

## Record No. 120919

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# In the Supreme Court of Virginia

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**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.**

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## PETITION FOR REHEARING

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The Protestant Episcopal Church in the Diocese of Virginia (the Diocese) and The Episcopal Church (the Church) respectfully petition the Court to rehear its refusal of their assignment of cross-error, for the following reasons.

### **ASSIGNMENT OF CROSS-ERROR**

The Circuit Court erred by 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.<sup>1</sup> Preserved in, e.g., the Diocese's Post-Trial Opening Brief (filed Aug. 5, 2011) at 38-42, and in The Episcopal Church's First Post-Trial Brief (filed Aug. 5, 2011) at 36.

### **REASONS TO GRANT THE CROSS-ERROR**

After a six-week trial and thousands of pages of post-trial briefing, the Circuit Court in this case concluded it was “overwhelmingly evident ... that [the Church] and the Diocese have contractual and proprietary interests” in the local church property at issue in this case. Letter Opinion, January 10, 2012 (“Op.”) at 104. In the same opinion, however, that court concluded that “neither” of the Church's or the Diocese's rules requiring local church

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<sup>1</sup> The Church's Brief in Opposition presented the same issue in slightly different language, asserting that “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.”

property to be held “in trust” for the larger Church “were effective in validating denominational trusts,” Op. at 62 n.68, because, in its view, “the policy in Virginia ... is that church property may be held by trustees for the local congregation, not for the general church,” and § 57-7.1 “did not change that policy.” Op. at 48.

In reaching that second conclusion, the Circuit Court rejected the Church’s and the Diocese’s statutory construction arguments and declined to address their arguments that its construction of § 57-7.1 violates the Virginia and U.S. Constitutions. In so doing, the court acknowledged that because of its first conclusion, finding “contractual or proprietary interests” in favor of the Church and the Diocese, its construction of § 57-7.1 was not “in any sense determinative” of the case. Op. at 49.

This Court has now granted The Falls Church’s (TFC’s) petition for appeal of the Circuit Court’s first conclusion, but has rejected the Church’s and the Diocese’s assignment of cross-error on the Circuit Court’s second conclusion. The Church and the Diocese respectfully request that the Court reconsider and grant their assignment of cross-error in this case, for four reasons.

First, the appeal and the cross-error assert constitutional defects in the Circuit Court’s decision that raise the same ultimate issue: the First

Amendment's impacts on how state law can and cannot govern churches. TFC argues that the Circuit Court's decision unconstitutionally gives hierarchical churches too much authority in ordering their own internal affairs. The Church and the Diocese argue that the Circuit Court's construction of § 57-7.1 unconstitutionally deprives hierarchical churches of precisely that authority. For the Court to grant the petition but refuse the cross-error risks resolving an important constitutional question without the benefit of argument on how its ruling might implicate all the issues at hand.

Second, if this Court were to consider only the appeal, and were to reverse and remand the Circuit Court's decision, TFC may argue – and the court may agree – that further litigation of the statutory question presented by this Petition is precluded by the law of the case or some related doctrine. That would be a one-sided and unfair resolution of litigation that presents difficult and arguable questions on both sides.

Third, in such an event the sole question facing the Circuit Court on remand may be whether its construction of § 57-7.1 passes constitutional muster. That is a pure question of law, fully briefed by the parties below, not once, but twice, including in the first phase of this case which earlier reached this Court (*Protestant Episcopal Church in the Diocese of Virginia v. Truro Church*, 280 Va. 6, 694 S.E.2d 555 (2010)). Indeed, that very

issue was among the assignments of error on which this Court granted permission to appeal in the case's first visit to this Court. No matter which way the Circuit Court might resolve that issue on remand, it is certain to be the subject of an appeal. In the light of these circumstances, and the significant and costly toll that this lengthy litigation already has taken on both sides, the Church and the Diocese respectfully urge the Court to grant their assignment of cross-error here.

Fourth, the question whether § 57-7.1 validates denominational trusts is important not only to The Episcopal Church, but to many other religious denominations with "trust" clauses in their governing documents. These include the Presbyterian Church (U.S.A.), the Cumberland Presbyterian Church, the United Methodist Church, the Christian Methodist Episcopal Church, the African Methodist Episcopal Zion Church, the African Union First Colored Methodist Protestant Church, and the Apostolic Overcoming Holy Church of God.<sup>2</sup> A decision by this Court clarifying the proper

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<sup>2</sup> See, e.g., *Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc.*, 719 S.E.2d 446 (Ga. 2011), *cert. denied*, 132 S. Ct. 2772 (2012); *Cumberland Presbytery of the Synod of the Mid-West of Cumberland Presbyterian Church v. Branstetter*, 824 S.W.2d 417, 422 (Ky. 1992); *St. Paul Church, Inc. v. Board of Trustees of the Alaska Missionary Conference of the United Methodist Church, Inc.*, 145 P.3d 541 (Alaska 2006); *Shirley v. Christian Methodist Episcopal Church*, 748 So. 2d 672 (Miss. 1999); *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980); *Scotts* (footnote continued)



construction of § 57-7.1 could reduce future church property litigation, saving valuable church resources for mission and ministry.

### **DEFECTS IN THE CIRCUIT COURT’S CONSTRUCTION OF § 57-7.1**

In *Jones v. Wolf*, 443 U.S. 595 (1979), the U.S. Supreme Court addressed the question how, consistent with the First Amendment, a religious denomination could guarantee that property of its local units would remain in the denomination 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.

The Episcopal Church responded to that directive by adopting a provision expressly stating that all local church property “is held in trust for this Church and the Diocese thereof” in which the local church is located. The Diocese adopted a similar canon in 1983. Since that time, a near unanimity of courts has concluded that local Episcopal church property is held in trust for the Church and its Dioceses. Yet the court below held that

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*African Union Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church*, 98 F.3d 78 (3d Cir. 1996); *Harris v. Apostolic Overcoming Holy Church of God, Inc.*, 457 So. 2d 385 (Ala. 1984).

these canons are ineffectual; in its view, Virginia law bars trusts for the benefit of religious denominations. Op. at 47-49.

This Court has held that “express trusts for super-congregational churches are invalid” in Virginia and therefore that “no implied trusts for such denominations may be upheld.” *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 507, 201 S.E.2d 752, 758 (1974). But that statement was based on Virginia’s historical (now antiquated and unconstitutional) antipathy to hierarchal churches. The court below relied on that statement when it declined to rule that current Virginia law recognizes trusts for denominations and their dioceses. Op. at 48. For the following reasons, the court below was wrong.

Since *Brooke v. Shacklett*, 54 Va. (13 Gratt.) 301 (1856), this Court has declined to construe predecessor statutes to § 57-7.1 as validating denominational trusts. In *Moore v. Perkins*, 169 Va. 175, 179-81, 192 S.E. 806, 808-09 (1937), the Court gave four reasons for maintaining that view: (1) amendments after the *Brooke* decision had not materially changed the first part of the statute; (2) the statute referred to trusts controlled by “local functionaries”; (3) the uses for which the statute allowed land to be held were local; and (4) the statutory limits on church property ownership were so small as to be inconsistent with an intent to allow non-local religious

groups to be the beneficiaries of trusts. *Norfolk Presbytery's* treatment of trusts for hierarchical churches was limited to restating that statutory construction and citing church property ownership limits as "evidence [of] this restrictive legislative intent." 214 Va. at 506-07, 201 S.E.2d at 757-58.

By subsequent legislation, the General Assembly has methodically eliminated every basis upon which *Norfolk Presbytery* and its predecessors relied. In 1993, the General Assembly repealed § 57-7 and enacted § 57-7.1.<sup>3</sup> Section 57-7.1 now provides, in pertinent part:

*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 diocese, 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.... [Emphases added.]

First, the first part of the new statute is radically different from the old one. Section 57-7 validated conveyances only for a detailed list of "uses, which ... from their very nature and the connection in which they are mentioned, must belong peculiarly to the local society." *Brooke v.*

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<sup>3</sup> Section 57-7.1 and former § 57-7 are set out in full in an Addendum to this Petition.

*Shacklett*, 54 Va. at 313. Section 57-7.1 validates “[e]very conveyance or transfer of *real or personal property* ... which is made to or *for the benefit of any church [or] church diocese.*”

Second, the modern statute, § 57-7.1, does not refer to “local functionaries.” It states instead that property shall be used for the purposes “determined appropriate by the authorities which, under its rules or usages, have charge of the administration of the temporalities thereof,” thereby recognizing the central role of church rules and deferring to the proper authorities under those rules.

Third, § 57-7.1 does not limit the uses for which property may be placed in trust for religious groups. Dedications of real estate are no longer required to be made for use “as a place for public worship, or as a burial place, or a residence for a minister,” nor are gifts of “books and furniture” limited to those made “for the benefit of such congregation, to be used on the said land in the ceremonies of public worship, or at the residence of their minister.” *Brooke*, 54 Va. at 313. The statute now imposes no limits on use, except to defer to the church’s proper authorities.

Fourth, Virginia’s acreage limits on church property ownership (former § 57-12) have been repealed. 2003 Va. Acts ch. 813. What is left is a broadly stated statute which, by its plain language, validates “*Every*

conveyance ... made to or for the benefit of any church, church diocese, religious congregation or religious society ....”

Fifth, ascribing to the modern § 57-7.1 the interpretation of old § 57-7 would impermissibly give no meaning to the repeal of § 57-7 or the changes embodied in § 57-7.1. See, e.g., *Va.-Am. Water Co. v. Prince William County Serv. Auth.*, 246 Va. 509, 517, 436 S.E.2d 618, 623 (1993) (“we assume that the General Assembly’s amendments to the law are purposeful and not unnecessary or vain”).

Finally, the serious constitutional questions resulting from the trial court’s ruling also require interpreting § 57-7.1 as a broad validation of religious trusts. See, e.g., *Yamaha Motor Corp. v. Quillian*, 264 Va. 656, 665, 571 S.E.2d 122, 126-27 (2002) (“a statute will be construed in such a manner as to avoid a constitutional question wherever this is possible”).

The Establishment Clauses of the First Amendment and Article I, § 16 of the Constitution of Virginia forbid laws that favor some religious groups over others. E.g., *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005); *Everson v. Board of Education*, 330 U.S. 1, 15 (1947); *Habel v. Indus. Dev. Auth.*, 241 Va. 96, 100-01, 400 S.E.2d 516, 518-19 (1991) (looking to federal Establishment Clause cases in construing Article I, § 16). TFC invoked the same clauses in its successful Petition for Appeal.

Construing § 57-7.1 as a validation of trusts for congregations, but not for hierarchical churches, grants a benefit – the ability to hold property in trust – to some religious groups but not others. It also recognizes and enforces the chosen property arrangements of congregational but not hierarchical churches, improperly granting a religious preference to congregational churches; and it prefers local religious organizations over regional or national ones, with the same constitutional infirmity.

Further, construing § 57-7.1 as the trial court did violates those same constitutional provisions by “impos[ing] 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)). Virginia law does not restrict non-religious organizations from creating trusts in favor of non-local organizations. See, e.g., Va. Code § 55-544.05 (allowing charitable trusts for any purpose “the achievement of which is beneficial to the community,” including “the advancement of education or religion”). The Virginia and U.S. Constitutions forbid Virginia law from treating churches differently in this regard.

## **CONCLUSION**

The Church and the Diocese respectfully ask the Court to reconsider and grant their assignment of cross-error.

Respectfully submitted,

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## **CERTIFICATE**

I hereby certify that on November 9, 2012:

An electronic version of the foregoing Petition for Rehearing, in Adobe Acrobat Portable Document Format (PDF) format, has been sent by electronic mail to scvbriefts@courts.state.va.us; and

Copies of the foregoing Petition for Rehearing, in Adobe Acrobat PDF format, have been sent by electronic mail to all Counsel for Appellant, named below:

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I further certify that the foregoing Petition for Rehearing does not exceed the longer of 10 pages or a word count of 1,750 words.

George A. Somerville

## ADDENDUM

### **Va. Code § 57-7. What transfers for religious purposes valid. (Repl. Vol. 1969). (Repealed, 1993 Va. Acts, ch. 370)**

Every conveyance, devise, or dedication shall be valid which, since the first day of January, seventeen hundred and seventy-seven, 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 the following section (§ 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 one, nineteen hundred fifty-three, for the use or benefit of any religious congregation, wherein no specific use or purpose is specified shall be valid. (Code 1919, § 38; 1954, c. 268; 1956, c. 611; 1962, c. 516.)

**Va. Code § 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 diocese, 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.

(1993, c. 370; 2005, c. 772.)