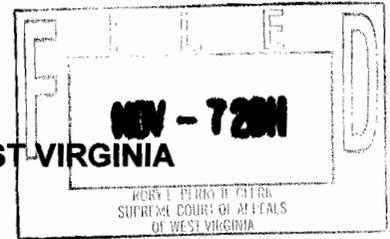


No. 11-1525



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

STATE OF WEST VIRGINIA ex rel.
THORNTON COOPER,

Petitioner,

v.

Honorable NATALIE E. TENNANT,
Secretary of State of the State of
West Virginia,

Respondent.

PETITION FOR WRIT OF MANDAMUS

THORNTON COOPER
Petitioner

Pro Se

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November 7, 2011

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

Pursuant to **Rule 16** of the **Revised Rules of Appellate Procedure**, **Thornton Cooper**, the **Petitioner** and **Relator** herein, hereby respectfully submits his **Petition for Writ of Mandamus**.

III. QUESTIONS PRESENTED.

- (1) IN THE REDISTRICTING OF THE WEST VIRGINIA STATE SENATE FOLLOWING THE 2010 CENSUS, HOW MANY COUNTIES DID THE LEGISLATURE NEED TO DIVIDE BETWEEN OR AMONG DIFFERENT SENATORIAL DISTRICTS TO MEET THE POPULATION EQUALITY REQUIREMENTS IMPOSED BY THE EQUAL PROTECTION CLAUSE?**
- (2) IN THE REDISTRICTING OF THE WEST VIRGINIA STATE SENATE FOLLOWING THE 2010 CENSUS, DID THE LEGISLATURE COMPLY WITH THE COMPACTNESS REQUIREMENT IMPOSED BY ARTICLE VI, § 4, OF THE WEST VIRGINIA CONSTITUTION?**
- (3) IN THE REDISTRICTING OF THE WEST VIRGINIA STATE SENATE FOLLOWING THE 2010 CENSUS, WHAT DEGREE OF POPULATION EQUALITY AMONG STATE SENATORIAL DISTRICTS IS MANDATED BY ARTICLE II, § 4, AND ARTICLE VI, § 4, OF THE WEST VIRGINIA CONSTITUTION?**
- (4) DOES W. VA. CODE § 1-2-1, AS AMENDED BY ENROLLED SENATE BILL NO. 1006, WHICH PASSED ON AUGUST 5, 2011, VIOLATE ARTICLE II, § 4, AND ARTICLE VI, § 4, OF THE WEST VIRGINIA CONSTITUTION?**

IV. STATEMENT OF THE CASE.

This Petition challenges the constitutionality of Enrolled Senate Bill No. 1006, a bill consisting of 97 pages that amended *W. Va. Code* § 1-2-1. The West Virginia Legislature passed the bill on August 5, 2011. Acting Governor Earl Ray Tomblin signed the bill on August 18, 2011. Petitioner's Exhibit No. 1 is a copy of that bill. (Appendix, pp. 1-97)

Thornton Cooper, the Petitioner and Relator herein, is a United States citizen and a native and resident of, and registered voter in, the City of South Charleston, Kanawha County, West Virginia. He has been a member of the Democratic Party since 1971, when he first registered to vote. Petitioner Cooper is also a property owner and taxpayer. He owns real estate in Kanawha County. He is also the co-owner of several pieces of real estate in Tucker County. He pays real-estate and personal-property taxes in Kanawha County and real-estate taxes in Tucker County.

Petitioner Cooper is familiar with the political process and has run for public office on a number of occasions. He has been involved with political campaigns since he was a teenager. In 2006 and 2010, he was elected to four-year terms as a member of the Kanawha County Democratic Executive Committee. In 2011, he was elected to a four-year term as a member of the South Charleston Democratic Executive Committee. The positions advanced and the relief requested herein reflect Petitioner Cooper's positions as an individual and not as a member of the Democratic Party or as a member of the South Charleston or Kanawha County Democratic Executive Committee.

For over thirty (30) years, Petitioner Cooper has, primarily without compensation, also served as a political cartographer. In an attempt to persuade legislative bodies to follow federal and state constitutional requirements, as he understands those requirements, when redistricting, Petitioner Cooper has repeatedly drawn up maps and/or written descriptions of redistricting plans and submitted these plans to those legislative bodies.

In 1982 and 1983, he designed and proposed the division of South Charleston into eight (8) single-member wards. After the South Charleston City Council refused to enact his proposal, he drafted a proposed change to the city charter that would require that the city be divided into no more than eight single-member wards and helped to found an organization known as South Charlestonians Organized for Reapportionment Equity (SCORE), which circulated petitions in a successful effort to place that proposed charter change, through the power of initiative, on the ballot in 1983. City voters approved the proposed charter amendment, which remains in effect. |

In the mid-1990's, Petitioner Cooper designed and proposed the current division of Kanawha County into four (4) magisterial districts. Following the 1980, 1990, 2000, and 2010 Censuses, he submitted proposals for redistricting West Virginia's Congressional Districts. He also actively participated in, and testified in, federal court cases on that subject following the 1980 and 1990 Censuses. He was qualified as an expert in the latter case, Stone v. Hechler, 782 F. Supp. 1116, 1122, 1123 (N. D. W. Va. 1992).

After the release, in 2001, of figures from the 2000 Census that indicated that Kanawha County was overrepresented in the State Senate, Mr. Cooper submitted to that body a plan for redistricting it. That plan would have divided Kanawha County in such a fashion that one senatorial district would have been located wholly within part of Kanawha County and another senatorial district would have included all of Putnam County and part of western Kanawha County. The remainder of Kanawha County would have been included in at least one other senatorial district.

Later in 2001, the Legislature enacted a different plan that continued to place all of Kanawha County into two overlapping countywide senatorial districts. Mr. Cooper provided assistance to State Senator John Unger, II, when that legislator challenged the 2001 legislation in federal court on the basis of population variances. The federal court upheld that piece of legislation. *Deem v. Manchin*, 188 F. Supp. 2d 651(N. D. W. Va. 2002), *aff'd, sub nom. Unger v. Manchin*, 536 U.S. 935, 122 S. Ct. 2617, 153 L. Ed. 2d 800 (2002).

The 2001 legislation reflected an increasing tendency by the Legislature to split counties between or among different senatorial districts, whether or not making each split was required to comply with federal case law under the Equal Protection Clause of the *Fourteenth Amendment*. Petitioner's Exhibit No. 2, a copy of pages 288 and 289 of the 1977 West Virginia Blue Book, shows maps of the West Virginia senatorial districts following the 1964 and 1977 reapportionments, along with the population of each district. (Appendix, p. 98) While no counties were split following the 1964 reapportionment, seven (7) counties were split following the 1977 reapportionment: Cabell, Ohio, Marion, McDowell, Monongalia, Nicholas, and Wayne Counties. Petitioner's Exhibit No. 3, a copy of page 349 of the 2007 West Virginia Blue Book, shows a map of the state's senatorial districts following the 2001 reapportionment, along with the populations of each county, or portion thereof, in each district. (Appendix, p. 99) Eleven (11) counties were divided under the 2001 law: Berkeley, Fayette, Grant, Marion, Mercer, Monongalia, Ohio, Roane, Upshur, Wayne, and Wyoming Counties. Under the plan that Petitioner Cooper had submitted in 2001, fewer counties would have been split and the overall population variances among

districts would have been much smaller. However, he would have to wait another decade before attempting to persuade the Legislature to come up with a better plan.

Following the release, in early 2011, of the official population counts of the various counties and localities from the 2010 Census, Petitioner Cooper began drafting reapportionment plans for submission to the redistricting committees of the State Senate and House of Delegates. In May, June, and July of 2011, the State Senate Redistricting Committee (SSRC), chaired by Senator Unger, held public hearings across the state to obtain recommendations as to redistricting from members of the public. Petitioner Cooper attended all twelve (12) of those public hearings and submitted and discussed detailed plans for redistricting the State Senate and the state's three (3) Congressional districts. His oral presentations (in videos produced by that committee), written redistricting proposals, and maps were all placed on the website of that committee. As of the date of the filing of this Petition, his submissions to that committee and those of other attendees at those public hearings are still accessible on that website.

Attendees at the SSRC hearings were given material relating to changes in the state's population. Petitioner's Exhibits Nos. 4, 5, 6, and 7 are copies of portions of that material. Petitioner's Exhibit No. 4 is a map of the state's 55 counties, along with their populations in 2010. (Appendix, p. 100) Petitioner's Exhibit No. 5 is a map of the state's 17 senatorial districts, including the names of the incumbent senators, as those senatorial districts existed as of the beginning of 2011. (Appendix, p. 101) Petitioner's Exhibit No. 6, a table showing the populations of those state-senate districts under the 2000 and 2010 Censuses, reflects that the state's population grew from 1,808,344 in

2000 to 1,852,994 in 2010. (Appendix, p. 102) Petitioner's Exhibit No. 7 is a table showing the populations of the state's 55 counties contained therein, under the 2000 and 2010 Censuses. (Appendix, pp. 103, 104)

The information contained in Petitioner's Exhibits Nos. 4-7 did not provide information that was sufficiently detailed for Petitioner Cooper to draft a proposal for redistricting the State Senate. Accordingly, he decided to draft a proposal that described portion of divided counties in terms of precincts, as those precincts are reflected on on-line Census maps. On May 16, 2011, he obtained a printout, in raw numerical form, of the population of each of the state's precincts, also known as "voting districts" or "VTD's", as those precincts are numbered and reflected in the Census Bureau's database. By Petitioner Cooper's count, the printout divides West Virginia into a total of 1,856 different VTD's. VTD numbers can be matched to specific precincts on a Census Bureau website.

In May, June, and July of 2011, he reviewed precinct maps on that website and matched them to the VTD's and population numbers set forth in the printout. He spent many hours manually creating tables that combined, in readable form, information from both the printout and from the Census Bureau website. From that information, he created his first detailed proposals for redistricting the State Senate. For each district, the plan included county population subtotals (if applicable). If a county had to be divided, his detailed proposal usually listed each VTD of that county, a description of any municipalities or other locations within that VTD that were marked on the Census maps, and the population count from the printout. An early draft of his developing proposal, sponsored solely for the purpose of discussion by State Senator Brooks

McCabe, is still on the SSRC's website. Also on that website is a copy of a map of Petitioner Cooper's plan, as he submitted that map at that committee's final public hearing, in Princeton on July 21, 2011. Petitioner's Exhibit No. 8 is a copy of that map, and of a disclaimer by the West Virginia State Senate Redistricting Task Force, as the SSRC (and its supporting staff) also called itself. (Appendix, pp. 105, 106)

Under Petitioner Cooper's proposal, the State Senate would be redistricted in accordance with his understanding of applicable constitutional provisions. Under his plan, only seven (7) counties – Berkeley, Cabell, Kanawha, Marion, Marshall, Monongalia, and Raleigh Counties – would be divided between or among different senatorial districts. The ideal population of each district is 109,000. ($1,852,994 \div 17 = 108,999.647+$.)

Two of those counties, Marshall and Berkeley Counties, like segments of a tapeworm, are each bordered by exactly two other counties (respectively, Ohio and Wetzel Counties, and Jefferson and Morgan Counties). The total 2010 population of the three (3) counties to the north of Marshall County (Hancock, Brooke, and Ohio Counties) is 99,188. The population of Marshall County is 33,107. The combined population of the four counties is thus 132,295. Therefore, even allowing a population variance of 5% above or below that figure of 109,000, under federal case law with respect to Equal Protection Clause, it is mathematically impossible to redistrict the State Senate into seventeen geographically separate districts without dividing Marshall County. Likewise, the 2010 population of Jefferson County, east of Berkeley County, is 53,498. The population of Berkeley County is 104,169. The combined population of the two counties is 157,667. Therefore, Berkeley County must also be split.

Because its population of 193,063 is less than 95% of 218,000 (109,000 x 2), Kanawha County must also be split.

With respect to other counties, Petitioner Cooper is of the opinion that it is bad policy to split any county (other than Marshall County) that has a population that is less than 54,500, the average population per member of the State Senate. This would unfairly dilute the voting power of the residents of that county. On the other hand, dividing a county with a population of more than 54,500 usually results in a situation in which at least one county resident is elected to the State Senate, with the possibility of another also being elected.

Under Mr. Cooper's proposal, as applied to the residency dispersal provision, in *Article VI, § 4, of the West Virginia Constitution*, that no more than one senator in a multicounty senatorial district may reside in the same county, Berkeley County (which, based on its population of 104,190, should have 1.91 members in the State Senate) would be guaranteed at least one county resident in the State Senate, with a strong likelihood that a second county resident would also be elected, and Kanawha County (which, based on its population of 193,063, should have 3.54 members in the State Senate) would be guaranteed at least three county residents in the State Senate, with a possibility that a fourth county resident would also be elected to that body. Three other counties would each be guaranteed at least one seat in the State Senate, with the possibility of electing another county resident to that legislative body: Cabell County (which, based on its population of 96,319, should have 1.77 members in the State Senate), Monongalia County (which, based on its population of 96,189, should have 1.76 members in the State Senate), and Raleigh County (which, based on its

population of 78,859, should have 1.45 members in the State Senate). Being guaranteed exactly one county resident in the State Senate would be Jefferson County (paired with part of Berkeley County); Putnam County, which has a population of 55,498 (paired with part of Kanawha County); Wayne County, which has a population of 42,481 (paired with part of Cabell County); Preston County, which has a population of 33,520 (paired with part of Monongalia County); and Mercer County, which has a population of 62,264 (paired with part of Raleigh County).

While this pairing would not be numerically ideal, the disparities in populations of senatorial districts composed of one county and a portion of another county would be much less than the plan in place at the beginning of 2011, in which Senate District 5 had a total 2010 population of 103,358, consisting of all 96,319 residents of Cabell County and only 7,039 residents of Wayne County: a ratio of 13.68 to 1. After Petitioner Cooper spoke at the SSRC's public hearing on Saturday afternoon, June 11, 2011, in Huntington explained his plan to put all of Wayne County and part of Cabell County in the same senatorial district, State Senator Robert Plymale, who is one of those 7,039 Wayne County residents and also a member of the SSRC, expressed to Mr. Cooper his strong disagreement with Mr. Cooper's plan. The tiny portion of Wayne County that was in Senate District 5 at the beginning of 2011 is barely visible, as a light dot at the top of Wayne County, on Petitioner's Exhibit No. 5. (Appendix, p. 101)

On the other hand, another portion of Mr. Cooper's plan, which would have put all of Fayette, Greenbrier, Monroe, and Summers Counties in the same senatorial district, received positive responses from State Senators William Laird, IV, and Ronald

Miller, two SSRC members who reside in Fayette and Greenbrier Counties, respectively, and who attended many of the public hearings.

The First Extraordinary Session of the Legislature for 2011 commenced on Monday, August 1, 2011. On Friday, August 5, 2011, the Legislature passed Senate Bill No. 1006, relating to the redistricting of the State Senate, and Senate Bill No. 1008, relating to congressional redistricting. Each bill was signed by Acting Governor Tomblin. The two bills contained somewhat different language that would amend *W. Va. Code § 1-2-2b* with respect to precinct boundary changes. Senate Bill No. 1008 passed after Senate Bill No. 1006. As amended by Senate Bill No. 1008, *W. Va. Code § 1-2-2b* now reads as follows:

If an election precinct of this state includes territory contained in more than one senatorial or delegate district, as such senatorial districts are established by section one of this article and as such delegate districts are established by section two of this article, the county commission of the county in which the precinct is located shall, prior to January 21, 2012, alter the boundary lines of its election precincts so that no precinct contains territory included in more than one senatorial or delegate district.

Petitioner's Exhibit No. 1, a copy of Enrolled Senate Bill No. 1006, reflects that that bill splits a total of thirteen (13) different counties – Berkeley, Gilmer, Grant, Kanawha, Marion, Marshall, McDowell, Mineral, Mingo, Monongalia, Putnam, Roane, and Wayne – in redistricting the State Senate. (Appendix, pp. 1-97) Of the seventeen (17) senatorial districts, only one of them, Senate District 10, contains no split counties. That district consists of all of Fayette, Greenbrier, Monroe, and Summers Counties. *Id.* Therefore, it would be fair to state that the Legislature did adopt one part of Petitioner Cooper's proposal. On the other hand, the bill continued to place all of Cabell County

and a portion (larger than the one under the 2001 reapportionment) of Wayne County in the same senatorial district. *Id.*

Petitioner's Exhibit No. 9 is a copy of the "Population Summary Report" with respect to Enrolled Senate Bill No. 1006. (Appendix, p. 107) That report reflects that, under that bill, there is only one senatorial district under that has a population variance of less than 1,000 from the ideal population of 109,000. That district, Senate District 10 (the one designed by Petitioner Cooper), has a population of 108,948, a variance of -52 (-0.05%) from the ideal population. *Id.* Three districts, Districts 1, 15, and 16 have variances of more than 5,000 from the ideal population. Those variances are -5,441 (-4.99%) for Senate District 1; +5,448 (+5.00%) for Senate District 15; and -5,450 (-5.00%) for Senate District 16. *Id.* That translates to an overall range of 10,898, just 2 individuals shy of 10% of the ideal population. *Id.*

Petitioner's Exhibit No. 10 is a copy of "Political Subdivisions Split Between Districts", another report with respect to the bill, which lists the 13 split counties and 37 split precincts under the bill. (Appendix, pp. 108-110) For example, the report reflects that the population of the Wayne County component of Senate District 5 under the bill has risen to 16,590. *Id.* The report further reflects that, under the bill, Senate District 8 is now composed of a portion of Putnam County with a population of 17,148 and a portion of Kanawha County with a population of 87,404. *Id.* Therefore, under this bill, Senate District 5 consists of two parts: one part, containing all of Cabell County, with a population of 96,319, and another part, containing part of Wayne County, with a population of 16,590, for a total district population of 112,909. (Appendix, pp. 107-110) Accordingly, the ratio of Cabell County residents to Wayne County residents in Senate

District 5 is now 5.81 to 1. Under this bill, Senate District 8 will consist of two parts: one part, containing part of Kanawha County, with a population of 87,404, and another part, containing part of Putnam County, with a population of 17,148, for a total district population of 104,552. (Appendix, pp. 107-110) Accordingly, the ratio of Kanawha County residents to Putnam County residents in Senate District 8 is now 5.10 to 1. Since the total population of West Virginia is 1,852,994, this means one senator from District 5 will have to be chosen from a portion of Wayne County that has less than 1% of the state's population and that one senator from District 8 will have to be chosen from a portion of Putnam County that has less than 1% of the state's population. Petitioner's Exhibit No. 11 is a copy of a "Plan Components Report", which sets forth in detail the population of each county and each precinct within split counties in each senatorial district under Enrolled Senate Bill No. 1006. (Appendix, pp. 111-128)

Petitioner's Exhibit No. 12 is a map of the new senatorial districts under Enrolled Senate Bill No. 1006. (Appendix, p. 129) To the extent that the word "compact" is understood as meaning "round", there are at least three senatorial districts that are lacking in compactness. One is Senate District 2, which resembles an icicle. If one imagines the northern boundaries of Marshall and Monongalia Counties as the edge of a roof, this icicle descends all the way down from that roof to the southern tip of Calhoun County, at the point of intersection among Calhoun, Clay, and Roane counties.

The second such district is Senate District No. 6, which resembles a rattlesnake. *Id.* The tail, or rattle, end of the snake is at the southern boundary of the Wayne County portion of Senate District 5. The body of the snake includes the sections of the district that run through portions of Wayne, Mingo, and McDowell Counties. The head of the

snake is Mercer County, which is shaped like a triangle. On the map, there are also three small portions of northern McDowell County in Senate District 5 that appear to be surrounded by the McDowell County portion of Senate District 9. These portions appear to be extensions of the Wyoming County portion of Senate District 9. Viewed together, the Wyoming and McDowell County portions of Senate District 9 appear, respectively, to be the body and claws of a crab resting on top of the rattlesnake.

The third such district is Senate District 12, which resembles a necktie swaying in a breeze. *Id.* The knot of the necktie is in Harrison County. The tip of the necktie is the point at which Clay, Nicholas, Fayette, and Kanawha Counties meet.

Recently, Mr. Cooper again revised and mapped out redistricting proposal. Using a redistricting website known as "Dave's Redistricting", Mr. Cooper printed off Petitioner's Exhibit No. 13. Petitioner's Exhibit No. 13 includes a West Virginia map that shows all 17 districts and three maps of portions of West Virginia that show the districts in more detail. (Appendix, pp. 130-133) On the left side of each map, the population of each district and the deviation from 109,000 appear. *Id.* In 14 of the 17 districts, the deviation is under 1,000 (and under 1%). The highest district population is that of New Senate District 3, which has a population of 110,727, and a deviation of only +1,727 (or 1.584%). The lowest district population is that of New Senate District 17 (which, under Mr. Cooper's district-numbering system, includes part of Berkeley County and all of Jefferson County), with a population of 106,456, and a deviation of only -2,544 (or -2.334%) *Id.* The overall population range is only 4,271 (or 3.918%).

After reviewing Enrolled Senate Bill No. 1006 and after initiating another legal proceeding on a different piece of legislation, Petitioner Cooper determined that the

Senate bill appears to violate provisions of *Articles II and VI* of the *West Virginia Constitution*. He then decided to bring a petition of mandamus before this Honorable Court to challenge the constitutionality of the legislation. On Wednesday, November 2, 2011, Petitioner Cooper mailed out, by United States Certified Mail, identical notices to two (2) elected officials of his intent to go to court. A copy of the notice and certificate of service is included in the Appendix as Petitioner's Exhibit No. 14. (Appendix, pp. 134-136) These notices were addressed and mailed to the Honorable Natalie E. Tennant, West Virginia Secretary of State, and the Honorable Darrell McGraw, West Virginia Attorney General.

Petitioner's Exhibit No. 15 is a detailed written description of the counties and, where necessary, the VTD's contained in each senatorial district, along with their locations and populations. (Appendix, pp. 137-157)

Petitioner's Exhibit No. 16 is a copy of portions of the transcripts of proceedings in Wheeling at the First Constitutional Convention of West Virginia, including those held on December 17, 1861, January 10, 11, and 15, 1862, and February 7, 1862, as well as most of the text of the *1863 Constitution*. DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION OF WEST VIRGINIA (Charles H. Ambler, Frances Haney Atwood, and William B. Matthews, eds.). (Appendix, pp. 158-188)

The **Honorable Natalie E. Tennant** is made a Respondent herein in her official capacity as Secretary of State of the State of West Virginia, which capacity includes broad powers over the conduct of elections in West Virginia. She is the chief election official of West Virginia.

Petitioner Cooper is filing this Petition, as a United States citizen and as a native of, resident of, voter in, and taxpayer in, Kanawha County and West Virginia, and as a taxpayer in Tucker County, to require the appropriate state official to comply with applicable requirements imposed by *Articles II and VI of the West Virginia Constitution*. He wants this Honorable Court to order Respondent Natalie E. Tennant **not** to process any of the certificates of announcement filed by candidates for the West Virginia State Senate in 2012 as if those certificates of announcement had been filed with respect to the delegate districts described in Petitioner's Exhibit No. 1. Instead, he wants this Honorable Court to order Respondent Tennant to process all of those certificates of announcement as if they had filed with respect to the senatorial districts set forth in his most recent redistricting plan, as mapped out in Petitioner's Exhibit No. 13 and as described in Petitioner's Exhibit No. 15, unless, on or before December 31, 2011, the Legislature passes a bill that redistricts the State Senate in a manner that is consistent with *Articles II and VI of the West Virginia Constitution* and the newly elected Governor has signed that legislation.

The following deadlines and events are particularly relevant to the questions presented herein and to the relief requested herein: (1) The period during which candidates may file to run for the State Senate begins on January 9, 2012, and ends on January 28, 2012. (2) The deadline for county commissions to alter boundary lines of precincts so that no precinct contains territory contained in more than one senatorial or delegate district is January 21, 2012. If the Court adopts the redistricting plan set forth in Petitioner's Exhibits Nos. 13 and 15, the dozens of precinct changes mandated by Enrolled Senate Bill No. 1006 would be eliminated. (3) The deadline for the

Secretary of State to certify to the each of the state's 55 county clerks the names of the particular candidates for the State Senate who are to appear on the ballots in a specific county is February 14, 2012.

V. SUMMARY OF ARGUMENT.

In redistricting the State Senate, the Legislature is required to comply with (1) the equal-representation requirements of *Article II, § 4*, of the *West Virginia Constitution*, (2) the equal-representation requirements of the Equal Protection Clause of the *Fourteenth Amendment*, and (3) the requirements, in *Article VI, § 4*, of the *West Virginia Constitution*, that each state senatorial district "shall be compact, formed of contiguous territory, bounded by county lines, and, as nearly as practicable, equal in population, to be ascertained by the census of the United States". These constitutional requirements must be harmonized.

The fact that Petitioner Cooper's redistricting plan divides only seven (7) counties between or among senatorial districts, and still comes much closer to population equality than does the plan in Enrolled Senate Bill No. 1006, which divides thirteen (13) counties, demonstrates that the Legislature unnecessarily violated the requirement, in *Article VI, § 4*, of the *West Virginia Constitution*, that each senatorial district be "bounded by county lines".

A review of the map of the districts created in Enrolled Senate Bill No. 1006 demonstrates that at least three of those districts violate the compactness requirement in *Article VI, § 4*, of the *West Virginia Constitution*.

A comparison of Petitioner Cooper's plan with that contained in Enrolled Senate Bill No. 1006 demonstrates that his plan better meets equal-representation

requirements than does the plan enacted by the Legislature. The Legislature's plan just barely meets the requirements of equal representation set forth in federal case law.

Petitioner Cooper submits that Enrolled Senate Bill No. 1006 violates the population-equality requirements in *Article II, § 4*, and *Article VI, § 4*, of the *West Virginia Constitution*, because the populations in 15 of the 17 senatorial districts created by that bill deviate more than 2.4% from the ideal population. Under his proposal, no district has a deviation that is as much as 2.4% from the ideal population.

Therefore, *W. Va. Code § 1-2-1*, as amended by Enrolled Senate Bill No. 1006, violates *Article II, § 4*, and *Article VI, § 4*, of the *West Virginia Constitution*.

Because the provisions of Enrolled House Bill No. 1006 violate the above sections of the *West Virginia Constitution* and because the redistricting plan submitted by Petitioner Cooper is in compliance with those same constitutional sections, he desires to have this Honorable Court order Respondent Natalie E. Tennant, West Virginia Secretary of State, to process any certificates of announcement by candidates for the State Senate in 2012 as if they had been filed in the districts set forth in his plan, unless, on or before December 31, 2011, the Legislature has passed, and the newly elected Governor has signed, a bill that redistricts the State Senate in accordance with those constitutional sections. Petitioner Cooper also wants this Honorable Court to rule that *W. Va. Code § 1-2-1*, as amended by Enrolled Senate Bill No. 1006, violates *Article II, § 4*, and *Article VI, § 4*, of the *West Virginia Constitution*.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.

Petitioner Cooper seeks to have the Clerk schedule this case for oral argument under *Rev. R. A. P. 20* before this Honorable Court.

Petitioner Cooper requests oral argument for several reasons: (1) The last reported decision by this Honorable Court that applied *Article VI, § 4*, in the redistricting of the State Senate was *Robertson v. Hatcher*, 148 W. Va. 239, 135 S.E.2d 675 (1964). This Court has not, in the last 47 years, applied this section in a redistricting case. However, the Court has applied this section in *White v. Manchin*, 173 W. Va. 526, 318 S.E.2d 470 (1984). (2) This is obviously a case of fundamental importance with statewide implications. (3) This case involves the constitutionality of a statute. To the best of Petitioner Cooper's knowledge, there are no material facts in dispute in this case.

Because the issues in the pending mandamus cases involving the redistricting of the House of Delegates involve complicated issues (like delegate assignment) that are very different from the complicated issues (like compactness) in the mandamus cases involving the redistricting of the State Senate (other than the shared population-equality issues), Petitioner Cooper would respectfully request that oral arguments in those two sets of cases be held on different days.

He also seeks to have this Court issue a rule to show cause.

VII. ARGUMENT.

- (1) **IN THE REDISTRICTING OF THE WEST VIRGINIA STATE SENATE FOLLOWING THE 2010 CENSUS, HOW MANY COUNTIES DID THE LEGISLATURE NEED TO DIVIDE BETWEEN OR AMONG DIFFERENT SENATORIAL DISTRICTS TO MEET THE POPULATION EQUALITY REQUIREMENTS IMPOSED BY THE EQUAL PROTECTION CLAUSE?**

A writ of mandamus will not issue unless three (3) elements coexist: (1) a clear legal right in the petitioner to the relief sought, (2) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and (3) the absence of

another adequate remedy. *Burdette v. Zakaib*, 224 W. Va. 325, 685 S.E.2d 903 (2009). As a United States citizen and as a West Virginia resident, voter, and taxpayer, Petitioner Cooper asserts that he does have a clear legal right to the relief sought in the Petition. Where the right sought to be enforced is a public one, mandamus can be sought by any citizen, taxpayer, or voter. *Rogers v. Hechler*, 176 W. Va. 713, 348 S.E.2d 713 (1986). The principle that a citizen, taxpayer, or voter has such interest as it entitles him or her to maintain mandamus applies when the Secretary of State is also named a party respondent. *White v. Manchin, supra*.

Respondent Tennant is the West Virginia Secretary of State. Pursuant to *W. Va. Code § 3-1A-6*, she is the chief election official of West Virginia. She is required to carry out her responsibilities in accordance with the *West Virginia Constitution*.

More specifically, it is with Respondent Tennant's office that all candidates for the State Senate must file their respective "certificates of announcement", *W. Va. Code § 3-5-7(b)(1)*, (or mail them with proper postmarks) "not earlier than the second Monday in January next preceding the primary election day, and not later than the last Saturday in January next preceding the primary election day," *W. Va. Code § 3-5-7(c)*. Among the information that must be included on a candidate's certificate of announcement is the "name of the office sought; the **district**, if any; and the division, if any". *W. Va. Code § 3-5-7(d)(2)*. (emphasis added) Each certificate of announcement must also include the "specific address designating the location at which the candidate resides at the time of filing, including number and street or rural route and box number and city, state and zip code". *W. Va. Code § 3-5-7(d)(5)*.

By the 84th day before the 2012 primary election, the Secretary of State is required to prepare a "certificate of candidates" , which includes, among other things, the name and residential address of every candidate who has filed a certificate of announcement with her office and the office for which he or she is a candidate. *W. Va. Code* § 3-5-9. After completing her certificate of candidates, the "Secretary of State shall ascertain therefrom the candidates whose names are to appear on the primary election ballot in the several counties in the state and shall certify to the clerk of the county commission in each county the certificate information relating to each of the candidates whose names are to appear on the ballot in that county." *Id.*

Petitioner Cooper is seeking to have this Honorable Court require that the Secretary of State provide such information relating to candidates for the State Senate to the respective county clerks as if those candidates had filed their certificates of announcement with respect to the senatorial districts that Petitioner Cooper has mapped and described in Petitioner's Exhibits Nos. 13 and 15, and that the Court require her **not** to provide such information as if the candidates had filed their certificates of announcement with respect to the districts that are described in Petitioner's Exhibit No. 1.

There is no other adequate remedy and mandamus is appropriate here. Furthermore, *W. Va. Code* §§ 3-1A-6, 3-5-7, and 3-5-9 are parts of *Chapter 3* of the *West Virginia Code*. Under *W. Va. Code* § 3-1-45, any "officer or person upon whom any duty is imposed by this chapter [*Chapter 3*] may be compelled to perform his or her duty by writ of mandamus. . . . A mandamus shall lie with the supreme court of

appeals, or any one of the judges thereof in vacation, returnable before court, to compel any officer herein to do and perform any duty required of him or her. . . .”

At least three (3) separate constitutional provisions – (a) *Article II, § 4*, of the *West Virginia Constitution*, (b) the Equal Protection Clause of the *Fourteenth Amendment*, and (c) *Article VI, § 4*, of the *West Virginia Constitution* – impose separate population-equality requirements on the Legislature when it reapportions the State Senate. Since these respective requirements, read in isolation, may lead to conflicting results, it is important that these provisions be harmonized.

Even before West Virginia became a state, there was widespread support, in the Virginia counties that are now part of West Virginia, for population equality in apportionment. Under the *Virginia Constitution of 1830*, Virginians who lived west of the Allegheny Mountains were assigned only a minority of the members of the Legislature. WEST VIRGINIA ENCYCLOPEDIA (Ken Sullivan ed.) 163. Results from the 1840 Census showed that the white population in the western part of Virginia outnumbered that in the remainder of the state. After years of public debate on the alleged unfairness of the *Virginia Constitution of 1830*, the voters of Virginia, in October 1851, ratified the *Virginia Constitution of 1851*, which, by apportioning representation in the Virginia Legislature on the basis of that state’s white population and by eliminating property qualifications as a requirement for voting, guaranteed that the majority of the seats in the Virginia House of Delegates would be chosen by residents of the “Trans-Allegheny” counties. *Id.*

Unchanged in its text since the 1872 Constitution was ratified, *Article II, § 4*, of the *West Virginia Constitution* (hereinafter referred to as "*Article II, § 4*") reads as follows:

Equal Representation

§ 4. Every citizen shall be entitled to equal representation in the government, and, in all apportionments of representation, equality of numbers of those entitled thereto, shall *as far as practicable*, be preserved. [emphasis added]

The words of this section, which are identical to the words of *Article I, § 7*, of West Virginia's 1863 Constitution, appear to be clear. Where a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed. *State ex rel. Smith v. Gore*, 150 W. Va. 71, 143 S.E.2d 791 (1965).

If census blocks, VTD boundaries, and county lines were no impediment, what division of West Virginia's population of 1,852,994 into 17 senatorial districts would satisfy the requirements of this section? As explained above, the average population per district would be slightly less than **109,000**. The mathematically ideal division of the state would be into six districts with a population of 108,999 each and 11 districts with a population of 109,000 each. ($108,999 \times 6 = 653,994$. $109,000 \times 11 = 1,199,000$. $653,994 + 1,199,000 = 1,852,994$.) For purposes of the Equal Protection Clause, **109,000** is used for calculating ideal population. Petitioner Cooper will also use 109,000 for analysis under *Article II, § 4*, and *Article VI, § 4*.

In devising his plan, set forth in Petitioner's Exhibits Nos. 13 and 15, Petitioner Cooper split no existing precincts (VTD's). (Appendix, pp. 137-157) By his count, West Virginia is divided into 1,856 separate VTD's, the average population per VTD is

about 998. ($1,856 \times 998 = 1,852,288$.) However, there is a wide range in the populations of the state's VTD's. Under his plan, the least populous district, New Senate District No. 17, has a population of **106,456** and the most populous district, New Senate District No. 3, has a population of **110,727**. (Appendix, p. 157) Therefore, the population variance of New Senate District No. 17, compared with the ideal population figure of 109,000, would be $-2,544$, or -2.334% , and the population variance of New Senate District No. 3 would be $+1,727$, or $+1.584\%$. It is, therefore, **practicable** to divide West Virginia into 17 senatorial districts without splitting any of its VTD's, and without splitting any more than seven counties, and still to have each of those districts deviate less than 2.4% from the ideal population of 109,000.

However, as explained hereinabove, the Legislature, in Enrolled Senate Bill No. 1006, insisted upon dividing thirteen (13) separate counties and many precincts in such a manner that every two years 15 senators would be elected from districts that have population variances in excess of 2.4%.

In *State ex rel. Smith v. Gore, supra*, this Court, in rejecting an argument that *Article II, § 4*, does not require equal representation in the election of delegates to a state constitutional convention, made the comment, “. . . The manner in which representation in the legislature shall be apportioned is specifically prescribed in Article VI of the Constitution. Therefore, the second clause of Article II, Section 4, ‘and in all apportionments of representation’ refers to something else than the legislature. . . .” 143 S.E.2d at 794. That comment is a bit confusing. Clearly, the use of the term “all apportionments” in that constitutional section includes the apportionment of the Legislature as well as apportionments relating to state constitutional conventions.

In any event, language similar to that in *Article II, § 4*, of the *West Virginia Constitution* is contained in *Article VI, § 4*, in of the *West Virginia Constitution*, which reads as follows:

Division of State Into Senatorial Districts

§ 4 For the election of senators the State shall be divided into twelve senatorial districts, which number shall not be diminished, but may be increased as hereinafter provided. Every district shall elect two senators, but, where the district is composed of more than one county, both shall not be chosen from the same county. The district shall be **compact**, formed of contiguous territory, **bounded by county lines**, and, **as nearly as practicable, equal in population**, to be ascertained by the census of the United States census. After every such census, the legislature **shall alter the senatorial districts, so far as may be necessary to conform to the foregoing provision.** [emphasis added]

In *Goines v. Rockefeller*, 338 F. Supp 1189, 1190, 1193 (S. D. W. Va. 1972), another case involving a legislative redistricting bill, the court quoted the language of *Article II, § 4*, and pointed out the contrast between the general language promoting population equality and the more specific language in *Article VI, § 4*.

What population variances between senatorial districts are unacceptable under the Equal Protection Clause? In reviewing a legislative redistricting plan, the Supreme Judicial Court of Massachusetts, in *McClure v. Secretary of Commonwealth*, 436 Mass. 614, 766 N.E.2d 847, 851 (2002), explained the basic test as follows:

The equal protection provision of the Fourteenth Amendment independently imposes an equal representation requirement on electoral districting. *Reynolds v. Sims*, 377 U. S. 533, 577, 84 S. Ct. 1362, 12 L.Ed.2d 506 (1964). The United States Supreme Court has stated that an apportionment plan with a maximum population deviation of under 10% is a deviation that the Legislature need not justify. [citations omitted] The maximum population deviation is calculated by determining the range of population deviation between the largest and smallest districts from the "ideal population" of a district. [citations omitted] Thus, where a plan includes no district with a population range of more than 5% under or 5% over the "ideal district population", the plan is within the 10% range and thus meets Federal population equality requirements ($\pm 5\%$ standard). The Federal

Voting Rights Act of 1965 must also be considered when implementing a redistricting plan. [citations omitted]

In *Holloway v. Hechler*, 817 F. Supp. 617 (S. D. W. Va. 1992), a federal district court ruled on a challenge made to a bill that redistricted the House of Delegates. The most overpopulated delegate district under the bill had a relative deviation of 4.97% greater than the ideal population and that the most underpopulated delegate district had a relative deviation of 5.00% less than the ideal population. *Id.* at 619. Because the overall deviation of 9.97% was less than 10%, the Court rejected that Equal Protection Clause challenge. *Id.* *But see Deem v. Manchin, supra.*

By Petitioner Cooper's calculation, the relative overall range under Enrolled Senate Bill No. 1006 is 9.998%. (See Appendix, pp. 107) If the population of Senate District 15 had three more residents, or 114,451, the relative overall range would exceed 10%. However, because the relative overall range under the bill is "only" 9.998% and because no Voting Rights Act issues are apparent under the bill to Petitioner Cooper, he is of the opinion that, under existing *federal* case law, there is no Equal Protection Clause issue to be raised with respect to Enrolled Senate Bill No. 1006.

A number of states have equality-in-apportionment constitutional provisions that exceed federal standards. For example, as the Supreme Court of Colorado noted, in *In Re Reapportionment of the General Assembly*, 45 P.3d 1237, 1248 (Colo. 2002), *Article V, § 46* of the *Colorado Constitution* reads as follows:

Section 46. Senatorial and representative districts.

The state shall be divided into as many senatorial and representative districts as there are members of the senate and house of representatives respectively, each district in each house having a population as nearly equal as

may be, as required by the constitution of the United States, but in no event shall there be more than five percent deviation between the most populous and the least populous district in each house.

Likewise, the “as far as practicable” standard under *Article II, § 4*, and the “as nearly as practicable” standard under *Article VI, § 4*, impose a **higher** standard of equality in apportionment than does the Equal Protection Clause. As Daniel Lamb, a cashier from Ohio County, noted when he addressed fellow delegates at the First Constitutional Convention on January 10, 1862, “we are to approach equality as ‘nearly as possible’. How near we can approach it in the senatorial districts is to be ascertained, perhaps, and the only mode of ascertaining that it exists is to **compare one apportionment which is proposed with another.**” (emphasis added) (Appendix, pp. 159, 171)

At that convention, arriving at a consensus on drafting constitutional provisions relating to the apportionment of the State Senate was relatively easy. A report submitted on January 11, 1862, by convention delegate James Hervey, an attorney from Brooke County, demonstrated that dividing the State Senate into 22 *single-member* districts would result in senatorial districts ranging in white population from 12,656 to 18,000. (Appendix, pp. 159, 174, 175) Instead, the delegates decided to divide the state's white population of 304,433 into nine *two-member* senatorial districts, with an average white population of 33,825.9 per senatorial district. (Appendix, pp. 165, 188) These districts were relatively equal in population, ranging from 32,063 to 34,603. *Id.* (The total range of 2,540 thus constituted 7.5% of the average white population per senatorial district and was closer than the 10% total deviation now allowed in Equal

Protection cases.) It was thus the initial apportionment of the State Senate that was to comply with the provisions of what is now *Article II, § 4*, as well as *Article VI, § 4*.

By comparing his plan with the Legislature's plan, Petitioner Cooper has demonstrated that the latter plan fails to meet the "as far as practicable" standard mandated by *Article II, § 4*, and the "as nearly as practicable" standard mandated by *Article VI, § 4*. The *West Virginia Constitution* may be more protective of individual rights than its federal counterpart. *State ex rel. Carper v. West Virginia Parole Bd.*, 203 W. Va. 583, 509 S.E.2d 864 (1998). Clearly, Senate Bill No. 1006 violates *Article II, § 4*, and *Article VI, § 4*.

Since Petitioner Cooper has demonstrated that every senatorial district under his plan (which splits only seven (7) counties) has a population variance of less than 2.4% from the ideal population, he has also demonstrated that there was no justification for the Legislature to split 13 counties in its plan. Clearly, the Legislature could have enacted his plan or some other plan without splitting any more than seven counties and could still have complied with the looser standards of the Equal Protection Clause.

On page 3 of Enrolled Senate Bill No. 1006, the Legislature, in W. Va. Code § 1-2-1(c), asserts that, in dividing the state into senatorial districts, the Legislature has –

(1) Adhered to the equality of population concept, while at the same time recognizing that from the formation of this state in the year 1863, each Constitution of West Virginia and the statutes enacted by the Legislature have recognized political subdivision lines and many functions, policies and programs of government have been implemented along political subdivision lines;

(2) Made the senatorial districts **as compact as possible, consistent with the equality of population concept;**

(3) Formed the senatorial districts of "contiguous territory" as that term has been construed and applied by the West Virginia Supreme Court of Appeals;

(4) Deviated from the long-established state policy, recognized in subdivision (1) above, **by crossing county lines only when necessary to ensure that all senatorial districts were composed of contiguous territory or when adherence to county lines produced unacceptable population inequalities and only to the extent necessary in order to maintain contiguity of territory and to achieve acceptable equality of population; and**

(5) Also taken into account in crossing county lines, to the extent feasible, the community of interests of the people involved. [emphasis added]

Contrary to these assertions, Petitioner Cooper has already demonstrated the Legislature has repeatedly crossed county lines even when it was **not** necessary to achieve acceptable equality of population. With respect to several (Gilmer, Grant, McDowell, Mineral, Mingo, Putnam, Roane, and Wayne) of the 13 counties divided by the Legislature in Enrolled Senate Bill No. 1006, Petitioner Cooper would add the following comments.

The Legislature did not need to split Gilmer County. Under Petitioner Cooper's plan all of the following counties are placed in New Senate District 12: Braxton, Clay, Gilmer, Lewis, Nicholas, Upshur, and Webster Counties, with Braxton County, the geographical center of the state also being the center of the district. The other six counties are adjacent to Braxton County. The population of New Senate District 12 is 108,615, with a population variance of only -385 (or -0.353%). The district is much rounder than the two senatorial districts set forth in Enrolled Senate Bill No. 1006 that contain pieces of Gilmer County. (Appendix, pp. 130, 132, 151, 152)

It was clearly unnecessary for the Legislature to split Grant and Mineral Counties. Under Petitioner Cooper's plan, all of the following counties are placed in New Senate District 15: Barbour, Grant, Mineral, Pendleton, Pocahontas, Randolph, and Tucker

Counties. The population of New Senate District 12 is 109,698, with a population variance of only +698 (or +0.640%). (Appendix, pp. 130, 133, 154)

It was also unnecessary for the Legislature to split McDowell and Mingo Counties. Under Petitioner Cooper's plan, all of the following counties are placed in New Senate District 9: Logan, McDowell, Mingo, and Wyoming Counties. The population of New Senate District 9 is 109,491, with a population variance of only +491 (or +0.450%). (Appendix, pp. 130, 132, 150)

The Legislature did not need to split Putnam County. Under Petitioner Cooper's plan, part of western Kanawha County and all of Putnam County are placed in New Senate District 5, a very compact district. The population of New Senate District 5 is 108,866, with a population variance of only -134 (or -0.123%). (Appendix, pp. 130, 132, 143-144) The decision by the Legislature to place part of Putnam County (with a population of 17,148) and part of Kanawha County (with a population of 87,404) in Senate District 8, so as to guarantee that a state senator be elected from a portion of a county that has less than 1% of the state's population, is a clear political gerrymander.

Nor did the Legislature need to split Roane County. Under Petitioner Cooper's plan, part of northern Kanawha County and all of Calhoun, Jackson, Mason, and Roane Counties are placed in New Senate District 4. The population of New Senate District 4 is 109,834, with a population variance of only +834 (or +0.765%). (Appendix, pp. 130, 132, 142)

Nor should the Legislature have split Wayne County. Under Petitioner Cooper's plan, part of Cabell County and all of Wayne County are placed in New Senate District 8, a small district. The population of New Senate District 8 is 108,767, with a

population variance of only --233 (or --0.214%). (Appendix, pp. 130, 132, 148-150)

The decision by the Legislature to continue to place part of Wayne County (with a population of 16,590) and all of Cabell County in Senate District 5, thereby continuing to guarantee that a state senator be elected from a portion of a county with less than 1% of the state's population, is another political gerrymander.

These divisions of counties between senatorial districts are in clear conflict with the provisions of *Article IV, § 4*. As the Supreme Court of Idaho stated in *Bingham County v. Com'n for Reapportionment*, 137 Idaho 870, 55 P.3d 863, 867 (2002), "A county may not be divided and parsed out to areas outside the county to achieve ideal district size, if that goal is attainable without extending the district outside the county." Likewise, the Court of Appeals of Maryland, in *Matter of Legislative Districting*, 370 Md. 312, 805 A.2d 292, 328 (2002), made this ruling: "We hold that the goals of avoiding the loss of experienced legislators and reducing incumbent contests, though rational, do not override the constitutional requirement that due consideration be given to subdivision boundaries." See the discussion about prioritization of constitutional criteria in redistricting matters in *In Re Reapportionment of the General Assembly*, *supra*. See also *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002); and *Burling v. Chandler*, 148 N.H.143, 804 A.2d 471 (2002).

It is clear that the Legislature needed to divide no more than seven counties between or among different senatorial districts in order to comply with the Equal Protection Clause. The division of thirteen counties in redistricting the State Senate was thus a clear violation of *Article VI, § 4, of the West Virginia Constitution*.

(2) **IN THE REDISTRICTING OF THE WEST VIRGINIA STATE SENATE FOLLOWING THE 2010 CENSUS, DID THE LEGISLATURE COMPLY WITH THE COMPACTNESS REQUIREMENT IMPOSED BY ARTICLE VI, § 4, OF THE WEST VIRGINIA CONSTITUTION?**

In enacting Enrolled Senate Bill No. 1006, did the Legislature violate the compactness requirement imposed by *Article VI, § 4*, of the *West Virginia Constitution*?

As Petitioner Cooper indicated in the Statement of the Case, he is of the opinion that Senate Districts 2, 6, and 12 under that bill are not compact. As a political cartographer, he could compose an entire brief, with supporting tables, charts, and drawings, on the subject of the compactness, or lack thereof, of those districts and of the districts under his plan and will do so if this Court so requests. See the discussion about compactness in *Stone v. Hechler, supra*. However, in the interests of space, his remarks in this Petition will be more general.

In many situations, the best compactness test is the Reock test, which involves dividing the area of a district by the area of the smallest circle that circumscribes that district. If a perimeter of a district is itself a circle, the district would have a score of 1.00. Contrary to a footnote in *Stone*, 782 F. Supp. at 1122, however, the diameter of that circle is **not** necessarily the line segment that connects the two most distant points on the perimeter of the district. For example, the diameter of the smallest circle that circumscribes an equilateral triangle will be **longer** than the line segment connecting the two most distant points on the perimeter of that triangle.

Petitioner's Exhibit No. 18 is an exhibit prepared by Petitioner Cooper to assist in explaining the compactness, or lack thereof, of two of these districts. (Appendix, p.

189) That exhibit consists of a map of the districts under Enrolled Senate Bill No. 1006, with large circles circumscribing Senate Districts 2 and 12. *Id.*

The Reock score of Senate District 2, the "icicle district", if Petitioner Cooper were to calculate that score, would not be so low that the district, on that basis alone, should be disqualified on the basis of compactness. Nevertheless, Petitioner Cooper believes that, for several other reasons, Senate District 2 is not compact. In the first place, under Petitioner Cooper's plan, his New Senate District 2 would consist of all of Tyler and Wetzel Counties and portions of Marion, Marshall, and Monongalia Counties. (Appendix, pp. 130, 133, 138-141) Therefore, his New Senate District 2 would easily fit inside the top half of the circle around the icicle district. The smallest circle circumscribing his New Senate District 2 is shown as a small circle enclosed by that larger circle. A comparison of the two circles shows that the following counties, or large portions thereof, are located outside the smaller circle and inside the larger circle: Barbour, Braxton, Calhoun, Gilmer, Lewis, Pleasants, Preston, Randolph, Ritchie, Upshur, Webster, Wirt, and Wood Counties. *Id.* Furthermore, the center of the smallest circle that circumscribes Senate District 2 is along the border of that district, along the Doddridge-Harrison county line. If a circle that circumscribes a district has its center outside, or just barely inside, that district, that fact itself is evidence that the district is not compact.

On the other hand, the Reock score of Senate District 6, the "rattlesnake district", if Petitioner Cooper were to calculate it, would definitely demonstrate that that district is not compact. In addition, the center of the circle circumscribing Senate District 6 is well outside that district, along the Boone-Logan county line. *Id.* Furthermore, all or nearly

all of the territory contained in Senate Districts 5, 7, 8, 9, and 17 is located within that circle, along with territory populated by more than 50,000 other individuals. *Id.*

Therefore, the circle that circumscribes Senate District 6 probably encloses territory inhabited by 500,000 to 600,000 West Virginians who do not live in District 6. By these criteria, Senate District 6 is clearly not compact.

Likewise, District 12, the "necktie district", consisting of all of Harrison, Lewis, Braxton, and Lewis Counties and part of Gilmer County, is not compact. Neckties may be pleasing to the eye, but they are not compact. Furthermore, the center of the district is just barely within the district. The only other positive thing that Petitioner Cooper can say about District 12 is that it includes much of I-79, thereby reducing travel time for elected officials.

For these reasons, Petitioner Cooper respectfully requests that the Court rule that Senate Districts 2, 6, and 12 are not compact, in violation of *Article VI, § 4*, of the *West Virginia Constitution*.

(3) IN THE REDISTRICTING OF THE WEST VIRGINIA STATE SENATE FOLLOWING THE 2010 CENSUS, WHAT DEGREE OF POPULATION EQUALITY AMONG STATE SENATORIAL DISTRICTS IS MANDATED BY ARTICLE II, § 4, AND ARTICLE VI, § 4, OF THE WEST VIRGINIA CONSTITUTION?

In the above discussions, Petitioner Cooper has repeatedly demonstrated that his plan for redistricting West Virginia's senatorial districts is much closer to numerical equality than the plan adopted by the Legislature. He is also of the opinion that the term "as far as practicable" in *Article II, § 4*, of the *West Virginia Constitution*,

and the term "as nearly as practicable", in *Article VI, § 4*, of the *West Virginia Constitution*, as applied to the redistricting of the State Senate, mean exactly what the term "as nearly as practicable" means when applied to congressional redistricting in federal cases.

Speaking for the United States Supreme Court in *Kirkpatrick v. Preisler*, 394 U.S. 526, 530, 531, 89 S. Ct. 1225, 22 L. Ed. 2d 519 (1969), Justice Brennan made it clear what that term means:

We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the "as nearly as practicable" standard. The whole thrust of the "as nearly as practicable" approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. . . . [The] "as nearly as practicable" standard requires that the State make a good-faith effort to achieve precise mathematical equality. . . . Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small.

There are other reasons for rejecting the *de minimis* approach. We can see no nonarbitrary way to pick a cutoff point at which population variances suddenly become *de minimis*. Moreover, to consider a certain range of variances *de minimis* would encourage legislators to strive for that range rather than for equality as nearly as practicable. The District Court found, for example, that at least one leading Missouri legislator deemed it proper to attempt to achieve a 2% level of variance rather than to seek population equality.

What Justice Brennan stated in 1969 is just as true is 2011. The very fact that federal courts will not normally overturn a state-senatorial redistricting scheme with an overall population variance of less than 10% (10,900 in this case) or a population variance of 5% (5,450 in this case) in either direction, has been repeatedly used by West Virginia legislators to aim for the maximum possible variance that will allow them to stay out of federal court rather than to strive for precise population equality. Indeed,

of the 17 senatorial districts described in Enrolled Senate Bill No. 1006, eleven of them have population variances that are more than 4% in either direction. (Appendix, p. 107) The population variances for Senate Districts 1, 15, and 16 are -4.99%, +5.00%, and -5.00%, respectively. *Id.*

To Petitioner Cooper, the most amusing part of the Legislature's focus on 5% variances is that legislators unnecessarily divided Mineral County under the pretext that there would be two senatorial districts to the east of the division line that would have populations of almost exactly 109,000 each. (It would have been far preferable, and perfectly constitutional, to attach all of Hardy County to Hampshire County, as Petitioner Cooper did in his plan, rather than to attach part of Mineral County to Hampshire County, as the Legislature did in its plan.)

After that unnecessary split of Mineral County was made, there were 217,998 West Virginia residents to the east of that division line, enough to place 108,999 in each senatorial district. However, a subsequent decision was made to place as few residents as possible in the most eastern district, designated Senate District 16 (containing all of Jefferson County and part of Berkeley County), and to place as many residents as possible in the next most eastern district, designated Senate District 15 (containing large portions of Berkeley and Mineral Counties and all of Hampshire and Morgan Counties).

As a result of the implementation of the second decision, the population of Senate District 15 is 114,448, with a deviation of +5,448 (or +5.00%), and the population of Senate District 16 is 103,550, with a deviation of -5,450 (or -5.00%), (Appendix, p. 107)

Justice Brennan was clearly right!

The term "as far as practicable" in *Article II, § 4*, of the *West Virginia Constitution*, and the term "as nearly as practicable", in *Article VI, § 4*, of the *West Virginia Constitution*, should be applied by this Court to the redistricting of the State Senate in the same fashion as the term "as nearly as practicable" is applied by the United States Supreme Court to congressional redistricting, with the understanding that no more than seven (7) counties may be split in the process of redistricting the State Senate.

Accordingly, Enrolled Senate Bill No. 1006 violates both *Article II, § 4*, and *Article VI, § 4*, of the *West Virginia Constitution*, on the issue of population equality.

4) DOES W. VA. CODE § 1-2-1, AS AMENDED BY ENROLLED SENATE BILL NO. 1006, WHICH PASSED ON AUGUST 5, 2011, VIOLATE ARTICLE II, § 4, AND ARTICLE VI, § 4, OF THE WEST VIRGINIA CONSTITUTION?

For the reasons set forth hereinabove, Petitioner Cooper submits that *W. Va. Code § 1-2-1*, as amended by Enrolled Senate Bill No. 1006, violates *Article II, § 4*, and *Article VI, § 4*, of the *West Virginia Constitution*.

VIII. CONCLUSION.

For the reasons discussed in this Petition, Petitioner Cooper now prays that this Honorable Court accept his Petition; issue a scheduling order; issue a rule to show cause; schedule this case for oral argument; and declare Enrolled Senate Bill No. 1006 unconstitutional as being violative of *Article II, § 4*, and *Article VI, § 4*, of the *West Virginia Constitution*.

Petitioner Cooper further prays that this Honorable Court order Respondent Natalie E. Tennant, West Virginia Secretary of State, to process any certificates of announcement by candidates for the State Senate in 2012 as if they had been filed in

the districts set forth in his redistricting plan, included in the Appendix, unless, on or before December 31, 2011, the Legislature has passed, and the newly elected Governor has signed, a bill that redistricts the State Senate in accordance with those constitutional sections and the recommendations he has made in this Petition.

Respectfully submitted,

THORNTON COOPER

Pro se



Thornton Cooper
3015 Ridgeview Drive
South Charleston, WV 25303
West Virginia State Bar No. 823
(304) 744-9616 (home)

Dated: November 7, 2011

VERIFICATION.

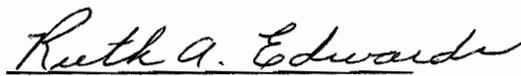
STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to-wit:

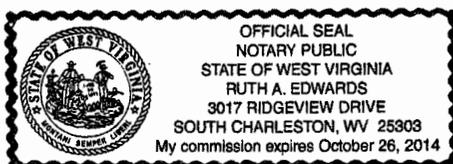
I, **Thornton Cooper**, after first being duly sworn upon oath, state that I am the Petitioner named in the attached and foregoing Petition for Writ of Mandamus, that I have read the same, and that the facts and allegations therein contained are true and correct, except insofar as they are therein stated to be on information and belief, and that, insofar as they are stated therein to be on information and belief, I believe them to be true.


Thornton Cooper

Taken, sworn to, and subscribed before me this 7th day of November, 2011.

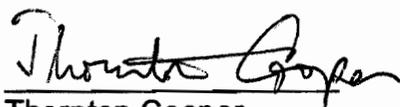

Ruth A. Edwards, Notary Public

My commission expires October 26, 2014



CERTIFICATE OF SERVICE

I, **Thornton Cooper**, the Petitioner herein, do hereby **certify** that I have served the foregoing **"Petition for Writ of Mandamus"** and the **Appendix** thereto upon the Honorable **Natalie E. Tennant**, Secretary of State of the State of West Virginia, (304) 558-6000, by hand-delivering a copy of the same to her office at Building 1, Suite 157-K, 1900 Kanawha Boulevard, East, Charleston, WV 25305-0770; and upon the Honorable **Darrell McGraw**, West Virginia Attorney General, (304) 558-2021, by hand-delivering a copy of the same to his office at the State Capitol Complex, Building 1, Room E-26, Charleston, WV 25305, all on this 7th day of November, 2011; and do **further certify** on this 7th day of November, 2011, that this Honorable Court should serve its **Rule to Show Cause**, if granted herein, **on those individuals at those addresses**, who may be reached at the aforementioned **telephone numbers**.


Thornton Cooper