale, encumbrance, or other transfer of consecrated church property or any property of a mission. *Id.* Episcopal Church Canon III.9.5(a)(2) provides that the ordained Episcopal rector of each parish is at all times entitled to the use and control of parish property "[f]or the purposes of the office," subject to and consistent with the Episcopal Church's Book of Common Prayer, the Church's Constitution and Canons, and the direction of the diocesan bishop under Canon III.9.5(a)(1). TEC-Diocese Ex. 1 at 76 & Ex. 2 at 84-85. Notably, pursuant to Canon III.9.5's allocation of local authority, a rector is not required to follow the wish of a congregational majority.

According to the Congregations, § 57-9(A) allows congregational majorities to circumvent all of the above property ownership rules. Because § 57-9(A) seizes control of the governance and polity of the Episcopal Church and the Diocese, it is unconstitutional.

Section § 57-9(A) cannot be meaningfully distinguished from Alabama's "Dumas Act," which was invalidated in *Goodson v. Northside Bible Church*, 261 F. Supp. 99 (S.D. Ala. 1966) (*Northside I*), *aff'd*, 387 F.2d 534 (5th Cir. 1967) (*Northside II*) (*cited with approval in Md. and Va. Eldership*, 396 U.S. at 369 n.5 (Brennan J., concurring)). The Dumas Act

> provide[d] in substance that where a 65% majority of adult members of a local church finds and declares itself to be in disagreement [with] the "* * * laws, discipline, social creeds and jurisdictional system of the parent church with respect to its social standards, practices or policies existing at the time the local church became affiliated or merged with the parent church * * *", the majority may sever its connection with the parent church and retain the possession and ownership of the local church property free and clear of any trust such as that set forth in the deed to the Trinity Methodist Church....

Northside I, 261 F. Supp. at 100. The courts reasoned, in part, that

> The Dumas Act operates only on protestant denominations of Christian faith.... the effect of the Dumas Act is to engraft upon a significant segment of American protestantism a legislative scheme of property ownership in derogation of the ecclesiastical systems evolved by several protestant denominations. For example, in Presbyterian, Episcopalian, and Lutheran churches there are connectional property features similar to those within the Methodist Church. The Dumas Act does not operate on purely congregational churches such as the Southern Baptists. It does, however, create a legislative body of a 65% majority of adult members for local churches within a connectional structure. It grants to this legislative body the right, power and authority to change established systems of church ownership without regard to the ecclesiastical law of the denomination. The warning of Madison[13] becomes fact if the legislature is permitted to write into the ecclesiastical law of connectional denominations a control of local church property by a 65% majority. For what is accomplished by the Dumas Act is a "particular sect of Christians", at least as applied to protestants, in which local property control is vested in a majority of not more than 65% of the local congregation. The establishment of such a class or sect is constitutionally prohibited.

Northside I, 261 F. Supp. at 103-04; *Northside II*, 387 F.2d at 537-38 (quoting *Northside I*). The same reasoning applies here, and this Court should reach the same conclusion. "By the passage of [§ 57-9(A), Virginia] has expressed a preference to and aided those who profess a belief in a congregational structured church. This it cannot do." *Northside I*, 261 F. Supp. at 104.

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[13] *See Northside I*, 261 F. Supp. at 103, quoting James Madison's *Memorial and Remonstrance Against Religious Assessments*: "'Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with same ease any particular sect of Christians, in exclusion of all other Sects?'"

E. Section 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.

This Court has held that, under § 57-9(A), a "division" can (and did, in this instance) "occur" regardless of the wishes, rules, and polity of the church to which a congregation is attached. Letter Opinion at 80-81. Likewise, without recognition or approval of a hierarchical church, separatists can create a "branch" of a church that is neither a part of the church nor subject to its rules or polity. *See id.* at 78 (holding that "CANA and ADV are branches of both the ECUSA and the Diocese"). The Congregations urge further that § 57-9(A) explicitly makes the congregational vote "conclusive."

The Congregations argue, therefore, that § 57-9(A) establishes a rule of decision for church property disputes in which hierarchical churches are cut out of determinations regarding church property ownership by legislative fiat. That eliminates the possibility of overcoming the congregational majority and insuring "that the faction loyal to the hierarchical church will retain the church property," which was essential to the "neutral principles" approach being held constitutional in *Jones v. Wolf*. *See* 443 U.S. at 605-06, discussed *supra* at 5.

The constitutional flaws in what the Congregations suggest is § 57-9(A)'s rule of decision are further illustrated by the fact that it disregards "neutral principles" entirely. Neutral principles, as defined by the Supreme Courts of the United States and Virginia, involves consideration of "the language of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property." *Jones*, 443 U.S. at 603; *accord*, *Green v. Lewis*, 221 Va. 547, 555, 272 S.E.2d 181, 185-86 (1980) ("In determining whether the [general church] has a proprietary interest in the [local church's] property, we look

to our own statutes, to the language of the deed conveying the property, to the constitution of the general church, and to the dealings between the parties"); *see also Norfolk Presbytery v. Bollinger*, 214 Va. 500, 505, 201 S.E.2d 752, 756-57 (1974).

Under the Congregations' interpretation of § 57-9(A), however, none of the neutral principles factors matters.[14] It does not matter that deeds expressly state a trust for an Episcopal entity, according to the rules or governing documents of the Episcopal Church or the Diocese. *See, e.g.*, Ex.11 to Praecipe Indexing Docs. (filed June 15, 2007) (Dec. 3, 1874, deed for Truro Church, then known as Zion Protestant Episcopal Church) (emphases added):

> .... to have and to hold the said parties of the second party & their successors forever, but *unto the following purposes, uses & trusts & conditions & none other* – that is to say, *for the use of the members & congregation of the Protestant Episcopal Church of the Diocese of Va.* worshipping & to worship in the building on said lot known as & called "Zion Church," *subject to the Constitution, canons & regulations of the Protestant Episcopal Church of the Diocese of Va.*

See also id. at Ex.5 (Nov. 20, 1874, deed for St. Stephen's, Heathsville) ("... *In trust* nevertheless and *for the sole use and benefit of the religious society and congregation known as the Protestant Episcopal Church* ...") (emphases added).

It does not matter that the governing documents of the local church explicitly reference, recognize, or are subject to the Constitutions and Canons of the Episcopal Church or the Diocese. *See, e.g.*, governing documents cited in n.25, *infra*.

It does not matter that "Code § 57-15 requires a showing that the property conveyance is the wish of the constituted authorities of the general church." *Norfolk Presbytery*, 214 Va. at 503, 201 S.E.2d at 755, *quoted in* Letter Opinion at 73.

It does not matter that the governing documents of the general church explicitly and

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[14] The Episcopal Church and the Diocese disagree, of course, with that radical position.

clearly state property ownership restrictions in favor of the general church. *See, e.g.*, Episcopal Church Canon I.7.4 (TEC-Diocese Exs. 1, 2); Diocese Canon 15.1 (TEC-Diocese Ex. 3).

It does not matter that the "dealings between the parties" show contractual or proprietary interests in favor of the general church. *Green*, 221 Va. at 555, 272 S.E.2d at 185-86; *see, e.g.*, section III.A, *infra*; TEC-Diocese Exs. 7-9, 37-38; *see also Diocese of Southwestern Va. of the Protestant Episcopal Church v. Buhrman*, 5 Va. Cir. 497, 502-08 (Clifton Forge 1977).

It apparently does not even matter that a deed is *to Diocesan trustees as trustees for the Diocese*. *See* Ex. 1 to Church of the Word's Petition for Approval of Report of Congregational Determination Pursuant to Va. Code § 57-9 (a deed, recorded while Church of the Word was a Diocesan mission, to certain individuals who serve as Diocesan trustees and who are named in the deed as "TRUSTEES for the Episcopal Protestant Church in the Diocese of Virginia").

Instead, under § 57-9(A), the only considerations are: "1.) [the existence of] 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.'" Letter Opinion at 81. If such conditions exist (as the Court has now ruled), the Congregations claim that a congregation may use § 57-9(A) to establish its sole control, ownership, and title to church property. The Constitution does not permit such a radical and one-sided approach to church property disputes. *See, e.g., Northside I & II, supra.*

The Congregations maintain that § 57-9(A) is constitutional because it applies only to churches who hold property by trustees (an independent constitutional deficiency, as discussed in section II.A, *infra*). Thus, they argue that it allows the Episcopal Church and the Diocese to overcome the congregational majority by taking the supposedly "minimal step" of altering their method of property ownership to hold title in the Bishop. Congregations' Memorandum in

Opposition (filed Jan. 11, 2008) at 36.[15] That argument must fail:

First, it asserts that a state can require changes in the Episcopal Church's and the Diocese's polity and amendment of their canons or penalize their choice not to do so. *See, e.g.*, TEC-Diocese Ex. 3 at 27 ("The Vestry of every Church and, when authorized by the Bishop, the Vestry Committee of a Mission, *shall elect Trustees ... to hold title to such property*") (emphasis added). The Commonwealth can do no such thing. *See* sections I.A & D, *supra*. Even if the Canons did not provide otherwise, the Free Exercise Clause does not allow a state to tell a church how to order its affairs in the ownership and management of consecrated properties – properties dedicated entirely to religious uses – on pain of losing such properties if it adopts another perfectly legal method of its own choosing. Requiring a church to hold all property in the name of a bishop (or a corporation) is no less problematic than imposing a rule vesting control of property in congregational majorities. The State has no legitimate interest in dictating methods of property ownership or control to churches. To the contrary, churches have every interest in making and the constitutional right to make those decisions themselves, just as they do with respect to other organization and governance issues.

Second, the "re-titling" argument dismisses as "minimal" what would be a significant practical burden on the Episcopal Church and the Diocese. There are approximately 200 Episcopal churches and missions in the Diocese and over 7600 in the Episcopal Church. *See* Congregations' Ex. 132 at 1 (cited in Letter Opinion at 81); Congregations' Ex. 91 at 6. The Episcopal Church and the Diocese would be forced to determine the status of and/or re-title each piece of property used. Furthermore, if the states have the authority that the Congregations

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[15] The Congregations point out that titling property in the name of a corporation would have the same impact. That claim rings hollow, as Virginia did not permit churches to incorporate before the division in the Episcopal Church identified by the Court. *See* Letter Opinion at 4 & n.3.

claim, such an effort may well be for naught: Virginia could amend § 57-9 to require some *other* form of property ownership at any time – and this pattern could be replicated in different permutations in all 50 states.

II. Section 57-9(A) violates the federal and state Establishment and Equal Protection Clauses.

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion." Article I, § 16 of the Constitution of Virginia states that "the General Assembly shall not prescribe any religious test whatever, or *confer any peculiar privileges or advantages on any sect or denomination*" (emphasis added). When Virginia courts apply Article I, § 16, they have looked to the federal Establishment Clause as a guide. *See, e.g., Habel v. Indus. Dev. Auth.*, 241 Va. 96, 100, 400 S.E.2d 516, 518 (1991). The plain language of Article I, § 16 mandates incorporation of the neutrality principle of federal law (discussed in subsection A, below). *Cf. Brooke v. Shacklett*, 54 Va. at 318 (denouncing the suggestion that the General Assembly acted with "the design of making a most unjust and invidious discrimination" against congregations which receive their ministers by assignment of hierarchical bodies "and in favor of those who have the selection of their own pastors").

Section 57-9(A) does not adhere to the bedrock Establishment Clause neutrality principle. Section 57-9(A) also fails each part of the three-part Establishment Clause test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion'") (citations omitted).[16]

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[16] Although the *Lemon* test has been criticized, it remains very much alive. In *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), Justice Scalia concurred in the

(footnote continued ...)

A. Section 57-9(A) fails to conform to the Establishment Clause's neutrality rule and violates the Equal Protection Clause because it prefers churches with congregational forms of government and discriminates between hierarchical churches.

The principle that "government should not prefer one religion to another, or religion to irreligion" is "a principle at the heart of the Establishment Clause" and "well grounded in our case law." *Board of Education v. Grumet*, 512 U.S. 687, 703, 704 (1994). *Accord, e.g.*, *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005): "The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion'" (citations omitted); *Everson*, 330 U.S. at 15 ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.").

In *Larson v. Valente*, 456 U.S. 228 (1982), the Supreme Court applied the neutrality principle and invalidated a portion of a statute that required charitable organizations to register with the State and file "extensive annual report[s]," exempting religious organizations that received more than half of their total contributions from members or affiliated organizations (the "fifty per cent rule"). The Supreme Court invalidated the fifty per cent rule as a facial discrimination among religious groups which violated "[t]he clearest command of the

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judgment but lamented the Court's "invocation of the *Lemon* test," comparing it to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." *Id.* at 398. The six-justice majority responded that "Justice Scalia's evening at the cinema" did not address "the reality that there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled." *Id.* at 395 n.7. The Supreme Court continues to apply the *Lemon* test. *See, e.g.*, *McCreary County v. ACLU*, 545 U.S. 844, 859 (2005). It is the Supreme Court's prerogative, not that of lower courts, to overrule or disregard constitutional precedents. *E.g.*, *United States v. Hatter*, 532 U.S. 557, 567 (2001). The Supreme Court of Virginia also continues to apply the *Lemon* test in Establishment Clause cases. *See, e.g., Va. College Bldg. Auth. v. Lynn*, 260 Va. 608, 628, 538 S.E.2d 682, 692 (2000).

Establishment Clause ... that one religious denomination cannot be officially preferred over another." *Id.* at 244. The Court held that "[t]he fifty per cent rule ... clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents." 456 U.S. at 246. "Section 309.515, subd. 1(b), is not simply a facially neutral statute, the provisions of which happen to have a 'disparate impact' upon different religious organizations. On the contrary, § 309.515, subd. 1(b), makes *explicit and deliberate distinctions between different religious organizations*." *Id.* at 247 n.23 (emphasis added). Section 57-9(A) likewise "makes explicit and deliberate distinctions between different religious organizations" and "grants denominational preferences." It prefers hierarchical churches whose property is not held by trustees over those that use trustees to hold title.[17]

This is not a theoretical distinction. Hierarchical denominations hold local church property by a variety of means, including in the name of trustees, in congregations' corporate names, in the name of the Bishop of the Diocese, and in the name of the mother church ("the International Church of the Foursquare Gospel, a California religious corporation") or its Presiding Bishop ("the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints, a Utah corporation sole"). Stipulation filed Dec. 6, 2007. Section 57-9(A) applies only to hierarchical churches whose property is held by trustees, including the Episcopal Church. It does not apply at all to the Roman Catholic Church, the Greek Orthodox Church, the Foursquare Church or the Church of Jesus Christ of Latter-day Saints, among others. *See* the Dec. 6, 2007, Stipulation. Application of § 57-9(A) to these cases would discriminate among religious groups by giving congregational majorities the power to control property that is held in the name of trustees but granting no similar power where property is held differently.

[17] As discussed *supra* at pp. 20-22, the response that hierarchical churches should re-title their property provides no answer at all.

The Attorney General's Office has identified yet another denominational preference in § 57-9(A) which further demonstrates that the statute is constitutionally infirm. *See* Ex. A:

> [Section 57-9(A)] provides protection only in the event that the congregation wants to join a branch of the same denomination. There is no statutory option if the congregation desires to join a different denomination or to become independent. Consequently, the law as it stands gives an incentive for one choice only – joining a branch of the original denomination – while giving a disincentive for the other choices – joining another denomination or becoming independent.

"[W]hen we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Larson*, 456 U.S. at 246. *Accord, e.g., Employment Division v. Smith*, 494 U.S. 872, 886 n.3 (1990) ("Just as we subject to the most exacting scrutiny laws that make classifications based on race ... so too we strictly scrutinize governmental classifications based on religion"); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. at 339 ("laws discriminating among religions are subject to strict scrutiny"). Under that standard, a statute "must be invalidated unless it is justified by a compelling governmental interest ... and unless it is closely fitted to further that interest." *Larson*, 456 U.S. at 247 (citations omitted). There is no governmental interest, much less one "of the highest order" (*Lukumi*, 508 U.S. at 546), in applying a rule of majority representation only to those hierarchical churches that hold local church property by trustees, nor in giving separating congregations an incentive to join only a branch of the same denomination. That should be the end of the matter.

In addition to discriminating among religions, § 57-9 also discriminates against some religions – such as the Episcopal Church – as compared to voluntary secular associations. *See* section I.C, *supra*. This too violates the Establishment Clause.

For essentially the same reasons, § 57-9(A) also violates the Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution ("nor shall any State ... deny to any

person within its jurisdiction the equal protection of the laws") and of Article I, Section 11 of the Constitution of Virginia. The rights to the free exercise of religion and to be free from establishment of religion manifestly are fundamental rights,[18] and that religion is a suspect classification is beyond credible dispute.[19] On both grounds, strict scrutiny is required. Where a "statute creates a 'suspect classification' (*e.g.* race, sex, or religion) or where it affects a fundamental constitutional right, the presumption of constitutionality fades, and the 'strict scrutiny' test, rather than the more relaxed 'rational relationship' test, applies." *Mahan v. National Conservative Political Action Committee*, 227 Va. 330, 336, 315 S.E.2d 829, 832 (1984). As discussed above, § 57-9(A) clearly fails the strict scrutiny test.

Article I, Section 11 of the Constitution of Virginia provides an even stronger basis for this conclusion, as it explicitly forbids governmental discrimination on the basis of religion (unlike the Fourteenth Amendment's Equal Protection Clause): Article I, Section 11 provides, in relevant part, that "the right to be free from any governmental discrimination upon the basis of religious conviction ... shall not be abridged."[20]

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[18] "[E]qual protection analysis requires strict scrutiny of a legislative classification ... when the classification impermissibly interferes with the exercise of a fundamental right," including "rights guaranteed by the First Amendment." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 & n.3 (1976).

[19] "[A]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738, 2757, 168 L. Ed. 2d 508, 529 (2007) (plurality opinion) (citations omitted). *See also, e.g., De La Cruz v. Tormey*, 582 F.2d 45, 49 (9th Cir. 1978), *cert. denied*, 441 U.S. 965 (1979) (governmental action runs afoul of the Equal Protection Clause of the Fourteenth Amendment "when the Government explicitly classifies or distinguishes among persons by reference to criteria such as race, sex, religion, or ancestry which have been determined improper bases for differentiation").

[20] The Supreme Court of Virginia has held that the quoted provision "is no broader than the equal protection clause of the Fourteenth Amendment to the Constitution of the United States." *Archer v. Mayes*, 213 Va. 633, 638, 194 S.E.2d 707, 711 (1973). That should not be read as

(footnote continued ...)

B. Section 57-9(A) lacks a secular legislative purpose.

The Establishment Clause requires that laws have "a secular legislative purpose." *E.g.*, *McCreary County*, 545 U.S. at 859-66. That purpose must be both genuine and primary. *Id.* at 864 ("although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective").

There are no officially "stated reasons" for § 57-9(A), so there is no purpose to which the Court can defer. The Court's Letter Opinion and the evidence at trial confirm, however, that § 57-9(A) lacks the requisite genuine, primary secular legislative purpose.

The Court stated 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." Letter Opinion at 48. The legislature may not act with a purpose to favor congregations over the hierarchical churches to which they belong or for the purpose of interfering with or forestalling the application of a hierarchical church's governing documents. The Court's apparent conclusion that the legislature did just that confirms that § 57-9(A) lacks a valid, secular legislative purpose.

The Court's finding is supported by the limited available evidence, presented at trial by the Congregations, which confirms that § 57-9 does not have a secular legislative purpose. Its sponsor, House Speaker John Baldwin, was the lawyer for at least one Methodist separatist congregation which filed an *ex parte* petition in the Circuit Court of Augusta County to obtain an order giving the congregation title to and control of the property it used. Tr. 221, 223; *see* Letter Opinion at 56. The Congregations' evidence is that the object of the statute was "*to protect local religious congregations* who when their church divided were compelled to make choice between

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imposing a more limited application of Article I, Section 11 than its literal terms require, but as expressing the Court's view of the reach of the Fourteenth Amendment Equal Protection Clause.

the different branches of it, and to allow them in some such cases to take their property with them ...." Tr. 223-24 (emphasis added), *quoted in* Letter Opinion at 56.[21]

The Attorney General has argued that § 57-9's purpose is to facilitate fair and efficient resolution of church property disputes. Commonwealth Brief (filed Jan. 11, 2008) at 18, 19. That contention ignores the evidence at trial, accepted by the Court's finding (quoted above).

The Attorney General or the Congregations might argue that circumstances in which a "division" exists are special cases, where the General Assembly believed that a special statute was required to resolve some special uncertainty. That contention would only highlight the fact that § 57-9(A) is a "special statute," *Md. and Va. Eldership*, 396 U.S. at 370 (Brennan, J., concurring), and one that impermissibly overrides both the rules and polity of hierarchical churches and the neutral principles approach. *See* sections I.B, I.D & I.E, *supra*.

C. Section 57-9(A) has a principal effect of advancing the interests of congregations and principles of congregational governance and inhibiting the interests of the Episcopal Church, the Diocese, and loyal Episcopalians.

Section 57-9(A) also has a principal effect of promoting control over property by congregational majorities, a principle of congregational governance. The General Assembly,

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[21] More generally, it is highly questionable whether Virginia's church property statutes historically had legitimate, neutral purposes with respect to their treatment of hierarchical churches. The Supreme Court of Virginia has stated that certain provisions were enacted for the purpose of restricting such churches. *See Maguire v. Loyd*, 193 Va. 138, 149, 67 S.E.2d 885, 893 (1951) ("In the light of the historical background, the constitution, and the legislative enactments, it is clear that the economic and resulting political power of churches was what was sought to be limited"). *See also id.* at 149, 67 S.E.2d at 892 (quoting as "very pertinent" a passage from *Gallego's Ex'rs v. Attorney General*, 30 Va. (3 Leigh) 450 (1832), that refers to the General Assembly's "hostility," "jealousy," and "fearful[ness]" with respect to religious incorporation, religious institutions' accumulation of possessions, and the granting of privileges to religious entities). The Court has identified further evidence of the same constitutional problem in *Brooke v. Shacklett*, 54 Va. 301. *See* Letter Opinion at 63 n.66 ("Significantly, the Brooke Court implies that, in Virginia, there is a distinct policy preference for the rights of local congregations ..."). This Court's findings regarding the purpose of § 57-9(A), enacted in 1867, demonstrate that it is infected with the same constitutional infirmity.

through § 57-9(A), did not merely provide a neutral way to determine which direction property takes. Neutral principles does that – providing a method to determine whether separatist congregations can take church property with them. Instead, the General Assembly instituted a one-sided rule of decision that gave particular religious groups (congregational majorities) the power to obtain exclusive title and control of church property. *See* section I.E, *supra*. The legislature itself advanced the interests of groups like the Congregations and inhibited the interests of groups like the Episcopal Church, the Diocese, and loyal Episcopalians.

D. The Court's interpretation of § 57-9(A) creates an unconstitutional entanglement by requiring inquiry into and/or decisions regarding doctrinal matters.

The Court's holdings entangle the Court in matters of church governance and doctrine. 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. *Id.* at 78-79.[22] That is a judgment that civil courts cannot and should not make. *See*,

[22] All Christian groups are "a part of a complex body" or "a division of a family descending from a particular ancestor." Letter Opinion at 78 (quoting Merriam-Webster's); *see, e.g.*, Tr. 911 (Douglas) (the Body of Christ). The Court distinguished the relationship of the Diocese/TEC with CANA/ADV from that with the Catholic Church on three grounds. Letter Opinion at 79. First, as discussed in this section, "common membership in the Anglican Communion" is a disputed doctrinal issue. Second, determining whether groups "adher[e] to that historical strand of Christianity known as Anglicanism" requires judging the groups' ecclesiastical relationships, history, and beliefs, and is particularly entangling given that Anglicans themselves do not agree on what Anglicanism is. *See, e.g.*, Tr. 846, 955-58 (Douglas). Finally, although self-identification may appear to avoid entanglement, it does not exclude other denominations, given that Anglican Communion members are part of "the One, Holy, Catholic, and Apostolic Church." *E.g.*, TEC-Diocese Ex. 1 & 2 (Preamble). *See generally* "Catholic," Dictionary.com Unabridged v.1.1 (Random House, Inc.) ("(among Anglo-Catholics) noting or pertaining to the conception of the church as the body representing the ancient undivided Christian witness, comprising all the orthodox churches that have kept the apostolic succession of bishops, and including the Anglican Church, the Roman Catholic Church, the Eastern Orthodox Church, Church of Sweden, the Old Catholic Church (in the Netherlands and elsewhere), etc."), *available at* http://dictionary.reference.com/browse/catholic (visited April 22, 2008).

e.g., *Reid v. Gholson*, 229 Va. at 187, 327 S.E.2d at 112 ("where church property and civil rights disputes can be decided *without reference to questions of faith and doctrine*, there is no constitutional prohibition against their resolution by the civil courts") (emphasis added); *id.* at 189, 327 S.E.2d at 113 (emphasis added):

> the civil courts will treat a decision by a governing body or internal tribunal of an hierarchical church as an ecclesiastical determination constitutionally immune from judicial review. To do otherwise would precipitate the civil court into the "religious thicket" of reviewing questions of faith and doctrine even when the issue is merely one of internal governance, because in such churches *the resolution of internal government disputes depends upon matters of faith and doctrine. Serbian Eastern Orthodox Diocese*, 426 U.S. at 724-25; *see also Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980).

The Court's "branch" holding contravenes Anglican doctrine and the conclusions of Anglican Communion authorities. The uncontradicted evidence was that Anglicanism organizes itself by geography and national boundaries and that "border crossings" or "interventions," such as CANA, violate ancient Anglican doctrine and traditions. *See, e.g.*, Congregations' Ex. 61 at 59, *cited in* Letter Opinion at 18; Tr. 284 (Irons), 875-76, 879-80 (Douglas), 1222-23 (Beers); Congregations' Ex. 185A at 1. As a direct result of this doctrine and traditions, authorities within the Anglican Communion have refused to recognize CANA and other such groups. The Archbishop of Canterbury, the "chief pastor" and "the pivotal instrument and focus of unity," with whom a relationship is "a touchstone of what it was to be Anglican" (Letter Opinion at 9, *quoting* Congregations' Ex. 61 at 41), has not invited CANA and other separatist bishops to the Lambeth Conference, the world-wide gathering of Anglican bishops. *See* Tr. 365-66 (Minns), 396-97 (Guernsey), 879-80 (Douglas). Canon Kenneth Kearon, Secretary General of the Anglican Communion, has stated that CANA is not a branch of the Anglican Communion and that the Bishop of CANA is not "in good standing with the See of Canterbury." *See* Tr. 362-63 (TEC-Diocese Ex. 31 was not admitted into evidence, but Bishop Minns had seen it before); Tr.

996-97 (Douglas).[23] That the Court's decision contravenes rather than defers to Anglican doctrine and authorities further illustrates the fact that "a court decision over what is or is not a branch of an original denomination necessarily entangles government and religion." Ex. A at 2.

III. Constitutional issues that are not the subject of the May 28 hearing

A. Section 57-9(A) violates the federal and state Contracts Clauses, in that it upsets contractual rights and interests established prior to 1867 and overrides the arrangements of the parties since 1867.

The rules of a voluntary association, as expressed in its governing documents, are contractual. *See* section I.C, *supra*. The Constitutions and Canons of the Episcopal Church and the Diocese define how the Church and the Diocese are organized and governed (their polity), and they bind all members and entities. *See* Letter Opinion at 5-7; *see also, e.g.*, pages 7-8 & section I.C, *supra*. Those rules and polity predate 1867, both generally and with respect to many property provisions.[24] *See, e.g.*, TEC-Diocese Exs. 1 & 2 at 1 (Preamble) ("This Constitution, adopted in General Convention in Philadelphia in October, 1789…"); TEC-Diocese Ex. 3 at 5 ("Whereas, the Protestant Episcopal Church of Virginia was organized in May, 1785 …").

If, as the Congregations contend, § 57-9(A) overrides the rules and polity of the Episcopal Church and the Diocese with respect to property ownership by making a reported congregational vote "conclusive," then § 57-9(A) works a substantial impairment of a contractual relationship, in violation of the Contracts Clauses. *See City of Charleston v. Public Serv. Comm'n*, 57 F.3d 385, 391 (4th Cir. 1995) (stating the federal Contracts Clause test);

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[23] Other Anglican leaders disagree with the Archbishop of Canterbury and Canon Kearon and choose to recognize groups like CANA as valid Anglican organizations, or they recognize that groups like CANA are irregular but conclude that they are pastorally necessary. That is immaterial. The Court may not adopt one side of a disputed doctrinal matter any more than it may contradict undisputed doctrine.

[24] The history of the Church's and the Diocese's property provisions has been mentioned in pleadings and briefs, but the Court has not yet taken any evidence on that point.

accord, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502-06 (1987); *Energy Reserves Group v. Kan. Power & Light Co.*, 459 U.S. 400, 411-12 (1983). *See also*, *e.g.*, *Finley v. Brent*, 87 Va. 103, 108, 12 S.E. 228, 230 (1890) (holding that § 57-9 was unconstitutional as applied, based on the federal and Virginia Contracts Clauses).

Since 1867, moreover, the parties have chosen to order their relationships in a way that recognizes rights and interests of the Episcopal Church and the Diocese that are not subject to the whims of congregational majorities. Given that the relevant statutes, deeds, and governing documents of the Episcopal Church and the Diocese are already before the Court, "course of dealing" will form the core of the trial in the declaratory judgment actions scheduled for October 2008. The evidence introduced at the § 57-9 trial in November, together with the deeds that are now part of the pleadings of the Episcopal Church and the Diocese pursuant to the Congregations' Motions Craving Oyer, offers a limited preview of the evidence that will be presented in October. *See* section I.E, *supra* (citing and briefly discussing a number of examples of evidence significant under a neutral principles approach). The Episcopal Church and the Diocese proffer the following non-exclusive evidence as well (without waiving and subject to their right to supplement and/or modify the evidence to be presented):

Diocesan Canon 15.1 was adopted in 1983, at an Annual Council where the then-existing Congregations were represented. Indeed, a member of one of the Congregations sat on the Diocesan committee that drafted and proposed Canon 15.1. The other, newer Congregations were formed and sought church status pursuant to the Diocesan canons in effect after 1983, including Canon 15.1 and other property-related provisions. *See supra* at 7-8 & n.7.

The Congregations, either as a whole or through their duly elected leaders, have repeatedly recognized the Diocese's authority, both as a general ecclesiastical matter and

specifically with respect to control over and ownership of real property. For example, the Congregations sought the approval of Diocesan authorities (as they were required to do by the Diocesan Canons, *see* TEC-Diocese Ex. 3 at 27 (Canon 14)) to encumber or take other actions related to such property. *See, e.g.*, Tr. 703 (Allison) (while he was a Vestry member, "the Church of the Apostles sought the Diocese's approval to acquire [certain new real] property").

Certain of the deeds state that property is to be held in trust and incorporate the rules of the Episcopal Church or the Diocese. *See* section I.E, *supra*. Most of the rest of the deeds explicitly reference the Episcopal nature of the subject entity. *See* Ex. A to TEC-Diocese Brief in Opposition to Demurrers and Pleas in Bar (filed July 13, 2007).

Prior to plans for disaffiliation and this litigation, most of the Congregations had governing documents (including constitutions, by-laws, and leadership manuals) that referenced, recognized, or were subject to the Constitutions and Canons of the Church and the Diocese.[25]

Prior to December 2006 or January 2007, the Congregations functioned for decades (and in some cases for a century or more) as Episcopal churches. The dealings between the parties reflect the Congregations' long and continuous participation in and recognition of the authority of the Episcopal Church and the Diocese. Along the way, the Congregations sought and received assistance from the Diocese and other Episcopal congregations, petitioned for church status in the Diocese subject to its rules, entered into instruments of donation memorializing

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[25] *See, e.g.*, TEC/Diocese Ex. 10 at 1 (St. Paul's Church Bylaws, 2005); Ex. 12 at 1 (St. Margaret's Church Constitution) ("St. Margaret's Episcopal Church in Woodbridge, Virginia, is guided and directed by the Constitution and Canons of the Protestant Episcopal Church in the Diocese of Virginia"); Ex. 13 at 2 (Church of the Epiphany Bylaws) ("The Parish ... is subject to the *Canons of the Protestant Episcopal Church in the Diocese of Virginia*"); Ex. 14 at 1 (St. Stephen's By-Laws, 2005); Ex. 16 (Truro Church By Laws); Ex. 25 at TFC-0160 (Falls Church Vestry Manual ("The Falls Church is subject to the constitution and canons of the national church (the Protestant Episcopal Church in the United States of America) and of the Diocese ..."); Ex. 36 at EDV0008290, EDV0008294 (Church of the Apostles' Vestry Handbook); Exs. 71-74 (additional Apostles documents accepted by Order entered Jan. 29, 2008).

Diocesan control over certain real property, used the term "Episcopal" in their organizational names, and had dealings with various levels of government in which the Congregations relied upon their relationship with the Diocese and/or recognized the rights and authority of the Diocese.

Section 57-9(A), as interpreted by the Congregations, would override the contractual relationships and dealings between the Congregations and the Diocese, working a substantial impairment of those relationships. The mere existence of § 57-9(A) does not prevent private parties from agreeing to arrange their affairs in another manner. The parties to this litigation entered into contractual relationships that do not give the Congregations the right to take control of property by the unilateral action of a congregational majority, and § 57-9(A) may not be applied to rewrite those contractual relationships in favor of one side.

B. Application of Va. Code § 57-9(A) to these cases would violate the Takings and Due Process Clauses of the United States and Virginia Constitutions.

The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment (*see, e.g., Kelo v. City of New London*, 545 U.S. 469, 472 n.1 (2005)), provides that private property shall not "be taken for public use, without just compensation." The Fourteenth Amendment also forbids "any State [to] deprive any person of life, liberty, or property, without due process of law." Article I, § 11 of the Constitution of Virginia similarly provides "[t]hat no person shall be deprived of his life, liberty, or property without due process of law; [and] that the General Assembly shall not pass ... any law whereby private property shall be taken or damaged for public uses, without just compensation, the term 'public uses' to be defined by the General Assembly."

Application of Va. Code § 57-9(A) to these cases would violate those bedrock constitutional prohibitions, for two distinct reasons: it would take the property of the Diocese

and the Episcopal Church for purely private purposes, without a public use (or "public purpose," *see Kelo*, 545 U.S. at 479-80), and without payment of just compensation.

Once it is established that the Diocese and the Episcopal Church have property interests in the lands and buildings at issue in these cases, as will be done at the trial scheduled for October 2008, there can be no disputing the fact that application of § 57-9(A) would work a taking of Church and Diocesan property. This is not a "regulatory takings" case. Here, application of § 57-9(A) would transfer both the beneficial title and the permanent right to physical occupation of real property from one group of private persons to another such group.

(1) A law that deprives a person of an entire property interest effects a taking, and that is true regardless of the amount of economic impact. In *Hodel v. Irving*, 481 U.S. 704 (1987), for example, the Supreme Court held that a federal statute eliminating only the right to devise certain small fractional interests in Native American land, often worth only pennies a year, constituted a taking – even though the statute served "a public purpose of high order" and the extent of investment-backed expectations in the property interest was "dubious," *id.* at 712, 715.

(2) "[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). *See also, e.g., id.* at 434-35 ("when the 'character of the governmental action,' [citation], is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner"). The *Loretto* Court specifically rejected an argument that a physical invasion by a private party should be treated differently from a similar invasion "by government." *Id.* at 432 n.9, *quoting Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). The Court held that "[a]

permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant." *Loretto*, 458 U.S. at 433 n.9.

Application of Va. Code § 57-9(A) to these cases would constitute a taking as defined by both *Hodel* and *Loretto* and similar cases. Even if § 57-9(A) were designed to serve a legitimate public purpose (*but see infra*), it could not constitutionally be applied to these cases, because it takes the property of one group of private persons and transfers that property to another group of private persons without payment of just compensation for the taking.

Application of Va. Code § 57-9(A) to these cases also would violate the constitutional requirement that a taking of private property be for a "public use" (which a long line of cases has defined as "public purpose," *see Kelo*, 545 U.S. at 479-80). "[O]ne person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937), quoted in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984). "[T]he Constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party. A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Midkiff*, 467 U.S. at 245. A "purely private taking" also is beyond the reach of the legislative power and therefore would violate the provisions of the Fourteenth Amendment and Article I, § 11 which prohibit deprivations of property without due process of law. *See, e.g., Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) (cited in *Kelo*), invalidating "a taking of private property of the railroad corporation for the private use of the petitioners"; "[t]he taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of

the fourteenth article of amendment of the constitution of the United States." *See also Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (quoted in, *e.g.*, *Kelo*, 545 U.S. at 478 n.5):

> An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.... A few instances will suffice to explain what I mean.... [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.

In Takings Clause cases, courts are deferential to legislative declarations of public purpose, even when property ultimately is transferred from one private owner to another, as demonstrated (for example) by *Kelo* and *Midkiff*.[26] There are nevertheless limits to the principle of deference, and these cases cross the line.

First, there is no legislative declaration of purpose or findings to support § 57-9(A), leaving discernment of its purposes to inference or conjecture. The only conceivable purposes for the statute are (1) to provide a rule of decision and thereby to facilitate the peaceful, orderly resolution of intra-church property disputes and (2) to prefer the decisions of congregational majorities over the rules of hierarchical religious institutions. The former purpose might be sufficient, if it were supported by the record and justified by the facts, but it is not. Where the parties have addressed property ownership in the rules of a hierarchical religious institution, there is no need for the direct interference of a secular legislative institution. And in our constitutional system, a State legislature manifestly has no legitimate interest (or public purpose) in "choosing a winner" in an intra-church property dispute – whether on theological grounds or

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[26] "[O]ne-to-one transfer[s] of property" are always "unusual exercise[s] of government power" that raise particular "suspicion that a private purpose [i]s afoot." *Kelo*, 545 U.S. at 487. In *Kelo* and *Midkiff*, however, the record demonstrated that the takings were not designed "to benefit a particular class of identifiable individuals," *Midkiff*, 467 U.S. at 245 (quoted in *Kelo*, 545 U.S. at 478), and therefore the suspicion was not borne out by the facts.

others, such as a preference for congregational majorities. The Congregations' own evidence, however, is that the purpose of the statute was "to protect local religious congregations" when churches divide, "and to allow them in some such cases to take their property with them"; and the Court's Letter Opinion agrees that that was the apparent purpose. *See* section II.B, *supra*. The actual statutory purpose, in other words, was to prefer the decisions of congregational majorities over the rules of hierarchical religious institutions. Even if § 57-9(A) provided for the payment of just compensation for the taking of Church and Diocesan property, therefore, it still does not serve a legitimate public purpose and therefore violates the Takings Clause.

Even if § 57-9(A) could pass muster under the Due Process and Takings Clauses of the federal Constitution, it would have to be invalidated under Article I, § 11 of the Constitution of Virginia. Article I, § 11 prohibits the enactment of "any law whereby private property shall be taken or damaged for public uses, without just compensation" and provides that "the term 'public uses' [is] to be defined by the General Assembly." The General Assembly has provided that definition in Va. Code § 1-219.1(A):

> The term 'public uses' mentioned in Article I, Section 11 of the Constitution of Virginia is hereby defined as to embrace only the acquisition of property where: (i) the property is taken for the possession, ownership, occupation, and enjoyment of property by the public or a public corporation; (ii) the property is taken for construction, maintenance, or operation of public facilities by public corporations or by private entities provided that there is a written agreement with a public corporation providing for use of the facility by the public; (iii) the property is taken for the creation or functioning of any public service corporation, public service company, or railroad; (iv) the property is taken for the provision of any authorized utility service by a government utility corporation; (v) the property is taken for the elimination of blight provided that the property itself is a blighted property; or (vi) the property taken is in a redevelopment or conservation area and is abandoned or the acquisition is needed to clear title where one of the owners agrees to such acquisition or the acquisition is by agreement of all the owners.

The transfer of property from the Diocese and the Episcopal Church to the Congregations, pursuant to § 57-9(A), would not serve a "public use" within the statutory definition, and there is

no conceivable rationalization that could bring the purposes of § 57-9(A) within the requirements of § 1-219.1(A). Application of Va. Code § 57-9(A) to these cases therefore would violate Article I, § 11 of the Constitution of Virginia.[27]

CONCLUSION

For the foregoing reasons, the Court should hold that application of Va. Code § 57-9(A) to these cases would be unconstitutional.

Respectfully submitted,

THE PROTESTANT EPISCOPAL CHURCH
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[27] Va. Code § 1-219.1(A) also affects the analysis under the federal Due Process and Takings Clauses, because no public purpose can be found to justify a taking which the General Assembly has said does not serve any public use.

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 a asterisk below), on this 23rd day of April, 2008:

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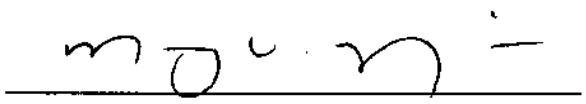

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SENATE OF VIRGINIA

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COMMITTEE ASSIGNMENTS:
COURTS OF JUSTICE
EDUCATION AND HEALTH
LOCAL GOVERNMENT
RULES
TRANSPORTATION

February 3, 2005

The Honorable John H. Watkins
General Assembly Building

Enclosed please find a letter from the Attorney General's office that highlights the constitutional problems with Virginia's existing statutes relating to church property, and supports the proposed reforms in S.B. 1305. Also enclosed is a fact sheet prepared by supporters that you may wish to use when responding to constituents. Also, as you know, I have prepared an amendment to S.B. 1305 which clarifies that churches can state their intentions regarding property matters through trust agreements without having to change their deeds.

In addition to the need to correct the constitutional deficiencies in the existing statutes, there is a practical need for the clarifications proposed by S.B. 1305. Presently, church property is owned by local trustees in most instances – your friends and neighbors who volunteer their services for their local congregation. In many churches – Baptist, Catholic, and Methodist, for example – the direction to these local trustees is very clear. In others, it is confusing and convoluted, and unfortunately these volunteer trustees are place in untenable situations when a property controversy erupts. The most important practical implication of S.B. 1305 is that it gives clear guidance to trustees and state court judges – specifically, if the denomination has a clear statement, either in the deed or in a trust agreement, that it owns the property then it does so; otherwise, the local congregation owns it. This was once the law of Virginia, but it was changed early last century and confusion and disputes have grown since then.

Without the clarifications included in S.B. 1305, there is a risk that our current statutes will be declared unconstitutional by a state or federal court – as our constitutional prohibition of church incorporation was in 2003. If that happens, we may have to deal with these issues on an emergency basis, rather than through our regular processes.

Thank you for your thoughtful consideration of S.B. 1305, and please let me know if I can respond to any questions at this time.

Sincerely,

Bill

Bill Mims

EXHIBIT
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COMMONWEALTH of VIRGINIA

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February 1, 2005

The Honorable William C. Mims
General Assembly Building
Richmond, Virginia 23219

Re: Senate Bill 1305

Dear Senator Mims:

You have asked us to examine the constitutionality of your proposed Senate Bill 1305 and the existing statute regarding the division of church property. I have conferred with William E. Thro, State Solicitor General, and we have determined that your bill – if enacted - would strengthen the existing law.

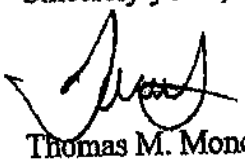
As presently in effect §57-9 has potential constitutional problems. The current language provides protection only in the event that the congregation wants to join a branch of the same denomination. There is no statutory option if the congregation desires to join a different denomination or to become independent. Consequently, the law as it stands gives an incentive for one choice only – joining a branch of the original denomination – while giving a disincentive for the other choices – joining another denomination or becoming independent.

Additionally §57-9, as currently written, may force the courts to determine if the denomination a congregation seeks to join is actually a branch of the original denomination or a new denomination. While adjudicating the property interests of any unincorporated association – to include a church - involves an examination of its internal workings, a court decision over what is or is not a branch of an original denomination necessarily entangles government and religion. Constitutional principles dictate the least possible involvement of the state in church matters.

Your proposed legislation, by contrast, provides for a dissatisfied congregation to make more than one particular choice. If enacted, a court will be able to more readily apply "neutral principles of law" based upon the source of legal title to real estate. The possibility of excessive entanglement is significantly reduced.

With my kindest regards, I remain

Sincerely yours,



Thomas M. Moncure, Jr.
Senior Counsel to the
Attorney General

Support Senate Bill 1305

SB 1305 amends section 57-9 and 57-15 of the Code of Virginia pertaining to the disposition of church property following a division within the congregation or church.

The statutes currently in effect date back to the mid-nineteenth century, are antiquated and ambiguous. The statutes give courts no guidance on when a division has occurred within a church and are riddled with ambiguity with regard to how and upon whose behalf a proprietary interest is established. As a result, courts trying to apply these statutes often must interpret church practice, rules, canonical law and at times even doctrine. For example, in 1967 the Supreme Court of Virginia ruled, following a long line of precedent, that the majority of a congregation could not "divert the use of property to the support of new and conflicting doctrines." *Baber v. Caldwell*, 207 Va. 694, 695-696 (1967).

Whatever else the separation of church in state may mean, it certainly must stand for the proposition that interpreting religious doctrine and the tenets of faith are outside the jurisdiction of the courts of the Commonwealth of Virginia. Sadly, that is not the case under the law today.

SB 1305 would amend the law to take courts out of the business of interpreting church doctrine and return them to the business of interpreting secular law. It does this in two ways:

1. It creates a conclusive presumption that a division has occurred when, by a majority vote of members over the age of 18, 10 congregations or 10 percent of all congregations within a denomination (whichever is less) vote to determine to which branch of the denomination they wish to belong, to belong to a different church, diocese, or religious society, or to become independent.

2. Where a division has occurred, the disposition of the property is determined by who is named in the deed or, if there is an express trust agreement, who is the beneficiary under the trust.

These rules are simple, straightforward, and fair. In interpreting them, courts are applying well understood principles of property law and have no occasion to delve into questions of church governance or doctrine.