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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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PAUL GOLDMAN,  
*Plaintiff-Appellee,*

v.

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

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

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**MOTION FOR SUMMARY JUDGMENT**

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U.S. COURT OF APPEALS  
FOURTH CIRCUIT

PAUL GOLDMAN

*Pro Se Appellee*

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Richmond, Virginia 23226

December 2, 2021

## JUDGE BRYAN'S POSITION

1. Circuit Court Judge Albert V. Bryan Sr. whose name now adorns one of the federal courthouses in Virginia, stated that “a suit against State officials acting pursuant to State laws [is] a type of action universally held appropriate to vindicate a Federally protected right,” citing *Ex parte Young*, 209 U.S. 123, 155-56 (1908). *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 (Equal Protection Clause of the 14<sup>th</sup> Amendment to the Federal Constitution challenge to the appointment of the Virginia General Assembly).
2. Circuit Court Judge Bryan rejected the Defendants claim saying “[n]or is a suit against a State barred by the Eleventh Amendment, as Defendants contend.” *Mann, supra* at 579.
3. In *Davis, supra*, the opinion, written by Chief Judge Earl Warren, said “[d]efendants, sued in their representative capacities, were various officials charged with duties in connection with state elections.” *Id.*
4. In the instant matter before this Court, and contrary to the claims detailed below, Defendant members of the State Board of Elections, without any notice to the Court, decided to issue and sign certificates of election to those elected last month pursuant to the old House of Delegate districts drawn according to an obsolete 2010 census, stating those elected were entitled to a two-year term, thus putting the full weight of the state government behind the claim there could not be an election under newly drawn House of Delegates districts according to the new, current 2020 census until November 2023, an unprecedented delay since *Reynolds v. Sims*, 377 U.S. 533 (1964), in defiance of the plain wording of Article II, Section 6 of the Constitution of Virginia, whose wording was changed last year to specifically include the Equal Protection Clause of the 14<sup>th</sup> Amendment, along with “judicial decisions” enforcing those incorporated constitutional rights. Exhibit 1.

## PRO SE APPELLEE'S ARGUMENT

5. As Justice Oliver Wendell Holmes taught us, the only thing between civilized society and the jungle is the law, such law now under attack everywhere, by those who put their or their friends' partisan gains above the law. See, Holmes, *The Common Law* (1881).
6. At all times, as January 1, 2021 dawned, the Herring Defendants, the state's top election officials, their counsel, the Office of Attorney General of Virginia Mark Herring, along with the other top elected officials leading the state's executive and legislative branches, were aware that the voters of Virginia had added additional requirements to Article II, Section 6 of the Constitution of Virginia as delineated in paragraph #15, *infra* (along with a 6-A). <https://www.elections.virginia.gov/proposed-constitutional-amendment-2020/>
7. “Every electoral district shall be drawn in accordance with the requirements of federal and state laws that address racial and ethnic fairness, including the ***Equal Protection Clause of the Fourteenth Amendment*** to the Constitution of the United States and provisions of the Voting Rights Act of 1965, as amended, ***and judicial decisions interpreting such laws.***” Article II, Sec. 6. (Emphasis added).

8. At all times, we can reasonably presume the Herring Defendants and/or their legal counsel were aware of the seminal case of *Cosner v. Dalton*, 52 F. Supp. 350, 354 (E.D. Va. 1981), a judicial decision interpreting the Equal Protect Clause of the Fourteenth Amendment to the Constitution of the United States (hereinafter “EPC”).
9. At all times, we can reasonably presume the Herring Defendants, and/or at least their legal counsel, therefore knew *Cosner, supra*, had been included within the new language of Article II, Section 6.
10. At all times, as January 1, 2021, dawned, the Herring Defendants and their attorneys knew this was a reapportionment year, as the Constitution of Virginia is clear on this point (“The Commonwealth *shall be reapportioned* into electoral districts in accordance with this section (6) and Section 6-A *in the year 2021.*” Article II, Section 6. (Emphasis added).
11. At all times, the Herring Defendants were aware that Article I (“Bill of Rights”) of the Constitution of Virginia declares all “power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them.” Article I, Sec. 2.
12. “That government is, or ought to be, instituted for the common benefit...of all the various modes and forms of government, which is best which is...most effectively secured *against the danger of maladministration...*” Article I, Section 3. (Emphasis added).
13. At all times, the Herring Defendants, the Governor, every member of the General Assembly, and the Defendant Commissioner of Elections knew the Commonwealth had undergone significant population changes since the 2010 Census, with some areas of the state gaining significant population and other areas losing significant population. Amended Complaint, Exhibit 1.
14. At all times, it is reasonable to presume the Herring Defendants knew, as did the Governor, the General Assembly, and the Attorney General, that *never in the history* of the Commonwealth had a general election for the House of Delegates in a reapportionment year been held using the old, outdated electoral maps drawn to the now obsolete previous U.S. Census since *Reynolds, supra*, ruled the EPC applied to state legislative districts (“To the extent that a citizen’s right to vote is debased, he is that much less a citizen...The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.”). *Id* at 568.
15. Indeed, it is reasonable to presume that the Herring Defendants, as did the Governor, the General Assembly, and the Attorney General, knew that *Cosner, supra*, decided in the 1981 reapportionment year, said plainly “(a)llowing elections to proceed under the 1971 [reapportionment] Act would greatly disadvantage the citizens in Virginia’s rapidly growing areas and **would effect great harm to the principle of one-person, one-vote.**” *Id*, at 363. (Emphasis added).
16. Accordingly, it is reasonable to presume that as the year 2021 began, the Herring Defendants as the top election officials in the Commonwealth, along with the Attorney General, the top legal officer in the state, knew it would not merely be unprecedented but

- unconstitutional to hold the November 2, 2021, general election for the House of Delegates using the old, outdated districts drawn to a now obsolete U.S. Census.
17. Indeed, Attorney General Herring had long been critical of former President Donald Trump for failing to adhere to the plain meaning of the U.S. Constitution as regards the 2020 U.S. Census, having attacked the Trump Administration for “blatant illegal politicization of the census” and its attempt to “manipulate” the numbers, such census data needed to allow states like Virginia to “perform critical governmental functions.” Press release, Office of Attorney General, dated November 30, 2020, available on the AG’s website. <https://www.oag.state.va.us/media-center/news-releases/1884-november-30-2020-herring-defends-census-at-supreme-court-against-trump-administration-s-latest-attacks>
  18. It remains for the historians to determine the precise reason or reasons for the unprecedented late delivery of vital 2020 U.S. Census data to Virginia in the 2021 reapportionment year.
  19. However, in terms of this instant matter, whether one wants to blame federal government census policies, the pandemic, or other factors, in whole or part, this following fact is not in dispute: as 2021 dawned, the leaders of Virginia’s state government, along with the newly created Virginia Redistricting Commission, had good reason to be concerned about whether the U.S. Census data needed to draft the new districts as required by federal and state law would arrive in time to complete these constitutional duties in the normal time of years past.
  20. Indeed, new Section 6-A added to Article II of the Constitution of Virginia by the voters last year had been written with these usual time frames in mind, which is to say neither the drafters nor the public considered the need to provide a specific remedy for what had now occurred in 2020. *See* Article II, Section 6-A.
  21. It is unclear whether state leaders were at any time hopeful the new Biden Administration might be able to get the necessary census information on time.
  22. But for whatever reason, the leaders of the General Assembly did something not done since the *Cosner* case: they decided not to push back the date of the June primary by several months to either late August or early September to give the maximum chance for the 2021 general election for the House of Delegates to be contested according to the new electoral districts as required by law.
  23. As the leaders of the state government know, it would make no political or legal sense, much less common sense, to hold a June primary using the old districts, and then hold the general election in November using the new districts.
  24. Those nominated in the June primary as the major party candidates for the House of Delegates, or those who filed by petition as independent or minor party candidates to run in an old district, would not be eligible to run in the new districts without repeating the entire nomination process.
  25. This would not only mean the expense expended to be nominated in June had been for naught, but it would further mean there would not be time to hold a new primary to nominate House of Delegate candidates prior to the general election as this date is set in Article IV, Section 3 of the Constitution of Virginia.

26. The effort to ensure electoral district alignments in the primary and general elections since the decision in *Mahan, Secretary, State Board of Elections, et al., v. Howell et al.*, 410 U.S. 315 (1973), must be seen as decisions made early in the reapportionment year process by state leaders to try and do precisely what the *Cosner* case would later decree, namely that “Virginia’s citizens are entitled to vote as soon as possible for their representatives under a constitutional appointment plan,” *Id* at 364. In accord: then-Judge Roger Gregory in *Harris v. McCory*, 159 F. Supp. 3d 600, 627 (2016), in which he found a redistricting plan in violation of the EPC and favorably cited this observation in *Cosner*.
27. Accordingly, unlike any previous Virginia State Board of Elections, any previous Governor, any previous Attorney General, and any previous General Assembly in the last 50 years, the leaders of state government in Virginia unilaterally decided that even if the Biden Administration managed to get the Census data delivered faster, the 2021 general election for the House of Delegates would be held using the old districts.
28. Therefore, the General Assembly, before the winter had ended, voted during the 2021 Special Session I to hold the primary in June, albeit one week later than normal. Chapter 239 of the Acts of Assembly of the 2021 Special Session I signed by the Governor on March 18, 2001. <https://lis.virginia.gov/cgi-bin/legp604.exe?212+sum+SB1148>
29. Admittedly, the Census data did arrive far too late to enable the 2021 general election for the House of Delegates to be held under newly drawn electoral districts.
30. But this fact cannot obscure the decision by state leaders to violate the Constitution, and the failure of the Herring Defendants to ensure the legality of said elections, which Defendants concede, *infra*, they are obligated to ensure.
31. In that connection, the Code of Virginia anticipates the need for the state’s top election officials to demand formal guidance on such important questions of election law.
32. Va. Code Section 2.2-505(A) says the “Attorney General shall his advice and render official advisory opinions in writing” when requested in writing by one of the following: “the Governor; a member of the General Assembly...head of a state department...board.”
33. Accordingly, the Herring Defendant members of the State Board of Elections through Chairman Brink, Defendant Commissioner of Elections, the Speaker of the House of Delegates, the Minority Leader of the House of Delegates, the Governor, indeed any member of the General Assembly could have asked the Attorney General to give formal guidance on these matters.
34. Despite *Pro se* Plaintiff having initially filed his Complaint in June, the Herring Defendants have never indicted they ever asked for such a formal opinion.
35. In addition, anticipating the need to seek guidance in extraordinary electoral situations, the Code of Virginia gives members of the Virginia State Board of Election a most extraordinary power, a power not cited by the Herring Defendants in this entire litigation.
36. Virginia Code Section 24.2-103(F) says the “State Board [of Elections] may petition a circuit court or the Supreme Court, whichever is appropriate, for a writ of mandamus or prohibition, **or other available legal relief, for the purpose of ensuring that elections are conducted as provided by law.**” (Emphasis added).
37. Upon information and belief, the State Board of Election did not even consider using this power.

38. However, Delegate Lee Carter has shown the media a letter he sent back in April to the Office of the Attorney General, asking the Attorney General to address the constitutionality of holding the general election for the House of Delegates under the old districts. <https://www.courthousenews.com/delayed-census-data-throws-wrench-into-virginia-house-elections/>
39. To date, Delegate Carter has not received a reply despite the seeming plain language of Va. Code Section cited in paragraph #32 *supra*.
40. When asked about this situation by District Court Judge Novak, the lead lawyer representing the Herring Defendants refused to confirm or deny receipt of the letter, citing Mr. Herring's policy on such letters (this attorney has now withdrawn from the case).
41. According to the Herring Defendants and their attorney, the relevant duties of the Defendant members of the State Board of Elections is to "supervise and coordinate the work of the county and city electoral boards and of the registrars to obtain uniformity in their practices and proceedings and legality and purity in all elections." Va Code Section 24.2 103 (A) as cited in Defendants Motion to Dismiss I at Page 2.
42. This description of their duties conveniently uses the terms "county and city" and makes it seem that the State Board of Elections is misnamed.
43. *Pro se* Plaintiff understands that Defendants were trying to say they had nothing to do with redistricting or the setting of the date of elections, saying none of them "are charged with the requirements relating to redistricting under either Title 24.2 of the Virginia Code or the Virginia Constitution." Motion To Dismiss I, page 10.
44. But even with that caveat, it is still striking that Defendants believed they could simply not cite Va. Code Section 24.2-679 and 680.
45. Va Code Section 24.2-679(A) says the "State Board shall...determine those persons who received the greatest number of vote and have been duly elected" to the House of Delegates.
46. Va. Code Section 24.2-680 says "Subject to the requirements of [Virginia Code Section] 24.2-948.2, the State Board shall without delay complete and transmit to each of the persons declared to be elected a certificate of election, certified by it under its seal of office."
47. The State Board never referenced either statute in either of its Motions To Dismiss.
48. Rather, in Motion To Dismiss II, in their Statement of Facts, the Herring Defendants say that "[n]o provision of the Virginia Constitution or the Virginia Code grants the SBE [State Board of Elections] or its members the authority to establish district plans or *to set any election.*" (Emphasis added). Motion To Dismiss II, at Page 2.
49. As the Herring Defendants fully know, *Pro se* Plaintiff never suggested the SBE had the power to establish districts.
50. The Herring Defendants go even further, saying, "none of the Defendants have the authority to alter the status quo with respect to establishing districts or *scheduling elections.*" Motion to Dismiss II, at page 3. (Emphasis added).

**DEFENDANTS-APPELLANTS' SUBSEQUENT ACTIONS THAT REQUIRE THIS MOTION FOR SUMMARY JUDGMENT**

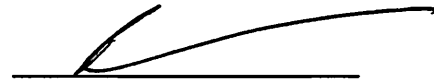
51. Despite claiming they had no power to “alter the status quo with respect to establishing districts or scheduling elections,” the Defendants have now used their power to do just that, albeit indirectly.
52. As indicated above, Defendants have not merely issued certificates of election, but these certificates say those winning on November 2, 2021 “were elected for a two-year term.” Defendant’s Response to Plaintiff’s Motion For a Temporary Injunction. Exhibit 1.
53. Contrary to the assertions of the Herring Defendants, they always had the power to affect the status quo and indirectly set the date of elections, and it is a fair presumption for *Pro se* Plaintiff to now assume they always intended to use it since *Pro se* Plaintiff filed his initial Complaint.
54. It matters not, for purposes of this Motion for Summary Judgment, whether a federal court has the power to declare such certifications of election invalid or disregard them in terms of the constitutional issues raised by *Pro se* Plaintiff.
55. What matters, or at least what *Pro se* Plaintiff believes should matter, is that over all these months, the Herring Defendants filed motion after motion, saying they had nothing to do with state elections, they had no way to alter the status quo and no way to impact the scheduling of elections, that *Ex parte Young* made it clear they were not a proper party in these kinds of matters.
56. Now, however, we discover they always intended, should they succeed in delaying matters until after the election, to use their power to grant the winners on November 2, 2021, two-year terms, at least to the extent they had such power.
57. This is the reason *Pro se* Plaintiff believed he needed to recapitulate what had transpired to date in paragraphs #1 through #57.
58. Accordingly, *Pro se* Plaintiff submits the actions of the Herring Defendant members of the Virginia State Board of Elections fatally undermine their 11<sup>th</sup> Amendment claim, to the extent it had any legal merit since the ruling of Circuit Court Judge Bryan Sr. 59 years ago.

**REMEDY**

*Pro se* Plaintiff asks for the following remedy:

- (A) The granting of his Motion for Summary Judgment; and
- (B) In the alternative, the dismissal of the Defendants' appeal on the grounds they have now conceded they have the very power and have already done the very type of act that *Ex parte Young* intended to bring within the wise jurisprudence of a federal court for the protection of an American citizen's federally protected constitutional rights.

Respectfully Submitted,



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*Pro Se* Appellee

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 2, 2021, this Motion for Summary Judgment was hand delivered to the Clerk of the United States Court of Appeals for the 4<sup>th</sup> Circuit Court. A true copy of this Motion was also sent, via first class mail, to the following attorneys at said address:

Brittany Record

Carol Lewis

Calvin Brown

Brittany McGill

Office of the Attorney General of Virginia

202 North Ninth Street

Richmond, Virginia 23219



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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Richmond Division

<b>Paul Goldman,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Civil Action No. 3:21-CV-420</b>
	)	
<b>Robert Brink, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**DEFENDANTS' RESPONSE TO  
PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION**

Defendants submit the following response to Plaintiff's Motion for Temporary Injunction (ECF No. 53). On Tuesday, November 16, 2021, the State Board of Elections issued the certificates of election for members-elect of the House of Delegates elected at the November 2, 2021 general election. Accordingly, this matter is moot, and Plaintiff's Motion for Temporary Injunction should be denied.

1. The State Board of Elections (SBE) is required to meet on the third Monday in November to certify the results of the November election.<sup>1</sup>

2. The SBE is required to, without delay, "complete and transmit to each of the persons declared to be elected a certificate of his election, certified by it under its seal of office."<sup>2</sup>

3. The SBE met on Monday, November 15, 2021 and certified the results of the November 2, 2021 general election, including the results for the election of members of the House of Delegates. At that meeting, the members of the SBE signed the required certificates of election for all individuals elected at the November 2, 2021 general election.

<sup>1</sup> Va. Code § 24.2-679(A).

<sup>2</sup> Va. Code § 24.2-680.

4. The SBE, through the Department of Elections, transmitted the signed certificates of election on Tuesday, November 16, 2021 to each individual elected to the House of Delegates at the November 2, 2021 general election.

5. In Plaintiff's Motion for Temporary Injunction, Plaintiff asks that an injunction "be issued preventing the Defendant members of the State Board of Election[s] from using the power granted them in their representative capacities to have the State Board of Elections issue Certificates of Election indicating those elected to the House of Delegates at the November 2, 2021, general election have the right to serve a two-year term." ECF No. 53, p. 1.

6. The relief that Plaintiff seeks, namely that the SBE be barred from issuing certificates of election to the members-elect of the House of Delegates indicating that they were elected for a two-year term, may not be granted. The SBE issued the relevant certificates of election to the members-elect of the House of Delegates five days ago. Accordingly, this matter is moot, and Plaintiff's Motion for Temporary Injunction should be denied.

Dated: November 19, 2021

Respectfully submitted,

ROBERT H. BRINK  
JOHN O'BANNON  
JAMILAH D. LECRUISE  
CHRISTOPHER E. PIPER

By: /s/ Carol L. Lewis  
Carol L. Lewis (VSB #92362)\*  
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*\*Attorneys for Robert H. Brink, John O'Bannon, Jamilah D. LeCruise, and Christopher E. Piper, in their official capacities.*

**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on November 19, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. A true copy was also sent, via first class mail and electronically, to:

Paul Goldman  
PO Box 17033  
Richmond, VA 23226  
*Pro se Plaintiff*

/s/ Carol L. Lewis  
Carol L. Lewis (VSB #92362)  
*Counsel for Defendants*

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U.S. COURT OF APPEALS  
FOURTH CIRCUIT

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4<sup>th</sup> CIRCUIT

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MOTION FOR Summary

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