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In the

Supreme Court of the United States

JOHN W. KEY, ET AL.,

APPELLANTS,

V.

MICHAEL M. DOYLE, ET AL.,

APPELLEES.

No. 76-1057

Washington, D. C.
October 5, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

JOHN W. KEY, et al.,

Appellants,

v. : No. 76-1057

MICHAEL M. DOYLE, et al.,

Appellees.

Washington, D. C.,

Wednesday, October 5, 1977.

The above-entitled matter came on for argument at 2:10 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

FLOYD WILLIS III, ESQ., 416 Hungerford Drive, Rockville, Maryland 20850; on behalf of the Appellants.

CARL F. BAUERSFELD, ESQ., Kurrus & Ash, 7101 Wisconsin Avenue, Bethesda, Maryland 20014; on behalf of the Appellees.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-1057, Key against Doyle.

Mr. Willis, I think you may proceed when you're ready.

ORAL ARGUMENT OF FLOYD WILLIS III, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. WILLIS: Mr. Chief Justice, may it please the Court:

Very briefly I'd like to mention the statement of the case to this Court.

This case involves a D.C. Mortmain statute, Section 18-302, and that statute basically provides that: "A devise or bequest or real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such," religious orders, and so on.

It is not valid unless it's made within 30 days before the death of the testator.

Sallye Lipscomb French executed a will and left religious bequests and did not survive that will for 30 days.

Thereafter, a complaint for instructions was filed by Judge Doyle, and the case was heard before the Superior Court on motion for summary judgment. The religious legatees being defendants as well as the heirs-at-law.

The lower court found that 18-302 is, in fact,

unconstitutional for both First and Fifth Amendment reasons. Appeal was taken to the District Court of Appeals. That Court found that the statute was unconstitutional for due process, or Fifth Amendment, reasons.

QUESTION: And didn't deal with the First Amendment?

MR. WILLIS: It did not deal with the First Amendment. Judge Reilly filed a concurring opinion, in which he dealt with the First Amendment.

QUESTION: Are you going to, at some time in your argument, summarize the reasoning of the majority of the Court of Appeals as to why it violated the Fifth Amendment?

MR. WILLIS: Yes, Your Honor.

QUESTION: And somewhere in your argument, will you discuss the jurisdictional question, which you did not cover in your brief, despite our rule that you ask that it be covered?

MR. WILLIS: Yes, Your Honor, that was the next thing I was going to get to, now that I've --

QUESTION: Was there a reason you didn't cover it in your brief?

MR. WILLIS: Inadvertance, Your Honor. It's sort of hidden, way down at the bottom of one of your rules, and I -- we just did not do so. We did make a statement that 1257(1) is the basis of the jurisdiction, but we did not argue it, and we apologize to the Court for not having done so.

QUESTION: Well, you knew it was there when we postponed rather than noted jurisdiction.

MR. WILLIS: Frankly, the significance of that escaped us, too. And we are now prepared to argue, and our argument would be very brief, basically based on Palmore, that this Court does in fact have appellate jurisdiction because of 1257(1) and because of the language in 1257(1) which states that the purposes of this section -- and I think the language must include the whole section, paragraphs 1, 2, and 3 -- that the highest court of the State includes the District of Columbia Court of Appeals.

And in Palmore, I believe Your Honors decided basically that since Congress had not said that a -- that the appellate rights of Mr. Palmore were because the statute was in fact the -- made the District of Columbia in fact equivalent to a State statute, then it must follow, in all reasoning, that the statute is in fact a statute of the United States.

And were it not so, I think that the additional language that I've earlier cited would have no meaning.

In addition to that, Your Honors, I feel that there are substantial federal questions involved here, and that our Jurisdictional Statement could be treated as a petition for writ of certiorari.

Now, with respect to the issues involved in this case, it is submitted that this statute does not infringe on

the establishment clause or the free exercise clause of the First Amendment.

At first blush, it certainly appears to involve religion. The statute is directed solely at religion.

QUESTION: Well, doesn't it include school teachers of some kind?

MR. WILLIS: Well, I don't think that's been the lower court's opinions of it, Your Honor. It says "lay teachers".

QUESTION: Well, you were addressing the statute as a whole, and my question goes to that. It says, "minister, priet, rabbi, public teacher, or preacher of the gospel".

MR. WILLIS: I think within the meaning of that statute, and the legislative history that appears in the Congressional Record, that the statute is directed only at religious persons or institutions.

QUESTION: You mean public teachers of religion?

MR. WILLIS: I assume that's the case. I assume that is someone who is not ordained, but goes about preaching a religious precept.

QUESTION: Then the next category "preachers of the gospel" would be redundant, because there are a lot of the preachers of the gospel who are not ordained ministers, I suppose.

MR. WILLIS: That's conceivable, Your Honor. I'm

not totally familiar with the rules and regulations involving ordainment.

QUESTION: I suppose if there were not a comma after "public teacher", the meaning that you attribute to the statute would be much clearer: public teacher or preacher of the gospel.

That comma makes your construction of it a little more difficult, doesn't it? Or the construction that you tell us that the District of Columbia courts have put on it.

MR. WILLIS: I think those are just consecutive statements of who the statute will apply to, Your Honor, and I think that's what the comma means.

Now, it certainly is something that hasn't occurred to any of us before this, in the arguments below, and I'm taken somewhat by surprise by that, and I really probably don't have a very good answer to it.

QUESTION: The court in this case said that the section, by its terms, declares void only the bequests and devises for the benefit of religious institutions or the clergy.

MR. WILLIS: That's correct, Your Honor. That's been the position of both Judge Newman and the D. C. Court of Appeals.

Now, the Court of Appeals decided this case only on the rational basis doctrine. It decided that the statute

had no objective that could stand a statutory scheme that would make it consistent with the Constitution.

We submit that the statute is really part of the statutory scheme involving the testamentary transfer of property, a power reserved solely to the courts and solely to the States, and that if the statute involves religion at all, it just does so indirectly.

The statute's objective is to prevent the improvident gifts to -- by a testator within this very brief period, 30 days, since the making of a will.

I think it is a twofold and a prophylactic basis.

It is to preclude the use of undue influence by religion, for the limited period of 30 days, --

QUESTION: But anybody else can use it?

MR. WILLIS: Undue influence?

QUESTION: Yes.

MR. WILLIS: Well, Your Honor, there are abilities to prevail when undue influence has been used, independent of this statute.

Certainly one can resort to the courts and prove that undue influence would have caused a testamentary disposition by a caveat proceeding.

QUESTION: I suppose the Legislature might have thought that the threat of eternal damnation was a higher degree of undue influence than the kind of influence that

might be brought by non-clerical people.

MR. WILLIS: That's exactly what we submit, Your Honor.

QUESTION: Like taking your foot off of the gas -- the oxygen tube.

MR. WILLIS: I don't understand, Your Honor.

The other premise of the statute is to preclude the unwise distribution of one's estate at the expense of one's natural heirs., again limited solely to the 30-day period.

I submit that surely the effect on religion, if there is any effect at all, is less than existed in Braunfeld, wherein the Jewish merchants maintained they were discriminated against because of their religious beliefs, in that they were not able to stay in the status of Americans on Sunday.

The statute is not designed to punish religion, in our view, or to limit religious practices or beliefs, nor is its purpose to establish or de-establish religion. It proscribes, only for a very brief period, testamentary transfers and such proscription is for a legitimate State purpose; that is, the legitimate fear of government that there is a mischief that can be perpetrated by, as Mr. Justice Rehnquist says, -- or at least more readily by -- a person having hopes of, having the ability to express to a testator the possibility of salvation.

We submit that the statute --

QUESTION: Mr. Willis, what happens in this case, if this will were to be -- well, suppose it gave the entire estate to these religious beneficiaries, and it were held to be in violation of this statute, what would happen? Would the earlier will be revived? Or would the decedent be regarded as dying intestate?

MR. WILLIS: In this case, the decedent would clearly be regarded as dying intastate, Your Honor. The statute -- there is a doctrine of independent relative -- or dependent relative revocation, which suggests that if the prior will made a similar dispositive scheme, then the prior will could be used rather than intestacy.

And it is stipulated that the doctrine does not apply in this case. There were two prior wills, 1960 and 1963.

QUESTION: Which certainly indicates how thin the statute's application to this decedent is?

MR. WILLIS: Well, Your Honor, the statute is not so thin, because she did not, in fact, make the same sort of religious bequest in her prior wills, only in the will in which she failed to survive for a period of 30 days did she make a substantial residuary bequest to religious institutions.

Actually, she made those bequests to three religious institutions: Johns Hopkins University, although it is not a church as such, is run by the church and maintained

by the church. And there has been some -- as the Court of Appeals in the District of Columbia said -- legal legerdemain that has enabled the statute to be gotten around on occasion, by declaring that a bequest to a charitable institution which is owned and run by a religion is not the same as a bequest to a religion, per se.

And much emphasis is put on that by the Court of Appeals of the District of Columbia.

QUESTION: Well, the effect of the statute is to void only so much of the will as devises the bequest to the church or clergy, is it not? It doesn't void the whole will, if there were independent bequests in it.

MR. WILLIS: No, only the bequests are declared to be invalid, those bequests to religious persons, institutions, et cetera.

QUESTION: So if you gave to four universities, two church-oriented and two not, the two church-oriented wouldn't get it?

MR. WILLIS: No, Your Honor, I don't think so. We conceded that Johns Hopkins does not fall within the purview of this statute, that Johns Hopkins is not in fact an institution, a church institution, as such; but rather is an educational institution that is incidentally operated by the church. And we've done so because the D. C. law has been very clear that they would hold in that fashion.

There was also a specific bequest to the Little Sisters of the Poor in this case, again a non-sectarian institution which is run by a Catholic Order.

QUESTION: So if you gave it to two clergymen teaching at a university and two laymen teaching at a university, the clergymen couldn't accept?

MR. WILLIS: Well, there's some law in the District of Columbia that suggests that if you are in fact giving it to an individual because he's an individual rather than a priest, that the statute would not have its effect.

QUESTION: Then it sounds like, by the time the D. C. Courts get through with it, there won't be anything there.

MR. WILLIS: Well, they have made serious inroads, and that's one of the reasons we feel that it has, if any effect at all, only a very minimal effect on the exercise of religion. The 30-day period for one, and the fact that the statute has been gotten around on many other occasions.

Now -- I've kind of lost my place -- we also submit that the statute does not violate the Fifth Amendment.

QUESTION: Well, I just wonder if -- let's assume that we disagreed with, or that we -- well, why do we have to reach the religious issue?

MR. WILLIS: We submit you don't have to reach the religious issue.

QUESTION: What if we disagreed with the lower court on the -- that it violates the due process clause?

MR. WILLIS: If you reach the issue that it violates the due process clause --

QUESTION: Well, what if we decide -- what if we didn't -- the lower court said that this violates the due process clause.

MR. WILLIS: And also the First Amendment, the lower court, the Superior Court of the District of Columbia, --

QUESTION: Well, I know, but the Court of Appeals didn't.

MR. WILLIS: The Court of Appeals did not. They said it was not necessary --

QUESTION: Well, let's assume we agree with you that the Court was wrong on the due process clause.

MR. WILLIS: Yes.

QUESTION: Then what do we do?

MR. WILLIS: You reverse and remand the case back, I believe.

QUESTION: Without talking about the First Amendment, do we?

MR. WILLIS: I would hope that that would be the case, although I'm certainly prepared here to argue.

QUESTION: Well, you've already argued the First Amendment.

MR. WILLIS: I understand that, and I argued that because I felt that it was likely that Your Honors would want to hear the First Amendment argument. They have -- the lower court certainly made that argument, and the concurring opinion of Judge Reilly certainly made that argument.

QUESTION: But we have no idea what the lower court -- how the lower court views the First Amendment issue.

MR. WILLIS: That's true, Your Honor.

It does -- it does bean in this fashion, though, Your Honor, on the procedural or a substantive due process or equal protection, the question becomes then: Is there a fundamental issue involved that requires strict scrutiny, as opposed to the rational basis.

And getting to rational basis, if, in fact, the statute does create a classification, these classifications don't offend constitutional safeguards of the Fifth Amendment. Because the classifications are clearly related to the statute's objective; that is, as I've already said, to protect the testator during this very brief period when they might be inclined to leave their property in an unwise fashion, and also, I believe, to preclude the church from exercising its unique abilities to influence gifts to religion.

QUESTION: How does that apply if one of the members of a professional football team, 27, 28 years old, makes a will leaving everything to a church, and then the airplane

carrying him down to Houston, Texas, for a football game, crashes ten days later; does that have any -- is that statute rational as applied to that situation?

Or is the purpose of the statute rational?

MR. WILLIS: The purpose of the statute, I think, is rational, Your Honor, and that's the test. Under --

QUESTION: The reason I picked a 27-year-old professional football player is that I suspect he was not anticipating death at the time he made that will.

MR. WILLIS: That's correct. Judge Newman, for instance, picked out a 25-year-old Ferrari driver, and the --

QUESTION: Well, that might be more dangerous.

MR. WILLIS: Yes.

[Laughter.]

MR. WILLIS: Should be.

At any rate --

QUESTION: Well, does it make any sense? Is there any element of undue influence as applied to an accidental death occurring --

MR. WILLIS: I don't think so, Your Honor. I think that that clearly is one of those unfortunate situations that runs in, runs afoul of this statute. But I don't think that makes it unconstitutional. Just --

QUESTION: Or, at any event, we wouldn't have to decide that in this case, because we don't have a 27-year-old

professional football player.

MR. WILLIS: No, I don't think I agree with Your Honor there, I think that that is an issue that has to be decided by this Court, and was addressed by the lower court, that the statute may very well apply to people in the prime of their life, who do not contemplate death, and it may very well allow people who die 31 days after of a terminal illness to escape the effect of the statute.

QUESTION: The federal estate and gift tax laws used to -- I think they do not any more -- containe an irrebutable presumption that any gift made within one year of death was in contemplation of death, and that presumably would be applicable to the Ferrari driver or the football player, wouldn't it?

MR. WILLIS: Yes, Your Honor.

QUESTION: And nobody, as far as I know, has attacked the constitutionality of those provisions.

MR. WILLIS: Well, no, the irrebutable presumption was specifically decided to be invalid by this Court -- ?

QUESTION: In Micron?

MR. WILLIS: The Heiner --

QUESTION: Heiner, yes.

MR. WILLIS: -- Heiner case.

Later, the IRS went to a rebutable presumption.

QUESTION: Right.

MR. WILLIS: And that certainly is something that could also be argued here, that why not -- and I think Judge Newman said this -- why not have a rebutable presumption, so that there could be some kind of procedural due process review so that Chief Justice Burger's example would be free from the effect of the statute.

Well, I submit to you there's a couple of reasons.

One, the testator is always dead, so that the motives of the testator are never going to be able to be discovered.

And two, it's awfully hard to imagine, at a due process hearing, the person who exercised that undue influence coming in and conceding it.

And I think it would be a futile act to have a due process hearing under that situation. If, in fact, this is an irrebutable presumption. And I think in order for it to be an irrebutable presumption, that is the only time we're going to have to have a due process hearing, to determine that.

QUESTION: Where would the influence be if somebody left money to the Episcopal Bishop in Kenya?

MR. WILLIS: I think if thatperson was in fact a resident of the District of Columbia, that statute -- that bequest would be declared invalid.

QUESTION: Even if nobody knows who he is.

MR. WILLIS: I guess there would have to be some

feeling that he was in fact a religious person, Your Honor, that would -- he would be, I believe, allowed to come in on a due process basis and show that the statute didn't apply to him, just as somebody would be allowed to show that, no, the date on this will is in fact 31 days before --

QUESTION: You mean a bishop, you'd show that he's not a clergyman?

MR. WILLIS: A bishop not a clergyman? I always thought that all bishops were clergymen.

QUESTION: Well, that's what I thought. But you said he could come in and --

MR. WILLIS: Well, if he could show -- if he could make a showing that he wasn't a clergyman, that his title of bishop didn't in fact mean that, I think he would be entitled to --

QUESTION: It would take a whole lot of money to get that, I think.

MR. WILLIS: As I have indicated, I believe this to be a rational classification, largely because of the unique ability of religions to purvey this kind of influence.

While it's true -- and this is something that the lower courts addressed themselves to -- that there are other classes of people who may have an equal opportunity, that is access-wise, to influence the testator, our submission is, as Justice Rehnquist has suggested, that none of them possess the

ability to suggest salvation, in return for a substantial bequest.

I also suggest that there's a way that the harsh aspect of this statute could have been avoided, particularly in the case of Sallye Lipscomb French. Her wills were written by a lawyer, she was 87 years old, it appears likely that her lifespan was a short one, she certainly could have made an inter vivos trust, which would exist for 31 days or 35 days, which would dispose of the identical property that she disposed of by her will. And it could have been defined.

So that there was a way that the harshness of the statute could have been avoided, if in fact she was a rational person, not affected by undue influence, then she could have elected to do so.

And she is not a welfare recipient who is not going to be put in the position of having to go to a lawyer and write a will, as has been the problem in some of the illegitimacy cases that Your Honors have decided.

I submit that in the irrebutable presumption area the case decided by Your Honors of Weinberger vs. Salfi is controlling.

In that case, as you may recall, there was an irrebutable presumption as such, that one who marries a person entitled to welfare benefits -- not welfare, social security benefits, and that marriage fails to survive for a nine-month

period, that the widow is in fact not entitled to the survivor benefits.

And Your Honors have decided that that statute is in fact a prophylactic one, as this one is a preventive one, that does not require anything other than the showing that in fact they do not meet the standards that are required under that statute.

And that's the same, I believe, set of facts here, except we are only dealing with 30 days, we're not dealing with nine months. Mr. Salfi, in fact, died of a heart attack, and the suggestion is that it could have been shown, if allowed, by Mrs. Salfi that he was a healthy man and this marriage was entered into not for a sham but rather as a genuine marriage.

I submit also,now that we've already talked about it a little bit, that there is no reason to apply the strict scrutiny standard. I submit the statute has a clearly secular purpose; that is, to protect the testator and the heirs, and to prevent a particular class, a defined class, from exercising undue influence within a very limited period.

Now, its primary effect I think neither advances nor inhibits religion. And I emphasize the words "primary effect". And there is no excessive entanglement with religion in this case, no more so, certainly, than in the tax case, Walz.

And in that situation, as I've indicated, the primary

effect portion of that standard is one that must most closely be reviewed.

The question becomes, in my view, in our view -- is the incidental impact on religion, that is, the denial of this bequest, here, assuming that there is an incidental impact, which results from a non-fundamental interest of a scheme of testamentary disposition, obviously one which does not have a fundamental right attached to it. There's some question as to whether or not there's a right to testamentary disposition without the State procedures in any event, Is that incidental impact sufficient to trigger strict scrutiny?

And I submit that in the standard that Your Honors have previously made, the primary effect clearly eliminates incidental impact.

And, consequently, that there is no compelling State interest that must be shown by the heirs-at-law, or, ordinarily, by the District of Columbia Government; but they have declined to become involved in this, after the Superior Court case.

Further, I suggest that what the courts below have done is they have substituted their own judgment for what is purely a legislative function. There is a rational basis for the statute. They don't like the statute and, as a consequence, they declare the statute to be violative of the Fifth and the

Fourteenth Amendments.

The statute may no longer be as valid as it once was -- it's an 1866 statute, the same Congress that passed the Fourteenth Amendment. And Judge Pomeroy, in a dissent in a case from Pennsylvania, In re Estate of Cavill, said that: "In an age when the hope of salvation may be less vivid and the fear of damnation less acute than formerly it was, one may disagree with the wisdom or necessity of the provision before us today; but wisdom -- whether that of this Court or the legislature -- is not determinative of legislative power."

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Willis.

Mr. Bauersfeld.

ORAL ARGUMENT OF CARL F. BAUERSFELD, ESQ.,

ON BEHALF OF THE APPELLEES

MR. BAUERSFELD: Mr. Chief Justice, may it please the Court:

I would like first to address myself to the jurisdictional question.

The appellees renew their motion to dismiss this appeal on the ground that the Court has no jurisdiction over the appeal under Title 28 U.S.C. Section 1257.

This motion is based upon the fact that while any statute of Congress is a statute of the United States, Congress did not intend laws applicable only in the District

of Columbia to be statutes of the United States, for purposes of this Court's appeal jurisdiction under Section 1257 of Title 28.

We rely on the case of the American Security and Trust Company vs. the Commissioners, and the other cases cited in our motion to dismiss, and also in the brief.

In the American Security case, the Court had under consideration the provisions of Section 250 of the Judicial Code, enacted in 1911, which provided that any final judgment or decree of the Court of Appeals may be re-examined in cases in which the construction of any law of the United States is drawn into question by the defendant.

The Court in the American Security case held that Section 250 of the Judicial Code should not be applied to purely local laws applicable only in the District of Columbia.

The opinion pointed out that the same phrase used in the statute may have different meaning in different connections. In other words, it is the context in which Congress uses the phrase that is important; and it is, we say here, that the context in the present situation, it is unreasonable to believe that Congress, in cases from the District of Columbia Court of Appeals, where a statute is limited or confined to the operation in the District of Columbia, are determined to be invalid, is not to come to this Court by direct appeal.

In Palmore vs. United States, the Court pointed out that jurisdictional statutes are to be strictly construed in authorizing appeal to this Court. That case interpreted certain provisions of the District of Columbia Court Reform and Criminal Procedure Act of 1970. That Act clearly indicated that distinctions between statutes of the United States and statutes of the District of Columbia are of jurisdictional importance, if the new District of Columbia Courts, organized under Article I, were to be able to function as purely local courts and the United States District Court for the District of Columbia, was to be able to function as an exclusively Article III court.

By Section 172(c) of that Act, Congress added Section 1363 to Title 28 of the Code, and that section provides: For purposes of this chapter -- referring to District Court jurisdiction -- references to the laws of the United States or Acts of Congress do not include laws applicable exclusively to the District of Columbia.

Congress has recognized, not only in the District of Columbia Court Reform Act of 1970, but generally, that enactments for the District of Columbia are separate and distinct from those that are applicable to the entire United States.

It has done this by enacting two separate Codes. The District of Columbia Code specifically provides that it

contains all the general and permanent laws relating to or enforced in the District of Columbia, except such laws as are applicable in the District of Columbia by reason of being laws of the United States. The latter laws, of course, appear in the United States Code.

Now, in the American Security and Trust Company case, the Court recognized that/jurisdictional statute it was interpreting there was passed to reduce the number of appeals to this Court. The position which was contended for by the appellant in that case would have had the effect of increasing the number of appeals, contrary to the intention of Congress.

QUESTION: Then they could come here only by way of certiorari?

MR. BAUERSFELD: Yes, sir.

QUESTION: Not at all by appeal, ever?

MR. BAUERSFELD: From the District Court for the District of Columbia. Yes, that would be my position.

QUESTION: And that's an unusual posture for any court, isn't it?

MR. BAUERSFELD: Well, at the present time, the appeals may only come here -- cases may only come here to this Court from the United States Court of Appeals for the District of Columbia Circuit by certiorari.

QUESTION: If it holds a State Act unconstitutional, doesn't the State have a right of appeal, rather than certiorari?

MR. BAUERSFELD: I think under 1254, that it may only come here by certiorari.

Certainly if a State court holds the State statute unconstitutional, it has no right to come here.

QUESTION: That's right.

QUESTION: But if it sustains it -- if it sustains it.

MR. BAUERSFELD: Yes, if it's a State statute.

QUESTION: The general principles of a federal court holds a federal statute unconstitutional, review is by certiorari.

MR. BAUERSFELD: Yes, sir.

QUESTION: But if a federal court holds a State statute unconstitutional, review is by appeal.

MR. BAUERSFELD: I've been corrected, Your Honor.

QUESTION: My only point is I think you place this Court in a position by itself. And that maybe your argument would have to be that that's what Congress intended.

MR. BAUERSFELD: That is what my argument is, Your Honor. It is not a court for the same magnitude as the United States Court of Appeals for the District of Columbia.

QUESTION: Well, what's involved in this case, and you argue to us that you want to cut down on the number of appeals to this Court, do you realize that you're using undue influence?

[Laughter.]

MR. BAUERSFELD: I didn't understand that, sir.

QUESTION: Well, if I understand it, what you're suggesting is that even when the District of Columbia Court of Appeals, as in this case, declares a District statute unconstitutional, a statute whose operation is confined to the District, unconstitutional under the Federal Constitution, that the only review here in this Court from the District of Columbia Court of Appeals is by certiorari. Is that right?

MR. BAUERSFELD: Yes, sir.

QUESTION: And you're urging on us, what? That we should treat this as a petition for cert, and then deny it?

MR. BAUERSFELD: Well, I was going to get to that. Let me first --

QUESTION: But that is your position on the jurisdictional question.

MR. BAUERSFELD: No, I had not finished yet.

QUESTION: Oh, I'm sorry.

MR. BAUERSFELD: But to further answer your question, if the District of Columbia Code is considered a State statute, the laws are equivalent to a State, then it's invalidating a State, in effect, a State law; and if it were a State court, the State court could not come to this Court by appeal.

QUESTION: Well, if, for jurisdictional purposes, the District of Columbia Court of Appeals is a State court,

isn't it? Under our cases?

MR. BAUERSFELD: Well, if it's made applicable, yes.

QUESTION: We've decided that, haven't we?

Well, if you deal with it as a State court, then if it's sustained, under your approach, if it's sustained, a District of Columbia Code provision against a federal challenge, it would come here by appeal.

MR. BAUERSFELD: That would be correct. But if it holds a statute unconstitutional, just like if a State court holds a State statute unconstitutional, then there would be no appeal to this Court.

QUESTION: I understand.

MR. BAUERSFELD: That was the point I was trying to make.

QUESTION: Let's see if I follow you. Didn't Palmore say that a D. C. Code provision was not a State statute for purposes of 1257?

MR. BAUERSFELD: It did say that, sir, but of course I'm getting back to my context argument in that event. It did say that; there's no question.

QUESTION: Well, may I just inquire? Are you arguing that a District of Columbia statute is neither a State statute nor a statute of the United States? Or are you arguing that it's a State statute?

MR. BAUERSFELD: I'm arguing, in effect, that it's a State statute.

QUESTION: I see. Why don't you argue that it's neither?

MR. BAUERSFELD: Well, I say, for purpose --

QUESTION: You're asking us to overrule Palmore, in effect, or to say it applies only to --

MR. BAUERSFELD: No, I would not. No, I say, as used in Palmore, that is correct. But in the context here, Congress, I'm saying, never intended to confer upon this Court appeal jurisdiction, jurisdiction on direct appeals, because, while the District of Columbia Court of Appeals is the highest court, it's the same as the highest court of a State, that does not necessarily mean that the statutes that are enacted are also of the highest court.

QUESTION: Well, I understand that, but why can't you reach the same conclusion -- and what's wrong with the argument -- that these are a species of legislation which are neither statutes of a State, unquote, or statutes of the United States, within the meaning of that term?

MR. BAUERSFELD: Well, of course, that is absolutely correct. They are not, because they can't be statutes of a State because they are not enacted by a State, they are enacted by the Congress.

QUESTION: And they are not a statute of the

United States by analogy to the section in a later chapter. Of course, that doesn't literally apply to this case, because it's a different chapter.

MR. BAUERFELD: That is correct.

We say that Congress did not intend, in creating the District of Columbia Court of Appeals, to allow appellate jurisdiction to this Court under the -- every time it holds a statute that is in the District of Columbia Code unconstitutional.

To do so would really expand its jurisdiction. In enacting the District of Columbia Court Reform Act of 1970, Congress intended to have the newly created Article I court function as local or State court; it intended the United States District Court to function as an Article III court. And by adding Section 1363 to the U. S. Code, it attempted to restrict the District Court's jurisdiction to Acts having general application.

It would seem to follow that this Court's appellate jurisdiction should be limited to cases involving statutes of the United States having general application rather than Acts of Congress that are confined to the District of Columbia.

It is in this context that we urge the Court to deny jurisdiction.

In Palmore vs. United States, this Court treated the Jurisdictional Statement as a petition for certiorari.

It is submitted that the Court should not follow that procedure in this case, because this case presents neither a substantial federal question nor an issue that needs further elucidation by way of precedent.

The D.C. statute here involved, the so-called Mortmain statute, is unique in the United States, in that it voids only religious testamentary gifts.

The Pennsylvania statutes and the other so-called Mortmain statutes are not nearly so discriminatory, in that they also prohibit gifts to other charitable organizations.

Here, the District of Columbia stands to gain tax revenue by continued validity of the statute, because the District of Columbia Code provides that the bequest would escheat to the District of Columbia if the testator had no living heirs.

Yet the District of Columbia did not appeal from the decision of the Superior Court. The United States has never entered an appearance in the case. Although each was given notice under Rule 47 of the Rules of the District of Columbia Court of Appeals, which is now in Title 28 U.S.C. Section 2403, where you have to notify the Attorney General in cases where there is a constitutional question or a statute being drawn into question.

So apparently neither the District of Columbia nor the United States consider that the issues in this case are

substantial, else they would be here today.

Further, there is a bill now pending before the City Council of the District of Columbia to repeal this particular statute. It is Bill 2-171, introduced June 1, 1977.

QUESTION: It wouldn't affect this case.

Will it?

MR. BAUERSFELD: Only on whether or not you consider it a federal question. A substantial question.

QUESTION: I don't see how it can affect this case at all.

Unless you're going to bring the testator back.

QUESTION: Their non-appearances might reflect a conviction that the Court of Appeals was right.

MR. BAUERSFELD: It may well, sir.

QUESTION: You hope.

MR. BAUERSFELD: Passing to the merits of the case, we urge the Court to affirm the decision of the Court of Appeals. The Court below held this statute invalid as establishing classifications that have no rational relationship to the purpose of the legislation, and thus deny equal protection of the law.

QUESTION: Whose right are you defending here, the churches or the testator's, or both?

MR. BAUERSFELD: I would say both, Your Honor. The

Court of Appeals placed their decision on the rights of the legatees, the churches.

QUESTION: And your client is one of the legatees?

MR. BAUERSFELD: Yes, sir -- well, I represent the --

QUESTION: Calvary Baptist Church.

MR. BAUERSFELD: -- Calvary Baptist Church.

QUESTION: So you're saying the legatees are being unconstitutionally discriminated against, as against other legatees; is that it?

MR. BAUERSFELD: Yes, sir.

QUESTION: And on the First Amendment question, whose rights did the District Court feel had been infringed? The testator's or the churches?

MR. BAUERSFELD: I think both. My best recollection, Your Honor, is that it's both.

QUESTION: Are you going to argue that question? I guess you are.

MR. BAUERSFELD: Yes, I thought we'd find time.

QUESTION: Whose rights are you -- I'll just ask you, whose rights are you going to --

MR. BAUERSFELD: I think, as far as First Amendment rights are concerned, it violated both.

QUESTION: Was the testator a member of the congregation, or whatever it's called, of your church?

MR. BAUERSFELD: Yes, she was a member of the

congregation.

QUESTION: And you certainly -- there are many cases that hold that a membership organization or association can assert the rights of its individual members. The NAACP and --

MR. BAUERSFELD: Yes, sir.

QUESTION: -- Birmingham and other cases.

MR. BAUERSFELD: Before getting into the merits, perhaps I should restate the facts, or bring out some additional facts.

The bequest that was made by Mrs. French left a number of bequests, and in addition it left her residuary to three persons: one-third Johns Hopkins University, which is not involved here, that bequest. Everybody admits it should be paid.

And then one bequest to the Calvary Baptish Church, one-third of the residuary; and one-third to St. Matthews Cathedral.

Mrs. French was a member of the Calvary Baptish Church. Her husband, a physician, who predeceased her, was a member of the Catholic faith.

It was stipulated in the case, and the Court of Appeals held, there is no evidence that the appellees had made any attempt to influence her choice of legatee.

In addition, this bequest in this case involves only

personal property, and it does not involve any real property.

The heirs-at-law here are collaterals, are a brother and nieces and nephews.

Getting back to my argument on the merits, the Court of Appeals relied on the legislative history, and stated that the purpose of the statute was to preclude death-bed gifts to clergymen and to religious organizations by persons who might be unduly influenced by religious considerations.

It pointed out that the statute voids only bequests and devises for the benefit of religious institutions or the clergy.

Testamentary bequests to charitable organizations are not included in the D. C. statute.

Further, the statute, as interpreted by the District of Columbia Court -- and I believe this Court will follow the interpretations of the District of Columbia Court -- distinguishes between bequests to religious institutions and bequests to charitable institutions owned and operated by religious institutions.

The statute only invalidates bequests to religious organizations for religious purposes and to the clergy.

The Court concluded that there was no rational basis for presuming that a testator, troubled by religious convictions, is likely to make a bequest directly to a church rather than to a charity run by a church.

The statute treats -- thus treats similarly situated legatees entirely different.

It further pointed out that there were others, such as lawyers, doctors, nurses, and charities who are in an equal position with some -- to influence a testator. Yet the statute never covers them.

And the singling out of reglion, where there is no grounds or difference, is irrational.

As I stated before, this statute operates if the testator has no family or heirs, and that is, if there are no heirs or family, the bequest is automatically void and escheats to the District of Columbia.

It was stated that the courts of the District of Columbia had used the doctrine of dependent relative revocation in other cases to avoid the statute, and this is true. And it was pointed out that it wasn't used in this case. The reason it wasn't used in this case is we never got to it. The court granted summary judgment on the other. But in the record it shows that the gift that Mrs. French made by her former wills to the charitable institutions.

QUESTION: They were identical?

MR. BAUERSFELD: No, they were not identical, but they did include them.

QUESTION: The same legatees?

MR. BAUERSFELD: The same legatees, yes.

Regarding the tax law, irrebutal presumption and presumption, even though, if they had presumption for purposes of tax purposes, it would never have voided the gift. The gift remained.

QUESTION: Right. It was just presumed to be in the question of death.

MR. BAUERSFELD: For tax purposes.

QUESTION: What was the name of the case in this Court involving that, back in the Thirties, do you remember?

MR. BAUERSFELD: I'm sorry, I forgot, sir.

QUESTION: I can't remember, either.

MR. BAUERSFELD: It was suggested also by counsel that the testator could have avoided this problem by making inter vivos gifts.

Well, that argument, I think, conflicts with the decision of this Court in Trimble -- the rationale decision in Trimble vs. Gordon, where that is not the issue. If she had done that, then we wouldn't have the issue here.

In his argument and in his brief, it is stated by the appellants that it is questionable whether the statute makes a classification at all, and thus, whether the equal concept of laws apply.

It is argued that it is a part of the law of the District relating to testamentary disposition. The appellees recognize that a State can legislate to regulate both

testate and intestate succession.

However, when the State does so legislate, it cannot do so in a discriminatory manner. And it is here, its laws must be consistent with the requirements of equal protection. And the statute here singles out gifts to religious institutions, for religious purposes, and to the clergy, in a discriminatory manner.

The appellants state that the statute does not regulate a fundamental interest protected by the First Amendment, and therefore that there is no need to show a compelling interest to justify the statute.

It seems to me that it needs little or no argument to show that the free exercise of one's religion is a fundamental constitutional right, protected by the First Amendment.

Now, the Court of Appeals did not reach the issue of whether the classification affects fundamental rights, since it concluded that the discriminatory treatment set forth in the statute could not withstand the rational basis test.

However, the trial court concluded that there was no compelling State interest to justify the classification made by the statute.

The statute singles out religious organizations, for religious purposes alone, and precludes the right of the

beneficiaries to receive the bequest.

QUESTION: Is this an argument that it violates the First Amendment?

MR. BAUERSFELD: No, this is till under the --

QUESTION: Equal protection.

MR. BAUERSFELD: -- equal protection clause.

QUESTION: Well, would you be making the same argument if all the statute did was to bar gifts to lawyers made within 30 days of death?

MR. BAUERSFELD: I believe so, yes, sir. If it singled out just lawyers, yes, sir.

QUESTION: Or any other identifiable --

MR. BAUERSFELD: Any other single person, yes.

QUESTION: Well, what if it singled out people who are apt to have access to a testator in the period immediately before he might expect to die, doctors, lawyers, priests, ministers, rabbis?

MR. BAUERSFELD: If it was broad and not just singling out religion --

QUESTION: And have family members.

QUESTION: Well, what about the set of cases that says that -- take my lawyer example, there is a line of cases that says a State needn't solve all the problems at once, it can take a step at a time, and they just stepped into the lawyers -- they just took the lawyer step in my example.

MR. BAUERSFELD: Yes.

QUESTION: But you think that would still be invalid?

MR. BAUERSFELD: If it's --

QUESTION: For the same reason that you're arguing on -- at least you don't think there's any difference between priests and lawyers, then, in that regard?

MR. BAUERSFELD: No, sir. I don't.

QUESTION: What about the argument that the possible promise of salvation provides a justification for legislating with respect to religious purposes?

MR. BAUERSFELD: Well, you are directly involving the First Amendment in that instance, and I think it is suspect.

QUESTION: But then, is that simply because of the First Amendment argument? Or is that also equal protection?

MR. BAUERSFELD: Well, I think they overlap, sir, but it is a First Amendment argument primarily.

QUESTION: Well -- excuse me.

QUESTION: Even if it were assumed to be factually accurate, that there's a greater risk of an unwise testamentary disposition to someone in exchange for a promise of salvation, you still say it violates the --

MR. BAUERSFELD: Yes. I think it violates both. Because it discriminates.

QUESTION: What part of the First Amendment do you

think that violates?

MR. BAUERSFELD: We think it violates both. However, the Court --

QUESTION: How does that lead to an establishment of a religion?

MR. BAUERSFELD: If I can get over -- do you want me to get out of the --

QUESTION: Yes. Since we're on the subject. You say it violates both sections of the First Amendment. How does this particular statute lead to the establishment of a religion?

MR. BAUERSFELD: Yes.

QUESTION: If it's enough money.

QUESTION: Well, the establishment clause says that you may pass no law which establishes or forbids a religion, and you're saying it violates -- it's the forbid clause, not the establishment clause.

QUESTION: Well, the establishment clause -- with all respect to you, Brother White -- it does not say "forbid".

QUESTION: It says "affecting".

QUESTION: It says "Congress shall make no law respecting an establishment of religion" --

QUESTION: "Respecting"

QUESTION: --"or prohibiting the free exercise of it." It's prohibiting the free exercise there.

QUESTION: Well, maybe we're in the free exercise problem.

MR. BAUERSFELD: I think we're in both. And if you --

QUESTION: At any rate, you don't need both, if you can persuade us on one, do you?

MR. BAUERSFELD: That is correct.

[Laughter.]

MR. BAUERSFELD: And the court below, in the trial court, held that it violated the equal protection -- the free exercise provision of the First Amendment.

QUESTION: The right of any testator, testatrix, to give -- make bequests and give legacies to anyone, any church or all churches.

MR. BAUERSFELD: Yes, sir.

QUESTION: And what authority is there for the proposition that the Chief Justice has just suggested to you, that the free exercise clause confers the right to unfettered -- unfetteredly bequeath money to any church, regardless of any State regulation?

QUESTION: The First Amendment.

QUESTION: Let me suggest an answer, that the free exercise preserves the right of the clergyman to persuade his member of his congregation to give to the church.

MR. BAUERSFELD: That was, of course, the direct

opinion of the concurring judge in the Court of Appeals. He placed it on that very right.

QUESTION: You don't go along with that?

MR. BAUERSFELD: Sir?

QUESTION: You don't go along with that?

MR. BAUERSFELD: Well, I think it's easier to justify it on other grounds. I agree with it, but I think it's just easier to justify it on other grounds.

QUESTION: On what grounds?

QUESTION: Equal protection?

MR. BAUERSFELD: Yes, the Court of Appeals reached it on the equal protection.

QUESTION: I know it did, but what -- maybe that's a slippery slope. What do you think we should decide it on? If we go your way.

MR. BAUERSFELD: Well, I would prefer you to decide it on the equal protection clause, sir.

The --

MR. CHIEF JUSTICE BURGER: Your time has expired now. I think your friend has one minute left.

Do you have anything further?

REBUTTAL ARGUMENT OF FLOYD WILLIS III, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. WILLIS: Yes, Your Honor.

Just on the issue of jurisdiction, I submit that

what my brother says is not accurate, because the statute would not include the last paragraph, that is 1257 wouldn't include the last paragraph, if Congress didn't mean for the State -- this Court to have appellate jurisdiction over the District of Columbia Court of Appeals.

The comment was made that D. C. has not appeared, the District Government has not appeared. I submit to you it is because of the de minimis effect of this statute, that it has on the District of Columbia, and not because they feel it is unconstitutional.

The very distinction between this statute and all other statutes of a like nature is what makes this statute more rational.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:09 p.m., the case in the above-entitled matter was submitted.]

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