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.	)	

DEFENDANT LEGISLATIVE RESEARCH COMMISSION'S RESPONSE IN OPPOSITION TO PLAINTIFFS' JOINT MOTION FOR SUMMARY JUDGMENT

The Kentucky Legislative Research Commission ("LRC") comes and states in Response to Plaintiffs' Joint Motion for Summary Judgment (Record No. 67):

LRC opposes the Plaintiffs' Joint Motion for Summary Judgment, as there are material issues of fact and Plaintiffs are not entitled to judgment as a matter of law. A Memorandum of Law in Support of this Response is attached hereto. The Court should deny the Plaintiffs' Motion for the reasons enumerated in detail in the Memorandum of Law.

There is no basis for a Summary Judgment at this time, and there are ongoing efforts to redistrict by the Kentucky General Assembly. A Summary Judgment would not be appropriate

at this time, as the state has a reasonably conceived plan for periodic readjustment of its legislative districts.

A proposed order is attached hereto.

Respectfully submitted:

s/Laura H. Hendrix
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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2013, a copy of the foregoing Response in Opposition to Plaintiffs' Joint Motion for Summary Judgment 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 electronic mail. Parties may access this filing through the Court's electronic filing system.

s/Laura H. Hendrix

Laura H. Hendrix

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DEFENDANT LEGISLATIVE RESEARCH COMMISSION'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' JOINT MOTION FOR SUMMARY JUDGMENT

The Kentucky Legislative Research Commission ("LRC") comes and states in Response to Plaintiffs' Joint Motion for Summary Judgment (Record No. 67):

I. STANDARD FOR SUMMARY JUDGMENT

In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Federal courts are "required to seek to uphold the constitutionality of state statutes where possible so as to refrain from interfering with the democratic functioning of a state's representative government." Northland Family

Planning Clinic, Inc. v. Cox, 487 F.3d 323, 339 (6th Cir. 2007). The Supreme Court has recently reiterated states' plenary power over their elections and federalism, stating "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." Shelby County, Ala. v. Holder, 133 S. Ct. 2612 (U.S. 2013) (internal citations omitted). 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." Id. The Supreme Court has refused to remove or "oust" duly elected Kentucky state officers, or make determinations contrary to settled state law. Taylor v. Beckham, 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. at 570-71). However, the General Assembly, not individual state officers or individual litigants, set the election law requirements. Since the principles of federalism limit the power of federal courts to intervene in state elections, district courts are wary of taking jurisdiction over these issues. Warf v. Bd. of Elections of Green County, 619 F.3d 553, 559 (6th Cir. 2010). Additionally, the U.S. Supreme Court has held that federal courts do not look into legislative motivations for actions, and legislative bodies are privileged to act within the legislative sphere. Tenney v. Brandhove, 341 U.S. 367, 377 (1951).

Legislatures redistrict, and unless there is "evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state

reapportionment nor permit federal litigation to be used to impede it." Growe v. Emison, 507 U.S. 25 (1993). Plaintiffs have presented no such evidence. Plaintiffs must show that a Defendant injured them as to substantially affect their legal interests. Relief is not available from the federal courts unless there is a tangible right to be enforced, but if "no comparable common-law right exists and no such constitutional or statutory interest has been created, relief is not available judicially." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 152-153 (1951). Ripeness is a core component of Article III standing and requires that "an injury in fact be certainly impending." National Treasury Employees Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996). In addition to these essential constitutional requirements, and even if a case is technically "ripe", prudential considerations counsel judicial restraint. See Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471 (1982). These include whether: 1) the complaint falls within the zone of interests protected by the statute or constitutional provision at issue; 2) the complaint raises abstract questions as generalized grievances more appropriately resolved by legislative branches; and 3) the plaintiff is asserting his or her own legal rights and interests rather than those of third parties. Allen v. Wright, 468 U.S. 737, 751 (1984).

Federal courts will not interfere with ongoing redistricting efforts because, "in the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself." Growe v. Emison, 507 U.S. 25, 33 (1993). As here, where there are ongoing efforts to redistrict, the Federal Courts do not step in to preempt the legislature and other actors, such as the Governor, from taking steps in that process. The standard under Reynolds v. Sims is that the State has a "reasonably conceived plan for periodic

readjustment of legislative apportionment." 377 U.S. 533, 583-584 (1964). Judicial relief is only appropriate when a legislature "fails to redistrict according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." Id. at 586. Redistricting " 'is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.' Chapman v. Meier, 420 U.S. 1, 27 (1975); see also Scott v. Germano, 381 U.S. 407, 409, (1965) (noting preference for both state legislature and state court to federal courts as agents of apportionment)." Pileggi v. Aichele, 843 F. Supp.2d 584, 592-93 (E.D. Pa. 2012).

Even if the basic allegation, as here, is that an older plan was used, courts "have recognized that no constitutional violation exists when an outdated legislative map is used" for a subsequent election, so long as there are ongoing efforts to redistrict. Garcia v. 2011 Legislative Reapportionment Commission, 2013 WL 1401788, *7 (E.D. Penn. April 8, 2013); citing Reynolds, 377 U.S. at 583-84. Where the mere complaint is that officials "failed to properly execute [their] duties in a timely fashion", such conclusory claims will be dismissed. Garcia, at *8; citing Graves v. City of Montgomery, 807 F.Supp.2d 1096 (M.D. Ala. 2011). Where a claim is "insubstantial", the judge may properly dismiss them without convening a three-judge court. Garcia, at *12, citing Duckworth v. State Admin. Bd. Of Election Laws, 332 F.3d 769, 772-73 (4th Cir. 2003). The Courts will dismiss claims for injunctive relief when there is no substantial question. Maryland Citizens for A Representative General Assembly v. Governor of Md., 429 F.2d 606, 611 (4th Cir. 1970). It would be "repugnant to principles of federalism and separation of power to interfere with the General Assembly's or governor's prerogatives" to intervene, where it was shown that Virginia's Legislature had agreed upon redistricting in the past ten years, even where the legislative elections were to be held in 4 months:

> As there is no reason to suspect that Virginia's lawmakers will fail to enact appropriate redistricting legislation in a timely manner, there is no basis for the requested relief. Moreover, as the Constitution leaves states with the primary responsibility for the apportionment of state legislative districts, Growe v. Emison, 507 U.S. 25, 24 (1993), it would be repugnant to principles of federalism and the separation of powers to interfere with the General Assembly's or governor's prerogatives now.

Carter v. Virginia State Bd. of Elections, 3:11-CV-7, 2011 WL 665408 (W.D. Va. Feb. 15, 2011). It was inappropriate to convene a three-judge panel as the matter was not ripe. Id.

When issues of material fact are disputed, courts do not entertain summary judgment. There are several factual allegations of Plaintiffs that are in dispute, thus summary judgment is inappropriate. Plaintiffs ask for a declaration that the 2002 maps ordered by the Kentucky Supreme Court violate the Fourteenth Amendment, and an injunction barring their use in future elections. The case is moot, because the issue of the 2012 elections has been adjudicated. Also, the Full Faith and Credit statute, 28 U.S.C. § 1738, requires a federal court to "accord a state court judgment the same preclusive effect that the judgment would have in a state court." Corzin v. Fordu, 201 F.3d 693, 703 (6th Cir.1999). Also, the test of Abbott Laboratories v. Gardner is not met because it is not ripe. 387 U.S. 136 (1967). There is no challenged governmental action that is final, as the process of redistricting is underway and ongoing, and there are two legislative sessions nigh. The challenged action has not created a direct and immediate dilemma. There are no elections in 2013 with a present right to vote for a candidate.

II. PLAINTIFFS HAVE NO STANDING

Article III of the U.S. Constitution provides that parties seeking federal court jurisdiction must allege an actual case or controversy, and must have sustained or be in immediate danger of sustaining some direct injury that is real and immediate and not "conjectural" or "hypothetical." Miyazawa v. City of Cincinnati, 825 F. Supp. 816, 818 (S.D. Ohio 1993), aff'd, 45 F.3d 126 (6th Cir. 1995). Plaintiffs here, as in Miyazawa, merely assert a "general complaint" that a candidate

that they may want to vote for may not be eligible to run for that office, thus they have "suffered no harm, nor will [they] suffer any greater harm than that of any other voter . . . that would provide [them] standing herein." Miyazawa v. City of Cincinnati, 45 F.3d 126, 127-28 (6th Cir. 1995); see also Burnette v. Bredesen, 566 F.Supp.2d 738, 742 (E.D. Tenn. 2008).

The Plaintiffs want to rush the process of redistricting, due to their erroneous and legally unsupported allegation that redistricting must take place prior to November 4, 2013. No court has mandated that the General Assembly undertake redistricting on a particular timetable in Kentucky, and Plaintiffs cite no case where a Kentucky state or federal court has ruled that the redistricting must occur before the residency date for the legislature. The General Assembly has plenary power over elections deadlines and responsibilities of elections officers, under Section 153 of the Kentucky Constitution. Plaintiffs have no "right" to accelerate the legislative redistricting process. The November 4, 2013 alleged "deadline" is a false flag hoisted by the Plaintiffs. Indeed, courts have held that legislatures, not federal courts, are the proper forums to weigh particular interests, political judgments and arrive at decisions. Perry v. Perez, 132 S.Ct. 934, 941 (2012). The County Clerk alleges that he will have to work to meet any possibly changed deadlines, but ministerial election officers must execute the laws as they are passed as part of their duties. Potter v. Campbell, 160 S.W. 763 (Ky. 1913). It is speculative, as a new law may be passed that may alleviate any such concerns, as has been done in the past. There is no allegation of injury with respect to the State Courts' decision to run the 2012 elections under the 2002 law. Plaintiffs agree that they have no damages. Kentucky's courts held that the 2012 elections should operate using 2002 redistricting, in direct contravention of the laws passed by the General Assembly. The only "injury" that Plaintiffs attempt to describe is amorphous, alleging "confusion" and "not receiving enough tax moneys." Brown Plaintiffs' Response to

Defendant Grimes' First Set of Interrogatories, page 6 (Exhibit 1). This is not sufficient. See LRC's Motion to Dismiss, Record 68, incorporated by reference.

III. PLAINTIFFS DO NOT MEET THE STANDARD FOR DECLARATORY JUDGMENT OR INJUNCTIVE RELIEF

Even if other grounds for abstention do not exist, federal district courts have discretion to determine whether to consider declaratory relief. AmSouth Bank v. Dale, 386 F.3d 763, 784 (6th Cir.2004); cited in Persley v. Lee, 794 F. Supp. 2d 728, 732-33 (E.D. Ky. 2011). The Declaratory Judgment Act is "an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." Wilton v. Seven Falls Co., 515 U.S. 277, 287 (1995). Courts look at four factors in declaratory judgment actions:

> (1) whether the declaratory action would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for *res judicata;*" (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy that is better or more effective.

Grand Trunk W. R.R. Co. v. Consol. Rail Corp., 746 F.2d 323, 326 (6th Cir.1984). In Persley, state actions were ongoing so the court declined to take jurisdiction. Courts decline declaratory relief where it would serve no useful purpose. Id. Additionally, no declaratory relief is available where it impinges on the legitimate legislative activities of a sovereign legislative body or its members. See Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 734 (1980).

A judgment would overstep the bounds of this Court's stated purpose: to enable the General Assembly to redistrict at either the 2013 or 2014 sessions. It will not settle the controversy over which plan will be passed next, but courts do not "trip up" state legislatures in their duties. Kentucky's courts have already decided this issue, and mandated the use of the old

lines. To decide contrary to that result would be to re-adjudicate that dispute and cause friction. There is no basis to do so, as the next legislative elections do not occur until 2014. The General Assembly can either redistrict in 2013 or 2014, this is the remedy, and there is simply no need for this declaration. There is a reasonably conceived plan for periodic readjustment of legislative representation in Kentucky, and that legislative process is ongoing. However, if the court overturns the decision of the state court, it should also issue a finding that 2012 House Bill 1 as passed by the General Assembly comported with the federal court precedents in interpreting the requirements of the Equal Protection Clause, and find it acted in conformity with federal law.

Plaintiffs also do not meet the injunctive relief standard. No injunctive relief may be given as against a legislative body, because of legislative immunity, nor against legislators. See Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 734 (1980). 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). However, Plaintiffs wish for the injunctive relief to apply to statutes enacted by the General Assembly in 2002, and ask that they not be used in the future. However, "as the Court concluded in Younger, 'the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it,' especially absent "any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief." Fieger v. Thomas, 74 F.3d 740, 750 (6th Cir. 1996) (quoting Younger v. Harris, 401 U.S. 37 (1971). There is not even a claim it would be enforced in the future. The equities, as stated above, mitigate against an injunction. Even if the Court found a violation, the courts permit the legislature to devise a remedy. United States v. Brown, 561 F.3d 420, 435 (5th Cir.2009).

IV. THERE IS NO VIOLATION OF EQUAL PROTECTION

Even assuming that courts will step in and adjudicate a dispute over continuing redistricting efforts, there is no magic number for invalidity, and courts must consider states' efforts to preserve political subdivision boundaries and other valid state concerns. Although Plaintiffs argue that "plans with a total deviation of greater than 10 percentage points create a prima facie case of an Equal Protection violation and are presumptively invalid," this is not necessarily the case. This ignores the fundamental precept of the state legislature as an independent body, as "legislative reapportionment is primarily a matter for legislative consideration and determination." Reynolds v. Sims, 377 U.S. 533, 586 (1964). Reynolds only requires "some reasonable plan for periodic revision of their apportionment schemes.… In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation." Id. At 583. Kentucky has engaged in that periodic readjustment, and is still in this process.

Plans for state legislatures require only "substantial" population equality. Gaffney v. Cummings, 412 U.S. 735 (1973). Deviations may be necessary to permit states to pursue other legitimate and rational state policies. See Reynolds, 377 U.S. at 577–81; see also Mahan v. Howell, 410 U.S. 315, 321–22 (1973). These policies include "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." Karcher v. Daggett, 462 U.S. 725, 740 (1983). Plans may have a greater total deviation in excess of ten percent, and it is reversible error not to consider whether a valid state interest exists in preserving political subdivision boundaries. Voinovich v. Quilter, 507 U.S. 146 (1993) (district court erred in concluding state legislative districts with

population deviations in excess of 10% from ideal invalid without first determining whether deviation necessary to preserve political subdivision boundaries). The U.S. Supreme Court upheld an 89% maximum deviation from equality and 16% average deviation to maintain integrity of political subdivisions and permit compact contiguous districts. Brown v. Thomson, 462 U.S. 835 (1983). The inquiry focuses on whether:

> the legislature's plan "may reasonably be said to advance [a] rational state policy" and, if so, "whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits."

Brown v. Thomson, 462 U.S. 835, 843 (1983). The legislature has flexibility in constructing legislative districts. Strict mathematical equality among district populations has never been required. Mahan v. Howell, 410 U.S. 315, 322 (1973). Instead, the standard has been referred to as the "goal of substantial equality." Brown, at 845. Kentucky's courts ruled that use of the 2002 plan was necessary to meet an interpretation of Kentucky Constitution Section 33's county integrity requirements, a result advocated for by litigants in privity to the Plaintiffs. Clearly, the plan still in place now is a result of the state court's determination of this "rational state policy" to respect county boundaries under Section 33. Federal court intervention is "a serious intrusion on the most vital of local functions." Miller v. Johnson, 515 U.S. 900, 915 (1995). The Supreme Court has carefully observed and reinforced principles of federalism and judicial restraint. Even when population disparities exist, if required by particular state constitutional concerns, courts have affirmed plans. See Brown, 462 U.S. at 843-44 (affirming plan in which county seat was underpopulated by 60% below the mean). Meeting the Section 33 county integrity requirement is the definition of a rational state policy. However, if this court finds that the state court decision does not meet the federal standard, it can find that the General Assembly's passage of 2012 House Bill 1 did meet this standard. The General Assembly will act either in the 2013 or 2014 sessions, the history of the General Assembly acting to protect equal protection concerns is clear,

so there is no need for summary judgment at this time. Under Reynolds, there is a reasonably conceived plan for readjustment that is ongoing.

V. HISTORY, TIMING, AND CONTEXT OF LEGISLATIVE REDISTRICTING

In the interest of providing the court with some perspective, historical information about Kentucky legislative redistricting is appropriate. The General Assembly has traditionally operated under the provisions of Kentucky and Federal law with respect to equal population. Plaintiffs state there is only a requirement of a "honest and good faith effort," to redistrict. Reynolds v. Sims, 377 U.S. 533 (1964). This standard has been met. The legislative timetable for redistricting should not be overstepped, as there is no indication that the General Assembly is not acting. The U.S. Supreme Court has held that the federal courts do not interfere with state legislative processes. Tenney v. Brandhove, 341 U.S. 367, 377 (1951).

The General Assembly has historically acted in good faith to pass redistricting legislation. The General Assembly has passed redistricting legislation 23 times since the advent of the current Kentucky constitution[1]. During the 69 years from 1894 to 1963, legislation to redistrict was enacted 6 times, or on average every 11.5 years. From 1963 to 2012, redistricting has passed an average of every 3 years, with 16 redistricting laws passing over 49 years. If one considers the 118 years since the first completion of redistricting, 1894, to the last passage of redistricting legislation, 2012, and divides this by the 22 times legislation has been passed since 1894, the General Assembly has averaged only 5.4 years between redistricting efforts. If this timetable is extended to 2014 (120 years), even if there is no redistricting until the 2014 Regular Session, the General Assembly will have averaged redistricting every 5.2 years.

[1]1893-1894, 1906, 1914, 1918, 1930, 1942, 1963, 1971, 1972, 1976, 1978, 1980, 1982, 1984, 1986, 1991, 1992, 1994, 1995, 1996, 2000, 2002, 2012. This includes House only and Senate only amendments. See attached Exhibit 2 with Ky. Acts Chapters, for additional reference.

The General Assembly undertook "major" redistrictings in 1893-1894, 1906, 1918, 1930, 1942, 1963, 1971, 1972, 1978, 1982, 1991, 1995, 1996, 2002, and 2012, passing comprehensive House and Senate legislative redistricting 14 times since 1894. Thus, over 118 years, until 2012, the General Assembly will have averaged passing major comprehensive redistricting every 8.4 years. If one extends this to 119 years through 2013, the General Assembly will still have passed redistricting legislation on average every 8.5 years, even if no legislation is passed in the 2013 special session. Assuming legislation passes in the 2013 special session, the redistricting frequency will rise to 15 times over the past 119 years, for an average of 7.9. If legislation is passed in the 2014 regular session, again, bringing the frequency to 15 times over 120 years, the average is 8 years between plans. Clearly, there is not any reluctance to redistrict, nor any long stretches of time between redistricting as were found wanting in Baker and Reynolds, nor any viable contention that the political process does not work. Allegations that General Assembly has "failed to do its duty" are without factual basis. It has always done its duty.

The LRC took the position in the 2012 state court litigation that the Equal Protection Clause, not county subdivisions, should govern the essential question of legislative redistricting, although the county subdivisions should be observed where practicable if not unduly violative of relative population equality. This has been the approach of the Kentucky General Assembly since the U.S. Supreme Court's rulings on Equal Protection in the early 1960's. In fact, the other southern states' fealty to "county integrity" was the primary reason offered in defense of redistricting lawsuits based on the Equal Protection Clause. Kentucky's legislature has always striven to give proper weight to county subdivisions, but under an approach that permits it as an independent body the ability to make those crucial policy-making decisions.

Plaintiffs cite no case requiring redistricting prior to the one year residency date for

legislative office. This erroneous, irrelevant and legally unsupported contention, that somehow the November 4, 2013 date mandates court involvement, is incorrect. No court or General Assembly has ever taken into account the residency requirement as a linchpin of a redistricting timetable. As a matter of law, hinging of General Assembly action upon this imaginary deadline, a political deadline, would violate the fundamental right of the General Assembly as the legislative body to set elections policy for the state under the Tenth Amendment. There is no right to know by November 4, 2013, what the district is, so that potential candidates can move to or from those districts. Any person who is a resident of that district as it exists, at the moment they file, can file for office, starting November 6, 2013 and ending January 28, 2014, unless these dates are modified by law. When the districts change as a result of redistricting, of course geographical area will change, and every candidate can file in the district which he or she had residence for a year prior to the regular election, in that new district. However, there is no legal requirement that a particular numbered district and its territory be in place by a year prior to the election, and Plaintiffs have asserted no court cases to this effect. They try to bootstrap a claim from the one-year residency requirement of Kentucky Constitution Section 32. However, there is no right to be a candidate. Clements v. Fashing, 457 U.S. 957 (1982); Carver v. Dennis, 104 F.3d 847, 851 (6th Cir. 1997). Therefore, there is no injury. Any person will be able to run in any one of the Senatorial Districts or Representative District up for election. Additionally, the claim is also that other "Plaintiffs" might "be drawn into a different district" and be "denied a right to stand as a candidate." Kentucky Courts have held that a candidate has no "right" to run in a particular numbered district. Anggelis v. Land, 371 S.W.2d 857 (Ky. 1963). That is purely a political consideration, of which the courts properly take no notice. Further, it is fundamental jurisprudence that this contention, even if it had merit, is not ripe at this time as a matter of law.

A residency requirement is, and should be, separate and distinct from the filing deadline. The first is a Constitutional requirement which may be assessed at any time by the Senate or House, the second, a statutory requirement that only sets a timetable for when people may begin and end their filing for candidacy. There is no right to identify with a particular district number, as "the district designations are merely conveniences in defining voting areas, and they have no intrinsic purpose such as would furnish a basis for requiring a candidate to be identified with a district as a numbered unit as distinguished from being identified with the geographical area defined by the district boundaries." McConnell v. Marshall, 467 S.W.2d 318, 320 (Ky. 1971). See also Anggelis v. Land, 371 S.W.2d 857 (Ky. 1963). Additionally, the Plaintiffs' asserted right would result in the General Assembly never having the authority to redistrict in a session that occurs in an election year, as every session begins in January and would by result always occur after the cutoff date for the residency requirement. This is not only an absurd result and an abridgement of the General Assembly's constitutional authority to redistrict, but also is contrary to its common past practice and that of every state legislature that redistricts in a similar fashion.

Also, the timetable for decennial redistricting may have begun in 1894, so even if a strict "10 year rule" was applied for state legislative redistricting, the next "deadline" for redistricting under the state Constitution would be 2014. Also, since the first redistricting after the initial lines were set was in 1906, an argument could be made that it is "ten years" after that date. In any event, the Franklin Circuit Court determined that there was no hard and fast deadline imposed upon the General Assembly. Exhibit 3. Kentucky's legislature has plenary discretion to set this timetable, under Reynolds.

Legislative redistricting has not been the subject of a federal court ruling since 1971, and the state court challenges from the 1990's and 2012 were premised only upon Section 33

considerations of county integrity. Legislative redistricting in the 1990's and 2012 did not violate federal Equal Protection. No federal district court in Kentucky has ever taken upon itself to redistrict the Kentucky legislature, nor to step in and create a timetable. Doing so now would be contrary to the principles of democracy, and would strip the General Assembly of its independence. The General Assembly enacted 2012 HB 1, which met Equal Protection standards. There has been a consistent and timely redistricting, even more frequently than every ten years. There is no need for this court to loose the bounds of judicial restraint and jump in to the political fray now. State courts used previous redistricting as a "remedy" if a plan is found to be unconstitutional on county-splitting grounds and have permitted the elections to run under previously-enacted legislation. The decision by the Kentucky courts in 2012 should be given appropriate weight, it makes the issue of "constitutionality" moot, as it already has been decided by that state court, and is therefore res judicata. The General Assembly has two opportunities to redistrict either in the 2013 special session or the 2014 regular session, and there is no legal reason why the General Assembly should not be permitted to do so. There are no regularly scheduled legislative elections in 2013. This ability to pass laws is essential to self-government through the legislative process, which is guaranteed under the U.S. Constitution, Article IV, Section 4, and U.S. Constitutional Amendment 10 and 11, and federal common law. The political process must be allowed adequate time and space to work out its differences.

This issue of the whether or not the current 2002 lines are "unconstitutional" has been addressed by the Kentucky Supreme Court and is res judicata. However, if the Court wishes to rule that this decision was not res judicata as to all the issues presented in the state court, then the fundamental question of whether the Kentucky Supreme Court was correct in "overruling" prior federal rulings, and abridging state separation of powers, to mandate a strict mathematical

standard that begins redistricting at the outer limits of the Equal Protection Clause by placing primacy on county integrity, may be determined by this court, under the federal law. It could hold that the Supreme Court's rulings in Fischer II and LRC v. Fischer impermissibly disregarded federal court rulings, in violation of the Supremacy Clause. Therefore, if the court wishes to make a declaratory judgment, then the LRC would submit that the General Assembly's 2012 legislation met the equal protection provisions as applied by this Court in Upton and Hensley, and the Court may permit it to be used for future elections. However, even under the Plaintiffs' contentions, there is no "litmus test" for constitutionality that would be appropriate at a summary judgment stage, and this Court should reject it.

a. Kentucky's Constitution and Past Redistricting Efforts-The General Assembly Has Diligently Done its Duty.

Kentucky has had four state constitutions, and the current Constitution was adopted in 1891. Sections 27 and 28 provide for strict separation of powers among the branches of Kentucky Government, one of the most stringent in the nation. Legislative Research Commission v. Brown, 664 S.W.2d 907 (Ky. 1984). This separation has been unchanged in the four constitutions adopted since 1792. Section 15 provides that "no power to suspend laws shall be exercised unless by the General Assembly or its authority." Section 29 vests legislative power in the General Assembly, which has authority to set public policy through its enactments. Section 32 provides the qualifications for legislative membership, including residency requirements. Grantz v. Grauman, 302 S.W. 364 (Ky. 1957). Section 38 provides that each House of the General Assembly is the judge of the qualifications, elections and returns of its members, each house may judge contested elections, and "the Courts are without jurisdiction to review its solemn determination." Raney v. Stovall, 361 S.W.2d 518, 523-24 (Ky. 1962); see also Taylor v. Beckham, 56 S.W. 177, 184, appeal dismissed, 178 U.S. 548 (1900). Section 152 provides "No

person shall ever be appointed a member of the General Assembly, but vacancies therein may be filled at a special election, in such manner as may be provided by law." Section 153 provides that the General Assembly has the power to regulate elections.

Redistricting of the state legislative body is a legislative function, not a judicial function, as is the passage of laws regulating elections. Unlike other states that may permit courts or unelected commissions to redistrict or regulate timetables for elections, Kentucky's constitution places this power with the General Assembly, and the power cannot flow over the "high wall" of separation. Fletcher v. Com., 163 S.W.3d 852, 872 (Ky. 2005). Section 33 of the Kentucky Constitution provides:

> The first General Assembly after the adoption of this Constitution shall divide the State into thirty-eight Senatorial Districts, and one hundred Representative Districts, as nearly equal in population as may be without dividing any county, except where a county may include more than one district, which districts shall constitute the Senatorial and Representative Districts for ten years. Not more than two counties shall be joined together to form a Representative District: Provided, In doing so the principle requiring every district to be as nearly equal in population as may be shall not be violated. At the expiration of that time, the General Assembly shall then, and every ten years thereafter, redistrict the State according to this rule, and for the purposes expressed in this section. If, in making said districts, inequality of population should be unavoidable, any advantage resulting therefrom shall be given to districts having the largest territory. No part of a county shall be added to another county to make a district, and the counties forming a district shall be contiguous.

Kentucky currently has 120 Counties.[2] Under the original 1891 Constitution, legislative elections were held in odd-numbered years. After adoption of Section 33 in 1891, the General Assembly redistricted itself in 1893, in May for the House and June for the Senate. Ky. Acts 235 (1891-1893). Stiglitz v. Schardien, 40 S.W.2d 315, 318 (1931). In 1894, the Senate allocated itself into short and long terms to enable Senatorial elections to be staggered, so that half of the Senate was elected every two years, completing the districting process. See 1894 Senate Journal, page 127; Anggelis v. Land, 371 S.W.2d 857, 858 (Ky. 1963); Combs v. Matthews, 364 S.W.2d 647, 649

[2] At the time of the writing of the present Constitution, Kentucky had 119 Counties.

(Ky. 1963). The first redistricting under Section 33, under the "every ten years thereafter" provision, was in 1906. Stiglitz, at 318. The next redistricting legislation was passed in 1918, 1930, and 1942. In 1906 and 1930, the state courts struck down redistricting on the basis of Section 33's population requirements, ordering the use of previous redistricting plans despite those plans being drawn based upon the previous Census counts. Ragland v. Anderson, 100 S.W. 865 (1907); Stiglitz, at 318 (1931). The last redistricting prior to the Baker v. Carr "modern era" of redistricting was in 1942. The average length of time between redistricting efforts of the General Assembly from 1894 to 1942 was 9.6 years[3]. Again, this was even before the advent of the equal protection jurisprudence of federal courts.

Notably, there was no federal or state court case that had to be filed in order to undertake legislative redistricting in response to the new federal jurisprudence. In 1963, in response to the Supreme Court's 1962 decision in Baker v. Carr, 369 U.S. 186, the Governor called a special session to address redistricting. Despite the Commissioner of Finance's contention that the redistricting could not be done until 1964 because the laws for redistricting were finalized in 1894, the legislators could convene in 1963 for that stated purpose. Combs v. Matthews, 364 S.W.2d 647, 649 (Ky. 1963). The General Assembly was currently in the special session. Although Kentucky had a hiatus of 21 years between 1942 and 1963 redistricting, the Kentucky court emphasized the contrast to Tennessee and other southern states, and the situation which led to the decision in Baker:

> The failure of Tennessee to reapportion its legislature since 1901 caused the Supreme Court, on March 26, 1962, to deviate from its historic policy of refraining from deciding so-called political questions on the ground they were non-justiciable.

Combs. Even noting this hiatus, the court merely noted that "promptness" was the key in determining the efficacy of legislative actions. To meet the Equal Protection mandate, now

[3] 1893-1894, 1906, 1914, 1918, 1930, 1942 redistrictings, for 48 years (1942-1894), divided by 5.

recognized as the primary concern, the legislature could disregard Section 33's prohibition against joining more than two counties in a redistricting plan, which "may include more than two (2) counties in a representative district if it deems that it is necessary in order to effect a reasonable equality of representation among respective districts." Id. A similar emphasis on reasonable promptness and reasonable equality was echoed in the Reynolds decision, which followed the next year. Again, there is a stark contrast with Kentucky's General Assembly, which had undertaken redistricting even more frequently than every ten years on average, and which, by the time of the issuance of the Reynolds opinion, had already acted to redistrict itself. Nowhere in Reynolds is there a strict 10 year requirement for redistricting.

In the 1970's, additional questions arose about issues with respect to Section 33's continued viability, in light of the developing federal law that emphasized Equal Protection. Senator Charles Upton filed a declaratory judgment action in the Eastern District of Kentucky, requesting an opinion on the extent of Section 33, and its interaction with the Equal Protection Clause. The unpublished 1971 decision, Upton v. Begley, later cited in Hensley v. Wood, 329 F. Supp. 787 (1971), held that the prohibition against splitting counties in Section 33 of the Kentucky Constitution was unconstitutional to the extent that it prevented compliance with the "one person, one vote" mandate of the U.S. Constitution. See Upton v. Begley, attached as Exhibit 4. The judgment stated:

> Section #33 of the Kentucky Constitution contravenes the 14th Amendment to the Constitution of the United States to the following extent and the following portions thereof are declared unconstitutional:
>
> That portion of the first sentence of said constitutional provision which reads as follows: "Without dividing any county"; and
> That portion of the last sentence of said Constitutional provision which reads as follows: "No part of a county shall be added to another county to make a district."

The District Court held that the Equal Protection Clause requires that a state:

> make an honest and good faith effort to construct districts in both houses of its legislature, as nearly as equal population as is practicable. The overriding objective of any re-apportionment plan must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal to that of any other citizen in the state, but mathematical exactness is not a constitutional requirement. Reynolds v. Sims, 377 U.S. 533 (1964).

The court held that legislative districts were malapportioned, and that they must be "reapportioned within a reasonable period of time using as the basis the population figures resulting from the 1970 census." The Court went on to say that population deviations were acceptable if done under a rational state policy. However, it also said that "population must always be the controlling consideration in apportionment of seats in a legislature, and cannot be submerged to other principles, including a policy of preserving geographic boundaries in composing legislative districts." The court said that equality of population simply "could not be accomplished" by following the policy in Section 33 of the Kentucky Constitution, and there was an "unavoidable conflict". The Supremacy Clause, therefore, mandated that Section 33 be declared invalid. The court did not set a deadline for redistricting, or state what a "reasonable period of time" would be, leaving it up to legislative discretion.

In 1971, following the passage of a redistricting plan by the General Assembly with a stated aim of equal representation, the federal court in Hensley v. Wood struck down the legislative redistricting plan enacted as violative of the Equal Protection Clause, as the overall range of the House plan was 25.5% and 18.92% for the Senate Plan. 329 F.Supp. 787 (E.D. Ky 1971). The court stated:

> It is true that there is no inflexible mathematical criteria for determining the constitutionality of reapportionment schemes. ***It is not permissible for a State to arbitrarily select a certain percentage of population deviation and then strive to meet or at least not exceed that mathematical variation of population.***

Id. at 793 (emphasis supplied). However, the federal court allowed that plan to be used for the upcoming legislative elections which were, at the time, held in the odd years. Redistricting and amendments thereto were then passed by the General Assembly in 1972, 1976, 1978, 1980, 1982, 1984, and 1986, applying this federal standard as established by Upton and Hensley. In 1979, a constitutional amendment was adopted by the people of Kentucky, to change legislative elections to even years, which would start in 1984. 1978 Acts Ch. 440, adopted Nov. 6, 1979.

b. State Courts' Revival of Section 33's Prohibition on County Splits.

The General Assembly again redistricted in 1991 in special session, with an amendment in 1992. A challenge to the law was brought on the basis of Section 33, and the Kentucky Courts ruled this could be brought in Campbell Circuit Court. Fischer v. State Board of Elections, 847 S.W.2d 718 (Ky. 1993) ("Fischer I"). In 1994, on remand, the Campbell Circuit Court held that the redistricting law was constitutional. However, the Kentucky Supreme Court reversed, ruling that the redistricting law did not meet Section 33's requirements against county splitting, essentially reviving that provision against the previous Federal court's order of 1971. There was no claim that the redistricting act "violate[d] any provision of the United States Constitution. In fact, [Plaintiff] admits that the Act would pass muster under the Constitution of the United States and relies entirely on Section 33 of the Constitution of Kentucky." Fischer v. State Bd. of Elections, 879 S.W.2d 475, 478 (Ky. 1994) ("Fischer II"). Neither the General Assembly nor the LRC were parties at this point in the lawsuit.

The Kentucky Supreme Court stated that it was creating a new standard for legislative redistricting based upon its interpretation of federal caselaw:

> Federal decisional law has long acknowledged the right of states to allow significant deviation from strict "one man, one vote" principles, absent invidious discrimination, to achieve important state policy. A total deviation of 16.4% was upheld in Mahan v. Howell, on the grounds that the State of Virginia had a substantial interest in preserving

> the integrity of its political subdivisions. Likewise, a total deviation of 89% was upheld in Brown v. Thomson,"on the basis of Wyoming's long-standing and legitimate policy of preserving county boundaries." While the federal courts have not abdicated their duty to require compliance with the Constitution of the United States in matters of state legislative apportionment, a presumption of validity has emerged and it is safe to say that so long as the maximum population deviation does not exceed −5% to +5%, and provided any such deviation is in furtherance of state policy, no violation of the Constitution of the United States will be found. Gaffney v. Cummings, and Connor v. Finch, supra.

Id. (citations omitted) The Court held that: "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. at 479. Despite the State Board of Elections' reliance upon Upton v. Begley and Hensley v. Wood, which the Kentucky General Assembly had used as the lodestone for redistricting since 1971, the Court held that it would not follow the federal courts' opinions:

> In support of their argument directed to the merits of this case, appellees have cited and rely on a 1971 unpublished decision of the United States District Court for the Eastern District of Kentucky, Upton v. Begley (Docket No. 364). This decision purports to declare unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, that portion of Section 33 of the Constitution of Kentucky which prohibits dividing any county in legislative apportionment. It is asserted that the General Assembly considered this opinion in formulating its reapportionment plan, thereby indicating its good faith. Appellant answers that this unpublished decision is erroneous, not binding on this Court, and that good faith is virtually irrelevant to the inquiry.
>
> We agree with appellant that the Upton decision is erroneous. It failed entirely to take account of this Court's decisions in Ragland v. Anderson, Stiglitz v. Schardien, and Combs v. Matthews, which placed appropriate priority on equality of representation for all citizens. It also failed to properly apply then controlling federal authority, Reynolds v. Sims. Of course, subsequent federal decisions which elaborate on the right of states to consider other important state law factors in the process of apportionment were not yet available. Whatever precedential value Upton v. Begley may ever have had has been seriously eroded by subsequent decisions of the Supreme Court of the United States.

Id. at 480 (internal citations omitted). The Court held that it would, however, delay the effective date of its decision until January 3, 1995 and allow the 1994 elections to run under the redistricting law which it had found unconstitutional under the county splitting provisions, in order to give the General Assembly opportunity to redistrict. Id. Interestingly, the attorney for

the Plaintiffs in the Hensley case who successfully challenged 1971 state redistricting on federal Equal Protection grounds was Donald C. Wintersheimer. As a state Supreme Court Justice, he filed a dissent in Fischer II:

> I must respectfully dissent from the majority opinion because the reapportionment acts of 1991 and 1992 represent a legitimate exercise of legislative discretion in developing an apportionment plan based on the principle of equality of population as a primary factor. I agree with the holding of the circuit court that equality of population is the most important element in apportionment. It is clear from any fair reading of Section 33 of the Kentucky Constitution that the integrity of the county unit when considered in an apportionment context is secondary to equality in population. . . . ***The Federal Constitution provides that the overriding consideration in any appointment plan is equality of population in state legislative districts. Reynolds v. Sims. Population remains the controlling criterion. All parties to this litigation concede that the current redistricting plans would pass Federal constitutional muster.***
> . . .
> The most recent Federal case on the subject provides instruction on how to approach such a situation. Hensley v. Wood, 329 F.Supp. 787 (1971), held that regardless of the legitimate desire to preserve the integrity of political subdivision units, the primary concern of the legislature with respect to apportionment must be the equal weight of the vote of each citizen. Some divergence from the population equality standard is permissible if it is necessary based on a legitimate consideration incident to the effectuation of a rational state policy. A reapportionment statute that was based on political sentiments and traditional subdivisions, violated the one-person one-vote principle, and did not conform as nearly as practicable to the standard. Hensley, supra.
> Any plan should not simply benefit a local or state government unit or further the career of any individual candidate.

Fischer, at 481-82 (Wintersheimer, Dissent) (emphasis supplied).

In August 1995, the legislature enacted both Senate and House redistricting plans, but the House bill was vetoed by the Governor after the House had adjourned sine die. The Campbell Circuit Court found the Senate plan unconstitutional on the ground that it was not accompanied by a House plan, and was therefore incomplete. A member of the House then resigned and the State Board of Elections petitioned to permit the filling of the vacancy via a special election, as required by the Kentucky Constitution. However, the Kentucky Supreme Court refused to allow the election. The Court held that when the districts' use was enjoined effective January 3, 1995:

> Upon our determination that such was unconstitutional, there is no legal theory whereby it or any portion of it could be used to establish a district for the purpose of filling a vacancy. As of January 3, 1995, there were no legislative districts as that concept is normally understood. There was but a single House district and a single Senate district comprising the whole of the Commonwealth of Kentucky.

State Board of Elections v. Fischer, 910 S.W.2d 245, 246 (Ky. 1995) ("Fischer III"). The LRC was a party to this lawsuit, and argued that the court should not permit the district to go unrepresented. The court rejected the view that anyone was "unrepresented" by virtue of not having a particular legislator in that district:

> Although a Senator [or Representative] 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 [or Representative] represents only those persons who voted for him.

Id. at 247, quoting Anggelis v. Land, 371 S.W.2d 857 (Ky. 1963). Therefore, the Kentucky Supreme Court refused to permit the election under the plan which was, admittedly, completely in compliance with the Equal Protection Clause. The General Assembly redistricted in 1996, and the law was upheld in Jensen v. State Board of Elections, 959 S.W.2d 771 (Ky. 1997). The court reiterated that the previous redistricting was struck down on the basis of the Court's newly stated rule that required maintaining a ***maximum*** population variation of plus-or-minus 5%, in order to ensure that the minimum number of counties were split. Id. at 772. The Court approved the plan because it split the minimum number of counties possible and that it "made full use of the maximum population deviation" required by the court in Fischer II of plus or minus 5%. The Jensen Court rejected a claim that the plan was "politically gerrymandered," stating that "[A]pportionment is primarily a political and legislative process. Our only role . . . is to ascertain whether a particular redistricting plan passes constitutional muster, not whether a better plan could be crafted." Id.

In 2000, the federal Census took place with Census information being received in 2001. State and Federal lawsuits were filed in 2001 to try and accelerate the enactment of redistricting, however, no court intervened to affect the General Assembly's redistricting timetable. 2002 House Bill 1 was passed on January 31, 2002. http://www.lrc.state.ky.us/recarch/02rs/HB1.htm The Act had a maximum population deviation of 10% for the House plan and 9.53% for the Senate. The Act also changed the filing deadline for legislative office to February 1, 2002.

c. The Current Cycle of Kentucky Legislative Redistricting: The Legislative Process Takes Time, As it Should, and Is Currently Ongoing.

The Plaintiffs' summary judgment motion states assumptions and speculation as "fact" regarding the supposed timetable for redistricting and actions taken or not taken by the General Assembly. However, this determination of what is a "reasonable time" is fundamentally a legislative one, that is appropriate not for courts to make, but for legislatures to make. See, Philpot v. Haviland, 880 S.W.2d 550, 553 (Ky. 1994); Tenney v. Brandhove, 341 U.S. 367, 377 (1951). Courts do not presume what a "reasonable time" is in terms of the timely introduction or passage of legislation, and leave this to the legislative body in the application of its rules and procedures. See Philpot. Additionally, legislatures are permitted sufficient time to investigate and to make value judgments as to the legislation to enact:

> This investigatory power, therefore, constitutes an extremely important function of the legislative process. It helps prevent unwise legislation, and it enables the enactment of statutes which serve the current needs of society.

1 Sutherland Statutory Construction § 12:1 (7th ed.). This process is ongoing, as part and parcel of the legislative process, including the legislature's and legislators' ability to inform themselves about the data underlying possible legislation, effects of court cases on current legislation, drafting legislation, and to act collectively at an appropriate time. Plaintiffs conclude that districts were legally "mal-apportioned" in March, 2011, which is not true. Since the last

redistricting was accomplished in January, 2002, the ten year period for redistricting, even assuming there is such a thing, would not have even run as of 2011. Also, Combs v. Matthews, *supra*, cites 1894 as the starting date for the legislative redistricting under the new Kentucky Constitution. Therefore, it may be permissible for the General Assembly to redistrict itself in 2014, under a reading of the "every 10 years" provision of Section 33.

On March 17, 2011, Kentucky got raw census numbers from the Census Bureau. Exhibit 5. However, Plaintiffs attempt to draw the pejorative conclusion that "despite the availability of this information in March, 2011," the Governor of Kentucky "decided not to call the General Assembly into special session that year to correct the mal-apportioned districts." This statement appears to conclude that all the "information" was available to the General Assembly in order to redistrict in March, 2011. All the "information" necessary to redistrict was not "available" to the General Assembly in March, 2011, and the General Assembly still is able to assimilate information in aid of its work in progress. Exhibit 5. The mere "availability" of the raw Census data on March 17, 2011 did not mean that it could be used for the purposes of redistricting. In any event, it acted in 2012 to redistrict, and is about to go into a special session and work is ongoing. Exhibit 5. Additionally, there may be other information that the General Assembly may or may not choose to use in the future, and the courts have said that this is valid. City of Detroit v. Franklin, 4 F.3d 1367 (6th Cir.1993).

The 2011 General Assembly did not have time to act even if it the data had been ready for use in Kentucky. The General Assembly had to adjourn the Regular Session sine die by March 30, 2011 according to the Kentucky Constitution, Section 42. On March 17, 2011, the General Assembly was in its veto recess, having used 28 days of the 30 days allotted to it in for the "short" regular session. See 2011 Legislative Calendar

http://www.lrc.ky.gov/sch_vist/11RS_calendar.pdf. Exhibit 6. Even if the General Assembly would have decided then and there to redistrict, it had insufficient legislative days to do so. As noted below, the information was not ready for use. Also, given the complexity of legislative redistricting, the staff time and preparation necessary, deliberations and discussion required, time for legislative input and understanding of the redistricting bills, constituent input, as well as other the time necessary for discussion and compromise, five days generally may not be a reasonable amount of time to decide upon, draft, meet in committee, deliberate, consider, read and pass the bill in question. Also, there are 138 members of the General Assembly, any one of whom may request that a bill be drafted for the General Assembly's consideration, and there are finite legislative resources that may be expended upon such efforts. The same is true for any session.

Also, the expense and time constraints of a special session were of concern to many lawmakers, given the Commonwealth's budget issues. A special session costs approximately $60,000 per day. Also, after the General Assembly adjourned in March, 2011, they had absolutely no power to convene in a special session. The Governor is not required to, nor can he be commanded to call a special session on a given topic. In Kentucky, the Governor has power to determine whether and when to call a special session, and for what purposes, and this is up to his or her complete discretion. Geveden v. Com., 142 S.W.3d 170, 172 (Ky. App. 2004) (denying State Legislators' motion for injunctive relief requiring the Governor to call a special session). Even though legislators may want a session to be called, they cannot require the Governor to do so, nor can the courts order a session. Id.

Additionally, such timing issues as when to best address redistricting, and when the General Assembly determines that it has sufficient information to undertake this weighty topic, is also governed by the intensive work that must be done to prepare for redistricting by the

legislative branch. It is also informed by the other legislative responsibilities, such as the time necessary to pass a budget and deal with other legislation. The legislative process of creating and analyzing bills with legislative redistricting plans takes significant time, as part of this legislative function of deliberation and decision-making. Exhibit 5. Since the Kentucky Supreme Court has reinvigorated the county split rule upon redistricting in such exacting terms, attempting to require the General Assembly to justify a minimum number of county splits, despite the federal court rulings referenced above, the process for drawing the maps is subject to even greater amounts of work that must take place. Additional time was necessary to ensure that the bill drafting system of the General Assembly was ready to draw up legislative bills relating to redistricting. Id.

Kentucky has 120 counties. The concerns with accuracy and communication with the bodies that must at some point carry out any redistricting legislation are paramount, and this also takes time. Id. Each of these counties has a county clerk. The precinct lines are maintained by the counties under KRS 117.055 and 117.0557. In order to even begin the process of placing data in a map format in order that it can be used for redistricting, each clerk must be contacted to make sure that the information, including the precinct lines that might have been altered by those counties since the previous redistricting, is correct. Id. In order for the mapping to be correct, these precinct lines must then be verified and put into the redistricting system for the use of the General Assembly. Id. Since Kentucky has 3,578 precincts and 161,672 census blocks, this process is time-consuming and exhaustive. Id. Additionally, there was an increase of 218 precincts and 29,373 census blocks from the previous redistricting, which meant that additional time had to be taken. Id. There was a concern about improving the accuracy of the county clerks' submissions as the return rate from County Clerks was only 60 percent in the previous round of redistricting in 2002. Id. It took until May 4, 2011 to create precinct layers for each county. See

Minutes of Interim Joint Committee on State Government, August 11, 2011, (Exhibit 7) http://www.lrc.ky.gov/minutes/st_gov/110824OK.HTM, and Exhibit 5.

However, due to the diligence of LRC staff and increased response from county clerks, from May 25, 2011 and July 19, 2011, all 120 county clerks did return precinct verification maps to LRC. Id. Out of the 120 county clerks contacted by LRC, 60 counties required corrections to be made in their maps. Id. Changes had to be made to Jefferson, Kenton, Campbell, and Boone Counties' maps. Exhibit 5. Based on this information, as confirmed by the County Clerks, then LRC was able to create a statewide precinct layer for the maps by July, 2011, by assigning population data to precincts. Exhibits 5 and 7. After this, in order for the General Assembly to properly make decisions on redistricting and receive public input, the information was placed on the LRC website. See http://www.lrc.ky.gov/gis/Redistricting%202010.htm Additionally, a redistricting computer was made available to the public with the data. Id. Public input was welcomed, both at the legislative committee meetings held during the interim, and also through interactions with state legislators. Exhibits 7, 8, 9, 10. During this interim meeting process, legislators were informed of the issues with redistricting and given information. Exhibit 5. Additionally, other groups, including one represented by Plaintiffs' Counsel, Dale Ho, were able to present information about the redistricting process. See http://www.lrc.ky.gov/minutes/st_gov/elec_ca/110823OK.HTM (Exhibit 8). This information as noted above was made available to the public through LRC publications. Notably, no Plaintiffs, or Mr. Ho, expressed concern about a supposed pressing issue with having districts drawn in November before the election year.

Following this process of data gathering, information sharing, conversation, bill drafting, and communication with legislators and the public, the 2012 Regular Session began January 3,

2012. Under Kentucky's constitutional process, any bill must have 3 readings on 3 separate days in each house, and each bill must be reported by a committee. The 2012 session was also a budget session. 2012 House Bill 1 was introduced in the House on the first day of the session, it passed the House on January 12 after being reported favorably from the House Standing Committee on State Government. Then, it was subsequently sent to the Senate, which also passed it out of the Senate Standing Committee on State Government, and passed by the Senate on January 19, 2012, signed by the presiding officers and enrolled, on the 11th legislative day. http://www.lrc.ky.gov/record/12rs/HB1.htm. On January 20, 2012, the Governor signed HB 1 into law as 2012 Acts Ch. 1. http://www.lrc.ky.gov/Statrev/ACTS2012RS/0001.pdf The law has a 10% variance for the House plan and a 9.84% variance for the Senate's. http://www.lrc.ky.gov/record/12rs/HB1/RS.pdf Exhibit 11. Therefore, the General Assembly passed a redistricting law that comported with the federal constitution provisions for Equal Protection, and gave due weight to the county splits. Because House Bill 1 was passed prior to the January 31, 2012 filing deadline, the filing deadline did not have to be altered from its original date, set in KRS 118.165, and interested candidates began filing their nomination papers for the primary election, so they could be listed on the ballot for the primary to be held in May, 2012.

Thursday, January 26, 2012, three members of the Kentucky House, House Minority Leader and LRC member Jeff Hoover, Representatives Joseph Fischer and 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 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, 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. Exhibit 3. LRC, on appeal, asserted that 2012 House Bill 1 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 12. On February 24, 2012, the Kentucky Supreme Court's order upheld the lower court's determination that the prohibition against county splits 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. 2012 WL 952983 (Ky. Feb. 24, 2012). Although the Court stated in its order that a full opinion would follow, which would have given guidance as to the reasoning behind the order, none followed for the pendency of the legislative session. This order was issued on the 34th day of the legislative session, and after the last day for legislative bill requests could be made under legislative rules. Then, on April 26, 2012, after the General Assembly had adjourned sine die, the Court issued a full opinion and stated:

> *Fischer II* requires division of the fewest number of counties mathematically possible in reapportionment plans. The LRC contends this is a judge-made standard not mandated by the

> Kentucky Constitution and that this standard should be replaced with a good faith requirement to divide only the fewest number of counties as is politically possible. We disagree.
>
> The text of Section 33 is clear that "as between the competing concepts of population equality and county integrity, the latter is of at least equal importance. The probability of population inequality is acknowledged, but the command with respect to the division of any county is absolute." And complying with Section 33's prohibition against split counties would violate equal protection principles. So we recognized in *Fischer II* that Kentucky avoided federal preemption because our earlier decisions construed Section 33 to give primacy to population equality. But we firmly stated that "total destruction of county integrity is not required and should be balanced with population equality to accommodate both." We reaffirm this assertion today.

Legislative Research Com'n v. Fischer, 366 S.W.3d 905, 911-12 (Ky. 2012). As noted above, this statement that a state court decision "requires division of the fewest number of counties mathematically possible", is in direct conflict with the Upton decision from 1971. However, this is the decision that was made by the state court.

Following this, the 2013 Regular Session ensued. The timeframe for the session was short, as it was only a 30 day session. As there were no regular elections for General Assembly members in 2013, the issue of redistricting was discussed and debated, but was not resolved. Consequently, a special session has been called for this purpose. As noted above, given the complexity of legislative redistricting, the timetable for a special session may vary, and sufficient time is necessary to address the pending questions. However, as the special session has been called for August 19, 2013, the legislative process is ongoing and active, and the legislative process should be allowed to work. Exhibit 5. All of the necessary time for the work that went into the 2012 and 2013 sessions will also need to take place in subsequent sessions in order to pass legislation, including compromise, conciliation, information gathering, discussion, deliberation, and voting.

Therefore, it is incorrect that the General Assembly has not acted in good faith, nor is it

true that they would "fail to act", given either the opportunity in the upcoming 2013 special or a 2014 legislative session, given the history. The legislative activity regarding redistricting is ongoing, and federal courts, as stated above, do not intervene where such ongoing efforts at redistricting are taking place. Of course, at the extraordinary session which has been called for the purpose of addressing redistricting, Plaintiffs are welcome to attend, give opinions and input on redistricting, and contact their Representatives and Senators to urging any plan that they believe would be beneficial to the Commonwealth of Kentucky.

VI. RES JUDICATA MANDATES AGAINST A FINDING OF UNCONSTITUTIONALITY IN A DECLARATORY JUDGMENT ACTION

The Plaintiffs ask for a declaration that the 2002 maps are "unconstitutional." This has already been litigated to conclusion by the same parties or privies in a lawsuit over the same issues. Additionally, the Full Faith and Credit statute requires the federal court to observe the finality of that opinion. The Supreme Court's February 24, 2012 order in that case adjudicated the same issues. 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 sought 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. The Plaintiffs activate the prohibitions of res judicata and collateral estoppel, and they bar this requested relief.

Res judicata 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).

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 they could have been raised in the first suit and arise from a common nucleus of fact. Gustafson, at 1254-55. 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, where they raise issues of "public law" and do not have different private rights "not shared in common with the public", so that continued challenges to the same issue would not "assume immortality." Id. at 1257-58. Therefore, "a state should not face an endless stream of lawsuits after each redistricting," and res judicata was applied. Id.

The parties were the same here, as the LRC 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. Even if the legislative members are removed, the same principles apply. 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 claims based on issues that were subsumed in the state court action.

Collateral estoppel would operate to bar the adjudication of any further relief, 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 re-litigated 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 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. In this part of the case, this is a question about the identical issue that was litigated in the state court, and this precludes relitigation of each ground that might have been presented as well as those actually presented. See Cromwell v. County of Sac, 94 U.S. 351 (1876).

VII. THE CLAIMS OVER THE USE OF 2002 LAW ARE MOOT

A moot action also does not present a justiciable case or controversy within the meaning of Article III, or give rise to 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 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. It mandated that legislative elections occur based upon the old law. 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.

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. Courts require claims to 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 or the 2002 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, a failure to bring such a suit until after that election is over moots it. Benton v. Clay, 233 S.W. 1041 (Ky. 1921). Despite an allegation of "unconstitutionality" of acts, where an allegedly improper Treasury payment had already been made, courts have refused to render a declaratory judgment, because it was moot. 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 do 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). The 2012 election occurred, legislators have been sworn into office, and seated by their respective bodies. There are no claims with respect to the usage of the 2002 redistricting bill that have not been mooted by the passage of time. Also there are no present elections. Additionally, the 2013 special session has not happened which may resolve this issue.

VIII. FINDING THE USE OF THE 2002 DISTRICTS UNCONSTITUTIONAL WOULD VIOLATE THE ROOKER-FELDMAN DOCTRINE.

Plaintiffs' complaint with respect to the 2012 redistricting arises from the Kentucky Supreme Court order that the 2012 elections be held based on the 2002 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 here, 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, and the injury "resulted from the state court judgment", this doctrine "precludes federal court jurisdiction where the claim is a specific grievance that the law was invalidly-even unconstitutionally-applied." Id. The Plaintiffs to this action are in privity with the Plaintiffs in the Fischer action in 2012 as stated above and are bound by its result. Com. ex rel. Dummit v.

Jefferson County, 189 S.W.2d 604, 606 (1945); citing Tait v. Western Maryland Railway Co., 289 U.S. 620 (1933).

IX. PLAINTIFFS' CLAIMS BASED ON THE 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). "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 are aggrieved by the passage of 2012 Regular Session House Bill 1, which was passed by the General Assembly and then signed into law on January 20, 2012, and the subsequent use by the Kentucky courts of the previous law from 2002. 2012 Ky.Acts Chapter 1. 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. Legislative Research Commission v. Fischer, 2012 WL 952983 (Ky. February 24, 2012) (Order of Kentucky Supreme Court, 2012-SC-091; 2011-SC-092, February 24, 2012). Therefore, any possible claims that Plaintiff has for any action relating to the passage of 2012 Regular Session House Bill 1, which became law on January 20, 2012, is barred by the statute of limitations. Since the last act of the General Assembly was passage of this law on January 20, 2012, then the one-year statute of limitations began to run then. Even if this Court gives Plaintiff the benefit of the doubt and 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. Obviously, Plaintiffs knew of the actions of the Kentucky Supreme Court in mandating that candidates run under the old districts. The statute of limitations has run.

X. THE GENERAL ASSEMBLY PASSED A PLAN THAT WAS CONSTITUTIONAL UNDER THE PLAINTIFFS' STANDARD, IN THE 2012 REGULAR SESSION

2012 House Bill 1, passed by the General Assembly and signed into law on January 20, 2012, is still the law in Kentucky, although the use of that law was enjoined by the Kentucky courts for the 2012 elections. The only reason that the Court found it unconstitutional and enjoined its use was under Section 33 of the Kentucky Constitution's prohibition against county splits. Plaintiffs allege as "fact" that: "Given the failure of the Kentucky General Assembly to pass a constitutional and lawful map in the 2011, 2012, or 2013 sessions … it is substantially certain that such condition will continue through November 4, 2013 and into and through the 2014 session." Again, the General Assembly did not fail to act, it **did** act in 2012 Regular Session to pass a redistricting law. The 2012 General Assembly enacted a legislative redistricting law, 2012 Regular Session House Bill 1, that the Governor signed into law on January 20, 2012. 2012 Ky. Acts Ch. 1; http://www.lrc.ky.gov/Statrev/ACTS2012RS/0001.pdf. The Legislative Record provides the daily summary of the actions of the General Assembly, and may be judicially noted just as the Act above. 2012 House Bill 1's "Population Summary Report" for the enacted version, which is provided to members and the public, may also be judicially noted. http://www.lrc.ky.gov/record/12RS/HB1/RS.pdf. Ex. 12. 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. If the court disregards the other considerations raised herein, such as mootness, lack of ripeness, and other bars to the court's consideration of this claim at this time, the courts should hold that this Act is constitutional under Equal Protection.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' Summary Judgment Motion.

Respectfully submitted:

s/Laura H. Hendrix___
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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2013, a copy of the foregoing 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 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 DENYING SUMMARY JUDGMENT

Upon the Motion of the Plaintiffs for Summary Judgment, and this Court being sufficiently advised, **IT IS HEREBY ORDERED** that the Plaintiffs' Joint Motion for Summary Judgment is hereby **DENIED.**

The Court finds that there is no basis for a Summary Judgment at this time, and that there are ongoing efforts to redistrict by the Kentucky General Assembly. A Summary Judgment would not be appropriate at this time, as the state has a reasonably conceived plan for periodic readjustment of its legislative districts.

Respectfully submitted:

s/Laura H. Hendrix___
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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 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 electronic mail. Parties may access this filing through the Court's electronic filing system.

s/Laura H. Hendrix

Laura H. Hendrix

DEFENDANT LRC'S EXHIBIT 1

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 (~~9077931~~ 90725)

Respectfully Submitted,

/s/Christopher Wiest

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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 2

REDISTRICTING LEGISLATION TIMETABLE

1893-May for the House, June for the Senate
Ky. Acts ch. 235 (1891-1983) Senate June 28, 1893
Ky. Acts ch. 193 (1891-1893) House May 3, 1893

1894-Senate (staggered terms)
Senate Journal, p. 127

1906- Ky. Acts ch. 139 (1906) House March 23, 1906

1914- Ky. Acts ch. 50 (1914) Senate March 19, 1914

1918- Ky. Acts ch. 3 (1918) Senate February 28, 1918
Ky. Acts ch. 45 (1918) House March 26, 1918

1930- Ky. Acts ch. 147 (1930) House March 20, 1930
Ky. Acts ch. 148 (1930) Senate March 20, 1930

1942- Ky. Acts ch. 1 (1942 Extra. Session) Senate (SB 4) April 8, 1942
Ky. Acts ch. 2 (1942 Extra. Session) House (SB 10) April 8, 1942

1963- Ky. Acts ch. 2 (1963) Senate (SB 4) February 28, 1963
Ky. Acts ch. 3 (1963) House (HB 3) February 28, 1963

1964- Ky. Acts ch. 15 (1964) Senate (SB 52) February 28, 1964

1971- Ky. Acts ch. 2 (1971) Senate & House (HB 1) March 24, 1971

1972- Ky. Acts ch. 227 (1972) Senate & House (SB 350) March 25, 1972
Ky. Acts ch. 6 (1972 1st Extra. Session) Senate & House (SB 2) June 27, 1972

1976- Ky. Acts ch. 231 (1976) House (HB 207) March 30, 1976

1978- Ky. Acts ch. 87 (1978) House (HB 319) March 17, 1978
Ky. Acts ch. 384 (1978) Senate & House (HB 607) March 30, 1978

1980- Ky. Acts ch. 152 (1980) House (HB 271) April 3, 1980

1982- Ky. Acts ch. 6 (1982) Senate (SB 57) February 18, 1982
Ky. Acts ch. 17 (1982) House (HB 294) February 18, 1982
Ky. Acts ch. 156 (1982) Senate (SB 278) March 26, 1982

1984- Ky. Acts ch. 44 (1984) House (HB 350) March 2, 1984

Ky. Acts ch. 111 (1984) House (HB 583) March 21, 1984
Ky. Acts ch. 185 (1984) House (SB 56) April 3, 1984

1986- Ky. Acts ch. 21 (1986) House (HB 35) February 20, 1986

1991- Ky. Acts ch. 3 (1991) Senate (SB 1) December 20, 1991
Ky. Acts ch. 5 (1991) House (HB 1) December 20, 1991

1992- Ky. Acts ch. 369 (1992) Senate & House (HB 56) April 10, 1992

1994- Ky. Acts ch. 497 (1994) Senate (SB 348) April 13, 1994

1995- 1995 SS HB 3 (House) vetoed by the Governor
Ky. Acts ch. 5 (1995) Senate (SB 6) August 4, 1995

1996- Ky. Acts ch. 1 (1996) House (HB 1) January 11, 1996
Ky. Acts ch. 2 (1996) Senate (SB 1) January 11, 1996

2000-Amendment to Senate plan
Ky. Acts ch. 325 (2000) Senate (SB 379) March 28, 2000

2002-January 2002-HB 1
Ky. Acts ch. 1 (2002) Senate & House (HB 1) January 31, 2002

2012-January 2012-HB 1
Ky. Acts ch. 1 (2012) Senate & House (HB 1) January 19, 2012

DEFENDANT LRC'S EXHIBIT 3

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 — **DEFENDANTS**
LEGISLATIVE RESEARCH COMMISSION — **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 1

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DEFENDANT LRC'S EXHIBIT 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

Filed 1-13-71

FRANKFORT

THE HONORABLE CHARLES B. UPTON, Etc. PLAINTIFF

VS JUDGMENT NO. 364

THE HONORABLE LELIA F. BEGLEY, ET AL DEFENDANTS

* * * * * *

In conformity with the order of this Court heretofore entered herein on January 5, 1971, and in conformity with the Findings of Fact and Conclusions of Law this date filed herein; and the Court being advised;

IT IS NOW THEREFORE ORDERED AND ADJUDGED HEREIN AS FOLLOWS:

(1) The pleadings, stipulations and exhibits show that a malapportionment exists in the 100 Representative and 38 Senatorial seats of the Kentucky General Assembly, and that said malapportionment cannot be remedied in harmony with Section No. 33 of the Kentucky Constitution.

(2) Section No. 33 of the Kentucky Constitution contravenes the Fourteenth Amendment to the Constitution of the United States to the following extent and the following portions thereof are declared unconstitutional:

That portion of the first sentence of said Constitutional provision which reads as follows:

"Without dividing any county";

and

That portion of the last sentence of said Constitutional provision which reads as follows:

"No part of a county shall be added to another county to make a district."

(3) The demand of the plaintiff's complaint and

amended complaint is sustained to the extent hereinbefore indicated; the Intervening Answer is dismissed; and the Defendants' Answer is dismissed.

This the 13th day of January, 1971.

BERNARD T. MOYNAHAN, JR.

Bernard T. Moynahan, Jr., Judge

A True Copy Attest:

Davis T. McGarvey, Clerk
U. S. District Court
By Nancy C Anderson
D. C.

NOTICE IS HEREBY GIVEN OF THE ENTRY OF THIS ORDER OR JUDGMENT ON 1-13-71

DAVIS T. McGARVEY, CLERK
BY: Nancy C Anderson D.C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

FRANKFORT

Filed 1-13-71

THE HONORABLE CHARLES B. UPTON, Etc. PLAINTIFF

VS FINDINGS OF FACT and CONCLUSIONS OF LAW NO. 364

THE HONORABLE LELIA P. BEGLEY, Et Al DEFENDANTS

* * * * * *

The Court being advised makes the following Findings of Fact and draws the following Conclusions of Law herein:

FINDINGS OF FACT

(1) The plaintiff is a resident of Whitley County, Kentucky, and is a voter in the Commonwealth of Kentucky. Plaintiff has standing to sue in this action individually as a representative of the class of persons who are registered and qualified voters in the Commonwealth of Kentucky who are entitled to vote for members of the General Assembly of Kentucky.

(2) The primary election for all members of the House of Representatives of the General Assembly of Kentucky, and one-half of the members of the Senate of said General Assembly will be held in May of 1971 pursuant to Kentucky law.

(3) The population figures of the 1970 Census for Kentucky reveal that the mean population figure for districts of the Senate is 83,166 and for districts of the House of Representatives is 31,603.

(4) The population figures of the 1970 Census for Kentucky reveal that the districts of the Senate vary from 56.47 percent of the "mean" population figure for Senate districts to 154.70 per cent of such mean figure. The Census figures show a variance of from 54.98 per cent to 138.05

per cent of the "mean" population figure for House districts.

(5) Some districts of the Senate and House, in the present apportionment plan are made up of only one county. Examples of such districts are:

Senate District 11	(Campbell County)
Senate District 24	(Kenton County)
Senate District 31	(Pike County)
House District 2	(Graves County)
House District 10	(Hopkins County)
House District 11	(Henderson County)
House District 23	(Barren County)
House District 51	(Madison County)
House District 57	(Franklin County
House District 76	(Greenup County)
House District 83	(Pulaski County)
House District 84	(Whitley County)
House District 85	(Laurel County)
House District 86	(Knox County)
House District 87	(Bell County)
House District 91	(Letcher County)
House District 92	(Perry County)

(6) The population figures of the 1970 Census reveal that of the districts of the House and Senate which are composed of only one county, the following districts have an excess of population over the mean population figure in the percentages shown:

Senate District 11	(Campbell County)	5.99%
Senate District 24	(Kenton County)	54.7 %
House District 57	(Franklin County)	3.63%
House District 76	(Greenup County)	4.30%
House District 83	(Pulaski County)	9.30%
House District 11	(Henderson County)	11.70%
House District 10	(Hopkins County)	17.36%
House District 51	(Madison County)	38.05%

(7) Section 33 of the Kentucky Constitution prohibited the first General Assembly, in providing for Senate and House Districts, from "dividing any county". The same section of the Kentucky Constitution requires that, in reapportioning the General Assembly, "no part of a county shall be added to another county to make a district, and the counties forming a district shall be contiguous".

CONCLUSIONS OF LAW

(1) The Court has jurisdiction of this action under Sections 1343 and 2201 of Title 28, and Sections 1983 and 1988 of Title 42, of the United States Code.

(2) The Equal Protection Clause of the Fourteenth Amendment to the Constitution requires that a state make an honest and good faith effort to construct districts in both houses of its legislature, as nearly as equal population as is practicable. The overriding objective of any reapportionment plan must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state, but mathematical exactness is not a constitutional requirement. Reynolds v. Sims, 377 U.S. 533, 84 Sup. Ct. 1362 (1964).

(3) The General Assembly of Kentucky as it is presently constituted is malapportioned, and the population variances of the districts of both the House of Representatives and the Senate do not conform to the requirements of either the Kentucky Constitution or the Fourteenth Amendment to the Constitution of the United States. Section 33, Kentucky Constitution, Reynolds v. Sims, supra; Swann v. Adams, 385 U. S. 440, 87 Sup. Ct. 569 (1967); Skolnick v. Illinois State Electoral Board, 307 F. Supp. 691 (N. D. Ill. 1969).

(4) The General Assembly of Kentucky, both under the Constitution of the United States and the Kentucky Constitution must be reapportioned within a reasonable period of time using as a basis the population figures resulting from the 1970 Census

(5) Minor deviations or variations from a pure population standard in reapportioning a state legislature are justifiable if effectuated under a rational state policy. A state may legitimately consider a reapportionment plan which maintains the integrity of various political subdivisions and provides for compact districts of contiguous territory. But population must always be the controlling consideration in apportionment of seats in a legislature, and cannot be submerged to other principles, including a policy of preserving geographical boundaries in composing legislative districts. Reynolds v. Sims, supra; Swann v. Adams, supra.

(6) The degree of equality of population in Senate and House Districts required by the Fourteenth Amendment to the Constitution of the United States could not be accomplished by any reapportionment plan which did not violate the prohibition against dividing counties in making legislative districts found in Section 33 of the Kentucky Constitution. Swann v. Adams, supra; Skolnick v. Illinois State Electoral Board, supra.

(7) Although Courts should attempt to accomodate relief in reapportionment cases to the apportionment provisions of state constitutions insofar as possible, where there exists an unavoidable conflict between the Federal Constitution and a state constitution, the Supremacy clause of the Federal Constitution controls, and those provisions of a state constitution which conflict with the requirements of the Federal Constitution are invalid insofar as they interfere with the application of the provisions of the Federal Constitution. Reynolds v. Sims, supra; Sudekum v. Hayes, 414 F.2d 41 (6th Cir. 1969)

(8) Section #33 of the Kentucky Constitution contravenes the 14th Amendment to the Constitution of the United States to the following extent and the following portions thereof are declared unconstitutional:

That portion of the first sentence of said Constitutional provision which reads as follows:

"Without dividing any county";

and

That portion of the last sentence of said Constitutional provision which reads as follows:

"No part of a county shall be added to another county to make a district."

A Judgment will this date be entered in conformity herewith.

This the 13th day of January, 1971.

D. C.

DEFENDANT LRC'S EXHIBIT 5

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.	)	

AFFIDAVIT OF SCOTT HAMILTON

Comes the Affiant, Scott Hamilton, after having been first duly sworn, and hereby states as follows:

1. My work address is Legislative Research Commission, Room 026, Capitol Annex, Frankfort Kentucky, 40601.

2. I am employed by the Legislative Research Commission as the Geographic Information Systems Manager. I have worked with the Geographic Information Systems Office since January 16, 2001, and I was the Geographic Systems Manager during the years up to and including the 2002 and 2012 redistricting process.

3. The Legislative Research Commission's Geographic Information Systems Office assists all members of the legislature, the Legislative Research Commission, the Committees of both the House of Representatives and the Senate, and Interim Joint Committees, in

performing their functions by offering both informational and analytical support. The office is staffed and works on a nonpartisan and confidential basis, serving all members of the legislature.

4. The Geographic Information Systems Office provides the information necessary to assist the General Assembly with state and congressional redistricting, among other duties.

5. The legislative process for redistricting has been ongoing since August, 2005 for this legislative redistricting cycle, and is continuing to the present time.

6. LRC submitted existing legislative district boundaries and related data files under Phase 1 of the 2010 Census Redistricting Data Program in December, 2005. Following submission of Kentucky's legislative district boundary lines, my office worked with the Census Bureau to verify submitted data. Additionally, my office realigned precinct and district boundaries as a result of the Census Bureau's MAF/Tiger Accuracy Improvement Project (MTAIP).

7. LRC then partially participated in Phase 2 of the 2010 Census Redistricting Data Program by submitting Kentucky's state legislative district boundaries from January to March 2009. LRC did not submit precinct boundaries under Phase 2 due to suspected discrepancies in the precinct database and because state law allows precinct boundary changes by counties following the Phase 2 submission deadline.

8. In Phase 3 of the Census Redistricting Data Program, the redistricting data and geography was received by the states.

9. From June 2009 to February 2011, my office assessed known precinct geography and data discrepancies to resolve problems, in conjunction with the State Board of Elections and county clerks.

10. On January 25, 2011, the Census 2010 redistricting geographic layers were received by my office.

11. On March 17, 2011, the raw Census population data was received by my office. However, this raw data had to be prepared for use for redistricting. Additionally, actual precinct boundaries upon which maps could be drawn were yet to be determined, as this information had not yet been received from county clerks.

12. From February to May, 2011, precinct layers were created for each of Kentucky's 120 counties, using the Census 2010 Redistricting geographic layers. This process took until May 4, 2011 to create precinct layers for each county.

13. The county precinct lines are maintained by the counties under KRS 117.055 and 117.0557.

14. In order to even begin the process of placing data in a map format in order that it can be used for redistricting, each clerk must be contacted to make sure that the information, including the precinct lines that might have been altered by those counties since the previous redistricting, was correct.

15. In order for the mapping to be correct, these precinct lines must then be verified and put into the redistricting system for the use of the General Assembly. Since Kentucky has 3,578 precincts and 161,672 census blocks, this process is time-consuming and exhaustive. Additionally, there was an increase of 218 precincts and 29,373 census blocks from the previous redistricting, which meant that additional time had to be taken to update and verify the precinct information.

16. Because of the large increase in the number of precincts, and because the verification rate from county clerks was extremely low in the 2002 round of redistricting, my office made a concerted effort to improve the accuracy of the county clerks' submissions of precinct boundary lines. We undertook a precinct verification process that was designed to be completed by July, 2011.

17. Because of my office's efforts to contact each county clerk, all 120 county clerks were contacted and sent maps for verification of precinct boundaries in May, 2011, with a deadline for verification of boundary lines or the return of maps with corrections by mid-June, 2011.

18. Out of the 120 county clerks contacted by LRC, 60 counties required corrections to be made in their maps, including Jefferson, Kenton, Campbell, and Boone Counties.

19. Based on this information, as confirmed by the County Clerks, LRC was able to create a statewide precinct layer for the maps by July, 2011, by assigning population data to precincts. After this, in order for the General Assembly to properly make decisions on redistricting and receive public input, the information was placed on the LRC website.

20. A redistricting computer was made available to the public in the Legislative Research Commission Library. The public has access to this computer in order to draw redistricting maps. This computer is still available for the public's use throughout the current ongoing redistricting cycle.

21. During the interim meeting process in 2011 and 2012, legislators were informed of the issues with redistricting and given information from my office.

22. The mapping software and redistricting database has been available for the purposes of drafting redistricting legislation starting in September 2011, and during the 2012 and 2013 sessions, as well as during the interims between legislative sessions and currently, and legislators and staff are able to utilize both as needed.

23. During the 2012 and 2013 sessions, and during the interims between legislative sessions, and currently, information relating to redistricting is available on the LRC website, and

the computer in the LRC Library with the mapping software and redistricting database has been available for the public's use since September 2011.

24. In preparation for the 2013 special session, the data and information relating to redistricting are available for preparation of redistricting legislation for consideration by the General Assembly. Any member of the General Assembly can request of LRC staff that a redistricting bill be drafted, and any member of the General Assembly may receive assistance from the Geographic Information Systems office relating to the redistricting process. All such information is confidential.

Further Affiant sayeth naught.

Scott Hamilton

STATE OF KENTUCKY)
) SS
COUNTY OF FRANKLIN)

Subscribed and sworn to before me on this the 24th day of July, 2013, by Scott Hamilton.

Notary Public

My Commission Expires:

January 26, 2014

DEFENDANT LRC'S EXHIBIT 6

2011 REGULAR SESSION CALENDAR

(Approved by LRC 10/6/10)

JANUARY – PART I

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
						1
2	3	4 Part I Convenes **(1)**	5 **(2)**	6 **(3)**	7 **(4)**	8
9	10	11	12	13	14	15
16	17 Martin Luther King, Jr. Day	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

Denotes break between Parts I and II. Bill drafts may be requested during this period for introduction when Part II convenes.

FEBRUARY – PART II

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
		1 Part II Convenes **(5)**	2 **(6)**	3 **(7)**	4 Last day for new bill requests **(8)**	5
6	7 **(9)**	8 **(10)**	9 **(11)**	10 **(12)**	11 Last day for new Senate bills **(13)**	12
13	14 Last day for new House bills **(14)**	15 **(15)**	16 **(16)**	17 **(17)**	18 **(18)**	19
20	21 Presidents' Day HOLIDAY	22 **(19)**	23 **(20)**	24 **(21)**	25 **(22)**	26
27	28 **(23)**					1

( ) Denotes Legislative Day

2011 REGULAR SESSION CALENDAR

(Approved by LRC 10/6/10)

MARCH

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
		1 **(24)**	2 **(25)**	3 **(26)**	4 Concurrence **(27)**	5
6	7 Concurrence **(28)**	8 **VETO**	9 **VETO**	10 **VETO**	11 **VETO**	12 **VETO**
13	14 **VETO**	15 **VETO**	16 **VETO**	17 **VETO**	18 **VETO**	19
20	21 **(29)**	22 **SINE DIE (30)**	23	24	25	26
27	28	29	30	31		

( ) Denotes Legislative Day

DEFENDANT LRC'S EXHIBIT 7

INTERIM JOINT COMMITTEE ON STATE GOVERNMENT

Minutes of the 3rd Meeting of the 2011 Interim

August 24, 2011

Call to Order and Roll Call

The third meeting of the Interim Joint Committee on State Government was held on Wednesday, August 24, 2011, at 1:00 PM, in Room 154 of the Capitol Annex. Representative Mike Cherry, Co-Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator Damon Thayer, Co-Chair; Representative Mike Cherry, Co-Chair; Senators Walter Blevins Jr., Jimmy Higdon, Gerald Neal, R. J. Palmer II, and John Schickel; Representatives Dwight Butler, Larry Clark, Leslie Combs, Tim Couch, Will Coursey, Danny Ford, Jim Glenn, Derrick Graham, Mike Harmon, Melvin Henley, Martha Jane King, Jimmie Lee, Brad Montell, Lonnie Napier, Sannie Overly, Darryl Owens, Tanya Pullin, Tom Riner, Carl Rollins II, Steven Rudy, Sal Santoro, John Will Stacy, Tommy Thompson, Tommy Turner, Jim Wayne, Alecia Webb-Edgington, and Brent Yonts.

Guests: Representatives Fred Nesler and Keith Hall; Greg Haskamp, Finance and Administration Cabinet; and Bill Thielen and T. J. Carlson, Kentucky Retirement Systems (KRS).

LRC Staff: Judy Fritz, Kevin Devlin, Brad Gross, Alisha Miller, Karen Powell, Greg Woosley, Bill VanArsdall, and Peggy Sciantarelli.

Approval of Minutes

The minutes of the July 21 meeting were approved, without objection. (This occurred near the end of the meeting.)

International Interest in Open Door Transparency in Kentucky

Greg Haskamp, Executive Director, Office of Policy and Audit, Finance and Administration Cabinet, gave an update about Kentucky's e-transparency web site, Open Door, which is serving as a model both nationally and internationally. Mr. Haskamp provided a one-page handout listing the numerous countries in Africa, the Middle East, and Asia that have expressed interest in Kentucky's searchable portal. He explained that Kentucky is the only state nationwide that has online expenditure records for all three branches of government and all independently elected offices. Much of the global interest

involves the International Visitor Leadership Program, a premier professional exchange program that brings visitors selected by U. S. embassies around the world to the United States for a three-week exchange program. It is handled under the auspices of the U. S. State Department and, in Kentucky, is sponsored by a number of groups, primarily the World Affairs Council of Kentucky/Southern Indiana and also the National Conference of States Legislatures. Since the Open Door's inception in 2009, leaders from 20 countries have come to Kentucky to learn about the website. The Cabinet is working to expand salary search information to include universities and quasi-governmental agencies, prepare for compliance with Senate Bill 7 [transparency legislation enacted in the 2011 Regular Session], and, in the long term, expand financial literacy resources. There were no questions for Mr. Haskamp. Representative Cherry thanked him for his report and also briefly spoke about his own recent discussions with a South African delegation.

Kentucky Retirement Systems Fund Loss Reporting Error

(This was a late addition to the meeting agenda at the Chair's request and is not listed on the official written agenda.) William Thielen, Interim Executive Director of KRS, and T. J. Carlson, Chief Investment Officer, were present to discuss why losses to the state employee pension fund in recent stock market volatility were not as severe as first reported. Mr. Carlson gave the following explanation.

The decline in the KRS financial portfolio had initially been reported by the media to be $1.7 billion—or 15 percent—when it was in fact only $500 million, or 5.4 percent. This happened because KRS staff released a pre-reconciled asset total for pension plan assets for the fiscal year through August 9, 2011. Due to a new asset allocation that took effect July 1, one section of the portfolio was being moved from the fixed income section, or bond section, to a real return section. When the KRS custodian ran the overnight account update, that account—valued at approximately $1.1 billion—was missing from the consolidation. The reported 15 percent loss was calculated by reporters and not by KRS. When KRS noticed the reported value of its portfolio to be dramatically below that of the other three public pension plans listed by the media, it became apparent there was an error because KRS, as a result of current reallocations, has more cash in its portfolio than average public pension plans. On August 18, KRS issued corrected information. Mr. Carlson closed by stating that the KRS Investment Committee has put in place new reporting procedures to prevent unreconciled information from being released in the future. KRS has also begun discussions with its custodian regarding the possibility of reconciling account information on a more frequent basis. When asked by Representative Glenn, he said that reporting could probably be done twice monthly with no increase in custodial fees; however, the KRS Board would have to decide whether increased fees would be justified for more frequent reporting.

Representative Cherry thanked the speakers. He also said he was heartened to see in KRS' press release that investment return in the KRS Pension Fund for the fiscal year ending June 30, 2011, was up approximately 19 percent, well above the assumed return rate of 7.75 percent.

Redistricting—Technological Aspects

Judy Fritz and Greg Woosley, State Government Committee staff, Geographic Information Systems (GIS) staff Scott Hamilton, and Office of Computer and Information Technology (OCIT) staff Jim Swain and Joel Redding, gave an overview of the technological aspects of redistricting, in preparation for the General Assembly's redrawing of legislative and congressional districts. Ms. Fritz, State Government Committee Staff Administrator, noted that a copy of today's PowerPoint presentation is included in the meeting folders and that it contains information about constitutional and case law relating to redistricting that will not be discussed today.

Ms. Fritz said it is anticipated that the redistricting system will be ready for use the first part of September—that is, precinct boundaries will have been verified and populated with the most recent census data, and the bill drafting and data systems will have been checked and double-checked. Upon approval by the Senate President and the House Speaker, in-house training and distribution of work stations will take place. She explained the process for submission of redistricting proposals and preparation of proposed plans as bill requests or amendments to existing bills. The process requires LRC staff to verify all redistricting plans and to create maps and reports to accompany each plan. The Senate State and Local Government and House State Government are the usual committees of jurisdiction for redistricting.

Mr. Woosley, State Government Committee staff analyst, discussed the process and requirements for establishment of election precincts by each county board of elections, pursuant to KRS 117.055. He explained that proposed precinct establishment orders (PEO) must be submitted to the State Board of Elections (SBE) for approval, and SBE must provide a copy of each submitted PEO to LRC for review and comment prior to SBE approval. Once a PEO is approved it is resubmitted to LRC for incorporation into the LRC database. Effective July 15, 2010, precinct lines were frozen until after redistricting takes place. Mr. Woosley said that state law requires that no election precinct cross congressional, state senate, or state house district boundaries, as well as local magisterial district lines. Following redistricting, county boards of elections are required by state law to alter precinct boundaries so that they do not cross legislative district lines.

Mr. Hamilton, GIS Manager, discussed redistricting data preparation and the five-phase 2010 Census Redistricting Data Program, which provides states the opportunity to delineate voting and state legislative districts and to suggest census block boundaries for use in census redistricting data tabulations. He explained that in December 2005, LRC

submitted legislative district boundaries under Phase 1 of the program. Kentucky only partially participated in Phase 2 (Voting District/Block Boundary Suggestion Project), since precinct boundaries were not submitted. The timeline for Phase2 submissions was January-March 2009, and Kentucky precincts were not frozen until July 2010. In Phase 3, redistricting data and geographic products were delivered to the states. Kentucky received the census GIS geographic layers in January 2010 and the census population data in March. Under Phase 4, the newly drawn congressional and legislative district boundaries will be collected, and 2010 Census data will be tabulated to those new districts. The data will then be released via DVD and to American Fact Finder, the Census Bureau's online, self-service search tool that delivers a wide variety of population, economic, geographic, and housing information. Phase 5—evaluation and recommendations for the 2020 Census—began at the recent NCSL Annual Conference in San Antonio, Texas. In a roundtable meeting at the Conference with Census Bureau officials, a number of staff from different states suggested that submission of precinct boundaries under Phase 2 of the Redistricting Data Program be moved to a later date in order to allow for greater participation.

Mr. Hamilton reviewed the timeline for redistricting data preparation. From October 2008 to June 2009, LRC staff realigned precinct boundaries to the newly improved census geography; June 2009 to February 2011, known precinct geography and data discrepancies were resolved; February 21-May 4, 2011, precinct layers were created for each county, using the newly released 2010 Census Redistricting GIS layers received January 25; May 10-18, 2011, precinct maps were created for each county; May 19, maps and accompanying documents were sent to county clerks for verification; May 25-July 19, precinct verification maps were returned to LRC by all 120 county clerks, and 60 counties required corrections to be made. The return rate from counties was only 60 percent in the previous round of redistricting. In July 2011, a statewide precinct layer was created. Kentucky has 3,578 precincts—an increase of 218 from the 2000 Census—and 161,672 census blocks—an increase of 29,373. Mr. Hamilton concluded by pointing out that the redistricting system would have been ready for use upon release of redistricting data by the Census Bureau if Kentucky could have fully participated in Phase 2 of the Redistricting Data Program. Full participation was not possible, though, because of election filing deadlines and the requirement to freeze precincts.

Mr. Swain, Chief Information Officer, briefed the Committee regarding storage and sharing of redistricting plan files and security procedures that are in place to protect the confidentiality of plan proposals and bill requests. He explained that, in addition to the security provided by the Maptitude software, there will also be instant offsite replication of data via fiber optics, nightly backups to a robotic tape system, and uninterruptible power systems. Computer stations with redistricting software for public use will be located in the LRC library, and unique logins and security will be provided for all users.

Mr. Redding, Deputy Chief Information Officer and LRC Webmaster, gave an overview of LRC's "Redistricting 2010" web page that will go online at a later date. Included in the web site will be links to redistricting bills and plan reports that have been made public, 2010 population information, current district maps, and census and redistricting information from the U. S. Census Bureau and the National Conference of State Legislatures. He noted that LRC's web site currently contains a link to "2010 Census Redistricting Data."

The staff presentation concluded with an on-screen demonstration of the Maptitude software by Mr. Woosley. This was followed by questions and comments from committee members.

When Representative Lee asked who is responsible for changing or establishing precinct lines, Mr. Woosley explained that county boards of elections, in conjunction with the State Board of Elections, control the creation of precinct boundaries. State law says that after each election the county board should review any precinct in which the votes cast in the last election totaled 700 votes or more. The only statutory provision that speaks to a mandatory change says that the State Board may withhold funds to counties for administration of elections if a precinct population increases by more than 1,500 registered voters.

Representative Lee asked about the legality of local governments moving precincts from one legislative district to another through annexation—a situation that had occurred in his own district. Mr. Woosley said that he cannot render a legal opinion but explained that state law prohibits precinct lines from crossing legislative boundaries and prohibits county boards of elections from altering legislative districts.

Responding to a question from Representative Montell, Mr. Hamilton explained that even though Kentucky did not gain significant population in the 2010 Census, the number of census blocks increased by 29,373 in order to accommodate the population increase in some areas that caused existing census blocks to become too populated.

Representative Graham asked whether the population in his district is properly represented now, since it had been altered by the moving of two precincts from the city into the county in error after the 2010 Census. Mr. Hamilton said that the mistake had been rectified. Responding to another question from Representative Graham, Representative Cherry said that state legislative and congressional redistricting plans can be filed either in separate bills or in the same bill, as was done in House Bill 1 (2002 Regular Session).

Representative Stacy and Representative Combs stated their opinion that in some counties there are split precincts where legislative district boundaries do not follow precinct lines. Mr. Woosley indicated that precinct boundaries have historically been

used in the redistricting process, in accord with state law. Representative Cherry said he, too, believes there may be some split precincts, and he directed staff to research this question and advise the Committee.

Representative Stacy and Representative Overly asked about the timetable, requirements, and authority for the redrawing of judicial districts. Mr. Woosley said that the Kentucky Constitution speaks to judicial redistricting with permissive language, while sections applying to legislative redistricting speak in mandatory language. Representative Cherry requested staff to research this issue also.

Senator Thayer said he has been contacted about judicial redistricting and is of the opinion that it should be addressed in the next legislative session. He said he was told it has been 20 years since judicial districts were last redrawn and that some judicial districts are completely out of balance with regard to population.

Subcommittee Report and Adjournment

Senator Thayer, Co-Chair of the Task Force on Elections, Constitutional Amendments, and Intergovernmental Affairs, reported on the Task Force's July 26 and August 23 meetings. The report was adopted without objection. Business concluded, and the meeting was adjourned at 2:25 p.m.

DEFENDANT LRC'S EXHIBIT 8

INTERIM JOINT COMMITTEE ON STATE GOVERNMENT

Task Force on Elections, Constitutional Amendments, and Intergovernmental Affairs

Minutes of the 3rd Meeting
Of the 2011 Interim

August 23, 2011

Call to Order and Roll Call

The 3rd meeting of the Task Force on Elections, Constitutional Amendments, and Intergovernmental Affairs of the Interim Joint Committee on State Government was held on Tuesday, August 23, 2011, at 1:00 PM, in Room 171 of the Capitol Annex. Representative Darryl T. Owens, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator Damon Thayer, Co-Chair; Representative Darryl T. Owens, Co-Chair; Senators Walter Blevins Jr., Jimmy Higdon, Alice Forgy Kerr, Gerald A. Neal, R.J. Palmer II, John Schickel, and Dan "Malano" Seum; Representatives Kevin D. Bratcher, Mike Cherry, Larry Clark, James R. Comer Jr., Joseph M. Fischer, Derrick Graham, Mike Harmon, Melvin B. Henley, Mary Lou Marzian, and John Will Stacy.

Guests: Sarah M. Jackson, Executive Director, Emily Dennis, General Counsel, Kentucky Registry of Election Finance; Dale Ho, Assistant Counsel, NAACP Legal Defense and Educational Fund, Inc.; LaDonna H. Thompson, Commissioner, Craig Thatcher, IT Branch Manager, Kentucky Department of Corrections.

LRC Staff: Judy Fritz, Karen Powell, Greg Woosley, Bill VanArsdall, and Terisa Roland.

Approval of Minutes

The minutes of the July 26, 2011 meeting were approved without objection, upon motion by Representative Henley and second by Senator Thayer.

Trending Now – Top Ten Current Campaign Finance Questions

Sarah Jackson and Emily Dennis from the Registry of Election Finance presented the top ten campaign finance questions heard by the Registry. Some of the issues discussed included whether campaign finance regulations apply to funds spent to get an issue on the ballot, whether candidates and committees can use raffles to raise funds or

solicit contributions, whether sitting legislators can retain funds raised for one district seat if that district seat number is changed by redistricting, whether Kentucky candidates can accept funds from a federally registered political action committee without subjecting the committee to Kentucky reporting requirements, whether judicial candidates can solicit contributions, and whether corporations can make contributions to candidates as a result of the United States Supreme Court ruling in the *Citizens United* case. Copies of the presentation were distributed to members, and a copy is available in the LRC library.

Several members of the Task Force posed questions and voiced their opinions and concerns on the Registry's presentation.

Counting Prison Populations for Redistricting

Dale Ho, Assistant Counsel of the NAACP Legal Defense and Educational Fund, discussed how and where prison populations are counted by the United States Census Bureau and how those populations are considered in the redistricting process. Mr. Ho discussed model legislation on reallocating prison populations from the facilities where they are housed to the prisoners' last known residential addresses, and he advised the where similar legislation has been adopted. He offered demographic examples of several of Kentucky's counties and testified as to how the prison population in those counties can affect relative representation in a redistricting plan, particularly at the local level. Mr. Ho distributed information folders to the members, and a copy is available in the LRC library.

LaDonna Thompson, Commissioner, and Craig Thatcher, IT Branch Manager, of the Kentucky Department of Corrections, testified as to the ability of the Department to report the last known residential address to the General Assembly if a process of prisoner reallocation were adopted as part of future redistricting processes. Commissioner Thompson and Mr. Thatcher provided members with a spreadsheet showing prison population by county of conviction and said other reports could be available to better understand the location and prior residence of Kentucky's prison population.

The members asked questions and voiced their concerns on how the prison population is currently allocated in Kentucky and other states and how a changed system of allocation might alter the redistricting process. Some members inquired as to how prisoners from other states should be allocated, how prisoners differ from students or members of the military who might also be present in a location on the date the census is conducted but not have an intent to stay permanently, and how this issue might be similar or different to how homeless persons are counted – with a comparison to how these persons register to vote, an issue that was discussed in the July meeting of the Task Force.

Business concluded, and the meeting adjourned at 2:30 p.m.

DEFENDANT LRC'S EXHIBIT 9

INTERIM JOINT COMMITTEE ON STATE GOVERNMENT

Minutes of the 1st Meeting of the 2011 Interim

June 29, 2011

Call to Order and Roll Call

The first meeting of the Interim Joint Committee on State Government was held on Wednesday, June 29, 2011, at 1:00 PM, in Room 154 of the Capitol Annex. Representative Mike Cherry, Co-Chair, called the meeting to order, and the secretary called the roll. Senator Damon Thayer, Co-Chair, and Representative Cherry jointly chaired the meeting.

Present were:

Members: Senator Damon Thayer, Co-Chair; Representative Mike Cherry, Co-Chair; Senators Walter Blevins, Jr., Gerald Neal, R. J. Palmer II, John Schickel, Dan "Malano" Seum, and Johnny Ray Turner; Representatives Linda Belcher, Kevin Bratcher, Dwight Butler, Larry Clark, Leslie Combs, James Comer, Jr., Tim Couch, Will Coursey, Joseph Fischer, Danny Ford, Jim Glenn, Derrick Graham, Mike Harmon, Melvin Henley, Martha Jane King, Jimmie Lee, Mary Lou Marzian, Brad Montell, Sannie Overly, Tanya Pullin, Tom Riner, Carl Rollins II, Steven Rudy, Sal Santoro, John Will Stacy, John Tilley, Tommy Turner, and Brent Yonts.

Guests: Representative Jim Gooch; Crit Luallen and Brian Lykins, Office of Auditor of Public Accounts; Jennifer Elliott, Kentucky Retirement Systems Board of Trustees; William Thielen, Kentucky Retirement Systems; and Cathy McCully, U. S. Census Bureau.

LRC Staff: Judy Fritz, Brad Gross, Karen Powell, Bill VanArsdall, Greg Woosley, and Peggy Sciantarelli.

Auditor's Examination of Kentucky Retirement Systems (KRS)

Guest speakers were State Auditor Crit Luallen; Brian Lykins, Director of the Office of Technology and Special Audits; Jennifer Elliott, Chair, KRS Board of Trustees; and William Thielen, KRS Interim Executive Director. Ms. Luallen reviewed the KRS special audit, which was released June 28, 2011.

The audit makes 92 recommendations to strengthen the Board of Trustees' oversight and governance of KRS. The report did not identify any matters that appear to have impacted KRS' financial condition. The audit focused on the specific questions

surrounding the use of placement agents, the internal audit process, and a broad review of Board policies and governance. A team of six auditors, led by Mr. Lykins, conducted more than 40 interviews, reviewed thousands of documents, and spent over 2,000 hours in the review. Based on the information reviewed, auditors saw no evidence of a "pay to play" scheme involving placement agents, no evidence of conflicts of interest that benefited KRS officials, and no evidence that KRS incurred any additional cost through the use of placement agents. However, the audit points out several troubling aspects regarding the use of placement agents and will be referred to the U. S. Securities and Exchange Commission (SEC), which has the authority to determine if further investigation is needed.

While the audit did not substantiate any specific evidence of wrongdoing, it pointed out a number of areas where the KRS Board could improve communications, accountability, and transparency. The audit recommendations offer numerous steps that KRS could take to strengthen Board governance.

After questions were raised regarding the use of placement agents, an internal audit was initiated at KRS and presented to the Board in August 2010. Placement agents are intermediaries—or third-party marketers—paid a fee by investment managers to solicit and secure potential investors. The internal audit found no wrongdoing in the use of placement agents, but KRS trustees questioned the internal audit process, as well as the fees that had been paid to placement agents. In August 2010, Governor Beshear sent a letter to the then-chair of the Board, suggesting that the Auditor of Public Accounts conduct an independent review of the adequacy of the internal audit process and other matters related to Board oversight. Subsequently, the Board of Trustees voted to request the review by the State Auditor's office. The audit found that the use of placement agents lacked transparency and may not have been in the best interest of KRS. One placement agent had an unusually close working relationship with KRS' former chief investment officer (CIO). That placement agent received a high percentage of the investment contracts, participated in seven of the 13 investment agreements in which placement agents were used, and could have earned a minimum of $1.3 million in fees on KRS investments. Additionally, firms with which he was affiliated could earn an additional $3 million from those investments. He appears to have acted as a representative of KRS, setting up appointments and making travel arrangements for the former investment officer. The relationship appears to have been different than that of other placement agents who typically contract with investment managers. In August 2009, the former CIO participated in the development of a placement agent disclosure policy, which was adopted by the Board of Trustees. Even after that policy was adopted to bring more transparency, the former CIO did not disclose the use of this same placement agent in a significant investment, thereby violating the new policy. The audit is being referred to the SEC primarily because of the questionable relationship and interaction between that placement agent and the former CIO. Both the former CIO, who resigned in July 2010, and the placement agent in question declined to be interviewed by the auditors, nor did

the auditors have access to their personal financial records. The SEC has been conducting a review of placement agents around the country and has initiated an informal inquiry in Kentucky.

The audit recommends that the KRS investment staff and the Board's investment committee ensure consistent compliance with all established investment policies; that all information required by the placement agent disclosure policy be presented to the Board in a clear and transparent manner; and that disclosure statements include political contributions within the past two years by placement agents. The report further recommends that the General Assembly consider requiring placement agents to register as lobbyists with the Executive Branch Ethics Commission and that the Board's investment committee receive detailed information on all recommended investments.

Auditors followed up on allegations that meetings set up by the Governor's Office may have resulted in undue influence on KRS officials. Interviews and analysis of documentation found no evidence of pressure to use specific firms, and no firms identified as having contacts made on their behalf received business from KRS.

State auditors found that the internal audit had insufficient involvement from the Board, lacked transparency, and resulted in confusion and suspicion among the trustees. Auditors found no evidence that information from the internal audit was withheld or delayed with an intent to hide fraud or wrongdoing. The fact that executive staff sat in on certain meetings of the internal audit staff diminished the perception of independence of the internal audit, but there was no evidence that this influenced the outcome. It is recommended that the audit committee of the Board develop and approve detailed procedures for special audits and that the KRS Division of Internal Audit conduct all of its audit field work in an independent manner, separate from the influence of KRS management.

The audit includes numerous recommendations relating to Board governance and operational policies, with specific recommendations to strengthen policies governing budget, conflict of interest, travel, spending, anonymous reporting of concerns, and bringing consistency to the board member selection process. The Board should revise the conflict-of-interest policy to require the CIO, investment directors, and general counsel to file annual conflict-of-interest statements, and penalties should be established for breach of board policy. Materials provided to the Board should be more informative and valuable in providing oversight, including quarterly investment and budget-to-actual investment expenditure reports, as well as an annual report of executive staff salaries.

The audit recommends that the enacted budget should include all aspects of expenditures except benefits. Currently, and historically, certain expenditures for the health care portion of the budget are not included in the enacted budget. Term limits should be established for the board chair and vice-chair. The audit found that the Board

could benefit from additional external auditing services, including scheduling of performance, compliance, and management audits, which is being done in many other states. Steps should be taken to make the board election and appointment process more consistent and stronger. Qualifications for gubernatorial appointees are dictated by statute, but there are no qualification requirements for elected trustees. The same disclosure requirements and application process should be followed for both elected and appointed board members. Applicants should be required to detail how their specific qualifications prepare them to be an effective trustee. Elected trustees should authorize a background check prior to appointment, which is already required of gubernatorial appointees. All of this information should be made available to the Governor and the trustees as part of the election process.

Although the purpose of the audit was not to examine KRS financial statements or investment performance, the report includes a detailed background section on the history and financial viability of KRS. This can be a valuable tool for policymakers when addressing issues relating to the long-term viability and financial status of the funds. The audit emphasizes that the long-term viability of KRS has been dramatically impacted by the state's consistent underfunding of the employer contribution since 2003. Beginning in 1993, the employer contribution was not fully funded for 12 of 17 years. The reforms passed by the General Assembly in 2008 will be helpful to ensure future viability of the system, but it is critical that future governors and legislators honor the commitment in that pension reform legislation to continue increasing the employer contribution to fully fund the systems. Strong board oversight of KRS assets is absolutely critical. The audit provides a roadmap for the Board to ensure proper transparency and accountability in its critical fiduciary role.

Concluding her overview, Ms. Luallen said that her office looks forward to working with the State Government Committee on aspects of the audit report that may be implemented through legislative change.

Ms. Elliott thanked the Auditor and her staff for their fair and thoughtful report. She said that the Board and members of the KRS executive staff embrace the audit and in a month or so will be looking closely at the recommendations with the full intent to implement them as much as possible.

Representative Cherry explained that HB 480, which passed the House but was not enacted in the 2011 regular session, addressed ethics, term limits for all board members, transparency, and use of placement agents. He plans to introduce it again in the next regular session and will maintain an open door policy for working on the legislation.

When asked by Senator Schickel, Ms. Luallen explained the role of placement agents, pointing out that their fees are not paid by KRS. The placement agent in question appeared to be "shopping" KRS to a number of different investment managers, rather

than being on contract with a particular investment manager, and may have been suggesting placements primarily based on his fees rather than the best interest of KRS. In California and New York, there have been scandals regarding placement agents involved in "pay to play" schemes.

Ms. Luallen confirmed Representative Cherry's statement that placement agents are now required to register with the SEC. The SEC had considered banning placement agents but instead adopted new guidelines to oversee their use. The SEC prohibits placement agents from receiving compensation in a state where they have contributed to certain elected officials or candidates for office in the past two years.

Responding to a question from Representative Yonts about placement agents' fees, Ms. Luallen explained that a comparison of KRS investments that were made both with and without placement agents indicated no apparent higher cost associated with the use of placement agents. In fact, after the placement agent controversy arose, KRS re-negotiated one particular investment to a lower level, which also lowered the placement agent's fee. Mr. Thielen added that KRS has no contracts with placement agents—that contractual arrangements are only between the investment manager and the placement agent.

Representative Bratcher expressed concern about funding of the system and asked whether there have been previous audits. Ms. Luallen said that each year KRS requests approval from the State Auditor's Office to hire an outside auditor for the annual financial audit. Her office typically grants this approval, monitors the process, and reviews the completed audit. A few years ago, her office also participated in a review conducted by a private CPA on contract with KRS relating to a land transaction controversy. Mr. Thielen added that the Auditor's office conducted a special audit of KRS' investment program about 15 years ago.

Ms. Luallen said her office is small, given the magnitude of the public funds spent in Kentucky, and must constantly decide which large audits would best be performed by internal staff versus the private CPA community. It was determined that the KRS financial audit was relevant and appropriate, comparable to other pension systems around the country. Representative Cherry noted that House Bill 480, as originally written, would require a state audit at least every five years, a provision which Ms. Luallen said she supports.

When Representative Gooch expressed doubt that requiring placement agents to register as lobbyists would sufficiently promote full disclosure, Ms. Luallen noted that the audit suggests ways to strength the Board's current placement agent disclosure policy. Ms. Elliott acknowledged that there may a need for additional policy improvements but said that, on suggestion by the new chief investment officer, KRS has strengthened a number of policies—including those related to conflict of interest and placement

agents—to require everyone doing investment business with KRS to disclose any relationship with KRS staff or trustees, financial or otherwise.

To answer questions from Representatives Fischer and Lee, Mr. Thielen, Ms. Luallen, and Mr. Lykins discussed the general role of private placement agents and their use relative to KRS investment decisions. They noted that KRS is looking at the rate of return on investments involving the use of agents and that alternative investments usually comprise about 11 percent of the total portfolio. Ms. Elliott said that KRS has contracts with two outside consultants, and they are now being asked to sign off on all recommended investments. She said the Board has established guidelines for the percentage allocation of KRS fund investments.

Mr. Thielen said that, to his knowledge, placement agents have never made a presentation to the KRS Board or investment committee. Typically, an investment management company would dictate the amount of investment, to some extent, and look for a minimum investment of $50-100 million. The KRS Board has delegated to its five-member investment committee the authority to make investment decisions, but the Board must ratify the decisions.

Senator Thayer said the audit should help strengthen House Bill 480 when it is introduced in 2012 and that he looks forward to working with Representative Cherry and the Auditor's Office to move the legislation forward. He said that the actuarially recommended contribution (ARC) percentage since 2003 has increased 32.69 percent; yet 27.97 percent of that increase occurred for some reason other than the General Assembly not funding the recommended employer contribution rate. He stressed that there are multiple reasons for the underfunding. As noted in the audit, the reasons include investment return below the 7.75 percent assumed rate of return; changes in actuarial assumptions; higher than anticipated retirement rates; unfunded retiree COLAs (cost of living adjustments); and high medical inflation rates. Since 2003, when the General Assembly started to not make the full ARC payment, there is not a year where the General Assembly funded the system lower than what the Governor recommended; in fact, in FYs 2007, 2008, 2009, and 2010, the ARC was funded higher than the Governor's recommended rate. The full ARC payment was not affordable during those years, and it does not appear to be realistic that the ARC schedule set out in House Bill 1 can be met in the future, considering that the unfunded liability of the system during the past three years alone has grown by $3 billion.

Senator Thayer said that he and the majority of the Senate believe that KRS needs to move toward a 401K style plan. The Senate is committed to providing the benefits promised to current retirees and employees, but it is clear it will be a challenge to continue meeting the House Bill 1 ARC schedule. Adding new employees into a system where the state carries all the risk will increase the unfunded liability if investment returns are not met. He thanked the Auditor for the excellent work of her office and said

he looks forward, at a future interim meeting, to a full discussion of the pros and cons of a 401K type benefit plan for future employees.

Representative Cherry said he is open to hearing both sides of the 401K issue but that it has not been proven that the retirement system would be better off with a defined contribution plan. He said that, at best, this is undetermined and will continue to be greatly debated. He agreed with Senator Thayer that there are multiple reasons for the system's underfunding.

Representative Cherry thanked the speakers. He also recognized Randy Overstreet, former KRS Board Chair, and acknowledged his hard work and contribution to the system during his tenure as chair.

Redistricting and Related Topics

Senator Thayer assumed the chair for the remainder of the meeting. Guest speaker was Cathy McCully, chief of the U. S. Census Bureau's Census Redistricting Data Office in Suitland, Maryland. Ms. McCully provided the Committee with the following handouts: copy of her PowerPoint presentation entitled "2010 Census Redistricting Data/What You Should Know"; two-page document entitled "Determination of Covered Areas for Voting Rights Bilingual Election Materials"; a July 2010 brochure entitled, "Strength in Numbers/Your Guide to 2010 Census Redistricting Data from the U. S. Census Bureau;" and a copy of "Voting Rights Act Amendments of 1992, Determinations Under Section 203," from the Federal Register, Vol. 67, July 26, 2002 (Census Bureau Director's determination as to which political subdivisions are subject to the minority language assistance provisions of Section 203 of the Voting Rights Act).

Ms. McCully's presentation included information relating to the 2010 Census; 2010 resident population of the United States; apportionment of the U. S. House of Representatives based on the 2010 Census; numeric change in resident population for the 50 states, the District of Columbia, and Puerto Rico from 2000 to 2010; 2010 census data; Public Law 94-171, enacted in 1975; P. L. 94-171 support products and summary files; map files for the 2010 census; block assignment files; process for P. L. 94-171 data delivery; American Community Survey (ACS); advanced group quarters file; voting rights tabulations; release of 2010 census data through 2013; Section 203 language determinations; Phase 4 - collection of post-2010 census redistricting plans; and Phase 5 - evaluation and recommendations for 2020 Census. Following are key elements of Ms. McCully's presentation.

The Census is basically the "R & R"—"representation and revenue"—of the federal government and serves as a basis for apportionment of Congress, reapportionment of state legislatures, federal and state funding, and also the redrawing of county, city, and school district boundaries. Based on the numbers, Kentucky will retain six congressional districts. Michigan was the only state, along with the Commonwealth of Puerto Rico, that

lost population between 2000 and 2010. It is estimated that $400 billion is distributed annually based on the federal Census.

Public Law 94-171, passed in 1975, requires the Census Bureau to work closely with state legislatures. Delivery of summary files to the states was completed March 24, 2011, before mandated delivery date of April 1. Block assignment files are files for non-TIGER (Topologically Integrated Geographic Encoding and Referencing) users who want to learn which blocks are associated with particular geographies. Map files for the 2010 Census include county block maps—which are the most detailed for association with data; voting district/state legislative district (VTD/SLD) reference maps; census tract reference maps; and—new for this Census—school district reference maps. Kentucky historically does not provide its voting districts to the Census Bureau, but the Bureau has maps that support the state's legislative boundaries prior to the 2010 Census. Block assignment files are assembled for congressional, state legislative, voting, and school districts, as well as incorporated places, census defined places, and American Indian (AIANNH) areas.

Summary files contain 100 percent enumeration data for multiple levels of geography. The data categories are: race alone; race combined with Hispanic/Latino origin; race alone 18+ (voting age); race combined with Hispanic/Latino origin 18+; and housing (counts of vacant and occupied units). By law, data is delivered in a nonpartisan manner to governors, majority and minority leaders of both parties, and also to commission directors and redistricting committees, if known. Data delivered to Kentucky reflects population growth of about 7.5 percent.

The American Community Survey (ACS) is an ongoing survey of 250,000 households every month. It replaces the traditional Census long form and plays an important role in the administration of federal programs. In December 2010, ACS five-year data for 2005-2009 was released, containing nationwide small-level demographics for legislative districts. Starting in December 2012 or 2013, via the ACS, legislators will be able to look at census data for newly drawn districts on an annual basis.

In addition to the maps, shapefiles and data, the Bureau has agreed to release the Advanced Group Quarters File, a table on group quarters that will facilitate redistricting and the Count Question Resolution Program. Group quarters include school dormitories, nursing homes, and prisons. Prison-based gerrymandering has become a national issue. Maryland, New York, and Delaware have passed laws to reallocate prisoners to their home area, and other states are also looking closely at the location of and demographics within their prisons. These data were made available to all the states in early 2011.

The Department of Justice asked the Bureau to prepare a special tabulation of citizenship by voting age/by race. This CVAP table was delivered in late January, 2011, and is now available on the Bureau's web site (www.census.gov/rdo/data).

Census data for 2010 will be released through 2013. Summary File 1, which contains detailed data down to the block level, is coming out now and will be delivered to Kentucky shortly. Summary File 2 will be released from December 2011 to April 2012. After the new congressional and legislative boundaries are drawn, the Bureau will retab the data and deliver new products for the newly-defined boundaries based on the 2010 Census numbers. This data will be rolled into the ACS.

Section 203 of the Voting Rights Act of 1965 provides for language assistance at the polls. Covered language minority groups are Hispanic, Asian, and American Indian. Since American Indian languages are not ordinarily provided in written format, counties that are covered under the American Indian provisions must provide translators in voting precincts. Minority group data will be available in the form of a Federal Register notice at the end of August. In 2002, Kentucky was not covered under the minority language assistance provision; however, because there are demographic changes in Kentucky, there is a possibility that there will be coverage in Kentucky in late August. This data will come from the ACS and is independent of the 2010 Census data.

Ms. McCully concluded her presentation with an overview of the Bureau's web site. She said that the Bureau this summer will begin an evaluation of how well the data was collected and how well it meets the needs of the states as they begin to redraw boundaries.

When Representative Cherry asked about Kentucky's lack of participation in the voting district data program, Ms. McCully said she does not think this puts Kentucky behind in any way and that Kentucky has never provided its voting district precincts for inclusion in that program. She said the precinct data layer is probably available in LRC's GIS internal files but is just not available through the census products for the public to use. Kentucky has all the other levels of geography available, including the census block, which is the tiniest piece of geography for which data is provided.

Representative Graham said that the 2010 Census undercounted the city of Frankfort by about 1,800, and he questioned how this could happen. Ms. McCully said it could have occurred for a number of reasons. Prior to the Census, the Bureau sends maps to the highest elected city officials in order to validate boundaries. It is possible that Frankfort city officials failed to notice that the map incorrectly portrayed the boundaries. The data—based on housing units, not persons—can be reallocated through the Count Question Resolution Program, but the process requires approximately four months from start to finish. For redistricting purposes, she usually advises proceeding as if the data had been correctly depicted, with the knowledge that the ensuing legislation will be appended with the new official counts subsequently provided by the Bureau. She cautioned, however, that it is essential that the correction be found valid. Also, the Bureau's report

through the Count Question Resolution Program would only provide new housing unit and group quarter totals but not demographic characteristics.

There was discussion of states that lost congressional seats as a result of the Census. Representative Pullin noted that Ohio, which borders her community, lost two seats.

Representative Montell asked when the General Assembly expects legislative and congressional redistricting to take place. Senator Thayer stated his preference to do it during the 2012 regular session. He said that at this time he does not feel it necessary, nor the expense justified, to have a special redistricting session. Representative Cherry said that conducting redistricting during the regular session can be impacted by the election filing deadline. He said he has no problem with doing it during a special session, if agreeable to the Senate, and that he personally prefers a special session. Senator Thayer said that the January filing deadline is not until the 31st and that if an agreement is in place, he feels it would be better to redistrict in January rather than incur the cost of a special session. He noted, however, that the November 2011 gubernatorial election and the need to pass a budget in the next regular session are also issues to be considered. Senator Thayer thanked Ms. McCully for traveling to Frankfort to participate in the meeting.

Subcommittee Report and Adjournment

A motion was passed by unanimous voice vote to adopt the subcommittee report of the Task Force on Elections, Constitutional Amendments, and Intergovernmental Affairs. Business concluded, and the meeting was adjourned at 2:55 p.m.

DEFENDANT LRC'S EXHIBIT 10

INTERIM JOINT COMMITTEE ON STATE GOVERNMENT

Minutes of the 2nd Meeting of the 2011 Interim

July 21, 2011

Call to Order and Roll Call

The second meeting of the Interim Joint Committee on State Government was held on Thursday, July 21, 2011, at 1:00 PM, in Room 149 of the Capitol Annex. Senator Damon Thayer, Co-Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator Damon Thayer, Co-Chair; Representative Mike Cherry, Co-Chair; Senators Walter Blevins Jr., Jimmy Higdon, Gerald Neal, R.J. Palmer II, John Schickel, Dan "Malano" Seum, and Johnny Ray Turner; Representatives Linda Belcher, Dwight Butler, Tim Couch, Will Coursey, Joseph Fischer, Danny Ford, Derrick Graham, Mike Harmon, Melvin Henley, Martha Jane King, Brad Montell, Sannie Overly, Darryl Owens, Tanya Pullin, Tom Riner, Carl Rollins II, Steven Rudy, Sal Santoro, John Will Stacy, John Tilley, Tommy Turner, and Brent Yonts.

Guests: Representative Tom Kerr; Tim Storey, National Conference of State Legislatures (NCSL); Mark Sipek, Kentucky Personnel Board; Dinah Bevington and Mary Elizabeth Harrod, Personnel Cabinet.

LRC Staff: Judy Fritz, Bill VanArsdall, Alisha Miller, Karen Powell, Brad Gross, Kevin Devlin, and Peggy Sciantarelli.

Approval of Minutes

The minutes of the June 29, 2011, meeting were approved without objection, upon motion by Representative Rudy.

Legislative and Congressional Redistricting

Guest speaker was Tim Storey, Senior Fellow in the Legislative Management Program, National Conference of State Legislatures, Denver, Colorado. Using a slide presentation entitled "Redistricting Overview," Mr. Storey discussed the basic elements of redistricting. His presentation is summarized as follows.

Mr. Storey began by showing illustrations of congressional districts in Illinois (Cook County) and Arizona, and a state senate district in Massachusetts, all of which were oddly drawn for specific reasons. He went on to explain that the U. S. Constitution requires redistricting to be done every 10 years, following the decennial census.

Technically speaking, redistricting is the process of drawing district lines, whereas reapportionment—which is only done by the Clerk of the U. S. House of Representatives—is the process of assigning congressional seats to the states, based on the Census. In the 1960s there was a series of Supreme Court decisions triggered by a 1962 Tennessee case, *Baker v. Carr*, which said that redistricting was justiciable, thus enabling federal courts to intervene. Tennessee and a number of states had gone decades without redrawing districts, and their districts were wildly malapportioned. Prior to 1962, federal courts had essentially stayed out of redistricting.

Apportionment data was delivered to the President by December 31, 2010. In March and April 2011, P. L. 94-171 data was delivered to the states. In all 50 states redistricting must be finalized prior to 2012 elections. Maine and Montana prefer to redistrict after the year 2012, but a judge has ruled that Maine must draw its congressional districts before 2012 elections. For the first time, California is not gaining any seats in the U. S. House. Seventeen states have completed either legislative and/or congressional redistricting. Kentucky is not one of the 16 states covered by Section 5 of the Voting Rights Act; those states are required to submit their redistricting plans to either the Department of Justice or the district court in Washington, D.C. for approval before they can become law. In 37 states the legislature draws legislative lines, and 13 states use a board or commission for redistricting. U. S. House districts are drawn by the legislature in 38 states and by a board or commission in seven states. Arkansas is the only state in which a three-person board (governor, attorney general, and secretary of state) redistrict for the legislative branch. California, through a voter initiative, adopted a new commission system this decade. Iowa has a unique model in which the nonpartisan staff of the legislature draw the plans. After the 2000 Census, redistricting brought litigation in more than 40 states, and the courts drew or revised plans in about a dozen states.

There are different population equality standards for congressional and legislative districts. Congressional districts must be as nearly equal in population as "is practicable," or capable of being done. To play it safe, most states draw districts that are almost exactly the same in population. In the 2000 round of redistricting only about 13 state congressional plans had a zero population variance; in the current redistricting cycle, 10 states already have drawn congressional plans with a zero variance. The courts generally allow a 10 percent deviation from ideal district size for legislative plans. However, in a Georgia case (*Larios v. Cox)* from the previous round of redistricting the courts struck down plans because they were drawn for partisan purposes, even though the districts fell within the 10 percent population variance. The 2010 census revealed that Kentucky congressional districts 2, 4, and 6 are overpopulated and that districts 1, 3, and 5 are underpopulated, based on the ideal district size of 723,228.

The federal Voting Rights Act and the 14th Amendment to the U. S. Constitution make it clear that no plan can have the intent or effect of discriminating against minority voters. General guidelines for compliance with the Voting Rights Act are: (1) Do

minorities represent most of the voters in a concentrated area? (2) Do other voters tend to vote for different candidates than minorities? (3) Is the minority population otherwise protected, given the totality of the circumstances? and (4) Race cannot be the predominant factor and should be balanced with traditional principles. (Mr. Storey referenced a 1980 North Carolina case, *Thornburg v. Gingles*.) Traditional redistricting principles include contiguity—all parts of the district are adjacent to each other; consideration of political boundaries; compactness—appearance of the district, or how close people live to each other; preservation of communities of interest—social, cultural, racial/ethnic, economic/trade, geographic, media, urban, rural, occupation, lifestyle, partisanship, and competition. Oregon adopted statutory guidelines that no district could intentionally favor or disfavor a candidate or party. Florida voters adopted a similar constitutional amendment, which is being litigated. Arizona had a provision requiring districts to be "competitive" that was litigated for more than five years.

Practical tips to consider in the redistricting process include: (1) expect the unexpected; (2) talk to legislators because they know their districts; (3) consider future development; (4) consult legal counsel often and think about what is discoverable; and (5) simplify shapes if at all possible.

In 2010, five states are adjusting census data prior to redistricting. Hawaii adjusts military people out of the count; Kansas adjusts students and military out of the count; and Delaware, Maryland, and New York have passed statutes to adjust prisoners out of their incarcerated location into their home of record. The New York law is in litigation, Delaware is reconsidering, and Maryland has made the adjustment in its database.

Mr. Storey concluded his presentation by stating that there is skepticism whether the new California commission system—a completely new way to accomplish redistricting—will be successful, with the state's redistricting deadline approaching in a few weeks. He said that there has been a dramatic shift toward public participation in the redistricting process. He also discussed the American Community Survey [an ongoing survey that provides data every year to help determine how more than $400 billion in federal and state funds are distributed each year].

Responding to inquiries from Representative Stacy, Mr. Storey said that the use of political boundaries in redistricting is permissible. If a state can show that it has consistently and historically followed certain rules about drawing plans, the courts will be differential up to a point, as long as the population variance is not too extreme. Litigation in redistricting cases primarily involves the Voting Rights Act but also the issues of population equality and partisan gerrymandering. Mr. Storey spoke briefly about a Texas case and a notable Pennsylvania gerrymandering case, *Vieth v. Jubelirer*, that went to the U. S. Supreme Court.

When Representative Owens asked about the counting of prisoners in the three states referred to earlier, Mr. Storey explained that the Census counted the prisoners in Delaware, New York, and Maryland in their place of incarceration. Those states' decision to adjust the data to count prisoners at their home of record instead involves an administrative element that is not easy to accomplish, and all three states have found it to be an administrative challenge because records are incomplete. New York and Delaware have not done the adjustment yet. In fact, Maryland was only able to adjust data for state prisoners because the federal bureau of prisons would not share data with the state. The Census is a platinum standard for data. If a state wants to adjust the data, it must be willing to defend the adjustment in court to show that it is as accurate or better than the Census count. So far no decision has been rendered on litigation relative to prisoner adjustment in this redistricting cycle.

When Representative Graham asked about the status of redistricting plans drawn in Wisconsin, where recall elections are being held, Mr. Storey said he does not know the circumstances regarding the challenges to those plans.

In response to an inquiry from Senator Thayer, there was brief discussion of congressional seats in Illinois's Cook County.

Senator Thayer pointed out that the meeting folders include copies of Peter Wattson's publication, "How to Draw Redistricting Plans That Will Stand Up in Court." He said also that copies of Mr. Storey's PowerPoint presentation will be provided to the Committee, and a PDF link to the fourth edition of NCSL's publication, "Redistricting Law," will also be available. He thanked Mr. Storey for an excellent presentation and noted that his appearance before the Committee was at no expense to LRC because of the agency's membership in NCSL.

Administrative Regulation Review

The Committee reviewed Personnel Board administrative regulation 101 KAR 1:325 (Probationary Periods), which was referred to the Committee July 6, 2011. Mark Sipek, Executive Director of the Personnel Board, explained the regulation. Mr. Sipek said that the normal probationary period for merit system classifications is six months. Per state agency requests, the amended regulation specifies a 12-month probationary period for the classifications Audiologist I, Fire Protection Systems Inspector, Probation and Parole Officer I, and Criminal Intelligence Analyst I and II. The regulation also eliminates classifications that are no longer used, changes the names of certain other classifications, deletes language in Section 1(4) that is no longer applicable, and adds clarifying language in Section 2(4). When asked by Representative Cherry, Mr. Sipek confirmed that the regulation does not affect HB 149, enacted in 2010, with respect to the probationary period for employees who move from unclassified into classified positions. Senator Thayer noted that the Committee has completed its review of the regulation and thanked Mr. Sipek for his testimony.

Information Transmittals from Personnel Cabinet

For the information of committee members, two transmittals were included in the meeting folders: House Bill 387/Personnel Cabinet Quarterly Report, dated April 2, 2011; and KRS 18A.030(6) Report, dated May 15, 2011. Present from the Cabinet were Dinah Bevington, General Counsel, and Mary Elizabeth Harrod, Director, Division of Employment Management.

Senator Thayer noted that the reports contain data only through March 23 and March 15, respectively, and he asked why data through the end of June has not yet been reported. Ms. Harrod said that second quarter data should be available within the next week, after cabinet employees complete posting to close out the fiscal year. Senator Thayer asked that the updated information be provided to the Committee in time for its August 24 meeting.

When Representative Henley asked why the Department for Natural Resources has 116 nonmerit employees, as reflected in the House Bill 387 report, Ms. Bevington said that those numbers came from the Department and that she would be happy to relay that question to the agency. Senator Thayer asked Ms. Bevington to also provide that information for the Committee's August meeting.

Senator Thayer thanked the speakers. Business concluded, and the meeting was adjourned at 2:20 p.m.

DEFENDANT LRC'S EXHIBIT 11

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 12

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 POINTS AND AUTHORITIES

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."

[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."

---

[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.
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> . . .
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> 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.

[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)).

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[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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