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

PAUL GOLDMAN, Plaintiff,	)	
v.	)	Case No. 3:21-cv-420
ROBERT H. BRINK, *et al.*, Defendants.	)	

SURREBUTTAL IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Now comes *pro se* Plaintiff, bringing this motion due to the extraordinary occurrence in Defendants' Reply, to wit: their raising, for the first time, their latest misreading of the plain language of the Constitution of Virginia, put into their Reply when they should have known they were adding an argument which had never appeared in the Plaintiff's Complaint or Response, or any previous document filed by Defendants in this litigation, and moreover, were adding to a document wherein Defendants argue to not allow Plaintiff an Oral Argument, such Argument they know would be his only chance to directly refute this latest red herring.

1. The normal procedure would be, of course, to manage such outrageous conduct at an Oral Argument, pointing out once again the Court having previously called on Defendants' counsel to stop this type of "irresponsible" conduct. JA 078.

2. Plaintiff is not using this Surrebuttal to refute what he has already easily refuted in his Response.

3. However, since Defendants reject an Oral Argument, it then logically flows they waited until after the Plaintiff's Response to raise this new argument.

4. Since Defendants have taken this tact to try and influence the outcome of this case, Plaintiff reads the basic law on surrebuttal to allow him to submit such a rebuttal in the interests of fairness and justice. See *U.S. v. King*, 879 F. 2d 137, 138 (4th Cir. 1989) (while specifically addressing evidence, the basic policy of allowing surrebuttal "to respond to any new matter brought up in rebuttal" would seem to apply, given the posture of the Defendants and as a matter of fairness to the Plaintiff).

5. Procedurally, the Court should not consider Defendants' new argument, described and refuted below, because Defendants failed to raise it in any of their Motions to Dismiss. See *United States v. Smith*, 44 F.3d 1259, 1266 (4th Cir. 1995) (in which the Court stated "we need not consider an argument raised for the first time in a reply brief").

6. To be sure, Judge Henry Hudson has not looked favorably upon new arguments in reply briefs: "This Court will not consider an argument raised for the first time in a reply brief." See *Bland v. Virginia State Univ.*, No. 3:06CV513-HEH, 2007 WL 446122, at *4 n.2 (E.D. Va. Feb. 7, 2007).

7. If, however, the Court allows Defendants extreme procedural latitude on this question, Defendants' new argument should be rejected anyway.

8. Near the end of their Reply, Defendants state "Goldman's theory of the effect of the redistricting order would also require a new election for Virginia's Senate more than eighteen months before the next scheduled election." Def. Rep. P. 17.

9. The lawyers for Defendants can be presumed to know the plain wording of Article II, Section 6 of the Constitution of Virginia.

10. This Section clearly says the "districts delineated in the decennial reapportionment law shall be implement for the November general election for…(state)

Senate...*that is held immediately prior to the expiration of the term* being served in the year that the reappointment law is required to be enacted." Article II, Section 6. (Emphasis added).

11. Due to the failure of the Virginia Redistricting Commission, the reapportionment Order of the Supreme Court of Virginia now serves in effect as the decennial law referenced in paragraph #10, *supra*. Response, P. 16.

12. The State Senate terms at issue began with the convening of the 2020 Session of the General Assembly and will expire immediately prior to the convening of the 2024 Session of the General Assembly.

13. Thus, as Article II, Section 6 makes clear, the new Senate districts are to be implemented for election purposes in the November 2023 general election, as this is the November election to be held "immediately prior to the expiration of the term being served in the year that the reapportionment law is required to be enacted."

14. The new districts take effect immediately as required by Article II, Section 6.

15. Article II, Section 6 further makes clear that while the new Senate districts become effective immediately (under normal circumstances this would be prior to the November 2023 election), those in the old districts can remain representing people in the General Assembly from the old districts not delineated in the new decennial law as long as they meet the requirements laid out in this Section.

16. Thus, the plain reading of the Constitution of Virginia clearly and completely refutes what the Defendants claim in their Reply, as the Constitution of Virginia clearly lays out how the *Reynolds* required reapportionment is managed as regards the Senate of Virginia.

17. This is why *Cosner v. Dalton*, 522 F. Supp. 350 (E. D. Va 1981) (three-judge court) did not apply the 14th Amendment to the State Senate as regards the 1982 election. In

accord: *Meyer v. Grant*, 486 U.S. 414 (1986) and *Bush v. Gore*, 531 U.S. 98 (2000). See Response, P. 19.

18. Article II, Section 6 of the Constitution of Virginia clearly explains the difference between the State Senate and House of Delegates in this key regard.

19. Such a difference does not run afoul of *Reynolds* as long as properly implemented.

20. Article II, Section 6 therefore only promised Virginians a vested right to elect their representative to the House of Delegates in the new districts drawn to the 2020 U.S. Census, such districts to have been contested on November 2, 2021. (In 2031, Virginians are promised elections in new districts for both the House and Senate according to the 2030 U.S. Census).

21. Article II, Section 6 clearly says the "districts delineated in the decennial apportionment law [Supreme Court Order] shall be implemented for the November general election for the…House of Delegates…*held immediately prior to the expiration of the term being served in the year that the reappointment law is required to be enacted.*" (Emphasis added).

22. As Plaintiff has pointed out, and Defendants have not denied, the redistricting plan contemplated by the Constitution, the plan used ever since *Reynolds v. Sims*, 377 U.S. 533 (1964) became law, was not utilized for the first time in Virginia, if not the United States, last November for reasons fully briefed by both parties and thus not germane to this Surrebuttal.

23. As Plaintiff has laid out repeatedly, the federal constitutional rulings of *Reynolds*, *Cosner*, *Meyer,* among other cases cited, support his legal position.

24. The Attorney General's lawyers have had ample time, given the advantages enjoyed by the government as the movant in this Motion to Dismiss (two briefs to the Plaintiff's

one), to refute Plaintiff's position and provide such authorities as they deem appropriate without stooping to the tactics in their Reply, such similar procedural tactics criticized last year. JA 078.

25. The Reply, given to Defendants as a discretionary option, is not intended to be used for such "drive by" tactics. JA 094.

26. In that connect, Defendants' related claim that Ms. Dawn Adams represents Plaintiff is likewise another last-minute offering, but since Plaintiff did make a Motion aimed at getting an answer, Defendants' use of the Reply to provide an answer is fine with Plaintiff. Even though Defendants say Plaintiff is now in the new House District 78, even though the state constitution says Plaintiff is entitled to a representative in that district, and even though *Reynolds* says such representation is protected by the federal constitution, Defendants fail to provide documentation demonstrating how Ms. Adams, never elected to represent the new House District 78, has any legal obligation to do so as matter of federal constitutional law.

27. Plaintiff has limited this surrebuttal to addressing a new matter raised by Defendants on their own, at a timing of their own, as part of a document aimed in significant part at denying Plaintiff an Oral Argument where he would have a chance to expose the constitutional error in what Defendants have told the Court.

Accordingly, given that Defendants, at the last moment, decided to try and influence the outcome of this matter by injecting the new argument above, Plaintiff has, in the interest of justice and fairness, filed this SURREBUTTAL and asks that the Court not consider Defendants' last-minute state senate argument.

Dated: April 26, 2022

Respectfully submitted,

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Pro se

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on April 26, 2022, I filed the foregoing with the Clerk of Court. A true copy was sent, via electronic mail as per prior agreement, to:

Andrew N. Ferguson
Steven G. Popps

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Paul Goldman
Pro se Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRIGINIA
RICHMOND DIVISION

GOLDMAN
Plaintiff(s),

v.

Civil Action Number: 3:21-cv-420

BRINK, ET AL
Defendant(s).

LOCAL RULE 83.1(M) CERTIFICATION

I declare under penalty of perjury that:

No attorney has prepared, or assisted in the preparation of SURREBUTTAL.
(Title of Document)

PAUL GOLDMAN
Name of *Pro Se* Party (Print or Type)

Signature of *Pro Se* Party

Executed on: APRIL 26, 2022 (Date)

OR

The following attorney(s) prepared or assisted me in preparation of _____.
(Title of Document)

(Name of Attorney)

(Address of Attorney)

(Telephone Number of Attorney)
Prepared, or assisted in the preparation of, this document

(Name of *Pro Se* Party (Print or Type)

Signature of *Pro Se* Party

Executed on: _____ (Date)