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

MEMORANDUM IN OPPOSITION TO THE COMMONWEALTH'S MOTION TO INTERVENE

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The Attorney General of the Commonwealth of Virginia seeks to intervene in this action under Virginia Supreme Court Rule 3:14. The Commonwealth has failed to satisfy the requirements of the Rule and its motion should be denied, but the Episcopal Church (the "Church") and the Diocese of Virginia (the "Diocese") do not object to allowing the Commonwealth to participate and file its attached brief as *amicus curiae*:

1. Rule 3:14 provides that "[a] new party may by leave of court file a pleading to intervene as a plaintiff or defendant to assert any claim or defense germane to the subject matter of the proceeding." The intervention rule "is a specific Rule enacted by this Court to govern the orderliness of proceedings .... [T]he Rule's history includes a strong adherence to limiting intervention to those parties who are legitimately plaintiffs or defendants because the nature of their claim includes some right that is involved in the litigation." *Eads v. Clark*, 272 Va. 192, 196-97, 630 S.E.2d 502, 504 (2006) (citing *Hudson v. Jarrett*, 269 Va. 24, 34, 606 S.E.2d 827, 832 (2005)).

2. Prior to 2000, there was no rule governing intervention on the law side of the Court. On the chancery side, former Rule 2:15 provided that a court could allow a party to file a petition asserting "any claim or defense germane to the subject matter" of the litigation. *Hudson,* 269 Va. at 32, 606 S.E.2d at 831. Thus, it was not necessary for intervention to occur as a party plaintiff or defendant. *See id.* Rule 3:14 now requires, however, "that an intervenor intervene specifically as a *plaintiff* or as a *defendant*. This addition reinforced the interpretation of former Rule 2:15 that an intervenor must be asserting an interest that is part of the subject matter of the litigation." *Hudson,* 269 Va. at 32, 606 S.E.2d at 831 (emphases in original).

3. The Commonwealth has not complied with Rule 3:14 because it does not purport to intervene as either a plaintiff or a defendant. *See* Commonwealth Motion at 2 ("mov[ing] to

intervene in this matter for the limited purpose of defending the constitutionality of Virginia Code § 57-9"). Its Motion therefore must be denied. *See Hudson*, 269 Va. at 33, 606 S.E.2d at 831 ("While intervention under Rule 3:19 [now 3:14] is within the discretion of the trial court, the intervention must meet the requirements of the Rule").

4. Nor would the Commonwealth be a proper party. It lacks any right or interest in the subject matter – the property occupied by the Congregations. It also necessarily lacks any interest in the outcome of the litigation because government should *never* assert an interest in which private party prevails in church property litigation. *Cf.* Commonwealth Brief at 19 (asserting that § 57-9 "exists only to resolve church property disputes fairly and efficiently").[1] For the Commonwealth to intervene as a party on either side of this litigation – as the rule governing intervention requires – would implicate the warning in *Reid v. Gholson*, 229 Va. 179, 327 S.E.2d 107 (1985), that in cases "concerning the civil and property rights of religious bodies and church members.... there is a danger that the power of the state may be called upon to aid a faction espousing a particular doctrinal belief, or to 'become entangled in essentially religious controversies.'" *Id.* at 187, 327 S.E.2d at 112. *See also Rayburn v. Gen. Conf. of 7th-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) ("On a procedural level, entanglement might also result from a protracted legal process pitting church and state as adversaries").

5. The Commonwealth's Motion to intervene also is untimely. *Cf.* 6 MOORE'S FED. PRACTICE - CIVIL 24.21[1] (3d ed.) ("All motions to intervene, whether permissive or as of right, must be timely"). Extensive litigation has already occurred, including a full trial; and the position of the Church and the Diocese has been clear since the inception of this litigation. *See,*

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[1] Yet the Commonwealth does just that, endorsing the Congregations' statutory interpretation. Commonwealth Brief at 3 n.5 ("the Commonwealth believes that CANA's interpretation of § 57-9 is both textually and historically accurate").

e.g., Answer of the Diocese to Truro Church Petition (filed Jan. 23, 2007) at 5 ("If Va. Code § 57-9 is interpreted in the fashion that Truro Church appears to interpret it, then it is in violation of the Constitution of the United States and the Constitution of Virginia").

6. The Commonwealth does not cite any Virginia authority other than Rule 3:14 to support intervention, mentioning only an inapplicable federal statute that grants an attorney general a right to intervene in a federal court case where constitutionality is at issue. There is no comparable Virginia statute, and in fact, the General Assembly recently rejected such a bill. *See* HB 2336 (2003 Session) (text and legislative history attached as Ex. A). The General Assembly's refusal to grant the Attorney General such a right "is an indication of the legislative policy in Virginia." *Crook v. Commonwealth*, 147 Va. 593, 601, 136 S.E. 565, 568 (1927); *see also Tabler v. Board of Supervisors*, 221 Va. 200, 202, 269 S.E.2d 358, 360 (1980) ("In determining legislative intent, we have looked *both* to legislation adopted and bills rejected by the General Assembly") (emphasis added).

7. Constitutional rights are routinely asserted in church property cases. The Church and the Diocese are not aware of any prior church property case in Virginia or elsewhere in which the state attorney general sought to intervene. Even in non-church property cases, private parties routinely litigate issues implicating the constitutionality of state statutes without intervention by the Commonwealth.[2]

8. The Commonwealth ignores the fact that the constitutionality of § 57-9 is only

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[2] *See, e.g., Martin v. Ziherl*, 269 Va. 35, 607 S.E.2d 367 (2005) (Virginia criminal law against fornication unconstitutional; Commonwealth participated on appeal as an *amicus*); *Lackman v. Long & Foster Real Estate, Inc.*, 266 Va. 20, 580 S.E.2d 818 (2003) (Virginia statute providing for enforcement of arbitration awards not unconstitutional); *Willis v. Mullett*, 263 Va. 653, 561 S.E.2d 705 (2002) (medical malpractice statute of limitations for minors did not violate Due Process Clauses); *Phillips v. Foster*, 215 Va. 543, 211 S.E.2d 93 (1975) (condemnation statute unconstitutional as applied because it permitted one landowner to take another's property).

conditionally at stake, misperceiving the arguments made by the Church and the Diocese. Not only have we urged constitutional avoidance, but we have argued that the statute is constitutional if correctly interpreted and applied. What is unconstitutional is the Congregations' radical interpretation of the statute, now endorsed by the Commonwealth. In contrast to the Church's and the Diocese's diligent efforts to avoid them, the Commonwealth seems determined to have the Court adjudicate constitutional issues.

9. Notably, the Attorney General's Office expressed a different view regarding the constitutionality of § 57-9 prior to seeking to intervene. In support of the failed Senate Bill 1305, a bill that would have explicitly allowed congregants leaving national denominations to keep church properties, *see* Church-Diocese Exs. 27 & 28, the Attorney General's Office provided a letter "highlight[ing] the constitutional problems" with § 57-9. Ex. B at 1; *see* Ex. B at 2 ("a court decision over what is or is not a branch of an original denomination necessarily entangles government and religion"). It also recognized that "[c]onstitutional principles dictate the least possible involvement of the state in church matters." *Id.*

10. The Church and the Diocese recognize that if this Court does ultimately decide the constitutionality of § 57-9 (which it need not do), the Commonwealth may wish to be heard. Those views may be properly presented as an *amicus curiae*. By allowing the Commonwealth to appear as an *amicus*, its stated (and only possible) interest would be fully accommodated, Rule 3:14 would be respected, and there would be no need to worry about any unexpected developments that the late arrival of a new party might bring. Accordingly, the Church and the Diocese do not object to the Commonwealth's involvement as an *amicus* or the acceptance of its

proposed brief so long as that does not create delay – *e.g.* through additional briefing.[3]

11. If, on the other hand, the Court grants leave for the Commonwealth to intervene, in light of the constitutional and practical problems noted above, any such intervention should be limited to briefing and argument regarding the constitutionality of § 57-9, which is all the Commonwealth seeks.

CONCLUSION

For the reasons set forth above, the Commonwealth's Motion to Intervene should be denied; but the Church and the Diocese do not object to the Court allowing the Commonwealth's participation as an *amicus curiae*.

Respectfully submitted,

THE PROTESTANT EPISCOPAL CHURCH
IN THE DIOCESE OF VIRGINIA

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[3] The Church and the Diocese have responded to the Commonwealth's Brief in our post-trial reply brief, and no further briefing by the Commonwealth or CANA Congregations on the constitutional issues should be permitted.

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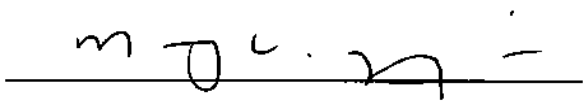


HB 2336 Attorney General.

Gary A. Reese | all patrons ... notes | add to my profiles

Summary as passed House: (all summaries)

Attorney General.

Requires the court or tribunal to notify the Attorney General of any proceeding raising a question as to the constitutionality of state law, and permits the Commonwealth to intervene in such suit for presentation of evidence and for argument on the issue of constitutionality. The bill provides that the Commonwealth has all the "rights of a party to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."

Full text:

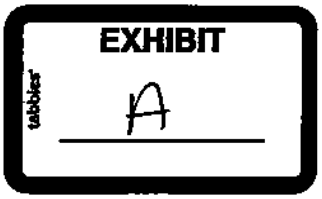
01/08/03 House: Presented & ordered printed, prefiled 01/08/03 038876253 **(impact statement)**
02/01/03 House: Committee substitute printed 030503253-H1 **(impact statement)**

Amendments:

House amendments rejected

Status:

01/08/03 House: Presented & ordered printed, prefiled 01/08/03 038876253
01/08/03 House: Referred to Committee on General Laws
01/14/03 House: Assigned to General Laws sub-committee: 4
01/21/03 House: Referred from General Laws (22-Y 0-N)
01/21/03 House: Referred to Committee for Courts of Justice
01/30/03 House: Assigned to C. J. sub-committee: 2
01/31/03 House: Reported from C. J. with substitute (21-Y 0-N)
02/01/03 House: Committee substitute printed 030503253-H1
02/01/03 House: Read first time
02/03/03 House: Read second time
02/03/03 House: Committee substitute agreed to 030503253-H1
02/03/03 House: Previous question ordered (86-Y 11-N)
02/03/03 House: VOTE: PREVIOUS QUESTION (86-Y 11-N)
02/03/03 House: Amendment by Del. Moran rejected (32-Y 65-N)
02/03/03 House: VOTE: REJECTED (32-Y 65-N)
02/03/03 House: Engrossed by House - committee substitute 030503253-H1
02/04/03 House: Read third time and passed House (67-Y 32-N)
02/04/03 House: VOTE: PASSAGE (67-Y 32-N)
02/04/03 House: Communicated to Senate
02/05/03 Senate: Constitutional reading dispensed
02/05/03 Senate: Referred to Committee for Courts of Justice
02/17/03 Senate: Failed to report (defeated) in C. J. (5-Y 6-N)



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HOUSE BILL NO. 2336

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice
on January 31, 2003)

(Patron Prior to Substitute--Delegate Reese)

A BILL to amend the Code of Virginia by adding a section numbered 2.2-506.1 relating to the right of the Office of the Attorney General to intervene in certain actions.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 2.2-506.1 as follows:

§ 2.2-506.1. Right of the Attorney General to intervene.

In any civil action, suit, or proceeding in any state court or other tribunal of the Commonwealth wherein the constitutionality of any state law or regulation affecting the public interest is drawn into question, the court or tribunal shall notify the Attorney General of such pendency, and upon a petition filed by the Attorney General within 30 days of the receipt of such notice, shall permit the Commonwealth to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument solely on the question of constitutionality. The Commonwealth shall, subject to the applicable provisions of law, have all the rights of a party to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

#

SENATE OF VIRGINIA

BILL MIMS
33rd SENATORIAL DISTRICT
PART OF FAIRFAX AND LOUDOUN COUNTIES
POST OFFICE BOX 741
LEESBURG, VIRGINIA 20178

COMMITTEE ASSIGNMENTS:
COURTS OF JUSTICE
EDUCATION AND HEALTH
LOCAL GOVERNMENT
RULES
TRANSPORTATION

February 3, 2005

The Honorable John H. Watkins
General Assembly Building

Enclosed please find a letter from the Attorney General's office that highlights the constitutional problems with Virginia's existing statutes relating to church property, and supports the proposed reforms in S.B. 1305. Also enclosed is a fact sheet prepared by supporters that you may wish to use when responding to constituents. Also, as you know, I have prepared an amendment to S.B. 1305 which clarifies that churches can state their intentions regarding property matters through trust agreements without having to change their deeds.

In addition to the need to correct the constitutional deficiencies in the existing statutes, there is a practical need for the clarifications proposed by S.B. 1305. Presently, church property is owned by local trustees in most instances – your friends and neighbors who volunteer their services for their local congregation. In many churches – Baptist, Catholic, and Methodist, for example – the direction to these local trustees is very clear. In others, it is confusing and convoluted, and unfortunately these volunteer trustees are place in untenable situations when a property controversy erupts. The most important practical implication of S.B. 1305 is that it gives clear guidance to trustees and state court judges – specifically, if the denomination has a clear statement, either in the deed or in a trust agreement, that it owns the property then it does so; otherwise, the local congregation owns it. This was once the law of Virginia, but it was changed early last century and confusion and disputes have grown since then.

Without the clarifications included in S.B. 1305, there is a risk that our current statutes will be declared unconstitutional by a state or federal court – as our constitutional prohibition of church incorporation was in 2003.. If that happens, we may have to deal with these issues on an emergency basis, rather than through our regular processes.

Thank you for your thoughtful consideration of S.B. 1305, and please let me know if I can respond to any questions at this time.

Sincerely,

Bill

Bill Mims

EXHIBIT
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B

COMMONWEALTH of VIRGINIA

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February 1, 2005

The Honorable William C. Mims
General Assembly Building
Richmond, Virginia 23219

Re: Senate Bill 1305

Dear Senator Mims:

You have asked us to examine the constitutionality of your proposed Senate Bill 1305 and the existing statute regarding the division of church property. I have conferred with William E. Thro, State Solicitor General, and we have determined that your bill – if enacted - would strengthen the existing law.

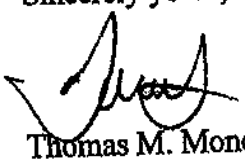
As presently in effect §57-9 has potential constitutional problems. The current language provides protection only in the event that the congregation wants to join a branch of the same denomination. There is no statutory option if the congregation desires to join a different denomination or to become independent. Consequently, the law as it stands gives an incentive for one choice only – joining a branch of the original denomination – while giving a disincentive for the other choices – joining another denomination or becoming independent.

Additionally §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. While adjudicating the property interests of any unincorporated association – to include a church - involves an examination of its internal workings, a court decision over what is or is not a branch of an original denomination necessarily entangles government and religion. Constitutional principles dictate the least possible involvement of the state in church matters.

Your proposed legislation, by contrast, provides for a dissatisfied congregation to make more than one particular choice. If enacted, a court will be able to more readily apply "neutral principles of law" based upon the source of legal title to real estate. The possibility of excessive entanglement is significantly reduced.

With my kindest regards, I remain

Sincerely yours,



Thomas M. Moncure, Jr.
Senior Counsel to the
Attorney General

Support Senate Bill 1305

SB 1305 amends section 57-9 and 57-15 of the Code of Virginia pertaining to the disposition of church property following a division within the congregation or church.

The statutes currently in effect date back to the mid-nineteenth century, are antiquated and ambiguous. The statutes give courts no guidance on when a division has occurred within a church and are riddled with ambiguity with regard to how and upon whose behalf a proprietary interest is established. As a result, courts trying to apply these statutes often must interpret church practice, rules, canonical law and at times even doctrine. For example, in 1967 the Supreme Court of Virginia ruled, following a long line of precedent, that the majority of a congregation could not "divert the use of property to the support of new and conflicting doctrines." *Baber v. Caldwell*, 207 Va. 694, 695-696 (1967).

Whatever else the separation of church in state may mean, it certainly must stand for the proposition that interpreting religious doctrine and the tenets of faith are outside the jurisdiction of the courts of the Commonwealth of Virginia. Sadly, that is not the case under the law today.

SB 1305 would amend the law to take courts out of the business of interpreting church doctrine and return them to the business of interpreting secular law. It does this in two ways:

1. It creates a conclusive presumption that a division has occurred when, by a majority vote of members over the age of 18, 10 congregations or 10 percent of all congregations within a denomination (whichever is less) vote to determine to which branch of the denomination they wish to belong, to belong to a different church, diocese, or religious society, or to become independent.

2. Where a division has occurred, the disposition of the property is determined by who is named in the deed or, if there is an express trust agreement, who is the beneficiary under the trust.

These rules are simple, straightforward, and fair. In interpreting them, courts are applying well understood principles of property law and have no occasion to delve into questions of church governance or doctrine.