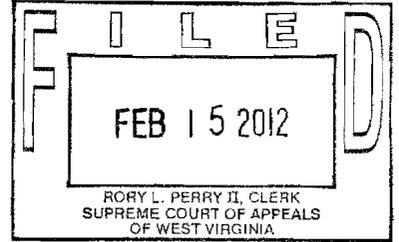


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Upon Original Jurisdiction

No. 12-0185



STATE OF WEST VIRGINIA
ex rel. **DONNA J. BOLEY,**

Petitioner,

v.

NATALIE E. TENNANT,
SECRETARY OF STATE OF THE
STATE OF WEST VIRGINIA, et al.
and FRANK DEEM,

Respondents.

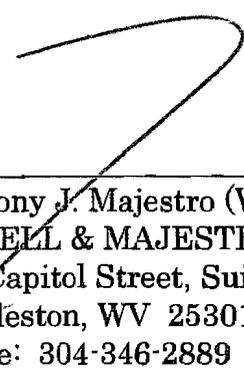
APPENDIX TO EMERGENCY PETITION FOR WRIT OF MANDAMUS

Anthony J. Majestro (WVSB 5165)
POWELL & MAJESTRO, PLLC
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Charleston, WV 25301
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amajestro@powellmajestro.com
Counsel for Petitioner Donna J. Boley

February 15, 2012

CERTIFICATE OF ACCURACY OF APPENDIX CONTENTS

I, Anthony J. Majestro, counsel for Petitioner Donna J. Boley, do, on this the 15th day of February 2012, hereby certify, pursuant to the provisions of Rule 7(c)(2) and Rule 16(3) of the Revised Rules of Appellate Procedure, that the contents of this Appendix are, to the best of my knowledge and belief, accurate copies of the items that I have described in the **TABLE OF CONTENTS OF THIS APPENDIX** and **EMERGENCY PETITION FOR WRIT OF MANDAMUS** to which this Appendix is appended.



Anthony J. Majestro (WVSB 5165)
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Donna Boley

From Ballotpedia

Donna Boley is a Republican member of the West Virginia State Senate. She has represented District 3 since her appointment in 1985.

She served as Senate Minority Leader from 1991 to 1997. She also worked as a Senior Advisor for the George W. Bush for President, West Virginia Campaign in the year 2000. In 2008 she worked as Chair for West Virginia Women, McCain for President.

Boley received her diploma from Sisterville High School in 1953. She went on to attend West Virginia University, Parkersburg in 1981.

Boley has worked as both a businessperson and bookkeeper.^[1]

Committee assignments

2011-2012

In the 2011-2012 legislative session, Boley has been appointed to these committees:

- Children, Juveniles and Other Issues Committee, West Virginia State Legislature
- Council of Finance and Administration, West Virginia State Legislature
- Education Committee, West Virginia State Senate

Donna Boley	
	
West Virginia State Senate District 3	
	Incumbent
	In office
	1985-Present
	Term ends
	January 9, 2013
Years in position	27
Party	Republican
Compensation	
Base salary	\$20,000/year
Per diem	\$131/day during session
Elections and appointments	
Last election	2008
First elected	1984
Next election	November 6, 2012
Term limits	N/A
Education	
High school	Sistersville High School, 1953
Personal	
Birthday	December 9, 1935
Place of birth	Tyler County, WV
Religion	Methodist

- Education Committee, West Virginia State Legislature
- Education Accountability Committee, West Virginia State Legislature
- Finance Committee, West Virginia State Senate
- Finance Committee, West Virginia State Legislature
- Government Organization Committee, West Virginia State Senate
- Government Organization Committee, West Virginia State Legislature
- Health and Human Resources Committee, West Virginia State Senate
- Health and Human Resources Accountability Committee, West Virginia State Legislature
- Military Committee, West Virginia State Senate
- Natural Resources Committee, West Virginia State Senate
- Rule-Making Review Committee, West Virginia State Legislature
- Rules Committee, West Virginia State Senate
- Special Investigations Committee, West Virginia State Legislature

Websites
Office website
 (<http://www.legis.state.wv.us/Senate1/Members/senmemview.cfm?input=Senator%20Boley>)

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 - 1.2 2009-2010
- 2 Elections
 - 2.1 2012
 - 2.2 2008
- 3 Campaign donors
 - 3.1 2008
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2009-2010

In the 2009-2010 legislative session, Boley served on these committees:

- Education Committee, West Virginia Senate
- Finance Committee, West Virginia Senate
- Government Organization Committee, West Virginia Senate
- Health and Human Resources Committee, West Virginia Senate
- Military Committee, West Virginia Senate
- Rules Committee, West Virginia Senate

Elections

2012

See also: West Virginia State Senate elections, 2012

Boley is running in the 2012 election for West Virginia State Senate, District 3. Boley is opposed by Frank Deem in the May 8 primary election. The general election takes place on November 6, 2012.^[2]

2008

On November 4, 2008, Donna Boley ran unopposed for re-election to the West Virginia State Senate, District 3.^[3] Boley raised \$10,173 for her campaign.^[4]

West Virginia State Senate, District 3 (2008)

Candidates	Votes	Percent
✓ Donna Boley (R)	35,470	100%

Campaign donors

2008

Boley raised \$10,173 for the 2008 election.

Her primary contributor is listed below.^[5]

Donor	Amount
Pfizer	\$1,000

Personal

Donna and her husband Jack have two children.

External links

- Biography from the West Virginia Legislature (<http://www.legis.state.wv.us/Senate1/members/senmemview.cfm>)
- Legislative profile from Project Vote Smart (http://www.votesmart.org/summary.php?can_id=7535)
- Biography from Project Vote Smart (http://www.votesmart.org/bio.php?can_id=7535)
- Campaign Contributions: 2010 (<http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=114181>) , 2008 (<http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=99672>) , 2006 (<http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=81955>) , 2004 (<http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=66128>) , 2000 (<http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=57285>)



Suggest a link

References

1. ↑ Project Vote Smart - Sen. Boley (http://www.votesmart.org/bio.php?can_id=7535)
2. ↑ West Virginia Secretary of State - 2012 Candidate Listing By Office (<http://apps.sos.wv.gov/elections/candidate-search/index.aspx>)
3. ↑ West Virginia Election Results (<http://apps.sos.wv.gov/elections/results/results.aspx?county=Statewide&electionid=1&type=0>)
4. ↑ Follow the Money, 2008 (<http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=99672>)
5. ↑ Campaign contributors to Donna Boley (<http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=99672>)

Political offices

Preceded by

-

West Virginia State Senate District 3

1984–present

Succeeded by

NA

● Current members of the West Virginia State Senate

[\[show\]](#)

Retrieved from "http://ballotpedia.org/wiki/index.php/Donna_Boley"

Categories: [Current member, West Virginia State Senate](#) | [State senators first elected in 1984](#) | [West Virginia](#) | [Republican Party](#) | [2012 incumbent](#) | [State Senate candidate, 2012](#) | [2012 primary](#)

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West Virginia Secretary of State — Online Data Services

Elections

Online Data Services Help

Candidate Detail

2012 State Senate						
Name	Party	County	City/State	Mailing Address	Phone (Campaign)	Filing Date
DONNA J. BOLEY E-mail: donnaoley@suddenlink.net	Republican	PLEASANTS District/Circuit 3	ST. MARYS, WV	Mailing Address: 2332 GREENS RUN RD ST. MARYS WV 26170	304-299- 0961	1/9/2012

Candidate Campaign Finance Information

Please note the Secretary of State's Office is working to update our Elections database systems. If you find any information that seems to be incorrect or missing, please contact the WV SOS Elections department at 304-558-6000 or via e-mail to elections@wvsos.com.

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Frank Deem

From Ballotpedia

Frank Deem (b. March 20, 1928) is a former Republican member of the West Virginia State Senate, representing District 3 from 1994 to 2010 and from 1964 to 1978. Deem is a 2012 Republican candidate for District 3 of the West Virginia State Senate.

Deem has served as a delegate in the West Virginia House of Delegates two times. He served from 1954 to

1962, and then again from 1988 to 1990. Deem has also served two separate terms in the West Virginia State Senate. His first term was from 1964 to 1978, and he has also served from 1994 to 2010.

Deem has attended both West Virginia University and Mountain State Business College. He went on to earn his BS from Marietta College.

Deem has served in the United States Navy. He has also worked as an oil and gas producer as well as a businessman.^[1]

Committee assignments

While a member of the West Virginia State Senate, Deem served on the following committees:

- Banking and Insurance Committee, West Virginia Senate
- Energy, Industry and Mining Committee, West Virginia Senate
- Judiciary Committee, West Virginia Senate
- Labor Committee, West Virginia Senate
- Natural Resources Committee, West Virginia Senate
- Pensions Committee, West Virginia Senate

Elections

Contents

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 - 2.3 2006
- 3 Campaign donors
 - 3.1 2006
- 4 Personal
- 5 External links
- 6 References

Frank Deem	
West Virginia State Senate, District 3	
Former member	
In office	
	1994 - 2010
	1964 - 1978
Party	Republican
Prior offices	
West Virginia House of Delegates	
	1954 - 1962
	1988 - 1990
Education	
Bachelor's	Marietta College
Military service	
Service/branch	United States Navy

2012

See also: West Virginia State Senate elections, 2012

Deem is running in the 2012 election for West Virginia State Senate, District 3. Deem is opposed by incumbent Donna J. Boley in the May 8 primary election. The general election takes place on November 6, 2012.^[2]

2010

Frank Deem was defeated by David Nohe in the May 11 primary in his bid for re-election to the West Virginia State Senate, District 3.^[3]

2006

On November 7, 2006, Frank Deem won re-election to the West Virginia State Senate, District 3.^[4]

Deem raised \$17,750 for his campaign.^[5]

West Virginia Senate, District 3 (2006)	
Candidates	Votes
✓ Frank Deem (R)	19,930
Larry Eugene Butcher (Write-in)	92

Campaign donors

2006

Deem raised \$17,750 for the 2006 election.

His major contributors are listed below.^[6]

Donor	Amount
West Virginia State Farm Agents	\$1,250
West Virginia Bankers Association	\$1,000
Coca-Cola Enterprises	\$1,000
Harry Esbenshade, Jr.	\$1,000

Personal

Deem is married to Rebecca Lewellyn. They have eight children.

External links

- Biography from Project Vote Smart (http://www.votesmart.org/bio.php?can_id=8670)
- Legislative profile from Project Vote Smart (http://www.votesmart.org/summary.php?can_id=8670)
- Campaign Contributions: 2008 (<http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=98554>) , 2006 (<http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=81996>) , 2004 (<http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=74511>) , 2002 (<http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=5810>) , 1998 (<http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=57019>)
- Frank Deem on Facebook (<http://www.facebook.com/pages/Senator-Frank-Deem/352925603246>)
- Frank Deem on Twitter (<http://twitter.com/SenatorDeem>)



Suggest a link

References

1. ↑ Project Vote Smart - Sen. Deem (http://www.votesmart.org/bio.php?can_id=8670)
2. ↑ West Virginia Secretary of State - 2012 Candidate Listing By Office (<http://apps.sos.wv.gov/elections/candidate-search/index.aspx>)
3. ↑ West Virginia official list of 2010 candidates (<http://apps.sos.wv.gov/elections/candidate-search/>)
4. ↑ Official Returns for the 2006 Election, Office of the WV Secretary of State (<http://www.sos.wv.gov/elections/historyresource/Documents/2006%20General%20Senate.pdf>)
5. ↑ Follow the Money 2006 (<http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=81996>)
6. ↑ Campaign contributors to Frank Deem (<http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=81996>)

Political offices

Preceded by

West Virginia State Senate District 3
1994–2010

Succeeded by
David Nohe (R)

● Current members of the West Virginia State Senate

[show]

Retrieved from "http://ballotpedia.org/wiki/index.php/Frank_Deem"

Categories: West Virginia | Republican Party | Former member, West Virginia State Senate | 2010 candidate | State Senate candidate, 2010 | 2010 incumbent | 2010 defeated | Republican incumbents defeated in a state senate primary in 2010 | 2012 challenger | State Senate candidate, 2012 | 2012 primary

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West Virginia Secretary of State — Online Data Services

Elections

Online Data Services Help

Candidate Detail

2012 State Senate						
Name	Party	County	City/State	Mailing Address	Phone (Campaign)	Filing Date
FRANK DEEM E-mail: fdeem@frontier.com	Republican	WOOD <i>District/Circuit</i> 3	VIENNA, WV	<i>Mailing Address:</i> 5518 2ND AVENUE VIENNA WV 26105	304-295- 6593	1/26/2012

Candidate Campaign Finance Information

Please note the Secretary of State's Office is working to update our Elections database systems. If you find any information that seems to be incorrect or missing, please contact the WV SOS Elections department at 304-558-6000 or via e-mail to elections@wvsos.com.

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Deem certified to run for Senate, setting up possible challenge

By Phil Kabler

CHARLESTON, W.Va. -- Former state Sen. Frank Deem, R-Wood, has been notified by the secretary of state's office that he will be certified as a Senate candidate on the 2012 primary ballot, setting up a possible constitutional showdown.

Deem said Monday he hopes his candidacy will lead to resolution of a provision in the state Constitution that he believes violates the "one man-one vote" mandate in the U.S. Constitution.

"I don't think it's right, and I think it's going to finally be before the courts," Deem said of the provision that, in multi-county senatorial districts, prohibits any one county from having more than one state senator.

Deem's primary opponent in the 3rd Senatorial District, Sen. Donna Boley, R-Pleasants, said Monday she believes it is improper for Deem to run, since Wood County already is represented by a senator, Sen. David Nohe, R-Wood.

"The constitution is very clear that he cannot file, and he can't serve when there would be more than one senator from the same county," she said Monday.

Nohe defeated Deem in the 2010 primary election, and is not up for re-election until 2014.

Deem, however, said that provision unconstitutionally disenfranchises voters in larger counties. He noted that Wood County makes up about 80 percent of the population in the 3rd District, which also includes Pleasants, Wirt, and part of Roane County, but can have no more than 50 percent of the district's representation in the Senate.

"We have 80 percent of the population, and yet we can't field a candidate, and we have to vote for a candidate from another county," Deem said of the current restrictions in the state Constitution.

Boley faulted Secretary of State Natahe Tennant for allowing Deem to remain on the ballot.

"I just wish she would do her job," Boley said, adding, "If she thinks her hands are tied somehow, she should let the Legislature know, and we can give her the enforcement power."

Jake Glance, spokesman for the secretary of state's office, said the office certifies that candidates have properly filed for office, but does not determine eligibility.

"We don't determine eligibility to be on the ballot," he said. "That's something that can be determined in court."

Glance said an election also may be contested, if a candidate is believed to be ineligible to serve.

"This office doesn't have a role in an election contest," he said.

Boley said Monday she does not plan to go to court to try to have Deem removed from the ballot.

"I'll probably just run against him," she said. "He's a millionaire, and he has all the money."

If Deem prevails, however, she said it could set a precedent where residents of smaller counties in multi-county senatorial districts would lose representation, while larger counties, such as Wood, would be all but assured of having two senators.

8 Comments

"I think he's an elitist," Boley said of Deem. "He really thinks the country club set should govern."

Also Monday, Deem resigned from the state Ethics Commission.

State law prohibits commissioners from running for public office. Deem, who was appointed to the commission last February, said Monday he wanted to verify that he would be certified as a candidate before stepping down.

"As soon as I got that notice, I resigned," he said.

Candidates for the 2012 primary election ballots will be certified on Feb. 14.

Reach Phil Kabler at ph...@wvgazette.com or 304-348-1220.



Natalie E. Tennant

Secretary of State
State of West Virginia

Office of the Secretary of State
Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, West Virginia 25305

Telephone: (304) 558-6000
Toll Free: 1-866-SOS-VOTE
Fax: (304) 558-0900
www.wvsos.com

March 4, 2010

Brian Helmick, Esq.
Spilman, Thomas & Battle, PLLC
P.O. Box 273
Charleston, WV 25321-0273

Re: Disqualification of candidates

Dear Brian:

Thank you for the thoughtful and thought-provoking discussion yesterday about the Secretary's statutory authority and responsibility. I have discussed the points raised by you with the general counsel. We wish to outline our thinking about the matter raised.

To begin with, the statutes and constitutional provisions cited by you appear to unequivocally indicate that the candidate in question is not eligible to be elected, or even to file a certificate of announcement. However, those same provisions do not state what person, or agency, has the express authority to make the determination of ineligibility. We are confident that our current view that disqualification decisions should be made by the judicial branch, rather than by the executive branch, reflects a well-reasoned, and legally defensible, position of several past administrations.

The authority and duties of the Secretary of State and the State Election Commission are set forth in Article 1A of Chapter 3. That article fails to give the Secretary authority to determine the eligibility of a candidate. In two specific code sections elsewhere [§§3-5-7(e) and 3-5-19(a)(4)], a process is established for either the Secretary or the SEC to determine a candidate is ineligible. Under the statutory construction standard of *expressio unius est exclusio alterius*, by specifically identifying two instances where authority is given, the Legislature has intended to limit that authority to those two specific circumstances. Furthermore, in both of those circumstances the agency's authority is only invoked upon filing of a written complaint. Otherwise, even if the Secretary or SEC is aware of the disqualifying fact, the Secretary or SEC may not act upon their own initiative and the "ineligible" candidate's campaign continues.

We do not agree with your interpretation that the §3-5-9 language, "who are entitled", gives the Secretary authority to make "entitlement" determinations for every certificate filed. Nor are we convinced that "entitled" means "eligible". We do, however, concede that your interpretation is an arguable position.

In most circumstances the determination of ineligibility is going to be a fact-finding decision. We believe there would be general reluctance to grant such authority to one elected official over all other elected officials and candidates. Even if the Secretary had authority to make fact-finding determinations, such determinations would almost invariably be challenged by the losing side and

would end up in court. Court is where we believe fact-finding determinations should be made and is where our current policy starts the process. Giving the Secretary additional responsibilities would not decrease the courts' involvement and would merely insert an unnecessary quasi-political decision into the process.

Finally, whatever authority the code gives the Secretary over state-wide and multi-county elections, devolves to the county clerks for county elections and to the municipal recorders for municipal elections. Do we really wish to grant so much authority to those multiple individuals?

As I expressed, we believe that the timing and circumstances of this particular issue argues against us changing our (and previous administration's) long-standing interpretation of the law. In an election year, it would look suspicious to some if we reached a new interpretation that favored a candidate who is a member of the legislature. However, we would be happy to explore, at a less politically charged time, revision of the current code. There would be several major concerns that would need to be addressed, including:

1. Do elected officials want another elected official (as opposed to a judge) making eligibility calls over their campaigns?
2. What would be the "bright-line" that clearly limits what sort of information the Secretary must investigate?
3. Would a formal complaint be required to initiate the review?
4. How do we preserve the due-process rights of the "accused"?
5. How do we treat, or distinguish, responsibilities of the county clerks for county elections and municipal clerks for municipal elections?

Thank you, again, for your suggestions and well-thought arguments. I enjoyed the discussion about the law. However, at this time the general counsel and I advise the Secretary that she cannot intervene.

Very truly yours,



Timothy G. Leach
Assistant General Counsel

OPINIONS

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Frank Deem: Redistricting in practice running counter to redistricting in theory

August 27, 2011 by Frank Deem
The Herald-Dispatch

Redistricting trumps every other subject in the West Virginia Legislature. Survival is the name of the game.

Every 10 years the legislature must divide the 100-member House of Delegates and the 34 members of the State Senate into districts which are equal in population. This requirement is the result of a U.S. Supreme Court ruling of 1962 which held that every citizen is entitled to equal representation.

The primary reason this issue was litigated is because of the fact that the population in the United States had shifted from rural to urban areas, yet the rural areas still dominated the Congress and state legislatures. For example, prior to this ruling every county in West Virginia elected a member of the House of Delegates, regardless of its population. Senatorial districts also were not formed equally in population.

Today representation in the state legislature is based on equal population. In spite of this fact, a provision in the West Virginia Constitution prohibits more than one senator from the same county, in a multi-county district, serving in that senatorial district. This provision was added to our constitution in 1861 because rural delegates dominated that convention and did not want the urban areas to become dominant.

For example, in the 3rd Senatorial District comprised of Wood, Pleasants, Wirt and part of Roane counties, Wood County with 86,000 residents has one senator and Pleasants County with 7,000 residents has one senator. Many people think this is unfair and does not give equal representation to the citizens of Wood County.

The West Virginia Chamber of Commerce and others are promoting single-member districts in the House of Delegates. As the Democrats are in complete control in the West Virginia House, they will not form single-member districts where they would be in danger of losing a seat. In multimember districts, the Democrats make sure there is a majority of their party in that district. If these multimember districts were split into single-member districts, there is a good chance some of these single-member districts would elect Republican delegates.

The state Constitution provides that senatorial districts shall be compact. If you look at the map of senatorial districts, you will find that they are anything but compact. The 3rd Senatorial district goes from Tyler to Kanawha County. Some of the new senatorial districts

are even less compact than that, requiring a five-hour trip from one end of the district to the other end. Closed-door deals are made to help incumbent senators save their seats. For example, in the current Senate redistricting plan, the 2nd district needed more population. To make the district compact, Pleasants County should have been taken from the 3rd district and added to the 2nd. However, to save a senator's seat, a part of Gilmer County, much farther away, was added to the 2nd district.

Many people feel that redistricting should be taken out of the legislature's control and put into the hands of an independent redistricting committee. This was recently done in the state of California and other states. Problem is that in West Virginia, we do not have initiative, which would give citizens the right to put issues like this on the ballot and be voted upon. Until that happens, and this would require a change in our constitution which must first be offered by the legislature, we will not have an opportunity to vote on the issue.

Frank Deem, of Vienna, served as Republican member of the West Virginia Legislature for 44 years, most recently as a senator from the 3rd District.

Comments

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No comments.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

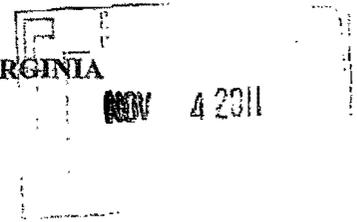
STATE OF WEST VIRGINIA ex rel.,
ELDON A. CALLEN, JIM BOYCE, PETRA WOOD,
JOHN WOOD, and FRANK DEEM,

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

Roger D. Forman (WV Bar# 1249)
Daniel T. Lattanzi (WV Bar# 10864)
THE LAW OFFICE OF ROGER D. FORMAN, L.C.
100 Capitol Street, Suite 400
Charleston, West Virginia 25301
(304) 346-6300
rdf@citynet.net or dlattanzi@citynet.net

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