

No. 11-1405

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**CHARLESTON**

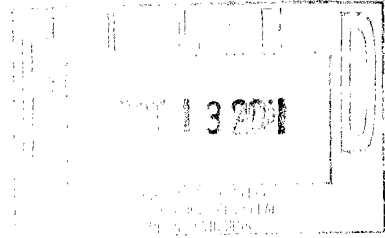
**STATE OF WEST VIRGINIA ex rel.  
THORNTON COOPER,**

**Petitioner,**

**v.**

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

**Respondent.**



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**PETITION FOR WRIT OF MANDAMUS**

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**THORNTON COOPER  
Petitioner**

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**October 13, 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 HOUSE OF DELEGATES FOLLOWING THE 2010 CENSUS, WHAT DEGREE OF POPULATION EQUALITY AMONG DELEGATE DISTRICTS IS MANDATED BY ARTICLE II, § 4, OF THE WEST VIRGINIA CONSTITUTION?**
- (2) IF THE POPULATION OF A COUNTY IS LESS THAN SIXTY PERCENT (60%) OF THE “RATIO OF REPRESENTATION”, AS THAT TERM IS DEFINED IN ARTICLE VI, § 7, OF THE WEST VIRGINIA CONSTITUTION, DOES § 6 OF THAT ARTICLE PROHIBIT THE WEST VIRGINIA LEGISLATURE FROM SPLITTING THAT COUNTY BETWEEN TWO OR MORE DELEGATE DISTRICTS?**
- (3) IN LIGHT OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AND OF ARTICLE II, § 4, OF THE WEST VIRGINIA CONSTITUTION, TO WHAT EXTENT DOES ARTICLE VI, § 7, OF THE WEST VIRGINIA CONSTITUTION REQUIRE THAT THE WEST VIRGINIA LEGISLATURE ASSIGN A SPECIFIC NUMBER OF DELEGATES TO A COUNTY OR “DELEGATE DISTRICT” WITH A PARTICULAR POPULATION?**
- (4) DO ARTICLE IV, § 4, AND ARTICLE VI, §§ 12 AND 39, OF THE WEST VIRGINIA CONSTITUTION PROHIBIT THE WEST VIRGINIA LEGISLATURE FROM IMPOSING “DELEGATE RESIDENCY DISPERSAL” REQUIREMENTS ON CANDIDATES FOR THE HOUSE OF DELEGATES IN ONE MULTIMEMBER DISTRICT?**
- (5) DOES W. VA. CODE § 1-2-2, AS AMENDED BY ENROLLED HOUSE BILL NO. 201, WHICH PASSED ON AUGUST 21, 2011, VIOLATE ARTICLE II, § 4, ARTICLE IV, § 4, AND ARTICLE VI, §§ 6, 7, 12, AND 39, OF THE WEST VIRGINIA CONSTITUTION?**



#### IV. STATEMENT OF THE CASE.

This Petition challenges the constitutionality of Enrolled House Bill No. 201, a bill consisting of 361 pages that amended *W. Va. Code* § 1-2-2. (Petitioner's Exhibit No. 1, Appendix, pp. 1-362) The Legislature passed the bill on August 21, 2011.

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 is a member of the Democratic Party, a property owner, and a 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.

For over thirty (30) years, Petitioner Cooper has, primarily without compensation, also served as a political cartographer. He has repeatedly drawn up maps and/or written descriptions of redistricting plans and submitted these plans to those legislative bodies. Following the 1980, 1990, 2000, and 2010 Censuses, he submitted plans for congressional redistricting. He also actively participated 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).

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 plans for submission to the redistricting committees of the State Senate and House of Delegates. In May through July of 2011, the State Senate Redistricting Committee held twelve (12) public hearings across the state. He attended each hearing and advocated dividing the House of Delegates into 100 single-member districts.

Attendees at those hearings were given material relating to changes in the state's population. Petitioner's Exhibits Nos. 2, 3, 4, 5, and 6 are copies of portions of that material. Petitioner's Exhibit No. 2 is a map of the state's 55 counties, along with their populations in 2010. (Appendix, p. 363) Petitioner's Exhibit No. 3 is a map of the state's 58 delegate districts, including the names of the incumbent delegates, as those delegate districts existed as of the beginning of 2011. (Appendix, p. 364) Petitioner's Exhibit No. 4, 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. 365) Petitioner's Exhibit No. 5 is a table showing the populations of the state's 55 counties contained therein, under the 2000 and 2010 Censuses. (Appendix, pp. 366, 367) Petitioner's Exhibit No. 6 is a table showing the populations of those 58 delegate districts under the 2000 and 2010 Censuses. (Appendix, pp. 368, 369)

The information contained in Petitioner's Exhibits Nos. 2-6 did not provide information that was sufficiently detailed for Petitioner Cooper to draft a proposal for dividing West Virginia into 100 single-member districts. Accordingly, he decided to draft a redistricting proposal that would create single-member districts composed of contiguous 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. Petitioner's Exhibit No. 7 is a copy of the first four pages of that printout. (Appendix, pp. 370-373) 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. For example, Petitioner's Exhibit No. 8 is a copy of a portion of a Census map of parts of Barbour, Randolph, and Upshur Counties. (Appendix, p. 374)

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 proposal for dividing the state into 100 single-member delegate districts. 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.

Unlike the State Senate committee, the House of Delegates Redistricting Committee (HDRC) operated under a much more closed process. However, Petitioner Cooper did send several e-mails to that committee's thirty (30) members. Those e-mails detailed his initial written plan, without splitting any of the state's precincts, for dividing the state into 100 districts. For example, Petitioner's Exhibit No. 9 is a copy of an e-mail that he sent on July 25, 2011, describing his plan to divide Brooke, Hancock, Marshall, Ohio, and Wetzel Counties into eight (8) districts. (Appendix, pp. 375-380)

The First Extraordinary Session of the Legislature for 2011 commenced on Monday, August 1, 2011. On that afternoon, he spoke at a hastily called public hearing held by the HDRC. 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 bills 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.

During the same special session, the Legislature, on Friday, August 5, 2011, also passed House Bill No. 106, which would have divided the House of Delegates into a total of 67 delegate districts. After reviewing Enrolled House Bill No. 106, Petitioner Cooper determined that it appeared to violate several sections of *Articles II and VI* of the *West Virginia Constitution*.

Accordingly, he decided to bring a petition of mandamus before this Honorable Court to challenge that bill if Acting Governor Tomblin signed it. If, in the alternative, Acting Governor Tomblin decided to veto Enrolled House Bill No. 106, Petitioner Cooper decided to challenge the constitutionality of any subsequent bill that appeared to violate the same sections of *Articles II and VI*.

Accordingly, on Wednesday, August 10, 2011, in an effort to comply with *W. Va. Code § 55-17-3(a)*, Petitioner Cooper mailed out, by United States Certified Mail, identical notices to three (3) elected officials of his intent to go to court if Acting

Governor Tomblin signed Enrolled House Bill No.106 or if appropriate legislative or executive relief was not provided in a timely manner. A copy of the notice and certificate of service is included in the Appendix as Petitioner's Exhibit No. 10.

(Appendix, pp. 381-387) These notices were mailed to the Honorable Natalie E. Tennant, West Virginia Secretary of State, the Honorable Earl Ray Tomblin, Acting West Virginia Governor, and the Honorable Darrell McGraw, West Virginia Attorney General. At the end of each notice, Mr. Cooper stated the following:

Mr. Cooper hopes that Acting Governor Earl Ray Tomblin will veto Enrolled House Bill No. 106 and will inform the Legislature that he wants it to enact a piece of legislation that complies with applicable federal and state constitutional requirements and that also divides West Virginia into 100 single-member delegate districts.

If the appropriate executive and/or legislative relief is not provided in a timely manner, Mr. Cooper plans to institute a proceeding in a court of competent jurisdiction in an effort to obtain the appropriate judicial relief.

On Wednesday, August 17, 2011, Acting Governor Tomblin vetoed Enrolled House Bill No. 106. On that date, Petitioner Cooper sent another e-mail to the HDRC's members. That e-mail detailed his second written plan, without splitting any of the state's precincts, for dividing the state into 100 districts.

The Second Extraordinary Session commenced on Thursday, August 18, 2011. On Sunday, August 21, 2011, the Legislature passed House Bill No. 201, which again would have divided the House of Delegates into a total of 67 delegate districts and protected most incumbents. Petitioner Cooper was informed that the bill corrected technical errors in the vetoed bill and imposed "delegate residency dispersal" requirements on a newly formed two-delegate district.

In addition, in House Bill No. 201, the Legislature incorporated part of Petitioner Cooper's **manner** of presenting his plan, as set forth in Petitioner's Exhibit No. 9, which was to include the population count of every precinct that is included in a particular delegate district, to include population subtotals for each portion of a county that is included in a particular delegate district, and to include the total population of each delegate district. Because the Legislature also split up many precincts, the population count for each census block in the split-up precincts is also listed in that bill. However, the new bill did not make any changes that eliminated the problems discussed in Petitioner Cooper's notices of August 10, 2011.

Depictions and summaries of the bill's contents were placed on the Legislature's website. From that website, Petitioner Cooper printed off Petitioner's Exhibits Nos. 11, 12, and 13. Petitioner's Exhibit No. 11 is a map of the 67 delegate districts under the bill. (Appendix, p. 388) Petitioner's Exhibit No. 12 is a "population summary report" that lists the population of each of the 67 districts, as well as the number of delegates to be elected from each district, the ideal population of the district, the actual deviation from the ideal population, and the percent deviation. (Appendix, pp. 389-391) Petitioner Cooper would note that there is a somewhat misleading column heading, titled "Deviation", on the second page of the exhibit that, instead of listing the actual numerical deviation for each of the multimember delegate districts, divides the actual numerical deviation by the number of delegates to be elected from each district. (Appendix, p. 390) Petitioner's Exhibit No. 13 is a "plan components report" that lists each county or portion thereof that is contained in each of the 67 districts, as well as the

population of each district and the population of each county or portion thereof that is contained in the district. (Appendix, pp. 392-398)

On Friday, September 2, 2011, Acting Governor Tomblin signed Enrolled House Bill No. 201.

Prior to the filing of this Petition, Mr. Cooper again revised in writing, and also mapped out, his third plan for dividing West Virginia into 100 single-member districts. Using a redistricting website known as "Dave's Redistricting", Mr. Cooper printed off Petitioner's Exhibits No. 14 and 15. Petitioner's Exhibit No. 14 is a West Virginia map that shows these districts. (Appendix, p. 399) Petitioner's Exhibit No. 15 is a set of six maps of portions of West Virginia; the population, population deviation (from the ideal population of 18,530), and district number of each delegate district are printed on these maps. (Appendix, pp. 400-405) Petitioner's Exhibit No. 16 is a detailed written description of the counties and, where necessary, the VTD's contained in each delegate district, along with their locations and populations. (Appendix, pp. 406-465)

Petitioner's Exhibit No. 17 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. 466-497)

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, IV, 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 House of Delegates 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 districts set forth in his most recent redistricting plan, as mapped out in Petitioner's Exhibits Nos. 14 and 15 and described in Petitioner's Exhibit No. 16, unless, on or before December 31, 2011, the Legislature passes a bill that redistricts the House of Delegates in a manner that is consistent with *Articles II, IV, and VI* of the *West Virginia Constitution* and the Acting Governor or 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 House of Delegates 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. 14, 15, and 16, the dozens of precinct changes mandated by Enrolled House Bill No. 201 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 House of Delegates who are to appear on the ballots in a specific county is February 14, 2012.

#### **V. SUMMARY OF ARGUMENT.**

In redistricting the House of Delegates, 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*, (3) the requirement, in *Article VI, § 6, of the West Virginia Constitution*, that each county having a population "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", and (4) the requirements, in *Article VI, § 7, of the West Virginia Constitution*, relating to the assignment of (at least) a specific number of delegates to each county or multicounty "Delegate District". These four constitutional requirements must be harmonized.

A comparison of Petitioner Cooper's plan with that contained in Enrolled House Bill No. 201 demonstrates that his 100-delegate-district plan better meets equal-representation requirements than does the 67-delegate-district 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 House Bill No. 201 violates the requirement in *Article II, § 4*, because the populations in many of the districts in that bill

deviate more than 4% from the ideal population. Under his proposal, no district has a deviation that is as much as 4% from the ideal population for that district.

Furthermore, because the Legislature's plan divides five (5) counties, each of which has a population that is "less than three fifths of the ratio of representation of the House of Delegates", by splitting each of these counties between two (2) separate delegate districts, that plan also violates *Article VI, § 6*. Under Petitioner Cooper's plan, no county with a population that is less than sixty percent (60%) of that ratio of representation is split between two (2) or more delegate districts.

Moreover, because, as to at least seventeen (17) other counties, each of which has a population that is **greater** than the ratio of representation, the Legislature's plan fails to assign at least the minimum number of mandated delegates per county, that plan also violates *Article VI, § 7*. Under Petitioner Cooper's plan, each of these counties is assigned at least the minimum number of mandated delegates.

Because it imposes "delegate residency dispersal" requirements on exactly one multimember district in West Virginia, Enrolled House Bill No. 201 also violates *Article II, § 4, Article IV, § 4, and Article VI, §§ 12 and 39 of the West Virginia Constitution*.

Therefore, *W. Va. Code § 1-2-2*, as amended by Enrolled House Bill No. 201, violates *Article II, § 4, Article IV, § 4, and Article VI, §§ 6, 7, 12, and 39 of the West Virginia Constitution*.

Because the provisions of Enrolled House Bill No. 201 violate the above sections of the *West Virginia Constitution* and because the 100-delegate-district 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 House of Delegates 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 House of Delegates in accordance with those constitutional sections. Petitioner Cooper also wants this Honorable Court to rule that *W. Va. Code § 1-2-2*, as amended by Enrolled House Bill No. 201, violates *Article II, § 4, Article IV, § 4, and Article VI, §§ 6, 7, 12, and 39* 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 and *Article VI, §§ 6 and 7*, in the redistricting of the House of Delegates was *Robertson v. Hatcher*, 148 W. Va. 239, 135 S.E.2d 675 (1964). This Court has not, in the last 47 years, applied those sections or explained how they are to be harmonized with the federal Equal Protection Clause and with *Article II, § 4*. (2) This is obviously a case of fundamental importance with statewide implications. (3) This case also involves the constitutionality of a statute. To the best of Petitioner Cooper's knowledge, there are no material facts in dispute in this case. For the above reasons, oral argument before this Honorable Court would appear to be appropriate in this proceeding.

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

## VII. ARGUMENT.

### **(1) IN THE REDISTRICTING OF THE WEST VIRGINIA HOUSE OF DELEGATES FOLLOWING THE 2010 CENSUS, WHAT DEGREE OF POPULATION EQUALITY AMONG DELEGATE DISTRICTS IS MANDATED BY ARTICLE II, § 4, OF THE WEST VIRGINIA CONSTITUTION?**

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*, 173 W. Va. 526, 318 S.E.2d 479 (1984).

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 House of Delegates 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 84<sup>th</sup> 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 House of Delegates to the respective county clerks as if those candidates had filed their certificates of announcement with respect to the 100 districts that Petitioner Cooper has mapped and described in Petitioner's Exhibits Nos. 14, 15, and 16, 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 67 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 four (4) separate constitutional provisions – (a) *Article II, § 4*, of the *West Virginia Constitution*, (b) the Equal Protection Clause of the *Fourteenth Amendment*, (c) *Article VI, § 6*, of the *West Virginia Constitution*, and (d) *Article VI, § 7*, of the *West Virginia Constitution* – impose separate population-equality requirements on the Legislature when it reapportions the House of Delegates. 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 100 single-member districts would satisfy the requirements of this section? Since the average population per district would be exactly **18,529.94**, a number that falls between two integers, **18,529** and **18,530**, the mathematically ideal division of the state would be into six districts with a population of 18,529 each and 94 districts with a population of 18,530 each. (18,529 x 6 = 111,174. 18,530 x 94 = 1,741,820. 111,174 + 1,741,820 = 1,852,994.) For purposes of analysis under *Article VI, §§ 6 and 7*, of the *West Virginia Constitution*

(hereinafter referred to as “Section 6” and “Section 7” or “§ 6” and “§ 7”), **18,529**, the largest integer that is *less than* 18,529.94, called the “ratio of representation”, is used as a divisor to calculate the minimum number of delegates to be assigned to a county or multicounty “Delegate District”. For purposes of the Equal Protection Clause, **18,530**, the integer that is *closest to* 18,529.92, is used for calculating ideal population. Petitioner Cooper will also use 18,530 for analysis under *Article II, § 4*.

In devising his plan, set forth in Petitioner’s Exhibits Nos. 14, 15, and 16, that would divide West Virginia into 100 districts, Petitioner Cooper split no existing precincts (VTD’s). (Appendix, pp. 406-465) 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 100-district plan, the least populous district, New Delegate District No. 74, has a population of **17,791** and the most populous district, New Delegate District No. 84, has a population of **19,190**. (Appendix, pp. 363, 399-405) Therefore, the population variance of New Delegate District No. 74, compared with the ideal population figure of 18,530, would be  $-739$  ( $17,791 - 18,530$ ), or  $-3.988\%$ , and the population variance of New Delegate District No. 84 would be  $+660$  ( $19,190 - 18,530$ ), or  $+3.562\%$ . It is, therefore, **practicable** to divide West Virginia into 100 districts without splitting any of its VTD’s and still to have each of those districts deviate less than 4% from the ideal population of 18,530.

However, the Legislature, in Enrolled House Bill No. 201, insisted upon dividing dozens of precincts in such a manner that most delegates would be elected from districts that had population variances in excess of 4%.



For example, under Petitioner Cooper's plan, the five-county area of Hancock, Brooke, Ohio, Marshall, and Wetzel Counties, with a total population of 148,878, is, without splitting any precincts, divided into eight (8) single-member delegate districts with an average district population of 18,610. That average population of 18,610 is only 80 over the ideal population of 18,530. Under his plan, the first eight delegate districts have respective populations of 18,461, 18,307, 17,977, 18,913, 18,669, 19,092, 18,815, and 18,644. (Appendix, pp. 406-412)

Under the Legislature's plan, these same five counties, and a piece of Monongalia County, elect a total of eight delegates under a different arrangement. In the first place, the Legislature, defying logic, added a piece of western Monongalia County, with a population of 1,033, to the five-county area (Appendix, p. 392), thereby **raising** the total population of the districts from which these eight (8) delegates are to be elected from 148,878 to 149,911, and likewise raising the average population per delegate to 18,739, or 209 above the ideal population of 18,530 per delegate. That territory with a population of 149,911 is divided into districts with the following populations: 37,602 (2 x 18,801), 19,289, 38,882 (2 x 19,441), 36,522 (2 x 18,261), and 17,616. (Appendix, pp. 389-392)

Rather than preserving all existing precincts in this area, the Legislature split five of them: Ohio County VTD's 12, 100, 137, 146, and 158, which have respective populations of 655, 487, 1,137, 2,383, and 2,194. (Appendix, pp. 6-19, 409, 410)

Let us examine how the Legislature split one of these precincts: VTD 146. Ohio County VTD 146, with a population of **2,383**, is divided as follows: One part of VTD 146, with a population of **845**, is placed in Delegate District 3; that part consists of

54 census blocks: 24 blocks with populations of 0 each, one block with a population of 1, four blocks with populations of 2 each, one block with a population of 6, one block with a population of 9, two blocks with populations of 10 each, two blocks with populations of 36 each, and the remaining 19 blocks with populations of 4, 12, 13, 14, 15, 16, 17, 19, 26, 33, 40, 41, 46, 48, 66, 67, 69, 75, and 108. (Appendix, pp. 12-14)

The other part of VTD 146, with a population of **1,538**, is placed in Delegate District 4; that part consists of 102 census blocks: 48 blocks with populations of 0 each, three blocks with populations of 1 each, three blocks with populations of 2 each, three blocks with populations of 3 each, three blocks with populations of 4 each, one block with a population of 5, three blocks with populations of 6 each, three blocks with populations of 7 each, four blocks with populations of 8 each, two blocks with populations of 12 each, two blocks with populations of 16 each, two blocks with populations of 18 each, two blocks with populations of 20 each, two blocks with populations of 21 each, two blocks with populations of 38 each, and two blocks with populations of 59 each, and the remaining 18 blocks with populations of 10, 11, 15, 18, 22, 23, 30, 43, 44, 45, 46, 51, 58, 83, 86, 89, 169, and 239. (Appendix, pp. 16-19)

Thus the Legislature divided five precincts in the above territory and still had population variances per delegate ranging from -914, or -4.933% to +911, or +4.916%, as compared with the ideal population of 18,530 per delegate. A review of the 361 pages of Enrolled House Bill No. 201 demonstrates that the above discussion is reflective of the Legislature's behavior throughout that piece of legislation

Enrolled House Bill No. 201 created 36 districts that have populations per delegate that deviate more than 741, and more than 4%, from the ideal population per

delegate of 18,530: Single-member Districts 2, 5, 6, 7, 14, 18, 20, 29, 30, 31, 33, 34, 38, 39, 40, 45, 47, 54, 55, 56, 57, 60, 63, 66, and 67 (each deviating more than 741 from 18,530); two-member Districts 3, 17, 22, 24, 28, and 42 (each deviating more than 1,482 from 37,060); three-member Districts 16, 27, and 36 (each deviating more than 2,223 from 55,590); and four-member Districts 35 and 48 (each deviating more than 2,964 from 74,120). (Appendix, pp. 389-391) These 36 districts are supposed to elect 54 of the state's 100 delegates.

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 *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 VII, §§ 6 and 7*. The court struck down a redistricting bill because the population variances between delegate districts therein violated the Equal Protection Clause. *Id.*

What population variances between delegate 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.*

By Petitioner Cooper's calculation, the relative overall range under Enrolled House Bill No. 201 is 9.9928%. (Appendix, pp. 389, 390) If the population of Delegate District 40 had two more residents, or 19,457, the relative overall range would exceed 10%. However, because the relative overall range under the bill is "only" 9.9928% 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 House Bill No. 201.

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*, imposes 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. 467, 479) 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*. 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, Enrolled House Bill No. 201 violates *Article II, § 4*.

**(2) IF THE POPULATION OF A COUNTY IS LESS THAN SIXTY PERCENT (60%) OF THE "RATIO OF REPRESENTATION", AS THAT TERM IS DEFINED IN ARTICLE VI, § 7, OF THE WEST VIRGINIA CONSTITUTION, DOES § 6 OF THAT ARTICLE PROHIBIT THE WEST VIRGINIA LEGISLATURE FROM SPLITTING THAT COUNTY BETWEEN TWO OR MORE DELEGATE DISTRICTS?**

*Sections 6 and 7* are, in large part, the result of a desire by the delegates of the First Constitutional Convention to comply with what is now *Article II, § 4*, while basing the apportionment of the House of Delegates on that of the House of Representatives. Lacking computers, software, the Internet, calculators, photocopiers, and a detailed census database, these convention delegates based their calculations on the total white population of each of 44 counties. Armed with pens, paper, and the ability to perform long division, these delegates debated a number of plans that arranged those counties, and their populations, in different ways. (Appendix, pp. 466-497)

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. 467, 482, 483) 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. 473, 497) These districts were relatively equal in population, ranging from 32,063 to 34,603. *Id.* In a reversal of the situation at the federal level, it was thus the initial apportionment of the State Senate, and not that of the House of Delegates, that was to comply with the provisions of what is now *Article II, § 4*.

That convention ultimately adopted a proposal that would *initially* elect 47 members of the House of Delegates from 44 counties. (Appendix, pp. 496, 497) If 44 counties together had elected 47 delegates and if, as applied to each state in the House of Representatives, each county had been assigned at least one delegate, the result would have been a lot closer to “county equality” than to “population equality.”

Instead, a committee compromise was adopted whereby any county with a population of less than 50% of the average population per delegate would have to be attached to one or more contiguous counties to form a “Delegate District” of greater than 50% of that average population before at least one delegate was assigned to represent that “Delegate District”. *Id.* Opponents of that compromise had attempted to have at least one delegate assigned to each county. (Appendix, pp. 476-482)

One delegate who supported the compromise was Daniel Lamb. On January 10, 1862, he made the following comments in support of that compromise:

. . . We have announced and adopted unanimously among our fundamental principles that representation should be apportioned as nearly as possible in proportion to the numbers of those entitled to be represented. We have passed that, and it passed unanimously. Now the old system of county equality is to be forced upon us in West Virginia. . . Gentlemen, if you adopt this [proposed amendment to assign at least one delegate to each county], do not attempt to perpetrate a fraud upon the people by holding out the delusive profession that you intend to apportion upon principle, that it shall be apportioned to the number of people to be represented. Tell them at once that your system of apportioning representation is not the system proclaimed by the Declaration of Independence, that all men are free and equal, but that you amend that declaration by inserting that “all counties shall be equal”. [Appendix, p. 478]

That committee compromise was included as part of §§ 7 to 17 of *Article IV* of the 1863 Constitution. (Appendix, pp. 496, 497) *Sections 7 and 8* read as follows:

7. For the election of Delegates, every county containing a white population of less than half 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.

8. When two or more counties are formed into a Delegate District, the Legislature shall provide by law that the Delegates to be chosen by the voters of the District shall be, in rotation, residents of each county, for a greater or less number of terms, proportioned as nearly as can be conveniently done, to the white population of the several counties in the District.

Nine years later, these two sections were replaced by *Article VI, § 6*, of the 1872 *Constitution*. *Section 6* has remained unchanged for the past 139 years. Important changes brought by the 1872 *Constitution* included the following: (a) Delegate terms were doubled from one year to two years. (b) Population was to be apportioned in accordance with the *whole* population of the state, not just with its *white* population. (c) The above requirement that representation of "Delegate Districts" be rotated, whereby each county therein would have a resident delegate at times between censuses, was eliminated. (d) The minimum population percentage that a county had to meet before it could elect its own delegate to the House of Delegates was raised from 50% (*one half*) of the ratio of representation to 60% (*three fifths*) of the ratio of representation.

Therefore, *Article VI, § 6*, now reads as follows:

#### **Provision for Delegate Representation**

6. 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. [emphasis added]

As was the case with its predecessor in the 1863 *Constitution*, § 7 of *Article VI* also states that each "Delegate District" shall "be entitled to at least one Delegate".

However, 110 years ago, the Legislature raised the number of its members to a level that was so high that no county would have to be attached to another county to be



assigned a delegate. As Petitioner's Exhibit No. 18, a copy of several pages of the MANUAL OF THE STATE OF WEST VIRGINIA FOR THE YEARS 1907-1908 (1907), reflects, the population of West Virginia in 1900 was 958,800. (Appendix, pp. 498-500) A redistricting bill that passed in 1901 raised the number of members of the House of Delegates to 86. LEGISLATURE OF WEST VIRGINIA MANUAL OF THE SENATE AND HOUSE OF DELEGATES, 79<sup>TH</sup> LEGISLATURE (2009-2010) (Eleanor Ringel ed.) 65. Accordingly, the ratio of representation for the House of Delegates in that year would have been 11,148. ( $11,148 \times 86 = 958,728$ .) Sixty percent of that figure would have been **6,688.8**. According to census figures for 1900, the population of the least populous county, Hancock County, was **6,693**. (Appendix, pp. 498-500)

However, after 1900, the populations of some counties began to decline to a point that subsequent increases in the number of delegates were insufficient to justify assigning at least one delegate to each county. Accordingly, a court challenge was filed and a circuit court struck down a redistricting law. In reversing that decision, this Court, in *State ex rel. Armbrecht v. Thornburg*, 137 W. Va. 60, 70 S.E.2d 73, 80, 81 (1952), made the following observation:

. . . . Moreover, it appears that beginning with the apportionment act of 1901, each county within the State has been apportioned at least one delegate, whether or not such county contained the proper delegate population ratio. . . .

The primary basis for the ruling in that case was that nothing in the legislative records indicated that the law was unconstitutional. *Id.*

In 1964, this Court reached an opposite result in *Robertson v. Hatcher*, *supra*, in which the Court noted an ambiguity in legislative records and ruled that a 1963

redistricting bill was unconstitutional. Under that redistricting bill, the House of Delegates had 106 members. In that decision, 135 S.E.2d at 684, the Court stated:

The application of the clear and unambiguous language of the above section [Article VI, § 7] to the population figures contained in the journal of the House of Delegates clearly reveals whether the apportionment provided in Section 2 of the Act was done in conformity with Article VI, Sections 6 and 7. The population of the state, 1,860,421, is divided by 106, the number of which the House is to consist. The result is 17,551, which is the ratio of representation for the House of Delegates, referred to in Article VI, Section 6. Three-fifths of such ratio of representation is 10,530 which, in accordance with the provisions of Section 6, is the number of persons a county must have if it is to be entitled to a delegate in the Legislature. The clear language of Section 6 unequivocally provides that any county with a population of less than three-fifths of the ratio of representation for the House of Delegates, 10,530 in this instance, shall be attached to some contiguous county or counties to form a delegate district. It is difficult to see how this could be more graphically stated to mean, in the circumstances of these proceedings, that if a county's population is less than 10,530, such county is not entitled to a delegate but must become part of a delegate district.

An examination of the Official House Journal for February 5, 1963, which contains the official 1960 Census, reveals that there are twelve counties in West Virginia, each of which has a population of less than 10,530. Clearly, under the provisions of Article VI, Section 6, these counties are not entitled to a delegate in the Legislature and the Act which so provided is patently unconstitutional. . .

In 1964, the Legislature enacted a redistricting bill that was consistent with *Robertson v. Hatcher*. Petitioner's Exhibit No. 19, a copy of page 218 of the WEST VIRGINIA BLUE BOOK (1966), contains a map of the counties and "Delegate Districts" under that 1964 reapportionment. (Appendix, p. 501)

In 1971, the Legislature again passed a bill that redistricted the House of Delegates in accordance with §§ 6 and 7. Nevertheless, in 1972, a federal district court, in *Goines v. Rockefeller, supra*, struck down that bill, holding that the population variances therein the bill were in violation of the Equal Protection Clause. For example, under the bill, Monroe County, with a population of 11,448, was apportioned one delegate, and Preston County, with a population of 25,864, was also apportioned

one delegate. *Id.* The Court reserved judgment on the plaintiffs' request that §§ 4, 6, and 7 of Article VI themselves be declared unconstitutional and void as being violative of the Equal Protection Clause. *Id.* at 1192.

After the Legislature, in 1973, enacted another redistricting bill, the plaintiffs renewed their lawsuit and challenged the constitutionality of the 1973 bill, which, for the first time, divided all of West Virginia into 36 districts that were actually called "delegate districts". *Goines v. Heiskell*, 362 F. Supp. 313, 314 (S. D. W. Va. 1973). In that case, the Court noted that the plaintiffs "ask that Sections 6 and 7 of Article VI of the West Virginia Constitution, relating to county boundary recognition in House of Delegates representation, be declared null and void". *Id.* at 319. Instead, the Court decided to uphold the validity of the new statute, which included 12 "delegate districts" that crossed county lines. *Id.* at 318. Rejecting the plaintiffs' request to have Sections 6 and 7 declared unconstitutional, the Court stated, *id.* at 319,

. . . The West Virginia Constitution, Article I, Section 1, recognizes that the "Constitution of the United States of America, and the laws and treaties made in pursuance thereof, shall be the supreme law of the land." In this action the controlling provisions of the United States Constitution can and will be applied and made effective without affirmatively nullifying any state constitutional provisions.

Accordingly, Sections 6 and 7 remain in effect to the extent that they are applied or construed in accordance with the Equal Protection Clause, and with Article II, § 4.

Because "Delegate District", as used in Sections 6 and 7, is a term that Petitioner Cooper would define as "a multicounty apportionment unit in West Virginia that includes at least one county that has a population that is below 60% of the ratio of representation," and that term has a very different meaning from the term "delegate district", as the latter term has been used by the Legislature since 1973, Petitioner

Cooper will hereinafter use the term "Section Six Delegate District" or "SSDD" to refer to a "Delegate District" as the term used in *Sections 6 and 7*,

Petitioner Cooper submits that two cardinal rules should be followed to minimize gerrymandering: (1) If the population of a county or SSDD is **less than** the average population per delegate, that county or SSDD should, whenever possible, be wholly included within a single-member district. (2) If the population of a county or SSDD is **greater than** the average population per delegate, the maximum number of whole single-member districts, consistent with the Equal Protection Clause and *Article II, § 4*, should be established within the boundaries of that county or SSDD.

Under *Robertson v. Hatcher*, *supra*, the Legislature, as it apportions the House of Delegates, is still required **to attach** every whole county containing a population of less than 60% of the ratio of representation to some contiguous county or counties to form an SSDD. To require that such a county be attached to at least one other county is to **foreclose** the option of **splitting** such a county between two or more other counties.

The first part of *Section 7* reads as follows:

7. After every census the Delegates shall be apportioned as follows: The ratio of representation of 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. . .

Pursuant to the above language, the "ratio of representation" is calculated as follows: (1) Determine West Virginia's population under the 2010 Census. The correct figure is 1,852,994. (2) Determine the number of members of the House of Delegates. That figure has remained at 100 for many years. (3) Divide 1,852,994 by 100. The result is exactly 18,529.94. (4) Round that figure **DOWN** to the nearest whole number. Even though 18,529.94 is, to the nearest whole number, 18,530,

*Section 7* states that the “fraction of a unit” (0.94) resulting from the division is to be rejected. Therefore, the “ratio of representation” under *Section 7* is 18,529. (5) Under *Section 6*, if a county has a population that is less than 60% of that “ratio of representation”, or 11,117.4 ( $0.60 \times 18,529 = 11,117.4$ ), that county must be attached to one or more contiguous counties to form an SSDD before the delegate-assignment calculations in *Section 7* are performed.

Is there a West Virginia county with a 2010 population under 11,117.4? Petitioner’s Exhibit No. 20 is another map of West Virginia counties and their 2010 populations. (Appendix, p. 502) On that map each county with a population below 11,117.4 is shaded. There are twelve (12) such counties. Those counties, and their respective populations, are as follows: Calhoun (7,627), Clay (9,386), Doddridge (8,202), Gilmer (8,693), Pendleton (7,695), Pleasants (7,605), Pocahontas (8,719), Ritchie (10,449), Tucker (7,141), Tyler (9,208), Webster (9,154), and Wirt (5,717) Counties. Under Petitioner Cooper’s redistricting plan, no county with a population below 11,117.4 is split between two or more districts. (Appendix, pp. 406-465)

On the other hand, each of the following five counties is split by Enrolled House Bill No. 201: (1) Clay County is split between Delegate Districts 32 and 33. (2) Gilmer County is split between Delegate Districts 33 and 34. (3) Pendleton County is split between Delegate Districts 54 and 55. (4) Pleasants County is split between Delegate Districts 6 and 7. (5) Tucker County is split between Delegate Districts 47 and 53. (Appendix, pp. 388, 392-398)

Petitioner Cooper submits that in so splitting these five counties, the Legislature violated *Article VI, §6*, of the *West Virginia Constitution*.

**(3) IN LIGHT OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AND OF ARTICLE II, § 4, OF THE WEST VIRGINIA CONSTITUTION, TO WHAT EXTENT DOES ARTICLE VI, § 7, OF THE WEST VIRGINIA CONSTITUTION REQUIRE THAT THE WEST VIRGINIA LEGISLATURE ASSIGN A SPECIFIC NUMBER OF DELEGATES TO A COUNTY OR "DELEGATE DISTRICT" WITH A PARTICULAR POPULATION?**

In view of the population-equality requirements imposed by the Equal Protection Clause and by *Article II, § 4*, to what extent does *Section 7* require that the Legislature assign a specific number of delegates to a county or SSDD with a particular population?

At the January 11, 1862, session of the First Constitutional Convention, Daniel Lamb again addressed his fellow delegates in support of the proposed predecessor to what is now *Section 7*:

I can only say in reference to this that it is the plan which has been finally adopted by Congress in apportioning representation in the House of Representatives of the United States. The matter of the principle of making that apportionment had been under discussion at different periods in the Congress of the United States since 1789 down to 1850. This plan was adopted as the most equal of any other that could be devised. As a merely arithmetical proposition giving us an adequate number in the house of delegates, it does, as near as possible apportion representation according to population. [Appendix, p. 484]

In 2011, the determination of how many congressional representatives each state is assigned is governed by *Article I, § 2, clause 3* of the *U. S. Constitution*, by § 2 of the Fourteenth Amendment, and by 2 *U.S.C. §§ 2a and 2b*. After that "reapportionment" determination has been made, then each state that has more than one representative performs the "redistricting" part of the process. In West Virginia, congressional redistricting is governed by *Article I, § 4*, of the *West Virginia Constitution* and by *W. Va. Code § 1-2-3*, which was last amended in August.

From the foregoing summary, an inconsistency should be apparent: The determination of the number of representatives that are assigned to West Virginia is the

responsibility of Congress, which makes the *first* decision (now delegated to the President). Then the *second* decision, about where to draw the congressional district lines, is made by the Legislature. But, as to reapportioning (reassigning the **number** of delegates that go to each county or SSDD) and redistricting (redrawing **district lines** within or through each county or SSDD) the West Virginia House of Delegates, both functions are performed by the same entity, the Legislature.

The system in place in 1862 at the federal level for dealing with the problem of *fractional remainders* (a fractional remainder being the fractional portion of the number that results when a state's total population is divided by the population of the ideal district, or "ratio of representation") was not permanent. See, *U. S. Dep't of Commerce v. Montana*, 503 U.S. 442, 112 S. Ct. 1415, 118 L. Ed. 2d 87 (1992).

How is the system of delegate assignment under § 7 supposed to operate? The applicable sentences of that section read as follows:

*. . . 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. [emphasis added]*

To comply with §§ 6 and 7, the first step in doing so is to attach each of the 12 least populous counties to adjacent counties to create SSDD's that each have a population of more than 60% of the ratio of representation. Under Petitioner Cooper's plan, those SSDD's, the counties and county populations they contain, and the SSDD populations are as follows:

<b>SSDD</b>	<b>County</b>	<b>Population</b>	<b>County</b>	<b>Population</b>	<b>SSDD Population</b>
SSDD 1	Calhoun	7,627	Wirt	5,717	13,344
SSDD 2	Clay	9,386	Kanawha	193,063	202,449
SSDD 3	Doddridge	8,202	Tyler	9,208	17,410
SSDD 4	Gilmer	8,693	Ritchie	10,449	19,142
SSDD 5	Pendleton	7,695	Pocahontas	8,719	16,414
SSDD 6	Pleasants	7,605	Wood	86,956	94,561
SSDD 7	Tucker	7,141	Grant	11,937	19,078
SSDD 8	Webster	9,154	Nicholas	26,233	35,387

Next, the following table sets forth the SSDD's; the counties not in SSDD's; the populations of each; the quotients resulting from dividing the population of the SSDD or county by the ratio of representation of 18,529 (which quotients represent the minimum number of delegates to be assigned to represent the SSDD or county); the fractional remainders after that division; the number of additional delegates that would be assigned to each SSDD or county under the formula contained in § 7; and the total number of delegates that would be assigned to each SSDD or county under that formula:

<b>SSDD/County</b>	<b>Population</b>	<b>Quotient</b>	<b>Remainder</b>	<b>Extra Delegate?</b>	<b>Total Assigned</b>
SSDD 1	13,344	0	13,344	1 (below 18,529)	1
SSDD 2	202,449	10	17,159	1 (rank: 3)	11
SSDD 3	17,410	0	17,410	1 (below 18,529)	1
SSDD 4	19,142	1	613		1
SSDD 5	16,414	0	16,414	1 (below 18,529)	1
SSDD 6	94,561	5	1,916		5
SSDD 7	19,078	1	549		1
SSDD 8	35,387	1	16,858	1 (rank: 5)	2
Barbour	16,589	0	16,589	1 (below 18,529)	1
Berkeley	104,169	5	11,524	1 (rank: 11)	6
Boone	24,629	1	6,100		1
Braxton	14,523	0	14,523	1 (below 18,529)	1
Brooke	24,069	1	5,540		1
Cabell	96,319	5	3,674		5
Fayette	46,039	2	8,981		2



Greenbrier	35,480	1	16,951	1 (rank: 4)	2
Hampshire	23,964	1	5,435		1
Hancock	30,676	1	12,147	1 (rank 10)	2
Hardy	14,025	0	14,025	1 (below 18,529)	1
Harrison	69,099	3	13,512	1 (rank: 9)	4
Jackson	29,211	1	10,682	1 (rank: 13)	2
Jefferson	53,498	2	16,440	1 (rank: 6)	3
Lewis	16,372	0	16,372	1 (below 18,529)	1
Lincoln	21,720	1	3,191		1
Logan	36,743	1	18,214	1 (rank: 2)	2
McDowell	22,113	1	3,584		1
Marion	56,418	3	831		3
Marshall	33,107	1	14,578	1 (rank 8)	2
Mason	27,324	1	8,795		1
Mercer	62,264	3	6,677		3
Mineral	28,212	1	9,683	1 (rank 14)	2
Mingo	26,839	1	8,310		1
Monongalia	96,189	5	3,544		5
Monroe	13,502	0	13,502	1 (below 18,529)	1
Morgan	17,541	0	17,541	1 (below 18,529)	1
Ohio	44,443	2	7,385		2
Preston	33,520	1	14,991	1 (rank: 7)	2
Putnam	55,486	2	18,428	1 (rank: 1)	3
Raleigh	78,859	4	4,743		4
Randolph	29,405	1	10,876	1 (rank: 12)	2
Roane	14,926	0	14,926	1 (below 18,529)	1
Summers	13,927	0	13,927	1 (below 18,529)	1
Taylor	16,895	0	16,895	1 (below 18,529)	1
Upshur	24,254	1	5,725		1
Wayne	42,481	2	5,423		2
Wetzel	16,583	0	16,583	1 (below 18,529)	1
Wyoming	23,796	1	5,267		1
<b>Total</b>	<b>1,852,994</b>	<b>73</b>	<b>-----</b>	<b>27</b>	<b>100</b>

From a review of the figures in the "Population" and "Quotient" columns of the above table, without first resolving the issue of what is to be done with fractional remainders, it is clear (a) that the population in each of five (5) SSDD's is adequate to elect a total of 18 members of the House of Delegates in single-member delegate districts that do not cross the boundaries of any of those SSDD's, (b) that the population in each of 29 counties is adequate to elect a total of 55 members of the House of

Delegates in single-member delegate districts that do not cross the boundaries of any of those 29 counties, and (c) that a total of 73 delegates could be elected from districts that did not cross the boundaries of any of those five (5) SSDD's and 29 counties.

Petitioner Cooper's 100-district plan did create all 73 separate single-member districts that did not cross the boundaries of those five SSDD's and 29 counties. (Appendix, pp. 406-465) Indeed, he created 11 single-member districts in SSDD 2, two such districts in Logan County, and three such districts in Putnam County, for a total of 76 single-member districts that do not cross the boundaries of any of those five SSDD's and 29 counties not in SSDD's.

On the other hand, as Petitioner's Exhibits No. 11 and 13 reflect, Enrolled House Bill No. 201 failed to comply with *Section 7*, in the following respects: Even though it was required to create at least one single-member district located wholly within the boundaries of each of the following eleven counties – Brooke, Greenbrier, Hampshire, Hancock, Lincoln, Logan, McDowell, Marshall, Mason, Mingo, and Wyoming Counties – the Legislature failed to do so in any of them. Even though it was required to create enough districts wholly within the boundaries of each of the following two counties – Fayette and Putnam Counties – to elect *two* delegates in each of those counties, the Legislature failed to create any such district in Fayette County and it created only one such district, a single-member district, in Putnam County. Even though it was required to create enough districts wholly within the boundaries of each of the following two counties – Harrison and Mercer Counties – to elect *three* delegates in each of those counties, the Legislature failed to create any such district in either of them. Even though it was required to create enough delegate districts wholly within Raleigh County

to elect *four* delegates, the Legislature only created two such single-member districts and no other such districts in that county. Even though it was required to create enough districts wholly within Cabell County to elect *five* delegates, the Legislature only created one such single-member district and no other such districts in that county.

Accordingly, the Legislature violated the plain language of *Section 7* as to the assignment of delegates in accordance with the quotients discussed above.

As to the remaining language in *Section 7* that would require the assignment of the other 27 delegates without crossing the boundaries of the SSDD's or of the counties, Petitioner Cooper is of the opinion that that remaining language is violative of the Equal Protection Clause and inconsistent with *Article II, § 4*, with the following exception: If an SSDD, or a county not in an SSDD, has a population that is greater than 98% but less than 102% of 18,529 or of a multiple of 18,529, Petitioner Cooper is of the opinion that no district lines should cross the boundaries of that county or SSDD.

In this regard, one SSDD and three counties have boundary lines that should not be crossed: SSDD 2 and Logan, Putnam, and Marion Counties. SSDD 2 (consisting of Clay and Kanawha Counties) has a population of 202,449, which is equal to 99.328% of 203,819 (18,529 x 11). Logan County has a population of 36,743, which is equal to 99.150% of 37,058 (18,529 x 2). Putnam County has a population of 55,486, which is 99.818% of 55,587 (18,529 x 3). Marion County has a population of 56,418, which is 101.495% of 55,587. Under Petitioner Cooper's plan, he created a total of 19 single-member delegate districts within the boundaries of SSDD 2 and each of those three counties, without crossing their respective boundaries. The Legislature crossed the boundaries of that SSDD and of each of those counties.

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."

**(4) DO ARTICLE IV, § 4, AND ARTICLE VI, §§ 12 AND 39, OF THE WEST VIRGINIA CONSTITUTION PROHIBIT THE WEST VIRGINIA LEGISLATURE FROM IMPOSING "DELEGATE RESIDENCY DISPERSAL" REQUIREMENTS ON CANDIDATES FOR THE HOUSE OF DELEGATES IN ONE MULTIMEMBER DISTRICT?**

May the Legislature constitutionally impose "delegate residency dispersal" requirements on candidates for the House of Delegates who reside in one multimember district in southern West Virginia?

On page 3 of Enrolled House Bill No. 201, *W. Va. Code § 1-2-2(b)(28)* reads as follows: "District twenty-eight is entitled to two delegates; not more than one delegate may be nominated, elected or appointed who is a resident of a single county within the district". (Appendix, p. 3) The description of Delegate District 28 is set forth on pages 133-147 of the bill. (Appendix, pp. 133-147) This two-member district consists of portions of Monroe, Raleigh, and Summers Counties. *Id.*

Similar statutory provisions with respect to the House of Delegates have been reviewed by federal courts. In *Goines v. Heiskell*, *supra*, the court, in 1973, referred to

such a provision as a “delegate residency dispersal” provision, 362 F. Supp. at 319, but rejected a challenge to such a provision. districts.” Nineteen years later, in *Holloway v. Hechler, supra*, the federal court referred to a district governed by a similar provision as a “proviso district”, 817 F. Supp. at 624, and rejected a challenge to such provisions under the Equal Protection Clause. *Id.* at 627.

Petitioner Cooper agrees that such “delegate residency dispersal” provisions do not violate the Equal Protection Clause. But they do appear to violate this Honorable Court’s ruling in *Sturm v. Henderson*, 176 W. Va. 319, 342 S.E.2d 287 (1986). In that case, the Court struck down two statutes that stated that no more than two members of a county school board “shall be elected from the same magisterial district”. At the time that the ruling was issued, on April 4, 1986, there was no state constitutional provision that imposed such a restriction. After that decision was issued, the Legislature placed on the ballot a proposed constitutional amendment to impose such a restriction in *Article XII, § 6*, of the *West Virginia Constitution*. This proposed constitutional amendment was ratified by state voters on November 4, 1986. See, *Adkins v. Smith*, 408 S.E.2d 60, 62 (W. Va. 1991).

But the principle enunciated in *Sturm v. Henderson* still applies: The right to become a candidate for public office is a fundamental right and restrictions on that right are subject to constitutional scrutiny. *Article IV, § 4*, of the *West Virginia Constitution* states that no person, “except citizens entitled to vote, shall be elected or appointed to any state, county or municipal office. . . .” Moreover, *Article VI, § 12* thereof reads as follows: “No person shall be a Senator or Delegate who has not for one year next preceding his election, been a resident within the District or County from which he is

elected; and if a Senator or Delegate remove from the District or County for which he was elected, his seat shall be thereby vacated.” Because no “delegate residency dispersal” requirements for candidates for the House of Delegates are set forth in the *West Virginia Constitution*, such a statutory provision is in “excess” of qualifications for office therein. See, *Sturm v. Henderson*, 342 S.E.2d at 291, 292. See also, *White v. Manchin*, *supra*, as to a state-senatorial residency dispersal provision that does not apply here. Indeed, as noted earlier in this Petition, the former requirements in the *1863 Constitution* that delegates representing multicounty “Delegate Districts” be rotated among counties were removed by the framers of the *1872 Constitution*.

In addition, because this provision relates to only one district, Petitioner Cooper believes that that part of the legislation constitutes a “local bill” that is prohibited by *Article VI, § 39*, of the *West Virginia Constitution*. See, *State ex rel. City of Charleston v. Bosely*, 165 W. Va. 332, 268 S.E.2d 590 (1980).

Accordingly, the delegate residency dispersal provision in question violates *Article IV, § 4*, and *Article VI, §§12 and 39* of the *West Virginia Constitution*.

**(5) DOES W. VA. CODE § 1-2-2, AS AMENDED BY ENROLLED HOUSE BILL NO. 201, WHICH PASSED ON AUGUST 21, 2011, VIOLATE ARTICLE II, § 4, ARTICLE IV, § 4, AND ARTICLE VI, §§ 6, 7, 12, AND 39, OF THE WEST VIRGINIA CONSTITUTION?**

For the reasons set forth hereinabove, Petitioner Cooper submits that *W. Va. Code § 1-2-2*, as amended by *Enrolled House Bill No. 201*, violates *Article II, § 4*, *Article IV, § 4*, and *Article VI, §§ 6, 7, 12, and 39* of the *West Virginia Constitution*.

### VIII. CONCLUSION.

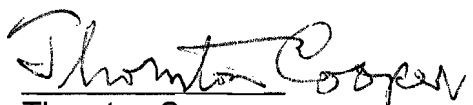
For the reasons discussed in this Petition, Petitioner Cooper now prays that this Honorable Court accept his Petition; issue a scheduling order; issue a rule to show cause; schedule this case for oral argument; and declare Enrolled House Bill No. 201, unconstitutional as being violative of *Article II, § 4, Article IV, § 4, and Article VI, §§ 6, 7, 12, and 39* 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 House of Delegates in 2012 as if they had been filed in the districts set forth in his redistricting plan for 100 districts, 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 House of Delegates in accordance with those constitutional sections and the recommendations he has made in this Petition.

Respectfully submitted,

THORNTON COOPER

Pro se

  
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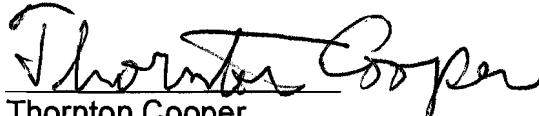
Dated: October 13, 2011

**VERIFICATION.**

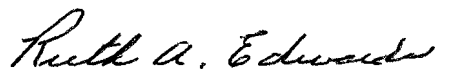
STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to-wit:

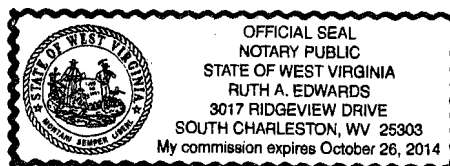
I, **Thornton Cooper**, after first being duly sworn upon oath, state that I am the Petitioner named in the attached and foregoing Petition for Writ of Mandamus, that I have read the same, and that the facts and allegations therein contained are true and correct, except insofar as they are therein stated 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 13th day of October, 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 13th day of October, 2011; and do **further certify**, on this 13th day of October, 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