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August 31, 2007

## ***VIA HAND DELIVERY***

Fairfax County Circuit Court  
Attn: Robin Brooks  
4110 Chain Bridge Road  
Fairfax, Virginia 22030

Re: *In Re: Multi-Circuit Episcopal Church Property Litigation* (CL-2007-0248724)

Dear Ms. Brooks:

Please find enclosed for filing the following:

1. Reply Memorandum Regarding the Scope of the § 57-9 Hearing and the Application of Va. Code § 57-9 to these Cases; and
2. One page cover sheets for each of the above pleadings to be filed in the following cases:
  - *In Re: Truro Church* (Circuit Court of Fairfax County Case No. 2006-15792);
  - *In Re: Church of the Apostles* (Circuit Court of Fairfax County Case No. 2006-15793);
  - *In Re: Church of the Epiphany, Herndon* (Circuit Court of Fairfax County Case No. 2007-556);
  - *In Re: St. Paul's Church, Haymarket* (Circuit Court of Fairfax County Case No. CL 2007-5686);
  - *In Re: St. Margaret's Church* (Circuit Court of Fairfax County Case No. CL 2007-5685);

Fairfax County Circuit Court  
Attention: Robin Brooks  
August 31, 2007  
Page 2

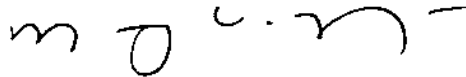
- *In Re: Church of Our Saviour at Oatlands* (Circuit Court of Fairfax County Case No. CL 2007-5363);
- *In Re: The Church at The Falls – The Falls Church* (Circuit Court of Fairfax County Case No. CL 2007-5249);
- *In Re: St. Stephen's Church* (Circuit Court of Fairfax County Case No. CL 2007-5903);
- *In Re: Church of the Word* (Prince William No. CL76197 - this case has not yet been transferred from the Circuit Court of Prince William County);
- *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 Fairfax County Case No. CL 2007-5683);
- *The Protestant Episcopal Church in the Diocese of Virginia v. St. Margaret's Church* (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 Fairfax County Case No. CL 2007-5684);
- *The Protestant Episcopal Church in the Diocese of Virginia v. Potomac Falls Church* (Circuit Court of Fairfax County Case No. CL 2007-5362);

Fairfax County Circuit Court  
Attention: Robin Brooks  
August 31, 2007  
Page 3

- *The Protestant Episcopal Church in the Diocese of Virginia v. Church of Our Saviour at Oatlands* (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 Fairfax County Case No. CL 2007-5250);
- *The Protestant Episcopal Church in the Diocese of Virginia v. St. Stephen's Church* (Circuit Court of Fairfax County Case No. CL 2007-5902); and
- *The Episcopal Church v. Truro Church et al.* (Circuit Court of Fairfax County Case No. 2007-1625).

A courtesy copy has been sent by email and hand delivery to Ms. Seana Cranston, Judge Bellow's law clerk.

Very truly yours,



Mary Catherine Zinsner

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Fairfax County Circuit Court  
Attention: Robin Brooks  
August 31, 2007  
Page 4

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#340306v1

**VIRGINIA:**  
**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

**IN RE:** )  
 )  
**MULTI-CIRCUIT EPISCOPAL** ) **CL 2007-0248724**  
**CHURCH PROPERTY LITIGATION** )

**FILED IN:** *The Protestant Episcopal Church in the Diocese of Virginia* [hereafter “*The Diocese*”] v. *Truro Church* (No. 2007-1236); *The Diocese v. Church of the Apostles* (No. 2007-1238); *The Diocese v. Church of the Epiphany, Herndon* (No. 2007-1235); *The Diocese v. Christ the Redeemer Church* (No. 2007-1237); *The Diocese v. St. Paul’s Church, Haymarket* (No. CL 2007-5683); *The Diocese v. St. Margaret’s Church* (No. CL 2007-5682); *The Diocese v. Church of the Word* (No. CL 2007-5684); *The Diocese v. Potomac Falls Church* (No. CL 2007-5362); *The Diocese v. Church of Our Saviour at Oatlands* (No. CL 2007-5364); *The Diocese v. The Church at The Falls – The Falls Church* (No. CL 2007-5250); *The Diocese v. St. Stephen’s Church* (No. CL 2007-5902); *The Episcopal Church v. Truro Church et al.*, (No. 2007-1625); *Church of the Apostles v. The Episcopal Church, et al.*, No. CL 2006-15793; *Truro Church v. The Episcopal Church, et al.*, No. CL 2006-15792; *Church of the Epiphany v. The Diocese, et al.*, No. CL 2007-556; *In Re: The Church at the Falls - The Falls Church*, No. CL 2007-5249; *In Re: The Church of our Saviour at Oatlands*, No. CL 2007-5363; *In Re: St. Paul’s Church, Haymarket*, No. CL 2007-5686; *In Re: St. Margaret’s Church*, No. CL 2007-5685; *In Re: St. Stephen’s Church*, No. CL 2007-5903; *In Re: Church of the Word*, Prince William No. CL76197.

**REPLY MEMORANDUM REGARDING  
THE SCOPE OF THE § 57-9 HEARING AND  
THE APPLICATION OF VA. CODE § 57-9 TO THESE CASES**

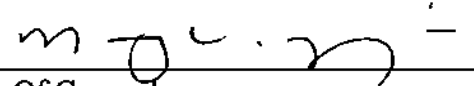
This acts as a one-page cover sheet reference pleading to the complete reply memorandum regarding the scope of the § 57-9 hearing and the application of Va. Code § 57-9 to these cases filed on behalf of the Diocese, which was filed in CL 2007-248724 (the omnibus case file), filed on August 17, 2007. The Diocese’s reply memorandum and this corresponding one-page reference pleading applies to the following cases:

*Omnibus case number: CL 2007 – 248724; The Protestant Episcopal Church in the Diocese of Virginia* [hereafter “*The Diocese*”] v. *Truro Church* (No. 2007-1236); *The Diocese v. Church of the Apostles* (No. 2007-1238); *The Diocese v. Church of the Epiphany, Herndon* (No. 2007-1235); *The Diocese v. Christ the Redeemer Church* (No. 2007-1237); *The Diocese v. St. Paul’s Church, Haymarket* (No. CL 2007-5683); *The Diocese v. St. Margaret’s Church* (No. CL 2007-5682); *The Diocese v. Church of the Word* (No. CL 2007-5684); *The Diocese v. Potomac Falls Church* (No. CL 2007-5362); *The Diocese v. Church of Our Saviour at Oatlands* (No. CL 2007-5364); *The Diocese v. The Church at The Falls – The*

*Falls Church* (No. CL 2007-5250); *The Diocese v. St. Stephen's Church* (No. CL 2007-5902); *The Episcopal Church v. Truro Church et al.*, (No. 2007-1625); *Church of the Apostles v. The Episcopal Church, et al.*, No. CL 2006-15793; *Truro Church v. The Episcopal Church, et al.*, No. CL 2006-15792; *Church of the Epiphany v. The Diocese, et al.*, No. CL 2007-556; *In Re: The Church at the Falls - The Falls Church*, No. CL 2007-5249; *In Re: The Church of our Saviour at Oatlands*, No. CL 2007-5363; *In Re: St. Paul's Church, Haymarket*, No. CL 2007-5686; *In Re: St. Margaret's Church*, No. CL 2007-5685; *In Re: St. Stephen's Church*, No. CL 2007-5903; *In Re: Church of the Word, Prince William* No. CL76197.

For the complete memorandum regarding the scope of the § 57-9 hearing and the application of Va. Code § 57-9 to these cases filed on behalf of the Diocese, please see the omnibus case file, CL 2007 – 248724.

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IN THE DIOCESE OF VIRGINIA

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**CERTIFICATE OF SERVICE**

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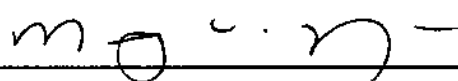
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**VIRGINIA:**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

**IN RE:**

**MULTI-CIRCUIT EPISCOPAL  
CHURCH PROPERTY LITIGATION**

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**REPLY MEMORANDUM FOR THE DIOCESE OF VIRGINIA  
REGARDING THE SCOPE OF THE § 57-9 HEARING  
AND THE APPLICATION OF VA. CODE § 57-9 TO THESE CASES**

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## TABLE OF CONTENTS

Table of Authorities .....	ii
Introduction.....	1
Summary of Argument .....	1
Argument .....	2
A. The Court must apply the rule of constitutional avoidance as a rule of statutory construction. ....	2
B. The petitioner congregations have not shown the occurrence of a “division” within the meaning of § 57-9(A). ....	3
C. The Anglican Communion is not a “church or religious society” within the meaning of Va. Code § 57-9(A). ....	4
D. Petitioner congregations have not joined a “branch” of the church or religious society to which they previously were attached. ....	7
Conclusion .....	9

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Clark v. Martinez</i> , 543 U.S. 371 (2005) .....	3
<i>Harris v. United States</i> , 536 U.S. 545 (2002).....	2
<i>Rust v. Sullivan</i> , 500 U.S. 173 (1991).....	2

### VIRGINIA CASES

<i>Baber v. Caldwell</i> , 207 Va. 694, 152 S.E.2d 23 (1967).....	5, 6
<i>Brooke v. Shacklett</i> , 54 Va. 301 (1856) .....	8, 9
<i>Cangiano v. LSH Building Co.</i> , 271 Va. 171, 623 S.E.2d 889 (2006) .....	8
<i>Eaton v. Davis</i> , 176 Va. 330, 10 S.E.2d 893 (1940).....	2
<i>Norfolk Presbytery v. Bollinger</i> , 214 Va. 500, 201 S.E.2d 752 (1974) .....	5, 6
<i>Reid v. Gholson</i> , 229 Va. 179, 327 S.E.2d 107 (1985).....	8
<i>Virginia Society for Human Life, Inc. v. Caldwell</i> , 256 Va. 151, 500 S.E.2d 814 (1998).....	2

## **INTRODUCTION<sup>1</sup>**

Ignoring the rule of constitutional avoidance, petitioner congregations argue five points in their Memorandum of Law on Scope of Hearing on Congregational Determinations Pursuant to Va. Code § 57-9 (Petitioners' Mem.). Those arguments are (1) that a "division," within the meaning of § 57-9(A), is "a breaking into parts, separation, severance or partition" (Petitioners' Mem. at 6); (2) that a division – of some nature, but not within their own definition as discussed herein – has occurred in the Diocese of Virginia, the Episcopal Church, and the Anglican Communion; (3) that the Anglican Communion is a "church or religious society" within the meaning of § 57-9(A); (4) that they have joined a "branch" of the Diocese and the Episcopal Church, or alternatively a branch of the Anglican Communion; and (5) that they have satisfied the procedural requirements of § 57-9(A).

## **SUMMARY OF ARGUMENT**

(1) Va. Code § 57-9 must be construed in such a manner as to avoid constitutional questions, an essential rule of statutory construction which precludes the construction placed on that statute by the petitioner congregations. (2) The Diocese disagrees with petitioners' definition of the statutory term "division" because it is incomplete. Petitioners ignore the well established principle that only the governing body of a hierarchical church has the power or authority to declare a division of such a church, as discussed in the Diocese's and the Episcopal Church's Memorandum Regarding the Scope of the § 57-9 Hearing and the Application of Va. Code § 57-9 to these Cases (Diocese-Church Mem.). Even the petitioners' own definition does not apply, however, to the "division" that they say has occurred. (3) The Diocese agrees with

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<sup>1</sup> The Diocese and the Episcopal Church have elected to divide their page allocation and file separate Replies.

petitioner congregations that they previously were “attached” to the Diocese and the Episcopal Church, within the meaning of the statute; but as discussed in the Diocese-Church Memorandum, the Anglican Communion is not a “church or religious society” to which a local church can be “attached” as those terms are used in § 57-9(A). (4) Petitioners’ “branch” arguments are simply erroneous, as discussed in the Diocese-Church Memorandum and herein. And finally, (5) the petitioner congregations’ failure to satisfy the substantive requirements of § 57-9(A) renders the issue of procedural compliance moot.

## ARGUMENT

### A. **The Court must apply the rule of constitutional avoidance as a rule of statutory construction.**

Petitioners cite extensive case law supporting the use of various canons of statutory construction, but they overlook the requirement that statutes “be construed in such a manner as to avoid a constitutional question wherever this is possible.” *Virginia Society for Human Life, Inc. v. Caldwell*, 256 Va. 151, 157, 500 S.E.2d 814, 816-17 (1998) (quoting *Eaton v. Davis*, 176 Va. 330, 339, 10 S.E.2d 893, 897 (1940)). “[A] finding of ambiguity is *not* a prerequisite for applying a narrowing construction to preserve a statute’s constitutionality. To the contrary, we may construe the plain language of a statute to have limited application if such a construction will tailor the statute to a constitutional fit.” *Virginia Society for Human Life*, 256 Va. at 157 n.3, 500 S.E.2d at 817 n.3 (emphasis added). This is an essential, fundamental rule of statutory construction, grounded in the doctrine of separation of powers and the principle of judicial restraint. *See, e.g., Harris v. United States*, 536 U.S. 545, 556 (2002) (“the canon’s goal of eliminating friction with our coordinate branch”); *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991). A court cannot ignore this rule when it construes a statute that presents constitutional issues, as petitioners apparently would have this Court do.

Neither the legislative branch of the State, through § 57-9, nor the judicial branch, in these cases, may constitutionally substitute its own rules of church organization and governance for those established by the Church and the Diocese themselves. Similarly, neither the legislature nor the courts may constitutionally divest the Diocese or the Episcopal Church of the trust, contractual or proprietary rights conferred by the laws of the Church. Section 57-9(A) must be construed in a way that avoids either of those results.<sup>2</sup>

**B. The petitioner congregations have not shown the occurrence of a “division” within the meaning of § 57-9(A).**

As noted above, the petitioner congregations define “division” in structural terms – “a breaking into parts, separation, severance or partition.” Petitioners’ Mem. at 6. The Diocese disagrees with that definition, because it is incomplete: it omits the requirement that only the governing body of a hierarchical church can declare a division of that church.

By their own argument, however, the “division” on which the congregations rely does not meet even their definition. They argue instead that *theological or doctrinal disagreements* have divided the Episcopal Church from other parts of the Anglican Communion and that similar disagreements in the Diocese and the Episcopal Church “led to the votes” of petitioner congregations to sever their ties to the Diocese and the Episcopal Church. Petitioners’ Mem. at

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<sup>2</sup> “The canon [of “constitutional avoidance”] is not a method of adjudicating constitutional questions by other means.... Indeed, one of the canon’s chief justifications is that it allows courts to avoid the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.” *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (citations omitted).

15. *See also id.* at 4 (“The division ... has prompted a substantial number of congregations in the United States to disaffiliate from TEC and their dioceses”)<sup>3</sup>

Recognizing that their own unilateral secession cannot constitute a structural “division” of the Diocese or the Episcopal Church itself, petitioner congregations do *not* argue that their separation from the Diocese and the Church is a “division” for purposes of the statute. They refer instead to a series of documents that include the word “division,” and they make the superficial argument, relying on those documents, that the use of that word means there is or was a division within the meaning of § 57-9. Petitioners’ Mem. at 12-15. Yet not one of those documents evidences any *structural* division – no “breaking into parts, separation, severance or partition” – in the Diocese or the Episcopal Church. And there is no allegation to the contrary.

In short, petitioners’ own argument demonstrates that these cases do not involve “divisions” within the meaning of the statute, according to their own definition of that term.<sup>4</sup>

**C. The Anglican Communion is not a “church or religious society” within the meaning of Va. Code § 57-9(A).**

Petitioner congregations admit that the Episcopal Church and the Diocese are a “church or religious society” and that petitioners were “attached” to the Episcopal Church and the Diocese, within the meaning of § 57-9, before they voted to sever those attachments. Petitioners’

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<sup>3</sup> Petitioner congregations also argue, at pages 6-11 of their memorandum, that a division can occur in a hierarchical church, within the meaning of § 57-9(A), without any formal action being taken by the church’s governing body. That issue now appears moot, in view of petitioner congregations’ implicit concession that there has been no “division” that satisfies their own definition of that term. In any event, the issue is addressed in the Diocese-Church Mem. at 7-10 and 14-22 and requires no further discussion here. The Diocese will present evidence relating to the issue at the November 19 hearing, however, if that becomes necessary.

<sup>4</sup> As stated above, petitioner congregations do not argue that their separation from the Diocese and the Episcopal Church is a “division” within the meaning of § 57-9(A). It is not, for reasons stated in the Diocese-Church Mem. at 7-10 and 14-22, and in the Episcopal Church’s separate Reply.

Mem. at 15-16. We agree. They argue further, however, that “the broader Anglican Communion” also is a “church or religious society” (and implicitly, but not explicitly, that they were and are “attached” to “the broader Anglican Communion”) within the meaning of § 57-9(A). That argument is in error.

Applicable law is simple, straightforward and clear. Section 57-9(A) “relates to churches, such as Episcopal and Presbyterian churches, that are subject to control by super-congregational bodies.” *Baber v. Caldwell*, 207 Va. 694, 698, 152 S.E.2d 23, 26-27 (1967). *See also Norfolk Presbytery v. Bollinger*, 214 Va. 500, 502-03, 201 S.E.2d 752, 755 (1974): § 57-9 “recognizes a distinction between an autonomous congregation and one which is part of a super-congregational or hierarchical denomination in providing for the determination of property rights upon a division of a church or congregation.” Subsection A addresses divisions in “super-congregational or hierarchical denomination[s]” and subsection B deals with divisions in autonomous congregations.<sup>5</sup>

There appears to be at least general agreement among the parties regarding the nature of the Anglican Communion. It is a “fellowship” of autonomous or independent national or regional churches (Provinces) whose members share a common faith and participate in four “instruments of unity” or “instruments of communion,” which are described in Petitioners’ Mem. at 16-17 and in the Diocese-Church Mem. at 7 & n.5, none of which has any governing authority over member Provinces. *See* Petitioners’ Mem. at 16 (Lambeth Conference meets every 10 years to “pass resolutions that state the position of the Communion ... and have moral force over

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<sup>5</sup> Petitioner congregations appear to overlook this well-settled law, arguing instead for “plain meaning” interpretations of the words “church” and “religious society,” based on dictionary definitions. Petitioners’ Mem. at 16, 17. Those arguments require no response, beyond the discussion in the text.



members of the Communion”). The Anglican Communion is not a hierarchical church or religious society, as Petitioners appear to concede. *See id.* at 18, stating that § 57-9 “does not use that term” (*i.e.*, “hierarchical”) and arguing that “there is no textual basis for concluding that a ‘church or religious society’ must be ‘hierarchical’ in every respect” – obscuring, of course, the fact that the Anglican Communion is not a hierarchical church or religious society in *any* respect. *See also id.* at 17, arguing that the Anglican Communion is “‘an organization of religious believers’ at the broadest possible level ....”

An organization of religious believers “at the broadest possible level” is *not* a “church or religious society” within the meaning of § 57-9(A), as construed in *Baber and Norfolk Presbytery*. The Anglican Communion may satisfy one of the many dictionary definitions of those terms, but it is not a hierarchical church to which local congregations can be “attached” within the meaning of § 57-9(A).

In *Baber*, the trial court found that the subject church, the Level Green Christian Church, was not entirely independent of any other church or general society. 207 Va. at 696, 152 S.E.2d at 25. The Supreme Court of Virginia reversed, finding that although Level Green was a member of the Virginia Christian Missionary Society, Level Green was autonomous and “[n]o super-congregational body control[led Level Green’s] action.” *Id.* at 697-98, 152 S.E.2d at 26; *see also id.* at 698, 152 S.E.2d at 26 (“Disciples churches in Virginia support the Virginia Christian Missionary Society and send delegates to the Alleghany District Convention. However, each congregation’s support of the Society is voluntary, and no congregation is bound by resolutions passed at the Convention”).

Just like Level Green and the Society, the Diocese and the Episcopal Church are “interrelated with” other Anglican churches “through [the Episcopal Church’s] membership” in

the Anglican Communion. *Id.* at 698, 152 S.E.2d at 27. As petitioners implicitly concede, however, in their argument that the Episcopal Church has chosen to “walk apart” from the Anglican Communion (Petitioners’ Mem. at 13-14), the Anglican Communion is not a hierarchical church or religious society and the Episcopal Church is not bound by decisions of instruments of the Communion or other members of the Communion. By contrast, the Episcopal Church *is* a hierarchical church, to which § 57-9(A) applies and whose Constitution and Canons (along with those of the Diocese) are binding on member churches, such as those in this litigation. Again, therefore, petitioner congregations’ own argument demonstrates that § 57-9(A) is not satisfied.

**D. Petitioner congregations have not joined a “branch” of the church or religious society to which they previously were attached.**

As discussed in the Diocese-Church Mem. at 23, a “branch” of a divided denomination, within the meaning of § 57-9(A), must be *either* a part of the original church or religious society *or* a new organization resulting from a formal division approved by the proper authorities of the church or society. The “Convocation of Anglicans in North America” (CANA) and the “Anglican District of Virginia” (ADV), the entities with which petitioner congregations are now affiliated, are neither; and the argument that “CANA and ADV are offshoots of TEC and the Diocese, respectively, created in response to the division ... that led to this dispute” (Petitioners’ Mem. at 19) is merely semantics.

Assuming *arguendo* that there has been a division, the seceding congregations must “attach” to a branch of the church or religious society from which they seceded for § 57-9(A) to apply. Thus, for petitioners’ argument to hold water, CANA and/or ADV must be a branch of such a church or religious society. Affiliation with the Red Cross, for example, would not suffice. Yet at the hearing on August 10, 2007, counsel for the petitioner congregations stated, in

response to a question from the Court, that “the fact that we reaffiliated with [CANAA]” does not “strengthen, or in any way affect the strength of our claim.” Tr. 81 (attached).

That concession cannot be squared with petitioners’ contention that they have “reaffiliated” with a “branch” of the Diocese, the Episcopal Church or the Anglican Communion within the meaning of § 57-9(A). As the Court stated, in response to that concession, petitioner congregations are “asking [the Court] to treat the Episcopal Church as if it was a congregational church and not a hierarchical church,” Tr. 95 (attached); but at the same time they are seeking the benefits of a statute that applies *only* to branches of a divided hierarchical church. Petitioners cannot have it both ways: “A party may not approbate and reprobate by taking successive positions in the course of litigation that are either inconsistent with each other or mutually contradictory.” *Cangiano v. LSH Bldg. Co.*, 271 Va. 171, 181, 623 S.E.2d 889, 895 (2006).

Indeed, it may fairly be noted that petitioners’ entire argument seeks simply to avoid the distinction between congregational and hierarchical churches. Petitioners’ argument based on *Reid v. Gholson*, 229 Va. 179, 192, 327 S.E.2d 107, 115 (1985), is illustrative. *See* Petitioners’ Mem. at 7. *Reid* involved a governance dispute in a congregational church, and the Court indicated unequivocally that its analysis and decision would have been different if the church had been a member of a hierarchical denomination. *See* 229 Va. at 188-90, 327 S.E.2d at 113. At the page cited in the Petitioners’ Memorandum, it discussed the potential application of § 57-9(B). Petitioners argue, however, that the discussion in *Reid* is illustrative of the type of “division” required for application of § 57-9(A). The congregational-hierarchical church distinction is a fundamental organizing principle in Virginia’s church property statutes, as discussed in the Diocese-Church Memorandum at 17. It cannot properly be disregarded, as petitioners do.

Petitioners' references to the Civil War era Episcopal Church and to *Brooke v. Shacklett*, 54 Va. 301 (1856) (Petitioners' Mem. at 20), do not help their case. The Southern Dioceses met separately during the war, reflecting the regional hostilities, the political view that the Confederacy was a separate and independent nation, and the fact that in Anglican polity church boundaries traditionally follow national borders. After the war they returned to the Episcopal Church in the United States. As far as we can determine, no property litigation resulted from the temporary separation.


The division of the Methodist Episcopal Church, which is discussed in the Diocese-Church Mem. at 14-16, and which gave rise to *Brooke v. Shacklett* and other property litigation, provides a far more relevant context for the understanding of legislation enacted to resolve issues of property ownership and to avoid property litigation in divided churches. The Methodist Episcopal Church divided itself into northern and southern branches and provided for congregations in areas bordering on the line of division to choose by majority votes whether to affiliate with the northern or the southern church. 54 Va. at 321-22. The Supreme Court held in *Brooke* that because "this division of the church was lawful" – meaning that it was effected according to the lawful processes of the church itself – members of local churches "in the southern organization of the church" occupied the same position in that hierarchy as they had in the undivided original organization. *Id.* at 323. Enactment of the statute now found at § 57-9 effectively codified the arrangement ordered by the Methodist Episcopal Church itself in *Brooke*, at least for churches that divide themselves without imposing their own geographical or other lines of division.

## CONCLUSION

For all of the reasons stated in the Diocese-Church Memorandum and this Reply, and for the reasons stated in the Episcopal Church's separate Reply, Va. Code § 57-9(A) does not apply under the circumstances of these consolidated cases.

Respectfully submitted,

THE PROTESTANT EPISCOPAL CHURCH  
IN THE DIOCESE OF VIRGINIA

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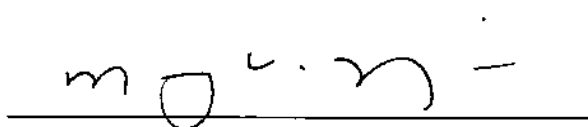
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A handwritten signature in black ink, appearing to read "m d m", is written above a horizontal line.

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

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 IN RE: :  
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 MULTI-CIRCUIT EPISCOPAL : OMNIBUS CASE NO.:  
 :  
 CHURCH PROPERTY LITIGATION : CL2007-0248724  
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Fairfax, Virginia

Friday, August 10, 2007

The above-entitled Matter came on for hearing before The Honorable Randy I. Bellows, Judge in and for the Circuit Court of Fairfax County, Virginia, 4110 Chain Bridge Road, Fairfax, Virginia 22030, in Courtroom 4C, beginning at approximately 2:00 p.m. before Lorraine E. Webb, Verbatim Court Reporter, when were present on behalf of the respective parties:

\* \* \* \* \*



1 maintaining the property. That encourages additional  
2 giving.

3 JUDGE BELLOWS: Well, is there any Virginia  
4 case that you're aware of that has changed the law on  
5 that? I mean, that's been pretty clearly expressed,  
6 implied trusts aren't recognized, and has that changed at  
7 all?

8 MR. JOHNSON: Your Honor, we don't believe it  
9 has. We don't believe it's changed even for express  
10 trusts.

11 JUDGE BELLOWS: Let me move on to another  
12 question that I have.

13 In a hierarchical church situation, in your  
14 view, with your deeds, and the constitution, and I realize  
15 what you've said about the canons, but I have the  
16 following question.

17 In this case, the churches that left did so  
18 with the intent of associating with another -- with the  
19 CANA. But could they have, consistent with what you're  
20 saying, for example, taken the property and donated it to  
21 the Red Cross, or taken the property and convert it to  
22 some profit-making enterprise?

1           MR. JOHNSON: There would be independent legal  
2 limits, Your Honor, on what the congregation could do on  
3 disaffiliation. Obviously, as tax exempt organizations,  
4 you know, any income or property can't be distributed for  
5 the benefit of a private individual. So they couldn't do  
6 that.

7           JUDGE BELLOWS: Could they have donated it to  
8 the Red Cross then?

9           MR. JOHNSON: Possibly. I mean, if I  
10 understand what is behind your question is, does the fact  
11 that we reaffiliated with the Convocation of Anglicans in  
12 North America strengthen, or in any way affect the  
13 strength of our claim, and the answer is no.

14          JUDGE BELLOWS: Well, that's one way to look at  
15 the question, but I'm also trying to understand the -- it  
16 appears to be your view that there is no limitation,  
17 except to the extent that there may be tax consequences or  
18 it may impact your 501(c) status --

19          MR. JOHNSON: No.

20          JUDGE BELLOWS: -- that there's no limitation  
21 on what the individual churches could have done with its  
22 property.

1           MR. JOHNSON: No. That's not correct, Your  
2 Honor. There is a trust here. It's a trust for the  
3 benefit of the local congregation, and so --

4           JUDGE BELLOWS: So what if the local  
5 congregation voted -- it almost seems that you are asking  
6 me to treat the churches here as congregational churches,  
7 not hierarchical churches. I understand that distinction  
8 in the law.

9           What if the churches had a majority vote, and  
10 the majority vote was that we have decided to disband as a  
11 church, because our membership has dwindled to the point  
12 that we no longer can keep this as a church, and we are  
13 going to donate the property to the Red Cross, or we are  
14 going to do something else with the property. And it  
15 appears to me that you're saying that there is nothing  
16 about this being a hierarchical church that limits what  
17 you can do.

18           MR. JOHNSON: Two thoughts, Your Honor. First  
19 of all, non-profit corporations routinely give donations  
20 and property to other non-profit corporations, including  
21 when they dissolve. But second of all, the question of  
22 the congregation's right, vis a vis the hierarchical

1           MR. JOHNSON: But they don't satisfy any of the  
2 requirements of the statute. The statute not only  
3 requires a writing, it says you have to have the parties  
4 on it identified, it has to be signed. You have to have a  
5 certain and definite description of the property. There's  
6 nothing like that here.

7           Even the most expansive cases that they cite  
8 involve the addresses of the property and the names of the  
9 people involved. The equivalent would be, if the canon  
10 said -- stated an interest in The Falls Church's property,  
11 and there's nothing like that here.

12           And so I would emphasize that the Statute of  
13 Frauds issue was not considered in the Green case, or in  
14 Norfolk Presbytery, nor was it considered expressly in  
15 Berman. Now, there was a fairly specific writing, and I  
16 don't know whether that specific writing would have  
17 satisfied the Statute of Frauds, but at least there was a  
18 specific writing.

19           So essentially, the rationale behind the  
20 Statute of Frauds, which is that we don't lightly infer  
21 this transfer of property, applies fully here.

22           JUDGE BELLOWS: Let me go back to the question

1 I asked you a while ago, because I don't think that I got  
2 an answer that -- at least not an answer that I understand  
3 at this point.

4 If the Truro Church had decided that it wanted  
5 to disband and give its property to the Red Cross, and  
6 took a vote of its members, and the membership, by a  
7 majority, voted to do that, in your opinion, could they  
8 have done that?

9 MR. JOHNSON: It seems to me that inasmuch as  
10 the deeds giving property, creating a trust for the  
11 benefit of the religious congregation known as Truro  
12 Church, that there would be serious questions under the  
13 deed whether you could become a completely different type  
14 of a religious organization, whether that would do  
15 violence to that express --

16 JUDGE BELLOWS: Well, why do you answer that  
17 question by just looking at the deed? What about the  
18 constitution and the -- I understand your argument on the  
19 canons, and your argument on the canons is I should not  
20 consider the canons. That's your first argument.

21 But let's say I disagree with that, and I can  
22 tell you I disagree with that, so to the extent that that

1 helps you understand that, because I do not believe I  
2 should not disregard the canons -- when you look at the  
3 canons and you look at the constitution, why is that not  
4 relevant in deciding whether -- I mean, the reason I'm  
5 raising this issue, because -- and in some respects it  
6 goes to the heart of the dispute between the parties -- is  
7 it appears to me the position of the departing churches,  
8 that they are, consistent with their deed, free to do  
9 whatever they -- and consistent with any kind of tax  
10 issues dealing with non-profit organizations -- free to  
11 dispose of the property as they wish.

12           You said the fact that they reaffiliated with  
13 the CANA churches is of no significance in the resolution  
14 of this issue, and perhaps that's true. It is certainly  
15 consistent with what you're saying, but it appears to me  
16 that you're asking me to treat the Episcopal Church as if  
17 it was a congregational church and not a hierarchical  
18 church, subject to the hierarchy of the church.

19           MR. JOHNSON: Let me try to answer the question  
20 this way, Your Honor. Not all aspects of the governance  
21 of a hierarchical church are the same, and get the same  
22 type of deference in the courts. They get deference on

CERTIFICATE OF REPORTER

I, Lorraine E. Webb, the Verbatim Court Reporter, do hereby certify that the transcript in the foregoing proceedings is true and accurate, to the best of my knowledge and belief; that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

Lorraine E. Webb