



De La Fuente v. Lamone et al

2017 | Cited 0 times | D. Maryland | June 5, 2017

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND ROQUE DE LA FUENTE, Plaintiff, v. LINDA LAMONE, et al., Defendants.

Civil Action No. ELH-16-2743

MEMORANDUM

President of the United States in 2016. ECF 1, ¶ 4. De La Fuente filed suit on August 2, 2016, against Linda Lamone, in her capacity as Administrator of the State Board of Elections (and twenty unnamed defendants, pursuant to 42 U.S.C. § 1983. See ECF 1. He claims that he was subjected to an unconstitutional burden to gain placement on the ballot in Maryland. Id.

In particular, De La Fuente claims that on Friday, July 29, 2016, in connection with the settlement of another federal case, to which plaintiff was not a party, the Board agreed to reduce , However, he complains that he could not benefit from the change because, under Md. Code

(2017 Repl. Vol.), § 5-703(f)(1) of , the deadline for an unaffiliated candidate to submit

settlement agreement. Id. 1

the deadline place[d] an extraordinary if not impossible burden to gather the signatures required by this deadline Id. In his suit, De La Fuente seeks, inter alia, the electoral process. Id. at 5. Moreover, he sought an Order placing him on the 2016

presidential ballot in Maryland, as well as a declaration extending the deadline for the submission of signatures by twenty or more days. Id. 2

But, plaintiff concedes that most of his requests are now moot, except for a declaration that E.L. § 5-ECF 12 at 3-4.

The docket does not reflect service on Lamone or anyone else. See docket. Nevertheless, on October 11, 2016, defendants moved to dismiss (ECF 4), supported by a memorandum of law. ECF 4- sought an extension of time in which to respond (ECF 6), which I granted. ECF 7. He filed his opposition on



De La Fuente v. Lamone et al

2017 | Cited 0 times | D. Maryland | June 5, 2017

January 23, 2017, well after the November 2016 presidential election. ECF 12 (. Defendants replied.

In their submissions, defendants argue, *inter alia*, that the case should be dismissed under Fed. R. Civ. P. 12(b)(1), because plaintiff has not demonstrated that he has Article III standing and because the case is now moot. See ECF 4-1; ECF 13. Defendants also argue that dismissal

1 De La Fuente stated that the petition deadline was August 2, 2016. ECF 1, ¶ 16. However, the petition deadline is the first Monday in August, and in 2016 it fell on August 1, 2016. This discrepancy is not material to the issues.

2 De La Fuente stated several times Presidential ballot in Arizona ECF 1, ¶ 4; see also ECF 1 at 5. Presumably, he meant Maryland, not Arizona. See *id.* Maryland

is appropriate under Fed. R. Civ. P. 12(b)(6) because, in their view, plaintiff has failed to state a claim upon which relief can be granted. See ECF 4-1. De La Fuente counters that he has Article III standing and contends that some of the relief sought in the Complaint is not moot. ECF 12.

The Motion is fully briefed. No hearing is necessary to resolve it. See Local Rule 105.6. The Court is mindful of its obligation to construe liberally the pleadings of a pro se *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); see also *White v. White*, 886 F.2d 721, 722-23 (4th

Cir. 1989). I have done so. Nevertheless, for the reasons that follow, I shall grant the Motion.

I. Background The Maryland Code provides that a candidate for public office who is not affiliated with any political party may be nominated for office by petition. E.L. § 5-703(b). Section 5-703(e) is E.L. § 5-703(e)(1) provides:

A candidate who seeks nomination by petition may not have the candidate's name placed on the general election ballot unless the candidate files with the appropriate board petitions signed by not less than 1% of the total number of registered voters who are eligible to vote for the office for which the nomination by petition is sought, except that the petitions shall be signed by at least 250 registered voters who are eligible to vote for the office. Section 5-703(e)(3) states The number of registered voters required to satisfy the requirements of paragraph (1) of this subsection shall be determined as of January 1 of the year of the primary election for which the nomination is sought. One percent of the total number of eligible voters in the State as of January of 2016 was approximately 38,000 people. See MARYLAND STATE BD. OF ELECTIONS, VOTER REGISTRATION ACTIVITY, January, 2016, available at: <https://go.usa.gov/x5M9v> (providing that there were a total of 3,768,669 active registered voters as of January 2016).

E.L. §5-703(f) is also relevant. It provides, *id.*: [A] petition that contains the required number of signatures specified under subsection (e)(1) of this section shall be filed with the appropriate board by



De La Fuente v. Lamone et al

2017 | Cited 0 times | D. Maryland | June 5, 2017

5 p.m. on the first Monday in August in the year in which the general election is held. August 1, 2016 was the first Monday in August 2016. 3

Pertinent to the case sub judice, on July 24, 2015, Greg Dorsey, an unaffiliated candidate for United States Senate in the 2016 general election, filed suit in this Court against, inter alia, Lamone, challenging the requirement that unaffiliated candidates must obtain signatures from 1% of eligible voters in the state. Dorsey v. Lamone, et al., GLR-15-2170 (D. Md.), ECF 1. 4

As noted, for 2016, the 1% provision would have required an unaffiliated candidate to gather about 38,000 signatures. See also ECF 12 at 3. Dorsey claimed that the requirement that unaffiliated candidates obtain approximately 38,000 signatures to gain ballot access under E.L. § 5-703 was unconstitutional, given that a candidate intending to run for political office as a representative of

3 information that, under Goldfarb, 791 F.3d at 508; see also Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007); Katyle v. Penn Nat'l Gaming, Inc., 637 F.3d 462, 466 (4th Cir. 2011), cert. denied, 565 U.S. 825 (2011); Philips v. Pitt County Mem. Hosp., 572 F.3d 176, 180 (4th Cir. 2009). However, judicial notice of adjudicative facts is appropriate only capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be ques Fed. R. Evid. 201.

Moreover, it is well settled that a district court notice of its own records Anderson v. Fed. Deposit Ins. Corp., 918 F.2d 1139, 1141 n.1 (4th Cir. 1990); Fed. R. Evid. 201. Courts may also take judicial notice of publicly available records without converting a motion to dismiss to a motion for summary judgment. See, e.g., Zak v. Chelsea Therapeutics Int'l, Ltd. facts and documents subject to judicial notice without converting the motion to dismiss into one

4 In view of the procedural posture of the case, the Court accepts as true the allegations in the Complaint. ECF 1.

a new political party could gain access to the ballot with only 10,000 signatures, in accordance with E.L. §§ 4-102(b)(2)(i) and 5-703.1. GLR-15-2170, ECF 1 at 2.

On June 10, 2016, Judge Russell denied defendant motion to dismiss, observing that Dorsey Id., ECF 13. Thereafter, on July 29, 2016, the Friday before

the August 1, 2016 deadline, the parties in Dorsey executed a settlement agreement. Id., ECF 20. It provided, in pertinent part, id., ECF 20-1 at 2:

E. For the 2016 General election and for any special general election that may hereafter be scheduled to be held prior to the end of the 2017 legislative session of the Maryland General Assembly, the Board will accept as sufficient for purposes of Elec. Law § 5-703(e) a candidate nominating petition for statewide office containing the signatures of at least 10,000 registered voters and that, provided



De La Fuente v. Lamone et al

2017 | Cited 0 times | D. Maryland | June 5, 2017

all other requirements are satisfied, the candidate shall be placed on the general election ballot. Section F of the settlement agreement provided that the Board would recommend to the General Assembly and to the Governor the passage of a bill during the 2017 legislative session eliminating the disparity in the signature requirements between unaffiliated candidates and new political party candidates. *Id.* The settlement agreement, however, did not change the date for unaffiliated candidates to submit their petitions. ECF 1, ¶ 16.

During the 2017 legislative session, at the request of the Board, the General Assembly unanimously passed legislation addressing the disparity in the signature requirements for unaffiliated candidates and new political parties. See H.B. 529, 2017 Reg. Session (Md. 2017) 5

Among other things, H.B. 529 amends E.L. § 5-703(e)(1), as follows:

5 Although HB 529 had been introduced by the time defendants filed their Reply on February 6, 2017 (ECF 13), it was not passed by both chambers of the General Assembly until April 3, 2017. Defendants did not reference HB 529 in their submissions. See ECF 4-1; ECF 13.

(e) (1) A candidate who seeks nomination by petition may not have the ame placed on the general election ballot unless the candidate files with the appropriate board petitions signed by not less than THE LESSER OF 10,000 REGISTERED VOTERS OR 1% of the total number of registered voters who are eligible to vote for the office for which the nomination by petition is sought, except that the petitions shall be signed by at least 250 registered voters who are eligible to vote for the office. [6] On May 26, 2017, Governor Lawrence J. Hogan announced that, pursuant to Art. II § 17(c) of the Maryland Constitution, he would permit H.B. 529 to become law without his signature. Letter from Lawrence J. Hogan, Governor of Maryland, to Michael E. Busch, Speaker of the Maryland House of Delegates (May 26, 2017), available at: <http://bit.ly/2rpFjUo>. HB 529 will take effect on October 1, 2017. See H.B. 529 at 8.

On August 2, 2016, just after the settlement was reached in Dorsey, and one day after the deadline for an unaffiliated candidate to file a petition under E.L. §5-703, De La Fuente filed this suit. See ECF 1. In his Complaint, De La Fuente claims, *id.* ¶ 19: When the ballot access laws are changed in the middle of a petitioning period, the state must grant more time otherwise the change is Fuente, given the short time between the July 29, 2016, settlement agreement and the petition deadline of August 1, 2016 [m]any people who would ordinarily put forth the effort would not do so because they were unaware [sic] of the settlement or there is not *Id.* ¶ 20. De La Fuente also asserts, *id.* ¶ 21:

II. Standard of Review Defendants have brought the Motion pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). As to Rule 12(b)(1), they argue, *inter alia*, that the Complaint should be dismissed

6 Lines indicate language removed from the Maryland Code and capitals indicate language added to



De La Fuente v. Lamone et al

2017 | Cited 0 times | D. Maryland | June 5, 2017

the Maryland Code.

because the relief requested in the Complaint is moot and because plaintiff lacks standing under Article III. ECF 4-1. 7 Three inter-related judicial doctrines standing, mootness, and ripeness ensure that federal courts Cases and Controversies *Worth v. Jackson*, 451 F.3d 854, 855 (D.C. Cir. 2006) (citing U.S. Const. art. III, § 2.). Accordingly, defendants argument that the Complaint is moot is properly considered under Rule 12(b)(1). See, e.g., *Nhung Thi Tran v. Holder*, DKC-10-2503, 2011 WL 3236098, at *1 (D. Md. July 27, 2011) heart of the court's Article III jurisdiction . . . *Abu Ali v. Gonzales*, 387 F. Supp. 2d 16, 17 (D.D.C. 2005) As mootness creates a jurisdictional defect, respondents' motion will be treated as a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1). .

Under Rule 12(b)(1), the plaintiff bears the burden of proving, by a preponderance of evidence, the existence of subject matter jurisdiction. See *Demetres v. East West Const., Inc.*, 776 F.3d 271, 272 (4th Cir. 2015); see also *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th pleaded in the complaint are

Kerns v. United States, 585 F.3d 187,

192 (4th Cir. 2009) (citation omitted) (alteration in original); see also *Buchanan v. Consol. Stores Corp.*, 125 F. Supp. 2d 730, 736 (D. Md. 2001). must be denied if the complaint allege *Kerns*, 585 F.3d at 192; accord *Clear Channel Outdoor, Inc.*, 22 F. Supp. 3d at 524. In a factual

7 Based on my disposition, I need not address the standard that applies to a Rule 12(b)(6) motion.

Kerns, 585 F.3d at 192. In that circumstance, the court

pleadings without converting the proceeding to one for summary *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004); see also *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). Here, defendants argue, inter alia, that it is apparent from the face of the Complaint that the case is now moot. See ECF 4-1; ECF 13. This challenge is a facial challenge, given that it is made on the basis of the four corners of the Complaint.

III. Discussion A case becomes moot when the issues no longer live or the parties lack a legally cognizable interest in the outcome. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)) (other internal citations omitted); see also *Grutzmacher v. Howard Cnty.*, 851 F.3d 332, 349 (4th Cir. 2017).

mootness goes to the heart of the Article III jurisdiction of the courts. *Castendet-Lewis v. Sessions*, 855 F.3d 253, 260 (4th Cir. 2017) (quoting *Friedman's, Inc. v. Dunlap*, 290 F.3d 191, 197 (4th Cir. 2002)). The inability of the federal judiciary to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy. *United States v. Hardy*, 545 F.3d 280, 283 (4th Cir. 2008) (quoting *DeFunis v. Odegaard*,



De La Fuente v. Lamone et al

2017 | Cited 0 times | D. Maryland | June 5, 2017

416 U.S. 312, 316 (1974)); see also *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (citations omitted).

In *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011), the Supreme Court's requirement of Article III maintains the public's confidence in an unelected but restrained Federal Judiciary For the federal courts to decide questions of law arising outside of cases and controversies would be inimical to the public interest. See also *Campbell-Ewald Co. v. Gomez*, ___ U.S. ___, 136 S. Ct. 663, 668 (2016) (a principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies). *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 973, 978 (2004) (abrogated in part on other grounds by *Lexmark Int'l, Inc. v.*

Static Control Components, Inc., ___ U.S. ___, 134 S. Ct. 1377, 1387 (2014).

In other words, during the pendency of a case, an actual controversy must exist. See *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974); *Williams v. Ozmint*, 716 F.3d 801, 808 (4th Cir. 2013). And, 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. *Porter v. Clarke*, 852 F.3d 358, 363 (4th Cir. 2017) (quoting *S.C. Coastal Conservation League v. U.S. Army Corps. of Eng'rs*, 789 F.3d 475, 482 (4th Cir. 2015)); see *Chafin v. Chafin*, ___ U.S. ___, 132 S. Ct. 1323, 1328 (2016) (questions that cannot affect the rights of litigants in the case before them or give opinions advising what brackets omitted); , ___ U.S. ___, 132 S. Ct. 1323, 1328 (2016).

able for a court to

advisory opinion upon a hypothetical basis, but for an adjudication of present right upon

Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 242 (1937); see also *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Indeed, the record it appears that the only concrete interest in the controversy has terminated, reasonable caution is needed to be sure that mooted litigation is not pressed forward, and unnecessary juridical pronouncements on even constitutional issues obtained *Continental Bank Corp.*, 494 U.S. at 480. When developments occur during the course of a case

that prevent the court from being able to grant the requested relief, the case must be dismissed. See *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

To be sure, the Supreme Court has recognized a narrow exception to the mootness doctrine. *Kingdomware Techs., Inc. v. United States*, ___ U.S. ___, 136 S. Ct. 1969, 1976 (2016) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)) (1) the challenged action [is] in its duration too short to

be fully litigated prior to cessation of the activity [is] a reasonable expectation that the same complaining party [will]



De La Fuente v. Lamone et al

2017 | Cited 0 times | D. Maryland | June 5, 2017

be subject to the same action again. *Id.* However, as discussed below, this exception is inapplicable to the case sub judice. Here, De La Fuente concedes that much of the relief that he seeks is moot. See ECF 12. In particular, De La Fuente states, *id.* at 3: Plaintiff concedes that the ballot access injury he sustained in the 2016 presidential election at the hands of the Defendants can no longer be remedied by declaratory relief requiring that he be placed on the 2016 ballot. *continues, id.*: Plaintiff further concedes that a TRO or preliminary injunction staying the

Defendant Secretary of State from preparing and disseminating 2016 election ballots [is] moot. any action requiring the Defendant Secretary of State to

destroy any existing ballots that did not contain Mr. De La Fuente's name is also now moot. *Id.* at 3-4. And, De La Fuente asserts, *id.* Plaintiff further concedes that a 2016 extension of the deadline to submit the newly reduced number of signatures is moot. Thus, the only relief that De La Fuente seeks in his Complaint that he has not conceded as moot is a declaration from the Court that, among other things, E.L. § 5-703 burden on unaffiliated candidates for President. ECF 1 at 5, ¶¶ A-C. However, this relief is

clearly moot.

As indicated, the General Assembly passed HB 529, and the Governor allowed it to become law. It amends E.L. § 5-703 to provide parity in the signature requirements for unaffiliated candidates and candidates of new political parties. Because this change will take effect before the next general election, there is no live controversy remaining as to the current law, and the declaratory relief that De La Fuente seeks is moot. *Cf. Cutonilli v. Federal Transit Administration*, that case was moot because a proposed mass transit line that was the subject of the suit was cancelled by the Governor after the District Court issued its opinion).

review is inapplicable because the issue here is not one that evades review. There is no reason to

believe that De La Fuente will again be subject to the law that he challenges after the amendments in HB 529 take effect on October 1, 2017.

In sum, because the relief that De La Fuente seeks in his Complaint is now moot, the Court lacks jurisdiction to proceed under Article III. Accordingly, I shall grant the Motion under Fed. R. Civ. P. 12(b)(1). 8

IV. Conclusion In view of the foregoing, I shall GRANT defend to Dismiss (ECF 4) under Rule 12(b)(1), because the relief requested in the Complaint is now moot. Because the Court lacks jurisdiction, I shall dismiss the suit, without prejudice. See *Broadlands*, 713 F.3d at 185 A dismissal for lack of standing or any other defect in subject matter jurisdiction must be one without prejudice, because a court that lacks jurisdiction has no power to adjudicate and dispose of a claim on the



De La Fuente v. Lamone et al

2017 | Cited 0 times | D. Maryland | June 5, 2017

merits. An Order follows, consistent with this Memorandum.

Date: June 5, 2017 /s/ Ellen Lipton Hollander United States District Judge

8 concerning standing or their claims under Rule 12(b)(6).

