
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**

**OPPOSITION TO MOTION
TO DISMISS OR AFFIRM**

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STATEMENT

Appellees attempt to characterize West Virginia's congressional redistricting process as a haphazard, rushed proceeding motivated solely by a desire to conclude the redistricting process. (Motion 1-3) Appellees' Statement with its selective citations from the record is incomplete and misleading.

S.B. 1008 was adopted after a careful and considered process that predated the legislative session. The Legislature's permanent, professionally staffed redistricting office provided support. (Doc-42, p.9; Doc-54, p.15) Legislators were considering potential congressional redistricting plans over a year prior to the enactment of S.B. 1008 – even before receipt of final census data. (Tr., 166-67) In March 2011, redistricting committees were created in both houses of the Legislature. (Doc-42, p.9) Over the summer, twelve public hearings were held throughout the state and attended by members of the Legislature and the public. (Tr., 196-97) Both houses set up internet web sites to exchange information with the public. (Doc-54, p.14) Before the start of the special redistricting session in August, the House Redistricting Committee held two meetings at which it heard from national and state experts regarding redistricting. (Tr., 195-96; Doc-42, p.9; Doc-54, p.15) Prior to the redistricting session, members of the Legislature and its professional staff attended seminars held by the National Conference on State Legislatures on the law related

to redistricting. (Tr., 195) The proposal that ultimately became S.B. 1008 was the subject of public discussion even before the start of the special session in August. (Tr., 167)

Appellees, based on statements made by their local senators who opposed the bill, argue that the Legislature's motivation was to finish and leave town. The debates in committee and on the floor belie the suggestion that S.B. 1008 was not carefully considered. (Doc-42-2 (committee proceedings)); (Doc-40-1 (floor proceedings)) That some members may have considered S.B. 1008 as the simplest solution does not mean that they did not believe that S.B. 1008 was in the best interests of the State. (Doc-40-1, p.190) (remarks of Senator Facemyer) Indeed, as Senator Facemyer noted, the simplicity of preserving as best as possible the existing districts serves important state interests by fostering existing relationships between members of Congress and their constituents ultimately increasing public participation in the electoral process. (Doc-40-1, pp.190-91, 194) No purpose would have been served by extending debate on a bill that had such widespread bipartisan support, in which the overwhelming Democratic majority preserved districts considered favorable to incumbent Republicans.



ARGUMENT¹

Karcher v. Daggett, 462 U.S. 725 (1983), adopted a flexible test recognizing that a state may adopt a congressional redistricting plan with avoidable population variances if it justifies the variances as necessary to achieve consistent, nondiscriminatory legislative policies. The interpretation of *Karcher* advanced by Appellees and accepted by the Majority below improperly destroys the flexibility granted by *Karcher* and replaces it with a practical requirement to avoid all or nearly all population variances.

Appellees rely heavily on relative comparisons between the 0.7886% variance in West Virginia's districts and districts in other states. (Motion at 12-13) These percentage comparisons miss the point. In the context of redistricting, these deviations – West Virginia's included – are small and insignificant.

One way to give these numbers context is to compare the intrastate district variances here with the interstate district variances resulting from the apportionment of the 535 members of the House of Representatives. The range between West Virginia's largest and smallest congressional districts (4,781 persons) pales in comparison to the interstate differences in

¹ President Kessler and Speaker Thompson (“The Legislature”) join fully in this brief. Governor Tomblin and Secretary Tennant join only in the fourth assignment of error regarding the remedy. (See J.S. 4, n.1; 12. n.4).

district size. While intrastate district variance in Appellees' example of Mississippi may be 134 persons, the interstate district variance between the average Mississippi and West Virginia congressional districts is 124,159 persons or 2,549% greater than the 4,781 person inter-district variation in West Virginia's congressional districts. See National Conference of State Legislatures, *2010 NCSL Congressional and State Legislative Redistricting Deviation Table*, <http://www.ncsl.org/legislatures-elections/redist/2010-ncsl-redistricting-deviation-table.aspx> (last visited June 2, 2012). An examination of this reference shows many other states with similar interstate variances – including districts in Virginia and Maryland that border Appellees' home county. Similar comparisons can be made with respect to state legislative districts – as some have populations as large as congressional districts. See, e.g., *id.* (Texas Senate districts with 8.04% inter-district variation which exceeds 65,000 persons).

Another way to provide context to these variances is to examine the number of registered voters in the districts.² Appellees complain their votes in congressional elections are diluted because their district has the largest population. However, an examination

² An examination of the numbers of registered voters is appropriate as the underlying inquiry is whether “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).

of the registered voters in each of the three congressional districts in S.B. 1008 shows that while Appellees' second congressional district is the largest in terms of population, it has the fewest registered voters by 12,056 persons, resulting in a percentage deviation of 2.9734%. (Doc-54, p.18)

In this context, the 0.7886% variance is not "gaping" as Appellees argue (Motion 13) or "a fairly significant deviation" as the Court below accepted. (App. 25)

1. Appellees misconstrue the first question presented. Contrary to Appellees' suggestion (Motion 14), the Legislature is not arguing that the Majority held that a 0.7886% variance could never be justified. Nor is the Legislature arguing that past approvals of similar variances mandate approval of a similar variance here. (Motion 14-15) Instead, the Legislature is arguing that the Majority below found the deviation to be a "major" deviation, and therefore imposed a burden on the State inconsistent with prior cases by requiring a "significantly more substantial" showing. (App. 25-28) The resolution of the question of whether a 0.7886% variance is now "major" as the Majority concluded (App. 28) or "minor" as the dissent noted (App. 39) is a substantial question as the *Karcher* test varies the burden with the size of the deviation. 462 U.S. at 741.

The Majority's approach is clearly contrary to the numerous cases cited by the Legislature. (J.S. 15-16)

The cases apply a less exacting burden on states to justify similarly-sized deviations and reject relative size comparisons in the context of deviations less than 1.00%. In *Skolnick v. State Electoral Bd. of Ill.*, 336 F.Supp. 839, 843 & n.2, 844, 846 (D.C.Ill. 1971), after considering four plans with 1% variance or less, the Court approved the 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.” In *Karcher* this Court cited *Skolnick* as an example of the proper rejection of “the plan with the lowest population deviation in favor of plans with slightly higher deviations that reflected consistent state policies.” 462 U.S. at 725, n.11. Similarly, in *Doulin v. White*, 535 F.Supp. 450, 452 (D.C.Ark. 1982), the Court approved a plan with a 0.78% variance, rejecting six other plans with variances as low as 0.13% after finding that the 0.65% difference between the plans was a “question of judgment.”

Appellees argue that this Court should essentially ignore decisions pre-dating *Karcher*. (Motion 15) The pre-*Karcher* authorities relied on *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), which first set forth the two-part test. *Karcher* reaffirmed the *Kirkpatrick* requirements. 462 U.S. at 731. Indeed, *Karcher* made it easier to justify variances. See *Karcher*, 462 U.S. at 779-80 (White, J., dissenting) (*Karcher* majority expanded ability of state to justify variances). Appellees do note *Turner v. State of Ark.*, 784 F.Supp. 585, 589

(E.D.Ark. 1991), which post-*Karcher* approved a 0.73% variance in the face of proposed alternatives with variances of 0.65% and 0.41%. Appellees' answer to *Turner's* application of an analysis similar to that advocated by the Dissent below is that *Turner* relied heavily on the pre-*Karcher* opinion in *Doulin, supra*. (Motion 15) Apparently this Court found no issues with *Turner's* reliance on the pre-*Karcher* precedent as *Turner* was summarily affirmed. 504 U.S. 952 (Mem.) (1992).

The Majority below imposed a greater burden to justify similarly sized deviations. The Majority explicitly applied its enhanced burden based on a trend towards 0.00% variance plans and the availability of new computers. (App. 26-27) Appellees, however, do not embrace the Majority's "times . . . they are a-changing" (App. 27) justification for enhancing the standard. Instead, they attempt to distinguish the cases cited by the Legislature by arguing that every case is supposedly different. (Motion 15-16) Notably, Appellees do not identify anything about the districts created by S.B. 1008 that would support applying the Majority's enhanced burden for a similarly sized deviation.

Faced with *Karcher's* two citations to *West Virginia Civil Liberties Union v. Rockefeller*, 336 F.Supp. 395 (S.D.W.Va. 1972), see 462 U.S. at 740-41 (0.78% deviation 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*), Appellees

argue that the citation was “an example of one court taking the general approach this Court was then laying out.” (Motion 15)

Whether or not *Karcher*’s two citations to *Rockefeller* (and one citation to *Skolnick, supra*) amount to an express approval of their holdings, the general approach taken by the Majority here in requiring the State to meet its changed times enhanced standard is certainly inconsistent with the “general approach” taken by the courts in *Rockefeller* and *Skolnick* noted with approval in *Karcher*. Whether the times have indeed changed such that a 0.7886% variance now presents a major deviation supporting the Majority’s correspondingly greater burden for justification under *Karcher* is a substantial constitutional question worthy of full review by this Court.

2. Redistricting by its very nature involves balancing and tradeoffs. *Abrams v. Johnson*, 521 U.S. 74, 101 (1997) (redistricting involves “balancing the myriad factors and traditions in legitimate districting policies”); *Perry v. Perez*, 132 S.Ct. 934, 941 (2012) (per curiam) (difficult to “defin[e] 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.”). The second prong of the *Karcher* analysis requires balancing avoidable population deviations against nondiscriminatory state interests. 462 U.S. at 740. Indeed, *Karcher* recognized that deference to legitimate “state legislative policies” is appropriate even if it results in “small differences

in the population of congressional districts.” *Id.* Deference is appropriate as the state political bodies are best able to balance these competing goals. *Abrams*, 521 U.S. at 101; *Perry*, 132 S.Ct. at 941.

Requiring proof of “why pursuing each of its asserted objectives necessitated some portion of the population variances” (Motion 23) is inconsistent with giving deference to balancing conducted by a state. Because the Legislature sought to balance the variances against its goals of avoiding splitting counties, preserving district cores, *and* avoiding incumbent conflicts, it is the entire deviation that is necessitated by the legislative objectives here.

Proof that none of the other plans considered met the Legislature’s legitimate goals with a smaller population deviation *is a specific showing* under *Karcher* that the objectives required the specific deviations in its plan. That no one has proposed a plan before or after S.B. 1008’s adoption that met all the Legislature’s legitimate goals with a smaller population deviation is strong evidence that the Legislature’s objectives required the specific deviations in its plan. Focusing on this evidence does not shift the burden to the Appellees. *Karcher* requires a state to show that the state’s explanations supported the deviations. *Larios v. Cox*, 300 F.Supp.2d 1320, 1355 (N.D.Ga. 2004). The evidence presented met this test. That Appellees have no evidence that the justifications were pretextual, discriminatory, or inconsistently applied is not a shifting of the burden.

Appellees argue there were available alternatives that might substantially vindicate the State's interests yet approximate population equality more closely. (Motion 23) It is possible to shave 3,197 persons from a county on the border of S.B. 1008's Second District and move them to the other two districts to remove the variance. The Dissent proposed one alternative. (App. 45, n.1) Appellees described another. (Motion 23-24) The Legislature, however, expressly considered and rejected a similar proposal in spite of the fact that it would have immunized S.B. 1008 from this challenge. (Tr., 252-53)

Karcher merely requires consideration of these potential "alternatives" as one non-determinative factor. *Karcher*, 462 U.S. at 741. The determination that, on balance, it was better to have a 0.7886% deviation than split a county between two or three congressional districts is consistent with *Karcher*, for as Appellees acknowledge (Motion 20), the *Kirkpatrick/Karcher* test does not require the state to produce the "best" plan. *See also Karcher*, 462 U.S. at 741, n.11 (courts "have often . . . rejected the plan with the lowest population deviation in favor of plans with slightly higher deviations that reflected consistent state policies" (*citing Rockefeller*)). The decision to reject these alternatives is entitled to deference. *Perry, supra; Abrams, supra*.

Finally, the burden Appellees seek to impose on states will essentially overrule *Karcher's* explicit holding that minor variances can be justified. If one does not care about intrastate boundaries, it is most

always possible to create an alternative plan with a zero variance by shifting small numbers of citizens. Such a result, however, would hardly be perfect; instead it would upset the State's 150-year tradition of keeping counties intact within congressional districts.

3. Appellees contend that the Legislature's argument below was that the deviation was justified by preserving the cores of existing districts rather than keeping current districts as intact as possible. (Motion 25-26) This is a blatant misrepresentation of the record. The Legislature consistently equated the two concepts consistent with the judicial approval of this approach (and the forerunner of S.B. 1008's districts) in *Stone v. Hechler*, 782 F.Supp. 1116 (N.D.W.Va. 1992).

Reviewing the record cited by Appellees betrays Appellees' misrepresentations. In every reference by the Legislature to preservation of the core, the references are made in the context of describing West Virginia's consistent policy of keeping the current districts as intact as possible. For example, one of the Appellees' citations contains multiple references (including actual testimony from the legislative record) equating core preservation with the state's historic policy of making the smallest changes possible. (Doc-42, p.11) The other cited pages (and the pages that follow) all contain similar references. Indeed, the Legislature's brief cited (Doc-42, p.28) *Stone, supra*, which expressly deferred to the 1991 West Virginia Legislature's determination "that preserving district cores means keeping as many of the current congressional districts intact as possible." 782 F.Supp. at 1127.

At trial, the Legislature consistently advanced the argument that the intent behind S.B. 1008 was to preserve the cores of the prior districts by keeping the current districts as intact as possible. Appellees' transcript citation makes clear that the argument being made in support of S.B. 1008 was that under *Stone*, the Court should defer to the legislative definition of core presentation. (Tr., 46-47) Twenty pages of the transcript are taken up with the defense illustration of how West Virginia historically made as few changes as possible and how the alternatives to S.B. 1008 made drastic changes. (Tr., 65-85)

The Majority expressly and emphatically rejected the argument that preserving the cores of a district by keeping the districts intact was a valid purpose under *Karcher*. (App. 17-21) This determination is contrary to numerous decisions of other redistricting courts, many of which this Court has affirmed. (*See* J.S. 25-26) It also gives inappropriate deference to the legislative determination of the definitions. *Cf. Stone, supra; Perry, supra.*

Faced with defending the Majority's unprecedented rejection of district preservation as a valid variance justification under *Karcher*, Appellees once again attempt to restate the argument into one not being made. The argument is not that keeping districts intact is an absolute constraint. (Motion 29) Nor do Appellants argue that districts need to be kept exactly the same. (Motion 28) Instead, the argument is simply that the Majority incorrectly rejected keeping current districts as intact as possible as a proper

nondiscriminatory legislative policy under *Karcher*. (J.S., i, 23-27)

Appellees' argument that the districts had different configurations prior to 1991 (Motion 28), when a decrease in the number of districts necessitated a more drastic change, is irrelevant to the question of whether S.B. 1008 preserved the existing districts. To the extent that the Majority concluded that preserving the districts intact was an insufficient basis to justify the 0.7886% variance, that conclusion was based on its incorrect determination of the applicable burden based on its belief that times have changed. (App. 21)

4. With respect to Appellants' appeal of the remedy imposed by the Majority, Appellees argue that the appeal is both moot and unripe. Neither argument serves as an appropriate bar to review here.

The modification of the injunction in response to the motion to stay did not change anything but the timing of the remedy. The Majority merely "defer[red]" action with respect to the remedy. (App. 58-59) Should this Court not uphold the constitutionality of S.B. 1008, the Majority's order that it will adopt one of several plans lacking majority support will distort the legislative process. (J.S. 29)

Moreover, this claim is ripe for review. The complaint is not that the Majority has adopted an improper plan. The complaint is that the Majority's threat to adopt one of two improper plans (or even the

equally improper plans filed by Appellees post-judgment) will distort the legislative process.

This Court should vacate the remedy announced by the Majority and instruct the court below to reconsider any judicial remedy in light of *Perry*.

◆

CONCLUSION

This Court should note probable jurisdiction to review the substantial questions raised in this appeal.

Respectfully submitted,

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