No. 11-1184

In the Supreme Court of the United States

NATALIE E. TENNANT, SECRETARY OF STATE, *et al.*,
Appellants,
v.

JEFFERSON COUNTY COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of West Virginia

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

The jurisdictional statement raises four questions, each of which is either incorrectly framed or not properly before this Court.

1. The case does not present the first question: Whether an inter-district population variance of 0.7886% in a congressional redistricting plan still constitutes a minor population deviation that may be justified under *Karcher*.

2. The second question does not fairly include all the subsidiary issues. It should be framed as follows: Whether appellants showed "with some specificity," as *Karcher* v. *Daggett*, 462 U.S. 725 (1983), demands, "that * * * particular objective[s] required the specific [population] deviations in [West Virginia's congressional redistricting] plan."

3. The third question was neither pressed nor passed upon below. It should be reframed to correspond to the issue appellants actually pressed and the district court actually decided: Whether maintaining "the status quo and making only tangential changes to * * * existing [congressional] districts," J.S. App. 18, represents a form of "preserving the cores of prior districts" in the sense this Court approved in *Karcher*, 462 U.S. at 740.

4. The fourth question is moot and would, in any case, not have been ripe for review: Whether a federal court finding a redistricting plan unconstitutional should adopt as a remedy redistricting plans either never considered by the state legislature or specifically rejected by the state legislature.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, appellants include 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; and Richard Thompson in his capactiy as the Speaker of the House of Delegates. Additional appellees are Patricia Noland and Dale Manuel, as individuals. Thornton Cooper intervened as a plaintiff below but is not a party on appeal before this Court.

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MOTION TO DISMISS OR AFFIRM

STATEMENT

This case concerns whether S.B. 1008 (codified at W. Va. Code § 1-2-3 (2012)), which redrew West Virginia's congressional districts after the 2010 census, violates Article I, § 2's guarantee of "one person, one vote." *Wesberry* v. *Sanders*, 376 U.S. 1, 18 (1964). The 2010 census established that West Virginia had a population of 1,852,994, J.S. App. 6, entitling it to three members of Congress, *id.* at 5. A plan best achieving numerical equality would contain one district with 617,664 people and two with 617,665. *Id*. at 6.

1. The Redistricting Process

On August 1, 2011, the West Virginia Legislature convened to redraw its state legislative and congressional districts and created the Select Committee on Redistricting (the "Committee"), comprising seventeen senators. J.S. App. 5. Two days later, the Committee held its first meeting and adopted a proposal formally called the "originating bill," but informally dubbed the "Perfect Plan," which created districts with as close to exact population equality as possible and divided only two counties. *Id*. at 6. This meeting lasted an hour and five minutes. Doc. 40-1, at 3, 8.

The Committee's only other meeting took place the next day, August 4, and lasted an hour and 48 minutes. Doc. 40-1, at 102-109. In it, the Committee rejected six alternatives: two proposed by Senator

Prezioso; three proposed by Senator McCabe but drafted by an outside attorney, Thornton Cooper; and one proposed by Senator Facemire on behalf of Senator Snyder, who was not on the Committee. J.S. App. 6. Two of the plans, Prezioso 2 and Cooper 3, had total population deviations[1] of .44%, Ex. O 38-39, and .04%, *id.* at 41, respectively, and did not split counties or place incumbents within the same district. See *id.* at 66. The Committee instead adopted an amendment to the Perfect Plan proposed by Senator Barnes. J.S. App. 6. The Barnes plan, colloquially known as the "Mason County Flop" because it simply moved Mason County from District 2 to District 3, Ex. O at 34, placed 615,991 people in District 1, 620,862 in District 2, and 616,141 in District 3, thereby creating a total population deviation of .79%—greater than that created by all but one of the alternatives and nearly twice as large as that created by the plan with the next-largest disparity, Prezioso 2, at .44%, J.S. App. 6-8. District 2, moreover, stretched fully across the state at the State's widest point, see *id.* at 65, for about 300 miles by road, *id.* at 20. The Committee then reported this plan to the Senate as S.B. 1008. *Id.* at 6. The Senate passed it the next day, after rejecting a floor amendment offered by Senator Snyder that had a much smaller .39% total

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[1] Total or "[o]verall population deviation is the difference in population between the two districts with the greatest disparity," *Abrams* v. *Johnson*, 521 U.S. 74, 98 (1997), that is, the difference between the largest and the smallest district. When expressed as a percentage, it represents 100 times the difference between the largest and the smallest districts divided by the size of the ideal district.

population deviation, split no county lines, and placed incumbents in different districts. *Id.* at 7 n.1.

At trial, testimony indicated that a prominent factor in S.B. 1008's approval was a desire to leave town as quickly as possible. According to one senator, S.B. 1008 was "the most politically expedient [plan]. It was one that we could do and move out and get out of town, easiest." Tr. 203 (statement of Senator Unger). And to another, "[i]t was the easiest switch we could have done." Doc. 40-1, at 190 (remarks of Senator Facemire). Amending S.B. 1008 in the Senate, by contrast, would have required spending more time, a prospect the legislature resisted. As one senator noted, "[i]f we [amend it], we're probably going to be here a few more days." Ex. Q 3. During the single day of senate consideration, the Senate Minority Leader stated, "it's late in the game. * * * [E]veryone wants to go home. Hopefully, tonight." Doc. 40-1, at 178. And later one of the state's primary witnesses explained why S.B. 1008 was passed so rapidly: "[the senators] want[ed] to do the easy thing since they were tired and desirous of heading home [on that Friday] so that legislators and staff could attend an out-of-state conference beginning on Sunday." Doc. 40-1, at 209. The House of Delegates approved S.B. 1008 on Saturday, August 6, without debate, and the Governor signed it into law 13 days later. J.S. App. 7.

2. District Court Proceedings

The plaintiffs (appellees here), the Jefferson County Commission and two of its commissioners, filed suit against Governor Tomblin, Secretary of

State Tennant, President of the Senate Kessler, and House Speaker Thompson (collectively the "State," "defendants," or "appellants") in the Northern District of West Virginia seeking, among other things, a declaratory judgment that S.B. 1008 violated Article I, § 2 of the U.S. Constitution and injunctive relief. J.S. App. 9. Shortly afterwards, Thornton Cooper moved to intervene as an additional plaintiff, requesting that the court enjoin S.B. 1008 as unconstitutional and adopt one of the three already-proposed Cooper plans (or eventually a later-proposed fourth Cooper plan) as a remedy. Intervenor's Compl. at 9; J.S. App. 10. The district court granted his motion. *Id.* at 9. Later, the district court transferred the case to the Southern District of West Virginia, *id.* at 9-10, and, pursuant to 28 U.S.C. § 2284, the Chief Judge of the Fourth Circuit appointed a three-judge court to hear the case, *id.* at 3.

Trial occurred on December 28. The district court issued its opinion and order on January 3, 2012 and an amendment adding a single footnote the next day. J.S. App. 3.

The district court began its analysis by noting that in *Wesberry* v. *Sanders*, this Court had held that Article 1, § 2 "mean[s] that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." *Id.* at 10 (quoting *Wesberry*, 376 U.S. at 7-8). In *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), it added, this Court held further that

> [a]lthough "[t]he extent to which equality may practically 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" [and this Court] rejected the argument that small, unexplained disparities might be considered de minimus, 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 10-11 (quoting *Kirkpatrick*, 394 U.S. at 530-31) (second and fourth alteration in original). The district court then laid out the two-step "procedural mechanism" for implementing the "*Sanders* practicability" standard that this Court had developed in *Karcher* v. *Daggett*, 462 U.S. 725, 730-31 (1983):

> At the outset, a party challenging [a congressional redistricting] 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 [population]." 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."

J.S. App. 11 (quoting *Karcher*, 462 U.S. at 730-31).

"The *Karcher* Court," the district court explained, "identified several policies or objectives that might support a conclusion of legitimacy" if "consistently applied," including "making districts compact, respecting municipal boundaries, preserving the

cores of prior districts, and avoiding contests between incumbent representatives." *Ibid.* (quoting *Karcher*, 462 U.S. at 740). "Importantly," it added, "the onus is on the [State] 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 relying on general assertions.'" *Ibid.* (quoting *Karcher*, 462 U.S. at 741).

The district court then applied that framework. At trial, it noted, "the State [had] helpfully conceded that the plaintiffs * * * satisfied their threshold burden" under *Karcher*'s first step. J.S. App. 12. That shifted the burden to the State to justify the population discrepancies, which the State attempted to do by arguing that "the enacted variance is solely the result of its efforts to accommodate the legitimate goals of respecting county boundaries, preserving the cores of extant districts, and avoiding a contest in the Republican primary between two of West Virginia's incumbent representatives." *Ibid.* The court then "address[ed] each of these contentions in turn." *Ibid.*

The district court recognized that "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." J.S. App. 15. After trial, however, it found that "there was nothing in the record * * * that would give any justification for the act of the Legislature in this regard." *Ibid.* Looking at the eight other proposals the Committee and the

Senate considered, the district court found that only one split counties and only one had a greater total population deviation than S.B. 1008. *Id.* at 16. The other six, it observed, "would have been more in keeping with the constitutional [command] of 'one person, one vote' [and] the[ir] rejection * * * militates strongly against a conclusion that the Legislature put forth the objective[] good-faith effort that *Karcher* requires." *Ibid.*

The court next recognized that "preserving the core of existing districts may afford a legitimate basis for a state to justify a population variance," J.S. App. 17, and considered three different possible conceptions of "core"—two geographical and one sociological. The "core of a district," it noted, "might be most comfortably conceived in geographical terms as being more or less the center portion of a district map." *Ibid.* But it quickly added that "[i]n West Virginia, 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 panhandles in the north and the east, or the coalfields in the south." *Ibid.* On the other hand, "a district's core [could] also implicate [the] social, cultural, racial, ethnic, and economic interests common to the population." *Ibid.*

The district court found, however, that "[n]one of these particular concerns factored significantly into the legislature's decision making." J.S. App. 18. "To the contrary," in fact, "the emphasis was on preserving the status quo and making only tangential changes to the existing districts," *ibid.,* which the

district court rejected as a form of core-preservation: "Regardless of how one perceives the 'core' of a congressional district, it must be, by definition, merely part of the whole." *Id.* at 19. "[E]recting a figurative fence around a district's entire perimeter preserves its * * * core only in the grossest, most ham-handed sense." *Ibid.*

The district court then noted that one district had no core at all under any conceivable definition: "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." J.S. App. 19. To the court, District 2's "excessive elongation" made it "an abomination," *id.* at 20 (quoting Tr. 127 (testimony of Dr. Martis)), which "strayed far from the [State's own] traditional notions of what * * * congressional districts ought to look like," *ibid.*

Finally, the district court recognized that the legislature's third putative goal, avoiding placing two incumbents in the same district, may "have been consistent with * * * *Karcher*," but, it added, "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." J.S. App. 22. It also noted that "six of the seven more compliant alternatives * * * would have achieved th[is] same avoidance goal as S.B. 1008, again calling into question the extent to which the Legislature

conducted its apportionment in objective good faith." *Ibid.*

The district court then rejected the State's arguments that court judgments upholding prior West Virginia congressional redistrictings in 1991 and 1971 supported S.B. 1008. There was, it found, an "obvious and critical difference between" the 2011 and 1991 plans. J.S. App. 25. Whereas the current plan involved a total population deviation of .79%, the 1991 plan involved one of only .09%. *Ibid.* The court held that "[h]owever inconsequential the burden in [the earlier case,] it is necessarily far [greater] when the variance to be justified is about nine times greater." *Ibid.*

The court also noted "some superficial appeal to the argument" that an earlier district court's approval of the 1971 plan, which involved a similar total population deviation, and the Supreme Court's "See, *e.g.*" reference to that case in *Karcher* as an example of where "legitimate objectives * * * on a proper showing could justify minor population deviations," 462 U.S. at 740, implied that S.B. 1008 might pass muster. J.S. App. 25. It observed, however, that since 1971, the expected degree of precision had narrowed. *Id.* at 26. In particular, of 20 states whose 2011 congressional redistricting plans it then had evidence of, only two—West Virginia and Arkansas—"ha[d] approved variances in excess of .03%," *ibid.*, a number less than 1/26th of West Virginia's variance, and that 15 of those 20 states "ha[d] enacted or, we[re] in the process of enacting, zero-variance proposals." *Ibid.* The court also noted that the *Karcher* opinion's reference to the

1971 plan as an example of one containing "minor" deviations was unsurprising in historical context. Its .79% total population deviation was much smaller than that of either of West Virginia's immediately preceding congressional plans—of over eight and four percent, respectively. *Id.* at 27.

Finding inadequate justification for the districts' population deviations, the court declared W.Va. Code § 1-2-3 unconstitutional. It noted in particular, that there was not "a single speck of evidence in the record revealing any finding by the Legislature allocating a specific variance in population toward achieving each of [its] asserted objectives." J.S. App. 30 n.13. Without such evidence, the State failed "*Karcher*'s admonition that [it] * * * show [with] some specificity that a particular objective required the specific deviations in its plan, *rather than simply relying on general assertions*." *Ibid.* (quoting *Karcher,* 462 U.S. at 741 (emphasis added by district court)).

The district court was "loath to devise on [its] own a redistricting plan" and sought to give the State an opportunity to redistrict properly. J.S. App. 30. It therefore deferred further remedial action until January 17, 2012 in the hope that defendants would themselves propose a constitutional plan. *Id.* at 31. In that time, it "encouraged" defendants to either "(a) [s]eek enactment of an apportionment plan that satisfies the applicable constitutional mandat[e], or (b) [p]resent the Court with one or more alternative plans approved by the defendants for the Court's consideration as an interim plan." *Ibid.* If no such plans were forthcoming, the court held, it would "be constrained to identify an interim plan for use in the

2012 congressional elections * * * from among those currently in the record of this case, likely either the so-called 'Perfect Plan' or Cooper Plan 4." *Ibid.*

Judge Bailey dissented. He argued that the court "ha[d] 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*." J.S. App. 33. Although he agreed that plaintiffs had "satisfied the first prong of *Karcher*," *ibid.*, he "disagree[d] that the State ha[d] failed to demonstrate a proper justification for the variance," *ibid.* He argued that the "legislative record corroborate[d]" that in redistricting the State was "concerned" with "(1) keeping counties intact; (2) preserving the core of existing districts; and (3) avoiding contests between incumbent members of Congress." *Id.* at 35. Since he believed the population variance was "**minor**," *id.* at 39 (original emphasis), and was necessary for the State to achieve objectives that "[we]re not only legitimate but of great importance," *id.* at 40, he would have upheld the redistricting plan. *Id.* at 44-45.

On January 6, 2012, defendants filed a motion to stay the judgment pending appeal. J.S. App. 54. The district court denied that motion on January 10, holding that defendants failed to "ma[k]e a strong showing that [they were] likely to succeed on the merits." *Ibid.* Much of the defendants' argument, it noted, rested on the proposition that "*Karcher* was a bad idea." *Id.* at 56 (quoting Tr. 43 (argument of Speaker Thompson's Counsel)).

With regard to remedy, the court was "acutely sensitive that legislative apportionment plans created by the legislature are to be preferred to judicially created plans," J.S. App. 57, and explained that it had designed the original remedial order to "afford[] the State a reasonable time to fashion a substitute for [S.B. 1008] and [to allow] the State to smoothly and expeditiously supersede any judicially imposed plan with a constitutional plan of its own making," *ibid.* The court noted, however, that the State's decision to appeal meant that there was "no longer * * * any pressing need * * * to impose a remedy by a specified time." *Id.* at 58. "Reiterating [its] strong preference that the State act on its own behalf in redistricting," the district court thus modified its original order to defer any further remedial action until after this Court had disposed of the appeal. *Ibid.*

ARGUMENT

S.B. 1008 deviates further from Article I, § 2's guarantee of "one person, one vote," see *Wesberry* v. *Sanders*, 376 U.S. 1, 18 (1964) (internal quotation marks omitted), than any other reported congressional districting plan in the country. See National Conference of State Legislatures, *2010 NCSL Congressional and State Legislative Redistricting Deviation Table*, http://www.ncsl.org/legislatures-elections/redist/2010-ncsl-redistricting-deviation-table.aspx (last visited May 24, 2012). At .79%, its total population deviation is nearly four times the next largest, see *ibid.* (reporting Mississippi with the

next highest total population deviation of .2%),[2] and 56.5 times the average of all other reported states containing more than one district, see *ibid.* (calculated by averaging deviations for all other States reported). Indeed, no court since *Karcher* has upheld a congressional redistricting plan containing a deviation this large.

The State invokes three policies to justify this gaping difference but, as the district court found, its arguments amount to little more than unsubstantiated gestures. J.S. App. 30 n.13 (finding that State was "*simply relying on general assertions*") (internal quotation marks omitted). By insisting that it need not "show [with] some specificity that a particular objective required the specific deviations in its plan," as this Court required in *Karcher* v. *Daggett*, 462 U.S. 725, 741 (1983), the State seeks to eviscerate Article I, § 2's robust guarantee of "one person, one vote." The district court correctly applied well-settled law in rejecting the State's arguments

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[2] This number may, in fact, significantly understate the difference. Although the NCSL Table reports an overall population deviation of .2% for Mississippi, *ibid.*, its own raw figures indicate one of only .018%, *ibid.* (calculating deviation by dividing difference in population between largest and smallest districts by ideal district size and multiplying by 100). The district court opinion ordering the Mississippi redistricting indicates an even smaller overall deviation. It reports that the largest district in its plan contained only 86 more people than the smallest district. See *Smith* v. *Hosemann*, No. 3:01-cv-855-HTW-DCB, 2011 WL 6950914, at *7 (S.D. Miss. Dec. 30, 2011) (3-judge court) ("The population deviation range is from +38 people in District 2 to -48 people in District 4."). If this is true, the overall population deviation is only .012%.

and this Court's plenary review of the district court's fact-bound decision is unwarranted.

I. The Case Does Not Present Appellants' First Question

The State's first question presented asks "[w]hether an inter-district population variance of 0.7886% in a congressional redistricting plan still constitutes a minor population deviation that may be justified under *Karcher*." J.S. i. The district court, however, recognized that all deviations—whether small or large—must be and potentially *could be* justified. *Id*. at 10-11. It simply held that the State had failed to justify the deviation in this case. See *id.* at 30 n.13. The district court never distinguished between "minor" variances, which could be justified, and "large" variances, which could not. It simply held that larger population deviations require correspondingly more powerful justification, see *id*. at 25, which correctly states the law, see *Karcher*, 462 U.S. at 741 ("The showing required to justify population deviations * * * depend[s in part] on the size of the deviations.") (internal quotation marks omitted). The State agrees. J.S. 14 ("*Karcher* requires the State to establish that deviations * * * are justified by legitimate state interests with the burden on the state varying based on several factors including the size of deviations.").

The State characterizes West Virginia's deviations as "minor"—although they are the largest reported in the nation, see pp. 12-13, *supra*—in order to make an unrelated argument not encompassed in the first question presented. Since other district courts and

this Court have found similarly sized deviations *in other plans* justified in the past, the State argues, its current deviations must be permissible too. J.S. 15-16. But, as the State's citations betray, see *id.* at 15, all but one of the district court cases were decided *before Karcher*. And the one that was not, *Turner* v. *Arkansas*, 784 F. Supp. 585 (E.D. Ark. 1991) (three-judge court) rested almost exclusively on a pre-*Karcher* case that had upheld a slightly larger total population deviation in the prior Arkansas plan than the one at issue. See *id.* at 585-588 (discussing and extensively quoting *Doulin* v. *White*, 535 F. Supp. 450 (E.D. Ark. 1982) (three-judge court)).

Similarly, this Court's passing "See, *e.g.*," reference in *Karcher* to a prior district court case from West Virginia upholding a plan containing a .78% deviation "as justified by the compactness provision in [West Virginia's] state constitution," 462 U.S. at 740-741, is not inconsistent with the result here. In that remark, the *Karcher* Court was merely pointing to the district court case as an example of one court taking the general approach this Court was then laying out. The Court was not affirming that court's judgment or approving its application of the test to the particular facts of that case.

These cases hardly create a conflict because, as this Court stated in *Karcher*, "[b]y necessity, whether deviations are justified requires case-by-case" analysis. 462 U.S. at 741. That a deviation of a particular size—whether thought "minor" or "major"—has been upheld in one plan and rejected in another creates no presumption that different courts are applying the "one person, one vote" guarantee

differently. Rather, it likely shows that they are applying the guarantee consistently to different plans reflecting different kinds and degrees of justification. Compactness, for example, may justify deviations of a certain size in one State's plan but not in another's. To hold that all deviations of a particular size must stand or fall together regardless of the plan or the State's asserted justifications would violate *Karcher*'s command that the inquiry be "flexible," *ibid.*, and displace the required careful "case-by-case," *ibid.*, analysis with a clumsy one-size-fits-all rule.

II. The State Failed to Justify Its Population Deviations Under *Karcher*

Article I, § 2 guarantees "one person, one vote" in congressional elections. *Wesberry* v. *Sanders*, 376 U.S. 1, 18 (1964) (quoting *Gray* v. *Sanders*, 372 U.S. 368, 381 (1963)). It requires States to endeavor to "achieve absolute [population] equality" among congressional districts. *Karcher* v. *Daggett*, 462 U.S. 725, 730 (1983) (quoting *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 531 (1964)). Congressional redistricting plans may enact "limited" deviations from the rule of absolute equality only if the deviations are "unavoidable despite a good-faith effort to achieve absolute equality" or if "justification is shown" for the deviations. *Kirkpatrick*, 394 U.S. at 526.

In order to determine whether a redistricting plan satisfies *Wesberry* and *Kirkpatrick*'s strict standard, this Court has established a two-part test. The party challenging a redistricting plan must first demonstrate the existence of "population differences among districts [that] could have been reduced or

eliminated altogether by a good-faith effort to draw districts of equal population." *Karcher*, 462 U.S. at 730. If it does, "the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal." *Id.* at 731. To discharge that burden,

> The State must * * * 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.

Id. at 741 (emphasis added). The showing, although "flexible," must be "specific" and cannot rely "on general assertions." In particular, the State must address "the availability of alternative[plans] that might substantially vindicate [its asserted] interests yet approximate population equality more closely." *Ibid*.

This case concerns only the second prong of the *Karcher* test. As it had to, the State conceded that plaintiffs satisfied the first prong. J.S. App. 12 ("Indeed, the State could hardly have argued otherwise, given that no fewer than seven less drastic alternatives were submitted for consideration."). The

State contends, however, that three policies justify the significant population variance among districts: "preserv[ing] the cores of existing districts, avoid[ing] incumbent conflicts, *and* ke[e]p[ing] counties whole." J.S 19. Although it does not contest the district court's finding that "one *or more* of the goals were individually served by alternate plans with smaller deviations," *ibid.* (emphasis added), it contends S.B. 1008's variances were nonetheless justified because "no plan met *all* the state's goals *and* had a smaller [overall] variance," *ibid.* (emphasis added).[3]

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[3] The State also complains that the district court misapplied *Karcher* by requiring "explicit findings." J.S. 19. This again misreads the district court's opinion. The district court lamented the lack of legislative findings, to be sure, see J.S. App. 15-16 n.7, and opined that official legislative findings in the record might even be "*sufficient*" for its review and "would certainly be preferable to a court attempting to ascertain [the legislature's] thinking via after-the-fact testimony of individual legislators," *id.* at 16 n.7 (emphasis added). The court never held, however, that such findings were *necessary*. In fact, it expressly analyzed all three of the State's asserted policies even though they were not mentioned anywhere in the legislative record. See J.S. App. 15 (holding that not splitting counties "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"); *id.* at 17-22 ("acknowledg[ing] that preserving the core of existing districts may afford a legitimate variance among congressional districts" but finding that S.B. 1008 did not serve this goal); *id.* at 22 (acknowledging that protecting incumbents "is consistent with * * * *Karcher*" but finding that the State had not put anything "in the record linking all or a specific part of the variance with th[is] particular interest"). The State's real complaint is not that the district court required an official legislative statement of purposes but rather that the court, following *Karcher*,

The State's argument both misunderstands the law and misreads the district court's opinion. In particular, the State misunderstands the nature of its burden under *Karcher*'s second prong. The State argues that so long as no other plan submitted to the district court achieves all the State's asserted goals while achieving a smaller overall variance, the district court must uphold the State's districting. This approach errs in several ways: (1) it places the burden of *Karcher*'s second prong on plaintiffs, not the State; (2) it mistakes the aim of the *Karcher* inquiry; (3) it tests the State's plan by comparing it to ones submitted by plaintiffs for very different purposes; and (4) it ignores two of the central factors that this Court has held the State must address as part of its *Karcher* showing.

First, the State's argument misplaces the burden of proof. *Karcher* makes clear that the State bears the burden under the test's second prong. 462 U.S. at 741 ("*The State must* * * * *show* with some specificity that a particular objective required the specific deviations in its plan.") (emphasis added). Under the State's view, however, the State bears no such burden—indeed, no burden at all. Instead plaintiffs, who have already met their initial burden under the first prong of *Karcher*, bear a second one. They must produce a plan that better achieves *each* of the State's asserted goals *individually* while also further reducing the overall population deviation. If they do not, the district court must uphold the State's plan.

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required it to show that the goals it was claiming to pursue justified the actual variances in the plan.

See J.S. 19 (arguing that plan should be upheld because "none of the alternative plans met all [three state] goals while adhering more closely to population equality.").

Second, this misplaced burden addresses a very different issue than does *Karcher*'s second prong. No longer does the test ask whether population variances are sufficiently justified by legitimate state policies. Instead, it asks whether there is a plan that better meets population equality *and* each of the State's asserted policies. This effectively creates a tournament in which each of the plans plaintiffs submit into evidence must individually challenge the presumptive legislative "champion." Its aim, moreover, is not to determine whether legitimate state policies justify a deviation from "one person, one vote," but whether any plan can better achieve the state policies—whatever their strength—without further increasing population disparities. But just as *Karcher* does not require the State to produce a "best" plan, see 462 U.S. at 739 n.10 (disavowing "that a plan cannot represent a good-faith effort whenever a court can conceive of minor improvements"); *Graham* v. *Thornburgh*, 207 F. Supp. 2d 1280, 1293 (D. Kan. 2002) (three-judge court) ("The court's task remains the evaluation of the adopted plan's constitutionality, not the determination of whether the court believes it to be the best possible plan."), it does not require plaintiffs to produce a "better" one under each and every criterion asserted by the State. Such an approach would turn the purpose of *Karcher*'s second prong on its head.

Third, under *Karcher*, plaintiffs introduce alternative plans for purposes other than showing they can "beat" the legislative plan on each of its own chosen criteria. In this case, for example, plaintiffs submitted the particular plans they did because they represented all the other plans that the legislature had actually considered and rejected.[4] Plaintiffs' aim was (1) to carry their burden of proof under *Karcher*'s first prong and (2) to show that the legislature rejected many alternatives that satisfied one, two, or three of the goals the State claimed it was pursuing as well as or better than the plan ultimately adopted. In this way, plaintiffs hoped to frame the context in which the State would have to carry *Karcher*'s second burden and question whether "the Legislature [had] put forth the objective[] good-faith effort that *Karcher* requires." J.S. App. 16. *Karcher* does not limit the alternatives a court should consider in determining whether the State has justified population deviations to those plaintiffs happen to introduce for other legitimate but unrelated reasons.

Fourth, the State's approach ignores two of the four factors this Court made central under the second prong of *Karcher*. That prong places on the State the burden to "show that a particular objective required the specific deviations in its plan." 462 U.S. at 741. Although the State never fully quotes or even describes what this showing entails, this Court held that it "is flexible [and] depend[s] on the size of the deviations, the importance of the State's interests,

[4] The one exception was the Cooper 4 plan, which plaintiff-intervenor introduced for still other reasons.

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." *Ibid*.

In addition to making rigid a test supposed to be "flexible," the State's approach ignores the second and fourth of *Karcher*'s four factors. By upholding a plan unless the plaintiffs produce a plan that better achieves population equality and each of the State's asserted goals individually, the approach limits consideration of how important the State's goals are. So long as each passes some basic threshold level of legitimacy, each counts as much as the others and the plaintiffs must "beat" the State on each one. Plaintiffs cannot argue, for example, that the State could have made the most minimal of tradeoffs against any of the individual state interests in order to achieve population equality much better.

More important, the State's approach completely ignores *Karcher*'s final factor. *Karcher* requires the State to address "the availability of alternatives that might substantially vindicate [the State's asserted] interests yet approximate population equality more closely." 462 U.S. at 741. The State's tournament approach, however, allows consideration only of alternatives that *better*, not *substantially*, vindicate those interests and, moreover, that better vindicate *each individually*. In other words, it allows the State to avoid *Karcher*'s required inquiry into whether small tradeoffs against or even just among some of the State's asserted policies would not achieve more precise population equality. Although *Karcher* does

not require that the State prove it created the "best" plan, it does require the State to "show with some specificity" that small tradeoffs could not appreciably improve population equality.

This, in turn, is precisely why *Karcher* requires—and the district court demanded—some evidence from the State explaining why pursuing each of its asserted objectives necessitated some portion of the population variances. 462 U.S. at 741; J.S. App. 30 n.13. Without any such evidence, the district court could not properly weigh *Karcher*'s fourth factor. It had no way of knowing whether the State could have "substantially vindicate[d]" any of its interests and minimized population variances much further. 462 U.S. at 741.

Record evidence shows, moreover, that the State could, in fact, have "substantially vindicate[d]" all three of its asserted interests and much reduced the overall population deviation. The dissent itself, for example, described a plan that "would have the effect of satisfying all the concerns expressed by the Legislature[, including population equality,] other than splitting of counties." See J.S. App. 45 n.1. It would, however, have "substantially vindicate[d]" even the one policy it appeared to violate because it could have been implemented by splitting only one county: Jackson.

The record reveals other possibilities as well. Consider a plan identical to S.B. 1008 but moving 1,523 of the voters in southern Randolph County to District 3 and 1,674 of the voters in northern Randolph County to District 1. District 1 would have

617,665 residents; District 2 617,665; and District 3 617,664. Such a plan would achieve maximum population equality.[5] It would also pit no incumbents against each other, transfer only 30,521 people from one district to another—the minimum that any plan achieving population equality needs to move—and split only one of West Virginia's 55 counties. Like the dissent's proposal, it trades off splitting one county for precise population equality.[6]

Lower courts understand how *Karcher* applies. They require States to offer specific justifications for particular deviations from population equality. In *Larios* v. *Cox*, for example, the Georgia legislature produced detailed evidence showing that a challenged 0.01% deviation, approximately 1/79th of the deviation here, was justified by the state's interest in avoiding splitting voting precincts, "explain[ing] in detail" what would have to be done "to reduce each district to a population deviation of plus or minus one person." *Larios* v. *Cox*, 300 F. Supp. 2d 1320, 1337, 1356 (N.D. Ga. 2004) (three-judge court); see also *Graham*, 207 F. Supp. 2d at 1294-1295 (three-judge court) (finding a 0.0049% deviation to be justified in light of the legislature's considered "decisions about which communities of interest it could maintain and which should be split"); *Vieth* v. *Pennsylvania*, 195 F.

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[5] Not splitting precincts might entail minor adjustments, but the State does not assert that this is one of its aims.

[6] Appellees do not argue that the district court should have adopted a plan like this. Rather, they point to it only to show how the State's proposed approach makes irrelevant consideration of an alternative that *Karcher*'s fourth factor makes central to the inquiry.

Supp. 2d 672, 677-678 (M.D. Pa. 2002) (three-judge court) (closely examining and rejecting the state interest in avoiding split voting precincts as a justification for a 19-person deviation); *Marylanders for Fair Representation, Inc.* v. *Schaefer*, 849 F. Supp. 1022, 1037 (D. Md. 1994) (three-judge court) (attributing four particular population deviations to the specific interests that justify them); *Stone* v. *Hechler*, 782 F. Supp. 1116, 1128 n.18 (N.D. W.Va. 1992) (three-judge court) (finding a 0.09% deviation to be justified by the interest in core preservation); *Anne Arundel Cnty. Republican Cent. Comm.* v. *State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 397 (D. Md. 1991) (three-judge court) (finding an eight-person deviation justified in light of the state's interest in keeping intact three particular regions, creating a minority voting district, and protecting incumbents); *Hastert* v. *State Bd. of Elections*, 777 F. Supp. 634, 645 (N.D. Ill. 1991) (three-judge court) (rejecting the state's justifications where they "do not address the population variations" in particular districts).

III. The State's Third Question Was Not Properly Pressed Or Ruled Upon Below And Would Make No Difference To The Case's Outcome

The State's third question presented asks "[w]hether preserving current congressional districts as intact as possible may constitute a nondiscriminatory legislative policy under *Karcher*." J.S. i. This spins quite differently the particular state policy argued below and ruled upon by the district court. There the State repeatedly

characterized this policy not as keeping "current congressional districts as intact as possible" but as "preserving the core of existing districts." See Defs' Jt. Opening Br. 11 (stating goal in this way three times); *id*. at 13 (two times); *id*. at 26 (once).

The State made its strategy clear in its opening argument. There it told the district court that although it would "hear expert testimony on how [the State was] not preserving cores[, all] that testimony is irrelevant because * * * what a core means is what the Legislature decides it means [and this court] should defer to the legislative definition[] of * * * what is a core." (Tr. 46-47) (State's opening statement). In other words, in the district court the State did not argue that "keeping current congressional districts as intact as possible" might be a possible justification under *Karcher* but something quite different: that its particular plan, which allegedly sought to move as few people as possible from one district to another, preserved existing districts' "cores," a different interest which this Court had already held could justify certain population deviations, see *Karcher*, 462 U.S. at 740.

This trial strategy was deliberate but dubious. It had the advantage, if successful, of easing the State's burden. If the district court accepted the argument that "a core means * * * what the Legislature decides it means," the State would not have to argue that "keeping current congressional districts as intact as possible" was a consistent and legitimate state policy that could justify West Virginia's deviations under *Karcher*. See 462 U.S. at 740. In other words, the State was trying to make its case easier by

shoehorning this separate interest into one *Karcher* had already accepted.

The strategy had several weaknesses, however. For one thing, the State discovered at trial that even its own witnesses did not understand how it was using the term "core." Tr. 177-178 ("I don't know what the core of a district means. * * * I've never * * * known what it means."); *id.* at 180 (responding to State's question "if the aim was to keep the cores the same * * * [does not] Senate Bill 1008 do[] that better than * * * any of the other proposals" with "I don't know that I can agree to cores because I haven't defined cores."). Such testimony undoubtedly damaged the State's case. For another, the district court might reject the State's argument that the legislature could define core however it wanted as a way of shortcutting the analysis required by *Karcher*'s second prong.

In the event, this is exactly what happened. The district court understood that the State was arguing that the plan "preserv[ed] the cores of extant districts." J.S. App. 12, 17-20. It then interpreted "core" in three different ways as broadly as possible, *id.* at 17 (treating core as "the center portion of a district," as "defined by more outlying geographic features, such as the panhandles in the north and the east, or the coalfields in the south," and as defined by "social, cultural, racial, ethnic, and economic interests common to the population"), to see if this interest could in any way justify some part of S.B. 1008's deviations. It held that "[n]one of these particular concerns factored significantly into the Legislature's decision making." *Id.* at 18. Instead, it

found, the State was actually pursuing a separate interest—"preserving the status quo and making only tangential changes to the existing districts," *ibid.* But there was no reason for the district court to analyze this interest since the State was not independently asserting it.

In a sense, the State reaped what it sowed. By trying to shoehorn one interest into a long-accepted but unrelated one, the State put forward at trial an argument different from the one it now asserts—and rightly lost it. Whatever the value of maintaining the status quo, doing so preserves "core[s] only in the grossest, most ham-handed sense." J.S. App. 19.

Even if the district court had formally ruled on the State's status quo policy, the outcome of the case would have been no different. In reflecting on whether maintaining the status quo as much as possible could justify West Virginia's variances, the district court both questioned how consistently the State had pursued this policy, see J.S. App. 20, and doubted whether the policy was important enough to do the great work required of it here, *id.* at 20-21. In this, the district court was correct. Although some lower courts have recognized an interest in keeping district boundaries somewhat close to what they were before, no court has ever held, as West Virginia argues, that this interest justifies deviating from population equality in order to preserve existing districts *almost exactly as they are*. In *Johnson* v. *Miller*, for example, the court found this particular interest satisfied by a plan that "maintain[ed] ninety-five counties (totally *or partially*) in the same districts"—and moved sixty-four counties into new

districts. 922 F. Supp. 1556, 1562 (S.D. Ga. 1996) (three-judge court) (emphasis added), *aff'd sub nom. Abrams* v. *Johnson*, 521 U.S. 74 (1997); *see also Stone* v. *Hechler*, 782 F. Supp. 1116, 1121-1122 (N.D. W.Va. 1992) (three-judge court) (finding interest served by plan moving two counties and 47,252 people into new districts); *Turner* v. *Arkansas*, 784 F. Supp. 585, 588 (E.D. Ark. 1991) (finding interest served by plan moving six counties and 96,164 people into new districts), *aff'd mem.*, 504 U.S. 952 (1992); *South Carolina State Conference of Branches of the NAACP* v. *Riley*, 533 F. Supp. 1178, 1180 (D.S.C. 1982) (three-judge court) (finding interest served by plan moving six counties into new districts), *aff'd mem.*, 459 U.S. 1025 (1982).

Resolving this issue would make no difference to the outcome of the case for another reason. The State is not asking simply that keeping "current districts as intact as possible [be held] a nondiscriminatory legislative policy under *Karcher*." J.S. i. If that were the case, the court could weigh moving different numbers of people from one district to another against particular population deviations and it could consider alternative plans with smaller population deviations that substantially vindicate this interest. Rather, the State is asking this Court to elevate this interest to an absolute constraint in redistricting, just like the other policies it puts forward in its discussion of its second question presented. See pp. 18-20, 22-24, *supra*. In other words, the State would have this Court uphold S.B. 1008 unless plaintiffs can create a plan (1) achieving population equality and *each* of its other asserted goals as well as S.B. 1008 does *and* (2)

moving the same number of people or fewer. Unless this Court accepts the State's novel view of the second prong of *Karcher*—one that transforms the inquiry from justifying population deviations to a tournament in which plaintiffs can challenge the State's plan only on the State's own terms—deciding the third question presented in the State's favor could make no difference.

IV. Any Issues Concerning Remedy Are Moot And, In Any Event, Would Not Have Been Ripe

In its fourth question presented, the State asks this Court to review the district court's original remedy, which, the State claims, "adopt[ed] * * * redistricting plans either never considered by the state legislature or specifically rejected by [it.]" J.S. i. The State neglects to note, however, that the district court's order denying the State's motion for a stay modified the original order to "defer any and all action with respect to a remedy until after the Supreme Court has disposed of the Defendants' forthcoming appeal." J.S. App. 58. That modification "forestalled" any "final remedy," *ibid.*, and left only "the continuing injunction against current section 1-2-3" in place, *ibid.* The State, in other words, is asking this Court to review something that the district court has effectively vacated. Whatever the merits of that order, any issues about it are, in the very deepest sense, moot. See, *e.g.*, *United States* v. *Davis*, 103 F.3d 48, 48 (7th Cir. 1996) ("If mootness means anything, it means * * * that one cannot successfully appeal when a district judge has already given the relief sought.").

Even if the district court had not vacated that part of the remedy the State complains of, review would be unripe. The district court's original order did not impose any plan on the State. J.S. App. 31. "[L]oath to devise on [its] own a redistricting plan," *id.* at 30, the court "encouraged [defendants] to: (a) [s]eek the enactment of an apportionment plan that satisfies the applicable constitutional mandate; or (b) [p]resent the Court with one or more alternative plans approved by the defendants for the Court's consideration as an interim plan." *Id.* at 31. Only if West Virginia did not enact a valid plan *and* the defendants did not submit a plan within two weeks, would the court act. *Ibid.* At that point, because of the pending election filing deadlines, the district court would "be constrained to identify an interim plan for use in the 2012 congressional elections * * * from among those currently in the record of this case." *Ibid.*

The district court, of course, never reached this point. Before the two weeks were up, this Court granted a stay keeping S.B. 1008 in place pending disposition of the appeal. 132 S. Ct. 1140 (2012). The district court thus never imposed *any* plan and never even indicated which precise plan it would have imposed had it been necessary to do so. Although in its original order the court stated that if no constitutional plan were forthcoming it would "*likely* [choose] either the so-called 'Perfect Plan' or Cooper Plan 4," J.S. App. 31 (emphasis added), it nowhere foreclosed other possibilities. In its later order denying the State's motion for a stay, in fact, the district court noted with approval two new plans

submitted, "apparently generated by the State's Redistricting Office within the past few days[, that] present[] a near-zero variance * * * and * * * thus appear[] to satisfy the 'one person, one vote' mandate of *Karcher*, while also accommodating many of the State's non-constitutional political concerns." *Id.* at 59-60. If the court had adopted either of these plans, it would have met the objections the State now makes. See J.S. 27-30.

As this Court has long held, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas* v. *United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas* v. *Union Carbide Agricultural Products Co.,* 473 U.S. 568, 580-581 (1985)). Even if it had not been effectively vacated, the district court's original remedy would have fallen in this category. The district court could have imposed any of a number of redistricting plans or none at all. And when a court "'ha[s] no idea whether or when [any particular remedy] will be ordered,' the issue is not fit for adjudication." *Ibid.* (quoting *Toilet Goods Assn., Inc.* v. *Gardner,* 387 U.S. 158, 163 (1967)).

V. The Case Is A Poor Vehicle For Deciding Any Of The Questions Presented

Appellants ask this Court to hear the case to resolve four questions. The first rests on a misreading of the district court's opinion. See p. 14, *supra.* Nothing the court said, let alone held, suggests that a .7886% population deviation can never be justified under *Karcher.* The district court,

in fact, carefully applied *Karcher* to determine whether the State could justify S.B. 1008's deviations. See J.S. App. 13-22. That application would have been unnecessary had the court taken the position the State imputes to it. If the Court believes it should address the first question, it should await a case where the issue was actually presented and decided below adversely to appellants.

The second question presented lacks the evidentiary record necessary for this Court to consider and properly decide it. Because the State took the view that the burden was on plaintiffs to show that another plan could have achieved each of the State's asserted objectives at least as well as S.B. 1008 *and* reduced population variances, there is little record evidence about how much population variance the State's various policies actually required, let alone what small tradeoffs might have led to gains in population equality. And the State submitted *no* record evidence on the *Karcher* factor that bears most heavily in this particular determination: "the availability of alternatives that might *substantially* vindicate [the State's] interests and yet approximate population equality more closely." *Karcher*, 462 U.S. at 741 (emphasis added). If the Court believes that the law governing how specifically a State must justify population deviations needs clarification, it should take a case where the State made *some* effort to justify population deviations and offered *some* evidence that no alternatives existed that would have "substantially vindicated" its goals.

Appellants did not squarely present their third question and the court below did not actually decide

it. For strategic reasons, the State decided to argue obliquely any interest in keeping existing districts intact. It did not argue straight-forwardly that this was the kind of concern *Karcher* allowed to justify population deviations and then submit evidence about its importance, the consistency with which the State had applied it, and the availability of alternatives that might substantially vindicate it yet achieve population equality more precisely, as *Karcher* instructs. 462 U.S. at 471. Instead, the State asserted this interest under the guise of another which this Court had already approved in *Karcher*: "preserving the cores of prior districts." See J.S. 12, 17-20. The district court understood that whether the plan preserved cores, not whether it kept districts intact, was the question the State was asking it to decide and decided it—against the State. The State, it held, could not simply declare that the "core means what[ever] the Legislature decides it means" as a way of shortcutting full *Karcher* analysis. Tr. 46 (opening argument of State's attorney).

Because of the State's strategy, there was no reason for the court to address, let alone decide, the different issue the State now presses in its third question. If the Court believes this part of *Karcher* doctrine needs illumination, it should again wait for a case where the question was squarely presented and decided below. The present case lacks the factual record necessary to decide the question and, in particular, to give guidance to the lower courts on the particular types of tradeoffs keeping districts intact might permit.

The fourth question presented is moot. In its denial of the State's motion for a stay, the district court effectively vacated the portion of the order that the State now complains of. See p. 30, *supra*. But even if it had not, that part of the order, which left the remedy to be determined later, would have been unripe for review. See *id*. at 31-32. This Court does not even know whether the district court would have had to impose a plan, let alone what plan it would have imposed. Without knowing whether it would have acted and what it would have done had it acted, this Court can hardly determine whether the district court would have acted properly or, indeed, at all. If this Court believes the law of remedy in this area needs clarification, it should wait for a case where (1) the district court actually imposed a plan and (2) it can determine what that plan was.

CONCLUSION

The appeal should be dismissed for want of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

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