

**IN THE MATTER OF
THE EPISCOPAL CHURCH v. THE RT. REV. WILLIAM H. LOVE**

**CROSS MOTION OF BISHOP LOVE AND BRIEF IN SUPPORT OF
CROSS MOTION AND OPPOSITION TO THE CHURCH'S MOTION**

Cross Motion for Summary Judgment

Bishop Love concurs with the Church that there are no disputed issues as to any material fact, but contends, in opposition to the Church's motion, that those undisputed facts entitle him to summary judgment as a matter of law pursuant to the Constitution and Canons of General Convention. Bishop Love respectfully moves the Hearing Panel, therefore, for the reasons set forth in the supporting brief below, for summary judgment dismissing each of the Church's allegations and vacating the partial restriction on his ministry.

**BRIEF IN OPPOSITION TO CHURCH MOTION AND IN SUPPORT OF
CROSS MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

The controlling issue in this proceeding was succinctly summarized eight years ago after General Convention gave initial approval to rites for same sex blessings. After the Convention one bishop wrote to his diocese:

Where then does that leave us? We are left with a situation in which the mind of this recent Convention appears to be to allow such services. However, The Constitution and The Book of Common Prayer still say something else, and the State of New York sits on the sidelines.¹

(That bishop decided to follow the mind of the Convention rather than the Constitution and the Book of Common Prayer.)

More recently, in its 2015 report to General Convention proposing a change to Canon I.18 the Task Force on the Study of Marriage began its discussion of the canonical history of marriage by noting:

Canonical history in The Episcopal Church is consistent in one respect: canons follow practice. That is, the Church changes and evolves its practice and then amends the canons to reflect the current practice. (2015 Blue Book, p. 552.)

The legal situation described by the bishop in 2012 and the Task Force in 2015 remains essentially the same today. The mind of General Convention and the practices in much of the Church say one thing, but the Constitution and Canons and the Book of Common Prayer say something else.

This is a proceeding in which one of the Church's diocesan bishops is charged with a violation of Church canons. What is relevant, therefore, are the actual terms—as they exist today, not as they may be amended or revised in the future—of the Constitution and Canons and the

¹“Full Marriage Equality,” *The Living Church*, July 19, 2012.

Doctrine, Discipline and Worship of the Church to which all bishops, including Bishop Love, must conform.

The Church devotes much of its brief to the effort to establish through textual analysis and legislative history that Bishop Love's Pastoral Direction was contrary to the intention of Resolution B012 passed by General Convention in 2018. Bishop Love agrees. The question before this Court, however, is not whether Bishop Love acted contrary to the intention of that resolution but whether his issuance of the Pastoral Direction violated the Constitution and Canons of the Church. On this controlling question, the Church spends only the final pages of its brief in strained and erroneous arguments.

We will show below that, first, neither Article X of the Constitution nor Canon II.3.6 provides canonical authorization for Resolution B012 as the Church argues. These canonical provisions apply explicitly only to "proposed revisions of the Book of Common Prayer." Ours is not an obscure or technical interpretation of these provisions, but instead is a fact General Convention and its standing commissions have emphasized repeatedly over the last three decades. Second, Resolution B012 does not authorize a proposed revision of the Book of Common Prayer and was never intended to do so. Third, the Church has made crystal clear through both canonical amendments and disciplinary decisions over the last quarter century that General Convention resolutions that do not effect canonical changes are not part of the "Discipline" of the Church and therefore are not a basis for canonical charges. Notwithstanding the intention of Resolution B012, Bishop Love has not violated Church Discipline. Fourth, Bishop Love has fully conformed to the Worship of the Church. Finally, Bishop Love's Pastoral Direction was necessary to conform to the explicit Doctrine, Discipline and Worship of the Church as set forth in its current constitutional and canonical documents.

I. THE PASTORAL DIRECTION DOES NOT VIOLATE ARTICLE X OR CANON II.3.6

A. Article X and Canon II.3.6 Only Authorize Trial Rites for Proposed Revisions to the Book of Common Prayer

Our starting point is to consider the explicit terms of Article X and Canon II.3.6, which the Church Brief puts forward as the canonical basis for Resolution B012. It is manifest that these provisions apply only to “a proposed revision of the Book of Common Prayer.” Article X permits General Convention to:

Authorize for trial use throughout this Church, as an alternative at any time or times to the established Book of Common Prayer or to any section or Office thereof, a proposed revision of the whole Book or of any portion thereof, duly undertaken by the General Convention. (Emphasis added.)

Similarly, Canon II.3.6 provides:

Whenever the General Convention, pursuant to Article X of the Constitution, shall authorize for trial use a proposed revision of the Book of Common Prayer, or of a portion or portions thereof, the enabling Resolution shall specify the period of such trial use, the precise text thereof, and any special terms or conditions under which such trial uses shall be carried out including translation. (Emphasis added.)

Neither of these provisions, therefore, is applicable to rites, trial or otherwise, that are not “proposed revisions” of all or part of the Book of Common Prayer.

This is not a technical or tendentious interpretation invented for this proceeding. General Convention itself has recognized the limited scope of these canonical provisions repeatedly in recent years and on several occasions has considered expanding the constitutional authority to approve additional rites beyond Article X’s restriction to “proposed revision[s] to the Book of Common Prayer.” The accepted understanding of Article X as it now stands was summarized in 2015 by the Standing Commission on Liturgy and Music in proposing a constitutional

amendment to Article X that would provide new constitutional authority for supplemental rites other than those offered as proposed revisions to the Book of Common Prayer:

The Constitution allows the General Convention to authorize alternative forms of worship only for trial use as a proposed revision of the Book of Common Prayer. Since the 1979 Book of Common Prayer was adopted, alternative forms of worship in the Enriching Our Worship series and in Liturgical Resources 1 have been authorized, even though these were not designated for trial use as a proposed revision of the BCP. In addition, a number of congregations are experimenting with other new liturgical forms. This amendment would create a clear, constitutional basis for experimental liturgical reforms that are not intended for trial use as a proposed revision of the Book of Common Prayer, while ensuring common prayer through the use of authorized liturgical materials. (2015 Blue Book, p. 418; emphasis added.)

Although General Convention has for many years authorized various supplemental rites, none of these has constitutional or canonical status. The SCLM's proposed constitutional amendment was designed to "create" a constitutional basis for these rites, but that amendment failed to pass.

In fact, General Convention has recognized the limited scope of Article X repeatedly over the last three decades:

- In 1991 General Convention made a first attempt to create a constitutional basis for supplemental rites by passing a first reading of a constitutional amendment to Article X to authorize General Convention to "provide for limited use for other forms of worship on an experimental basis for such periods of time and upon such terms and conditions as the General Convention may provide." In 1994, however, the second reading of the proposed amendment was rejected by a large margin. (1991-A121; 1994-A016.)
- In 1997 General Convention tackled the issue again by passing a resolution asking the SCLM and the Standing Commission on Constitution and Canons jointly "to submit to the 73rd General Convention for first reading an amendment to the Constitution of this

Church to add to Article X an authorization for preparation and use of additional liturgical materials.” (1997-C021; emphasis added.)

- In 2000, the two standing commissions submitted as requested a proposed constitutional amendment to Article X to authorize General Convention to “provide for use of other forms for the renewal and enrichment of the common worship of this church for such periods of time and upon such terms and conditions as the General Convention may provide.” Once again, this proposed amendment passed a first reading in 2000 but was rejected when considered on the second reading in 2003. (2000-A132; 2003-A108.)
- In 2006 the General Convention tried again. It passed a resolution inviting “bishops and the larger church into dialogue about the relations between local liturgical initiatives and ordered authority” and instructing the two standing commissions once again to “examine canons and rubrics that govern the development and use of liturgical materials and propose amendments authorizing appropriate local and regional liturgical initiatives.” (2006-A078; emphasis added.)
- In 2015, a proposed amendment to Article X identical to that first attempted in 2000 was again considered by General Convention. It passed the House of Bishops with an amendment making use of the supplemental rites subject to the approval of the diocesan bishop, but the House of Deputies then rejected the amendment. (2015-A066.)

The conclusion is inescapable: Article X (and therefore Canon II.3.6) applies “only for trial use as a proposed revision of the Book of Common Prayer” and any constitutional authority to provide for other supplemental rites must be “created” or “added” through “amendments” to Article X as it now reads. This does not mean that other rites have not been approved by General

Convention over the years; it means only that those rites are extra-canonical and have not been authorized through the exercise of General Convention's Article X authority.

B. Resolution B012 Was Not a “Proposed Revision” of the Book of Common Prayer

The legislative record is clear that the rites authorized in B012 were not offered as a proposed revision to the Book of Common Prayer. Resolution B012 was offered as a substitute for the resolution (2018-A085) that had been proposed by the special Task Force on the Study of Marriage created to make recommendations on marriage rites to the 2018 Convention. The Task Force's resolution explicitly proposed to “authorize for trial use as additions to The Book of Common Prayer (to be inserted following page 438)” the rites that were later included in B012. Resolution B012's distinctive feature was to delete this language referring to additions to the Book of Common Prayer and instead simply authorize them as supplemental rites for trial use and publication in “Liturgical Resources 2.”

It seems to have been understood by everyone involved with Resolution B012 that one of the primary purposes of the substitute resolution was to remove the proposal that the rites be considered as a proposed revision to the Book of Common Prayer. In offering Resolution B012 its authors stated that “Resolution B012 continues to authorize the two Trial Use Marriage Rites first authorized in 2015 without time limit and without seeking a revision of the 1979 Book of Common Prayer.” In a Q and A accompanying their proposal, they stated:

Q: Are you proposing that these rites become part of the Book of Common Prayer?

A: No, at least not now. Our proposal differs in this way from that of the Task Force on the Study of Marriage, which does propose moving toward prayer book revision (Resolution A085). They propose to present the Trial Use rites now as prayer book amendments. This would need to pass again in 2021 before attaining Prayer Book status.

But authorizing Trial Use rites is not the same thing as proposing Prayer Book revision. In order to become part of the Book of Common Prayer, a resolution would need to

propose that they be adopted as a prayer book amendment, be sent to diocesan conventions for discussion, and then pass again on a second reading at the next General Convention. Our resolution does not propose any of that, but instead simply extends the period of Trial Use.² (Emphasis added.)

The resolution's proponents went on to outline many problems with making the rites a proposed revision to the Book of Common Prayer.

The effect of this fundamental change to the Task Force's proposed resolution—changing the rites from a proposed revision to the Book of Common Prayer to supplemental trial rites—was widely publicized and understood. The Living Church reported that the chair of the Task Force stated: “Resolution B012 offers open-ended trial use without any eventual amendment of the Book of Common Prayer. Providing the liturgies for marriage for trial use in this manner relegates the liturgies for marriages of same-sex couples to perpetual second-class status.” Similarly, The Living Church quoted the Rev. Canon Susan Russell, a task force member, as saying this resolution “consign[s] marriage for same-sex couples to perpetual second-class trial use status.”³

The Episcopal News Service described Resolution B012 as follows: “the original B012 would have continued trial use of the two trial-use marriage rites without a time limit and without seeking a revision of the prayer book.”⁴ Although B012 was heavily amended on the floor of the Convention before passing, this feature was not changed.

To conclude, this review of the canonical status of B012 demonstrates the following:

² “Marriage for the Whole Church, Resolution B012, Proposed for General Convention,” Press Release, Episcopal Diocese of Long Island, June 28, 2018.

³ Kirk Petersen, “Doubts Greet Resolution B012,” *The Living Church*, July 3, 2018.

⁴ Mary Frances Schjonberg, “General Convention Moves One Step Closer Toward Sacramental Marriage Equality,” *Episcopal News Service*, July 9, 2018.

- Article X of the Constitution and Canon II.3.6 “authorize alternative forms of worship only for trial use as a proposed revision of the Book of Common Prayer” (SCLM Report, 2015 Blue Book, p. 418.)
- Resolution B012 was explicitly offered by its proponents as a way to authorize the same sex marriage rites “without seeking a revision of the 1979 Book of Common Prayer.” “Authorizing Trial Use rites is not the same thing as proposing Prayer Book revision.”
- Accordingly, the rites authorized in B012 are extra-canonical and outside the canonical mandates of Article X and Canon II.3.6. The Pastoral Direction did not violate those mandates by precluding use of these rites in the diocese of Albany.⁵

II. RESOLUTION B012 IS NOT PART OF THE DISCIPLINE OF THE CHURCH

As noted at the outset, Bishop Love acknowledges that his Pastoral Directive was contrary to the intention of Resolution B012. We demonstrated above why this fact does not constitute a violation of Article X or Canon II.3.6. We now turn to the question whether acting contrary to the resolution is itself a failure to conform to the Discipline of the Church and therefore a canonical violation apart from Article X.

The term “Discipline” as used in the Declaration of Conformity is not a vague or elastic concept. To the contrary, it has been given a precise canonical definition as a result of controversies in the 1990s, particularly the trial of Bishop Walter Righter.

⁵The original proponents of B012 were clear that they were not proposing a revision to the Book of Common Prayer, but they incorporated the prefatory recitals of the original proposed resolution and were under the erroneous impression that their resolution was authorized by Article X. As we demonstrated above that view is contrary both to the plain text of the canons and the understanding of General Convention repeatedly expressed over the last thirty years when it has considered this precise issue.

One of the primary issues in the trial of Bishop Righter was the extent to which resolutions of General Convention are canonically binding on all members of the clergy. With this issue looming large in the Church a resolution submitted to the 1994 General Convention sought to clarify the canonical status of resolutions by providing that

those [General Convention resolutions] which amend the Constitution or Canons or state their intent to interpret and/or apply any provision of the Constitution or Canons of this Church shall be deemed binding upon the Church in the same manner and to the same degree as Canon Law and to be part of the Discipline of this Church to which ordinands must promise conformity. (1994-B005.)

This 1994 resolution was referred to the Standing Commission on Constitution and Canons, which considered it and reported back to the 1997 General Convention.

In the interim, in 1996, the Court for the Trial of a Bishop in the *Righter* case also dealt with the issue of the extent to which General Convention resolutions are binding. In that case, Bishop Righter was charged with violating the doctrine of the Church by ordaining to the priesthood a noncelibate homosexual. The charge against Bishop Righter was that he violated a General Convention resolution that stated “we believe it is not appropriate for this Church to ordain a practicing homosexual or any person who is engaged in heterosexual relationships outside of marriage.” The court addressed the issue of the effect of violating a resolution of General Convention as follows:

Some doctrinal teachings of the Church have been found to be so important to the ordering of the life of the Church that they have been made mandatory, with disciplinary consequences defined in canon law for failure to conform....No such written constraint is contained in the Canons that forbids the ordination of persons because of homosexuality, in orientation or in practice. In light of the controversy concerning the Church's teachings about homosexuality over the past decade and a half, it is significant that no Canon, positive or negative, has been passed by General Convention with respect to such ordinations. We do not find a constraint in the Canons that proscribes Respondent's action as charged in Count 2.... *Stanton v. Righter*, Court for the Trial of a Bishop, p. 8 (1996).

The complainants in the *Righter* case had argued that a resolution of General Convention itself would constitute just such full and clear authority. But the court found the resolution in that case to be advisory, not binding:

This is not to say that Resolution A-53s does not hold up traditional teachings of the Church which should be respected and taught as guides for Christian living even when under serious discussion and proposed reinterpretation. We agree that it does. Yet it does not set forth a clear constraint which allows canonical disciplinary action. The Church may forbid what has been done here, but not by a recommendatory resolution. *Id.*, p. 9.

We cite the *Righter* decision not to suggest that the resolution at issue in the *Righter* case is comparable in all respects to B012, but to provide the context for General Convention's decisive legislative answer to this question concerning the canonical effect of resolutions.

The year after the *Righter* decision the 1997 General Convention addressed the issue of the extent to which General Convention resolutions are binding by amending Title IV to make explicit what content is contained in the "Doctrine" and "Discipline" of the Church to which ordinands pledge conformity and to which they are subject to canonical discipline under Title IV. In doing so the 1997 General Convention considered but rejected the broad language of the proposed 1994 resolution that would have made interpretations of the canons in General Convention resolutions binding on the Church. In its report to the Convention the Standing Commission on Constitution and Canons concluded:

We were also concerned that the effect of the proposal would be to give resolutions which state an intent to apply or interpret Canon Law -but which are not amendments thereto -the same status as Canon Law. Amendments to the Constitution or Canons are treated by General Convention with the utmost seriousness, and may be adopted only after proper procedures and consideration. The proposed resolution would allow other resolutions to be as binding as these, but without passing through the same scrutiny by General Convention.

Finally, SCCC was concerned about the impact of the proposed resolution on the General Convention legislative process. Resolutions would have entirely different consequences

depending on whether certain magic words -stating an intent to interpret or apply Canon Law -are included. While not necessarily bad, such a process would radically change the consideration of resolutions, depending on whether or not the distinctive language were included. (1997 Blue Book, p. 20.)

Instead, mindful of the issues in the Righter case, the Commission proposed and General Convention adopted amendments to Title IV to make explicit which Church instruments and resolutions can provide a basis for discipline under Title IV. These definitions were retained in the revised Title IV adopted in 2009 and remain part of the canon law of the Church today.

There can be no question as to the purpose of these definitions added to Title IV: to identify which actions of General Convention are binding and to provide clarity through legislation as to the possible sources of Title IV discipline. The Standing Commission explained the purpose of these definitions as follows:

The Commission felt that one intent of the proposed resolution -to provide guidance as to which actions of General Convention were binding and enforceable as a matter of Title IV discipline -is not only important but, in light of recent Presentment proceedings, necessary. As a result of the experience of the church in dealing with those Presentment proceedings, the Commission felt that it is possible to provide that guidance by legislating, in general terms, the sources of "Discipline" as that term is used in the Title IV context.

It is also apparent that Discipline is frequently interwoven with Doctrine in the application of Title IV. Because of the very careful work done in connection with the Presentment of The Rt. Rev. Walter Righter, and the cooperation and assistance that the Commission received from many other persons learned in the subject, we felt it was possible to offer some guidance as to the sources of "Doctrine" as well. (Id.)

As a result of these controversies in the 1990s, the extent to which various instruments, resolutions and pronouncements of Church bodies are binding on members of the clergy for disciplinary purposes is a matter of unambiguous canon law. Canon IV.2 now contains a precise definition of "Discipline of the Church:"

Discipline of the Church shall be found in the Constitution, the Canons and the Rubrics and the Ordinal of the Book of Common Prayer.

As already noted, the purpose of this definition was stated explicitly at the time it was added to Title IV in 1997: “to provide guidance as to which actions of General Convention were binding and enforceable as a matter of Title IV discipline.” The consequence of this definition, plainly intended by General Convention, is that the only resolutions of General Convention that can be a source of discipline under Title IV are those that amend the Constitution and Canons, Rubrics or Ordinal. It must be emphasized again that Bishop Righter had just been acquitted in a disciplinary trial that turned on the question of which resolutions of General Convention are binding. The legislative answer to that question, confirming the decision of the *Righter* court, is found in the Canon IV.2 definition.

It is obvious that Resolution B012 did not amend the Constitution, Canons, Rubrics or Ordinal. Therefore, it cannot be an independent source of canonical discipline, whatever its intent and effect might be otherwise.

III. BISHOP LOVE CONFORMED TO THE DOCTRINE AND DISCIPLINE OF THE CHURCH AND IMPLEMENTED AND ENFORCED CHURCH CANONS THROUGH HIS PASTORAL DIRECTION

Most of the Church Brief is devoted to arguing that Bishop Love violated Resolution B012. We have just shown that violation of the resolution could not provide a basis for disciplinary charges because it was not authorized by Article X or Canon II.3.6 and was not otherwise part of Church Discipline. We will demonstrate in this section that Bishop Love’s Pastoral Direction fully conformed to the Constitution and Canons and the Book of Common Prayer and implemented and enforced Church Doctrine and Discipline.

A. The Current Doctrine and Discipline of the Church Continue to Prohibit Use of Same Sex Marriage Rites

Although the intention of Resolution B012 unquestionably was to authorize same sex marriage rites in the Church that resolution effected no change to the Constitution and Canons, the Book of Common Prayer or the Doctrine and Discipline of the Church as canonically defined. Indeed, the current Doctrine and Discipline of the Church continues to preclude the use of same sex marriage rites, notwithstanding the intention of Resolution B012 and the 2015 amendment to the marriage canon, I.18, that made that canon gender neutral but did not revise any other canons.

Both General Convention itself and the proponents of same sex marriage have long recognized that there were multiple canonical impediments to the use of rites for same sex marriage. When such rites were first approved by General Convention in 2012 by authorizing “Liturgical Resources 1,” the very materials approved noted that both the Rubrics and Canon I.18 contained canonical prohibitions to same sex marriage:

Both the rubrics of the Book of Common Prayer and Canon I.18 reserve the rite of Holy Matrimony to a man and a woman. This is not subject to the discretion of either a bishop or priest. If the Bishop Diocesan has authorized use of a liturgy for Blessings, the priest may celebrate that. And, unless directed not to do so by the Bishop Diocesan, the priest may officiate at the civil marriage. However, the structure and text of parts of Canon I.18 may be interpreted as not authorizing a member of the clergy to officiate at a civil marriage where the couple is not eligible for Holy Matrimony, e.g., a civil marriage of a same-gender couple.

A bishop, priest, or deacon who violates the rubrics or the Canon risks disciplinary action under Title IV. (2012-A049; 2012 Blue Book, p. 220; emphasis added.)

The Rubric referenced here is that on page 422 of the Book of Common Prayer: “Christian marriage is a solemn and public covenant between a man and a woman in the presence of God.” Former Canon I.18 tracked this language from the Rubric until it was amended in 2015, but that amendment did nothing to change the Rubric.

Even after the impediment in Canon I.18 was removed in 2015, the Task Force on the Study of Marriage reported to General Convention in 2018 that the prohibitions in the Rubrics and Church Doctrine remained. In addition to proposing that the same sex marriage rites be added as a proposed revision to the Book of Common Prayer, the Task Force also concluded: “additional concurrent changes in the rubrics, the prefaces and the catechism are needed to make clear that marriage is available to any couple.” (2018 Blue Book, p. 792.)⁶

The Task Force proposed remedying this defect by changing the Rubrics and Catechism so that the new rites would then conform to the (to be revised) Church Doctrine. In the Task Force’s proposed resolution, the definition of Christian marriage in the Rubric would be changed from “a man and a woman” to “two people.” And the proposed revision to the Catechism would read:

Q. What is Holy Matrimony?

A. Holy Matrimony is Christian marriage, in which two (2) people enter into a life-long union, make their vows before God and the Church, and receive the grace and blessing of God to help them fulfill their vows. (2018 Resolution A085; 2018 Blue Book, pp. 793-94.)

But in Resolution B012 itself General Convention refused to enact these proposals. As noted above, Resolution B012 authorized the trial rites not for inclusion in the Book of Common Prayer as the Task Force had proposed, but instead for inclusion in Liturgical Resources 2 following the precedent of the 2015 General Convention. And rather than make the necessary

⁶The Catechism defines marriage as a life-long union between a woman and a man. (BCP, p. 861.) The Catechism is part of the Doctrine of the Church as defined by Canon IV.2. Conformity to Church Doctrine, promised in ordination vows, is made canonically mandatory in Canon IV.4. This is discussed in Section III.C below.

amendments to the Catechism and Rubrics to remove the other canonical impediments to same sex marriage, B012 instead resolved that:

the material prepared by the TFSSM with regard to paragraph one of “Concerning the Service” of Marriage, the proper prefaces for Marriage and the Catechism be referred to the SCLM for serious consideration as they engage in the process of revision of the Book of Common Prayer. (2018-B012, par. 5.)

Therefore, the actions of General Convention and its committees confirm that multiple canonical impediments remain for the use of same sex marriage rites, including canons requiring conformity to the Rubrics of the Book of Common Prayer, conformity to the Doctrine of the Church as canonically defined and conformity to diocesan as well as general canons.

B. Church Canons Require Conformity to the Rubrics of the Book of Common Prayer

As already noted, the Rubrics explicitly define Christian marriage as between a man and a woman and therefore continue to constitute an independent canonical impediment to use of same sex marriage rites. Indeed, conformity to the Rubrics of the Book of Common Prayer is canonically mandated in multiple canons.

First, Canon IV.4.1(b) requires that all clergy “conform to the Rubrics of the Book of Common Prayer.” A breach of this canon makes clergy subject to Title IV discipline pursuant to Canon IV.3.2.⁷

Second, Canon III.9.6(a) makes a rector’s authority over worship “subject to the Rubrics of the Book of Common Prayer, the Constitution and Canons of this Church, and the pastoral

⁷ Canon IV.2 reads: “A Member of the Clergy shall be accountable for any breach of the Standards of Conduct set forth in Canon IV.4.”

direction of the Bishop.”⁸ Canon III.9.6 thus provides a separate canonical barrier to the use of same sex marriage rites since it requires compliance with the Rubrics and Church Doctrine in worship. Violation of this canon makes a member of clergy subject to Title IV discipline pursuant to Canon IV.3.1(a).⁹

Canon III.9.6 is especially pertinent to Resolution B012. The final amendment to that oft amended resolution was to make explicit the intention of B012 not to change the provisions of Canon III.9.6. (B012, resolve 7.) The bishop chairing the legislative committee considering this resolution said the addition was made “simply to make clear as we can that this resolution is not in conflict with the provisions of the ministry canons of the church regarding the authority of rector or priest in charge of congregations.”¹⁰ But Canon III.9.6 requires compliance with the Rubrics and Church Doctrine expressed in the Catechism, which B012 elsewhere refused to alter. Moreover, Bishop Love’s Pastoral Direction was expressly issued pursuant to this very canon which makes parish worship subject to the pastoral direction of the bishop. In effect, the Pastoral Direction did nothing more than require compliance with the terms of Canon III.9.6.

The final place (besides Canon IV.4.1(b) and Canon III.9.6) that there is a canonical mandate to conform to the Rubrics is the requirement in Canon IV.4.1(c) that clergy “abide by the promises and vows made when ordained.” Canon IV.2 defines the Rubrics as part of Church

⁸ The relevant paragraph of Canon III.9.6(a) reads: “The Rector or Priest-in-Charge shall have full authority and responsibility for the conduct of the worship and the spiritual jurisdiction of the Parish, subject to the Rubrics of the Book of Common Prayer, the Constitution and Canons of this Church, and the pastoral direction of the Bishop.”

⁹ Canon IV.3.1 reads: “A Member of the Clergy shall be subject to proceedings under this Title for: (a) knowingly violating or attempting to violate, directly or through the acts of another person, the Constitution or Canons of the Church or of any Diocese.”

¹⁰ Mary Frances Schjonberg, “Marriage Rites Resolution Heading Back to House of Deputies,” *Episcopal News Service*, July 11, 2018.

Discipline.¹¹ Canon IV.4.1(c) thus makes conformity to Church Discipline, including the Rubrics, canonically mandatory.

C. Church Canons Require Conformity to the Doctrine of the Church

Church Doctrine also continues to constitute an independent canonical impediment to the use of same sex marriage rites. Because this is a disciplinary proceeding in which Bishop Love is charged with canonical violations, we have focused to this point on Church Discipline and on answering the canonical charges in the Church's Brief. But what was uppermost in Bishop Love's decision to issue the Pastoral Direction was not the detailed canonical provisions we have analyzed above, but instead was his duty expressed in the Declaration of Conformity and elsewhere in his ordination vows to guard and conform to the Doctrine of the Church.¹²

As we have already discussed in the context of Church Discipline, the fallout from the *Righter* case led General Convention in 1997 to include a precise definition of Church Doctrine in Title IV of the Canons:

Doctrine shall mean the basic and essential teachings of the Church and is to be found in the Canon of Holy Scripture as understood in the Apostles and Nicene Creeds and in the sacramental rites, the Ordinal and Catechism of the Book of Common Prayer. (Canon IV.2.)

Significantly in light of the charges against Bishop Love, two of these canonically defined sources of Church Doctrine, the sacramental rites of the Book of Common Prayer and the Catechism, define Christian marriage. The rite of Holy Matrimony states that Christian

¹¹ Canon IV.2 reads in part: "Discipline of the Church shall be found in the Constitution, the Canons and the Rubrics and the Ordinal of the Book of Common Prayer." See pp. 8-12 above.

¹² The charge that Bishop Love failed to conform to the Doctrine of the Church was included in the Statement of Alleged Offense, but apparently is no longer being pressed by the Church. In any event, that charge is refuted in this section.

marriage is “the joining together of this man and this woman in Holy Matrimony” “until we are parted by death”. BCP 423,427. Another source of Church Doctrine specified in Canon IV.2, the Catechism, defines the sacramental rite of Holy Matrimony as follows:

Holy Matrimony is Christian marriage, in which the woman and man enter into a life-long union, make their vows before God and the Church, and receive the grace and blessing of God to help them fulfill their vows. (BCP, p. 861.)

This definition of Christian marriage as the union of man and woman is the only definition of marriage in the sources of Church Doctrine specified by the Church’s current canon law.

It is readily apparent that neither General Convention resolutions nor trial rites are part of the Doctrine of the Church as defined in Canon IV.2. General Convention resolutions were intentionally omitted from the canonical definition (as the legislative history of the definitions discussed above in Section II demonstrates). And the sacramental rites identified in Canon IV.2 are those “of the Book of Common Prayer,” not rites in other compilations or trial rites in a proposed revision, which are constitutionally designated in Article X as “an alternative... to the established Book of Common Prayer.”

As noted often above, the trial rites authorized in Resolution B012 were not proposed for inclusion in the Book of Common Prayer. But even if they had been, they could not have changed Church Doctrine so long as they remained trial rites. Under Article X of the Constitution those rites remain (even after authorization) only a “proposed revision” to the Book of Common Prayer that can be used on a trial basis as an “alternative” to, not a part of, the Book of Common Prayer. Therefore, even proposed revisions have no doctrinal authority and could

not have such authority under Canon IV.2 until formally incorporated into the Book of Common Prayer.

It is clear from the canonical definition of Church Doctrine that no liturgical material outside the Book of Common Prayer can ever revise the Doctrine of the Church, especially when authorized merely for “trial use.” The manifest intent of the trial rites provision in Article X is to permit experimentation with different liturgical formulations consistent with existing Church Doctrine through the authorization of trial rites, not to permit the revision (much less the “trial” revision) of Church Doctrine itself. The notion of “trial doctrine” is a theological (and canonical) absurdity.

As noted above, the Task Force on the Study of Marriage recognized that Church Doctrine had to be changed to permit same sex marriages. It not only proposed that the new rites be incorporated into to the Book of Common Prayer (thereby changing Church Doctrine), it also reported to General Convention that “additional concurrent changes in the rubrics, the prefaces and the catechism are needed to make clear that marriage is available to any couple.” (2018 Blue Book, p. 792.) But in Resolution B012 itself General Convention refused the proposal to change Church Doctrine.

It is this unchanged Doctrine to which Bishop Love has conformed and to which his Pastoral Direction instructed diocesan clergy to conform. Failure to conform to the Doctrine of the Church is, of course, a violation of “the promises and vows made when ordained” and a violation of Canon IV.4.1(c). The current Doctrine of the Church, therefore, is yet another canonical prohibition on the use of same sex marriage rites.

D. Church Canons Require Conformity to Diocesan Canons

Canon IV.3.1(a) requires that all clergy refrain from violating “directly or through the acts of another person, the Constitution or Canons of the Church or of any Diocese.” On its face, Canon IV.3 requires compliance with Albany Canon 16, one of the “Canons of the Church or of any Diocese.” (Albany Canon 16, quoted in full on pp. 6-7 of the Church Brief, does not permit same sex marriages in the Diocese of Albany.)

The Church Brief does not mention Canon IV.3, but instead argues that Albany Canon 16 “directly conflicts” with Canon I.18 and that Bishop Love “has effectively sought to repeal” Canon I.18 within the Diocese of Albany. (Church Brief at 16.) But even a cursory review of Canon I.18 demonstrates that there is no mandate whatsoever in Canon I.18 regarding same sex marriage rites. It simply adopted gender-neutral language for the general marriage canon, thereby removing one canonical impediment to same sex marriage rites, but neither mandating such rites nor even attempting to remove the numerous other canonical prohibitions that exist elsewhere in the general canons and that we surveyed above.

Thus, the Church is simply mistaken when it states in its Brief that since the revision of Canon I.18 in 2015 “the Canons of the General Convention no longer have limited the applicability of the sacramental rite of marriage to unions of a man and a woman.” (Church Brief at 16.) The revision to Canon I.18 removed the canonical prohibition on same sex marriage that was previously stated in that canon, but it did nothing to remove other canonical barriers, including the canonical requirements to conform to the Rubrics and Doctrine of the Church in Canons III.9.6 and IV.4.

The purposeful decision of General Convention in 2018 to leave the Rubrics and Church Doctrine unchanged—despite the recognition that “additional concurrent changes in the rubrics, the prefaces and the catechism are needed to make clear that marriage is available to any couple”—demonstrates the fundamental flaw in the Church’s argument. No one argued in 2015 or 2018 that the permissive provisions in the revised Canon I.18 “repealed” (or were repealed by) the Rubrics or Church Doctrine. Indeed, the Task Force reported that this remained a problem that still needed fixing in 2018.

As noted, Albany Canon 16 restates and implements the stated Doctrine of the Church as articulated in the sacramental rites of the Book of Common Prayer, the Rubrics and the Catechism, all of which are canonically mandated by Canons III.9.6 and IV.4. Just as the permissive provisions of Canon I.18 do not repeal or nullify mandatory conformity to Church Doctrine and Rubrics, neither do they “directly conflict” with Albany Canon 16 which implements the latter.

The actions of General Convention itself demonstrate that Canon I.18 is not in “direct conflict” with a bishop’s refusal to permit same sex marriage rites. On the same day it amended Canon I.18 General Convention passed Resolution 2015-A054 that expressly made the use of such rites subject to the approval of the diocesan bishop. In the three years between 2015 and 2018 Bishop Love enforced Albany Canon 16, but no one charged him with a violation of Canon I.18 or with “repealing” it in the diocese. What changed in 2018 was neither Albany Canon 16 nor Canon I.18, but Resolution B012. But as we have now stated repeatedly that resolution was extra-canonical and effected no canonical changes. The attempt to discern “direct conflict” between Albany Canon 16 and Canon I.18, which co-existed side-by-side for three years before Resolution B012, is merely an effort to find a canonical violation—necessary for a Title IV

proceeding—by reading the intentions of the extra-canonical resolution back into the pre-existing canon.

In any event, far from repealing the revised Canon I.18 the Diocese of Albany has implemented it for all marriages in the diocese since 2015. One can easily lose sight of the fact that this is the marriage canon for the Church. The change to gender-neutral language, although controversial, is only one part of the canon, which continues to be used in the Diocese of Albany.¹³

E. Resolution B012 Is Unlawful Insofar as It Invites Church Clergy to Violate the Doctrine and Discipline of the Church and Attempts to Nullify the Canonical Authority of Diocesan Bishops

To summarize:

- General Convention and its committees have long recognized that there are numerous canonical and doctrinal prohibitions on the use of same sex marriage rites in addition to former Canon I.18.
- These canonical prohibitions include requirements to conform to the Rubrics and Doctrine of the Church.
- Albany Canon 16 and Bishop Love’s Pastoral Direction implemented and enforced these general canons.
- Title IV itself requires compliance with diocesan canons.
- The Pastoral Direction is authorized by Canon III.9.6 and does nothing more than require compliance with that canon. In passing Resolution B012 General

¹³ Other dioceses have canons similar to Albany Canon 16. The Church argues that diocesan canons cannot “take precedence” over general canons. (Brief at 16-17.) One need not address this issue here because General Convention has not at present enacted any canon incompatible with these diocesan canons, which continue to reflect the current Doctrine of the Church and general canons other than Canon I.18.

Convention made it as “clear as we can that this resolution is not in conflict with the provisions of the ministry canons of the church regarding the authority of rector or priest in charge of congregations.”

- Resolution B012 itself effected no canonical or doctrinal changes.

The conclusion is inescapable that Resolution B012 invited canonical disobedience and nonconformity to the stated Doctrine and Discipline of the Church. To be sure, Bishop Love declined this invitation, but that is not a canonical offense.

In addition, the extra-canonical Resolution B012 attempts to mandate the relinquishment of episcopal authority by the diocesan bishop in violation of Article II.3 of the Constitution and Canon II.12.3(3). These canons restrict the episcopal ministry of a bishop to the diocese in which elected unless permission is obtained to minister in another diocese from the bishop exercising jurisdiction there.¹⁴ As The Episcopal Church has often noted in recent years this fundamental tenet of episcopal governance dates from the ancient ecumenical councils of the Christian church. Although Resolution B012 implicitly acknowledges this foundational principle, the resolution attempts to circumvent it by purporting to require Bishop Love (and any others who would enforce the stated Doctrine and Discipline of the Church) to relinquish his episcopal authority over those in the diocese who disagree with his position and permit another bishop to minister in the diocese. But mandated “permission” (on threat of disciplinary charges)

¹⁴ Art. II.3 reads: “A Bishop shall confine the exercise of such office to the Diocese in which elected, unless requested to perform episcopal acts in another Diocese by the Ecclesiastical Authority thereof, or unless authorized by the House of Bishops, or by the Presiding Bishop by its direction, to act temporarily in case of need within any territory not yet organized into Dioceses of this Church.”
Canon III.12.3(e) reads: “No Bishop shall perform episcopal acts or officiate by preaching, ministering the Sacraments, or holding any public service in a Diocese other than that in which the Bishop is canonically resident, without permission or a license to perform occasional public services from the Ecclesiastical Authority of the Diocese in which the Bishop desires to officiate or perform episcopal acts.”

is not permission in any meaningful sense; instead the mandate is effectively the elimination of the permission requirement. The principle of episcopal governance is gravely jeopardized and the authority of the diocesan bishop undermined when a single General Convention can require by mere resolution the permission necessary for one bishop to enter the diocese of another. This is a dangerous precedent.¹⁵

IV. BISHOP LOVE HAS CONFORMED TO THE WORSHIP OF THE CHURCH

Unlike the other terms of the Declaration of Conformity, the term “Worship” is not defined in the definitions of Title IV. Instead, it is defined by extension throughout the canons. The starting point is Article X of the Constitution.

The Book of Common Prayer, as now established or hereafter amended by the authority of this Church, shall be in use in all the Dioceses of this Church. No alteration thereof or addition thereto shall be made unless [amended or authorized in accordance with the provisions of Article X or falling within the proviso recognizing the authority of bishops to approve special forms of worship].

The plain meaning of this article is that worship in the Church consists of use of (i) the Book of Common Prayer, (ii) proposed revisions of the Book of Common Prayer approved by General Convention; (iii) changes in the lessons and psalms approved by General Convention; and (iv) “special forms of worship” approved by the bishop.

¹⁵ Resolution B012 was heavily amended on the floor and has several internal inconsistencies. Bishop Love’s position is that B012 was not passed pursuant to Article X and is not otherwise part of the Discipline of the Church. Therefore, the exact terms and inconsistencies in B012 are not pertinent to his defense. If, however, B012 were thought to be authorized by Article X, those precise terms might loom large in this proceeding. Moreover, the trial usage that can be constitutionally authorized pursuant to Article X must be optional: the trial rites can only be authorized as an “alternative” to the Book of Common Prayer. An attempt to make trial rites mandatory would exceed the authority defined in Article X. Again, this should not be relevant in this proceeding since B012 was not authorized by Article X.

The Church's official commentary on its Constitution and Canons, White and Dykman, interprets Article X and the Declaration of Conformity to require use of the Book of Common Prayer. Noting that Article X did not expressly apply to missionary districts until after amendments in 1901 it concludes:

This should not be taken to mean that before 1901 other forms of worship could be used by a clergyman in a missionary district. The obligation imposed by the declaration of conformity to "the doctrine and worship of the Protestant Episcopal Church," required of him by old Article 7, would have entailed the use of the Prayer Book.¹⁶

To repeat: the canonical commentary prepared at the direction of General Convention states that the Declaration of Conformity "entail[s] use of the Prayer Book" and that "other forms of worship" cannot be used. (Other forms of worship approved by the bishop are now authorized by Article X's proviso.)

The term "Worship" is also defined by extension in Title II of the Canons, which is entitled "Worship." This Title describes worship in the Church as the Book of Common Prayer, proposed revisions of the Book of Common Prayer and "special forms of service" for congregations worshipping in a language other than English, the latter subject to detailed provisos, including that the bishop approving use of these special forms be satisfied that they are "in accordance with the Doctrine and Worship of this Church." (Canon II.4.)

Bishop Love has faithfully conformed to these canonically specified forms of worship, and there is no claim to the contrary. The charge against him instead is that he failed to conform to forms of worship approved in an extra-canonical resolution of General Convention. Finding a canonical violation based on deviations from extra-canonical liturgical practices used in other

¹⁶ Edwin A. White and Jackson Dykman, *Annotated Constitution and Canons*, vol. I, p. 134, Church Publishing, 1981

dioceses when the member of clergy has scrupulously conformed to the canonical forms of worship is to circumvent through the back door what General Convention tried to foreclose by defining “Doctrine” and “Discipline”: to limit disciplinary offenses to clearly defined canonical violations.

The only effort to define “Worship” in Church Brief is the following:

The canonical authorization of same-sex marriage and General Convention’s promulgation of the Authorized Marriage Rites pursuant to canonically-based authorizing legislation, together with the availability of these rites in all other domestic dioceses of the Church, establish that the Authorized Marriage Rites constitute a significant element of the Worship of The Episcopal Church. Denying access to these rites, therefore, conflicts with current standards and common practices of Worship in this Church. (Church Brief at 17.)

We have shown above that Resolution B012 was not in fact based on canonical authority because it does not purport to be a “proposed revision of the Book of Common Prayer.” And all that needs to be said about the “current standards and common practices” of other dioceses is to quote the SCLM in its report to General Convention in 2006:

The multiplication of liturgical and musical materials intended for occasional use at the direction of the Diocesan bishop ... has rendered the meanings of prayer book phrases like *forms set forth by authority with this Church* and *subject to the direction of the bishop* (BCP p. 13) and *hymns...authorized by this Church* (BCP p. 14) difficult to interpret.... It is time to give serious consideration to a structure in which these resources can be understood and evaluated, in order to honor the spirit of prayer book rubrics.... (2006 Blue Book, p.222; italics in the original.)

It would be a gross travesty if Bishop Love were found to have violated his ordination vow to conform to the Worship of the Church because he determined to use the canonically specified Book of Common Prayer and “to honor the spirit of prayer book rubrics” rather than use the “multiplication of liturgical and musical materials” that may be “common practices” in some dioceses but are not canonically specified.

CONCLUSION

To find that Bishop Love has violated the Church's Canons or the Declaration of Conformity the Court would have to turn the canons upside down:

- A resolution that emphatically was offered as not a proposed revision to the Book of Common Prayer (“authorizing Trial Use rites is not the same thing as proposing Prayer Book revision”) would have to become a “proposed revision.”
- A canon that is entirely permissive and nowhere mandates same sex marriage rites and that did not purport to change Church Doctrine, Rubrics or other canons would suddenly three years later nullify Albany Canon 16 which continues to conform to the unamended Doctrine and Rubrics.
- The Declaration of Conformity would have to be interpreted so as not to require but to prohibit conformity to the actual Doctrine and Discipline of the Church as currently and canonically defined and to the canonically specified liturgical sources and Rubrics.

At the outset, we quoted a bishop trying to decide whether to follow the mind of General Convention or the Constitution and the Book of Common Prayer. The divergence between the intentions of General Convention and the actual terms of the Constitution and Canons and the Book of Common Prayer described by this bishop remains, at least for the present. No one disputes the intentions of the most recent General Convention. But as shown above, the Doctrine and Discipline of the Church as stated in the Book of Common Prayer, the Constitution and the Canons still say something else. And no one disputes that Bishop Love acted contrary to the mind of the recent Convention. The ultimate issue in this case is whether the mind of the majority at a single General Convention supersedes the constitutional documents of the Church.

If it does, Bishop Love is guilty as charged. But if the rule of law prevails, the charges against him must be dismissed and the partial restriction on his ministry vacated.

Respectfully submitted,

William E. Strickland, Jr. +

The Rev. William E. Strickland, Jr.
Counsel for Respondent
518-588-6919
chipstrickland11@gmail.com

Mark McCall

Mark McCall
Co-Counsel for Respondent

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copies to:

Paul E. Cooney
Church Attorney
pecooney@gmail.com

Diane E. Sammons
Counsel for the Hearing Panel
Nagel Rice LLP
103 Eisenhower Parkway
Roseland NJ 07068
dsammons@nagelrice.com

The Rt. Rev. W. Nicholas Knisely
Convener, Hearing Panel
Office of the Bishop
275 North Main Street
Providence RI 02903
nicholas@episcopalri.org