No. 21-2180

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PAUL GOLDMAN,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

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

REPLY BRIEF OF APPELLANTS

JASON S. MIYARES
Attorney General

CHARLES H. SLEMP, III
Chief Deputy Attorney General

MONIQUE A. MILES
Deputy Attorney General

JOSHUA N. LIEF
Senior Assistant Attorney General

CAROL L. LEWIS
Assistant Attorney General

ANDREW N. FERGUSON
Solicitor General

KEVIN M. GALLAGHER
Deputy Solicitor General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-5315 – Telephone
(804) 371-0200 – Facsimile

Counsel for Defendants-Appellants

February 8, 2022

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

INTRODUCTION

Appellee Paul Goldman's brief focuses primarily on the merits of his remaining claim, and spills considerable ink debating the proper formulae for determining whether an apportionment plan violates the Fourteenth Amendment. But the merits are not before the Court. Appellants Robert H. Brink, John O'Bannon, Jamilah D. Le Cruise, and Christopher E. Piper (collectively, the Election Officials) challenge the district court's decision that they were not entitled to sovereign immunity. Determining *that* question is straightforward.

First, although Goldman nominally alleges violations of the Fourteenth Amendment's Equal Protection Clause, the substance of his claim sounds in the Virginia Constitution. He can point to no federal right that he is vindicating that exists apart from the obligation imposed by the Virginia Constitution to conduct an election during reapportionment years. Because the *Ex parte Young* exception to sovereign immunity does not extend to a state officer's alleged violation of state law, the Election Officials are entitled to sovereign immunity.

Second, Goldman is not eligible for the *Ex parte Young* exception to sovereign immunity because he cannot establish standing, which is part

and parcel of the sovereign immunity analysis. Goldman's argument on standing conflates the merits of his putative malapportionment claim with the requirements of Article III injury-in-fact. The Supreme Court has made clear that, even in malapportionment cases, the plaintiff must demonstrate that he has suffered an individualized, cognizable injury. Goldman cannot show the requisite injury and thus the Election Officials are entitled to sovereign immunity.

Accordingly, the Court should reverse with instructions to dismiss Goldman's remaining claim for lack of subject-matter jurisdiction.

ARGUMENT

I. The Eleventh Amendment bars Goldman's remaining claim because it rests on state law

Although Goldman nominally pleads a violation of the federal Equal Protection Clause, his remaining claim rests on a deadline imposed by the Virginia Constitution. Relying on a forty-year-old district court opinion and a First Amendment case, Goldman characterizes the federal character of his claim as the Equal Protection Clause's protection of his "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." Appellee Br. 13

(citing *Cosner v. Dalton*, 522 F. Supp. 350 (E.D. Va. 1981), and *Meyer v. Grant*, 486 U.S. 414 (1988)). But, according to Goldman's allegations, it is the *Constitution of Virginia* that mandates that elections conducted in a "reapportionment year must be contested in new districts drawn pursuant to the 2020 U.S. Census." JA 11, 17. Goldman has identified no rule of federal law requiring states that conduct an election during a reapportionment year to use districts drawn from the most recent census data. Because his claim turns on a question of state, rather than federal, law, it is beyond the sovereign-immunity exception articulated in *Ex parte Young*. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

Rather than clearly explain the federal nature of his claim, Goldman attacks Appellants' citation of *Bragg v. West Virginia Coal Association*, 248 F.3d 275 (4th Cir. 2001), contending that, unlike here, that case turns on the federal government having invited the state to engage in exclusive enforcement of the statutory scheme. Appellee Br. 13–14. Whatever difference the facts of that case present, its principles are controlling. This Court "must evaluate the degree to which a State's sovereign interest would be adversely affected by a federal suit seeking

injunctive relief against State officials, as well as to the extent to which *federal*, rather than State, law must be enforced to vindicate the federal interest." *Bragg*, 248 F.3d at 293. Goldman makes no argument as to how his claim meets this standard.

Finally, Goldman contends that consideration of this issue is inappropriate on appeal because the Commonwealth did not precisely raise in the district court the sovereign-immunity arguments it now raises. Appellee Br. 2. It is true that the Commonwealth did not raise precisely the same arguments before the district court that it raises on appeal, but this Court has held that "once a defendant raises a *claim* before the district court, it may make a new *argument* for that claim on appeal." *United States v. Green*, 996 F.3d 176, 184 (4th Cir. 2021); see also *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."). This Court therefore should consider the Commonwealth's sovereign immunity arguments as it presents them in this appeal.

II. Goldman has not presented an ongoing violation of federal law

Even if this Court were to interpret Goldman's remaining claim as federal in nature, the claim cannot proceed against the Election Officials because Goldman has not presented an ongoing violation of federal law—as required under *Ex parte Young*, see *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 330 (4th Cir. 2001)—because he lacks standing. In the absence of an ongoing violation of federal law, the Election Officials are entitled to sovereign immunity.

Goldman's primary response is to contend that standing "is not appropriate for an 11th Amendment interlocutory appeal." Appellee Br. 6. Although Goldman wishes to separate the inquiries, "there is a common thread between Article III standing analysis and *Ex parte Young* analysis."[1] *Cressman v. Thompson*, 719 F.3d 1139, 1146 n.8 (10th Cir. 2013). Accordingly, to "seek the kind of injunctive relief *Ex parte Young* permits, [the plaintiff] must establish that it has standing under

[1] Indeed, Goldman's theory is tantamount to an argument that this Court is otherwise powerless to address a standing issue on appeal. But, of course, "[w]hen a question of standing is apparent," even if "not raised or addressed in the lower court," it is this Court's "responsibility to raise and decide the issue sua sponte." *Benham v. City of Charlotte*, 635 F.3d 129, 134 (4th Cir. 2011).

Article III." *WCI, Inc. v. Ohio Dep't of Pub. Safety*, 18 F.4th 509, 514 (6th Cir. 2021); see also *Gregory v. Texas Youth Comm'n*, 111 Fed. Appx. 719, 721 (5th Cir. 2004) ("To seek relief under the *Ex Parte Young* exception, a plaintiff must establish standing."); *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994) ("Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation."). Goldman cannot establish standing under either of his theories.

First, Goldman has not established standing as a Virginia voter. The Supreme Court has long recognized that a person's right to vote is "individual and personal in nature." *Reynolds v. Sims*, 377 U.S. 533, 561 (1964). Thus, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage. *Baker v. Carr*, 369 U.S. 186, 206 (1962). As the Fifth Circuit has succinctly put it, in the malapportionment context "[i]t is settled . . . that a voter from a district that is overpopulated and under-represented suffers an injury-in-fact" whereas "a voter who resides in an *under*populated district cannot properly allege an injury-in-fact."

Hancock Cnty. Bd. of Supervisors v. Ruhr, 487 Fed. Appx. 189, 196 (5th Cir. 2012) (citing *Baker*, 369 U.S at 205–06).

These requirements accord with the purposes of the Article III standing inquiry. Standing ensures not only that the federal courts are limited to deciding actual cases and controversies rather than settling political disputes. *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). It also ensures that the "proper" plaintiff is bringing the case or controversy, that is, one who is in fact injured by the allegedly unlawful conduct and whose injury could be redressed by the relief he seeks. *Raines v. Byrd*, 521 U.S. 811, 818 (1997).

In any malapportionment case, there are potentially thousands of voters who suffer an injury from an unlawful map because they reside and vote in a district that is underrepresented in the legislature. See, *e.g.*, *Garcia v. 2011 Legislative Reapportionment Comm'n*, 559 Fed. Appx. 128, 133 (3d Cir. 2014) ("Malapportionment's harm is felt by individuals in overpopulated districts who actually suffer a diminution in the efficacy of their votes and their proportional voice in the legislature."). But there similarly are potentially thousands of voters who suffer no injury because they live and vote in a district that is

overrepresented in the legislature, or because they would lose representation in a lawfully apportioned map. *Id.* ("Although all those in a covered [area] are impacted by malapportionment, not everyone is injured."). Article III limits the courts to deciding only the cases brought by the injured voters even though the remedy they seek—a redrawing of the entire statewide map—will affect the uninjured voters. That an uninjured voter will be affected by the remedy to a malapportioned map does not confer standing on the uninjured voter. *A fortiori*, a voter who will in fact be injured by the remedy—because he or she lives in a district whose representation will be reduced under a new geographic distribution—lacks standing even if many voters in other districts have standing to bring a malapportionment claim. *Id.* ("[A] voter who has not been injured lacks standing to sue on behalf of individuals who are actually injured by a plan of apportionment."); see also *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) ("Ordinarily, a party must assert his own legal rights and cannot rest his claim to relief on the legal rights of third parties." (quotation marks and alterations omitted)).

Goldman resides in District 68, which, according to the data he attached to his Second Amended Complaint, has a current population of

85,223. JA 28, 86. Because the 2020 census revealed that Virginia has a total population of 8,631,393, a districting scheme composed of entirely equal districts would produce 100 districts of 86,313 people. See JA 88; Appellant Br. 22. Goldman's current district thus contains *fewer* people than it would under a purely proportional system—meaning that his vote is inflated *above* what it would be under new maps based on the 2020 Census data.

Goldman's response further elides the merits, remedy, and standing analyses. He contends that "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" and those residing in districts with "factually determined population deviations exceeding lawful limits have constitutional harm and thus standing to sue." Appellee Br. 8. But Goldman's theory "rests on a failure to distinguish injury from remedy."[2] *Gill v. Whitford*, 138 S. Ct. 1916,

[2] Indeed, even if Goldman were correct that the relevant injury analysis was whether an individual lived in a district with a population deviation exceeding lawful limits, he would still not have standing. Even under his theory, his district had a population deviation only 6.5% above the ideal district. See Appellee Br. 16. The Supreme Court has indicated that a deviation of less than 10% is prima facie constitutional. See *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983).

1930 (2018). The *injury* in a "one person one vote" case is vote dilution—a violation of the "individual plaintiff's right to an equally weighted vote"—whereas the *remedy* to such an injury (if it exists) is "a wholesale 'restructuring of the geographical distribution of seats in a state legislature.'" *Id.* (quoting *Reynolds*, 377 U.S. at 561).[3] That the remedy in a malapportionment case involves a statewide restructuring of the geographic distribution of legislative districts *does not* confer standing on every voter in the state. Only voters who are personally injured by the malapportionment have Article III standing to bring these claims, even if the remedy they seek will affect districts other than their own. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring))). Goldman puts the

[3] Goldman attempts to distinguish *Gill* by contending that it is a partisan gerrymandering case, "not a *Reynolds* case." Appellee Br. 6. But the Court in *Gill* made clear that the *injuries* in partisan gerrymandering and *Reynolds* cases are similar, even if the *remedies* may differ. See *Gill*, 138 S. Ct. at 1930. The injury in both cases is the denial of an equally weighted vote, which means the standing analysis is very similar.

cart before the horse, asking the Court to analyze the remedy before determining if he is injured at all.[4]

Neither can Goldman establish standing by widening the lens to the alleged 78.4% population deviation between the least populated and the most populated districts, which, according to Goldman, "offends the very citizens who enacted the changes in 2020 Constitutional Referendum to ensure such unconstitutionality never occurred in Virginia." Appellee Br. 16. In *Gill*, the Court rejected a similar claim of "statewide injury," noting that the holdings in *Baker* and *Reynolds* "were expressly premised on the understanding that the injuries giving rise to those claims were individual and personal in nature." 138 S. Ct. at 1930

[4] A vote dilution injury "arises from the particular composition of the voter's own district, which causes his vote . . . to carry less weight than it would carry in another, hypothetical district." *Gill*, 138 S. Ct. at 1930. Goldman's primary objection to this analysis is not the "hypothetical district"—he too uses an "ideal district" for comparison, see Appellee Br. 8, 16—but rather what population data is relevant. Goldman's calculations are all based on the *2010* Census data, in which his district was allegedly overpopulated and underrepresented. See Appellee Br. 15–16. But using 2010 data makes no sense, as Goldman's entire claim is premised on the idea that his vote carries less weight than it would if Virginia had been reapportioned pursuant to the *2020* Census data. See, *e.g.*, JA 15. Goldman's current district contains fewer people than it would under a purely proportional system, meaning that, as of the 2021 election, he was overrepresented.

(quotation marks omitted). Indeed, the statewide injury advanced by Goldman is precisely the sort of "generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—[that] does not state an Article III case or controversy." *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–74 (1992)).[5]

Second, Goldman has not established standing as a potential candidate for office. The Supreme Court has very recently reiterated that a potential candidate for office must show that he is "able and ready" to pursue public office to establish standing. *Carney v. Adams*, 141 S. Ct. 493, 500 (2020). Although Goldman highlights factual differences between *Carney* and this case, Appellee Br. 18–19, *Carney*'s principle—that a plaintiff allegedly excluded from a competition for government benefits can only establish standing by showing that he was prepared to

[5] At the very least, this Court should remand to the district court for further proceedings on the standing question. See Appellee Br. 5 (contending that the "District Court explicitly did not decide standing and factual development here is required").

compete for that benefit—has a lengthy pedigree. See *Carney*, 141 S. Ct. at 500 (collecting cases). For similar reasons, Goldman's contention that he could not have been "able and ready" to "run in a nonexistent election," Appellee Br. 19, is incorrect: he must allege that he was prepared to compete if the election were to take place. Here, he has only alleged that he "is contemplating" running for a seat in the House of Delegates. JA 15. That allegation falls short of the mark.

CONCLUSION

For the foregoing reasons, we respectfully request that the decision of the district court be reversed with instructions to dismiss.

Respectfully submitted,

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

By: */s/ Kevin M. Gallagher*
Kevin M. Gallagher
Deputy Solicitor General

JASON S. MIYARES
Attorney General

CHARLES H. SLEMP, III
Chief Deputy Attorney General

MONIQUE A. MILES
Deputy Attorney General

JOSHUA N. LIEF
Senior Assistant Attorney General

CAROL L. LEWIS
Assistant Attorney General

ANDREW N. FERGUSON
Solicitor General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-5315 – Telephone
(804) 371-0200 – Facsimile

Counsel for Defendants-Appellants

February 8, 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 2,667 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century typeface.

/s/ Kevin M. Gallagher

Kevin M. Gallagher

CERTIFICATE OF SERVICE

I certify that on February 8, 2022, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. A true copy was also sent, via first class mail and electronically, to:

Paul Goldman
P.O. Box 17033
Richmond, Virginia 23226
Goldmanusa@aol.com
Pro Se Appellee

/s/ Kevin M. Gallagher
Kevin M. Gallagher