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January 11, 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 CANA Congregations' Memorandum in Opposition to the Post-Trial Opening Brief of The Episcopal Church and The Diocese, plus twenty-one (21) copies of a one-page covers sheet 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: Seana C. Cranston, 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

CANA CONGREGATIONS' MEMORANDUM IN OPPOSITION TO THE POST-TRIAL OPENING BRIEF OF THE EPISCOPAL CHURCH AND THE DIOCESE

Truro Church, The Falls Church, Church of the Apostles, Church of the Epiphany, Church of Our Saviour at Oatlands, Church of the Word, St. Margaret's Church, Christ the Redeemer Church, St. Stephen's Church, St. Paul's Church, and Potomac Falls Church (collectively, the "CANA Congregations") and various associated defendants respectfully submit this

post-trial memorandum of law in opposition to the post-trial opening brief of the Episcopal Church and the Diocese of Virginia.[1]

[1] (CL 2007-1236; CL 2007-1238; CL 2007-1235; CL 2007-1237; CL 2007-5683; CL 2007-5682; CL 2007-5684; CL 2007-5362; CL 2007-5364; CL 2007-5250; CL 2007-5902; and CL 2007-5903).

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INTRODUCTION

The overriding theme of the opening post-trial brief of the Episcopal Church ("TEC") and the Diocese of Virginia ("Diocese") (collectively, "the Church") is that the terms "division" and "branch" within the meaning of Virginia Code § 57-9 must be interpreted "in accordance with [each] denomination's own rules and polity." The Church does not make any serious attempt to reconcile this interpretation with the *text* of § 57-9—which refers only to divisions having "occurred," and says nothing about denominational approval. Nor does the Church grapple with the *history* of § 57-9, which confirms that several Presbyterian congregations and dozens of congregations in the Methodist Baltimore Conference—the division of which, the Virginia Supreme Court recognized, was not consensual—successfully invoked the statute. Moreover, the Church has yet to explain what *purpose* § 57-9 would serve if limited to consensual divisions, which involve no property disputes.

Lacking any argument based on the statute's text, history, or purpose, the Church claims that § 57-9 violates *the Constitution* by "obliterating the distinction between congregational and hierarchical churches" and "restructuring the Episcopal Church." But § 57-9 does not interfere with church governance. The statute merely provides a presumption that the neutral principle of majority rule will govern a church's *property ownership*. The statute applies only to property held by trustees, and a hierarchical church can avoid its operation here simply by directing congregations to transfer title to the bishop—a form of ownership used by the Diocese itself. Section 57-9 is thus consistent with *Jones v. Wolf*, 443 U.S. 595 (1979), and there is no basis for any suggestion that § 57-9 substantially burdens the Church's religious exercise. Indeed, it is the Church's reading of § 57-9 that raises constitutional concerns. By its lights, § 57-9 would mean something new in every case. The result would be inconsistent rulings based on different polities

and the very denominational discrimination that the Church decries. The CANA Congregations' reading of § 57-9 avoids these difficulties, and is fully consistent with the First Amendment.

I. The Position That A "Division" Must Be Accomplished In A Manner Consistent With The Affected Denomination's Polity Lacks Any Support In The Text, Structure, History, Or Purpose of Virginia Code § 57-9, And Would Require The Courts To Apply The Statute Differently In Every Case.

The central argument of the Church is that a "division" within the meaning of § 57-9 is "a structural division of the denomination accomplished in accordance with that denomination's own rules and polity" and "resulting in the creation of two or more entities which might properly be viewed as legal successors to the formerly undivided church." TEC Br. 2, 5.[2] Although a division need not be "amicable," the Church says, it does "require appropriate action of the regularly constituted body empowered to effect or recognize a structural division"—which here is "the General Convention of the Episcopal Church." TEC Br. 1, 5. Any other reading of § 57-9 would "interfere[e] in matters of internal church governance." TEC Br. 2.

As explained in our opening brief, such a reading finds no support in the text, grammar, or structure of § 57-9, none of which points to approval by higher ecclesiastical authorities or suggests that the outcome depends on the "polity" of the denomination involved. In addition, such a reading is foreclosed by the undisputed historical evidence presented at trial, and by the Church's public use of the term "division" outside of court. Such a reading would also effectively render § 57-9 meaningless, since consensual "structural" divisions require no judicial resolution of disputed issues of ownership and TEC's own experts admit that TEC-approved divisions create no "branch" and provide no opportunity for congregational votes. CANA Br. 13-30.

[2] Throughout this brief, the opening post-trial briefs of the CANA Congregations and of TEC and the Diocese will be cited as "CANA Br." and "TEC Br.," respectively.

Perhaps aware of these difficulties, the Church attempts to change the subject—to shift the focus from a specific analysis of the text and structure of § 57-9 to the broad "legal context surrounding § 57-9," to "trust and voluntary association principles," to "closely related statutory provisions," and to "constitutional considerations." Br. 6-7, 12. These vague and general points, however, fail to cast any doubt on the specific analysis of § 57-9 set forth in our opening brief.

None of the decisions on which the Church relies even applied § 57-9(A). Moreover, in arguing that § 57-9 "has harmoniously co-existed with" the rest of Virginia law (TEC Br. 6), the Church's analysis essentially presumes that § 57-9 has no meaning independent of other provisions of the Virginia Code, in contravention of settled principles of statutory interpretation. Perhaps most importantly, the meaning and scope of § 57-9 would, under the Church's view, vary from denomination to denomination. This view not only makes no sense as a matter of statutory interpretation—absent express indications to the contrary, the meaning of a legislative enactment does not vary from context to context or private party to private party—but would also take the Court into the heart of the doctrinal "thicket" that the Church has urged the Court to avoid.

A. Virginia Precedent Does Not Support the Position that Virginia Code § 57-9 Applies Only to Denominationally Approved or "Structural" Divisions, and It Is Undisputed that the 29 Court Decisions Applying the Statute Shortly After Its Adoption Involved Divisions that Were Not Approved by Denominational Authorities.

The Church failed to rebut the undisputed evidence at trial that congregations have successfully invoked the division statute in at least 29 cases in which denominational division was unapproved by denominational authorities. CANA Br. 25-28. Citing *Brooke v. Shacklett*, 54 Va. 301 (1856), *Hoskinson v. Pusey*, 73 Va. 428 (1879), and more recent decisions such as *Norfolk Presbytery v. Bollinger*, 214 Va. 500 (1974), and *Green v. Lewis*, 221 Va. 547 (1980), the Church argues that "Virginia courts in the periods both before and after the adoption of § 57-9 consistently have held that individuals' only right to use church property depends on their con-

tinuing membership in the applicable denomination." TEC Br. 6-7. None of these cases, however, supports the claim that § 57-9 applies only to denominationally approved divisions.

1. Brooke v. Shacklett

Brooke pre-dated the division statute by eleven years and involved only a single division, the 1840s split of the Methodist Episcopal Church ("MEC") pursuant to its 1844 "Plan of Separation," which itself predated the statute by 23 years. Even assuming, *arguendo*, that *Brooke* turned on whether the congregation's separation from MEC was approved by MEC or consistent with its polity, that decision would in no way mean that *the statute* was intended to be so limited.

First, § 57-9 provides congregational voting rights far broader than did the MEC Plan of Separation. The statute applies to all "divisions" that may "occur," not simply to "structural" divisions, and not simply to divisions in the MEC. The statute as originally phrased is especially clear in this regard: "whereas divisions *have occurred in some churches or religious societies* to which such religious congregations have been attached, and *such divisions may hereafter occur*." Act of 1866-67, Ch. 210, pp. 649-50 (emphasis added). Moreover, the 1844 Plan of Separation allowed only churches in border areas to decide which branch to join (54 Va. at 326-27), whereas § 57-9 gives *all* congregations the right to vote.[3] That § 57-9 grants broader voting rights than those set forth in the MEC Plan of Separation eviscerates the notion that the General Assembly intended to require hierarchical approval for any congregation to proceed under the statute, or was designed simply to codify *Brooke*.

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[3] The General Assembly's recognition that "divisions have occurred in some churches" and that further "divisions may hereafter occur"—together with its repeated recodification of the statute with only minor changes—demonstrates the irrelevance of TEC's and the Diocese's observation that "all known uses of § 57-9" involved Presbyterian and Methodist congregations. TEC Br. 18-19. *See also Finley v. Brent*, 87 Va. 103 (1890) (involving a dispute between the Methodist Episcopalians and the much-smaller Methodist Protestants).

Second, the 1842 deed in *Brooke* contained numerous clauses restricting the property's use to a "house or place of worship for the use of the members of the Methodist Episcopal Church in the United States of America, according to the rules and discipline which from time to time may be agreed upon and adopted by the ministers and preachers of the said church at their general conferences in the United States of America." 54 Va. at 302, 314.[4] Indeed, after reviewing the extensive trust language in the deed, the Court explained that if Virginia permitted denominations to obtain trust interests in congregational property, it would have concluded as a matter of "first impression" that the denomination was the owner. *Id.* It was only against the backdrop of this language—which, notably, the Church fails to quote—that the Court stated that "[t]he primary object of the whole transaction must necessarily have been to provide and secure a place of worship according to the [denomination's] discipline." TEC Br. 7 (citing 54 Va. at

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[4] "By deed bearing date the 3d day of June 1842, John C. Davis and wife, in consideration of ninety dollars, conveyed to Benjamin Brooke, George W. Shacklett and three others, a lot in the town of Salem in the county of Fauquier, ***upon the following trusts: In trust*** *that they shall erect and build, or cause to be erected and built thereon, a house or place of worship for the use of the members of the Methodist Episcopal church in the United States of America, according to the rules and discipline which from time to time may be agreed upon and adopted by the ministers and preachers of the said church at their general conferences in the United States of America*; ***and in further trust and confidence***, that they shall at all times forever hereafter, permit such ministers and preachers belonging to said church as shall from time to time be duly authorized by the general conferences of the ministers and preachers of the said Methodist Episcopal church, or by the annual conferences authorized by the said general conference, to preach and expound God's holy word therein. ***And in further trust and confidence***, that as often as any one or more of the trustees herein before mentioned shall die or cease to be a member or members of the said church, according to the rules and discipline as aforesaid, then and in such case it shall be the duty of the stationed preacher or minister (authorized as aforesaid) who shall have the pastoral charge of the members of the said church, to call a meeting of the remaining trustees as soon as conveniently may be; and when so met, the said minister or preacher shall proceed to nominate one or more persons to fill the place or places of him or them whose office or offices has or have been vacated as aforesaid: provided, the person or persons so nominated shall have been one year a member or members of the said church immediately preceding such nomination, and be at least twenty-one years of age . . . ". 54 Va. at 302-03; *accord id.* at 314.

317). At most, therefore, *Brooke* stands for the proposition that in the absence of § 57-9, courts will give great weight to the language of the relevant deeds in deciding church property disputes.

Third, as explained in our opening brief (at 16-19), it is undisputed that the Methodist Episcopal congregations that filed § 57-9 petitions after enactment of the statute were *not* acting pursuant to the 1844 Plan of Separation. Those congregations belonged to the Baltimore Conference, which voted to remain in MEC in the 1840s but divided in the 1860s when MEC changed its position on slavery. The court orders granting their petitions made no reference to any denominational approval, and TEC's historical expert acknowledged that the 1844 Plan of Separation "broke down soon after its enactment in 1844," well before the Baltimore Conference divided. Tr. 1158:6-15 (Mullin); *accord* Tr. 243:17-19 (Irons) ("Q * ** what relevance, if any, did the 1844 plan of separation have in 1867? A None."); Tr. 202:22-203:17 (same).

Indeed, the Virginia Supreme Court has rejected the argument that the Baltimore Conference and its member congregations, having in 1845 declared its allegiance to MEC, had a right under the 1844 Plan of Separation to disaffiliate from MEC in 1861 and join MEC South. As the Court recognized in *Hoskinson v. Pusey*, 73 Va. 428, 436 (1879), the Plan provided only for early determinations by border conferences that wished to reaffiliate with MEC South, and it did not "provide for a further disintegration to take place in some emergency that might arise in the indefinite future." Thus, "[t]he action at Staunton in 1861, after the lapse of fifteen years from the adoption of the resolutions in Baltimore, was not based on any claim of right under the plan of separation devised in 1844, but, as has been seen, in the alleged 'unconstitutional action' of the general conference at Buffalo, in May, 1860." *Id.* at 437-38. Moreover, "the congregation, although within the territorial limits of the Baltimore Conference, which was a border conference, was not a 'border society,' within the meaning of the resolution of 1844, as was the case in

Brooke & others v. Shacklett, ***and hence had no authority under these resolutions to determine by a majority of its members its adherence to the church south***." *Id.* at 438-39 (emphasis added). The Virginia Supreme Court's near-contemporaneous summary of this history both confirms the testimony at trial and forecloses any suggestion that § 57-9 was enacted in furtherance of MEC's 1844 Plan of Separation. Indeed, it was enacted precisely because the Plan of Separation did *not* permit Virginia congregations in the Baltimore Conference to disaffiliate from MEC.

Similarly, it is undisputed that the Presbyterian congregations that filed petitions under the division statute to reaffiliate with the Southern Old School Presbyterians (PCUS) were not invoking a denominationally approved plan of separation. Professor Mullin acknowledged that the split that created the PCUS was a "division" that was not denominationally approved,[5] and there is no evidence in any of the court orders approving the PCUS congregations' votes that the PCUSA (the Northern branch) approved the separation. *See also Central Univ. of Ky. v. Walters' Exrs.*, 90 S.W. 1066, 1066 (Ky. 1906) ("[a] schism in the Presbyterian Church of the United States of America resulted in about 1865 in the withdrawal of a considerable number of its members, who subsequently organized themselves into a separate body"; "[a]fter the division," "the Presbyterian Church of the United States" was "called the 'Southern Presbyterian Church'"). In short, the suggestion that § 57-9 merely codified *Brooke* cannot be squared with history.

2. Hoskinson v. Pusey

Notwithstanding that *Brooke* does not support its position, the Church asserts that Virginia courts "appl[ied] . . . the same denominational restrictions on conveyances for religious purposes *after* the enactment of [§ 57-9]." TEC Br. 10. Citing *Hoskinson*, it says that when faced with a post-1867 dispute involving two factions of a MEC congregation, the Court simply

[5] Tr. 1155:18-1156:17, 1157:19-1158:1; *accord* Tr. 87:7-90:4 (Valeri); CANA Br. 16-18.

asked: "'Who, then are the *cestuis que trust* under the deed in question, the beneficiaries entitled to the control and use of the . . . church building?'" TEC Br. 10 (quoting 73 Va. at 431). Indeed, it claims that, "[a]s there had been no division of the hierarchical church that might affect the trustees' obligations (as there had been in *Brooke*), the Court [in *Hoskinson*] affirmed a decree awarding the property to the members of the denomination named in the deed." *Id.*

The Church's argument overlooks critical portions of the Court's opinion in *Hoskinson*. The Court there did not reach the question whether there had been a division under § 57-9 because the congregation failed to comply with the statute's procedural requirements. The Court noted that it was "not clear, from the evidence, whether this [vote] of the congregation was had before or after the passage of the act referred to," that "there was "no evidence that the determination of the congregation manifested by the vote was reported to the circuit court of Loudoun county, approved by that court, and so entered on its minutes," and that a "claim of title, based on proceedings under the statute, [was] not made by the [congregants] in their answer to the bill." 73 Va. at 440. Stating that "[c]ompliance with these requirements is essential to the effect given by the statute," the court concluded that it could not apply the statute. *Id.* Yet the Church, in suggesting that "there had been no division" in *Hoskinson* (Br. 10), neglects to mention the Court's findings in this regard.

As noted above, moreover, the Court in *Hoskinson* provided a lengthy explanation of the Baltimore Conference division, concluding that MEC's 1844 Plan of Separation did *not* authorize congregations in that Conference to separate from MEC. 73 Va. 438-39. Were the Church correct that § 57-9 applies only to denominationally authorized divisions, there is every reason to think that the Court would have relied on this fact as a basis for disqualifying the congregation

from invoking § 57-9. The fact that the Court did not do so confirms that it did not view denominational approval of the division as a requirement for invoking the statute.[6]

3. Norfolk Presbytery v. Bollinger and Green v. Lewis

The modern cases cited by the Church, *Norfolk Presbytery v. Bollinger*, 214 Va. 500 (1974), and *Green v. Lewis*, 221 Va. 547 (1980), likewise do not support the view that a § 57-9 "division" requires denominational approval. In those cases, single congregations voted to become "independent" and "free from any affiliation" (*Green*, 221 Va. at 550), or "independent and autonomous" (*Norfolk Presbytery*, 214 Va. at 501). Thus, neither congregation could have satisfied § 57-9's requirement that it vote to join a "branch of the church or society," and neither congregation invoked § 57-9.[7] Not surprisingly, the Court did not address the meaning of a denominational "division" in those circumstances.[8]

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[6] The Court in *Hoskinson* noted that if "the statute had been complied with in every particular," it would have had to resolve "the question . . . whether the act does not encroach upon vested rights in putting it in the power of a majority of the members of the congregation to shift the title and use of the property without the consent and against the will of the minority," and the "further question, how the operation of the statute is affected, if at all, by the provision of the state constitution on 'church property,' art. 11." *Id.* at *8. The Court's reference to "vested rights," however, was simply to note the possibility that application of the statute could implicate the Contracts Clause as applied to pre-1867 deeds such as those before the Court. *See Finley v. Brent*, 12 S.E. 228, 228 (Va. 1890) (invalidating application of § 57-9 to divest a party of vested rights under an 1860 deed); *Weaver v. Graham*, 450 U.S. 24, 29-30 (1981) ("Evaluating whether a right has vested is important for claims under the Contracts or Due Process Clauses, which solely protect pre-existing entitlements"). The two pre-1867 deeds here, which involve only The Falls Church, do not create any property interest in TEC or the Diocese. Indeed, one of them pre-dates both TEC and the Diocese. *See* CANA Congregations' Reply Memorandum Regarding the Scope of the § 57-9 Hearing 18-20. The state constitutional provision referenced by the Court (Article 11) was repealed in 1902. *Compare* Va. Const. (1870) *with* Va. Const. (1902).

[7] *See* Appellee's Br. in *Norfolk Presbytery v. Bollinger*, Va. No. 8241, at 14 ("§57-9 is not involved in this case"); Br. of Appellee in *Green v. Lewis*, Va. No. 781388 (failing to cite § 57-9).

[8] The same is true of the Circuit Court's decision in *Diocese of Southwestern Virginia v. Buhrman*, 5 Va. Cir. 497 (Clifton Forge 1977), which in any event is not binding on this Court.