

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

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

**COMMONWEALTH'S MEMORANDUM IN SUPPORT OF  
MOTION FOR PARTIAL RECONSIDERATION**

COMES NOW the Commonwealth of Virginia, ex rel. Kenneth T. Cuccinelli, II, and files this Memorandum in support of CANA Congregations' Motion for Partial Reconsideration of Personal Property Ruling ("Mot. for Partial Recons.") from the Court's January 10, 2012 letter opinion with respect to ownership of personal property held by the CANA Congregations and vested thereby in the Protestant Episcopal Church in the Diocese of Virginia ("the Diocese").<sup>1</sup>

The Attorney General of Virginia has the authority, and duty, "to act on behalf of the public with respect to" assets held by "charitable entities" that are "incorporated in or doing any business in Virginia," such as those at issue here, and "the authority to seek such judicial relief as may be necessary to protect the public interest in such assets." Va. Code Ann. § 2.2-507.1(A). *See Dodge v. Trs. of Randolph-Macon Woman's Coll.*, 276 Va. 10, 16, 661 S.E.2d 805, 808-09 (2008) ("This statute further gives the Attorney General the authority to act on behalf of the

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<sup>1</sup> The Commonwealth of Virginia takes no position with respect to the Court's decision as to matters not raised by the CANA Congregations in their motion for partial reconsideration.

public when a charitable corporation incorporated in or doing business in Virginia uses charitable property in a manner inconsistent with the corporation's governing documents *or applicable law.*"); *see also*, Va. Code Ann. § 55-532 (requiring non-profit entities to notify the Attorney General before disposing of assets so that the Attorney General "may exercise his common law and statutory authority over the activities of these organizations"); *accord Tauber v. Commonwealth*, 255 Va. 445, 451, 499 S.E.2d 839, 842 (1998) (The Supreme Court of Virginia "long ago recognized the common law authority of the Attorney General to act on behalf of the public in matters involving charitable assets." (citing *Clark v. Oliver*, 91 Va. 421, 427-28, 22 S.E. 175, 177 (1895))).

The Attorney General here asserts the public interest in the wishes of donors being honored -- that the charitable gifts of donors be used "for such purposes as are established by . . . the gift or bequest made to" the religious body in question. Va. Code Ann. § 2.2-507.1; *see, e.g., Gallego's Ex'rs v. Att'y Gen.*, 30 Va. (3 Leigh) 450, 461 (1832) (noting that "[t]he attorney general filed an information and bill, to have [the charitable gifts] applied to the objects for which they were bequeathed, and to enforce the execution of the trusts in respect to them"); Va. Code Ann. § 57-4 (directing that assets donated "for a charitable purpose" to a "vestry" that was no longer in existence be managed by the governing body of the locality in which the vestry lay and that the governing body "shall apply such money or other thing in such manner as may have been directed by the donor.")). Pursuant to this authority and in pursuit of the public interest, the Attorney General urges this Court to grant reconsideration of its ruling insofar as it concerns the disposition of personal property to the Diocese.

## ARGUMENT

### I. Donor Intent Governs the Disposition of Personal Property Between Conflicting Claims of Religious Entities.

The Supreme Court of Virginia has affirmed in this very case that church property disputes are to be resolved with reference to the general laws of property and contract. *See Protestant Episcopal Church v. Truro Church*, 280 Va. 6, 29, 694 S.E.2d 555, 567-68 (2010) (citing, as exemplary, Va. Code Ann. § 57-7.1; *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.*, 249 Va. 144, 452 S.E.2d 847 (1995); *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980); and *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 201 S.E.2d 752 (1974)). That donor intent is paramount and governs the disposition of property, both real and personal, by one entrusted with its management is a principle beyond dispute and interwoven throughout the law governing charitable trusts. *Compare* Va. Code Ann. § 57-7.1 ("Any such conveyance or transfer *that fails to state a specific purpose* shall be used for the religious and benevolent purposes of the church, church diocese, religious congregation or religious society as determined appropriate by the authorities which, under its rules or usages, have charge of the administration of the temporalities thereof." (emphasis added)), *with* Va. Code Ann. § 22.1-122 (providing that "[a]ny donations made to the Board of Education or to any member thereof for the benefit of any public school or schools in the Commonwealth . . . shall be expended by the Board in accordance with the wishes of the donor"); Va. Code Ann. § 23-9.2 (declaring "the public policy of the Commonwealth" with regard to financing higher education to be that private donations "be used in accordance with the wishes of the donors thereof").

In ruling for the Diocese, the Court relied upon Code § 57-10, which provides that:

When personal property shall be given or acquired for the benefit of an unincorporated church or religious body, to be used for its religious purposes, the same shall stand vested in the trustees having the legal title to the land, to be held

by them as the land is held, and upon the same trusts or, if the church has created a corporation pursuant to § 57-16.1, to be held by it as its land is held, and for the same purposes.

Va. Code Ann. § 57-10. Assuming for purposes of argument that Code § 57-10 is relevant to the disposition of the personal property in this case, a point the CANA Congregations contest,<sup>2</sup> *see* Mot. for Partial Recons. at 9, this default rule -- that personal property "is held" in the same manner and by the same trustees of a religious body as hold title to the body's real property -- does not evince an intent to amend the bedrock principle that assets donated to a charitable organization *be reserved to the use and organization that the donor intended*. Nor does this section speak at all to the situation presented: a dispute over ownership of personal property between a congregation and a hierarchical church body with which the congregation had previously associated. Accordingly, this Court should reconsider applying this statute outside its plain context to dislodge general principles of trust law. *See Truro Church*, 280 Va. at 29, 694 S.E.2d at 567-68.

Other statutes, such as Va. Code Ann. §§ 57-1 and 57-7.1, caution against this overbroad reading of Section 57-10. Va. Code § 57-1, passed by the General Assembly within ten years of the Commonwealth's independence, declares "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical, and even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of

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<sup>2</sup> Va. Code Ann. § 57-10, prior to July 1, 2005, read:

*When books or furniture shall be given or acquired for the benefit of such church diocese, religious congregation, church, or religious society, or branch or division thereof, to be used on such land in the ceremonies of public worship or at the residence of such bishop, or minister or clergyman, the same shall stand vested in the trustees having the legal title to the land, to be held by them as the land is held, and upon the same trusts.*

(emphases added).

the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern." Toward preventing this violation "of the natural rights of mankind," *id*; Va. Code Ann. § 57-2, the General Assembly enacted as law the principle "[t]hat no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever." Va. Code § 57-1. The principles of reading statutes "in pari materia" and not presuming a repeal by implication, *see Eastlack v. Commonwealth*, 282 Va. 120, 125, 710 S.E.2d 723, 725 (2011) (citing *Hughes v. Cole*, 251 Va. 3, 14, 465 S.E.2d 820, 828 (1996) for the proposition that "repeal of a statute by implication is not favored, and there is a presumption against a legislative intent to repeal where express terms indicating such intent are lacking"), compels the Court to prefer a reading of Va. Code Ann. § 57-10 that would not repeal, in part, Va. Code § 57-1, by commanding an involuntary transfer of donations from the support of one religious congregation to that of another, over the religious objections, and in violation of the clearly expressed intent, of the donors. *See Gallego's Ex'rs*, 30 Va. (3 Leigh) at 473 ("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?").

Finally, Va. Code Ann. § 57-7.1 also supports the conclusion that Code § 57-10 should not be read as an (implicit) command to ignore donor intent when resolving disputes between religious organizations over personal property. That section, entitled "What transfers for religious purposes valid," provides in pertinent part: "[a]ny such conveyance or transfer *that fails to state a specific purpose* shall be used for the religious and benevolent purposes of the [recipient religious entity] as determined appropriate by the authorities" designated by the

recipient entity. Va. Code Ann. § 57-7.1 (emphasis added). The emphasized language implies that "any such conveyance or transfer" that does "state a specific purpose" is not subject to the rule that the religious authorities may decide upon an appropriate use. If the Court finds evidence that the "conveyance or transfer" of any of the personal property at issue was conveyed with the specific purpose that it *not* be used to benefit the Diocese, the Court cannot vest in the Diocese legal right to that personal property.

## **II. Virginia Law Must Be Construed To Avoid Conflicting With the United States and Virginia Constitutions.**

In addition to the natural interpretation of Va. Code Ann. § 57-10 urged above, there is another rule of construction that requires this Court to grant reconsideration of any ruling vesting personal property, without regard to expressed donor intent, in the Plaintiffs: courts "have a duty to construe statutes subject to a constitutional challenge in a manner that 'avoid[s] any conflict with the Constitution.'" *Copeland v. Todd*, 282 Va. 183, 193, 715 S.E.2d 11, 16 (2011) (quoting *Commonwealth v. Doe*, 278 Va. 223, 229, 682 S.E.2d 906, 908 (2009)). "In this context, we will narrowly construe a statute where such a construction is reasonable and avoids a constitutional infirmity." *Va. Soc'y for Human Life v. Caldwell*, 256 Va. 151, 157, 500 S.E.2d 814, 816-17 (1998); *see also, Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988) (holding, in the First Amendment context, that no overbreadth exists if curative construction is one to which the statute is "readily susceptible.").

The religious freedoms protected by the First Amendment of the United States Constitution, as applied to the Commonwealth through the 14th Amendment, as well as Article I,

§ 16 of the Virginia Constitution,<sup>3</sup> prohibit the forced transfer of funds to benefit a religious organization. *See Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("It 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"); *see also*, Va. Const. art. I, § 16 ("No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . . . it 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."). As Thomas Jefferson wrote in the preamble to the bill that would become Va. Code Ann. § 57-1, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical" and "that even the 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." *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 13 (1947) (emphasis added).

Although the Court can and must resolve this dispute over property rights, and thus necessarily will recognize property interests in one religious body as opposed to another, it must under the mandate in this case do so in reliance upon neutral principles of law, which require that donor intent be honored. Accordingly, the Court must reject an interpretation of Va. Code Ann. § 57-10 that would imply that donor intent with respect to personal property is to be ignored in the case of a dispute over church property, especially where individuals have expressed in no uncertain terms that they object on grounds of conscience to having their donations diverted to the support of a particular religious organization. We defer to the parties and this Court as to

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<sup>3</sup> "[T]he protections under the Virginia Constitution are 'parallel' to those of the U.S. Constitution." *Glassman v. Arlington Cnty.*, 628 F.3d 140, 149 (4th Cir. 2010) (citing *Coll. Bldg. Auth. v. Lynn*, 260 Va. 608, 538 S.E.2d 682, 691 (2000)).



whether the evidence adduced makes out such a scenario; however, in the judgment of the Attorney General, the CANA Congregations have raised a prima facie case that this Court's decision fails to honor donor intent, thereby running afoul of fundamental principles of religious freedom, and thus meriting reconsideration. *See* Mot. for Partial Recons. at 3-8.

### CONCLUSION

WHEREFORE, the Commonwealth of Virginia respectfully requests that CANA Congregations' Motion for Partial Reconsideration of Personal Property Ruling be granted to the extent that donor intent is demonstrated on the record.

Respectfully submitted,

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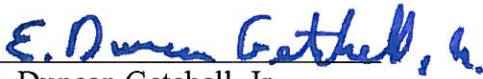
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