IN THE SUPREME COURT OF THE STATE OF NEVADA

ALLIANCE FOR AMERICA'S FUTURE, A VIRGINIA NON-PROFIT CORPORATION; PATTI HECK, AN INDIVIDUAL; AND KARA AHERN, AN INDIVIDUAL,
Appellants,
vs.
THE STATE OF NEVADA, BY AND THROUGH ROSS MILLER, ITS SECRETARY OF STATE,
Respondent.

No. 56283

FILED

FEB 24 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Appeal from a district court order granting a preliminary injunction in an election law action. First Judicial District Court, Carson City; James E. Wilson, Judge.

This case comes to us as an interlocutory appeal from an order granting a preliminary injunction. While NRAP 3A(b)(3) permits an interlocutory appeal from a preliminary injunction order, the scope of review on such an appeal is generally limited to "whether the District Court had abused its discretion in issuing a preliminary injunction." University of Texas v. Camenisch, 451 U.S. 390, 393 (1981); see also University Sys. v. Nevadans for Sound Gov't, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004) ("Determining whether to grant or deny an injunction is within the district court's sound discretion."). If post-appeal events make the preliminary injunction moot, then the interlocutory appeal is moot and should be dismissed, so the unresolved damage and other issues can be litigated to conclusion in the district court. Independence Party of Richmond County v. Graham, 413 F.3d 252, 256 (2d Cir. 2005).

These rules are partly pragmatic, see Camenisch, 451 U.S. at 395 ("a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits"), and partly rooted in the fundamental principle that courts should only decide actual issues of actual consequence to the parties, not provide advisory opinions on abstract questions of law or policy.

> The question of mootness is one of justiciability. This court's duty is not to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment. Thus, a controversy must be present through all stages of the proceeding, and even though a case may present a live controversy at its beginning, subsequent events may render the case moot.

Personhood Nevada v. Bristol, 126 Nev. ___, ___, 245 P.3d 572, 574 (2010) (citations omitted) (dismissing as moot an appeal from an order granting injunctive and declaratory relief in a ballot initiative matter, where the proponents did not obtain the signatures needed to qualify the initiative and the election occurred without the initiative appearing on the ballot). For a general discussion, see 16 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction and Related Matters § 3921.1, at 25-27 (2d ed. 1996) (although not "rigidly limited," "[a]ppellate consideration of interlocutory injunction appeals . . . ordinarily focuses on the injunction decision itself"; "[t]he curtailed nature of most preliminary injunction proceedings means that the broad issues of the action are not apt to be ripe for review, most obviously as to issues that have not yet been decided by the trial court, and appellate courts are apt to be particularly reluctant to expand review when constitutional issues are involved" (footnotes omitted)).

The preliminary injunction challenged by this appeal ordered Alliance for America's Future to stop running certain television advertisements found to advocate Brian Sandoval's election as governor unless it first registered with the Nevada Secretary of State as a political action committee (PAC). The preliminary injunction issued on June 2, 2010, days before the contested Republican primary between now-Governor Sandoval and then-Governor Jim Gibbons. Although Alliance appealed the preliminary injunction order, neither Alliance nor the State moved to convert the preliminary injunction into a permanent one or to expedite this appeal. On the contrary, both parties followed a normal briefing schedule, with several extensions. As a result, the briefing did not conclude until 2011, after the primary and general elections were over, and Governor Sandoval had won. From what appears in the record, Alliance complied with the preliminary injunction by discontinuing the challenged advertisements. Nothing suggests Alliance intends to air the advertisements now. Indeed, recent filings suggest that Alliance has done nothing further in Nevada.

On this record, it does not appear that this court could grant Alliance effective relief by reversing or modifying the district court's preliminary injunction, assuming it were so inclined. The harm caused by the preliminary injunction against Alliance airing the television advertisements unless it registered as a PAC has occurred. Thus, this appeal has become moot. See Graham, 413 F.3d at 256 ("In light of the fact that [the] election has already taken place, a decision by our court affirming or reversing the district court's [preliminary injunction] decision would not have any effect on the rights or obligations of the parties."). Legal issues remain as to the penalties sought by the Secretary of State in

the district court for, among other matters, the pre-injunction airings of the advertisements that occurred,[1] but those issues have yet to be resolved by the district court. The preliminary injunction order itself, however, is moot.

"Even when an appeal is moot, . . . this court may consider it when the matter is capable of repetition, yet evading review." Nevadans for Sound Gov't, 120 Nev. at 720, 100 P.3d at 186. This occurs when "the duration of the challenged action is 'relatively short' and there is a 'likelihood that a similar issue will arise in the future.'" Personhood, 126 Nev. at ___, 245 P.3d at 574 (citing and quoting Traffic Control Servs. v. United Rentals, 120 Nev. 168, 171-72, 87 P.3d 1054, 1057 (2004)).

In this case, however, application of the mootness exception is unwarranted. Alliance asserts two principal legal challenges on appeal: the first concerns the proper construction of "expressly advocate" as used in NRS 294A.004; the second, whether the definition of "committee for political action" in NRS 294A.0055 is rendered unconstitutional by its lack of a "major/primary purpose" limitation. But the centerpiece statute, NRS 294A.004, was materially amended, see 294A.0075, after the district court issued its injunction order (indeed, after the briefing concluded in this court). Thus, the question presented—the propriety of an injunction under the pre-2011 version of NRS 294A.004—is not likely to repeat in other cases, while the underlying legal issue can and will be decided by the

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[1]Indeed, the Secretary of State recently has moved to supplement its complaint to add new parties and additional penalty claims against Alliance and the proposed additional parties defendant.

district court in connection with the penalty claims.[2] And the second issue—the lack of a "major/primary purpose" limitation—was not developed before the district court and thus is not properly before us on this appeal.

Unlike Personhood, where the post-appeal changes rendered the entire case moot, live issues remain in the district court concerning the penalties sought to be imposed on Alliance and Alliance's (and the proposed new defendants') defenses, both constitutional and statutory, to those penalties. For us to address NRS 294A.004 in the abstract, from the rearview mirror perspective of its 2011 amendment, not only ventures into advisory opinion territory, it intrudes on the Due Process "vagueness" and First Amendment "chilling effect" defenses Alliance has asserted to the remaining, unresolved penalty claims. Worse from a public policy perspective, it is unclear how the "major purpose" challenge Alliance makes on appeal to NRS 294A.0055 would have impacted district court's analysis of NRS 294A.004 had the parties and the district court had the luxury of time to develop and consider it.[3] On an appeal from a final, fully

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[2]In this case, the penalty claims by the Secretary of State that remain pending in the district court raise the same or similar legal questions to those pressed on this appeal. As in Graham, 413 F.3d at 256, there is "no reason to believe that [those] issues . . . cannot be fully litigated before th[e district] court. And, in due course, following the entry of final judgment in that court, they can be reviewed on appeal in this court."

[3]Alliance's efforts to assert a major/primary purpose argument on appeal illustrates the problem in attempting plenary appellate review in the context of an interlocutory appeal from a preliminary injunction order. The complaint in this case was filed on May 25, 2010, along with the application for a preliminary injunction. Alliance filed its opposition on

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litigated judgment, rather than a hastily wrought preliminary injunction, this court's analysis would be fully informed, not piecemeal, which is of benefit to the public and the parties alike.

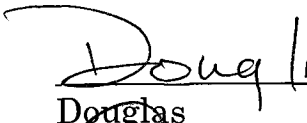
The law did not always allow interlocutory appeals from preliminary injunction orders. Their allowance stemmed "from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955), overruled on other grounds by Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988). "Reconciliation of the policies of the final judgment appeal structure with the policies [that support allowing interlocutory appeals of injunction orders] has led to a policy of construing the injunction appeals provision strictly, so as to confine its application to the needs that inspired it." 16 Federal Practice and Procedure, supra, § 3921, at 18. Where, as here, "the event giving rise to the necessity of preliminary injunctive relief has passed" and "the legal questions underlying the interlocutory appeal remain before the district court in the still-pending action, review by our court would unnecessarily and inappropriately preempt the district court's resolution of the controversy before it." Graham, 413 F.3d at 256-57 (Calabresi, J.).

. . . continued

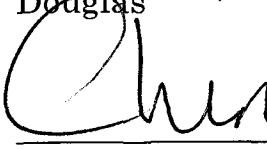
May 27, 2010, which it supplemented on June 1, 2010, with an affidavit the State objected to as hearsay. The matter was argued on June 1, 2010, and the injunction issued the following day. This appeal, which was not sought to be expedited, followed. No discovery was taken, no witnesses were deposed or called, and no other proceedings were had before the appeal was brought.

For these reasons, we vacate the district court's preliminary injunction order as moot and remand for further proceedings consistent with this order.

_____, C.J.
Saitta



_____, J.
Douglas



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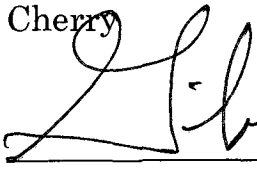

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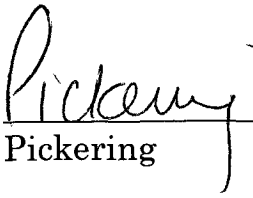
Gibbons



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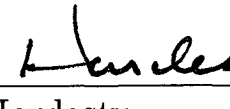
Pickering



_____, J.
Hardesty

_____, J.
Parraguirre

cc: Hon. James E. Wilson, District Judge
Holtzman Vogel PLLC
Holland & Hart, LLP/Carson City
Attorney General/Carson City
Carson City Clerk