VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In re:	)	**Case Nos.:** CL 2007-248724,
Multi-Circuit Episcopal Church Litigation	)	CL 2006-15792,
	)	CL 2006-15793,
	)	CL 2007-556,
	)	CL 2007-1235,
	)	CL 2007-1236,
	)	CL 2007-1237,
	)	CL 2007-1238,
	)	CL 2007-1625,
	)	CL 2007-5249,
	)	CL 2007-5250,
	)	CL 2007-5362,
	)	CL 2007-5363,
	)	CL 2007-5364,
	)	CL 2007-5682,
	)	CL 2007-5683,
	)	CL 2007-5684,
	)	CL 2007-5685,
	)	CL 2007-5686,
	)	CL 2007-5902,
	)	CL 2007-5903, and
	)	CL 2007-11514

BRIEF OF *AMICI CURIAE* GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH, AFRICAN METHODIST EPISCOPAL CHURCH, AFRICAN METHODIST EPISCOPAL ZION CHURCH, WORLDWIDE CHURCH OF GOD, THE RT. REV. CHARLENE KAMMERER, BISHOP OF THE VIRGINIA ANNUAL CONFERENCE OF THE UNITED METHODIST CHURCH, AND W. CLARK WILLIAMS, CHANCELLOR OF THE VIRGINIA ANNUAL CONFERENCE OF THE UNITED METHODIST CHURCH

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INTRODUCTION

In 1979, when authorizing states to use "neutral principles" to resolve church property disputes, the United States Supreme Court reassured religious organizations on two key points:

First, when implementing the approach, civil courts would *not* be permitted even to conduct a searching *inquiry* into—much less *resolve*—questions of church doctrine or church polity. *Jones v. Wolf*, 443 U.S. 595, 602, 605 (1979). Rather, a state's implementation of the approach was to be "*completely* secular in operation." *Id.* at 603 (emphasis added). Indeed, the Court explained, that was among the "primary advantages" of employing neutral principles. Since the "method relies *exclusively* on objective, well-established concepts of trust and property law familiar to lawyers and judges," proper use of the method would "free civil courts *completely* from entanglement in questions of religious doctrine, polity, and practice." *Id.* (emphasis added).

Second, if a state were to adopt a rule of "majority representation"—seeking to determine title based on the vote of local church members—that rule must be *presumptive* only. *Id.* at 607-08. If it were otherwise—if the state treated a congregation's vote as *conclusive*—the rule might seem "neutral" (in the sense that its application required no religious inquiry), but it would clearly discriminate against hierarchical denominations, such as those (like Methodist denominations) in which local churches hold their property in trust for the denomination as a whole. Thus, since the rule of decision must be "flexible enough to accommodate all forms of religious organization and polity," *id.* at 603, the Court was emphatic that "any rule of majority representation *can always be overcome* under the neutral-principles approach" through any number of mechanisms, including "by providing that the church property is held in trust for the general church." *Id.* at 607-08 (emphasis added).

In the face of these instructions from the Supreme Court, § 57-9 of the Virginia Code cannot withstand constitutional challenge. A statute does not remotely qualify as "*secular* in operation" when it compels a civil court to conduct a five-day trial, probing deeply into the ecclesiastical structures and relationships of a wide array of religious groups, in order to determine:

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

The mere recitation of these issues leaves no doubt that criteria imposed by § 57-9 bear no resemblance to "objective, well-established concepts of trust and property law familiar to lawyers and judges." *Jones*, 443 U.S. at 603. Indeed, § 57-9 is so hopelessly infused with religious concepts that it gave the Court little choice but to take the nearly unfathomable step of receiving testimony from experts on church polity and church history, in order "to assist the Court in its obligation to *interpret* 57-9." *Letter Opinion* ("*Ltr. Op.*") 63 (emphasis added). When the very *meaning* of a *state's* statute cannot be ascertained without consulting experts on *religion*, that is a sure sign that the statute fails the test of "free[ing] civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Jones*, 443 U.S. at 603.

Making matters worse, § 57-9 blatantly discriminates among religious denominations. As the Court has already pointed out, the express terms of § 57-9 "reflect a determination by the

Virginia legislature to protect the voting rights of any local congregation which is subject to a hierarchical church's constitution or canons." *Ltr. Op.* 48. Furthermore, whereas "the legislature defers completely to the independent church's constitution, ordinary practice, or custom," it "shows no such deference" to the hierarchical denominations' rules, practices or customs. *Id.*

Virginia has no legitimate interest in establishing "voting rights" for church members, let alone imposing state-authored voting regulations on some churches, while "deferring" to another church's "customs." Such prejudice violates the "clearest command of the Establishment Clause," which "is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

More to the point, if the local church's majority vote is treated as "conclusive" on all questions of title—which the congregations argue is the proper reading of § 57-9—that would leave the parent church powerless to overcome the state's preference for "majority representation." Under that construction, the statute plainly fails to be "flexible enough to accommodate all forms of religious organization and polity," and utterly disregards the Supreme Court's clear instructions in *Jones v. Wolf*.

All of this—the statute's deep and preferential encroachment into subjects of profound religious significance—is entirely unnecessary to serve any legitimate state interest. The *amici* agree completely that the Commonwealth has a "legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively." *Jones*, 443 U.S. at 602. But it is fully within Virginia's power to achieve that interest by the straightforward application of truly neutral, generally applicable principles of *property* law that bind all other litigants in the state—public or private, religious or secular. That is not what § 57-9 purports to do, and that is plainly not its purpose. On the

contrary, for the entirely illegitimate purpose of "protecting" local congregations from "a hierarchical church's constitution or canons," *Ltr. Op.* 48, the statute erects unique rules of decision for church property disputes—rules that draw civil courts into a theological thicket, and that plainly favor certain types of denominations over others.

INTERESTS OF THE *AMICI*

The *amici* are well-suited to emphasize the points outlined above. They are institutions associated with "hierarchical" denominations, whose property interests are most at risk if the constitutionality of § 57-9 is affirmed. And, they have adopted provisions in their governing documents that the Supreme Court has recognized not only as perfectly legitimate mechanisms for protecting a hierarchical church's interest in local church property, but also as mechanisms which civil courts will be "bound" to enforce, even in states that have adopted the neutral principles approach. *Jones*, 443 U.S. at 606.

Indeed, some of the *amici* have used trust clauses and similar provisions as a means of defining and implementing their ministry since long before the Supreme Court announced that the civil enforceability of those provisions would survive any state's adoption of the neutral principles approach. More than 250 years ago, John Wesley, the father of Methodism, caused deeds with trust clauses to be drawn up in England as a means of reinforcing the doctrine that bishops, not local churches, control the appointment of pastors. John Leo Topolewski, *Mr. Wesley's Trust Clause: Methodism in the Vernacular*, in METHODIST HISTORY, vol. XXXVII, no. 3, pp. 144-45 (Yrigoyen, Jr., Charles, ed. 1999). For Wesley, maintaining the bishops' appointment prerogative helped reinforce the crucial Methodist principles of "connectionalism" and "itineracy." *Id.* Yet, if the local church trustees had unfettered control of the church property, that control could extend to the pulpit as well, giving the local church the ability to

exclude the bishop's pastoral appointments, and thereby undermining religious principles that, for Methodists, have deep biblical roots.[1]

The *amici* mention the doctrinal roots of their rules regarding polity and property ownership, not to invite the Court to resolve any dispute over such matters, but to emphasize that—as the Supreme Court has recognized time and time again—disputes over church polity and administration are frequently infused with religious significance, and are entitled to the same protection against state encroachment as purely doctrinal disputes. *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976) (the principle that the First Amendment "'commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine' . . . applies with equal force to church disputes over church polity and church administration"). Similarly, for denominations that the courts have dubbed "hierarchical," their choice of such a polity is not motivated by purely "administrative" concerns; rather, the choice reflects a *belief*—a belief that "religious activity derives meaning in large measure from participation in a larger religious community[,]" which is "an organic entity not reducible to a mere aggregation of individuals." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring).

In any event, the Methodist trust clause that owes its origin to John Wesley has long appeared in the Book of Discipline of The United Methodist Church and has been recognized by the Supreme Court as a valid means by which a denomination may protect rights in local church property. *See Jones*, 443 U.S. at 600-601 & n.2. Virtually identical trust clauses have been

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[1] The principles of "connectionalism" and "itineracy" arise from the "idea that as a people of faith[, Methodists] journey together in connection and in covenant with one another," an idea that has "deep biblical roots," as evidenced by New Testament images like "the vine and the branches, . . . the fellowship of the saints, the Body of Christ, and a host of others . . . ." THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH, ¶ 112 at 111-112 (1992).

adopted by the other Methodist denominations that have joined this brief as *amici*, namely, the African Methodist Episcopal Zion Church and the African Methodist Episcopal Church.

Even putting aside their rules on property, however, *all* denominations—regardless of their polity choices—have an interest in the constitutional principles discussed here. Recognizing that "freedom for all religion . . . naturally assume[s] that every denomination [will] be equally at liberty to exercise and propagate its beliefs," *Larson*, 456 U.S. at 245, even those denominations that adopt the principle of congregational autonomy have every reason to object to the official denominational preference enshrined in § 57-9, and to any attempt to adjudicate church property rights by reference to profoundly religious criteria. Given their structure, congregational organizations may rarely become involved in legal disputes that extend beyond the local church level, but they can be expected to share an interest in the even-handed application of state laws that erect no unique hurdles for churches, that prefer no church over another, and that respect each church's freedom to develop, interpret and apply its own rules of church doctrine, church polity and church administration, without interference by the state.

ARGUMENT

I. Section 57-9 Violates The First Amendment By Requiring Civil Courts to Conduct an Extensive Inquiry Into, and Then Resolve, Fundamentally Religious Questions

It is apparent from the face of the statute that any conscientious application of § 57-9(A) requires a "searching and therefore impermissible inquiry into church polity." *Serbian*, 426 U.S. at 723. As the Court acknowledged at the outset of its Letter Opinion, the statute "requires the resolution" of four questions, *Ltr. Op.* at 2, all of which are utterly infused with religious

precepts, and none of which bears any resemblance to "objective, well-established concepts of trust and property law familiar to lawyers and judges." *Jones*, 443 U.S. at 603.[2]

Nor is there any room to pretend that "the judicial role" in applying these terms will be "straightforward according to the evidence" and "entirely secular." *Comm. Br.* at 11. Conclusive proof to the contrary is revealed in the record of this very case. A five-day trial was conducted to obtain the "factual background" needed to serve as "the foundation for the Court's legal analysis and conclusions." *Ltr. Op.* at 4. Over the course of the trial, the Court was given "an account of key events that have occurred within *all levels* of the Anglican Communion," regarding an "*internal* conflict" and "profound" doctrinal discord that "has been brewing for many years." *Id.*

Furthermore, the inquiry did not stop at calling "fact" witnesses and introducing exhibits. Rather, to assist the Court in evaluating whether the doctrinally-rooted discord produced the ecclesiastical developments needed to meet the criteria employed in § 57-9, the parties presented dueling "expert" witnesses on such matters as American religious history (Dr. Valeri, Union Theological Seminary); Virginia church history (Dr. Irons, Elon University); Episcopal Church polity and the Anglican Communion (Dr. Douglas, Episcopal Divinity School); and Anglican history (Dr. Mullen, General Theological Seminary Episcopal Church). The Court conscientiously studied this testimony—spanning centuries, crossing continents, and exploring in

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[2] The Commonwealth's *amicus* brief insists, without explaining, that "Section 57-9 is a neutral law of *general* applicability." *Comm. Br.* at 4. It is apparent from the statute's very terms, however, that the law imposes a rule that applies uniquely to the resolution of property disputes involving "churches" and "religious societies." Moreover, the *amici* are not aware of any analogous statute—and none has been cited by the Attorney General, the parties or the Court—that purports to resolve property disputes among purely secular associations without reference to the language of any transactional or organizational documents, but solely by reference to a head count taken after a "division" within the membership or between the association and some parent organization.

detail the organizational workings and relationships among multiple Anglican denominations and their respective dioceses, divisions and parishes. Indeed, the Court's mere summary of the experts' expositions of church history and polity spans 15 pages of the Court's 83-page letter opinion.

And not only that: since § 57-9's essentially religious rubric was adopted in 1867, the Court felt obliged to *compare* the present-day discord in the Anglican Communion with the so-called "great divisions" within "the Methodist and Presbyterian churches that prompted the passage of 57-9." *Ltr. Op.* 83. Of course, no reliable comparison can be made without a record, so detailed expert testimony regarding the polity and history of those other denominations (which, of course, were not before the Court) was taken as well.

The *amici* do *not* fault either the parties for presenting this evidence, or the Court for its conscientious review of the evidence. *Putting the constitutional issue aside*, the parties and the Court were *obliged* to engage in an exhaustive inquiry into quintessentially religious questions, because the express terms of the statute gave them no choice. That said, the constitutional question cannot legally be put to the side, while a civil court sifts and weighs testimony from church officials and expert theologians on profound and complex questions of church structure and organization. "It is not only the conclusions that may be reached by [government officials] which may impinge on rights guaranteed by the Religion Clauses, but also *the very process of inquiry* leading to findings and conclusions." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (emphasis added).

If the trial in this case is the kind of judicial inquiry that religious institutions must now expect to undergo in order to resolve church property disputes in Virginia, there can be little doubt that it will create precisely the hazard that the neutral principles approach was designed to

prevent—namely, "inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern." *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969). Henceforth, denominations facing doctrinal discord among their members—as denominations always have and always will—must calculate what steps to take with one eye directed at what is best for the church, and the other trained on the impact it might have on a Virginia jurist's assessment of whether the discord has been handled or evolved in such a way as to satisfy the essentially religious criteria employed in § 57-9(A). *See Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) ("wary of . . . judicial review of their decisions," churches would be pressured to "make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments.").

In sum, § 57-9 is simply not a neutral, generally applicable principle of property law with which civil courts are familiar, and which can be applied without drawing the court into resolving religious issues. It is just the opposite. The statute applies solely in the context of resolving church property disputes, and it employs criteria for decision that compel the court to conduct a "searching and therefore impermissible inquiry into church polity." *Serbian*, 426 U.S. at 723.

II. Section 57-9 Violates The First Amendment By Discriminating Among Denominations

The Establishment Clause precludes states from passing laws "which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947). Furthermore, although states have some leeway to adjust their laws to accommodate Free Exercise rights, the "principle of denominational neutrality . . . 'is *absolute*.'" *Larson*, 456 U.S. at 246) (*quoting Epperson v. Arkansas*, 393 U.S. 97, 106 (1968)) (emphasis

added). As a result, any law that grants denominational preferences "must be invalidated unless it is justified by a compelling governmental interest" and "is closely fitted to further that interest." *Larson*, 456 U.S. at 247, *citing Widmar v. Vincent*, 454 U.S. 263, 269-270 (1981), *and Murdock v. Pennsylvania*, 319 U.S. 105, 116-117 (1943).

The same prohibition against "denominational preferences," moreover, "is inextricably connected with the continuing vitality of the Free Exercise Clause," *Larson*, 456 U.S. at 245, and clearly operates to constrain the state's development of "neutral principles" of "general applicability" to address issues of ostensibly secular concern. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs"). Thus, even putting the Establishment Clause aside, the Supreme Court's Free Exercise jurisprudence teaches that laws that are not neutral—or even laws that are simply not "generally applicable"—must be invalidated unless they are "justified by a compelling governmental interest" that is "narrowly tailored to advance that interest." *Id.* at 531-32.

Section 57-9 cannot withstand such strict scrutiny. As the Court has correctly noted, "the legislature *defers completely* to the independent church's constitution, ordinary practice, or custom, whereas in (A), the legislature shows no such deference" to "a hierarchical church's constitution or canons." *Ltr. Op.* 48 (emphasis added). On that basis alone, the statute clearly violates the prohibition against denominational preferences.

Moreover, under the congregations' construction, the discrimination would be exacerbated by failing to provide hierarchical denominations—or, for that matter, any aggrieved minority at the local level—with any mechanism to "overcome" the state-imposed "rule of majority representation." *Jones*, 443 U.S. at 607-08. The Supreme Court never envisioned that

the neutral principles approach could be constructed so as to dictate an outcome that is clearly antithetical to the doctrine and polity adopted by millions of Christians in this country. On the contrary, the Court explicitly reassured hierarchical denominations that, "[u]nder the neutral-principles approach, the outcome of a church property dispute is *not* foreordained," *Jones,* 443 U.S. at 606, and gave direct instruction on how to ensure that, even under a neutral principles analysis, church property could be retained by a loyal faction in the event of a schism:

> At any time *before the dispute erupts*, the parties can *ensure*, if they so desire, *that the faction loyal to the hierarchical church will retain the church property*. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. *The burden involved in taking such steps will be minimal*. And *the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form*.

Id. (emphases added).

These clear instructions are plainly violated by any statute that is read to leave no room for denominations and local churches to provide in advance —in their organizational documents, deeds, or elsewhere—that the parent church has an interest in local church property that cannot be unilaterally expunged by a simple majority of local church members.

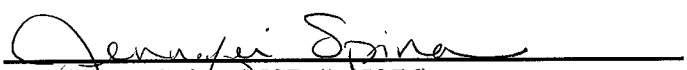
In short, by any measure, § 57-9 is the furthest thing from a "generally applicable," "neutral" principle that is "flexible enough to accommodate all forms of religious organization and polity." *Id.* at 603. Nor is application of the essentially religious and discriminatory criteria set forth in the statute necessary for Virginia to fulfill any valid governmental purpose. The Commonwealth has no legitimate interest in "protecting" congregations from the objectively discernable legal consequences that may or may not flow from the terms of the "constitution or canons" of the denomination with which the congregation chose to affiliate. *Ltr. Op.* 48. Rather, Virginia's only legitimate interest in this arena is to provide "a civil forum where the ownership

of church property can be determined conclusively" and "peacefully." *Id.* at 602. To achieve that end, Virginia is entirely free to join the many states that resolve church property disputes by applying "well-established concepts of trust and property law familiar to lawyers and judges," thereby leveling the playing field for all parties, while keeping the state free from entanglement in questions of religious doctrine, polity, and practice.

CONCLUSION

Decades before the First Amendment's religion clauses were applied to the states—and in the immediate aftermath of the Civil War—the Virginia legislature enacted a statute that expressed a frank preference for congregational autonomy, and which otherwise requires an officer of the state to adjudicate church property disputes by resolving which religious institutions "qualify" as "churches" or "religious societies," whether they have experienced defections of a "magnitude" sufficient to constitute a "division," and whether any such division has spawned a "branch" to which a majority of adult congregants have become "attached." More than 150 years later, the bare statement of these criteria should be enough to conclude that this framework is unconstitutional. The only arguably "neutral" task is counting heads; everything else plunges the state deeply into a morass of ecclesiastical inquiry and denominational preference. For these reasons, the *amici* urge the Court to rule that § 57-9 cannot constitutionally be employed to resolve church property disputes in the Commonwealth of Virginia.

Respectfully submitted,



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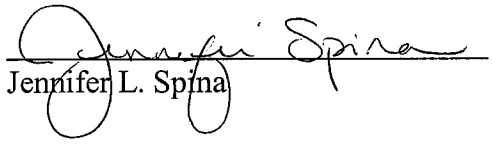

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