

**VIRGINIA:**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

<b>In re:</b>	)	<b>Case Nos.:</b>	CL 2007-248724,
<b>Multi-Circuit Episcopal Church Litigation</b>	)		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

**THE EPISCOPAL CHURCH'S SUPPLEMENTAL BRIEF  
ON CONSTITUTIONAL ISSUES**

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## INTRODUCTION

As the Church and the Diocese showed in their Post-Trial briefs, the Free Exercise and Establishment Clauses of the United States and Virginia Constitutions preclude the States from substituting their own rules of governance and structure for those established by a religious denomination itself, or from adopting statutes that discriminate among different religious groups on their face without a compelling reason sufficient to withstand strict scrutiny. *See* TEC/Diocese Opening Br. at 40-54; TEC/Diocese Reply Br. at 15-28. The Episcopal Church does not restate each of the arguments already presented, which remain valid and require that § 57-9, as interpreted by this Court in this case, be held unconstitutional. However, the Court's April 3, 2008, Letter Opinion issued in this matter appears to particularly implicate two closely-related aspects of First Amendment protections and prohibitions that, therefore, merit a more extensive explication than was previously provided. In this supplemental brief, the Episcopal Church expands upon these two particular aspects of First Amendment protection, and shows how the Court's particular preliminary ruling violates each of them.<sup>1</sup>

### **I. THE FIRST AMENDMENT PROHIBITS STATE INTERFERENCE IN A CHURCH'S INTERNAL AFFAIRS.**

Although the First Amendment contains two distinct provisions, the Free Exercise Clause and the Establishment Clause, which are sometimes separately applied and discussed, the same concerns for religious freedom and the separation of church and state of course motivate both. Thus, the cases interpreting and applying the requirements and protections of the Free Exercise and Establishment Clauses overlap, and some of the First Amendment prohibitions that the courts have articulated are not explicitly tied to one clause or the other. *See e.g., Westbrook v.*

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<sup>1</sup> The Episcopal Church further joins in and adopts the arguments presented by the Diocese of Virginia in its supplemental brief, which is being filed separately.

*Penley*, 231 S.W.3d 389, 397 n.6 (Tex. 2007) (“Courts have grounded the doctrine of church autonomy in different aspects of the First Amendment, some looking to the Free Exercise Clause, some to the Establishment Clause, some to both, and others to neither in particular.”). It is clear, however, that among other things, the First Amendment (1) protects the right of religious denominations to establish their own polities and rules of governance free from state interference; and (2) prohibits courts from entangling themselves in a church’s affairs by engaging in a “searching inquiry” into or deciding ecclesiastical issues, even in the context of an otherwise justiciable civil dispute.

**A. The First Amendment Protects the Right of Religious Denominations to Establish Their Own Polities and Rules of Governance.**

The right of religious denominations to establish their own rules and polity, free from state interference, is at the core of what the Free Exercise Clause of the United States Constitution and Article I, § 16 of the Virginia Constitution protect. This is because “[r]eligion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] Clause.” *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 341 (1987) (Brennan, J., concurring) (citation omitted).

In *Watson v. Jones*, 80 U.S. 679, 727 (1871), the Supreme Court first articulated the well-established principle that the government, whether through its courts or its legislatures, must not attempt to interfere in the internal workings of religious denominations or churches. In *Watson*, a dissenting majority of a local church congregation had broken with the national church over its pronouncements on the issue of slavery. The national church replaced the local church’s pastor and trustees with members loyal to it. In the light of “a broad and sound view of the relations of church and state under our system of laws,” the Supreme Court resolved the resulting dispute

over the control of property in accordance with the church's own decisions. *Id.* As the Court explained,

“[i]n this country the full and free right to entertain any religious belief, to practice any religious principle and to teach any religious doctrine . . . is conceded to all. . . . *The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for . . . the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.*” *Id.* at 728-29.

The Court recognized, moreover, that

“it would . . . lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.” *Id.* at 729.

Thus, the Court concluded, “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.” *Id.* at 727.

Although *Watson* was technically decided as a matter of federal common law, later Supreme Court decisions confirm that the concern for religious liberty which permeates the *Watson* Court's opinion indeed reflects Constitutional requirements. In *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), the Supreme Court made clear that a hierarchical religious denomination has a First Amendment right to determine its organization and governance and that courts must thereafter defer to that determination. In *Kedroff*, the New York legislature had passed a statute providing for the incorporation and administration of Russian Orthodox churches and further providing that these churches “should for the future be governed by the ecclesiastical body and hierarchy of the American metropolitan district” of that church, rather than by the

Soviet-based hierarchy. *Id.* at 97-99. A dispute subsequently arose between the Moscow-based and the North American church leadership over the control of St. Nicholas' Cathedral in New York.

The New York Court of Appeals held that the North American authorities had the right to possess and control the local property, based on the provisions of the New York statute. The Supreme Court reversed, however, holding that the statute was unconstitutional because “[i]t prohibits in this country the free exercise of religion.” *Id.* at 107. The Court explained that a hierarchical church has a First Amendment right to govern and organize itself as it sees fit and that any interference with that right by a state is unconstitutional. *Id.* at 116. The Court emphasized that there is a “freedom for religious organizations, an independence from secular control or manipulation – *in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.*” *Id.* (emphasis added). In short, the states are to respect the rules and governance established by the church itself.

The Court reaffirmed these views in *Maryland and Virginia Eldership v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970), *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) and *Jones v. Wolf*, 443 U.S. 595 (1979). In *Eldership*, the Court dismissed for want of a substantial federal question the appeal of a church property dispute that the state court had resolved pursuant to the same sort of neutral principles analysis employed in *Virginia*.<sup>2</sup> 369 U.S. 367. Concurring, Justice Brennan emphasized the need for the states to scrupulously avoid intrusion into ecclesiastical affairs, specifically noting that any state statutes governing

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<sup>2</sup> In the absence of any denominational rule restricting local congregational control over property, the state court had ruled in favor of the congregation. *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 254 A.2d 162, 168 (Md. 1969).

church property “must be carefully drawn to leave control of ecclesiastical polity, as well as doctrine, to church governing bodies.” *Eldership*, 396 U.S. at 370.

In *Milivojevich*, the Supreme Court of Illinois had awarded control of property held by the Serbian Eastern Orthodox Diocese for the United States and Canada, an Illinois religious corporation, to one who years earlier had been properly elected Bishop of that diocese. The larger Serbian Orthodox Church, however, of which the diocese in that case was a part, had defrocked the bishop, divided the diocese into three smaller dioceses, and recognized other bishops as the leaders of those new dioceses entitled to control of the diocesan property. The Illinois courts held that the bishop had not been properly removed pursuant to church procedures, and further held that the Serbian Orthodox Church had not acted within its authority in dividing the diocese into three.

The Supreme Court reversed, reasoning that “[t]he [First] Amendment ... commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. *This principle applies with equal force to church disputes over church polity and church administration.*” 426 U.S. at 710 (citation and internal quotation marks omitted) (emphasis added). In purporting to determine and decide what the Serbian Orthodox Church’s rules were, the Illinois courts had effectively substituted their own rules for those espoused by the church itself, and in so doing had violated the First Amendment. Thus, the Court stated that “civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.” *Id.* at 713.

Finally, a religious denomination’s right to establish and maintain its own rules was reaffirmed in *Jones v. Wolf*, even as the Court was approving the use of the neutral principles

approach in some circumstances. The Court stressed in its decision that the application of neutral principles was “flexible enough to accommodate all forms of religious organization and polity,” and that a court applying neutral principles to disputes involving religious organizations must “completely” abstain from resolving “questions of religious ... polity[] and practice.” 443 U.S. at 603. The Court explained that the neutral principles “shares the peculiar genius of private-law systems in general – flexibility in ordering private rights and obligations to reflect the intentions of the parties.” *Id.* at 603. Thus, under this approach, hierarchical churches with “minimal” effort could ensure that their established polity and structure would continue to be respected: “[T]he parties can ensure ... that [local church members] loyal to the hierarchical church will [always control and] retain the church property” through amendment of the general church’s governing documents “to recite an express trust in favor of the denominational church,” among other possible methods. *Id.* at 606.<sup>3</sup>

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<sup>3</sup> When applying the neutral principles approach, *Jones* repeatedly made clear that civil courts must give effect to property ownership provisions in hierarchical church governing documents. 443 U.S. at 603 (“Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency”), 604 (“The neutral-principles method ... requires a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church”), 607-08 (“Most importantly, any rule of majority representation can always be overcome, under the neutral-principles approach ... by providing, in the corporate charter or the constitution of the general church, ... that the church property is held in trust for the general church and those who remain loyal to it”), and 606:

“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.”

As reflected in this discussion in *Jones*, the states may not properly seek to impose on a hierarchical church a form of governance by majority rule. Concurring in *Kedroff*, Justice Frankfurter specifically refuted this notion: “It is said that an impressive majority both of the laity and of the priesthood of the old local church now adhere” to the beliefs and party that the New York court’s judgment had favored. 344 U.S. at 122. “Be that as it may, it is not a function of civil government under our constitutional system to assure rule to any religious body by a counting of heads.” *Id.*

In short, it is clear that a state must not, under the guise of “neutral principles” or otherwise, substitute its own rules regarding intra-church organization and relations for those adopted by the church itself. The First Amendment requires that internal church rules and relationships be respected.

Other jurisdictions have consistently recognized and reaffirmed these important principles. In 1959, Alabama enacted a statute (the “Dumas Act”) similar to § 57-9(A). The Dumas Act explicitly permitted a 65% majority of a local church congregation to withdraw from a hierarchical church with the local church property if, in the congregation’s view, there had been a change in the “social policies” of the parent church. The constitutionality of this statute was challenged in a pair of lawsuits – one in the Alabama state courts and one in the federal courts. See *Northside Bible Church v. Goodson*, 387 F.2d 534 (5th Cir. 1967); *First Methodist Church of Union Springs v. Scott*, 226 So.2d 632 (Ala. 1969).

In both cases, the statute was struck down as unconstitutional. The Fifth Circuit noted that the statute “grants to [a] legislative body the rights, power and authority to change established systems of church ownership without regard to the ecclesiastical law of the denomination.” *Northside Bible Church*, 387 F.2d at 538 (quoting district court opinion). Thus,

the court concluded that the Act was unconstitutional because it “*brazenly intrude[d] upon th[e] very basic and traditional practice of the Methodist Church, and supersedes the processes available within the church structure for the settlement of disputes.*” *Id.* Similarly, the Supreme Court of Alabama, after recounting in detail the procedural history and lessons of *Kedroff*, concluded that “we are bound by the decisions last cited, and, accordingly, we hold that [the Act] is unconstitutional and invalid as applied in the instant case.” *First Methodist Church of Union Springs*, 226 So.2d at 640.

The Virginia Supreme Court has recognized and articulated the same concern for church autonomy reflected in the cases just discussed. In *Reid v. Gholson*, 229 Va. 179, 327 S.E.2d 107 (1985), the Court addressed a First Amendment challenge to a circuit court’s order permitting a court officer to oversee an annual meeting of a congregational church that had historically been governed by a principle of majority rule. Laying out the “distinction between hierarchical and congregational churches” in this context, the Court explained:

Hierarchical churches may, and customarily do, establish their own rules for discipline and internal government. They may, and frequently do, establish internal tribunals to decide internal disputes arising in matters of discipline and internal government. These tribunals may be guided by a body of internally-developed canon or ecclesiastical law, sometimes developed over a period of centuries. The decisions of such tribunals may be promulgated as matters of faith and are entirely independent of civil authority. One who becomes a member of such a church, by subscribing to its discipline and beliefs, accepts its internal rules and the decisions of its tribunals. For that reason, the civil courts will treat a decision by a governing body or internal tribunal of an hierarchical church as an ecclesiastical determination constitutionally immune from judicial review. 229 Va. 188-189, 327 S.E.2d 113.<sup>4</sup>

*See also, e.g., Diocese of Southwest Virginia of the Protestant Episcopal Church in the United States of America v. Buhrman*, 5 Va. Cir. 497, 507 (Clifton Forge Cir. Ct. Nov. 28, 1977) (“The

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<sup>4</sup> The Court recognized that the rulings of a Congregational Church would be equally immune from review after “the majority has spoken in a fairly conducted congregational meeting held after proper notice to the membership.” *Id.* In *Reid* itself, however, the membership had been unable to conduct such a meeting.

Executive Board [of the Diocese], by a formal resolution, has determined that the [parish] property has been abandoned within the context of church law, and it is most doubtful if that determination is subject to review by this court”).

Other state courts have held similarly. *See Singh v. Singh*, 114 Cal. App. 4th 1264, 1280 (2004) (explaining in context of congregational church property dispute that although disputes involving control of church property may be decided in accordance with neutral principles, it is clear that the internal church rules must be respected in that process, and that “the decisions of the highest religious tribunal on questions of discipline, faith, or ecclesiastical rule, custom, or law must be accepted.”); *First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States of America*, 62 N.Y.2d 110, 116-17 (1984) (“The Constitution directs that religious bodies are to be left free to decide church matters for themselves, uninhibited by State interference.”); *Westbrook v. Penley*, 231 S.W.3d 389, 397 (Tex. 2007) (in dismissing professional negligence claim for lack of subject matter jurisdiction, holding that although court’s inquiry did not require resolution of “theological question,” inquiry would nonetheless “unconstitutionally impede the church's authority to manage its own affairs” because “[c]hurches have a fundamental right ‘to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine’”) (quoting *Kedroff*, 344 U.S. at 116).

Notwithstanding the above authority, the congregations have argued that application of their interpretation of § 57-9(A) would not interfere with denominational polity because (at least until such time as Virginia may choose to amend its statute), a hierarchical church “may avoid the statute entirely by directing congregations to hold title in corporate form or to transfer title to the bishop.” Cong. Opening Br. at 36. The Congregations’ argument, in other words, is that a

state may properly tell a church how to order its affairs in the ownership and management of properties devoted entirely to religious uses, rather than permitting churches to make their own decisions on such matters, and that that does not violate the First Amendment. That is nonsense. As the above authorities demonstrate, the First Amendment requires that churches be free to establish their own polities and rules. Requiring a hierarchical church to title congregational property in the name of a bishop or a corporation is no less problematic than imposing a rule vesting control of property in congregational majorities. Decisions about which of the entities or officers within a church's hierarchical structure should hold what property and for what purposes, like decisions about how church rules should be adopted or leaders selected, goes to the heart of a church's organization and polity. These are choices that a religious denomination must be free to make without state interference, consistent with its own particular theology, missionary goals, and structure.

**B. The Establishment Clause prohibits civil courts from making extensive inquiry into or deciding ecclesiastical issues.**

Closely related to the First Amendment's protection of the right of religious denominations to establish their own rules and polities is the equally well-established principle that the states must avoid "excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971)(citation and quotation marks omitted). This prohibition, which is usually but not exclusively grounded in the First Amendment's Establishment Clause, occurs when judicial review of a claim requires a searching inquiry into or resolution of religious matters, such as church polity, doctrine or practice. *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F. Supp. 2d 732, 737 (D.N.J. 1999) ("[e]xcessive entanglement may occur when judicial review of a claim requires 'a searching . . . inquiry into church doctrine'") (quoting *Milivojevich*, 426 U.S. at 723); *Knuth v. Lutheran Church Missouri Synod*, 643 F. Supp. 444,

448 (D. Kan. 1986) (declining to exercise jurisdiction over claim that “would require this court to undertake in a searching and impermissible inquiry into church polity”). *See also Milivojevich*, 426 U.S. at 723 (civil court prohibited from “engaging in a searching and therefore impermissible inquiry into church polity”). The case law is clear that the civil courts simply cannot engage in such a searching inquiry.

As the Supreme Court in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969), explained, in reversing a decision of the Georgia Supreme Court which had resolved the civil controversy before it (a property dispute) on the basis of a civil jury determination of ecclesiastical issues:

“First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. Because of these hazards, the First Amendment enjoins the employment of organs of government for essentially religious purposes . . . .”

*See also Jones v. Wolf*, 443 U.S. at 604 (“there may be cases where the deed, the corporate charter, or the constitution of the general church [or, as in this case, a state statute] incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.”); *General Council on Finance & Administration v. California Superior Court*, 439 U.S. at 1369, 1372-73 (1978) (noting that cases which place “constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity” are “premised on a perceived danger that in resolving intrachurch disputes the State will become entangled in essentially religious controversies”).

Of course, this does not preclude a civil court from identifying or acknowledging relevant elements of church polity altogether. *See, e.g., Jones v. Wolf*, 442 U.S. at 607-608 (under the neutral principles approach, the courts look to a general church’s governing documents). It does, however, prohibit the civil courts from inquiring extensively into a church’s internal affairs in order to resolve uncertain ecclesiastical issues. As the Court in *Milivojevich* explained,

“The constitutional provisions of the American-Canadian Diocese were not so express that the civil courts could enforce them without engaging in a searching and therefore impermissible inquiry into church polity.” *Id.* at 722-723 (internal punctuation and citation omitted).

In that case, then, the courts were required to defer to the hierarchical church’s interpretation and application of its own polity and rules.<sup>5</sup>

The courts of Virginia and other jurisdictions similarly have found that First Amendment protections prohibit a court from applying a statute in a manner that would require substantial inquiry into church matters. *See Cha v. Korean Presbyterian Church of Washington*, 262 Va. 604, 612, 553 S.E.2d 511, 515 (2001) (dismissing complaint for lack of subject matter jurisdiction where “[r]esolution of plaintiff’s claims by a civil court would have required that the circuit court adjudicate issues regarding the church’s governance, internal organization, and doctrine” and would violate both First Amendment to U.S. Constitution and Art. I, § 16 of Virginia Constitution); *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (declining jurisdiction over Title VII claim because “scrutiny [of claim] would...give rise to ‘excessive government entanglement’ with religious institutions prohibited

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<sup>5</sup> Similarly, in *Jones v. Wolf*, the Court noted that determining the locus of control “[i]n some cases...would not prove difficult. But in others, the locus of control would be ambiguous, and a careful examination of the constitutions of the general and local church, as well as other relevant documents, would be necessary to ascertain the form of governance adopted by the members of the religious association. In such cases, [this] would appear to require a searching and therefore impermissible inquiry into church polity.” 443 U.S. at 605 (internal punctuation and citations omitted).

by the *establishment clause of the First Amendment*”) (quoting *Lemon*, 403 U.S. at 13); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1359 (D.C. Cir. 1990) (dismissing Age Discrimination in Employment Act and similar Maryland statutory claim because resolution of claim would “require interpretation of provisions in the [Book of Discipline] that are highly subjective, spiritual, and ecclesiastical in nature”), 1360 (dismissing contract claim because judicial “inquiry...would constitute an excessive entanglement in [church’s] affairs”); *Scharon v. St. Luke’s Episcopal Presbyterian Hospital*, 929 F.2d 360, 362, 363 (8th Cir. 1991) (holding “applying Title VII and the ADEA...would require ‘excessive government entanglement with religion’” because “[i]t is not only the conclusions that may be reached...which may impinge on rights guaranteed by the Religion Clauses, *but also the very process of inquiry.*”) (quoting *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1978) (emphasis added); *Leavy v. Congregation Beth Shalom*, 490 F. Supp. 2d 1011, 1025 (N.D. Iowa 2007) (dismissing Americans with Disabilities Act claim because adjudication of claim “presses the civil court to become excessively entangled in internal church affairs and is prohibited by the *First Amendment*”); *Wollman v. Poinsett Hutterian Brethern, Inc.*, 844 F. Supp. 539, 542 (D.S.D. 1994) (dismissing ERISA claim in part because “the excessive entanglement test...and the *Free Exercise Clause of the First Amendment* prohibit this Court from inquiring into the relationship between individual members and the [religious entity]”); *Westbrook*, 231 S.W.3d at 400 (dismissing claim on ground that secular issues could not be separated from ecclesiastical issues and “while the elements of [plaintiff’s] professional-negligence claim can be *defined* by neutral principles without regard to religion, the *application* of those principles...would impinge upon [church’s] ability to manage its internal affairs”).

The prohibition against entanglement in the religious thicket, moreover, does not solely preclude the courts from purporting to resolve issues of religious “doctrine” *per se*. As the Virginia Supreme Court has recognized, “in [hierarchical] churches, the resolution of internal government disputes depends upon matter of faith and doctrine.” *Reid*, 229 Va. at 189, 327 S.E.2d at 113. Thus, “the civil courts will treat a decision by a governing body or internal tribunal of an hierarchical church as an ecclesiastical determination constitutionally immune from judicial review. To do otherwise would precipitate the civil court into the ‘religious thicket’ of reviewing questions of faith and doctrine *even when the issue is merely one of internal governance . . .*” *Id.* (emphasis added). Accordingly, numerous courts have recognized that issues related to the structure and organization of a church are among those “ecclesiastical issues” that the civil courts may not review or decide.

For example, as noted above, one of the issues in *Milivojevich* was whether the Serbian Orthodox Church (referred to as the “Mother Church”) had wrongfully divided the American-Canadian Diocese into three separate dioceses. 426 U.S. at 698. The Illinois Supreme Court independently scrutinized the Mother Church’s polity and rules and held that the division was unlawful because it was beyond the Mother Church’s authority. *Id.* at 698, 720-21. The Supreme Court reversed, holding among other things that the Illinois courts’ review involved a “searching and therefore impermissible inquiry into church polity.” *Id.* at 723. The Court explained:

*We will not delve into the various church constitutional provisions relevant to this conclusion, for that would repeat the error of the Illinois Supreme Court. It suffices to note that the reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs; Arts. 57 and 64 of the Mother Church constitution commit such questions of church polity to the final province of the Holy Assembly.”* *Id.* at 721 (emphases added).

*See, e.g., Turbeville v. Morris*, 26 S.E.2d 821, 828, 832 (S.C. 1943) (merger of three denominations is “matter[]...of purely ecclesiastical nature...” which is “to be determined by church tribunals alone” and “in considering a civil right which is dependent upon an ecclesiastical mater [civil courts] will accept as final the decision of a legally constituted ecclesiastical tribunal having jurisdiction over the matter”); *Fortin v. Roman Catholic Bishop of Worcester*, 625 N.E.2d 1352, 1355 (Mass. 1994) (merger of parish not subject to judicial review); *Galish v. Catholic Bishop of Chicago*, 394 N.E.2d 572-579, (Ill. Ct. App. 1979) (merger of parish with other nearby parishes “involves a question of church polity over which civil court have not jurisdiction”); *Hutchinson v. Thomas*, 789 F.3d 392, 396 (6th Cir. 1986) (“The ‘neutral principles’ doctrine has never been extended to religious controversies in the areas of church government, order and discipline, nor should it be.”).

In short, although a civil court may resolve many disputes involving churches, including property disputes, this jurisdiction does not open the door to a court to resolve any matter of church polity that may be implicated along the way. Instead, if a church property dispute requires the resolution of an issue of internal doctrine or discipline, the court must defer to the highest judicatory of a hierarchical church.

## **II. THE COURT’S APRIL 3, 2008, RULING VIOLATES THESE CONSTITUTIONAL PROHIBITIONS AND PROTECTIONS.**

### **A. Under the Court’s April 3, 2008, Ruling, § 57-9(A) Overrules Important Aspects of the Episcopal Church’s Own Polity and Rules.**

It was undisputed at trial that the Episcopal Church’s own polity and rules do not permit individual congregations to divide the Church or any diocese thereof. Rather, any such division requires the action of the Church’s General Convention. *See, e.g.,* Trial Tr. 842:19-844:4-6 (Douglas testimony); Trial Tr. 1220:12 – 1223:19 (Beers testimony); Def. Ex. 2 (Episcopal

Church's Constitution and Canons). Indeed, the Court's April 3 ruling recognizes as much. *See* Letter Op. at 57-58 (describing some of the undisputed evidence in the record on this point); *id.* at 80 (rejecting argument that a legally cognizable "division" in a religious denomination must be "accomplished in accordance with that denomination's own rules and polity").

Similarly, the Episcopal Church (like the other 37 provinces of the Anglican Communion) has an established polity that is autonomous of the Anglican Communion. Under the Church's governing structure, ultimate authority is vested in the Church's General Convention. TEC/Diocese Ex. 2, at Art. I; Tr. 840:7 – 840:12 (Douglas). No other denomination or instrument has the authority to alter or dictate changes in the Episcopal Church's internal affairs. Tr. 861:16 – 862:3, 936:14 – 936:17 (Douglas). The Court's April 3 ruling appears to recognize this as well. *See* Letter Op. at 5 ("ECUSA's governing body is the General Convention, which consists of the House of Bishops and the House of Deputies.")

Finally, the evidence established that the Anglican Communion's instruments have disapproved the formation of CANA and the ADV, and do not consider or treat them as *bona fide* parts of the Communion. Tr. 879:4 – 880:8 (Douglas); 1039:20 – 1040:4 (Mullin).

The Court's April 3 ruling holds that § 57-9(A), by governmental fiat, countermands the above-described ecclesial rules or structures in at least three important respects:

First: Although the Church's polity and rules do not permit individual congregations to divide the Church or any Diocese thereof, the Court has held that Virginia has granted Episcopal congregations (at least with a civil court's concurrence) that power. The Court's finding of a "division" is premised upon the departure of a tiny percentage (less than 1% of the Church's more than 7,600 congregations): "[T]his Court finds that a division has occurred within the ECUSA. The record demonstrates that numerous congregations, clergy, and members have

separated from ECUSA as a result of internal strife within ECUSA, in order to establish a new ‘polity’ for others to join.” Letter Op. at 82. See also *id.* at 81 (“The Court finds that . . . a division has occurred within the Diocese. Over 7% of the churches in the Diocese, 11% of its baptized membership and 18% of the diocesan average Sunday attendance of 32,000 have left the Diocese in the past two years.”). At least with respect to the Episcopal Church, moreover, the Commonwealth has purported to vest that power in congregations throughout the country: a “division” can (and indeed, arguably must) be based in the first instance on the departure of congregations outside of Virginia.

Second: Although the Episcopal Church has not established any sort of legal relationship with the other provinces of the Anglican Communion, or granted any other province any authority whatsoever over its constituent congregations, the Court has held that the Virginia General Assembly, in § 57-9, has imposed its own legal relationship on these autonomous bodies, such that the unilateral actions of other provinces located in other countries may alter the legal status or rights of the Episcopal Church and its component parts. See Letter Op. at 74-83 (finding that the Congregations may properly invoke § 57-9(A) based on events in the Anglican Communion).

Third: Although the Anglican Communion’s instruments of communion do not acknowledge the legitimacy or permit the participation of CANA or the ADV, the Court has held that it may determine that CANA and ADV are nevertheless “branches” and parts of the Anglican Communion – and thus, in the Court’s view, of the Episcopal Church and the Diocese – based on the Court’s view of the Commonwealth’s contrary decree in § 57-9(A). Letter Op. at 79 (“ECUSA, the Diocese, CANA, ADV, the Church of Nigeria, and the Church of Uganda, are all joined together by their common membership in the Anglican Communion.”); *id.* (“CANA,

the American Arm of the Church of Uganda, . . . [and] ADV, . . . all continue to be, both directly and indirectly, common members of the Anglican Communion.”); *id.* at 78 (CANA and ADV “are ‘branches’ of the Anglican Communion . . . the ECUSA and the Diocese.”).

In each of these respects, the Court’s ruling and § 57-9 would substitute rules created by the Commonwealth of Virginia for rules and relationships established by the Episcopal Church or the Anglican Communion themselves. This, as the authorities discussed in section I.A. above make clear, the Commonwealth may not do.

**B. The Court’s Ruling Delves Into the Religious Thicket and Independently Resolves Numerous Ecclesiastical Issues.**

Just as it unconstitutionally interferes with the Episcopal Church’s (and other hierarchical churches’) right to establish their own polities and rules of governance, the Court’s ruling with respect to § 57-9(A) delves into and resolves numerous issues in the heart of the religious thicket.

**1. The Court Conducted a Searching Inquiry Into Purely Religious Documents and Relationships.**

At the outset, the Court’s ruling displays a constitutionally prohibited “searching inquiry” into numerous ecclesiastical matters. The Court spends almost 40 pages on a recitation of the facts and evidence it deems relevant to this ruling. Some of these facts, to be sure, were undisputed and/or were clearly expressed in documents with secular as well as ecclesiastical purpose, and thus are proper subjects of judicial notice. The Church’s Constitution and Canons, for example, and the Constitution of the Anglican Consultative Council, fall into this category. See *Jones v. Wolf*, 443 U.S. at 608-609.<sup>6</sup> A large portion of the evidence the Court discusses,

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<sup>6</sup> We note, however, that the Court in some instances has incorrectly quoted from or described the provisions of these documents. For example, the Court states that the Episcopal Church “considers itself to be ‘a Fellowship . . . of those duly constituted dioceses, Provinces, and regional Churches in communion with the See of Canterbury . . .’” Letter Op. at 5. In fact, the

however, does not meet this description. For example, the Court quotes from and relies heavily on the “Windsor Report,” a document authored by an *ad hoc* ecclesiastical commission for the sole purpose of reporting on and helping to work through theological issues and relationships, with no legal or secular status or authority whatsoever. The Court gives similarly searching scrutiny to numerous other purely religious documents such as “Primates’ Communiqués” and individual pieces of correspondence both among religious leaders, and between some of these clergy and their respective flock. *See, e.g.*, Letter Op. at 12-13 (Letters from Bishop Lee); 15-20 (Windsor Report); 23-26 (Reconciliation Commission Report); 30 (Letters from Bishop Lee); 33 (Letters from Bishop Lee); 37 (Primates Communiqué); 38-39 (Letters to/from Presiding Bishop Katherine Jefferts Schori). Such searching inquiry directly implicates the Supreme Court’s concern that “First Amendment values are plainly jeopardized when . . . litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. . . . [T]he hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.” *Blue Hull Memorial Presbyterian Church*, 393 U.S. at 449.

## **2. The Court Resolved Numerous Ecclesiastical Issues.**

The Court analyzed these religious documents, moreover, in order to find relationships that the religious entities themselves disavow. *Compare* Letter Op. at 76-79 (concluding that the CANA Congregations are both attached to and branches of the Diocese, the Church, and the Anglican Communion), *with*, Tr. 1039:7-10 – 1040:19 (Mullin); TEC/Diocese Opening Br. At 25-30, 36-38. After engaging in the “searching inquiry” described above, the Court then went on to independently resolve numerous issues of religious polity and practice – in every case in a

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quoted provision of the Church’s Constitution states that the *Anglican Communion* is such a fellowship, not the Episcopal Church. *See* Defs. Ex. 2 at 1.

manner contrary to the rules or self-concept or established polity of the ecclesiastical entity involved. Specifically, the Court found that (1) the Anglican Communion is a “religious society”; (2) the congregations were “attached” to the Anglican Communion; (3) CANA, the American Arm of the Church of Uganda, and the ADV are “branches” of the Anglican Communion; (4) CANA and ADV are “branches” of the Episcopal Church and the Diocese; and (5) the Diocese, the Episcopal Church and the Anglican Communion have “divided”.<sup>7</sup> These holding go to the core of church polity – that is, as the Court notes, the “structure which adjudicates not only what happens within an individual congregation such as how worship shall be conducted, but how congregations shall relate to each other and ordained people shall relate to each other.” Letter Op. at 52 n. 42 (internal punctuation omitted) (quoting Trial Tr. 93:17-22).

It is true that the Court in most instances purported to define the applicable statutory term in accordance with secular dictionary definitions. This, however, does not satisfy the Constitution’s prohibition against interfering in the internal affairs of a religious denomination. See *Westbrook*, 231 S.W.3d at 400 (dismissing claim on ground that secular issues could not be separated from ecclesiastical issues and “while the elements of [plaintiff’s] professional-negligence claim can be *defined* by neutral principles without regard to religion, the *application* of those principles...would impinge upon [church’s] ability to manage its internal affairs”).

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<sup>7</sup> As the Attorney General’s Office has recognized in the past, for example – based in part on consultation with the same State Solicitor General who signed the Commonwealth’s Brief in this case:

[Section] 57-9, as currently written, may force the courts to determine if the denomination a congregation seeks to join is actually a branch of the original denomination or a new denomination.... [A] court decision over what is or is not a branch of an original denomination *necessarily entangles* government and religion.”

See letter attached to TEC/Diocese’s Post-Trial Reply Br. as Exhibit B) (emphasis added).

### 3. Aspects of the Court's Ruling Explicitly Rest on Religious Grounds.

The Court's rulings in this regard are particularly troubling, moreover, as the Court's conclusion that the congregations have properly invoked § 57-9 in this litigation actually explicitly relies upon purely theological determinations and criteria.

As noted above, the Court's April 3 ruling determined, among other things, that CANA and ADV are "branches" of the Episcopal Church, the Diocese of Virginia, and the Anglican Communion. Letter Op. at 78-79. Without this aspect of the Court's ruling, the petitions would have to be dismissed for failure to meet the statute's "branch" requirement. Yet the Court's decision on this point has no secular basis. Rather, it depends entirely on the Court's own infusion of legal significance to the purely historic and religious "bonds of affection" that exist among the provinces of the Anglican Communion.

The Court's ruling appears to acknowledge that even under the dictionary definitions of "branch" it adopts, one religious denomination ordinarily cannot create or become a "branch" of another. Thus, the Court concurs with the undisputed evidence at trial that when the Episcopal Church created a new missionary diocese to minister to Mexican Catholics who had become disaffected from, and were departing, the Catholic Church, "no one considered the Episcopal Diocese in Mexico to be a 'branch' of the Roman Catholic Church." Letter Op. at 79. *Cf. id.* at 51 (discussing and quoting Dr. Valeri's testimony that "if a group of individuals from the Lutheran Church left the Lutheran Church and became Baptists, . . . this would be merely a 'departure or transfer,' rather than a 'division.'")

From any secular perspective, this is precisely what happened in this case. A tiny fraction of the Episcopal Church's congregations and members have become dissatisfied with recent events within the Episcopal Church, and have chosen to join the Church of Nigeria or

some other pre-existing denomination. No new denomination has formed – only a new component of a pre-existing denomination that for these purposes is the precise equivalent of the Episcopal Church’s missionary diocese in Mexico. The evidence is undisputed that the various provinces, including specifically the Church of Nigeria and the Episcopal Church, are legally autonomous entities. Cong. Ex. 61 at 35-36 (¶ 18); TEC/Diocese Ex. 6 at 9; Tr. 645:17 – 648:22 (Yisa). The Court’s ruling does not purport to question this.

Nevertheless, the Court’s ruling concludes that the Church of Nigeria *has* successfully created a “branch” of the Episcopal Church and the Diocese of Virginia for purposes of § 57-9, solely because “ECUSA, the Diocese, CANA, ADV, the Church of Nigeria, and the Church of Uganda, are all joined together by their common membership in the Anglican Communion, by their adherence to that historical strand of Christianity known as Anglicanism, and by their shared desire to be a part of that particular branch of Christianity whose adherents call themselves Anglicans.” Letter Op. at 79. *See also id.* at 77 & n. 78 (the relationship of “communion” that exists among the provinces of the Anglican Communion “makes this case entirely distinguishable from a situation in which, for example, a group of disillusioned Roman Catholics leave to join the Episcopal Church, or vice versa”).<sup>8</sup> Similar “bonds of affection” are not, and cannot, be used to affect the legal rights and obligations of secular entities, however. That requires actual binding or contractual relationships that are utterly absent here.

In other words, the Court’s ruling necessarily rests on its own view of the significance of the purely theological relationship between the entities involved. This is constitutionally impermissible.

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<sup>8</sup> Paradoxically, the Court also found that a “division” has occurred in the Anglican Communion because the Church of Nigeria has “broken all relations” with the Episcopal Church.

Like its ruling that the Church of Nigeria had created “branches” of the Episcopal Church and the Diocese, the Court’s ruling that the CANA congregations were (and are) “attached” to the Anglican Communion also necessarily and impermissibly rests on purely theological grounds.

The Virginia Supreme Court has held that, for purposes of § 57-9, “attachment” requires actual structural connection or control. *See Baber v. Caldwell*, 207 Va. 694, 698, 152 S.E.2d 23, 26-27 (1967)(“We hold that the Level Green Christian Church is entirely independent of any other church or general society within the meaning of Code § 57-9 . . . It may be true, as the minority group insists, that before 1963 the Level Green Christian Church was interrelated with Disciples churches through its membership in the Virginia Christian Missionary Society and the Alleghany District Convention. But interrelation or . . . ‘cooperation’ does not destroy or even impair independence.”) *Cf. Watson v. Jones*, 13 Wall. at 723 (congregational polity exists when “a religious congregation . . ., by the nature of its organization, is strictly independent of other ecclesiastical associations, and *so far as church government is concerned*, owed no fealty or obligation to any higher authority.”)(emphasis added). Neither the congregations nor the Court point to any evidence that the CANA congregations or any other congregations are “attached” to the Anglican Communion in the structural or legal sense required by *Baber*, and indeed they are not.

Instead, the Court’s ruling with respect to “attachment” rests solely on the members of the CANA congregations’ “personal ties of ‘affection or sympathy’” to, and “‘communion’ with,” the Anglican Communion. These theological ties, the Court explained, made all the difference: “When the CANA Congregations voted to depart, they did not affiliate with the Roman Catholic Church, the Presbyterian Church, or the Methodist Church. Rather, they affiliated with a religious body to which they viewed themselves as already ‘attached’ and ‘in

communion' . . . ." Letter Op. at 77. In the Court's view, "[t]hat makes this case entirely distinguishable from a situation in which, for example, a group of disillusioned Roman Catholics leave to join the Episcopal Church, or vice versa." *Id.* at 77 n.78.

From a secular, legal perspective, however, the CANA congregations were no more "attached" to the Anglican Communion that they were to the Roman Catholic Church: there was simply no structural relationship between them. In thus resting solely on theological grounds, the Court's ruling in this respect crossed into the religious thicket, and out of the realm of proper judicial authority.

### **III. IF APPLIED TO TRUMP THE OTHER "NEUTRAL PRINCIPLES" FACTORS THE SUPREME COURT OF VIRGINIA HAS IDENTIFIED, § 57-9 WOULD EFFECT ADDITIONAL FREE EXERCISE VIOLATIONS.**

The congregations have argued that if it applies and is otherwise found to be Constitutional, § 57-9 would override the specifications in the applicable property deeds, the Church's undisputed rules governing local church property, and all of the other evidence concerning the course of dealing between the parties, and would be "dispositive" as to the ownership and control of the property at issue. The congregations' position on this point is incorrect. If § 57-9 were indeed applied in the manner that the congregations urge, however, that would result in additional Constitutional violations, as discussed below.

#### **A. Section 57-9 Would Not Be "Conclusive" As to the Disposition of the Property at Issue.**

Section 57-9 provides that a petition filed under its terms is "conclusive" only "if" the petition is "approved by the court." The statute does not direct or require the circuit courts to approve such petitions regardless of any other consideration. Moreover, there is nothing in the statute that is either inconsistent with or would appear to override the Virginia Supreme Court's direction that to resolve a church property dispute, the Virginia courts are to consider the deeds

to the property, the rules of the general church involved, and the course of dealing between the parties *in addition* to any applicable state statutes. *See Green v. Lewis*, 221 Va. 547, 555 (1980); *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 505 (1974).

Nor is § 57-9 (were it to be applied) the only state statute that would have to be considered in the course of a neutral principles analysis. Section 57-9(A)'s requirement that a congregational vote be "approved by the court" before it may be given effect necessarily implicates the mandate in § 57-15 that the court consider evidence of the "wish" of "constituted authorities thereof having jurisdiction in the premises, or of the governing body of any church diocese" before approving any transfer of church property. This conclusion is reinforced by the repeated references in § 57-15 to "branch or division" – clearly a reference back to § 57-9. *See* 57-15 ("The trustees of such a church, diocese, . . . *or branch or division thereof*, . . .") and ("Upon evidence being produced before the court that it is the wish of the congregation, or church or religious denomination or society *or branch or division thereof*, or the constituted authorities thereof having jurisdiction in the premises, or of the governing body of any church diocese . . ."). If § 57-15 was not intended to encompass congregational votes taken pursuant to § 57-9, there would be no need to reference "branch" or "division." This interpretation is entirely consistent with *Green v. Lewis*, which holds that with respect to a division in a "supercongregational" church, there must be "a showing that the property conveyance is the wish of the constituted authorities of the general church." 221 Va. at 553, 272 S.E.2d at 184 (*quoting Norfolk Presbytery*).

Nor is there any evidence that § 57-9 was adopted in order to grant certain "voting rights" to some, but not all, of Virginia's church congregations (those whose property is held by trustees). *Cf. Kedroff*, 344 U.S. at 122 (Frankfurter, J., concurring) ("It is not a function of civil

government under our constitutional system to assure rule to any religious body by a counting of heads.”). The Congregations’ own evidence (which the Court cited at p. 56) established only that the statute was adopted in order to establish a procedure for settling property rights in circumstances when a hierarchical church had structurally divided, thus *compelling* congregations to make a choice as to which of the “branches” of the formerly-united church they would thereafter adhere. See Letter Op. at 56. The element of “compulsion” in this proffered purpose for § 57-9 only makes sense, moreover: it is in such circumstances that the legal duties of trustees holding title to property may be unclear. The fact that some church members may be dissatisfied with a hierarchical denomination’s direction and wish to switch allegiance, of course, does not “compel” the congregations of that denomination to choose among any “branches” of the still-intact denomination, or otherwise create any ambiguity regarding trustees’ legal obligations.<sup>9</sup>

Rather than establishing a “conclusive” rule that necessarily overrides all other considerations, then, § 57-9 establishes a default rule or procedure that might be employed in the absence of a private-law provision or agreement that may resolve the dispute. As *Jones v. Wolf* suggests, such a default rule may be perfectly permissible: the states may indeed adopt a “presumptive” rule of majority representation or some other mechanism, *provided that the* “presumption” is “defeasible upon a showing that the identity of the local church is to be determined by some other means.” 443 U.S. at 607. Specifically, the Court explained, “any rule of majority representation can always be overcome, under the neutral-principles approach, either by providing, in the corporate charter or the constitution of the general church, that the identity

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<sup>9</sup> In this context, the statute’s restriction to congregations whose “property is held by trustees,” rather than being a wholly arbitrary discrimination among different religious denominations, might be explained as an effort to target the problem sought to be addressed.

of the local church is to be established in some other way, or by providing that the church property is held in trust for the general church and those who remain loyal to it.”<sup>10</sup>

Accordingly, the voting procedures set forth in § 57-9 were not intended to, and in any event do not, override all other considerations in the event of a “division” as defined by this Court.

**B. If Applied as Conclusive, § 57-9 Unconstitutionally Intrudes into the Episcopal Church’s Internal Rules and Polity in Other Significant Respects.**

If the statute were interpreted and applied as the Congregations contend, however, that would result in a number of other violations of the Free Exercise clause. Since its very origins, the Episcopal Church has operated under the principle that local congregational property is held as a part and for the mission of the Church, and cannot be diverted to other purposes at a congregation’s option.

The earliest Canons of the Diocese, for example, described local parish property, both real and personal, as “belonging to the Protestant Episcopal Church.” TEC Complaint ¶ 42. Church Canon II.6(1), adopted in 1871, requires that consecrated parish property be “secured for ownership and use by a Parish, Mission, Congregation, or Institution affiliated with this Church

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<sup>10</sup> It is also well established that generally, parties may privately order their affairs in a manner that supersedes otherwise-applicable statutory provisions. *See, e.g., Mahoney v. NationsBank of Va., N.A.*, 249 Va. 216, 220-21, 455 S.E.2d 5, 7-8 (1995) (contracting party may not invoke statutory U.C.C. provision to override contract terms); *Board of Supervisors v. Sampson*, 235 Va. 516, 520-22, 369 S.E.2d 178, 180-81 (1988) (permissible contract term shortening time established by statute binding upon contracting parties); *Chandler v. Fletcher*, 169 Va. 32, 37-38, 192 S.E.2d 786, 788-89 (1937) (submission to bench trial waived statute providing for jury trial); *Pettus v. Hendricks*, 113 Va. 326, 330-31, 74 S.E. 191,193 (1912) (association’s charter controlled eligible class of beneficiaries notwithstanding statute that permitted larger class of individuals to be beneficiaries because statute did not modify charter). *See also Hoskinson v. Pusey*, 73 Va. 428, 440 (1879) (questioning whether applying predecessor to § 57-9 “encroach[es] upon vested rights in putting it in the power of a majority of the members of the congregation to shift the title and use of the property without the consent and against the will of the minority”).

and subject to its Constitution and canons.” Canons II.6(2) and I.7(3), adopted in 1868 and 1940, respectively, forbid parishes from encumbering or alienating real property without the consent of diocesan leaders. Further tying parish property to the Church’s mission, Canon III.9(5), adopted in 1904, makes clear that it is the Episcopal rector of each parish who is at all times entitled to the use and control of parish property, subject to the Constitutions and Canons of the Church and the Diocese. Finally, restating the restrictions embodied in these earlier canons, Church Canon I.7(4) and Diocesan Canon 15.1 state that all real and personal property held by or for the benefit of any Church or Mission is held in trust for the Church and the Diocese. *See* TEC/Diocese Ex. 2, Canon I.7(4); Ex. 3, Canon 15.1. The Canons of the Diocese of Virginia provide that if ever a congregation ceases to operate as an identifiable Episcopal parish, the Diocese may declare that parish’s property to be “abandoned” and require that title be transferred to Diocesan trustees (as indeed the Diocese has done in this case). TEC/Diocese Ex. 3, Canon 15(3).

In stark contrast to these rules, § 57-9, if treated as “conclusive” in this case, would provide that in the event of a sufficiently serious theological dispute, local Episcopal congregations may disregard the hierarchical structure of the Church, elect by majority vote to leave the Church and the Diocese, and retain parish property for their own use in association with another, pre-existing denomination. The Commonwealth would thus be substituting its own, flatly inconstant rule regarding the use and control of parish property for those established by the Church itself.

## **CONCLUSION**


The effect of the Court’s ruling is to create an Episcopal Church different in Virginia than anywhere else. This alone shows that this Court’s ruling has impermissibly entangled the state in the polity of the Church, and infringed upon the Church’s First Amendment right to establish its

own polity and rules of governance. Moreover, this Court has created legal relationships between the Church and the Anglican Communion and other provinces of the Anglican Communion that do not exist.

Under the Court's ruling, the Episcopal Church and all religious denominations in Virginia would be subject to the control of a civil court declaring a division that will trigger § 57-9, without regard to their own established structures or Rules. There is no question that this has a chilling effect and severely compromises a hierarchical church's ability to maintain its polity. The ruling also unquestionably burdens the Church's ability to practice its faith for fear that should some number of its members decide that it disagrees with the Church or the Diocesan leadership – whether over the color of the carpet or an issue of doctrine, as here – these members would be free to enlist the aid of the state to depart from the Church and the Diocese, contrary to the rules of the Church. As this Court has interpreted it, § 57-9(A) is thus unconstitutional.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing THE EPISCOPAL CHURCH'S SUPPLEMENTAL BRIEF ON CONSTITUTIONAL ISSUES were sent by electronic mail to all counsel named below and by first-class mail to the lead counsel at each firm (indicated with an asterisk below), on this 23rd day of April, 2008:

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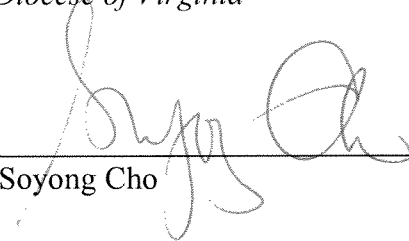
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