

VIRGINIA: IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In Re: Multi-Circuit Episcopal Church Property Litigation

Plaintiff  
vs.

Civil Action No. CL 2007-248724

Previous Chancery No. CH

Defendant

FRIDAY MOTIONS DAY - RESPONSE/OPPOSITION TO MOTION

Title of Motion(s) to which Response is filed: Opp of CANA Cong to Mot for Leave to Participate in Oral Argmt

Responding Party: CANA Congregations

DATE TO BE HEARD: 05/16/08

Time Estimate (combined, no more than 30 minutes): 30

Responding Party will use Court Call telephonic appearance:  Yes  No

RESPONSE by: George O. Peterson/Cana Congregations Sands, Anderson, Marks & Miller PC  
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CERTIFICATIONS

- I certify that I have in good faith conferred or attempted to confer with other affected parties in an effort to resolve the subject of the motion without Court action; and,
- I have read, and complied with, each of the Instructions for Responding Party on the reverse side of this form.

Responding Party/Counsel of Record

CERTIFICATE OF SERVICE

I certify on the 9th day of May, 2008, a true copy of the foregoing Response was  mailed  faxed  delivered to all counsel of record pursuant to the provisions of Rule 4:15(e) of the Rules of the Supreme Court of Virginia.

Responding Party/Counsel of Record

**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,  
 ) CL 2007-556,  
 ) CL 2007-1235,  
 ) CL 2007-1236,  
 ) CL 2007-1237,  
 ) CL 2007-1238,  
 ) CL 2007-1625,  
 ) CL 2007-5249,  
 ) CL 2007-5250,  
 ) CL 2007-5362,  
 ) CL 2007-5363,  
 ) CL 2007-5364,  
 ) CL 2007-5682,  
 ) CL 2007-5683,  
 ) CL 2007-5684,  
 ) CL 2007-5685,  
 ) CL 2007-5686,  
 ) CL 2007-5902,  
 ) CL 2007-5903, and  
 ) CL 2007-11514

**OPPOSITION OF CANA CONGREGATIONS TO MOTION OF GENERAL COUNCIL  
ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH,  
ET AL., FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AS *AMICI CURIAE***

The CANA Congregations, 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 (hereafter collectively the "CANA Congregations") by their counsel, hereby file this Opposition to the Motion of General Council on Finance and Administration of the United

Methodist Church, et al. (hereinafter referred to as the “*amici*”), for leave to participate in oral argument as *Amici Curiae*.

### STATEMENT

1. Some sixteen months into this litigation, and after hundreds of pages of briefing addressing both the statutory and constitutional issues in this case, the *amici* seek not only to file a brief on the First Amendment issues raised by the Episcopal Church (ECUSA) and the Diocese of Virginia (Diocese), but also to participate in oral argument on those issues. It is undisputed that many properties of Methodist congregations in Virginia are held in corporate form (Stipulations of Fact ¶ 3) (filed Dec. 6, 2007), and thus could not be affected by application of § 57-9. Moreover, the *amici* cite no evidence that their denominations have experienced a “division” within the meaning of § 57-9.

### ARGUMENT

2. *Amici* (supported by ECUSA and the Diocese) seek to justify their participation in oral argument on the grounds that (1) their property interests are “at risk” and (2) the Court has permitted “the Commonwealth to participate as an *amicus* in support of the constitutionality of § 57-9(A), both in briefing and at oral argument.” Motion ¶¶ 2, 3. Indeed, ECUSA and the Diocese go so far as to say that “basic considerations of fairness and balance” warrant granting the *amici*’s motion to take part in oral argument.

3. The CANA Congregations did not oppose the filing of the *amici*’s brief, but these arguments do not begin to justify the *amici*’s participation in oral argument. Participation by *amici* in oral argument is rare, even at the appellate level, and particularly for private parties.

4. There is no lack of symmetry in a decision permitting the Attorney General to orally defend a statute against a constitutional challenge and denying private parties who claim

to be affected the right to weigh in as *amici* on the other side. The Attorney General has a duty to defend all duly enacted legislative provisions against constitutional challenge. He speaks from a perspective that is different from that of any other party, public or private, and his motion to participate as a *party* to these proceedings remains pending. As Mr. Thro made clear before this Court on January 25, 2008, the Attorney General is defending a Virginia statute and is not favoring any party. The Attorney General moved to intervene before this Court's decision on § 57-9 and Mr. Thro suggested that the Attorney General would be adverse to the CANA Congregations if this Court were to apply the statute in a way that they claimed was unconstitutional. See Transcript of January 25, 2008 hearing, Exhibit 1 hereto, at page 13, line 9 to page 15, line 19 and page 28, line 17 to page 30, line 8. The interests of these private *amici* are far more attenuated, if they are implicated at all.

5. The term "*amicus curiae*" is a Latin term meaning "friend of the court." Accordingly, the traditional role of *amici* has been to act as a friend of the court providing guidance on questions of law. *Bryant v. Better Business Bureau of Greater Maryland*, 923 F. Supp. 720 (D. Md. 1996). This Court has broad discretion to admit, exclude and/or control the participation of *amici*. Typically, Virginia courts consider whether *amici* either provide helpful analysis of the law, have a special interest in the subject matter of the suit, or counsel needs assistance. See *Tafas v. Dudas*, 511 F. Supp. 2d 652 (E.D.Va. 2007). As we show below: (1) *amici* proffer no helpful analysis; (2) *amici* lack the required special interest in the subject matter of this action; and (3) existing counsel do not need *amici*'s assistance.

#### **I. *Amici* Proffer No Helpful Analysis Because Their Arguments Are Duplicative**

6. Neither the *amici* nor ECUSA and the Diocese have demonstrated any unique usefulness to the proffered participation of the *amici*. Indeed, the two arguments offered by the

*amici* are virtually identical to arguments proffered by ECUSA and the Diocese. For example, the *amici's* leading argument (at 6) that "Section 57-9 violates the First Amendment by requiring civil courts to conduct an extensive inquiry into, and then resolve, fundamentally religious questions" mirrors both ECUSA's argument (at 18) that "[t]he Court's ruling delves into the religious thicket and independently resolves numerous ecclesiastical issues" and the Diocese's argument (at 29) that the Court's decision "creates an unconstitutional entanglement by requiring inquiry into and/or decisions regarding doctrinal matters." Similarly, *amici's* second argument (at 9) that "Section 57-9 violates the First Amendment by discriminating among denominations" mirrors the Diocese's argument (at 23) that: "Section 57-9(A) fails to conform to the Establishment Clause's neutrality rule and violates the Equal Protection Clause because it prefers churches with congregational forms of government and discriminates between hierarchical churches." Moreover, virtually every case that the *amici* cite is likewise cited by ECUSA and the Diocese. ECUSA and the Diocese have already filed two separate briefs on these issues and presumably will both speak at oral argument.

## **II. *Amici* Lack Any Special Interest In The Subject Matter Of The Suit**

7. *Amici's* proffer does not demonstrate that they have property interests that are at risk here. There has been no showing of a division or creation of a branch of any of the *amici* which would trigger the application of § 57-9. Moreover, the issue at hand is whether the application of Va. Code § 57-9 to *these parties* in *this case* would be unconstitutional. *Phillips v. Foster*, 215 Va. 543, 546, 211 S.E.2d 93 (1975). As ECUSA's counsel stated at the May 21, 2007 hearing: Tr. P. 45, lines 6-10. "Your Honor, I don't think it makes any sense at all to try to address the constitutional issues first. I think that this is an as-applied challenged defense. We are not arguing that the statute is unconstitutional on its face." The *amici* are not parties to this

case and there is no authority for the proposition that any ruling by this Court would be binding on them or their property interests. *State Water Control Board v. Smithfield Foods*, 261 Va. 209, 542 S.E.2d 766 (2001) (*res judicata* applies only when there is, *inter alia*, identity of the parties).

8. Moreover, if *amici's* polity gives it rights in and control over congregations' property, then since at least 1942 they have had the ability to cause congregational property to be titled in the name of their bishops or some other ecclesiastical officer. See Virginia Code § 57-16 (1942). Thus, a decision by this Court that § 57-9, as applied in this case, does not offend constitutional dictates would not necessarily deprive the *amici* of any interest in the property. Indeed, as noted above, title to the properties of many of the *amici's* congregations is in corporate form, placing those properties beyond the scope of the statute. Stipulations of Fact ¶ 3.

9. Contrary to the proffer of ECUSA and the Diocese, the *amici* do not have sufficient "other ties to these proceedings" to justify their participation in oral argument. Historical testimony regarding the Methodists and other denominations was introduced only to establish the historical understanding of division and branch in the 19th century, an issue on which this Court has already ruled. The issue at hand is constitutionality, not the meaning of § 57-9. Further, in *Green v. Lewis*, 221 Va. 547, 272 S.E. 2d 181 (1980), in which one of the *amici* was a party, § 57-9 was not invoked and, more importantly, the Court did not address the constitutional issues presented here. If this Court were inclined to receive argument from participants in prior cases relied on by the parties, we would need a much bigger courtroom.

10. Equally unavailing is ECUSA's and the Diocese's argument that this court is required, under constitutional principles of religious freedom, to allow the *amici* to participate in oral argument. No authority is cited for this proposition. Moreover, this proposition, if ever accepted, would similarly require this Court to allow the participation of any church or religious

society wishing to be heard, such as, The Anglican Church in Nigeria, The Anglican Church in Kenya, CANA itself, The Anglican District of Virginia, and many others. The Diocese has already proffered that four additional national churches will be joining in the *amici*'s brief and that the Diocese does not object to them arguing at the hearing. See, Transcript of April 25, 2008 hearing, Exhibit 2 hereto, at page 17, line 20 to page 19, line 13.

### III. Existing Counsel Are Not In Need Of Assistance

11. There already are fourteen parties and one *amicus* in this case. We respectfully suggest that existing counsel need no assistance at the oral argument by the *amici* who are expected to make the same arguments which counsel for ECUSA and the Diocese are well qualified to make.

WHEREFORE, the Motion of the United Methodist Church, et al. to participate in oral argument as *amici* should be denied.

Dated: May 9, 2008

Respectfully submitted,

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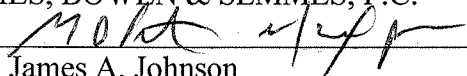
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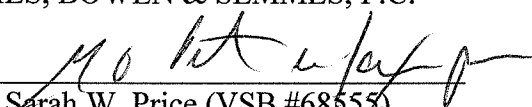
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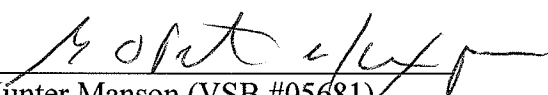
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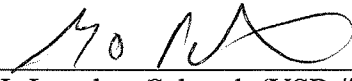
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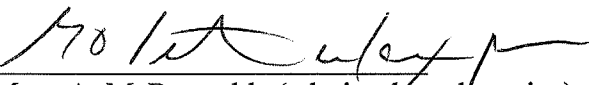
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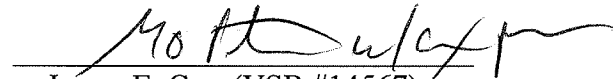
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 9<sup>th</sup> day of May, 2008 a copy of the foregoing  
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\_\_\_\_\_  
George O. Peterson

1 VIRGINIA :

2 IN THE CIRCUIT COURT OF FAIRFAX COUNTY

3 ----- x

4 IN RE: :

5 MULTI-CIRCUIT EPISCOPAL : OMNIBUS CASE NO.

6 CHURCH PROPERTY LITIGATION : CL2007-0248724

7 ----- x

8 Fairfax, Virginia

9 Friday, January 25, 2008

10 The above-entitled matter came on for hearing  
11 before The Honorable Randy I. Bellows, Judge in and for  
12 the Circuit Court of Fairfax County, Virginia, 4110 Chain  
13 Bridge Road, Courtroom 4G, Fairfax, Virginia, beginning at  
14 approximately 2:18 p.m., before Maureen S. Bennie,  
15 Verbatim Court Reporter, when were present on behalf of  
16 the respective parties:

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1 constitutional issues --

2 THE COURT: Of course.

3 MR. THRO: -- of course we would like to  
4 participate.

5 THE COURT: I should have mentioned that. That  
6 would flow from -- it actually would flow, in my view,  
7 from you being amicus or intervening, either one. I would  
8 expect that to happen.

9 Let me ask you a further question about this  
10 notion of intervening as a plaintiff or a defendant. I am  
11 just wondering what exactly your status is. If I was to  
12 -- you know, the Episcopal Church is saying, among many  
13 other things, but in essence that they have an  
14 interpretation which they believe is the correct one of  
15 57-9 which thereby renders the statute constitutional.  
16 CANA is saying that their interpretation is wrong, that  
17 there is another interpretation that I should adopt and  
18 the statute is constitutional. But can you imagine the  
19 scenario where I agreed with the Episcopal Church's view  
20 and CANA under those circumstances took the position that  
21 the statute was unconstitutional, given that  
22 interpretation?

1 MR. THRO: Yes.

2 THE COURT: So wouldn't that -- if your position  
3 is to defend the constitutionality of the statute, would  
4 that essentially flip you from a plaintiff to a defendant  
5 under that scenario?

6 MR. THRO: Let me make sure that I understand  
7 Your Honor scenario correctly, because I want to answer  
8 this accurately, to the best of my knowledge.

9 THE COURT: I think I can capture what I said in  
10 a single sentence. Either party, it seems to me, may end  
11 up asserting the unconstitutionality of the statute,  
12 depending on the interpretation I put on it.

13 MR. THRO: Yes.

14 THE COURT: That essentially -- where does that  
15 put you?

16 MR. THRO: Well, I think to date, only the  
17 Episcopal Church has asserted that a particular  
18 interpretation is unconstitutional. If CANA were to say  
19 that the Episcopal Church's interpretation is  
20 unconstitutional, then that would put us adverse to CANA,  
21 and we would be defending the constitutionality of the  
22 statute or the interpretation advanced by the Episcopal

1 Church. Our job is to defend the constitutionality of the  
2 statute.

3 THE COURT: Do you believe if you are nominally  
4 a plaintiff that you have to be on all fours with the  
5 positions asserted by any other plaintiff in the case?

6 MR. THRO: No, Your Honor. That is why I think  
7 it is -- and I understand that the Virginia rules of  
8 intervention do not talk about just being an intervenor.  
9 But I think it is more appropriate to characterize us as  
10 just an intervenor.

11 If the defense of the constitutionality of the  
12 statute requires us to take a position that is contrary to  
13 CANA, we will not hesitate to do so. If the defense of  
14 the constitutionality requires us to take the position  
15 that is contrary to the Episcopal Church, we will not  
16 hesitate to do so. In fact, conceivably, I suppose there  
17 is a situation where defense of the constitutionality of  
18 the statute would require us to take a position that is  
19 contrary to both the plaintiffs and the defendants.

20 THE COURT: All right. I will be glad to hear  
21 from you again, but is there anything else initially that  
22 you want to say?

1 about that, that leads to results that are, quite frankly,  
2 strange, if not ludicrous.

3 For example, there would be nothing to prevent  
4 two private parties from saying let's bring a declaratory  
5 judgment action saying that a particular statute is  
6 unconstitutional, we'll get the Judge to agree with us  
7 that it's unconstitutional and then neither of us will  
8 appeal and the statute becomes unconstitutional, at least  
9 in the judgment of that court, and if the Commonwealth is  
10 not a party to that, then the Commonwealth can never  
11 appeal and can never seek judicial review.

12 THE COURT: Well, that's probably a bad example,  
13 because that would not be a genuine declaratory judgment  
14 action, because there really isn't a matter in  
15 controversy. A better example might be where the party on  
16 the other side didn't do a very good job.

17 MR. THRO: That, perhaps, would be an example.

18 If you take my hypothetical, though, and say  
19 okay, there really was a controversy -- let's say that we  
20 are not a party. Let's say that you declare the statute  
21 unconstitutional, and then let's say that instead of  
22 appealing, the parties decide that they will reach some



1 sort of settlement. At that point, we have a ruling that  
2 the statute is unconstitutional and there is no way for  
3 the Commonwealth to appeal that.

4 Let's also say that, hypothetically, it was  
5 declared unconstitutional by the Virginia Supreme Court,  
6 the Commonwealth wants to -- thinks the Virginia Supreme  
7 Court is wrong, wants the U.S. Supreme Court to review it,  
8 the issue is a matter of federal constitutional law. If  
9 the parties settled at that point, there is no way that  
10 the Commonwealth could seek review.

11 And the U.S. Supreme Court has been absolutely  
12 clear that when the Commonwealth wants to ask the U.S.  
13 Supreme Court to review the constitutionality of a statute  
14 and the Commonwealth is already a party, that is more than  
15 sufficient standing. So, in other words, the mere threat  
16 that this statute will be invalidated either as applied or  
17 on its face is sufficient to give the Commonwealth  
18 standing in this proceeding, and we would be intervening  
19 on the side of the plaintiffs, merely because, as you have  
20 described the procedural posture of the case, plaintiff  
21 seems to be the appropriate title right now. But if at  
22 some point someone were to raise an argument that the

1 Episcopal Church's interpretation is unconstitutional and  
2 if you were to permit that -- and I understand that it is  
3 late in the game -- then the Commonwealth would be on the  
4 side of the Episcopal Church, defending the  
5 constitutionality of that interpretation.

6 So, in short, Your Honor, we are asking to come  
7 in and come in as a party merely to defend the  
8 constitutionality of it.

9 THE COURT: All right.

10 Mr. Davenport and Ms. Anderson, anybody else  
11 want to be heard on this issue?

12 MR. DAVENPORT: No, sir.

13 THE COURT: All right. I will take a brief  
14 recess and then I will come back and give you my decision.

15 (Whereupon, a recess was taken from 2:48 p.m. to  
16 3:00 p.m.)

17 THE COURT: I told you I was going to give you a  
18 decision, but I actually have some more questions and  
19 even, potentially, a proposal to actually resolve this,  
20 not the case, but this motion. I will start by asking  
21 Mr. Thro this question:

22 You understand that there are several different

## CERTIFICATE OF REPORTER

1  
2  
3 I, Maureen S. Bennie, the court reporter who was  
4  
5 duly sworn to well and truly report the foregoing  
6  
7 proceedings, do hereby certify that they are true and  
8  
9 correct to the best of my knowledge and ability; and that  
10  
11 I have no interest in said proceedings, financial or  
12  
13 otherwise, nor through relationship with any of the  
14  
15 parties in interest or their counsel.

16  
17 \_\_\_\_\_  
Maureen S. Bennie

18 Verbatim Court Reporter  
19  
20  
21  
22

1 VIRGINIA :

2 IN THE CIRCUIT COURT OF FAIRFAX COUNTY

3 ----- x

4 IN RE: :

5 MULTI-CIRCUIT EPISCOPAL : CASE NO. CL 2007-0248724

6 CHURCH PROPERTY LITIGATION :

7 ----- x

8 Fairfax, Virginia

9 Friday, April 25, 2008

10 The above-entitled matter came on for hearing  
11 before The Honorable Randy I. Bellows, Judge in and for  
12 the Circuit Court of Fairfax County, Virginia, 4110 Chain  
13 Bridge Road, Courtroom 4G, Fairfax, Virginia, beginning at  
14 approximately 2:35 p.m., before Maureen S. Bennie,  
15 Verbatim Court Reporter, when were present on behalf of  
16 the respective parties:

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1 THE COURT: No, they wouldn't. They wouldn't  
2 have standing on your deadline for filing. I mean, that's  
3 out of their control. My only hesitation is -- I mean,  
4 since they are asking to have amicus status, essentially  
5 you are saying that your position is you don't oppose  
6 amicus status?

7 MR. COFFEE: Correct.

8 THE COURT: So they certainly would have no  
9 problem with me granting them amicus status --

10 MR. COFFEE: Correct.

11 THE COURT: -- for purposes of the filing of the  
12 brief without resolving yet the issue of argument?

13 MR. COFFEE: I have already apprised counsel for  
14 the Methodists that we do object to their participating in  
15 oral argument.

16 THE COURT: Okay.

17 MR. COFFEE: So they understand the need to have  
18 that teed up for resolution by the Court.

19 THE COURT: Okay.

20 MS. ZINSNER: Your Honor, I just want to make  
21 sure, absolutely clear, that with respect to the amicus  
22 brief, it's not necessarily limited to the Methodists.

1 There may be other -- we believe there will be four  
2 national churches that join in that brief, so I don't want  
3 there to be any --

4 THE COURT: Well, you mean the churches that are  
5 listed now?

6 MS. ZINSNER: Right.

7 THE COURT: You are not talking about other  
8 amicus briefs, are you?

9 MS. ZINSNER: No. They will be joining that  
10 brief.

11 THE COURT: Well, I believe I understand  
12 Mr. Coffee when he refers to the Methodist Church, he is  
13 referring to every church listed on that pleading.

14 MR. COFFEE: That's correct, Your Honor. I am  
15 using it generically.

16 MS. ZINSNER: But I believe there may be more  
17 joining that brief, Your Honor.

18 THE COURT: You mean filing additional briefs or  
19 simply filing --

20 MS. ZINSNER: No, Your Honor.

21 THE COURT: -- statements that they join in the  
22 position?

1 MS. ZINSNER: Simply filing statements that they  
2 join in it.

3 THE COURT: Okay.

4 MS. ZINSNER: I just didn't want there to be any  
5 misunderstanding.

6 THE COURT: All right. Well, that's something  
7 that's not before me right now, right, because they  
8 haven't done that.

9 And, Mr. Davenport, this is consistent with your  
10 understanding?

11 MR. DAVENPORT: We have absolutely no objection  
12 to the Methodists or others filing an amicus brief and  
13 arguing.

14 THE COURT: Okay. Well, the argument issue I  
15 certainly am not resolving today, because I don't have the  
16 counsel for the Methodist churches here. So I can't  
17 resolve that issue without giving him an opportunity to  
18 respond to -- because I believe I -- didn't I schedule  
19 this for the parties to have an opportunity to respond to  
20 the other parties' position?

21 MR. COFFEE: You had asked us, Your Honor, to  
22 respond by Wednesday.

## CERTIFICATE OF REPORTER

I, Maureen S. Bennie, the court reporter who was

duly sworn to well and truly report the foregoing

proceedings, do hereby certify that they are true and

correct to the best of my knowledge and ability; and that

I have no interest in said proceedings, financial or

otherwise, nor through relationship with any of the

parties in interest or their counsel.

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Maureen S. Bennie

Verbatim Court Reporter