UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

February 11, 2020

No. 19-2382
(3:18-cv-00428-HEH)

FALLS CHURCH MEDICAL CENTER, LLC *et al.*,

Plaintiffs-Appellants,

v.

M. NORMAN OLIVER, *et al.*,

Defendants-Appellees.

JOINT MOTION TO VACATE BRIEFING SCHEDULE AND PLACE CASE IN ABEYANCE PENDING LEGISLATIVE PROCESS

Pursuant to Rule 27 of Federal Rules of Appellate Procedure and Fourth Circuit Rules 27(a) and 12(d), the Parties jointly move to vacate the current briefing schedule in this case and to place the case in abeyance pending an ongoing legislative process that may moot some, if not all, of the issues in this appeal. Counsel for all Parties are informed of the intended filing of the motion and no Party intends to file any response.

Plaintiffs-Appellants challenged the constitutionality of certain components of the Commonwealth of Virginia's statutory and regulatory scheme applicable to

abortion providers: (1) the "Physician-Only Law," 12 Va. Code Ann. §§ 18.2-71, -72; (2) the "Hospital Requirement," 12 Va. Code Ann. § 18.2-73; (3) the "Two-Trip Mandatory Delay Law," 12 Va. Code Ann. § 18.2-76; and (4) the "Licensing Scheme," composed of the "Licensing Statute," 12 Va. Code Ann. § 32.1-127(B)(1) and its implementing "Licensing Regulations," 12 Va. Admin. Code § 5-412 *et seq*.

On September 30, 2019, after a two-week trial on the merits, the District Court entered a final Opinion and Order in this case. *See* No. 3:18-cv-00428-HEH, ECF Nos. 195, 196. The District Court invalidated and enjoined certain of the challenged laws, while upholding others. *Id*. In so doing, the District Court repeatedly noted that it could not conclude that such laws were sound public policy, deferring to the Virginia General Assembly to evaluate the merit of the laws. *See id.* at 38 ("Whether [the Physician-Only Law] is wise public policy is an issue for the Virginia General Assembly to address."); *id.* at 55-56 ("The Court underscores that its analysis does not turn simply on the merits of [the Two Trip Mandatory Delay Law]. That determination is within the purview of the General Assembly."); *id.* at 26 ("This public policy issue, [the Licensing Scheme], is best left to the legislative branch of government.").

Plaintiffs-Appellants filed a Notice of Appeal with the District Court on November 29, 2019. No. 3:18-cv-00428-HEH, ECF No. 201. On December 17, 2019, Plaintiffs-Appellants filed a docketing statement with this Court. ECF No. 7.

Counsel for Defendant-Appellees made their appearances on January 10, 2020. ECF Nos. 14, 15. The Court entered a briefing schedule in this appeal on January 29, 2020. ECF No. 17. Plaintiffs-Appellants' opening brief is currently due March 9, 2020, and Defendants-Appellees' response brief is due April 8, 2020. *Id.*

In the interim, the Virginia General Assembly's 2020 legislative session began on January 8, 2020. Two bills, HB 980 (in the House of Delegates), and SB 733 (in the Senate) were pre-filed on January 7, 2020, and are currently progressing through the legislative process.[1] Both bills address the Physician-Only Law, the Two-Trip Mandatory Delay Law, and the Licensing Statute—the three laws highlighted by the District Court as ripe for review by the Legislature and likely to be challenged in this appeal.

Litigation challenging the validity of laws and seeking prospective relief is "rendered moot if during the pendency of the action the legislation is repealed or amended in a significant way such that the allegedly offensive provision ceases to exist." *Ragan v. Vosburgh*, No. 96-2621, 1997 WL 168292, at *4 (4th Cir. April 10, 1997) (citing *U.S. Dep't of the Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986)); *Brooks v. Vassar*, 462 F.3d 341, 348 (4th Cir. 2006) (holding that "[w]hen a legislature amends or repeals a statute, a case challenging the prior law can become

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[1] *See* Virginia Legislative Information System, 2020 Session, for full legislative history of these bills. http://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+HB980, (HB 980); http://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+SB733 (SB 733).

moot" and dismissing elements of an appeal where statutory amendments addressed constitutional defects identified by Plaintiffs). Where amendments to existing laws or the enactment of new ones "substantially alters the posture of th[e] case," federal courts have found the intervening legislation to be a material factor in determining whether there is an actual ongoing case or controversy to adjudicate. *See e.g.*, *Galioto*, 477 U.S. at 559 (explaining that a challenge to federal firearms statute was moot after Congress amended the statute to eliminate the allegedly discriminatory provision); *Cent. Radio Co. Inc. v. City of Norfolk, Va.*, 811 F.3d 625, 632 (4th Cir. 2016) (dismissing as moot appeal regarding a regulation that was "no longer in force"); *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam) (holding that a substantial amendment to a regulation rendered litigation challenging its validity moot); *New Orleans Flour Inspectors v. Glover*, 160 U.S. 170, 170 (1895) (repeal of provision under attack rendered litigation moot).

In light of the significant developments thus far during this legislative session in the Commonwealth and the possibility that passage of HB 980/SB 733 into law may dramatically alter the scope and substance of this appeal, the Parties respectfully request that the Court vacate the Briefing Schedule issued on January 29, 2020 and exercise its authority under Fourth Circuit Rule 12(d) to place the case in abeyance. The legislative session is currently scheduled to conclude on March 7, 2020—*less*

than a month away—and the Governor is required to act on legislation passed by the General Assembly by April 6, 2020.

The relatively short delay to determine the proper scope of this appeal would relieve this Court of the inefficiencies and burdens attendant to reviewing and considering arguments that may become irrelevant, moot, or require additional briefing depending on the outcome of legislative process. The issues may be substantially narrowed, and the Parties jointly agree that the prejudice of the proposed delay is minimal, given the brevity of the delay.

In the interests of judicial economy and the swift resolution of this litigation, the Parties respectfully ask the Court to vacate the current briefing schedule; to place the case in abeyance pending a determination of whether the ongoing legislative process may narrow or eliminate the issues on appeal; and to direct the Parties to file a Joint Status Report with the Court no later than April 10, 2020 detailing the status of HB 980/SB 733. At that time, if appropriate or necessary, the Parties will request that the Court set an appropriate briefing schedule under its procedures.

Respectfully submitted,

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