UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

No. 1:22-CV-568

JULIETTE GRIMMETT, RALSTON LAPP GUINN MEDIA GROUP, the JOSH STEIN FOR ATTORNEY GENERAL CAMPAIGN, JOSH STEIN, SETH DEARMIN, and ERIC STERN,

Plaintiffs,

v.

N. LORRIN FREEMAN, in her official capacity as District Attorney for the 10th Prosecutorial District of the State of North Carolina,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION (RULE 12(b)(1) and 12(h))

NOW COMES Defendant N. LORRIN FREEMAN, in her official capacity as District Attorney for the 10th Prosecutorial District of the State of North Carolina, and respectfully submits this Memorandum of Law in support of her Motion to Dismiss for Lack of Subject Matter Jurisdiction.

INTRODUCTION

As stated by Plaintiffs: "This is a case about whether nine words in a political advertisement … can be criminally prosecuted as 'false' under N.C. Gen. Stat. §163-274(a)(9) without running afoul of the First Amendment's prohibition on abridgment of free speech." (DE-20 at 1). But no Plaintiff can now be "criminally prosecuted"

based on the "political advertisement" referenced in Plaintiffs' amended complaint -- the statute of limitations for any such prosecution has expired. Accordingly, this case is moot -- meaning this Court lacks subject matter jurisdiction. The case should be dismissed with prejudice under Rule 12.

FACTS

The original three plaintiffs in this case filed this action on 21 July 2022, bringing claims for "declaratory judgment" and "First Amendment & 42 U.S.C. §1983", alleging that they were being threatened with prosecution by Defendant under N.C.G.S. §163-274(a)(9) (hereinafter "the Statute") as a result of their involvement with a political ad for the Josh Stein campaign for Attorney General in 2020 referred to in the complaint as "Survivor" (hereinafter "the Stein Political Ad"). (DE-1).

Specifically, the original plaintiffs alleged (1) that the "underlying dispute in this action concerns the handling of a backlog of untested rape kits in North Carolina" (DE-1, ¶19); (2) that the original plaintiffs were involved in creation and running of the Stein Political Ad, which plaintiffs contend was a response to a political ad run by Stein's opponent (DE-1, ¶22-25); (3) the Stein Political Ad was broadcast to the public in September and October 2020 (DE-1, ¶26); (4) a criminal investigation was conducted as to whether the Stein Political Ad violated the Statute (DE-1, ¶37-42); and (5) the original plaintiffs "believe that enforcement action under the Statute is forthcoming." (DE-1, ¶43). Based on these facts, the original plaintiffs sought (a) a declaration that the Statute is unconstitutional; and (b) "temporary and/or

preliminary injunctive relief as well as a permanent injunction" barring enforcement of the Statute against them. (DE-1 at 22).

Plaintiffs also filed a motion for temporary restraining order, seeking a TRO barring Defendant "from taking any enforcement action with respect to the Statute." (DE-5 at 3). After hearing, on 25 July 2022 this Court entered a TRO, barring Defendant from enforcing the Statute against Plaintiffs. (DE-16).

After full briefing on the preliminary injunction issue, this Court held a hearing on the original plaintiffs' motion for preliminary injunction on 4 August 2022, and on 9 August 2022 entered an order denying the motion for preliminary injunction. (DE-23).

The original plaintiffs immediately filed an appeal (DE-24), and then sought an injunction pending appeal from this Court pending appeal. On 15 August 2022, this Court denied the motion for injunction pending appeal. (DE-35).

The original plaintiffs then sought an injunction pending appeal in the Fourth Circuit. In their motion papers, the plaintiffs specifically agreed to enter a tolling agreement as to the statute of limitations for any prosecution under the Statute of any plaintiff relating to the Stein Political Ad. (4th Cir. No. 22-1844, Doc. 9-1 at 23). The Fourth Circuit granted the original plaintiffs' motion for injunction pending appeal on 23 August 2022, specifically noting that it was doing so subject to the plaintiffs' representation as to a tolling agreement. (4th Cir. No. 22-1844, Doc. 14 at 4 n.2).

Plaintiffs then filed an Amended Complaint in this Court, adding Stein, Dearmin, and Stern as plaintiffs, but leaving the essential factual allegations and the claims unchanged. (DE-39). The relief sought by Plaintiffs remained identical to the original complaint, (DE-39 at 23), as did the Plaintiffs' focus on the threat of potential prosecution under the Statute arising from the Stein Political Ad. (DE-39, ¶17-24; 35-42).

Plaintiffs also then agreed to the tolling agreement promised to the Fourth Circuit. On 21 September 2022, all parties executed a tolling agreement that tolled the running of the two-year statute of limitations under N.C.G.S. §15-1 applicable to any violation of the Statute by Plaintiffs until twenty-one (21) days after issuance of the mandate by the Fourth Circuit on Plaintiffs' appeal of the denial of their motion for preliminary injunction. *See* Exhibit A (declaration with copy of tolling agreement).

On 8 February 2023, the Fourth Circuit issued an opinion vacating the district court's order denying the motion for preliminary injunction, determining that Plaintiffs were likely to succeed on the merits of their claims, and remanding the case to the district court for further proceedings. On 2 March 2023, the Fourth Circuit issued its mandate.

Accordingly, the two year statute of limitations applicable to any violation of the Statute arising from the Stein Political Ad has now expired. Plaintiffs allege in their Amended Complaint that the ad ran in September and October 2020 (DE-39, ¶24), and Defendant concedes that the ad last ran in early October 2020 (DE-18 at

21; DE-18-1, ¶5). The two year limitations period therefore would have expired in October 2022, absent operation of the tolling agreement. With operation of the tolling agreement, the limitations period did expire on 23 March 2023, twenty-one days after issuance of the Fourth Circuit's mandate on 2 March 2023.

The expiration of any threat of prosecution to Plaintiffs has been confirmed by Defendant. Shortly after the Fourth Circuit's ruling in February 2023, Defendant issued a press release confirming that no prosecution of Plaintiffs will take place for their involvement with the Stein Political Ad and that the criminal investigation has been closed. *See* Exhibit A (declaration with copy of press release).

ARGUMENT

A motion to dismiss raising a lack of subject matter jurisdiction "may be brought at any time -- even on appeal -- regardless of whether a litigant raised the issue in an initial pleading." *Sucampo Pharmaceuticals, Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 548 (4th Cir. 2006); *see also* Fed. R. Civ. P. 12(h) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action"); *Brickwood Contractors, Inc. v. Datanet Engineering, Inc.*, 369 F.3d 385, 390 (4th Cir. 2004) ("questions of subject matter jurisdiction may be raised at any point during the proceedings").

"Mootness is a jurisdictional question." *Chapin Furniture Outlet Inc. v. Town of Chapin*, 252 Fed. Appx. 566, 570 (4th Cir. 2007). A motion to dismiss pursuant to Rule 12(b)(1) is a proper vehicle to achieve dismissal of a case where the action becomes moot while pending. *See, e.g. Vote No on Amendment One, Inc. v. Warner*,

400 F.Supp.3d 504, 508-11 (S.D.W.Va. 2019) (granting Rule 12(b)(1) motion to dismiss where First Amendment challenge to state statute became moot). And in determining a subject matter jurisdiction challenge based on mootness under Rule 12(b)(1), this Court may consider facts submitted by affidavit or exhibit in addition to the pleadings. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999); *Allen, Allen, Allen & Allen v. Williams*, 254 F.Supp.2d 614, 623 (E.D. Va. 2003); *Vote No on Amendment One*, 400 F.Supp.3d at 508-09.

I. When A Case Becomes Moot During the Litigation, the Court is Deprived of Subject Matter Jurisdiction.

This Court's subject matter jurisdiction "extends only to actual cases or controversies." *Porter v. Clarke*, 852 F.3d 358, 363 (4th Cir. 2017) (*citing* U.S. Const., art. III, §2). "When a case or controversy ceases to exist -- either due to a change in the facts or the law -- the litigation is moot, and the court's subject matter jurisdiction ceases to exist also." *Id.* "A case becomes moot … when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Catawba Riverkeeper Foundation v. N.C. Dept. of Transportation*, 843 F.3d 583, 588 (4th Cir. 2016). The actual controversy must exist at all stages of the litigation -- "[e]ven if a justiciable controversy exists when litigation begins, Article III requires a federal court to depart the field if the controversy later abates, that is, if ongoing events have wiped the slate clean." *Rhode Island Association of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 34 (1st Cir. 1999).

As stated by the United States Supreme Court:

> This case or controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate … The parties must continue to have a personal stake in the outcome of the lawsuit … This means that, throughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.

Spencer v. Kemna, 523 U.S. 1, 7 (1998) (citations and quotations omitted).

Here, as explained below, Plaintiffs no longer have a "personal stake in the outcome" or are "threatened with, an actual injury traceable to the defendant." *Spencer*, 523 U.S. at 7.

II. This Case is Now Moot.

The factual basis of Plaintiffs' amended complaint seeking injunctive relief is the threat of imminent prosecution by Defendant, under the Statute, for their involvement in the Stein Political Ad.[1] (DE-39, ¶2-3, 20-24, 35-41). The Statute is a misdemeanor under North Carolina law. Under North Carolina law there is a two-year statute of limitations on the prosecution of misdemeanor offenses. *See* N.C.G.S. §15-1.

The Stein Political Ad last ran in October 2020. (DE-18 at 21; DE-18-1, ¶5; DE-39, ¶24). The statute of limitations period on any violation created by the Stein Political Ad therefore expired in October 2022, absent operation of the tolling

[1] Without this threat of imminent prosecution, Plaintiffs would not have standing to challenge the constitutionality of the Statute. A plaintiff seeking to challenge a statute or regulation as violative of the First Amendment must show "a specific present objective harm or a threat of a specific future harm" to have standing. *Laird v. Tatum*, 408 U.S. 1, 14 (1972). In the First Amendment context, a plaintiff has standing to bring a pre-enforcement lawsuit like this one only where he or she can allege "an actual and well-founded fear that the law will be enforced against them." *Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383, 393 (1988).

agreement. Any extension provided by the tolling agreement has now also expired. Therefore, as a matter of law, no Plaintiff can be prosecuted for any violation of the Statute arising from the Stein Political Ad. Defendant has confirmed this fact, issuing a press release stating that the criminal investigation of Plaintiffs is "closed." *See* Exhibit A (declaration with press release attached).

Given these facts, this lawsuit is now moot. As a matter of law, no Plaintiff (or anyone else for that matter) can be prosecuted for violation of the Statute based on the Stein Political Ad, due to the expiration of the statute of limitations. The specific injunctive relief sought by Plaintiffs in the Amended Complaint -- protection from prosecution under the Statute for their involvement with the Stein Political Ad -- is therefore no longer needed. Under those circumstances, Plaintiffs are not "threatened with, an actual injury traceable to the defendant," *Spencer*, 523 U.S. at 7, and the case is moot. *United States v. Scantlebury*, 921 F.3d 241, 249 (D.C. Cir. 2019) (where "there is no possibility that Appellants will be indicted for the same alleged offenses that give rise to this case" due to expiration of statute of limitations, the case is moot).[2]

The fact that this case involves a facial constitutional challenge to the Statute does not alter this result. "The Supreme Court has made it abundantly clear that one

[2] The Fourth Circuit and numerous other courts have found cases to become moot during the pendency of litigation under similar circumstances. *See, e.g. Lighthouse Fellowship Church v. Northam*, 20 F.4th 157, 161-63 (4th Cir. 2021) (challenged regulation expired and no longer applied to plaintiff); *Chapin*, 252 Fed. Appx. At 569-72 (challenged regulation amended and no long applied to plaintiff); *Vote No on Amendment One*, 400 F.Supp.3d at 510-11 (plaintiffs no longer engaged in activities covered by challenged statutes).

challenging the validity of a criminal statute must show a threat of prosecution under the statute to present a case or controversy." *Doe v. Duling*, 782 F.2d 1202, 1206-07 (4th Cir. 1986). This threat must be both "real and immediate." *Id.*

In *Doe*, the Fourth Circuit denied standing to unmarried adults who sued to challenge the constitutionality of Virginia's criminal fornication statutes, on the grounds that the plaintiffs faced "only the most theoretical threat of prosecution." *Id.* While *Doe* was a standing case, both standing and mootness are based on the Article III "case or controversy" requirement. And "[e]ven in the area of First Amendment disputes, the Supreme Court has generally required a credible threat of prosecution before a federal court may review a state statute." *Doe*, 782 F.2d at 1206.

Federal courts "may only decide cases that matter in the real world at the time that we decide them." *Eden, LLC v. Justice*, 36 F.4th 166, 170 (4th Cir. 2022). In this case, the expiration of the statute of limitations bars any potential prosecution of Plaintiffs or anyone else under the Statute for violations arising from the Stein Political Ad. This threat of prosecution for involvement with the Stein Political Ad is the entire basis for the injunctive relief sought in Plaintiffs' lawsuit. The case is therefore moot, and should be dismissed with prejudice.

III. The "Capable of Repetition Yet Evading Review" Exception Does Not Apply.

Plaintiffs may attempt to argue that the "capable of repetition yet evading review" exception to the mootness doctrine somehow applies here. This exception applies only if "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the

same complaining party will be subject to the same action again." *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (*citing Spencer*, 523 U.S. at 17). This exception is "a narrow one, reserved for exceptional circumstances." *Int'l Board of Teamsters, Local No. 639 v. Airgas, Inc.*, 885 F.3d 230, 237 (4th Cir. 2018) (citations and quotations omitted). The "party seeking to invoke this exception to the mootness doctrine bears the burden of showing its application." *Williams v. Ozmint*, 716 F.3d 801, 810 (4th Cir. 2013).

Neither of the prongs of this narrow exception can be met here. First, any constitutional challenge to the Statute is most likely to take place in the context of a prosecution -- it is a criminal statute. Any constitutional challenge would be fully litigated before a final judgment of conviction could be entered for any prosecution under the Statute. Therefore, in the context of the most likely circumstance of a challenge to the Statute, this "duration" issue would have no application, as the constitutional challenge would be made and fully resolved within the prosecution itself.

The second inquiry likewise cannot be met. The second prong requires a "reasonable expectation" or "demonstrated probability" that "the same controversy will recur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (emphasis added). A "mere physical or theoretical possibility" of the same complaining party being subjected to the same action again is insufficient to satisfy this inquiry. *Id.* The Fourth Circuit has similarly stated that "conjecture as to the likelihood of repetition has no place in the application of this exceptional and narrow

grant of judicial power to hear cases for which there is *in fact* a *reasonable* expectation of repetition." *Incumaa v. Ozmint*, 507 F.3d 281, 289 (4th Cir. 2007) (emphasis added).

The Stein Political Ad is in the past, and as a matter of law cannot be the subject of prosecution under the Statute because of the expiration of the statute of limitations. Plaintiffs' entire complaint arises out of the Stein Political Ad. For that reason alone, repetition is not possible, and the exception cannot apply. And it is mere "conjecture," *Incumaa*, 507 F.3d at 289, for Plaintiffs to assert that some other unknown and yet uncreated political advertisement they may become associated with in the future could result in the prosecution under the Statute.[3]

Likewise, given the ruling of the Fourth Circuit in this case on the preliminary injunction issue, the likelihood of *any* prosecution under the Statute in the future, for *any* political ad, is not just unlikely, but virtually impossible. There is no "demonstrated probability" that the Statute will be applied to Plaintiffs in any way, in any form, in the future, and therefore the exception cannot apply. *Lighthouse*, 20 F.4th at 165-66; *Vote No on Amendment One*, 400 F.Supp.3d at 511 (rejecting application of capable of repetition yet evading review exception where "there is no 'reasonable expectation' that the facts alleged in the complaint will occur once more during the next election"). No exception to the mootness doctrine applies to Plaintiffs' lawsuit.

[3] Plaintiffs may not attempt to assert their constitutional claims on behalf of other, yet unknown, future potential criminal defendants either. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another").

CONCLUSION

For the reasons set out herein, Defendant N. Lorrin Freeman respectfully requests that her Motion to Dismiss be granted, and this case be dismissed with prejudice.

This the 26th day of March, 2023.

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