UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

KENNY BROWN, individually and in his official capacity as the Boone County Clerk, et al.,	)	**ELECTRONICALLY FILED**
Plaintiffs,	)	**Civil No. 2:13-cv-00068**
v.	)	**DJB-GFVT-WOB**
THE COMMONWEALTH OF KENTUCKY, et al.,	)	
Defendants.	)	
MARTIN HERBERT, et al.	)	
Plaintiffs,	)	**Civil No. 3:13-cv-00025**
v.	)	**DJB-GFVT-WOB**
KENTUCKY STATE BOARD OF ELECTIONS, et al.,	)	
Defendants.	)	

MOTION TO DISMISS BROWN PLAINTIFFS' 2012 ELECTIONS CLAIMS AGAINST LEGISLATIVE RESEARCH COMMISSION UNDER FED. R. CIV. P. 12 FOR LACK OF SUBJECT MATTER JURISDICTION, FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Defendant Kentucky Legislative Research Commission[1] ("LRC"), by counsel, named in Plaintiff's complaint, respectfully moves this Honorable Court to dismiss the "Brown Plaintiffs'" claims as against LRC, relating to the holding of the 2012 elections under the 2002 redistricting

[1] The LRC's Motion to Dismiss applies **only** to the LRC and not to the Senate President or the Speaker of the House.

law, for lack of subject matter jurisdiction, and for failure to state a claim upon which relief may be granted, for the reasons stated below:

a. Brown Plaintiffs lack standing to sue LRC on the 2012 elections claims, under Article III;
b. The Complaint states no claims against LRC for the 2012 elections held under the 2002 redistricting law;
c. The Tenth and Eleventh Amendments Bar the 2012 Claims as to LRC;
d. Legislative Immunity bars the 2012 claims against LRC;
e. The Claims with respect to the 2012 Redistricting are moot;
f. The Claims based upon the 2012 Redistricting are barred by the statute of limitations;
g. Res judicata and collateral estoppel bar the claims regarding the 2012 elections;
h. The 2012 Claims are barred by the Rooker-Feldman Doctrine;
i. If there is no res judicata or collateral estoppel as to the 2012 state court lawsuit, then this Court can permit 2012 HB 1 to be used in 2014 Redistricting, absent an enactment in the 2013 or 2014 Legislative Sessions; and
j. The Noerr-Pennington Doctrine Precludes this Claim over the 2012 elections as against LRC.

Fed. R. Civ. P. 12(b)(1) & (b)(6).

This motion is supported by a memorandum of law, which is filed contemporaneously herewith. A Proposed Order is filed.

Respectfully submitted,

s/ Laura H. Hendrix
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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2013, a copy of the foregoing Motion to Dismiss was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail or electronic mail. Parties may access this filing through the Court's electronic filing system.

s/ Laura H. Hendrix_

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BROWN PLAINTIFFS' 2012 ELECTIONS CLAIMS AGAINST THE LEGISLATIVE RESEARCH COMMISSION UNDER FED. R. CIV. P. 12 FOR LACK OF SUBJECT MATTER JURISDICTION, FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

The Kentucky Legislative Research Commission[1] ("LRC") named in the Brown Plaintiffs' complaint respectfully moves this Honorable Court to dismiss the Brown Plaintiffs' claims against it relating to the use of the 2002 maps for redistricting in 2012, for lack of subject matter

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jurisdiction, and failure to state a claim upon which relief may be granted, and respectfully submit the following **MEMORANDUM OF LAW** in support of their **MOTION TO DISMISS**. Fed. R. Civ. P. 12.

I. INTRODUCTION

These are two lawsuits filed over state legislative redistricting. Both ask that this court issue a declaratory judgment that the current redistricting statutes are unconstitutional under federal and state law. They further ask that the court, prospectively, issue an injunction prohibiting the use of the current districts and maps. However, one lawsuit, brought by the "Brown Plaintiffs" also asks for damages to be assessed for an alleged past "failure to redistrict", a claim that was dismissed by this Court, a declaratory judgment to that effect, and attorneys' fees. This motion deals only with the Brown Plaintiffs' claims against LRC relating to the use of the 2002 maps for redistricting in 2012, which include alleged damages which have been agreed by the Plaintiffs to be baseless, and declaratory judgment and attorneys' fees therefrom.

The Legislative Research Commission, under KRS 7.100, is the administrative service agency for the legislative branch. The LRC cannot and does not pass laws, but it is part and parcel of the legislative branch. Neither does it enforce the laws, which is the responsibility of the executive branch. In a very practical sense, there is no present controversy regarding the LRC for this Court to adjudicate with respect to the 2012 redistricting. There is no standing on the part of the Plaintiffs. In any event, the Plaintiff does not ask for any cognizable relief as against LRC as to the 2012 elections, nor apparently from any other party, and any claims against it arising from the Kentucky Courts' order to use the 2002 maps for the 2012 elections should be formally dismissed from this action, as agreed to in open court by the Brown Plaintiffs. This court does not have subject matter jurisdiction over these claims as there is no present controversy for this

court to adjudicate, nor any standing on the part of the Brown Plaintiffs to bring this lawsuit against LRC as to the 2012 elections, because it has done nothing to affect them. Under Kentucky's strict separation of powers provisions, LRC does not enforce the laws, as that authority rests squarely with proper executive branch agencies. See Legislative Research Commission v. Brown, 664 S.W.2d 907 (Ky. 1984). The General Assembly, as a whole, passed a 2012 redistricting Act that comported with the Equal Protection Clause. However, the Kentucky Courts enjoined enforcement of that Act on the basis of its interpretations of Section 33 of the Kentucky Constitution's prohibition against county splits. Plaintiffs do not ask for any cognizable relief. As to their damages claim, Plaintiffs have agreed that they failed to state a claim upon which relief may be granted, and this claim was dismissed by the Court in its earlier order. Therefore, their claims for relief and any attorneys fees should be formally foreclosed by this court.

Obviously, the LRC has taken no action to administer the laws, nor interpret them, as they have not the power to do so. Therefore, there is no standing to sue them on a claim relating to the 2012 elections. Plaintiffs have not stated any legal basis for holding anyone in this case liable for a mere compliance with the Supreme Court's orders with respect to the 2012 elections. This issue was decided over a year ago, and no appeal was taken from the decision of the Kentucky Supreme Court to the U.S. Supreme Court. Plaintiffs do not allege any acts on the part of the LRC that would allow a claim under its theory that the 2002 redistricting act was improperly used for the 2012 Elections, and there is no "failure" on the part of LRC to act. Plaintiffs simply allege that the General Assembly "failed to act." This is not true, as legislation was passed in both 2002 and 2012 to enact redistricting. The General Assembly **did** act in the 2012 Regular Session to pass a redistricting bill, 2012 Regular Session House Bill 1, that the

Governor signed into law on January 20, 2012. The text of that law, 2012 Kentucky Acts Chapter 1, may be found at http://www.lrc.ky.gov/Statrev/ACTS2012RS/0001.pdf. The Legislative Record provides the daily summary of the actions of the General Assembly, and same may be judicially noticed by this Court. The "Population Summary Report" for the enacted version of 2012 House Bill 1, which is provided to members and the public, may also be judicially noted by this Court. http://www.lrc.ky.gov/record/12RS/HB1/RS.pdf. The Population Summary Report shows that the overall range of the House Districts under 2012 HB 1 was 10%, and the overall range of the Senate Districts was 9.84%. Id. Exhibit 1. This Court can also judicially note that the General Assembly passed redistricting legislation in 2002, 2002 Regular Session House Bill 1, http://www.lrc.state.ky.us/recarch/02rs/HB1.htm. This bill had an overall range of 10% for the State House, and the State Senate had an overall range of 9.53%. http://www.lrc.state.ky.us/recarch/02rs/HB1/RS.doc.

The Kentucky Supreme Court, in an order dated February 24, 2012, mandated that the 2012 legislative elections would occur under the 2002 law, based on a finding that 2012 House Bill 1 violated Section 33 of the Kentucky Constitution and the Kentucky Supreme Court's previous opinion in Fischer v. State Board of Elections, 879 S.W.2d 475 (Ky. 1994) ("Fischer II"). Legislative Research Commission v. Fischer, 2012 WL 952983 (Order of Kentucky Supreme Court, 2012-SC-091; 2011-SC-092, February 24, 2012). This Court may also take judicial notice that the Kentucky Supreme Court, not the General Assembly, issued the following order:

> [T]he terms of the injunction entered by the Franklin Circuit Court remain in place as follows:
> 1. The districts as enacted in the 2002 Ky. Acts and codified in KRS 5.200, et seq., remain in place with the election to be conducted with the boundaries in effect immediately prior to the enactment of House Bill 1 (2012).
> 2. The filing deadline for the aforesaid districts was February 10, 2012.

Id. Exhibit 2. Therefore, it is incorrect to state that the General Assembly imposed the 2002 districts upon the state. This was done via a Court Order. There is no allegation that anyone acted outside that Court order with respect to the 2012 elections.

I. APPLICABLE LEGAL STANDARDS FOR RULE 12 MOTIONS

Federal courts, as courts of limited jurisdiction, must have a constitutional or statutory basis for exercising that jurisdiction. Gross v. Hougland, 712 F.2d 1034, 1036 (6th Cir. 1983). Federal courts thus have an independent obligation to decide whether they have subject-matter jurisdiction, and if none exists, the case must be dismissed under Rule 12(b)(1). Arbaugh v. Y & H Corp., 546 U.S. 500, 506 (2006); Todd v. Weltman, Weinberg & Reis Co., L.P.A., 434 F.3d 432, 435 (6th Cir. 2006). The Plaintiff then bears the burden of showing that the court possesses subject matter jurisdiction. Moir v. Greater Cleveland Regional Transit Auth., 895 F.2d 266, 269 (6th Cir. 1990).

On a motion to dismiss under Rule 12(b)(6) for failure to state a claim, a court cannot accept as true the plaintiff's legal conclusions or unwarranted factual inferences, and dismissal is required if the court determines that the plaintiff can prove no set of facts that would entitle him to the requested relief against a Defendant. A complaint must allege sufficient facts to state a claim against a Defendant for relief that is plausible on its face, and must be dismissed if these are not presented. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

II. ARGUMENT

a. Plaintiffs Lack Standing to Sue LRC on the 2012 Elections Claims, under Article III Because They Have Not Alleged an Injury in Fact Traceable to LRC.

Article III of the U.S. Constitution confers judicial power on the Federal Courts only in

"cases and controversies", and persons seeking to invoke the federal jurisdiction must allege an actual case or controversy. Allen v. Wright, 468 U.S. 737, 750 (1984). The Plaintiff has the burden of establishing Article III standing, and must show that:

> (1) It has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;
> (2) The injury is fairly traceable to the challenged actions of defendant; and
> (3) It is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

The Brown Plaintiffs first must assert that the actions of the LRC injured him in some way as to substantially affect his legal interests. The Plaintiffs must show that they personally suffered some actual injury at the hands of LRC. This must be an "injury in fact" that is "distinct and palpable," not "abstract," "conjectural" or "hypothetical", and it must be traceable to the challenged actions of LRC. See Allen v. Wright, 468 U.S. 737 (1984).

Here, the Plaintiff has made no such allegation of injury, as discussed above, with respect to the Kentucky State Courts' decision to run the 2012 elections under the 2002 enacted redistricting. The Brown Plaintiffs agreed that they have no damages claim. However, they did not have any claims to assert in the first place, against the LRC. The Kentucky State Courts made the determination to run the 2012 elections under the 2002 redistricting, in direct contravention of the laws passed by the General Assembly. The only "injury" that Plaintiffs attempt to describe is:

> Plaintiffs have suffered vote dilution, inadequate representation in their legislature, and damage as a result of having to undergo an election with unconstitutional boundaries, and confusion as to appropriate districts and voter data as a result of the unconstitutional districts drawn in 2011. … Northern Kentucky, where Plaintiffs live, receive[ ] only a fraction in value of the tax money paid to Frankfort in government services such as infrastructure improvements, services, schools and other areas, which fact only amplifies the damages caused by taxation without representation. The damages are capable of

> calculation by the amount of tax revenues Plaintiffs have paid to Frankfort since March, 2011, or a portion thereof, by an equal percentage of mal-apportionment suffered.

Brown Plaintiffs Response to Defendant, Alison Lundergan Grimes, First Set of Interrogatories Directed to the Brown Plaintiffs, page 6 (July 9, 2013) (Exhibit 3). The "Response" also attempts to take the State Board of Elections and Secretary of State to task for running elections under the Court Order of February 24, 2012. Additionally, they assert there was an issue as to the special election held for the House seat in June, although no motion was made to this Court to alter the time table for same, or enjoin it.

b. The Complaint States No Claims Against LRC for the 2012 Elections as Held Under the 2002 Redistricting Law.

The Complaint states no claim against LRC for the 2012 Elections. First, 42 U.S.C. § 1983 does not permit a claim to be made against the state as an entity or against individuals in their official capacities. In suing LRC as a state agency, Plaintiffs have, in effect, sued the state, which is not a "person" under the Civil Rights Act. The Supreme Court has held that a state agency is not a "person" under 42 U.S.C. § 1983. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989). Therefore, without the underlying claim, there would be no provision for 42 U.S.C. § 1988 attorneys' fees. However, there is no allegation of a claimed violation by LRC of any alleged constitutional rights arising under 42 U.S.C. § 1983. In any event, Brown Plaintiffs have agreed they have no damages claims arising from the 2012 elections. The courts have stated that general ability to enforce a law, without more, does not give rise to a claim. Children's Healthcare is a Legal Duty, Inc. v. Deters, 92 F.3d 1412, 1416 (6th Cir. 1996). In this case, there is not even an ability to "enforce" a law. Therefore, without the underlying claim, there would be no provision for 42 U.S.C. § 1988 attorneys' fees on the basis of the 2012 elections claim.

Additionally, although the Complaint alleges without statutory support, and in a vague and conclusory way, that the Plaintiffs are purporting to sue for "vote dilution," and thus ask for attorneys fees under 42 U.S.C. §1973l(e), they did not state such a claim, nor could they. First, they do not specifically cite 42 U.S.C. §1973(a) in their claim for relief, although they purport to allege an entitlement to attorneys fees for "vote dilution" under 42 U.S.C. §1973l. However, 42 U.S.C. §1973 applies to protect those persons who are members of a protected class of racial and language minorities. Thornburg v. Gingles, 478 U.S. 30, 43 (1986). A claim under this section must include an averment that the right to vote is intentionally denied on the basis of race, color, or status as a language minority. There is no allegation of any such thing. Section 2 of the Voting Rights Act, 42 U.S.C. §1973, premises standing upon a Plaintiff's standing as a member of a minority group. Therefore, unless a Plaintiff alleges that he or she "is a member of a protected minority," that Plaintiff has "filed a claim upon which relief cannot be granted." Perry-Bey v. City of Norfolk, Va., 678 F. Supp. 2d 348, 360 (E.D. Va. 2009). Plaintiffs have made no such claim that they are members of a protected minority.

There is no declaratory judgment claim, either state or federal, stated in the Complaint against LRC for the 2012 elections. Again, the LRC does not enact laws nor enforce them. The Kentucky Courts overruled the actions of the General Assembly as a whole, more than a year ago, and reinstituted the 2002 district lines. A claim that presents no justiciable controversy cannot be considered by a court as against that party. If the claim is under state law, the courts would look to state requirements. Kentucky Courts have said that they decide cases only if an "actual controversy" exists with respect to the rights and duties of the parties. Revis v. Daughtery, 287 S.W.28 (Ky. 1926). Where there is no showing that any action was taken against a party by a Defendant, there is no basis for a declaratory judgment. Commonwealth ex

rel Watkins v. Winchester Water Works, 197 S.W.2d 771 (1946). The federal courts have stated, for declaratory judgment actions, the injury in fact resulting from the Defendant's action is mandatory. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 473 (1982). There is no allegation that LRC took any action whatsoever with respect to Plaintiffs in running the 2012 elections. Therefore, there is no declaratory judgment claim against LRC with respect to the 2012 elections.

The Plaintiffs lack standing to sue over the 2012 elections because they have not alleged an injury in fact. The claims with respect to the 2012 redistricting and elections, as stated by Plaintiffs and enumerated above are vague and speculative, including a claim of "confusion," thus there is no "case nor controversy" for it to decide. The Plaintiffs must show that they personally suffered some actual or threatened injury. The courts have to define the "admittedly" imprecise concept of injury by describing it as an "injury in fact" that is "distinct and palpable," not "abstract," "conjectural" or "hypothetical". See Allen v. Wright, 468 U.S. 737 (1984). Plaintiffs have alleged no injury in fact, as described by the above discussion, where they simply fail to assert facts delineating this injury in any non-hypothetical way. Mere allegations of "confusion" are not enough to vault these claims into federal court. However, the Court's order specifically told Plaintiffs what to do with respect to the 2012 elections.

Additionally, two of the Plaintiffs allege that they were candidates in 2012 and may wish to be ones in the future. They have no rights which were abridged in 2012. However, there is no standing on the basis of the right to be a candidate. Clements v. Fashing, 457 U.S. 957 (1982). "The First Amendment does not in terms confer a right to run for public office, and this court has held that it does not do so by implication either." Carver v. Dennis, 104 F.3d 847, 851 (6th Cir. 1997). The Kentucky Supreme Court has bluntly stated:

> Laws commonly, if not universally, impose upon candidacy geographic or residential restrictions, age and citizenship restrictions, and sometimes educational or experiential restrictions. Such laws effectively control the eligibility for elective office without any abridgment of First Amendment liberty because running for elective office is simply not among the rights secured by the First Amendment.

Cook v. Popplewell, 394 S.W.3d 323, 337 (Ky. 2011). Additionally, even though Plaintiffs argue they or others wished to vote for particular candidates who might have run from particular districts, the Sixth Circuit has held that "A voter has no right to vote for a specific candidate or even a particular class of candidates." Citizens for Legislative Choice v. Miller, 144 F.3d 916, 921 (6th Cir. 1998).

Also, the Plaintiffs argue that somehow they are represented by "improperly elected officials" under the 2012 elections as ordered by the Kentucky Supreme Court. Under Kentucky law, a private citizen cannot maintain an action to declare an election void, even under the legal theory that the election was "unconstitutional," as no person has "any justiciable right to keep from office a person who claims it by virtue of an election." Witten v. Sternberg, 475 S.W.2d 496, 498 (Ky. 1971). Therefore, any past injury that they assert with respect to the 2012 elections for legislators is not a cognizable claim. Also, any such claims would be also subject to the concerns outlined below. Additionally, under Vieth v. Jubelier, the Supreme Court has stated that the plaintiffs have no standing where all they have alleged is the possibility of political interests possibly being abridged, and no concrete justiciable claims thereunder. 541 U.S. 267 (2004).

Indeed, Kentucky's Supreme Court has rejected this ludicrous idea that Plaintiffs are somehow "unrepresented" in the State Legislature. The Court has stated that, even where a legislator's existing legislative district is moved from one part of the state to the other, the entire General Assembly represents all the state's residents:

> However, as stated in Selzer v. Synhorst, 253 Iowa 936, 113 N.W.2d 724:

> '* * * The idea that we are personally represented and represented only by officials for whom we have voted stretches too far the theory of representative government. In some states our incumbent President did not receive a majority vote. In Washington, D. C., the residents did not vote at all. The President however, is still the President of all the people.'
> Although a Senator is required by Section 32 of the Kentucky Constitution to be a resident of the district from which he is elected, once he is elected he represents generally all the people of the state and specifically all the people of his district as it exists during his tenure in office. Certainly no one would suggest that a Senator represents only those persons who voted for him.

Anggelis v. Land, 371 S.W.2d 857, 859 (Ky. 1963).

Even though there is an amorphous assertion that somehow people who may or may not be elected to the State House and Senate may need to be "removed from office," or are otherwise "improperly elected" and there would be no redress, this is not true. Under Sections 38 and 39 of the Kentucky Constitution, the House or Senate could act to rule upon the qualifications of a member elected to the body, via a legislative contest action timely initiated after the election under KRS 120.215. However, federal courts do not involve themselves in such political disputes. The U.S. Supreme Court has ruled, in a case construing Kentucky's similar provision for gubernatorial contest actions which are similarly decided by the legislature under Section 90 of the Kentucky Constitution, that federal courts would not interfere with the legislature's solemn determination as to who should serve as Governor:

> The highest court of the state has often held, and, in the present case has again declared, that under these constitutional provisions the power of the general assembly to determine the result is exclusive, and that its decision is not open to judicial review

Taylor v. Beckham, 178 U.S. 548 (1900). The Supreme Court refused to overturn the result of the election as finally determined by the General Assembly and upheld the then-Kentucky Court of Appeals' decision in Taylor v. Beckham, 108 Ky. 278, 56 S.W. 177, 178 (Ky. 1900). Additionally, each House of the General Assembly, under Section 38 of the Kentucky Constitution, has the final the ability to determine its membership, where a legislative election

has already been held, and courts refuse to entertain a declaratory judgment action of this kind. Raney v. Stovall, 361 S.W.2d 518, 523 (Ky. 1962).

Courts do not get involved in such issues where they allege no injury in fact. Additionally, the claims are political in nature, such as Plaintiffs' claims that they are not receiving "enough tax dollars" as a result of the 2012 elections, and are somehow entitled to a refund on their payments. These are political concerns that Courts do not concern themselves with. It is unclear whether Plaintiffs make these claims as "representatives" of their county governments, i.e. as county officials, or in an individual capacity. However, the Kentucky Courts have held that county officials cannot increase the amount of tax dollars appropriated to their respective counties by suing the state. Additionally, since county governments are essentially subdivisions and subordinate to the state government, they cannot sue to receive more funds or fees from the state. They can only be paid under the provisions of Kentucky law, including appropriations, and counties and officers thereof cannot sue for additional tax dollars. See County Fiscal Courts v. Com., Justice and Public Safety Cabinet, 2009-CA-001710-MR, 2010 WL 3361293 (Ky. App. Aug. 27, 2010). As "the county is but an arm of the state government; it is merely a subdivision of the state formed for administrative convenience," the moneys appropriated by statute to officers thereof is strictly governed by statute, and officers and counties cannot sue for more funds. Holland v. Fayette County, 41 S.W.2d 651, 655 (1931). Clearly, "no officer is entitled to demand or receive for the performance of his public duties more than is authorized by the law. KRS 64.410(2); Smothers v. Washington County Fiscal Court, 294 Ky. 35, 170 S.W.2d 867." Webster County v. Nance, 362 S.W.2d 723, 724 (Ky. 1962).

The Plaintiffs apparently claim that they are entitled to their tax money back. This is clearly

not a viable claim. Section 230 and 231 of the Kentucky Constitution provide sovereign immunity for any claim that attempts to claw back tax dollars from the Commonwealth. Kentucky state courts and federal courts have stated that there is no claim stated on this basis. Sections 230 and 231, taken together, prohibit suits commanding the General Assembly or the Executive Branch to open up the State Treasury. The General Assembly appropriates funds for stated purposes, and there is no concomitant power in the court to order payments in excess of statutory and budgeted amounts.

Section 230 states, in pertinent part:

> No money shall be drawn from the State Treasury, except in pursuance of appropriations made by law.

Section 231, set forth above, absolutely prevents lawsuits to gain access to the public fisc, and means that the Commonwealth does not waive its sovereign immunity. Kentucky courts have consistently held that Section 231 "grants the General Assembly exclusive authority to decide when and under what conditions the Commonwealth will allow itself to be subjected to suit." Dept. of Banking and Securities v. Brown, 605 S.W.2d 497, 500 (Ky. 1980). The General Assembly has not consented to allow either itself, its members, nor the public Treasury, nor executive branch to be sued in this case. Read in tandem, these sections prevent this attempted raid on the Treasury.

The Kentucky Supreme Court, in Fletcher v.Commonwealth, confirmed that the power of the purse rests exclusively with the General Assembly, and not with agencies charged with carrying out these directives. The Court stated thus:

> We have consistently held that this provision means exactly what it says. Commonwealth ex rel. Armstrong v. Collins, 709 S.W.2d 437, 441 (Ky.1986) ("It is clear that the power of the dollar-the raising and expenditure of the money necessary to operate state government-is one which is within the authority of the legislative branch of government. The Constitution of the Commonwealth so

> states and we have so stated."); L.R.C. v. Brown, 664 S.W.2d at 925 ("The budget, which provides the revenue for the Commonwealth and which determines how that revenue shall be spent, is fundamentally a legislative matter."); Ferguson v. Oates, 314 S.W.2d 518, 521 (Ky.1958) ("[T]he purpose of [Section 230] was to prevent the expenditure of the State's money without the consent of the Legislature.").

Fletcher v. Commonwealth, 163 S.W.3d 852, 863-864 (Ky. 2005). The Court affirmed that legislative bodies have final control over the level and direction of funding:

> Article I, Section 9, Clause 7 of the United States Constitution contains wording almost identical to that of Section 230, and the United States Supreme Court has consistently given that provision its literal meaning. Cincinnati Soap Co. v. United States, 301 U.S. 308, 321, 57 S.Ct. 764, 770, 81 L.Ed. 1122 (1937) ("It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."); Reeside v. Walker, 52 U.S. (11 How.) 272, 291, 13 L.Ed. 693 (1850) ("However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned."). Its purpose is to vest in Congress, the branch of government that is most representative of the people, the power to determine how the people's money will be spent. Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 427-28, 110 S.Ct. 2465, 2473, 110 L.Ed.2d 387 (1990) ("But the Clause has a more fundamental and comprehensive purpose **.... It is to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants."**); Cincinnati Soap Co., 301 U.S. at 321, 57 S.Ct. at 770 ("The provision of the Constitution ... that, 'No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,' was intended as a restriction upon the disbursing authority of the Executive department ....").

Id. (emphasis supplied). The Plaintiffs seek a declaration completely contrary to this holding. Political questions are not the purview of the courts to resolve, and the courts leave them in the hands of the political branches to resolve. Fletcher, at 860.

The Kentucky General Assembly determines how much and where the people's money is spent, and the total amounts that are appropriated for each purpose. Commonwealth ex rel Armstrong v. Collins, 709 S.W.2d 437 (Ky. 1986). By passing a budget, the General Assembly has determined the use of that limited pool of funds, as mandated by the Kentucky Constitution.

It sets the Commonwealth's fiscal priorities, which includes appropriations. However, the proper avenue for an appeal for more tax dollars for county officials is through the political process, not the judicial process.

The separation of powers provisions in Sections 27, 28, and 29 of the Kentucky Constitution also prohibit the counties or other litigants from using the judiciary to compel the legislature to act, or from commanding the executive branch to open up the Treasury. Courts have held that it is the province of the legislature to determine the proper level of appropriations that were necessary to enable the executive to enforce the laws. See Comm., Cabinet for Health and Family Services v. G.W.F., 229 S.W.3d 596 (Ky.App. 2007) (Holding that court could not force Cabinet to pay for hair follicle testing in absence of specific appropriation from the Legislature). The courts have said that the General Assembly, in examining the financial condition of the state, can suspend or change previously authorized salaries, transfer funds among various executive departments, and otherwise act to ensure the fiscal solvency of the Commonwealth. See Collins, supra. If it is alleged that certain county officials need more money to run their operations, such as for elections, Plaintiffs cannot receive additional "reimbursement" out of the Treasury, when same is not appropriated. Hager v. Shuck, 87 S.W. 300 (Ky. 1905).

Also, an alleged claim that tax moneys paid into the State Treasury were somehow "improperly paid" under a theory of unconstitutional "taxation without representation" would also have to involve the State Department of Revenue and the State Treasurer, although they have not been sued in this action. Therefore, the Plaintiffs have failed to join parties necessary for just adjudication of this particular claim, however, these parties may also be able to assert their immunities from suit. Additionally, this lawsuit may not be brought in federal court

alleging improper payments of state taxes, under whatever novel theory that Plaintiffs espouse. If Plaintiffs are truly claiming that they or persons they represent are entitled to a refund of their tax revenues for all of Northern Kentucky, they would have to individually sue in state court under KRS 134.590 for that specific refund and adjudicate this through the state court system. Additionally, they would have had to allege that they paid the exact amount of taxes "under protest", and then sue to get it back, and absent that, they would have no claim. They have not stated that Plaintiffs have done so. See Coleman v. Inland Gas Corp., 21 S.W.2d 1030 (Ky. 1929). Additionally, the Kentucky Courts have affirmed that state tax dollars are not "refundable" absent a specific state statute, and state taxpayers have no ability to demand repayment from the government:

> Since a taxpayer has no immunity from taxation, which is not a contractual liability but rather the shared costs of the benefits of government, no fundamental right is involved.

Miller v. Johnson Controls, Inc., 296 S.W.3d 392, 403 (Ky. 2009). Indeed, the Kentucky Courts have held that there is no right to object to taxation on the mere basis that some taxes are used in other parts of the Commonwealth, and specifically rejected a claim that a given method of taxation was, as in the Plaintiffs' words, "taxation without representation":

> The building of citizenship out of and with children in each of the counties and cities of the state of the class of those in appellee's home is not only a purpose of local concern, but is a matter of state-wide importance. It is an essential and important business of all governments. City of Louisville v. Com., 134 Ky. 488, 121 S. W. 411. The pre-eminent purpose and primary duties of the appellee are to rescue delinquent, incorrigible, dependent, neglected, helpless children of the county and city, and to care for and develop them mentally, physically, and morally, in order to afford to them an opportunity for an equal chance in life with the more fortunate. Such work of the appellee is a matter of public concern, not only to Jefferson county and the city of Louisville, but to the entire state, although only children residing in Jefferson county and the city of Louisville are eligible to receive the benefits of the authorized taxation. The Legislature may constitutionally enact such legislation as in its discretion will insure the provisions therefor.

Fox v. Board for Louisville & Jefferson County Children's Home, 244 Ky. 1, 50 S.W.2d 67, 73 (1932).

The federal courts have held that they have no basis for adjudicating mere state tax complaints:

> As the case is brought here from a state court, the construction put by the court below upon the statutes and Constitution of its own state is not open to review here. Southwestern Oil Co. v. Texas, 217 U. S. 114; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 569. Since the Kentucky Court of Appeals has held that the plaintiff is not entitled under the state law to the relief prayed even if the act of 1918 be deemed invalid, no questions as to the validity of that act under the federal Constitution is presented for decision on this record.

Swiss Oil Corporation v. Shanks, 273 U.S. 407, 411-12 (1927).

c. The Tenth and Eleventh Amendments Bar The 2012 Claims As to LRC.

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the State, are reserved to the State respectively, or to the people.

The Eleventh Amendment of the United States Constitution provides as follows:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State.

U.S. Const.amend. XI.

The U.S. Supreme Court has stated that an "unconsenting State is immune from suits brought in federal courts ***by her own citizens*** as well as by citizens of another State." Edelman v. Jordan, 415 U.S. 651, 662-63 (1974)(emphasis supplied); see also Alden v. Maine, 527 U.S. 706, 727 (1999) (applying the Tenth and Eleventh Amendments to bar suit); Tennessee Dept. of Human Services v. U.S. Dept. of Education, 979 F.2d 1162, 1166 (6th Cir. 1992). The Eleventh Amendment prevents a citizen "from suing his own state in federal court for damages, past debts,

or retroactive relief of any kind." Id. at 1166 (citing Edelman v. Jordan). A claim against LRC would be retroactive.

A state's Eleventh Amendment immunity may only be waived in two ways. First, a state's Eleventh Amendment immunity may be waived by Congressional enactment of a statute, under an "unmistakably clear" and valid exercise of the power of Section 5 of the Fourteenth Amendment. Nevada Dept of Human Resources v. Hibbs, 538 U.S. 721, 726 (2003); Touvell v. Ohio Dept. of Mental Retardation and Developmental Disabilities, 422 F.3d 392, 395 (6th Cir. 2005). Second, a state may effect a waiver of this immunity by consenting to suit in federal court, however, there is no consent here by LRC. Lapides v. Board of Regents of the University System of Georgia, 535 U.S. 613, 616 (2002); Nair v Oakland County Community Mental Health Auth., 443 F.3d 469, 474 (6th Cir. 2005).

There is no Congressional act cited by Plaintiff that constitutes a waiver of the state's immunity, as Section 1983, stated above, has been construed to disallow it. Kentucky has not waived its sovereign immunity on its own behalf. Kentucky Constitution Sections 230, 231. The lawsuit purports to sue LRC in its capacity as a part of the state, a state legislative agency. Because the State has not waived its sovereign immunity from suit, Plaintiffs' claims against them are barred by the Eleventh Amendment. Edelman, 415 U.S. at 662-663. Thus, Plaintiffs have failed to state a claim upon which relief may be granted as to the LRC on the 2012 elections claim. They cannot be held liable for Plaintiffs' claims arising from alleged past constitutional violations, particularly where it is not alleged to have done anything with regard to Plaintiffs. Carpenter v. Kentucky, 2008 WL 4999127 (E.D. Ky. Nov. 21, 2008). Accordingly, the 2012 election claims against LRC should be dismissed, as they asked for injunctive or monetary relief against it, as should any pendent state law claims, based upon the 2012 elections. See Pennhurst

State School v. Haldeman, 465 U.S. 89, 100-01 (1984). However, as discussed below, there are no state or federal law claims made relating to the 2012 elections.

Plaintiffs apparently seek to dislodge duly elected representatives on the basis of their allegations that the 2012 elections were somehow "illegal." However, the Supreme Court stated that the states have plenary power over these elections, out of respect for federalism. The U.S. Supreme Court has recently reiterated that the 10th Amendment protects the states' ability to determine their elections. More specifically, " 'the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.' " Gregory v. Ashcroft, 501 U.S. 452, 461–462, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (quoting Sugarman v. Dougall, 413 U.S. 634, 647, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973)." Shelby County, Ala. v. Holder, 133 S. Ct. 2612 (U.S. 2013). As a sovereign state, "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." Shelby County, Ala. v. Holder, 133 S. Ct. 2612 (U.S. 2013). As noted above, the United States Supreme Court has refused to remove or "oust" duly elected Kentucky state officers. Taylor v. Beckham, 108 Ky. 278, 56 S.W. 177, 178 (Ky. 1900); 178 U.S. 548 (1900). The Sixth Circuit held, in dismissing a challenge to a state's method of electing officers on First and Fourteenth Amendment claims that voters had an interest in electing particular legislators, that the state has an interest in preserving the orderly administration and the finality of its elections, thus:

> our decision rests on the State's sovereign interest in structuring its government. It is an interest recognized by both the text of the Constitution and the spirit of federalism.

Citizens for Legislative Choice v. Miller, 144 F.3d 916, 925 (6th Cir. 1998) (citing Taylor v. Beckham, 178 U.S. 548, 570-571).

d. Legislative Immunity Bars the 2012 Claims Against LRC.

The Plaintiffs cannot bring the LRC into this suit if it is premised on any legislative activity they have performed or are going to perform. Any activities that they are alleged to have performed with respect to legislative responsibilities are not the proper subject of a damages, declaratory judgment or injunctive relief claim, or attorney fees award, under legislative immunity. The courts have held that activities relative to the passage of legislation, or the lack of passage of legislation, cannot give rise to a 42 U.S.C. § 1983 claim for damages, nor may the courts assess prospective or declaratory relief against legislative entities such as LRC. See Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 734 (1980). Therefore, Plaintiffs' claims relating to the use of the 2002 law to hold 2012 elections, even assuming any were properly stated, which they are not, and any prospective or declaratory relief, is not available.

The Kentucky Constitution, like the Constitutions of most other states, contains a provision that protects the immunity and privilege of the legislature to act. Section 43. The United States Supreme Court has specifically held that state legislators are absolutely immune from suit under the federal common law for any actions that they take in performing fundamental legislative duties, including the passage or non-passage of legislation. Tenney v. Brandhove, 341 U.S. 367, 375 (1951). Legislators may not be "questioned in another place" for their legislative activity, either by being required to defend lawsuits based upon their legislative actions, or by being forced to testify about legislative acts. This applies to any actors, including legislative staff and others acting within the legitimate legislative sphere. Eastland v. United States' Servicemen's Fund, 421 U.S. 491, 507 (1975). It protects legislators and legislative staff against civil suits for their actions within this legislative sphere. Eastland, at 503, citing Doe v.

McMillan, 412 U.S. 306, 314 (1973). This clause applies not only to literal speech or debate but any legislative act regardless of where it is performed. Kraus v. Kentucky State Senate, 872 S.W.2d 433, 440 (Ky. 1994); Wiggins v. Stuart, 671 S.W.2d 262 (Ky.App. 1984).

State legislators and staff have absolute legislative immunity as a matter of federal common law when acting "in the sphere of legitimate legislative activity," even from a civil rights suit under 42 U.S.C. §1983. Tenney, at 372-373, 376. This immunity applies to declaratory judgments or injunctive relief. Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 732-733 (1980). The immunity and privilege applies to legislators and staff acting within this legitimate legislative sphere. Eastland v. United States' Servicemen's Fund, 421 U.S. 491, 507 (1975). Courts have said "The question to be resolved is whether the actions of petitioners fall within the 'sphere of legitimate legislative activity.' If they do, the petitioners 'shall not be questioned in any other Place' about those activities since the prohibitions of the Speech or Debate Clause are absolute." Id. at 501.

The Sixth Circuit recognizes that absolute immunity extends to "legislators and their aides when performing acts of a legislative nature." Cullinan v. Abramson, 128 F.3d 301, 308 (6th Cir. 1997), citing Gravel v. United States, 408 U.S. 606 (1972). Due process, equal protection, and conspiracy claims are foreclosed against legislators and even state legislative staff. Porter v. Bainbridge, 405 F.Supp.83, 91-92 (S.D.Ind. 1975). Speech or debate clause protection extends to legislative activities even if they are not performed within the confines of the legislative hall, and makes them immune to service of civil process and forced inquiries relating to their legislative conduct, and the legislator and staff are to be "treated as one". Gravel v. United States, 408 U.S. 606, 616 (1972).

The Courts have refused to abridge this basic immunity, even in the face of a redistricting

lawsuit, and cannot be used to hold legislators or other legislative actors accountable for or questioning them about enacting a certain redistricting plan or failing to enact an alternative plan. Marylanders for Fair Representation, Inc. v. Schaefer, 144 F.R.D. 292, 299 (D. Md. 1992). Courts have held that all actors within this legislative purview, acting to work on legislative redistricting bills, are immune. Marylanders for Fair Representation, Inc. v. Schaefer, 144 F.R.D. 292, 300-01 (D. Md. 1992).

Therefore, when LRC was sued over the issue of the use of the 2002 law in the 2012 elections, whether to answer for legislative conduct such as the passage of legislation, or as an attempt to constrain the legislative process, legislative immunity forecloses such a suit against it. Constitutional claims, if there are any, may be adjudicated by the Courts by challenging their enforcement, as against the bodies who enforce the law. However, they are not properly adjudicated by naming a body that has no enforcement authority, in a mere attempt to hamstring or affect the legislative process. The LRC is not required to defend a facial challenge to the application of a law which has been adjudicated by the Kentucky Courts to be in force, nor should they be subjected to questioning about internal legislative processes or motivations. The LRC, since it is made up of legislators and also acts as the administrative body of the General Assembly, also shares this immunity and cannot be sued on the basis of its activities in the legislative process, as it is only exercising legislative powers as "part and parcel" of the legislative branch. See LRC v. Brown, 664 S.W.2d 907 (Ky. 1984).

e. The Claims with Respect to the 2012 Redistricting Are Moot.

An action that is moot also does not present a justiciable case or controversy within the meaning of Article III, nor give rise to any cognizable claims. Ashcroft v. Mattis, 431 U.S. 171, 172-73 (1977); Church of Scientology Flag Service Org. v. City of Clearwater, 777 F.2d 598,

604 (11th Cir. 1985). A case is moot when the issues presented are no longer "live." House Bill 1 enacted in the 2012 Regular Session was prevented from going into effect by the February 24, 2012 order of the Kentucky Supreme Court, as stated above. The Kentucky Supreme Court mandated that the Senate and House of Representatives elections occur based upon the old law, passed in 2002. Any claims that were available at that point died with the election of those members to the General Assembly, who were seated by their respective bodies as of January, 2013. It is unclear what the basis of their claims are that the General Assembly somehow "failed to act" or LRC's responsibility for that alleged failure.

Courts have held that the passage of time prevents even cognizable claims from being asserted as courts uphold a state's interest in proceeding with elections in a timely fashion, and courts would not step in even if it were only 94 days after its passage. Thus,

> Laches, a reflection of the maxim "equity aids the vigilant," arises when there has been an unwarranted delay which would work a hardship or disadvantage to another. Thus, those courts which have considered comparable claims have in effect balanced the interests of the parties and required that any claims against the state procedure be pressed expeditiously. As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made, and the candidate's and party's claims to be a serious candidate and a serious party who have received a serious injury become less credible by them having slept on their rights.

Libertarian Party v. Davis, 601 F. Supp. 522, 525 (E.D. Ky. 1985). Thus, any claims relating to the passage of the 2012 House Bill, even if there were any, were moot, and the Plaintiffs sat on their rights and should be barred by laches from asserting any claims.

Mootness is "sufficient ground for denying the convocation of a three-judge court." Barnes v. Tarrytown Urban Renewal Agency, 338 F. Supp. 262, 271 (S.D.N.Y. 1972). There are no claims with respect to the 2012 elections that are not mooted by the passage of time. Where the lawsuit involves the alleged lawfulness of an election and persons elected to office thereunder, courts have stated that a failure to bring such a suit until after that election is over

moots the lawsuit, especially where the complainant was only generally asserting a right as a voter. Benton v. Clay, 233 S.W. 1041 (Ky. 1921). Despite an allegation of "unconstitutionality" of the acts, where an allegedly improper Treasury payment had already been made, Kentucky courts have refused to render a declaratory judgment, because it was moot:

> They have been paid, valid or invalid, validated constitutionally or not. The constitutionality of this act cannot possibly affect any further acts on the part of the present appellees, and so its decision is neither necessary nor proper as a guide to them. The case on this aspect presents a purely academic question of law so far as the parties to this appeal are concerned. This court has ever steadily declined to answer such questions.

Coke v. Shanks, 291 S.W. 362, 366 (1927).

A justiciable controversy does not include questions "which are merely advisory, or are academic, hypothetical, incidental or remote, or which will not be decisive of any present controversy." Curry v. Coyne, 992 S.W.2d 858, 860 (Ky.App.1998). Where there is "no more than an academic dispute concerning certain general legislative or executive powers of the defendants" to happen in the future, courts would "not decide speculative rights or duties which may or may not arise in the future, but only rights and duties about which there is a present actual controversy presented by adversary parties, and in which a binding judgment concluding the controversy may be entered." Veith v. City of Louisville, 355 S.W.2d 295, 297 (Ky. 1962), citing Axton v. Goodman, 265 S.W. 806 (Ky. 1924). Specifically, the rights of parties in the future, where there was "no present right to vote on a question" would not be a proper declaratory judgment action. Kelly v. Jackson, 268 S.W. 539 (Ky. 1925). Where there was no present election going on, courts would not adjudicate rights as to the propriety of a possible candidate, as it was merely an "academic exercise". Revis v. Daugherty, 287 S.W.28, 29 (Ky. 1926). Even though the complaint was brought against the Attorney General, the plaintiff:

> may not convert his academic question into a justiciable one by inserting the name of the Attorney General after "v." in the caption of his petition as a defendant therein without

> some averment bringing the case within the class of submissions contemplated and required by the statute. …So far as a legal presentation of the question is concerned, the plaintiff had as well made the Governor of the commonwealth or any other officer of the state, or of any county therein, or any individual that might be found therein, a defendant in his alleged petition. As drawn, it is of no more legal efficacy than would have been a letter written to the judge of the court to obtain his opinion upon a purely academic question.

Id.

In this case, the 2012 election has already occurred, and legislators have been sworn into office, and seated by their respective bodies. There is no claim with respect to the 2012 elections that have not been mooted by the passage of time.

f. Plaintiffs' Claims Based on 2012 Redistricting are Barred by the Statute of Limitations.

An action for declaration of rights for an alleged violation of constitutional rights is subject to a one-year statute of limitations. Hill v. Thompson, 297 S.W.3d 892 (Ky.App. 2009). The Sixth Circuit Court of Appeals has held that "section 1983 actions in Kentucky are limited by the one-year statute of limitations found in section 413.140(1)(a)." Collard v. Kentucky Bd. of Nursing, 896 F.2d 179, 182 (6th Cir.1990). The statute of limitations "begins to run when the plaintiff knows or has reason to know of the injury which is the basis of his action and that a plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence." Id. at 183, citing Sevier v. Turner, 742 F.2d 262, 272 (6th Cir.1984).

Plaintiffs state in their Complaint that they were somehow aggrieved by the passage of 2012 Regular Session House Bill 1, which was passed by the General Assembly and signed into law by Governor Steven Beshear on January 20, 2012. 2012 Regular Session House Bill 1 enacted a redistricting plan for the House and Senate state legislative districts as well as the State Courts. 2012 Ky.Acts Chapter 1. The bill was challenged on the basis of Section 33 of the Kentucky Constitution and Equal Protection concerns, but plaintiffs believed that county

integrity under Section 33 had priority over Equal Protection considerations. The Kentucky Supreme Court in an order dated February 24, 2012, ordered that the 2012 legislative elections take place under the 2002 law, based on a finding that it violated Section 33's prohibitions on county splits. Legislative Research Commission v. Fischer, 2012 WL 952983 (Ky. February 24, 2012). Exhibit 2. Therefore, any possible claims that these Plaintiffs had against the LRC for any action relating to the passage of 2012 Regular Session House Bill 1, which became law on January 20, 2012, are barred by the statute of limitations. Since the last act of the General Assembly, whom Plaintiffs purport to sue, was passage of this law on January 20, 2012, then the one-year statute of limitations began to run then. Even if this Court considers the statute of limitations as running on February 24, 2012, which is the date that the Kentucky Supreme Court issued its Order mandating that 2012 elections had to be held using the 2002 law, when it enjoined the implementations of the new legislative districts for the 2012 elections, the statute of limitations on their damages claim, even assuming there is one, ran on February 24, 2013.

Additionally, in the discovery materials, Plaintiffs state that they were injured "as a result of the unconstitutional districts drawn in 2011", and they have damages from the amount of tax revenues lost "since March 2011". If this is so, then the alleged claims arose in 2011, which were even earlier than the February 24, 2013 date. Brown Plaintiffs Response to Defendant Grimes First Set of Interrogatories, p. 6. Exhibit 3.

The statute of limitations began to run on the 2012 redistricting claims, even if there were any, at the very latest when the Kentucky Supreme Court issued its order mandating the use of the previous law on redistricting, which was February 24, 2012. Obviously, Plaintiffs knew of the actions of the Kentucky Supreme Court in mandating that candidates run under the old

districts. They sat on whatever non-existent rights that they had. Therefore, the statute of limitations has run.

g. **Res Judicata and Collateral Estoppel Bar the Claims Regarding the 2012 Elections.**

The issues with respect to the 2012 Redistricting Act, 2012 HB 1 have already been litigated to conclusion by the same parties to this lawsuit. Therefore, Plaintiffs cannot now bring another lawsuit based on the same issues with respect to the 2012 elections. On Thursday, January 26, 2012, three members of the Kentucky House of Representatives, House Minority Leader Jeff Hoover (and LRC member), Representative Joseph Fischer, and Representative Kim King, and other citizens, filed a lawsuit in Franklin Circuit Court, 12-CI-109. They sued the Secretary of State, State Board of Elections, and Maryellen Allen, Interim Director of the State Board of Elections. The lawsuit alleged that 2012 House Bill 1, with respect to the House Districts, violated Section 33 of the Kentucky Constitution, and the Fourteenth Amendment's Equal Protection Clause because it was "partisan" and "violated the population ranges," that it deprived them of their Federal Freedom of Association rights by penalizing Republican voters and Representatives solely because of their political affiliation and beliefs, and that it violated 42 U.S.C. § 1983. Senator Kathy Stein and other citizens intervened in the lawsuit as "Intervening Plaintiffs," claiming was that 2012 House Bill 1, with respect to the Senate Districts, violated Section 33 of the Kentucky Constitution, the Fourteenth Amendment's Equal Protection Clause, 42 U.S.C. § 1983, and alleged that the Senate plan could not move one district number to another. The LRC intervened in the case.

On February 7, 2012, the Franklin Circuit Court issued a temporary injunction against the Secretary of State and State Board of Elections, keeping the same districts in place for the 2012 elections, and enjoining the use of the new districts under 2012 HB 1. The Legislative Research

Commission, on appeal, asserted that the plan met the primary federal requirement of redistricting--the Equal Protection Clause--while adequately addressing the issue of county splits under Section 33 of the Kentucky Constitution. Exhibit 4. As stated above, on February 24, 2012, the Kentucky Supreme Court's order upheld the lower court's determination that Section 33 was violated, enjoined the implementation of HB 1, and ruled that the districts as enacted in 2002 would remain in place for the 2012 elections.

The Supreme Court's order of February 24, 2012 in that case adjudicated the same issues with respect to the 2012 redistricting that Plaintiffs seek to raise here. The court's full opinion delineates the reasons for the Court's previous order. Legislative Research Commission v. Fischer, 366 S.W.3d 905 (Ky. 2012). Additionally, as this lawsuit allegedly seeks to join "all the members of the Senate and the House" by virtue of suing the Senate President and the House Speaker, and the LRC, all are therefore parties to this case as well, including the original Plaintiffs in the state court case. By so doing, the Plaintiffs herein activate the prohibitions of res judicata and collateral estoppel, and they bar this lawsuit as it seeks to re-litigate the case.

Res judiciata prevents a party from raising a claim that has already been decided. Four elements are necessary for res judicata to apply: (1) a final judgment; (2) rendered by a court of competent jurisdiction; (3) the parties or those in privity with them must be identical; and (4) the same causes of action. Gustafson v. Johns, 434 F.Supp. 2d 1246 (S.D. Ala. 2006); aff'd, 213 F. App'x 872 (11th Cir. 2007). There was an order by the Supreme Court on February 24, 2012 in the case, which required the holding of the 2012 elections under the previous law, and a subsequent opinion. Legislative Research Commission v. Fischer, supra. 2012 WL 952983 (Order of Kentucky Supreme Court, 2012-SC-091; 2011-SC-092, February 24, 2012);

Legislative Research Commission v. Fischer, 366 S.W.3d 905 (Ky. 2012). Obviously, the Kentucky Supreme Court was a "court of competent jurisdiction" to decide the claims.

Federal courts have held that prior court judgments involving the same or substantially the same plaintiffs in redistricting cases, and involving the same causes of action, operate as res judicata, and subsequent federal suits may not be brought on the same claims, as they "involve the same cause of action." Gustafson, at 1255-56. In Gustafson, the court held that all the redistricting claims arose from a common nucleus of fact, thus the state court suit was res judicata as to the federal suit, and it could not be brought, as:

> Causes of action in a second suit are barred if they could have been raised in the first suit. See Davila v. Delta Air Lines, Inc., 326 F.3d 1183, 1187 (11th Cir.2003); Olmstead v. Amoco Oil Co., 725 F.2d 627, 629 (11th Cir.1984) (Res judicata "extends not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same 'operative nucleus of fact.' ").
>
> The *Montiel* plaintiffs brought one-person-one-vote claims and racial gerrymandering claims based on the Equal Protection Clause and Section 2 of the Voting Rights Act. Plaintiffs in this case bring: (1) a one-person-one-vote claim; (2) a partisan gerrymandering claim; and (3) a First Amendment freedom of association claim. All of these claims arise out of a common nucleus of fact-i.e., the 2001 redistricting. The *Montiel* plaintiffs could have brought any of these claims and, in fact, did bring the one-person-one-vote claim.

Gustafson, at 1254-55. Additionally, although the Plaintiffs in that case argued they were not "the same," the Court held that redistricting lawsuits should not continue ad infinitum, and that the citizen parties would be considered to be the same parties for purposes of res judicata:

> When plaintiffs have raised an issue of public law, they do not allege that they "have a different private right not shared in common with the public." Tyus, 93 F.3d at 457. Virtual representation is particularly appropriate for public law issues because the number of plaintiffs with standing is "potentially limitless." Id. at 456. If successive plaintiffs could continually challenge a public law, such claims "would assume immortality." Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist., 750 F.2d 731, 741 (9th Cir.1984).
>
> Redistricting lawsuits are precisely the type of public law issue to which virtual representation should be applied. While the Eleventh Circuit has adopted a rather strict

> standard for the application of virtual representation in private law cases, it also has noted that there is less preclusion protection for a plaintiff who complains of a public action that "has only an indirect impact on his interests." Equal Employment Opportunity Comm'n v. Pemco Aeroplex, Inc., 383 F.3d 1280, 1289 (11 th Cir.2004) (quoting Richards, 116 S. Ct at 1768).
>
> Redistricting is a public action that has only an indirect impact on a plaintiff's interest. The present lawsuit does not involve the denial of an individual's right to vote. Rather, the lawsuit argues that votes are given unequal weight when they are aggregated by district. The remedy for any individual voter's claim of unequal weighting necessarily affects the rights of all other voters. Indeed, when statewide relief is sought, the rights of all voters are potentially affected. The victory of any plaintiff's lawsuit would deliver the relief sought by all the potential plaintiffs.
>
> Because one plaintiff's case will resolve the issue for all similarly-situated voters, fence-sitting should be discouraged; all parties aggrieved by the redistricting should be encouraged to join in one action. Without virtual representation, there is no limit to the number of potential plaintiffs who could bring successive lawsuits against a state for redistricting. A state should not face an endless stream of lawsuits after each redistricting. Virtual representation is particularly appropriate for a public law issue like legislative redistricting. See, e.g., Tyus, 93 F.3d at 456 (barring a redistricting lawsuit because of res judicata); Robertson v. Bartels, 148 F.Supp.2d at 452 (same); Thompson v. Smith, 52 F.Supp.2d 1364, 1370 (M.D.Ala.1999) (barring several of plaintiff's redistricting claims because of res judicata); McNeil, 828 A.2d at 860-62 (barring a redistricting lawsuit because of res judicata).

Id. at 1257-58.

The parties were the same in both suits, as the Legislative Research Commission was a party, the Legislators who brought the state court suit are purported Defendants herein, and the Secretary of State and State Board of Elections are Defendants, as they were in the state court suit. Any other Plaintiffs in the state court suit, as "citizens," are in privity with the current Plaintiffs, as they alleging the same types of public law questions as were alleged in the 2012 state litigation. These were the exact same issues raised and dealt with by the Supreme Court. Therefore, Plaintiffs are completely precluded from their damages, costs, and injunctive relief claims based on issues that were subsumed in the state court action.

Collateral estoppel would operate to bar the adjudication of any further relief against the LRC based on the 2012 Redistricting, including attorneys fees. All the issues were raised regarding the constitutionality of the 2012 redistricting, and a judgment was made. Therefore, these issues cannot be relitigated in a subsequent lawsuit. Montana v. United States, 440 U.S. 147, 153 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979). The same issues were raised and resolved in the Kentucky Supreme Court case, and the persons "for whose benefit" a cause of action is litigated are bound by the decision. Montana, at 154.

h. The 2012 Claims are Barred by the Rooker-Feldman Doctrine.

The Plaintiffs' complaint with respect to the 2012 redistricting arises from the situation that ensued when the Kentucky Supreme Court ordered the 2012 elections to be held based on the 2002 Kentucky redistricting law. This is the source of their grievance. However, a party aggrieved by a state-court decision cannot attack this decision collaterally by an independent suit in Federal District Court, essentially "appealing" that decision, under the Rooker-Feldman Doctrine. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). A party "aggrieved by a state-court decision cannot appeal that decision to a district court, but must instead petition for a writ of certiorari from the United States Supreme Court." DLX, Inc. v. Kentucky, 381 F.3d 511, 516 (6th Cir. 2004). Where the Plaintiffs are alleging that the action taken by the state courts caused their injury:

> [T]he fundamental and appropriate question to ask is whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment.' ") (quoting Garry v. Geils, 82 F.3d 1362, 1365 (7th Cir.1996)); Tropf v. Fid. Nat'l Title Ins. Co., 289 F.3d 929, 937 (6th Cir.2002) (The doctrine "precludes federal court jurisdiction where the claim is a specific grievance that the law was invalidly-even unconstitutionally-applied in the plaintiff's particular case.")

Id. Therefore, this Court must dismiss the lawsuit.

i. If there is no Res Judicata or Collateral Estoppel, or Application of Rooker-Feldman Doctrine as to the 2012 State Court Lawsuit, then this Court Should

Permit 2012 HB 1 to be Used for Redistricting in 2014, Absent an Enactment in the 2013 or 2014 Legislative Sessions.

If it is determined by this Court that there was no res judicata or collateral estoppel effect of the prior state court lawsuit that determined the rights of the parties, relating to the 2012 redistricting, then this Court, based upon judicially noticeable information, should permit the elections authorities to utilize the lawfully enacted 2012 Regular Session House Bill 1 districts in the 2014 Legislative Elections and declare that it is constitutional under the Equal Protection Clause.

The Kentucky Supreme Court upheld the Franklin Circuit Court's standard for state legislative redistricting, based upon Fischer II, which required that the provisions of the Equal Protection Clause remain secondary to the State Constitutional goal of non-division of counties under Section 33 of the Kentucky Constitution. While LRC opposed this approach, it is what the state court decided. That case is long since over, as stated below, and LRC has no desire to relitigate it. However, if the Plaintiffs wish to reargue the constitutionality of 2012 HB 1, then the LRC would then adopt LRC's previous position, at least for purposes of this motion, that Equal Protection should be the standard for redistricting of state legislative races and that the General Assembly should be able to have reasonable discretion in addressing county subdivisions under Section 33.

It is clear that 2012 Regular Session House Bill 1 met the guidelines for federal Equal Protection, under the test as stated by Plaintiffs' complaint. It meets the standard under Reynolds v. Sims, 377 U.S. 533 (1964), as stated by Plaintiffs, that "equal protection… requires that legislative districts be roughly equal."

> The federal One–Person, One–Vote standard also applies to state elections and state redistricting plans. See Sandusky Cnty. Democratic Party v. Blackwell, 387 F.3d 565, 569 (6th Cir.2004). The Supreme Court has tolerated greater population deviations in state legislative plans, however, at least when the deviations are justified by legitimate

> considerations. *See* Brown v. Thomson, 462 U.S. 835, 850, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983) (O'Connor, J., concurring); Karcher v. Daggett, 462 U.S. 725, 730, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983). A plan that exhibits population disparities over 10%, however, triggers a *prima facie* One–Person, One–Vote violation and requires an explanation from the state. *See* Brown, 462 U.S. at 850, 103 S.Ct. 2690 (O'Connor, J., concurring).

NAACP v. Snyder, 879 F. Supp. 2d 662, 668 (E.D. Mich. 2012).

This being the standard, then the judicially noticeable facts regarding 2012 House Bill 1 require the dismissal of this claim against LRC, at the very least, because the General Assembly passed a bill meeting that standard in the 2012 Regular Session. The law that the General Assembly passed is still the law of Kentucky, as it has not been repealed by the General Assembly. This court could declare that it is in force for the upcoming 2014 elections. 2012 House Bill 1's "Population Summary Report" for the enacted version may be judicially noted by this Court as stated above. http://www.lrc.ky.gov/record/12RS/HB1/RS.pdf. Exhibit 1. The Population Summary Report shows that the overall range of the House Districts under 2012 HB 1 was 10%, and the overall range of the Senate Districts was 9.84%. Id. The law used the 2010 Census numbers. KRS 5.010, as amended by 2012 Ky. Acts. Ch. 1.

> The issue of political subdivisions was given proper weight in Reynolds:
>
> > it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. To do so would be constitutionally valid, so long as the resulting apportionment was one based substantially on population and the equal-population principle was not diluted in any significant way. Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting. Lower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation.

Reynolds v. Sims, 377 U.S. 533, 578 (1964). The "lower courts" in this District have stated that Section 33's concerns for county integrity are of no moment in federal courts, although a state legislature may recognize them for purposes of legislative decisionmaking. This position is also

consistent with the historical position of this District. Although the Complaint also raises Section 33 arguments, to a federal court, these are of secondary importance to the Equal Protection Clause. In 1971, this Court recognized that Section 33 is unconstitutional under the Equal Protection Clause:

> Although provisions in the Kentucky Constitution disallow multi-member districts it was decided in the District Court case of Upton v. Begley (Docket No. 346, Eastern District of Kentucky at Frankfort) that the prohibition in section 33 of the Constitution against the dividing of counties to make legislative districts was unconstitutional.

Hensley v. Wood, 329 F. Supp. 787, 789 (E.D. Ky. 1971). Clearly, under the federal standard, the provisions of Section 33 take a backseat to the Equal Protection standard.

This is to say merely that, just as the General Assembly has an interest in doing its best to meet the standards set by the federal courts and the state courts, it also should not be whipsawed by various parties, on the one hand in state court, and in the other hand in federal court, while it only seeks to make a legislative determination as to the districts to be used in the upcoming elections. This Honorable Court may take judicial notice of the fact that 2012 House Bill 1 is still law, although it was not implemented for the 2012 elections. There is no reason that this Court could not order that 2012 Regular Session House Bill 1 be used for the 2014 legislative elections, as they comply fully with the Equal Protection standard as set forth in Reynolds v. Sims.

j. The Noerr-Pennington Doctrine Precludes this Claim Over the 2012 Elections as Against LRC.

Under federal law, there is no cause of action for "failure to pass a law" or for passing a law or urging the passage of a law, or going to court over a law, even if that law is alleged to be unconstitutional. Under the Noerr-Pennington doctrine, all persons, whether they are state officials or private citizens, have the right under the First Amendment to the United States Constitution to participate in the process of passing the laws, as all persons may petition their

Government. The LRC is protected by the Noerr-Pennington doctrine from any judicial redress against it for exercising their fundamental political rights in the political and legislative arena, and in court actions. Section 1(6) of the Kentucky Constitution and the First Amendment to the U.S. Constitution protects all persons engaged in that process from restrictions upon that right. Fortunately for democracy, none of this conduct alleged is the basis of a lawsuit for damages, under any legal theory, and cannot result in a lawsuit to punish past political conduct nor enjoin future political conduct. Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); Mine Workers v. Pennington, 381 U.S. 657 (1965).

Kentucky and federal courts have held that these acts of interacting within government to redress grievances are protected conduct under the First Amendment, and "every person or group engaged…in trying to persuade [legislative] action is exercising the First Amendment right of petition." Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 491 (D.C. Cir. 1967). No one can sue a citizen for damages for a petition, including circulating one for impeachment, as "proceedings in courts of justice, legislative proceedings, and petition and memorials to the Legislature are privileged." Yancey v. Comm., 122 S.W. 123, 125 (Ky.1909). This is a subject matter and jurisdictional issue that may be addressed at any time. The Sixth Circuit has said that liability for damages may not be assessed if the core of the complaint involves activity before the state legislature or courts:

> Under the *Noerr-Pennington* doctrine, liability may not be assessed under § 1983 or the anti-trust laws except in very limited circumstances, for actions taken when petitioning authorities to take official action, regardless of the motives of the petitioners, even where the petitioning activity has the intent or effect of depriving another of property interests.

Eaton v. Newport Bd. of Educ., 975 F.2d 292, 298 (6th Cir. 1992). Even after a trial and assessment of damages, the Sixth Circuit threw out the verdict and stated that this was a lawsuit

over political free speech. See also, Wilder v. Hall, 501 F. Supp. 2d 887, 895-96 (E.D. Ky. 2007).

The Kentucky Supreme Court has also applied the Noerr-Pennington doctrine, which derives from these rights of petition, and has held that it immunizes efforts to influence public officials, thus foreclosing claims of intentional interference with contractual relations, constitutional and 42 U.S.C. 1983 claims. Grand Communities, Ltd. v. Stepner, 170 S.W.3d 411, 415 (Ky.App. 2004). All tort claims are prohibited, including intentional interference with contract, conspiracy, and gross negligence claims, where a legislative body was petitioned. White v. Ashland Park Neighborhood Ass'n,, 2009 WL 1974750 (Ky. App. July 10, 2009). It also applies to claims that legislative actors attempted to influence a state agency, in an individual capacity. Astoria Entertainment v. Edwards, 159 F. Supp. 2d 303, 324 (E.D. La. 2001) aff'd, 57 F. App'x 211 (5th Cir. 2003). Conspiracy allegations are also foreclosed. Hopkinsville Cable TV v. Pennyroyal Cablevision, 562 F. Supp. 543, 547 (W.D. Ky. 1982). This applies to efforts to influence all branches of government, including an administrative agency. Potters Med. Ctr. v. City Hosp. Ass'n, 800 F.2d 568, 577-78 (6th Cir.1986). Courts refuse to delve into the ongoing process of legislation, as this would interfere with the necessary "back and forth" that must occur in our representative democracy.

The core of Plaintiffs' 2012 claim is that the Legislature did not pass the redistricting bill that they wanted, and courts imposed the 2002 districts on the 2012 election, and that they should get damages from this legislative process, and the state court action, and future court involvement or damages based upon that action. Petitioning, however, does not guarantee that speech "will persuade or that advocacy will be effective." Smith v. Arkansas State Highway Employees, 441 U.S. 463, 465 (1979). Plaintiffs cannot concoct a federal tort claim against LRC

for legislative action or actions in court. These generalized and legally unsupported complaints based upon participating in the legislative process are foreclosed as they all related to the passage of the 2012 legislation at issue. However, Courts rightfully decline to interfere. Therefore, the claims based on the use of the 2002 legislation are not viable. Conversely, no person could sue Plaintiffs if they participated in the process of urging passage or defeat of legislation.

CONCLUSION

For the foregoing reasons, the LRC's motion to dismiss any claims with respect to the 2012 elections should be granted, and the Plaintiffs should be entitled to no monetary relief thereunder, and no attorneys' fees.

Respectfully submitted:

s/Laura H. Hendrix
Laura H. Hendrix
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Attorney for Legislative Research Commission

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2013, a copy of the foregoing Memorandum was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail and electronic mail. Parties may access this filing through the Court's electronic filing system.

s/Laura H. Hendrix
Laura H. Hendrix

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

KENNY BROWN, individually and in his official capacity as the Boone County Clerk, et al.,	)	**ELECTRONICALLY FILED**
Plaintiffs,	)	**Civil No. 2:13-cv-00068 DJB-GFVT-WOB**
v.	)	
THE COMMONWEALTH OF KENTUCKY, et al.,	)	
Defendants.	)	
MARTIN HERBERT, et al.	)	
Plaintiffs,	)	**Civil No. 3:13-cv-00025 DJB-GFVT-WOB**
v.	)	
KENTUCKY STATE BOARD OF ELECTIONS, et al.,	)	
Defendants.	)	

PROPOSED ORDER

Plaintiffs initiated these actions regarding Kentucky redistricting. The "Brown Plaintiffs" have named the Kentucky Legislative Research Commission as a Defendant, and have enumerated issues with respect to the 2012 Legislative Elections and redistricting held under the Kentucky Supreme Court's Order of February 24, 2012.

This Court having been requested to dismiss the claims against the Legislative Research Commission, in the above-styled case, relating to 2012 elections held under the Kentucky

Supreme Court's order, for lack of subject matter jurisdiction, and for failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12, and this Court being sufficiently advised, does hereby GRANT the Legislative Research Commission's Motion to Dismiss and IT IS HEREBY ORDERED that the claims relating to any money damages, state law claims, declaratory relief, injunctive relief, or claims to attorneys fees, relating to the 2012 legislative elections as held under the Kentucky Supreme Court's Order of February 24, 2012, as against the Legislative Research Commission are DISMISSED WITH PREJUDICE, as there are no viable claims thereunder, as a matter of law.

RESPECTFULLY SUBMITTED:

s/ Laura H. Hendrix
Laura H. Hendrix
General Counsel
Legislative Research Commission
State Capitol, Room 104
Frankfort, Kentucky 40601
Telephone: (502) 564-8100
Laura.Hendrix@lrc.ky.gov

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2013, a copy of the foregoing Proposed Order was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail or electronic mail. Parties may access this filing through the Court's electronic filing system.

s/ Laura H. Hendrix

DEFENDANT LRC'S EXHIBIT 1

Plan: (HH001C04)
Plan Type: House Plan

Population Summary Report

Tuesday January 10, 2012 9:21 PM

DISTRICT	POPULATION	DEVIATION	% DEVN.
1	41,961	-1,433	-3.30
2	41,784	-1,610	-3.71
3	41,793	-1,601	-3.69
4	41,957	-1,437	-3.31
5	41,391	-2,003	-4.62
6	41,978	-1,416	-3.26
7	44,357	963	2.22
8	45,259	1,865	4.30
9	45,552	2,158	4.97
10	42,245	-1,149	-2.65
11	44,901	1,507	3.47
12	45,203	1,809	4.17
13	42,123	-1,271	-2.93
14	44,523	1,129	2.60
15	45,363	1,969	4.54
16	41,533	-1,861	-4.29
17	45,227	1,833	4.22
18	45,533	2,139	4.93
19	45,437	2,043	4.71
20	42,583	-811	-1.87
21	43,279	-115	-0.27
22	42,154	-1,240	-2.86
23	42,618	-776	-1.79
24	45,730	2,336	5.38
25	41,626	-1,768	-4.07
26	45,074	1,680	3.87
27	41,926	-1,468	-3.38
28	41,418	-1,976	-4.55
29	41,440	-1,954	-4.50
30	41,398	-1,996	-4.60
31	41,395	-1,999	-4.61
32	42,045	-1,349	-3.11
33	43,424	30	0.07
34	41,486	-1,908	-4.40
35	41,393	-2,001	-4.61

Plan: (HH001C04)
Type: House Plan

DISTRICT	POPULATION	DEVIATION	% DEVN.
36	41,654	-1,740	-4.01
37	41,396	-1,998	-4.60
38	41,403	-1,991	-4.59
39	41,390	-2,004	-4.62
40	42,217	-1,177	-2.71
41	41,424	-1,970	-4.54
42	41,436	-1,958	-4.51
43	41,436	-1,958	-4.51
44	41,556	-1,838	-4.24
45	44,029	635	1.46
46	41,660	-1,734	-4.00
47	45,563	2,169	5.00
48	43,942	548	1.26
49	41,402	-1,992	-4.59
50	43,437	43	0.10
51	43,168	-226	-0.52
52	45,565	2,171	5.00
53	41,392	-2,002	-4.61
54	44,360	966	2.23
55	43,885	491	1.13
56	44,576	1,182	2.72
57	41,952	-1,442	-3.32
58	45,564	2,170	5.00
59	45,208	1,814	4.18
60	45,565	2,171	5.00
61	42,213	-1,181	-2.72
62	45,563	2,169	5.00
63	45,564	2,170	5.00
64	45,565	2,171	5.00
65	45,441	2,047	4.72
66	45,565	2,171	5.00
67	41,391	-2,003	-4.62
68	45,565	2,171	5.00
69	45,563	2,169	5.00
70	43,731	337	0.78
71	43,028	-366	-0.84
72	42,992	-402	-0.93
73	41,400	-1,994	-4.60
74	45,418	2,024	4.66
75	42,450	-944	-2.18
76	41,809	-1,585	-3.65

Plan: (HH001C04)
Type: House Plan

DISTRICT	POPULATION	DEVIATION	% DEVN.
77	43,607	213	0.49
78	45,564	2,170	5.00
79	41,424	-1,970	-4.54
80	45,562	2,168	5.00
81	42,139	-1,255	-2.89
82	45,558	2,164	4.99
83	45,565	2,171	5.00
84	41,849	-1,545	-3.56
85	45,559	2,165	4.99
86	45,558	2,164	4.99
87	42,028	-1,366	-3.15
88	45,563	2,169	5.00
89	45,558	2,164	4.99
90	45,496	2,102	4.84
91	43,540	146	0.34
92	43,920	526	1.21
93	41,858	-1,536	-3.54
94	41,527	-1,867	-4.30
95	41,527	-1,867	-4.30
96	41,556	-1,838	-4.24
97	45,205	1,811	4.17
98	42,538	-856	-1.97
99	45,554	2,160	4.98
100	45,565	2,171	5.00

Total Population:	4,339,367
Ideal District Population:	43,394

Summary Statistics

Population Range:	41,390 to 45,730
Ratio Range:	1.10
Absolute Range:	-2,004 to 2,336
Absolute Overall Range:	4,340.00
Relative Range:	-4.62% to 5.38%
Relative Overall Range:	10.00%
Absolute Mean Deviation:	1,594.61
Relative Mean Deviation:	3.67%
Standard Deviation:	1,719.76

Plan: (SH001S02)
Plan Type: Senate Plan

Population Summary Report

Wednesday January 18, 2012 10:29 PM

DISTRICT	POPULATION	DEVIATION	% DEVN.
1	118,199	4,005	3.51
2	110,366	-3,828	-3.35
3	111,261	-2,933	-2.57
4	113,724	-470	-0.41
5	113,861	-333	-0.29
6	116,322	2,128	1.86
7	115,372	1,178	1.03
8	120,498	6,304	5.52
9	119,503	5,309	4.65
10	109,345	-4,849	-4.25
11	111,499	-2,695	-2.36
12	109,883	-4,311	-3.78
13	112,061	-2,133	-1.87
14	118,077	3,883	3.40
15	117,756	3,562	3.12
16	118,569	4,375	3.83
17	119,779	5,585	4.89
18	114,172	-22	-0.02
19	110,147	-4,047	-3.54
20	110,606	-3,588	-3.14
21	112,792	-1,402	-1.23
22	110,751	-3,443	-3.02
23	111,776	-2,418	-2.12
24	113,701	-493	-0.43
25	116,743	2,549	2.23
26	115,780	1,586	1.39
27	112,596	-1,598	-1.40
28	114,700	506	0.44
29	109,594	-4,600	-4.03
30	119,280	5,086	4.45
31	115,588	1,394	1.22
32	109,273	-4,921	-4.31
33	119,466	5,272	4.62
34	114,644	450	0.39
35	117,659	3,465	3.03

Plan: (SH001S02)
Type: Senate Plan

DISTRICT	POPULATION	DEVIATION	% DEVN.
36	109,462	-4,732	-4.14
37	115,301	1,107	0.97
38	109,261	-4,933	-4.32

Total Population: 4,339,367
Ideal District Population: 114,194

Summary Statistics

Population Range: 109,261 to 120,498
Ratio Range: 1.10
Absolute Range: -4,933 to 6,304
Absolute Overall Range: 11,237.00
Relative Range: -4.32% to 5.52%
Relative Overall Range: 9.84%
Absolute Mean Deviation: 3,039.29
Relative Mean Deviation: 2.66%
Standard Deviation: 3,554.99

Plan: (J0956B01)
Plan Type: Supreme Court Districts

Population Summary Report

Thursday December 29, 2011 3:00 PM

DISTRICT	POPULATION	DEVIATION	% DEVN.
1	600,757	-19,153	-3.09
2	598,131	-21,779	-3.51
3	594,349	-25,561	-4.12
4	741,096	121,186	19.55
5	599,224	-20,686	-3.34
6	597,414	-22,496	-3.63
7	608,396	-11,514	-1.86

Total Population: 4,339,367
Ideal District Population: 619,910

Summary Statistics

Population Range: 594,349 to 741,096
Ratio Range: 1.25
Absolute Range: -25,561 to 121,186
Absolute Overall Range: 146,747.00
Relative Range: -4.12% to 19.55%
Relative Overall Range: 23.67%
Absolute Mean Deviation: 34,625.00
Relative Mean Deviation: 5.59%
Standard Deviation: 53,614.56

DEFENDANT LRC'S EXHIBIT 2

Supreme Court of Kentucky

2012-SC-091-TG

LEGISLATIVE RESEARCH COMMISSION — APPELLANT

V.

APPEAL FROM FRANKLIN CIRCUIT COURT
FRANKLIN CIRCUIT COURT NO. 12-CI-00109
COURT OF APPEALS NO. 2012-CA-000266-MR

JOSEPH M. FISCHER, ET AL. — APPELLEES

AND

2012-SC-092-TG

LEGISLATIVE RESEARCH COMMISSION — APPELLANT

V.

APPEAL FROM FRANKLIN CIRCUIT COURT
FRANKLIN CIRCUIT COURT NO. 12-CI-00109
COURT OF APPEALS NO. 2012-CA-000264-I

JOSEPH M. FISCHER, ET AL. — APPELLEES

ORDER

AFFIRMING

Before this Court is the decision of the Franklin Circuit Court, which held House Bill 1 (2012), the reapportionment act of 2012, unconstitutional under Section 33 of the Kentucky Constitution and further enjoined the implementation of the new legislative

districts for the 2012 elections. Having considered the briefs filed by the parties and having heard oral argument thereon, this Court concludes that House Bill 1 (2012), the reapportionment act of 2012, is facially unconstitutional in violation of Section 33 of the Kentucky Constitution, as construed by *Fischer v. State Board of Elections,* 879 S.W.2d 475 (Ky.1994). Accordingly, we affirm the trial court.

Because of the need for certification of candidates by the Secretary of State no later than February 27, 2012, and to ensure an orderly process for the Secretary of State and the State Board of Elections to follow in conducting the upcoming elections, this Court is compelled to reiterate that Appellant's motion to dissolve the temporary injunction entered on February 7, 2012, in the above-styled actions has been denied. Until the General Assembly passes redistricting legislation that complies with Section 33 of the Kentucky Constitution, the terms of the injunction entered by the Franklin Circuit Court remain in place as follows:

1. The districts as enacted in the 2002 Ky. Acts and codified in KRS 5.200, et seq., remain in place with the election to be conducted with the boundaries in effect immediately prior to the enactment of House Bill 1 (2012).
2. The filing deadline for the aforesaid districts was February 10, 2012.

Due to the expedited nature of these actions, preparation of a full opinion at this time was not possible but such opinion will follow this order.

All concur, except Scott, J., not sitting.

ENTERED: February 24, 2012.

Chief Justice

DEFENDANT LRC'S EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION (AT COVINGTON)

KENNY BROWN, *et al.*,	:	**Case No. 13-CV-68-WOB-GFVT-DJB**
Plaintiffs,	:	**Judge William O. Bertelsman**
v.	:	**Judge Danny J. Boggs**
COMMONWEALTH OF KENTUCKY, *et al.*,	:	**Judge Gregory F. Van Tatenhove**
Defendants.	:	
MARTIN HERBERT, *et al.*,	:	**Case No. 13-CV-25-WOB-GFVT-DJB**
Plaintiffs,	:	**Judge William O. Bertelsman**
v.	:	**Judge Danny J. Boggs**
KENTUCKY STATE BOARD OF ELECTIONS, *et al.*,	:	**Judge Gregory F. Van Tatenhove**
Defendants.	:	

BROWN PLAINTIFFS RESPONSE TO DEFENDANT, ALISON LUNDERGAN GRIMES FIRST SET OF INTERROGATORIES DIRECTED TO THE _BROWN_ PLAINTIFFS

Plaintiffs in *Kenny Brown, et. al. v. Commonwealth, et. al.*, Case No. 13-CV-68- WOB-GFVT-DJB by and through their respective Counsel, hereby respond to Defendant, Alison Lundergan Grimes First Set of Interrogatories Directed to the *Brown* Plaintiffs.

Plaintiffs' answers and responses are made subject to the following which are preserved wherever applicable, and are applied as general objections that are not waived:

1. All questions as to competency, relevancy, materiality, privilege, and admissibility of the answers and responses and the subject matter thereof as evidence for any purpose in any further proceeding in this action (including the hearing of this action) and in any other action;

2. The right to object to the use of any such answer or response, or the subject matter thereof, on any ground in any further proceedings of this action (including the trial of this action) and in any other action;

3. The right at any time to revise, correct, add to, supplement, or clarify any of the answers and responses or objections contained herein and to provide information and produce evidence of any subsequently discovered facts; and

4. The right to assert additional privileges if warranted by new documents or evidence discovered at a later date.

General Objections

1. Plaintiffs object to these discovery requests and all definitions and instructions provided by Defendant to the extent Defendant seeks to impose any duty upon Plaintiffs beyond those envisioned in the Federal Rules of Civil Procedure.

2. Plaintiffs object to those discovery requests and all definitions and instructions to the extent they may be deemed to seek disclosure of documents or information protected by the attorney-client privilege or work product doctrine.

3. Plaintiffs object to these discovery requests and all definitions and instructions to the extent they may be deemed to seek disclosure of the mental impressions or legal strategies of its attorneys, which are protected from disclosure by the work product doctrine.

4. Plaintiffs object to Defendant's interrogatories and document requests to the extent they seek information not reasonably calculated to lead to the discovery of admissible evidence.

5. Plaintiffs object to Defendant's interrogatories to the extent they call for a narrative response.

6. Plaintiffs object to Defendant's interrogatories and document requests to the extent they seek information that is not limited to time periods relevant to this litigation.

7. Plaintiffs object to Defendant's interrogatories and document requests to the extent they call for information already known to, in the possession of, or otherwise available to the requesting party or its representatives.

8. Plaintiffs object to Defendant's interrogatories and document requests to the extent they seek information that is repetitive, internally or with regard to other discovery propounded by Plaintiffs.

9. Plaintiffs object to any interrogatory and document request that is moot, vague, ambiguous or unclear.

1. **Please describe each fact and each document supporting, contradicting, or in any way relating to your allegation in numerical paragraph 62 of the Complaint that the Secretary of State has "deliberately failed to constitutionally redistrict."**

RESPONSE: Objection. This interrogatory is overly broad, unduly burdensome, and not likely to lead to the discovery of relevant information. Plaintiffs further object to the characterization in this interrogatory of paragraph 62 of the Complaint as if the allegations therein applied exclusively and specifically to the Secretary of State. Further objecting, this request is inappropriate for initial discovery as contemplated by the Court's scheduling order and is in violation of same, and is likewise inappropriate and irrelevant given Plaintiffs' previous voluntary withdrawal of their claims for money damages; furthermore, this Interrogatory calls for information that may be protected by the attorney-client and/or work product doctrine. Without waiving these objections and in the spirit of cooperation envisioned under the Civil Rules, without revealing information covered by the attorney-client and/or work product doctrine, Plaintiffs state as follows:

The Secretary of State, after the Commonwealth of Kentucky received March, 2011, 2010 Census data: (1) failed to propose maps that met the requirements of the United States and Kentucky Constitutions to the Kentucky General Assembly; (2) failed to declare or state to the Kentucky General Assembly that the 2012 redistricting was unconstitutional; (3) deliberately and willfully conducted the 2012 elections using unconstitutional maps in violation of the United States and Kentucky Constitutions; (4) conducted a special election in June, 2013, for a legislative house district that, in combination with other districts was constitutionally mal-apportioned; and (5) the Kentucky Secretary of State, as Chief Elections Officer, as provided in K.R.S. 117.015, is responsible, as a board member and chair, for the administration of the election laws of the state; in that capacity, the Kentucky Secretary of State should have, but failed to, vindicate the rights of Kentuckians to free and fair constitutional elections by seeking judicial relief following the receipt of the 2010 Census data, given the failure of the Kentucky General Assembly to pass constitutional redistricting maps.

2. Please describe each fact and each document supporting, contradicting, or in any way relating to your allegation in numerical paragraph 62 of the Complaint that the State Board of Elections has "deliberately failed to constitutionally redistrict."

RESPONSE: Objection. Plaintiffs incorporate their objections stated in their response to interrogatory No. 1 as if restated here verbatim. Plaintiffs further object to the characterization in this interrogatory of paragraph 62 of the Complaint as if the allegations therein applied exclusively and specifically to the State Board of Elections. Without waiving these objections or revealing information covered by the attorney-client and/or work product doctrine and in the spirit of cooperation envisioned under the Civil Rules, Plaintiffs state:

The State Board of Elections, and specifically its members, after the Commonwealth of Kentucky received March, 2011, 2010 Census data: (1) failed to propose maps that met the requirements of the United States and Kentucky Constitutions to the Kentucky General Assembly; (2) failed to declare or state to Kentucky General Assembly that the 2012 redistricting was unconstitutional; (3) deliberately and willfully conducted the 2012 elections using unconstitutional maps in violation of the United States and Kentucky Constitutions; (4) conducted a special election in June, 2013, for a legislative house district that, in combination with other districts was constitutionally mal-apportioned; and (5) the Kentucky State Board of Elections, as provided in K.R.S. 117.015, is responsible for the administration of the election laws of the state; and in that capacity, the Kentucky State Board of Elections should have, but failed to, vindicate the rights of Kentuckians to free and fair constitutional elections by seeking judicial relief following the receipt of the 2010 Census data, given the failure of the Kentucky General Assembly to pass constitutional redistricting maps.

3. Please describe each fact and each document supporting, contradicting, or in any way relating to your allegation in numerical paragraph 64 of the Complaint that the Secretary of State "abused the authority of [her] respective office[] and, while acting under color of law and with knowledge of Plaintiffs' established rights, used [her] office[] to violate their rights to equal protection under the law, equal access to vote and equal right to vote and representation."

RESPONSE: Objection. Plaintiffs incorporate their objections and answers stated in their response to interrogatory No. 1 as if restated here verbatim. Without waiving these objections, or revealing information covered by the attorney-client and/or work product doctrine and in the spirit cooperation envisioned under the Civil Rules, Plaintiffs further object to the characterization in this interrogatory of paragraph 64 of the Complaint as if the allegations therein applied exclusively and specifically to the Secretary of State:

See response to Interrogatory No. 1.

4. Please describe each fact and each document supporting, contradicting, or in any way relating to your allegation in numerical paragraph 64 of the Complaint that the State Board of Elections "abused the authority of [its] respective office[] and, while acting under color of law and with knowledge of Plaintiffs' established rights, used [its] office[] to violate their rights to equal protection under the law, equal access to vote and equal right to vote and representation."

RESPONSE: Plaintiffs incorporate their objections and answers stated in their response to interrogatory No. 2 as if restated here verbatim. Without waiving these objections or revealing information covered by the attorney-client and/or work product doctrine, and in the spirit cooperation envisioned under the Civil Rules, Plaintiffs further object to the characterization in this interrogatory of paragraph 64 of the Complaint as if the allegations therein applied exclusively and specifically to the Kentucky Board of Elections:

See response to Interrogatory No. 2.

5. Please enumerate any and all money damages that you claim in numerical paragraph 66 of the Complaint you continue to suffer as a result of the alleged constitutional violations that are the subject of this lawsuit.

RESPONSE: Objection. This interrogatory is overly broad, unduly burdensome, and not likely to lead to the discovery of relevant information. Further objecting, this interrogatory is inappropriate and irrelevant given Plaintiffs' withdrawal of their claims for money damages. Finally, this Interrogatory calls for information that is protected by the attorney-client and/or work product doctrine. Without waiving these objections and in the spirit of cooperation envisioned under the Civil Rules, Plaintiffs state that:

Plaintiffs no longer have a claim in this Action for money damages, but have retained their claims for attorney fees. Answering further without waiving the foregoing objections, Plaintiffs

have suffered vote dilution, inadequate representation in their legislature, and damage as a result of having to undergo an election with unconstitutional boundaries, and confusion as to appropriate districts and voter data as a result of the unconstitutional districts drawn in 2011. Without waiving the foregoing objections and further answering, Northern Kentucky, where Plaintiffs live, receive only a fraction in value of the tax money paid to Frankfort in government services such as infrastructure improvements, services, schools and other areas, which fact only amplifies the damages caused by taxation without representation. The damages are capable of calculation by the amount of tax revenues Plaintiffs have paid to Frankfort since March, 2011, or a portion thereof, by an equal percentage of mal-apportionment suffered. Further answering and subject to the foregoing objections, Plaintiffs also have claims for attorney fees – which although not treated as damages but costs under 42 USC 1988 and 42 USC 1973l – those fees continue to increase every day, indeed the fees are escalating in part due to Plaintiffs having to propound discovery to Defendants to prove straightforward facts such as population data, or in responding to discovery requests that do not significantly advance the merits of the case to its conclusion.

6. Please describe each fact and each document supporting, contradicting, or in any way relating to your allegation in numerical paragraph 71 of the Complaint that the Secretary of State "fail[ed] to conduct constitutional redistricting."

RESPONSE: Plaintiffs incorporate their objections and answers stated in their response to interrogatory No. 1 as if restated here verbatim. Plaintiffs further object to the characterization in this interrogatory of paragraph 71 of the Complaint as if the allegations therein applied exclusively and specifically to the Secretary of State. Without waiving these objections or revealing information covered by the attorney-client and/or work product doctrine:

See response to Interrogatory No. 1.

7. Please describe each fact and each document supporting, contradicting, or in any way relating to your allegation in numerical paragraph 71 of the Complaint that the State Board of Elections "fail[ed] to conduct constitutional redistricting."

RESPONSE: Plaintiffs incorporate their objections and answers stated in their response to interrogatory No. 2 as if restated here verbatim. Plaintiffs further object to the characterization in this interrogatory of paragraph 71 of the Complaint as if the allegations therein applied exclusively and specifically to the Kentucky Board of Elections. Without waiving these objections or revealing information covered by the attorney-client and/or work product doctrine, and in the spirit cooperation envisioned under the Civil Rules:

See response to Interrogatory No. 2.

VERIFICATION

Pursuant to 28 U.S.C. 1746, I, Kenny Brown, declare and verify, under penalty of perjury that the foregoing is true and correct. Executed on July 9, 2013.

Kenny Brown, in his official and individual capacity

SIGNATURE REGARDING OBJECTIONS

AS TO ALL OBJECTIONS:

Christopher Wiest (~~0077931~~ 90725)

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing upon counsel for Defendants and Plaintiffs in the consolidated *Herbert* case, this 9th day of July, 2013, via electronic mail and ordinary U.S. mail.

/s/Christopher Wiest

DEFENDANT LRC'S EXHIBIT 4

Supreme Court of Kentucky

CASE NO. 2012-SC-091-TG
2012-SC-092-TG

LEGISLATIVE RESEARCH COMMISSION — **APPELLANT**

v.

JOSEPH M. FISCHER, et al., — **APPELLEES**

BRIEF FOR APPELLANT
LEGISLATIVE RESEARCH COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Brief for Appellant by electronic mail and U.S. Mail this 22nd day of February, 2012, upon the following: Victor B. Maddox, John David Dyche, Jennifer Metzger Stinnett, Jason M. Nemes, 2700 PNC Tower, 101 S. Fifth St., Louisville, KY 40202; David Tachau, Dustin Meek, Tachau Meek PLC, 3600 PNC Tower, 101 S. Fifth St., Louisville KY 40202; Scott White, Sarah Mattingly, Morgan & Pottinger, 133 W. Short St., Lexington, KY 40507; Anita Britton, Britton Osborn Johnson, 200 W. Vine St., Ste. 800, Lexington KY 40507; Jack Conway, Sean Riley, Office of the Attorney General, 700 Capitol Ave., Ste. 118, Frankfort, KY 40601; and Phillip Shepherd, Chief Circuit Judge, Franklin Circuit Court, 669 Chamberlin Ave., Frankfort, KY 40601.

Counsel For Appellant

INTRODUCTION

While questioning the soundness of this Court's decision in *Fischer II* that "county integrity" must be protected with "mathematical precision," the Franklin Circuit Court felt bound by that decision to declare that the 2012 apportionment plan contravenes § 33 KY. CONST. And despite recognizing that the 2002 legislative districts deviate from one-person, one-vote to a far greater extent than the 2012 districts, the Court enjoined use of the 2012 districts to preserve the right of voters in presently odd-numbered Senate districts to vote for a Senate candidate in 2012 rather than 2014.

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STATEMENT OF THE CASE

The Franklin Circuit Court enjoined the Secretary of State and Board of Elections from conducting elections under the 2012 apportionment plan and required the 2012 legislative elections to occur under the prior (2002) apportionment plan which it replaced.

In contrast, this Court's most recent decision postponed the effectiveness of its decision declaring the new apportionment plan unconstitutional, and allowed elections to go forward under the new apportionment plan that had been concurrently declared unconstitutional. *Fischer v. State Bd. of Elections*, 879 S.W.2d 475, 480 (Ky. 1994) (*Fischer II*). In *Fischer II*, this Court allowed the General Assembly ample time to reapportion the districts consistently with the Court's newly rendered opinion. *See Fischer II*, 879 S.W.2d at 480. That decision is consistent with standard practice in federal one-person, one-vote cases. *See* pp. 33-34, *infra*.

In contrast to this Court's Solomonic decision, the Circuit Court's injunction requires the General Assembly to either forgo its constitutional right of appeal and enact new reapportionment legislation consistent with the Circuit Judge's views – including his opinion concerning changing odd and even-numbered Senate districts – or permit elections to proceed under the 2002 districts.

But it is undisputed that the 2002 districts deviate egregiously from one-person, one-vote. With the passage of a decade that saw significant population shifts throughout Kentucky, the 2002 districts are significantly malapportioned. For example, House district 60 now has a +42.7% deviation from the ideal per-district population and Senate district 11 now has a +22.2 deviation. In contrast, all the 2012 districts except two

comply with the "plus-or-minus 5%" rule of *Fischer II*. Moreover, it is undisputed that the 2012 Senate districts comply with the federal rule, which requires an overall range of less than 10% between the least populous district and the most populous district, and the 2012 House districts exceed the overall range of 10% by a statistically insignificant difference.

Clearly, the 2012 apportionment plan comes far closer to achieving population equality than the 2002 districts. Consequently, the Temporary Injunction effectuates far more voter dilution than does House Bill 1. Appellees nevertheless argue that dissolution of the Temporary Injunction "would effectively deny the constitutional right of the Plaintiffs and all citizens of the Commonwealth to have elections using districts that comply with the clear mandate of this Court and the Kentucky Constitution."[1] But it is indisputable that the 2002 legislative districts violate the "plus-or-minus 5%" test of *Fischer II* to a far greater extent than House Bill 1 (2012).

The Court should therefore dissolve the Temporary Injunction – even if it affirms the declaration that House Bill 1 violates the *Fischer II* standards – and allow the 2012 election to proceed under the 2012 districts while the legislature enacts a new apportionment plan (if necessary) for the next election cycle.

The filing deadline need not be delayed again.

Contrary to the Secretary of State, dissolution of the Temporary Injunction, allowing legislative elections to proceed under the 2012 districts, does not require the filing deadline to be reopened, at all. The statutory deadline for filing to run in a 2012 district was January 31 (and was extended by one week under the Restraining Order).

[1] Respondents'/Plaintiffs' Response to LRC Motion for Interlocutory Relief Pursuant to CR 65.07, p. 1 (hereinafter "Response").

Accordingly, any person who desired to be a candidate for the House or Senate in a 2012 district had ample time to file her candidacy papers.

The districts in which some candidates reside are numbered differently in the 2002 plan than in the 2012 plan. When the Franklin Circuit Court issued the Temporary Injunction, the Secretary of State unilaterally required such candidates to withdraw their filings to run in the 2012 districts as a precondition to filing to run in a 2002 district. Apparently, the Secretary of State believed that the prohibition against filing as a candidate for more than one office would preclude a candidate who had filed for a 2012 district from filing in a differently numbered 2002 district. But requiring candidates to withdraw their filings was both unnecessary and unwise. Clearly, when the dust settles on this litigation, there will be only one set of legislative districts for the 2012 elections – either the 2002 districts or the 2012 districts. A candidate whose residence is in two differently numbered districts (depending on whether the 2002 or 2012 boundaries are used) is not filing for two offices because he will obviously withdraw from one when the other is finalized as the operative district.

Accordingly, it was absolutely unnecessary to require the candidates to withdraw their filing papers. And the remedy is simple: the withdrawn candidacy filings can be deemed valid despite the involuntary withdrawal improvidently required by the Secretary of State. Thus, every candidate who filed otherwise valid papers to run for the House or the Senate in a 2012 district pursuant to House Bill 1 prior to the expiration of the January 31 deadline (as extended one week by the Restraining Order) can simply be deemed to have timely filed their candidacy papers. Dissolving the Temporary Injunction will not further delay the 2012 legislative elections.

STATEMENT OF FACTS

The Kentucky General Assembly acted promptly to redistrict the Commonwealth's legislative and judicial districts by enacting 2012 Regular Session House Bill 1, which was signed by the Governor and became law on January 20, 2012. HB 1 contained an emergency clause pursuant to Kentucky Constitution Section 55, thus it became law upon the Governor's signature. The filing deadline of January 31, 2012, at 4:00 p.m., was established by KRS 118.165.

On January 26, 2012, two business days prior to the filing deadline, the Plaintiffs (Appellees) Joseph M. Fischer, Jeff Hoover, Kim King, Frey Todd and Anthony Gaydos (hereinafter collectively "Rep. Hoover") filed a Verified Complaint and Motion for Temporary Injunction, and noticed it to be heard on Monday, January 30, 2012, at 10:30 a.m. The Plaintiffs sought a Temporary Injunction enjoining the Secretary of State and the State Board of Elections from certifying any candidates' names as nominees, from certifying the names of candidates to county clerks, from certifying the order of the ballot, "conducting or preparing to conduct elections for the existing legislative districts, created by statute for the General Assembly of Kentucky under the provisions of HB 1", and from enforcing the statutory filing deadline.

The Appellees David B. Stevens, M.D., David O'Neill, Jack Stephenson, Marcus McGraw, and Kathy Stein (hereinafter collectively "Senator Stein") intervened as Plaintiffs to contest the Senate districts in HB 1.

On January 31, 2012, the Franklin Circuit Court entered a nonappealable Restraining Order enjoining enforcement of the filing deadline until February 7, 2012 at 4:30 p.m. The Court then set a hearing date for February 6, 2012 to hear the Motion for

Temporary Injunction. The Court also permitted the Legislative Research Commission (hereinafter "LRC") to intervene under KRS 5.005.

On February 7, 2012, Franklin Circuit Court issued a Temporary Injunction enjoining election officials from conducting elections for the Kentucky Senate and House of Representatives pursuant to the districts in House Bill 1 and required the 2012 elections to proceed under the districts in the preexisting apportionment plan that had been enacted in 2002. The Franklin Circuit Court held that the apportionment plan for both the House and Senate violated § 33 KY. CONST., as construed by this Court in *Fischer II*, because (1) each includes one district whose population exceeds the ideal per-district population by more than 5%, and (2) each divides more than the fewest number of counties mathematically possible while staying within the plus-or-minus 5% standard announced in *Fischer II*.

The Court also held that Senator Stein had raised a significant Constitutional issue by her challenge to the portion of House Bill 1 that moved the Senate district numbered 4 to the territory in which she resides, which had previously been within the Senate district numbered 13. But the Court stated that it needed more evidence to decide whether that change unconstitutionally deprived those voters of the right to vote for a Senator for two more years than if their residence had remained within an odd-numbered district.

The Circuit Court recited that there was no just reason to delay an appeal from its declaratory judgment invalidating House Bill 1 as being in contravention of § 33 KY. CONST. as construed by this Court in *Fischer II*.

LRC filed a Notice of Appeal from the Circuit Court's February 7, 2012 judgment on February 10, 2012. The Court granted LRC's motion to transfer this appeal and, upon

the recommendation of the Court of Appeals, also transferred LRC's Motion pursuant to CR 65.07 to dissolve the Temporary Injunction.

ARGUMENT

I. *Fischer II* was modified by *Jensen*, and should be further modified or overruled.

A. The holding in *Fischer II* that the General Assembly must divide only the fewest number of counties mathematically possible – while also achieving the plus-or-minus 5% standard for population equality – should be replaced with a requirement that the General Assembly must endeavor in good faith to protect county boundaries to the extent practicable while also attaining the requisite population equality.

In *Fischer II*, a 5-2 majority of this Court adopted a standard for protecting "county integrity" that is found nowhere in the Constitution of Kentucky. Simply stated, § 33 KY. CONST. requires that no county can be split in an apportionment act, at all. But *Fischer II* correctly declared that provision unconstitutional under the federal Equal Protection Clause line of cases.[2] In a state such as Kentucky which has more counties that it has House districts, with several of those counties being above the statistical ideal per-district population, an absolute prohibition against splitting counties is void and unenforceable as a violation of the Equal Protection Clause of the U.S. Constitution. *Accord Wells v. White*, 623 S.W.2d 187, 200 (Ark. 1981) (provision in Arkansas

[2] While the 1891 Constitutional Convention decided that "the command with respect to the division of any county is absolute," "any such view is now untenable . . . ." 879 S.W.2d at 477, 479. The author of *Fischer II* recognized that the unenforceability of the anti-county-splitting provision in § 33 resulted from application of *Baker v. Carr*, 369 U.S. 186 (1962) and its progeny. *Jensen v. Kentucky State Bd. of Elections*, 959 S.W.2d 771, 777 (Ky. 1997) (Lambert, J., dissenting).

Constitution prohibiting splitting county boundaries "is likewise unconstitutional in that it violates the principle of one-man, one-vote.").[3]

Instead of simply declaring unconstitutional and unenforceable the anti-county-splitting clause in § 33, however, *Fischer II* substituted a different constitutional test:

> The mandate of Section 33 is to make full use of the maximum constitutional population variation as set forth herein and divide the fewest possible number of counties.

879 S.W.2d at 479. But § 33 does not require the General Assembly to "divide the fewest possible number of counties." It requires the General Assembly to not split any county, at all; a mandate which is indisputably unconstitutional. Accordingly, the majority in *Fischer II* created a new test for protecting county boundaries that is found nowhere in the Constitution. The requirement that an apportionment act must divide the fewest number of counties mathematically possible is a judge-made standard that is not required by the Constitution.

The majority opinion's ode to the importance of counties in the lives of Kentuckians is nothing less than a pronouncement that public policy should protect county integrity as vigorously as possible, subject to the constitutional command of equality. But it is well settled that it is for the General Assembly, not the judiciary, to establish public policy:

> Shaping public policy is the exclusive domain of the General Assembly. We have held that "[t]he establishment of public policy is granted to the legislature alone. It is beyond the power of a court to vitiate an act of the legislature on the grounds that the public policy promulgated therein is contrary to what the court considers to be in the public interest."

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[3] *See, e.g., Connor v. Finch*, 431 U.S. 407, 418-19 (1977) ("[T]he policy against breaking county boundary lines is virtually impossible of accomplishment in a State where population is unevenly distributed . . . ."); *see also Reynolds v. Sims*, 377 U.S. 533, 581 (1964).

Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc., 286 S.W.3d 790, 807 (Ky. 2009) (citing *Commonwealth ex rel. Cowan v. Wilkinson*, 828 S.W.2d 610, 614 (Ky. 1992)).

In *Jensen*,[4] this Court retreated from protecting county integrity with "mathematical precision" at the expense of equality of representation. Indeed, the author of *Fischer II* said in his dissent in *Jensen* that the majority was rejecting the "central holding" in *Fischer II*. 959 S.W.2d at 777 (Lambert, J., dissenting).

In *Jensen*, the plaintiff argued that the principle of protecting "county integrity" with "mathematical precision" required the General Assembly to allocate a full House district to any county with sufficient population to contain a full House district. This Court recognized that the drafters of the compromise embodied in § 33 probably intended the result sought by the plaintiff. But because that result was not mandated by the express language of § 33, this Court refused to impose that requirement upon the General Assembly when apportioning House districts:

> The delegates [at the 1891 Convention] probably did not foresee that a county with sufficient population to contain a whole district within its borders might not be given such a district. However, regardless of what the delegates may or may not have foreseen, **that requirement was not included in the language of Section 33**.

959 S.W.2d at 775 (emphasis added).

Of course, the same is true of the *Fischer II* standard requiring splitting the fewest number of counties mathematically possible: "that requirement was not included in the language of Section 33."

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[4] *Jensen v. Ky. State Bd. of Elections*, 959 S.W.2d 771, 776 (Ky. 1997).

Thus, *Jensen* rejected an effort to extend the "county integrity" principle, squarely holding:

> We have long held that when the goals of population equality and county integrity inevitably collide, the requirement of approximate equality of population must control.

959 S.W.2d at 774.

In the course of holding that *Fischer II* did not literally require the result sought by the appellant in *Jensen*, this Court quoted its holding in *Fischer II*. Rep. Hoover and Senator Stein argue that was a reaffirmation that dividing "the fewest number of counties" requires adhering to a mathematical formulation of that test. LRC respectfully suggests that *Jensen* represents a relaxation of county integrity protection, as the dissent in *Jensen* concluded, and that splitting 28 (rather than 24) small counties in pursuant of population equality should not render House Bill 1 *per se* unconstitutional.

Moreover, the mathematical precision demanded by Rep. Hoover would result in "county integrity" being denigrated, rather than protected. As the number of less populous counties that cannot be split is increased, the number of more populous counties that must be split increases commensurately. Thus, in the name of protecting "county integrity," *Fischer II* requires larger counties to be balkanized more than would otherwise be necessary to satisfy the "plus-or-minus 5% rule." In short, *Fischer II* protects smaller counties at the expense of larger counties, leaving "county integrity" in the eye of the beholder.

The other flaw in the "mathematical precision" interpretation of *Fischer II* is that it requires every Kentucky reapportionment plan to begin the decade at the maximum population deviation permitted by federal constitutional law. The inevitable result is that

Kentucky's legislative districts quickly violate one-person, one-vote and, by the end of the decade, are egregiously malapportioned. This consequence flows from "[t]he mandate" of *Fischer II* "to make full use of the maximum constitutional population variation" allowed by law "and divide the fewest possible number of counties." 879 S.W.2d at 479. Thus, interpreting *Fischer II* as requiring splitting "with mathematical precision the fewest number of counties that must be divided" (Response, p. 4.) at the outer limits of one-person, one-vote means that the inevitable collision with population equality occurs immediately, and the equally inevitable result is that population shifts leave Kentucky's legislative districts seriously malapportioned at the end of the ensuing decade. That is clearly true of the 2002 districts that would prevail in the 2012 elections if the Temporary Injunction is not dissolved.

In this case, the Franklin Circuit Court candidly critiqued this fallacy in *Fischer II*'s reasoning, and invited this Court to overrule it:

> It is apparent that the Supreme Court's ruling in Fischer II has had unintended consequences. . . . It is a concern of this Court that the Fischer II mandate *requires* the legislature to "make maximum use" of the 10% population variance it approved in that case. As a result, each new redistricting plan post-Fischer II must begin the decennial period with a 10% deviation in the population of districts, and this variation is virtually certain to increase with each passing year as a result of normal demographic trends and the movement of people from rural to urban areas. Accordingly, Fischer II seems to guarantee districts that over time will violate the 10% variation standard even more quickly, because it *starts* with a 10% variation.
>
> Likewise, Fischer II is based on the Supreme Court's belief that county integrity and population equality can always be reconciled, but it is apparent from the proceedings in this case that the constitutional value of population equality is significantly impaired by the requirement to preserve county integrity. . . . All of these considerations militate in favor of giving greater weight to population equality than county integrity when those values clash, as they inevitably do. Those considerations, however, must be addressed to the Kentucky Supreme Court, not to a trial court that

is required to apply the binding precedent of Fischer II.

(Opinion at 3-4) (footnote omitted) (italics in original).

Holding that it is bound by *Fischer II*, the Franklin Circuit Court held that, under *Fischer II*, the 2012 reapportionment plan for both the Senate and House of Representatives contravenes § 33 KY. CONST. because: (1) each includes one district that exceeds the so-called ideal per-district population by more than 5%; and (2) each divides more than the minimum number of counties mathematically possible while also achieving the "plus or minus 5%" standard announced in *Fischer II*. The Franklin Circuit Court entered a final judgment declaring House Bill 1 unconstitutional for those violations of the 5% rule and made that judgment appealable under CR 54.02.

But the standard erected by *Fischer II* is not required by the Constitution. The policy question of preserving certain county boundaries is therefore remitted by the doctrine of separation of governmental powers to the General Assembly. Again, *Jensen* is on point:

> Apportionment is primarily a political and legislative process. . . . Our only role in this process is to ascertain whether a particular redistricting plan passes constitutional muster, not whether a better plan could be crafted.

959 S.W.2d at 776 (citation omitted).

To the extent *Jensen* has not already done so, *Fischer II* should be modified or overruled.[5] The Court should replace the requirement that the reapportionment plan split

[5] "'We have long recognized, of course, that the doctrine of *stare decisis* is less rigid in its application to constitutional precedents' . . . 'because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.'" *Matheney v. Commonwealth*, 191 S.W.3d 599, 621 (Ky. 2006) (Cooper, J., dissenting) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991); *Agostini v. Felton*, 521 U.S. 203, 235 (1997)). "'It is thus not only our prerogative but also our duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question. And if the precedent or its rationale is of doubtful validity, then it should not stand.'" *Bright v. Am. Greetings Corp.*, 62 S.W.3d 381, 387 (Ky. 2001) (quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627-628 (1974)). In recent years,

the fewest number of counties mathematically possible with a test that echoes the federal test for population equality, namely, to "make an honest and good faith effort to construct districts [splitting the least number of county lines] . . . as is practicable" while maximizing population equality. *Reynolds v. Sims*, 377 U.S. 533, 577 (1964).

An illustrative precedent is *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983), the sequel to the Tennessee decision relied upon by the majority in *Fischer II*.[6] Having previously declared unconstitutional the provision in the Tennessee Constitution prohibiting splitting county lines, the Tennessee Supreme Court decided that "the Legislature must enact a House Plan reasonably close to dividing only 25 counties" (the minimum number mathematically necessary to split). 656 S.W.2d at 842. "If the legislature proceeds in good faith," it can divide more than the mathematical minimum.

Another illustrative precedent is *Logan v. O'Neill*, 448 A.2d 1306 (Conn. 1982). In that case, the Connecticut constitution provided that "no town shall be divided" when drawing legislative districts. It was conceded that the apportionment plan "divides more towns than necessary to meet the federal [one-person, one-vote] requirements." *Id.* at 1309. The challengers presented expert testimony that apportionment plans could be drawn "which resulted in fewer town segments than the adopted plan." *Id.* at 1311. The Court rejected "[t]he plaintiffs' contention . . . that the town integrity principle requires the General Assembly to adopt [the plan] . . . which most effectively minimizes the cutting of town lines." *Id.* at 1312. The Court squarely held that political decision is entrusted to the "judgment" of the legislature. *Id.*

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this Court has overruled settled precedent without discussing *stare decisis*. *See Fletcher v. Commonwealth ex rel. Stumbo*, 163 S.W.3d 852, 869 (Ky. 2005); *Martin v. Commonwealth*, 96 S.W.3d 38, 56 (Ky. 2003).

[6] 897 S.W.2d at 479 (citing *State ex rel. Lockert v. Crowell*, 631 S.W.2d 702 (Tenn. 1982)).

And another illustrative precedent is *In re Reapportionment Plan for Pennsylvania General Assembly*, 442 A.2d 661 (Pa. 1981). In that case, the Pennsylvania constitution provided that, "[u]nless absolutely necessary no county . . . shall be divided in forming" legislative districts. *Id.* at 666 (quoting Pa. Const. art. II, § 16). The court rejected the challengers' argument that splitting county boundaries was permitted by the state constitution "only if these deviations are absolutely necessary to survive federal equal protection analysis." *Id.* The court squarely held that "adherence to political subdivision lines must yield to this 'overriding objective'" of population equality. *Id.* The court therefore held that the decision as to how many county lines to split is remitted to the "constitutionally permissible judgment" of the legislature. *Id.* at 668.

By allowing the General Assembly to split a handful of counties in addition to the mathematical minimum, the Court would allow the General Assembly to keep larger portions of more populous counties intact. And by eliminating the requirement that an apportionment plan must start the decade at the outer limits of one-person, one vote, this Court would restore its prior precedent's holding that population equality is the paramount concern of the Kentucky Constitution. *Stiglitz v. Schardien*, 239 Ky. 799, 40 S.W.2d 315, 320 (1931); *Ragland v. Anderson*, 125 Ky. 141, 100 S.W. 865 (1907). These modifications would promote both population equality and county integrity while recognizing that implementing those goals by drawing the district boundary lines is, in the final analysis, a political question.[7]

Moreover, overruling or modifying *Fischer II* does not "declare the preservation of county integrity irrelevant for redistricting purposes . . . ." (Response at 32.) Quite

[7] Kentucky adheres to the political question doctrine of nonjusticiability. *Fletcher v. Commonwealth ex rel. Stumbo*, 163 S.W.3d 852, 860 (Ky. 2005).

the contrary, modifying *Fischer II* would allow the General Assembly to exercise the lawmaking power in a manner which preserves the integrity of the more populous counties, not just the least populous counties. And it would not deprive the General Assembly of the discretion to protect the integrity of small counties, as well, to the extent that can be done while accommodating the paramount principle of population equality.

This Court should dissolve the Temporary Injunction and permit the 2012 election cycle to proceed using the districts enacted in House Bill 1. *See Fischer II* at 480. The Court could then determine the constitutionality of House Bill 1 according to its customary schedule, while giving the General Assembly ample time thereafter to enact further legislation – if any – necessitated by this Court's decision.

B. The Court should also clarify that population equality is satisfied by attaining an overall range of 10% between the least populous district and the most populous district, not the "plus-or-minus 5%" deviation from the ideal per-district population erroneously adopted by *Fischer II*.

In *Fischer II*, this Court held that the apportionment plan challenged in that case satisfied federal one-person, one-vote standards. 879 S.W.2d at 478. This Court first correctly recognized that federal Constitutional law for state legislative apportionment is less stringent than the requirements for Congressional redistricting:

> It is important to note, however, that while controlling federal decisions require virtual perfection in the apportionment of Congressional districts, no such rule prevails with respect to the apportionment of state legislative districts.

Id. (citing *Connor v. Finch*, 431 U.S. 407 (1977); *Gaffney v. Cummings*, 412 U.S. 735 (1973)).[8]

[8] The cases relied upon by Rep. Hoover support this conclusion. For example, in *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996), the court expressly stated that "the equal population requirements for congressional districts, which are imposed by Art. I, § 2 of the Constitution, are more stringent than those

Noting that the apportionment plan at issue contained "a population deviation range of -4.97% to +4.94% from the ideal district population . . .", *id.* at 476, the majority articulated the federal standard as a deviation from the ideal, per-district population that "does not exceed -5% to +5% . . . ." *Id.* at 478. In *Jensen*, this Court interpreted the federal standard adopted in *Fischer II* as "a maximum variation of plus-or-minus 5% from the ideal population of a legislative district." 959 S.W.2d at 772.

But the federal standard is an overall range of 10% between the least populous district and the most populous district, not a deviation of plus or minus 5% from the ideal, per-district population. While deviation from the ideal district is used in Congressional redistricting under the Apportionment Clause, state legislative redistricting is governed by the Equal Protection Clause. The dispositive question for equal protection is the relative voting strength of the most populous district compared to the least populous district and the 10% overall range evolved as a rebuttable presumption of equality of voting strength.[9]

The precedents relied upon by Rep. Hoover squarely support LRC's analysis. For example, in *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996) the Fourth Circuit squarely held that the "[m]aximum deviation is the sum of the absolute value of the deviation of the

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for state or local legislative districts, which are governed by the Equal Protection Clause of the Fourteenth Amendment." Rep. Hoover nevertheless argues: "Ordinarily, legislative districts must be nearly identical in population, as is the case in congressional redistricting." (Response, p. 30.)

[9] LRC concedes that the federal 10% rule refers to an overall range between the least populous district and the most populous district of "less than 10%," as distinguished from "10% or less. " While a percentage stated as 9.9 to infinity is not statistically significantly different from a percentage stated as 10.0 to infinity, LRC concedes that the correct collocation of words is "less than 10%." However, Rep. Hoover's argument that LRC contends that the federal law allows deviations from the ideal per-district population "of as much as 10%" misstates LRC's argument. (Response at 27.) The federal 10% rule refers to the overall range between the least populous district and the most populous district.

district with the smallest population and that of the district with the largest population." 93 F.3d at 1216, n. 2.[10]

Thus, under the federal 10% rule, a district may exceed a 5% deviation from the ideal, per-district population, so long as the overall range is less than 10%. Of course, arithmetically, the most and least populous districts could not deviate much from plus-or-minus 5% without causing the apportionment plan to miss the 10% overall range. Nevertheless, one or two districts may exceed +5%, as occurs in House Bill 1, if the overall range to the least populous district is less than 10%.

The Franklin Circuit Court declared House Bill 1 unconstitutional under *Fischer II's* "plus-or-minus 5%" rule solely because House District 24 varies by +5.38%, while Senate District 8 varies by +5.52%. (Opinion, p. 5, Findings of Fact ¶ 2; *id* p. 8, Conclusion of Law ¶ 3.) ("House Bill 1 fails to comply with the 'maximum constitutional population variation' as set forth in *Fischer* by virtue of the fact that at least **one** House District and **one** Senate District have a population variance greater than 5%.") (emphasis added).

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[10] Because the equal protection inquiry is the relative voting strength between districts, federal law looks to the "overall range" of the population deviation between the least populous county and the most populous county is 10% or less. *Brown v. Thomson*, 462 U.S. 835 (1983). It is therefore important to understand that the "maximum population deviation" is **not** the "plus or minus 5%" invented in *Fischer II*. Stating a statistic as plus or minus relative to the so-called "ideal population of a district" is a "relative deviation." NATIONAL CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2010, at 23 (2009). The federal 10% rule is not a "relative deviation" from the ideal of plus-or-minus 5%, but is the "overall range." "The 'overall range' is the difference in population between the largest and smallest districts . . . . Although the courts normally measure a plan using the statistician's 'overall range,' they almost always call it something else, such as 'maximum deviation.'" *Id.*, pp. 23-24, n. 71 (collecting cases). The courts often add the relative deviation of the least populous district to the relative deviation of the most populous district and refer to the sum as the "maximum deviation between any two districts . . . ." *Gaffney*, 412 U.S. at 303. Accordingly, unlike *Fischer II*, federal one-person, one-vote standards permit a relative deviation more than plus 5% for the most populous district if the relative deviation from the ideal of the least populous district leaves the overall range between the least populous and most populous at 10% or less.

Yet it is undisputed that the Senate reapportionment plan complies with the federal 10% rule. And, while Appellees contend that the House districts do not comply with the federal 10% rule, the 10.0013287% overall range results from the legislature's decision not to split LaRue County, leaving House District 24 with 166 people more than necessary for the range to be less than 10%, a result concededly permissible under federal law as protecting county integrity. These facts graphically illustrate the manner in which Kentucky's unique, plus-or-minus 5% rule differs fundamentally from the federal 10% rule.

In fact, the Franklin Circuit Court found that House Bill 1 complies with the federal 10% rule: "House Bill 1 provides an overall range of deviation for House Districts of 10%, and an overall range of deviation for Senate Districts of 9.84%. . . . It is undisputed that House Bill 1 sets those variances at, or near, the constitutionally permissible limits for both House and Senate." (Opinion at 5-6, Findings of Fact ¶ 5.)

This Court should hold that the federal 10% rule governs under § 33 KY. CONST. as well as under the federal Equal Protection Clause. Adopting the 10% overall range, instead of the plus-or-minus 5% deviation, would permit the General Assembly even more flexibility for protecting the integrity of county boundaries, while retaining approximate population as the paramount goal of apportionment. And by so holding, this Court would also conclude that House Bill 1 does not violate the Kentucky Constitution under the 10% rule.

C. Overruling *Fischer II* will not require Kentucky to justify every deviation from pure population equality.

Federal constitutional precedents hold that if a state legislative apportionment plan achieves the overall range of less than 10%, it is presumed constitutional and the

challengers carry the burden of proving that the plan is unconstitutional for reasons other than population inequality. Only if the plan has an overall range of 10% or more is the state required to justify the population disparity with a rational state policy, such as county integrity.

Rep. Hoover nevertheless makes the absurd argument that "[o]verruling *Fischer II* and abandoning the county integrity clause of Section 33 would remove any justification for even the slightest population deviation between districts . . . ." (Response at 31.) Rep. Hoover continues: "If Kentucky were to abandon the clear, easy to apply, dual mandate of *Fischer II* . . . federal constitutional law would bar *any* population deviation, and would instead require near perfect equality, just as it does now for congressional redistricting." (*Id.* at 32.) (italics in original). Likewise, he asserts: "The moment Kentucky abandons the rational state policy of preserving county integrity . . . any deviation from strict population equality in redistricting is unconstitutional under federal law." (*Id.* at 33.)

Rep. Hoover's contention is predicated upon his clearly erroneous conclusion that every deviation from pure equality must be justified by the state:

> *Every* deviation from population equality must advance a rational state interest . . . . [W]here population deviations are not supported by such legitimate interests but, rather, are tainted by arbitrariness or discrimination, they cannot withstand constitutional scrutiny.
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> . . .
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> While the Supreme Court recognized in *Brown* that "as a general matter" an apportionment plan with a maximum population deviation *less than 10%* falls into the category of minor deviations, the Court went on to affirm that "the ultimate inquiry . . . is whether the legislature's plan 'may be said to advance [a] rational state policy.'" *Brown*, therefore, requires . . . [the state] **to prove that *any* population deviations are justified by the faithful adherence to a rational state policy if challenged.**

> . . .
>
> Second, *Brown* and subsequent cases make clear that unless there is a rational state policy involved – such as an (sic) consistent, nondiscriminatory policy to preserve county integrity – then there is no permissible population deviation under federal equal protection law.
>
> . . .
>
> The "ultimate inquiry" in judging any deviation from equality – *of any magnitude* – is whether the legislature's plan "may reasonably be said to advance [a] rational state policy," such as a consistently applied policy of preserving a county integrity.

Id. at 28, 28-29, 31 (italics in original) (boldface added) (quoting *Brown v. Thomson*, 462 U.S. at 835, 848 (1983)).

But federal law does not require an apportionment plan that achieves the overall range of less than 10% to be justified, at all, much less on some state policy other than having attained sufficient population equality by attaining an overall range of less than 10%.

Rep. Hoover's own authorities so hold. In *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996), the Fourth Circuit squarely held that the State has the burden to justify the population deviations only if the overall range exceeds 10%:

> If the maximum deviation is less than 10%, the population differential will be considered *de minimus* and will not, by itself, support a claim of vote dilution. If the maximum deviation is greater than 10%, it is *prima facie* evidence of a one person, one vote violation, and the state must justify the population disparity by showing a rational and legitimate state policy for the districting plan.

93 F.3d at 1217-18. Indeed, contradicting his own brief, Rep. Hoover concedes the burden of proof is on the challenger if the plan's overall range is less than 10%:

> Thus, the practical implication of *Brown* for redistricting litigation involved the burden of proof. Redistricting plans that keep their overall

> population deviations *under* 10% enjoy a presumption of validity. The burden of proving the plan unconstitutional falls on the challengers. . . .
>
> Supreme Court decisions have treated overall population deviations of less than 10% as requiring no proof that a rational state policy supports them, while placing the burden of proving a rational state policy on states whose plans exhibit overall deviations of 10% or more . . . .

(Response at 30, 33.) (italics in original).[11]

Clearly, Rep. Hoover's argument that the state must justify even the most minor deviation from pure population equality fundamentally misunderstands federal constitutional law. Consequently, modifying or overruling *Fischer II* would not deprive Kentucky of the presumption of constitutionality under federal law for apportionment plans that achieve an overall range of less than 10%.[12]

The only case Rep. Hoover cites is *Cox v. Larios*.[13] But there is no opinion of the Court at that citation, at all, for the obvious reason that the decision is merely a summary affirmance of a decision by a three-judge District Court.

It is well settled that "[a] summary affirmance such as *Cox* represents no more than a decision of the United State Supreme Court not to hear an appeal . . . ."[14] "When

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[11] Other cases relied upon by Rep. Hoover contain precisely the same holding. *Hulme v. Madison County*, 188 F.Supp. 2d 1041, 1047 (S.D. Ill. 2001) ("It is also clear that a total population deviation of less than 10% enjoys a presumption of validity and will not, by itself, support a claim of invidious discrimination."); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F.Supp. 1022, 1031 (D. Md. 1990) ("Thus, a redistricting plan with a maximum deviation below ten percent is *prima facie* constitutional and there is no burden on the State to justify that deviation.").

[12] Rep. Hoover's repeated reference to "a consistently applied, even-handed rational state policy" (Response at 36) also misstates federal law. A state is not required to justify district boundaries if the overall range is less than 10%. Even if the overall range exceeds 10%, there is no requirement that the justification take the form of a mandate in the state constitution. *Abate v. Mundt*, 403 U.S. 182, 186 (1971). The strict scrutiny test is inapplicable to state legislative reapportionment, in recognition of the political nature of the decisionmaking involved in apportionment; so the state need only present a rational basis for the boundaries even when the overall range exceeds 10%. *Karcher v. Daggett*, 462 U.S. 725, 741 (1983).

[13] 542 U.S. 947 (2004).

[14] *In re Mun. Reapportionment of Twp. of Haverford*, 873 A.2d 821, 835 (Pa. Commw. Ct. 2005).

we summarily affirm, without opinion, the judgment of a three-judge District Court we affirm the judgment but not necessarily the reasoning by which it was reached."[15] It is therefore well settled that "[s]ummary actions . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

Rep. Hoover nevertheless contends that *Cox v. Larios* is a ground-breaking precedent. Despite U.S. Supreme Court cases expressly holding that apportionment plans which satisfy a 10% overall range do not violate the federal Equal Protection Clause,[16] Rep. Hoover proclaims that "the United States Supreme Court has made this plain in *Cox v. Larios*, 124 S.Ct. 2806, 2807-08 (1984) . . . ." (Response at 33.) But nothing is made "plain" in *Cox*, at all, because there is no opinion of the Court in *Cox*, much less an opinion of the Court with the holding attributed to it by Rep. Hoover.

Every quotation that Plaintiffs' Response attributed to *Cox* is either a quotation from the separate opinion of Justice Stevens concurring in the summary affirmance, or a quotation from the District Court opinion below. Neither has any precedential value for this Court.

Rep. Hoover nevertheless make the ludicrous statement that "[i]n his concurring opinion, . . . Justice Stevens explained the Supreme Court's rationale." (Response at 34.) But a concurring opinion never explains the majority's rationale; it always explains why

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[15] *Fusari v. Steinberg*, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring) (footnote omitted) (citing *Edelman v. Jordan*, 415 U.S. 651, 671 (1974)).

[16] *Brown v. Thomson*, 462 U.S. 835 (1983); *Connor v. Finch*, 431 U.S. 407 (1977); *Gaffney v. Cummings*, 412 U.S. 735 (1973).

the concurring judge disagrees with the majority's rationale. And here, there is no majority opinion, at all.

Rep. Hoover is obviously relying upon an opinion that has zero precedential value. Mr. Justice Stevens was consistently in the minority in the cases attacking redistricting plans as partisan in motive and result. *See, e.g., League of United Latin American Citizens v. Perry*, 548 U.S. 399, 447 (2006) (Stevens, J., concurring in part and dissenting in part); *Vieth v. Jubelirer*, 541 U.S. 267, 318 (2004) (Stevens, J., dissenting). His concurrence in the summary affirmance in *Cox* adds nothing to his minority view.

And the District Court opinion quoted by Plaintiffs is the only reported decision subsequent to *Brown v. Thomson* that inquired into a state apportionment plan that fell within the 10% federal rule. That District Court opinion is therefore referred to in the academic literature as an "aberrantly" decided "outlier" case.[17]

All of the cases (except *Larios*) relied upon by Rep. Hoover actually stand squarely for the proposition that an overall range less than 10% is not only presumed to be constitutionally valid, but cannot be attacked on the basis of population deviations at all. As a matter of federal constitutional law, an overall range less than 10% is "*de minimus* and will not, by itself, support a claim of vote dilution." *Daly*, 93 F.3d at 1217-18. Consequently, the burden is upon the challengers to demonstrate that an apportionment plan with an overall range less than 10% is unconstitutional for some reason other than population deviations between the districts. But the U.S. Supreme

[17] "Vigo, Hulme, and Larios are outliers in the canon of reapportionment jurisprudence, not only because the three redistricting plans at issue were aberrantly struck down as unconstitutional post-*Brown v. Thomson*, but also because the defendants in all three cases were uncharacteristically frank about what motivated them to malapportion districts." Stephanie Cirkovich, Abandoning the Ten Percent Rule and Reclaiming One Person, One Vote, 31 CARDOZO L. REV. 1823, 1844 (2010).

Court has been unable to fashion any jurisprudential standard by which a reapportionment plan can be attacked for reasons other than population inequality.

When apportionment plans that satisfy the federal 10% rule are challenged for drawing lines to achieve partisan advantage, the Supreme Court routinely dismisses the challenge for lack of a workable standard of review.[18] From the 5-4 decision in *Davis v. Bandemer*[19] through a series of fractured decisions, culminating the 4-1-4 decision in *Vieth*,[20] the Supreme Court has dismissed every such "partisan linedrawing" case it has considered for failure to state a claim. Thus, while the Supreme Court has held such a challenge is technically justiciable, the culmination of this line of cases is the plurality opinion written by Justice Scalia in *Vieth* in which he said that the total absence of any "judicially discernible and manageable standards for adjudicating political gerrymandering claims . . . ." renders it a legal fiction to say that political linedrawing cases are justiciable. *Vieth*, 541 U.S. at 281 (plurality).[21]

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[18] Attacks upon apportionment plans for reasons other than population inequality are referred to in the caselaw as "political gerrymandering." To be clear, however, those courts do not use the term "political gerrymandering" with reference to the irregularity of district boundaries. Rather, "political gerrymandering" is shorthand for cases in which the attack upon the apportionment plan alleged that the boundaries of districts were drawn with partisan motives for partisan effects. For clarity, LRC therefore denominates the "political linedrawing" cases.

[19] 478 U.S. 109 (1986).

[20] *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

[21] Because that rebuttable presumption is so difficult to overcome with a "political linedrawing" challenge, courts and commentators often say the 10% federal rule is *de facto* a "safe harbor." The standard textbook recognizes the 10% overall range as a safe harbor. *See* DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN AND DANIEL P. TOKAJI, ELECTION LAW: CASES AND MATERIALS, p. 73 (4th ed. 2008) ("small deviations (up to 10%) at the state level require no justification at all."); *see also Fund for Accurate & Informed Representation v. Weprin*, 796 F.Supp. 662, 668 (N.D. N.Y. 1992) ("This concession [that the redistricting plan had a 9.43% overall range] is fatal to the one person, one vote claim because, absent credible evidence that the maximum deviation exceeds 10 percent, plaintiffs fail to establish a *prima facie* case of discrimination . . . sufficient to warrant further analysis by this Court."), aff'd, 506 U.S. 1017 (1992).

The case on which Rep. Hoover relies so heavily, *Daly v. Hunt*, agrees that any challenge to an apportionment plan that meets the federal 10% rule would have to be maintained on a basis other than population inequality:

> The 10% *de minimus* threshold recognized in *Brown* does not completely insulate a state's districting plan from attack **of any type**. . . . [I]f the maximum deviation is less than 10%, the population disparity is considered *de minimus* and the plaintiff cannot rely on it alone to prove invidious discrimination or arbitrariness.
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> . . .
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> Presumably, an apportionment plan that satisfies the 10% *de minimus* threshold could nevertheless be challenged under another theory, such as a violation of the Voting Rights Act or as an unconstitutional racial gerrymander under *Shaw v. Reno* . . . .

93 F.3d at 1220-21 (citing *Shaw v. Reno*, 590 U.S. 630 (1993)). Thus, as Justice Cooper wrote for this Court in *Jensen*:

> Nevertheless, the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm.

Judicial review of the political process by which the various lines are (literally) drawn during redistricting would contravene Kentucky's "strictly construed" doctrine of separation of powers and would involve a political question.[22] As the Court said in *Gaffney*:

> It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. . . . Politics and political considerations are inseparable from districting and apportionment. . . . The reality is that districting inevitably has and is intended to have substantial political consequences.

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[22] Kentucky continues to adhere to the political question doctrine. *Fletcher v. Commonwealth ex rel. Stumbo*, 163 S.W.3d 852, 860 (Ky. 2005). To be sure, vindication of the principle of equal representation is justiciable. *Ragland v. Anderson*, 125 Ky. 141, 100 S.W. 865, 866-67 (1907). But review for political purpose and effect is not justiciable.

412 U.S. at 752-53.

In this case, the Senate districts concededly fall within the 10% overall range provided by settled U.S. Supreme Court precedent. And to a statistician, the House districts' deviation rounds out to 10%. Moreover, it is indisputable from the statistics available in the attested documents that were introduced into evidence that the deviation of 10.0013287 among the House districts is a mathematical function of 166 people in LaRue county retained in that particular district in order not to divide that county. Thus the microscopic statistical deviation from 10% results from the principle of "county integrity" upon which Plaintiffs have built their entire case under Section 33 of the Kentucky Constitution. And preserving the integrity of counties justifies such an insignificant population deviation under federal law, as well. *Brown*, 462 U.S. at 843 (quoting *Abate v. Mundt*, 403 U.S. 182, 185 (1971).

In sum, Rep. Hoover's federal Equal Protection Clause argument misstates the governing precedents. Accordingly, modifying the "mathematical precision" requirement of *Fischer II* will not result in Kentucky being required to justify every minor deviation from pure population equality. The 10% federal rule would continue to apply and, so long as the General Assembly achieves the 10% overall range, any Kentucky apportionment plan would satisfy the federal precedents.

II. The Temporary Injunction should be dissolved because it is predicated upon an erroneous conclusion of law, changes the *status quo* and treads unnecessarily on the separation of powers.

LRC agrees that the balance of the equities requires the 2012 legislative elections to proceed according to the statutory schedule. But Senators and Representatives should

be elected in 2012 from the districts enacted in 2012, which comply with the 10% overall range required by federal one-person, one-vote caselaw.

It is undisputed that, with the passage of time, the districts enacted in 2002 do not satisfy that standard. Indeed, the overall range of the 2002 House districts is now 60.71%, and the overall range of the Senate districts is 37.71%,[23] compared to the federal 10% rule. Accordingly, the rights of the voters on a statewide basis are better served by conducting the 2012 elections under the plan that more closely complies with federal one-person, one-vote standards.

Indeed, the Circuit Court did not base its preference for the 2002 districts upon either standard set forth in *Fischer II*. Quite the contrary, he predicated the injunction upon the claim of certain voters residing in Fayette County that their voting rights are abridged by the reassignment of some of the territory of formerly numbered Senate district 13 to a new district numbered as 4. But the Circuit Court did not enter a final and appealable declaratory judgment on those voters' claim. Rather, he determined that their claim "raised a substantial issue of law" (Opinion p. 9), but said that he "has not found . . . any controlling legal authority that addresses the question" posed by that claim (*id.* p. 10). That conclusion of law ignores the square holding in *Anggelis v. Land*, 371 S.W.2d 857 (Ky. 1963). That erroneous conclusion of law constitutes an abuse of discretion requiring dissolution of the Temporary Injunction.

[23] These statistics are from public LRC documents of which this Court may take judicial notice. With shifts in population, House district 60 under the 2002 plan has a +42.7% deviation from the ideal per-district population while House district 43 has a -18.01% deviation. Senate district 11 has a +22.2% deviation and Senate district 29 has a -17.51% deviation.

A. *Anggelis v. Land* is controlling precedent. The Temporary Injunction therefore rests upon an erroneous conclusion of law.

The Circuit Court gave an unduly narrow reading of *Anggelis v. Land*, which is, indeed, the controlling precedent. In that case, the 13th Senate district, which had encompassed all of Fayette County, was reduced to encompass only the territory inside the Lexington city limits. The 12th district was moved from Meade, Hardin and LaRue Counties to encompass Fayette County outside the city limits.[24]

The Senator elected from the former 12th district had two more years to serve on his term, but obviously was not a resident of Fayette County. The plaintiff contended that the incumbent Senator's lack of residence in Fayette County created a vacancy to be filled by a special election. This Court recognized that the 12th district would continue to be represented for the next two years by a non-resident:

> Admittedly the redistricting has caused an unusual situation in which the Senator representing the Twelfth District neither lives within the boundaries of that District as presently constituted nor was he elected by the people who do live within them.

371 S.W.2d at 859. But this Court said the non-residence of the incumbent Senator did not divest him of his office, nor create a vacancy in the 12th district:

> The Act does not abolish the office, nor shorten the term of the Senator presently representing the Twelfth District and it is doubtful whether the Legislature could validly have done so. . . . Contrary to appellant's contention, it is our opinion that the Act did not create a new Twelfth Senatorial District but merely changed the geographic boundaries of that District. Therefore, there is no vacancy in the office of Senator from the Twelfth District.

Id. at 858-59 (citing *Payne v. Davis*, 254 S.W.2d 710 (Ky. 1953)).

[24] *See* Intervening Defendant LRC's Trial Exhibit 3.

In *Anggelis*, as in this case, the incumbent senator had two more years to serve on his term. Thus, the voters in the new 12th district would not be voting for a senator for six years – precisely the contention advanced by Senator Stein (and accepted by the Franklin Circuit Court) in this case – namely, that if the non-resident represented Fayette County for another two years, "the people of the [12th] District will not be represented in the 1964 Senate." 371 S.W.2d at 858. This Court rejected that argument.

This Court recognized that every reapportionment in Kentucky is impacted by the fact that our Senate has staggered four-year terms. Consequently, in every reapportionment in which new boundaries are drawn to adhere to one-person, one-vote, there will be voters who formerly resided in odd-numbered districts who are moved to even-numbered districts and vice versa.[25] That fact, standing alone, does not deprive those voters of any right:

> Although a Senator is required by Section 32 of the Kentucky Constitution to be a resident of the district from which he is elected, once he is elected he represents generally all the people of the state and specifically all the people of his district as it exists during his tenure in office. Certainly no one would suggest that a Senator represents only those persons who voted for him. **The fact that the persons who are represented by the Senator from the Twelfth District are no longer the ones who elected him indicates there is a hiatus following a redistricting** of the state. . . .
>
> Section 33 of the Kentucky Constitution provides *inter alia* that the Legislature shall redistrict the state every ten years. **The framers of the Constitution must have realized that for two years after each redistricting there would be some persons in the state who would not be represented in the Senate by a Senator of their own choosing.** Apparently the men who framed our Constitution thought that this circumstance was offset by the desirability of maintaining a Senate, in which at least one-half of the members are always experienced men.

[25] For example, in *Anggelis*, parts of Hardin and Meade counties that had been in the 12th district were moved to the new 5th district. s *See* Intervening Defendant's Trial Ex. 3.

371 S.W.2d at 859 (emphasis added); *accord*, *Republican Party of Oregon v. Keisling*, 959 F.2d 144 (9th Cir. 1992).[26]

Anggelis is, in fact, directly on point. In repeatedly stating that "[t]here is no controlling case law on this issue" (Opinion at 9), the Circuit Court simply misstated the facts in *Anggelis*. The Circuit Court seemed to think that it was the voters in the new 12th district that voted in the 1963 election and that it was the voters in the 13th district who waited two years to vote. The Franklin Circuit Court said:

> It appears that the Senator elected by the voters in all of Fayette County for the 13th District continued to serve until the next election for an odd numbered district, and the voters who were re-assigned to an even numbered district were able to elect a new senator at the first election after the 1963 redistricting. Thus no citizen was assigned to be represented by a senator who had never been elected by the voters of that geographic area, nor was the right of any citizen to vote for a senator delayed.

(Opinion at 9.) But, of course, the true facts are precisely contrary to the Circuit Court's rendition. The voters who were reassigned to the even-numbered 12th district were not able to elect a new senator at the first election after the 1963 redistricting. They were assigned to be represented by a senator who had never been elected by the voters of that geographic area, and who would serve two more years. This Court squarely held that result did not implicate the constitutional rights of those voters. The Circuit Court has simply ignored the holding in *Anggelis* by misreading its facts, in order to reach that Court's desired result as to Senator Stein's candidacy for reelection from district 13.

It is well settled that a misapplication of the controlling law is inherently an abuse of discretion. *City of Louisville v. Allen*, 385 S.W.2d 179, 184 (Ky. 1964) ("An abuse of

[26] This Court's holding that the effect of four year staggered terms in reapportionment is not a deprivation of voting rights is supported by a legion of cases. *See Kahn v. Griffin*, 2004 WL 1635846, n. 9 (D. Minn. July 20, 2004) (collecting cases).

discretion may be said to be an error of law"); *Buddenberg v. Buddenberg*, 304 S.W.3d 717, 722 (Ky. App. 2010) ("A trial court abuses its discretion when its decision rests on an error of law . . . ."). These principles apply with equal force to appellate review of a temporary injunction. *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 162 (Ky. 2009) ("The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."); *see also Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772, 790 (5th Cir. 1999) ("A district court abuses its discretion if it . . . relies on erroneous conclusions of law . . . .").

The Circuit Court's decision to ignore this Court's true holding in *Anggelis* is an abuse of discretion. The Temporary Injunction should be dissolved.

B. The Circuit Court issued the injunction to preserve Senator Stein's claims as to odd-numbered districts, not upon Rep. Hoover's claims under *Fischer II*. In doing so, the Court changed – rather than preserved – the *status quo*.

There is nothing in the Circuit Court's opinion that indicates in any way that the Circuit Court preferred the seriously malapportioned 2002 districts to the 2012 districts solely because House Bill 1 did not divide the fewest number of counties mathematically possible (or that one House and one Senate district slightly exceeded +5%). After all, the 2002 apportionment plan splits 27 counties, compared to the 2012 plan splitting 28, whereas 24 is the fewest that it is mathematically possible to split in either year.

It is clear from the Circuit Court's opinion that the Temporary Injunction was issued to preserve the *status quo* as to the even-numbered and odd-numbered Senate districts *pendente lite* while the Circuit Court considered the as yet undecided state constitutional question raised by Senator Stein. The Circuit Court discussed the number of voters being moved from odd-numbered to even-numbered Senate districts (and vice

versa) as the focal point of his remedial analysis. (Opinion at 13-14.) Indeed, the Circuit Court focused particularly upon Senate district 13 in Fayette County. (*Id.* at 14.) Focusing exclusively on this issue, the Circuit Court concluded:

> The Court therefore concludes that the redistricting cure of House Bill 1 is worse than the malapportionment disease that it is legally required to remedy, at least for the next two years.

(*Id.* at 13.) Clearly, the Temporary Injunction was issued to preserve the *status quo* until the Court could adjudicate Senator Stein's claims as to the odd-numbered Senate districts.

Rep. Hoover nevertheless recites the Circuit Court's declaratory judgment as to § 33 and claims:

> The Franklin Circuit Court **then stated** that **because** of this Section 33 violation "the public interest demands that the Court grant injunctive relief to maintain the *status quo* pending a full adjudication of the merits." (*Id.* at 13, ¶ 15.) HB 1's excessive number of county splits was definitely among the factors upon which the Circuit Court based its injunction.[27]

But the Circuit Court said no such thing. Rep. Hoover has taken one snippet of the Opinion out of context, and conflated it into his conclusory argument, creating a cut-and-paste version of ¶ 15 that totally changes what the Circuit Court actually said.

In ¶ 15, the Franklin Circuit Court first states that "the Court is mindful that the current districts are out of balance and must be redrawn to comply with the 'one person, one vote' mandate of federal and state law." But the Court indicated that the malapportionment of the 2002 districts is ameliorated by the fact that House Bill 1 does not completely attain the plus-or-minus 5% test of *Fischer II*. The Court then proceeds to

[27] Rep. Hoover's Response to Motion to Stay Pending Appeal, pp. 6-7 (emphasis added).

say that this balance is tipped by the impact of HB 1 on the voting rights of voters in odd-numbered Senate districts:

> The Court further finds as yet undisputed evidence that as many as 351,394 persons will be legislatively re-assigned under House Bill 1 from districts that are required to elect a senator this year to districts that will not hold an election until 2014. Those citizens, for two full annual sessions of the General Assembly (2013 and 2014) would be assigned to senators who do not reside in the districts they represent and who have no meaningful ties to those communities. The Court therefore concludes that the redistricting cure of House Bill 1 is worse than the malapportionment disease that it is legally required to remedy, at least for the next two years. In these circumstances, the public interest demands that the Court grant injunctive relief to maintain the *status quo* pending a full adjudication on the merits.

(*Id.* at p. 13 ¶ 15.) Of course, the claim that had not yet received "a full adjudication on the merits" is Senator Stein's claim, not Rep. Hoover's claim under Section 33, which has been fully adjudicated.

Moreover, the Franklin Circuit Court used the balance of its Findings of Fact, ¶¶ 16-17, to further explain that it was the constitutional concerns over the odd-numbered Senate districts that prompted it to preserve the *status quo* by requiring the elections to be run in the 2002 districts. Specifically, the Franklin Circuit Court held:

> The re-assignment of geographic territory of the former SD 13 to an even numbered district. . . . appears to be an arbitrary decision without a rational basis. . . . Here, the public's right to elect a senator has been delayed for 2 years, and . . . the Court can see no countervailing rational basis or valid reason to re-assign the former SD 13 to an even numbered district, thereby delaying the right of those citizens to vote on the election of their senator.

(Opinion p. 14 ¶ 17.) Clearly, the injunction was issued to protect Senator Stein's interests.

The Circuit Court also said, "it is necessary to maintain the *status quo* pending a final adjudication because in the absence of injunctive relief 'the acts of the adverse party

will tend to render such final judgment ineffectual.'" (*Id.* at 13.) (quoting CR 65.04(1)). The Circuit Court seems unconcerned that the converse is equally true; by mandating that the elections proceed under the 2002 districts, Senator Stein obtained complete relief on the merits despite the fact that the Circuit Court readily concedes that her claim has not yet been adjudicated. That is an unprecedented use of the power of an injunction to resolve a political question.

Rep. Hoover cites cases for the proposition that a stay pending appeal would amount to a decision on the merits. But conducting the 2012 legislative elections in the 2012 districts would not be a decision on the merits. This Court could still determine the constitutionality of House Bill 1 and, if deemed unconstitutional, require the General Assembly to reapportion for the next election cycle. But conducting the 2012 elections under the 2002 districts does amount to a decision on the merits, because it gives Senator Stein all the relief she has requested despite the fact that her claim remains to be adjudicated. If the elections are conducted under the 2002 districts, Senator Stein will be eligible to be elected to a 4-year term and there will be nothing that this or any other court can do about that for the next four years. Thus it is the mandate of the Temporary Injunction to conduct the elections using the 2012 districts that amounts to a decision on the merits. That injunction should be dissolved, and the partial declaratory judgment should be stayed pending this appeal.

Moreover, requiring elections to be held under the old malapportioned districts rather than the new districts changes the *status quo*. It is well settled that "a temporary injunction is an extraordinary remedy . . . ." *Commonwealth ex rel. Cowan v. Wilkinson*, 828 S.W.2d 610, 612 (Ky. 1992). "It is apparent that the issuance of such an injunction

constitutes a prejudgment of the controversy before the defendant has had his day in court, and doubtful cases should await final judgment. **This is particularly true when mandatory relief is asked,** as in the present case, which **will change the status quo.**" *Oscar Ewing, Inc., v. Melton*, 309 S.W.2d 760, 762 (Ky. 1958) (emphasis added) (internal citation omitted).

The Temporary Injunction issued in this case does not "merely . . . maintain the status quo." *Maupin v. Stansbury*, 575 S.W.2d 695, 698 (Ky. App. 1978). "Actually it would appear that the temporary injunction would change the status quo . . . ." *Cowan*, 828 S.W.2d at 613. Plainly, the *status quo* for the 2012 elections consists of the districts enacted by the 2012 General Assembly for those elections. Enjoining the use of those districts *pendente lite*, and mandating that the election officials instead use the 2002 districts, does not preserve the *status quo*, it changes it.

In order to preserve the *status quo*, this Court decided in *Fischer II* that the 1994 elections should proceed under the apportionment plan it declared unconstitutional. 879 S.W.2d at 480-81. That is consistent with the standard practice of federal courts, which routinely stay pending appeal a declaratory judgment invalidating an apportionment plan. *See, e.g., Whitcomb v. Chavis*, 403 U.S. 124, 140 (1971) (The judgment of the 3-judge District Court had been stayed pending appeal, 396 U.S. 1055 (1970), "thus permitting the 1970 elections to be held under the existing apportionment statutes declared unconstitutional by the District Court."); *Davis v. Mann*, 377 U.S. 678, 684 (1964) ("On application by appellants, THE CHIEF JUSTICE . . . granted a stay of the District Court's injunction pending final disposition of the case by this Court. Because of this stay, the November 1963 election of members of the Virginia Legislature was conducted

under the existing statutory provision" which had been held unconstitutional by the District Court).[28]

The only case that Rep. Hoover cites actually supports LRC's analysis. *Pileggi v. Aichele*, --- F.Supp. 2d ---, 2012 WL 398784 (E.D. Pa. Feb. 8, 2012) squarely holds that elections may proceed under an unconstitutional apportionment plan. "'[W]here an impending election is imminent and a State's election machinery is already in progress,' in which a court may withhold the granting of relief, even if an existing apportionment scheme is found to be invalid." *Id.* at *6 (quoting *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

The reason that Pennsylvania's 2012 legislative elections are to be run in the 2001 districts is a function of a unique provision in the Pennsylvania Constitution. Specifically, Pa. Const. Art. II, § 17 creates a Legislative Reapportionment Commission whose apportionment plan is appealable directly to the Pennsylvania Supreme Court. Under § 17(e), the reapportionment plan does not "have the force of law" until approved by that court.[29] Thus, when the Pennsylvania Supreme Court rejected the Commission's 2011 apportionment plan, that plan did not yet have the force of law.[30] That left the 2001

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[28] Rep. Hoover seems to contend both *Whitcomb* and *Davis* support the Temporary Injunction issued in this case, but Rep. Hoover has misread both opinions. Unlike the present case, those cases did not involve an injunction against conducting election under the newly enacted district and requiring the elections to be conducted under the previous apportionment plan. Rather, in both cases, the 3-judge District Court had declared unconstitutional the existing legislatively-enacted plan and promulgated a judicially-created plan. In both cases, the U.S. Supreme Court issued a stay of the declaratory judgment declaring the most recently enacted plan unconstitutional, thereby permitting the elections to proceed under the most recently enacted plan despite the declaration that the plan was unconstitutional. Thus, both cases squarely support LRC's position, not Rep. Hoover's position, as to the Temporary Injunction issued by the Franklin Circuit Court.

[29] *Pileggi*, at *1. ("A reapportionment plan has the force of law only when the Supreme Court has 'finally decided' an appeal . . . .) (citing Pa. Const. Art. II, § 17(e)).

[30] *See Holt v. 2011 Legislative Reapportionment Comm'n*, --- A.2d ---, 2012 WL 360584 (Pa. Jan. 25, 2012).

plan as the only plan with the force of law. *Pileggi*, at *10 ("Under these unique circumstances, . . . the election should proceed under the **only-existing** plan, the 2001 Plan.") (emphasis added).

Of course, House Bill 1 was enacted by the General Assembly and signed into law by the Governor. It has the force of law, and it should not have been enjoined in favor of the significantly malapportioned 2000 plan.

The changes in the odd-numbered and even-numbered Senate districts are presumed to be constitutional, and the Circuit Court has not adjudged otherwise.

Moreover, House Bill 1 complies with the federal 10% rule and, as the Circuit Court conceded, the 2002 districts do not. Thus, the Circuit Court's injunction reflects his policy preference that incumbents in odd-numbered districts be allowed to run for reelection from their old districts (and procure a new four-year term before this Court can effectively decide this appeal) over the policy of equality of representation statewide.

LRC respectfully suggests that the Temporary Injunction changes the *status quo* and effectuates a profound imbalance of the equities while ignoring controlling precedent. That constitutes an abuse of discretion. The Temporary Injunction should be dissolved so that legislative elections in 2012 may proceed under the boundaries enacted by the General Assembly in 2012.

C. The Temporary Injunction treads needlessly upon the Constitutional doctrine of separation of powers.

The Circuit Court's decision plainly treads needlessly upon Kentucky's "strictly construed" doctrine of separation of powers.[31] While adherence to one-person, one-vote

[31] *Legislative Research Comm'n ex rel. Prather v. Brown*, 664 S.W.2d 907, 912 (Ky. 1984) (quoting *Arnett v. Meredith*, 275 Ky. 223, 121 S.W.2d 36, 38 (1938).

presents a justiciable controversy, the actual drawing of the lines in an apportionment plan is a quintessential political question. Indeed, this Court expressly held in *Jensen* that an apportionment map drawn by the judiciary would be unconstitutional, "for the issuance of such an injunction would clearly violate the requirement of separation of powers. Ky. Const., Sections 27, 28, 29. Section 33 assigns to the legislature the duty to reapportion itself." 959 S.W.2d at 773.

Thus, when the Franklin Circuit Court said "the Court can see no countervailing rational basis or valid reason to re-assign the former SD 13 to an even numbered district," (Opinion at 14), it was deciding a political question that is not for the courts to decide. "Apportionment is primarily a political and legislative process. Our only role in the process is to ascertain whether a particular redistricting plan passes constitutional muster, not whether a better plan could be crafted." 959 S.W.2d at 776 (citation omitted).

Rep. Hoover nevertheless characterizes as "completely meritless" any argument that it would violate the separation of powers for the Kentucky judiciary to draft a reapportionment plan. (Response at 20.) In support of that contention, Rep. Hoover relies exclusively upon decisions applying the federal one-person, one-vote doctrine, not cases decided under the Constitution of Kentucky. Obviously, cases decided under the Equal Protection Clause of the Constitution of the United States do not involve a question of separation of powers under a state constitution because the Supremacy Clause trumps state law. At this procedural stage of this case, however, the Franklin Circuit Court has expressly reserved decision upon the Rep. Hoover's federal constitutional claims. The partial Declaratory Judgment relates solely to those Plaintiffs' state constitutional claims

under *Fischer II* and, under the square holding in *Jensen*, this Court could not remedy those alleged violations of § 33 KY. CONST. by drafting its own reapportionment plan.

Both Rep. Hoover and Senator Stein contend that LRC does not have "standing" to seek dissolution of the injunction because, they say, "LRC is not adversely affected" by the injunction. Rep. Hoover contends that "[t]he Circuit Court did not issue an injunction that adversely affects the LRC or the legislative branch in any way." (Response at 9.) That sweepingly conclusory statement ignores the interests of the General Assembly as a coordinate branch of government. It is well settled that a state legislative body has standing to litigate a violation of the doctrine of separation of powers. *Colorado General Assembly v. Lamm*, 700 P.2d 508 (Colo. 1985) (collecting cases). Specifically, a state legislature has standing in reapportionment litigation. *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 194 (1972). A classic example in Kentucky is *Legislative Research Commission ex rel. Prather v. Brown*, 664 S.W.2d 907 (Ky. 1984).

Appellees' argument also ignores the fact that the core issue created by the injunction is whether members of the General Assembly will stand for reelection in the 2002 districts or the 2012 districts, despite the fact that the General Assembly exercised the lawmaking power – vested by the Constitution exclusively in the General Assembly – and decided that the 2012 elections should be conducted in the districts established in 2012 by House Bill 1.

To say that the General Assembly is not "adversely affected" by a declaration that its enactment is unconstitutional – and an injunction ordering the Executive Branch to

ignore an enactment of the Legislative Branch for conducting elections for members of the Legislative Branch – exalts procedural form over constitutional substance.

In sum, by valuing the rights of the voters in the odd-numbered 13th district higher than the principle of population equality state-wide, the Circuit Court's "balancing of the equities" is an abuse of discretion. By ignoring the binding precedent of *Anggelis*, changing the *status quo* and deciding a political question, the decision is an abuse of discretion. The Temporary Injunction should therefore be dissolved.

CONCLUSION

For the foregoing reasons, the Temporary Injunction should be dissolved. This Court should modify *Fischer II* by adopting the federal 10% rule and eliminating the requirement of "mathematical precision" when protecting county integrity, and hold that House Bill 1 does not contravene § 33 KY. CONST. In the alternative, the partial Declaratory Judgment should be stayed pending appeal, so that the 2012 legislative elections are conducted using the districts enacted in House Bill 1 (2012) rather than the 2002 districts.

Respectfully submitted,

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INDEX TO APPENDIX

APPENDIX A

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 12-CI-109

JOSEPH M. FISCHER, et al. — PLAINTIFFS
and
DAVID B. STEVENS, M.D., et al. — INTERVENING PLAINTIFFS

V.

TEMPORARY INJUNCTION
UNDER CR 65.04 AND PARTIAL DECLARATION OF RIGHTS

ALISON LUNDERGAN GRIMES,
in her official capacity as
Secretary of State for the Commonwealth
of Kentucky, et seq. and
LEGISLATIVE RESEARCH COMMISSION — DEFENDANTS
INTERVENING DEFENDANT

This action is before the Court on the motions of the Plaintiffs and Intervening Plaintiffs for a Temporary Injunction under CR 65.04. The Plaintiffs filed this action to challenge the constitutionality of the House re-districting plan adopted by the Kentucky General Assembly in House Bill 1, which was signed into law by the Governor on January 20, 2011. The Court held a hearing on January 30, 2012 at which all original parties were represented by counsel. The Court granted the motion of David Stevens, Jack Stephenson, Marcus McGraw and Senator Kathy Stein to intervene under CR 24.01. The Intervening Defendants raise a similar challenge the provisions of House Bill 1 for re-districting of the Kentucky Senate.

The Court then granted a restraining order under CR 65.03 to preserve the *status quo* pending its decision on the motion for temporary injunction. The Court's restraining order prohibits the Secretary of State for implementing the filing deadline for legislative offices Tuesday, February 7, 2012. After the Court granted the Intervening Plaintiffs the right to participate, the Legislative Research Commission filed a motion to intervene pursuant to KRS

5.005, which the Court also granted. The Court further set this action for an evidentiary hearing and further argument on Monday, February 6, 2012.

The Court heard evidence and argument at the hearing on February 6, 2012, and being sufficiently advised, IT IS ORDERED the motions of the plaintiffs and intervening plaintiffs for a temporary injunction under CR 65.04 is GRANTED for the reasons set forth below.

DISCUSSION

This action presents a challenge to the new districts that the General Assembly adopted for House and Senate districts in House Bill 1 of the 2012 General Assembly. The Kentucky Supreme Court has established an authoritative interpretation of the requirements of Section 33 of the Kentucky Constitution for redistricting of legislative districts in Fischer v. State Board of Elections, 879 S.W.2d 475 (Ky. 1994)[1]. The Fischer case was subsequently revisited in Jensen v. State Board of Elections, 959 S.W.2d 771 (Ky. 1997), which dealt with the application of Section 33 to the multiple divisions of a single county. Jensen recognized that any plan that maintains county integrity and population equality, as interpreted by the Supreme Court, is bound to result in multiple divisions of some counties. Nevertheless, the central ruling of Fischer II has remained in force, and must be applied by this Court. As the Court held in Jensen, the constitutional mandate of Section 33 requires a redistricting plan "to make full use of the maximum constitutional population variation as set forth herein [plus or minus 5%] and divide the fewest possible number of counties." 959 S.W.2d at 776.

The uncontested evidence before this Court demonstrates that the House and Senate Districts adopted in House Bill 1 fail on both counts. At least one House District and one Senate District exceed the "maximum constitutional population variation" set forth in Fischer II. Both

[1] This case or Fischer II, was preceded by Fischer v. State Board of Elections, 847 S.W.2d 718 (Ky. 1992), which dealt with venue questions (Fischer I). *See also* State Board of Elections v. Fischer, 910 S.W.2d 245 (Ky. 1996) dealing with application of the redistricting rulings to special elections during this time frame (Fischer III).

the House and the Senate plans adopted in House Bill 1 divide more counties than "the fewest possible number of counties." Accordingly, this Court is required to apply this binding precedent and hold that the legislative redistricting provisions of House Bill 1 violate Section 33 of the Kentucky Constitution, as construed by the Kentucky Supreme Court.

The Legislative Research Commission has advanced strong arguments that Section 33 of the Kentucky Constitution should be construed in a more flexible manner, to give the legislature greater discretion in the difficult task of balancing the competing, and sometimes inconsistent, constitutional values of population equality and county integrity. Whatever merit those arguments may have, they must be addressed to the Kentucky Supreme Court. This Court remains bound by that Court's decision in Fischer II.

It is apparent that the Supreme Court's ruling in Fischer II has had unintended consequences. In Fischer II, the Supreme Court stated that "We recognize that the division of some counties is probable and have interpreted Section 33 to permit such division to achieve population requirements. However, we can scarcely conceive of a circumstance in which a county or part thereof which lacks sufficient population to constitute a district would be subjected to multiple divisions." *Id.*, 879 S.W.2d 479, fn 5. A short time later, after the legislature struggled to draw a plan that complied with Fischer II, the Court in Jensen was forced to observe that "In fact, what we thought was scarcely conceiveable has been proven to be unavoidable." 959 S.W.2d at 776.

This demonstrates the real tension between the competing values of county integrity and population equality that continues today. It is a concern of this Court that the Fischer II mandate *requires* the legislature to "make maximum use" of the 10% population variance it approved in that case. As a result, each new redistricting plan post-Fischer II must begin the decennial

period with a 10% deviation in the population of districts, and this variation is virtually certain to increase with each passing year as a result of normal demographic trends and the movement of people from rural to urban areas. Accordingly, Fischer II seems to guarantee districts that over time will violate the 10% variation standard even more quickly, because it *starts* with a 10% variation.

Likewise, Fischer II is based on the Supreme Court's belief that county integrity and population equality can always be reconciled, but it is apparent from the proceedings in this case that the constitutional value of population equality is significantly impaired by the requirement to preserve county integrity. The Supreme Court's view of the importance of county integrity in Fischer II appears rooted in the history of the county unit, and fails to recognize that at the time of the adoption of the 1891 constitution, the county was the central unit of government for basic government services such as roads, education, mental health, and social welfare. *See e.g.*, Ireland, *The County in Kentucky History* (University Press of Kentucky, 1976), *Little Kingdoms* (University Press of Kentucky, 1977). In today's world of government, all of those functions now reside primarily with state government, rather than county government. All of these considerations militate in favor of giving greater weight to population equality than county integrity when those values clash, as they inevitably do[2]. Those considerations, however, must be addressed to the Kentucky Supreme Court, not to a trial court that is required to apply the binding precedent of Fischer II.

The duty of this Court is to apply the binding precedents that control the application of Section 33. Under the controlling precedents, the provisions of House Bill 1 simply fail to pass constitutional muster.

[2] It appears that the text of Section 33 itself requires that greater weight be given to population equality, in that it qualifies the provision on maintaining county integrity with the expressed command that "Provided, in doing so the principle requiring every district to be as nearly equal in population as may be shall not be violated."

FINDINGS OF FACT

1. Under the population data from the 2010 U.S. Census relied upon by the General Assembly in redrawing its district lines in House Bill 1, the ideal district for the House of Representatives would include 43, 394 people, and the ideal district for the Senate would include 114,194 people. The ideal district is composed of the total population of Kentucky reflected in the 2010 census, divided by 100 for the House of Representatives and divided by 38 for the Senate.

2. The Districts for the House and Senate established in House Bill 1 contain variations from the ideal population for House and Senate Districts. House District (HD) 24 contains a population of 45,730, a 5.38% variance from the ideal. One Senate District (SD 8) contains a population of 120,498, a variance of 5.52% from the ideal. In the House of Representatives, 15 districts (HD 47, 52, 58, 60, 62, 63, 64, 66, 68,69, 78, 80, 83, 88, and 100) include a variance of 5%, the maximum variance allowed under Fischer v. State Board of Elections., 879 S.W.2d 475 (Ky. 1994). (*See* Exhibit 3 to the Complaint, LRC Population Summary Report, January 10, 2012).

3. House Bill 1 divides 28 counties in districts for the House of Representatives, and 5 counties for Senate districts.

4. House Floor Amendment 1 to House Bill 1 provides for a redistricting that divides only 24 counties. Senate Floor Amendment 1 to House Bill 1 provides for a redistricting that divides only 4 counties.

5. House Bill 1 provides an overall range of deviation for House Districts of 10%, and an overall range of deviation for Senate Districts of 9.84%. *See* LRC Population Summary Report, *Id.* Plaintiffs have argued that this level of variance between the least populous

district and the most populous district exceeds the constitutional requirements for House Districts. It is undisputed that House Bill 1 sets those variances at, or near, the constitutionally permissible limits for both House and Senate.

6. The Plaintiffs have identified at least one House District, HD 80, that has been designed in such a manner as to raise a substantial question as to whether that district complies with the requirement of Section 33 that "the counties forming a district shall be contiguous." House District 80 contains a one mile wide strip that runs from the Casey County border, through the northwestern corner of Pulaski County, to the Rockcastle County border. This strip of Pulaski County contains only 1882 residents. (*See* LRC's Answers to the Court's Questions, filed 2/6/12).

7. Former Senate District 13, in which Intervening Plaintiffs Stevens, Stephenson, McGaw vote and reside, and which is represented by Intervening Plaintiff Senator Kathy Stein, was located entirely within Fayette County prior to the enactment of House Bill 1, which re-located Senate District 13 to the northeastern Kentucky counties of Bath, Fleming, Harrison, Lewis, Mason, Montgomery, Nicholas and Robertson Counties. The vast majority of the geographic territory that constituted the former SD 13, and almost all the voters who resided there, have been re-assigned by House Bill 1 to SD 4, which formerly was located in Western Kentucky and is represented by Sen. Dorsey Ridley of Henderson.

8. The Fayette county voters of the former SD 13 elected a senator in the election of 2008, and absent the enactment of House Bill 1, would elect a senator in 2012. All odd numbered Senate Districts are on the ballot in 2012, and all even numbered Senate Districts are on the ballot in 2014.

9. By virtue of the enactment of House Bill 1, and the reassignment of the voters in the geographic territory that formerly constituted SD 13 to SD 4, the voters who reside in that territory will be denied the right to vote for and elect a Senator for 2 additional years, from 2012 (when the election would have been held prior to House Bill 1, to 2014 when it would be held if House Bill 1 is allowed to take effect).

10. In Fayette County alone, 113,724 citizens who resided in the former territory of SD 13, were reassigned to SD 4 by House Bill 1. (LRC Exhibit 1, Hearing 2/6/12).

11. House Bill 1 further provides that a statewide total of 351,394 citizens and residents were transferred from odd numbered districts (for which senators were elected in 2008, and for which elections will be held this November) to even numbered districts (for which senators were elected in 2010 and elections will be held in November, 2014). (LRC Exhbit 1, Hearing 2/6/12).

12. In addition to the wholesale reassignment of the voters of former SD 13 to SD 4, House Bill 1 also reassigns the voters of 9 other counties[3] *in their entirety* from odd numbered Senate Districts to even numbered Senate Districts.

13. By virtue of this reassignment, virtually all of the residents and voters of the former SD 13 in Fayette County, and in the other 9 counties that were transferred *en masse*, will be denied the right to vote for and elect a senator to represent them for two additional years, and will be represented for two entire legislative sessions in the Senate by a person not elected by the voters of the district, but assigned to them by legislative fiat.

[3] Boyd, Breathitt, Casey, Estill, Gallatin, Johnson, Magoffin, Powell, Pulaski and Russell Counties are all reassigned from odd numbered districts to even number districts. *See LRC Exhibit 1, id.*

CONCLUSIONS OF LAW

1. The decision of the Kentucky Supreme Court in Fischer v. State Board of Elections, 879 S.W.2d 799 (Ky. 1984) provides that under Section 33 of the Kentucky Constitution, the General Assembly may enact a redistricting plan in which the population variation "does not exceed -5% to +5% from an ideal legislative district." *Id.* at 479.

2. Fischer further provides that the General Assembly is obligated to "formulate a plan which reduces to the minimum the number of counties which must be divided between legislative districts. ... The mandate of Section 33 is to make full use of the maximum constitutional population variation as set forth herein and divide the fewest possible number of counties." *Id.*

3. House Bill 1 fails to comply with the "maximum constitutional population variation" as set forth in Fischer by virtue of the fact that at least one House District and one Senate District have a population variance greater than 5%. The right of the plaintiffs and intervening plaintiffs to proportional representation under Section 33 of the Kentucky Constitution, as construed by the Kentucky Supreme Court in Fisher, *id.*, has been violated by the provisions of House Bill 1.

4. House Bill 1 fails to comply with the mandate of Fischer to "divide the fewest possible number of counties" because the record in this case demonstrates that it is possible to divide as few as 24 counties in the House, and as few as 4 counties in the Senate.

5. The Plaintiffs have raised a substantial issue of law regarding the issue of whether HD 80, and perhaps HD 89, comply with the requirement of Section 33 that "counties

forming a district shall be contiguous." There is no controlling case law on this issue, and the issue requires further proof and briefing on the merits before the Court can render a final decision.

6. The Intervening Plaintiffs have raised a substantial issue of law regarding whether their transfer from SD 13 to SD 4 has unconstitutionally impaired their right to vote for and elect a senator. The Court is not aware of, and the parties have not cited, any controlling legal authority on this issue. In Anggelis v. Land, 371 S.W.2d 857 (Ky. 1963), the former Court of Appeals rejected a claim that the Redistricting Act of 1963, dividing the 13th Senate District into two districts (12 and 13), created a vacancy in the office of Senator from the 12th district. No claim was raised that the Act denied or abridged the right of any citizens to vote on the election of their senator. Rather, Anggelis rejected an attempt by the sitting Senator in the 13th district to obtain by mandamus a certificate of nomination "as Democratic nominee, for the office of State Senator from the Twelfth Senatorial District of Kentucky." *Id.* at 858. Having been moved out of his district, he sought to be re-elected by judicial action rather than standing for election in the newly established district. Anggelis did not challenge the re-districting at all. It appears that the Senator elected by the voters in all of Fayette County for the 13th District continued to serve until the next election for an odd numbered district, and the voters who were re-assigned to an even numbered district were able to elect a new senator at the first election after the 1963 redistricting. Thus no citizen was assigned to be represented by a senator who had never been elected by the voters of that geographic area, nor was the right of any citizen to vote for a senator delayed.

7. Senator Stein seeks no such relief here, but rather, she and her constituents maintain that by transferring the geographic territory of former SD 13 (an odd numbered district that will be subject to election this year) to SD 4 (an even numbered district that will not be subject to election until 2014), that House Bill 1 denies and abridges their right to elect a senator, and, as a practical matter extends the term of the Senator representing them from 4 years to 6 years because the last election for senator in that geographic territory was in 2008, and the next election will be held until 2014.

8. The Court has not found, nor have the parties cited, any controlling legal authority that addresses the question of whether an entire senatorial district can be transferred from an odd numbered district to an even numbered district, when such a transfer results in a delay of 2 years in the right of those citizens to elect a senator. The Court concludes that this alleged abridgement of the voting rights of the Intervening Plaintiffs is a substantial question of law that merits a full adjudication on the merits.

9. In deciding whether to grant injunctive relief, this Court is required to weigh the competing equities, including the public interest. Maupin v. Stansbury, 575 S.W.2d 695 (Ky. App. 1978). This balancing of competing interests is also required in connection with cases that allege the impairment of the right to vote. *See, e.g.* Burdick v. Takushi, 504 U.S. 428 (1992). Here, the Court finds that the "character and the magnitude" of the asserted impairment of the right to vote is substantial, and the public interest requires preservation of the *status quo* pending a final judgment.

10. Having found a violation of the rights of the Plaintiffs and Intervening Plaintiffs, the Court must address the question of remedies. Here, the Court recognizes that there are substantial competing interests. The last redistricting completed by the General

Assembly was enacted into law in 2002 (*see* 2002 Ky. Acts., c. 1). Accordingly, we are in the 10th year of that plan, and a new census was completed last year, showing that the districts are substantially out of balance. Thus, there is no question that the legislature is under an obligation to complete re-districting as soon as possible. The question before the Court then, is whether the November 2012 elections should be conducted under the district boundaries that preceded the enactment of House Bill 1, or whether the Court should redraw legislative district line, or require the legislature to redraw those lines (and extend all necessary deadlines to do so).

11. The Court finds and concludes that there is no constitutional or statutory deadline that requires that legislative district lines be redrawn prior to the November 2012 election. In fact, the case law on redistricting is replete with cases that demonstrate that the decennial redistricting required by Section 33 has been only loosely observed. *See* Combs v. Matthews, 364 S.W.2d 647 (Ky. 1963), Stiglitz v. Schardien, 239 Ky. 799, 40 S.W.2d 315 (Ky. 1931), Ragland v. Anderson, 125 Ky. 141, 100 S.W. 865 (Ky. 1907).

12. If the Court allows the district lines established in House Bill 1 to take effect immediately, it is uncontested that virtually all of the citizens and voters of the former SD 13 (at least 113,000 citizens) will be represented in not one, but two full annual sessions of the General Assembly (the 2013 and 2014 sessions) by a senator who does not live in the district, and has no political, social, economic or other connection to the community he has been assigned to represent. Those citizens and voters will be represented in the Senate by a Senator from another area of the state who has been politically assigned to this task. Those citizens and voters will be denied the right to

select their own senator for another two years, although they otherwise would be able to vote for a senator this November.

13. Likewise it appears that there are hundreds of thousands of citizens and voters who are similarly situated to the Intervening Plaintiffs. LRC Exhibit 1 documents that there are 350,394 persons who have been moved from odd numbered districts to even numbered districts, and thereby will be delayed by 2 years in their right to vote for a senator. It is true that LRC Exhibit 1 indicates that 400,667 persons were moved from an even numbered to an odd numbered district, and thereby will be able to vote for a senator 2 years sooner than they would have if they remained in an even numbered district. But the Court can find no basis for holding that the law allows the General Assembly the right to delay one citizen's right to vote for a senator by advancing the right of other citizens' vote for a senator.

14. The Court can find no basis in law or precedent for the wholesale transfer of virtually an entire Senate District from an odd-numbered district to an even numbered district, in a manner that delays the right of the voters of the district to elect a senator by two years. No such law or precedent has been cited to the Court. The Court recognizes that Senate Districts have been re-assigned to new geographic territory, and that to some degree such re-assignments are necessary to address shifts in population. Such transfers of districts to new territory have been upheld by Opinions of the Attorney General. *See OAG 82-18 and OAG 82-55.* But there are no reported cases in which this issue has been decided, and no prior redistricting legislation in which a challenge has been brought by voters who claim their right to vote for a senator has been impaired. Again, this Court concludes that these issues warrant a full

adjudication on the merits, and it is necessary to maintain the *status quo* pending a final adjudication because in the absence of injunctive relief "the acts of the adverse party will tend to render such final judgment ineffectual." CR 65.04(1). Maupin v. Stansbury, *supra.*

15. In balancing the equities, the Court is mindful that the current districts are out of balance and must be redrawn to comply with the "one person, one vote" mandate of federal and state law. But the question before the Court is one of timing. The Court notes that the uncontested evidence in this case demonstrates that House Bill 1 itself violates with the mandate of Section 33 for proportional representation because it includes districts in both House and Senate that exceed the maximum 5% variation. The Court further finds as yet undisputed evidence that as many as 351,394 persons will be legislatively re-assigned under House Bill 1 from districts that are required to elect a senator this year to districts that will not hold an election until 2014. Those citizens, for two full annual sessions of the General Assembly (2013 and 2014) would be assigned to senators who do not reside in the districts they represent and who have no meaningful ties to those communities. The Court therefore concludes that the redistricting cure of House Bill 1 is worse than the malapportionment disease that it is legally required to remedy, at least for the next two years. In these circumstances, the public interest demands that the Court grant injunctive relief to maintain the *status quo* pending a full adjudication on the merits.

16. The Court finds and concludes that there is no Kentucky case on point deciding whether the impairment of the Intervening Plaintiffs' voting rights reflected in House Bill 1 constitutes a violation of the guarantee of due process and equal protection of

the law under Sections 2 and 3 of the Kentucky Constitution. However, the Court notes that other jurisdictions have found equal protection violations in similar circumstances. As explained by a three judge federal District Court in Wisconsin,

> "every new reapportionment plan creates a situation that results in 'holdover' Senators and the temporary disenfranchisement of some residents for a two-year period. .. The temporary disenfranchisement of citizens is constitutionally tolerated under either of two related theories. Due to the complexities of the reapportionment process, a temporary loss of voting rights (the cases speak of a 'delay' in the right to vote) is tolerated when it is an 'absolute necessity' or when it is 'unavoidable.'" Republican Party of Wisconsin v. Election Board, 585 F.Supp. 603 (E.D. Wis. 1984), *vacated and remanded* Wisconsin Elections Board v. Republican Party of Wisconsin, 469 U.S. 1081 (1984).[4]

17. The re-assignment of geographic territory of the former SD 13 to an even numbered district is neither "an absolute necessity" nor "unavoidable." On the record before this Court, it appears to be an arbitrary decision without a rational basis. To the extent that political considerations concerning the political impact of this re-assignment on the majority party are involved, the Court notes that this is a political process and it is appropriate to take political concerns into consideration so long as they do not impair the nonpartisan voting rights of the public. Here, the public's right to elect a senator has been delayed for 2 years, and in conducting the balancing test required under Burdick *supra*, the Court can see no countervailing rational basis or valid reason to re-assign the former SD 13 to an even numbered district, thereby delaying the right of those citizens to vote on the election of their senator. No such rational basis has been advanced thus far in the litigation.

[4] The U.S. Supreme Court granted an order staying the lower court's ruling, apparently because of time constraints that would make the mechanics of running the 1984 election difficult or impossible. 469 U.S. 812. After the November election was held under the legislatively adopted plan, rather than the judicially imposed plan, the action became moot, and the Supreme Court vacated the lower court's decision and directed dismissal of the complaint.

CONCLUSION

For the reasons stated above, IT IS ORDERED AND ADJUDGED as follows:

1. The defendant Allison Lundergan Grimes, in her capacity as Secretary of State of the Commonwealth of Kentucky, and the Kentucky State Board of Elections, and all agents, employees and others acting in concert with them, are hereby ENJOINED under the provisions of CR 65.04 from implementing the districts for the Kentucky House of Representatives and Kentucky Senate that are set forth in House Bill 1, enacted by the 2012 General Assembly;

2. Until the General Assembly passes redistricting legislation that complies with all applicable constitutional requirements to revise the districts in effect under KRS 5.005 (2011), as enacted by 2002 Ky. Acts, c. 1, the elections for the House and Senate shall be conducted with the legislative district boundaries in effect immediately prior to the enactment of House Bill 1 for both the House of Representatives and the Senate.

3. The filing deadline set forth in KRS 118.165 shall be extended through 4:00 p.m. on Friday, February 10, 2012 to allow all candidates and potential candidates the opportunity to make the required candidacy filings under the temporary injunction issued by this Court, with the legislative districts required by this Court's ruling;

4. The motion of the Legislative Research Commission to intervene as a matter of right is GRANTED under CR 24.01 and KRS 5.005(1).

5. This is a final and appealable judgment on the claim set forth in Count I of the Complaint filed by Plaintiffs Fischer, Hoover, King, Todd and Gaydos for violation

of their rights under Section 33 of the Kentucky Constitution regarding the population variance of greater than 5%, and the failure to divide "the fewest possible number of counties." It is also a final and appealable judgment on the claim set forth in Count I of the Intervening Complaint filed by Intervening Plaintiffs Stevens, Stephenson, McGraw and Stein for violation of their rights under Section 33 of the Kentucky Constitution regarding the population variance of greater than 5% and the failure to divide "the fewest possible number of counties." Those claims of the plaintiffs and intervening plaintiffs under Fischer v. State Board of Elections, 879 S.W.2d 475 (Ky. 1994) constitute a facial challenge to the constitutionality of House Bill 1 under Section 33 of the Kentucky Constitution, and there is no just cause for delay in the entry of this judgment on the facial challenge to the constitutionality of House Bill 1. *See* CR 54.02

6. The Court RESERVES ruling on all other claims and defenses, pending the filing of Answers, completion of discovery, and briefing on the merits. Accordingly, this Order is an interlocutory order on all other claims of the Plaintiffs[5] and the Intervening Plaintiffs[6].

7. The bond previously set for the issuance of the restraining order under CR 65.03 ($200), which was posted by the Plaintiffs, shall remain in effect and serve as the bond for the temporary injunction.

[5] Lack of contiguity under Section 33, State and Federal Equal Protection, State and Federal Freedom of Association, 42 U.S.C. Sec. 1983, and Declaratory and Injunctive Relief under KRS 418.040)
[6] Equal Protection, Freedom of Association, Violation of Term of Office, 42 U.S.C. Sec. 1983, and Declaratory and Injunctive Relief.

IT IS SO ORDERED this 7th day of February, 2012, at 3:00 p.m. EST.

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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