
In The
Supreme Court of Virginia

RECORD NO. 071248

JENNA DODGE, et al.,

Appellants,

v.

**THE TRUSTEES OF RANDOLPH-MACON WOMAN'S COLLEGE,
D/B/A RANDOLPH-MACON WOMAN'S COLLEGE,
A Virginia non-stock charitable corporation,**

Appellees.

REPLY BRIEF OF APPELLANTS

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REPLY BRIEF OF APPELLANTS

The central fact of this case is that it is “neither impossible nor impracticable” for the College to adhere to its purpose as a single-sex college for women. J.A. 109, 215 (Complaint, ¶ 36; Amended Complaint, ¶ 36). Unwilling to dispute this fact at trial, the Board filed demurrers, thereby accepting the Plaintiffs’ allegation as true. Now, on appeal, the Board tries to escape its admission by claiming that it decided to co-educate the College “in response to lagging enrollment and mounting financial difficulty.” Bd. Br. at 4-5. And it claims this decision “provide[s] the greatest odds of the College’s long-term survival and success.” *Id.* Inexplicably, the Board cites the Amended Complaint (¶¶ 23 and 28) as the source of these “facts.” This is misleading. Neither the Complaint nor Amended Complaint support the Board’s assertions. Instead, the Board is trying to smuggle into this appeal highly disputed factual claims that may be relevant in a *cy pres* proceeding, but that are wholly improper on a demurrer.¹

A. The Board of Trustees Has Breached Its Legal Duties.

The Plaintiffs have shown that the two parts of § 2.2-507.1 can be reconciled in a manner that allows room for each. *See* Pls. Br. at 20-22. Under Subsection A, the Board is confined by the parameters found in the governing documents, most notably single-sex education for women. So long as it acts within those parameters, it has the benefit of the “standard of conduct” cited by Subsection B. But, because the Board’s decision to co-educate the College violates the governing documents, it cannot claim protection under Subsection B. The Board makes no attempt to address this reading of the statute.

¹ The Board contends that the Plaintiffs raise the *cy pres* issue but do not address it in their brief. Bd. Br. at 6, n2. The Board is mistaken. The Plaintiffs point out that, if it were impossible or impracticable for the College to continue as a single-sex institution, then the *cy pres* doctrine would give the Board an avenue to change its mission. Pls.’ Br. at 12 (citing Va. Code § 55-268.7). But the Board has the burden to make that showing, and it has not even attempted to do so. Nothing more need be said.

Instead, the Board tries to rewrite the first sentence of Subsection A by adding a limitation the General Assembly omitted. The sentence reads:

The assets of a charitable corporation incorporated in or doing any business in Virginia shall be deemed to be held in trust for the public for such purposes as are established by the governing documents of such charitable corporation, the gift or bequest made to such charitable corporation, or other applicable law.

Va. Code § 2.2-507.1 (as amended by 2004 Va. Acts, ch. 289). The Board, in effect, wants to add the phrase, “*but only for purposes of the Attorney General’s oversight authority.*” See Bd. Br. at 9, 16. This re-writing of the statute should be rejected. See *Blake Constr. Co. v. Upper Occoquan Sewage Auth.*, 266 Va. 564, 575, 587 S.E.2d 711, 719 (2003) (declining defendant’s statutory interpretation because the legislature “could have written the statute as [defendant] suggest[ed] but declined to do so.”).

The Board’s argument gains no traction from its attempt to slice and dice the word “deemed.” Contrary to the Board’s hairsplitting, the word “deem” often is a synonym for “is” or “are.” For example, “when, by legislative enactment, certain acts are *deemed* to be a crime of a particular nature, they *are* such crime, and not a semblance of it, nor a mere fanciful approximation....” *Commonwealth v. Pratt*, 132 Mass. 246, 247 (1882) (emphasis added) (cited in *Black’s Law Dictionary* 504 (4th ed. 1968)). This is the meaning intended here. The statement that “[t]he assets of a charitable corporation... shall be deemed to be held in trust” means that those assets *are* held in trust.²

² Another meaning of “deemed” is “considered” or “treated as if.” *Satcher v. Commonwealth*, 244 Va. 220, 242, 421 S.E.2d 821, 834 (1992) (quoting *Black’s Law Dictionary* 415 (6th ed. 1990)). But this does not help the Board. Treating the assets of a charitable corporation *as if* they are held in trust necessarily means treating the charitable corporation *as if* it is a trustee; and it means allowing beneficiaries and donors to enforce limitations on the use of the assets *as if* the assets are held in trust.

Also unavailing is the Board's preoccupation with the reference to the Attorney General found in the statute's headline. "The headlines of the sections printed in black-face type are intended as mere catchwords to indicate the contents of the sections and do not constitute part of the act of the General Assembly." Va. Code § 1-217. While the title of a section may sometimes be a guide to legislative intent, such an extrinsic source should not be used to narrow the meaning of a statute plain on its face. *Norfolk & W. R. Co. v. White*, 158 Va. 243, 254, 163 S.E. 530, 534 (1931) (refusing to narrow meaning of statute based on statute's headline, citing predecessor to § 1-217).³

The Board's attempt to invoke the legislative history of § 2.2-507.1 fares no better. A key passage in the three-Justice opinion reads: "we have previously stated that a charitable corporation *in this context* is, essentially, a trust." *Commonwealth v. JOCO Foundation*, 263 Va. 151, 165, 558 S.E.2d 280, 287 (2002) (Lemons, J., joined by Koontz and Kinser, JJ., dissenting) (emphasis added).⁴ The Board contends that the phrase, "in this context" refers to what the Board calls "questions of jurisdiction and authority." Bd. Br. at 14. But this reading is implausible. The passage is commenting on charitable corporations in general, not just that specific case. Leaving no doubt as to which "context" the Justices had in mind, the opinion explains that the charitable corporation then before it was similar to charitable corporations previously before the Court:

The corporation was organized for charitable or benevolent or literary purposes. Contributions made to it and the assets realized therefrom were

³ It is easy to understand why the statute was placed in Title 2.2. The second sentence refers to the Attorney General, and placing the first sentence elsewhere, based on mechanical adherence to title topics, would have risked confusion and inconvenience.

⁴ In their opening brief, Plaintiffs inadvertently paraphrased this passage rather than quoting it exactly, thereby causing it to read: "a charitable corporation *under the circumstances* is, essentially, a trust." Pls.' Br. at 12-13 (emphasis added). Counsel apologizes for the error, but notes that the thrust of Plaintiffs' argument remains the same.

dedicated to those purposes and stamped with a public interest by the charter, the laws of this State, sound reason and public policy.

JOCO, 263 Va. at 166, 558 S.E.2d at 287 (Lemons, J., joined by Koontz and Kinser, JJ., dissenting) (citing previous cases where charitable assets had been diverted). It was in *this* context, that the *JOCO* dissent said a charitable corporation is, essentially, a trust, and it was this view that the General Assembly adopted when it enacted § 2.2-507.1.

At the heart of the Board's case is its astounding assertion that § 2.2-507.1 "imposes no obligations on the College whatsoever." Bd. Br. at 17. While the Board must treat § 2.2-507.1 as a nullity in order to prevail, there is no reason for the Court to disregard the statute. The first sentence of § 2.2-507.1 requires, *inter alia*, that the assets of a charitable corporation be used "for such purposes as are established by the governing documents of such charitable corporation." To limit the purposes for which the assets may be used is to limit the trustees in whose hands the assets are held. Yet, the Board contends that the first sentence of the statute is only intended as a limitation on the Attorney General, even though that sentence does not mention the Attorney General and even though it was the power of the corporation, not the power of the Attorney General, that the General Assembly sought to curb when it passed this statute in response to *JOCO*.

The Board also argues that it is complying with § 2.2-507.1 because its governing documents contain boilerplate language allowing it to exercise any power granted by the Nonstock Corporation Act, and because one such power is "[to] amend its articles of incorporation at any time to add or change a provision that is required or permitted in the articles." Bd. Br. at 4 (quoting Va. Code § 13.1-884). The argument is circular. It is not the purpose of § 13.1-884 to make lawful what the law elsewhere forbids. Whether a change to coeducation is "permitted" by the articles depends on whether the articles are

subject to the restraints of § 2.2-507.1 (which they clearly are). The interpretation advanced by the Board would make § 2.2-507.1 meaningless by allowing charitable corporations to divert their assets to any new purpose merely by changing the articles. This practice was at issue in *JOCO*, and § 2.2-507.1 was enacted to prevent it.

In discussing the VUTC, the Plaintiffs noted that there are two alternative subsections by which the VUTC applies to the Board: (i) the specific criteria of § 55-541.02(A), and (ii) the “catch-all” provision of § 55-541.02(B). Pls.’ Br. at 22. The Board’s response is unpersuasive. For example, the Board suggests that if the § 2.2-507.1 requirement for the charity to act in accordance with its governing documents were sufficient to constitute administration in the “manner of an express trust,” then every corporation would be a trust because all must act in accordance with their governing documents. This is specious. All corporations may have governing documents but only corporations covered by § 2.2-507.1 are required to treat their assets as “held in trust.” Also, once it is clear that the College is a trust – or is to be “treated as” a trust – the Board offers no reasons why the principles of the VUTC should not be applied. The reasons for applying the VUTC, under § 55-541.02(B), are unrefuted. *See* Pls.’ Br. at 25-26.

B. The Donors and Beneficiaries of R-MWC Have Standing.

Anxious to avoid the merits of Plaintiffs’ case, the Board insists that only the Attorney General has standing, even in the face of the Attorney General’s rebuff of their position. According to the Board, “the Attorney General concedes that he is advocating a *change* in Virginia law.” Bd. Br. at 21 (emphasis added). This is disingenuous. The Attorney General has persuasively explained the law governing his Office as the law exists *now*. *See* Att’y Gen. Br. at 1 (“The Attorney General’s Role *Is* Not Exclusive.”) (emphasis added). The fact that many States take a similar position merely reinforces his

explanation.⁵ The impracticality of the new duties the Board would foist upon him also undergirds his argument.⁶

The Board seeks to deny standing to the Plaintiffs by asking this Court to repudiate its decision in *Clark v. Oliver*, 91 Va. 421, 427, 22 S.E. 175, 177 (1895), which made it clear that beneficiaries have standing to enforce a trust. The Board’s invitation should be declined. To begin, the Board is mistaken when it says that the statement cited by Plaintiffs was only dictum. The immediate issue in *Clark* was whether the plaintiffs, who were donors, had standing to challenge the trust when it misapplied the contributions they had made. The Court ruled that they did not; however, this ruling was not made in isolation. Instead, the Court placed its decision in the context of a larger legal framework that explained that the misapplication of the contribution – which the Court viewed as fraudulent – need not go unchallenged but could be opposed by “the Attorney General, acting upon behalf of the public, or by the trustees charged with its custody and administration, or by some person having a beneficial interest in the object of the trust.” *Id.* at 428, 22 S.E. at 177. This language concerning the availability of other remedies was

⁵ The Board misconstrues the reason the Attorney General cites *Holt v. College of Osteopathic Physicians and Surgeons*, 394 P.2d 932, 934 (Cal. 1964). The point is not that co-trustees have standing, but the larger survey of the law undertaken in *Holt*.

⁶ The Attorney General’s explanation of the practical problems that would arise from giving him exclusive standing has been repeatedly recognized by courts. For example, in *Jones v. Grant*, 344 So.2d 1210 (Ala. 1977), a case upholding the right of students to sue a college board of directors for misuse of funds, the court said:

[T]hroughout the country... supervision of the administration of charities has been neglected.... The manifold duties of [the attorney general] make readily understandable the fact that such supervision is necessarily sporadic... [A] liberal rule as to the standing of a plaintiff to complain about the administration of a charitable trust... seems decidedly in the public interest.

Id. at 1212 (quoting *Paterson v. Paterson Gen. Hosp.*, 235 A.2d 487, 528 (1967)).

“essential to the rationale” of *Clark* and, thus, cannot be cast aside as *dictum*. *State Farm Mut. Auto. Ins. Co. v. Davies*, 226 Va. 310, 315, 310 S.E.2d 167, 169 (1983).⁷

The Board then contends that, even under *Clark*, the student-plaintiffs lack standing on the implausible theory that they really are not beneficiaries of the trust. *See* Bd. Br. at 23. The Board tries to draw a distinction between those who only are beneficiaries for purposes of charitable immunity and those who also are beneficiaries for purposes of charitable enforcement. Assuming *arguendo* that such a distinction is valid, these students clearly are in the latter category.⁸ They are not tourists who wandered into a museum or church to have a casual look around. They were admitted to the College for a four-year course of study, and they came because they sought the benefits of a single-sex education. They are exactly the sort of beneficiaries who have standing to sue. *See Jones*, 344 So.2d at 1212 (discussed *infra* at 12-13).

The Board’s discussion of the common law fares no better. The Board assumes that the law governing charitable trusts in Virginia is the lineal descendent of charitable trust law as it began in fifteenth century England. *See* Bd. Br at 20-21. The Board then contends that, given their English origin, charitable trusts are subject to “the common law

⁷ Moreover, even if it were *dictum*, the language in *Clark* still would be the most authoritative statement of Virginia law yet available on the right of beneficiaries to hold a charitable trust accountable for unlawful diversion of assets. It should not be so lightly disdained. As this Court observed about a statement of alleged *dictum* in another case, “the principle announced is essentially sound, and, if not law, should be made law.” *Pope v. Commonwealth*, 131 Va. 776, 795, 109 S.E. 429, 435 (1921). Indeed, in the 112 years since *Clark* was decided, there has not been a single reported decision holding that a beneficiary lacks standing to enforce a charitable trust, or denying a beneficiary the right to bring such a suit. The decision below was the first, and it wholly ignored *Clark*.

⁸ If there is to be a difference in standing between two groups of beneficiaries, the distinction should not be made by changing the meaning of “beneficiary,” but by limiting standing to those beneficiaries who have a special interest that sets them apart from the public. Arguably, a member of the public who casually visits a museum or church remains, essentially, just a member of the public and thus lacks a special interest. But that is not the case with these student-plaintiffs.

of England” which, it claims, limited enforcement power to the Attorney General as representative of the Crown. *Id.* (citing Va. Code § 1-200).

The argument is based on a mistaken assumption about history. The role of the Crown in enforcing charitable trusts – and the ensuing prerogative of the Attorney General – were the result of a statute, 43 Elizabeth, concerning charitable uses. But this Court ruled very early that 43 Elizabeth, “if ever in force here, was repealed in 1792.” *Gallego’s Ex’rs v. Attorney Gen.*, 30 Va. (3 Leigh) 450, 462 (1832) (dismissing bill of Attorney General). Charitable trusts could not exist in Virginia until 1839, when the legislature enacted a statute to permit them. *See* 1839 Va. Acts, p. 11; *Sweet Briar Institute v. Button*, 280 F. Supp. 312, 313 (W.D. Va. 1967) (1839 statute “validate[d] charitable trusts for education, which were not permitted prior to this legislative approval.”).

Because charitable trusts in Virginia do not have a common law origin – but have their own statutory genesis – this Court is not bound by “the common law of England” in determining who may enforce them, nor was the Court so bound when it decided *Clark*. Instead, the Court was free to fashion its own common law rule, one suitable to Virginia. This it did when it ruled in *Clark* that beneficiaries may file suit on their own and need not wait for the Attorney General, who may never intercede on their behalf.

Moreover, Virginia’s adoption of the common law “does not mean that common-law rules are forever chiseled in stone, never changing. The common law is dynamic, evolves to meet developing societal problems, and is adaptable to society’s requirements at the time of its application by the Court.” *Williamson v. Old Brogue, Inc.*, 232 Va. 350, 353, 350 S.E.2d 621 (1986). “Such [common law] doctrines and principles as are repugnant to the nature and character of our political system, or which the different and varied circumstances of our country render inapplicable to us, are either not in force here, or must

be so modified in their application as to adapt them to our condition.” *Foster v. Commonwealth*, 96 Va. 306, 310, 31 S.E. 503, 505 (1898). Given the centralization of power implicit in an eighteenth century monarchy, it would not be not surprising if only the Attorney General could bring suit in England to enforce a charitable trust.⁹ But, given the diffusion of authority that our democratic institutions contemplate – and given the many tasks already imposed on the Attorney General – it makes no sense to deprive beneficiaries of the right to take up their own cause. The Court understood this in *Clark*. So does the Attorney General. The rule in *Clark* should not be changed.

The Board also cites *In re Petition for the Appointment of Church Trustees*, 20 Va. Cir. 199 (Loudoun Cty. Cir. 1990); however, that case is not relevant here. In *Church Trustees*, the issue was whether plaintiffs who were *not* members of the congregation for which the trust was established had standing to seek the appointment of trustees for long-abandoned trust property. In other words, those plaintiffs were complete strangers to the trust, and the trial court understandably ruled that they had no standing. In the case at bar, the student-plaintiffs are not strangers to the trust. They are among the young women for whom the College was established.

The Board also cites *Governing Nonprofit Organizations*, by Marion R. Fremont-Smith. *See* Bd. Br. at 20. But, this work actually supports the Plaintiffs:

Although members of the *general public* are not recognized by the courts as proper parties to bring a suit against a charity for breach of duty,... the Attorney General’s power of enforcement is *not exclusive*. Where a charitable trust is created for a group of beneficiaries who are *ascertainable* at a given particular time... these individuals [are] proper parties to bring

⁹ The Board cites *History of the Law of Charity, 1532-1827*, by Gareth Jones. *See* Bd. Br. at 20. But this book deals exclusively with English law – not American – and, even then, the author explains that enforcement actions, “although formally in the name of the Attorney-General, had to be brought at the relation of a private individual.” Jones at 161. There is no such procedure in Virginia. Moreover, there is no need for one because, under *Clark*, beneficiaries may bring suit in their own names.

enforcement actions. *The general rule is that a person must be able to show that he is entitled to a benefit from the trust beyond the benefit to which members of the public in general are entitled.*

Fremont-Smith at 328 (emphasis added) (citing Restatement (Second) of Trusts, § 391, cmt. b). Or, as the Attorney General explained, “private parties who have a sufficient legal interest, should be allowed to bring an enforcement action.” Att’y Gen. Br. at 3. The student-plaintiffs satisfy this criterion.

The Board attempts to blur the distinction between *potential* beneficiaries and *actual* beneficiaries. For example, in *Association for the Relief of Aged Indigent Female Persons v. Beekman*, 21 Barb. 565 (N.Y. 1854), the court ruled that the Attorney General had to bring the claim, but that ruling was based upon the fact that there were “no certain persons who [were] entitled” to the benefits of the trust. *Id.* Because the plaintiff in *Beekman* was only one of many possible potential beneficiaries, it did not have standing to enforce the trust. This is not the case here, where the student-plaintiffs, having been admitted to the College, are *actual* beneficiaries.¹⁰

The Board also cites three cases where it says “courts have refused to apply the [special interest] doctrine to classes much more narrowly defined than those in this case.” Bd. Br. at 25-26.¹¹ These cases are inapposite. In each case, the plaintiffs were members of a broad class of *potential* beneficiaries of the trust. Unlike the student-plaintiffs in the case at bar, none were *actual* beneficiaries. The point is illustrated by *Rhone v. Adams*, No. 1060482, 2007 Ala. LEXIS 219, *9-10 (Oct. 12, 2007), where the court distinguished

¹⁰ *Beekman* and other cases cited by the Board are contrary to *Hooker v. Edes Home*, 579 A.2d 608 (D.C. App. 1990), where the plaintiffs’ status as *potential* beneficiaries was enough to confer standing. See Pls.’ Br. at 33. Because the student-plaintiffs are *actual* beneficiaries, there is no need to decide which approach is more persuasive.

¹¹ *Averill v. Lewis*, 106 Conn. 582, 138 A. 815, 816 (1927), *Revici v. Conference of Jewish Material Claims Against Germany*, 11 Misc. 2d 354, 174 N.Y.S.2d 825 (N.Y. Sup. Ct. 1958), and *Clevenger v. Rio Farms, Inc.*, 204 S.W.2d 40 (Tex. Civ. App. 1947)).

between college students who had standing because they were “readily identifiable as *actual* beneficiaries” and other plaintiffs who lacked standing because they were only “*potential* beneficiaries” of a charitable trust. *Id.* at *8 (emphasis in original). As actual beneficiaries of the charitable trust, the student-plaintiffs here have standing as well.

The Board also claims that college students never can have a special interest in enforcing the charitable trust distinct from that of the general public. Bd. Br. at 24. Such a claim flies in the face of common sense, and the cases the Board cites do not support its position. *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), did not involve a suit *against* trustees alleging a breach of their duties. It was a suit brought *by* the trustees to challenge an act of the New Hampshire legislature altering the corporate charter issued by the British crown. At issue was whether the change violated the federal constitutional ban on legislation impairing the obligations of contract. Indeed, the Court noted that “[n]either the founders of the college, nor the youth for whose benefit it was founded, complain of the alteration made in its charter, or think themselves injured by it.” 17 U.S. at 641. Thus, the facts of *Dartmouth* are far different from the case at bar, where the trustees are defendants, and where the women for whose benefit the College was founded complain about – and are injured by – the Board’s diversion of assets.

Looking to Georgia law, the Board relies on *Miller v. Alderhold*, 228 Ga. 65, 184 S.E.2d 172 (1971), where students in a private college were found not to have standing to challenge certain actions by the board of trustees. Reliance on *Miller* is misplaced. A more recent statement of Georgia law is found in *Warren v. Board of Regent of the University System of Georgia*, 247 Ga. App. 758, 544 S.E.2d 190 (2001), which states:

“[T]he mere fact that a person is a *possible beneficiary* is not sufficient to entitle him to maintain a suit for the enforcement of a charitable trust.” To authorize an individual to enforce a charitable trust in Georgia, the plaintiff

must have some pecuniary interest in it or show that *she is a beneficiary or else show in some way she may avail herself of its educational advantages.*

247 Ga. App. at 761, 544 S.E.2d at 193 (emphasis added) (quoting Restatement (Second) Trusts, p. 279, § 391, cmt. c). In the case at bar, the student-plaintiffs are not *possible beneficiaries* of R-MWC; they are *actual beneficiaries* who have availed themselves of the College's educational advantages. Under *Warren*, they have standing.

The Board cites *Associated Students of the University of Oregon v. Oregon Investment Council*, 82 Ore. App. 145, 728 P.2d 30 (1986), but that case does not help the Board. Although the court ruled that the Oregon students did not have standing, the ruling was not based on their status as students but on the nature of their alleged injury – “opposition to apartheid on social and moral grounds.” 82 Ore. App. at 150, 728 P.2d at 32. The court labeled these concerns “abstract” and “not sufficiently special” to distinguish plaintiffs from others opposed to apartheid. *Id.*, 748 P.2d at 33. Critical to the outcome in *Associated Students* was the fact that the Oregon students alleged neither a “diversion of funds” nor “financial injury to themselves or to Oregon's colleges and universities.” *Id.* at 151, 728 P.2d at 33. By contrast, in the case at bar, *all* of the College assets are being diverted, with resulting injury of the student-plaintiffs who came to the College seeking single sex education.

Finally, the Board's view that students never have standing to challenge the actions of college trustees was soundly rejected in *Jones v. Grant*, 344 So.2d 1210 (Ala. 1977), where the court upheld the right of students to sue a college's board of directors for misuse of funds. As shown by *Jones*, this result is the logical consequence of two well-established principles. First, “[t]he students of a charitable institution are beneficiaries of a charitable trust.” *Id.* at 1212 (citing authorities). And, second, “[b]eneficiaries of a charitable trust

have a right to maintain a suit to enforce the trust or prevent diversion of the funds.” *Id.* (citing authorities). The same logic applies here. Indeed, even in *Associated Students*, the court did not disagree with *Jones*, but took pains to distinguish the real injury suffered by the Alabama students from the abstract injury claimed by the Oregon students. 82 Ore. App. at 150-51, 728 P.2d at 33. The injury suffered by the Plaintiffs here also is real.

The Board also is mistaken when it says that the Plaintiffs have no standing under the VUTC. The fact that the College acquired its trust status “pursuant to a statute,” Va. Code § 55-541.02(A), does not mean that the *donor-plaintiffs* are not “settlers.” Under the VUTC, the term “settlor” includes anyone who contributes money to a trust created by someone else. *See* Va. Code § 55-541.03 (defining “Settlor” as “a person... who creates, or contributes property to, a trust”) (emphasis added). Thus, donors to the College are settlers. And, settlers have standing to enforce the trust. *See* Va. Code § 55-544.05(C) (providing standing for settlers); Va. Code § 55-541.03 (providing for multiple settlers).¹²

The Board also is mistaken when it says the *student-plaintiffs* have no standing under the VUTC. The Board’s argument depends on its view that students had no standing to enforce charitable trusts before the VUTC was enacted. That view is incorrect. *See supra* at 7-9. Moreover, even if students had no standing then, they have standing now. Ignored by the Board is the rule of construction the General Assembly wrote into the VUTC: “In applying and construing this Uniform Act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that

¹² The Board cites *Guaranty Trust Co. v. New York*, 299 N.Y. 295, 301, 86 N.E.2d 754, 756 (1949), for its statement that “statutory trusts are enactments of the Legislature in which no ‘settlor’ plays a part.” But that case did not arise under the Uniform Trust Code. Instead, it involved an unemployment compensation fund created by the state into which employers were required to make payments. When employers paid that money, they were not making gifts; they were “simply paying an excise tax.” *Id.* The contributions made to the College were not tax payments. They were donations. The donor-plaintiffs are “settlers” and, as such, they have standing to sue.

enact it.” Va. Code § 55-551.01. This special rule of construction constitutes “[a] statutory change in the common law” and refutes any “presumption that no change was intended.” *Mitchem v. Counts*, 259 Va. 179, 186, 523 S.E.2d 246, 250 (2000). Given the need to promote uniformity, the outcome is clear. “The prevailing view” and “the current, common-law view” is to embrace the special interest doctrine that the Board opposes. *See* Pls.’ Br. at 32 (quoting *Holt*, 394 P.2d at 934; *Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 91 P.3d 1019, 1025 (Ariz. Ct. App. 2004); and Restatement (Second) of Trusts § 391 (1959)). Although the Board does not favor special interest standing, it does not deny that its position runs contrary to the majority view, nor does it deny that adopting its viewpoint would undermine the uniformity the General Assembly sought when it enacted the VUTC.

C. The Board’s Other Arguments Are Without Merit.

This case has far-reaching consequences, but not the ones the Board describes. The Plaintiffs do not seek the right to second guess routine management decisions by a charitable corporation; but a change in the corporate purpose is not routine. And, if *these* Trustees are allowed to change *this* charitable purpose, when they admit by their demurrer that there is no need to do so, there will be no basis to stop other trustees from taking advantage of that precedent and changing other charitable purposes at their whim. Faced with uncertainty about the handling of their philanthropy, potential donors would be understandably skeptical about donating to Virginia-based corporate charities. The loss of their donations would be a loss to the public.

The Board also says that the Court should rule against the Plaintiffs, because some male students already have been admitted. They say that the eggs are already broken and that the omelet cannot be unscrambled. But it really does not work that way. The patient

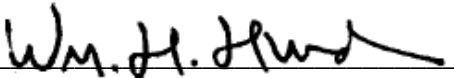
may be running a fever, but the patient is not dead. Given the right care, the patient can be restored. Moreover, adding more men to the few already there would divert even more resources away from the education of women and, thus, do even more damage to the College's charitable purpose. On the other hand, even if equity allowed the men who are there to stay until graduation, it would be only a short while before they moved on and the College's purpose restored in full. And, contrary to the Board's suggestion, the trial court's ruling on the demurrer precluded any possibility of a temporary injunction. An appeal on the merits was the only option available. And, surely it cannot be the law that trustees can breach their fiduciary duties so long as they do so quickly and before this Court can render its judgment.

CONCLUSION

The decision of the trial court should be reversed and the case remanded for trial on the merits.

Respectfully submitted,

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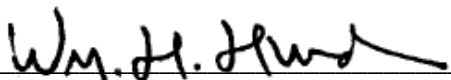
CERTIFICATE PURSUANT TO RULE 5:26(d)

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, I hereby certify that, on December 5, 2007, twenty copies of this Reply Brief of Appellants were hand-delivered to the Clerk of the Supreme Court of Virginia, Supreme Court Building, 100 North Ninth Street, Richmond, Virginia 23219; and three copies of this brief were mailed by first-class mail, postage prepaid, to counsel for the appellees and the Attorney General at their addresses set forth below:

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