In The

Supreme Court of Virginia

RECORD NO. 171098

THE PURE PRESBYTERIAN CHURCH OF WASHINGTON and SAMYEOL KIM,
Appellants/Defendants,

v.

THE GRACE OF GOD PRESBYTERIAN CHURCH,
Appellee/Plaintiff.

OPENING BRIEF OF APPELLANTS

From the Circuit Court of Fairfax County
No. CL2016-16945

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INTRODUCTION

The Grace of God Presbyterian Church ("Grace Presbyterian"), a Korean congregation consisting of approximately 100 members, formerly known as Great Grace Presbyterian Church, obtained a judgment below declaring that it was the product of a valid merger between Grace Presbyterian and The Pure Presbyterian Church of Washington ("Pure Presbyterian").[1] Pure Presbyterian is another Korean congregation, numbering thirty-some people, which prior to the judgment gathered at 12851 Knight Arch Road, Fairfax, Virginia 22030, which it owned (the "Church Property"). The judgment below granted injunctive relief requiring Pure Presbyterian to transfer title to the Church Property to Grace Presbyterian.

The judgment below is a nullity for three reasons. The relief sought by Grace Presbyterian was premised on a declaration regarding the governance and succession of a religious society, which the Circuit Court for Fairfax County lacked jurisdictional competence to decide. Additionally, when Grace Presbyterian non-suited its breach of contract count, it eliminated the only claim conferring jurisdiction on the trial court. Grace Presbyterian's cause of action was indisputably mature at the time of filing, denying the trial court below any statutory declaratory judgment jurisdiction. Finally, because Pure Presbyterian

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[1] As there is no disagreement that Grace Presbyterian was the name adopted by Great Grace Presbyterian Church about the time of the events in question, *see* JA 99, that entity is referred to as simply Grace Presbyterian for purposes of clarity.

was under the protection of a federal bankruptcy court, and the Church Property was within the exclusive in rem jurisdiction of that Court when the Complaint and First Amended Complaint were filed, those filings were void for want of jurisdiction.

STATEMENT OF THE CASE & MATERIAL PROCEEDINGS BELOW

As alleged in the Complaint filed by Grace Presbyterian on December 9, 2016: "On November 2, 2015, Pure Presbyterian filed for Bankruptcy under Chapter 11 of the Title 11 of the United States Bankruptcy Code. Their only substantial asset was their church property and their only substantial liability was the Note securing that property which was held, along with a deed of trust, by ACM United, LLC . . . ." JA 2. As also alleged in the Complaint: "On September 21, 2016, a Plan of Reorganization (the "Plan") was confirmed by the bankruptcy court." JA 2. Under the Plan, Pure Presbyterian had two options for satisfying the debt on its building. "The first source would be from funds provided by another church that chooses to merge with the debtor." JA 118. Pure Presbyterian was allowed six months in which to merge. The Plan further allowed: "If the debtor is unable to effect a merger and liquidation of the debt within the time allowed, the debtor shall sell the Church Property. The debtor has had a number of offers and inquiries for the Church Property that are sufficient to liquidate the debt." JA 118.

The First Amended Complaint was filed on February 1, 2017 and contained three counts. JA 46–83. Count I was for declaratory judgment running against Pure Presbyterian alone. JA 52–53. Count II sought an injunction against all defendants. JA 53. Count III, pled in the alternative, alleged a breach of contract by Pure Presbyterian. JA 53–54. On March 15, 2017, Grace Presbyterian served papers on Pure Presbyterian, nonsuiting Count III and its associated ad damnum. JA 84–85; *see* JA 86–87.

Following an unsuccessful demurrer, Pure Presbyterian filed a timely answer to the First Amended Complaint, repeatedly denying that a merger had occurred, JA 89–91, demanding strict proof, JA 92, and pleading the statute of frauds. JA 93. Pure Presbyterian admitted that it filed for bankruptcy prior to November 2, 2015,[2] that its only substantial asset was the Church property, and its only substantial liability was the debt on that property. *Cf.* JA 50; 90. Pure Presbyterian likewise admitted that the Plan was confirmed on September 21, 2016 and that the Plan was attached to the First Amended Complaint as Exhibit B. *Cf.* 50; 90.

On February 20, 2017, Pure Presbyterian filed its Final Report and Motion for Final Decree in the bankruptcy court. JA 187–90. In it, Pure Presbyterian

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[2] The filing date was actually November 2, 2015, as alleged, not prior thereto. JA 127. *See also* Code § 8.01-388; Va. R. Evid. 2:203 (allowing judicial notice of official publications of the United States).

reported that it continued to have the options of merger or sale. . On March 16, 2017, counsel for Grace Presbyterian filed a notice of the transfer of the claim from the holder of the note to Grace Presbyterian. JA 224–56. Grace Presbyterian filed a Response to Motion to Close the Case, stating that it "has no objection to entry of the Final Decree." JA 258. Although it claimed to be the merged entity potentially envisioned in the Plan, asserting that the "merger process began … when the two congregations … voted to join together" and that "[t]he merger was completed in February 2017, when Grace [Presbyterian] purchased the note," JA 257, Grace Presbyterian sought no determination from the bankruptcy court. Instead, when the bankruptcy court granted the motion on March 31, 2017, it recited: "Nothing in the motion to close case and final account, and this order shall be dispositive of any issue pending between the debtor and the Great Grace Presbyterian Church, currently pending in the Circuit Court of Fairfax County, Virginia (Case No. CL2016-16945)." JA 260–61; *see* JA 263–66.

Trial commenced in the Circuit Court of Fairfax County on May 1, 2017 and ran through May 3, 2017. Pure Presbyterian moved to strike at the conclusion of Grace Presbyterian's evidence on the grounds that the draft Merger Agreement required a signed writing and payment of the debt in full, neither of which had occurred. JA 521–24. Counsel for Grace Presbyterian replied: "We've met the terms of the agreement. And through partial performance, that's how we step

around 11-2 which is how they demurred saying, well you have a statute of frauds." JA 524–25.

The jury was instructed on May 2, 2017, JA 716–23, and found for Grace Presbyterian on two special interrogatories the next day. JA 781, 783–85. Judgment was entered on May 19, 2017 over the objection of Pure Presbyterian, JA 99–102, and a timely notice of appeal was filed on June 16, 2017. JA 103–05. The trial transcript was not filed within either 60 or 70 days, but on motion this Court granted leave to file out of time. A timely petition for appeal followed.

STATEMENT OF FACTS

The facts testified to at trial demonstrated that Grace Presbyterian had had a building at 3331 Holloman Road in Falls Church. JA 337. Pure Presbyterian, also known as OnMaEul Church, had a building on Knight Arch Road, the Church Property. JA 336–37. The Pastor of Grace Presbyterian acknowledged: "Truthfully, the OnMaEul location of the church is much better, that's the truth." JA 493. He approached Pure Presbyterian when it was in financial difficulties and under the control of the bankruptcy court suggesting either a merger or a purchase. JA 476–78.

The Pastor of Grace Presbyterian maintained that an agreement to merge the two churches was reached through a process in which Pure Presbyterian supposedly voted to merge on February 14, 2016, with Grace Presbyterian then

voting to merge on February 22, 2016. JA 496–98. He thought the merger was finalized with the selection of a new church name on March 7, 2016. JA 498. However, Deacon Daniel Kim of Grace Presbyterian testified: "The first formal merger was Easter Sunday 3-27-16." JA 339; *see* JA 335–336.

Grace Presbyterian had entered into a listing agreement to sell its building at 3331 Holloman Road on March 2, 2016. JA 337, 343, 345–47. Subsequently, on or about April 4, 2016, Deacon Kim of Grace Presbyterian drafted the Merger Agreement, which was attached as Exhibit B to the Affidavit of Yosop Kang, which was Exhibit A to the First Amended Complaint. JA 66–67. It was undisputed that none of the churches signed the Merger Agreement, JA 351–52, 354–55, 431–32; JA 553, which recited that mutual signatures was a condition of its effectiveness. *See* JA 67, 134.

Pure Presbyterian had a different understanding of what was going on between the two churches. Its leadership believed that Pure Presbyterian's vote had merely signaled an agreement to have joint services and other meetings and to enter a period of discernment to determine whether a merger would be a good fit for the two congregations, with Pure Presbyterian reserving its options to merge or sell the Church Property. JA 546–49, 646–50. By April 2016, the experience had proved rocky. JA 549–50, 553–54, 556–58, 567, 568.

During this period, Grace Presbyterian was advised by Pure Presbyterian's bankruptcy counsel not to merge finances when representatives of Pure Presbyterian met with him. JA 375–76. As a consequence, there were two separate offering boxes when the congregations worshipped jointly at the Church Property on Knight Arch Road. JA 376–77; JA 554–55.

Grace Presbyterian sold its church building on October 21, 2016, with Grace Presbyterian receiving $816,000 in equity. JA 387–90. Using those proceeds, cash on hand, and a $200,000 loan from a sister church, JA 390–92, Grace Presbyterian then bought the note on Pure Presbyterian's building, the Church Property, in January of 2017 for a discount. JA 411–14.

Well prior to that, in early November, 2016, Pure Presbyterian withdrew from merger efforts through an email notice, advancing as the reasons, inter alia, "denominational issues, spiritual differences, and other problems," as well as stating an intent to sell its building to satisfy the debt. JA 138–40; *see* JA 570, 609–10. On December 5, 2016 Pure Presbyterian asserted sole ownership of the Church Property by locking out non-congregants. JA 407–410. Ten days later, Grace Presbyterian's right of entry was restored under an agreed temporary injunction. JA 40–42. Joint services, however, were not restored. JA 429–30. After receiving notice of the purchase of the note, Pure Presbyterian tendered interest payments to Grace Presbyterian in accordance with the Plan, which had

been approved by the United States Bankruptcy Court for the Eastern District of Virginia on September 21, 2016. JA 429, 414–18; *see* JA 185–86.

On cross-examination, Deacon Kim of Grace Presbyterian stated that no one from Pure Presbyterian played any role in drafting the proposed Merger Agreement. Instead it was based on Deacon Kim's understanding of the agreement after discussions with both sides. JA 422–23. Deacon Kim also recognized that the Merger Agreement stated: "This contract will be effective immediately after it's been signed by both [Pure Presbyterian] and [Grace Presbyterian]," and that it required "that both parties have to sign it and date it and that each will have an original signature." JA 425–427.

Deacon Kim agreed that the Merger Agreement required the payment of the entire balance of $1.334 instead of the $1.15 million paid. JA 439–40. He also acknowledged that a Christian church could have a desire to pay its creditors in full and that Grace Presbyterian had not done that. JA 441–43. When Elder Kang of Grace Presbyterian was examined as an adverse witness, he agreed that the undertaking in the Merger Agreement to pay the $1,334,394.29 debt of Pure Presbyterian was a material term. JA 702–03. Finally, he recognized that the Church Property, assessed at $2.23 million, was being acquired by Grace Presbyterian for $1.15 million. JA 469.

Despite being instructed: that there is a strong presumption that no contract exists without a signature where the parties intend to culminate their agreement with a signed contract, and that this presumption can only be overcome with strong evidence, JA 723; that partial performance satisfies the statute of frauds only where the acts alleged to constitute part performance are consistent with no other theory than a party acting in furtherance of the unsigned contract, and even then only so far as is necessary to prevent a fraud, JA 722–23; and on the principle of *contra proferentem*, JA 721, the jury found the existence of an unwritten contract to merge the congregations and full performance by Grace Presbyterian under that contract. This finding was the basis for the May 19, 2017 Final Order, granting declaratory and injunctive relief to Grace Presbyterian. JA 99–102.

ASSIGNMENTS OF ERROR

I. The trial court erred as a matter of law in proceeding on this case and entering the Final Order disposing of the Church Property, as this judgment was necessarily predicated upon a judicial determination that Grace Presbyterian was the successor church to Pure Presbyterian, which was held to be extinguished by the merger, a determination beyond the constitutional competence of the trial court to resolve, even employing neutral secular standards, and was thus entered without subject matter jurisdiction.[3]

II. The trial court erred as a matter of law in adjudicating this case and entering declaratory and injunctive relief for Grace Presbyterian after it non-suited its breach of contract claim because Grace Presbyterian's declaratory judgment claim was predicated on a breach of contract theory that was fully mature at

[3] Although this argument was not made below, lack of subject matter jurisdiction may be raised for the first time on appeal. *See, e.g.*, *Seabolt v. Cty. of Albemarle*, 283 Va. 717, 719 (2012).

the time of filing, and so outside the trial court's declaratory jurisdiction under Code § 8.01-184. As a consequence, the trial court lacked subject matter jurisdiction to enter the Final Order, which is a nullity.[4]

III. The trial court erred as a matter of law in adjudicating this case and entering the Final Order disposing of to the Church Property, as the bankruptcy court had prior, exclusive in rem jurisdiction over the Church Property when the Complaint and the First Amended Complaint were filed, rendering these filings nullities and leaving the trial court without subject matter jurisdiction.[5]

STANDARD OF REVIEW
(Assignments of Error I, II, & III)

Jurisdiction presents questions of law reviewed de novo. *The Country Vintner, Inc. v. Louis Latour, Inc.,* 272 Va. 402, 410 (2006); *accord Henderson v. Ayres & Hartnett, P.C.*, 285 Va. 556, 563 (2013). Lack thereof may be raised for the first time on appeal. *See, e.g.*, *Seabolt*, 283 Va. at 719.

AUTHORITIES & ARGUMENTS

I. The Circuit Court of Fairfax County lacked constitutional competence to decide that Grace Presbyterian succeeded Pure Presbyterian by merger, extinguishing Pure Presbyterian. (Assignment of Error I)

It is clear that Virginia courts have jurisdiction to resolve church property disputes employing neutral principals of law. *See, e.g.*, *Falls Church v. Protestant Episcopal Church in the U.S.*, 285 Va. 651, 664 (2013) ("Virginia has long applied neutral principles of law when there is a dispute between a hierarchical church and

[4] Although this argument was not made below, lack of subject matter jurisdiction may be raised for the first time on appeal. *See, e.g.*, *Seabolt*, 283 Va. at 719.

[5] Although this argument was not made below, lack of subject matter jurisdiction may be raised for the first time on appeal. *See, e.g.*, *Seabolt*, 283 Va. at 719.

a local congregation over the ownership of church property.”). But the court below was asked to do, and did, something qualitatively different. It was asked to declare that Grace Presbyterian is a church body to the exclusion of Pure Presbyterian. This is what the trial court did, entering a judgment extinguishing Pure Presbyterian by merging it into Grace Presbyterian, “the surviving church” “with unified offerings, back accounts, services *and clergy*, according to the bylaws of Grace of God.” JA 101 ¶ (vi) (emphasis added). On this basis, the trial court entered an injunction that transferred all property of Pure Presbyterian, including the Church Property, to Grace Presbyterian and subjected “all members of … the surviving church … to the bylaws of said church and its denomination” under pain of contempt. *See* JA 100–01 ¶¶ (i), (ii), (iii), (iv), (vii), (viii), (iv). The trial court below lacked the jurisdictional competence to enter this order, even when applying otherwise neutral principles. *See Singh v. Mooney*, 261 Va. 48, 51–52 (2001) (“An order is void *ab initio* if entered by a court in the absence of jurisdiction of the subject matter or over the parties, *if the character of the order is such that the court had no power to render it*, or if the mode of procedure used by the court was one that the court could “not lawfully adopt.” (emphasis added)).

“The United States Supreme Court, applying the First Amendment, has held that generally civil courts are not a constitutionally permissible forum for a review of ecclesiastical disputes.” *Cha v. Korean Presbyterian Church of Wash.*, 262 Va.

604, 610 (2001). Rather, "religious freedom encompasses the power (of religious bodies) to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 721–22 (1976) (quotation marks omitted)); *see Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) ("[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes.").

"While what is or is not an 'ecclesiastical' dispute is often debatable, issues of church governance … are unquestionably outside the jurisdiction of the civil courts." *See Bowie v. Murphy*, 271 Va. 127, 133 (2006). Determining whether Grace Presbyterian is the successor church to Pure Presbyterian—the ecclesia—is at its core an ecclesiastical dispute, requiring the courts to choose between competing ecclesiastical interpretations of their congregational votes and joint services, and to determine who the clergy and the membership are. *See, e.g.*, *Hutterville Hutterian Brethren, Inc. v. Sveen*, 776 F.3d 547, 557 (8th Cir. 2015) (holding that a case that required determining "which excommunications were valid and which is the true church" as part of determining corporate control of a religious society presents "religious questions" outside the jurisdiction of the courts to determine); *cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v.*

E.E.O.C., 565 U.S. 171, 181–190 (2012) (reviewing the constitutional history and case law prohibiting state interference with religious societies' internal governance). Whether Grace Presbyterian has absorbed and extinguished Pure Presbyterian, placing Pure Presbyterian's members under Grace Presbyterian's clergy and bylaws, obviously raises questions of church governance over which the trial court "lacked subject matter jurisdiction." *Cha*, 262 Va. at 612; *see, e.g.*, *Wipf v. Hutterville Hutterian Brethren, Inc.*, 2012 S.D. 4, ¶ 27, 808 N.W.2d 678, 686 (2012) (holding that because the Supreme Court of South Dakota could not "uphold the circuit court's order, findings, and conclusions without also endorsing its decision on the identity of corporate leaders and members," there was no subject matter jurisdiction).

II. The Circuit Court never obtained declaratory judgment jurisdiction over this mature contractual dispute, rendering its declaratory judgment a nullity. (Assignment of Error II)

In conferring declaratory jurisdiction under Code § 8.01-184, "[t]he General Assembly created the power to issue declaratory judgments to resolve disputes before the right is violated," so as to guide parties' future conduct. *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cty. Bd. of Supvrs.*, 285 Va. 87, 98 (2013). "[T]he same Code section also imposes limitations upon the exercise of such jurisdiction and power" in accordance with its purposes. *City of Fairfax v. Shanklin*, 205 Va. 227, 229 (1964). Thus, declaratory jurisdiction does not exist

"where claims and rights asserted have fully matured, and the alleged wrongs have already been suffered." *Charlottesville Area Fitness*, 285 Va. at 99 (internal quotation marks omitted); *accord Lafferty v. Sch. Bd. of Fairfax Cty.*, 293 Va. 354, 361 (2017) ("The intent of the declaratory judgment statutes is not to give parties greater rights than those which they previously possessed, but to permit the declaration of those rights *before they mature*." (emphasis added) (quoting *Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 421 (1970))); *Cherrie v. Va. Health Servs., Inc.*, 292 Va. 309, 318 n.2 (2016) ("'[W]here claims and rights asserted have fully matured, and the alleged wrongs have already been suffered, a declaratory judgment proceeding, which is intended to permit the declaration of rights before they mature, is not an available remedy.'" (quoting *Bd. of Supvrs. v. Hylton Enters.*, 216 Va. 582, 585 (1976))). Similarly, where "the actual objective in the declaratory judgment proceeding [i]s a determination of [a] disputed issue rather than an adjudication of the parties' rights, the case is not one for declaratory judgment" nor is a declaration "an available remedy." *Charlottesville Area Fitness Club*, 285 Va. at 99; *accord Green v. Goodman-Gable-Gould Co.*, 268 Va. 102, 107 (2004) ("Where a declaratory judgment as to a disputed fact would be determinative of issues, rather than a construction of definite stated rights, status, and other relations, commonly expressed in written instruments, the case is not one for declaratory judgment." (quotation marks omitted)).

These limitations on a trial court's jurisdiction are rooted in "[t]he purpose of declaratory judgments, which are creatures of statutes, *see* Code §§ 8.01-184 through -191[:] … to supplement rather than to supersede ordinary causes of action and to relieve litigants of the common law rule that no declaration of rights may be judicially adjudged until a right has been violated." *Green*, 268 Va. at 106–07 (quotation marks omitted). Consonant with the General Assembly's intent, this Court has adhered to the view that declaratory jurisdiction "will not as a rule be exercised where some other mode of proceeding is provided," and will exist only where "[p]reventive relief is the moving purpose" at the time of filing, and not coercive relief for wrongs done. *See Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 419, 421 (1970).

The declaratory judgment entered below observes neither of these limitations on the exercise of declaratory judgment jurisdiction. When Grace Presbyterian initially filed suit, its members complained that they had been denied access to the Church Property by Pure Presbyterian, which had taken the position that the alleged Merger Agreement had not been consummated. *See* JA 3–4, ¶¶ 13, 18, 20. Grace Presbyterian's claims were all fully mature when suit was instituted, as evident from even a cursory review of those claims. These were for compensatory damages from an alleged past breach of contract, JA 5, ¶¶ 23–27 & JA 6 (Prayer No. 1), for a declaration validating the alleged contract, for a finding

that Grace had fully performed the contract, for a finding that Pure Presbyterian had breached, for a finding that Grace Presbyterian owns the Church and is entitled to "unfettered access" to it (JA 5, ¶¶ 28–30 & JA 6 (Prayer No. 2)), and to an injunction affirming Grace Presbyterian's ownership of and access to the Church Property, (JA 6, ¶¶ 31–36, (Prayer No. 3)).

Grace Presbyterian's First Amended Complaint asserted essentially the same claims: for breach of contract, declaratory relief, and injunctive relief. *See* JA 53, ¶¶ 49–53 & JA 54 (Prayer No. 1) (increasing the ad damnum tenfold); JA 52–53, ¶¶ 40–42 & JA 54 (Prayer No. 2) (adding a prayer for a declaration that Grace was entitled to "appoint new trustees to be placed on the deed"); JA 53, ¶¶ 43–48 & JA 54–55 (Prayer No. 3) (asserting same prayer for injunctive relief). Yet on March 15, 2017, Grace Presbyterian nonsuited the entire breach of contract count and prayer for compensatory relief, leaving the declaratory judgment count under Code § 8.01-184 as its only substantive claim. JA 84–85, 86; *see* JA 53, ¶ 43 (incorporating only the declaratory judgment claim by reference into the injunctive claim); *cf.* Code § 8.01-620. Following a jury trial "pursuant to Virginia Code Section 8.01-336(d)," the trial court, informed by the jury's factual findings "that the parties reached a merger agreement" and that Grace of God "performed its obligations" thereunder, entered a declaratory judgment for Grace Presbyterian and

granted it wide-ranging declaratory and coercive relief. *See* JA 99, 100–01, ¶¶ (i) through (x).

The declaratory judgment below—determining that Grace Presbyterian and Pure Presbyterian had a contract, which Grace Presbyterian performed and Pure Presbyterian breached—also violates the rule against using declaratory judgment jurisdiction to determine disputed factual issues rather than to declare defined rights. *See Charlottesville Area Fitness Club*, 285 Va. at 99. This Court in *Green* applied that rule to dismiss an action for a declaratory judgment. *Green*, 268 Va. at 105, 110. Like Grace Presbyterian below, the homeowners in *Green* had filed their suit as a claim for breach of contract, which they nonsuited prior to trial electing to proceed only on their declaratory claim. And like Grace Presbyterian, the "actual objective" of the homeowners in *Green* "in the declaratory judgment proceeding was a determination of that disputed issue [regarding performance under the contract] rather than an adjudication of the parties' rights" under the contract's terms. *Id.* at 108, *see id.* at 109–10 (despite claiming the case was about adjudication of contract rights, plaintiff "was actually asking the circuit court to decide whether the [defendant] had breached the contract between them and [plaintiff]"). The *Green* Court held that "that issue should have been litigated in the context of a breach of contract claim," *id.* at 108, and so dismissed "the declaratory judgment action," *id.* at 110.

In *Asplundh Tree Expert Co. v. Pacific Emp'rs Ins. Co.*, 269 Va. 399 (2005), this Court rejected the argument that "a trial court lacks subject matter jurisdiction over a declaratory judgment action when an insurance company seeks a declaration of its obligations under an insurance policy after making a voluntary payment to resolve the underlying tort claim" the contention being that "the real purpose of the suit [had become one] to obtain a money judgment," not a declaration of rights. *Id.* at 407. In rejecting that argument, this Court distinguished *Liberty Mutual*, explaining that that case involved "whether the trial court had [declaratory] jurisdiction at the outset," whereas *Asplundh* was "concerned with the issue of continuing jurisdiction," *id.* at 409, because the claim in *Asplundh* had not matured into one for coercive relief "[a]t the time the declaratory judgment action was filed." *Id.* at 408. Because there "[t]he trial court[had been] vested with subject matter jurisdiction at the time the declaratory judgment action[was] filed," the *Asplundh* Court relied on authority that courts might "retain[] jurisdiction" once assumed, even where coercive relief had become the natural effect of any declaration for the plaintiff. *Id.* at 408–09. Here, as in *Liberty Mutual*, the question is "whether the trial court had jurisdiction at the outset" over Grace Presbyterian's declaratory claim. As in *Liberty Mutual*, it did not and thus reversal, vacatur of the judgment, and dismissal of Grace Presbyterian's claims should follow.

This result flows from the fact that Code § 8.01-184 confers subject matter jurisdiction. Declaratory judgments that exceed the limits of the Declaratory Judgment Act, like all other judgments entered without subject matter jurisdiction, are "a nullity." *Shanklin*, 205 Va. at 231 (holding that "it was error for the trial court to take jurisdiction of the motion for declaratory judgment. Accordingly, the final order … will be reversed and declared a nullity and the motion for declaratory judgment will be dismissed."); *accord, e.g.*, *Daniels v. Mobley*, 285 Va. 402, 412 (2013) (holding that because the plaintiff did "not present a justiciable controversy, … the circuit court did not have authority under the declaratory judgment statute to exercise jurisdiction concerning such [declaratory] claim" and vacating the declaratory judgment as well as dismissing the declaratory claim); *see Virginian-Pilot Media Cos., LLC v. Dow Jones & Co., Inc.*, 280 Va. 464, 468 (2010) ("A judgment or order entered by a court that lacks jurisdiction of the subject matter is a nullity."). This want of "subject matter jurisdiction" "'may be raised at any time'" to invalidate such judgments, *Charlottesville Area Fitness*, 285 Va. at 113 (McClanahan, J., concurring) (quoting *Virginian-Pilot*, 280 Va. at 468); *see id.* ("The General Assembly conferred subject matter jurisdiction upon circuit courts to issue declaratory judgments to resolve disputes 'before the right is violated.'" (quoting *Patterson v. Patterson*, 144 Va. 113, 120 (1926))), even in or by this

Court. *See, e.g.*, *Garrett v. Majied*, 252 Va. 46 (1996) (*sua sponte* raising and holding that a statute granted no subject matter jurisdiction to enter certain relief).

Because the declaratory judgment below, reached following the trial of a mature contract dispute to a jury, was entered without subject matter jurisdiction, it should be declared a nullity and void.

III. At the time the Complaint and the First Amended Complaint were filed, exclusive in rem jurisdiction over the Church Property remained in the Bankruptcy Court, and so did not exist in the Circuit Court. (Assignment of Error III)

As a matter of Federal statutory law,

> The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction –
>
> (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of the property of the estate;

28 U.S.C. § 1334(e).

As the Fourth Circuit has held, exclusive jurisdiction—as a matter of bankruptcy law—becomes non-exclusive at the time the plan is confirmed and the debtor's property is transferred to the reorganized entity *unless otherwise stated in the plan or confirmation order*. *Valley Historic Ltd. P'ship v. Bank of New York*, 486 F.3d 831, 837–38 (4th Cir. 2007) ("[I]n the context of a Chapter 11 proceeding in connection with other provisions of Title 11, it creates exclusive jurisdiction over 'property' for a limited period of time—until confirmation and the property vests in the reorganized debtor. 11 U.S.C. § 1141(b) ("Except as otherwise

provided in the plan or the order confirming the plan, the confirmation vests all the property of the estate in the debtor.”).

Of course, the nature of the jurisdiction over the Church Property was initially necessarily in rem because it was exclusive, *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466–68 (1939), and because the res was in custodia legis. *Nat’l Automatic Tool Co. v. Goldie*, 27 F. Supp. 399, 402 (D. Minn. 1939) (citing *United States v. Klein*, 303 U.S. 276, 281 (1938)). *See also Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 369 (2006) (“Bankruptcy jurisdiction, as understood today and at the time of the framing, is principally *in rem* jurisdiction.”). As the Third Circuit has recognized,

> It will hardly be questioned that a District Court has the power to protect by injunction its exclusive jurisdiction over the property and assets of a bankrupt. And the same is true with respect to the property and assets of a debtor or the proceedings in bankruptcy for the debtor’s reorganization.

In re Standard Gas & Electric Co., 139 F.2d 149, 152 (3d Cir. 1943). It should equally be beyond question that where a bankruptcy court exercises its authority under 11 U.S.C. § 1141(b) not to vest some or all of the assets of the estate in the reorganized entity at the time of plan confirmation, the retained jurisdiction over those assets is likewise in rem.

Retaining jurisdiction under 11 U.S.C. § 1141(b) requires no fixed formula or magic words. “Retention of the court’s jurisdiction, including enforcement of a

plan, is … determined by the agreed upon terms of a plan." *In re Friedberg*, 192 B.R. 338, 341 (S.D.N.Y. 1996) (citing *In re Johns-Manville Corp.*, 7 F.3d 32 (2d Cir. 1993), and *In re Dilberts Quality Supermkts., Inc*., 368 F.2d 922 (2d Cir. 1966)); *see In re Johns-Manville Corp*., 7 F.3d at 34 ("A bankruptcy court retains post-confirmation jurisdiction in a chapter 11 proceeding only to the extent provided in the plan of reorganization. … The bankruptcy court's post-confirmation jurisdiction therefore is defined by reference to the Plan." (internal citations omitted)); *In re Dilberts*, 368 F.2d at 924 ("The contention that adoption of the reorganization plan ousted the court of jurisdiction must be rejected. … By its order of August 25, 1964 the court expressly reserved jurisdiction 'to hear and determine any and all questions as to the title to and possession of the assets and property vested or revested pursuant to this order, and the character and extent of such assets.'").

The Plan did not completely or comprehensively vest the property of the estate in Pure Presbyterian. Instead, Pure Presbyterian was given six months to merge and another six months in which to sell. JA 118. "During the merger and sale periods, the Debtor will retain the property and continue to pay the adequate protection payments as they become due." JA 118. "If the property is not sold and the claim paid by that date, then ACM shall be free to institute a foreclosure proceeding and enforce its rights under the deed of trust." JA 118. Furthermore,

the Bankruptcy Court expressly retained jurisdiction "[t]o enforce the provisions of the Plan, including to hear and determine any plan for further reorganization; [t]o correct any defect, cure any omission or reconcile any inconsistency in the Plan or in the order of th[e] Bankruptcy Court confirming th[e] Plan as may be necessary to carry out the purpose and intent of th[e] Plan; and [t]o determine such other matters as may be provided for in the Confirmation Order or as may be authorized under the provisions of the Code." JA 121.

This Court's "jurisprudence has long held that a court's jurisdiction is determined at the time the litigation is filed." *E.C. v. Virginia Dep't of Juvenile Justice*, 283 Va. 522, 527 (2012). This includes actions for declaratory relief. *See, e.g.*, *Hoffman Family, L.L.C. v. Mill Two Assocs. P'ship*, 259 Va. 685, 694 (2000) (affirming an exercise of jurisdiction because "a justiciable controversy existed at the time Hoffman filed the initial bill of complaint . . . ."). "A defect in subject matter jurisdiction cannot be cured by reissuance of process, passage of time, or pleading amendment." *Morrison v. Bestler*, 239 Va. 166, 170 (1990). And "[a]n order is void *ab initio* if entered by a court in the absence of jurisdiction of the subject matter . . . ." *Singh*, 261 Va. at 51.

Clearly, upon confirmation through the closing of the bankruptcy, the bankruptcy court retained in rem jurisdiction over the property for all purposes, other than for negotiating a merger or sale, and retained jurisdiction over the lien.

More importantly, because in rem jurisdiction, to the extent it exists at all, is exclusive, the circuit court lacked jurisdiction over the res when the Complaint and First Amended Complaint were filed. Because the subject matter of this action, the Church Property, remained subject to the in rem jurisdiction of the Bankruptcy Court at the time of filing, the Final Order was void *ab initio*. *See, e.g.*, *Lucas v. Biller*, 204 Va. 309, 313, 315 (1963) (holding an order void "[e]ven though a motion for judgment alleges matter proper for the potential jurisdiction of the court, and the court has acquired actual jurisdiction of all the necessary parties," because "the controversy belongs exclusively in another court" where it was first brought); *see also, e.g.*, *Iron City Sav. Bank v. Isaacsen*, 158 Va. 609, 626–27 (1932) ("[W]here it appears … that, though the bill alleges matter proper for the exercise of the potential jurisdiction of a court of chancery, [but] the court has not acquired jurisdiction … of the *res* necessary to the exercise of that jurisdiction" because before another court, an "objection to the jurisdiction of the court … is that it lacks jurisdiction of the subject matter; and, therefore, the objection … may be shown at any time; and the court, when it comes to its attention, should ... refuse to proceed").

CONCLUSION

Accordingly, the judgment below should be vacated, and the case dismissed for want of jurisdiction.

Respectfully submitted,

Date: January 30, 2018

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CERTIFICATE

The undersigned hereby certifies that the foregoing Opening Brief complies with Rules 5:6, 5:26, and 5:27, and further certifies as follows:

(1) The Appellants/Defendants are The Pure Presbyterian Church of Washington and Samyeol Kim.

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(5) On this 30th day of January, 2018, I caused three (3) copies of the foregoing Opening Brief of Appellants and three (3) copies of the Joint Appendix to be hand delivered to the Clerk's Office of the Supreme Court of Virginia for filing, as required by Rule 5:26(c)(1) and (e). An electronic copy of the foregoing Opening Brief of Appellants and an electronic copy of the Joint Appendix were filed through VACES with the Clerk's office, as required by Rule 5:26(e) and 5:32(a)(3)(i). And, an electronic copy of the foregoing Opening Brief of Appellants and an electronic copy of the Joint Appendix were sent via electronic mail to all Counsel for Appellee, as required by Rule 5:26(e).

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