IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON

NOS. 11-1405 and 11-1447

STATE OF WEST VIRGINIA, *ex rel.*
THORNTON COOPER,

Petitioner,

v. **NO. 11-1405**

HONORABLE NATALIE E. TENNANT,
Secretary of State of the State of
West Virginia,

Respondent,

v.

RICK THOMPSON, SPEAKER,
West Virginia House of Delegates,

Intervenor.

AND

State of West Virginia *ex rel.* STEPHEN ANDES and Joseph Haynes, individually and as members of the County Commission of Putnam County; Brian Wood, individually and as Putnam County clerk; Bob Baird, Myles Epling and Rick Handley, individually and as members of County Commission of Mason County; and Diana Cromley, individually and as Mason County Clerk, Petitioner

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CONSOLIDATED RESPONSE TO THE PETITIONS FOR A WRIT OF MANDAMUS AND A WRIT OF PROHIBITION

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

THOMAS W. RODD
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301
Telephone: 304-558-5830
State Bar No. 3143
E-mail: twr@wvago.gov

Counsel for Respondent

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I.

INTRODUCTION; STATEMENT REGARDING ORAL ARGUMENT; AND STATEMENT REGARDING IMPORTANT DEADLINES IMPLICATED BY THE PETITIONS

This Consolidated Response is filed on behalf of the Respondent, the Honorable Natalie E. Tennant, West Virginia Secretary of State ("the Secretary"), in response to (1) a Petition for a Writ of Mandamus filed by Petitioner Thornton Cooper, No. 11-1405 (the "Cooper Petition"); and (2) to a Writ of Prohibition filed by the Petitioners Stephen Andes, *et al.,* No. 11-1447 (the "Andes Petition").

The Respondent Secretary is the named Respondent in the above-styled proceedings in her role as the constitutional officer designated with authority to enforce, in part, provisions of House Bill 201, redistricting legislation regarding the West Virginia House of Delegates that was passed by the West Virginia Legislature in 2011 and signed by the Acting Governor.

In her official capacity, Secretary Tennant had no role in the drafting, design, or creation of any redistricting plan. Insofar as the Petitioners ask this Court to require the Legislature to replace the provisions of House Bill 201 with other legislation, Secretary Tennant is, of course, unable to

comply with such a requirement. In fact, the Office of the Secretary of State is charged with executing the applicable law as determined by this Court -- regardless of the result of these Petitions -- and overseeing the conduct of an election on May 8, 2012.

Nevertheless, as the constitutional officer charged with the law's execution and enforcement, Secretary Tennant accepts the responsibility of her Office to "respond" to the Petitions by presenting a full legal defense to the plan enacted in House Bill 201. Secretary Tennant accepts this responsibility even though she personally does not necessarily agree with the process by which the legislation was created, or the contents of the legislation.

The Secretary believes it important, at the outset of her response, to make the Court aware of **pressing time issues**. Clerks, county commissions, and candidates considering filing for office have **imminent deadlines** to accomplish certain required actions and to make personal and professional decisions.

The Secretary believes the following deadlines to be pressing and decisive: (1) potential candidates must know for what Delegate District they may file at least by the filing period, which begins on **January 9, 2012** and lasts until January 28, 2012 -- and even sooner if they need to give the matter some study and thought before filing; and (2) county commissions must have **completed** the redrawing of any precincts that include territory contained in more than one senatorial or delegate district no later than **January 21, 2012.** W. Va. Code § 1-2-2b [2011].

With respect to this second deadline: any proposed redrawing of precinct boundaries must be published as a Class II-0 legal notice at least one month before revised boundaries take effect, making **December 21, 2011** the last possible date of publication. W. Va. Code § 3-1-7 [2003]. A meeting of the county commission would necessarily have to take place some days before the

publication date. Such meeting would require five days' public notice. W. Va. Code § 6-9A-3 [1999]. The clerk's preparatory work before presenting to the commission will also take some time.

Accordingly, the Respondent Secretary of State suggests that **the effective go/no-go date for conducting the 2012 election in accord with the 2011 House of Delegates redistricting enacted by the Legislature in House Bill 201 -- that is challenged in the above-styled Petitions -- is on or about December 1, 2011.**

In light of the imminence of the foregoing-described deadlines, the substantial uncertainty for the counties and the public and the consequences thereof that are created by the pendency of these Petitions is illustrated by the fact that, upon information and belief, a number of counties have already taken preliminary procedural steps to implement the 2011 redistricting legislation, including the provisions of House Bill 201. Those steps range from preliminary consultations regarding the redrawing of precinct lines to actual readiness to mail notices of precinct changes to affected registered voters. Counties are necessarily conflicted about whether to continue with this preparatory work (and expense) -- or to wait for action by this Court.

In light of the foregoing -- and based upon the discussion *infra* of the lack of any facial merit in the claims raised in the above-styled Petitions -- the Respondent Secretary says that pursuant to Rules 6 and 16(j) of this Court's *Revised Rules of Appellate Procedure*, this Court should dispense with oral argument and issue a memorandum decision in the above-styled Petitions denying a rule to show cause with prejudice and permitting the 2012 elections to go forward under House Bill 201's duly-enacted redistricting legislation.

In the alternative, this Court should first recognize that time simply does not exist prior to the above-discussed deadlines for additional briefing and argument of the issues raised by the

Petitions -- much less for any possible remedial legislative process of crafting new redistricting legislation that could be applied to the upcoming 2012 elections. If this Court believes that further proceedings regarding these Petitions are necessary -- proceedings that the Respondent Secretary believes are *not* necessary -- **this Court should not "stay" the effectiveness of House Bill 201, because that legislation is constitutionally far superior to the legislation that it replaced.**

In this regard, it is important for this Court to understand that the Petitioners *do not dispute* that the methods, principles, considerations, and practices used by the 2011 West Virginia Legislature in House Bill 201 to create House of Delegates Districts for the coming decade are the same methods, principles, considerations, and practices -- the same "legislative toolkit" -- that the Legislature has used in past redistricting, and that have been upheld in prior cases.[1]

Indeed, the Andes Petition explicitly points to this Court's refusal of a petition ten years ago that challenged the 2001 "division" of Putnam County in creating Delegate Districts for "not respecting county boundaries" (Andes Petition p. 9) -- a practice in the West Virginia redistricting "legislative toolkit" that has been endorsed by courts for forty years or more. *See discussion infra* at pp. 14.

Similarly, the Cooper Petition's central claim is the entirely novel proposition that compliance with 140-year-old provisions of the West Virginia Constitution requires adopting a 100-single-member Delegate District scheme that has **never** been in place in West Virginia. (*See* discussion at p. 16 infra.)

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[1]There is not a single line in either Petition asserting that the methods, principles, considerations, and practices used in House Bill 201 represent a novel or significant departure from prior Legislative practice.

Moreover, it is beyond dispute that the 2011 legislative redistricting legislation embodied in House Bill 201 is constitutionally far superior to its predecessor -- because **the Delegate Districts in House Bill 201 are based on the most recent census figures.** *(See* Cooper Petition, Exhibit 5, App. at 366-67.) To be clear: due to population changes over the past decade, many of the Delegate Districts that the 2011 legislation replaces are patently in violation of the one constitutional redistricting principle that all parties agree is paramount -- the principle of equal representation, "one person, one vote."[2] House Bill 201 enacts a representative apportionment scheme that is far more aligned with this core constitutional principle of equal representation than the apportionment that it replaces. (Cooper Petition, Exhibits 11 and 12, App. at 388-90.) This Court should not permit the delay of West Virginia voters' constitutional right to equal representation by allowing these Petitions, simply by their filing, to delay and derail duly-enacted redistricting legislation that indisputably serves to advance those rights.

Moreover,

> as was held in Syllabus Point 1, in part, of *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965), "[c]ourts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt."

Sale ex rel. Sale v. Goldman, 208 W. Va. 186, 191, 539 S.E.2d 446, 451 (2000).

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[2]The cornerstone case of *Reynolds v. Sims,* 377 U.S. 533, 569 (1964) established that "the overriding objective of state legislative redistricting must be substantial equality of population among the various districts." *Gaffney v. Cummings,* 412 U.S. 735 (1973) first established the principle at a total deviation from an "ideal district" size of less than ten percent in legislative redistricting was *prima facie* constitutional. House Bill 201 is within that range; as Petitioner Cooper's Petition demonstrates, the districting that House Bill 201 replaces is not.

For these reasons, if this Court does not, after considering this and other Responses to the Petitions, refuse to grant a rule to show cause with prejudice; then in that case, regardless of what further proceedings are established, this Co should not "stay" the currently enacted House Bill 201 redistricting legislation. Rather, in light of the foregoing-described deadlines for the 2012 election, this Court should allow the election to go forward under the extant and constitutionally superior legislation embodied in House Bill 201; and any possibly future-ascertained defects in the 2011 redistricting may be corrected by the Legislature in time for the next regularly scheduled election cycle. To do otherwise would indisputably result in constitutional harm to large numbers of voters in the 2012 elections.[3]

II.

STATEMENT OF THE CASE, RESPONSE TO QUESTIONS PRESENTED, AND SUMMARY OF ARGUMENT

A. The Cooper Petition.

Petitioner Thornton Cooper, a private citizen with a longstanding interest in redistricting, asks this Court to issue a rule to show cause and grant a writ of mandamus requiring the Respondent to implement Cooper's proposed Legislative redistricting plan on January 9, 2012 -- unless by that date the Legislature has enacted and the Governor has signed a new Legislative redistricting plan. (Cooper Petition at 9.)

Cooper argues that his redistricting proposal has two features that the Legislature's 2011 enactment does not have, and that provide a basis for this Court to order their adoption. First,

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[3]This Response summarily dismisses, as should this Court, Petitioner Cooper's suggestion that this Court can or should under any circumstances simply adopt his personal redistricting plan without an opportunity for Legislative action. Cooper cites no authority for such a procedure, and there is none.

Cooper says that his proposal preserves existing 2011 precinct boundaries (sometimes referred to in Cooper's Petition as "Voting Districts, or "VDDs"). Second, Cooper says his proposal eliminates House of Delegate Districts that have more than one Delegate elected from the District ("multi-member" Districts).

On his first point, Cooper is correct in asserting that the redistricting legislation enacted by the West Virginia Legislature in 2011 does not rely upon the preservation of existing 2011 "precinct boundaries." Precinct boundary changes to correspond to the 2011 revised delegate and senatorial district boundaries are required by Senate Bill 1008's enactment of W. Va. Code § 1-2-26 [2011]. However, Cooper cites no statutory, constitutional, or case law authority for the principle of "preservation of precinct boundaries." In West Virginia, precincts are established on the basis of registered voters, not population; are not local political boundaries; are created for the administrative convenience of voters; and can be redrawn as needed. W. Va. Code § 3-1-7 [2003]. For this reason, it is difficult to see how a putative "principle" or goal of "preserving existing precincts" supports Cooper's argument that this Court should issue a writ of mandamus and replace the 2011 Legislative enactment with Cooper's proposal.[4]

On his second point, Cooper is also correct in asserting that the 2011 redistricting legislation does not eliminate multi-member Delegate Districts. The 2011 redistricting legislation includes 20 multi-member Delegate Districts. House Bill 201, W. Va. Code § 1-2-2 [2011]. As discussed further *infra* at pp. 15-16, **multi-member Delegate Districts have been a feature of West Virginia's political landscape since 1872.** Again, it is difficult to see how the novel "principle"

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[4]The United States Census figures for "Blocks" in House Bill 201 represent actual population figures that the Census assigns to various state political subdivisions for redistricting purposes

of establishing entirely single-member Delegate Districts justifies the issuance of the writ sought by Cooper. Indeed, Cooper never contends that multi-member districts are unconstitutional *per* se; but he appears to conjure a mandate requiring the creation of exclusively single-member Delegate Districts from a strained and unreasonable reading of provisions of the West Virginia *Constitution.* (*See* discussion *infra* at p. 20.)

Cooper also argues that the 2011 Legislative redistricting enactment of House Bill 201 violates provisions of the West Virginia *Constitution* by imposing a "delegate residence dispersal" requirement in one multi-member District. As discussed *infra* at pp. 15-16, such requirements are also a long-standing feature of West Virginia state legislative districting, have been upheld in numerous cases here and nationwide, and serve legitimate constitutional and public policy interests. However, in another context they have been held to be constitutionally impermissible. The Respondent Secretary believes that the balancing of constitutional interests on this issue is a matter for this Court, on which she takes no position. (*See* discussion *infra* at pp. 23-24.)

On all other issues raised by Cooper, the Secretary says that the Legislative redistricting of the West Virginia House of Delegates embodied in H.B. 201 was within the discretion of the Legislature and in accord with court-approved methods, principles, considerations, and practices. Therefore, with respect to Cooper's Petition, this Court should refuse to grant a rule to show cause with prejudice.

B. The Andes Petition.

Petitioner Andes, a Republican County Commissioner for Putnam County, joins with several other officials and citizens of Putnam and Mason Counties (together, "Andes") in asking this Court to issue a rule to show cause and a writ of prohibition enjoining the Respondent from implementing

the provisions of 2011 House Bill 201 relating to the redistricting of the West Virginia House of Delegates.

Andes asserts that under the pre-2011 redistricting plan enacted by the Legislature, portions of Mason and Putnam Counties have been part of three Delegate Districts; and that two of those portions of the two counties have been joined with portions of other adjacent counties to form Delegate Districts. (Andes Petition at 3-4, Ex. 3.) Andes also asserts that under the provisions of House Bill 201, a new Delegate District has been created within Putnam County, and that portions of Mason and Putnam Counties are now part of five Districts. (*Id.*) Andes argues that the Legislature in enacting House Bill 201 "apparently" did not give "much consideration" to county boundaries and crossed county boundaries "unnecessarily;" failed to consider the "community interests of the people;" and did not "attempt[ ] to draw delegate districts compactly - "apparently" to protect "majority party incumbents." (*Id.* at 6.)

Andes argues that the Legislature is required to "abide by county lines." (*Id.* at 7.) Andes argues that as a matter of constitutional law county boundaries should be paramount in drawing Delegate District lines except insofar as "equal representation" principles dictate otherwise. (*Id.* at 7). However, Andes cites to no decisional authority for this proposition, and the pre-2011 redistricting, as applied to Putnam and Mason Counties, clearly is not in accord with this putative principle. Thus Andes states that this Court refused a "Writ" in 2001 in which the Mason County Commission raised the same grievance that Andes raises in the instant case -- that "no resident of Mason County has ever been elected to the West Virginia House of Delegates." (*Id.* at 9.)

Andes further asks this Court to repudiate the established principle that a Legislature in redistricting is entitled to take partisan political considerations into account; and to distance itself

from the jurisprudence of the United States Supreme Court in *Vieth v. Jubeliear*, 541 U.S. 267 (2004), which held that because no one has as yet identified judicially manageable criteria for allegedly partisan gerrymandering claims, such claims are not ordinarily justiciable. (*See* discussion *infra* at p. 18.)

C. Response to Questions Presented and Argument Summary.

Cooper and Andes say that the Questions Presented by their Petitions are (1) whether the redistricting enacted by House Bill 201 violates Article VI, §§ 6 and 7 of the West Virginia *Constitution;* and (2) whether it violates Article II, Section 4 of the West Virginia *Constitution* and the 14th Amendment to the United States *Constitution.* The Respondent Secretary of State says that the answer to these questions, for the reasons set forth herein, is "no."

Cooper also presents the question whether the "delegate residency dispersal" provision of House Bill 201 violates the provisions of Article IV, § 4 and Article VI, §§ 12 and 39 of the West Virginia *Constitution.* The Respondent Secretary of State says that there are valid arguments on both sides of this issue; and that the ultimate answer to this question, should this Court decide to address the issue, is a matter for this Court to decide.

III.

ARGUMENT

The Respondent Secretary will begin her legal response to the arguments made by the Petitioners with a discussion of four major West Virginia redistricting cases that have established the principles that this Court should bring to bear on the claims made in the above-styled Petitions. While in some instances the legal principles that these cases rely upon are more authoritatively set

forth in other decisions, they are explained and laid out well in these four cases that the Respondent believes conclusively show that the Cooper and Andes Petitions do not have merit.

First, in *Goines v. Rockefeller,* 338 F. Supp 1189 (S.D. W. Va.) (1972), the United States District Court for the Southern District of West Virginia reviewed West Virginia's 1971 redistricting legislation. The plaintiffs in *Goines* sought a declaratory judgment that the provisions of West Virginia *Constitution* Article VI, §§ 6 and 7 -- the provisions relied upon by Petitioners Cooper and Andes in arguing that "dividing" counties into different portions and combining those portions into Delegate Districts is an unconstitutional practice -- were themselves unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States *Constitution*, because the application of those state constitutional provisions resulted in gross disparities in the population of Delegate Districts, in violation of the principle of "one person, one vote" or equal representation. (*Id.* at 1192.)

West Virginia *Constitution*, Article VI, § 6 reads:

> For the election of delegates, every county containing a population of less than three fifths of the ratio of representation for the House of Delegates, shall, at each apportionment, be attached to some contiguous county or counties, to form a delegate district.

West Virginia *Constitution*, Article VI, § 7 reads:

> After every census the delegates shall be apportioned as follows: The ratio of representation for the House of Delegates shall be ascertained by dividing the whole population of the state by the number of which the House is to consist and rejecting the fraction of a unit, if any, resulting from such division. Dividing the population of every delegate district, and of every county not included in a delegate district, by the ratio thus ascertained, there shall be assigned to each a number of delegates equal to the quotient obtained by this division, excluding the fractional remainder. The additional delegates necessary to make up the number of which the House is to consist, shall then be assigned to those delegate districts, and counties not included in a delegate district, which would otherwise have the largest fractions

unrepresented; but every delegate district and county not included in a delegate district, shall be entitled to at least one delegate.

Notably, in *Goines* the then -- West Virginia Secretary of State "respond[ed] that these provisions of the West Virginia *Constitution* in their application to legislative apportionment may be invalid in some particulars . . . and that a process was in place to consider amendments to the State's Constitution in order to conform the provisions of Article VI to requirements of the equal protection clause of the United States *Constitution*." 338 F. Supp. at 1192.

Even more notably, in *Goines* the defendant West Virginia Secretary of State stipulated that **"The West Virginia Legislature, within the limitations imposed by the West Virginia *Constitution*, Article VI, §§ 4, 6 and 7, cannot significantly improve on the overall percentage deviation from population equality embodied in 1971 [redistricting legislation.]"** (*Id.* at 1191.) That 1971 deviation was in the amount of "an 83 percent deviation from population equality and a 2.26 to 1 ratio . . . between the most populated district and the least populated district . . ." (*Id.* at 1194.)

The *Goines* court held that this degree of deviation unconstitutionally violated the principle of equal representation; and the court therefore invalidated the 1971 redistricting and required the Legislature to enact a "valid legislative apportionment statute." (*Id.* at 1197.) The court declined the plaintiffs' invitation to explicitly invalidate the provisions of West Virginia *Constitution* Article VI, §§ 6 and 7, but also pointedly concluded that the equal representation principles of the United States *Constitution* "prevail over any inconsistent provision of a state constitution." (*Id.* at 1195.) And in his Petition, Cooper concedes that "[i]n 1971, the Legislature passed a bill that redistricted the House of Delegates *in accordance* with §§ 6 & 7 [and] in 1972, a federal district court . . . struck

down that bill [because] the [resulting] population variances were in violation of the Equal Protection Clause." (Cooper Petition at 27.) (Emphasis added.)

Subsequently, in the second leading case of *Goines v. Heiskell*, 362 F. Supp. 313 (S.D. W. Va. 1973), the United States District Court for the Southern District of West Virginia reviewed a 1973 West Virginia redistricting legislation that followed the decision in *Goines*. The 1973 redistricting at issue in *Goines v. Heiskell* involved the creation of 11 multi-county districts, and 12 districts crossing county lines -- resulting in a sixteen percent variance in population among districts. (*Id.* at 318, emphasis added.) The plaintiffs in *Goines v. Heiskell,* like the plaintiffs in *Goines v. Rockefeller*, again requested that the provisions of West Virginia *Constitution,* Article VI, §§ 6 and 7 **"relating to county boundary recognition** in House of Delegates representation be declared null and void" -- in order to remove obstacles to achieving equal representation. (*Id.* at 319, emphasis added.) The plaintiffs in *Goines v. Heiskell* stated that in the 1973 redistricting,"county boundaries are fragmented at will . . . [and] the political boundaries dike has been broken and rendered inoperable." (*Id.*)

There also were intervening plaintiffs in *Goines v. Heiskell,* who took a different tack in challenging the 1973 legislation. The intervening plaintiffs did not challenge the provisions of West Virginia *Constitution*, Article VI, §§ 6 and 7. Rather, like the Petitioners in the instant case, the intervening plaintiffs in *Goines v. Heiskell* claimed that the legislation's **failure to observe county boundaries** was constitutionally flawed under Article VI, §§ 6 and 7. (*Id.* at 321.) The *Goines v. Heiskell* court rejected this challenge as well, observing that in one example by crossing county lines, "the percentage population variance in the two districts has been reduced." (*Id.)*

The *Goines v. Heiskell* court, after discussing at length the high level of deference that courts give to legislative balancing and choices in redistricting matters, concluded that the 1973 Legislative redistricting -- which had substantially reduced the population disparity that the Secretary of State had stipulated was required by a strict adherence to the provisions of Article VI, §§ 6 and 7 of the West Virginia *Constitution* -- was a constitutionally acceptable and permissible balancing of complex and difficult competing interests. (*Id.* at 323.) The *Goines v. Heiskell* court, echoing *Goines v. Rockefeller,* declined to "affirmatively nullify[]" the provisions of Article VI, §§ 6 and 7 of the West Virginia *Constitution* challenged state constitutional provisions -- but also held that the "overriding objective" and "controlling principles" of equal representation must be applied and made effective, despite those provisions. (*Id.* at 319.)

Specifically relevant to one of Cooper's claims, discussed further *infra* at p. 23, the plaintiffs in *Goines v. Heiskell* also challenged certain "delegate residency dispersal" or "proviso" provisions in the 1973 redistricting legislation. (*Id.* at 319-21.) The *Goines v. Heiskell* court rejected this challenge for the same reasons that the court stated in the third leading case to be discussed herein, *Holloway v. Hechler,* 817 F. Supp. 617 (S.D. W. Va. 1992).

In *Holloway*, the United States District Court for the Southern District of West Virginia reviewed claims that the 1991 West Virginia House of Delegates redistricting denied voters their constitutional right to equal representation. That 1991 redistricting created 23 multi-member Delegate Districts and 33 single-member Districts. (*Id.* at 620.) The 1982 redistricting which preceded the redistricting at issue in *Holloway* had created 27 multi-member districts and 13 single-member districts. (*Id.* at 628.) The 2011 redistricting that is at issue in the instant cases created 20 multi-member districts and 47 single-member districts. W. Va. Code § 1-2-2 [2011].

The plaintiffs in *Holloway* -- exactly like Petitioner Cooper in his Petition -- claimed that the Legislature should have created 100 single-member Delegate Districts. (817 F. Supp. at 620.) The *Holloway* court, in response, pointed out that multi-member Delegate Districts have been in existence in West Virginia as early as 1872, and recognized that such districts do not offend the principle of equal representation. *(Id. at* 623, n.8.) The *Holloway* court also pointed out that multi-member districts where one member is required to be from a portion of the district (Cooper refers to these, like the *Goines v. Heiskell* court, as "delegate residency dispersal" districts; the *Holloway* court called them "proviso" districts), existed well before the 1992 redistricting, and held that such delegate residency dispersal districts have been approved in other cases and do not violate the principle of equal representation. (*Id.* at 624-27.)

The *Holloway* court reviewed applicable federal law and held that because the population variance from an "ideal" district in the 1992 redistricting did not exceed plus or minus five percent, or a ten percent range, the 1992 redistricting *prima facie* met constitutional equal representation standards. (*Id.* at 623.) The *Holloway* court further recognized that a Legislature is allowed to consider the protection of incumbents and perceived political advantage in making redistricting decisions -- as long as those considerations do not result in "a population malapportionment of unconstitutional magnitude." (*Id.* at 628.)

Based on the foregoing-described principles, the *Holloway* Court concluded that the 1992 West Virginia redistricting did not offend the principle of equal representation -- despite the fact that some Delegates of the minority party (like the Andes Petitioners in the instant cases), were "not entirely satisfied" with the 1992 revision of the district in their region. (*Id.*)

Finally, in the fourth leading case of *Deem v. Manchin*, 188 F. Supp. 2d 651 (2002), the United States Court for the Northern District of West Virginia held that the 2001 West Virginia State Senate legislative redistricting plan was constitutionally sound.

The *Deem* court held that "a redistricting exercise is . . . a balancing process in which one objective must sometimes yield to serve another. This is an exercise peculiarly suited to the give and take of the legislative process. Courts, as a consequences, should be reluctant to substitute their judgment for the legislature's choices." (*Id.* at 657.) Even though the 2001 Senate plan "rather cavalierly violate[d] the objective of crossing county lines only when necessary to preserve other stated goals," (*id.* at 658) nevertheless the *Deem* court found that the plan, which had a *greater* than ten percent population variance and thus lacked *prima facie* constitutional validity, was an acceptable result of the legislative balancing process.

From the foregoing discussion of *Goines v. Rockefeller, Goines v. Heiskell, Holloway*, and *Deem* (and the authority that those cases discuss), certain principles and conclusions can be drawn that should guide this Court in considering the Cooper and Andes Petitions.

First, all four cases show that the complex business of drawing state legislative district boundaries is inherently a compromise-laden political process -- requiring legislators to consider their own political self-interest, the wishes of their constituents, the well-being of their state and local communities, various statutory and constitutional provisions, and their ability to persuade a majority of their colleagues to give weight to their views.

In this process, no legislator, whether leader or lowly back-bencher, is an island. No doubt each legislator would wish to be like Petitioner Cooper, a putative *deus ex machina* who needs only to satisfy himself that he has the superior plan -- or like Petitioner Andes, who sees a potential

political or regional disadvantage in the legislation, but whose forces could not muster the political strength to have things go more their way, and seeks to fare better in the courts. Simply put, there are winners and losers in redistricting -- and "fairness" is largely in the eye of the beholder. *See* Robert McKay, Reapportionment: the Law and Politics of Equal Representation 52 (1965) ("[T]o the affected legislators reapportionment involves no less an issue than political survival.").

Second, and in recognition of this first principle, courts in reviewing redistricting legislation under constitutional challenges have come to see that only criteria, metrics, and standards that are clear-cut, readily ascertainable, and objectively measurable -- and that eschew and avoid necessarily politically-laden choices -- are judicially manageable. *See* Redistricting Law 2010, National Conference of State Legislatures, p. 126:

> It is fairly clear that [under U.S. Supreme Court jurisprudence since *Vieth v. Jubelirer*, 541 U.S. 267 (2004)] mid-decade restricting, incumbent protection, unproportional representation in a single election and pairing minority party incumbents in the same district are not, by themselves, sufficient to support a constitutional claim of partisan gerrymandering.

www.floridaredistricting.org/Handlers/HouseContentDocumentRetriever.ashx?Leaf=houseconte nt/redistricting/Lists/LegalResources/Attachments/4/Redistricting_Law_2010[Final].pdf.

See generally, Kinney, V. *"The Path That Leads to Nowhere -- The Supreme Court Re-Examines the Trek Through the Political Thicket,"* U. Ark. Little Rock L. Rev. 251 (2006).

Applying these principles and standards, paramount among the criteria that modern courts have uniformly cleaved to and held to be actually justiciable is the mathematical standard of "one-person, one-vote" or equal representation, which has been enshrined in the "ten percent variation" principle. Thus, if a state legislative redistricting plan assures that there is less than a ten percent variation in district populations from the ideal, then the plan is *prima facie* not violative of the

principle of equal representation. *Deem, supra*, 188 F. Supp. 2d at 655-666. Of course, House Bill 201 concededly meets this test.

It is furthermore the consistent message of the above cases -- and indeed, of all modern redistricting cases -- that once the inquiry goes beyond equal representation (and certain other immutable, historically suspect, and objective criteria like race), other authorized or permissible redistricting factors like compactness, community interest, protection of incumbency, partisan advantage, single-member vs. multi-member, political boundary lines, and even contiguity in some instances, are just that -- factors -- that are properly part of the legislative balancing process, but only very rarely if ever can serve as the basis for a successful court challenge to redistricting legislation.

Goines v. Rockefeller, Goines v. Heiskell, Holloway, and *Deem* bear out these principles and analysis in real, on-the-ground West Virginia examples. For example, in *Goines v. Rockefeller,* as explained *supra* at p. 13, the Respondent's predecessor, Secretary of State Jay Rockefeller, **stipulated** that application of the 140-year-old provisions of West Virginia *Constitution*, Article VI, §§ 6 and 7 in House of Delegates redistricting -- the provisions upon which Petitioner Cooper relies to support strict adherence to county lines and single-member districts -- would necessarily result in unconstitutional population disparities. *Goines v. Rockefeller*, 338 F. Supp 1191 (S.D. W. Va.) (1972). In this regard, the Respondent offers appropriate deference to her predecessor's view. This is why the federal courts in both *Goines v. Rockefeller* and *Goines v. Heiskell* held that these constitutional provisions, created at a distant time in the history of this State, were at the least suspect -- and in any event could not have a controlling weight in Legislative redistricting decisions. **The *Goines v. Heiskell* and *Holloway* courts explicitly approved of districts that crossed county lines and that had multiple members.**

Notably, in a passage that is somewhat buried in his Petition but significant in the consideration of his arguments, Petitioner Cooper explicitly concedes that **his own redistricting proposal** violates what he claims to be the dictates of West Virginia *Constitution*, Article VI, § 7. Cooper explains that **even his plan must deviate** from Article VI, § 7 -- because to follow the dictates of § 7 would be "violative of the [federal] Equal Protection Clause and inconsistent with Article II, § 4 [of the West Virginia *Constitution*.]" (West Virginia's equal representation clause). (Cooper Petition at 36.) This latter provision states:

> Every citizen shall be entitled to equal representation in the government, and, in all apportionments of representation, equality of numbers of those entitled thereto, shall as far as practicable, be preserved.

Moreover, Cooper bases his argument on a strained and unnecessarily narrow reading of West Virginia *Constitution*, Article VI, §§ 6 and 7. Cooper's narrow reading has not only been effectively precluded by *Goines v. Rockefeller, Goines v. Heiskell, Holloway,* and *Deem,* as shown *supra* at pp. 14-15 -- this reading is not compelled by the language of the West Virginia *Constitution* itself. Cooper concedes that his Petition and plan are premised upon a definition of the term "Delegate District" that he says has a "very different meaning [from how] the term has been used by the Legislature since 1973[.]" (Cooper Petition at 28.)

Thus, to support his claims, Cooper must add a modifier of his own invention to the language of Article VI, §§ 6 and 7. Cooper says that the Legislature pursuant to those sections is required to "attach every **whole** county containing a population of less than 60% of the ratio of representation to some contiguous county or counties to form [Cooper's version of] a "Delegate District." (Cooper Petition at 29, emphasis added). Cooper cites to *Robertson v. Hatcher,* 148 W. Va. 239, 135 S.E.2d 675 (1964) for this "attach a **whole** county" proposition.

However, the word "whole," modifying the word "county," is not found in *Robertson* or Article VI, §§ 6 and 7. Nothing in *Robertson* or Article VI is violated by reading the provisions thereof to permit dividing a county into several portions, and then attaching those portions to contiguous portions of adjacent counties, to form Delegate Districts. Indeed, that is just what the Legislature has done since 1973 -- and that is also what Cooper himself admittedly does in his plan.

In this regard, this Court is reminded of the principle that "[w]hen the constitutionality of a statute is questioned *every reasonable construction of the statute must be resorted to* by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment." Syllabus Point 3, *Willis v. O'Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967). *Accord*, Syl. Pt. 3, *Donley v. Bracken*, 192 W. Va. 383, 452 S.E.2d 699 (1994) (emphasis added).

The simple truth is that Article VI, §§ 6 and 7 of the West Virginia *Constitution* – especially as interpreted by Cooper have had little and even counterproductive utility as stricter standards for equal representation have evolved. The simple truth is furthermore that crossing county lines and combining portions of counties, along with the time-honored use of multi-member districts -- as long there is no resulting population variation plus or minus of more than a total of ten percent from the "ideal district population" -- have become integral parts of the court-approved and *prima facie* constitutional West Virginia "legislative toolkit."

House Bill 201 adheres to these settled principles. House Bill 201 especially does not -- under any argument presented in the above-styled Petitions -- so present to this Court such a patently

unconstitutional scheme that would justify this Court in issuing a writ of mandamus to prevent the Respondent Secretary from carrying out her duty to implement duly-enacted legislation.[5]

Turning to the issues raised in the Andes Petition (which overlap substantially with those raised by Cooper), Andes cites to the case of *Harmison v. Ballot Com'rs*, 45 W. Va. 179, 31 S.E.2d 394 (1898) for the principle that "the legislature *is not permitted to divide counties* to create House districts." (Andes Petition, at 15, emphasis added.) But the holding in the *Harmison* case was about a redistricting that was not based on a new census report; and the holding in that case had nothing to do with adherence to county boundaries.

Andes also cites to the case of *Mahan v. Howell*, 410 U.S. 315, (1973) where the Court held that the Virginia Legislature could seek to avoid the fragmentation of political subdivisions. However, while Andes correctly cites to the *Mahan* case for the proposition that it is "rational" for a state to apportion districts to maintain the integrity of political subdivision lines, nothing in that case suggests that the word "rational" means "mandatory."

Insofar as Andes complains of a "vote dilution" of Mason County voters, Andes also recognizes that under House Bill 201 Mason County residents now comprise a majority in the newly

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[5]Petitioner Cooper concedes that House Bill 201 meets the 10% test. Cooper argues that the "as far as practicable" standard in Art. 2, § 2 of the West Virginia *Constitution* exceeds federal standards. *Goines v. Rockefeller, Goines v. Heiskell, Holloway,* and *Deem* teach that the standards pushing West Virginia toward more equal representation have been entirely based upon federal case law. Moreover, it is clear that "practicability" is a word susceptible of many interpretations; and the teaching of recent cases *Goines v. Rockefeller, Goines v. Heiskell, Holloway,* and *Deem* should be persuasive on what constitutes an acceptable level of practicability. Cooper asserts in his Petition at 22 that "a number of states" have established equal representation standards that "exceed federal standards." But his only citation is to a Colorado constitutional provision that specifically established a numerical standard. It cannot be said that Petitioner Cooper has established a clear violation of the West Virginia *Constitution's* equal representation principles in a legislative redistricting plan that meets federal constitutional standards.

created 14th district. (Andes Petition at 23.) Finally, the Andes Petition's claims of illegality in "pairing minority party incumbents in the same district" are not cognizable constitutional claims. *See* Redistricting Law 2010, *supra.* The arguments in the Andes Petition, rejected by this Court a decade ago, remain without merit.

Finally, in addition to his broad-brush challenge to the entire House of Delegates redistricting plan enacted in House Bill 201, Petitioner Cooper has specifically challenged the provisions that amended W. Va. Code § 1-2-2 [2011] to require that the two Delegates elected from District 28 reside in two different counties (of the three counties within the District).

As previously discussed *infra* at pp. 15-16, and in *Holloway, supra*, such "proviso" or "delegate residency dispersal" districts have existed and been approved for many years, both in West Virginia and nationwide. Cooper raises the apparently novel argument that the continued validity of such districts in West Virginia is questionable in light of this Court's ruling in *Sturm v. Henderson*, 176 W. Va. 319, 342 S.E.2d 287 (1986), which held that residency requirements for school board members violated West Virginia *Constitution* Article IV, § 4 by imposing qualifications for holding office that were not prescribed in the *Constitution.*

On this point, the counter-argument to Cooper's position is (1) that the use of "delegate residency dispersal" districts is a long-standing practice in West Virginia in multi-member districts; and (2) they have been expressly permitted as part of the "legislative toolkit" in a number of cases (*see id.*) to accomplish legitimate Legislative goals -- including the very goal that the Andes and Cooper Petitions embrace, enhancing the chance of residents of a county to elect a Delegate from their own county. *See Holloway, supra.*

Moreover, the 1986 ratification of an amendment in the wake of the *Sturm* case to explicitly approve of the use of residency dispersal requirements in connection with school boards is evidence of popular support of such mechanisms. *See Adkins v. Smith*, 185 W. Va. 481, 408 S.E.2d 60 (1991). Finally, *Sturm* was not a redistricting case, where the default rule is judicial deference to the necessarily complex multi-issue balancing engaged in by the Legislature. Thus *Sturm* is quite distinguishable from the instant case.

Having presented this counter-argument to that made in Cooper's Petition, the Respondent Secretary believes that the "delegate residency dispersal" issue is properly left to this Court for resolution, if this Court chooses to do so.

IV.

CONCLUSION.

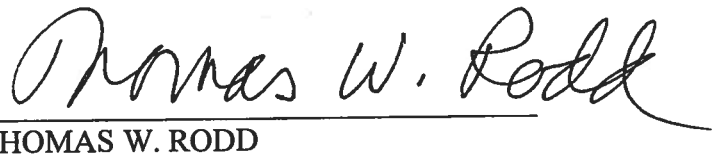
For the foregoing reasons, the Respondent Natalie E. Tennant, West Virginia Secretary of State, asks this Court to refuse to issue a rule to show cause in the above-styles cases with prejudice, and for further relief as this Court finds proper.

Respectfully submitted,

Natalie E. Tennant
West Virginia Secretary of State
Respondent

by counsel,

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL



THOMAS W. RODD
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301
Telephone: 304-558-5830
State Bar No. 4173
E-mail: twr@wvago.gov

Counsel for Respondent

VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to-wit:

I, Natalie Tennant, state that I am the Respondent in the foregoing "Response to Petitions for Writs of Mandamus and Prohibition", that I have read the same, and that the facts and allegations therein contained are true and correct to the best of my belief and knowledge.

November 4, 2011
DATE

Natalie Tennant
NATALIE TENNANT

CERTIFICATE OF SERVICE

I, THOMAS W. RODD, Assistant Attorney General and counsel for the Respondent herein, do hereby certify that I have served a true copy of the attached CONSOLIDATED RESPONSE TO THE PETITIONS FOR A WRIT OF MANDAMUS AND A WRIT OF PROHIBITION upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 4th day of November, 2011, addressed as follows:

To: Thornton Cooper, Esq.
3015 Ridgeview Drive
South Charleston, WV 25303

Jennifer Scragg Karr, Esq.
Counsel for the Andes Petitioners
3389 Winfield Road
Winfield, WV 25213

Anthony Majestro, Esq.
Counsel for the Intervenor Speaker Rick Thompson
405 Capitol Street, Suite P-1200
P.O. Box 3081
Charleston, WV 25331

Thomas W Rodd

THOMAS W. RODD