

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,

Applicants,

v.

JEFFERSON COUNTY COMMISSION, et al.,

Respondents.

APPENDIX TO
EMERGENCY APPLICATION FOR STAY PENDING APPEAL
TO THE UNITED STATES SUPREME COURT OF ORDER OF THREE-JUDGE
PANEL ENJOINING CONGRESSIONAL ELECTION FROM BEING
CONDUCTED UNDER REDISTRICTING PLAN ENACTED BY LEGISLATURE

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Exhibit 1

**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.

Civil Action No. 2:11-CV-0989

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.

MEMORANDUM OPINION AND ORDER

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 most populous of the three, the

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, Monroe, (Continued)

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 the clerks of the fifty-five county

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

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

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.

representatives, David McKinley and Shelley Moore Capito. We address each of these contentions in turn.

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

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.

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," 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.

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.

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 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,

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

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

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

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 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.

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).

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

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, (Continued)

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:

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

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.

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

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

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.

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 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

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.

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

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.

that time"). The times, as Bob Dylan once proclaimed, they are a-changing, and what once was characterized as "minor" may now be 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

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.

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:

(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

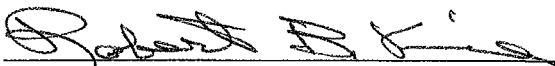
In the absence of successful compliance with one of the foregoing conditions, the Court will, on or after January 17,

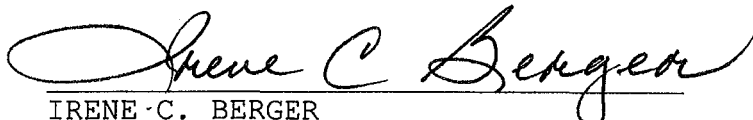
¹⁴ Any plans presented by the defendants under paragraph (2)(b) should be explained to the Court, and, if necessary, fully justified. Further, the plaintiffs should be accorded the opportunity to assess and offer comment to the Court with respect to any such plans.

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 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.


ROBERT B. KING
United States Circuit Judge


IRENE C. BERGER
United States District Judge

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.

Exhibit 2

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.

II.

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 constitutional equation. We think it has been adequately demonstrated that

¹The 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).

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.

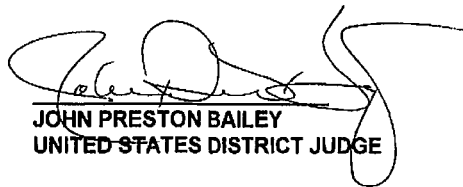

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

Exhibit 3

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.

Civil Action No. 2:11-CV-0989

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.

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

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

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

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, 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.

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 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

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.") (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).

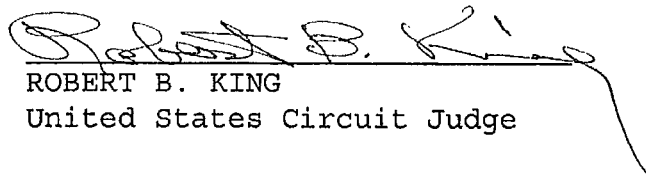
By our decision to further defer imposition of a remedy, the Defendants will suffer no irreparable injury. The Supreme Court may reject their appeal, after which we expect the State to enact a constitutional plan. Or the Court may accept the appeal and ultimately vacate our Order, which may have the 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 many of the State's non-constitutional political concerns. See Response at 5-6.

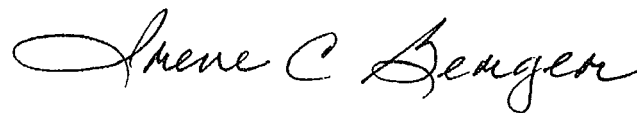
Although a final remedy is forestalled, the continuing injunction against current section 1-2-3 reemphasizes the vindication of the Plaintiffs' (and the Intervening Plaintiff's) rights and helps to ameliorate any injury they and the citizens

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

DATED: January 10, 2012.


ROBERT B. KING
United States Circuit Judge


IRENE C. BERGER
United States District Judge

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.

CERTIFICATE OF SERVICE

I, Anthony J. Majestro, do hereby certify that a true and correct copy of the APPENDIX TO EMERGENCY APPLICATION FOR STAY PENDING APPEAL TO THE UNITED STATES SUPREME COURT OF ORDER OF THREE-JUDGE PANEL ENJOINING CONGRESSIONAL ELECTION FROM BEING CONDUCTED UNDER REDISTRICTING PLAN ENACTED BY LEGISLATURE has been sent via electronic mail and USPS, postage pre-paid, on January 13, 2012, to:

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