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IN THE SUPREME COURT OF APPEALS

OF VIRGINIA

Record No. _____

ALAN L. DEAN, ET AL.,

Petitioners,

vs.

ROCCO PAGLICELLI, ET AL.,

Respondents.

MEMORANDUM BRIEF OF ARLINGTON COUNTY CIVIC FEDERATION

Malcolm D. Miller, Attorney
Munsey Building
Washington 4, D.C.

June 9, 1952.

4021 1/2

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

LAN L. DEAN, ET AL.,

Petitioners

vs.

ROCCO PAOLICELLI, ET AL.,

Respondents.

Record No. _____

PETITION FOR LEAVE TO FILE BRIEF BY ARLINGTON COUNTY CIVIC FEDERATION

The Arlington County Civic Federation of Arlington County, Virginia, and the undersigned counsel, respectfully request the Court to accept for filing and its consideration in the above-entitled matter, the memorandum brief, in typewritten-mimeographed form, tendered herewith, and submits this request as friends of the Court, or on any other basis deemed proper by the Court; and as grounds for this request say:

1. The litigants in this proceeding do not represtnt the very large number of residents and citizens of Arlington County who are employed in the Federal government, and whose political rights will be affected by the Court's decision as to whether or not they may become members of the County Board of such County; and there is need to explain their views to this Court.

2. The litigants in this proceeding do not represent the very large number of residents and citizens of Arlington County who may or may not be Federal employees, but who desire that Federal employees be available as candidates for the office of member of the County Board in order that they may have the right to vote for the Federal employees who they believe are the best qualified persons willing to become candidates for such office.

3. The Arlington County Civic Federation is in a position to

express the views of numerous such residents and citizens, because the Federation is composed of delegates from about 40 citizens associations and county-wide organizations in Arlington which are interested in this matter. At its regular meeting held on June 3, 1952, the Federation voted to make such representations by intervention or as friend of the Court for the purpose of submitting such views; and this petition and the accompanying brief are submitted by the undersigned on behalf of the Federation as a result of such authorization.

4. The undersigned is a delegate to the Federation, a resident and voter in Arlington County, and is admitted to practice before this Court.

5. There has been insufficient time for the undersigned to print this brief on behalf of the Federation, as he was not requested to do so until June 6, 1952. The Federation will not seek opportunity to make oral argument.

WHEREFORE, The Federation and the undersigned pray that this Court accept for its consideration the memorandum brief tendered herewith, as friends of the Court or in such other capacity and under such conditions as the Court deems proper.

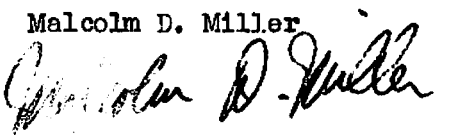
Respectfully submitted,

ARLINGTON COUNTY CIVIC FEDERATION

Malcolm D. Miller, Attorney
Munsey Building, Washington 4, D.C.

I hereby certify that a copy of this petition and accompanying brief were mailed to counsel for appellants and appellees on June 8, 1952, or delivered to them on June 9, 1952.

Malcolm D. Miller



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IN THE SUPREME COURT OF APPEALS OF VIRGINIA

Record No. _____

ALAN L. DEAN, ET AL.,
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Respondents.

MEMORANDUM BRIEF OF ARLINGTON COUNTY CIVIC FEDERATION IN SUPPORT OF PETITION FOR APPEAL

To the Honorable, the Justices of the Supreme Court of Appeal of Virginia:

The Arlington County Civic Federation, and the undersigned counsel, respectfully request the Court to accept this memorandum brief for consideration in the above-entitled proceeding, which appeals a decision of the Arlington Circuit Court declaring that Federal employees may not also be County Board members.

The Arlington County Civic Federation supports the contentions made in appellants' brief printed and filed with this Court; and this memorandum brief will avoid repetition of the arguments made for appellants.

II. IMPORTANCE OF CONTROVERSY TO ARLINGTON COUNTY CITIZENS

Arlington County had a population of 134,990 by the 1950 census, which also showed that of 53,983 working residents of the County, 27,127 or 50.3 per cent were Government employees. These numbers have increased, of course, with the national defense program since the census.

Federal employees play a very important part in the County government. Two of the five County Board members are presently Federal employees, and a third member of the Board was a Federal employee when he was elected and qualified. In addition, hundreds of Federal employees have an active part in the government. This is due to the unique method of using the capabilities of Federal employees on official boards and commissions such as the County Civil Service Commission, Planning Commission, Welfare Board, Public Utility Commission. The County Board has also established standing advisory committees on particular subjects as Fiscal Affairs, County Government, and the like, and Federal employees play an important part on these committees. For example, the Planning Commission and its advisory committees included 87 non-paid citizens who contributed part-time services in the completion of a comprehensive plan of county improvements, and many of those citizens were Federal employees.

Arlington is a rapidly growing community, having a population now of about 145,000 compared with only about 26,000 in 1930 and 57,040 in 1940. The County has become primarily residential for Federal employees and those who service Federal employees. It seems inconceivable to these employees of the U.S. Government and their families that they should not be permitted to elect persons from among themselves to be members of the County Board. Furthermore, it seems inconceivable to them that the county government may lose the services of numerous other Federal employees who are willing to contribute their abilities on official boards, commissions, and committees without any thought of remuneration other than the satisfaction of being of service to the community. Many of these Federal employees are nationally recognized experts in their fields, and Arlington County has benefitted greatly from their acts of citizenship.

Voters of the county are entitled to candidates who are the most capable. Disqualification of over one-half of the working population would mean that the majority of available candidates cannot seek the part-time office of County Board member and at the same time hold their Federal employment. Voters deprived of an opportunity to elect such candidates include non-Federal employees as well as Government workers.

The flood of newcomers into Arlington and Northern Virginia (who are mostly Federal employees) has created a sociological problem which is normally to be expected, but also to be deplored; i.e., the feeling on the one hand that the newcomers do not belong, while the newcomers resent their exclusion. This has been noticeable both between northern and downstate Virginians and between the newcomers and old-timers within the northern area. Deprivation of the right to serve on the County Board, for legal reasons obscure to laymen, would only widen the gulf of misunderstandings. Federal employees will never be able to understand why they should be subject to class discrimination by relegation to an inferior grade of State citizenship incapable of holding local offices.

Federal employees also are subject to provisions of the so-called Hatch Act of Congress which forbids them to hold State offices or engage in political activities (18 U.S.C. sec. 61). At the instance of Virginia Senators, the statute provides, however, that the U.S. Civil Service Commission may make local exemptions, and orders have been issued which allow Federal employees to become "independent" candidates for the County Board, and to hold part-time local offices. Federal employees may not hold full-time county or State offices of any kind. They

may not become party candidates nor support party candidates. Most Federal employees hope for the repeal of this legislation.

The Hatch Act exemptions are one of the reasons for subsection 11 of section 2-29 of the Virginia code, as both exemptions must be in effect to qualify the Federal employee to hold office as County Board members. Thus, the decision of the Arlington Circuit Court, if upheld, would nullify the exemption from the Hatch Act, at least in part. To the Federal employee, this matter is of great importance.

2. THE BASIS OF THE EXEMPTION IS REASONABLE

The provisions of section 2-27 of the Virginia Code are subject to exemptions in 14 subsections of section 2-29. Subsection (10) permits "any United States government clerk" to hold office in any city government. The provision of subsection (11) permits any "United States government employee" to hold any county office in any county "having a population in excess of three hundred inhabitants per square mile." The exemption applicable to all cities is in "general" language and applies to all the State. If the exemption is to be extended to counties which are most like cities, it would seem reasonable to use the population density classification for that purpose. Thus subsection (11) merely extends the

same privilege to counties of high density population as extended to all cities.

The first Act to use the 300 people per square mile formula was Chapter 347 of the Acts of 1912, entitled "An Act Authorizing the Appointment of Trial Justice of the County of Alexandria." The constitutionality of this Act was upheld by the Supreme Court of Appeals in the case of Ex Parte Settle 114 Va. 715, on March 13, 1913. Said the Court:

> "It is true that the Act applies only to the County of Alexandria, that being the only county in the State which has a population of three hundred or more to the square mile. But the fact that a law applies only to certain territorial districts does not render it unconstitutional, provided it applies to all districts and all persons who are similarly situated, and to all parts of the State where like conditions exist. Laws may be made to apply to a class only, and that class may be in point of fact a small one, provided the classification itself be a reasonable and not an arbitrary one, and the law may be made to apply to all of the persons belonging to the class without distinction."

Today there are 3 counties in Virginia which had a population of 300 per square mile at the time of the 1950 census: Arlington, Elizabeth City, and Warwick. Both the latter are in the Norfolk Metropolitan Area, adjacent to Newport News. As of December 31, 1951, according to statistics of the U.S. Civil Service Commission, this area employed 42,675 of the Federal employees out of the

78,040 in the State. This latter figure does not include those employed in Arlington, Alexandria, Falls Church, and Fairfax, which helped to make up the D.C. Metropolitan Area total of 248,995. Federal installations in the Warwick-Elizabeth City part of the Norfolk Metropolitan area include: Fort Monroe, Kecoughtown Veterans Hospital, Langley Air Force Base, the National Advisory Committee for Aeronautics, Yorktown Naval Mine Depot, Fort Eustis, Colonial National Historical Park, and the normal ones of the Department of Agriculture, Post Office Department, etc. It would appear that there is a direct relationship between the population density of counties and the proportion of workers who are Federal employees, a fact which would make Section 2-29(11) general and not special legislation.

The Hatch Act exemptions, previously mentioned, have been extended by U.S. Civil Service Commission orders to Alexandria, Falls Church, and to Fairfax County in addition to Arlington, and subsection 2-29 (11) of the Virginia Code was correspondingly amended. Actually, the correlation of Federal and State laws has been the foundation for these provisions of law. Certainly this correlation has a basis in reason, and should justify the action of this Court in upholding the subsection.

3. EXEMPTION IS TRADITIONAL IN VIRGINIA

Magistrates of the county courts were originally the officers who correspond with the 1870 change to county board members known as supervisors of magisterial districts under section 111 of the present Constitution.

A review of the House and Senate Journals for the year 1788 reveals that there was considerable discussion and amending of a proposal which became Chapter 38 of the Laws of Virginia on December 8, 1788. Entitled "An Act to Disable Certain Officers under the Continental Government from Holding Offices under the Authority of the Commonwealth", it provided as follows:

> "Whereas the good people of this Commonwealth in Convention Assembled did on the twenty-fifth day of June last, ratify a Constitution for the Government of the United States of America, the operation of which will soon commence;
>
> "And whereas it is judged expedient and necessary, that all those who shall be employed in the administration of said Government, ought to be disqualified from holding or administering any office, or place whatsoever, under the government of the Commonwealth;
>
> "Be it therefore enacted by the General Assembly that the members of the Congress of the United States, and all persons who shall hold any Legislative, Executive, or Judicial office, or other lucrative office whatsoever, under the authority of the United States, shall be ineligible to, and incapable of holding any seat in either House of the General Assembly, or any Legislative, Executive or Judicial office, or

"other lucrative office whatsoever, under the government of this Commonwealth:

"Provided that such disqualifications shall not extend to militia officers or magistrates of the county courts."

An Act of January 16, 1819, entitled "An Act to Reduce to one Act the Acts to Disable Officers of the Continental Government from Holding Offices under the Authority of this Commonwealth," retained the "Whereases" of the 1788 Act, but changed the other part to read as follows:

"Be it therefore enacted, That no person holding or accepting any office or place, or any commission or appointment whatsoever, legislative, executive or judicial, civil or military, under the authority of the United States, whether any pay or emolument be attached to such office, place, or commission, or appointment, or otherwise, or accepting or receiving any emolument whatsoever from the United States, shall be capable of holding any office, legislative, executive, or judicial, or any other office, place, or appointment of trust or profit, under the Government of the Commonwealth:

"Provided that nothing herein contained shall be so construed, as to prevent members of Congress from sitting as county court magistrates, or from holding offices in the militia, or so as to exclude any person receiving a pension from the United States, in consequence of any wound received in war, from any office under the Commonwealth, on account of such pension; or, so as to create any exclusion whatsoever, of militia officers or soldiers, on account of the recompense they may receive from the United States, when called into actual duty.

"All acts and parts of acts, coming within the purview of this act, shall be and the same are hereby repealed."

The Code of 1849 added "Visitors of the University and Virginia Military Institute" to the list of offices Congressmen might hold.

The Virginia Constitution of 1870 was the first to include a provision similar to section 32 of the present Constitution, reading as follows:

> "All elections shall be by ballot, and all persons entitled to vote shall be eligible to any office within the gift of the people, except as restricted within this Constitution."

In 1884, following the so-called "Reconstruction" period, there was enacted Chapter 145 which retained the exemptions of the previous laws, but changed the prohibition clause to read thus:

> "No person shall be capable of holding any such post, who holds any post of profit, trust, or emolument, under the government of the United States, or who is in the employment of the United States government in any capacity, shall ipso facto, vacate any post of profit, trust, or emolument, under the government of this Commonwealth, or any town, city, or county thereof, and it shall be the duty of the constituted authorities of this Commonwealth, to take such action as may be necessary to fill any vacancy so created, either by appointment or by causing an election or elections, to be held, as may be provided by law, whenever the fact of such acceptance shall be brought to their attention."

Beginning with Chapter 313 of the Acts of 1895-96, which provided that Fourth Class Postmasters might be notaries and school trustees, the General Assembly enacted sixteen separate laws pertaining to exceptions to the

general prohibition, including Chapter 448 of the Acts of 1897-98, Chapter 35 of the Acts of 1899-1900, Chapter 61 of the Acts of 1901-02, Chapter 361 of the Acts of 1908, Chapter 325 of the Acts of 1910, Chapter 73 of the Acts of 1915, Chapter 315 of the Acts of 1918, Chapter 98 of the Acts of 1920, Chapter 433 of the Acts of 1924, Chapter 440 of the Acts of 1928, Chapter 22 of the Acts of 1930, Chapter 18 of the Acts of 1936, Chapter 157 of the Acts of 1938, Chapter 92 of the Acts of 1950. At the 1952 session, the General Assembly passed House Bill 369 by Delegates Taylor and Singleton of Lynchburg permitting U.S. Commissioners of Referees in bankruptcy to hold the office of Assistant Judge of a Municipal Court of any city or Assistant Judge of a Juvenile and Domestic Relations Court of any city.

The above laws are Section 2-29 of the 1950 Code, and Federal employees eligible for membership on county boards include those who are in active military service (subsection 3), United States Commissioners, census enumerators, third or fourth class postmasters, caretakers of the national guard (subsection 4) rural or star route mail carriers (subsection 5), foremen, quartermen, leading men, artisans, clerks, or laborers employed in any navy yard or naval reservation in Virginia (subsection 9). In 1928 there was enacted in

that part of subsection 11, here in controversy, applicable to any United States government employee in any county having population in excess of three hundred inhabitants to the square mile. In 1950 there was added to subsection (11) the clause "or of any city or county adjoining any county having a population in excess of two thousand inhabitants per square mile."

4. SECTION 2-27 IS UNCONSTITUTIONAL

Appellants' brief points out that section 32 of the Virginia Constitution conflicts with section 2-27 of the Code, in that the Constitution qualified office-holders upon the basis of their right to vote, except as otherwise provided in the Constitution. That brief points out the fact that section 2-27 is not a general law, but a special law; and that it conflicts with the equal protection provision in the 14th amendment to the U.S. Constitution.

The Arlington County Civic Federation concurs in the positions taken by Appellants, but adds the following thoughts.

Section 2-27 is special legislation because it applies to a special class of citizens, who are prohibited from holding State offices (with certain special exceptions) merely because they are Federal employees. While section 63 of the Virginia Constitution may not forbid this type of special legislation, nevertheless because

section 2-29 is entirely special legislation any amendments would not be forbidden by section 64 of the Constitution.

In addition, the honey-combing of section 2-27 by the fourteen subsections of section 2-29 has certainly left a remainder which is "special". Therefore, even if the original act--which always had exceptions--should be considered general legislation, and even if these fourteen subsections should be considered general legislation, so little has been left that what is left is more special than that which has been taken away by the exceptions. Thus, the remainder should be considered in violation of section 64, and the whole statute should fall.

Sections 63 and 64 of the Virginia Constitution were intended to prevent discrimination by special legislation. Section 32 of the Virginia Constitution has been construed to forbid discrimination. This Court so held in Black v. Trower, 79 Va. 123, saying:

> "And hence it follows that a statute which discriminates in favor of one class against other classes of citizens in respect to eligibility to office, or otherwise in respect to public privileges, cannot be sustained unless authorized by the Constitution itself..."

This matter of "class discrimination" was also the basis for the Court's decisions in Gwaltmey v. Lyons, 116 Va. 872 and District Road Board v. Spilman, 117 Va. 201.

The decision of the Arlington Circuit Court had the effect of imposing "class discrimination" against the

largest class of residents and citizens in the County, by deciding that they are not eligible to hold office as County Board members. The decision discriminated in favor of a minority of Arlington citizens. Therefore, the actual result of the Circuit Court's decision was contrary to the purpose and intention of sections 32, 63 and 64 to prevent class discriminations, which was also the purpose of the "equal protection" clause of the 14th amendment to the U.S. Constitution.

It is respectfully submitted that this Court should not construe these provisions of the Virginia Constitution contrary to their spirit and intent, but should hold that section 2-27 of the Code is invalid to the extent it discriminates against Federal employees as a class of Virginia citizens.

CONCLUSION

The Arlington County Civic Federation and the undersigned respectfully pray that this Court reverse the decision of the Arlington Circuit Court.

Respectfully submitted,

ARLINGTON COUNTY CIVIC FEDERATION

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