Fourth Circuit Court of Appeals
Richmond, Virginia

Dr. Duane Thresher	)	Appeal of
Plaintiff	)	U.S. District Court,
	)	Eastern District of Virginia,
v.	)	Richmond Division,
	)	Judge David J. Novak,
Governor of Virginia Ralph Northam	)	Case Number 3:20cv307.
Defendant	)	

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Appeal

My, plaintiff Dr. Duane Thresher's, appeal of the indicated case is two-pronged.

First, the legal argument made by Judge David J. Novak in his decision is faulty (suspiciously so; see second prong). The subject matter jurisdiction, the Eleventh Amendment, put forth by the defendant, Governor of Virginia Ralph Northam, and eagerly taken up by Judge Novak, ignores the jurisdiction, 42 U.S. Code § 1983, that I gave in my original Complaint and brings up the critical and urgent need to finally, after 225 years and the Civil War, clearly decide the Constitutional question:

> Does the Eleventh Amendment, or anything else in the U.S. Constitution (cf. Article VI, § 2), mean that the states, including state officials, have sovereign immunity and can not be sued by individuals for violations of Constitutional rights or federal law?

The second prong of my appeal is violation of my Fifth Amendment — since Judge Novak is a federal official — right to procedural due process, i.e. a fair trial by an unbiased judge. Judge Novak had a clear active bias for Governor Northam and against me, with clear motivations for this bias. Besides his decision, as indicated, this bias manifested in his unfair

rulings during the case, but also in his delays of the case.

Judge Novak's delaying of the case should rightfully be considered as part of his violation of my Fifth Amendment right to due process, but instead leads into the critical and urgent need to finally, after 230 years, clearly decide the Constitutional question:

> Does the Sixth Amendment stating "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial" mean that in civil cases, particularly against government officials, trial decisions can be delayed indefinitely — to mootness, to only after the favored party has achieved what it wants, including political goals, or to financial ruin for the disfavored party (cf. "justice delayed is justice denied")?

Additionally, by Judge Novak dismissing my case, I continue to have violated the Constitutional right my case was about, my First Amendment right to peaceably assemble, as well as my Fourteenth Amendment right to have the First Amendment, and all other Constitutional rights, apply to the states, including state officials, which brings us back to the first Constitutional question above.

1. Judge Novak's Suspiciously Faulty Legal Argument

The basis of Judge Novak's decision — Memorandum Order Granting Motion To Dismiss (filed 23 Nov 2020) — is lack of subject matter jurisdiction due to the Eleventh Amendment. This was put forth by Governor Northam in his Memorandum In Support of Defendant's Rule 12(b)(1) Motion To Dismiss (filed 5 Jun 2020).

However, as clearly stated at least twice in my Complaint (received by Judge Novak 29 Apr 2020), the jurisdiction I gave, with proof that it applied, was 42 U.S. Code § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ..."

That 42 U.S. Code § 1983 was ignored by Northam is understandable since there is no way around it, he couldn't argue on the merits of the case so needed to obfuscate, and he can say whatever he wants to make his case, however deceitful.

That 42 U.S. Code § 1983 was ignored by Judge Novak is a clear violation of my Fifth Amendment right to procedural due process, i.e. a fair trial by an unbiased judge. As I will further show in that section below, Judge Novak unfairly ignored the important points in my Complaint and motions, in favor of Northam, who he often just parroted, including what Northam deceitfully said I said.

If the Court too thinks the Eleventh Amendment applies here, it will have to strike down 42 U.S. Code § 1983 as unconstitutional.

Any competent lawyer or judge will know of the quagmire of paradoxical precedents that surround state sovereign immunity — i.e. that an individual can't sue a state or state official — as the Eleventh Amendment is said to support. It is surprising to the point of showing incompetence that Judge Novak never mentioned Alden v. Maine, 527 U.S. 706 (1999), the most recent important paradoxical precedent supporting state sovereign immunity (and itself described as "startling"). Judge Novak got out of law school years before 1999 and obviously and incompetently does not stay current.

I tried to quickly dismiss the Eleventh Amendment argument, as it rightfully should have been, by just citing Ex parte Young, 209 U.S. 123 (1908) and stating:

> "However, the Eleventh Amendment does not prevent suits against state officials in which the relief sought is an injunction against the violation of federal law (Ex parte Young, 209 U.S. 123 (1908)), which is exactly the case here."

I did this first in my Motion for Default Judgment (received by Judge Novak 10 Jun 2020) and then, when Judge Novak unfairly ignored it there — as I pointed out to him — in my Motion for De Facto Summary Judgment (17 Jun 2020); see below § 2, Unfair and Biased.

Judge Novak continued to unfairly ignore this, and much of his decision is an argument — tortuous since it is faulty — for why Ex parte Young does not apply in my case. Making this argument involved trying to separate government from government official, which is a fool's errand — government *is* government officials — and necessarily leads to tortuous faulty arguments. It also involved unfairly ignoring even more of my Complaint and motions; see below § 2, Unfair and Biased.

Like Amy Coney Barrett and other Supreme Court Justices, I am a Constitutional originalist, because any other interpretation leads to paradoxes. As I quoted from Thomas Jefferson in the Argument section of my Supreme Court Petition for Writ of Certiorari, included in my Proof in Thresher v. Novak, Supreme Court Petition for Writ of Certiorari (received by Judge Novak 18 Nov 2020):

> "On every question of construction [let us] carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text or invented against it, conform to the probable one in which it was passed."

As a former scientist in a very mathematical field, climate modeling, with a very extensive math background, including at MIT, I am painfully aware of what happens when you are wrong in just one step of a proof or multistep calculation: the result is wrong, often paradoxically wrong, i.e. a cascade failure occurs. This is exactly the same — it's all just logic — as when you use precedents to decide legal cases. The same is true when you change

the axioms of a proof, the initial calculation of a multistep calculation, or the meaning of Amendments (as in "living Constitution" interpretation).

Given that judges are human and subject to both incompetence and corruption — trying to twist the law to make it mean what they want it to mean — they are often wrong, including, perhaps particularly, in precedents and Amendment interpretation. This is why the appeals system exists and decisions are overturned. And there would be even more overturnings if it wasn't so expensive to appeal.

So I make my argument against the Eleventh Amendment supporting state sovereign immunity, and thus the decision against me, based on what the Eleventh Amendment actually says:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

This clearly does not apply to my case. I am a citizen of Virginia suing, at worst, the state of Virginia, and more reasonably, Virginia Governor Northam himself. But again, trying to separate government from government official is a fool's errand.

The Eleventh Amendment resulted from Chisholm v. Georgia (1793), in which a South Carolina man sued the state of Georgia over an inheritance. Georgia argued it could not be sued in federal court, but the Supreme Court ruled that it could, under Article VI, § 2 of the U.S. Constitution. Georgia then successfully led a movement among the states to add the Eleventh Amendment to the U.S. Constitution. But again, the Eleventh Amendment says nothing about a citizen of a state suing his own state or his own state's officials.

I too make my argument against anything else in the U.S. Constitution supporting state sovereign immunity based on what Article VI, § 2 of the U.S. Constitution clearly states:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Bill of Rights was written explicitly so individuals could sue the federal government, including federal officials. For what does it mean to have rights and the rule of law if you can't sue over the violation of those rights by the federal government, including federal officials?

The First Amendment itself, rather than being just a random collection of protected activities as many believe, is a list of increasingly aggressive ways to call for change in government (history makes it clear that religion is one of these), culminating in the right to sue government:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Like the Bill of Rights, this is true for other federal laws, like 42 U.S. Code § 1983.

If Constitutional rights and federal law apply to the states, then obviously an individual can at least sue his own state, including its officials, for violation of Constitutional rights or federal law.

Furthermore, since the time the Constitution, including the Bill of Rights, was ratified, the United States has had a devastating civil war that showed unequivocally that the Constitution and the laws of the United States must be followed by the states and their officials.

And out of the Civil War came the Fourteenth Amendment. Today, almost all of the Bill of Rights has been incorporated into the Fourteenth Amendment and thereby made applicable to the states.

The Fourteenth Amendment was used for much of the successes of the Civil Rights Movement. The Eleventh Amendment is being repurposed, and state sovereign immunity redeclared, in order to roll back civil rights, which will include overturning the successes of the Civil Rights Movement. This may be exactly what Governor Northam is looking to achieve since he is clearly a racist: it was discovered that, as an adult in his medical school yearbook, Northam, who is white, proudly posed in blackface next to someone dressed as a KKK Klansman.

Not being allowed to sue state officials like Governor Northam allows them to become dictators, as I argue best in my aforementioned Supreme Court Petition for Writ of Certiorari.

All government officials, both elected and unelected, want to be dictators. Having to answer to the people, those who pay your salary, which is the job's primary purpose, is the one big downside to a well paid, well benefited, secure job. There is thus an overwhelming tendency in government to arrange things so it is impossible, or at least as hard as possible, for the people to get to you and demand changes in government.

Conditions with government are back to those that led up to the American Revolution and the U.S. Constitution, particularly the Bill of Rights, all of which started with the states, particularly Virginia.

2. Judge Novak's Violation of My Fifth Amendment Right to Due Process: Unfair and Biased

The second prong of my appeal is violation of my Fifth Amendment — since Judge Novak is a federal official — right to procedural due process, i.e. a fair trial by an unbiased judge.

Judge Novak had a clear active bias for Governor Northam and against me, with clear motivations for this bias. Besides his decision, as indicated, this bias also manifested in his unfair rulings, favoring Northam, during the case, but also in his delays of the case. This delaying should rightfully be considered as part of his violation of my Fifth Amendment right to due process, but instead leads into the critical and urgent need to finally, after 230 years, clearly decide the Sixth Amendment question described above, i.e. is there a right to a speedy trial in civil cases?

2.1 Judge Novak's Bias Manifested in Unfair Rulings and Decision

As described in my letter (5 May 2020) responding to Judge Novak's letter (29 Apr 2020) requiring a physical address for Governor Northam for service of summons, I was having a great deal of trouble serving the summons (filed on 29 Apr 2020) on Northam, particularly given the described government v. government official issue, the Coronavirus Scare, and the increased security around Northam because of the protesting of his Coronavirus Executive Orders; Northam intentionally made himself hard to find. I thus asked Judge Novak to have U.S. Marshals serve the summons under Rule 4(c)(3) of the Federal Rules of Civil Procedure (FRCP): "At the plaintiff's request, the court may order that service be made by a United States marshal".

In his Memorandum Order (filed 8 May 2020), Judge Novak unfairly, favoring Northam, denied my request stating "due to the ongoing threat posed by the COVID-19, the Court finds that Plaintiff's circumstances at this time do not warrant putting the United States Marshals Service personnel at risk". Risks, and risks much greater than Coronavirus (or serving a summons to a government official just a couple blocks away), are part of a U.S. Marshal's job description. Denying the service of a U.S. Marshal to me was clearly intended to make it hard on me out of bias against me.

The described government v. government official issue meant I didn't really know who I could serve the summons on. Stemming from my 4 May 2020 phone call to Virginia Attorney General Mark Herring, on 11 May 2020 Virginia Deputy Attorney General Samuel Towell emailed me that I could serve the summons on Rita Davis, Counsel to the Governor. This made sense: the Virginia Attorney General's Office saying I had to serve the summons not on them, the State of Virginia, but on Northam's lawyer. On 15 May 2020, after considerable effort, I was finally able to have the Richmond Sheriff's Office serve the summons on Rita Davis, Northam's lawyer.

Northam's response was thus due on 5 Jun 2020, 21 days later. I received no response by then that was legal under FRCP Rule 5(b), so as required made a Motion for Default Judgment (received by Judge Novak 10 Jun 2020). In his Order (filed 11 Jun 2020), Judge Novak unfairly, favoring Northam, denied this motion, citing precedents — more examples of precedents being wrong and causing a cascade failure — where the Courts "express a strong preference" against and "disfavor" default judgments, which are not lawful rulings.

On 15 Jun 2020 I finally received Northam's response. Included in it was a Notice of Ap-

pearance, which, without mentioning Rita Davis at all, said that Virginia Assistant Attorney General Robert McEntree, i.e. the State of Virginia, would be Northam's lawyer. Throughout the case, as I clearly stated in my motions, I only sent my motions to Rita Davis, never to Robert McEntree.

In my Motion for De Facto Summary Judgment (17 Jun 2020), I demanded of Judge Novak, "As it implicitly determines the outcome of this case, the Court must explicitly rule on whether the Virginia Attorney General's Office can insinuate itself as counsel for Governor Northam." Judge Novak never explicitly responded to this, i.e. he unfairly ignored it, but by this he implicitly ruled on this matter in Northam's favor and against me.

As described above, Judge Novak unfairly ignored the jurisdiction I put forth in my Complaint, 42 U.S. Code § 1983, in favor of that which Northam put forth, the Eleventh Amendment. I tried to quickly dismiss the Eleventh Amendment, as it should have been, by just citing Ex parte Young, 209 U.S. 123 (1908) and stating:

> "However, the Eleventh Amendment does not prevent suits against state officials in which the relief sought is an injunction against the violation of federal law (Ex parte Young, 209 U.S. 123 (1908)), which is exactly the case here."

I did this first in my Motion for Default Judgment and then, when Judge Novak unfairly ignored it there — as I pointed out to him — in my Motion for De Facto Summary Judgment.

Judge Novak continued to unfairly ignore this, and much of his decision is an argument — tortuous since it is faulty — for why Ex parte Young does not apply in my case. Making this argument involved trying to separate government from government official, which is a fool's errand — government *is* government officials — and necessarily leads to tortuous faulty arguments. It also involved unfairly ignoring even more of my Complaint and motions.

Parroting Northam, so in his favor, Judge Novak ludicrously argued in his decision that Governor Northam had no role in the enforcement of his own executive orders. As I argued at length in my Complaint and aforementioned Supreme Court Petition for Writ of Certiorari, Governor Northam was making laws himself, i.e. his executive orders, and enforcing them with his military (see Article V, Section 7 of the Constitution of Virginia, as well as the argument using it, in either of my mentioned documents), which is the Virginia National Guard (similarly see Order E of Executive Order 51). Judge Novak unfairly ignored all this, in favor of Northam.

Similarly, Judge Novak said I asked for no monetary damages, when in my Complaint I clearly asked for "the fees and costs of the suit". As described though, the main relief I was seeking was "an injunction against the violation of federal law".

Also parroting Northam, Judge Novak started his decision with a lot of hyperbole, presenting it as scientific fact, about how deadly Coronavirus is, desperately trying to imply that it warrants nullifying the Bill of Rights and other Constitutional rights. However, in my Supreme Court Petition for Writ of Certiorari I explained:

> The framers of the U.S. Constitutions Bill of Rights were all painfully aware of the dangers of epidemics, having survived the terrible 1775 – 1782 North American smallpox epidemic. Smallpox has a mortality rate of about 30% and survivors often suffer horrifying lifelong aftereffects. Smallpox inoculation existed at the time, but even that had a 0.5% – 2% mortality rate, the same as the worst case scenario for Coronavirus, which is transmitted in exactly the same way, face-to-face contact.
>
> And yet the framers of the U.S. Constitution's Bill of Rights, started before 1789, did not allow for nullifying the First Amendment right to peaceably assemble. They did not even put a limit on this right even though it is the most easily quantifiable.

Judge Novak unfairly ignored all this, in favor of Northam.

Finally, in all his mentioned documents, parroting Northam's, Judge Novak unfairly removed "Dr." from my name in the case name, while keeping "Governor of Virginia" for Northam. Judge Novak did this to take authority away from me and keep it for Northam. I have a Ph.D. from an Ivy League university, Columbia, in a very mathematical hard science and have, with great effort, earned the title "Dr." Part of a fair trial by an unbiased judge is being treated with due respect. Further, I decide how I am addressed, which I did when I filed my Complaint and gave the case a name.

2.2 Judge Novak's Bias Manifested in Delays

Delays in this case inherently favored Northam: he could wait to mootness, to only after he achieved what he wanted, including political goals, or to my financial ruin. Thus rulings by Judge Novak delaying this case for no reason are unfair and biased. (Any ripeness argument is ridiculous because there was a well-defined, live controversy, with specific facts, and with a past injury *and* a likely future injury.)

These delays are most clearly shown with a chronological description.

As described in § 2.1, I was having a great deal of trouble serving the summons (filed on 29 Apr 2020) on Northam and on 5 May 2020 requested that Judge Novak have U.S. Marshals do this. On 8 May 2020 Judge Novak refused, delaying service of summons by at least a week, to 15 May 2020; not more only because of considerable effort by me.

As also described in § 2.1, Northam's response was thus due on 5 Jun 2020. I received no response by then that was legal under FRCP Rule 5(b), so as required made a Motion for Default Judgment (received by Judge Novak 10 Jun 2020). In his Order (filed 11 Jun 2020), Judge Novak unlawfully denied this motion. The default judgment laws exist for a reason: because, as this case proves for both Northam and Judge Novak, delaying (stalling) is a great way to get around the law; "justice delayed is justice denied". I did not receive Northam's response until 15 Jun 2020.

By the time of my Motion for De Facto Summary Judgment, 17 Jun 2020, it was clear that Judge Novak was biased and had already unfairly made his decision, as described in § 2.1, in favor of Northam and against me. I thus just wanted a decision issued immediately so I could appeal it. Since Judge Novak had clearly already made his decision, I expected it soon.

However, Northam had stalled as much as he could, and now Judge Novak took over completely.

On 13 August 2020, Judge Novak, in an Order that came "before the Court on its own initiative", ordered Northam to prove he had served his response on me, which was a matter that had been settled two months before. Still, this led me to believe that a decision was now truly imminent.

Two months more later, I submitted a Demand for Immediate Judgment and Thresher v. Novak (received by Judge Novak 27 Oct 2020). As I said there, I realized Governor Northam was going to use his Coronavirus Executive Orders to interfere in the elections in favor of his party, Democrats, and was being abetted in this by Judge Novak and his delaying. I wanted an immediate judgment so I could appeal directly to the Supreme Court, since it involved elections.

I submitted this Supreme Court Petition for Writ of Certiorari (received by the Supreme Court 29 Oct 2020), which is included in my Proof in Thresher v. Novak, Supreme Court Petition for Writ of Certiorari (received by Judge Novak 18 Nov 2020). However, as shown in the also included Supreme Court letter, my Petition was rejected because Judge Novak had not issued a decision yet. Thus, in yet another way — the right to be heard — Judge Novak violated my Fifth Amendment right to due process.

Judge Novak only filed his decision on 23 Nov 2020, the day GSA Administrator Emily Murphy formally recognized Democrat Joe Biden as the winner of the contested 2020 Presidential Election and authorized the start of a transition process to the Biden Administration.

In Northam's mentioned Memorandum, he argues for mootness. In my Motion for Default Judgment I showed this to be false because Northam would use his Executive Orders "during the second wave of Coronavirus in the Fall". Judge Novak delayed his decision until late Fall.

Judge Novak assumed that I, as a pro se litigant, would just give up, including for financial reasons as I described in my Complaint, if he made the case drag on long enough. In fact, Judge Novak delayed his decision until the start of the holiday season, so that I, as a pro se litigant, would find it hard to appeal, which I repeatedly said I was going to do. I did indeed find it hard to appeal.

2.3 Judge Novak's Bias Motivations

While the above extensive pattern of unfair rulings and delays is more than enough to clearly show bias against me, giving Judge Novak's motivations for this bias must certainly fully

prove it. There are three general motivations for this bias, as will be described.

This Court may share some of these motivations for bias, so should be alert to them in its decision.

2.3.1 Irrational Fear of Coronavirus, Governor Northam as Savior

Judge Novak has an irrational fear of Coronavirus so suffers from the delusion that Governor Northam and his Coronavirus Executive Orders are saving him from death.

As described in § 2.1, Judge Novak denied my lawful request for a U.S. Marshal to serve the summons saying "due to the ongoing threat posed by the COVID-19, the Court finds that Plaintiff's circumstances at this time do not warrant putting the United States Marshals Service personnel at risk", even though U.S. Marshals face much greater risks every day as part of their job.

As also described in § 2.1, parroting Northam, Judge Novak started his decision with a lot of hyperbole, presenting it as scientific fact, about how deadly Coronavirus is.

Judge Novak is in Richmond where Governor Northam is and where Northam's Coronavirus Executive Orders are most strictly enforced and which the media incompetently, deceitfully, and profitably paints as an incredibly dangerous place due to Coronavirus (e.g. it expands "Richmond" to the "Richmond area" to increase the death count).

2.3.2 Wants To Be Unaccountable Government Official, Hates Pro Se Litigants

As described in § 1, Judge Novak wants to be a government official who is not accountable to the people. He strongly sympathizes with Governor Northam in this regard. Judge Novak was an Assistant United States Attorney for over 18 years, accountable only to federal judges, which he strived for years to become, including being denied as not fit the first time.

Judge Novak hates pro se litigants like myself because we take control away from attorneys. He doubly does not want government officials to be held accountable by pro se litigants. In my motions, Demand for Immediate Judgment and Thresher v. Novak (received by Judge Novak 27 Oct 2020) and Proof in Thresher v. Novak, Supreme Court Petition for Writ of Certiorari (received by Judge Novak 18 Nov 2020), among other places, I made it abundantly clear to Judge Novak that I was going to sue him, as just another government official, under the same law I sued Governor Northam.

A pro se litigant with a better education than his own is particularly galling to Judge Novak. His education, only a B.S. from Saint Vincent College and a J.D. from Villanova University School of Law, is one reason he may have been denied as not fit the first time he tried to become a judge.

As described in § 2.1, in all his mentioned documents, parroting Northam's, Judge Novak

unfairly removed "Dr." from my name in the case name, while keeping "Governor of Virginia" for Northam. Judge Novak did this to take authority away from me and keep it for Northam. I have a Ph.D. from an Ivy League university, Columbia, in a very mathematical hard science and have, with great effort, earned the title "Dr." I also have a B.S. in Electrical Engineering and Computer Science from MIT.

As described in § 2.2, Judge Novak delayed the case to harm me as a pro se litigant.

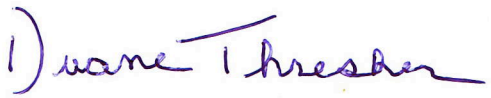
2.3.3 Democrat

Judge Novak is either a Democrat like Governor Northam or strongly favors them during the Coronavirus Scare; see motivation of § 2.3.1.

While Judge Novak finally became a judge as a nominee of President Trump, Trump has a history of appointing people who later turned out to be strongly opposed to him.

As described in § 2.2, I realized Governor Northam was going to use his Coronavirus Executive Orders to interfere in the elections in favor of his party, Democrats, and was being abetted in this by Judge Novak and his delaying. I said this in my Demand for Immediate Judgment and Thresher v. Novak (received by Judge Novak 27 Oct 2020). I also said there that I was going to submit a Petition for Writ of Certiorari to the Supreme Court, which I could do because the issue was about elections.

The Petition was rejected because Judge Novak had not issued a decision yet. Judge Novak only filed his decision on 23 Nov 2020, the day GSA Administrator Emily Murphy formally recognized Democrat Joe Biden as the winner of the contested 2020 Presidential Election and authorized the start of a transition process to the Biden Administration.



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21 December 2020