RECORD NO. 21-2180

In The

United States Court Of Appeals For The Fourth Circuit

PAUL GOLDMAN,

Plaintiff – Appellee,

v.

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 – Appellants,

and

VIRGINIA STATE BOARD OF ELECTIONS; RALPH NORTHAM, Governor of Virginia, in his official capacity

Defendants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT RICHMOND

BRIEF OF APPELLEE

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KMH

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
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- Counsel has a continuing duty to update the disclosure statement.

No. 21-2180 Caption: GOLDMAN v BRINK, ET AL

Pursuant to FRAP 26.1 and Local Rule 26.1,

PAUL GOLDMAN
(name of party/amicus)

who is APPELLEE, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO

2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
If yes, identify all such owners:

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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☒NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☒NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☒NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☒NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: Pro Se Date: 1 Nov 2021

Counsel for: Pro Se

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INTRODUCTION

The Court: "Mr. Goldman…I just want to confirm…you are asking… essentially [for] *Cosner* relief." JA 079.

Mr. Goldman: "Yes." JA 079.

Judge Novak referenced *Cosner v. Dalton*, 522 F. Supp 350 (E. D. Va. 1981) (hereinafter "*Cosner*"), the leading 4th Circuit case on holding a general election for the Virginia House of Delegates (hereinafter "House") using unconstitutional electoral districts in a reapportionment year violates the U.S. Constitution. "*Virginia citizens* are *entitled to vote as soon as possible* for their representatives *under a constitutional appointment plan*." *Id.* at 364 (Emphasis added). The three-judge court in *Harris v. McCrory*, 159 F. Supp. 600, 627 (Dist. Ct. MD. N. Car 2016), in the opinion by the Hon. Roger Gregory, found this rationale persuasive.

The only issue decided by the District Court below was the rejection of Appellant's claim they were immune from suit because they were not responsible for conducting state elections as alleged by Appellee. SA 002 and 003. In this interlocutory appeal, Appellants do not even try to refute the specific reasons given by Judge Novak for his rejection. Appellants never cite *Cosner*. They surely realized Judge Novak's opinion tracks this Circuit's jurisprudence. *Wright v. North Carolina*, 787 F 3d 256 (4th Cir. 2016). Instead they mainly focus on alleged standing issues.

Yet Judge Novak pointedly reserved the standing issue for future factual and legal development, saying Appellants didn't challenge standing. "I gave you the full time on the motion to dismiss…you didn't raise standing;" JA 107. Appellants had earlier said "Your honor, we moved to dismiss (only) on the Eleventh Amendment because…). JA 092. Judge Novak rejected their "sovereign immunity" claim while establishing a briefing schedule on the standing issue. JA 071-72.

The District Court anticipated an appeal limited to Appellants' 11th Amendment sovereign immunity claim – nothing else. JA 067. "(I)f you…appeal on sovereign immunity…everything is stayed." JA 112.

Interlocutory appeals are "best understood as a …practical construction" of the collateral order doctrine. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 41 (1995). The U.S. Supreme Court "disallow[s] appeal from any decisions which is tentative, informal, or incomplete." *Id*. at 42.

Appellee believes Appellants may therefore have included issues inappropriate for this appeal. However, Appellee will discuss them so the Court will see they lack substantive merit.

The Appellants' first suggest Appellee is using "subterfuge" to hide a state claim in federal clothing to bypass *Ex parte Young*, 209 U.S. 128 (1908). Br, p.17.

This is moot court rhetoric aimed at hiding the fact they have abandoned

their months long claim of being immune from suit due to their possessing no powers specially connected to conducting statewide elections. SA 002, 003, 009. In Virginia's seminal redistricting, *Davis v. Mann*, 377 U.S. 678, 680 (1964) said similar state election officials were proper parties as "(d)efendants, sued in their representative capacities, were various officials charged with duties in connection with state elections." The recent Final Order Establishing Voting Districts from the Supreme Court of Virginia, assigned to the "State Board of Elections and the Virginia Department of Elections" the job of ensuring that future elections for the House of Delegates are conducted according to the applicable state election law. SA 036.

But in order to give the appearance of this being a sovereign immunity appeal, Appellant's cite *Reynolds v. Sims*, 377 U.S. 533 (1964) for support of their "subterfuge" state claim rationale. Had they read a little further in that opinion, they would have seen the following declaration: to wit, "(w)hile we do not intend to indicate that decennial reappointment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements…But if reapportionment were accomplished with less frequency, it would *assuredly be constitutionally suspect*." *Id*. at 584 and 585 (Emphasis added).

Renown Supreme Court cases, *Meyer v. Grant*, 486 U.S. 414 and *Bush v. Gore*, 531 U.S. 98 (2000), likewise explain the rationale for Appellee properly

pleading a federal constitutional claim. Thus based either on *Cosner's* direct route, or the indirect path of *Meyer* and *Bush*, Appellee's lawsuit is well grounded in federal constitutional law. As to the other claims in the Appeal, it will shortly be seen how they are rooted in an inappropriate, not to mention an incorrect standing argument, far afield from their rejected 11th Amendment immunity claim. Indeed the main one relies on a curious use of a cherrypicked quote from their key case, *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

JURISDICTION

This Court has jurisdiction to consider the issues properly before it in this interlocutory appeal – not all the matters raised by Appellants. The 11th Amendment is properly construed as a shield, not a sword. "Interlocutory appeals…are the exception, not the rule" and issues not appealable as of right, regardless of how Appellants frame them, are not properly before the Court. *Johnson*, supra. See also *Cohen v. Beneficial Loan Corp*. 337 U.S. 541 (1949). Pursuant to *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). Appellants could of course challenge the District Court's rejection of their argument that they had neither the power nor the special relationship to conduct state elections as pled by Appellee. *Puerto Rico*, infra at 147. Indeed, Judge Novak made clear at the hearing every other issue but the Appellants articulated reasons for claiming 11th Amendment protection were not

final, indeed he gave Appellants to file another motion to dismiss on any other issue. JA 111. They declined. Moreover, they are now no longer making that 11th Amendment claim. Apparently, they now have changed their mind and concede they have all along been tasked to conduct state elections.

Appellants instead make three basic arguments.

First, they persist in mischaracterizing Appellee's equal protection argument as a disguised state claim despite *Cosner*, supra, *Davis*, supra, *Mahan*, infra, *Meyer* and *Bush*, supra. *Puerto Rico*, supra, however allows government officials to make clearly wrongful assertions in an interlocutory appeal.

Second, Appellants' challenge Appellee's standing as a candidate. They cite no case claiming this is appropriate in an 11th Amendment interlocutory appeal. This is precisely the kind of issue best left to the trier of fact, as the hearing transcript of Appellants' lead counsel showed. JA 105. The District Court explicitly did not decide standing and factual development here is required. Indeed, Appellants inexplicably misinformed this Court about the decision below. "*As the court recognized* ", claim Appellants, "Goldman's vote was if anything, inflated, not deflated, by the use of these districts." Br., p.13.

In truth, Judge Novak recognized no such thing.

The Court: "I don't know if he has standing or not." JA 109.

The District Court's Memorandum Opinion addresses Defendants' Motion to Dismiss the Second Amended Complaint, which raises only sovereign immunity arguments. JA 45. Judge Novak noted "Defendants did not bring a standing challenge." *Id.* "Nor did they reply to Plaintiff's Response to their renewed Motion to Dismiss." *Id.* For this reason the Order being appealed established a briefing schedule to develop the proper record for further proceedings. JA 072. Appellee declines to speculate on the motivation for Appellants providing such misinformation to this Court. But it is important to be clear: there was no final decision on any related standing issue as the Order clearly states. JA 071. Appellant's candidate standing claim is not appropriate for an 11th Amendment interlocutory appeal.

Judge Novak's colloquy on standing included his saying "(p)articularly under *Gill v. Whitford*, the Supreme Court's case on this, I believe that Mr. Goldman is going to have to demonstrate that his individual vote is underrepresented for malapportionment." JA 088. With all due respect, *Gill v. Whitford*, 138 S. Ct. 1916 (2018), is not a *Reynolds* case. It is a "partisan gerrymandering" case. *Id.* at 1941. *Gill* said "(o)ur first consideration of a partisan gerrymandering claim came in *Gaffney v. Cunmings*, 412 U.S. 735 (1973)". Reynolds, *supra*, was decided in 1964. There are key, fundamental differences.

Yet, thirdly, Appellant's main thrust on standing is their saying "Goldman's effort to bring this claim in federal court also fails for another reason: Goldman lacks standing." Br., p.20. They base this on their unique, unsupported view of the facts required for the statistical analysis needed in a *Reynolds* case. Appellee reads *Puerto Rico,* supra, as acknowledging there will be 11th Amendment sovereign Immunity cases where the law and facts are intertwined, a clean line not easily found. But an interlocutory appeal can't be one rooted in a genuine issue of disputed fact. *Winfield v. Bass*, 106 F.3d 525 (4th. Cir. 1997). The review of the challenged denial of sovereign immunity would therefore seem only ripe for decision if it "turns on an issue of law." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

This is important since Appellants claim the "baseline for standing" in the instant case "is the 'hypothetical district' that Goldman would receive if he were to obtain the relief, he seeks: proportionate districts based on the 2020 Census." Br., p.23. Appellants cite *Gill*, supra for this proposition. But this is not what Gill said at all. *Gill* is a partisan gerrymandering case, not a *Reynolds* case. *Gill* explains the difference between a partisan gerrymandering case and a *Reynolds* case precisely in the section of their opinion from where Appellants lifted their cherrypicked quote. In a partisan gerrymandering case, the "harm arises from the particular composition of the voter's own district, which causes his vote – having been

packed or cracked – to carry less weight than it would carry in another, hypothetical district." *Id.* at 1931. "Remedying the individual voters harm, therefore, does not necessarily require restructuring all of the state's legislative districts." *Id.*

The *Gill* Court points out this key distinction, saying that in a *Reynolds*' claim, "the only way to vindicate an individual plaintiff's right to an equally weighted vote was through a wholesale 'restructuring of the geographical distribution of seats in a state legislature." *Id.* at 1930. Thus, as Appellee pointed out at the hearing to both Judge Novak and to Appellant's, the factual statistical analysis required is based on a meticulous accounting of the population deviations in all 100 House districts to determine their exact population deviation from the "ideal" district. JA 089. See e.g., *Cosner*, supra, *Mahan*, infra and of course *Harris v. Arizona Independent Redistricting Commission*, 136 S. Ct. 1301 (2016), infra. It is basic logic: in order to implement the one person, one vote principle of equally weighted votes, every House district must be within a certain population deviation of every other district. Appellee explains the factual statistical analysis infra. Those residing in districts (interested voters naturally are the usual plaintiffs but this is not a constitutional requirement) with factually determined population deviations exceeding lawful limits have constitutional harm and thus standing to sue. This underscores the need for full factual development, as Judge Novak made plain. It

further highlights the policy reason interlocutory appeals have certain limitations as suggested by *Mitchell* and *Johnson*, supra.

ISSUES

(1) Whether the 11th Amendment bars Appellee's lawsuit against the named state officials, sued in their representative capacities, for violating his voting rights as protected by the federal constitution?

STATEMENT

For purposes of judicial economy, Appellee generally adopts the Statement of Appellant with these specific objections. Appellant leaves the impression the "newly-amended" Constitution set 2021 as the reapportionment year. Brief, p.6. The previous language replaced by the 2020 Constitutional Referendum cited by Appellants already had made 2021 a reapportionment year.

Further, Appellee is clearly seeking to have a federal court protect his federal constitutional rights with a federal constitutional remedy.

SUMMARY OF ARGUMENT

The failure of the federal government to timely provide 2020 U.S. Census data created delays in the Virginia reapportionment process. But this federal failure doesn't provide a constitutional "free pass" for state officials to arbitrarily decide to violate Appellee's constitutionally protected voting rights. Virginia voters, as Appellant's acknowledge, had in 2020 specifically given themselves the

right to vote in 2021 for their representative to the House pursuant to new districts crafted according to the 2020 U.S. Census. Forty years ago *Cosner* said the failure of the state to hold such an election in a reapportionment year violated the Equal Protection Clause and thus required a new election the next year using constitutionally approved districts consistent with the latest U.S. Census. The state readily complied. *Cosner v. Robb*, 541 F. Supp. 613 (E.D. Va. 1982). Appellants are trying to obfuscate their unconstitutional conduct, by refusing to say plainly they take a contrary position: to wit, the federal constitution permits a two year delay until 2023 before holding an election for the 100 House members using such new districts. Even assuming *arguendo*, *Cosner* is wrongly decided, *Meyer*, supra, clearly holds that once the citizens of a state are conferred the right to a 2021 election using new maps, the state is obligated to provide said right "in a manner consistent with the federal Constitution." *Id*. at 420, 424. *Bush*, supra is in accord as cited by *Wright*, supra at 260 "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." (*Bush*, supra, at 104, 105).

Previous claims suggesting members of the Va. Board of Elections were not the proper parties when challenging the conduct of state elections have long been rejected by the Fourth Circuit. See, e.g., *Libertarian Party v. Judd*, 718 F.3d 308, 311 (4th Cir. 2013) ("The named defendants…members of the Va. Board of

Elections…(are) sued in their official capacities as administrators of the Commonwealth's election laws"). Indeed, the Supreme Court of Virginia Final Order establishing new legislative districts under the 2020 U.S. Census says the " State Board of Elections and the Virginia Department of Elections shall…ensure that…any future regular or general that may be held for the…Virginia House of Delegates…will proceed as scheduled" according to these new House maps. "For any special elections that may be scheduled before the next regular primary or general election for…Virginia House of Delegates…the State Board of Elections, and the Virginia Department of Elections will need to determine whether, under the particular circumstances presented," the existing maps in November 2021 or the new maps "should be used." SA 036 and 037.

Therefore Defendants surely cannot be surprised their claim that the "defendants, the State Elections Officers, are…immune from suit" because of the 11th Amendment had always been rejected in Virginia since *Davis*, infra. SA 009.

ARGUMENT

I. Appellee's recognized federal constitutional claims are not barred by the 11th Amendment

Cosner and *Meyer* supra, along with *Bush*, supra clearly say Appellee's claim arise under the federal constitution. *Cosner* found the apportionment scheme at issue for the House of Delegates "violates the Equal Protection Clause of the Fourteenth Amendment." *Id*. at 354. "*Virginia citizens* are *entitled to vote as soon*

as possible for their representatives *under a constitutional appointment plan*." *Id*. at 364 (Emphasis added). Judge Novak said plainly "(t)his is a *Reynolds* case," referring to *Reynolds*, supra. JA 113. Appellant's claim, now abandoned, that Appellee had sued the wrong parties have been rejected for 6 decades. *Davis*, et al, infra.

Moreover, *Meyer* covers any constitutional ground *Cosner* might have left unclear. In *Meyer*, the Colorado Constitution gave citizens the "initiative petition" right to place a proposal on the statewide ballot. *Id*. at 415. But "(o)ne section of state law regulating the initiative process makes it a felony to pay petition circulators." *Id*. Thus, the Supreme Court had to decide "whether that provision is unconstitutional" under the federal constitution. *Id*.

The Tenth Circuit Court of Appeals debated the matter *en banc*. The Supreme Court noted "the Court of Appeals rejected an argument advanced by a dissenting judge that since Colorado had no obligation to afford its citizens an initiative process, it could impose this condition on its use." *Id*. at 420. Rather, the Tenth Circuit Court of Appeals ruled that once a state granted this right to its citizens, "the State was obligated to do so in manner consistent with the Constitution" of the United States of America. *Id.*

The Supreme Court directly addressed the state versus federal claim: "Colorado contends that because the power of the initiative is a state-created right,

it is free to impose limitations on the exercise of that right." *Id*. A unanimous Supreme Court agreed with the Tenth Circuit, ruling Colorado must satisfy whatever appropriate constitutional burden would be required for a state to justify such a limitation. *Id*. at 424. While *Meyer* arose under the First Amendment, its rationale is applicable when, as here, a state attempts to abrogate a state created citizen voting right protected by the Equal Protection Clause. Thus *Cosner* and *Meyer* stand for the same federal constitutional principle: the Equal Protection Clause protects Appellee's *Reynolds* right to choose his representative to the House in a constitutionally sound district drawn pursuant to the 2020 U.S. Census consistent with the one person one vote principle as soon as possible. In *Bush v. Gore*, supra, the Supreme Court likewise concluded that once a state chooses to grant its citizens a particular voting right, this right is now federally protected from denigration by state officials unless the state can satisfy the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. *Id*. at 103-05. *Id*. at 103, 104 and 105.

Thus Appellants disparaging Appellee's suit as being "federal in name only" is not well founded, as is their primary reliance on *Bragg v. West Virginia Coal Ass'n*, 248 F.3d. 275 (4th Cir.) misplaced. Br., p.20. *Bragg* is premised on a claim "Congress through SMCRA (Surface Mining Control and Reclamation Act of 1977) (had) invited the States to create their own laws, which would be of

"exclusive" force in regulation of surface mining within their borders." *Id.* at 297,298. Here, the federal government never invited Virginia to take over "exclusive" enforcement of any part of the Equal Protection Clause, nor could it.

Appellants claim *Cunningham v. Lester*, 990 F.3d. 362 (4th Cir. 2021) shows Appellee's pleading is a "subterfuge." Brief, p.20. Appellee find this description frivolous. Appellants lastly cite *Reynolds*, supra, for the proposition that "(J)udicial relief becomes appropriate only when a legislature fails to reapportion according to the federal constitutional requisites *in a timely fashion after having had an adequate opportunity to do*." *Id.* at 586 (Emphasis in Brief). This has nothing to do with any 11th Amendment immunity claim. Moreover, it would take an evidentiary hearing for Appellants to prove their claim such "timely fashion" and "adequate opportunity" have not yet taken place.

II. Appellee has presented a substantial federal question.

Appellants' claim "Goldman has not presented a substantial violation of federal law sufficient to invoke the *Ex Parte (sic) Young* exception because he nakedly lacks standing to pursue the Equal Protection claim he alleges." Brief, p.21. Appellants are attempting a standing argument in transparent 11th Amendment clothing. Appellants say Appellee's House District # 68 had a population of 85, 223 at the time of the November 2021 election (85,344 is the proper statistic. SA 014). They then assert the 2020 U.S. Census says the ideal

House has a population of 86,314. JA 88. They claim this small population deviation proves "Goldman cannot show the required particularized injury." Br., p. 21.

Appellants cite no *Reynolds* case supporting their argument. The proper statistical calculation in a *Reynolds* case is whether Appellee had an equally weighted vote last November when Virginia required him to choose his representative to the House of Delegates. As *Mahan v. Howell*, 410 US 315, (1973), makes clear, and as *Cosner, supra* at 355 explained, the correct statistical calculation for determining whether there exist an unconstitutional unequally weighted legislative reappointment plan starts with determining the scheme's "maximum percentage variance." *Id.* This is done by combining the deviations of the least populated district and the most `populated district from the "ideal" district. *Id.*

At the time Appellee voted in November, House District # 75, the least populated, had a population of 67,404. House District # 87 had become the most populated with 130,192 individuals. SA 014. In the 2010 U.S. Census, Virginia had 8,001,024 people. This made the constitutional "ideal" district 80,010 under the 2010 Census. https://www.census.gov/programs-surveys/decennial-census/guidance/2010/2010-data-products-at-a-glance.html.

House District # 75 therefore rested 15.7% below the ideal district, while House District 87 stood 62.7% above the ideal district under the obsolete 2010 Census Appellant concedes had been used to craft the districts contested last November. Brief, p. 5. This equates to a "maximum percentage variance" of 78.4% for House district maps used for the 2021. Such a gross deviation from the principle of one person one vote in an apportionment has been per unconstitutional since *Reynolds*.

Given this proven unconstitutional population deviation, the remaining inquiry is whether Appellee has standing to sue. The correct population of Appellee's House District # 68 is 85,344. This calculates into a population deviation of 6.5% above the ideal district in the census used to draw the maps contested at the 2021 election. When combined with the 15.7% shortfall for House District # 75, this equals more than a 22% population deviation, a particularized injury in fact far in excess of the permissible limits allowed by *Mahan*, supra, *Cosner* supra, and the seminal U.S. Supreme Court case of *Harris v. Arizona*, infra. Appellants fail to grasp how a 78.4% population deviation not only defies all federal jurisprudence since *Reynolds* but also offends the very citizens who enacted the changes in 2020 Constitutional Referendum to ensure such unconstitutionality never occurred in Virginia. As *Harris v. Arizona* points out, the 22.3% dilution in Appellee's right to an equally weighted vote will be

almost impossible for Appellants to defend if not *per se* unconstitutional. *Id.* at 1307, 1309.

Appellants however insist their unique comparison between the population of Appellee's old House District # 68 and the "ideal" House District according to the 2020 U.S. Census is the proper statistical matrix. Appellant claim three cases support their analysis. But *United States v. Hays*, 515 U.S.737 (1995), *Sinkfield v. Kelley*, 531 U.S. 28 (2000) and their main citation, *Gill v. Whitford*, 138 S. Ct. 1916 (2018), do not. *Hays* is a racial gerrymandering case, as is *Sinkfield*. Since Appellants cite *Gill*, they know *Gill* pointed out the standing analysis in a racial gerrymandering is far different. *Gill* at 1930 (citing *Hays*). Significantly, Plaintiffs in both cases were given evidentiary hearings. As discussed supra, the *Gill* dispute centered over partisan gerrymandering. The Court said "[t]his is not the usual case. It concerns an unsettled kind of claim this Court has not yet agreed upon, the contours and justiciability of which are unresolved." *Id*. at 1933 and 1934. "We therefore remand the case to the District Court." *Id.* at 1934.

Yet Appellants' make an even greater fundamental mistake. Not one of their cases remotely reflect the facts in the instant matter. Here, the state conducted an election using districts created pursuant to an obsolete census when a new current Census existed. Unlike *Cosner*, there existed no court order allowing the use of an unconstitutional apportionment plan in a reappointment year. *Id*. at 364. None of

cases cited by Appellant indicate there existed a factual situation with a similar state constitutional right for voters. Indeed, prior to the last November, this factual scenario had not arisen since *Reynolds*.

Appellants inexplicably suggest the failure of national government to provide timely Census data allowed state government to run roughshod over Appellee's federally protected constitutional rights. Admittedly the delayed Census data created an unprecedented factual situation. Appellants concede the situation raises important legal issues. They are right to believe the matter needs a full analysis – but surely not in the context of this interlocutory appeal which Judge Novak made clear was limited to his rejection of their flawed 11th Amendment immunity claim.

III. Candidate Goldman has standing.

Appellants fail to even directly mention 11th Amendment immunity. *Johnson*, supra. Appellants cite one case, *Carney v. Adams*, 141 S. Ct. 493 (2020). It has nothing to do with 11th Amendment immunity.

Carney does not involve a candidate for elected office. "This case concerns a Delaware constitutional provision that requires that appointments to Delaware's major courts reflect a partisan balance." *Id.* at 496-497. As Carney said, "(t)his a highly-fact specific." The court said "the record evidence" doesn't show standing. *Id*. at 501. One reason: Adams had only become an independent 8 days before

filing the suit. Before then, he had been a long time Democratic activist. *Id*. at 501. In any event, the record was fully developed factually before the appeal.

Appellants know full well that shortly after the election, the Appellant members of the Va. Board of Elections signed and issued certificates of election to the winners of the November 2021 elections. SA 029-030. These certificates appear to be issued in violation of state law. SA 018. Moreover, these certificates apparently say the winners were elected to a two-year term ending in 2024. SA 026. The state law giving them the power to issue these certifications doesn't directly indicate they are to include the length of the term. SA 025. Thus, according to Appellants, and the state government for which they speak, there will not be a 2022 election for the House. Appellants know neither Appellee nor anyone else can legally file a declaration of candidacy to run in a nonexistent election. *See, e.g*., Va. Code Section 24.2- 520. It is stretches credulity for state officials to defend a denial of an 11Amendment immunity defense by arguing Appellee isn't a candidate because he hasn't filed an official declaration of candidacy form for an election Appellants' say will not occur.

IV. Appellants' 11th Amendment appeal is seemingly not well documented.

With all due respect, Appellants have known all along they were they were properly sued in their representative capacity as the state officials responsible for conducting state elections. They met the very tests laid out by Judge Novak. They

had the "special relation" along with the "proximity" and "responsibility" explained in *Wright*, supra. "(A) suit against State officials acting pursuant to State laws [is] a type of action *universally held appropriate* to vindicate a Federally protected right" (citing *Ex parte Young*, 209 U.S. 128 (1908). *Mann, et al, v. Davis*, et al, 213 F. Supp. 577, 579 (1962), *aff'd* on the merits, remanded for further proceedings, *Davis, Secretary of the [Virginia] Board of Elections et al v. Mann, et al*, 377 U.S. 678, 680 (1964) (Emphasis added).

Appellants claim these are crucial issues of state law for a state tribunal. Yet as Appellee has repeatedly pointed out, state law gives the Va Board of Elections extraordinary power to seek guidance on such legal matters from the Supreme Court of Virginia. SA 05. At all times, Appellants were aware of the command in the state Constitution, to wit: "Every electoral district shall be drawn in accordance with the requirements of federal and state laws that address racial and ethnic fairness, including the ***Equal Protection Clause of the Fourteenth Amendment*** to the Constitution of the United States and provisions of the Voting Rights Act of 1965, as amended, ***and judicial decisions interpreting such laws***." Article II, Sec. 6. (Emphasis added). *Cosner*, supra is such a case, having been decided under the Equal Protection Clause in this Circuit. Moreover, the Constitution of Virginia says the "Commonwealth ***shall be reapportioned*** into electoral districts in accordance with this section (6) and Section 6-A ***in the year 2021***." Article II, Section 6. (Emphasis added).

Reynolds said nearly sixty years ago that waiting until 2023, or 13 years after the last reappointment to hold an election for the one hundred House seats under newly drawn district maps is "*constitutionally suspect*". *Id.* at 585. This alone justifies a federal challenge in a federal court. Under Appellant's view, the Virginia General Assembly will retain a State Senate and the House of Delegates where membership is apportioned according to an unconstitutional census chosen by hugely unequally weighted votes until 2024 in direct contradiction of the expressed of the people of Virginia, who retain the ultimate sovereign power in Virginia pursuant to Article I, Section 2 of the Constitution of Virginia. This situation has never before happened in America, not merely Virginia, since *Reynolds* made state redistricting subject to the federal constitution.

Finally, in *Covington v. North Carolina,* 270 F Supp.3d 881, (Dist. Ct. Md. North Carolina 2017), the 3- Judge Court cited *Cosner* favorably for the proposition that "shortening the terms of elected officials and ordering a special election does not unduly intrude on state sovereignty, particularly when the constitutional violation is widespread." *Id*. at 896, In *Page v. Virginia State Board of Elections,* 58 F. Supp 3d 533 (E.D. Va 2014), the, the 3-Judge Court cited and agreed with *Cosner* that citizens "are entitled to vote as soon as possible for their representatives under a constitutional apportionment plan." *Id*. at 555,

Accordingly, the *Cosner* principle, based on the federal constitution, stood clearly as the law in this Circuit during 2021.

Surely, Appellants' lawyer, the Attorney General of Virginia, had an obligation to tell them to follow the federal constitution as decreed by the federal courts in this 4th Circuit, particularly after the citizens demanded such a voting right in the 2020 Constitutional Referendum. Br., P.6. "No right is more precious in a free country…(o)ther rights, even the most basic, are illusory if the right to vote is undermined." *Williams v. Rhodes*, 393 U.S. 23 (1968).

Appellee has the utmost respect for the Virginia's top election officials, he has worked with many over the years, they have truly helped move our Commonwealth forward in voting rights. Thus Appellee is baffled since the cases cited by Appellee stand for the proposition that a state legislature allowed to remain so malapportioned until 2024 threatens to undercut the legitimacy of our institutions. Appellants have once again not challenged, indeed not mentioned *Cosner*, and have now also abandoned their original 11th Amendment immunity claim. In that regard, Appellee has always laid out a set of reasonable facts to support his claim, to support his standing, such facts to be accepted as true. *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (11th Amendment immunity case).

CONCLUSION

Months ago, Appellee said certain powerful politicians did not want an election in 2022 since it would not be in their personal, political interests, although it would be in the public interest. They feared losing their political power if made to run in a primary or general election in such newly drawn districts. JA 021. Appellee asks the Court to keep this in mind when considering the bona fides of the Appellants' argument.

Appellee asks the Court to (1) affirm Judge Novak's decision rejecting Appellant's 11th Amendment sovereign immunity appeal, and (2) remand the case to the 3-Judge Panel along with an order to expediate what Appellants concede are important issues so that the case may be decided on the merits as soon as possible to allow time to vindicate not only Appellee's voting rights but also those of his fellow Virginians who said in 2020 they deserved no less as the sovereign power in the Commonwealth.

Respectfully submitted,

By: *<u>/s/ Paul Goldman</u>*

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