

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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**STATE OF WEST VIRGINIA ex rel.
STEPHEN ANDES and JOSEPH
HAYNES**, individually and in official
capacities as members of the County
Commission of Putnam County, West
Virginia; **BRIAN WOOD**, individually
and in official capacity as Putnam County
Clerk; **BOB BAIRD, MYLES EPLING
and RICK HANDLEY**, individually and
in official capacities as members of the
County Commission of Mason County,
West Virginia; and **DIANA CROMLEY**,
individually and in official capacity as
Mason County Clerk,

Petitioners,

v.

NATALIE TENNANT, in her official
Capacity as Secretary of State of the State
of West Virginia,

Respondent.

PETITION FOR WRIT OF PROHIBITION

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NOW COME the Petitioners and petition this Honorable Court for a Writ of Prohibition pursuant to Rule 16 of the *West Virginia Revised Rules of Appellate Procedure* and for permanent injunction restraining the enforcement, operation and execution of *W.Va. Code §1-2-2*, as amended, all relating to the apportionment of membership of the House of Delegates.

QUESTIONS PRESENTED

- I. Does Enrolled House Bill 201, Codified as W.Va. Code §1-2-2, Violate Article VI, Sections 6 and 7 of the West Virginia Constitution?**
- II. Does Enrolled House Bill 201, Codified as W.Va. Code §1-2-2, Violate the Equal Protection Provisions of the Fourteenth Amendment of the United States Constitution and Article II, §4 of the West Virginia Constitution?**
- III. Does Political Gerrymandering Violate the Equal Protection Provision of Article II, §4 of the West Virginia Constitution?**

STATEMENT OF THE CASE

Petitioners are citizens and elected officials of Putnam and Mason County. Petitioners Stephen Andes and Joseph Haynes are citizens and voters of Putnam County, West Virginia. They are duly elected Commissioners of Putnam County, West Virginia. They are both registered Republican. Prior to the passage of HB 201 they resided in the 14th Delegate District. Pursuant to HB 201, they now live in the newly created 15th Delegate District.

Petitioner Brian Wood is a citizen and voter of Putnam County, West Virginia. He is the duly elected Clerk of Putnam County, West Virginia. He is registered

Republican. Prior to the passage of HB 201 he resided in the 14th Delegate District. Pursuant to HB 201, he now lives in the newly created 15th Delegate District.

Petitioner Bob Baird is a citizen and voter of Mason County, West Virginia. He is a duly elected Commissioner of Mason County, West Virginia. He is registered Republican. Both prior to and since the passage of HB 201 he has resided in the 14th Delegate District.

Petitioner Myles Epling is a citizen and voter of Mason County, West Virginia. He is a duly elected Commissioner of Mason County, West Virginia. He is registered Republican. Both prior to and since the passage of HB 201 he has resided in the 13th Delegate District.

Petitioner Rick Handley is a citizen and voter of Mason County, West Virginia. He is a duly elected Commissioner of Mason County, West Virginia. He is registered Democrat. Both prior to and since the passage of HB 201 he has resided in the 14th Delegate District.

Petitioner Diana Cromley is a citizen and voter of Mason County, West Virginia. She is the duly elected Clerk of Mason County, West Virginia. She is registered Democrat. Both prior to and since the passage of HB 201 she has resided in the 14th Delegate District.

Natalie Tennant is the duly elected Secretary of State of the State of West Virginia. She is the chief election official of West Virginia, per W.Va. Code §3-1A-6(a). Her charges include the duty of examining election returns, taking actions thereon, declaring election results, distributing election laws, certifying to the County Clerks of each county lists of candidates nominated, certifying to the Legislature the members elected for it, certifying to the counties the number of delegates and senators that may

be elected under the legislative apportionment acts and constitution of the state, notifying each candidate, and discharging other official functions in connections with each statewide election.

The West Virginia House of Delegates consists of one hundred members. W.Va. Code §1-2-2(b). The term lasts two years and elections for all one hundred seats are held every two years. W.Va. Const., Art. VI, §3.

Article VI, §10 of the West Virginia Constitution requires the Legislature to reapportion the senatorial and delegate districts as soon as possible after each United States Census. The United States Census population results for West Virginia were rendered in March 2011. The Legislature adopted the census results and listed them in House Bill 201, announcing the population of West Virginia to be 1,852,994. (See Appendix, Exh. 1). Further, the Legislature calculated the change in population by county and also by delegate district, and posted the 2010 and 2000 populations for the public on its website. (See Appendix, Exh. 2).

Any candidate for the House of Delegates must file a certificate of announcement with the Respondent Secretary of State. W.Va. Code §3-5-7. For the upcoming elections in 2012, candidates for the House of Delegates must file with Respondent their certificates of candidacy announcements between January 9, 2012 and January 28, 2012. See W.Va. Code §3-5-7(c).

For approximately ten years prior to September 2, 2011, Putnam County contained parts of three delegate districts and Mason County contained parts of two delegate districts. The northern half of Putnam and Mason Counties were joined with a small southwestern part of Jackson County to comprise the 13th Delegate District. The lower half of Putnam and Mason Counties comprised the 14th Delegate District, but the

most southern portion of Putnam County was joined with Lincoln, Logan and Boone Counties to form the 19th Delegate District. (See Appendix, Exh. 3).

For approximately twenty years, the people of the 13th District shared two Democrat Delegates and the 14th District shared two Republican Delegates. For the past ten years, the 19th District has shared 4 Democrat Delegates.

All delegates elected in the 13th District shared among Putnam, Mason and Jackson Counties have been residents of Putnam County, West Virginia. (See Appendix, Exh. 5). All delegates elected in the 14th District shared between Putnam and Mason Counties have also been residents of Putnam County, West Virginia. (Id.) No resident of Putnam County has ever been a delegate of the 19th District.

According to the Census, the population of Putnam County increased to 55,486. Mason County's population increased to 27,324. Even Jackson County had an increase in population. However, population of the counties of Boone, Lincoln and Logan, and neighboring Kanawha County, all decreased. (See Appendix, Exh. 2).

On August 1, 2011, the Legislature convened for its First Extraordinary Session of 2011. On August 5, 2011, the Legislature passed House Bill 106, redrawing the boundaries of the House districts. Then Acting Governor Tomblin vetoed House Bill 106 because it contained technical errors on August 17, 2011.

On August 18, 2011, the Legislature convened for a Second Extraordinary Session to remedy the defects in House Bill 106. The new legislation was assigned as "House Bill 201". (See Appendix, Exh. 1). Enrolled House Bill 201 ("HB 201") was passed by the Second Special Session of the West Virginia Legislature on August 21, 2011 and was to take effect from passage. Then Acting Governor Earl Ray Tomblin signed HB 201 into law on September 2, 2011.

Pursuant to HB 201, an eastern portion of Putnam County is taken from the 13th and 14th Delegate Districts to comprise a new 38th District with a portion of Kanawha County where a single Republican Delegate resides. The remainder of the portion of Putnam that had been in the 13th District is mostly maintained intact and combined with a smaller portion of the northern area of Mason County and a larger portion of the southwestern part of Jackson County. The population of Putnam County's portion is 16,167; the population of Mason County's portion is 13,184; and the population of Jackson County's portion is 7,920. The new 13th Delegate District will maintain its two seats in the House. (See Appendix, Exh. 4).

Pursuant to HB 201, the southern portion of Mason County is maintained in the 14th Delegate District which stretches into Putnam County to include a much smaller portion than during the past decade. The population of Mason County's portion is 14,140 and the population in Putnam County's portion is 3,537. Neither current Republican Delegate resides in the newly created 14th District. The new 14th District will have only one delegate. (See Appendix, Exh. 4).

Pursuant to HB 201, a new delegate district is created solely within Putnam County and is called the 15th District. The district consists of most of the remainder of the former 14th District, totaling 18,384 citizens. Both incumbent Republican Delegates of the 14th District reside in this newly created district. However, this new district is entitled to only one delegate. (See Appendix, Exh. 4).

Pursuant to HB 201, the southern portion of Putnam County that had been in the 19th Delegate District will expand and be designated as the 22nd District. More Putnam Countians, for a total of 10,013, will join the large delegate district with Lincoln, Logan and Boone Counties. The population of those in Logan County is 4,393; the population

of those in Lincoln County is 17,971; and the population of those in Boone County is 2,872. This district will be entitled to two delegates. (See Appendix, Exh. 4).

The Putnam County Clerk and Putnam County Commission will now require more ballot styles at taxpayers' expense every election because instead of being divided into three delegate districts, Putnam County will comprise five. More importantly, the people of Putnam County who are entitled to three representatives in the House of Delegates are now only guaranteed one. The people of Mason County who have been denied their own delegate for approximately twenty years are still guaranteed none.

It does not appear that the Legislature gave much consideration to county boundaries when it reapportioned the delegate districts. It does not appear that the Legislature attempted to draw the delegate districts compactly. Rather, it appears that the Legislature deviated from the long-established State policy of respecting political subdivision lines and instead chose to cross county lines unnecessarily to create delegate districts. It appears that the Legislature failed to consider the community interests of the people when it crossed county lines to create odd-shaped, sprawling delegate districts. It appears that the House of Delegates drew its districts to protect majority political party incumbents and to harm minority political party incumbents. It appears that political affiliation of the members of the House of Delegates, along with the political leanings of the voters of the State of West Virginia, was the paramount consideration in determining the new delegate district boundaries; whereas, the boundaries of political subdivisions were given little to no consideration.

SUMMARY OF ARGUMENT

This Honorable Court should strike the newly amended and reenacted Section 1-2-2 of the Code of the State of West Virginia because it is unconstitutional. Otherwise, the people of Putnam and Mason Counties, and many others similarly situated across the State of West Virginia will be forced to endure another ten years of inadequate, unequal representation in the West Virginia House of Delegates.

Sections 6 and 7 of Article VI of the Constitution of the State of West Virginia are clear and in compliance with the Equal Protection Clauses of the Constitution of the United States and this State. Article VI does not authorize the Legislature to split counties into separate delegate districts. When read in conjunction with Article II, §4 of the State Constitution and the 14th Amendment of the United States Constitution, Article VI, §§ 6 and 7 require the Legislature to apportion delegates based on population and to abide by county lines unless it is necessary to effectuate substantially equal representation for the people. Given that Section 6 prevents any county with less than sixty-percent of the ratio of citizens to delegates from having its own delegate, it is unlikely that there will ever be an occasion when the Legislature should ignore county boundaries.

The United States Supreme Court has said there is no mathematical formula establishing a deviation range for what is and is not permissible under the Fourteenth Amendment. See Mahan v. Howell, 410 U.S. 315, 329, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973). As long as the apportionment plan furthers a legitimate State policy and substantial equality among the citizens is achieved, then constitutional requirements are met. See generally Id.; Reynolds v. Sims, 377 U.S. 533, 560, 84 S.Ct. 1362, 1380, 12 L.Ed.2d 506 (1964).

It is difficult to ascertain the reasoning behind the House redistricting plan in HB 201. Hence it may be irrational, arbitrary or capricious. Although Mason County has sufficient population for its own delegate and Putnam County has the population to support three delegates, both counties are divided and forced to share representation in the State House of Delegates. (See Appendix, Exh. 4).

For approximately twenty years, Mason County has been divided in half to create portions of two delegate districts even though it has had the population to support a delegate all on its own. Its people have been outnumbered by Putnam County residents in the past two reapportionment plans and it has become generally known that because of it, Mason County cannot elect its own delegate. (See Appendix, Exh. 5). With the new apportionment of HB 201, Putnam County is now placed in a similar situation.

Putnam County is now to be divided among five districts. Only one of these districts consists solely of Putnam Countians. Out of the remaining four districts, Putnam Countians will be outnumbered by other county residents in all but one. Conceivably, Putnam County could end up with only one delegate these next ten years.

Moreover, the one district Putnam now has all to itself contains two incumbent delegates. Coincidentally, these two delegates are members of the minority political party.

Looking at the newly designed, odd-shaped delegate districts across West Virginia, it is difficult to ascertain the rationale behind it – other than political gerrymandering. Although political considerations may naturally be made by politicians, this factor cannot outweigh the Constitutional protection for counties and their citizens.

Unlike the United States Supreme Court in Vieth v. Jubelirer, 541 U.S. 267, 271, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004), this Court should afford some means of protection for citizens discriminated against by their own government because of their affiliation with a minority party. Our republican form of government is endangered where the majority political party in power abuses it and intentionally harms the minority by depriving people of a voice in exercising our most precious right.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary under Rule 18(a) of the West Virginia Revised Rules of Appellate Procedure. This matter should be set for a Rule 20 argument because it involves issues that (1) are of first impression, (2) involve fundamental rights of utmost importance to the public, and (3) involve the constitutionality of a statute.

Approximately ten years ago, after the previous delegate apportionment of 2001, the Mason County Commission petitioned this Court to prevent another ten years of inadequate representation in the West Virginia House of Delegates. The Court refused to hear the Writ. Consequently, Mason County has spent the past ten years without any of its residents representing it in the West Virginia House of Delegates.

Since Mason County was split to create delegate districts with neighboring counties of Putnam and Jackson County in 1991, no resident of Mason County has ever been elected to the West Virginia House of Delegates. Similarly, the House reapportionment of 2011 has divided Putnam County in order to comprise five separate delegate districts, all of which but one crosses county lines. If this Court refuses to grant this Writ, the people of Putnam and Mason Counties will spend the next ten years with unequal and inadequate representation in the West Virginia House of Delegates.

“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.” Reynolds v. Sims, 377 U.S. 533, 560, 84 S.Ct. 1362, 1380, 12 L.Ed.2d 506 (1964), quoting Wesberry v. Sanders, 376 U.S. 1, 17-18, 84 S.Ct. 526, 535, 11 L.Ed.2d 481 (1964). This Honorable Court needs to stand up for the citizens of Mason and Putnam County who have no voice in the House of Delegates. This Court needs to tell the West Virginia Legislature that counties matter and must be given serious consideration when it comes to apportioning delegate districts under Article VI, §§ 6 & 7 of the Constitution of West Virginia.

This Court should also hear this matter because it provides the opportunity to hold that the Equal Protection provision of the West Virginia Constitution provides more protection than its federal counterpart. This Court should rule that political gerrymandering is still a justiciable issue in this State and that it violates Article IV, §2 of the West Virginia Constitution. When the West Virginia Legislature violates the people’s Constitutional rights, this Court must afford a remedy.

ARGUMENT

The interests of justice and a most sacred right of the people compel this Honorable Court to issue a writ of prohibition against the Respondent Secretary of State to prevent further violations of the constitutional rights of the people to vote for their representatives in the West Virginia House of Delegates and to be equally represented by them. This Court has declared it will use its discretion to grant writs of prohibition “to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently

of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.” Hinkle v. Black, Syl. Pt. 1, *in part*, 164 W.Va. 112, 262 S.E.2d 744 (1979). This Court’s intervention is needed to prevent the Respondent from moving forward in implementing and carrying out the provisions of a new redistricting law that violates the Constitution of the State of West Virginia and the Constitution of the United States.

House Bill 201 contains substantial, clear-cut, legal errors that are in plain contravention of clear constitutional rights of the people. Immediate action by this Court is needed to prevent further violations of constitutional rights of those who may file to run for House of Delegates in January 2012.

I. Enrolled House Bill 201, Codified as W.Va. Code §1-2-2, Violates Article VI, Sections 6 and 7 of the West Virginia Constitution Because it Fails to Give Due Consideration to County Lines.

Article VI of the Constitution of West Virginia specifically prescribes “[t]he manner in which representation in the legislature shall be apportioned.” State ex rel. Smith v. Gore, 150 W.Va. 71, 76, 143 S.E.2d 791, 794 (1965). This Court has already determined, “The language of Article VI, Sections 6 and 7 of the West Virginia Constitution, being clear and unambiguous, will be applied and not construed.” Robertson v. Hatcher, Syl. Pt. 4, 148 W.Va. 239, 135 S.E.2d 675 (1964). Further, the Robertson Court declared, “The clear intention of the electorate as embraced in the language of Article VI, Sections 6 and 7 of our Constitution, is to accomplish a just and equitable apportionment of the membership in the House of Delegates after each official census.” Id., 148 W.Va. at 253, 135 S.E.2d at 684 (1964).

Article VI, Section 6 of the Constitution of West Virginia 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.

This provision mandates that every county containing less than 60-percent of the population divided by one hundred delegates “shall be attached to some contiguous county or counties, to form a delegate district.” Robertson, Syl. Pt. 6, *supra*. Note the language states “county or counties” – not portions thereof. Moreover, the term “attached” is used – not “split” or “divide”. It also suggests the possibility that if a county has at least three-fifths of the ratio of representation for the House of Delegates, it may be entitled to comprise a delegate district by itself.

Section 7 of the same Article goes further to state that “every delegate district and county not included in a delegate district, shall be entitled to at least one delegate.” Article VI, Section 7 of the Constitution of West Virginia explicitly details how the House must be reapportioned after every census. Section 7 states 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.

Emphasis added. This section details the calculation for delegate representation.

The easiest way to begin calculating for reapportionment is to first divide the State's population by the number of House seats. Given that the State's population according to the 2010 US Census is 1,852,994 and the current number of House members is 100, the ratio of citizens to delegates is 18,529.94. (See Appendix, Exh. 2). However, Section 7 requires that the fractional unit be discarded which results in 18,529 people per delegate.

The next step is to calculate three-fifths or rather, sixty-percent, of 18,529 pursuant to Section 6. This equates to 11,117.40. Thus, every county with less than 11,117 citizens may not be allotted a delegate. Rather, these counties must be attached to another county or delegate district.

The practical step then is to determine which counties have a population of at least 18,529. These counties should each be allotted at least one delegate. Putnam and Mason County each have more than 18,529 residents.

According to the 2010 Census, Putnam County's population is 55,486. (See Appendix, Exh. 2). Thus, Putnam County should be allotted no less than two delegates and possibly even three delegates with a 2.99 quotient. Moreover, with Mason County having a population of 27,324, its quotient is 1.47, entitling it to no less than one delegate. (Id.). But none of these calculations mean Mason County or any other county should be divided for representation purposes in the House of Delegates.

The culmination of provisions in Article VI are plainly written to indicate that "delegate district" means "county" or "counties", but not mere portions of a county or counties, are to be combined for purposes of representation in the House.

A. Counties are to be united, not divided.

The statute apportioning senatorial districts is set forth in W.Va. Code §1-2-1. Unlike the House apportionment statute, this legislation includes statutory language expressing the Legislature's method in drawing senatorial boundaries. Specifically, W.Va. Code §1-2-1 explains that in order "to achieve equality of population as near as is practicable" in redrawing senatorial districts, the Legislature:

- (1) Adhered to the equality of population concept, while at the same time recognizing that from the formation of this state in the year one thousand eight hundred sixty-three, each constitution of West Virginia and the statutes enacted by the Legislature have recognized political subdivision lines and many functions, policies and programs of government have been implemented along political subdivision lines;
- (2) Made the senatorial districts as compact as possible, consistent with the equality of population concept;
- (3) Formed the senatorial districts of "contiguous territory" as that term has been construed and applied by the West Virginia Supreme Court of Appeals;
- (4) Deviated from the long-established state policy, recognized in subdivision (1) above, by crossing county lines only when necessary or when adherence to county lines produced unacceptable population inequalities and only to the extent necessary in order to maintain contiguity of territory and to achieve acceptable equality of population; and
- (5) Also taken into account in crossing county lines, to the extent feasible, the community of interests of the people involved.

In contrast, there is no explanation in the West Virginia Code by the Legislature as to why House districts were drawn to cross county lines when it is unnecessary. Mason County has sufficient population entitling it to its own delegate and Putnam

County has sufficient population to entitle it to no less than two and possibly three delegates – without the need to cross a county line to increase population in the district.

The Legislature did not explain why it ignored political subdivision lines in carving up districts among Mason and Putnam counties. The Legislature did not explain why it failed to make the House districts as compact as possible, consistent with the equality of population concept. The Legislature did not explain why it deviated from the long-established state policy of recognizing and adhering to political subdivision lines by crossing the boundaries of counties that had more than sufficient population to have their own delegates within their respective counties. The Legislature did not explain that it considered the community of interests of the people of Putnam and Mason counties when it crossed county lines to create districts. And the reason is obvious: Because the Legislature did not make any of these considerations when it carved up delegate districts. It is apparent they gave little to no consideration to county lines.

The reason similar language does not appear in the House redistricting Act is because the Legislature is not permitted to divide counties to create House districts. For example, in the case of Harmison v. Ballot Com'rs., 45 W.Va. 179, 31 S.E. 394 (1898), we can see how the Legislature apportioned delegates to a multi-county delegate district in late Nineteenth Century. Then in 1891, the Legislature grouped Berkeley, Jefferson and Morgan counties as a new district and assigned them two delegates. Simultaneously, Berkeley and Jefferson counties were also allotted one delegate each. A few years later in 1897, the Legislature tried to reduce the multi-member district by removing Morgan County and reducing the two-county district down to one delegate. It gave a delegate to Morgan County and allowed Berkeley and Jefferson counties to each keep one delegate.

The 1897 Act was struck down by this Court on the basis that House apportionment could not be changed until after the next census; however, what is relevant to the case at bar is the history showing that our forefathers did not carve up counties to comprise delegate districts.

More enlightening are Sections 8 and 9 of Article VI of the State Constitution. When adopted and ratified by the people of this State, Article VI, §§ 8 and 9 specified how delegates were to be apportioned in the beginning. The number of delegates in some counties ranged from one to four, whereas other counties were joined to comprise a delegate district. However, in no instance were any counties split in half or thirds or fifths.

Article VI, §8 makes the following designations:

Until a new apportionment shall be declared, the counties of Pleasants and Wood shall form the first delegate district, and elect three delegates; Ritchie and Calhoun, the second, and elect two delegates; Barbour, Harrison and Taylor, the third, and elect one delegate; Randolph and Tucker, the fourth, and elect one delegate; Nicholas, Clay and Webster, the fifth, and elect one delegate; McDowell and Wyoming, the sixth, and elect one delegate.

Article VI, §9 further states as follows:

Until a new apportionment shall be declared, the apportionment of delegates to the counties not included in delegate districts, and to Barbour, Harrison and Taylor counties, embraced in such district, shall be as follows:

To Barbour, Boone, Braxton, Brooke, Cabell, Doddridge, Fayette, Hampshire, Hancock, Jackson, Lewis, Logan, Greenbrier, Monroe, Mercer, Mineral, Morgan, Grant, Hardy, Lincoln, Pendleton, Putnam, Roane, Gilmer, Taylor, Tyler, Upshur, Wayne, Wetzel, Wirt, Pocahontas, Summers and Raleigh counties, one delegate each.

To Berkeley, Harrison, Jefferson, Marion, Marshall, Mason, Monongalia and Preston counties, two delegates each.

To Kanawha county, three delegates.

To Ohio county, four delegates.

This Court recently reminded us, “Words used in a state constitution, as distinguished from any other written law, should be taken in their general and ordinary sense.” WV Citizen Action Group v. Tomblin et al., Syl. Pt. 2, ___ W.Va. ___, ___ S.E.2d ___, WL 263735 (Jan. 18, 2011), *quoting* State ex rel. Trent v. Sims, Syl. Pt. 6, 138 W.Va. 244, 77 S.E.2d 122 (1953). Thus, when the West Virginia Constitution uses the term “county” and “counties” it does not mean portions thereof; it means the whole county or entire counties combined.

B. Counties’ boundaries must be respected in redistricting and a County should only be divided when necessary to prevent significantly unequal representation in the West Virginia House of Delegates.

“The United States Supreme Court has already ruled that states’ objective of preserving the integrity of political subdivision lines is rational since it furthers the legislative purpose of facilitating enactment of statutes of purely local concern and preserves for the voters in the political subdivisions a voice in the state legislature on local matters.” Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973). It explained that “insuring some voice to political subdivisions, as political subdivisions,” was justification for deviation from population-based representation in state legislatures. Id., 410 U.S. at 319.

The Supreme Court found no unconstitutionality in Mahan where the Virginia Legislature “consistently sought to avoid the fragmentation of such subdivisions, assertedly to afford them a voice in Richmond to seek such local legislation.” Id., 410 U.S. at 323. As in Virginia, counties are an integral part of West Virginia.

Our Legislature has recognized that it is important for voters to know the county of residence for candidates in a delegate district that crosses county lines. Thus, W.Va. Code §3-5-13(3)(B), requires that “[t]he city of residence of every candidate, the state of residence of every candidate residing outside the state, the county of residence of every candidate for an office on the ballot in more than one county and the magisterial district of residence of every candidate for an office subject to magisterial district limitations” be printed beneath the names of candidates on a ballot.

Since Mason and Putnam Counties have been forced to share delegates in accordance with House reapportionments of 1991 and 2001, there has been no delegate from Mason County. (See Appendix, Exh. 5). Multiple attempts have been made by Mason County residents to run for House of Delegates since 1991 -- to no avail. Consequently, in recent years, there has been no attempt by a Mason or Jackson County resident to run for House of Delegates in the 13th or 14th Delegate District. (Id.).

It would be ludicrous to argue that the reason Putnam County candidates always garner more votes than Mason or Jackson County candidates is because the candidates who reside in Putnam County are always better suited to represent all the people when it comes to policy decisions and making law or that they are better campaigners or that they can afford to hire consultants to run better campaigns or any mixture of these things. Rather, the one commonality in the election results -- no matter who the House candidates are -- is that those residing in Putnam County always win. (Id.).

It is natural for people to vote for their own kind. Residents within a county have common interests. They share a tax base. They travel the same roads and abide by the same ordinances. They encounter similar terrain and environments. They are interdependent upon each other to share costs of a courthouse, ambulance services,

police and fire protection, libraries, parks and schools. They share a common ground in their county of residence, a familiarity with each other because they live in the same place.

Inarguably, the State has limited resources. When a delegate of the 13th or 14th Delegate District has to choose between political subdivisions in divvying out State resources, it is reasonable for the delegate to show preference for the county with more residents and voters, to wit: Putnam County. Historically and today, counties matter.

II. Enrolled House Bill 201, Codified as W.Va. Code §1-2-2, Violates the Fourteenth Amendment of the United States Constitution and Article II, §4 of the West Virginia Constitution Because it Does Not Provide Equal Representation to the Citizens of Putnam and Mason Counties.

The Fourteenth Amendment of the Constitution of the United States provides that no State may “deny to any person within its jurisdiction the equal protection of the laws.” Similar language is found in Article II, Section 4 of the Constitution of West Virginia. The latter provides as follows:

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.

The West Virginia Supreme Court of Appeals has already determined this State Constitutional provision clearly provides “every citizen shall have equal representation in government,” and “clearly requires equality in *all* apportionments of representation[.]” State ex rel. Smith v. Gore, in part, 150 W.Va. 71, 74, 143 S.E.2d 791, 794 (1965).

Although the United States Supreme Court held, in Reynolds v. Sims, 377 U.S. 533, 568, 84 S.Ct. 1362, 1385, 12 L.Ed.2d 506 (1964), that the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution requires that legislative districts be apportioned on a population basis, courts have recognized that population is not the sole consideration. The starting point when apportioning state legislative representatives begins with population and this consideration, while the controlling factor, is not the sole criterion. See Reynolds v. Sims, 377 U.S. 533, 567, 84 S.Ct. 1362, 1384, 12 L.Ed.2d 506 (1964).

Out of Reynolds v. Sims, *supra*, and Mahan v. Howell, , 410 U.S. 315, 93 S.Ct. 979, 35 L.E.2d 320 (1973), a constitutional test for state legislative apportionment schemes emerged: (1) Does the reapportionment plan further the State's rational policy; and (2) Does the population disparity among districts exceed constitutional limits? See Mahan, 410 U.S. at 326, 328. As long as the plan furthers a rational State policy or interest and substantial equality among the citizens is achieved, then an apportionment plan meets the United States Constitutional requirements.

In Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979, 35 L.E.2d 320 (1973), the United States Supreme Court reaffirmed its Reynolds v. Sims, *supra*, holding by quoting, “[T]he 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.” Mahan, further quoting Reynolds, stated, “[S]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.” The Mahan Court

established that there is no mathematical formula establishing a deviation range for what is and is not permissible under the Fourteenth Amendment. See Mahan, 410 U.S. at 329.

In Brown v. Thomson, 462 U.S. 835, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983), the United States Supreme Court held that excessive population deviation did not violate the Equal Protection Clause where legislative districts were drawn to preserve county lines. There, excessive population variations were the result of the consistent and nondiscriminatory application of a legitimate state policy. The State of Wyoming had a Constitution mandating that every county “shall constitute a senatorial and representative district’ and that ‘[e]ach county shall have at least one senator and one representative.” Id., 462 U.S. 835 at 837, 103 S.Ct. at 2693, *quoting Wyo. Const.*, Art. 3, §3. The legislators were required to be “apportioned among the said counties as nearly as may be according to the number of their inhabitants.” Id., *quoting Wyo. Const.*, Art. 3, §3.

The United States Supreme Court has already established, “The policy of maintaining the integrity of political subdivision lines in the process of reapportioning a state legislature . . . is a rational one.” Mahan, 410 U.S. at 329. Indeed, the Supreme Court indicated in Reynolds v. Sims, 377 U.S. 533, 580, 84 S.Ct. 1362, 1391, 12 L.Ed.2d 506 (1964), that “insuring some voice to political subdivisions, as political subdivisions,” can justify some deviation from population-based representation in state legislatures.

In Goins v. Heiskell, 362 F.Supp. 313, 317 (S.D. W.Va. 1973), the federal district court explained, “While population is the basic factor to be considered in a legislative apportionment plan, other factors are to be examined and weighed.” There, the Court upheld the West Virginia Legislature’s House apportionment Act of 1973 finding that

the 16.179 maximum percentage population variance among delegate districts “tolerable and acceptable when considered with other legitimate interests and factors incident to the effectuation of a rational state policy.” Heiskell, 362 F.Supp. at 323. There, the Legislature allotted thirty-six delegate districts for one hundred House members, consisting of “13 single-county districts, 11 multi-county districts, and 12 districts involved in some manner in crossing county lines, either giving up or annexing areas of other counties.” Heiskell, 362 F.Supp. at 318. In that case, counsel for the Secretary of State was able to cite reasons for the particular plan which outweighed the population deviation such as the plan’s “minimum cutting of county lines and the minimum fragmentation of county areas in forming delegate districts, the preservation of the integrity of county boundaries, and the freedom and latitude to select the legislative structure best suited to the needs and wishes of the state[.]” Heiskell, 362 F.Supp. at 321.

In the 1973 Mahan case the United States Supreme Court upheld the State of Virginia’s House of Delegates reapportionment plan. See Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973). Finding the plan, which had a maximum percentage population variance in districts of 16.4, constitutional, the Court acknowledged that it was “rational” for a state to apportion districts in a manner to maintain the integrity of political subdivision lines. Id.

The Reynolds v. Sims Court provided:

A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or

natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering.

Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.

377 U.S. at pp. 578-79, 84 S.Ct. at 1390.

Although it is possible that Mason County voters may be able to elect a representative from Mason County in the newly created 14th District where Mason County voters outnumber those in Putnam County, a resident delegate is not guaranteed. Moreover, were a Mason County resident elected in the new 14th District, the delegate could not provide adequate representation to the citizens of Mason County because the delegate's representation would have to be split with Putnam County.

Likewise, a representative in Putnam County in the new 13th, 22nd and 38th Delegate Districts would be shared among other counties. Putnam County is only guaranteed one delegate although it is entitled to three.

III. Enrolled House Bill 201, Codified as W.Va. Code §1-2-2, Should be Struck Down by this Court Because it Constitutes Partisan Gerrymandering.

The State of West Virginia denies to the people of Putnam and Mason County equal protection of the laws when it chooses not to give them equal representation because of their political party affiliation. In the Legislature, not only are county lines crossed but many of the delegate districts are contorted.

“Political gerrymander” has been defined as “[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one

political party an unfair advantage by diluting the opposition's voting strength." Vieth v. Jubelirer, FN 1, 541 U.S. 267, 271, 124 S.Ct. 1769, 1773, 158 L.Ed.2d 546 (2004), quoting Black's Law Dictionary 696 (7th ed. 1999). In 1986, the United States Supreme Court held that these type of cases were justiciable under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Davis v. Bandemer, 478 U.S. 109, 143, 106 S.Ct. 2797, 2816, 92 L.Ed.2d 85, cited in Holloway v. Hechler, 817 F.Supp. 617, 627 (S.D. W.Va.).

However, in a 2004 case, Justice Scalia, writing for Chief Justice Rehnquist and Justices O'Connor and Thomas, stated that because over the previous eighteen years "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged," political gerrymandering cases must be nonjusticiable. Vieth v. Jubelirer, 541 U.S. 267, 281, 124 S.Ct. 1769, 1778, 158 L.Ed.2d 546 (2004). Justice Kennedy concurred that the underlying case should be dismissed, but wrote in his concurring opinion that he "would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases." Id., 541 U.S. at 306, 124 S.Ct. at 1793.

The layout of the districts in Putnam and Mason Counties overwhelmingly appears to be the result of the majority political party of the House of Delegates attempting to protect historically Democratic districts by keeping them intact while disbanding historically Republican districts. For example, the historically Democratic 13th Delegate District has two seats with only one incumbent intending to refile for his seat in 2012. It could easily have been redrawn as a single-member district without harming any incumbent next year. Instead, the Legislature chose to remove an eastern portion of Putnam County to add with historically Republican voters of Kanawha

County and create a new 38th Delegate District. The 38th District is one of the newly created single-member districts that has been created where a three-member historically Republican district was disbanded to create three single-member districts.

The idea of curtailing the 13th Delegate District to bring it back within the confines of Putnam County and to give Mason County its own delegate was proposed to some members of the House Committee on Redistricting. Mason and Putnam Counties could have continued to share the 14th Delegate District representatives with a smaller portion of Mason County and by regaining the Putnam citizens from the 19th District. This is just one example of a reasonable way the Legislature could have apportioned the territory.

Putnam County has become generally known as a Republican county because typically more votes are cast for the Republican candidate on a countywide basis. Many believe this to be the main basis for dividing Putnam County among five delegate districts and allotting it a *single*-member district – the only district completely within its boundaries – and which happens to include the residences of *two* Republican incumbents. The situation is odd given that Putnam County has population to support 2.99 delegates and similarly populated counties are treated differently.

For example, Jefferson County with less population having only 53,498 residents is allotted three single-member delegate districts all within its border. (See Appendix, Exhs. 1 & 2). Marion County which has little more than a thousand more in population than Putnam has a large three-member delegate district and then shares a little more than a thousand residents with portions of Monongalia and Taylor Counties. (Id.).

Citizens are not treated equally when their delegate districts are apportioned to circumvent the political will of the voters. Representative seats should not be

apportioned to manufacture political results. Perhaps the political affiliation or voting tendencies of voters may be given some consideration so that likeminded people can share a representative, it must certainly not be given as much weight as population or county lines.

The United States Supreme Court has ruled it permissible for a State Legislature to apportion representative districts based on achieving “political fairness” between political parties. See Gaffney v. Cummings, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973). In Gaffney, although the Court acknowledged that political considerations are naturally made in drawing district lines, it restated the principle that “multimember districts may be vulnerable, if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized.” *Id.*, 412 U.S. at 754, 93 S.Ct. at 2332, *citing See White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314; Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971); and *See also Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).

In Fortson v. Dorsey, 379 U.S. 433, 439, 85 S.Ct. 498, 501, 13 L.Ed.2d 401 (1965), the Supreme Court indicated it would reconsider whether a multimember districting plan was acceptable if it were shown that the districts were drawn to “minimize or cancel out the voting strength of racial or political elements of the voting population.”

If districts are apportioned in a manner that reflects no policy, but is “simply arbitrary and capricious” discrimination, then the plan violates the Fourteenth Amendment of the United States Constitution. Reynolds v. Sims, 377 U.S. 533, 557, 84 S.Ct. 1362, 1379, 12 L.Ed.2d 506 (1964), *quoting Baker v. Carr*, 369 U.S. 186, 226, 83 S.Ct. 691, 715, 7 L.Ed.2d. 663 (1962). The United States Supreme Court has warned, “Indiscriminate districting, without any regard for political subdivision or natural or

historical boundary lines, may be little more than an open invitation to partisan gerrymandering.” Reynolds v. Sims, 377 U.S. 533, 558-79, 84 S.Ct. 1362, 1390, 12 L.Ed.2d 506 (1964). There, the Court stated that “a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering.” Id., 377 U.S. at 581, 84 S.Ct. at 1391.

On the other hand, the United States Supreme Court has also recognized that “[p]olitics and political considerations are inseparable from districting and apportionment.” Gaffney v. Cummings, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973), *cited in* Goins v. Heiskell, 362 F.Supp. 313, 321 (S.D. W.Va. 1973). Nevertheless, there is a difference in having a preference or choosing one rational way to apportion representative districts over another. As long as the intent in apportioning is not to harm voters’ rights because of their political party preference, then some political considerations are naturally permissible under both the United States and West Virginia Constitution. However, this should never be the paramount consideration. That plane is for considerations of substantially equal representation based on population and political subdivision boundaries.

CONCLUSION

The Petitioners respectfully urge this Honorable Court to declare Enrolled House Bill 201, codified as §1-2-2 of the West Virginia Code, as amended, invalid. It “clearly violates one or more provisions of the State Constitution,” and the United States Constitution. See Robertson v. Hatcher, Syl. Pt. 5, 148 W.Va. 239, 135 S.E.2d 675 (1964).

WHEREFORE, these Petitioners pray that this Honorable Court:

- (1) Issue a Rule to Show Cause to Respondent to demonstrate why Petitioners' requested relief should not be granted;
- (2) Enter an Order suspending the rules of the Court pursuant to Rule 2 of the West Virginia Revised Rules of Appellate Procedure, so that this proceeding may be expedited and that this Court may do substantial justice before the filing period for candidates to the House of Delegates begins on January 9, 2012;
- (3) Order Oral Argument before the Court pursuant to Rule 20 of the West Virginia Revised Rules of Appellate Procedure;
- (4) Declare that Enrolled House Bill 201, as codified in W.Va. Code §1-2-2 violates Article VI, §§ 6 and 7 of the Constitution of the State of West Virginia;
- (5) Declare that Enrolled House Bill 201, as codified in W.Va. Code §1-2-2 violates the Equal Protection Clause of Article II, §4 of the Constitution of the State of West Virginia and of the Fourteenth Amendment of the Constitution of the United States;
- (6) Prohibit and restrain Respondent from performing official functions in connection with the filing by persons of candidacy for the House of Delegates pursuant to W.Va. Code §3-5-7, and from taking any action pursuant to W.Va. Code §3-5-9 which would implement the provisions of Enrolled House Bill 201 and consequently deny the citizens of Putnam and Mason Counties their constitutional rights to equal and adequate representation in having residents of their own counties seated as members of the West Virginia House of Delegates;
- (7) Retain jurisdiction of this case during any special legislative session called to remedy the unconstitutional apportionment plan and to ensure the

Legislature's compliance with all provisions of the Constitution of the State of West Virginia and the United States; and

(8) Any further relief this Court deems just and proper.

Respectfully submitted,

By counsel,



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Counsel for Petitioners

VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF PUTNAM, to-wit:

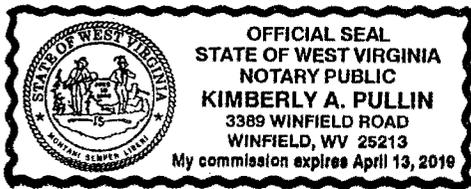
I, Brian Wood, after first being duly sworn upon oath, state that I am a Petitioner named in the foregoing "Petition for Writ of Prohibition", that I have read the same, along with the attached "Appendix", and that the facts and allegations therein contained are true and correct to the best of my belief and knowledge.



BRIAN WOOD

Taken, sworn to, and subscribed before me this 20th day of October, 2011.

My commission expires: April 13, 2019.

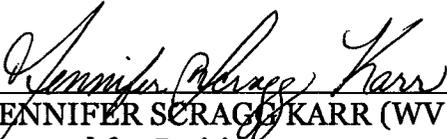




NOTARY PUBLIC

CERTIFICATE OF SERVICE

I, Jennifer Scragg Karr, counsel for Petitioners, do hereby certify that I have this 21st day of October 2011, served the foregoing “Petition for Writ of Prohibition” and “Appendix” thereto via hand-delivery upon the parties to whom a rule to “show cause” should also be served at their respective offices, to wit: The Honorable Natalie Tennant, Secretary of State of the State of West Virginia, (304) 558-6000, State Capitol Complex, Building 1, Suite 157-K, 1900 Kanawha Boulevard, East, Charleston, WV 25305; and the Honorable Darrell McGraw, West Virginia Attorney General, (304) 558-2021, State Capitol Complex, Building 1, Room E-26, 1900 Kanawha Boulevard, East, Charleston, WV 25305.



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