

**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 Governor of West Virginia,  
JEFFERY KESSLER, in his capacity as the President of the West Virginia Senate,  
RICHARD THOMPSON, in his capacity as the Speaker of the West Virginia House of  
Delegates,

*Applicants,*

v.

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

and

THORNTON COOPER, intervening Plaintiff below,

*Respondents.*

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**RESPONDENTS' OPPOSITION TO EMERGENCY APPLICATION  
FOR STAY PENDING APPEAL FROM THE ORDER OF THREE-JUDGE  
PANEL ENJOINING CONGRESSIONAL ELECTION FROM BEING  
CONDUCTED UNDER REDISTRICTING PLAN ENACTED BY LEGISLATURE**

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TO THE HONORABLE JOHN ROBERTS, CHIEF JUSTICE OF THE SUPREME  
COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH  
CIRCUIT:

RESPONDENTS OPPOSE THE ISSUANCE OF AN EMERGENCY STAY

I.  
Introduction

This case arises from federal and state constitutional challenges to West  
Virginia's congressional redistricting plan enacted after the 2010 United States Census.  
That plan, known as the "Mason County Flop Plan" (Doc. 64, Exhibit 1. *Also Supp.*

Appendix 1) is codified at W. Va. Code § 1-2-3 [2011]. The 2011 plan simply “flops” Mason County, which borders on the Ohio River, from West Virginia’s 2<sup>nd</sup> Congressional District to the 3<sup>rd</sup> Congressional District. The Mason County Flop plan otherwise changes nothing else in the 2<sup>nd</sup> Congressional District and thus continues a serpentine district first created in 1991 in a form that the respondents’ expert, Dr. Kenneth Martis, a preeminent expert in congressional districts, described as an “abomination.”<sup>1</sup> (Doc. 68 at PageID # 1352).

At issue is the applicants’ motion for an emergency stay of the District Court’s grant of a permanent injunction barring the Governor of West Virginia and the West Virginia Secretary of State from enforcing W. Va. Code § 1-2-3 [2011]. The respondents contend that there is no emergency warranting a stay and that the Legislature, as is its duty, will either pass a constitutional redistricting plan during its regular session already underway or, if it does not, pursuant to 2 U.S.C. 2a(c)(1) the current districts shall remain in effect until the Legislature completes its task.

## II. Argument

### A. The West Virginia Legislature will be Hindered by a Stay

The Legislature is already acting to enact a constitutional congressional redistricting plan in response to the District Court’s decision to permanently enjoin enforcement of W. Va. Code § 1-2-3 [2011]. The West Virginia legislature was not in session when the District Court entered its Memorandum Opinion and Order (Doc. 68) on

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<sup>1</sup> It has been described as the longest district east of the Mississippi River. For example, it is 313 miles from Charles Town, the county seat of Jefferson County to Ripley, the county seat of Jackson County – also in the 2<sup>nd</sup> District. By contrast, Charles Town is closer to New York City (267 miles), the state capital of New Jersey, Trenton (207 miles), the state capital of Pennsylvania, Harrisburg (112 miles), the state capital of Virginia (148 miles) and Washington, D.C. (66 miles) than it is to the other end of the 2<sup>nd</sup> District.

January 4, 2012. However, once in session it took only until Monday, January 16, 2012<sup>2</sup> for Senate Bill 199 to be introduced in the West Virginia Senate. (Supp. Appendix 2). The redistricting map attached to SB 199 is identical to the map offered by plaintiffs below as an exemplar of a redistricting plan that meets all federal and state constitutional requirements. *See* Doc. 72-3.

Thirteen of West Virginia's thirty-four state senators sponsored SB 199.<sup>3</sup> SB 199 enjoys bipartisan support: both Senate Majority Leader Unger and Senate Minority Leader Hall are co-sponsors. Its sponsors include state senators from every region of West Virginia: north, east, central and south. Indeed, Secretary of State Tennant's husband, Senator Eric Wells, is a co-sponsor.

Moreover, SB 199 cures a stated redistricting concern testified to at trial by Senate Judiciary Chairman Corey Palumbo – specifically, SB 199 does not pit congressional incumbents against one another. And, completely contrary to the applicants' claim that not crossing county lines is a policy of West Virginia when redistricting, the redistricting plan set forth in SB 199 crosses two county lines. Indeed and notwithstanding his testimony at trial, Senate Judiciary Chairman Palumbo is himself a sponsor of SB 199.

If for some unknown reason the Legislature should fail to follow through with corrective legislation, congressional elections would likely be conducted under the existing districts. *See* 2 USC § 2a(c)(1). Once the issues are resolved districts could then be reapportioned in time for the next congressional election. Alternatively, the

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<sup>2</sup> SB 199 appeared on the West Virginia Legislature's official website before the appellants filed the instant appeal. It appeared on the "Legislative Bulletin Board" on January 13, 2012 under the category "Senate Bills to be Introduced."

<sup>3</sup> [http://www.legis.state.wv.us/Bill\\_Status/bills\\_history.cfm?year=2012&sessiontype=RS](http://www.legis.state.wv.us/Bill_Status/bills_history.cfm?year=2012&sessiontype=RS)

Legislature could enact a statute changing the filing deadlines for the primary election or even move the primary election itself.

The applicants' contention that their appeal will be moot if the Legislature actually chooses a new plan without a stay in place is without merit. There is no reason that a new, constitutional redistricting plan that adheres to the District Court's instructions could not have a sunset provision or another legislative device that keeps the enjoined congressional redistricting plan "alive."

West Virginia can enact a bill such as SB 199 and conduct congressional primary elections on time. It took all of one day of special session for the Legislature to enact the enjoined congressional redistricting statute<sup>4</sup> and there is no reason to believe the legislature cannot act in a timely manner. Indeed, the Legislature has been in session only a few days and many bills have been introduced, from prohibiting state funding of abortions (HB 2035), to making it a criminal offense to disturb the peace to (HB 2190), to Instituting a "Celebrate Freedom Week" (HB 2414).

If the applicants prevail in their appeal to this Court the Legislature could then decide whether to modify the congressional districts in accordance with this Court's decision. This approach has the virtue of allowing this Court time to decide whether to note jurisdiction without undue haste. But there is no benefit to imposing an emergency stay as a stay would only discourage the Legislature from fulfilling its constitutional duty to redistrict while it awaits this Court's decision.

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<sup>4</sup> Significant issues such as Marcellus Shale have recently been addressed by special session. <http://www.governor.wv.gov/newsroom/pressreleases/Pages/GovernorPreparestoCallLegislatureintoSpecialSession.aspx>

B.  
The Respondents Do Not have “Unclean Hands”

The legislative applicants suggest that the respondents have caused the present situation by delay and thus, they need a stay. In other words, despite the fact that the Legislature passed an unconstitutional plan, it is the Jefferson County Commission’s fault that there is a political problem for the Legislature. A brief history is in order to rebut this claim.

During the August 4, 2011 Senate Select Redistricting Committee meeting with the Senates’s constitutional law expert, Robert Bastress, Professor Bastress was asked for his comment about the .79% deviation and answered:

It’s a fairly significant deviation, particularly as you mentioned earlier, with modern technology. The .79 is, of course, larger than the .64 in Karcher. The Stone case did say the larger the deviation, the greater the burden of justification. And that was part of the Stone thinking that, well, this is a pretty minor deviation. It was .09 compared to .0025 so it didn’t take much of a justification. It would take more of a justification, significantly more substantial justification, to support a .79 deviation.

(Doc. 42-2, PageID # 792). So, prior to the passage of the bill, their own legislative expert warned the Senate of the consequences of the .79% overall population deviation if there was not a substantial justification.<sup>5</sup>

Pursuant to W. Va. Code § 55-17-3 [2008] (requiring advance notice of suit against government agencies) the respondents provided advance notice of suit and the basis for the suit by certified letter dated September 30, 2011 and received by each of the applicants on October 3, 2011:

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<sup>5</sup> The applicants also complain that service took two weeks. The respondents point out that personal service on the constitutional officers was required because there is no statute in West Virginia prescribing a different method of service for actions like this and personal service was made more difficult because the constitutional officers were not in session and thus had to be personally located for service.

David Hammer, Esq. and I will be filing suit in federal court on behalf of the many West Virginians – particularly those in the Eastern Panhandle – who will be denied the constitutional right to effective representation in Congress as a result of the congressional redistricting found in Senate Bill 1008 passed during the special session this past summer. The basis of the claim is that the congressional districts violate the constitutional principle of “one person, one vote. (Supp. Appendix 3)<sup>6</sup>

In addition to the West Virginia Attorney General this notice was addressed to the Governor, Senate President Kessler, and Speaker of the House Thompson. Despite having notice of the suit more than one month in advance of the suit’s November 4, 2011 filing date, the applicants took no action to cure the constitutional defects.

At the trial on December 28, 2011 the applicants *admitted* that the respondents satisfied the first prong of *Karcher v. Daggett*, 462 U.S. 725 (1983). A fair inference from this admission, coupled with Professor’s Bastress’ advice, and advance notice of the suit the applicants received is that the applicants have known since August of 2011 – prior to passage of the bill - that a significant “one person, one vote” constitutional issue exists. Despite this knowledge, the applicants themselves have not taken corrective action in any form. Thus, the applicants should not be heard to accuse the respondents of unclean hands.

### C.

#### The Record Does Not Warrant a Stay Pending Appeal

At trial the applicants agreed that *Karcher v. Daggett*, 462 U.S. 725 (1983) requires “justification shown” for any variance. (Tr. 41, lines 18 – 20).<sup>7</sup> During the single day that it took the Legislature to enact a congressional redistricting plan it did not create a contemporaneous record in any form sufficient to show that the 4,871 person variance in this case, or any part thereof, was necessary to achieve some legitimate goal

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<sup>6</sup> This exhibit is not already of record because below the applicants did not challenge statutory notice.

<sup>7</sup> The trial transcript is designated in the Supp. Appendix as 4.

as it was required to do by *Karcher*. (Doc. 68 at PageID # 1347 - 48; tr. 221). It did not articulate its reasons for deviation despite being instructed to do so by a constitutional law expert whom the Legislature hired to provide it with guidance during the redistricting process. (Doc. 68 at PageID # 1356 - 57). The Senate Select Committee even understood that “findings” were necessary to communicate with the courts: [Testimony of Sen. Majority Leader Unger<sup>8</sup>] “Yes, sir. That’s how we communicate to the courts is through our findings.” (Tr. 236). Majority Unger testified that it was the Legislature’s “common practice” to include legislative findings in legislation “in order to help clarify policy decisions, or at least justify why what [sic] we’re doing what we’re doing.” (Tr. 221). Consistent with Majority Leader Unger’s testimony, another of the Legislature’s witness, Senate Judiciary Chairman Corey Palumbo agreed that legislative findings are not unusual in a bill. (Tr. 260). In the absence of legislative findings and in contravention of the Legislature’s common practice to make legislative findings it is a fair inference that there was not “a good-faith effort to draw districts of equal proportion.” *Karcher* at 730.

Having made no legislative finding at the time of W. Va. Code § 1-2-3’s passage, at trial the Legislature relied upon *post hoc* justifications for the population variance through the testimony of only one witness - Senate Judiciary Chairman Corey Palumbo. Senator Palumbo testified as to his general understanding of the decision-making process. (Doc. 68 at PageID # 1347). Senator Palumbo admitted that even as to accommodating the redistricting priorities he identified, other redistricting maps might also have accomplished those priorities, but no other such maps were considered. (Tr. 259).

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<sup>8</sup> Majority Leader Unger was called by the legislative applicants as a witness in their case in chief.

No testimony was offered from any member of the West Virginia House of Delegates as to why the House voted to approve the redistricting plan notwithstanding the variance from equality. Indeed, the House waived its rules of procedure and passed SB 1008 without debate. (Doc. 68 at PageID # 1339). The Governor of West Virginia likewise did not testify at trial and thus no insight can be gained from the executive branch. Yet the legislative applicants would have this Court find, based upon the general understanding of one state senator out of thirty-four state senators and 100 delegates that its *post hoc* explanation for the 4,871 person variance in the redistricting plan they enacted over competing plans with zero variance was, in good-faith, necessary.

The respondents respectfully submit that reliance upon one senator's or delegate's trial testimony as to a bicameral legislature's "thought" process is inherently unreliable and unworkable. It is altogether too likely that another senator or delegate might have a completely different perspective as to the "thought" process of a legislative body, whatever that term "thought process" might mean, thus making a legislature's "thought" unknowable absent a legislative finding in some form. *Cf.*, footnote 15, *Kaplan v. Chertoff*, 481 F. Supp. 2d 370, 384, 2007 U.S. Dist. LEXIS 22935 (E.D. Pa. 2007) ("While a court may seek from the public record to ascertain the collective intent of Congress when it interprets a statute, the subjective intent of any particular person involved in the legislative process is not determinative. Thus the members of Congress, or staffpersons who draft legislation, are not deposed or called on to testify in actions involving statutory interpretation." Internal citations omitted).

If the West Virginia legislature had good-faith reasons as to why the variance in this case was necessary in light of "consistently applied" state interests it should have

followed the expert guidance it received specific to the .79% overall population variance, which was consistent with its practice in other legislation, and made a legislative finding upon which West Virginians could rely and, if necessary, which a court could review within the framework of constitutional principles embodied in “one person, one vote” and potentially competing principles of legislative deference. Absent such a finding it makes little sense to review the District Court’s decision and provides no basis for granting an emergency stay.

If *Karcher* is not to be overruled by their appeal the legislative applicants, would have this Court undertake the uninviting task of 1) discerning legislative intent in the absence of a legislative finding of intent; 2) evaluating that found intent for “a good-faith effort to draw districts of equal proportion” and then, 3) determining whether the population deviation of nearly 5,000 was necessary to achieve some legitimate goal. Or, and as they stated below, the applicants would have this Court overrule *Karcher*, a precedent of nearly thirty years. But neither of these prospects on this record satisfies the first two factors in deciding whether a stay should be granted. *See Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (factors for considering whether to grant a stay pending appeal).

D.

The Legislative Applicants do not have Standing to Appeal Because they have not Suffered Injury by the Judgment

At issue for Article III standing to appeal the decision of the district court is whether the applicants have suffered injury by the judgment; not, as the legislative applicants argue, whether they had standing to appear as a party below. Article III

standing is a continuing requirement on appeal. The 2<sup>nd</sup> Circuit Court of Appeals explained the issue succinctly:

Because Article III of the Constitution permits the adjudication of "Cases" or "Controversies" only, litigants appearing before federal courts must demonstrate that they have standing to invoke the court's jurisdiction. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 137 L. Ed. 2d 170, 117 S. Ct. 1055 (1997). To claim standing, a litigant must have suffered "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent.'" *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. [211] 2130 (1992)) (internal quotation marks omitted). The Article III standing requirement "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Id.* (citing *Diamond v. Charles*, 476 U.S. 54, 62, 90 L. Ed. 2d 48, 106 S. Ct. 1697 (1986)). To have standing at the appellate stage, however, a litigant must demonstrate "injury caused by the judgment rather than injury caused by the underlying facts." 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3902, at 63 (2d ed. 1992); *see also Diamond*, 476 U.S. at 62 ("The decision to seek review must be placed 'in the hands of those who have a direct stake in the outcome[,] . . . not . . . in the hands of 'concerned bystanders[.]'" (citations omitted).

*Tachiona v. United States*, 386 F.3d 205, 210 - 211 (2<sup>nd</sup> Cir. 2004).

The House and Senate applicants were not enjoined from any action within their authority by the permanent injunction issued against *enforcement* of W. Va. Code § 1-2-3 [2011]. The legislature does not have the constitutional authority to enforce the law. To the contrary, the legislature's authority to enact constitutional redistricting legislation is completely unencumbered by the permanent injunction as evidenced by the introduction of SB 199 sponsored by thirteen state senators.

In August of 2011 it took a single day for the Senate and House to pass SB 1008. In considering the amount of time necessary for the Legislature to enact new redistricting legislation such as SB 199 in response to the Court's decision, the undisputed testimony at trial was that all of the regional statewide meetings have been concluded, the Senate

Select Committee had a full opportunity to be informed of its constitutional obligations in redistricting by a constitutional expert,<sup>9</sup> and new redistricting maps could be generated in seconds (tr. 213 - 214), and exemplars of constitutional redistricting maps are in the record. (Docs. 72-2; 72-3).

The Legislature having been encouraged to act and now acting vis-à-vis the introduction of SB 199 is simply not irreparably injured and has not suffered substantial injury of any kind so as to confer Article III standing upon it to appeal the District Court's permanent injunction against enforcement of W. Va. Code § 1-2-3 [2011].

E.

The Executive Applicants are Not Appealing on Constitutional Grounds

The Governor of West Virginia and the Secretary of State are not seeking to appeal the District Court's opinion on constitutional grounds. They have stipulated that they would be bound by the results of the case below without further participation:

The Defendant Natalie E. Tennant wishes to rely upon the Plaintiffs and the other Defendants in the instant case to prepare and submit a Joint Statement of Stipulated and Disputed Facts, and to file briefs that frame and argue the issues in the instant case to this Court, and she wishes to rely upon her Answers to assert her position in the instant case; she believes that she does not need or wish to make additional submissions to this Court beyond those Answers, and she hereby waives her right to do so; and **she stipulates that the issues in the instant case may be resolved and that she will be bound by the results of the instant case without her further participation in briefing, argument, or submitting evidence or testimony.**

*Statement, Motion, and Stipulation by West Virginia Secretary of State Natalie E.*

*Tennant Regarding Joint Statement of Disputed and Undisputed Facts, Briefing, and*

*Testimony* (Doc. 35 at PageID # 245, ¶ 2) [boldface added]. For the Governor's

substantively identical statement *see Statement, Motion, and Stipulation by West Virginia*

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<sup>9</sup> The transcribed testimony of which is a part of the official record of the Senate should any member desire to refresh their recollection by reading such testimony. *See* Doc. 42 at PageID # 770 and continuing.

*Governor Earl Ray Tomblin Regarding Joint Statement of Disputed and Undisputed Facts, Briefing, and Testimony* (Doc. 39 at PageID # 264, ¶ 2). These two waivers and stipulations were accepted by the District Court for good cause shown. *See* Doc. 44 (granting Secretary Tennant’s motion); Doc. 46 (granting Governor Tomblin’s motion).

Indeed, in her official capacity Secretary Tennant has made her position regarding the District Court’s Memorandum Opinion and Order abundantly clear on the official website of the West Virginia Secretary of State:

“I am confident that West Virginia can achieve equal populations in its congressional districts,” Secretary Tennant said. “The Court has shown with this ruling that equal representation of all citizens in Washington is most important.”

\* \* \*

“The Secretary of State’s Office was not part of the legislative redistricting process **and accepts the determination that the process did not produce a constitutional result.**”

(Doc. 72-1).

Being “**confident that West Virginia can achieve equal populations**” after reviewing the District Court’s Memorandum Opinion and Order and having **accepted the determination** of the District Court **that the process did not produced a constitutional result**, the Executive branch is not entitled to a stay of the District Court’s permanent injunction.

One may speculate that the Legislature may abrogate its duty to constitutionally redistrict the congressional districts but that has not happened and will not happen unless the Legislature refuses to act upon SB 199 or some equivalent bill. But certainly there is time at present for the Legislature and Executive to enact constitutional redistricting legislation so long as they do not delay. And, if the Legislature chooses to delay in

fulfilling its constitutional duty and causes the current districts to remain in effect, its members will be accountable to the electorate.

F.

The District Court Correctly Applied the Applicable Law

The respondents will not repeat here the District Court's Memorandum Opinion and Decision [Doc. 68]. The District Court's decision is, in the respondent's view, an accurate recitation of precedent and principle that was correctly applied to the facts developed at trial.

Your respondents would add only this: The Legislative applicants rely heavily upon *Stone v. Hechler*, 782 F. Supp. 1116 (N.D.W. Va. 1992) in which the district court rejected a challenge to West Virginia's 1991 congressional redistricting statute where the maximum population variance was 556 people or .09% variance - a small fraction of the deviation at issue here. (*See discussion* in Doc. 68 at PageID # 1357 - 1358). However, the applicants ignore the trend of federal case law and of state legislation since 1990 which is toward plans that have a population variance of fewer than ten people between the most populous and least populous congressional districts in a state. *See e.g., Vieth v. Pennsylvania*, 195 F. Supp.2d 672 (M.D.Pa. 2002) (holding that Pennsylvania failed to meet its burden that the population variance of nineteen people between the most populous and least populous congressional districts was necessary to achieve some legitimate goal), *appeal dismissed as moot, Schdweiker v. Vieth*, 537 U.S. 801 (2002). *See also* (Doc. 68 at PageID # 1354 – 55; 1358 – 59 [discussing the nationwide redistricting trend toward perfect equality]).

This trend is entirely consistent with the United States Constitution and the principle of "one person, one vote." A reversal of the District Court's decision would

necessarily cause states to take a “Goldilocks” approach to overall population variance when redistricting to find the maximum variance that would still be “just right.” The Constitution as it has been applied in the caselaw for decades does not speak to permissible variances within specified ranges; equality is the standard and that standard is ever more capable of being perfectly met. The evidence at trial was that the vast majority of states that have more than one congressional district are in fact meeting the goal of equality. Where the constitutional standard of equality is not met *Karcher* requires that legislatures do the “heavy lifting” of justifying deviations from equality. The West Virginia legislature did not justify its nearly 5,000 person overall population deviation in this case as evidenced by the absence of any findings as to why the population variance was compelled.

There should be no question that the applicants seek to overturn *Karcher*. At trial, they admitted as much to the Court:

MR. MAJESTRO: .... *Karcher* was a bad idea, and that we reserve -- we're not conceding --

JUDGE KING: *Karcher* was a bad idea?

MR. MAJESTRO: Yes. We, we, we think Justice White got it right in the dissent. It's a five-four opinion.

JUDGE KING: *Karcher* is bad law.

MR. MAJESTRO: Bad law,

(Tr. 43 - 44).

But seeking to overturn a decision with which one disagrees is not grounds for an emergency stay.

III.

CONCLUSION

For the foregoing reasons the applicants have not met the standard for an emergency stay pending appeal. The respondents respectfully request that the application for an emergency stay pending appeal be denied.

Dated this the 17<sup>th</sup> day of January, 2012.

Respectfully submitted,

/s/ David M. Hammer  
David M. Hammer, Esq.,  
Counsel of Record  
Hammer, Ferretti & Schiavoni  
408 West King Street  
Martinsburg, WV 25401  
Phone: (304) 264-8505  
Fax: (304) 264-8506  
Email: dhammer@hfslawyers.com

/s/ Stephen G Skinner  
Stephen G. Skinner, Esq.  
PO Box 487  
Charles Town, WV 25414  
Phone: (304) 725-7029  
Fax: (304) 725-4082  
Email: sskinner@skinnerfirm.com

Counsel for Respondents Jefferson  
County Commission, Patricia  
Noland, and Dale Manuel

## CERTIFICATE OF SERVICE

I, David M. Hammer, hereby certify that on January 17, 2012 I served a true and correct copy of “RESPONDENTS’ OPPOSITION TO EMERGENCY APPLICATION FOR STAY PENDING APPEAL FROM THE ORDER OF THREE-JUDGE PANEL ENJOINING CONGRESSIONAL ELECTION FROM BEING CONDUCTED UNDER REDISTRICTING PLAN ENACTED BY LEGISLATURE” upon the following counsel of record by e-mail delivery to the addresses identified below and via USPS, postage prepaid:

Stuart Thornton Cooper  
3015 Ridgeview Drive  
South Charleston, WV 25303  
thornbush@att.net  
Intervenor below, *Pro se*

George E. Carenbauer  
Steptoe & Johnson, PLLC-Charleston  
PO Box 1588  
Charleston, WV 25326  
George.Carenbauer@steptoe-johnson.com  
Counsel for Jeffrey Kessler

Ray E. Ratliff, Jr.  
State Capitol Complex  
Building 227M – 01  
1900 Kanawha Boulevard, East  
Charleston, WV 25305  
Ray.ratliff@wvsenate.gov  
Counsel for Jeffrey Kessler

Anthony J. Majestro  
J.C. Powell  
Powell & Majestro  
405 Capitol Street, Suite P-1200  
Charleston, WV 25301  
amajestro@powellmajestro.com  
amajestro@aol.com  
Counsel for Richard Thompson

Scott E. Johnson  
Thomas Rodd  
Assistant Attorney General  
Office of the Attorney General  
812 Quarrier St 6<sup>th</sup> Floor  
Charleston, WV 25301  
sej@wvago.gov  
twr@wvago.gov  
Counsel for Natalie Tennant

/s/ David M. Hammer  
David M. Hammer, Esq. (WV #5047)  
Counsel of Record  
Hammer, Ferretti & Schiavoni  
408 West King Street  
Martinsburg, WV 25401  
Phone: (304) 264-8505  
Fax: (304) 264-8506  
dhammer@hfslawyers.com

Counsel for Jefferson County Commission,  
Patricia Noland, and Dale Manuel