

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

JOSEPH M. FISCHER, et al.

PLAINTIFFS

v. **PLAINTIFFS' PRELIMINARY RESPONSES TO THE
COURT'S QUESTIONS IN EVIDENTIARY HEARING
ORDER OF JANUARY 31, 2012**

ALISON LUNDERGAN GRIMES, et al.

DEFENDANTS

Plaintiffs, Joseph M. Fischer, Jeff Hoover, Kim King, Frey Todd, and Anthony Gaydos ("Plaintiffs") state as follows for their preliminary responses to the questions in this Court's January 31, 2012 Order setting this matter for an evidentiary hearing and further oral argument, and shall be prepared to address the questions further at the hearing on February 6, 2012:

1. How many citizens are temporarily disenfranchised by being assigned by House Bill 1 to a legislative district that is represented by a Senator or Representative who has never appeared on the ballot in the districts to which they are assigned under House Bill 1?

Plaintiffs take no position on this issue and defer to intervening plaintiffs Stevens, *et al.*

2. What is the rational basis for assigning the geographic area encompassed in an odd numbered Senate District (former Senate District 13) for which elections are held in 2012 to an even numbered Senate District (new Senate District 4) that will not be on the ballot until 2014?

Plaintiffs take no position on this issue and defer to intervening plaintiffs Stevens, *et al.*

3. Is there any rational basis to deny citizens of the former Senate District 13 the right to elect a Senator during the 2012 election cycle in which they would otherwise be entitled to vote for a Senator absent reassignment of that territory to an even numbered District? Does the reassignment of the former territory of Senate District 13 to Senate District 4 constitute special legislation under Section 59 of the Kentucky Constitution?

Plaintiffs take no position on this issue and defer to intervening plaintiffs Stevens, *et al.*

4. What is the constitutional deadline, if any, for the decennial legislative redistricting required by Section 33 of the Kentucky Constitution for the districts that were established in 2002 by 2002 Ky. Acts., c.l. effective Jan. 31, 2002?

Section 33 of the Constitution of Kentucky states that redistricting shall occur every ten years: “At the expiration of that time, the General Assembly shall then, and every ten years thereafter, redistrict the State” The pre-HB 1 legislative districts went into effect on January 31, 2002, and were used in the 2002 primary election.

Additionally, the United States Supreme Court recently summarily affirmed the U. S. District Court for the Southern District of Mississippi when the district court ruled, in 2011, that the state legislature must redistrict the state legislature in time for the 2012 elections. The district court allowed elections to proceed in 2011 under the 2002 maps, but it held the case in abeyance to ensure that the state legislature enacted a new redistricting plan for the 2012 election. *Mississippi State Conference of the National Association for the Advancement of Colored People v. Barbour*, 2011 WL 1870222, summarily affirmed at 132 S. Ct. 542 (S.D. Miss. 2011). And in *Georgia v. Ashcroft*, the United States Supreme Court said that if the state legislature does not redistrict in response to the new census numbers, then a court will step in and ensure compliance with the one person, one vote mandate before the next election. 539 U.S. 461, n.2 (2003).

Therefore, the state must be redistricted according to Kentucky law before the elections of 2012.

5. What is the minimum number of counties that must be divided in order to comply with *Fischer v. St. Bd. Of Elections*, 879 S.W.2d 475 (Ky. 1994) for the House? And for the Senate?

For House of Representative Districts, the fewest possible number of counties that must be divided in order to comply with *Fischer v. St. Bd. of Elections*, 879 S.W.2d (Ky. 1994) (*Fischer II*) is 24.

As to the House of Representatives districts, Section 33 of the Kentucky Constitution as interpreted and applied in *Fischer II* requires 22 counties to be divided, or split, because their populations are too large to contain a single House of Representatives district. The ideal House district size is 43,394. Any county that has a population larger than 1.05% of the ideal district, or 45,564, must be divided. According to U. S. Census data, the 22nd largest county in Kentucky (Henderson) has a population of 46,250 and so it must be divided. The 23rd largest county (Nelson) has a population of 43,437, and so is within the allowable variation of 1.05%. Consequently, 22 counties must be divided because their populations are too large to form a single district.

If this exercise is repeated with the remaining counties, it is evident that there are two other counties that do not border a divided county and do not border a county that could be added whole to form a district. Thus, as a matter of pure mathematics, the smallest possible number of divided counties is 24: 22 counties that must be divided because of their size, and 2 counties that must be divided because they cannot be joined with another whole county. “This is the standard in light of the *Fischer* mandate” and Section 33 “requires that legislative districts be redrawn by dividing the smallest possible number of counties while keeping population variation within plus-or-minus 5% of an ideal district”. OAG 96-1. As to the Senate districts, Plaintiffs take no position on this issue and defer to intervening plaintiffs Stevens, *et al.*

6. How many Pulaski County residents and voters are included in House District 80?

1,882 residents and 1,146 registered voters.

7. How many Laurel County residents and voters are included in House District 89?

13,758 residents and 8,693 registered voters.

8. What factual or legal problems exist with proposed alternatives to House Bill 1 (e.g. House Floor Amendment #1), concerning compliance with the U.S. Constitution, the Voting Rights Act of 1965, or other federal statutes?

None. Regarding the Voting Rights Act of 1965, any “problem” as to House Floor Amendment #1 is speculative and a matter of statutory and judicial interpretation. There do not appear to be even such speculative “problems” with other alternative House redistricting plans in the legislative record (*e.g.*, HB 284, HB 292, HB 298, HB 318, and HB 370) and the record of this case, however. More significantly, plaintiffs are not required to show that alternative plans are free from any and all potential objections in order to prevail, but need only show that the House districts created by HB 1 are unconstitutional on their face because those districts contain population variations from the ideal district population of more than plus-or-minus 5% and because HB 1 divides more than the fewest possible number of counties. *See Fischer II*, 879 S.W. 2d at 479; *State Board of Elections v. Fischer*, 910 S.W. 2d 245 (Ky. 1995); *Jensen v. State Board of Elections*, 959 S.W. 2d 771, 774(Ky. 1997) (“*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.”) A plan that satisfies both elements of the *Fischer II* test is constitutional under Section 33. A plan that fails either element of the test is unconstitutional under Section 33. *Jensen, Id.* at 774-75.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this document was served by electronic mail and U.S. Mail on February 3, 2012 upon David Tachau, Dustin B. Meek, Jonathan T. Salomon, and Katherine E. McKune, TACHAU MEEK PLC, 3600 National City Tower, 101 S. Fifth Street, Louisville, KY 40202-3120 and Anita M. Britton, BRITTON OSBORNE JOHNSON PLLC, 200 W. Vine St., Suite 800, Lexington, KY 40507, and on Scott White, 133 W. Short Street, Lexington, KY, 40507, and on Pierce Whites, Office of the Speaker of the House, 702 Capitol Avenue, Capitol Annex Room 303, Frankfort, KY, 40601, and, as a matter of courtesy, on Laura H. Hendrix, General Counsel, Legislative Research Commission, State Capitol Annex, Room 104, Frankfort, Kentucky 40601, and, as a matter of courtesy, on Sheryl Snyder, 400 West Market Street, Suite 3200, Louisville, Kentucky 40202.



Counsel for Plaintiffs