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Abstract:

In Kennedy v. St. Joseph’s Ministries, Inc., the Fourth Circuit held that a federal appellate court may properly permit appeals of certified, interlocutory dismissal orders under 28 U.S.C. § 1292(b) (“§1292(b)”)—even on matters of first impression—without the district court first addressing more routine grounds for dismissal. In interpreting this exception to the final-judgment rule, the court failed to heed “the cardinal principal” of judicial self-restraint that holds “that if it is not necessary to decide more, it is necessary not to decide more.” Moreover, the court did not address the legal or factual hurdles facing parties who seek or oppose appeals under §1292(b).

The Kennedy decision therefore (1) encourages piecemeal litigation by allowing parties to obtain interlocutory appeals under §1292(b), even when the case might just as efficiently be decided through a final judgment; and (2) leaves parties uncertain about how to litigate appeals under §1292(b). As such, the Kennedy decision threatens to lead to less efficiency and greater costs within the circuit, both to litigants and the courts.

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Draft (2994 words):

In *Kennedy v. St. Joseph's Ministries, Inc.*, the Fourth Circuit held that federal appellate courts properly permit appeals of certified, interlocutory dismissal orders under 28 U.S.C. § 1292(b) (“§1292(b)”)—even on matters of first impression—without the district court first addressing more routine grounds for dismissal. In so holding, the court failed to heed “the cardinal principal” of judicial self-restraint that holds “that if it is not necessary to decide more, it is necessary not to decide more.” Moreover, the court did not address the legal or factual hurdles facing parties who seek or oppose appeals under §1292(b).

The *Kennedy* decision therefore risks greater costs to Fourth Circuit litigants and courts. First, it encourages piecemeal litigation by allowing parties to obtain interlocutory appeals under §1292(b) even when the case might just as efficiently be decided through a final judgment. Second, it leaves parties uncertain about how to litigate appeals under §1292(b).

I. The Case.

Villa St. Catherine, Inc., a Catholic organization (now known as St. Joseph’s Ministries) ran a nursing facility that hired Kennedy, a member of the Church of the Brethren, as a nursing assistant. When one of its directors told Kennedy to change her attire, she refused, allegedly because of her own religious beliefs. St. Catherine then terminated her.

Kennedy filed suit against St. Catherine under Title VII, alleging religious harassment, retaliatory discharge, and discriminatory discharge based on her religious beliefs. St. Catherine moved for summary judgment, arguing that under Title VII’s “religious organization” exemption it was exempt from all of Kennedy’s claims.

The parties consented to try their case before a magistrate judge, who issued an order dismissing Kennedy’s claim for discriminatory discharge, but denying dismissal of Kennedy’s religious harassment and retaliation claims. St. Catherine requested that the magistrate judge certify his order under §1292(b), the magistrate judge did so, and a panel of the Fourth Circuit then permitted St. Catherine to appeal the certified order.

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2 See *Kennedy*, 657 F.3d at 200 (King, J., dissenting) (quotation and citation omitted).
3 *Id.* at 190, 190 n.1.
4 *Id.* at 190-191.
5 *Id.*
6 *Id.*
7 *Id.*; see 42 U.S.C. §2000e-1(a).
8 *Kennedy*, 657 F.3d at 191.
9 *Id.*
On appeal, a majority of the Fourth Circuit panel (Judges Shedd and Wynn) concluded—in a matter of first impression—that Title VII’s “religious organization” exemption applied to bar Kennedy’s religious harassment and retaliation claims, and therefore reversed the district court’s order and remanded with instructions to enter judgment in St. Catherine’s favor. In doing so, the majority concluded—in contrast to a dissenting opinion issued by Judge King—that the earlier panel had not improvidently permitted St. Catherine to appeal.

II. Legal Background.

Federal courts generally follow the “final-judgment rule” that “requires that except in certain narrow circumstances in which the right would be irretrievably lost absent an immediate appeal, litigants must abide by the district court’s judgments, and suffer the concomitant burden of a trial, until the end of proceedings before gaining appellate review.” This rule serves several important purposes, including promoting “efficient judicial administration.”

As an exception to the final-judgment rule, § 1292(b) permits appeals of nonfinal orders if the appealing party satisfies a two-step process outlined by the Supreme Court in Coopers & Lybrand v. Livesay. First, the party must “obtain the consent of the trial judge.” Second, as Livesay explained, “even if the district judge certifies the order under § 1292(b), the appellant still has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.” Notably, federal appellate courts may “deny the appeal for any reason, including docket congestion.”

III. The Court’s Reasoning.

The Kennedy majority did not provide its own reasons for permitting St. Catherine’s appeal. Instead, it gave four reasons for disagreeing with Judge King’s dissent.

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10 Id. at 192-195, 196.
11 Id. at 195-196.
15 Id.
16 437 U.S. 463, 475 (1978) (citation and quotation omitted).
17 Id.
First, “the requirements of § 1292(b) [were] clearly satisfied in this case,” and “[n]othing ha[d] changed since [the court] granted permission to appeal which cause[d] §1292(b) to be inapplicable.”\textsuperscript{18}

Second, “no doctrine” counseled “courts to avoid ruling on legal issues involving undisputed facts that are before them,”\textsuperscript{19} particularly as (1) “the Supreme Court ha[d] answered legal questions posed in § 1292(b) orders before the factual development of the record ha[d] occurred,”\textsuperscript{20} and (2) federal courts have “a virtually unflagging obligation . . . to exercise the jurisdiction given them.”\textsuperscript{21}

Third, Judge King’s view would lead to the anomalous result of the Fourth Circuit being able to affirm a dismissal of Kennedy’s claims on any ground presented in the record (including Title VII’s statutory exemption), but being constrained from doing so “when—as here—it [was] the only issue properly before” the court.\textsuperscript{22}

Fourth, Judge King’s approach would “waste judicial resources” both for the Kennedy parties and for future parties,\textsuperscript{23} by counseling “district courts to refrain from dismissing cases on statutory legal grounds when it is possible that the party will lose on the merits at some indeterminate point in the future.”\textsuperscript{24}

In dissent, Judge King agreed that the magistrate judge had properly accomplished the first step of the §1292(b) procedure and disputed only the court’s exercise of its jurisdictional discretion under the second step.\textsuperscript{25} This disagreement stemmed from “the Art. III notion that federal courts may exercise power only in the last resort, and as a necessity.”\textsuperscript{26} Citing “the cardinal principal of judicial restraint”—namely, “that if it is not necessary to decide more, it is necessary not to decide more”—Judge King would have required the Court to decide the religious organization exemption only after (and if) Kennedy’s remaining claims had withstood the routine standards of dismissal under Rule 12(b)(6) and Rule 56.\textsuperscript{27}

In examining Kennedy’s claims under those standards, Judge King concluded that it was doubtful that Kennedy had even properly pled—much less could provide summary judgment evidence to support—her religious harassment and retaliation claims.\textsuperscript{28} This fact meant that the Fourth Circuit could easily have avoided resolving the

\textsuperscript{18} Kennedy, 657 F.3d at 195.
\textsuperscript{19} Id. (emphasis in original).
\textsuperscript{20} Id. (citing Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 179 (1982)).
\textsuperscript{21} Id. (citing Colorado River Water Conservation Dist. v. U.S., 424 U.S. 800, 817 (1976)).
\textsuperscript{22} Id. at 196.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id. at 196 n.1 (King, J., dissenting).
\textsuperscript{26} Id. (citations, and quotations omitted).
\textsuperscript{27} Id. at 200 (citations and quotations omitted).
\textsuperscript{28} Id. at 198-199.
complex—and first impression—issue of whether Title VII’s statutory exemption barred Kennedy’s religious harassment or retaliation claims by first “leaving the district court to answer the much simpler questions of whether Kennedy has adequately pleaded or can forecast sufficient evidence to prove a Title VII violation.”

Thus, in following the lead of other courts that had “judiciously declined to entertain § 1292(b) appeals where the question certified may be mooted by further proceedings in the district court,” Judge King concluded that the majority erred in violating the principle that “federal courts should not reach out to resolve complex and controversial questions unnecessarily.”

IV. Analysis.

A. The Kennedy Decision Does Not Convincingly Establish Reasons for Overriding the Final Judgment Rule.

The majority’s four stated reasons for permitting St. Catherine’s appeal do not convincingly establish why the Court should have avoided the “cardinal principal” of judicial self-restraint. This section addresses each of the majority’s reasons in turn.

1. The relevant issue was not whether St. Catherine met the procedural requirements of §1292(b), but only whether the Fourth Circuit properly exercised its discretionary jurisdiction.

The Kennedy majority’s first argument—that the requirements of §1292(b) had been met—is curious at best.

First, if the majority meant to indicate only that the magistrate judge’s order satisfied the requirements of the first step of the §1292(b) procedure, then the statement is irrelevant as to whether St. Catherine satisfied its burden under §1292(b)’s second step. Indeed, Judge King conceded the propriety of the magistrate judge’s order, and never argued that §1292(b) was “inapplicable.” But if the majority meant to suggest that the propriety of the magistrate’s order meant also that St. Catherine had satisfied its burden on appeal, then the statement improperly conflates the two steps of §1292(b) and contravenes the rule that St. Catherine bore a burden on persuasion on appeal.

Second, the majority’s reliance on the fact that “nothing” had changed suggests that the earlier panel’s decision somehow bound the majority. But other Fourth Circuit

29 Id. at 196 (King, J., dissenting).
30 Id. at 200 (citation, brackets, and quotation omitted).
31 See supra Part II.
32 See Kennedy, 657 F.3d at 196 n.1 (“I do not contest our discretionary jurisdiction.”).
33 See supra Part II.
cases had determined that appeals had been improvidently granted under §1292(b), without any indication that circumstances had changed.34

2. Federal courts announce and generally follow the rule of judicial restraint—whether the facts are in dispute or not.

The Kennedy majority’s second argument—that “no doctrine” counseled against deciding issues where the facts were undisputed—merits particular attention.

First, the majority’s statement appears to conflict with the doctrine of judicial self-restraint that holds “that if it is not necessary to decide more, it is necessary not to decide more.”35 The majority did not explain why this general statement of judicial practice is or should be limited to cases where the facts are disputed.

Second, while no “doctrine” may provide the counsel the majority specifies, federal appellate courts’ practice undermines this statement. Specifically, those courts often refuse to reach a prevailing party’s alternative grounds for affirmance in summary judgment cases—one sign that the “cardinal principal” applies even when the facts are accepted as undisputed.36 Similarly, when those courts must “accept as true” the complaints’ “factual allegations” under Rule 12(b)(6),37 they still determine that they improvidently granted appeals under §1292(b)38—another indication that the “cardinal principal” applies when the “facts” are viewed as beyond dispute.

Indeed, the principal of judicial self-restraint should apply with greater force when an issue may create or exacerbate a split among the circuit courts.39 In this case, for instance, Kennedy held that Title VII’s religious exception precluded Kennedy’s claims of retaliation, while an earlier opinion indicated that the Third Circuit would have reached the opposite conclusion.40

In any event, neither of the majority’s Supreme Court cases discussed the propriety of an appellate court’s discretion under §1292(b). Without comment, Sumitomo merely noted that the appellate court had granted interlocutory appeal.41 Meanwhile, Colorado River never mentioned §1292(b), and instead focused on concurrent jurisdiction,42 a circumstance that allows federal courts to abstain from

34 See, e.g., Wilson v. Ferrell, 738 F.2d 637, 638 (4th Cir. 1984).
35 See Kennedy, 657 F.3d at 200 (citation and quotation omitted).
36 See, e.g., Childers Oil Co., Inc. v. Exxon Corp., 960 F.2d 1265, 1270 n.4 (4th Cir. 1992).
38 See, e.g., Caraballo-Seda v. Municipality of Hormigueros, 395 F.3d 7, 9 (1st Cir. 2005).
40 See LeBoon v. Lancaster Jewish Community Center Ass’n, 503 F.3d 217, 231-234 (3rd Cir. 2007) (on appeal from summary judgment, concluding that defendant qualified under Title VII’s religious organization exemption, but continuing to analyze the merits of plaintiff’s Title VII retaliation claims).
41 See Sumimoto, 457 U.S. at 179.
42 See Colorado River, 424 U.S. at 817.
exercising jurisdiction only in “exceptional” circumstances with “[o]nly the clearest of justifications.” 43 That standard lies at the opposite end of §1292(b)’s discretionary jurisdiction that can be declined for any reason. 44

3. Adhering to the final judgment rule here would not lead to anomalous results.

The Kennedy majority’s third argument—that Judge King’s approach would lead to anomalous results—is also unpersuasive. While the majority correctly noted that the Fourth Circuit may affirm a dismissal on any grounds apparent in the record, that rule is also discretionary. 45 Hence, following the example of several other circuits—and Judge King’s approach of judicial self-restraint—the Fourth Circuit would likely choose not to decide the propriety of a dismissal when the parties had not addressed the issue or when the issue were one of first impression. 46 In those circumstances, Judge King’s approach would not lead to any “anomaly.”

More fundamentally, St. Catherine’s issue was only “properly before” the court because of its own decision to permit St. Catherine’s appeal. The issue would not have been “properly before” the court if the court had determined that the appeal had been improvidently granted. In this sense, then, the majority’s statement only begs the question of whether the court should have exercised its discretionary jurisdiction.

4. The decision to deny St. Catherine’s appeal would not necessarily have wasted judicial resources—particularly for future litigants.

The Kennedy majority’s fourth and final argument—that Judge King’s approach wasted judicial resources—may be the most intriguing.

First, as a technical matter Judge King’s approach in Kennedy would not have wasted any more judicial resources than the majority’s approach. That is, had the majority determined that the Title VII exemption did not bar Kennedy’s claims, its approach would have resulted in a remand to the magistrate court—the same “waste” of resources produced by Judge King’s approach. Put another way, the majority opinion “saved” judicial resources, but only by ending the litigation through its ultimate decision—not by advancing a superior analytical approach to the issue of its discretion under §1292(b).

Second, as a more concrete matter Judge King’s approach might have saved resources in Kennedy had one of the majority’s judges joined Judge King’s opinion early

43 Id. at 818, 819.
44 See supra Part II.
45 See, e.g., Mann v. Haigh, 120 F.3d 34, 36 (4th Cir. 1997) (noting that court “may affirm the judgment of the district court on any basis that the record fairly supports.”) (emphasis added).
46 See, e.g., Syms v. Olin Corp., 408 F.3d 95, 107 (2nd Cir. 2005).
on in the appellate process. As it was, the parties used no fewer than five lawyers on appeal and eight months in the appellate process.\(^{47}\) Had the Fourth Circuit determined early on that it had improvidently granted St. Catherine’s appeal, the parties could have used that time—and redirected those resources—in the trial court. This would seem like a particularly reasonable course in a case like \textit{Kennedy} that involved just one plaintiff, one defendant, three straightforward claims under Title VII, and relatively minimal damages.

Third, as a prudential matter, Judge King’s approach of judicial self-restraint closely comports with a central goal of the final-judgment rule—to prevent the waste of resources—and with the “exceptional” quality of the §1292(b) exception. In the long run, this approach encourages appellate courts to focus their resources on final decisions and prevents parties from spending years in the appellate system—only to be directed back to the lower courts for a final decision.

\textbf{B. The Kennedy Decision Gives Little Guidance to Future Litigants.}

Under \textit{Livesay}, St. Catherine bore “the burden of persuading” the Fourth Circuit “that exceptional circumstances” existed to “justify a departure from the basic policy of” the final-judgment rule.\(^{48}\) The \textit{Kennedy} decision, however, never mentioned \textit{Livesay} or St. Catherine’s burden on appeal. It never identified how heavy St. Catherine’s “burden of persuading” was, what evidence St. Catherine used to meet it, or whether Kennedy could possibly have still defeated St. Catherine’s request by providing contravening evidence.

But by permitting St. Catherine’s appeal, the \textit{Kennedy} decision implies that a legal issue of first impression satisfies the “exceptional circumstances” requirement.\(^{49}\) Still, because the opinion fails to address \textit{Livesay’s} standard, it is unclear whether legal issues of first impression always satisfy this requirement, or only do so where—as in \textit{Kennedy}—the issue terminates the litigation.

Likewise, the \textit{Kennedy} decision leaves open a number of practical questions, including: What types of evidence should the party seeking appeal include in the record to satisfy its burden under §1292(b)? Assuming the party seeking appeal satisfies its burden, can the party opposing appeal still prevail by providing sufficient contravening evidence? If so, what sorts of evidence should the party opposing appeal provide?

Unsurprisingly, these uncertainties may well lead to further litigation—and greater costs to the judicial system and its parties.\textsuperscript{50}

\textbf{V. Conclusion.}

In \textit{Kennedy v. St. Joseph’s Ministries, Inc.}, the Fourth Circuit held that federal appellate courts properly permit appeals of nonfinal dismissal orders under 28 U.S.C. § 1292(b)—even on matters of first impression—without the need for the district court to address more routine grounds for dismissal.\textsuperscript{51} But particularly as the appealing party under §1292(b) must persuade the appellate court that “exceptional circumstances justify a departure from the” final-judgment rule,\textsuperscript{52} the court did not provide convincing reasons for its avoidance of the cardinal rule of judicial self-restraint.\textsuperscript{53} Nor did it detail the legal and logistical hurdles parties face in seeking or opposing interlocutory appeals under §1292(b).\textsuperscript{54} The \textit{Kennedy} decision therefore leads to more piecemeal litigation, greater uncertainty, and, ultimately, higher investments of resources for both courts and litigants of the Fourth Circuit.\textsuperscript{55}

\textsuperscript{50} See, e.g., Richard A. Posner, Economic Analysis of Law 604 (7th ed. 2007).
\textsuperscript{51} See supra Parts I, III.
\textsuperscript{52} See supra Part II.
\textsuperscript{53} See supra Part IV.A.
\textsuperscript{54} See supra Part IV.B.
\textsuperscript{55} See supra Part IV.