In the
Supreme Court of Virginia

RECORD NO. 09-0683

THE EPISCOPAL CHURCH,

Appellant,

v.

TRURO CHURCH *ET AL.*,

Appellees.

Opening Brief of Appellant

The Episcopal Church

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TABLE OF CONTENTS

PAGE

ASSIGNMENTS OF ERROR 3

QUESTIONS PRESENTED 5

STATEMENT OF FACTS 6

I. The Structure Of The Episcopal Church And The Diocese 6

II. The Anglican Communion 9

III. The Current Dispute 10

STATEMENT OF THE CASE 11

ARGUMENT 13

I. The Circuit Court Erred In Interpreting § 57-9(A). 13

A. The Court Misinterpreted The Term "Division" 14

1. "Division" has many common meanings 15

2. Related Virginia statutory and case law makes clear that congregational majorities cannot strip hierarchical churches of property rights in violation of denominational polity and rules 16

3. Section 57-9 was prompted by and has been applied only to divisions accomplished in conformity with denominational polity 21

a. Methodist Division 23

b. Presbyterian Divisions 24

4. The statute's sponsor stated that § 57-9(A) was designed to protect congregations "compelled to make a choice" after their denomination had divided 25

5. The principle of constitutional avoidance also supports the interpretation of § 57-9(A) that respects hierarchical church polity 26

6. The circuit court's interpretation is unsupported 27

B. The Congregations Have Not Joined A "Branch Of The Episcopal Church Or The Diocese" 28

C. The Congregations' Petitions Cannot Be Based on Events In The Anglican Communion 31

1. The Anglican Communion is not a "church or religious society" to which the congregations were "attached" 32

2. The Anglican Communion has not "divided" 34

II. The Circuit Court's Interpretation and Application Of § 57-9(A) Was Unconstitutional 34

A. The Court's Decision Violated The Free Exercise Clause 35

1. The First Amendment protects churches' rights to decide aspects of internal church governance, including the "division" of church bodies and restrictions on property 36

2. Previous state efforts to establish elements of church governance have been struck down 39

3. The circuit court misapplied Jones v. Wolf 41

B. The Circuit Court's Interpretation Of § 57-9(A) Violates The Establishment Clause 45

III. The Circuit Court Erred in Refusing to Consider Evidence Directed By Norfolk Presbytery and Green v. Lewis 46

IV. The Circuit Court Erred In Holding That The Episcopal Church And The Diocese Waived Their Right To Argue That The Parties Have Contracted Around § 57-9 49

CONCLUSION 50
CERTIFICATE..... 51

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Alston v. Commonwealth,
274 Va. 759, 652 S.E. 2d 456 (2007) 16

Baber v. Caldwell,
207 Va. 694, 152 S.E. 2d 23 (1967) 33

Bishop & Diocese of Colo. v. Mote,
716 P.2d 85 (Colo. 1986) 1

Board of Supervisors of Fairfax County v. Sampson,
235 Va. 516, 369 S.E. 2d 178 (1988) 48

Boyd v. Commonwealth,
236 Va. 346, 374 S.E. 2d 301 (1988) 16

Brooke v. Shacklett,
54 Va. (13 Gratt.) 301 (1856) ..... passim

Cha v. Korean Presbyterian Church of Washington,
262 Va. 604, 553 S.E. 2d 511 (2001) 2

Chandler v. Fletcher,
169 Va. 32, 192 S.E. 786 (1937) 48

Cheshire v. Giles,
144 Va. 253, 132 S.E. 479 (1926) 24

City of Virginia Beach v. Board of Supervisors,
246 Va. 233, 435 S.E. 2d 382 (1993) 16

Crook v. Commonwealth,
147 Va. 593, 136 S.E. 565 (1927) 30

Daniel v. Wray,
580 S.E. 2d 711 (N.C. Ct. App. 2003) 1

Diocese of Southwestern Va. v. Buhrman,
5 Va. Cir. 497 (Clifton Forge 1977),
pet. refused, Rec. No. 780347 (Va. June 15, 1978) 1, 18-19, 48

Episcopal Diocese of Mass. v. Devine,
797 N.E. 2d 916 (Mass. App. Ct. 2003)..... 1

Episcopal Diocese of Rochester v. Harnish,
899 N.E. 2d 920 (N.Y. 2008) 1

Finley v. Brent,
87 Va. 103, 12 S.E. 228 (1890) 18

First Born Church of the Living God v. Hill,
481 S.E. 2d 222 (Ga.1997)..... 41

First Methodist Church v. Scott,
226 So. 2d 632 (Ala. 1969)..... 41

Gibson v. Armstrong,
46 Ky. 481 (1847) 18

Goodson v. Northside Bible Church,
261 F.Supp. 99 (S.D. Ala. 1966),
aff'd, 387 F. 2d 534 (5th Cir. 1967)..... 40, 41

Green v. Lewis,
221 Va. 547, 272 S.E. 2d 181 (1980) .....passim

Hoskinson v. Pusey,
73 Va. 428 (1879)..... 18

In re Church of St. James the Less,
888 A.2d 795 (Pa. 2005) 1

In re Episcopal Church Cases,
198 P.3d 66 (Cal. 2009) 1, 38, 44

In re Estate of Douglass,
143 N.W. 299 (Neb. 1913)..... 32

Jampol v. Farmer,
259 Va. 53, 524 S.E. 2d 436 (2000) 48

Jones v. Wolf,
443 U.S. 595 (1979) .....passim

Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church,
344 U.S. 94 (1952) 2, 36, 37, 43

Larson v. Valente,
456 U.S. 228 (1982) 45, 46

Lemon v. Kurtzman,
403 U.S. 602 (1971), aff'd, 411 U.S. 192 (1973) 45

Lewis v. Commonwealth,
184 Va. 69, 34 S.E. 2d 389 (1945) 33

Maryland & Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.,
396 U.S. 367 (1970) 40

Norfolk Presbytery v. Bollinger,
214 Va. 500, 201 S.E. 2d 752 (1974) ..... passim

Pettus v. Hendricks,
113 Va. 326, 74 S.E. 191 (1912) 48-49

Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church,
393 U.S. 440 (1969) 31, 36, 44

Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Diocese of Conn.,
620 A.2d 1280 (Conn. 1993) 1

Reid v. Gholson,
229 Va. 179, 327 S.E. 2d 107 (1985) 2, 39-40

Serbian Orthodox Diocese v. Milivojevich,
426 U.S. 696 (1976) 2, 37, 44

Smith v. Swormstedt,
57 U.S. 288 (1854) 23

Southeastern Community College v. Davis,
442 U.S. 397 (1979) 28

Sustar v. Williams,
263 So. 2d 537 (Miss. 1972) 41

Virginia Society for Human Life v. Caldwell,
256 Va. 151. 500 S.E. 2d 814 (1998),
aff'd, 187 F.3d 633 (4th Cir. 1999)..... 26

Yamaha Motor Corp. v. Quillian,
264 Va. 656, S.E. 2d 122 (2002) 21

CONSTITUTIONS:

US CONST., amend. 1 ..... passim

VA. CONST., art. I, § 16 ..... 4, 35

STATE STATUTES:

1886-67 Va. Acts 649, amend. of Code of 1860, Ch. 77, § 9 19

2005 Va. ALS 772 42

Va. Code § 20-23 32

Va. Code §57-7.1 20

Va. Code §57-8 19

Va. Code §57-9 ..... passim

Va. Code §57-9(A) ..... passim

Va. Code §57-9(B) 13, 19, 27

Va. Code §57-14 20

Va. Code § 57-15 ..... 14, 20, 47, 48

Va. Code § 57-16 ..... 20, 44

Va. Code §57-16.1 20

OTHER AUTHORITIES:

16 Michie's Juris, Religious Societies § 10 (2000) 21, 25

Merriam-Webster's Online Dictionary 15-16

This case involves the interpretation and constitutionality of Virginia Code §57-9(A), a Civil War-era statute that addresses property rights in the event of a "division" of a hierarchical "church or religious society" to which congregations are "attached." The circuit court applied § 57-9(A) to permit dissenting majorities of The Episcopal Church's parishes to divert property from the Church, in direct contravention of the rules and polity the founders and members of the Episcopal Church have created for themselves. Those rules and that polity are designed to ensure the Church's continuity during periods of theological debate. Thus, Episcopal "parishes" are formed by "dioceses" and may not legally "divide" the Church, and the use of parish property is not subject to the will of congregational majorities, but is expressly limited to use for the mission of the Church and its dioceses.[1]

The Episcopal Church's right to establish its own structures and rules is protected by the U.S. and Virginia Constitutions. "[R]eligious freedom

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[1] Numerous courts have affirmed that Episcopal parish property remains with the Church in the event of dispute. See, e.g., In re Episcopal Church Cases, 198 P.3d 66 (Cal. 2009); Episcopal Diocese of Rochester v. Harnish, 899 N.E.2d 920 (N.Y. 2008); In re Church of St. James the Less, 888 A.2d 795 (Pa. 2005); Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Diocese of Conn., 620 A.2d 1280 (Conn. 1993); Bishop & Diocese of Colo. v. Mote, 716 P.2d 85 (Colo. 1986); Daniel v. Wray, 580 S.E.2d 711 (N.C. Ct. App. 2003); Episcopal Diocese of Mass. v. Devine, 797 N.E.2d 916 (Mass. App. Ct. 2003); Diocese of Southwestern Va. v. Buhrman, 5 Va. Cir. 497 (Clifton Forge 1977), pet. refused, Rec. No. 780347 (Va. June 15, 1978).

encompasses the 'power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721-22 (1976) (quoting Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 116 (1952)); See also Cha v. Korean Presbyterian Church of Washington, 262 Va. 604, 611, 553 S.E. 2d 511, 514 (2001) ("it is well established that a civil court may [not] interfere in matters of church government"); Reid v. Gholson, 229 Va. 179, 189, 327 S.E. 2d 107, 113 (1985) ("a decision by . . . an hierarchical church [is] an ecclesiastical determination constitutionally immune from judicial review … even when the issue is merely one of internal governance").

The circuit court, however, concluded that with § 57-9(A), the General Assembly has eviscerated the structure and rules The Episcopal Church has established for itself, and for the Church (and other hierarchical churches) in Virginia, substituted a congregational polity under which, in the event of a theological disagreement, local congregations may legally "divide" the Church and retain parish property for their own use. The circuit court's interpretation of § 57-9(A) is inconsistent with the statute's legal and historical context and all known prior applications. It is also unconstitutional. If the legislature may regulate internal church governance

as the circuit court held, then no denomination – be it hierarchical or congregational – is able to decide matters of church governance for itself, "free from state interference." The circuit court should be reversed on these grounds alone. See infra, Argument Sections I and II.

Even if the circuit court's conclusions regarding the applicability and constitutionability of § 57-9(A) were correct, moreover, the judgment should be reversed and remanded for further proceedings consistent with 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), which establish that courts resolving church property disputes are to consider deeds, the general church's rules, and the course of dealing between the parties, in addition to any relevant state statutes. The circuit court erred in ruling that that precedent did not apply to this church property dispute, and in refusing to consider whether, notwithstanding § 57-9(A), the Church has a contractual and proprietary interest in the property involved that "could not be eliminated by unilateral action of the congregation[s]." Id. at 555, 272 S.E. 2d at 185. See infra, Argument Sections III and IV.

ASSIGNMENTS OF ERROR

1. The circuit court erred in interpreting and applying the term "division" in Va. Code § 57-9(A) and the statute itself to supersede the

Episcopal Church's polity, because its interpretation ignores and conflicts with related Virginia statutory and case law, the principle of Constitutional avoidance, and the statute's past application.

2. The circuit court erred in holding that CANA and the ADV are "branches" of the Episcopal Church or the Diocese of Virginia (the "Diocese") for purposes of § 57-9(A), because CANA and the ADV were formed by the Church of Nigeria, and because the court's holding impermissibly rested on its own finding of "communion."

3. The circuit court erred in holding that the Anglican Communion satisfied § 57-9(A), because the Anglican Communion has not "divided," even under the court's definition of the term, and also is not a "church or religious society" to which the congregations were "attached."

4. The circuit court erred in holding that its interpretation of § 57-9(A) is consistent with the First Amendment to the United States Constitution and Article I, § 16 of the Virginia Constitution, because its interpretation both intrudes on matters at the core of internal church governance and discriminates among religious dominations.

5. The circuit court erred in holding that Green v. Lewis, 221 Va. 547, 272 S.E. 2d 181 (1980), does not apply to this case, because Green's holding, that claims of interest in church property must be resolved after

consideration of deeds, general church rules, state statutes, and the course of dealing between the parties, applies to all such claims.

6. The circuit court erred in holding that the Church and the Diocese waived their right to argue that they and their congregations contracted around § 57-9(A), because the Church and the Diocese raised this defense in their answers and in briefing, and all parties recognized that this issue remained.

QUESTIONS PRESENTED

1. Should § 57-9(A) be interpreted consistently with related Virginia statutory and case law that respects the polity of hierarchical churches and with the principle of Constitutional avoidance? (Assignments of Error 1-3.)

2. Is § 57-9(A) unconstitutional if applied to supersede the polity and rules of a hierarchical church? (Assignment of Error 4.)

3. Does Green v. Lewis apply to church property disputes arising under § 57-9(A)? (Assignment of Error 5.)

4. Does a party waive the argument that an opposing party is contractually precluded from invoking a statute when it raises the defense in its answer and explains it in briefing? (Assignment of Error 6.)

STATEMENT OF FACTS

I. The Structure Of The Episcopal Church And The Diocese

The Episcopal Church is a hierarchical religious denomination with three tiers of governance. The "General Convention" is the highest governing body in the Church. It has adopted and amends the Church's Constitution and Canons, containing the law of the Church and binding on all entities of the Church. [2]

The Church is geographically divided into 111 "dioceses," including the Diocese of Virginia. Each diocese is governed by a diocesan Bishop and an Annual "Convention" or "Council" that adopts and amends a diocesan Constitution and Canons to supplement the Church's Constitution and Canons within that diocese.[3] It is undisputed that under the Church's law, only the General Convention has the authority to "divide" either the Episcopal Church or a diocese.[4] In keeping with Episcopal Church polity

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[2] See JA 910-1263 (Church's Constitution and Canons in effect in 2006 and 2007).

[3] See JA 1264-1344 (Diocese's Constitution and Canons in effect in December 2006 and 2007).

[4] JA 915-16, 951-52, 954 (Church Const. Art. V; and Canons I.10 & 11(3)(f)); JA 2508-2510 (Douglas); JA 2798-2800 (Beers). Dr. Douglas testified for the Church and the Diocese as an expert on the Church and the Anglican Communion. Mr. Beers is the "Chancellor," or legal advisor, to the Presiding Bishop of the Church, and testified as a fact witness for the Church and the Diocese.

and Anglican tradition, under which no more than one Anglican bishop exercises jurisdiction in a particular territory, the Church's rules contemplate that such "divisions" will be geographical.[5] However, the General Convention has the authority to effect some other type of "division" should it choose to do so. JA 2801 (Beers).

At the lowest level of the Church's governing structure are its individual congregations, primarily "parishes." Each parish is governed by its "vestry," comprising its ordained "rector" and a number of elected lay persons. Church Canon I.13(2) leaves the "establishment of a new Parish … to the action of the several Diocesan Conventions." JA 955. Accordingly, Diocesan Canons 10.1 and 10.6 set forth the requirements for formation of parishes in the Diocese, including "acknowledg[ing] the jurisdiction of the Bishop … of the Diocese," maintaining a "program of identifiable Episcopal services," and "shar[ing] in the support of the Episcopate of the Diocese." JA 1282-86.[6]

The Church's rules and polity similarly ensure that parishes, will continue to further the Church's mission and ministry regardless of the views of current congregational majorities. Thus, any change in a parish's

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[5] JA 2800-01 (Beers); JA 2541-42, 2545 (Douglas).

[6] In the Diocese of Virginia, parishes are referred to as "churches."

status requires diocesan approval and action. See JA 1283 (Canon 10.6). Congregational majorities, moreover, have no ability to direct the use and control of parish property away from The Episcopal Church.

First, parish leaders, who have custody of such property, must swear as a condition of taking office to be bound by the rules and discipline of the Church. Church Canon III.9.5(a) establishes that the rector of each parish is at all times entitled to the use and control of parish property, subject to the Constitution and Canons of the Church. JA 985. Clergy, as a condition of ordination, must execute a written declaration in which they "solemnly engage to conform to the Doctrine, Discipline, and Worship of the Episcopal Church." JA 917 (Church Const. Art. VIII). Diocesan Canon 11.8 requires every vestry member to promise a "hearty assent and approbation to the doctrines, worship and discipline of The Episcopal Church." JA 1285. Church Canon I.17.8 mandates that every officer in the Church "well and faithfully perform the duties of that office in accordance with the Constitution and Canons of [the] Church and of the Diocese in which the office is being exercised." JA 961.

Second, other canons explicitly restrict the property itself for the Church's mission. Church Canons I.7.3 and II.6.2 and Diocesan Canon 15.2 prohibit parishes from encumbering or alienating property without the

consent of the Diocese. JA 946, 967, 1290. Church Canon II.6.1 requires that property consecrated by a Bishop be "secured for ownership and use by a Parish … affiliated with this Church and subject to its Constitution and Canons." JA 967. Church Canon I.7.4 states that all real and personal property held by parishes is held in trust for the mission of the Church and the Diocese, and may be controlled by the parish only "so long as [it] remains a part of, and subject to, this Church and its Constitution and Canons." JA 946; see also JA 1290 (Diocesan Canon 15.1, same). Finally, Diocesan Canon 15.3 directs the Diocese "to take charge and custody" of any property that has ceased to be used by an Episcopal congregation. JA 1291.

II. The Anglican Communion

The Episcopal Church is a "Province" of the Anglican Communion, which is an international fellowship of 38 autonomous regional churches that generally trace their histories to the Church of England and remain in theological "communion" with the Church of England's primate, the Archbishop of Canterbury. See, e.g., JA 437-38 (Rpt. of Truro Church at ¶¶ 8-9); JA 2514 (Douglas). The Anglican Communion has no hierarchical structure, no uniform Prayer Book, no Constitution or Canons, no legislative body, and no ecclesiastical or juridical authority over its member Provinces,

let alone over individual congregations within those Provinces. JA 2660-61, 2665-66 (Mullin);[7] JA 2514-2530, 2537-38, 2580, 2601-04, 2632-33 (Douglas).

III. The Current Dispute

In recent years, during a period of theological debate, a small minority of The Episcopal Church's more than 7,600 congregations have voted to leave the Church.[8] Often, they have joined one of several other existing denominations, including the Church of Nigeria. However, the Church's General Convention has taken no action to divide either The Episcopal Church or any one of its dioceses in connection with this dissent or debate: The Church's governing structure and geographical territory have been unaffected.

In 2005, the Church of Nigeria, which began as a mission of the Church of England and is also a part of the Anglican Communion, formed a U.S. mission now known as "CANA" to minister to expatriate Nigerians and, later, to former Episcopalians and others, and has taken other action to express its disagreement with The Episcopal Church. JA 2155-56 (Minns);

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[7] Dr. Mullin testified for the Church and the Diocese as an expert on American religious history and the Anglican Communion.

[8] See, supra, n.1.

JA 2399-2403, 2412-13 (Yisa).[9] As noted above, this sort of intrusion into another Anglican province's territory violates long-standing Anglican doctrine and practice, see supra p. 6-7; accordingly, CANA and its clergy have not been recognized as legitimate parts of the wider Communion. JA 2541-42, 2545-46 (Douglas); JA 2195, 2207-10 (Minns). However, the Church of Nigeria, the Episcopal Church, and all other Provinces of the Anglican Communion remain part of that same Communion. JA 2532-34 (Douglas); JA 2447 (Yisa).

STATEMENT OF THE CASE

Following their respective votes to leave The Episcopal Church and join CANA, appellees filed petitions pursuant to § 57-9(A), which on its face provides a default mechanism for clarifying the duties of church trustees in the event of a "division" of a "church or religious society" to which a local congregation holding property through trustees is "attached."[10] The Church and the Diocese opposed the § 57-9 proceedings and filed complaints seeking declarations that the property at issue is held for the mission of the Church and the Diocese, in accordance with the Church's rules and the

[9] Martyn Minns is a missionary bishop of the Church of Nigeria, with jurisdiction over CANA. Abraham Yisa is the registrar of the Church of Nigeria.

[10] In Virginia, real property of many Episcopal parishes or churches, including that of the nine appellee congregations, is held by trustees.

course of dealing between the parties. All cases were consolidated in the circuit court.

Following a five-day trial, the circuit court issued an opinion on April 3, 2008, holding that § 57-9(A)'s requirements of "division," "branch," "church or religious society," and "attached" had been met. JA 3853-3938. Thus, the court held, the congregations' petitions were supported independently by events in the Diocese, the Church, and the Anglican Communion. On June 27, 2008, the court issued opinions holding that its interpretation of § 57-9 was constitutional (JA 4120-68), and that in a church property dispute under § 57-9, it need not engage in the analysis set forth in Norfolk Presbytery and Green v. Lewis. JA 4169-82. Finally, on August 19, 2008, the circuit court ruled that the Church and the Diocese had waived their right to argue that they and the congregations had contracted around the default rules of § 57-9(A). JA 4230-45. After a three-day trial on miscellaneous remaining issues, on January 8, 2009, the circuit court issued a final judgment granting the congregations' § 57-9(A) petitions and dismissing the Church's and Diocese's declaratory judgment actions as moot, with the exception of an endowment fund related to one of the congregations. JA 4900-4926.

ARGUMENT

I. <u>The Circuit Court Erred In Interpreting § 57-9(A)</u>.

The full text of § 57-9(A) is as follows:

> "If a division has heretofore occurred or shall hereafter occur in a church or religious society, to which any such congregation whose property is held by trustees is attached, the members of such congregation over 18 years of age may, by a vote of a majority of the whole number, determine to which branch of the church or society such congregation shall thereafter belong. Such determination shall be reported to the circuit court of the county or city, wherein the property held in trust for such congregation or the greater part thereof is; and if the determination be approved by the court, it shall be so entered in the court's civil order book, and shall be conclusive as to the title to and control of any property held in trust for such congregation, and be respected and enforced accordingly in all of the courts of the Commonwealth."[11]

As the history, purpose, and legal context of this statute demonstrates, § 57-9(A) was adopted to apply when a hierarchical church structurally divides into two or more organizations, creating legal uncertainty and disputes as to (1) which of the resulting bodies has succeeded to the hierarchical church's legal rights and obligations; and (thus) (2) the legal duties of court-appointed trustees holding title to property of the congregations of the formerly-united church. There was (and is) no other

[11] § 57-9(B), which applies to congregational churches, is similar, except that the disposition of the property is to be decided by "a majority of the members of such congregation, entitled to vote by its constitution … [or] by its ordinary practice or custom."

clear statutory mechanism for resolving such uncertainties.[12]

In 140 years, the statute has never been interpreted or applied as it was here, to give a dissenting minority of the members of a hierarchical church the right to legally divide their denomination and divert to their own purposes property held for the denomination's ministry and members. As we show below, the circuit court: (1) misinterpreted the term "division" and thus misapplied it to the Church and the Diocese, (2) erroneously held that CANA and its Virginia arm, the "ADV," are "branches" of the Church and the Diocese, and (3) erroneously held that the Anglican Communion is a "religious society" to which the congregations were "attached" and that it has "divided."

A. The Court Misinterpreted The Term "Division."

Choosing among several common meanings of the term "division," the circuit court interpreted that word in § 57-9(A) to mean any '"split"' or '"rupture in a religious denomination that involve[s] the separation of a group of congregations, clergy, or members from the church, and the formation of an alternative polity that disaffiliating members could join."' JA 3934-35 (quoting congregations' brief). The Court erred.

[12] Other related statutes (specifically § 57-15) address only "sales" and "transfers" of title to property, which would not generally occur in the case of a "division" of the larger church body to which the congregation was attached.

"Division" is an ambiguous term that can mean several different things in different contexts. Thus, the proper meaning of that term in the context of § 57-9(A) must be sought through other tools of statutory interpretation, including the statute's legal context, history, and past application, as well as the principle of constitutional avoidance. These sources confirm that "division" in § 57-9(A) means a structural separation accomplished in accordance with a hierarchical church's own polity. Such a division would in fact result in two or more entities that may be legal successors to the formerly undivided church, and thus would be expected to affect property rights. The statute has previously been applied to resolve property disputes in that circumstance and no other.

1. "Division" has many common meanings.

The term "division" has many common meanings and implications, including but not limited to: Disagreement on theological or other issues; the existence of different denominations; the legal departure of a few people from an existing denomination; and the structural separation of a church body into two. Both sides' experts confirmed that point. JA 1905, 1964-65, 2003-04 (Valeri); JA 2029, 2125 (Irons).[13] See also Merriam-Webster's Online Dictionary, www.Merriam-Webster.com/dictionary/division

[13] Drs. Valeri and Irons testified for the congregations as experts on American religious history.

(providing eleven distinct definitions of "division"). The statute therefore cannot be interpreted on the basis of its plain language alone — context is critical.

2. Related Virginia statutory and case law makes clear that congregational majorities cannot strip hierarchical churches of property rights in violation of denominational polity and rules.

Turning to context, one important consideration is whether and how the court's interpretation of § 57-9(A) fits within the larger body of Virginia law governing churches. "[S]tatutes are not to be considered as isolated fragments of law … . [T]hey should be so construed as to harmonize the … system and make the scheme consistent … ." Alston v. Commonwealth, 274 Va. 759, 769, 652 S.E. 2d 456, 462 (2007). Thus, this Court has made clear that related statutes must be construed both in pari materia, see City of Virginia Beach v. Board of Supervisors, 246 Va. 233, 236-37, 435 S.E. 2d 382, 384 (1993), and in the light of their common law context. Boyd v. Commonwealth, 236 Va. 346, 349, 374 S.E. 2d 301, 302 (1988) ("A statutory change in the common law is limited to that which is expressly stated or necessarily implied because the presumption is that no change was intended.")

Here, the legal context refutes the notion that § 57-9(A) overrides the internal governance or property rights of hierarchical churches. First,

Virginia courts both before and after the adoption of § 57-9 have consistently held that the right to use hierarchical church property generally depends on continuing membership in the denomination, and have allowed property to be diverted from that denomination only in the event of a legal division undertaken in accordance with denominational polity.

In Brooke v. Shacklett, 54 Va. (13 Gratt.) 301, 311 (1856), this Court explained that when property has been conveyed to trustees for the use and benefit of a local congregation, the "purposes of the trust" require adherence to that church's rules and polity. Thus, in the event of a dispute within a hierarchical church, the faction adhering to the denomination is entitled to the use and control of the property. Id. at 321.

The application of this rule was complicated in Brooke, because the denomination at issue (the Methodist Episcopal Church or "MEC") had divided into two bodies, creating uncertainty as to which was the current beneficiary of the existing trust. See infra pp. 23-24. Only after concluding that the local congregation had been lawfully entitled to join the new "Methodist Episcopal Church South" under the MEC's "Plan of Separation" did the Court hold that it could use the property in connection with that new denomination. Brooke, 54 Va. at 324-25. The Methodist Episcopal Church South,

> "by virtue of its organization under [the Plan of Separation], is now the lawful successor of the Methodist Episcopal church in respect to the disciplinary control and protection of the members of the church adhering to the south division. And such members have now the same right to enjoy the church property which was held by their societies before the division, in exclusion of those who repudiate the authority of the Methodist Episcopal church, south." Id. at 327 (emphases added).

In Gibson v. Armstrong, 46 Ky. 481, 524 (1847), a case on which the Brooke Court relied, the court similarly explained that a local congregation of the MEC could retain local church property after joining the Methodist Episcopal Church South because

> "the southern Church stands not as a seceding or schismatic body, breaking off violently or illegally from the original Church, and carrying with it such members and such rights only as it may succeed in abstracting from the other, but as a lawful ecclesiastic body, erected by the authority of the entire Church, with plenary jurisdiction over a designated portion of the original association, recognized by that Church as its proper successor and representative within its limits." Id. at 524 (emphasis added).

Had no lawful, structural division occurred, the result would be different.

Virginia courts continued to apply the same denominational restrictions on local church property after the enactment of § 57-9. See Hoskinson v. Pusey, 73 Va. 428 (1879) (awarding property to members of MEC, where extraordinary circumstances of Brooke and Gibson had passed); Finley v. Brent, 87 Va. 103, 12 S.E. 228 (1890) (congregational majority could not take property from hierarchical denomination); Green,

221 Va. 547, 272 S.E. 2d 181 (same); Diocese of Southwestern Va., 5 Va. Cir. at 503 (Clifton Forge 1977), pet. refused, Rec. No. 780347 (Va. June 15, 1978) (deed to a "component of [the Episcopal Church] … leads inescapably to the conclusion that the trustees cannot hold title to the subject property for persons or groups who are withdrawn from and not under the authority of The Episcopal Church").

Related statutory provisions similarly confirm Virginia's respect for religious freedom and internal church rules. Section 57-9 was adopted by 1866-67 Va. Acts. 649 (Ch. 210), as an amendment to Chapter 77, § 9 of the Code of 1860, which governed the appointment of church trustees (now found at § 57-8).[14] There was no hint of any intent to create "voting rights" that contravened existing denominational polities; rather the statute spoke solely of the appointment and obligation of trustees "to promote the purpose and object of the conveyance, devise or dedication." See id. Moreover, § 57-9 itself, from its inception, has contained separate provisions governing hierarchical churches (now § 57-9(A)), and congregational churches (now § 57-9(B)) – a distinction that would be unnecessary if their differing polities were not to be respected.

At the same time, other provisions of Chapter 57 uniformly confirm

[14] Copies of the 1866-67 Act of Amendment and Chapter 77 of the Code of 1860 are attached hereto as Ex. 1.

that in Virginia, the state respects, and does not seek to override, hierarchical church rules and polity. Section 57-7.1 directs that any transfer to or for the benefit of any church entity that "fails to state a specific purpose shall be used … as determined appropriate by the authorities which under [that church's] rules or usages, have charge of the administration of the temporalities thereof." Section 57-14 provides that upon suit by members of a church diocese or congregation, the court may compel trustees holding title to church property to transfer or sell that property if "it appears that the governing body of the church diocese or the congregation has given its assent thereto in the mode prescribed by its authorities." "In the case of a super-congregational church," § 57-15, which governs the sale, exchange, or encumbrance of church property, "requires a showing that the property conveyance is the wish of the constituted authorities of the general church." Norfolk Presbytery, 214 Va. at 503, 201 S.E. 2d at 755. Under § 57-16, church property may be held by ecclesiastical officers only when that is permitted by "the laws, rules, or ecclesiastical polity" of that church, and then only "for the purpose authorized and permitted by [that church's] laws, rules or ecclesiastic polity." § 57-16.1 similarly provides that local church corporations may hold property only "for any purpose authorized and permitted by the laws, rules,

or ecclesiastic polity of the church or body."

The legal context, in short, strongly suggests that § 57-9(A) does not override or replace hierarchical church polity, but was intended, and should be interpreted, to accommodate that type of polity, consistent with the larger body of Virginia law. Thus, commenting specifically on § 57-9 and on "property rights in case of division or secession," even basic Virginia hornbooks have explained:

> "Civil courts freely recognize and affirm the right of any individual or group to leave, abandon or separate from membership in a church. Upon separation, however, such person may not take with him the property of the church departed from, since such property, in the absence of agreement with the church, remains under the jurisdiction and control of the church." 16 Michie's Juris, Religious Societies § 10, 105-106 (2000) (emphasis added).

Section 57-9 governs the disposition of property only "[w]here no breach of trust or diversion of property on the part of the majority faction of a church is shown." Id. at 103.

3. Section 57-9 was prompted by and has been applied only to divisions accomplished in conformity with denominational polity.

The proper interpretation of the term "division" in § 57-9 is also evidenced by the particular church "divisions" that both prompted the adoption of the statute, and have, until now, provided the sole occasions for its application. See Yamaha Motor Corp. v. Quillian, 264 Va. 656, 665,

571, S.E. 2d 122, 126 (2002) (we may determine legislative intent "from the occasion and necessity of the statute being passed") (internal quotations omitted). As the uncontradicted evidence showed, all of these divisions were in fact accomplished in accordance with the denomination's own rules and polity, and created genuine uncertainty regarding trustees' legal duties. The circuit court made no findings to the contrary.

As the circuit court noted, § 57-9 was prompted by the profound structural divisions that occurred prior to the Civil War in the largest denominations of that era – Presbyterian, Methodist, and Baptist. See JA 3938. Those divisions were major historical events, fundamentally different from the proliferation of small, dissident denominations that have otherwise characterized American religious history. They also led to disputes and litigation in Virginia. Id.; see also JA 2690-93 (Mullin); Brooke, 54 Va. at 324. Indeed, virtually every 19th century example of the term's use that the congregations' experts proffered referred to one of these divisions. See JA 2693-94.[15] Each of these divisions also occurred in accordance with the denomination's own polity. See JA 2678-80 (Mullin).

[15] The one exception was an excerpt from an 1874 Journal of the Diocese of Minnesota, which discussed recent "schism" and lamented "this and all other unhappy divisions" in the church catholic. See JA 2710-12.

The congregations have striven mightily to obscure this undisputed fact by arguing that the divisions in the Presbyterian and Methodist Churches were not "amicable" and that the governing bodies of the denominations did not "approve" of either the dissidents or the division. That, however, is beside the point. Each division, rancorous though it was, occurred in accordance with the denomination's own polity – and those various polities did not, in all cases, require that a division be accomplished by specific action of the church's governing body. The congregations presented no evidence, and the court made no findings, to the contrary.

a. The Methodist Division. As this Court has previously held, the division of the MEC was effected pursuant to a "Plan of Separation" adopted in 1844 by the MEC's governing body, its General Conference. Brooke, 54 Va. at 324-25; Smith v. Swormstedt, 57 U.S. 288, 304-305 (1854). After the division, the Plan "broke down," in that the northern Church changed its mind and sought to undo the already-effected division. See JA 2681-84 (Mullin). As recognized in Swormstedt and Brooke (and explained at trial by Dr. Mullin), however, the Methodist division was validly accomplished in 1844 pursuant to the General Conference's plan, notwithstanding the northern conferences' later change of heart. JA 2683-84 (Mullin); JA 3921 (April 3 Op.) (in Brooke, the division

was "formally recognized at the highest level of the hierarchy of the church"). Accordingly, the MEC's property interests could be divided between the new branches.[16]

b. Presbyterian Divisions. In 1837, the Presbyterian General Assembly voted to strike from its rolls several Synods and Presbyteries. The excluded church bodies then organized the "New School" Presbyterian Church. JA 2685-86 (Mullin); JA 2010 (Valeri). The "New School" and the original "Old School" Churches each later divided again (in 1857-59, and in 1861, respectively). In each case, several presbyteries first withdrew, as they had the right and authority to do under Presbyterian polity. JA 2686-88 (Mullin); see also JA 1996, 2012-15 (Valeri). In recognition of the departures, the respective General Assemblies again struck those presbyteries from their rolls, significantly altering the original denominations.[17]

— — — — —

[16] The congregations have sought to portray Dr. Mullin's testimony that the Plan "broke down" after its adoption as an "admission" that somehow supports their position. As just explained, it is not.

[17] In 1845, the Baptist Board of Foreign Missions also divided into two or more separate bodies by action of the congregations, in accordance with Baptist polity. JA 2689-90 (Mullin). See also Cheshire v. Giles, 144 Va. 253, 257, 132 S.E. 479, 480 (1926) ("It is abundantly shown in the record that each congregation in this [Baptist] denomination is independent and has absolute control over its property and internal affairs").

The circuit court agreed that it was these divisions, and not the commonplace departures of small groups to form new denominations, that prompted the adoption of § 57-9. JA 3938. Moreover, the evidence also showed that these historic divisions are the only ones to which the statute previously has been applied. Dr. Irons explained that of the 29 19th Century petitions he uncovered, 25 involved congregations attached to the MEC that voted to join either the MEC North or the MEC South.[18] Four were Presbyterian. JA 2096 (Irons); JA 3912 (April 3 Op.). There are no other known uses of § 57-9(A). If the Virginia General Assembly intended § 57-9(A) to have an impact any time a few congregations left one denomination to join (or form) another, that has gone unnoticed by generations of Virginians. See e.g., 16 Michie's Juris., Religious Societies § 10 (§ 57-9 controls disputes only when majority faction is not seeking to breach existing trust or divert property from legal beneficiary).

4. The statute's sponsor stated that § 57-9(A) was designed to protect congregations "compelled to make a choice" after their denomination had divided.

Aside from the historical and statutory context discussed above, the sole evidence of the General Assembly's intent in passing § 57-9 was a

[18] These included congregations in the "Baltimore Conference" of the MEC, that originally adhered to the MEC (North) but sought after 1861 to change their affiliation from the MEC (North) to the other "branch" created by the 1844 division, the MEC (South). See JA 3910-11 (April 3 Op.).

statement by its sponsor, John Baldwin, who explained that the provision was adopted "to protect local congregations who when their church divided were compelled to make a choice between the different branches of it." JA 2074-75 (emphasis added); JA 3911 (April 3 Op.) (same). This history further confirms that the term "division" means a structural division of the denomination into pieces that are legal successors to the previously unified church: Only in such a case would local congregations be "compelled to make a choice" among the new "branches" of their former denomination.

5. The principle of constitutional avoidance also supports the interpretation of § 57-9(A) that respects hierarchical church polity.

Statutes must be "construed in such a manner as to avoid a constitutional question whenever this is possible," and courts should "construe the plain language of a statute to have limited application" when necessary. Virginia Society for Human Life v. Caldwell, 256 Va. 151, 157, & n.3. 500 S.E. 2d 814, 816-17 & n.3 (1998) (citations and quotations omitted). The circuit court's interpretation of § 57-9(A) failed to heed this directive, and thus not only raised a constitutional question, but rendered the statute unconstitutional. See infra Section II.

6. The circuit court's interpretation is unsupported.

Ignoring the context and these tools of statutory interpretation, the circuit court rested its erroneous interpretation of "division" on (1) the fact that the historical divisions that prompted § 57-9 were not "amicable," (2) the court's belief that the term must mean the same thing in § 57-9(A) (hierarchical churches) and (B) (congregational churches), (3) the fact that officials of the Diocese have used the term "division" to refer to separation of individuals from the Church, and (4) the court's belief that the definition urged here would "make § 57-9(A) a nullity." JA 3934-36. These suppositions are irrelevant, erroneous, or both.

First, it is true that the divisions that prompted § 57-9 were not "amicable": To the contrary, they were bitter and spawned numerous disputes over property. What matters, however, is that each division comported with each church's polity, as discussed above.

Second, "division" indeed means the same thing in § 57-9(A) and (B): A structural separation of the applicable church in accordance with its polity. The facts surrounding the division of a hierarchical church will look different from those in a congregational church, because their polities are different. The statutory definition, however, is constant.

The parties' use of the term "division" is also of no moment. As

noted, the term has many meanings, some of which do apply to this (and other similar) situations.[19] That the Diocese or the Church may have used the word "division" in some other context sheds no light on the General Assembly's intent in the different, legal context of § 57-9. Cf. Southeastern Community College v. Davis, 442 U.S. 397, 411 n. 11 (1979) ("[I]solated statements by individual Members of Congress … made after the enactment of the statute … cannot substitute for a clear expression of legislative intent).

Finally, requiring that a legally-cognizable "division" comport with the affected church's polity hardly renders the statute a nullity. Section 57-9(A) created an orderly procedure for clarifying the legal duties and obligations of trustees and the status of property in the event of a division in a hierarchical denomination that might alter the trustees' and the denomination's respective legal rights and obligations. It has been usefully applied in precisely – and until now only – that circumstance.

B. The Congregations Have Not Joined A "Branch" Of The Episcopal Church Or The Diocese.

The circuit court further erred in holding that CANA and its Virginia

[19] For example, Congregations' Ex. 15 (JA 2835) refers to the "divisions" in theological opinion that led to the congregation's votes; Congregations' Ex. 68 (JA 2980) refers to the potential "division" of a few individuals from the Church, and Congregations' Ex. 6 (JA 2824) refers to the "division" of Christianity into numerous denominations.

component, the ADV, are "branches" of the Episcopal Church or the Diocese within the meaning of § 57-9(A). The circuit court defined "branch" to mean "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. However, CANA was founded as a mission of the Church of Nigeria, not of the Episcopal Church. JA 3881-82. The ADV is a part of CANA. JA 2153-54 (Minns). Thus, the "particular ancestor" from which CANA and ADV have "descended," and the "main body" from which they "shoot or extend," is the Church of Nigeria. Under both the circuit court's stated definition and any other reasonable view, CANA and ADV are "branches" of the Church of Nigeria, not The Episcopal Church or the Diocese.

The circuit court apparently viewed CANA and ADV as "branches" of the Episcopal Church and the Diocese because many of their current members came from the Episcopal Church and because all of these entities view themselves as parts of the Anglican Communion. JA 3933-34. Neither fact justifies the circuit court's conclusion.

As the circuit court itself recognized, one church does not become a "branch" of another because it is made up largely of the latter's former members. See JA 3934 (acknowledging that the Episcopal Church's

Missionary Diocese of Mexico, which was founded to form a home for disaffected Roman Catholics and was principally comprised of such members, is not a "branch" of the Roman Catholic Church but of the Episcopal Church); see also JA 1943 (Valeri) (no "division" if individuals leave the Lutheran Church to join a Baptist Church). Indeed, the General Assembly has recently rejected an amendment to § 57-9 that would have permitted congregations, in the event of a division, to vote to join "a different church, diocese, or society." JA 3704-05 (draft of SB 1305 (2005)). "This is an indication of the legislative policy in Virginia." Crook v. Commonwealth, 147 Va. 593, 601, 136 S.E. 565, 568 (1927) (relying on legislature's rejection of bill in interpreting earlier statute).

Nor can these entities' claimed or actual status as parts of the Anglican Communion change the analysis. Even assuming that the Church of Nigeria, CANA, and The Episcopal Church are all in some sense "branches" of the Anglican Communion,[20] it does not follow that a sub-part of the Church of Nigeria is a branch of the Episcopal Church. Under this logic, the Virginia judiciary is not only a "branch" of the Commonwealth's government, but also a "branch" of both the General Assembly and the

[20] As noted above, there was no evidence that the Anglican Communion itself recognizes or includes CANA. All of the evidence was to the contrary. JA 2207, 2209-10 (Minns); JA 2545-45, 2635-36 (Douglas); JA 2670 (Mullin).

Executive Office of the Governor – and vice versa. The absurdities inherent in the circuit court's analysis are patent.

Moreover, by resting its finding of a "branch" on the court's own belief that The Episcopal Church and CANA are "joined together by their common membership in the Anglican Communion,"[21] the circuit court resolved these "church property disputes on the basis of religious doctrine and practice." Jones v. Wolf, 443 U.S. 595, 602 (1979). This is constitutionally forbidden. Id.; Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

C. The Congregations' Petitions Cannot Be Based on Events In The Anglican Communion.

The circuit court also erroneously concluded that events in the Anglican Communion satisfied § 57-9(A). As we show below, the Anglican Communion is not a "church" or "religious society" to which the congregations were "attached;" nor has it "divided" even under the circuit court's expansive (and erroneous) definition of that term.

[21] See JA 3934 ("While it is certainly true that no one considered the Episcopal Diocese in Mexico to be a "branch" of the Roman Catholic Church," a different result obtains in this case because these parties "are all joined together by their common membership in the Anglican Communion …").

1. The Anglican Communion is not a "church or religious society" to which the congregations were "attached."

The circuit court declined to decide whether the Anglican Communion is a "church," but held that it is a "religious society," which it declared to be a "more general" entity than a church. JA 3930. However, there is no reason to think that the statutory term "religious society" is anything other than a synonym for "church," included out of respect for groups like the Society of Friends (Quakers), that do not call themselves "churches." See JA 2661-62 (Mullin); In re Estate of Douglass, 143 N.W. 299, 300 (Neb. 1913) ("The terms 'church' and 'society' are used to express the same thing."); Va. Code § 20-23 (equating "religious denomination" and "religious society"). Moreover, the expert opinion was unanimous and uncontradicted: The Anglican Communion is not considered either a "church" or a "religious society." JA 2511-13 (Douglas); JA 2659, 2662-64 (Mullin). Indeed, "religious society" could not have referred to an international association of autonomous churches in 1867 when § 57-9 was adopted, as none then existed. JA 2663-65 (Mullin). Cf. Lewis v. Commonwealth, 184 Va. 69, 72-73, 34 S.E. 2d 389, 390 (1945) ("common carriers" did not include buses because buses did not exist when statute was adopted).

Nor is the Anglican Communion an organized legal entity of the sort that § 57-9 must contemplate. In this regard, this Court has held that "attachment" for purposes of § 57-9(A) depends upon the presence of a legal organization that exercises "control" over a local congregation. See Baber v. Caldwell, 207 Va. 694, 697-98, 152 S.E. 2d 23, 26 (1967) (§ 57-9(A) did not apply because "[n]o super-congregational body control[led the local church's] action") (emphasis added). See also Brooke, 54 Va. at 320 (membership in a church entails "a submission to its government") (citation omitted).

However, it is undisputed that the Anglican Communion exercises no control over its member provinces, let alone over parishes, and utterly lacks any structure that could qualify it as a "church" or "religious society" (capable of legal "division") for purposes of § 57-9(A). JA 2660-66 (Mullin); JA 2511-13 (Douglas). (By contrast, The Episcopal Church and the Diocese directly "control" parishes through their constitutions and canons and, in the case of the Diocese, through other mechanisms.)

Religious societies of the sort covered by § 57-9(A) must logically have a legal organization and structures that allow them both (1) to form or admit, and to some degree control, member congregations, and (2) to structurally "divide" into two or more successor legal entities. Interpreting

the statute to apply to organizations that have no juridical authority over congregations — including not only the Anglican Communion, but such entities as the World Council of Churches, for example — would wreak havoc with ecclesiastical affairs and property rights throughout Virginia.

2. The Anglican Communion has not "divided."

The circuit court held that the Anglican Communion had "divided" because the Church of Nigeria had taken steps to distance itself from The Episcopal Church. JA 3937-38. However, even under the court's definition (as a "split … or rupture in a religious denomination that involve[s] the … formation of an alternative polity that disaffiliating members could join"), a "division" under § 57-9(A) must mean more than strained – or even severed – personal relations between members of an intact group. Here, both The Episcopal Church and the Church of Nigeria remain part of the Anglican Communion. JA 2532-34 (Douglas); JA 2447 (Yisa). Nor has any parallel or alternative polity to the Anglican Communion formed. Thus, even under the circuit court's definition, there has been no "division."

II. The Circuit Court's Interpretation and Application Of § 57-9(A) Was Unconstitutional.

As shown, under the hierarchical structure that The Episcopal Church has established for itself, only the General Convention has the authority to divide either the Church as a whole or one of its dioceses. Similarly,

although individuals may leave the Church at any time, local congregations may not under any circumstances unilaterally divert local church property to some other denomination by majority vote: The Church's express rules make clear that all such property is "held in trust for [the] Church and the Diocese thereof in which such Parish . . . is located," and may be used by the parish only "so long as the particular Parish . . . remains a part of, and subject to, this Church and its Constitution and Canons." See supra pp. 8-9.

The circuit court, however, held that notwithstanding those express rules, § 57-9(A) establishes a different structure and polity for some hierarchical churches, including The Episcopal Church, in which local church property is held by trustees. Hierarchical churches in which property is not held by trustees, as well as congregational churches, are free from these state-established rules: The state (at least at the moment) respects those churches' polities. This interpretation of § 57-9(A) violates both the Free Exercise and the Establishment Clauses of the First Amendment to the U.S. Constitution and Article I, §16, of the Virginia Constitution.

A. The Court's Decision Violated The Free Exercise Clause.

The U.S. Supreme Court has repeatedly affirmed that under the Free

Exercise Clause, churches are free to establish their own polities and rules of governance, free from state interference. Because of this principle, both the U.S. Supreme Court and other appellate courts have uniformly struck down state statutes that, in ways comparable to the circuit court's view of § 57-9(A), purported to dictate how or by whom church property would be controlled.

1. The First Amendment protects churches' rights to decide aspects of internal church governance, including the "division" of church bodies and restrictions on property.

In Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94 (1952), the Court considered a property dispute between the Soviet-based Russian Orthodox Church and a purportedly "autonomous" United States district of that Church formed by the district's own governing body. Id. at 97-98 & n. 2. The New York Court of Appeals awarded the property to the U.S. group based on a state statute that purported to recognize the district's chosen autonomy. Id. at 99 n. 3,106. See also Presbyterian Church, 393 U.S. at 447-48 (summarizing facts of Kedroff). The Supreme Court, however, held that the statute was unconstitutional because

> "[b]y fiat it displaces one church administrator with another. It passes the control of matters strictly ecclesiastical from one church authority to another. It thus intrudes for the benefit of one segment of a church the power of the state into the

> forbidden area of religious freedom contrary to the principles of the First Amendment…. [The statute] directly prohibits the free exercise of an ecclesiastical right, the Church's choice of its hierarchy." Kedroff, 344 U.S. at 119 (emphasis added); see also id. at 107.

The State protested that, among other things, its statute sought only to effectuate the wishes of the vast majority of the affected U.S. church members, but the Court rejected that concern. As Justice Frankfurter stated in concurring, "it is not a function of civil government under our constitutional system to assure rule to any religious body by a counting of heads." Id. at 122.

In Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), the Court specifically held that whether a diocese had been "divided" was a matter of internal governance protected from state interference — despite the impact of that precise issue on property rights. In Milivojevich, the general church had divided one of its dioceses into three and also removed the diocesan bishop. Id. at 703. In a lawsuit over control of the property, the Illinois Supreme Court held that the general church had not properly divided the diocese or otherwise acted under its own rules. Id. at 707. The U.S. Supreme Court reversed, explaining that the state court's ruling was unconstitutional because "the reorganization of the Diocese involves a matter of internal church government, an issue at

the core of ecclesiastical affairs." Id. at 721. Thus, the courts were not free to substitute their own views concerning the diocesan division for those espoused by the hierarchical church itself.

The Supreme Court's most recent pronouncement in a church property case, Jones v. Wolf, 443 U.S. 595 (1979), reaffirms the important Free Exercise principles set forth in its earlier precedents. In Jones, the Court considered the constitutionality of the specific "neutral principles of law" approach to deciding church property disputes adopted in Georgia, which looks to deeds, state statutes, corporate charters, and general church rules to determine whether property is restricted for the general church. Id. at 600. The Court held that Georgia's analysis passed constitutional muster precisely because it left churches free to order their own affairs in a manner that the courts must respect. [22]

The Court explained that the neutral principles approach is "flexible enough to accommodate all forms of religious organization and polity," because churches can "specify what is to happen to church property in the event of a particular contingency" through "reversionary clauses and trust

[22] See In re Episcopal Church Cases, 198 P.3d 66, 80 (Cal. 2009) (Jones "did not deny that free exercise rights require a secular court to defer to decisions made within a religious association…. Rather, the majority argued that the neutral principles approach is consistent with this requirement").

provisions." Id. at 603 (emphasis added). "At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property" by modifying the deeds or the corporate charter, or amending the rules of the general church to recite an express trust in favor of the denomination. Id. at 606.

After concluding that none of the relevant materials contained any restriction in favor of the general church in that case, the Jones court went on to discuss a second issue – the identity of the local congregation holding (unrestricted) title to the property. 443 U.S. at 600, 602. In this regard, the Supreme Court indicated that a "presumption" of majority rule — "defeasible" upon a showing that the identity of the congregation was to be determined in some other way — could be constitutional. The Court noted that any such presumption "can always be overcome, under the neutral-principles approach … by providing that the church property is held in trust for the general church and those who remain loyal to it." Id. at 607-08.

2. Previous state efforts to establish elements of church governance have been struck down.

In keeping with the above authority, any state statutes governing church property "must be carefully drawn to leave control of ecclesiastical polity, as well as doctrine, to church governing bodies." Maryland & Virginia Eldership of Churches of God v. Church of God at Sharpsburg,

Inc., 396 U.S. 367, 370 (1970) (Brennan, J., concurring). See also Reid, 229 Va. at 189, 327 S.E. 2d at 113 (strongly affirming hierarchical churches' constitutional right to self-governance and organization). Thus, previous state efforts to control internal church governance in ways comparable to § 57-9(A) (as interpreted here) have been struck down.

In Goodson v. Northside Bible Church, 261 F.Supp. 99 (S.D. Ala. 1966), aff'd, 387 F. 2d 534 (5th Cir. 1967), the court addressed Alabama's "Dumas Act," which, similar to the circuit court's interpretation of § 57-9(A), permitted a local congregation of a hierarchical church to withdraw from the general church with its property if 65% of the local congregation declared itself to be in disagreement with the general church. Id. at 100. The court held that this transfer of power to a congregational majority was unconstitutional:

> "Under the First Amendment, the states are not permitted to so intrude on the internal affairs of a religious order. The court is not required, or constitutionally authorized, to pass on the wisdom of the [church's] structure and polity. The court is bound by the Constitution to protect it." Id. at 102.

Moreover, the court explained, "[b]y passage of the Dumas Act, Alabama has expressed a preference to and aided those who profess a belief in a congregational structured church. This it cannot do." Id. at

104.[23] See also First Methodist Church v. Scott, 226 So. 2d 632 (Ala. 1969) (similarly holding Dumas Act unconstitutional); Sustar v. Williams, 263 So. 2d 537 (Miss. 1972) (holding unconstitutional state statute that purported to give 66⅔% majorities of local church congregations the ability to eliminate denominational trust interests in local church property). Cf. First Born Church of the Living God v. Hill, 481 S.E. 2d 222 (Ga.1997) (applying state statute requiring non-profit corporations to hold annual membership meetings to church corporation would violate church's "fundamental religious freedom, as a hierarchical religious body, to determine its own governmental rules and regulations").

3. The circuit court misapplied Jones v. Wolf.

Largely ignoring the above authority, the circuit court held that Jones gave the states license to impose governance by majority rule on hierarchical churches so long as they provide an "escape hatch" — or "any" method of avoiding the state-imposed governing structure "before the dispute erupts." The court believed that the Commonwealth provided this

[23] Although the circuit court here tried to distinguish Goodson on the ground that the Dumas Act purportedly contained a "departure from doctrine" element, in fact, the statute required only that the local congregation, not the courts, declare a disagreement with the parent church to trigger the statutory procedures. 261 F.Supp. at 100. Thus, neither the district court nor the Fifth Circuit relied on any departure-from-doctrine element in holding the statute unconstitutional.

"escape hatch" by limiting § 57-9 to "property held in trustees," thus allowing the Church and the Diocese to avoid the statute by titling all property in the name of a bishop. In fact, however, the Church and the Diocese had no such "escape hatch" from § 57-9 in this case. Moreover, the court's ruling directly conflicts with U.S. Supreme Court authority; eliminates the First Amendment's guarantee of church self-governance in favor of a state-created menu of available options; and imposes a substantial burden on religion.

First, no "escape hatch" was actually available here, because until 2005, § 57-9(A) applied to all local church property, regardless of how it was titled. See 2005 Va. ALS 772 (adding limitation to property "held by trustees").[24] As the court found, the dispute between the Church and these congregations arose long before 2005, however. JA 3866-85 (detailing the development of the dispute during 2003-2005). The circuit court was therefore wrong to say that the Church could have "permanently avoided

[24] This 2005 amendment further supports the conclusion that § 57-9 was actually intended to provide a mechanism for clarifying the duties of trustees, not create "voting rights." This limitation was added in connection with a broader set of amendments that accommodated Virginia churches' new ability to incorporate, and to hold property in that form. See 2005 Va. ALS 772. If the intention of § 57-9(A) were truly designed to create "voting rights" for congregations in times of theological debate and dissent, the sudden limitation of those rights to congregations holding property through trustees would be inexplicable.

any potential application" of the statute at "any time within the past 140 years." JA 4150. Indeed, because the statute can always be amended, no church may "permanently" avoid it.

Second, the circuit court's view that the ability to avoid § 57-9(A) altogether rendered the statute constitutional was directly rejected in Kedroff. Justice Jackson in his dissent in Kedroff argued that the parties could avoid the New York statute by choosing not to incorporate. 344 U.S. at 128. The majority rejected that view. The circuit court's reasoning similarly conflicts with Jones' explicit caution that any statutory "presumption" of majority rule must be "defeasible." Under the circuit court's view, § 57-9(A) does not establish a defeasible presumption, but a firm rule that is simply inapplicable in some (state-specified) circumstances.

Third, as these precedents suggest, the distinction between a "presumption" that a church may successfully rebut with evidence of its own contrary rules, and an inflexible rule of limited application, is constitutionally crucial. The First Amendment creates a protected sphere of internal church governance into which the states may not intrude. A rebuttable presumption accommodates this protected sphere, because state-created rules of internal governance may not supersede contrary church rules. Inflexible state rules, on the other hand, effectively eliminate

the protected sphere, instead allowing the states to determine – and at any time change – the church polity options currently available. Thus, the circuit court's view does not accommodate the religiously-diverse society that the First Amendment guarantees, but only "ensures" that churches will have a choice of two or more state-specified alternatives.

Finally, the need to alter a church's internal rules and practices to adapt to the (current) restrictions set forth in § 57-9(A) substantially burdens religious denominations. Different churches have different views as to where title to various types of property should reside, and under what conditions. See JA 3842-44; Va. Code § 57-16 (church officers may hold property only "for any purpose authorized and permitted by [the church's] … polity"). Here, the Bishop of the Diocese generally does not hold title to parish property. JA 4006-10 (identifying limited property Bishop does hold). Overriding this structure is hardly a "minimal" burden on religion. Milivojevich, 426 U.S. 696; see also Presbyterian Church, 393 U.S. at 450 (First Amendment prohibits courts from deciding the relative importance of doctrines to a particular religion).

The burden involved with the circuit court's interpretation is also substantial in practical terms. See Episcopal Church Cases, 198 P.3d at 80 ("requiring every parish in the country to ratify [a denominational trust

provision] would impose a major . . . burden on the church").

B. The Circuit Court's Interpretation Of § 57-9(A) Violates The Establishment Clause.

As the U.S. Supreme Court declared in Larson v. Valente, 456 U.S. 228, 244 (1982), "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." The Court thus struck down a statute that applied only to religious organizations deriving more than 50% of their funds from non-members. Id. at 233. The Supreme Court held that the statute "clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents." Id. at 246-47.[25]

The circuit court held that § 57-9 did not discriminate among religious sects because "[t]he text does not state hierarchical churches are subject to the law while non-hierarchical churches are not." JA 4154. This, of course, was also true in Larson. As in Larson, § 57-9(A) applies based on a stated

[25] Because § 57-9 discriminates among religions, it is not necessary to engage in additional analysis under Lemon v. Kurtzman, 403 U.S. 602 (1971), aff'd, 411 U.S. 192 (1973). Larson, 456 U.S. at 252 ("the Lemon v. Kurtzman 'tests' are intended to apply to laws affording a uniform benefit to all religions, and not to provisions [like the 50% test at issue] … that discriminate among religions…. [T]he Lemon test is not necessary to the disposition of the case before us."). In any event, § 57-9(A) would not pass muster under that test. See Larson, 456 U.S. at 251-55 (holding in the alternative that statute failed Lemon analysis because it fostered excessive governmental entanglement with religion by burdening select denominations and "politicizing religion").

criterion (whether property is held by trustees) that will apply to some denominations but not others.

In addition, the text of § 57-9 does discriminate between hierarchical and congregational churches. The circuit court itself noted this disparate treatment:

> "There is, however, a significant distinction between § 57-9(A) [applicable to hierarchal churches] and (B) [applicable to congregational churches] regarding the procedure for a majority vote….[I]n (B), the legislature defers completely to the independent church's constitution, ordinary practice, or custom, whereas in (A), the legislature shows no such deference." JA 3903.

The statute thus cannot be either distinguished from Larson or characterized as neutrally applicable.

Finally, the circuit court did not even consider whether a compelling state interest exists or whether the statute is narrowly tailored. There can be no compelling state interest in decreeing that church property disputes shall be settled by congregational majority rule and not pursuant to a denomination's own established rules, or in superseding the polity of hierarchical religious organizations when they hold property through trustees but not otherwise.

III. The Circuit Court Erred in Refusing to Consider Evidence Directed By Norfolk Presbytery and Green v. Lewis.

The circuit court should be reversed for the reasons just discussed

alone. The court compounded its errors, however, by ruling that it need not follow this Court's rulings in Norfolk Presbytery and Green. Thus, regardless of the Court's ruling on issues I and II above, the circuit court's judgment should be reversed and remanded.

In Norfolk Presbytery, a case initiated under Va. Code § 57-15, this Court first announced the framework that Virginia courts are to use in resolving "a dispute over church property": They are to "[consider] the statutes of Virginia, the express language in the deeds and the provisions of the constitution of the general church." 214 Va. at 505, 201 S.E. 2d at 756-57. This Court followed and expanded on Norfolk Presbytery in Green v. Lewis, in which a congregation of the A.M.E. Zion Church voted to disaffiliate. Green was not filed under § 57-15, nor did it involve a sale or encumbrance of property to which § 57-15 would apply. In fact, both parties' pleadings invoked § 57-9. JA 4011-13, 4015.

This Court's decision in Green did not even mention which code section had been invoked. The case, the Court explained, involved "a dispute between the congregation of [the local church] on the one part and the general church on the other," and the issue was whether "the general church had . . . establish[ed] that it had a proprietary interest in the property" of the local church. 221 Va. at 548, 272 S.E. 2d at 181.

Accordingly, as in Norfolk Presbytery, the Court declared that it would "look to our own statutes, to the language of the deed conveying the property, to the constitution of the general church, and to the dealings between the parties" to "determin[e] whether the A.M.E. Zion Church has a proprietary interest in the [local church] property" that "cannot be eliminated by unilateral action of the congregation." Id. at 555, 272 S.E. 2d at 185-86.

Circuit courts have understood this analysis to apply to all church property disputes, specifically including suits brought under § 57-9. *See* Diocese of S.W. Virginia of the Protestant Episcopal Church v. Buhrman, 5 Va. Cir. 497 (Clifton Forge 1977); JA 4021-30 (Trustees of Cave Rock Brethren Church v. Church of the Brethren, No. 1802 (Botetourt Co. June 30, 1976)). This understanding only makes sense. Statutes are rarely, if ever, applied without opportunity to consider evidence and argument showing that they should not be applied in a particular case. Among other things, parties ordinarily may enter into contractual arrangements that will supersede otherwise applicable statutory rules.[26] By ignoring Norfolk

[26] See Jampol v. Farmer, 259 Va. 53, 58, 524 S.E.2d 436, 439 (2000) (statute providing amendment procedures for certificates of deposit did not preclude parties from amending terms in an alternate manner); Board of Supervisors of Fairfax County v. Sampson, 235 Va. 516, 522, 369 S.E.2d 178, 181 (1988) (applying a shorter, contractual period in lieu of the statutory period of limitations); Chandler v. Fletcher, 169 Va. 32, 192 S.E. 786 (1937) (submission to bench trial waived statute); Pettus v. Hendricks,

Presbytery and Green, the circuit court in this case erroneously refused even to consider any such evidence.

IV. The Circuit Court Erred In Holding That The Episcopal Church And The Diocese Waived Their Right To Argue That The Parties Have Contracted Around § 57-9.

On July 16, 2008, the court ordered the parties to brief various issues, including "whether the Church "may assert at the October trial that the CANA Congregations have contracted away . . . their right to file a 57-9 petition." JA 4183-85.[27] The Church and the Diocese did not contest – and never have contested - the congregations' rights to file 57-9 petitions, but contended in their briefing on this issue that the October trial should include the issue of whether the CANA congregations have contracted away the rights asserted in their 57-9 petitions.

In a letter opinion issued August 19, 2008, the court held that the Church and Diocese had waived the right to "assert that the CANA

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113 Va. 326, 74 S.E. 191 (1912) (association's private charter, not statute, defined class of permissible beneficiaries.)

[27] Earlier, the court had ordered the parties to file lists of remaining legal issues that the court might decide as a matter of law. JA 3948. The Church and the Diocese listed as issues: "3. Whether private parties retain the freedom to arrange their rights in religious property . . . by contract as they see fit . . .. [notwithstanding] § 57-9 . . . ." and "6. Whether the Episcopal Church and the Diocese . . . have waived the right to argue that the Court must determine property ownership in order to enter a final order in the 57-9 actions." See JA 3956-58.

Congregations have contracted away, waived, abandoned, or relinquished their right to file their 57-9 petitions." JA 4233. To the extent the court was ruling only that the Church could not challenge the congregations' right to file 57-9 petitions, the Church agrees. To the extent the court was ruling that the Church had waived its argument that those petitions should be denied because the congregations have contractually bound themselves to a different set of rules, however, the court erred. As the court's August 19 opinion appears to recognize, "what ECUSA/Diocese earlier pled and asserted was . . .[that] '[ECUSA/Diocese's] canons are binding as a matter of Virginia church property law, and therefore govern notwithstanding § 57-9.'" JA 4234.[28] Precisely.

CONCLUSION

For these reasons, this Court should reverse, declare § 57-9(A) inapplicable and/or unconstitutional, dismiss the congregations' § 57-9 petitions with prejudice, and remand for consideration of the Church's and the Diocese's declaratory judgment actions.

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[28] This argument was raised repeatedly. See JA 553, 556 (Aff. Defenses 2&3); JA 1565,1568-69 (explaining that if the court were to determine that the statutory requirements of § 57-9(A) were satisfied, they would present evidence that "§ 57-9 ... may not be applied here, because the congregations and their leaders have legally bound themselves to an alternative structure and rules"); Id. at 7-8 & n.5.); JA 3956-59 (identifying remaining legal issues, including these).

CERTIFICATE

Pursuant to Va. Sup. Ct. Rule 5:17(e), I hereby certify that:

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