

No. 11A674

**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,

Applicants,

v.

JEFFERSON COUNTY COMMISSION, et al.,

Respondents.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY

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REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY

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

INTRODUCTION

Respondents have filed an opposition (“Application Opposition”) to the Applicants’ previously filed Stay Application. In the Application Opposition, Respondents concede that, absent a stay, the 2012 election likely will be conducted under a decade old redistricting plan that has a significantly worse population variance than the enjoined Senate Bill 1008. This concession destroys any ability of the Respondents to establish irreparable injury from the requested stay.

Many of the arguments for granting the Stay Application set forth therein were ignored by Respondents and will not be restated herein. Applicants¹ incorporate fully the Stay Application and submit this Reply.

ARGUMENT

I. RESPONDENTS' CLAIM THAT THE LEGISLATURE WILL BE "HINDERED" BY A STAY IS FACTUALLY INCORRECT AND, IN ANY EVENT, DOES NOT SUPPORT DENYING THE STAY.

Respondents first argue that a stay would hinder the Legislature which is already considering alternatives to Senate Bill 1008 and that a stay would hinder the effort to enact a new plan in time to conduct the May 8, 2012 primary election. Both the implied premise that, absent a stay, a new plan could be adopted in time, and the implied conclusion that hindering the Legislature supports denial of the Stay Application are false. Moreover, Respondents' concede that the failure to timely adopt a new redistricting plan that passes the muster of two of the three judges on the court below would

¹As noted previously, Senate President Kessler and House Speaker Thompson will appeal both the decision finding Senate Bill 1008 unconstitutional and the remedy proposed by the Majority. Governor Tomblin joined in the Emergency Motion to Stay before the three-judge panel insofar as it sought reversal of the interim remedy imposed by the Majority. On January 10, 2012, the three-judge panel "deferred any and all action with respect to a remedy until after the Supreme Court has disposed of the Defendant's forthcoming appeal." Stay Order at 6. Thus, Governor Tomblin joins in this Emergency Application For Stay, but takes no position on the constitutionality of Senate Bill 1008 and will not join the appeal on that basis. Secretary Tennant joins in this Emergency Motion to Stay and will join in the 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 will 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.

result in “congressional elections . . . likely be[ing] conducted under the existing districts” enacted following the 2000 census. *See* Stay Application Opposition at 3 (citing 2 U.S.C. § 2a(c)(1)). This concession destroys any claim of irreparable harm that Respondents might otherwise make.

It is by no means certain that the Legislature will be able to reach the consensus necessary to timely pass a new redistricting bill. The Respondents have not disputed Secretary Tennant’s opinion provided herein and in the Court below: Compliance with the Military and Overseas Voters Empowerment Act of 2009, 42 U.S.C. § 1973ff, et seq. (“MOVE”) requires special treatment for overseas voters and mandates that the candidate-filing period for the 2012 primary election must be concluded by no more than a few days beyond the currently scheduled January 28, 2012 deadline in order for primary elections to be held as scheduled on May 8, 2012. *See* Defendants’ Memo In Support of Motion to Stay at 5 [Doc. 70]; *see also* Stay Application at 4-5. Thus, time is quickly running out for a legislative solution.

Currently, the only legislative activity noted by Respondents’ Application Opposition, is the introduction of one bill, S.B. 199, whose lead sponsor is Senator Unger, the only Senator to vote against Senate Bill 1008. This is not the only congressional redistricting bill introduced in the Senate.² Respondents emphasize the number of co-sponsors for S.B. 199, but this does

²*See* S.B. 223 & S.B. 225 available at http://www.legis.state.wv.us/Bill_Status/bill_status.cfm.

not guarantee Senate passage, let alone enactment.³ See 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 new plans). Several other plans are being discussed some of which would appear to be extremely controversial. *Id.* As various legislators made clear in interviews published today, the ongoing discussions of alternative plans are intended as a backup should this Court not grant a stay. *Id.*

Even among the 13 co-sponsors of S.B. 199, there is not a consensus. Indeed, in spite of co-sponsoring S.B. 199, Senator Snyder introduced S.B. 225.⁴ Senator Hall, the Minority Leader, is a co-sponsor of both S.B. 199 and S.B. 223.⁵

Respondents also emphasize that Senate Bill 1008 passed in one day. Stay Application Opposition at 4. Of course, Senate Bill 1008 passed in one day after months of public hearings and four committee meetings and passed

³As of January 17, 2012, the Legislature's public records show that 1,020 bills have been introduced for consideration in the 2012 sixty day regular session. <http://bit.ly/zCwCqD> None of these bills have passed either house. During the 2011 regular session, 1894 bills were introduced, <http://bit.ly/x2oNFI>, while only 191 were enacted. <http://bit.ly/zNeSem>. It is clear introduction does not guarantee that a bill becomes a law.

⁴http://www.legis.state.wv.us/Bill_Status/bills_history.cfm?year=2012&sessiontype=RS

⁵S.B. 223 follows the basic contours of Senate Bill 1008, but splits two smaller counties in the Second Congressional District to eliminate the 0.788% variance of Senate Bill 1008. http://www.legis.state.wv.us/Bill_Status/bills_history.cfm?year=2012&sessiontype=RS

in a special session dedicated solely to redistricting. *See generally* Joint Stipulations [Doc. 54]. Senate Bill 1008 also passed with large bipartisan majorities sufficient to suspend the requirements of the West Virginia Constitution that do not otherwise permit such quick legislative action.⁶ There is no guarantee of such widespread support for any of the plans currently under consideration.⁷ In addition, the West Virginia Constitution requires a supermajority vote to make a bill effective on passage; otherwise, the new plan will not take effect for 90 days. W.Va. Const., Art. IV, § 30 (requiring a 2/3 affirmative vote of all elected members in each house). Finally, whatever plan might be adopted would still be subject to challenge based on the West Virginia Constitution's compactness requirement, W.Va. Const., Art. I, § 4, the interpretation of which the Majority Opinion has left open and in doubt.⁸

It is clear that the current consideration of alternative plans is not motivated by a desire to voluntarily adopt a new plan. Legislation is being considered now only because of the Majority Opinion and only because the

⁶West Virginia Const., Art. VI, § 29.

⁷*See* <http://www.dailymail.com/News/statehouse/201201170165?page=2&build=cache>.

⁸*See* Majority Opinion at 28-29 (noting that new plan must “comport with compactness requirement” and that “ultimate arbiter” of requirement is Supreme Court of Appeals of West Virginia). The Majority Opinion’s implicit rejection in dicta of the Legislature’s previous determination of what compactness means, Majority Opinion at 29-30, a determination previously upheld in *Stone v. Hechler*, 782 F.Supp. 1116, 1126 (N.D.W.Va. 1992), creates both uncertainty and the potential to further delay the ultimate approval of a new plan.

Legislature does not wish to allow the court below to usurp the Legislature's role and judicially pick from two plans that have substantial public opposition. Respondents cannot argue that Senate President Kessler and House Speaker Thompson do not speak for the Legislature in seeking to appeal the Majority Opinion and reinstate Senate Bill 1008.⁹ Aside from whether there is time to adopt a new plan, Respondents ignore the substantial issue of whether it is proper to force the Legislature to adopt a new plan on the eve of an election under the duress of the mandate of a divided decision of the three judges below. Ample precedent from this Court and its Justices establishing that forcing legislative action in this manner constitutes irreparable harm goes unrefuted by Respondents. *See* Stay Application at 33-35 (citing cases).

Respondents' other arguments are similarly unpersuasive. Respondents' conclusory suggestion that filing deadlines could be changed offers no rebuttal to Secretary Tennant's opinion that the MOVE Act mandates that the candidate-filing period for the 2012 primary elections must be concluded by no more than a few days beyond the currently scheduled January 28, 2012 deadline in order for primary election to be held as scheduled on May 8, 2012.

⁹President Kessler and Speaker Thompson are authorized to prosecute this appeal on behalf of the Legislature unless a majority of both houses overrule the decision. *See* W.Va. Legislature Joint Rule 31 (<http://www.legis.state.wv.us/Joint/rules.cfm#31>) (Senate President and House Speaker authorized to act on behalf of Legislature with respect to "the legal affairs of the Legislature unless otherwise directed by a majority vote of both houses while the Legislature is in session"). No member has even attempted to overrule their decision.

Respondents do not seriously dispute that the forced adoption of a new redistricting plan would cause irreparable harm by mootng the appeal of both the challenges to the Majority Opinion’s substance and its choice to impose a remedy now. Instead, they argue that mootness could be avoided by adopting a plan with a sunset provision. Stay Opposition at 4. This would create additional irreparable harm because to do so would cause unnecessary disruption in the congressional districts contrary to the State’s established practice in the modern era of making only small changes to congressional districts to preserve constituent relationships with their representatives. *See* Stay Application at 6-7 (noting consistent state policy of preserving districts). The State’s policy to do so is based on considerations recognized as valid and not refuted by Respondents. Stay Application at 27-28 (citing cases).

Respondents’ suggestion that the primary could be moved does not address the substantial costs both political and economic to moving the primary election either partially by forcing another special election, or necessitating the rescheduling of all state, local and national elections.¹⁰ *See* Stay Application at 32-33. Respondents similarly ignore the ample precedent

¹⁰*Cf. Cromarite v. Hunt*, 1998 WL 35254678, p*16 (E.D.N.C.1998) (Ervin, Circuit Judge, dissenting). The Stay Application inadvertently quoted from *Cromarite* without indicating that it was Judge Ervin’s dissent. Stay Application at 30, 32-33. Nonetheless, Applicants believe that Judge Ervin’s concerns over the political and economic costs of moving an election in process are persuasive and applicable here. This is especially true when, unlike *Cromarite* where the districts were challenged on the basis of racial discrimination to which strict scrutiny applies, the constitutional challenge here is to a “minor” population variance. This Court’s numerous stays to permit appeals of population variance challenges supports the reasoning of Judge Ervin in *Cromarite*. *See* Stay Application at 15-16 (citing cases).

establishing that overturning a presumptively valid statute constitutes irreparable harm to the State supporting a stay. Stay Application at 34-35.

Finally, Respondents' concession that the State could choose to conduct the 2012 congressional election based on districts enacted in 2001 following the 2000 census completely destroys all credibility to the claim that they would be irreparably injured by granting the stay to allow the election to be conducted under the provisions of Senate Bill 1008. While 2 U.S.C. § 2a(c)(1) permits such an election, Stay Application at pp. 14 & n.2, 33, Respondents' preference for an election under the provisions of the 2001 congressional redistricting statutes is wholly inconsistent with their claims in this litigation.

Contrary to prior precedent, Respondents convinced a majority of the court below that a 0.7886% variance was a "major" variance. Majority Opinion at 28. They now oppose a stay to allow the 2012 election to be conducted under Senate Bill 1008 on an interim basis pending appeal when the alternative is a ten-year old plan with a variance that is 9.5%. *See* Stay Application at 14. This is a variance *more than 12 times larger* than the challenged variance in Senate Bill 1008.

Moreover, Respondents make much of the supposed lack of compactness in the districts set forth in Senate Bill 1008 based on the length of the district. *See, e.g.*, Stay Opposition at 2 n.1 (noting that the distance between county seats in the district is 313 miles). While the 2001 district complied

with the state compactness requirements, *Stone v. Hechler*, 782 F.Supp. at 1126, the 2001 Second Congressional District includes Mason County which extends the district westward an additional 30 miles from the westward most county seat (Ripley, West Virginia in Jackson County) in Senate Bill 1008.

Respondents offer no reason at all for their inexplicable acceptance of an interim remedy that has a 12 times greater variance and is less compact. Given this, Respondents cannot show any irreparable harm from granting the stay.¹¹

II. RESPONDENTS' DELAY IN BRINGING SUIT SUPPORTS GRANTING THE STAY.

Respondents do not contest Applicants' argument that delay in bringing suit constitutes an equitable factor that supports granting a stay. *See* Stay Application at 36 (citing cases). Instead, they make a weak attempt at justifying the delay and attempt to characterize Applicants' argument as one based on "unclean hands". Stay Opposition at 6. Neither argument is persuasive.

Respondents' first justification for the three-month delay is the supposed need to comply with W. Va. Code § 55-17-3 which requires pre-suit notice by the "complaining parties" thirty days prior to bringing certain actions against a state "government agency". Even making the questionable assumption that

¹¹Respondents also ignore the fact that their votes are not diluted by Senate Bill 1008 because, while they reside in the slightly largest district under Senate Bill 1008 based on population, they reside in the district with the smallest number of registered voters. *See* Stay Application at 35-36.

the provision can constitutionally apply to an action based on 42 U.S.C. § 1983 brought in federal court,¹² the provision explicitly excludes “actions seeking injunctive relief where the court finds that irreparable harm would have occurred if the institution of the action was delayed by the provisions of this subsection.” Respondents’ failure to take advantage of this exception is an admission that they suffer no irreparable harm.

More importantly, however, no explanation is given for the almost two-month delay in sending the notice of claim. Senate Bill 1008 was enacted on August 5, 2011. Why did it take two months to send the notice? Respondents offer no reason for the two-month delay in sending the notice. Similarly, Respondents’ claim that it took two weeks to serve the complaint because the “constitutional officers were not in session”, Application Opposition at 5, n.5, is similarly unavailing. The returns of service establish that Secretary Tennant was served at her office in the State Capitol, [Doc. 21] and the remaining defendants, after the request was made, agreed to designate staff or attorneys to accept service. [Docs. 19, 20, 22].

Finally, Respondents’ implication that the State has “unclean hands” also fails. First, while Professor Bastress, a law professor who was one of the losing attorneys in *Stone, supra*, see Majority Opinion at 24, n.10, testified

¹²*Cf. Felder v. Casey*, 487 U.S. 131, 140 (1988) (“[W]e fully agree with this near-unanimous conclusion of the federal courts [that] notice-of-claim provisions are inapplicable to § 1983 actions brought in federal court”).

that a 0.79% deviation needed to be justified under the second step of *Karcher v. Daggett*, 462 U.S. 725 (1983), the Legislature was certainly justified in relying on this Court’s citation with approval in *Karcher*, 462 U.S. at 740-41 (1983) of the justification of the 0.7888% “minor” variance in *West Virginia Civil Liberties Union v. Rockefeller*, 336 F. Supp. 395 (S.D. W.Va. 1972).¹³ Majority Opinion at 22-23 (noting Senator Palumbo’s testimony regarding reliance on *Karcher’s* approval of the variance in *Rockefeller*). Such reliance was especially appropriate given Professor Bastress’ testimony that the law had not changed since prior three-judge panels approved West Virginia’s previous congressional districts. *See* Dissenting Opinion at 4 (citing Bastress committee testimony). Nor does the unremarkable fact that it was possible to have a plan with a smaller deviation make the State’s conclusion that the deviation was justified under *Karcher* a decision made in bad faith. Indeed, that the Legislature’s conclusion was shared by a Chief District Court Judge on the panel renders the Respondents’ claim that the State acted in bad faith extremely questionable. *See* Dissenting Opinion at 1 (“I would conclude that the State has violated neither Article 1, § 2 of the United States Constitution nor Article 1, § 4 of the West Virginia Constitution.”).

¹³While the Courts have characterized the variance in *Rockefeller* as .78 and the variance in Senate Bill 1008 as .79, as Judge Bailey notes in his dissent, the variance in *Rockefeller* was .7888 and the variance in Senate Bill 1008 is .7886. Dissenting Opinion at 5. Therefore, Senate Bill 1008 actually has a smaller variance than the plan approved in *Rockefeller*.

Respondents' delay in bringing suit constitutes an equitable factor that supports granting a stay.

III. *KARCHER* DOES NOT REQUIRE THE LEGISLATURE TO MAKE FORMAL LEGISLATIVE FINDINGS WHEN THE JUSTIFICATION FOR A MINOR VARIANCE IS APPARENT FROM THE LEGISLATIVE RECORD.

Respondents offer little argument in response to the Legislature's claim that it is reasonably likely to succeed on appeal with respect to the challenge that the court below misapplied *Karcher*. The Respondents' argument relies solely on the factual premise that the Legislature sought to justify the variance only after the fact, and the legal premise that explicit findings were required to be formally adopted by the Legislature. Both premises are false.

At the December evidentiary hearing, the Legislature called three witnesses. While the Legislature also relies on this "post hac" testimony, prior to hearing, the Applicants filed the complete legislative record, which was either stipulated to or admitted into evidence without objection. *See* Joint Stipulation [Doc. 56]; Hearing Transcript at 274. In its pre-hearing memoranda, the Legislature extensively cited both the historical context in which Senate Bill 1008 was adopted and the debates and proceedings leading up to the adoption of Senate Bill 1008.

The Respondents rely on the Majority Opinion's novel construction of *Karcher* requiring explicit findings to justify a variance. *See* Majority Opinion at 15, n.7. While the West Virginia Legislature sometimes includes explicit findings, it never has done so in the context of its congressional

redistricting statutes. Stay Application at 7-8. Neither this Court nor the prior three-judge panels reviewing West Virginia congressional districts have ever mentioned the lack of explicit findings. *See, e.g., Stone v. Hechler*, 782 F.Supp. at 1121 (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. at 396-98 (finding variance 0.7888% variance based on review of legislative record and post-enactment testimony in the absence of findings). Respondents do not contest that other courts, including decisions affirmed by this Court, have taken similar approaches. *See* Stay Application at 23 (citing cases).

Neither the Majority Opinion nor the Respondents refute the existence of the substantial legislative record supporting the Legislature's determination that the variance in this case was justified by the consistent state policies recognized by *Karcher*. The Dissenting Opinion succinctly sets forth a summary of the record. *See* Dissenting Opinion at 2-5. Moreover, the consistent state policies are supported by the history of West Virginia redistricting following this Court's 1960's recognition of the judicial one-man-one-vote challenges. *See* Stay Application at 6-8. None of this is disputed by Respondents.

Moreover, Senator Palumbo's testimony at the evidentiary hearing is consistent with the legislative record. *See* Hearing Transcript at 258-59. In the Application Opposition, Respondents distort Senator Palumbo's

testimony. He testified that: “I certainly can't sit here and say that's [Senate Bill 1008 was] the only map that could have accomplished [all the Legislature's purposes]. It's the only one that I recall us considering that would have accomplished that.” Hearing Transcript at 259. As the Dissenting Opinion recognized, after reviewing all the maps that were considered, Senator Palumbo's conclusion was correct. Dissenting Opinion at 8-10. While it is possible to come up with infinite combinations, no one has (either before or since the Majority Opinion) come up with a map that balanced the goals recognized by the Legislature *and has a variance less than Senate Bill 1008*.

While the justifications for the “minor” deviations are obvious on the legislative record presented below, this Court need not engage in fact finding. The problem, as recognized by the Dissenting Opinion, is that the Majority Opinion improperly applied the wrong standard. *See* Stay Application at 19-28. Noting probable jurisdiction will allow this Court to properly instruct the court below on the proper standard which can be applied on remand and thereafter by all the other courts reviewing congressional redistricting plans.

Respondents argue that because there is a trend in some states towards a 0.00% variance, *Karcher* should be strictly construed to the point that no variance can effectively be justified. This result is not consistent with either *Karcher* or other cases interpreting it. *See* Stay Application at 19-20 (citing e.g., *Doulin v. White*, 535 F.Supp. 450, 452 (D.C.Ark. 1982) (approving 0.78%

variance); *Turner v. State of Ark.*, 784 F.Supp. 585, 589 (E.D.Ark. 1991) (0.73% variance), *aff'd* 504 U.S. 952 (Mem) (1992). While the Legislature believes that a substantial doubt exists whether this Court was correct in *Karcher* that federal district courts should be the judge of whether minor variances are justified by consistent state policies,¹⁴ it is the Respondents and the Majority Opinion that seek to overturn *Karcher* by essentially prohibiting any population variance because it is technically possible to do so thereby prohibiting states from balancing multiple valid state interests to support minor deviations in population. As the Dissenting Opinion correctly recognized, a correct application of *Karcher's* flexible test and recognized valid state interests supports the constitutionality of Senate Bill 1008. Dissenting Opinion at 1, 10.

Finally, Respondents offer no response to the claim raised by all Applicants herein that the Majority Opinion's decision to impose a remedy on

¹⁴The distinction between this Court's treatment of congressional and legislative redistricting malapportionment claims cannot be supported by either the text of the Constitution or logic. *See* Stay Application at 31 n.7. Indeed, as Justice Scalia has recently noted in the context of attempting to divine a standard for 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 eve of the commencement of the election process was an error. *See* Stay Application at 28-30.

As such, a “reasonable probability” exists that four Justices will consider the errors raised in the Stay Application sufficiently meritorious to note probable jurisdiction and “a fair prospect” that a majority of the Court will conclude that the decision below was erroneous. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (citations omitted); *see also Hollingsworth v. Perry*, 130 S.Ct. 705, 710 (2010) (per curiam) (same; citing *Rostker*).

IV. ALL OF THE APPLICANTS HAVE STANDING TO APPEAL THE MAJORITY OPINION AND THIS COURT HAS JURISDICTION TO REVIEW ALL THE ERRORS ALLEGED BY APPLICANTS.

Respondents repeat nearly verbatim the standing arguments raised below. Respondents do not directly refute either the arguments or the authorities cited by Applicants. *See* Stay Application at 17-18, n.5.

Respondents, seemingly accepting that the Legislature has standing to defend the constitutionality of Senate Bill 1008, take the curious position that it does not have standing to appeal a judgment declaring the enactment unconstitutional and enjoining its enforcement. Application Opposition at 9-10. This argument is nonsensical and contrary to this Court’s precedent.

First, this Court has recognized the right of state legislatures to intervene and subsequently appeal decisions invalidating state statutes in both redistricting and in other contexts. In *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 194 (1972), this Court concluded that it is “settled”

that a properly authorized legislative body had standing on appeal in a case challenging a state redistricting statute. Similarly, in *Karcher v. May*, 484 U.S. 72, 80 (1987), the district court permitted the incumbent legislative leaders with authority to act on behalf of the state legislature to intervene in a case challenging the constitutionality of a state statute because the legislature was responsible for enacting the statute and because no other party defendant was willing to defend the statute. This Court rejected the claim that the Legislature did not have standing to “to represent the State's interests in both the District Court and the Court of Appeals.” *Id.* at 81-82; *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (citing *Karcher v. May*, *supra*). Contrary to the distinction drawn by Respondents, if the Legislature has standing to defend the law, it is injured by an injunction prohibiting its enforcement and may therefore appeal even if the Legislature is not directly responsible for enforcement.¹⁵ *Beens*, 406 U.S. at 194-95.

Second, the fact that Governor Tomblin and Secretary Tennant are only challenging the remedy imposed by the Majority Opinion does not prevent an appeal by them on that single basis. As noted previously, their agreement to

¹⁵This Court need not even reach this question as Secretary Tennant has direct enforcement responsibilities. The Respondents do not contest that Secretary Tennant's appeal of the remedy brings the entire case to this Court for review on appeal including the declaratory judgment that Senate Bill 1008 is unconstitutional. *See* Stay Application at 18, n.5 (citing *United States v. Locke*, 471 U.S. 84, 92 (1985) and *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988)). Moreover, the Court's Order explicitly enjoins all of “*the defendants*” from enforcing Senate Bill 1008. Majority Opinion at 30 (emphasis added).

be bound by the decision in this case and allow the Legislature to substantively defend the constitutionality of Senate Bill 1008 was not a concession to agree to any remedy the court below would impose or a waiver of the right to appeal an improper remedy. *See* Stay Application at 14, n. 5.

CONCLUSION

The Applicants greatly appreciate the Chief Justice's prompt attention to this Application by requesting expedited briefing. As noted above, West Virginia's congressional election is in limbo with deadlines fast approaching. For the reasons noted herein and in the Stay Application, Applicants request that their emergency stay application be granted forthwith allowing the 2012 congressional election to be conducted under the provisions of Senate Bill 1008 or, alternatively if directed by this Court, under the provisions of 2 U.S.C. §2a(c)(1).. Applicants, while recognizing and appreciating the Court's busy workload, respectfully request a quick decision on this Application to allow the State to orderly process its elections free of the uncertainties that the Majority Opinion and the Stay Opinion have caused.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Anthony J. Majestro, do hereby certify that a true and correct copy of the **REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY** has been sent via electronic mail and USPS, postage pre-paid, on January 18, 2012, to:

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