In the
SUPREME COURT OF VIRGINIA

RECORD NO. 090682

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA,

Appellant,

v.

TRURO CHURCH, *et al.*,

Appellees.

BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANT THE PRO*TESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA*

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The General Council on Finance and Administration of the United Methodist Church, the Baptist Joint Committee for Religious Liberty, the Evangelical Lutheran Church in America ("ELCA"), Gradye Parsons, Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) ("PCUSA"), the General Conference of Seventh-day Adventists, the African Methodist Episcopal Zion Church, the African Methodist Episcopal Church, the Rt. Rev. Charlene Kammerer (Bishop, Virginia Annual Conference of The United Methodist Church), W. Clark Williams (Chancellor, Virginia Annual Conference of The United Methodist Church), the Virginia and Metropolitan Washington, D.C. Synods of the ELCA, the Rev. Dr. G. Wilson Gunn, Jr. (General Presbyter, National Capital Presbytery, PCUSA), Elder Donald F. Bickhart (Stated Clerk, Presbytery of Eastern Virginia, PCUSA), the Virlina District Board—Church of the Brethren, Inc., and the Mid-Atlantic II Episcopal District of the African Methodist Episcopal Zion Church, by counsel, submit this brief as *amici curiae*, in support of the position advanced on appeal by the Appellant Protestant Episcopal Church in the Diocese of Virginia ("Diocese").[1]

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[1] The *Amici* are submitting an identical brief in support of the Appeal of The Episcopal Church, Record No. 090683, which seeks review of the same Circuit Court decisions.

SUMMARY OF INTEREST OF THE *AMICI*

The *amici* listed above are a diverse group of national, regional, and state denominational entities and religious communities. They join as *amici* in this case because Va. Code § 57-9 unconstitutionally (and unnecessarily) interferes with religious freedom interests secured by the First Amendment and recognized in a long line of U.S. Supreme Court cases that preclude any arm of state government from becoming entangled in questions of religious doctrine, polity, and practice. Specifically, § 57-9:

(1) interferes with a church's constitutional right to adopt and apply it own rules of self-governance, free from state interference, by displacing the church's property ownership and voting rules with the legislature's own construct;

(2) adopts statutory criteria that are inherently religious, thereby compelling civil courts to conduct a "searching and therefore impermissible inquiry into church polity" (*Serbian Orthodox Diocese v. Milivojevich,* 426 U. S. 696, 723 (1976)); and

(3) discriminates against and among churches—impeding the use of trust provisions by churches alone, and expressing a frank bias against "hierarchical" or "connectional" denominations.

The *amici* stand together on these issues because, notwithstanding their diversity, they all recognize that Va. Code § 57-9 is antithetical to religious autonomy. Each of the *amici* comes from a specific faith tradition, and each has a view toward church property ownership that is informed by their individual structures and roles, reflecting faith-based differences in the polity (internal structure and allocation of responsibility) of their denominations.

Among the *amici* are entities representing the most common patterns of church government—hierarchical, connectional, and congregational—reflecting the self-understandings of each particular group of believers about their relations with each other, their leaders, and their God. These beliefs are rooted in their diverse interpretations of Scripture over centuries. That they call themselves Methodists, Lutherans, Baptists, or members of any other religious group, reflects a personal choice to be in a covenantal or communal relationship with others who share their respective beliefs and commitments.[2]

Given their differing polities, the *amici* place differing emphases on the constitutional infirmities of Va. Code § 57-9. The *amici* rooted in the

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[2] A full listing of all of the *amici* and a more detailed statement of their interests in this matter is appended as an Addendum to this Brief.

Methodist tradition, for example, have used trust provisions in their governing documents—provisions which the U.S. Supreme Court has held civil courts are "bound" to enforce, *Jones v. Wolf*, 443 U.S. 595, 606 (1979), but which are futile in the face of Va. Code § 57-9. Indeed, Methodism's founder, John Wesley, first caused trust clauses to be inserted in the deeds of all local church properties more than 250 years ago. He did so as a means of reinforcing the *doctrinally rooted* practice of having bishops, not congregations, control the appointment of pastors. John Leo Topolewski, *Mr. Wesley's Trust Clause: Methodism in the Vernacular*, in METHODIST HISTORY, vol. XXXVII, no. 3, pp. 144-45 (Yrigoyen, Jr., Charles, ed. 1999).[3]

The Lutheran *amici*, on the other hand, are more focused on the need protect the integrity of *ecclesiastical* *voting* procedures that Lutherans have designed to apply precisely when local church members wish to disaffiliate from the denomination but seek to retain the church property. Described in some detail below, these voting procedures stand to be displaced by the state-imposed voting rules set forth in Va. Code § 57-9.

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[3] For Wesley, maintaining the bishops' appointment prerogative helped reinforce the crucial Methodist principles of "connectionalism" and "itineracy." *Id*. Yet, if the local church trustees had unfettered control of the church property, that control could extend to the pulpit as well, giving the local church the ability to exclude the bishop's pastoral appointments.

Importantly, the Evangelical Lutheran Church in America ("ELCA") is organized neither as a hierarchical church in the Roman Catholic tradition, nor as a congregational church in the Anabaptist tradition. Rather, it understands itself as a church in which the congregations, synods, and related organizations are "*interdependent* partners sharing responsibly in God's mission." *ELCA Constitution*, Chapter 5 (Principles of Organization), § 5.01 (emphasis added). The ELCA Constitution defines this interdependence in the following terms:

> This church shall seek to function as people of God through congregations, synods, and the churchwide organization, all of which shall be interdependent. *Each part, while fully the church, recognizes that it is not the whole church* and therefore lives in a partnership relationship with the others.

Id., Chapter 8 (*Relationships*), § 8.11 (emphasis added).[4]

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[4] This partnership is neither civil nor legal in nature (*Id*. § 8.17) but represents the covenantal relationship between all the expressions of the one body that is the church. This covenant is fundamental to the denomination's self-understanding:

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

(Continued)

To reinforce the interdependence between local faith communities, regional synods, and the church-wide organization, the ELCA Constitution provides that congregations are not free to leave the denomination on their own volition. Instead, if a congregation wishes to leave the ELCA, it must follow a detailed procedure, which is set forth in both the denomination's and the congregation's constitutions. *Id*., Chapter 9 (*Congregations*) §§ 9.22 and 9.62; Model Congregation Constitution Chapters 6 & 7. This procedure explicitly applies to all congregations and requires:

- adoption of a resolution by a two-thirds (2/3) majority of the "Voting Members" present at a legally called and conducted meeting;
- formal notification of the synodical bishop;
- a mandatory consultation period of at least 90 days;
- written notification by mail to all Voting Members of the congregation, and
- a second vote at a legally called and conducted meeting at which a two-thirds (2/3) majority of the voting members present approve leaving the ELCA.

These ecclesiastical voting procedures reflect over 388 years of Lutheran tradition in America. Unlike many protestant denominations in the

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> in breadth, it expresses the fellowship of believers and congregations in our day.

Id., Chapter 3 (*Nature of the Church*), § 3.02 (emphasis added).

United States, the ELCA is the product of a slow unification of a large number of ethnic-based Lutheran denominations (e.g., Scandinavian, German, Slovak, Baltic), each with its own polity and traditions of self-governance, ranging from the very congregational-oriented Lutheran Free Church (Norwegian), to the more hierarchically structured Augustana Evangelical Lutheran Church (Swedish). For these churches to unite and thrive as a single denomination, many compromises and accommodations had to be made, many of which are reflected in the above-described policies and procedures regarding a congregation's termination of its relationship with the other expressions of the church. That careful balance—a byproduct of every church's constitutional right to develop its own rules of self-governance without state interference—stands to be displaced by the state-imposed voting rules dictated by Va. Code § 57-9.

For other *amici*, Va. Code § 57-9, by itself, poses no significant threat. The Seventh-day Adventist Church, for example, conclusively settled the question of local church property ownership more than a century ago, by requiring that fee simple title to all church properties be held by "conference"-wide (i.e., regional) church corporations, not local congregations. The General Conference of Seventh-day Adventists stands with the other *amici*, however, because it recognizes the ultimate and real danger

posed to *all* religious groups if state legislatures or courts are permitted to establish or resolve ostensibly "civil" rights by reference to inherently religious criteria, or by displacing a church's own faith-based rules of self-governance, or by discriminating among churches. As James Madison understood, "freedom for *all* religion . . . naturally assume[s] that every denomination [will] be *equally* at liberty to exercise and propagate its beliefs," and that "such equality would be impossible in an atmosphere of official denominational preference." *Larson v. Valente,* 456 U.S. 228, 245 (1982).

Finally, any notion that the *amici* are driven by devotion to "hierarchical" forms of church governance is belied by inclusion of the Baptist Joint Committee for Religious Liberty. Mindful of a long history of religious persecution of Baptists, the Baptist Joint Committee finds no incongruity between allegiance to congregational autonomy and joining this brief, which reflects the longstanding Baptist values of religious freedom and separation of church and state. The Committee's "mission is to defend and extend God-given religious liberty for all, furthering . . . the principle that religion must be freely exercised, neither advanced nor inhibited by government." http://www.bjcpa.org/index.php?option=com_content&task=view&id=77&Itemid=136 Having so defined its mission, the Baptist Joint Committee

agrees that the free exercise clause forbids application of a statute such as Code § 57-9, notwithstanding that, in this particular case, its application would make dispositive the majority vote of local church members. If that is to be the rule used to resolve a given dispute, it must be a rule adopted in advance *by the church itself*, not a one-size-fits-all rule imposed by the State.

ASSIGNMENTS OF ERROR

Although the *amici* believe that all of the Assignments of Error contained in the Brief filed by the Diocese are meritorious, the arguments of the *amici* relate to Assignment of Error No. 4 identified in the Brief filed by Diocese. That is, the Circuit Court erred by holding that Va. Code § 57-9 is constitutional, inasmuch as the statute violates both the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution.

QUESTIONS PRESENTED

1. Does Va. Code § 57-9 qualify as a "neutral principle of law" of the sort approved by the U.S. Supreme Court in *Jones*—or is § 57-9 both "generally applicable" and "neutral" under the free exercise rubric mandated by *Employment Division v. Smith*, 494 U.S. 872 (1990)—when the statute

a. interferes with internal church governance by supplanting a church's own property ownership and voting rules with state-imposed rules;

b. cannot be applied without having civil courts conduct a searching inquiry into matters of religious polity and practice; and

c. discriminates against and among religious organizations?

2. Does Va. Code § 57-9 represent the least restrictive means for Virginia to achieve its interest in the peaceful resolution of church property disputes?

STATEMENT OF THE CASE

The *Amici* adopt and incorporate by reference the Statement of the Case set forth in the Brief of the Appellant.

ARGUMENT

I. Va. Code § 57-9 Violates the First Amendment by Displacing a Churches' Own Rules of Self-Governance Concerning Property Ownership and Voting Rights

In 1872, in *Watson v. Jones*, 13 Wall. (80 U.S.) 679 (1872), the United States Supreme Court laid the cornerstone in a long line of holdings that constrain any state's latitude in adopting and applying rules for resolving church property disputes. *See Serbian,* 426 U. S. at 710 ("The principles limiting the role of civil courts in the resolution of religious controversies that incidentally affect civil rights were initially fashioned in *Watson v. Jones"*).

Although writing “before the First Amendment had been rendered applicable to the States through the Fourteenth Amendment,” *id*., core principles of religious freedom nevertheless served as the bedrock of the *Watson opinion*.

Using language that had "a clear constitutional ring," *Presbyterian Church v. Hull Church,* 393 U. S. 440, 449 (1969), the *Watson* Court explained:

> In this country, the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property and which does not infringe personal rights is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. *The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine*, and to create tribunals for the decision of controverted questions of faith within the association *and for the, is unquestioned*. *All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it*.

Watson, 13 Wall. (80 U. S.) at 729 (emphasis added).

In time, the above-described principles of church autonomy were not only grounded in the religion clauses of the First Amendment; they were also recognized as extending to 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." *Kedroff v. St. Nicholas Cathedral,* 344 U. S. 94, 116 (1952).

Finally, there can be no question that this constitutionally protected religious autonomy concerning "matters of church government" encompasses a church's freedom to adopt—and to expect and demand civil court enforcement—of it's own rules of property ownership, provided only that they are "embodied in some legally cognizable form**."** *Jones*, 443 U.S. at 606. Indeed, this was first expressed by the U.S. Supreme Court in *Watson* in 1872. The *Watson* Court recognized that (1) churches, like all other voluntary associations, have an inherent right to adopt rules to ensure that their property will be dedicated perpetually to particular uses, including for the use and support of particular denominations, beliefs, doctrines or practices; and (2) when religious organizations so choose—i.e., choose to impress church property with a trust—then it is "the obvious *duty* of the court, in a case properly made, to see that the property so dedicated is not diverted from the trust which is thus attached to its use." *Id*. at 723 (emphasis added).

A little more than a century later, in *Jones v. Wolf*, *supra*, the U.S. Supreme Court reinforced this conclusion—again holding that state legislatures and courts must respect *and enforce* a religious organization's choice, through the use of commonplace trust provisions, to dedicate local church property to a particular denomination. Thus, even while allowing

states to apply "neutral principles" of property law when resolving church property disputes, the Court re-assured denominations that,

> [u]nder 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**.**

Id. at 606 (emphasis added). *See also id.* at 607-08 ("Most importantly, any rule of majority representation can always be overcome under the neutral principles approach . . . by providing that the church property is held in trust for the general church and those who remain loyal to it.").

Every bit of this precedent is trampled by Va. Code § 57-9. The trust provisions incorporated not merely in The Episcopal Church's governing documents, but also in the Methodist, Presbyterian, and Church of the Brethren denominations' governing documents, are gutted of efficacy—nullified by state statute. In their place, the state purports to resolve ownership rights based on an up-or-down vote, in accordance with voting requirements of the state's own choosing, in utter disregard of the voting procedures that may have been adopted by the churches themselves. Neither

result can possibly be squared with longstanding precedent concerning the religion clauses of the First Amendment.

II. Va. Code § 57-9 Violates The First Amendment By Requiring Civil Courts to Conduct an Extensive Inquiry Into Fundamentally Religious Questions

The *Jones* Court also made clear that, when implementing the "neutral principles" approach, civil courts can*not* constitutionally conduct even a searching *inquiry* into—much less resolve—questions of church *polity*. *Jones,* 443 U.S. at 602, 605. Rather, a state's application of neutral legal principles must be "secular in operation." *Id.* at 603. Indeed, the *Jones* Court explained, that was a "primary advantage" of employing neutral principles. Because the "method relies *exclusively* on objective, *well-established concepts of trust and property law familiar to lawyers and judges*," proper use of the method would "free civil courts *completely* from entanglement in questions of religious doctrine, polity, and practice." *Id.* (emphasis added).

This holding was in keeping with a principle enforced just three years earlier, in *Serbian*, namely, that the principle that " 'commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine' . . . applies with equal force to church disputes over church polity and church administration." *Serbian*, 426 U.S. at 710.

This is the rule because, as the U.S. Supreme Court has frequently recognized, lawsuits that turn on matters of church polity and church administration—no less than matters of dogma and doctrine—are infused with religious significance.

A denomination's choice of church polity is a reflection of its belief that "religious activity derives meaning in large measure from participation in a larger religious community[,]" which is "an organic entity not reducible to a mere aggregation of individuals." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). *See also Reid v. Gholson*, 229 Va. 179, 189, 327 S.E.2d 107, 113 (1985) (a church's "internal governance" depends "upon matters of faith and doctrine"); *Bowie v. Murphy*, 271 Va. 127, 133, 624 S.E.2d 74, 78 (2006) ("issues of church governance . . . are unquestionably outside the jurisdiction of the civil courts"). Thus, it matters not that the Circuit Court may have refrained from passing upon a question of pure religious "dogma." The Constitution is violated even when, as in this case, a state statute's very interpretation or application requires a "searching and therefore impermissible inquiry into church polity." *Serbian,* 426 at 723.

There can be little doubt that these principles are violated by Va. Code § 57-9. A statute does not remotely qualify as *"secular* in operation"

when it compels a civil court, as happened here, to conduct a five-day trial, probing deeply into the ecclesiastical structures and relationships of a wide array of religious groups, in order to determine

- which of them "qualifies"—by the state's calculus—as a "church" or "religious society";
- whether any of them has experienced "discord" of a "magnitude" sufficient—from the state's perspective—to give rise to a "division"; and
- whether any such "division" can be seen—through the state's eyes—as having caused the original "church" to grow a "branch,"
    - which has formed an "alternative polity," and
    - to which a defecting congregation has voted to become "attached."

That this is the crux of the inquiry required by Va. Code § 57-9 is self-evident from the statute's express terms. Given the language of the statute, the Circuit Court itself defined the dispositive inquiry as follows:

> This matter requires the resolution of four questions:
>
> First, what are the definitions of "*church*" and "*religious society*," as those terms are used in 57-9(A), and *do either of these terms apply to the Protestant Episcopal Church in the Diocese of Virginia [hereinafter "Diocese"], the Protestant Episcopal Church in the United States of America, [hereinafter "ECUSA"] or to the Anglican Communion*?

> Second, what is the definition of "*attached*," as that term is used in 57-9(A), and does the term apply to the congregations that are the plaintiffs in this litigation [hereinafter "CANA Congregations"], in that they are *"attached" to the Diocese, the ECUSA, or the Anglican Communion*?
>
> Third, what is the definition of "*branch*," as that term is used in 57-9(A), and are any of the following entities--the *Convocation of Anglicans in North America [hereinafter "CANA"], the American Arm of the Church of Uganda, the Church of Nigeria, or the Anglican District of Virginia [hereinafter "ADV"]-- "branches" of the Diocese, the ECUSA, or the Anglican Communion*?
>
> Fourth, and perhaps most importantly, what is the definition of "*division*," as that term is used in 57-9(A), and *has such a "division" occurred in a "church or religious society*" to which the CANA Congregations were *attached*?

JA 3857 (emphasis added).

The mere recitation of these issues leaves no doubt that the criteria imposed by § 57-9 bear no resemblance to "objective, well-established concepts of trust and property law familiar to lawyers and judges." *Jones,* 443 U.S. at 603. Nor is there any room to pretend, as the Commonwealth argued below, that the judicial role in resolving these questions was "straightforward" or "secular" in operation. On the contrary, over the course of the five-day trial, the Circuit Court was given an "account of key events that have occurred within *all levels* of the Anglican Communion," concerning an "internal conflict" and "profound" doctrinal discord that had "been brewing for many years." JA 3859.

Furthermore, § 57-9 is so hopelessly infused with religious concepts that the Circuit Court received testimony from, of all things, experts on church polity and church history. Specifically, the Court received expert testimony on such matters as American religious history (Dr. Mullin, General Theological Seminary and Dr. Valeri, Union Theological Seminary); Virginia church history (Dr. Mullin and Dr. Irons, Elon University); and Episcopal Church polity and the Anglican Communion (Dr. Douglas, Episcopal Divinity School). The trial court conscientiously absorbed this testimony; its summary of the experts' views on church history and polity spans 15 pages of the Circuit Court's original letter opinion regarding the applicability of § 57-9. JA 3904-18.

Moreover—and astonishingly—this testimony from experts on religious matters was received not to resolve an issue of fact, which would have been bad enough. Rather, by the Circuit Court's own account, the expert testimony on religious matters was sifted and weighed in order "to assist the Court in its obligation to *interpret* 57-9." JA 3918 (emphasis added). When the very *meaning* of a *state's* statute cannot be ascertained without consulting experts on *religion,* that is a sure sign the statute has failed to "free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Jones,* 443 U.S. at 603.

In addition, since § 57-9 was enacted in 1867, the trial court felt duty-bound, in assessing legislative intent, to compare the present-day discord in the Anglican Communion with the "great divisions" within "the Methodist and Presbyterian churches that prompted the passage of 57-9." JA 3938. Of course, no reliable comparison can be made without a record, so detailed expert testimony regarding the polity and history of those other denominations (which, of course, were not before the Court) was received as well. *See, e.g.,* JA 3909-11.

In the end, the Court wrote an elaborate opinion that spanned centuries, crossed continents, and otherwise probed deeply into the ecclesiastical structures and relationships of a wide array of religious entities—all in order to determine which of them "qualifies" as a "church" or "religious society," whether any of them has experienced "discord" of a "magnitude" sufficient to give rise to a "division," and whether any such "division" caused the original "church" to grow a "branch," which formed an "alternative polity," to which the defecting congregations had become "attached."

By any measure, this sort of inquiry is the furthest thing from the "neutral principles" approach approved in *Jones* or allowed by *Serbian*. It was, instead, an elaborate inquiry that was fundamentally "ecclesiastical in its character—a matter over which the civil courts exercise no jurisdiction—

a matter which concern[ed] theological controversy, church discipline [and] ecclesiastical government . . . ." *Watson*, 13 Wall. (80 U. S.) at 733. As the U.S. Supreme Court recognized long ago in *Watson* (and reinforced with a Constitutional foundation in *Serbian*):

> [I]t is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may and must be examined into with minuteness and care, for they would become in almost every case the criteria by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, would open the way to all the evils which we have depicted as attendant upon the doctrine of Lord Eldon, and would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions.

Id. at 733-34.

III. Va. Code § 57-9 Violates The Free Exercise Clause Because it is Neither "Generally Applicable," Nor "Neutral," and Is Not the "Least Restrictive Means" of Serving a Compelling State Interest

Va. Code § 57-9 bears no resemblance to any generally applicable principle of property law. On the contrary, and purportedly for the entirely illegitimate purpose of "protecting" local congregations from "a hierarchical church's constitution or canons," JA 3903, the statute erects unique rules of decision for church property disputes alone—rules that inevitably draw civil courts into a theological thicket, and that plainly favor certain types of denominations over others.

The foregoing discussion demonstrates that employing Va. Code § 57-9 to resolve church property disputes is at odds with the neutral principles approach approved in *Jones*. The constitutional infirmity of the statute can be seen just as clearly, however, by applying the U.S. Supreme Court's more recent decision in *Smith*, *supra*, which did not involve church property, but which establishes a clearly discernable, irreducible floor for a state statute to withstand scrutiny under the Free Exercise Clause.

In *Jones*, the U.S. Supreme Court held that it was constitutionally permissible for states to resolve church property disputes by applying the same "neutral principles" of trust or property law that would control in a purely secular case. *Jones*, 443 U.S. at 602-03. Distinctly, but somewhat similarly, *Smith* held that an individual's Free Exercise rights are generally not implicated by the application of "neutral" laws of "general applicability." *Smith*, 494 U.S. at 880. A common theme of both decisions is that, subject to some very important caveats,[5] churches and individual religious actors may generally be required to play by the same rules as everyone else.

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[5] For example, although neutral principles of trust and property law may generally be used to resolve "church property disputes," the First Amendment simultaneously "requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." *Jones*, 443 U.S. at 602. In addition, *Smith* has generally been applied only to laws affecting religiously-motivated conduct

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But the flip-side is equally true, as cases both before and after *Smith* have emphasized. The other side of the coin—which now stands as a baseline test for constitutional validity under the Free Exercise Clause—is that governmental regulations cannot burden or interfere with religious practice or church self-governance unless, at a minimum:

(1) the burden or interference is the incidental effect of a law that is both "neutral" and "generally applicable," *Church of the Lukumi Babalu Aye, Inc. v. Hialeah ("Lukumi"),* 508 U.S. 520, 531-32 (1993); or

(2) when the regulation in question is the "least restrictive means of achieving some compelling state interest." *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 718 (1981).

As explained below, Va. Code § 57-9 fails this test on every count.

A. Va. Code § 57-9 is Not a Law of "General Applicability"

Section 57-9 is not "generally applicable." By its express terms, it applies solely in the context of resolving property disputes involving

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(Continued)

(generally by individuals); it has never been used to justify a purportedly "neutral" law that impedes, supplants or otherwise interferes with matters of internal church governance or polity. *See, e.g., First Born Church of the Living God, Inc. v. Hill*, 481 S.E.2d 221 (Ga. 1997) (code provision regarding annual meetings of non-profit corps couldn't be applied to a church).

"churches" and "religious societies." For that reason alone, it was incumbent upon the defecting congregations or the Commonwealth to establish that the statute is the least restrictive means of achieving a compelling state interest. As explained below (*see* § III.C), no such showing is possible.

The Circuit Court erroneously accepted the Attorney General's argument that § 57-9 met the test of "general applicability" because the General Assembly was purportedly " 'motivated by a non-discriminatory purpose—resolving property disputes quickly and peacefully when a denomination divided . . . .' " JA 4147. Although "neutrality" and "general applicability" are similar, *Lukumi,* 508 U.S. at 531, and "motive" might sometimes shed light a statute's neutrality, *Id.,* 508 U.S. at 532, it does not follow that pure motives can transform a statute that applies solely to church property disputes into a law of "general applicability." As Justice Scalia (the author of *Smith*) explained in his concurring opinion in *Lukumi*:

> The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted[.] . . . Nor, in my view, does it matter that a legislature consists entirely of the purehearted, if the law it enacts in fact singles out a religious practice for special burdens.

Lukumi, 508 U.S. at 558-59 (Scalia, J., concurring).

Equally misplaced was the Circuit Court's observation that "other states . . . have laws regarding the disposition of church property[,]" many of which "single out *specific religious denominations* for special treatment." JA 4147 (emphasis in original). This reasoning fails to recognize the elementary distinction between cases that address "governmental efforts to *benefit* religion" (such as by providing an exemption from generally applicable laws), which are typically addressed under the Establishment Clause, and the very different question presented when legislation is said "to *disfavor* . . . religion," where "the *Free Exercise Clause* is dispositive." *Lukumi,* 508 U.S. at 532. *See also Smith*, 494 U.S. at 877 (the "free exercise of religion means" that government may not "impose special disabilities on the basis of religious views or religious status") (*citing McDaniel v. Paty*, 435 U.S. 618 (1978), *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953), *and Larson*, 456 U.S. at 245). *Cf. id*., 494 U.S. at 890 (the First Amendment allows, but does not require, religious exemptions from neutral laws of general applicability).

There is no question that § 57-9—regardless of motive or design—"disfavors" certain church organizations. In Virginia, secular voluntary associations may hold property through trustees who can be obliged, through trust provisions, to hold the association's property for particular purposes or

uses. In contrast, an unincorporated *religious* association's adoption of such trust provisions have now been pronounced worthless—nullified by the religion-specific provisions of Va. Code § 57-9. Thus, to ensure the continued dedication of their property to propagation of particular religious principles or beliefs, religious associations alone must either convert themselves into corporations or convey title to some "higher" religious authority.

That is a chief and irremediable flaw of § 57-9: it limits the property ownership options for unincorporated religious associations but not for their secular counterparts. The Free Exercise Clause forbids Virginia from drawing such distinctions. *See Lukumi,* 508 U.S. at 532; *Smith*, 494 U.S. at 877; *Falwell v. Miller*, 203 F. Supp. 2d 624, 630-32 (W.D. Va. 2002) (invalidating Virginia's ban on church incorporation because it imposed a burden only on religious organizations).

B. Va. Code § 57-9 is Not "Neutral"

This same prejudice—the legislature's discriminatory nullification of property trusts for unincorporated religious associations—compels the conclusion that Va. Code § 57-9 is no more "neutral" than it is "generally applicable." But the statute fails the neutrality test even more bluntly by discriminating not merely between secular and religious associations, but also among different types of religious associations.

On its face, § 57-9 displays a frank and unconstitutional bias in favor of denominations that adopt polities where congregational autonomy is paramount. The Circuit Court itself highlighted this bias, concluding that § 57-9 "reflect[s] 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*." JA 3903 (emphasis added). Similarly, the Court ruled, whereas § 57-9 "*defers completely* to the *independent* church's constitution, ordinary practice, or custom," the statute *"shows no such deference" to a hierarchical denomination's rules, practices or customs*." *Id*. (emphasis added).

In other words, under § 57-9, if a schism arises in denominations where congregational autonomy is decisive, Virginia's courts must apply the voting rules adopted by the congregation itself in resolving the property dispute between rival factions. Otherwise, state-imposed voting rules will be applied, so as "to protect" local congregants from the result dictated by their own "hierarchical church's constitution or canons," or even by the local church's own organizational documents.

Virginia has no legitimate interest in establishing "voting rights" for church members, let alone imposing state-authored voting regulations on some churches, while "deferring" to another church's "customs." Such

blatant discrimination has long been understood to violate the "clearest command of the Establishment Clause," which "is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244.

The same prohibition against "denominational preferences," however, "is inextricably connected with the continuing vitality of the Free Exercise Clause." *Id*. at 245. A statute cannot possibly qualify as "neutral" under Free Exercise precedent when its express terms discriminate between religions. *Lukumi,* 508 U.S. at 532. Further, by displacing only certain churches' voting rules, the State selectively "lend[s] its power to one or the other side in controversies over religious authority," which is strictly forbidden by the Free Exercise Clause. *Smith*, 494 U.S. at 877.

C. Va. Code § 57-9 Does Not Serve a Compelling State Interest By the Least Restrictive Means

Since § 57-9 is neither "generally applicable" nor "neutral," the statute cannot withstand challenge under the Free Exercise Clause unless it represents "the least restrictive means of achieving some compelling state interest." *Thomas,* 450 U.S. at 718. *See also Lukumi,* 508 U.S. at 531-32. Neither the Commonwealth nor the Appellee congregations can make that case.

All of the foregoing—the statute's use of facially discriminatory and

inherently religious terms that compel civil courts to probe deeply into subjects of profound religious significance—is entirely unnecessary to serve any legitimate state interest. It goes without saying that Virginia has a "legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively." *Jones,* 443 U.S. at 602. Virginia has the power to achieve that interest, however, by the straightforward application of truly neutral, generally applicable principles of property law that bind all other litigants—public or private, religious or secular. Indeed, Virginia courts have employed such principles to resolve church property disputes in other cases, demonstrating that Virginia has no need to apply § 57-9 to achieve its only legitimate state interest, namely, the peaceful and conclusive resolution of property ownership disputes. S*ee, e.g., Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980), *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 201 S.E.2d 752 (1974).

CONCLUSION

For all of the foregoing reasons, the *amici* respectfully urge the Court to reverse the Circuit Court's decision in this case and hold that Va. Code § 57-9 is unconstitutional because it violates the Free Exercise and Establishment Clauses of the First Amendment to the Constitution of the United States of America.

Respectfully submitted,

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CERTIFICATE

Pursuant to Va. Sup. Ct. Rule 5:27, I hereby certify that on this 21st day of December, 2009:

Fifteen printed copies of the Brief Of *Amici Curiae* have been transmitted by hand for filing in the office of the Clerk of this Court.

Another copy of the brief, in Word format, has transmitted to the Clerk of this Court by email.

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ADDENDUM

DETAILED STATEMENT OF INTEREST OF THE *AMICI*

The *Amici* are well-suited to emphasize the points outlined in this brief. Several are (or are associated with) "hierarchical" or "connectional" denominations, whose property interests are most at risk if the constitutionality of § 57-9 is affirmed. Many have adopted trust provisions in their governing documents that the U.S. Supreme Court has recognized not only as perfectly legitimate mechanisms for protecting a hierarchical church's interest in local church property, but as mechanisms which civil courts are "bound" to enforce, even in states that have adopted the "neutral principles" approach to resolving church property disputes. *Jones*, 443 U.S. at 606.

Methodist *Amici*

For example, trust provisions of the type that are imperiled by the Circuit Court's interpretation of § 57-9 have been used by Methodist churches since Methodism's founding by John Wesley. More than 250 years ago, Wesley caused trust clauses to be inserted in the deeds of all local church properties as a means of reinforcing the *doctrinally rooted* practice of having bishops, not congregations, control the appointment of pastors. John Leo Topolewski, *Mr. Wesley's Trust Clause: Methodism in the Vernacular*, in METHODIST HISTORY, vol. XXXVII, no. 3, pp. 144-45 (Yrigoyen, Jr.,

Charles, ed. 1999). For Wesley, maintaining the bishops' appointment prerogative helped reinforce the crucial Methodist principles of "connectionalism" and "itineracy." *Id*. Yet, if the local church trustees had unfettered control of the church property, that control could extend to the pulpit as well, giving the local church the ability to exclude the bishop's pastoral appointments.

Given this perspective, the *amici* include the following Methodist entities:

1) **General Council on Finance and Administration of The United Methodist Church ("GCFA").** The General Council on Finance and Administration of the United Methodist Church ("GCFA") is a national agency of The United Methodist Church. The United Methodist Church is one of the largest religious denominations in the United States with more than eight million members, 43,000 clergy, and 35,000 local churches. It also has more than a million members outside the United States and performs mission work in over 165 countries. Under United Methodist Church polity, GCFA is the national agency charged with protecting the legal interests of the denomination. In that role, GCFA is called on to assist in protecting the denomination's property interests in civil courts. In particular, GCFA seeks to enforce the provisions of United Methodist ecclesial law requiring that all

local church property be held in trust for the denomination. Thus, GCFA has a strong interest in this case, where the right of a denomination to enforce such property interests is at issue.

2) **The Rt. Rev. Charlene Kammerer (Bishop) and W. Clark Williams (Chancellor), Virginia Annual Conference Of The United Methodist Church.** Bishop Kammerer is the Presiding Bishop of the "Annual Conference" of The United Methodist Church that oversees all local United Methodist congregations in Virginia. As the episcopal leader of the Virginia Conference, it is Bishop Kammerer who ministers to congregations whose members and clergy may be struggling with whether to remain part of the Conference or the denomination, and to ensure that, whatever their ultimate decision, the trust and related property provisions in the United Methodist Book of Discipline are respected and upheld. Mr. Williams is the Conference's Chancellor, who is charged by the Book of Discipline to serve as legal counsel to the Bishop and to protect the legal and property interests of the Conference.

3) **African Methodist Episcopal Zion Church ("AME Zion Church") and African Methodist Episcopal Church ("AME Church").** The AME Zion Church and the AME Church are distinct, autonomous denominations, each of which was established in the late 18th century. Although the found-

ers of the AME Zion and AME denominations chose to leave what is now known as The United Methodist Church, they carried with them, virtually intact, the doctrines and polity established by John Wesley. Thus, the Books of Discipline of both of these historic African American denominations, like the Discipline of The United Methodist Church, include provisions that require that all local church property be held in trust for the denomination as a whole.

4) **Mid-Atlantic II Episcopal District, AME Zion Church.** The Mid-Atlantic II Episcopal District of the AME Zion Church, under the episcopal leadership of Bishop Warren M. Brown, oversees three "Annual Conferences" that have congregations located in Virginia, namely, the Virginia Conference, the Virginia-East Tennessee Conference, and the Philadelphia-Baltimore Conference. Bishop Brown can speak for all of the African Methodist Episcopal Zion Churches in The Commonwealth of Virginia and his pronouncements are binding on the membership of its congregations. Like other Methodist denominations that trace their lineage to John Wesley, it is central to AME Zion polity that local churches hold their property in trust for the denomination as a whole. Recently, in the neighboring state of Maryland, Bishop Brown and the AME Zion Church—after a 10-year court battle—recovered the real property of what had been the denomination's

single largest congregation, which seceded from the denomination in 1999 but sought to retain all church property, notwithstanding trust provisions in the AME Zion *Discipline* that are functionally identical to those endorsed as enforceable by the United States Supreme Court in *Jones*. *See From the Heart Church Ministries, Inc. v. Philadelphia-Baltimore Annual Conference*, 964 A.2d 215 (Md. App. 2009) (explaining that the "Supreme Court in *Jones* noted the means by which parties to a church property dispute could *ensure* control over property in the event of a schism," including having "'the constitution of the general church . . . recite an express trust in favor of the denominational church'") (*quoting Jones*, 443 U.S. at 606) (emphasis added).

Baptist

5) **The Baptist Joint Committee for Religious Liberty.** The Baptist Joint Committee for Religious Liberty is supported by the Alliance of Baptists, the Seventh Day Baptist General Conference, the Religious Liberty Council, the Progressive National Baptist Convention, the North American Baptist Conference, the National Missionary Baptist Convention, the National Baptist Convention, USA, Inc., the National Baptist Convention of America, the Cooperative Baptist Fellowship, the Baptist State Convention of North Carolina, the Baptist General Convention of Texas, the Baptist

General Convention of Missouri, the Baptist General Conference, the Baptist General Association of Virginia, and the American Baptist Churches USA. Mindful of a long history of religious persecution of Baptists—the Baptist Joint Committee for Religious Liberty joins this brief in support of the longstanding Baptist values of religious freedom and separation of church and state. The Committee's "mission is to defend and extend God-given religious liberty for all, furthering the Baptist heritage that champions the principle that religion must be freely exercised, neither advanced nor inhibited by government." http://www.bjcpa.org/index.php?option=com_content&task=view&id=77&Itemid=136 The Baptist Joint Committee agrees that the free exercise clause forbids application of a statute such as Code § 57-9, notwithstanding that, in this particular case, its application would make dispositive the majority vote of local church members. If that is to be the rule used to resolve a given dispute, it must be a rule adopted in advance by the church itself, not a rule imposed by the State.

Presbyterian *Amici*

In reliance upon the Supreme Court's holding in *Jones*, the Presbyterian Church (U.S.A.) and its related judicatories long ago amended their governing documents to include provisions to "ensure that . . . the faction

loyal to the hierarchical church will retain the church property" in the event of a "division." *Jones,* 443 U.S. at 606. Having been assured by the U.S. Supreme Court that "civil courts will be bound to give effect" to such provisions, *id*., the Presbyterian *amici* are vitally interested in the Court's evaluation of the constitutionality of a state statute that purports to supplant "the result indicated by the parties" before any "division" occurred. *Id*.

Given their longstanding support of the trust principles that bind local church and denomination, the Presbyterian *amici* include the following:

6) **Gradye Parsons, the Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.).** The Presbyterian Church (U.S.A.) ("PCUSA") is a national Christian denomination with nearly 2.3 million members in more than 11,200 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. It is organized through an ascending series of organizations known as church sessions, presbyteries, synods, and, ultimately, a general assembly. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. That said, the General Assembly is the highest legislative and interpretive body of the denomination, and the

final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

7) **The Rev. Dr. G. Wilson Gunn, Jr. (General Presbyter, National Capital Presbytery, PCUSA) and Elder Donald F. Bickhart (Stated Clerk, Presbytery of Eastern Virginia, PCUSA).** The Rev. Dr. Gunn is the senior administrative officer in the PCUSA's National Capital Presbytery. Elder Bickhart is the elected official responsible for carrying out ecclesiastical functions in the PCUSA's Presbytery of Eastern Virginia. The National Capital Presbytery contains 109 congregations with 34,000 members. Fifty-one of those congregations are located in the Virginia counties of Loudoun, Fairfax, Arlington, Prince William and Fauquier. The National Capital Presbytery and its predecessor presbyteries have vigorously defended the principle of beneficial interest throughout their history, understanding it to be central to Presbyterian Church Order that local churches hold their property in trust for the larger denomination as a whole. The Presbytery of Eastern Virginia contains 63 congregations, with 17,824 members, located in the Southeastern and Eastern Shore parts of Virginia. Neither of these Presbyteries claims to speak for all Presbyterians within their bounds. Nor are their pronouncements binding on the membership of

their congregations. However, their statements are considered worthy of the respect and prayerful consideration of all the presbytery's members.

Lutheran *Amici*

Lutheran organizations have joined this brief principally to protect the integrity of *ecclesiastical* (as opposed to state-imposed) *voting* procedures that Lutherans designed to apply when local church members wish to disaffiliate from the denomination but retain the church property.

8) **Evangelical Lutheran Church in America ("ELCA").** The ELCA is the largest Lutheran denomination in the United States, with 4.7 million members organized into 10,470 congregations.[6] Importantly, the ELCA is organized *neither as a hierarchical church* in the Roman Catholic tradition, *nor as a congregational church* in the Anabaptist tradition. Rather, it understands itself as a church in which the congregations, synods, and related organizations are "*interdependent* partners sharing responsibly in God's mission." *ELCA Constitution*, Chapter 5 (Principles of Organization), § 5.01 (emphasis added).

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[6] The ELCA is a member church in the World Lutheran Federation, a federation of Lutheran churches in 78 countries with a membership of over 68.3 million worldwide.

The ELCA Constitution defines this interdependence in the following terms:

> This church shall seek to function as people of God through congregations, synods, and the churchwide organization, all of which shall be interdependent. *Each part, while fully the church, recognizes that it is not the whole church* and therefore lives in a partnership relationship with the others.

Id., Chapter 8 (*Relationships*), § 8.11 (emphasis added). This partnership is neither civil nor legal in nature (*Id*. § 8.17) but represents the covenantal relationship between all the expressions of the one body that is the church. This covenant is fundamental to the denomination's self-understanding:

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

Id., Chapter 3 (*Nature of the Church*), § 3.02 (emphasis added).

To reinforce the interdependence between local faith communities, regional synods, and the churchwide organization, the ELCA Constitution provides that congregations are not free to leave the denomination on their own volition. Instead, if a congregation wishes to leave the ELCA, it must

follow a detailed procedure which is set forth in both the denomination's and the congregation's constitutions. *Id*., Chapter 9 (*Congregations*) §§ 9.22 and 9.62; Model Congregation Constitution Chapters 6 & 7. This procedure explicitly applies to all congregations and requires:

- adoption of a resolution by a two-thirds (2/3) majority of the "Voting Members"[7] present at a legally called and conducted meeting;
- formal notification of the synodical bishop;
- a mandatory consultation period of at least 90 days;
- written notification by mail to all Voting Members of the congregation, and
- a second vote at a legally called and conducted meeting at which a two-thirds (2/3) majority of the voting members present approve leaving the ELCA.

The foregoing is the process an ELCA congregation must follow simply to secede; if it is joining a non-Lutheran church body *and also* desires to take its property with it, then that congregation must also receive

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[7] ELCA polity recognizes four distinct types of membership in its congregations: (1) Baptized Members, (2) Confirmed Members, (3) Voting Members, and (4) Associate Members. ELCA MODEL CONSTITUTION CHAPTER 8 (*MEMBERSHIP*). Each classification has different requirements, but only "Voting Members" are entitled to vote on the question of a congregation leaving the ELCA. In addition—and in contrast to the secular standard imposed by Va. Code § 57-9—there is no age requirement to be a "Voting Member" in an ELCA congregation, and many Virginia congregations have Voting Members who are under the age of 18.

synodical approval. (Similarly, synod council approval is required if the congregation was previously a member of the Lutheran Church in America (a predecessor body of the ELCA), or if it was founded by the ELCA, regardless of the intended disposition of the church property.)[8]

9) **<u>The Virginia and Metropolitan Washington, D.C. Synods of the ELCA</u>.** Joining their denomination as *amici* on this brief are two of the 65 Synods in the ELCA. The Virginia Synod has 166 congregations located throughout most of Virginia. The Metropolitan Washington, D.C. Synod has 75 congregations, 35 of which are located in Arlington, Fairfax, Loudoun and Prince William counties, as well as the cities of Alexandria, Fairfax and Falls Church. The vast majority of the ELCA congregations in Virginia are unincorporated, and their property is held by trustees appointed pursuant to Virginia Code § 57-8. Accordingly, the Virginia and Metropolitan Washing-

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[8] The above-described ecclesiastical procedures reflect over 388 years of Lutheran history and tradition in America. Unlike many protestant denominations in the United States, the ELCA is the product of a slow unification of a large number of ethnic-based Lutheran denominations (e.g., Scandinavian, German, Slovak, Baltic), each with its own polity and traditions of self-governance, ranging from the very congregational-oriented Lutheran Free Church (Norwegian), to the more hierarchically structured Augustana Evangelical Lutheran Church (Swedish). For these churches to unite and thrive as a single denomination, many compromises and accommodations had to be made, many of which are reflected in the above-described policies and procedures regarding a congregation's termination of its relationship with the other expressions of the church.

ton, D.C. Synod will be directly affected by this Court's ruling on the constitutionality of Virginia Code § 57-9.

Church of the Brethren

10) **Virlina District Board—Church of the Brethren, Inc.** The Virlina District of the Church of the Brethren encompasses approximately 90 congregations and fellowships, with 11,000 members, mostly in Virginia, but with additional congregations in North Carolina and West Virginia. The Church of the Brethren's organizational documents expressly provides:

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

Manual Of Organization And Polity, Ch. VI.

Furthermore, Church of the Brethren polity expressly provides for the disposition of church property when a local congregation opts to withdraw from the denomination:

> If a congregation . . . attempts by either majority or unanimous vote to withdraw from the Church of the Brethren district in which it is located or otherwise ceases to exist or function as a congregation of the Church of the Brethren, any property that it may have shall be within the control of the district board and may be held for the designated purposes or sold or disposed of

> in such a manner as the district board, in its sole discretion, may direct.

In short, like its Methodist counterparts, the Church of the Brethren, as authorized by *Jones*, has expressly imposed a trust in the denomination's favor on all local church property, and has specifically provided that a withdrawing congregation—even by unanimous, much less a simple majority, vote—cannot extinguish that trust.

Seventh-day Adventist Church

11) **<u>The General Conference of Seventh-day Adventists</u>.** The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church, a denomination with more than 10 million members worldwide, and 41,000 congregations. The Seventh-day Adventist Church conclusively settled the question of local church property ownership in the 1800s, by requiring that all church properties must held in fee simple, not by local congregations, but by "conference"-wide (i.e., regional) church corporations. For this reason, Va. Code § 57-9, in itself, cannot impair the free exercise rights of Seventh-day Adventists.

Nonetheless, the General Conference of Seventh-day Adventists stands with the other *amici* who have joined this brief because it recognizes the ultimate and real danger posed to *all* religious groups if state legislatures or courts undertake to establish or resolve property or contractual

rights by reference to inherently religious criteria, by displacing a church's own faith-based rules of self-governance, or (worst of all) by discriminating among churches. As James Madison understood, "freedom for *all* religion . . . naturally assume[s] that every denomination [will] be *equally* at liberty to exercise and propagate its beliefs," and that "such equality would be impossible in an atmosphere of official denominational preference." *Larson*, 456 U.S. at 245.