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April 23, 2008

VIA HAND-DELIVERY

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

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

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

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

In re: Church of the Word, Gainesville; (Circuit Court of Prince William County; CL73464) (Circuit Court of Fairfax County; CL 2007-11514);

The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Epiphany, Herndon (Circuit Court of Fairfax County; CL 2007-1235);

The Protestant Episcopal Church in the Diocese of Virginia v. Truro Church (Circuit Court of Fairfax County; CL 2007-1236);

The Protestant Episcopal Church in the Diocese of Virginia v. Christ the Redeemer Church (Circuit Court of Fairfax County; CL 2007-1237);

The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Apostles (Circuit Court of Fairfax County; CL 2007-1238);

The Episcopal Church v. Truro Church et al. (Circuit Court of Fairfax County; CL 2007-1625);

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

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

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

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

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

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

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

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

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

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

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

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

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

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Dear Ms. Brooks:

I am enclosing for filing in the above-styled case an original, The CANA Congregations' Opening Post-Decision Brief, plus twenty-one (21) copies of a one-page covers sheet to be placed in the file for the above-styled cases.

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

Very truly yours,

SANDS ANDERSON MARKS & MILLER, PC



George O. Peterson

cc: Seana C. Cranston, Law Clerk to the Honorable Randy I. Bellows (via hand-delivery)
Bradfute W. Davenport, Jr., Esquire
Heather H. Anderson, Esquire
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William E. Thro, Esquire

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

**In re:
Multi-Circuit Episcopal Church
Litigation**

)
) **Civil Case Numbers:**
) CL 2007-248724,
) 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 CANA CONGREGATIONS' OPENING POST-DECISION BRIEF

The Falls Church, Truro Church, Church of Our Saviour at Oatlands, Church of the Apostles, Church of the Epiphany, Church of the Word, St. Margaret's Church, Christ the Redeemer Church, St. Stephen's Church, Potomac Falls Church, and St. Paul's Church (collectively, "CANA Congregations"), by their counsel, hereby file this opening post-decision brief. In its April 3, 2008, Order, this Court invited briefing to address the assertions that (1) "the Contracts Clause issue will require an evidentiary hearing"; and (2) such a hearing "will involve factual matters similar or identical to those factual matters at issue in the Declaratory Judgment actions." Order at 2. This brief addresses those issues.

INTRODUCTION

Section 57-9(A) of the Virginia Code (“division statute”) provides that when a religious denomination experiences a division, any congregation attached to the denomination may vote to determine which branch of the divided body it wishes to join and report its determination to the local circuit court.¹ The statute further directs that if the congregation’s determination is “approved by the court,” it “shall be *conclusive as to the title to and control of any property held in trust for such congregation*, and be respected and enforced accordingly in all of the courts of the Commonwealth.” (Emphasis added.)

This Court has now ruled that the CANA Congregations have satisfied the core elements of § 57-9: the “division,” “branch,” “attached,” and “church or religious society” requirements. *See* Letter Opinion on the Applicability of Va. Code § 57-9(A) (Apr. 3, 2008) (“Op.”) at 74-83. What remains for the Court to determine is: (1) whether the statute, as interpreted by the Court, is constitutional under the First Amendment to the Constitution and the religious freedom provisions of the Virginia Constitution; (2) whether the CANA Congregations’ votes satisfy the statute, if that issue is disputed; and (3) whether application of the statute in these circumstances would violate the Contracts Clause by impairing contractual rights of the Episcopal Church in

¹ The statute provides in relevant part:

Va. Code § 57-9. How property rights determined on division of church or body.

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

the United States of America (“ECUSA”) or the Episcopal Diocese of Virginia (“Diocese”) that vested prior to the statute’s adoption in 1867. *See* April 3, 2008, Order 1-2.

Initially, ECUSA and the Diocese did not dispute that, if the elements of § 57-9 are satisfied, the statute supersedes their common law claims to the CANA Congregations’ properties.² More recently, however, they have suggested that the Court must adjudicate their common law claims regardless of its rulings on § 57-9, and that the evidence that would support their Contracts Clause challenge is co-extensive with the “course of dealing” evidence supporting their common law claims. *See* April 3 Order at 2 (“it has been asserted that the Contracts Clause issue will require an evidentiary hearing ... [that] will involve factual matters similar or identical to those factual matters at issue in the Declaratory Judgment actions”). Thus, the Court must resolve the relationship between the Contracts Clause issues and the declaratory judgment actions to determine the proper scope of the trial commencing October 6, 2008.

Contrary to the recent suggestions of ECUSA and the Diocese, there will be no need for this Court to resolve all of the common law claims if it sustains § 57-9 against the federal and state religion clause challenges and approves the CANA Congregations’ votes. As an initial matter, § 57-9, if satisfied, is “conclusive as to the title to and control” of all property. Thus, even assuming, *arguendo*, that sometime after 1867 ECUSA and the Diocese adopted canons that, in the *absence* of § 57-9, would support valid common-law claims to the properties at issue, any such interests would be subject to, and superseded by, the CANA Congregations’ rights un-

² *See* Letter from Heather H. Anderson to Hon. Randy I. Bellows at 2 (May 11, 2007) (“the interpretation and application of § 57-9 is a discrete, key issue that . . . would dispose of the eight 57-9 proceedings filed by the departed congregations, as well as resolve the validity of . . . defendants’ [57-9] defense to the declaratory judgment actions”); *accord* Letter from Bradfute W. Davenport, Jr., to Hon. Randy I. Bellows at 4 (May 11, 2007); *see also* 5/21/07 Tr. 48 (H. Anderson: resolution of “whether there is a division in the Episcopal Church or in the relevant church or religious society” “may very well simplify things a great deal down the road”).

der § 57-9. *See* Response of the CANA Congregations to the Court's August 31, 2007, Order (filed Sept. 10, 2007) (addressing the relationship between § 57-9 and the declaratory judgment actions).

Moreover, there are several reasons why ECUSA and the Diocese will not be able to establish a Contracts Clause violation in the application of § 57-9 to any of the properties at issue. *First*, the Contracts Clause at most protects contractual rights that were vested prior to § 57-9's adoption in 1867. Based on the response to the CANA Congregations' Motion Craving Oyer, only one church (The Falls Church) has pre-1867 properties, however, and the deeds to those properties do not recognize, let alone create enforceable property interests in, ECUSA or the Diocese. *Second*, whether a party has an enforceable vested contractual interest is governed by state law, and pre-1867 Virginia law did not recognize denominational interests in congregational property. *Third*, even if pre-1867 Virginia law *had* recognized such denominational interests, ECUSA and the Diocese did not then claim any such interest. Rather, the earliest active canon that ECUSA and the Diocese rely upon for creation of a purported property interest was adopted in 1868, one year after the division statute was enacted. We develop these points in detail below.³

ARGUMENT

I. ECUSA and the Diocese will not be able to establish a valid Contracts Clause claim to any of the properties at issue.

ECUSA and the Diocese assert that applying § 57-9 here would divest them of contractual rights in local church property, in violation of the Contracts Clause of the U.S. and Virginia

³ The CANA Congregations will address the balance of the constitutional arguments raised by ECUSA and the Diocese in the CANA Congregations' responsive brief, to be filed on May 2, 2008.

Constitutions.⁴ They further claim that this issue “is inextricably entwined with the merits of [their] declaratory judgment actions.” Memorandum Regarding the Scope of the § 57-9 Hearing 22. ECUSA and the Diocese, however, have overstated the overlap between the Contracts Clause issues and their common law claims, and those claims fail as a matter of law even insofar as they relate to alleged *pre-1867* property interests.

A. The Contracts Clause at most protects contractual rights that were vested prior to the adoption of Virginia Code § 57-9.

It is black letter law that the Contracts Clause restricts (at most) the retroactive application of statutes to deprive a party of *preexisting*, vested rights—rights that were secured by contract as of the date of the challenged legislation. The leading case is *Ogden v. Saunders*, 25 U.S. 213, 262 (1827), in which the Supreme Court held that the Contracts Clause embodies an “overruling and admitted distinction, between [laws] which operate retrospectively, and those which operate prospectively.” Duly enacted laws “are not repugnant to the constitution, so far as they apply to subsequent contracts”; the Contracts Clause thus “forbid[s] the application of the repealing law to past contracts, and to those only.” *Id.* at 260, 261.⁵

It follows that “[the] law of the [jurisdiction] where the contract is made” is “incorporated with the contract,” “constitutes the law of the contract so formed, and must govern it throughout”—“whether [that law] affects its validity, construction, or discharge.” *Id.* at 264, 265.

⁴ See U.S. Const. Art. I, § 10 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts”); Va. Const. Art. I, § 11 (The General Assembly “shall not pass any law impairing the obligation of contracts”). The Virginia Contracts Clause parallels the protections provided by the federal Contracts Clause. See *Working Waterman’s Ass’n of Virginia, Inc. v. Seafood Harvesters, Inc.*, 227 Va. 101, 109 (1984) (“The Virginia contract clause has been interpreted by this Court in a manner similar to the treatment of the federal clause by the United States Supreme Court”). Thus, for convenience we refer only to the “Contracts Clause.”

⁵ Accord *id.* at 254-55 (a law “passed before the contract was made . . . could not be said to impair its obligation”); *id.* at 262 (“laws, like those which affect the validity and construction of contracts, are valid as to subsequent [contracts]”); *id.* at 267 (“retrospective laws were alone in the contemplation of the [Constitutional] Convention”).

Moreover, the reason for the distinction between prospective and retrospective invalidations of contracts is that it is not “unjust, or oppressive, to declare by law, that contracts subsequently entered into, may be discharged in a way different from that which the parties have provided, but which they know, or may know, are liable, under certain circumstances, to be discharged in a manner contrary to the provisions of their contract.” *Id.* at 267.

The Supreme Court’s modern Contracts Clause jurisprudence continues to adhere to the distinction between contracts that pre-date and contracts that post-date the challenged statute’s adoption. As the Court explained in *Weaver v. Graham*, “[e]valuating whether a right has vested is important for claims under the Contracts or Due Process Clauses, which solely protect *pre-existing* entitlements.” 450 U.S. 24, 29-30 (1981) (emphasis added). Today, as in *Ogden*, “the laws which subsist at the time and place of the making of a contract” merely “enter into and form a part of it.” *See Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 429-30 (1934); *see also Fairfax Hosp. Ass’n v. Sines*, 1989 WL 641952, *2 (Va. App. 1989) (calling it a “fundamental tenet” that the Contracts Clause restricts impairment of only “already existing private contracts”).

Given these holdings, even assuming, *arguendo*, that sometime after 1867 ECUSA and the Diocese adopted canons that would support valid common-law claims to the properties, any such canonical interests would be subject to, and superseded by, the CANA Congregations’ rights under § 57-9. The only protected rights are those that vested prior to 1867. Not surprisingly, then, the only Virginia case invalidating application of the division statute involved vested contractual rights under a deed that pre-dated the statute’s adoption. *See Finley v. Brent*, 87 Va. 103, 108 (Va. 1890) (involving an 1860 deed).

ECUSA and the Diocese cannot make out a colorable Contracts Clause claim even as to the limited property here that *does* pre-date the statute. As the deeds filed pursuant to the Order on the Motion Craving Oyer confirm, of the CANA Congregations that hold real property, only The Falls Church received real property prior to 1867. *See* Praecepte Indexing Documents Filed Pursuant to Order on Motion Craving Oyer (filed June 14, 2007). As to the post-1867 properties, the division statute is “incorporated with the contract” and “must govern it throughout.” *Ogden*, 215 U.S. at 264, 265; *accord Blaisdell*, 290 U.S. at 429-30.

The only issue germane to the Contracts Clause issue, therefore, is whether ECUSA and the Diocese had contractual rights that were reflected in pre-1867 deed language. For those CANA Congregations with no pre-1867 property, the Contracts Clause is not even implicated. ECUSA and the Diocese thus have no basis to argue that their Declaratory Judgment actions against all 11 CANA Congregations are co-extensive with their Contracts Clause challenge to § 57-9.

B. The only pre-1867 deeds at issue do not create any vested contractual interest in ECUSA or the Diocese.

As to The Falls Church, moreover, the deeds to the pre-1867 parcels preclude any finding that ECUSA or the Diocese had pre-1867 contractual interests in the relevant property.

Of the two pre-1867 deeds, the first is the original 1746 Falls Church deed, which conveyed property to the vestry for the congregation of The Falls Church (then directly under the Church of England) for “such use as the said vestry shall think proper.” *See* Praecepte Indexing Documents Filed Pursuant to Order on Motion Craving Oyer.⁶ This deed contains no reference whatsoever to any Episcopal church, to the Diocese, or to ECUSA itself. That is not surprising,

⁶ Technically, there are two 1746 Falls Church documents, one dated March 19, 1746, the other dated March 20, 1746. For convenience, and because they pertain to the same parcel of property, we refer to them collectively as the 1746 deed.

since the denomination did not exist until October 1789. *See* ECUSA Const. Preamble (ECUSA-Diocese Trial Exh. 1). Thus, the 1746 deed cannot support their claim of a contractual interest.

The other pre-1867 deed, dated 1852 (the “1852 deed”), conveyed certain land contiguous to The Falls Church to the “Trustees of the Episcopal Church, known and designated as the ‘Falls Church’ in Fairfax County, of the County of Fairfax in the State of Virginia . . . and their successors.” *See* Praecipe Indexing Documents Filed Pursuant to Order on Motion Craving Oyer. Although the 1852 deed uses the term “Episcopal Church” to identify the “Falls Church,” this reference simply describes The Falls Church and clarifies that the deed was conveying property to the Church, not to the *City* of “Falls Church,” which is named after the Church. Moreover, the 1852 deed stands in marked contrast to the deed in *Finley*, which expressly restricted the conveyance of property “for the sole and exclusive use and benefit of religious congregations of regular orthodox Methodist Protestants which may thereafter assemble there to worship” and “for no other use or purpose whatever.” 87 Va. at 104. The 1852 Falls Church deed contains no such use or purpose restrictions. Thus, the Contracts Clause is not implicated by application of the division statute to this property, either.

The pre-1867 deeds at issue thus provide no basis for any assertion of “vested rights” in ECUSA or the Diocese. This is all the more clear in light of pre-1867 law, which, as discussed below, did not recognize any denominational interests in local church property.

C. Pre-1867 Virginia law did not recognize denominational claims to trust interests in congregational property.

It is no answer to say that although the relevant deeds grant no vested contractual rights to ECUSA and the Diocese, the denomination had such rights under a trust or contract theory based on internal church canons. In 1867, as today, deeds and other contract-based property interests were subject to “[the] law of the [jurisdiction] where the contract [was] made,” which was

“incorporated with the contract.” *Ogden*, 215 U.S. at 264; accord *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 429-30 (1934). Pre-1867 law therefore governed whether ECUSA and the Diocese had vested contractual rights in the limited pre-1867 properties, and Virginia law did not recognize denominational interests in congregational property.

The claims of ECUSA and the Diocese rest on implied trust and contract theories that would have found no support in 19th century Virginia law.⁷ As the Virginia Supreme Court recounted in *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 505 (1974), the longstanding Virginia rule barring denominational interests in congregational property⁸ traces at least to *Gallego’s Ex’rs v. Attorney General*, 30 Va. 450 (1832), which “held that a trust for indefinite beneficiaries, if the named trustee is an individual or unincorporated body, is invalid unless expressly validated by statute.” *Norfolk Presbytery*, 214 Va. at 505. Over the years, the Virginia General Assembly has incrementally broadened the types of property that may be held in express trust for

⁷ See Diocese Compl. ¶ 24 (alleging that the properties at issue are “held in trust for the Episcopal Church and the Diocese”); accord *id.* ¶ 31(b) (seeking affirmation of “trust” rights); ECUSA Compl. ¶ 48, prayer for relief. ECUSA and the Diocese do not allege an interest based on any written trust instrument, and they attached no such instrument to their Complaints. Rather, they seek to *transfer* title from the current trustees (Diocese Compl. ¶ 31(d)), and they conceded at the Motion Craving Oyer hearing that “there are no formal trust documents.” Tr. 24 (June 8, 2007). Their asserted interest is thus based solely on the concept of an *implied* trust. See *id.* (asserting that “other documents evidence trust rights,” and that “[t]he constitutions and canons of the church refer to trust rights”). The claim of ECUSA and the Diocese to a “contract” or “proprietary” “interest” in the properties at issue is likewise based not on deeds, but on canons. Diocese Compl. ¶ 31; ECUSA Compl. ¶¶ 68-69; ECUSA Compl. ¶ 48 (citing canon language asserting that property “is held in trust for The Episcopal Church and the Diocese of Virginia”); Diocese Compl. ¶ 17 (same).

⁸ Accord *id.* at 503 (“Virginia has never adopted the implied trust doctrine to resolve church property disputes”); *id.* (expressly rejecting the view that “absent express limitations in the deed, church property is held subject to an implied trust for the general church”); *id.* at 504 (rejecting the view “that the implied trust doctrine was the only constitutional rule for resolving church property disputes”); *id.* at 507 (“As express trusts for supercongregational churches are invalid under Virginia law no implied trusts for such denominations may be upheld”); *Reid v. Gholson*, 229 Va. 179, 187 n.11 (1985) (Virginia has a “strong tradition” of “refus[ing] to adopt the ‘implied trust’ theory in favor of hierarchical churches” and “refus[ing] to apply the traditional chancery doctrine of judicial *cy-pres*, in favor of religious trusts for indefinite beneficiaries”).

denominational authorities. *Id.* at 506-07. But no such legislative changes were made until well into the 20th century (*id.*), and there can be no dispute that in 1867, church property used for religious purposes could be held by trustees *only* for the benefit of local congregations, not for the benefit of a denomination or diocese. *E.g., Norfolk Presbytery*, 214 Va. at 506.

In *Brooke v. Shacklett*, 13 Gratt. 301, 309-10 (Va. 1856), for instance, the Virginia Supreme Court affirmed that the rule of *Gallego's Ex'rs* “applies with equal force to a conveyance of property to a religious congregation by deed.” Although the Virginia General Assembly had enacted statutory language in the 1840s approving of trusts “for the use and benefit of religious congregations,” the Court deemed it “obvious that the conveyances, devises and dedications to which the acts mean to give validity, are conveyances, devises and dedications of property for the use of the ‘religious congregations’ therein mentioned, in the limited and local sense of the term.” *Id.* at 313. Had the deed at issue conveyed property “for the benefit of the ‘Methodist Episcopal church in the United States as an aggregate body or sect,’” the Court explained, “it would plainly stand . . . out of the influence and operation of the statutes.” *Id.* at 314.

Brooke is just one in a long line of Virginia Supreme Court decisions to the same effect. *See Hoskinson v Pusey*, 32 Gratt. 428, 431 (1879) (“[T]he conveyance is not for the use of the Methodist Episcopal Church in a general sense. Such a conveyance in this state would be void. But it is a conveyance for the use of a particular congregation of that church, in the limited and local sense of the term—that is, for the members, as such, of the congregation of the Methodist Episcopal Church, who, from their residence at or near the place of public worship, may be expected, to use it for that purpose”); *Moore v. Perkins*, 169 Va. 175, 179-80 (1937) (invalidating attempt to convey by deed property to be held in trust for Methodist Episcopal Church South and stating that “church,” “religious society,” and “religious congregation” are terms that “apply to

the local congregation, and not to the church at large in its denominational sense”; holding that “[n]o dedication of property to religious uses, which does not respect these rights of the local society or religious congregation, no deed which does not design such enjoyment of the uses of the property conveyed, by the local society or congregation, can be placed within the influence of the statutes”); *Maguire v. Lloyd*, 193 Va. 138, 144 (Va. 1951) (holding that an earlier version of § 57-7, which addressed conveyances of property to benefit a “church or religious organization,” validated a gift to “the First Church of Christ, Scientist, of Lynchburg, Virginia,” as a gift to a “local church”).

Indeed, even the principal Contracts Clause authority on which ECUSA and the Diocese rely, *Finley v. Brent*, 87 Va. 103 (1890), confirms that Virginia’s prohibition on trusts in favor of religious denominations continued well beyond 1867. The Court there awarded the property at issue to the minority of the congregation only because language from the 1860 deed at issue—which expressly restricted use of the church “for the sole and exclusive use and benefit of religious congregations of regular orthodox Methodist Protestants,” “for the purpose of regular worship of the Methodist Protestants, and for no other use or purpose whatever”—gave that minority vested property rights that § 57-9 could not retroactively impair. *Id.* at 104. *Finley* thus affirms that the relevant focus is on the deed language, and that ECUSA and the Diocese cannot rely on any denominational trust (express *or* implied) to establish a Contracts Clause claim in pre-1867 property.

D. The Canons of ECUSA and the Diocese do not in any event purport to create any pre-1867 rights.

Even if Virginia law had recognized denominational interests in congregational property in 1867, the canons of ECUSA and the Diocese did not purport to create any such interests.

ECUSA and the Diocese have identified their canons as the primary source of their alleged proprietary and contractual rights in the CANA Congregations' properties. By their own allegations, however, the earliest canon that purportedly created a property interest (ECUSA Canon II.6) was adopted "in part in 1868 and in part in 1871" (ECUSA Compl. ¶ 42), and the other canons were adopted between 1904 and 1979 (ECUSA Compl. ¶¶ 44-47). Thus, those canons uniformly post-date the adoption of the division statute and cannot support a claim under the Contracts Clause. Although ECUSA's complaint cites "Former [Diocese] Canon I.7" and "Former [Diocese] Canon I.10," which allegedly were adopted in 1793 (ECUSA Compl. ¶ 42), these canons are "*former*" canons, repealed long ago. Thus, even if these canons had vested legally cognizable property rights in the denomination as opposed to the local church (a point we dispute), they are legally irrelevant.

Setting aside when the canons of ECUSA and the Diocese purported to create (unilaterally) a trust in their favor, even ECUSA's own reporters over the years have rejected the notion that the canons confer enforceable property rights. For example, according to the *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America Adopted in General Conventions 1789-1922*, the canon that purports to restrict the alienation of consecrated church property without the permission of the bishop "is only of moral value, and has no legal effect," and the canon that purported to require religious communities to include in their constitutions a provision stating that their property is held in trust for ECUSA "could only have moral weight [and]. . . [h]owever expressed in a Canon it would have no legal force." *Id.* at i, 542, 785 (1924); accord I E. White & J. Dykman, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America* 265, 266 (1954) ("The power of the General Convention over the disposition of real

property is questionable, governed as it is by the law of the state in which it is situated”); E. White & J. Dykman, *I Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America Otherwise Known as The Episcopal Church* 297 (1981) (“State laws control the conveying and encumbering of real estate, and each case which arises must be decided according to the law of the situs of the property”). These statements—which were commissioned by ECUSA and published by its official publishing house—constitute party admissions⁹ and confirm that, even today, the canons do not themselves create enforceable property interests.

But even if the current canons of ECUSA and the Diocese created an enforceable property interest, the canons asserted no such interest in local church property in 1867, let alone the specific sort of interest needed to support a Contracts Clause violation. *See General Motors v. Romein*, 503 U.S. 181, 187 (1993) (a statute cannot unconstitutionally impair obligations under a contract where there was “no . . . agreement regarding the specific . . . terms allegedly at issue”).

⁹ *See* E. White & J. Dykman, *I Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America Otherwise Known as The Episcopal Church*, at vi (Foreword) (1981) (“This annotation is respectfully submitted . . . as an authoritative expression of the meaning of the Constitution and Canons of the Episcopal Church as they exist at this time”); Dep. of David B. Beers 476:14-22 (Oct. 23, 2007) (Rule 4:5(b)(3) deposition) (“White & Dykman is published under the auspices of what we call a Standing Commission, which is an elected -- appointed -- body of priests, other clergy and laity. And this particular Standing Commission is called the Standing Commission on Constitution and Canons. And . . . they provide some inducement for the publication of editions of White & Dykman”); *Barr v. S.W. Rodgers Co.*, 33 Va. App. 273, 279 (Va.App.,2000) (“Declarations made by a party to litigation when offered through someone other than the declarant, though hearsay, are admissible in Virginia as party admissions. *See Goins v. Commonwealth*, 251 Va. 442, 461, 470 S.E.2d 114, 127 (1996). The party admission rule includes not only statements made by the party himself or herself, but also statements of other persons who stand in close relationship to the party. *See* Charles E. Friend, *Law of Evidence in Virginia* § 18-41 (5th ed.1993). Thus, an agent’s statements may be admitted against his or her principal if the agent made the statements while acting within the scope of employment and the agent had authority to make such statements on behalf of the principal.”)

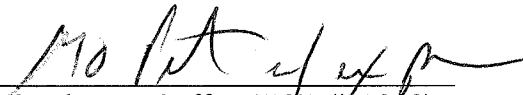
This undisputed fact likewise bars them from establishing any constitutional violation from the application of § 57-9 in this case.¹⁰

¹⁰ As discussed in the text, ECUSA and the Diocese cannot establish any vested, pre-1867 contractual right in the properties at issue. But even assuming, *arguendo*, that they could do so, they could not satisfy the remaining elements of a constitutional violation. Under the Contracts Clause, “a court must determine whether state law has, in fact, impaired any contract; if so, it must then determine if the contract was substantially impaired; if the state law is found to constitute a substantial impairment of the contract, a court must determine whether that impairment is nonetheless permissible as a legitimate exercise of the state's sovereign powers.” *City of Charleston v. Public Service Comm’n of West Virginia*, 57 F.3d 385, 390-91 (4th Cir. 1995) (internal quotation marks omitted); *see also Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 243-46 (1978) (discussing same three-part standard). Setting aside whether ECUSA and the Diocese could establish a substantial or “severe” impairment, *Bannum, Inc. v. Town of Ashland*, 922 F.2d 197, 202 (4th Cir. 1990) (“[a] severe impairment is one where the legislation alters the terms of a contract by effectively imposing on one of the parties an obligation which it had not reasonably anticipated or relieving a party of a contractual obligation”), Virginia’s legitimate interest in providing for orderly resolution of church property ownership in the event of denominational divisions would in any event justify such an impairment.

Dated: April 23, 2008

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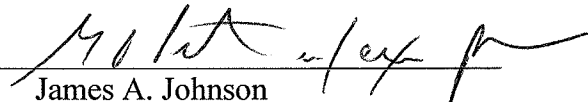
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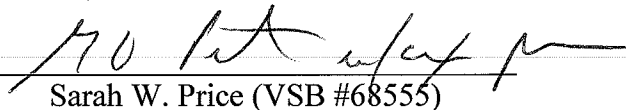
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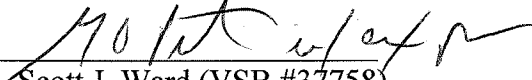
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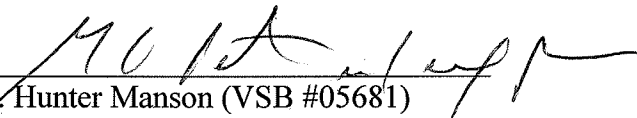
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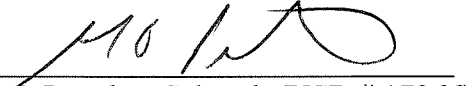
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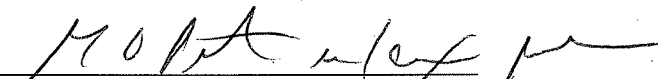
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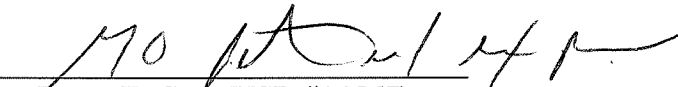
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IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

In re:)
Multi-Circuit Episcopal Church) **Civil Case Numbers:**
Litigation) CL 2007-248724,
) 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 CANA CONGREGATIONS' OPENING POST-DECISION BRIEF

This acts as a one-page cover sheet reference pleading to the complete The CANA Congregations' Opening Post-Decision Brief filed in CL 2007-248724 (the omnibus case file), on April 23, 2008. The Response of Petitioners, The CANA Congregations' Opening Post-Decision Brief and this corresponding one-page reference pleading applies to the Omnibus case number: CL 2007 – 248724 and the following cases:

1. *In re: Truro Church*; (Circuit Court of Fairfax County; CL 2006-15792);
2. *In re: Church of the Apostles*; (Circuit Court of Fairfax County; CL 2006-15793)

3. *In re: Church of the Word, Gainesville*; (Circuit Court of Prince William County; CL73464) (Circuit Court of Fairfax County; CL 2007-11514);
4. *The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Epiphany, Herndon* (Circuit Court of Fairfax County; CL 2007-1235);
5. *The Protestant Episcopal Church in the Diocese of Virginia v. Truro Church* (Circuit Court of Fairfax County; CL 2007-1236);
6. *The Protestant Episcopal Church in the Diocese of Virginia v. Christ the Redeemer Church* (Circuit Court of Fairfax County; CL 2007-1237);
7. *The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Apostles* (Circuit Court of Fairfax County; CL 2007-1238);
8. *The Episcopal Church v. Truro Church et al.* (Circuit Court of Fairfax County; CL 2007-1625);
9. *In re: Church at the Falls, The Falls Church*; (Circuit Court of Fairfax County; CL 2007-5249);
10. *The Protestant Episcopal Church in the Diocese of Virginia v. The Church at The Falls – The Falls Church* (Circuit Court of Arlington County Case No. 07-125)(Circuit Court of Fairfax County; CL 2007-5250);
11. *The Protestant Episcopal Church in the Dioceses of Virginia v. Potomac Falls Church* (Circuit Court of Loudoun County Case No. 44149)(Circuit Court of Fairfax County; CL 2007-5362);
12. *In re: Church of Our Savior at Oatlands*; (Circuit Court of Fairfax County; CL 2007-5363);
13. *The Protestant Episcopal Church in the Diocese of Virginia v. Church of Our Saviour at Oatlands* (Circuit Court of Loudoun County Case. No. 44148)(Circuit Court of Fairfax County; CL 2007-5364);
14. *In re: Church of the Epiphany*; (Circuit Court of Fairfax County; CL 2007-556);
15. *The Protestant Episcopal Church in the Diocese of Virginia v. St. Margaret's Church* (Circuit Court of Prince William Case No. CL 73465)(Circuit Court of Fairfax County; CL 2007-5682);
16. *The Protestant Episcopal Church in the Diocese of Virginia v. St. Paul's Church, Haymarket* (Circuit Court of Prince William County Case No. CL 73466)(Circuit Court of Fairfax County; CL 2007-5683);

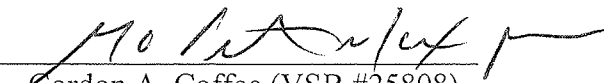
17. *The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Word* (Circuit Court of Prince William County Case No. CL 73464)(Circuit Court of Fairfax County; CL 2007-5684);
18. *In re: St. Margaret's Church*; (Circuit Court of Fairfax County; CL 2007-5685);
19. *In re: St. Paul's Church, Haymarket*; (Circuit Court of Fairfax County; CL 2007-5686);
20. *The Protestant Episcopal Church in the Diocese of Virginia v. St. Stephen's Church* (Circuit Court of Northumberland County Case No. CL 07-16)(Circuit Court of Fairfax County; CL 2007-5902); and
21. *In re: St. Stephen's Church*; (Circuit Court of Fairfax County; CL 2007-5903).

For the complete The CANA Congregations' Opening Post-Decision Brief, please see the omnibus case file, CL 2007 – 248724.

Dated: April 23, 2008

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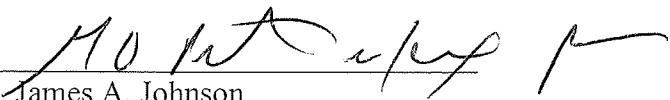
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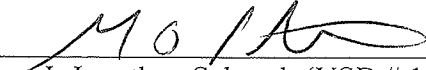
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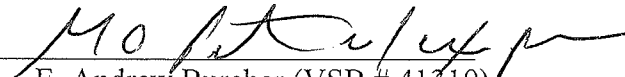
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