No. 21-2180(L)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PAUL GOLDMAN,
Plaintiff-Appellant,

v.

ROBERT H. BRINK, in his official capacity, *et. al.*,
Defendants-Appellees.

On Appeal from the United States District Court for
the Eastern District of Virginia

SUPPLEMENTAL BRIEF OF APPELLANT

PAUL GOLDMAN
Pro Se Appellant
P.O. Box 17033
Richmond, Virginia 23226

July 10, 2022

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

INTRODUCTION

District Judge David Novak: "You know, what I write now is going to be used for future elections." *Thomas v. Beals, et al*. - 06/13/2022 Hearing Transcript, Page 13.

Judge Novak made this declaration one week after the lower court opinion in the instant matter, in a related but still pending case challenging the electoral districts used in the 2021 House of Delegates election. Substantively therefore, he seemingly agrees with the potential "serious jolt" to the principle of equal representation articulated in *Reynolds v. Sims*, 377 U.S. 522 (1964) based on his view of *Gill v. Whitford*, 138 S. Ct. 1916 (1916) as already discussed in Appellant's Motion for an Expedited Hearing filed in this instance matter. (Appellant has already addressed other comments made by Judge Novak from the bench at this June 13, 2022, hearing).

Appellant highlights this comment since, while it may not go directly to the law of appellate jurisdiction, he reads *Dobbs v. Jackson*, 597 U.S. ____ (2022) for this proposition: to wit, if a right is not clearly spelled out in the constitution, then the Congress will may need to pass legislation to ensure that the Courts will recognize that right. In that connection, *MTM Inc. v. Baxley, Attorney General of Alabama*, 420 U.S. 799 (1975) seems to say that the appeal in the instant matter is properly heard in Richmond, Virginia before the 4th Circuit panel previously

assembled and sitting at the hearing last March. Surely the Congress knew the substantial additional hardship, not to mention the cost and time delay if this appeal had to be made in Washington, as opposed to here in Richmond. Appellant, like *MTM*, *supra*, believes the congressional policy discussed therein shows the Congress understood this relative hardship on citizens, on the Courts in question, and thus logically decided to give the Appellant and those similarly situated what amounts to a right to have this appeal heard in the more local venue, as this would the most likely to provide the fastest and most efficient resolution.

The instant matter seems provide the perfect example. The 4th Circuit has already held a hearing on the case. The Panel pointed out that the government had written two briefs addressing the standing issue. The Court remanded the matter back to district court to deal solely with standing. Requiring the U.S. Supreme Court, with its heavy workload, to start anew when a perfectly qualified panel of three appellate jurists has been wrangling with the matter since last year, violates basic congressional policy on the efficient use of the High Court's time and resources.

As for the second jurisdictional issue, the government's claim of an 11th Amendment immunity had been rejected by this Circuit nearly six decades ago in *Mann v. Davis, infra.* The government failed to point this out to the Court or cite any contrary authority. The 4th Circuit itself noted the government's initial 11th

Amendment claim had morphed into a standing challenge. But the 11th Amendment immunity is not based on standing, as this concept comes from a different part of the U.S. Constitution.

Accordingly, irrespective of the Court's decision on its jurisdiction over an appeal of the June 6, 2022, opinion, the Court should dismiss the sovereign immunity appeal for the reasons stated in the Appellant's Motion for Summary Judgement filed last year on that matter.

JURISDICITON

When ordering the remand, the Court specifically retained jurisdiction. Thus, the matter is correctly before the Court at this time for a ruling.

ISSUES PRESENTED

(1) Does this Court have appellate jurisdiction to review the June 6, 2022, three-judge court opinion?

(2) If this Court cannot review the June 6, 2022, opinion, then how should it proceed as regards the pending appeal from the October 12, 2021, single judge decision?

STATEMENT

At this juncture, restating the long procedural history is useful as it supports Appellant's view on the congressional policy cited herein. *MTM, supra*.

1. Plaintiff first filed his complaint on June 28, 2021. ECF # 1.

2. A similar but yet more complicated matter took two weeks to resolve, from start to finish. *Cosner v. Dalton,* 522 F. Supp. 350 (E.D. Va. 1981).

3. At all times, defendants had the right, if not the obligation, to use the special power given the Virginia Board of Elections by state law to seek the opinion of the Supreme Court of Virginia on the constitutionality of holding the 2021 House of Delegates election in clear violation of Article II, Section 6 of the Virginia Constitution along with the 14th Amendment of the U.S. Constitution as found by the controlling federal case at the time. Id.

4. That state leaders intentionally failed to do their jobs was also discussed at the October 12, 2021, hearing, with the government lawyers saying in effect you can't make us do it if we don't want to. Section 24.2-103(F), Code of Virginia.

5. Plaintiff filed a Motion for an expedited hearing on September 10, 2021, citing the upcoming November elections for the House of Delegates. ECF # 19.

6. The Motion was denied on September 14, 2021. ECF # 14.

7. On October 12, 2021, Judge Novak held the first hearing in the matter. ECF # 43 (Transcript).

8. On this same date, he issued his opinion as a single district judge.

9. He denied the state's 11th Amendment immunity claim as Judge Albert Bryan, Sr. had done 59 years before. *Mann, et al, v. Davis, et al,* 213 F. Supp. 577, 579 (1962), *aff'd* on the merits, remanded for further proceedings, *Davis, Secretary, State Board of Elections, et al v. Mann, et al,* 377 U. 678, 680 (Defendant Davis was the head of the Virginia State Board of Elections).

10. On this same October 12th date, Judge Novak issued an order explaining how the court would proceed on standing. ECF # 41.

11. He allowed 17 days for intervenors, since he knew there would be citizens seeking to intervene. JA 091.

12. "I suspect Mr. Goldman…has friends in other districts…where the population is greatly increased, whether it's in Hampton Roads or in Northern Virginia" he declared. Id.

13. Judge Novak later again addressed this matter by saying "Mr. Goldman, if you find your buddies who are going to want to intervene…I'm giving a deadline also of the 29th for anybody to intervene…" JA 115.

14. In that connection, Judge Novak had previously asked Plaintiff, "What district gained the most in population? Was it Loudoun?" JA 091.

15. He wasn't guessing as Loudoun's explosive decade growth had been well known, so Plaintiff told him the "Eighty-seventh" centered there. Id.

16. "So my point" said Judge Novak "is this…I suspect you have another buddy that wants to get with standing." Id.

17. Had intervenors actually been allowed, then as Judge Novak pointed out, he expected those joining would come from the most or nearly the most malapportioned districts.

18. Most importantly, since Plaintiff filed far in advance of the 2021 election, the intervenors would benefit from my avoiding key points most recently discussed by the Supreme Court in *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022).

19. Indeed, the state's actions on October 12, 2021, are instructive in that regard.

20. Their explanation for not challenging my standing in their Motion to Dismiss was "the Eleventh Amendment was dispositive and is immediately appealable." JA 108.

21. Judge Novak had said at the October 12 hearing, that on "the 8th, November 8th…we're going to have oral argument on standing." JA 115.

22. The government knew they were going to lose if intervenors were allowed, and thus they dared not let the Scheduling Order go into effect.

23. Moreover, the cost of filing an individual lawsuit is significant.

24. The fee is $505.

25. The fee to have the Complaints served can be several hundreds of dollars, as it must be served on all the Defendants, not the Attorney General.

26. And finally: very few Virginians are able to file a suit *pro se*.

27. The *pro bono* bar on these types of matters is basically an ideal of the past.

28. Intervention, in comparison, has no such monetary expense.

29. To put this into perspective: the famed case of *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) ruled the state's $1.50 poll tax put an unconstitutional burden on the exercise of the right to vote.

30. Once Judge Novak had explained the Scheduling Order steps, the state's top lawyer immediately asked: "Can we…ask that it include the ruling I understand you already to have made; that if we do file a notice of appeal, that this entire schedule is stayed?" JA 117.

31. To which Judge Novak replied, "Yeah." And the state's top lawyer said: "Thank you." Id.

32. Judge Novak then says: "I'm going to change my order…I have a draft order. I'm going to have to modify it. But I want to keep the trains moving on this. But, yeah, if you file the notice of appeal, I'll immediately stay everything and that will be that." JA 118.

33. He added, however, "what I don't want you [the government] to do is file a notice of appeal just to stall, and then withdraw the notice of appeal when it comes time to briefing and then I'm back stuck with a mess." Id.

34. "There are people that would like to intervene" Plaintiff pointed out. JA 120.

35. Judge Novak replied: "I'm not inviting them, but I kind of know the reality of the way this is going to work." Id.

36. Indeed, right now, there are three other individuals who have filed a suit since the opinion dismissing *Goldman v. Brink*, all of whom were ready to intervene prior to the June 6, 2022, opinion. See *Thomas v. Beals*, *supra*.

37. On October 13, 2021, acting on Judge Novak's request, Chief Judge Gregory convened a three-judge panel. ECF # 44.

38. On October 18, 2021, the state noticed an appeal. ECF # 47.

39. On October 20, 2021, the three-judge court, acting through Judge Novak, issued an order making it impossible for anyone to intervene. ECF # 49.

40. On November 30, 2021, Plaintiff moved for a reconsideration of the denial of his motion for a temporary injunction to block defendant members of the Virginia Board of Elections from issuing two-year certificates of election on the grounds he had shown they had been issued in violation of state law. ECF # 56.

41. On December 6, 2021, the Motion was denied. ECF # 57.

42. On March 18, 2022, the three-judge court called a status hearing to address the remand.

43. On March 21, 2022, the parties were asked to address several issues, one being standing. ECF # 69.

44. Judge Novak, speaking for the three-judge court, said the remand order prohibited allowing any intervenors in the case. Id.

45. The Memorandum Opinion was issued on June 6, 2022.

SUMMARY OF ARGUMENT

The three-judge court statute "is a technical one to be narrowly construed." *Bailey v. Patterson*, 369 U.S. 31,33 (1962)(citation omitted). Since *Baker v. Carr*, 369 U.S. 186 (1962), plaintiffs having standing are entitled to a decision on the merits, and this decision is reviewable directly by the U.S. Supreme Court. As the lower court opinion was not on the merits, *MTM, supra* and congressional policy says the 4th Circuit is the appropriate venue for an appeal, not the U. S. Supreme Court.

ARGUMENT

I. *MTM v. BAXLEY* IS DISPOSITIVE

Since standing is a matter, as Judge Novak has said, that could be handled by a single judge court, then appeal on this issue goes to the 4th Circuit irrespective of whether a three-judge court chooses to address the matter. JA 081. As indicated above, the policy basis for this jurisdictional outcome is generally discussed in *MTM.* The analysis is dispositive.

II. SOVERIGN IMMUNITY APPEAL IS NOT WELL PLED

As discussed *supra*, the 11th Amendment immunity, if applicable, is not rooted in a lack of Article II standing analysis. Rather, it is rooted solely in the 11th Amendment shielding certain state officials from being held accountable in federal court under certain circumstances. Or put another way: if there were no 11th Amendment, there could still be a standing claim based on this other part of the original U.S. Constitution. Thus the 11th Amendment was added to provide a different claim protecting state governments from suit in federal court.

In fact, Judge Novak's claim of an appalling delay tactic in this matter makes little legal or factual sense if the interlocutory appeal is well pled on sovereign immunity. It was always a stalling tactic, not a credible legal argument, as Judge Novak discussed at the October 12 hearing. JA 120.

Accordingly, the sovereign immunity appeal should be dismissed as contrary to settled law in this Circuit irrespective of whether the Court says it will hear the standing appeal or not.

CONCLUSION

The Court (1) has jurisdiction to hear the standing appeal, (2) the procedural history of this case is a prime example of why congressional policy would want to give a citizen the right to have his or her appeal locally as opposed to the U.S.

Supreme Court, and (3) the sovereign immunity appeal should be rejected in 2022 for the same reason it was rejected in a redistricting case in 1962.

Respectfully submitted,
By: */s/ Paul Goldman*

Paul Goldman
Pro se
P.O. Box 17033
Richmond, Virginia 23221
804.833.6313
Goldmanusa@aol.com

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced front, and it contains less than 4,000 words, excluding the parts exempted by Rule (f).

/s/ Paul Goldman

Paul Goldman
Pro se
P.O. Box 17033
Richmond, Virginia 23221
804.833.6313
Goldmanusa@aol.com

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2022, this brief was sent electronically to the Clerk of the United States Court of Appeals for the 4th Circuit Court. A true copy of this Brief was also sent electronically to the following attorneys at an agreed upon address:

Andrew Ferguson

Steven Popps

/s/ Paul Goldman

Paul Goldman
Pro se
P.O. Box 17033
Richmond, Virginia 23221
804.833.6313
Goldmanusa@aol.com