No. 07-41120

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FERNANDO MORALES-GARZA,

Plaintiff-Appellant

v.

SUSANA LORENZO-GIGUERE,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The appellee does not request oral argument. The briefs and the record adequately present the factual and legal arguments raised in this case. Accordingly, appellee does not believe that oral argument will significantly assist the Court's resolution of the issues. If the Court schedules oral argument, however, appellee of course will participate to aid the Court's adjudication of this matter.

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1291.

ISSUE PRESENTED

Whether the district court erred in dismissing appellant's claims that absentee voting procedures that do not use his proposed methods for preserving privacy must be declared invalid under 42 U.S.C. 1983, the Help America Vote Act, 42 U.S.C. 15301 *et seq*. and federal patent law.

STATEMENT OF THE CASE

Appellant Fernando Morales-Garza states that he has developed a method of using personal identification numbers in absentee voting which, he claims, would enhance voter privacy and reduce fraud. Appellant brought suit against Susana Lorenzo-Giguere, an attorney in the Voting Section of the Department of Justice's Civil Rights Division. He alleged that Ms. Lorenzo-Giguere needed the court's guidance on compliance with the Help America Vote Act (HAVA) and asked the court to declare that HAVA "no longer protects" current voting systems because his improved system now exists. (R. 1 at 10; SRE 5).[1] Later, appellant suggested the possibility of liability under 42 U.S.C. 1983 and 28 U.S.C. 1498. The district court dismissed appellant's complaint in its entirety for lack of subject matter jurisdiction.

STATEMENT OF THE FACTS

1. Before initiating this suit, appellant brought a similar action in the Eastern District of Virginia against the United States Election Assistance Commission (EAC) for EAC's refusal to adopt his invention, a system of privately

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[1] "R. _" refers to documents in the district court record, listed by docket number and using the pagination assigned in this Court's electronic record. "RE _" refers to pages in the appellant's Record Excerpts. "SRE _" refers to pages in the appellee's Supplementary Record Excerpts.

selected password numbers ("personal voting codes") that he claims will protect the privacy of absentee voters who submit ballots by mail. *Morales* v. *United States Election Assistance Comm'n*, No. 1:06-46, 2006 U.S. Dist. LEXIS 96797, at *3 (E.D. Va. Aug. 14, 2006); (R. 1 at 6-7; SRE 1-2). In that case, as in this one, Morales-Garza asserted that absentee voting processes violated HAVA, 42 U.S.C. 15301 *et seq*., and that voters needed his system to ensure privacy. (R. 7, Exh. 1 at 48-50; R. 1 at 6; SRE 1, 8-10). He urged the court to "order the EAC to promptly publish *your court's interpretation* on 'privacy'" and asserted that failure to act would bring "national chaos." (R. 7, Exh. 1 at 49; SRE 9) (emphasis in original). The court dismissed Morales-Garza's complaint (styled as a "Petition for Summary Judgment"), finding that Morales-Garza did not properly serve the complaint, that sovereign immunity protected the EAC, and that Morales-Garza did not allege injury sufficient to establish standing. *Morales*, 2006 U.S. Dist. LEXIS 96797, at *4-10; (R. 7, Exh. 2 at 65-76; SRE 11-22). Morales-Garza did not appeal. (R. 7, Exh. 3 at 77-78; SRE 23-24).

2. On March 1, 2007, appellant initiated the present case under HAVA, filing a Petition for Summary Judgment (which the court construed as a complaint) in the Southern District of Texas, claiming that "the by mail voting process of the entire United States" violates HAVA. (R. 1 at 6; SRE 1). He asserted that

appellee Susana Lorenzo-Giguere, an attorney in the Voting Section of the Department of Justice's Civil Rights Division, "desperately needs this Court['s] interpretation of HAVA." (R. 1 at 7; SRE 2). Presumably in order to promote use of his new voting system, he sought a declaratory judgment "that HAVA Section 301(c)(2)," which preserves paper balloting procedures, "no longer protects or excuses paper ballot voting systems" from Section 301(a)(1)(A)'s privacy requirements. (R. 1 at 10; SRE 5). Morales-Garza also claimed that the present system "permits intimidation, inhibition and vote trade" which his procedures presumably could remedy, and that as a result, he suffered a "loss of confidence" in the electoral process. (R. 1 at 6, 10; SRE 1, 5). He did not allege that he had or ever would vote by mail. In a later filing, Morales-Garza suggested possible liability under 28 U.S.C. 1498, which provides a cause of action where the United States uses a patented invention without license, and under 42 U.S.C. 1983. (R. 10 at 105; SRE 25).

Representing its employee Lorenzo-Giguere, the United States filed a motion to dismiss, arguing, *inter alia*, that Morales-Garza lacked standing, that there is no private right of action under HAVA, and that his claims were barred by sovereign immunity and collateral estoppel. (R. 7 at 34; SRE 7).

3. The district court dismissed the case, finding that it lacked subject matter jurisdiction because Morales-Garza's claims were "wholly insubstantial and frivolous." *Morales-Garza* v. *Lorenzo-Giguere*, No. B-07-17, 2007 U.S. Dist. LEXIS 67023, at *9 (S.D. Tex. Sept. 11, 2007) (quoting *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946)); (R. 24 at 164; RE 13). The court concluded that Morales-Garza could not obtain the declaratory relief he sought under HAVA, which does not provide a private right of action. *Morales-Garza*, 2007 U.S. Dist. LEXIS 67023, at *11; (R. 24 at 165; RE 14). Although Morales-Garza may have perceived an "implicit call for a solution to the privacy dilemma," the court stated, that "does not establish that Congress statutorily granted a private cause of action under HAVA." *Morales-Garza*, 2007 U.S. Dist. LEXIS 67023, at *11; (R. 24 at 165; RE 14).

The court further found that Morales-Garza had no cause of action under 42 U.S.C. 1983, because the appropriate remedy for a HAVA violation is suit by the federal government against a State and because Section 1983 does not apply to federal officers. *Morales-Garza*, 2007 U.S. Dist. LEXIS 67023, at *12; (R. 24 at 165-166; RE 14-15). In addition, the court ruled that appellant failed to state a cause of action under 28 U.S.C. 1498, as that statute protects inventions from unlicensed government use, rather than mandating government use of particular

inventions. *Morales-Garza*, 2007 U.S. Dist. LEXIS 67023, at *12-*13; (R. 24 at 166; RE 15).

SUMMARY OF ARGUMENT

Appellant's claims are clearly without merit because the statutes he cites do not permit him to sue an attorney in the Justice Department to seek adoption of his voter privacy protection system. He has identified no violation of HAVA. Nor may he sue a federal official under 42 U.S.C. 1983 for failing properly to enforce HAVA. The federal patent law on which he relies, 28 U.S.C. 1498, does not authorize him to force the federal government to use or purchase his invention. Dismissal was proper because appellant failed to state a cause of action on which he could recover, failed to establish subject matter jurisdiction, and failed to allege concrete harm sufficient to establish standing.

STANDARD OF REVIEW

The Court reviews a district court's dismissal under Federal Rule of Civil Procedure 12(b)(1) *de novo*. *Ramming* v. *United States*, 281 F.3d 158, 161 (5th Cir. 2001), cert. denied, 536 U.S. 960 (2002). The court may affirm on any ground supported by the record, including one not relied on by the district court. *California Gas Transp., Inc.* v. *NLRB*, 507 F.3d 847, 853 (5th Cir. 2007).

ARGUMENT

THE DISTRICT COURT PROPERLY DISMISSED APPELLANT'S CLAIMS

A. Appellant Failed To State A Claim Upon Which Relief Could Be Granted[2]

Under Federal Rule of Civil Procedure 12(b)(6), a complaint should be dismissed if it fails to state a claim upon which relief can be granted. To survive a motion to dismiss, a plaintiff's factual allegations, taken as true, "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955, 1965 (2007). A plaintiff's "obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions," *id.* at 1964-1965 (internal quotations omitted), and "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Fernandez-Montes* v. *Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993).

In this case, appellant did not allege facts that could in any way support claims under HAVA, Section 1983, or federal patent law. First, the declaratory relief that appellant sought is not available under HAVA, which sets standards that

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[2] Although the district court cited only Federal Rule of Civil Procedure 12(b)(1) in dismissing the case, Rule 12(b)(6) and the principles of standing provide clearer bases for disposing of appellant's claims, and this Court may affirm on these grounds. See *California Gas Transp., Inc.*, 507 F.3d at 853.

States and localities must meet in federal elections and provides funding for their implementation. 42 U.S.C. 15481-15483. For example, HAVA requires States to permit provisional balloting, adopt certain voter identification requirements for registrants, maintain registration lists, and use voting equipment that meets federal standards. *Ibid*. Morales-Garza points to nothing in HAVA that gives him the right to have his system of pin numbers implemented in absentee voting.[3] The United States Attorney General is charged with enforcing HAVA, and Morales-Garza raises no claim cognizable under the statute's enforcement provision. 42 U.S.C. 15511. Nothing in HAVA permits Morales-Garza to sue the federal government over its interpretation or enforcement of that statute.[4]

Second, appellant failed to state a cause of action under 42 U.S.C. 1983. That statute provides a federal cause of action against persons acting "under color

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[3] HAVA Section 301(a)(1)(A)(i) requires voters be able "to verify (in a private and independent manner) the votes selected * * * before the ballot is cast and counted." 42 U.S.C. 15481(a)(1)(A).

[4] It is clear that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Community for Creative Non-Violence* v. *Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986) (quoting *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973)). The Supreme Court has recognized that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency''s absolute discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985).

of any statute, ordinance, regulation, custom, or usage, *of any State or Territory or the District of Columbia*." 42 U.S.C. 1983 (emphasis added); see also *Butz* v. *Economou*, 438 U.S. 478, 503 n.30 (1978) (noting the "absence of a statute similar to § 1983 pertaining to federal officials"). It does not apply to federal officers such as appellee, who act under federal law. *Belhomme* v. *Widnall*, 127 F.3d 1214, 1217 (10th Cir. 1997) ("[a] claim under 42 U.S.C. § 1983 fails as a matter of law because this section applies to actions by state and local entities, not to the federal government"), cert. denied, 523 U.S. 1100 (1998).

Third, Morales-Garza failed to state a claim under 28 U.S.C. 1498, which allows owners of patents to recover when an invention "is used or manufactured by or for the United States without license of the owner thereof or lawful right." Owners may seek "reasonable compensation for such use." See *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 664 (1999). In this case, Morales-Garza did not allege that the United States or Ms. Lorenzo-Giguere used his invention without permission. Rather, he claimed they have harmed him by *not* adopting his proposed new plan for absentee voting pin numbers. Section 1498 does not address this "harm."

B. *The District Court Properly Dismissed This Case Under Rule 12(b)(1) And* Bell *v*. Hood

The district court properly dismissed appellant's complaint for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Although a plaintiff's failure to state a cause of action on which relief may be granted ordinarily would not defeat jurisdiction, the Supreme Court has stated that when the claims are "wholly insubstantial and frivolous," the federal court lacks jurisdiction under 28 U.S.C. 1331. See *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946). "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss.* v. *City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998) (citation omitted); see also *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975) (stating that a federal court "has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them" and may address only "a real and substantial controversy admitting of specific relief through a decree of a conclusive character") (internal quotations omitted). As demonstrated above, appellant's claims were utterly frivolous on their face. The district court therefore properly dismissed his complaint under Rule 12(b)(1).

C. Appellant Lacked Standing To Bring This Suit

The district court also lacked subject matter jurisdiction in this case because Morales-Garza suffered no injury conferring standing to bring this suit. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (holding that the "core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III"). Standing requires an injury in fact—a "concrete and particularized" "invasion of a legally protected interest." *Ibid*. "[C]onjectural" or "hypothetical" injury is insufficient. *Ibid*. (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990)). The injury must be "fairly . . . trace[able] to the challenged action of the defendant," and it must be "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id*. at 560-561 (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38-42 (1976)).

In this case, appellant did not allege harm from the government's failure to adopt or endorse his pin number system, beyond his speculative and generalized fears that the present electoral system "permits intimidation, inhibition and vote trade," causing him to "lo[se] confidence" in the electoral process. (R. 1 at 6, 10; SRE 1, 5). He did not claim that he had experienced difficulty voting or that the privacy of his vote had been compromised. He did not even allege that he had or

would cast a vote by mail. Nor did he allege that Ms. Lorenzo-Giguere had directly harmed him, but instead asserted that she "desperately needs this Court['s] interpretation of HAVA * * * to advi[s]e the DOJ." (R. 1 at 7; SRE 2).

Appellant's claims that he would benefit were the court to issue an "order that HAVA Section 301(c)(2) no longer protects or excuses paper ballot voting systems" from HAVA's privacy mandate are purely speculative. (R. 1 at 10; SRE 5). He assumes not only that his invention would remedy the purported violation, but also that it would be adopted by local voting administrators, and that it is patentable in a way that would yield him income. Similarly, Morales-Garza's assertions that "inventors have the right to make a living by selling their inventions" and that he has "the right to get attention" (R. 10 at 108; SRE 28), do not give rise to a "personal stake" in changing absentee ballot procedures sufficient to confer standing. *Raines* v. *Byrd*, 521 U.S. 811, 819 (1997).

Because appellant failed to state a claim upon which relief could be granted, raised legal claims that were so frivolous as to deprive the district court of subject matter jurisdiction, and did not show injury sufficient to establish standing, the district court's dismissal was proper.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment dismissing this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Microsoft Word and WordPerfect and contains no more than 3,000 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

_____

APRIL J. ANDERSON
Attorney

Date: March 12, 2008

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2008, one copy of the foregoing BRIEF FOR THE APPELLEE was served by first class mail, postage prepaid, upon the following pro se appellant:

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