

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

**KENNY BROWN, et al.,** :  
 :  
 **Plaintiffs,** : **Case No. 2:13-CV-68-WOB-GFVT-DJB**  
 :  
 v. :  
 :  
 **COMMONWEALTH OF KENTUCKY,** :  
 *et al.,* :  
 :  
 **Defendants.** :  
 :  
 :

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**MARTIN HERBERT, et al.,** :  
 :  
 **Plaintiffs,** : **Case No. 3:13-CV-25-WOB-GFVT-DJB**  
 :  
 v. :  
 :  
 **KENTUCKY STATE BOARD OF** :  
 **ELECTIONS, et al.,** :  
 :  
 **Defendants.** :  
 :  
 :

**MOTION PURSUANT TO FRCP 41(a)(2) TO DISMISS THE KENTUCKY  
LEGISLATIVE RESEARCH COMMISSION IN CASE NO. 13-CV-68-WOB-GFVT-DJB**

Plaintiffs in the matter of *Brown, et. al v. Commonwealth, et. al.*, Case No. 13-cv-68-WOB-GFVT-DBB, by and through counsel, and pursuant to FRCP 41(a)(2) move to dismiss (1) the Kentucky Legislative Research Commission. Given the LRC’s recent reliance on legislative immunity, it is appropriate to dismiss them from this suit. Plaintiffs request that these claims be dismissed without prejudice. A Memorandum in Support is attached hereto and incorporated by reference herein. A proposed Order is attached.

Respectfully Submitted,

/s/Christopher D. Wiest

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*Counsel for Plaintiffs in Brown, et.  
al. v. Commonwealth, et. al.*

**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 12th day of July, 2013, via the Court's CM/ECF system.

/s/Christopher Wiest

IN THE UNITED STATES DISTRICT COURT  
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**MEMORANDUM IN SUPPORT OF MOTION PURSUANT TO FRCP 41(a)(2) TO DISMISS THE KENTUCKY LEGISLATIVE RESEARCH COMMISSIONIN CASE NO. 13-CV-68-WOB-GFVT-DJB**

Plaintiffs seek to dismiss the Kentucky Legislative Research Commission from this matter. The Court's decision to grant/deny Plaintiff's Rule 41 request hinges on "whether a 'without prejudice' dismissal would cause [Defendant's] to suffer plain legal prejudice." *Univ. Estates, Inc. v. City of Athens*, No. 2:09-cv-758, 2011 U.S. Dist. LEXIS 53414, at \*4-\*5 (S.D. Ohio May 18, 2011) (citing *Perkins v. MBNA Am.*, 43 F. App'x 901, 902 (6th Cir. 2002), *Jones v. Lemke*, 178 F.3d 1294, [published in full-text format at 1999 U.S. App. LEXIS 2291], 1999 WL 107984, at \*2 (6th Cir. 1999) (unpublished table decision), *Grover*, 33 F.3d at 718 (6th Cir.

1994)). In making this determination, the Court must consider four factors: (1) Defendant's effort and expense in preparation of trial; (2) any excessive delay and lack of diligence on the part of Plaintiff in prosecuting the action; (3) the sufficiency of Plaintiff's explanation for the need of the dismissal; and (4) whether Defendant has filed a motion for summary judgment. *Maldonado v. Thomas M. Cooley Law Sch.*, 65 F. App'x 955, 956 (6th Cir. 2003) (citing *Grover*, 33 F.3d at 718). Courts have consistently held that "plain legal prejudice" does not result merely from the prospect of a second lawsuit on identical issues. *Lones v. S. Cent. Power Co.*, No. 04-883, 2005 U.S. Dist. LEXIS 46935, 2005 WL 1309088, at \*1 (S.D. Ohio May 31, 2005); *B & J Mfg. Co. v. D.A. Frost Indus., Inc.*, 106 F.R.D. 351, 352 (N.D. Ohio 1985); *Grover*, 33 F.3d at 718.

The Kentucky Legislative Research Commission, today, sought dismissal, in part, based on immunity, as to the 2012 Elections claims. If that immunity applies to those claims, it applies across the Board. The LRC is, apparently, not waiving its legislative immunity (though it could do so under K.R.S. 5.005).

Legislative immunity is an affirmative defense which can be waived or forfeited, and, unless raised, does not affect the power of a federal court to adjudicate. *See, e.g., Kingman Park Civic Ass'n v. Williams*, 358 U.S. App. D.C. 295, 348 F.3d 1033, 1039 (D.C. Cir. 2003) (mayor waived legislative immunity by expressly disavowing it in the district court); *Powell v. Ridge*, 247 F.3d 520, 531 (3d Cir. 2001) (Roth, J., concurring) ("legislative immunity may be waived"); *Fraternal Order of Police v. City of Hobart*, 864 F.2d 551, 554 (7th Cir. 1988) (by failing to invoke legislative immunity in the district court, members of city counsel waived that defense). Indeed, sometimes legislators who are sued decide to forego legislative immunity and defend on the merits. *See, e.g., Martinez v. Bush*, 234 F. Supp. 2d 1275, 1278 (S.D. Fla. 2002) (three-judge court) (Florida redistricting case).

Given that posture, and LRC's reliance on legislative immunity, which Plaintiffs do not dispute, Plaintiffs are willing to dismiss it **completely** from this matter (including, without limitation, its ability to attempt to intervene at a later juncture).

Respectfully Submitted,

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/s/Christopher Wiest

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**ORDER GRANTING DISMISSAL OF BROWN PLAINTIFFS MOTION UNDER FRCP 41(a)(2) TO DISMISS THE KENTUCKY LEGISLATIVE RESEARCH COMMISSION IN CASE NO. 13-CV-68-WOB-GFVT-DJB**

This Court, finding the Motion of the Brown Plaintiffs to be well taken, hereby dismisses the Kentucky Legislative Research Commission from this matter without prejudice.

IT IS SO ORDERED:

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Judge Van Tatenhove