

In the Supreme Court of Virginia

THE FALLS CHURCH (ALSO KNOWN AS THE CHURCH AT THE FALLS—THE FALLS CHURCH), DEFENDANT-APPELLANT

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA
AND THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA,
PLAINTIFFS-APPELLEES

OPPOSITION TO MOTION FOR TEMPORARY SUSPENSION OF BRIEFING SCHEDULE

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Counsel for Appellant The Falls Church

Defendant-Appellant The Falls Church (TFC) respectfully submits this opposition to the motion of Plaintiffs-Appellees the Protestant Episcopal Church in the United States of America and the Protestant Episcopal Church in the Diocese of Virginia for a temporary suspension of the briefing schedule. For several reasons, the motion should be denied.

First, as plaintiffs note (at 2), this Court previously granted the parties' joint motion to extend the merits briefing deadlines, resulting in a two-week extension of time to file plaintiffs' briefs (to January 21, 2013). Plaintiffs fail to mention, however, that TFC agreed to join the motion only if plaintiffs' pending rehearing petition would not result in further changes to the schedule. When plaintiffs requested TFC's support for a two-week extension of the deadline for their brief, TFC expressly conditioned its support on plaintiffs' agreement that "[a]ny action by the Court on your [plaintiffs'] petition for rehearing on the denial of your assignment of cross-error will not affect this schedule." See Ex. A at 2 (correspondence between counsel).

Plaintiffs' counsel initially responded, "I can think of no reason why we would not agree to that," and later confirmed: "We are in agreement. I will prepare a joint motion for your review." Ex. A at 1. Thus, the parties' agreement to jointly seek an extension of the briefing schedule specifically contemplated that this Court might not rule on plaintiffs' rehearing petition

before the deadline for plaintiffs' briefs. Now, however, plaintiffs seek the Court's consent to breach their agreement with TFC and secure a second extension—one that would delay the briefing indefinitely, until the Court rules on the very issue that plaintiffs earlier agreed "will not affect [the briefing] schedule."

Second, plaintiffs have failed to show either good cause for a further extension or sufficient grounds to be released from their agreement with TFC. Plaintiffs assert that it was not until they called the Office of the Clerk on December 11, 2012, that they learned "that the Court will not make that decision [on its rehearing petition] until its January session." Motion at 2. What Plaintiffs fail to explain is why they did not call the Office of the Clerk earlier, *before* they agreed to TFC's condition that the Court's action (or inaction) on the rehearing petition would not justify any further change to the revised briefing schedule.

Third, allowing plaintiffs to renege on their agreement would prejudice TFC, as suspending the briefing schedule is likely to unreasonably delay resolution of TFC's appeal. On November 21, 2012, when plaintiffs' counsel originally approached TFC's counsel to request a two-week extension for their merits brief, TFC's counsel telephoned the Office of the Clerk and was informed that, provided the briefing was completed by February 14,

2013, the case would almost certainly be set for argument during the week of February 25, 2013. On that basis, TFC agreed to support the schedule that the Court ultimately approved—under which TFC’s reply brief is due on February 11, 2013.

As TFC’s counsel noted in corresponding with plaintiffs’ counsel concerning the joint motion, the proposed schedule (later adopted) “will allow the briefing to be completed in time for the case to be heard the week of February 25.” Ex. A at 2; see also *id.* (discussing “the briefing cutoff for cases to be heard the week of February 25”). But if the Court now grants plaintiffs’ motion to suspend the briefing, the argument schedule will be delayed by at least two months, resulting in a comparable delay in the Court’s issuance of a decision, and the objective of an expeditious resolution will be thwarted. Moreover, if plaintiffs’ rehearing petition is denied, the briefing and argument of TFC’s appeal will have been delayed for no reason.

Fourth, it would be unfair for plaintiffs to receive more time to prepare their opposition brief than that provided by the two-week extension they have already received. As TFC’s counsel noted in correspondence with plaintiffs’ counsel, the agreed-upon schedule “will allow equal extension for both sides (14 days each).” Ex. A at 2. The same cannot be said of plaintiffs’ newfound proposal. By waiting until December 11—the day before

TFC's brief was due—to propose a suspension of the schedule, plaintiffs ensured that any suspension of the schedule would benefit only them. Under their proposal, they would receive more time to respond to TFC's brief, while depriving TFC of additional time to prepare its opening brief (or for that matter its reply brief, see Motion at 3 (proposing a schedule for the reply that is “consistent with the interval allowed by the current briefing schedule”)). Thus, plaintiffs are attempting to unilaterally rewrite the parties' agreement to their advantage and TFC's detriment.

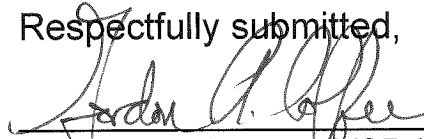
Fifth, in the event that the Court grants plaintiffs' rehearing petition after the January argument session, plaintiffs will have ample time to make any necessary adjustments to their brief to address the issue presented in their cross-assignment of error. For example, if the Court announces a decision on the rehearing petition on January 11, plaintiffs will still have 10 days to make any needed revisions to their brief. (Plaintiffs themselves have suggested that this is a realistic timetable for a decision by the Court. See Ex. B (correspondence between counsel).) Indeed, even a few days should be sufficient for plaintiffs to incorporate the arguments supporting their cross-assignment into their merits brief, as plaintiffs have already developed those arguments at length—both in the petition for rehearing and on numerous occasions in the court below.

Finally, as TFC's counsel informed plaintiffs' counsel when he inquired whether TFC would oppose the instant motion (Ex. B at 1), should the Court grant plaintiffs' rehearing petition after their merits brief is filed, TFC has no objection to supplemental briefing on the cross-assignment of error, provided TFC has a comparable opportunity to respond.

CONCLUSION

For the foregoing reasons, plaintiffs' motion should be denied.

Respectfully submitted,



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Counsel for Appellant The Falls Church

December 19, 2012

I HEREBY CERTIFY that on this 19th day of December, 2012, copies of the foregoing document were sent by electronic and first-class mail to all counsel named below, and transmitted to the clerk of this Court via overnight delivery.

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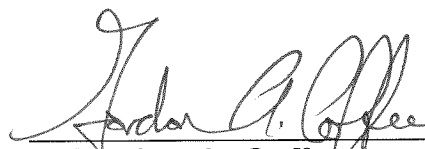

Gordon A. Coffee

EXHIBIT A

Johnson, Steffen N.

From: Somerville, George A. [george.somerville@troutmansanders.com]
Sent: Wednesday, November 21, 2012 1:00 PM
To: Johnson, Steffen N.
Cc: Coffee, Gordon A.; Kostel, Mary E.; Davenport, Brad; Zinsner, Mary C.
Subject: RE: follow-up on the briefing schedule

We are in agreement. I will prepare a joint motion for your review.
Again, thanks.

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"I feel sorry for the person who can't get genuinely excited about his work. Not only will he never be satisfied, but he will never achieve anything worthwhile." - Walter Chrysler

From: Johnson, Steffen N. [mailto:SJohnson@winston.com]
Sent: Wednesday, November 21, 2012 12:44 PM
To: Somerville, George A.
Cc: Coffee, Gordon A.; Kostel, Mary E.; Davenport, Brad
Subject: RE: follow-up on the briefing schedule

Sounds good. Just let us know. And happy Thanksgiving to you all as well.

From: Somerville, George A. [mailto:george.somerville@troutmansanders.com]
Sent: Wednesday, November 21, 2012 12:35 PM
To: Johnson, Steffen N.
Cc: Coffee, Gordon A.; Kostel, Mary E.; Davenport, Brad
Subject: RE: follow-up on the briefing schedule

I think so. I can think of no reason why we would not agree to that, but I haven't gotten confirmation from all interested persons yet. I will confirm as soon as I can.

Many thanks, Steffen. Have a great holiday!

George

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From: Johnson, Steffen N. [<mailto:SJohnson@winston.com>]
Sent: Wednesday, November 21, 2012 11:28 AM
To: Somerville, George A.
Cc: Coffee, Gordon A.; Kostel, Mary E.; Davenport, Brad
Subject: follow-up on the briefing schedule

George et al.,

We have now had a chance to discuss the schedule and to speak with Doug Robelen about the argument calendar and the briefing cutoff for cases to be heard the week of February 25. Here's what we would propose that we jointly ask of the Court (Doug said one motion is preferable to multiple motions):

1. The deadline for our opening brief would be extended 7 days, to December 12.
2. The deadline for your responsive brief would be extended 14 days (from the extended deadline), to January 21.
3. The deadline for our reply brief would be extended 7 days (also from the extended deadline), to February 14.
4. Any action by the Court on your petition for rehearing on the denial of your assignment of cross-error will not affect this schedule.

This will allow equal extension for both sides (14 days each). It will allow extra time for each side given the Thanksgiving and Christmas and New Year's holidays. And it will allow the briefing to be completed in time for the case to be heard the week of February 25. The difference from what we discussed on the phone is that we would prefer to break up our 14 days and use 7 for the opening brief and 7 for the reply.

Please let us know if this is agreeable to you.

Steffen

Steffen N. Johnson

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EXHIBIT B

Johnson, Steffen N.

From: Johnson, Steffen N.
Sent: Thursday, December 13, 2012 10:30 AM
To: 'Somerville, George A.'
Cc: Davenport, Brad; Zinsner, Mary C.; Kostel, Mary E.; Beers, David B.; 'Scott Ward'; 'Johnson, James'; PFarquharson@semmes.com; Johnson, Steffen N.; Coffee, Gordon A.
Subject: RE: draft motion
Attachments: RE: follow-up on the briefing schedule

George,

We unfortunately cannot agree to your request.

When you first approached us to request a two-week extension of the deadline for your brief, we specifically based our agreement to such an extension on the following condition (among others): "Any action by the Court on your petition for rehearing on the denial of your assignment of cross-error will not affect this schedule." You initially responded, "I can think of no reason why we would not agree to that," and you later confirmed: "We are in agreement." Thus, our agreement specifically contemplated this eventuality and took account of it. I have attached our exchange of correspondence.

Should the court act on your rehearing petition after your brief is filed, and should it grant the petition, the Court will undoubtedly provide you with an opportunity to submit a supplemental brief. We would of course not object to supplemental briefing, provided we have a comparable opportunity to respond.

Best regards,

Steffen

Steffen N. Johnson

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**WINSTON
& STRAWN
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From: Somerville, George A. [<mailto:george.somerville@troutmansanders.com>]
Sent: Wednesday, December 12, 2012 2:59 PM
To: Coffee, Gordon A.; Johnson, Steffen N.
Cc: Davenport, Brad; Zinsner, Mary C.; Kostel, Mary E.; Beers, David B.
Subject: draft motion

Gentlemen:

Attached is our draft motion for suspension of the briefing schedule. Please let us know whether you will consent to the granting of the motion or intend to file responses in opposition (or perhaps take some middle ground – which I leave to your imaginations; I'm only quoting the Rule).

Further on the timing factor: My best educated guess – and of course it is no more than that – is that the proposed suspension will not have a major impact on the actual schedule. A decision on our PFR should be announced either during or shortly after the January Session, which ends on 1/11. If it is announced that day (along with decisions in cases argued in the November Session), then our proposed deadline would be 1/25, only 4 days later than it is scheduled now. The motion asks to maintain the same interval for your reply brief as is currently allowed; but you obviously would have the option of beating that deadline, if you chose to do so, which would even further advance the likelihood of getting us onto the February docket.

We will look forward to your response.

With all best wishes,

George Somerville

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