IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

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*,

Plaintiffs, and

THORNTON COOPER,

Intervening Plaintiff,

v.

Civil Action No. 2:11-CV-989
(KING, BAILEY, BERGER)

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

Defendants.

RESPONSE BY THORNTON COOPER IN OPPOSITION TO MOTION FOR STAY.

Thornton Cooper, the Intervening Plaintiff, hereby submits his **Response** in opposition to the Defendants' Motion for Stay of Judgment Pending Appeal that was filed on Friday afternoon, January 6, 2012, in the above-captioned case. Mr. Cooper

opposes that motion in all respects for the reasons set forth hereinbelow. This Response will also serve as a memorandum of law in opposition to that motion.

In their motion and supporting memorandum, the Defendants state that they disagree with the remedy portion of this Court's majority memorandum opinion and order dated January 4, 2012, as revised (hereinafter referred to as "the Order"). On page 30 of the Order this Court stated that the "enforcement of section 1-2-3 by the defendants is therefore permanently enjoined." On page 31 of the Order, this Court also stated that "the 2012 congressional elections will nevertheless be conducted under an interim plan promulgated by the Court, subject" to certain conditions.

House Speaker Richard Thompson and State Senate President Jeffrey Kessler, also state that they disagree with the ruling in the Order that Enrolled Senate Bill No. 1008 is unconstitutional. All four of the Defendants seek a stay of the Order. Defendants Thompson and Kessler state they intend to appeal the Order to the United States Supreme Court.

The applicable rule governing motions for stays of orders granting permanent injunctions by three-judge federal district courts is *Rule 62(c)* of the *Federal Rules of Civil Procedure*, which reads as follows:

> (c) INJUNCTION PENDING AN APPEAL. While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge court, the order must be made either:
> (1) by that court sitting in open session; or
> (2) by the assent of all of its judges, as evidenced by their signatures.

This rule was discussed in *Bragg v. Robertson*, 109 F.R.D. 194 (S. D. W. Va. 1999), a case involving a challenge to the issuance of state and federal permits for a mountain-top removal project. In that decision, the court stated:

> The merits of the motion are governed by the four-part test set forth in *Long v. Robinson,* 432 F.2d 977, 979 (4th Cir. 1970), which requires the moving party show 1) that it would likely prevail on the merits of the appeal; 2) that it will suffer irreparable injury if the stay is denied; 3) that the other parties will not be substantially harmed by the stay; and 4) that the public interest will be served by granting the stay. [*Bragg*, 109 F.R.D. at 196.]

In *Bragg,* the court granted a stay even though the movants therein failed to meet their burdens in that four-part test. In that case, many coal miners had been informed that they would be laid off by their employers in an attempt to put pressure on the court to stay its order. *Id.* That court stated that it "believes it preferable to attempt to defuse invective and diminish irrational fears so that reasoned decisions can be made with all deliberate speed, but with distractions minimized." *Id.*

Clearly, the announcements of mass layoffs cannot be wielded as a club in this case in an attempt to bludgeon this Court into departing from the above four-part test. After all, West Virginia has only three (3) individuals representing its citizens in the United States House of Representatives. However, on page 3 and 4 of their memorandum, the Defendants state that they "are also appealing based upon public and private opposition to the decision".

Under the four-part test cited in *Bragg*, the Defendants have failed to meet their burden.

(1) In the first place, the Defendants/movants/ prospective appellants are not likely to prevail on the merits of the appeal. Although the district court, in *Stone v. Hechler*, 782 F. Supp. 1116 (N. D. W. Va. 1992), did allow West Virginia's 1991

congressional-redistricting statute, with a maximum population variance of **556**, to stand, the weight of federal case law and of state legislation since 1990 is toward plans that have a population variance of fewer than 10 persons between the most populous and least populous congressional districts in a state. *See, e.g., Vieth v. Pennsylvania,* 195 F. Supp. 2d 672 (M. D. Pa. 2002), *appeal dismissed, Jubelirer v. Vieth*, 537 U.S. 801, 123 S. Ct. 67, 154 L. Ed. 2, *appeal dismissed, Schweiker v. Vieth*, 537 U.S. 801, 123 S. Ct. 68, 154 L. Ed. 2 (holding that the Commonwealth of Pennsylvania failed to meet its burden that the population variance of **19** between the most populous and least populous congressional districts was necessary to achieve some legitimate goal).

(2) In the second place, the Defendants themselves are not likely to suffer any injury if the stay is denied. No Defendant has announced that he or she is running for one of the congressional seats. Nor is any candidate for a congressional seat likely to suffer any injury if the stay is denied. The Legislature and the Governor have been given a reasonable amount of time in the Order to enact and sign a bill that is constitutional before January 17, 2012.

In addition to being a voter, an attorney, a political cartographer, and a party in this case, Mr. Cooper has also been a congressional candidate, during the 2008 Democratic primary election in the Second Congressional District. What a congressional candidate needs, when he or she files, on or before January 28, 2012, is to know which territory is included in each of the three congressional districts, so that he or she may file in the district that he or she believes to be most appropriate. Usually, the most appropriate district in which to file is the one in which the candidate's house or apartment is situated. Mr. Cooper agrees with the approach enunciated in the Order.

Furthermore, as the Chair of the Candidate Recruitment Committee of the Kanawha County Democratic Executive Committee, Mr. Cooper has the responsibility of attempting to ensure that each 2012 general-election ballot in Kanawha County has a Democratic candidate for every position on the ballot. Because of the popularity of Congresswoman Capito, it is difficult to find Democratic candidates who are willing to take the chance of being trounced by her in the general election. If, by the evening of the last day of the filing period, no other Democrat has filed to run in the congressional district in which South Charleston is located, Mr. Cooper plans to recruit himself to make sure that there is a Democratic congressional candidate on his ballot in the 2012 general election. However, he hopes that some other Democrat will run for the congressional seat in question.

So that candidates for each congressional seat may know the territory embraced by each congressional district before Saturday, January 28, 2012, Mr. Cooper hopes that the Court will, by Monday, January 23, 2012, approve an interim plan if the Legislature and Governor fail to act by Tuesday, January 17, 2012.

(3) In the third place, Mr. Cooper, as a voter, will be harmed if either the 2001 or the 2011 congressional redistricting plan is allowed to be used as the congressional redistricting plan for the 2012 congressional elections in West Virginia. Enrolled Senate Bill No. 1008 divided West Virginia into three congressional districts with populations of 615,991, 620,862, and 616,141. The population variance between the most populous and least populous congressional districts under that legislation is **4,871**, or **0.78862%** of the ideal population of 617,665. Therefore, as a resident of the congressional district with the population of 620,862, he will suffer by having his vote diluted if the

congressional elections in West Virginia are conducted in 2012 under the 2011 statute. His vote will be diluted even further if Mason County is added back to the Second Congressional District and the congressional elections in West Virginia are conducted in 2012 under the 2001 statute.

(4) Fourth, the public interest will not be served by granting the stay, which would deprive the other voters in the Second Congressional District of having their votes count as much as do the votes of voters in the First and Third Congressional Districts under Enrolled Senate Bill No. 1008.

Finally, Mr. Cooper respectfully submits that the Defendants should comply with the Order, rather than appealing it. It is embarrassing to Mr. Cooper as a West Virginia native and resident that elected officials from his state have announced that they will try to persuade the United States Supreme Court to allow West Virginia to move **backward** in 2012. For such state officials to do so would tend to reinforce the national perception that West Virginia is one of the most backward states in the nation.

Accordingly, the motion for a stay should be **DENIED**.

THORNTON COOPER

Intervening Plaintiff

Pro Se

/s/ Thornton Cooper
Thornton Cooper (WVSB No. 823)
3015 Ridgeview Drive
South Charleston, WV 25303
(304) 744-9616 (home)
thornbush@att.net

Dated: January 9, 2012

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AT CHARLESTON

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*,

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Defendants.

CERTIFICATE OF SERVICE.

I, Thornton Cooper, Intervening Plaintiff, do hereby certify that on January 9, 2012, I electronically filed the foregoing **RESPONSE BY THORNTON COOPER IN**

OPPOSITION TO MOTION FOR STAY with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

David M. Hammer, Esq.
Hammer, Ferretti & Schiavoni
408 West King Street
Martinsburg, WV 25401
Phone: (304) 264-8505
Fax: (304) 264-8506
dhammmer@hfslawyers.com
Counsel for Plaintiffs;

Stephen G. Skinner, Esq.
Skinner Law Firm
P. O. Box 487
Charles Town, WV 25414
Phone: (304) 725-7029
Fax: (304) 725-4082
sskinner@skinnerfirm.com
Counsel for Plaintiffs;

George E. Carenbauer, Esq.
Steptoe & Johnson
P. O Box 1588
Charleston, WV 25326
Phone: (304) 353-8000
Fax: (304) 353-8180
George.Carenbauer@steptoe-johnson.com
Counsel for DefendantJeffrey Kessler;

Anthony J. Majestro, Esq.
Cynthia A. Majestro, Esq.
Powell & Majestro, PLLC
405 Capitol Street, Suite P-1200
Charleston, WV 25301
Phone: (304) 346-2889
Fax: (304) 346-2895
amajestro@powellmajestro.com
cmajestro@powellmajestro.com
Counsel for Defendant Richard Thompson; and

Thomas W. Rodd, Esq.
Assistant Attorney General
Office of the Attorney General
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Phone: (304) 558-5830
Fax: (304) 558-5833
twr@wvago.gov
Counsel for Defendants Natalie E. Tennant and Earl Ray Tomblin.

/s/ Thornton Cooper
Thornton Cooper (WVSB No. 823)
3015 Ridgeview Drive
South Charleston, WV 25303
(304) 744-9616 (home)
thornbush@att.net