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

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

ARGUMENT

In his Brief, the appellee Health Commissioner (hereinafter, "the Commonwealth") is unable to refute the plaintiffs' basic contention that they are injured by Virginia's law banning "nudist camps for juveniles," and will continue to be so injured while the law remains in effect. Instead, the Commonwealth accuses the plaintiffs of pursuing "new claims" on appeal. It then invites this Court to decide this case on the merits, even though the only issues raised below were standing and mootness. Neither of these strategies succeeds.

I. ALL OF THE PLAINTIFFS HAVE STANDING

As explained in Appellants' Opening Brief, the plaintiffs in this case are unquestionably injured by Virginia Code § 35.1-18. That statute prohibits the licensing of any "nudist camp for juveniles." Plaintiffs White Tail Park and AANR-East wish to operate a "nudist camp for juveniles" as defined in the statute. The plaintiff parents wish to send their children to such a camp, and the plaintiff children wish to attend such a camp. They are unable to do so because of the Virginia statute. If plaintiffs receive the relief they requested – a declaratory judgment and injunction against the statute – their injuries will be redressed.

The Commonwealth's brief in no way refutes any of these basic elements of the plaintiffs' standing. Instead, it maintains that the plaintiff's Complaint only concerned the

AANR-East summer camp for 2004, not any future summer camps, and is therefore moot. *See* Appellee's Br. at 21-23. This simply is not the case. The Complaint makes clear that "In the summer of 2003, [AANR-East] held a week-long summer camp for nudist youth, ***with the expectation that it would become an annual event***. This year's camp is scheduled for July 24 through July 31, 2004." J.A. 9. (emphasis added). Moreover, the plaintiffs' request for relief is in no way limited to the summer of 2004. The plaintiffs seek "[a] declaration that HB 158 violates the First and Fourteenth Amendments to the United States Constitution" and a "permanent injunction prohibiting the defendant from refusing to license, or revoking the license of, White Tail Park or AANR-East by reason of their operation of a 'juvenile nudist camp.'" J.A. 11. To be sure, the plaintiffs *also* sought a *preliminary* injunction to allow the summer camp to operate during the summer of 2004. But the plaintiffs' injury and need for permanent relief extend far past that date and into the foreseeable future.

Even if the Commonwealth's artificially narrow construction could somehow be read into the Complaint, this Court should not adopt it. "For purposes of ruling on a motion to dismiss for want of standing, . . . 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). Fairly construed in this manner, the Complaint

alleges that the plaintiffs intended to hold and attend a "nudist camp for juveniles" in 2004 and in subsequent summers, and that challenged statute will continue to prevent them from doing so as long as it is in effect.

II. THIS COURT SHOULD DECLINE THE COMMONWEALTH'S BACKDOOR INVITATION TO DECIDE THIS CASE ON THE MERITS, SINCE THE COMMONWEALTH NEVER FILED A RULE 12(b)(6) MOTION AND THE MERITS WERE NEITHER BRIEFED NOR DECIDED BELOW.

In the district court, the Commonwealth moved for dismissal solely based on standing and mootness, and the district court dismissed the case on precisely those grounds. Through a circuitous route with no legal support, the Commonwealth asks this Court to affirm the dismissal of this case on the grounds that the Complaint fails to state a claim. The Court should deny this request.

The Commonwealth begins by asserting that *Ex Parte Young*, 209 U.S. 205 (1908) does not apply in this case.[1] The doctrine of *Ex Parte Young* holds that "the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law." *Frew v. Hawkins*, 124 S. Ct. 899, 903 (2004). Of course, this precisely describes the present lawsuit: Plaintiffs seek to enjoin the Commissioner of Health, in his official capacity, from continuing to enforce a state statute that, plaintiffs contend, violates the federal constitution. The

[1] The Commonwealth made no sovereign immunity arguments in the District Court, and raises the *Ex parte Young* argument for the first time on appeal.

Commonwealth nonetheless claims that *Ex parte Young* does not apply because the Complaint is deficient *on the merits.*

While paying lip service to the Supreme Court's holding that "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim," Appellee's Br. at 24 (quoting *Verizon Maryland, Inc. v. Public Serv. Comm'n,* 535 U.S. 635, 646 (2002)), the Commonwealth proceeds to invite this Court to do just that. The Commonwealth fallaciously insists that "the Fed. R. Civ. P. 12(b)(1) inquiry into whether a federal court has jurisdiction under the *Ex parte Young* doctrine necessarily includes the Fed. R. Civ. P. 12(b)(6) inquiry into whether a claim has been stated." Appellees' Br. at 24. The Commonwealth does not – and cannot – cite any authority for this proposition.

In fact, the Supreme Court in *Verizon*, *supra*, expressly foreclosed the Commonwealth's proposed analysis. There, the plaintiff filed an action against members of a state regulatory commission, alleging that an order of the commission violated federal law and seeking declaratory and injunctive relief. The Court held that [i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint ***alleges*** an ongoing violation of federal law and seeks relief properly characterized as prospective.'" 535 U.S. at 645. (*quoting Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S.

261, 296 (1997)) (emphasis added). The Supreme Court emphasized that this inquiry did *not* require it to determine whether, in fact, the commission's order was unlawful:

> The Fourth Circuit suggested that Verizon's claim could not be brought under *Ex parte Young*, because the Commission's order was probably *not* inconsistent with federal law after all. . . . It may (or may not) be true that the FCC's since vacated ruling does not support Verizon's claim; it may (or may not) also be true that state contract law, and not federal law as Verizon contends, applies to disputes regarding the interpretation of Verizon's argument. But the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the case.

Id. at 646 (citation omitted).

The Commonwealth did not file a Rule 12(b)(6) motion in the district court. The question of whether the Complaint states a claim for which relief may be granted was not decided or briefed in the district court.[2] This Court should not decide it for the first time on appeal.[3]

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[2] The Commonwealth suggests that in its ruling on plaintiffs' motion for preliminary injunction, the district court "implicitly" held that plaintiffs had failed to state a claim. (Appellee's Br. at But this Court and the Supreme Court have consistently emphasized that a preliminary injunction ruling is *not* a ruling on the merits, and cannot be treated as one. For example, in *Gellman v. Maryland*, 538 F.2d 603 (4th Cir. 1976), the Court held that a district court could not convert a preliminary injunction hearing to a ruling on the merits, where the defendant had not filed a 12(b)(6) motion and where "clear and unambiguous" notice had not been given to the plaintiffs:

> The notice and hearing requirements of Rules 12(b) and 56(c) are far more than formalities. . . . [defendant]'s argument that the hearing on preliminary injunction effectively presented all of the issues which [plaintiff] could or would have presented at a hearing on summary judgment is inapposite, for loss of a motion for preliminary injunction means only temporary lethality. Final judgment is not then a possibility.

CONCLUSION

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

Id. at 605 (*quoting Georgia Southern & F. Ry. Co. v. Atlantic Coast Line R. Co.*, 373 F.2d 493, 497-8 (5th Cir. 1967)). *See also University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (noting the differences between preliminary injunction proceeding and determination on the merits, and concluding that "In light of these considerations, it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits"); *Hazardous Waste Treatment Council v. South Carolina,* 945 F.2d 781, 787 (4th Cir. 1991) (noting that "minimization of change in the status quo and not decision on the merits of the controversy is the objective" of a preliminary injunction determination).

[3] Should the Court determine that it is appropriate to reach the merits of the Complaint, plaintiffs request an opportunity to brief the matter fully.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2005, I served two copies of the foregoing brief by U.S. Mail, postage prepaid, addressed as follows:

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