No. 21-2180

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PAUL GOLDMAN,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

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

APPELLANTS' RESPONSE TO APPELLEE'S MOTION TO DISMISS THE APPEAL

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INTRODUCTION

Appellee Paul Goldman has filed in this Court a motion to dismiss Appellant Election Officials' interlocutory appeal of the district court's order denying their motion to dismiss the complaint as barred by sovereign immunity. The Court thereafter ordered the Election Officials to respond to that motion.

FACTUAL BACKGROUND

On June 28, 2021, Appellee Paul Goldman filed suit in the Eastern District of Virginia alleging that various state officials violated the U.S. and Virginia Constitutions when the Commonwealth failed to hold the 2021 Virginia House of Delegates elections on the basis of 2020 census data—which the Commonwealth did not possess until after the electoral process was underway. *See* Joint Appendix ("JA") 4. Appellee named as defendants then-Governor Ralph Northam, the Virginia State Board of Elections, and various Elections Officials in their official capacities—Christopher Piper (Commissioner of the Virginia Department of Elections); Jamilah D. LeCruise (Secretary of the State Board of Elections); John O'Bannon (Vice Chair of the State Board of Elections);

and Robert Brink (Chairman of the State Board of Elections).[1] *See* JA 1–4.

Goldman twice amended his complaint, and the defendants moved to dismiss his second amended complaint as barred by sovereign immunity. A single-judge district court—presided over by the Honorable David J. Novak—granted the motion as to the Governor and the Virginia State Board of Elections. JA 59, 61, 64. Likewise, the district court dismissed Goldman's claim under the Virginia Constitution as barred by sovereign immunity. JA 67–70; *see also* JA 84. But the district court denied the motion as to the Election Officials, concluding that the *Ex parte Young* exception to sovereign immunity permitted this claim to go forward. JA 65–67.

Judge Novak held a hearing on October 12, 2021 where he announced his ruling on the Election Officials' motion to dismiss and informed the parties that a memorandum opinion and order would issue on the same day. JA 83–84. He explained that 28 U.S.C. § 2284 might eventually require the convening of a three-judge district court to address

[1] Appellee had also sued Jessica Bowman in her official capacity as Deputy Commissioner of the State Board of Elections, but she was terminated from the suit in September 2021. JA 3.

the merits of Goldman's malapportionment claim, and he informed the parties that he had "already alerted Chief Judge Gregory . . . [that] we might need a [three-judge] panel." JA 81–82. He did not indicate when he had made that request to Chief Judge Gregory. He informed the parties, however, that he had authority under section 2284 to decide "jurisdictional" issues—including sovereign immunity and standing—sitting as a single-judge district court. JA 83, 112. He told the parties that he would need to decide whether Goldman had standing to press his federal claim "before we get to the three-judge panel because standing is jurisdictional." JA 90. He elaborated that "even though I've got Judge Gregory on notice that we may need a three-judge panel, I'm going to deal with standing first." *Ibid.*

He described standing as a "big issue" for Goldman, JA 81, and expressed his view that, under *Gill v. Whitford*, 138 S. Ct. 1916 (2018), Goldman would have to demonstrate that he suffered an "individual harm to [him] in [his] particular district," JA 114, by demonstrating "that his individual vote is underrepresented for malapportionment," JA 88; *see also, e.g.*, JA 92. Judge Novak expressed doubt that Goldman could "demonstrate" that he had suffered such an individual injury for

purposes of standing because his district was "overrepresented" based on 2021 census data. JA 88–89.

After the hearing, Judge Novak ordered the Election Officials to notify the court by October 18, 2021, whether they intended to appeal his ruling. JA 71. Judge Novak further ordered that, if the Election Officials filed a notice of appeal, all further proceedings would be stayed pending the resolution of that appeal. JA 71–72. Finally, he established a schedule for the parties to brief the unresolved Article III standing questions and ordered Goldman to address whether Judge Novak could resolve the standing questions sitting as a one-judge district court, or whether a three-judge district court had to resolve those questions. *Ibid.*

Although Judge Novak told the parties at the hearing that he intended to decide standing before a three-judge district court was convened, Chief Judge Gregory issued an order on the day of the hearing stating that "[Judge] Novak has requested appointment of a three-judge district court," and appointing Circuit Judge Thacker and Senior District Judge Jackson to sit with Judge Novak as a three-judge court. JA 123–24.

The Election Officials noticed this appeal on October 18, 2021, JA 125, and Judge Novak stayed the case pending the disposition of the appeal, JA 128.

ARGUMENT

1. Section 2284 provides that "[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of . . . the apportionment of any statewide legislative body." 28 U.S.C. § 2284(a). It provides, however, that a single district judge has the power first to "determine[]" whether "three judges are not required," and to "conduct all proceedings except the trial" even in cases where a three-judge panel is required. *Id.* § 2284(b)(1), (3).

A three-judge district court is "not required" where the federal question is "insubstantial." *Shapiro v. McManus*, 577 U.S. 39, 44 (2015). "Insubstantiality in the claim may appear because of the absence of federal jurisdiction, lack of substantive merit in the constitutional claim, or because injunctive relief is otherwise unavailable." *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 F.2d 606, 611 (4th Cir. 1970) (footnotes omitted); *see also Simkins v. Gressette*, 631 F.2d 287, 295 (4th Cir. 1980) (same). A single district

judge therefore has the "power to dismiss a complaint for want of general subject-matter jurisdiction, without inquiry into the additional requisites" for a three-judge district court. *Gonzalez v. Automatic Employee Credit Union*, 419 U.S. 90, 96 n.14 (1974).[2]

"Sovereign immunity is 'jurisdictional in nature.'" *Bullock v. Napolitano*, 666 F.3d 281, 283 (4th Cir. 2012) (quoting *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)). Judge Novak therefore had the power under section 2284 to decide the sovereign immunity question presented in this appeal without convening a three-judge court. *See NAACP v. Merrill*, 939 F.3d 470, 475 (2d Cir. 2019). An order denying a sovereign immunity defense is a collateral order that may be immediately appealed. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993). And courts have recognized that "the court of appeals has jurisdiction when a single judge has only taken action he could

[2] In a filing dated February 27, 2022, and styled as a "Motion to Authorize," Goldman argues that the Election Officials have improperly attacked his merits claims as "insubstantial" and "frivolous." Dkt. 46 ¶¶ 16, 17, 19. At this stage of the litigation, the Election Officials contend that Goldman's claim is "insubstantial" because it suffers from jurisdictional defects—including a lack of Article III standing. *See* Br. of Appellants 20–21. It is well established that claims brought under section 2284 are "insubstantial" when federal courts lack jurisdiction to decide them. *See, e.g.*, *McManus*, 577 U.S., at 44–45; *Simkins*, 631 F.2d at 295. The Election Officials have not addressed the merits of Goldman's claims—much less argued that they are "'wholly insubstantial or frivolous'" under section 2284—as addressing the merits would be premature at this stage of the litigation given the jurisdictional defects. *McManus*, 577 U.S. at 45 (quoting *Bell v. Hood*, 327 U.S. 678, 682–83 (1983)).

properly take," even where a three-judge court is ultimately required to resolve the underlying merits claims. *Stone v. Philbrook*, 528 F.2d 1084, 1089 (2d Cir. 1975).

Although standing was not resolved below, it is also properly the subject of this interlocutory appeal. "[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998) (brackets in original) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997)). An appellate court is "bound" to "answer" the standing question "for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Id.* at 94 (quoting *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)); *see also Benham v. City of Charlotte, N.C.*, 635 F.3d 129, 134 (4th Cir. 2011) ("When a question of standing is apparent, but was not raised or addressed in the lower court, it is our responsibility to raise and decide the issue sua sponte."); *accord Merrill*, 939 F.3d at 474.

This obligation to determine standing applies in interlocutory appeals, just as in any other setting. *See Williams v. Hansen*, 326 F.3d

569, 574 n.4 (4th Cir. 2003) (holding that, on an interlocutory appeal of a denial of qualified immunity, the appellate court is "obliged to take notice if plaintiffs lacked standing as the absence of standing would be a jurisdictional defect"); *District of Columbia v. Trump*, 930 F.3d 209, 215 (4th Cir. 2019) (dismissing interlocutory appeal of denial of absolute immunity for lack of standing below), *vacated on other grounds*, 959 F.3d 126 (4th Cir. 2020); *see also, e.g.*, *In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig.*, 488 F.3d 112, 122 (2d Cir. 2007) (obligation to determine jurisdiction under *Steel Co.* "is not extinguished because an appeal is taken on an interlocutory basis and not from a final judgment"); *Whole Woman's Health v. Jackson*, 13 F.4th 434, 446 (5th Cir. 2021) ("[O]n an interlocutory appeal reviewing the denial of Eleventh Amendment immunity, 'we may first determine whether there is federal subject matter jurisdiction over the underlying case.'" (quoting *Hospitality House, Inc. v. Gilbert*, 298 F.3d 424, 429 (5th Cir. 2002))); *Wong v. United States*, 373 F.3d 952, 960–61 (9th Cir. 2004) (similar). Judicial economy favors resolving the standing question in this interlocutory appeal rather than reserving the question for a later stage

of the litigation. *See Lamar Advertising of Penn, LLC v. Town of Orchard Park, N.Y.*, 356 F.3d 365, 372 (2d Cir. 2004).

2. Although the district court had jurisdiction to decide the sovereign-immunity question and the issues presented are properly the subjects of an interlocutory appeal to this Court, Goldman argues that this Court never properly acquired appellate jurisdiction due to the fluke of timing of when the three-judge district court was convened. He contends that section 2284(b)(3)'s provision that "[a]ny action of a single judge may be reviewed by the full court any time before final judgment" ousts this Court of jurisdiction to review an order of a single-judge district court after a three-judge district court has been convened. Because the Election Officials filed their notice of appeal after Chief Judge Gregory convened the three-judge district court on October 12, Goldman reasons that the three-judge district court alone has authority to review Judge Novak's order. Mot. 4.

Neither of the cases on which Goldman relies for this proposition so holds. In *Hicks v. Pleasure House, Inc.*, a single-judge district court issued a temporary restraining order against enforcement of a state statute pursuant to a previous version of 28 U.S.C. § 2284(b)(3). 404 U.S.

1, 1–2 (1971) (per curiam). Such an order remained "in force only until the hearing and determination by the full court." 28 U.S.C. § 2284(3) (1970). The defendant sought an interlocutory appeal at the Supreme Court pursuant to its jurisdiction to hear direct appeals from three-judge district courts. *See* 28 U.S.C. § 1253. The Court dismissed the appeal for want of jurisdiction, on the ground that section 1253 strictly limits the Supreme Court's direct appellate jurisdiction to cases actually decided by a three-judge district court. *Hicks*, 404 U.S. at 2.

In dicta, the *Hicks* Court noted that the courts of appeals have power to review some orders issued by a single-judge district court in a section 2284(b)(3) case. *Id.* at 3. It noted in passing that "if no such appeal is taken before the three-judge court is convened, application must be made to that court for vacation or modification of the temporary restraining order pending a final determination on the merits." *Id.* (footnote omitted).

Hicks does not resolve the jurisdictional question in this case for two reasons. First, the order at issue in *Hicks* was a temporary restraining order. As with the previous version of the statute, section 2284(b)(3) expressly contemplates that review of temporary restraining

orders issued by a one-judge district judge in a section 2284 case would be carried out by the three-judge district court. *See* 28 U.S.C. § 2284(b)(3) (A single-judge temporary restraining order "shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction."). Threshold jurisdictional rulings by a single judge, however, are not generally reviewed by the three-judge district court; they are reviewed by the court of appeals. *See Stone*, 528 F.2d at 1089.

Second, *Hicks* concerned the jurisdiction of the Supreme Court to review orders of a one-judge district court, not the jurisdiction of the court of appeals. The question whether the court of appeals would be ousted of jurisdiction if a three-judge district court were convened after the order under review were entered was not before the Court in *Hicks*, and the Court therefore did not rule on it.

Goldman's other case—*Associated Theatres, Inc. v. Wade*—similarly concerns an appeal of preliminary injunctive relief entered by a one-judge district court. 487 F.2d 1221 (5th Cir. 1973). In that case, the chief judge of the circuit convened a three-judge district court to decide the underlying constitutional claim. *Id.* at 1222–23. Two weeks later, a

one-judge district court preliminarily enjoined the enforcement of a state-court order. *Ibid.* The Fifth Circuit held that it lacked jurisdiction to review the action of the single district judge because the three-judge court had been convened. *Id.* at 1223.

As in *Hicks*, the order at issue in *Wade* was a preliminary injunctive order that the statute expressly contemplated would be reviewed by the three-judge district court. And in *Wade*, the order under review was issued *after* the three-judge court had been convened. *Wade* therefore did not consider whether a court of appeals would have jurisdiction to consider a one-judge district court's ruling on a threshold jurisdictional question entered before the three-judge court was convened, and it is not persuasive authority as to that question. Where injunctions are not at issue, other cases have held that "the Court of Appeals did not err in exercising jurisdiction over the appeal," even where a three-judge district court would otherwise be necessary. *Steffel v. Thompson*, 415 U.S. 452, 457 n.7 (1974); *Stone*, 528 F.2d at 1089 (court of appeals has jurisdiction to review order of one-judge district court "when a single judge has only taken action he could properly take").

3. The Election Officials have not discovered a case in this precise procedural posture, where the one-judge district court clearly had authority to enter an order on a threshold jurisdictional question, the court of appeals clearly had jurisdiction to review that order on appeal, and after that order was entered but before the appeal was commenced, a three-judge district court was convened. The Election Officials believe that the authority presented by Goldman does not demonstrate that this Court is ousted of its jurisdiction. In light of the lack of clear precedents in this area, however, to the extent that this Court has doubts regarding its jurisdiction, and given also that the district court has never decided the important standing questions presented by this appeal, the Election Officials recognize that the Court may prefer to remand the case so that the district court may consider the standing issues in the first instance.

The Election Officials note that if the case were remanded, the three-judge district court may have to decide whether it has been properly constituted, or whether Judge Novak sitting alone must first resolve the outstanding jurisdictional questions before the three-judge court is convened. *See, e.g.*, *Getty v. Reed*, 547 F.2d 971, 973 (6th Cir. 1977) (Single district judge "can and should . . . screen the pleading filed

and dismiss it if . . . the District Court has no jurisdiction over the action."); 17A Fed. Prac. & Proc. Juris. § 4235 (3d ed.) ("It has always been clear that the single judge must decide in the first instance whether a case is one in which three judges are required although that question can be reconsidered by the three-judge court after it is convened and it can dissolve itself and return the case to the single judge if it does not think a three-judge court is required by statute." (footnote omitted))

Second, the Election Officials note that a remand would not foreclose the possibility of a future interlocutory appeal on these issues. A three-judge district court in a section 2284 case is "not a different court from the District Court." *Jacobs v. Tawes*, 250 F.2d 611, 614 (4th Cir. 1957); *see also Alabama Legislative Black Caucus v. Alabama*, 988 F. Supp. 2d 1285, 1306 (M.D. Ala. 2013) ("A three-judge district court is still a district court within the ordinary hierarchical structure of the federal judiciary."). Although an order of a three-judge district court "granting or denying . . . an interlocutory or permanent injunction" in a section 2284 case is reviewed directly by the Supreme Court, 28 U.S.C. § 1253, appeals of other orders from three-judge district courts are taken to the court of appeals, *see Gonzalez*, 419 U.S. at 99–100; *Cary v. Wynn*, 439 U.S. 8

(1978) (per curiam) (appeals of declaratory judgments of three-judge district courts lie in court of appeals). The Election Officials could therefore seek this Court's interlocutory review of an order of the three-judge district court denying their sovereign immunity defense.

CONCLUSION

For the foregoing reasons, the Court should deny the motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limitations of Fed. R. App. P. 27(d)(2) because it contains 3,019 words. This brief complies with Rule 27(d)(1)(E) (requiring a response to comply with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6)) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook typeface.

/s/ Andrew N. Ferguson

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CERTIFICATE OF SERVICE

I certify that on March 4, 2022, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. A true copy was also sent, via first class mail and electronically, to:

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