VIRGINIA:
IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

In re:	)	
Multi-Circuit Episcopal Church	)	**Civil Case Numbers:**
Litigation	)	CL 2007-248724,
	)	CL 2007-1235,
	)	CL 2007-1236,
	)	CL 2007-1238,
	)	CL 2007-5250,
	)	CL 2007-5683,
	)	CL2007-5682,
	)	CL 2007-5684, and
	)	CL 2007-5902
	)	

CANA CONGREGATIONS' MOTION FOR PARTIAL RECONSIDERATION OF PERSONAL PROPERTY RULING

COME NOW The Falls Church ("TFC"), Truro Church ("Truro"), Church of the Apostles ("Apostles"), Church of the Epiphany ("Epiphany"), St. Margaret's Church ("St. Margaret's"), St. Paul's Church ("St. Paul's"), St. Stephen's Church ("St. Stephen's), and various Trustees (collectively the "Congregations"), and seek partial reconsideration of the Court's January 10, 2012, letter opinion with respect to ownership of the personal property held by the CANA Congregations.[1]

At the conclusion of its letter opinion, the Court briefly addressed the issue of ownership of the personal property held by the Congregations. The Court held that under Va. Code § 57-10, "the disposition of the personal property of these churches follows the disposition of the real property." Op. 111. The Court added the caveat, however, that donations to the Congregations would be excluded if made after a certain date—the "point of demarcation." *Id.* The court defined the point of demarcation as the date "when it was absolutely clear that a contribution or donation … to one of the seven congregations was not a contribution to an Episcopal congregation." *Id.* After discussing four possible points of demarcation, the Court chose the last one: January 31 and February 1, 2007, when the Diocese filed its declaratory judgment actions.

The Court's chosen point of demarcation is erroneous for three separate reasons. First, it violates the rights of donors to the Congregations to designate the purposes to which their donations may or may not be put. That the donations went to Congregations affiliated with the Episcopal Church does not override the intent expressed by members, no later than 2003, that their voluntary donations *not* go to the benefit of the Diocese or

[1] That the Congregations are seeking reconsideration of only the ruling on personal property should not be viewed as a waiver of their objections to the remainder of the letter opinion, which objections the Congregations preserve.

TEC. Even assuming, *arguendo*, that Va. Code § 57-10 (rather than *Norfolk Presbytery* and *Green*) provides an appropriate default rule in cases of unrestricted donations to a congregation, it does not (and could not) purport to negate restrictions imposed or endorsed by donors. Among other difficulties, the Court's ruling in this regard cannot be squared with the Virginia Act for Religious Freedom, Va. Code § 57-1, which provides that "no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever." Moreover, if § 57-10 were read to permit Virginia courts to override donors' intent, such a reading would violate the most basic principles of religious liberty enshrined in the U.S. and Virginia Constitutions. *Infra* at 3-16.

Second, and quite apart from the fact that the Court's chosen point of demarcation contravened the intent of members who donated to the Congregations, the date selected by the Court is beyond the date requested by plaintiffs in two respects. To begin with, plaintiffs characterized the dates that the Congregations voted to disaffiliate as the relevant date for their claims. By using a later date, the Court is effectively giving plaintiffs relief broader than they have sought throughout the litigation—to the financial detriment of most of the Congregations. *Infra* at 16-22.

In addition, the Court's refusal to allow the Congregations to subtract the cost of paying for and maintaining the real property after the point of demarcation is at odds with plaintiffs' agreement earlier in the case that it was "fine" for the Congregations to make such expenditures with the monies on hand when the Congregations disaffiliated. Nor is the decision not to credit the amounts paid towards mortgages and maintenance justified on the basis that the Congregations had use of the property. Not only did plaintiffs never

advance such an argument prior to trial, they also failed to introduce evidence at trial to carry their burden of proving the fair market rental value of each property. *Infra* at 22-24.

Third, the Court's order that the Congregations forfeit their current tangible personal property unless they can show that it was purchased with funds acquired after the date of demarcation is inappropriate. If the Congregations otherwise turn over personal property in compliance with the letter opinion, then there is no basis to subject them to the further burden of having to demonstrate the provenance of after-acquired property. Indeed, this aspect of the Court's decision holds the potential to grant plaintiffs a sizeable windfall. *Infra* at 24-25.

I. This Court had no legal authority to override the wishes of members with respect to the use of their donations.

A. The evidence at trial demonstrated that the Congregations' members did not want their donations going to TEC or the Diocese.

The Court's decision directed that all personal property held by the Congregations as of the point of demarcation be turned over to plaintiffs. In support of its chosen point of demarcation, the Court reasoned that, by that date, donors clearly would have been on notice that their donations would not be going to entities affiliated with TEC. Op. 112. The Court rejected an earlier point of demarcation on the theory that the Congregations "remained Episcopal churches, constituent members of the Diocese and TEC" through 2003, 2004, 2005, and most of 2006. Op. 111. While acknowledging evidence that donors did not wish for their money to go to TEC or the Diocese (Op. 111 n.84), the Court evidently believed that those wishes were subordinate to plaintiffs' alleged interest in the Congregations' property. But the fact that the Congregations were affiliated with the Diocese and TEC is not a sufficient basis to override their donors' express wishes.

First, donations made by members to the Congregations were voluntary. *See, e.g.,* Tr. 4112:20-4113:11 (discussing that people "were starting to stop giving" to the Congregation because of anger at the national church). As a 2004 Diocesan task force recognized when addressing how to respond to decreased donations, "lay people with conscientious objections cannot be compelled to give." Exh. A at 6.[2] Even when donors had made pledges, they were "free to withhold or restrict" those pledges. *Id.* at 17. Moreover, as this Diocesan task force recognized, donors were free to place limitations on their donations, including that money not go to the denomination: "We either have to honor restrictions or give the money back." *Id.* at 14. Indeed, Diocesan witnesses testified at trial that the Diocese had its own restricted funds, Tr. 655:14-656:14 (discussing various restricted accounts), and that the Diocese had to honor "donor intent." Tr. 725:8-11 ("because of a donor intent, there are restrictions" on the Diocese's use of certain funds).

Second, plaintiffs' own witnesses admitted that the Congregations were not required to contribute a portion of their revenues to either the Diocese or TEC. *E.g.,* Tr. 202:4-18, 698:4-699:3 (Diocesan budget was funded by voluntary pledges from congregations).[3] They further admitted that the Congregations could put restrictions on their pledges to the Diocese. Tr. 725:16-726:21 (discussing restrictions imposed by various congregations and the impact of those restrictions on the Diocese's budget). Further,

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[2] *See* Tr. 733:3-734:17, 741:5-742:21 (discussing this document and showing portions to the Court).

[3] By contrast, in *Green v. Lewis*, the congregation had to pay mandatory assessments to the denomination, a point that the Virginia Supreme Court noted several times. 223 Va. at 551-52.

plaintiffs' witnesses admitted that there was no mechanism by which either plaintiff could take personal property belonging to an affiliated congregation. Tr. 360:7-13. Thus, donors to the Congregations would not have had any expectation that their contributions would automatically or necessarily support the denomination.

Third, because of anger at actions of TEC and the Diocese, donors would not contribute to the Congregations absent an assurance that their donations would *not* go to either plaintiff. The evidence at trial was uncontradicted on this point. As one Truro vestry member explained, "there were a number of our parishioners who didn't want a single cent of their money going to the Diocese of the national Church and who, in fact, would not contribute to Truro if they thought that any of their money would do so." Tr. 1548:10-14. *See also* Tr. 3312:13-16 (Apostles established a General Fund Designated Account "so that members could give money to that account and know that none of that money would go to the national Church"); DCOE Ex. 512; Tr. 2298:2-2299:8, 2379:4-2381:4) (Epiphany gave members the option of designating contributions either to outreach or as "Epiphany only"); Tr. 2951:4-2952:15 (by mid-2003, TFC's members knew of and supported decision to cease contributions to the denomination).

Initially, TFC, Truro, Apostles, St. Margaret's, St. Paul's, and Epiphany adopted an "opt out" policy—giving members the option of designating on their checks, pledge cards, or other registrations that their donations would not be shared in whole or part with TEC and/or the Diocese. Tr. 3980:13-3981:5; Tr. 3980:13-3981:11 (St. Margaret's); Tr.

1901:22-1902:16; Tr. 1880:22-1881:22; DSTP Ex. 526 (St. Paul's).[4] Some started this policy in the 1990s, others later. Tr. 2948:7-2952:15 (TFC); Tr. 3980:13-3981:11 (St. Margaret's); Tr. 1901:22-1902:16; Tr. 1880:22-1881:22; DSTP Ex. 526 (St. Paul's). (Tr. 1901:22-1902:16; Tr. 1880:22-1881:22; DSTP Ex. 526 (St. Paul's). A majority of members at each Congregation chose this option. *E.g.,* Tr. 2949:22-2950:2 ("84 percent of the [TFC] congregants … checked the box that they did not want their tithe to go to the Diocese and, therefore, to the national Church"); DCOE Ex. 354; Tr. 2381:18-2382:16 (discussing the amounts designated for "Epiphany only" during the period 2004-2006).

In the wake of the 2003 General Convention, several Congregations shifted from an "opt out" policy to an "opt in" policy. Members had become even more vocal about not wanting their pledges to support either TEC or the Diocese. Given the overwhelming numbers of members who objected to any part of their money going to the denomination, the vestries of TFC, Apostles, and Truro chose in 2003 and 2004 to revise their policy on designating gifts. These vestries informed members that their monies would *not* go to support either the Diocese or TEC, and that any members wishing to support the Diocese or TEC should do so independently. Tr. 1557:5-17. As one church newsletter explained:

> **For calendar year 2004:**
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> - No funds will be pledged to the Diocesan operating budget for 2004.
> - The monies normally given to the Diocese will instead be given directly to strengthening selected mission churches within the diocese, and organizations such as the AAC.
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> Each COA member has the opportunity to act in accordance with his or her personal conviction. *"Each one should be fully convinced in his own mind." Romans 14:5b.* Therefore, any COA member who wishes to provide funds to the Diocese of Virginia or ECUSA for their undesignated use should contact the church office for forwarding information.

[4] St. Stephens curtailed contributions to the Diocese and TEC, but its vestry did not generally allow congregants to put negative restrictions on donations. Tr. 3698:10-3699:1.

Apostles Ex. 100.00001.

The trial testimony confirmed that members were aware and approved of the vestry decisions:

> Q Did members of The Falls Church acknowledge that none of their money would be contributed to the Diocese or the Episcopal Church?
>
> **A Yes.**
>
> Q Did any member of The Falls Church complain to the vestry that they were unaware that none of their money would be contributed to The Falls Church or the Episcopal Church?
>
> **A No.**

Tr. 2951:15-2952:15. Plaintiffs did not deny that these policies were implemented or allege that donors were unaware of them.[5] Nor did they introduce any evidence that members objected to the policies. Thus, it was undisputed that the policies were put in place to accommodate the members' desire that their money *not* support the Diocese or TEC.

The cutoff of funding occurred three years before the Congregations' votes to disaffiliate and to retain ownership of the property at issue—the overwhelming results of which confirm the donors' intent that their contributions would not be forwarded to TEC or the Diocese.[6] Given the rapid turnover of funds at TFC, Truro and Apostles, monies in

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[5] In fact, one of plaintiffs' witnesses, a former TFC member, admitted making a separate donation to the Diocese. Tr. 1484:17-19. But any direct contributions by individual parishioners to plaintiffs were the exception. As one vestry member of Apostles testified, "To the best of my knowledge, there weren't any conversations or requests for addresses for the Diocese or for the national Church." Tr. 3319:7-10.

[6] At Apostles, for example, 94.9 percent (354 members) of the congregation voted to disaffiliate, and 96.5 percent (360 members) voted that the majority should retain ownership of the property. Apostles § 57-9 Petition. Similarly, at The Falls Church, 90.5 percent of the congregation (1221 members) voted to disaffiliate, and 94.3 percent (1272 members) voted that the majority of the congregation should retain its property. TFC § 57-9 Petition, Exh. 20 at 1-2 (Judges' Report). And at Truro Church, 92.2 percent of

their bank accounts when the Congregations voted to disaffiliate (and also later at the point of demarcation) were necessarily donated well after the cutoff of contributions to plaintiffs.[7] A witness for Apostles summarized the Congregation's cash flow as follows:

> Q Given the operating budget for 2004 and 2005, did all of the monies that Apostles held on the date of the vote on December 16th, 2006, consist solely of funds contributed after the decision to cease giving to the Diocese?
>
> **A Yes.**

Tr. 3398:22-3399:5. Plaintiffs did not attempt to prove otherwise.

In these circumstances, the Court can readily conclude that all of the bank accounts of TFC, Truro, and Apostles as of the date of demarcation consisted of funds that donors intended would *not* be turned over to plaintiffs.[8] Similarly, there is no difficulty in concluding that tangible personal property purchased after the cutoff of contributions

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the congregation (1,010 members) voted to disaffiliate, and 94.3 percent (1,034 members) voted that the majority of the congregation should retain its property. *See* TRU196.055-.058. *See also* 9/28/08 Order (finding that the Congregations' petitions, reports, and exhibits made out a prima facie case that satisfied Va. Code § 57-9).

It is also fanciful to think that anything like the multimillion dollar budgets raised by these Congregations in the year preceding the vote could have been raised by the modest numbers of persons who voted to remain affiliated with the denomination. As discussed below, the Court's order thus operates to convey the vast majority of contributions made by the thousands who were compelled by religious conviction to vote to leave TEC and the Diocese, to the few who felt compelled to remain affiliated with those entities.

[7] *See, e.g.,* Tr. 3442:5-12 (Truro spent money as fast as it came in); Tr. 2532:19-2535:5 (discussing turnover in cash flow at the Falls Church).

[8] While there would need to be a segregation of funds for St. Margaret's, St. Paul's, and Epiphany, that "accounting difficulty" is not as daunting as the Court intimated in its letter opinion. *See, e.g.,* DCOE-525; Tr. 2381:9-2384:19 (showing percentage of Epiphany pledges that asked that donations not be shared with plaintiffs); DSTP Exs. 315-353 (for the period 1967 to 2005, $748,249.64 was donated by St. Paul's directly to third parties). Moreover, the final order proposed by plaintiffs already contemplates an accounting by the Congregations of their personal property.

to the Diocese and TEC, but before the point of demarcation, should remain with the Congregations. Honoring the intent of the donors requires no less.

B. Awarding plaintiffs the donated funds, or property purchased with those funds, is not required by Va. Code § 57-10, and would violate the Virginia Act for Religious Freedom (Va. Code § 57-1), the First Amendment, and the Virginia Constitution.

As noted above, the Court acknowledged the relevance of donor intent in describing the "point of demarcation" as the date "when it was absolutely clear that a contribution or donation ... to one of the seven congregations was not a contribution to an Episcopal congregation." Op. 111. But rather than rely on the undisputed evidence of donor intent, the Court held that, under Va. Code § 57-10, "the disposition of the personal property of these churches follows the disposition of the real property." *Id.* That was error.

1. At the outset, it is questionable that Va. Code § 57-10 even applies independently of Va. Code § 57-9.[9] The Virginia Supreme Court in *Green v. Lewis* did not even cite § 57-10, and plaintiffs did not invoke it at trial here. Indeed, in contrast to various other provisions of Title 57, one searches the entire 4,786-page trial transcript in vain for any mention of § 57-10 by anyone, including the Court.

But even assuming, *arguendo*, that § 57-10 provides an appropriate rule in cases of unrestricted donations to a congregation, nothing in § 57-10 purports to override the wishes of donors who intend that their voluntary contributions to their congregations *not* be forwarded to an affiliated denomination. At most, § 57-10 would provide a default

[9] The CANA Congregations did not invoke § 57-10 in any of their post-trial briefs, and those briefs separately discussed the ownership of the real property and the ownership of the personal property. Nor did the Diocese invoke § 57-10, and TEC cited the statute only once—in one sentence in its final reply brief (at 12), to which the Congregations had no opportunity to respond.

rule that—absent some contrary indication in the relevant documents and evidence—the chattel should be treated like the realty. Here, specific evidence of donor intent takes precedence over any such default rule. Indeed, as explained presently, any reading of § 57-10 that permitted awarding monies to plaintiffs in contravention of the wishes of the donors would violate both the Virginia Act for Religious Freedom, Va. Code § 57-1, and the donors' First Amendment and state constitutional rights. *See* Va. Const. art. I, § 16 ("No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever … . [I]t shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please.")

2. The Virginia Act for Religious Freedom, authored by Thomas Jefferson, was proposed in response to a Virginia bill that would have imposed an assessment for the support of ministers. *See generally Everson v. Board of Education*, 330 U.S. 1, 11-16 (1947) (discussed below). As Jefferson put it—in language that remains on the Virginia books 225 years later—"to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical; … even … forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern." *Id.* at 13; Va. Code § 57-1.

The Virginia statute thus provides that "no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, re-

strained, molested or burthened, in his body or goods." Va. Code § 57-1.[10] Yet this Court's opinion does just that, by directing that monies contributed by members will go to the very entities that they intended would *not* receive support. The Court is forcing these donors to provide financial support to a denomination whose doctrine and leadership they have found objectionable. And as Virginia law makes clear, the fact that the denomination may at some earlier point have been religious adherents of the donors' "own religious persuasion" is irrelevant.

Given § 57-1's specific imperative that individuals not be compelled to financially support religious denominations or clergy to which they object, it makes no sense to read the general language of § 57-10 as carving out an implicit exception to, or impliedly repealing, that rule. *See Boulevard Bridge Corp. v. City of Richmond*, 203 Va. 212, 218 (1962) ("a later act does not by implication repeal an earlier act unless there is such a clear, manifest, controlling, necessary, positive, unavoidable, and irreconcilable inconsistency and repugnancy, that the two acts cannot ... be reconciled"). Rather, those statutes should be read "in pari materia." *City of Virginia Beach v. Board of Supervisors*, 246 Va.

[10] Other provisions of Virginia church property law confirm that the conditions imposed by donors of property must be honored. *E.g.*, Va. Code § 57-4 ("Donations to vestries for charitable purposes. Where, previous to January 30, 1806, any donation was made of money or any other thing, for a charitable purpose, and the donation was to be controlled or managed by a vestry, the governing body of the county, city or town, in which the charity was intended by the donor to be exercised, shall exercise the same powers, and perform the same duties, respecting the donation, that could or ought to have been exercised and performed by the vestry, if it had continued to exist and been a corporate body, and shall apply such money or other thing in such manner as may have been directed by the donor."); Va. Code § 22.1-107 (school boards having control over church property shall manage the property "according to the wishes of the donor"). The same neutral principle governs outside the church property context. *E.g.*, Va. Code § 22.1-126 (property given to school boards shall be managed and applied "according to the wishes of the donor").

233, 236-37 (1993). As explained below, however, if the Court were to conclude otherwise, the U.S. and Virginia Constitutions would foreclose such a reading of § 57-10. For the government, through its courts, to override an individual's wishes not to support a particular religious denomination is a constitutional violation of the highest order.

3. As Justices across the jurisprudential spectrum have recognized, the principle that the government's power may not be used to compel financial support for a religious denomination deemed objectionable is as settled as any principle of constitutional law. *E.g.*, *Everson v. Board of Education*, 330 U.S. 1, 16 (1947); *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *id.* at 640-41 (Scalia, J., dissenting); *Rosenberger v. Rector of University of Virginia*, 515 U.S. 839, 869 (1995) (Souter, J., dissenting). That, in part, is what it means for the "exercise of religion" to be "free" (U.S. Const. Amend. I), and prohibiting compulsory financial support for a particular church was arguably the Framers' clearest object in adopting the First Amendment's religion clauses. *Everson*, 330 U.S. at 11-16.

For example, in *Everson*—the U.S. Supreme Court's first modern Establishment Clause case—the Court explained that "compell[ing] [dissenters] to pay tithes and taxes to support government-sponsored churches," "to pay ministers' salaries," or "to build and maintain churches and church property aroused the[] indignation" of "freedom-loving colonials." *Id.* at 10-11. And "[i]t was these feelings which found expression in the First Amendment." *Id.* at 11.[11] Noting that "Virginia ... provided a great stimulus and able leadership for the [disestablishment] movement," the Court went on to explain that "[t]he

[11] *See also id.* at 9 (citing the history of persons being "required to support" "religious establishments" of the "English Crown" as inspiring the First Amendment); *id.* at 16 ("[n]o tax in any amount ... . . can be levied to support any religious activities or institutions.")

people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group." *Id.* at 11.

Indeed, it was the Virginia General Assembly's bill "to renew Virginia's tax levy for the support of the established church" that led to the disestablishment movement's "dramatic climax." *Id.* In response to that bill, James Madison, the principal author of the First Amendment, "wrote his great Memorial and Remonstrance," which "eloquently argued that ... no person, either believer or non-believer, should be taxed to support a religious institution of any kind." *Id.* at 12. As Madison explained, government may not rightly "force a citizen to contribute" even "three pence only of his property for the support of any one establishment." *Id.* at 65-66 (reprinted in Appendix to dissenting opinion of Rutledge, J.). Similarly, as noted above, Jefferson objected to Virginia's assessment bill, maintaining—in a principle now embodied in Va. Code § 57-1—that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." *Everson*, 330 U.S. at 13 (quoting the Virginia statute). In fact, "the provisions of the First Amendment ... were intended to provide the same protection against governmental intrusion as the Virginia statute." *Id.*[12]

[12] It is no answer to say that the Court's order does not impose a "tax" for an "established" church in the strictest sense of those words. The same could have been said of the Virginia assessment bill that inspired the Virginia Act for Religious Freedom (Va. Code § 57-1) and the First Amendment. The fact that compulsory financial support was just one incident of religious establishments (another was compulsory attendance) does not make it any less of a constitutional violation. *Everson*, 330 U.S. at 16 (explaining that a "tax in any amount" or "whatever form" is invalid). And as Madison said in remonstrat-

Lee v. Weisman, 505 U.S. 577, 587 (1992), likewise confirms that "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." Although the Court there divided over the constitutionality of prayer at public school graduations, all Justices agreed that coerced support for religion was unconstitutional. *See id.*; *id.* at 605 (Blackmun, J., concurring) ("There is no doubt that attempts to aid religion through government coercion jeopardize freedom of conscience."); *id.* at 622 (Souter, J., concurring); *id.* at 640-41 (Scalia, J., dissenting). Indeed, seven Justices invoked Virginia's history in so arguing.

As Justice Souter noted in his three-Justice concurrence, "[t]he Framers adopted the Religion Clauses in response to a long tradition of coercive state support for religion, particularly in the form of tax assessments," and "Jefferson and Madison [themselves] opposed" the "hated assessments." *Id.* at 622. Similarly, Justice Scalia's dissent for four Justices—who took the narrowest view of the Establishment Clause—stated that "[t]he coercion that was a hallmark of historical establishments of religion" included "financial support by force of law." *Id.* at 640-641. "Thus, for example, in the colony of Virginia, where the Church of England had been established, ... all persons ... were tithed for the

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ing against the Virginia assessments bill, "it is proper to take alarm at the first experiment on our liberties." *Id.* at 65 (Appendix to dissenting opinion of Rutledge, J.).

Further, judicially compelled financial support of an objectionable religious denomination is no less state action than legislative compulsion of that nature. *See Shelley v. Kraemer*, 334 U.S. 1, 14 (1948) (the Fourteenth Amendment applies not only to "legislative" action, but to "the action of state courts"); *Ex Parte Virginia*, 100 U.S. 339, 347 (1879) ("A State acts by its legislative, its executive, or its judicial authorities."). Indeed, it was the courts that enforced the legislative assessments imposed by the colonial legislatures. *See Everson*, 330 U.S. at 65, 67 (Appendix to dissenting opinion of Rutledge, J.) (*Memorial and Remonstrance* explaining that "religion [is] exempt from the authority of ... the Legislative Body," "the coordinate departments," and "the Civil Magistrate").

public support of Anglican ministers, and were taxed for the costs of building and repairing churches." *Id.* at 641; *see also Rosenberger*, 515 U.S. at 869 (Souter, J., dissenting) ("Madison wrote against a background in which nearly every Colony had exacted a tax for church support, the practice having become 'so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence.'" (quoting *Everson*, 330 U.S. at 11 (footnote omitted)). These Establishment Clause principles govern here.

Even in the church property context, the Supreme Court has long recognized that courts are duty-bound to honor donors' intent. As the Court explained in *Jones v. Wolf*, "regardless of the form of church government, it would be the 'obvious duty' of a civil tribunal to enforce the 'express terms' of a deed, will, or other instrument of church property ownership." *Jones v. Wolf*, 443 U.S. 595, 603 n.3 (1979) (quoting *Watson v. Jones*, 80 U.S. 679, 722-23 (1871)). And *Watson*, the decision upon which *Jones* relied for this proposition, confirms that this principle is no less true for donations of personal property than of real estate: "[I]t must be that [donors] can prevent the diversion of the property or fund to other and different uses. This is the general doctrine of courts of equity as to charities, and it seems equally applicable to ecclesiastical matters." 80 U.S. at 723; *see also id.* (noting that this rule applies both to "congregation[s] of the independent or congregational form" and to those having the "associated form of church government").

In sum, if allowed to stand, the violations of donor intent effected by the Court's January 10 letter opinion would be both unconstitutional and ironic. It was in Virginia that Madison remonstrated against compelling citizens to give even "three pence" to a church to which they object, and Jefferson successfully argued that it is "sinful and ty-

rannical" to compel support for religious leaders or institutions whom one does not support—both arguments having been successfully made in support of disestablishment. And as the Virginia Supreme Court queried in *Gallego's Ex'rs v. Attorney General*, 1832 WL 1845, *13 (1832): Does it not strike the most common understanding as an invasion of right, to give an estate which is devised to a roman catholic charity, to a charity of the church of England, on the principle, that the first was void at law, and the next is *cy pres* the testator's intention, when nothing in the world could have been farther from his intention?" If history is not to repeat itself, this Court should reconsider its opinion to bring it into accord with the undisputed evidence of donor intent as to personal property.

II. The Court's Order gives plaintiffs more relief than they requested.

A. The Court's selection of a "point of demarcation" after the votes to disaffiliate gives plaintiffs greater relief than they sought.

As noted, the Court held that the Congregations must turn over their tangible and intangible personal property as of "the filing date of the Declaratory Judgment actions by the Diocese against each congregation on either January 31, 2007 ... or February 1, 2007." Op. 112. The Court chose those dates as "the point of demarcation" on the basis that they represented the "point in time when it was absolutely clear that a contribution or donation ... was *not* a contribution to an *Episcopal* congregation." Op. 111 (emphasis in original). In other words, the Court viewed those dates as the point when members would clearly be on notice that their donations would not be going to support plaintiffs.

The Court's unilateral selection of a point of demarcation was erroneous for three reasons. First, no evidence introduced at trial suggests that donors gave or withheld money based on when plaintiffs filed their declaratory judgment actions. To the contrary,

as discussed above, the uncontradicted evidence was that donors expressed their intent long before January 31, 2007, that their money not go to plaintiffs. *E.g.*, Tr. 2949:21-2950:2 (by the late 1990s, "84 percent of the congregants at that time checked the box that they did not want their tithe to go to the Diocese and, therefore, to the national Church"; by 2003, virtually no one designated contributions for the denomination); Tr. 1557:5-17; Tr. 2951:15-2952:15; Apostles Ex. 100.00001 (The Falls Church, Truro and Apostles ceased contributions in 2003 and told parishioners to contribute directly to the Diocese if they desired money to go to the denomination).

Second, plaintiffs never requested that they be given the Congregations' personal property as of the date when they filed their declaratory judgment actions. They consistently took the position that they should receive funds as of the dates when the Congregations voted to disaffiliate, and they never suggested any other point of demarcation.[13] Thus, the Court's unilateral selection of January 31 and February 1, 2007, as the cutoff dates results in giving plaintiffs broader relief than they even requested.

The complaints filed by the Diocese and TEC (nine days apart) sought a declaration of ownership in the Congregations' property, but neither suggested that ownership would be determined as of the date when the actions were commenced. Instead, the complaints indicated that the point of demarcation was the date on which the Congrega-

[13] The other possible points of demarcation considered by the Court were equally unsupported by the record. For example, plaintiffs would have no rights to the Congregations' bank balances on the dates they began curtailing contributions to the Diocese and Episcopal Church. Not only would such dates in many cases be outside the applicable statute of limitations period, plaintiffs never disputed that the Congregations had the right to cease making contributions to the denomination. *See, e.g.*, Tr. 711:13-712:1 (Diocese has no say in whether a congregation pays a pledge).

tions voted to disaffiliate. For example, the complaints referenced the dates of the Congregations' "vote[s] to sever ... denominational ties with The Episcopal Church and the Diocese," alleging that "*since the*[*se*] *actions* ... defendants have unlawfully appropriated the real and personal property" at issue. *E.g.*, Compl. ¶¶ 22-23 (The Falls Church) (emphasis added).

Neither plaintiff gave notice as the litigation unfolded that they viewed the filing date for the declaratory judgment actions as the point of demarcation. To the contrary, plaintiffs represented that they were seeking property as of the date of the votes:

> MS. ZINSNER: We don't believe it is overwhelming or onerous. There is discrete discovery requests we would propound on accounting; what assets did you have ***at the time of the vote***, where are those assets now and whether any transfers were made, and that would be with respect to the real and personal property. It's a little easier with real property. You know, we have lis pendens filed. But with respect to the personal property, we would ask for a listing of the bank accounts and other assets on deposit at the time of the disaffiliation, because it's our obvious contention that we have proprietary contract and trust rights to such properties.

5/30/08 Tr. 25:2-14 (emphasis added). In response to these comments, the Court also referenced the date of the vote as the point of demarcation:

> THE COURT: But can't it capture in interrogatories what they're looking for in a way—and maybe this is just the same thing under a different name, but can't they do an interrogatory that says what property *at the time of the vote* did you own, what property have you encumbered, what property have you transferred, give a list of personal property? . . .
>
> But regardless of the result—they may not be entitled to it now, but then there are other things—you know, for example, *at the time of the vote*, what property did the Falls Church own—that's a question that doesn't seem to be problematic—have you encumbered that property, have you transferred that property, those are questions, it seems to me, that are not especially intrusive and that would seem to be appropriate. But, for example, the other things you mentioned—how have you spent your money *since the vote*, what kind of contributions have you gotten, who are your

contributions from—those are matters that it would seem to me they would never be entitled to have.

5/30/08 Tr. 29:1-7, 30:7-19 (emphasis added).

Plaintiffs were even more categorical a few months later in disavowing any claim to donations made to the Congregations after the votes, as reflected in this colloquy:

JUDGE BELLOWS: Well, what I'm asking you is, you're saying that if I confirm the vote, and I say that the vote was to disaffiliate, you're saying that any property acquired after the day of the vote is treated identically to property acquired before the vote?

MR. BURCHER: No. It's not even at issue. In other words, it is as if it is something that this—

JUDGE BELLOWS: Oh. You're saying just the opposite. You're saying that regardless of what decision—even if I rejected the vote, CANA still owns that truck?

MR. BURCHER: Correct. That's the position. And we basically—

JUDGE BELLOWS: But what if they used not—I mean—

MR. BURCHER: Well, if they used funds that, for example, goes to the checking account—

JUDGE BELLOWS: Yeah. What if they used a checking account that was a Truro Church checking account?

MR. BURCHER: Then you have a tracing issue. I mean, we've all identified basically accounts and items that were owned at the time of the vote in the property stipulations that we've presented. I don't know—and see, for me, I don't have this issue for my church. But my understanding of this for the others—

MS. ANDERSON: You were kind to volunteer.

MR. BURCHER: I'm trying to help the Court understand what the issue is, and as to my understanding of it, it is that no one is—

JUDGE BELLOWS: But when you say it's a tracing issue, that is a complicated endeavor. It can be a complicated endeavor, particularly when you're talking about co-mingled funds, or funds contributed subsequent to the date of the vote.

> The reason I'm raising this issue is, I think the parties have a right to know as quickly as possible when I decide the vote issue, what property is subject to that decision.
>
> And what the Episcopal and the Diocese were saying to me in that footnote, is that there is a conflict between the parties over what property is covered, at least to some extent.
>
> MR. BURCHER: That issue, I think, Your Honor, does boil down to that one church, whether or not there's a deed that went to the incorporated entity and then back to the trustees.
>
> But, for example, let's say—so I can argue on behalf of Church of the Word, who does—you know, they do—in Church of the Word's instance, they have received funds from donations after the date of the vote, after the date of the filing of the petition.
>
> New checking accounts in the incorporated entity that they established have been set up. Those, we don't think are subject to 57:9, and those we don't think are at issue in this—there isn't an ownership dispute over those.
>
> JUDGE BELLOWS: Does the Episcopal Church agree with you?
>
> MR. BURCHER: I don't know the answer to that, but—
>
> MS. ANDERSON: ***Basically, yes, Your Honor***. Aside from the tracing issue, which I think would come into play as a part of our declaratory judgment actions in the event that one or more of the votes were rejected. I think that's when and where we would get to that potential problem.
>
> But aside from that, ***I think we're in agreement that the money that they've received due to contributions since the time that they disaffiliated, and whatever purchases that they may have made with that, the Episcopal Church and the Diocese haven't made a claim on that property. There is no current dispute as to that.***
>
> Now, I don't want to get—so that is basically what we're talking about when we use the general term, after-acquired property.

9/19/08 Tr. 46:2-49:10 (emphasis added).

Plaintiffs never retreated from this position. Indeed, they affirmed it after remand from the Supreme Court. *E.g.*, Response to Order Entered October 15, 2010, at 3 (filed

Nov. 8, 2010) (tying position on "Accounting discovery" to "[t]he assets held by the Congregations at the time of their separations"). Moreover, plaintiffs' post-trial briefs stated that "'plaintiffs do not seek donations made after the disaffiliation.'"[14] Consistent with these concessions, plaintiffs did not dispute our statements that the relevant cutoff date was "'the time each Congregation voted to disaffiliate in 2006 or early 2007.'" *Id.* at 67 n.45 (quoting CANA Br. 159-60). Moreover, the trial transcript is filled with direct and cross examinations in which counsel for both sides keyed off of "what [property] was pre-vote and what property was post-vote." Tr. 2392:15-16; *accord* Tr. 2387:17-2388:22, 2463:16-2464:6, 2604:8-16, 2848:22-2851:7, 3364:5-3366:14, 3380:15-3381:13, 3396:9-19, 3406:5-16.

As the foregoing confirms, the dates of the votes have been treated as the dates of disaffiliation and hence the point of demarcation throughout the litigation. By choosing a different point of demarcation, the Court, acting sua sponte, has awarded relief that was neither requested by TEC and the Diocese nor, indeed, ever considered by the parties. This action violates long-standing Virginia precedent that "a court is not permitted to enter a decree or judgment order based on facts not alleged or on a right not pleaded and claimed" by the parties. *Potts v. Mathieson Alkali Works*, 165 Va. 196, 207 (1935); *see also Jenkins v. Bay House Associates*, 266 Va. 39, 42-45 (2003).

Third, the Court's choice of a date that was never suggested by plaintiffs prejudices the Congregations. Using the date unilaterally chosen by the Court rather than the

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[14] Diocese Reply Br. 68 (Oct. 14, 2011) (quoting *Episcopal Diocese of Ohio v. Anglican Church of the Transfiguration*, No. CV-08-654973 (Ohio Common Pleas Cuyahoga Co., Journal Entry No. 1 (Sept. 29, 2011)), and stating that "[t]he facts are the same in these cases, and the same conclusion should follow").

date of the vote works to the financial detriment of most of the Congregations and does further violence to the wishes of the donors, who did not want their money going to support either plaintiff. The change in dates also imposes a huge logistical burden on the Congregations. In reliance on the various statements that TEC and the Diocese made, the Congregations used the dates of the votes as the basis for keeping careful records of post-vote contributions and post-vote acquisition of personal property. The Congregations now face the prospect of having to create a new inventory and tracing of funds. This is no easy feat, particularly five years after the fact.

B. Plaintiffs agreed in 2008 that the Congregations could use pre-point of demarcation funds to pay for and maintain the properties after disaffiliation.

The Court's letter opinion directed that the Congregations turn over all personal property acquired prior to the point of demarcation, as well as all bank and investment accounts as of that date. Op. 112. The Court further ordered that the Congregations turn over tangible property acquired after the point of demarcation unless they could show that the property was either donated after the point of demarcation or purchased with funds donated after the point of demarcation.

In a footnote, the Court rejected the notion that the Congregations should receive a credit for pre-point of demarcation funds that were used to pay for mortgages on, or maintenance of, the church facilities. The Court's rationale was "the obvious fact that the CANA Congregations had the use of the property since that point in time as well." Op. 112 n.85. But for two reasons, this rationale finds no support in the record. First, plaintiffs expressly stated early in the litigation that they view paying for the property as a le-

gitimate expense that could be paid out of pre-point of demarcation funds. Second, plaintiffs never introduced any evidence to support an offset for the properties' rental values.

First, as discussed above, in May 2008 plaintiffs demanded the right to take discovery from the Congregations as to the assets each Congregation held at the time of the vote to disaffiliate. They further demanded to know what the Congregations had done with the funds after the vote. After the Congregations voiced an objection to the scope of the discovery sought by plaintiffs, plaintiffs elaborated on their position:

> MS. ZINSNER: Your Honor, we're not interested in their current assets now, their weekly collections. But to the extent they had assets as of the date of the vote of disaffiliation and ***to the extent they have used those assets to pay for the property or to maintain the property, that's fine***. But to the extent they have used those assets as of the date of the disaffiliation to pay their rectors, to pay their lawyers, that is what we have an issue with.

5/30/08 Tr. 32:3-11 (emphasis added).

Soon after clarifying what they viewed as a permissible expense, plaintiffs served interrogatories asking the Congregations to identify the uses to which they had put any pre-point of demarcation funds. Specifically, they asked each Congregation to "identify with particularity all real and personal property that you claim a legal or equitable interest in as of the date [the Congregation] purports to have disaffiliated from the Diocese and the Episcopal Church." They then asked each Congregation to state the purpose of any use of funds on deposit as of that date. Exh. B at 5 (Accounting Interrogatory #1 to Truro Church). There would be no reason to pose such questions if the Congregations were not entitled to use the funds on hand as of the votes for at least some purposes. Consistent with their position at the May 30 hearing, plaintiffs sought through the interrogatories to learn whether any funds had been used in ways that plaintiffs viewed as impermissible.

In the wake of plaintiffs' representations that it was "fine" to use funds on hand as of the votes to pay for and maintain the properties, several of the Congregations continued doing so. In the cases of Apostles and Epiphany, the Congregations continued to pay substantial mortgages on top of ordinary maintenance. For Epiphany, the total paid for principal and interest on the mortgage was well over $1 million from the date of the vote through trial. DCOE-042; Tr. 2357. In keeping with plaintiffs' representation, the Congregations should be allowed to credit these amounts—and any others devoted to post-disaffiliation maintenance—against any amounts declared to be payable to plaintiffs.[15]

No offsets against the credits are appropriate. The Court is correct that the Congregations continued to have use of the property during this time period. But plaintiffs never alleged that this use would disqualify the Congregations from using pre-disaffiliation funds to maintain the properties (or, in the cases of Apostles and Epiphany, paying the mortgage). Moreover, plaintiffs never introduced at trial any evidence as to the rental value of the property. And it was they, not the Congregations, who bore the burden of introducing such evidence. *See Broadus v. Gresham*, 181 Va. 725, 735-36 (1943) (party claiming offset has burden of proof); *Stohlman v. S&B Limited Partnership*, 249 Va. 252, 255 (1995) (plaintiff had burden of showing rental value of property in relation to contract price in order to recover damages).

[15] Because plaintiffs did not make similar statements as to improvements and maintenance funded prior to the votes to disaffiliate, the Congregations do not seek reconsideration as to such expenses (while reserving all rights on appeal).

III. The Congregations should not be obligated to trace the funds used to purchase property after the point of demarcation if no deficit exists in the accounts they relinquish or if they remit the full balance in the accounts as of the demarcation date.

In addition to directing that the Congregations turn over all personal property acquired prior to the point of demarcation, the Court ordered the Congregations to turn over tangible property acquired after the point of demarcation unless they could show that the property was either donated after the point of demarcation or purchased with funds donated after the point of demarcation. Op. 112. But there is no justification for imposing this additional burden on the Congregations, and it creates the potential for giving plaintiffs a windfall that they never even sought.

If the Diocese and TEC receive the net amount in the Congregations' bank accounts as of the point of demarcation and all personal property acquired prior to the point of demarcation,[16] they will have received everything they sought and will have no right to *any* personal property purchased by the Congregations after that date—regardless of the source of funds for the purchase. If plaintiffs receive all they requested in their complaints or to which they otherwise agreed, they should not also receive the Congregations' after-acquired property merely because the Congregations are unable to trace the source of funds for the purpose. For the same reason, if the Congregations relinquish

[16] The Congregations note that some of the funds on hand were for restricted purposes. Putting aside the intent of donors that money not go to plaintiffs, donors gave money for specific uses, such as building funds. In other cases, funds were specifically earmarked for third parties (*e.g.*, missionaries, schools, or other nonprofits). Moreover, the Congregations had some accrued liabilities at the point of demarcation date. The Congregations are currently discussing these issues with plaintiffs in the hope of reaching an amicable resolution. If those discussions do not resolve the issues, the Congregations will provide more specifics in connection with the submission to the Court on the final order.

everything called for under the Court's opinion, they should not be put to the burden of having to prove the source of funds for their post-point of demarcation purchases. That could well result in a double recovery.

WHEREFORE, the CANA Congregations respectfully request that their motion for reconsideration on certain personal property issues be granted.

Dated: February 22, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of February, 2012, a copy of the foregoing CANA Congregations' Motion for Partial Reconsideration was sent by electronic mail to:

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DIOCESAN TASK FORCE ON GIVING
April 30, 2004

Request for Comments on Alternative Approaches
To Parish Giving to the Diocese

Dear colleagues in ministry in the Diocese of Virginia:

This memo asks for your comments on various approaches to parish financial support for our diocese. The Giving Task Force has been reviewing data and options for diocesan financing. Most of these financing options are in use in some form in this or other dioceses. We need your help to formulate workable recommendations for our future financial course.

We will be taking comments on the options outlined in this memo. We seek your comments by letter, by e-mail, and orally at the Clergy/Lay Professional Conference on May 4 and at hearings to be held on May 25, 27, June 2, and June 5 around the diocese. The details of these hearings and the address for receipt of comments are shown at the end of this document.

The Task Force also plans to distribute a survey to rectors, wardens, and diocesan council delegates, seeking both factual information as well as opinion on several key issues on which we need to make recommendations. Your responses to this survey will be an important aid in formulating workable recommendations for our diocesan finances.

The Task Force has made no decisions about which, if any, of these options to recommend. Too often in the past, financing options have been formulated in isolation, adopted by Diocesan Council, and then promptly ignored. Without sufficient understanding and endorsement by our lay and clergy leadership, no financing approach we recommend will actually help resolve our current financial problems. Thus, we have chosen deliberately to wait for your comments before we make any decisions. Your comments are very important.

Our objective, after reviewing your comments and supporting data, is to try to formulate consensus recommendations, if possible, on ways to resolve our current fiscal crisis while keeping as many of our parishes engaged in the common life of the diocese as possible. We hope to circulate specific draft recommendations for your comment in September. Depending on the degree of interest, we may once again hold hearings to take oral comments on any recommended course of action.

SUMMARY

As a diocese, we face significant financial problems, and cannot sustain adequate diocesan functions at the current level of support. Diocesan Council asked Bishop Lee to establish this Task Force to address these problems.

A review of the data indicate two major sources of our fiscal troubles, first, an erosion of parish giving over the last 12 years, and second, a sharp negative reaction to General

Convention. As you review these data and recommendations, please keep in mind that many dioceses are facing significant shortfalls in revenue after General Convention; changing the diocesan finance system will not necessarily help resolve these problems. By the same token, changing that system may help address pre-existing financial problems, which in dollar terms may be larger than the shortfall following General Convention.

The Diocesan Task Force on Giving seeks your comments on various options for diocesan giving. Since 1957, the Diocese of Virginia has relied on voluntary giving from parishes for almost all its revenue. Giving in 1965 was reportedly averaged around 18% of parish revenue. Since 1991, parish giving to the Diocese has declined in terms of percentage of parish income from around 11% to around 6.5% in 2002. Revenue to the Diocese sharply declined in both percentage and absolute terms after the 2003 General Convention, resulting in cuts of almost 20% in the 2004 budget.

The Task Force has agreed that any plan it proposes needs to further four objectives:

(1) provide more predictable, reliable sources of revenue for Diocesan functions;

(2) reduce rather than inflame divisions;

(3) promote better stewardship by individuals in parishes; and

(4) increase engagement by parishes in carrying out long-standing Diocesan priorities.

We will recommend that any plan we recommend, including continuation of the current version of the Virginia Plan, be formalized in a diocesan canon.

The Task Force seeks your comments on four broad questions:

A. How do we allocate the obligation to support the diocese among our parishes? In other words, how do we calculate each parish's fair share obligation?

Options include a flat percentage of parish income, a graduated percentage based on parish size, a per capita approach based on the number of parishioners, and a cost of service approach, which attempts to equitably apportion the cost of the services rendered by the diocese to the parishes and their people.

B. Should giving to the diocese voluntary, mandatory, or a blend of these two approaches?

Currently, the amount a parish gives to the diocese is voluntarily chosen by the parish or mission on a percentage basis of parish revenue for the year. The obligation to give to support the Episcopate is already a canonical obligation.

C. How should any such obligations to give be enforced?

Options used in other dioceses include publication of the defaulting parishes, reduction or elimination of Diocesan Council representation, and at least theoretically, reduction to mission status and change of lay and clergy leadership. Currently there is no enforcement system within our current Diocesan giving scheme. Although the current canons provide that a parish financially support the Diocese by making monthly payments, we are not aware of any parish having been subject to disciplinary action as a result of failing to make such payments. The adoption of the Virginia Plan in 1957 was in part a reaction against the assessment system previously in force.

D. What, if any, conscience clause or alternate compliance mechanism should be included to recognize the irregular circumstances in which we are presently operating?

As a result of the controversial actions of the 2003 General Convention, a significant minority of parishes and individuals in the Diocese have conscientious objections to giving to support the Diocese, in part because they do not wish their money used to support the General Church and in part because they object to the votes of our Bishop and lay and clergy deputations at General Convention. Some of these dissenting parishes and individuals continue to give to specified diocesan ministries or support diocesan and parochial missions and mission work instead of giving to the unrestricted diocesan budget. In these circumstances, any change in diocesan giving obligations may need a "safety valve" or alternate compliance mechanism so that we avoid needless controversy with colleagues who are still willing to give, pray, and work for the spread of Christ's Kingdom.

Part I below presents background on parish giving and the Virginia Plan. Part II presents the Task Force's agreed upon approach. Part III seeks your comments in responses to the four broad questions outlined above, as well as your thoughts on very specific questions about the strengths and weaknesses of different options.

I. Background on Parish Giving to the Diocese.

A. Erosion of Parish Giving, 1992-2003.

Prior to the 2003 General Convention, the average level of parish support to the diocese had declined to about 6.5% of parish income, even though the 1992 version of the Virginia Plan of Proportionate Giving called on all parishes to give at least 10% (slightly under the then-current average of around 11% in 1991) and even though the 1999 version of the Virginia Plan specified a giving range of eight to sixteen percent, depending on parish income.

With a few announced exceptions, the erosion of parish giving over this time did not result from ideological objections. Some contend that it results largely from a failure at the highest levels and by Diocesan Council to emphasize stewardship and stewardship education,

essential components for the success of any voluntary plan of proportionate giving. The diocesan stewardship committee has, however, labored faithfully throughout this period.

Whatever the cause, this eroding level of support to the general diocesan budget meant that while basic diocesan functions were funded, there was far too little regular revenue to fund critical church planting needed to keep pace with population growth in some of the fastest growing areas in the United States, as well as to address other diocesan priorities (youth, conference centers, and church revitalization) adequately.

B. Fiscal Response to 2003 General Convention.

Press reports indicate that the General Church has suffered a six percent reduction in revenue, but that some dioceses have lost substantially more. For example, significant reductions have occurred in Southern Virginia (slightly over 20%), Western New York (almost 20%), Mississippi (15%), and Central Gulf Coast, among others. Virginia's shortfall of nearly 20% is among the worst, but reflects a trend evident in a number of other American dioceses.

So far, the reported reductions in diocesan revenue do not seem to be correlated with the kind of diocesan financing system such dioceses employ. These facts strongly imply that changing diocesan financing systems will not fully resolve any funding shortfall. In colloquial terms, a high mandatory percentage of zero is still zero. We cannot compel our people to give; we are not the IRS capable of garnishing people's wages. A mandatory system can be effectively defeated by lay people restricting their gifts, as is already occurring.

In response to the controversial actions of the 2003 General Convention, overall parish giving to this diocese has sharply declined. In some cases revenue declined because while parishes gave the same percentage of their revenue, they lost substantial numbers of pledgers and substantial pledge revenue. In other cases, the ones garnering the most attention, revenue declined because some parishes had a conscientious objection to giving to the unrestricted diocesan budget after the actions of General Convention, and either cut or zeroed out their diocesan pledge. Overlapping with the actions of these dissenting parishes is the reality that many pledgers restricted gifts to their parishes to assure no money went to the diocese or General Church.

Some data shows that some dissenting parishes are redirecting money which would otherwise go to the unrestricted diocesan budget to ministries supported by the diocesan budget, including support of church plants and missions within the diocese. The redirection of this funding to closely related diocesan ministries, while helpful, does not resolve the overall diocesan fiscal problem.

In revenue terms, the 2004 diocesan budget suffered almost a twenty percent shortfall, a serious blow. The measures taken to close that gap this year are short-term expedients and are unsustainable in the long term without significant reductions in diocesan personnel and program. Our parishes and people apparently continue to expect significant service from the diocesan office, however, despite these revenue shortfalls.

In absolute dollar terms, however, the more serious revenue problem has been the erosion of parish giving prior to General Convention. The sharp reaction to General Convention brought the underlying problem to a head.

C. Virginia Plan of Proportionate Giving: Current System.

We will be making the reports on the 1984, 1992, and 1999 restatements of the Virginia Plans available on the Diocesan website. There is much confusion about what the Virginia Plans said. They require a proportionate gift to the diocese, as part of an overall plan of personal and parish stewardship. The 1992 and 1999 plans recommended giving ranges, with the 1992 plan recommending 10% across the board, and the 1999 plan recommending a range, based on parish income, of 8 to 16%, increasing with parish revenue. Both versions reinforced the biblical tithe as the minimum standard for individual giving.

At their best, these plans have provided a theologically coherent approach to parish and individual stewardship that resulted in substantial and sufficient revenue for the Diocese in most years since its initial adoption in 1957. They have contributed to the tradition of civility in our common mission and ministry. People from other dioceses have commented on the absence of angry wrangling about mandatory assessments that marred their diocesan conventions.

In part because of the relatively lighter diocesan financial load imposed on our parishes (when compared to many other dioceses), our parish mission efforts are positive examples to the rest of the country. At many of our parishes domestic and foreign mission is robust, outreach efforts are substantial, and our people are vitally connected to the wider church and world to spread the Gospel.

The sharpest criticism of the Virginia Plan is that we have not really followed it. Instead, at too many churches, it has become an excuse for vestries to give a minimal amount to the Diocese, and to avoid grappling with serious stewardship issues. The 1999 plan, unlike its predecessors, made no mention of the key concept of working to give at least half our parish revenue outside the parish.

Some contend that we have not systematically and regularly emphasized stewardship at the highest Diocesan levels, a vital aspect of any successful plan of voluntary giving to the Diocese. This contention is itself controversial, as it ignores the continued efforts of Diocesan stewardship committees over the last three decades.

It is undisputed, however, that tithing and stewardship have not been themes at our Diocesan Councils for a long time. Instead, we have treated finances as an unpleasant plumbing issue rather than a vital theological issue, and may be paying the price for our misplaced priorities. In the current inflamed circumstances, however, it is unclear whether a renewed emphasis on stewardship will be effective, as those most opposed to the actions of General Convention tend to overlap strongly with those congregations most firmly committed to the biblical tithe.

For the 2004 budget, there were about one third of parishes which gave 10% or more to the diocese, a third which gave 5% or less, and a third which gave between 5 and 10%. Regardless of the past successes of the Virginia Plan, the current fiscal debacle makes clear that it has not worked well this year, and raises very serious questions about whether any continuation of that plan will resolve our fiscal problems.

II. Task Force Objectives and Agreements.

Our Task Force has met and agreed that any plan we propose, including any continuation of the current Virginia Plan of proportionate giving, needs to further these objectives:

1. Provide a more predictable, reliable source of revenue for diocesan functions;

2. Reduce rather than inflame divisions;

3. Promote better stewardship by individuals in parishes; and

4. Increase engagement by parishes in carrying out long-standing diocesan priorities such as church planting.

We will recommend that whatever approach is ultimately chosen -- including continuation of the current system -- be written into diocesan canons so there is no later dispute about what we as a diocese have agreed upon, as has occurred with prior Virginia Plan resolutions.

Our Task Force also agrees that any recommendation we make should be "revenue neutral," in other words, seek to reliably raise revenue equivalent to the 2002 or 2003 Diocesan Budget. While there are fair arguments to be made that substantially more revenue is needed to plant enough new churches in growing areas and among growing ethnic populations, the Task Force also recognizes that there are widespread parish budget shortfalls, making an increase in the proportion of parish income sent to the diocese very difficult.

III. Detailed Questions for Commentary.

The Task Force has formulated questions on which we seek your thoughtful commentary. The Task Force recognizes that there are sharp ideological and theological divisions which have contributed to our financial problems. While recognizing these divisions, we are seeking to formulate a proposal which will allow us to continue to work together productively, while these divisions remain unresolved.

We will not be successful if we try to force our opponents to subscribe to our side's views about General Convention's actions. We cannot undo those actions at the Diocesan level, much less in this Task Force. By the same token, those anxious to impose mandatory requirements must recognize that a high percentage of zero is still zero. Our lay people with conscientious objections cannot be compelled to give; hectoring those with whom we disagree seldom inspires abundant giving. Thus, while we will receive and read carefully all comments,

our objective is not to re-hash General Convention but to reach recommendations that will help resolve our fiscal problems.

Our diocesan canons currently require that each parish and mission financially support the Episcopate, do so in regular monthly installment payments, and provide the annual pledge by November 30 for the coming year. The amount of these payments is discretionary with vestries; the obligation to make some payments to support the Episcopate is already mandatory.

Our questions for your comment fall into four basic areas:

A. How do we allocate the obligation to support the diocese among our parishes?

B. Should giving to the diocese voluntary, mandatory, or a blend of these two approaches?

C. How should any such obligations to give be enforced?

D. What, if any, conscience clause or alternate compliance mechanism should be included to recognize the irregular circumstances in which we are presently operating?

A. How do we allocate the obligation to support the diocese among our parishes? How do we calculate the figure to be paid to the Diocese by each parish each year?

These questions need decision whether the approach chosen is voluntary, mandatory, or some mixture. Diocesan canons currently require each parish to support the episcopate. There are a variety of ways that each parish's suggested giving be determined.

1. Flat percentage giving.

For example, the 1992 resolution restating the Virginia Plan called for a guideline of ten percent of parish revenue, with additional giving of at least one percent for diocesan mission/church planting. Diocesan assessments in other dioceses range as high as twenty-two percent. Straight percentage giving on the 2002 budget would have obliged all parishes to have given somewhere between six and seven percent of their revenue to meet that budget.

The advantages of a flat percentage is that it is equitable among parishes, is consistent with tithing, which does not vary by individual income, and does not overtly penalize good stewardship. The disadvantages include the fact that parishes with good stewardship but lower percentage giving to the diocese are sometimes pilloried when compared to those with less effective stewardship but a higher percentage of giving to the diocese. Additionally, there is the controversial claim that smaller parishes cannot afford the same percentage giving as a larger parish.

Questions:

a. Should the amount of any flat percentage we use change annually to meet a budget target?

b. If so, how should the target and percentage be calculated?

c. If we do not change the flat percentage figure annually, what percentage figure should we use? Should it be ten percent to correspond to the Biblical tithe? If not, how do we justify asking our parishioners to tithe to the parish church if we are unwilling to follow that example in how we treat our diocese?

d. How should any flat percentage figure we choose account for shortfalls in giving resulting from fiscal or other problems at pledging parishes?

e. Should any special provision be made for mission parishes?

f. What percentage level should a church be meeting in order to move from mission to parish status?

g. If an established parish cannot meet a minimum asking to the diocese, doesn't that indicate that the parish is unready to be more than a mission and should be returned to mission status since its lay and clergy leadership have failed to meet the basic requirements in the canons to be a parish church?

h. If we use a flat percentage of giving, how do we equitably address the following situation:

Two parishes are situated in the same area and draw demographically similar congregations. Parish A has a large annual budget and gives five percent of its annual revenue to the diocese. Parish B has a smaller annual budget but gives ten percent of its annual revenue to the diocese. The amounts given by each parish to the diocese are roughly the same. Parish A has a substantial mission and outreach program; Parish B has a much smaller one. Average pledging at parish A is much higher at Parish A than Parish B, apparently because of an emphasis by the leadership on the Biblical tithe.

Is it appropriate to expect Parish A to increase its percentage giving to the diocese and sacrifice mission programs? Should Parish A discharge clergy instead in order to meet its recommended (or mandatory) giving level to the diocese?

2. Percentage giving, graduated by parish size.

The 1999 resolution graduated giving by the amount of parish revenue, with eight percent being the bottom rung, and sixteen percent the top rung. This approach is more complex to administer than a straight percentage. Some contend that it penalizes good stewardship by demanding a higher percentage of income of higher revenue parishes, without regard

to parish obligations, many of which are undertaken in support of diocesan mission and ministry initiatives.

Its history over the last five years in this diocese suggests that it has been honored primarily where it allows parishes to cut their diocesan giving. Additionally, there appears to be little correlation with actual parish giving and these guidelines by size of the parish. It is not at all clear that vestries understand the giving ranges, at least not judged by the numerical performance.

a. What, if any, theological justification is there for different giving percentages to the diocese, either based on parish revenue or number of parishioners?

b. What is the economic justification for assigning lower percentage giving ranges to low revenue parishes than to high revenue parishes? What data support this economic justification?

c. If we are to use a giving range based on parish income, how do we deal with restricted donations?

d. If we are to use a giving range based on parish income, should the ranges change annually to meet a revenue target for the diocese?

e. If the giving ranges are to change annually, how are the new percentages to be calculated prior to diocesan council?

f. If we are to use a fixed giving range, what should those percentages be, in light of the manifest failure of most parishes to honor the current ranges?

g. What is the theological and economic justification for any newly proposed set of permanent ranges? What data support any such economic justification?

3. **Per capita giving, by numbers of communicants, or some similar measure (e.g. average Sunday attendance).**

This is actually a very old approach. It avoids a large parish, small parish split, and rewards good parish stewardship, since everything above a particular amount is kept by the local parish.

Virginia claims about 90,000 communicants, so that this approach, if taken in 2003 would yield a per capita payment of about $50 a communicant for the 2003 budget of about $4,500,000. For a parish of 100, this would mean a diocesan payment by the parish of $5,000. For a parish of 3,000, this would mean a diocesan payment of $150,000. These are very rough numbers for illustration.

This approach would provide a strong incentive to keep the rolls of communicants up to date, something that might reduce delegates at council for some parishes which are not careful

about this issue. This approach may, however, tend to burden parishes with lower income parishioners somewhat more heavily than parishes in higher income areas.

Questions:

a. If we use a per capita fee approach to pay for our diocese, how should be go about setting any such per capita figure (price per person)? Is it the entire diocesan budget? Is it some lesser portion of that budget?

b. If we use a per capita approach, should the cost of the Virginia Episcopalian be folded into this fee?

c. How does this per capita approach correspond to the economic costs of diocesan service to parishes, many of which costs are not proportionate to size of parish membership?

d. On what statistical basis should we determine the number of people on which the per capita charge will be assessed? Average Sunday attendance? Number of confirmed communicants? Average of Easter and Christmas attendance? Number of baptized members?

e. What is the most accurate and equitable way to measure membership over time if we use a per capita approach to fund our diocese? How do we assure the quality of this information?

f. If a parish has excellent stewardship, is it equitable and appropriate for it to provide only a flat dollar figure to the diocese and not to share in its abundance for common mission and ministry, as it would with a percentage giving approach? In colloquial terms, shouldn't the diocese have an "up side"?

4. Cost of Service Approach.

About sixty percent of our membership joins the Episcopal Church as adults. We cannot assume that financial support of the Episcopate is understood as a key aspect of being an Episcopalian. Many vestries ask a blunt but revealing question when it is time to complete diocesan pledges – what are we getting for the money we send to the diocese? Put differently, what are the core functions of the diocese that are essential to Episcopal church identity so that we as a parish or mission should be underwriting that work to be members in good standing?

Examination of these diocesan expenses suggests that a significant portion of them are proportionate to the number of parishes, rather than size. These might be functions such as Episcopal visitations. It takes a bishop as long to drive to a parish for confirmation whether he or she has ten or a hundred to confirm. The length of parish visits is not proportionate to the size of the parish.

Likewise, care of the clergy, a key role for our bishops, is more proportionate to number of parishes than to lay membership, since most parishes are served by only one member of the clergy.

The diocese also provides certain investment management and other services to small parishes that would not be economical for them to provide for themselves. Large parishes, for the most part, do not use these services, as they have the resources to use more convenient local services.

The diocese provides mission and ministry opportunities in the wider world for small parishes that large parishes frequently provide. The economies of scale are such that feasible mission and education opportunities at a parish with 1,000 average Sunday attendance are impossible at a parish with 50 average Sunday attendance.

For many of these basic functions, a small parish is much more expensive for the diocese to serve on a per person basis than a parish with a large membership. This economic reality, if reflected in askings of parishes, suggests that a substantial part of diocesan expenses should be allocated on the basis of the number of parishes, without regard to number of members or parish income.

To illustrate, if one assumes 180 parishes and a $4.5 million diocesan budget, this approach would result in a charge per parish of $25,000 per year. For comparative purposes, dioceses which use a mandatory assessment and are composed primarily of small parishes sometimes charge as much as 22% of parish income in mandatory assessments. Thus, for a parish with a $100,000 budget, this would be $22,000. That figure is close to the $25,000 figure this "per capita, by parish" approach would yield.

Other Episcopal and diocesan functions are more appropriately understood as a basic function of being a diocese, e.g. support for the General Church, church planting, camps and conference centers, and church revitalization. Those costs do not vary by the number of parishes, and might better be allocated on the basis of lay membership.

If one were to refine a cost of service approach, one might allocate the basic costs of the office of bishop, and most of the administrative costs of the diocesan office on the basis of the number of parishes, while allocating the costs of church planting and of the General Church on the basis of lay membership, since these are actions of the entire diocese.

To present a simplistic example, if half of diocesan costs were allocated on a per capita church basis and the other half allocated on the basis of numbers of members, each parish would face a per capita charge of $12,500 on the basis of 180 parishes and a $4.5 million budget, and a membership charge of about $25 per member, assuming 90,000 members and a $4.5 million budget. Thus, for a parish with 100 members and a $100,000 a year annual budget this blended approach would yield a figure of about $15,000 per year. For comparative purposes, this figure corresponds to a percentage giving range of about 15% a year. Fifteen percent of parish revenue a year is common in dioceses with mandatory assessments.

The cost of service approach, while very different than the Virginia Plan, has impacts similar to the large assessments used in some other dioceses. It also provides a useful benchmark by which to gauge the economic assertions made in support or opposition to other approaches. The cost of service approach would require substantial adjustments in our thinking about diocesan finance. These differences in approach are not necessarily a bad thing.

Questions:

a. Does this cost of service approach unduly burden small parishes? In particular, does this approach discourage mission and outreach at the local level by these parishes?

b. Does this cost of service approach inappropriately slow the movement of missions to full parish status?

c. If one takes a cost of service approach, what diocesan costs are most appropriately allocated on the basis of the number of members and what diocesan costs are most appropriately allocated on the basis of number of churches (divided equally among all parishes)? Why?

d. If the diocese is to move to this approach, what should the procedure be to determine these figures in advance of diocesan council and the November 30 deadline for submission of pledges for the coming year?

e. By what means should these calculations be subject to review by Diocesan Council?

f. What if any theological basis is there for a cost of service approach to funding the diocese?

g. Does the cost of service approach encourage good stewardship by our people?

B. Should giving to the diocese voluntary, mandatory, or a blend of these two approaches?

We have described above some of the strengths and weaknesses of the Virginia Plan of Proportionate Giving, which was adopted in part as a reaction to the problems with mandatory assessments. We need to recognize that no plan of giving to the diocese is painless or uncontroversial. To some degree, all are complicated.

1. Mandatory Assessments v. Voluntary Giving.

Regardless of how we calculate a parish's fair share giving to the diocese – flat percentage of revenue, percentage of revenue varying by size, per capita by communicant, or "cost of service" – one key decision is whether giving is voluntary or mandatory.

The strongest argument against voluntary giving is the free rider problem – parishes which quietly coast on others' donations to the diocese, and do little for mission or outreach or anyone outside themselves. This problem has grown worse over the last five years. It is difficult to convince a vestry to give generously, sometimes at the expense of clergy salary increases, increased outreach, and urgent building repairs, if the parish down the road has stiffed the diocese with impunity and is doing very nicely for itself.

Thus, equity among similarly situated parishes is one strong argument in favor of mandatory giving. This is true regardless of the basis for calculating the shares. As we have recognized with mandatory clergy health insurance, we have to bear one another's burdens for some diocesan functions.

In addition, mandatory assessments, if complied with, would mean that overall askings are likely to be lower. For example, if we used a flat percentage of revenue to meet the 2003 budget of about $4.5 million, it would mean something in the range of six to seven percent per parish. This is substantially less than many parishes are currently giving. It is substantially less than the current giving ranges (up to 16%) in the 1999 Virginia Plan, and significantly less than the 10 percent figure in the 1992 version of the Virginia Plan.

Similarly, if the mandatory assessment figures were based on a per capita basis of communicants, the likely figures would be in the $50 to $100 range, depending on the basis (average Sunday attendance, communicants, Easter attendance) chosen. Thus, for a parish of 50 members, there would be a charge of $2500 to $5000; twice that for 100 members. Once again, it is difficult to say with a straight face that these figures are too burdensome, given that the average pledge by parishioners in the diocese is about $2100, and the average family income in the state is $47,000 a year.

The down side of mandatory assessments is significant, however. With the exception of 1970-71, and again this year, Virginia has managed reasonably well for 47 years with a system of voluntary giving. That system, many would argue, has worked to foster a robust program of mission and outreach at the local level and of civility in our diocesan deliberations. We may hurt mission and outreach and undercut diocesan civility and unity if we take enforcement action against financially defaulting parishes. Since 1957, we have grown to become the largest diocese in the Episcopal Church. The Virginia Plan has also fostered, when it is working well, stronger Biblical stewardship. That stewardship has benefited both the parish and the diocesan levels of ministry. It has avoided needless disputes where parishes have in good faith reduced diocesan pledges for a time in order to address urgent local needs, such as capital campaigns, or to foster key mission work. It has given the diocese an "up side," a share of the revenue when good stewardship has increased revenue to parishes, and has given the diocese an incentive to foster stewardship and tithing education.

As a practical matter, however, reliance on voluntary giving means that the suggested percentages will need to be higher, since some parishes will predictably fail to give their proportionate share, or in some cases anything. Additionally, trying to draw distinctions among parishes by size and percentage has not been notably successful.

While the diocesan office is very leanly staffed, and now suffering acutely from the funding shortfall, it has functioned effectively for most of this time. Our diocese is widely respected for the breadth of "churchmanship" which it contains, usually amicably, and for its effective program of church planting, conducted to a large degree with diocesan funds.

Putting aside ideological disputes, any program of mandatory assessment will need to provide an appeal mechanism to deal with parishes which suffer financial reverses or who are otherwise unwilling or unable to pay their assessed share. That appellate mechanism will need to have some enforcement mechanism if it is to function effectively, even though such sanctions are usually more effective as a threat than in imposition.

In other dioceses, sanctions for failing to pay assessments include unseating delegates at their conventions. This practice often entails angry disputes and the worst kind of special pleading. This effectively puts the church's worst foot forward in our annual public meetings and poisons the atmosphere. These appellate proceedings have all the theological uplift of a tax audit.

In addition to these real costs to our civility, tradition, and time for more productive ministry, a major problem with a mandatory assessment is that it places dissenting parishes in violation of the canons. Adoption of mandatory assessments, without providing some appropriate, alternate means for the dissenters to comply with, will be viewed as highly provocative and needlessly so.

Mandatory assessments are easily defeated if lay people restrict their offerings. Once again, we are not the IRS and cannot garnish people's wages. We either have to honor restrictions or give the money back. Presumably it is better for our people to give something to their parish church, even with some strings attached, than it is for them to give nothing.

We are being urged by Archbishops Rowan and Eames to avoid provocation and to keep as many of our colleagues at the table as possible. The example Virginia sets is important to the rest of the church. It is important for us to address these real financial concerns without degenerating into a game of power politics.

Questions:

a. If we do not adopt mandatory assessment, how do we close the current revenue gap?

b. If we do not adopt mandatory assessment, how do we deal with "free-rider" parishes," those with no theological objection which nonetheless fail to give anything like a proportionate share of revenue (however calculated) to the diocese?

c. If we keep a voluntary program of giving, how can we convincingly perform the theological education about tithing needed for such a program to work in the current inflamed environment, where those congregations most firmly in favor of tithing overlap significantly with those most opposed to the actions of General Convention?

d. If we adopt a mandatory program, how do we avoid inflaming divisions among our parishes and people, when a significant number of our parishes and people have a theological objection to supporting the unrestricted budget of the diocese and the General Church because of their objection to the actions of General Convention?

e. If we adopt a mandatory program, how do we avoid undercutting parish stewardship?

f. If we adopt a mandatory program, how do we deal with a parish where the bulk of its people restrict their gifts so that nothing may be sent to the diocese or General Church?

g. If we go to a mandatory approach, how do we deal with the undeniable reality that there is no way to compel our lay people to make unrestricted gifts to the church?

2. Blended Approach.

Some dioceses now use a hybrid system of finance, with a mandatory assessment of some kind, usually a small flat percentage, for the basic diocesan functions, and voluntary giving for mission and similar efforts over and above the mandatory assessment. In Virginia, this might take the form of a five percent parish revenue or $40-50/head mandatory assessment coupled with voluntary giving, e.g. ten percent of parish revenue, for church planting and similar mission efforts.

Thus, for example, in a parish of 100 members with a $125,000 budget, this might take the form of an assessment of $5,000 ($50 x 100 members) for the basic functions of the diocese – salaries, utilities, bishop's travel costs, e-mail, accounting, help in the search process, recruitment and screening of seminarians, investment management, health insurance management, support of the general church, etc. – and an asking of ten percent -- $12,500 – counting whatever was paid in the per capita assessment for the mandatory functions of the diocese. In this example, if the full asking were met, the diocese would receive $5,000 for its basic functions, and $7,500 for its church planting and other work not counted in its basic functions. The additional $7,500 would not be mandatory.

The advantages of this approach are to preserve a significant degree of local autonomy and to provide a more reliable basis to pay for the basic functions of the diocese. The approach would be more complex to administer than our current system. It would require many of the trappings of the mandatory assessment system, including an appellate mechanism, and some decisions about how to determine the amount needed for the basic functions of the diocese. And, like a mandatory assessment system, it would probably also require a conscientious objector clause, allowing an alternate means of giving for the current inflamed circumstances.

Questions:

a. Are any increases in reliability of diocesan revenue with a blended financing system worth the complexity?

b. How are the overhead costs of functions like church planting supposed to be allocated?

c. Will parishes adequately support such a hybrid system if discrete parts of the diocesan budget are voluntarily supported?

C. How should any such obligations to give to the Diocese be enforced?

The Virginia Plan has no enforcement mechanism, though parishes which give little or which default on their pledges generally have difficulty in obtaining loan approvals from the Standing Committee and the Bishop for expansion. Annual pledge records are published at each diocesan council, and that publicity encourages parishes to complete their pledges.

Our current canons do require support for the diocese, in regular monthly installments, although the canons do not specify an amount. Under the current canons, a parish which refuses completely to support the diocese might technically be subject to formal disciplinary action, up to and including replacement of the vestry and conversion to mission status. To date, however, we are unaware of any such action in Virginia while the Virginia Plan has been in force. In defense of parishes not giving to the unrestricted diocesan budget prior to General Convention, most appear to be giving something significant to other diocesan ministries, including the Diocesan Fund for Human Need, to Bishop's Discretionary Funds, and to diocesan or parish missions within the diocese.

One of the benefits of the current voluntary approach has been to give Virginia Diocesan Councils a remarkable tradition of civility and positive emphasis, at least according to clergy coming from other dioceses. With the recent breakdown of the Virginia Plan, however, serious questions have arisen about making giving to the diocese mandatory, and to employ some of the enforcement mechanisms from other dioceses.

A typical enforcement provision might have these elements:

- ξ payments must be made on monthly basis to the Diocese
- ξ interest will accrue on any monthly payment not made by the last day of the month
- ξ a parish that has not fulfilled its annual assessment/pledge (plus any interest) owing to the Diocese will lose its voice and vote at the upcoming Annual Council

Mechanisms in force in other dioceses, or which are similar, include:

(a) monthly publication of the list of defaulting parishes and the amounts of their default;
(b) depriving defaulting parishes of lay and clergy vote(s) at council, recognizing that both lay and clergy are responsible for meeting parish financial obligations;
(c) depriving defaulting parishes of voice at council;
(d) depriving clergy and lay delegates from defaulting parishes of the right to sponsor resolutions, canonical changes, or budget amendments on the floor of council;
(e) providing for automatic Standing Committee and/or Ecclesiastical disapproval of loans for defaulting parishes to build new facilities or otherwise to encumber their real property; and
(f) reduction of a parish to mission status for persistent default on mandatory obligations to the diocese.

Although the last option sounds extreme, it is reportedly being threatened in Western New York against five parishes who refuse to give to that diocese because of the actions taken at General Convention.

These sanctions range from gentle to draconian. The problem with any sanction, however, is that sanctions are likely to antagonize the people we are trying to encourage to work together enthusiastically. In addition, harsh sanctions ignore the reality that our revenue comes mostly from lay people's voluntary pledges, which lay people are free to withhold or restrict.

Parishes' only options in the face of such restrictions are either to honor the restrictions or give the money back. To do otherwise, to override donor restrictions while keeping the money, is fraud. Presumably it is better to have a parishioner giving substantially for a restricted purpose than not to give at all.

Given the number of times a year when our bishops and clergy make appeals for specific offerings, it is unconvincing for the church to condemn our laity for restricting their gifts to specific objectives rather than giving generally to denominational structures they no longer trust. It is after all rare for clergy to turn down a check to their discretionary fund.

Any enforcement mechanism will also have to provide an appeal mechanism to address financial emergencies. Parishes, like businesses and individuals, will sometimes face insolvency or similar dire financial circumstances. Once again, punishing donors or their clergy probably won't increase revenue, especially when a parish or mission is in deep financial trouble.

Questions:

(a) If our diocese is to refuse to seat delegates to Council from financially defaulting parishes, is there any theological or practical justification to distinguish between lay and clergy from the defaulting parishes? If so, what is it?

(b) If we are trying to keep as many factions at the table as possible, how does depriving a defaulting parish of its votes and possibly voice at Council help accomplish that objective?

(c) If we are trying to avoid inflaming the current situation, how can enforcement mechanisms minimize inflammatory results while maximizing revenue?

(d) How can we assure fairness to parishes which pay the full amount of the recommended (or required) diocesan pledges if there is no effective enforcement against those parishes which do not pay?

(e) If we have no enforcement mechanism, what chance do we have that our financing system will effectively address our "free rider" problem?

D. What, if any, conscience clause or alternate compliance mechanism should be included to recognize the irregular circumstances in which we are presently operating?

There is a big difference between "free-rider" parishes and those conscientious objectors who remain willing to give with restrictions for our common diocesan ministries. As Executive Board has recognized, these are irregular times in the church, and sometimes irregular means have to be tolerated, as they were in the last thirty years in connection with women's ordination, with same sex blessings in many dioceses prior to the 2003 General Convention, and with other hot button issues in our lifetime.

We are being asked by the Archbishop of Canterbury, as well as Archbishop Eames and our domestic leadership, to keep people of diverse views together while the severe strains created by General Convention's actions are addressed in a systematic and thoughtful way. It may be critical to our continued unity to providing dissenting parishes an alternate means to fulfill canonical obligations to support our common ministries. Claims of inclusiveness are hollow if they don't extend to parishes with which we disagree.

The Task Force has seen evidence demonstrating that prior to General Convention several parishes still dissenting from the Righter Trial verdict were giving substantial amounts to the Diocesan Fund for Human Need, to Bishop's Discretionary Accounts, and to help plant new churches, all recognized diocesan ministries. Since General Convention, the Task Force has been provided evidence that at least one dissenting parish has re-directed its prior diocesan pledge to support mission churches or missioners within the diocese. Another has directed a portion to support prison ministries cut from the diocesan budget. These are helpful actions, indicative of a sincere desire to remain engaged in the life of the diocese.

By the same token, the amounts involved in this re-directed giving tend to be materially less than what was given in diocesan pledges. The donations are uncoordinated, difficult to track, and if they are to become a part of our diocesan life, will impose significant administrative costs.

In order for a financial conscience clause to work, it should:

- provide clear and objective way to measure compliance, and not be subject to revocation with changes in Bishops and key personnel at Council;
- should support important diocesan work of a kind agreed upon in advance by the diocese;
- not be lightly invoked;
- not be usable as a cover for stinginess.

Dissenting parishes have expressed concern that they will be subject to discipline for refusing to give in an unrestricted way to the diocese and national church, even though they find the decisions of those in control of these institutions repugnant on several key matters. These divisions are extremely deep and are not likely to be resolved soon.

Despite these divisions, some of these parishes and their leadership have also expressed the desire to continue to work together on critical priorities such as church planting and diocesan mission. That support, if genuine and tangible, can make a big difference to the success of church plants and specific diocesan missions otherwise supported out of the unrestricted diocesan budget. If the money comes to these same common efforts by a different route, our common efforts are helped, not hurt.

There are conscience clauses used sometimes in the labor relations context. They provide for the giving of money to alternative recipients in lieu of union dues by those workers who conscientiously object to joining or giving to a union. This eliminates the potential free rider problem, since the objector is not financially better off for refusing to pay union dues while his fellow laborers pay to improve all of their conditions through collective bargaining.

Similar substitute giving sometimes occurred during the early controversies over women's ordination; the Presiding Bishop's Fund sometimes received multiple parish donations arising from disputes about the validity of a single service at which women clergy presided. These included collections taken at the service; and matching donations from parishes and/or bishops who refused to accept the first donation, but who then used their discretionary funds to assure that the Presiding Bishop's Fund was not shorted by the amount of the first donation.

Any conscience clause, however, is a headache to administer and imposes significant administrative costs. Giving to specified ministries ignores the undeniable reality that the diocesan office overhead and personnel are essential to making these ministries work.

Here is an example of a conscience clause which might work in the current context:

A parish which declines to give to the unrestricted diocesan budget may fulfill its canonical obligation to support the episcopate in the following way. By December 15 before the upcoming year, the vestry of the affected parish must decide, by written motion, to invoke this alternate means of compliance by a two thirds vote of all vestry members, with the yeas and nays recorded and

prominently posted in the parish and reported to the diocese. Alternate compliance shall consist of a written parish pledge to one or more of the following diocesan ministries, remitted in regular monthly installments, reported to the diocesan treasurer by December 31 for publication at Council, and included in the Diocesan Journal. The following diocesan ministries shall be deemed appropriate recipients for such pledges:

(a) Bishop's Discretionary Fund;
(b) church planting for a specific mission church within the diocese;
(c) the Diocesan Missionary Society;
(d) financial support for a specific mission within the diocese;
(e) diocesan prison ministries;
(f) Shrinemont;
(g) Rosslyn;
(g) Another specific diocesan ministry agreed upon with the Executive Board in advance of the vestry vote.

The total of the dissenting parish's pledges to these specified ministries shall be at least one hundred and fifty percent of the pledge to the unrestricted diocesan budget which the dissenting parish would otherwise be obliged to give to the diocesan budget for the coming year. The amount of giving pursuant to these pledges shall be reported by the receiving ministries. The giving record to these ministries shall be published prior to the following year's Council and provided to Council delegates in the same manner as parish pledges to the Diocese for its unrestricted budget. Failure to comply with these pledges shall be subject to the same sanctions as any default in meeting a parish's pledge to the unrestricted diocesan budget. "

The use of the 150% figure is to assure that this clause is not lightly invoked and to recognize that there are significant administrative costs to this kind of targeted giving. It is also to assure that current parish giving for these purposes is not simply re-packaged as the substitute diocesan pledge, leading to a net decrease in revenue in some cases.

The requirement of a two thirds recorded vote is to assure that there is full and public consideration of this approach and that there is something approaching a consensus within the parish's leadership about this conscientious objection.

The list of ministries is a partial reflection of our diocesan priorities, with the catch-all that something worked out with the Executive Board in advance will also pass muster. The focus on church planting and related items is a reflection of the strong mission emphasis of both our diocese and also a recognition that a significant part of our diocesan budget is spent in support of these specific efforts, so that giving to them will offset to some degree the refusal to pledge directly to the diocesan budget. The listings of Shrinemont, DMS, and Rosslyn are included for similar reasons: we have emphasized youth and our camps and conference centers as priorities, along with church planting.

Questions:

(a) If our diocese adopts a system of mandatory assessment, should a conscience clause (alternate compliance mechanism) be included to allow those still willing to give with restrictions to help support important diocesan ministries?

(b) If our diocese decides to continue with a program of voluntary giving, should we include a conscience clause? If so, why?

(c) If we adopt a system of mandatory assessment and do not include a practical conscience clause for those still willing to write checks to diocesan ministries, how is that consistent with our claims to be inclusive of many different viewpoints?

(d) If we adopt a system of mandatory assessment and do not include a practical conscience clause, what is the likely revenue impact on the diocese? What data support these predictions?

(e) Should any conscience clause require some payment toward overhead of the ministries being specifically supported? If so, how should this figure be calculated? If not, how should that overhead be funded?

(f) How can a conscience clause be worded to avoid a parish re-packaging charitable work it was doing prior to General Convention and calling that re-wrapped package compliance with mandatory assessments?

(g) What diocesan ministries should be canonically included in any such conscience clause? Why?

(h) If we adopt a conscience clause, what are its prospects for helping resolve our current fiscal crisis?

(i) If you are from a dissenting parish and support a conscience clause, do you believe that your parish avail itself of such a clause and provide substantial (if restricted) support to diocesan ministries? Which ministries? How much money?

(j) If you are from a dissenting parish and do not believe your parish will provide substantial support for specified diocesan ministries through a conscience clause, is there any reason the diocese should bother to adopt such a clause?

****

The task force will gladly receive written and e-mail comment on this discussion draft. Comments should be sent to Nancy Jenkins, at the Diocesan Office. The deadline for written comments is Friday, June 18, 2004, though we will gratefully receive them before that time.

While we will try to consider comments submitted late, there is no assurance that we will be able to give them the weight their content may deserve if they arrive late.

The Task Force will be taking oral comments on this discussion draft at the Clergy/Lay Professional Conference on May 4 at Shrinemont. We will also receive oral comments at the following four hearings:

St. Stephen's, Culpeper, 7 pm; Tuesday, May 25

St. Stephen's, Richmond, 7 pm, Thursday, May 27

Truro, Fairfax, 730 pm, Wednesday, June 2

St. John's, Tappahannock, 10 am, Saturday, June 5

The rules for presentation at these hearings will depend on how many people show up to present oral comments. It would be helpful to the Task Force if those presenting oral comments could provide a written version of their remarks so that we can share these with any absent members, and so we can refer back to these remarks later. The members of the Task Force may ask questions to clarify statements, but it is not our intention to debate those making presentations, since the Task Force has a wide spectrum of views and since the Task Force has to weigh all comments before making any decisions on its recommendations.

We appreciate your cooperation and interest, and hope this detailed presentation is useful to help us all crystallize our thinking about the wisest means to move forward effectively in ministry at a time of painful division.

Faithfully,

Russ Randle
Chair, Giving Task Force

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202.457.5282 (w); 703.527.8930 (h)

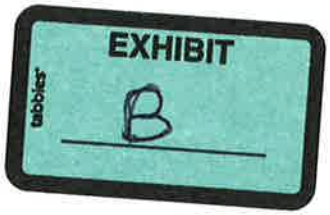
VIRGINIA:

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

THE DIOCESE AND THE EPISCOPAL CHURCH'S
ACCOUNTING INTERROGATORIES TO TRURO CHURCH

Pursuant to Part 4 of the Rules of the Supreme Court of Virginia, the Protestant Episcopal Church in the Diocese of Virginia and The Episcopal Church propound the following accounting interrogatories to Truro Church.



DEFINITIONS AND INSTRUCTIONS

1. The "Diocese" means the Protestant Episcopal Church in the Diocese of Virginia.

2. The "Episcopal Church" or the "Church" means the institution that is now known as The Episcopal Church, however it was named or known at any other date or time.

3. "Truro," when used other than as part of a longer name (*e.g.* "Truro Episcopal Church"), means defendant Truro Church and any predecessor entities, however named or known, whether incorporated or unincorporated, and including but not limited to Truro Episcopal Church; Zion Church; and Zion Protestant Episcopal Church.

4. "You" or "your" means the defendant Truro and its clergy, vestry, directors, officers, trustees, representatives, attorneys, experts, investigators, or anyone acting on behalf of any the foregoing.

5. "This case" refers to all legal proceedings in the above list between the Diocese, the Episcopal Church, and the eleven congregations describing themselves as the "CANA Congregations," including all petitions, claims, and defenses of any party.

6. "Describe" or "description" when used in reference to persons or the members of a class means to identify each individual person or member of a class. When used in reference to a document, "describe" or "description" means to state the following as to each document: (a) its title, if any, and/or subject, if identified; (b) its nature and contents; (d) its date; (d) the name, address and position of its author(s), signer(s) or producer(s); (e) the name, address and position of the addressee, if any, and of all persons who have received copies; and (f) its present location and the name, address and position of the person(s) having custody of it.

7. "Document" has the meaning assigned by Rule 4:9(a) of the Rules of the Supreme Court of Virginia and includes any thing that contains information, including any written,

recorded, graphic or multimedia material however produced or reproduced, tangibly or in electronic format, whether or not in your possession, custody or control and whether or not claimed to be privileged against discovery on any ground.

8. As used in Interrogatories and Requests for the Production of Documents, "regarding" means embodying, describing, evidencing, discussing, containing, identifying, mentioning, pertaining to, or otherwise relating to in any way, in whole or in part, the subject(s) referred to in the interrogatory or request.

9. "Identify" or "identification" when used in reference to an individual person means to state his/her full name, his/her present address, his/her home and business telephone numbers, and his/her present or last known position and business affiliation. When used in reference to an entity, "identify" or "identification" means to state the full name, present or last known address, and present or last known telephone number of such entity. When used in regard to real property, "identify" means to state: (i) the full address of the property, the tax map identification number, the deed book number and page number of the operative deed, or other public record information that is unique to the real property; and (ii) the fair market value or estimated value of the property (along with the factual basis for the value, if an estimated value is provided). When used in regard to personal property, as defined *infra*, "identify" means to state: (i) any name by which the property is commonly known or referred to by Truro; (ii) the vehicle identification number; serial, certificate, or account number; or other unique characteristics of the property, distinguishing it from other personal property held or used by Truro and allowing the Court or a litigant other than Truro to refer to the property in a clear and unambiguous way; (iii) the account balance, fair market value, or estimated value of the property (along with the factual

basis for the value, if an estimated value is provided); (iv) the amount and holder of any lien, encumbrance, or loan secured by the property.

10. "Communication" refers to any and all written documents between two or more persons, or oral communications, including telephone communications, personal conferences, meetings or otherwise, between two or more persons.

11. Whenever you are requested to give a date, if you are unable to give the exact day, month, and year, give your best estimate.

12. Unless otherwise specified, year ranges are inclusive. For example, a reference to "1919-1922" refers to each and every year in that range, beginning with January 1, 1919, and ending with December 31, 1922.

13. For each document or other communication as to which a privilege or other ground of exclusion is claimed, describe the document or other communication and state the basis for such claims of privilege or other ground of exclusion.

14. Conjunctions ("and" and "or") and noun and verb forms (singular or plural) and tenses (past or present) are intended to and shall be construed to encompass the largest possible scope for these requests and shall not be construed to exclude information from the scope of these requests.

15. "Personal property" includes, but is not limited to, checking, savings or other financial accounts; certificate of deposit or shares in banks, savings and loans, thrifts, buildings and loans, credit unions, brokerage houses or cooperatives; interests in any contracts, agreements, leases, licenses or joint venture arrangements; stocks, bonds, annuities, partnership interests, equity interests or other type of ownership in any limited liability company, partnership, joint venture, corporation, mutual fund, REIT or any investment vehicle; automobiles, boats, aircraft;

and any sacramental items, musical equipment, office equipment, office furnishings, books, pictures and other art objects, antiques, coin, stamp or other collectibles having a value of $500 or more.

INTERROGATORIES

1. Identify with particularity all real and personal property that you claim a legal or equitable interest in as of the date Truro purports to have disaffiliated from the Diocese and the Episcopal Church.

ANSWER:

2. With respect to any and all property identified in response to Interrogatory 1, state whether any such real or personal property having a value of $500.00 or more has been transferred, sold or otherwise alienated since the date of the vote; state the date and nature of the transfer, sale or other alienation; and describe the circumstances of same. With respect to any funds maintained in checking, savings or other financial accounts, state whether such accounts have been segregated since the vote to disaffiliate and whether the balances have remained intact. If the funds on deposit have been used for any purpose, describe the circumstances with particularity and state the date of the use of funds or payment out of such account, the payee and check number (if any), and the specific purpose for such use of funds.

ANSWER:

3. For the 90 day period ending on the date you purport to have disaffiliated from the Diocese and the Episcopal Church, identify any real property or personal property transferred or conveyed by you in an amount or with a value greater than $500.00. With respect to any such

transfers or conveyances, identify the date of such occurrence, identify all persons or entities who you contend have any interest or right in any property so transferred or conveyed, and the consideration for such transfer or conveyance.

ANSWER:

THE PROTESTANT EPISCOPAL CHURCH
IN THE DIOCESE OF VIRGINIA

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CERTIFICATE OF SERVICE

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