No. 21-164

In The Supreme Court of the United States

TRUSTEES OF THE NEW LIFE IN CHRIST CHURCH,
Petitioner,

v.

CITY OF FREDERICKSBURG, VIRGINIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION

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INTRODUCTION

The Petition should be denied. This is not a case about who may be a minister of the Petitioner's church or about the free exercise of religion. Instead, this case is about the authority of a court to make a determination of relevant facts, based on the evidence, when adjudicating a church's application for Virginia's tax exemption for the residence of the minister of the church.

The Church did not meet its burden of proving entitlement to the exemption. Discovery determined that neither of the occupants of the residence was "the minister of the church" as required by Virginia Code § 58.1-3606(A)(2). The lower state court interpreted that statutory exemption to require that the occupant be one that is set apart from the congregation as the leader.

The church is free to name as many minsters as it wishes, but the Virginia Code permissibly provides a real property tax exemption for one residence only – "The residence of the minister of the church." Despite how the Church seeks to frame the lower state court's finding, this case was never about delving into ecclesiastical pursuits or abridging the Church's right to exercise its religion.

STATEMENT OF FACTS AND THE CASE

New Life in Christ Church ("NLICC" or "the Church"), a Presbyterian Church located in Spotsylvania County, Virginia, owns residential property in the City of Fredericksburg ("the Property"). (Pet. App. 7a). The Property is occupied as a residence by Josh Storms and Anacari Storms

(collectively, "the Storms"), both of whom are employed part-time as Directors of College Outreach and Youth Ministers for the Church. (Pet. App. 45a-46a). The Storms each are paid for their part-time work a salary of $6,000 per year, plus a $12,000 taxable fringe benefit for the housing provided at the Property. (Pet. App. 59a).

The Church sought a real estate tax exemption for the Property under the Virginia Constitution, which exempts real property "exclusively occupied or used by churches . . . for . . . the residences of their ministers." Va. Const., art. X, §6(a)(2). The City denied the application, pointing to Virginia Code § 58.1-3606(A)(2), and its language restricting the exemption to "the residence of the minister of the church." (Pet. App. 33a – 35a). The Church did not provide any evidence to the City in support of its application, so the City relied on NLICC's website in making its decision. The website identified the church's leaders as its Senior Pastor, Associate Pastor, and Assistant Pastor, and then named about 30 church ministries, including the College Ministry led by the Storms. (Pet. App. 31a). As the City then noted, the Storms may be "ministers" of the church, but neither of them is "the minister of the church," as required to qualify for the tax exemption. (Pet. App. 28a – 38a).

The Church's Trustees filed a Complaint for Declaratory Relief in the City of Fredericksburg Circuit Court, which they later amended, asking the Circuit Court to declare that the Property was exempt from the City's real estate taxation under Virginia Code § 58.1-3606(A)(2) and Va. Const., art. X, § 6(a)(2). The Amended Complaint alleged that "the Property was purchased by the Church to be

used as the residence of the Minister of the Church and has in fact been used as residence of the church Minister since its purchase," and that "the property is used as the residence of the Church Minister." (Pet. App. 7a, ¶¶ 5 and 7).

NLICC admitted in discovery that it is governed by the Presbyterian Church Book of Church Order ("BCO"). (Pet. App. 46a – 47a). Under the BCO, the pastoral relations of the Church are pastor, associate pastor, and assistant pastor. Douglas Kittredge is the Founding Pastor and Sean Whitenack is the Lead Pastor for the Church. (Pet. App. 47a). Neither resides at the Property, nor does the Church's Associate Pastor or Assistant Pastor. (Pet. App. 48a).

Following the completion of discovery, the City moved for summary judgment, which the Circuit Court granted, "based upon facts presented through pleading and discovery indicating that the residents of the [Property] are not 'the minister' as required under Virginia Code § 58.1-3606(A)(2)." (Pet. App. 1a – 2a). During the hearing on the motion for summary judgment, the Circuit Court attempted to clarify the issue for counsel: ". . . the issue is whether the two individuals living in this property . . . are ministers for purposes of the tax exemption. I don't think anyone is trying to tell this church who their ministers are. I don't think we can, I don't think we should be able to or that we should, but the issue is whether they qualify for purposes of the tax exemption as ministers and that's really the focus of this Court . . . ." (Pet. App. 114a).

The Trustees filed a Petition for Appeal with the Supreme Court of Virginia, which was denied. (Pet. App. 4a – 5a). This Petition for *Certiorari* followed.

SUMMARY OF ARGUMENT

This Court should not grant *certiorari*, because neither the City, nor the Circuit Court, nor the Supreme Court of Virginia has burdened or countenanced the burdening of, the Church's free exercise of its religion in any way.

Neither the City nor the Circuit Court resolved any religious question, nor did either interpret or question the Church's doctrine or beliefs. Rather, the City, and then the Circuit Court, simply resolved a tax exemption question, by applying undisputed facts to a statute enacted by the Virginia General Assembly. The landowner Church, which sought the tax exemption, simply failed to bear its burden of proving facts to establish its entitlement to that exemption.

This Court's decision last term in *Fulton v. City of Philadelphia*, 141 S.Ct. 1868 (2021) does not change the analysis of this case. *Fulton* involved a contractual requirement that compelled a religious foster care agency to compromise its religious beliefs. That contract failed the "generally applicable" standard because it gave an administrator sole authority to grant exceptions to the contractual requirement, in his or her sole discretion. In contrast, NLICC does not, and cannot, allege that paying residential real estate taxes compels it to compromise its religious beliefs. And the Virginia Constitution essentially eliminates local discretion in applying the tax exemption statute, under the "strict construction" rule and binding judicial precedent.

In the end, NLICC asks the Court to rule that no civil authority—neither the City nor any court—

may question its assertion of fact that the Storms are "the Minister of the Church." Such a ruling is not compelled by any constitutional, statutory, or decisional law, including *Fulton,* and would be contrary to the Due Process Clause.

ARGUMENT

1. The adjudication of NLICC's tax exemption application did not interfere with matters of church government, faith, or doctrine.

Because this is at heart a tax case, review of NLICC's claim of exemption from taxes must begin with acknowledgement of the relevant state constitutional and statutory provisions.

"All property [in Virginia], except as . . . provided [otherwise], shall be taxed." Va. Const., art. X, § 1. "Exemptions of property from taxation . . . shall be strictly construed" against the landowner. *Id.*, § 6(f). "[T]he taxpayer has the burden to establish that it comes within the terms of the exemption." *DKM Richmond Associates, L.P. v. City of Richmond*, 249 Va. 401, 407, 457 S.E.2d 76, 80 (1995).

The Virginia Constitution provides that certain property shall be exempt from taxation, namely, "[r]eal estate and personal property owned and exclusively occupied or used by churches or religious bodies . . . for the residences of their ministers." Va. Const., art. X, § 6(a)(2).

"[T]he [Virginia] General Assembly by general law may restrict or condition, in whole or in part, but not extend," this exemption. Va. Const., art. X, §

6(c). Consistent with that provision, the General Assembly limited the real property exempt from taxation to that which is

> *owned by churches* or religious bodies, . . . *and exclusively occupied or used* for religious worship or *for the residence of the minister* of any church or religious body, and such additional adjacent land reasonably necessary for the convenient use of any such property.

Virginia Code § 58.1-3606(A)(2) (emphases added).

These state constitutional and statutory provisions do not offend the United States Constitution. Tax exemptions are acts of legislative grace, imposing a burden of proof on the person or entity claiming entitlement to the exemption. *See Dickinson v. United States*, 346 U.S. 389, 395 (1953); *Nielsen Co. (US), LLC v. County Bd. Of Arlington County*, 289 Va. 79, 98, 767 S.E.2d 1, 10 (2015) (*citing INDOPCO, Inc. v. Commissioner,* 503 U.S. 79, 84 (1992)). Entitlement to that grace is strictly construed against the party claiming the exemption. *Children, Inc. v. City of Richmond*, 251 Va. 62, 66, 466 S.E.2d 99, 102 (1996). To meet its burden of proof, a claimant, here the Church, must show facts to establish a basis for application of the exemption.

Entitlement to the exemption at issue here requires proof of three factual elements: 1) that the property involved is owned by a church or religious organization; 2) that it is a residence; and, 3) that the occupant of the residence is *the minister* of the church. Virginia Code § 58.1-3606(A)(2).

The Supreme Court of Virginia interpreted the exemption in question in *Cudlipp v. City of Richmond*, 211 Va. 712, 180 S.E.2d 525 (1971).[1] There, a lower court had found that the statutory term "the minister"—the same phrase at issue in this case—limited the exemption to property used by one single minister per religious body, and accordingly ruled that the exemption did not apply to the Bishop Coadjutor of the Protestant Episcopal Diocese of Virginia, who the court determined was not "the minister" of the Diocese. The Supreme Court of Virginia reversed, noting that Virginia law at the time required a liberal rule of construction, and that the phrase "the minister," construed liberally, did not require the exemption to be limited to only one minister per religious body. The state Supreme Court then considered the Bishop Coadjutor's role in the church, ultimately concluding that the Bishop Coadjutor was a "minister" under the statute because he had "full authority" and "final authority" over the Diocese.

The *Cudlipp* Court did not interfere with the Episcopal Church's First Amendment rights by reviewing the facts of that case and applying the same to the statutory tax exemption language. In the case at bar, the same tax exemption was at issue, and basic fact-finding remained necessary for its proper application, under the strict construction now required of tax exemption statutes. The Circuit

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[1] *Cudlipp* interpreted a predecessor statute, Virginia Code § 58-12, which later was recodified verbatim as Virginia Code § 58.1-3606. The prior statute was given a liberal construction under the former state constitution, while the modern state constitution now requires the exemption statutes to be strictly construed. Va. Const., art X, §6(f).

Court in this case engaged in the same exercise of its authority; it interpreted and applied Virginia Code § 58.1-3606(A)(2) to the facts presented. The evidence simply did not support NLICC's contention that the minister of the church resided at the Property. The College Ministers did not have full authority or final authority over the Church and therefore did not meet the statutory requirement, as construed by *Cudlipp,* to exempt the Property from taxation.

Many states offer what is commonly referred to as the "parsonage" tax exemption. *See* Maurice T. Brunner, Annotation, Taxation: exemption of parsonage or residence of minister, priest, rabbi, or other church personnel, 55 A.L.R.3d 356 (1974); Annotation, Taxation: exemption of parsonage or residence of minister or priest, 13 A.L.R. 1196 (1921). For years, courts have – without infringing upon religious liberty and the First Amendment – applied facts to statutes to determine if a religious body has met its burden of proving entitlement to an exception.

Many of these exemptions require courts to define the scope of church leadership in order to apply the facts to the operative statute. In one state, analysis of the exemption required a determination whether the church "pastor" residing in the house was "in charge" of the church. *Missionaries of Our Lady of La Salette v. Michalski*, 15 Wis. 2d 593, 599-600, 113 N.W.2d 427, 431 (1962). After defining what constituted a "pastor," the court then applied the definition to that church-owned real estate and ruled that the residents of the property were not "pastors," as required by the statute. *Id.* In another state, a court defined "officiating clergyman" to mean a pastor installed over a parish or congregation. *Int'l*

Missions, Inc. v. Borough of Lincoln Park, 87 N.J. Super. 170, 174-5, 208 A.2d 431, 433-4 (N.J. Super. Ct. App. Div. 1965). The courts in these states exercised their sovereign powers of statutory interpretation to construe and apply those statutes, just as the court did in *Cudlipp* and the Circuit Court did in this case.

Likewise, federal courts engage in statutory interpretation to determine qualification for the ministerial exception housing allowance pursuant to 26 U.S.C. § 107. The federal income tax exemption for parsonages allows "a minister of the gospel" to receive tax-free housing from an employing church, whether the church provides the housing directly or indirectly through an allowance. Non-clergy must generally pay taxes on the value of such housing. *Freedom from Religion Found., Inc. v. Lew,* 773 F.3d 815, 818 (7th Cir. 2014).

Out of necessity, determination of the application of this exemption often requires that courts engage in fact finding and evaluation of proof to determine whether a claimant of the exemption meets the requirements of being a minister of the gospel. *Silverman v. Comm'r of Internal Revenue,* 57 T.C. 727, 730 (1972). While Section 1.107-1(a) of the Income Tax Regulations aids courts in this review, there are often factors particular to a certain faith that must be considered to determine whether someone is a "minister of the gospel" under the exemption language. *See Silverman*, 57 T.C. at 731 ("The import . . . is that religions are not similar in their ministerial authority. In the Jewish religion there are dual pulpits, a bipartite ministry.").

In such cases, the courts are required to ascribe some meaning to the term "minister." "It is

from the record before us that we determine the nature of the religious discipline under scrutiny, the ecclesiastical authority, if any, in that religion, and the functions of a 'minister' in that religion." *Id.* at 730-31. Where courts look to determine who is a minister, they review the religious body's governing documents. *See Kirk v. Comm'r of Internal Revenue,* 425 F.2d 492, 494-5 (D.C. Cir. 1970). *See also* Joni Larson, Ministers qualifying for rental allowance exclusion, 1 Mertens Law of Fed. Income Tax'n § 7:184 (person entitled to exclusion must "perform sacerdotal functions and conduct religious worship . . . in accordance with the stated tenets and practices of the denomination."). Likewise, the Circuit Court made its factual determinations and deliberately indicated why its determination does not abridge the Free Exercise Clause by stating, "[no one] is trying to tell this church who their ministers are. I don't think we can . . . but the issue is whether [the occupants] qualify for purposes of the tax exemption as ministers and that's really the focus of this Court." (Pet. App. 114a).

The rules established by the Church are its own, not the City's or the Court's. However, the government may recognize and give effect to those rules when assessing a tax exemption claim, and the Church may not arbitrarily deny its own rules to avoid paying taxes. *See Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929). The Church's argument that what it says cannot be subject to verification is "tantamount to the proposition that the First Amendment right of free exercise of religion, ipso facto, assures no restraints, no limitations and, in effect, protects those exercising the right to do so unfettered." *Christian*

Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 856 (1972). The Court of Appeals for the Tenth Circuit could find "no legal authority" supporting such a conclusion almost fifty years ago, *id*., and none has been identified since. And, as this Court reminded us in recent weeks, "no man may be a judge in his own case," consistent with the Due Process clause. *Chrysafis v. Marks*, Case No. 21A8, 2021 WL 3560766 at *1 (Aug. 22, 2021).

The Circuit Court did not offend the Free Exercise Clause of the First Amendment in its finding, the Supreme Court of Virginia made no error in denying the appeal, and this Court should deny the Petition for *Certiorari*.

2. *Fulton* is inapplicable to this case because the tax exemption statute does not burden the free exercise of religion, and because the statute was applied under the strict construction standard and relevant judicial precedent.

NLICC argues in the alternative that this Court should grant *certiorari* in light of its recent ruling in *Fulton v. City of Philadelphia*, 141 S.Ct. 1868 (2021). *Fulton* addressed a restriction in the City of Philadelphia's standard foster care contract that interfered with the religious beliefs and practices of Catholic Social Services ("CSS"), a Catholic-based adoption service. These restrictions prohibited adoption agencies from discriminating on the basis of sexual orientation, a provision which ran afoul of the beliefs of CSS, and "put[] it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs." 141 S.Ct. at 1876. The

only exception to the restriction was in the "sole discretion" of the City's Commissioner of the Department of Human Services. *Id.* at 1878. *Fulton* does not affect this case.

NLICC has not been put to the choice of abandoning or compromising its religious beliefs. Instead, it is required to pay generally-applicable property taxes on real estate it owns – an obligation the Constitution permits and of which NLICC rightfully does not complain. "[T]o the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant." *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 391 (1990). The state action in this case – the taxation of real property – does not impose a burden on NLICC's religious exercise, and NLICC could hardly argue that a statute creating a *tax exemption for churches* does so.

In *Fulton*, this Court noted that laws lack general applicability in the context of free exercise of religion claims if a vague "good cause" standard permits the government to grant exemptions on a case by case basis, or if religious conduct is prohibited while similar secular conduct is permitted. 141 S.Ct. at 1877. The Virginia statute at issue here suffers from neither flaw.

While the Virginia legislature has not provided a definition of "the minister" in the statute, the Supreme Court of Virginia has. In *Cudlipp*, the Supreme Court of Virginia held that to be "the minister," one must have "final" and "full authority" over a congregation. *Cudlipp*, 211 Va. at 713, 180 S.E.2d at 527. This definition establishes the outer

parameters for administration of the tax exemption statute. The City and Virginia courts were bound to follow this judicial precedent from the state's highest court, a far cry from the "sole discretion" wielded by the Philadelphia contract administrator.

The facts and foundation of this case cannot be crammed into a *Fulton*-type analysis, as *Fulton* dealt with state interference with a religious belief that simply does not exist under these facts. Furthermore, *Fulton* is factually and legally distinct from the facts admitted by the Church and the exemption provided in Virginia Code § 58.1-3606, which does not give "sole discretion" to one person. *See Fulton*, 141 S.Ct. at 1878. Judicially-reviewed fact-finding is very different from sole discretion.

What NLICC wants here is "sole discretion" to self-certify the identity of the person living in the Property, without any judicial review or other oversight. But, the City and Virginia courts are bound by the Virginia Constitution, the state statutes, and the state judiciary's interpretations thereof. None of those violate the United States Constitution, and this Court should deny this Petition.

CONCLUSION

The First Amendment does not require the City or the courts to accept NLICC's preferred broad interpretation of the tax exemption statute, which would encompass the residence of "any" or "every" minister of the church, as opposed to "the" minister. Instead, the City and the courts could, consistent with the First Amendment, construe the exemption under its plain language and Virginia precedent, to

limit the exemption to the residence of the person with full authority over church matters.

The First Amendment does not require the City nor any court to permit NLICC to *conclusively* self-certify its qualification for a tax exemption; and when the tax exemption applies to what is commonly known as the "parsonage," the Free Exercise Clause does not prohibit tax authorities from asking whether the "parson" lives in the house, or from rejecting the applicant's allegation that he or she does, when all of the applicant's own evidence is to the contrary. Assessing that evidence against the tax exemption statute does not constitute an interference with NLICC's internal governance.

This is not a Free Exercise Clause case. No civil authority meddled with the Church's religious affairs or addressed a religious question. It is a case of a property owner whose evidence did not establish the elements required by the tax exemption statute as construed under the state's rule of strict construction. The Court should decline to grant *certiorari*.

Respectfully submitted,

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