Record No. 04-2002

In the
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WHITE TAIL PARK, et al.,

Plaintiffs-Appellants,

v.

ROBERT B. STROUBE,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

OPENING BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

This case arises out of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. The present appeal is from the district court's Final Order dated August 10, 2004, which disposed of all of the parties' claims. A Notice of Appeal was filed August 13, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in holding the case moot, when the challenged statute was still in effect and continued to affect the plaintiffs.

2. Whether the district court erred in holding that the plaintiffs did not have standing.

3. Whether the district court erred in dismissing the plaintiffs' case rather than allowing an opportunity to amend the complaint.

STATEMENT OF THE CASE

This is a challenge under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution to Virginia Code § 35.1-18, which prohibits defendant Commissioner of Health from licensing any "nudist camp for juveniles." The plaintiffs are the two organizations that run the only such "nudist camp for juveniles" in Virginia, children who wish to attend the camp, and their parents who wish to send them to the camp.

The plaintiffs filed their Complaint along with a Motion for Preliminary Injunction on June 29, 2004. J.A. 6, 13. On July 15, 2004, the district court heard argument on the Motion for Preliminary Injunction, and denied the motion. J.A. 60, 81.

The defendant filed a Motion to Dismiss for Lack of Standing and a Motion to Dismiss Anonymous Plaintiffs on July 12, 2004. J.A., 26, 29. The plaintiffs filed a Motion for Leave to Use Pseudonyms and for Protective Order. A hearing on all of these motions was held on August 10, 2004. J.A. 104. The court ruled from the bench that the case was moot and that the plaintiffs lacked standing. J.A. 114-15. On the same day, the court issued a Final Order granting the defendant's Motion to Dismiss for Lack of Standing, and finding that defendant's Motion to Dismiss Anonymous Plaintiffs and plaintiffs' Motion for Leave to Use Pseudonyms was moot. J.A. 121. The plaintiffs filed a timely notice of appeal on August 13, 2004. J.A. 122.

STATEMENT OF FACTS

The AANR-East Summer Camp

In the summer of 2003, the Association for Nude Recreation-East (AANR-East), opened its week-long nudist summer camp on property owned by the White Tail Park, Inc. near Ivor, Virginia. J.A. 9, 16, 55. The camp is modeled on one that has been operated successfully by the Junior

Florida Association for Nude Recreation (JFANR) since 1992. J.A. 9, 16.

The summer camp consists of two programs that run concurrently: a Youth Camp for 11- to 15-year-olds, and a Leadership Academy for 15- to 18-year-olds. J.A. 9, 16, 55-56. As at other camps, campers participate in swimming, arts and crafts, sports, and campfire sing-alongs. Additionally, campers engage in discussion and instruction in such topics as social nudism, peer pressure, avoiding alcohol and drugs, and the changes in their bodies. The camp seeks to instill respect in oneself and others, and to inculcate the values associated with the social nudist movement. J.A. 9, 16-17, 57-58. Consistent with the social nudist philosophy, all of these recreational and educational activities take place in the nude. J.A. 9, 17. The camp's code of conduct provides that "[n]udity by campers must promote mutual respect, confidence, openness, honesty, trust, and acceptance of differences," and must not be "uncomfortable, humiliating, degrading, or promote ridicule." J.A. 9, 17.

The summer camp takes special care for its campers' safety. All staff at the AANR-East camp are subject to rigorous background checks and must be recommended by a local nudist club and approved by the national AANR office. A security wall surrounds the camp, and two roving patrols are always on duty. J.A. 9, 17, 56-57.

The camp was a great success in the summer of 2003, and plaintiffs AANR-East and White Tail Park planned to continue it in the summer of 2004 and annually thereafter. J.A. 9, 17 55-56. The Virginia General Assembly acted quickly to prevent that. In its 2004 session, the Assembly passed the following revision to Virginia Code § 35.1-18 (italics indicate additions to the text):

> No person shall, own, establish, conduct, maintain, manage, or operate any hotel, restaurant, summer camp, or campground in this Commonwealth unless the hotel, restaurant, summer camp, or campground is licensed as provided in this chapter. The license shall be in the name of the owner or lessee. No license issued hereunder shall be assignable or transferable. *The Board [of Health] shall not issue a license to the owner or lessee of any hotel, summer camp or campground in this Commonwealth that maintains, or conducts as any part of its activities, a nudist camp for juveniles. A "nudist camp for juveniles" is defined to be a hotel, summer camp or campground that is attended by openly nude juveniles whose parent, grandparent, or legal guardian is not also registered for and present with the juvenile at the same camp.*

Plaintiff AANR-East nonetheless applied for a summer camp permit for the summer of 2004. J.A. 32. In so doing, it promised that it would abide by the new law, but expressly reserved their it to hold the camp as planned if allowed to do so by court order. J.A. 33. The Department of Health issued a summer camp permit to AANR-East for the dates July 23 through July 31, 2004. J.A. 34.

AANR-East and White Tail Park (collectively, the "plaintiff organizations"), joined by three families (collectively, the "plaintiff families," the "plaintiff children," or the "plaintiff parents," as appropriate) filed this action and moved for a preliminary injunction,

asking that the law be suspended and the 2004 camp allowed to go forward as planned. J.A. 13. The district court denied the motion on July 15, 2004. J.A. 81.

Given the district court's ruling, AANR-East had two choices: It could hold the camp at White Tail Park, but require the presence of a parent or guardian for the entire week, or it could cancel the program. The plaintiffs had determined that out of thirty-five youths who wished to attend the camp, only eleven could do so if a parent, grandparent, or guardian was required to be present all week. J.A. 55-56. Finding it impossible to create a suitable summer camp environment with so few campers, they cancelled the camp at White Tail Park, and instead hastily arranged to hold a camp out of state. J.A. 110, 118. In light of the forced cancellation of the summer camp, AANR-East surrendered its 2004 summer camp permit and requested the return of its permit fee. J.A. 102.

The Plaintiff Families

The plaintiff families consist of three families that had planned to send their children to the 2004 AANR-East summer camp at White Tail Park.[1] J.A. 10, 19-24. The families are all practicing nudists, and believed that the camp would be a valuable experience for their children.

[1] The plaintiff families sued using pseudonyms, and the defendant has disputed their right to do so. *See* J.A. 29, 91. In light of its dismissal of the case, the district court declined to resolve that dispute. J.A. 121. The question of plaintiffs' anonymity is therefore not before this Court.

The revisions to Virginia Code § 35.1-18 impeded these plans. In two of the families, no parent, grandparent or guardian was available to remain at the summer camp all week. The third sent of plaintiff parents managed to get that week off of work, but would have preferred not to spend the week and the camp.

SUMMARY OF ARGUMENT

As amended, Virginia Code § 35.1-18 prohibits the licensing of any "nudist camp for juveniles," defined as any ". . . summer camp or campground that is attended by openly nude juveniles whose parent, grandparent, or legal guardian is not also registered for and present with the juvenile at the same camp." In other words, Virginia Code § 35.1-18 prohibits – and was intended to prohibit – precisely the kind of summer camp that the plaintiff organizations opened in 2003 and planned to continue in future summers. The district court nonetheless found that plaintiffs' challenge to the statute was moot because the plaintiff organizations were unable to hold the summer camp in 2004. The district court further held that the plaintiff organizations (which wish to operate the type of summer camp the statute prohibits) and the plaintiff families (who wish to send their children to the type of summer camp the statute prohibits) lack standing to challenge the statute. The district court was incorrect.

This case is not moot. The plaintiff organizations were not able to hold their summer camp in 2004 because

Virginia Code § 35.1-18 prohibits "nudist camp[s] for juveniles" and because the district court denied the plaintiffs request for a preliminary injunction to allow the camp to go forward. The plaintiff organizations still hope and intend to have the camp in the summer of 2005 and in subsequent summers. The Virginia statute still prevents them from doing so. A continuing case or controversy therefore still exists.

The plaintiffs have standing to challenge Virginia Code § 35.1-18 because they each have suffered, and continue to suffer, a concrete and particularized injury as a result of the law. The plaintiff organizations are injured because they are unable to operate their "nudist camp for juveniles" and thereby disseminate information and values to nudist youth. Even if the plaintiff organizations somehow managed to continue operating the camp in compliance with the statute by requiring the presence of a parent, grandparent or guardian for each child, the plaintiffs would be injured because the number of children in attendance would necessarily be reduced.

The plaintiff families are injured because they are unable to send their children to the AANR-East summer camp at White Tail Park, since the camp is prohibited by § 35.1-18. If the camp did reopen, but required the presence of a parent, grandparent or guardian, it would be difficult for the plaintiff families to send their children to the camp

under those circumstances, and some of the plaintiff children might not be able to attend at all.

Finally, even if the plaintiffs' Complaint did not contain adequate allegations to establish their standing, the district court should not have dismissed the complaint, but should have afforded the plaintiffs an opportunity to amend the complaint.

ARGUMENT

I. STANDARD OF REVIEW

The district court dismissed the present case for mootness and lack of standing, both elements of the "case or controversy" requirement of Article III. "The district court's dismissal of a complaint for lack of subject matter jurisdiction is reviewed *de novo*." *Jordahl v. Democratic Party of Virginia*, 122 F.3d 192, 197 (4th Cir. 1997) (citing *Tillman v. Resolution Trust Corp.*, 37 F.3d 1032, 1034 (4th Cir.1994)). *Accord Marshall v. Meadows*, 105 F.3d 904, 905-906 (4th Cir. 1997) (dismissal for lack of standing is reviewed *de novo*); *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 950 n.14 (4th Cir.1992) (dismissal for lack of justiciable question reviewed *de novo*). Moreover, "[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

II. THE CASE IS NOT MOOT.

The district court's ruling that the case is moot is utterly without basis. A case is moot only if "(1) it can be said with assurance that that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Furthermore, "[t]he heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 189 (2000). The Commonwealth cannot meet this formidable burden.

Before Virginia Code § 35.1-18 was revised to prohibit "nudist camps for juveniles," White Tail Park and AANR-East had planned to make their summer camp an annual event. It is still their hope and intent to do so if the law is eventually overturned. Thus, the plaintiff organizations will continue to be injured by the law for as long as it is in existence. The plaintiff families will likewise be prevented from sending their children to the camp for as long as the statute is in existence. Far from being completely and irrevocably eradicated," the effects of the challenged statute will continue every summer that the statute is in force.

Indeed, the continuing harm in this case is far more definite than in other cases that this Court and the Supreme

Court have held *not* to be moot. For example, in *City of Erie v. Paps A.M.*, 529 U.S. 277 (2000), the plaintiff, a corporation that ran a nude dancing establishment called Kandyland, challenged the city's anti-nudity ordinance. By the time the case reached the Supreme Court, the corporation no longer owned Kandyland or any other nude dancing establishment. 529 U.S. at 287. Moreover, the corporation's owner stated in an affidavit that he no longer "ha[d] any intention to own or operate a nude dancing establishment in the future." *Id.* at 289 (Scalia, J., dissenting). Nonetheless, the case was not moot because "Pap's is still incorporated under Pennsylvania law, and it *could* again decide to operate a nude dancing establishment in Erie." *Id.* at 287 (emphasis added).

Similarly, in *Rowley v. McMillan*, 502 F.2d 1326 (4th Cir. 1974), the plaintiffs sued Secret Service officers who had excluded them from a "Billy Graham Day" celebration at which the President spoke. The district court issued an injunction prohibiting the Secret Service from discriminatorily excluding plaintiffs from future presidential events. 502 F.2d at 1330. On appeal, the defendants argued that the case was moot because "Billy Graham Day was a unique, nonrecurring occasion, not to be repeated in the foreseeable future." *Id.* at 1334. This Court rejected that argument, explaining:

> While we do not suppose that Charlotte, North Carolina, will again arrange public events to honor Dr. Graham in the near future, there is nothing in the record to suggest that the President of the United States is

> planning to cease making personal appearances before general public audiences, that the federal defendants will fail to perform their statutory duty of protecting him on such occasions, or that the plaintiffs or others similarly situated will not seek admission to future general public meetings for the purpose of exercising rights protected by the first amendment.

Id.

In this case, the plaintiff organizations have stated a clear intention to continue holding summer camps every year if they are allowed to do so. If a case or controversy existed in *Erie* because the plaintiff might at some time in the future open a nude dancing club, and in *Rowley* because the plaintiffs might at some indefinite point attend a hypothetical presidential appearance, then surely it exists here.

The Commonwealth and the district court made much of the fact that AANR-East surrendered its 2004 summer camp license. But that license was only in effect from July 23 through July 31, 2004 – the dates for which the plaintiff organizations had planned their 2004 summer camp. J.A. 34. Thus, it had no bearing on plaintiffs' intent to hold the summer camp in the future. AANR-East must apply for additional licenses for future summers. In fact, at the time of the summary judgment hearing, AANR-East had already applied for a summer camp permit for 2005.[2] J.A. 117.

III. THE PLAINTIFFS HAVE STANDING.

The three elements of standing are: (1) an injury in fact that is concrete and particularized, and actual or

[2] The permit was subsequently granted.

imminent (2) an injury fairly traceable to the challenged conduct and (3) redressability of the injury by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). All of the plaintiffs are able to meet this standard, and the district court's ruling to the contrary is erroneous.

A. The Organizational Plaintiffs Have Standing.

White Tail Park and AANR-East have suffered and continue to suffer concrete and particularized injuries due to Virginia Code §35.1-18. Because the statute does not allow the organizational plaintiffs to operate a "nudist camp for juveniles" unless a parent, grandparent or guardian of each child is present for the entire duration of the camp, only eleven out of an expected thirty-four children would have been able to come to the camp in 2004. The low number of potential campers made it impossible to provide the summer camp experience that the organizational plaintiffs envisioned. As a result the camp was cancelled.[3] There is no reason to believe that the situation will change in future years. Under the current law, there will always be a substantial number of children who will not be able to

[3] The fact that the plaintiffs managed to put together a summer camp at the last minute in another state does not negate the injury of being unable to have the camp in Virginia. If a state law prohibited demonstrators from assembling to protest a war, the protesters would not be deprived of standing simply because they could go protest the war in a different state. The plaintiffs are entitled to exercise their constitutional rights in every state.

come to camp, and very likely it will continue to be impracticable to have the camp under those circumstances.

This situation injures the plaintiff organizations in several ways. First, they are harmed financially because they cannot collect the fees for the camp. J.A. 55. More importantly, they are harmed because they cannot particular values related to social nudism in a structured camp environment that has been successful in other states for years. "The summer camp's activities are designed to be an experience that instills character-building traits in youths that have grown up in nudist family environments." J.A. 57. The camp seeks to

> educate nudist youth and inculcate them with the values and traditions that are unique to the culture and history of the nearly century old American social nudist movement. These educational experiences, by necessity, require a social nudist environment in order to impart the values and traditions of family social nudism, while simultaneously providing a traditional summer camp experience.

Id. The plaintiffs are injured because they have been prevented from imparting these values within the structure of a "traditional summer camp experience."[4]

Furthermore, even if Virginia Code §35.1-18 did not require them to cancel the camp altogether, the plaintiff organizations would still be injured by the diminished

[4] "That [the plaintiff organizations] remain free to employ other means to disseminate their ideas does not take their speech through [a structured summer camp program] outside the bounds of First Amendment protection. . . . The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant* 486 U.S. 414, 424 (1988).

number of campers who would be able to attend. Again, this would cause a reduction in the plaintiffs' revenue. Additionally, it would diminish the plaintiffs' ability to disseminate their message. A limitation on the size of a speaker's audience constitutes a substantial First Amendment harm. *See, e.g., Meyer v. Grant*, 486 U.S. 414, 422-423 (1988) (Prohibition on payment of petition circulators restricts political speech because it "limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach.")

Finally, the district court was wrong when it stated that "if the [plaintiff families] do not have standing, neither does White Tail Park or AANR-East because their 'organizational standing' derives from that of the [plaintiff families]." J.A. 114. Because the organizational plaintiffs have *themselves* suffered injuries because of Virginia Code § 35.1-18, they have standing in their own right, without reference to the injuries suffered by their members.[5] "[A]n association may have standing to sue in federal court either based on an injury to the organization in its own right ***or*** as the representative of its members who have been harmed." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149,

[5] Even if the plaintiff association's standing did depend on that of the plaintiff families, however, the requirement would be met because the family plaintiffs have individual standing, as shown in the next section.

155 (4th Cir. 2000). *See also Warth v. Seldin*, 422 U.S. 490, 511 (1975) ("There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy.") The organizational plaintiffs seek redress for their own injuries.

Having demonstrated that they have suffered and will continue to suffer significant injury because of Virginia Code § 35.1-18, the plaintiff organizations easily meet the remaining two requirements for standing, causation and redressability. The plaintiffs' injuries to their ability to transmit information and values of social nudism is caused directly by Virginia Code § 35.1-18. But for the statute, they would have been able to have their summer camp in Virginia in 2004 with about thirty-five campers. Their injuries would be fully redressed by a court order enjoining the enforcement of the statute.

B. The Plaintiff Families Have Standing.

The plaintiff families are likewise injured by Virginia Code § 35.1-18. The plaintiff children wish to attend the summer camp at White Tail Park, at which they expect to have fun and spend time with their friends. The plaintiff parents wish to send their children to the summer camp, both to have fun and to absorb the values and information that are taught there. These plans will be frustrated if the organizational plaintiffs are unable to operate the summer

camp. If the summer camp goes forward, but requires the attendance of a parent, grandparent or guardian, some of the children will be unable to attend. Others may be able to attend, but at great inconvenience to their parents, and at the cost of the "traditional summer camp experience" that the camp seeks to provide. These are concrete and particularized injuries sufficient to confer standing on the plaintiff families.

The district court decided that the Virginia statute "merely imposes a minimal restriction" upon the plaintiff parents' ability to send their children to the AANR-East summer camp. J.A. 115. This conclusion ignores the fact that in 2004 the statute made it utterly impracticable for AANR-East to hold the camp in Virginia, and that the same will likely be true in the future. Even if the camp were operational, many families – including two of the plaintiff families – would be unable to send their children if a parent, grandparent, or guardian were required to spend the week at camp. At the preliminary injunction hearing, the district court opined that "[p]eople who love their children or grandchildren will make the modest adjustment necessary to their schedules so that their children or grandchild can have this unique camp experience." J.A. 76. But is simply a fact of life that many if not most parents do not have the flexibility in their work schedules to take a week off whenever they wish. And not all children have four

grandparents who are alive, in good health, and able to spend a week at camp.

Moreover, even if it were true the Virginia statute imposed only a minor inconvenience on parents who wished to send their children to the summer camp, such an inconvenience it is *still* sufficient to confer standing. The injury in fact requirement "is one of kind and not of degree." *Friends of the Earth v. Gaston Copper*, 204 F.3d at 156. "The claimed injury need not be great or substantial; an identifiable trifle, if actual and genuine, gives rise to standing." *Id.* (quoting *Conservation Council of North Carolina v. Costanzo,* 505 F.2d 498, 501 (4th Cir.1974)). Virginia Code § 35.1-18 places "actual and genuine" obstacles to plaintiff families' ability to send their children to summer camp, the plaintiff families therefore have standing it.

Like the plaintiff organizations, the plaintiff families have no difficulty meeting the final two standing elements. Their inability to send their children to the camp of their choice is caused by Virginia Code § 35.1-18. An injunction prohibiting the enforcement of the statute would fully resolve the problem.

IV. THE DISTRICT COURT ERRED IN DISMISSING THE CASE RATHER THAN AFFORDING PLAINTIFFS AN OPPORTUNITY TO AMEND THE COMPLAINT.

In the court below, the plaintiffs requested that, if the court found the complaint deficient as to standing, it allow plaintiffs to amend the complaint to describe their

injuries more fully. J.A. 111. The district court's failure even to consider that request was out of step with Supreme Court precedent.

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), two individuals alleged that the defendant's practice of racial steering in Richmond had deprived them of the "benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices." 455 U.S. at 376. The complaint, however, only alleged that the individuals were residents of the Richmond area, without stating whether they were residents of the neighborhoods affected by the discrimination. The Court found that "the extreme generality of the complaint [made] it impossible to say that respondents have made factual averments sufficient if true to demonstrate injury in fact." *Id.* at 378. But the Court did not order that the case be dismissed. Instead, it instructed the district court to "afford the plaintiffs an opportunity to make more definite the allegations of the complaint." *Id.* at 378. *See also Freeman v. First Union Nat.*, 329 F.3d 1231, 1235 (11th Cir. 2003) (plaintiffs should be given opportunity to amend complaint to remedy standing defects); *Cook v. Reno*, 74 F.3d 97 (5th Cir. 1996) (same).

As explained in Part III, *supra*, the plaintiffs believe that their complaint adequately demonstrates their standing. If this Court finds otherwise, however, it should direct the

district court to allow plaintiffs an opportunity to amend the complaint.

CONCLUSION

For the foregoing reasons, the appellants respectfully request that the district court decision be reversed, and that the case be remanded for further proceedings.

REQUEST FOR ORAL ARGUMENT

Plaintiffs request oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2004, I served two copies of the foregoing brief by U.S. Mail, postage prepaid, addressed as follows:

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