

ORAL ARGUMENT SCHEDULED OCTOBER 8, 2009

No. 08-5205

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FEDERAL TRADE COMMISSION,
Appellee,

v.

SCOTT TARRIFF, EDWARD MALONEY, and PAUL CAMPANELLI,
Appellants.

On Appeal from the
United States District Court for the District of Columbia

SUPPLEMENTAL BRIEF OF APPELLEE FEDERAL TRADE COMMISSION

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September 30, 2009

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties and intervenors appearing below and in this Court are listed in the supplemental brief of appellants Scott Tarriff, *et al.*, filed with this Court on September 23, 2009.

B. Ruling Under Review

Reference to the ruling at issue appears in the supplemental brief of appellants Scott Tarriff, *et al.*, filed in this matter on September 23, 2009.

C. Related Cases

This case has not been previously before this Court. There are no related cases.

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* Authorities upon which we chiefly rely are marked with asterisks.

ISSUE PRESENTED

Whether, as a result of the fact that appellants have complied with the Commission's subpoenas, this appeal remains justiciable.

ARGUMENT

THIS APPEAL IS JUSTICIABLE BECAUSE, IF APPELLANTS PREVAIL, THERE IS "EFFECTUAL RELIEF" THAT THIS COURT MAY ORDER

As the Supreme Court explained in *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992), "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief,' the appeal must be dismissed." In this case, appellants resisted the Commission's investigative subpoenas *ad testificandum* because they did not want their testimony to be recorded by sound and visual means ("videotape"). The Commission initiated this action in the district court, and after the district court ordered enforcement, all three appellants complied: they were deposed, and their testimony was videotaped. Appellants have continued to press their case on appeal. They argue that, if they prevail, this Court could order the destruction of the videotapes. Because such relief would be "effectual," this case remains justiciable.

In *Church of Scientology*, the IRS employed compulsory process to obtain tape recordings that belonged to the Church, but that were in the possession of a third

party. After the district court ordered enforcement, the third party gave the tapes to the IRS. The Ninth Circuit then held that, because the tapes had already been turned over, the Church's appeal was moot. The Supreme Court disagreed. The Court recognized that, once the IRS obtained the tapes, the parties could not be returned to the *status quo ante*: it would not be possible to erase the knowledge that IRS agents had obtained as a result of examining the tapes. 506 U.S. at 12. However, the Court held that "a court can fashion *some* form of meaningful relief in circumstances such as these." *Id.* at 12-13 (emphasis in original). Parties have a possessory interest in their own property, and if the district court erred in enforcing the compulsory process, a reviewing court could still order that the property be returned. *Id.* at 13. The Court further observed that, even if the government had already returned originals to the owner and retained only copies, the retention of the copies could constitute an affront to the privacy of the owner's papers and effects. Thus, a court could "effectuate a partial remedy by ordering the Government to destroy or return any and all copies it may have in its possession." *Id.*

In this case, appellants contend that the Commission was not entitled to videotape their depositions. A videotape records demeanor evidence that cannot be preserved through stenographic transcription. Appellants essentially argue that the Commission is not entitled to obtain this sort of demeanor evidence, and is, therefore,

not entitled to retain the videotapes that it made. Thus, they urge this Court to order the Commission to destroy the videotapes. Brief for Appellants Scott Tarriff, et al., at 58. The relief that appellants request, destruction of the videotapes, would constitute “some meaningful relief” for the “wrong” that appellants believe was done to them. This is sufficient to render their appeal justiciable.

This case is similar to *United States v. Tanoue*, 94 F.3d 1342 (9th Cir. 1996). In that case, the IRS served compulsory process on Tanoue to obtain handwriting exemplars. Tanoue refused to comply, contending that his handwriting was not relevant to the IRS’s investigation, and that the compulsory process violated his rights under the Fourth and Fifth Amendments. After the district court enforced the process, Tanoue complied, but he pursued his arguments on appeal. Before addressing the merits of Tanoue’s arguments, the court held that his appeal was not moot. *Id.* at 1344. The Ninth Circuit relied on *Church of Scientology*, and held that, if Tanoue were to prevail in his arguments, the IRS could be ordered to return the exemplars and to destroy any copies it had made. *Id.* at 1344. This, according to the court, would constitute “meaningful relief” and precluded a holding of mootness. Thus, the government’s continued retention of Tanoue’s handwriting evidence, which, according to Tanoue, was evidence that the government was never entitled to obtain, rendered his appeal justiciable. Here, the Commission retains evidence of appellants’

demeanor during their depositions. Just as in *Tanoue*, appellants contend that the Commission was not entitled to obtain that evidence. Because the destruction of that evidence would provide appellants with some “meaningful relief,” their appeal is justiciable.

As appellants note, *Office of Thrift Supervision v. Dobbs*, 931 F.3d 956 (D.C. Cir. 1991), is not to the contrary. In that case, OTS subpoenaed Dobbs to testify in Fair Oaks, California, but subsequently changed the location of his deposition to San Francisco. Dobbs did not object to testifying, but complained instead about the change in location. After the district court entered an enforcement order, Dobbs was deposed in San Francisco. Nonetheless, he pursued his appeal, and this Court held that the appeal was moot. To the extent that Dobbs did not want to go to San Francisco, there was no relief that this Court could grant him once he had already traveled there. In fact, Dobbs asked that this Court to seal the transcript of his testimony against any future use. Not only was that relief unrelated to the wrong Dobbs claimed to have suffered, but also, as this Court noted, “Dobbs is seeking this Court’s protection from future OTS action that may never occur.” 931 F.2d at 958. Such relief should be requested only if OTS attempted, in the future, to use the testimony. *Id.*

Dobbs is instructive for the present case, but only to a degree. As we have shown previously, any challenge by appellants to hypothetical future uses of their videotaped testimony is premature, and their attempt to base the present appeal on such concerns is improper. Brief for Appellee Federal Trade Commission at 23-27. *Dobbs* supports our position on this point and, if that were the only argument appellants advanced, would also support a holding of mootness.

But in this case, appellants make arguments not made in *Dobbs*, and, as a result, *Dobbs*' mootness holding does not apply. Unlike *Dobbs*, appellants do not simply object to the location of their testimony nor do they ask only for a bar on future use of that testimony. Rather, they argue that the Commission has gained possession of a type of evidence it was not entitled to obtain, and they seek to remedy that continued possession by an order requiring the destruction videotapes. This case is, accordingly, akin to *Church of Scientology* rather than to *Dobbs*.

Because, in the unlikely event that appellants prevail on this appeal, the destruction of the videotapes would provide them with some "effectual relief," their appeal has not been rendered moot, and this appeal is justiciable.

CONCLUSION

For the foregoing reasons, this appeal is justiciable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 30, 2009, I electronically filed the Supplemental Brief of Appellee Federal Trade Commission with the Clerk of this Court. On that same day, I also filed eight copies of the same document with the Clerk, and I served two copies on appellants by express overnight delivery addressed to:

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