IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

Upon Original Jurisdiction

STATE OF WEST VIRGINIA, ex rel.
THE COUNTY COMMISSION OF
MONROE COUNTY, WEST VIRGINIA,
acting by and through its members:
Michael Shane Ashley, Clyde Gum, Jr.
and William Miller, in their
official capacities, an as citizens and
residents of Monroe County, West Virginia;

Petitioners,

v. No. 11-1516

RICHARD THOMPSON, in his official
Capacity as Speaker of the House of
Delegates of the State of West Virginia; and
NATALIE E. TENNANT, in her official
Capacity as Secretary of State of
the State of West Virginia,

Respondents.

RESPONDENT RICHARD THOMPSON'S RESPONSE TO MONROE COUNTY'S PETITION FOR WRIT OF PROHIBITION

Anthony J. Majestro (WVSB 5165)
POWELL & MAJESTRO, PLLC
405 Capitol Street, Suite P1200
Charleston, WV 25301
Phone: 304-346-2889
amajestro@powellmajestro.com
Counsel for Respondent Richard Thompson, Speaker of the West Virginia House of Delegates

November 14, 2011

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RESPONDENT RICHARD THOMPSON'S RESPONSE TO MONROE COUNTY'S PETITION FOR WRIT OF PROHIBITION

Respondent, Richard Thompson, in his official capacity as Speaker of the House of Delegates of the State of West Virginia ("Speaker Thompson") submits this Response to the instant Petition for Writ of Prohibition filed by the County Commission of Monroe County, *et al.* ("Monroe Petition").

On November 4, Speaker Thompson filed Intervenor Thompson's Combined Response to the Petitions in *State ex rel. Cooper v. Tennant*, No. 11-1405 ("Cooper (House) Petition") and *State ex rel. Andes, et al. v. Tennant*, No. 11-1447 ("Putnam Mason Petition"). On that same day Secretary Tennant filed her consolidated response to these petitions. Much of the reasoning in these previously-filed responses is applicable to the claims raised in the Monroe Petition. To avoid unnecessary repetition, Speaker Thompson incorporates those responses here. What follows are additional arguments for rejecting the Monroe Petition. For the reasons set forth both herein and previously by him and Secretary Tennant, Speaker Thompson believes that this Court should refuse all three petitions challenging House Bill 201's redistricting of the West Virginia House of Delegates with prejudice.

QUESTIONS PRESENTED

I. **WHETHER PETITIONERS CAN OBTAIN REVIEW IN THIS COURT WITHOUT ESTABLISHING A CLEAR CONSTITUTIONAL PROVISION TO COUNTER THE LEGISLATURE'S PLENARY POWER TO APPORTION DELEGATES.**

II. **WHETHER HOUSE BILL 201 VIOLATES ARTICLE VI, SECTION 6 AND SECTION 7 OF THE WEST VIRGINIA CONSTITUTION BY SPLITTING COUNTIES WITH INSUFFICIENT POPULATION TO SUSTAIN A DELEGATE BETWEEN TWO OR MORE DELEGATE DISTRICTS OR COUNTIES.**

III. **WHETHER HOUSE BILL 201'S USE OF MULTIMEMBER DISTRICTS VIOLATES THE WEST VIRGINIA CONSTITUTION.**

IV. **WHETHER MONROE COUNTY HAS PRESENTED A VIABLE CONSTITUTIONAL ALTERNATIVE TO HOUSE BILL 201'S REDISTRICTING OF MONROE COUNTY.**

STATEMENT OF THE CASE[1]

In Monroe County's view, because it did not appreciably grow or shrink, it should be immune from redistricting changes. This provincial view ignores both the population changes in surrounding counties and the need to fit the redistricting of all of the State's delegate districts into a comprehensive plan.

First, as Monroe County concedes, its 2010 population was only 13,502. *See* Monroe App. at p. 1. As West Virginia's 2010 population was 1,852,994, the ideal population for each of 100 districts in a state is 18,530. Under federal guidelines mandated by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution ("Equal Protection Clause"), districts that are larger or smaller by 5% or more are disfavored. *See* Intervenor's Combined Response at pp. 14-16. Thus, to create a district, Monroe County needed to add an area with approximately 4,103 additional people.

[1]Speaker Thompson's previously filed Combined Response sets forth the general background for the adoption of H.B. 201 which is incorporated herein. What follows is a response to the Monroe Petition's specific claims.

Second, while Monroe's County's population was relatively stable over the last decade, the population of Southern West Virginia as a whole was not. The shift in population north and east resulted in a net loss of two delegates. Bennett Memo App. at 1 [Ex.1]. That drop in population made it more difficult to find excess population from surrounding counties to add to smaller counties.

Finally, when one looks at the proposal submitted by Monroe Country, it is clear that when one attempts to fit the Monroe piece into the whole State, Monroe's proposed solution is unworkable.

Monroe County argues that Greenbrier County should be a separate two-member delegate district wholly within its own borders based on its population of 35,480 which would give it a total deviation of 4.26%. Monroe Petition at p. 32. Monroe County then proposes that Raleigh County, with 78,859 citizens be assigned four delegate districts. *Id.* Then, the excess Raleigh population of 4,739 could be joined with a wholly intact Summers County (population 13,927) to create single-member district consisting of 18,666 persons with a deviation of 0.7%. *Id.* Finally, Monroe County proposes that Mercer County, with a total population of 62,264, be assigned three delegate districts (55,590) which would purportedly leave 6,674 in excess population. *Id.* Monroe would then combine 5,000 persons from Mercer County's supposed excess with Monroe County into a single-member district. *Id.* at pp. 32-33.

The first problem with the Monroe County proposal is that it would result in combining two non-contiguous counties – Monroe and Mercer. First, a close look at the map reveals that Mercer County does not border Monroe County. Bennet Memo, App. at 1 [Exh. 1]. To the North, Mercer County borders Summers County. *See* U.S.G.S. Topo Map, App. at 28 [Exh. 2];. To the East, Mercer County borders Giles County, Virginia. *Id.* With respect to Monroe County,

it borders Summers County to the West and Giles County, Virginia to the South. *Id.* Thus, the Northeast corner of Mercer County does not touch the Southwest corner of Monroe County.

The second problem with the Monroe proposal is that it fails to account for the loss of delegates in the region. Bennett Memo App. at 1 [Ex.1]. When the Monroe proposal is combined with the apportionment of the rest of the State, the total number of delegates increases to 101. *Id.* Even if this were permitted, it would result in changing the ideal, minimum, and maxim delegate district sizes necessitating a complete redrawing of the delegate districts statewide. *Id.*

Finally, even if a contiguous district were made bridging Monroe and Mercer through a portion of Summers, this would create the need to shift other districts in Wyoming and Raleigh, moving populations in and out of contiguous counties requiring changes in many other districts. Bennett Memo App. at 1-2 [Ex.1].

The idea that redistricting challenges cannot be looked at in isolation is further supported by an analysis of the proposals set forth in the Putnam/Mason Petition which create similar spill-over problems. Bennett Memo App. at 3-4 [Ex.3].

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

As noted in his previous Combined Response, Speaker Thompson respectfully requests that this Court's decision be rendered on an expedited basis following the currently scheduled argument.

With respect to oral argument, Speaker Thompson requests a total of thirty minutes to respond to the three petitioners challenging the redistricting of the West Virginia House of Delegates.

SUMMARY OF ARGUMENT

The apportionment of delegate districts is a legislative function under the constitution. Thus, under the West Virginia Constitution, the Legislature's plenary power can be limited only by clear restrictions contained in the Constitution. Monroe County's policy arguments for why the County should be kept together in a single delegate district are arguments that are properly directed to the Legislature, not arguments that present appropriate reasons for this Court to overturn a legislative reapportionment.

Monroe's argument that W.Va. Const. art. VI, §§ 6-7 do not specifically authorize the creation of delegate districts for anything other than "the lumping together of counties" violates the applicable rules of constitutional interpretation as, in the absence of a clear restriction, the Constitution cannot limit the Legislature's plenary power over redistricting. Reading W.Va. Const. art. VI, §§ 6-7 as containing an implicit limitation on splitting counties for delegate districts is clearly inappropriate given that the express limitation contained in § 4 that senatorial districts be bounded by county lines. *Goines v. Rockefeller* 338 F.Supp. 1189, 1190 n.2 (S.D. W.Va. 1972), the only Court to address this question reached the correct result that the Legislature is permitted to split counties because the Court asked the correct question: is there a "clear requirement" that limits the Legislature?

Monroe offers no sound reason why it is permissible to place some of the citizens of Mercer County in a district where, according to Monroe's logic, they will be unrepresented. Splitting and combining counties is required by the Equal Protection Clause. How those counties are split and combined is a matter for the Legislature.

Monroe County has not and cannot argue that the County was split to effectuate an improper purpose or to dilutee the right to vote. Monroe County residents are not

disenfranchised simply because they make up a minority of their two-member representative district. Members of a group are disenfranchised only when they are denied an opportunity to effectively influence the election results by securing the attention of the winning candidate. No such showing has been made here.

House Bill 201 does not violate an alleged preference in the West Virginia Constitution for single member districts. Multimember districts do not violate the West Virginia Constitution as two, three and four delegate districts are expressly provided in the initial apportionment in the Constitution. There is no evidence that combining a smaller county with a larger county gives the smaller county any more voting power than combining pieces of a smaller county with larger pieces of another county. Second, Monroe County presents no explicit bar to the use of multimember districts in the Constitution. Thus, even if multimember districts were not explicitly recognized in sections 8 and 9, the fact that the Constitution contains no explicit prohibition on the use of multimember districts for smaller counties means that the Legislature's plenary power allows them to reapportion in this manner.

Multimember districts are not unconstitutional. Despite repeated constitutional attacks upon multimember legislative districts, the United States Supreme Court has consistently held that they are not *per se* unconstitutional and can violate the Fourteenth Amendment only if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities. There is no evidence here that any discriminatory or wrongful purpose was behind the use of multimember districts. Given the history of the use of these districts in this State and the West Virginia Constitution's recognition of them, this Court should not interfere with the Legislature's discretion in choosing the combination of single member and multimember districts

Finally, Monroe's proposed district itself violates the West Virginia Constitution because it combines non-contiguous counties. The West Virginia Constitution allows contagious counties to be combined. Contrary to Monroe County's suggestion, Monroe County is not contiguous with Mercer and therefore cannot be combined to create a two county delegate district. Moreover, like the proposal advanced by the Putnam/Mason Petition, Monroe County's plan fails to consider the impact the proposed plan has on the reapportionment of the rest of the State. Monroe County's plan would also result in a plan with 101 delegates, which would, if accepted require the redrawing of the entire delegate map,

ARGUMENT

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

Speaker Thompson incorporates herein Part I of the argument raised in his Combined Response. *See* Combined Response at pp. 9-11. For the reasons stated therein, it is clear that the apportionment of delegate districts is a legislative function under our State's constitution. Under the West Virginia Constitution, the Legislature's plenary power can be limited only by clear restrictions contained in the Constitution.

Monroe County presents fairness and policy arguments for the creation of a district wherein its citizens are the majority of the voters. Monroe County had the opportunity to offer (and did offer) these policy arguments to the Legislature. Monroe Petition at p. 7. Indeed, the arguments resulted in changes to the legislative districts encompassing Monroe County. *Id.* It should be clear, however, that these policy arguments are properly directed at the Legislature, not this Court. As the Pennsylvania Supreme Court recognized, "The Court in reviewing a reapportionment plan is not to substitute a more 'preferable' plan . . . but only to assure that

constitutional requirements have been met." *In re Reapportionment Plan for Pennsylvania General Assembly*, 497 Pa. 525, 537, 442 A.2d 661, 667 (1981); *see also Schneider v. Rockefeller*, 31 N.Y.2d 420, 427, 340 N.Y.S.2d 889, 894, 293 N.E.2d 67, 70 (1972) ("While petitioners urge several alternate plans which they claim approach mathematical exactness and minimize or eliminate violations of county lines, we would emphasize that it is not our function to determine whether a plan can be worked out that is superior to that set up by chapter 11. Our duty is, rather, to determine whether the legislative plan substantially complies with the Federal and State Constitutions.").

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

Speaker Thompson incorporates herein Part III of the argument raised in his Combined Response. *See* Combined Response at pp. 17-19. For the reasons stated therein, it is clear that H.B. 201 does not violate the provisions of Article VI, §§ 6-7 of the West Virginia Constitution. Simply put, because there is no explicit restriction on splitting counties too small to sustain a delegate district, the Legislature is not restricted by these provisions from adopting a reapportionment plan that does not keep small counties whole. Specific responses to Monroe County's arguments follow.

Monroe County argues that W.Va. Const. art. VI, §§ 6-7 do not specifically authorize the creation of delegate districts for anything other than "the lumping together of counties." Monroe Petition at p. 17 & n.2. As an initial matter, if this statement of the law were correct, Monroe's proposal for the creation of a district combining Monroe and Mercer County would also violate this provision. More importantly, however, the argument ignores the applicable rules of

constitutional interpretation as, in the absence of a clear restriction, the Constitution cannot limit the Legislature's plenary power over redistricting. *See* Intervenor's Combined Response at pp. 9-12. Reading W.Va. Const. art. VI, §§ 6-7 as containing an implicit limitation on splitting counties for delegate districts is clearly inappropriate given that the express limitation contained in the § 4 that senatorial districts are to be bounded by county lines.

As Monroe County recognizes, the only Court to address this question, rejected Monroe's argument:

> Section 4 of Article VI of the state constitution relates to apportionment of the State Senate, requiring senatorial districts to be "bounded by county lines." That section is not directly involved in this action and its constitutionality need not be considered here. The Court does not read in Section 7 any clear requirement that delegate districts be "bounded by county lines." Sections 6 and 7 relate to ascertainment and assignment of delegate representation in the House of Delegates from the several counties and delegate districts. Section 6 permits a county having at least three-fifths of the population representation ratio to have a delegate. Section 7 provides that "every delegate district and county not included in a delegate district" shall be entitled to at least one delegate. It further provides for the assignment of the additional delegates, not already assigned to counties and delegate districts having population representation ratios qualifying therefore, to delegate districts and counties "which would otherwise have the largest fractions unrepresented."

Goines v. Rockefeller 338 F.Supp. 1189, 1190 n.2 (S.D. W.Va. 1972). Monroe County argues that the *Goines* Court ignored the wording of section 7 that "does not authorize the creation of delegate districts . . . for anything other than the lumping together of counties." Monroe Petition at p. 17, n.2. As is evident from comparing *Goines* to Monroe County's argument, *Goines* reached the correct result because the Court asked the correct question: Is there a "clear requirement" that limits the Legislature? The answer, of course, is no, and thus, the absence of explicit permission cannot override the Legislature's plenary power over redistricting. *See also Robertson v. Hatcher*, 148 W.Va. 239, 250-251, 135 S.E.2d 675, 683 (1964) (rejecting argument that Legislature cannot superimpose senate districts on top of one another based on the lack of

"any inhibition" against the practice, holding: "The test of legislative power in this State is constitutional restriction, and what the people have not said in the organic law their representatives shall not do, they may do. . .") (citations and internal quotations omitted).

Monroe County relies on opinions from Pennsylvania and North Carolina. In *Butcher v. Bloom*, 415 Pa. 438, 464-465, 203 A.2d 556, 571 (Pa.1964), the Pennsylvania Constitution specifically required that the delegates be apportioned "among the several counties" unlike the West Virginia Constitution that permits small counties to "be attached to some contiguous county or counties to form a delegate district." W.Va. Const, art. VI, § 6. Notwithstanding the specific "intention to respect county lines" in the Pennsylvania Constitution, the Court authorized the "the division or combination of counties in the formation of districts" when necessary to equalize population. *Butcher v. Bloom*, 415 Pa. at 465, 203 A.2d at 571. North Carolina law is even clearer in its restrictions on splitting counties. As *Stephenson v. Bartlett*, 355 N.C. 354, 362, 562 S.E.2d 377, 384 (2002), makes clear, the North Carolina Constitution, unlike West Virginia's, explicitly bars counties from being divided for the creation of either house or senate districts. These cases simply have little application to the West Virginia Constitution.

Monroe County next argues that the Equal Protection Clause does not necessarily require ignoring county lines (at least to the extent that was undertaken in H.B. 201). Monroe County concedes that the West Virginia Constitution's grant of a delegate district to any county with 60% of the ideal population is preempted by the Equal Protection Clause. It then proceeds to argue that the Legislature failed to give any care to political subdivisions and has "t[orn] counties apart for no rational reason." Monroe Petition at p. 23. Without any analysis or support, it argues that the result was partisan gerrymandering. *Id.* at p. 24.

The only specific complaint offered is failure to keep Monroe County whole. As noted above and below, Monroe's alternative is not constitutionally possible without splitting Summers County to make a contiguous district between Monroe and Mercer and redoing the entire delegate map.

The premises of Monroe's arguments also fail. Monroe offers no sound reason why it is permissible to place citizens of Mercer County in a district where, according to Monroe's logic, they will be unrepresented.

Splitting and combining counties is required by the Equal Protection Clause. How those counties are split and combined is a matter for the Legislature:

> In this instance, the choice of which county to split in a manner that results in a district not being wholly contained within that particular county is a judgment that must be vested with the Commission. *Hellar v. Cenarrusa,* 106 Idaho 586, 588, 682 P.2d 539, 541 (1984) (apportioning the State Legislature "is, in the first instance, a matter of legislative discretion and judgment"). We simply cannot micromanage all the difficult steps the Commission must take in performing the high-wire act that is legislative district drawing. Rather, we must constrain our focus to determining whether the split was done to effectuate an improper purpose or whether it dilutes the right to vote. Neither has been shown. Therefore, our preference for deferring to the Commission compels us to resolve the issue in its favor.

Bonneville County v. Ysursa, 142 Idaho 464, 472, 129 P.3d 1213, 1221 (Idaho 2005) (footnote omitted). Likewise, Monroe County has not and cannot argue that the County was split to, "effectuate an improper purpose or [to] dilute[e] the right to vote." *Id.*

Finally, this Court should reject the idea that voters who are a minority of a district are disenfranchised:

> The residents of Berlin are not disenfranchised simply because they make up a minority of their two-member representative district. Even in situations involving racial or political groups, proportional representation is not constitutionally required. See *Davis v. Bandemer,* 478 U.S. [109,] 132, 106 S.Ct. 2797, 92 L.Ed.2d 85 [(1986)] (one cannot presume that the winning candidate will entirely ignore the voters who supported the losing candidate; "a group's

> electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult"). Members of a group are disenfranchised only when they are denied an opportunity to effectively influence the election results by securing the attention of the winning candidate.

In re Town of Woodbury, 177 Vt. 556, 562-563, 861 A.2d 1117, 1125 (2004); *Beaubien v. Ryan,* 198 Ill.2d 294, 301, 762 N.E.2d 501, 506-507, 260 Ill.Dec. 842, 847- 848 (2001) ("Plaintiffs complain that the Commission's plan will result in some units of local government being split into different districts. . . Our court has long recognized that the boundaries of such units do not necessarily reveal communities of interest and that such units may have to be split for redistricting purposes in order for the resulting districts to meet the other requirements of law, particularly the requirement of equality of population."). Like the Court in *Woodbury, supra,* this Court should reject Monroe County's challenge because, "Petitioners have made no showing that they have no opportunity to influence the election or secure the attention of the winning candidate."

III. HOUSE BILL 201'S USE OF MULTIMEMBER DISTRICTS DOES NOT VIOLATE THE WEST VIRGINIA CONSTITUTION.

Monroe County next argues that House Bill 201 violates the alleged preference in the West Virginia Constitution for single-member districts. This argument fails for many of the same reasons as its other claims.

First, it cannot be seriously argued that multimember districts violate the West Virginia Constitution as two-, three- and four-delegate districts are expressly provided for in the initial apportionment in the Constitution. *See* W.Va. Const. art. VI, §§ 8-9. Contrary to Monroe's suggestion, smaller counties were combined in both single-member and multimember districts. *Id.* at § 8. There is no evidence that combining a whole smaller county with a larger county

gives the smaller county any more voting power than combining pieces of a smaller county with larger pieces of another county.

Second, Monroe County presents no explicit constitutional bar to the use of multimember districts. Thus, even if multimember districts were not explicitly recognized in sections 8 and 9, the fact that the Constitution contains no explicit prohibition on the use of multimember districts for smaller counties means that the Legislature's plenary power authorizes it to reapportion in this manner. *Robertson v. Hatcher*, 148 W.Va. at 250-251, 135 S.E.2d at 683.

Third, multimember districts, while disfavored when a Court is imposing the districts on a state, are not unconstitutional. Despite repeated constitutional attacks upon multimember legislative districts, the United States Supreme Court has consistently held that they are not *per se* unconstitutional. *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 158-159, 91 S.Ct. 1858, 1877, 29 L.Ed.2d 363 (1971); *Kilgarlin v. Hill*, 386 U.S. 120, 87 S.Ct. 820, 17 L.Ed.2d 771 (1967); *Burns v. Richardson*, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966); *Fortson v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965). Such legislative apportionments could violate the Fourteenth Amendment only if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities or some other similar group. *See White v. Regester, supra; Whitcomb v. Chavis, supra; Burns v. Richardson, supra; Fortson v. Dorsey, supra.* To prove such a purpose, it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers. *White v. Regester, supra*, 412 U.S., at 765-766, 93 S.Ct., at 2339; *Whitcomb v. Chavis*, 403 U.S., at 149-150, 91 S.Ct., at 1872. A plaintiff must also prove that the disputed plan was "conceived or operated as [a] purposeful devic[e] to further ... discrimination," *id.*, at 149, 91 S.Ct. at 1872.

The Supreme Court has held that a court in formulating an apportionment plan as an exercise of its equity powers should, as a general rule, not permit multimember legislative districts. "[S]ingle-member districts are to be preferred in court-ordered legislative reapportionment plans unless the court can articulate a 'singular combination of unique factors' that justifies a different result. *Mahan v. Howell*, 410 U.S. 315, 333, 93 S.Ct. 979, 989, 35 L.Ed. 320." *Connor v. Finch*, 431 U.S. 407, 415, 97 S.Ct. 1828, 1834, 52 L.Ed.2d 465.

In this case, there is no evidence that any discriminatory or wrongful purpose was behind the use of multimember districts. Given the history of the use of these districts in this State and the West Virginia Constitution's recognition of them, this Court should not interfere with the Legislature's discretion in choosing the combination of single-member and multimember districts.

IV. MONROE COUNTY HAS PRESENTED NO VIABLE CONSTITUTIONAL ALTERNATIVE TO HOUSE BILL 201'S REDISTRICTING OF MONROE COUNTY.

After conceding that drawing delegate lines within county boundaries would violate the Equal Protection Clause, Monroe County argues that preference should be given to preserving county boundaries in smaller counties. Monroe Petition at pp. 29-30. Monroe County proceeds to set forth a proposed plan that it argues complies with both the Equal Protection Clause and the protect-small-county-boundaries-rule it advances. Monroe's proposal, however, itself violates the West Virginia Constitution because it combines non-contiguous counties. Moreover, like the proposal advanced by the Putnam/Mason Petition, Monroe County's plan fails to consider the impact the proposed plan has on the reapportionment of the rest of the State, and as such, is unworkable.

As noted above, the first problem with the Monroe County proposal is that it that is would result in combining two non-contiguous counties – Monroe and Mercer. Under Monroe County's interpretation of Article VI, § 6, the West Virginia Constitution permits a small county to be joined with a county or a portion of contiguous county. *See* W.Va. Const art. VI, § 6 ("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)). A contiguous county is defined as follows:

> We agree with the view expressed in *Mader v. Crowell*, 498 F.Supp. 226, 229 (M.D.Tenn.1980), that a "[d]istrict lacks contiguity only when a part is isolated from the rest by the territory of another district." *Webster's* defines contiguous as "being in actual contact: touching along a boundary or at a point." *Webster's New Collegiate Dictionary* 245 (1973).

In re Apportionment Law Appearing as Senate Joint Resolution 1 E, 1982 Special Apportionment Session; Constitutionality Vel Non, 414 So.2d 1040, 1051 (Fla. 1982).[2]

It is possible to take a portion of Summers County and create a contiguous district with portions of Summers, Monroe, and Mercer Counties.[3] However, such a district would result in the splitting of one small county (Summers) to preserve another (Monroe). While Speaker Thompson believes that that the Legislature could have created such a plan, nothing about the West Virginia Constitution requires favoring Monroe County over Summers County in this manner.

Even if one did ignore the fact that the two counties are noncontiguous and create a district by combining Monroe County with a part of Mercer County, the result would not be as

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[2]Monroe's alternative proposal of creating a multi-member district combining Monroe County with all of Mercer County, Monroe Petition at 33, n.20, would suffer from the same constitutional defect.

[3]*See* App. at pp. 1-2 [Exh. 1].

simple as Monroe suggests. As noted above, the result is the creation of a plan with 101 delegate districts which, one way or another, would require the complete redistricting of the State. In addition, there is excess population from other counties that would have to be reallocated to another contiguous district likely necessitating further reallocations if not a complete revision of all districts.[4] *See* App at pp. 1-2 [Exh. 1].

It is well settled that, "in determining whether a good faith effort to establish districts substantially equal in population has been made, a court must necessarily consider a State's legislative apportionment scheme as a whole." *In re Reapportionment Plan for Pennsylvania General Assembly* 497 Pa. 525, 537-539, 442 A.2d 661, 667 - 668 (1981) (quoting *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 735 n.27, 84 S.Ct. 1459, 1473 n.27, 12 L.Ed.2d 632 (1964)). Consequently, it is improper to "focus solely on the challenged districts and ignore the fact that a redistricting plan must form an integrated whole." *Rodriguez v. Pataki*, 308 F.Supp.2d 346, 451-52 (S.D.N.Y. 2004).

"Redistricting is a difficult and often contentious process. A balance must be drawn. Trade-offs must be made. In the end, the question turns on who is to make those assessments." *Beaubien v. Ryan*, 198 Ill.2d 294, 301, 762 N.E.2d 501, 506-07, 260 Ill.Dec. 842, 847- 48 (2001); *see also In re Reapportionment Plan for Pennsylvania General Assembly*, *supra* ("Mere dissatisfaction with the fact that certain political subdivisions have been divided or have been included within particular legislative districts is not sufficient to invalidate the Final Reapportionment Plan as unconstitutional."). This Court, like the Legislature, must consider the statewide ramifications of the challenges to the plan.

> Moreover, we disagree with petitioners' suggestion that the so-called "ripple effect" is an impermissible consideration, outside the constitutional or

[4]Similar issues are presented when the alternate plans suggested in the Putnam/Mason petition are examined. *See* App. at pp. 29-30 [Exh. 3].

> statutory criteria. The constitution and the statutory provisions both acknowledge that it is impossible to absolutely comply with all numerical and nonnumerical criteria in all districts.

In re Town of Woodbury, 177 Vt. at 562, 861 A.2d at 1125.

When, as here, the Legislature has constructed a plan that, as a whole, complies with the State and Federal Constitutions, there is no role for the Court. *Schneider v. Rockefeller*, 31 N.Y.2d 420, 427, 293 N.E.2d 67, 70, 340 N.Y.S.2d 889, 894 (1972) ("While petitioners urge several alternate plans which they claim approach mathematical exactness and minimize or eliminate violations of county lines, we would emphasize that it is not our function to determine whether a plan can be worked out that is superior to that set up by chapter 11. Our duty is, rather, to determine whether the legislative plan substantially complies with the Federal and State Constitutions.").

CONCLUSION

For the reasons noted previously and herein, Speaker Thompson respectfully requests that the Court refuse to issue the writ and dismiss the Monroe Petition with prejudice.

VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to-wit:

I, Richard Thompson, Speaker of the House of Delegates of the State of West Virginia, after first being duly sworn upon oath, state that I am the Respondent named in the attached and foregoing Response to Petition for Writ of Prohibition, that I have read the same, and that the facts and allegations therein contained are true and correct, except insofar as they are therein stated to be on information and belief, and that, insofar as they are stated therein to be on information and belief, I believe them to be true.

Richard Thompson, Speaker of the
House of Delegates of the State of West Virginia

Taken, sworn to, and subscribed before me this 13th day of November, 2011.

My commission expires Dec. 13, 2016.

Notary Public

Official Seal
Notary Public
State of West Virginia
Carolyn J. Epling
House of Delegates
Bldg. 1, Rm. M-212, 1900 Kanawha Blvd., E.
Charleston, WV 25305-0470
My commission expires December 13, 2016

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

Upon Original Jurisdiction

STATE OF WEST VIRGINIA, ex rel.
THE COUNTY COMMISSION OF
MONROE COUNTY, WEST VIRGINIA,
acting by and through its members:
Michael Shane Ashley, Clyde Gum, Jr.
and William Miller, in their
official capacities, an as citizens and
residents of Monroe County, West Virginia;

Petitioners,

v. No. 11-1516

RICHARD THOMPSON, in his official
Capacity as Speaker of the House of
Delegates of the State of West Virginia; and
NATALIE E. TENNANT, in her official
Capacity as Secretary of State of
the State of West Virginia,

Respondents.

CERTIFICATE OF SERVICE

On November 14, 2011, comes the undersigned counsel and does hereby certify that service of the attached **Respondent Richard Thompson's Response to Monroe County's Petition for Writ of Prohibition** has been made upon the opposing parties by mailing a true and exact copy thereof by U.S. Mail to the addresses below:

Jeffry A. Pritt, Esq.
Pritt Law Firm, PLLC
PO Box 708
Union, WV 24983
Phone: 304-772-4700
jeffpritt@prittlawfirm.com

Darrell V. McGraw, Jr., Esquire
West Virginia Attorney General
Room 26-E, Building 1
1900 Kanawha Blvd., East
Charleston, WV 25305

Honorable Natalie E. Tennant
Secretary of State of the State of West Virginia
State Capitol Building
1900 Kanawha Boulevard, East
Charleston, WV 25305
Respondent

Anthony J. Majestro (WVSB 5165)