



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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July 16, 2008

LETTER OPINION

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Re: *In Re: Multi-Circuit Episcopal Church Property Litigation (CL 2007-0248724)*

Dear Counsel:

This matter comes before the Court on the Commonwealth's Renewed Motion to Intervene for the limited purpose of defending the constitutionality of Va. Code § 57-9(A). For the reasons stated below, the Court today grants the Commonwealth's motion to intervene.¹

¹ Because the Commonwealth seeks leave to intervene for the limited purpose of defending the constitutionality of § 57-9(A), the Court accordingly grants the Commonwealth leave to intervene solely for its requested purpose. The Court does not decide today any issue regarding whether the Commonwealth should

Va. Sup. Ct. Rule 3:14 states in pertinent part that “[a] new party may by leave of court file a pleading to intervene as a plaintiff or defendant to assert any claim or defense germane to the subject matter of the proceeding.”² Rule 3:14 does not specifically address the question presented here, which is whether the Attorney General of Virginia may be permitted to intervene in a Virginia state court to defend the constitutionality of a Virginia state statute. However, as the Attorney General notes, it is in fact “somewhat unusual” for the Commonwealth to move to intervene in a state court to defend the constitutionality of a state statute, given that most constitutional challenges to Virginia statutes occur in federal court. At the federal level, a state attorney general’s specific interest in defending the constitutionality of state statutes is explicitly recognized, both in 28 U.S.C. § 2403(b),³ and in U.S. Sup. Ct. R. 29 (4)(c).⁴

be granted leave to intervene for any purpose broader than that specifically requested by the Commonwealth.

The Court further notes that the Attorney General states that “[b]ecause the Episcopal Church and the Diocese claim that [§ 57-9(A)] is unconstitutional and because the CANA Congregations take the opposite view, the Commonwealth requests that it be aligned with the CANA Congregations in all proceedings in which the constitutionality of the statute is at issue.” (Commonwealth’s Opening Br. Concerning its Renewed Mot. to Intervene at 1 n.1.) Although the Court is not convinced that it is necessary for the Commonwealth to be “aligned” with one side or the other in these proceedings for purposes of intervention to defend a statute’s constitutionality, the Court also does not find any such alignment problematic. In any event, the Court does not find it necessary to rule upon whether or not the Attorney General should be granted leave to intervene so as to be “aligned” with the CANA Congregations.

² Va. Sup. Ct. R. 3:14 (LexisNexis 2008).

³ 28 U.S.C. § 2403(b) states

[i]n any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent

ECUSA/Diocese object to the Commonwealth's intervention, asserting that, under Va. Sup. Ct. R. 3:14, "[t]he Commonwealth cannot intervene as a plaintiff or defendant in this matter because it does not assert any claims or interests that would properly place it in the shoes of the Episcopal Church, the Diocese, or the Congregations." However, as noted above, Rule 3:14 does not specifically address the precise issue presented here. The Attorney General of Virginia has a unique interest in defending the constitutionality of the statutes of the Commonwealth. Indeed, as the State Solicitor General stated at the January 25, 2008 hearing on the Commonwealth's initial motion to intervene:

Your Honor, I would like to address a distinction which I think the Episcopal Church has blurred, perhaps unintentionally, and that is the distinction between having a right to intervene and having a duty to defend the constitutionality of the statute.

We have never asserted that we have a right to intervene. Now, in Federal Court, we do. 28 USC 2403(b) gives a state the right to intervene whenever . . . the constitutionality of a statute is raised, and neither the state nor . . . an officer is a party to [that] litigation. We do not have a statute like that in Virginia, so there is no right to intervene. But the fact that there is no right to intervene does not mean that there is a prohibition against this Court deciding to allow us to intervene.

necessary for a proper presentation of the facts and law relating to the question of constitutionality.

28 U.S.C.S. § 2403(b) (LexisNexis 2008).

⁴ That rule states as follows:

In any proceeding in this Court in which the constitutionality of any statute of a State is drawn into question, and neither the State nor any agency, officer, or employee thereof is a party, the initial document filed in this Court shall recite that 28 U.S.C. § 2403(b) may apply and shall be served on the Attorney General of that State. In such a proceeding from any court of the United States, as defined by 28 U.S.C. § 451, the initial document also shall state whether that court, pursuant to 28 U.S.C. § 2403(b), certified to the State Attorney General the fact that the constitutionality of a statute of that State was drawn into question. See Rule 14.1(e)(v).

U.S. Sup. Ct. R. 29(4)(c) (LexisNexis 2008).

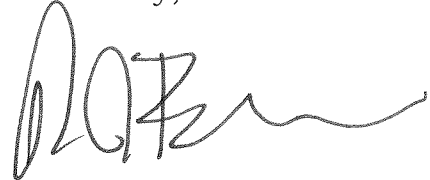
The Attorney General feels—as do all of his recent predecessors, if you read their opinions—that they have an obligation to defend the constitutionality of statutes enacted by the democratically-elected representatives of the People and then signed into law by the People’s democratically-elected governor. That’s what is going on here. They are attacking the constitutionality of the statute. The Attorney General has a duty to defend that statute. He has chosen to exercise or attempt to exercise that duty to defend the statute by asking this Court for permission to intervene in this litigation.

Hr’g Tr. 26:14-27:18.

The Court further notes that, while ECUSA/Diocese cite several Virginia cases in support of their position, none of those cases involve a Virginia court denying the Attorney General intervenor status to defend the constitutionality of a Virginia statute. Nor is the Court aware of any such case.

Thus, the Court today grants the Attorney General permission to intervene in this litigation for his stated purpose.⁵

Sincerely,

A handwritten signature in black ink, appearing to read 'Randy I. Bellows', written in a cursive style.

Randy I. Bellows,
Circuit Court Judge

⁵ Nothing in today’s decision granting the Commonwealth’s motion to intervene alters the result of this Court’s letter opinion of May 12, 2008, regarding ECUSA/Diocese’s Motion for Leave to Amend Answers to § 57-9 Petitions. In their brief in support of their Motion for Leave to Amend, ECUSA/Diocese had argued that the Attorney General’s involvement in this litigation supported ECUSA/Diocese’s invocation of Va. Code § 57-2.02 as a defense. The Court does not agree. The Attorney General has sought to intervene in this litigation in order to defend the constitutionality of § 57-9(A). The Attorney General’s defense of that statute does not change the fact that this remains a property dispute between private parties.