

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

4 2011

Upon Original Jurisdiction

STATE OF WEST VIRGINIA, ex rel.
THORNTON COOPER,

Petitioner,

v.

No. 11-1405

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

Respondent.

AND

STATE OF WEST VIRGINIA, ex rel.
STEPHEN ANDES, et al.,

Petitioners,

v.

No. 11-1447

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

Respondent.

**INTERVENOR RICHARD THOMPSON'S COMBINED
RESPONSE TO PETITION FOR WRIT OF MANDAMUS
AND PETITION FOR WRIT OF PROHIBITION**

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**INTERVENOR RICHARD THOMPSON'S COMBINED
RESPONSE TO PETITION FOR WRIT OF MANDAMUS
AND PETITION FOR WRIT OF PROHIBITION**

Intervenor, Richard Thompson, in his capacity as Speaker of the West Virginia House of Delegates ("Speaker Thompson") submits this Combined Response to the Petition for Writ of Mandamus and Petition for Writ of Prohibition which, pursuant to West Virginia Code § 53-1-3, has been verified by him. For the reasons set forth herein, Speaker Thompson believes that this Court should refuse both petitions with prejudice.

QUESTIONS PRESENTED

1. **WHETHER A CLEAR CONSTITUTIONAL PROVISION EXISTS IN THIS CASE SUFFICIENT TO OVERRIDE THE LEGISLATURE'S PLENARY POWER TO APPORTION DELEGATES.**
2. **WHETHER HOUSE BILL 201 VIOLATES EITHER FEDERAL EQUAL PROTECTION GUARANTEES OR ARTICLE II, SECTION IV OF THE WEST VIRGINIA CONSTITUTION.**
3. **WHETHER HOUSE BILL 201 VIOLATES ARTICLE VI, SECTION 6 AND SECTION 7 OF THE WEST VIRGINIA CONSTITUTION BECAUSE THE BILL SPLITS COUNTIES WITH INSUFFICIENT POPULATION TO SUSTAIN A DELEGATE BETWEEN TWO OR MORE DELEGATE DISTRICTS OR COUNTIES.**
4. **WHETHER HOUSE BILL 201 VIOLATES ARTICLE VI, SECTION 6 AND SECTION 7 OF THE WEST VIRGINIA CONSTITUTION BECAUSE THE BILL SPLITS COUNTIES WITH SUFFICIENT POPULATIONS TO SUSTAIN ONE OR MORE DELEGATES BETWEEN TWO OR MORE DELEGATE DISTRICTS OR COUNTIES.**
5. **WHETHER THE MASON/PUTNAM PETITIONERS HAVE MET THE BURDEN OF ESTABLISHING THAT ANY PART OF HOUSE BILL 201 CONSTITUTES PARTISAN GERRYMANDERING.**

STATEMENT OF THE CASE

Every decade, the West Virginia Legislature faces with the difficult task of reapportioning the State's population to create districts from which the members of the United States House of Representatives, the West Virginia Senate, and the West Virginia House of Delegates are chosen.

With respect to the reapportionment of the West Virginia House of Delegates, the process began with the appointment of the House Select Committee on Redistricting ("HSCR"). App. at Pg. 1 [Ex.1]. The members of the HSCR came from all regions of the State and consisted of 20 Democrats and 10 Republicans reflecting the 65/35 present make up of the House of Delegates. *Id.* The Speaker named Majority Leader Brent Boggs as Committee Chair. *Id.*

Although the HSCR was comprised of 30 members, the process leading up to the final proposal took place largely at the local level and involved close interaction among residents, county officials and each of the 100 members of the House of Delegates. App. at Pg. 3 [Ex.2]. All Delegates and state residents were encouraged to provide feedback to the HSCR. *Id.*

The HSCR created a number of avenues for public feedback. A web site was created to provide information to the public regarding the redistricting process. *Id.* From the site, members of the public could enter their zip code and obtain the identity of their Delegate and their Regional HSCR members. *Id.*; *see also* App. at Pg. 8 [Ex. 3] (listing of HSCR members and Delegate for citizens in the 25314 zip code). The search identified the contact information for the applicable Regional HSCR members. *See, e.g., id.* Citizens also had the option of writing the HSCR, calling the HSCR's toll free number, and receiving updates of the select committee's work electronically on Twitter. App. at Pg. 3 [Ex. 2].

The HSCR met during the June and July interims. Presentations were made providing members with general knowledge of the redistricting process. App. at Pg. 1[Ex. 1]. Committee members met regionally and reported their regional recommendations back to the HSCR staff. Upon receipt of the various regional plans, the HSCR staff merged the plans into one state map. See http://www.legis.state.wv.us/legisdocs/2011/1x/maps/house/HB106_Plan_Components_Report.pdf (detailing proposed new districts and providing population summaries); http://www.legis.state.wv.us/legisdocs/2011/1x/maps/house/HB106_Map_Book.pdf (graphic maps of districts).

The Acting Governor called the Legislature into special session on August 1, 2011. At that time, the House received a request for a public hearing which was held on August 1, 2011 at 5pm. The HSCR met on August 2, 2011. App. at Pg. 11 [Ex. 4]. The committee reviewed the plan, considered amendments and approved that the plan. The result was H. B. 106 which was then sent to the House floor (with an accompanying minority report) for consideration. App. at Pg. 11 [Ex. 4].

H.B. 106 was read on three separate days. App. at Pg. 11 [Ex. 4]. The bill was subject to extensive debate where a number of amendments were proposed. App. at Pg. 11 [Ex. 4]. A motion to substitute the minority report which called for the creation of 100 single member districts was considered and rejected. App. at Pg. 11 [Ex. 4]. Four amendments were adopted on August 5, 2011. App. at Pg. 11 [Ex. 4]. The bill was then passed by the House on August 5, 2011. App. at Pg. 11 [Ex. 4]. The Senate passed the House bill and, after rejecting two amendments, passed H.B. 106. App. at Pg. 10 [Ex. 4].

Following the completion of First Special Session, technical errors were discovered in the bill by the House staff arising from the amendments adopted on the House floor. Because of these errors, the Governor vetoed the bill on August 17, 2011. App. at Pg. 10 [Ex. 4].

A second special session was called for August 18, 2011. A new bill, H.B. 201 was introduced which corrected the previous errors. See App. at Pg. 13 Ex. 5]. The House then voted to dispense with committee consideration of the new bill allowing immediate consideration on the House floor. App. at Pg. 13 [Ex. 5]. On August 20, 2011, the bill was amended once on the floor by voice vote after 14 amendments to the proposed amendment were considered and rejected. App. at Pg. 13 [Ex. 5]. After considerable debate, H.B. 201 passed the House on August 20, 2011. App. at Pg. 13 [Ex. 5]. The Senate considered H.B. 201 on August 21, 2011. After rejecting three amendments, the Senate passed the bill. App. at Pg. 12 [Ex. 5]. The Governor signed the bill on September 2, 2011. App. at Pg. 12 [Ex. 5].

The resulting statute, W.Va. Code § 1-2-2, created 67 delegate districts. Of those, 47 districts contained were single member districts (an increase in four single-member districts from the current apportionment). App. at Pgs. 14-15 [Ex. 6]. With respect to multimember districts: one five- member district was created, two four-member districts were created, six three-member districts were created, and eleven two-member districts were created. App. at Pg. 15 [Ex. 6]. A summary of the district populations and their deviations from the ideal district population of 18,530 is included in the Appendix. Detailed final district maps appear at <http://www.legis.state.wv.us/house/redistricting.cfm>.

As passed H.B. 201, the deviation from the ideal population ranges from -5% to + 4.99% for a total deviation of 9.99% from ideal. App. at Pg. 16 [Ex. 6]. The House redistricting staff conducted an analysis of the redistricting plan proposed by Petitioner Cooper. In Petitioner

Cooper's plan, the deviation from the ideal population ranges from -3.99% to + 3.56% for a total deviation of 7.55% from ideal. App. at Pg. 19 [Ex. 7].

Unlike H.B. 201, Petitioner Cooper's plan, was not created with input from the constituents of the various regional areas and would cause a number of current members to be forced to run against each other. The resulting election would force experienced members out of the legislature thereby depriving the voters of the choice of keeping the experienced members. A complete analysis of incumbent conflicts for all 100 districts was not undertaken, but a quick review of the plan and existing delegate residences discloses the following conflicts:

Delegates Ennis and Givens currently reside in District 3 of the Cooper plan.
Delegates Fleischauer and Pasdon currently reside in District 13 of the Cooper plan.
Delegates Martin and Paxton currently reside in District 38 of the Cooper plan.
Delegates Guthrie, Hatfield, Nelson and Wells reside in District 41 of the Cooper plan.
Delegates Brown and Skaff reside in District 43 of the Cooper plan.
Delegates C. Miller and Craig reside in District 58 of the Cooper plan.
Delegates Perry and Pino reside in District 80 of the Cooper plan.

App. at Pg. 20 [Ex. 8] (Memo From Tom Bennett, House Redistricting Staff).

On October 13, 2011, Petitioner Thornton Cooper filed a Petition for a Writ of Mandamus in this Court No. 11-1405 ("Cooper Petition") challenging the passage of House Bill 201 (2011). On October 21, 2011, Petitioners Stephen Andes, et al., filed their Petition for Writ of Prohibition in this Court, No. 11-1447 ("Putnam/Mason Petition") bringing separate challenges to the passage of House Bill 201. On October 28, 2011, Speaker Thompson moved to intervene in these actions in his official capacity as Speaker of the West Virginia House of Delegates. This Court granted that motion by order on November 1, 2011. Pursuant to that Order, Speaker Thompson files this Response.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Speaker Thompson agrees with the Respondent Secretary of State that this Court should, for the reasons set forth in her response and herein, exercise its discretion and decline to issue a rule to show cause with prejudice as to both petitions as authorized by Revised Rule of Appellate Procedure 16(i). Speaker Thompson respectfully requests that the decision be rendered on an expedited basis with an appropriate memorandum decision issued pursuant to Rule 21 to follow. An expedited decision will allow candidates to make election plans without any uncertainty regarding which district they would be seeking to represent.

If, however, the Court grants the Rule to Show cause with respect to one or both of the petitions, Speaker Thompson agrees with Petitioner Cooper, that, for the reasons stated in his petition, that it may be appropriate to hold a full Rule 20 argument if such an argument can be scheduled on an expedited basis. Following any argument, for the reasons noted above, Speaker Thompson again respectfully requests that, if it is possible, the Court to enter a summary order setting forth its ruling and following up with a more detailed decision.

With respect to any oral argument, additional time may be needed for argument beyond that provided by Rule 20 depending on whether one, two, or more petitions are consolidated for oral argument.¹

¹On November 4, 2011, Speaker Thompson was served with a Petition by the Monroe County Commission challenging H.B. 201. This Petition directly names him as a Respondent. In addition, news reports indicate that the filing of two separate petitions challenging the redistricting of the West Virginia Senate is imminent. *See* <http://www.wvgazette.com/News/201111030238> (November 3, 2011).

SUMMARY OF ARGUMENT

The apportionment of delegate districts is a legislative function under our state constitution. The test of legislative power in this State is constitutional restriction, and what the people have not said in the organic law their representatives shall not do, they may do. When considering the constitutionality of an act of the Legislature, the negation of legislative power must appear beyond reasonable doubt; otherwise, the power of the Legislature is plenary. This Court has upheld the Legislature's plenary power with respect to elections in general and redistricting in particular. Furthermore, the fact that reapportionment is inherently political strengthens the argument that the Legislature has plenary power in this sphere.

House Bill 201 allows for a less than 10% population variance and therefore complies with the federal constitution's Equal Protection Clause requirements. Long ago this Court confirmed that the equal apportionment clause in Article II of the West Virginia Constitution is not applicable to legislative redistricting. There exists no basis for throwing out the Legislature's plan due to the fact that a plan can be devised with a lesser population variance than the one adopted. The U.S. Supreme Court recognized that the state legislatures needed some flexibility in establishing these apportionments and has approved such apportionments. And, of course, the power to select between opposing plans that comply with the federal Equal Protection Clause is properly vested in the Legislature.

Since the West Virginia Constitution does not prohibit the Legislature from splitting counties of sufficient or insufficient populations and joining those portions with portions from other counties to establish a delegate district, there is no violation of a constitutional prohibition upon the Legislature's plenary power by House Bill 201. There are no constitutional requirements as to what constitutes a delegate district so as to limit the Legislature's drawing of

said districts. There are no constitutional limitations on the Legislature's power to draw those delegate districts across county lines. Accordingly, there are no constitutional prohibitions on the Legislature's reapportionment power that have been violated by House Bill 201.

Petitioners' partisan gerrymandering claim also fails. Petitioners have neither articulated a justiciable standard, how the Court can apply that standard, or presented any evidence, other than conclusory assumptions, that the Legislature has engaged in partisan gerrymandering. While the United States Supreme Court still considers partisan gerrymandering claims justiciable, there currently exists no Supreme Court approved standard for determining when the political act of redistricting crosses the line into partisan gerrymandering. In any event, Petitioners' conclusory assumptions are a wholly insufficient basis to overturn this redistricting.

ARGUMENT

Respondent Secretary of State has filed a response to the Petitions. Speaker Thompson believes that the arguments raised by her in the response independently justify denying the Petitions. Speaker Thompson adopts and incorporates those arguments, and for the sake of brevity will not repeat them here. Instead, Speaker Thompson presents the following arguments which also support the rejection of the two Petitions.

I. UNLESS RESTRICTED BY A CLEAR CONSTITUTIONAL PROVISION, THE LEGISLATURE'S POWER TO APPORTION DELEGATES IS PLENARY AND NOT SUBJECT TO REVIEW IN THIS COURT.

It is clear that the apportionment of delegate districts is a legislative function under our state constitution. The provisions dealing with legislative apportionment all are contained in Article VI of the Constitution, the Article of the Constitution setting forth matters dealing with the composition of the legislature and other issues regarding the legislative power. Indeed, after setting forth the initial apportionments of legislative districts, Article VI, § 10 broadly declares that the “arrangement of the . . . delegate districts, and the apportionment of delegates, shall hereafter be declared *by law*, as soon as possible after each succeeding census....”

This Court has long recognized that the West Virginia Constitution contains a broad grant of legislative power:

In *Eskew v. Buckhannon Bank*, 115 W.Va. 579, 587, 177 S.E. 433, 437, (1934) this Court applied the rule applicable in the interpretation of every State Constitution, as distinguished from the Constitution of the United States, that the Constitution of a state ‘is not a grant of powers to the Legislature, and the Legislature is supreme unless restricted by the Constitution.’ . . . [T]he State Legislature is the supreme law-making body within the State, and, as such, may enact any law not prohibited by the State or Federal Constitutions. . . .

State ex rel. Fox v. Brewster, 140 W.Va. 235, 251, 84 S.E.2d 231, 241 (1954) (citations omitted); *see also Robinson v. Charleston Area Med. Ctr., Inc.*, 186 W.Va. 720, 725, 414 S.E.2d

877, 882 (1991) (“ ‘The Constitution of West Virginia being a restriction of power rather than a grant thereof, the legislature has the authority to enact any measure not inhibited thereby.’” quoting Syl. pt. 1, *Foster v. Cooper*, 155 W.Va. 619, 186 S.E.2d 837 (1972)). Thus, “[t]he test of legislative power in this State is constitutional restriction, and what the people have not said in the organic law their representatives shall not do, they may do.” *Robertson v. Hatcher*, 148 W.Va. 239, 250-251, 135 S.E.2d 675, 683 (1964) (citations omitted). While the legislature is not free to disregard constitutional limitations, when “considering the constitutionality of an act of the legislature, *the negation of legislative power must appear beyond reasonable doubt.*” *State v. James*, 710 S.E.2d 98, 104 (W.Va. 2011) (emphasis added); *see also* syl. pt 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965) (same); *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405, 412 (W.Va. 2011) (same).

This doctrine of plenary legislative power in the absence of a clear constitutional restriction specifically applies to election issues. *See, e.g.*, syl. pt. 2, *State ex rel. Brewer v. Wilson*, 151 W.Va. 113, 150 S.E.2d 592 (1966) (“The power of the legislature to regulate the nomination and election of candidates for public office and to prescribe essential qualifications to be possessed by candidates in order to be eligible to be nominated or elected is plenary within constitutional limitations.”), *overruled on other grounds by Marra v. Zink*, 163 W.Va. 400, 256 S.E.2d 581 (1979); *see also* *Miller v. Burley*, 155 W.Va. 681, 700, 187 S.E.2d 803, 815 (W.Va. 1972) (“This holding clearly states the fundamental legal proposition that, in the absence of a constitutional inhibition, the power of the legislature to prescribe the manner of voting in elections is plenary.”). Indeed, in *Robertson v. Hatcher*, 148 W.Va. 239, 250-251, 135 S.E.2d 675, 683 (1964) (citations and internal quotations omitted), this Court specifically applied the

doctrine in the context of determining the Constitutionality of the reapportionment of West Virginia State Senate Districts:

The plaintiffs contend that superimposition of the Seventeenth Senatorial District upon the Eighth Senatorial District constitutes a violation of Article VI, Section 4, of the West Virginia Constitution. . . .An examination of Section 4 fails to reveal any inhibition against the superimposing of one senatorial district upon another. Our State Constitutional being a restriction of power rather than a grant of power as is the Federal Constitution, the Legislature may enact any measure which is not specifically prohibited by the State or Federal Constitution.

The Legislature of this State, unlike the Congress of the United States under the Federal Constitution, does not depend for its authority upon the express grant of legislative power. The Federal Constitution is a grant of power; a State Constitution is a restriction of power. The Constitution of a State is examined to ascertain the restraints, if any, which the people have imposed upon the Legislature, not to determine the powers they have conferred. The Legislature of this State possesses the sole power to make laws and it is necessarily invested with all the sovereign power of the people within its sphere.

In relation to legislative powers. . . the general powers of the Legislature are almost plenary and that it can legislate on every subject not interdicted by the Constitution itself. The test of legislative power in this State is constitutional restriction, and what the people have not said in the organic law their representatives shall not do, they may do. . .

Thus, in determining the challenges raised in the subject petitions, this Court is limited to the determination of whether the Legislature's reapportionment scheme violated some limitation or inhibition of the Legislature's plenary power that clearly appears beyond a reasonable doubt.

Application of this doctrine is especially appropriate in this context. Redistricting is inherently political:

“[W]hether or not nonpopulation factors are expressly taken into account in shaping political districts, they are inevitably ever present and operative. They influence all election outcomes in all sets of districts. The key concept to grasp is that there are no neutral lines for legislative districts ... every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place.’ Dixon, Fair Criteria and Procedures for Establishing Legislative Districts 7-8, in Representation and Redistricting Issues (B. Grofman, A. Lijphart, R. McKay, & H. Scarrow eds. 1982).”

Davis v. Bandemer, 478 U.S. 109, 129, 106 S.Ct. 2797, 2808 (1986). Once one recognizes the inherent political nature of the redistricting process, the idea that the political branches should have plenary power unless they contravene clear constitutional limitations becomes unassailable. Simply put, political decisions should be made by the political branches not the courts. Apart from the question of whether courts should delve into these political issues, a serious question arises whether courts can even come up with standards that are subject to judicial application. Indeed, while the United States Supreme Court found claims of political gerrymandering capable of judicial review in *Bandemer*, *supra*, in the more than twenty years since *Bandemer*, the United States Supreme Court has been incapable of coming up with a standard to apply that commands support from a majority of the Court. *See, e.g., Vieth v. Jubelirer*, 541 U.S. 267, 281, 124 S.Ct. 1769, 1778 (2004) (plurality opinion) (“Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Bandemer* exists. As the following discussion reveals, no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged.”); *see also id.* at 1793 (Kennedy, concurring) (“First is the lack of comprehensive and neutral principles for drawing electoral boundaries. No substantive definition of fairness in districting seems to command general assent. Second is the absence of rules to limit and confine judicial intervention. With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.”).

Finally, as the Petitioners acknowledge and the Secretary of State makes clear in her response, the redistricting rules set forth in the West Virginia Constitution have, to a large extent, been preempted by modern equal protection jurisprudence under decisions interpreting the United States Constitution. The relatively bright line +5%/-5% test under federal law, *see Part*

II, *infra*, is capable of providing both legislative guidance and a clear standard for judicial review. The West Virginia Constitutional provisions indisputably can no longer be applied as written. *Id.* Given the need to comply with these federal requirements which are clear to both courts and legislatures, this Court should be even more reluctant to find implied limits to the Legislature's otherwise plenary power and thus further complicating the difficult task of obtaining a legislative majority necessary to pass a redistricting bill.

II. HOUSE BILL 201 DOES NOT VIOLATE EITHER FEDERAL EQUAL PROTECTION GUARANTEES OR ARTICLE II, SECTION 4 OF THE WEST VIRGINIA CONSTITUTION BECAUSE THIS NEITHER APPLIES TO LEGISLATIVE REDISTRICTING NOR IMPOSES A STANDARD GREATER THAN THE TEN PERCENT VARIANCE ALLOWED UNDER FEDERAL LAW.

Both of the petitions argue that House Bill 201 violates Article II, § 4 of the West Virginia Constitution. In addition, while the Cooper Petition concedes that that bill complies with the Equal Protection Clause of the United States Constitution, the Putnam/Mason Petition argues that the redistricting fails the federal equal protection test. *See* Putnam/Mason Petition at pp. 20-23. Both of these arguments fail.

Article II, § 4 provides that "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." This general provision, however, is subject to the more specific provisions of Article VI which are specific to legislative apportionment.

While the Putnam/Mason Petition quotes a broad passage from this Court's opinion in *State ex rel. Smith v. Gore*, 150 W.Va. 71, 76, 143 S.E.2d 791, 794-95 (1965), regarding section 2's application to all apportionments, the passage is taken out of context. The complete holding rejects both petitioners' claims that section 2 applies to legislative redistricting:

We believe that Article II, Section 4 of our Constitution is clear in its terms and that the intention thereof is manifest from the language used. It provides for equal representation in government and, additionally, in all apportionments of representation. *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 other than the legislature.*

150 W.Va. at 76, 143 S.E.2d at 795 (emphasis added). Contrary to Petitioner Cooper's claims, this holding is not puzzling. It is a straightforward application of an established rule of construction. As this Court noted in *State ex rel. Collins v. Bedell*, "[g]eneral and indefinite terms of one provision of a constitution, literally embracing numerous subjects, are impliedly limited and restrained by definite and specific terms of another, necessarily and inexorably withdrawing from the operation of such general terms, a subject which, but for such implied withdrawal, would be embraced and governed by them." 194 W.Va. 390, 400, 460 S.E.2d 636, 646 (1995) (quoting syl. pt. 5, *Lawson v. Kanawha County Court*, 80 W.Va. 612, 92 S.E. 786 (1917)).

Even if Article II, § 4 of the West Virginia Constitution has any bearing on state legislative apportionments, Cooper is incorrect in arguing that the Equal Protection Clause of the United States Constitution permits a greater variance in legislative district size than Section 4 of the State Constitution. The Equal Protection Clause of the United States Constitution generally permits deviations in state legislative districts within a 10% range (+/- 5%). See *Brown v. Thomson*, 462 U.S. 835, 842-43, 103 S.Ct. 2690, 2696 (1983). As Cooper concedes, H.B. 201 complies with the standards imposed by federal equal protection law. Cooper Petition at pp. 21-22. Cooper's argument that H.B. 201 violates Article II, Section 4 is based Section 4's inclusion of the phrase "as far as practicable." Cooper Petition at p. 22.

While Cooper cites no precedent for the proposition that the use of the phrase “as far as practicable” translates into a standard that is stricter than the standard imposed by the Equal Protection Clause which is not qualified by the “as far as practicable” language, Cooper’s logic does not withstand examination. The 1872 Constitution’s use of the qualification “as far as practicable” does not evidence a stricter standard; instead, it qualifies and thereby weakens what otherwise would be a textual requirement of absolute equal apportionment. Unlike Section 4, the Equal Protection Clause contains no explicit textual qualification on its guarantee. U.S. Const., Amend 14, § 1 (“No State shall make or enforce *any law which shall . . . deny to any person* within its jurisdiction the equal protection of the laws.” (emphasis added)). Thus, based on a pure textual analysis, the Equal Protection Clause imposes a stricter standard than that imposed by Section 4.

Of course, as the 1872 drafters explicitly recognized, absolute equality would be impractical. The United States Supreme Court has recognized this and, on a number of occasions, has interpreted the Equal Protection Clause as requiring legislative apportionments to be subject to a test of practicality:

By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, *as nearly of equal population as is practicable*. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.

Reynolds v. Sims, 377 U.S. 533, 577, 84 S.Ct. 1362, 1389-90 (1964) (emphasis added); *see also Hadley v. Junior College Dist. of Metropolitan Kansas City*, 397 U.S. 50, 56, 90 S.Ct. 791, 795 (1970) (“[W]henver a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment

requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, *as far as is practicable*, that equal numbers of voters can vote for proportionally equal numbers of officials.” (emphasis added)); *cf. Wesberry v. Sanders*, 376 U.S. 1, 14, 84 S.Ct. 526, 533 (1964) (constitutional test for the validity of congressional districting schemes in U.S. House of Representatives “means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.”).

Applying the “as equal as practicable test” set forth in *Reynolds v. Sims*, the Supreme Court has consistently allowed deviations that do not exceed ten percent:

In view of these considerations, we have held that minor deviations from mathematical equality among state legislative districts are insufficient to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State. Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations.

Brown v. Thomson 462 U.S. at 842-43, 103 S.Ct. at 2696 (citations and internal quotations omitted).²

The alternative rule advanced by Petitioner Cooper would be unworkable.³ Petitioner Cooper’s test requires judicial rejection of a legislative apportionment plan that passes scrutiny

²The Putnam/Mason Petitioners’ suggestion that the less than 10% deviation here violates the Equal Protection Clause is puzzling. The only basis for the argument is that county lines are not respected. While it is sometimes permissible to take into account county lines in justifying a deviation over 10%, *see Brown v. Thomson, supra*, Petitioners cite no Equal Protection Clause precedent that requires county lines to be respected when the population deviation is less than 10%.

³Petitioner Cooper’s reliance on interpretations of the Colorado Constitution is inapplicable here as the Colorado provision sets an explicit standard of 5%. Colorado Const., art. V, § 46. Moreover, it is hard to argue that the general West Virginia equal representation provision calls for a standard stricter than the 10% variance allowed by federal law when Article VI, §§ 6-7 when enacted explicitly allowed a county with only 60% of the ideal population to have its own delegate.

under the Equal Protection clause if a challenger can set forth an alternative plan that has a smaller deviation. The United States Supreme Court has recognized that state legislatures need some breathing room to accomplish equality in apportionment: “We must remember that the machinery of government would not work if it were not allowed a little play in its joints.” *Reynolds v. Sims*, 377 U.S. at 577 n. 57 (quoting *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501, 51 S.Ct. 228, 229 (1931)). Within the bounds of the West Virginia and United States Constitutions, the choice between one or more legislative plans is properly vested in the West Virginia Legislature.

III. HOUSE BILL 201 DOES NOT VIOLATE ARTICLE VI, SECTION 6 AND SECTION 7 OF THE WEST VIRGINIA CONSTITUTION AS THESE SECTION DO NOT PROHIBIT SPLITTING COUNTIES WITH INSUFFICIENT POPULATION TO SUSTAIN A DELEGATE BETWEEN TWO OR MORE DELEGATE DISTRICTS OR COUNTIES.

In House Bill 201, some counties with populations that are insufficient to sustain a delegate district are split between two counties. Petitioner Cooper argues that this apportionment violates Article VI, §§ 6-7 of the West Virginia Constitution. When the text of these provisions is analyzed under the applicable rules of constitutional construction, it is clear that there is no violation.

Article VI, § 6 of the West Virginia Constitution provides as follows:

For the election of delegates, every county containing a population of less than three fifths of the ratio of representation for the House of Delegates, shall, at each apportionment, be attached to some contiguous county or counties, to form a delegate district.

Article VI, § 7 of the West Virginia Constitution provides as follows:

After every census the delegates shall be apportioned as follows: The ratio of representation for the House of Delegates shall be ascertained by dividing the whole population of the state by the number of which the House is to consist and rejecting the fraction of a unit, if any, resulting from such division. Dividing the

population of every delegate district, and of every county not included in a delegate district, by the ratio thus ascertained, there shall be assigned to each a number of delegates equal to the quotient obtained by this division, excluding the fractional remainder. The additional delegates necessary to make up the number of which the House is to consist, shall then be assigned to those delegate districts, and counties not included in a delegate district, which would otherwise have the largest fractions unrepresented; but every delegate district and county not included in a delegate district, shall be entitled to at least one delegate.

As an initial matter, it is clear that the manner which these provisions were initially applied as described by Petitioner Cooper clearly violates modern equal protection jurisprudence as counties with populations between 60% and 95% of the ideal population were assigned a delegate. Such an apportionment plan clearly violates modern equal protection jurisprudence. *See, e.g., Goins v. Rockefeller*, 338 F.Supp 189 (S.D.W.Va. 1972) (striking down W.Va. apportionment applying the 60% test of §§ 6-7). It makes little sense to elevate the less than 60% standard and apply a strict construction that limits the legislative options when dealing with smaller counties when the premise of the provision that counties with populations between 60% and 95% of the ideal population would be assigned a delegate is unenforceable.

Cooper argues that every county with less 60% of the ideal population must be attached in whole to some contiguous county or counties, to form a delegate district. Of course, section 6 does not contain that explicit requirement. Instead, it requires “every county containing a population of less than [60% of the ideal population] be attached to some contiguous county or counties, to form a delegate district.” The provision explicitly allows the smaller counties to be attached to a “contiguous county or counties.” It does not explicitly forbid splitting a county into two parts and attaching each part to “some contiguous . . . counties.” While the provision permits the legislature to design an apportionment plan where a county with less than 60% of the ideal population is attached in whole to a contiguous county to form a single delegate district,

section 6 does not explicitly forbid attaching parts of a smaller county to two contiguous counties.

Robertson v. Hatcher, 148 W.Va. at 250-251, 135 S.E.2d at 683 requires rejection of Petitioner Cooper's claims. Just as superimposition of two State Senate Districts upon one another does not constitute a violation of Article VI, Section 4, of the West Virginia Constitution because an "examination of Section 4 fails to reveal any inhibition against the superimposing of one senatorial district upon another," House Bill 201's split of counties with less than 60% of the ideal population into two and attaching parts of the smaller county to two different contiguous counties is not impermissible as section 6 "fails to reveal any inhibition against the" practice. Because there is not explicit constitutional inhibition, the Court should respect the Legislature's plenary power over reapportionment and reject this claim.

IV. HOUSE BILL 201 DOES NOT VIOLATE ARTICLE VI, SECTION 6 AND SECTION 7 OF THE WEST VIRGINIA CONSTITUTION AS THESE SECTIONS DO NOT PROHIBIT SPLITTING COUNTIES WITH SUFFICIENT POPULATIONS TO SUSTAIN ONE OR MORE DELEGATES BETWEEN TWO OR MORE DELEGATE DISTRICTS OR COUNTIES.

In House Bill 201, some counties with populations that are sufficient to sustain one or more delegates are split between two counties. Petitioner Cooper and the Putnam/Mason Petitioners argue that this apportionment also violates Article VI, §§ 6-7 of the West Virginia Constitution. Because no explicit provision prohibits this practice, there is no constitutional violation.

Contrary to Petitioners' arguments, there is no explicit requirement in §§ 6-7 that a county that is large enough to form a delegate district with one or more delegates be maintained and not have its population split among other counties or delegate districts.

Petitioners' arguments fail because there are no requirements for what can constitute a delegate district. Nothing in the Constitution prohibits the Legislature from defining a delegate district as including, for example, a part of Putnam County and a part of Kanawha County as it did with District 38. Unlike House Districts, Senate Districts were explicitly defined to be "bounded by county lines." W.Va. Const., art. VI, § 4. While § 7 permits the Legislature to treat a whole county as a delegate district and § 6 requires smaller counties to be combined with one or more contiguous counties to create a delegate district, nothing explicitly prohibits the creation of delegate districts by combining parts of large counties into delegate districts.

In House Bill 201 the Legislature defined the delegate districts in a manner that is not contrary to the explicit terms of the West Virginia Constitution. Because the Constitution does not negate the Legislature's otherwise plenary power "beyond reasonable doubt," *State v. James, supra*, the Legislature's decision to define the delegate districts in the manner in which it did is not subject to challenge in this Court by the petitioners. *Robertson v. Hatcher, supra*.

V. THE MASON/PUTNAM PETITIONERS HAVE FAILED TO ESTABLISH THAT ANY PART OF HOUSE BILL 201 CONSTITUTES PARTISAN GERRYMANDERING.

The final argument raised by the Putnam Mason Petitioners is that the delegate districts in Putnam County and Mason County were designed in a manner that constitutes partisan gerrymandering.

In *Davis v. Bandemer*, 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986), the Court held that an equal protection challenge to a political gerrymander presents a justiciable case or controversy, *id.*, at 118–127, 106 S.Ct. 2797, but there was disagreement over what substantive standard to apply. Compare *id.*, at 127–137, 106 S.Ct. 2797 (plurality opinion), with *id.*, at 161–162, 106 S.Ct. 2797 (Powell, J., concurring in part and dissenting in part). That disagreement

persists. A plurality of the Court in *Vieth*, *supra* would have held such challenges to be nonjusticiable political questions, but a majority declined to do so. *See* 541 U.S., at 306, 124 S.Ct. 1769 (KENNEDY, J., concurring in judgment); *id.*, at 317, 124 S.Ct. 1769 (STEVENS, J., dissenting); *id.*, at 343, 124 S.Ct. 1769 (SOUTER, J., dissenting); *id.*, at 355, 124 S.Ct. 1769 (BREYER, J., dissenting).

As Justice Scalia recognized in *Vieth*, following *Bandemer*, no case alleging the kind of partisan gerrymandering attempted to be alleged by the Putnam/Mason Petitioners here has been successful. *See Vieth v. Jubelirer*, 541 U.S. at 280-81 & 6, 124 S.Ct. at 1778 & n.6. Similarly, the most recent attempt to establish a standard in the United States Supreme Court also failed. *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 413-414, 126 S.Ct. 2594, 2607 (2006).

In this case, Petitioners neither articulate a standard, allege that the standard is capable of judicial application, nor allege that they have presented facts that comply with the standard. All that is alleged is that two Republican incumbents have been forced to run against each other while similarly populated counties are allegedly treated differently. Petitioners' evidence is anecdotal and insufficient.

In *Holloway v. Hechler*, 817 F.Supp. 617, 627 (S.D.W.Va. 1992), the Court applied the plurality's test from *Bandemer*:

To establish an Equal Protection violation in this, a partisan gerrymandering case, the Republicans [plaintiffs] must 'prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.' 478 U.S. at 127, 106 S.Ct. at 2808.

The Court rejected the partisan gerrymandering claim based on this test in spite of testimony from a political demographer, the director for redistricting for the Republican National Committee, and the testimony of five Republican members of the House of Delegates. Notably,

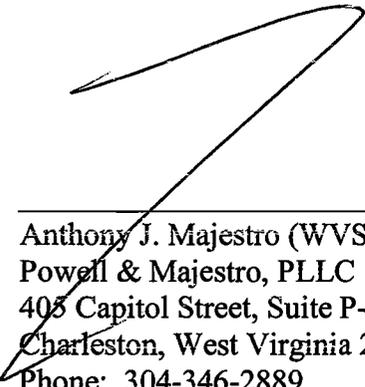
the Court in *Holloway v. Hechler* found it significant that only 5 of the 26 Republican incumbents testified. *Id.* Here no incumbent candidate or anyone else has provided testimony. Instead, all Petitioners present is the unsupported statement that “[m]any believe [the fact that Putnam County is generally known as Republican] as the main basis for dividing Putnam County. Putnam/Mason Petition at p. 25. While the plurality test from *Bandemer* was later rejected by the Court in *Vieth, supra, Holloway v. Hechler* clearly illustrates the insufficiency of Petitioners’ evidentiary showing.

CONCLUSION

For the reasons noted herein, the Intervenor, Richard Thompson, respectfully requests that the Court refuse to issue the rule to show cause and reject the Cooper Petition and the Putnam/Mason Petition with prejudice.

Richard Thompson, in his official capacity as Speaker of the West Virginia House of Delegates,

By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel.
THORNTON COOPER,

Petitioner,

vs.)

No. 11-1405

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

Respondent.

and

STATE OF WEST VIRGINIA, ex rel.
STEPHEN ANDES, et al.,

Petitioners,

vs.)

No. 11-1447

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

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached **INTERVENOR RICHARD THOMPSON'S COMBINED RESPONSE TO PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF PROHIBITION** was served upon the persons listed below by mailing via USPS, postage pre-paid, a true copy thereof as required by Rule 37, Rules of Appellate Procedure, on this 4th day of November, 2011:

Thornton Cooper, Esquire
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Petitioner

Honorable Natalie E. Tennant
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Anthony J. Majestro (W.Va. State Bar ID #5165)

VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to-wit:

I, Richard Thompson, Speaker of the West Virginia House of Delegates, after first being duly sworn upon oath, state that I am the Intervenor named in the attached and foregoing Combined Response to Petition for Writ of Prohibition and 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.


Richard Thompson
Speaker of the West Virginia House of Delegates

Taken, sworn to, and subscribed before me this 3rd day of November, 2011.

My commission expires September 16, 2012.




Beth L. Thompson
Notary Public