No. _____

In The
Supreme Court of the United States

NATALIE TENNANT, in her capacity as the Secretary of State, EARL RAY TOMBLIN, in his capacity as the Chief Executive Officer of the State of West Virginia, JEFFREY KESSLER, in his capacity as the President of the Senate of the West Virginia Legislature, and RICHARD THOMPSON, in his capacity as the Speaker of the House of Delegates of the West Virginia Legislature,

Appellants,

v.

JEFFERSON COUNTY COMMISSION, PATRICIA NOLAND, as an individual and behalf of all others similarly situated, and DALE MANUEL, as an individual and behalf of all others similarly situated, and THORNTON COOPER,

Appellees.

On Appeal From A Three-Judge Panel Of The United States District Court For The Southern District Of West Virginia

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

This Court has interpreted article I, § 2 of the United States Constitution which provides for the House of Representatives to be chosen "by the People of the several States" as requiring congressional districts to be apportioned, as nearly as is practicable, to achieve population equality. Under *Karcher v. Daggett,* 462 U.S. 725 (1983), a state adopting a plan with avoidable population variances must justify the variances as necessary to achieve consistent, nondiscriminatory legislative policies. The questions presented are:

1. Whether an inter-district population variance of 0.7886% in a congressional redistricting plan still constitutes a minor population deviation that may be justified under *Karcher.*

2. Whether a state relying on multiple legislative policies to justify a population variance must separately quantify with factual findings the variance justified by each legislative policy by enumerating the specific portion of the variance justified by each separate policy.

3. Whether preserving current congressional districts as intact as possible may constitute a nondiscriminatory legislative policy under *Karcher*.

4. Whether a federal court finding a redistricting plan unconstitutional should adopt as a remedy redistricting plans either never considered by the state legislature or specifically rejected by the state legislature.

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The opinion of the three-judge panel (App. 3) is not yet reported. The opinion of the panel (App. 52) denying the Appellants' Emergency Motion for Stay Pending Appeal and deferring the imposition of a remedy is unpublished.

JURISDICTION

On January 3, 2012, a divided three-judge panel of the United States District Court for the Southern District of West Virginia entered a memorandum opinion and order granting a permanent injunction, and thereafter by order dated January 4, 2012, the panel majority amended the memorandum opinion. (App. 1) The panel majority further amended the order on January 4, 2012. (App. 52) Appellants filed their notice of appeal to this Court on January 27, 2012. (App. 48)

Jurisdiction in this Court is invoked under the provisions of 28 U.S.C. § 1253 as Appellants seek review of "an order granting. . . . an interlocutory or permanent injunction in any civil action, suit or proceeding required . . . to be heard and determined by a district court of three judges. As the underlying action was an action "challenging the constitutionality of the apportionment of congressional districts," it is required to be heard by a district court of three judges. 28 U.S.C. § 2284(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 2, cl. 1 of the United States Constitution provides in relevant part: "The House of Representatives shall be composed of Members chosen . . . by the People of the several States. . . ."

Article I, § 4 of the Constitution of West Virginia provides:

> For the election of representatives to Congress, the state shall be divided into districts, corresponding in number with the representatives to which it may be entitled; which districts shall be formed of contiguous counties, and be compact. Each district shall contain, as nearly as may be, an equal number of population, to be determined according to the rule prescribed in the constitution of the United States.

West Virginia Code § 1-2-3 currently provides:

> The number of members to which the state is entitled in the House of Representatives of the Congress of the United States are apportioned among the counties of the state, arranged into three congressional districts, numbered as follows:
>
> First District: Barbour, Brooke, Doddridge, Gilmer, Grant, Hancock, Harrison, Marion, Marshall, Mineral, Monongalia, Ohio, Pleasants, Preston, Ritchie, Taylor, Tucker, Tyler, Wetzel and Wood.

Second District: Berkeley, Braxton, Calhoun, Clay, Hampshire, Hardy, Jackson, Jefferson, Kanawha, Lewis, Morgan, Pendleton, Putnam, Randolph, Roane, Upshur and Wirt.

Third District: Boone, Cabell, Fayette, Greenbrier, Lincoln, Logan, Mason, McDowell, Mercer, Mingo, Monroe, Nicholas, Pocahontas, Raleigh, Summers, Wayne, Webster and Wyoming.

STATEMENT

This appeal arises from ongoing proceedings before a three-judge panel in the Southern District of West Virginia challenging the West Virginia Legislature's ("Legislature") redistricting plan for the United States House of Representatives. In a divided opinion entered six days prior to the commencement of the filing period for the 2012 primary election, the panel majority enjoined the election of West Virginia's congressional delegation under a redistricting plan enacted by the Legislature with nearly unanimous bipartisan majorities ("Majority Opinion"). (App. 3)

Appellants, Natalie E. Tennant, in her capacity as the Secretary of State of the State of West Virginia; Earl Ray Tomblin, in his capacity as the Chief Executive Officer of the State of West Virginia; Jeffrey Kessler, in his capacity as the President of the Senate of the West Virginia Legislature; and Richard Thompson, in his capacity as the Speaker of the House of Delegates of the West Virginia Legislature,

having timely filed a Notice of Appeal, now file this Jurisdictional Statement in support of this Court's jurisdiction and to alert the Court to the substantial questions raised by this appeal. Senate President Kessler and House Speaker Thompson have appealed the judgment below in its entirety. Governor Tomblin and Secretary Tennant join in this appeal insofar as it seeks reversal of the interim remedy imposed by the Majority Opinion.[1]

In the modern era of redistricting that followed this Court's decision in *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Legislature has been consistent in its redistricting goals. From 1971 through the enactment of the 2011 statute currently under challenge, the

[1] Governor Tomblin joined in the Emergency Motion to Stay before the three-judge panel and the Emergency Application for Stay submitted to the Chief Justice of the United States insofar as these motions sought reversal of the interim remedies imposed by the Majority Opinion. On January 20, 2012, the Supreme Court of the United States entered an Order granting the stay. (Doc. 78) Governor Tomblin joins in the appeal insofar as it seeks reversal of the interim remedy imposed by the Majority. Governor Tomblin, however, takes no position on the constitutionality of Senate Bill 1008 and does not join the appeal on that basis. Secretary Tennant joined in the two previous requests for a stay and joins in this appeal insofar as it seeks reversal of the interim remedy imposed by Majority. Secretary Tennant, however, remains neutral on the merits of the constitutionality of Senate Bill 1008 case and does not join in an appeal on that basis. The stay and the question of the remedy will resolve election conduct procedural issues – which is the Secretary's responsibility – while the appeal will decide the legal issues – which are not her responsibility.

Legislature has sought to avoid contests among incumbent representatives, keep counties intact, and retain the core of the prior districts by making only minimal changes to both the number of counties and persons involved all while at the same time attempting to make the districts as compact as West Virginia's unique geography permits. Prior federal three-judge panels have recognized these aims and have previously approved West Virginia's congressional districts in a form that is essentially identical to the districts now found to be unconstitutional by the majority of the panel.

Relying on these prior federal opinions, the 2011 Legislature made one small change – moving one county from one district to another. In doing so, the Legislature rejected a number of alternate proposals – including some with smaller inter-district variances. The alternatives either split counties, created contests between incumbent representatives, and/or destroyed the character of the existing districts.[2] Notably, in spite of controlling both houses of the Legislature by large margins and the Governor's office, the elected members of the Democratic Party rejected partisan redistricting plans that would have increased the Democratic performance of the new districts and/or placed the two Republican incumbents in the same district. The newly enacted statute

[2] A chart comparing the various plans is included in the Appendix at 65.

amended W.Va. Code § 1-2-3 ("Senate Bill 1008") and provided new districts based on the 2010 census.

A review of West Virginia's redistricting history establishes the consistency under which the Legislature has approached redistricting.

The Legislature made a number of changes to West Virginia's congressional districts in 1971, a redistricting driven by the reduction in congressional districts from five to four and the dictates of *Wesberry*. In spite of a 0.7886% population variance,[3] a three-judge panel rejected state and federal constitutional challenges. *West Virginia Civil Liberties Union v. Rockefeller*, 336 F.Supp. 395 (S.D.W.Va. 1972).

In 1982, following the 1980 census, the Legislature enacted a new redistricting statute that moved only three counties with a population of 35,397. No counties were split and no incumbents were placed in the same district. (Doc. 42-1, Exh. C).

Following the 1990 census, when the number of congressional districts was reduced from four to three, the Legislature's redistricting policies remained the same. While the need to reduce the

[3] While the Courts have characterized the variance in 1971 as 0.78% and the variance in Senate Bill 1008 as 0.79%, as Judge Bailey notes in his dissent, the variance in the 1971 plan was 0.7888% and the variance in S. B. 1008 is 0.7886%. Dissenting Opinion, (App. 39) Therefore, Senate Bill 1008 actually has a smaller variance than the 1971 plan.

number of districts resulted in one new district where two previous incumbents resided, the reduction was accomplished without splitting counties. The 1991 plan preserved intact all of the counties from two of the previous congressional districts in two of the new congressional districts and, compared to the other plans considered, best preserved the third district by severing only two counties with a population of 47,252. *See* Doc. 42-1, Exh. D; *see also Stone v. Hechler*, 782 F.Supp. 1116, 1121-22 & n. 9 (N.D.W.Va. 1992). A challenge to this district based on compliance with the state and federal constitutions was rejected by the three-judge panel in *Stone, supra*. *Id.* at 1129.

Following the 2000 census, the Legislature redistricted by moving only two counties with a combined population of 33,722. (Doc. 42-1, Exh. D) No counties were split and no incumbent conflicts were created.

And finally, following the 2010 census, the Legislature enacted Senate Bill 1008 in 2011 that simply moved Mason County, with a population of 27,324, from the Second Congressional District to the First Congressional District. (App. 7) The enacted bill did not result in any two incumbents residing in the same district or the splitting of any county. (App. 7, n. 2)

The congressional district maps from the past thirty years are reproduced in the Appendix. (App. 61-64) The maps visually show how over the decades the Legislature has strived to create new districts

that preserve both county lines and the existing districts to the greatest extent possible.

In the modern era, the Legislature has not placed incumbents in the same district, except when the reduction in the number of districts made that result inevitable. The Legislature has also kept the cores of prior districts intact as much as possible, limiting both the number of counties and number of people moved to a different congressional district. And in the 150-year history of the state, the Legislature has never split a county in establishing congressional districts.

In connection with the 2011 redistricting, six different plans were actively considered by the Legislature. (App. 6) As Chief Judge Bailey aptly points out in his dissent, the debate over those plans establishes that the Legislature's aims were preserving the existing districts, avoiding incumbent conflicts, and keeping counties intact. (App. 42) Comparing the alternatives, it is clear that the enacted plan was the only plan that best met all three of the Legislature's goals. (App. 35) Similarly, as Chief Judge Bailey recognized, the testimony at the December 28, 2012 evidentiary hearing was consistent with the legislative record. (App. 45)

Senate Bill 1008 was passed by the Legislature on August 5, 2011 and signed into law by the Governor on August 18, 2011. The case below was not filed until November 4, 2011. A three-judge panel was appointed on November 30, 2011. On December 28,

2011, the panel held an evidentiary hearing and heard argument. On January 3, 2012, the Majority Opinion was issued, and the Dissenting Opinion was filed later that same day. The Majority Opinion was amended on January 4, 2012 to address the dissent. (App. 2)

The Majority Opinion found Senate Bill 1008 unconstitutional and enjoined Appellants from using the districts in the upcoming congressional election. (App. 29) The majority reasoned that Senate Bill 1008 was unconstitutional because it had a population variance of 0.7886% between the largest and smallest districts which constituted a major variation that was not sufficiently justified under its interpretation of *Karcher v. Daggett*, 462 U.S. 725 (1983). (App. 12) The Majority Opinion struck down Senate Bill 1008 in spite of the fact that *Karcher* characterized a nearly identical 0.7888% population variance in West Virginia as "minor" and justified by West Virginia's historical policies noted above. *Karcher,* 462 U.S. at 740-41 (*citing West Virginia Civil Liberties Union v. Rockefeller's* 0.78% deviation as one example of a "minor population deviatio[n]" that could be justified based on compactness). The Majority Opinion has established a new standard that is at odds with *Karcher* based upon its conclusion that "times . . . they are a-changing" and that "what was once characterized as 'minor' may now be considered 'major.'" (App. 27) As the Dissenting Opinion recognized, the Majority Opinion is a departure from this Court's previous precedents. (App. 44)

The Majority Opinion undercuts this Court's holding in *Karcher* that a state may adopt a plan with a minor variance in order to achieve consistent and nondiscriminatory policy objectives. 462 U.S. at 740-41. The Majority Opinion misconstrues the acceptable policies and creates a strict standard of proof that is beyond what is required under *Karcher* by requiring the Legislature to link each policy with a specific variance. (App. 25, 27) As stated succinctly by Judge Bailey in the opening sentence of his dissent: "The majority in this case has applied a standard of review which not only fails to give sufficient deference to the Legislature but also disregards the flexibility of *Karcher v. Daggett*." (App. 33)

The court's January 3, 2012 order set a schedule under which the court would adopt an "interim" redistricting plan on or after January 17, 2012. The court "encouraged" the Applicants to submit a new plan – one either legislatively enacted or approved by the Applicants. (App. 31) Otherwise, the Court would choose the interim remedy from two plans that were before the Court. (App. 31) The first of the court's chosen options was a plan expressly rejected by the Legislature, while the second option was one filed in court by one of the plaintiffs without previously being either legislatively considered or publicly presented in any forum prior to being filed on December 17, 2011. (Doc. 29)

On January 6, 2012, Applicants filed an Emergency Motion for Stay of Judgment Pending Appeal (Doc. 69) with a supporting memorandum. (Doc. 70)

On January 10, 2012, the same two-judge majority denied the motion for a stay, but modified the injunction by deferring "any and all action with respect to a remedy until after the Supreme Court has disposed of the Defendants' forthcoming appeal." (App. 53-54) ("Stay Order"). The Stay Order further provided that, "The State, however, continues to be enjoined from conducting its 2012 congressional elections pursuant to [W.Va. Code § 1-2-3] as currently enacted." (App. 58) The Stay Order rejected West Virginia's request to stay the Court's judgment set forth in the Majority Opinion and conduct the primary under Senate Bill 1008. *Id.*

The filing period for West Virginia's May 8, 2012 primary commenced on January 9, 2012. In order to file, candidates for Congress are required to designate one of West Virginia's three congressional districts in which they intend to run. W.Va. Code § 3-5-7(d)(2). The filing period ended on midnight, January 28, 2012. *Id.* The deadlines for this election cycle were constrained by the Military and Overseas Voters Empowerment Act of 2009, 42 U.S.C. § 1973ff, et seq. Compliance with that Act will require special treatment for overseas voters during the primary election cycle. Because of the MOVE Act's deadlines, the candidate-filing period for the 2012 primary elections could not have been extended more than a few days beyond the scheduled January 28, 2012 deadline in order for primary elections to be held as scheduled on May 8, 2012.

On January 13, 2012, Appellants filed an emergency application for a stay with the Chief Justice as Circuit Justice for the Fourth Circuit. (No. 11A674). On January 20, 2012, the Chief Justice referred the stay application to the full Court which, without dissent, granted a stay of the majority's injunction pending this appeal. 132 S.Ct. 1140 (2012). As a result, the 2012 West Virginia congressional elections are being conducted under the districts set forth in Senate Bill 1008.

THE QUESTIONS[4] ARE SUBSTANTIAL

One theme underlies the questions presented by this appeal. Redistricting by a legislature involves balancing the state's sometimes conflicting policy goals while at the same time assuring that the plan meets the relevant state and federal constitutional requirements. There are almost an infinite number of district combinations. The issue thus becomes a question of where to draw the line between the role of a federal court reviewing a redistricting plan and the proper deference accorded to the legislature to determine how to balance the often conflicting policies.

[4] With respect to the first three questions presented which involve substantive challenge to the Majority Opinion, these questions are raised on behalf of President Kessler and Speaker Thompson only. *See infra* p. 4, n. 1. The fourth question presented regarding the claim that the remedy imposed by the Majority Opinion is inappropriate is brought by all Appellants.

Just this year, this Court reiterated that "[r]edistricting is 'primarily the duty and responsibility of the State.'" *Perry v. Perez*, 132 S.Ct. 934, 940 (2012) (per curiam) (*citing Chapman v. Meier,* 420 U.S. 1, 27, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975)). This is because courts struggle in "defining neutral legal principles in this area, for redistricting ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment." *Perry v. Perez*, 132 S.Ct. at 941.

The Majority Opinion (and cases like it) draw the line in a manner that replaces the political judgment of elected officials with a formalistic rigor inconsistent with legislative deference and respect for the exercise of political judgment. The questions presented below are important in that they all involve the delineation of the respective roles of state legislatures and the federal judiciary.

1. In *Wesberry,* this Court interpreted U.S. Const. art. I, § 2, cl. 1 which provides that members of the House of Representatives be chosen "by the People of the Several States," to mean "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S. at 7-8. Thereafter, in *Kirkpatrick v. Preisler,* 394 U.S. 526, 530-31 (1969) this Court held that the Constitution "requires that the State make a good-faith effort to achieve precise mathematical equality." *Kirkpatrick* rejected the argument that small, unexplained disparities might be considered de minimis

holding that "[u]nless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." *Id.* at 531.

Karcher reaffirmed and refined *Kirkpatrick* and set forth a two-part test. At the first step, a party challenging an apportionment must demonstrate the existence of a population disparity that "could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal proportion." *Karcher,* 462 U.S. at 730. The first stage presents very little burden on a challenger. *See, e.g., Vieth v. Pennsylvania,* 195 F.Supp.2d 672 (M.D.Pa. 2002) (population variance of nineteen people between the most populous and least populous congressional districts sufficient to meet part I of *Karcher* test), *appeal dismissed as moot, Schweiker v. Vieth,* 537 U.S. 801 (2002).

In its second step, *Karcher* requires the State to establish that deviations in its congressional redistricting plan are justified by legitimate state interests with the burden on the state varying based on several factors including "the size of the deviations." 425 U.S. at 741. The Majority Opinion rejected Applicants' contention that deviations of 0.7886% should be considered small. *See* (App. 27) (characterizing deviation as "'major'"). Instead, the Majority Opinion used the fact that many other states have variances approaching 0.00% as grounds for holding that small variances of 0.7886% are more significant now than they were when previous decisions of this Court and other three-judge panels were decided.

The Majority Opinion also focused on relative comparisons between small deviations. (App. 25, n. 11) (noting that the 0.79% deviation was 877% greater than the deviation approved in *Stone*). This Court and other three-judge panels have disagreed with both the relative size of the deviation and the idea that comparing such small deviations is meaningful. *See Karcher,* 462 U.S. at 740-41 (*citing West Virginia Civil Liberties Union v. Rockefeller's* 0.78% deviation as one example of a "minor population deviatio[n]" that could be justified based on compactness); *id.* at 741 n. 11 (discussing "small deviations" that were acceptable *citing Rockefeller*). *Karcher, supra* n. 11, also cited with approval *Skolnick v. State Electoral Bd. of Ill.*, 336 F.Supp. 839, 843 & n. 2, 844, 846 (D.C.Ill. 1971), in which the Court, after considering four plans with 1% variance or less, adopted a plan with the third largest variance (0.75%) characterizing "the variances in each plan [as] so small that the only way to distinguish among them is to consider what non-population factors went into the drawing of each." Both before and after *Karcher,* other three-judge panels have concurred that similar deviations are small. *See Doulin v. White*, 535 F.Supp. 450, 452 (D.C.Ark. 1982) (after finding adopted state plan with 2.10% variance unconstitutional, Court adopted previous version that had passed one house of legislature with .78% variance and rejected six plans with variances as low as .13% finding the 0.65% difference in plans a "question of judgment"); *Preisler v. Secretary of State of Mo.*, 341 F.Supp. 1158, 1162 (D.C.Mo. 1972) (approving 0.6291% deviation and noting "The

minor variations from the ideal are constitutionally permissible under the Constitution of the United States."); *see also Turner v. State of Ark.*, 784 F.Supp. 585, 589 (E.D.Ark. 1991) (rejecting challenge to plan with .73% variance in spite of proposed alternatives with variances of .65% and .41%), *aff'd*, 504 U.S. 952 (Mem.) (1992).

The majority made this determination on the grounds that technology has made it easier to devise plans with no population variance and that a majority of states have adopted this approach in recent years.[5] Majority Opinion at 26-27. Improved technology simply enables legislatures to engage in gerrymandering with surgical precision, and adoption of plans with no variance does nothing to eliminate such schemes but simply insulates them from certain litigation. By contrast, the policy of West Virginia to adopt plans that keep counties whole, avoid incumbent contests, and respect the existing core of districts, is a check on gerrymandering and political

[5] The times have not changed that much. The use of computers in redistricting is not new. *West Virginia Civil Liberties Union v. Rockefeller*, 336 F.Supp. at 396-98. (1972 opinion noting that redistricting committee "utilized the services of an IBM 360 Computer which, upon having been fed relevant data, produced redistricting proposals and also evaluated redistricting proposals made by other individuals"). Nor are computers always necessary. Respondent Cooper filed an affidavit stating that he began to create his plans using a pen, paper, and a calculator. *See* Cooper Affidavit at 5 ¶ 15 (Doc 32-1).

payback because deviation from those policies requires explanation.

Equally important, the majority's holding requiring substantial justifications for small deviations is inconsistent with *Karcher* which recognizes that deviations are acceptable if justified by legitimate state interests and that the showing is a flexible one. 462 U.S. at 731.

As the Dissenting Opinion recognized, the Majority Opinion's characterization of these deviations as "major" is in conflict with *Karcher* and these authorities. (App. 39) The issue of whether the advent of newer computers and a trend in other states towards no variance changes the constitutional standard raises a constitutional question that is substantial.

2. In the Majority Opinion, the Court strictly construed *Karcher* as requiring that a state relying on a legislative policy to justify a variance show a strict link between the specific policy and particular variance. (App. 25) (quoting *Karcher,* 462 U.S. at 741). In this case, the variances in the West Virginia plan are supported by multiple state policies. The plan that was ultimately approved by the Legislature was the one that best met all of the State's criteria. The Majority Opinion rejected the State's justifications, holding that there was no evidence allocating the variance between the multiple justifications. *See, e.g.,* (App. 30, n. 13) (finding *Karcher* does not permit multiple justifications to be taken together to support an aggregate variance).

As the Dissenting Opinion points out, this approach is in conflict with *Karcher*'s holding allowing flexibility in the showing required to justify a variance. Dissenting Opinion, (App. 39) (quoting *Karcher,* 462 U.S. at 741). A number of other three-judge panels have approved this approach. *Stone v. Hechler,* 782 F.Supp. 1116, 1129 (N.D.W.Va. 1992) (court found that deviations were required to balance state aims of preserving cores of preexisting districts, and complying with state requirements regarding compactness and not dividing counties); *Graham v. Thornburgh*, 207 F.Supp.2d 1280, 1293 (D.Kan. 2002) ("The court's task remains the evaluation of the adopted plan's constitutionality, not the determination of whether the court believes it to be the best possible plan. The key inquiry is whether the legislature made legitimate choices in balancing its various objectives, not whether the court would make the same choices."); *Larios v. Cox*, 300 F.Supp.2d 1320, 1355 (N.D.Ga. 2004) (finding it is immaterial that a "better" plan might have been possible holding that *Karcher* merely required that defendant's explanations supported the deviation).

Thus, while the Majority Opinion acknowledges the fact that West Virginia has never split counties between congressional districts could qualify "as one of those 'consistently applied' interests that the Legislature might choose to invoke to justify a population variance," the Court rejected the justification because it was not shown to justify the entire 4,871 person variance or any specific portion of it. (App.

14-15) What the Majority Opinion ignores is that the Legislature was not only seeking a plan that kept counties whole, it was looking for a plan that preserved the core of the existing districts, avoided incumbent conflicts, *and* kept counties whole. As the Dissenting Opinion found, the plan adopted is consistent with these goals, and none of the alternative plans met all these goals while adhering more closely to population equality. (App. 44) The Majority Opinion, while finding that one or more of the goals were individually served by alternate plans with smaller variances, Majority Opinion, (App. 16), does not contest the Dissenting Opinion's recognition that no plan met all of the state's goals and had a smaller variance.

The Majority Opinion's improper construction of *Karcher* also extends to its requirement of explicit findings. (*See* App. 15, n. 7) Three-judge panels have approved deviations in prior West Virginia districts in the absence of specific findings. *See, e.g., Stone v. Hechler*, 782 F.Supp. 1116, 1121 (N.D.W.Va. 1992) (finding state policies from debates and votes on different plans in the absence of findings or resolutions); *West Virginia Civil Liberties Union v. Rockefeller,* 336 F.Supp. 395, 396-98 (D.C.W.Va. 1972). This Court has affirmed decisions in which lower court judges have taken this approach. *Johnson v. Miller*, 922 F.Supp. 1556, 1562 (S.D.Ga. 1995) (finding consistent legislative policy of maintaining cores of districts from historical review of prior two decennial redistrictings), *aff'd, Abrams v. Johnson,* 521 U.S. 74

(1997); *see also Kidd v. Cox*, 2006 WL 1341302, 8 (N.D.Ga. 2006) (assuming in the absence of evidentiary challenge to the contrary state policies recognized by prior federal court are still vital interests).

The Majority Opinion and Appellees operate under the assumption that it is necessary to overrule *Karcher* to approve of the small variance contained in Senate Bill 1008. The Majority Opinion incorrectly reads *Karcher* to require a strict scrutiny analysis that is not consistent with the examples cited with approval in *Karcher*. It is not necessary to overrule *Karcher* to find that this analysis is incorrect. *Cf. State of Kan. ex rel. Stephan v. Graves,* 796 F.Supp. 468, 471 (D.Kan. 1992) (noting that "conceivably a majority of the current Supreme Court might take the view of the original dissenters" in *Karcher*). However, whether or not this Court overrules *Karcher,* it should not approve of the strict requirements imposed by the majority below.

First, the majority's reading of *Karcher* is not justified by the text of the Constitution. Article I, § 2, cl. 1 of the United States Constitution provides that "The House of Representatives shall be composed of Members chosen . . . by the People of the several States. . . ." Since *Wesberry,* this Court has interpreted U.S. Const. art. I, § 2, cl. 1 to require "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S. at 7-8. With respect to state legislative redistricting, this Court imposed an almost identical

standard based on the Equal Protection Clause. *See Reynolds v. Sims*, 377 U.S. 533, 577 (1964) ("the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable"). As early as *Reynolds,* however, this Court afforded more flexibility to the states to perform legislative redistricting, *id.* at 577-78, in spite of the fact that the Equal Protection Clause contains a textual requirement of equality while Article I, § 2, cl. 1 does not.

Moreover, a federal judiciary imposing a rigid standard is not the only check on small variances in population in congressional districts. Indeed, as Justice Scalia has noted in the context of judging partisan gerrymandering claims, "the Framers provided a remedy for such practices in the Constitution. Article I, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to "make or alter" those districts if it wished." *Vieth v. Jubelirer,* 541 U.S. 267, 275 (2004) (plurality opinion) (*citing* U.S. Const. art. I, § 4's provision that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations" and the historic exercise of Congressional power under this clause).

The traditional redistricting goals recognized as a justification for variances in *Karcher* serve as

restraint against gerrymanders. However, a "requirement of precise mathematical equality continues to invite those who would bury their political opposition to employ equipopulous gerrymanders." *Karcher*, 462 U.S. at 780 (White, J., dissenting). The Majority's Opinion's construction of *Karcher* permits reliance on precise mathematical equality to obviate the need of "the political cartographer to justify his work on its own terms." *Id.*

This Court has been unable to come up with a standard for judging partisan gerrymandering. *Vieth v. Jubelirer, supra*. Because partisan gerrymandering is as a practical matter judicially unreviewable, this Court's population variance jurisprudence should not provide political cover for the gerrymanders by affirming the strict mathematical equality requirements imposed in the Majority Opinion of the court below.

Redistricting by its nature involves tradeoffs. The Majority Opinion's focus on independently matching each policy justification with a specific finding that the specific deviation is justified prevents a state from balancing these interests. The Majority Opinion effectively precludes states from engaging in a balancing of legitimate policy goals if they have a redistricting plan that has a variance greater than zero. Thus, the issue of whether the Majority Opinion is correct regarding the legal showing necessary to justify a minor population deviation presents an

important constitutional question worthy of this Court's review.

3. The Majority Opinion is also in conflict with this Court's express approval in *Karcher* of "preserving the cores of prior districts" as a state policy that could justify a variance under *Karcher's* second step. 462 U.S. at 740. The conflict arises because the Majority Opinion adopted a definition of preserving the district's cores that is without any legal support and contrary to both this Court's precedents and the precedents of a number of three-judge panels including two prior West Virginia panels. The Majority Opinion does not dispute that the challenged redistricting plan geographically preserves the three districts to the greatest extent possible. (App. 18) ("the emphasis was in preserving the status quo and making only tangential changes to existing districts); *id.* at 180, 241, 243 ("erecting a figurative fence around a district's entire perimeter preserves its geographic core only in the grossest, most ham-handed sense"). Instead, after conceding that "Senate Bill 1008 was the most effective proposal in maintaining the status quo," the Majority Opinion declares this undisputed state interest "beside the point." (App. 20)

The Majority Opinion, abandoning all pretext of deference, then proceeds to lecture the State on why it should abandon a valid state interest consistently recognized in precedent. (App. 21) ("we are as a nation expressing our realization that resistance to change merely for the sake of preserving the status

quo is not a virtue to be celebrated and promoted as an end to itself"). The most striking feature of the majority's opinion on this point is the lack of any legal authority supporting its interpretation of this factor. Thus, the propriety of the Majority Opinion's new definition of maintaining the cores creates an important constitutional question.

It is clear that the Majority Opinion's definition is not dictated by this Court's prior precedents. First, the Majority Opinion's focus on zero variance in discussing this factor is not appropriate. The second step of the *Karcher* analysis presupposes variances greater than zero. *Karcher* specifically allows a state to justify variances greater than zero with valid state interests. 462 U.S. at 740. Seeking to preserve the cores of existing districts is one of those interests specifically allowed. *Id.*

The Majority Opinion equates the "core" of a district with "communities of interest." (App. 17) (*citing Graham v. Thornburgh*, 207 F.Supp.2d 1280, 1294 (D.Kan. 2002)). A review of the *Graham* opinion reveals that the Majority Opinion reversed the definition. The *Graham* Court quoted the Kansas redistricting guidelines that required taking into account "communities of interest" which included both the social and cultural factors quoted by the Court and other separate factors including geographic factors such as maintaining "the cores of existing districts" and placing "whole counties" in the same districts. *Id.* Indeed, in concluding that the plan complied with the state community of interest test, *Graham* points out

the small number of counties split and the fact that "the 1992 districts have been preserved to a relatively high degree" without mentioning any of the social or cultural factors emphasized by the Majority Opinion. *Id.*

The Majority Opinion's definition (and that of the Plaintiff's Expert), is simply in conflict with precedent. The Dissent recognized this. Dissenting Opinion, (App. 46) A prior West Virginia panel found a definition based on population and geography appropriate. *Stone v. Hechler*, 782 F.Supp. 1116, 1121-22 (N.D.W.Va. 1992) (defining core preservation based on counties and population kept together). This Court has also approved definitions of core preservation that focus on keeping geographic boundaries and populations in prior districts. *Abrams v. Johnson,* 521 U.S. 74, 99-100 (1997) (finding district court plan maintained "core districts" *affirming Johnson v. Miller*, 922 F.Supp. 1556, 1562 (S.D.Ga. 1995) (defining core maintenance based on number of counties kept in plan from plan adopted last decade)); *Turner v. State of Ark.*, 784 F.Supp. 585, 588 (E.D.Ark. 1991) (finding valid state interest from post-enactment legislative testimony that legislature's goal was "to adopt a 1991 congressional redistricting plan that was as close to the plan approved by [by federal court in prior decade] as possible . . . [by trying] to make as few changes as possible to meet the 'one person, one vote' standard."), *aff'd,* 504 U.S. 952 (1992) (Mem.); *see also South Carolina State Conference of Branches of the NAACP v. Riley,* 533 F.Supp. 1178, 1180 (D.S.C.

1982) (pre-*Karcher* noting that court drafting redistricting plan should alter old plans only as necessary to achieve the requisite goals of the new plan), *aff'd,* 459 U.S. 1025 (Mem.) (1982); *cf. Colleton County Council v. McConnell*, 201 F.Supp.2d 618, 647 (D.S.C. 2002) (defining core preservation based on *NAACP v. Riley, supra*). Other three-judge panels have come up with similar characterizations. *Larios v. Cox*, 300 F.Supp.2d 1320, 1334 (N.D.Ga. 2004) ("Core retention can be viewed in one of two ways: (1) in terms of the largest core of a prior district that is included in a successor district, or (2) in terms of the district core of each incumbent located in a district."); *David v. Cahill,* 342 F.Supp. 463, 469 (D.C.N.J. 1972) ("The plan set forth in DS 5 follows most former district lines as nearly as any we have considered, and leaves a substantial core of constituents in all former districts except the new Thirteenth District.").

Moreover, the Majority Opinion's rejection of the State's definition raises the issue of how much deference a three-judge panel owes state determinations. The Majority Opinion is in conflict with the prior West Virginia determinations:

> We think [the principle of legislative deference in redistricting] has application here. There is merit to the arguments of both Stone and the State concerning how to reduce the concept of "core" to definitional practicability. The State Legislature, however, considered both arguments and chose the one now advanced by the State in this

> litigation, that preserving district cores means keeping as many of the current congressional districts intact as possible.

Stone v. Hechler, 782 F.Supp. 1116, 1126 (N.D.W.Va. 1992).

Finally, as the Dissenting Opinion recognized, there are valid and important public policy reasons for keeping the cores of districts intact. (App. 41) (keeping cores together helps foster personal contact with representatives and continuity in working toward achieving district goals); *see also Riley*, 533 F.Supp. at 1181 (same). Indeed, the passage of time itself supports keeping districts together as the relationships that develop benefit all the citizens of the districts. *Committee for a Fair and Balanced Map,* 2011 WL 6318960 at p*25. ("The existence of District 4 for the last 20 years has now resulted in constituent-incumbent relationships in all three districts that didn't exist when the district was first created by the *Hastert* court and thus, the basis for upholding the oddly shaped district has changed."). Resolution of these important constitutional issues will assist future reviewing courts.

The Majority Opinion's limited definition of a district's core is in conflict with this Court's teachings and the holdings of a number of other courts and creates a substantial constitutional question worthy of review by this Court.

4. The Majority Opinion's choice of a remedy also fails to provide the deference to the legislative

process required by this Court's opinions. While the Majority Opinion, as modified by the Stay Opinion, offered the State the opportunity to pass a new congressional redistricting plan, (App. 31) (Majority Opinion), (App. 54) (Stay Opinion), the Majority indicated that absent the State enacting a new plan or the defendants agreeing on a new plan, the Court would likely adopt of one of the two plans presented that meet its 0% variance requirement. Given the real possibility that there will not be legislative agreement, *see, e.g.,* Ry Rivard, *Charleston Daily Mail* (January 18, 2012) (http://www.dailymail.com/News/statehouse/201201170165?page=2&build=cache) (legislative leaders in both houses noting lack of consensus for any of the proposed alternative plans some of which are very controversial), the question of the standard for choosing a judicial remedy is significant in this case.

In *Whitcomb v. Chavis,* 403 U.S. 124, 160 (1971), this Court emphasized that the remedial powers of a federal court in a redistricting case should be limited such that it is improper to disturb districts "any more than necessary" to remedy the constitutional violation. Thus, "faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying" a state plan – even one that was itself unenforceable – "to the extent those policies do not lead to violations of the Constitution. . . ." *Abrams v. Johnson,* 521 U.S. 74, 79 (1997). On the same day that this Court granted the stay in this case, it

reaffirmed these important principles. *Perry v. Perez*, 132 S.Ct. at 941.

Of the two plans selected by the majority, one was specifically rejected (the Perfect Plan) and one was never even presented to the Legislature (Cooper 4). Neither plan meets the goals of the plans that were adopted. The Perfect Plan (or 0% Variance Plan), splits counties, over one-third of the State's counties and population, and places two incumbents in the same district. (App. 65) The Cooper 4 Plan, splits one county, and moves 40% of the counties and almost 40% of the State's population. *Id.*

By stating that it would adopt one of these plans – neither one of which had majority support – the court below incentivized the minority that support those plans to stall or block any legislation as the Majority Opinion has indicated that, absent legislative action, the court below would judicially enact one of these plans. As the Dissenting Opinion recognized, it is possible to address the population variance and at the same time preserve some of the policies underlying the adoption of the original plan. (App. 45, n. 1) If this Court affirms the majority's liability determination, it should make clear that any judicial remedy should be guided to the greatest extent possible by the policies in the plan actually adopted by the Legislature. The cases cited above establish that the Majority Opinion's preference for two plans that ignore the policies that underlie Senate Bill 1008 was

error. This error constitutes a substantial constitutional question worthy of this Court's review.

CONCLUSION

For the reasons noted herein, this Court should note probable jurisdiction.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA
AT CHARLESTON**

JEFFERSON COUNTY COMMISSION, et al.,

Plaintiffs, and

THORNTON COOPER,

Intervening Plaintiff,

v. Civil Action No. 2:11-CV-0989

NATALIE E. TENNANT, et al.,

Defendants.

ORDER OF AMENDMENT

The Court's Memorandum Opinion and Order of January 3, 2012, is hereby amended through the substitution of a new footnote 13, as reflected on the attachment hereto.

It is so ORDERED.

DATED: January 4, 2012.

/s/ Robert B. King
ROBERT B. KING
United States Circuit Judge

/s/ Irene C. Berger
IRENE C. BERGER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA
AT CHARLESTON

JEFFERSON COUNTY COMMISSION; PATRICIA NOLAND, as an individual and on behalf of all others similarly situated; and DALE MANUEL, as an individual and on behalf of all others similarly situated,

Plaintiffs, and

THORNTON COOPER,

Intervening Plaintiff,

v.

NATALIE E. TENNANT, in her capacity as the Secretary of State; EARL RAY TOMBLIN, in his capacity as the Chief Executive Officer of the State of West Virginia; JEFFREY KESSLER, in his capacity as the Acting President of the Senate of the West Virginia Legislature; and RICHARD THOMPSON, in his capacity as the Speaker of the House of Delegates of the West Virginia Legislature,

Defendants.

Civil Action No.
2:11-CV-0989

AMENDED MEMORANDUM OPINION AND ORDER

(Filed Jan. 4, 2012)

ROBERT BRUCE KING, United States Circuit Judge, and IRENE CORNELIA BERGER, United States District Judge:

The Jefferson County Commission and two of its commissioners, Patricia Noland and Dale Manuel, both of whom reside in Jefferson County, West Virginia, and each proceeding in his or her individual capacity, filed this suit on November 4, 2011, challenging the congressional apportionment enacted by the State of West Virginia following the 2010 census. In their Complaint, the plaintiffs name as defendants Secretary of State Natalie E. Tennant, Governor Earl Ray Tomblin, State Senate President Jeffrey Kessler, and Speaker Richard Thompson of the West Virginia House of Delegates, each in his or her official capacity. Pursuant to 28 U.S.C. § 2284, this three-judge district court was duly appointed by the Chief Judge of the Court of Appeals for the Fourth Circuit to consider the plaintiffs' claims. The trial of the matter took place at The Robert C. Byrd United States Courthouse in Charleston on December 28, 2011, and it is now ripe for decision.

Upon careful consideration of the parties' written submissions and the testimony, evidence, and arguments of counsel, we conclude that West Virginia's congressional apportionment was not accomplished in conformance with the Constitution of the United

States. The plaintiffs are therefore entitled to have the enactment declared null and void, and, in turn, to have the Secretary of State permanently enjoined from conducting West Virginia's elections for Congress in accordance therewith.

I.

A.

The 435 voting members of the United States House of Representatives are distributed among the several states in numbers proportionate to each state's percentage of the nation's population, based upon an "actual Enumeration" first conducted in 1790 and repeated "every subsequent Term of ten Years." U.S. CONST. art. I, § 2, cl. 3; *see* 2 U.S.C. § 2a (requiring that President employ algebraic "method of equal proportions" to calculate and transmit to 82nd Congress within one week of convening on January 3, 1951, and each fifth Congress thereafter, results of most recent decennial census and number of representatives to which each State thereby entitled). Upon such certification by the Executive of the resultant number of representatives, each state establishes its own methodology for apportioning the corresponding districts within its borders.

In West Virginia's case, the state constitution commands that congressional districts "shall be formed of contiguous counties, and be compact. Each district shall contain, as nearly as may be, an equal number of population, to be determined according to

the rule prescribed in the constitution of the United States." W. Va. Const. art. I, § 4; *see* W. Va. Code § 1-2-3 (identifying three current congressional districts, each comprised of contiguous whole counties). The "rule prescribed in the constitution of the United States" incorporates the requirements of Article I, Section 2, together with the Fourteenth Amendment, the latter of which, among other things, prohibits a state from denying "any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1; *see Baker v. Carr,* 369 U.S. 186 (1962) (civil rights action alleging equal protection violations stemming from legislature's redistricting asserts justiciable Fourteenth Amendment claim).

In response to the federal government's certification of the 2010 census and confirmation that West Virginia would remain entitled to three representatives in Congress, President Kessler appointed seventeen state senators to a "Redistricting Task Force" (the "Task Force"), chaired by Senator (and Majority Leader) John Unger, which conducted a series of twelve public meetings throughout the state during the spring and early summer of 2011 to gather citizen input. On August 1, 2011, the West Virginia Legislature, at the proclamation of Governor Tomblin three days earlier, convened its First Extraordinary Session to determine state legislative and federal congressional districts. Senate Resolution No. 103, adopted at the outset of the special session, established the Select Committee on Redistricting (the "Committee"), comprised of the seventeen Task Force senators. *See*

Joint Opening Brief of Defendants Jeffrey Kessler and Richard Thompson [hereinafter "D. Br."], Exhibit M.

On August 3, 2011, the Committee was presented with an initial proposal providing for a virtually equal division of the State's official 2010 population of 1,852,994. Under that proposal, formally called the "originating bill" but informally dubbed the "Perfect Plan," the First and Second Congressional Districts would each contain 617,665 persons, with the remaining 617,664 to reside in the Third. The Perfect Plan generally observed political boundaries at the county level, although it divided two counties – Kanawha and Harrison – between districts. *See* Plaintiffs' Exhibit 8.

The following day, August 4, 2011, Committee members proposed alternatives to the Perfect Plan. The Committee ultimately rejected six such alternatives, including two by Senator Roman Prezioso (devised by the Democratic Congressional Campaign Committee, a/k/a the "DCCC"), three by Senator Brooks McCabe (suggested by attorney Thornton Cooper), and one by Senator Douglas Facemire (suggested by non-Committee member Senator Herb Snyder). The Committee reported to the full Senate an eighth proposal, Senate Bill ("S.B.") 1008, propounded by Senator Clark Barnes, which retained the 2001 district boundaries, except for transferring Mason County from the Second District to the Third. On the Senate floor, Senator Snyder moved to amend the bill with a ninth proposal, but that motion was

defeated. The Senate ultimately passed S.B. 1008 over the lone dissent of Senator Unger.[1] The House of Delegates, under the stewardship of Speaker Thompson, approved the bill without debate, and it was signed into law by Governor Tomblin on August 18, 2011.

The resulting apportionment statute, appearing in codified form at West Virginia Code section 1-2-3, provides for 615,991 persons in the First District; 620,862 in the Second; and 616,141 in the Third.[2] The

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[1] The nine alternatives considered by the Legislature were disposed of thusly: (a) the three McCabe (Cooper) Plans were presented to and implicitly rejected by the Committee at the Task Force stage, which adopted the Perfect Plan on August 3, 2011, as the "originating bill"; (b) the two Prezioso (DCCC) Plans were considered and rejected by the Committee on August 4, 2011; (c) on that same date, the Committee also considered and rejected the Facemire (Snyder) Plan; (d) the Snyder Floor Amendment was considered and rejected by the full Senate on August 5, 2011; and (e) the Barnes Plan was considered and approved by the Committee as an amendment to the Perfect Plan on August 4, 2011, and it was then enacted into law as S.B. 1008. Consequently, the Barnes Plan is the plan under challenge in these proceedings.

[2] As provided by section 1-2-3, the counties of Barbour, Brooke, Doddridge, Gilmer, Grant, Hancock, Harrison, Marion, Marshall, Mineral, Monongalia, Ohio, Pleasants, Preston, Ritchie, Taylor, Tucker, Tyler, Wetzel, and Wood constitute the First District. The Second District is comprised of Berkeley, Braxton, Calhoun, Clay, Hampshire, Hardy, Jackson, Jefferson, Kanawha, Lewis, Morgan, Pendleton, Putnam, Randolph, Roane, Upshur, and Wirt Counties. The Third District encompasses the remaining counties, i.e., Boone, Cabell, Fayette, Greenbrier, Lincoln, Logan, Mason, McDowell, Mercer, Mingo,

(Continued on following page)

most populous of the three, the Second District, exceeds the mean (617,665) by 3,197 persons (0.52%), in contrast to a shortfall of 1,674 (0.27%) in the least populous First District, resulting in a total variance (a/k/a "Relative Overall Range" or "ROR") of 4,871 (0.79%). As illustrated below, the ROR of the enacted apportionment was the eighth most severe of the nine proposals considered:

Rank	Proposal	ROR
1.	Perfect Plan	0.00%
2.	McCabe (Cooper) Plan 3	0.04%
3.	McCabe (Cooper) Plan 2	0.06%
4.	McCabe (Cooper) Plan 1	0.09%
5.	Snyder Floor Amendment	0.39%
6.	Facemire (Snyder) Plan	0.42%
7.	Prezioso (DCCC) Plan 2	0.44%
8.	S.B. 1008 (Barnes Plan)	0.79%
9.	Prezioso (DCCC) Plan 1	1.22%

In accordance with a timetable imposed by statute, *see* W. Va. Code § 3-5-7, a candidate for Congress in West Virginia is required to file a Certificate of Announcement with the Secretary of State, *see id.* § 3-1A-6(a). The Secretary thereafter transmits to

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Monroe, Nicholas, Pocahontas, Raleigh, Summers, Wayne, Webster, and Wyoming.

the clerks of the fifty-five county commissions a certification that the candidate is qualified to appear on the ballot. *See id.* § 3-5-9. The filing period for the upcoming statewide elections is scheduled to begin on January 9, 2012, and to conclude on January 28, 2012. Candidates for Congress are obliged, at the time of filing, to inform the public of the district in which they intend to run. *See id.* § 3-5-7(d)(2).

B.

The plaintiffs commenced this action in the Northern District of West Virginia on November 4, 2011, against Secretary Tennant, Governor Tomblin, President Kessler, and Speaker Thompson (collectively, the "State" or the "defendants"), seeking a declaratory judgment that West Virginia Code section 1-2-3 fails to comport with the Constitution of the United States (Count One), and that the districts as drawn also contravene the West Virginia constitutional requirements of numerical equivalence and of compactness (Counts Two and Three, respectively). The Complaint requests that the State be permanently enjoined from conducting its congressional elections in conformance with section 1-2-3, and it urges that a more suitable alternative be substituted as the State's official apportionment scheme.

On November 22, 2011, Thornton Cooper moved for leave to intervene as an additional plaintiff, and that motion was granted on November 30, 2011. Subsequently, on December 15, 2011, venue was

transferred to the Southern District of West Virginia. Shortly thereafter, on December 17, 2011, Cooper submitted for our consideration a tenth proposal, i.e., Cooper Plan 4. That proposal divided Taylor County between the First and Third Districts, resulting in a total variance of four persons (0.00% ROR), with 617,663 being placed in the First District; 617,667 in the Second; and 617,664 in the Third.

II.

A.

The Constitutional directive that members of the House of Representatives be chosen "by the People of the Several States," U.S. CONST. art. I, § 2, cl. 1, has been interpreted to "mean[ ] that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders,* 376 U.S. 1, 7-8 (1964). Although "[t]he extent to which equality may practicably be achieved may differ from State to State and from district to district," the Constitution nonetheless "requires that the State make a good-faith effort to achieve precise mathematical equality." *Kirkpatrick v. Preisler,* 394 U.S. 526, 530-31 (1969) (citing *Reynolds v. Sims,* 377 U.S. 533, 577 (1964)). The *Kirkpatrick* Court emphatically rejected the argument that small, unexplained disparities might be considered de minimis, instructing that "[u]nless population variances among congressional districts are shown to have resulted

despite such effort, the State must justify each variance, no matter how small." *Id.* at 531.

The Supreme Court has prescribed a procedural mechanism to implement the *Sanders* practicability standard. At the outset, a party challenging apportionment must demonstrate the existence of a population disparity that "could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal proportion." *Karcher v. Daggett,* 462 U.S. 725, 730 (1983). Upon such a showing, the burden shifts to the state to prove "that each significant variance between districts was necessary to achieve some legitimate goal." *Id.* at 731.

The *Karcher* Court identified several policies or objectives that might support a conclusion of legitimacy. *See Karcher,* 462 U.S. at 740 ("Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives."). Importantly, the onus is on the proponent of the challenged apportionment – here, the State of West Virginia – to affirmatively demonstrate a plausible connection between the asserted objectives and how they are manifested. As the *Karcher* Court emphasized, the State must show "that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions." *Id.* at 741.

B.

At trial last week, the State helpfully conceded that the plaintiffs (hereinafter including the intervening plaintiff) have satisfied their threshold burden under *Karcher* to demonstrate that the 0.79% variance enacted through S.B. 1008 might have been reduced. *See* Transcript of Proceedings of December 28, 2011 [hereinafter "Tr."] at 43, 84. Indeed, the State could hardly have argued otherwise, given that no fewer than seven less drastic alternatives were submitted for consideration.[3] The State nonetheless maintains that the enacted variance is solely the result of its efforts to accommodate the legitimate goals of respecting county boundaries, preserving the cores of extant districts, and avoiding a contest in the Republican primary between two of West Virginia's incumbent representatives, David McKinley and Shelley Moore Capito. We address each of these contentions in turn.

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[3] *Cf. Stone v. Hechler,* 782 F. Supp. 1116, 1125 (N.D. W. Va. 1992) (per curiam), in which the three-judge panel, applying *Karcher,* reasoned that "if any plan (other than the one under judicial attack) would reduce or eliminate population differences among the congressional districts, the plaintiff has met its burden." The court continued, "[b]ecause seventeen other plans with a lower overall variance were before the Legislature . . . , the Court concludes that Stone has satisfied his burden." *Id.* at 1126.

1.

As initially set forth *supra,* the Constitution of West Virginia provides for the division of the state into congressional districts, which "shall be formed of contiguous counties, and be compact. Each district shall contain, as nearly as may be, an equal number of population, to be determined according to the rule prescribed in the constitution of the United States." W. Va. Const. art. I, § 4.[4] The integrity of county boundaries has been characterized as a "West Virginia constitutional requirement," *Stone v. Hechler,* 782 F. Supp. 1116, 1123 (N.D. W. Va. 1992) (per curiam), an observation probably emanating from the quoted excerpt's reference to "counties" and not parts or portions of counties.

The *Stone* court's comment in passing was not pertinent to the decision in that case, and its accuracy is in any event called into question if the Article 1 excerpt is interpreted within the context of the entire document. In particular, the state constitution's Article 6 provision governing apportionment for the purpose of electing the West Virginia Senate specifies that those districts be "bounded by county lines." W. Va. Const. art. VI, § 4. The absence of a similarly precise reference to "lines" in Article 1 casts doubt on the intended meaning therein of the word "counties,"

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[4] The compactness and equality requirements of Article I, Section 4 form the basis of the plaintiffs' claims under Counts Two and Three of the Complaint, and they will be briefly discussed *infra* in Part III.

with the result that the provision should reasonably be construed to contemplate that counties may be subdivided, so long as the district's contiguity remains intact.[5]

Upon the Perfect Plan being moved before the Committee, Senator Unger explained the legal basis for the plan's division of counties. *See* Tr. at 200. Though challenging many members' long-held assumptions to the contrary, the concept of county-splitting was more or less embraced by the Committee as a whole, engendering at least some preliminary discussion of conforming alternatives. *See id.* at 80-81, 173-74, 200-02.

Whether mandated by the state constitution or not, it is undisputed that, since West Virginia was admitted to the Union nearly 150 years ago, none of its counties have ever been divided between two or more congressional districts.[6] In accordance with

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[5] The parties indicated at trial that West Virginia Senate districts no longer observe county lines, owing to the indirect effect of a federal court decision that struck down as violative of the Fourteenth Amendment's Equal Protection Clause the State's apportionment of the House of Delegates. *See Goines v. Rockefeller,* 338 F. Supp. 1189, 1195 (S.D. W. Va. 1972) ("'When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls.'" (quoting *Reynolds,* 377 U.S. at 584)). Though the "county lines" provision is no longer of practical effect, the construct of Article VI, Section 4 is nonetheless useful to discern the drafters' intent as to the slightly dissimilar provisions of Section 4 of Article I.

[6] The nation having largely adopted zero-variance congressional apportionment, *see infra* Part II.C, West Virginia and

(Continued on following page)

Karcher, then, maintaining the integrity of county boundaries within congressional districts could, in West Virginia's case, qualify as one of those "consistently applied" interests that the Legislature might choose to invoke to justify a population variance.

To that end, Senator Corey Palumbo, Chair of the Senate Judiciary Committee, testified at trial that "it was important to, to a lot of people, whether it was a specific requirement or not, . . . to try to avoid splitting up counties, the county boundaries." Tr. at 248-49. Though we give due credit to Senator Palumbo's testimony concerning his general understanding of the decisionmaking process, the Legislature neglected to create a contemporaneous record sufficient to show that S.B. 1008's entire 4,871-person variance – or even a discrete, numerically precise portion thereof – was attributable to the professed interest in keeping counties intact. As Senator Unger testified without contradiction, there was "nothing in the record as far as the legislation that would give any justification for the act of the Legislature in this regard." *Id.* at 222.[7]

Iowa are the only remaining states that have never split counties between districts. *See* Tr. at 201. If we assume that the *Karcher* Court meant its reference to "municipal boundaries" to also include "county lines," the nationwide devaluation of county line integrity may portend the eventual deletion of municipal or county boundaries from the list of potentially legitimate justifications. *See* D. Br., Exhibit O, at 24.

[7] There was considerable discussion at trial concerning the need for the Legislature to include its findings within the enactment, a practice that is generally "pretty common," Tr. at

(Continued on following page)

Moreover, of the eight other proposals under consideration, only the Perfect Plan transgressed county lines, and only Prezioso Plan 1 advocated for a greater variance. Consequently, the Legislature had before it seven alternative proposals that would have operated consistently with its asserted interest in preserving counties inviolate, six of which would have been more in keeping with the constitutional archetype of "one person, one vote." The rejection of more compliant proposals that would have advanced the State's interest at least as effectively as the less compliant one actually adopted militates strongly against a conclusion that the Legislature put forth the objectively good-faith effort that *Karcher* requires. *See Karcher,* 462 U.S. at 739-40 (approving district court's conclusion that plaintiffs had satisfied initial burden by demonstrating availability of plans with less extreme population deviations).

222, but one that evidently has never been followed in relation to an apportionment bill, *see id.* at 255. We think it sufficient that the Legislature's rationale with respect to specific population variances and other relevant considerations, whether denominated "findings" or not, be plainly and accurately documented in the official legislative record. Such could take the form of a Joint Resolution expressing the contemporaneous thinking of the Legislature as a body, which would certainly be preferable to a court attempting to ascertain that thinking via the after-the-fact testimony of individual legislators. But even that minimum requirement was not satisfied here.

2.

Karcher acknowledged that preserving the core of existing districts may afford a legitimate basis for a state to justify a population variance among congressional districts. The word "core" has been defined as "the central or most important part of something, in particular . . . the part of something that is central to its existence or character." *The New Oxford American Dictionary,* 378 (2d ed. 2005). In the context of congressional apportionment, the core of a district might be most comfortably conceived in geographic terms as being more or less the center portion of a district map. In West Virginia, however, a state whose irregular shape defies facile description and where most of its largest municipalities lie near its borders, a district's core might as readily be defined by more outlying geographic features, such as the panhandles in the north and the east, or the coalfields in the south. *See* Tr. at 230 (Senator Unger's testimony that "we're all connected, but some of us are . . . connected more than others. . . . I think that the Eastern Panhandle has a very unique situation, as well as the Northern Panhandle, as well as Southern West Virginia").

Beyond the discrete bounds of geography, however, a district's core can also implicate its "[s]ocial, cultural, racial, ethnic, and economic interests common to the population of the area, which are probable subjects of legislation (generally termed 'communities of interest')." *Graham v. Thornburgh,* 207 F. Supp. 2d 1280, 1286 (D. Kan. 2002). The plaintiffs' trial expert, Professor Ken Martis of West Virginia University,

explained that "political, geographic, social, economic, [and] cultural variables . . . can be used to look at communities of interest." Tr. at 114. Dr. Martis elaborated that communities of interest can be circumscribed, for example, by metropolitan areas, by "vernacular" zones of shared economic initiatives, and even by similarities in geologic features, watersheds, and environmental policy. *See id.* at 114-25; Plaintiffs' Exhibits 3-7.

None of these particular concerns factored significantly into the Legislature's decisionmaking, however. *See* Tr. at 129, 220. To the contrary, the emphasis was on preserving the status quo and making only tangential changes to the existing districts. *See id.* at 180, 241, 243. Senator Unger cited the general resistance to change, noting that the delegates from Mason County were among the few voting against even the minimal tweak that was eventually approved: "[Y]ou always have 'not in my backyard.' . . . [T]hey didn't want to go to the 3rd Congressional District. They didn't want to move." *Id.* at 202-03. Accordingly, Senator Unger termed S.B. 1008 as "the most politically expedient. It was one that we could do and move out and get out of town, easiest." *Id.* at 204.

In that sense, the legislative evaluation of district cores in 2011 was reminiscent of the one twenty years earlier in *Stone*. The court in *Stone* chose not to attempt its own definition of "core," instead deferring to the Legislature's determination that "preserving district cores means keeping as many of the current

congressional districts intact as possible." 782 F. Supp. at 1126. The plaintiff therein did not take fundamental issue with maintaining intactness, but contended that the concept had been misapplied to preserve current districts; he unsuccessfully urged the court to focus instead on safeguarding traditional districts, i.e., to preserve the essential political character "of those counties that have been together in the same district for most of the history of the State." *Id.*

Regardless of how one perceives the "core" of a congressional district, it must be, by definition, merely part of the whole. A core-Democratic district is bound to have Republican voters; there will be churchgoers who attend Mass though they live in a predominantly Protestant district; shopping malls and sports cars shall, at least in West Virginia, inevitably give way to cornfields and hay wagons. In a similar fashion, erecting a figurative fence around a district's entire perimeter preserves its geographic core only in the grossest, most ham-handed sense that encasing a nuclear reactor in tons of concrete preserves the radioactive core of that structure.

Indeed, with respect to the current Second District, snaking for the most part in single-county narrowness across the breadth of the state, hundreds of miles southwesterly from the Shenandoah River to the Ohio, identifying its core – geographic or otherwise – would prove virtually impossible. Kanawha County, the most populated in the state, is in that district together with Berkeley County, which has recently become the second most populous,

notwithstanding that the county seats (Charleston and Martinsburg, respectively) are about 300 miles apart by highway. The anomaly brings to mind the old football adage that when a team decides it has two starting quarterbacks, it more precisely has none. Taking note of the Second District's excessive elongation, Dr. Martis called it "an abomination." Tr. at 127.

We certainly understand that, as a general proposition, rearranging a greater number of counties to achieve numerical equality in redistricting means that more citizens will need to accustom themselves to a different congressperson. While we imagine that the acclimatization process may give rise to a modicum of anxiety and inconvenience, avoiding constituent discomfort at the margins is not among those policies recognized in *Karcher* as capable of legitimizing a variance. That S.B. 1008 was the most effective proposal in maintaining the status quo, *see* Tr. at 181, is therefore beside the point.

By its dogged insistence that change be minimized for the benefit of the delicate citizenry, we think it likely that the State doth protest too much, at least when we evaluate its position from the perspective of relatively recent history. As demonstrated at trial, the 1991 apportionment effecting the reduction of West Virginia's allocation in Congress from four seats to three, through its introduction of a serpentine Second District, strayed far from the traditional notions of what the state's congressional districts ought to look like. *See* Tr. at 71, 140; Intervenor's Exhibit 3. More specifically, Dr. Martis testified that

beginning with the state's creation in 1863, "if you look at all the districts up until 1991, the Eastern Panhandle has been kept intact." *Id.* at 140.[8] From our vantage point, what the State now decries as a deviation from the norm could instead be described as a long-postponed reckoning of accounts.[9]

Change is the essence of the apportionment process. Change is required to redress representational inequities that occur over time as people move in or move away, and districts experience significant demographic shifts. By gravitating toward apportionment plans with zero variances, we are as a nation expressing our realization that resistance to change merely for the sake of preserving the status quo is not a virtue to be celebrated and promoted as an end to itself. Conversely, change for the sake of observing the bedrock constitutional principle of "one person, one vote" is an honorable and patriotic endeavor, one that we are confident the Legislature and citizens of West Virginia will see fit to embrace. As Justice Black reminded us in *Wesberry v. Sanders*:

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[8] The term "Eastern Panhandle" generally refers to the eight West Virginia counties of the Potomac River watershed, east of the Eastern Continental Divide, i.e., Jefferson, Berkeley, Morgan, Mineral, Hampshire, Grant, Hardy, and Pendleton. *See* Tr. at 143-45.

[9] Asked whether he was "aware that the public particularly in the Eastern Panhandle is not happy with the current congressional plan," Senator Palumbo responded, "I have been made aware of that, yes." Tr. at 257.

> It would defeat the principle solemnly embodied in the Great Compromise – equal representation in the House for equal numbers of people – for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others.

376 U.S. at 14.

3.

Much was made at trial of the bipartisanship evidenced by the Democratic-dominated Legislature as it strove to avoid placing Republican incumbents McKinley and Capito in the same district. *See* Tr. at 183-84 (testimony of Senator Snyder); *id.* at 243-48, 259 (testimony of Senator Palumbo). The legislators' laudable intent appears to have been consistent with the latitude afforded by *Karcher,* but, as with the desire to respect county boundaries, we can point to nothing in the record linking all or a specific part of the variance with the particular interest in avoiding conflict between incumbents. Moreover, six of the seven more compliant alternatives (excepting the Perfect Plan) would have achieved the same avoidance goal as S.B. 1008, again calling into question the extent to which the Legislature conducted its apportionment in objective good faith.

C.

In defense of the process employed by the State, Senator Palumbo testified that the Committee relied extensively on *Stone,* which upheld the 1991 apportionment. *See* Tr. at 250, 253-54. In addition, Senator Palumbo's confidence in the constitutionality of S.B. 1008 was buoyed by *Karcher* itself insofar as Justice Brennan's majority opinion had characterized a prior West Virginia apportionment effort resulting in a nearly identical variance as having court-approved "minor population deviations." *See Karcher,* 462 U.S. at 740-41 (citing *W. Va. Civil Liberties Union v. Rockefeller,* 336 F. Supp. 395, 398-400 (S.D. W. Va. 1972)); Tr. at 256 ("[W]e knew for a fact . . . that a variance of .788 . . . was already found [in *Rockefeller*] to be a variance that could be justified.").

The Committee was not left to depend on its own legal analysis. During its second meeting of the special session, on August 4, 2011, the Committee heard from constitutional law expert Robert Bastress, the John W. Fisher II Professor of Law at West Virginia University, concerning the applicable precedents. At the outset, Professor Bastress carefully explained that "[t]he overriding principle, of course, with congressional redistricting is the requirement that the Legislature make every effort to achieve perfect equality; that is, [ ] perfect one person, one vote districts." D. Br., Exhibit O, at 8. Later on, in response to questioning, Professor Bastress reiterated that, following *Karcher,*

> [y]ou cannot deviate at all from perfect equality unless you've made a good faith effort to avoid any deviation and that the Legislature has *found* that any deviation whatsoever is necessary to achieve some legitimate interest. And the [C]ourt has said even a de minimis deviation has to be justified.

Id. at 17 (emphasis added); *see* Tr. at 198 (Senator Unger's testimony that "[t]he two overarching principles that we communicated, at least to the senators, first was the one person, one vote principle out of the U.S. constitution. And the second was the compactness principle.").

There are undeniable parallels between the present dispute and that in the 1991 *Stone* case, the last time that West Virginia's apportionment was challenged in federal court. *Stone,* however, does not compel us to a particular result. *See Gasperini v. Center for Humanities, Inc.,* 518 U.S. 415, 430 n.10 (1996) (relating proliferation of judges in New York federal district, "each of whom sits alone and renders decisions not binding on the others"). And we have already intimated what we now state clearly: we are unpersuaded by *Stone*'s discussion of preserving the core of congressional districts.[10]

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[10] Before the Committee, Professor Bastress offered his opinion on *Stone* that "as the losing lawyer in that case . . . of course I think the decision was wrong." D. Br., Exhibit O, at 12.

The most obvious and critical difference between the two situations, though, is that the court in *Stone* approved the State's reapportionment resulting in a 0.09% variance, while the plan before us enacts a variance of 0.79%. The size of a deviation bears on the substantiality of the showing that must be made to justify it. *See Karcher,* 462 U.S. at 741. The *Stone* court commented that the variance in that case rendered "the State's burden . . . correspondingly light." 782 F. Supp. at 1128. However inconsequential the burden in *Stone,* it is necessarily far more cumbersome in a case like this one, when the variance to be justified is almost nine times greater. *Cf.* D. Br., Exhibit O, at 23 (setting forth Professor Bastress's opinion that 0.79% is "a fairly significant deviation. . . . It would take more of a justification, significantly more substantial justification, to support a .79 deviation").[11]

There undoubtedly is some superficial appeal to the argument, based on *Karcher*'s endorsement of the 1972 result in *Rockefeller,* that a 0.79% variance in West Virginia is every bit as acceptable almost forty years later. Indeed, Senator Palumbo questioned Professor Bastress in the Committee proceedings as to whether the redistricting requirements had changed since *Stone* in 1991 had applied the general principles announced eight years before that in

[11] Put another way, the 0.79% deviation (4,871 persons) in this case is about 877% of the 0.09% deviation (556 persons) in *Stone.*

Karcher, and Professor Bastress replied that they had not. *See* D. Br., Exhibit O, at 12.

The bedrock legal principles may not have changed, but the precision with which they are applied undoubtedly has. The plaintiffs submitted a list at trial documenting the current apportionment efforts of twenty states following the 2010 census. *See* Plaintiffs' Exhibit 10. Of the listed states, only West Virginia and Arkansas have approved variances in excess of 0.03%. Fifteen of the states have enacted, or are in the process of enacting, zero-variance proposals like the Perfect Plan. Advances associated with the advent of computer technology have made achieving these sorts of results much easier and much more practicable than when *Karcher* and *Stone* were decided. *See* D. Br., Exhibit O, at 13 (statement of Professor Bastress that "there has been a national trend towards almost perfect equality. That has been enabled by the development of some very sophisticated software").

The Legislature has its own permanent redistricting office, *see* Tr. at 166, though Senator Snyder testified that, at least until the special session, "few [legislators] had real desire to, to have maps and so forth of the congressional districts done," *id.* at 167. Using Maptitude® software, the redistricting office can efficiently generate apportionment scenarios, observing any number of parameters such as political boundaries and compactness. *See id.* at 187, 213-16;

Plaintiffs' Exhibit 11.[12] There is, therefore, no technological barrier to West Virginia conducting its apportionment efforts as precisely as its sister states have.

Moreover, a bit of history helps to place the *Karcher* Court's approval of the *Rockefeller* apportionment in the proper perspective. In the 1950s, West Virginia was divided into six congressional districts having a variance in excess of eight percent. *See* Intervenor's Exhibit 1. The state lost a seat following the 1960 census, and the subsequent apportionment resulted in a variance that, while substantially smaller, yet approached four percent. *See id.*

In light of the relatively large disparities confronted by West Virginia immediately prior to the apportionment occasioned by the 1970 census (in which the state's congressional representation was again reduced, to four), it is hardly surprising that the Supreme Court referred to the 0.788% variance in *Rockefeller* as "minor." *See* Tr. at 159 (Cooper's statement that "it's important to understand the context that the Federal Court ruled in 1972 in light of what had been the . . . congressional redistricting population disparities before that time"). The times, as Bob Dylan once proclaimed, they are a-changing, and what once was characterized as "minor" may now be

[12] Senator Unger testified that legislative staff members had, early on, devised several distinct zero-variance models, and he assured us that similar proposals could be "generated very quickly." Tr. at 235.

considered "major." Put simply, S.B. 1008 was not enacted in conformance with the Constitution. As a result, the plaintiffs are entitled to declaratory and injunctive relief as to Count One of their Complaint.

III.

The plaintiffs having prevailed on the federal challenge underlying Count One, we need not reach or address the merits of Counts Two and Three, premised on alleged violations of state law. We surmise only that, with respect to Count Two, the state constitutional requirement of practicable equivalence is no more stringent than that of the federal Constitution, in that the former specifically incorporates "the rule prescribed in the constitution of the United States." *See* W. Va. Const. art. I, § 4. By virtue of the incorporation, it would appear that the protections against disenfranchisement afforded by either is conterminous with the other.

The apportionment that is ultimately emplaced must, of course, comport with the compactness requirement of the Constitution of West Virginia. The ultimate arbiter of that document is the state's Supreme Court of Appeals, which recently rebuffed a number of challenges to the Legislature's redistricting of the State Senate, including an allegation that the districts were not compact within the meaning of Article I, Section 4. *See* Order, *State ex rel. Cooper v. Tennant,* No. 11-1525, slip op. pending (W. Va. Nov. 23, 2011).

At the trial of the case at bar, counsel for the State confronted Dr. Martis with a map of the seventeen senate districts that the Supreme Court of Appeals had just upheld, challenging his opinion that two of those districts (the 6th and the 12th) were not compact, but instead elongated. *See* Tr. at 133. The point was argued that the state Supreme Court's conclusion as to the senate districts disposed of the plaintiffs' Count Three contention here that the Second Congressional District as enacted in S.B. 1008 was insufficiently compact.

We need not and do not decide that issue today. The State should nonetheless bear in mind, for purposes of devising an alternative to the enactment identified herein as unconstitutional, that a proposal's compactness is best evaluated in holistic terms and not by viewing one or two districts in isolation. *See* Tr. at 135-36 (testimony of Dr. Martis generally concurring in counsel's suggestion that "you can't just look at one district" and opining that "compact in the State Constitution [means] that all districts as best possible be compact"). In that regard, the inclusion of two or three elongated districts among seventeen may be considerably more tolerable than one among three.

IV.

Pursuant to the foregoing, the Court is compelled to declare S.B. 1008, as codified at West Virginia Code section 1-2-3, in contravention of the Constitution of

the United States. The enforcement of section 1-2-3 by the defendants is therefore permanently enjoined.[13]

Although we are loath to devise on our own a redistricting plan for the State of West Virginia, the 2012 congressional elections will nevertheless be conducted under an interim plan promulgated by the Court, subject to the following conditions:

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[13] Our good friend Judge Bailey dissents from this declaration and would deny relief to the plaintiffs on all counts. Judge Bailey acknowledges that we "must determine whether the population deviation in the adopted plan was necessary to achieve the State's objectives." Dissenting Op. at 2. He cannot point, however, to a single speck of evidence in the record revealing any finding by the Legislature allocating a specific variance in population toward achieving each of the asserted objectives. Our friend cites no such evidence because it simply does not exist. It is not permissible for the State to say, for example, "If one examines the record, one could distill vague references to three *Karcher* interests, which, taken together with no indication of their relative importance, justify an aggregate variance of 4,871 persons." Judge Bailey chides us for declining to apply *Karcher* in a fashion flexible enough to approve of that sort of approach, though he dutifully echoes *Karcher*'s admonition that "'[t]he State must . . . show some specificity that a particular objective required the specific deviations in its plan, *rather than simply relying on general assertions.'*" Dissenting Op. at 2 (emphasis added) (quoting *Karcher,* 462 U.S. at 741). While *Karcher* indeed instructs that the "showing required to justify population deviations is flexible," *id.,* such flexibility refers only to the "showing," which is subject to case-by-case balancing of individual and governmental interests. The "deviations" that are the subject of the showing, in stark contrast, must be documented with precision, and that was not done in this case.

(1) The Court will defer further action with respect to a remedy for the constitutional defect identified herein until January 17, 2012; and

(2) In the period prior to January 17, 2012, the defendants are encouraged to:

(a) Seek the enactment of an apportionment plan that satisfies the applicable constitutional mandate; or

(b) Present the Court with one or more alternative plans approved by the defendants for the Court's consideration as an interim plan.[14]

In the absence of successful compliance with one of the foregoing conditions, the Court will, on or after January 17, 2012, be constrained to identify an interim plan for use in the 2012 congressional elections in West Virginia from among those currently in the record of this case, likely either the so-called "Perfect Plan" or Cooper Plan 4.[15] In any event, any

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[14] Any plans presented by the defendants under paragraph (2)(b) should be explained to the Court, and, if necessary, fully justified. Further, the plaintiffs should be accorded the opportunity to assess and offer comment to the Court with respect to any such plans.

[15] Senator Unger testified that legislative staffers worked with Professor Martis to conform the Perfect Plan in rough equivalence to the original three congressional districts drawn at West Virginia's creation in 1863, *see* Tr. at 207, and Dr. Martis confirmed that the Perfect Plan is, in his view, compact under the Constitution of West Virginia, *see id.* at 149.

interim plan adopted by the Court may be substituted for and superseded by the Legislature and the Governor, so long as such substitution complies with the applicable constitutional mandate.

Finally, the Court will retain jurisdiction in this case for such other and further proceedings as may be appropriate, pending further order.

DATED: January 4, 2012.

/s/ Robert B. King
ROBERT B. KING
United States Circuit Judge

/s/ Irene C. Berger
IRENE C. BERGER
United States District Judge

Chief District Judge BAILEY, dissenting.

I.

The majority in this case has applied a standard of review which not only fails to give sufficient deference to the Legislature but also disregards the flexibility of *Karcher v. Daggett,* 462 U.S. 725 (1983). Accordingly, I am compelled to dissent.

I certainly agree that the plaintiffs have satisfied the first prong of *Karcher* – showing a variance from exact equality which could be avoided. I disagree that the State has failed to demonstrate a proper justification for the variance. As a result, I would conclude that the State has violated neither Article I, § 2 of the Constitution of the United States nor Article I, § 4 of the Constitution of West Virginia. In reaching the compactness issue, I would conclude that the second congressional district satisfies the compactness requirement contained in Article I, § 4 of the Constitution of West Virginia.

In *Karcher,* the Supreme Court provided the following guidance to a court tasked with determining whether a state legislature has justified a variance:

> Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives. As long as the criteria are

> non-discriminatory, *see Gomillion v. Lightfoot,* 364 U.S. 339 (1961), these are all legitimate objectives that on a proper showing could justify minor population deviations. *See, e.g., West Virginia Civil Liberties Union v. Rockefeller,* 336 F.Supp. 395, 398-400 (S.D. W.Va. 1972) (approving plan with 0.78% maximum deviation as justified by compactness provision in state constitution); *cf. Reynolds v. Sims,* 377 U.S. 533, 579 (1964); *Burns v. Richardson,* 384 U.S. 73, 89, and n. 16 (1966). The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions. The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors.

462 U.S. at 740-41.

Following this framework, a reviewing court should first identify the legislative policies considered in the process which culminated in the approval of the redistricting plan challenged. Next, a court must determine whether the population deviation in the adopted plan was necessary to achieve the State's

objectives, applying this standard flexibly depending upon: (1) the size of the deviation contained in the plan adopted, (2) the importance of the State's interests, (3) the consistency with which the plan adopted reflects those interests, and (4) the availability of alternative plans with lower deviations that substantially vindicate those interests.

A.

At the hearing, the defendants established that in adopting the plan before this Court, the legislators were concerned about three primary state interests, namely: (1) keeping counties intact; (2) preserving the cores of existing districts; and (3) avoiding contests between incumbent members of Congress. As outlined below, the legislative record corroborates that these objectives are not *ad hoc* in nature.

1. Keeping Counties Intact

On August 3, 2011, the Senate Committee on Redistricting (the "Committee") met to originate a bill reapportioning West Virginia's three congressional districts. At that meeting, Senator Stollings moved the Committee to originate a bill containing the plan that has been called the "Initial Proposal," the "Perfect Plan," or the "Unger Plan." This plan, which I will call the Unger Plan, splits Kanawha and Harrison counties. As a result, the prevailing topic of the meeting was the idea of splitting counties. Apparently in response to or in anticipation of concern over splitting

counties, Senator and Committee Chair Unger noted that Arkansas had split counties for the first time after the 2010 census. (*See* [Doc. 40-1] at 3). Senator Barnes then questioned the exact locations of the splits of Kanawha and Harrison counties. (*Id.* at 5). Senator Boley inquired whether the Legislature was constitutionally permitted to split counties. (*Id.* at 7). Senator Hall went so far as to express concern that voting to originate the Unger Plan would indicate that the Committee endorsed dividing county lines. (*Id.*).

The next day, the Committee heard testimony from Robert M. Bastress, Jr., John W. Fisher II Professor of Law, West Virginia University College of Law ("Professor Bastress"). Senator Unger asked Professor Bastress whether a reviewing court would consider the objective less important because only West Virginia and Iowa maintain the tradition of not splitting counties. (*See* [Doc. 42-2] at 130-131). Undoubtedly, this question was posed in an effort to persuade other members of the Committee to relent from their position against splitting counties. Finally, in supporting the plan adopted, Senator Hall noted that his opinion keeping counties intact should be a legitimate justification of the variance. (*Id.* at 159-160).

2. Preserving the Cores of Existing Districts

During the August 4, 2011, meeting of the Committee, Senator Palumbo asked Professor Bastress

whether West Virginia's congressional districts had been challenged since the State lost its fourth seat. (*See* [Doc. 42-2] at 117). Professor Bastress indicated that the districts were challenged after the 1990 census but upheld in *Stone v. Hechler,* 782 F.Supp. 1116 (N.D. W.Va. 1992) based in part upon the State's objective of preserving the cores of previous districts. (*Id.* at 117-118). Senator Palumbo then confirmed that the law on redistricting had not substantially changed in the intervening 20 years. (*Id.* at 118-119).

During the same meeting, Senator Foster asked Professor Bastress whether other state legislatures had adopted congressional reapportionment plans that required major shifts in population among districts. (*See* [Doc. 42-2] at 132-134). This question reflects either that Senator Foster was concerned about adopting a plan that would require substantial shifts in population or that Senator Foster was attempting to persuade other members of the Committee that avoiding those shifts in population was an insufficient justification for adopting a plan with a variance in population. Finally, in proposing the plan adopted, Senator Barnes noted that his plan preserved the cores of the previous districts; Senator Miller agreed. (*Id.* at 162-163).

3. Avoiding Incumbency Contests

Before hearing testimony from Professor Bastress on August 4, 2011, Senator Unger addressed an apparent concern within the Committee of selecting a

plan that would create a contest between incumbents. First, Senator Unger noted that the Constitution of the United States does not require a member of the United States House of Representatives to reside within the district he or she represents. (*See* [Doc. 42-2] at 113-114). Senator Unger then explained that Congressman Allen West of Florida represents a district in which he does not reside. (*Id.*).

Upon hearing testimony from Professor Bastress, Senator Unger asked whether incumbency protection was a priority in congressional redistricting. (*Id.* at 135). Professor Bastress responded that protecting incumbents was a legitimate and valid objective. (*Id.*). Senator Hall then indicated that he considered asking the same question. (*Id.*). Finally, Senator Foster asked Professor Bastress how common it was for a representative to reside outside the district he or she represents, stating that he assumed it was rare. (*Id.* at 136-137). Professor Bastress admitted that it was not common because "it's harder to get elected if you don't live in that district." (*Id.* at 137).

B.

Having identified the interests considered by the State, I will determine whether the population deviation in the adopted plan was necessary to achieve the State's objectives, applying this standard flexibly depending upon the four factors articulated in *Karcher*.

1. Size of Deviation

The variance in this case is a **minor** variance. In *West Virginia Civil Liberties Union v. Rockefeller,* 336 F.Supp. 395 (S.D. W.Va. 1972), cited by the *Karcher* Court as involving a "minor" variance, the population deviation was 0.7888%. The deviation in the plan under scrutiny in this case is 0.7886%, leading to the inescapable conclusion that the deviation in this plan is also "minor."

Despite this clear guidance, the majority concludes that the deviation at issue is significant. In reaching this conclusion, the majority argues that since *Karcher,* there has been (1) an improvement in the redistricting software used by state legislatures and (2) a national trend toward population equality. This Judge finds neither basis proper nor persuasive. The first basis necessarily assumes that the current Court would depart from the *Karcher* Court's characterization of a minor variance. However, we lower court judges live in the present and should abstain from offering predictions of how the current configuration of the Court may adjust its previous decisions in light of technological advancements. Instead, I have more properly applied the law as it stands. The second basis completely ignores the *Karcher* Court's admonition that these types of challenges should be considered on a case by case basis. *See Karcher,* 462 U.S. at 741.

2. Importance of State's Interests

Taken together, there can be no question that the objectives considered by the Legislature are not only legitimate but of great importance. With respect to keeping counties intact, the Court notes that Article I, § 4 of the Constitution of West Virginia requires that congressional districts "shall be formed of contiguous counties. . . ." This evidences a state policy of maintaining county boundaries. *See Stone,* 782 F.Supp. at 1123 (recognizing a "West Virginia constitutional requirement that districts be drawn with adherence to county lines"). Furthermore, the State has never before broken county lines in establishing Congressional districts. While *Karcher* admittedly speaks in terms of municipal boundaries, *Reynolds v. Sims, supra,* cited by the Court in *Karcher* speaks in terms of the boundaries of political subdivisions. In fact, the Court in *Abrams v. Johnson,* 521 U.S. 74, 99-100 (1997), explicitly recognized that a State's choice not to split counties which represent communities of interest is a legitimate justification under *Karcher.* As such, the majority's crystal ball moment in which it predicts that the current Court would likely drop respecting municipal boundaries as a legitimate justification if read to include county lines is inexplicable, though such creative tweaking of *Karcher* accurately foreshadows the route the majority travels to reach its unprecedented decision.

Maintaining the cores of existing districts is also a valid consideration in congressional redistricting per *Karcher. See also Turner v. State of Arkansas,* 784

F.Supp. 585, 588-89 (E.D. Ark. 1991) (recognizing causing the fewest changes in the location of counties and people as "two key legitimate legislative objectives" under *Karcher*). This is more than merely following the status quo. There are valid policy reasons. Keeping the existing districts intact allows the public to know their elected representatives and allows the representative to know his or her district, its problems and needs. In addition, local entities may have been working with their representative on projects to better the district. If that local entity is then shifted to another district, the result may be a loss or delay in the project.

Finally, the avoidance of pitting incumbent representatives against one another is a valid interest per *Karcher*. The majority affords little deference to this objective, perhaps because the Constitution of the United States does not require a person to reside in the district he or she represents. However, such a view entirely ignores the political reality that voters will rarely elect a person to the United States House of Representatives who does not reside in their congressional district.

3. Consistency between State's Interests and Plan Adopted

Turning to the plan which was adopted by the State, sometimes referred to as the "Barnes Amendment," the evidence shows that the State's interests

are consistently reflected. No county lines were compromised, it only shifted 1.5% of the population to another district, and it did not pit any incumbents against each other.

Adding to this consistency, there is no evidence that the State's objectives were pretextual. In fact, this Judge was greatly impressed by the Legislature's efforts to address its redistricting duties in a non-partisan manner. The testimony presented and the results achieved confirm that in choosing the Barnes Amendment, no effort was made to skew election results or to provide any competitive advantage to either party. The West Virginia Legislature is overwhelmingly controlled by the Democratic Party. The members nevertheless chose to ignore that voting power and approve an amendment offered by a Republican.

This bipartisan attitude is also reflected in the final vote tallies on the plan, which passed the State Senate 31-1 and the House of Delegates 90-5. When one considers that these legislative bodies speak for the people of West Virginia, this Court should be hesitant to thwart that will, especially where the State has advanced legitimate reasons for the minor variance from perfect equality.

4. Adequacy of Available Alternatives

The evidence shows that none of the other eight plans presented at the hearing would have substantially vindicated the State's interests while adhering more closely to population equality.

None of the plans considered by the Committee or on the Senate floor is an adequate alternative. The Unger Plan has a variance of 0.00%, but splits counties, moves over 34% of the population from one district to another, and pits incumbents against one another. The plan referred to as "Prezioso No. 1," advanced on behalf of the Democratic Congressional Campaign Committee, has a variance of 1.22%, moves 8% of the population from one district to another, but creates no incumbent contests. The plan called "Prezioso No. 2," also advanced on behalf of the Democratic Congressional Campaign Committee, has a variance of 0.44%, moves 8% of the population from one district to another, but creates no incumbent contests. The Facemire Plan has a variance of 0.42%, moves 38.5% of the population from one district to another, and pits incumbents against one another. The Snyder Floor Amendment has a variance of 0.39%, moves 6.7% of the population from one district to another, and does not pit incumbents against one another.

Likewise, none of the Cooper plans is an adequate alternative. "Cooper No. 1" has a variance of 0.09%, moves 43.8% of the population from one district to another, and pits incumbents against one

another. "Cooper No. 2" has a variance of 0.06%, moves approximately 45% of the population from one district to another, and pits incumbents against one another. "Cooper No. 3" has a variance of 0.04%, moves over 40% of the population from one district to another, and does not pit incumbents against one another. Even "Cooper No. 4," which was developed during the course of this litigation and not considered by the Legislature, has a variance of virtually 0.00%, but splits Taylor County, moves one-third of the population from one district to another, and does not pit incumbents against one another.

In comparison, the adopted Barnes Amendment plan has a variance of 0.7886%, moves only 1.5% of the population from one district to another, does not split counties, and does not pit incumbents against one another. As such, a comparison of the adopted plan with the others under consideration clearly shows that the Legislature's exercise of discretion in selecting this plan is beyond reproach. In holding otherwise, the majority has ignored the Court's admonition in *Abrams* that "[t]he task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies." 521 U.S. at 101. Therefore, I believe that variance in the plan adopted was necessary to achieve the State's objectives, applying this standard flexibly after consideration of the four factors articulated in *Karcher*. Accordingly, I would conclude that the State has violated neither Article I,

§ 2 of the Constitution of the United States nor Article I, § 4 of the Constitution of West Virginia.[1]

III.

In reaching the compactness issue, this Judge will also not find fault with the compactness of the adopted plan. In *Stone,* the Court found the second congressional district to be sufficiently compact:

> After reviewing the experts' calculations and considering the floor debate and record evidence, we have come to the view that Plan II follows the West Virginia constitutional dictate that districts be compact. The West Virginia Constitution does not define compactness but imposes upon the State Legislature the obligation to consider it is a principal fact in apportioning congressional districts. The Legislature was aware both of the state constitutional requirement and the effect of compactness in the federal

[1] The majority criticizes the Legislature for failing to consider other possible "perfect equality" plans. While all agreed that other such plans were possible, they also agreed that it was not possible without splitting counties. Given the bona fide interest in maintaining county lines, this Judge cannot fault the Legislature for not examining more deficient plans. Thus, given that the Legislature will have to now split counties to satisfy the demands of the majority of this Court in direct contravention of *Karcher,* this Judge would suggest that people be moved to the first and third congressional districts from the westerly end of the second district. Such a result would have the effect of satisfying all of the concerns expressed by the Legislature (other than splitting of counties).

> constitutional equation. We think it has been adequately demonstrated that each legislative body kept the concept of compactness as a principal goal of its redistricting efforts and did this primarily in pursuit of fulfilling its State constitutional obligations. The fact that there were other Plans that would be deemed more compact than Plan II under the three tests employed by the experts does not detract from the Legislature's effort. In the legislative view, the districts in Plan II were compact as the Legislature viewed that requirement under the West Virginia Constitution, and in weighing that and other legitimate goals it was acting preeminently in a role reserved to a state legislature by the United States Supreme Court.

782 F.Supp. at 1127-28 (internal citations omitted).

This Judge is of the opinion that the Court in *Stone* properly deferred to the Legislature's view of the State constitutional requirement of compactness. Applying the same approach here, there can be no question that removing the most westerly end of the district certainly increases the compactness of the district, at least from the layman's view. Accordingly, I would conclude that the second congressional district is compact as required by Article I, § 4 of the Constitution of West Virginia.

For the reasons stated above, I respectfully dissent from the majority's decision.

The Clerk is directed to transmit copies of this Dissenting Opinion to all counsel of record herein.

DATED: January 3, 2012.

/s/ John Preston Bailey
JOHN PRESTON BAILEY
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

JEFFERSON COUNTY COMMISSION; PATRICIA NOLAND, ***as an individual and behalf of all others similarly situated;*** **and DALE MANUEL,** ***as an individual and behalf of all others similarly situated,***

Plaintiffs, and

THORNTON COOPER,

Intervening Plaintiff,

v.

NATALIE E. TENNANT, ***in her capacity as the Secretary of State;*** **EARL RAY TOMBLIN,** ***in his capacity as the Chief Executive Officer of the State of West Virginia;*** **JEFFREY KESSLER,** ***in his capacity as the Acting President of the Senate of the West Virginia Legislature;*** **and RICHARD THOMPSON,** ***in his capacity as the Speaker of the House of Delegates of the West Virginia Legislature,***

Defendants.

Civil Action No. 2:11-CV-989 (KING, BAILEY, BERGER)

NOTICE OF APPEAL

(Filed Jan. 27, 2012)

Notice is hereby given that Defendants, Natalie E. Tennant, in her capacity as the Secretary of State West Virginia; Earl Ray Tomblin, in his capacity as the Chief Executive Officer of the State of West Virginia; Jeffrey Kessler, in his capacity as the President of the Senate of the West Virginia Legislature; and Richard Thompson, in his capacity as the Speaker of the House of Delegates of the West Virginia Legislature, by their respective undersigned Counsel, hereby appeal to the Supreme Court of the United Sates, pursuant to 28 U.S.C. § 1253 from this Court's Memorandum Opinion and Order Dated January 3, 2012 [Doc. 65], as amended January 4, 2012 [Docs. 67, 68], and further modified by Order Denying Defendants' Emergency Motion for a Stay of Judgment Pending Appeal [Doc. 74].

Senate President Kessler and House Speaker Thompson hereby appeal the aforesaid orders in their entirety. Governor Tomblin and Secretary Tennant join in this appeal insofar as it seeks reversal of the interim remedy imposed by Majority.[1]

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[1] Governor Tomblin joined in the Emergency Motion to Stay before the three-judge panel and the Emergency Application for Stay submitted to the Chief Justice of the United States insofar as they sought reversal of the interim remedies imposed by the Majority. On January 20, 2012, the Supreme Court of the United States entered an Order granting the stay. [Doc. 78] Governor Tomblin joins in the appeal insofar as it seeks reversal of the

(Continued on following page)

RICHARD THOMPSON, in his capacity as the Speaker of the West Virginia House of Delegates

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interim remedy imposed by the Majority. Governor Tomblin, however, takes no position on the constitutionality of Senate Bill 1008 and will not join the appeal on that basis. Secretary Tennant joined in the two previous requests for a stay and joins in this appeal insofar as it seeks reversal of the interim remedy imposed by Majority. Secretary Tennant, however, remains neutral on the merits of the constitutionality of Senate Bill 1008 case and does not join in an appeal on that basis. The stay and the question of the remedy will resolve election conduct procedural issues – which is the Secretary's responsibility – while the appeal will decide the legal issues – which are not her responsibility.

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[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

JEFFERSON COUNTY COMMISSION; PATRICIA NOLAND, as an individual and on behalf of all others similarly situated; and DALE MANUEL, as an individual and on behalf of all others similarly situated,

Plaintiffs, and

THORNTON COOPER,

Intervening Plaintiff,

v.

NATALIE E. TENNANT, in her capacity as the Secretary of State; EARL RAY TOMBLIN, in his capacity as the Chief Executive Officer of the State of West Virginia; JEFFREY KESSLER, in his capacity as the Acting President of the Senate of the West Virginia Legislature; and RICHARD THOMPSON, in his capacity as the Speaker of the House of Delegates of the West Virginia Legislature,

Defendants.

Civil Action No. 2:11-CV-0989

ORDER DENYING DEFENDANTS' EMERGENCY MOTION FOR STAY OF JUDGMENT PENDING APPEAL

(Filed Jan. 10, 2012)

Before the Court is the Defendants' "Emergency Motion for Stay of Judgment Pending Appeal" (the "Motion"), filed January 6, 2012. The Motion, made pursuant to Federal Rule of Civil Procedure 62(c), requests a stay of the January 3, 2012 Order (the "Order"), incorporated within the Memorandum Opinion superseded by Order of Amendment entered the following day, that declared West Virginia Code section 1-2-3 unconstitutional and permanently enjoined the statute's enforcement. By their Response filed January 9, 2012, the Plaintiffs oppose the Defendants' request for a stay.[1]

---

[1] The Plaintiffs have reminded us of Governor Tomblin's previous stipulation "that the issues in the instant case may be resolved and that he will bound by the results of the instant case without his further participation in briefing, argument, or submitting evidence or testimony." Statement, Motion, and Stipulation by West Virginia Governor Earl Ray Tomblin Regarding Joint Statement of Disputed and Undisputed Facts, Briefing, and Testimony at ¶ 2; *see* Response at 2-3. Secretary Tennant submitted a virtually identical stipulation, and, according to the Plaintiffs, she has issued through her website a public statement to the effect that her Office "accepts the determination that the [apportionment] process did not produce a constitutional result." *Id.* at 3-4 (citation omitted). The Plaintiffs theorize that the Governor and Secretary of State have therefore waived the right to further contest the Court's injunction against enforcement of section 1-2-3, and, concomitantly,

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The Defendants intend to seek review of the Order in the Supreme Court of the United States. Toward that end, they request that the Order be suspended pending appeal, particularly insofar as it would implement an interim plan for congressional apportionment supplanting section 1-2-3 in the event that the State of West Virginia declines to enact or present for our consideration, on or before January 17, 2012, an alternative that satisfies the requirements of the Constitution. In ruling upon the Motion, we are bound to evaluate:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
>
> (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

With respect to the merits, the Defendants will be charged on appeal with persuading the Supreme Court that the State's enacted variance of 0.79% remains substantively tolerable in a national environment where variances much closer to true zero are

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that Speaker Thompson and President Kessler, who are not responsible for the statute's enforcement, lack standing in their own right to seek a stay. Although the Plaintiffs make an interesting point, we are content to dispose of the Motion on its merits as to all Defendants.

the norm. Beyond that substantial hurdle, however, the Defendants will have to convince the Court that the Legislature, which made no findings attempting to justify the variance, was entitled to neglect its procedural responsibility in the face of clear Court precedent obliging it to demonstrate that "a particular objective required the specific deviations in its plan, rather than simply relying on general assertions." *Karcher v. Daggett,* 462 U.S. 725, 741 (1983).

At trial, his counsel candidly expressed Speaker Thompson's position that "*Karcher* was a bad idea . . . we think Justice White got it right in the dissent." Transcript of Proceedings of December 28, 2011, at 43. Among the Defendants, President Kessler evidently agrees with Speaker Thompson's assessment of the Supreme Court's decision, as they forecast that their appeal will be "based upon their judgment that [the Order] is incorrect on the merits." Memorandum in Support of Emergency Motion for Stay ("Memorandum") at 3. On the other hand, Governor Tomblin and Secretary Tennant represent that they will participate in the appeal only "insofar as it seeks reversal of the interim remedy" described above, i.e., the potential imposition of an interim apportionment plan on or after January 17, 2012. *Id.* at 3 n.1. In particular, Secretary Tennant "remains neutral on the merits of the constitutionality" of section 1-2-3 "and will not join in on an appeal on that basis." *Id.*

As an Article III court, of course, we are obliged to ply our trade within the realm of the "what is" and not venture into the "what-ought-to-be." Although the

Supreme Court could concur in Speaker Thompson's endorsement of Justice White's position nearly thirty years after the fact and ultimately overrule *Karcher,* we would hardly characterize counsel's hopeful musings to that effect as the "strong showing" required to justify a stay.

Nonetheless, we are acutely sensitive that "'legislative apportionment plans created by the legislature are to be preferred to judicially constructed plans.'" Memorandum at 7 (quoting *Karcher v. Daggett,* 455 U.S. 1303, 1307 (Brennan, Circuit Justice 1982) (granting stay pending appeal)). Indeed, we have attempted to faithfully apply that precept by affording the State a reasonable time to fashion a substitute for section 1-2-3, and by providing for the State to smoothly and expeditiously supersede any judicially imposed plan with a constitutional plan of its own making. *See* Order at 31-32 (emphasizing that "we are loath to devise on our own a redistricting plan for the State of West Virginia").

By establishing an initial two-week window for corrective action on a redistricting plan, we hoped to facilitate the State's implementation of a plan that Secretary Tennant could administer within the existing statutory framework. *See, e.g.,* W. Va. Code § 3-5-7(c) (requiring that certificates of announcement by congressional candidates be filed "not later than the last Saturday in January next preceding the primary election day"); *id.* § 3-5-9 (mandating that Secretary certify candidates "[b]y the eighty-fourth day next preceding the day fixed for the primary election").

The filing of an appeal by the Defendants likely makes it more difficult (or even impossible) for Secretary Tennant, county officials, and potential candidates for Congress to comply with the current deadlines, but that is a choice reserved for the State, which certainly has the ability to modify those deadlines in aid of its litigation strategy.

Put succinctly, the decision to appeal appears to manifest the Defendants' determination that the State's congressional elections may be procedurally bifurcated from those contesting other offices and efficiently administered in a more fluid manner. In light of the Defendants' display of confidence, we no longer perceive any pressing need, in the absence of State action, to impose a remedy by a specified time. Therefore, reiterating our strong preference that the State act on its own behalf in redistricting, we shall defer any and all action with respect to a remedy until after the Supreme Court has disposed of the Defendants' forthcoming appeal. The State, however, continues to be enjoined from conducting its 2012 congressional elections pursuant to section 1-2-3 as currently enacted.[2]

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[2] Judicial comity also weighs in favor of suspending further action while the matter is pending appeal. An appeal generally "divests the district court of control of those aspects of the case involved in the appeal." *Marrese v. Am. Acad. of Orthopaedic Surgeons,* 470 U.S. 373, 379 (1985); *cf. United States v. Christy,* 3 F.3d 765, 767-68 (4th Cir. 1993) (" '[It is] generally understood that a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously.' ")

(Continued on following page)

By our decision to further defer imposition of a remedy, the Defendants will suffer no irreparable injury. The Supreme Court may reject their appeal, after which we expect the State to enact a constitutional plan. Or the Court may accept the appeal and ultimately vacate our Order, which may have the effect of reinstating current section 1-2-3. In either event, Secretary Tennant will no doubt have endured a certain amount of aggravation and inconvenience from having to accommodate and implement a plan on relatively short notice. That injury, though unfortunate, has not been shown irreparable as of today, almost four full months prior to the primary election scheduled for May 8, 2012. As a matter of fact, the Plaintiffs have convincingly demonstrated to the contrary through the submission with their Response of two alternative plans, apparently generated by the State's Redistricting Office within the past few days. Each of these alternatives presents a near-zero variance equivalent to the so-called "Perfect Plan," and each thus appears to satisfy the "one person, one vote" mandate of *Karcher,* while also accommodating

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(quoting *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 58 (1982)). Though we possess the putative authority to "suspend, modify, restore, or grant an injunction on terms . . . that secure the opposing party's rights," Fed. R. Civ. P. 62(c), we are nevertheless not empowered "to adjudicate anew the merits of the case." *Natural Res. Def. Council, Inc. v. Southwest Marine, Inc.,* 242 F.3d 1163, 1166 (9th Cir. 2001). Consequently, "any action taken pursuant to Rule 62(c) may not materially alter the status of the case on appeal." *Id.* (citation and internal quotation marks omitted).

many of the State's non-constitutional political concerns. *See* Response at 5-6.

Although a final remedy is forestalled, the continuing injunction against current section 1-2-3 reemphasizes the vindication of the Plaintiffs' (and the Intervening Plaintiff's) rights and helps to ameliorate any injury they and the citizens of West Virginia may suffer by virtue of the delay occasioned by the Defendants' decision to pursue an appeal.[3] Through ensuring, on the Plaintiffs' behalf, that West Virginia's 2012 congressional elections are not conducted pursuant to a constitutionally defective apportionment plan, and at the same time accommodating to the fullest extent possible the Defendants' (and the Court's) desire that any substitute plan be of State origin, the public interest is thereby also served. In view of all the circumstances, we are persuaded to exercise our discretion in favor of DENYING the Defendants' Motion, but the Order is MODIFIED as aforesaid.

It is so ORDERED.[4]

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[3] *See* Response by Thornton Cooper in Opposition to Motion for Stay at 5 (maintaining that "Mr. Cooper, as a voter, will be harmed if either the 2001 or the 2011 congressional redistricting plan is allowed to be used").

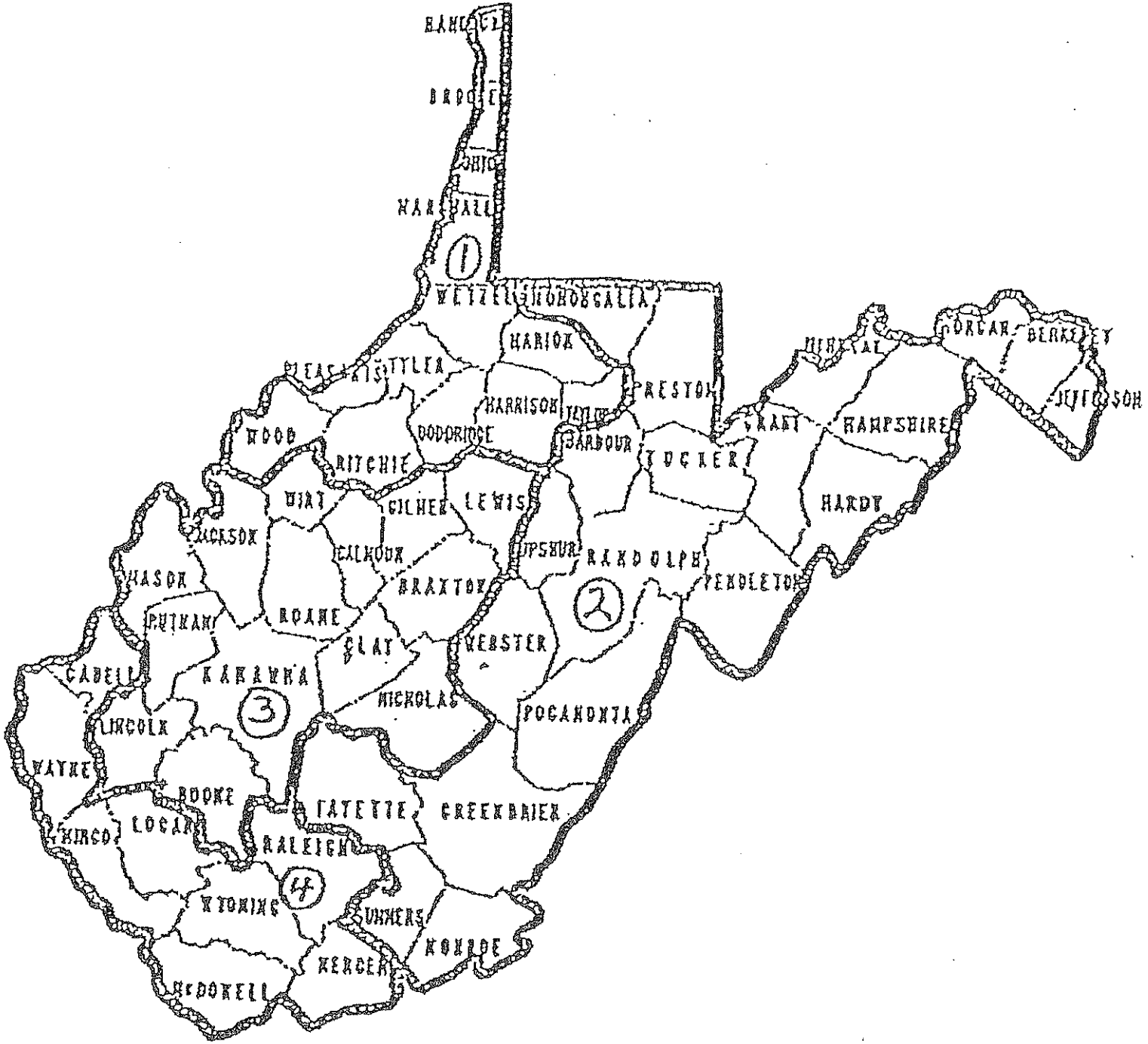
[4] This order, in the same fashion as the one to be appealed, is entered by a majority of this three-judge Court. Our distinguished friend Judge Bailey, having dissented from entry of the Order awarding the Plaintiffs declaratory relief, would grant the Motion and stay that Order.

DATED: January 10, 2012.

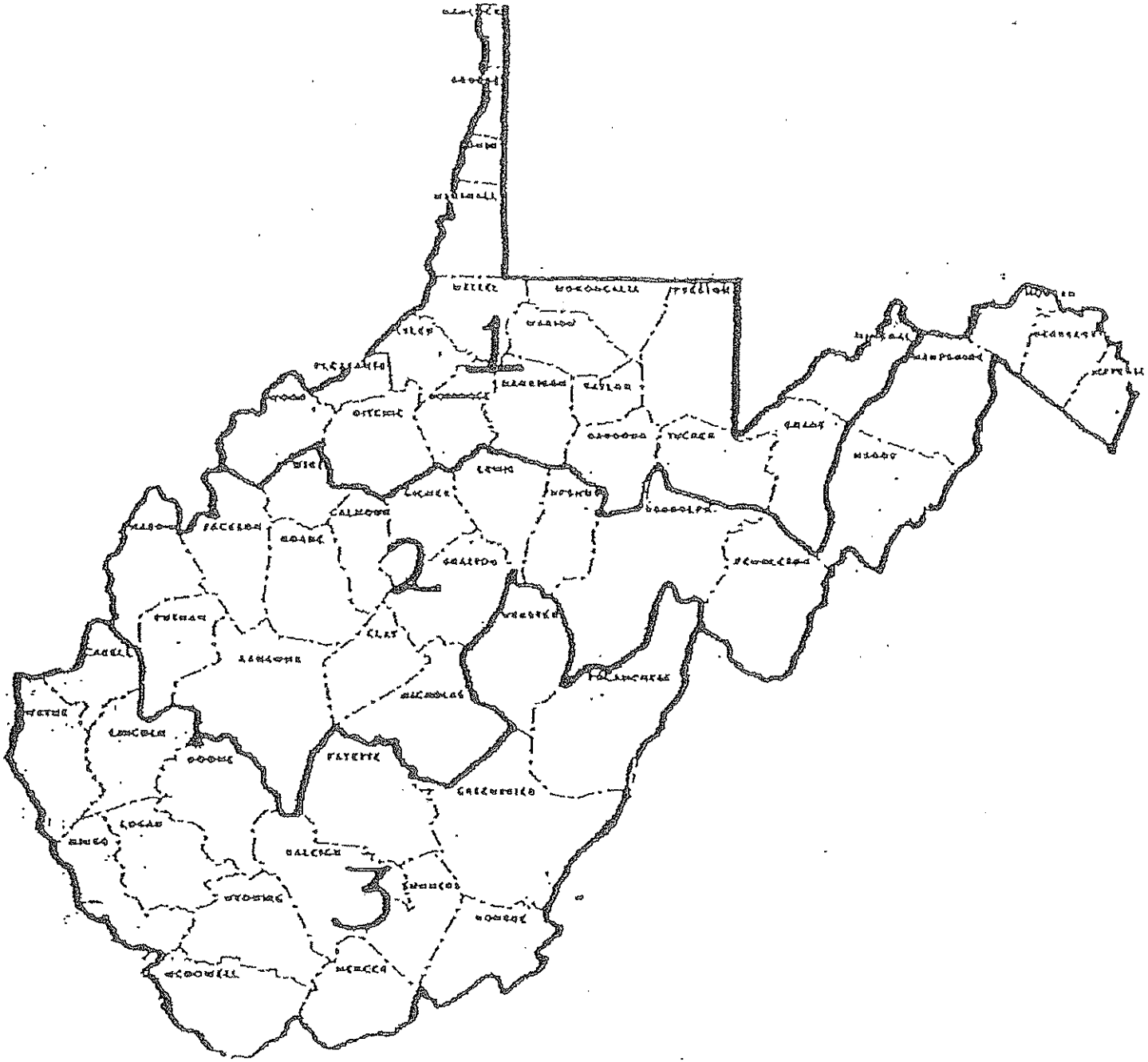
/s/ Robert B. King
ROBERT B. KING
United States Circuit Judge

/s/ Irene C. Berger
IRENE C. BERGER
United States District Judge

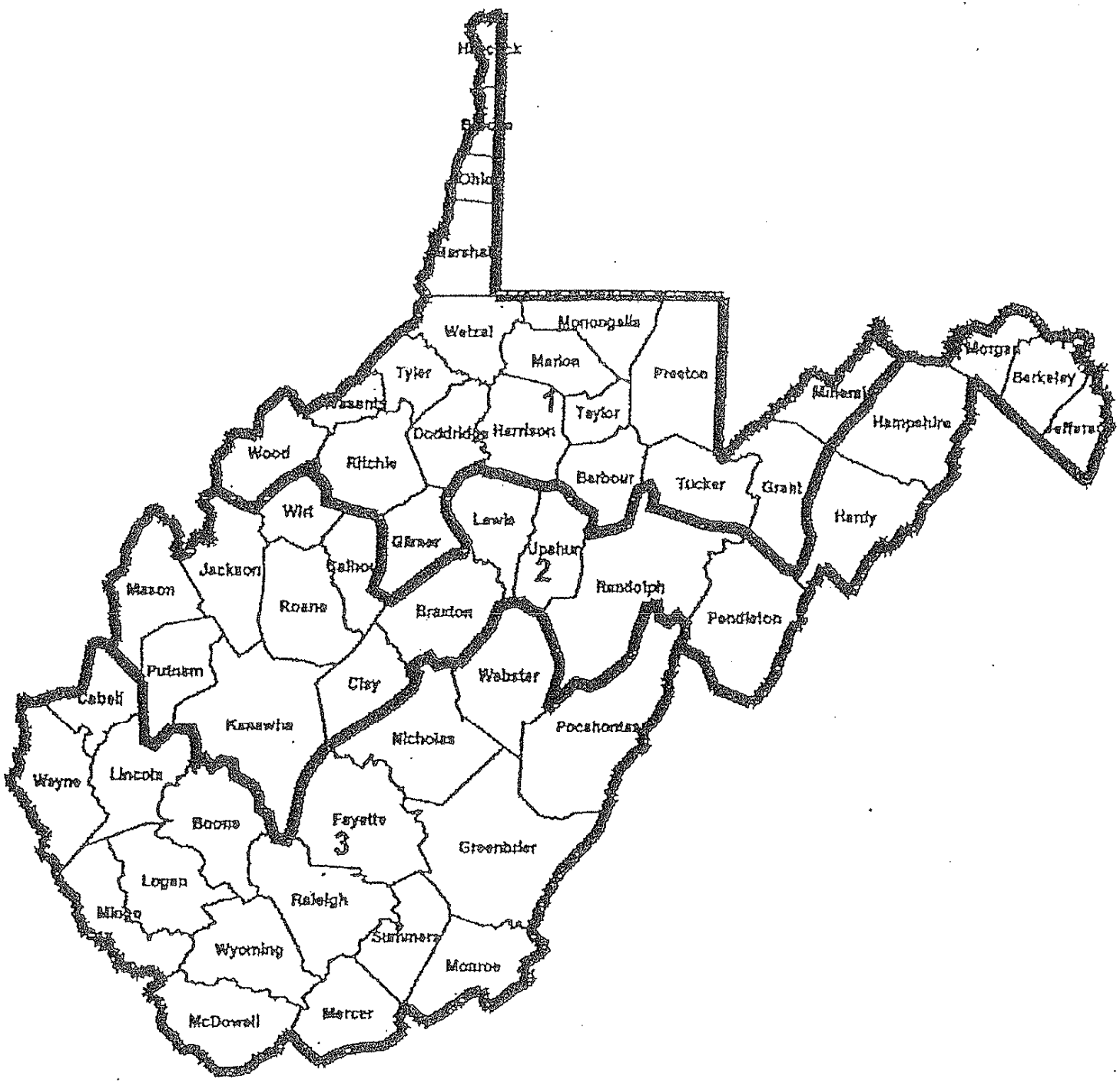
Defendants' Hearing Exhibit 3
1982 West Virginia Congressional District Map



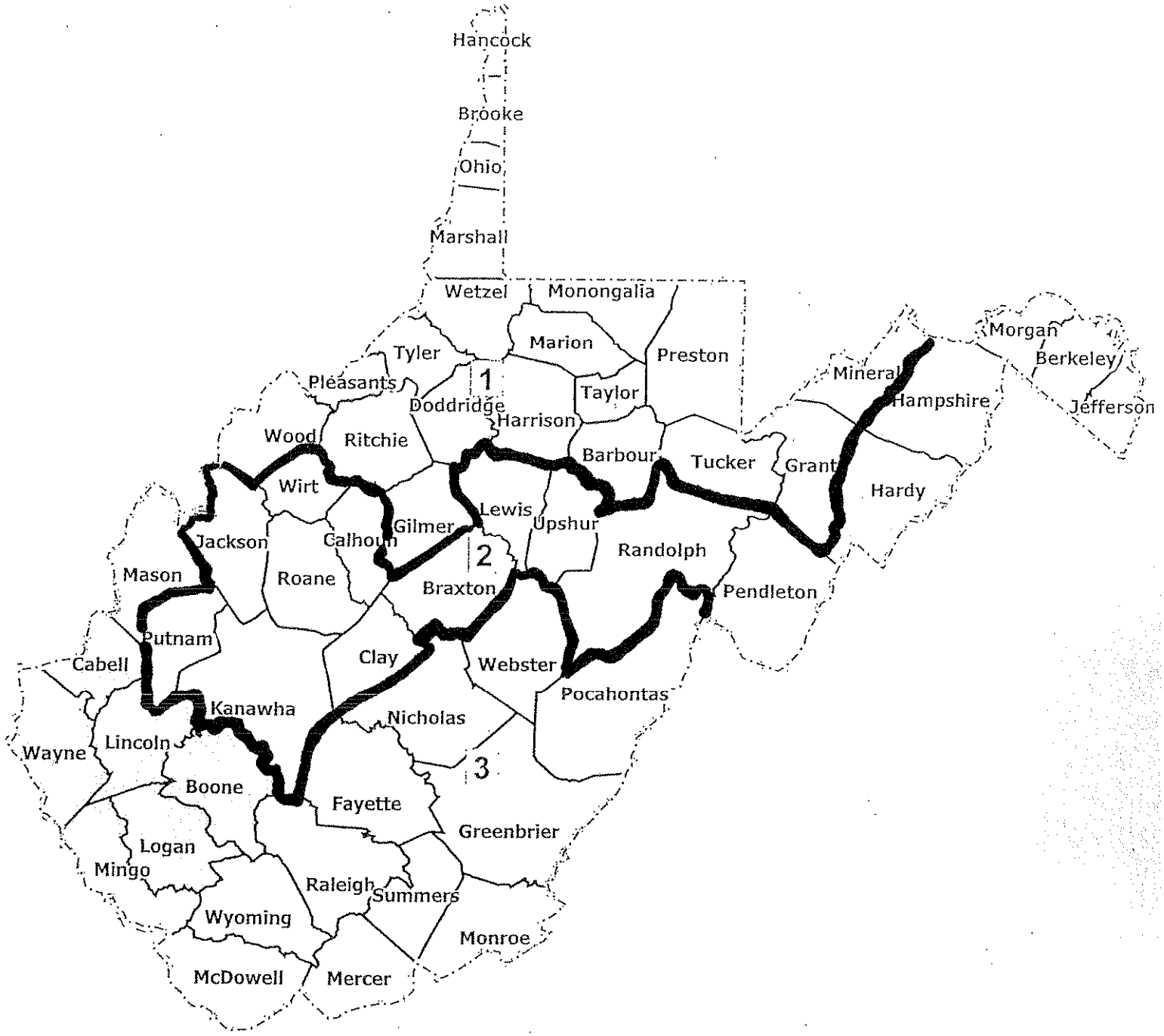
Defendants' Hearing Exhibit 4
1991 West Virginia Congressional District Map



Defendants' Hearing Exhibit 5
2001 West Virginia Congressional District Map



Defendants' Hearing Exhibit 22
2011 West Virginia Congressional District Map



Defendants' Hearing Exhibit 28

	Snyder (floor)	Adopted	Zero Variance	Facemire	Prezioso 1	Prezioso 2	Cooper 1	Cooper 2	Cooper 3	Cooper 4
Counties Split	0	0	2	0	0	0	0	0	0	1
Number of Counties moved	7	1	19	20	9	9	23	20	21	22
State-wide Percertage of Counties moved	12.7%	1.8%	34.5%	36.4%	16.4%	16.4%	41.8%	36.4%	38.1%	40%
Number of Residents moved	124,468	27,324	636,187	717,837	143,605	140,297	813,363	949,065	746,732	709,747
State-wide Percertage of Residents moved	6.7%	1.5%	34.3%	38.7%	7.7%	7.6%	43.9%	51.2%	42.1%	38.30%
Incumbents Placed in Same District	No	No	Yes	Yes	No	No	Yes	Yes	No	No
Relative overall Population Range	0.39%	0.79%	0.00%	0.42%	1.22%	0.44%	0.09%	0.06%	0.04%	n/a