

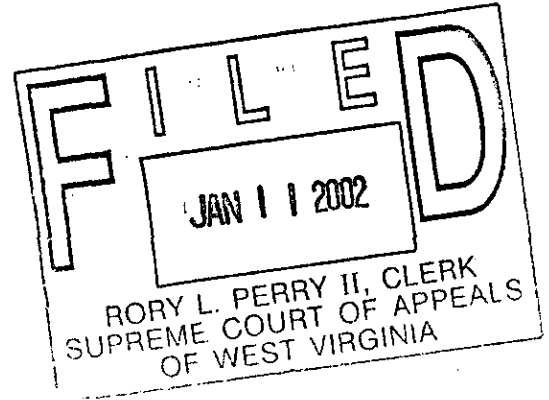
No. 30094

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
DARRELL V. MCGRAW, JR., in his
capacity as ATTORNEY GENERAL
for the STATE OF WEST VIRGINIA,
Petitioner,

v.

GREGORY A. BURTON, CABINET SECRETARY
of the DEPARTMENT OF ADMINISTRATION;
NICHELLE PERKINS, DIRECTOR OF
PERSONNEL of the DEPARTMENT OF
ADMINISTRATION; et al.,
Respondents.



BRIEF AMICUS CURIAE BY THORNTON COOPER

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January 11, 2002

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BRIEF AMICUS CURIAE BY THORNTON COOPER

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA:

Thornton Cooper hereby submits his Brief Amicus Curiae in the above-captioned case. The opinions reflected in this Brief are his as an individual, not as an attorney for the Public Service Commission of West Virginia (Commission), which has been granted intervenor status in this case. Therefore, the opinions expressed herein may well diverge from those expressed in the brief that is being submitted in this case by the General Counsel for the Commission.

I. REASONS FOR SUBMITTING BRIEF.

Mr. Cooper is submitting this Brief Amicus Curiae for two sets of reasons:

In the first place, he has served as a state employee for a combined period of about twenty-five (25) years between

1972 and the present, about twenty-three (23) years of which he has served since being admitted to the West Virginia State Bar. During his first year that he worked as a state employee, he was classified-exempt. He has worked for about twenty-four (24) years in positions that are in the classified service.

Therefore, he has civil-service property rights that Attorney General Darrell V. McGraw, Jr. (the Petitioner or Relator), may or may not be attempting to destroy herein.

From 1989 to the present, Mr. Cooper has served as the Deputy Director of the Commission's Transportation Division. In his day-to-day activities, he provides both administrative and legal services.

Because of ambiguities and internal inconsistencies in the Petition and memorandum in support thereof, Mr. Cooper is unable to ascertain whether he falls within the scope of the Relator's "hit list".

On the one hand, the third paragraph of the prayer on page 8 of the Petition requests that "the Director of the Division of Personnel be directed to remove all legal positions from the classified and classified-exempt service". Mr. Cooper is not occupying a "legal position"; he performs some legal services under a position for which being a member of the West Virginia State Bar is not a prerequisite.

On the other hand, the fourth paragraph of the prayer on page 8 further requests that "all attorneys employed by the agencies listed in Exhibit 1 to perform legal services be

deemed employees of the Attorney General, serving at his will and pleasure and subject to his supervision". The Commission is listed in Exhibit 1. Mr. Cooper is employed by that agency and does perform legal services and administrative services for it.

In the second place, in his capacity as an individual, Mr. Cooper attended both of the hearings in a congressional redistricting case that had been filed in the United States District Court for the Northern District of West Virginia in late 1981, Brookover v. Manchin, Civil Action No. 81-0095-C, which was heard by a three-judge court. He also read the pleadings in that case and was a witness at the second hearing. The decisions in that case were not published. (The lead plaintiff in that case was Ginger Brookover, a resident of Monongalia County. Her surname was incorrectly converted to "Gingerbrook" in footnote 1 to Manchin v. Browning, infra.)

In the proceedings in Brookover v. Manchin, the then Attorney General -- through one of his subordinate attorneys -- intentionally refused to represent the legal positions of the defendant therein, then Secretary of State A. James Manchin. That refusal by the Attorney General's Office to represent Mr. Manchin's legal positions in federal court led to the case of Manchin v. Browning, 170 W. Va. 779, 296 S.E.2d 909 (1982).

The current Attorney General, Darrell V. McGraw, Jr., is attempting in 2002 to have this Honorable Court overrule

substantial portions of the majority opinion in Manchin v. Browning of which Darrell V. McGraw, Jr., as an earlier member of this Honorable Court, was the author in 1982.

Mr. Cooper does not desire to be judicially transferred to the Attorney General's Office. In addition, Mr. Cooper wants this Honorable Court to reaffirm certain portions of the Manchin v. Browning decision that the Relator wants this Honorable Court to overrule. Nevertheless, Mr. Cooper is also of the opinion that the majority opinion in Manchin v. Browning included unnecessary language that has been cited to hamstring occupants of the Attorney General's Office for the past two decades.

As friend of the Court, Mr. Cooper will attempt to avoid duplicating the legal points that other attorneys have made or will make in this mandamus proceeding.

II. LEGAL ARGUMENT.

- A. BECAUSE NEITHER THE RELATOR NOR THIS HONORABLE COURT HAS GIVEN PARTY STATUS TO THE MEMBERS OF THE WEST VIRGINIA STATE BAR THAT THE RELATOR WANTS THIS HONORABLE COURT TO TRANSFER TO THE RELATOR'S OFFICE, THE COURT SHOULD DENY THE RELATOR'S PETITION INsofar AS IT SEEKS THE TERMINATION OR TRANSFER OF THESE LAWYER EMPLOYEES.

The mandamus proceeding before this Court involves issues more important than those in turf battles relating to which elected officials control which offices in the marble-lined halls of the State Capitol Building.

This case involves the involuntary termination and involuntary transfer of human beings, not chattels that may

be carted from one office to another. These human beings do not lose their due-process rights simply because the affected individuals are state employees or because they are members of the West Virginia State Bar. Nor do these individuals lose their due-process rights merely because the proceeding originates in this Court or in mandamus.

Assuming arguendo that there is any merit whatsoever in the Relator's request that these employees be terminated by their current employers and involuntarily transferred to the at-will employment of the Relator, the author of this Brief is of the opinion that it should be manifestly obvious that the affected employees should be identified by name by the Relator, be given actual notice of the Relator's intentions, be given party status, and be permitted to file motions, to conduct discovery, to offer evidence, to cross-examine the Relator and others, to submit briefs, and to file petitions for rehearing or appeals.

In seeking the termination and transfer of the members of the West Virginia State Bar in question, the most appropriate procedure for the Attorney General to have followed would have been to have filed a civil action in the Circuit Court of Kanawha County for declaratory and injunctive relief listing as defendants (1) all of the members of the Bar of whom he sought the termination and transfer and (2) all of the state agencies and/or agency officials that employed those members of the Bar. Such a procedure would have facilitated the protection of the due-

process rights of the lawyer-employees in question. Presumably, such litigation would have included over 200 defendants.

Unfortunately, the Attorney General decided to file his case as an original proceeding in mandamus before this Honorable Court. Instead of including over 200 Respondents, the attorneys for the Relator listed only as Respondents only two (2) officials, who were not even identified by name on the face of the Petition.

Under Rule 14(a) of the Rules of Appellate Procedure, a memorandum was supposed to have been filed with the Petition that listed "the names and addresses of those persons upon whom the rule to show cause is to be served, if granted." The author of this Brief assumes that only Secretary Burton and Director Perkins were listed on that memorandum.

Before issuing its rule to show cause, this Honorable Court could have required that the Relator supply the names and addresses of all of the members of the Bar that he wanted the Court to have terminated and transferred. Instead, the November 8, 2001, rule to show cause, while expanding the number of Respondents from two (2) individuals to eight (8) individuals, again failed to list the names and addresses of over 200 members of the Bar that are real parties in interest in this litigation.

In the rule to show cause, the Court also permitted a number of agencies and state officials to move to intervene

in this case. Some agencies, such as the Commission, moved to intervene and were granted intervenor status.

Mr. Cooper filed a motion to intervene or, in the alternative, to file a brief amicus curiae. The Court denied his motion to intervene but permitted him to file this Brief. From the Court's ruling on his motion, he assumes that all other motions filed by members of the Bar that are, or may be, subject to the proposed termination and transfer were handled by the Court in a similar fashion.

If so, then most real parties in interest in this case have been denied the right to participate in this case on an equal basis with the Relator and the agencies and officials that the Court has permitted to be included as Respondents.

What the Relator seeks to do arguably adversely affects the property interests of over 200 individuals who are not being allowed to be parties in this case. Under the Fourteenth Amendment to the United States Constitution and under the Article 3, §10, of the West Virginia Constitution, those individuals have due-process rights which will be violated if this Honorable Court requires that these employees be terminated and transferred without first being made full parties in the legal proceedings by which the termination and transfer would be effectuated.

The author of this Brief is further of the opinion that the proposed termination and transfer to the Relator's office of members of the Bar who are currently performing legal services as employees of state agencies, such as the

Commission, pursuant to explicit statutory authority from the West Virginia Legislature is completely without merit.

The notion that Article VII, §1, of the West Virginia Constitution mandates such a result flies in the face of the clear wording of that section. Using similar logic, Treasurer John Perdue could argue that the members of the West Virginia Investment Management Board, appointed in accordance with the provisions of Article 6 of Chapter 12 of the West Virginia Code, should instead be selected by him and serve at his will and pleasure.

With respect to members of the Bar who are providing legal services as employees of agencies that lack statutory authorization to hire such employees, the Relator's arguments may have some merit. But even these employees should not be terminated or transferred without being given the opportunity to have full party status.

Accordingly, even if it finds any merit in the Relator's arguments with respect to any of the over 200 individuals that the Relator wants to have terminated and transferred, this Honorable Court should still deny the requested writ on the basis that the Relator had a duty to include them as Respondents in this case. If there is any merit in Attorney General McGraw's arguments as to such employees, he should be given the opportunity to proceed against them and their employers in a civil action for declaratory and injunctive relief in the Circuit Court of Kanawha County.

- B. BECAUSE THE SECRETARY OF STATE IS A COEQUAL OF THE ATTORNEY GENERAL, BECAUSE THE SECRETARY OF STATE IS NOT A NOMINAL PARTY, BECAUSE ANY ELECTED STATE OFFICIAL SUED IN AN OFFICIAL CAPACITY SHOULD HAVE HIS OR HER POLICY POSITIONS ZEALOUSLY DEFENDED BY HIS OR HER ATTORNEY, BECAUSE THE ATTORNEY GENERAL CAN MOVE TO INTERVENE, AND BECAUSE THE RELIEF REQUESTED IN THE RELATOR'S BRIEF GOES BEYOND THE SCOPE OF THE PETITION, THE COURT SHOULD DENY THE RELATOR'S REQUEST TO OVERRULE MANCHIN V. BROWNING.

On page 26 of the Memorandum in support of the Petition (the Memorandum), the Relator states that Manchin v. Browning should be overruled insofar as it holds that a nominal defendant may dictate state policy.

However, a comparison of the Petition and the Memorandum demonstrates that the relief requested on page 26 of the Memorandum goes beyond the scope of the Petition itself. The Petition describes the Relator's desire to exercise control over more than 200 members of the West Virginia State Bar now employed as state employees without his consent. The Petition is not about a nominal defendant dictating state policy. Moreover, the Secretary of State was not listed as a Respondent in the Petition.

It would be manifestly unfair, then, for this Honorable Court to undermine or demean the office of the Secretary of State without his being even mentioned in the nine pages of the Petition or included as a Respondent.

Furthermore, a review of Article VII, §1, of the West Virginia Constitution demonstrates that the Attorney General and the Secretary of State are coequal executive-branch officers elected by the people of West Virginia. If the

Secretary of State is a "nominal party", the Attorney General would, by the same logic, also be a "nominal party".

Furthermore, the West Virginia Secretary of State has not been a nominal party in the Brookover v. Manchin case and similar federal redistricting cases. In West Virginia, the Secretary of State, not the Attorney General, is the chief election officer of the state.

In Brookover v. Manchin, the listing of the Secretary of State as the sole or lead defendant is consistent with other redistricting cases in federal court. See, e.g., West Virginia Civil Liberties Union v. Rockefeller, 336 F. Supp. 395 (S.D. W. Va 1972); Goinas v. Heiskell, 362 F. Supp. 313 (S.D. W. Va. 1973); Stone v. Hechler, 782 F. Supp. 1116 (N.D. W. Va. 1992). The Secretary of State is the lead or sole Defendant because supervising the fair conduct of elections is a very important function, whether or not former Justice Richard Neely realized that in 1982 and whether or not the Relator realizes it in 2002. Because most statewide elections in West Virginia are not close, there is a tendency among some elected officials to trivialize the importance of the Secretary of State's Office.

In 2000 and 2002 Florida Secretary of State Katherine Harris was called many things. "Nominal party" was not one of them.

In Brookover v. Manchin, the Secretary of State's role as defendant was important for another reason: A. James Manchin, like the plaintiffs in that case, acknowledged that,

because of population shifts in the 1970's, the population variances among the state's then four congressional districts had become unconstitutionally large. The plaintiffs in that case resided in the then sprawling Second Congressional District, which, under the 1980 census had a significantly higher population than any of the other three districts.

Although he may have been ridiculed in 1981 because of his oratory and his distribution of certificates and medallions, that Secretary of State Manchin took his oath of office to uphold the state and federal constitutions seriously was reflected by his repeated public acknowledgements in 1981 that the population variances among the congressional districts were unconstitutionally large.

Unfortunately, his suggested remedy in 1981 for the population imbalance was that all four congressional races in West Virginia be run at large (statewide) in 1982. While that remedy had been authorized in certain factual situations by earlier versions of federal statutes, at-large elections in states with more than one representative had been phased out by federal statute prior to 1981. See, e.g., 2 U.S.C. §2c and related statutes.

Accordingly, the plaintiffs in Brookover v. Manchin sought to have the federal court enjoin Mr. Manchin from having the congressional candidates run at large. The plaintiffs also sought to have the applicable redistricting statute declared unconstitutional and requested that that court order the 1982 elections conducted under a

redistricting plan drafted by the author of this Brief.

In accordance with applicable law, the Attorney General's Office was served with a copy or copies of the plaintiffs' complaint. Then Attorney General Chauncey Browning, Jr., assigned the case to one of the attorneys in his office, the late S. Clark Woodroe, Esq. The Attorney General's Office then decided to take the position that the population variances under the 1980 census among West Virginia's four congressional districts (last reapportioned after the 1970 census) were not unconstitutionally large.

There was an obvious procedure whereby both the position of Mr. Manchin and the position of Mr. Browning could have been properly presented to the federal court. The obvious procedure would have been for Mr. Browning to file a timely motion to intervene as a party in the litigation pursuant to Rule 24 of the Federal Rules of Civil Procedure. Timely motions to intervene are often granted in such cases. See, e.g., the procedural history in *Goines v. Heiskell*, supra.

For the Attorney General himself to be a party in a case involving a redistricting statute would have been entirely proper. For example, nearly four decades ago, the late Attorney General C. Donald Robertson filed a lawsuit both in his capacity as a citizen and taxpayer and in his capacity as Attorney General to challenge the constitutionality of a recently enacted redistricting statute. *Robertson v. Hatcher*, 148 W. Va. 239, 135 S.E.2d 675 (1964).

If Mr. Browning had intervened, one attorney from the

Attorney General's Office could have zealously argued his legal position and another attorney from the same office could have zealously argued Mr. Manchin's legal position.

Nevertheless, neither the Attorney General nor any other individual filed a petition to intervene prior to the first hearing in Brookover v. Manchin. Instead, Mr. Woodroe filed his pleadings as Counsel for Mr. Manchin even though those pleadings reflected the legal position of Mr. Browning, not that of Mr. Manchin.

Understandably upset that Mr. Woodroe was, as his Counsel, articulating a legal position that was not that of the Secretary of State, Mr. Manchin orally complained to the three-judge court at the first hearing in the case that the pleadings bearing Mr. Manchin's name that Mr. Woodroe had prepared did not reflect Mr. Manchin's position. The court allowed Mr. Woodroe to proceed and Mr. Manchin exited the courtroom shouting, "God save the State of West Virginia".

Not long after the first hearing, however, the court issued a short opinion and order declaring the challenged statute unconstitutional and giving the Legislature a period of time to enact a new statute. The position of the plaintiffs and of Mr. Manchin that the old statute was unconstitutional was thus properly vindicated and the position of the Attorney General's Office was properly rejected.

During the 1982 regular session, the Legislature enacted a new congressional redistricting statute that was not as

mathematically close as that drafted by the author of this Brief but that nevertheless significantly reduced the population variances among the four congressional districts. Under this new plan, the First Congressional District became relatively overpopulated.

After the enactment of that statute, a second hearing was held before the three-judge court. Not long before the hearing, residents of the new First Congressional District filed a motion to intervene. But the Court, on its own motion, determined that that petition to intervene had not been filed in a timely manner prior to the hearing and, on that basis, denied intervenor status to those residents. Following a brief evidentiary hearing, the Court promptly dismissed the case from the docket.

Meanwhile, A. James Manchin filed a suit against Mr. Browning, which led to the Manchin v. Browning ruling. The author of this Brief is of the opinion that the various syllabus points in that opinion were valid then and remain valid today. What is missing from both the majority opinion authored by then Justice Darrell V. McGraw, Jr., and the dissenting opinion from then Justice Richard Neely is the obvious fact that both the legal position of Mr. Manchin and the legal position of Mr. Browning could have been zealously argued to the federal court if Mr. Browning had taken the time to move to intervene in the federal litigation.

One possible benefit of the requirement that copies of complaints against state agencies be served on the Attorney

General's Office should be that the Attorney General is given notice and the opportunity to move to intervene in the proceeding as a party if he or she does not believe that the legal positions of the named defendants adequately represent those of the Attorney General. The Attorney General should be allowed to intervene in those cases, not as a superior to the other defendants, and not in lieu of the other defendants, but as an additional defendant whose legal position is entitled to no more, and no less, deference than the legal positions articulated by the named defendants.

In the opinion of the author of this Brief, this Honorable Court should not retreat from any syllabus point in Manchin v. Browning but should also clarify that the Attorney General, or any other elected state officer in the Executive Branch, has the right to intervene as a party defendant in cases brought against state officials or state agencies without first having to have a client to represent unless the West Virginia Legislature, by explicit enactment, prohibits such intervention. The public policy effectuated this suggestion would be that the voters' positions would be more likely to be taken into consideration and that the possibility or perception of collusion in such cases would be thereby minimized.

In short, each statewide elected official in the Executive Branch, including the Attorney General, would have a right to a seat at the table. The Attorney General should not, however, be entitled to occupy a seat at the head of the

table.

The author of this Brief is of the opinion that most members of West Virginia's "plural executive", as the Relator has referred to the six (6) elected officials in question, would be too busy with their day-to-day statutory duties to have time to abuse the intervention rights suggested above.

III. PRAYER.

For the reasons set forth hereinabove, Thornton Cooper, as a friend of the Court, requests that the positions contained in this Brief Amicus Curiae be considered by this Honorable Court as it ponders the many difficult issues raised by the Relator in his Petition.

Respectfully submitted,

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Dated: January 11, 2002

CERTIFICATE OF SERVICE

I, Thornton Cooper, do hereby certify that copies of the foregoing "Brief Amicus Curiae by Thornton Cooper" were hand-delivered to the following offices: to the offices of Michael R. Crane, Esq., at 105 Capitol Street, Charleston, WV 25301; to the offices of David S. Alter, II, Esq., Garrett M. Jacobs, Esq., Carol Egnatoff, Esq., Kimberly D. Bentley, Esq., and Heidi L. Talmage, Esq. (five copies), at 350 Capitol Street, Charleston, WV 25301; to the offices of Stuart Calwell, Esq., and Vincent Trivelli, Esq. (two copies), at 405 Capitol Street, Suite 607, Charleston, WV 25301; to the offices of Chad M. Cardinal, Esq., at 307 Jefferson Street, Charleston, WV 25311; to the offices of Deborah L. McHenry, Esq., at 810 Kanawha Boulevard, East, Charleston, WV 25301; to the offices of Bruce Ray Walker, Esq., at 1018 Kanawha Boulevard, East, Suite 700, Charleston, WV 25301; to the offices of Gregory W. Bailey, Esq., Howard E. Seufer, Jr., Esq., and Rochelle Lantz Glover, Esq. (three copies), at 600 Quarrier Street, Charleston, WV 25301; to the offices of Robert E. Lannan, Esq., Charles R. McElwee, Esq., and William C. Porth, Jr., Esq. (three copies), on the sixth floor of the United Center at 500 Virginia Street, East, Charleston, WV 25301; to the offices of Rebecca S. Charles, Esq., West Virginia Environmental Quality Board, at 1615 Washington Street, East, Suite 301, Charleston, WV 25311; to the offices of Jennifer B. Walker, Esq., at the Senate President's Office in the State Capitol Building,

Charleston, WV 25305; to the offices of Mark W. McOwen, Esq., and M. E. "Mike" Mowery, Esq. (two copies), at Room M-450, State Capitol Building, Charleston, WV 25305; to the offices of Diana Stout, Esq., West Virginia Treasurer's Office, at Room E-122 State Capitol Building, Charleston, WV 25305; to the offices of Silas B. Taylor, Esq., at Room E-26, State Capitol Building, Charleston, WV 25305; to the offices of John T. Poffenbarger, Esq., and Heather Connolly, Esq. (two copies), at Room E-119, State Capitol Building, Charleston, WV 25305; to the offices of Lisa Hopkins, Esq., State Auditor's Office, at Room W-100, State Capitol Building, Charleston, WV 25305; to the offices of Susan B. Saxe, Esq., West Virginia Consolidated Public Retirement Board, at Building 5, Room 1000, State Capitol Complex, Charleston, WV 25305; to the offices of Rebecca M. Tinderbell, Esq., West Virginia Department of Education, at Building 6, Room 362, State Capitol Complex, Charleston, WV 25305; and to the offices of Richard E. Hitt, Esq., at the Public Service Commission of West Virginia, 201 Brooks Street, Charleston, WV 25301, all on this 11th day of January, 2002; and do further certify that copies of the foregoing "Brief Amicus Curiae by Thornton Cooper" were served by mailing true copies thereof by United States First Class Mail, to the following addresses: Alan M. Drescher, Esq., Office of Judges, P. O. Box 2233, Charleston, WV 25328; William L. Ballard, Esq., Bureau of Employment Programs-Legal Division, One Players Club Drive, Third Floor,

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Thornton Cooper