Record No. 090682

# In the Supreme Court of Virginia

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA, APPELLANT

*v.*

TRURO CHURCH, *ET AL.*, APPELLEES

## BRIEF FOR APPELLEES CANA CONGREGATIONS


GORDON A. COFFEE (VSB #25808)
gcoffee@winston.com
GENE C. SCHAERR
gschaerr@winston.com
STEFFEN N. JOHNSON
sjohnson@winston.com
ANDREW C. NICHOLS (VSB #66679)
anichols@winston.com
*Winston & Strawn LLP*
*1700 K Street N.W.*
*Washington, D.C. 20006*
*(202) 282-5000 (telephone)*
*(202) 282-5100 (facsimile)*

*Counsel for Truro Church and its Trustees The Falls Church, Church of the Apostles, and Church of the Epiphany*

SCOTT J. WARD (VSB #37758)
sjw@gg-law.com
*Gammon & Grange, P.C.*
*8280 Greensboro Drive, 7th Floor*
*McLean, VA 22102*
*703-761-5000 (telephone)*
*703-761-5023 (facsimile)*

*Counsel for The Falls Church*

GEORGE O. PETERSON (VSB #44435)
gpeterson@sandsanderson.com
TANIA M. L. SAYLOR
tsaylor@sandsanderson.com
*Sands Anderson Marks & Miller*
*1497 Chain Bridge Road, Suite 202*
*McLean, VA 22101*
*703-893-3600 (telephone)*
*703-893-8484 (facsimile)*

*Counsel for Truro Church and Trustees*

MARY A. MCREYNOLDS
marymcreynolds@mac.com
*Mary A. McReynolds, P.C.*
*1050 Connecticut Ave., N.W., 10th Fl.*
*Washington, D.C. 20036*
*(202) 429-1770 (telephone)*
*(202) 772-2358 (facsimile)*

*Counsel for Church of the Apostles, Church of the Epiphany, St. Margaret's Church, St. Paul's Church, and St. Stephen's Church*


*Additional counsel listed on inside cover*

JAMES A. JOHNSON
jjohnson@semmes.com
PAUL N. FARQUHARSON
pfarquharson@semmes.com
SCOTT H. PHILLIPS
sphillips@semmes.com
*Semmes, Bowen & Semmes, P.C.*
*25 South Charles Street, Ste. 1400*
*Baltimore, Maryland 21201*
*(410) 539-5040 (telephone)*
*(410) 539-5223 (facsimile)*

*Counsel for The Falls Church*

JAMES E. CARR (VSB #14567)
northvajim@aol.com
*Carr & Carr*
*44135 Woodbridge Parkway, Ste. 260*
*Leesburg, VA 20176*
*703-777-9150 (telephone)*
*703-726-0125 (facsimile)*

*Counsel for Church of Our Savior at Oatlands*

E. ANDREW BURCHER (VSB #41310)
eaburcher@thelandlawyers.com
*Walsh, Collucci, Lubeley, Emerick & Walsh, P.C.*
*4310 Prince William Pkwy., Ste. 300*
*Prince William, VA 22192*
*703-680-4664 ext. 159 (telephone)*
*703-680-2161 (facsimile)*

*Counsel for Church of the Word, St. Margaret's Church, St. Paul's Church, and their Related Trustees*

R. HUNTER MANSON (VSB #05681)
manson@kaballero.com
*P. O. Box 539*
*876 Main Street*
*Reedville, VA 22539*
*804-453-5600 (telephone)*
*804-453-7055 (facsimile)*

*Counsel for St. Stephen's Church*

## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... iii

GLOSSARY ..... viii

INDEX OF CIRCUIT COURT LETTER OPINIONS ..... viii

INTRODUCTION AND SUMMARY OF ARGUMENT ..... 1

STATEMENT OF FACTS AND OF THE CASE ..... 7

ARGUMENT ..... 7

I. The Circuit Court Properly Refused To Add Conditions To § 57-9 That Would Nullify The Congregational Voting Right. ..... 7

A. There is not one fixed set of "neutral principles." ..... 8

B. Sections 57-9 and 57-15 govern distinct circumstances. ..... 9

C. Reading the § 57-15 factors into § 57-9 would gut § 57-9's voting requirements and the principle of majority rule. ..... 11

D. The circuit court did consider ownership. ..... 12

II. The Circuit Court Correctly Held That The Diocese Could Not Be The Beneficiary Of Trusts In Ordinary Congregational Property. ..... 16

A. The Diocese's assertion that denominational trusts are valid in Virginia is foreclosed by fourteen decisions of this Court and a 1996 opinion of the Attorney General. ..... 17

B. Even if Virginia law permitted denominations to hold beneficial interests in local congregational property, that would not change the result. ..... 19

C. Virginia law on denominational trusts is constitutional. 22

III. The Circuit Court Correctly Determined That Section 57-9's Requirements Were Satisfied In This Case. 25

IV. Section 57-9 Neither Burdens The Diocese's Religious Exercise Nor Discriminates Among Denominations. 28

A. The circuit court correctly held that *Jones v. Wolf* does not require deference to a denomination's canons. 29

B. Having to make secular property arrangements that it routinely makes does not substantially burden the Diocese. 30

C. Section 57-9 does not interfere with the "governance" or "polity" of ECUSA or the Diocese. 37

D. The Diocese's other authorities are inapposite. 38

E. Section 57-9 does not discriminate among religions or between religious denominations and secular associations. 42

F. The contention that the Virginia Constitution imposes requirements different from those of the U.S. Constitution has been waived, and in any event is unpersuasive. 47

V. The Circuit Court Rightly Ruled That § 57-9 Effects No "Taking." 47

VI. The Circuit Court Properly Held That The Diocese Was Precluded From Directly Attacking A Final Order In Another Case. 49

CONCLUSION 50

## TABLE OF AUTHORITIES

**Page(s)**

**FEDERAL CASES**

*Allen v. Wright*,
468 U.S. 737 (1984) ..... 46

*American Guidance Foundation, Inc. v. United States*,
490 F. Supp. 304 (D.D.C. 1980) ..... 28

*Corp. of Presiding Bishop v. Amos*,
483 U.S. 327 (1987) ..... 22, 44-45

*Falwell v. Miller*,
203 F. Supp. 2d 624 (W.D. Va. 2002) ..... 23, 33, 46

*GMC v. Tracy*,
519 U.S. 278 (1997) ..... 24

*Heckler v. Matthews*,
465 U.S. 728 (1984) ..... 46

*Hernandez v. Comm'r*,
490 U.S. 680 (1989) ..... 43

*Home Bldg. & Loan Ass'n. v. Blaisdell*,
290 U.S. 398 (1934) ..... 48

*Jones v. Wolf*,
443 U.S. 595 (1979) ..... 4-5, 7-9, 29-31, 35-38, 41, 45

*Kedroff v. St. Nicholas Cathedral*,
344 U.S. 94 (1952) ..... 38-39

*Larson v. Valente*,
456 U.S. 228 (1982) ..... 42-44

*Lemon v. Kurtzman*,
403 U.S. 602 (1971) ..... 40

*Maryland & Va. Eldership v. Church of God at Sharpsburg, Inc.*,
396 U.S. 367 (1969) (Brennan, J., concurring) ..... 9

*Northside Bible Church v. Goodson*,
387 F.2d 534 (5th Cir. 1967) ..... 40

*Presbyterian Church v. Hull Church*,
393 U.S. 440 (1969) ..... 40

*Serbian Orthodox Diocese v. Milivojevich*,
426 U.S. 696 (1976) ..... 39-40

*Texaco, Inc. v. Short*,
454 U.S. 516 (1982) ..... 48

*Watson v. Jones*,
80 U.S. 679 (1871) ..... 36

*Wisconsin v. Yoder*,
406 U.S. 205 (1972) ..... 28, 32

**STATE CASES**

*All Saints Parish Waccamaw v. Protestant Episcopal Church*,
685 S.E.2d 163 (S.C. 2009) ..... 20

*Baber v. Caldwell*,
207 Va. 694, 152 S.E.2d 23 (1967) ..... 15

*Baldwin v. McConnell*,
273 Va. 650, 643 S.E.2d 703 (2007) ..... 47, 49

*Berner v. Mills*,
265 Va. 408, 519 S.E.2d 159 (2003) ..... 21

*Boxwell v. Affleck*,
79 Va. 402 (1884) ..... 17

*Brooke v. Shacklett*,
54 Va. 301 (1856) ..... 17

*City of Newport News v. Elizabeth City County*,
189 Va. 825, 55 S.E.2d 56 (1949) ..... 7

*Davis v. Mayo*,
82 Va. 97 (1886) ..... 17

*Diocese of Southwestern Va. v. Buhrman*,
1977 Va. Cir. LEXIS 4 (Clifton Forge Nov. 28, 1977) ..... 11

*Fifield v. Van Wyck's Ex'r*,
94 Va. 557, 27 S.E. 446 (1897) ..... 17

*Finley v. Brent*,
87 Va. 103, 12 S.E. 228 (1890) ..... 17, 21, 41

*First Methodist Church v. Scott*,
226 So. 2d 632 (Ala. 1969) ..... 40

*Gallego's Ex'rs. v. Attorney General*,
30 Va. 450 (1832) ..... 17

*Globe Furniture Co. v. Trustees of Jerusalem Baptist Church*,
103 Va. 559, 49 S.E. 657 (1905) ..... 17

*Green v. Lewis*, 221 Va.
547, 272 S.E.2d 181 (1980) ..... 3, 8, 10-11, 15, 17

*Halifax Corp. v. First Union Nat'l Bank*,
262 Va. 91, 546 S.E.2d 696 (2001) ..... 12

*Halifax Corp. v. Wachovia Bank*,
268 Va. 641, 604 S.E.2d 403 (2004) ..... 25

*Hoskinson v. Pusey*,
73 Va. 428 (1879) ..... 17

*Jackson v. Fid. & Deposit Co.*,
269 Va. 303, 608 S.E.2d 901 (2005) ..... 10

*Kim v. Douval*,
259 Va. 752, 529 S.E.2d 92 (2000) ..... 49

*Maguire v. Lloyd*,
193 Va. 138, 67 S.E.2d 885 (Va. 1951) ..... 17

*Moore v. Perkins*,
169 Va. 175, 192 S.E. 806 (1937) ..... 17

*Natrella v. Board of Zoning Appeals*,
231 Va. 451, 345 S.E.2d 295 (1986) ..... 22

*Niklason v. Ramsey*,
233 Va. 161, 353 S.E.2d 783 (1987) ..... 50

*Norfolk Presbytery v. Bollinger*,
214 Va. 500, 201 S.E.2d 752 (1974) ..... 3, 8-12, 15-18

*Reid v. Gholson*,
229 Va. 179, 327 S.E.2d 107 (1985) ..... 8-9, 12, 17, 45, 47

*Sustar* v. *Williams*,
263 So. 2d 537 (Miss. 1972) ..... 40

*Tazewell County. Sch. Bd. v. Brown*,
267 Va. 150, 591 S.E.2d 671 (2004) ..... 19

*Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.*,
249 Va. 144, 452 S.E.2d 847 (1995) ..... 17-19

*Trustees of Cave Rock Brethren Church v. Church of the Brethren*,
1976 Va. Cir. LEXIS 58 (Botetourt Co. June 30, 1976) ..... 11

*Unit Owners' Ass'n v. Gillman*,
223 Va. 752, 292 S.E.2d 378 (1982) ..... 24, 46

*Virginia College Bldg. Auth. v. Lynn*,
260 Va. 608, 538 S.E.2d 682 (2000) ..... 47

*Weathers v. Com.*,
262 Va. 803, 553 S.E.2d 729 (2001) ..... 18

**FEDERAL CONSTITUTION**

U.S. Const., Amendment I ..... 5, 7, 28-29, 47

U.S. Const., Amendment V ..... 49

**STATE CONSTITUTION, STATUTES, AND SESSION LAW**

Va. Code § 8.01-428 ..... 50

Va. Code § 55-544.01 ..... 19

Va. Code § 55-544.05(B) ..... 20

Va. Code § 55-544.05(C) ..... 20

Va. Code § 57-3 ..... 12

Va. Code § 57-7 ..... 17-18, 21

Va. Code § 57-7.1 ..... 4, 16-21

Va. Code § 57-9 ..... 1-16, 21-22, 25-31, 33-38, 40-50

Va. Code § 57-9(A) ..... 10-11, 15, 31-32

Va. Code § 57-9(B) ..... 11, 15

Va. Code § 57-15 ..... 3-4, 8-11, 17, 25

Va. Code § 57-16 ..... 17, 23, 31-32

Va. Code § 57-16(C) ..... 21

Va. Code § 57-16.1 ..... 34

1993 Va. Acts, ch. 370 ..... 18

2005 Va. Acts, ch. 772 ..... 19

Va Const. Art. I, § 16 ..... 47

Va. Const. Art. I, § 11 ..... 49

## GLOSSARY

| | |
|---|---|
| ADV | The Anglican District of Virginia |
| CANA | The Convocation of Anglicans in North America |
| CANA Congregations | The nine Appellees, collectively |
| Dennis Canon | Episcopal Church Canon I.7(4) |
| Diocese | The Protestant Episcopal Church in the Diocese of Virginia |
| ECUSA | The Episcopal Church in the United States |
| MEC | Methodist Episcopal Church in the United States |
| MECS | Methodist Episcopal Church South |
| REC | Reformed Episcopal Church |

## INDEX OF CIRCUIT COURT LETTER OPINIONS


| | |
|---|---|
| JA 3853-3938 | Letter Opinion on the Applicability of Va. Code § 57-9(A) (April 3, 2008) |
| JA 3971-3981 | Letter Opinion (May 12, 2008) |
| JA 4120-4168 | Letter Opinion on the Constitutionality of Va. Code § 57-9(A) (June 27, 2008) |
| JA 4169-4182 | Letter Opinion on the Court's Five Questions (June 27, 2008) |
| JA 4246-4261 | Letter Opinion (Aug. 19, 2008) (Contracts Clause) |
| JA 4230-4245 | Letter Opinion (Aug. 19, 2008) (Waiver) |
| JA 4878-4899 | Letter Opinion (December 19, 2008) |

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Diocese's appeal challenges a longstanding policy judgment of the General Assembly—that when a denomination experiences a "division," competing claims to beneficial ownership of congregational property held in trust should be resolved by a neutral principle: majority rule. Applying this rule does not require courts to decide whether the denomination changed its doctrine, or to determine which body is the "true" church. Rather, courts need only make secular determinations: whether a group of congregations separated from a denomination (in a "division") to form a new polity (a "branch"), and whether the votes were valid. That procedure, embodied in Va. Code § 57-9, applies *only* to property held by trustees, *not* to property held by church corporations or officers—forms of ownership routinely used by the Diocese, and by many other denominations in Virginia.

The nine appellees here ("CANA Congregations") are among a broad group of congregations and dioceses who have responded to recent events in the Episcopal Church ("ECUSA") and Diocese of Virginia ("Diocese") by voting to divide from the denomination. Invoking § 57-9, appellees reported their votes in various circuit courts. Unhappy with the results of the votes, ECUSA and the Diocese intervened to challenge § 57-9 and its constitutionality. The judge appointed to hear the consolidated cases, Randy I.

Bellows, rejected those challenges in several painstaking opinions issued after two trials, multiple hearings, and more than 20 rounds of briefing.

The Diocese offers no credible reason to reverse these rulings. Having admitted the existence of a "division," and that the CANA Congregations have joined a "branch" (JA 3938, 4160-61 & n.56), the Diocese's main assertion is that a "division" can satisfy § 57-9 only if effected in a manner consistent with the denomination's "polity." But this Court long ago rejected the view that church property disputes in Virginia must be resolved in accordance with the denomination's internal rules. Nor is deference required here as a matter of statutory interpretation, as § 57-9, in contrast to other parts of Title 57, does not refer to denominational approval or polity. What is more, the extensive, undisputed historical evidence introduced at trial, including 29 court orders approving § 57-9 petitions without any mention of denomination approval (JA 3011-3031), confirms that a "division" does not depend on compliance with the denomination's polity.

Not only is the Diocese's reading of § 57-9 inconsistent with the historical evidence adduced at trial, it "would make 57-9(A) a nullity." JA 3936. As the circuit court noted, if "divisions" were consensual, "there would be little need for a division statute, for churches would simply approve divisions amicably and divide up their property without intervention from secu-

lar institutions of government." *Id.* This is especially true here, as "divisions" within the meaning of ECUSA's polity are geographical redistrictings, and congregations in such "divisions" do not vote.

Lacking any argument based on § 57-9, the Diocese says this case should be governed by the "neutral principles" factors applied under § 57-15 in *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 201 S.E.2d 752 (1974) and *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980). But § 57-9 itself reflects a neutral principle—majority rule. And as the trial court noted:

> *Norfolk* demonstrates a key difference between 57-9 and 57-15: just as 57-9 requires only a majority approval of the congregation in order for the court to determine ownership of property upon a division, 57-15 also originally required *only congregational approval* for a conveyance of property. However, 57-15 was affirmatively amended to include the specific words: "constituted authorities," and "governing body of any church diocese." In contrast, 57-9 contains absolutely no reference to the governing authorities of a church.

JA 3929. Further, neither *Norfolk* nor *Green* addressed "neutral principles" in a § 57-9 case. Both arose when single congregations became "independent" and "free from any affiliation." *Green*, 221 Va. at 550, 272 S.E.2d at 182; *Norfolk*, 214 Va. at 501, 201 S.E.2d at 753-54. Thus, neither congregation voted to join a "branch of the church," as required by § 57-9, or filed a § 57-9 report. And neither case addresses the meaning of "division."

The complaint that the trial court did not consider each *Norfolk/Green* factor also rests on a false premise. Where ownership was disputed, the

court held trials to resolve it. For most property, title was never at issue; the dispute was over the *beneficiary* for whom the Congregations' trustees hold title. But the whole point of § 57-9 is to provide a neutral means—a majority vote—for settling competing claims to property held in trust in the event of a division. Adjudicating which party had a superior interest "*prior* to determining whether a congregation has satisfied the requirement of 57-9(A)" would "deprive it of its independent meaning." JA 4180 (letter op.).

Because the function of § 57-9 is to settle competing trust claims, it makes no difference whether the Diocese could be a trust beneficiary under Va. Code § 57-7.1. But the Diocese cannot claim the benefit of that statute in any event. Nowhere in § 57-7.1 did the General Assembly purport to reverse 14 decisions of this Court, spanning 160 years, barring denominational trusts. Rather, the statute provides that it is "declaratory of existing law." Moreover, the Diocese cannot establish the existence of any transfers or conveyances that would satisfy the statute. It relies not on the expressed intention of the *settlor*, but on its own unilateral declaration that its canons make it the *beneficiary* of trusts in the Congregations' properties.

Nor does the fact that § 57-9 embodies different neutral principles from § 57-15 render it unconstitutional. In *Jones v. Wolf*, 443 U.S. 595, 607 (1979), the U.S. Supreme Court held that "[m]ajority rule" is "consistent with

both the neutral-principles analysis and the First Amendment." As *Jones* explained, state courts may resolve church property disputes—even those involving "hierarchical" churches—by applying "a presumptive rule of majority representation," so long as state law provides some "method of overcoming the majoritarian presumption" through legal arrangements made "before the dispute erupts." *Id.* at 606, 608. Although state law must be "flexible enough to accommodate all forms of religious organization[s]," "the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes. Indeed, 'a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrin[e].'" *Id.* at 602, 603.

As the circuit court held, § 57-9 easily passes muster under *Jones*: It requires only secular analysis, and permits hierarchical churches to avoid majority rule by arranging, before any disputes erupt, to place title to local churches in a church officer or corporation. "*Jones* expressly states that one way in which a religious organization can avoid the presumptive rule of majority representation is to modify its deeds, and describes any burden involved in making such a modification as 'minimal.'" JA 4151-52 (letter op.) (quoting 443 U.S. at 606). And it was stipulated that many denominations in Virginia have availed themselves of these alternative forms of ownership,

placing congregational property beyond § 57-9's reach. JA 3842-48.

In seeking review, the Diocese conceded that "[h]ierarchical churches that choose not to hold property by trustees are not burdened by 57-9(A)." Pet. 27. Indeed, the Diocese itself is one of those churches, as it holds 29 properties in its Bishop's name. Nor does the Diocese offer a valid reason why congregational property cannot be held in other ways. It complains that having to re-title property would "breed suspicion and resentment" by local congregations, but this merely underscores that congregations in the Diocese do not view their property as held in trust for the denomination.

The Diocese nevertheless argues that § 57-9 implicates its right "to control [its] own affairs" (Br. 1) and "discriminates" against it because some of its congregations' property is held by trustees. But this falsely equates a denomination's ability to organize itself as it wishes with its desire to hold property in the form that it wishes. As the circuit court recognized, ECUSA and the Diocese could have "avoided any potential application of 57-9(A)" by "re-titl[ing] their properties." Const. Op. 31. The denomination continues to function with the same leaders, geographic regions, and form of government. Indeed, it readily concedes that "[t]he Church's governing structure and geographical territory have been unaffected" by the CANA Congregations' disaffiliations. ECUSA Br. 10. Thus, the effect of the ruling

below is not to "restructure" the denomination's polity, but to award *property* to congregations that voted to join another branch. And the fact that the CANA Congregations chose one branch over another is a function of the democratic process, not any statutory bias against denominations.

This case is governed by the settled principle that "[t]he wisdom and propriety of [a] statute come within the province of the legislature," even if "there are two sides to the question." *City of Newport News v. Elizabeth City County*, 189 Va. 825, 831, 836, 55 S.E.2d 56, 60, 62 (1949). The Diocese objects to the outcome of the votes under § 57-9, but that cannot justify voiding a longstanding law. The judgment should be affirmed.

## STATEMENT OF FACTS AND OF THE CASE

Our statement of facts and of the case is set forth in our brief in response to the ECUSA appeal.

## ARGUMENT

### I. The Circuit Court Properly Refused To Add Conditions To § 57-9 That Would Nullify The Congregational Voting Right.

In *Jones v. Wolf*, the U.S. Supreme Court held that applying a "rule of majority representation" to property disputes involving a hierarchical church is consistent with "both the neutral-principles analysis and the First Amendment." 443 U.S. at 607. Citing *Jones*, this Court has since held that "the right to reasonable notice" and "the right to an honest count of the

votes . . . are neutral principles of law, applicable not only to religious bodies, but to public and private lay organizations and to civil governments." *Reid v. Gholson*, 229 Va. 179, 189-90, 327 S.E.2d 107, 113 (1985). Since 1867, Virginia has embodied these very neutral principles in § 57-9.

Despite the case law holding that majority rule is a "neutral principle," the Diocese asserts (Br. 13-14) that the trial court failed to follow the "neutral principles analysis" of *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 201 S.E.2d 752 (1974), and *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980). But this view wrongly presumes that the exact same set of "neutral principles" must apply to all church property disputes. Moreover, *Norfolk* and *Green* applied § 57-15, which has critical textual differences from § 57-9 and serves an entirely different purpose.

### A. There is not one fixed set of "neutral principles."

Neither the U.S. Supreme Court nor this Court has stated that one set of "neutral principles" must govern all church property disputes. *Jones* addressed "[t]he neutral-principles method ... as it ... evolved in Georgia," but it did not purport to restrict States to specific "neutral principles." 443 U.S. at 604. The Court merely gave examples of "neutral principles," which it defined as "secular in operation, and yet flexible enough to accommodate

all forms of religious organization and polity." *Id.* at 604.[1] Following *Jones*, *Reid* applied the "neutral principles" of notice and majority rule to protect the right of a congregational majority to vote and to claim ownership of property under § 57-9. 229 Va. at 191, 327 S.E.2d at 115.

**B. Sections 57-9 and 57-15 govern distinct circumstances.**

That the Court in *Reid* articulated different "neutral principles" than in *Norfolk* and *Green* reflects the fact that §§ 57-9 and 57-15 address different circumstances. Section 57-9 resolves competing claims to beneficial ownership of property held by trustees in the event of a denominational or congregational "division." In that circumstance, congregations "attached" to a denomination have a right to "vote" on which "branch" to join, and that vote is "conclusive" of title to such property. By contrast, as ECUSA admits, § 57-15 "address[es] only 'sales' and 'transfers' of title to property, which would not generally occur in the case of a 'division.'" ECUSA Br. 14 n.12.[2] And, in contrast to § 57-9, § 57-15 says nothing about any right to "vote."

---

[1] *Jones* also confirms the validity of a State relying on a "formal title" doctrine (*id.* at 603 n.3), under which courts "determine ownership by studying deeds, reverter clauses, and general state corporation laws," *not* course of dealing. *Maryland & Va. Eldership v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 370 & n.4 (1969) (Brennan, J., concurring).

[2] Indeed, appellants conceded below that they "do not allege a 'conveyance' (or a contract to convey)" (7/13/07 Br. in Opp. to Demurrers 23), and the other events that could implicate § 57-15—encumbrances, land exchanges, and boundary disputes—are not at issue here.

The impetus for *Norfolk's* and *Green's* development of neutral principles comes from language found in § 57-15 but not in § 57-9. The congregation in *Norfolk* invoked § 57-15, which the Court read to "require[] a showing that the property conveyance is the wish of the constituted authorities of the general church." 214 Va. at 503, 201 S.E.2d at 755.[3] But as the circuit court noted, "57-15 was *affirmatively amended* to include the specific words: 'constituted authorities,' and 'governing body of any church diocese,'" whereas "57-9 contains absolutely no reference to the governing authorities of a church." JA 3929. Thus, in advocating that § 57-9 must be read just as § 57-15, the Diocese is asking the Court to "add language to the statute the General Assembly has not seen fit to include," or to "accomplish the same result by judicial interpretation." *Jackson v. Fid. & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005). That is not valid.

Neither *Norfolk* nor *Green* analyzed § 57-9(A), let alone said that the

---

[3] The Court held that the denomination would "have no standing to object to the property transfer" under § 57-15 it if was "unable to establish a proprietary interest in the property." 214 Va. at 503, 201 S.E.2d at 755. The Court thus looked to neutral principles to gauge whether the denomination possessed the requisite proprietary interest. *Id.* at 507. The same is true of *Green*, 221 Va. at 555. The Diocese's assertion that the trial court should have applied neutral principles to determine whether the Diocese had a proprietary interest here thus ignores the fact that those principles served a distinct purpose in *Norfolk* and *Green*—establishing standing to invoke § 57-15—a purpose that has no application here.

specific "neutral principles" set forth for purposes of § 57-15—one of which is "the statutes of Virginia", *Norfolk*, 214 Va. at 505, 201 S.E.2d at 756—would supplant the legislature's stated preference for majority rule in cases of denominational "divisions." As the trial court held—after carefully reviewing the pleadings, briefs, and orders in those cases—those cases "did not involve invocation of 57-9(A)" or any "alleged 'division.'" JA 4174. Nor is this surprising, as both *Norfolk* and *Green* involved one congregation that became "independent," *Norfolk*, 214 Va. at 501, 201 S.E.2d at 753; *Green*, 221 Va. at 549, 272 S.E.2d at 182, not a group of congregations that formed a new "branch." JA 4174.[4]

### C. Reading the § 57-15 factors into § 57-9 would gut § 57-9's voting requirements and the principle of majority rule.

Setting aside the fact that neither *Norfolk* nor *Green* called for engrafting extraneous "neutral principles" onto § 57-9, consideration of those

[4] As the trial court explained (JA 4173 n.2), the circuit court opinions cited by the Diocese (at 14 n.6) did not apply a neutral principles analysis under § 57-9(A). In *Trustees of Cave Rock Brethren Church v. Church of the Brethren*, 1976 Va. Cir. LEXIS 58, *9 (Botetourt Co. June 30, 1976), the disaffiliating church argued that it was "an independent, autonomous congregation and that, pursuant to Code § 57-9, when a division occurs *in such a church* the majority of its members entitled to vote may decide the [property issue]." JA 4027 (emphasis added). The congregation thus relied on what is now § 57-9(B), rather than § 57-9(A). In the same vein, *Diocese of Southwestern Va. v. Buhrman*, 1977 Va. Cir. LEXIS 4 (Clifton Forge Nov. 28, 1977), involved a single congregation that broke away from the Diocese of Southwestern Virginia to become independent. Neither congregation alleged a "division," much less purported to join a "branch."

factors is not needed to clarify any ambiguity in the statute. Quite the contrary, the Diocese's purpose is to *negate* the congregational votes. But a court cannot nullify an otherwise proper congregational vote through consideration of factors not included in the statute.[5] *See Halifax Corp. v. First Union Nat'l Bank*, 262 Va. 91, 99-100, 546 S.E.2d 696, 702 (2001) ("courts cannot ... [adopt] a construction which amounts to holding the legislature did not mean what it has actually expressed"). And as *Reid* illustrates, the role of the court under § 57-9 is not to diminish the conclusiveness of a congregational vote, but rather to ensure that it is conducted fairly. 229 Va. at 192-93, 327 S.E.2d at 115 (approving appointment of a commissioner to oversee a vote); *cf.* Va. Code § 57-3 (directing that majority vote on disposition of glebe land and church property "be conducted at such time and place as the circuit court may prescribe").

**D. The circuit court did consider ownership.**

The Diocese also complains that by not analyzing the *Norfolk* and *Green* "neutral principles," the trial court "ignored the predicate question of whom the property is 'held in trust for'" and gave the CANA Congregations a right "to expropriate property." Br. 14, 2. The implication is that the Con-

[5] Far from contesting the votes here, the Diocese and ECUSA stipulated that the Congregations' reports and exhibits were *prima facie* evidence that the voting requirements of § 57-9 were satisfied. 9/26/08 stipulated order.

gregations invoked § 57-9 as a means of obtaining title to property to which they otherwise had no right. To the contrary, title was rarely at issue. In fact, the deeds submitted below showed that title to all but one parcel[6] was deeded to *trustees appointed by, and acting for, the Congregations.*[7]

For the few parcels where title was disputed, the court held separate trials to adjudicate the dispute—considering not just the deeds but also other indicia of ownership. For example, the Diocese challenged The Falls Church's ownership of its original parcel, claiming that a congregation that had stayed in the Diocese was the true successor under a Colonial-era deed. The court thus held a two-day trial concerning this parcel, ultimately finding that The Falls Church owned it—a finding that was not appealed. JA 4891-98 (letter op.). Moreover, the court heard evidence and took briefing concerning the validity of a corrective deed conveying title to Truro Church. JA 4657-59 (Order). In all other cases, the Diocese did not contest title, instead stipulating that the real property was subject to § 57-9. JA 4902. The Diocese's protest that the trial court failed to consider deeds or

---

[6] For one congregation, the circuit court held that trustees appointed by the Diocese necessarily had to hold title for the benefit of the local congregation. The court thus did not reach the congregation's assertion that it was the intended beneficiary of the trust, as evidenced by a later substitution of trustees appointed directly by the congregation. JA 4886-87 (letter op.).

[7] For example, a parcel for The Falls Church was deeded in 1956 to three named "Trustees of the Falls Church, Falls Church, Virginia." JA 1428.

"whether property [wa]s congregationally-owned" (Br. 4) thus rings hollow.

Appellants' main position below was not that the Congregations' trustees did not own the property, but rather that it had to be used for the denomination's mission. JA 817-18 ¶¶ 67-69; JA 756 ¶ 27. In fact, in purporting to declare a trust in "property *held by or for the benefit of any Parish, Mission, or Congregation*," their own canons recognize the Congregations' interest. JA 946 ("Dennis Canon"), JA 1290 (Diocese Canon 15.1).[8] As these canons state, ECUSA and the Diocese have no interest unless the property is *also* held "by or for the benefit of" the Congregations.

The Diocese's complaint is not that the Congregations have no interest, but instead that they did not prove that they "alone" were the beneficiary. Br. 14. This presumes, of course, that the denomination had an interest. But even if the denomination could unilaterally declare itself to be a beneficiary of congregational property via the "Dennis Canon" (and it cannot), the trial court did not have to adjudicate, *apart from § 57-9*, which party was the superior beneficiary. As the court found, based on extensive historical evidence, the very point of § 57-9 was to provide a simple mechanism—a vote—for resolving competing claims to beneficial owner-

[8] Diocese Canon 12, § 6 also provides for vestries to hold title "to the property of the Church," with "Church" defined elsewhere in the canons as the local congregation. JA 1287-88.

ship generated by divisions. JA 3910-11, 3936, 3938 (letter op.) (discussing the property disputes that preceded enactment of § 57-9). That is why a valid vote is "conclusive as to the title to and control of any property held in trust for such congregation." If the beneficial ownership of the property had to be litigated independently of the vote, the vote would *not* be "conclusive" as to title or control. Indeed, the vote would serve no purpose at all, and § 57-9 would be "deprive[d] ... of its independent meaning." JA 4180.[9]

In sum, § 57-9 does not *displace* the neutral principles approach; it *embodies* that approach. It provides a neutral means of resolving property disputes without the necessity of considering denominational rules, whether one group or another is the "true" church, or whether property is being used consistent with the denomination's "mission." The trial court's careful ruling

---

[9] The lone citation (without analysis) to § 57-9 in *Norfolk* and *Green* was simply to acknowledge that Virginia law "recognizes a distinction between an autonomous congregation and one which is part of a supercongregational or hierarchical denomination in providing for the determination of property rights upon a division." *Norfolk*, 214 Va. at 502, 201 S.E.2d at 755; *Green*, 221 Va. at 555, 272 S.E.2d at 185. And indeed it does. But the authority for this statement was *Baber v. Caldwell*, which observed that *Episcopal* churches are governed by the *first* sentence of § 57-9: "The first sentence of the section relates to churches, such as Episcopal and Presbyterian churches, that are subject to control by super-congregational bodies." 207 Va. 694, 698, 152 S.E.2d 23, 26 (1967). The Diocese's reading of these cases would obliterate the distinction between congregational churches (covered by § 57-9(B)) and denominational churches (covered by § 57-9(A)), by limiting § 57-9's application to the former.

on this issue—entered after much briefing—should be affirmed.

## II. The Circuit Court Correctly Held That The Diocese Could Not Be The Beneficiary Of Trusts In Ordinary Congregational Property.

The Diocese (but not ECUSA) also appeals the ruling that Virginia does not recognize denominational trusts in congregational property. Br. 15-20. *Norfolk* and prior cases held that "trusts for supercongregational churches are invalid" (214 Va. at 507, 201 S.E.2d at 758), and the Diocese concedes that, prior to 1993, Virginia law barred such trusts. Br. 15. Nonetheless, it says a 1993 statutory amendment silently overruled these cases.

As explained below, the Diocese's view is foreclosed by a long line of precedent, by the legislature's statement that the 1993 amendment was "declaratory of existing law," and by post-1993 opinions of this Court and the Attorney General—which the legislature is deemed to be aware of—stating that § 57-7.1 validates only trusts for local churches. But in any case, the circuit court's holding on this issue was unnecessary to the outcome. If the law changed in 1993, that change could not be applied retroactively to deprive the Congregations of property rights under pre-1993 deeds. The Diocese also has not complied with the requirements for establishing a trust even if denominational trusts *are* valid. And § 57-9 provides a "conclusive" resolution of *all* competing claims of beneficial ownership—and would thus apply even if the Diocese had a beneficial interest.

### A. The Diocese's assertion that denominational trusts are valid in Virginia is foreclosed by fourteen decisions of this Court and a 1996 opinion of the Attorney General.

At least ***14*** rulings of this Court issued between 1832 and 1995 hold that § 57-7.1 (or its predecessors) allow trustees to hold most church property *only* for congregations.[10] JA 4180-82. The Court held to this view even after the legislature added the terms "church" and "diocese" to § 57-7 (and "church" and "denomination" to §§ 57-15, 57-16).[11] Thus, when ECUSA passed the Dennis Canon in 1979, its effort to name itself a beneficiary of congregational property was invalid under Virginia law. Still, the Diocese says its trust interest was validated in 1993, when § 57-7.1 replaced § 57-7 and modernized its archaic language. But as the trial court held, 160 years of case law cannot have been *silently overruled* by a law stating: "'this act

---

[10] *Gallego's Ex'rs. v. Attorney General*, 30 Va. 450, 461-62 (1832); *Brooke v. Shacklett*, 54 Va. 301, 312-13 (1856); *Hoskinson v. Pusey*, 73 Va. 428, 431 (1879); *Boxwell v. Affleck*, 79 Va. 402, 407 (1884); *Davis v. Mayo*, 82 Va. 97, 102 (1886); *Finley v. Brent*, 87 Va. 103, 106, 12 S.E. 228, 229 (1890); *Fifield v. Van Wyck's Ex'r*, 94 Va. 557, 560, 27 S.E. 446, 447 (1897); *Globe Furniture Co. v. Trustees of Jerusalem Baptist Church*, 103 Va. 559, 561, 49 S.E. 657, 658 (1905); *Moore v. Perkins*, 169 Va. 175, 179-81, 192 S.E. 806, 808-09 (1937); *Maguire v. Lloyd*, 193 Va. 138, 144, 67 S.E.2d 885, 889-90 (Va. 1951); *Norfolk*, 214 Va. at 503; *Green*, 221 Va. at 555, 272 S.E.2d at 185; *Reid v. Gholson*, 229 Va. 179, 187 n.11, 327 S.E.2d 107, 112 n.11 (1985); *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.*, 249 Va. 144, 152, 452 S.E.2d 847, 851-52 (1995).

[11] Since 1962, some property can be held in trust for a diocese. *Norfolk*, 214 Va. at 506-07, 2d S.E.2d at 757-58 (§ 57-7 was expanded to cover residences conveyed to benefit a "diocese," but "not . . . beyond this").

is declaratory of existing law.'" 1993 Acts, ch. 370. JA 4181 (letter op.).

The Diocese asserts that the "declaratory of existing law' language "suggests that the prior statute was incorrectly limited." Br. 19. But "[w]hen the General Assembly acts in an area in which one of its appellate courts already has spoken, it is presumed to know the law as the court has stated it and to acquiesce therein, and if the legislature intends to countermand such appellate decision it must do so explicitly." *Weathers v. Com.*, 262 Va. 803, 805, 553 S.E.2d 729, 730 (2001). All the more so where the legislature wishes to overrule not one, but ***14***, prior rulings of this Court.

Even since 1993, the Court has cited *Norfolk* as holding that "§ 57-7.1 validates transfers . . . for the benefit of local religious organizations." *Asbury*, 249 Va. at 152, 452 S.E.2d at 851. The Diocese says § 57-7.1 was not at issue in *Asbury* (Br. 19 n.9), but that is incorrect. The Court had to confirm "that the Trustees," who sought to assert the congregation's rights, "[we]re proper parties," and standing turned on § 57-7.1. *Id.* at 152, 452 S.E.2d at 852. Citing § 57-7.1, the Court found that the trustees could only have been trustees for the congregation, which established standing.[12]

---

[12] *Id.* ("Code § 57-7.1 validates transfers, including transfers of real property, for the benefit of local religious organizations. *See Norfolk Presbytery v. Bollinger*, 214 Va. 500, 506, 201 S.E.2d 752, 757-58 (1974) (construing former Code § 57-7).").

Thus, the analysis of § 57-7.1 was necessary to the decision.

Moreover, in 1996 the Attorney General opined that § 57-7.1 "encompasses property held for the benefit of a local congregation, as opposed to property held by a larger hierarchical body." 1996 Va. Opp. Atty. Gen. 194 (Apr. 4, 1996). The legislature "'is presumed to have knowledge of the Attorney General's interpretation of statutes, and [its] failure to make corrective amendments evinces legislative acquiescence.'" *Tazewell County. Sch. Bd. v. Brown*, 267 Va. 150, 163, 591 S.E.2d 671, 677 (2004). The legislature amended § 57-7.1 in 2005 (2005 acts, ch. 772), but none of its changes reflect disagreement with the Attorney General's opinion—or with *Asbury*. Thus, denominational trusts remain invalid in Virginia.

### B. Even if Virginia law permitted denominations to hold beneficial interests in local congregational property, that would not change the result.

Setting aside the 1993 revision, there are three independent grounds for affirmance on this issue. *First*, even if denominational trusts were now valid, the Diocese has not complied with the requirements for establishing such a trust. Under Virginia law, only the settlor—who holds title—may establish a trust.[13] As the South Carolina Supreme Court recently held—in

[13] Va. Code § 55-544.01 (a trust's terms are governed by "the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as

reasoning applicable here—"[i]t is an axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another or transfer legal title to one person for the benefit of another." *All Saints Parish Waccamaw v. Protestant Episcopal Church*, 685 S.E.2d 163, 174 (S.C. 2009). Thus, "neither [a notice of interest recorded by a diocese] nor the Dennis Canon has any legal effect." *Id.*

The Diocese is effectively asserting the right to create a trust by means not available to secular associations or local congregations. The Diocese has disclaimed any "conveyance," which is needed to satisfy § 57-7.1. Br. in Opp. to Demurrers (7/13/07) at 23 (appellants "do not allege a 'conveyance' (or a contract to convey)"). Nor does the Diocese hold title to the subject properties. The only basis for its alleged interest is an internal *canon*. But a putative *beneficiary* cannot unilaterally create a trust, and the "trusts" that the Diocese asserts—in contrast to those of the Congregations—are not embodied in the deeds, land records, or any trust instruments reflecting the settlors' intent. JA 1345-1444 (deeds). Thus, even if denominational trusts were valid, the Diocese could not establish one.

*Second*, even if § 57-7.1 had changed the law prospectively, it could

---

may be established by other evidence that would be admissible in a judicial proceeding"); Va. Code § 55-544.05(B), (C) (charitable trusts).

not be applied to pre-1993 conveyances or retroactively implement a canon passed 14 years earlier—when even the Diocese acknowledges that Virginia did not permit denominational trusts.[14] Br. 15. "[T]he phrase 'declaratory of existing law' is not a statement of retroactive intent." *Berner v. Mills*, 265 Va. 408, 414, 519 S.E.2d 159, 161 (2003). Further, that any new aspects of § 57-7.1 were at most prospective is confirmed by differences between the prior law (§ 57-7)—which validated *both* conveyances "which hereafter shall be made" *and* conveyances "which, since January 1, 1777, *ha*[*ve*] *been* made"—and the current law (§ 57-7.1), which says only that a conveyance "which *is* made ... *shall be* valid." (Emphasis added). *Cf.* Va. Code § 57-16(C) (deeds to ecclesiastical officers "made prior to March 18, 1942 ... are hereby ratified and declared valid"). Finally, applying § 57-7.1 retroactively to create a new beneficial interest in the Congregations' properties would violate the Contracts Clause. *Finley*, 87 Va. at 108.

*Third*, even if the Diocese had a beneficial interest, that would not eliminate the Congregations' beneficial interest, and § 57-9 would still provide a "conclusive" answer to the question of "title" and "control." As noted, § 57-9 presumes a dispute between competing groups, each asserting a

---

[14] The vast majority of the property at issue was acquired prior to 1993. JA 1345-1444 (deeds).

superior beneficial interest in the subject property. JA 3910-11, 3936, 3938 (discussing the disputes that preceded enactment of § 57-9). Thus, even if the Diocese were a second beneficiary of the trusts at issue, § 57-9 would still resolve the question of ownership as between the Diocese and the Congregations—the parties named as beneficiaries in the deeds.[15]

### C. Virginia law on denominational trusts is constitutional.

The Diocese also seeks to portray Virginia's rule on denominational trusts as unconstitutional and reflective of a historic "bias against hierarchical churches." Br. 15. But statutory distinctions not designed to disadvantage particular faiths need only be "rationally related to [a] legitimate purpose" (*Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987)), and the Diocese ignores several legitimate reasons for Virginia's rule.

*First*, a rule barring additional entities from asserting a beneficial interest in congregational property serves the interest of avoiding clouds on title to local real estate. The legislature may reasonably have thought that prospective purchasers (or those injured on the property) should be able to

[15] The competing claimants are not limited to those in the congregation. Part B of the statute governs disputes within a congregation. Part A, however, governs divisions in a denomination and grants voting rights to congregations "attached" to such denominations. If Part A were read to resolve only intra-congregational disputes, it would add nothing to Part B. But courts may not "read[] any legislative enactment in a manner that will render any portion of it useless." *Natrella v. Board of Zoning Appeals*, 231 Va. 451, 461, 345 S.E.2d 295, 301 (1986).

rely on the terms of the deed, without regard to unrecorded canons.

As the trial court noted, the "General Assembly may have wished to create a presumption in favor of ownership at the local level, because of its recognition that property [held in trust] is generally managed from the local level, or it may have believed that a presumption of local majority ownership was appropriate given that most (if not all) funding for local churches, even in denominations, comes from the local level." JA 4165. Regardless, the Diocese is not burdened by the rule, since it can put title in an officer under Va. Code § 57-16—as it routinely does. JA 4151 (letter op.).

*Second*, unlike the plaintiffs in *Falwell v. Miller*, 203 F. Supp. 2d 624 (W.D. Va. 2002)—which invalidated Virginia's longtime ban on the incorporation of churches—it cannot fairly be said that the Diocese is seeking a right available to others, or is similarly situated to secular associations who might assert a trust interest in their members' property. As discussed above, for an entity to become a beneficiary of a trust in real property, it must either (1) hold title to the property at issue or (2) be named as a beneficiary in the deed in a conveyance reflecting the intent of the *settlor*. The Diocese alleges neither: it simply seeks to establish a beneficial interest in land simply by unilaterally passing a canon. The notion that it constitutes "discrimination" against denominations for the Commonwealth to decline to

recognize such a "trust" is frankly absurd, as "any notion of discrimination assumes a comparison of substantially similar entities." *GMC v. Tracy*, 519 U.S. 278, 298-99 (1997). Indeed, it is the recognition of such a trust that would be discriminatory—against congregations.

That Virginia does not permit associations to assert ownership over members' property by passing a rule—let alone without publicly recording its interest—is confirmed by *Unit Owners' Ass'n v. Gillman*, 223 Va. 752, 292 S.E.2d 378 (1982). That case addressed whether a condominium association could "fine [members] and encumber[] their property" for violating duly adopted rules. 223 Va. at 765, 292 S.E.2d at 384. Claiming it was a "self-governing community," the association argued that its bylaws gave it the right to do so and that "every unit owner purchased subject to this power." 223 Va. at 763, 766, 292 S.E.2d at 383, 385. Although the bylaws there, unlike the canons here, were "recorded with the master deed," the Court unanimously disagreed. The governing act "does permit the exercise of wide powers by an association," the Court explained, but "these powers are limited by general law" and "no language" in the [statute] ... authorizes the executive or governing body of a condominium to levy fines, impose penalties, or exact forfeitures for violation of bylaws." 223 Va. at 763, 292 S.E.2d at 383. As *Gillman* confirms, the canons here cannot create a trust.

In sum, the Diocese is not asking to be treated the same as congregations or secular associations under Virginia law; it is asking for *more favorable* treatment. But in any event, the rule on denominational trusts serves several valid interests, including clarity of title; and the Diocese is not burdened by the rule, as it can place title in a corporation or an officer.

## III. The Circuit Court Correctly Determined That Section 57-9's Requirements Were Satisfied In This Case.

In three pages (Br. 21-24), the Diocese offers several miscellaneous and undeveloped statutory arguments. Insofar as these points are raised in ECUSA's brief, we respond in our brief there (at 11-41). But even a brief response shows that these scattershot points lack merit.

1. The Diocese states that language referring to denominational polity in "*other* statutes" (*e.g.*, 57-15) supports reading *§ 57-9* to contain such language. Br. 22. But § 57-15 "also originally required only congregational approval for a conveyance of property," but "was *affirmatively amended* to include the specific words: 'constituted authorities,' and 'governing body of any church diocese.'" JA 3929 (letter op.). Section 57-9, by contrast, "contains absolutely no reference to the governing authorities of a church." *Id.* And "when the General Assembly includes specific language in one section of a statute, but omits that language from another section of the statute, we must presume that the exclusion of the language is intentional." *Halifax*

*Corp. v. Wachovia Bank*, 268 Va. 641, 654, 604 S.E.2d 403, 408 (2004).

2. The Diocese also says the trial court misapplied its definition of "branch" as "a part of a complex body," since there is no current "relationship between CANA and ADV" and "[ECUSA] or the Diocese." Br. 24. But the Diocese fails to quote the court's full definition,[16] let alone its analysis, which made clear that a branch is rightly understood as an "offshoot" of the mother church. JA 3933. For example, the entities created in various divisions in the 1900s—*e.g.*, the Cumberland Presbyterian Church, the Methodist Episcopal Church South, and the Reformed Episcopal Church—were "considered 'branches' of their 'mother' church," despite having disaffiliated. *Id.* Indeed, as the Diocese's expert, Professor Mullin, admitted, a "branch" is "an extension that grows out of an earlier body," but "*it does not necessarily have to be legally connected.*" JA 3917 (emphasis added).

3. The Diocese next asserts that the Anglican Communion is not a "church or religious society" to which the Congregations are "attached." Br. 21. But the circuit court found a division at the Diocese, ECUSA, and the Anglican Communion levels, and each of those findings was an independent basis for its decision that § 57-9 applies. Moreover, as explained in our

[16] The circuit court defined "branch" as "a division of a family descending from a particular ancestor," or "[a]ny arm or part shooting or extending from the main body of a thing." JA 3933 (letter op.).

brief in ECUSA's appeal (at 38-40), the court's finding that the Anglican Communion is a "religious society" for purposes of § 57-9 was based on testimony—including from the Diocese's witnesses—that the Communion is a "fellowship of churches" whose members have organized relationships that mirror the dictionary definition of "society." JA 2574-76, 3930-31.

And as to whether the CANA Congregations were "attached" to the Anglican Communion, the court found that the Diocese's position was refuted by the preamble to ECUSA's own constitution, which cites ECUSA's status as a "constituent member" of the Communion. JA 3860, JA 1079, 3618. To be sure, the CANA Congregations' attachment to the Anglican Communion was indirect, but that did not distinguish it from its attachment to ECUSA—which the Diocese and ECUSA have not contested. JA 2538.

4. Finally, the Diocese asserts that the trial court's findings required it to delve into intra-church communications and to "rely[] on theological concepts" such as "'impairment'" of the "'fabric' or 'bonds' of 'communion.'" Br. 23. This misrepresents the record. To begin with, the out-of-context snippets cited by the Diocese relate only to the Anglican Communion portion of the case, which was an independent basis for the ruling below. But as the court noted, it cited these communications only to provide background—as the U.S. Supreme Court has done in like cases—and to show that church

officers themselves referred to "divisions" in the Communion. JA 4164 ("to describe a religious controversy, *even in detail*, is not to make a religious determination"), JA 3937. The court relied on objective criteria—such as the amendment to the Church of Nigeria constitution—to show the division and the formation of an alternate polity. JA 3938. As to the finding that the Anglican Communion was a "religious society" under § 57-9, the court's inquiry was no more (and probably less) extensive than that required for the state to lawfully determine whether, for example, an entity is a "church" for purposes of the Internal Revenue Code (*e.g.*, *American Guidance Foundation, Inc. v. United States*, 490 F. Supp. 304, 306 & n.2 (D.D.C. 1980)), or a claim is "religious" for purposes of the Free Exercise Clause (*Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972)). The court did not rely on any constitutionally forbidden judgments.

## IV. Section 57-9 Neither Burdens The Diocese's Religious Exercise Nor Discriminates Among Denominations.

Unable to show that § 57-9 applies only to "divisions" implemented by its own "polity," the Diocese says the trial court's reading of § 57-9 burdens its faith, discriminates among churches, and foists "congregational governance . . . on hierarchical churches," in violation of the First Amendment. Br. 35. As the trial court held, these arguments were rejected in *Jones* and "are predicated . . . on a characterization of [the] Court's . . . opinion that

bears only a passing resemblance to the opinion itself." JA 4127.

### A. The circuit court correctly held that *Jones v. Wolf* does not require deference to a denomination's canons.

Any assertion that § 57-9 burdens religious exercise is foreclosed by *Jones*, which held that States "may resolve [church property] dispute[s] on the basis of 'neutral principles'" and need not "defer to the resolution of an authoritative tribunal of the hierarchical church" or to its "'laws and regulations.'" 443 U.S. at 597, 608 (citation omitted). There, a congregation voted to leave the Presbyterian Church (PCUS) to affiliate with another denomination. A church tribunal had ruled that the PCUS-affiliated wing was "the true congregation," but the Georgia courts disagreed and held that the majority owned the property. *Id.* at 598. The PCUS wing claimed that it was unconstitutional for States to apply majority rule to ownership issues in a hierarchical church. The Supreme Court disagreed, stating: "If . . . Georgia has adopted a presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means, we think this would be consistent with both the neutral-principles analysis and the First Amendment." *Id.* at 607. The Court then went on to explain why this arrangement would not unduly burden the free exercise of religious denominations:

Majority rule is generally employed in the governance of religious so-

> cieties. Furthermore, the majority faction generally can be identified without resolving any question of religious doctrine or polity. . . . Most importantly, any rule of majority representation can always be overcome, under the neutral-principles approach, either by providing, in the corporate charter or the constitution of the general church, that the identity of the local church is to be established in some other way, or by providing that the church property is held in trust for the general church and those who remain loyal to it.

*Id.* at 607-08 (citations omitted). Finally, the Court emphasized that States have wide discretion to structure church property law, stating: "Indeed, the State may adopt any method of overcoming the majoritarian presumption, so long as the use of that method does not impair free-exercise rights or entangle the civil courts in matters of religious controversy." *Id.* at 608.

Under *Jones*, then, state law must be "flexible enough to accommodate all forms of religious organization[s]," but States may use a default rule of majority ownership to resolve church property disputes—even in cases involving "hierarchical" churches—so long as there is a "method of overcoming the majoritarian presumption" by arrangements made "before the dispute erupts." *Id.* at 603, 606, 608. *Jones* does not require deference to denominational canons. And since there are several means for hierarchical churches to avoid application of § 57-9, the statute is constitutional.

### B. Having to make secular property arrangements that it routinely makes does not substantially burden the Diocese.

As noted, *Jones* specifically addressed whether it unconstitutionally

burdens a denomination's religion to be required to take steps under neutral principles of property law to avoid a default rule of majority ownership. And as the trial court stated, "*Jones* expressly states that one way in which a religious organization can avoid the presumptive rule of majority representation is to modify its deeds, and describes any burden involved in making such a modification as 'minimal.'" JA 4152 (quoting 443 U.S. at 606).

1. The record is especially clear that § 57-9 does not burden *this* denomination's religious exercise. The law does not apply to property held by corporations—as evidenced by a ruling below favoring the Diocese[17]—or to property held by church "officers" under § 57-16. The Diocese's canons authorize such holdings;[18] and the Diocese's bishop holds 29 such properties in his own name (JA 3092-97, 3114-20). Thus, as the trial court noted:

> [ECUSA and the Diocese] argue that to place their Virginia properties in the name of an ecclesiastical officer, or to incorporate, would place a substantial burden on their religious exercise. ECUSA/Diocese' argument becomes much less persuasive in light of the fact that Bishop Lee already holds about 29 properties in his own name. Thus the Diocese itself regularly—and of its own free will—engages in the very

---

[17] JA 4889-90 (letter op.)(assets in The Falls Church Endowment Fund are "held by a corporation," and "are not held by its trustees," and "this form of corporate ownership takes the Endowment Fund wholly beyond the reach of . . . section 57-9(A)"). The Falls Church has not appealed this ruling.

[18] Diocese Canon 15.4 ("The Bishop, or Ecclesiastical Authority, is hereby authorized to acquire by deed, devise, gift, purchase or otherwise, any real property for use or benefit of the Diocese. Property so acquired shall be held . . . in accordance with the provisions of Section 57-16.") (JA 1291).

> practice which it simultaneously protests "substantially burdens" its free exercise of religion.

JA 4150-51.[19] As the court recognized, "[t]he free exercise clause protects the free exercise of religion; it does not protect religious organizations from all administrative inconveniences." JA 4151; *Yoder*, 406 U.S. at 215-16.

Indeed, the Diocese has *conceded* that "[h]ierarchical churches that choose not to hold property by trustees are not burdened by §57-9(A)." Pet. 27. And since the Diocese likewise "choose[s] not to hold property by trustees," this concession is fatal to its free exercise claim.

2. The Diocese raises a hodgepodge of points in hopes of avoiding this difficulty. Citing the role of "lay involvement" in Episcopal governance and Diocese Canon 15.1, which provides for congregations to elect "trustees" to "hold title," the Diocese insinuates that it has a religious objection to other ownership forms. Br. 31-32. The record forecloses that claim.

*First*, the Diocese stipulated that some member congregations do *not* hold their property by trustees. JA 3842 ¶ 1. *Second*, Diocese Canon 15.4 states that, "in accordance with . . . Section 57-16 of the Code of Virginia," either "the Bishop, or Ecclesiastical Authority" may hold "any real property for use or benefit of the Diocese." JA 1291. *Third*, churches in Virginia

---

[19] JA 3114-3120 (Journal of the 210th Annual Council of the Diocese) ("Properties Held"); JA 3092-3097 ("Properties Held").

have been free to hold property in corporate form since 2002, *Falwell*, 203 F. Supp. 2d at 632-33, and the Diocese's canons do not prohibit that. JA 3787 (bishop's letter citing "congregations . . . that have chosen or choose in the future to incorporate under Virginia law"). *Fourth*, § 57-16 permits congregations themselves to appoint "ecclesiastical officers" to hold title. And, of course, appointing a congregational "officer" to hold title and placing title in a corporation are both compatible with "lay involvement."

The facts also foreclose any notion that the decision below "ignores the practical . . . burden" of adopting alternative ownership forms. Br. 32. Several hierarchical churches in Virginia have placed property outside of the scope of § 57-9 without undue difficulty. For example, the property of Catholic and Mormon congregations is held by bishops, and the property of Greek Orthodox and Foursquare churches, among others, is held by corporations. JA 3843.[20] Had the Diocese used either of these approaches

[20] That the form of property holdings varies not only *among* but *within* religious denominations—including Episcopal, Presbyterian, Methodist, and Lutheran ones (JA 3843-3844)—confirms that nothing prevents genuinely hierarchical churches from taking steps, before a dispute erupts, to put title in a form that conforms to the shared expectations of the parties. *See* Amicus Br. 7 (§ 57-9 "poses no significant threat" to the "Seventh-day Adventist Church, for example," which "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").

more broadly than it already does, § 57-9 would not apply to it. And the fact "[t]hat the Diocese availed itself of this alternative ownership in some cases but chose not to do so in others (and not in the instant cases) does not turn a constitutional statute into an unconstitutional one." JA 4167.

3. The rest of the Diocese's points appear to mock the trial court for referring to the means of avoiding § 57-9 as an "escape hatch." Br. 31-33. The Diocese baldly asserts "that until 2005," "§ 57-9 was not limited to property held by trustees, meaning that no 'escape hatch' was available." Br. 33; ECUSA Br. 42. But as Exhibit 1 to ECUSA's brief shows, § 57-9 has applied only to property "held in trust" since its passage. As the trial court noted, the phrase "held by trustees" was added to many parts of Title 57 "simultaneously with the addition of § 57-16.1," which confirmed that churches may incorporate. JA 4180-81. But those words "d[id] not change the substantive meaning of the statute." JA 4181.

Without record support, the Diocese suggests that asking congregations to re-title property would cause "disruption" or "breed . . . resentment." Br. 32-33. But if that were true, it would simply reflect the fact that congregations in the Diocese view themselves as rightful owners of property titled in their name, having never conveyed a trust interest to the denomination. Indeed, any such resentment would confirm that the denomination's effort

to impose a trust through the unilateral passage of a canon—promulgated at a time when even the Diocese admits (Br. 16) Virginia did not recognize denominational trusts—was not based on "the intentions of *the parties*." *Jones*, 443 U.S. at 603 (emphasis added).

4. The Diocese further states that "Virginia has no conceivable interest in creating traps for churches, from which they need means of 'escape,'" and that the ruling below "treats *Jones* as a constitutional 'bait and switch.'" Br. 31, 33. But the circuit court's use of the term "escape hatch" simply connotes that § 57-9 is easily avoided—a point confirmed by the Diocese's own practices. And several parts of *Jones* confirm that States need not defer to church constitutions, let alone *canon law*.

*First*, the phrase from *Jones* cited by the Diocese—that "the constitution of the general church can be made to recite an express trust in favor of the denominational church," and "civil courts will be bound to give effect to the result indicated by the parties"—is immediately followed by the proviso, "provided it is embodied in some legally cognizable form." 443 U.S. at 606. What is "legally cognizable," of course, depends on the neutral requirements of state property law. And as we have shown, Virginia law does not recognize "trusts" that are unilaterally created by a beneficiary, let alone

provide that such "trusts" supersede congregational rights under § 57-9.[21]

*Second*, noting that it could "not declare what the law of Georgia is," the Court in *Jones* directed the Georgia courts on remand to "specify how, under Georgia law, [the majority] presumption may be overcome." *Id.* at 608-09 & n.5. If the Court had meant to *require* recognizing "trust" provisions in denominational canons, it would not have given the state courts *discretion* to decide how a denomination could avoid majority rule.

*Third*, *Jones* reiterated that States may decide church property issues using "formal title" doctrine, which does not take into account church rules. *Id.* at 603 n.3.[22] Indeed, *Jones* expressly permits "'a State [to] adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters.'" *Id.* at 602.

In sum, there is no "bait and switch." "[N]eutral provisions of state law governing the manner in which churches own property" simply "cannot be

---

[21] The Diocese says "only documents that require 'inquiry into religious doctrine' . . . are not 'legally cognizable.'" Br. 34 n.20. But in reaffirming that religious writings are *not* legally cognizable as a matter of *constitutional* law, *Jones* was not prescribing what sorts of legal arrangements *are* legally cognizable as a matter of *state property* law.

[22] As the Court explained, even *Watson v. Jones*, 80 U.S. 679, 722-23 (1871)—a pre-*Erie* decision in which the court deferred to a denominational hierarchy—said that, "regardless of the form of church government, it would be the 'obvious duty' of a civil tribunal to enforce the 'express terms' of a deed, will, or other instrument of church property ownership" even if contrary to the wishes of the hierarchy. *Id.* at 603 n.3.

said to 'inhibit' the free exercise of religion." *Id.* at 606. And while States must provide *some* reasonable means for denominations to secure ownership of congregational property, denominations are not necessarily entitled to secure such property *by the means of their choice*. The Diocese simply fails to read *Jones* in light of the neutral requirements of Virginia law.[23]

### C. Section 57-9 does not interfere with the "governance" or "polity" of the ECUSA or the Diocese.

Unable to distinguish *Jones*, the Diocese tries to recast this as a case about its "polity," and to portray § 57-9 as foisting "congregational governance—local majority control—on hierarchical churches." Br. 35. But this blurs the settled line between property disputes and genuine disputes over polity.[24] Section 57-9 merely provides a default rule that majority votes will govern one aspect of a church's affairs (property ownership) in a limited circumstance (a division) that is identifiable on a secular basis (the separation of congregations who form a new polity)—*if and only if* the property is

---

[23] The Diocese's notion (Br. 32) that it violates the doctrine of "unconstitutional conditions" for States to apply a default rule of majority control to property owned by trustees but not to other forms of ownership (all of which the Diocese uses) is ridiculous. The government is not thereby burdening the exercise of any constitutional right, let alone conditioning its exercise on the denial of a benefit such as unemployment compensation (as in *Sherbert*) or government contracts (as in *Umbehr*).

[24] *See Jones*, 443 U.S. at 606-07 (distinguishing between matters of "religious doctrine or polity" and "church property disputes" and holding that the latter may be resolved by *any* method that avoids resolution of doctrine).

held by trustees. Hierarchical churches may avoid § 57-9 by directing congregations to put title in other forms—forms the Diocese routinely uses.

Section 57-9 thus does not "restructure" any diocese or require ECUSA to recognize the legitimacy of CANA or ADV. Nor does it interfere with the denomination's ability to choose Episcopal leaders or discipline clergy. The Diocese continues to function as it has in the past, with the same regions, leaders, and form of government. That is why, in arguing that there has been no "division" for statutory purposes, ECUSA admits that "[t]he Church's governing structure and geographical territory have been unaffected" by the CANA Congregations' disaffiliations. ECUSA Br. 10.[25]

**D. The Diocese's other authorities are inapposite.**

The Diocese's other authorities, which the circuit court carefully analyzed (JA 4130-4135, 4147-4149), are not to the contrary. In *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), ownership of the property turned on whether a hierarchical church is entitled to deference in choosing eccle-

[25] The Diocese broadly asserts that "church governance *is* a doctrinal matter." Br. 25. But if this were always true and controlling, the Court would have had to defer to the denomination in *Jones*, which likewise involved claims that "the 'laws and regulations' of the [denomination]" governed. 443 U.S. at 609. Instead, the Court held that where property is at issue, courts need not defer. *Id.* at 597. Indeed, if all matters of "church governance" were deemed purely doctrinal, it would be unconstitutional for courts to enforce church canons. The Diocese's appeal for application of its canons depends upon their having *secular* import.

siastical *leaders*. Explaining that the question was "the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese," the Court held that "[t]his controversy . . . is strictly a matter of ecclesiastical government." 344 U.S. at 113, 115. The law there "regulate[d] church administration, the operation of the churches, [and] the appointment of clergy, by requiring conformity to church statutes." *Id.* at 107. Thus, *Kedroff*—which was not even *cited* by the Court in *Jones*—was not principally about who owned the church property. Rather, "to resolve the dispute, the Court was forced to determine essentially who was the 'true' bishop." JA 4130 (letter op.). There is no such issue here.

Similarly, in *Serbian Orthodox Diocese v. Milivojevich*, a state court reviewed a hierarchical church tribunal's decision (1) to "defrock[]" a bishop for lack of "fitness to serve," and (2) to reorganize a diocese, reversing both decisions as "arbitrary" and "procedurally and substantively defective under the [church's] internal regulations." 426 U.S. 696, 698, 702, 721 (1976). The Supreme Court reversed, holding that issues as to bishops' "conformity" to a "standard of morals" are "purely ecclesiastical"—and thus beyond civil courts' jurisdiction. *Id.* at 714. As to the reorganization of the diocese, the Court held that the state court had "substituted its interpretation of the

[church] constitutions for that of the [tribunal]" on provisions that "were not so express that the civil courts could enforce them." *Id.* at 721, 723.

Thus, while "the issue as to who would hold the church property" was "[u]nderlying this doctrinal dispute," the Court "emphasized[] [that] 'the case essentially involves not a church property dispute, but a religious dispute.'" JA 4135 (quoting *Milivojevich*, 426 U.S. at 709). *Milivojevich* might be relevant if the CANA Congregations had asked the trial court to reinstate a bishop, or to reverse a decision of ECUSA to subdivide the Diocese based on an alleged misreading of its own canons. But they did not. The circuit court's ruling was based on the secular meaning of "division" under § 57-9 (JA 4161); and as ECUSA admits, "[t]he Church's governing structure and geographical territory have been unaffected." ECUSA Br. 10.[26]

The Diocese further asserts that § 57-9 violates *Lemon v. Kurtzman*,

---

[26] The Diocese also cites *Northside Bible Church v. Goodson*, 387 F.2d 534 (5th Cir. 1967), and *First Methodist Church v. Scott*, 226 So. 2d 632 (Ala. 1969), pre-*Jones* cases involving Alabama's "Dumas Act." Br. 25 n.14. But as Judge Bellows held, that act both "explicitly singled out protestant churches" and had "a departure-from-doctrine provision that was unconstitutional" under *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969). JA 4148. By contrast, "section 57-9 contains no sect-specific language—it applies to *any* 'congregation' attached to '*any*' 'church or religious society,' and it contains no 'departure-from-doctrine' requirement." JA 4149. Similarly, under the statute at issue in *Sustar* v. *Williams*, 263 So. 2d 537, 543 (Miss. 1972), another pre-*Jones* case, "the Mississippi courts [we]re required to determine" whether there was "church doctrinal 'deep-seated disagreement'" before a party could invoke the statute at issue.

403 U.S. 602 (1971) (Br. 43), which the Court has *never* applied to church property, on the ground that it serves no secular purpose. But § 57-9 in fact serves many secular purposes: it "allows for peaceful conflict resolution" (JA 4156), avoids the uncertainty of trust law on display when multiple parties assert beneficial interests, and provides a rule that courts can administer. *Jones*, 443 U.S. at 607. Citing the trial court's observation that, in passing § 57-9, the legislature may have wished to protect "voting rights" of congregations in hierarchical churches, the Diocese says this "dooms" § 57-9. Br. 44. But the outcome of votes under § 57-9 is not "foreordained." *Jones*, 443 U.S. at 606. Churches may vote to stay in the mother church, as some did historically (JA 4154 n.43), and § 57-9 overrides the interests of whichever side loses the vote.[27] In all events, a legislative determination that congregations should be able to decide property ownership by a vote is no different from the law at issue in *Jones*: it is simply a default rule that does not apply if the denomination places title in a corporation or officer. For the same reasons, § 57-9 does not "advance" religion.

Similarly, § 57-9 decreases "entanglement" as compared with other

[27] As the court held, because all of the denomination's alleged contractual rights post-date enactment of § 57-9, any impairment of those rights would be constitutional. JA 4251; *cf. Finley v. Brent*, 87 Va. 103, 12 S.E. 228 (1890) (involving a pre-statute deed). That ruling has not been appealed.

approaches, by providing for simple majority rule where (1) property is held by trustees and (2) there is a "division" involving the separation of congregations and formation of a new polity, or "branch." As Judge Bellows explained, § 57-9 simply requires "neutral, objective observations and findings regarding whether there has been a split within a church or religious society that leads to a separation and corresponding formation of an alternative polity. Nothing in this definition requires a civil court to resolve or delve into *any* matter of religious/theological belief, doctrine, or practice." JA 4162. By contrast, the Diocese's approach, under which "division" means something new with each polity at issue, would "draw this Court into the very thicket that they simultaneously argue this Court should avoid." JA 4159.

### E. Section 57-9 does not discriminate among religions or between religious denominations and secular associations.

The Diocese also argues that § 57-9 "discriminates among religious groups based on methods of holding property," asserting that such "deliberate distinctions between different religious organizations" violate the rule of *Larson v. Valente*, 456 U.S. 228, 244, 247 n.23 (1982), that "one religious denomination cannot be officially preferred over another." Br. 40-42. But discrimination among different forms of *property ownership* is not the same as discrimination on the basis of *religion*.

1. *Larson* involved a law that initially exempted all faiths from chari-

table solicitation reporting rules, but was amended to exempt only groups receiving at least half of their donations from members. *Id.* at 230-32. In practice, this burdened *one* group: the Unification Church, which had a duty to engage in "public-place proselytizing and solicitation of funds." *Id.* at 234.

As Judge Bellows noted, "the legislative history" of this statute "evidenced an explicit intent to 'get at' the 'Moonies' but to protect the 'Roman Catholic Archdiocese,'" and "[i]t was against this backdrop that the Court held that the amendment's 'explicit and deliberate distinctions between different religious organizations' had the 'express design' of 'religious gerrymandering' and effecting a 'denominational preference'—warranting . . . strict scrutiny." JA 4155 (citations omitted). "[T]he legislative history of 57-9," by contrast, "demonstrates no such hostility or animus toward a specific denomination." *Id.* Further, the (non-exhaustive) stipulation shows that congregations in *several* denominations hold property by trustees. JA 3843 ¶¶ 1-4. Indeed, given the varied ways in which congregations in the Diocese hold property, § 57-9 "discriminates" both against and *in favor of* the Diocese, depending on which property is at issue.

In any event, later cases (not cited by the Diocese) confirm that strict scrutiny applies only if "the law *facially* differentiates among religions," or is deliberately designed to do so. *Hernandez v. Comm'r*, 490 U.S. 680, 695

(1989) (emphasis added); *Amos*, 483 U.S. at 339 ("strict scrutiny" does not apply if "a statute is neutral on its face"). As the trial court held, § 57-9 "does not make explicit and deliberate distinction[s] between religious sects. The text does not state [that] hierarchical churches are subject to the law while non-hierarchical churches are not, but rather applies based on the form in which churches choose to hold property." Thus, "*Larson* is inapplicable." JA 4154. Indeed, if the rule were otherwise, few church property laws would avoid strict scrutiny, since nearly all of them set ownership rules that have different impacts on different churches.

Indeed, even if the Diocese were the *only* denomination whose congregations held property by trustees, § 57-9 would be constitutional. The law would remain neutral on its face; there is no evidence that it was designed to "target" Episcopalians; and the Diocese can avoid § 57-9's application—as other denominations have done—by directing member congregations to hold title in the name of the bishop, officer, or corporation. That the Diocese already holds 29 properties in forms outside § 57-9's reach precludes any finding that the law unfairly singles it out.[28]

---

[28] Without explanation, the Diocese says § 57-9 discriminates "between hierarchical churches and congregational churches that hold property by trustees." Br. 39. This is an odd assertion, given the Diocese's insistence that such entities must be treated differently. But in any case, part A and B of § 57-9 each apply only to property "held in trust," and only in "divisions."

2. The Diocese also says § 57-9 favors "secular" groups. Br. 39. As the trial court held, however, this view "assumes that the Free Exercise Clause somehow mandates that the legislature treat church property disputes identically to disputes involving secular voluntary associations. It does not." JA 4145. The Supreme Court has never suggested that strict scrutiny applies to laws that deal solely with religion in general or church property in particular. Rather, it has held that "where a statute is neutral on its face and motivated by a permissible purpose," "[t]he proper inquiry is whether [the legislature] has chosen a rational classification to further a legitimate end." *Amos*, 483 U.S. at 339. States "may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters'" and provides a means, "before the dispute erupts," for the parties to provide for denominational ownership. *Jones*, 443 U.S. at 602, 606. Section 57-9 meets these requirements.

Finally, that there is no "division statute" for secular groups does not mean § 57-9 unlawfully favors them. Rather, "the right to reasonable notice, the right to attend and advocate one's views, and the right to an honest count of the votes . . . are neutral principles of law, *applicable not only to religious bodies, but to public and private lay organizations and to civil governments as well.*'" *Reid*, 229 Va. at 189-90, 327 S.E.2d at 113. More-

over, secular associations cannot assume ownership of members' property simply by passing rules. *Gillman*, 223 Va. at 762-66, 292 S.E.2d at 383-84.[29] Thus, § 57-9 does not grant a privilege to congregations that secular groups do not enjoy.[30]

---

[29] In the Diocese's view (Br. 40), *Falwell*, 203 F. Supp. 2d at 630, shows that § 57-9 must satisfy strict scrutiny because, like a ban on incorporating churches, § 57-9 lacks neutrality and general applicability. But § 57-9 does not "impose special disabilities on the basis of religio[n]." *Id.* at 630. Indeed, it does not impose disabilities at all—it simply provides a vehicle for churches to resolve property disputes in a division, and it applies only to property held in trust. JA 4145-47. And if strict scrutiny did apply, § 57-9 is closely tailored to the government's compelling interest in minimizing entanglement with churches and simplifying litigation over church property.

[30] Citing a page-long letter from a staff lawyer in the Attorney General's office regarding a bill to broaden § 57-9, the Diocese says § 57-9 unconstitutionally disfavors congregations that become "independent." Br. 42. But this letter is not a formal opinion, it does not state that § 57-9 is unconstitutional, and two Attorneys General have vigorously defended § 57-9 here. To be sure, § 57-9 could be misinterpreted so as to entangle the court in theological disputes over what constitutes a "branch." But the trial court's definition was purely secular—the polity formed when a group of congregations disaffiliates from its mother church—and the legislature may reasonably have believed that, as a matter of basic fairness, a different rule should apply when multiple congregations disaffiliate than when one disaffiliates.

In any event, standing to raise claims that § 57-9 is *underinclusive* is limited to congregations that have actually been subjected to discrimination—*i.e.*, to those found not to qualify as a "branch." *Allen v. Wright*, 468 U.S. 737 (1984) (standing to raise discrimination claims is limited to those who have suffered discrimination). And if some hypothetical party did have standing, and the Court were concerned that § 57-9 might be underinclusive, the remedy would not be to strike down § 57-9, but rather to interpret the "branch" requirement to apply to such a group. *Heckler v. Matthews,* 465 U.S. 728, 739 n.5 (1984) (where one alleges that a law is constitution-

### F. The contention that the Virginia Constitution imposes requirements different from those of the U.S. Constitution has been waived, and in any event is unpersuasive.

The Diocese argues on appeal that Article I, § 16 of the Virginia Constitution applies with "even greater force" than the First Amendment. Br. 36. That argument is "waived by failure to raise the constitutional issue below." *Baldwin v. McConnell*, 273 Va. 650, 660 n.3, 643 S.E.2d 703, 708 n.3 (2007); JA 4126-27.[31] But in any event, this Court has repeatedly held that the Virginia and federal religion clauses are coextensive, and that statutes which satisfy one satisfy the other.[32]

## V. The Circuit Court Rightly Ruled That § 57-9 Effects No "Taking."

Although § 57-9 resolves only competing ownership claims of *private* parties, the Diocese briefly asserts that § 57-9 "takes" its property interests "[*i*]*f* the Diocese has property interests under the 'neutral principles' approach, or *if* property is held in trust for the Diocese." Br. 47 (emphasis added). As the trial court recognized, the argument is "entirely circular." *Id.*

---

ally underinclusive, "ordinarily extension [of a statute], rather than nullification, is the proper course").

[31] Comm. Br. in Response to Petitions for Appeal 7 n.2 ("the Virginia Constitution is coextensive with the National Constitution's Religious Clauses"; "[n]either the Episcopal Church nor the Diocese contend otherwise").

[32] *E.g., Virginia College Bldg. Auth. v. Lynn*, 260 Va. 608, 626, 538 S.E.2d 682, 691 (2000) (the meaning of Article I, § 16 has "always been informed by the United States Supreme Court Establishment Clause jurisprudence"); *Reid v. Gholson*, 229 Va. 179, 187-88, 327 S.E.2d 107, 112 (1985).

Title is held by trustees for the Congregations, and "the very purpose of section 57-9 is to settle . . . a dispute over who owns property held in trust for local congregations"—over who is the *beneficial* owner. JA 4166 (letter op.). Moreover, the Diocese has not appealed the ruling that it lacked vested rights in the CANA Congregations' properties as of § 57-9's adoption (JA 4249-51), and there could be no "taking" of property interests supposedly created by ECUSA's canons after 1867, since any such interests would be subject to § 57-9. *See Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 429-30 (1934) ("'laws which subsist at the time and place of the making of a contract . . . enter into and form a part of it, as if they were expressly referred to or incorporated in its terms").

The Diocese thus ignores the difference between a law that settles title and one that takes title. But as the circuit court held, "[a] state does not take property when it adjudicates competing claims to title by parties based on neutral legal principles." JA 4166. If it did, all statutes resolving disputed property rights would effect a "taking." *Cf.* Diocese Br. 46-49 (citing only cases where property ownership was *undisputed*).

At most, therefore, this case involves a classic scenario where property interests are disputed. Judicial resolution of such cases does not effect a "taking." *E.g.*, *Texaco, Inc. v. Short*, 454 U.S. 516, 518, 526 (1982)

(rejecting a takings challenge to a statute that required owners of unused mineral rights to file a statement with the county every 20 years refreshing those rights and holding that a state may "condition the permanent retention of a property right on the performance of reasonable conditions that indicate a present intention to retain the interest"). Indeed, if laws such as § 57-9 "took" private property, *all* laws resolving disputed property rights would do so. For example, Virginia's adverse possession statute, which bars recovery of real property after 15 years of "actual, hostile, exclusive, visible, and continuous possession," would effect a taking. *Kim v. Douval*, 259 Va. 752, 756, 529 S.E.2d 92, 95 (2000). That is not the law.[33]

## VI. The Circuit Court Properly Held That The Diocese Was Precluded From Directly Attacking A Final Order In Another Case.

Finally ,the Diocese says the trial court erred in refusing to overturn a

---

[33] Nor can the Diocese be heard to claim the Virginia "takings" provision is more protective than its federal counterpart. Br. 48. That argument too is "waived by failure to raise the constitutional issue below." *Baldwin*, 273 Va. at 660 n.3, 643 S.E.2d at 708 n.3. But in any event, the Diocese offers no explanation or authority for this assertion, which is false—the language of the two provisions is nearly identical. *Compare* Va. Const. I, § 11 (prohibiting "any law whereby private property shall be taken or damaged for public uses, without just compensation") *with* U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation").

The Diocese alludes in passing to "due process" requirements (Br. 47), but cites only takings cases. Not only does the Diocese fail to support or effectively argue any due process violation, neither ECUSA nor the Diocese pressed due process violations below—so the argument is waived.

final order entered in September 2006 by another judge in a different case. That order authorized Christ the Redeemer to transfer a parcel of property to appellee Truro Church. While the Diocese was not a party to the order, it has never explained why it waited over two years to challenge the order. JA 4883-84; JA 4907 (1/8/09 Final Order 8, ¶ II.J). Moreover, the Diocese chose not to file an independent action to vacate the order, as required by Va. Code § 8.01-428, opting instead to raise the issue during the final phase of a § 57-9 proceeding. JA 4884. The court thus correctly held that it "lacked jurisdiction to modify, vacate or suspend" the order. JA 4883.

*Niklason v. Ramsey*, 233 Va. 161, 353 S.E.2d 783 (1987), does not absolve the Diocese of its non-compliance. This Court held there that the judgment entered by the trial court did not violate Rule 1:1, even though it impacted an earlier judgment, because the two proceedings had different parties and issues. *Id.* at 164, 353 S.E.2d at 785. Here, the Diocese was not requesting relief that would only collaterally impact the earlier order. As the trial court found, it was directly attacking the order and asking to have it vacated or suspended. JA 4883. Thus, *Niklason* is inapposite.

## CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

/s/ Gordon A. Coffee
GORDON A. COFFEE (VSB #25808)
gcoffee@winston.com
GENE C. SCHAERR
gschaerr@winston.com
STEFFEN N. JOHNSON
sjohnson@winston.com
ANDREW C. NICHOLS (VSB #66679)
anichols@winston.com
*Winston & Strawn LLP*
*1700 K Street N.W.*
*Washington, D.C. 20006*
*(202) 282-5000 (telephone)*
*(202) 282-5100 (facsimile)*

*Counsel for Truro Church and its Trustees The Falls Church, Church of the Apostles, and Church of the Epiphany*

SCOTT J. WARD (VSB #37758)
sjw@gg-law.com
*Gammon & Grange, P.C.*
*8280 Greensboro Drive, 7th Floor*
*McLean, VA 22102*
*703-761-5000 (telephone)*
*703-761-5023 (facsimile)*

JAMES A. JOHNSON
jjohnson@semmes.com
PAUL N. FARQUHARSON
pfarquharson@semmes.com
SCOTT H. PHILLIPS
sphillips@semmes.com
*Semmes, Bowen & Semmes, P.C.*
*25 South Charles Street, Ste. 1400*
*Baltimore, Maryland 21201*
*(410) 539-5040 (telephone)*
*(410) 539-5223 (facsimile)*

*Counsel for The Falls Church*

GEORGE O. PETERSON (VSB #44435)
gpeterson@sandsanderson.com
TANIA M. L. SAYLOR
tsaylor@sandsanderson.com
*Sands Anderson Marks & Miller*
*1497 Chain Bridge Road, Suite 202*
*McLean, VA 22101*
*703-893-3600 (telephone)*
*703-893-8484 (facsimile)*

*Counsel for Truro Church and Trustees*

MARY A. MCREYNOLDS
marymcreynolds@mac.com
*Mary A. McReynolds, P.C.*
*1050 Connecticut Ave., N.W., 10th Fl.*
*Washington, D.C. 20036*
*(202) 429-1770 (telephone)*
*(202) 772-2358 (facsimile)*

*Counsel for Church of the Apostles, Church of the Epiphany, St. Margaret's Church, St. Paul's Church, and St. Stephen's Church*

E. ANDREW BURCHER
eaburcher@thelandlawyers.com
*Walsh, Collucci, Lubeley, Emerick & Walsh, P.C.*
*4310 Prince William Pkwy., Ste. 300*
*Prince William, VA 22192*
*703-680-4664 ext. 159 (telephone)*
*703-680-2161 (facsimile)*

*Counsel for Church of the Word, St. Margaret's Church, St. Paul's Church, and their Related Trustees*

JAMES E. CARR (VSB #14567)
*northvajim@aol.com*
*Carr & Carr*
*44135 Woodbridge Parkway, Ste. 260*
*Leesburg, VA 20176*
*703-777-9150 (telephone)*
*703-726-0125 (facsimile)*

*Counsel for Church of Our Savior at Oatlands*

R. HUNTER MANSON (VSB #05681)
manson@kaballero.com
*P. O. Box 539*
*876 Main Street*
*Reedville, VA 22539*
*804-453-5600 (telephone)*
*804-453-7055 (facsimile)*

*Counsel for St. Stephen's Church*

*Counsel for Appellees*

Dated: February 1, 2010

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of February, 2010, fifteen true copies of this foregoing Brief of Appellees CANA Congregations were filed by hand in the Office of the Supreme Court of Virginia, a true copy was sent by electronic mail in PDF format to the Office of the Clerk of the Supreme Court of Virginia and three true copies of the foregoing Brief for Appellees CANA Congregations were sent by electronic mail and first-class mail, postage prepaid, each to:

Bradfute W. Davenport, Jr., Esquire
George A. Somerville, Esquire
Joshua D. Heslinga, Esquire
TROUTMAN SANDERS, LLP
P.O. Box 1122
Richmond, VA 23218

Mary C. Zinsner, Esquire
TROUTMAN SANDERS, LLP
1660 International Drive, Suite 600
McLean, VA 22102

A. E. Dick Howard
627 Park Street
Charlottesville, VA 22902

William J. Virgulak, Jr., Esquire
BRAULT PALMER GROVE
WHITE & STEINHILBER, LLP
3554 Chain Bridge Road, Suite 400
Fairfax, VA 22030

Heather H. Anderson, Esquire
Adam M. Chud, Esquire
Soyong Cho, Esquire
GOODWIN PROCTER, LLP
901 New York Ave., N.W.
Washington, D.C. 20001

Robert C. Dunn, Esquire
Law Office of Robert C. Dunn
P.O. Box 117
Alexandria, VA 22313-0117

E. Duncan Getchell, Jr., Esquire
William E. Thro, Esquire
Stephen R. McCullough, Esquire
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

All Counsel for Appellees

Mark D. Loftis
Frank K. Friedman
WOODS ROGERS PLC
Wachovia Tower, Suite 1400
10 South Jefferson Street
Post Office Box 14125
Roanoke, VA 24038-4125

Gordon B. Tayloe, Jr.
KELLAM, PICKRELL, COX & TAYLOE, P.C.
403 Boush Street, Suite 300
Norfolk, VA 23510-1217

Samuel J. Webster
WILLCOX & SAVAGE, PC
1800 Bank of America Center
Norfolk, VA 23510

Thomas E. Starnes
Michael J. McManus
DRINKER BIDDLE & REATH LLP
1500 K Street, NW
Washington, D.C. 20005-1209

/s/ Gordon A. Coffee
Gordon A. Coffee