

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
48TH JUDICIAL CIRCUIT
DIVISION I
CIVIL ACTION NO. 12-CI-00109

JOSEPH M. FISCHER, *et al.*
and
DAVID B. STEVENS, M.D.

PLAINTIFFS

v.

ALISON LUNDERGAN GRIMES,
in her official capacity as Kentucky
Secretary of State, *et al.* and
LEGISLATIVE RESEARCH COMMISSION

DEFENDANTS

* * * * *

**SUPPLEMENTAL RESPONSE
IN OPPOSITION TO INJUNCTIVE RELIEF**

The Court has granted leave to the parties to file supplemental briefs in support of their positions. Defendants Alison Lundergan Grimes (in her official capacity as Kentucky Secretary of State), the Kentucky State Board of Elections, and Maryellen Allen (in her official capacity as Interim Acting Executive Director of the Kentucky State Board of Elections) adopt their previous Response and submit the following additional discussion and authorities in response to Plaintiffs' Motion for injunctive relief.

I. INTRODUCTION

The Secretary of State is singular in her purpose: as the Chief Election Official of the Commonwealth, she seeks to uphold her sworn oath to "support the Constitution of the United States and the Constitution of this Commonwealth of Kentucky" and to "faithfully execute, to the best of [her] ability, the office of Secretary of State according to law." Ky. Const. § 228.

The State Board of Elections similarly seeks to meet the statutory mandate that it “administer the election laws of the state ...” KRS 117.015(1).

At this point, the Court may either (1) grant a temporary injunction, mandating that the 2012 General Assembly election proceed pursuant to the legislative district boundaries established in 2002, or some other redistricting plan prescribed by the Court,¹ or (2) deny injunctive relief and permit the election to proceed under House Bill 1 while the Court considers the allegations contained in Plaintiffs’ and Intervening Plaintiffs’ complaints. Of course, in determining whether to issue a temporary injunction, the Court should consider the impact upon the Secretary of State and Board of Elections’ ability to execute their duties and the public’s interest in the conduct of an orderly primary election. Indeed, while we are many months away from a final decision regarding the merits of Plaintiffs’ and Intervening Plaintiffs’ Complaints, we are, as set forth herein, only days away from possibly impairing the entire primary election process as it relates to candidates for state Senator and state Representative, if the requested injunctive relief is granted. Accordingly, because the movants have failed to satisfy the three familiar prerequisites for injunctive relief, established in *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978), and reaffirmed in *Price v. Paintsville Tourism Commission*, 261 S.W.3d 482, 484 (Ky. 2008), this Court should deny Plaintiffs’ and Intervening Plaintiffs’ requests for a temporary injunction. Alternatively, if the Court believes injunctive relief is merited, these Defendants request that the Court prescribe a framework that will permit the 2012 election for state Senators and state Representatives to proceed toward a May 22, 2012, primary.

¹ As the Court and parties are aware, there may be questions with respect to the constitutionality of proceeding pursuant to the districts established in 2002.

II. DISCUSSION

A. Under the *Maupin* Standards for Injunctive Relief, the Court Should Deny Plaintiffs' Motion.

The procedural context of this case is significant. Plaintiffs filed their Complaint and served these Defendants on January 26, 2012. These Defendants' Answer is not due until February 15, 2012, and no discovery has been taken. Most importantly, the motion before the Court on Monday, February 6, is one for a temporary injunction; as such, the Court is *not* tasked with ultimately determining the constitutionality of House Bill 1 on February 6, 2012. Instead, the Court must consider only the Plaintiffs' likelihood of success, the existence of immediate and irreparable harm, and the public interest and balance of the equities. *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978); *Price v. Paintsville Tourism Comm'n*, 261 S.W.3d 482, 484 (Ky. 2008). If each of those elements does not weigh in favor of enjoining elections pursuant to the legislative districts established by House Bill 1, the Court must deny Plaintiffs' and Intervening Plaintiffs' requests for a temporary injunction pending a resolution on the merits. Moreover, even after this Court reaches a resolution on the merits, an appeal seems inevitable. As a result, we are likely a significant time away from a final decision on the constitutionality of House Bill 1.

For the reasons set forth more fully in these Defendants' Response, the Court should deny the motions for a temporary injunction and allow elections pursuant to the legislative districts established by House Bill 1, for which state and local election officials continue to prepare, to occur.² To further assist the Court in determining whether the prerequisites for a

² In addition to preparing for ballot printing, redistricting imposes on counties additional obligations with respect to precinct boundaries. See *Zeigler Aff.*, ¶¶15-7 (discussing generally process of re-drawing precinct boundaries).

temporary injunction have been met, these Defendants submit for the Court's consideration the following statutory and practical deadlines related to the 2012 primary election:

Conditions Precedent to May 22, 2012, Primary Election

- May 22, 2012 – Date of primary elections for nomination of candidates to be voted for at the regular November election. KRS 118.025(3).
- April 2, 2012 – Deadline for county clerks to print ballots for the primary election. KRS 117.085(5) (50 days before election).
- March 1, 2012 – Date by which county clerks must provide to ballot printers certifications of candidates from the Secretary of State and the county clerks and lists from the counties of the precincts included in each legislative district. Affidavit of Roger Baird (“Baird Aff.”), ¶5 (attached hereto as Exhibit A); Affidavit of Guy Zeigler (“Zeigler Aff.”), ¶2 (attached hereto as Exhibit B).
- February 27, 2012 – Date by which Secretary of State must certify to county clerks the name, place, residence, and party of each candidate for office who must run in the primary. Affidavit of Mary Sue Helm (“Helm Aff.”), ¶6 (attached hereto as Exhibit C); *see also* KRS 118.215(1) (Secretary of State must certify candidates to county clerks no later than second Monday following filing deadline).
- February 21, 2012 – If ballot position is determined no later than this date, the Secretary of State's office believes it will be able to certify candidates to county clerks by February 27, 2012. Helm Aff., ¶ 8; *see also* KRS 118.225(2) (Secretary of State's office determines order of names of candidates on ballots on the Thursday following candidate filing deadline).³

In light of these facts, the legislative districts applicable to offices that will be on the ballot in the May, 22, 2012, primary must be defined *prior to February 21, 2012*. *See* Helm Aff., ¶8. Any other result may render the Secretary of State, State Board of Elections, and county officials unable to accomplish the statutory prerequisites to the election.

³ Additionally, it is worth noting that if the ultimate legislative districts are other than those created by HB1, candidates who themselves or whose co-signers are no longer residents of the district for which they filed will need time to withdraw, obtain the necessary signatures, and re-file in the appropriate district according to the new plan. Helm Aff., ¶4.

Certainly, the Court understands the urgency of this matter and is making all efforts to expedite this proceeding – which is not lost on these Defendants. But at present – having not been adjudicated otherwise – House Bill 1 is law. Additionally, it is difficult to imagine how a final decision on the merits could be reached within the next two weeks, in sufficient time to accomplish all of the conditions precedent to the May 22, 2012, primary. Quite clearly, an injunction that elevates the interests of the Plaintiffs over those of the voting public in general is inequitable and disserves the public.

Accordingly, these Defendants respectfully suggest that the Court deny injunctive relief and permit the 2012 elections for seats in the General Assembly to proceed pursuant to House Bill 1. This approach finds support in the Kentucky Supreme Court’s decision in *Fischer v. State Board of Elections*, 879 S.W.2d 475 (Ky. 1994) (*Fischer II*). There, after finally determining the 1991 Reapportionment Act was unconstitutional, the Court addressed the conundrum of whether to nonetheless permit elections to proceed along the boundaries established by that act:

We recognize that immediate effectiveness of this opinion would disrupt the orderly process of electing Representatives and Senators in 1994. We also recognize that by virtue of Section 31 of the Constitution of Kentucky, no member of the General Assembly may be deprived of his or her seat by virtue of reapportionment after the member is elected, and that regardless of changes in district composition which may occur subsequent to an election, a Senator or Representative is entitled to serve for and during the term for which he was elected and to represent the numerical district from which elected. *Anggelis v. Land*, Ky., 371 S.W.2d 857 (1963). With the foregoing in mind, we deem it appropriate to postpone the effective date of this decision, though not the finality of this opinion, until January 3, 1995, at which time the 1991 Reapportionment Act, KRS Chapter 5, shall be invalid.

Fischer II, 879 S.W.2d at 480⁴; see also *French v. Boner*, 963 F.2d 890, 892 (6th Cir. 1992)

(observing that “where ‘an impending election is imminent and a State’s election machinery is

⁴ *Anggelis v. Land* involved a challenge to a redistricting plan that divided Fayette County, which previously had comprised only the 13th Senatorial District, into two districts, the 12th and 13th.

already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative reapportionment case, even though the existing apportionment scheme was found invalid.”) (quoting *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)).

Because Plaintiffs and Intervening Plaintiffs have failed to satisfy the standards for a temporary injunction, as previously articulated and further explained above, these Defendants respectfully request the Court deny injunctive relief and order that the 2012 elections for state Senator and state Representative be conducted pursuant to the legislative districts established by House Bill 1.

B. If the Court Grants Injunctive Relief, these Defendants Request that the Court Prescribe a Framework that Will Permit the 2012 Election for State Senators and State Representatives to Proceed.

An injunction imposed by this Court will result in demonstrable harm to the public interest. However, if the Court is inclined to grant a temporary injunction against elections pursuant to the House Bill 1 legislative boundaries (which these Defendants believe is contraindicated on the *Maupin* standards), it should not lose sight of the fast-approaching statutory and practical deadlines for conducting the May 22, 2012, primary election. Accordingly, in that event, these Defendants request that the Court prescribe an alternative framework that will enable these Defendants and the county clerks to proceed and the 2012 General Assembly elections to be held during the pendency of this lawsuit. Any plan of action should respect the citizens’ right to vote and the candidates’ interests in running for elective

371 S.W.2d 857, 858 (Ky. 1963). The Court rejected the argument that those Fayette County residents who lived in the territory encompassed by the newly drawn 12th district were without representation, explaining that “[t]he 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.” *Id.* at 859.

office by determining the applicable legislative districts before February 21, 2012. Respectfully, in weighing arguments concerning the alleged disenfranchisement of a particular district of voters, the Court should consider that an election process thrown into chaos runs the substantial risk of disenfranchising a far greater number of voters and materially impairing the candidacy of persons whose races are not even directly implicated by House Bill 1.⁵

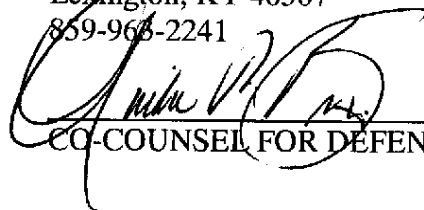
III. CONCLUSION

A challenge to the constitutionality of a legislative act should not be permitted to hold hostage elections unless the well-known requirements for injunctive relief are satisfied. Accordingly, for the reasons set forth in their Response and above, these Defendants request that the Court deny the Plaintiffs' and Intervening Plaintiffs' requests for a temporary injunction and further respectfully request that the Court allow the elective process to proceed in an orderly and timely fashion with definitive direction as to the legislative boundaries to be employed by the election officials of the Commonwealth, including these Defendants.

Respectfully submitted,

Anita M. Britton, Esq.
BRITTON OSBORNE JOHNSON PLLC
200 West Vine Street, Suite 800
Lexington, KY 40507
859-966-2241

By:



CO-COUNSEL FOR DEFENDANTS

⁵ Other races scheduled to be on the ballot in the May 22 primary include United States President, United States Representative, Commonwealth's attorneys, Judge of the Court of Appeals, and various local offices. Although the cost of a primary varies by county, it is uniformly significant. *See Zeigler Aff.*, ¶18 (cost of primary in Franklin County estimated to be \$60,000). The cost of elections is secondary to considerations of fairness and equality, but it should not be ignored. If candidates for state Senator and state Representative do not appear on the May 22, 2012 primary ballot, the financial impact on the counties (and the Commonwealth) of having to conduct a separate primary will be substantial.

AND

David Tachau
Dustin E. Meek
Jonathan T. Salomon
Katherine E. McKune
TACHAU MEEK PLC
101 South Fifth Street, Suite 3600
Louisville, KY 40202-310
502-238-9910

CERTIFICATE OF SERVICE

I hereby certify that I have served a true copy of the foregoing by regular and electronic mail, this 3rd day of February, 2012, upon the following:

Victor B. Maddox
John David Dyche
Jennifer Metzger Stinnett
Jason M. Nemes
Fultz Maddox Hovious & Dickens PLC
2700 National City Tower
101 South Fifth Street
Louisville, KY 40202-3116

Pierce Whites
2374 Switzer Road
Frankfort, KY 40602

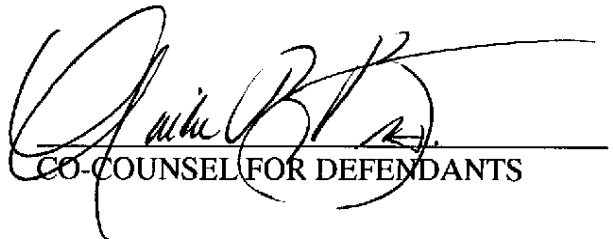
Scott Jones
One Riverfront Plaza
401 West Main Street, Suite 710
Louisville, KY 40202

Scott White
Sarah Mattingly
Morgan & Pottinger
133 W. Short Street
Lexington, KY 40507

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528 Leawood Drive
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Sheryl Snyder
Frost Brown Todd
400 West Market Street, Suite 3200
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Laura Hendrix, General Counsel
Legislative Research Commission
State Capitol, Room 300
725 Capital Avenue
Frankfort, KY 40602


CO-COUNSEL FOR DEFENDANTS

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* * * * *

AFFIDAVIT OF ROGER BAIRD

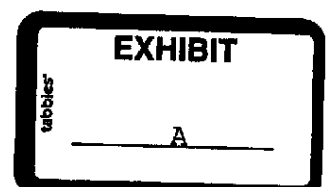
Roger Baird, being above 18 years of age and duly sworn, states:

1. My name is Roger Baird. I am employed as the President of Harp Enterprises Inc. ("Harp"). Harp prints the paper election ballots used by the county clerks in 97 of the 120 counties in Kentucky.

2. Because of Harp's role in the administration of Kentucky's elections, I have been following closely the activities surrounding the 2012 redistricting process. I understand that the Franklin Circuit Court has restrained the Secretary of State and the State Board of Elections from proceeding with the January 31, 2012 filing deadline for candidates for the General Assembly.

3. Pursuant to KRS 117.085(5), election ballots must be printed no later than 50 days prior to the primary election. Because the 2012 primary election is to be held on May 22, 2012, election ballots must be printed by April 2, 2012.

4. Before Harp can print election ballots for any of the 97 counties that rely on it to timely produce their ballots, we require the following information: (1) for offices that file with the Secretary of State's Office, certification of the candidates from the Secretary of State (as



provided to us by the county clerk); (2) for offices that file with the county clerk, certification of the candidates from the county clerk; and (3) a list from the county clerk of the precincts, by name or number, that are included in each legislative district encompassed by their respective county.


5. In order for Harp to print election ballots for use in the May 22 primary election by the April 2, 2012 statutory deadline, we must receive the items identified in Paragraph 4 no later than March 1, 2012.

Further affiant sayeth naught.



ROGER BAIRD

Subscribed and sworn to under penalty of perjury before me by ROGER BAIRD on February 3, 2012.



NOTARY PUBLIC, KY STATE AT LARGE
My Commission expires: 10-15-14
Id. No. 430054

COMMONWEALTH OF KENTUCKY
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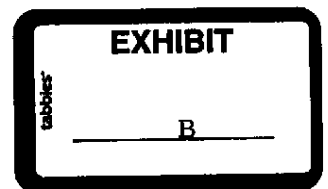
DEFENDANTS

* * * * *

AFFIDAVIT OF GUY ZEIGLER

Guy Zeigler, being above 18 years of age and duly sworn, states:

1. My name is Guy Zeigler. I currently serve as the Franklin County Clerk. The Franklin County Clerk's Office is responsible for a variety of functions, including voter registration and conduction of elections in Franklin County.
2. I understand that Franklin County's vendor for ballot printing, Harp Enterprises, needs certain items from Franklin County no later than March 1, 2012, in order to print ballots for the May 22, 2012, primary. These items include the Secretary of State's certification of candidates, my certification of candidates who file for local offices in Franklin County and a list of precincts, by name or number, that are included in each legislative district encompassing Franklin County.
3. No two precincts may have the same name or number. Accordingly, if the final district boundaries ultimately divide any Franklin County precincts, only one part of the former precinct may retain its current name and number, and the other portion(s) must be assigned a new name and number.



4. In order to provide a precinct list to Harp Enterprises by its March 1, 2012 deadline, I must know the final district boundaries well in advance of that date. The length of time that it will take myself and other county clerks to determine the specific precincts in each legislative district will depend on how many precincts are ultimately moved, and more importantly, split by the final 2012 redistricting plan.

5. Pursuant to KRS 117.055, precinct boundaries may not cross state senatorial or representative districts.

6. If the legislative districts ultimately adopted split any precincts, many counties will likely require substantial time to re-draw precinct boundaries to comply with KRS 117.055. (HB1 permitted 45 days to complete this process.)

7. In addition, if the legislative districts ultimately adopted split any precincts, counties will be required to manually move voters to new precincts and notify them of the changes.

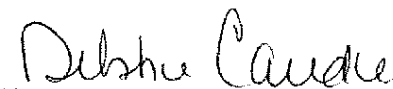
8. The estimated cost of a primary election in Franklin County is \$60,000.

Further affiant sayeth naught.

Dated: February 3, 2012


GUY ZEIGLER

Subscribed and sworn to under penalty of perjury before me by GUY ZEIGLER on February 3, 2012.


NOTARY PUBLIC, KY STATE AT LARGE
My Commission expires: 1-17-13

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
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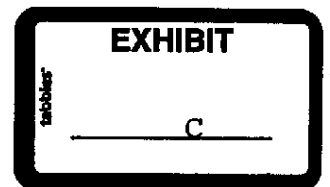
DEFENDANTS

* * * * *

AFFIDAVIT OF MARY SUE HELM

Mary Sue Helm, being above 18 years of age and duly sworn, states:

1. My name is Mary Sue Helm. I am employed in the Office of the Kentucky Secretary of State (the "Secretary") as the Director of Administration and Elections. I have served in that role since Secretary of State Alison Lundergan Grimes was sworn into office in January 2012. With the exception of approximately six months in 2008, I have been continuously employed in the Secretary's Office since 1988.
2. Pursuant to statute, the Secretary's Division of Administration, among other duties, is responsible for certain election procedures and processes in the Commonwealth. The Secretary is the filing official for candidates seeking statewide office or an office voted on by electors from more than one county, for members of Congress, for members of the General Assembly, and for all judicial candidates.
3. I understand that the Franklin Circuit Court has restrained the Secretary and the Board of Elections from proceeding with the January 31, 2012 filing deadline for candidates for the General Assembly.



4 To date, many candidates have already filed for House and Senate races in the legislative districts established by House Bill 1. If the district boundaries adopted by House Bill 1 are changed such that these candidates or their co-signers are no longer residents of the district for which they filed, such candidates will need time to withdraw their filings, obtain necessary signatures and re-file in the appropriate legislative district.

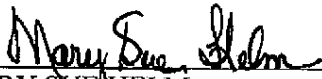
5 Following the candidate filing deadline, pursuant to KRS 118.225, the Secretary must draw to determine the ballot order of the names of candidates for the primary. Although KRS 118.225(2) provides that this drawing is to be held on the Thursday following the candidate filing deadline, it may practically be conducted on the same day but subsequent to the filing deadline.

5 Following the drawing for ballot position, the Secretary is further required to certify certain information to the county clerks. Specifically, for each office for which she is the filing official, the Secretary must, pursuant to KRS 118.215, certify the names of the candidates, their place of residence, and their party, all of which is specified on the nomination papers or the certificates and petitions of nomination. Under KRS 118.215, such certification must occur no later than the second Monday after the filing deadline. After ballot positions are determined, it will take several days for the Secretary and her staff to prepare these certifications.

6 It is my understanding that in order for the great majority of county clerks to provide certain required information by March 1, 2012 to their ballot printing vendor, the Secretary must certify candidates for offices to the county clerks no later than February 27, 2012.


8. Based upon my nearly 25 years of experience working in the Secretary's Office, the May 22 primary election may proceed if the candidate filing deadline and drawing for ballot position occur no later than Tuesday, February 21, 2012.

Further affiant sayeth naught.



MARY SUE HELM

Subscribed and sworn to under penalty of perjury before me by MARY SUE HELM on February 3, 2012.



NOTARY PUBLIC, KY STATE AT LARGE
My Commission expires: 8-19-15 # 449562