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September12, 2008

VIA HAND-DELIVERY

Fairfax County Circuit Court
ATTENTION: Robin Brooks
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

RE: *Multi-Circuit Episcopal Church Property Litigation*, (Circuit Court of Fairfax County, CL-2007-0248724);

In re: Truro Church; (Circuit Court of Fairfax County; CL 2006-15792);

In re: Church of the Apostles; (Circuit Court of Fairfax County; CL 2006-15793);

In re: Church of the Word, Gainesville; (Circuit Court of Prince William County; CL73464) (Circuit Court of Fairfax County; CL 2007-11514);

The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Epiphany, Herndon (Circuit Court of Fairfax County; CL 2007-1235);

The Protestant Episcopal Church in the Diocese of Virginia v. Truro Church (Circuit Court of Fairfax County; CL 2007-1236);

The Protestant Episcopal Church in the Diocese of Virginia v. Christ the Redeemer Church (Circuit Court of Fairfax County; CL 2007-1237);

The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Apostles (Circuit Court of Fairfax County; CL 2007-1238);

The Episcopal Church v. Truro Church et al. (Circuit Court of Fairfax County; CL 2007-1625);

In re: Church at the Falls, The Falls Church; (Circuit Court of Fairfax County; CL 2007-5249);

The Protestant Episcopal Church in the Diocese of Virginia v. The Church at The Falls – The Falls Church (Circuit Court of Arlington County Case No. 07-125)(Circuit Court of Fairfax County; CL 2007-5250);

The Protestant Episcopal Church in the Dioceses of Virginia v. Potomac Falls Church (Circuit Court of Loudoun County Case No. 44149)(Circuit Court of Fairfax County; CL 2007-5362);

In re: Church of Our Savior at Oatlands; (Circuit Court of Fairfax County; CL 2007-5363);

The Protestant Episcopal Church in the Diocese of Virginia v. Church of Our Saviour at Oatlands (Circuit Court of Loudoun County Case. No. 44148)(Circuit Court of Fairfax County; CL 2007-5364);

In re: Church of the Epiphany; (Circuit Court of Fairfax County; CL 2007-556);

The Protestant Episcopal Church in the Diocese of Virginia v. St. Margaret's Church (Circuit Court of Prince William Case No. CL 73465)(Circuit Court of Fairfax County; CL 2007-5682);

The Protestant Episcopal Church in the Diocese of Virginia v. St. Paul's Church, Haymarket (Circuit Court of Prince William County Case No. CL 73466)(Circuit Court of Fairfax County; CL 2007-5683);

The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Word (Circuit Court of Prince William County Case No. CL 73464)(Circuit Court of Fairfax County; CL 2007-5684);

In re: St. Margaret's Church; (Circuit Court of Fairfax County; CL 2007-5685);

In re: St. Paul's Church, Haymarket; (Circuit Court of Fairfax County; CL 2007-5686);

The Protestant Episcopal Church in the Diocese of Virginia v. St. Stephen's Church (Circuit Court of Northumberland County Case No. CL 07-16)(Circuit Court of Fairfax County; CL 2007-5902); and

In re: St. Stephen's Church; (Circuit Court of Fairfax County; CL 2007-5903).

Dear Ms. Brooks:

I am enclosing for filing in the above-styled case an original, The CANA Congregations' Respsonsive Brief on Voting Issues, plus twenty-one (21) copies of the one-page cover sheets to be placed in the file for the above-styled cases.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

SANDS ANDERSON MARKS & MILLER, PC

George O. Peterson

cc: Sara G. Silverman, Law Clerk to the Honorable Randy I. Bellows (via hand-delivery)
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VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

In re:	)	
Multi-Circuit Episcopal Church	)	**Civil Case Numbers:**
Litigation	)	CL 2007-248724,
	)	CL 2006-15792,
	)	CL 2006-15793,
	)	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 CANA CONGREGATIONS' RESPONSIVE BRIEF ON VOTING ISSUES

The Falls Church, Truro Church, Church of Our Saviour at Oatlands, Church of the Apostles, Church of the Epiphany, Church of the Word, St. Margaret's Church, Christ the Redeemer Church, St. Stephen's Church, Potomac Falls Church, and St. Paul's Church (collectively, "CANA Congregations"), by their counsel, hereby file this responsive brief on the voting issues identified by the Court at the August 22, 2008, Hearing.

1. Which party bears the burden of proof and production related to the voting issues in the § 57-9 actions and what is the standard of proof?

The parties appear to agree that the CANA Congregations have the burden of establishing that a congregational majority voted to sever ties with the Episcopal Church and to affiliate with CANA and ADV, and that the relevant evidentiary standard on all issues is proof by a preponderance of the evidence. *See* ECUSA-Diocese Opening Br. 1-3. As explained in our opening brief (at 1), however, to the extent that the Church alleges that (1) particular votes were improperly counted or not counted (thus affecting the vote numerator), or (2) voters were improperly included in, or excluded from, the list of eligible voters (thus affecting the vote denominator), they bear the burden of production. *Redford v. Booker*, 166 Va. 561, 570 (1936).

2. What factors should the Court examine in determining whether the votes taken by the CANA Congregations filing Va. Code § 57-9 Petitions were "fairly taken"?

As explained in our opening brief, whether the CANA Congregations' votes were fairly taken should depend upon factors such as whether the congregants were given reasonable notice of the issues, date(s), and eligibility requirements for the vote; whether the eligibility standards were generally consistent with the standards for congregational votes set forth in church canons; whether the votes were secret and impartially counted; and whether there was some reasonable means of allowing persons who were not on the eligible voter rolls to establish their eligibility to vote or to cast a provisional ballot. *See* Opening Br. 2.

For the most part, ECUSA and the Diocese identify similar standards: whether those entitled to vote "had adequate notice of the vote and their right to participate in it"; whether the votes were "properly counted"; and whether the votes were free from "manipulation" and "coercion." Br. 3. But citing *Bush v. Gore*, 531 U.S. 1046 (2000), various other federal cases, and statutes such as the Labor-Management Reporting and Disclosure Act and the Voting Rights Act, they go on to suggest that various standards applied in "other voting contexts" should likewise

govern here. Br. 4-6. Thus, although the CANA Congregations' believe that the evidence at trial will show that their votes were "fairly taken" under any reasonable standard, they wish to emphasize that the standards that apply are those required by Va. Code § 57-9.

3. How should the Court construe the term "members" in Va. Code § 57-9(A)?

ECUSA and the Diocese do not address the fact that, should the Court adopt their definition of "member," many persons who (1) "no longer attend[] and cannot be contacted by mail or phone," (2) "ha[ve] not attended the congregation for more than a year and ha[ve] not contributed either financially or in service to the parish," (3) "attend[] another congregation," or (4) are "attending a church affiliated with another denomination, and no longer give[] to [the] congregation or participate[] in [the] congregation's worship," would be deemed "members" for purposes of § 57-9(A). Moreover, they acknowledge that only "communicants in good standing" are "eligible to vote at ordinary congregational meetings" under church canons. Br. 6-7. Not surprisingly, they offer no reason why the General Assembly would extend voting rights to those who not only lack such rights under ordinary church rules, but also maintain no current connection to the congregation and may not perceive themselves, or wish to be considered, as members.

Instead, ECUSA and the Diocese raise three arguments. First, they argue that the "plain meaning" of "member" includes "all persons," regardless of their activity level, ever "baptized or enrolled in [the] church"—or perhaps even all those listed in "parish directories," or those with some (undefined) "connection with or involvement in" the particular church. Br. 8, 9. Second, they contend that membership should be defined expansively because § 57-9(A), in contrast to § 57-9(B), does not refer to members "entitled to vote." Br. 10-11. Third, they maintain that for the Court to adopt the definition of "member" that ECUSA and the Diocese have consistently used in previous congregational elections—"communicants in good standing"—would draw the Court into the theological "thicket." These arguments are unpersuasive.

A. The plain meaning of "members of [the] congregation" does not support the interpretation advanced by ECUSA and the Diocese.

ECUSA and the Diocese advance a definition of "member" that would extend to anyone ever "baptized or enrolled in a church," regardless of whether that person wishes to be a member, continues to attend, has moved away, has joined another congregation or denomination, or has altogether renounced religion. Br. 8. Moreover, although what it means to be "enrolled" in a congregation is not defined, ECUSA and the Diocese appear to suggest that "members" includes anyone with an (unspecified) "connection with or involvement in" the church—such as being listed in church "directories"—whether or not they have formally applied for (or received) membership. Br. 9. These arguments are untenable for several reasons.

First, the reading of "members" advanced by ECUSA and the Diocese divorces the term "member" from the term "congregation." *See* ECUSA Canon I.17.1(a) (defining "members" of "this Church"). As explained in our opening brief (at 4-5), being a member of a *congregation* entails actually assembling there for worship—that is, "congregating." In addition to the authorities we have previously cited, *Black's Law Dictionary* defines "congregation" as [a]n assembly or gathering; specifically, an assembly or society of persons who together constitute the *principal supporters* of a particular parish, or *habitually* meet at the same church for religious exercises." *Black's Law Dictionary* 301 (6th ed. 1990) (emphasis added). Read as a whole, then, the phrase "member of [the] congregation" requires not only being listed on the congregation's rolls, but at least occasional attendance. Presumably that is why the Virginia Supreme Court, in dismissing for lack of standing certain plaintiffs' challenge to the dismantling of a church building, focused on the fact that they "had not attended services there for years." *Brown v. Virginia Advent Christian Conference*, 194 Va. 909, 912 (1953); *see also id.* (noting that "another plaintiff . . . claimed membership in Griffith Church but had not attended Adventist services there since 1942").

The Church's reading of "member" would grant control over the congregation's property to many who (1) are now active members able to vote in other churches—Episcopal or otherwise—but never asked for a formal transfer; (2) have not attended for years, perhaps since their baptism as an infant; (3) have moved away or are otherwise unreachable; (4) have never expressed an interest in becoming a member (or have expressly asked not to be), but are listed in the congregation's "directory" by virtue of being related to a member; (5) do not want to be considered members, either because they have altogether renounced the faith or because they disagree with particular teachings. As a textual matter, such persons cannot be considered part of the "congregation" simply because they do not "congregate" with it.

Nor are such persons meaningful stakeholders in the determination of which branch the congregation should join and which faction should keep the property. Many of them have made no conscious and voluntary choice to be an adult member. Some of those who became members as infants, but have not returned, may not even be aware that the church exists. And while the Church insists that "all of those entitled to vote under the statute must have had adequate notice of the vote and their right to participate in it" (Br. 3), they do not explain what a congregation should do when the whereabouts of these so-called "members" are unknown—when, for all we know, they may be dead but that cannot be verified. Particularly where a statutory term is undefined, it should not be read to produce such "absurd results"—results that are "are inconsistent with the purpose of [§ 57-9]." *See Andrews v. Browne*, 276 Va. 141, 153 (2008).

The absurdity of extending voting rights to those who never go to church—and may have moved away or be unreachable—is all the more clear in light of the Protocol and the position of the Church on the meaning of "whole number." The Protocol not only defines eligible voters but, consistent with Diocesan canons, states that the "voting shall be by ballot in person." *See*

Diocese Canon 11, § 5 ("The voting shall be by ballot in person and, unless otherwise provided by the meeting, a majority of the votes cast shall be necessary to a choice. There shall be no voting by proxy."). Thus, the CANA Congregations conducted their votes consistently with these expectations. Now, ECUSA and the Diocese say those who never came to church (and might well have been unreachable) not only should have been considered "members," but should have gotten an automatic vote against disaffiliation without showing up. That is a vote "fairly taken"?

ECUSA and the Diocese intimate that the CANA Congregations, in abiding by the Protocol and the "communicants in good standing" standard, excluded a large "subset" of "members over the age of 18." Br. 6. The "communicant in good standing" standard, however, does not set a high hurdle for participation. Holy Communion is regularly offered at the CANA Congregations' Sunday services, and one need only attend a few times a year to be considered a "communicant in good standing." ECUSA Canon I.17.2(a), 3. Thus, those who *wish* to be "members of [the] congregation" can easily do so. Indeed, inasmuch as being an "active baptized member" (a term not defined in the canons) requires some level of annual participation in the congregation, there is not a major difference between the participation required to be an "active baptized member" and that required to be a "communicant in good standing." Both standards, however, require *some* current participation, in contrast to ECUSA's sweeping definition of "member."

Even in ordinary secular parlance, a "member" would generally be understood as someone who is an active, dues-paying participant in the organization. A local Kiwanis club, for example, would not ordinarily treat as "members" people who joined the organization ten years ago but moved to a faraway city, stopped participating, or renounced the Kiwanis organization as "too conservative." In ordinary parlance, therefore, being a "member" of an organization generally entails active participation. And this is doubly true when the issue is whether someone is a

"member" of a "congregation"—since the very word "congregation" connotes a group that regularly gathers for worship.

Second, the history of § 57-9(A) likewise belies any suggestion that the phrase "members of [the] congregation" should be read so broadly as to include those who are inactive in the congregation, and therefore lack any meaningful stake in the outcome of the vote. As originally enacted in 1867, the statute referred to a vote of "communicants and pew holders and pew owners." *See* 1867 Va. Acts ch. 210, p. 649, 650. Although the qualifications of these individuals varied slightly from denomination to denomination and from congregation to congregation, "communicants" were commonly understood as those who were regular in attendance, subscribed to the beliefs of the congregation, and contributed to its finances. "Pew holders" and "pew owners" were those who paid specified sums to either rent or own a designated pew in a church.[1] Thus, "communicants, pew holders, and pew owners" collectively were those who had a meaningful connection with a congregation and a stake in its property. They were the people who ordinarily "congregated" when the body assembled. Not surprisingly, they were also the persons typically eligible to vote in elections under denominational rules.[2]

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[1] *See, e.g.*, http://www.fairfaxcounty.gov/COURTS/CIRCUIT/archives.htm (explaining that, in the late 1700s, for example, "it was an Anglican custom for landed gentry to purchase private box pews to provide private space at public worship" and that "[t]his custom also helped to defray the cost of the new church's construction").

[2] Aruound the time the division statute was passed, the only persons eligible to vote in congregational elections in the Diocese were "communicants," "pew-holders," or contributors to the charges of the parish. *See, e.g.*, Exh. A, JOURNAL OF THE SEVENTY THIRD ANNUAL COUNCIL OF THE PROTESTANT EPISCOPAL CHURCH IN VIRGINIA (Richmond 1868), *Amendments to the Constitution and Canons of the Diocese of Virginia (Adopted in Council of 1868)*, Canon IX (referring to "pew-holders" or contributors to the charges of the parish); Exh. B, REVISED CONSTITUTION AND CANONS OF THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA (Richmond, Va. 1872), pp. 13-14, Canon IX, *Election and Duties of Vestries and Wardens, &c*, Section 1 (referring to "communicants" of the Church or regular contributors to the charges of the parish); Exh. C, REVISED CONSTITUTION AND CANONS OF THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA (Richmond, Va. 1882), pp.13-14, Canon VIII, *Election and Duties of Ves-*

Not all denominations refer to their members as "communicants," however, and the practice of renting and owning pews fell by the wayside over time, as churches relied more heavily on voluntary contributions.[3] Thus, as part of a broader effort to modernize Title 57 of the Virginia Code, the General Assembly in 2005 substituted "members" for the phrase "communicants, pew holders, and pew owners." *See* Exh. F (2005 Va. Acts ch. 772 (S.B. 1267)). The same bill also updated the Code both by providing for the incorporation of churches and substituting the phrase "personal property" for "books and furniture" (*id.*)—a phrase that likewise traces to the 1867 Code. *See* 1867 Va. Acts ch. 107, p. 907.

ECUSA and the Diocese are effectively arguing that the General Assembly's decision to replace "communicants, pewholders, and pewowners" with "members" in 2005 effected a major change in the substantive meaning of the statute. The obvious import of the amendment, however, was simply to reflect the fact that the terms "pew holders" and "pew owners" had become obsolete, and that the term "communicant," while not obsolete, was likely not inclusive of all denominations.

Accordingly, there is no basis to any suggestion that the General Assembly intended to broaden the range of those eligible to vote to those who both lack the ability to do so under ordinary church rules and have no meaningful current connection to the congregation. Indeed, any such suggestion would be contrary to the General Assembly's choice of the term "members of

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tries and Wardens, &c, Section 1 (referring to "communicants" of the Church or regular contributors to the charges of the parish); Exh. D, http://www.ststephenswb.org/index.php?option=com_content&task=view&id=94&Itemid=34 ("In many parishes the pew rent served as a family's annual contribution to the parish, which along with specific criteria of church attendance, guaranteed a place as parishioners in good standing and the right to vote for Vestry."); Exh. E, http://www.usgwarchives.org/va/history/-firstpresby/miscreports.html (1837 Constitution of First Presbyterian Church of Norfolk, Virginia) (explaining the voting rights of "communicants and Pew-Holders").

[3] *See* Exh. D (explaining that pew rentals reached their "height, in the early part of the twentieth century" but fell out of use later in the 20th century).

[the] *congregation*"—again, signifying a collection of those who regularly assemble together. As this Court has recognized, "[a]lthough it has undergone minor non-substantive changes since its enactment in 1867, both sides concede that the statute remains substantively the same today as it did in 1867." April 3, 2008, Opinion 49 n.37.

Third, the definition of "member" being advanced by ECUSA and the Diocese is inconsistent with their own ordinary use of the term. Both ECUSA and the Diocese have publicly (and repeatedly) equated "membership" with being a "communicant in good standing" in various contexts. ECUSA's website, for example, contains a "Frequently Asked Questions" section with the following question and answer:

> **What constitutes membership in the Episcopal Church?**
>
> According to the Constitution and Canons, Title I, Canon 17, Section 2(a) on p. 50:
>
> "All members of this Church who have received Holy Communion in this Church at least three times during the preceding year are to be considered communicants of this Church."
>
> Title I, Canon 17, Section 3 on p. 54 goes on to say:
>
> "All communicants of this Church who for the previous year have 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, are to be considered communicants in good standing."[4]

This passage contains no hint that those who infrequently (or never) attend congregational worship or support it financially may nonetheless qualify as "members" of Episcopal congregations. Rather, it treats "membership" as synonymous with being a "communicant in good standing."

The Diocese has likewise made repeated public statements that effectively equate membership with being a "communicant in good standing." Indeed, well after the Diocese learned of the CANA Congregations' use of the "communicant in good standing" standard in their disaf-

[4] http://www.episcopalchurch.org/87702_ENG_HTM.htm (Exh. G).

filiation votes—a decision made pursuant to a Protocol authored by the Diocese's own chancellor—the Diocese continued to describe their disaffiliation votes as votes of their "*members*." For example, in a letter that Bishop Lee sent to the Diocese on January 18, 2007, he repeatedly referred to "the votes of the majority *of members* of these congregations." Exh. H at 2 (emphasis added).[5] In a press release issued on January 24, 2007, he added: "Following the votes of the majority *membership* of 15 Episcopal churches in The Diocese of Virginia to leave The Episcopal Church, . . . "the majority *membership* of the 15 churches have filed civil actions styled as 'reports' with the respective circuit courts in an effort to transfer ownership of the affected properties. . . . The majority *membership* of the 15 churches voluntarily chose to sever their ties with the Diocese." Exh. I (all emphases added). Myriad other announcements of the Diocese—including several that post-date the filing of their declaratory judgment actions—similarly describe the votes at issue as majority votes of the "members" or "membership."[6]

If, at the time of these public pronouncements, the Diocese and ECUSA believed that a vote of "communicants in good standing standard" was not a vote of the "members," they chose

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[5] *See also id.* at 1 (noting that "the *membership* of these congregations voted to sever their ties with the Episcopal Church and affiliate with CANA"); *id.* ("In some of our congregations, *members* led by their lay and ordained leadership, have voted to leave The Episcopal Church") (all emphases added).

[6] See Exh. J (Jan. 31, 2007, news release) ("The Diocese of Virginia has responded in court to claims regarding real and personal property made by 11 congregations where the majority *membership* has voted to leave The Episcopal Church"); *id.* ("The leadership of the Diocese recently concluded that the majority *membership* of the separated congregations voluntarily chose to sever their ties with the Diocese"); Exh. K (Feb. 21, 2007, news release) (referencing "the 15 congregations where the majority of *members* have voted to leave the Episcopal Church"); Exh. L (Nov. 16, 2007 news release) ("After majority *memberships* of the congregations voted to leave the Diocese, the 15 departing congregations filed civil actions"); *see also* Exh. M at __ (Mar. 2, 2007, news release) ("the majority of the [St. Margaret's] congregation voted to leave the Diocese and The Episcopal Church to join the Convocation of Anglicans in North America (CANA)"; same as to The Falls Church and St. Stephen's); Exh. N at 1 (Oct. 11, 2007, news release) ("In the Diocese of Virginia, a total of 15 congregations would vote by majorities to quit The Episcopal Church and The Diocese of Virginia") (all emphases added).

a strange way to say it. Plainly, the Diocese did *not* believe that. It is only now, after several adverse rulings in this litigation, that ECUSA and the Diocese are advocating a definition of the phrase "members of [the] congregation" that has no relationship to either actual voting practice or ordinary usage of the term in the denomination—much less to the phrase's plain meaning.

B. Subpart B of Va. Code § 57-9 does not support reading the term "member" in subpart A to include those otherwise ineligible to vote.

ECUSA and the Diocese next seize on the fact that, in contrast to subpart B, subpart A of the statute does not contain the phrase "entitled to vote by its ordinary practice or custom." Br. 6. Thus, they claim that the General Assembly intended to grant voting rights without regard to whether members are "entitled to vote under the Church's own rules." Br. 10. This textual difference, however, does not support the weight that they place on it—particularly when the phrase "entitled to vote" is considered in light of its statutory context, history, and purpose.

Section 57-9(B) provides that when a division occurs in an independent congregation, property ownership may be decided 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 inclusion of this language is not surprising, given that independent congregations are often organized less formally than those affiliated with denominations. Frequently such congregations "ha[ve] no written constitution or by-laws." *E.g., Reid v. Gholson*, 229 Va. 179, 181 (1985). The statute thus puts independent congregations on notice of where the civil courts will look to determine who can vote in any divisions that may arise therein.

What is most significant about the language quoted above, however, is that it focuses on who was entitled to vote either "*at the time of the division*" (where there is a written constitution) or according to the congregation's "*ordinary* practice or custom" (where there is no constitution).

(Emphasis added.) The General Assembly was thus concerned that the ordinary voting eligibility rules not be materially changed after any division—something independent congregations, particularly those without written governing documents, can more easily do than their denominational counterparts (whose voting rules are typically set regionally or nationally). *See, e.g., Reid*, 229 Va. at 190 (discussing a post-vote constitution and other practices that would have affected members' rights). By specifying the use of the eligibility standards that existed "at the time of the division" or under "ordinary" practice, the General Assembly was not specifying a different eligibility rule for subpart B than for subpart A. Rather, it was specifying that the basic ground rules should be set ahead of time—behind the veil of ignorance, when no one knows what might lead to a division or the relative strength of the resultant factions. *See generally* John Rawls, *A Theory of Justice* (1971).[7]

This rationale applies with equal force to subpart A of the statute. This is especially clear when one considers that the original language of what is now subpart A of § 57-9 referred to "communicants and pew holders and pew owners"—those who typically would have been "entitled to vote" under denominational rules, such that there was no need for the General Assembly to refer to them as such. Here again, the argument of ECUSA and the Diocese places overwhelming significance on the 2005 amendment changing "communicants, pew holders, and pew owners" to "members." But as the Court and the parties have previously recognized, the changes to § 57-9 over the years have been stylistic and "non-substantive." April 3 Op. 49. n.37.

In sum, the import of the passage from § 57-9(B) upon which ECUSA and the Diocese so

[7] There are many secular and rational bases for the law to distinguish between denominations and congregations, and it is easy to understand why the General Assembly might perceive a greater need to put independent congregations, which often operate less formally, on *notice* concerning the eligibility rules that would be applied in a division. It is difficult, by contrast, to conceive of any rational basis for distinguishing between them for purposes of determining who is "entitled to vote" on property matters.

heavily rely is that the same basic eligibility rules that applied before the vote should generally apply afterwards as well. Yet the Diocese and ECUSA are seeking to impose a new definition of "members of the congregation"—one inconsistent with past rules, longtime practice, and the Protocol, not to mention the statute's plain language. Consistent with each of those sources, this Court should instead adopt the "communicants in good standing" standard.

C. Use of the "communicant in good standing" standard would not require the Court to make theological determinations.

In a further attempt to discourage the Court from limiting "members of [the] congregation" to those authorized to vote under ordinary Diocesan canons and the Protocol, ECUSA and the Diocese suggest that defining "members" as "communicants in good standing" would "risk[] plunging the Court into the quintessentially doctrinal questions inherent in the relevant ecclesiastical requirements." Br. 11. As they put it, "judicial inquiry" into whether someone is "'faithful' in 'corporate worship'" would be unconstitutional. Br. 11. This argument, however, misrepresents the Court's role in assessing evidence concerning membership.

We do not dispute that civil courts may not themselves determine, on a theological basis, whether someone was a "faithful" church member. They may, however, hear evidence concerning the secular components of membership—*e.g.*, whether a person attended the church or supported it financially during a given time period—and they may defer to the entity responsible for determining eligibility (here, the congregation) on any questions of a spiritual nature. *Brown*, 194 Va. at 912 (holding that the plaintiffs were not church members with standing to sue because they "had not attended services for years"); *cf. Green v. Lewis*, 221 Va. 547, 551 (1980) (distinguishing between "active and inactive members"). If courts could not do so, they could never pass on the validity of a religious congregation's vote: membership in a church by definition involves satisfying at least *some* criterion involving the members' shared religious doctrine. *E.g.*, I

New Oxford Shorter Dictionary 399 (defining "church" as "[a] particular organized Christian society, distinguished by special features of doctrine, worship, etc."). As both Virginia and U.S. Supreme Court precedent make clear, however, that does not preclude civil courts from passing on the validity of the votes of religious congregations. *Reid*, 229 Va. at 189-90; *Jones v. Wolf*, 443 U.S. 595, 607 (1979).

To the extent that qualifying as "communicants in good standing" requires members to be "faithful" to the congregation, the Court need not make that determination itself, any more than it need determine the validity of members' baptisms to conclude that they are "baptized members" under the Church's definition.[8] In one instance the Court defers to the congregation's regular list of those who have satisfied the criteria for "baptism," in the other the Court defers to the congregation's regular list of those who have been "faithful." Consistent with a desire to abide by principles of inclusiveness, the CANA Congregations generally consider a person to be "faithful" if they actively participate in the life of the Church (*e.g.*, by attending and giving). But in any event, it is the congregation, a private entity, that makes judgments concerning any spiritual components of membership. Thus, there is no constitutional difference between the Church's definition of "members" and that advanced by the CANA Congregations.

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[8] Under the view of ECUSA and the Diocese, membership is limited to those "whose baptisms are recorded in the parish." Br. 8. Determining membership on this basis would likewise involve deferring to the congregations, but the underlying spiritual requirement of "baptism" is spiritual in nature. According to Episcopal doctrine, "Holy Baptism" is not simply a secular rite; it "is full initiation by water and the Holy Spirit into Christ's Body the Church," and it involves a "Baptismal Covenant" and various prayers and creedal professions of faith, among other things. *See* Exh. O at 4 (Book of Common Prayer, Rite of Holy Baptism). Thus, for a person to become a member, the rite must occur and someone must make a spiritual determination that a legitimate baptism took place. The court then simply defers to that private determination.

D. ECUSA and the Diocese are in all events estopped from advocating a different definition of "member" than that found in the Protocol for Departing Congregation.

As explained in our opening brief, ECUSA and the Diocese are also equitably estopped from urging a new standard for eligible voters at this late date. Pursuant to the unanimous report negotiated by the Special Committee, chaired by Diocesan Chancellor Russ Palmore, the CANA Congregations set about to conduct votes in which "[a]ll adult communicants in good standing, registered in the particular church in question, [were] entitled to vote at the congregational meeting." CANA Exh. 67 at p.2. At no point did ECUSA or the Diocese suggest that their view of membership had changed, or that the CANA Congregations should apply some other eligibility standard in the disaffiliation votes. The CANA Congregations' relied on the Diocese's actions, conducting their votes in a manner consistent with the Protocol. The Church is thus estopped from redefining "member" now. *See Employers' Commercial Union Ins. Co. v. Great American Ins. Co.*, 214 Va. 410, 413 (1973); Opening Br. 7-8.

4. How should the Court construe the phrase "by a vote of a majority of the whole number," in Va. Code § 57-9(A)?

As noted in our opening brief (at 9-10), the Virginia Supreme Court in *Baber v. Caldwell* explained that a circuit court applying § 57-9(B) could approve resolutions if they were "adopted by a majority of the members of the congregation who were [1] present at the meeting and [2] entitled to voted as provided in Code § 57-9." 207 Va. 694, 700 (1967). *Baber* thus suggests that the § 57-9 denominator consists of those who were eligible to vote *and* did so. ECUSA and the Diocese do not discuss *Baber*, and thus have failed to make their case that members who did not vote should be included in the denominator. Moreover, interpreting § 57-9(A) to require only a majority of those voting would be consistent with both Diocesan canons and the Protocol. *See* DVA Canon 11, § 5 ("The voting shall be by ballot in person and, unless otherwise provided

by the meeting, a majority of the votes cast shall be necessary to a choice.").[9]

The Church's reading of "whole number," however, is particularly untenable in conjunction with their position that "members" should be defined to include those who never attend the church—persons who may now be adherents to another faith (or no faith), residents of another state, unreachable, or even dead. ECUSA and the Diocese profess to support the concept of a vote "fairly taken," but they do explain how it is "fair" for people with no meaningful connection to a congregation to get an automatic "no" vote on whether the congregation should join another branch of the church. Nor, for that matter, do they explain how it is "fair" to encourage congregations to use one standard of membership before their votes while claiming afterwards that a different standard applies. Had the CANA Congregations ignored the Protocol and the Diocese's canons, choosing to define the congregation's "members" more broadly than in ordinary congregational votes, one expects that ECUSA and the Diocese would be claiming that the CANA Congregations stuffed the ballot box with ineligible votes. Nothing in § 57-9, however, supports either their "bait-and-switch" approach to defining "members" or the notion that the term should be defined to extend to those with no stake in the congregation's future.

In any event, the CANA Congregations expect that the evidence at trial will support judgment in their favor regardless of how the phrase "whole number" is interpreted, particularly if the phrase "members of [the] congregation" is properly defined, consistent with its plain language, to exclude those who no longer maintained any connection with the Congregations as of their votes. Thus, this Court may not need to resolve whether *Baber* applies to § 57-9(A).

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[9] The Church maintains that the 19th century orders admitted at trial confirm their reading of the phrase "majority of the whole number." Br. 13. Although many of these orders involve congregations in which a majority of all members voted to disaffiliate, that is not uniformly the case. For example, the Buffalo Gap Station Methodist church determined to disaffiliate by a vote of three to two, with members four failing or refusing to vote. CANA Ex. 96 at 10.