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December 21, 2007

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; 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);

Letter to Clerk of the Court
December 21, 2007
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Dear Ms. Brooks:

I am enclosing for filing in the above-styled case an original CANA Congregations' Opening Post-Trial Memorandum Concerning Application of Va. Code § 57-9, 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

Litigation

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CL 2007-5683,

CL 2007-5684,

CL 2007-5685,

CL 2007-5686,

CL 2007-5902,

CL 2007-5903, and

CL 2007-11514

**CANA CONGREGATIONS' OPENING POST-TRIAL MEMORANDUM
CONCERNING APPLICATION OF VIRGINIA CODE § 57-9**

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

memorandum of law concerning the application of Va. Code § 57-9 to the facts established at the bench trial conducted between November 13 and November 20, 2007 (the “hearing” or “trial”).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 AND SUMMARY OF ARGUMENT

From the days of Thomas Jefferson, James Madison, George Mason, and the Virginia Statute for Religious Freedom, the Commonwealth of Virginia has had a long history of deferring to local control of congregational property. In keeping with this tradition, in 1867 the Virginia General Assembly, acting in response to the myriad denominational splits in the 19th century, passed the statute now codified at Va. Code § 57-9(A).² Recognizing that local congregations should generally retain property held by their duly appointed trustees in the event of a past or future denominational split, the General Assembly provided that where a “church or religious society” experiences a “division,” congregations “attached” to such a church or religious society may vote to determine which “branch” of the divided body they wish to join. Each voting congregation may then report its determination to the local circuit court, and the court’s approval of that determination is “conclusive as to the title and control of any property held in trust for such congregation.” The statute remains on the books today, after several recodifications, with only minor, non-substantive changes.

At trial, the CANA Congregations showed that they have satisfied each of the core requirements of § 57-9.³ Specifically, they demonstrated that there has been a “division” in the

² § 57-9. How property rights determined on division of church or society.

A. If a division has heretofore occurred or shall hereafter occur in a church or religious society, to which any such congregation whose property is held by trustees is attached, 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. Such determination shall be reported to the circuit court of the county or city, wherein the property held in trust for such congregation or the greater part thereof is; and if the determination be approved by the court, it shall be so entered in the court’s civil order book, and shall be conclusive as to the title to and control of any property held in trust for such congregation, and be respected and enforced accordingly in all of the courts of the Commonwealth.

³ Pursuant to the Court’s direction at the September 14, 2007, hearing (Sept. 14, 2007, Tr. 41), the resolution of certain related issues, such as whether the CANA Congregations’ majority de-

“church” or “religious society” to which they were formerly “attached”—namely, the Episcopal Church (“TEC”), the Diocese of Virginia (“Diocese”), and the worldwide Anglican Communion—and that they have joined a “branch” of the divided body created as a result of that division. Indeed, the evidence on many of these points was undisputed.

In the brief that follows, we summarize the evidence proffered on these issues at trial and explain why it supports judgment in the CANA Congregations’ favor. In Part I, we discuss the proper interpretation of the key terms in § 57-9—“division” and “branch”—in light of the expert testimony at trial. CANA experts Mark Valeri and Charles Irons demonstrated from their exhaustive review of primary source materials that ordinary 19th century Americans would have understood a “division” to have occurred when a group of congregations, members, or clergy broke away from their denomination—typically without the denomination’s approval—in sufficient numbers to set up a new organization. Relatedly, a “branch” was most commonly understood to be that new organization—a group of churches with its own, newly established polity, but with a historical connection to the prior denomination. Indeed, the testimony on this issue was essentially undisputed, because TEC’s historical expert conceded that he knew nothing about the common usage of “division” and “branch” in the 19th century. Instead, he offered an admittedly “distinctive,” “narrow,” and “technical” historian’s definition.

Against this backdrop, we explain in Parts II, III, and IV how the evidence at trial independently satisfies these statutory requirements at the TEC, Diocese, and Anglican Communion levels, respectively. Here again, much of the evidence is undisputed. Numerous congregations and clergy have disaffiliated from TEC and formed new branches thereof. CANA is one such branch, and since its formation in 2005 CANA has quickly grown into a religious denomination

terminations satisfied the procedural requirements of § 57-9, and whether the property at issue is held by the Congregations’ trustees, has been deferred to a later date.

that provides ecclesiastical oversight for some 60 congregations and 12,000 members, the vast majority of whom are former members of TEC. Since intervening in this litigation, TEC has studiously avoided referring to any “division,” but its use of that term outside of this Court—including in reference to past splits in the Church, such as the division that created the Reformed Episcopal Church—confirm that TEC has experienced such a division. Indeed, TEC’s leading expert effectively conceded as much on cross examination. He acknowledged not only that he had used the term “division” in prior public statements and writings to describe splits in TEC, but also that TEC has experienced a post-2003 “schism,” which he defined as a group’s “voluntary action” to separate from its denomination—*i.e.*, in a manner consistent with the common understanding of the term “division.”

As shown in Part III, moreover, the CANA Congregations have proven a division not only at the TEC level, but also at the diocesan level, thereby providing a separate basis for satisfying the statute. The division in the Diocese is evidenced not only by the many congregations, clergy, and several thousand members that have disaffiliated from the Diocese to form the Anglican District of Virginia—according to the Diocese’s own statistics, more than 11 percent of the Diocese’s membership and 18 percent of its average Sunday attendees disaffiliated between 2005 and 2007—but also by the admissions of several senior diocesan officials, formally appointed committees, and the Diocese’s Annual Council. Indeed, the Bishop of the Diocese, Peter Lee, wrote to the members of the voting congregations on the eve of their vote, and said this:

American Christianity has been punctuated over the years by frequent divisions, with one group choosing to separate because they believed the separated group might be more pure than their former identity. That has not been characteristic of the way we Anglicans have dealt with differences.

I encourage you when you vote, to vote for the unity and mission of the church, therefore remaining one with your diocese, and reject the tempting calls to division

“Frequent divisions, with one group choosing to separate” to form a new “identity.” Bishop Lee’s words are a testament to the common understanding of “division” and “branch,” not only today but in 1867. Indeed, the statute was invoked at least 29 times shortly after its adoption, in circumstances much like those that gave rise to this dispute.

Finally, as demonstrated in Part IV, the CANA Congregations’ showing that the Anglican Communion is divided independently satisfies the requirements of § 57-9. The division at the international level is evidenced by many official pronouncements of “division” by the organs and offices of the Anglican Communion, including its Primates and the Windsor Report issued by the Lambeth Commission on Communion; by formal statements of “broken communion” between numerous Anglican Provinces and TEC; and by the decision of the Church of Nigeria, with which CANA is affiliated, to amend its constitution to cut off all legal and structural relations with TEC. The international element of this dispute also confirms the magnitude of the division in TEC and the Diocese, as many TEC congregations, clergy, and members have reaffiliated with foreign Anglican provinces in order to maintain their ties with the historic Anglican faith.

In summary, the General Assembly enacted the division statute to ensure that a neutral principle—majority rule—would govern situations when a group of congregations and clergy divided from their former denomination and formed a new branch of the church. That happened in the 19th century, and it happens today. What is perhaps unique about this case is that the division has played out at the international level of the church as well. But it is no less a division within the meaning of § 57-9, and the evidence at trial demonstrated as much.

I. There Is No Evidentiary Dispute Over The Ordinary 19th Century Usage Of “Division” And “Branch,” The Key Terms In Virginia Code § 57-9.

In Virginia, “the popular, or received import of words, furnishes the general rule for the interpretation of statutes.” *Lawrence v. Craven Tire Co.*, 210 Va. 138, 140-41 (1969) (quotation

omitted). Moreover, when interpreting undefined statutory terms, courts examine the terms' ordinary meaning "[a]t the time of enactment of the statute." *Lewis v. Com.*, 184 Va. 69, 72 (1945). Part I of this brief addresses the meaning of the terms "division" and "branch," which is central to a proper interpretation of Virginia Code § 57-9.

In Part I.A, for example, we explain that in mid-19th century America (as today), the term "division" was most commonly understood to refer to a split in a religious denomination involving the separation of a group of congregations, clergy, or members who formed an alternative polity. The evidence on this issue was undisputed, as TEC's historical expert admitted that he had no knowledge concerning the common usage of the term during the relevant time period.

In Part I.B, we explain that there is no basis—in the text, history, or purpose of the statute—to the notion that the separation of a group of congregations from its mother church is not a "division" unless the highest authorities of the denomination formally approve of it. TEC's historical expert conceded that most of the church "separations" in the 19th century were not consensual. The division statute was successfully invoked some 29 times shortly after its adoption, including in contested cases arising in denominations whose divisions were anything but consensual. And any reading of § 57-9 that limited its application to denominationally authorized divisions would render meaningless the voting rights that it confers.

In Part I.C., we explain that the term "branch" was most commonly understood in mid-19th century America to refer to an offshoot of a denomination created as a result of a division, or to the group left behind—not to an administrative subunit of the church, or to a new diocese created by administrative or geographical redistricting. Indeed, TEC has admitted that when it subdivides an existing diocese, congregations are not permitted to choose which diocese they

wish to join, and that the resulting entities are not “branches”—and thus that the statute has no application in such circumstances.

A. The Term “Division” Connotes the Separation of a Group of Congregations, Clergy, or Members from Their Former Denomination in Sufficient Numbers to Establish a New Polity or Governmental Structure.

The period leading up to 1867 was an era of myriad church splits. CANA expert Mark Valeri explained that there were “divisions all over the place,” Tr. 82:2, and TEC expert Robert Mullin likewise testified that “[t]here are all sorts of separations going on in the 19th Century”—there was “a tremendous flowering of religious differentiation.” Tr. 1102:4-5, 1098. Many of these divisions were over slavery, but others involved issues ranging from “revivalism” to governance to “[d]ebate over liturgical practices” and “the language of the Baptismal Office.” Tr. 81:22, 105:19 (Valeri); Tr. 1120, 1148 (Mullin). In short, denominational divisions were the order of the day, and “were a subject of frequent public commentary” in Virginia and elsewhere in the nation. Tr. 104:16-22 (Valeri).

Many of the divisions in the 19th century involved groups separating from the Methodist, Presbyterian, and Baptist churches,⁴ then the nation’s largest denominations. Tr. 103:6-104:14

⁴ There were numerous 19th century divisions among the Methodists. Tr. 183:10-183:14 (Irons) (the Methodist family of churches divided “[m]ore than a dozen times” in the 19th century), Tr. 104 (Valeri) (discussing the divisions that created the Methodist Church in 1830, the Protestant Methodist Church in 1843, the Wesleyan Methodist Church in 1844 to 1845, and the Free Methodist Church in 1860); Tr. 185:19-186:10 (Irons) (Reformed Methodist Church); Tr. 186:11-188:11 (Irons) (African Methodist Episcopal Church and African Methodist Zion Church); Tr. 188 (Irons) (Methodist Protestant Church); Tr. 188-89 (Irons) (Methodist Episcopal Church and Methodist Episcopal Church South); Tr. 188-189 (Irons) (division of the Baltimore Conference from the Methodist Episcopal Church); Tr. 1161 (Mullin) (“the separation of the African Methodist Episcopal [Church] was a great scandal and a great division”).

The same is true of the Presbyterians. *See, e.g.*, Tr. 57-69 (Valeri) (Old School-New School division); Tr. 69-75 (Valeri) (United Synod division from New School Presbyterians, creating a Southern branch of the New School); Tr. 1155 (Mullin) (describing same division as a division of the New School into Northern and Southern branches); Tr. 77-78 (Valeri) (Cumberland Presbyterians division from PCUSA); Tr. 81 (Valeri) (Old Light Synod, Associate Reform Presbyte-

(Valeri); Tr. 183, 208 (Irons); Tr. 1134 (Mullin). Others, however, involved smaller denominations such as the Lutherans and Episcopalians. For example, Professor Mullin testified that “the Lutherans divided into 17 [or] 18 different religious communities” during the 19th century (Tr. 1098), and he admitted to publicly describing as “divisions” splits resulting in the formation of the Episcopal Church in the Confederate States and the Reformed Episcopal Church (Tr. 1124-25; 1129-31).

A great number of 19th century divisions directly involved Virginians, and ordinary Virginians would have been aware of the many divisions occurring elsewhere.⁵ Furthermore, the frequency with which the division statute was invoked shortly after its adoption confirms that Virginians were accustomed to church splits and the resulting litigation over property.

Although § 57-9 does not define “division,” evidence at trial conclusively demonstrated that the most common understanding of that term in mid-19th century America (as today) was of a split, schism, or rupture in a religious denomination that involved the separation of a group of congregations, clergy, or members from the church and the formation of an alternative polity that disaffiliating members could join.⁶ For example, Professor Valeri offered unrefuted testimony

rian Church of the South, Associate Reform Synod); Tr. 83-84 (Valeri) (Old School division into Northern and Southern branches).

The same is also true of the Baptists. Tr. 204-206 (Irons); 1102 (Mullin).

⁵ E.g., Tr. 1153:16-18 (Mullin) (there were “many, many separations that were going on in Virginia”); Tr. 183:10-184:12 (Irons) (Virginians were aware of all of the dozen-plus splits in the Methodist Church, and were directly affected in Virginia by at least nine of them); Tr. 205:12-206:6 (Irons) (Baptists divisions affected Virginia); Tr. 207 (Irons) (Lutheran division involving the Lutheran Church in the Confederate States of America affected Virginia); Tr. 70-72, 104 (Valeri) (discussing Presbyterian and other divisions arising in or affecting Virginia).

⁶ According to definitions that date from the era when § 57-9 was adopted, “division” simply means the “[s]tate of being divided.” See Noah Webster, *A Dictionary of the English Language* 219 (1872) (preface dated 1867). Recent definitions are to the same effect. 1 *Oxford English Dictionary* 558 (1971) (“division” means “the state of being divided into parts or branches; partition; severance.”); *Random House Dictionary of the English Language* 420 (1967) (“the act or

that “the most common definition” of “division” was “[t]he separation of a group from an existing denomination, renunciation of its authority, and beginning of the formation of an alternative structure.” Tr. 55 (Valeri).⁷ Similarly, Professor Charles Irons testified that an “ordinary Virginian” would have understood the term “division” to refer to any “separation” or “fragmentation of one religious jurisdiction” into “two or more jurisdictions.” Tr. 178, 179; *accord id.* at 191 (explaining that a division involved the breaking apart of a church into “separate and distinct organizations”); *cf.* Tr. 1099:1-16, 1101:11-1102:20 (Mullins) (drawing a “distinction between a separation” and a “division,” but acknowledging that all divisions entail “separation” and that other historians use the term “division” to describe the “not-so-great division[s]”).

TEC and the Diocese offered no contrary evidence. Indeed, Professor Mullin disclaimed any knowledge of the ordinary usage of “division” in the 19th century. Tr. 1100, 1149:11, 1135, 1152:18-1153:7, Tr. 1133:9-13 (same).⁸

The historical evidence at trial also demonstrated that although divisions typically began with internal strife, such strife did not itself amount to a “division” under the most common un-

state of being divided”; “Division usually means little more than the marking off or separation of a whole into parts”); *Webster’s New Universal Unabridged Dictionary* 538 (2d ed. 1983) (“a dividing or being divided; separation”).

⁷ *See id.* (Valeri: describing “[t]he most common definition” as “the separation out of the group of members of a religious . . . denomination in sufficient numbers to begin to form an alternative polity and the renunciation of the authority of the original group in that process”); *accord id.* at 54 (a “division” is “a separation” of “a group of congregations or lower adjudicatories . . . and renunciation of the previous group and formation of—beginning of a formation of a separate polity or governmental structure”), *id.* at 116.

⁸ As Professor Valeri explained on cross examination, the meaning of “division” in “church historical parlance” was consistent with its meaning in general 19th century “common parlance.” Tr. 128. In particular, “[f]rom 1890 to 1910, the American Society of Church History produced a series of definitive—what at the time were definitive histories of the major denominations,” “a great new sociological project, and they were to represent official denominational records and accounts, and the words ‘divisions’ and ‘branches’ are used throughout those volumes as I’ve represented the meanings today.” *Id.*

derstanding of that term. As Professor Valeri explained, “internal strife” was occasionally called “division” and “frequently” led to a “division,” but the most common use of that term involved “[t]he separation of a group from an existing denomination” and “beginning of the formation of an alternative structure.” Tr. 78:20-79:16, 54-55. In other words, divisions would often result from internal strife, but the divisions themselves entailed disaffiliating congregations or clergy and the formation of a new entity. Moreover, divisions would often widen over time as additional congregations and members left the denomination to join the new entity. Tr. 79:1-7 (Valeri) (after the initial members “form a group,” “they are later joined by other groups over the period of weeks, months, sometimes years”). For example, TEC expert Mullin admitted that the division of the Old School Presbyterians into Northern and Southern branches took at least two to three years (Tr. 1155:15-17), Professor Irons recounted that the divisions involving the African Methodist Episcopal Church (AME Church), and the African Methodist Episcopal Zion Church (AME Zion Church) widened over several years (Tr. 186-187), and Professor Valeri explained that the division in the Episcopal Church that led to formation of the Reformed Episcopal Church took place over a two-year period, from 1873 to 1874 (Tr. 105:6-16).

The only numerical threshold for a division was that the number of disaffiliating members be sufficient to form a new polity. Tr. 92-94 (Valeri). This would likely preclude the departure of a single congregation from being considered a division, as “a single congregation cannot form a polity or begin to form an alternative polity.” Tr. 93 (Valeri). But apart from whatever number of congregations and ministers was necessary to “form an alternative polity,” there was no specific “stated size” or “minimum size in order to reflect a division.” Tr. 92:4-9, 93:3-22, 94 (Valeri).

Many 19th century divisions began small and grew over time. For example, it is undisputed that the groups that divided from the Methodists to form the Reformed Methodist Church, the AME Church, and the AME Zion Church were “very small”—roughly a dozen congregations formed the AME Church and six or seven congregations formed the AME Zion Church. Tr. 185:19-186:4, 187 (Irons). The Cumberland Presbyterian Church was established by just “three ministers” who divided from their former church and formed a presbytery that quickly grew to include congregations. Tr. 78:4-19 (Valeri). Likewise, the Presbyterian divisions that resulted in the formation of the Old Light Synod, the Associate Reform Presbyterian Church of the South, and the Associate Reform Synod, all involved “very small groups, handfuls . . . of smaller Presbyterian Churches.” Tr. 81:4-16 (Valeri). As TEC’s Professor Mullin acknowledged, “you see the word division used in common parlance to describe other, smaller separations.” Tr. 1153:1-4.⁹

The Reformed Episcopal Church is perhaps the most powerful illustration of how the separation of a relatively small group is appropriately considered a “division,” whether judged by the standard of the 19th century or that of modern usage. Tr. 105-112 (Valeri). As Professor Valeri explained, the division that resulted in the formation of Reformed Episcopal Church in 1873 and 1874 arose out of a disagreement over liturgical practices and the related suspension of TEC Bishop George David Cummins. The division “culminated in a formal organization into a church and then after that into congregations worshipping under [the Reformed Episcopal Church’s] name.” Tr. 105:17-106:5. The Reformed Episcopal Church began with only seven ministers and 19 laypersons, and with only a handful of congregations attending its first conven-

⁹ Most of the 19th century groups that separated from their denomination were smaller than their mother church, Tr. 91:15-92:3, 111:21-112:1 (Valeri), and the name and governmental structure of the former church typically did not change after the division, Tr. 77:13-22, 90:5-8, 194 (Valeri).

tion. Tr. 111:21-112:1 (Valeri); Tr. 1103 (Mullin). Indeed, the Reformed Episcopal Church has always been small in relation to TEC; even today the Reformed Episcopal Church has only 6,000 members. Tr. 111:7-112:1 (Valeri). Yet the Reformed Episcopal Church's modest numbers did not deter the Bishop of the Episcopal Diocese of Minnesota, in his annual address in 1874, from describing the separation as a "division" or from charging Bishop Cummins with causing a "schism." Tr. 109 (Valeri); Tr. 1104-12 (Mullin).

Indeed, TEC has consistently taken the position that the formation of the Reformed Episcopal Church was the result of a "division" in the Church—including, most significantly, in an official resolution adopted by the Church in 1988 at its 69th General Convention. Tr. 112-13 (Valeri); Tr. 1117-18 (Mullin). Resolution D-088, which TEC then adopted, stated:

"Resolved, the House of Bishops concurring, That this 69th General Convention direct the Standing Commission on Ecumenical Relations to explore the possibilities of dialogue with representatives of the Reformed Episcopal Church *looking toward the healing of this particular division* and direct the Standing Commission on Ecumenical Relations to report to the next General Convention.

CANA Exh. 6 (emphasis added). As Professor Valeri explained, TEC adopted this resolution to "reach out" to the Reformed Episcopal Church as a matter of "ecumenical relations," and "quite intentionally" "chose the word 'division' to describe what happened historically." Tr. 112:10-20. Thus, although it took some 115 years, the General Convention of the Episcopal Church has called the church split involving the Reformed Episcopal Church a "division."

Similarly, TEC's own website contains a "Glossary of Church Terms" with definitions from *An Episcopal Dictionary of the Church*, which is published by Church Publishing, Inc., the "official publisher of the General Convention of the Episcopal Church." CANA Exh. 5; Tr. 110:10-111:3; Tr. 906:3-10 (Douglas). "Schism" is among the dictionary terms listed on this website, and it is defined as follows: "This word of Greek origin means *a rip, tear, split, or division*. In ecclesiastical terms, it is a *formal and willful separation* from the unity of the church."

CANA Exh. 5 (emphasis added). After listing some of the best known schisms in church history, the definition concludes: “The earliest *significant schism* from the Episcopal Church was that of the *Reformed Episcopal Church, which began in 1873*. There were also some *smaller schisms* from it in the later twentieth century over Prayer Book revision and the ordination of women.” CANA Exh. 5 (emphasis added).

This definition is instructive for several reasons. *First*, it shows that when TEC is speaking of “divisions” outside of the context of this litigation, it describes them as everyone else does—as “willful separations” from the church, or “splits,” or “schisms.” *Second*, TEC’s own definition undermines Professor Mullin’s claim (discussed below) that TEC has never experienced “divisions,” as it not only describes the division involving the Reformed Episcopal Church as a “significant schism” but acknowledges other, late-20th century divisions involving other points of disagreement. *Third*, in stating that the split involving the Reformed Episcopal Church “began in 1873,” TEC’s definition confirms the testimony of Professors Valeri and Irons that a division or schism sometimes involves a process that unfolds over time. *Fourth*, the definition confirms that the separation involving the Reformed Episcopal Church was a “formal and willful separation” despite the absence of approval from TEC’s General Convention. *Finally*, in indicating that the split that resulted in the formation of the Reformed Episcopal Church was of greater significance than other “smaller,” late-20th century divisions, the definition confirms that there is no particular size requirement for a division. *See also* Tr. 900:14-17 (Douglas) (acknowledging TEC’s view that “there’s no numerical requirement for a division”). In short, this definition confirms that a departure of congregations such as the one that led to this dispute is a division under TEC’s own understanding of that term.

The conclusion of Professors Valeri and Irons that the term “division” was most often used to refer to the separation of a group of congregations who formed a new polity was based on a thorough review of a broad range of primary source materials, including “[s]ecular newspapers, religious journals or serials, sermons, pamphlets, tracts, records of official denominational conventions and also denominational histories”—publications that were “widely available” in Virginia. Tr. 53, 56 (Valeri); *see also* Tr. 176-177, 190, 197, 213-215, 223, 225-245 (Irons) (denominational literature and minutes, sermons, secular newspapers, court records). Professors Valeri and Irons demonstrated the breadth of usage of these terms by reference to papers ranging from *The New York Times* to local Virginia papers to denominational publications such as *The Presbyterian* and *The Christian Observer*. Tr. 68, 69:9-70:6, 87, 99, 241. Moreover, Professor Valeri testified that this definition would not “vary by denomination,” but rather “holds across the board.” Tr. 56; *accord* Tr. 94:4-9. As discussed below (see Part I.B.5), there was no contrary testimony concerning the common usage of the term “division” in the 19th century: TEC expert Mullin admitted that he had no knowledge concerning 19th century common usage (Tr. 1125, 1100, 1149:11, 1135, 1152:18-1153:7, 1133:9-13), and his testimony was largely focused not on primary source material, but on secondary historical “reference books” (Tr. 1135:7-17).

B. There Is No Basis to the Contention of TEC and the Diocese that Separations of Religious Entities Are Only “Divisions” if Approved, Recognized, Formally Declared, or Consented to by the Highest Denominational Authorities.

TEC and the Diocese insist that the “separation” of a group of churches from a religious denomination to form a new polity does not amount to a “division” unless the highest authorities of that body formally declare or approve of the separation. *See, e.g.*, Tr. 1116, 1067:14-1070:13 (Mullin); Tr. 841:16-844:3 (Douglas); *see also* Sept. 14, 2007, Tr. 39 (directing that the parties address whether division “require[s] a formal declaration by the highest level of a hierarchical church”). As explained below, however, this remarkable assertion is inconsistent with the text,

structure, and history of § 57-9—and with the views of their own expert, Professor Mullin, who admitted on cross examination that many 19th century divisions did not receive denominational approval. Moreover, requiring such formal denominational approval would render meaningless the voting rights conferred by § 57-9.

1. The text of § 57-9 provides no support for the notion that “divisions” must be approved by the highest authorities of the denomination.

At the outset, it merits emphasis that the text of § 57-9 provides no support for the position of TEC and the Diocese. Section § 57-9 uses the term “division” without any modifier—let alone the modifiers “approved,” “formal,” “consensual,” or “recognized.” TEC and the Diocese thus ask this Court to read a word into the statute, which the Virginia Supreme Court strictly forbids. *BBF, Inc. v. Alstom Power, Inc.*, 645 S.E.2d 467, 469 (Va. 2007) (“we are not free to add language, or to ignore language, contained in statutes”) (quotation omitted); *Oraee v. Breeding*, 270 Va. 488, 503 (2005) (“[c]ourts cannot add language to the statute the General Assembly has not seen fit to include”).

In addition, the notion that a division is a pre-planned, formal event is flatly inconsistent with the phrasing, verb tense, and verb choice in § 57-9. The statute applies “[i]f a division has heretofore *occurred* or shall hereafter *occur*.” (Emphasis added.) In the mid-19th century (as today), the dictionary defined “occurrence” as “[a] coming or happening; hence, any incident or accidental event.” Noah Webster, *A Dictionary of the English Language* 498 (1872) (preface dated 1867); *cf. Webster’s Ninth New Collegiate Dictionary* 817 (1983) (to “occur” means “to come into existence: happen”; and the term “‘occurrence’ may apply to a happening without intent, volition, or plan”). Thus, the sense of the statute is that divisions “happen,” often in unplanned ways, contrary to the TEC-Diocese position that the statute is limited to divisions that result from a consensual, deliberative process by denominational authorities. Indeed, if the pur-

pose of § 57-9 were to address *consensual* divisions, it would have been far more natural for the General Assembly to have referred to a division having been “effected,” “implemented,” or in some way brought about *by the denomination*. Cf. Va. Code § 57-7.1 (“conveyance . . . shall be used for the . . . purposes of the . . . religious society . . . as determined by the authorities which, under its rules or usages, have charge of [its] administration”); Va. Code §§ 8.01-400, 19.2-271.3, 20-26, 24.2-703.1 (“‘accredited religious practitioner’ means a person who has been . . . accredited by a formal religious order”).

2. The undisputed evidence concerning the ordinary usage of the term “division” in the 19th century confirms that the term was not limited to formally approved separations.

The undisputed evidence at trial likewise showed that there is no historical support for the view that the term “division” is necessarily (if ever) limited to separations from a church that are formally approved by the church’s highest authorities.

Professors Valeri and Irons both testified that all of the denominational divisions that occurred in the 19th century were “[u]namicable and unconsensual”; they were aware of “none” that involved “the approval or consent of the higher ecclesiastical authorities” of the original denomination. Tr. 55:22-56:14 (Valeri); Tr. 181:20-182:4 (Irons) (“I don’t know of one”). Professor Valeri explained that a division generally involved “the renunciation of the authority of the original group” (Tr. 55:15-20), and Professor Irons added that limiting the term “division” to cases involving denominational approval “would preclude most divisions of the 19th century” because “there are no amicable divisions and, indeed, I don’t think I would characterize any of them as consensual” (Tr. 181:8-19, 182:18-20).

The undisputed evidence therefore shows that, whether the divisions involved the Methodists,¹⁰ Presbyterians,¹¹ Lutherans,¹² Baptists,¹³ or Episcopalians,¹⁴ they were quite consistently non-consensual. Indeed, rejection of the authority of the former denomination was a hallmark of 19th century divisions, and it would make no sense, as a linguistic or a historical matter, to limit that term to divisions *recognized* as such by the denomination in which the division occurs.

3. TEC-Diocese expert Professor Robert Mullin conceded that at least some of the “major” or “great” divisions in the 19th century did not involve denominational approval.

TEC expert Robert Mullin claimed on direct examination that the “great” 19th century divisions were consensual or recognized. He acknowledged on cross-examination, however, that the “separations” that he would call “divisions” involved plans for separation that either were not approved by denominational authorities or quickly broke down. His testimony concerning the Presbyterians is illustrative. Professor Mullin testified that there were three “divisions” in the Presbyterian Church in the 19th century, one of which was the split of the Old School and New School Presbyterians beginning in 1837—a split that he would describe as one of the “great divisions” of the 19th century. Tr. 1154:11-17; Tr. 1102:4-11. But Professor Mullin readily admitted on cross-examination that this division was not consensual:

Q And you said the Presbyterian Church split into an Old School and New School in 1837, right?

A That is correct, sir.

¹⁰ Tr. 1158 (Mullin); Tr. 187-89 (Irons).

¹¹ Tr. 1154-58 (Mullin); Tr. 60, 62-69, 87-90 (Valeri).

¹² Tr. 207 (Irons).

¹³ Tr. 205 (Irons).

¹⁴ Tr. 1123-25 (Mullin); Tr. 107-08 (Valeri) (Reformed Episcopal Church); Tr. 1129-32 (Mullin); Tr. 216-217 (Irons) (Episcopal Church in the Confederate States).

- Q And is it your contention there was some kind of Plan of Separation associated with that attempt?
- A There was a Plan of Separation that was proposed and it was never ratified.
- Q Never ratified.
- A Yes. It broke down on certain political issues.
- Q So it wasn't in play in the 1850s or '60s, was it?
- A No, but the division was a fait accompli in the 1850s.

Tr. 1154:15-1155:7. Even TEC's own historical expert, therefore, admitted that lack of a formal or approved plan of separation is not an impediment to a division occurring and becoming a "fait accompli." Professor Mullin's testimony that the Old School-New School split was not consensual was in fully accord with that of Professor Valeri. Tr. 60:7-12, 62:21-69:15.

Similarly, Professor Mullin acknowledged that in at least one of the other two 19th century Presbyterian "separations" that even he would recognize as a "division"—the split of the Old School Presbyterians into Northern and Southern branches, between the late 1850s and late 1860s—the Northern branch did not recognize the validity of the Southern Branch and "still wanted to lay claim to the Southern synods." Tr. 1155:18-1156:17. After the adoption of § 57-9 and a roughly 10-year dispute between the Northern and Southern synods, he explained, "what happens with the Presbyterians is that, in effect, the Old School Presbyterians of the North accept the decision of their Southern brothers and choose instead to create a Plan of Union with the Northern New School Presbyterians." Tr. 1157:19-1158:1. On this subject, too, Mullin's testimony is consistent with the testimony of Professor Valeri, who testified that while there was initially a "hope that the division, when it is made, will be made entirely in peace, harmony, and good feelings," ultimately that "hope . . . was unfulfilled" because the division "was denounced roundly" and the General Assembly of the Northern Church refused to recognize the ordinations of ministers in the Confederate States. Tr. 87:7-90:4.

Thus, it is undisputed that at least two of the three largest Presbyterian divisions in the 19th century were *not* approved by the highest authorities of the denominations. Rather, those authorities were forced, over their objection, to accept that there would be two churches.

Professor Mullin's testimony concerning the Methodists is to the same effect. Specifically, he admitted that the plan of separation that came closest to formal approval by church authorities in the 19th century—the (never ratified) Plan of Separation for the Methodist Episcopal Church —“broke down soon after its enactment in 1844.” Tr. 1158:6-15. His testimony in this regard is consistent with that of Professor Irons, who explained that although “the Methodists envisioned an amicable and consensual separation,” reflected in a “provisional plan of separation,” ultimately “[i]t was not a consensual division.” Tr. 189. Specifically, “the annual conferences in the slave-holding states, 13 annual conferences, assumed it was already active and the annual conferences in the north uniformly rejected it. That is, they did not give that three-fourths approval necessary for the plan.” Tr. 193 (Irons); *accord id.* at 194 (explaining that, before there was an opportunity for ratification, “the Southern conferences went ahead and called for the organization of an independent jurisdiction of the Methodist Church in the south and they met in their first General Conference in 1846”). This “separation” too qualifies as one of what Professor Mullin calls the “great divisions” of the 19th century. Tr. 1160.

Professor Mullin's admission that the 1844 Plan of Separation broke down shortly after its proposal, moreover, confirms that the 1861 division of the Methodist Baltimore Conference was not authorized by the Methodist Episcopal Church. As Professor Irons explained, that Conference, which included parts of Virginia, Maryland, Pennsylvania, and Delaware (Tr. 195), opted in the wake of the 1844 Plan of Separation to stay with the Northern branch of MEC and to adopt a “middle way” position on slavery, prohibiting slave owning by ministers but refusing to

discipline ordinary members for such behavior. Tr. 196:10-20. In 1861, however, one year after MEC passed a resolution more broadly condemning slavery, “the Baltimore Conference renounced the authority of the General Conference,” creating another “division” in which congregations left MEC “in piecemeal fashion” with many “churches physically separating themselves from the Methodist Episcopal Church.” Tr. 198-200 (Irons). The Northern branch of MEC “did not accept the division by the Baltimore Conference and sought to recoup their lost members and their lost churches by targeting individual congregations” and “convinc[ing] many northern Methodists to rejoin and resubmit to their authority.” Tr. 200-01 (Irons). Many other congregations, however, “reject[ed] these overtures” and for much of the 1860s there were two Baltimore Conferences, each seeking the allegiance of congregations within the former conference. Tr. 201-02 (Irons).

There is no question, however, that none of these actions was taken pursuant to the 1844 Plan of Separation. As Professor Irons explained:

Q Could one make the argument that the division of the Baltimore Conference in 1861 was done pursuant to the 1844 plan of separation?

A No.

Q Why not?

A Well, the most obvious answer is that in 1846 the Baltimore Conference, A, rejected the plan of separation saying it could never divide pursuant to the plan of separation because it disagreed with the very foundations of it, and then just for good measure it voted to stay in the Methodist Episcopal Church North. So it rejects the plan but then anyway votes to remain with the northern branch.

Q To your knowledge, did the Baltimore Conference when it left the Methodist Episcopal Church in 1861 [invoke] the plan of separation?

A No, they did not.

Tr. 202:22-203:17; Tr. 243:17-19 (“Q * * * what relevance, if any, did the 1844 plan of separation have in 1867? A None.”). As discussed below, moreover, it is undisputed that numerous Methodist congregations in the Baltimore Conference successfully invoked the division statute

just months after its adoption, with some voting to remain with the Northern branch and others to align with the Southern branch. Tr. 232:18-233:15, 242:11-244:7 (Irons).

In summary, TEC's historical expert admitted that three of the largest 19th century divisions—the Old School-New School division of the Presbyterians, the Old School division into Northern and Southern branches, and the Methodist Episcopal division into Northern and Southern branches—lacked denominational approval. Moreover, given Professor Mullin's failure to offer testimony about the many other non-Episcopal divisions in the 19th century—including the Methodist division involving the Baltimore Conference that immediately preceded the adoption of § 57-9—it is undisputed that the vast majority of 19th century church splits were non-consensual.

4. Professor Mullin's testimony on whether the Episcopal Church has experienced "divisions" was contrary to his prior public statements and writings, which used the term "division" in the same manner as ordinary Americans in the 19th century and today.

Professor Mullin further acknowledged that various other "separations" (large and small) that resulted in the formation of new organizations were not officially blessed by their former denominations. Tr. 1099, 1102, 1107, 1137, 1139, 1146-49, 1151, 1153. Similarly, he acknowledged that his colleague Professor Russell Richey, who has written "a very nice work on divisions in the Methodist Church," uses the term more broadly than Professor Mullin would. Tr. 1136-37. And although Professor Mullin emphatically denied at trial that the Episcopal Church had ever experienced a "division," he acknowledged on cross examination that his position was inconsistent with this own prior statements and scholarly writings.

For example, Professor Mullin initially claimed that TEC never "divided" in the Civil War, notwithstanding the Northern Episcopal Church's refusal to approve of the formation of a Southern branch. But cross-examination elicited a contrary view:

Q And you would never use the word division to describe what happened during the Civil War with respect to the Episcopal Church, would you?

A I know what you're going to do, sir. And I don't remember what language I used in 1986.

Q You used the word division to describe what happened, did you not?

A I don't read my own work, sir, at least not as carefully as you do.

* * *

Q You said, did you not, in your own book, "When succession and *the division* within the Church between North and South ended this concern, Episcopal Evangelicals often moved closer to the sensibilities concerning slavery shown by their Protestant neighbors."

A That is correct.

Tr. 1129:13-1131:6 (emphasis added). Thus, without hesitation, Professor Mullin used the word "division" in his book to describe the separation between the northern and southern branches of the Episcopal Church.

Of course, now having been retained to offer expert testimony in five separate matters for TEC, Professor Mullin says: "I'd like to revise that word"—"now I . . . would use the word separation." Tr. 1131:19-1132:9. But the fact remains that, before this litigation, he used the term "division" in the same way that everyone else does—to refer to situations where a group of congregations and clergy breaks away from its former denomination and sets up a new polity.

Professor Mullin further admitted that in ordinary parlance people—including himself—would refer to the breakaway of the Reformed Episcopal Church from the Episcopal Church as a "division":

Q. In your view, how many divisions has the Episcopal Church suffered in its long history?

A In my view, none, sir.

Q Professor Mullen, I'd like to hand you what's been marked as Exhibit 293.

* * *

Q This is a more contemporary news article, is it not?

A Yes, sir.

* * *

Q * * * And you are quoted, are you not, as saying, “My sense is that there’s still a lot of anger, frustration and ill will. But the thing you have to understand about the Episcopal Church is that it has been remarkably resilient and it has suffered *very few divisions* in its long history.”

You didn’t say zero divisions, did you, Professor Mullen?

A No, I did not.

Q What divisions did you have in mind when you were talking to this newspaper reporter?

A Well, sir, I must say, I don’t recall. When I talk to a newspaper reporter, I sometimes do not speak as carefully as one speaking to a lawyer like you.

There have been splinter groups, and I will agree with that. There was the Reformed Episcopal schism.

If he would have said, “Do you mean the term division in a technical term,” I would have then probably said, “Well, no, it’s technically not a division the same way that the Presbyterians divided in 1837 or the Methodists divided in 1844, but a new organization emerged from out of the Episcopal Church.”

Q So what happened was that you lapsed to the more common, ordinary meaning of the word division, did you not?

A Yes, sir.

Tr. 1123:14-1125:15 (emphasis added). Thus, TEC’s leading expert admits that when he “lapses to the more common, ordinary meaning of the word, division,” non-consensual church splits—including the departure of the Reformed Episcopal Church from TEC—qualify as a “division.” *Id.*

Finally, Professor Mullin acknowledged that one of the Episcopal Church’s leading historians—Professor Robert Prichard of Virginia Theological Seminary, whom Professor Mullin listed on his bibliography—specifically described the Reformed Episcopal Church’s departure from TEC as a “division” in his respected work on the Church’s history. Tr. 1115:16-1116:6, 1119:11-1120:2.

In short, TEC's own expert witness ultimately confirmed the point made by CANA's expert witnesses, namely, that in ordinary parlance, in 1867 as now, the term "division" does not require the approval of the religious body in which the division occurs.

5. Professor Mullin admitted that he had no knowledge of the common usage of the term "division" in the 19th century, and that his own distinctive reading of that term was a technical historians' view.

Even assuming, *arguendo*, that a handful of the denominational "separations" during the 19th century were approved by the highest denominational authorities, that fact would in no way prove that *most* such splits were consensual, let alone that common usage of the term "division" excluded unapproved separations. Indeed, Professor Mullin drew distinctions among different types of divisions that have no basis in the text of § 57-9. For example, he distinguished between the "great" or "major" divisions of the 19th century and other, smaller "divisions." *E.g.*, Tr. 1101-02, 1161. The following exchange from his cross-examination is instructive:

Q And is it your contention that no self-respecting historian would use the word division to describe what you characterize as a separation?

A I would not say that, sir.

Q So some historians don't have the same distinction that you draw, correct?

A Some historians will talk about this, but I will say that they will usually highlight the great divisions of the Presbyterians, Methodists and Baptists as being distinct.

* * * There are all sorts of separations going on in the 19th Century. And historians will talk about them. But when, in a standard history, they'll talk about the great divisions, they're going to be talking about these divisions between 1837 and 1844 with the Presbyterians—and '45, the Presbyterians and Methodists and Baptists. That's not to say that there were not—the AME came off in 1816, and the AME Zion came off in 1820. But that is a traditional point where historians will say this is an important event in 19th Century American religious history.

Q But historians often would attach the label division to what you would call the not-so-great division, correct?

A I know some who do.

Tr.1101:11-1102:20.

Perhaps historians do view the “great divisions” as “distinct” in some respect, but that does not mean that the “not-so-great divisions” were any less “divisions.” Section 57-9 does not distinguish between “great,” “major,” and other divisions, and it does not support Professor Mullin’s admittedly “distinctive,” “narrow,” and “technical” construction of that term. Tr. 1125-1126; Tr. 1122:6-11; Tr. 1124:19-1125:15.

Most importantly, however, although Professor Mullin suggested that separations were not “divisions” unless formally blessed by the mother church,¹⁵ he readily admitted that he had no knowledge of “common usage” during the 19th century, and thus that his definition of the terms at issue was not based on such usage:

Q And is it your contention that this distinction that you draw between a separation and a division was well-known to the general public in the 19th Century?

A I do not have an understanding of what the general public was. In both the contemporary—in contemporary literature that distinction is being made.

Q So you don’t really know what people—what terms people commonly used in the 19th Century, do you?

A *I know what terms some people used, but I do not know what the public usage was.*

Q And indeed, the public may not draw such a fine distinction between division and separation that you do, correct?

A That is correct.

Tr. 1100 (emphasis added). *Accord* Tr. 1149:11 (“I don’t know about the public at large, sir.”); Tr. 1135 (“Q. And again, you’re talking about experts as opposed to the ordinary people in the mid-19th Century. A. That is correct, sir.”); Tr. 1152:18-1153:7 (contrasting “the historians’ view versus the public’s view” and acknowledging “the fact that you see the word division used in common parlance to describe other smaller separations”); Tr. 1133:9-13 (same).

¹⁵ Tr. 1099 (Mullin) (drawing a “distinction between a separation and what you would attach the label of division to”).

In light of the fact that “the popular, or received import of words, furnishes the general rule for the interpretation of statutes” (*Lawrence*, 210 Va. at 140-41), Mullin’s admission that he knew nothing about “public usage” of the term “division” in the 19th century renders virtually his entire testimony irrelevant. *See also Lewis*, 184 Va. at 72 (looking to ordinary meaning “[a]t the time of enactment of the statute”). Professors Valeri and Irons, by contrast, both testified, based on extensive review of primary source materials, to their familiarity with common usage of the terms at issue during the relevant time period. Tr. 52 (Valeri); Tr. 176-179 (Irons). Thus, the CANA Congregations’ evidence concerning the common meaning of church “divisions” in the 19th century is therefore undisputed.

6. Shortly after its adoption, the division statute was successfully invoked at least 29 times in several Virginia counties, with no evidence that any such division was approved by the denomination.

The CANA Congregations also offered undisputed testimony that many congregations successfully invoked the division statute shortly after its adoption, without any indication that the divisions were approved by their former denominations.

As Professor Irons testified (and no one disputed), numerous 19th century divisions resulted in litigation over local church property, including in Virginia. Tr. 219:16-220:5. The 1860s in particular were years of “[v]ery significant ecclesiastical disorder and competition for the[] [Methodist Baltimore Conference] churches’ allegiance,” and the division of that Conference led to “litigation about the control of church property for over a decade after [1866].” Tr. 202:6-203:4 (Irons). Similarly, it is undisputed that the Presbyterian divisions in the 1860s were not resolved until after the division statute’s adoption, and the Presbyterians too resorted to the courts well after 1867 to resolve issues of property ownership. Tr. 1157:19-1158:1 (Mullin); Tr. 87:7-90:4 (Valeri); Tr. 243 (Irons).

The division statute was thus enacted in a period when ownership of church property was hotly contested, and Professor Irons' review of court records in various Virginia counties (Augusta, Fairfax, Rockbridge, Rockingham) not surprisingly confirmed that between 1867 and 1869 at least 25 Methodist congregations and four Presbyterian congregations invoked the statute. Tr. 220, 225-26, 231, 242-244; Exhs. 95-98, 118-19. Notwithstanding the absence of any evidence of denominational approval, however, the courts without exception ruled for the majority of the congregation. Tr. 220, 230, 232-33 (Irons); CANA Exhs. 95-98, 118-19.

Eighteen of these 29 disputes involved congregations in Augusta County, Virginia, which was located in the Baltimore Conference of the Methodist Episcopal Church and was home to a large number of churches. Tr. 222, 228-30, 242, 243:20-244:1 (Irons); Exhs. 95-98. As discussed above, the Baltimore Conference divided in the 1860s when the Northern branch of the Church (MEC) changed its position on slavery, resulting in the formation of two Baltimore Conferences, respectively affiliated with the Northern and Southern branch (MECS) of the Methodist Episcopal Church. In the wake of the division statute's adoption, therefore, Virginia congregations in the Baltimore Conference region were voting to determine which branch of the Church to join and reporting their votes to the local circuit courts. Tr. 230, 243:13-244:7 (Irons). The congregations' petitions recounted the tallies of the votes, many of which reflected divided congregations, and identified the branch that the congregations voted to join. CANA Exh. 95-98. Most of the Methodist congregations in Augusta County voted to join the Southern branch of the Church, but some, including one black congregation, voted to join the Northern branch. Tr. 230, 241:14-22, 242:11-243:1 (Irons); CANA Exhs. 95-98. Again, there is no evidence that the denomination approved of any of these disaffiliations.

Indeed, as discussed above, it is undisputed that the 1844 Plan of Separation would not have covered the votes of these Baltimore Conference congregations—even if the Plan had been ratified, and even if it had not broken down. Tr. 200-03, 243 (Irons), Tr. 1158 (Mullin). Some of the petitions, moreover, were objected to by the dissenting factions in the congregation. Tr. 241, 230 (Irons). Indeed, one of the most well known and hotly contested Augusta County disputes involved a Methodist congregation in Staunton represented by John Baldwin, Speaker of the Virginia General Assembly's House of Representatives and author of the statute now known as § 57-9. Tr. 221-23, 241 (Irons). As the local newspaper then reported, the congregation that he represented sought, over the objection of the dissenters, "to claim the benefit of [the statute's] protection," namely "to protect local religious congregations who when their church divided" made "[a] choice between the different branches of it, and to allow them in some such cases to take their property with them." Tr. 223:19-224:8 (Irons).

Professor Irons also provided undisputed testimony that four Presbyterian congregations in Augusta County successfully invoked § 57-9. Tr. 243:5-12; Exh. 97-98, 119. These four congregations voted to separate from the Northern branch of the Presbyterian Church (Old School, or PCUSA) to join the Presbyterian Church in the United States (PCUS), the Old School Presbyterian's Southern branch. Tr. 243:5-12 (Irons); Exhs. 97-98, 119. Here, too, in each case the congregation's majority prevailed. Exhs. 97-98, 119. And here too, there is no indication, in any of the court records or related newspaper articles that Professor Irons discussed, that denominational approval was sought, obtained, or even thought necessary for any of these congregations to rely on the statute. Tr. 244:4-12, 224:9-12 (Irons).

In summary, this consistent pattern of local congregations invoking the division statute in contested cases and without any evidence of denominational approval both confirms that the stat-

ute was routinely applied and refutes TEC's argument that a "division" within the meaning of the statute requires such approval. But this is not surprising. The notion that the General Assembly in 1867 would require denominational consent to any "division" flies in the face of the broader historical backdrop. See *Enoch v. Com.*, 141 Va. 411, 434 (1925) (it is the "duty" of courts to consider "history and life of the country"); accord 17 Michie's Jurisprudence, *Statutes* § 39 (2006) (courts appropriately consult "the history of the times"). Virginia had just fought a war over whether individual States had the right to separate from the Union without the Union's consent. Quite apart from the ordinary 19th century meaning of "division"—on which the evidence is undisputed, as discussed above—it is fanciful to suggest that, in the war's immediate aftermath, the pre-Reconstruction General Assembly would have enacted legislation that effectively forbade churches from separating from (typically Northern) denominations and keeping their property without the consent of the highest authorities of the denominations. Yet that is the implication of the position of TEC and the Diocese.

7. Other considerations confirm that the term "division" in § 57-9 is not limited to formally approved denominational splits, and such a reading would render the statute meaningless.

Other considerations preclude reading § 57-9 to apply only to divisions approved by the highest authorities of the denomination. To begin with, the TEC-Diocese interpretation is at odds with the guidance that the Virginia Supreme Court has provided concerning the meaning of § 57-9. As that Court explained in analyzing subpart B of the statute in *Reid v. Gholson*, the type of "division" that is "a prerequisite to relief under 57-9" involves a situation where the disaffiliating parties "have expressed [their] desire to separate from the body of their church, and to rend it into groups," and where some are "excommunicated" or viewed as "apostate" based on the underlying disagreement. 229 Va. 179, 192 (1985). Under this common-sense reading of the stat-

ute, a division exists where (as here) different groups have gone their separate ways over what they deem to be important differences. And there is no reason to think that the Virginia General Assembly intended to define “division” differently for purposes of Parts A and B of the statute. See Sept. 14, 2007, Tr. 39 (directing the parties to address “whether the term division is defined differently in 57-9(A) and 57-9(B)”).

Finally, but perhaps most importantly, the interpretation of § 57-9 advanced by TEC and the Diocese would render the statute useless. First, where the highest authorities of a denomination approve of the church’s division, there is no dispute over property ownership and no need for the “conclusive” rule of ownership that § 57-9 provides. Yet, as discussed above, the historical evidence shows that § 57-9 was adopted for the very purpose of handling such disputes.

Second, even if (as TEC and the Diocese suggest) the meaning of the statute varied from denomination to denomination—*i.e.*, even if the meaning of the statute here turned on how *Episcopalians* defined “division”—the statute, under their reading, could *never* apply to a division in TEC. The reason is that, under the “fundamentally geographic” divisions of dioceses that are authorized by TEC’s canons, no Episcopal congregation would ever be permitted by TEC to vote to determine which diocese it would join. Tr. 899-900 (Douglas) (“Q. * * * So for a congregation in Western Massachusetts to vote to join the diocese in Eastern Massachusetts at the time when they were divided would be a violation of the Episcopal polity, correct? A. Correct, that would not happen.”); Tr. 898:18-899:16 (Douglas) (same). TEC and the Diocese further admit that when the General Convention administers such a “division,” the resulting new dioceses

would not be considered “successor” entities or “branches,” but rather “two new diocese[s].” Tr. 900:9-13 (Douglas).¹⁶

By TEC’s and the Diocese’s own admission, then, the statute would have no application under their canonical definition of “division,” because allowing congregation to choose where to affiliate would violate church canons. In other words, TEC and the Diocese are urging the Court to adopt an interpretation of § 57-9 that would deny the voting rights conferred by the statute. Such a result is not permitted under Virginia law. *See Natrella v. Board of Zoning Appeals*, 231 Va. 451, 461 (1986) (“[t]he rules of statutory interpretation argue against reading any legislative enactment in a manner that will render any portion of it useless, repetitious, or absurd”).

C. The Term “Branch” Is Properly Interpreted to Include the New Entity Created When a Group of Congregations, Clergy, or Members Separates from Its Former Denomination and Formally Reorganizes a Separate Polity, and to the Original Entity from which the Group Separates.

The evidence at trial also conclusively demonstrated that the term “branch” was most commonly understood in mid-19th century America to refer to an offshoot of a denomination

¹⁶ Related testimony from TEC and the Diocese make clear that it would require a *constitutional amendment* for TEC to divide itself up on a non-geographic basis—to break up the church into two or more separate entities. Tr. 1223:7-17 (Beers) (for the General Convention to “divide the Church in some other non-geographic way” would “require a very substantial rearranging of our polity or our system of governance” and “would require Constitutional and canonical changes”); Tr. 896:8-898:13 (Douglas). Thus, even if the TEC-Diocese definition of “division” were not limited to consensual geographic redistricting, they advance a definition of the term that, by their lights, would not have any application to them.

See TEC-Diocese Exh. 1, TEC Canon I.13.1 (“Every Congregation of this Church shall belong to the Church in the Diocese in which its place of worship is situated”); *id.*, TEC Canon I.16 (congregations wishing to affiliate with TEC must have “the consent of the Bishop in whose Diocese it is situate”); *see also* I E. White & J. Dykman, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America* 318-319 (1954) (“Whereas a question may arise, whether a congregation within the diocese of any bishop, or within any State in which there is not any bishop settled, may unite themselves with the Church in any other diocese of State, it is hereby determined and declared that all such unions shall be considered irregular and void; and that every congregation of the Church shall be considered as belonging to the body of the Church of the diocese, or of the State, within the limits of which they dwell or within which there is seated a Church to which they belong”).

