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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Upon Original Jurisdiction

No. 12-0185

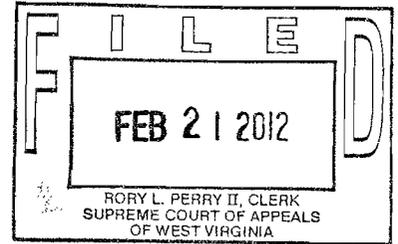
STATE OF WEST VIRGINIA, ex rel.
DONNA J. BOLEY,

Petitioner,

v.

NATALIE E. TENNANT,
SECRETARY OF STATE OF THE
STATE OF WEST VIRGINIA,
and FRANK DEEM,

Respondents.



**RESPONSE OF FRANK DEEM TO THE EMERGENCY PETITION
FOR WRIT OF MANDAMUS OF PETITIONER DONNA J. BOLEY**

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February 21, 2012

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**RESPONSE OF FRANK DEEM TO THE EMERGENCY PETITION FOR WRIT OF
MANDAMUS OF PETITIONER DONNA J. BOLEY**

Respondent Frank Deem (“Respondent”), by and through his counsel Benjamin L. Bailey and Jonathan S. Deem of the law firm of Bailey & Glasser, LLP, hereby responds to the Emergency Petition for Writ of Mandamus of Petitioner Donna J. Boley (“Petitioner”), and states as follows:

QUESTION PRESENTED

Petitioner posed the question of whether the residency dispersal provisions specified in section four, article VI of the West Virginia Constitution and W. Va. Code § 1-2-1 require the Secretary of State to exclude from the ballot a candidate whose filing for office, nomination, and election would violate those provisions.

STATEMENT OF THE CASE

This case is about whether the residency dispersal restrictions in W. Va. Const. Art. VI, § 4 and W. Va. Code § 1-2-1 may be lawfully and constitutionally applied to stifle the political participation of a vast majority of the residents and voters of the third senatorial district (“District 3”).

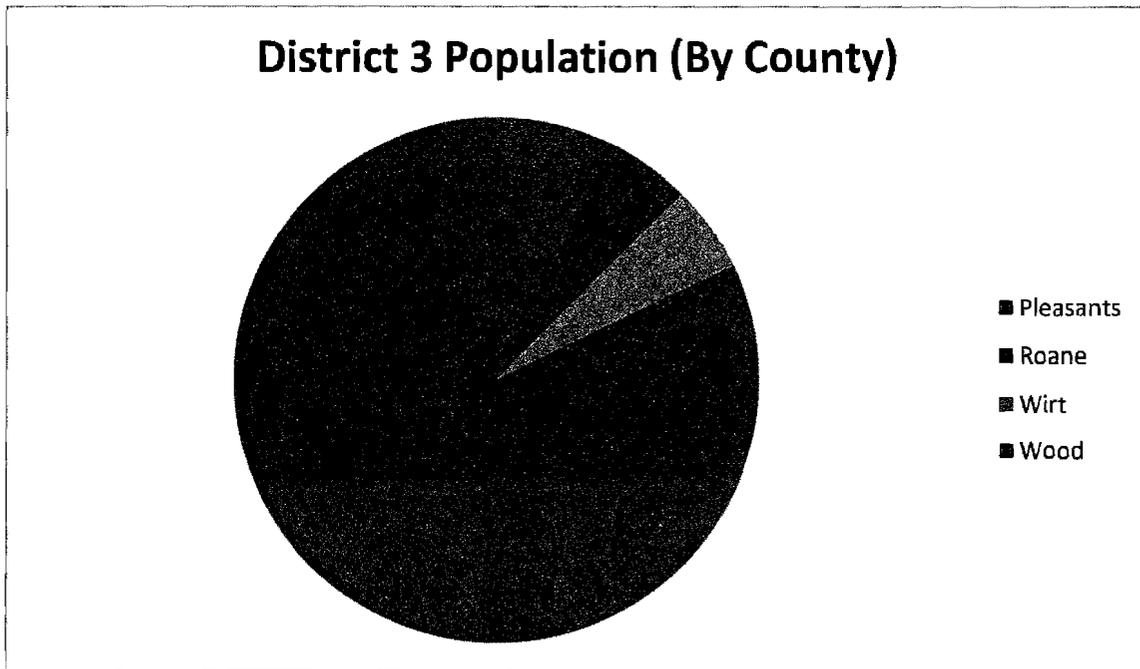
Respondent is a Republican candidate for the West Virginia Senate running for office in District 3. App. at 1-2 [Ex.1]. Petitioner is an incumbent Senator representing District 3. Pet. Writ Mandamus at 1. Petitioner is also Respondent’s opponent in the upcoming District 3 Republican primary scheduled for May 8, 2012. App. at 1-2 [Ex.1]. In bringing this challenge, Petitioner seeks to have Respondent’s name stricken from the ballot so that she may once again run for Senate unopposed.¹

¹ Petitioner and Respondent are the only candidates certified for election to the Senate in District 3. There are no democrats, independents or minor party candidates running in the race. App. at 1-2 [Ex.1].

Petitioner argues that the residency dispersal provisions of W. Va. Const. Art. VI, § 4 and W. Va. Code § 1-2-1 disqualify Respondent from running for Senator because there is already an incumbent Senator who resides in the same county as Respondent. Pet. Writ Mandamus at 4. Respondent resides in Vienna, Wood County, West Virginia. Incumbent Senator David Nohe, elected to a four-year term in 2010, also resides in Wood County. *Id.* at 1-2. Thus, Petitioner argues that Respondent is disqualified pursuant to W. Va. Const. Art. VI, § 4 and W. Va. Code § 1-2-1, and may not be nominated or elected to represent District 3 in the Senate. *Id.* at 4.

In accordance with W.Va. Code § 1-2-1, District 3 is composed of Wood, Wirt, Pleasants and a portion of Roane Counties. The vast majority of the population of District 3 resides in Wood County. According to figures obtained from the West Virginia Secretary of State, the population of Wood County is 86,956 (roughly 82.12% of total District 3 population); the population of Wirt County, the least populated county in the State, is 5,717 (roughly 5.40% of total District 3 population); the population of Pleasants County is 7,605 (roughly 7.18% of total District 3 population); and the population of the District 3 portion of Roane County is 5,609 (roughly 5.30% of total District 3 population). App. at 3 [Ex.2]. The combined population of District 3 counties other than Wood, according to the Secretary of State's figures, is therefore 18,931 or roughly 17.88% of total District 3 population. Thus, Wood County residents outnumber other residents of District 3 by a ratio of approximately 5:1.

Figure 1.1 below shows the dispersal of population among the District 3 counties:



App. at 3 [Ex.2].

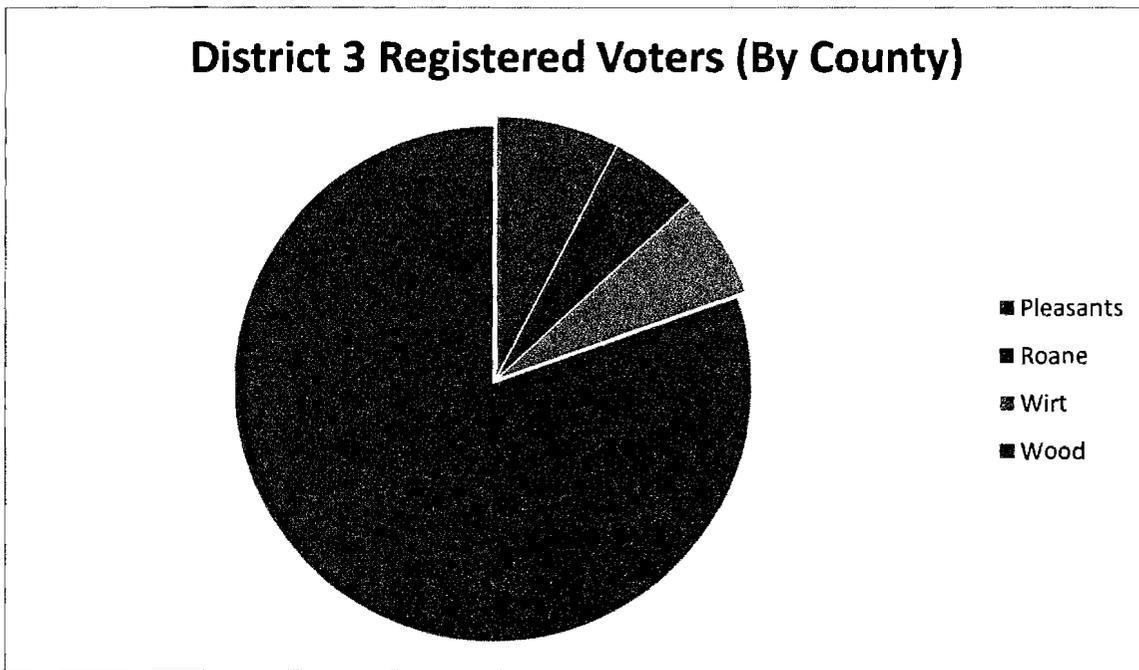
District 3 voter registration and political party affiliation numbers fall along similar lines. According to data obtained from the Secretary of State, as of February 17, 2012, there were 54,082 registered voters in Wood County (roughly 80.39% of total registered voters in District 3); 4,343 registered voters in Wirt County (roughly 6.46% of total registered voters in District 3); 5,120 registered voters in Pleasants County (roughly 7.61% of total registered voters in District 3); and 3,726 registered voters in the District 3 portion of Roane County (roughly 5.54% of total registered voters in District 3). App. at 4 [Ex.3]. The total number of registered voters in District 3 in counties other than Wood is therefore 13,189 or roughly 19.61% of total registered voters in District 3. Therefore, registered voters in Wood County outnumber registered voters in other portions of District 3 by a ratio of approximately 4:1.

Figure 2.1 below shows the dispersal of registered voters in District 3 by party affiliation:

West Virginia Voter Registration Senatorial District 3						
County	Democrat	Republican	Mountain	No Party Affiliation	Other	Total
Pleasants	2564	1585	0	832	139	5120
Roane	1757	1202	5	755	7	3726
Wirt	2090	1483	5	703	62	4343
Wood	21035	21531	40	11052	424	54082
Total	27446	25801	50	13342	632	67271

App. at 4 [Ex.3].

Figure 2.2 below depicts the dispersal of registered voters in District 3 Counties:



Id. As these figures indicate, there is great disparity between Wood County and the other District 3 counties in terms of population, voter registration and political party affiliation.

Striking Respondent's name from the ballot in District 3 would enable Petitioner to run unopposed in both the primary and general elections. App. at 1-2 [Ex.1]. Indeed, Petitioner is accustomed to running unopposed. Petitioner was first appointed to the Senate in 1985 by

Governor Arch A. Moore. App. at 5 [Ex.4]. She was elected to her first full term in office in 1988 and has served continuously since. App. at 6 [Ex.5]. From the time Petitioner was first appointed to the present day, the Senator serving opposite Petitioner in District 3 resided in Wood County.² Thus, since 1985, every citizen of Wood County has been unable to run for the Senate in 50% of the general elections.

According to the records of the Secretary of State, Petitioner has sought election to the Senate a total of seven times since 1988. App. at 9 [Ex.8]. In the past twelve primary and general elections in which Petitioner was a candidate for Senate, Petitioner was opposed in only four elections. *Id.* To Respondent's knowledge, prior to this year, Petitioner has never faced an opponent in the District 3 Republican primary. *See id.*

SUMMARY OF ARGUMENT

Residency dispersal restrictions as applied to District 3 unjustifiably and unconstitutionally infringe upon the rights of the overwhelming majority of the district's citizens to run for Senate and the rights of district voters to support and vote for the candidates of their choice. The relevant boundary lines of District 3 coupled with the draconian rule that no two Senators from the same district may reside in the same county ensures that over 80% of the District 3 population is prohibited for running for Senate in any election when there is already an incumbent Senator residing in Wood County. The same rules guarantee that independent and minor party candidates have virtually no access to the ballot.

Petitioner has held her seat in the Senate for nearly thirty years and has faced opposition a grand total of four times. Petitioner has never faced an opponent in the Republican primary.

² The Honorable Keith Burdette, a resident of Wood County, served opposite Petitioner in the Senate from 1982-1994. App. at 7 [Ex.6]. Respondent served opposite Petitioner in the Senate from 1994-2010. App. at 8 [Ex.7]. The Honorable David Nohe, a resident of Wood County, defeated Petitioner in the 2010 Republican Primary. Pet. Writ Mandamus at 1. Senator Nohe currently represents District 3 in the Senate. *Id.*

Petitioner has never faced opposition from an independent or minority party challenger. If this Court grants her a writ of mandamus, she will be assured victory in the upcoming election without a single vote being cast. This has become par for the course in District 3, and it is unconstitutional.

In West Virginia, laws that restrict the rights of citizens to run for public office are subject to strict scrutiny. *See* Argument Section I.A., below. This is because the right to participate in the democratic process is a fundamental right in West Virginia that is protected under the First and Fourteenth Amendments to the United States Constitution and our State's Constitution. *Id.* Unfair and overly burdensome restrictions on the rights of candidates must be balanced against the interests those restrictions purportedly serve. *Id.* Here, the interests most often discussed include broadening the representation of local interests and ensuring that the views of less populated counties are heard. *Id.* These interests appear legitimate, in theory. In practice, they unfairly and unconstitutionally tip the scales away from more urban counties and towards areas with less population. Should this Court grant Petitioner's writ as requested, the citizens of Pleasants County are assured a greater opportunity to participate in the Senate than the citizens of Wood County, despite the fact Wood County has five times the population of Pleasants County. Thus the parochial interests that are being served are light compared to the unconstitutional burdens on candidacy and voting rights in District 3.

Therefore, Respondent respectfully requests this Court to deny with prejudice Petitioner's request to issue a rule to show cause, deny with prejudice Petitioner's request for a writ of mandamus, issue an Order declaring that the residency dispersal provisions of W. Va. Const. Art. VI, § 4 and W. Va. Code § 1-2-1 are unconstitutional as applied to Respondent and District 3,

and issue an Order declaring that Respondent is eligible to be a candidate for nomination and election to the Senate from District 3.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent believes oral argument is appropriate in this case pursuant to the criteria in W. Va. Rev. Rule of App. Pro. 18(a). Petitioner seeks to strike Respondent's name from the election ballot. Accordingly, her desired remedy implicates serious fundamental rights. Candidate eligibility cases test basic constitutional rights. *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) ("The impact of candidate eligibility requirements on voters implicates basic constitutional rights."). The importance of the interests involved is even more pronounced when, as here, the movant seeks to strike a person's name from the ballot. *State ex rel. Sowards v. County Comm'n of Lincoln County*, 196 W. Va. 739, 747, 474 S.E.2d 919, 927 (1996) ("Any effort to strike a candidate's name from the ballot quite obviously invokes serious constitutional concerns.").

Additionally, Respondent does not believe the issues raised in this proceeding have been authoritatively decided. Respondent's challenge to the constitutionality of the residency dispersal requirements of W. Va. Const. Art. VI, § 4 and W. Va. Code § 1-2-1 is an "as applied" challenge and necessarily turns upon the specific facts and circumstances of this case. Respondent is unaware of any authoritative decision in this or any other jurisdiction that addresses the fundamental question raised by Respondent; that is, whether the application of W. Va. Const. Art. VI, § 4 and W. Va. Code § 1-2-1 is an unconstitutional burden on candidacy and voting rights in District 3.

Furthermore, given the nature of the interests involved and the importance of the outcome of this case to the democratic process, Respondent respectfully requests selection of this

case for Rule 20 argument. “Cases suitable for Rule 20 argument include, but are not limited to: (1) cases involving issues of first impression; (2) cases involving issues of fundamental public importance; (3) cases involving constitutional questions regarding the validity of a statute, municipal ordinance, or court ruling; and (4) cases involving inconsistencies or conflicts among the decisions of lower tribunals.” W. Va. Rev. Rule of App. Pro. 20(a). This case meets at least three of the criteria listed in Rule 20. As stated above, this is an issue of first impression in West Virginia that has not been authoritatively decided, the case involves issues of fundamental public importance, and the case involves constitutional questions regarding the application of W. Va. Const. Art. VI, § 4 and W. Va. Code § 1-2-1. Therefore, Rule 20 argument is appropriate.

Finally, Respondent agrees that a published opinion would be appropriate in this case to provide guidance to future candidates and to further develop the jurisprudence in this State with respect to the fundamental rights of voters and candidates.

ARGUMENT

I. The residency dispersal restrictions in W.Va. Constitution Article VI, § 4 and W.Va. Code § 1-2-1 should not be applied to disqualify Respondent in this particular case.

W. Va. Const. Art. VI, § 4 states:

For the election of senators, the state shall be divided into twelve senatorial districts, which number shall not be diminished, but may be increased as hereinafter provided. Every district shall elect two senators, but, where the district is composed of more than one county, both shall not be chosen from the same county. The districts shall be compact, formed of contiguous territory, bounded by county lines, and, as nearly as practicable, equal in population, to be ascertained by the census of the United States. After every such census, the Legislature shall alter the senatorial districts, so far as may be necessary to make them conform to the foregoing provision.

W. Va. Code § 1-2-1(e), as amended by Senate Bill 1006 enacted during the First Extraordinary Session of the West Virginia Legislature in 2011, interprets W. Va. Const. Art. VI, § 4 and states, in relevant part, “[w]ith respect to a senatorial district which is composed of one or more whole counties and one or more parts of another county or counties, no more than one senator shall be chosen from the same county or part of a county to represent such senatorial district” The section goes further, however, to restrict the ability of a person to be a candidate for Senate when he or she resides in the same county as an incumbent Senator. W. Va. Code § 1-2-1(f) states, in relevant part:

Candidates for the Senate shall be nominated as provided in section four, article five, chapter three of this code, except that such candidates shall be nominated in accordance with the residency dispersal provisions specified in section four, article VI of the West Virginia Constitution and the additional residency dispersal provisions specified in subsection (e) of this section. Candidates for the Senate shall also be elected in accordance with the residency dispersal provisions specified in said section and the additional residency dispersal provisions specified in subsection (e) of this section. In furtherance of the foregoing provisions of this subsection, no person may file a certificate of candidacy for election from a senatorial district described and constituted in subsection (d) of this section if he or she resides in the same county and the same such senatorial district wherein also resides an incumbent senator, whether the senatorial district wherein such incumbent senator resides was described and constituted by chapter ten, Acts of the Legislature, Fifth Extraordinary Session 2001, or was described and constituted in subsection (d) of this section or its immediately prior enactment.

As stated above, incumbent Senator David Nohe resides in Wood County. Thus, despite redistricting, the residency dispersal restrictions in W. Va. Const. Art. VI, § 4 and W. Va. Code § 1-2-1, as applied to District 3, prohibit over 80% of the population of District 3 who may otherwise be eligible to run for Senate from even filing to be a candidate.³ This affects not only

³ Under W. Va. Const. Art. IV, § 4, all citizens entitled to vote who are over the age of twenty-five are entitled to hold the office of Senator.

the rights of citizens, like Respondent, who desire to seek election to the Senate, but also the constitutionally protected rights of all registered voters in District 3. Moreover, the dispersal provisions are especially harsh on independent and minor party candidates and voters whose ballot access and political opportunities are severely restrained.

A. The residency dispersal restrictions in W.Va. Const. Article VI, § 4 and W. Va. Code § 1-2-1, as applied to Respondent and the residents of District 3, are unconstitutional.⁴

Ballot access cases implicate important constitutional freedoms protected under the United States and West Virginia Constitutions, including freedom of speech, freedom of association and equal protection. *See State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 223 S.E. 607 (1976); *State ex rel. Piccirillo v. City of Follansbee*, 160 W. Va. 329, 334, 233 S.E.2d 419, 423 (1977); *State ex rel. Billings v. City of Point Pleasant*, 194 W. Va. 301, 305, 460 S.E.2d 436, 440 (1995). Accordingly, the right to stand for election is a fundamental right in West Virginia. *Syl. Pt. 2, Billings*, 194 W. Va. at 302, 460 S.E.2d at 437; *Syl. Pt. 1, Piccirillo*, 160 W. Va. at 329, 233 S.E.2d at 420; *see also State ex rel. Carenbauer v. Hechler*, 208 W. Va. 584, 592-93, 542 S.E.2d 405, 413-14 (2000).

Moreover, ballot access cases implicate the fundamental rights of voters. The United States and West Virginia Constitutions protect not only the rights of candidates to stand for election, but also the rights of voters to support and vote for the candidates of their choice. *See Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (“the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at

⁴ Respondent bases his challenge to the constitutionality of W. Va. Const. Art. VI, § 4 and W. Va. Code § 1-2-1, as applied to District 3, on the First and Fourteenth Amendments to the United States Constitution, the freedoms of speech and association guaranteed under Sections 7 and 16 of Article III of the West Virginia Constitution, the equal protection principles of Section 10 of Article III of the West Virginia Constitution, and the right of political participation guaranteed under Section 1 of Article IV of the West Virginia Constitution.

least some theoretical, correlative effect on voters.” ((quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)); see also *White v. Manchin*, 173 W. Va. 526, 546, 318 S.E.2d 470, 490 (1984). As this Court stated in *State ex rel. Sowards v. County Comm'n of Lincoln County*,

The issue raised by the relators not only implicates the right to seek public office but also the right of citizens to vote for candidates of their choice. The right to vote, in turn, helps to preserve all other rights because it provides the people with the ultimate means of expressing their will and directing the public policy of the State and its subsidiary units. Consequently, as Chief Justice Warren put it: ‘The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.

196 W. Va. 739, 747, 474 S.E.2d 919, 927 (1996).

Thus, in West Virginia, in order to withstand constitutional scrutiny, restrictions on the rights of candidates must serve a legitimate and compelling state interest. Syl. Pt. 2, *Billings*, 194 W. Va. at 302, 460 S.E.2d at 437; *White*, 173 W. Va. at 543-44, 318 S.E.2d at 488 (1984) (“This Court has frequently recognized that the right to become a candidate for public office is a fundamental right, and that any restriction on the exercise of this right must serve a compelling state interest. Therefore, strict scrutiny applies, whether under the equal protection clause of the fourteenth amendment or under the fundamental right to candidacy under our state constitution. . .”).

As the Petitioner states in her Petition, this Court, as well as federal courts in West Virginia, have examined the interests served by similar residency dispersal requirements. Just recently, this Court noted, with respect to the redistricting of West Virginia House of Delegates districts, “delegate residency dispersal requirements have been a consistent feature of legislative redistricting in West Virginia, have been upheld and have withstood equal protection challenges in numerous cases, and satisfy valid and legitimate constitutional and public policy interests.”

State ex rel. Cooper v. Tennant, ___ W. Va. ___, No. 11-1405, slip op at 34 (Feb. 13, 2012). Similarly, in *Goines v. Heiskell*, 362 F. Supp. 313, 319-20 (S.D. W.Va. 1973), the United States District Court for the Southern District of West Virginia addressed the propriety of delegate residency dispersal in the context of redistricting. The *Goines* Court, quoting from a brief filed by the Attorney General of West Virginia, noted that delegate residency dispersal provisions “assure every geographic area of having a more effective voice in the Legislature.” *Id.* at 319-320. Further, it was noted in a footnote to this Court’s opinion in *White v. Manchin* that residency dispersal in the Senate serves the interests of insuring meaningful representation for all counties in the State Legislature. 173 W. Va. at 543, n. 8, 318 S.E.2d at 487, n. 8.

Respondent acknowledges that previous decisions of this and other courts recognize residency dispersal as serving the public’s interests. Respondent strongly believes, however, that residency dispersal as applied in West Virginia has afforded the rural areas of this State an unfair and unconstitutional advantage over the more populated counties. Instead of enhancing the interests of different localities, Respondent believes residency dispersal improperly tilts the scales in favor of citizens of rural counties, overtaking counties that are more urban in nature. In Respondent’s view, rural politicians who represent a very small portion of the State’s population wield an inordinate amount of influence over public affairs. For example, in the case at bar, should this Court grant Petitioner a writ of mandamus as requested, Pleasants County, which has roughly 0.41% of the State’s population (according to figures obtained from the U.S. Census Bureau), will be guaranteed one representative in the Senate.⁵ Pleasants County, despite having only 0.41% of the State’s population, will have roughly 3.0% of the total representation in the Senate, which is composed of thirty-four members in accordance with W. Va. Code § 1-2-1(d).

⁵ According to the most recent census figures, West Virginia’s estimated population is 1,855,364. *See* www.quickfacts.census.gov/qfd/states/54000.html (visited on February 20, 2012).

On the other hand, Wood County, with 4.69% of the State's population, can never have more than 3.0% of the total representation in the Senate. Thus, residency dispersal, as applied to District 3 and elsewhere in the State, provides more power and authority to rural counties, who in turn reap the benefits of the additional funding and public resources that parochial politics tends to deliver.

But it is unnecessary for this Court to determine that residency dispersal does not serve a compelling state interest in order to rule in favor of Respondent. In addition to being tied to a compelling state interest, strict scrutiny requires that ballot access restrictions be narrowly tailored. *State ex rel. Billings v. City of Point Pleasant*, 194 W. Va. 301, 308-09, 460 S.E.2d 436, 443-44 (1995) (stating that a statute will not be upheld if “there is a less restrictive means of satisfying legitimate state goals.”); *see also State ex rel. Carenbauer v. Hechler*, 208 W. Va. 584, 604, 542 S.E.2d 405, 425, (2000) (“In other words, when the State passes a law that infringes on a fundamental constitutional right, such as the right to stand for election, such a law only withstands strict constitutional scrutiny if it is narrowly tailored to meet a compelling state interest.” (Starcher J., dissenting))). “Therefore, unduly restrictive election laws, even if based on compelling governmental purposes, are unconstitutional.” *Billings*, 194 W. Va. at 308, 460 S.E.2d at 443.

The United States Supreme Court applies a balancing test to ballot access regulations that warrant a heightened level of constitutional scrutiny. In *Anderson v. Celebrezze*, 460 U.S. 780, 789-90 (1983), the United States Supreme Court stated,

a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the [constitutional] rights . . . that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In

passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

The *Anderson* test was applied by this Court to a law restricting ballot access in *Billings v. City of Point Pleasant*. 194 W. Va. at 305-06, 460 S.E.2d at 440-41 (holding that a sixty-day limitation on changing party affiliation prior to filing a certificate of candidacy was necessary to accomplish a compelling state interest in preserving the political process). Therefore, to withstand strict scrutiny, the governmental interests ostensibly served by the residency dispersal restrictions in W.Va. Const. Art. VI, § 4 and W. Va. Code § 1-2-1 must be weighed against the heavy burden such restrictions place upon the constitutional rights of Respondent and the residents of District 3.

Any governmental interests, compelling or otherwise, are outweighed by the injuries inflicted upon the fundamental freedoms at issue. Senate residency dispersal, as applied to District 3, has resulted in a culture of political stagnation. When there is an incumbent Senator residing in Wood County, the vast majority of registered voters, roughly 80% of the district, are prohibited from running for office. This has created a system where competitive, robust elections are the exception, not the rule.

Since 1988, Petitioner has run for a full term in the Senate seven times, including the election at issue here. Petitioner has been contested in only four of those elections. Should the Court grant the writ requested by Petitioner, thereby guaranteeing Petitioner an uncontested election, Petitioner will have never faced an opponent in the Republican primary. Moreover, should Petitioner's writ be granted, Petitioner will be guaranteed a successful reelection without a single vote having been cast.

Thus, in this specific case, the interests served by residency dispersal appear to be the Petitioner's interests, rather than the interests of the public at large. Political opportunity and the ability to participate in the political process are the cornerstones of our democracy. *See State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 520, 223 S.E.2d 607, 612-13 (1976) (opining that an anti-succession provision that enlarges the franchise by guaranteeing competitive primary and general elections "does not frustrate but rather furthers the policy of the Fourteenth Amendment.") In District 3, the opportunity for a fully competitive robust election occurs every four years instead of every two, as should be the case in a more balanced district where the opportunity to run for Senate is not so drastically slanted against one portion of the population.

Respondent does not believe the constitution requires all Senate districts to be single county districts. *See White v. Manchin*, 173 W. Va. 526, 543, n. 8, 318 S.E.2d 470, 487, n. 8 (1984) (stating in *dicta* that the Court does not believe the United States Constitution mandates single county senatorial districts). Nor does Respondent believe that free speech and equal protection require each multi-county district be drawn so that the populations within each county in the district are exactly equal. However, Respondent cannot accept the premise that residency dispersal requirements are constitutional in all contexts, regardless of the imbalance created. At some point, constitutional principles of democracy and fairness must be protected from undue harm. Here, in a district where over 80% of the citizens who may otherwise be qualified to run for office are denied that opportunity solely on the basis of residency within the district, there can be no question a constitutional violation occurs.

In other words, the constitutional rights of the many outweigh the parochial interests of the few. A fair, meaningful and open democratic process should not be sacrificed in order to preserve the nebulous concept of broadening the representation of local interests. Besides, as

Petitioner points out in her brief, the law presumes that a candidate elected in an at-large district represents the interests of all the residents of the district, not just the interests of his or her neighbors. See Petition at pages 10-14 ((discussing *Dallas County v. Reese*, 421 U.S. 477 (1975); *Dusch v. Davis*, 387 U.S. 112 (1967); and *Fortson v. Dorsey*, 379 U.S. 433 (1965)). It cannot be said, therefore, that disposing of residency dispersal in this instance will fail to serve the local interests of Pleasants, Wirt and Roane Counties. Those interests would be served, and they would be served without unfairly and unconstitutionally burdening the rights of candidates and voters.

Moreover, the political makeup of District 3 weighs heavily against the application of residency dispersal when an incumbent Senator resides in Wood County. As indicated in Figure 2.1 above, in District 3 there are a total of 50 voters registered with the Mountain Party, 13,342 voters registered as independents, and 632 voters whose party affiliate is classified as “other.” The vast majority of these voters reside in Wood County. According to the Secretary of State’s figures, of the 14,024 registered voters in District 3 who are not members of the two major political parties, 11,516 reside in Wood County. That equates to roughly 82.12% of independent and minor party voters in District 3. Whenever an incumbent Senator resides in Wood County, the candidate pool for independents and minor parties is reduced by approximately 82.12%.

This Court has stated that any restriction upon eligibility for office which exists for the purpose of limiting the franchise of any substantial group of citizens is inherently unconstitutional. *State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 516-17, 223 S.E.2d 607, 611 (1976). Moreover, the United States Supreme Court, which applies heightened scrutiny to ballot access restrictions that impose burdens on new or small political parties or independent candidates, has said “the State may not act to maintain the ‘status quo’ by making it virtually

impossible for any but the two major political parties to achieve ballot positions for their candidates.” *Clements v. Fashing*, 457 U.S. 957, 965 (1982) (noting that heightened scrutiny applies to cases involving classification schemes that burden independents and minor parties).

Here, residency dispersal makes it virtually impossible for independents and minor party candidates to achieve ballot position in District 3 because the overwhelming majority of such persons who may run for Senate reside in Wood County. Thus, residency dispersal in District 3 unfairly favors the major political parties over the independents and minor parties. This is especially compelling in the case of Mountain Party candidates. According to the Secretary of State’s figures, there are only ten citizens in District 3 registered with the Mountain Party residing outside of Wood County. From a standpoint of pure common sense, the chance that one of those ten citizens will run for Senate in a year where there is an incumbent Senator residing in Wood County is miniscule. Indeed, to Respondent’s knowledge, Petitioner has never faced a minor party or independent challenger.

This discriminatory effect on independents and minor parties harms not only potential candidates, but also the entire political process. According to the United States Supreme Court, debate on public issues should be uninhibited, robust and wide-open. *Anderson v. Celebrezze*, 460 U.S. 780, 793-94 (1983) ((quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) (internal quotations omitted)). These important principles are not served when state regulations allow election campaigns to be monopolized by dominant political parties. *Id.* “By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas.” *Id.*

Therefore, West Virginia's residency dispersal restrictions, as applied to Senate races in District 3, unfairly burden the constitutional rights of voters and candidates, including independents and minor political parties, and do not meet strict scrutiny. The harms inflicted upon fundamental freedoms and the democratic process outweigh any governmental interest Petitioner or the State may put forth to justify the restrictions.

B. The outcome of this case does not rest solely on the United States Supreme Court's "one person, one vote" jurisprudence.

Based on certain statements Respondent made to newspapers in this State, Petitioner apparently anticipated that Respondent would defend his candidacy on the basis that the Senate residency dispersal restrictions violate the United States Supreme Court's "one person, one vote" jurisprudence. Indeed, the majority of the substantive portion of Petitioner's brief is dedicated to summarizing a line of cases that support the notion that residency dispersal restrictions, as applied to at-large voting districts, are not *per se* unconstitutional under the rule of "one person, one vote." Pet. Writ Mandamus at 10-16. Respondent indeed feels strongly that the vast majority of District 3 residents are not receiving the representation they deserve. However, as discussed fully above, the gravamen of Respondent's challenge is not based on equal protection principles involving voter dilution. Rather, the strength of Respondent's case lies in the fact that the residency dispersal restrictions are an unconstitutional burden on the rights of candidates and voters in District 3 under the line of First Amendment and equal protection cases pertaining to ballot access.

Dallas County v. Reese, 421 U.S. 477, (1975), *Dusch v. Davis*, 387 U.S. 112 (1967) and *Fortson v. Dorsey*, 379 U.S. 433 (1965) were all equal protection challenges to redistricting plans and were based on voter dilution. Similarly, the West Virginia cases cited by Petitioner, *State ex rel. Cooper v. Tennant*, ___ W. Va. ___, No. 11-1405, slip op at 34 (Feb. 13, 2012),

Goines v. Heiskell, 362 F. Supp. 313 (S.D. W.Va. 1973), and *Holloway v. Hechler*, 817 F. Supp. 617 (S.D.W. Va. 1992), *aff'd*, 507 U.S. 956 (1993), addressed, in relevant part, challenges to residency dispersal based on the premise that the dispersal at issue diluted the representation and voting power of the district's residents.

The dispositive issues of this case do not rest solely on these redistricting decisions. First, as this Court recently noted, the inherent political nature of redistricting and the resulting interplay between the separate, but equal, branches of government necessitates judicial restraint. *See Cooper* at 27. (“The extensive precedent analyzing the effect of state constitutional provisions upon legislative redistricting plans demonstrates that the act of redistricting is an inherently political process. Both the complexity in delineating state legislative district boundaries and the political nature of such endeavors necessarily preempt judicial intervention in the absence of clear, direct, irrefutable constitutional violation.”). Second, unlike here, the redistricting challenges were facial challenges to the statutes in issue. Again, as this Court noted in *Cooper*, under a facial challenge, “[t]he challenger must establish that no set of circumstances exists under which the legislation would be valid; the fact that the legislation might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.” *Id.* at 12 ((quoting *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 691, 408 S.E.2d 634, 641 (1991))). Here, the controlling standard of review is strict scrutiny, which requires a particular law or restriction to have as little effect as possible on the fundamental rights in issue. *See State ex rel. Billings v. City of Point Pleasant*, 194 W. Va. 301, 308, 460 S.E.2d 436, 443 (Under strict scrutiny “unduly restrictive election laws, even if based on compelling governmental purposes, are unconstitutional.”). The application of strict scrutiny to this case underscores the final point. The redistricting cases cited by Petitioner were not decided

under strict scrutiny. They were decided based on the presumption that an official elected from an at-large district represents the entire district and not just his or her residency district. *See e.g., Dallas County*, 421 U.S. at 479-480. If a test was applied, it was something other than strict scrutiny. *See e.g., Goines v. Heiskell*, 362 F. Supp. 313 (1973) (“The Court cannot say that the Legislature lacked rational reasons and bases for the delegate residency dispersal provisions in the statute language creating the nine multimember districts.”)

Similarly, past decisions of this Court have touched upon residency dispersal in some fashion. *See Sturm v. Henderson*, 176 W.Va. 319, 342 S.E.2d 287 (1986) (holding that a residency dispersal requirement for county school board elections was in conflict with certain constitutional articles governing qualifications of candidates); *Burkhart v. Sine*, 200 W. Va. 328, 331, 489 S.E.2d 485, 488 (1997) (addressing a residency dispute in an election for county commission); and *State ex rel. Sandy v. Johnson*, 212 W. Va. 343, 345, 571 S.E.2d 333, 335 (2002) (addressing a residency dispute in an election for county commission). However, none of these cases addressed the constitutional ballot access issues raised by Respondent and none involved strict scrutiny.

In *White v. Manchin*, 173 W. Va. at 543, n. 8, 318 S.E.2d at 487, n. 8, this Court specifically addressed the residency dispersal requirements for Senate. Again, however, that challenge appears to have been based on voter dilution, not on the interwoven rights of candidates and voters to stand for election. *See id.* (“The essence of [the defendant’s] argument is that because the Wayne County portion of the 5th Senatorial District contains a minority percentage of the total population of the district, the voters of Cabell County, as well as potential candidates for Senate [that] also reside there, are unconstitutionally deprived of their right to be represented in proportion to their number by our state constitution’s requirement that no two state

senators in a multi-county senatorial district shall reside within the same county.”) Moreover, the Court in *White* specifically declined to address the issue in any dispositive fashion. *Id.* Thus, the footnote in *White* may reasonably be construed as *dicta* and not as controlling precedent. *See Rogers v. Albert*, 208 W. Va. 473, 477, n. 9, 541 S.E.2d 563, 567, n. 9 (2000) (noting that *dicta* from a prior decision has no *stare decisis* or binding effect upon this Court).

Thus, the outcome of this proceeding is not solely controlled by the cases cited in Petitioner’s brief. Rather, this case must be decided under the rule that restrictions on ballot access in West Virginia must be narrowly tailored to a compelling state interest to survive constitutional scrutiny. That analysis weighs in favor of Respondent because any interests served by the restrictions applied to District 3 are outweighed by the severe harm inflicted on the constitutional rights of candidates and voters.

Nevertheless, Respondent takes the additional position that the residency dispersal provisions of W.Va. Const. Art. VI, § 4 and W. Va. Code § 1-2-1, as applied to District 3, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Equal Protection Clause of Section 10, Article III of the West Virginia Constitution because such provisions act to minimize or cancel out the voting strength of independents and minority parties, as discussed more fully above. *See Fortson*, 379 U.S. at 439 (reserving the question of whether a multi-member constituency apportionment scheme, under the circumstances of a particular case, violates equal protection by operating to minimize or cancel out the voting strength of racial or political elements of the voting population).

II. Petitioner is not entitled to a Writ of Mandamus.

“A writ of mandamus will not issue unless three elements coexist – (1) a clear legal right in the petitioner to the relief sought; (2) a clear legal duty on the part of respondent to do the

thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.” Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969).

This Court has adopted a special form of mandamus to test the eligibility of candidates to stand for election. “Because there is an important public policy interest in determining the qualifications of candidates in advance of an election, this Court does not hold an election mandamus proceeding to the same degree of *procedural* rigor as an ordinary mandamus case.” Syl. Pt. 2, *State ex rel. Bromelow v. Daniel*, 163 W.Va. 532, 258 S.E.2d 119 (1979) (emphasis added). “It is only when a writ of mandamus has been invoked to preserve the right to vote or to run for political office that this Court has eased the requirements for strict compliance for the writ's preconditions, especially those relating to the availability of another remedy.” Syl. Pt. 2, *Carenbauer*, 208 W. Va. 584, 542 S.E.2d 405.

Still, mandamus is an extraordinary remedy and should be invoked sparingly. *State ex rel. Billings v. City of Point Pleasant*, 194 W. Va. 301, 303, 460 S.E.2d 436, 438 (1995). Despite relaxed procedural constraints, Petitioner must show a clear and indisputable right to the writ in order to obtain relief. *Id.*

Petitioner fails to meet the first two elements for a writ of mandamus. First, Petitioner fails to show that she has a clear legal right to the relief sought. Respondent has shown that the residency dispersal restrictions in W. Va. Const. Art. VI, § 4 and W. Va. Code § 1-2-1 may not be lawfully applied to restrict his candidacy because the restrictions, as applied, unfairly and unconstitutionally burden the constitutional rights of Respondent and District 3 residents. Second, Petitioner fails to show a clear legal duty on the part of the respondents to do the thing which she seeks to compel. Respondent takes no position on whether the Secretary of State has the authority to go behind a certificate of candidacy to determine questions relating to

eligibility.⁶ However, Petitioner has not shown that the Secretary of State has a clear, non-discretionary legal duty to order the removal of Respondent's name from the ballot, thus handing the election to Petitioner without a vote being cast, because the application of the residency dispersal restrictions to Respondent and the citizens of District 3 is unconstitutional.

CONCLUSION

For these reasons, Respondent respectfully requests this Court to give the people of District 3 a choice on the ballot and to (1) deny with prejudice Petitioner's request to grant a rule to show cause; (2) deny with prejudice Petitioner's request for a writ of mandamus; (3) issue an Order declaring that the residency dispersal provisions of W. Va. Const. Art. VI, § 4 and W. Va. Code § 1-2-1 are unconstitutional as applied to Respondent and District 3; and (4) issue an Order declaring that Respondent is eligible to be a candidate for nomination and election to the Senate from District 3.

FRANK DEEM

By counsel,



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⁶ Respondent believes, however, that such a proposition raises serious public policy and due process concerns. It is a tricky proposition to suggest that a state official who is subject to partisan elections should be permitted to act as judge and jury in all instances to test the eligibility of citizens seeking certification as candidates. This is especially troublesome given the expense of initiating legal process and the strict timing constraints on obtaining judicial review (such as the Secretary of State's March 2 deadline at issue here).

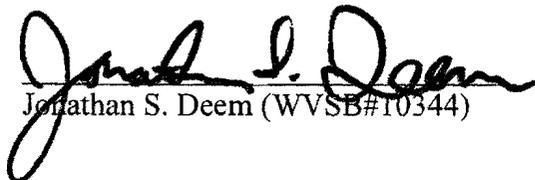
**CERTIFICATE OF SERVICE AND
MEMORANDUM OF PERSONS TO BE SERVED**

I, Jonathan S. Deem, counsel for Frank Deem, do certify that on this 21st day of February, I have served the Response of Frank Deem to the Emergency Petition for Writ of Mandamus of Petitioner Donna J. Boley and Appendix to Response of Frank Deem to Emergency Petition for Writ of Mandamus of Petitioner Donna J. Boley as set forth below.

The Honorable Natalie E. Tennant
West Virginia Secretary of State
Room 157-K, Building 1
State Capitol Building
1900 Kanawha Boulevard, East
Charleston, WV 25305
(via Hand Delivery)

The Honorable Darrell V. McGraw
West Virginia Attorney General
Room E-26, Building 1
State Capitol Building
1900 Kanawha Boulevard, East
Charleston, WV 25305
(via Hand Delivery)

Anthony J. Majestro
Powell & Majestro, PLLC
405 Capitol Street, Suit P-1200
Charleston, WV 25301
(via Hand Delivery)


Jonathan S. Deem (WVSB#10344)

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Upon Original Jurisdiction
No. 12-0185

STATE OF WEST VIRGINIA, ex rel.
DONNA J. BOLEY,

Petitioner,

v.

NATALIE E. TENNANT,
SECRETARY OF STATE OF THE
STATE OF WEST VIRGINIA,
and FRANK DEEM,

Respondents.

VERIFICATION

STATE OF WEST VIRGINIA
STATE AT LARGE to wit:

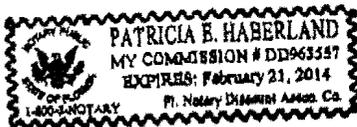
Frank Deem, being first duly sworn upon oath, states that he is the Respondent in the above styled case, that he has read the Response of Frank Deem to the Emergency Petition for Writ of Mandamus and that the facts and allegations contained therein are true except insofar as therein stated to be upon information and belief and insofar as therein stated upon information and belief he believes them to be true.



Frank Deem

Taken, subscribed and sworn to before me this the 20th day of February, 2012

My commission expires Feb. 21, 2014



Patricia E. Haberland
Notary Public