



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

Jeffrey Thomas, Jr.
301 Virginia St. Unit 1514
Richmond, VA 23219

Michelle C. Thomas
43720 Red House Drive
Lansdowne, VA 20176

Phillip E. Thompson
43709 Mahogany Run Court
Leesburg, VA 20176

Plaintiffs,

v.

Civil No. 3:22-cv-427-DJN

Susan Beals
1100 Bank St.
Richmond, VA 23219

Robert Brink
1100 Bank St.
Richmond, VA 23219

Virginia Department of Elections
1100 Bank St.
Richmond, VA 23219

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Comes now Plaintiffs Jeffrey Thomas, Jr., Michelle C. Thomas, and Phillip E. Thompson to hereby file their Opposition to Defendants' Motion to Dismiss (ECFs 24-25). Under the legal standard the Court must follow, and Defendants should have followed, the Amended Complaint easily survives a Motion to Dismiss. The Court conducted a clear analysis last month on this

matter in the related case, *Goldman v. Brink* (ECF 89, Granting Defendant's Motion to Dismiss). Defendants ignored the Court's instructions, rulings and admonitions in favor of Gish galloping this case into mootness.

Defendants raise the following claims: standing; sovereign immunity; and mootness. The first two arguments have already been rejected by the Court, and the third must be rejected at the Motion to Dismiss stage.

STANDARD OF REVIEW

Under 12(b)(6) of the Rules of Federal Civil Procedure, the Defendants' Motion to Dismiss can only be granted if there were no set of facts that would entitle Plaintiffs to a verdict on the claims in issue. There is no question, as will be outlined below, that the facts in this case entitle the Plaintiffs to the relief sought. The Defendants must accept the facts alleged in the Complaint as true. *See Scheuer v. Rhoades*, 416 U.S. 232, 236 (1974); *Puerto Rico ex. rel. Quiros v. Alfred L. Snapp & Sons*, 632 F.2d 365 (4th Cir. 1980). Furthermore, all reasonable inferences must be made in this case under a review of a Motion to Dismiss must be viewed in favor of Plaintiffs. *See Johnson v. Mueller*, 415 F.2d 354 (4th Cir. 1969); *MacKethan v. Peat. Marwick. Mitchell & Co.*, 439 F. Supp. 1090 (E.D. Va. 1977).

A complainant can only be dismissed if it appears beyond a doubt that Plaintiffs cannot recover under any set of facts which could be proven, which is not the case in this instance. *See Doby v. Safeway Stores. Inc.*, 523 F. Supp. 1162 (E. D. Va. 1981); *Austin v. Reynolds Metals Co.*, 327 F. Supp. 1145 (E. D. Va. 1970). Under the facts as plead in the Plaintiffs' Amended Complaint, this Court can make a sufficient finding and order a proper remedy. The Plaintiffs in their Amended Complaint have pleaded sufficient factual and legal claim to demonstrate that

there are “enough facts to state a claim to relief that is plausible on its face” in this case. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

DEFENDANTS’ ARGUMENTS HAVE ALREADY BEEN REJECTED BY THE COURT

I. *Standing*

The Court analyzed standing as related to the Equal Protection and malapportionment claims last month. “As the Supreme Court recently clarified, plaintiffs in vote-dilution cases must demonstrate that their “injury is district specific,” meaning that their injury “arises from the particular composition of [their] own district, which causes his vote...to carry less weight than it would carry in another, hypothetical district. *Gill v. Whitford*, 138 Ct. 1916, 1930-31 (2018) (quoting *Baker v. Carr*, 369 U.S. 186, 206 (1962)). For that reason, “a voter from a district that is overpopulated and underrepresented suffers an injury-in-fact,” while “a voter who resides in an underpopulated district cannot properly allege an injury-in-fact” (citations in *Goldman v. Brink*, ECF 89, p. 17).

The deviation of the current House of Delegates maps is 130,192/67,404, or 93.2% (Stipulation of Facts ¶¶ 50-51). There has been no redistricting plan since *Reynolds v. Sims* 377 U.S. 553, (1964) in which a nearly two-to-one disparity has been considered constitutional. Disparities become *prima facie* constitutionally suspect at the 10% level. *Brown v. Thomson*, 462 U.S. 835, (1983). (Am. Compl. ¶¶ 56-58).

All parties have stipulated that all three Plaintiffs live in House of Delegates Districts that have significantly larger populations than the ideal district. (ECF 21, Stipulation of Facts ¶¶ 45-48, delineating ideal district population as 86,314, and Plaintiffs’ districts’ populations as 94,095, 101,629, and 104,692, for Mr. Thomas Jr., Rev. Thomas, and Mr. Thompson, respectively).

There was an issue in the *Goldman* case over whether Mr. Goldman had voted in the 2021 general elections. All parties in this case stipulate that all three Plaintiffs voted in the 2021 elections in underrepresented House of Delegates districts and live at those same addresses (ECF 21, Stipulation of Facts ¶¶ 4-25).

Plaintiffs' requested remedy would redress their continual malapportionment injuries. Defendants' argument that Plaintiffs lack standing because one cannot go back in time to prevent Defendants from holding unconstitutional elections would bar citizens from seeking relief for injury-in-fact, and thereby sanction unconstitutional elections. This senseless argument, ignoring the dozens of redistricting cases Defendants cite, would bar the courthouse doors for any malapportionment claim.

Defendants cannot expect the parties to ignore the Court's rulings on standing from June 6, 2022. The Court articulated its reasoning on standing ("To determine whether a voter has standing to pursue a malapportionment claim, courts must compare the population of a plaintiff's district to that of the hypothetical ideal district." *Gill*, 138 S. Ct. at 1931 *Goldman*, ECF 89, p. 23). Defendants' standing claims should be quickly denied.

II. *Sovereign Immunity*

The Court instructed Defendants' counsel:

"If you want to assert sovereign immunity, particularly to preserve it for appellate purposes, I'm not going to change my opinion, right? But I want you to be able to preserve the issue for an appeal if that's what you decide to do. So, on that point, if it's the same argument as before, you can just say, "We assert sovereign immunity as we did before. We understand the Court's opinion on this. We respectfully disagree. We're not

going to rehash it. We want to preserve it.” That’s all you have to do. You don’t have to re-brief it, right?” (June 13, 2022, Hearing Tr. 8:5-15).

Ignoring the Court’s directions, Defendants offer an off topic stemwinder, citing, among others, the “alleged treaty violation” related to “a murder prosecution” of a Panamanian citizen in 1988 (pp. 12-17). Plaintiffs quoted the Court’s rulings on sovereign immunity in the Amended Complaint ¶¶ 83-88. (citing *Goldman*, ECF 40). The Court has already found that the Defendants Beals and Brink were the proper parties in this matter (*Goldman*, ECF 40). Defendants simply ignore that the Virginia Department of Elections is also a proper party to election cases. (e.g., *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, (4th Cir. 2016), ruling after a two-week bench trial). Defendants cannot disregard the Court’s instructions and rulings on this precise topic in favor of patently irrelevant materials. Defendants have been admonished for “stalling tactics.” Further dilatory tactics should not be rewarded, and their sovereign immunity argument should be quickly denied.

The Cosner Precedent Is Proper Relief and Controls in this District

Defendants confusingly contend that Plaintiffs are not seeking proper relief, but they are fond of relying on cases other than *Goldman v. Brink* and *Cosner v. Dalton* 522 F. Supp. 350, (E.D. Va. 1981). Defendants’ misleading citations to other districts and circuits (Motion to Dismiss, p. 34, fn. 11) concern state senate (quadrennial) elections. Their reliance on *Purcell* cases involves ordering new redistricting (e.g., district line drawing) immediately prior to elections (Motion to Dismiss, pp. 34-35). Here, the House of Delegates district lines have been known since December 2021 and will be used in 2023 (Stipulation of Facts ¶ 37). Defendants are able to conduct special elections in these district lines in less than one month (Am. Compl. ¶¶ 90-

100). There is no record evidence indicating that Defendants are unable to conduct the required elections.

The 93.2% deviation of the current House of Delegates (Stipulation of Facts ¶¶ 50-51) is off the constitutional spectrum. This Court rejected as unconstitutional proposed House of Delegates districts with a disparity of 26.6%. Further, “The population variations that the [U.S. Supreme] Court deemed “too great to be justified by any state interest so far suggested” were *Swann v. Adams* 365 U.S. 440 (1967) (25.65%), *Kilgarlin v. Hill* 386 U.S. 120 (1967) (26.48%), and *Whitcomb v. Chavis* 403 U.S. 124 (1971) (24.78%)... Guided by the precepts that the Supreme Court has explained in the cases we have cited, we conclude that the [redistricting] Act of August 11 is facially unconstitutional because the deviation among the populations of the districts that it creates exceeds the limits tolerated by the Equal Protection Clause.” *See Cosner v. Dalton*, 522 F. Supp. 350, 358 (E.D. Va. 1981).

“In *Reynolds v. Sims*, 377 U.S. 533, 568, (1964), the Court held that the “Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.” To implement this constitutional requisite, the Court explained, a state must “make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable.” 377 U.S. at 577, 84 S.Ct. at 1390. This, too, is the command of Article II, § 6 of the Virginia Constitution.” *Cosner v. Dalton*, 522 F. Supp. 350, 356 (E.D. Va. 1981)

There is no state interest in conducting 2021 House of Delegates elections for two-year terms under unconstitutional lines that would outweigh citizens’ interests in constitutional, one-person one-vote districts – a fundamental principle of our democracy. Defendants holding Delegate elections for one-year terms would have at least attempted to redress the severe

disparities in the House of Delegates, well known to Defendants long before they received the decennial Census data in early August 2021 (Stipulation of Facts ¶ 31). Defendants evince no “honest and good faith effort to construct districts . . . as nearly of equal population as is practicable.” *Reynolds v. Sims, supra*.

In *Cosner* the Court considered, but declined, holding special elections after the November general elections. “The 1971 [redistricting] Act is substantially out of date because Virginia's population has grown some 15%, with that growth unevenly spread throughout the Commonwealth. Allowing elections to proceed under the 1971 Act would greatly disadvantage the citizens in Virginia's rapidly growing areas (areas that are more heavily populated by minority voters) and would affect great harm to the principle of one-person, one-vote. November the 3rd is already fixed as the date for a statewide election for state officials including the Governor. Experience suggests that if the statewide election proceeds on November the 3rd but the House of Delegates election is postponed, voter turnout for the latter will be significantly lower than otherwise. We believe that a strong and representative turnout for the House election depends on holding it on November the 3rd.” *Cosner v. Dalton*, 522 F. Supp. 350, 363-64 (E.D. Va. 1981) Indeed, turnout has been significantly higher in midterm election years compared to the following House of Delegates election years in every state election this century.¹ **“Because Virginia's 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 Act or our own plan. That election should be held the same day as the November general election.”** *Cosner v. Dalton*, 522 F. Supp. 350, 364 (E.D. Va. 1981) (bolding added)

¹ <https://www.elections.virginia.gov/resultsreports/registrationturnout-statistics/>.

Defendants Do Not Have Clean Hands to Raise Mootness or the *Purcell* Principle

Defendants' mootness and *Purcell* contentions do not survive scrutiny, particularly at the Motion to Dismiss stage. Defendants do not address Amended Complaint ¶¶ 90-100, which clearly indicate there is time for Defendants to conduct special primary elections if ordered to do so.

As the Court noted, Defendants are "largely" to blame for this delay.

"I remain particularly unhappy about how Attorney General Herring and his subordinates litigated this case back in the fall. If they had done their job the way it should have been done, putting everything in one pleading, which is the way it's supposed to happen, I would have been able to address standing, which I wanted to do repeatedly, and I said that, and we would have been done by November, right? And then Mr. Thomas, if he wanted to, could have filed his lawsuit back in November. What I'm saying to you is this: I'm worried and disturbed by the fact that if you're going to raise the *Purcell* principle now, I'm not so sure you have clean hands doing that, because **the reason we're so late in the game is the stall tactics that Attorney General Herring and his subordinates engaged in, which I find to be appalling what they did.** It is really just not appropriate for the way they handled this case." (June 13, 2022, Hearing Tr: 9:1-17) (bolding added).

The Court instructed: "And so if you're going to assert that principle, you need to address in your papers why the delay is not your fault and how it is that you can assert that principle, you know you, when you-all - - and from my perspective are largely due to the delay." (June 13, 2022, Hearing Tr: 9:1-17). "If the Commonwealth does [assert the *Purcell* principle], you need to address the delay, Mr. Poppo, from your perspective." (June 13, 2022, Hearing Tr: 10:19-21).

“I remain incredibly unhappy with the way that your predecessors handled this. What should have happened – I kept saying that during the hearing. I’m sure you’ve gone over the transcript. I had serious reservations about Mr. Goldman’s standing, and it turns out he lacked standing, right? Had they done what I wanted to do, right, instead of appealing me right away and waiting until the hearing on standing, this case would have been done in November, and Mr. Thomas could have done whatever he wanted to do. I raised the point about the fact that he could have filed his lawsuit back then, but you need to address that in the context of the *Purcell* argument, because you’re going to raise it, I don’t think you have clean hands. I’m not so sure about his hands either, but if you’re going to invoke that principle, you better explain why when the delay is caused by you to a large portion of that, because I’m thinking not just about this case, I’m thinking about the 20 other cases that are coming after this, right? You know, what I write now is going to be used for future elections. So that’s – so if you’re going to raise that, you better be able to explain that.” (June 13, 2022, Hearing Tr: 13:3-23).

Ignoring the Court’s directions and admonitions, Defendants did not address this except to lambaste citizens for following the Court’s instructions in seeking their voting rights. Defendants could have attempted redistricting under other Census Data (i.e., American Community Survey data); sought an advisory opinion on the constitutionality of their elections; held elections for one-year terms; or not sought to delay this case at every opportunity. The current Attorney General was elected last year and inaugurated in January. But from Plaintiffs’ perspectives, there is no meaningful difference between the “one Attorney General’s office” (June 13, 2022, Hearing Tr: 9:19-20) that has continuously offered nothing but a unified strategy to delay this case into mootness.

Plaintiffs Are Citizens Seeking Their Voting Rights

The Court instructed Plaintiffs to “address their significant delay in filing the original Complaint and, subsequently, the Amended Complaint.” (ECF 16, Scheduling Order ¶ 3).

The delay in these proceedings is undoubtedly the fault of Defendants and their various counsel. Defendants conducted unconstitutional elections; Plaintiffs are citizens whose voting rights were abridged. Plaintiffs are powerless to compel Defendants to abide by their constitutional responsibilities without court intervention.

The case record demonstrates Plaintiff Thomas Jr., has not “slept on his rights” but moved repeatedly to put the relevant facts before the Court beginning last year. “Plaintiff Thomas Jr. moved to intervene in the *Goldman* case on October 15, 2021, pursuant to the Court’s October 12, 2021, Order directing that “by October 29, 2021, any prospective intervenors who wish to intervene in this case must file a Motion to Intervene” (*Goldman v. Brink*, ECF 41 ¶ 5).” (Am. Compl. ¶ 74). Plaintiff Thomas Jr., a *pro se* litigant, was following the Court’s instructions regarding intervention from the October 12, 2021, hearing. He had every reason to believe that was the proper path for bringing his claims before the Court. The Court issued an order staying the Goldman case on October 20, 2021. Plaintiff Thomas Jr. further filed a Notice imploring the Court to allow him to join Mr. Goldman’s lawsuit. “In light of Federal Rules of Civil Procedure Rule 1’s requirement for “the just, speedy, and inexpensive determination of every action and proceeding” and the Court’s March 21, 2022, Hearing and Order (ECF 69),” Plaintiff Thomas Jr. filed a “Notice of Intent to File Separate Lawsuit and Request for Joinder” on March 24, 2022. (*Goldman v. Brink*, ECF 71-1, p. 1). This Court or Circuit could have (and arguably should have) permitted Plaintiff Thomas Jr. to intervene in the *Goldman* case prior to the issuance of a stay or *sua sponte* thereafter. When the *Goldman* case was dismissed for lack of standing on June 6,

2022, the last line read, “The Court advises Mr. Thomas that, if he elects to file his own lawsuit in this district involving the same issues in this case, he must indicate at the time of filing that his case is related to the instant case, consistent with the Court’s related case procedures.” (*Goldman*, ECF 89, p. 31, fn. 19). Plaintiff Thomas Jr. filed suit on June 8, 2022. The facts of Mr. Thomas Jr.’s case have been before the Court for nearly a year. This does not evince somebody “sleeping on their rights” but a citizen trying to get his voting rights back in the face of calculated state government opposition.

On October 12, 2021, the Court ordered that no party move to intervene after October 29, 2021 (*Goldman v. Brink*, ECF 41 ¶ 5). After he filed, Plaintiff Thomas Jr. had heard there were other citizens who might want to join his case. He asked the Court what to do in the June 13, 2022, hearing.

“Plaintiff: There are some people who profess an interest in a motion to intervene who have various aspects of standing that I don’t have, particularly under the Voting Rights Act. If they would wish to intervene in this case, will you set -

The Court: I don’t give advisory opinions. If somebody files a motion, I’ll deal with the motion.

Plaintiff: Okay.

The Court: But I think we need to deal with your case first here. And look, if there’s other people that want to file a lawsuit, they can file lawsuits.” (June 13, 2022, Hearing Tr: 21:3-13).

Rather than file a motion to intervene or new lawsuits, the most expeditious way to get Plaintiff Thomas and Thompsons’ claims before the Court was to file an Amended Complaint pursuant to Federal Rules of Civil Procedure Rule 15(a)(1). Plaintiffs did so three days after the

hearing. Defendants' lashing out that this was "gamesmanship" (Motion to Dismiss, p. 32) is zany. "The amended complaint responds to the Court's June 13, 2022, status hearing by clarifying the relief requested, adding relevant facts regarding the potential timing of special elections, and fixing typographical errors. It also adds" two Plaintiffs and a Defendant. (Am. Compl., ECF 14, p. 19).

"This is why I'm so disturbed by the way that Attorney General Herring and his subordinates handled the case. You represent the Commonwealth. You represent all the voters in this state and that includes Mr. Thomas, which included Mr. Goldman. I don't know if Mr. Thomas has a right to relief or not, but he does have a right to be heard, and the stall game tactics that your office, your predecessors engaged in, have deprived citizens of this Commonwealth, who you work for, from a chance to be heard. And I'm not happy about that." (June 13, 2022, Hearing Tr: 16:16-24).

The Court is right. It is hardly Plaintiffs' fault that Defendants and their counsel proceeded as they did with unconstitutional elections and legal obstruction. The attempt to redirect blame to Plaintiffs for the conduct of Defendants and what the Court called "appalling...stall tactics" their counsel has engaged in is hardly credible, particularly at the Motion to Dismiss stage. "Covid" cannot be a catch-all to explain why Defendants and the Commonwealth have done nothing to address the unconstitutional, nearly two-to-one imbalance in Virginia's House of Delegates districts that will persist until 2024 without Court intervention.

CONCLUSION

Plaintiffs have properly pleaded their claim of Equal Protection and Voting Rights Act injuries. The Court has already been clear in its standing and sovereign immunity rulings issued in the *Goldman* case that Plaintiffs have standing, and the parties are proper in this case. Defendants are responsible for conducting unconstitutional elections and engaging in stall tactics. They do

not have clean hands and cannot meet their burden at the Motion to Dismiss stage that mootness or the *Purcell* principle applies. Thus, Plaintiffs respectfully request that this Court deny Defendant's Motion to Dismiss and continue this expedited process to address the wrong the Government of Virginia has exacted on its own citizens to deny the concept of one person, one vote.

Respectfully submitted,


Dated: July 11, 2022,

Plaintiff Jeffrey Thomas, Jr.
301 Virginia St. Unit 1514
Richmond, VA 23219
(804) 418-0252
jeffburkethomas@gmail.com

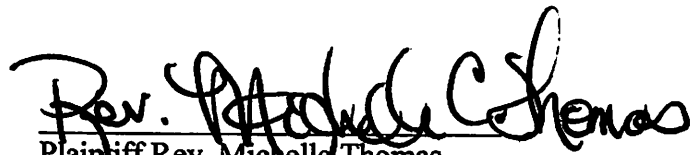
Plaintiff Rev. Michelle Thomas
43720 Red House Drive
Lansdowne, VA 20176
pastorthomas@gomtechnow.com

Plaintiff Phillip E. Thompson
43709 Mahogany Run Court
Leesburg, VA 20176
(301) 535-0488

Dated: July 11, 2022,



Plaintiff Jeffrey Thomas, Jr.
301 Virginia St. Unit 1514
Richmond, VA 23219
(804) 418-0252
jeffburkethomas@gmail.com



Plaintiff Rev. Michelle Thomas
43720 Red House Drive
Lansdowne, VA 20176
pastorthomas@gomtechnow.com

Plaintiff Phillip E. Thompson
43709 Mahogany Run Court
Leesburg, VA 20176
(301) 535-0488
philliptho@icloud.com

Local Civil Rule 83.1 Pro Se Certification

I declare under penalty of perjury that:

1. No attorney, other than co-Plaintiff Thompson, who is not a practicing attorney in the Commonwealth of Virginia, has prepared or assisted in the preparation of this document.

Plaintiff Jeffrey Thomas, Jr.

Signed: Jeffrey Thomas Jr.

Executed on: July 11, 2022

Plaintiff Rev. Michelle Thomas

Signed: Rev. Michelle C. Thomas

Executed on: July 11, 2022

Plaintiff Phillip Thompson

Signed: _____

Executed on: July 11, 2022

Plaintiff Rev. Michelle Thomas

Signed: _____

Executed on: _____ (date)

Plaintiff Phillip Thompson

Signed: *Phillip E. Thompson* _____

Executed on: 7/11/2022 _____ (date)

Plaintiff Rev. Michelle Thomas
43720 Red House Drive
Lansdowne, VA 20176
pastorthomas@gomtechnow.com

Phillip E. Thompson

Plaintiff Phillip E. Thompson
43709 Mahogany Run Court
Leesburg, VA 20176
(301) 535-0488
philliptho@icloud.com

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Plaintiff Jeffrey Thomas, Jr.

Signed: _____

Executed on: _____ (date)

Certificate of Service

I hereby certify that on July 11, 2022, I caused to be served on counsel for Defendants, Steven Popps, spopps@oag.state.va.us, and Andrew Ferguson, aferguson@oag.state.va.us, this Opposition.

Dated: July 11, 2022,



Plaintiff Jeffrey Thomas, Jr.
301 Virginia St. Unit 1514
Richmond, VA 23219
(804) 418-0252
jeffburkethomas@gmail.com