IN THE COURT OF APPEALS OF VIRGINIA

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Record No. 1074-22-4

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STEVE GASKINS, et. al,

Appellants

v.

MCLEAN BIBLE CHURCH,

Appellee.

_____

AMENDED REPLY BRIEF OF APPELLANTS

_____

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NATURE OF THE CASE

Appellants appeal an order from the Circuit Court of Fairfax County dismissing as moot their suit for breach of contract. Plaintiffs file in response to the Brief of Appellee ("MBC Br."), filed September 30, 2022.

ARGUMENT

I. Factual Background

Appellee's entire argument of mootness is based on the fact that the three Elders purportedly elected at the July, 2021 meeting resigned, and were purportedly reelected at the June 2022 MBC congregational meeting. According to Appellee, this moots anything that occurred before the 2022 election. Appellee – and the trial court as well – is incorrect.

One reads Appellee's Brief in vain for any mention of the reason MBC's Board of Elders ("the Board") went to such extraordinary lengths to corrupt the results of the 2021 Elder election. As noted on Page 8 of Appellants' Opening Brief ("Gaskins Br."), the Elders left no procedural trick untried in order to avoid the specter of a "congregational veto." Under the MBC constitution, if candidates for Elder fail in two consecutive votes to obtain 75 percent support, the entire Board of Elders must then face a "vote of confidence." *Id*. If the Board cannot achieve 75 percent, the Board is removed, and the congregation can select an entirely new Board. *Id*. Without the congregational veto, "all authority in the church remains in the hands of the Board." *Id*. The prospect of a congregational veto was the ultimate "threat" the Board was determined to evade.

After the Elder candidates failed to gain the required 75 percent at MBC's June 2021 congregational meeting, failure at the rescheduled July meeting would trigger the specter of a "congregational veto." *Id*. at 10.

Accordingly, the Board proceeded to strip MBC members of the right to a secret ballot at the July 2021 Elder election. *Id*. The Board also continued placing into "inactive," nonvoting

status, members in good standing it believed would vote against its chosen candidates. *Id*. at 11. The Board required numerous members to cast unconstitutional "provisional" ballots, for the purpose of giving the Board the ability to throw out "provisional" ballots that might have been cast the "wrong" way. *Id*. Due to the Board's frantic efforts, its chosen candidates achieved 75 percent at the July 2021 meeting, successfully averting the "congregational veto." *Id*. at 12.

Appellants asked the court to order a new election, with procedural protections including a secret ballot, and open to all members arbitrarily placed in "inactive" status.

Appellee filed a flurry of motions, including a motion to dismiss, two demurrers, and a motion for a discovery protective order, consuming from November 2021-May 2022.

Meanwhile Appellee refused to respond to Appellants' August 2021 discovery requests until all demurrers and motions to dismiss were resolved. By the time the Fairfax County Court denied Appellee's final demurrer and granted its motion for protective order, Appellee had scheduled new Elder elections for June 2022, and filed a plea in bar, alleging mootness.

The MBC constitution requires new Elder elections every June. R. 328 (Compl. at p. 6). As litigation continued, the Board continued to alter the voter universe, to ensure that in 2022 there would be no threat of a congregational veto. In December 2021, the Board presented for approval hundreds of new handpicked members. Gaskins Br. at 13. Given that the 2021 election was in dispute, and in an attempt to maintain the status quo, Appellees sought an injunction against election of any new members until the Court could rule on the dispute. However, the Board rammed through the election before a hearing could be scheduled. *Id*. at 14.

Again in May, 2021, the Board presented for approval numerous more handpicked members, just before the June 2022 Elder election. *Id*.

Having thus ensured against any possibility that they might not obtain 75 percent support, the

disputed Elders from the 2021 election "resigned," and stood for reelection with three other candidates selected by the Board, at the June 2022 congregational meeting. *Id*. The Board claimed that persons willing to affirm that "before God [they] still claim to be an active member of the church" could vote, if they had been a member at some point going back to March 2021. *Id* at 15-16.

However, the Board sent notice of the election only to those it deemed part of the "active membership database." *Id*. at 15. Thus, the claimed promise of voting rights to all the members deactivated during the Board's relentless 2021 purge was purely illusory. No evidence was presented at the plea in bar hearing that a single purged member received notice of the 2022 vote.

Finally, the Board effectively amended the MBC constitution, which requires that congregational meetings be at a "time and place" with notice to the congregation, with the requirement of a quorum of "ten percent (10%) of the voting membership..." *Id*. at 17. Instead, in an unprecedented action, the Board switched to a five-day online voting scheme, with no quorum. *Id*. In a surprise to no one, the Board gained over 80 percent support for its candidates at the June 2022 sham vote (MBC Br. at 12), and promptly filed its plea in bar, alleging mootness.

Appellee now spends 62 pages attempting to hoodwink this Court into overlooking the factual dispute in this case – the fact that the June 2021 MBC voter universe denied the Board its 75 percent support, that one more similar loss would have triggered the "congregational veto," and that the Board has taken numerous illegal steps, to ensure that the voter universe entitled to vote in the 2021 Elder election and any subsequent "vote of confidence," has been denied that opportunity.

In effect, Appellee argues, because an illegitimate Board, elected through improper procedures, succeeded in swelling the voter universe with supporters, and delaying court proceedings for a year, this Court is required by the mootness doctrine to ratify the wrongdoing.

II. The Circuit Court improperly dismissed the case where no evidence was presented to support the plea in bar

A. Appellants did not waive their objection

Appellant noted that "even the relief they're saying they gave us … it is conclusory statements by the Church with no evidence to support." R. 910 (42:11-16). In fact, Appellants repeatedly pointed out the lack of evidence to support Appellee's conclusory statements.

> If this was going to be mooted, the Court would have to assume two things: The Court would have to assume this ballot was secret. **There's no evidence of that**. The Court would have to assume that everyone who was a member from March 2020 on down to the present was given an opportunity to vote and had some notice of this meeting. **There's no evidence to that effect**. R. 908 (40:14-22) (emphasis added).

(In fact, Appellee's own exhibit made clear that only members on the "active member database" would receive any notice of the June 2022 vote. Gaskins Br. at 25. Thus, Appellee's exhibit actually supported Appellants' claim of another constitutional violation at the 2022 vote). The objection was preserved, repeatedly.

B. Appellee presented no evidence bearing upon several key facts, without which no determination of mootness could properly be made.

It is uncontested historical fact that the Elders failed to reach the required 75 percent support at the June 2021 Elder election. MBC Br. at 7. Had they failed to do so at the second vote in July 2021, the then-existing membership had the right to exercise the congregational veto. The fact that an entirely different voter universe has held another election a year later, does nothing and can do nothing to restore the rights denied to the July 2021 MBC membership.

Appellee cannot approbate and reprobate. First, Appellee claimed below that it had opened the 2022 election to all members in good standing as of March 2021 (albeit without any notice that there **was** an election), and therefore the case was moot. R. 878-881.

Appellee now argues to this Court that because the contested Elders resigned and were purportedly re-elected in 2022, with an all-new voter universe, this fact alone moots the case. MBC Br. at 24. Appellee then claims the lack of notice to 2021 members of the 2022 election is

"irrelevant," because Appellant's claim regarded the 2021 election, not 2022. MBC Br. at 18. Appellee cannot have it both ways. The fact that a new membership, a year later, does not desire a congregational veto, cannot moot the fact that the 2021 membership was illegally denied its vote.

Thus, because Appellee produced only unsupported conclusory assertions, unsupported by testimony or affidavit at its plea in bar hearing, and failing even to touch on salient contested issues in its plea in bar, the Circuit Court erred in making a finding of mootness.

Still more crucially, even assuming that all the unsupported exhibits presented by Appellee constitute "evidence," all that evidence fails to touch on a central factual question which was never touched on by Appellee at the plea in bar hearing, and on which the court made no factual findings.

Considering as true the allegations in the Complaint that Appellee purged members prior to the 2021 election "by designating them 'inactive' on an arbitrary basis," "expressly to predetermine the outcome of the election" (Compl. at ⁋⁋ 45-46), and assuming as true the allegation in Appellee's plea in bar Exhibit A that only the "active membership database" would receive notification of the 2022 election (R. 513 (Exh. A at 13)), there is a distinct issue of fact in contention. 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 2022 vote, had they received notice of the 2022 election.

Appellee's citation to *Cal. Condo. Ass'n v. Peterson* (869 S.E.2d 893) does not help its case. The Supreme Court held that "[a] plea in bar can raise an affirmative defense targeting solely the allegations of the complaint (assumed arguendo to be true), thus obviating any need for an evidentiary hearing." *Id*. at 896. If this were what Appellee had done, *Cal. Condo Ass'n*. would help its argument. Instead, Appellee presented a plea in bar founded almost entirely not on law, but on facts. "Some plea-in-bar arguments turn heavily on facts, such as pleas asserting that an accord-

and-satisfaction occurred after the filing of a contract claim. Other plea-in-bar arguments turn primarily on law…." *Id*. (internal citation omitted).

Determination of Appellee's plea of mootness requires resort not just to the law, but to the facts. And Appellee's unsupported assertions in the court below cannot establish mootness. Appellee's own pleadings admit MBC did not provide the required notice to members arbitrarily removed from the "active member database." But no information was presented regarding how many members were placed into "inactive" nonvoting status without proof of missing eight consecutive services, thus never receiving notice of the June 2022 vote. Appellee alleges that at the 2022 election, the contested Elder candidates received at least 85 percent of the vote. R. 875 (7:5). The constitution requires at least 75 percent approval to avoid a congregational veto. MBC Br, at 3. Unless the number of members arbitrarily dismissed is less than the number required to bring approval at the 2022 vote down from 85 percent to less than 75 percent, the case cannot be moot.

This matter should be remanded to the Circuit Court for discovery as to these central facts. No determination of mootness can properly be made without them.

C. The term-of-office cases cited by Appellee are distinguishable and inapposite.

Appellee cites *Ficklen v. Danville*, 146 Va. 426 (1926), and *Hamer v. Commonwealth*, 107 Va. 636 (1907), for the proposition that this case is moot because another election has intervened. The cases are inapposite for one simple reason. Neither case cited by Appellee involved the election of officials with the authority to control the process of their own re-election, thus resulting in their re-election. One involved appointed election judges, the other involved a voter bond issue.

The present case is effortlessly distinguishable from *Ficklin* and *Hamer*. Here, the Board, including the Elders purportedly chosen in the disputed 2021 election, had sole authority to recommend candidates for the 2022 Elder election. Between the 2021 and 2022 elections, the

disputed Board assumed sole authority to shrink or expand the voter universe. Further, aside from determining the voter universe, the disputed Board had sole control over the process by which 2022 Elders would be elected. Nothing remotely similar was true of the *Hamer* judges, who were appointed and not elected, or the *Ficklen* bond vote, which was simply called again the following year by the duly-elected city council. Appellants' claim is that because the Board was not legitimately elected in 2021, it was without constitutional authority to call and control the 2022 election – that until 2021's election is validly held, all actions of the purported Board are *ultra vires*.

Were the Court to grant a new election as Appellant asks, and were the Board to fail to obtain a 75 percent majority, and if the congregation selected new leadership via those votes, the 2022 election would simply be a nullity. A 2022 election called and run by a Board invalidly "elected" in 2021, with that Board selecting all candidates, determining all voting procedures, and (again) violating the MBC constitution – this time by failing to give the required notice of the election – is not a superseding event to the 2021 breach of contract. It is a continuing breach.

This case is wholly different from *Hamer* and *Ficklin,* and the cases are inapposite. The constitution is a contract between MBC and all its members,[1] and contractually obligates MBC to give notice of elections to all members. Failure to give notice particularly to members arbitrarily scrubbed from the "active" rolls, specifically because they were deemed by the Elders as likely to support Appellants' position, still constitutes a breach of contract with Appellants.

D. The elections cases cited by Appellee are distinguishable and inapposite.

Appellee cites *Freedom Party v. New York State Bd. of Elections,* 77 F.3d 660, 662-63 (2d Cir. 1996) for the proposition that the occurrence of an election "moots the claims." MBC Br. at

[1] See *Gottlieb v. Economy Stores, Inc.*, 199 Va. 848, 856 (Va. 1958) ("The constitution and by-laws adopted by a voluntary association constitutes a contract between the members, which, if not immoral or contrary to public policy, or the law, will be enforced by the courts").

35. Appellee badly misconstrues *Freedom Party.* The case dealt with two groups fighting over the right to use the name "Freedom Party" on the 1995 election ballot. The case reached the Second Circuit after the election, and was held moot.

However, the court noted that the Supreme Court, in *Storer v. Brown,* expressly stated that "passage of an election does not necessarily render an election-related case moot." *Id*. at 662. In fact, where "[t]he issues properly presented, and their effects …will persist in future elections, and within a time frame too short to allow resolution through litigation," a "controversy is 'capable of repetition, yet evading review,'" *Johnson v. FCC*, 829 F.2d 157, 159 n. 7 (D.C. Cir. 1987) (quoting *Storer v. Brown*, 415 U.S. 724, 737 n.8, 94 S. Ct. 1274, 1282 n.8, 39 L. Ed. 2d 714, 727 n.8 (1974).

Such is the case here. Despite Plaintiff's best efforts, this case has not even reached the discovery stage, let alone any resolution, through some 15 months of litigation and four dispositive motions hearings. The constitutional violations committed by Appellee have not just "effects" that "persist" into future elections, but effects that dispositively **control** future elections.

Appellee's citation to *Brockington v. Rhodes*, 396 U.S. 41 (1969) is likewise unavailing. Appellee misrepresents *Brockington* as holding that election-related relief is always moot after an election. But the *Brockington* plaintiff sought only a writ of mandamus to place his name on the 1968 ballot. He stated no intent to run in the future. Thus, the case did not implicate the "capable of repetition" exception. The Court held that "**in view of the limited nature of the relief sou**ght, we think the case is moot because the congressional election is over." *Id.* at 43. The case is inapposite.

Appellee cites several federal cases where mootness was found, all of which involve only the question of access to the ballot in a given election cycle. Appellee also cites state court cases from Montana and Illinois – and again, completely misconstrues the cases.

In the Illinois case of *Jackson v. Bd. of Election Comm'rs*, 975 N.E.2d 583 (Ill. 2012), the

state court denied the plaintiff's request to place her on the ballot for an election already concluded. Tellingly, however, the court noted that "**if [plaintiff] wanted a new election** outside the normally scheduled April 5 runoffs, **it was incumbent upon her to include such a request in the petition** for leave to appeal**. Because she failed to do so, we deem the issue to be forfeited**." Id. at 591. Accordingly, *Jackson* actually supports Appellants' position, that courts can and do grant requests for new elections when the remedy is appropriate, and mootness does not prevent such a remedy.

Meyer v. Jacobsen, 510 P.3d 52 (Mt. 2022) has a similar teaching, which also aids Appellant and not Appellee. The Montana Supreme Court recited that under the general rule, "[plaintiff's] claims as pled are moot" as "specific to the 2020 election, which concluded nearly two years ago," because "the court is unable due to an intervening event or change in circumstances to grant the relief [the] complaint sought or to restore the parties to their original positions." *Id.* at 57 (internal quotations omitted). But the court granted relief, specifically because the issue was ""capable of repetition, yet could evade review." *Id*. at 57. The plaintiff must first "establish that the duration of the challenged action was too short to be fully litigated prior to its cessation" to be granted the exception. *Id*. Then, "[u]nder the second prong of the exception, [plaintiff] must establish a reasonable expectation that the same complaining party would be subject to the same action in the future." *Id.* at 58. Since ""[c]ourts recognize challenges to election laws as a quintessential category of controversies that are too short-lived to survive the litigation lifespan," (*Id.*) relief was granted.

Again, *Meyer* supports Appellants' position. A yearly election is "too short-lived to survive the litigation lifespan." And the Court is not "unable due to an intervening event or change in circumstances to grant the relief [the] complaint sought or to restore the parties to their original positions." Through the proper channels of discovery that Appellants have been seeking since last August, the Court can determine who the proper member universe consisted of in July of 2021, and

an election limited to that membership universe, with proper notice and secret ballots, can be held.

III. This case falls into the exception for matters "capable of repetition yet evading review."

A. Appellants preserved their objection

This case falls squarely into the "capable of repetition yet evading review" exception.

Appellants did not waive their objection. At the conclusion of the hearing, the Court asked counsel for both parties of their views on the exception, and both responded, so there is no surprise to the court or to Appellee, that Appellants object on this ground. R. 921 (53:4-13).

In reply to the Court's question, counsel for Appellants argued that "certainly it's capable of repetition yet evading review, but I don't think it matters." Counsel went on to add, "it really doesn't matter…. The relief that we've asked for has not been granted…. [A] new election with an entirely different voter universe does not moot the [case]…" R. 923 (55:7-11). Appellants in no sense waived by stating that the matter should not be moot even without reference to the exception.

Appellee notes correctly that the purpose of the requirement for a contemporaneous objection is to prevent unfairness "to opposing counsel, who is expected to respond to it, and to the trial court, which must rule on it." *Washington v. Commonwealth*, 228 Va. 535, 549 n.4 (1984). The objection was raised, in response to specific questioning by the court to both counsel, as to whether the exceptions applied. R. 921 (53:4-13). Appellee is on notice that Appellants raised the objection, though they believed it unnecessary for a determination in their favor. Contrary to Appellee's assertion, Appellants never told the Circuit Court the exception was "irrelevant," only that they believed that the Court need not reach the exception to rule in their favor. At the conclusion of its ruling, the Court stated, "all the good arguments and objections are preserved." R. 927 (59:2-3).

B. Appellee's illegal actions from 2021 were in fact repeated at the 2022 election.

Second, Appellee's illegal actions are not only capable of repetition, but based on

Appellee's own pleadings, some unconstitutional actions **were** repeated at the 2022 election.

The "capable of repetition" exception applies in "exceptional situations involving disputes of abbreviated duration" where the party seeking review "can make a reasonable showing that he will again be subjected to the alleged illegality." *Va. Dep't of State Police v. Elliott*, 48 Va. App. 551, 554 (Va. Ct. App. 2006). This is just such a case.

Appellants have demonstrated not only the likelihood that the Board will again violate the constitutional rights of MBC members when Elder elections are held, but the fact that the Board already did so again at the 2022 election. Appellants have clearly alleged that they and other members entitled to vote are also entitled to "reasonable notice" of election times and dates. Gaskins Br. at 27. See also *Reid v. Gholson*, 229 Va. 179, 189 (Va. 1985):

> "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") (emphases added).

Likewise, the MBC constitution requires the Board to give notice of elections to all members. *Id*. at 17. But Appellee's own plea in bar filings showed that notice was only granted to those in the "active member database," rendering the claimed "right to vote" of members without notice purely illusory. Gaskins Br. at 25. Accordingly, despite Appellee's denials (MBC Br. at 43), Appellants have pleaded a violation of the MBC constitution, both in the 2021 and 2022 elections.

All Appellee showed was that a whole new voter universe in June 2022 made a different decision than the voter universe in June 2021. This in no way helps Appellee's case.

Appellee's argument appears to be twofold – First, that because in all likelihood future Elder elections will feature voter universes different from June 2021, it is too late for this Court to grant relief, and the case is moot. In reality, had a fair election been held in July 2021, with a

similar outcome to the election a month before, the then-member universe would have had a constitutional right to a "vote of confidence" in the Elder Board. Had this occurred, it is entirely possible that an entirely different Elder Board would have presided over the June 2022 vote, and that a partially or entirely different slate of Elders then elected. It is also entirely possible that the members handpicked by the Board in December 2021 and May 2022 would not have been selected, as a different Board would have been presenting candidates for a membership vote.

Unlike Appellee – who first argued that the case was moot because Appellants had been granted most of their desired relief, and now argues that because a new election was held at all, regardless of whether it granted the requested relief, the matter is necessarily moot (R. 881 (13:12-20)) – Appellants need not, approbate and reprobate. They objected in the court below that the "capable of repetition" exception applies, and Appellee's own filings prove that Appellee yet again violated its constitution in the 2022 election by failing to provide notice to members entitled to vote, since Appellee could not prove they missed the required eight consecutive services.

Second, Appellee appears to argue that the "capable of repetition" exception should not apply because a year has gone by without resolution of the case, and that somehow Appellants' failure to prosecute the case waives the objection. The record below destroys Appellee's argument.

Appellants filed their complaint before the July 2021 "re-vote" of the June 2021 election where the Elders failed to achieve 75 percent. They sought injunctive relief against the July vote until the disputed issues could be resolved. R. 892 (24:6-11). The Court was simply unable to schedule a hearing before the vote occurred. *Id.* Again in December, when the Board packed the voter rolls with hundreds of new members, Appellants again sought an injunction, but the Court could not find time on the schedule before the vote. R. 884 (16). Appellee's entire strategy has been to delay and distract, in hopes that the 2022 election would then offer it a claim of mootness.

Accordingly, this case is precisely the sort of case to which the exception applies. Appellee quotes *Va. Dep't of State Police v. Elliott*, 48 Va. App. 551, 554 (Va. Ct. App. 2006) for the proposition that the "capable of repetition" exception "applies only in exceptional situations…" Appellee fails to complete the court's sentence: "involving disputes of abbreviated duration where the party seeking review "can make a reasonable showing that he will again be subjected to the alleged illegality." *Id*. Appellants have made the required showing. Appellee has violated the constitutional rights of its members (including Plaintiffs) in three successive elections, in June/July 2021, and in June 2022. Appellee's argument is apparently that it cannot deny Appellant's rights in the year 2021 again, so this Court loses jurisdiction on mootness grounds.

Appellee also cites to *Va. Mfrs. Ass'n v. Northam*, 74 Va. App. 1 (Va. Ct. App. 2021), as support for its claim that Appellants cannot claim the "capable of repetition" exception, because the *Virginia Manufacturer's Association* Court held that six months was enough time for the Plaintiffs to seek injunctive relief against a gubernatorial executive order. Here, Appellants twice sought injunctive relief, to stop the July 2021 vote until the underlying dispute could be resolved R. 892 (24:6-11), and to stop the expansion of the voter universe by the addition of new members in December 2021. R. 884 (16). On both occasions, the actions against which Appellants sought an injunction were carried out before the Court could schedule a hearing. Appellants twice endeavored to seek injunctive relief, and only when that failed, opted to seek the desired relief at trial. *Va. Mfrs. Ass'n* is no help to Appellee, and Appellants are still entitled to claim the exception.

Appellee claims that Appellants' argument regarding whether members handpicked between the disputed elections should have been allowed to vote, evidence about a "time, place and quorum" for the vote, and evidence about "voting results and who voted" are waived. MBC Br. at 22-23. They are not. Appellants raised in the Court below the issue of handpicked new

members swelling the voter rolls (R. 899 (31:16-22; 32:1-11). They raised the issue of "voting results and who voted." R. 908 (40:7-22). They raised the issue of "time, place and quorum." R. 905 (37:5-8). Appellants stated a basis to claim the "capable of evading review" exception, and were not required to pack the Assignment of Error with every at which they raised objection.

IV. This case falls within the exception for voluntary cessation of illegal conduct.

A. Appellants did not waive their argument

Again, Appellee argues that Appellants have waived this argument, because they contend that Appellee's illegal conduct continues. This is incorrect.

Appellant of course continues to argue, both at the plea in bar hearing and before this Court, that Appellee continues to act in violation of the Constitution. R. 908 (40:7-22). But Appellee is arguing that the case is mooted because illegal conduct has ceased (if it ever occurred). R. 879 (11:7, 19-22; 12:1-22). Appellant argued in the court below that the case was not moot because the illegal conduct had not in fact ceased, but Appellee argued that since Appellants had been given some portion of their requested relief, the matter is mooted.

"[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). Yet Appellee's own filings proved that the Board had failed to give the members the constitutionally required notice of the June 2022 vote. Gaskins Br. at 17. Accordingly, Appellants' repeated objections that illegal conduct had not ceased put Appellee and the Court on notice that Appellants disputed the claim of "voluntary compliance." The objection is preserved.

B. Appellee did claim to have voluntarily ceased its illegal actions, and therefore this case meets the exception to mootness

Appellee argues that the "voluntary cessation" exception folds into the "capable of

repetition" exception, as both "look to the likelihood of a defendant committing the same wrongful conduct in the future." MBC Br. at 49. Then Appellee again attempts to approbate and reprobate, arguing before this Court positions 180 degrees opposite of the positions it took at Circuit Court.

At Circuit Court, Appellee argued, "another reason that this new election moots everything is t**his is also what the Plaintiffs asked for."** R. 879 (11:5-7) (emphasis added). Specifically, Appellee claimed to have hired a "neutral, independent observer" for the 2022 election. R. 880 (12:9-10). Second, Appellee claimed it would "report to the membership, to the Church, to the congregation, the specific tabulations. In other words, who got what, what was the vote. And they did that." R. 880 (12:11-14). Third, Appellee claimed, "[t]hey even permitted those folks who claim to be members…. **And it goes back as far as what the Plaintiffs requested**, Judge. They wanted that to allow all folks who claim to still be members of the Church when the pandemic began, as of 16 March 2020, to vote." R. 881 (13:1-2, 12-16) (emphasis added). Appellee also claimed that the June 2022 vote was by secret ballot. R. 880 (12:3-4). As a result, Appellee claims, the case is mooted. (This although Appellee also admits that Plaintiffs' request for relief limiting any recapitulation of the 2021 election to be limited to those members who were in good standing as of the date of the 2021 election – not the hundreds of members selected after the rigged vote – was never granted). R. 884 (16:3-6).

Finally, Appellee claims the 2022 election "was not spurred by litigation and thus not by a voluntary cessation of conduct." MBC Br. at 50. This is simply spurious. Although an Elder election was scheduled for June per the MBC constitution, Appellee's own proposal for the June 2022 election was titled the "Plan for Lawsuit Resolution." R. 507; R. 878 (10:17-18). There is no suggestion that the three contested Elders purportedly elected in 2021 would ever have "resigned' prior to being purportedly reelected at the 2022 election, other than in an attempt, as Appellee confesses on the same page of its brief, to moot the lawsuit. (See MBC Br. at 50: "The contested

elders' resignation earlier this year was an unequivocal act that nullified the 2021 election").

Moreover, "a voluntary cessation of the . . . practices complained of could make [the] case moot only if it could be said with assurance that there is no reasonable expectation that the wrong will be repeated. Otherwise, the defendant is free to return to his old ways." *SEG Props., L.L.C. v. Northam*, 105 Va. Cir. 216, 218 (Loudoun Cir. 2020) (quoting *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974). The defendant's burden to demonstrate that "there is no reasonable expectation that the wrong will be repeated" is a "heavy one." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). By contrast – as demonstrated in Section II.B, *supra* – some unconstitutional actions already **were** in fact repeated at the 2022 election, including the failure to give reasonable notice, and the illegal decision to defy the constitution's requirement of "time, place and quorum" for a meeting to elect Elders. Appellants have demonstrated a "reasonable expectation" that Appellee's violations of the constitution to ensure their desired result will be repeated – and already were.

CONCLUSION

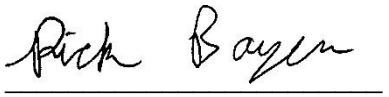
Appellee's failure to provide notice of the 2022 vote to purged members, and the lack of information as to how many members were wrongly purged, renders a decision of mootness entirely improper before discovery. Appellants neither waived nor forfeited their Assignments of Error.

Appellants have both demonstrated that the duration of Appellee's challenged action was too short to be fully litigated prior to its cessation," and established a reasonable expectation that the same complaining party would be subject to the same action in the future. Accordingly, Appellants have met the "capable of repetition" exception. For the same reasons, Appellants have also demonstrated that even Appellee's claimed "cessation of illegal activity" is unavailing because there is in fact a "reasonable expectation that the wrong will be repeated." Thus, Appellants have also met the "voluntary cessation" exception, and this case is not moot.

Accordingly, Appellants respectfully request that this honorable Court reverse the dismissal of this cause, and remand to the Circuit Court of Fairfax County for further proceedings.

Respectfully submitted,

Steve Gaskins, Roland Smith, Mike Manfredi,
Kevin Elwell, Adam Jeantet,
By Counsel



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CERTIFICATION

1. I, Rick Boyer, counsel for Plaintiffs, certify that on the 13th day of October, 2022, pursuant to Rules 5A:1 and 5A:19, an electronic copy of this Reply Brief of Appellants was filed, via VACES, with the Clerk of the Court of Appeals of Virginia. I also delivered by email a copy to the following:

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2. The foregoing Reply Brief of Appellant contains 5617 words and 20 pages, not counting the matter excluded under Rule 5A:22.

_____/s/_____
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