COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
48TH JUDICIAL CIRCUIT
DIVISION ____
CIVIL ACTION NO. _____

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PLAINTIFFS

v.

ALISON LUNDERGAN GRIMES, in her official capacity
as Kentucky Secretary of State

Serve: Alison Lundergan Grimes
Office of the Secretary of State
The Capitol Building
700 Capital Avenue
Suite 152
Frankfort, KY 40601

and

Jack Conway
Office of the Attorney General
700 Capitol Avenue, Suite 118
Frankfort, KY 40601

KENTUCKY STATE BOARD OF ELECTIONS,

Serve: Maryellen Allen
Interim Acting Executive Director
Kentucky State Board of Elections
140 Walnut Street
Frankfort, KY 40601

and

Jack Conway
Office of the Attorney General
700 Capitol Avenue, Suite 118
Frankfort, KY 40601

MARYELLEN ALLEN, in her official capacity as Interim Acting Executive Director of the Kentucky State Board of Elections

Serve: Maryellen Allen
Interim Acting Executive Director
Kentucky State Board of Elections
140 Walnut Street
Frankfort, KY 40601

and

Jack Conway
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PLAINTIFFS' MOTION AND MEMORANDUM IN SUPPORT FOR TEMPORARY INJUNCTION

Pursuant to CR 65.04, Plaintiffs move the Court for a temporary injunction to enjoin the Kentucky State Board of Elections and Secretary of State from taking any action pursuant to KRS Chapter 118 or related provisions to certify any candidate as the nominee for office in the General Assembly, or otherwise taking steps to conduct the 2012 elections using the existing unconstitutional districts. Plaintiffs ask that the Court prohibit the Defendants from taking any

action referred to above unless and until a constitutional plan of redistricting occurs that complies with the Kentucky and United States Constitutions.[1]

I. INTRODUCTION

This action was filed on January 26, 2012, seeking a declaration that House Bill 1 ("HB 1"), and the Kentucky House of Representative districts created and established by HB 1, violate the Kentucky and United States Constitutions, as well as 42 U.S.C. § 1983, and are therefore invalid.[2] HB 1 was passed by the Kentucky General Assembly in the 2012 regular session and signed into law (and made immediately effective) by Kentucky Governor Steve Beshear on Friday, January 20, 2012.

As a result of HB 1, all of the Plaintiffs[3] now reside in state House districts in which their constitutional rights, including the right to vote and the right to equal protection of the laws, are violated. Therefore, concurrent with filing their Verified Complaint, Plaintiffs filed this motion for emergency injunctive relief – seeking to prevent imminent violations of Plaintiffs' right to vote as secured by the Kentucky and the United States Constitutions. Specifically, Plaintiffs ask this Court to enjoin Defendants from the following actions:

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[1] Plaintiffs request that the Court exercise its discretion and waive the CR 65.05 requirement that surety be issued on injunctions, as no cost or damages will be incurred or suffered by Defendants as result of issuance of the requested preliminary injunction. *See Moltan Co. v. Eagle-Picher Indus., Inc*., 55 F.3d 1171, 1176 (6th Cir. 1995); *Hurwitt v. City of Oakland*, 247 F.Supp. 995 (N.D.Cal.1965).

[2] Specifically, the districts created by HB 1: (a) violate Section 33 of the Kentucky Constitution in that they divide more counties than necessary to achieve equality of population and create districts comprised of non-contiguous counties, and do so for partisan purposes and without regard to any rational government interest or state policy; (b) violate Article IV, § 2 of the United States Constitution, the Fourteenth Amendment to United States Constitution, and Sections 2, 3, and 6 of the Kentucky Constitutions in that the partisan composition and population ranges and variations of the districts violate the constitutional principle of "one person, one vote;" (c) deprive the plaintiffs of their freedom of association rights guaranteed by the First Amendment of the United States Constitution and Section 1 of the Kentucky Constitution by penalizing Republican voters and Representatives solely because of their party affiliation and political beliefs and cannot be justified as furthering any legitimate state interest; and (d) deprive the plaintiffs of their constitutional rights under color of a state statute in violation of 42 U.S.C. § 1983. *See* Compl. ¶ 2.

[3] Three of four of the Plaintiffs are state legislators. However, these Plaintiffs are before the Court not in their capacity as state legislators, but instead as citizens, taxpayers, and residents of this Commonwealth and the counties that have been adversely affected by HB 1.

(1) Certifying pursuant to KRS § 118.185 any candidate's name as the nominee of his party for any office subject to redistricting, or notifying any candidate who files for office in the existing unconstitutional districts and is unopposed that he or she is the nominee;

(2) Certifying the names of candidates for any office subject to redistricting to the county clerks, or certifying the order in which the names will appear on the ballot;

(3) 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, until the merits of this Complaint are finally adjudicated by this Court; and

(4) Enforcing or implementing in any respect the filing deadline for candidates seeking election to the General Assembly of Kentucky, or any other offices subject to redistricting following the passing of HB 1, currently established by KRS § 118.165(1) as 4:00 p.m. EST on January 31, 2012, and, if necessary, extending such deadline to a date not sooner than seven days after the effective date of a new redistricting plan that complies with all applicable state and federal laws.

A proposed temporary injunction is attached as Exhibit 1. Without a temporary injunction the Plaintiffs, as well as thousands of other similarly situated citizens, will be irreparably damaged in that they will be deprived of the type of representation in the legislative branch of State Government specifically required by Section 33 of the Kentucky Constitution (hereinafter referred to as "Section 33").[4]

[4] Section 33 of the Kentucky Constitution ("Section 33") 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**. (Emphasis added).

II. APPLICABLE JUDICIAL DECISIONS

In *Fischer v. State Board of Elections*, 879 S.W.2d 475 (Ky. 1994) *("Fischer II")*, plaintiff Fischer challenged a redistricting plan for the House of Representatives that divided 48 of Kentucky's 120 counties. The Supreme Court held that:

> There is no fundamental impediment to a full accommodation of the dual mandates of Section 33 of the Constitution of Kentucky. Within reasonable limits, federal law is no barrier and our decisions in *Ragland* and *Stiglitz* do not command perfect population equality at the total expense of county integrity. Population equality under Section 33 may be satisfied by a variation which does not exceed −5% to +5% from an ideal legislative district. By simple arithmetic, and using the ideal district population figures relied upon by the General Assembly for the 1991 Reapportionment Act, this would mean that no House district could have fewer than 35,010 citizens nor more than 38,696 citizens, and no Senate district could have fewer than 92,132 citizens nor more than 101,830 citizens. Using these parameters, the General Assembly can formulate a plan which reduces to the minimum the number of counties which must be divided between legislative districts. One such plan was placed in evidence and there may be others which are equal or superior to it. **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.** (Emphasis added).

Thus, Section 33 mandates that redistricting for the House of Representatives be accomplished by dividing the fewest number of counties possible while maintaining a maximum population deviation of plus or minus five percent from the ideal population of a state House of Representatives district.

The United States Supreme Court has held that, as a general matter, "an apportionment plan with a maximum population deviation *under 10%* falls within [a] category of minor deviations" [from population equality] that are insufficient to make out a prima facie case of discrimination in violation of the Fourteenth Amendment. *Brown v. Thomson,* 462 U.S. 835, 842, 103 S.Ct. 2690, 2696, 77 L.Ed.2d 214 (1983) (emphasis added). However, a plan with a higher maximum deviation "creates a prima facie case of discrimination and therefore must be justified by the State." *Id.* at 842–43, 103 S.Ct. at 2696. In considering legitimate justifications,

courts must consider "[t]he consistency of application and the neutrality of effect of the nonpopulation criteria" in order to determine whether a state legislative reapportionment plan violates the Fourteenth Amendment. *Id.* at 845–46, 103 S.Ct. at 2697–98.

In *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) *aff'd,* 542 U.S. 947, 124 S. Ct. 2806, 159 L. Ed. 2d 831 (2004), a unanimous three-judge panel of the U. S. District Court for the Northern District of Georgia held, and the United States Supreme Court summarily affirmed, that Georgia's state legislative reapportionment plans, which deviated from population equality by a total of 9.98%, violated constitutional one person, one vote principles, concluding, among other things, that:

> The population deviations in the Georgia House and Senate Plans are not the result of an effort to further any legitimate, consistently applied state policy. Rather, we have found that the deviations were systematically and intentionally created (1) to allow rural southern Georgia and inner-city Atlanta to maintain their legislative influence even as their rate of population growth lags behind that of the rest of the state; and (2) to protect Democratic incumbents. Neither of these explanations withstands Equal Protection scrutiny. First, forty years of Supreme Court jurisprudence have established that the creation of deviations for the purpose of allowing the people of certain geographic regions of a state to hold legislative power to a degree disproportionate to their population is plainly unconstitutional. Moreover, the protection of incumbents is a permissible cause of population deviations *only* when it is limited to the avoidance of contests between incumbents and is applied in a consistent and nondiscriminatory manner. The incumbency protection in the Georgia state legislative plans meets neither criterion. Therefore, that interest cannot save the plans from constitutional infirmity. Quite simply, the Georgia plans violate the Equal Protection Clause.

Id. at 1338.

The *Larios* court therefore issued a judgment for violation of equal protection as to a state legislative reapportionment plans as an unconstitutional partisan gerrymander violating the "one person, one vote" principle, and for violation of First Amendment rights of association, and enjoined future elections under the reapportionment plan for the Georgia House of Representatives. *Id.* at 1357.

Finally, in *Ridings v. City of Owensboro*, 383 S.W.2d 510, 512 (Ky. 1964), Kentucky's high court held that, as to legal requirements of contiguity such as that in Section 33, the use of "corridors or fingers" to establish contiguity could constitute "a mere subterfuge" that "cannot supply the necessary contiguity."

III. FACTS

In order for redistricting to be in conformity with Section 33 and *Fischer II*, 22 counties are to be divided, or split, because their populations are too large to contain a single House of Representatives district. HB 1 splits 28 counties, at least three of which are majority Republican counties among multiple House districts. *See* Compl. ¶ 30. Lewis County is divided among three districts, and Laurel and Pulaski Counties are divided among four districts. *Id.* ¶ 31. A copy of a map showing HB 1's districts and county splits is attached hereto as Exhibit 2. Therefore, HB 1 splits six more than the minimum amount required by law.

The "ideal" population of a Kentucky House of Representatives district is 43,394. The relative range of HB 1 from the ideal population of a Kentucky House of Representatives district is -4.62% to 5.38%, and the relative overall range is 10.0013827%. A copy of a chart detailing HB 1's deviations from the ideal district population is attached hereto as Exhibit 3. Again, HB 1's deviations above the ideal population, and deviations *most* above the ideal population, are concentrated in districts having Republican majorities or substantial Republican minorities. *Id.* ¶ 34. But deviations below the ideal population and deviations most below the ideal population are concentrated in districts having Democratic majorities or substantial Democratic minorities. *Id*.

HB 1's combination of an excessive number of divided counties and partisan-based deviations from the population of the ideal district results in bizarrely-shaped districts that

circumvent Section 33's command that "counties forming a district shall be contiguous." *See* Ex. 2. In fact, many of the House of Representatives districts in HB 1 that are of dubious contiguity also have significant deviations from the population of an ideal district and there is no basis upon which to conclude that the population deviations in HB 1's House of Representatives districts results from any interest in county contiguity as required by Section 33.

For example, District 80 runs from the Fayette County line through western Madison County to Rockcastle County, which is connected to Casey County by a narrow strip of Pulaski County, along the Lincoln County line. *See* Compl. ¶ 36. The population contained in District 80 exceeds the ideal district population by 5%, the maximum amount permitted by *Fisher II*. The "Pulaski Strip" is a sham incorporated into HB 1 solely for the purpose of creating the illusion of "contiguity" between Casey County and Rockcastle County, or between Casey County and Madison County, even though these counties are not contiguous within the meaning and text of Section 33. *Id.* ¶ 37; *see* also Ex. 2.

The 89th District, or the "Laurel County Zigzag," is a sham incorporated into HB 1 for the purpose of creating the illusion of "contiguity" between McCreary County and Laurel County, even though these counties are not contiguous within the meaning and text of Section 33. This district stretches from the Tennessee border in McCreary County, zigzags narrowly through Laurel County, and then encompasses all of Jackson County. *See* Compl. ¶ ¶ 39-40; *see also* Ex. 2. The population contained in District 89 exceeds the ideal district population by 4.99%, only missing the maximum amount permitted by *Fisher II* by 0.01%.

Finally, as drafted by House Democrats and as based on the composition of the Kentucky House of Representatives at the time, HB 1 puts nine incumbents across the state in districts with other incumbent representatives. Of those, eight were Republicans and only one was a

Democrat, House Majority Leader Rocky Adkins, who was put in the 99th District with Republican Jill York. Plaintiff King, a Republican, was put in the 54th District with Republican Mike Harmon. *Id.* ¶ 44.

The population deviations in HB 1 are not below the level of 10% --the deviations amount to 10.0013827% -- and therefore exceed the level at which deviations will ordinarily, without evidence of arbitrariness or discrimination, be considered de minimis. The divergences from a strict population standard contained in HB 1 are not based on legitimate considerations incident to the effectuation of a rational state policy as articulated by the United States Supreme Court. Instead, the deviations from the ideal population are designed to protect incumbent Democrats, to punish incumbent Republicans, to dilute the vote of Republicans in counties and districts that exceed the ideal population, and to deny Republicans effective representation in counties arbitrarily split and their residents scattered to adjoining Democrat counties and districts.

IV. LEGAL ARGUMENT IN SUPPORT OF TEMPORARY INJUNCTION

This emergency motion is brought to the Court on January 26, 2012. At 4:00 p.m. on January 31, pursuant to KRS § 118.165, the deadline for candidates to file for election to the offices subject to redistricting in Kentucky expires. Candidates who file seeking election must do so using the existing districts for the General Assembly even though these districts are unconstitutional per se. The existing districts under HB 1 create an excessive number of divided counties, partisan-based deviations from the population of the ideal district, and non-contiguous districts – all of which are unconstitutional as a matter of both state and federal constitutional law. Even so, the General Assembly and the Governor, charged in the first instance with ensuring that Plaintiffs' Equal Protection rights are not violated and that no further elections are

held in the existing districts, have given their stamp of approval to HB 1. With the deadline for filing in the existing unconstitutional districts only a few days away, immediate action in the form of a temporary injunction is crucial.

This Court is charged with the responsibility of ensuring that no further elections are conducted using the existing districts. *Reynolds v. Sims*, 377 U.S. 533, 585, 84 S. Ct. 1662, 1393 (1964) ("[I]t is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan."). The United States Supreme Court has said in this same context, in *Scott v. Germano*, 381 U.S. 407 (1965) (per curiam) that "the power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this court but appropriate action by the States in such cases has been specifically encouraged." *Id.* at 409.[5]

The Supreme Court's decision in *Reynolds* and subsequent cases established conclusively that Plaintiffs have a constitutional right to vote in districts that are substantially equal in population. In *Germano*, the Court found that the federal district court erred when it invalidated the Illinois Supreme Court's plan to redistrict the Illinois State Senate. More importantly, the Court remanded the case to the federal District Court "with directions that the District Court enter an order fixing a reasonable time within which the appropriate agencies of the State of Illinois, including its Supreme Court, may validly redistrict the Illinois State Senate; provided

[5] Should this Court fail to issue injunctive relief, or act to protect Plaintiffs' Equal Protection rights, it will fall to the federal courts to do so. *Growe v. Emison*, 507 U.S. 25, 36-37 (1993) (holding that a District Court should defer to the state court only so long as it appears that the state court will act to ensure that new districts are created in time for the upcoming primary elections).

that the same be accomplished within ample time to permit such plan to be utilized in the 1966 election...." *Id.* (quoting *Germano*, 381 U.S. at 409 (emphasis added)).

The Supreme Court has left no doubt that this Court has jurisdiction over this action, and that it should exercise that jurisdiction. "We applaud the willingness of state courts to assume jurisdiction and render decision in cases involving challenges to state legislative apportionment schemes." *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 674 (1964). In *Tawes*, the Supreme Court reversed a ruling of the Maryland Court of Appeals to the effect that the existing apportionment scheme was not unconstitutional. The Court then noted:

> Since primary responsibility for legislative apportionment rests with the legislature itself and since adequate time exists in which the Maryland General Assembly can act, the Maryland courts need feel obliged to take further affirmative action only if the legislature fails to enact a constitutionally valid state legislative apportionment scheme in a timely fashion after being afforded a further opportunity by the courts to do so. However, under no circumstances should the 1966 election of members of the Maryland Legislature be permitted to be conducted pursuant to the existing or any other unconstitutional plan.

377 U.S. 656, 675, 84 S.Ct. 1429 (1964) (emphasis added).

At this eleventh hour, it is imperative that this Court take action to protect Plaintiffs' rights under the Kentucky and United States Constitutions. The primary election is scheduled to occur on May 12, 2012, less than four months from now. Given the practical realities involved, including the simple mechanical aspects of compiling the names of qualified candidates for the primary election and preparing and distributing the necessary ballots, there is little time left before it will be impossible to complete the necessary tasks without delaying the primary election itself.

In preparation for that election, KRS Chapter 118 provides all manner of deadlines and actions by the Defendant, Alison Lundergan Grimes, Secretary of State, that follow from the expiration of the filing deadline. For example:

> KRS § 118.125 -- requires that any person who is qualified shall have his name printed on the official ballot upon filing with the Secretary of State or county clerk as appropriate, at the proper time, a notification and declaration.
>
> KRS § 118.165 -- provides that in the case of General Assembly and House of Representatives offices, the "proper time" is 4:00 p.m. January 31, 2012.
>
> KRS § 118.185 -- directs that "if it appears, after the expiration of the time for filing nomination papers, that there is only one (1) candidate who has filed the necessary papers for a place on the ballot of any party on whose ballot he is entitled to have his name printed, the officer with whom the papers are filed shall immediately issue and file in his office a certificate of nomination, and send a copy to the candidate."
>
> KRS § 118.215 -- directs that not later than the third Tuesday of February -- February 21, 2012 -- the Secretary of State shall certify to the county clerks the names of the candidates for the offices, including the General Assembly, as well as the order in which the names will appear on the ballot.

All of these actions threaten to do irreparable harm to the Plaintiffs' Equal Protection rights to vote in districts having substantially equal populations. Unless a temporary injunction is entered, the Secretary of State will be compelled by law to certify any unopposed candidate who files for the primary election as the nominee of his party. Names must be certified for the ballot, and the order of names specified. Ballots must be designed and printed. All of this will require the expenditure of scarce state resources, and yet all of it will be futile, when the existing districts are dissolved and new, constitutional districts are created. If it is not futile, it will be at the expense of Plaintiffs' Equal Protection rights. At a minimum, it is clear that expiration of the existing deadline will tend to render any final judgment this Court may issue ineffectual, within the meaning of CR 65.04(1).

It is enough today that the Court issues a temporary injunction staying the implementation of the filing deadline, and barring the Defendants from taking any of the actions specified in Chapter 118. Once that is accomplished, the Court will have time to determine an appropriate deadline, by which the General Assembly must act, or to conduct its own trial and

create new legislative and congressional districts that pass constitutional muster. Although at this point the process of creating new districts cannot be completed immediately, it is imperative now that the Court act to enjoin the Defendants from taking any of the steps outlined above. In particular, Plaintiffs move the Court to enjoin Defendants from:

(1) Certifying pursuant to KRS § 118.185 any candidate's name as the nominee of his party for any office subject to redistricting, or notifying any candidate who files for office in the existing unconstitutional districts and is unopposed that he or she is the nominee;

(2) Certifying the names of candidates for any office subject to redistricting to the county clerks, or certifying the order in which the names will appear on the ballot;

(3) 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, until the merits of this Complaint are finally adjudicated by this Court; and

(4) Enforcing or implementing in any respect the filing deadline for candidates seeking election to the General Assembly of Kentucky, or any other offices subject to redistricting following the passing of HB 1, currently established by KRS § 118.165(1) as 4:00 p.m. EST on January 31, 2012, and, if necessary, extending such deadline to a date not sooner than seven days after the effective date of a new redistricting plan that complies with all applicable state and federal laws.

In support of this motion, Plaintiffs have filed a Verified Complaint setting forth their claims for relief and demonstrating the irreparable harm to their right to vote that will occur in the absence of a temporary injunction. Plaintiffs request that the Court enter the tendered injunction order and set this matter for an immediate hearing.

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