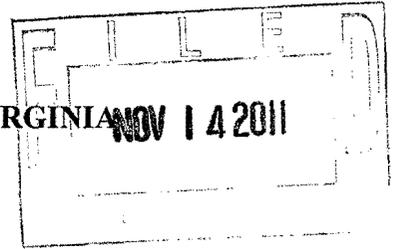


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



NOS. 11-1517 and 11-1525

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

Petitioner,

v.

NO. 11-1525

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

Respondent;

AND

STATE OF WEST VIRGINIA *ex rel.* ELDON A. CALLEN,
Jim Boyce, Petra Wood, John Wood, and Frank Deem,

Petitioners,

v.

NO. 11-1517

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

Respondent.

CONSOLIDATED RESPONSE TO THE PETITIONS
FOR A WRIT OF MANDAMUS FILED BY THORNTON COOPER
AND ELDON CALLEN, *ET AL.*

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I.

**INTRODUCTION AND STATEMENT REGARDING IMPORTANT DEADLINES
IMPLICATED BY THE PETITIONS**

A. Matters and Pleadings Before this Court.

This Consolidated Response is filed on behalf of the Respondent, the Honorable Natalie E. Tennant, West Virginia Secretary of State (“the Respondent Secretary”) in response to (1) a Petition for a Writ of Mandamus filed by Petitioner Thornton Cooper, No. 11-1525 (the “Cooper Senate Petition”); and (2) to a Petition for a Writ of Mandamus filed by Eldon A. Callen, *et al.*, 11-1517 (the “Callen Senate Petition”). Both Petitions relate to the 2011 redistricting of the West Virginia Senate.

B. The Position of the Respondent Secretary With Respect to the Cooper and Callen Senate Petitions.

The Respondent West Virginia Secretary of State, Natalie E. Tennant, is the named respondent in these proceedings in her role as the constitutional officer designated with authority to enforce, in part, provisions of SB 1006, the 2011 legislation that created new State Senate Districts following the results of the 2010 United States Census.

In her official capacity, Secretary Tennant had no role in the drafting, design, or creation of any redistricting plan. In fact, the Office of the Secretary of State is charged with executing the law, once the issues raised by the Petitions are resolved, regardless of the result. Nevertheless, Secretary Tennant accepts her responsibility and agrees to respond. As a member of the executive branch of

government, it is the duty of Secretary Tennant to defend the legislation regardless of whether she, personally, agrees with the process or the product.¹

Additionally, the Respondent Secretary has been asked to advise this Court that the West Virginia Senate wishes this Court to know that the Senate is very interested in these proceedings -- and that the Senate fully agrees with the defense of the 2011 Senate redistricting legislation as presented by the Secretary of State. The Senate does not plan to intervene in the instant cases; the Senate is, at the time of this filing, involved in and occupied with the constitutionally required process of selecting its presiding officer. Moreover, the Senate submits that it is unnecessary to duplicate arguments and it is not a named party.

C. Pressing Time Issues.

The Respondent Secretary believes it important, at the outset of her response, to make the Court aware of certain pressing time issues and deadlines related to the upcoming May 8, 2012 , statewide election.

Clerks, county commissions, and persons considering filing as candidates for office have imminent deadlines to accomplish certain legally required actions and/or to make important personal and professional decisions. Potential candidates must know for what Senate District they may file by the filing period, which begins on January 9, 2012 and lasts until January 28, 2012 -- and ideally sooner, so they may give the matter some study and thought before any filing. Moreover, county

¹Before presenting her argument, the Respondent Secretary wishes to inform this Court that her husband, Kanawha County State Senator Erik Wells, did not vote on the 2011 State Legislative redistricting legislation of which Senate Bill 1006 is a portion -- due to his active military service. However, it is theoretically possible that this redistricting legislation could, in some attenuated way, affect Senator Wells. If this Court should require the Respondent Secretary to recuse herself from further personal involvement with the instant litigation, she could designate one of her Deputies to act in her stead, although she does not believe this is warranted under the circumstances.

commissions must have completed the redrawing of any precincts that include territory contained in more than one senatorial or delegate district by no later than January 21, 2012. W. Va. Code § 1-2-2b [2011]. Any proposed redrawing of precinct boundaries must be published as a Class II-0 legal notice at least one month before revised boundaries take effect, making December 21, 2011 the last possible date of publication. W. Va. Code § 3-1-7 [2003]. A meeting of the county commission would necessarily have to take place some days before the publication date. Such meeting would require five days' public notice. W. Va. Code § 6-9A-3 [1999]. The county clerk's preparatory work before presenting to the county commission will also take some time.

Additionally, upon information and belief, a number of counties have already taken preliminary procedural steps to implement the 2011 redistricting legislation. Those steps range from preliminary consultations regarding the redrawing of precinct lines to actual readiness to mail notices of precinct changes to affected registered voters. Counties are necessarily conflicted about whether to continue with this preparatory work (and expense) -- or to wait for action by this Court.

Accordingly, the Respondent Secretary of State suggests that the **effective go/no-go date** for conducting the 2012 election in accord with the 2011 State Senate redistricting enacted by the Legislature that is challenged in the above-styled Petitions -- is no later than **on or about December 1, 2011**.

Additionally -- and to briefly reiterate an important point made by the Respondent Secretary in her Response to the pending Cooper and Andes House of Delegates redistricting challenges² -- even if this Court should conclude that further proceedings regarding any of these challenges are

²These are a Petition for a Writ of Mandamus filed by Petitioner Thornton Cooper, No. 11-1405 (the "Cooper House Petition"); and a Writ of Prohibition filed by the Petitioners Stephen Andes, *et al.*, No. 11-1447 (the "Andes House Petition").

necessary, or that some further Legislative action is required, there are strong reasons that this Court should not stay the effectiveness of the West Virginia Legislature's 2011 redistricting legislation.

Specifically, the House and Senate Districts that the 2011 West Virginia redistricting legislation replaced are, due to major population changes, patently and substantially in violation of the paramount redistricting principle of equal representation, or "one person, one vote." See *Reynolds v. Sims*, 377 U.S. 533, 569 (1964) ("the overriding objective of state legislative redistricting must be substantial equality of population among the various districts.") As all parties must concede, the West Virginia Legislature's duly-enacted 2011 state legislative redistricting legislation is far more aligned with this principle than the apportionment scheme that it replaced. Any (assumed - *arguendo*) defects in the 2011 redistricting could be corrected by the Legislature in time for the next regularly scheduled election cycle. This Court should in any event not impose undeniably substantial constitutional harm on large numbers of voters in the 2012 elections.

II.

STATEMENT OF THE CASE, RESPONSE TO QUESTIONS PRESENTED, AND SUMMARY OF ARGUMENT

A. The Cooper Senate Petition.

Petitioner Thornton Cooper ("Cooper") asks this Court to issue a writ of mandamus requiring the Respondent to implement Cooper's proposed State Senate redistricting plan unless the Legislature has enacted and the Governor has signed a new Legislative redistricting plan by December 31, 2011. (Cooper Senate Petition, at 15.)³

³This Response will not belabor the obvious point that to the extent that Cooper is asking this Court to impose Cooper's preferred plan in response to the claims in his Petition for a Writ of Mandamus, his request is meritless. As this Court held very recently in Syllabus Point 2 of *County* (continued...)

Cooper concedes that the redistricting in Senate Bill 1006 “meets the requirements of equal representation [‘one person, one vote’] set forth in federal case law.” (Cooper Senate Petition, at 17.) Cooper argues that his redistricting proposal results in lesser population disparities among districts than those in Senate Bill 1006. (*Id.* at 16.) Citing no decisional authority for the proposition, Cooper argues that Article II, Section 4 and Article VI, Section 4 of the *West Virginia Constitution* impose a stricter standard for equal state legislative representation than does the “one-person, one vote” equal representation jurisprudence of the Fourteenth Amendment to the *United States Constitution*. (*Id.* at 17, 26, 36.) Cooper also argues that Senate Bill 1006 creates Senate Districts that in thirteen instances are not defined by county boundaries, and therefore is unconstitutional because it violates the provisions of Article VI, Section 4 of the *West Virginia Constitution* -- which states that State Senate Districts shall be “bounded by county lines . . .” (Cooper Senate Petition, at 30.)⁴ However, Cooper concedes that his own Senate redistricting proposal necessarily deviates from county lines in seven instances. (*Id.* at 7.)

³(...continued)

Comm’n of Greenbrier County v. Cummings, ___ W. Va. ___, ___ S.E.2d ___, No. 11-1035, November 10, 2011, “[m]andamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse to do so, but it is never employed to prescribe in what manner they shall act, or to correct errors that they have made.”

⁴W. Va. Const. art. VI, § 4 states:

For the election of senators, the state shall be divided into twelve senatorial districts, which number shall not be diminished, but may be increased as hereinafter provided. Every district shall elect two senators, but, where the district is composed of more than one county, both shall not be chosen from the same county. The districts shall be compact, formed of contiguous territory, bounded by county lines, and, as nearly as practicable, equal in population, to be ascertained by the census of the United States. After every such census, the Legislature shall alter the senatorial districts, so far as may be necessary to make them conform to the foregoing provision.

Cooper also argues that the redistricting in Senate Bill 1006 does not meet the “compactness” standard for State Senate Districts that is set forth in Article VI, Section 4 of the *West Virginia Constitution*. However, Cooper himself has conceded in prior litigation that “compactness, a relative term, is difficult to achieve in West Virginia[.]” *Stone v. Hechler*, 782 F. Supp. 1116, 1122-29 (N.D. W. Va. 1992). Notably, the *Stone v. Hechler* court rejected Cooper’s position in that case on compactness, and upheld the West Virginia Legislature’s determination that the new Second Congressional District -- stretching from Charles Town to Huntington -- met State and Federal Constitutional compactness tests, due to West Virginia’s “unique geographical configurations.” (*Id.*)⁵

Finally, Cooper argues that Senate Bill 1006 is defective because it does not preserve existing 2011 precinct boundaries. Precinct boundary changes to correspond to the 2011 revised delegate and senatorial district boundaries are required by W. Va. Code § 1-2-2b [2011]. Cooper cites no statutory, constitutional, or case law authority for the putative constitutional principle of “preservation of precinct boundaries.” In West Virginia, precincts are established on the basis of registered voters, not population; are not local political boundaries; are created for the administrative convenience of voters; and can be and are redrawn as needed, whether or not redistricting has occurred. W. Va. Code § 3-1-7 [2003]. For these reasons, it is difficult to see how a nonexistent constitutional principle of “preserving existing precincts” in any fashion supports Cooper’s argument.

⁵“Because of different initial shapes, along with rivers, coasts, and other natural boundaries, [different states' districts] are unlikely to achieve comparable degrees of compactness.” Richard Niemi, *et al.*, *Journal of Politics* (1990).

B. The Callen Senate Petition.

Petitioners Callen, *et al.* echo Cooper’s arguments. They argue that Senate Bill 1006 is unconstitutional because under the bill “Monongalia County was split into three senatorial districts . . .[;]” and “12 other counties have been unnecessarily divided.” (Callen Senate Petition, at 2, 4.) However, the Callen Petitioners notably fail to advise this Court that prior to the enactment of Senate Bill 1006, Monongalia County was already divided among three Senatorial Districts. Like Cooper, the Callen Petitioners concede that in State Senate redistricting, there must be substantial divergence from county lines, despite the language of Article VI, Section 4 of the *West Virginia Constitution*. (*Id.* at 6.) The Callen Petitioners name three counties they say must be divided and leave open the possibility of the need to divide others. (*Id.*) The Callen Petitioners also complain about the division of existing precincts as a result of the redistricting enacted in Senate Bill 1006. (*Id.* at 2, 5, 6, 7.) However, they cite no authority for any constitutional or other protection for existing precincts, *see* discussion *supra*.

C. Response to Questions Presented and Summary of Argument .

The Cooper and Callen Petitioners question whether Senate Bill 1006 must be struck down because it impermissibly conflicts with the *West Virginia Constitution*. The Respondent Secretary of State Natalie E. Tennant says that the answer to this question, for the reasons set forth herein, is “no.”

III.

ARGUMENT

The Petitioners ask that this Court exercise its original mandamus jurisdiction to block the Respondent Secretary from enforcing a duly-enacted act of the Legislature because the act is

allegedly unconstitutional. This Court should begin its consideration of this request by considering the appropriate standard of review.

It is a settled principle of West Virginia law that “[w]hen the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and *any doubt must be resolved in favor of the constitutionality of the legislative enactment.*” Syllabus Point 3, *Willis v. O'Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967) (emphasis added).

Moreover, as Justice Cleckley wrote, “[p]arties seeking a writ of mandamus bear the burden of proving that the right to the desired relief is *clear and indisputable.*” *State ex rel. Sowards v. County Comm’n of Lincoln County*, 196 W. Va. 739, 750, 474 S.E.2d 919, 930 (1996) (refusing to issue writ even under liberalized mandamus election procedure).

This longstanding principle was also articulated in Syl. Pt. 1 of *State ex rel. Appalachian Power Company v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965):

In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. *Courts are not concerned with questions relating to legislative policy.* The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt. [emphasis added.]

Additionally -- and most importantly for this Court’s consideration of the instant cases -- Syllabus Point 4 of *State ex rel. W. Va. Hous. Dev. Fund v. Copenhaver*, 153 W. Va. 636, 171 S.E.2d

545 (1969) states that “[a] fact once determined by the legislature, and made the basis of a legislative act, is not thereafter open to judicial investigation.” (emphasis added).

With respect to the specific law governing redistricting in West Virginia, the Respondent Secretary has previously discussed -- in her earlier-filed Response to the Cooper and Andes House Petitions, *see* note 1 *supra* -- four leading West Virginia legislative redistricting cases: *Goines v. Rockefeller*, 338 F. Supp 1189 (S.D. W. Va.) (1972); *Goines v. Heiskell*, 362 F. Supp. 313 (S.D. W. Va. 1973); *Holloway v. Hechler*, 817 F. Supp. 617 (S.D. W. Va. 1992); and *Deem v. Manchin*, 188 F. Supp. 2d 651 (2002), *aff'd sub nom. Unger v. Manchin*, 536 U.S. 935, 122 S. Ct. 2617, 153 L. Ed. 2d 800 (2002). She incorporates herein her arguments therein -- because while the first three of these four cases involved the redistricting of the West Virginia House of Delegates, many of their principles are applicable to the instant challenges to the 2011 State Senate redistricting.

The fourth case discussed in the Respondent Secretary’s prior Response, *Deem v. Manchin*, 188 F. Supp. 2d 651 (2002), held that the 2001 West Virginia State Senate legislative redistricting plan was constitutionally sound.

Notably, the redistricting plan enacted in 2011 in Senate Bill 1006 and at issue in the Cooper and Callen Senate Petitions varies only slightly from the redistricting plan approved as constitutional in *Deem* -- where the court approved the Legislature’s giving constitutional importance *inter alia* to maintaining the historic cores of existing Senate Districts. *See* discussion *infra* at p. 16. More specifically, the 2001 State Senate redistricting of West Virginia at issue in *Deem* divided eleven counties and kept forty-four counties whole; while the 2011 redistricting challenged by the Cooper and Callen Petitioners divides thirteen counties and keeps forty-two counties whole.

Importantly, the *Deem* court held that “a redistricting exercise is . . . a balancing process in which one objective must sometimes yield to serve another. This is an exercise peculiarly suited to the give and take of the legislative process. Courts, as a consequence, should be reluctant to substitute their judgment for the legislature’s choices.” *Deem v. Manchin* 188 F. Supp. 2d at 657. Even though the *Deem* court found that the 2001 Senate redistricting plan “violate[d] the objective of crossing county lines only when necessary to preserve other stated goals,” the *Deem* court found that the plan -- which unlike the 2011 plan had a greater than ten percent population variance, and thus lacked *prima facie United States Constitutional* validity -- was nevertheless an acceptable result of the legislative balancing process. (*Id.* at 658.)

The *Deem* opinion is also instructive on the standard that this Court should apply in the instant cases:

Our [the reviewing court’s] quest is not to find the best plan, but rather to assess the constitutionality of the plan the legislature has chosen. Here, the deviation from the ideal exceeds only slightly 10%. **The legislature has adopted five rational and legitimate policy goals to justify a deviation in excess of 10%. In many respects these goals are competing and must be balanced by the legislature. We cannot conclude from the facts of this case that, in this balancing process, the legislature has failed to meet the requirement that the policies be consistently applied.** Accordingly, we hold that House Bill 511, as it relates to the West Virginia Senate, is constitutional.

188 F. Supp. 2d at 658 (emphasis added).

The *Deem* court’s attention to the legislative findings that explained the rationale behind the 2001 Senate redistricting plan (that the *Deem* court approved) is important -- because in the instant cases, the 2011 Legislature also made such findings. As noted *supra*, these findings, “once determined by the legislature, and made the basis of a legislative act, [are] not thereafter open to judicial investigation.” Syllabus Point 4, *State ex rel. W. Va. Hous. Dev. Fund v. Copenhaver, supra*.

Moreover, in 2011 the Senate enacted an improved plan, where the population deviations among Districts now fall within the ten per cent *prima facie* constitutional limit -- that the 2001 plan approved in *Deem* had exceeded.

The Legislature's findings, in Senate Bill 1006, are as follows:

(c) The Legislature recognizes that in dividing the state into senatorial districts, the Legislature is bound not only by the United States Constitution but also by the West Virginia Constitution; that in any instance where the West Virginia Constitution conflicts with the United States Constitution, the United States Constitution must govern and control, as recognized in section one, article I of the West Virginia Constitution; that the United States Constitution, as interpreted by the United States Supreme Court and other federal courts, requires state legislatures to be apportioned so as to achieve equality of population as near as is practicable, population disparities being permissible where justified by rational state policies; and that the West Virginia Constitution requires two senators to be elected from each senatorial district for terms of four years each, one such senator being elected every two years, with one half of the senators being elected biennially, and requires senatorial districts to be compact, formed of contiguous territory and bounded by county lines. The Legislature finds and declares that it is not possible to divide the state into senatorial districts so as to achieve equality of population as near as is practicable as required by the United States Supreme Court and other federal courts and at the same time adhere to all of these provisions of the West Virginia Constitution; but that, in an effort to adhere as closely as possible to all of these provisions of the West Virginia Constitution, the Legislature, in dividing the state into senatorial districts, as described and constituted in subsection (d) of this section, has:

(1) Adhered to the equality of population concept, while at the same time recognizing 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;

(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 to ensure that all senatorial

districts were formed of contiguous territory 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.

W. Va. Code § 1-2-1(c) (2011).

These findings conclusively establish that in enacting Senate Bill 1006 the West Virginia Legislature engaged in a complex, multi-factorial balancing process (a process that was expressly upheld in *Deem v. Manchin*, ten years earlier), and thereby produced a result that varied only slightly (two additional county line deviations) from the redistricting approach that was upheld in *Deem*. The very substantial similarity between the 2001 Senate redistricting approach that was found to be constitutional in *Deem*, and the 2011 redistricting approach in the instant case, simply precludes a finding that the latter enactment is “clear[ly] and indisputabl[y]” unconstitutional (*State ex rel. Sowards v. County Comm'n of Lincoln County, supra*) -- especially when “any doubt must be resolved in favor of the constitutionality of the legislative enactment.” *Willis v. O'Brien, supra*.

Speaking more broadly, *Deem* and the other cases discussed in the Respondent Secretary’s previously-filed Response to the House of Delegates redistricting challenges stand for certain core legal principles that should inform this Court’s analysis in the instant cases. Those principles may be summarized as follows:

1. Drawing state legislative district boundaries is inherently a compromise-laden and political process -- necessarily requiring legislators to consider their own and their party’s own political self-interest, the wishes of their supporters and constituents, the well-being of their state and local communities, various statutory and constitutional provisions, and their ability to persuade a majority of their colleagues to give weight to their views.

2. In most cases, only those criteria, metrics, and standards that are clear-cut, readily ascertainable, and objectively measurable, and that eschew and avoid second-guessing politically-laden choices -- are judicially manageable.

3. Once the inquiry goes beyond equal representation and assuming that a plan is *prima facie* constitutional under equal representation principles and does not implicate certain other immutable, historically suspect, and objective criteria like race), other authorized or permissible redistricting factors like compactness, community interest, protection of incumbency,⁶ partisan advantage, single-member vs. multi-member, political boundary lines, and even contiguity in some instances, are ordinarily just that -- factors -- that are properly part of the legislative balancing process, but can rarely serve as the basis for a successful court challenge to state legislative redistricting legislation.

4. Specifically, the 140-year-old provisions of the West Virginia *Constitution* regarding the use of county boundaries in establishing legislative districts cannot have a talismanic weight in Legislative redistricting decisions. Crossing county lines and combining portions of counties in the service of other constitutionally legitimate considerations is part of a longstanding, court-approved, and *prima facie* constitutional West Virginia “legislative toolkit.”

See generally Respondent Natalie E. Tennant’s *Consolidated Response to the Petitions for a Writ of Mandamus and a Writ of Prohibition* in Cases Nos. 11-1405 and 11-1447. As discussed in that *Consolidated Response*, applying these principles in the instant case further supports the constitutionality of Senate Bill 1006.

The Respondent Secretary does not have the knowledge in her official capacity and would not presume to definitively detail the process and considerations that were used by the West Virginia Legislature to arrive at Senate Bill 1006. However, the following information, based on the public record, may be useful to this Court. Authority for this information may be found at the Senate Redistricting Task Force and Select Committee on Redistricting website,

⁶ *See Karcher v. Daggett*, 462 U.S. 725, 740, (1983) (permitting states to deviate from ideal population equality for the purpose of avoiding contests between incumbents).

<http://www.legis.state.wv.us/Senate1/redistricting.cfm>.⁷ Thus, the Senate's approach from the outset has been an open and transparent one, seeking and receiving extensive public input on a wide range of constitutionally important and authorized factors.

On March 31, 2011 Acting Senate President Jeff Kessler (D - Marshall) formed the Senate Redistricting Task Force, chaired by Senate Majority Leader John Unger (D - Berkeley).⁸ The U.S. Census Bureau had earlier released West Virginia's population statistics, showing a dramatic shift in population from the south to the north over the last ten years. *See* Exhibit A hereto.

The Task Force held statewide meetings soliciting public comment on redistricting as follows: May 4, Berkeley County, Martinsburg; May 11, Ohio County, Wheeling; May 18, Kanawha County, Charleston; May 21, Marion County, Fairmont; May 25, Mingo County, Williamson; June 1, Raleigh County, Beckley; June 2, Pocahontas County, Marlinton; June 8, Logan County, Chapmanville; June 11, Cabell County, Huntington; June 15, Wood County, Parkersburg; June 25, Upshur County, Buckhannon, WV; and July 21, Mercer County, Princeton.

⁷The Senate Redistricting website contains, *inter alia*: 2011 Senate District and Congressional maps; public comments submitted online; document submissions from citizens and public officials; press releases; news articles covering the Task Force meetings; video excerpts of the Task Force meetings; and statistics related to the 2001 districts.

⁸The bipartisan, geographically diverse Task Force consisted of seventeen members representing each of the State's senatorial districts, and included Senators John Unger II (D-Berkeley) as Chair; Ron Stollings (D - Boone) as Vice Chair; Clark Barnes (R-Randolph); Donna Boley (R-Pleasants); Richard Browning (D - Wyoming); Larry Edgell (D - Wetzel); Doug Facemire (D - Braxton) ; John Pat Fanning (D - McDowell); Dan Foster (D - Kanawha); Mike Hall (R-Putnam); Orphy Klempa (D - Ohio); William Laird (D - Fayette); Ronald Miller (D - Greenbrier); Corey Palumbo (D - Kanawha); Robert Plymale (D - Wayne); Roman Prezioso (D - Marion); and Bob Williams (D - Taylor).

Petitioner Cooper, as he advises this Court, attended each of these public meetings to advocate for his personal view of what would be the best redistricting plan.⁹ Following the series of public meetings, the Task Force met as the Senate Select Committee on Redistricting, and produced proposed legislation, Senate Bill 1006, which was ultimately adopted by the Senate and House and signed by the Acting Governor on August 18, 2011.

In her official capacity and as a party in the instant cases, the Respondent Secretary of State cannot definitively assert -- beyond the foregoing-cited legislative findings -- the various considerations made by the Legislature in arriving at the redistricting plan set forth in Senate Bill 1006. However, she has consulted with representatives of the Senate, and will offer in a footnote a partial explanation of some of those considerations.¹⁰

⁹See

http://www.legis.state.wv.us/senate1/redistricting/redistricting_documents/2010/citizen_submissions/May_4_2011_Thornton_Cooper.pdf (written submission); *see also* <http://www.youtube.com/watch?v=F5dcX3WRCpc&feature=BFa&list=PLE16DFB1CE3404E37&index=2> (Cooper video testimony on his Senate plan begins at 6:00 minutes).

¹⁰There were substantial population shifts between 2000 and 2010 in West Virginia, although the total state population had relatively little change. Substantial population losses in the Northern Panhandle and the Southern “Coalfields” counties, together with substantial population growth elsewhere and particularly in Monongalia County and the Eastern Panhandle, required significant changes to Senate Districts in those areas -- thereby creating a pronounced and inescapable “ripple effect” on many other Senate Districts. However, even with the changes necessitated by the “ripple effect,” the 2011 Senate District 2, for example, still encompasses all or part of nine counties (*i.e.* Marshall, Wetzel, Tyler, Ritchie, Calhoun, Gilmer, Doddridge, Marion and Monongalia); Monongalia County continues to be divided by three Districts (the 2nd, 13th and 14th); and the relative shape of the division in Monongalia in the 2011 map is similar to that in the 2001 map. This keeps the historic core of the District intact, especially compared to the alternative proposed by Cooper -- which is to move Morgantown into the 14th. Suffice it to say that it is a legislative function (as opposed to a judicial task) to address the significant population shifts in this region and other areas (*e.g.*, the superimposed 8th and 17th districts in Kanawha County), together with the resulting ripple effects, when drawing Senate Districts. In a fully democratic fashion, the Senate held regional public hearings and debates, and thereafter a legislative plan was properly deliberated and
(continued...)

Importantly, the point of this example/explanation is *not* to engage in a back-and-forth discussion with Cooper or the Callen Petitioners about particular district boundaries. Such a discussion, despite Cooper's and the Callen Petitioners' desire to engage in it, is completely beyond the proper scope of this proceeding.

Rather, the point of this explanation is simply to show this Court, by way of one example, that the 2011 Legislature was indeed balancing real, complex, and constitutionally legitimate factors in the choices that it made, as authorized in *Deem v. Manchin, supra* and *Stone v. Hechler, supra*. The foregoing-quoted findings of fact that are part of Senate Bill 1006 conclusively establish that the Legislature permissibly weighed constitutionally legitimate factors -- including, as approved in 2001 in the *Stone v. Hechler* case, the preservation of the historic cores of existing Senate Districts:

Accordingly, the West Virginia Legislature's consideration of . . . preserving prior district cores . . . was completely proper and in accordance with the West Virginia Constitution. Such policies were consistent and were rationally applied. . . the State has met its burden of showing legitimate justification for the variances by demonstrating that the Legislature . . . was guided in large part by its pursuit of the legitimate State goals of preserving as many of the cores of prior districts as possible and in obtaining the greatest degree of compactness practicable that is also consistent with its goal of preserving the cores of previous districts.

Stone v. Hechler, 782 F. Supp. at 1128-29.

Thus, applying the relevant case law regarding West Virginia legislative redistricting to the State Senate redistricting plan enacted in 2011 results in the conclusion that the Legislature acted within constitutional parameters. Additionally, applying settled principles of the presumption of constitutionality, deference to Legislative findings, and the rigorous substantive standard for mandamus cases, the same result obtains.

¹⁰(...continued)
adopted.

The Callen Petitioners cite this Court to the case of *In re Reapportionment of Colorado Gen. Assembly*, 45 P.3d 1237 (Colo. 2002). In that case, in which the Chief Justice and two other Justices dissented, the majority of the Colorado court held that a legislative redistricting Commission plan was unconstitutional because it did not properly respect county boundaries. The three dissenters in *In re Reapportionment of Colorado Gen. Assembly* criticized the majority opinion for creating a new rule requiring that:

... the redistricting authority must begin by drawing immovable lines that protect the more populous counties . . . the rules announced by the majority represent an extraordinary departure from precedent and upset decades of settled expectations about the application of constitutional criteria.

Id. at 1260, Bender, J. dissenting. The dissenters continued:

The majority's formulaic approach fails to recognize the mathematical nuances involved in creating districts that maximize compliance with the relevant constitutional criteria. The complexity of the geography of our state, the diverse types of communities, the different and sometimes competing federal and state constitutional requirements, and the almost infinite number of district permutations that can be generated all combine to require this court to defer to the discretion of the Commission, provided that the Proposed Plan was drawn on the basis of the appropriate constitutional criteria.

....

the Commission's Proposed Plan preserves intact fifty-one out of our sixty-three counties. The focus of the majority's opinion, this dissent, and the arguments of the parties has thus been upon the few counties in which splits do occur.

Unfortunately, it is not possible to accommodate everyone. Such is the dilemma faced by the Commission. If the Commission satisfies the desires of one county, city or community of interest to remain whole and undivided, it often must necessarily split another county, city, or community of interest.

....

The alternate plans presented by the objectors in this case may well be acceptable under the Colorado Constitution. However, the presentation of an

alternate, constitutionally acceptable plan does not render the Commission's Proposed Plan unconstitutional, even if many people believe that the alternate plan is better. *See, e.g., In re Reapportionment 1982*, 647 P.2d at 197 (“[T]he Commission must have the discretion to choose where the necessary and constitutionally permissible compromises are made.”).

(*Id.* at 1265-66.)

The Respondent Secretary of State asks this Court to consider both the majority and dissenting opinions in the foregoing Colorado case -- neither of which is, of course, precedential authority in the instant cases. Upon such review, it would appear that the dissenting Justices in the Colorado case are more aligned with the approach taken in *Deem* and the other West Virginia cases that the Respondent has cited to this Court.

Also cited by the Callen Petitioners is *Stephenson v. Bartlett*, 562 S.E.2d 377 (NC 2002) which involved several complex issues arising under the Voting Rights Act, and -- as in the Colorado case supra -- included several dissents that persuasively discuss why a rigid adherence to county lines can and should not be a supervening factor that trumps all other valid factors in the Legislative balancing process. Similarly, the majority in the Callen-cited case of *Bingham County v. Idaho Comm'n for Reapportionment*, 55 P.3d 863 (Idaho 2002) explicitly stated that it was necessarily unconstitutional for the redistricting plan to consider the factor of “maintaining traditional neighborhoods and communities of interest [and] avoiding oddly shaped districts” when such factors conflicted with adherence to county lines. 55 P.3d at 869. The dissent to the *Bingham County* decision stated:

The Commission considered the unique physical features of our State that bore upon the daunting task of creating legislative district that would pass constitutional and statutory muster. The Commission wrote:

There are several physical factors which complicate redistricting in Idaho. The unique shape of the state limits the combinations of contiguous counties that can be combined to create legislative district. The geography of Idaho (wilderness areas, mountain ranges, deserts and rivers) in some cases limit the ideal combination of certain counties in the creation of legislative districts. The low population density of many counties limits the ideal combination of certain counties in the creation of legislative districts. The fact that most of the external boundaries of Idaho (with the exception of certain areas on the western border) run through very sparsely populated areas limits the ideal combination of counties in the creation of legislative districts. For redistricting purposes, Idaho is the exact opposite of the rectangular shaped state whose population is evenly distributed over flat farmland. The federal one person/one vote requirement, the Idaho Constitution's limitation on the number of districts, the Idaho Constitution's limitation on the division of counties in the formation of legislative districts, and these unique physical features necessarily result in the creation of a few legislative districts that are not ideal under any redistricting plan.

Bingham County, 55 P.3d at 872 (Idaho 2002.) The Respondent Secretary submits that no West Virginia jurisprudence supports the mechanistic approach taken by the majority in this Idaho case; and that the foregoing cases from other jurisdictions do not outweigh the clear weight of the cases regarding West Virginia redistricting cited by the Respondent.

Additionally, on the issue of compactness, the discussion *supra* at pp. 6-7 and the case of *Stone v. Hechler*, 782 F. Supp. 1116 (N.D. W. Va. 1992) demonstrate that in a State like West Virginia, with its unique geographic features and multiple other legitimate constitutional considerations in the redistricting process, compactness must be and properly is a flexible concept that permits substantial variety in the shape of Districts -- as Cooper's plan itself shows. *See also Bush v. Vera*, 517 U.S. 952, 977 (1996) ("We thus reject, as impossibly stringent, the District Court's view of the narrow tailoring requirement, that a 'district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria.'"). Thus, the redistricting

in Senate Bill 1006 properly and necessarily balanced strict “regularity” of shape with other legitimate and traditional districting criteria -- like communities of interest, preserving the historic cores of existing Districts, and of course the paramount strictures of “one-person, one vote.”

IV.

CONCLUSION

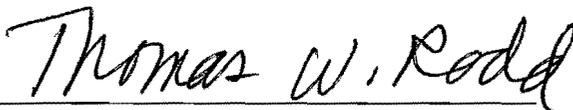
The 2001 State Senate redistricting plan that was approved as constitutional in *Deem v. Manchin*, 188 F. Supp. 2d 651 (2002), divided eleven counties and kept forty-four counties whole; while the 2011 redistricting that is challenged as unconstitutional by the Cooper and Callen Petitioners is superior in terms of “one person, one vote” and divides thirteen counties and keeps forty-two counties whole. For this and for all of the foregoing-discussed reasons, the Respondent Natalie E. Tennant, West Virginia Secretary of State, asks this Court to decline to issue the requested Writs of Mandamus, and for further relief as this Court finds proper.

Respectfully submitted,

Natalie E. Tennant
West Virginia Secretary of State
Respondent

by counsel,

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Counsel for Respondent

VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to-wit:

I, Natalie E. Tennant, state that I am the Respondent in the foregoing **CONSOLIDATED RESPONSE TO THE PETITIONS FOR A WRIT OF MANDAMUS FILED BY THORTON COOPER AND ELDON CALLEN, ET AL.**, that I have read the same, and that the facts and allegations therein contained are true and correct to the best of my belief and knowledge.

DATE

11/14/11

Natalie E. Tennant
NATALIE E. TENNANT

CERTIFICATE OF SERVICE

I, THOMAS W. RODD, Assistant Attorney General and counsel for the Respondent herein, do hereby certify that I have served a true copy of the attached **CONSOLIDATED RESPONSE TO THE PETITIONS FOR A WRIT OF MANDAMUS FILED BY THORNTON COOPER AND ELDON CALLEN, *ET AL.*** upon the Petitioners by depositing said copy in the United States mail, with first-class postage prepaid, on the 14th day of November, 2011, addressed as follows:

To: Thornton Cooper, Esq.
3015 Ridgeview Drive
South Charleston, WV 25303

Daniel T. Lattanzi
Roger D. Forman
100 Capitol Street, Suite 400
Charleston, WV 25301



THOMAS W. RODD