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

OPPOSITION BRIEF FOR THE EPISCOPAL CHURCH AND THE DIOCESE

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INTRODUCTION

The Congregations introduce their opening brief in the same manner as their opening statement in November: with the unsupported and erroneous claim that Virginia has "a long history of deferring to local control of congregational property." Congregations' Opening Post-Trial Memorandum ("Cong. Mem.") at 1. In fact, Virginia has a long history of dedication to the principle of religious freedom, and an inextricable element of religious freedom is a hierarchical church's freedom to organize and govern itself as it sees fit. *See Reid v. Gholson*, 229 Va. 179, 187, 327 S.E.2d 107, 111-12 (1985) ("The constitutional guarantees of religious freedom have no deeper roots than in Virginia, where they originated, and nowhere have they been more scrupulously observed") (footnotes omitted); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 721-22 (1976), quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) ("religious freedom encompasses the 'power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine'") (bracketed text in original). *See also* Post-Trial Opening Brief for the Episcopal Church and the Diocese ("TEC-Diocese Brief") at 13-15, 40-42.[1] Virginia does *not* have a history of deferring to local control of congregational property where the congregation involved is a constituent part of a hierarchical church. Virginia's history in that regard is quite the opposite. *See* TEC-Diocese Brief at 6-13.

In their effort to recast § 57-9 as a radical statute that should be read as a sweeping override of the polity and rules of hierarchical churches, the Congregations essentially ignore applicable Virginia church property law. Tellingly, in 60 pages of briefing they cite only one Virginia church property case (*see* Cong. Mem. at 28) – and they misconstrue the one case that

[1] Citations to the TEC-Diocese Brief are to the Corrected Brief filed January 8, 2008.

they do briefly mention, *Reid v. Gholson*, 229 Va. 179, 327 S.E.2d 107 (1985). *Reid* actually supports the positions of the Diocese and the Episcopal Church. *See* § I.G, *infra*.

The Congregations rely primarily on the argument that the term "division" was sometimes used in common parlance to refer to the secession of small numbers of people from a larger religious denomination. Even if that is true, it cannot bear the weight they place on it. The ordinary meaning of a term is one consideration when approaching a task of statutory interpretation, but it is not the only consideration – particularly where, as here, the term has no consistent meaning in "common parlance."

The Congregations also rely heavily on dictionary definitions of statutory terms. (Indeed, they cite more dictionaries than cases.) As Judge Learned Hand once observed, however, "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945).

As discussed in our Opening Brief and below, the evidence, the historical and legal context, and applicable tools of statutory construction all confirm that in the context of this statute, a "division" refers to a structural division of an existing denomination in accordance with that denomination's rules and polity, such that the legal rights and obligations held by the formerly undivided body may have transferred to two or more legal successors.

The Congregations also say that the 1867 General Assembly "passed the statute now codified at Va. Code § 57-9(A)." Cong. Mem. at 1. In fact, the 1867 General Assembly passed the statute that is now § 57-9(A) *and* § 57-9(B). If the Congregations' interpretation were correct, there would be *no need* for *separate* provisions. The statute reflects a legislative policy

of recognizing the property rights of hierarchical denominations, and it has always done so.

In sum, the evidence at trial demonstrates that the Congregations have not satisfied § 57-9(A). They approach the target by three different, alternative routes – via the Diocese, the Episcopal Church, and the Anglican Communion – and all fail.

I. The Congregations have not shown a "division" in the Episcopal Church or the Diocese.

The Congregations ague that they have shown a "division" in the Episcopal Church and the Diocese for purposes of § 57-9(A) based on a supposed "common understanding" of that term as the unilateral separation of a small number of individuals from an existing denomination. As shown in our opening brief and discussed below, however, the evidence demonstrates that there is no such "common understanding," and much of the evidence to which the Congregations point actually uses the term in ways that do not fit their proposed definition.

The Congregations attack the Church's and the Diocese's position by arguing that the major denominational divisions that preceded the adoption of § 57-9 were accomplished through unapproved, unilateral separations. The Congregations further argue that the Church's and the Diocese's interpretation of the word "division" is somehow precluded by the word "occurred"; would render the statute useless; is contrary to what the 1867 Virginia General Assembly would have wanted and with past applications of § 57-9; and is in some way inconsistent with the Virginia Supreme Court's discussion in *Reid v. Gholson* of a "division" in a *congregational* church under § 57-9(B). As we show below, all of those efforts fail.

A. The evidence does not establish a single, commonly understood, meaning of "division."

The Congregations' case rests upon their "common understanding of the term 'division,'" which, they contend, was sometimes used to refer to the separation of a few individuals from an existing denomination and the formation of a new, competing polity. *See* Cong. Mem. at 2-3.

The term "division" is sometimes used loosely in that way; but if the Congregations hoped to establish that that was "the" meaning of the term in "common understanding," they failed.

1. <u>The evidence demonstrates that "division" is ambiguous.</u>

The Congregations' expert witnesses testified that "division" can mean many different things, depending on the context. *See* TEC-Diocese Brief at 15-16. The Congregations' own evidence thus demonstrates only that the word "division" is ambiguous. *E.g.*, *Gillespie v. Commonwealth*, 272 Va. 753, 758, 636 S.E.2d 430, 432 (2006), *citing Brown v. Lukhard*, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985) ("Language is ambiguous if it admits of being understood in more than one way, refers to two or more things simultaneously, is difficult to comprehend, is of doubtful import, or lacks clearness and definiteness.").

2. The Congregations' arguments regarding the use of "division" <u>by the Episcopal Church are both wrong and beside the point.</u>

The Congregations argue that the Episcopal Church must view all separations, of even a few individuals, as a "division" of the church from whence they came because a dictionary published by Church Publishing, Inc. defines "*schism*" (which would include such separations) as a "rip, tear, split, or division" and "a formal and willful separation from the unity of the church." Cong. Mem. at 11-12. That is nonsense. One could just as logically insist that "schism" and "rip" have precisely the same meaning As Dr. Mullin explained, in contrast to a structural "division," which in the case of a hierarchical church typically requires an action of that church's highest judicatory, a "schism" is accomplished through "a voluntary action by individuals." Tr. 1116. The above dictionary definition supports that distinction, detailing (in the case of a "schism") a "willful *separation from* the unity of the church."[2] (Emphasis added.)

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[2] Dr. Valeri's testimony that a "division" and a "schism" are accomplished in similar ways merely assumes his definition of the term "division." A structural separation of a hierarchical

(footnote continued ...)

Thus, although a "division" is one kind of event that may be described as a schism, other events would also qualify. It is not always necessary to distinguish carefully between a "division" and a "schism," but that does not mean that there is no distinction. When interpreting a specific term in a statute purporting to affect legal rights to property, accuracy and precision are needed.

The Congregations also argue that a former Bishop of the Episcopal Diocese of Minnesota in 1874, and the Episcopal Church in 1988, referred to the formation of the Reformed Episcopal Church as a "division." Cong. Mem. at 10-11; *see* Cong. Exs. 6, 51. Even if true, this would only confirm the ambiguity of the term as described by the Congregations' own experts. *See supra* § I(A)(1). As Dr. Mullin explained, however, neither document used that term – even loosely – to refer to a structural division in the Episcopal Church. Instead, the references highlighted by the Congregations use the word "division" to refer to "a division of the Unified Christian Church – or of that one universal church," in the same way that "one will say that there are divisions in the Christian community, Lutherans and Episcopalians are part of this division, but there was never a time when Lutherans and Episcopalians divided from each other. They're just simply offshoots from a unified church in the ancient world." Tr. 1077-78 (referring specifically to 1988 document, Cong. Ex. 6). *See also* Tr. 1084 ("My sense here is that [the reference to "unhappy division" in the 1874 document, Cong. Ex. 51] is being used as a division within the larger universal church, not a formal division of the Episcopal Church").

The 1874 document did use the term "division" to refer to a structural division in the Episcopal Church; that reference, however, was to a division of one of the Church's dioceses pursuant to its own rules and polity. *See* Tr. 167-68; Cong. Ex. 51. The Congregations' experts

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(footnote continued:)
church into two parts is not the same thing as a schism, which requires only the departure of a few individuals who independently form a new church.

ignore that use of the term. Tr. 166-68.

Dr. Valeri proffered a different view regarding the Episcopal Church's own view of the Reformed Episcopal Church in the 19th and 20th Centuries, but his opinions cannot be credited. Dr. Valeri's specialty is American church history in the 17th and 18th Centuries, not the 19th or 20th. Tr. 124; Congregations' Ex. 168 at 2-3. More important, Dr. Valeri knows little or nothing about the Episcopal Church, or its polity or history, as demonstrated by his lack of knowledge on numerous basic points. For example, he testified that the Church's General Convention elects bishops. Tr. 121-22. Episcopal bishops actually are elected "[b]y the Diocese that's searching for a Bishop." Tr. 347 (Minns). *See also* Tr. 1202 (Lee). Dr. Valeri lacks knowledge of the role of a Standing Committee – a key Episcopal governing body, *see* Tr. 1197 (Lee); TEC/Diocese Ex. 3 at 10-11 (Art. XV), 27 (Canons 14 & 15.2), 31-32 (Canon 21) – or even the name of the Diocese's Annual Council. Tr. 121-22. And he testified that the Diocese of Virginia was divided into the Dioceses of Eastern Virginia and Western Virginia after the Civil War, Tr. 113-14, 122-23, but there have never been any such entities. *See* Congregations' Ex. 171 at 3-4.[3]

Drs. Douglas and Mullin, on the other hand, possess undeniable expertise in the Episcopal Church and its history and polity. Tr. 830-38, 1024-28; TEC/Diocese Exs. 39, 41.

3. The Congregations' arguments regarding the use of "division" by the Diocese are similarly misguided.

The Congregations similarly point to the appearance of the word "division" in various

[3] Dr. Irons similarly is not an Episcopalian, a member of the clergy, a theologian, a canon lawyer, or an expert on Episcopal polity. Tr. 246-47. He testified erroneously, and at length, regarding the Episcopal Church's experience during the Civil War. Indeed the very documents that he purported to rely on contradicted his conclusions. *See* Tr. 208-11, 251-54, 260-61. He is a friend of the Yates family and had never heard of § 57-9 until he received the call from the Rev. John Yates of The Falls Church that led to his engagement in this case. Tr. 248-49. Dr. Irons' knowledge of religious history drops off markedly in the 1870s, and in fact he graduated from college only 11 years ago and received his Ph.D four and a half years ago. Tr. 247.

Diocesan documents, citing uses of the word in one sense as proof of something entirely different. At pages 45-46, for example, they point to the January 2005 report of the Diocese's "Reconciliation Commission," which contains "seven references to the 'division' in the Diocese" – ten months *before* the first congregation (South Riding Church, which is not a party to this case) left the Diocese. *See* TEC-Diocese Brief at 24 & n.12. In exactly the same way, the Congregations advance a misinterpretation of a resolution of the Diocese's Annual Council in January 2005, also before the Congregations' own definition of division was satisfied with respect to the Diocese. *See id.*; Cong. Mem. at 46; Congregations' Ex. 148 at 278-79. The Congregations' interpretation of the later Special Committee report also is inconsistent with the document and unpersuasive. *See* TEC-Diocese Brief at 24 & n.13.

4. Conclusion

The evidence establishes beyond question that the term "division" has many different meanings in common parlance, and the Congregations themselves are in fact proposing a definition that excludes some such meanings while including others. This case therefore could not be resolved on the basis of "common parlance," even if it were appropriate to focus on that one tool of statutory construction to the exclusion of all others.

B. "Common parlance" forms only part of the picture.

The Congregations argue that statutory terms take on "the popular, or received import of words" as used "'[a]t the time of enactment of the statute.'" Cong. Mem. at 4-5 (citations omitted). That is only part of the story, at best. Among other things, an "important principle of statutory construction is that 'words in a statute are to be construed according to their ordinary meaning, *given the context in which they are used.*' The context may be examined by considering the *other language used in the statute and the language of other statutes dealing*

with closely related subjects." *City of Virginia Beach v. Bd. of Supervisors*, 246 Va. 233, 236-37, 435 S.E.2d 382, 384 (1993) (emphases added, citations omitted). If the words of a statute are not sufficiently explicit,

> we may determine legislative intent "from the occasion and necessity of the statute being passed [or amended]; from a comparison of its several parts and of other acts *in pari materia*; and sometimes from extraneous circumstances which may throw light on the subject."

Yamaha Motor Corp. v. Quillian, 264 Va. 656, 665, 571 S.E.2d 122, 126 (2002) (citations omitted; bracketed text in original). Thus,

> a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. It is, therefore, an established rule of law that all acts *in pari materia* are to be taken together, as if they were one law; and they are directed to be compared in the construction of statutes, because they are considered as framed under one system, and having one object in view.

Tobacco Growers' Co-op. Ass'n v. Danville Warehouse Co., 144 Va. 456, 466, 132 S.E. 482, 485 (1926), quoting *Fox's Adm'rs. v. Commonwealth*, 57 Va. (16 Gratt.) 10 (1860). The Supreme Court of Virginia has repeatedly followed this principle in interpreting Title 57, citing § 57-9 to aid in the interpretation and application of § 57-15. *See Green v. Lewis*, 221 Va. 547, 553, 272 S.E.2d 181, 184 (1980); *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 502, 201 S.E.2d 752, 755 (1974). The Congregations ignore this, focusing exclusively on § 57-9.

In addition, courts must "assume legislative familiarity with Virginia case law when the legislature enacts a statute which might impact upon that law," *Dodson v. Potomac Mack Sales & Service, Inc.*, 241 Va. 89, 94, 400 S.E.2d 178, 180 (1991). The Court therefore must assume that the legislators in 1867 were familiar with *Brooke v. Shacklett*, 54 Va. (13 Gratt.) 301 (1856); and it must "apply the established principle that a statutory provision will not be held to change the common law unless the legislative intent to do so is *plainly manifested*," *Herndon v. St. Mary's Hospital, Inc.*, 266 Va. 472, 476, 587 S.E.2d 567, 569 (2003) (emphasis added). A

"statute must therefore be read along with the provisions of the common law, and the latter will be read into the statute unless it clearly appears from express language or by necessary implication that the purpose of the statute was to change the common law." *Wicks v. City of Charlottesville*, 215 Va. 274, 276, 208 S.E.2d 752, 755 (1974), *appeal dismissed*, 421 U.S. 901 (1975). And "[a] statutory change in the common law is limited to that which is expressly stated or necessarily implied because the presumption is that no change was intended." *Boyd v. Commonwealth*, 236 Va. 346, 349, 374 S.E.2d 301, 302 (1988). The common law applied in *Brooke* supports the interpretation of § 57-9 advanced by the Church and the Diocese; and § 57-9 manifests no intent to change that principle, much less a plain manifestation of such an intent.

Finally, the principle of constitutional avoidance dictates that statutes be interpreted to avoid potential constitutional issues whenever possible. "[W]hen the constitutionality of a statute is challenged, we are guided by the principle that all acts of the General Assembly are presumed to be constitutional.... Therefore, 'a statute will be construed in such a manner as to avoid a constitutional question wherever this is possible.'" *Yamaha Motor Corp.*, 264 Va. at 665; 571 S.E.2d at 126-27. Constitutional avoidance compels the Church and the Diocese's interpretation of § 57-9. *See* TEC-Diocese Brief at 13-15, 40-53.

In short, conventional tools of statutory construction, including the historical and legal context that must inform the interpretation of § 57-9, show that "division" cannot be interpreted as the Congregations would like.

C. The denominational divisions that prompted § 57-9, and to which the statute has been applied, were consistent with the Church's and the Diocese's definition.

The Congregations devote much space to arguing that the various religious separations or divisions of the 19th Century were not "consensual" or "amicable." That is a red herring. The question is not whether a separation must take place "entirely in peace, harmony, and good

feelings" (Tr. 88) for it to constitute a legally cognizable "division." Nor is the question whether a "division" must take place pursuant to an agreed-upon plan, nor even whether a "division" must be approved in advance. The question is whether a "division" affecting property rights must be a structural separation of an existing denomination into two or more new bodies accomplished in accordance with its rules and polity, or whether § 57-9(A) overrides the polity and rules of hierarchical churches and vests control solely in congregational majorities. In that regard, the evidence (and the law) is undisputed: The 19th Century did indeed see several major, denominational divisions, accomplished in accordance with each denomination's own rules and polity, and those were the events that prompted the adoption of § 57-9.

1. The evidence shows that the major divisions of the 1800's were consistent with the polities of the churches in question.

Both the Congregations' and the Church's and Diocese's experts testified that various sources described the great 19th Century splits in the Methodist, Presbyterian, and Baptist denominations as "divisions." The evidence was that all of those divisions were consistent with the rules and polities of the churches in question, however, and the Congregations' experts did not testify to the contrary.[4]

The Congregations point out that their expert witnesses, Drs. Valeri and Irons, testified that there were no consensual church divisions in the 19th Century. Cong. Mem. at 15. That shows only that the Congregations' experts do not have a good understanding of their subject matter. There is no room for doubt that the division of the Methodist Episcopal Church in the

[4] The departure of individuals to establish a new denomination is not itself contrary to the polity or rules of the Episcopal Church (or presumably any other denomination), of course. Individuals are always free to worship as they choose. The violation would come only if the civil courts treated such unilateral departures as a "division" of the Church itself, justifying a deprivation of the Church's property or other legal rights.

1840s was effected pursuant to a formal plan of separation enacted by its 1844 General Conference. That is true as a matter of law. *Smith v. Swormstedt*, 57 U.S. 288, 301-02, 304-09 (1854); *Brooke*, 54 Va. at 324-25; *see* Tr. 1049-54 (Mullin); TEC-Diocese Brief at 16 n.6. The Congregations continue to claim (citing Dr. Irons) that the plan of separation lacked a necessary ratification. Dr. Irons was wrong, as Dr. Mullin explained, Tr. 1050-54, and as the Supreme Courts of Virginia and the United States have held.

Unlike the Methodists, the great divisions in the Presbyterian Church did not take place pursuant to a plan agreed upon in advance. The evidence nevertheless showed that each of those divisions was either initiated or confirmed by the governing body of the denomination and took place in a manner consistent with denominational polity. In 1837, the Presbyterian General Assembly voted to exclude several of its Synods and Presbyteries (which then organized the New School), creating a "division" that severed significant portions of its own territory and altered the General Assembly's composition. Tr. 1055-56 (Mullin); *see also* Tr. 159 (Valeri).

In the cases of the two later Presbyterian divisions between North and South, the 1857-59 New School division and the 1861 Old School division, several presbyteries first withdrew, *as they had the right and authority to do under Presbyterian polity*. Tr. 1056-58 (Mullin); *see also* Tr. 145 (Valeri).[5] The respective General Assemblies then struck those presbyteries from their rolls, as the 1837 Assembly had done, again significantly altering the governing bodies and compositions of the original denominations. Tr. 1056-58 (Mullin); *see also* Tr. 162-64 (Valeri) (the New School General Assembly "recognized that [the departure] existed," but he cannot recall the language used; and the Old School General Assembly "recognized that the division

[5] Under the Constitution and Canons of the Episcopal Church, on the other hand, Episcopal parishes and missions have no similar right to secede. Tr. 1232-33 (Beers).

existed").[6] The Congregations make much of the fact that the Old School General Assembly initially protested the departing presbyteries' actions and did not immediately act to confirm the division. The Old School General Assembly's hesitation may have created a period of uncertainty, but any uncertainty ended when it acted decisively to strike those presbyteries from it rolls and confirm the division of that church.[7]

Misrepresenting selected portions of Dr. Mullin's testimony on cross-examination, the Congregations claim that Dr. Mullin in some way conceded that one or more of the great divisions was not properly acknowledged or affirmed by the applicable denomination. Cong. Mem. at 16-20. He did no such thing. As the above discussion and citations show, Dr. Mullin testified at length regarding each of the great denominational divisions of the 19th Century and the manner in which each was effected by and in accordance with the rules of the applicable denomination. His testimony on cross-examination was entirely consistent with those facts.[8]

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[6] In 1845, the Baptist Board of Foreign Missions also divided into two or more separate bodies. As the Baptists are a congregational denomination, that "division" was properly effected by the congregations themselves, in accordance with Baptist polity. Tr. 1048, 1059 (Mullin); *see also* Tr. 204-05 (Irons) (the Baptists present "a much more confusing picture," and their "emphasis on congregational authority leads them to regard super congregational affiliations more lightly").

[7] This Court need not determine the rights of Virginia Presbyterians in the interim and lacks a record to do so.

[8] The Congregations point to Dr. Mullin's (1) acknowledgment that the Presbyterian Church had not adopted a "plan of separation" (and that thus none was "in play" in the 1850s or 1860s), Cong. Mem. at 17; Tr. 1154-55; (2) testimony that the Old School General Assembly initially objected to the departure of its Southern presbyteries in the 1860s, and did not affirm a division until 1867, Cong. Mem. at 17; Tr. 1155-58; and (3) confirmation that in some respects, the Methodists' plan of separation "broke down" after it was adopted in 1844. Cong. Mem. at 18; Tr. 1158. None of that is remotely inconsistent with Dr. Mullin's testimony (on direct) that the division of the Presbyterian Church into the Old School and New School was accomplished in 1837 when the General Convention voted to exclude four synods, Tr. 1055; that the Old (and New) School General Assemblies acted officially to remove their southern synods (Tr. 1058, 1157), similarly effecting divisions under Presbyterian polity; and that (as the Supreme Courts of the United States and Virginia also recognized in *Smith v. Swormstedt* and *Brooke v. Shacklett*),

(footnote continued ...)

In sum, it is not surprising that the major church divisions of the 19th Century were not pleasant or amicable. The evidence nevertheless shows that those divisions were accomplished pursuant to official actions by church governing bodies or otherwise were consistent with denominational polities. Nothing of that nature has occurred in the Episcopal Church.

2. The purported 1861 "division" of the Baltimore Conference does not aid the Congregations' case.

In a final effort to obscure the consistent pattern of properly-effected structural divisions of the nation's major religious denominations leading to the adoption of § 57-9, the Congregations point to a purported "division" of the Baltimore Conference of the Methodist Episcopal Church in 1861. *See* Cong. Mem. at 18-20. That Conference, they note, elected (pursuant to the plan of separation) to remain part of the Methodist Episcopal Church (North), and no later "division" of the Conference was authorized or contemplated by the 1844 plan of separation. The Congregations ignore a critical point: the underlying dispute over slavery in the Baltimore Conference was a continuation of the same dispute that had led to the 1844 division of the denomination, and after the Civil War the congregations involved were simply attempting to change their original election under the Plan and switch to the other "branch" created in 1844: the Methodist Episcopal Church South. As Dr. Irons reluctantly admitted, the Baltimore Conference did not divide into new "branches" in or after 1861, Tr. 280-81, and the events of 1861 therefore do not qualify as a "division" according to his definition.

The 1861 events in the Baltimore Conference of the Methodist Episcopal Church therefore cannot be (and were not) separated from the 1844 division of that Church, insofar as

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(footnote continued:)
the Methodist division was validly accomplished in 1844 pursuant to the General Conference's plan, notwithstanding the northern conferences' later change of heart. Tr. 1050-54.

they relate to the adoption or application of § 57-9. To the extent that the statute may have been utilized shortly after its adoption by congregations in that Conference, its requirements were satisfied by the "division" and the "branches" that had been created in 1844, in accordance with the Methodist Church's own rules and polity.

To the extent that the Baltimore Conference congregations' actions in the 1860s violated Methodist polity, moreover, it is far from clear that they would have been accepted under § 57-9. The few trial court petitions that the Congregations located were *ex parte* and unopposed.[9] In the only reported decision that can be located involving a Baltimore Conference congregation (*Hoskinson v. Pusey*, 73 Va. 428 (1879)), on the other hand, the majority of the local congregation was *not* permitted to retain congregational property after disaffiliating from the Methodist Episcopal Church and affiliating with the Methodist Episcopal Church South – precisely because, as the Court acknowledged, the congregation had no right under the 1844 plan of separation to make that belated election. *Id.* at 432-39.[10]

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[9] The Congregations claim that some petitions "were objected to by the dissenting factions in the congregation" and refer to a "hotly contested Augusta County dispute." Cong. Mem. at 27, citing Tr. 241, 230, 221-23, 241. None of the cited testimony, nor any other evidence in the record, shows that any petition was opposed by a "dissenting faction." The only testimony might *possibly* support such an inference is a reference to "the response of the congregation" in Dr. Irons' description of a newspaper article, Tr. 223-24; but that does not demonstrate that the congregation's "response," *id.*, was to any "objection of the dissenters," Cong. Mem. at 27. The record shows that in one of the Augusta County cases, "somebody other than the congregation wanted to come in and participate," Tr. 268, and to challenge the constitutionality of the statute. Tr. 266. Those intervenors were excluded and the constitutional issues were not decided. Tr. 268-70. The Augusta court nevertheless recognized that the constitutional issues were "of grave importance and general interest involving ... principles much cherished by our people." Tr. 269.

[10] *Hoskinson* arose from disputes in two Loudoun County churches between factions adhering to the Methodist Episcopal Church (the minorities of the congregations) and the Methodist Episcopal Church South. The Court rejected the majority faction's arguments based on the 1867 Act that is now § 57-9, on the ground "that it does not appear by the record that the provisions of the statute have been fully complied with," *id.* at 439. It then went on to point out, *sua sponte*, that the argument raised important constitutional questions: "If ... the provisions of the statute

(footnote continued ...)

3. The great divisions described above were the impetus for § 57-9.

As noted above, the historical experts all agreed that the great 19th Century divisions in the Methodist, Presbyterian, and Baptist denominations were referred to as "divisions." The Congregations' experts claimed that "division" was "most commonly" used to refer to unauthorized separations from existing denominations, but they failed to produce a single documentary example. To the contrary, the evidence cited by both of the Congregations' experts used that term solely in describing the three great denominational divisions. Tr. 1063-64; *see* TEC-Diocese Brief § I(B)(3).[11]

Neither of the Congregations' experts claimed, moreover, that any smaller separations were referred to as "divisions" usually, commonly, or regardless of the context. Nor did the Congregations' experts deny that there is a difference in the way the great divisions of the 19th Century were (and are) perceived and commonly discussed, as compared to the smaller schisms or separations which would also qualify as "divisions" under their view.

Dr. Mullin, on the other hand, testified explicitly that such a distinction did and does exist. Tr. 1046-47, 1062-63, 1160-62. He engaged in a broad examination of "contemporary literature," finding that there was a distinction made at the time between those great divisions and mere separations that led to new denominations, which were generally (although not always)

(footnote continued:)
had been complied with ... the question would have been presented, whether the act does not encroach upon vested rights in putting it in the power of a majority of the members of the congregation to shift the title and use of the property without the consent and against the will of the minority .... *These are questions of interest and great practical importance.* It is not necessary, however, to decide them in this case ...." *Id.* at 440 (emphasis added). *Cf.* note 9, *supra.*

[11] Indeed, Dr. Valeri's and Dr. Irons' opinions regarding the "most common" use of the term "division" may properly reflect only apparent (and unsurprising) findings that the term was used "most commonly" to refer to the great denominational divisions, which they erroneously characterize as being "unauthorized."

described in other terms. Tr. 1100; *see also* Tr. 1159-62 (describing the breadth of Dr. Mullin's research into both primary and secondary materials of the time and his findings as to how the word "division" was used).[12] More important, Dr. Mullin testified that the societal interest and concern generated by the great denominational divisions cannot be compared to the flowering of smaller denominations earlier in the 18th and 19th Centuries, and that the great divisions were the ones that prompted the adoption of § 57-9. Tr. 1060-63. There was no evidence to the contrary. Indeed, as just shown, the Congregations' evidence was in accord.

D. Use of the word "occurred" does not help the Congregations' case.

The Congregations attempt to bolster their case with the dictionary's definition of "occur" (as meaning "happen"), which also appears in the statute. Cong. Mem. at 14. The meaning of the word "occur" is not an issue in this case, and that verb does not help to define the ambiguous noun ("division") that precedes it. As just discussed, several true denominational "divisions" *had* "occurred" in the years before § 57-9 was enacted, and they triggered the adoption of the statute. The word "occurred" provides no basis for broadening the term "division" as the Congregations propose. To the contrary, it confirms the term should be interpreted in accordance with the historic events that preceded the statute.

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[12] The Congregations attempt to marginalize Dr. Mullin's testimony as "a technical historians' view" and repeatedly claim that Dr. Mullin lacks knowledge about the use of the term "division" in common parlance. Cong. Mem. at 23. That distorts the experts' testimony. The Congregations' experts similarly testified – and demonstrated with substantial documentary evidence – that the great divisions were in fact commonly referred to as such. Dr. Mullin's testimony was simply that other church separations, on the whole, were discussed in different terms. *E.g.*, Tr. 1062-63. That is not "technical," but an assertion of historic fact that the Congregations' experts did not contradict. Moreover, Dr. Mullin formed his opinion using the same methodology as Dr. Valeri. *See* Tr. 1159-62 (describing Dr. Mullin's research into primary and secondary materials and his expert opinions as to how the word "division" was used); Tr. 125 (Dr. Valeri read the "contemporary historical literature" describing "the various incidents, *which I call divisions*") (emphasis added).

E. The Church's and the Diocese's definition does not render the statute "useless."

The Congregations argue at pages 29-30 that the Episcopal Church's and the Diocese's definition of "division" would render § 57-9(A) useless. That is inaccurate. Section 57-9(A) created an orderly procedure for clarifying the duties of trustees and the status of property in the event of a structural division in a hierarchical denomination that might legitimately alter the trustees' and the denomination's respective legal rights and obligations.[13] As the Congregations' own evidence shows, the statute was used shortly after its adoption in a number of unopposed, *ex parte* proceedings – in exactly that circumstance. There is no evidence that it has ever been used in any other. The statute obviously is not "useless" simply because it does not apply to every instance in which a few people or congregations decide they would like to leave a hierarchical denomination. Its purpose is simply narrower – and far less problematic – than that.

Nor is it necessary that the statute be applied to vest control of property in congregational majorities in every case of a true denominational division – for example past divisions of the Diocese of Virginia in accordance with the Episcopal Church's procedures and rules. The statute nevertheless had (and has) a purpose, as its past usage demonstrates. When a division is accomplished in accordance with the rules and polity of a hierarchical denomination, § 57-9(A) can apply. The 19th Century divisions of the Methodist and Presbyterian denominations are

[13] The Congregations describe the statute as though its principal (if not sole) purpose was to confer "voting rights." Cong. Mem. at 5, 14. There is no evidence to support that description. The original statute suggests that it was actually intended to create a procedure for clarifying duties of church trustees: what is now § 57-9 was enacted (by 1866-67 Va. Acts 649 (Ch. 210)) as an amendment to Chapter 77, § 9 of the Code of 1860, which provided for the appointment of trustees (now found at § 57-8).

illustrative. Under similar circumstances, the statute could be applied today.[14]

F. Reconstruction era history does not advance the Congregations' case.

The Congregations argue that it is "fanciful" to suggest 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 highest authorities of the denominations." Cong. Mem. at 28. There is no evidence to support their suggestion that the General Assembly in 1867 harbored secessionist animus or wanted to enable secession by religious groups, or that Virginia's acting governing bodies were moving toward resistance and defiance rather than reconciliation. Indeed, other contemporaneous legislative acts expressly state the opposite sentiment. In a resolution adopted February 6, 1866, for example, the General Assembly stated "[t]hat the people of this commonwealth, and their representatives .... accept the result of the late contest, and do not desire to renew what has been so conclusively determined; nor do we mean to permit any one, subject to our control, to attempt its renewal, or to violate any of our obligations to the United States government." 1865-66 Va. Acts at 449 (page mis-numbered 57), Joint Resolution No. 1. It would be "fanciful" indeed for the Court to rely on the Congregations' unsupported and inaccurate speculations regarding the "pre-Reconstruction General Assembly."[15]

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[14] The statute also could apply to divisions in the Episcopal Church, if its duly constituted authorities – the General Convention – amended its governing documents and organized it differently, as General Convention has the authority to do. Tr. 896-97 (Douglas), 1223 (Beers).

[15] The Congregations' evidence is that Col. John Baldwin, the Speaker of the House of Delegates, represented one or more congregations that had decided to separate from one of the Methodist or Presbyterian denominations, and that he obtained the passage of what is now § 57-9. Tr. 221, 223. That, combined with Dr. Mullin's testimony that these great divisions prompted the adoption of the statute, is all that the record of this case shows with respect to the motivation for the enactment of what is now § 57-9.

G. The Congregations' sole, cursory mention of church property law is misleading.

The Congregations offer their only allusion to church property law at pages 28-29 of their Memorandum, and it is misguided. They rely on the Court's "reading" of the word "division" in *Reid v. Gholson*, 229 Va. 179, 327 S.E.2d 107, and argue that there is no reason to think that the word has different meanings in § 57-9(A) and (B). The Church and the Diocese agree that a "division" is defined in the same way in both § 57-9(A) and (B) – as a structural severance of the church into two, accomplished in accordance with the church's own rules and polity. *See* TEC-Diocese Brief at 1-2. The facts underlying such a division, however, are necessarily different in a congregational church – such as the one at issue in *Reid* – than in a hierarchical church.

A division in an autonomous congregation (under § 57-9(B)) occurs when a faction "desire[s] to separate from the body of their church, or to rend it into groups, each of which seeks to take over all the property and characterize the other as apostate, excommunicated, and outcast." *Reid*, 229 Va. at 192, 327 S.E.2d at 115. That is consistent with applicable principles of congregational governance. *Reid* nowhere suggests that the facts underlying a "division" for purposes of § 57-9(A) should or would be described in the same terms. To the contrary, *Reid* exemplifies the centrality under Virginia law of the distinction between hierarchical and congregational churches. *See id.* at 188, 327 S.E.2d at 112-13, explaining that the permissible scope of "judicial inquiry into 'church governance' .... requires analysis in light of the distinction between hierarchical and congregational churches."

> Hierarchical churches may, and customarily do, establish their own rules for discipline and internal government.... *One who becomes a member of such a church, by subscribing to its discipline and beliefs, accepts its internal rules and the decisions of its tribunals.* For that reason, the civil courts will treat a decision by a governing body or internal tribunal of an hierarchical church as an ecclesiastical determination constitutionally immune from judicial review. To do otherwise would precipitate the civil court into the "religious thicket" of reviewing questions of faith and doctrine even when the issue is merely one of internal governance, because in such churches the resolution of internal

government disputes depends upon matters of faith and doctrine.

....

Congregational churches, *on the other hand*, are governed by the will of the majority.

Id. at 188-89, 327 S.E.2d at 113 (emphases added, citations omitted).

Cases decided both before and after 1867 show that Virginia has always looked to whether the rules of a hierarchical church allowed a congregation's attempt to separate. *See* TEC-Diocese Brief at 6-11. By reaffirming the binding effect of a hierarchical church's "internal rules and the decisions of its tribunals" and emphasizing the rights of hierarchical churches with respect to internal governance, *Reid* confirms that § 57-9(A) may not be used to rewrite the Constitutions and Canons of the Episcopal Church and the Diocese and redefine the polity of the Episcopal Church. 229 Va. at 189, 327 S.E.2d at 113. Thus, a division in a hierarchical church or religious society occurs only when it is effected by means consistent with the governing rules of that church or society.

H. <u>The evidence does not establish a "division" under the Congregations' definition.</u>

The evidence does not establish a "division" in the Episcopal Church or the Diocese even under the Congregations' own definition of that term. By the Congregations' definition, a "division" is "a split in a religious denomination involving the separation of a group of congregations, clergy, or members who *formed an alternative polity*." Cong. Mem. at 5 (emphasis added). As discussed below, these separatists did not create a new polity or governmental structure. They joined an existing, established polity, the Church of Nigeria.[16]

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[16] Despite continuing to cite some of the same dictionaries, the Congregations' definition of "division" has taken on a different meaning from their pre-trial scope briefs. Before, they defined division as *structural* change in a hierarchical church. *See* CANA Congregations' Memorandum of Law on Scope of Hearing on Congregational Determinations Pursuant to Va.

(footnote continued ...)

II. The Congregations have not joined a "branch" of the Episcopal Church or the Diocese.

The Congregations define "branch" as "[1] the *new entity created* when a group of congregations, clergy, or members separates from its former denomination and formally *reorganizes a separate polity*, and ... [2] the original entity from which the group separates." Cong. Mem. at 30 (caption; capitalization altered, emphases added). *See also, e.g., id.* at 5 ("an offshoot of a denomination *created as a result of a division* ..." (emphasis added)); *id.* at 31 ("'the new organization or polity that results from [a] division,'" quoting Tr. 94 (Valeri)).

The Church and the Diocese agree that when it is read in its context (*see City of Virginia Beach*, 246 Va. at 236-37, 435 S.E.2d at 384), the word "branch" in § 57-9(A) means either a continuing part of a "church or religious society" or a new organization resulting from a "division." *See* TEC-Diocese Brief at 25. The purported "branches" that the Congregations have joined, however, are neither. CANA and ADV are parts of a different, pre-existing church, the Church of Nigeria. They are *not* "new organization[s] or polit[ies]" created as a result of a "division" of the Episcopal Church.

All of the evidence presented at trial confirms that the creation of a new entity is a necessary aspect of a "branch" under § 57-9(A), even under the Congregations' definition.[17] *See* Tr. 1003-04 (Douglas), 1038-39 (Mullin). If CANA is a "branch" of anything, it is a branch of

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(footnote continued:)
Code § 57-9 (filed Aug. 17, 2007) at 6 ("a breaking into parts, separation, severance, or partition"). Now, they have abandoned the structural element, arguing that a "division" is merely the separation of small groups or "the state of being divided." Cong. Mem. at 7 & n.6. The Congregations' definition is growing both murkier and worse as a matter of law and policy.

[17] The Church and the Diocese disagree that a new church formed by a few individuals who have left an existing church can be considered a "branch" of the latter or that the individuals' departure can be considered a "division" of the church. But even under the Congregations' definitions and evidence, the creation of a new church is a necessary part of the picture.

the Church of Nigeria; and it makes no sense to claim that a branch (or a constituent part) of one church is a "branch" of another. As stated in the TEC-Diocese Brief at 27, the Roman Catholic Church or one of its dioceses would not become a branch of the Episcopal Church if a group of Episcopal congregations left the Episcopal Church and joined the Roman Catholic Church or a Roman Catholic diocese. That analogy is no less accurate if the Catholic Church organized a new diocese or "convocation" (*i.e.*, a non-geographical component) to welcome the defectors. Indeed, the undisputed evidence confirms this point in the context of actual historical experience: The Episcopal Church in fact created a new missionary diocese to minister to Mexican Catholics who had become disaffected from, and were departing, the Catholic Church. Tr. 877-78 (Douglas). Yet not surprisingly, no one referred to or considered that Episcopal Diocese as a "branch" of the Catholic Church – it was a branch of the Episcopal Church, just as CANA is a "branch" of the Church of Nigeria. *Id.*

Even the dictionary definition quoted in the Congregations' Memorandum (at 31 n.17) undercuts their case: "Noah Webster, *A Dictionary of the English Language* 81 (1872) (preface dated 1867) (defining branch in relevant part as '[a]ny arm or part shooting or extended from the main body of a thing')." Again, none of that describes the relationship between CANA and the Episcopal Church or the Diocese. CANA has never "extended from the main body of" the Episcopal Church or the Diocese. It originated and has grown entirely separate and apart.

III. The Congregations' Petitions cannot be granted based on events in the Anglican Communion.

As set forth in the Church's and the Diocese's opening brief, the Congregations presented no evidence of any structural division in the Anglican Communion, or that the Anglican Communion is a "church or religious society" to which the Congregations were or are "attached" for purposes of the statute. TEC-Diocese Brief at 31-38. The uncontradicted evidence

confirmed the opposite. Tr. 844-46, 872 (Douglas), 1029-37 (Mullin). The Congregations nevertheless attempt to construct a case under § 57-9 based on overly-broad definitions of key terms and the Church of Nigeria's disapproval. Their efforts must be rejected.

A. <u>The Anglican Communion has not divided into branches.</u>

At page 49 of their Memorandum, the Congregations argue an entirely new theory of the case: that there are now two branches of the Anglican Communion, consisting of "those who continue relating to all Provinces that relate to the See of Canterbury, and those who have cut off their relationship with TEC and relate only to Provinces that are viewed as adherents to the historic Anglican faith."[18] This so-called "division" is not in *any* sense the result of a structural division of an existing organization. (Indeed, as Dr. Douglas explained at length, Tr. 863, 958-61, 964-65, the Anglican Communion is not an intact whole that is capable of "division" within the meaning of § 57-9(A).) It is at best a description of the relational tensions and theological differences of opinion among certain autonomous Anglican provinces. One might as well say that that the Anglican Communion is "divided" into Provinces that ordain women and those that do not, or into Provinces that use a particular version of the Prayer Book and those that do not. Indeed, one could come up with any number of ways of grouping the Anglican Provinces (or indeed, the members of the World Council of Churches or any other federation of independent churches) according to various criteria – and under the Congregations' view, on that basis trigger a shakeup of church property rights throughout Virginia. That cannot be what the General Assembly had in mind.

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[18] This is not the first time that the Congregations have come up with a new "branch" theory. Their pleadings in their 57-9 actions allege only that they joined a branch of the Anglican Communion, *not* the Church or the Diocese. *See, e.g.*, Truro Church Petition for Approval of Report ¶ 14 ("the members of Truro Church ... voted to join another branch of the Anglican Communion").

Even if the provinces of the Anglican Communion were structurally separated into different groups, there is no evidence that any such group is a "branch" of the Communion for purposes of § 57-9.[19] There was no evidence that a group of Provinces in theological agreement or particular points may together be considered a "branch," let alone that the Church of Nigeria is recognized as being part of a "branch" that relates only to certain other Provinces. Further, this Court cannot constitutionally inquire into groupings among Provinces on doctrinal bases.

As noted, the evidence is undisputed that the Anglican Communion is not capable of a structural "division" – it is a family of churches that at various times experiences tensions and differences of opinion among its various Provinces.[20] The evidence also is undisputed that all Provinces continue as members of the Anglican Communion, notwithstanding tensions among them. The Congregations invite the Court to ascribe secular, legal content to "breach[es in] the proper constraints of our bonds of affection," Tr. 433, but that is impossible without the Court thrusting itself into a "religious thicket." *See* TEC-Diocese Brief at 19-20, 39.

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[19] The Congregations claim that Presiding Bishop Jefferts Schori referred to *CANA* as a "distinct 'part' or 'branch of the Anglican Communion.'" Cong. Mem. at 55. In fact, the Presiding Bishop was referring to the Church of Nigeria, not to CANA or, even more remotely, to all provinces who do not continue "relat[ing] to all Provinces that relate to the See of Canterbury." *Id.*

[20] The Congregations argue, based on a statement from his deposition, that Dr. Douglas agrees that tension among Provinces might "evidence" a "division of the Anglican Communion." Cong. Mem. at 53. That is a misuse of his deposition for two reasons. First, the deposition testimony of a testifying non-party witness can be used only for impeachment, not as proof of the matters described in the deposition. *See* Va. S. Ct. R. 4:7(a)(2), (4); *Commercial Distributors, Inc. v. Blankenship*, 240 Va. 382, 394, 397 S.E.2d 840, 847 (1990). Second, Dr. Douglas explained at trial that he was referring in his deposition to division in the sense of "the alienation of church[es] as one from another" rather than a "division" of the Anglican Communion itself. Tr. 960. On the latter issue, he confirmed his consistent view that the Anglican Communion itself is not an intact whole that can be divided. Tr. 961-62.

B. The Anglican Communion is not a "church or religious society," and the Congregations were not "attached" to the Anglican Communion, within the meaning of § 57-9(A).

Both Dr. Mullin and Dr. Douglas were qualified as experts on the Anglican Communion, and they were the only such experts. Both testified (1) that the Anglican Communion is not a "church or religious society" and (2) that individual congregations are not "attached" to Anglican Communion. TEC-Diocese Brief at 34-38. Without reference to this evidence, and ignoring the Virginia Supreme Court's interpretations of § 57-9,[21] the Congregations again attempt to rely on the most sweeping of dictionary definitions to support their case. The dictionary definitions, however, actually are consistent with the testimony.

Dr. Mullin explained that for purposes of § 57-9(A) a "church" is a "group of Christians which agree to ... follo[w] ... rules of worship" such as following a common liturgy, and rules concerning ordination, ordering, and discipline. Tr. 1030; TEC-Diocese Brief at 34. That is consistent with dictionary definitions. *See Webster's Third New Int'l Dictionary (Unabridged)* 404 (2002) (defining "church" as, among many other things, "c: a body of Christian believers holding the same creed, observing the same rites, and acknowledging the same ecclesiastical authority regarded either as the only true representative or as a separate branch of the church universal and often confined to territorial or historical limits: Denomination ... f: ecclesiastical power, authority, or government"); Cong. Mem. at 55 (a "church" is a "particular Christian organization with its own distinctive doctrines") (citing *Compact Oxford English Dictionary of*

[21] At the most basic level, the Congregations' interpretation of "church or religious society" fails to recognize that under § 57-9(A) a church or religious society *must* be hierarchical or super-congregational. *Norfolk Presbytery*, 214 Va. at 502, 201 S.E.2d at 755 ("Code § 57-9 ... recognizes a distinction between an autonomous congregation and one which is part of a super-congregational or hierarchical denomination"); *Baber v. Caldwell*, 207 Va. 694, 698, 152 S.E.2d 23, 26 (1967) (§ 57-9(A) "relates to churches, such as Episcopal and Presbyterian churches, that are subject to control by super-congregational bodies").

Current English, Third Edition (2005)). The Congregations also (at 55) press a broader definition of "church" that would eliminate any requirement of an actual organization or structure to which a congregation might be "attached": "a body ... of religious believers: as a: the whole body of Christians." On its face, however, that definition would be too broad and incompatible with the statute. *See also* Tr. 1029-30 (Mullin) (recognizing and eliminating that broad, non-organizational definition).

Moreover, the dictionary and the undisputed evidence at trial agree that a "religious society" is just another name for a church. *Webster's Third Int'l Dictionary (Unabridged)* 404 (defining "church" as "6: a body of worshipers: *a religious society* or organization ... a society, school, or the like resembling the Christian church") (emphasis added); Tr. 1031-33 (Mullin) (explaining that "religious society" is a synonym for "church"). There is no evidence that the Virginia General Assembly was using the term in any other way in § 57-9. Even under the alternative meaning the Congregations press (a "number of persons associated for any temporary or permanent objects," Cong. Mem. at 56), however, the Anglican Communion does not qualify. It is a "communion of churches, not of individuals." Tr. 1033 (Mullin). As Dr. Mullin testified (without contradiction), associations of churches are not called "societies," but by other terms. Tr. 1034. *See also* Tr. 1033-34 (Mullin) (the General Assembly could not have been referring to associations of independent churches, as none existed in 1867).

The Congregations' dictionary definition of "attached" fares no better. *Compare Webster's Third Int'l Dictionary (Unabridged)* 140 (defining "attach" as "to place (an individual or unit in the military) under the control of another organization for specific purposes") *with Baber v. Caldwell*, 207 Va. 694, 698, 152 S.E.2d 23, 26 (1967) (defining attachment in terms of control); Tr. 872 (Douglas), Tr. 1036 (Mullin) (same). As with "church," the Congregations also

urge a broader definition of "attached" that would dispense with any organizational requirement whatsoever and include mere "emotional ties, as of affection or loyalty," Cong. Mem. at 58, but that definition again is too broad and incompatible with the statute and controlling case law.[22]

Thus, even if this Court were to engage in an examination of various dictionary definitions, the definitions support the undisputed testimony of Dr. Mullin and Dr. Douglas that the Anglican Communion is not a "church or religious society" to which the CANA Congregations were "attached." TEC-Diocese Brief at 34-38.

CONCLUSION

This case involves the use and control of property that until December 2006 or January 2007 was indisputably held by local parishes or missions of the Episcopal Church, a hierarchical church whose polity and rules preclude local congregations from unilaterally "dividing" the larger Church or diverting parish property to any other mission. The Congregations are bound by this polity and these rules. *Reid*, 229 Va. at 188-89, 327 S.E.2d at 113 ("One who becomes a member of [a hierarchical] church, by subscribing to its discipline and beliefs, *accepts its internal rules* and the decisions of its tribunals"); *Hoskinson*, 73 Va. at 431-32, quoting *Brooke*, 54 Va. at 320 ("[t]o constitute a member of any church, two points at least are essential, without meaning to say that others are not so, a profession of its faith and a *submission to its government*") (emphases added). They may not employ § 57-9(A) to override the Episcopal Church's polity and rules and impose principles of congregational governance on a hierarchical church.

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[22] The Congregations attempt to equate congregational relationships with the Anglican Communion to relationships with the national Episcopal Church. The fact is that the Episcopal Church's Constitution and Canons, by which parishes and their leadership explicitly pledge to abide, directly governs the life and operations of its congregations (and their clergy). Tr. 345-46 (Minns), 393-96 (Guernsey), 506-09 (Yates), 1036-37 (Mullin). There is no similar connection between congregations and the Anglican Communion. *See* TEC-Diocese Brief at 21 n.8.

Respectfully submitted,

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