U.S. Department of Justice

United States Attorney
District of New Jersey
Civil Division

CRAIG CARPENITO
UNITED STATES ATTORNEY

David Bober
Assistant United States Attorney

402 E. State St., Room 430
Trenton, NJ 08608
david.bober@usdoj.gov

main: (609) 989-2190
direct: (609) 989-0564
fax: (609) 989-2360

February 7, 2018

Hon. Peter G. Sheridan
United States District Judge
United States Courthouse
402 E. State St.
Trenton, NJ 08608

Re: *LaVergne v. Bryson, et al.*,
No. 11-7117 (PGS)

Dear Judge Sheridan:

I write respectfully in response to the "motion to vacate and dismiss" (Docket No. 6) filed by plaintiff Eugene LaVergne on November 13, 2017. In the motion, LaVergne asks the Court to set aside and vacate a judgment that it entered more than six years ago, in December 2011. The Court has scheduled oral argument for March 6, 2018, at 2:00 p.m. For the reasons set forth below, the Court should deny the motion in all respects.

A. Background

This case arises from a complaint that Mr. Lavergne filed in 2011, in which he alleged that the method of congressional apportionment under 2 U.S.C. § 2a violates several provisions of the Constitution, including separation of powers, the nondelegation doctrine, the principle of "one person, one vote," and "Article the First," an amendment to the Constitution that was proposed in 1789, which LaVergne claims was ratified and is part of the Constitution. According to Mr. LaVergne, the Constitution, as amended by "Article the First," requires an apportionment plan of one member of Congress per 50,000 citizens, which would increase the House of Representatives from its current size of 435 to more than 6,000. *See generally LaVergne v. Bryson*, 497 F. App'x 219 (3d Cir. 2012). LaVergne asked the Court to convene a three-judge panel to consider his claims. On December 16, 2011, this Court, acting *sua sponte*, denied the request for a three-judge panel and dismissed

LaVergne's complaint. *See* Docket No. 3. The Third Circuit affirmed in September 2012, upholding this Court's determination that Lavergne lacked standing and that the issues he raised were non-justiciable and insubstantial. *See LaVergne*, 497 F. App'x at 219.

Nearly five years later, in April 2017, LaVergne and several co-plaintiffs filed another lawsuit in the United States District Court for the District of Columbia, making allegations that are identical to the claims in the 2011 lawsuit before this Court. *See LaVergne v. United States House of Representatives, et al.*, No. 17-793 (D.D.C.). Specifically, LaVergne, in a 171-page complaint, asks the United States District Court for the District of Columbia to convene a three-judge panel, and alleges that "Article the First" has been "fully ratified and fully consummated as a permanent part of the United States Constitution since at least June 21, 1792." *See id.* Docket No. 1 (Complaint) at pages 17, 30.

In response to this complaint, the United States Attorney's Office for the District of Columbia filed a motion to dismiss, arguing, among other things, that LaVergne's claims are foreclosed by the doctrine of collateral estoppel, because LaVergne already litigated them before this Court and lost. Then, in an apparent attempt to escape the collateral-estoppel doctrine, LaVergne filed the Rule 60 motion that is currently pending before this Court, arguing that the Court's six-year-old decision should be vacated because the Court lacked jurisdiction to enter it. Specifically, LaVergne contends that this Court was required, under 28 U.S.C. § 2284, to convene a three-judge panel to consider his claims, and that the Court's dismissal of his complaint, without convening the three-judge panel that LaVergne requested, renders its judgment void.

B. Legal Standards Applicable to Motions Under F.R.C.P. 60

Federal Rule of Civil Procedure 60(b) provides that a court "may relieve a party . . . from a final judgment, order, or proceeding" under certain circumstances. The general purpose of Rule 60(b) is "to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done." *Walsh v. Krantz*, 423 F. App'x 177, 179 (3d Cir. 2011); *see also, e.g.*, *Flagstar Bank, FSB v. Norman*, No. 2012-0048, 2016 WL 910185, at *1 (D.V.I. Mar. 9, 2016). The Rule sets forth six circumstances in which a party may seek relief from judgment:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b)(1)-(6).

Rule 60 motions that are filed for reasons (1), (2), and (3) above must be filed "no later than a year after the entry of the judgment." *See* Fed. R. Civ. P. 60(c). But that time limit does not apply to LaVergne, who purports to file his motion under Rule 60(b)(4). *See* Docket No. 6. Such motions must be filed "within a reasonable time." *See* Fed. R. Civ. P. 60(c). Courts within this Circuit have generally interpreted this language to mean that motions under Rule 60(b)(4) can be brought essentially at any time. *See, e.g.*, *United States v. One Toshiba Color Television*, 213 F.3d 147, 157 (3d Cir. 2000) ("there are no time limits with regards to a challenge to a void judgment because of its status as a nullity"); *United States v. Williams*, No. 02-172-27, 2015 WL 224381, at *3 (E.D. Pa. Jan. 16, 2015) ("some authority states that a motion under Rule 60(b)(4) may be made at any time") (collecting authorities).

C. The Court Should Deny the Motion in All Respects

Although Mr. LaVergne's motion is not untimely, it is meritless. As noted above, Mr. LaVergne relies primarily on 28 U.S.C. § 2284, which, according to Mr. LaVergne, requires the Court to convene a three-judge panel whenever an action is filed challenging the apportionment of congressional districts. But this argument overstates § 2284. While the statute provides that "[a] single judge shall not . . . enter judgment *on the merits*," *see* 28 U.S.C. § 2284(b)(3) (emphasis added), it does not prohibit a single judge from dismissing a lawsuit for lack of jurisdiction, and also contemplates that a single judge is permitted to find that a three-judge panel is not required. *See* 28 U.S.C. § 2284(b)(1) (providing that a single judge "shall . . . immediately notify the chief judge" "*unless he determines that three judges are not required*") (emphasis added). Consistent with this language, the Third Circuit has explained that a single district judge can "decline to convene a three-judge court" if "the plaintiffs' constitutional challenge [is] legally frivolous and insubstantial." *Page v. Bartels*, 248 F.3d 175, 191 (3d Cir. 2001). Put another way, "[a] panel of three judges need not be assembled . . . and a single judge of the district court may issue a ruling on the merits where 'the plaintiffs' constitutional challenge [is] legally frivolous and insubstantial." *Garcia v. 2011 Legislative Reapportionment Comm'n*, 559 F. App'x 128, 131 (3d Cir. 2014) (citing *Page*).

Along the same lines, the Court of Appeals for the District of Columbia has explained:

> [Section 2284's] provisions come into play only when . . . jurisdiction exists. It remains for the judge who is asked to convene a three-judge court to determine whether jurisdiction exists in the District Court; and, if he properly concludes there is no jurisdiction, his power to dismiss the complaint, as well as to deny the motion to convene a three-judge tribunal, is in no way circumscribed by Section 2284.

Lion Mfg. Corp. v. Kennedy, 330 F.2d 833, 840–41 (D.C. Cir. 1964).

This Court dismissed Mr. LaVergne's complaint after finding that he lacked standing and that his claims presented a nonjusticiable political question. *See* Docket No. 3. Nothing in § 2284 prevents a single judge from making those determinations, nor does it prevent a court of appeals from affirming. *See Lion Mfg.*, 330 F.2d at 841 n.14 (noting that courts of appeals may hear jurisdictional determinations by a single judge).

In arguing to the contrary, Mr. LaVergne relies on *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998), in which the D.C. Circuit reversed a district court's dismissal of an apportionment case for failure to convene a three-judge panel. *LaRouche*, however, noted only that a single judge could not "decide the *merits*" of such a claim. 152 F.3d at 981 (emphasis added). It did not reverse the district court for making jurisdictional determinations without convening a three-judge court. Tellingly, the appeals court in *LaRouche* reviewed the district court's jurisdictional determinations, including its determination that the claims at issue presented a nonjusticiable political question, directly under the usual *de novo* standard. *Id.* at 979–81. It was only in the context of the district court's *merits* determinations – not its jurisdictional findings – that the court of appeals held that a three-judge panel was required.

The same is true of the other case that Mr. LaVergne relies upon: *Shapiro v. McManus*, 136 S. Ct. 450 (2015). There, too, the issue was whether the district court properly dismissed the case on the merits (rather than for lack of jurisdiction) before convening a three-judge panel. *Id.* at 455 (noting that "[i]n the present case, however, the District Judge dismissed petitioners' complaint not because he thought he lacked jurisdiction, but because he concluded that the allegations failed to state a claim for relief on the merits"). *Shapiro*, like *LaRouche*, confirmed that a district court may dismiss a case for jurisdictional reasons without convening a three-judge panel if it determines that no substantial federal question exists: "absent a substantial federal question, even a single-judge district court lacks jurisdiction, and '[a] three-judge court is not required where the district court itself lacks jurisdiction of the complaint

or the complaint is not justiciable in the federal courts.'" *Id.* (quoting *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 100 (1974)).

These authorities make clear that this Court was not required to convene a three-judge panel to consider Mr. LaVergne's claims. Rather, the Court appropriately declined to convene such a panel after finding that the claims were wholly insubstantial and that LaVergne lacked standing. This course of action is contemplated by the text of § 2284, was affirmed by the Third Circuit in this case nearly six years ago, and was confirmed by the Supreme Court in *Shapiro*. There is thus no basis to vacate this Court's 2011 decision, and the Court should deny Mr. LaVergne's current motion in all respects.

I thank the Court for its consideration of this matter.

Respectfully submitted,

CRAIG CARPENITO
United States Attorney

By: s/ David Bober
DAVID BOBER
Assistant U.S. Attorney

cc: Eugene Martin LaVergne
543 Cedar Ave.
West Long Branch, NJ 07764