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June 26, 2008

**VIA HAND-DELIVERY**

Fairfax County Circuit Court  
ATTENTION: Robin Brooks  
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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);

*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).

Letter to Clerk of the Court  
June 26, 2008  
Page 3

Dear Ms. Brooks:

I am enclosing for filing in the above-styled case an original, CANA Congregations' Reply Brief Pursuant to the Court's June 6, 2008, Order, plus twenty-one (21) copies of the one-page cover sheets 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,

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**VIRGINIA:**

**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,  
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 ) CL 2007-5686,  
 ) CL 2007-5902,  
 ) CL 2007-5903, and  
 ) CL 2007-11514

**THE CANA CONGREGATIONS' REPLY BRIEF  
PURSUANT TO THE COURT'S JUNE 6, 2008, ORDER**

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 reply brief pursuant to the Court's June 6, 2008, Order.

1. **Did the Supreme Court of Virginia, in *Green v. Lewis*, hold that a trial court presiding over a 57-9(A) petition must consider the factors set out in *Green v. Lewis*, in addition to making the determinations actually set out in 57-9(A)? Does the holding of *Green v. Lewis* apply only to proceedings under 57-15, or does it apply to proceedings brought under 57-9 as well?**

In January, in response to our post-trial argument that neither *Green* nor various other Virginia cases “applied § 57-9(A),” the Church stated: “The Church and the Diocese have never suggested otherwise.” Post-Trial Reply Br. 5 (Jan. 17, 2008). Now, calling it an “indisputable fact” that “*Green* was a case ‘brought under 57-9,’” the Church insists that “[*Green*’s] holding necessarily applies to 57-9 cases.” Responsive Br. 1. The Church got it right the first time.

No party in *Green* developed a § 57-9 argument, and neither the circuit court nor the Supreme Court analyzed that provision—certainly not § 57-9(A). That is no surprise, since *Green* involved only one congregation that became “independent.” 221 Va. at 549. But in any event, the Church’s argument depends on the notion that making a single reference to a statute in one’s initial pleading means that any later ruling “necessarily” rests on that statute. That is absurd.

Notwithstanding its earlier representations,<sup>1</sup> the Church now says that “*Green* did not apply or interpret § 57-15” because that case involved no effort “to transfer or encumber land.” Br. 1-2. But the Court’s analysis in *Green* largely tracked *Norfolk Presbytery*, and *Green* does not suggest that anything turns on the existence of a transfer in disputes involving one congregation.

*Green*’s multi-factor “neutral principles” analysis was therefore grounded in § 57-15, and nothing in that decision suggests that the Court’s analysis governs every case arising under Title 57 of the Virginia Code. This case is governed by a different statute (§ 57-9(A)) and a different “neutral principle” (majority rule) designed to apply in different circumstances (a denomina-

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<sup>1</sup> The Church previously read *Green* as a § 57-15 case. See, e.g., Opposition Br. 8 (Jan. 11, 2008) (describing *Green* as “citing § 57-9 to aid in the interpretation and application of § 57-15”); Br. in Opp. to Supp. Br. of Congregations 23 (May 9, 2008) (describing *Green* as “reading § 57-9 as supporting the Court’s construction of § 57-15”). Nowhere in its briefs on the scope of the § 57-9 hearing did the Church suggest *Green* was a § 57-9 case.

tional “division”). The Church’s reading of *Green* would strip § 57-9(A) of any meaning.

**2. Has the court in its April 3, 2008 opinion already resolved the issue described in Question 1 above, as asserted by the CANA Congregations?**

The Church says our opening brief “fails to respond” to Question #2 because it discusses “the relationship between § 57-9(A) and § 57-15” but nowhere shows how the Court has decided “whether *Green* applies to proceedings brought under § 57-9.” Br. 3. But this argument presumes that the “factors” analyzed in *Green* are equally applicable *even apart from* § 57-15. As we have shown, they are not. The *Green* factors are based on § 57-15, and reading *Green* any other way would effectively repeal § 57-9(A). These arguments directly respond to Question #2.

The Church devotes the balance of its discussion of Question #2 to the argument that “the term ‘neutral principles’ is shorthand for the longer phrase ‘neutral principles of law, developed for use in *all* property disputes.’” Responsive Br. 4. Indeed it is, but that simply means that the *principle* must be capable of application in all property disputes—*i.e.*, without consideration of doctrinal issues. *See Jones*, 443 U.S. at 603 (a neutral-principles approach must be “completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity,” and rely on “objective, well-established concepts of trust and property law”). Nowhere did the Court in *Jones* suggest that States could not adopt *statutes* that, while embodying neutral principles, were designed specifically for resolving church property disputes. Nor did the Court there examine how broadly Georgia applied majority rule to secular institutions; it stated that the principle of majority rule was “generally employed in the governance of *religious* societies.” *Id.* at 607. Section 57-9(A) thus fits squarely within the holding of *Jones*.

**3. What is the meaning of the phrase “if the determination be approved by the court” as that phrase is used in 57-9(A)? Specifically, once this court determines that 57-9(A) has been properly invoked, is the “approval” limited to a review of the vote taken or does it permit, or even require, as ECUSA and the Diocese assert, that the court examine various other considerations, including those set forth in *Green*?**

The only two areas of dispute here are whether § 57-9 requires the Court to analyze the

*Green* “factors”—a point addressed under Question #1; and whether the statute requires the congregation to establish ownership of the properties at issue *before* invoking § 57-9(A)—a point addressed under Question #5.

4. **What is the meaning of the phrase “shall be conclusive as to the title to and control” of the property in question, as that phrase is used in 57-9(A)?**

The only disagreement here appears to be over the meaning of the phrase “property held in trust for such congregation”—a point addressed under Question #5.

5. **What is the meaning of the phrase “congregation whose property is held by trustees,” as that phrase is used in 57-9(A)? Specifically, is Mr. Hurd correct when he asserted at oral argument on May 28, 2008 that the phrase “congregation whose property is held by trustees” is not simply a reference to the property that is the subject of the 57-9(A) petition but, rather, requires the Court to make an initial determination, prior to the Court’s consideration of the validity of the vote, as to “who” owns the property at issue?**

In contrast to its prior positions, the Church has finally admitted that § 57-9 can resolve disputes as to the rightful owner of congregational property in a division. It now says, however, that § 57-9 resolves *only* “disputes between majority and minority factions of a congregation,” *not* disputes involving the mother church. Br. 5. The Church’s ever-changing view is baseless.

First, if § 57-9(A) resolved only disputes *within* congregations, it would add nothing to § 57-9(B). The General Assembly, however, distinguished between “attached” congregations and “entirely independent” ones, recognizing that the interests of the denomination (the “church or society”) would be implicated in cases under § 57-9(A). The Church’s reading would ignore these textual differences between Parts A and B, rendering § 57-9(A) superfluous.

Second, Virginia law historically has not recognized denominational trust interests in local church property.<sup>2</sup> The Church says that has changed. But even if § 57-7.1 overruled 160

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<sup>2</sup> There is no merit to the Church’s claim that Virginia’s rule barring denominational trust interests in local church property unconstitutionally discriminates against denominations. *First*, the rule does not “discriminate” among similarly situated parties, as there are valid secular reasons for treating congregational and denominational ownership differently (*e.g.*, the General Assem-

years of precedent—and it did not, since it was “declaratory of existing law”— it would only remove one impediment to the Church’s claim to be a beneficiary under the trusts. Moreover, in no event could the statute be read to extinguish the longstanding beneficial interests of the CANA Congregations. The properties would still be “held in trust for the congregation” for the purposes of § 57-9.

Third, it is the intention of the settlor (not the beneficiary) that governs the creation of a trust, and a settlor cannot intend to create a trust that the law does not permit. *See Auerbach v. County of Hanover*, 252 Va. 410, 414 (1996) (“[t]o ascertain the intent of the grantors, the deed is to be examined as a whole and effect given to all of its terms and provisions not inconsistent with some principle of law or rule of property”). Thus, to whatever extent Virginia law barred denominational trusts *when the subject properties were conveyed*, the Court could not apply §57-7.1 retroactively without rewriting the trust and imputing to the donors an unlawful intent. Such retroactive application of the law would be invalid, and would violate the Contracts Clause.<sup>3</sup>

Fourth, the fact that congregations appoint the trustees who hold local church property itself satisfies the § 57-9 language upon which the Church’s new argument relies.<sup>4</sup> Moreover,

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bly may have wished to favor local ownership on the basis that property is managed locally, or because funding to build and maintain churches, even in denominations, is typically raised locally). *Second*, a denomination is not burdened by the rule because it may secure an interest in congregational property by placing ownership in the name of an ecclesiastical officer or a corporate entity. *Third*, the Church’s argument presumes that congregations will act contrary to the denomination’s wishes. Yet, even in cases of division, a congregation may vote to remain with the original denomination rather than affiliating with a different branch.

Nor would it be troubling if the rule barring denominational trusts treated denominations differently from any similarly situated secular institutions (if such institutions exist), as States are free to adopt rules that govern only church property disputes. *E.g.*, *Jones*, 443 U.S. at 602-08.

<sup>3</sup> The Church has not explained how its canons can rewrite the trusts created by the deeds to add itself as a beneficiary.

<sup>4</sup> *See Globe Furniture Co. v. Trustees of Jerusalem Baptist Church*, 103 Va. 559, 561 (1905) (“the trustees of a church merely hold the legal title to the real estate conveyed, devised, or dedicated for the use and benefit of the religious congregation at whose instance they have been ap-



even the Church's own canons reflect the fact that congregational property is held for the congregation's use, not for denominational activities. The Dennis Canon, for example, purports to apply only to "property held by or for the benefit of any Parish, Mission, or Congregation." TEC-Diocese Exh. 1, Canon I.7.4; TEC-Diocese Exh. 2, Canon 15 (same as to "any Church or Mission in this Diocese").<sup>5</sup> That is likely why the Church's arguments have asserted the interests of "loyal" Episcopalians, and why the Episcopal Church's answer to the § 57-9 petitions "admits and avers that trustees for The Falls Church hold legal title to the real property currently possessed by The Falls Church for the congregation of The Falls Church, a parish or mission of the Episcopal Church, subject to the Constitutions and Canons of the Episcopal Church and the Diocese of Virginia." ECUSA Answer to Falls Church Petition, ¶ 2 (CL 2007-5249). In short, even the Church's canons confirm that the CANA Congregations have a *colorable* claim.

Finally, the existence of any ambiguity as to which parties are beneficiaries of the trusts at issue would simply confirm the General Assembly's wisdom in distinguishing between property held in trust and property held either in the name of an ecclesiastical officer or in corporate form—the ownership of which is clear, and which is not subject to § 57-9. Section 57-9 presumes a dispute over which party is the beneficiary of the trusts at issue, and provides a neutral

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pointed"); *Moore v. Perkins*, 169 Va. 175, 180-81 (1937) ("In the first sentence of the statute as amended in 1867, 'church' is used alternately with 'religious society.' In the 1901 amendment, 'church' is used alternately with 'religious congregation,' which terms, as stated, were construed, in the cases cited, to apply to the local congregation, and not to the church at large in its denominational sense. This restricted meaning is further evidenced in the subsequent proviso—that where the objects of 'such trust' are so undefined that the chancery courts of the Commonwealth cannot enforce them, then the gift shall enure to the trustees of the beneficiary congregation . . . Subsequent provisions of this act, now sections 39 to 46 (as amended), clearly indicate that it is contemplated that the trustees to whom title to such gifts shall enure shall be individual trustees of the local congregation.")


<sup>5</sup> Diocese Canon 12, § 6, for example, provides that "[e]ach Vestry, as the constituted agents of the Church, shall transact all its temporal business, e.g.: (a) providing for the appointment of Trustees pursuant to the laws of the Commonwealth of Virginia to hold title to the property of the Church." Diocese Canon 10, § 1 defines a "Church" as a local body. TEC-Diocese Exh. 2.

framework precisely to resolve such disputes.

Dated: June 26, 2008

Respectfully submitted,

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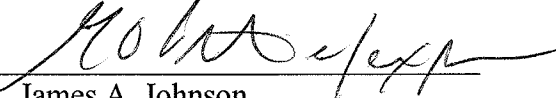
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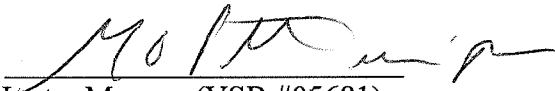
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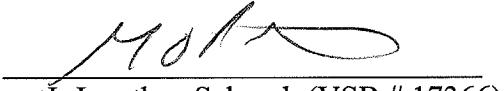
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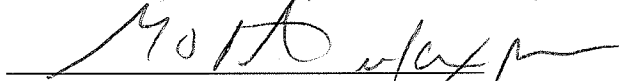
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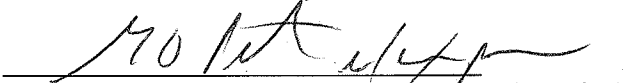
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 26<sup>th</sup> day of June, 2008 a copy of the foregoing CANA Congregations' Reply Brief Pursuant to the Court's June 6, 2008, Order, was sent by electronic mail and first-class mail, postage prepaid, to:

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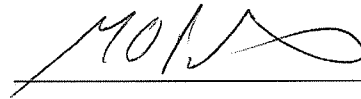
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A handwritten signature in black ink, appearing to read "G. O. Peterson", is written above a solid horizontal line.

George O. Peterson

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR FAIRFAX COUNTY**

<b>In re:</b>	)	
<b>Multi-Circuit Episcopal Church</b>	)	<b>Civil Case Numbers:</b>
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	)	CL 2007-5685,
	)	CL 2007-5686,
	)	CL 2007-5902,
	)	CL 2007-5903, and
	)	CL 2007-11514

**CANA CONGREGATIONS' REPLY BRIEF PURSUANT  
TO THE COURT'S JUNE 6, 2008, ORDER**

This acts as a one-page cover sheet reference pleading to the complete CANA Congregations' Reply Brief Pursuant to the Court's June 6, 2008, Order, and filed in CL 2007-248724 (the omnibus case file), on June 26, 2008. The CANA Congregations' Reply Brief Pursuant to the Court's June 6, 2008, Order 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);
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6. *The Protestant Episcopal Church in the Diocese of Virginia v. Christ the Redeemer Church* (Circuit Court of Fairfax County; CL 2007-1237);
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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 CANA Congregations' Reply Brief Pursuant to the Court's June 6, 2008, Order, please see the omnibus case file, CL 2007 – 248724.

Dated: June 26, 2008

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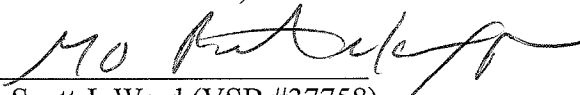
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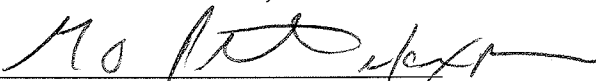
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 26<sup>th</sup> day of June, 2008 a copy of the foregoing one-page Cover Sheet for CANA Congregations' Reply Brief Pursuant to the Court's June 6, 2008, Order, was sent by electronic mail and first-class mail, postage prepaid, to:

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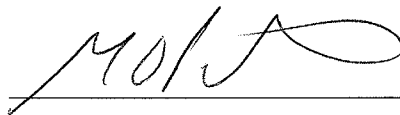
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A handwritten signature in black ink, appearing to read "G. O. Peterson", is written above a solid horizontal line.

George O. Peterson