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No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States

NATALIE TENNANT, in her capacity as the Secretary of State, EARL RAY TOMBLIN, in his capacity as the Chief Executive Officer of the State of West Virginia, JEFFREY KESSLER, in his capacity as the President of the Senate of the West Virginia Legislature, and RICHARD THOMPSON, in his capacity as the Speaker of the House of Delegates of the West Virginia Legislature,

Appellants,

v.

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

Appellees.

On Appeal From A Three-Judge Panel Of The United States District Court For The Southern District Of West Virginia

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

This Court has interpreted article I, § 2 of the United States Constitution which provides for the House of Representatives to be chosen "by the People of the several States" as requiring congressional districts to be apportioned, as nearly as is practicable, to achieve population equality. Under *Karcher v. Daggett,* 462 U.S. 725 (1983), a state adopting a plan with avoidable population variances must justify the variances as necessary to achieve consistent, nondiscriminatory legislative policies. The questions presented are:

1. 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. Whether a state relying on multiple legislative policies to justify a population variance must separately quantify with factual findings the variance justified by each legislative policy by enumerating the specific portion of the variance justified by each separate policy.

3. Whether preserving current congressional districts as intact as possible may constitute a nondiscriminatory legislative policy under *Karcher.*

4. 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

BLANK PAGE

OPINION BELOW

The opinion of the three-judge panel (App. 3) is not yet reported. The opinion of the panel (App. 52) denying the Appellants' Emergency Motion for Stay Pending Appeal and deferring the imposition of a remedy is unpublished.

JURISDICTION

On January 3, 2012, a divided three-judge panel of the United States District Court for the Southern District of West Virginia entered a memorandum opinion and order granting a permanent injunction, and thereafter by order dated January 4, 2012, the panel majority amended the memorandum opinion. (App. 1) The panel majority further amended the order on January 4, 2012. (App. 52) Appellants filed their notice of appeal to this Court on January 27, 2012. (App. 48)

Jurisdiction in this Court is invoked under the provisions of 28 U.S.C. § 1253 as Appellants seek review of "an order granting. . . . an interlocutory or permanent injunction in any civil action, suit or proceeding required . . . to be heard and determined by a district court of three judges. As the underlying action was an action "challenging the constitutionality of the apportionment of congressional districts," it is required to be heard by a district court of three judges. 28 U.S.C. § 2284(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 2, cl. 1 of the United States Constitution provides in relevant part: "The House of Representatives shall be composed of Members chosen . . . by the People of the several States. . . ."

Article I, § 4 of the Constitution of West Virginia provides:

> For the election of representatives to Congress, the state shall be divided into districts, corresponding in number with the representatives to which it may be entitled; which districts shall be formed of contiguous counties, and be compact. Each district shall contain, as nearly as may be, an equal number of population, to be determined according to the rule prescribed in the constitution of the United States.

West Virginia Code § 1-2-3 currently provides:

> The number of members to which the state is entitled in the House of Representatives of the Congress of the United States are apportioned among the counties of the state, arranged into three congressional districts, numbered as follows:
>
> First District: Barbour, Brooke, Doddridge, Gilmer, Grant, Hancock, Harrison, Marion, Marshall, Mineral, Monongalia, Ohio, Pleasants, Preston, Ritchie, Taylor, Tucker, Tyler, Wetzel and Wood.

Second District: Berkeley, Braxton, Calhoun, Clay, Hampshire, Hardy, Jackson, Jefferson, Kanawha, Lewis, Morgan, Pendleton, Putnam, Randolph, Roane, Upshur and Wirt.

Third District: Boone, Cabell, Fayette, Greenbrier, Lincoln, Logan, Mason, McDowell, Mercer, Mingo, Monroe, Nicholas, Pocahontas, Raleigh, Summers, Wayne, Webster and Wyoming.

STATEMENT

This appeal arises from ongoing proceedings before a three-judge panel in the Southern District of West Virginia challenging the West Virginia Legislature's ("Legislature") redistricting plan for the United States House of Representatives. In a divided opinion entered six days prior to the commencement of the filing period for the 2012 primary election, the panel majority enjoined the election of West Virginia's congressional delegation under a redistricting plan enacted by the Legislature with nearly unanimous bipartisan majorities ("Majority Opinion"). (App. 3)

Appellants, Natalie E. Tennant, in her capacity as the Secretary of State of the State of West Virginia; Earl Ray Tomblin, in his capacity as the Chief Executive Officer of the State of West Virginia; Jeffrey Kessler, in his capacity as the President of the Senate of the West Virginia Legislature; and Richard Thompson, in his capacity as the Speaker of the House of Delegates of the West Virginia Legislature,

having timely filed a Notice of Appeal, now file this Jurisdictional Statement in support of this Court's jurisdiction and to alert the Court to the substantial questions raised by this appeal. Senate President Kessler and House Speaker Thompson have appealed the judgment below in its entirety. Governor Tomblin and Secretary Tennant join in this appeal insofar as it seeks reversal of the interim remedy imposed by the Majority Opinion.[1]

In the modern era of redistricting that followed this Court's decision in *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Legislature has been consistent in its redistricting goals. From 1971 through the enactment of the 2011 statute currently under challenge, the

[1] Governor Tomblin joined in the Emergency Motion to Stay before the three-judge panel and the Emergency Application for Stay submitted to the Chief Justice of the United States insofar as these motions sought reversal of the interim remedies imposed by the Majority Opinion. On January 20, 2012, the Supreme Court of the United States entered an Order granting the stay. (Doc. 78) Governor Tomblin joins in the appeal insofar as it seeks reversal of the interim remedy imposed by the Majority. Governor Tomblin, however, takes no position on the constitutionality of Senate Bill 1008 and does not join the appeal on that basis. Secretary Tennant joined in the two previous requests for a stay and joins in this appeal insofar as it seeks reversal of the interim remedy imposed by Majority. Secretary Tennant, however, remains neutral on the merits of the constitutionality of Senate Bill 1008 case and does not join in an appeal on that basis. The stay and the question of the remedy will resolve election conduct procedural issues – which is the Secretary's responsibility – while the appeal will decide the legal issues – which are not her responsibility.

Legislature has sought to avoid contests among incumbent representatives, keep counties intact, and retain the core of the prior districts by making only minimal changes to both the number of counties and persons involved all while at the same time attempting to make the districts as compact as West Virginia's unique geography permits. Prior federal three-judge panels have recognized these aims and have previously approved West Virginia's congressional districts in a form that is essentially identical to the districts now found to be unconstitutional by the majority of the panel.

Relying on these prior federal opinions, the 2011 Legislature made one small change – moving one county from one district to another. In doing so, the Legislature rejected a number of alternate proposals – including some with smaller inter-district variances. The alternatives either split counties, created contests between incumbent representatives, and/or destroyed the character of the existing districts.[2] Notably, in spite of controlling both houses of the Legislature by large margins and the Governor's office, the elected members of the Democratic Party rejected partisan redistricting plans that would have increased the Democratic performance of the new districts and/or placed the two Republican incumbents in the same district. The newly enacted statute

[2] A chart comparing the various plans is included in the Appendix at 65.

amended W.Va. Code § 1-2-3 ("Senate Bill 1008") and provided new districts based on the 2010 census.

A review of West Virginia's redistricting history establishes the consistency under which the Legislature has approached redistricting.

The Legislature made a number of changes to West Virginia's congressional districts in 1971, a redistricting driven by the reduction in congressional districts from five to four and the dictates of *Wesberry*. In spite of a 0.7886% population variance,[3] a three-judge panel rejected state and federal constitutional challenges. *West Virginia Civil Liberties Union v. Rockefeller*, 336 F.Supp. 395 (S.D.W.Va. 1972).

In 1982, following the 1980 census, the Legislature enacted a new redistricting statute that moved only three counties with a population of 35,397. No counties were split and no incumbents were placed in the same district. (Doc. 42-1, Exh. C).

Following the 1990 census, when the number of congressional districts was reduced from four to three, the Legislature's redistricting policies remained the same. While the need to reduce the

[3] While the Courts have characterized the variance in 1971 as 0.78% and the variance in Senate Bill 1008 as 0.79%, as Judge Bailey notes in his dissent, the variance in the 1971 plan was 0.7888% and the variance in S. B. 1008 is 0.7886%. Dissenting Opinion, (App. 39) Therefore, Senate Bill 1008 actually has a smaller variance than the 1971 plan.

number of districts resulted in one new district where two previous incumbents resided, the reduction was accomplished without splitting counties. The 1991 plan preserved intact all of the counties from two of the previous congressional districts in two of the new congressional districts and, compared to the other plans considered, best preserved the third district by severing only two counties with a population of 47,252. *See* Doc. 42-1, Exh. D; *see also Stone v. Hechler*, 782 F.Supp. 1116, 1121-22 & n. 9 (N.D.W.Va. 1992). A challenge to this district based on compliance with the state and federal constitutions was rejected by the three-judge panel in *Stone, supra*. *Id.* at 1129.

Following the 2000 census, the Legislature redistricted by moving only two counties with a combined population of 33,722. (Doc. 42-1, Exh. D) No counties were split and no incumbent conflicts were created.

And finally, following the 2010 census, the Legislature enacted Senate Bill 1008 in 2011 that simply moved Mason County, with a population of 27,324, from the Second Congressional District to the First Congressional District. (App. 7) The enacted bill did not result in any two incumbents residing in the same district or the splitting of any county. (App. 7, n. 2)

The congressional district maps from the past thirty years are reproduced in the Appendix. (App. 61-64) The maps visually show how over the decades the Legislature has strived to create new districts

that preserve both county lines and the existing districts to the greatest extent possible.

In the modern era, the Legislature has not placed incumbents in the same district, except when the reduction in the number of districts made that result inevitable. The Legislature has also kept the cores of prior districts intact as much as possible, limiting both the number of counties and number of people moved to a different congressional district. And in the 150-year history of the state, the Legislature has never split a county in establishing congressional districts.

In connection with the 2011 redistricting, six different plans were actively considered by the Legislature. (App. 6) As Chief Judge Bailey aptly points out in his dissent, the debate over those plans establishes that the Legislature's aims were preserving the existing districts, avoiding incumbent conflicts, and keeping counties intact. (App. 42) Comparing the alternatives, it is clear that the enacted plan was the only plan that best met all three of the Legislature's goals. (App. 35) Similarly, as Chief Judge Bailey recognized, the testimony at the December 28, 2012 evidentiary hearing was consistent with the legislative record. (App. 45)

Senate Bill 1008 was passed by the Legislature on August 5, 2011 and signed into law by the Governor on August 18, 2011. The case below was not filed until November 4, 2011. A three-judge panel was appointed on November 30, 2011. On December 28,

2011, the panel held an evidentiary hearing and heard argument. On January 3, 2012, the Majority Opinion was issued, and the Dissenting Opinion was filed later that same day. The Majority Opinion was amended on January 4, 2012 to address the dissent. (App. 2)

The Majority Opinion found Senate Bill 1008 unconstitutional and enjoined Appellants from using the districts in the upcoming congressional election. (App. 29) The majority reasoned that Senate Bill 1008 was unconstitutional because it had a population variance of 0.7886% between the largest and smallest districts which constituted a major variation that was not sufficiently justified under its interpretation of *Karcher v. Daggett*, 462 U.S. 725 (1983). (App. 12) The Majority Opinion struck down Senate Bill 1008 in spite of the fact that *Karcher* characterized a nearly identical 0.7888% population variance in West Virginia as "minor" and justified by West Virginia's historical policies noted above. *Karcher,* 462 U.S. at 740-41 (*citing West Virginia Civil Liberties Union v. Rockefeller's* 0.78% deviation as one example of a "minor population deviatio[n]" that could be justified based on compactness). The Majority Opinion has established a new standard that is at odds with *Karcher* based upon its conclusion that "times . . . they are a-changing" and that "what was once characterized as 'minor' may now be considered 'major.'" (App. 27) As the Dissenting Opinion recognized, the Majority Opinion is a departure from this Court's previous precedents. (App. 44)

The Majority Opinion undercuts this Court's holding in *Karcher* that a state may adopt a plan with a minor variance in order to achieve consistent and nondiscriminatory policy objectives. 462 U.S. at 740-41. The Majority Opinion misconstrues the acceptable policies and creates a strict standard of proof that is beyond what is required under *Karcher* by requiring the Legislature to link each policy with a specific variance. (App. 25, 27) As stated succinctly by Judge Bailey in the opening sentence of his dissent: "The majority in this case has applied a standard of review which not only fails to give sufficient deference to the Legislature but also disregards the flexibility of *Karcher v. Daggett*." (App. 33)

The court's January 3, 2012 order set a schedule under which the court would adopt an "interim" redistricting plan on or after January 17, 2012. The court "encouraged" the Applicants to submit a new plan – one either legislatively enacted or approved by the Applicants. (App. 31) Otherwise, the Court would choose the interim remedy from two plans that were before the Court. (App. 31) The first of the court's chosen options was a plan expressly rejected by the Legislature, while the second option was one filed in court by one of the plaintiffs without previously being either legislatively considered or publicly presented in any forum prior to being filed on December 17, 2011. (Doc. 29)

On January 6, 2012, Applicants filed an Emergency Motion for Stay of Judgment Pending Appeal (Doc. 69) with a supporting memorandum. (Doc. 70)

On January 10, 2012, the same two-judge majority denied the motion for a stay, but modified the injunction by deferring "any and all action with respect to a remedy until after the Supreme Court has disposed of the Defendants' forthcoming appeal." (App. 53-54) ("Stay Order"). The Stay Order further provided that, "The State, however, continues to be enjoined from conducting its 2012 congressional elections pursuant to [W.Va. Code § 1-2-3] as currently enacted." (App. 58) The Stay Order rejected West Virginia's request to stay the Court's judgment set forth in the Majority Opinion and conduct the primary under Senate Bill 1008. *Id.*

The filing period for West Virginia's May 8, 2012 primary commenced on January 9, 2012. In order to file, candidates for Congress are required to designate one of West Virginia's three congressional districts in which they intend to run. W.Va. Code § 3-5-7(d)(2). The filing period ended on midnight, January 28, 2012. *Id.* The deadlines for this election cycle were constrained by the Military and Overseas Voters Empowerment Act of 2009, 42 U.S.C. § 1973ff, et seq. Compliance with that Act will require special treatment for overseas voters during the primary election cycle. Because of the MOVE Act's deadlines, the candidate-filing period for the 2012 primary elections could not have been extended more than a few days beyond the scheduled January 28, 2012 deadline in order for primary elections to be held as scheduled on May 8, 2012.

On January 13, 2012, Appellants filed an emergency application for a stay with the Chief Justice as Circuit Justice for the Fourth Circuit. (No. 11A674). On January 20, 2012, the Chief Justice referred the stay application to the full Court which, without dissent, granted a stay of the majority's injunction pending this appeal. 132 S.Ct. 1140 (2012). As a result, the 2012 West Virginia congressional elections are being conducted under the districts set forth in Senate Bill 1008.

THE QUESTIONS[4] ARE SUBSTANTIAL

One theme underlies the questions presented by this appeal. Redistricting by a legislature involves balancing the state's sometimes conflicting policy goals while at the same time assuring that the plan meets the relevant state and federal constitutional requirements. There are almost an infinite number of district combinations. The issue thus becomes a question of where to draw the line between the role of a federal court reviewing a redistricting plan and the proper deference accorded to the legislature to determine how to balance the often conflicting policies.

[4] With respect to the first three questions presented which involve substantive challenge to the Majority Opinion, these questions are raised on behalf of President Kessler and Speaker Thompson only. *See infra* p. 4, n. 1. The fourth question presented regarding the claim that the remedy imposed by the Majority Opinion is inappropriate is brought by all Appellants.

Just this year, this Court reiterated that "[r]edistricting is 'primarily the duty and responsibility of the State.'" *Perry v. Perez*, 132 S.Ct. 934, 940 (2012) (per curiam) (*citing Chapman v. Meier,* 420 U.S. 1, 27, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975)). This is because courts struggle in "defining neutral legal principles in this area, for redistricting ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment." *Perry v. Perez*, 132 S.Ct. at 941.

The Majority Opinion (and cases like it) draw the line in a manner that replaces the political judgment of elected officials with a formalistic rigor inconsistent with legislative deference and respect for the exercise of political judgment. The questions presented below are important in that they all involve the delineation of the respective roles of state legislatures and the federal judiciary.

1. In *Wesberry,* this Court interpreted U.S. Const. art. I, § 2, cl. 1 which provides that members of the House of Representatives be chosen "by the People of the Several States," to mean "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S. at 7-8. Thereafter, in *Kirkpatrick v. Preisler,* 394 U.S. 526, 530-31 (1969) this Court held that the Constitution "requires that the State make a good-faith effort to achieve precise mathematical equality." *Kirkpatrick* rejected the argument that small, unexplained disparities might be considered de minimis

holding that "[u]nless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." *Id.* at 531.

Karcher reaffirmed and refined *Kirkpatrick* and set forth a two-part test. At the first step, a party challenging an apportionment must demonstrate the existence of a population disparity that "could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal proportion." *Karcher,* 462 U.S. at 730. The first stage presents very little burden on a challenger. *See, e.g., Vieth v. Pennsylvania,* 195 F.Supp.2d 672 (M.D.Pa. 2002) (population variance of nineteen people between the most populous and least populous congressional districts sufficient to meet part I of *Karcher* test), *appeal dismissed as moot, Schweiker v. Vieth,* 537 U.S. 801 (2002).

In its second step, *Karcher* requires the State to establish that deviations in its congressional redistricting plan are justified by legitimate state interests with the burden on the state varying based on several factors including "the size of the deviations." 425 U.S. at 741. The Majority Opinion rejected Applicants' contention that deviations of 0.7886% should be considered small. *See* (App. 27) (characterizing deviation as "'major'"). Instead, the Majority Opinion used the fact that many other states have variances approaching 0.00% as grounds for holding that small variances of 0.7886% are more significant now than they were when previous decisions of this Court and other three-judge panels were decided.

The Majority Opinion also focused on relative comparisons between small deviations. (App. 25, n. 11) (noting that the 0.79% deviation was 877% greater than the deviation approved in *Stone*). This Court and other three-judge panels have disagreed with both the relative size of the deviation and the idea that comparing such small deviations is meaningful. *See Karcher,* 462 U.S. at 740-41 (*citing West Virginia Civil Liberties Union v. Rockefeller's* 0.78% deviation as one example of a "minor population deviatio[n]" that could be justified based on compactness); *id.* at 741 n. 11 (discussing "small deviations" that were acceptable *citing Rockefeller*). *Karcher, supra* n. 11, also cited with approval *Skolnick v. State Electoral Bd. of Ill.*, 336 F.Supp. 839, 843 & n. 2, 844, 846 (D.C.Ill. 1971), in which the Court, after considering four plans with 1% variance or less, adopted a plan with the third largest variance (0.75%) characterizing "the variances in each plan [as] so small that the only way to distinguish among them is to consider what non-population factors went into the drawing of each." Both before and after *Karcher,* other three-judge panels have concurred that similar deviations are small. *See Doulin v. White*, 535 F.Supp. 450, 452 (D.C.Ark. 1982) (after finding adopted state plan with 2.10% variance unconstitutional, Court adopted previous version that had passed one house of legislature with .78% variance and rejected six plans with variances as low as .13% finding the 0.65% difference in plans a "question of judgment"); *Preisler v. Secretary of State of Mo.*, 341 F.Supp. 1158, 1162 (D.C.Mo. 1972) (approving 0.6291% deviation and noting "The

minor variations from the ideal are constitutionally permissible under the Constitution of the United States."); *see also Turner v. State of Ark.*, 784 F.Supp. 585, 589 (E.D.Ark. 1991) (rejecting challenge to plan with .73% variance in spite of proposed alternatives with variances of .65% and .41%), *aff'd*, 504 U.S. 952 (Mem.) (1992).

The majority made this determination on the grounds that technology has made it easier to devise plans with no population variance and that a majority of states have adopted this approach in recent years.[5] Majority Opinion at 26-27. Improved technology simply enables legislatures to engage in gerrymandering with surgical precision, and adoption of plans with no variance does nothing to eliminate such schemes but simply insulates them from certain litigation. By contrast, the policy of West Virginia to adopt plans that keep counties whole, avoid incumbent contests, and respect the existing core of districts, is a check on gerrymandering and political

[5] The times have not changed that much. The use of computers in redistricting is not new. *West Virginia Civil Liberties Union v. Rockefeller*, 336 F.Supp. at 396-98. (1972 opinion noting that redistricting committee "utilized the services of an IBM 360 Computer which, upon having been fed relevant data, produced redistricting proposals and also evaluated redistricting proposals made by other individuals"). Nor are computers always necessary. Respondent Cooper filed an affidavit stating that he began to create his plans using a pen, paper, and a calculator. *See* Cooper Affidavit at 5 ¶ 15 (Doc 32-1).

payback because deviation from those policies requires explanation.

Equally important, the majority's holding requiring substantial justifications for small deviations is inconsistent with *Karcher* which recognizes that deviations are acceptable if justified by legitimate state interests and that the showing is a flexible one. 462 U.S. at 731.

As the Dissenting Opinion recognized, the Majority Opinion's characterization of these deviations as "major" is in conflict with *Karcher* and these authorities. (App. 39) The issue of whether the advent of newer computers and a trend in other states towards no variance changes the constitutional standard raises a constitutional question that is substantial.

2. In the Majority Opinion, the Court strictly construed *Karcher* as requiring that a state relying on a legislative policy to justify a variance show a strict link between the specific policy and particular variance. (App. 25) (quoting *Karcher,* 462 U.S. at 741). In this case, the variances in the West Virginia plan are supported by multiple state policies. The plan that was ultimately approved by the Legislature was the one that best met all of the State's criteria. The Majority Opinion rejected the State's justifications, holding that there was no evidence allocating the variance between the multiple justifications. *See, e.g.,* (App. 30, n. 13) (finding *Karcher* does not permit multiple justifications to be taken together to support an aggregate variance).

As the Dissenting Opinion points out, this approach is in conflict with *Karcher*'s holding allowing flexibility in the showing required to justify a variance. Dissenting Opinion, (App. 39) (quoting *Karcher*, 462 U.S. at 741). A number of other three-judge panels have approved this approach. *Stone v. Hechler*, 782 F.Supp. 1116, 1129 (N.D.W.Va. 1992) (court found that deviations were required to balance state aims of preserving cores of preexisting districts, and complying with state requirements regarding compactness and not dividing counties); *Graham v. Thornburgh*, 207 F.Supp.2d 1280, 1293 (D.Kan. 2002) ("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. The key inquiry is whether the legislature made legitimate choices in balancing its various objectives, not whether the court would make the same choices."); *Larios v. Cox*, 300 F.Supp.2d 1320, 1355 (N.D.Ga. 2004) (finding it is immaterial that a "better" plan might have been possible holding that *Karcher* merely required that defendant's explanations supported the deviation).

Thus, while the Majority Opinion acknowledges the fact that West Virginia has never split counties between congressional districts could qualify "as one of those 'consistently applied' interests that the Legislature might choose to invoke to justify a population variance," the Court rejected the justification because it was not shown to justify the entire 4,871 person variance or any specific portion of it. (App.

14-15) What the Majority Opinion ignores is that the Legislature was not only seeking a plan that kept counties whole, it was looking for a plan that preserved the core of the existing districts, avoided incumbent conflicts, *and* kept counties whole. As the Dissenting Opinion found, the plan adopted is consistent with these goals, and none of the alternative plans met all these goals while adhering more closely to population equality. (App. 44) The Majority Opinion, while finding that one or more of the goals were individually served by alternate plans with smaller variances, Majority Opinion, (App. 16), does not contest the Dissenting Opinion's recognition that no plan met all of the state's goals and had a smaller variance.

The Majority Opinion's improper construction of *Karcher* also extends to its requirement of explicit findings. (*See* App. 15, n. 7) Three-judge panels have approved deviations in prior West Virginia districts in the absence of specific findings. *See, e.g., Stone v. Hechler*, 782 F.Supp. 1116, 1121 (N.D.W.Va. 1992) (finding state policies from debates and votes on different plans in the absence of findings or resolutions); *West Virginia Civil Liberties Union v. Rockefeller,* 336 F.Supp. 395, 396-98 (D.C.W.Va. 1972). This Court has affirmed decisions in which lower court judges have taken this approach. *Johnson v. Miller*, 922 F.Supp. 1556, 1562 (S.D.Ga. 1995) (finding consistent legislative policy of maintaining cores of districts from historical review of prior two decennial redistrictings), *aff'd, Abrams v. Johnson,* 521 U.S. 74

(1997); *see also Kidd v. Cox*, 2006 WL 1341302, 8 (N.D.Ga. 2006) (assuming in the absence of evidentiary challenge to the contrary state policies recognized by prior federal court are still vital interests).

The Majority Opinion and Appellees operate under the assumption that it is necessary to overrule *Karcher* to approve of the small variance contained in Senate Bill 1008. The Majority Opinion incorrectly reads *Karcher* to require a strict scrutiny analysis that is not consistent with the examples cited with approval in *Karcher*. It is not necessary to overrule *Karcher* to find that this analysis is incorrect. *Cf. State of Kan. ex rel. Stephan v. Graves,* 796 F.Supp. 468, 471 (D.Kan. 1992) (noting that "conceivably a majority of the current Supreme Court might take the view of the original dissenters" in *Karcher*). However, whether or not this Court overrules *Karcher,* it should not approve of the strict requirements imposed by the majority below.

First, the majority's reading of *Karcher* is not justified by the text of the Constitution. Article I, § 2, cl. 1 of the United States Constitution provides that "The House of Representatives shall be composed of Members chosen . . . by the People of the several States. . . ." Since *Wesberry,* this Court has interpreted U.S. Const. art. I, § 2, cl. 1 to require "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S. at 7-8. With respect to state legislative redistricting, this Court imposed an almost identical

standard based on the Equal Protection Clause. *See Reynolds v. Sims*, 377 U.S. 533, 577 (1964) ("the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable"). As early as *Reynolds,* however, this Court afforded more flexibility to the states to perform legislative redistricting, *id.* at 577-78, in spite of the fact that the Equal Protection Clause contains a textual requirement of equality while Article I, § 2, cl. 1 does not.

Moreover, a federal judiciary imposing a rigid standard is not the only check on small variances in population in congressional districts. Indeed, as Justice Scalia has noted in the context of judging partisan gerrymandering claims, "the Framers provided a remedy for such practices in the Constitution. Article I, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to "make or alter" those districts if it wished." *Vieth v. Jubelirer,* 541 U.S. 267, 275 (2004) (plurality opinion) (*citing* U.S. Const. art. I, § 4's provision that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations" and the historic exercise of Congressional power under this clause).

The traditional redistricting goals recognized as a justification for variances in *Karcher* serve as

restraint against gerrymanders. However, a "requirement of precise mathematical equality continues to invite those who would bury their political opposition to employ equipopulous gerrymanders." *Karcher*, 462 U.S. at 780 (White, J., dissenting). The Majority's Opinion's construction of *Karcher* permits reliance on precise mathematical equality to obviate the need of "the political cartographer to justify his work on its own terms." *Id.*

This Court has been unable to come up with a standard for judging partisan gerrymandering. *Vieth v. Jubelirer, supra*. Because partisan gerrymandering is as a practical matter judicially unreviewable, this Court's population variance jurisprudence should not provide political cover for the gerrymanders by affirming the strict mathematical equality requirements imposed in the Majority Opinion of the court below.

Redistricting by its nature involves tradeoffs. The Majority Opinion's focus on independently matching each policy justification with a specific finding that the specific deviation is justified prevents a state from balancing these interests. The Majority Opinion effectively precludes states from engaging in a balancing of legitimate policy goals if they have a redistricting plan that has a variance greater than zero. Thus, the issue of whether the Majority Opinion is correct regarding the legal showing necessary to justify a minor population deviation presents an

important constitutional question worthy of this Court's review.

3. The Majority Opinion is also in conflict with this Court's express approval in *Karcher* of "preserving the cores of prior districts" as a state policy that could justify a variance under *Karcher's* second step. 462 U.S. at 740. The conflict arises because the Majority Opinion adopted a definition of preserving the district's cores that is without any legal support and contrary to both this Court's precedents and the precedents of a number of three-judge panels including two prior West Virginia panels. The Majority Opinion does not dispute that the challenged redistricting plan geographically preserves the three districts to the greatest extent possible. (App. 18) ("the emphasis was in preserving the status quo and making only tangential changes to existing districts); *id.* at 180, 241, 243 ("erecting a figurative fence around a district's entire perimeter preserves its geographic core only in the grossest, most ham-handed sense"). Instead, after conceding that "Senate Bill 1008 was the most effective proposal in maintaining the status quo," the Majority Opinion declares this undisputed state interest "beside the point." (App. 20)

The Majority Opinion, abandoning all pretext of deference, then proceeds to lecture the State on why it should abandon a valid state interest consistently recognized in precedent. (App. 21) ("we are as a nation expressing our realization that resistance to change merely for the sake of preserving the status

quo is not a virtue to be celebrated and promoted as an end to itself"). The most striking feature of the majority's opinion on this point is the lack of any legal authority supporting its interpretation of this factor. Thus, the propriety of the Majority Opinion's new definition of maintaining the cores creates an important constitutional question.

It is clear that the Majority Opinion's definition is not dictated by this Court's prior precedents. First, the Majority Opinion's focus on zero variance in discussing this factor is not appropriate. The second step of the *Karcher* analysis presupposes variances greater than zero. *Karcher* specifically allows a state to justify variances greater than zero with valid state interests. 462 U.S. at 740. Seeking to preserve the cores of existing districts is one of those interests specifically allowed. *Id.*

The Majority Opinion equates the "core" of a district with "communities of interest." (App. 17) (*citing Graham v. Thornburgh*, 207 F.Supp.2d 1280, 1294 (D.Kan. 2002)). A review of the *Graham* opinion reveals that the Majority Opinion reversed the definition. The *Graham* Court quoted the Kansas redistricting guidelines that required taking into account "communities of interest" which included both the social and cultural factors quoted by the Court and other separate factors including geographic factors such as maintaining "the cores of existing districts" and placing "whole counties" in the same districts. *Id.* Indeed, in concluding that the plan complied with the state community of interest test, *Graham* points out

the small number of counties split and the fact that "the 1992 districts have been preserved to a relatively high degree" without mentioning any of the social or cultural factors emphasized by the Majority Opinion. *Id.*

The Majority Opinion's definition (and that of the Plaintiff's Expert), is simply in conflict with precedent. The Dissent recognized this. Dissenting Opinion, (App. 46) A prior West Virginia panel found a definition based on population and geography appropriate. *Stone v. Hechler*, 782 F.Supp. 1116, 1121-22 (N.D.W.Va. 1992) (defining core preservation based on counties and population kept together). This Court has also approved definitions of core preservation that focus on keeping geographic boundaries and populations in prior districts. *Abrams v. Johnson,* 521 U.S. 74, 99-100 (1997) (finding district court plan maintained "core districts" *affirming Johnson v. Miller*, 922 F.Supp. 1556, 1562 (S.D.Ga. 1995) (defining core maintenance based on number of counties kept in plan from plan adopted last decade)); *Turner v. State of Ark.*, 784 F.Supp. 585, 588 (E.D.Ark. 1991) (finding valid state interest from post-enactment legislative testimony that legislature's goal was "to adopt a 1991 congressional redistricting plan that was as close to the plan approved by [by federal court in prior decade] as possible . . . [by trying] to make as few changes as possible to meet the 'one person, one vote' standard."), *aff'd,* 504 U.S. 952 (1992) (Mem.); *see also South Carolina State Conference of Branches of the NAACP v. Riley,* 533 F.Supp. 1178, 1180 (D.S.C.

1982) (pre-*Karcher* noting that court drafting redistricting plan should alter old plans only as necessary to achieve the requisite goals of the new plan), *aff'd,* 459 U.S. 1025 (Mem.) (1982); *cf. Colleton County Council v. McConnell*, 201 F.Supp.2d 618, 647 (D.S.C. 2002) (defining core preservation based on *NAACP v. Riley, supra*). Other three-judge panels have come up with similar characterizations. *Larios v. Cox*, 300 F.Supp.2d 1320, 1334 (N.D.Ga. 2004) ("Core retention can be viewed in one of two ways: (1) in terms of the largest core of a prior district that is included in a successor district, or (2) in terms of the district core of each incumbent located in a district."); *David v. Cahill,* 342 F.Supp. 463, 469 (D.C.N.J. 1972) ("The plan set forth in DS 5 follows most former district lines as nearly as any we have considered, and leaves a substantial core of constituents in all former districts except the new Thirteenth District.").

Moreover, the Majority Opinion's rejection of the State's definition raises the issue of how much deference a three-judge panel owes state determinations. The Majority Opinion is in conflict with the prior West Virginia determinations:

> We think [the principle of legislative deference in redistricting] has application here. There is merit to the arguments of both Stone and the State concerning how to reduce the concept of "core" to definitional practicability. The State Legislature, however, considered both arguments and chose the one now advanced by the State in this

> litigation, that preserving district cores means keeping as many of the current congressional districts intact as possible.

Stone v. Hechler, 782 F.Supp. 1116, 1126 (N.D.W.Va. 1992).

Finally, as the Dissenting Opinion recognized, there are valid and important public policy reasons for keeping the cores of districts intact. (App. 41) (keeping cores together helps foster personal contact with representatives and continuity in working toward achieving district goals); *see also Riley*, 533 F.Supp. at 1181 (same). Indeed, the passage of time itself supports keeping districts together as the relationships that develop benefit all the citizens of the districts. *Committee for a Fair and Balanced Map,* 2011 WL 6318960 at p*25. ("The existence of District 4 for the last 20 years has now resulted in constituent-incumbent relationships in all three districts that didn't exist when the district was first created by the *Hastert* court and thus, the basis for upholding the oddly shaped district has changed."). Resolution of these important constitutional issues will assist future reviewing courts.

The Majority Opinion's limited definition of a district's core is in conflict with this Court's teachings and the holdings of a number of other courts and creates a substantial constitutional question worthy of review by this Court.

4. The Majority Opinion's choice of a remedy also fails to provide the deference to the legislative

process required by this Court's opinions. While the Majority Opinion, as modified by the Stay Opinion, offered the State the opportunity to pass a new congressional redistricting plan, (App. 31) (Majority Opinion), (App. 54) (Stay Opinion), the Majority indicated that absent the State enacting a new plan or the defendants agreeing on a new plan, the Court would likely adopt of one of the two plans presented that meet its 0% variance requirement. Given the real possibility that there will not be legislative agreement, *see, e.g.,* Ry Rivard, *Charleston Daily Mail* (January 18, 2012) (http://www.dailymail.com/News/statehouse/201201170165?page=2&build=cache) (legislative leaders in both houses noting lack of consensus for any of the proposed alternative plans some of which are very controversial), the question of the standard for choosing a judicial remedy is significant in this case.

In *Whitcomb v. Chavis,* 403 U.S. 124, 160 (1971), this Court emphasized that the remedial powers of a federal court in a redistricting case should be limited such that it is improper to disturb districts "any more than necessary" to remedy the constitutional violation. Thus, "faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying" a state plan – even one that was itself unenforceable – "to the extent those policies do not lead to violations of the Constitution. . . ." *Abrams v. Johnson,* 521 U.S. 74, 79 (1997). On the same day that this Court granted the stay in this case, it

reaffirmed these important principles. *Perry v. Perez*, 132 S.Ct. at 941.

Of the two plans selected by the majority, one was specifically rejected (the Perfect Plan) and one was never even presented to the Legislature (Cooper 4). Neither plan meets the goals of the plans that were adopted. The Perfect Plan (or 0% Variance Plan), splits counties, over one-third of the State's counties and population, and places two incumbents in the same district. (App. 65) The Cooper 4 Plan, splits one county, and moves 40% of the counties and almost 40% of the State's population. *Id.*

By stating that it would adopt one of these plans – neither one of which had majority support – the court below incentivized the minority that support those plans to stall or block any legislation as the Majority Opinion has indicated that, absent legislative action, the court below would judicially enact one of these plans. As the Dissenting Opinion recognized, it is possible to address the population variance and at the same time preserve some of the policies underlying the adoption of the original plan. (App. 45, n. 1) If this Court affirms the majority's liability determination, it should make clear that any judicial remedy should be guided to the greatest extent possible by the policies in the plan actually adopted by the Legislature. The cases cited above establish that the Majority Opinion's preference for two plans that ignore the policies that underlie Senate Bill 1008 was

error. This error constitutes a substantial constitutional question worthy of this Court's review.

CONCLUSION

For the reasons noted herein, this Court should note probable jurisdiction.

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