

Nos. 21-2180

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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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JOINT APPENDIX

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MARK R. HERRING  
*Attorney General*

MICHELLE S. KALEN  
*Solicitor General*

ERIN B. ASHWELL  
*Chief Deputy Attorney General*

A. ANNE LLOYD  
BRITTANY M. JONES  
*Deputy Solicitors General*

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**U.S. District Court**  
**Eastern District of Virginia - (Richmond)**  
**CIVIL DOCKET FOR CASE #: 3:21-cv-00420-DJN-RAJ-SDT**

Goldman v. Brink, et al.

Panel: District Judge David J. Novak

District Judge Raymond A. Jackson

District Judge Stephanie Thacker

Case in other court: USCA, KHancock, Case Manager, 21-02180

Cause: 28:1331 Fed. Question: Civil Rights Violation

Date Filed: 06/28/2021

Jury Demand: None

Nature of Suit: 441 Civil Rights: Voting

Jurisdiction: Federal Question

**Plaintiff**

**Paul Goldman**

represented by **Paul Goldman**

4414 Grove Avenue

P.O. Box 17033

Richmond, VA 23226

804-833-6313

PRO SE

**Defendant**

**Robert Brink**

*Chairman of the State Board of Elections, in  
his official capacity*

represented by **Carol Louise Lewis**

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**LEAD ATTORNEY**

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**ATTORNEY TO BE NOTICED**

**Jessica Merry Samuels**

Office of the Attorney General (Richmond)

202 North 9th Street  
Richmond, VA 23219  
(804) 786-6835  
Fax: (804) 371-0200  
Email: jsamuels@oag.state.va.us  
*TERMINATED: 11/09/2021*

**Defendant**

**John O'Bannon**

*Vice Chair of the State Board of Elections,  
in his official capacity*

represented by **Carol Louise Lewis**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Brittany Ashley McGill**

(See above for address)  
*ATTORNEY TO BE NOTICED*

**Calvin Cameron Brown**

(See above for address)  
*ATTORNEY TO BE NOTICED*

**Jessica Merry Samuels**

(See above for address)  
*TERMINATED: 11/09/2021*

**Defendant**

**Jamilah D LeCruise**

*Secretary of the State Board of Elections, in  
her official capacity*

represented by **Carol Louise Lewis**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Brittany Ashley McGill**

(See above for address)  
*ATTORNEY TO BE NOTICED*

**Calvin Cameron Brown**

(See above for address)  
*ATTORNEY TO BE NOTICED*

**Jessica Merry Samuels**

(See above for address)  
*TERMINATED: 11/09/2021*

**Defendant**

**Christopher Piper**

*Commissioner of the State Board of  
Elections, in his official capacity*

represented by **Carol Louise Lewis**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Brittany Ashley McGill**

(See above for address)  
*ATTORNEY TO BE NOTICED*



**Calvin Cameron Brown**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Jessica Merry Samuels**  
(See above for address)  
*TERMINATED: 11/09/2021*

**Movant**

**Jeffrey Thomas, Jr.**

represented by **Jeffrey Thomas, Jr.**  
301 Virginia St.  
Unit 1514  
Richmond, VA 23219  
PRO SE

**Defendant**

**Jessica Bowman**  
*Deputy Commissioner of the State Board of  
Elections, in her official capacity*  
*TERMINATED: 09/10/2021*

represented by **Carol Louise Lewis**  
(See above for address)  
*TERMINATED: 09/10/2021*  
*LEAD ATTORNEY*

**Brittany Ashley McGill**  
(See above for address)  
*TERMINATED: 09/10/2021*

**Calvin Cameron Brown**  
(See above for address)  
*TERMINATED: 09/10/2021*

**Movant**

**Joshua Stanfield**  
*TERMINATED: 10/07/2021*

represented by **Joshua Stanfield**  
208 Crestwood Court  
Yorktown, VA 23692  
PRO SE

**Defendant**

**Virginia State Board of Elections**  
*TERMINATED: 10/12/2021*

represented by **Carol Louise Lewis**  
(See above for address)  
*TERMINATED: 10/12/2021*  
*LEAD ATTORNEY*

**Brittany Ashley McGill**  
(See above for address)  
*TERMINATED: 10/12/2021*

**Calvin Cameron Brown**  
(See above for address)  
*TERMINATED: 10/12/2021*

**Jessica Merry Samuels**  
(See above for address)  
*TERMINATED: 11/09/2021*

**Defendant****Ralph Northam***Governor of Virginia, in his official capacity**TERMINATED: 10/12/2021*represented by **Carol Louise Lewis**

(See above for address)

*TERMINATED: 10/12/2021**LEAD ATTORNEY***Brittany Ashley McGill**

(See above for address)

*TERMINATED: 10/12/2021***Calvin Cameron Brown**

(See above for address)

*TERMINATED: 10/12/2021***Jessica Merry Samuels**

(See above for address)

*TERMINATED: 11/09/2021*

| Date Filed | #        | Docket Text   |
|------------|----------|---|
| 06/28/2021 | <u>1</u> | COMPLAINT against All Defendants ( Filing fee \$ 402, receipt number 34683050825), filed by Paul Goldman. (Attachments: # <u>1</u> Civil Cover Sheet, # <u>2</u> Service Information, # <u>3</u> Receipt)(adun, ) (Entered: 06/28/2021)   |
| 06/28/2021 | <u>2</u> | Summons Issued as to All Defendants. Mailed to Plaintiff with copy of Rule 4. (adun, ) (Entered: 06/28/2021)  |
| 07/06/2021 | <u>3</u> | AMENDED COMPLAINT against Jessica Bowman, Robert Brink, Jamilah D LeCruise, Ralph Northam, John O'Bannon, Christopher Piper, and Virginia State Board of Elections, filed by Paul Goldman.(jpow, ) (Entered: 07/06/2021)  |
| 07/12/2021 | <u>4</u> | Summons Returned Unexecuted by Paul Goldman as to Jessica Bowman, Robert Brink, Jamilah D LeCruise, Ralph Northam, John O'Bannon, Christopher Piper, Virginia State Board of Elections. (Advised Plaintiff to return summonses marked unexecuted to have new summonses issued, summonses were returned but not marked unexecuted) (jpow, ) (Entered: 07/12/2021)  |
| 07/12/2021 | <u>5</u> | Summons Reissued as to Jessica Bowman, Robert Brink, Jamilah D LeCruise, Ralph Northam, John O'Bannon, Christopher Piper, and Virginia State Board of Elections. Advised Plaintiff summonses are ready for pick up in the Clerk's Office with a copy of Rule 4. (jpow, ) (Entered: 07/12/2021)  |
| 07/15/2021 | <u>6</u> | REISSUED SUMMONSES Returned Executed by Paul Goldman to Jessica Bowman served on 7/13/2021, answer due 8/3/2021; Robert Brink served on 7/13/2021, answer due 8/3/2021; Jamilah D LeCruise served on 7/13/2021, answer due 8/3/2021; Ralph Northam served on 7/13/2021, answer due 8/3/2021; John O'Bannon served on 7/13/2021, answer due 8/3/2021; Christopher Piper served on 7/13/2021, answer due 8/3/2021; and Virginia State Board of Elections served on 7/13/2021, answer due 8/3/2021. (jpow, ) (Entered: 07/15/2021) |
| 07/20/2021 | <u>7</u> | NOTICE of Appearance by Carol Louise Lewis on behalf of Jessica Bowman, Robert Brink, Jamilah D LeCruise, Ralph Northam, John O'Bannon, Christopher Piper, Virginia State Board of Elections (Lewis, Carol) (Entered: 07/20/2021)   |
| 07/20/2021 | <u>8</u> | NOTICE of Appearance by Brittany Ashley McGill on behalf of Jessica Bowman, Robert Brink, Jamilah D LeCruise, Ralph Northam, John O'Bannon, Christopher Piper, Virginia   |

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|            |           | State Board of Elections (McGill, Brittany) (Entered: 07/20/2021)   |
| 07/20/2021 | <u>9</u>  | CERTIFICATE of Service re <u>7</u> Notice of Appearance by Carol Louise Lewis on behalf of Jessica Bowman, Robert Brink, Jamilah D LeCruise, Ralph Northam, John O'Bannon, Christopher Piper, Virginia State Board of Elections (Lewis, Carol) (Entered: 07/20/2021)  |
| 07/20/2021 | <u>10</u> | NOTICE of Appearance by Calvin Cameron Brown on behalf of Jessica Bowman, Robert Brink, Jamilah D LeCruise, Ralph Northam, John O'Bannon, Christopher Piper, Virginia State Board of Elections (Brown, Calvin) (Entered: 07/20/2021)  |
| 08/02/2021 | <u>11</u> | Local Rule 83.1(M) Certification received from Paul Goldman (jpow, ) (Entered: 08/02/2021)  |
| 08/03/2021 | <u>12</u> | MOTION to Dismiss for Lack of Jurisdiction <i>and Failure to State a Claim</i> with Roseboro., by Jessica Bowman, Robert Brink, Jamilah D LeCruise, Ralph Northam, John O'Bannon, Christopher Piper, Virginia State Board of Elections. (Lewis, Carol) (Entered: 08/03/2021)  |
| 08/03/2021 | <u>13</u> | Memorandum in Support re <u>12</u> MOTION to Dismiss for Lack of Jurisdiction <i>and Failure to State a Claim</i> with Roseboro., filed by Jessica Bowman, Robert Brink, Jamilah D LeCruise, Ralph Northam, John O'Bannon, Christopher Piper, Virginia State Board of Elections. (Lewis, Carol) (Entered: 08/03/2021)   |
| 08/17/2021 | <u>14</u> | MOTION - Plaintiff's Motion For An Extension of Time to Response To Defendant's Motion to Dismiss filed by Paul Goldman. (jpow, ) (Entered: 08/17/2021)   |
| 08/18/2021 | <u>15</u> | ORDER (Granting in Part and Denying in Part Plaintiff's Motion for Extension of Time) - For good cause shown, the Court hereby GRANTS IN PART and DENIES IN PART Plaintiff's Motion <u>14</u> . The Court GRANTS Plaintiff's Motion to the extent that he requests an extension of time to respond to Defendants' Motion to Dismiss. However, the Court will only extend the time to respond by seven (7) days. No further extensions will be granted. Signed by District Judge David J. Novak on 8/18/2021. Copy mailed to plaintiff. (jpow, ) (Entered: 08/18/2021)   |
| 09/07/2021 | <u>16</u> | MOTION for Leave to File Amended Complaint for Declaratory Judgment by Paul Goldman. (Attachments: # <u>1</u> Local Rule 83.1(M) Certification, # <u>2</u> Envelope, # <u>3</u> Amended Complaint for Declaratory Judgment, # <u>4</u> Envelope)(jpow, ) (Entered: 09/08/2021)  |
| 09/10/2021 | <u>17</u> | ORDER (Granting Leave to Amend Complaint and Setting Deadlines for Renewal of Motion to Dismiss) - The Court hereby GRANTS Plaintiff's Motion <u>16</u> . The Court will not grant any further amendments. Plaintiff's Amended Complaint (ECF No. 16-3) shall be deemed the operative complaint for this action. It is ORDERED that the Clerk shall docket Plaintiff's Amended Complaint (ECF No. 16-3), which is attached to Plaintiff's Motion (ECF No. 16), as Plaintiffs Amended Complaint. Accordingly, the Court hereby DENIES WITHOUT PREJUDICE Defendants' Motion to Dismiss <u>12</u> as moot. Pursuant to Federal Rule of Civil Procedure 15(a)(3), Defendants shall have fourteen (14) days from the entry hereof to renew their Motion to Dismiss. Under Local Rule 7(K)(l), Plaintiff shall have twenty-one (21) calendar days to file a response, measured from the date of Defendants' filing. Defendants shall have six (6) calendar days to reply to Defendant's response. Signed by District Judge David J. Novak on 9/9/2021. Copy of order mailed to pro se plaintiff. (jpow, ) (Entered: 09/10/2021) |
| 09/10/2021 | <u>18</u> | AMENDED COMPLAINT against Robert Brink, Jamilah D LeCruise, Ralph Northam, John O'Bannon, Christopher Piper and Virginia State Board of Elections, filed by Paul Goldman. (Attachments: # <u>1</u> Exhibit, # <u>2</u> Envelope)(jpow, ) (Entered: 09/10/2021)  |
| 09/10/2021 | <u>19</u> | MOTION for Expedited Hearing by Paul Goldman. (jsmi, ) (Entered: 09/13/2021)  |
| 09/13/2021 | <u>20</u> | Local Rule 83.1(M) Certification re <u>19</u> received by Paul Goldman. (Attachments: # <u>1</u>  |

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|            |           | Envelope)(jpow, ) (Entered: 09/13/2021)   |
| 09/14/2021 | <u>21</u> | ORDER (Denying Plaintiffs Motion for Expedited Hearing) - Because there are no pending motions before the Court, the Court hereby DENIES the Motion <u>19</u> . The case will proceed accordingly. Defendants have the remaining balance of time to renew their Motion to Dismiss in light of the Amended Complaint <u>18</u> pursuant to the Court's September 10, 2021 Order <u>17</u> . Signed by District Judge David J. Novak on 9/13/2021. Copy of order mailed to Plaintiff. (jpow, ) (Entered: 09/14/2021)  |
| 09/21/2021 | <u>22</u> | MOTION for Joinder re PROSPECTIVE PLAINTIFF JOSHUA STANFIELD AND MEMORANDUM OF LAW IN SUPPORT filed by Joshua Stanfield, pro se. (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2, # <u>3</u> Local Rule 83.1(M) Certification)(jpow, ) (Entered: 09/21/2021)   |
| 09/23/2021 | <u>23</u> | MOTION to Dismiss <i>Second Amended Complaint</i> with Roseboro,. by Jessica Bowman, Robert Brink, Jamilah D LeCruise, Ralph Northam, John O'Bannon, Christopher Piper, Virginia State Board of Elections. (Lewis, Carol) (Entered: 09/23/2021)   |
| 09/23/2021 | <u>24</u> | Memorandum in Support re <u>23</u> MOTION to Dismiss <i>Second Amended Complaint</i> with Roseboro,. filed by Jessica Bowman, Robert Brink, Jamilah D LeCruise, Ralph Northam, John O'Bannon, Christopher Piper, Virginia State Board of Elections. (Lewis, Carol) (Entered: 09/23/2021)  |
| 09/24/2021 | <u>25</u> | SCHEDULING ORDER Setting Briefing Schedule re <u>23</u> MOTION to Dismiss <i>Second Amended Complaint</i> with Roseboro, filed by Ralph Northam, Robert Brink, Jamilah D LeCruise, Christopher Piper, John O'Bannon, Jessica Bowman and Virginia State Board of Elections. Signed by District Judge David J. Novak on 9/24/2021. (cgar) (Entered: 09/24/2021)   |
| 09/29/2021 | <u>26</u> | Memorandum in Opposition re <u>22</u> MOTION for Joinder filed by Jessica Bowman, Robert Brink, Jamilah D LeCruise, Ralph Northam, John O'Bannon, Christopher Piper, Virginia State Board of Elections. (Lewis, Carol) (Entered: 09/29/2021)  |
| 09/30/2021 | <u>27</u> | RESPONSE to Defendants' Motion to Dismiss <u>23</u> , filed by Paul Goldman. (Attachments: # <u>1</u> Plaintiff's Sworn Statement of Facts)(jpow, ) (Entered: 09/30/2021)   |
| 10/05/2021 |           | Set Hearing as to <u>23</u> MOTION to Dismiss <i>Second Amended Complaint</i> with Roseboro. Motion Hearing set for 10/27/2021 at 11:00 AM in Richmond Courtroom 6300 before District Judge David J. Novak. (cgar) (Entered: 10/05/2021)  |
| 10/05/2021 |           | Reset Hearing <u>23</u> MOTION to Dismiss <i>Second Amended Complaint</i> with Roseboro. Motion Hearing reset for 10/12/2021 at 10:00 AM in Richmond Courtroom 6300 before District Judge David J. Novak. (cgar) (Entered: 10/05/2021)  |
| 10/06/2021 | <u>28</u> | ORDER re <u>23</u> MOTION to Dismiss <i>Second Amended Complaint</i> with Roseboro,. filed by Ralph Northam, Robert Brink, Jamilah D LeCruise, Christopher Piper, John O'Bannon, Jessica Bowman and Virginia State Board of Elections. Court SCHEDULED hearing on Defendants' Motion to Dismiss the Second Amended Complaint at 10 a.m. on October 12, 201. Court ORDERS that by noon on October 8, 2021, Defts file pleading in which they identify who in the government of Virginia has the authority to establish district plans and set a general election, and, therefore, provide the relief that Plaintiff seeks. Signed by District Judge David J. Novak on 10/6/2021. Copy mailed to pro se plaintiff. (cgar) Modified docket text on 10/7/2021 (jpow, ). (Entered: 10/06/2021) |
| 10/06/2021 | <u>29</u> | Prospective Plaintiff Joshua Stanfield's MOTION to Intervene. (jpow, ) (Entered: 10/06/2021)  |
| 10/06/2021 | <u>30</u> | PROSPECTIVE PLAINTIFF JOSHUA STANFIELD'S MOTION TO INTERVENE AND RESPONSE TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO  |

|            |           |  |
|------------|-----------|--|
|            |           | PROSPECTIVE PLAINTIFF'S MOTION FOR JOINDER <u>26</u> . (jpow, ) (Entered: 10/06/2021)  |
| 10/06/2021 | <u>31</u> | MEMORADUM ORDER denying Stanfield's <u>22</u> Motion for Joinder. Signed by District Judge David J. Novak on 10/6/2021. (cgar) Copy mailed to pro se plaintiff on 10/7/2021 (jpow, ). (Entered: 10/06/2021)  |
| 10/07/2021 | <u>32</u> | MEMORANDUM ORDER (Denying Motion to Intervene) - For the reasons set forth in the Memorandum Order <u>31</u> denying Stanfield's Motion for Joinder <u>22</u> , the Court hereby DENIES Stanfield's Motion to Intervene <u>29</u> . Signed by District Judge David J. Novak on 10/6/2021. Copy of memorandum order mailed to pro se plaintiff. (jpow, ) (Entered: 10/07/2021)  |
| 10/08/2021 | <u>34</u> | ORDER requiring further briefing - SEE ORDER FOR ALL DETAILS. Signed by District Judge David J. Novak on 10/8/2021. (cgar) (Entered: 10/08/2021)   |
| 10/08/2021 | <u>35</u> | NOTICE of Appearance by Jessica Merry Samuels on behalf of Robert Brink, Jamilah D LeCruise, Ralph Northam, John O'Bannon, Christopher Piper, Virginia State Board of Elections (Samuels, Jessica) (Entered: 10/08/2021)   |
| 10/08/2021 | <u>36</u> | Response to <u>28</u> Order,,, filed by Robert Brink, Jamilah D LeCruise, Ralph Northam, John O'Bannon, Christopher Piper, Virginia State Board of Elections. (Samuels, Jessica) (Entered: 10/08/2021)   |
| 10/09/2021 | <u>38</u> | Response to <u>34</u> Order filed by Robert Brink, Jamilah D LeCruise, Ralph Northam, John O'Bannon, Christopher Piper, Virginia State Board of Elections. (Samuels, Jessica) (Entered: 10/09/2021)  |
| 10/12/2021 | <u>39</u> | Minute Entry for proceedings held before District Judge David J. Novak:Motion Hearing held on 10/12/2021 re <u>23</u> MOTION to Dismiss <i>Second Amended Complaint</i> with Roseboro, filed by Ralph Northam, Robert Brink, Jamilah D LeCruise, Christopher Piper, John O'Bannon, Jessica Bowman and Virginia State Board of Elections. Matter came on for hearing on Motion to Dismiss Second Amended Complaint. Arguments heard. Briefing/Scheduling Order and Memorandum Opinion to issue. (Court Reporter Tracy Stroh, OCR.)(cgar) (Entered: 10/12/2021)  |
| 10/12/2021 | <u>40</u> | MEMORANDUM OPINION (Granting in Part and Denying in Part Defendants' Motion to Dismiss). Signed by District Judge David J. Novak on 10/12/2021. (jpow, ) (Entered: 10/12/2021)   |
| 10/12/2021 | <u>41</u> | ORDER (Granting in Part and Denying in Part Defendants' Motion to Dismiss the Second Amended Complaint and Setting Deadlines) - This matter now comes before the Court on Defendants' Motion to Dismiss the Second Amended Complaint (ECF No. 23). For the reasons set forth in the accompanying Memorandum Opinion <u>40</u> , the Court hereby GRANTS IN PART and DENIES IN PART the Motion to Dismiss. <u>23</u> . On November 8, 2021, at 11 a.m., the Court will conduct a hearing on the remaining Defendants' Renewed Motion to Dismiss, and in particular, the issue of standing. The Court hereby tentatively SCHEDULES a hearing before a three-judge panel on the cross-motions for summary judgment on December 3, 2021, at 10 a.m., subject to the availability of the two other panel members. SEE ORDER FOR DETAILS AND DEADLINES. Signed by District Judge David J. Novak on 10/12/2021. Copy of memorandum opinion and order mailed to pro se plaintiff. (jpow, ) (Entered: 10/12/2021) |
| 10/12/2021 |           | Motion Hearing (Renewed Motion to Dismiss) set for 11/8/2021 at 11:00 AM in Richmond Courtroom 6300 before District Judge David J. Novak. (cgar) (Entered: 10/12/2021)   |
| 10/12/2021 | <u>42</u> | Local Rule 83.1(M) Certification by Paul Goldman. (jpow, ) (Entered: 10/12/2021)   |

|            |           |   |
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| 10/12/2021 | <u>43</u> | TRANSCRIPT of proceedings held on October 12, 2021, before Judge David J. Novak, Court Reporter/Transcriber Tracy Stroh, Telephone number 804-916-2278. <b>NOTICE RE REDACTION OF TRANSCRIPTS: The parties have thirty(30) calendar days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. The policy is located on our website at <a href="http://www.vaed.uscourts.gov">www.vaed.uscourts.gov</a> Transcript may be viewed at the court public terminal or purchased through the court reporter/transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 11/12/2021. Redacted Transcript Deadline set for 12/13/2021. Release of Transcript Restriction set for 1/10/2022.(stroh, tracy) (Entered: 10/12/2021)</b>                        |
| 10/13/2021 | <u>44</u> | ORDER - The Honorable David J. Novak has requested appointment of a three-judge district court in the above-captioned case, in which the plaintiff challenges the constitutionality of a statewide legislative apportionment scheme, arguing that the Virginia House of Delegates districts are malapportioned. I DO HEREBY DESIGNATE AND ASSIGN the Honorable Stephanie D. Thacker, United States Circuit Judge for the Fourth Circuit, and the Honorable Raymond A. Jackson, United States District Judge for the Eastern District of Virginia, to sit with the Honorable David J. Novak, the three to constitute a district court of three judges to hear and determine this matter as provided by 28 U.S.C. § 2284. Signed by Roger L. Gregory, Chief Judge, U.S. Court of Appeals for the Fourth Circuit on 10/12/2021. (Attachments: # <u>1</u> Letter)(tjoh, ) Modified on 10/13/2021 to add that a copy of this Order and attached cover letter mailed to pro se plaintiff. (tjoh, ). (Entered: 10/13/2021) |
| 10/15/2021 | <u>45</u> | Prospective Plaintiff Thomas' MOTION to Intervene by Jeffrey Thomas, Jr. (Attachments: # <u>1</u> Local Rule 83.1(M), # <u>2</u> Exhibit, # <u>3</u> Complaint (Received), # <u>4</u> Proposed Order)(jpow, ) (Entered: 10/15/2021)   |
| 10/15/2021 | <u>46</u> | E-Noticing Registration Request for Pro Se Litigants filed by Jeffrey Thomas, Jr. (jpow, ) (Entered: 10/15/2021)  |
| 10/18/2021 | <u>47</u> | NOTICE OF INTERLOCUTORY APPEAL as to <u>41</u> Order on Motion to Dismiss,,, <u>40</u> Memorandum Opinion by Robert Brink, Jamilah D LeCruise, John O'Bannon, Christopher Piper. Filing fee \$505, receipt number AVAEDC-8052643. (Samuels, Jessica) (Entered: 10/18/2021)  |
| 10/19/2021 | <u>48</u> | Transmission of Notice of Appeal to US Court of Appeals re <u>47</u> Notice of Interlocutory Appeal (All case opening forms, plus the transcript guidelines, may be obtained from the Fourth Circuit's website at <a href="http://www.ca4.uscourts.gov">www.ca4.uscourts.gov</a> ) (tjoh, ) (Entered: 10/19/2021)   |
| 10/20/2021 | <u>49</u> | ORDER (Staying Case) - This matter comes before the Court on Defendants' Notice of Interlocutory Appeal <u>47</u> , moving to appeal the Court's October 12, 2021 Order granting in part and denying in part Defendants' Motion to Dismiss the Second Amended Complaint on sovereign immunity grounds <u>41</u> . Because sovereign immunity furnishes "both a defense to liability and a limited entitlement not to stand trial or face the other burdens of litigation," the Court hereby STAYS this case until further order of the Court, including all motions to intervene. Signed by District Judge David J. Novak on 10/20/2021. Copy of order mailed to pro se Plaintiff, Paul Goldman and Prospective Intervenor, Jeffrey Thomas, Jr. as directed. (jpow, ) (Entered: 10/20/2021)   |
| 10/20/2021 |           | USCA Case Number 21-2180 USCA, KHancock, Case Manager for <u>47</u> Notice of Interlocutory Appeal filed by Robert Brink, Jamilah D LeCruise, Christopher Piper, John O'Bannon. (tjoh, ) (Entered: 10/20/2021)  |
| 10/20/2021 |           | Minute Entry for proceedings with District Judge David J. Novak:3 Judge Panel Telephone Conference held on 10/20/2021. (cgar) (Entered: 10/21/2021)   |

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| 11/08/2021 | <u>51</u> | MOTION to Withdraw as Attorney by Robert Brink, Jamilah D LeCruise, Ralph Northam, John O'Bannon, Christopher Piper, Virginia State Board of Elections. (Samuels, Jessica) (Entered: 11/08/2021)  |
| 11/09/2021 | <u>52</u> | ORDER (Granting Motion to Withdraw as Counsel) - The Court hereby GRANTS Defendants' Motion (ECF No. <u>51</u> ) and hereby DIRECTS the Clerk to terminate Ms. Samuels as counsel of record in this matter. Signed by District Judge David J. Novak on 11/9/2021. Copy of order mailed to Plaintiff. (jpow, ) (Entered: 11/09/2021)   |
| 11/19/2021 | <u>53</u> | MOTION for a Temporary Injunction by Paul Goldman. (jpow, ) (Entered: 11/19/2021)   |
| 11/19/2021 | <u>54</u> | RESPONSE to Motion re <u>53</u> MOTION <i>for Temporary Injunction</i> filed by Robert Brink, Jamilah D LeCruise, John O'Bannon, Christopher Piper. (Lewis, Carol) (Entered: 11/19/2021)  |
| 11/23/2021 | <u>55</u> | ORDER (Denying Motion for Injunction as Moot) - This matter comes before the Court on prose Plaintiffs Motion for a Temporary Injunction, requesting a Temporary Injunction to enjoin Defendant members of the State Board of Elections ("the Board") Robert Brink, John O'Bannon and Jamilah D. LeCruise ("the Board members") from issuing Certificates of Election indicating that those elected to the House of Delegates in the November 2, 2021 general election will serve a two-year term. (Mot. for Temporary Inj. at 1 (ECF No. 53).) The Court agrees with the Board members and DENIES AS MOOT the Motion for a Temporary Injunction (ECF No. <u>53</u> ). See order for details. Signed by District Judge David J. Novak on 11/23/2021. Copy of order mailed to pro se plaintiff. (jpow, ) (Entered: 11/23/2021) |
| 11/30/2021 | <u>56</u> | MOTION for Reconsideration of Denial of Plaintiff's Motion for Temporary Injunction by Paul Goldman. (jpow, ) (Entered: 11/30/2021)   |

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Paul Goldman )  
P.O. Box 17033 )  
Richmond, Virginia 23226 )  
*Pro se* )

Case No: 3:21-CV-420

Plaintiff, )

v. )  
Ralph Northam, Governor of Virginia, in his )  
official capacity )

AMENDED COMPLAINT FOR DECLARATORY  
JUDGMENT

Virginia State Board of Elections )

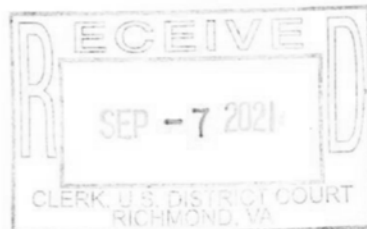
Robert Brink, Chairman of the State Board )  
of Elections, in his official capacity )

John O'Bannon, Vice Chair of the State )  
Board of Elections, in his official capacity )

Jamilah D. LeCruise, Secretary of the State )  
Board of Elections, in her official capacity )

Christopher Piper, Commissioner of the )  
State Board of Elections, in his official )  
capacity )

Defendants. )



**AMENDED COMPLAINT FOR DECLARATORY JUDGMENT**

Pursuant to Federal Rules of Civil Procedure Rule 15(a), Plaintiff hereby files his Amended Complaint. There is good cause for the Amended Complaint.

Plaintiff was served by mail with Defendant's Motion to Dismiss filed electronically on August 3. Pursuant to Plaintiff's Motion requesting additional time to respond, the Court granted Plaintiff an additional seven days to obtain certain recently released 2020 U. S. Census Bureau data. This Amended Complaint is filed within the time deadlines.

This data was not yet available when Plaintiff filed his initial Complaint. Defendants, on Page 5 of their Memorandum of Law in support of their Motion to Dismiss, averred such Census data was fundamental to fairly resolving the instant matter. This Census data has since become publicly available and is incorporated herein. Therefore, the issues of disagreement between



Plaintiff and Defendants have been significantly narrowed. Defendant Bowman has been dropped.

For these reasons, Plaintiff respectfully asks the Court to docket this Amended Complaint and moot the original Complaint and Defendants' Motion to Dismiss.

### SUMMARY

1. As a result of the Court permitting Plaintiff sufficient time to obtain new U.S. Census data, the key facts, along with the key principles of state and federal constitutional law, are seemingly no longer in dispute.
2. As Plaintiff stated in his original Complaint, the unconstitutional nature of the governmental action being conducted on a continuing basis as regards the upcoming November 2021 House of Delegates general election had been pointed out to Defendants forty years ago in *Cosner v Dalton*, 522 F. Supp. 350 (E.D. Va 1981).
3. As Defendants concede in the Statement of Facts in their Motion to Dismiss, the Constitution of Virginia mandates this election this reapportionment year must be contested in new districts drawn pursuant to the 2020 U.S. Census. Defendant, Memorandum of Law, Page 1.
4. Upon information and belief, no previous House of Delegates election mandated by the Constitution of Virginia in a reapportionment year has ever been held using the old, existing districts created pursuant to an obsolete Census finished eleven years prior.
5. Yet the governmental leaders of the Commonwealth of Virginia are currently in the process of holding the 2021 November general elections for the House of Delegates using the existing old districts created pursuant to the obsolete 2010 U.S. Census. See, e.g., *Washington Post*, 5/24/21: [https://www.washingtonpost.com/local/virginia-politics/virginia-elections-ballot-house-races/2021/05/24/da784752-b98a-11eb-a6b1-81296da0339b\\_story.html](https://www.washingtonpost.com/local/virginia-politics/virginia-elections-ballot-house-races/2021/05/24/da784752-b98a-11eb-a6b1-81296da0339b_story.html).
6. At all times, state leaders knew such a scheme clashed with the plain wording of the Constitution of Virginia. See *Washington Post*, 2/16/21: [https://www.washingtonpost.com/local/virginia-politics/census-delays-virginia-elections/2021/02/16/0f4488ac-706f-11eb-b8a9-b9467510f0fe\\_story.html](https://www.washingtonpost.com/local/virginia-politics/census-delays-virginia-elections/2021/02/16/0f4488ac-706f-11eb-b8a9-b9467510f0fe_story.html).
7. Accordingly, it is reasonable to presume Defendants have long been aware of the reasoning, not merely the outcome, in *Cosner*, *supra*, the leading case in this area.
8. Indeed, the same Article II, Section 6 cited by Defendants in support of their Motion to Dismiss had been amended in 2020 to ensure the Governor and state election officials would abide by the following in a reapportionment year such as 2021: "Every electoral district shall be drawn in accordance with... [among other laws] the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States...and **judicial decisions interpreting such laws.**"  
<http://results.elections.virginia.gov/vaelections/2020%20November%20General/Site/Referendums.html>

9. *Cosner* was decided under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. (“Because we conclude that the Act [referencing the reapportionment law passed by the Virginia General Assembly] violates the Equal Protection Clause of the Fourteenth Amendment....”) *Cosner*, *supra*, at 354.

10. That Virginia had been experiencing uneven population growth and/or decline among different regions during the past decade must presumed to have been known by Defendants, the Attorney General, and the General Assembly. See, e.g., “Virginia Population Shifts”, *The Virginia Newsletter*, Weldon Cooper Center for Public Service at the University of Virginia, Volume 93, No. 1, January 2017, available at [vig.coopercenter.org](http://vig.coopercenter.org).

11. Accordingly, it is simply not credible for a Governor, an Attorney General, the leaders of the General Assembly, or the Defendant top state election officials to claim they didn’t have reason to know holding the 2021 November elections under the old existing districts would do great damage to Plaintiff’s equal protection rights until they had possession of the official U.S. Census data for 2020.

12. “Allowing the [1981] elections to proceed under the 1971 Act [i.e., outdated districts created pursuant to the obsolete 1971 census] would greatly disadvantage the citizens in Virginia’s rapidly growing areas and **would effect a great harm to the principle of one person, one vote.**” *Cosner*, *supra*, at 363. (Emphasis added).

13. At all times, Defendants Northam, Brink, and seemingly Piper had a statutory right to ask the Attorney General for a formal official publicly available legal opinion on the constitutionality of holding the 2021 House of Delegate election under the existing, old districts. Va. Code Section 2.2-505. See also <https://www.oag.state.va.us/citizen-resources/opinions/official-opinions>.

14. Had said Defendants or any member of the General Assembly merely invoked the command of the statute, the Attorney General had a legal obligation to reply. *Id.*

15. Upon information and belief, no such Defendant asked for an opinion.

16. Given the new language to the state constitution, and the fact it appears no previous general election for the House of Delegates in a reapportionment year has taken place using old districts created pursuant to an old, obsolete census, the failure to seek an official opinion of the Attorney General is seemingly inconsistent with the general “good faith” standard required of state officials in redistricting cases. See, e.g., *Kirkpatrick v. Preisler*, 394 U.S. 526, 530 (1969) [“State (must) make a good faith effort”].

17. *Cosner* was decided on August 25, 1981, more than two months **before** the November 3, 1981, House of Delegate elections at issue.

18. In *Cosner*, the General Assembly had used the new 1980 Census data to enact a new reapportionment plan on August 11, 1981, creating one hundred House of Delegates districts to be contested on November 3, 1981. *Cosner*, at 353.

19. But *Cosner* found the new reapportionment plan unconstitutional. *Id.* at 354.

20. “Having found the August 11 plan unconstitutional, we must consider the question of appropriate relief. Any remedy must, of course, be considered in light of the imminence of the 1981 elections” due to be held in November. *Cosner*, at 363.

21. "A number of remedies have been suggested" declared the opinion. *Id.*
22. "[T]he court could implement its own plan." *Id.*
23. But the Court rejected implementing its own plan. *Id.*
24. "[W]e could permit the Virginia General Assembly to devise [another] plan of its own." *Id.*
25. The Court also rejected this option. *Id.*
26. "[W]e could order the elections to be reorganized to follow the 1971 district lines." *Id.*
27. The Court rejected using the old districts as population growth had been "unevenly spread throughout the Commonwealth." *Id.* See also paragraph #12, *supra*.
28. *Cosner* found it "impractical" to expect the General Assembly to reconvene and produce a constitutionally acceptable plan in time to "accommodate an election on November 3." *Cosner*, at 364.
29. *Cosner* therefore allowed the 1981 House of Delegates elections to proceed under the unconstitutional (August 11) reapportionment plan created using 1980 census data, saying such interim relief could be permitted "when as here, necessary election machinery is already in progress for an election rapidly approaching." *Id.* (citations omitted)
30. At the same time, the Court found "Virginia citizens are entitled to vote as soon as possible for their representatives under a constitutional apportionment plan." *Id.*
31. Accordingly, the Court limited "the terms of members of the House of Delegates elected in 1981 to one year." *Id.*
32. *Cosner* ordered the Defendant "state election officials to conduct a new election in 1982 for the House of Delegates" under a constitutional reapportionment plan. *Id.*
33. This 1982 special election was held in November 1982 under a constitutional plan enacted by the General Assembly. See *Cosner v Robb, et al.* 541 F. Supp. 613 (E.D. Va. 1982). (Robb had replaced Dalton as Governor; the State Board of Election members remained Defendants).
34. Upon information and belief, no state official ever suggested holding the court-ordered special election in 1982 a year after the 1981 general election put an unfair burden on any legitimate state interest. (Indeed, three consecutive House of Delegates resulted from the *Cosner* decision as all one hundred House of Delegate seats were again contested in 1983 at the regularly scheduled general election). Paragraph # 6, *supra*.
35. Defendants and the Attorney General cannot claim surprise at what Plaintiff has now discovered when overlapping the 2020 Census data with the old existing House districts to be contested this November.
36. The population deviation between these House Districts grossly exceeds the maximum allowed under Supreme Court decisions since the seminal reapportionment case in Virginia, *Mahan v. Howell*, 410 U.S. 315 (1973). (Mahan was the Secretary of the State Board of Elections and Howell, representing himself *pro se*, is now a legendary figure in Virginia politics, but back then a State Senator destined to be elected Lieutenant Governor a few months later) [The current general standard is that deviations of 10% or more are considered constitutionally

questionable and invariably will “not be tolerable” except due to exceptional circumstances. *White v Register*, 412 U.S. 755, 764 (1973)].

37. Virginia House of Delegates District #3 has a population of 71,122, according to the 2020 U.S. Census. (Plaintiff’s Exhibit 1) (hereinafter “Exhibit 1”).

38. Virginia House of Delegates District #87 has a population of 130,082, according to the 2020 U.S. Census. (Exhibit 1).

39. The population deviation between HD #3 and HD #87 is approximately 82%.

40. This far exceeds the maximum allowable deviation generally permitted for state legislative reapportionments. *See, e.g., Harris, v Arizona Independent Redistricting Commission*, 136 S. Ct. 1301, 1307 (2016).

41. Such an egregious deviation, on the order of 7 to 8 times bigger than considered tolerable as a general constitutional rule, is not unique to a comparison with House District #3. House District #1 has a population of 72,160, House District #4 has a population of 73,740 and House of District #79 a population of 73,909 as compared to the 130,082 residents in HD #87 [roughly 75% or greater for each of the three].

42. A 10% deviation between the most populated and least populated legislative districts would automatically trigger serious constitutional concerns in any contested election in a reapportionment year. *Id.*

43. Yet using, *arguendo*, a 12% deviation marker finds over four-fifths of all 100 House of Delegates Districts to be contested in November with population 12% or greater, a staggeringly unconstitutional deviation pattern. (Exhibit 1).

44. There are approximately thirty House of Delegates Districts with populations at least 25% larger than House District #3.

45. Plaintiff resides in a House District whose population is sufficiently greater than HD#3 to give him the necessary standing to sue using *Harris*, *infra*, *Cosner* *infra*, and *Mahan* *infra*. *See* paragraphs #55 through #69 *supra*.

46. The U.S. Supreme Court recognized nearly 50 years ago that the Virginia State Board of Elections and its members were proper parties for the instant matter. *See e.g., Mahan*.

47. Governors have long been considered proper parties for challenges to Virginia apportionment laws. *See, e.g., Cosner v. Dalton*, *infra*, *Cosner v. Robb*, *infra* and *Republican Party v. Wilder, et al.* 774 F. Supp. 400 (W.D. Va. 1991) [In the latter, Governor Wilder and Michael Brown, Executive Secretary to the Virginia State Board of Elections, were likewise sued in their official capacities].

48. The Virginia state government intends to hold the 2021 House of Delegates elections pursuant to districts created according to the 2010 U.S. Census and signed by Governor Bob McDonnell on April 29, 2011. Chapter 1 of the Acts of Assembly of the 2011 Special Session.

49. Two weeks before, Governor Bob McDonnell vetoed the reapportionment bill passed by the General Assembly in part because it violated the Equal Protection Clause of the 14<sup>th</sup> Amendment to the U.S. Constitution. Message accompanying Governor’s veto of House Bill 5001, [lis.virginia.gov](https://www.lis.virginia.gov) (2011 Special Session). [Thus, the Office of Governor’s previous intimate involvement with the reapportionment plan at issue 11 years later makes the current occupant

of that office a proper Defendant when sued in his official capacity. *Ex Parte Young*, 209 U.S. 123 (1908)].

50. Finally, even assuming, *arguendo*, Virginia did not receive the U.S. Census data needed to draft new districts in time for the upcoming November 2, 1981 general election for the House of Delegates, this is a distinction without a difference as regards *Cosner*: to wit, the gravamen both in 1981 and now in 2021 is the grossly unconstitutional population deviations between House districts being contested in 1981 and again in 2021 in a reapportionment year, thus both cases are revolve around how best to remedy such unconstitutionality so citizens can enjoy their constitutional right of equal protection of the laws as soon as possible. See paragraphs # 9 thru # 31 *supra*.

#### **JURISDICTION AND VENUE**

51. This Court has jurisdiction over the subject matter and parties pursuant to 28 U.S.C. § 1331, as this case involves questions of federal law.

52. This Court has supplemental jurisdiction over the related state law claims pursuant to 28 U.S.C. § 1367(a) because those claims form part of the same case or controversy under the Equal Protection Clause of the United States Constitution.

53. Venue is proper in, and Defendants are subject to the personal jurisdiction of, this Court because Defendants are citizens of Virginia, operate in their official capacities in the Eastern District of Virginia, and all or most of the events giving rise to this action occurred in this District.

54. Plaintiff is a resident of Virginia.

#### **PARTIES**

55. Plaintiff Paul Goldman resides in Richmond, Virginia.

56. Goldman is a qualified voter in the 68<sup>th</sup> Virginia House of Delegates District.

57. Goldman was denied his right to run in a constitutionally drawn 68<sup>th</sup> district in 2021 and is contemplating using his core political rights guaranteed by the U.S. Constitution to run for the House of Delegates in a constitutionally drawn 68<sup>th</sup> district (or whatever the number of the district wherein he would reside).

58. The population of House of Delegates District #68 is 85,233, according to 2020 U.S. Census data. Exhibit 1.

59. Plaintiff Goldman's district has a population size over 19% greater than House of Delegates District #3.

60. Defendant Ralph Northam is the Governor of Virginia. He is a resident of Virginia, and his office is in Richmond, Virginia. He is being sued in his official capacity.

61. The Virginia State Board of Elections is headquartered in Richmond, Virginia.

62. Defendant Robert Brink is the Chair of the State Board of Elections. He is a citizen of the Commonwealth of Virginia. His office is in Richmond, Virginia. He is being sued in his official capacity.

63. Defendant John O'Bannon is the Vice Chair of the State Board of Elections. He is a citizen of the Commonwealth of Virginia. His office is in Richmond, Virginia. He is being sued in his official capacity.

64. Defendant Jamilah LeCruise is the Secretary of the State Board of Elections. She is a citizen of the Commonwealth of Virginia. Her office is in Richmond, Virginia. She is being sued in her official capacity.

65. Defendant Christopher Piper is the Commissioner of the Virginia Department of Elections. He is a citizen of the Commonwealth of Virginia. His office is in Richmond, Virginia. He is being sued in his official capacity.

66. The Virginia State Board of Elections (hereinafter, "State Board") is tasked by state law with ensuring "legality and purity in all elections" and to "ensure that major risks to election integrity are...addressed as necessary to promote election uniformity, legality and purity." Va. Code § 24.2 103(A).

67. The Virginia Department of Elections is the operational arm used by the State Board to ensure that the State Board is fulfilling its duty to ensure the integrity, purity, and uniformity of state elections.

#### **STATEMENT OF FACTS**

68. The Commonwealth of Virginia intends to hold the November 2021 House of Delegates elections according to Chapter 1 of the Acts of Assembly of the 2011 Special Session, codified in Va. Code § 24.2-304.3.

69. This state reapportionment law was signed by Governor Bob McDonnell on April 29, 2011. See paragraph # 48, *supra*.

70. It was the General Assembly's second attempt at a constitutional redistricting bill. See paragraph #49, *supra*.

71. Governor McDonnell vetoed the first reapportionment bill passed by the General Assembly pursuant to the 2010 census. *Id.*

72. The first bill passed the Senate and the House on April 11, 2011. *Id.*

73. Governor McDonnell vetoed it on April 15, 2011. *Id.*

74. In justifying the veto, the Governor gave several reasons, including his concern that part of the proposed reapportionment plan violated the equal protection clause. *Id.*

75. Roughly five years later, several citizens mounted a legal challenge to a dozen of the legislative districts drawn in the plan signed by Governor McDonnell. *Bethune-Hill v. Virginia State Board of Elections*, 137 S. Ct. 786 (2017).

76. The challenge proved successful, and the matter got remanded for further consideration. *Golden Bethune-Hill et al. v. Virginia State Board of Elections, et al. Defendants* (3:14cv852, 2019) [The Virginia State Board of Elections, the Chair, the Vice Chair, and the Secretary, along with the Department of Elections were named defendants, and had representation including a lawyer from the Office of the Attorney General].



77. Adjustments to certain legislative district lines were made as required using the 2010 Census data. *Id.*

78. Article II, Section 6 of the Virginia Constitution requires House of Delegates electoral districts to be redrawn in 2021 using the 2020 census. Paragraph # 3, *supra*.

79. In November 2020, Virginia voters approved Amendments to the Constitution concerning drafting the new apportionment plan required pursuant to the 2020 Census. Paragraph # 8, *supra*.

80. The voters added to the Constitution language stating that new legislative districts comply not only with state mandates but also the “Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States”; the “Voting Rights Act of 1965, as amended”; and “judicial decisions interpreting” these enactments. Article II, section 6 of the Constitution of Virginia. *Id.*

81. The voters also added a new provision creating the Virginia Redistricting Commission. Article II, section 6 A.

82. The Virginia Redistricting Commission (hereinafter “Commission”) says the Constitution of Virginia is clear and that “for the House of Delegates the new districts are to be implemented for the general election on November 2, 2021.” [www.virginiaredistricting.org](http://www.virginiaredistricting.org), Commission News for February 12, 2021.

83. As demonstrated in paragraphs #36 through #45, *supra*, the statistical proof as regards the unconstitutionality of the election plan to be used this coming November 2, 2021, is irrefutable.

84. Such irrefutability can be reasonably assumed to have been common knowledge to state government leaders including Defendants long before this lawsuit was filed, and of course, on or before House District population data was available from the Commission. See paragraphs #6 and #12, *supra*, and the emails in Exhibit 1.

#### **THE LAW OF THE CASE**

85. Since *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution applies to state legislative redistricting.

86. The Constitution of Virginia explicitly affirms that the Equal Protection Clause as well as the Voting Rights Act of 1965 applies to state legislative redistricting plans, as do judicial decisions like *Cosner*. See paragraphs #8 and #9, *supra*.

87. The Census data available to both Plaintiff and Defendants irrefutably demonstrates the unconstitutionality of holding the November 2021 House of Delegates general elections under the old districts. Exhibit 1.

88. Plaintiff Goldman’s standing is irrefutable, as he resides in a House of Delegates district whose population is over 19% greater than House District #3.

89. Moreover, any deviation from equally populated districts greater than 10% is only constitutional if state officials can demonstrate “an honest and good faith effort” to have tried

to avoid any such deviation among the districts, the burden of proof being on the state. See, *Harris* at 1306.

90. Given that Defendants never sought any guidance from any Court, nor guidance from the Attorney General as permitted in Va. Code Section 2.2-505, and that state leaders likewise failed to seek any such guidance before deciding to conduct the House of Delegates election under old, existing districts drawn to an obsolete census from 11 years ago, this raises a fair inference that Defendants failed to make an “honest and good faith effort” to discharge their duties in a reapportionment year. *Reynolds, supra*.

91. Indeed, nearly fifty years ago, in *Mahan v. Howell*, 410 U.S. 315 (1973), involving 1971 Virginia House of Delegates redistricting, the Court found Virginia state officials had to make a good faith effort in a reapportionment year to adhere to their responsibilities under the Equal Protection Clause. *Id* at 324.

92. Given the respective deviations in population size affecting Plaintiff, he has demonstrated the injury in fact required to pursue the instant matter. See, e.g., *Cosner, Mahan, supra*.

93. The November 1981 general elections for the House of Delegates at issue in *Cosner* had not yet occurred.

94. *Cosner* ruled that an injury to Plaintiffs had already occurred since the Commonwealth intended to conduct the upcoming election under an unconstitutional plan. These are precisely the circumstances in the instant matter. See paragraph #97, *infra*.

95. *Cosner* and *Mahan* therefore refute Defendants’ claim in their Motion to Dismiss that no such particularized injury can legally occur until the November elections have been held. Defendants, Motion to Dismiss, Page 5.

96. The constitutionally required injury occurs the moment the state decides to hold an election under an unconstitutional electoral plan. *Cosner, Mahan*.

97. As *Cosner* pointed out, “[a]llowing elections **to proceed** under the 1971 Act would...effect great harm to the principle of one person, one vote.” *Id* at 363. (Emphasis added).

98. Defendants apparently intend to claim that, unlike *Cosner*, the state had to use the old districts, as the necessary Census data to make new districts in time for the 2021 was never expected to be available.

99. Even assuming, *arguendo*, this to be true, this claim is irrelevant to the instant matter, as *Cosner* and *Mahan* make clear.

100. The deciding constitutional principle is that the districts being contested in the upcoming November 2021 general election are unconstitutional.

101. Any alleged lack of Census data, while it may explain the failure of state officials to abide by the state and federal constitutions, cannot obliterate the Equal Protection Clause rights of the plaintiff, much less the citizenry of Virginia, to have a constitutionally reapportioned state legislature as soon as possible. Paragraph #30, *supra*.

102. *Cosner* found that the Governor and the State Board of Elections were proper parties to the suit.



103. Governor Robb, who succeeded Governor Dalton, was substituted in a later redistricting suit related to that matter and the State Board of Elections Chair, along with others, remained a Defendant. *Cosner v. Robb*, 541 F. Supp. 613, 619 fn. 2 (E.D. Va. 1982).

104. In 1991, the Republican Party of Virginia, along with many Republican members of the House of Delegates, sued then-Governor Wilder and State Board of Elections Executive Director Michael Brown challenging the reapportionment plan enacted according to the 1990 Census by the Virginia General Assembly and signed by Governor Wilder on April 19, 1991. *Republican Party of Virginia v. Wilder*, 744 Fed. Supp 400, 408 Fn. 2 (W.D. Va. 1991).

105. Plaintiffs sought a preliminary injunction. *Id* at 401.

106. The Court denied the injunction as it failed to meet the requirements of *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353 (4<sup>th</sup> Cir. 1991).

107. “We do not believe that a redistricting plan, which has been entrusted to the Commonwealth, by law, and especially to the General Assembly and the Governor thereof...” met the conditions for injunctive relief. *Republican Party of Virginia v. Wilder*, at 407.

108. The Supreme Court, in *Mahan*, recognized the Virginia State Board of Elections as a proper party in a redistricting case.

109. Therefore, with all due respect, Defendant’s Motion to Dismiss claiming *none* of the Defendants are proper parties is not well grounded in the law. Motion to Dismiss, Memorandum, pp. 9-10.

110. The 2011 legislation creating most of the districts being contested in 2021 took effect after the General Assembly negotiated away the Governor’s objections. Paragraphs #68 through #77, *supra*.

111. Accordingly, *Ex Parte Young*, 208 U.S. 123 (1908) is fully satisfied as regards all Defendants.

112. Plaintiff believes sovereign immunity, to the extent it might otherwise generally apply in cases involving state legislative reapportionment, has been waived by the voters when they approved substantive changes to Article II, Section 6 in 2020. Paragraph #8, *supra*.

113. Virginians wanted to make sure state officials would be held to the highest constitutional redistricting standards in their conduct as articulated in federal law and judicial decisions.

114. Virginia voters are empowered to make such decisions, since under the Constitution of Virginia, “all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amendable to them.” Article I, Section 2.

#### **NATURE OF THE ACTION REQUESTED IN THIS CASE**

115. State officials are plowing ahead, for apparently the first in Virginia history, to hold House of Delegates elections in a reapportionment year pursuant to old House of Delegates districts created according to an old, obsolete U.S. Census.

116. This state action is irrefutably unconstitutional. See, e.g., *Cosner*, *supra*.

117. Plaintiff has standing to bring this instant matter as he has shown the necessary particularized injury to his constitutional rights from this governmental action.

118. But to avoid any unnecessary embarrassment to the Defendants along with other state officials, Plaintiff is limiting his inquiry to the election issue addressed and decided by *Cosner*: to wit, will those elected to the House of Delegates this November be elected to serve for only a one-year term, or will they be elected to the normal two-year term expiring in 2024?

119. If the unconstitutional nature of the 2021 House of Delegates election is not cured until the start of the 2024 General Assembly, when those elected in 2023 under a presumably constitutional reapportionment plan are sworn in, this will mark the first time in Virginia history, and seemingly American history, that it took so long to finally seat a state legislature in which all the members were elected according to a constitutional reapportionment plan based on the latest U.S. Census.

120. Plaintiffs believe citizens have a right to know the length of the term for those being elected to the House of Delegates this 2021 as soon as possible.

#### **COUNT ONE: VIOLATION OF THE U.S. CONSTITUTION**

121. For purposes of efficiency, Plaintiff incorporates by reference paragraphs 1 through 120, *supra*.

122. The failure to adopt required reapportionment violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

123. The state's plan to hold the upcoming general elections for members of the House of Delegates using the existing, old state legislative districts violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

124. Since *Reynolds*, the U.S. Supreme Court has made clear Plaintiff has a constitutional right to have his vote counted equally through his representatives elected to the General Assembly as the principle of equal legislative body representation as regards the population of legislative districts is a "fundamental goal" of our system of laws. *Wesberry v. Sanders*, 376 U.S. (1964).

125. Plaintiff has a right to expect that state officials will ensure legislators elected to the House of Delegates represent districts having the constitutionally required equally weighted populations within permitted deviations as soon as possible. *Cosner, supra*.

126. Plaintiff has the required standing to bring this action.

127. Defendants are proper parties.

128. According to *Cosner*, Plaintiff's protected core First Amendment rights should allow him to run for the House of Delegates in 2022, should he so choose, instead of being forced to wait until 2023 due to the failure of the appropriate state authorities to adhere to the requirements of the federal constitutions.

129. The decision of the Governor and the top state election officials to not seek guidance as to the constitutionality of the upcoming House of Delegates general election despite Va. Code

Section 2.2-505 raises the inference that such Defendants have not operated with the “good faith” generally required in redistricting law. See, e.g., *Harris, Mahan, White, supra*.

130. This failure along with the other governmental conduct at issue raises the inference that Defendants along with other state officials have put the interest of incumbent legislators ahead of the public’s interest, since it is a fair inference to assume incumbents would rather have a two-year term and thus not risk losing their seats in a 2022 primary or special election. [Upon information and belief, no incumbent on the ballot this November exercised his or her right under Va. Code Section 2.2-505 to seek guidance the matter. Upon information and belief, every incumbent is running on a platform telling voters their vote will give them the normal two-year term expiring in 2024].

131. For these reasons, Plaintiff believes the *Cosner* rationale retains the same constitutional common sense today as it did 40 years ago, thus compelling, as a matter of equal protection of the laws, that those elected to the House of Delegates this November should only serve a one-year term.

132. Therefore, Plaintiff’s rights guaranteed under the U.S. Constitution are being violated, inflicting significant harm to his right to equal protection of the law.

133. Defendants, being the Governor and his top state election official appointees, are therefore subject to federal court order to ensure Plaintiff’s constitutional rights are not so violated, as was done in *Cosner*.

134. Plaintiff asks that the Court award such relief as it deems justified, including costs and attorney fees, where appropriate.

#### **COUNT TWO: VIOLATION OF THE CONSTITUTION OF VIRGINIA**

135. For purposes of efficiency, Plaintiff incorporates by reference paragraphs 1 through 134, *supra*.

136. The failure to adopt – indeed, even attempt to adopt – the required redistricting plan violates Article II, Section 6, and 6-A of the Constitution of Virginia.

137. The state’s plan to hold the upcoming general elections for members of the House of Delegates using the existing state legislative districts created due to the 2011 Census violates Article II, Section 6, and 6-A of the Constitution of Virginia.

138. Since *Reynolds, supra*, the U.S. Supreme Court has made clear Plaintiff’s constitutional right to have his vote counted equally and equally represented in the state legislature.

139. The failure of state officials to even seek guidance from state officials as to whether they are conducting an election in violation of the Equal Protection Clause was anticipated by voters in the Constitutional Amendment referendum adopted in November 2020.

140. The new language added by Virginians to the state constitution amounts to a waiver of sovereign immunity in redistricting matters, the power to make such an exception given to the people by Article I, Section 2 of the Constitution of Virginia.

141. Thus, Plaintiff’s right under the Constitution of Virginia to be equally represented in the House of Delegates is being violated.

142. Plaintiff therefore asks the Court to ensure that Defendants take such action as necessary to protect said right from further injury from state action.

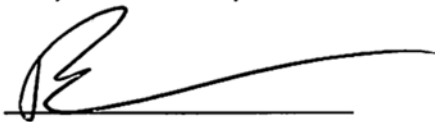
143. Plaintiff asks the Court to award such relief as seems justified, including costs and attorney's fees were justified.

#### REMEDY

For the reasons stated above, based upon fact and law, comes now the Plaintiff asking this Honorable Court for the following relief:

- (A) For good cause shown, including but not limited to the recent release of 2020 U.S. Census data, as well as F.R.Cv.P. 15(a), docket this Amended Complaint and moot the Original Complaint and Defendants' Motion to Dismiss.
- (B) Declare the Commonwealth of Virginia, and the Defendants herein expected to protect the integrity of our election process, to be in violation of the Constitution of the United States, such Constitution requiring the upcoming November 2, 2021, general election for the House of Delegates be held under a constitutionally valid reapportionment plan created pursuant to the 2020 Census data.
- (C) Declare the Commonwealth of Virginia, and the Defendants herein expected to protect the integrity of our election process, to be in violation of the Constitution of Virginia, such Constitution requiring the upcoming November 2, 2021, general election for the House of Delegates be held under a constitutionally valid reapportionment plan created pursuant to the 2020 Census data. he
- (D) Declare that those elected to the House of Delegates on November 3, 2021, shall only be elected to one-year terms, such terms to expire one year after they officially begin.
- (E) Order the Defendants to ensure that the Commonwealth of Virginia hold new elections for the House of Delegates on the date of the November 2022 general elections under a constitutionally crafted reapportionment plan consistent with the 2020 U.S. Census.
- (F) Such other relief as the Court deems required, including reimbursement of costs, attorney fees and other measures where appropriate.

Respectfully submitted by:

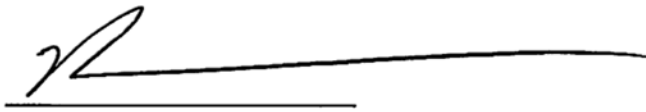


Paul Goldman  
P.O. Box 17033  
Richmond, Virginia 23226  
804 833 6313  
[Goldmanusa@aol.com](mailto:Goldmanusa@aol.com)  
*Pro se*

**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on September <sup>PG</sup>2 2021, I mailed this Amended Complaint for Declaratory Judgement to the Clerk of the Court in paper form via U.S. mail. A true copy of said complaint was also sent, via first class mail, to:

Calvin Brown  
Carol Lewis  
Brittany A. McGill  
Office of the Attorney General  
202 North Ninth Street  
Richmond, Virginia 23219

A handwritten signature in black ink, appearing to be 'P. Goldman', with a long horizontal line extending to the right.

---

Paul Goldman  
P.O. Box 17033  
Richmond, Virginia 23226  
804-833-6313  
Goldmanusa@aol.com  
*Pro se*



Josh Stanfield <jstanfield@gmail.com>

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## Response to 8/12/21 request for records under the Virginia Freedom of Information Act

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VA Redistricting <varedistrictingcommission@dls.virginia.gov>  
To: jstanfield@gmail.com

Thu, Aug 19, 2021 at 3:52 PM

Dear Mr. Stanfield,

The Virginia Redistricting Commission is in receipt of your request for records made on August 12, 2021, in accordance with the Virginia Freedom of Information Act (§ 2.2-3700 et seq.). Specifically, you request a copy of the 2020 U.S. Census data that includes population count by state legislative district.

Attached are Virginia's current senate, house, and congressional districts with 2020 total population numbers.

Thank you.


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Virginia Redistricting Support Staff  
Division of Legislative Services

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### 3 attachments

 **CurrentCongPops.xlsx**  
10K

 **CurrentHousePops.xlsx**  
12K

 **CurrentSenatePops.xlsx**  
11K

| Congressional District | Total Pop |
|------------------------|-----------|
| 1                      | 827,606   |
| 2                      | 750,830   |
| 3                      | 756,761   |
| 4                      | 789,815   |
| 5                      | 739,211   |
| 6                      | 763,401   |
| 7                      | 817,419   |
| 8                      | 798,257   |
| 9                      | 696,755   |
| 10                     | 885,422   |
| 11                     | 805,916   |



| House District | Total Pop |
|----------------|-----------|
| 1              | 72,160    |
| 2              | 95,943    |
| 3              | 71,122    |
| 4              | 73,740    |
| 5              | 78,048    |
| 6              | 75,907    |
| 7              | 83,147    |
| 8              | 82,624    |
| 9              | 76,561    |
| 10             | 104,752   |
| 11             | 82,567    |
| 12             | 80,929    |
| 13             | 101,024   |
| 14             | 77,452    |
| 15             | 83,134    |
| 16             | 76,046    |
| 17             | 84,322    |
| 18             | 84,753    |
| 19             | 79,238    |
| 20             | 83,233    |
| 21             | 87,522    |
| 22             | 82,430    |
| 23             | 85,200    |
| 24             | 79,775    |
| 25             | 91,409    |
| 26             | 85,732    |
| 27             | 84,046    |
| 28             | 91,396    |
| 29             | 89,512    |
| 30             | 88,631    |
| 31             | 90,269    |
| 32             | 101,567   |
| 33             | 96,452    |
| 34             | 83,109    |
| 35             | 92,718    |
| 36             | 85,767    |
| 37             | 86,978    |
| 38             | 83,282    |
| 39             | 83,168    |
| 40             | 86,857    |
| 41             | 82,736    |
| 42             | 84,433    |
| 43             | 86,451    |
| 44             | 84,955    |
| 45             | 94,426    |
| 46             | 87,847    |

|    |         |
|----|---------|
| 47 | 92,865  |
| 48 | 89,069  |
| 49 | 91,445  |
| 50 | 92,429  |
| 51 | 91,531  |
| 52 | 96,642  |
| 53 | 90,002  |
| 54 | 92,735  |
| 55 | 88,538  |
| 56 | 94,344  |
| 57 | 90,063  |
| 58 | 86,637  |
| 59 | 80,792  |
| 60 | 74,075  |
| 61 | 76,980  |
| 62 | 87,096  |
| 63 | 86,360  |
| 64 | 90,632  |
| 65 | 99,689  |
| 66 | 87,989  |
| 67 | 85,614  |
| 68 | 85,223  |
| 69 | 84,405  |
| 70 | 86,701  |
| 71 | 93,525  |
| 72 | 87,217  |
| 73 | 85,509  |
| 74 | 83,132  |
| 75 | 73,868  |
| 76 | 90,306  |
| 77 | 85,670  |
| 78 | 92,633  |
| 79 | 73,909  |
| 80 | 81,389  |
| 81 | 85,736  |
| 82 | 82,393  |
| 83 | 86,984  |
| 84 | 81,895  |
| 85 | 86,550  |
| 86 | 88,505  |
| 87 | 130,082 |
| 88 | 102,140 |
| 89 | 81,246  |
| 90 | 80,561  |
| 91 | 78,950  |
| 92 | 81,511  |

|            |               |
|------------|---------------|
| <b>93</b>  | <b>82,347</b> |
| <b>94</b>  | <b>81,279</b> |
| <b>95</b>  | <b>83,170</b> |
| <b>96</b>  | <b>92,322</b> |
| <b>97</b>  | <b>89,621</b> |
| <b>98</b>  | <b>79,664</b> |
| <b>99</b>  | <b>83,356</b> |
| <b>100</b> | <b>80,697</b> |

| Senate District | Total Pop |
|-----------------|-----------|
| 1               | 210,332   |
| 2               | 201,145   |
| 3               | 227,443   |
| 4               | 217,849   |
| 5               | 204,662   |
| 6               | 192,220   |
| 7               | 212,627   |
| 8               | 203,368   |
| 9               | 211,030   |
| 10              | 221,865   |
| 11              | 234,129   |
| 12              | 224,935   |
| 13              | 285,955   |
| 14              | 223,946   |
| 15              | 187,845   |
| 16              | 224,850   |
| 17              | 231,913   |
| 18              | 208,217   |
| 19              | 201,773   |
| 20              | 192,077   |
| 21              | 209,459   |
| 22              | 199,174   |
| 23              | 210,087   |
| 24              | 220,288   |
| 25              | 208,433   |
| 26              | 212,085   |
| 27              | 229,423   |
| 28              | 240,019   |
| 29              | 242,257   |
| 30              | 225,568   |
| 31              | 220,011   |
| 32              | 216,112   |
| 33              | 242,481   |
| 34              | 207,669   |
| 35              | 210,324   |
| 36              | 225,792   |
| 37              | 208,256   |
| 38              | 182,827   |
| 39              | 216,153   |
| 40              | 186,794   |

**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>Ralph Northam, et al.,</b> | ) |                                     |
|                               | ) |                                     |
| <b>Defendants.</b>            | ) |                                     |

**DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT**

Defendants move to dismiss the Second Amended Complaint under Federal Rules of Civil Procedure 12(b)(1). The basis for this motion is set forth in the accompanying Memorandum in Support of Defendants' Motion to Dismiss Second Amended Complaint.

**ROSEBORO NOTICE**

Consistent with the requirements of *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), the following notice advises the *pro se* plaintiff that:

- 1) He is entitled to file a response opposing the motion and any such response must be filed within twenty-one (21) days of the date on which this motion was filed; and
- 2) The Court could dismiss this action on the basis of the Defendants' moving papers if he does not file a response; and
- 3) He must identify all facts stated by the Defendants with which he disagrees and must set forth his version of the facts by offering affidavits (written statements signed before a notary public under oath) or by filing sworn statements (bearing a certificate that it is signed under penalty of perjury); and

4) He also is entitled to file a legal brief in opposition to the one filed by the Defendants.

Respectfully submitted,

By: /s/ Carol L. Lewis  
Counsel

Mark R. Herring  
*Attorney General of Virginia*

Erin B. Ashwell  
*Chief Deputy Attorney General*

Donald D. Anderson  
*Deputy Attorney General*

Heather Hays Lockerman  
*Senior Assistant Attorney General*

Carol L. Lewis (VSB #92362)\*

Brittany A. McGill (VSB #92401)\*

Calvin C. Brown (VSB #93192)\*

*Assistant Attorney General*  
Office of the Attorney General  
202 North Ninth Street  
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804-692-1647 (facsimile)  
clewis@oag.state.va.us

*\* Attorneys for Ralph Northam, Robert H. Brink, John O'Bannon, Jamilah D. LeCruise and Christopher E. Piper, in their official capacities, and the Virginia State Board of Elections*

**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on September 23, 2021, I electronically filed the Defendants' Motion to Dismiss the Complaint and Amended Complaint with the Clerk of Court using the CM/ECF system. A true copy of said Motion to Dismiss was also sent, via first class mail, to:

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

/s/ Carol L. Lewis  
Carol L. Lewis (VSB #92362)\*  
Assistant Attorney General  
Office of the Attorney General  
202 North Ninth Street  
Richmond, Virginia 23219  
804-692-0558 (telephone)  
804-692-1647 (facsimile)  
clewis@oag.state.va.us

*\* Attorney for Ralph Northam, Robert H. Brink, John O'Bannon, Jamilah D. LeCruise, and Christopher E. Piper, in their official capacities, and the Virginia State Board of Elections*

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

Richmond Division

PAUL GOLDMAN,  
*Pro se* Plaintiff,

v.

Civil No. 3:21-cv-420 (DJN)

RALPH NORTHAM, *et al.*,  
Defendants.

**MEMORANDUM ORDER**  
**(Denying Motion for Joinder)**

This matter comes before the Court on *pro se* Prospective Plaintiff Joshua Stanfield's ("Stanfield") Motion for Joinder, moving to join the case as a plaintiff. (ECF No. 22.) For the reasons set forth below, the Court hereby DENIES the Motion for Joinder.

**I. BACKGROUND**

**A. Plaintiff's Second Amended Complaint**

Article II, §§ 6 and 6-A of the Constitution of Virginia require the Virginia Redistricting Commission ("the Commission") to redraw the electoral districts for the House of Delegates for the November 2, 2021 election using the population data from the 2020 Census. (2d Am. Compl. (ECF No. 18) ¶¶ 78, 81-82.) According to the Commission's website, the new electoral districts for the House of Delegates will come into effect for the November 2, 2021 general election. (2d Am. Compl. ¶ 82.) However, the Commonwealth of Virginia allegedly intends to hold this year's upcoming general election using a state reapportionment law enacted during the 2011 Special Session, which was based on 2010 Census data and later adjusted after a legal challenge using that data. (2d Am. Compl. ¶¶ 68-77 (citing Va. Code § 24.2-304.3; *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 786 (2017).)



*Pro se* Plaintiff Paul Goldman (“Plaintiff”) resides in Virginia. (2d Am. Compl. ¶ 55.)

He plans to vote in House of Delegates District 68 during the 2021 election, and he “is contemplating . . . run[ing] for the House of Delegates in a constitutionally drawn 68th district (or whatever . . . the district wherein he would reside).” (2d Am. Compl. ¶¶ 56-57.) Plaintiff identifies as Defendants Ralph Northam (“Northam”), the Virginia State Board of Elections (“the Board”), Robert Brink (“Brink”), John O’Bannon (“O’Bannon”), Jamilah D. LeCruise (“LeCruise”) and Christopher Piper (“Piper”) (collectively, “Defendants”). (2d Am. Compl. at 1.) Plaintiff sues Northam, Brink, O’Bannon, LeCruise and Piper in their official capacities. (2d Am. Compl. at 1.)

Northam serves as the Governor of Virginia. (2d Am. Compl. ¶ 60.) The Board has its headquarters in Virginia and exists to “ensur[e] ‘legality and purity in all elections’ and to ‘ensure that major risks to election integrity are . . . addressed as necessary to promote election uniformity, legality and purity.’” (2d Am. Compl. ¶¶ 61, 66 (citing Va. Code. § 24.2-103(A).) Brink, O’Bannon and LeCruise (“the Board members”) serve as the Chair, Vice Chair and Secretary of the Board, respectively.<sup>1</sup> (2d Am. Compl. ¶¶ 62-64.) Piper serves as the Commissioner of the Virginia Department of Elections. (2d Am. Compl. ¶ 65.) The Virginia Department of Elections — which Plaintiff has not named as a defendant — functions as the Board’s “operational arm” and carries out its duties. (2d Am. Compl. ¶ 67.) Northam, Brink,

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<sup>1</sup> The Board has five members: Brink, the Chairman; O’Bannon, the Vice Chair; LeCruise, the Secretary; and Donald W. Merricks (“Merricks”) and Angela Chiang (“Chiang”), two general Board members. *SBE Board Members*, Va. Dep’t of Elections, <https://www.elections.virginia.gov/board/board-members/> (last visited Oct. 4, 2021). Plaintiff does not name Merricks or Chiang as Defendants in the Second Amended Complaint. (Am. Compl. at 1.)

O'Bannon, LeCruise and Piper have their offices in Richmond, Virginia, and citizenship in Virginia. (2d Am. Compl. ¶¶ 60, 62-65.)

Plaintiff attaches to his Second Amended Complaint spreadsheets that he received from the Commission showing the current total population in state House of Delegates, state Senate and congressional districts based on the results of the 2020 Census. (2d Am. Compl. Ex. 1. at 1-6.) According to that data, House of Delegates District 68, where Plaintiff currently resides, has a population of 85,223 people.<sup>2</sup> (2d Am. Compl. ¶ 58.) This district has a population 19.8% larger than that of House of Delegates District 3, which has a population of 71,122. (2d Am. Compl. Ex. 1. at 3-4.) Plaintiff alleges that, because of this deviation, holding the 2021 House of Delegates election using the current electoral maps violates both the state and federal constitutions. (2d Am. Compl. ¶¶ 121-43.) In Count I, Plaintiff alleges a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. (2d Am. Compl. ¶¶ 121-34.) In Count II, Plaintiff alleges a violation of Article II, §§ 6 and 6-A of the Constitution of Virginia. (2d Am. Compl. ¶¶ 135-43.)

Based on these claims, Plaintiff requests that the Court declare that Defendants violated the Constitution of Virginia by choosing to conduct the 2021 general election using an old legislative district map based on outdated Census data, declare that those who win election to the House of Delegates serve one year terms, order Defendants to hold new elections for the House of Delegates on the date of the November 2022 general election using a reapportionment plan

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<sup>2</sup> Plaintiff states in the Second Amended Complaint that House of Delegates District 68 has a population of 85,233. (2d Am. Compl. ¶ 58.) The data that he attaches to the Second Amended Complaint show that that District has a population of 85,223. (2d Am. Compl. Ex 1 at 4.)

based on the 2020 Census data, and order any other required relief, including reimbursement of costs, attorney's fees and other appropriate measures. (2d Am. Compl. at 13.)

**B. Stanfield's Motion for Joinder and Defendant's Response**

On September 23, 2021, Stanfield filed the instant Motion to join this case as a plaintiff, alleging the same claims and requesting the same relief as Plaintiff. (Mot. for Joinder at (ECF No. 22).) In his Motion, Stanfield notes that in August 2021, he analyzed the 2020 U.S. Census data and requested the relevant population data on Virginia legislative districts, which he provided to Plaintiff. (Mot. for Joinder at 2-3.) While considering this data, Stanfield noticed that his House of Delegates district, District 93, has a population 58% larger than that of House of Delegates District 87. (Mot. for Joinder at 3.) Consequently, he believes that he has grounds to raise the same claims as Plaintiff under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Article II, §§ 6 and 6-A of the Constitution of Virginia. (Mot. for Joinder at 3.) He therefore moves for permissive joinder pursuant to Federal Rule of Civil Procedure 20(a)(1). (Mot. for Joinder at 3-9.)

On September 29, 2021, Defendants responded to Stanfield's Motion. (Defs.' Mem. in Opp. to Prospective Pl. Joshua Stanfield's Mot. for Joinder as Pl. ("Defs.' Resp.") ECF No. 26.) Defendants argue that Stanfield used the incorrect legal mechanism to move to join the suit, and that he should have moved for intervention under Rule 24. (Defs.' Resp. at 1.) They continue that even if Stanfield had moved to intervene, he still does not meet the standard set forth under Rule 24. (Defs.' Resp. at 1.)

**C. Procedural History**

In June 2021, Plaintiff filed his original Complaint (ECF No. 1), alleging violations of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Article II, §§

6 and 6-A of the Virginia Constitution. (Pl.’s Compl. (“Compl.”) (ECF No. 1) ¶¶ 81-99).)

Plaintiff named Northam, the Board, the Board members, Piper and Jessica Bowman (“Bowman”), whom Plaintiff identified as the Deputy Commissioner of the Board, as Defendants. (Compl. at 6.) In July 2021, Plaintiff filed his First Amended Complaint. (ECF No. 3.) On August 3, 2021, Defendants moved to dismiss the First Amended Complaint for lack of jurisdiction and failure to state a claim. (ECF No. 12.) Defendants also noted that Bowman no longer worked for the government of Virginia. (Mem. in Supp. of Defs.’ 1st Mot. to Dismiss (“Defs.’ First Mem.”) ¶ 9 (ECF No. 13).)

On September 10, 2021, Plaintiff then filed for leave to amend his Complaint a second time, which the Court granted. (Mot. for Leave to File Am. Compl. at 1-2 (ECF No. 16); Order, Sept. 10, 2021 (“Order”) at 1 (ECF No. 17).) The Second Amended Complaint became the operative complaint in this action. (Order at 1.) Plaintiff dropped Bowman from his Second Amended Complaint, and she was dismissed from the case. (2d Am. Compl. at 2.) Plaintiff also moved for an expedited hearing on the Second Amended Complaint. (ECF No. 19.) On September 14, 2021, the Court denied his Motion for an Expedited Hearing. (ECF No. 21.)

On September 23, 2021, Defendants moved to dismiss the Second Amended Complaint for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1) (Defs.’ Mot. to Dismiss 2d Am. Compl. (“Mot. to Dismiss”) at 1-2 (ECF No. 23)), asserting that sovereign immunity shielded them from suit (Defs.’ Mem. in Supp. of Mot. to Dismiss 2d Am. Compl. (“Defs.’ 2d Mem.”) at 5-11 (ECF No. 24)). On September 30, 2021, Plaintiff responded to the Motion to Dismiss and attached a “Sworn Statement of Facts” to his Response. (Resp. to Defs.’ Mot. to Dismiss (“Pl.’s Resp.”) (ECF No. 27); Pl.’s Sworn Statement of Facts (ECF No. 27-1).)

On September 23, 2021, Defendants moved to dismiss the Second Amended Complaint for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1) (Mot. to Dismiss 2d Am. Compl. (“Mot. to Dismiss”) at 1-2 (ECF No. 23)), asserting that sovereign immunity shielded them from suit (Defs.’ Mem. in Supp. of Mot. to Dismiss 2d Am. Compl. (“Defs.’ 2d Mem.”) at 5-11 (ECF No. 24)). On September 30, 2021, Plaintiff responded to the Motion to Dismiss. (Resp. to Defs.’ Mot. to Dismiss (“Pl.’s Resp.”) (ECF No. 27); Pl.’s Sworn Statement of Facts (ECF No. 27-1).)

On September 23, 2021, Stanfield filed the instant Motion to join this case as a plaintiff, alleging the same claims and requesting the same relief as Plaintiff. (Mot. for Joinder (ECF No. 22).) The Court ordered Defendants to respond to Stanfield’s Motion for Joinder by September 29, 2021, and ordered Stanfield to reply to Defendants’ response to his Motion by October 4, 2021. (Order, Sept. 24, 2021 (ECF No. 25).) On September 29, 2021, Defendants filed their Response to Stanfield’s Motion for Joinder. (ECF No. 26.) Stanfield filed his reply on October 6, 2021. (Stanfield’s Reply at 1 (ECF No. 29).)

## II. ANALYSIS

“Rule 24 is, strictly speaking, the proper vehicle for a non-party to insert itself into ongoing litigation.” *Johnson v. Qualawash Holdings, L.L.C.*, 990 F. Supp. 2d 629, 636 (W.D. La. 2014). Federal courts possess the authority to construe motions for joinder as motions to intervene. *Faust v. Vilsack*, 2021 WL 2383232, at \*1 (E.D. Wis. June 10, 2021); *cf. Johnson*, 990 F. Supp. 2d at 636 (noting that federal courts may construe motions by non-parties based on failure to join a required party under Rule 19 as motions to intervene under Rule 24). As a non-party, Stanfield cannot move to join himself as a party under Rule 20. Thus, the Court will construe his Motion as a motion to intervene under Rule 24.

As an initial matter, Stanfield has failed to follow the filing requirements for a motion to intervene. Rule 24(c) requires a non-party to serve its motion to intervene “on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.” Fed. R. Civ. P. 24(c). Stanfield did not file a pleading setting out the claim or defense on which he seeks to intervene. But even if Stanfield had complied with this requirement, he does not meet the requirements for intervention as of right under Rule 24(a) or permissive intervention under Rule 24(b).

**A. Intervention as of Right Pursuant to Rule 24(a)**

Rule 24(a) sets out the rules for intervention as of right and states that, on a timely motion, the court may permit any non-party to intervene that:

- (1) is given an unconditional right to intervene by a federal statute; or
- (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a). As the party moving for intervention, Stanfield bears the burden of establishing his right to intervene. *In re Richman (Richman v. First Woman's Bank)*, 104 F.3d 654, 658 (4th Cir. 1997). To do so, Stanfield must show “(1) an interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of the action; and (3) that the applicant's interest is not adequately represented by existing parties to the litigation.” *Teague v. Bakker*, 931 F.2d 259, 260-61 (4th Cir. 1991). The party moving for intervention must prove each of these three elements to prevail on their motion. *United Guar. Residential Ins. Co. of Iowa v. Phila. Sav. Fund Soc'y*, 819 F.2d 473, 474 (4th Cir. 1987). The district court has the

discretion to permit or deny intervention. *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976). As explained below, Stanfield does not satisfy this test.

First, Stanfield clearly has an interest in the subject matter of the litigation, and the action might impair the protection of that interest.<sup>3</sup> An individual has an interest in an action when he has a “‘significantly protectable interest’ in the litigation.” *Lee v. Va. Bd. of Elections*, 2015 WL 51789993, at \*2 (E.D. Va. Sept. 4, 2015) (citing *Teague*, 931 F.2d at 261). In other words, he must “stand to gain or lose by direct legal operation of the district court’s judgment . . . on [the] complaint.” *Teague*, 931 F.2d at 260. Second, to satisfy the next requirement of the Rule 24 test, the movant must demonstrate that failure to permit intervention would impair his interest. *Richman*, 104 F.3d at 659.

Like Plaintiff, Stanfield asserts that Defendants have violated the Virginia Constitution by allegedly proceeding with an election using maps drawn based on outdated data from the last decennial census, and that his House of Delegates district has a disproportionately greater population than others in Virginia in violation of the Equal Protection Clause of the Fourteenth Amendment. (Mot. for Joinder at 7.) He also requests that the Court mandate that Delegates elected in this year’s election serve one-year terms and that another House of Delegates election take place next year, off the usual cycle. (Mot. for Joinder at 5-6.) Stanfield may possess a particularized interest in the size of his House of Delegates district under the Equal Protection Clause as a voter in that specific district. *See Reynolds v. Sims*, 377 U.S. 533, 561 (1964) (noting that the right to vote is personal, and in cases challenging a state legislative apportionment, “the

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<sup>3</sup> Stanfield does not assert that a statute furnishes him the unconditional right to intervene in this action pursuant to Rule 24(a)(1), and the Court has not found a statute that would give him that right, so it will not address this provision of the Rule.

judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens.”)

However, any Virginia voter could assert the same interest that Stanfield does in enforcing the Virginia Constitution's requirement that the legislature be reapportioned every ten years in accordance with the most recent Census data. Courts routinely deny motions to intervene by voters who assert generalized interests common to all voters. (Defs.' Resp. at 5 (quoting *League of Women Voters v. Va. State Bd. of Elections*, 458 F. Supp. 3d 460, 465 (W.D. Va. 2020)); see also *Lee*, 2015 WL 51789993, at \*3 n.7 (finding that voters seeking intervention asserted generalized interests in upholding the constitutionality of certain Virginia election laws and denying them intervention).

Moreover, regardless of the generality of his interests, Stanfield has not shown that Plaintiff cannot adequately represent his interests. As Stanfield himself states, his “right to relief arises under precisely the same transactions and occurrences as that of Plaintiff Goldman.” (Mot. for Joinder at 5.) Plaintiff has vigorously litigated this case, including filing two amended complaints (ECF Nos. 3, 18), requesting an expedited hearing (ECF No. 19) and responding to Defendants' Motion to Dismiss in a 19-page, single-spaced document with an attached statement of facts (ECF No. 27). Plaintiff and Stanfield make the same legal arguments and request the same relief. (Mot. for Joinder at 5.) Nothing suggests that Plaintiff will not continue to adequately represent Stanfield's interests as a voter in a relatively populous House of Delegates district, or as a Virginia voter concerned about the Commission's delay in drawing an updated legislative apportionment plan. For that reason, the Court will deny Plaintiff intervention as of right.



**B. Permissive Intervention Pursuant to Rule 24(b)**

Rule 24(b) states that on a timely motion, a court may permit a non-party to intervene if that party

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

Fed. R. Civ. P. 24(b).

Further, “[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3). Thus, a movant must demonstrate “(1) that their motion is timely; (2) that their claims or defenses have a question of law or fact in common with the main action; and (3) that intervention will not result in undue delay or prejudice to the existing parties.” *RLI Ins. Co. v. Nexus Servs., Inc.*, 2018 WL 5621982, at \*5 (W.D. Va. Oct. 30, 2018). “[A] decision on a Rule 24(b) motion lies within the sound discretion of the trial court.” *Hill v. W. Elec. Co.*, 672 F.2d 381, 385-86 (4th Cir. 1982).

Assuming, *arguendo*, without deciding, that Stanfield filed his Motion in a timely fashion and that his claims rest on common questions of fact and law, the Court will still deny Stanfield permissive intervention.<sup>4</sup> As discussed above, although every single Virginian may not be able to assert the exact same Equal Protection claim as Plaintiff and Stanfield, the thousands of Virginia voters who live in disproportionately populous districts could assert such a claim.

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<sup>4</sup> The Court notes that Stanfield himself admits that he requested a copy of the 2020 Census data from, among others, the Commission and the Department on August 13, 2021, analyzed the 2020 Census data on August 17, 2021, sent Plaintiff his analysis on August 18, 2021 and received the data that he requested from the Commission on August 19, 2021. (Mot. for Joinder 2-3.) However, he waited to file his Motion for Joinder for over a month until September 21, 2021. (Mot. for Joinder at 1.)


Further, all Virginia voters could contest Defendants' alleged decision to proceed with this year's general election using electoral maps based on the last decennial census, which Plaintiff and Stanfield assert violates the Virginia Constitution. (2d Am. Compl. ¶¶ 121-43; Mot. for Joinder at 3.) And as the court explained in *League of Women Voters of Virginia*, "[t]he Court is not inclined to open the floodgates on this lawsuit to any voter in the state who would like to intervene" and transform this action into a public forum. 458 F. Supp. 3d at 467. The Court could conceivably allow every interested voter to move to intervene and then deny each of their motions, but that would waste judicial time and resources as well as unduly prejudice the existing parties. *Ohio Valley Env't Coal., Inc. v. McCarthy*, 313 F.R.D. 10, 31 (S.D.W. Va. 2015). For these reasons, the Court will also deny Stanfield permissive intervention.

#### IV. CONCLUSION

For the reasons set forth above, the Court hereby DENIES Stanfield's Motion for Joinder (ECF No. 22).

Let the Clerk file a copy of this Memorandum Order electronically and notify all counsel of record.

It is so ORDERED.

  
\_\_\_\_\_/s/\_\_\_\_\_  
David J. Novak  
United States District Judge

Richmond, Virginia  
Dated: October 6, 2021

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

Richmond Division

PAUL GOLDMAN,  
*Pro se* Plaintiff,

v.

Civil No. 3:21-cv-420 (DJN)

RALPH NORTHAM, *et al.*,  
Defendants.

**MEMORANDUM OPINION**  
**(Granting in Part and Denying in Part**  
**Defendants' Motion to Dismiss)**

*Pro se* Plaintiff Paul Goldman (“Plaintiff”) brings this action against Defendants Ralph Northam (“Governor Northam”), the Virginia State Board of Elections (“the Board”), Robert Brink (“Brink”), John O’Bannon (“O’Bannon”), Jamilah D. LeCruise (“LeCruise”) and Christopher Piper (“Piper”) (collectively, “Defendants”), alleging violations of Article II, §§ 6 and 6-A of the Constitution of Virginia and of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. This matter now comes before the Court on Defendants’ Motion to Dismiss the Second Amended Complaint (ECF No. 23). For the reasons set forth below, the Court hereby GRANTS IN PART and DENIES IN PART the Motion to Dismiss.<sup>1</sup>

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<sup>1</sup> This Memorandum Opinion addresses Defendants’ Motion to Dismiss the Second Amended Complaint (ECF No. 23), which raises only sovereign immunity arguments. Defendants raised standing in their First Motion to Dismiss. (1st Mot. to Dismiss (ECF No. 12); Mem. in Supp. of Defs.’ Mot. to Dismiss at 4-8 (“Defs.’ 1st Mem.”) (ECF No. 13).) However, Defendants did not bring a standing challenge in their Motion to Dismiss the Second Amended Complaint. (2d Mot. to Dismiss (ECF No. 23); Defs.’ Mem. in Supp. of Their Mot. to Dismiss 2d Am. Compl. (“Defs.’ 2d Mem.”) (ECF No. 24).) Nor did they reply to Plaintiff’s Response (ECF No. 27) to their renewed Motion to Dismiss. The Court has a responsibility to consider standing *sua sponte*, because the issue affects the Court’s subject matter jurisdiction. *See Buscemi v. Bell*, 964 F.3d 252, 258 (4th Cir. 2020) (stating that the court must assure a plaintiff has standing on its own initiative). For that reason, the Court ordered Defendants to file a

## I. BACKGROUND

A motion made pursuant to Federal Rule of Civil Procedure 12(b)(1) challenges the court's jurisdiction over the subject matter of the complaint. A defendant moving for dismissal for lack of subject matter jurisdiction may either attack the complaint on its face, asserting that the complaint "fails to allege facts upon which subject matter jurisdiction can be based," or, as here, may attack "the existence of subject matter jurisdiction in fact, quite apart from any pleadings." *White v. CMA Const. Co., Inc.*, 947 F. Supp. 231, 233 (E.D. Va. 1996) (internal citations omitted). When deciding a Rule 12(b)(1) motion to dismiss, a federal court may resolve factual questions to determine whether it has subject matter jurisdiction. *Thigpen v. United States*, 800 F.2d 393, 396 (4th Cir.1986), *overruled on other grounds*, *Sheridan v. United States*, 487 U.S. 392 (1988).

As explained below, the parties dispute whether Defendants have the power to set an election or establish legislative district lines. The resolution of that dispute determines whether Plaintiff has named the correct defendants in the Second Amended Complaint. As such, the Court accepts the factual allegations of the Second Amended Complaint as true, except to the extent that they relate to Defendants with regard to these responsibilities.

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pleading on, among other issues, whether Defendants believe that Plaintiff has standing to bring the instant action. (Order, Oct. 8, 2021 (ECF No. 32).) In their pleading in response to this issue, Defendants stated that they do not believe that Plaintiff has standing, because he has not alleged a specific intent to run for office or an intent to vote in the upcoming elections. (Defs.' Resp. to Oct. 8, 2021 Order at 3-4 (ECF No. 38).) Defendants also posit that without new district plans based on the 2020 U.S. Census data to compare to the current maps from 2011, Plaintiff cannot show that he has suffered a constitutionally cognizable harm due to his status as a voter in House of Delegates District 68. (Defs.' Resp. to Oct. 8, 2021 Order at 4.) Thus, in an accompanying Order, the Court will require both parties to submit supplemental briefing on standing.

### A. Plaintiff's Complaint

Article II, §§ 6 and 6-A of the Constitution of Virginia require the Virginia Redistricting Commission (“the Commission”) to redraw the electoral districts for the state House of Delegates for the November 2, 2021 election using the population data from the 2020 U.S. Census. (2d Am. Compl. ¶¶ 78, 82.) According to the Commission’s website, the new electoral districts for the House of Delegates will come into effect in time for the election. (2d Am. Compl. ¶ 82.) However, the Commonwealth of Virginia allegedly intends to hold the upcoming election using a House of Delegates district apportionment plan enacted during the 2011 Special Legislative Session. (2d Am. Compl. ¶ 68.) The Virginia General Assembly (“the General Assembly”) based this plan on the 2010 Census data, and then-Governor Bob McDonnell signed the plan into law in April 2011. (2d Am. Compl. ¶ 69.) The General Assembly adjusted this plan’s congressional districts after a legal challenge several years later. (2d Am. Compl. ¶¶ 75-77 (citing *Bethune-Hill v. Va. State Bd. of Elecs.*, 137 S. Ct. 786 (2017).))

*Pro se* Plaintiff Paul Goldman (“Plaintiff”) resides in Richmond, Virginia. (2d Am. Compl. ¶ 55.) He alleges that he is a “qualified voter” in House of Delegates District 68, and he “is contemplating . . . run[ing] for the House of Delegates in a constitutionally drawn 68th district (or whatever the district. . . wherein he would reside).” (2d Am. Compl. ¶¶ 57-58.) Plaintiff identifies as defendants Governor Northam, the Board, Brink, O’Bannon, LeCruise and Piper. (2d Am. Compl. at 1.) Plaintiff sues Governor Northam, Brink, O’Bannon, LeCruise and Piper in their official capacities. (2d Am. Compl. at 1.)

Governor Northam serves as the Governor of Virginia. (2d Am. Compl. ¶ 60.) The Board has its headquarters in Virginia and exists to ensure “legality and purity in all elections” and to “ensure that major risks to election integrity are . . . addressed as necessary to promote

election uniformity, legality and purity.” (2d Am. Compl. ¶ 66 (citing Va. Code. § 24.2-103(A).) Brink, O’Bannon and LeCruise (“the Board members”) serve as the Chair, Vice Chair and Secretary of the Board, respectively.<sup>2</sup> (2d Am. Compl. ¶¶ 62-64.) Piper serves as the Commissioner of the Virginia Department of Elections.<sup>3</sup> (2d Am. Compl. ¶ 65.) The Virginia Department of Elections — which Plaintiff has not named as a defendant — functions as the Board’s “operational arm” and carries out its duties. (2d Am. Compl. ¶ 67.) Governor Northam, Brink, O’Bannon, LeCruise and Piper have their offices in Richmond, Virginia, and citizenship in Virginia. (2d Am. Compl. ¶¶ 60, 62-65.)

Plaintiff attached to his Complaint spreadsheets that he received from the Commission showing the current total population in the state House of Delegates, state Senate and congressional districts based on the results of the 2020 Census. (2d Am. Compl. Ex. 1. at 1-6.) According to that data, House of Delegates District 68, where Plaintiff currently resides, has a population of 85,223 people.<sup>4</sup> (2d Am. Compl. ¶ 58.) This district has a population 19.8% larger than that of House of Delegates District 3, which has a population of 71,122. (2d Am. Compl.

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<sup>2</sup> The Board has five members: Brink, the Chairman; O’Bannon, the Vice Chair; LeCruise, the Secretary; as well as Donald W. Merricks (“Merricks”) and Angela Chiang (“Chiang”), two general Board members. *SBE Board Members*, Va. Dep’t of Elecs., <https://www.elections.virginia.gov/board/board-members/> (last visited Oct. 4, 2021). Plaintiff does not name Merricks or Chiang as Defendants in the Second Amended Complaint or explain why he has not named them. (2d Am. Compl. at 1.)

<sup>3</sup> In the caption of his Second Amended Complaint, Plaintiff identifies Piper as the “Commissioner of the State Board of Elections.” (2d Am. Compl. at 1.) In his statement of facts, he states that Piper serves as “the Commissioner of the Virginia Department of Elections.” (2d Am. Compl. ¶ 65.) The Court will rely on the facts that Plaintiff alleges and refer to Piper as the Commissioner of the Department of Elections.

<sup>4</sup> Plaintiff states in the Second Amended Complaint that House of Delegates District 68 has a population of 85,233. (2d Am. Compl. ¶ 58.) The data that he attaches to the Second Amended Complaint show that that District has a population of 85,223. (2d Am. Compl. Ex 1 at 4.)

Ex. 1. at 3-4.) Plaintiff alleges that, because of this deviation, holding the 2021 House of Delegates election using the current electoral maps violates both the state and federal constitutions. (2d Am. Compl. ¶¶ 121-43.) In Count One, Plaintiff alleges a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>5</sup> (2d Am. Compl. ¶¶ 121-34.) In Count Two, Plaintiff alleges a violation of Article II, §§ 6 and 6-A of the Constitution of Virginia. (2d Am. Compl. ¶¶ 135-43.)

Based on these claims, Plaintiff requests that the Court declare that Defendants violated the Constitution of Virginia by choosing to conduct the 2021 general election using an old legislative district map based on stale Census data, and declare that those who win election to the House of Delegates serve one-year terms. (2d Am. Compl. at 13.) Additionally, Plaintiff asks the Court to order Defendants to hold new elections for the House of Delegates on the date of the November 2022 general election using a reapportionment plan based on the 2020 Census data. (2d Am. Compl. at 13.) Finally, Plaintiff requests that the Court order any other required relief, including reimbursement of costs, attorney's fees and other appropriate measures. (2d Am. Compl. at 13.)

## **B. Legal Background**

Plaintiff grounds his claim for relief primarily on *Cosner v. Dalton*. (2d Am. Compl. ¶¶ 2, 9, 17-35 (citing 522 F. Supp. 350 (E.D. Va. 1981).) That case included several consolidated cases in which counties, organizations and individuals challenged the

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<sup>5</sup> In Count One of the Second Amended Complaint, Plaintiff contends that his “protected core First Amendment rights should allow him to run for the House of Delegates in 2022 . . . instead of being forced to wait until 2023 due to the failure of appropriate state authorities to adhere to the requirements of the federal constitutions (*sic*).” (2d Am. Compl. ¶ 128.) The Court reads this statement as merely argument that frames Plaintiff's Fourteenth Amendment challenge, and not as a claim of a First Amendment violation. As such, the Court construes Count One solely as a claim under the Equal Protection Clause.

constitutionality of the House of Delegates reapportionment plan that the Virginia General Assembly enacted in 1981. *Cosner*, 522 F. Supp. at 353. The plaintiffs brought suit against various state election officials, including the Governor of Virginia, the Chairman of the Board and other members of the Board. *Id.* at 350. They argued — among other claims — that the reapportionment plan violated the Equal Protection Clause of the Fourteenth Amendment, “because it [did] not provide for substantial population equality in electoral districts,” and Article II, § 6 of the Virginia Constitution, which required districts to “be composed of contiguous and compact territory and . . . give . . . representation in proportion to the population of the district.” *Id.* at 353-54. They sought several forms of relief, including a declaration of the reapportionment plan as unconstitutional, an injunction prohibiting the Board from conducting the 1981 House of Delegates elections using that map and an order requiring the Board to conduct the election using the 1971 apportionment act. *Id.* at 354.

A three-judge panel in the United States District Court for the Eastern District of Virginia found that the 1981 reapportionment plan violated the Equal Protection Clause under *Reynolds v. Sims*, which required states to “make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable.” *Id.* at 356 (quoting *Reynolds v. Sims*, 377 U.S. 533, 577 (1964)). While the Supreme Court permitted “some deviation from strict numerical equality,” the court reasoned that the deviations between the House of Delegates districts’ populations exceeded constitutional limits, and the reasons that the defendants provided for these deviations did not pass constitutional muster. *Id.* at 357-61.

The court considered a myriad of possible solutions to this problem, noting that “[a]ny remedy must . . . be considered in light of the imminence of the 1981 elections.” *Id.* at 363. The court issued its decision on August 25, 1981, just a few weeks before the primary election on



September 8, 1981, and the general election on November 3, 1981. *Id.* The court decided not to devise its own reapportionment or have the General Assembly create a new plan before the 1981 elections. *Id.* Rather, it directed the defendants to hold the 1981 elections using the contested maps and gave the General Assembly until February 1982 to craft and implement constitutional maps. *Id.* at 364. If the General Assembly did not complete new, constitutional maps by that deadline, the court would consider drawing its own legislative maps and retained jurisdiction for that purpose. *Id.* The court also limited the terms of those elected to the House of Delegates in 1981 to one year and directed the state election officials to conduct a House of Delegates election in 1982, off the usual cycle, using the General Assembly's new, constitutional maps or the court's plan. *Id.* It specified that those Delegates who won election in 1982 would serve the remainder of the 1982-84 term, subject to the General Assembly extending the term to a full two years. *Id.*

Plaintiff argues that, as in *Cosner*, the current House of Delegates apportionment plan does not comport with constitutional standards under the Equal Protection Clause. (2d Am. Compl. ¶¶ 9-35, 50, 90-114.) For that reason, he posits, the Court should afford him the same relief that the *Cosner* court furnished, namely, limiting the members of the House of Delegates who win election this year to one-year terms and directing Defendants to hold a House of Delegates election in 2022, off the usual cycle. (2d Am. Compl. at 13.)

#### **D. Procedural History**

In June 2021, Plaintiff filed his original Complaint ("Compl." (ECF No. 1)), alleging violations of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Article II, §§ 6 and 6-A of the Virginia Constitution. (Compl. ¶¶ 81-99.) Plaintiff named Governor Northam, the Board, the Board members, Piper and Jessica Bowman ("Bowman"),

whom Plaintiff identified as the Deputy Commissioner of the Board, as defendants. (Compl. at 6.) In July 2021, Plaintiff filed his First Amended Complaint. (1st Am. Compl. (ECF No. 3).) On August 3, 2021, Defendants moved to dismiss the First Amended Complaint for lack of jurisdiction and failure to state a claim. (1st Mot. to Dismiss at 4-13.) Defendants also noted that Bowman no longer worked for the government of Virginia. (Defs.' 1st Mem. at 2.)

On September 10, 2021, Plaintiff then filed for leave to amend his complaint a second time, which the Court granted. (Mot. for Leave to File Am. Compl. at 1-2 (ECF No. 16); Order, Sept. 10, 2021 (ECF No. 17).) The Second Amended Complaint became the operative complaint in this action. (Order, Sept. 10, 2021.) Plaintiff dropped Bowman from his Second Amended Complaint, and she was dismissed from the case. (2d Am. Compl. at 2.) Plaintiff also moved for an expedited hearing on the Second Amended Complaint on the same day that he filed for leave to amend his complaint, before Defendants had an opportunity to respond to the Second Amended Complaint. (Pl.'s Mot. for Expedited Hr'g (ECF No. 19).) For that reason, on September 14, 2021, the Court denied Plaintiff's Motion for an Expedited Hearing. (Order, Sept. 10, 2021 (ECF No. 21).)

On September 23, 2021, Defendants moved to dismiss the Second Amended Complaint for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1) (Mot. to Dismiss 2d Am. Compl. ("2d Mot. to Dismiss") at 1-2 (ECF No. 23)), asserting that sovereign immunity shielded them from suit (Defs.' 2d Mem. at 5-11).<sup>6</sup> The Court lays out Defendants' contentions in further detail below.

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<sup>6</sup> The same day, Joshua Stanfield ("Stanfield") moved to join this case as a plaintiff, alleging the same claims as Plaintiff. (Mot. for Joinder, (ECF No. 22) (stating that Stanfield's claims to relief arose under identical transactions and occurrences as Plaintiff's.) The Court ordered Defendants to respond to Stanfield's Motion for Joinder by September 29, 2021, and ordered Stanfield to reply to Defendants' response to his Motion by October 4, 2021. (Order,

In light of the upcoming House of Delegates election, the Court ordered Plaintiff to respond to Defendants' Motion to Dismiss the Second Amended Complaint by September 29, 2021. (Order, Sept. 24, 2021 (ECF No. 25).) Additionally, the Court ordered Defendants to file their Reply, if any, to Plaintiff's Response to their Motion to Dismiss by October 4, 2021. (Order, Sept. 24, 2021.) On September 30, 2021, Plaintiff responded to the Motion to Dismiss and attached a "Sworn Statement of Facts" to his Response. (Resp. to Defs.' Mot. to Dismiss ("Pl.'s Resp.") (ECF No. 27); Pl.'s Sworn Statement of Facts (ECF No. 27-1).) Defendants did not reply to Plaintiff's Response to their Motion to Dismiss by the Court's deadline, rendering the Motion to Dismiss now ripe for review.<sup>7</sup>

## II. STANDARD OF REVIEW

A motion made pursuant to Federal Rule of Civil Procedure 12(b)(1) challenges the court's jurisdiction over the subject matter of the complaint. A defendant moving for dismissal

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Sept. 24, 2021 (ECF No. 25).) On September 29, 2021, Defendants filed their Response to Stanfield's Motion for Joinder. (ECF No. 26.) On October 6, 2021 — two days after the Court's deadline — Stanfield filed a Motion to Intervene and replied to Defendants' Response to his Motion for Joinder (ECF Nos. 22, 23.) The Court later denied both Motions. (ECF Nos. 31-32.)

<sup>7</sup> Because Defendants did not reply to Plaintiff's Response, the Court ordered Defendants to file a pleading identifying who in the Virginia government has the authority to draw districts. (Order, Oct. 6, 2021 (ECF No. 28).) Shortly thereafter, the Court ordered Defendants to file a pleading explaining whether the Attorney General had received a request for an opinion on the constitutionality of the 2021 election, whether the Attorney General had issued that opinion, and if he had, what the opinion stated. (Order at 2, Oct. 8, 2021 (ECF No. 34).) As discussed above, the October 8, 2021 Order also directed Defendants to explain whether they believed Plaintiff has standing to bring this action. (Order at 3, Oct. 8, 2021.) In response to these Orders, Defendants argued that the General Assembly alone has the authority to set the time, place and manner of general elections. (Defs.' Resp. to Oct. 6, 2021 Order at 2 (ECF No. 36).) Additionally, Defendants asserted that the Attorney General does not publicly comment on pending opinion requests, and that Virginia Code § 2.2-505 does not compel the Attorney General to respond to these requests or require him to follow a particular timeline in responding. (Defs.' Resp. to Oct. 8, 2021 Order ¶ 2.) They also noted that they believe that Plaintiff does not have standing, but they did not move to dismiss the Second Amended Complaint on that ground. (Defs.' Resp. to Oct. 8, 2021 Order ¶ 3.)

for lack of subject matter jurisdiction may either attack the complaint on its face, asserting that the complaint “fails to allege facts upon which subject matter jurisdiction can be based,” or, as here, may attack “the existence of subject matter jurisdiction in fact, quite apart from any pleadings.” *White v. CMA Const. Co., Inc.*, 947 F. Supp. 231, 233 (E.D. Va. 1996) (internal citations omitted). In either case, the plaintiff bears the burden of proof to establish jurisdiction. *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). The Court must dismiss an action if it determines that it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3).<sup>8</sup>

Under the Federal Rules of Civil Procedure, a complaint or counterclaim must state facts sufficient to “‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests[.]’” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). As the Supreme Court opined in *Twombly*, a complaint or counterclaim must state “more than labels and conclusions” or a “formulaic recitation of the elements of a cause of action,” though the law does not require “detailed factual allegations.” *Id.* (citations

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<sup>8</sup> Plaintiff attaches to his Response to the Motion to Dismiss a Sworn Statement of Facts. (ECF No. 27-1.) When a defendant makes a facial challenge to subject matter jurisdiction under Rule 12(b)(1), a court will treat the motion like a motion made for failure to state a claim under Rule 12(b)(6) and take only the facts alleged in the complaint as true. *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009). But when a defendant challenges the factual allegations that a plaintiff makes in support of subject matter jurisdiction, a court can resolve factual disputes to decide whether it has subject matter jurisdiction. *Thigpen*, 800 F.2d at 396. By that token, a court “may consider affidavits, depositions, or live testimony without converting [a Rule 12(b)(1) Motion] into one for summary judgment.” *Lewis v. UPS Freight*, 2010 WL 1640270, at \*1 (citing *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995)); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)). It appears that Defendants raise a factual dispute regarding who in the government of Virginia can provide the relief that Plaintiff seeks. (Defs.’ 2d Mem. at 1.) For that reason, only to the extent that the Sworn Statement of Facts responds to Defendants’ factual challenge regarding their electoral responsibilities, the Court will take them into consideration. Likewise, the Court will also consider Defendants’ pleadings in response to its October 6 and October 8 Orders to the same extent. (Defs.’ Resp. to Oct. 6, 2021 Order; Defs.’ Resp. to Oct. 8 Order.)

omitted). Ultimately, the “[f]actual allegations must be enough to raise a right to relief above the speculative level,” rendering the right “plausible on its face” rather than merely “conceivable.” *Id.* at 555, 570. Thus, a complaint or counterclaim must assert facts that are more than “merely consistent with” the other party’s liability. *Id.* at 557. And the facts alleged must be sufficient to “state all the elements of [any] claim[s].” *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003) (citing *Dickson v. Microsoft Corp.*, 309 F.3d 193, 213 (4th Cir. 2002) and *Iodice v. United States*, 289 F.3d 270, 281 (4th Cir. 2002)).

### III. ANALYSIS

The Eleventh Amendment provides that “[t]he 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.” U.S. Const. amend. XI. The Supreme Court has interpreted this Amendment to bar private individuals from suing a state in federal court. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 363 (2001). By extension, the Eleventh Amendment prohibits “not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities.” *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997).

The Supreme Court crafted a limited exception to this doctrine in *Ex parte Young*, “which permits a federal court to issue prospective injunctive relief against a state officer to prevent ongoing violations of federal law, on the rationale that such a suit is not a suit against the state for the purposes of the Eleventh Amendment.” *McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010) (citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908)). The Supreme Court grounded this exception on the legal fiction that a state officer who commits an ongoing violation of

federal law “is . . . stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.” *Ex parte Young*, 209 U.S. at 160.

For *Ex parte Young* to apply, a plaintiff must demonstrate an ongoing violation of federal law. *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 330 (4th Cir. 2001). “The requirement that the violation of federal law be ongoing is satisfied when a state officer’s enforcement of an allegedly unconstitutional state law is threatened, even if the threat is not yet imminent.” *Id.* (citation omitted). With this background in mind, the Court will first address Count One of the Second Amended Complaint.

**A. Count One: Violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution**

In Count One of the Second Amended Complaint, Plaintiff contends that “[t]he failure to adopt [the] required reapportionment [of the Virginia state and congressional districts] violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.” (2d Am. Compl. ¶ 122.) He challenges Defendants’ alleged decision to proceed with this year’s general election for the House of Delegates “using the existing, old state legislative districts,” because these districts do not “hav[e] the constitutionally required equally weighted populations within permitted deviations.” (2d Am. Compl. ¶¶ 123, 125.) According to Plaintiff, the deviations between the House of Delegates district populations violate his “constitutional right to have his vote counted equally though his representatives elected to the General Assembly.” (2d. Am. Compl. ¶ 124 (citing *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).) He argues that, under *Cosner*, he should have the ability to run for the House of Delegates in 2022 instead of having to wait until 2023 “due to the failure of the appropriate state authorities to adhere to the requirements of the federal constitutions (*sic*).” (2d Am. Compl. ¶ 128.)

Further, Plaintiff admonishes the alleged decision of Governor Northam, the Board members and Piper not to seek a formal written opinion from the Virginia Attorney General (“the Attorney General”) on the constitutionality of holding this year’s election using old maps. (2d Am. Compl. ¶ 129 (citing Va. Code § 2.2-505(A) (permitting the governor, a chairman or secretary of an electoral board or head of a state department, among others, to seek advice and an official advisory opinion on how to legally discharge their duties)).) Plaintiff alleges that this failure to seek the Attorney General’s formal advice and opinion “raises the inference that Defendants have not operated with the ‘good faith’ generally required in redistricting law,” and that Defendants “have put the interests of incumbent legislators ahead of the public’s interest.” (2d Am. Compl. ¶¶ 129-30.) Although he does not mention the statute, the Court assumes that Plaintiff brings this claim under 42 U.S.C. § 1983, which provides the vehicle for alleging violations of federal constitutional and statutory rights. *See* 42 U.S.C. § 1983 (“Every person who, under color of any statute . . . of any State 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.”)

In their Motion to Dismiss, Defendants argue that the Court lacks jurisdiction to adjudicate this claim, because sovereign immunity under the Eleventh Amendment shields them. (Defs.’ 2d Mem. at 5-9.) Plaintiff responds that Virginia plaintiffs have sued the Governor, the Board and Board members over redistricting disputes in federal court before, but courts did not dismiss these defendants on sovereign immunity grounds. (Pl.’s Resp. ¶¶ 9-65 (citing *Mahan v. Howell*, 410 U.S. 315, 317, 333 (1973) (affirming in part and reversing in part three-judge district court’s finding that Virginia legislative reapportionment statutes permitted

constitutionally impermissible deviations in state House and Senate district populations); *Cosner*, 522 F.3d at 350, 364 (directing defendants, including the Governor of Virginia and members of the Board, to hold an off-cycle election for the House of Delegates).)

According to Plaintiff, because federal courts can raise sovereign immunity as a jurisdictional basis for dismissal *sua sponte*, the fact that federal courts do not typically dismiss the Governor, the Board or Board members as defendants implicitly demonstrates that they (and the Commissioner of Elections) constitute proper parties in redistricting-related challenges. (Pl.’s Resp. ¶¶ 114-18 (citing *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 227 (4th Cir. 1997) (“[B]ecause of its jurisdictional nature, a court ought to consider the issue of Eleventh Amendment immunity at any time, even *sua sponte*.”)).) The Court first turns to Plaintiff’s claim under Count One against the Board and Governor Northam separately, and then Piper and the Board members together.

#### **i. The Board**

First, Defendants argue that the Board has immunity from suit, because it operates as an arm of the state and has not waived its sovereign immunity. (Defs.’ 2d Mem. at 5-6.) Consequently, the Eleventh Amendment affords it the same protection as the Commonwealth itself. (Defs.’ 2d Mem. at 5-6.) As noted above, Plaintiff argues that Virginia plaintiffs have previously sued the Board in federal court, and the courts did not discuss this issue or grant the Board sovereign immunity. (Pl.’s Resp. ¶¶ 9-65 (citing *Mahan*, 410 U.S. at 317; *Cosner*, 522 F. Supp at 350, 353).) For that reason, he supposes, these courts implicitly found that the Board constitutes an appropriate party in redistricting-related challenges. (Pl.’s Resp. ¶¶ 9-65.)

The Court disagrees with Plaintiff. *Ex parte Young* permits suits for injunctive and declaratory relief against individual officers or officials of a state or local government in their



official capacity to remedy violations of federal law. *Ex parte Young*, 209 U.S. at 178; *Libertarian Party of Va. v. Va. State Bd. of Elecs.*, 2020 WL 3732012, at \*5 (E.D. Va. Sept. 16, 2010), *aff'd*, 434 F. App'x 174 (4th Cir. 2011). However, the Eleventh Amendment also immunizes states and those state entities that operate as “arms of the state.” *Hutton v. S.C. Ret. Sys.*, 773 F.3d 536, 541 (4th Cir. 2014). An agency constitutes an “arm of the State” for Eleventh Amendment purposes and receives sovereign immunity when, “in its operations, the state is the real party in interest . . . [and] the named party [is] the *alter ego* of the state.” *Ram Ditta ex rel. Ram Ditta v. Md. Nat'l Cap. Park and Plan. Com'n*, 822 F.2d 456, 457 (4th Cir. 1987) (citations omitted).

In *Libertarian Party of Virginia v. Virginia State Board of Elections*, the court found that

[T]he Board of Elections functions as a quintessential “arm of the State” with respect to approving candidates for official ballots and making other official election-related decisions. A suit against the State Board of Elections is therefore functionally equivalent to a suit against the Commonwealth of Virginia, and the State Board of Elections is entitled to the same protections of sovereign immunity as the Commonwealth itself.

2010 WL 3732012, at \*5 (citing *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)). The Court concurs with this analysis and finds that Plaintiff's claims against the Board cannot survive the Motion to Dismiss.

Plaintiff correctly points out that in several cases involving redistricting challenges, federal courts have not dismissed the Board — or the Governor or Board members — as defendants. (Pl.'s Resp. ¶¶ 9-65.) The explanation for this trend likely lies in the unique, “hybrid nature” of Eleventh Amendment immunity. *Wis. Dep't of Corrs. v. Schacht*, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring).

The Supreme Court has framed the Eleventh Amendment as “enact[ing] a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject-matter

jurisdiction.” *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997). By way of illustration, the Eleventh Amendment bears characteristics of both subject-matter jurisdiction and personal jurisdiction. *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 479-81 (4th Cir. 2005). Like subject matter jurisdiction, parties can raise sovereign immunity at any point during judicial proceedings. *Schact*, 524 U.S. at 394 (Kennedy, J., concurring). But as with personal jurisdiction, state defendants can waive sovereign immunity, and courts do not have to examine the issue *sua sponte*, contrary to what Plaintiff asserts. (Pl.’s Resp. ¶¶ 9-65); *Schact*, 524 U.S. at 394 (Kennedy, J., concurring); *Constantine*, 411 F.3d at 481.

Thus, every court of appeals that has addressed the issue — including the Fourth Circuit — has treated sovereign immunity in a manner similar to an affirmative defense, which the defendant must assert and a federal court need not address *sua sponte*.<sup>9</sup> *Hutto*, 773 F.3d at 543 (listing cases). Against this background, sovereign immunity “is not strictly an issue of subject-matter jurisdiction, neither is it merely a defense to liability.” *Constantine*, 411 F.3d at 482 (citing *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45 (1993)).

Consequently, if the state defendants did not plead sovereign immunity in the redistricting cases to which Plaintiff refers, then the deciding court had no obligation to discuss it. (See Pl.’s Resp. ¶¶ 9-65 (citing *Mahan*, 410 U.S. 315; *Cosner*, 522 F. Supp. 350).) The Board does claim sovereign immunity in this case, however. (Defs.’ 2d Mem. at 9-10.) Congress has

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<sup>9</sup> Plaintiff cites *Suarez Corp. Industries* for the proposition that a federal court must address Eleventh Amendment issues on its own initiative. (Pl.’s Resp. ¶¶ 114-18.) However, Plaintiff overstates the holding in that case. As the Fourth Circuit more recently held, “[t]he Supreme Court has made it clear that federal courts are not *required* to raise Eleventh Amendment issues *sua sponte*.” *Constantine*, 411 F.3d at 481 n.3 (alteration in original) (citing *Schact*, 524 U.S. at 389). In *dicta*, the Fourth Circuit has held that “because of its jurisdictional nature, a court *ought* to consider the issue of Eleventh Amendment immunity at any time, even *sua sponte*,” but has not required courts to independently address the issue. *Id.* (emphasis added) (quoting *Suarez Corp. Indus.*, 125 F.3d at 227).

not abrogated state sovereign immunity in claims brought under § 1983. *See Libertarian Party of Virginia*, 2010 WL 3732012, at \*5 (noting that Congress has not abrogated sovereign immunity for states in § 1983 suits). And Defendants have not waived their sovereign immunity in this action, as they have only moved to dismiss the two Amended Complaints, responded to a Motion for Joinder and complied with the Court’s requests for pleadings from them. *See Kadel v. N.C. State Health Plan for Teachers and State Emps.*, 12 F.4th 422, 450 (4th Cir. 2021) (Agee, J., dissenting) (stating that a state can waive sovereign immunity through “voluntary, affirmative litigation conduct” (citing *Lapides v. Bd. of Regents*, 535 U.S. 613, 619 (2002))). Since the Board serves as an arm of the state for Eleventh Amendment purposes, the *Ex parte Young* exception does not apply to it, and the Court must dismiss Plaintiff’s claims against the Board. *See Libertarian Party of Virginia*, 2010 WL 3732012, at \*5 (dismissing claim against the Board on sovereign immunity grounds).

**ii. Governor Northam**

In their Motion to Dismiss, Defendants argue that Governor Northam has immunity from suit because he merely bears a general obligation to enforce the laws of the Commonwealth, does not have a special relation with the electoral or redistricting processes and has not acted or threatened to enforce an unconstitutional policy. (Defs.’ Mot. at 6-9.) Again, Plaintiff responds that in *Cosner*, *Mahan* and other redistricting-related cases, federal courts did not dismiss the Governor of Virginia on Eleventh Amendment grounds as lacking a special relation with the alleged unconstitutional policy. (2d Am. Compl. ¶¶ 9-65.) Further, he specifies that he does not contend that Governor Northam has the power to redraw district maps. (Pl.’s Resp. ¶¶ 119-20.) Rather, he challenges the alleged decision of Governor Northam and the other Defendants to conduct this year’s election using maps based on outdated Census data. (Pl.’s Resp. ¶¶ 119-20.)

For the *Ex parte Young* exception to sovereign immunity to apply a particular state officer, a plaintiff must first prove that the state officer in question maintains a “special relation” with the contested statute, meaning that the officer has the authority to enforce the statute. *Ex parte Young*, 209 U.S. at 192; *Doyle v. Hogan*, 1 F.4th 249, 255 (4th Cir. 2021). This requirement limits plaintiffs to suing only those officers with the legal ability to remedy the alleged constitutional violation. *Ex parte Young*, 209 U.S. at 158. In turn, it ensures that “[any] federal injunction will be effective with respect to the underlying claim.” *S.C. Wildlife Fed’n v. Limehouse*, 549 F.3d 324, 333 (4th Cir. 2008). The statute at issue may expressly declare that the official possesses enforcement powers, or some other general law may vest the official with those powers. *Ex parte Young*, 209 U.S. at 158. “General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law.” *Gilmore*, 252 F.3d at 331 (quoting *Children’s Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416 (6th Cir. 1996)). For that reason, the “mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute.” *Id.* (quoting *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979)). However, plaintiffs do not bear a particularly heavy burden on this prong. They can satisfy this requirement by simply showing that the state officer in question has “proximity to and responsibility for the challenged state action,” as opposed to some “qualitatively special” relationship. *Limehouse*, 549 F.3d at 333 (alterations in original).

At the second step of this analysis, a plaintiff must demonstrate that he has suffered an ongoing violation of his constitutional rights. *Ex parte Young*, 209 U.S. at 159-60; *Gilmore*, 252 F.3d at 330. “The requirement that the violation of federal law be ongoing is satisfied when a

state officer's enforcement of an allegedly unconstitutional state law is threatened, even if the threat is not yet imminent." *Gilmore*, 252 F.3d at 330 (citation omitted).

Here, Defendants assert that Governor Northam has no particular relation with the electoral process in Virginia outside of his general law enforcement duties and his authority to postpone an election in a state of emergency and set a special election when vacancies in office occur. (Defs.' 2d Mem. at 8 (citing Va. Code §§ 24.2-207, -209, -216, -603.1).) The Governor also appoints the five members of the Board and the Commissioner, whom the General Assembly must confirm. § 24.102. Article II of the Virginia Constitution, which establishes the state constitutional provisions on Virginia's electoral process, electoral officers and right to vote, does not confer upon the Governor any special electoral duties. Va. Const. art. II.

Plaintiff does not allege facts to suggest that Governor Northam bears a special connection to the Virginia electoral process beyond his general law enforcement role. Rather, he alleges that Governor Northam failed to exercise his discretion to ask the Attorney General for a formal opinion on the legality of proceeding with this year's elections using an old apportionment plan. (2d Am. Compl. ¶¶ 129-30 (citing Va. Code § 2.2-505).) He also argues that the office of the Governor of Virginia maintains a special relation to the enforcement of the current map of legislative districts, because Governor McDonnell signed the plan into law in 2011.<sup>10</sup> (2d Am. Compl. ¶¶ 49, 71-75; Pl.'s Resp. ¶ 124.) As he does with the Board, Plaintiff contends that in *Cosner*, *Mahan* and other Virginia election law cases, plaintiffs sued the Governor of Virginia in his official capacity in federal court, and the courts did not dismiss the

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<sup>10</sup> The fact that the Governor of Virginia signed this bill into law only speaks to the Governor's general enforcement power. Also, the enactment of the 2011 apportionment map occurred under a different districting scheme. The current scheme does not even require the Governor's signature, further evincing his lack of specific enforcement power in this instance. Va. Const. art. II, § 6-A(e).

Governor on sovereign immunity grounds, which demonstrates that Governor Northam constitutes a proper defendant. (Pl.’s Resp. ¶¶ 9-65.)

However, for the reasons discussed above, if the Governor did not raise Eleventh Amendment immunity in the cases that Plaintiff cites, then the federal courts deciding those cases had no duty to address the issue on their own initiative, rendering Plaintiff’s supposition irrelevant to this analysis. *See supra* Part I.A (discussing contours of sovereign immunity doctrine). Since Governor Northam has no special relation with the conduct of Virginia elections beyond his general law enforcement authority, he does not constitute a proper party, and the Court must dismiss Plaintiff’s claims against him.<sup>11</sup>

**ii. The Board Members and Piper**

Similarly, Defendants assert that the Eleventh Amendment shields Piper, Brink, O’Bannon and LeCruise from suit, because they “do not have authority to execute the remedies sought by Plaintiff.” (Defs.’ 2d Mem. at 9.) Board members “supervise and coordinate the work of the county and city electoral boards and of the registrars” to promote election integrity, uniformity, legality and purity. (Defs.’ 2d Mem. at 9 (quoting Va. Code § 24.2-103(A)).) The Commissioner of the Department of Elections “carr[ies] out the electoral administrative and programmatic operations in the Commonwealth.” (Defs.’ 2d Mem. at 9 (citing § 24.2-102).) According to Defendants, these officers cannot set district plans or elections, so the *Ex parte Young* exception does not apply to them. (Defs.’ 2d Mem. at 9.)

In their Response to the Court’s October 6, 2021 Order, Defendants posit that only the General Assembly can “regulate the time, place, manner, conduct and administration of . . .

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<sup>11</sup> Because the Court finds that Governor Northam bears no special relation to the process of setting an election, the Court will not discuss the prong of the test that addresses ongoing violations of constitutional law. *Gilmore*, 252 F.3d at 330.

general . . . elections.” (Defs.’ Resp. to Oct. 6, 2021 Order at 2 (quoting Va. Const. art. II, § 4 (alterations in original).) The General Assembly has, in turn, enacted a statute requiring general elections to be held “on the Tuesday after the first Monday in November or on the first Tuesday in May.” (Defs.’ Resp. to Oct. 6, 2021 Order at 2 (quoting Va. Code § 24.2-101).)

As explained above, Plaintiff argues in response that he does not challenge the electoral maps themselves or the Commission’s failure to craft maps using the 2020 Census data in time for this year’s election. (Pl.’s Resp. ¶¶ 119-20.) Instead, he contests the decision to proceed with this year’s election using the 2011 maps. (Pl.’s Resp. ¶¶ 119-20.) Again, Plaintiff posits in response that federal courts have consistently allowed suits against members of the Board to proceed, and sovereign immunity should not protect them in this case as a result. (2d Am. Compl. §§ 9-65; Pl.’s Resp. ¶ 112.) In *Cosner*, Plaintiff explains, the position of Commissioner of Elections did not yet exist.<sup>12</sup> (Pl.’s Resp. ¶ 177.) The Court interprets this assertion to mean that the cases that Plaintiff cites do not shed light one way or the other on the propriety of Piper as a Defendant.

Of all his claims, Plaintiff’s claim under the Equal Protection Clause against the Board members and Piper is the only one that can survive Defendants’ Motion to Dismiss. In *Grimes*, the Eastern District of Kentucky permitted a suit challenging the constitutionality of Kentucky’s ballot access scheme to proceed against members of the state’s board of elections, which administered the state’s election, supervised voter registration and maintained voter rolls, and the secretary of state, who served as the “chief election official for the Commonwealth.” 164 F. Supp. 3d 945, 949 (E.D. Ky. 2016) (quoting Ky. Rev. Stat. Ann. § 117.101(1)-(2)) (current

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<sup>12</sup> The position of Commissioner did not come into existence until 2014. Markus Schmidt, *Edgardo Cortes, Commissioner of the Virginia Department of Elections*, Richmond Times-Dispatch (Aug. 10, 2014), [https://richmond.com/edgardo-cortes-commissioner-of-the-virginia-department-of-elections/article\\_4f38f170-8a6a-5aca-bd40-57dd83654eae.html](https://richmond.com/edgardo-cortes-commissioner-of-the-virginia-department-of-elections/article_4f38f170-8a6a-5aca-bd40-57dd83654eae.html).

version at Ky. Rev. Stat. Ann. § 117.015(1)-(2)), *aff'd*, 835 F.3d 570 (6th Cir. 2016). In that case, third-party political groups challenged the statutory requirement that they gather a certain number of signatures to appear on the ballot, while major parties could automatically receive ballot access for a four-year period after a qualifying presidential election. *Id.* at 947.

Both the board members and secretary of state claimed that their authority to administer elections “[was] too general” to strip them of sovereign immunity. *Id.* at 949. The court disagreed. *Id.* at 951. It reasoned that the board members and secretary of state “[were] not personally responsible for listing the candidates’ names on ballots *per se*.” *Id.* at 950. Still, they bore some responsibility for “perpetuation of the ballot access regime,” because they trained county clerks and other members of county boards of elections. *Id.* Since “there [was] a realistic probability that [these] official[s] would] take legal or administrative actions against the plaintiff’s interests” — chiefly, facilitating an election under the challenged ballot access framework — the board members and secretary constituted proper defendants. *Id.* (quoting *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1048 (6th Cir. 2015)).

Likewise, here, the Board members and Commissioner oversee and administer the electoral process in Virginia. (2d Am. Compl. ¶¶ 65-66.) Like the board members and secretary of state in Kentucky, these individuals facilitate the state’s elections, even if they do not draw the legislative district maps or set elections themselves. (2d Am. Compl. ¶¶ 65-66); *Grimes*, 164 F.3d at 950. “The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact.” *Ex parte Young*, 209 U.S. at 157. Defendants may be correct that only the General Assembly can set and regulate the timing and conduct of an election. (Pl.’s Resp. to Oct. 6, 2021 Order at 2 (quoting Va. Const. art. II, § 4).) But the Board members and Piper oversee the execution of the General Assembly’s enactments.



(2d Am. Compl. ¶¶ 65-66.) *Ex parte Young* exists to ensure that the officials with enforcement — not legislative — power comply with the Constitution. *See Ex parte Young*, 209 U.S. at 161 (finding that state attorney general had sufficient connection to the enforcement of the statute at issue to be sued).

Therefore, here, the Board members and Commissioner maintain the special enforcement relationship with the electoral process that Governor Northam lacks. And unlike the Board, they each serve as individual state officers, and not as an arm of the state. For these reasons, the Court finds that Plaintiff’s claim under Count One against the Board members and the Commissioner survives the Motion to Dismiss.

**B. Count Two: Violation of Art II, §§ 6 and 6-A of the Virginia Constitution**

In Count Two of the Second Amended Complaint, Plaintiff argues that the Virginia Constitution requires the implementation of state legislative and congressional districts based on the most recent decennial census, and that elections for the House of Delegates occur using those new plans in the same year. (2d Am. Compl. ¶¶ 135-43.) In their Motion to Dismiss, Defendants assert that Plaintiff cannot use the *Ex parte Young* exception to enforce compliance with the Virginia Constitution, as the exception applies only to violations of federal law. (Defs.’ 2d Mem. at 9-10.) Further, they posit that Virginia has not waived its Eleventh Amendment immunity. (Defs.’ 2d Mem. at 10.)

Plaintiff responds that the Commonwealth has waived its sovereign immunity. In support of this supposition, he cites Article I, § 2 of the Virginia Constitution, which states that “[t]hat 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.” Va. Const. art. I, § 2. According to Plaintiff, Virginia voters have the power to waive the Commonwealth’s sovereign immunity pursuant to

this state constitutional provision. (2d. Am. Compl. ¶ 140.) Thus, when Virginia voters approved Article II, § 6-A of the Virginia Constitution, Defendants lost the protection of sovereign immunity in suits brought under that provision. (2d Am. Compl. ¶¶ 112-14; Pl.’s Resp. ¶¶ 88-100.) Plaintiff elaborates that if Virginia voters cannot sue state election officials for violations of this state constitutional provision, then they have no avenue to ensure that the electoral maps are redrawn in accordance with decennial Census data, and that these maps are implemented in time for the general election in the year following the Census. (2d Am. Compl. ¶ 113; Pl.’s Resp. ¶ 96.)

Plaintiff’s argument overlooks the purpose of the *Ex parte Young* exception. That doctrine exists to provide an exception to sovereign immunity only in cases of ongoing violations of federal — not state — law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). “*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.” *Perez v. Ledesma*, 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part and dissenting in part) (emphasis added). Count Two alleges a violation of the Virginia Constitution, and consequently, the Court cannot redress that claim under the *Ex parte Young* exception.

Moreover, the Commonwealth has not waived sovereign immunity as to claims of violations of Article II, § 6-A of the Virginia Constitution. “The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.” *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985). “[A] State’s constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued . . . for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity,

it must specify the State's intention to subject itself to suit in *federal court*.” *Id.* at 241 (alterations in original) (internal citation and quotation marks omitted). “In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, [a court] will find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.” *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (citation and internal quotation marks omitted).

Nowhere in the Virginia Constitution does Virginia consent to suit in federal court. *Lighthouse Fellowship Church v. Northam*, 515 F. Supp. 3d 384, 399 (E.D. Va. 2021). Furthermore, Plaintiff cites no Virginia Supreme Court decisions indicating that the Commonwealth has waived sovereign immunity from suit in federal court on state constitutional claims, nor has the Court discovered any.<sup>13</sup> *See id.* (finding in suit against Virginia governor that the parties and that court had not located any state supreme court decisions waiving Eleventh Amendment immunity in federal court on state constitutional claims). Instead, Plaintiff simply

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<sup>13</sup> The Supreme Court of Virginia has indeed held that “sovereign immunity does not preclude declaratory and injunctive relief claims based on self-executing provisions of the Constitution of Virginia or claims based on federal law. *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 704 S.E.2d 365, 371 (4th Cir. 2011).

A constitutional provision is self-executing when it expressly so declares. . . . [C]onstitutional provisions in bills of rights and those merely declaratory of common law are usually considered self-executing. The same is true of provisions which specifically prohibit particular conduct. “Provisions of a Constitution of a negative character are generally, if not universally, construed to be self-executing.”

*Robb v. Shockoe Slip Found.*, 324 S.E.2d 674, 681-82 (Va. 1985) (quoting *Robertson v. Staunton*, 51 S.E. 178, 179 (Va. 1905)).

Article II, §§ 6 and 6-A of the Virginia Constitution do not contain an explicit declaration that they are self-executing. Even if Article II, §§ 6 and 6-A constitute self-executing provisions, they still would not waive sovereign immunity in federal court, because a state must do so clearly and unambiguously. *See Lighthouse Fellowship Church*, 515 F. Supp. 3d at 399 n.3 (assuming *arguendo* that Virginia constitutional provisions at issue were self-executing but finding them not sufficient to waive a state’s sovereign immunity in federal court).

asserts that “the public support of the new constitutional language as evidenc[es] a public intention to make certain Virginia adheres to case law.” (Pl.’s Resp. ¶ 98.) Without more, the Court cannot find that Virginia waived its sovereign immunity as to the provisions of the Constitution of Virginia under which Plaintiff sues, and therefore, must dismiss Count Two of the Second Amended Complaint.

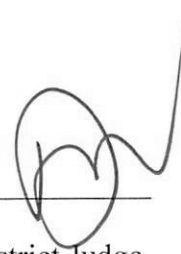
#### IV. CONCLUSION

For the reasons set forth above, the Court hereby GRANTS IN PART and DENIES IN PART Defendants’ Motion to Dismiss the Second Amended Complaint (ECF No. 23). Specifically, the Court GRANTS Defendants’ Motion as to Count One against Governor Northam and the Board and Count Two as to all Defendants. However, the Court DENIES Defendants’ Motion as to Count One as to Brink, O’Bannon, LeCruise and Piper.

An appropriate Order will issue.

Let the Clerk file a copy of this Memorandum Opinion electronically and notify all counsel of record.

It is so ORDERED.

  
\_\_\_\_\_/s/\_\_\_\_\_  
David J. Novak  
United States District Judge

Richmond, Virginia  
Date: October 12, 2021

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

Richmond Division

PAUL GOLDMAN,  
*Pro se* Plaintiff,

v.

Civil No. 3:21-cv-420 (DJN)

RALPH NORTHAM, *et al.*,  
Defendants.

**ORDER**

**(Granting in Part and Denying in Part Defendants' Motion to Dismiss  
the Second Amended Complaint and Setting Deadlines)**

*Pro se* Plaintiff Paul Goldman ("Plaintiff") brings this action against Defendants Ralph Northam ("Governor Northam"), the Virginia State Board of Elections ("the Board"), Robert Brink ("Brink"), John O'Bannon ("O'Bannon"), Jamilah D. LeCruise ("LeCruise") and Christopher Piper ("Piper") (collectively, "Defendants"), alleging violations of Article II, §§ 6 and 6-A of the Constitution of Virginia and of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. This matter now comes before the Court on Defendants' Motion to Dismiss the Second Amended Complaint (ECF No. 23). For the reasons set forth in the accompanying Memorandum Opinion (ECF No. 40), the Court hereby GRANTS IN PART and DENIES IN PART the Motion to Dismiss.

Further, for the reasons discussed at the hearing on October 12, 2021, the Court hereby ORDERS the following.

1. By October 18, 2021, the remaining Defendants shall notify the Court in a filed pleading whether they are appealing the Court's ruling on sovereign immunity. Should the remaining Defendants file a notice of appeal, the Court will immediately stay all proceedings in

this case. Should the remaining Defendants notify the Court that no appeal will be taken on the issue of sovereign immunity, the following schedule will apply, subject to modification by the Court as necessary.

2. By October 19, 2021, the parties shall file a stipulation of facts as it relates to standing, providing sufficient factual basis to allow the Court to address whether Plaintiff has standing to pursue his Equal Protection Clause claim.

3. By October 22, 2021, the remaining Defendants shall file a renewed Motion to Dismiss, which shall include arguments challenging Plaintiff's standing to bring this action, or a statement on whether they concede that Plaintiff has standing.

4. By October 29, 2021, Plaintiff shall respond to the remaining Defendants' Renewed Motion to Dismiss, if they file one. If the remaining Defendants challenge the Plaintiff's standing, the Plaintiff shall state in his response whether he believes that 28 U.S.C. § 2284 requires a three-judge panel to address the issue of standing or whether the undersigned alone can adjudicate this jurisdictional issue.

5. By October 29, 2021, any prospective intervenors who wish to intervene in this case must file a Motion to Intervene.

6. By November 4, 2021, Defendants shall file their Reply, if any, to Plaintiff's Response to their Renewed Motion to Dismiss, as well as their Answer to the Second Amended Complaint (ECF No. 18). Additionally, if any prospective intervenors move to intervene, Defendants may also respond to those Motions to Intervene and address the prospective intervenors' standing by this date. Should the remaining Defendants challenge Plaintiff's standing to bring this case, the remaining Defendants shall also state in their reply whether they

believe that 28 U.S.C. § 2284 requires a three-judge panel to address the issue of standing or whether the undersigned alone can adjudicate this jurisdictional issue.

Further, in light of the public reporting that state Delegate Lee J. Carter (“Carter”) requested that the Virginia Attorney General (“the Attorney General”) issue an opinion on the constitutionality of the 2021 general election (Defs.’ Resp. to Oct. 8, 2021 Order ¶ 1 (ECF No. 38)), the Court will give the Attorney General until November 4, 2021, to issue an opinion in response to Carter’s and any other similar request that he may have received, *if the Attorney General so chooses*. If the Attorney General elects to issue an opinion on this matter by that date, the remaining Defendants shall also file a pleading as to the impact of that opinion on this case by November 4, 2021.

7. On November 8, 2021, at 11 a.m., the Court will conduct a hearing on the remaining Defendants’ Renewed Motion to Dismiss, and in particular, the issue of standing. Should the Court determine that 28 U.S.C. § 2284 requires a three-judge panel to address the issue of standing, the Court will notify the parties before November 8, 2021, and advise the parties as to whether this schedule must be modified to accommodate the need for the three-judge panel.

If the Court finds standing to exist, the following schedule will apply:

8. By November 15, 2021, the parties shall each file cross-motions for summary judgment.

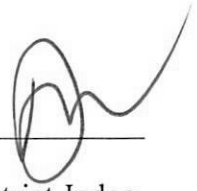
9. By November 22, 2021, the parties shall respond to each other’s cross-motions for summary judgment.

10. Finally, the Court hereby tentatively SCHEDULES a hearing before a three-judge panel on the cross-motions for summary judgment on December 3, 2021, at 10 a.m., subject to

the availability of the two other panel members.

Let the Clerk file a copy of this Order electronically and notify all counsel of record.

It is so ORDERED.

  
\_\_\_\_\_/s/\_\_\_\_\_  
David J. Novak  
United States District Judge

Richmond, Virginia

Date: October 12, 2021



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

PAUL GOLDMAN,

v.

RALPH NORTHAM, et al.

Civil Action No.:  
3:21 CV 420

October 12, 2021

COMPLETE TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE DAVID J. NOVAK  
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

Paul Goldman, Esquire  
4414 Grove Avenue  
Richmond, Virginia 23226

Pro Se Plaintiff

Jessica M. Samuels, Esquire  
Carol L. Lewis, Esquire  
OFFICE OF THE ATTORNEY GENERAL  
202 North 9th Street  
Richmond, Virginia 23219

Counsel on behalf of the Defendants

TRACY J. STROH, RPR  
OFFICIAL COURT REPORTER  
UNITED STATES DISTRICT COURT

1 (The proceeding commenced at 9:58 a.m.)

2 THE CLERK: In the matter of *Paul Goldman v.*  
3 *Ralph Northam, et al.* Civil Action 3:21 CV 420. Paul  
4 Goldman representing him -- proceeding pro se. On behalf  
5 of Ralph Northam, et al. is Jessica M. Samuels and Carol  
6 L. Lewis.

7 Are we ready to proceed?

8 THE COURT: Mr. Goldman, are you ready?

9 MR. GOLDMAN: Yes, sir.

10 THE COURT: Are you all ready?

11 MS. SAMUELS: Yes, Your Honor.

12 THE COURT: Who's who over there?

13 MS. SAMUELS: Good morning, Your Honor. My name  
14 is Jessica Samuels. I'm here for defendants. This is my  
15 co-counsel Carol Lewis.

16 MS. LEWIS: Good morning, Your Honor.

17 THE COURT: All right. Good morning.

18 All right. So the way we're going to proceed is  
19 this. You have to keep your mask on while you're over at  
20 the table except for when it's your time to speak.

21 You're going to find out, there's not going to  
22 be much argument here today. I'm basically going to tell  
23 you what the ruling is and how we're going to proceed here  
24 today.

25 So what I'm going to do is this. Instead of you

1 going up to the lectern, I'm going to ask you some  
2 questions. Just stay seated. If you have a response,  
3 take your mask down and speak into the microphone so the  
4 court reporter can hear you. Okay?

5 MR. GOLDMAN: Over there?

6 THE COURT: You got that?

7 Okay. Now, the reason -- normally a motion to  
8 dismiss, I handle this on the papers. I don't normally  
9 have a hearing. But the way that you all -- both sides  
10 are litigating this case is not acceptable, and so we're  
11 going to talk about that.

12 Mr. Goldman, I know you're proceeding pro se,  
13 but I also know you're a lawyer. Some people think you're  
14 an expert in these areas. Okay? And, look, you can't be  
15 sending press releases to my law clerk. I understand you  
16 apologized, said it was a mistake, but that's ex parte  
17 contact with the Court. That cannot happen again or  
18 there's going to be consequences to you, number one.

19 Number two, you can't be talking about Russians,  
20 elephants, and Houdini in pleadings. While you might  
21 think it's cute, I do not think. This is a federal court.  
22 I've taken your claims quite seriously. I think you have  
23 something to work with here. Okay? But you've got to  
24 take it seriously too. All right? So let's knock off the  
25 nonsense and get to the legal issues here. Because there

1 are some really important legal issues that you've raised  
2 here, and I'm taking it really seriously. That's why I'm  
3 having an emergency hearing on this.

4           Now, on the State, I'm not sure what you all are  
5 doing over there. And I say this with all due respect.  
6 He filed his second amended complaint. I deny his motion  
7 to expedite. So you had the full time to brief this. I  
8 was expecting a motion to dismiss that was different than  
9 what I got from you all. Okay? Particularly standing. I  
10 think standing is a major issue. You raised it the first  
11 time. You didn't raise it the second time.

12           Even more concerning, then he responded with his  
13 Houdini, elephants, and all the other stuff. Look, it's  
14 nonsense, but he makes some serious points. You all  
15 didn't reply. I've never seen that in federal court.  
16 Frankly, it's pretty irresponsible.

17           So because you didn't -- and I'm not saying this  
18 to be mean. I'm telling you, to both of you, we're  
19 procedurally out of whack here, right?

20           So then I issued those two orders to get answers  
21 to the stuff that you should have -- the State should have  
22 indicated -- should have replied to to address it. Okay?  
23 And that's -- and then I issued the orders.

24           Ms. Samuels, I guess you jump in the case, which  
25 I'm now glad, right? I'm hoping that you're going to help

1 me move forward on this. And you say that there are some  
2 standing issues.

3 Now, I believe there is standing issues --  
4 okay? -- but for different reasons. But you can't do it  
5 in a drive-by in response to my order. That needs to be  
6 in a motion to dismiss. Okay?

7 And so we're completely out of whack here. All  
8 right? So what we're going to do is this. I'm going to  
9 just tell you how I'm going to rule. I'm going to ask you  
10 some questions as we go forward, and then I'm going to  
11 tell you what our schedule is going to be going forward.

12 Now, Mr. Goldman, you can take your mask down.  
13 I just want to confirm that the relief that you are asking  
14 for is essentially the *Cosner* relief. You're not asking  
15 to enjoin the election. What you're saying is any  
16 delegate that would be elected on November the 2nd, their  
17 term would be commuted in half; essentially from a  
18 two-year term to a one-year term and that we would have an  
19 off-cycle election then next November, appropriately using  
20 the census from 2020; is that right?

21 MR. GOLDMAN: Yes. Basically, yes, sir.

22 THE COURT: Okay. You don't want an injunction.  
23 So there's no issue about us stopping the election. I  
24 haven't seen that in your papers and you're not asking for  
25 it?

1 MR. GOLDMAN: I don't know why anybody would say  
2 that. You're correct.

3 THE COURT: Okay. Now -- so from my take, then,  
4 we don't necessarily have to resolve this before the  
5 election. The election can go forward as it is and we can  
6 still deal with it. I mean, we're on a little bit of a  
7 timeline because if I do grant your relief, not only do we  
8 have to have the general election, the parties would have  
9 to have enough time to select their delegate -- or I'm  
10 sorry -- their nominee, whether it's by primary, by  
11 convention, or whatever process that they want.

12 MR. GOLDMAN: Yeah. The *Cosner* case was issued  
13 prior to the primary. That's why I thought it was  
14 important to issue it prior to the voting.

15 As I say, I believe the voters have a right to  
16 know the length of the term. I think that's intrinsic to  
17 the right to vote.

18 And as I understand the position of the other  
19 side is that after the election, the people that have been  
20 elected get to decide whether it's going to be a one-year  
21 or two-year term, and that's just unacceptable.

22 THE COURT: Well, why don't you wait to see how  
23 this is going to play out.

24 MR. GOLDMAN: Okay.

25 THE COURT: I'm not so sure that's the way it's

1 going to work. But I just want to confirm that that's the  
2 only relief that you're asking for, meaning that we don't  
3 have to have a decision, then, by the Election Day.

4 MR. GOLDMAN: Correct.

5 THE COURT: I'm trying to move as quickly as I  
6 can, but I don't think that will work.

7 Now, number two, the Commonwealth, in their  
8 papers, alluded to a three-judge panel. I'm ahead of you  
9 on this. All right?

10 Now, a three-judge panel, as I understand the  
11 statute, 2284, first of all, it says, "A district court of  
12 three judges shall be convened." So it doesn't require a  
13 request of the plaintiff. Mr. Goldman has not requested  
14 that. I think I have an obligation to seek a three-judge  
15 panel, but only when a decision is rendered on the merits.

16 So what we have right -- the only thing that's  
17 pending in front of me right now is a 12(b)(1) motion  
18 really -- only really alleging sovereign immunity. Now,  
19 I'm going to give you some time to deal with standing  
20 because I think that's a big issue.

21 But my reading of that statute says that one  
22 judge can resolve the issue of jurisdiction. If we get to  
23 the merits, then I need to get the three-judge panel,  
24 which I've already alerted Chief Judge Gregory. He's the  
25 one that appoints the three-judge panel. He knows about

1 this and we might need a panel.

2 But do you disagree with what I just said,  
3 Mr. Goldman, about one judge being able to resolve  
4 jurisdictional issues?

5 MR. GOLDMAN: Can address that, sir?

6 THE COURT: Yeah.

7 MR. GOLDMAN: As I read the statute, the reason  
8 I didn't ask for one is I'm not challenging a -- *Cosner*  
9 was a challenge to the actual -- the new districts. I'm  
10 not -- there is no new districts. There is nothing to  
11 challenge in that regard.

12 I was just thinking that, therefore, since the  
13 statute would allow a judge to make the decision as to  
14 whether, in fact, they needed to have constitutional  
15 districts in the future, at some point, and alert the  
16 voters that there will be another election in 2022 so they  
17 would know that the people running -- and having been a  
18 campaign manager myself, it's really not even fair to the  
19 candidates to tell them -- that was my reason why I didn't  
20 think I needed one.

21 THE COURT: Well, actually, though, what the  
22 statute says, in relevant parts, "A district court of  
23 three judges shall be convened when an action is filed  
24 challenging the constitutionality of the apportionment of  
25 any statewide or legislative body."



1           You are challenging the constitutionality of  
2 this election. It's just the remedy that you're seeking  
3 is the off-cycle election and the commuting of the terms.  
4 That's what your equal protection claim is, Count One,  
5 which is going to survive in part here today. You're  
6 going to find that out.

7           But I'm -- right now, the only thing that I'm  
8 dealing with is the jurisdiction of this Court to deal  
9 with it, and I believe that one judge can resolve that.

10           Do you agree?

11           MR. GOLDMAN: I could just state what I said.  
12 I'm not --

13           THE COURT: Okay. All right.

14           The Commonwealth, Ms. Samuels, do you agree that  
15 one judge can resolve jurisdictional issues?

16           MS. SAMUELS: Yes, Your Honor.

17           THE COURT: Okay. So that's the way we're going  
18 to proceed.

19           Now, the jurisdictional issues are not just  
20 sovereign immunity, which the Commonwealth has raised, but  
21 also standing, which I really want to talk about.

22           Now, let me tell you -- I'm going to tell you  
23 what my ruling is now on the sovereign immunity issue.  
24 Okay? We have an opinion ready to go. We're going to  
25 issue it when we get done. So I'm not giving you argument

1 here. I'm going to ask you some questions down the road,  
2 but -- now, I'm going to go in reverse order.

3 Count Two, the violation under the Virginia  
4 Constitution, I'm going to grant the Commonwealth's motion  
5 on that. There's been no waiver of sovereign immunity.  
6 So I'm going to dismiss that claim as to all the parties.

7 However, Count One, the equal protection clause,  
8 I'm going to grant that motion in part and deny it in  
9 part. I'm going to grant the motion as it relates to the  
10 Virginia State Board of Elections, which is a state  
11 entity, and Governor Northam.

12 I'm going to deny it, however, as to the  
13 election officials -- Brink, O'Bannon, LeCruise, and  
14 Piper -- finding that they fall within the *Ex parte Young*  
15 exception. Because they're -- Commonwealth, your point  
16 about the General Assembly and its Redistricting  
17 Commission and stuff, that's about the policy markers.  
18 *Ex parte Young* is about the implementers, the executioners  
19 of it. And that's -- these people certainly fall in that.  
20 You'll see my opinion as to why.

21 So we still have left now just Count One as to  
22 those election officials. And I'm telling you that now  
23 because I think that affects standing, right? So the only  
24 thing that is left is an equal protection claim as to  
25 those election officials. And essentially, the way that I

1 read this, now -- because if Count Two would have  
2 survived, it would have been somewhat of a different  
3 analysis because it would have been Mr. Goldman saying,  
4 "Hey, the Constitution says you've got to use this  
5 Redistricting Commission using the census. They didn't --  
6 they haven't done it" -- they still can't agree to  
7 anything, it looks like over there -- "and because of  
8 that, I'm harmed," right? Which, I think, is a little bit  
9 different. On equal protection here, I think the analysis  
10 is a little bit different on standing than what the State  
11 did.

12 Now, let me ask you this, Mr. Goldman. And you  
13 do have the burden of establishing standing, and you're  
14 going to get an opportunity to establish it.

15 First of all, why have you only sued three of  
16 the five board members? Why is that?

17 MR. GOLDMAN: That's how it's done -- if you  
18 read a lot of the cases, they're the officers. Some  
19 people sue all five. In *Republican Party v. Wilder*, they  
20 just sued Michael Brown. They used to just sue the  
21 secretary.

22 So I took it from various cases that you just  
23 could sue the top three officers. I was thinking of  
24 adding them. But that's really why. You sue the top  
25 three officers and you sue the commissioner. That was the

1 theory.

2 THE COURT: All right. That's fine. And,  
3 again, I've said those officials survive. So your equal  
4 protection claim is still alive.

5 Do you intend to vote in House District 68?

6 MR. GOLDMAN: Yes. Can I address that or --

7 THE COURT: Yeah.

8 MR. GOLDMAN: I've looked -- I've read all the  
9 cases from *Davis v. Mann*. 1964 was the first case in  
10 Virginia. It was decided -- sent down the same day as  
11 *Reynolds v. Sims*. There's never been -- in any of these  
12 cases, intent to vote has never been standing in terms of  
13 an equal protection clause. You either had to be a  
14 resident or a qualified voter. I think they used taxpayer  
15 in that case, but I don't know why they did. There were  
16 three different groups of people.

17 If you read *Reynolds v. Sims*, it says  
18 specifically you have to be a qualified voter and a  
19 citizen. Not to be flip about it, but it's the same  
20 reason when you plead it, you don't submit your birth  
21 certificate. I mean, you don't have to prove you're  
22 alive. Plus, it's also a question of fact whether, in  
23 fact, you would intend to vote. And anybody that knows  
24 me, read the history -- I presented nothing -- would know  
25 I've probably been -- in Virginia, I only missed one

1 election because I didn't like any of the people in it.

2 THE COURT: Okay. But I'm not -- I'm not -- I'm  
3 not asking you for the legal argument. You're going to  
4 get a chance to make that.

5 I just want to know -- because you said you're  
6 qualified to vote. I just want to ask you, you intend to  
7 vote?

8 MR. GOLDMAN: Yeah. I always voted except one  
9 time.

10 THE COURT: All right. Do you still intend to  
11 run for the House of Delegates?

12 MR. GOLDMAN: Depends on the district.

13 THE COURT: What's that?

14 MR. GOLDMAN: Depends on the district. If you  
15 look at the districts, some of them -- you know, that's  
16 why they can't get a Commission to do anything because in  
17 my area, it could make a big difference which way you go.  
18 There's -- it can go republican and you can't win or you  
19 can go towards the democratic city and you can win.

20 So I think -- having -- you can't make a  
21 decision on that. Plus, if I can do that, that's not --  
22 that was just two prongs of the standing --

23 THE COURT: I'm just asking you a question,  
24 right? Look, I think the reason the Commission can't make  
25 a decision is because the political forces cannot

1 understand our democracy runs on compromise, and nobody  
2 will compromise. It's like the old Rolling Stones song:  
3 You don't always get what you want, you get what you need.  
4 Maybe if they played the Rolling Stones over there while  
5 they're having their sessions, maybe they would be more  
6 successful. I don't know. But that's up to them.

7           So -- but here's the reason I raise this. It  
8 seems to me -- although, Commonwealth, you have focused  
9 more on about whether he's going to run. I think the  
10 issue is whether there's malapportionment as to his  
11 district on voting, right? And that's what I think we  
12 need to address. Particularly under *Gill v. Whitford*, the  
13 Supreme Court's case on this, I believe that Mr. Goldman  
14 is going to have to demonstrate that his individual vote  
15 is underrepresented for malapportionment.

16           Now, I'm only looking at the stats that you gave  
17 me, and I had smarter people than me who are better at  
18 math look at this. It looks like, on the face of what's  
19 going on, it's not underrepresented. In fact, he's  
20 overrepresented; that the-- that Mr. Goldman's district,  
21 68, has a population of 85,223 when the average ideal  
22 district should be 86,313.93. So let's say 314. The  
23 difference is about 1263. So his district is 1.27 percent  
24 smaller than the ideal, meaning not only is Mr. Goldman  
25 not underrepresented, he's actually overrepresented, which

1 I think would affect the standing issue on this. But  
2 we're not deciding this today to.

3 MR. GOLDMAN: Can I address that, sir?

4 THE COURT: Go ahead.

5 MR. GOLDMAN: The way you do -- my vote is being  
6 diluted because the way it's been done in all the court  
7 cases is you take -- you can only have a 10 percent  
8 deviation between the least populated and the most  
9 populated.

10 THE COURT: Uh-huh.

11 MR. GOLDMAN: The least populated district,  
12 under what they're going to run in, is House District  
13 Number 3. That's 71,000. My district has -- that's what  
14 it is now. My district has roughly 86,000. So my votes  
15 are being diluted, in fact, because 71,000 people get the  
16 same vote as I get. That's why you can't have more than  
17 10 percent deviation under the Arizona case, ever since  
18 *White v. Regester* back in the 70's. And that's why the  
19 State itself is limited to a 10 percent deviation.

20 You don't compare it to the ideal. You compare  
21 it to the hundred districts being completed. That's the  
22 way these cases have been done, and that's why I brought  
23 it.

24 THE COURT: Okay. But you're going to get a  
25 chance to say that. It's your burden to establish

1 standing.

2           But what I'm saying is we're messed up here  
3 because we really don't even have a motion to dismiss yet  
4 on standing. If you want to raise it -- I want you to  
5 look at it. I have a burden myself to make sure that I  
6 have jurisdiction, which is what that order -- the second  
7 order that I was issued, I was asking the Commonwealth  
8 whether or not Commonwealth concedes that. Ms. Samuels,  
9 you responded saying you don't concede it, and you think  
10 that's just another basis to dismiss it, right?

11           But procedurally, we need to get back to doing  
12 this in a procedural, proper way. I need a motion to  
13 dismiss on standing grounds, if you want to challenge  
14 standing.

15           And then, Mr. Goldman, you get a full chance to  
16 respond on that, and then they're going to get a chance to  
17 reply.

18           I hope you take advantage of the reply this  
19 time.

20           All right. Now, we're going to deal with that  
21 before we get to the three-judge panel because standing is  
22 jurisdictional. And even though I've got Judge Gregory on  
23 notice that we may need a three-judge panel, I'm going to  
24 deal with standing first.

25           Now, the other issue is this. I denied



1 Mr. Stanfield's motion for joinder/intervention because I  
2 thought he was in the same spot as Mr. Goldman. But now  
3 that this has survived sovereign immunity, I suspect  
4 Mr. Goldman, who's well-known in this area, has friends in  
5 other districts -- delegate districts where the population  
6 is greatly increased, whether it's in Hampton Roads or in  
7 Northern Virginia.

8 Do you know what district gained the most in  
9 population? Was it Loudoun?

10 MR. GOLDMAN: Eighty-seventh.

11 THE COURT: Which is where?

12 MR. GOLDMAN: It's mostly Loudoun. It's a few  
13 other things, Northern Virginia. That has 130,000  
14 compared to 71, but --

15 THE COURT: Okay.

16 MR. GOLDMAN: -- it's 82 percent variation.

17 THE COURT: So my point, though, is this. Since  
18 you got your buddy Stanfield in, I suspect you have  
19 another buddy that wants to get in with standing.

20 If there's going to be a motion to intervene, I  
21 want to have a deadline on this so the Commonwealth has an  
22 opportunity to address that, and I'm going to set a  
23 deadline on that. This is not going to go on ad nauseam,  
24 right? My guess -- I've been around the block a few  
25 times -- is you're out recruiting somebody from one of

1 those increased population districts.

2 But to me, Commonwealth, this issue is about  
3 malapportionment and the impact on his individual vote as  
4 opposed to whether he's going to run or not as a delegate.  
5 You haven't addressed that. I'm going to give you a  
6 chance to address that.

7 MS. SAMUELS: Your Honor, can I be heard? I  
8 think we have addressed that in the filing that we --

9 THE COURT: Well, you don't have a motion to  
10 dismiss. You didn't move to dismiss the second amended --

11 MS. SAMUELS: Your Honor, we moved to dismiss on  
12 the Eleventh Amendment because that, in our view, came  
13 first procedurally and barred all of these claims as an  
14 immunity doctrine.

15 I think there's an important difference between  
16 the immunity doctrine that we think resolves all of these  
17 claims. I understand Your Honor has a different view.

18 But if the standing analysis is going to end up  
19 looking a lot like a merits analysis, which it sounds like  
20 it might, our view might be that a three-judge panel would  
21 be needed to decide that if we're going to tread into the  
22 merits. And so --

23 THE COURT: Well, you can ask for that in your  
24 papers if that's what you think it is. I don't think it  
25 is. I think --

1 MS. SAMUELS: Understood. If --

2 THE COURT: I think it's jurisdictional.

3 MS. SAMUELS: I --

4 THE COURT: Why don't you wait until you hear  
5 what my schedule is. I think I'm going to give you  
6 adequate time. My point is I want you to have adequate  
7 time to brief this and to address these issues.

8 MS. SAMUELS: I guess the one issue I'd just  
9 like to raise, Your Honor, that I hope might change your  
10 mind on whether we need to proceed here is that if all  
11 that's left is a federal equal protection claim about  
12 malapportionment, the only remedy to that would be new  
13 maps. The law does not -- these prior cases, like  
14 *Bethune-Hill*, for example, which was a standalone federal  
15 claim, those were -- maps were drawn in 2011. They were  
16 challenged in 2014, and we didn't get new maps until 2019.  
17 And so the elections proceeded on the maps until it could  
18 be resolved.

19 And so if the challenge is a standalone federal  
20 claim, which we understand is all that's left, per the  
21 ruling Your Honor intends to issue, is that the remedy  
22 would be not challenging the old maps because that --  
23 that's effectively in the rearview mirror at this point.  
24 It's challenging the new maps, which we don't have before  
25 us. It's just entirely premature.

1           And so we think the better outcome here, in  
2 terms -- from a standing jurisdictional analysis, would be  
3 to dismiss this case for lack of standing because it's  
4 premature, which we did argue in our pleading over the  
5 weekend, and --

6           THE COURT: But you haven't filed a motion to  
7 dismiss. It was a drive-by statement in response to my  
8 request as to whether or not -- I'm going to get this  
9 procedurally in order. That's what I'm doing here. Okay?

10          MS. SAMUELS: Would Your Honor --

11          THE COURT: You might be right. You might --

12          MS. SAMUELS: Would Your Honor entertain an oral  
13 motion to dismiss on that basis, that it's entirely  
14 premature?

15          THE COURT: No. I have a schedule I'm going to  
16 give to you.

17          MS. SAMUELS: Okay.

18          THE COURT: You're going to see this is -- just  
19 hang in there for a minute. Okay?

20          Now, the other issue is this. I want to talk to  
21 you about the Attorney General's opinion and the  
22 Redistricting Commission that's going on. I understand  
23 the Redistricting Commission has already punted on the  
24 delegates and the state senators from some public  
25 reporting, and I think this now goes, I guess, to the

1 Supreme Court under the statute.

2 But, Mr. Goldman, you raised this issue about  
3 the Attorney General's opinion in terms of good faith, and  
4 I really wasn't understanding what you were talking about.  
5 Do you want to explain to me, like, what you mean by that?

6 MR. GOLDMAN: Yes. Because it would go to the  
7 facts.

8 Can I just make one response to -- to what the  
9 Attorney General's folks were saying? The Cosner case  
10 came up before --

11 THE COURT: No. Listen, you guys are all going  
12 to get a chance to brief this.

13 MR. GOLDMAN: All right.

14 THE COURT: That's the way we run around here.

15 MR. GOLDMAN: This is what I --

16 THE COURT: We're not in state court. We  
17 proceed according to the rules, and that's what this  
18 hearing is about.

19 So I didn't understand, though, what your -- you  
20 know, I asked them about the Attorney General's opinion  
21 because I was trying to figure out, like, what are you  
22 trying to -- what's your argument?

23 MR. GOLDMAN: Can I explain it?

24 THE COURT: Yeah.

25 MR. GOLDMAN: As I read the statutes of

1 Virginia, the State Board of Elections is supposed to  
2 oversee and ensure the integrity of the elections. That's  
3 in the code. In fact, the State Board of Elections has a  
4 very special power. It actually can petition the Virginia  
5 Supreme Court if it thinks there's a question over the  
6 constitutionality of an election. It's a very unusual  
7 power. It doesn't need a case of controversy. It can get  
8 an advisory opinion.

9           So as I saw it this way. As you know, I said I  
10 thought it was incumbent protection. Now, why, with the  
11 *Cosner* case, which I thought was added to the state  
12 Constitution by the voters when it said all judicial  
13 decisions -- that is the standard in our state -- which we  
14 know what the *Cosner* case said. It struck me as odd that  
15 nobody requested an opinion that either the governor, the  
16 Commissioner of Elections, who I think could do it,  
17 certainly the chairman of the Electoral Board could do it,  
18 as to are we proceeding constitutionally? We have a case  
19 out there that says it isn't. It's been cited favorably.  
20 Plus, they have the power to go to the Supreme Court and  
21 effectively get an advisory opinion. Why would that have  
22 been put in the law? And nobody did anything.

23           THE COURT: Well, it's -- it's optional. They  
24 don't have to.

25           MR. GOLDMAN: Yeah.

1           THE COURT: The way I read the statute, though,  
2 is if they do, it's a "shall," that the Attorney General  
3 shall issue the opinion, which is some of my questions.

4           As I understand it, Delegate Carter, though,  
5 did, made a request. And when -- the way I read the  
6 statute -- and I'll give the Commonwealth a chance to be  
7 heard, in addition to what they said in their papers -- is  
8 that the Attorney General then is obligated to respond  
9 because it uses the word "shall" in the statute when the  
10 General Assembly, the governor, and somebody else makes a  
11 request.

12           Am I misreading this, Ms. Samuels?

13           MS. SAMUELS: Yes, Your Honor. We believe you  
14 are.

15           But more importantly, because of the Pennhurst  
16 ruling that this Court can't order state officials to  
17 comply with state law, we think even considering or  
18 analyzing the statute in this way is effectively extra  
19 jurisdictional and not relevant here and is not properly  
20 before this Court.

21           THE COURT: Well, I'm not going to order him to  
22 respond. That's not what this is about. I'm just trying  
23 to factor in -- understand his argument and see how this  
24 factors in.

25           But you made the point in your papers, which I

1 very much agree with, about principles of federalism,  
2 right? Very concerned about that, right?

3 But it seems to me that if you're invoking  
4 principles of federalism, the first line -- the first  
5 officer, really, in the state, in terms of dealing with  
6 this issue, is really the Attorney General, right? He's  
7 the chief legal officer of the state.

8 Now, I understand the timeline here is  
9 problematic, which is one of the points that you made.  
10 You got a constitutional amendment last year. The census  
11 information doesn't come over until August. As I  
12 understand, it was then in an incompatible format. They  
13 lost a couple more weeks then. So this is all still after  
14 his lawsuit was originally filed, and we're just starting  
15 to get moving and grooving on the Commission. It looks  
16 like the Commission is not going to do anything. So I  
17 gather it goes to the Supreme Court under those rules.

18 But it seems to me, though, that it might be a  
19 wise idea for the Attorney General -- because he's now --  
20 we're now in litigation on this -- purely optional, not  
21 ordering -- may want to issue an opinion on this and tie  
22 it to the -- you know, you haven't answered the case yet  
23 because we've dealt with the standing issue, right?

24 So it may be that as he sees the Commission run  
25 its course, they're not doing a good job. It goes to the



1 Supreme Court. And I'm not saying he would say this, but  
2 he may ultimately agree that what is needed is what  
3 Mr. Goldman is saying. I'm not saying that's the answer,  
4 but he might decide that, which could moot some of this --  
5 moot this lawsuit out and let the state system run  
6 appropriately, which is what I think you're saying in  
7 terms of your federalism argument.

8 Does that make sense to you?

9 MS. SAMUELS: I suppose, hypothetically, that is  
10 a way this could proceed. But it's just neither here nor  
11 there in terms of this case, and it has nothing to do with  
12 the relief that the Court can order in this case.

13 THE COURT: Well, look, I'm not ordering him to  
14 issue the opinion.

15 MS. SAMUELS: Then, honestly, candidly,  
16 Your Honor, I don't understand how it's relevant to the  
17 claims here. Because if the claim is that the --  
18 somebody's rights are being violated because of what the  
19 Attorney General did or didn't do, which is what it  
20 sounds --

21 THE COURT: I'm not saying that. He's got  
22 something about good faith. I still don't understand.  
23 I'm going to let him formulate it.

24 What I'm saying to you is this, that I'm going  
25 to give you time to address standing. Okay? I don't know

1 if he's got standing or not. I'm a little concerned right  
2 now. But there may also be an intervenor jump in.

3 Let's say he survives on standing. You're then  
4 going to have to give an answer anyhow. This is all going  
5 to take some time. This is not going to happen in two  
6 days, right?

7 It could be that the Attorney General says,  
8 "Hey, before we -- I give an answer on this, I want to  
9 give an opinion." Because it could align -- I'm not  
10 saying it would, but it could align with what Mr. Goldman  
11 wants.

12 In other words, you could say, after everything  
13 has gone through the Commission, you've looked at the  
14 issues, you now know that I've denied sovereign immunity,  
15 you may say that's what we have to do. We have to have an  
16 off-cycle election next year. The Attorney General could  
17 decide that, right? He could recommend that.

18 MS. SAMUELS: The Attorney General has  
19 discretion under the statute. I agree that the  
20 Attorney General has discretion to consider and issue  
21 opinions as he deems appropriate. But I don't think  
22 there's any precedent for somehow staying or waiting to  
23 adjudicate or relating into this case what a nonparty --  
24 the Attorney General is not a party to this litigation --  
25 may or may not decide to do as a matter of discretion

1 under state law. I just think it's neither here nor  
2 there.

3 THE COURT: No. He's the lawyer. You work for  
4 him. You're counsel.

5 MS. SAMUELS: I am here representing the named  
6 defendants in this case: The governor, who is, I  
7 understand, dismissed; the State Board of Elections; and  
8 the state elections officers.

9 THE COURT: Right.

10 MS. SAMUELS: The Attorney General has not been  
11 named, has not appeared, has not otherwise --

12 THE COURT: I know he's not a party. I get  
13 that, right? But you get direction from the  
14 Attorney General. He's the chief legal officer of the  
15 state.

16 MS. SAMUELS: The Attorney General's Office --

17 THE COURT: You work for him, right?

18 MS. SAMUELS: Your Honor, I work for the Office  
19 of the Attorney General, which represents many state  
20 agencies across the entire Commonwealth. And there's a  
21 difference between when the named -- every time a named  
22 defendant is sued, to say that some nonparty is involved  
23 because the lawyer happens to represent the same clients,  
24 I mean, there's no precedent for that, at least in the  
25 private context.

1 THE COURT: All right.

2 MS. SAMUELS: And I don't understand a way that  
3 that could be reasonably important.

4 THE COURT: Well, I think you're misinterpreting  
5 what I'm saying, but we're going to move on.

6 All right. Let's talk about what the schedule  
7 is going to be going forward now, because what we still  
8 have is Count One. Let me ask one other question first.

9 Mr. Goldman, you also alluded to the First  
10 Amendment I believe in your Count One. Are you also  
11 making a First Amendment challenge? Because I didn't  
12 really understand what that was about.

13 MR. GOLDMAN: No. Because, you know, the right  
14 to run for office -- what I was talking about, if I  
15 remember -- I don't think it's in the second amended  
16 complaint -- was that I thought people had the right to  
17 know whether they were voting for someone for a one-year  
18 term or two-year term, the right to vote being part of the  
19 First Amendment.

20 And I thought, therefore, that if you looked at  
21 it, it was intrinsic in the First Amendment right to vote  
22 that if you don't -- someone -- is this person going to  
23 have a one-year term or two-year term.

24 We've never had an election like this before.  
25 Never had an election like this before under the old

1 districts. Ever. We've never had an election when we're  
2 not even sure whether it's a one-year term or two-year  
3 term.

4           And the reason I mentioned some of that is  
5 that -- I'll get a chance to put -- if you go back and  
6 read -- I put in a Washington Post article. They are --  
7 leading legislatures have been talking for a year and a  
8 half about, well, maybe we'll have to do this. We may  
9 have to run three times. They were talking about this for  
10 a whole year. And yet here we are, people are voting, and  
11 it could turn out that they think they're voting for a  
12 two-year term and it's a one-year term.

13           THE COURT: Look, my question is simply this.  
14 Are you making a First Amendment challenge?

15           MR. GOLDMAN: No.

16           THE COURT: That answer is no? Okay. All  
17 right.

18           All right. Here's what we're going to do. I'm  
19 going to order the following schedule: By Friday the  
20 15th, I want the two of you to work together to come up  
21 with stipulated facts. It seems to me one of two  
22 things -- this case is going to be resolved one of two  
23 ways. One is either by standing or, number two, on  
24 cross-motions for summary judgment. Those would have to  
25 be heard by a three-judge panel.

1           And if you think a three-judge panel needs to  
2 address standing, I'll take a look at that, Commonwealth.

3           But no matter what, the facts really here  
4 aren't, to me, in dispute. You've given me all this  
5 census data. I'm trying to figure it out.

6           But you filed another statement of facts  
7 attached to your response. I want an agreed set of facts  
8 that talks about the core issues as it relates to  
9 standing, as it relates to you, Mr. Goldman, and a  
10 statement of facts, then, that if I were -- if this case  
11 does survive the standing issue, which I'm very skeptical  
12 about, that we could then move to cross-motions for  
13 summary judgment because I want to get this moving.

14           So you'll work together, stipulation of facts.  
15 If you have --

16           MS. SAMUELS: Your Honor, can we be heard to  
17 object? The timing on this is going to be very difficult,  
18 very unreasonable and is -- if the idea is to put -- if we  
19 are being ordered by a one-judge panel to put together  
20 facts on which a summary judgment motion would be decided,  
21 we think that would fall outside of one judge's  
22 jurisdiction and would have to be ordered by three.

23           The idea that the Commonwealth is going to be  
24 held, in three days, during an election season, to put  
25 together facts on which a federal apportionment challenge

1 is going to be heard by one judge we think is extremely  
2 procedurally irregular, and that's not how we should  
3 proceed.

4 THE COURT: Well, what are the facts that you  
5 think that are so cumbersome for you?

6 MS. SAMUELS: Well, it sounds like Your Honor  
7 would like us to work with Mr. Goldman to agree to what  
8 the census data says, what it shows, percentages,  
9 proportions. And frankly, Your Honor, that's all before  
10 the Redistricting Commission right now as the Virginia  
11 voters decided it last fall.

12 I mean, we're happy to put together stipulated  
13 facts to the extent that Mr. Goldman wants to swear under  
14 oath that he intends to vote or those kind of threshold  
15 procedural, factual issues. But if the idea is factual  
16 issues to evaluate an apportionment claim and maps and  
17 districts and percentages, not only can that not be done  
18 in three days, but an order to do that probably needs to  
19 come from three judges.

20 MR. GOLDMAN: Can I --

21 THE COURT: Okay. Well, certainly you could do  
22 stipulated facts for standing, which is where -- to me,  
23 standing is a major issue here, right?

24 You've now raised it in response to my order.  
25 And it seems to me, from what I think the issue is on

1 standing, this is how many people live in his -- in his  
2 district versus the population in some other districts. I  
3 think he's actually overrepresented. That's my take on  
4 this.

5 MS. SAMUELS: Again, Your Honor, we don't think  
6 that's the right frame. The frame is that this is  
7 premature. There are no maps to challenge because the  
8 only maps that exist are being used and won't be used  
9 again.

10 So if the Court is going to dig in on is he  
11 overrepresented by this much or how much or that much,  
12 that's exactly the merits of the claim. That's *Reynolds*.  
13 That's 10 percent, and it simply can't be decided by a  
14 one-judge panel under the name of standing.

15 And so the only fact, from our perspective, to  
16 which we're happy to stipulate that's relevant to  
17 standing, is there are no new maps yet to be challenged,  
18 and for that reason, it's premature. End of story.

19 THE COURT: Do you want to dismiss this action  
20 based on standing?

21 MS. SAMUELS: Yes, Your Honor.

22 THE COURT: Okay. I'm going to give you a  
23 chance to brief that. Okay? I'm going to give you  
24 another chance to file another motion to dismiss so you  
25 can fully address that.



1 MS. SAMUELS: I'd like to just reserve my  
2 objection that if the Court's view is that standing and  
3 the merits turn on effectively the same underlying facts  
4 about district --

5 THE COURT: No, I don't.

6 MS. SAMUELS: Okay.

7 THE COURT: What I'm trying to say -- I'm trying  
8 to do this expeditiously, right?

9 MS. SAMUELS: I understand. And to that point,  
10 Your Honor, as you noted at the beginning, that we're not,  
11 as we agree, bound by the current election, the five --  
12 the three-day turnaround is not necessary here because  
13 the -- the state process is still running its course, and  
14 there's no need to move as such a breakneck pace in this  
15 context if the current election --

16 THE COURT: Well, this case has actually been  
17 sitting around. And I gave you the full time on the  
18 motion to dismiss before and you didn't raise standing  
19 there.

20 MS. SAMUELS: Because in our --

21 THE COURT: I wouldn't be in this position if  
22 you had done your job the first time.

23 MS. SAMUELS: In our view, Your Honor, the  
24 Eleventh Amendment is dispositive and the idea that  
25 standing is a separate bar to this Court's jurisdiction --

1 of course, the Court has to be assured of it -- but the  
2 Eleventh Amendment was dispositive and is immediately  
3 appealable. So that was enough to raise at the outset to  
4 decide whether this case was going to move forward.

5 THE COURT: Do you want to file a notice of  
6 appeal now on the --

7 MS. SAMUELS: I need to consult with my client  
8 about that, Your Honor.

9 THE COURT: All right. That's fine.

10 MR. GOLDMAN: Can I --

11 MS. SAMUELS: How long do you need to do that?  
12 I'm going to give you time to do that.

13 MR. GOLDMAN: Can I address some of things --

14 THE COURT: No. Hold on a second. I'm asking  
15 her a question.

16 MS. SAMUELS: Can we have 48 hours, Your Honor?

17 THE COURT: Oh, you can have more than that.

18 MS. SAMUELS: I would love that. I'd love a  
19 month.

20 THE COURT: Well, you're not going to --

21 MS. SAMUELS: How about a week? May I have a  
22 week?

23 THE COURT: Look, these are serious issues.

24 MS. SAMUELS: I understand.

25 THE COURT: My point is I want both sides to

1 have a chance to be heard on this before we move forward.

2 I don't know if he has standing or not. I'm  
3 questioning it. I have serious reservations about it, but  
4 I want to do it in a procedurally appropriate way.

5 MS. SAMUELS: Could I propose what we might  
6 think might be a good way to do that to address the  
7 Court's concerns?

8 If we're going to be heard to be changing the  
9 complaint in terms of Mr. Goldman's now alleging to vote,  
10 we think it would be appropriate -- although the Court has  
11 already ruled that there would be no more pleadings, that  
12 if we're going to be filing another motion to dismiss --

13 THE COURT: No. You are going to get more  
14 pleadings.

15 MS. SAMUELS: I understand. So if we're going  
16 to file another motion to dismiss based on what has come  
17 out in court today, we think there needs to be another  
18 complaint and a pleading that we're going to answer to,  
19 because it's a moving target and it just changed this  
20 morning. And so in order to brief that fully, we think  
21 there needs to be another complaint for us to answer to  
22 and then a reasonable amount of time for us to respond.

23 THE COURT: All right. No, we're not doing  
24 that.

25 MR. GOLDMAN: Can I get a chance to --

1 THE COURT: No. No. No.

2 Here's what we're going to do. Today is  
3 Tuesday. All right. If -- what if I give you until  
4 Friday to -- I'll tell you what. I'll give you until  
5 Monday to decide whether you want to appeal on sovereign  
6 immunity grounds. Okay? You'll file a notice by Monday.

7 MS. SAMUELS: Is the Court ruling that then you  
8 would be shortening the length of the time, under the  
9 federal rules, to appeal?

10 THE COURT: You just asked for 48 hours. I'm  
11 giving you more than you asked for.

12 MS. SAMUELS: Okay.

13 THE COURT: Because once you file that, I lose  
14 jurisdiction and I don't have to worry about it, right?

15 MS. SAMUELS: Understood.

16 THE COURT: All right. But I need to keep this  
17 thing moving. Because there is a time sequence on here  
18 that I -- because, look, I don't know if he's going to  
19 prevail or not. I don't know if he has standing.

20 And even if he has standing, you know, then we  
21 get to the merits, and, you know, I've -- we've got to get  
22 time for a three-judge panel. And then you've got to have  
23 rulings sufficient that if there is going to be an  
24 off-cycle election, that parties can pick their  
25 candidates.

1           You know, in the *Cosner* case, they ordered  
2 everything to be resolved by February. I'm trying to move  
3 at an appropriate speed, recognizing, though, I didn't  
4 expedite it before when I thought I was giving you the  
5 opportunity to do what you needed to do. Now I'm kind of  
6 stuck because I don't think you did what you needed to do.  
7 So I'm trying to be fair, but I need to move the case.

8           MS. SAMUELS: Okay.

9           THE COURT: So I'm going to give you until  
10 Monday.

11           I'm going to give you until the 19th to do a  
12 renewed motion to dismiss, raising standing or any other  
13 issue other than the sovereign immunity that you think is  
14 appropriate. So, like, I want to -- this is your shot.  
15 Okay?

16           But I want to get some stipulations of fact. If  
17 you are objecting to stipulations of fact as it relates to  
18 the merits -- although I do think they overlap -- that's  
19 fine. Stipulations of fact as it relates to standing. So  
20 you meet and confer.

21           And I'll tell you what I'm going to do is I'll  
22 give you until the 16th -- hold on. No. What day is  
23 Monday? Monday is the 18th, right?

24           MR. GOLDMAN: 18th.

25           MS. SAMUELS: Your Honor, we don't think our

1 deadline should have to run until the appeal decision is  
2 made.

3 THE COURT: No. I'm with you on that. I'm just  
4 trying to figure out the calendar.

5 MS. SAMUELS: I understand.

6 THE COURT: Okay. So just calm down for a  
7 second. Okay?

8 So Monday is what day? The 18th? Is that what  
9 day it is? Do we have the calendar? The 18th. Okay.

10 How about we do the stipulation of facts on the  
11 19th and I back up your motion to dismiss until Friday the  
12 22nd? Is that what it is?

13 THE CLERK: Yes, sir.

14 THE COURT: Okay? So if you file your notice of  
15 appeal on sovereign immunity grounds, which is -- that's  
16 your prerogative, everything is stayed. Okay?

17 If not, I need to keep moving forward because I  
18 have -- you know, I've identified Judge Gregory of the  
19 possible need here of a -- of a three-judge panel here.  
20 But I want -- before we get a three-judge panel, I think I  
21 have to answer the standing basis, which is what I'm  
22 trying to accomplish here, right?

23 So -- so you're to work together about what you  
24 think are the material facts as it relates to standing.

25 I don't want you filing your own stuff.

1 MR. GOLDMAN: I understand.

2 THE COURT: I want you to work together as much  
3 as you agree. If there are facts that you are in  
4 disagreement as it relates to standing, you'll tell me in  
5 the pleading; that you believe, you know, XYZ is a fact  
6 and if you believe XYZ is a fact. If you can't agree,  
7 you're going to tell me. But I want -- to me, these  
8 facts, as it relates to standing at least, really are not  
9 in dispute. I just don't see that here. But go ahead.

10 MR. GOLDMAN: I just want to make a couple  
11 comments. There is no case that says anybody has to say  
12 they intend to vote in order to get their equal protection  
13 rights. They keep saying it. They cited --

14 THE COURT: Forget that. Forget that. You're  
15 going to make that -- I'm past that. I'm past that.

16 This is a *Reynolds* case. I'm going to look at  
17 it, and we're going to kind of go from there.

18 But I need some -- I need to know if there's --  
19 I could take discovery even on jurisdictional issues. I  
20 have the ability to do that. I just don't think that  
21 there's issues in dispute here as it relates to standing  
22 based upon -- because to me, this is a census-driven thing  
23 based upon your individual district. This is not about  
24 the entire state.

25 I think that the Supreme Court case law is clear

1 that you, Mr. Goldman, who has the burden on standing, has  
2 to establish individual harm to you in your particular  
3 district. And I think you can get facts -- you can agree  
4 to what those facts are. Then you would make your legal  
5 argument. They're going to file a motion to dismiss.

6 I'm going to give you until the 29th. I'll give  
7 you until the 29th to respond. So you have a week to  
8 respond.

9 I'm going to give -- then, Commonwealth, you  
10 until November the 4th to do a couple things. Okay?  
11 Number one, to reply on the standing issue. Two, you  
12 haven't given an answer yet in this complaint because you  
13 filed the motion to dismiss. I'm denying it in part. I  
14 would want your answer to the complaint.

15 But here's the other thing I'm going to suggest  
16 to you. And, again, I want to make it clear, I'm not  
17 ordering this. Okay? But I'm -- I'm -- I think I'm  
18 accepting, to some extent, Ms. Samuels, your argument  
19 about federalism.

20 November the 4th is two days after the election.  
21 It seems to me by then, we're going to have an idea of  
22 what this Commission is doing, whether it's in the Supreme  
23 Court or not. You're going to look at this case and  
24 decide what's the best way forward. Maybe the Attorney  
25 General wants to opine before November the 4th. Again, he



1 doesn't have to, but he might want to because that could  
2 relate to what your answer is. The Attorney General could  
3 decide, hey, we've got a problem here and we're just going  
4 to agree to the relief. He doesn't have to do that. But  
5 if he does, I would want that by the 4th. Because to me,  
6 there could be a mootness issue depending on what he does  
7 under -- using your principles of federalism, which I'm  
8 very much in favor of. I want him to do his job, but I'm  
9 not ordering him to do it, to be clear on that. Okay?

10           What I am saying is by the 4th, I want to have  
11 your answer. I want to have the reply.

12           Now, it seems to me -- I just kind of know the  
13 way this is going to go. Mr. Goldman, if you find your  
14 buddies who are going to want to intervene -- this is not  
15 going to go on forever -- I'm giving a deadline also of  
16 the 29th for anybody to intervene because I want the  
17 Commonwealth to be able to respond to the intervention,  
18 any motions to intervene, also on November the 4th. I  
19 want to just kind of keep this on track.

20           Now, this may have to change, but this is kind  
21 of where I'm headed on this.

22           On the 8th, November the 8th at 11:00, we're  
23 going to have oral argument on standing -- okay? -- and  
24 any -- anything else that, Commonwealth, you put in your  
25 motion. You're not -- we're not going to rehash sovereign

1 immunity. That's what appellate judges are for, right?

2 I don't know what else you would want to raise  
3 other than standing, but this is your chance. Like, I  
4 don't want to have any other issues crop up that are  
5 jurisdictional. We're going to address it on November  
6 the 8th.

7 If I dismiss it on standing issue, the case is  
8 over. We don't have to worry about it. If I deny it,  
9 then we need to move forward with the three-judge panel  
10 and I would alert that to Judge Gregory.

11 What I'm looking at is cross-motions for summary  
12 judgment. Because I think even if I deny the motion on  
13 standing, this is a case that can be resolved on summary  
14 judgment. Like, I don't think we have to have a trial.  
15 If you think otherwise, you'll tell me, right? That will  
16 be up to you guys. But it seems to me this could all be  
17 resolved on summary judgment.

18 I'm looking at a deadline of November 15th on  
19 cross-motions for summary judgment, with responses on the  
20 22nd to each other's motions. And subject to the  
21 availability of a three- -- of the other two judges on the  
22 panel, I was tentatively looking at December the 3rd for a  
23 three-judge panel to hear the merits. But that's only if  
24 we get there.

25 Again, I am very concerned about this standing

1 issue, and I'm not sure we're going to get that far. But  
2 I want to have a general lay of the land so you all can  
3 properly prepare and we can move forward in an expedited  
4 way.

5 I don't have stipulated facts for the  
6 cross-motions for summary judgment, then, in this. I'll  
7 let you all just do the standard motion for summary  
8 judgment, and we'll kind of go from there.

9 If you think you're going to need discovery,  
10 though, for the summary judgment motions, you'll tell me  
11 November the 8th when I -- at the time of the argument on  
12 the standing issue. I don't think you need it, but you'll  
13 tell me if you think -- you know, we're going to deal with  
14 this in an appropriate procedure.

15 All right.

16 MS. SAMUELS: I'm sorry. Can I ask, Your Honor?  
17 Is Your Honor going to issue this in a written ruling or  
18 is this the oral ruling for the scheduling?

19 THE COURT: You're going to get an order.

20 MS. SAMUELS: Can we -- can we just ask that it  
21 include the ruling I understand you already to have made;  
22 that if we do file a notice of appeal, that this entire  
23 schedule is stayed?

24 THE COURT: Yeah.

25 MS. SAMUELS: Thank you.

1           THE COURT: I'm going to change my order. We  
2 have an opinion ready to go, okay, on your sovereign  
3 immunity. I know you disagree with me. You're not going  
4 to be the first to disagree with me, and you won't be the  
5 last. Okay? If you want to appeal me, that's fine. They  
6 get paid too. Okay? It doesn't phase me. All right?

7           But I'm thinking -- I need to move this along,  
8 right? And that's what I'm trying to do.

9           So you'll get an order that says that. I have  
10 to -- I have a draft order. I'm going to have to modify  
11 it now.

12           But I want to keep the trains moving on this.  
13 But, yeah, if you file the notice of appeal, I'll  
14 immediately stay everything and that will end it.

15           Now, I hope, if you do that, you're sincere.  
16 Like, you're not just trying to do the stall game to wait  
17 this thing out.

18           Look, we have a serious disagreement about a  
19 legal issue. I respect that. I disagree with you. But  
20 that's okay. That's way the life goes.

21           But what I don't want you to do is file a notice  
22 of appeal just to stall and then withdraw the notice of  
23 appeal when it comes time to briefing and then I'm back  
24 stuck with a mess. And not only would I be upset, I think  
25 Chief Judge Gregory would be upset about that because he's

1 got -- he's lining up a potential -- two other judges.  
2 You know, it's a circuit judge and a district court judge  
3 to sit with me on this panel, if necessary, right?

4 MS. SAMUELS: Understood.

5 THE COURT: And it's not fair. You know, we're  
6 working hard on it. You may not think so, but we're  
7 working hard on this, right?

8 And I really want you to have a chance to be  
9 heard, and I want him to have a chance to be heard,  
10 appropriately though, right, in response to the procedure.

11 So I guess the short answer is you're going to  
12 get an order.

13 MS. SAMUELS: Thank you, Your Honor.

14 THE COURT: You're going to get an order along  
15 with the opinion on the sovereign immunity so that you can  
16 review it, decide whether you want to take me up or not.  
17 Okay?

18 MS. SAMUELS: Thank you.

19 THE COURT: All right. Since you have the  
20 microphone, is there anything else you want to say?

21 MS. SAMUELS: If I could just have one moment?

22 THE COURT: Yeah.

23 MS. SAMUELS: That's all, Your Honor. Thank  
24 you.

25 THE COURT: All right. Mr. Goldman, this is

1 your chance. Is there anything else you want to say?

2 MR. GOLDMAN: The -- there are people that would  
3 like to intervene because they feel like --

4 THE COURT: I'm sorry. I can't hear you.

5 MR. GOLDMAN: There are people that would like  
6 to intervene. Do they have -- they filed basically the  
7 same thing that Mr. Stanfield filed, which I didn't help  
8 him with at all.

9 THE COURT: It has to be -- I think I indicated  
10 what the appropriate motion is, a motion to intervene in  
11 the Stanfield case.

12 MR. GOLDMAN: Okay.

13 THE COURT: I'm not inviting them, but I kind of  
14 know the reality of the way this is going to work.

15 And I just want to -- look, my guess is I'm  
16 going to have to modify this schedule at some point. But  
17 I just want to keep the trainings moving. Because, look,  
18 these are serious issues, and if, ultimately, Mr. Goldman  
19 does prevail, people need to have time to get ballots  
20 together and stuff like this.

21 And it's -- you know, you talk about the -- the  
22 impact on voters and delegates. There's also cost.  
23 There's a lot of money in running elections and ballots  
24 for the taxpayers, and I'm very concerned about that. And  
25 I want to -- so I'm making sure we do this right, right?

1           And I'm fully committed to have both sides have  
2 a full chance to brief it. This hearing is really about  
3 me trying to get you back on track the way it should be,  
4 right?

5           I understand why you did it, Commonwealth, with  
6 just the sovereign immunity. I disagree with you. I wish  
7 you had done it all at one time. It would have been a lot  
8 easier to deal with, but that ship has sailed. Okay?  
9 Let's just get back on track and moving forward.

10           You'll let me know. I want you to file a  
11 pleading. If it's a notice of appeal, you've got to file  
12 it anyhow. But if you're not going to appeal me, I want  
13 you to file a pleading saying, hey, you're not going to  
14 appeal me. All right? Just so I know what's going on.

15           MS. SAMUELS: Yes, sir.

16           THE COURT: Does that sound fair?

17           MS. SAMUELS: Yes, Your Honor.

18           THE COURT: All right. Anybody else have  
19 anything else to say? Now is your time. Speak now or  
20 forever hold your peace.

21           MS. SAMUELS: Nothing further. Thank you.

22           THE COURT: All right. Work together on the  
23 stipulation of facts in the interim. Okay?

24           We don't -- I don't need any craziness. You're  
25 a serious guy. I want serious lawyering here. I know you

So let's get a reasonable stipulation of facts that you can both live with so I can do my job. I desperately want to do my job and do a good job for both of you. Okay?

(The proceeding concluded at 10:49 a.m.)

I, Tracy J. Stroh, OCR, RPR, Notary Public in and for the Commonwealth of Virginia at large, and whose commission expires September 30, 2023, Notary Registration Number 7108255, do hereby certify that the pages contained herein accurately reflect the stenographic notes taken by me, to the best of my ability, in the above-styled action.

/s/  


---

 Tracy J. Stroh, RPR



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

PAUL GOLDMAN

Plaintiff,

v.

No. 3:21-cv-00420-DJN

RALPH NORTHAM, Governor of Virginia,  
in his official capacity, et al.

Defendants.

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O R D E R

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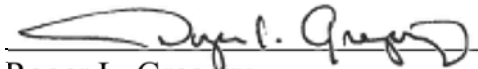
The Honorable David J. Novak has requested appointment of a three-judge district court in the above-captioned case, in which the plaintiff challenges the constitutionality of a statewide legislative apportionment scheme, arguing that the Virginia House of Delegates districts are malapportioned.

A district court of three judges is to be convened “when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.” 28 U.S.C. § 2284(a). The chief judge of the circuit shall “designate two other judges, at least one of whom shall be a circuit judge,” to serve as part of a three-judge court to hear and determine the action. 28 U.S.C. § 2284(b)(1).

NOW THEREFORE, I DO HEREBY DESIGNATE AND ASSIGN the Honorable Stephanie D. Thacker, United States Circuit Judge for the Fourth Circuit, and

the Honorable Raymond A. Jackson, United States District Judge for the Eastern District of Virginia, to sit with the Honorable David J. Novak, the three to constitute a district court of three judges to hear and determine this matter as provided by 28 U.S.C. § 2284.

This 12th day of October, 2021.

A handwritten signature in dark ink, appearing to read "Roger L. Gregory", is written over a horizontal line.

Roger L. Gregory  
Chief Judge, U.S. Court of Appeals  
for the Fourth Circuit

**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>           | ) |                                     |

**NOTICE OF APPEAL**

Notice is hereby given that the remaining Defendants in the above-captioned matter, Chairman Robert H. Brink, Vice-Chairman John O'Bannon, and Secretary Jamilah D. LeCruise (the Chairman, Vice-Chairman, and Secretary of the Virginia State Board of Elections, respectively), and Commissioner of the Virginia State Department of Elections Christopher E. Piper, appeal to the United States Court of Appeals for the Fourth Circuit from the October 12, 2021 Memorandum Opinion (Dkt. No. 40) and Order of the District Court (Dkt. No. 41) denying the Eleventh Amendment immunity defense raised in Defendants' Motion to Dismiss the Second Amended Complaint (Dkt. No. 23).<sup>1</sup>

This appeal is taken under 28 U.S.C. § 1291.

Dated: October 18, 2021

Respectfully submitted,

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

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<sup>1</sup> Defendants Governor Northam, the Virginia State Board of Elections, and Jessica Bowman were dismissed from the lawsuit and therefore do not join as Appellants in this appeal.

By: /s/ Jessica Merry Samuels  
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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 October 18, 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*

Jeffrey Thomas, Jr.  
301 Virginia St.  
Unit 1514  
Richmond, VA 23219  
*Pro se Proposed Intervenor*

/s/ Jessica Merry Samuels  
Jessica Merry Samuels (VSB #89537)  
*Counsel for Defendants-Appellants*

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

Richmond Division

PAUL GOLDMAN,  
Plaintiff,

v.

Civil No. 3:21-cv-420 (DJN)


ROBERT BRINK, *et al.*,  
Defendants.

**ORDER**  
**(Staying Case)**

This matter comes before the Court on Defendants' Notice of Interlocutory Appeal (ECF No. 47), moving to appeal the Court's October 12, 2021 Order granting in part and denying in part Defendants' Motion to Dismiss the Second Amended Complaint on sovereign immunity grounds (ECF No. 41). A denial of sovereign immunity provides grounds for an immediate interlocutory appeal under the collateral order doctrine. *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 327 n.1 (4th Cir. 2008). Because sovereign immunity furnishes "both a defense to liability and a limited entitlement not to stand trial or face the other burdens of litigation," the Court hereby STAYS this case until further order of the Court, including all motions to intervene. *See White v. Chapman*, 2015 WL 13021744, at \*2 (E.D. Va. Apr. 29, 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009)) (staying case to allow the Fourth Circuit to decide whether sovereign immunity shielded defendant).

Let the Clerk file a copy of this Order electronically and notify all counsel of record and the *pro se* parties, to include Plaintiff Paul Goldman and Prospective Intervenor Jeffrey Thomas, Jr.

It is so ORDERED.

\_\_\_\_\_/s/   
David J. Novak  
United States District Judge  
On behalf of the three-judge panel with the  
agreement of United States Circuit Judge  
Stephanie D. Thacker and United States District  
Judge Raymond A. Jackson

Richmond, Virginia  
Dated: October 20, 2021