

No. 21-2180

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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PAUL GOLDMAN,

*Plaintiff-Appellee,*

v.

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

*Defendants-Appellants.*

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

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**APPELLANTS' RESPONSE TO APPELLEE'S MOTION TO  
SUPPLEMENT THE RECORD AND APPENDIX**

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JASON S. MIYARES  
*Attorney General*

ANDREW N. FERGUSON  
*Solicitor General*

CHARLES H. SLEMP, III  
*Chief Deputy Attorney General*

KEVIN M. GALLAGHER  
*Deputy Solicitor General*

CAROL L. LEWIS  
*Assistant Attorney General*

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

January 28, 2022

*Counsel for Defendants-Appellants*

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## INTRODUCTION

Consistent with this Court’s Rules, Appellants collaborated with Appellee to compile a Joint Appendix. Now, despite agreeing to the inclusion of certain materials in this *Joint* Appendix (and the exclusion of others), Appellee seeks leave to file a supplemental appendix. But there were good reasons to omit each of the five documents Appellee seeks to add to the appendix: whether because the Rules dictated their exclusion, the documents postdated the notice of appeal, the documents are immaterial to the issues on appeal, or a combination of the three. Accordingly, Appellee cannot show the extraordinary circumstances required to file a supplemental appendix.

## FACTUAL BACKGROUND

On June 28, 2021, Appellee Paul Goldman filed suit in the Eastern District of Virginia alleging that the use of Virginia’s pre-existing districts in the November 2021 election for the Virginia House of Delegates violated both a deadline imposed by the Virginia Constitution and the one-person, one-vote principle of the federal Equal Protection Clause. *See* Joint Appendix (“JA”) 4. Appellee named as defendants then-Governor Ralph Northam, the Virginia State Board of Elections, and various Elections Officials in their official capacity—Christopher Piper

(Commissioner of the Virginia Department of Elections); Jamilah D. LeCruise (Secretary of the State Board of Elections); John O'Bannon (Vice Chair of the State Board of Elections); and Robert Brink (Chairman of the State Board of Elections).<sup>1</sup> *See* JA 1–4.

The district court granted in part and denied in part defendants' motion to dismiss the case as barred by the Eleventh Amendment. As to the Governor and the Virginia State Board of Elections, the district court granted the motion, holding that sovereign immunity precluded relief. JA 59, 61, 64. Likewise, the district court dismissed Appellee's claim under the Virginia Constitution as barred by sovereign immunity. JA 67–70; *see also* JA 84. But the district court did not dismiss Appellee's Equal Protection claim against the Elections Officials, concluding that the *Ex Parte Young* exception to sovereign immunity permitted this claim to go forward. JA 65–67. On October 18, 2021, the Elections Officials timely appealed, and, two days later, the district court stayed the proceedings pending resolution of the appeal. *See* JA 125, 128.

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<sup>1</sup> Appellee had also sued Jessica Bowman in her official capacity as Deputy Commissioner of the State Board of Elections, but she was terminated from the suit in September 2021. JA 3.

Pursuant to the requirements of this Court's Rules, Appellants and Appellee coordinated to compile the Joint Appendix. Appellants submitted the Joint Appendix to the Court on December 6, 2021. Appellee did not object to the Joint Appendix until January 10, 2022, when he filed a motion to supplement the record and motion for a supplemental appendix ("Mot."), requesting to add to the appendix (1) defendants' memorandum in support of their motion to dismiss Appellee's second amended complaint; (2) a printout of statistics from the Virginia Redistricting Commission; (3) Appellee's motion for reconsideration of denial of his motion for temporary injunction; (4) Appellee's motion for summary judgment filed before this Court; and (5) the Supreme Court of Virginia's final redistricting order.

### **LEGAL STANDARD**

This Court requires "both sides" to assemble an appendix that contains "the final order or order appealed from, the complaint or petition . . . as well as all other parts of the record which are vital to the understanding of the basic issues on appeal." Fourth Cir. R. 30(b)(1), 30(c). "The use of a selectively abridged record allows the judges to refer easily to relevant parts of the record." Fourth Cir. R. 30(b)(1). It is

“unnecessary to include everything in the appendix” because “the entire record is available to the Court.” *Id.* In fact, the Court “may impose sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix.” Fourth Cir. R. 30(a).

A motion for leave to file a supplemental appendix will only be granted for “good cause.” Fourth Cir. R. 30(c). “Except under the most extraordinary circumstances, supplementary appendices will not be accepted.” *Id.*

## ARGUMENT

Appellee cannot show the “most extraordinary circumstances” or “good cause” required to supplement the appendix. Fourth Cir. R. 30(c). The Joint Appendix—which Appellee participated in compiling—accurately reflects the portions of the record “which are vital to the understanding of the basic issues on appeal.” Fourth Cir. R. 30(b)(1). None of the five documents identified by Appellee should be added to the appendix.

1. Defendants’ memorandum in support of their motion to dismiss the second amended complaint was properly excluded from the

Joint Appendix because “[m]emoranda of law in the district court should not be included in the appendix unless they have independent relevance.” Fed. R. App. P. 30(a)(2). Appellee proffers no independent relevance for this memorandum; the only justification for its inclusion now is that “Appellee believed [it] would be included in the Joint Appendix.” Mot. 2. But this contention is belied by the fact that Appellee participated in the compilation of the Joint Appendix in the first instance and did not timely object to this document’s exclusion after receiving a copy of the Joint Appendix. *See* Fed. R. App. P. 30(b)(1) (allowing the appellee to “serve on the appellant a designation of additional parts to which it wishes to direct the court’s attention” within “14 days after receiving the designation”).

2. Appellee’s self-prepared evaluation of “statistics from the Virginia Redistricting Commission,” Mot. 1, was not presented for consideration to the lower court and provides no substantiation as to how the totals were derived. *See United States v. Vidal*, 815 F. App’x 732, 735 (4th Cir. 2020) (per curiam) (denying motion for leave to file a supplemental appendix containing “new analysis of Sentencing Commission data” because it was “new evidence on appeal”). This unverified data is also not material to the issues on appeal, as Appellee

admits. *See* Mot. 1 (usage of the data is “not statistically significant for purposes of this litigation”).

3. Appellee’s Motion for Summary Judgment is not a part of the record on appeal. “The following items constitute the record on appeal: (1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk.” Fed. R. App. P. 10(a). Appellee (improperly) filed this motion before this Court, not the district court. *See* ECF No. 12. Absent exceptional circumstances, this Court does “not consider issues raised for the first time on appeal.” *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 242 (4th Cir. 2009) (quoting *Volvo Const. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 603 (4th Cir. 2004)).

4. Appellee’s motion for reconsideration of the denial of his motion for temporary injunction is immaterial to the issues on appeal. Appellee’s motion postdated the notice of appeal by over a month. Further, the district court held that it did not have jurisdiction over the motion given Appellants’ notice of appeal. *See Goldman v. Brink*, No. 3:21-cv-00420-DJN-RAJ-SDT, ECF No. 57, at 2 (E.D. Va. Dec. 6, 2021). “It is the general rule, of course, that a federal appellate court does not

consider an issue not passed upon below.” *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

5. Finally, the Supreme Court of Virginia’s final order drafting new reapportionment maps should be excluded from the appendix for several reasons. It postdates the notice of appeal; it was never brought before the district court; and it is publicly available to the Court. It is also immaterial to the issues on appeal. Appellee’s theory of relevance is that the order “task[s] Appellants with certain duties, such duties related to the 11th Amendment immunity.” Mot. 1. But the Eleventh Amendment issues before the Court do not turn on Appellants’ alleged duties; they turn on whether Appellee’s claim arises under federal law or state law, or whether Appellee has presented a *substantial* federal question.

## CONCLUSION

For these reasons, we ask that Appellee’s Motion to Supplement the Record and Motion for a Supplemental Appendix be denied.

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*

ANDREW N. FERGUSON  
*Solicitor General*

CHARLES H. SLEMP, III  
*Chief Deputy Attorney General*

CAROL L. LEWIS  
*Assistant Attorney General*

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

January 28, 2022

*Counsel for Defendants-Appellees*

## CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 1,340 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 Schoolbook typeface.

*/s/ Kevin M. Gallagher*

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Kevin M. Gallagher

## CERTIFICATE OF SERVICE

I certify that on January 28, 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  
*Pro Se* Appellee

*/s/ Kevin M. Gallagher*

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Kevin M. Gallagher