

**VIRGINIA:**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

<b>In re:</b>	)	<b>Case Nos.:</b>	CL 2007-248724,
<b>Multi-Circuit Episcopal Church Litigation</b>	)		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 EPISCOPAL CHURCH'S AND THE DIOCESE OF VIRGINIA'S OPENING BRIEF ON 57-9 VOTING ISSUES PURSUANT TO AUGUST 22, 2008, ORDER**

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On August 22, 2008, the Court directed the parties to submit briefs addressing a number of issues related to the application of § 57-9(A)'s voting requirement and, accordingly, the scope of the October 2008 trial at which the propriety of the voting at issue in these cases will be determined. The Court specifically requested that the parties address: (1) the burden and standard of proof applicable to the voting requirements; (2) what the Court must examine to decide whether the votes taken by the CANA Congregations filing Va. Code § 57-9 Petitions were "fairly taken"; (3) the definition of the term "members" in Va. Code § 57-9(A); and (4) the meaning of the phrase "by a vote of a majority of the whole number," in Va. Code § 57-9(A). The Episcopal Church and the Diocese hereby submit their opening brief on these issues.<sup>1</sup>

**I. The CANA Congregations bear the burdens of proof and production of evidence that their petitions meet the statutory requirements and therefore may be approved.**

Section 57-9(A) provides that if the statutory requirements of "division," "branch," "attachment," and "church or religious society" have been met, 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." The statute goes on to provide that this "determination shall be reported to the circuit court," and if accepted by the court "shall be conclusive as to the title to and control of any property held in trust for such congregation." As proponents of the petitions, seeking to establish that they met the requirements of the statute and to persuade the Court to approve their petitions, the

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<sup>1</sup> This brief addresses the issues enumerated in the agreed Order entered by the Court on September 3, 2008. It does not address other issues that the parties have described as remaining, including issues regarding Potomac Falls Church's contention that it need not comply with § 57-9(A); the Congregations' contention that they should prevail in the 57-9 actions on estoppel / waiver grounds; the Episcopal Church's and the Diocese's contention that certain property is not subject to the 57-9 actions; and the issue of whether the 57-9 action encompasses a congregation's property held by trustees for the applicable Congregation as of the date of the petition or as of the date of the Court's approval.

Congregations must establish all elements of the statutory requirements.

As a general rule, “the party who has the burden of *persuasion* on an issue will also have the *initial* burden of *going forward*.” Charles E. Friend, *The Law of Evidence in Virginia* § 9-3 at 320 (6<sup>th</sup> ed. 1996). Thus, the burden of proof will generally fall “on the plaintiff” or “on the party who takes the affirmative on a particular issue.” *Id.* (emphases omitted). *See also Brooks v. Worthington*, 206 Va. 352, 359, 143 S.E.2d 841, 847 (1965) (“the burden of proof is always on the plaintiff to establish his case .... The duty of going forward with the evidence shifts to the defendant only when the plaintiff has established his case by evidence, but the burden of proof never shifts”); *Nosay v. Owens*, 193 Va. 343, 349, 68 S.E.2d 531, 535 (1952) (“the burden always rests upon the plaintiff to establish his case”); *Hall v. Hall*, 181 Va. 67, 80, 23 S.E.2d 810, 815 (1943) (“the necessity of proving his case always rests upon the plaintiff and never shifts”); *Kohlsaatt v. Parkersburg & Marietta Sand Co.*, 266 F.283, 284 (4th Cir. 1920) (“the duty of the plaintiff to prove his case ... never shifts or changes”).

Whichever formulation of the test is applied, under the circumstances presented here, it is a congregation filing a petition pursuant to § 57-9(A) who must prove that the statutory requirements have been met and that its petition should be approved by the Court. Indeed, in the case of § 57-9(A), which until now has been applied only in *ex parte* proceedings, there often is no other candidate on whom any burden of proof could possibly be imposed. *See, e.g.,* Plaintiffs’ Exs. 96-98, 118-120 (approving § 57-9(A) petitions on *ex parte* congregational showings that statutory requirements had been met).

## **II. The standard of proof is preponderance of the evidence.**

Ordinarily, of course, the burden of proof placed upon the plaintiff in a civil case is the “preponderance of the evidence” standard. *RF&P Corp. v. Little*, 247 Va. 309, 318, 440 S.E.2d

908, 914 (1994) (“as a general rule, civil litigants are assigned the burden of proving their cases by a preponderance of the evidence”). With respect to the issues discussed herein, the Episcopal Church and the Diocese assume that this is the burden that would be applied in this case.

### **III. Application of the requirement that the votes be “fairly taken”**

On June 27, 2008, this Court held that under the statute, it must “consider whether the congregational vote was ‘fairly taken,’ in accordance with the provisions of 57-9(A).” *See* Letter Opinion on the Court’s Five Questions (June 27, 2008) at 10. The contours of what it means for the vote to have been “fairly taken” are not explicitly described in the text of the statute itself. At a minimum, however, it appears that to be “fairly taken,” a vote under 57-9(A) must meet the following criteria: (i) all of those entitled to vote under the statute must have had adequate notice of the vote and their right to participate in it; (ii) all of those entitled to vote under the statute must have been permitted a fair and reasonable opportunity to advocate their views and to cast a ballot; (iii) all of the votes must have been properly counted; and (iv) the voting process must be free from stigma and manipulation, and implemented without improper coercion.

The Virginia Supreme Court discussed the elements of a “fair” congregational vote in *Reid v. Gholson*, 229 Va. 179, 327 S.E.2d 107 (1985). In *Reid*, one faction of a “large independent congregational church” brought suit, seeking “the appointment of a Special Commissioner to ‘run and oversee’ [a] proposed congregational meeting ‘in the interest of having a fair and impartial annual meeting.’” *Id.* at 181, 184, 327 S.E.2d at 108, 110. The key part of the Court’s opinion described the rights at stake and the reason judicial intervention was warranted. Such intervention may be necessary, the Court explained, “when the members of a congregational church merely seek the protection of the court for the purpose of obtaining a fairly-conducted meeting.” *Id.* at 189, 327 S.E.2d at 113. In such a case,

A member of a congregational church ... may appeal only to the simple and fundamental principles of democratic government which are universally accepted in our society. *These principles include the right to reasonable notice, the right to attend and advocate one's views, and the right to an honest count of the votes.* Such rights are fundamental to our notions of due process. They are neutral principles of law, applicable not only to religious bodies, but to public and private lay organizations and to civil governments as well. Courts must apply them every day, and can do so without any danger of entering a "religious thicket."

*Id.* at 189-90, 327 S.E.2d at 113-14 (citations omitted, emphases added). The Court in *Reid* went on to conclude that there had been "a clear showing of a continuing course of conduct by Reid and his adherents to obstruct the dissenters in the exercise of their civil rights mentioned above. They have been persistently 'silenced' and excluded from voting. Meetings have been called upon improper notice, votes favorable to the dissenters suppressed, and unauthorized absentee ballots counted against them." *Id.* at 190, 327 S.E.2d at 114.

The same specific indicia of a "fair vote" identified in *Reid v. Gholson*, not surprisingly, have been repeatedly cited and applied in other voting contexts. *See, e.g., Bush v. Gore*, 531 U.S. 1046, 1048 (2000) (Stevens, J., dissenting) ("It is certainly not clear that the Florida decision violated federal law. The Florida Code provides elaborate procedures for ensuring that every eligible voter has a full and fair opportunity to cast a ballot and that every ballot so cast is counted"); *Anderson v. United States*, 417 U.S. 211, 227 (1974) ("Every voter in a federal primary election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes"); *Wirtz v. Local 153, Glass Bottle Blowers*, 389 U.S. 463, 472 (1968) ("Specific provisions [of the Labor-Management Reporting and Disclosure Act of 1959] insure equality of treatment in the mailing of campaign literature; require adequate safeguards to insure a fair election, including the right of any candidate to have observers at the polls and at the counting of ballots; guarantee a 'reasonable opportunity' for the nomination of

candidates, the right to vote without fear of reprisal, and ... the right of every member in good standing to be a candidate, subject to ‘reasonable qualifications uniformly imposed’”); *Democratic Party of Virginia v. State Board of Elections*, 1999 Va. Cir. LEXIS 551 at \*6 (Richmond City 1999) (granting preliminary injunction blocking pilot voter registration program in the face of allegations that the program would cause “‘stigmatization, intimidation and separation’ of the voters” because “the public interest in ensuring the voting process is fair and impartial outweighs the interests of this experimental pilot program going forward”).

To be “fairly taken,” a vote must be free of intimidation and coercion. *See* 42 U.S.C. §§ 1971(b) and 1973i(b) (anti-intimidation provisions of Voting Rights Act); *Burson v. Freeman*, 504 U.S. 191 (1992) (state has a compelling interest in preventing voter intimidation and election fraud). The vote must be conducted with integrity and regularity, must be free of manipulation and preserve voter secrecy and ballot anonymity. *See Burson*, 504 U.S. at 200-205 (discussing generally the history of election regulation and need to preserve voter anonymity and ballot secrecy); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 343 (1995) (describing secret ballot as “the hard-won right to vote one’s conscience without fear of retaliation”); *Campaign for Family Farms v. Glickman*, 200 F.3d 1180 (6th Cir. 2000) (holding that “there is a strong and clearly established privacy interest in a secret ballot”). Finally, the election must afford every voter a chance to register his or her will. *Viktora v. Cressman*, 169 N.W. 551 (S.D. 1918) (upholding school district consolidation election finding “there is absolutely nothing in the record to show but that the election was fairly and honestly conducted, and, even if there was anything that could be deemed an irregularity, there is nothing from which it could be inferred that it deprived any voter of a fair chance to register his will in relation to the issue before the voters, or from which it could be inferred that the will of the voters was not fairly and truly

ascertained and declared.”)

The same criteria should apply to a vote taken pursuant to § 57-9(A). As described below, § 57-9(A) requires that a vote purporting to change or determine the future use and control of local church property must reflect the wishes of a “majority of the whole number” of the congregation’s “members.” To be “fairly taken,” a vote must, at the least, be conducted in a manner that permits that requirement to be met. Those entitled to vote under the statute must be made aware of that fact; they must be given a fair and reasonable opportunity to advocate their views and permitted to vote; their votes must have been counted; and the voting process must be free from stigma and manipulation, and implemented without improper coercion.

**IV. The term “members” in § 57-9(A) is not limited to “voting members” or “communicants in good standing.”**

As noted, § 57-9(A) requires that a congregation’s petition reflect a vote of the “members of such congregation over 18 years of age.” In contrast, § 57-9(B) provides that the vote shall be taken by “a majority of the members of such congregation, entitled to vote by its constitution as existing at the time of the division, or where it has no written constitution, entitled to vote by its ordinary practice or custom.” The Congregations pled that they had conducted their votes in accordance with Va. Code § 57-9(A).<sup>2</sup> Notwithstanding those assertions, and in the face of § 57-9(A)’s specific direction, it now appears that some or all of the CANA Congregations conducted votes in which only *some* of their members over the age of 18 – that is, only the subset of those members who were considered to be “communicants in good standing” and thus eligible

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<sup>2</sup> *E.g.*, Church of the Apostles’ Petition ¶ 14 (alleging a vote “conducted in compliance with Va. Code § 57-9”); Truro Church’s Petition ¶ 14 (same); The Falls Church’s Petition ¶ 16 (same); Church of Our Saviour at Oatlands’ Petition ¶ 16 (same). *See also* each of the foregoing at ¶ 1 and n.1 (seeking approval pursuant to and quoting § 57-9(A)).

to vote at ordinary congregational meetings – were entitled to vote under § 57-9(A).<sup>3</sup> Section 57-9(A), however, does not refer to “communicants in good standing,” nor does it limit its voting rights or requirements to those who are entitled to vote under the Church’s rules. Instead, the vote must reflect the will of a majority of *all* “members” over the age of 18.<sup>4</sup>

At the hearing on August 22, 2008, counsel for the CANA Congregations indicated that the criteria for “membership” in an Episcopal parish and the size of each of the Congregations’ membership at the time of their respective votes are matters as to which they need or would like to submit evidence. The Episcopal Church and the Diocese agree that these are mixed questions of law and fact, as to which some evidence may need to be presented, at trial, by stipulation or otherwise. Whether the term “members” in § 57-9(A) is limited to “communicants in good standing” or “members entitled to vote under the Church’s own rules,” however, is a pure question of law that this Court can and should decide prior to trial.

**A. The plain meaning of “member” does not connote entitlement to vote under the Church’s own rules.**

As this Court has recognized, in interpreting the provisions of § 57-9(A) it “is first required to consider the ‘plain meaning’ of the words as they are used in the statute.” April 3, 2008, Letter Opinion at 47. “This is one of the most basic principles of statutory construction within our legal system.” *Id.* n.35 (citing *United States v. Gonzales*, 520 U.S. 1, 5 (1997), and *Hackney v. Commonwealth*, 186 Va. 888, 891-92 (1947)). *See also Woods v. Mendez*, 265 Va.

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<sup>3</sup> Written discovery is outstanding (responses are due September 12), and corporate depositions have been noticed, both of which should clarify this point.

<sup>4</sup> It further appears that at least some of the Congregations may have misapplied the canonical criteria for a communicant in good standing, thus improperly depriving some of even that group of members of their right to vote. That is plainly not an issue that can be decided as a matter of law. Indeed, as discussed in Section IV.C below, it would be improper for the Court to make such a determination at all. This is simply one of the reasons that the Congregations’ efforts to limit the statutory term “members” to “communicants in good standing” must fail.



68, 75, 574 S.E.2d 263, 267 (2003) (“when the General Assembly has used words of a plain and definite import, courts cannot assign to them a construction that effectively would add words to the statute and vary the plain meaning of the language used”).

The plain meaning of the term “members” involves simply a connection with or involvement in a particular group, including a church. Thus, for example, Merriam-Webster’s Online Dictionary, relied upon by the Court in its April 3, 2008, Letter Opinion at 75-78, defines “member” as “one of the individuals composing a group” or “a person baptized or enrolled in a church.” See <http://www.merriam-webster.com/dictionary/member> (visited Sept. 2, 2008). Webster’s New International Dictionary defines the term similarly: “one of the persons composing a society, community, or party; an individual who belongs to an association.” Webster’s New Int’l Dictionary of the English Language 1533 (2d ed. unabridged 1937) (attached as Ex. A). Other dictionaries do the same.<sup>5</sup> As these definitions make clear, the right or eligibility to vote on matters of interest to the association or society at issue is not an element of the ordinary understanding of the term “members.” Indeed, some societies do not utilize votes at all, and the concept of voting vs. non-voting memberships is commonplace. The term “members,” standing alone, encompasses both.

Consistent with these ordinary understandings of the term, in the Episcopal Church, the individuals composing a particular parish – the “members” of that parish – are all persons whose baptisms are recorded in the parish. See Episcopal Church Canon I.17(1) (TEC- Diocese Trial

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<sup>5</sup> See, e.g., “Member,” Dictionary.com Unabridged v. 1.1 (Random House, Inc. 2008) at <http://dictionary.reference.com/browse/member> (visited Sept. 2, 2008) (“a person, animal, plant, group, etc., that is part of a society, party, community, taxon, or other body”); “Member,” *The American Heritage Dictionary of the English Language* 4th ed. (Houghton Mifflin Co. 2004), available at <http://dictionary.reference.com/browse/member> (visited Sept. 2, 2008) (“One that belongs to a group or an organization”).

Ex. 1 & 2). For statistical purposes, the Church requires that parishes annually report their number of “active, baptized members” – that is, individuals who are included in parish records and who actually participate or contribute in some way to the life of the congregation. Prior to their votes to disaffiliate from the Episcopal Church, each of the Congregations reported its “active membership” pursuant to this requirement,<sup>6</sup> and in the course of this litigation the Congregations have frequently relied upon and made representations about the “membership” of the Episcopal Church based on such statistics. *See, e.g.*, CANA Congregations’ Opening Post-Trial Mem. (filed Dec. 21, 2007) at 36 n.20 (citing Plaintiffs’ Ex. 90 at 8 and Plaintiffs’ Ex. 102, which show certain Episcopal Church statistics); *id.* at 43 (citing Plaintiffs’ Ex. 132, stating Diocesan statistics), *cited in* April 3, 2008, Letter Opinion at 81. The Congregations also have maintained parish directories, which provide additional evidence of the persons that they consider as composing or belonging to the parish.

In none of these contexts is the term “member” treated as the equivalent of “persons entitled to vote.” To the contrary, the Canons of the Diocese of Virginia specifically limit voting rights at congregational meetings pursuant to the rules of the Church to a certain category of “members,” namely “adult communicants in good standing, registered in the particular Church in which they offer to vote.” Diocesan Canon 11(5), (13) (TEC-Diocese Trial Ex. 3 & 4). “Adult communicants in good standing,” in turn, are all “members” of the Church who (i) “have received Holy Communion in this Church at least three times during the preceding year,” (ii) are “sixteen years of age and over,” and (iii) have, “for the previous year ... been faithful in corporate worship, unless for good cause prevented, and have been faithful in working, praying, and giving for the spread of the Kingdom of God.” Episcopal Church Canon I.17(2) & (3)

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<sup>6</sup> *See, e.g.*, Parochial Report of Church of the Epiphany (EDV0030910-12) (attached as Ex. B).

(TEC-Diocese Trial Ex. 1 & 2). Each year, parishes report their numbers of “communicants in good standing” and “adult communicants in good standing,” separate from and in addition to their total number of “members.” Not surprisingly, the number of communicants in good standing in a particular parish is often less than the parish’s “membership” – sometimes by a significant margin.

**B. The term “member” in § 57-9(A) contrasts sharply with the language of § 57-9(B).**

That the term “member” in § 57-9(A) must refer to all those who are part of or “enrolled” in a congregation, in accordance with the term’s ordinary meaning and the Church’s and the Congregations’ own practices, is confirmed by consideration of the starkly different language of § 57-9(B). As this Court explained in its April 3 Letter Opinion (at 48):

There is ... a significant distinction between § 57-9(A) and (B) regarding the procedure for a majority vote. In the case of an independent church, such as the one described in (B), those who may participate in the vote are those “*entitled to vote by [the congregation’s] constitution as existing at the time of the division, or where it has no written constitution, entitled to vote by its ordinary practice or custom ....*” In contrast, in (A), those entitled to vote are “*the members of such congregation over 18 years of age....*” Thus, in (B), the legislature defers completely to the independent church’s constitution, ordinary practice, or custom, whereas *in (A), the legislature shows no such deference.* [Emphases added.]

In other words, the General Assembly plainly understood how to refer to “those entitled to vote under the church’s own rules” when it chose to, and it explicitly did so in § 57-9(B). In § 57-9(A), the legislature used very different language, with a very different ordinary meaning. The Court should not presume that this difference is of no significance. It is well accepted that “[w]hen the General Assembly uses two different terms in the same act, it is presumed to mean two different things.” *Forst v. Rockingham Poultry Marketing Coop., Inc.*, 222 Va. 270, 278, 279 S.E.2d 400, 404 (1981); *Klarfeld v. Salsbury*, 233 Va. 277, 284-85, 355 S.E.2d 319, 323 (1987). *See also Monument Associates v. Arlington County Bd.*, 242 Va. 145, 149, 408 S.E.2d

889, 891 (1991) (it is “the settled rule of statutory construction that an enactment should be interpreted, if possible, in a manner which gives meaning to every word”).

**C. Defining “member” to mean “communicant in good standing” risks entangling the Court in the thicket of ecclesiastical issues, making § 57-9(A) unconstitutional as applied.**

The ordinary tools of statutory construction set forth above show that the term “member” in § 57-9(A) must be construed to mean just that, and not “communicant in good standing” or “member entitled to vote” as the Congregations apparently propose. We note, moreover, that to limit the term “member” to “communicants in good standing,” as the Congregations did, risks plunging the Court into the quintessentially doctrinal questions inherent in the relevant ecclesiastical requirements. As noted above, for example, determining whether individuals are “communicants in good standing” requires an examination not simply of whether the individual is counted as a part of the parish or listed in membership records, but of how often he or she had taken Holy Communion and whether he or she had been sufficiently “faithful” in “corporate worship,” “working,” “giving,” and even “praying” “for the spread of the Kingdom of God.” Under any reasonable interpretation of church property jurisprudence, judicial inquiry into such questions would violate the First Amendment.<sup>7</sup> See, e.g., *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709-10, 713-14, 719 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969); *Reid v. Gholson*, 229 Va. 179, 187, 189, 327 S.E.2d 107, 112, 113 (1985); *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 503, 201 S.E.2d 752, 755 (1975). Interpreting the term “member” according to its ordinary

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<sup>7</sup> In light of the fact that Virginia looks to First Amendment jurisprudence as a guide in interpreting the corresponding religious freedom provisions of the Virginia Constitution, see Constitutionality Letter Opinion (June 27, 2008) at 7 n.4, such an inquiry also would violate those provisions. In the interest of brevity this brief refers simply to the “First Amendment.”

meaning properly avoids this issue.<sup>8</sup>

**V. The phrase “majority of the whole number” in § 57-9(A) requires a majority vote of the whole number of “members” eligible to vote, whether or not they voted.**

Just as the Court can and should resolve the proper definition of the statutory term “members” as a matter of law, it should, if there is any dispute on this issue, resolve the meaning of the statutory phrase “majority of the whole number” as a matter of law. That is, does the statute require that the vote reflect a majority of “the whole number” of members or only a majority of those who actually cast a ballot?

In their efforts to invoke the statute, the CANA Congregations properly concluded that a majority of the “whole number” was required. Thus, the Rector of The Falls Church wrote to the congregation days before its vote and emphasized the need for participation, acknowledging § 57-9(A)’s requirement that the vote achieve a majority of all members, not just those who actually cast a ballot:

As you know, your vestry has recommended that we vote to separate from The Episcopal Church (TEC), and the voting begins this Sunday morning. I cannot overstate the importance of your participating in this vote. *Virginia law requires a strong voter turnout in such church decisions. Not voting is equivalent to voting to remain in the denomination.*

Letter from the Rev. John Yates “To the family of The Falls Church” (Dec. 7, 2006) at 1 (Ex. C) (emphasis added). Likewise, the Rector of Church of the Epiphany wrote days before its vote that “Not voting will be counted as a vote to stay in the Episcopal Church.” Letter from the Rev.

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<sup>8</sup> The Episcopal Church and the Diocese recognize that the Court has already held that § 57-9(A) is constitutional. Contracts Clause Letter Opinion (August 19, 2008) at 3. If the Congregations created constitutional problems with respect to their votes – a topic that the Court has always stated would be adjudicated later, *see* Scope Hearing Tr. (Sept. 14, 2007) at 41-42, 115; April 3, 2008, Order at 2; Five Questions Letter Opinion (June 27, 2008) at 10, and about which essential discovery necessarily has occurred only recently – however, the Court can and should consider such constitutional problems.

Robin Raugh (Dec. 27, 2006) at 1 (Ex. D). Furthermore, the Congregations did not simply schedule a congregational meeting at which a vote of those present could be taken. Instead, they went to great lengths to ensure a majority vote of all of those who – under their own (erroneous) definition of “members” – were eligible to vote, holding the polls open for many days.<sup>9</sup>

Accordingly, at the August 22, 2008, hearing, counsel for the CANA Congregations affirmed that the statute requires a majority vote of “the whole number” of members and not just a majority of those who voted.<sup>10</sup>

The Congregations’ own case law, quoted in the Court’s Five Questions Letter Opinion (June 27, 2008), at 7-8, confirms that the above understanding of “majority of the whole number” was correct. In Plaintiffs’ November 2007 Trial Ex. 96, a June 28, 1867, Order from the Augusta County CL Order Book, for example, the congregation submitted that it had voted

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<sup>9</sup> See, e.g., Ex. 19 to Church of the Apostles’ Report at 1 (reflecting that the “Special Parish Meeting” at which the vote occurred began on December 9, 2006, and ended on December 17, 2006); Ex. 19 to Truro Church’s Report at 1 (“a congregational vote was held at Truro Church from December 10-17, 2006”); Ex. 20 to The Falls Church’s Report at 1 (referring to the “Congregational Meeting and Vote December 10 to 16, 2006”).

<sup>10</sup> See Tr. at 61-62 (Aug. 22, 2008):

9 MR. DAVENPORT: The majority of the whole  
10 number. I mean just so there is no confusion about it,  
11 our position is that that language means a majority of  
12 all the members is required under the statute.

13 So if somebody doesn't show up, that's a vote  
14 to stay in the Episcopal Church. I think that's a legal  
15 issue.

....

5 THE COURT: What is your -- have you taken a  
6 position on this?

7 MR. COFFEE: It would be a majority of the  
8 eligible voters.

9 THE COURT: Whether they show up or not.

10 MR. COFFEE: Correct.

As evidenced by the discussion following those statements, the parties disagree about how to define “members,” who are the “eligible voters” under the statute. It appears, however, that the parties agree that a vote of the “majority of the whole number” of such persons must be obtained.

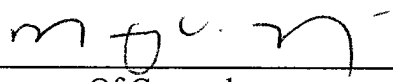
by a “majority of the whole number” to affiliate with the Methodist Episcopal Church South. The court held, “it appearing to the Court from an inspection of the said papers that ... of the 118 members of the said congregation, entitled to vote [illegible] voted in accordance with the determination of the Congregation and the remaining 17 either failed or refused to vote – the Court doth approve the proceedings of the said Congregation and their said determination ....”

*Id.* The court’s approval, in other words, was based upon the congregation’s attainment of a majority of the 118 total members (entitled under the statute to vote), and not of the 101 who actually voted. Similarly, Plaintiffs’ Exhibit 97 shows that the court approved a congregational petition after affirming that “of 163 members of said Congregation entitled to vote, 118 voted in accordance with the determination of the congregation, and the remaining 45 either failed or refused to vote.” Again, the vote reflected a majority of “the whole number” of reported members, and not just of those who cast ballots. *See also* Plaintiffs’ Ex. 118 (approving petitions where it “appear[ed] that a majority of those entitled by law to vote in each of said congregations has voted in favor of adhering to the Methodist Episcopal Church South”); Plaintiffs’ Ex. 119 (approving petition where it appeared that the number of votes in favor of adherence to the Presbyterian Church in the United States exceeded a majority of the whole number entitled by law to vote); Plaintiffs’ Ex. 120 (approving petitions where respective congregations had determined, “by vote of a majority of the whole number authorized by law to vote,” to adhere to the Methodist Episcopal Church South).

Accordingly, the phrase “majority of the whole number” in § 57-9(A) refers to and requires a majority of the total number of a congregation’s “members” over the age of 18, regardless of how many or how few actually cast a ballot.

Respectfully submitted,

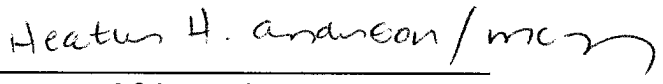
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IN THE DIOCESE OF VIRGINIA

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1762878.3



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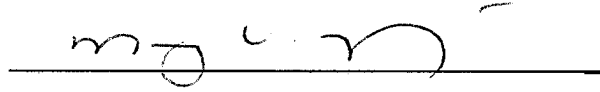
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A handwritten signature in black ink, appearing to read "m. c. cullough", is written above a solid horizontal line.

#1762878v3

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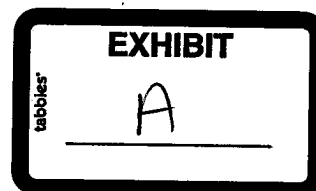
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THE 2005 REPORT OF EPISCOPAL CONGREGATIONS AND MISSIONS  
 ACCORDING TO CANONS I.6, I.7, AND I.17  
 (OTHERWISE KNOWN AS THE PAROCHIAL REPORT)



Name of Congregation <b>Church of the Epiphany</b>		Diocese <b>Virginia</b>
Street <b>Oak Hill Elementary School 3210 Kinross Cricle</b>		City <b>Oak Hill</b>
State <b>VA</b>	Zip + 4 <b>20171</b>	County <b>Fairfax</b>
Mailing Address <b>PO Box 710995</b>		City <b>Oak Hill</b>
State <b>VA</b>	Zip + 4 <b>20171</b>	Congregation's Phone Number <b>703-715-6070</b>
Federal Tax ID # <b>54-1397724</b>	Congregation's E-mail address	Congregation's URL (Web Address) <b>churchoftheepiphany-episcopal.cc</b>

**Report Preparation**

Page 2 Prepared by (Print or type name) <b>Betsy Zimmermann</b>	Daytime Phone <b>703-481-8601 x100</b>
Page 3 Prepared by (Print or type name) <b>Janice Monaghan</b>	Daytime Phone <b>703-481-8601 x115</b>

**Certified by the Clerk of the Vestry**

Certified by (Print or type name) <b>John Ticer</b>	
Signature	Date <b>3/1/06</b>

**Certified by Treasurer/Financial Officer**

Certified by (Print or type name) <b>Andy Plummer</b>	
Signature	Date <b>3/1/06</b>

**Certified by Rector/Vicar/Person in Charge**

Certified by (Print or type name) <b>The Rev. Robin Rauh</b>	
Signature	Daytime Phone
	Date <b>3/1/06</b>

**Vestry Approval**

Indicate date the Parochial Report was approved by the Vestry or Bishop's Committee (Canon I.6.1)	Date <b>3/14/06</b>
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Church of the Epiphany

Oak Hill

Virginia

Congregation

City

Diocese

Page 2

**Membership, Attendance and Services of the Reporting Congregation**

**Using Last Year's Report:**

Using the 2004 Parochial Report, record the Number of Baptized Members Reported as of December 31, 2004. (See your 2004 Parochial Report, Box M04)

Active Baptized Members of the Reporting Congregation Reported Last Year

Members Reported Last Year = M04. 1,233

**Using the Register of Church Membership and Rites:**

During the Report Year

1. Increases during year. All members added to the baptized members section of your congregation's Membership Register during 2005 by: baptism, confirmation/reception, or transfer; and those persons restored from inactive status, or not counted in last year's membership count.

Increases in Membership

Total Increases = 1. 47

Decreases in Membership

2. Decreases during year: All baptized members lost by death, transferred to another congregation, removed to inactive status in the Register of Church Membership and Rites, removed for other reasons, or not removed from last year's membership count.

Total Decreases = 2. 12

Active Baptized Members of the Reporting Congregation At Year-End

M05: Add the increases entered in Box 1 to Box M04. Then subtract the decreases entered in Box 2 for the total active membership as of December 31, 2005

Total Active Baptized Members (end of report year) = M05. 1,268

Communicants in Good Standing of the Reporting Congregation

3. All communicants in good standing: All baptized members of the reporting congregation, who "have received Holy Communion at least three times during the preceding year" and are faithful "in corporate worship, unless for good cause prevented," and "in working, praying, and giving for the spread of the Kingdom of God."

All communicants (adults and youth) in good standing = 3. 1,268

Youth in Good Standing

4. Those communicants in good standing (counted on line 3) who are under age 16.

Communicants in good standing who are under age 16 = 4. 431

Others Active

5. Others who are active whose baptisms are not recorded in the Parish Register, or in another Episcopal congregation.

Others = 5. 45

**Using the Service Register:**

Average Sunday Attendance for 2005

6. Sunday & Saturday Evening Attendance: Divide total Sunday attendance by number of Sundays.

Average Sunday Attendance = 6. 366

Easter Attendance in 2005

7. Easter Attendance (7) 754

**Sacraments & Services:**

Number of Holy Eucharists Celebrated During 2005

- 8. Sunday & Saturday Evening Eucharists (8) 91
- 9. Weekday Eucharists (9) 12
- 10. Private Eucharists (10) 9
- 11. Daily Offices on Sunday (11) 2
- 12. Daily Offices on Weekdays (12) 7
- 13. Marriages (13) 4
- 14. Burials (14) 1

Daily Offices and Other Services Held During 2005

**Using the Register of Church Membership and Rites:**

Baptisms in 2005

- 15. Baptisms 16 years and older (15) 2
- 16. Baptisms under 16 years of age (16) 10

Confirmations in 2005

- 17. Confirmations 16 years and older (17) 4
- 18. Confirmations under 16 years of age (18) 9

Received in 2005

- 19. Received by a bishop (19) 0

**Education:**

Children and Youth

20. Total Church School Students Enrolled (20) 130

Adult Education

21. Do you have any regular Sunday or weekday adult education program(s)? Yes  No

Church of the Epiphany  
Congregation

Oak Hill  
City

Virginia  
Diocese

Page 3

**Stewardship and Financial Information of the Reporting Congregation**

**Giving Information for 2005:**

Number of Pledges	1. Number of signed pledge cards for 2005 -report year	(1)	117
Total \$ Pledged	2. Total dollar amount pledges for 2005-report year	(2)	\$618,826

**Report of Revenues and Expenses for 2005:**

Operating Revenues	3. Plate offerings, pledge payments & regular support	(3)	\$789,596	
	4. Money from investments, used for operations	(4)	\$0	
	5. Other operating income, including unrestricted gifts & restricted gifts used for operations, & contributions from congregation's organizations	(5)	\$122,111	
	6. Unrestricted bequests used for operations	(6)	\$0	
	<i>Subtotal Normal Operating Income (3 + 4 + 5 + 6) = A</i>			\$911,707
	7. Assistance from diocese for operating budget	(7)	\$0	
	<i>Total Operating Revenues (A + 7) = B</i>			\$911,707
Non-Operating Revenues	8. Funds received for capital projects	(8)	\$797,081	
	9. Additions to endowment, & other investment funds	(9)	\$0	
	10. Contributions & grants for congregation based outreach & mission programs	(10)	\$0	
	11. Funds for transmittal to other organizations	(11)	\$12,841	
	<i>Subtotal Non-Operating Revenues (8 + 9 + 10 + 11) = C</i>			\$809,922
<i>Total All Revenues (B + C) = D</i>			\$1,721,629	
Operating Expenses	12. To diocese for assessment, apportionment, or fair share	(12)	\$10,000	
	13. Outreach from operating budget	(13)	\$88,467	
	14. All other operating expenses	(14)	\$824,631	
	<i>Subtotal Operating Expenses (12 + 13 + 14) = E</i>			\$923,098
Non-Operating Expenses	15. Major improvements & capital expenditures	(15)	\$3,523,368	
	16. Expense for congregation's outreach & mission	(16)	\$0	
	17. Funds contributed to Episcopal seminaries	(17)	\$0	
	18. Funds transmitted to other organizations	(18)	\$13,063	
<i>Subtotal Non-Operating Expenses (15 + 16 + 17 + 18) = F</i>			\$3,536,431	
<i>Total All Expenses (E + F) = G</i>			\$4,459,529	

**At Year-End:**

As of December 31, 2005	19. Total cash in all checking & passbook savings accounts	(19)	\$61,563
	20. Total investment at market value (not including cash reported in line 19)	(20)	\$1,043,638



December 7, 2006

**TO THE FAMILY OF THE FALLS CHURCH:**

As you know, your vestry has recommended that we vote to separate from The Episcopal Church (TEC), and the voting begins this Sunday morning. I cannot overstate the importance of your participating in this vote. Virginia law requires a strong voter turnout in such church decisions. Not voting is equivalent to voting to remain in the denomination.

Perhaps it seems strange to you that, after 25 years of teaching that we should work for renewal from within The Episcopal Church, I have changed my mind. I have not come to this decision lightly – it's the most difficult of my life.

Primarily, I believe that the time when we must act is now. In spite of the sternness of Bishop Lee's recent letter, I believe there is a good possibility of a peaceful, negotiated separation that will include a way for us to continue our ministry from this property, if we act now. There is now still a partially open door but I fear it will soon be slammed shut, whether by actions of our own Diocese or through aggressive actions by the National Church. We cannot negotiate unless our congregation has formally voted to separate. Some other reasons:

First. I have observed the fundamental doctrinal disintegration of The Episcopal Church from up close for over forty years. Our new Presiding Bishop espouses a fascinating array of different heresies and seems totally unaware of this. Our own bishop has challenged my emphasis on the sole, mediatorial work of Christ, stating in a recent letter to me that "I do believe by underlining Jesus as the only hope you make an ideological statement that exceeds the witness of Scripture." Ancient orthodox truths are now understood quite differently – the old words are still used but have lost their original meaning. Certainly there are still many fine, faithful folks in The Episcopal Church, but the denomination has come loose from its biblical moorings.

Second. I have watched how The Episcopal Church treats those who refuse to follow in the new paths. First, you are told how valued you are. Next, you are marginalized. Then, orthodox theological positions are rejected and finally, you are forced to leave. Many other churches have experienced this and are watching to follow our example.

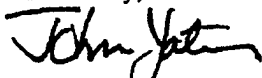
Third. The Global South Anglicans are urging us to leave. The Global South represents the "faith of our fathers" – these churches are far from perfect but their moral and spiritual rudder is rooted in scripture. With the support of the Global South we can establish a vibrant, orthodox North American Anglican Church that affirms these clear biblical truths, and they are urging us to act now.

We are by no means "rushing into" this vote. We have been extremely cautious and patient in ten years of conversation with our diocese about these key issues; we have spent seven years in a "sexuality dialogue group," and have met repeatedly with our bishop in attempts to pull him back to a traditional position on sexual ethics. But his decisions here in Virginia and in the National Church have been critical milestones leading up to the 2003 General Convention's decision. Prior to that we warned him that a tearing apart of the Communion would be unavoidable should he continue his leadership in the same direction. We waited three more years to see if things would change at the 2006 General Convention. Things did change, but for the worse. Our bishop is viewed by some as a conservative in the church, but next month his successor will be chosen. What positions will that person take? One of the nominees has been a major supporter of an Episcopal Sex-Ed curriculum propagated by the man who is now Bishop of New Hampshire and his like-minded colleagues. Further, canonical changes may be put in place at Diocesan Council in January that will put our church at great risk.

Finally, why should you vote for Resolution 2, calling for retention of the property? The simplest answer is that the property of The Falls Church has been used for over two hundred years as a location for spreading the authentic good news of Christ's saving work as presented in the Holy Scriptures. In my view, it would be highly regrettable (and bad stewardship) to relinquish this holy ground to those under the authority of leaders who with increasing candor and fervor are deserting the gospel essentials.

If the congregational vote does strongly support separation, I won't be clapping or cheering, as it is an extremely sad situation. But I'll be confident we've made the right choice. The Israelites were both hopeful and fearful as they set out toward the Promised Land. But the sea parted before them as they stepped out in faith. God took them through the wilderness to purify them, but He led them home eventually. He'll lead us, too. Of that, I'm confident.

Devotedly,

  
John Yates



EDV0039749

December 27, 2006

Dear Family in Christ,

I hope you have all had a blessed Christmas and are enjoying this season of promise and celebration of the birth of our Lord. The Christmas Eve worship was the first one in our new building. It was a thrill to see so many individuals, families and children filling up the sanctuary that night!

By now you have heard of our Vestry's recommendation to leave the Episcopal Church and move temporarily to the Anglican District of Virginia in anticipation of an eventual home in a new American Anglican Province. You will have the opportunity to make your vote on Jan. 7-14<sup>th</sup>. Please remember these dates. Not voting will be counted as a vote to stay in the Episcopal Church.

There is hope and sadness for our family. For many, considering leaving the Episcopal Church feels like changing your name or abandoning your heritage. It's painful. Many have of an emotional attachment to the Episcopal identity. If the vote is to leave, we will not be changing who we are, but rather with whom we identify: the Episcopal Church or the wider Anglican Communion. It is a decision to be in the Convocation of Anglicans in North America in the company of the same churches we have been sharing in ministry<sup>1</sup>. We will be not abandoning our Apostolic and liturgical roots. Our Prayer Book, Communion service, 500 years of Christian faith and tradition will be preserved, not gone. Luke and I will still continue to function as recognized priests in the Communion, to teach, care for and lead the Church. The Biblically based, Christ centered content of our worship, Bible teaching, staff and programs will not change. We will remain who we are as the Epiphany family, under orthodox Anglican-American leadership within the traditional apostolic succession recognized in the Church, our Prayer Book and Christendom.

We have an opportunity to remain in the Anglican Communion along with our founding church and many others in the newly formed Anglican District of Virginia<sup>1</sup>, an American structure for American Anglicans with an independent constitution and canons, Bishop and Council. It is not a foreign-controlled entity. It is a way station, a safe harbor until a new American province is formed<sup>2</sup>, connecting not only our churches but also many other denominations that have expressed an interest in re-uniting in one Church, one Faith, one Baptism. We will continue to have a recognized and legitimate standing within the Anglican Communion.

---

<sup>1</sup> Depending on how the congregation votes, we will be with our founding church, Truro, the Falls Church, Church of the Apostles, Church of the Word, Gainesville, St. Stephen's, Heathsville, St. Margaret's, Woodbridge, Potomac Falls Church, St. Paul's, Haymarket and Christ the Redeemer, Chantilly among many others.

<sup>2</sup> There will be a meeting of Primates in February to consider the necessity of a new province in keeping with previous statements in support of one.



We want to ensure that the future of the Church is here for our children and youth. We built a three-story Christian Ed Center for our kids to have a future and a hope as well as our Youth group facility and renovation of our Parish Hall. Our new Sanctuary has extended our abilities to worship and invite others to meet Jesus Christ. Young people involved in music and the arts are excited about the days ahead.

Our liturgy and worship are important to preserve for future generations. We want to dream big dreams- like starting a school to help kids grow in their faith. Our outreach to the poor is just at the beginning of making a great impact on our community and neighborhood. This is a time of reaching our neighbors for Jesus Christ.

Please let me know of your concerns. Luke and I are available to meet with you in your homes, here at the church and to respond in any way that will reassure and help you and your loved ones during this time.

*<sup>6</sup>Don't worry about anything; instead, pray about everything. Tell God what you need, and thank him for all He has done. <sup>7</sup>If you do this, you will experience God's peace, which is far more wonderful than the human mind can understand. His peace will guard your hearts and minds as you live in Christ Jesus.*

---Philippians 4:6-7 (NLT)

God bless you.

A handwritten signature in cursive script that reads "Robin Rauh".

Robin Rauh,  
Rector