Record No. 120919

In the Supreme Court of Virginia

The Falls Church (also known as The Church at the Falls – The Falls Church),

Defendant-Appellant,

v.

The Protestant Episcopal Church in the United States of America

and

The Protestant Episcopal Church in the Diocese of Virginia,

Plaintiffs-Appellees.

BRIEF OF A. E. DICK HOWARD AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTRODUCTION AND INTEREST OF *AMICUS*

Amicus is the White Burkett Miller Professor of Law and Public Affairs at the University of Virginia. He was executive director of the Commission on Constitutional Revision, whose proposals resulted in the current Constitution of Virginia. He was counsel to the General Assembly during the constitutional revision session in 1969 and directed the successful referendum campaign for the Constitution's ratification in 1970.

Amicus has filed this Brief to provide further context to the historical significance of the repeal of Va. Code § 57-7 and concurrent enactment of § 57-7.1. Section 57-7's strikingly different treatment of congregations and hierarchical churches arose from a pervasive hostility to hierarchical churches in roughly the first century of the Commonwealth's existence. While this hostility persisted well into the twentieth century, in more recent years the General Assembly and the people of Virginia have moved away from it in favor of reaffirming the principles of religious freedom declared in our founding documents. Reflecting this trend, Section 57-7.1 for the first time made no distinction between the property rights of congregations and hierarchical churches.

Ignoring both the historical context and Section 57-7.1's plain language, the Circuit Court interpreted the statute as preserving the antiquated hostility toward hierarchical churches. The Circuit Court ruled

that the repeal of Section 57-7 and enactment of Section 57-7.1 made no change to church property rights. Not only was the Circuit Court's reading of the statute incorrect, but the discriminatory effect of this interpretation renders the statute unconstitutional under both the U.S. and Virginia Constitutions.

Amicus files this Brief to request that this Court correct the Circuit Court's error in interpreting Section 57-7.1. Doing so will reinforce Virginia's trajectory toward enlarging religious liberty and will avoid rendering the statute unconstitutional.

FACTS

This Brief adopts the statement of facts of Appellees.

ASSIGNMENT OF CROSS-ERROR

This Brief addresses only the Appellees' Assignment of Cross-Error that the Circuit Court erred in holding that Va. Code § 57-7.1 does not validate trusts for the benefit of a hierarchical church and by rejecting a constitutional challenge to that interpretation.

STANDARD OF REVIEW

The standard of review for issues of statutory interpretation and constitutionality is *de novo*, for legal error.

ARGUMENT

I. The Circuit Court erred in holding that Va. Code § 57-7.1 does not validate trusts for the benefit of a hierarchical church.

In holding that Va. Code § 57-7.1 does not provide property rights to hierarchical churches, the Circuit Court ignored not only the plain language of the statute, but also the historical context in which it was enacted. The Circuit Court's reading of Section 57-7.1 denies the principles of religious freedom espoused in Virginia's founding documents. Such a reading is a relic of antiquated hostility toward hierarchical church property rights that no longer has any place in Virginia law.

A. Virginia's founders viewed state interference with religion of any kind as antithetical to religious freedom.

In our founding era, Virginians took the lead in declaring enduring principles of religious freedom. In particular, they recognized the importance of curbing legislative attempts to restrict the exercise of that freedom. James Madison's 1785 Memorial and Remonstrance against Religious Assessments argued forcefully that "in matters of Religion, no man's right is abridged by the institution of Civil Society," and that "Religion is wholly exempt from its cognizance." Madison further noted that "[b]ecause Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body," which must be

restrained from restricting "the rights of the people" to ensure "[t]he preservation of a free Government."

Thomas Jefferson's Statute for Religious Freedom, enacted in 1786, proclaims that no person shall "suffer on account of his religious opinions or belief," and that all persons "shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities." Va. Code § 57-1. This statute also admonishes "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty." *Id*. Since incorporated into the Constitution of Virginia, the statute now appears in Article I, Section 16 of the Constitution.

B. Despite these founding principles, hostility developed toward hierarchical churches, which were viewed as dangerous and potential challengers to state power.

But the early history of the Commonwealth also demonstrates that the concept of religious freedom meant different things to different people. Many were hostile to hierarchical churches, considering their ownership of property to be inconsistent with the preservation of religious liberty and the power of the state. Indeed, the history of laws restricting church ownership of property in Virginia evinces sharp hostility toward the accumulation of

wealth by churches generally and hierarchical churches in particular. In *Gallego v. Attorney General*, 30 Va. (3 Leigh) 450, 477 (1832), Judge Henry St. George Tucker summed up this pervasive hostility toward hierarchical churches:

> No man at all acquainted with the course of legislation in Virginia, can doubt, for a moment, decided hostility of the legislative power to religious incorporations. Its jealousy of the possible interference of religious establishments in matters of government, if they were permitted to accumulate large possessions, as the church has been prone to do elsewhere, is doubtless at the bottom of this feeling. The legislature knows . . . that wealth is power.

Judge Tucker attributed enactments curbing church property rights to this hostility:

> [H]ence, the repeal of the act incorporating the episcopal church, and of that other act which invested the trustees appointed by religious societies with power to manage their property: hence too, in part, the law for the sale of the glebe lands: hence the tenacity with which applications for permission to take property in a corporate character . . . have been refused.

Id. at 478. Referencing "the vast domains of the clergy acquired by the catholic establishment of France," and the English "church establishment possessed of over-grown wealth and power," Judge Tucker further explained that these enactments arose from fear "that the grant of any privilege" to a hierarchical church, "however trivial, might serve but as an entering wedge to greater demands." *Id*.

This hostility led to later enactments having the effect of restricting ownership and management of property by hierarchical churches, even while allowing other church organizations some limited property rights. In 1867, the General Assembly enacted what would later become Va. Code §§ 57-7, which validated conveyances in favor of church congregations, and 57-12, which limited the quantity of property that might be held for a congregation's benefit.

In *Maguire v. Loyd*, 193 Va. 138, 149, 67 S.E.2d 885, 893 (1951), this Court affirmed the restrictive scope of Sections 57-7 and 57-12 on church property rights generally, noting that "[i]n the light of the historical background, the constitution, and the legislative enactments" addressing church ownership and control of property in Virginia, "it is clear that the economic and resulting political power of churches was what was sought to be limited." The purported "evil resulting from trusts for religious purposes," according to the Court, led the General Assembly to make "a marked distinction between trusts for religious purposes and trusts for literary or educational purposes." *Id*. at 142-43, 67 S.E.2d at 889. This "distinction between trusts for religious purposes and trusts for literary or educational purposes has continued down to the present time," *i.e.*, the 1950s. *Id*. at 143, 67 S.E.2d at 889. Explaining that "[t]he fundamental underlying purpose of the legislature" in enacting Sections 57-7 and 57-12 "was to fix

a monetary limit on ownership of personalty by churches, exclusive of books and furniture," this Court held that "[t]his purpose may not be thwarted by an attempt to do indirectly that which cannot be done directly" and limited the amount of a bequest held in trust in favor of a Lynchburg church. *Id*. at 150, 67 S.E.2d at 893.

Later, this Court confirmed in *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 506-07, 201 S.E.2d 752, 758 (1974), that, under Section 57-7, "trusts for a general hierarchical church . . . would be invalid," and that Section 57-12's limits "evidence this restrictive legislative intent." In short, even the limited rights granted to congregations under Section 57-7 were not available to hierarchical churches.

As Virginia entered the twentieth century, its Constitution continued to embody this hostility. One delegate at the Constitutional Convention of 1901-02 quoted from *Gallego*, *supra*, and went on to declare that "1,580 years ago in the city of Rome the power was first conferred upon the churches of receiving property by last will and testament, and I assert that from that day to this it has been a root from which evil alone continually has grown." Report of the Proceedings and Debates of the Constitutional Convention at 753 (1901-02). As a result, the Constitution of 1902 continued the existing ban on churches incorporating in Virginia. *See* Va. Const. of 1902, § 59. For a time Virginia's current Constitution contained a

similar prohibition. Va. Const. art. 4, § 14, cl. 20 (repealed by amendment in 2006).

C. Over time, the General Assembly and the people of Virginia have turned away from this traditional hostility toward hierarchical churches.

But nearly from the earliest years of this hostility toward hierarchical churches, voices challenged its impact on constitutional grounds. In 1815, the U.S. Supreme Court struck down Virginia laws divesting the Episcopal Church of the "glebe lands" that had been acquired and used by predecessor parishes of the Church of England. *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815). The Court noted that the dramatic shift in Virginia toward increased restriction of church property rights "presents not only a most extraordinary diversity of opinion in the legislature" but also demonstrates "the more embarrassing considerations of the constitutional character and efficacy of those laws." *Id*. at 48.

Over time, these voices grew louder and more numerous. Various denominations and legislators sought to ease restrictions on church ownership of property and to allow churches to incorporate. Many argued that the laws in place discriminated against religious groups. *See* Thomas E. Buckley, "After Disestablishment: Thomas Jefferson's Wall of Separation in Antebellum Virginia," 61 J. of S. Hist. 445, 454-455, 461 (1995).

The move to put Virginia's hostility to hierarchical churches behind us has been reinforced, indeed sometimes hastened, by the reading the U.S. Supreme Court has given to the First Amendment's religion clauses. In the nineteenth century, state legislatures were free largely to do as they pleased when it came to matters of religion and government, save as they might be limited by their own state constitutions. The First Amendment did not reach what the states did. *Permoli v. New Orleans*, 44 U.S. (3 How.) 589 (1845). Indeed, although the Fourteenth Amendment became effective in 1868, it was not until the 1940s that the Supreme Court began insisting that states adhere to the commandments of the First Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (non-establishment). Now we have a vast body of Supreme Court caselaw giving guidance as to the protection the Constitution gives churches, religious bodies, and religion generally.

One of the relics of hostility in Virginia against what some religious bodies sought to do was the prohibition against the incorporation of churches. First appearing in the Constitution of Virginia in 1851, it survived extensive debate in the Constitutional Convention of 1901-02. In 1969 the Commission on Constitutional Revision proposed to omit the provision. The Commission reasoned that the prohibition singled out religious bodies and excluded them from the benefits of a general law to which all others

were entitled. To say that people may incorporate for any purposes save religious ones is a manifest violation of the First Amendment. The General Assembly decided, however, to leave the ban in place. *See* 1 A. E. Dick Howard, Commentaries on the Constitution of Virginia 545-46 (1974).

It required a federal court decision to do what the revision commission had proposed. Jerry Falwell and his church challenged the State Corporation Commission's refusal to grant the church a corporate charter. Ruling in the church's favor, the district court rested its decision on a core requirement of First Amendment law – that laws that impact religion must be both neutral and of general applicability. Government may not, the court said, "impose special disabilities on the basis of religious views or religious status." *Falwell v. Miller*, 203 F. Supp. 2d 624, 630 (W.D. Va. 2002) (quoting *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990)). Because of the state constitution's ban, churches in Virginia were denied the benefits of incorporation "solely on account of their religion." Being thus neither neutral nor of general applicability, the ban violated the First Amendment. *Id*. at 631.

This decision resulted in the General Assembly's enacting Va. Code § 57-16.1, which specifically allows churches to incorporate and defers to a church's "laws, rules, or ecclesiastic polity." 2005 Va. Acts, ch. 928 (p.1734); *see id.*, ch. 772. The General Assembly also repealed

Va. Code § 57-12. This change was made, according to the General Assembly, in order "to modernize laws governing churches." *Id*. In 2006, the Virginia Constitution was amended to delete the prohibition on incorporation.

D. The enactment of Va. Code § 57-7.1 was another step away from the traditional hostility toward hierarchical churches, and it permits conveyances of property to, or for the benefit of, church dioceses and religious societies.

It was in keeping with this context of moving away from the discredited hostility toward hierarchical churches that the General Assembly repealed Section 57-7 and enacted Section 57-7.1. To be sure, by the time Section 57-7.1 was enacted in 1993, Virginia had long since moved past the antiquated notion that hierarchical churches might somehow be an existential threat to state sovereignty that must be curbed through onerous prohibitions on property ownership.

Section 57-7.1 validates "[e]very conveyance or transfer of real or personal property, whether inter vivos or by will, which is made to or for the benefit of any church, church diocese, religious congregation or religious society, whether by purchase or gift." By its plain terms, the statute permits conveyances to church dioceses and religious societies. The statute also allows for property to "be used for the religious and benevolent purposes of the . . . church diocese . . . or religious society . . . as determined

appropriate by the authorities which, under its rules or usages, have charge of the administration of the temporalities thereof." *Id*.

Yet the Circuit Court's decision ignores both the historical trend away from hostility toward hierarchical churches and the statute's plain language. At the moment in time during which the General Assembly and the people of Virginia have sought to modernize their treatment of church property rights, the Circuit Court's treatment of hierarchical churches under Section 57-7.1 enshrines the same, antiquated, peculiar distrust and unequal treatment of hierarchical churches.

II. Va. Code § 57-7.1 as interpreted by the Circuit Court is unconstitutional and should be interpreted to avoid any constitutional concerns.

A. Va. Code § 57-7.1 as interpreted by the Circuit Court is unconstitutional.

The Circuit Court's interpretation of Section 57-7.1 treats local congregations and hierarchical churches differently, providing the former with property rights to which the latter is not entitled. This reading also treats hierarchical churches differently from other charitable organizations generally. As interpreted by the Circuit Court, therefore, the statute discriminates against hierarchical churches and is unconstitutional under both the Virginia and U.S. Constitutions. Under Article I, Section 16 of the Constitution of Virginia, "the General Assembly shall not . . . confer any

peculiar privileges or advantages on any sect or denomination." The First Amendment of the U.S. Constitution likewise "mandates governmental neutrality between religion and religion, and between religion and non-religion." *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005).

No one has said it better than Justice Hugo L. Black in the seminal case of *Everson v. Board of Education*, 330 U.S. 1, 15 (1947): "Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another." In case after case, and in a range of contexts, the Supreme Court has insisted that the state stand neutral among religions. In *Larson v. Valente*, 456 U.S. 228 (1982), the Court found a First Amendment violation when a state statute imposed certain registration and reporting requirements only on those religious organizations that solicited more than 50% of their funds from nonmembers. Such a requirement worked a "denominational preference" and thus violated the First Amendment's requirement mandating "governmental neutrality between religion and religion." *Id*. at 246.

In deciding whether a law fails the test of neutrality and general applicability, it is appropriate to take into account the "historical background of the decision under challenge." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993). Thus it underscores the constitutional defect in the Circuit Court's reading of Section 57-7.1 to mull

the historic animus that led in earlier times to laws aimed at hierarchical churches in particular and accumulation of church property in general.

Even if one lays aside that history, however, it is enough under First Amendment principles articulated in countless U.S. Supreme Court cases to realize that, if Section 57-7.1 be read as the Circuit Court has done, then that section flatly fails the constitutional requirement that, when it comes to churches and religion, state law must be neutral and of general application. Section 57-7.1 must not be interpreted to choose favorites among the many religious organizations that operate in Virginia, or between hierarchical churches and other charitable organizations. Barring hierarchical churches from exercising the same property rights enjoyed by other entities is exactly what the First Amendment forbids.

The Circuit Court's interpretation of Section 57-7.1 is little different from the former Article 4, Section 14, Clause 20 of the Constitution of Virginia, which was struck down in *Falwell*, *supra*, and ultimately amended out of existence in 2006. As with the bar to church incorporation in *Falwell*, the Circuit Court's reading of Section 57-7.1 "distinguishes churches and religious denominations from other groups in the broader context of Virginia law," and deprives hierarchical churches of property rights "[u]nlike other groups in Virginia." 203 F. Supp. 2d at 630-31.

B. This Court should interpret Va. Code § 57-7.1 in a way that avoids constitutional concerns.

There is no need to read Section 57-7.1, as the Circuit Court has done, to collide with the U.S. and Virginia Constitutions. This Court consistently seeks to avoid interpretations that could render statutes unconstitutional, even when the language of such statutes is unambiguous. *See*, *e.g.*, *Va. Soc'y for Human Life, Inc. v. Caldwell*, 256 Va. 151, 156-57 & n.3, 500 S.E.2d 814, 816-17 & n.3 (1998) (holding that "a finding of ambiguity is not a prerequisite" for application of this rule, and explaining, "[t]o the contrary, we may construe the plain language of a statute to have limited application if such a construction will tailor the statute to a constitutional fit."). Here, the language of Section 57-7.1 does not lead one to the interpretation thrust upon it by the Circuit Court. Instead, its natural and unforced language leads to an interpretation that treats congregations and hierarchical churches equally.

In its 1969 report to the Governor and General Assembly of Virginia, the Commission on Constitutional Revision articulated one of the premises for its recommendations: "The Commission has proceeded on the assumption that the people of Virginia want to shape their own destiny, that they do not want to abdicate decisions to others, such as the Federal Government . . . ." Report of the Commission on Constitutional Revision 11

(1969). Recall the old ban on the incorporation of churches. It required a federal court, in the *Falwell* case, to do what the Commission had proposed be done by the General Assembly – repeal the patently unconstitutional bar to churches incorporating. The same constitutional defect that infected the Virginia rule on the incorporation of churches tainted the old attitude to church property expressed in former Section 57-7. The General Assembly has acted to sweep away that anachronistic and unconstitutional provision. In enacting Section 57-7.1, the legislature has done what needed to be done. Yet the Circuit Court's interpretation refuses to recognize the General Assembly's step forward.

In its recent history, Virginia has done much to reform its laws on church property to avoid the very constitutional problems the Circuit Court's decision entails. We have come a long way in redeeming the fundamental principles of religious freedom that lie at the base of Virginia's and the nation's founding. This Court should reaffirm the consistent trend toward enhanced religious freedom by articulating the correct interpretation of Section 57-7.1. In so doing, this Court will topple one of the final barriers to ending disparate treatment of religious denominations, and make Virginia's era of hostility toward hierarchical churches little more than a historic relic.

CONCLUSION

The judgment of the Circuit Court should be affirmed on alternative

grounds – either that Va. Code § 57-7.1 permits conveyances to hierarchical churches such as the Episcopal Church, or that Va. Code § 57-7.1 is unconstitutional.

Respectfully submitted,

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Certificate

I hereby certify that on January 18, 2013:

An electronic version of the foregoing Brief, in Adobe Acrobat Portable Document Format (PDF) format, has been emailed to scvbriefs@courts.state.va.us, and fifteen printed copies have been mailed to the Clerk for filing; and

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I hereby certify that the foregoing Brief complies with Rule 5:26 of the Supreme Court of Virginia.

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