Record No. 090683

In the Supreme Court of Virginia

THE EPISCOPAL CHURCH, 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 VII

INDEX OF CIRCUIT COURT LETTER OPINIONS VII

INTRODUCTION AND SUMMARY OF ARGUMENT 1

STATEMENT OF FACTS AND OF THE CASE 3

STANDARD OF REVIEW 9

ARGUMENT 10

I. The Circuit Court Correctly Held That A "Division" Involves The Separation Of A Group Of Congregations From A Denomination And The Formation Of An Alternative Polity, Not A Formally Approved Administrative Restructuring Of The Denomination. 11

A. The text, history, and purpose of § 57-9, as well as the relevant case law, uniformly confirm that § 57-9 is not limited to consensual "divisions." 12

Text 14

History 17

Precedent 24

Purpose 28

B. ECUSA's use of the term "division" outside of court confirms that the circuit court properly interpreted it. 30

II. The Circuit Court Properly Held That CANA And ADV Qualified As "Branches" Within The Meaning Of § 57-9. 32

A. A "branch" for purposes of § 57-9 is not an entity with a connection to the denomination from which it disaffiliated 33

B. CANA's and ADV's relationship with the Anglican Church of Nigeria does not make them any less a "branch." 34

III. The Circuit Court Rightly Found, As A Third And Independent Ground For Its Ruling, That The Anglican Communion Is A Religious Society That Experienced A Division. 37

Church or Religious Society 38

Division 40

IV. Section 57-9 Neither Burdens ECUSA's Religious Exercise Nor Discriminates Among Denominations, And Thus Satisfies The Federal And State Religion Clauses. 41

A. The circuit court correctly held that *Jones v. Wolf* does not require deference to a denomination's canons. 42

B. ECUSA's other authorities are inapposite. 45

C. Section 57-9 does not discriminate among religions or between religious denominations and secular associations. 46

V. The Circuit Court Rightly Refused To Engraft Onto § 57-9 The Same Factors That Apply Under § 57-15, Which Would Nullify The Congregational Voting Right. 47

VI. The Circuit Court Correctly Found That ECUSA Had Not Timely Asserted a Waiver Defense. 48

CONCLUSION 50

STATUTORY ADDENDUM 1a

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Falwell v. Miller,
203 F.Supp.2d 624 (W.D. Va. 2002) 44

Home Building & Loan Assn. v. Blaisdell,
290 U.S. 398 (1934) 48

Jones v. Wolf,
443 U.S. 595 (1979) 2, 7, 42-47

Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) 45-46

Larson v. Valente,
456 U.S. 228 (1982) 46, 47

Northside Bible Church v. Goodson,
387 F.2d 534 (5th Cir. 1967) 46

Presbyterian Church v. Hull Church,
393 U.S. 440 (1969) 46

Serbian Orthodox Diocese v. Milivojevich,
426 U.S. 696 (1976) 45-46

Solid Waste Agency v. U.S. Army Corps of Eng'rs,
531 U.S. 159 (2001) 37

Walters v. Nat. Ass'n of Radiation Survivors,
473 U.S. 305 (1985) 10

Watson v. Jones,
80 U.S. 679 (1871) 28, 45-46

STATE CASES

Brooke v. Shacklett,
54 Va. 301 (1856) 25-26

City Council of City of Emporia v. Newsome,
226 Va. 518, 311 S.E.2d 761 (1984) 10

Com. v. Allen,
269 Va. 262, 609 S.E.2d 4 (2005) 10

Crook v. Commonwealth,
147 Va. 593, 136 S.E. 565 (1927) 37

Finley v. Brent,
87 Va. 103, 12 S.E. 228 (1890) 27

First Methodist Church v. Scott,
226 So. 2d 632 (Ala. 1969) 46

Great Atlantic & Pacific Tea Co. v. City of Richmond,
183 Va. 931, 33 S.E.2d 795 (1945) 16

Green v. Lewis,
221 Va. 547, 272 S.E.2d 181 (1980) 2-3, 7, 11, 30, 47

Halifax Corp. v. Wachovia Bank,
268 Va. 641, 604 S.E.2d 403 (2004) 15

Hoskinson v. Pusey,
73 Va. 428, 437-38 (1879) 26-27

In Re Douglass' Estate,
94 Neb. 280, 143 N.W. 299 (1913) 38

Lawrence v. Craven Tire Co.,
210 Va. 138, 169 S.E.2d 440 (1969) 14

Looney v. Commonwealth,
145 Va. 825, 133 S.E. 753 (1926) 39

Natrella v. Board of Zoning Appeals,
231 Va. 451, 345 S.E.2d 295 (1986) 29

Norfolk Presbytery v. Bollinger,
214 Va. 500, 201 S.E.2d 752 (1974) 2-3, 11, 28, 30, 46-47

Oraee v. Breeding,
270 Va. 488, 621 S.E.2d 48 (2004) 15

Perel v. Brannan,
267 Va. 691, 594 S.E.2d 899 (2004) 10

Reid v. Gholson,
229 Va. 179, 327 S.E.2d 107 (1985) 3, 24, 47

Schmidt v. Wachovia Bank,
271 Va. 20, 624 S.E.2d 34 (2006) 29

Sustar v. *Williams*,
263 So. 2d 537 (Miss. 1972) 46

Tabler v. Bd. of Supervisors,
221 Va. 200, 269 S.E.2d 358 (1980) 37

Virginia Dynamics Co. v. Payne,
244 Va. 314, 421 S.E.2d 421 (1992) 48

Whitmer v. Graphic Arts Mut. Ins. Co.,
242 Va. 349, 410 S.E.2d 642 (1991) 17

FEDERAL CONSTITUTION

U.S. Const. Amendment I 2, 11, 42

STATE CONSTITUTION, STATUTES, AND SESSION LAW

Va. Code § 57 ..... 1, 12-16

Va. Code § 57-7.1 16

Va. Code § 57-2.02 8

Va. Code § 57-9 ..... 1-3, 5-17, 23-24, 26-29, 32-34, 37-38, 40-44, 46-50

Va. Code § 57-9(A) 8, 11-12, 14-15, 24, 37, 44

Va. Code § 57-9(B) 11, 24

Va. Code § 57-11 29

Va. Code § 57-13 29

Va. Code § 57-15 ..... 2-3, 8, 11, 14-15, 29-30, 47

Va. Code § 57-15(B) 12

Va. Code § 57-16 ..... 12, 43-44

Va. Code § 57-16.1 43

1866-67 Va. Acts, ch. 210 26

OTHER AUTHORITIES

I *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America* 301 (1981) (E. White and J. Dykman, eds.). *See* http://www.episcopalarchives.org/White_and-_Dykman_combinedvols_1997.pdf 45

N. Webster, *A Dictionary of the English Language* 498 (1872) (preface dated 1867 16

Webster's Ninth New Collegiate Dictionary 817 (1983) 16

E. White and J. Dykman, eds. *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America Otherwise Known as The Episcopal Church* (1981) 45

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 Episcopal Church's ("ECUSA's") appeal challenges a longstanding judgment of the General Assembly, embodied in Va. Code § 57-9, that when a denomination experiences a "division," competing claims to congregational property held in trust should be resolved by the neutral principle of majority rule. In compliance with § 57-9, the nine appellees here ("CANA Congregations") held and reported votes in various circuit courts. ECUSA and the Diocese of Virginia ("Diocese") intervened, and now challenge a series of rulings finding the statute both applicable and constitutional.

Faced with the admissions of its officers and witnesses as to the existence of a "division" and the CANA Congregations having joined a "branch" (JA 3939, 3889, 3938, 4160-61 & n.56, 2749), ECUSA says § 57-9 extends only to "divisions" effected in accordance with the denomination's "polity." But this reading fails as a matter of statutory interpretation, as § 57-9—in contrast to other parts of Title 57—does not refer to denominational polity. Moreover, extensive historical evidence introduced at trial belies ECUSA's claim that § 57-9 "has never been interpreted or applied as it was here." Br. 14. The record includes not only undisputed expert testimony showing the common usage of "division" and "branch" at the statute's inception—testimony that the court found more credible than that offered by ECUSA's

witnesses—but also 29 court orders approving § 57-9 petitions in circumstances like those here. Moreover, this Court's own opinions discuss § 57-9 in a manner consistent with the circuit court's interpretation.

ECUSA's constitutional challenge fares no better. As the U.S. Supreme Court has held, "[m]ajority rule" is "consistent with both the neutral-principles analysis and the First Amendment." *Jones v. Wolf*, 443 U.S. 595, 607 (1979). Thus, states may resolve church property disputes—even those involving "hierarchical" churches—by applying "a presumptive rule of majority representation," so long as the law provides a "method of overcoming the majoritarian presumption" through legal arrangements made "before the dispute erupts." *Id.* at 606, 608. As the circuit court held, § 57-9 satisfies *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. This escape hatch was not only available to ECUSA, it was used: as the evidence at trial showed, the Diocese holds 29 properties in its Bishop's name.

ECUSA's complaint that the circuit court did not address the "neutral principles" factors applied to Va. Code § 57-15 under *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), also misses the mark. As this Court rec-

ognized in *Reid v. Gholson*, 229 Va. 179, 192, 327 S.E.2d 107, 115 (1985), majority voting, and the procedures needed to ensure a fair vote, are themselves "neutral principles." Neither *Norfolk* nor *Green* called for an application of other statutes in cases involving § 57-9. Neither case involved a "division" or a "branch"; and both arose when single congregations became "independent." *Green*, 221 Va. at 550, 272 S.E.2d at 182; *Norfolk*, 214 Va. at 501, 201 S.E.2d at 753-54. Moreover, both cases applied only § 57-15, which, unlike § 57-9, has been amended to make any conveyance of property subject to approval of the denomination's "constituted authorities."

ECUSA neglects to mention that, where title was disputed, the circuit court did consider both other statutes and deeds and held three trials to adjudicate disputes over specific parcels. ECUSA's real complaint is not that the court failed to consider the relevant evidence, but that it refused to overturn the Congregation's votes by engrafting factors onto § 57-9 that the legislature has chosen not to add. The decision below should be affirmed.

STATEMENT OF FACTS AND OF THE CASE

In 2006, the CANA Congregations (and two others), facing a widening split in the Diocese, ECUSA, and the Anglican Communion, began deliberating over whether to remain affiliated with ECUSA and the Diocese or to join other congregations that had recently disaffiliated. In late 2006 and

early 2007, the Congregations voted on that issue, pursuant to a written "Protocol for Departing Congregation" ("Protocol") negotiated with the Diocese and drafted by its chancellor. JA 2676-79, 2311-15. Before the votes, Diocesan officials (including the bishop) addressed the Congregations in person, by video, or by letter, noting that "American Christianity has been punctuated over the years by frequent divisions, with one group choosing to separate." JA 3889. Despite the bishop's plea to "reject the tempting calls to division" (*id.*), each Congregation overwhelmingly voted to disaffiliate from ECUSA and the Diocese and to affiliate instead with the Convocation of Anglicans in North America ("CANA") and the Anglican District of Virginia ("ADV"), which are affiliated with the Anglican Communion through the Anglican Church of Nigeria. In all, those who disaffiliated constituted nearly 20% of average Sunday attendance in the Diocese. JA 3936.

In keeping with the Protocol, the Diocese and the CANA Congregations appointed teams to negotiate property disputes created by the votes. The Diocese later advised, however, that ECUSA's new Presiding Bishop opposed such negotiations. JA 3603-04. The Presiding Bishop indicated that she was amenable to a settlement with congregations who disaffiliated to become Roman Catholic, Baptist, or Methodist—or even those who wished to sell their property for "secular purposes," such as a "saloon"—but

could not support negotiations with congregations who affiliated with "another branch of the Anglican Communion." JA 4160, 3223-34.

Pursuant to Va. Code § 57-9, nine of the CANA Congregations filed reports in circuit courts detailing the results of the votes.[1] ECUSA and the Diocese intervened, without objection, and filed answers. They then filed separate declaratory judgment suits against the Congregations and their vestries, rectors, and trustees, alleging that the individual defendants had improperly taken control of the Congregations' properties.[2] While acknowledging that the deeds were titled in the names of trustees for the CANA Congregations, ECUSA and the Diocese alleged that, under church canons adopted in 1979, the property was in fact held in trust for them. JA 563.

A panel of three circuit court judges appointed by this Court granted a motion to consolidate the § 57-9 petitions and declaratory judgment actions before one judge, and Judge Randy I. Bellows was designated to oversee them. In May 2007, ECUSA and the Diocese agreed that the application and interpretation of § 57-9 were "discrete, key issues" that the court should resolve first. JA 830, 835. In November 2007, after extensive discovery, the court held a five-day trial. ECUSA and the Diocese argued that

---

[1] Two other congregations had no real estate and filed no §57-9 petitions.

[2] The complaint against Church of the Word sought only personal property.

a "division" under § 57-9 required denominational approval, and that CANA and ADV were not "branches" within the meaning of the statute.

After trial, the parties stipulated that church property in Virginia is held in various forms, with congregations in some denominations putting title in the name of a denominational officer or corporation, congregations in other denominations putting title in the name of trustees, and congregations in other denominations—including the Diocese—using a mix of these forms of ownership. JA 3842-48. The parties then submitted three rounds of briefs, totaling 250 pages, regarding the meaning and constitutionality of § 57-9.

On April 3, 2008, the court issued an 83-page opinion analyzing § 57-9's historical background; the meaning of the terms "division," "branch," "attached," and "religious society"; whether ECUSA, the Diocese, or the Anglican Communion had divided; and whether CANA or ADV were "branches" of those entities for purposes of § 57-9. The court held that § 57-9 applied, finding the evidence of division "not only compelling, but overwhelming." JA 3858. As the court stated, "[t]he only way [it] could find a 'division' *not* to exist among the pertinent entities" was "to define the term so narrowly and restrictively as to effectively define the term out of existence." *Id.*

The court then requested additional briefing on the question whether § 57-9, as applied, would violate the federal and state religion clauses. JA

3939-40. The court gave ECUSA and the Diocese leave to raise other constitutional challenges, after which they raised a takings claim. The parties then submitted two more rounds of lengthy briefs addressing all issues except appellants' Contracts Clause challenge. The circuit court allowed *amici curiae* and the Attorney General both to submit briefs and to take part in a full-day hearing on the constitutional issues.

On June 27, 2008, the court issued a 49-page opinion holding that § 57-9, as applied here, is constitutional. JA 4120-68. The court explained, inter alia, that (1) "each" of its own "factual findings" was "secular"; (2) § 57-9 "applies equally to all religious sects" and is not motivated by "animus toward a specific denomination"; (3) § 57-9 is constitutional under *Jones v. Wolf*, 443 U.S. 595, 607-08 (1979), which permits state courts to resolve property disputes in "hierarchical" churches based on "a presumptive rule of majority representation," so long as there is a "method of overcoming the majoritarian presumption"; and (4) ECUSA is not burdened by § 57-9, since it does not apply to property held by church officers, and the Diocese "regularly" holds properties in that form. JA 4139, 4151, 4154-55, 4167.

ECUSA and the Diocese then raised several other issues relating to the meaning of § 57-9 and whether the court *both* had to address factors set out in *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980), *and* find the

requirements of § 57-9 to be met. On June 27, 2008, after three rounds of briefing, the court resolved those issues in an 11-page opinion holding that *Green* "is not a case interpreting or applying § 57-9(A)," but rather § 57-15, and that reading *Green* to require identical analysis under § 57-9 would "deprive [§ 57-9] of its independent meaning." JA 4172, 4180.

ECUSA further sought to raise two new affirmative defenses. In July 2008, it asserted that the CANA Congregations had "contracted away" or "waived" their right to invoke § 57-9.[3] After three more rounds of briefing and a hearing, the court denied leave to amend in a 14-page opinion holding that, while ECUSA couched its motion as one to "clarify" its earlier answer, it actually raised a *new* defense. JA 4231-45. The court held that the Congregations would be "severely prejudiced" if it considered a waiver defense after a five-day trial, extensive pre- and post-trial briefing, and several hearings on § 57-9's applicability and constitutionality. JA 4245, 4237-44.

In August 2008, after briefing and argument, the court issued a 14-page opinion holding that § 57-9 does not violate the Contracts Clause. JA 4246-61. As the court held, that clause protects only "preexisting" contracts; any contracts formed after § 57-9's adoption are subject thereto; and

[3] ECUSA also moved to amend the complaint to assert that § 57-9 violated Va. Code § 57-2.02. The denial of that motion has not been appealed.

ECUSA and the Diocese had no contractual rights in the properties at issue when § 57-9 was adopted. JA 4249-51. That ruling was not appealed.

ECUSA and the Diocese then stipulated that approval of the § 57-9 petitions would moot their declaratory judgment suits as to property covered by § 57-9. 9/3/08 Order. The court thus turned to whether the CANA Congregations' votes were fair and what property was within the scope of the § 57-9 petitions. In September 2008, ECUSA and the Diocese stipulated that the votes were valid and that, based on the court's rulings, most of the real and personal property was subject to § 57-9. However, ECUSA and the Diocese contested the CANA Congregations' ownership of three parcels and whether The Falls Church Endowment Fund was held in trust.

In December 2008, after three days of trial and many briefs, the court issued a 20-page ruling resolving those issues. JA 4878-99. It ruled that the Endowment Fund—the assets of which are held in corporate form—was not covered by the statute, but held for the Congregations on the three parcels. The court entered a final judgment, the terms of which were negotiated by the parties, on January 8, 2009. These appeals followed.

STANDARD OF REVIEW

Although this Court reviews questions of law and mixed questions of law and fact de novo, factual findings are reversed only if "plainly wrong or

without evidence to support them." *E.g.*, *Perel v. Brannan*, 267 Va. 691, 698, 594 S.E.2d 899, 903 (2004). And "[w]hen . . . the evidence 'presented a 'battle of experts,'" the Court "defer[s] to the trial court's judgment of the weight and credibility to be given their testimony.'" *Com. v. Allen*, 269 Va. 262, 276, 609 S.E.2d 4, 13 (2005).

In addition, Virginia statutes carry "a strong presumption of validity. Unless a statute clearly violates a provision of the United States or Virginia Constitutions, [this Court] will not invalidate it." *City Council of City of Emporia v. Newsome*, 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984). And even "more deference is called for" where "the statute in question . . . has been on the books for over [140] years." *Walters v. Nat. Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (120-year-old statute).

ARGUMENT

In **Parts I and II**, we demonstrate that a § 57-9 "division" involves not a denominationally-approved redistricting plan, but a nonconsensual separation of a group of congregations from their mother church and the formation of an alternative polity, or "branch," that other congregations can join. In **Part III**, we explain that the circuit court rightly found, as an independent basis for its decision, that the Anglican Communion is a "religious society" that experienced a "division." In **Part IV**, we explain that the default rule of

majority ownership under § 57-9 is easily avoidable by adopting forms of ownership routinely used by Virginia denominations, including ECUSA, and thus satisfies the First Amendment. In **Part V**, we show that the trial court rightly declined to apply the same analysis under § 57-9, which itself embodies a neutral principle, as was applied in *Norfolk* and *Green*—§ 57-15 cases. And in **Part VI**, we show that the trial court rightly found ECUSA to have waived the argument, first raised months after a ruling that § 57-9 applied, that the CANA Congregations waived their right to invoke the statute.

I. The Circuit Court Correctly Held That A "Division" Involves The Separation Of A Group Of Congregations From A Denomination And The Formation Of An Alternative Polity, Not A Formally Approved Administrative Restructuring Of The Denomination.

More than 140 years ago, following decades of conflicts over property triggered by denominational and congregational splits,[4] the General Assembly decided that congregations could resolve such conflicts by a neutral principle: majority rule. Under the act now codified at Va. Code § 57-9(A),[5] members of congregations "attached" to denominations may vote to decide which branch of the fractured body to join in the event of a "division" in the denomination. Similarly, § 57-9(B) allows "independent" congregations to

---

[4] As ECUSA's expert admitted: "There are all sorts of separations going on in the 19th Century." JA 2723 (Mullin); *accord* JA 1933, 1955 (Valeri) (citing "divisions all over the place," reflected in "frequent public commentary").

[5] The full text of Va. Code § 57-9 is set forth in an addendum to this brief.

vote in the event of a "division" in the congregation. In both cases, judicial approval of the vote is "conclusive" as to the title of "property held in trust for such congregation." The statute does *not* apply, however, to property held by church officers under § 57-16, or to property held by incorporated churches under § 57-15(B)—forms of ownership routinely used by Virginia denominations, including the Diocese.

As shown below, the circuit court's conclusion that § 57-9's terms are satisfied is compelled by the act's text, history, precedent, and purpose. Appellants' use of § 57-9(A)'s key terms—"division" and "branch"—in both written statements and testimonial admissions, confirms this result.

A. The text, history, and purpose of § 57-9, as well as the relevant case law, uniformly confirm that § 57-9 is not limited to consensual "divisions."

The circuit court held a five-day trial on the applicability of § 57-9. It heard undisputed expert testimony on the ordinary meaning of the terms "division" and "branch" at the time of the statute's enactment, and extensive expert testimony and documentary evidence concerning its historical context. JA 3904-18. Citing dictionary definitions from 1867 and today, the historical record, and other sections of Title 57, the court defined "division," according to its "plain meaning," as a denominational "split" that "involve[s] the separation of a group of congregations" from a denomination and "the

formation of an alternative polity that disaffiliating members c[an] join." JA 3935; JA 3901-04. Applying this definition, the court found a "division" at three levels—in the Diocese, ECUSA, and the Anglican Communion—each of which is independently sufficient to satisfy the statute. JA 3936-38.

ECUSA does not dispute that, if the trial court read division correctly, the CANA Congregations have satisfied § 57-9. Rather, it says the court erred in rejecting its view that a "division" is "a structural separation accomplished in accordance with [the denomination's] own polity." Br. 15; Diocese Br. 21. As ECUSA put it below, a "division of the Episcopal Church occurs only when the General Convention says it occurs." 11/15/07 Tr. 757.

As the circuit court recognized, this view cannot be reconciled with the ***text*** of § 57-9—which, unlike other parts of Title 57, says nothing about denominational approval or polity. Nor can ECUSA's reading of § 57-9 be squared with ***history*** or ***precedent***, both of which confirm that numerous congregations successfully invoked the act in divisions that were *not* consistent with the general church's polity. ECUSA's reading would also undermine § 57-9's ***purpose***: As Judge Bellows explained, reading the act to require that the division be consistent with the denomination's polity—*i.e.*, in some way blessed by church authorities—would render the act a "nullity," since churches in any such divisions "would simply approve divisions

and amicably divide up their property without intervention from secular institutions of government." JA 3936. And finally, ECUSA's reading makes no sense as a matter of ***statutory interpretation.*** Under its view, the meaning of § 57-9 would vary from case to case based on the "polity" at issue—which would take courts into the heart of the "thicket" that ECUSA urges them to avoid. In short, ECUSA's reading of § 57-9 is untenable.

Text. Although "the popular . . . import of words[] furnishes the general rule for [statutory] interpretation" (*Lawrence v. Craven Tire Co.*, 210 Va. 138, 140-41, 169 S.E.2d 440, 441 (1969)), ECUSA does not seriously argue that its reading of "division" is based on § 57-9's text. That is not surprising. The act refers to divisions having "occurred," not to their being "approved" or "implemented." And as Judge Bellows noted, "'division' has no modifiers—the words 'formal' or 'approved by the hierarchy,' or 'approved by the constituent authorities of the church . . .' do not appear in either section 57-9(A) or (B)." JA 3935.

Indeed, the General Assembly has repeatedly reenacted § 57-9 with minor, stylistic changes (JA 3904 n.37), but it has never restricted the act to divisions effected under denominational rules. This stands in contrast to amendments to several other provisions of Title 57, most notably § 57-15. As the circuit court explained, § 57-15 "also originally required only congre-

gational approval for a conveyance of property," but it "was *affirmatively amended* to include the specific words: 'constituted authorities,' and 'governing body of any church diocese.'" JA 3929. Indeed, § 57-15 was again amended in 2005 to allow transfer of an incorporated church's property if "authorized in accordance with the church's . . . *polity*." (Emphasis added). By contrast, § 57-9—which was also amended in 2005—"contains absolutely no reference to the governing authorities of a church," and nothing in its text limits it to "divisions" allowed by the denomination's polity. *Id.* Thus, reading § 57-9(A) as limited to such divisions would ignore "a key difference between 57-9 and 57-15." JA 3828-29 & n.76 (letter op.).

ECUSA suggests that the existence of language referring to denominational polity in *other* parts of Title 57 supports reading *§ 57-9* to contain such language. Br. 19-20. But that would turn the usual rules of statutory construction on their head. As this Court has held, "[c]ourts cannot add language to the statute the General Assembly has not seen fit to include," *Oraee v. Breeding*, 270 Va. 488, 503, 621 S.E.2d 48, 55 (2004); 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). Thus,

ECUSA's acknowledgment that § 57-9 must be read "in pari materia" with the rest of Title 57 is fatal to its own interpretation of § 57-9. Br. 16.

The notion that a division is "accomplished in accordance with [the denomination's] polity" (Br. 15) is also inconsistent with the phrasing and verb choice in § 57-9, which applies "[i]f a division has heretofore *occurred* or shall hereafter *occur*." (Emphasis added.) In 1867 (as today), an "occurrence" was "[a] coming or happening; hence, any incident or accidental event."[6] Were ECUSA's view correct, it would have been far more natural for the legislature to refer to divisions being "effected," "implemented," or brought about *by the denomination*. *Cf.* Va. Code § 57-7.1 (a "conveyance . . . shall be used for the . . . purposes of the . . . religious society . . . as determined by the authorities which, under its rules or usages, have charge of [its] administration"). That the legislature chose not to do so is dispositive.

In an effort to excuse its failure to discuss § 57-9's "plain language," ECUSA says division "is an ambiguous term." Br. 15-16. But "many words . . . have various meanings" (*Great Atlantic & Pacific Tea Co. v. City of Richmond*, 183 Va. 931, 947, 33 S.E.2d 795, 802 (1945)), and courts must

---

[6] N. Webster, *A Dictionary of the English Language* 498 (1872) (preface dated 1867); *cf. Webster's Ninth New Collegiate Dictionary* 817 (1983) (to "occur" means "to come into existence: happen"; an "'occurrence' may apply to a happening without intent, volition, or plan").

"construe . . . words in the context in which they are used" (*Whitmer v. Graphic Arts Mut. Ins. Co.*, 242 Va. 349, 353, 410 S.E.2d 642, 644 (1991)). Here, the immediate context, surrounding laws, and common usage preclude other meanings. For example, "division" cannot mean mere "[d]isagreement on theological or other issues," the "departure of a few people" from a denomination, or the "existence of different denominations" (Br. 15), as none of those situations, without more, results in a "branch." ECUSA has not offered a definition of "division" that both comports with common usage and gives meaning to both "division" and "branch."[7]

History. Lacking any textual argument, ECUSA asserts that "uncontradicted evidence" showed that "all of the[] divisions" that "prompted [§ 57-9's] adoption" or provided "occasions for its application" "were in fact accomplished in accordance with the denomination's own rules." Br. 22. According to ECUSA, "[t]he circuit court made no findings to the contrary." *Id.*

The record flatly contradicts these assertions. As Judge Bellows put it, ECUSA's expert testimony was not "tethered" to the "pertinent historical

---

[7] Citing an article quoting the act's legislative sponsor, ECUSA says § 57-9 applies only to a so-called structural division, because only in such a case would local congregations be "'compelled to make a choice'" among the branches. Br. 26. But § 57-9 states that congregations "may" vote on which branch to join, not that they must do so. And as the trial court noted, ECUSA's "divisions," which are geographic, involve *no* voting. JA 3935.

record." JA 3918. And as he specifically found, "if the history of division within churches . . . in the United States informs this Court of anything, it is that division is frequently nonconsensual and contested and takes place without the approval or affirmation of the hierarchy." JA 3916.

Judge Bellows' finding was based on extensive undisputed testimony from two historians who explained that the term "division"—especially when used with "branch"—was most often used to describe a non-consensual separation of a group of congregations from a denomination to form an alternative polity. JA 3904-12. As Professor Mark Valeri testified, "the most common definition" of "division" in 1867 was "[t]he separation of a group from an existing denomination, renunciation of its authority, and beginning of the formation of an alternative structure." JA 1906. Professor Charles Irons testified that an "ordinary Virginian" would have understood "division" in the same way. JA 2029-30, 2042. Moreover, this definition does not "vary by denomination"; it "holds across the board." JA 1907 (Valeri).[8]

Professors Valeri and Irons both testified that 19th century divisions

---

[8] The conclusion of Professors Valeri and Irons was based on an exhaustive review of primary sources, including court records, "[s]ecular newspapers, religious journals or serials, sermons, pamphlets, tracts, records of official denominational conventions and also denominational histories"—publications that were "widely available" in Virginia. JA 1904, 1907; JA 1919-21, 1938, 1950, 2027-28, 2041, 2048, 2064-66, 2074, 2076-96.

were not only "[u]namicable," but "unconsensual"; in fact, they were aware of "none" that involved "the approval or consent of the higher ecclesiastical authorities." JA 1906-07 (Valeri); *see* JA 2032, 2033 (Irons) ("I don't know of one"; "I don't think I would characterize any of them as consensual.").[9]

Indeed, the evidence on the ordinary meaning of division in the 1800s is undisputed. While ECUSA's historian testified as to how some (but not all) historians defined "division," he repeatedly conceded he "'d[id] not know what the public usage' of the term division would have been in the 19th century." JA 3917 n.65 (letter op.).[10] Instead, he offered an admittedly

---

[9] For example, Professor Valeri testified that the Presbyterian split into Old and New School branches in the 1830s was not done pursuant to denominational rules (JA 1909, 1913-15), and the same is true of the Old and New School branches' divisions of their own in the 1850s and 60s (JA 1922-26, 1933-34, 1939). Similarly, Professor Irons testified that none of the Methodist divisions was consensual. JA 2032-33 (Irons), 3909-12 (letter op.).

[10] The following exchange is representative:

> Q And is it your contention that this distinction that you draw between a separation and a division was well-known to the general public in the 19th Century?
>
> A I do not have an understanding of what the general public was. In both the contemporary—in contemporary literature that distinction is being made.
>
> Q So you don't really know what people—what terms people commonly used in the 19th Century, do you?
>
> A I know what terms some people used, but I do not know what the public usage was.
>
> Q And indeed, the public may not draw such a fine distinction be-

"distinctive," "narrow," and "technical" reading of division, based on secondary "reference books." Tr. 1124-26, 1122, 1135.

In fact, Professor Mullin admitted that, in his own public writings and statements, he had used the term "division" to describe church splits that he insisted for purposes of this litigation are not divisions. For example, he initially testified that ECUSA has *never* divided—not even in the Civil War, when the Episcopal Church in the Confederate States was formed. But as he admitted on cross, his own book calls that very split a "'division within the Church.'" JA 2752. And when asked about an article that quoted him as saying ECUSA had experienced just a "few divisions," he admitted that when he "lapses to the more common, ordinary meaning of the word," even unapproved splits—such as the 1873 disaffiliations that led to formation of the Reformed Episcopal Church—qualify as a "division." JA 2744-46. Not surprisingly, the circuit court found Professor Mullin's testimony to be less credible than that of Professors Valeri and Irons. JA 3918. And the concessions he ultimately gave strongly support their conclusions.

---

tween division and separation that you do, correct?

A That is correct.

JA 2645; *see* JA 2770 ("I don't know about the public at large."); JA 2756 ("Q. And again, you're talking about experts as opposed to the ordinary people in the mid-19th Century. A. That is correct"); JA 2773-74 (contrasting "the historians' view versus the public's view"); JA 2754 (same).

Contrary to ECUSA's assertion (Br. 22), moreover, it is not true that "virtually every 19th century example of the term's use that the congregations' experts proffered" related to what ECUSA calls the "profound structural divisions that occurred prior to the Civil War."[11] Rather, there were "more than a dozen" Methodist divisions (JA 2034), a host of Presbyterian divisions (JA 1908-35), "17 [or] 18" Lutheran divisions (JA 2719), multiple African Methodist and Baptist divisions (JA 2036-37, 2055-57), and two Episcopal divisions (JA 1956-63), to cite just a few.[12]

Moreover, Professor Mullin ultimately admitted that most if not all of the largest 19th century church splits were not consensual. For example,

---

[11] Although ECUSA repeatedly uses the term "structural divisions" (Br. 13, 15, 18), Professor Mullin never used that term. Nor does the statute.

[12] Methodist examples included not only the 1844 division of the Methodist Episcopal Church into Northern and Southern branches (MECS), but also divisions that led to the Reformed Methodist Church, African Methodist Episcopal Church, African Methodist Episcopal Zion Church, Methodist Church, Protestant Methodist Church, Wesleyan Methodist Church, Free Methodist Church, and the 1860s' division of MEC's Baltimore Conference. JA 1955, 2034-40. Presbyterian examples included the 1830s' Old School-New School split, United Synod, Cumberland Presbyterian Church, Old Light Synod, Associate Reformed Presbyterian Church of the South, Associate Reform Synod, and the Northern and Southern split of the Old School. JA 1908-29, 1932-35. The vast majority of these divisions affected Virginians. JA 1921-22, 1955 (Valeri); JA 2034-35, 2056-58 (Irons); JA 2774 (Mullin) ("many, many separations . . . were going on in Virginia").

We urge the Court to review the testimony of Professors Valeri and Irons, as well as the cross-examination of Professor Mullin, in their entirety. JA 1893-2019 (Valeri), 2020-2139 (Irons), 2653-2783 (Mullin).

he admitted that the "separation" that came closest to formal approval—the never-ratified 1844 plan of separation of the Methodist Episcopal Church (MEC)—"broke down soon after its enactment in 1844." JA 2779.[13] And as the trial court held—quoting his testimony—an attempted deal among the Presbyterians in the 1860s was "[n]ever ratified" and "broke down on certain political issues," but that did not prevent the "division" from becoming "a fait accompli." JA 3917 n.65. Indeed, although ECUSA now says (incorrectly) that those who separated "had the right to do so under Presbyterian polity" (Br. 24),[14] ECUSA admitted below that "the great divisions in the Presbyterian Church did *not* take place pursuant to a plan agreed upon in advance." 1/11/08 Br. 11 (emphasis added).[15]

---

[13] This testimony is consistent with Professor Irons', who stated that while "the Methodists envisioned an amicable and consensual separation," reflected in a "provisional plan of separation," ultimately "[i]t was not a consensual division" because the "annual conferences . . . did not give that three-fourths approval necessary for the plan." JA 2040, 2044.

[14] Professor Valeri, whom ECUSA cites to support this claim, said no such thing. He was emphatic that *no* 19th century division, including the Presbyterian splits, was denominationally sanctioned. JA 1939 (Southern branch was "denounced roundly and the Presbyterian Church actually had statutes in its own constitution which would have made the ordination of ministers in this new PCCSA invalid"); JA 1940 ("[the Northern branch] denounce[s] it, [and] actually passes a series of resolutions" that "demanded . . . fealty").

[15] ECUSA notes that the Northern branch "struck [the Southern] presbyteries from their rolls" (Br. 24), but such actions constitute *resignation to*, not *ratification or approval of*, the division. And as Mullin admitted, the names were stricken *after* § 57-9 was adopted in February 1867. JA 2777-78.

Nor is there any basis for ECUSA's assertion (Br. 22) that the legislature meant to limit the term "division" to "major historical events." The legislature could not have known, in 1867, which divisions would someday meet that description. And whatever "prompted" its adoption (*id.*), the statute applies to all "divisions"—including those that "hereafter occur"—not those viewed as "major" in the cool light of history. Further, no witness testified that the existence of a division hinged on its size. Rather, as ECUSA's officer admitted, "there's no numerical requirement for a division." JA 2566.[16]

---

[16] Professor Mullin likewise conceded that "you see the word division used in common parlance to describe other smaller separations" (JA 2773-74), and that other historians reject his view that only the three largest 19th century church splits (two Presbyterian and one Methodist) were "divisions." JA 2736-37, 2740-41, 2757-58. And Professor Valeri explained that, apart from the number of congregations and ministers needed to "form an alternative polity," there was no specific "minimum size in order to reflect a division." JA 1943, 1944, 1945 (Valeri). Divisions came in all sizes, and the new branch was typically smaller than the old branch. JA 2668-69 (Mullin).

For example, it is undisputed that the groups that divided from the Methodists to form the Reformed Methodist Church, the AME Church, and the AME Zion Church were "very small"—roughly a dozen congregations formed the AME Church and six or seven congregations formed the AME Zion Church. JA 2036-38 (Irons). The Cumberland Presbyterian Church was formed by just "three ministers" who divided from their former church and formed a presbytery that quickly grew to include congregations. JA 1929 (Valeri). Likewise, the Presbyterian divisions that resulted in the formation of the Old Light Synod, the Associate Reform Presbyterian Church of the South, and the Associate Reform Synod, all involved "very small groups, handfuls . . . of smaller Presbyterian Churches." JA 1932 (Valeri).

Similarly, the division that led to the formation of the Reformed Episcopal Church (REC) began in 1873 with only seven ministers, 19 laypersons, and

Not surprisingly, the court below "found the opinions of the CANA experts to be" both "more persuasive and convincing" and "tied directly to the particular and pertinent historical record relevant to the instant case." JA 3918. By contrast, "significant opinions offered by ECUSA-Diocese experts did not appear to be so tethered; rather, they appeared to be expressions of opinion based on the experts' general knowledge." *Id.* There is no basis to disturb these findings.

Precedent. All relevant precedent confirms that a "division" need not be sanctioned by the denomination. *First*, as this Court noted in analyzing § 57-9(B), the type of "division" that is a "prerequisite to relief under 57-9" occurs when parties "separate from the body of their church, and . . . rend it into groups." *Reid*, 229 Va. at 192, 327 S.E.2d at 115. This definition forecloses the notion that a division must be consensual. And as the trial court held (JA 3929), "division" means the same thing under § 57-9(A).

Second, the record includes 29 circuit court orders from many Vir-

---

a handful of congregations. JA 1962-63 (Valeri), 2724 (Mullin); and even today REC has only 6,000 members, far less than CANA (JA 1962-63); *see generally* JA 1956-63 (Valeri). Yet this modest beginning did not deter ECUSA's Bishop of Minnesota, in his 1874 address, from calling the separation a "division." JA 1960 (Valeri); JA 2725-33 (Mullin).

In any event, even if, contrary to its text, § 57-9 were limited to "historic" divisions, the court below made a factual finding that the events here constitute "a division of the first magnitude." JA 3938 (letter op.).

ginia counties, issued shortly after 1867 and uniformly approving congregational votes as dispositive of title under the statute. JA 3011-31, 2071-97. As the trial court found, Professor Irons' testimony on these orders is "especially helpful . . . in understanding the early history of 57-9." JA 3918. And none of the orders—one of them secured by the act's sponsor, John Baldwin, representing a Methodist church—suggest that the congregation acted consistently with the denomination's polity. JA 2096, 2138 (Irons).

Lacking any counter-examples, ECUSA cites *Brooke v. Shacklett*, 54 Va. 301 (1856) (Br. 17), a case predating the statute by 11 years and one Civil War. *Brooke* involved only one division—that of the Methodist Episcopal Church (MEC), pursuant to its 1844 "plan of separation." Even this division was not consensual: As Professor Mullin admitted, the "plan of separation" was never "ratified" and "broke down." JA 2779.

But even if the 1844 plan had been ratified, it did not cover the *later* division in MEC's Baltimore Conference, which covered much of Virginia. JA 2094 (Irons) ("Q *** what relevance, if any, did the 1844 plan of separation have in 1867? A None."). In 1845, that Conference had declared allegiance to MEC; but in the 1860s, it "renounced the authority of the General Conference," creating another "division" in which many congregations left "in piecemeal fashion." JA 2049-51 (Irons). Thus, as this Court noted

in *Hoskinson v. Pusey*—a case arising under an earlier version of § 57-9—the division in the Conference and the votes that followed, "fifteen years from the adoption of the [1844] resolutions," "w[ere] not based on any claim of right under the plan of separation." 73 Va. 428, 437-38 (1879).

That is not surprising, as the voting rights under the 1844 plan were far more modest than those granted by § 57-9. The 1844 plan allowed only congregations in "border" areas to vote, whereas § 57-9 gives *all* congregations statewide that right.[17] And § 57-9 applies to *all* "divisions" that may "occur," not just MEC's division. As the original version of § 57-9 stated: "*divisions have occurred in some churches or religious societies* to which such religious congregations have been attached, and *such divisions may hereafter occur*." Act of 1866-67, ch. 210, pp. 649-50 (emphasis added).

That the statute granted broader voting rights than those provided by MEC's plan of separation eviscerates the notion that the legislature meant only to codify ECUSA's reading of *Brooke*. Indeed, this Court's contemporaneous summary of this history in *Hoskinson* suggests that the act may have been passed precisely because the 1844 plan did *not* provide for Virginia congregations to disaffiliate from MEC. In any case, several orders in

---

[17] *Hoskinson*, 73 Va. at 438-39 ("The congregation, although within the territorial limits of the Baltimore conference, which was a border conference, was not a 'border society,' within the meaning of the resolutions of 1844").

the record involved Baltimore Conference congregations whose disaffiliations were not approved by MEC. JA 2051-54, 2094-95 (Irons).

Nor do the § 57-9 cases heard by this Court in the late 1800s suggest that a "division" had to satisfy denominational polity. Had that been so, it would have been an obvious basis for deciding *Hoskinson*, where the Court noted that the congregation "had no authority under [the 1844] resolutions to determine by a majority of its members its adherence to the church south." 73 Va. at 439. Instead, the Court ruled that "there [was] no evidence that the determination of the congregation manifested by the vote was reported to the circuit court of Loudoun county, approved by that court, and so entered on its minutes. Compliance with these requirements is essential." *Id.* at 440. Similarly, in *Finley v. Brent*, 87 Va. 103, 12 S.E. 228 (1890), a dispute involving a Methodist Protestant church, the Court did not hold that § 57-9 did not apply because the denomination had not blessed the congregation's vote. Rather, it held that the Contracts Clause barred applying the law retroactively, to deprive a party of property rights that were "vested" under an 1860 (pre-statute) deed. 87 Va. at 108, 12 S.E. at 230.[18]

Third, this Court rejected the polity- or deference-to-hierarchy based

[18] By contrast, the court below held that none of the pre-1867 deeds gave ECUSA any property rights. JA 4246-61. This ruling was not appealed.

approach to church property issues in *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 201 S.E.2d 752 (1974). As the Court there stated, *Watson v. Jones*, 80 U.S. 679 (1871), a pre-*Erie* federal common law decision, "held that those who unite themselves with a hierarchical church do so with an implied consent to its government," but Virginia is "not bound by the rule of *Watson*" or its holding that decisions of "the general church" are "binding on local congregations and on civil courts." 214 Va. at 504, 201 S.E.2d at 755-56. Rather, Virginia is a "neutral principles" state (*id.*), and majority rule is one such principle.

Purpose. It is for good reason that the text, structure, and history of § 57-9—as well as the case law—point in the same direction: The statute would serve no meaningful purpose if limited to consensual "divisions." As the circuit court explained, if "divisions" were denominationally sanctioned, "there would be little need for a division statute, for churches would simply approve divisions amicably and divide up their property without intervention from secular institutions of government." JA 3936.

This would be true in any denomination, but it is especially true in ECUSA. As Judge Bellows noted, under "[ECUSA's] definition of 'division,' 57-9(A) would *never* apply to the [denomination], since the record shows that, according to ECUSA's canons, the only 'divisions' that are allowed are

essentially geographic, and an ECUSA congregation is not allowed to decide which diocese to join"—*i.e.*, there is no choice of "branch." JA 3935; *see* JA 2566-67 (Douglas) ("for a congregation in [one diocese] to vote to join [another] . . . would be a violation of the Episcopal polity"). ECUSA's reading of § 57-9 would thus eviscerate the voting rights that it provides. That may be ECUSA's wish, 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).

Aware of this difficulty, ECUSA says § 57-9 is designed to clarify the "duties of court-appointed trustees" in a division. Br. 13-14, 28. But trustees can always "seek[] [courts'] aid and direction" as to their duties. *E.g., Schmidt v. Wachovia Bank*, 271 Va. 20, 23, 624 S.E.2d 34, 36 (2006). And here, any confusion could be dealt with in an *ex parte* suit brought either by the trustees under §§ 57-11 or 57-15, or by "one or more members" of the congregation under § 57-13. ECUSA's reading of § 57-9 does not distinguish it from these statutes, much less explain its voting provisions.[19]

---

[19] ECUSA says § 57-15 "address[es] only 'sales' and 'transfers' of title . . . , which would not generally occur in the case of a division." Br. 14 n.12. If ECUSA is suggesting that there have been no transactions here that trigger § 57-15, we agree. That is yet another reason why the circuit court did not err in declining to conduct the very same analysis here that the Court conducted in *Green*, 221 Va. at 553, 272 S.E.2d at 184, and *Norfolk*, 214 Va. at 503, 201 S.E.2d at 755—both of which were § 57-15 cases.

B. ECUSA's use of the term "division" outside of court confirms that the circuit court properly interpreted it.

The circuit court also made factual findings that "ECUSA and Diocese leaders have in the past used the term 'division' themselves to describe the very situation before this Court." JA 3935. For example, the Diocese's bishop wrote to the Congregations just days before their votes, stating:

> American Christianity has been punctuated over the years by frequent ***divisions, with one group choosing to separate*** because they believed the separated group might be more pure than their former identity. That has not been characteristic of the way we Anglicans have dealt with differences.
>
> I encourage you when you vote, to vote for the unity and mission of the church, therefore remaining one with your diocese, and reject the tempting calls to ***division*** . . . .

JA 3889 (emphasis added). Contrary to ECUSA's brief (at 28), this written statement cannot be dismissed as a use of "division" from "some other context." It involved the very facts before the Court, days before the votes. And since the issue is the ordinary usage of "division," it is telling that when the Diocese's highest officer speaks outside of court, he uses the term "division" to describe situations where "one group choos[es] to separate" to form a new entity—precisely how the term is used in common parlance.

Further, just months before the votes, a Special Committee formally appointed by the Diocese's bishop produced a unanimous report addressing "the division which may cause some to 'walk apart.'" JA 3033. That re-

port—authored by the Diocese's Chancellor, Russell Palmore—provided a "Protocol for Departing Congregations" to follow in order to disaffiliate. JA 3034; JA 2314-14, 2322. Thus, the report's reference to "division" cannot merely refer to differences of opinion. *Accord* JA 2835 (diocesan report repeatedly referring to the "division"); JA 3088-89; JA 2259-68.

Other documents at trial showed that ECUSA described as a "division" the 1873 separation—in defiance of ECUSA polity—of a small group that left to form the Reformed Episcopal Church (REC). Although ECUSA denounced these departures, an 1874 church journal that criticized the group for *violating* church canons described what transpired as a "division" (JA 1958-61, 1990, 2823). A century later, ECUSA's General Convention passed a resolution describing the same split as a "division," even though it conflicted with church polity. JA 1963 (Valeri); JA 2824. ECUSA's own words thus confirm that the court correctly defined "division."

The definition of "division" that ECUSA developed for this lawsuit also cannot be squared with the more objective perspective stated in *An Episcopal Dictionary of the Church*, which is published by ECUSA's "official publisher" and posted on ECUSA's website. JA 2823; JA 1961-62 (Valeri); JA 2572 (Douglas). That dictionary treats "division" as a synonym for "schism," defining the latter as "*a rip, tear, split, or* ***division***"—"a ***formal***

and willful separation from the unity of the church." JA 2823 (emphasis added). The dictionary further describes the division that created REC as "the earliest *significant schism* from the Episcopal Church," in contrast to "*smaller schisms* from [the Church] in the later twentieth century." *Id.* (emphasis added). Reading this definition as a whole, it is clear that —outside of court—ECUSA views a "division" as a "formal and willful separation" from a denomination. And since the division here is already far larger than the one that created REC, it is "significant" by ECUSA's standards.

Professor Mullin likewise admitted on cross-examination that ECUSA has experienced a post-2003 "schism." JA 2749. And he defined "schism" as a group's "voluntary action" to "separate" from a denomination, which corresponds to the common meaning of "division." *Id.* Thus, his testimony confirms that ECUSA has experienced a "division" for purposes of § 57-9.

In sum, as the circuit court found, "[t]he only way this Court could find a 'division' *not* to exist among the pertinent entities" is "to define the term so narrowly and restrictively as to effectively define the term out of existence." JA 3858. As the Court may not read § 57-9 so as to "make 57-9(A) a nullity" (JA 3936 (letter op.)), the circuit court's reading must be affirmed.

II. The Circuit Court Properly Held That CANA And ADV Qualified As "Branches" Within The Meaning Of § 57-9.

ECUSA's challenge to the circuit court's reading of "branch" is equally

misguided. Section 57-9 provides that in the event of a "division," congregations may vote on which "branch" to join. As the circuit court explained, "[a] 'branch' is 'simply the logical corollary of [a] division,'" and "describes the entities that remain in the aftermath of a division." JA 4157. This only makes sense, as a "division" *by definition* involves the formation of an alternative polity that congregations can join. Having found that ECUSA, the Diocese, and the Anglican Communion had each undergone "divisions," the court naturally found that CANA, ADV, and the Church of Nigeria were respective "branches," or "offshoots," of those entities. JA 3933. Each of these three findings independently satisfies § 57-9.

A. A "branch" for purposes of § 57-9 is not an entity with a connection to the denomination from which it disaffiliated.

Citing 19th century and modern dictionaries, 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. The historical record supports that reading, particularly where "branch" is used with "division." As the trial court found, the entities created in the wake of 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.* And ECUSA's witness admitted that a

"branch" is "an extension that grows out of an earlier body," but "it does not necessarily have to be legally connected." JA 3917 (quoting Mullin).

Given the undisputed meaning of the "branch" requirement, there is no question that it is satisfied. As the circuit court noted, "[t]here has never been any dispute . . . 'that the members of CANA and ADV were previously attached to the Episcopal Church, that these organizations were established specifically to form a new denominational home for those separating from the Episcopal Church, or that they are made up almost entirely of former Episcopal congregations, clergy, and members.'" JA 4158 (citation omitted). Extensive undisputed proof supported this finding.[20]

B. CANA's and ADV's relationship with the Anglican Church of Nigeria does not make them any less a "branch."

ECUSA offers no other reading of "branch," let alone one that works with "division." Nonetheless, it challenges the court's finding that CANA

---

[20] All of CANA's bishops, and the vast majority of its 100 or so clergy, were former ECUSA clergy (the balance were newly ordained and had no prior affiliation). JA 3890; JA 2164-66 (Minns). More than 10,000 of CANA's 12,000 members came directly from ECUSA, and most of those who left ECUSA and joined CANA left as entire congregations. JA 3890; JA 2168.

All of ADV's 20 Virginia congregations are led by former ECUSA clergy, and nearly all of its 7,500 members came from the Diocese. JA 3891. The 15 congregations who left the Diocese to form ADV comprised nearly 20% of the Diocese's average Sunday attendance. JA 3936, 3036. ADV also has more members than the Reformed Episcopal Church, which grew out of a "division." JA 3936 ("since its formation, ADV alone is already 25 percent larger than the Reformed Episcopal Church is even today").

and ADV are branches of ECUSA and the Diocese. Br. 28-31. Because CANA is affiliated with the Anglican Church of Nigeria, ECUSA says it is a "branch" of *that* entity. Br. 29. "[O]ne church does not become a 'branch' of another," ECUSA argues, "because it is made up largely of the latter's former members." *Id.* But this contention wrongly assumes that a "branch" has to be connected to its mother church, and glosses over the events that led to creation of CANA and ADV, their status as separately incorporated U.S. entities, and the relationships between the entities.

In 2003, decisions at ECUSA's General Convention triggered conflict both within ECUSA and the Diocese and in the wider Anglican Communion. JA 3866-81. CANA was thus established to provide an alternative polity for Episcopalians who desired to leave ECUSA while maintaining an affiliation with other parts of the Communion. JA 3881-85. CANA's corporate charter encompasses all U.S.-based Anglicans who wish to "br[eak] away from the Episcopal Church." JA 3890. Similarly, the division in the Diocese led to formation of ADV in 2006 "to provide a structure for the Episcopal and pastoral oversight for the[] various congregations" disaffiliating from the Diocese. JA 2163; JA 2988-93; JA 3891. Both CANA and ADV, then, are new polities—offshoots of ECUSA and the Diocese, respectively—created as a result of the divisions in those entities.

That CANA and ADV are related to other parts of the Anglican Communion through the Anglican Church of Nigeria—which itself amended its constitution to disaffiliate from ECUSA—does not change the fact that the congregations and clergy who formed CANA and ADV as U.S. entities came from ECUSA and the Diocese, not the Church of Nigeria. CANA and ADV remain distinct bodies, incorporated under U.S. law, and their bishops and other leaders came from ECUSA. *See supra* n. 20. As ECUSA admitted at trial, each was created to "minister[] to individuals who have left the Episcopal Church." JA 2568 (Douglas).[21]

ECUSA's position is also foreclosed by the act's most common use shortly after its adoption: the division in MEC's Baltimore Conference. As noted above, while MEC split into northern and southern (MECS) branches in 1844, the Baltimore Conference did not divide from MEC until the 1860s. As Judge Bellows recognized, citing this Court's decision in *Hoskinson*:

> [A]lthough MEC South predated the Baltimore Conference division (much as the Church of Nigeria predated the division in TEC), a new Conference was created as a result of that division to receive those leaving MEC (much as CANA and ADV were created to receive those congregations leaving TEC). Thus, the most typical use of § 57-9 in-

[21] That CANA and ADV formed as a result of a division in which numerous congregations separated from ECUSA distinguishes them from ECUSA's peculiar example involving the Diocese of Mexico. Br. 30. In any event, "[n]o part of the Court's definition and application of the term 'branch' turned upon the Court's brief discussion of that hypothetical." JA 4157 n.46.

> volved congregations from one church (MEC) joining a new religious society (the Southern Baltimore Conference) affiliated with MEC South, a "preexisting church."

JA 4158 n.48 (citations omitted). ECUSA conceded below, moreover, that this use of the statute—the way in which it was successfully used by its sponsor and 25 congregations—satisfied § 57-9. 1/11/08 Br. 14.[22]

In sum, where there is a division, there is a branch. And as the circuit court recognized, both elements of § 57-9 are unquestionably met here.

III. The Circuit Court Rightly Found, As A Third And Independent Ground For Its Ruling, That The Anglican Communion Is A Religious Society That Experienced A Division.

The circuit court also held that § 57-9 was satisfied on a third and independent ground, based upon events in the worldwide Anglican Commun-

---

[22] ECUSA's reliance on the Senate's failure to pass SB 1305 (2005), which was withdrawn before a vote, does not alter the "branch" analysis. Br. 30. SB 1305 did not purport to codify the circuit court's reading of § 57-9, but would have *expanded* it by allowing congregations not only to vote to join a "branch," but to become "independent." And in any event, "[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001). SB 1305 was never even voted on. And as ECUSA's own cases show, courts consider legislative inaction only if a statute's meaning is so well settled that inaction can be viewed as an affirmation of prior readings of the law. *See Crook v. Commonwealth*, 147 Va. 593, 596-97, 601, 136 S.E. 565, 567-68 (1927) (inaction was "an indication" of law's meaning where Court had issued an "illuminating opinion . . . express[ing] fully our views on [its] construction"); *Tabler v. Bd. of Supervisors*, 221 Va. 200, 269 S.E.2d 358 (1980) (four refusals to adopt legislation showed lack of intent). Here, there has been neither a recent decision authoritatively interpreting § 57-9(A) nor repeated efforts to amend it for a specific purpose.

ion. The court found (1) that the Anglican Communion was a "religious society" under § 57-9, (2) that it suffered a division in the wake of ECUSA's actions in 2003, (3) that the CANA Congregations were "attached" to the Communion through their affiliation with ECUSA; and (4) that the Congregations had joined branches of the divided Communion. Aware of its Presiding Bishop's admissions, ECUSA contests only the first two findings.[23]

Church or Religious Society. After analyzing the statute's text and structure, the trial court held that "religious society" has a broader connotation than "church" in § 57-9. JA 3930-31. ECUSA insists that "religious society" is merely a synonym for "church." Br. 32-33. But ECUSA fails to address, much less refute, the court's analysis of these terms,[24] and its argument that they are synonyms is at odds with the usual rules of statutory construction, which require that every term be given independent meaning. *Looney v. Commonwealth*, 145 Va. 825, 832, 133 S.E. 753, 755 (1926).

Citing only the testimony of its own experts, ECUSA also asserts that the Anglican Communion does not qualify as a religious society. Br. 32.

---

[23] At deposition, the Presiding Bishop described the Congregations as having joined "another branch of the Anglican Communion." JA 4160 n.56.

[24] The lone case that ECUSA cites says only that "society" *may* be used synonymously with "church" where the word "society" is part of the name of the church that is a party to the case. Nowhere does this Nebraska case hold that "society" is *necessarily* synonymous with "church." *In Re Douglass' Estate*, 94 Neb. 280, 284, 143 N.W. 299, 300 (1913).

But the trial court found these witnesses to be less credible than CANA's (JA 3918), and other parts of their testimony confirm that the Communion is a religious society. Both witnesses agreed that the Communion is a "fellowship of churches,"[25] and Professor Douglas admitted that it is an enduring body whose members have organized relationships, a shared history, and other interactions that mirror the modern dictionary definition of "society." JA 2574.[26] Leaders of the Anglican Communion describe it as a "society of churches" (JA 3863-64, 3866, 3931), and the Preamble to the ECUSA Constitution defines it as "a Fellowship within the One Holy, Catholic, and Apostolic Church of those duly constituted Dioceses, Provinces, and regional Churches" (JA 911). Indeed, Professor Douglas' concern with the term "society" was not that it is inaccurate, but that it "implies a much looser kind of federation or voluntary association that doesn't get at the historic DNA and relationship as a family of churches." JA 2578; JA 2582-84.

ECUSA also says the Anglican Communion does not exert control over congregations, such that they cannot be deemed "attached" to the so-

---

[25] *E.g.*, JA 2659 (Mullin) ("the Anglican Communion . . . is a Fellowship . . . of churches in communion with the Archbishop of Canterbury"); JA 2529, 2582-84 (Douglas) (the Communion is an association and fellowship of churches); JA 2513 (describing the Communion "as a family of churches").

[26] This testimony refutes ECUSA's attempts to analogize the Anglican Communion to groups such as the World Council of Churches. Br. 33-34.

ciety under § 57-9. Br. 33. But control need not be direct. Indeed, the CANA Congregations attachment to ECUSA itself was always indirect, mediated through the Diocese. JA 2538. And as stated in the Preamble to its constitution, ECUSA is a "constituent member" of the Anglican Communion. JA 3860, 1079, 3618. Thus, the circuit court had ample support for its factual finding that the Congregations were "attached" to the Communion as to ECUSA—through mediating bodies. JA 4162, 3931-33.

Division. ECUSA also asserts that there has been no "division" in the Anglican Communion because no "parallel polity" was formed as a result of the division. Br. 34. But as the circuit court found, an alternative polity formed as a result of the Church of Nigeria's amendment of its Constitution—which "changed the legal relationship between the Church of Nigeria" and other Provinces of the Anglican Communion, especially ECUSA —and its severance of all ties (financial and otherwise) with ECUSA. JA 3937-38; JA 3882-83. As even ECUSA's expert witnesses acknowledged, these changes "altered the relationship between the Church of Nigeria and the Episcopal Church," constituted "the most severe action one province could take to disassociate itself from another province," and "evidence[d] a

division of the Anglican Communion." JA 2611-12, 2638-39, 2615.[27]

IV. Section 57-9 Neither Burdens ECUSA's Religious Exercise Nor Discriminates Among Denominations, And Thus Satisfies The Federal And State Religion Clauses.

In arguing that there has been no "division" for purposes of § 57-9, ECUSA concedes that "[t]he Church's governing structure and geographical territory have been unaffected" by the CANA Congregations' disaffiliations and the ruling below. Br. 10. But in arguing that § 57-9 is unconstitutional, ECUSA insists that the ruling below "eviscerated [its] structure" and "substituted a congregational polity." Br. 2. ECUSA was right the first time, and its admission belies any claim that § 57-9 interferes with its "polity" or free exercise. Nor is there any basis to its view that § 57-9 "discriminate[s] among religious sects" (Br. 45), in violation of the Establishment Clause.

---

[27] ECUSA asserts that the trial court deemed CANA a "branch" of ECUSA because both are members of the Anglican Communion, and thus somehow resolved this case "on the basis of religious doctrine." Br. 31. The record is to the contrary. As the court made clear, applying its definition of branch "requires no theological or doctrinal analysis at all." JA 4158. Whether "CANA and ADV currently share any theological similarities to the Episcopal Church is irrelevant to whether they 'descended from' or 'extended from' that Church, and the Court need not (and did not) resolve any such questions to find the branch requirement satisfied." *Id.* (citations omitted). Thus, the court deemed CANA a "branch" of ECUSA solely because CANA represented "the separation of a group of congregations . . . from ECUSA and the formation of an alternate polity that disaffiliating members could [join]." JA 3937. That is a secular inquiry.

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

The notion that § 57-9 burdens ECUSA's free exercise is foreclosed by *Jones v. Wolf*, 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. The petitioners there, like ECUSA here, said it was unconstitutional to apply "a presumptive rule of majority representation" to decide property ownership in a case involving a hierarchical church. *Id.* at 607. The Court disagreed, stating that majority rule was "consistent with both the neutral-principles analysis and the First Amendment. Majority rule is generally employed in the governance of religious societies. Furthermore, the majority faction generally can be identified without resolving any question of religious doctrine or polity." *Id.*

To be sure, *Jones* held that state law must be "flexible enough to accommodate all forms of religious organization[s]," and that a denomination must be able to avoid or "overcome" the presumption that majority rule will govern ownership by legal arrangements made "before the dispute erupts." *Id.* at 603, 606, 608. But contrary to ECUSA's position, the Court did not say that state courts *must* recognize denominational canons or provide any particular method of avoiding majority rule. Rather, in a sentence omitted

from ECUSA's brief (Br. 38-39, 41-43), the Court explained: "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." 443 U.S. at 608.

Here, there are ample means by which denominations may overcome the default rule of majority ownership under § 57-9. For example, they may place title in church officers under § 57-16, or in corporate form under § 57-16.1. *Jones* held that "[t]he burden involved in taking such steps" as "modify[ing] the deeds" is "minimal" for purposes of free exercise analysis. 443 U.S. at 606; JA 4152 (letter op.). And as the trial court found, both the Diocese itself (for some 29 properties) and many other Virginia denominations routinely use these alternative forms of ownership.[28] In short, 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 (letter op.).

ECUSA says the default rule of majority ownership in a division is not technically a "presumption" that is "defeasible." Br. 43. What matters un-

---

[28] JA 4150-51 ("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 practice which it simultaneously protests 'substantially burdens' its free exercise of religion."); JA 3112-20 (Journal of the 210th Annual Council of the Diocese) ("Properties Held"); JA 3092-97 ("Properties Held").

der *Jones*, however, is whether the rule may reasonably be avoided by adopting other ownership forms "before the dispute erupts" (443 U.S. at 606), not whether state law labels the alternatives a means of "defeating" the "presumption." Both *Jones* and the Diocese's own use of § 57-16 belie any claim that § 57-9 imposes more than a "minimal" burden. "[N]eutral provisions of state law governing the manner in which churches own property" simply "cannot be said to 'inhibit' the free exercise of religion." *Id.*

Aware of this difficulty, ECUSA baldly asserts that "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." Br. 42. But as shown by the 1867 act appended to ECUSA's brief, § 57-9 has *always* applied only to property "held in trust."[29] Section 57-16, passed in 1942, provides an alternative by allowing a "church" or "denomination" to appoint "officers" to hold title. And corporate ownership has been an option since *Falwell v. Miller*, 203 F.Supp.2d 624 (W.D. Va. 2002), was issued in April 2002.

In sum, as the official reporters of ECUSA's constitution and canons put it: "[*Jones*] gives great weight to the actions of controlling majorities, and would appear to permit a majority faction in a parish to amend its par-

---

[29] As the trial court held, the 2005 changes to § 57-9 "d[id] not change [its] substantive meaning." 5Qs Op. 13.

ish charter to delete all references to the Episcopal Church, and thereafter to affiliate the parish—and its property—with a new ecclesiastical group."[30] We agree. ECUSA simply fails to read *Jones* in light of *Virginia* law.

B. ECUSA's other authorities are inapposite.

As the trial court held (JA 4130-35, 4147-49), ECUSA's other cases—including *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); and *Watson v. Jones*, 80 U.S. 679 (1871)—pre-date *Jones* and involve distinct issues such as whether a hierarchical church gets deference on its choice of ecclesiastical leaders or the interpretation of rules that are not amenable to civil court enforcement. We have addressed these authorities above or in our response to the Diocese's brief (at 38-42), and we will not repeat that analysis here. Suffice it to say that ECUSA's reading of these decisions is patently incorrect and, indeed, would gut *Jones v. Wolf*.[31]

---

[30] I *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America* 301 (1981) (E. White and J. Dykman, eds.). *See* http://www.episcopalarchives.org/White_and-_Dykman_combinedvols_1997.pdf (p. 315 of the online pagination).

[31] *Kedroff*, 344 U.S. 94, 115 (1952) (a hierarchical church's choice of its *leaders* "is strictly a matter of ecclesiastical government"); *Milivojevich*, 426 U.S. at 721, 723 (dismissing ecclesiastical leaders for non-"conformity" to the "standard of morals required of them" is "purely ecclesiastical"; civil courts may not "substitute [their] interpretation of the [church] constitutions for that of the [internal church tribunal]" on provisions that "were not so express that the civil courts could enforce them"); *Watson v. Jones*, 80 U.S.

Nor is there any merit to ECUSA's remarkable assertion that the trial court "[l]argely ignor[ed] the above authority." Br. 41. To the contrary, in an exhaustive, 49-page, single-spaced opinion, the court canvassed the entire "History of U.S. Supreme Court Church Property Law," analyzing *Watson*, *Kedroff*, *Kreshnik*, *Milivojevich*, *Hull Church*, *Maryland & Virginia Eldership*, *Jones*, *Larson*, and *Lemon*, this Court's cases, and various non-Virginia cases. JA 4130-64 (letter op.). ECUSA's various criticisms do not in the slightest undermine the court's careful analysis of those decisions.

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

ECUSA is likewise incorrect in claiming that § 57-9 violates *Larson v. Valente*, 456 U.S. 228 (1982), because it "discriminates among religious sects . . . based on a stated criterion (whether property is held by trustees)

---

679 (1871) (pre-*Erie* federal common law case that deferred to a hierarchical church tribunal's resolution of a property dispute, but was rejected by this Court in *Norfolk*, 214 Va. at 504, 201 S.E.2d at 755-56).

Northside Bible Church v. Goodson, 387 F.2d 534 (5th Cir. 1967), and *First Methodist Church v. Scott*, 226 So. 2d 632 (Ala. 1969), are pre-*Jones* cases involving Alabama's "Dumas Act." Br. 40-41. Moreover, as Judge Bellows held, the 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. 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.

that will apply to some denominations but not others." Br. 45-46. As we explain in our response to the Diocese's brief (at 42-46), discrimination among different forms of *property ownership* is not the same as *religious* discrimination, and *Larson* restricts only the latter. Indeed, ECUSA can avoid § 57-9's application by directing congregations to put title in an officer or corporation—something the Diocese already does for 29 properties.

V. The Circuit Court Rightly Refused To Engraft Onto § 57-9 The Same Factors That Apply Under § 57-15, Which Would Nullify The Congregational Voting Right.

Lacking any convincing argument that § 57-9 is either unsatisfied or unconstitutional, ECUSA says the trial court erred in not applying the same legal framework that was applied in *Norfolk* and *Green*. Br. 46-49. But as we explain in our brief in the Diocese's appeal (at 7-16), majority rule is itself a "neutral principle," *Reid*, 229 Va. at 189-90, 327 S.E.2d at 113; *Jones*, 443 U.S. at 607; and the same "neutral principles" need not apply to all church property disputes, without regard to the applicable statutes. *Norfolk* and *Green* did not apply § 57-9 or analyze its "division" and "branch" requirements; they applied § 57-15, which has a distinct text and purpose. Nor is this surprising, as each case 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 that formed a "branch." JA 4174.[32]

VI. The Circuit Court Correctly Found That ECUSA Had Not Timely Asserted a Waiver Defense.

Finally, there is no basis to reverse the circuit court's conclusion that ECUSA—in waiting until after trial and the ruling on § 57-9's applicability—waived its right to argue that the CANA Congregations gave up the right to invoke § 57-9 in the first place. In May 2007, the trial court took letter briefs and held a lengthy conference to discuss the issues in the case and the order in which they should be decided. ECUSA advised the trial court (1) that "the application and interpretation of § 57-9 is indeed a discrete, key issue that can and should be resolved as soon as practicable," and (2) that "reso-

---

[32] ECUSA says "[s]tatutes are rarely . . . applied without opportunity to consider evidence showing that they should not be applied to a particular case." Br. 48. This is a puzzling statement, since the purpose of the 2007 trial was to address whether § 57-9 was applicable. If ECUSA is suggesting that its canons are a contract that overrides § 57-9, that is exactly backwards. "'[L]aws 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." *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 429-30 (1934); and ECUSA did not appeal the trial court's ruling that § 57-9 does not, as applied, violate the Contracts Clause. JA 4246-61.

If ECUSA is now suggesting that its canons are an implicit agreement *not to invoke* § 57-9, that too turns the usual rule on its head. A "statutorily created right" must "be expressly waived," *Virginia Dynamics Co. v. Payne*, 244 Va. 314, 316, 421 S.E.2d 421, 423 (1992), and ECUSA has never suggested that any CANA Congregation expressly agreed not to invoke § 57-9. Moreover, as explained below, ECUSA failed to raise waiver as a defense until well after the circuit court had found the statute applicable.

lution of this issue would dispose of the . . . 57-9 proceedings." JA 829-31. In response, the court ordered and later held a (five-day) trial on "the applicability of § 57-9." JA 888-94. And in April 2008, the court issued an 83-page opinion finding that the Congregations had satisfied § 57-9.

Faced with this adverse ruling, in July 2008—18 months after the answers, ten months after trial, and three months after the court found § 57-9 applicable—ECUSA requested a second trial on the applicability of § 57-9, this time addressing whether the Congregations had impliedly waived the right to invoke it. JA 4230-45.[33] As the trial court described this defense, ECUSA was newly saying the Congregations "contracted away, waived, abandoned or relinquished their right to file a 57-9 petition." JA 4233.

After extensive briefing and oral argument, the trial court rejected this defense, finding that ECUSA did not "plead the[] claim" or "do so timely." JA 4237. After chronicling the case's protracted history, the court found that ECUSA had not alleged that the CANA Congregations had relinquished their right to invoke § 57-9. JA 4237-43.[34] The court further found

---

[33] ECUSA has not alleged that any CANA Congregation expressly agreed not to invoke § 57-9 in the event of a division.

[34] As the court noted, ECUSA's answer to an interrogatory that asked it to identify "all factual and legal basis for [its] contention that the congregations' petitions do not comply with Va. Code § 57-9" said nothing about waiver or "contracting around" the statute. *Id.* at 10-11.

that allowing ECUSA to raise that argument "eighteen months" into the suit would unfairly prejudice the Congregations. JA 4233, 4243, 4245.

ECUSA does not appeal the prejudice finding. Instead, it claims that it raised a waiver defense in its answer to the § 57-9 petitions, by asserting that the CANA Congregations were bound by ECUSA's canons. Br. 50.[35] But as the trial court recognized, whether the "canons are binding as a matter of . . . law, and therefore govern *notwithstanding* § 57-9"—an issue that was extensively litigated below—is "entirely different" from "the contention that the CANA Congregations have given up/waived their right to ever invoke 57-9(A) in the first place." JA 4234, 4237. In short, ECUSA may not "assert[] that [§ 57-9] may not be invoked at all, long after that statute has been meticulously dissected at trial and in voluminous briefs, and long after the Court has determined that the statute was property invoked." JA 4243. ECUSA has provided no reason to disturb this ruling.

CONCLUSION

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

---

[35] ECUSA distinguishes between the Congregations' procedural and substantive rights under § 57-9, stating that it now agrees that they had the right to file § 57-9 petitions, but that they lacked any rights under the statute because they had bound themselves to "a different set of rules." Br. 49-50. But no matter how ECUSA tries to recast its position below, it cannot overcome its failure to plead waiver as a reason why § 57-9 was inapplicable.

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

STATUTORY ADDENDUM

Va. Code § 57-9. How property rights determined on division of church or society.

A. 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.

B. If a division has heretofore occurred or shall hereafter occur in a congregation whose property is held by trustees which, in its organization and government, is a church or society entirely independent of any other church or general society, a majority of the members of such congregation, entitled to vote by its constitution as existing at the time of the division, or where it has no written constitution, entitled to vote by its ordinary practice or custom, may decide the right, title, and control of all property held in trust for such congregation. Their decision shall be reported to such court, and if approved by it, shall be so entered as aforesaid, and shall be final as to such right of property so held.

(Code 1919, § 40; 1972, c. 825; 2005, cc. 681, 772.)

Va. Code § 57-16. Property held, etc., by ecclesiastical officers.

A. How property acquired, held, transferred, etc. - Whenever the laws, rules or ecclesiastic polity of any church or religious sect, society or denomination commits to its duly elected or appointed bishop, minister or other ecclesiastical officer, authority to administer its affairs, such duly elected or appointed bishop, minister or other ecclesiastical officer shall have power to acquire by deed, devise, gift, purchase or otherwise, any real or personal property, for any purpose authorized and permitted by its laws, rules or ecclesiastic polity, and not prohibited by the laws of Virginia, and the power to hold, improve, mortgage, sell and convey the same in ac-

cordance with such laws, rules and ecclesiastic polity, and in accordance with the laws of Virginia.

B. Transfer, removal, resignation or death of ecclesiastical officer. - In the event of the transfer, removal, resignation or death of any such bishop, minister, or other ecclesiastical officer, the title and all rights with respect to any such property shall pass to and become vested in his duly elected or appointed successor immediately upon election or appointment, and pending election or appointment of such successor, such title and rights shall be vested in such person or persons as shall be designated by the laws, rules, or ecclesiastical polity of such church or religious sect, society or denomination.

C. Validation of deeds, etc. - All deeds, deeds of trust, mortgages, wills or other instruments made prior to March 18, 1942, to or by a duly elected or appointed bishop, minister or other ecclesiastical officer, who at the time of the making of any such deed, deed of trust, mortgage, will or other instrument, or thereafter, had authority to administer the affairs of any church or religious sect, society or denomination under its laws, rules or ecclesiastic polity, transferring property, real or personal, of any such church or religious sect, society or denomination, are hereby ratified and declared valid. All transfers of title and rights with respect to property, prior to such date from a predecessor bishop, minister or other ecclesiastical officer who has resigned or died, or has been transferred or removed, to his duly elected or appointed successor, by the laws, rules or ecclesiastic polity of any such church or religious sect, society or denomination, either by written instruments or solely by virtue of the election or appointment of such successor, are also hereby ratified and declared valid.

D. Insufficient designation of beneficiaries or objects of trust. - No gift, grant, bequest or devise made on or after March 18, 1942, to any such church or religious sect, society or denomination or the duly elected or appointed bishop, minister or other ecclesiastical officer authorized to administer its affairs, shall fail or be declared void for insufficient designation of the beneficiaries in, or the objects of, any trust annexed to such gift, grant, bequest or devise; but such gift, grant, bequest or devise shall be valid; provided, that whenever the objects of any such trust shall be undefined, or so uncertain as not to admit of specific enforcement by the courts of the Commonwealth, such gift, grant, bequest or devise shall be held, managed, and the principal or income appropriated, for the religious and benevolent uses of such church or religious sect, society or denomination by its duly

elected or appointed bishop, minister or other ecclesiastical officer authorized to administer its affairs.

E. Rights and remedies cumulative. - The rights created and the remedies provided in this section shall be construed as cumulative and not exclusive.

F. No implied repeal of other provisions. - This section shall not be so construed as to effect an implied repeal of any other provisions of this chapter.

(1942, p. 382; Michie Code 1942, § 38a; 1962, c. 306; 1966, c. 308; 2005, cc. 681, 772.)

Va. Code § 57-16.1. Property of unincorporated church held by corporation.

Whenever the laws, rules, or ecclesiastic polity of an unincorporated church or religious body provide for it to create a corporation to hold, administer, and manage its real and personal property, such corporation shall have the power to (i) acquire by deed, devise, gift, purchase, or otherwise, any real or personal property for any purpose authorized and permitted by the laws, rules, or ecclesiastic polity of the church or body, and not prohibited by the law of the Commonwealth and (ii) hold, improve, mortgage, sell, and convey the same in accordance with such law, rules, and ecclesiastic polity, and in accordance with the law of the Commonwealth.

(2005, cc. 772, 928.)