

**VIRGINIA:**  
**IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX**

<b>In re:</b>	)	Civil Case Nos.
	)	CL-2007-0248724,
<b>MULTI-CIRCUIT</b>	)	CL-2006-15792,
<b>EPISCOPAL</b>	)	CL-2006-15793,
<b>CHURCH PROPERTY</b>	)	CL-2007-556,
<b>LITIGATION</b>	)	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,
	)	CL-2007-11514

**THE COMMONWEALTH'S BRIEF  
PURSUANT TO JUNE 6, 2008 ORDER**

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June 23, 2008

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The Commonwealth of Virginia, upon relation of Robert F. McDonnell in his official capacity as Attorney General of the Commonwealth, pursuant to this Court's Order of June 6, 2008, submits its Brief.

The Commonwealth has moved to intervene for the limited purpose of defending the constitutionality of *Virginia Code* § 57-9 ("§ 57-9"). This Court deferred ruling on the Motion to Intervene, but granted limited amicus curiae status to the Commonwealth.<sup>1</sup> Because the sole reason for the Commonwealth's motion to intervene is to defend the constitutionality of § 57-9 and because its amicus status is limited to the constitutionality of § 57-9, it would be inappropriate for the Commonwealth to address issues that are not directly or indirectly related to the constitutionality of § 57-9.<sup>2</sup>

The questions posed by this Court's June 6, 2008 Order do not relate to the constitutionality of § 57-9. Rather, those questions involve issues of statutory interpretation, the meaning of the decisions of the Supreme Court of Virginia, and the applicability of § 57-9 to the facts of this litigation. Not surprisingly, the briefs

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<sup>1</sup> Now that this Court has ruled that § 57-9 is applicable and, thus, must determine the constitutionality of § 57-9, the Commonwealth requests that this Court grant its Motion to Intervene.

<sup>2</sup> On occasion, the Commonwealth will file an amicus brief in the Supreme Court of Virginia to address a public policy issue. *See, e.g. Dodge v. Trustees of Randolph-Macon Woman's College*, \_\_\_ Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Va. 2008) (ability of private persons to enforce charitable trust); *In re Hannett*, 270 Va. 223, 619 S.E.2d 465 (2005) (authority of Circuit Judge to appoint Acting Commonwealth's Attorney).

of the Episcopal Church and the CANA Congregation generally avoid constitutional issues. The one exception is the Episcopal Church's implicit suggestion that the canon of constitutional avoidance requires this Court to accept its interpretation of § 57-9. See *Episcopal Church Br. in Response to June 6, 2008 Order* at 19-20.

The Episcopal Church's suggestion is mistaken. The canon of constitutional avoidance does not command that this Court reject any interpretation that simply raises a constitutional issue. Rather, the canon commands that "where an otherwise acceptable construction of a statute would raise *serious constitutional problems*, the Court will construe the statute to avoid such problems." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (emphasis added). "[T]he elementary rule is that every reasonable construction must be resorted to, in order *to save a statute from unconstitutionality*." *Gonzales v. Carhart*, 127 S. Ct. 1610, 1631 (2007) (emphasis added, citation omitted). The canon applies only where there are multiple plausible constructions and one particular construction results a finding of unconstitutionality. As the U.S. Supreme Court explained:

Indeed, one of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that [the legislature] did not intend the alternative which raises serious constitutional doubts.

*Clark v. Martinez*, 543 U.S. 371, 381-82 (2005). "The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and

the canon functions as *a means of choosing between them.*” *Id.* at 385 (emphasis original).

The canon is inapplicable in this case. As explained in the Commonwealth’s and CANA Congregation’s post-decision briefs, the CANA Congregation’s construction of § 57-9—which this Court essentially adopted in its previous opinion—results in a finding of constitutionality. Thus, this Court is not choosing between a plausible construction that is constitutional and a plausible construction that is unconstitutional. It is choosing between two plausible constructions—both of which are constitutional. The fact that the Episcopal Church’s alternative construction would render the statute inapplicable to this case and, thus, avoid the resolution of any constitutional issues does not trigger the canon of constitutional avoidance. The canon is triggered only if the CANA Congregation’s construction actually results in a finding of unconstitutionality.

**CONCLUSION**

For the reasons stated above and in the Commonwealth's previous briefs, § 57-9 is constitutional as applied in this litigation.

Respectfully submitted,

**COMMONWEALTH OF VIRGINIA ex rel.  
ROBERT F. McDONNELL**, in his official  
capacity as Attorney General of the  
Commonwealth

*/s/ William E. Thro*

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June 23, 2008

**CERTIFICATE OF SERVICE**

I certify that on this 23rd day of June 2008, the original of THE COMMONWEALTH'S BRIEF PURSUANT TO THE JUNE 6, 2008 ORDER has been sent via overnight delivery to Office of the Clerk of the Circuit Court of Fairfax County and that a copy has been mailed by first class, postage prepaid, U. S. Mail to counsel listed below:

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**VIRGINIA:**  
**IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX**  
**THE COMMONWEALTH'S BRIEF PURSUANT TO THE**  
**JUNE 6, 2008 ORDER**

This acts as a one-page cover sheet reference pleading to the complete THE COMMONWEALTH'S BRIEF PURSUANT TO THE JUNE 6, 2008 ORDER, filed in CL 2007-248724 (the omnibus case file), on June 23, 2008. THE COMMONWEALTH'S BRIEF PURSUANT TO THE JUNE 6, 2008 ORDER and this corresponding two-page reference pleading applies to the Omnibus case number: CL 2007-248724 and the following cases:

Case Number	<i>Style of Case</i>
CL 2006-15792	<i>In re: Truro Church</i>
CL 2006-15793	<i>In re: Church of the Apostles</i>
CL 2007-0556	<i>In re: Church of the Epiphany</i>
CL 2007-1235	<i>The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Epiphany, Herndon</i>
CL 2007-1236	<i>The Protestant Episcopal Church in the Diocese of Virginia v. Truro Church</i>
CL 2007-1237	<i>The Protestant Episcopal Church in the Diocese of Virginia v. Christ the Redeemer Church</i>
CL 2007-1238	<i>The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Apostles</i>
CL 2007-1625	<i>The Episcopal Church v. Truro Church et al.</i>
CL 2007-5249	<i>In re: Church at the Falls, The Falls Church;</i>



Case Number	<i>Style of Case</i>
CL 2007-5250	<i>The Protestant Episcopal Church in the Diocese of Virginia v. The Church at The Falls – The Falls</i>
CL 2007-5362	<i>The Protestant Episcopal Church in the Dioceses of Virginia v. Potomac Falls Church</i>
CL 2007-5363	<i>In re: Church of Our Savior at Oatlands</i>
CL 2007-5364	<i>The Protestant Episcopal Church in the Diocese of Virginia v. Church of Our Saviour at Oatlands</i>
CL 2007-5682	<i>The Protestant Episcopal Church in the Diocese of Virginia v. St. Margaret’s Church</i>
CL 2007-5683	<i>The Protestant Episcopal Church in the Diocese of Virginia v. St. Paul’s Church, Haymarket</i>
CL 2007-5684	<i>The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Word</i>
CL 2007-5685	<i>In re: St. Margaret’s Church</i>
CL 2007-5686	<i>In re: St. Paul’s Church, Haymarket;</i>
CL 2007-5902	<i>The Protestant Episcopal Church in the Diocese of Virginia v. St. Stephen’s Church</i>
CL 2007-5903	<i>In re: St. Stephen’s Church</i>
CL 2007-11514	<i>In re: Church of the Word, Gainesville</i>

For the complete THE COMMONWEALTH’S BRIEF PURSUANT TO THE JUNE 6, 2008 ORDER, please see the omnibus case file CL 2007-248724.

Respectfully submitted,

**COMMONWEALTH OF VIRGINIA**  
**ex rel. ROBERT F. McDONNELL,**  
in his official capacity as Attorney  
General of the Commonwealth

*/s/ William E. Thro*

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