

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

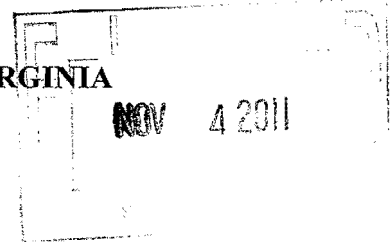
STATE OF WEST VIRGINIA ex rel.,
ELDON A. CALLEN, JIM BOYCE, PETRA WOOD,
JOHN WOOD, and FRANK DEEM,

Petitioners,

v.

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

Respondent.



11-1517

Case No. _____

PETITION FOR WRIT OF MANDAMUS

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CASE LAW:

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CONSTITUTION:

United States Constitution, Fourteenth Amendment	7, 8
West Virginia Constitution, Article VI, § 4	1, 2, 3, 4, 7, 10, 11

STATUTES:

Senate Bill No. 1006 (Senate Redistricting Act of 2011)	1, 2, 3, 4, 5, 6, 10, 11
West Virginia Code § 1-2-1	4
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III. QUESTION PRESENTED

- (1) **DOES SENATE BILL NO. 1006 VIOLATE THE WEST VIRGINIA MANDATORY CONSTITUTIONAL REQUIREMENTS OF PRESERVING COUNTY LINE BOUNDARIES AND KEEPING SENATORIAL DISTRICTS COMPACT?**

IV. STATEMENT OF THE CASE

This Petition challenges the constitutionality of Senate Bill No. 1006, also known as the Senate Redistricting Act of 2011. Petitioners Eldon A. Callen, Jim Boyce, Petra and John Wood, and J. Frank Deem have been deprived of their constitutional rights to participate in future elections as voters or candidates by the failure of the West Virginia Legislature to abide by mandatory provisions of the West Virginia Constitution. Article VI, § 4, which relates to the division of the state into senatorial districts, provides in part that “(t)he districts *shall be compact, formed of contiguous territory, bounded by county lines and as nearly as possible, equal in population . . .*” (Emphasis added). The Senate plan does not conform to these mandatory constitutional requirements.

The Petitioners, residents of Monongalia and Wood Counties, are filing this Petition to require the appropriate state officials to comply with Article VI, § 4 of the West Virginia Constitution in the redistricting of the state senatorial districts. The Petitioners therefore request the Court to declare Senate Bill No. 1006 unconstitutional and issue a temporary redistricting plan compliant with state constitutional requirements and/or to order the responsible state officials to redraw the senatorial districts in compliance with the West Virginia Constitution.

V. SUMMARY OF ARGUMENT

Senate Bill No. 1006 violates Article VI, § 4 of the West Virginia Constitution because

the senatorial redistricting plan unnecessarily divides counties and precincts, and fails to keep districts compact. For example, Monongalia County was split into three separate senatorial districts in clear disregard for the preservation of county line boundaries and creation of compact districts. Along with Monongalia County, 12 other counties have been unnecessarily divided. Additionally, the new districts have unwarranted divisions of numerous precincts, some of which appear to be intentional. The Senate could have avoided these significant divisions and still complied with the equal representation requirements of the United States Constitution. The failure of the Senate to properly balance the federal and state constitutional requirements of redistricting impairs the rights of West Virginia citizens to effective representation in the Legislature.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners seek to have the Clerk schedule this case for oral argument under Rule 20 of the Rules of Appellate Procedure. This case concerns issues of fundamental public importance and involves the constitutionality of Senate Bill No. 1006. Hence, oral argument is appropriate in this proceeding.

VII. ARGUMENT

1. Senate Bill No. 1006 Violates Article VI, § 4 of the West Virginia Constitution

A. The parties are affected citizens of West Virginia.

According to the 2010 census the population of West Virginia is 1,852,994. The State Senate comprises seventeen senatorial districts, which creates an ideal district population of 109,000 people. The Senate may deviate from this number to comply with state constitutional

requirements.¹ Generally, if the maximum population deviation is less than 10%, meaning that the difference between the least populated and most populated districts does not exceed 10% of the ideal district, the plan is *prima facie* non-discriminatory. *See Brown v. Thompson*, 462 U.S. 835 (1983).

In regard to this particular Petition, the Petitioners have a direct interest in the constitutionality of Senate Districts 2, 13 and 14. For example, Eldon Callen is an attorney and long-time resident of Monongalia County. Under SB No. 1006, Mr. Callen's residence would be located in Senate District 13. He is an elected Democratic Commissioner of Monongalia County. Mr. Callen participated in a Senate Public Hearing on redistricting held in Marion County. As a representative of Monongalia County, he strongly advocated that the West Virginia Constitutional requirements in Article VI, 4 relating to senatorial districts being "bounded by county lines" should be followed. He cited practical and legal reasons for keeping the County whole and not dividing it into separate senatorial districts. (Exhibit A, Appendix pp. 1-4)

Jim Boyce is an engineer and long-time resident of Monongalia County. Under SB No. 1006, Mr. Boyce's residence would be located in Senate District 14. He objects to dividing Monongalia County into three separate senatorial districts and believes the Legislature wrongly failed to abide by the mandatory requirements of Article VI, § 4 of the West Virginia Constitution.

Petra and John Wood are long-time residents of Monongalia County. Ms. Wood works as a biologist and Mr. Wood is a statistician. Under SB No. 1006, the Wood's residence would

¹ The law regarding equal representation in the redistricting process is explained in Section VII.1.C of the Petition.

be located in Senate District 2. The Woods object to dividing Monongalia County into three separate Senatorial Districts and believe the Legislature wrongly failed to abide by the mandatory constitutional requirements of Article VI, § 4.

Frank Deem is a long-time resident of Wood County and is the owner of the company J. F. Deem Oil & Gas. Mr. Deem began his career in the W. Va. Legislature in 1954, serving a total of 44 years as a Republican in both the West Virginia House of Delegates and the West Virginia Senate. His record of service in the W. Va. Legislature is the longest of any member. He has participated in redistricting on numerous occasions. He believes a closer examination of SB No. 1006 reveals several examples of intentional splitting of precincts and counties for reasons not required by or consistent with the mandatory requirements of Article VI, § 4, or any other provision in state or federal statutes, constitutions or case law.

B. Senate Bill No. 1006 fails to preserve county line boundaries and keep senatorial districts compact.

Senate Bill No. 1006 expressly recognizes that the state constitution “requires senatorial districts to be compact, formed of contiguous territory and bounded by county lines.” The Title to the Bill, which states the Senate’s intent to amend W. Va. Code §§ 1-2-1 and 1-2-2(b), also states that the Senate was required to create “incidental precinct boundary changes” in redrawing the new senatorial districts. *See* SB No. 1006. The intent to create only incidental boundary changes gives the appearance of sincerity, as the Bill later declares the Senate’s recognition “that from the formation of this state in the year 1863, each Constitution of West Virginia and the statutes enacted by the Legislature have recognized political subdivision lines and many functions, policies and programs of government have been implemented along political

subdivision lines.” See SB No. 1006. The complete map of the senatorial districts outlined in SB No. 1006, however, divides a number of counties, including the precincts within those counties, throughout the State of West Virginia. (Exhibit B, Appendix p. 5).

The Legislature redrew Senate District 2 to incorporate a northwestern portion of Monongalia County. The Legislature also completely disregarded the boundary lines of the Precincts 84 and 60 and proceeded to divide them with no apparent justification. The addition of Monongalia County is unnecessary, as Senate District 2 could easily have included Pleasants County in its entirety to fulfill its population requirements. The current plan is in clear violation of the requirements to preserve county boundaries and keep districts compact.

Attached as Exhibit C is a map of how Monongalia County is divided into three separate senatorial districts. (Exhibit C, Appendix p. 6) Also marked on the map is the location of the current House of Delegate members. As can be seen from the map, Democratic Delegate Marshall resides in Precinct 60. Her precinct has been split by encircling her home, the effect of which is to remove her from Senate District 14 and place her into Senate District 13. (Exhibit D, Appendix p. 7). Additionally, Precinct 84, where Democratic Delegate Fleischauer lives, has also been divided by encircling the property where she resides. The effect of this division is to remove her from Senate District 13 and place her into Senate District 2. (Exhibit E, Appendix p. 8)

The Title of Senate Bill No. 1006 indicates there are “incidental boundary changes.” The Petitioners do not believe that either of the precinct boundary changes in Monongalia County are incidental. The district lines are clearly drawn around the homes and property of Delegates Fleischauer and Marshall, thus creating the presumption that the Senate intentionally divided

their precincts. In addition to these two precinct splits, the plan divides 35 other precincts throughout the state. Petitioners suspect that these other divisions are not merely incidental but, similar to the divisions in Monongalia County, exist to specifically carve out potential senate candidates from certain districts.

By intentionally dividing precincts, the Title of Senate Bill No. 1006 is inconsistent with the body of the Bill. Article VI, § 30 of the state constitution prohibits the Legislature from adopting legislation when the title does not align with the substance of the bill,

No act hereafter passed, shall embrace more than one object, and that shall be expressed in the title. But if any object shall be embraced in an act which is not so expressed, the act shall be void only as to so much thereof, as shall not be so expressed, and no law shall be revived, or amended, by reference to its title only; but the law revived, or the section amended, shall be inserted at large, in the new act.

In Senate Bill No. 1006, the Title states that only incidental boundary changes were drawn. This statement is incorrect, as Precincts 84 and 60 were intentionally divided to remove potential candidates from Senate Districts 13 and 14. Where an act itself flatly contradicts what its title imports, it must be stricken down under the constitutional mandate. *GE Co. v. Wender*, 151 F. Supp. 621 (S.D. W. Va. 1957). The Title misleads the public into thinking that boundary changes were incidental, which is not the case. By misleading the public on this matter, the Senate has directly affected their interest in effective representation for future elections. Hence, the contradiction between the Title and the provisions of the Bill should render it unconstitutional.

The Petitioners understand that some counties require division to comply with equal representation requirements, such as Berkeley, Kanawha and Marshall Counties. Such divisions,

however, are not necessary for the other counties in West Virginia. For example, Wayne County is currently divided among three different senatorial districts, which is unnecessary and in violation of the West Virginia Constitution. Gilmer, Grant, Marion, McDowell, Mineral, Mingo, Putnam and Roane Counties also suffer from unnecessary county divisions and precinct splits.

Additionally, numerous precinct splits exist within the above counties. Precinct divisions should always be avoided and the Senate could have easily redrawn the districts without splitting 37 precincts throughout West Virginia. These county and precinct divisions directly affect West Virginia citizens' right to effective representation in the Legislature. By failing to preserve the boundaries of West Virginia counties and precincts, the Senate violated the mandatory constitutional requirements of Article VI, § 4.

C. Various jurisdictions support the requirements of preserving county line boundaries and keeping districts compact.

Generally, the main objective of any state legislature is to obtain equal population among the districts with minimal deviation. This objective, however, is not absolute and the law allows a state legislature to evaluate many other concerns and goals when redistricting. These concerns are normally based on state constitutional requirements, such as following political subdivision lines, respecting county boundaries and maintaining communities of interest.

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution requires that a state make an honest and good faith effort to construct districts as nearly of equal population as is practicable. *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). So 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. *Id.* at 579. Significantly, a state is free, as a matter of federal constitutional law, to construe the mandates of its own constitution more liberally in cases of legislative redistricting

A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to *deter the possibilities of gerrymandering.*

Id. at 580-81 (emphasis added).

The United States Supreme Court has provided guidance into balancing equal representation requirements while maintaining state interests. In the decision *Mahan v. Howell*, 410 U.S. 315 (1973), the Court examined a challenge to Virginia's legislative redistricting plan. The Court, applying the conclusions reached in *Reynolds*, discussed the factors that justify limited departures from the equal representation requirements in the Fourteenth Amendment. *Mahan*, 410 U.S. at 322. The majority took note of the Virginia General Assembly's constitutional authority to enact local legislation dealing with particular political subdivisions. The Court found that this function was a significant and substantial aspect of the Virginia legislature's powers and thus justified an attempt to preserve political subdivision boundaries in drawing the house districts. *Id.* at 325-29.

Other jurisdictions have found constitutional violations where the state requires the preservation of county line boundaries. *In re Reapportionment of the Colorado General Assembly*, 45 P.3d 1237 (Colo. 2002), the Colorado Supreme Court rejected a legislative reapportionment plan

because it was not “sufficiently attentive to county boundaries ” and was not accompanied by “an adequate factual showing that less drastic alternatives could not have satisfied the equal population requirement of the Colorado Constitution.” *Id.* at 1246, Article V, §§ 46 and 47 of the Colorado Constitution. The Court found that the Commission placed too much emphasis on the equal population requirement to the detriment of the state constitution’s other requirements:

The constitutional criteria instead contemplate the Commission taking an overview of Colorado’s population by county, ***then generating a map that respects the state’s legal preference for county integrity***, then applying minimization of city divisions, compactness, contiguity, and community of interest criteria to add portions of counties to other counties in forming districts, when necessary.

Id. at 1251 (emphasis added).

Importantly, the Colorado Supreme Court also provided this statement on the preservation of counties,

Counties are a basic structural unit of local government for carrying out state purposes. Counties and the cities within their boundaries are already established as communities of interest in their own right, with a functioning legal and physical local government identity on behalf of citizens that is ongoing.

Id. at 1248. The Petitioners strongly feel that their communities of interest have been deeply affected by the division of Monongalia County. For example, Cheat Lake and areas north of Morgantown have been grouped into Senate District 2. These communities share more interests with the citizens of Senate District 13, which includes the city of Morgantown, than they do with the very rural communities in parts of Calhoun and Gilmer Counties. To preserve the communities of interest located in Monongalia County, the county should be made whole and only consist of Senate District 13.

In addition to Colorado, many other jurisdictions have recognized the importance of respecting county line boundaries and keeping districts compact. *See, e.g., Stephenson v. Bartlett*, 562 S.E.2d 377, 384-92 (N.C. 2002) (affirming the superior court ruling that the North Carolina State Senate and House plans were unconstitutional because of a state constitutional provision prohibiting the division of counties); *In re 2001 Redistricting Cases*, 44 P.3d 141, 142-44 (Alaska 2002) (affirming a lower court decision holding that two newly drawn house districts were in violation of the state constitutional requirement of keeping districts compact); *Bingham County v. Comm'n for Reapportionment*, 55 P.3d 863, 65-69 (Idaho 2002) (holding that the legislative redistricting plan violated the Idaho Constitution by dividing counties more than was necessary to meet equal population requirements).

Like in Virginia, Colorado, North Carolina and other states, West Virginia's founders made a decision that keeping county boundaries intact was important for redistricting, presumably, as the U.S. Supreme Court observed in *Reynolds v. Sims*, *supra*, “to deter the possibilities of gerrymandering.” Unconstitutional gerrymandering by ignoring county and precinct boundaries is exactly what happened in SB No. 1006. As the Court held in *Reynolds v. Sims*, it is a legitimate objective of a state to construct districts along political subdivision lines to prevent the type of mischief that can occur with gerrymandering. This Court should enforce the mandatory provisions of our constitution to preserve the rights of citizens as voters or as candidates to have effective representation in the Legislature.

VIII. CONCLUSION

For the reasons discussed in this Petition, the Petitioners now pray that this Honorable Court accept their petition and declare Senate Bill No. 1006 in violation of Article VI, § 4 of the West Virginia Constitution. The Petitioners further request the Court to issue a temporary redistricting plan compliant with state constitutional requirements and/or to order the responsible state officials to redraw the senatorial districts in compliance with the West Virginia Constitution. The Petitioners also request attorney fees and costs.

Respectfully submitted,
ELDON A. CALLEN, et al.



Roger D. Forman (WV Bar# 1249)

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VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF Monongalia, to-wit:

I, Eldon A. Callen, after first being duly sworn upon oath, state that I am a Petitioner named in the attached and foregoing Petition, that I have read the document, and that the facts and allegations contained therein are true and correct, except insofar as they are stated to be on information and belief, and that insofar as they are stated to be on information and belief, I believe them to be true.

Eldon A. Callen

Taken, sworn to and subscribed before me this 2nd of November, 2011.

Donald L. McMillan

My commission expires January 26, 2012



VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF Wood, to-wit:

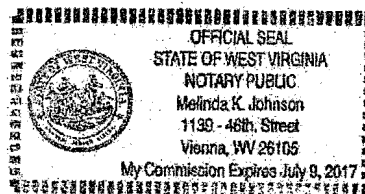
I, FRANK DEEM, after first being duly sworn upon oath, state that I am a Petitioner named in the attached and foregoing Petition, that I have read the document, and that the facts and allegations contained therein are true and correct, except insofar as they are stated to be on information and belief, and that insofar as they are stated to be on information and belief, I believe them to be true.

of Frank Deem

Taken, sworn to and subscribed before me this 2nd of November, 2011.

Melinda K. Johnson

My commission expires July 9, 2017.

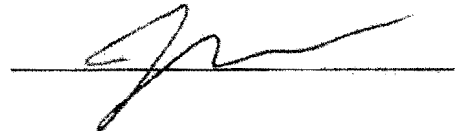


VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF MONONGALIA, to-wit:

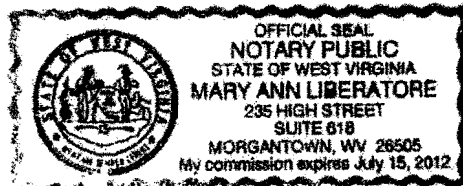
I, James Boyce, after first being duly sworn upon oath, state that I am a Petitioner named in the attached and foregoing Petition, that I have read the document, and that the facts and allegations contained therein are true and correct, except insofar as they are stated to be on information and belief, and that insofar as they are stated to be on information and belief, I believe them to be true.



Taken, sworn to and subscribed before me this 2nd of November, 2011.

Mary Ann Liberatore

My commission expires 7/15/2012

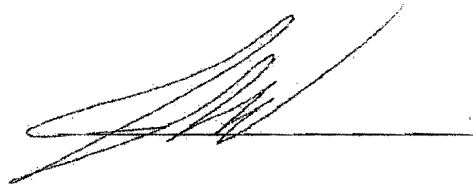


VERIFICATION

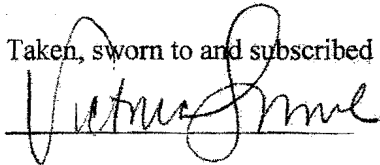
STATE OF WEST VIRGINIA

COUNTY OF Monongalia, to-wit:

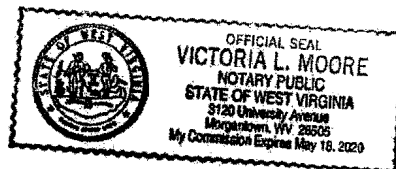
I, John M Wood, after first being duly sworn upon oath, state that I am a Petitioner named in the attached and foregoing Petition, that I have read the document, and that the facts and allegations contained therein are true and correct, except insofar as they are stated to be on information and belief, and that insofar as they are stated to be on information and belief, I believe them to be true.



Taken, sworn to and subscribed before me this 2 of November, 2011.



My commission expires May 18, 2020



VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF Monongalia, to-wit:

I, Petra B. Wood, after first being duly sworn upon oath, state that I am a Petitioner named in the attached and foregoing Petition, that I have read the document, and that the facts and allegations contained therein are true and correct, except insofar as they are stated to be on information and belief, and that insofar as they are stated to be on information and belief, I believe them to be true.

Petra B. Wood

Taken, sworn to and subscribed before me this 2 of November, 2011.

Victoria L. Moore



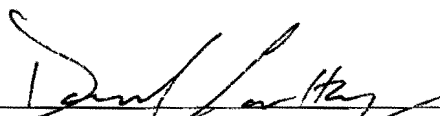
My commission expires May 18, 2020

CERTIFICATE OF SERVICE

I, Daniel T. Lattanzi, do hereby certify that service of the foregoing Petition for Writ of Mandamus has been made this 4th day of November, 2011, by first class mail, postage prepaid, on the following:

**Hon. Natalie Tennant, Secretary of State
State Capitol Complex
Building 1, Suite 157-K
Charleston, WV 25305**

**Darrell McGraw, Attorney General
State Capitol, Room E-26
1900 Kanawha Blvd., E.
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