COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO. 2012-CI-00109

JOSEPH M. FISCHER, ET AL. **PLAINTIFFS**

v.

ALISON LUNDERGAN GRIMES, ET AL. **DEFENDANTS**

MEMORANDUM OF LAW FOR LEGISLATIVE RESEARCH COMMISSION

May it please the Court:

For its Memorandum of Law in support of a declaration of rights that House Bill 1 is constitutional, Legislative Research Commission ("LRC") states as follows:

I. The redistricting plan for the House of Representatives complies with the Constitution of the Commonwealth of Kentucky.

In *Fischer v. State Board of Elections*[1] (*Fischer II*), the Supreme Court of Kentucky squarely held that the command in § 33 KY. CONST. that legislative districts be drawn "without dividing any county" is unconstitutional. While the 1890 Constitutional Convention decided that "the command with respect to the division of any county is absolute" (897 S.W.2d at 477), "any such view is now untenable . . . ." *Id.* at 479.

The author of *Fischer II*, former Chief Justice Lambert, recognized that the unenforceability of the anti-county-splitting provision in § 33 resulted from the application of *Baker v. Carr*[2] and its progeny. *Jensen v. Ky. State Bd. of Elections*, 959 S.W.2d 771, 777 (Ky. 1997) (Lambert, J., dissenting).

Justice Lambert was, of course, correct. In a state such as Kentucky which has more counties than it has House districts, with several of those counties being below the statistical,

[1] 879 S.W. 2d 475 (Ky. 1994)
[2] 369 U.S. 186 (1962).

per-district mean, an absolute prohibition against splitting counties is void and unenforceable as a violation of the Equal Protection Clause of the Constitution of the United States. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 581 (1964) ("Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-population principle in that legislative body. This would be especially true in a State where the number of counties is large and many of them are sparsely populated, and the number of seats in the legislative body being apportioned does not significantly exceed the number of counties."); *see also 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 . . . .").[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 concededly unconstitutional.

Accordingly, what the Court did in *Fischer II* was to amend the language of the Constitution by judicial fiat, creating a standard other than the standard prescribed by the Constitution, itself. In doing so, it exceeded its writ.

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[3] The 5-4 decision in *Brown v. Thomson*, 462 U.S. 835 (1983) concerning one county in the Wyoming House does not support a contrary conclusion. The narrow holding in that case is limited to the concurring opinion of Justice O'Connor, leaving it "extraordinarily narrow" and "empty of likely precedential value." 462 U.S. at 850 (Brennan, J., dissenting). Indeed, the majority opinion recognized that application of the anti-county-splitting rule had correctly been declared unconstitutional as applied to the Wyoming Senate, and the majority opinion expressly reaffirmed the general rule announced in *Reynolds* that is quoted in the text, above.

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 public policy promulgated therein is contrary to what the court considers to be in the public interest."

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)).

Moreover, if *Fischer II* were interpreted to impose a mathematical mandate on the General Assembly's exercise of the legislative power, then "county integrity" would be 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 balkanized likewise increases. But the concept of "county integrity" applies state-wide, not to a minority of counties. In the final analysis, the determination of the fewest number of counties that should be split to achieve equality of representation is a political question to be determined by the legislative power vested exclusively in the General Assembly.

In *Jensen*, the Supreme Court obviously appreciated the error of interpreting *Fischer II* as mandating a mathematical formula. 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).[4]

[4] If this Court does not agree that *Jensen* overruled *Fischer II*, and considers *Fischer II* to be precedent that is binding upon this Court, then LRC has preserved for appellate review the questions whether the Supreme Court has, or should, overrule *Fischer II*.

Prior to *Fischer II*, binding precedent required the General Assembly to give preeminence to the requirement of equality of population. *Stiglitz v. Schardien*, 239 Ky. 799, 40 S.W.2d 315, 320 (1931). In *Jensen*, the Supreme Court restored that hierarchy of constitutional values. The Court held:

> We have long held that when the goals of population equality and county integrity inevitably collide, the requirement of proximate equality of population must control. . . . We reiterated this priority in *Fischer II* when we adopted plus-or-minus 5% as the maximum population variation allowable in creating House and Senate districts. . . . *Fischer II* then held that after satisfying the requirement of approximate equality of population, the next priority of a reapportionment plan is the preservation of county integrity, which is accomplished by dividing the fewest possible number of counties.

959 S.W.2d at 774-75.

LRC respectfully submits that the General Assembly has complied with that requirement by dividing what – in the opinion of the General Assembly – is the fewest number of counties that should be divided while attaining the paramount goal of equality of representation. Only five counties are split among Senate districts; three of which exceed 105% of the mean and the other two exceed 95% of the mean. In drawing the House of Representatives districts, ninety-two counties are not split, and twenty-eight counties are split. Of those, twenty-two are over 105% of the mean, three are over 95% of the mean and two must be split due to the combination of their population and the population of adjacent counties (Marshall or Trigg, and Harlan). Moreover, the Senate districts are within the 10% deviation and the microscopic, statistically insignificant degree to which the House districts exceed the 10% range amounts to a handful of residents in one district.

In sum, the General Assembly has enacted legislation reapportioning the districts in a manner that attains the plus/minus 5% goal, while dividing the fewest possible number of counties that, in the collective judgment of the legislators, were necessary to divide to attain the

paramount, equality goal. This Court should defer to that decision by the political branch of government.

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).

The Court should enter a judgment declaring House Bill 1 does not contravene the Constitution of Kentucky.

II. The change in the geographic situs of Senate Districts 4 and 13 does not disenfranchise any voter nor otherwise violate the Constitution.

According to *Anggelis v. Land*, 371 S.W.2d 857 (Ky. 1963), there is no "disenfranchisement" when districts are redistricted, as no Act of the General Assembly can or does abolish any office, nor shorten or lengthen any term. The only thing that redistricting does is change the boundaries of a particular district.

In *Anggelis*, the 1963 General Assembly had divided the "old" 13th Senate District into the 12th and 13th Districts. Because § 31 KY. CONST. provides for staggered elections for odd and even numbered Senate districts, only the candidates for the new 13th District would have to file to run in the 1963 elections. The Plaintiff alleged that this created a "vacancy" in the new 12th District because there was no Senator who currently lived in the new 12th District. He also alleged that the new 12th District would not be represented by a person elected by the voters of that district for 2 years, because the 12th District was not up for election that year. He argued this resulted in disenfranchisement, saying that "the people of the [12th] District will not be represented in the 1964 Senate". 371 S.W.2d at 858.

The Court rejected this disenfranchisement argument, stating that the Senator from the 12th District still represented that district, even though the new boundaries meant that the Senator did not reside within the area where he previously stood for election, nor was he elected by those particular voters. The Court said:

> 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. Payne v. Davis, Ky., 254 S.W.2d 710. 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.
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> * * * The idea that we are personally represented and represented only by officials for whom we have voted stretches too far the theory of representative government . . . .
>
> 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. However, this situation is comparable to that which results when persons move from one district to another.
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> 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. Section 31, Kentucky Constitution . . .

371 S.W. 2d at 858-59 (emphasis added) (quoting *Selzer v. Synhorst*, 253 Iowa 936, 113 N.W.2d 724 (1962) (citing *People ex rel. Snowball v. Pendegast*, 96 Cal. 289, 31 P. 103 (1892)).

Anggelis is directly on point, and requires the conclusion that the changes to the boundaries and location of Senate Districts 4 and 13 are constitutional.

III. So-called "political gerrymandering" is not justiciable.

The alleged political gerrymandering fails to state a claim upon which relief may be granted by this Court. As Justice Cooper wrote 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.

959 S.W. 2d at 776.

Indeed, the absence of "judicially discernible and manageable standards for adjudicating political gerrymandering claims" renders those claims non-justiciable. *Vietch v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality). Accordingly, Plaintiff's claims of political gerrymandering fail to state a claim upon which relief may be granted by this Court.

IV. The Court should not hold House Bill 1 unconstitutional unless the violation of constitutional limitations on the lawmaking power is "clear, complete and unequivocal."

It is black letter law that an act of the legislature will not be invalidated by the courts unless there is no "doubt" that it "clearly offends" constitutional limitations on the lawmaking power of the General Assembly.[5] The separation of powers envisions a tripartite government under which the legislative branch enacts the laws, the executive branch implements them, and the judiciary interprets them. And, if the judiciary determines that an act clearly contravenes the Constitution's limitations on the lawmaking power, then the Court is bound to strike down the law as unconstitutional.[6]

But it is precisely because each branch of government has its own separate and co-equal responsibility in our tripartite system that this Court is required to presume the constitutionality

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[5] *Manning v. Sims*, 308 Ky. 587, 213 S.W.2d 577, 580 (1948) (citations omitted) (courts should never declare legislative act invalid "until after every doubt has been resolved in its favor.")

[6] *Lafferty v. Huffman*, 99 Ky. 80, 35 S.W. 123 (1896), *overruled in part on other grounds by D. & W. Auto Supply v. Dep't of Revenue*, 602 S.W.2d 420, 425 (Ky. 1980).

of a duly enacted statute like House Bill 1. The presumption of constitutionality derives from the Lockean principle that sovereignty rests with the people, and thus all authority not specifically relinquished in the Constitution and its Bill of Rights for the protection of certain fundamental rights remains with the people's elected representatives. *See* § 26 KY. CONST. Any judicial declaration of unconstitutionality of a legislative act raises such serious separation of powers questions that courts refuse to take that draconian step unless such an interpretation is unavoidable.[7] Before the Judicial Branch will exercise its awesome power to invalidate an enactment of the representative legislature, the unconstitutionality of the statute must be "clear, complete and unequivocal."[8]

House Bill 1 does not "clearly offend" § 33 nor any other constitutional limitations. Plaintiffs' claims must therefore be denied.

CONCLUSION

For the foregoing reasons, the Court should enter final judgment dismissing, with prejudice, all the claims of the Plaintiffs and Intervening Plaintiffs, and declaring the rights of the parties by declaring that House Bill 1 is constitutional.

Respectfully Submitted,

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and

[7] *Fletcher v. Peck*, 10 U.S. 87, 6 Cranch 87, 3 L. Ed. 162, 175 (1810).
[8] *Cornelison v. Commonwealth*, 52 S.W.3d 570, 572 (Ky. 2001).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were served by electronic mail on this the 3rd day of February, 2012, on:

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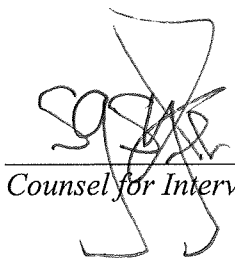

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