

SUPREME COURT OF NORTH CAROLINA

HEST TECHNOLOGIES, INC. and
INTERNATIONAL INTERNET
TECHNOLOGIES, LLC,

Plaintiffs-Appellees,

vs.

STATE OF NORTH CAROLINA ex rel.
BEVERLY PERDUE, GOVERNOR, in her
official capacity, et al.,

Defendants-Appellants.

From Guilford County
No. 08 CVS 457

From Court of Appeals
No. 11-459

**MOTION FOR TEMPORARY STAY AND
PETITION FOR WRIT OF SUPERSEDEAS**

Plaintiffs Hest Technologies, Inc. and International Internet Technologies, LLC, respectfully submit this Petition for Writ of Supersedeas and Motion for Temporary Stay pursuant to Rules 2 and 23 of the North Carolina Rules of Appellate Procedure. Plaintiffs seek a brief stay of this Court’s opinion and judgment until the U.S. Supreme Court rules on Plaintiffs’ forthcoming petition for a writ of certiorari. Pursuant to U.S. Supreme Court Rule 23.3, Plaintiffs must present their stay request

to this Court before seeking a stay of this Court's decision from the U.S. Supreme Court.

ARGUMENT

On December 14, 2012, this Court issued a written opinion reversing the Court of Appeals and holding that N.C. Gen. Stat. § 14-306.4 does not violate the First Amendment. Plaintiffs respect this Court's ruling, but disagree with it. Plaintiffs will promptly seek further review of this important First Amendment issue in the U.S. Supreme Court.

A brief stay of this Court's judgment is appropriate while Plaintiffs seek further appellate review. As explained below, without a stay of this Court's judgment, Plaintiffs' First Amendment rights could be violated, their businesses may permanently close, and thousands of North Carolina employees may lose their jobs. In light of these drastic consequences, the equities strongly favor a brief stay while Plaintiffs present their petition for a writ of certiorari to the U.S. Supreme Court.

First, the stay sought by Plaintiffs truly will be brief. The Supreme Court typically rules on petitions for certiorari two to three weeks after briefing closes. Eugene Gressman *et al.*, *Supreme Court Practice* 517-18 (9th ed. 2007). Thus, the stay sought here is not like a stay pending appeal in an ordinary case, where the judgment could be delayed for a year or more. Moreover, this Court routinely

allows similar stay requests while it considers similar petitions for discretionary review from the lower courts.

Second, stays pending further appellate review are particularly appropriate in First Amendment cases. As this Court has held, “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Harris v. Matthews*, 361 N.C. 265, 270, 643 S.E.2d 566, 569 (2007). The U.S. Supreme Court agrees. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). Here, two lower courts concluded that N.C. Gen. Stat. § 14-306.4 violates the First Amendment. Although this Court held otherwise, the risk that the U.S. Supreme Court might disagree warrants a brief stay to avoid the possible violation of Plaintiffs’ First Amendment rights.

Third, without a stay, Plaintiffs’ licensees and similar internet cafés and business centers may be forced to permanently close. (*See* Pls.’ Ct. of App. Opp. to State’s Stay Mot. Appendix, Hagie Aff. ¶¶ 5-8.) Forcing a business to permanently shut down is a paradigmatic example of irreparable harm. *See A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 407, 302 S.E.2d 754, 763 (1983).

Moreover, the denial of a temporary stay would result in an equally drastic consequence for thousands of North Carolina citizens: unemployment. If Plaintiffs’ business centers and internet cafés close, they will be forced to lay off thousands of their North Carolina employees (*See* Pls.’ Ct. of App. Opp. to State’s

Stay Mot. Appendix, Burns Aff. ¶¶ 4-5; Hagie Aff. ¶¶ 2, 5). Thousands more employees will be let go at business centers and internet cafés operated by third parties not involved in this lawsuit. These North Carolina citizens will become unemployed in one of the most protracted economic downturns in the nation's history.

Fourth, the State will not be harmed if this Court stays its judgment for a brief period until the U.S. Supreme Court rules on Plaintiffs' petition for a writ of certiorari. Plaintiffs' licensees have operated in the State for more than four years and the State will not be harmed by a short stay lasting only a few more months at most. Indeed, for nearly three years, Plaintiffs operated their promotional sweepstakes businesses pursuant to the trial court's preliminary injunction in this case, which prevented the State from taking (or threatening to take) any enforcement action against them. (R pp 127-37.)

During those three years, the State never appealed the preliminary injunction or sought to stay it, declined to take any enforcement action against other sweepstakes operators not subject to the trial court's injunction, and even declined to enforce existing gambling, slot machine, and video gaming laws against businesses operating video poker machines and other plainly illegal devices under the guise of sweepstakes. The State's willingness to tolerate these businesses for years undercuts any argument that it would be harmed by a brief stay while

Plaintiffs seek further review in the U.S. Supreme Court.

Moreover, N.C. Gen. Stat. § 14-306.4 has never taken effect. The trial court held that a critical provision of the law was overbroad before the law's effective date, and the Court of Appeals found the entire law unconstitutional. Because the law has not been enforced in the two years since its enactment, the State will not be harmed by a brief stay preventing its enforcement for a few more months at most.

For these reasons, the Court should allow this motion and petition, and stay its judgment pending a decision on Plaintiffs' petition for a writ of certiorari to the U.S. Supreme Court.¹

CONCLUSION

Plaintiffs respectfully request that the Court grant this motion for temporary stay and petition for a writ of supersedeas and stay its judgment in this case until the U.S. Supreme Court rules on Plaintiffs' petition for a writ of certiorari.

Respectfully submitted, this the 18th day of December, 2012.

Electronically Submitted
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¹ Appellate Rule 23 does not include an express provision permitting this Court to stay its judgment pending further review in the U.S. Supreme Court. However, given the U.S. Supreme Court's instruction that such stay requests be presented to this Court, *see* U.S. Supreme Court Rule 23.3, the Court should exercise its authority under Rule 2 and construe Appellate Rule 23 to permit a temporary stay in these circumstances.

N.C. App. R. 33(b) Certification: I certify that the attorneys listed below have authorized me to list their names on this brief as if they had personally signed.

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VERIFICATION

The undersigned attorney for Plaintiffs, after being duly sworn, says:

The material allegations of the foregoing petition are true to my personal knowledge.



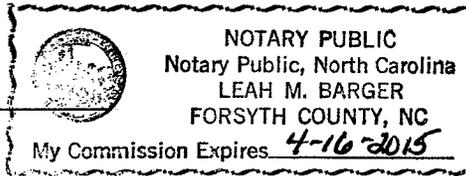
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Forsyth County, North Carolina

Sworn to (or affirmed) and subscribed before me
by Richard S. Gottlieb.

Date: Dec 18, 2012


Leah Barger, Notary Public



My Commission expires: 4-16-2015

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on 18 December 2012 the foregoing **MOTION FOR TEMPORARY STAY AND PETITION FOR A WRIT OF SUPERSEDEAS** was served upon the following by e-mail attachment and first class mail:

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