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August 17, 2007

VIA HAND-DELIVERY

Fairfax County Circuit Court
ATTENTION: Robin Brooks
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

RE: *Multi-Circuit Episcopal Church Property Litigation, Fairfax County
Circuit Court, CL-2007-0248724*

*In re: Church at the Falls, The Falls Church; Fairfax County Circuit Court; CL
2007-5249;*

In re: Truro Church; Fairfax County Circuit Court; CL 2006-15792;

In re: Church of the Epiphany; Fairfax County Circuit Court; CL 2007-556;

*In re: Church of Our Savior at Oatlands; Fairfax County Circuit Court; CL 2007-
5363;*

*In re: St. Paul's Church, Haymarket; Fairfax County Circuit Court; CL 2007-
5686;*

In re: St. Margaret's Church; Fairfax County Circuit Court; CL 2007-5685;

In re: St. Stephen's Church; Fairfax County Circuit Court; CL 2007-5903;

In re: Church of the Apostles; Fairfax County Circuit Court; CL 2006-15793

*The Protestant Episcopal Church in the Diocese of Virginia v. Truro Church
(Circuit Court of Fairfax County Case No. 2007-1236);*

The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Apostles (Circuit Court of Fairfax County Case No. 2007-1238);

The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Epiphany, Herndon (Circuit Court of Fairfax County Case No. 2007-1235);

The Protestant Episcopal Church in the Diocese of Virginia v. Christ the Redeemer Church (Circuit Court of Fairfax County Case NO. 2007-1237);

The Protestant Episcopal Church in the Diocese of Virginia v. St. Paul's Church, Haymarket (Circuit Court of Prince William County Case No. CL 73466)(Circuit Court of Fairfax County Case No. CL 2007-5683);

The Protestant Episcopal Church in the Diocese of Virginia v. St. Margaret's Church (Circuit Court of Prince William Case No. CL 73465)(Circuit Court of Fairfax County Case No. CL 2007-5682);

The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Word (Circuit Court of Prince William County Case No. CL 73464)(Circuit Court of Fairfax County Case No. CL 2007-5684);

The Protestant Episcopal Church in the Dioceses of Virginia v. Potomac Falls Church (Circuit Court of Loudoun County Case No. 44149)(Circuit Court of Fairfax County Case No. CL 2007-5362);

The Protestant Episcopal Church in the Diocese of Virginia v. Church of Our Saviour at Oatlands (Circuit Court of Loudoun County Case. No. 44148)(Circuit Court of Fairfax County Case No. CL 2007-5364);

The Protestant Episcopal Church in the Diocese of Virginia v. The Church at The Falls – The Falls Church (Circuit Court of Arlington County Case No. 07-125)(Circuit Court of Fairfax County Case No. CL 2007-5250); and

The Protestant Episcopal Church in the Diocese of Virginia v. St. Stephen's Church (Circuit Court of Northumberland County Case No. CL 07-16)(Circuit Court of Fairfax County Case No. CL 2007-5902).

The Episcopal Church v. Truro Church et al. (Circuit Court of Fairfax County Case No. 2007-1625),

Letter to Clerk of the Court
August 17, 2007
Page 3

Dear Ms. Brooks:

I am enclosing for filing in the above-styled case an original CANA Congregations' Memorandum of Law on Scope of Hearing on Congregational Determinations Pursuant to Virginia Code § 57-9 and twenty (20) copies of a one-page covers sheet to be placed in the file for the above-styled cases.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

SANDS ANDERSON MARKS & MILLER, PC



George O. Peterson

cc: Maia L. Miller, Law Clerk to the Honorable Randy I. Bellows (via hand-delivery)
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Scott T. Ward, Esquire
R. Hunter Manson, Esquire
James E. Carr, Esquire
Edward H. Grove, III, Esquire

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

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

**CANA CONGREGATIONS' MEMORANDUM OF LAW
ON SCOPE OF HEARING ON CONGREGATIONAL DETERMINATIONS
PURSUANT TO VA. CODE § 57-9**

This acts as a one-page cover sheet reference pleading to the complete CANA Congregations' Memorandum of Law on Scope of Hearing on Congregational Determinations Pursuant to Virginia Code § 57-9, which was filed in CL 2007-248724 (the omnibus case file), filed on August 8, 2007. The CANA Congregations' Memorandum of Law on Scope of Hearing on Congregational Determinations Pursuant to Virginia Code § 57-9 and this corresponding one-page reference pleading applies to the Omnibus case number: CL 2007 – 248724 and the following cases:

1. *In re: Church at the Falls, The Falls Church*; Fairfax County Circuit Court; CL 2007-5249;
2. *In re: Truro Church*; Fairfax County Circuit Court; CL 2006-15792;
3. *In re: Church of the Epiphany*; Fairfax County Circuit Court; CL 2007-556;
4. *In re: Church of Our Savior at Oatlands*; Fairfax County Circuit Court; CL 2007-5363;
5. *In re: St. Paul's Church, Haymarket*; Fairfax County Circuit Court; CL 2007-5686;
6. *In re: St. Margaret's Church*; Fairfax County Circuit Court; CL 2007-5685;
7. *In re: St. Stephen's Church*; Fairfax County Circuit Court; CL 2007-5903;
8. *In re: Church of the Apostles*; Fairfax County Circuit Court; CL 2006-15793;
9. *The Protestant Episcopal Church in the Diocese of Virginia v. Truro Church* (Circuit Court of Fairfax County Case No. 2007-1236);
10. *The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Apostles* (Circuit Court of Fairfax County Case No. 2007-1238);
11. *The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Epiphany, Herndon* (Circuit Court of Fairfax County Case No. 2007-1235);
12. *The Protestant Episcopal Church in the Diocese of Virginia v. Christ the Redeemer Church* (Circuit Court of Fairfax County Case NO. 2007-1237);
13. *The Protestant Episcopal Church in the Diocese of Virginia v. St. Paul's Church, Haymarket* (Circuit Court of Prince William County Case No. CL 73466)(Circuit Court of Fairfax County Case No. CL 2007-5683);
14. *The Protestant Episcopal Church in the Diocese of Virginia v. St. Margaret's Church* (Circuit Court of Prince William Case No. CL 73465)(Circuit Court of Fairfax County Case No. CL 2007-5682);

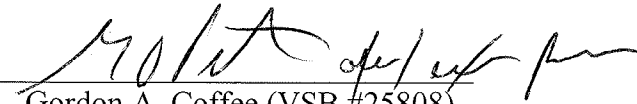
15. *The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Word* (Circuit Court of Prince William County Case No. CL 73464)(Circuit Court of Fairfax County Case No. CL 2007-5684);
16. *The Protestant Episcopal Church in the Dioceses of Virginia v. Potomac Falls Church* (Circuit Court of Loudoun County Case No. 44149)(Circuit Court of Fairfax County Case No. CL 2007-5362);
17. *The Protestant Episcopal Church in the Diocese of Virginia v. Church of Our Saviour at Oatlands* (Circuit Court of Loudoun County Case. No. 44148)(Circuit Court of Fairfax County Case No. CL 2007-5364);
18. *The Protestant Episcopal Church in the Diocese of Virginia v. The Church at The Falls – The Falls Church* (Circuit Court of Arlington County Case No. 07-125)(Circuit Court of Fairfax County Case No. CL 2007-5250);
19. *The Protestant Episcopal Church in the Diocese of Virginia v. St. Stephen's Church* (Circuit Court of Northumberland County Case No. CL 07-16)(Circuit Court of Fairfax County Case No. CL 2007-5902); and
20. *The Episcopal Church v. Truro Church et al.* (Circuit Court of Fairfax County Case No. 2007-1625).

For the complete CANA Congregations' Memorandum of Law on Scope of Hearing on Congregational Determinations Pursuant to Virginia Code § 57-9, please see the omnibus case file, CL 2007 – 248724.

Dated: August 17, 2007

Respectfully submitted,

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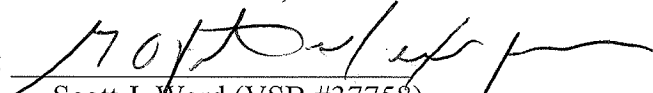
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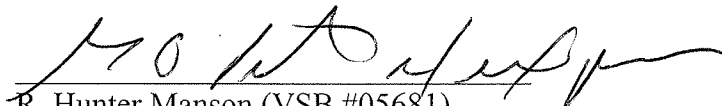
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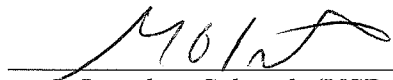
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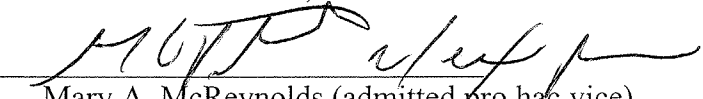
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of August, 2007 a copy of the foregoing one-page Cover Sheet for the CANA Congregations' Memorandum of Law on Scope of Hearing on Congregational Determinations Pursuant to Virginia Code § 57-9, was sent by electronic mail and first-class mail, postage prepaid, to:

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George O. Peterson

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

In re:)	
Multi-Circuit Episcopal Church)	Civil Case Numbers:
Litigation)	CL 2007-248724,
)	CL 2006-15793,
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)	CL 2007-5902, and
)	CL 2007-5903.

**CANA CONGREGATIONS' MEMORANDUM OF LAW
ON SCOPE OF HEARING ON CONGREGATIONAL DETERMINATIONS
PURSUANT TO VA. CODE § 57-9**

COME NOW The Falls Church, Truro Church, Church of Our Saviour at Oatlands, Church of the Apostles, Church of the Epiphany, Church of the Word, St. Margaret's Church, Christ the Redeemer Church, St. Stephen's Church, St. Paul's Church, and Potomac Falls Church (hereinafter collectively, the "CANA Congregations") and each of their Trustees¹ who are named defendants (hereinafter collectively, "Related Individuals") and, pursuant to the order of this

¹ The Trustees of The Falls Church are separately represented and have filed a Special Plea.

Court, file this joint memorandum of law explaining the scope of the hearing (to be held on November 19, 2007) on the CANA Congregations' determinations pursuant to Virginia Code § 57-9. (CL 2007-5249; CL 2006-15792; CL 2007-556; CL 2007-5363; CL 2007-5686; CL 2007-5685; CL 2007-5903; CL 2006-15793; CL 2007-1236; CL 2007-1238; CL 2007-1235; CL 2007-1237; CL 2007-5683; CL 2007-5682; CL 2007-5684; CL 2007-5362; CL 2007-5364; CL 2007-5250; CL 2007-5902; and CL 2007-5903).

INTRODUCTION

In 1867, the Virginia General Assembly, acting in response to denominational schisms generated by disputes over slavery and the Civil War, passed Va. Code § 57-9.² Recognizing that local congregations should retain property held by their appointed trustees in the event of a past or future denominational conflict, the General Assembly provided that where a “church or religious society” experiences a “division,” affiliated congregations may simply vote to determine which “branch” of the divided body they wish to join. Each voting congregation may then report its determination to the local circuit court, and the court’s approval of that determination is “conclusive as to the title and control of any property held in trust for such congregation.” The statute remains on the books today, in a form that is substantially the same as when it was enacted.

In this case, the CANA Congregations will demonstrate at trial that there is a division in the Diocese of Virginia (the Diocese), the Episcopal Church (TEC), and the worldwide Anglican

² § 57-9. How property rights determined on division of church or society.

A. If a division has heretofore occurred or shall hereafter occur in a church or religious society, to which any such congregation whose property is held by trustees is attached, the members of such congregation over 18 years of age may, by a vote of a majority of the whole number, determine to which branch of the church or society such congregation shall thereafter belong. Such determination shall be reported to the circuit court of the county or city, wherein the property held in trust for such congregation or the greater part thereof is; and if the determination be approved by the court, it shall be so entered in the court’s civil order book, and shall be conclusive as to the title to and control of any property held in trust for such congregation, and be respected and enforced accordingly in all of the courts of the Commonwealth.

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

Communion, triggered by a decision of TEC to repudiate past positions on human sexuality and the authority of Scripture. The existence, source, and depth of the division have been widely reported in the press and acknowledged in public statements issued by the Diocese, TEC, and the Anglican Communion. The division has led more than half of the provinces of the Anglican Communion to announce a severance of relations with TEC and has prompted a substantial number of congregations in the United States to disaffiliate from TEC and their dioceses. Many of the departing congregations, including the CANA Congregations, chose to affiliate with branches that were created as a result of the division in the church.

In conformity with Subpart A of § 57-9, the CANA Congregations conducted a vote on whether to affiliate with the Convocation of Anglicans in North America (CANA) and the Anglican District of Virginia (ADV). CANA and ADV were created in response to the subject division as an offshoot for Episcopal congregations that desire to remain part of the Anglican Communion and to adhere to its stated doctrine on sexuality and the authority of Scripture. By large supermajorities,³ the CANA Congregations voted to end their affiliation with TEC and to affiliate with CANA and ADV.⁴ By even larger supermajorities,⁵ nine of the CANA Congrega-

³ The following percentages of voting members cast ballots to disaffiliate from TEC and the Diocese: (1) Truro Church: 92 percent; (2) The Falls Church: 90 percent; (3) Church of our Saviour: 82 percent; (4) Church of the Apostles: 97 percent; (5) Church of the Epiphany: 78 percent; (6) St. Margaret's Church: 78 percent; (7) St. Paul's Church: 94 percent, (8) St. Stephens Church: 75 percent; (9) Potomac Falls Church: 86 percent; and (10) Church of the Word: 95 percent.

⁴ Defendant Christ the Redeemer Church, never having been affiliated with TEC, did not vote on the issue of ending any affiliation with TEC, but voted unanimously to affiliate with CANA.

⁵ The following percentages of voting members cast ballots indicating that the property should be retained by the majority of the congregations: (1) Truro Church: 94 percent; (2) The Falls Church: 94 percent; (3) Church of Our Saviour: 82 percent; (4) Church of the Apostles: 98 percent; (5) Church of the Epiphany: 89 percent; (6) St. Margaret's Church: 84 percent; (7) St. Paul's Church: 96 percent, (8) St. Stephens Church: 72 percent; (9) Potomac Falls Church: 93 percent; and (10) Church of the Word: 97 percent.

tions voted to retain their property and improvements that they and their fellow parishioners had purchased, erected, and maintained.⁶ Reports attesting to the votes of the CANA Congregations were filed with the Circuit Courts in which the CANA Congregations are located, as required by § 57-9.

TEC and the Diocese have disputed the CANA Congregations' right to invoke § 57-9, claiming that the statute is applicable only to divisions that TEC and the Diocese have formally recognized or implemented. They have also disputed that CANA and ADV are branches within the meaning of the statute and refused to acknowledge that the votes conducted by the CANA Congregations met the requirements of § 57-9. The legal and factual issues to be resolved by the Court in this case thus are: (1) whether there has been a "division" in (2) a "church or religious society" to which the CANA Congregations were formerly "attached"; (3) whether the CANA Congregations determined to join a "branch" of the divided church or religious society; and (4) whether that determination was based on a properly conducted vote within the meaning of § 57-9. As explained below, each of these issues involves sub-issues of statutory interpretation and will require the presentation of certain evidence at the § 57-9 hearing in November.

ISSUES TO BE RESOLVED

I. What Constitutes a Division Under § 57-9?

The threshold substantive question in a matter arising under Va. Code § 57-9 is whether there has been a "division" in the "church or religious society" to which the voting congregations were "attached." The term "division" is undefined, but the traditional understanding—both in 1867 and today—is of a schism or rupture in a church (typically over doctrinal issues). Nowhere

⁶ The other two CANA Congregations that are defendants, Christ the Redeemer Church and Potomac Falls Church, do not own any real property.

in the plain text of the statute or in the historic context in which the statute was enacted is there support for the Diocese's and TEC's insistence that a "division" requires the formal approval of the governing body of a denomination. Moreover, requiring such a formal recognition would render the statute and the voting rights it confers meaningless.

In Virginia, "legislative intent is determined by the plain meaning of words used." *Richmond v. Confrere Club of Richmond, Inc.*, 239 Va. 77, 80 (1990). "[W]hen a statute is clear and unambiguous, its plain meaning must be accepted without resort to extrinsic evidence or the rules of construction." *Id.* According to both recent definitions and those that date from the era when the statute was adopted, "division" simply means "the state of being divided into parts or branches; partition; severance." 1 *Oxford English Dictionary* 558 (1971); see also Noah Webster, *A Dictionary of the English Language* 219 (1872) ("State of being divided"); *Random House Dictionary of the English Language* 420 (1967) ("the act or state of being divided"; "Division usually means little more than the marking off or separation of a whole into parts"); *Webster's New Universal Unabridged Dictionary* 538 (2d ed. 1983) ("a dividing or being divided; separation"). According to its plain meaning, then, a "division" "in a church or religious society" (§ 57-9) is just what it sounds like—a breaking into parts, separation, severance, or partition.

The Diocese and TEC maintain that, to satisfy the statute, such a partition, severance, or separation must be formally "recognized" by the denomination. As examples, the Diocese cites the "formal division in the Diocese of Virginia [that] occurred in 1877 when, with the permission of the General Convention of the Episcopal Church, the Diocese of Virginia separated into the Diocese of Virginia and the Diocese of West Virginia"; (2) the similarly approved 1892 division of the Diocese of Virginia, creating a new Diocese of Southern Virginia; and (3) the similarly

approved 1919 division of the Diocese of Southern Virginia, creating the Diocese of Southwestern Virginia. Diocese Answers to First Set of Interrog. at 3-4. By contrast, the Diocese argues, in this case there was no such “recognized” division, and therefore § 57-9 is not satisfied.

This reading of the statute is untenable for several reasons. *First*, § 57-9 uses the term “division” without any modifier—let alone the modifier “recognized,” “approved,” or “formal.” TEC and the Diocese thus ask this Court to read a word into the statute, which the Virginia Supreme Court strictly forbids. *BBF, Inc. v. Alstom Power, Inc.*, 645 S.E.2d 467, 469 (Va. 2007) (“we are not free to add language, or to ignore language, contained in statutes”) (quotation omitted).

Second, the TEC-Diocese interpretation is at odds with the limited guidance that the Virginia Supreme Court has provided concerning the meaning of § 57-9. As the Court explained in analyzing subpart B of the statute in *Reid v. Gholson*, the type of “division” that is “a prerequisite to relief under 57-9” involves a situation where the disaffiliating parties “have expressed [their] desire to separate from the body of their church, and to rend it into groups,” and where some are “excommunicated” or viewed as “apostate” based on the underlying disagreement. 229 Va. 179, 192 (1985). Under this common sense reading of the statute, a division exists where (as here) different groups have gone their separate ways over what they deem to be important differences of opinion over doctrine, policy, governance, or polity.

Third, the view that § 57-9 is limited to denominationally approved divisions is otherwise inconsistent with the phrasing, verb tense, and verb choice in § 57-9. The statute applies “[i]f a division *has heretofore occurred or shall hereafter occur*” (emphasis added). The verb “occur” simply means “to come into existence: happen,” and the dictionary explains that the term “‘occurrence’ may apply to a happening without intent, volition, or plan.” *Webster's Ninth New Col-*

legiate Dictionary 817 (1983). Thus, the sense of the statute is that “divisions happen,” whether or not they are planned, contrary to TEC’s and the Diocese’s insistence that the statute is limited to divisions that result from a consensual, deliberative process by denominational authorities. If the purpose of the statute were to address consensual redistricting, it would have been far more natural for the General Assembly to have referred to a division having been “effected,” “implemented,” or in some way brought about *by the denomination*.

Fourth, the absence of any requirement in § 57-9 for denominational approval stands in contrast to other sections of the Virginia Code (including some sections of title 57) that *do* reference official determinations by church leadership. *See* Va. Code § 57-7.1 (“conveyance . . . shall be used for the . . . purposes of the . . . religious society . . . as determined by the authorities which, under its rules or usages, have charge of [its] administration”); Va. Code §§ 8.01-400, 19.2-271.3, 20-26, 24.2-703.1 (“‘accredited religious practitioner’ means a person who has been . . . accredited by a formal religious order”). Virginia “follow[s] the rule . . . that ‘when the General Assembly includes specific language in one section of a statute, but omits that language from another section of the statute, we must presume that the exclusion of the language is intentional.’” *Halifax Corp. v. Wachovia Bank*, 268 Va. 641, 654 (Va. 2004). *See also Lucy v. County of Albemarle*, 258 Va. 118, 129 (Va. 1999) (noting that the courts will compare statutes that “relate to the same person or thing”). Thus, the Court can conclude that the General Assembly did not intend to limit § 57-9 to officially recognized or consensual divisions but rather to make the statute applicable to *all* divisions in a denomination.

Fifth, the word “division” as commonly understood in 1867 referred to schisms in denominations that typically were not sanctioned by church officials. When interpreting undefined terms in a statute, a court should examine the usual meaning of the terms at the time the statute

was enacted. *Lawrence v. Craven Tire Co.*, 210 Va. 138, 140-41 (1969) (“[T]he popular, or received import of words, furnishes the general rule for the interpretation of statutes.”) (quotation omitted); *Lewis v. Com.*, 184 Va. 69, 72 (Va. 1945) (looking to meaning “[a]t the time of enactment of the statute”). In this case, the CANA Congregations intend to introduce evidence at trial showing that fierce controversies over abolition and the Civil War led several major denominations—Baptist, Presbyterian, Methodist, and Episcopal—and many smaller ones to fracture by 1861.⁷ In at least half of those denominations, including the Episcopal Church, the Southern churches established a new branch without formal recognition or approval by higher church authority of the separation. Contemporaneous accounts, including from persons affiliated with TEC, referred to the fractures of the denomination as “divisions,” notwithstanding the absence of approval for the fractures from the governing authority of the original denomination.

The notion that the General Assembly in 1867 would require denominational consent to any “division” thus flies in the face of the historical backdrop, an important component of any statutory analysis. *Enoch v. Com.*, 141 Va. 411, 434 (Va. 1925) (it is the “duty” of courts to consider “history and life of the country”); accord 17 Michie’s Jurisprudence, *Statutes* § 39 (2006) (courts appropriately consult “the history of the times”). Virginia had just fought a war over whether individual States had the right to separate from the Union without the Union’s consent. It is fanciful to suggest, in the immediate aftermath of this war, that the pre-Reconstruction General Assembly would have enacted legislation that effectively forbade churches from separating from (typically Northern) denominations and keeping their property without the consent of the

⁷ These were not the sole causes of divisions. Many denominations fractured in the mid-1800s in response to divergent views on evangelism, the role of ritual, the significance of baptism, use of English in liturgy, and the Oxford Movement. The Episcopal Church itself experienced long periods of conflict over many of these issues.

higher authorities of the denominations. Indeed, the opposite conclusion can be drawn—that the General Assembly wanted to ensure the right of local congregations to maintain their property in the event of a division in a denomination, regardless of whether the denomination’s governing body then approved of the division.

This motivation to ensure local control of church property would not have ended with the Civil War. As the CANA Congregations will demonstrate at trial, the ruptures occasioned by the debates over slavery were not quickly reconciled after the South surrendered in 1865. While the Episcopal Church by 1866 reached some form of reconciliation with the Episcopal Church in the Confederate States, the Baptist, Presbyterian, and Methodist churches remained divided for decades to come. Moreover, property disputes continued even after the Civil War. For example, in 1865 the General Assembly of the Presbyterian Church offered reconciliation to congregations that were part of the southern branch, but on the condition that ministers sign statements repenting of their support for slavery and state secession. The resulting disagreements led to court fights over property that culminated, ironically, in the U.S. Supreme Court case of *Watson v. Jones*, 80 U.S. 679 (1871). These controversies would have been well-known to the Virginia General Assembly at the time of the enactment of § 57-9.

Sixth, the interpretation of § 57-9 advanced by TEC and the Diocese would render the provision useless. Under their view, divisions under § 57-9 occur only when dioceses are split into small geographic regions, not when doctrinal disputes cause a rupture in a denomination. Putting aside the fact that the term “division” was not so narrowly defined in 1867, TEC and the Diocese have not explained why the General Assembly would provide a statutory right to conduct a congregational vote in the case of amicable redistricting. More fundamentally, they have not indicated that they would even have permitted such a vote.

In the cases TEC and the Diocese identified, there appears to have been no opportunity given to congregations to decide which Diocese to join. For example, a congregation in Norfolk in 1892 that was geographically located in the new Diocese of Southern Virginia evidently could not vote to remain in the Diocese of Virginia. Indeed, such a vote would have violated the concept enshrined in church canons that diocesan authority is strictly *territorial*. See TEC Canon I.13.1 (“Every Congregation of this Church shall belong to the Church in the Diocese in which its place of worship is situated”); TEC Canon I.16 (congregations wishing to affiliate with TEC must have “the consent of the Bishop in whose Diocese it is situate”); see also I E. White & J. Dykman, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America* 318-319 (1954) (“Whereas a question may arise, whether a congregation within the diocese of any bishop, or within any State in which there is not any bishop settled, may unite themselves with the Church in any other diocese of State, it is hereby determined and declared that all such unions shall be considered irregular and void; and that every congregation of the Church shall be considered as belonging to the body of the Church of the diocese, or of the State, within the limits of which they dwell or within which there is seated a Church to which they belong”).

TEC and the Diocese are thus urging the Court to adopt an interpretation of § 57-9 that makes the voting rights conferred by the statute meaningless. Such a result is not permitted under Virginia law. See *Natrella v. Board of Zoning Appeals*, 231 Va. 451, 461 (Va. 1986) (“[t]he rules of statutory interpretation argue against reading any legislative enactment in a manner that will render any portion of it useless, repetitious, or absurd”).

II. Has a Division Occurred in the Diocese, TEC, or the Anglican Communion?

In light of the text of § 57-9, the initial factual issue to be determined at trial is whether a division has occurred in the Diocese, TEC, or the Anglican Communion. If the Court rejects TEC's and the Diocese's contention that a "division" within the meaning of § 57-9 requires formal consent by church authorities, then perhaps they would stipulate to the existence of a division within their ranks triggered by decisions at TEC's 2003 General Convention. If the Diocese and TEC challenge the existence of this division, the CANA Congregations will put on evidence to prove that such a division exists.⁸

Such evidence would take several forms, including statements from representatives of the Diocese. The CANA Congregations would show that in 1998, the bishops of the Anglican Communion overwhelmingly passed a resolution declaring that "abstinence is right for those who are not called to marriage" and "homosexual practice [is] incompatible with Scripture." In 2003, however, TEC's General Convention approved the election of a non-celibate homosexual as the Bishop of New Hampshire and authorized blessings for same-sex unions. The Primates of all of the various provinces of the Communion then issued a unanimous warning that "[i]f [the] consecration [of the Bishop of New Hampshire] proceeds . . . many provinces are likely to consider themselves to be out of communion with [TEC]. This will tear the fabric of our Communion at its deepest level, and may lead to further division on this and further issues as provinces have to decide in consequence whether they can remain in communion with provinces that choose not to break communion with [TEC]" (emphasis added). TEC proceeded with the consecration. *See Congregations' § 57-9 Reports* (hereinafter, "Reports") ¶¶ 14-16.

⁸ While the CANA Congregations are asking the Court to acknowledge the fact of a division, they are in no way asking for a judicial determination of doctrinal issues.

In what has become known as the Windsor Report, a commission appointed by the Archbishop of Canterbury (at the unanimous request of the Primates) declared that TEC's actions "have uncovered major divisions throughout the Anglican Communion." "Those divisions," the Report explained, "have been obvious at several levels of Anglican life: between provinces, between dioceses and between individual Anglican clergy and laity." "The overwhelming response [to TEC's actions]," the Report continued, "has been to regard these developments as departures from genuine, apostolic Christian faith." The Report also noted that "some eighteen of the thirty-eight provinces of the Anglican Communion, or their [bishops] on their behalf, have issued statements which indicate . . . their basic belief that [TEC's actions] are 'contrary to biblical teaching' and as such unacceptable." Reports ¶¶ 20-21. As the CANA Congregations will show at trial, the number of Anglican provinces to do so has since grown.

The Windsor Report also recommended that, among other things, TEC "be invited to express its regret that the proper constraints of the bonds of affection were breached in the events surrounding the election and consecration of [the bishop of New Hampshire], and for the consequences which followed, and that such an expression of regret would represent the desire of TEC to remain within the Communion." If TEC would not respond favorably to these recommendations, and "[s]hould the call to halt . . . not be heeded," the Report declared, "then we shall have to begin to learn to walk apart." TEC failed to adopt fully the recommendations of the Windsor Report.

In June 2006, Archbishop of Canterbury Rowan Williams—one of the Anglican "Instruments of Unity," and the Primate of the Church of England—responded by stating that "[t]he recent resolutions of the General Convention have not produced a complete response to the challenges of the Windsor Report." As a result, he explained, "[t]here is no way that the Anglican

Communion can remain unchanged by what is happening at the moment.” In November 2006, the Anglican Communion’s 19 Global South Primates issued similar statements, explaining that “a number of the resolutions adopted by the [TEC General] Convention were actually contrary to the Windsor Report” and calling for formation of a “separate ecclesiastical structure of the Anglican Communion in the USA.” Reports ¶¶ 30-32.

These developments in the broader Anglican Communion were paralleled in TEC and the Diocese. For example, certain dioceses in the United States have passed resolutions expressly acknowledging the division in TEC. *See, e.g.*, Resolution Adopted by the Diocese of Tennessee (“We acknowledge the existence of serious division in our worldwide Anglican Communion and within the Episcopal Church USA over decisions of the 74th General Convention 2003 of the Episcopal Church relating to issues of human sexuality. We lament and regret that at times these issues, and the reactions to them, have created tension, conflict and division within the Diocese of Tennessee, the Episcopal Church USA and the Anglican Communion”).

Similarly, the Diocese of Virginia has openly acknowledged the divisions generated by the 2003 Convention. In January 2004, the Diocese established a Reconciliation Commission to address the “profound differences” caused by TEC’s actions. Reports ¶ 41. In January 2005, the Commission issued a report acknowledging the “severe division in our Diocese” and concluding: “[W]e cannot avoid the difficult question: ‘Can we continue to live together?’ We understand from some of those among us that the answer may ultimately be ‘No,’ and that in this case there must be provision for an amicable divorce.” *Id.* ¶ 42.

In late 2005, in response to the Reconciliation Commission Report, Diocese of Virginia Bishop Peter Lee formed a Special Committee chaired by Russell Palmore, Chancellor of the Diocese, to address the division and the possibility that parishes might disaffiliate. *Id.* ¶ 44. Af-

ter months of deliberations, in September 2006 the Special Committee issued a unanimous report that included a “Protocol for Departing Congregation” (“Protocol”). Citing “the *division which may cause some to ‘walk apart,’*” the Protocol provided, among other things, for congregations to hold vestry and congregational votes on whether to sever ties with TEC and the Diocese. *Id.* ¶¶ 45-46 (emphasis added). Bishop Lee and other Diocese officials lauded the Protocol as a “useful way forward.” *Id.* ¶ 46.

Although Lee endorsed the Protocol, several days before numerous congregational votes were scheduled over whether to disaffiliate with the Diocese and join another branch of the Anglican Communion, he wrote to discourage the voting congregations from disaffiliating. While appealing to congregants to “affirm your ministry in the Episcopal Church and in the Diocese of Virginia,” he acknowledged the division in the Diocese that had led to the votes: “American Christianity has been punctuated over the years by frequent divisions That has not been characteristic of the way we Anglicans have dealt with differences. I encourage you when you vote, to vote for the unity and mission of the church, therefore remaining one with your diocese, and rejecting the tempting calls for division.” *Id.* ¶ 47. At trial, the CANA Congregations will also present additional recent evidence of division.

III. Were the CANA Congregations Attached to the “Church Or Religious Society” in Which the Division Occurred?

In establishing that there has been a “division,” the CANA Congregations will also show that this division occurred within the broader “church or religious society” to which the CANA Congregations previously were “attached.” There is no dispute that TEC and the Diocese are a “church or religious society” within the meaning of § 57-9. TEC Answers to First Set of Interrog. at 3; Diocese Answers to First Set of Interrog. at 4. Nor is there any dispute that the CANA

Congregations were attached to TEC and the Diocese.⁹ That, together with the clear division in TEC and the Diocese, is more than sufficient to satisfy § 57-9. But notwithstanding the disagreement of TEC and the Diocese, it is also true that the broader Anglican Communion is a “church or religious society.”

The plain meaning of “church” is an “organization of religious believers.” *Webster’s Ninth New Collegiate Dictionary* 240 (1988). This definition describes the Anglican Communion, which according to the preamble to TEC’s own constitution is “a Fellowship within the One, Holy, Catholic, and Apostolic Church, of those duly constituted Dioceses, Provinces, and regional Churches in communion with the See of Canterbury, upholding and propagating the historic Faith and Order as set forth in the Book of Common Prayer.” The Anglican Communion and its members thus share a common faith.

More specifically, as the CANA Congregations will show at the hearing, the Communion’s “organization” is embodied in the four “Instruments of Unity,” which include

- the Archbishop of Canterbury, who functions as the spiritual head of the Communion and determines whether a Province (such as TEC) is “in communion” with the See of Canterbury;
- the Lambeth Conference, an international forum of all bishops in the communion held approximately every 10 years at the invitation of the Archbishop of Canterbury, to reinforce unity, discuss matters of mutual concern, and pass resolutions that state the position of the Communion on such matters and have moral force over members of the Communion;
- the Anglican Consultative Council, over which the Archbishop of Canterbury presides, which typically meets every three years, and which consists of representative bishops, clergy, and laity chosen by 38 Provinces; and
- (4) the Primates’ Meeting, which is convened annually at the invitation of the Archbishop of Canterbury as an international forum for thought, prayer, and consulta-

⁹ Defendant Christ the Redeemer Church alone was not previously affiliated with TEC or the Diocese.

tion among the Primates (archbishops) of the 38 Provinces in the Anglican Communion.

Reports ¶ 9. Further, the Anglican Communion’s common faith is found in a shared affirmation of the authority of the Bible, the Book of Common Prayer, the Ordinal of 1662, and the Thirty-Nine Articles of Religion. This faith is also reflected in the Communion’s common origins in the Church of England. In short, in every possible respect the Anglican Communion is a “church.” Report ¶¶ 8.

The Anglican Communion is also a “religious society.” A society is “an enduring and cooperating social group whose members have developed, organized patterns of relationships through interaction with one another.” *Webster’s Ninth New Collegiate Dictionary, supra*, at 1119. The Communion fits this description as well, because it is an “enduring and cooperating [religious] social group whose members [Provinces, Dioceses, and parishes, among others] have developed, organized patterns of relationships” embodied in the Instruments of Unity.

These conclusions are confirmed by TEC’s and the Diocese’s own descriptions of the Anglican Communion. According to TEC’s Complaint, the Anglican Communion is “a *fellowship* of independent regional churches around the world, that *trace their respective roots to the Church of England*, are recognized by the Archbishop of Canterbury as being *in ‘communion’* with him, and are *constituent members* of an advisory body of bishops, priests, and laity from 38 provinces of the Anglican Communion known as the ‘Anglican Consultative Council.’” Compl. ¶ 36 (emphasis added); see also Diocese Compl. ¶ 21 (similarly describing the Communion as “a loosely knit fellowship of independent regional churches around the world”). “[F]ellowship,” common institutional “roots,” “communion,” “constituent members”—these terms well describe “an organization of religious believers” at the broadest possible level—that is, a “church.” They

also describe “an enduring and cooperating social group whose members have developed, organized patterns of relationships through interaction with each other”—that is, a “religious society.”

TEC takes issue with this conclusion on the ground that a “church or religious society” must be “hierarchical.” TEC Answers to First Set of Interrog. at 3. The statute, however, does not use that term, and “[c]ourts cannot add language to the statute the General Assembly has not seen fit to include.” *Oraee v. Breeding*, 270 Va. 488, 503 (Va. 2005). To be sure, the statute refers to a “congregation” that is “attached” to a “church or religious society,” which shows that (unlike under Part B of the statute) the congregation must be part of a “church or religious society” that is broader than the congregation. In that regard, it is fair to say that the statute covers “supercongregational” churches. See Diocese Answers to First Set of Interrog. at 3. But that is as far as the statute goes, and there is no textual basis for concluding that a “church or religious society” must be “hierarchical” in every respect.

Indeed, the use of the term “religious society” elsewhere in Virginia law suggests precisely the opposite. The term is used in Article I, § 16 of the Virginia Constitution as a term broader than “sect” or “denomination” to encompass other religious entities. And as the term is used in Virginia Code §§ 18.2-207, 20-23 and 20-26 to address the performance and recordation of marriages, it is clearly intended to refer broadly to all churches and religious denominations, regardless of whether they are “congregational,” “supercongregational,” “hierarchical,” or something else. Cf. *Application of Ginsburg*, 236 Va. 165 (1988); *Cramer v. Commonwealth*, 214 Va. 561 (1974). In sum, the Anglican Communion plainly qualifies as a “church” or “religious society” within the meaning of § 57-9.¹⁰

¹⁰ TEC’s position assumes a dualistic world in which there are only two types of churches: hierarchical and congregational. In reality, however, the world of religious organizations is far more

IV. Have the CANA Congregations Joined a “Branch” of the Divided Church or Religious Society?

When the CANA Congregations determined to disaffiliate from TEC and the Diocese, they simultaneously joined a different “branch” of the “church or religious society” to which they were formerly “attached.” Section 57-9 does not define the term “branch.” But according to Black’s Law Dictionary (8th ed. 2004), a “branch” is an “offshoot, lateral extension, or division of an institution.” As the CANA Congregations will show at trial, CANA and ADV are offshoots of TEC and the Diocese, respectively, created in response to the division within TEC and the Diocese that led to this dispute. Reports ¶¶ 48-52. By affiliating with the Church of Nigeria (Anglican Communion) through CANA and ADV, the CANA Congregations sought to maintain their ecclesiastical relationship with each other and the Anglican Communion. Reports ¶¶ 48-51.

TEC and the Diocese have advanced the argument that CANA and ADV cannot be “branches” within the meaning of § 57-9 because they are not subject to the authority of TEC or the Diocese. There is no requirement in the statute, however, that a new branch have any ongoing affiliation with the previously undivided “church or religious society.” As with “division,” “branch” is not modified by such terms as “affiliated,” “recognized,” “acknowledged,” or “authorized.” Moreover, reading such a modifier into § 57-9 would make little sense, as it would ignore the very basis for the division—the disaffiliating parties’ “desire to separate from the

complex. The CANA Congregations acknowledge that they are governed by Subpart A of § 57-9, and that TEC and the Anglican Communion both have certain limited attributes of “hierarchical” churches. But that does not mean that the “church or religious society” must be “hierarchical” in all respects for the statute to apply. Indeed, in framing § 57-9, the General Assembly did not distinguish between “hierarchical” and “non-hierarchical” churches, but rather made a broader distinction between an “attached” and an “entirely independent” congregation. Subpart B of the statute refers to a “congregation” that is a “church or society entirely independent of any other church or general society,” while Subpart A refers to a “congregation” that is “attached” to a broader “church or religious society.”

body of their church, and to rend it into groups,” on the basis of doctrinal differences or perceived “aposta[cy].” *Reid*, 229 Va. at 192. Moreover, it would vitiate the rights of local congregations to vote on which “branch” to join if the “branch” were required to be under the ecclesiastical authority of the former denomination.

The TEC-Diocese interpretation also flies in the face of the term “branch” as understood in 1867. The CANA Congregations will show at trial that a “branch” of a religious denomination was understood to have a common origin but no current formal connection. For example, writers of the era referred to “branches” of the Presbyterian church or, more broadly, to the many “branches” of Christianity in the United States. Invoking this contemporaneous understanding of “branch,” the Bishop of the Diocese of Virginia of the Episcopal Church of the Confederate States referred in 1865 to the Episcopal Church having two “branches” in the United States. Yet the same writing affirms that the Southern “branch” was not under the ecclesiastical authority of the Northern “branch”—and certainly was not established with its approval.

The Virginia Supreme Court’s decision in *Brooke v. Shacklett*, 54 Va. 301 (1856), also casts doubt on the interpretation advanced by TEC and the Diocese. *Brooke* predates § 57-9 by eleven years, but in some respects appears to have provided part of the inspiration for that statute. *Brooke* involved an 1842 deed granting funds for a “house or place of worship for the use of the members of the Methodist Episcopal Church in the United States of America.” *Id.* at 314. In the 1840s, the Methodist Episcopal Church divided over slavery into the separately governed Methodist Episcopal Church and the Methodist Episcopal Church South. The Court had to decide which part of the congregation, which itself was divided, was the rightful beneficiary of the deed. Ultimately, the Court allowed congregations “adhering to the church in the south by a vote of the majority of the members” to “remain under the unmolested pastoral care of the southern

church.” *Id.* at 322. But although the Methodist Episcopal Church South was described as a new “branch” of the formerly undivided denomination, it would have been nonsensical to say that the Southern branch was under the authority of the Northern church.

Finally, even if § 57-9 required the CANA Congregations to remain attached to the previously undivided church or religious society, they have done so by remaining attached to the Anglican Communion. CANA was formed in response to the division within TEC and the Diocese as a missionary initiative of the Church of Nigeria—by far the largest province of the Anglican Communion. By virtue of that affiliation, CANA’s districts (including ADV), bishops, constituent churches, and missions are members of the Anglican Communion just as are any other Church of Nigeria districts, bishops, churches, and missions. Accordingly, although it is not a requirement of § 57-9, the CANA congregations remain attached to a “branch” of the Anglican Communion. *See* TEC Compl. ¶¶ 37-38 (stating that the Church of Nigeria is a member of the Anglican Communion).

V. Have the CANA Congregations Satisfied the Procedural Requirements of Va. Code § 57-9?

According to the statute, “the members of [a disaffiliating] congregation over 18 years of age may, by a vote of a majority of the whole number, determine to which branch of the church or society such congregation shall thereafter belong. Such determination shall be reported to the circuit court of the county or city, wherein the property held in trust . . . is.” Va. Code § 57-9. The Reports filed by the CANA Congregations identified the steps they took to comply with these procedural requirements. In their answers, TEC and the Diocese refused to admit that these steps satisfied the statute. Moreover, they responded to requests for admission regarding the votes by claiming a lack of knowledge.

Since TEC and the Diocese evidently intend to insist that the CANA Congregations prove every aspect of the vote, the CANA Congregations are prepared to introduce testimony from the persons who oversaw the voting process of each congregation. That testimony will cover the determination of eligible voters; the wording of the ballot; the process to provide notice of the vote; the efforts made to give the Diocese and any dissenting vestry members an opportunity to persuade parishioners to vote against the ballot questions; the voting period; the tallying of the ballots; and the reporting of the vote. Given the number of congregations that conducted votes, putting on such evidence alone may take a day or two.

WHEREFORE, the defendant CANA Congregations and the Related Individuals, by counsel, respectfully request that this Honorable Court conduct the hearing on the applicability of Va. Code § 57-9 in a manner consistent with the points outlined above, and grant such additional relief as the case may require and the Court deems just.

Respectfully submitted,

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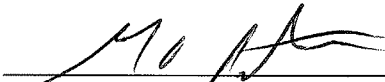
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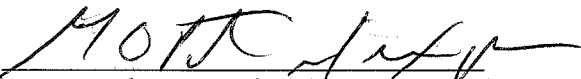

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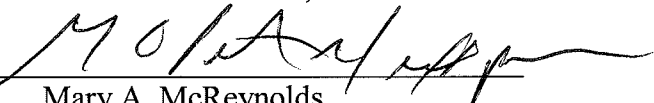
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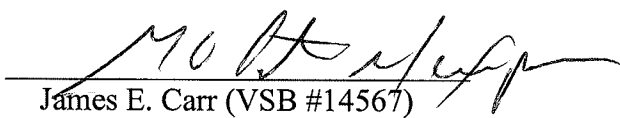
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of August, 2007, a copy of the foregoing CANA Congregations' Memorandum of Law on Scope of Hearing on Congregational Determinations Pursuant to Virginia Code § 57-9 was sent by electronic mail and first-class mail, postage prepaid, to:

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