

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Paul Goldman)
)
 Plaintiff,)
 v.)
)
 Ralph Northam, *et al.*)
)
 Defendants.)

Case No: 3:21-CV-420



RESPONSE TO DEFENDANTS’ MOTION TO DISMISS

Comes now Plaintiff Paul Goldman, *pro se*, in response to Defendants new Motion to Dismiss, such response due by September 29, 2021, wherein Plaintiff addresses Defendant’s contentions, among other things, that ***all the Defendants are immune from suit under the 11th Amendment, and that Ex Parte Young, 209 U.S. 123 (1908) is in accord***, such contentions, with all due respect, seeming at odds with at least 55 years of jurisprudence in Virginia, at least two seminal cases before the United States Supreme Court.

DEFENDANTS CONTINUED SILENCE ON COSNER v. DALTON SPEAKS VOLUMES

1. The term “the Elephant in the Room”, if you had asked my Russian grandfather, came from the famous fable “The Inquisitive Man” by the greatest Russian fabulist, Ivan Andreevich Krylov, about a man who went to a museum, told his friend “I saw everything they have there, and examined it carefully” yet when asked to describe the Elephant at the Museum, couldn’t recall having seen it. “The Inquisitive Man,” 1814.
2. Like the man in the Russian fable, Defendants, the Governor and his appointees to the state’s top election law positions, such positions long responsible for administering the state’s election laws, advised both regularly and in specifically in this instant matter by able counsel from the Office of Attorney General, claim to have been dutifully adhering to their state and federal constitutional duties in this reapportionment year, [not to mention a new state law enacted this year which expects the Attorney General to protect the right of “any voter” whenever the Attorney General has “reasonable cause to believe that a violation of an election law has occurred and that the rights of any voter or group of voters have been affected by such violation.” VA. Code Section 24.2-104.1.]
3. Yet like the man in the fable, they claim not to have seen the case of *Dalton v. Cosner*, 52 F. Supp. 350 (E.D. Va. 1981), decided by this court 40 years ago.
4. Yet like the man in the fable, they claim not to have seen, among many others, cases such as *Libertarian Party of Virginia v. Jude, et al.*, 718 F. 3e 308 (4th Cir.) where the “named defendants are the three members of the Virginia Board of Elections (“collectively the Board”), sued in their official capacities as administrators of the Commonwealth’s election laws.” [The

opinion makes no mention of the 11th Amendment immunity even though, under Defendant's legal theories, it seems to be a jurisdictional matter." See generally, Memorandum of Law in Support of the Motion to Dismiss ("hereinafter "Motion").

5. Indeed, Defendants go further than the famed Russian storyteller, they claim to possess powers greater than America's most acclaimed illusionist Harry Houdini, renowned for his "Vanishing Elephant" illusion more than a century ago.

6. Houdini could not have worked for the state of Virginia it seems, as he knew it would be impossible to make the Elephant in the Room disappear, be it the 5 ton, 8-foot-tall animal he took that night on stage, or a smaller version in a Courtroom.

7. Admittedly, as a matter of legal procedure, Defendants were not obligated to address *Cosner* or any specific argument raised in the Amendment in their Motion, but rather focus only on the area they believed supported their demand that the suit be dismissed. See, e.g., *Republican Party of North Carolina, v. Martin, Governor of North Carolina, et al* (along with the North Carolina Board of Election and its members), 980 F.2d 943 (1992) [political gerrymandering redistricting case]

8. But while the few pages of the *Cosner* decision are far smaller physical size the Elephant in Houdini's trick or Krylov's fable, even the humblest Russian peasant would know it has loomed for 40 years now as the Elephant in the Room over the legal jurisprudence in the instant matter.

9. Moreover, the decision by the three Judge Court in *Cosner* did not merely allow the case against Governor John Dalton and the members of the State Board of Elections to precede, it ruled for Plaintiff's against all those government officials, not merely limiting the terms of House members to be elected in the ordered election in 1982, but did also "direct the state election officials to conduct a new election in 1982" even though, at the time of the election, there had yet to be enacted the new districts to be so contested. *Cosner*, at 364.

10. This was hardly surprising as the *Cosner* court had described defendant as "a number of Virginia officials, including those who have responsibility to conducting the state's elections." *Id* at 353. In accord, see Judd, paragraph # 4 *infra*.

11. As Defendants surely know, Governor Dalton in 1981 had the same powers as Defendant Governor Northam in the instant matter.

12. As Defendants surely know, the members of the Virginia State Board of Elections in 1981 had the same duties as their counterparts here in 2021.

13. As Defendants surely know, the position of Commissioner of Elections did not yet exist.

14. The drafters of the House districts in question in *Cosner* were not the Defendant Governor and his Board of top state election officials.

15. This is because, as *Ex Parte Young*, 209 U.S. 123 (1908), points out, the key legal question turns on *who has the prospective authority to enforce the law*, not on who had the retrospective authority to create the law. "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, and whether it arises out of the general law, or is specially created by the act itself, is not material as long as it exists." *Id* at 157.

16. In 1966, two citizens of Virginia sued the State Board of Elections in the seminal case involving enforcement of the Poll Tax. *Supra*, paragraph 17.
17. *Harper v. Va. State Board of Elections, et al*, 383 U.S. 663, is one of the most storied cases in Virginia history.
18. The Attorney General of Virginia, along with key staffers, were among the lawyers for the Virginia State Board of Elections (hereinafter "SBE"). *Id* at 664.
19. The SBE did not create the Poll Tax. *Id* at 686 fn 1.
20. The SBE had no authority to overturn the Poll Tax. *Id*.
21. The SBE did not collect the tax. *Id*.
22. Yet according to legally theory, as I understand it, undergirding the Defendant's Motion, the Supreme Court erred in not dismissing this suit based on the Eleventh Amendment.
23. The case was argued at the trial level in the Eastern District of Virginia on October 21, 1964. *Id* at 270. (There were two consolidated cases, the second being *Butts v. Harrison, Governor, et al.*).
24. The Attorney General of Virginia appeared for "defendants Virginia State Board of Elections.... (and) Albertis Harrison) in the respective cases. *Id*.
25. At the time, Virginia had a segregationist Governor, and the segregationist Byrd Machine maintained an iron grip, through control of the General Assembly, on the top election officials, the poll tax being among the key laws keeping them in power.
26. Yet despite what Defendant's claim was a knockout legal punch worthy of Rocky Marciano, they never threw it.
27. Fourteen months later, *Harper v. Va. State Board of Elections, et al., infra* was argued before the U.S. Supreme Court. Future Justice Thurgood Marshall, among other famous lawyers, made an appearance, as did the Attorney General of Virginia. Mills Godwin, a top lieutenant in the Democratic segregationist machine still controlling Virginia, now sat in the Governor's chair.
28. Legendary Supreme Court Justice Hugo Black, and several colleagues wrote dissents strongly disagreeing with the majority decisions. *Id* at 671 686.
29. Again, the Poll tax had been among the key voting laws used by the segregationist machine to stay in power.
30. There is no mention of the Eleventh Amendment in either the majority opinion or the dissenting opinions.
31. A few years the Supreme Court of the United State decided the seminal Virginia redistricting case, *Mahan Secretary, State Board of Elections, et. al, v. Howell, et al* 410 U.S. 315 (1973).
32. The legendary Henry Howell, who helped topple the Byrd segregationist with legal suits against state officials, sued Ms. Mahan, famed for her iron-fisted rule over the State Board of Elections, claiming the 1971 reapportionment law violated *Reynolds v. Simms*, 377 U.S. 533 (1964) by condoning among other things unconstitutional population deviations among the newly created district lines.

33. Attorney General Andrew Miller, who would a few years later face off against Howell in perhaps the most famous Democratic gubernatorial primary in modern times, defended Ms. Mahan, along with a future Attorney General.
34. The trial court had issued its opinion on July 2, 1971. See *Howell v. Mahan*, 330 F. Supp. 1138 (Dist. Ct., ED Virginia 1971).
35. A few weeks before, on June 16, 1971, the trial court had entered an Interlocutory Order. *Id.*, at 1150.
36. The Court said that “such of the defendants herein, and their successors in office, as are charged by law with the conduct of said elections, as well as the agents, employees and attorneys therefore, and each of them is hereby, enjoined and restrained from conducting...” *Id.* at 1150 point # 3.
37. “That the Governor and Attorney General of Virginia be...dropped as parties.” *Id.* at point # 4 (the Court gives no reason).
38. Thus, roughly 18 months after the trial court decision, the matter received resolution by the Supreme Court of the United States. *Mahan v. Howell, infra*, at 316.
39. In justifying its decision, the opinion cited several redistricting cases, including *Whitcomb, Governor of Indiana, v. Chavis*, 403 U.S. 124 (1971) and *Wells v. Rockefeller, Governor of New York, et al.*, 394 U.S. 542 (1969).
40. A companion opinion, concurring in part and dissenting in part, cited among others the seminal redistricting case of *Wesberry, et al. v. Sanders, Governor of Georgia, et al.*, 376 U.S. 1. *Mahan*, at 341.
41. There is no mention in *Mahan*, at any level, as regards her or any other member of the SBE being immune to suit under the Eleventh Amendment.
42. Ms. Mahan had no authority to draft the districts at issue in that reapportionment case.
43. Ms. Mahan had no authority to adjust any of the district lines that might ultimately be required by the litigation.
44. Then, in 1981, came the Elephant in the Room. Paragraph # 3, *infra*.
45. Once again, legal challenges were filed against the new apportionment plan passed by the General Assembly of Virginia as required by Article II, Section 6 of the Virginia Constitution, and furthermore required to be in accordance with the applicable federal jurisprudence on the matter.
46. Unlike in 1966 and 1981, any number of individuals and state localities, most with legal representation but a few *pro se*, were Plaintiffs.
47. As indicated previously, the Court said the “defendants are a number of Virginia officials, including those who have responsibility for **conducting** the state elections.” (emphasis added). Paragraph # 10, *infra*.
48. There is no mention of the Eleventh Amendment in the opinion.
49. Unlike *Mahan*, the Governor was not dropped as a Defendant.
50. The Court said the “deviations in the August 11 Act (the reapportionment law passed by the General Assembly creating the new House of Delegates districts to be contested in the upcoming November 3, 1981, general election) range from 22.13% to 27.72%.... Even accepting

the figures most favorable to the State... [the [Supreme Court has not held a reapportionment statute with a deviation of this magnitude to be constitutional.” *Cosner*, at 158.

51. There is no need to rehash the Court’s analysis as to the appropriate relief, as it has been extensively discussed in the Amended Complaint. See, e.g., the Summary.

52. Suffice to say, as indicated above, that the Court ordered the State Election Officer Defendants to do their job and conduct a new election in 1982 under a new constitutional plan THAT HAD NOT YET BEEN ENACTED, but the Court said the General Assembly had time to enact a new constitutionally acceptable plan: if the General Assembly failed to do as the Court commanded, the Court would draft its own reapportionment plan. *Cosner*, *infra*, at 363-364.

53. Neither the primary nor the general election slated to be contested under the constitutional plan had yet taken place. *Id* at 363.

54. But the Court said that allowing elections process to “proceed” under the old districts created pursuant to a now outdated census would “effect great harm to plaintiff’s constitutional rights under the “one person, one vote” principle. *Id*.

55. Thus, as in the Russian fable, updated for Virginia lawyers, Defendants have gone into the library of all things electorally legal, claimed to have studied everything, yet when required to write their Motion, they apparently could not recall having seen Harper, *infra*, Mahan, *infra*, *Cosner*, *infra*, Judd, *infra*.

56. The same for *Republican Party of Virginia v. Wilder*, in his official capacity as Governor of the Commonwealth, and Michael Brown, in his official capacity as Executive Secretary to the State Board of Elections, 774 F. Supp 400 (W.D. Va 1991), where in the VA GOP had filed suit charging the recently enacted 1991 reapportionment law unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution, along with Article II, Section 6 of the State Constitution.

57. In *Republican Party of Virginia v. Wilder*, the Plaintiffs sought an injunction. Amended Complaint, paragraphs #104107.

58. The Court opinion discussed *Cosner* and used the rationale therein in part to justify its decision. *Id* 407.

59. Not long ago, the U. S. Supreme Court heard yet another redistricting case from Virginia, entitled *Golden Bethune-Hill, et al. v. Virginia State Board of Elections*, 137 U.S. 788 (2017), which apparently according to the Motion should never have been permitted.

60. In deciding the Bethune Hill case, the opinion cited *Shaw, et al. v. Hunt, Governor of North Carolina, et al* 517 U.S. 899 (1996) [Shaw II], the case having originated in the 4th Circuit. Likewise, the opinion referenced *Bush, Governor of Texas et al. v. Vera*, 517 U.S. 952 (1996) a Texas case involving litigation over unconstitutional legislative districts.

61. In none of these cases is a discussion of the Eleventh Amendment found.

62. Indeed, in the Conclusion to Defendant’s Motion, it is telling that Defendants only raise their Eleventh Amendment argument as to Count II.

63. Defendants do not raise it in reference for a reason to dismiss Count I.

64. Instead, Defendants conclude by saying “Plaintiff asks the Court to require the Defendants to set a general election in November 22, though Defendants have no authority

under the Virginia Constitution or Virginia Code to set such an election.” Motion to Dismiss, page 10.

65. With all due respect, the Defendants are at best playing semantical games.

66. A federal Court, as did *Cosner*, has the power, as the Plaintiff’s requested to “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.” Amended Complaint, Relief Requested (E).

67. Surely Defendants are not suggesting the Court should conduct the election itself.

68. While repetitious perhaps, it is useful to restate again precisely what was said in the *Cosner* opinion on the matter of relief, to wit: **“Because Virginia citizens are entitled to vote as soon as possible for their representatives under a constitutional apportionment plan, we will limit the terms of members of the House of Delegates elected in 1981 to one year. We also will direct the state election officials to conduct a new election in 1982 for the House of Delegates under the General Assembly’s new plan or our own. That election shall be held the same day as the November general election.”** *Cosner*, at 364. (Emphasis added).

69. Surely Defendants are not claiming the *Cosner* Court exceeded its authority, and that this has never been mentioned in all the intervening years especially by cases in this 4th Circuit citing *Cosner* with favor. See cases cited in Plaintiff’s Motion for an Expedited Hearing, paragraphs # 13 and # 14. [Motion denied].

70. Plaintiff fails to see how the words in his Amended Complaint cited by Defendants in paragraph # 66 *infra*, meaningfully if at all differ from the language in *Cosner*.

71. In the Conclusion to their Motion as regards Count I, Defendants further say “Plaintiff further asks this court to require Defendants to set such an election when district plans have not yet been established to govern the November 2022 elections and Defendants have no authority to establish such plans.” Motion, page 10

72. If Defendants had been willing to see the Elephant in the Room, they would know that the language used by Plaintiff is PRECISELY what the Court ordered in *Cosner*. See *Cosner*, *infra*.

73. *Cosner* was decided on August 25th.

74. The Court allowed the process of conducting the 1981 House of Delegates election in a reapportionment under unconstitutional districts to precede to its conclusion on November 3, 1981, saying there was no reason to believe a new constitutional reapportionment plan as required by the Constitution of Virginia and the 14th Amendment to the U.S. Constitution could be in place by the day of said election. *Id.*, at 363.

75. Once again, in *Cosner*, the state election officials ordered to make sure the election took place HAD NO AUTHORITY TO ESTABLISH SUCH A PLAN.

76. But they did have the responsibility, as did the Virginia Board of Elections, operating through its members from the poll tax case, the seminal *Mahan* case, the *Cosner* case, which is directly applicable here, the *Wilder* case, et al., to take care to make certain state elections are conducted lawfully and constitutionally without violation of the rights of voters.

77. Accordingly, in this instant matter, with the November election approaching, these similar if not in many respects, the precise same constitutional concerns are being raised by Plaintiff *pro se*, admittedly alone unlike *Cosner*, the primaries had already been held without a court order and those responsible for ensuring the integrity of the state election process showing no interest in seeking such order. [Plaintiff filed this case back in June. Defendants' response has been to file two Motions To Dismiss, oppose Plaintiff's Motion for an Expediated hearing for the reasons submitted therein, and to reject Plaintiff's request to mediate the matter, as despite such mediation being encouraged by Local Rule 83.6].

78. Plaintiff reads *Cosner* has standing for the proposition that the Constitution of Virginia does not give state officials the unvarnished discretion to conduct an election they know or have reason to know would violate the constitutional rights of plaintiff among other groups, especially when there is an outstanding decision in this Circuit on point, and thus the government is conducting an election without being able to tell voters whether they are exercising their franchise to elect member to the House of Delegates for a one-year term, or a two-year term.

79. Plaintiff believes this must be the policy reason state law gives the Governor and the Chair of the Virginia State Board of Elections, among others, the right to put this question in writing to the Attorney General of Virginia and require him to provide a written reply. [That is, the law says "shall" provide an answer]. VA. Code Section 2.2-505(A).

80. As the Amended Complaint points out, these individuals failed to seek his advice, at least formally as required. Paragraph # 15.

81. Plaintiff believes that the logical extension of *Cosner's* saying citizens at the right for a constitutionally apportioned General Assembly as soon as possible, it logically follows these same voting rights included that prior to the election if not prior to voting, citizens have the right know whether they are electing members to the House of Delegates for one-year term, or a two-year term. *Cosner*, at 363-364.

82. Outside of the delay in the delivery of the census data, there is no practical difference between *Cosner* and the instant matter as to the constitutional rights and remedies at issue.

83. In both cases, the upcoming November elections are being held under an unconstitutional map.

84. In *Cosner*, at least the unconstitutional maps were crafted pursuant to the current census.

85. Here, the election is being held pursuant to legislative districts created in accordance with the old, outdated 2011 census. Amended Complaint, paragraphs # 68-74.

86. As the Amended Complaint shows, the population deviations caused by using old legislative districts in a growing state like Virginia grossly exceeded the deviations approved by the Supreme Court. Amended Complaint, paragraphs # 36-45.

87. Defendants close their Motion by saying "this Court lacks subject matter jurisdiction, given that the relief requested by Plaintiff to have this federal court enforce a state law clearly violates both the Eleventh Amendment to the Constitution of the United States and is not permissible under the *Ex Parte (sic) Young* exception."

88. As to the waiver of sovereign immunity in the limited, once every ten-year reapportionment, assuming *arguendo* this is an issue in the instant matter, Plaintiff has laid out his reason for believing the new language added by the voters to the Constitution of Virginia should be read as authorizing this limited waiver. Amended Complaint, paragraphs 112-114.

89. Under the newly enacted state constitutional provisions, for instance, the Supreme Court of Virginia is given legislative power to draft legislative districts if the Virginia Redistricting Commission and the General Assembly are stalemated. Article II, Section 6-A.

90. Unlike every other situation in Virginia history where the Supreme Court may have been required to draft a plan, this time it will come *not* to the Court in a legal case or controversy.

91. Let us assume, *arguendo*, the Supreme Court of Virginia must craft the legislative districts.

92. Who, then, is a citizen to sue, since it is not possible to sue the Supreme Court of Virginia?

93. Logically therefore, this would seem to require a suit in federal court.

94. However, under Defendant's view of the law, the federal court would not have jurisdiction.

95. Assume, *arguendo*, there is no federal violation in this hypothetical redistricting case but only one of state law.

96. Under defendants' theory, Virginia citizens would seemingly have no judicial remedy.

97. Additionally the new language added to Constitution is intended to require state officials to adhere to federal case law in an apportionment year as regards interpreting federal statutes and federal constitutional provisions now made part of the Constitution of Virginia.

98. Plaintiff reads the public support of the new constitutional language as evidencing a public intention to make certain Virginia adheres to case law that might otherwise be applicable in a reapportionment year.

99. Since such reapportionment occurs only one every ten years, Plaintiff believes it is most reasonable to assume the public, in such limited circumstance as to the decennial reapportionment, would not state officials be able to use sovereign immunity to avoid being held accountable for violation to said public's equal protection rights.

100. Defendants misread the law as to the power of a federal court to demand that state officers abide by the Constitution of the United States.

101. Defendants claim that "(p)laintiff alleges that the failure to ultra vires establish district plans and set a new election is a violation of the Virginia Constitution on the part of the State Elections Officers Defendants." Motion, page 10.

102. With all due respect, Plaintiff has alleged no such thing.

103. Plaintiff, as in *Cosner*, has merely said that his constitutional rights have been violated due to the fact the state is in the process of conducting the upcoming November 2021 general election to the House of Delegates pursuant to unconstitutional legislative district.

104. Plaintiff has not asked Defendants to do anything but their legal and constitutional duties.

105. As in *Cosner*, Plaintiff has asked the court to order Defendants to see that an election in 2022 under a constitutional plan is conducted by the very state officials who the federal judiciary has been rightfully holding responsible for the administering state election laws since at least 1966. Harper, *infra*.

106. As in *Cosner*, Plaintiff had no need to sue those state actors creating the districts since the gravamen of his Amended Complaint is to have the constitutional rights of the citizenry restored as soon as possible to allow voters to elect their representatives to a constitutionally reapportioned House of Delegates. See e.g., *Cosner*, *infra*.

107. In addition, Defendant not merely misreads *Ex Parte Young*, but concedes a major part of Plaintiff's legal argument. See paragraph # 108 *supra*.

108. Defendants say, "the legal fiction of the *Ex Parte Young* doctrine **allows suit for injunctive or declaration relief against individual officers or officials of a state or local government**, not against a state or state agencies." (Emphasis added). Motion, Page 6fn1. *Lighthouse Fellowship Church v. Northam* [footnotes omitted].

109. What Defendants call fiction is far different than being an illusionist trying to make *Cosner* disappear.

110. If the federal judiciary could not hold state election officials accountable for violating the state constitution, then Plaintiff submits this would be a fatal legal blow to federalism.

111. But a philosophical discussion aside, it would seem Defendants have admitted that the three members of the State Board of Election, its top officials, are indeed proper plaintiffs in the instant, the Commissioner too, irrespective over Defendant Governor.

112. As indicated in paragraphs *supra*, Plaintiff has properly chosen such Defendants as discussed by the Motion since they are the ones administering the conduct of state elections. See e.g., *Cosner*, *infra*, Libertarian Party *infra*.

113. Under Defendants' theory of *Ex parte Young*, state officials have unbridled discretion to violate the federal constitution without being held accountable before the federal judiciary in a system based on federalism.

114. As to the doctrine of sovereign immunity relied upon by Defendants in their Motion, they fail to cite *Suarez Corp. Industries v McGraw*, 125 F. 3d 222 (4th Cir. 1997).

115. "We believe that, because of its jurisdictional nature, a court ought to consider the issue of Eleventh Amendment immunity at any tie, even *sua sponte*." *Id* at 227.

116. Plaintiff reads Defendant's Motion as in accord with this suggestion in *Suarez*.

117. Accordingly, Defendants would seem to be suggesting, in effect, that the Supreme Court had no jurisdiction in the poll tax case, in Mahan, *infra*, *Cosner v Dalton*, *infra*, *Cosner v. Robb*, 541 F. Supp. 613 (E.D. Va. 982) (Mr. Robb had been elected to succeed and was sued along with members of the Va Board of Elections), *Republican Party of Virginia*, *Bethune-Hill*, Libertarian Party, *infra*.

118. With all due respect, therefore even the great Houdini, who could escape the inescapable, knew better than to believe he could escape reality and make the Elephant in the Room disappear.

DEFENDANTS CONFUSE THE CRAFTING OF LEGISLATIVE DISTRICTS WITH CONDUCTING AN ELECTION PURUSANT TO THESE DISTRICTS

119. With all due respect, the Amended Complaint does not suggest that Defendants were responsible for crafting the new House of Delegates legislative districts required to be created by the Constitution of Virginia in a reapportionment year pursuant to the guidelines in Article II, Section 6 along with the strictures in redistricting demanded by federal courts of those so drafting these maps in Virginia, nor responsible in the future for such activities.

120. Indeed, the gravamen of Plaintiff's request for the Court to cure the damage being done to his equal protection rights under the 14th Amendment of the United States in Count I along with said rights under the Constitution of Virginia, is to have a constitutionally elected General Assembly convened as soon as possible, this requiring an election in 2022 in terms of being as soon as possible as stated in *Cosner*, *infra*. Amended Complaint, paragraphs 118-120.

121. Plaintiff made plain the Virginia Redistricting Commission had the first crack at drawing the new legislative district lines in Constitution with Article II, Section 6 A of the Constitution of Virginia.

122. The Supreme Court found Ms. Mahan a proper party in *Mahan* even though she played no role in drawing electoral maps.

123. *Cosner* likewise did not order Governor Dalton to draft new redistricting maps nor did it order the state officials to draw new districting either, but merely to conduct the election in their role of administrators of state elections. Paragraph # 8, *infra*.

124. Indeed, Plaintiff's discussion as to why Governor Northam is a proper related, to among other things, the role played by the Governor's office in drafting the 2011 reapportionment law being used for the upcoming November elections, an unprecedented situation in the history of the state. Amended Complaint, paragraphs # 68-74.

125. As *Cosner* makes clear, a Plaintiff can ask a federal court to set a new election in 2022 before the required legislative districts for that election have been created.

126. Contrary to the previous Motion to Dismiss, Defendants did not challenge Plaintiff's facts as to his having the requisite standing. Amended Complaint.

127. Contrary to the previous Motion to Dismiss, Defendants did not challenge Plaintiff's facts as to his having the requisite injury.

128. Contrary to the previous Motion to Dismiss, Defendants did not claim it lacked sufficient data from the U.S. Census Bureau to determine whether a case or controversy existed in the instant matter.

129. Instead, in the current Motion, Defendants simply take the position *all* the defendants are immune from suit, a position seeming in defiance of 55 years of legal precedent.

PLAINTIFF'S STATEMENT OF FACTS

130. Where accurate, the Defendant's statement of facts is incorporated herein as discussed in paragraph's # 165-179, *supra*.

131. Prior to 2021, upon information and belief, Defendants were aware 2021 would be a reapportionment year.
132. Prior to 2021, upon information and belief, Defendants were aware of the changes made to the Constitution of Virginia by the voters last year.
133. Prior to 2021, upon information and belief, Defendants were aware that these changes required the redistricting process to abide by judicial decisions interpreting the Equal Protection Clause of the 14th Amendment to the Constitution of the United States.
134. Prior to 2021, upon information and belief, Defendants were aware that in 1981, 1982 and 1983, the decision in *Cosner v. Dalton*, *infra*, required general elections for the House of Delegates in all three years.
135. Prior to 2021, upon information and belief, Defendants were aware the reason this occurred had been due to the failure of those in charge of the redistricting process had failed to produce a constitutionally valid reapportionment plan in time for the upcoming primary and general elections.
136. Prior to 2021, upon information and belief, Defendants and/or their legal advisors were aware of *Harper v. Va State Board of Elections*, *infra*.
137. Prior to 2021, upon information and belief, Defendants and/or their legal advisors were aware of *Mahan v. Howell*.
138. Prior to 2021, upon information and belief, Defendants and/or their legal advisors were aware that there were several cases in this 4th Circuit favorable mentioning the rationale of the decision in *Cosner*.
139. Prior to 2021, upon information and belief, Defendants and/or their legal advisors were aware that at since at least since the *Harper v. Va State Board of Elections*, such Board, through its members have been those responsible for conducting state elections by the federal courts.
140. Prior to 2021, so far as Plaintiff can determine, no Attorney General, no Governor, and no Virginia State Board of Elections has ever suggested that the state has the power to hold an election in a reapportionment year under the existing, out of date districts without a court order.
141. Prior to 2021, the State of Virginia has never held an election for the House of Delegates using the old districts in a reapportionment year for the reasons stated in *Cosner*, at 363.
142. Prior to 2021, so far as Plaintiff can determine, no federal court has ever suggested holding such an election would be constitutional, indeed *Cosner* specifically pointed out that holding such an election would violate the one person one vote standard in a growing state like Virginia. *Id.*
143. Prior to 2021, upon information and belief, Defendants and their lawyers were aware that the U.S. Census Bureau data normally provided to Virginia to produce new redistricting maps in time for the November 2, 2021, election for the House of Delegates would be delayed likely well into 2021. See Amended Complaint, website cited in paragraph # 82.
144. The Virginia Redistricting Commission admitted they were likely to fail to meet their constitutional duty to provide new House of Delegate districts in time for the November election. *Id.*

145. The Virginia Redistricting Commission conceded this violated the plain wording of Article II, Section 6 of the Constitution of Virginia. *Id.*

146. At all times, the Code of Virginia provided a mechanism for the Governor and the members of the Virginia Board of Elections to seek a formal written of the Attorney General as to how such a failure might impact their duties to conduct elections as established by the very court decisions now enshrined in the Constitution of Virginia. Amended Complaint, paragraph # 13.

147. None of these Defendants took advantage of this provision, which would require the Attorney General of Virginia to formally provide such advice. Amended Complaint, paragraph # 14.

148. The state of Virginia, operating through the appropriate officials did not seek to authorize holding a statewide primary election under unconstitutional districts even though *Cosner*, the only case to consider such a circumstance, authorized the holding of such an election prior to the primary and seemingly says this may be required.

149. On August 3, 2021, Defendants filed their first Motion to Dismiss in the instant matter.

150. Defendants claimed the Plaintiff lacked standing.

151. In their second such Motion, the Defendants do not claim Plaintiff lacks standing, as his standing is self-evident based on the Amended Complaint, paragraph's # 36-45, 55-60, Exhibit 1.

152. In their first Motion to Dismiss, Defendants claimed they lacked the data to determine if the unconstitutionality claimed by Plaintiff did indeed exist.

153. In their second such Motion, Defendants do not claim they lack the census data to make such a judgment.

154. Since the 1966 litigation in the poll tax case, through the cases cited herein, Plaintiff is unaware of any Defendant Governor, any Defendant Virginia Board of Elections, any Defendant State Election Office, upon opinion and belief, no such Defendant has ever suggested who, other themselves, might be the responsible governmental official to ensure the constitutionality and integrity of any such general election as is upcoming the November 3, 2021.

155. Defendants do not deny that the upcoming general election for the House of Delegates must satisfy the same basic constitutional requirement as found in *Cosner v. Dalton*.

156. Defendants do not deny the wildly excessive unconstitutional population deviations between the House of Delegate seats being contested this November as discussed in the Amended Complaint. See paragraph # 151, *infra*.

157. Earlier this month, adhering to Local Rule 83.6, Plaintiff tried to invoke the mediation offered by the rule and encouraged therein.

158. Defendants rejected such a discussion.

159. Defendants have had access to the U.S. Census Bureau data they deemed so important to this matter for over a month. See Amended Complaint, since at least August 26th and likely sooner. Plaintiff's Motion for an Expedited Hearing, paragraph # 17.

160. Therefore, it is one month since Defendants have had the data demonstrating, beyond any doubt, that they are conducting an unconstitutional election, without any court approval, under the prevailing constitutional case law as to the permissible population deviations.

161. Indeed, Defendants have now known, for at least over a month, that the districts now being contested violate state law as to permissible population deviations between the 100 House of Delegate seats to be contested this November. Va. Code § 24.-2 304.04(1).

162. As in *Cosner*, a Court order “direct(ing) the state election officials (the same named Defendants in the instant matter) to conduct a new election” in 2022 for the House of Delegates “under a...new (reapportionment) act, or our own...(on) the same days as the (2022) general election)” will achieve the basic goals of the Plaintiff’s lawsuit, although as Plaintiff says in his Amended Complaint, he also believes the Court can grant and he can ask, for “such other relief” as may be deemed necessary in the instant matter.

163. Defendants do not deny Plaintiff’s assertion that the Virginia State Board of Elections (hereinafter, “State Board”) is tasked by state law 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.” Va. Code § 24.2 103(A).

164. Defendants do not deny that 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.

165. As the *Cosner* court found and so ruled, the relief requested by Plaintiff, as regards restoring his state and federal constitutional rights now being violated, will do such restoration and protection, as it did for similarly situated Plaintiffs 40 years ago, since now, as then, Defendants are the proper parties for a citizen to sue in federal court in this instant matter.

RESPONSE TO DEFENDANTS’ STATEMENT OF FACTS

166. As to Defendants Statement of Facts (hereinafter “Defendant Fact”) # 1, Plaintiff agrees those are the Defendants in the instant matter.

167. As to Defendant Fact # 2, Plaintiff agrees there is an Article V, Section 7 containing the general description of certain duties of the Governor as provided by Defendants but to the extent Defendants are claiming that the Governor has no whatever role in the conduct of the elections at issue as discussed in *Cosner* and other cases cited herein, then the Plaintiff disagrees.

168. As to Defendants’ Fact # 3, Plaintiff confesses to be baffled by this alleged Fact since Plaintiff **is not asking the Governor to establish any “district plans or to set a general election” as Defendants surely are aware.** See, e.g. *Cosner v. Dalton*, whereas in the instant matter, (the Defendant Governor John Dalton) wasn’t asked to draft any district, nor was he so ordered, the Court saying the required districts would be created soon enough, either by the General Assembly or the Court itself, not Defendants. Thus, Plaintiff disputes Fact # 3 as it is unclear as regards precisely what Defendants are claiming.

169. As to Defendant Fact # 4, Plaintiff agrees that among the duties required and expected of the Defendants named in Fact # 4 are such duties but to the extent Defendants are claiming that these are the only duties for the Defendants named herein and that said Defendants have no role in the conduct of the elections at issue as discussed in *Cosner* along with the other cases cited herein, then Plaintiff disagrees.

170. As to Defendant Fact # 5, Plaintiff confesses to be baffled by this alleged Fact since Plaintiff is not asking the “the SBE or its members” to establish any “district plans or to set a general election” as Defendants surely are aware. See, e.g. discussion in paragraph # 167 *infra*. Thus, Plaintiff disputes Fact # 5 as it is unclear what precisely Defendants are claiming as regards this Fact.

171. As to Defendant Fact # 6, Plaintiff agrees this a phrase contained in the Va. Code Section cited by Defendants in their Fact # 6.

172. As to Defendant Fact # 7, Plaintiff agrees among the duties expected of the Virginia Department of Elections (ELECT) are those cited in Defendant Fact # 7, but to the extent Defendants are claiming that these are the only duties for ELECT and that ELECT has no role in the conduct of the elections at issue as discussed in *Cosner* along with the other cases cited herein, then Plaintiff disagrees.

173. As to Defendant Fact # 8, Plaintiff agrees that among the duties cited therein are duties expected to be carried out by ELECT, but to the extent Defendants are claiming these are the only duties expected of ELECT and that ELECT has no role in the conduct of the elections at issue as discussed in *Cosner* along with the other cases cited herein, then Plaintiff disagrees.

174. As to Defendant Fact # 9, Plaintiff confesses to be baffled by this alleged Fact since Plaintiff is not asking Defendant Piper or ELECT to establish any establish any “district plans or to set a general election” as Defendants surely are aware. See, e.g. paragraph # 167 above. Thus, Plaintiff disputes Fact # 9 as it is unclear what precisely Defendants are claiming as regards to this Fact.

175. As to Defendant Fact # 10, Plaintiff confesses to be baffled by this alleged Fact since again, Defendant seems unaware of *Harper*, *Mahan*, *Cosner*, *Republican Party of Virginia*, and other cases cited herein, all cases arising under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, all cases where in sitting Governor and/or, the VA State Board of Elections and/or members of the SBE were named Defendants, all such cases finding at least one or more to be proper parties and in all such cases the fact that Defendants had no authority to craft legislative districts or schedule an election were deemed irrelevant to the constitutional issues at hand.

176. As to Defendant Fact # 11, starting with *Harper*, *infra*, and such other cases cited above that it isn't the “Plaintiff assert(ing) that Defendants are proper parties” but the Plaintiff is relying on over 50 years of federal court jurisprudence in Virginia for that proposition.

177. As to Defendant Fact # 12, Plaintiff doesn't understand what Defendant is trying to say and thus object to Fact # 12 since Plaintiff has never said Defendants were responsible for drafting the reapportionment plan, but as in *Cosner*, the failure to adopt the required constitutional plan led the Court to order the same State Election Officials (different individuals

of course and there was no Commissioner back in 1981) to do precisely what Plaintiff seeks in this matter: to have his constitutional rights restored as soon as possible, the same result as in *Cosner*, this requiring new elections in 2022 under a constitutionally sound reapportionment plan for the House of Delegates. *Cosner*, at 363.

178. As to Defendant Fact # 13, Plaintiff confesses to be baffled on this matter and thus again must object to Fact # 13 *since the foundational basis of any redistricting lawsuit is that the government has failed in its constitutional obligation to produce the constitutionally required redistricting plan*, therefore of course the plan referenced by Defendants does not exist and furthermore, on the Plaintiff is not asking the Defendants to “establish such a redistricting plan.”

179. As to Defendant Fact # 14, Plaintiff agrees that he has asked the Court for an appropriate remedy, the remedy ordered by *Cosner* deemed so appropriate in 1981, but this is not all Plaintiff has requested, as the Amended Complaint clearly also asks the Court to consider such other remedies as it would deem appropriate based on the facts and law in the instant matter forty years later. Amended Complaint, Remedy (F).

WHEREFORE, Plaintiff respectfully asks that Defendants’ Motion to Dismiss be denied.

Respectfully submitted,

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

Paul Goldman

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Richmond, Virginia 23226
804 833 6313
Goldmanusa@aol.com
Pro se

Certificate of service:

THIS IS TO CERTIFY that on September 29, 2021, I filed this Response to Defendants' Motion to Dismiss with the Clerk of the Court. A true copy of this response 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

Signed,



Paul Goldman
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Pro se

PLAINTIFF'S SWORN STATEMENT OF FACTS

1. Where accurate, the Defendant's statement of facts is incorporated herein as discussed in paragraph's # 165-179, *supra*.
2. Prior to 2021, upon information and belief, Defendants were aware 2021 would be a reapportionment year.
3. Prior to 2021, upon information and belief, Defendants were aware of the changes made to the Constitution of Virginia by the voters last year.
4. Prior to 2021, upon information and belief, Defendants were aware that these changes required the redistricting process to abide by judicial decisions interpreting the Equal Protection Clause of the 14th Amendment to the Constitution of the United States.
5. Prior to 2021, upon information and belief, Defendants were aware that in 1981, 1982 and 1983, the decision in *Cosner v. Dalton*, *infra*, required general elections for the House of Delegates in all three years.
6. Prior to 2021, upon information and belief, Defendants were aware the reason this occurred had been due to the failure of those in charge of the redistricting process had failed to produce a constitutionally valid reapportionment plan in time for the upcoming primary and general elections.
7. Prior to 2021, upon information and belief, Defendants and/or their legal advisors were aware of *Harper v. Va State Board of Elections*, *infra*.
8. Prior to 2021, upon information and belief, Defendants and/or their legal advisors were aware of *Mahan v. Howell*.
9. Prior to 2021, upon information and belief, Defendants and/or their legal advisors were aware that there were several cases in this 4th Circuit favorable mentioning the rationale of the decision in *Cosner*.
10. Prior to 2021, upon information and belief, Defendants and/or their legal advisors were aware that at since at least since the *Harper v. Va State Board of Elections*, such Board, through its members have been those responsible for conducting state elections by the federal courts.
11. Prior to 2021, so far as Plaintiff can determine, no Attorney General, no Governor, and no Virginia State Board of Elections has ever suggested that the state has the power to hold an election in a reappointment year under the existing, out of date districts without a court order.
12. Prior to 2021, the State of Virginia has never held an election for the House of Delegates using the old districts in a reapportionment year for the reasons stated in *Cosner*, at 363.
13. Prior to 2021, so far as Plaintiff can determine, no federal court has ever suggested holding such an election would be constitutional, indeed *Cosner* specifically pointed out that holding such an election would violate the one person one vote standard in a growing state like Virginia. *Id*.
14. Prior to 2021, upon information and belief, Defendants and their lawyers were aware that the U.S. Census Bureau data normally provided to Virginia to produce new redistricting maps in time for the November 2, 2021, election for the House of Delegates would be delayed likely well into 2021. See Amended Complaint, website cited in paragraph # 82.

15. The Virginia Redistricting Commission admitted they were likely to fail to meet their constitutional duty to provide new House of Delegate districts in time for the November election. *Id.*
16. The Virginia Redistricting Commission conceded this violated the plain wording of Article II, Section 6 of the Constitution of Virginia. *Id.*
17. At all times, the Code of Virginia provided a mechanism for the Governor and the members of the Virginia Board of Elections to seek a formal written of the Attorney General as to how such a failure might impact their duties to conduct elections as established by the very court decisions now enshrined in the Constitution of Virginia. Amended Complaint, paragraph # 13.
18. None of these Defendants took advantage of this provision, which would require the Attorney General of Virginia to formally provide such advice. Amended Complaint, paragraph # 14.
19. The state of Virginia, operating through the appropriate officials did not seek to authorize holding a statewide primary election under unconstitutional districts even though *Cosner*, the only case to consider such a circumstance, authorized the holding of such an election prior to the primary and seemingly says this may be required.
20. On August 3, 2021, Defendants filed their first Motion to Dismiss in the instant matter.
21. Defendants claimed the Plaintiff lacked standing.
22. In their second such Motion, the Defendants do not claim Plaintiff lacks standing, as his standing is self-evident based on the Amended Complaint, paragraph's # 36-45, 55-60, Exhibit 1.
23. In their first Motion to Dismiss, Defendants claimed they lacked the data to determine if the unconstitutionality claimed by Plaintiff did indeed exist.
24. In their second such Motion, Defendants do not claim they lack the census data to make such a judgment.
25. Since the 1966 litigation in the poll tax case, through the cases cited herein, Plaintiff is unaware of any Defendant Governor, any Defendant Virginia Board of Elections, any Defendant State Election Office, upon opinion and belief, no such Defendant has ever suggested who, other themselves, might be the responsible governmental official to ensure the constitutionality and integrity of any such general election as is upcoming the November 3, 2021.
26. Defendants do not deny that the upcoming general election for the House of Delegates must satisfy the same basic constitutional requirement as found in *Cosner v. Dalton*.
27. Defendants do not deny the wildly excessive unconstitutional population deviations between the House of Delegate seats being contested this November as discussed in the Amended Complaint. See paragraph # 151, *infra*.
28. Earlier this month, adhering to Local Rule 83.6, Plaintiff tried to invoke the mediation offered by the rule and encouraged therein.
29. Defendants rejected such a discussion.

30. Defendants have had access to the U.S. Census Bureau data they deemed so important to this matter for over a month. See Amended Complaint, since at least August 26th and likely sooner. Plaintiff's Motion for an Expedited Hearing, paragraph # 17.

31. Therefore, it is one month since Defendants have had the data demonstrating, beyond any doubt, that they are conducting an unconstitutional election, without any court approval, under the prevailing constitutional case law as to the permissible population deviations.

32. Indeed, Defendants have now known, for at least over a month, that the districts now being contested violate state law as to permissible population deviations between the 100 House of Delegate seats to be contested this November. Va. Code § 24.-2 304.04(1).

33. As in *Cosner*, a Court order "direct(ing) the state election officials (the same named Defendants in the instant matter) to conduct a new election" in 2022 for the House of Delegates "under a...new (reapportionment) act, or our own...(on) the same days as the (2022) general election)" will achieve the basic goals of the Plaintiff's lawsuit, although as Plaintiff says in his Amended Complaint, he also believes the Court can grant and he can ask, for "such other relief" as may be deemed necessary in the instant matter.

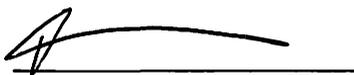
34. Defendants do not deny Plaintiff's assertion that the Virginia State Board of Elections (hereinafter, "State Board") is tasked by state law to ensure "legality and purity in all elections" and to "ensure that major risks to election integrity are...addressed as necessary to promote election uniformity, legality and purity." Va. Code § 24.2 103(A).

35. Defendants do not deny that 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.

36. As the *Cosner* court found and so ruled, the relief requested by Plaintiff, as regards restoring his state and federal constitutional rights now being violated, will do such restoration and protection, as it did for similarly situated Plaintiffs 40 years ago, since now, as then, Defendants are the proper parties for a citizen to sue in federal court in this instant matter.

I, Paul Goldman, declare under penalty of perjury that the foregoing "Plaintiff's Sworn Statement of Facts" is true and correct. Executed on this 29th day of September, 2021.

Signed,



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