In the
# SUPREME COURT OF VIRGINIA

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## RECORD NO. 090683

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**THE EPISCOPAL CHURCH,**

*Appellant,*

**v.**

**TRURO CHURCH, *et al.*,**

*Appellees.*

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# REPLY BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANT THE EPISCOPAL CHURCH

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## INTRODUCTION

So much ink has been spilled in this case that the diverse religious institutions that filed an opening *amicus* brief in support of The Episcopal Church hesitated to add yet another brief to the mix.[1] They are doing so, however, for two reasons.

First, the multiple assignments of error, arguments and counter-arguments have obscured the controlling test for measuring the constitutionality of Va. Code § 57-9 under the Free Exercise Clause. Contrary to the impression left by the Appellees and their *amici*, there is no "escape hatch" test. Rather, the dispositive test is simply this: Legislation that burdens a religious practice violates the Free Exercise Clause unless:

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

(1) the law is both "generally applicable" and "neutral"; or (2) the law is not "generally applicable," or is not "neutral," but it serves a compelling state interest by the least restrictive means. When that straightforward test is brought to the forefront, there can be no doubt that § 57-9 is unconstitutional. Indeed, it is not a close case.

Second, it should not go without mention that the extensive briefing on this appeal—like the inquiry conducted in the trial court—has only underscored the constitutional infirmity of the statute. As the *amici* previously explained, a statute cannot be seen as keeping civil judges out of the "theological thicket" when, among other things, a trial requires testimony from experts on religion "to assist the Court in its obligation to interpret" the statute. JA 3918. The appeal has only widened the intrusion into religious matters. Page after page of argument concerning ecclesiastical matters have now been presented to this Court for review and decision, and there is sure to be more to come in reply and at oral argument. None of this should be surprising. Given the inherently religious terms of the statute, it is all but impossible for any court to interpret and apply § 57-9 without conducting a "searching and therefore impermissible inquiry" into religious matters. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 (1976).

## ARGUMENT

### I. Appellees Have Essentially Ignored The Dispositive Test Under The Free Exercise Clause

Resting on *dicta* from *Jones v. Wolf*, 443 U.S. 595 (1979), the Appellees argue that § 57-9 is constitutional because it purportedly offers the Episcopal Church two "escape hatches." According to the Appellees, adopting either "escape hatch"—that is, placing title to local church property in a hierarchical church officer, or incorporating all local parishes in Virginia—would impose no significant burden. Thus, the argument continues, the Legislature has supplied a supposedly simple means of side-stepping a statute that otherwise imposes majority-rule voting "rights," which are antithetical to the polities of the Episcopal Church and many of the *amici*, and that nullify property-ownership rules which the denomination and its members have adopted for themselves.

The "escape hatch" argument ignores the controlling test under the Free Exercise Clause. There is no such thing as an "escape hatch" test. Rather, the decisive test is established by *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. Hialeah ("Lukumi"),* 508 U.S. 520 (1993). *Smith* holds that the Free Exercise Clause is generally not implicated by "neutral" laws of "general

applicability."[2] Three years later, *Lukumi* held that it follows from *Smith* that (1) a law that interferes with a religious practice violates the Free Exercise Clause if it (2) "fail[s] to satisfy" the "requirements" of "neutrality" and "general applicability," unless (3) the law is "justified by a compelling governmental interest" and "narrowly tailored to advance that interest." *Id.* at 531-32. Section 57-9 fails every aspect of this test.

## II. Appellees Cannot Satisfy The Controlling Test For Measuring Whether Va. Code § 57-9 Violates The Free Exercise Clause

### A. Churches Have A Constitutionally Protected Right To Develop Their Own Rules Of Property Ownership And Va. Code § 57-9 Unquestionably Impedes Application Of Those Rules

Neither the Appellees nor their *amici* dispute that a church's free exercise rights extend not only to matters of "faith and doctrine," but to "matters of church government." *Kedroff v. St. Nicholas Cathedral,* 344

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[2] *Smith* is particularly at odds with the "escape hatch" argument because it draws courts into *weighing* the burden on a church's being impelled to pass through a state-contrived "escape hatch." Evaluating Appellants' contention that it would be burdensome to incorporate every Virginia parish, or to place title to all property in the Bishop, is exactly the sort of inquiry that Justice Scalia found objectionable in *Smith*. *Smith*, 494 U.S. at 887 (courts should not be engaged in "the unacceptable 'business of evaluating the relative merits of differing religious claims[,]' [*United States v. Lee, 455 U.S.* 252, *263 n. 2* (1982)] (Stevens, J., concurring)[,] and "must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim"); *cf. Smith,* 494 U.S. at 889, n.5 ("it is horrible to contemplate that [civil] judges will regularly balance against the importance of general laws the significance of religious practice").

U.S. 94, 116 (1952). Nor do they dispute that this freedom includes the rights of (1) churches to adopt their own rules of property ownership, *Jones*, 443 U.S. at 606, and (2) associations of churches to adopt rules to ensure that each congregation's property is perpetually dedicated to a particular denomination's use. *Watson v. Jones*, 13 Wall. (80 U.S.) 679, 723 (1872). Indeed, when churches exercise this right—namely, to impress their property with a trust—then it is "the obvious *duty* of the court, in a case properly made, to see that the property so dedicated is not diverted from the trust which is thus attached to its use." *Id.*[3] *See also Jones*, 443 U.S. at 606 ("the constitution of the general church can be made to recite an express trust in favor of the denominational church" and "civil courts will be bound to give effect to the result indicated by the parties").

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[3] The elementary principles recognized in *Watson* refute any suggestion that trust provisions expressed in general church documents are unenforceable because they are supposedly "unilaterally" imposed from "on high." In truth, trusts that arise in this context are not unilateral, but *consensual*. They arise as a matter of contract—as a pact, express or implied—among those who freely unite with religious associations whose rules (typically adopted by delegates from local churches) reflect that the holding of local church property in trust for all of the denomination's members is integral to unity in faith and effective ministry. As the U.S. Supreme Court put it in *Watson*, "[a]ll who unite themselves to such a body do so with an implied consent to this government . . . ." *Watson*, 13 Wall. (80 U. S.) at 729.

Under § 57-9, property ownership and other rules of polity that a denomination and its members adopt for themselves are nullified when a civil judge is persuaded that the state-imposed criteria of the statute have been met. Indeed, as interpreted by the Circuit Court, the Appellees and their *amici*, when § 57-9 applies it makes no difference what the relevant *deeds*—let alone the church's governing documents—say about the matter. The local church may have expressed a trust in the general church's favor in the clearest possible terms, but if § 57-9 comes into play, that covenant—not to mention the intentions and restricted gifts of prior parishioners—will be expunged, and property rights will be decided by a simple majority vote of the congregation's *current* adult members.

Besides Alabama and Mississippi—whose similar statutes were invalidated years ago[4]—no other state has devised such a system for resolving church property disputes. Nor can such a system be sustained against a Free Exercise challenge unless Section 57-9 (1) is both "generally applicable" and "neutral," *Lukumi,* 508 U.S. at 546, or (2) is the "least restrictive means of achieving some compelling state interest."

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[4] *See Goodson v. Northside Bible Church*, 261 F.Supp. 99 (S.D. Ala. 1966), *aff'd*, 387 F.2d 534 (5th Cir. 1967)); *First Methodist Church of Union Springs v. Scott*, 226 So.2d 632 (Ala. 1969); *Sustar v. Williams*, 263 So.2d 537 (Miss. 1972).

*Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 718 (1981).

### B. Section 57-9 Is Neither Generally Applicable, Nor The Least Restrictive Means Of Serving a Compelling State Interest

#### 1. Section 57-9 Is *Not* Generally Applicable

The most obvious deficit of § 57-9 is that it is *not*, by any measure, a law of "general applicability." Indeed, with one small exception, the Appellees and their *amici* have completely ignored this bedrock component of the Free Exercise test. There is no mention of the "general applicability" requirement in the Commonwealth's brief; none in the CANA Congregation's brief filed in Episcopal Church's appeal; and none in any of the *amicus* briefs filed in support of the Appellees. Rather, the sole rejoinder to the argument that § 57-9 lacks "general applicability" appears in a footnote at the end of the CANA Congregations' brief in the appeal of the Diocese of Virginia (discussed *infra* at 9-10).

This silence is telling, but it should not be surprising, because it is self-evident that § 57-9 is not a law of "general applicability." By definition, such laws apply to *everyone*—like the controlled substances law that was enforced in *Smith*—not just to churches. *Jones* is even more apt, since it involved a church property dispute. *Jones* held that, generally speaking, civil courts may resolve church property disputes without violating the

Constitution by applying " 'neutral principles of law, *developed for use in all property disputes* . . . .' " *Id.*, 443 U.S. at 600 (quoting *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969)) (emphasis added). This Court made the same point in *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 504, 201 S.E.2d 752, 756 (1974).

On its face, § 57-9 does not apply to *all* property disputes, but only to disputes involving churches. Moreover, the statute's rule of decision—"majority wins"—has no counterpart in the secular realm. In the "real world," property cases are not settled by casting votes; they are resolved by reviewing deeds, trust instruments, organizational documents and similar materials to determine, in the first instance, who holds record title, and next, whether the property is subject to the rights of another party or has been dedicated to specific uses and purposes.

That was the essence of the neutral principles approach approved in *Jones*. Far from condoning the ostensibly "neutral"—but unmistakably congregational—method of counting heads, *Jones* approved application of commonplace rules of property and trust law, pursuant to which the state "court examined the deeds to the properties, the state statutes dealing with implied trusts, . . . and the [parent church's governing documents] to

determine whether there was any basis for a trust in favor of the general church." *Jones*, 443 U.S. at 600.

Furthermore, the necessity of applying such ordinary principles of property and contract law even-handedly—to religious and secular associations alike—was spelled out more than a century earlier in *Watson*:

> *Religious organizations come before us in the same attitude as other voluntary associations* for benevolent or charitable purposes, *and their rights of property or of contract are equally under the protection of the law* . . . .

*Watson*, 13 Wall. (80 U.S.) at 714 (emphasis added). Thus, the Court continued,

> *it seems hardly to admit of a rational doubt that an individual or an association of individuals may dedicate property by way of trust to the purpose of sustaining, supporting, and propagating definite religious doctrines or principles*, provided that in doing so they violate no law of morality and give to the instrument by which their purpose is evidenced the formalities which the laws require. *And it would seem also to be the obvious duty of the court, in a case properly made, to see that the property so dedicated is not diverted from the trust which is thus attached to its use*. **** *This is the general doctrine of courts of equity as to charities, and it seems equally applicable to ecclesiastical matters*.

*Id.* at 723 (emphasis added).

These passages also suffice to refute the Appellees' lone argument regarding the "general applicability" requirement. In a footnote near the end of one of the CANA Congregations' briefs, Appellees say nothing more to counter the argument that § 57-9 is not generally applicable than that it

> does not "impose special disabilities on the basis of religio[n]." [*Falwell v. Miller*, 203 F. Supp. 2d 624, 630 (W.D. Va. 2002).] Indeed, it does not impose disabilities at all—it simply provides a vehicle for churches to resolve property disputes in a division, and it applies only to property held in trust.

*CANA Congregations' Br.* (Record No. 090682) at 46, n.29.

Yet, the disability imposed on religious organizations could hardly be more obvious. *Watson* held that religious associations must receive the same rights of property and contract as are enjoyed by their secular counterparts, and that the same legal principles must guide civil court decisions in all such cases. *Watson*, 13 Wall. (80 U.S.) at 714. Over a century later, the Supreme Court approved the constitutionality of applying the neutral principles approach, but in so doing was unequivocal that, if denominations arranged there affairs in accordance with the generally applicable rules, then "civil courts will be bound to give effect to the result indicated by the parties . . . ." *Jones*, 443 U.S. at 606.

Borrowing the language of Justice Scalia in *Smith*, to do otherwise—to enforce trusts or property use-restrictions in a secular context, while giving state sanction to the abrogation of such interests when a religious association is involved—is precisely to "impose special disabilities on the basis of religious views or religious status." *Smith*, 494 U.S. at 877 (citing

*McDaniel v. Paty,* 435 U.S. 618 (1978), *and Fowler v. Rhode Island, 345 U.S. 67, 69* (1953)).

This discussion also belies the dominant thrust of the Beckett Fund's *amicus* brief, which is to erect and attack a straw man. The Becket Fund repeatedly suggests that The Episcopal Church is seeking special treatment and blind "deference" to its rules. *See Beckett Br.* at 3-4.[5] In fact, the Appellants and the *amici* supporting them understand that *Jones* held that states are not constitutionally required to pay strict deference to whatever a church says when resolving church property disputes—that,

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[5] The Becket Fund, a self-described "law firm," makes the argument that allowing the state to dictate rules for churches is *preferable*, from a Free Exercise perspective, to enforcing rules that churches establish for themselves. *Beckett Br.* at 27, et seq. Such arguments may explain why none of the Beckett Fund's wide array of church-related clients signed on to its brief. Further, although the *amici* respect much of the Becket Fund's work, it is presumptuous for its lawyers to lecture that "The Episcopal Church, the Diocese of Virginia, and their *amici* . . . forget that there are more than two ways to organize a church[,]" including "not just classic hierarchies like the Roman Catholic Church and classic congregational churches like Quakers or Baptists," but "many shades of grey in between, like Lutherans or Presbyterians . . . ." *Id.* at 1. Lutheran and Presbyterian bodies who actually operate in ministry along this continuum are quite aware that they are "organized neither as a hierarchical church in the Roman Catholic tradition, nor as a congregational church in the Anabaptist tradition." *Brief of Amici Curiae in Support of The Episcopal Church* (Record No. 090683) (*"Orig. Amici Br."*) at 4. Yet, they have aligned themselves with the Episcopal Church's positions in this case, rather than with Beckett's litigators, because they recognize § 57-9 to be no less at odds with their polities than with Episcopal polity. *See, e.g., id.* at 4-7.

subject to some important caveats,[6] states can ask churches to arrange their affairs to comply with property rules that would govern the outcome in disputes arising in secular contexts. But the reverse is equally true: when churches establish property interests in accordance with generally applicable rules, they are entitled to have those rights enforced on the same terms as everyone else. *Jones*, 443 U.S. at 606; *Watson*, 13 Wall. (80 U.S.) at 714, 723; That is not a plea for special treatment; it is a plea for equal treatment.[7]

### 2. Section 57-9 Is *Not* The Least Restrictive Means Of Achieving A Compelling State Interest

Because § 57-9 is not a law of "general applicability," the Court need not address the statute's "neutrality," but may instead proceed directly to the strict scrutiny test. *Lukumi*, 508 U.S. at 546 ("A law burdening religious practice that is not neutral *or* not of general application must undergo the

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[6] For example, although generally applicable laws may, in principle, be used to resolve church property disputes, civil courts must still "defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." *Jones*, 443 U.S. at 602.

[7] As previously explained (*Orig. Amici Br.* at 23-24), none of the foregoing means *all* religion-specific statutes are unconstitutional. Putting aside that a rare religion-specific statute may pass strict scrutiny, religion-specific statutes that *favor* religion are governed by the *Establishment Clause* and are often approved "for purposes of accommodating our traditions of religious liberty." *McDaniel*, 435 U.S. at 639. *See also Lukumi,* 508 U.S. at 532.

most rigorous of scrutiny.") Further, the "compelling interest standard . . . is not 'water[ed] ... down' but 'really means what it says.' " *Id.* (quoting *Smith,* 494 U. S. at 888). "A law that targets religious conduct for distinctive treatment . . . will survive strict scrutiny only in rare cases." *Lukumi*, 508 U.S. at 546. At a minimum, § 57-9 must be the "least restrictive means of achieving a compelling state interest." *Thomas*, 450 U.S. at 718.

Section 57-9 is not the "least restrictive means of achieving" Virginia's interest in the peaceful and certain resolution of property disputes. Numerous states—including Virginia itself (*Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980); *Norfolk*, *supra*)—routinely satisfy this interest by adopting the method truly approved in *Jones*, that of applying general "concepts of trust and property law" so "familiar to lawyers and judges" as to "promise[] to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Jones*, 443 U.S. at 603.

### C. Va. Code § 57-9 Is *Not* "Neutral" As Regards Religion

Although the foregoing conclusively establishes § 57-9's unconstitutionality, some brief remarks regarding the neutrality requirement are in order. The *amici* have already explained (*Orig. Amici Br.* at 14-20) that the trial court conducted a "searching and therefore impermissible inquiry" into numerous religious questions. *Serbian*, 426 U.S. at 723. This

conclusion was based on the trial record alone, including (most remarkably) the receipt of testimony from experts on religion, upon which the Circuit Court frankly acknowledged reliance in order to decipher the very meaning and application of the statute's numerous religious terms. JA 3918.

The appeal has carried the intrusion into religion to the next level, calling upon the State's highest court to penetrate the same, decidedly ecclesiastical realm. Page after page of the Appellees' briefs address core issues of church polity and governance. For example, two "parts" of the Appellees' brief in the Episcopal Church's appeal—an argument that extends across 27 pages—are devoted to "demonstrat[ing] 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." *CANA Congregations' Br.* (Record No. 090683) at 10. Later, the same brief argues that the Circuit Court correctly concluded that the worldwide Anglican Communion is a "religious society" that experienced a "division." *Id.* To validate their arguments, the Appellees again refer to their religion experts, who have based their opinion testimony on "an exhaustive review of . . . religious journals or serials,

sermons, pamphlets, tracts, records of official denominational conventions and also denominational histories[.]" *Id.* at 18, n.8.

By any measure, the inquiry being presented to this Court—which is the inevitable byproduct of statute that is hopelessly infused with inherently religious terms—bears no resemblance whatsoever to the "neutral principles" approach approved by the U.S. Supreme Court. That approach must put churches on equal footing with secular litigants, must rely "exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges," and must "free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Jones*, 443 U.S. at 603. Section 57-9 does nothing of the kind.

## CONCLUSION

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

Respectfully submitted,

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## CERTIFICATE

Pursuant to Va. Sup. Ct. Rule 5:27, I hereby certify that on this 1st day of March, 2010:

Fifteen printed copies of the foregoing Reply Brief Of *Amici Curiae* In Support Of Appellant The Episcopal Church have been transmitted by hand for filing in the office of the Clerk of this Court.

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

Three copies of brief will be mailed, and one copy emailed, to the persons named below:

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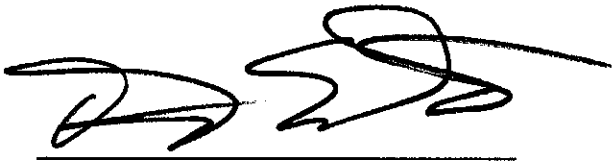

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