IN THE COURT OF APPEALS OF VIRGINIA

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Record No. 0154-22-2

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STEVE GASKINS, et. al,

Appellants

v.

MCLEAN BIBLE CHURCH,

Appellee.

_____

PETITION FOR APPEAL

_____

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NATURE OF THE CASE

Appellants – Steve Gaskins, Roland Smith, Mike Manfredi, Kevin Elwell and Adam Jeantet – file this Petition for Appeal of the grant of a Plea in Bar in the Circuit Court for Fairfax County dismissing their case. **On Pages 40 (there was no cessation of illegal activity) 42 (Appellee presented no evidence to show mootness), and 55 (capable of repetition yet evading review), of the Trial Transcript, the objections were argued, and were preserved on Page 59.**

Appellants argue that the pleadings demonstrate a continuing issue of disputed fact between the litigants, such that the case is demonstrably not moot, and the trial court's order should be overturned.

JURISDICTION

This Court has jurisdiction to consider this appeal pursuant to Code of Virginia § 17.1-405: "Unless otherwise provided by law, any aggrieved party may appeal to the Court of Appeals from… 3. Except as provided in subsection B of § 17.1-406, any final judgment, order, or decree of a circuit court in a civil matter…."

ASSIGNMENT OF ERROR

Appellants assign error to the Circuit Court's finding that their case was moot due to intervening actions by Defendants. Appellants aver that the Circuit Court erred because (1) Appellee did not present evidence relating to its intervening activities, and thus failed to sustain its "heavy burden" to show mootness; (2) this matter falls under the "capable of repetition yet evading review" exception to the mootness doctrine; (3) this matter falls under the exception providing that "cessation of an allegedly illegal practice" does not render a case moot. On Pages 40 (there was no cessation of illegal activity) 42 (Appellee presented no

evidence to show mootness), and 55 (capable of repetition yet evading review), of the Trial Transcript, the objections were argued, and were preserved on Page 59.

STATEMENT OF FACTS

A. Procedural Background of the Case

This matter arises out of a civil trial in Fairfax County Circuit Court. Appellants Steve Gaskins, Roland Smith, Mike Manfredi, Kevin Elwell and Adam Jeantet are members of Appellee McLean Bible Church ("MBC").

Appellants filed a breach of contract suit against Appellee, alleging multiple violations of the MBC constitution ("the constitution") arising out of disputed elections for MBC's governing Board of Elders in June and July, 2021. Appellants sought injunctive relief ordering the disputed 2021 elections to be conducted again with procedural safeguards in place.

Appellee filed a motion to dismiss on jurisdictional grounds, arguing that the First Amendment proscribes courts from any involvement in the internal affairs of a church. Appellants argued that under Virginia law, the constitution and bylaws of a voluntary association constitute a contract between the association and the members, which can be enforced neutrally without regard to ecclesiastical concerns. On December 3, 2021, the Fairfax Circuit Court, the Hon. Thomas Mann presiding, denied the motion to dismiss.

Appellee also filed a demurrer, alleging that the constitution grants plenary power to the Board of Elders, and that even if all Appellants claims in their Complaint were true, they failed to state a claim for relief. On December 17, 2022, the Fairfax Circuit Court, the Hon. John Tran presiding, denied the demurrer.

(Appellants then amended their Complaint to include a fraud count, which was dismissed by grant of a demurrer on February 18, 2022 in Fairfax County Circuit Court, the Hon. John Tran

presiding. This matter is currently proceeding under Appellants' Second Amended Complaint, less the dismissed fraud count).

Appellee then moved for leave to file a plea in bar on mootness grounds, and for the plea in bar to be granted and the case dismissed. The matter was heard before the Honorable David Bernhard, Circuit Judge, on July 24, 2022. Appellants were represented by Rick Boyer, of Integrity Law Firm in Lynchburg. Appellee was represented by Brandon Elledge, of Holland & Knight in Tysons, Virginia.

At the conclusion of the arguments, the Court granted Appellee leave to file its plea in bar, granted the plea in bar, and dismissed the case as moot. This appeal follows.

B. Historical Background of the Case

This dispute arose out of actions alleged in Appellants' Second Amended Complaint, a copy of which is attached as Appellants' Exhibit 1. Appellants made a number of allegations. They alleged that MBC is governed by its constitution. Complaint at ⁋ 11 [Compl. at ⁋ 11]. A copy of the MBC constitution was attached to the Complaint, and is attached herewith as Appellants' Exhibit 2. Under the constitution, MBC's governing body is its Board of Elders ("the Board"). *Id.* at ⁋ 12. The Board must consist of at least six Elders, to be elected at MBC's June Congregational Meeting, for three-year terms. *Id.* at ⁋ 30. Terms of Elders are staggered, and one-third of the Board is elected each year. *Id.*

1. The Board Engineers a Tainted 2021 Elder Election, to Avoid Facing the "Congregational Veto"

a. The MBC Constitution Vests "Immense Power" in the Board of Elders, With Only One "Congregational Veto" Option

The Elders have "immense power" under the "insular framework" of the constitution. *Id.* at ⁋ 34. This extends so far that no one may seek election as Elder without first being selected as a

candidate by the Board and presented to the congregation for a vote. *Id.* at ⁋ 32. To become an Elder, one must be nominated by a member of the church. Const. Art. VI, § 3. Then they must undergo a review and vetting by the Nominating Committee. *Id.* Then, the Nominating Committee makes its recommendations and the Elders select from this pool, the candidates that they will put forward for election. *Id.* And instead of providing a list of all the qualified candidates, as a plain reading of the Constitution would indicate, they only put forward the exact number required to fill the vacant positions. Compl. at ⁋ 41. In other words, they hand-pick and pre-select from among the entire population of qualified Elder Nominees.

There are "only two" checks on the power of the Elders under the constitution. *Id.* at ⁋ 36. The first is the ability of the MBC congregation to vote on new Elders under Art. VI, § 4 of the constitution. *Id.* at ⁋ 36. (That article requires a 75 percent affirmative vote for election as an Elder. *Id.* at ⁋ 33). The second check is that, if candidates presented by the Board fail in two consecutive votes to receive the required 75 percent for election to the Board, (the first Elder election, then a second election with proposed "additional nominations" as required by Article VI, § 4 of the constitution), the remaining Elders "shall be required to convene a Congregational Meeting and request a Vote of Confidence from the congregation." Const. Art. VI, § 11.

At that point, the congregation has authority to require a "vote of confidence" on the entire Board. If the remaining Elders do not achieve "a 75 % affirmative vote of the votes cast by members of the congregation present and voting," the Board is dissolved effective immediately and the congregational members present and voting elect temporary leadership. Const. Art VI § 11.B. This interim governing board then begins the process of reconstituting the Board of Elders through the formation of a new Nominating Committee. *Id.* at ⁋ 37. Barring such a "congregational veto," all authority in the church remains in the hands of the Board. *Id.* at ⁋⁋ 34-35.

b. The Board Begins to Purge Members Before the 2021 June Congregational Meeting to Avoid a "Vote of Confidence" and the Specter of a "Congregational Veto"

As Appellants and other members of a minority of MBC "dissenters" [see *Reid v. Gholson*, 229 Va. 179, 182 (1985)] began to challenge the Board's leadership on the direction of MBC, the Board began "seeking to disqualify members from voting, attempting to purge members by designating them 'inactive' on an arbitrary basis, without support from the constitution, and with no record that the members had missed eight consecutive Sundays [the threshold requirement under Art. V, § 4 of the constitution to be placed in nonvoting status]" Compl. at ⁋ 45. This tactic was an effort to thin the ranks of dissenters who might not support the Board's preferred candidates at the June Congregational Meeting. *Id*. at ⁋ 46. The Constitution has no other provision to deny voting rights besides removal from church membership. *Id.* at ⁋⁋ 89-90. And the only provision for declaring a member "inactive" and thus nonvoting is if the member can be determined to have missed eight consecutive services, without "reasonable excuse." *Id.* at ⁋⁋ 45, 90. The MBC constitution promises that "all "active members who have passed their sixteenth (16^{th}) birthday" have voting privileges in the church." *Id.* at ⁋ 89 (quoting MBC Constitution Art. V, § 2).

The Board's selective purging of the membership rosters was "arbitrary and capricious," done expressly to "predetermine the outcome of the election." *Id.* at ⁋ 46. It was a constitutional violation, constituting a breach of contract with the members, including Appellants. The Board's overriding concern was to prevent a "'vote of confidence,' requiring a 75 percent affirmative vote to avoid a whole new Board being nominated by the congregation." *Id.* at ⁋ 62.

Appellants alleged that "a large number" of MBC members were arbitrarily placed in "inactive" nonvoting status, including Appellants Elwell and Jeantet. *Id.* at ⁋ 49. The total

number of members purged is unknown to Appellants. Appellants submitted discovery requests in August 2021, hoping to determine the total number, but no responsive information has yet been submitted by Appellee. The question remains a salient disputed question of fact that alone mandates that the grant of a plea in bar be reversed.

c. After Losing the Election, the Board Eliminates the Secret Ballot and Votes Again

At the 2021 June Congregational Meeting, the Board silenced any dissenting voices. "At the outset of the Meeting, it was announced from the pulpit that there would be no public discussion of the candidates for Elder or the voting processes, and that any attempt at public discussion would lead to forcible removal from the building." *Id.* at ⁋ 47.

Yet despite the purge and its efforts to silence dissenting opinions, the Board failed to obtain the required 75 percent vote for its three Elder candidates at 2021's June Congregational Meeting. *Id.* at 56.

Article VI, § 4 requires that, if the Board's selected candidates fail to receive 75 percent of the vote, the Board must "submit additional nominations" to the congregation for approval. *Id.* at ⁋ 63. Instead, the Board simply called a new election for July 2021, and resubmitted the three defeated Elder candidates. *Id.* at ⁋ 63. This was also a constitutional violation, constituting a breach of contract with the members, including Appellants.

Aware that the purge had been insufficient, and that additional action was needed to evade the 75 percent requirement, the Board announced that – for the first time in the 60-year history of MBC – it was eliminating the ability of members to cast secret ballots for Elder elections. Id at ⁋ 66. This was due to the fact that "[t]he congregation includes some 100-plus members who are also paid staff of MBC," some of whom "on information and belief … voted against the proposed slate of Elders at the June 30 meeting." *Id.* at ⁋ 68. "The elimination of the

secret ballot would likely subject these staff persons to 'discipline up to and including termination and being 'publicly dismissed from the Church fellowship' at the hands of the powerful Board of Elders, who now know, to a person, how each member and staff person voted." *Id.* at ⁋ 69.

Meanwhile, between the June Congregational Meeting and the July revote, "the Elders continued placing into 'inactive' status members they believed were among the dissenters, with no evidence that they had missed the required eight consecutive services." *Id.* at ⁋ 73. At both the June and July meetings, the Board refused to allow the dissenters any discussion at the meeting before calling the vote. *Id.* at ⁋ 76. The Board followed through on its threat, and required all members' names to be on their ballots if they wished to vote. *Id.* at ⁋ 75. Again at the July vote, numerous members – including Appellants Elwell and Jeantet – were only permitted to cast "provisional" ballots. *Id.* at ⁋ 77. Elwell and Jeantet were required to have their name placed on the provisional ballot. There is no provision for "provisional ballots" in the MBC constitution. *Id.* at ⁋ 79. "The purpose for the unprecedented creation of 'provisional' ballots in conjunction with the equally unprecedented elimination of secret ballots, was simply so the Elders could make an *ex post facto* decision to throw out a ballot – after, of course, seeing which member's name was written on the non-secret ballot, and whether the member had voted 'correctly' or not. *Id.* at ⁋ 80. This was also a constitutional violation, constituting a breach of contract with the members, including Appellants.

Furthermore, the very method of voting had been altered because the Congregational Meeting Structure that had been in place for 60 years was also altered at the July Meeting. No longer were votes conducted at a meeting in one place, at one time, in which a quorum - as required by Article VIII § 2 of the Constitution - could be established, and a single vote

conducted and completed all within the same meeting. Instead, the meeting was spread-out across two Sunday worship services. This had the effect of harvesting votes from two meetings, without establishing a quorum at either, as required by the Constitution. Because of the lack of quorum, these were not legitimate Congregational Meetings under the constitution and any actions taken at such an alleged Congregational Meeting are null and void.

In the end, the combined constitutional violations were sufficient for the Board's handpicked candidates to narrowly win the July revote, ensured by the illegal purge of members, an improper July meeting, the Board's *ultra vires* decision to put forward the same candidates again instead of the constitutionally required "additional nominations," and the coercion imposed by the destruction of the secret ballot, particularly on members whose continuing employment with MBC depended on the good graces of the Elders. *Id.* at ¶ 82.

2. After Winning the Non-Secret-Ballot Election, the Board Continues to Purge Dissenters

After narrowly winning the July revote – aided by the destruction of the secret ballot – the Board continued punishing dissenters they could now prove had voted against their Elder candidates. Plaintiffs alleged numerous specific instances, and alleged that "the Elders have continued to place dissenting members of MBC into 'inactive' status since the July vote, with no evidence that the members have missed the required eight consecutive meetings, and solely on the basis of having voted the 'wrong' way on July 18." *Id.* at ¶¶ 83-87.

3. The Board Selectively Increases the Voter Universe to Deny Court Relief

When Appellants filed this cause, they expressly asked the Court for specific relief, aimed at preserving the status quo, and preserving the integrity of the membership voting universe as it stood as of the date of the 2021 June Congregational Meeting. Appellants requested, *inter alia*, the following relief:

1. Enter a temporary and permanent injunction ordering the Board to **conduct all elections by secret ballot at any future votes on Elders** under the current MBC Constitution;
2. Enter an Order that the July 18, 2021 election be declared invalid as violative of the MBC Constitution, and order a new election for the three Elder positions purportedly elected at that meeting (a "new election");
3. Enter a temporary and permanent injunction ordering Defendant, and its Board of Elders, should the purported Elders not receive a three-quarters affirmative vote at the new election, to permit the congregation of MBC to conduct a "vote of confidence" on the entire Board, pursuant to Article 11, Section 6.B of the MBC Constitution, and order that the "vote of confidence" be conducted via secret ballot;
4. Enter a temporary and permanent injunction ordering Defendant, and its Board of Elders, **to permit voting at the new election and any subsequent "vote of confidence" by any member included on the Church's active roll as of March 1, 2020, when the coronavirus pandemic created a "reasonable excuse" for members to miss services, as well as any member duly added to the Church's membership rolls from March 1, 2020 until July 18, 2021 when the purported Elders were elected**, unless any such member has requested to be removed from active voting status;
5. Enter a temporary and permanent injunction **forbidding Defendant, and its Board of Elders, from permitting voting at the new election and any subsequent "vote of confidence" by any members added to MBC membership rolls subsequent to the July 18, 2021 meeting, in order to preserve the status quo as of the date of the tainted election** which Plaintiffs ask this Court to declare invalid as violative of the MBC Constitution. Plaintiffs request that all members added to MBC after July 18, 2021 be permitted to vote in Elder elections only **after the contested election** of July 18, 2021, **and any "vote of confidence" that may be required** as a result, is properly conducted by the membership duly entitled to vote at that time, in order to preserve the status quo;
6. Enter a temporary and permanent injunction ordering Defendant, and its Board of Elders, to provide counts and tabulations of all elections, beginning with June 2021, to the congregation.
7. Enter an Order appointing a special commissioner to oversee the voting process and vote counts at the new election for Elders and any "vote of confidence" that may be required as a result, in **order to ensure that all proper votes – and only proper votes – are accurately and honestly counted**;
8. Enter an Order **directing the Board to disclose to the congregation the names of all persons placed on inactive status, or removed from the membership rolls entirely, from January 1, 2021 to the present, together with the reasons for the action taken and the evidence to support** the action…. [Compl. at pp. 23-24 (emphasis added).]

Since the tainted July revote, on multiple occasions the Board has continued to selectively handpick hundreds of new MBC members, to ensure that if the Court ever ruled in Appellants' favor, effective relief would be essentially impossible.

In December 2021, the Board hastily elected hundreds of selectively handpicked new members. Appellants sought an injunction against election of any new members until the

membership universe as of the June Congregational Meeting could properly vote on the Elders – and any subsequent "vote of confidence" on the entire Board that might ensue – preserving the integrity of the status quo. The Court was unable to schedule a hearing on the matter before the new members were quickly voted on, however. Tr. At 16.

Again in May, the Board elected numerous selectively handpicked new members, to again swell the ranks of members inclined to support the Board's candidates, and make effective relief under the status quo still more difficult for the Court. Tr. At 31-32.

4. The Board Concocts its "Plan for Lawsuit Resolution," in an Effort to Force "Mootness"

a. The Board's "Plan" Claims to Provide Appellants' Requested Relief

In May of this year, just as Appellants began to schedule depositions in the case, the Board concocted a "Plan for Lawsuit Resolution" ("the Plan") to create the illusion of "mootness." Less than a week before Appellants' first deposition was scheduled, Appellee presented the Plan at the Plea in Bar hearing in the trial Court as Defendant's Exhibit A, and it is attached here by the same nomenclature.

Under the Plan, the 2022 June Congregational Meeting would be held on June 1, 2022 to vote on 2022 Elders. Exhibit A, at p.1 [Exh. A at 1]. In an effort to provide the illusion that Appellants' claims were addressed, the Plan had several proposals that at first glance might appear as concessions. The election would this time be conducted by secret ballot. *Id.* The three disputed 2021 Elders (Jim Burris, Chuck Hollingsworth and Ken Tucker) would resign their positions, and be up for re-election along with the three new candidates for 2022. *Id.* at 22. Finally, the Board claimed that "individuals on the church's active roll as of March 1, 2020 (when the [COVID-19] pandemic began)" would be allowed to participate. *Id.* at 24.

If the new voter universe - enlarged by the new members added in December 2021, March 2022 and May 2022 – then approved the Elders, MBC would file a Plea in Bar to dismiss the lawsuit as moot.

b. The "Plan" Includes Poison Pills to Ensure Appellants' Requested Relief is not Granted

However, the Board included numerous poison pills which ensured that the relief actually sought in Appellants' Complaint would not be granted.

First, the Plan proposed that, just before the 2022 June Congregational Meeting, MBC would vote in May on yet another large slate of new members selectively handpicked by the Board, adding them to the voter rolls, expanding the voter universe just in time for the new election. Ex. A at p. 3.

Second, the Plan proposed that notification of the May 2022 vote (to add more new members) and the June 2022 vote (for Elders) would be sent electronically to the "active membership database." *Id.* at 13. In other words, all members considered by the Board to be in good standing – everyone **not** a subject of the 2021 purge – would receive notification of the votes. But as counsel argued at the Plea in Bar hearing in the trial court, some of the members denied by their own Elders the rights contained in their own church's constitution last June, have likely stopped regularly attending or in some cases begun attending other churches. Tr. at 33. No evidence was presented at the Plea in Bar hearing that a single member subject to the 2021 purge ever received notification of their "right" to vote in an election they likely never even knew was occurring – although those meeting the Board's approval and surviving the purge would receive notification. Tr. at 40.

Third, even if a purged member managed to somehow hear of the June 2022 vote, the Plan required any such individuals to affirm that "before God [they] still claim to be an active

member of the church." With this poison pill, Appellee capitalized on the presumed honesty of dissenters. Any members who might have in fact tried out other churches as a result of being disenfranchised by MBC leaders last year would be required to lie in order to vote – although had the vote been properly conducted last June when Appellees asked the trial court to stop the clock, such member would have been an active member and entitled to vote.

Fourth, the Plan in effect prospectively amended the MBC constitution, to prospectively do away with the "congregational veto." The constitution provides, in Article VI, § 11 that if a "vote of confidence" should be required after a failed Elder election, and "the Board fails to receive the 75% vote, a nominating committee shall be chosen by the congregation consisting of six (6) people. They shall nominate a new slate of Elders and submit them directly to the congregation for approval."

But the Plan calls for the Elders – even after failing the "vote of confidence" – to be able to exercise "dead hand control" of the process of selecting their own replacements.

> If duly elected elders do not receive 75% affirmation of voting members in a vote of confidence, … the church will appoint a new six-man governing board and six-person nominating committee through the following process: Location pastors [the pastors of MBC's various satellite campus locations throughout Northern Virginia] … will present a prospective six-man governing board and six-person nominating committee to the church for affirmation… If a simple majority of active members present and voting affirms this governing board and nominating committee, then this governing board will begin leading the church." [Exh. A at 24.]

In effect, if the Elders fail to gain the required 75 percent vote of confidence, the location pastors, chosen by and serving at the discretion of the defeated Elders (Compl. at ⁋ 34), could simply reappoint the defeated Elders, this time needing only fifty percent plus one to defeat the clear meaning of the MBC constitution's promise that the congregation could select new leadership if the Board could not maintain 75 percent support. This effectively amends the MBC

constitution without resort to the amendment process outlined in Article III, § 2, which requires 75 percent support of the congregation. Exh. 2, Art. III. § 2. In addition, they did not observe the requirement in Article III, § 2 of the constitution to provide notice at least three Sundays before and vote on a change to the constitution. These are additional constitutional violations, constituting a breach of contract with the members.

Finally, the Plan utilized a scheme for conduct of the election that was specifically forbidden by the MBC constitution. Article VIII of the constitution requires that notice of the "time and place" of the June Congregational Meeting to elect Elders must be given by the elders to the congregation. It further requires that "a quorum of the congregation for the purpose of congregational meetings shall consist of a minimum of ten percent (10%) of the voting membership of the church." Const. Article VIII, § 2.

But instead of holding the 2022 June Congregational Meeting at a "time and place," as the June 2021 meeting was (and every other previous June Congregational Meeting in the history of MBC), the Board instead purported to authorize a five-day voting period from Wednesday-Sunday, June 1-5, with no "time or place," and with members voting online at random at any time during that five-day period. Ex. A at p. 3. Counsel for Appellee at the plea in bar hearing noted the large size of the voting universe of over 1500 in the 2022 vote that purportedly elected the new Elders. Tr. at 9. He argued that even subtracting "283" voters who were elected as members after July of 2021 and participated in the June 2022 election, more than 75 percent of respondents supported the new Elders. Tr. at 45. With a five-day voting window, it is not surprising that a larger-than-usual percentage of the congregation voted, and likely weakened the voting strength of the dissenters. The Board's disregard of the constitution's requirement of time, place and quorum was another constitutional violation, that constituted a breach of contract, and that again prevented the relief

requested by Plaintiffs – a June Congregational Meeting - with time, place and quorum – open to all valid members as of June 2021, to preserve the integrity of the status quo at that time.

c. The Board Engineers a Victory at June 2022 Congregational Meeting

After adding new members and sending notification only to those deemed by the Board to be "active members," the Board was able to obtain a majority of over 80 percent for its six Elder candidates at the June 2022 meeting.

STANDARD OF REVIEW

When a defensive plea in bar is considered, at trial or on appeal, if no evidence is taken, the court may rule only upon the pleadings, and the facts stated in Plaintiff's motion for judgment must be taken as true. "The defensive plea in bar shortens the litigation by reducing it to a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery. The moving party carries the burden of proof on that issue of fact. Where no evidence is taken in support of the plea, the trial court, and the appellate court upon review, must rely solely upon the pleadings in resolving the issue presented. When considering the pleadings, the facts stated in the plaintiffs' motion for judgment [are] deemed true." *Tomlin v. McKenzie*, 251 Va. 478, 480 (1996).

"The standard of review on appeal when considering a plea in bar is functionally *de novo* when the appellate court must consider solely the pleadings to resolve the issue presented. When the circuit court takes no evidence on the plea in bar, [courts] accept the plaintiff's allegations in the complaint as true." *Plofchan v. Plofchan*, 299 Va. 534, 547 (2021) (internal quotation omitted).

"[T]he burden of establishing that [courts] lack jurisdiction rests on the party who alleges that a controversy before [the court] has become moot." *Reston Hosp. Ctr., LLC v. Remley*, 63 Va. App. 755, 767 (Va. Ct. App. 2014).

ARGUMENT

Appellee presented no evidence outside the pleadings, in the Court below, to support its plea in bar. It asked the Court to sustain its plea in bar on the basis of unsupported conclusory statements in its pleading, despite contradictory and disputed facts in its pleading. The truth of Appellee's claims below was disputed by the parties at the hearing, and could not be ascertained without discovery. The Court stated no factual findings except that the case was moot. Critical facts remain in dispute between the parties, and an active controversy remains between the parties. In addition, this case falls within both the "voluntary cessation of illegal activities" and "capable of repetition yet evading review" exceptions to the mootness doctrine. Accordingly, the ruling in the Court below to grant the plea in bar was plain error, and should be overturned.

A. Appellee Utterly Failed to Produce Facts to Meet its Burden of Proof for Mootness

"[T]he burden of establishing that we lack jurisdiction rests on the party who alleges that a controversy before us has become moot." *Reston Hosp. Ctr., LLC v. Remley*, 63 Va. App. 755, 767 (2014). Appellee has utterly failed to meet that burden here.

At the plea in bar hearing in the court below, no witnesses were called. Appellee submitted only its plea in bar and two exhibits which were attached to the plea in bar. Exhibit A was the Board's "Plan for lawsuit resolution." Exhibit B was a chart showing purported results from the election held between June 1-5, 2022, purporting to show that even excluding the 283 members voting who MBC claimed were elected after July of 2021 (and assuming they all voted for the Elders), the Elder candidates in question still received from 83 to 86 percent of the vote. No affidavits, witnesses or certifications were submitted by Appellee in support of the plea in bar

exhibits. The Court made no factual findings, except to say that the case is moot. Accordingly, review by this Court is "functionally de novo." *Plofchan*, 299 Va. at 547.

The relief requested by Appellants in their Complaint is exceedingly straightforward. It alleges that the Board conducted a long-term campaign to illegally purge members it believed would vote against its Elder candidates, in an attempt to fraudulently predetermine the outcome. It asks the Court to allow determination through discovery of who and how numerous those members were and, if they could not be determined to have missed eight consecutive services (the threshold for "inactive" member status under the constitution), to allow them all to vote, along with all other members in good standing as of the June and July 2021 elections – but not hundreds of new members handpicked by the disputed Elders months after the fraudulent vote.

Even assuming that those facts in Appellee's plea in bar and exhibits which are not internally contradicted are true, only individuals in the "active membership database" were to receive notice of the Plan and their opportunity to vote during the June 2022 "election half-week." Exh. A at 13.

Considering as true – as the Court must – the allegations in Appellants' Complaint that Appellee purged members prior to the 2021 election "by designating them 'inactive' on an arbitrary basis, with no record that the members had missed eight consecutive Sundays," and that the purge was undertaken "expressly to predetermine the outcome of the election" (Compl. at ¶¶ 45-46), and also assuming as true the allegation in Appellee's Exhibit 1 that only the "active membership database" would receive notification of the voting for the 2022 election (Exh. A at 13), there is a distinct issue of fact in contention between the parties. Only discovery can reveal how many members were removed by Appellee from the "active membership database," and whether that number would have been enough to drop the Elder candidates below 75 percent of

the vote, had they received notice of the 2022 election. Indeed, counsel for Appellants noted that at he had on hand four affidavits of members in good standing affirming that they had never received notice. Tr. at 35-36. These are factual issues that are both seminal and disputed, and that cannot be determined without discovery. Accordingly, it is inappropriate to sustain a plea in bar at this stage.

Appellants acknowledge the basic axiom that "Generally, a case is moot and must be dismissed when the controversy that existed between litigants has ceased to exist … [w]henever it appears or is made to appear that there is no actual controversy between the litigants, or that, if it once existed, it has ceased to do so." *Daily Press, Inc. v. Commonwealth*, 285 Va. 447, 452 (2013).

However, Appellee's pretense that the "actual controversy" between the litigants is gone is the barest of pretenses. Appellants' Complaint asked the court, similarly to the relief in *Reid v. Gholson*, to "[e]nter an Order appointing a special commissioner to oversee the voting process and vote counts at the new election for Elders and any 'vote of confidence' that may be required as a result, in **order to ensure that all proper votes – and only proper votes – are accurately and honestly counted**; [and] [e]nter an Order **directing the Board to disclose to the congregation the names of all persons placed on inactive status, or removed from the membership rolls entirely, from January 1, 2021 to the present, together with the reasons for the action taken and the evidence to support** the action…. [Compl. at pp. 23-24 (emphasis added).]

Rather than disclosing the identity and number of purged members who should be added back into the voter universe, Appellee has added hundreds of supporters of the Board instead. The plain language of the Plan demonstrates that no notice of the vote was furnished to the

purged members, and any purged member who did happen to hear of the vote would not be permitted to participate without "before God" claiming to still be an active member, even after being purged. This is no sense the "free and fair vote" Appellants asked the Court to ensure. Compl. at ⁋ 135. The controversy between the parties remains live, and the plea in bar must be denied.

B. This Case Falls Within Both Exceptions to the Mootness Doctrine

1. This Case Falls Within the "Voluntary Cessation of Illegal Activity" Exception

Furthermore, there are two well-recognized exceptions to the mootness doctrine. First, "cases involving voluntary cessation of allegedly illegal activity are exempted from the mootness doctrine. See *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 59 L. Ed. 2d 642, 99 S. Ct. 1379 (1979) (noting that, "as a general rule, 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.'" *Harrisonburg Rockingham Soc. Servs. Dist. v. Shifflett*, 2005 Va. App. LEXIS 280, at *10-11 (Va. Ct. App. 2005) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). "Second, cases that are capable of repetition, yet evading review remain justiciable." *Id.* (internal quotation omitted).

Appellants' case falls squarely into both exceptions. First, the heart of Appellee's argument is its claim to be no longer doing the things Appellants complained of last year. However, "a defendant claiming that its voluntary compliance moots a case bears the **formidable burden** of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (emphasis added).

"The case is moot because the contested elders resigned," Appellee argues, and "the case is moot because the Church has held a new, intervening election under proper procedures … in accordance with the Church's constitution…." Plea in Bar at 3, 4. As demonstrated in the Statement of Facts *supra*, by the language of the Plan itself, Appellee has entirely failed to conduct the June 2022 election in accordance with the constitution. The entire procedure for a days-long, online election, with flagrant opportunity for denial of the secret ballot yet again, was a violation of the constitutional requirement in Article VIII for congregational meetings with "time and place" and a ten-percent "quorum" of members actually in attendance. But regardless, "voluntary cessation of illegal conduct does not deprive the tribunal of power to hear and determine the case." *Shifflett*, 2005 Va. App. LEXIS 280, at *10-11.

2. This Case Falls Within the "Capable of Repetition yet Evading Review" Exception

Second, the sham vote of 2021 is entirely "capable of repetition yet evading review." With no related discovery having been turned over, only Appellee still has any idea just how many members were purged, and removed from the "active membership database" that, according to Appellee's Plan, was the only ticket to be notified of the 2022 Elder election. Exh. A at 13. The trial court did not make any finding as to how many members were purged and thus not subject to notice, and indeed it could not, as Appellee has refused for 10 months to respond to discovery requests, and presented no evidence at the plea in bar hearing or in its pleading as to how many members were purged.

This Court need look no further than Appellee's Exhibit A to see the utter fallacy of its mootness claim. The Plan proposed that notification of the May and June 2022 votes would be sent electronically to the "active membership database." Exh. A at 13. But no evidence was

presented at the plea in bar hearing that a single member subjected to the 2021 purge (and thus not in the "active membership database") ever received notification of their "right" to vote – or that an election was even being held – in 2022. With no facts in evidence to support it, the Court did not and could not have made any such finding. Accordingly, without discovery, it was wholly improper to grant the plea in bar.

As the U.S. Supreme Court ruled in *Richmond Newspapers v. Va.*, a court's "jurisdiction is not necessarily defeated by the practical termination of a contest which is short-lived by nature. … If the underlying dispute is capable of repetition, yet evading review, … it is not moot." *Richmond Newspapers v. Va.*, 448 U.S. 555, 563 (1980). The fact that Appellee managed to drag this case out for a full year from its July 2021 commencement without responding to discovery, so as to reach the 2022 June Congregational Meeting and hold a new election, does not moot the ongoing violations of the MBC constitution. "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.* at 189. That is Appellee's burden to prove. "[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 190. Instead, as Appellants allege in their Complaint, "[o]n information and belief, the Elders have continued to place dissenting members of MBC into inactive status since the July [2021] vote…." Compl. at ⁋ 87. And as noted *supra*, only members in the "active membership database" were informed of their right to vote in 2022. Exh A. at 13.

The best evidence of Appellee's intent is its bald declaration on Page 24 of the Plan that even if the six Elders fail to receive 75 percent support, the Location Pastors – all selected by the Elders – would simply appoint six persons of their own choosing to submit to the congregation –

this time needing only 51 percent support for election. Exh. A at 24. The Board has no intention of ever submitting to the "Congregational Veto" dictated by Article VI, § 11 of the MBC constitution, regardless of the congregation's votes or this Court's action. Given the allegations in the Complaint and the Board's response in the Plan, it is likely if not essentially certain that the challenged actions will be repeated as often as necessary without action by this Court.

If the burden were on Appellant's to demonstrate that the challenged actions were likely to recur, that burden would be fairly met. But the burden is on Appellee to prove otherwise. That burden has not been and cannot be met.

3. The Trial Court Erred in Sustaining a Plea in Bar With no Facts to Support it, When the Burden of Proof was on Appellee

Appellee asked the trial court to find the case moot. To do so, the court had to accept as facts multiple conclusory statements for which Appellee provided no evidentiary support, and to ignore plain evidence on the record that the case was still live.

First, the court had to accept the conclusory statement that all persons "including individuals on the church's active roll as of March 1, 2020 (when the pandemic began)" had opportunity to vote in the 2022 election. Yet the only evidence before the court indicated that only individuals currently on the "active membership database" even had notice of the vote. Exh. A at 13. Without notice of the existence of the 2022 election, the evidence shows the purged dissenters had no practical means to exercise the sham "right" claimed by the Plan.

Second, the court had to ignore the fact that Appellee ignored the command of the constitution and the unbroken 60-year tradition of holding the June Congregational Meeting at a "time and place" where a "quorum" could be determined to exist. Exh, 2, Art. VIII. To obtain its result of over 80 percent of voters allegedly voting to support the Elders in June 2022, the Board had to hold yet another illegal election, again in violation of the constitution's specific terms.

Third, the court had to accept unsupported exhibits with no affidavits or ore tenus testimony. The only "evidence" as to the vote totals in the June 2022 election that purportedly re-elected the challenged Elders was a one-page spreadsheet, unsupported by affidavit or oral testimony, that alleged that each Elder candidate received between 86 and 89 percent of votes cast. The "Plan" itself was presented in written form as Exhibit A, and was again unsupported by affidavit or oral testimony to its authenticity.

Fourth, the Court had to accept Appellee's unsupported, conclusory assertion that only 283 members selected since the disputed 2021 election actually voted in the 2022 election, such that there were not enough new members participating to affect whether the Elder candidates received 75 percent of the vote. A single line on Exhibit B of Appellee's pleading, reading "vote total even if excluding the 283 new members" is the only information the Court has to quantify the effect of Appellee's expansion of the voter universe in an attempt to ensure that the status quo from last July was not preserved.

Fifth, the court had to accept Appellee's unsupported, conclusory claim that the June 2022 vote was in fact a secret ballot, since the lack of a secret ballot was a primary focus of Appellants' Complaint and requested relief. The Plan baldly states that MBC's electronic voting system "ensures that each vote comes from an actual member, but … church leaders … cannot see how individual members voted." Exh. A at 19. The Plan goes on to claim that "no Elder, Lead Pastor or Location Pastor has information about who voted or how anyone voted last summer…." *Id.* Yet, taking the allegations in Plaintiffs' Complaint as true, as the Court must, after last July's vote the Board continued punishing dissenters they could now prove had voted against their Elder candidates. Plaintiffs alleged numerous specific instances, and alleged that "the Elders have continued to place dissenting members of MBC

into ‘inactive’ status since the July vote, with no evidence that the members have missed the required eight consecutive meetings, and solely on the basis of having voted the ‘wrong’ way on July 18.” Compl. at ⁋⁋ 83-87. Accordingly, this Court cannot accept either the unsupported assertion that last year’s vote was confidential, or that this year’s vote was. Further, Appellees offered no evidence at the plea in bar hearing to support their conclusory statement in the Plan.

Appellants’ Complaint alleged a long and coordinated campaign of illegal actions in violation of the MBC Constitution to “predetermine the outcome” of the MBC Elder election. With its plea in bar, Appellee offers nothing more than unsupported conclusory statements from the “foxes guarding the henhouse” that everything was done properly this time. This Court must consider the facts in Appellants’ Complaint as true. Under the correct standard of review, Appellants have amply demonstrated that a live controversy exists between the parties.

4. Appellee’s Failure to Provide Notice of the 2022 Vote to Purged Members Defeats the Plea in Bar

Since the outset of this case, Appellants have appealed to the “neutral principles of law” articulated by the Virginia Supreme Court in *Reid v. Gholson*, 229 Va. 179 (1985). The *Gholson* Court made clear that “the members of a congregational church [may] seek the protection of the court for the purpose of obtaining a fairly-conducted meeting.” *Gholson*, 229 Va. at 190.

> “[a] member of a congregational church, seeking the aid of the court in protecting his civil and property rights, may appeal only to the simple and fundamental principles of democratic government which are universally accepted in our society. These principles include the right to reasonable notice, the right to attend and advocate one's views, and the right to an honest count of the votes. Such rights are fundamental to our notions of due process. They are neutral principles of law, applicable not only to religious bodies, but to public and private lay organizations and to civil governments as well. *Id.* at 189-190.

However, the Plan makes clear Appellee’s continuing efforts to disadvantage dissenters in the voting process. As in *Gholson*, so in this case. “[Dissenters] have been persistently

'silenced' and excluded from voting. Meetings have been called upon improper notice, votes favorable to the dissenters suppressed, and unauthorized absentee ballots counted against them." *Id.* at 190.

The same holds true in this case. Appellants allege that Appellee refused to allow any discussion before the votes in June and July, 2021. Compl. at ⁋ 76. Indeed, Appellee threatened that any attempt to discuss dissenting opinions "would lead to forcible removal from the building." *Id.* at ⁋ 47. Appellants allege that Appellee has illegally purged large numbers of dissenting members into "inactive" nonvoting status. *Id.* at ⁋⁋ 49. 73. The Plan itself states that only persons in the "active membership database" would receive notice of and emailed ballot information for the June 2022 Elder election. Exh. A at 13. Likewise, just as the *Gholson* defendants counted "unauthorized absentee ballots," by Appellee's own admission at the plea in bar hearing, the Board has selected hundreds of new members to add to the voter universe after the disputed 2021 elections, adding still more members just weeks before the June 2022 vote they cite as their very basis to claim mootness. Exh. B.

Appellee's admitted failure to provide notice to purged members utterly vitiates any claim of mootness. Appellee trumpets its alleged margin of over 80 percent for the Elders in the June 2022 election. But without notice to purged members, the outcome of the June 2022 election was neatly predetermined.

Gholson protects members' "right to attend" voting meetings of voluntary associations. But any "right to attend" which Appellee claims was provided to purged members was destroyed by the lack of "reasonable notice," which *Gholson* rightly ties to the "right to attend." From the outset, the right to "advocate one's views" has been thoroughly destroyed by Appellee. Compl.

at ⁋⁋ 47, 76. And the right to "an honest count of the votes" is destroyed by the inclusion of hundreds of new members handpicked by the Board since the disputed 2021 election.

A principal reason for Appellants' request in discovery for the identity of purged members is to allow Appellants themselves to ensure that notice is provided to purged members should the Court order a new election. Allowing Appellee – with its demonstrated track record of voter suppression and ballot stuffing – to maintain exclusive control of the lists of purged members and the process of notification to purged members of Elder elections, only ensures that the basic democratic rights *Gholson* protects will never, and can never, be provided to the members of MBC.

In the absence of discovery into the underlying questions of the number of purged members, notice of the 2022 vote to those purged members, and whether or not the 2022 ballot was actually secret, a live controversy between the parties plainly exists. Granting the plea in bar was manifestly clear error, and it should be overturned by this Court.

CONCLUSION

Appellee had the burden to prove that no live controversy remains between the parties. Appellee failed to produce any evidence supporting its claim, and accordingly failed to meet its burden. This case also falls neatly into both the "voluntary cessation of illegal activity" and "capable of repetition yet evading review" exception to the mootness doctrine. The Court below erred in accepting a multitude of unsupported assertions as fact. And Appellee's failure to provide notice to purged members of the 2022 vote provides the final "nail in the coffin" of its sham claim of mootness.

Accordingly, Appellants respectfully request that this honorable Court overturn the decision of the court below, reverse the dismissal of this cause, remand the matter to the Circuit

Court of Fairfax County for further proceedings in the cause, and grant such other and further relief as this Court may deem appropriate.

Respectfully submitted,

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CERTIFICATION

I, Rick Boyer, counsel for Plaintiffs, hereby certify that on this 19th day of July, 2022, I delivered by electronic mail a true and accurate copy of this Petition for Appeal to the following counsel for Appellee in this matter:

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