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 IN OPPOSITION AND ASSIGNMENT OF CROSS-ERROR

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INTRODUCTION

The Episcopal Church (the "Church") incorporates by reference the positions taken by the Diocese of Virginia in its Brief in Opposition and Assignment of Cross-Error in opposition to the Petition for Appeal and in support of the assignment of cross-error; and adds the following:

In *Jones v. Wolf,* 443 U.S. 595 (1979), the U.S. Supreme Court addressed the question of how, consistent with the First Amendment, a religious denomination could guarantee that property of its local church units would remain in the denomination even when a faction within a local church becomes disaffected with the denomination. The Court held that a religious denomination can, among other things, make its governing documents "recite an express trust in favor of the denominational church," and that "civil courts will be bound to give effect" to such provisions. *Id.* at 606.

That same year, The Episcopal Church (the "Church"), following this directive, adopted a provision – its 1979 Trust Canon – expressly stating that all local church property "is held in trust for [The Episcopal] Church and the Diocese thereof" in which the local church is located. The Diocese of Virginia (the "Diocese") adopted a similar canon in 1983. Since that time, twenty courts in twelve states have concluded that local Episcopal church

property is held in trust for the Church and its dioceses.[1] Only one has decided otherwise,[2] and that decision has been rejected by other courts as an outlier.[3]

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[1] *See* (in alphabetical order by state):

California:

Episcopal Church Cases, 45 Cal. 4th 467, 489, 198 P.3d 66, 82 (2009) (local church holds its property "in trust for the greater [Episcopal] church"), *cert. denied*, 130 S. Ct. 179 (2009);

Huber v. Jackson, 175 Cal. App. 4th 663, 677, 96 Cal. Rptr. 3d 346, 356 (2009) (parish holds property "in trust for the Episcopal Church and the Los Angeles Diocese, and by disaffiliating from the church defendants and their new parish under another church have no right in the property"), *review denied*, No. S175401, 2009 Cal. LEXIS 9850 (Sept. 17, 2009), *cert. denied*, 130 S. Ct. 1690 (2010);

New v. Kroeger, 167 Cal. App. 4th 800, 824, 828, 84 Cal. Rptr. 3d 464, 482, 486 (2008) ("the Episcopal Church impressed a trust on local church property");

Episcopal Diocese of San Diego v. Rector, Wardens & Vestry of St. Anne's Parish in Oceanside, No. 37-2007-00068521-CU-MC-CTL, J. at 2 (Cal. Super. Ct. June 4, 2010) (attached hereto as Exh. 1) (parish property "is held in trust for The Episcopal Church and The Episcopal Diocese of San Diego");

Colorado:

Bishop & Diocese of Colo. v. Mote, 716 P.2d 85, 108 (Colo. 1986) (enforcing "trust [that] has been imposed upon the [parish's] real and personal property for the use of [The Episcopal Church]");

Grace Church & St. Stephen's v. Bishop & Diocese of Colo., No. 07 CV 1971, Order at 26 (Colo. Dist. Ct. Mar. 24, 2009) (attached hereto as Exh. 2) ("trust [in favor of The Episcopal Church] that has been created through past generations of members of [the parish] prohibits the departing parish members from taking the property with them");

Connecticut:

Episcopal Church in the Diocese of Conn. v. Gauss, 302 Conn. 408, 413, 28 A.3d 302, 307 (2011) (1979 Trust Canon "clearly establishes an express trust interest in [local church property] in favor of the Episcopal Church and the Diocese"), *cert. denied,* 2012 WL 910227 (June 18, 2012);

Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Episcopal Church in the Diocese of Conn., 224 Conn. 797, 821–22, 620 A.2d 1280, 1292 (1993) (enforcing "trust relationship that has been implicit ... between local parishes and dioceses since the founding of [The Episcopal Church] in 1789");

Georgia:

Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Georgia, 290 Ga. 95, 115, 718 S.E.2d 237, 253 (2011) ("a trust on Christ Church's property in favor of the Episcopal Church existed well before the dispute erupted that resulted in this litigation");

Massachusetts:

Episcopal Diocese of Mass. v. DeVine, 59 Mass. App. Ct. 722, 730, 797 N.E.2d 916, 923 (2003) (parish "holds its property in trust for the Diocese and [The Episcopal Church]");

Missouri:

Smith v. Church of the Good Shepherd, No. 04CC-000864, J. & Order at 4–5 (Mo. Cir. Ct. Oct. 13, 2004) (attached hereto as Exh. 3) (enforcing The Episcopal Church's property canons);

New York:

Episcopal Diocese of Rochester v. Harnish, 11 N.Y.3d 340, 351, 899 N.E.2d 920, 925 (2008) (The Episcopal Church's rules "clearly establish an express trust in favor of the Rochester Diocese and the National Church");

Tr. of the Diocese of Albany v. Trinity Episcopal Church of Gloversville, 250 A.D.2d 282, 288, 684 N.Y.S.2d 76, 81 (N.Y. App. Div. 1999) (enforcing "trust relationship which has implicitly existed between the local parishes and their dioceses throughout the history of the ... Episcopal Church");

Diocese of Cent. N.Y. v. Rector, Church Wardens, & Vestrymen of the Church of the Good Shepherd, 880 N.Y.S.2d 223 (N.Y. Sup. Ct. Jan. 8, 2009) (enforcing The Episcopal Church's trust interest in parish property);

St. James Church, Elmhurst v. Episcopal Diocese of Long Island, No. 22564/05, Mem. at 31 (N.Y. Sup. Ct. Mar. 12, 2008) (attached hereto as Exh. 4) ("all real and personal property held by St. James Church, Elmhurst is held in trust for the Episcopal Church and the Episcopal Diocese of Long Island");

Ohio:

Episcopal Diocese of Ohio v. Anglican Church of the Transfiguration, No. CV-08-654973, Omnibus Op. & Order at 15–16 (Ohio Ct. C.P. Cuyahoga Cnty. Apr. 15, 2011) (attached hereto as Exh. 5) ("the [1979 Trust] Canon governs the outcome of this litigation ... . The real and personal property at issue is impressed with a trust in favor of [The Episcopal Church] and the Episcopal Diocese");

Pennsylvania:

In re Church of St. James the Less, 585 Pa. 428, 452, 888 A.2d 795, 810 (2005) (parish "is bound by the express trust language in [The Episcopal Church's canons] and therefore, its vestry and members are required to use its property for the benefit of the Diocese");

Tennessee:

Convention of the Protestant Episcopal Church in the Diocese of Tenn. v. Rector, Wardens, & Vestrymen of St. Andrew's Parish, 2012 WL 1454846, at *20 (Tenn. Ct. App. Apr. 25, 2012) (parish "holds the Property in trust for the Diocese, and the disassociating members of [the parish] are not entitled to claim any ownership interest in the Property");

Texas:

St. Francis on the Hill Church v. The Episcopal Church, No. 2008-4075, Final Summ. J. at 3 (Tex. Dist. Ct. Dec. 17, 2010) (attached hereto as Exh. 6) (parish's property "is held and may be used only for the ministry and work of the [Episcopal] Church and the Diocese");

Wisconsin:

Episcopal Diocese of Milwaukee, Inc. v. Ohlgart, No. 09-CV-00635, Order Granting Mots. For Partial Summ. J. at 2 (Wis. Cir. Ct. Apr. 3, 2012) (attached hereto as Exh. 7) ("Defendants had no authority to control,

The facts are no different in the present case; yet the trial court here refused to find that the local Episcopal church property at issue is held in trust for the Diocese and the Church. Letter Opinion of the Court (Jan. 10, 2012) ("Op.") at 48. (The court found in favor of the Church and the Diocese on other grounds.) The court did so because it determined that Virginia law, specifically Virginia Code Section 57-7.1, does not validate trusts in favor of church dioceses or denominations, but validates only trusts in favor of local churches. Op. at 48.

As we show below, that determination was erroneous. Section 57-7.1 by its plain language does indeed validate trusts for the benefit of

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remove, take, or keep the real and personal property of St. Edmund's Episcopal Church, Inc. for uses inconsistent with or in violation of the Canons and Constitutions of the Diocese and Episcopal Church").

[2] *See All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of South Carolina*, 385 S.C. 428, 685 S.E.2d 163 (2009).

[3] *See, e.g., Episcopal Church in the Diocese of Conn.*, 302 Conn. at 446-47, 28 A.3d at 326 (finding *All Saints* "distinguishable" because court "specifically relied on South Carolina statutory and common law, including the law on trusts, relating to the formal conveyance of title, and thus gave no weight to the [General Church's canons]. ... Moreover, the court did not examine documents signed by congregation members when they were seeking to become a parish, which might have indicated whether parish members had agreed to abide by the constitution and canons of the Episcopal Church."); *Rector, Wardens & Vestrymen of Christ Church in Savannah*, 290 Ga. at 117 & n.18, 718 S.E.2d at 255 & n.18 (*All Saints* decision "is readily distinguishable" and "has not been followed in a church property case by any court outside [South Carolina]").

church dioceses. Because the statute is clear on its face, the trial court should have enforced that clear meaning. Neither rationale posited by the court for its conclusion warrants ignoring the statute's plain language. Moreover, the trial court's construction of the statute renders it unconstitutional, by treating churches organized in a diocesan or denominational structure less favorably than churches organized as autonomous entities independent of a larger church, not to mention less favorably than secular organizations. The statute's plain language, by contrast, creates no such constitutional infirmity. That language should be enforced. The trial court's conclusion that Section 57-7.1 does not validate trusts for the benefit of denominational churches should therefore be reversed.

STATEMENT OF FACTS

The Church incorporates the facts and reference to facts set out by the Diocese in its brief. To those facts the Church adds the following:

In 1979, in response to the U.S. Supreme Court decision in *Jones v. Wolf*, 443 U.S. 595, the Episcopal Church adopted a rule (the "1979 Trust Canon," or the "Dennis Canon"), which provides:

> "Sec. 4. All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust,

> however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to this Church and its Constitutions and Canons.
>
> "Sec. 5. The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action but no such action shall be necessary for the existence and validity of the trust." TEC-18-2; Tr. 1214:9-16.

The Diocese of Virginia adopted a parallel canon in 1983. PX-COM-222-105–06.

ASSIGNMENT OF CROSS-ERROR

The trial court erred in holding that Virginia Code Section 57-7.1 does not validate trusts in favor of religious denominations, while allowing trusts in favor of local churches. Op. at 48. The issue was preserved, among other places, in post-trial briefing. *See, e.g.*, Post-Trial Opening Brief for the Episcopal Diocese of Virginia (filed Aug. 5, 2011) at 38-42; The Episcopal Church's First Post-Trial Brief (filed Aug. 5, 2011) at 36.

ARGUMENT

The assignment of cross-error presents a question of law, for which the standard of review is *de novo*. *Phelps v. Com.*, 275 Va. 139, 141, 654 S.E.2d 926, 927 (2008).

The trial court's determination that Section 57-7.1 does not validate denominational trusts violates fundamental rules of statutory construction. As we set out below, the court erroneously (1) ignored the plain language of the statute; (2) relied in its analysis on factors that did not support its rejection of the statute's plain language; and (3) adopted a construction of the statute that renders it unconstitutional when the application of the statute's plain language leads to a constitutional result. For these reasons, the trial court's determination that Section 57-7.1 does not validate denominational trusts should be reversed.

I. THE TRIAL COURT ERRED IN FAILING TO ENFORCE THE CLEAR AND UNAMBIGUOUS LANGUAGE OF SECTION 57-7.1.

When construing statutes, Virginia courts implement the universal rule of looking first to the statutory language itself. If that language is "clear and unambiguous" courts look no further. *Cummings v. Fulghum*, 261 Va. 73, 77, 540 S.E.2d 494, 496 (2001) ("When the language in a statute is clear and unambiguous, [courts] are bound by the plain meaning of that language."); *Taylor v. Shaw & Cannon Co.*, 236 Va. 15, 19, 372 S.E.2d 128, 131 (1988) (internal citations omitted) ("When an enactment is clear and unequivocal, general rules for construction of statutes of doubtful meaning do not apply."). Only when statutory language is "ambiguous or would lead to an absurd result" do courts look beyond the statute's text to

discern its meaning. *Washington v. Com.*, 272 Va. 449, 455, 634 S.E.2d 310, 313 (2006); *see also Hampton Roads Sanitation Dist. Comm. v. City of Chesapeake*, 218 Va. 696, 702, 240 S.E.2d 819, 823 (1978) ("It is unnecessary to resort to the rules of statutory construction when a statute is free from ambiguity and the intent is plain.").

Here, the text of Section 57-7.1 is clear and unambiguous, and its meaning should be enforced. It provides:

> "§ 57-7.1. What transfers for religious purposes valid.
>
> "Every 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, shall be valid.
>
> "Any such conveyance or transfer that fails to state a specific purpose shall be used for the religious and benevolent purposes of the church, church dioceses, religious congregation or religious society as determined appropriate by the authorities which, under its rules or usages, have charge of the administration of the temporalities thereof.
>
> "No such conveyance or transfer shall fail or be declared void for insufficient designation of the beneficiaries in any case where the church, church diocese, religious congregation or religious society has lawful trustees in existence, is capable of securing the appointment of lawful trustees upon application as prescribed in § 57-8, is incorporated, has created a corporation pursuant to § 57-16.1, or has ecclesiastical officers pursuant to the provisions of § 57-16."

The first paragraph of Section 57-7.1 clearly and unambiguously validates "transfer[s] of real or personal property" made "for the benefit of

any ... church diocese." Moreover, the inclusion of "church diocese" or "church dioceses" in each succeeding paragraph demonstrates a careful and consistent allocation of rights and authority to such general church authorities. The trial court's conclusion that the statute does not recognize trusts in favor of church dioceses – which are by definition *regional* organizations – but only recognizes trusts in favor of *local* church organizations, Op. at 48, flatly contradicts the statutory language and should be reversed.

II. THE FACTORS ON WHICH THE TRIAL COURT RELIED TO REJECT THE STATUTE'S PLAIN LANGUAGE DO NOT SUPPORT THE COURT'S CONCLUSION.

Neither factor relied on by the trial court for rejecting the statute's plain language in fact supports the court's conclusion. First, the court relied on this Court's statement in *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.*, 249 Va. 144, 152, 452 S.E.2d 847, 851 (1995), that "Code § 57-7.1 validates transfers, including transfers of real property, for the benefit of local religious organizations." *See* Op. at 48.

Of course, the Court's language says nothing, one way or the other, about broader church entities. Moreover, a cursory examination of that case reveals that it did not present the question of whether Section 57-7.1 validates trusts for church dioceses. Rather, that case involved a local

church's challenge to an arbitration award requiring it to pay a construction contractor "under the doctrine of quantum meruit, for work performed ... under an invalid change order to a construction contract." 249 Va. at 147; 452 S.E.2d at 848. This Court's discussion of Section 57-7.1 arose in its consideration of whether the local church's trustees had standing to appeal the trial court order directed at the church itself. Because Section 57-7.1 "validates [property] transfers ... for the benefit of local religious organizations" and Section 57-8 "'authorizes the appointment of trustees'" to hold local church property, this Court reasoned, the trustees were "proper parties to maintain [the] appeal." 249 Va. at 152, 452 S.E.2d at 851-52. The question of whether Section 57-7.1 validates trusts in favor of religious denominations did not come up. Accordingly, nothing in *Trustees of Asbury* provides a basis for departing from the clear statutory language of Section 57-7.1.

The second reason the trial court gave for rejecting the clear language of Section 57-7.1 is that when the General Assembly adopted the current statutory language in 1993 it stated that the statute was "declaratory of existing law." Op. at 48; *see also* 1993 Virginia Laws Ch.

370 (H.B. 1579).[4] As we explain below, the trial court construed that statement to mean that the General Assembly intended Section 57-7.1 to be substantively identical to former Section 57-7, which it replaced. But that is not the only way to understand the phrase "declaratory of existing law"; indeed, this Court has recognized that that statement may be overcome by clear statutory language. *See Berner v. Mills*, 265 Va. 408, 412, 579 S.E.2d 159, 160 (2003) (recognizing that legislative amendment "expanded" reach of existing statute even though General Assembly characterized the amendment as "declaratory of existing law").

Moreover, as we show below, a comparison of Section 57-7.1 with the former Section 57-7 quickly reveals that the statutes are far from substantively identical and cannot sensibly be regarded as such. Instead, a review of developments in First Amendment jurisprudence leading up to the General Assembly's repeal of Section 57-7 and adoption of Section 57-7.1 in its place suggests a different understanding of the legislature's statement that the new statute was "declaratory of existing law": The new statute was intended to bring Virginia statutory law into compliance with "existing" *constitutional* law as it had recently been elucidated by the U.S. Supreme Court.

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[4] There have been amendments to Section 57-7.1 since 1993, but they are not relevant here. *See* 2005 Virginia Laws Ch. 772 (S.B. 1267).

A. By Its Plain Language, Section 57-7.1 is Not Substantively Identical to the Former Section 57-7.

From 1962 until its repeal in 1993, Section 57-7 provided as follows:

"§ 57-7 What transfers for religious purposes valid.

"Every conveyance, devise, or dedication shall be valid which, since January 1, 1777, has been made, and every conveyance shall be valid which hereafter shall be made of land for the use or benefit of any religious congregation as a place for public worship, or as a burial place, or a residence for a minister, or for the use or benefit of any church diocese, church, or religious society, as a residence for a bishop or other minister or clergyman who, though not in special charge of a congregation, is yet an officer of such church diocese, church or religious society, and employed under its authority and about its business; and every conveyance shall be valid which may hereafter be made, or has heretofore been made, of land as a location for a parish house or house for the meeting of societies or committees of the church or others for the transaction of business connected with the church or of land as a place of residence for the sexton of a church, provided such land lies adjacent to or near by the lot or land on which is situated the church to which it is designed to be appurtenant; or for use in furtherance of the affairs of any church diocese, and the land shall be held for such uses or benefit and for such purposes, and not otherwise. And no gift, grant, or bequest hereafter made to such church diocese, church or religious congregation, or the trustees thereof, shall fail or be declared void for insufficient designation of the beneficiaries in, or the objects of, any trust annexed to such gift, grant, or bequest in any case where lawful trustees of such church diocese, church or congregation are in existence, or the church diocese, or the congregation is capable of securing the appointment of such trustees upon application as prescribed in § 57-8; but such gift, grant, or bequest shall be valid, subject to the limitation of § 57-12; provided, that whenever the objects of any such trust shall be undefined or so uncertain as not to admit of specific enforcement by the chancery courts of the Commonwealth,

> then such gift, grant, or bequest shall inure and pass to the trustees of the beneficiary church diocese or congregation, to be by them held, managed, and the principal or income appropriated for the religious and benevolent uses of the church diocese or congregation, as such trustees may determine, by and with the approval of the vestry, board of deacons, board of stewards, or other authorities which, under the rules or usages of such church diocese, church or congregation, have charge of the administration of the temporalities thereof.
>
> "Provided that any devise of property after January 1, 1953, for the use or benefit of any religious congregation, wherein no specific use or purpose is specified shall be valid." Va. Code § 57-7 (1992).

This statute contained several limitations on the holding of property that do not appear in Section 57-7.1. First, the former Section 57-7 validated transfers of property for the benefit of church dioceses for the limited purpose of using the property "as a residence for a bishop or other minister or clergyman who, though not in special charge of a congregation, is yet an officer of such church diocese, church or religious society, and employed under its authority and about its business." Section 57-7.1 contains no such limitation. It simply validates transfers "for the benefit of any ... church diocese." That plain language simply cannot be read to include the limitation that Section 57-7 contained. "When a statute ... has been revised, and the General Assembly has omitted provisions formerly

enacted, the parts omitted may not be revived by construction, but must be considered as annulled." *Cummings*, 261 Va. at 79, 540 S.E.2d at 497.

Similarly, Section 57-7 validated transfers of property for the benefit of local churches "as a place for public worship, or as a burial place, or a residence for a minister." Section 57-7.1 contains no such limitation, validating transfers "for the benefit of any church." Here, too, the plain language of Section 57-7.1 cannot be read to include limitations that the General Assembly removed from the Code.

Gone, too, is the requirement that land conveyed for use as "a parish house or house for the meeting of societies or committees of the church or others for the transaction of business connected with the church" or for "a place of residence for the sexton of a church" must "lie[] adjacent to or near by the lot or land on which is situated the church to which it is designed to be appurtenant."

In the light of these textual changes, the General Assembly could not have meant that Section 57-7.1 was substantively identical to Section 57-7 when it stated that the new statute was "declaratory of existing law." The trial court erroneously construed that statement as commanding it to ignore the plain language of Section 57-7.1.

B. The Better Reading of the General Assembly's Statement that Section 57-7.1 was "Declaratory of Existing Law" is as an Indication that the New Statute Reflected Recent Developments in Constitutional Jurisprudence.

It is undisputed that Virginia historically did not allow denominational trusts. *See, e.g., Norfolk Presbytery v. Bollinger*, 214 Va. 500, 505-07, 201 S.E.2d 752, 757-58 (1974) (discussing cases). As this Court noted in 1974, that prohibition was reflected in the plain language of the former Section 57-7:

> "The 1962 amendment to § 57-7, Acts 1962, c.516, broadened the scope of religious trusts to include property conveyed or devised for the use or benefit of a church diocese for certain residential purposes. The General Assembly has not gone beyond this, however, to validate trusts for a general hierarchical church and such trusts would be invalid. *Hoskinson v. Pusey*, 73 Va. 151 (32 Gratt.) 428, 431 (1879); *Brooke v. Shacklett*, [54 Va. 133 (13 Gratt.) (1856)] at 312-13. Indeed the provisions of Code § 57-12, limiting the amount of land which may lawfully be held by church trustees, evidence this restrictive legislative intent. *See Moore v. Perkins*, [169 Va. 175, 192 S.E. 806 (1937)] at 181, 192 S.E. at 809.[5]
>
> "As express trusts for super-congregational churches are invalid under Virginia law no implied trusts for such denominations may be upheld." *Norfolk Presbytery*, 214 Va. at 506-07, 201 S.E.2d at 757-58.

After the issuance of *Norfolk Presbytery* in 1974 and before the General Assembly's repeal of Section 57-7 and adoption of Section 57-7.1 in its place in 1993, the U.S. Supreme Court issued two decisions that call

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[5] Section 57-12 was repealed in 2003. Acts 2003, c. 813.

into question the constitutionality of Virginia's disfavor of trusts for the benefit of church organizations other than local churches.

First, in *Larson v. Valente*, 456 U.S. 228 (1982), the Court struck down as unconstitutional a state rule giving preferential treatment to some religious organizations over others. Under that rule, "only those religious organizations that received more than half of their total contributions from members or affiliated organizations would remain exempt" from certain registration and reporting requirements. *Id.* at 231-32. The Court began its analysis by noting that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id.* at 244. The rule at issue "clearly grant[ed] denominational preferences of the sort consistently and firmly deprecated in our precedents," and thus would have to be "invalidated unless it is justified by a compelling governmental interest ... and ... is closely fitted to further that interest." *Id.* at 246-47 (internal citations omitted). Finding that the rule fell short of that stringent standard, the Court declared it unconstitutional. *Id.* at 255.[6]

Second, as we have seen above, in *Jones v. Wolf*, 443 U.S. at 606, the Court invited hierarchical religious denominations to protect their

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[6] Like the federal Constitution, Virginia's Constitution forbids laws that favor some religious groups over others. Va. Const. art. I, § 16.

interests in local church property by reflecting those interests in concrete form, including by "recit[ing] an express trust in favor of the denominational church" in their governing documents. *Jones* was a 5-4 decision, and the four-Justice minority in that case was concerned that the majority opinion, *inter alia*, did not adequately protect the First Amendment rights of "those who have formed the [religious] association and submitted themselves to its authority." 443 U.S. at 618 (Powell, J., dissenting). The majority's statement that a denomination could protect its property by "recit[ing] an express trust" in its documents was made in direct response to that concern. *See* 443 U.S. at 605-06. Accordingly, that statement amounted to a strong suggestion, if not a command, that denominational churches be allowed to ensure in their governing documents that local property be held in trust, and that such trust language be enforceable under state law.

Following these decisions, in 1993 the General Assembly repealed Section 57-7 and adopted Section 57-7.1, which contained none of the limiting language in 57-7 and on its face validates trusts for the benefit of both local churches and regional church dioceses. Since the General Assembly is assumed to know the law, *see, e.g., Commonwealth v. Bruhn*, 264 Va. 597, 602, 570 S.E.2d 866, 869 (2002), it is reasonable to understand its statement in 1993 that new Section 57-7.1 was "declaratory

of existing law" to mean that the new statute took "existing" First Amendment jurisprudence into account.

III. THE TRIAL COURT'S READING OF SECTION 57-7.1 RENDERS THE STATUTE UNCONSTITUTIONAL.

Any construction of a statute that raises questions of its constitutionality must be avoided. *Va. Society for Human Life, Inc. v. Caldwell*, 256 Va. 151, 156-57 & n.3, 500 S.E.2d 814, 816-17 & n.3 (1998). The trial court's determination that Section 57-7.1 discriminates among religious organizations by validating trusts for local churches and not for regional or denominational churches raises just such a specter, and must be reversed.

As noted above, the U.S. Supreme Court made clear in *Larson* that laws that discriminate between religious sects must satisfy strict scrutiny. *See Larson*, 456 U.S. at 246-47. Similarly, since 1993 (when Section 57-7.1 was adopted) the U.S. Supreme Court has also announced that laws treating religious organizations less favorably than secular organizations must also satisfy strict scrutiny. In *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), the Court struck down a city ordinance regulating the slaughter of animals. The Court found that the ordinance targeted a specific religious group's practices and therefore was required to satisfy "strict scrutiny." *Id.* at 535-38. The ordinance failed that test,

because although there were "legitimate governmental interests in protecting the public health and preventing cruelty to animals," those could have been addressed by restrictions "stopping far short of a flat prohibition of" the particular religious group's practices. *Id.* at 538.

The same outcome was reached in *Falwell v. Miller*, 203 F. Supp. 2d 624 (W.D. Va. 2002), where the court declared unconstitutional a provision in the Virginia Constitution prohibiting the incorporation of churches or religious denominations. In that case, there was no evidence, or even argument, that a "compelling governmental interest" existed for treating religious organizations less favorably than secular ones. *Id.* at 632. The provision was subsequently deleted from Virginia's Constitution by voters at the general election on November 7, 2006. Va. Const. art. IV, § 14, Historical Notes (West 2012).

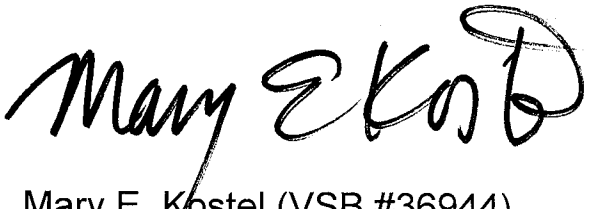
Not surprisingly, here there is nothing in the record showing that there is a "compelling governmental interest" in Virginia's depriving denominational churches from benefiting from trusts while allowing local churches and secular organizations to have those benefits. As construed by the trial court in this case, Section 57-7.1 would not pass strict scrutiny. The plain language of the statute allows such trusts and creates no

constitutional infirmities. The plain language should be enforced, and the trial court's determination should be reversed.

CONCLUSION

For the reasons stated herein, the trial court's determination that Section 57-7.1 does not validate denominational trusts should be reversed.

Respectfully submitted,



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CERTIFICATE

I hereby certify that on June 25, 2012, 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 seven printed copies will be delivered to the Clerk for filing; and copies of the foregoing Brief were sent by electronic mail and U.S. First Class Mail to all Counsel for Appellant, named below:

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I hereby certify that the foregoing Brief complies with Rule 5:26 of the Supreme Court of Virginia, except as otherwise provided by Rule 5:18.