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

JOSEPH M. FISCHER, et al. PLAINTIFFS

And

DAVID B. STEVENS, M.D. INTERVENING PLAINTIFFS

v.

ALISON LUNDERGAN GRIMES, et al. DEFENDANTS

"No matter how distasteful it may be for the judiciary to review the acts of a co-ordinate branch of government their duty under their oath of office is imperative."

Fischer v. State Board of Elections, 879 S.W. 2d 475, 476 (Ky. 1994)"(*Fischer II*"), *quoting, Ragland v. Anderson*, 125, 125 Ky. 141, 100 S.W. 865(1907)

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF INJUNCTION PURSUANT TO CR 64.04

For more than 100 years, the duty of the Kentucky judiciary to serve as a check on the activities of the other branches of government in connection with redistricting has been clear. The duty is "imperative" and " it must be exercised "even when the court's view of the constitution is contrary to that of the other branches". *Fischer* v *State Bd. of Elections*, 879 S.W. 2d 475 , 476 (Ky. 1994)("*Fischer II*").

Our Supreme Court requires that any redistricting plan must meet a two part test to survive a challenge under Section 33 of the Kentucky Constitution. First, it must contain population variations from the ideal district population of no more than plus-or-minus 5%. If the plan satisfies that standard, the plan must then divide the fewest possible number of counties. This two-part test was announced in *Fischer II.* 879 S.W. 2d at 479. One year later, the Court reiterated that this was the central holding of *Fischer II,* when it decided *State Board of Elections v. Fischer*, 910 S.W. 2d 245 (Ky. 1995)("*Fischer III*"). Two years after that, the Court again reiterated the same two-part test, without change. *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. A plan that fails either element of the test is unconstitutional. *Jensen, Id.* at 774-75.

Moreover, the Court's only role in the redistricting process is to ascertain whether a particular redistricting plan passes this test of constitutional muster, not whether a better plan could be crafted. This is the holding of the Kentucky Supreme Court as set forth in *Fischer II,* as reiterated in *Fischer III,* as reiterated again by the Court in *Jensen*[1]. As a result, the issue before the Court with the facial challenge under Section 33 raised by the Amended Verified Complaint and the Motion for Temporary Injunction under CR 65.04 is simply this: does HB 1 satisfy both parts of the two-part *Fischer II* test? Is the maximum population variation in each House and Senate district within the plus-or-minus 5% maximum constitutional population variation permitted for purposes of approximate population equality and one person, one vote principles?

[1] Defendants concede this limit on the Court's role. (Defendants' Initial Response to Plaintiffs' Motion and Memorandum in Support for Temporary Injunction, at 12.)

If so, does HB 1 divide the fewest possible number of counties? As the indisputable facts demonstrate, HB 1 fails both elements of the two-part *Fischer II* test. Its population variations exceed 5%, with House District 24 deviating from the ideal district by 5.38% and Senate District 8 deviating from the ideal district by 5.52%. At the same time, HB 1 divides twenty-eight counties, while the fewest possible number of counties that must be divided is twenty-four.

As the Plaintiffs will demonstrate below, with incontrovertible evidence, HB 1 is simply unconstitutional on its face. And because the Court's role is limited to determining if HB 1 passes the "test of constitutional muster", the Court need not consider whether alternative plans, such as the floor amendment to HB 1 or any other alternative bill, were better, or whether any other plan contained other objectionable features.

HB 1 IS UNCONSTITUTIONAL UNDER SECTION 33 BECAUSE THE POPULATION VARIATION IN SOME DISTRICTS EXCEEDS +5%.

In its Restraining Order Under CR 65.03, issued January 31, 2012, this Court found as follows:

> "The Plaintiffs and Intervening Plaintiffs have made a showing by verified complaint that at least one House District and at least one Senate District exceeded the population variance standard set forth by the Kentucky Supreme Court in *Fischer v. State Bd. Of Elections*, 879, S.W.2d 475 (Ky, 1994)."

Because this Court has already found that HB 1 violates the "one person, one vote" element of the two-part *Fischer II* test, the redistricting plan created by HB 1 is unconstitutional. HB 1 simply does not meet the first element of the two-part *Fischer II* test of constitutional muster.

The only escape from the conclusion just stated is if Defendants, or some intervening party, can rebut the averments of the Verified Amended Complaint and the Verified Intervening Complaint, and the additional supporting evidence to be offered, or can somehow show with

competent rebuttal evidence that the finding reached by the Court on January 31, 2012 is incorrect. Plaintiffs submit that such rebuttal evidence is impossible. Defendants and the Intervening Defendant do not challenge the averment in the Verified Complaint that District 24 created by HB 1 contains a population deviation of greater than 5%, specifically, 5.38%. It is simply a fact. The inclusion of a population deviation of greater than 5% represents a facial and fatal constitutional defect.

Nor is there any concern for the quality or quantum of evidence. The Legislative Research Commission ("LRC") creates a "Population Summary Report" for each redistricting bill introduced in the General Assembly. The Population Summary Report for HB 1 was attached as Exhibit 3 to the Verified (now Amended) Complaint. That report shows that the maximum population deviation for House districts created by HB 1 is 5.38%, in House District 24, and for Senate Districts is 5.52%. The Population Summary Report is created by LRC as part of its official business. It is made available to members of the General Assembly, including Plaintiff Joseph Fischer. The attached affidavit of Rep. Fischer (Exhibit __) makes plain that the HB 1 Population Summary Report attached to the Amended Verified Complaint as Exhibit 3, was created by LRC in the course of its official business, and given to Rep. Fischer in the course of his official business.[2]

Beyond that, Exhibit 3 comes directly from the Kentucky Legislative Research Committee's ("LRC") website. See http://www.lrc.ky.gov/record/12RS/HB1/HCS1RS.pdf. If the Defendants or intervening parties refuse to stipulate to the data contained in the Population

[2] At 2:00 pm on February 3, 2012, the LRC provided certified copies of the many of the documents providing the basic redistricting facts, including the Population Summary Report for HB 1, Exhibit 3 to the Amended Verified Complaint.

Summary Report, the Court may take judicial notice of the content of the LRC created reports. The LRC is "an independent agency in the legislative branch of state government, which is exempt from control by the executive branch and from reorganization by the Governor." *See* KRS § 7.090. According to the LRC's website, it was "established in 1948 as a fact-finding and service body for the Legislature," and is "a 16 member panel that consists of the Democratic and Republican leaders from the House of Representatives and the Senate." *See* http://www.lrc.ky.gov/org_adm/lrc/aboutlrc.htm.

The Kentucky Supreme Court and Court of Appeals have cited to the LRC's website as authority. *See Fox v. Grayson*, 317 S.W.3d 1, 18 n.83 (Ky. 2010). In *Fox*, the Supreme Court also cited a print newsletter published by the LRC and stated that while the newsletter was not provided to the court by the parties, the court may "properly *sua sponte* consider documents available to the general public." 317 S.W.3d at 18, n.82 (citing *Polley v. Allen*, 132 S.W.3d 223, 226 (Ky. Ct. App. 2004) ("A court may properly take judicial notice of public records and government documents, including public records and government documents available from reliable sources on the internet.")).

Therefore under KRE 201, judicial notice of these exhibits and the Population Summary Report data created and published by LRC is appropriate.. The data and facts contained in the report is competent, admissible and authoritative evidence and provides all that the Court needs as evidence in support of the requested temporary injunction.

Alternatively, the reports may be admitted to evidence pursuant to KRE 803(8) as "records, reports, statements, or other data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities,...or factual finding resulting from an investigation made pursuant to authority granted by law." The LRC reports

reflect the LRC findings regarding the population deviation of each district created by HB 1, and the maximum population variation created by the law. For HB 1, the greatest variation if 5.38% and 5.52% for the House and Senate, respectively. Both numbers exceed the maximum 5% variation permitted under Section 33, as interpreted by *Fischer II*. There is no concern for the trustworthiness of the reports, and they will surely be admitted to evidence in any evidentiary hearing or trial. Given this, it is impossible for Defendants or any other party to present evidence that would require the Court to withdraw its finding that HB 1 fails the "maximum constitution population deviation" element of the *Fischer II* test.

Further, no party has thus far answered the Amended Verified Complaint, or denied any of the averments, which stand unrebutted. In addition to the Verified Complaint the Court need only use as evidence the text of HB 1, which is now the law in the Commonwealth. Plaintiffs attached HB 1 as Exhibit 1 of their Verified Complaint, as laws and legislative enactments are routinely considered by and reviewed by courts. *See Bd. of Trs. of Judicial Form Ret. Sys. v. Attorney General*, 132 S.W.3d 770, 785 (Ky. 2003) (considering fact that original, proposed version of bill was withdrawn and reviewing language of withdrawn bill to discern legislative intent); *see also McGlone v. McGlone*, 613 S.W.2d 419, 420 (Ky. 1981) ("We customarily take judicial notice of Acts of Congress as well as legislation in sister states, so that had this Act of Congress not been furnished in movant's brief, we would nevertheless have obtained it for the purpose of a proper resolution of this matter.").

Therefore, as a matter of law, there is irrefutable evidence for the Court to find that HB 1 exceeds the maximum constitutional population variation, and violates Section 33 on that ground alone.

HB 1 Is Unconstitutional Under Section 33 Because It Divides Twenty Eight Counties, Four More Than The Fewest Possible.

Aside from the failure of HB 1 to satisfy the maximum population deviation element of the two-part *Fischer II* test, HB 1 fails the second part of the test as well. The Amended Verified Complaint makes plain that the fewest possible counties that can be divided while making full use of the maximum population variation of plus-or-minus 5% is twenty four counties. Plaintiffs are aware of at least six alternate bills that were filed that do exactly that. The floor amendment to HB 1 along with HB 248, HB 284, HB 292 and HB 318 and HB 370, each divided twenty-four counties, while satisfying the plus-or-minus 5% maximum population variation element of the test. (See e.g., Political Subdivision Report for HB 284 (Exhibit 2); HB 292 (Exhibit 3); and HB 318 (Exhibit 4 to follow)). The Amended Verified Complaint makes plain as well that HB 1 divides twenty eight counties – four more than the minimum. The Political Subdivision Report for HB 1 confirms the division of twenty-eight counties; (Exhibit 5). These averments are verified and unrebutted, as is the other evidence.

Beyond that, the Court may take judicial notice of the maps created by HB 1. Exhibit 2 of the Amended Verified Complaint is copy of a map showing HB 1's districts and twenty-eight county splits – four more than the fewest possible number of counties that can be split while making full use of the maximum population variation. Exhibit 2 comes directly from the Kentucky Legislative Research Committee's ("LRC") website. *See* http://www.lrc.ky.gov/record/12RS/HB1/HCS1RM.pdf. Because Exhibit 2 comes directly from the LRC website, the Court may take judicial notice of it. With the maps, the Court can simply count the number of counties that are divided. For comparison, the Court can look at the LRC prepared maps for each of the other bills, and count the number of counties divided. HB 1

divides twenty eight, while each of the other bills divides twenty-four. Thus, HB 1fails the second element of the test of constitutional muster.

Absent a stipulation by the Defendants or the intervening parties that the fewest possible counties that must be divided is twenty four, the simple method of counting the divided counties on the official maps is more than enough evidence. In fact, this is exactly what Kentucky's Attorney General did when determining if a proposed redistricting bill introduced in the 1996 General Assembly was constitutional. After *Fischer II* and *Fischer III*, but before *Jensen*, Kentucky's Attorney General was asked for an opinion regarding the constitutionality of a redistricting bill. After analyzing the Supreme Court interpretations of Section 33 in *Fischer I*, *Fischer II* and earlier cases, Attorney General Chandler concluded that 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, at *3.

In a careful and deliberate analysis, the Attorney General noted: "Fortunately, ... the smallest number of divided counties can be derived with mathematical precision. Once that figure is determined, it cannot fluctuate". OAG 96-1, January 8, 1996 at *3. The Attorney General then outlined the rules for determining the fewest possible number of counties. First, determine how many counties have a population of greater than 1.05% of an ideal district, since each such county must be divided. Then, determine how many counties must be divided because their population and the populations of their contiguous counties does not allow them to be joined whole to another county to form a district. Using the methodology outlined by the Attorney General, the number of additional counties that can be divided can be determined with mathematical certainty.

In 1996, the fewest possible number of counties was twenty-two, because 20 counties had populations exceeding 1.05% of the ideal district, and because of geography a county in western Kentucky and one in Eastern Kentucky had to be divided. Thus, the fewest possible divided counties, after taking full use of the maximum population variation of plus or minus 5%, was twenty-two. OAG 96-1 at *4. Once that number was determined, the Attorney General simply looked at the map provided to it by LRC, along with the text of the bill. (OAG 96-1, at *5). By examining the map, the Attorney General confirmed that the plan divided twenty-two counties -- the fewest number possible. And because no district exceed the ideal district by more than 5%, the plan was constitutional.

Similarly, the Court need only look at the LRC map for HB 1 to conclude that HB 1 divides twenty-eight counties. As well, the Court can look to the Political Subdivision Report prepared by LRC, attached to this Supplemental Memorandum as Exhibit 5. That report confirms that HB 1 divides twenty-eight counties. The same Political Subdivision Report for HB 284, for HB 292, for HB 318 and for the floor amendment show that each of those bills divides twenty-four counties.

Alternatively, the Court can take judicial notice of the US Census data, compiled by LRC. See Exhibit 6. This data shows that twenty-two Kentucky counties in 2010 had populations exceeding 1.05% of the ideal district. And by the same method outlined by the Attorney General in OAG 96-1, two additional counties must be divided. Thus, it is indisputable that twenty-four counties must be divided, and that twenty-four divided counties is the fewest possible.

One is left to wonder why the leadership of the General Assembly did not ask the Attorney General for an opinion about the constitutionality of HB 1. There was extensive floor

debate in the General Assembly, and opponents of HB 1 read directly from the opinion in *Fischer II*, warning that the bill was facially unconstitutional. The method for determining the fewest possible divided counties is simple, and precise. Once determined, the fewest possible counties does not fluctuate, and the constitutionality of any plan being considered by the General Assembly can easily be assessed. Perhaps Speaker Stumbo decided not to ask the Attorney General for an opinion because he had already decided that he did not care what the Attorney General had to say, or, for that matter, what the Kentucky Supreme Court had to say.

During committee hearings on the bill on January 11, 2012, Speaker Stumbo declared as follows in connection with a discussion about the *Fischer II* test of constitutional muster:

33:18 – "We do have directive from the court, Representative Ford, to split as few counties as probably are practical. I wouldn't say possible. I would say practical."

http://www.ket.org/cgi-bin/cheetah/watch_video.pl?nola=WGAOS+013020&altdir=&template

The Speaker's statement was recorded by KET and can be found on the KET website linked on the LRC website, The Court may take judicial notice of it, along with Speaker Stumbo's novel approach to constitutional law.

Later, during floor debate, the Speaker was equally explicit in his disregard for the Supreme Court's interpretation of Section 33. The statements that appear below follow statements on January 12, 2012 by Plaintiff Fischer and by Rep. Ford (R-Rockcastle) in which both read from *Fischer II,* and urged Speaker Stumbo not to pass a facially unconstitutional bill.

> 81:13 – "I would submit to you that the word possible means what you can get passed and what you can get done in light of all the circumstances."
>
> 81:38 – "My interpretation of that is possible means what you can pass in light of the spirit of the document. What you can pass that makes sense in the modern world. What you can pass through this body and the Senate and get signed into law."
> http://www.ket.org/cgi-bin/cheetah/watch_video.pl?nola=WGAOS+013028&altdir=&template

The Speaker's statement was recorded and can be found on KET website linked on the LRC website, and the Court may take judicial notice of it.

There is no other way to say it: in the Speaker's world, politics trumps the Constitution. Despite the clarity of the Supreme Court in a series of cases between 1994 and 1997 --cases that are binding precedent -- the Speaker insists that "fewest number possible" of divided counties simply means the fewest number that a majority decide suits their political purposes. And despite an unmistakable bright line test of constitutional muster of a "maximum constitutional population variation of plus-or-minus 5%", the Speaker insists that districts with population variations of 5.38% and 5.52% are constitutional because these numbers are "only slightly" over 5%, again for political purposes.

HB 1 VIOLATES SECTION 33 OF THE KENTUCKY CONSTITUTION BECAUSE THE DISTRICTS ARE NOT CONTIGUOUS WITHIN THE MEANING OF SECTION 33.

Section 33 of the Kentucky Constitution expressly requires that "the counties which form a district shall be contiguous". The Supreme Court has noted that "we regard this requirement as immutable." *Fischer II*, 879 S.W. 2d at 476, n.4.

The Court need only look at the map of HB 1 to know that House District 80 is not comprised of counties that are "contiguous" within the meaning of the word for purposes of Section 33. Casey County is connected by a narrow strip of Pulaski County that is no more than one mile wide at the Pulaski/Rockcastle border.(Affidavit of Mark Vaught, Exhibit 7). It is apparently impossible to drive from Casey County to Rockcastle County without leaving House District 80, for there is no significant road through the Pulaski Strip from Casey County to Rockcastle County. (See Exhibit 7 at Paragraph 9). Only 1,802 people live in the Pulaski County portion of District 80, or 2.85% of the District's population. Yet the District is overpopulated by

5%. At the far northern end of the district, part of Madison County stretches to the suburbs of Lexington. This is not a district that is in any meaningful sense composed of contiguous counties.

In the annexation context, the Supreme Court has held that Courts look on similar efforts to connect annexed territory with a city as suberfuges or shams. See *Griffin v. City of Robards,* 990 S.W. 2d 634. (Ky. 1999). Why would the Supreme Court have a more stringent standard for deciding whether a small city can annex a nearby strip mall or subdivision than it would for deciding whether the most fundamental aspect of social, economic and political life in Kentucky -- the county -- has been respected, and the individual right of equal sufferage and effective representation has been upheld?

Plaintiffs submit that the inclusion of a narrow swath of Pulaski County in House District 80 does great violence to the mandate of Section 33 and explained in *Fischer II.* It disregards natural and historic boundaries. It combines two counties that are by no means contiguous, Casey and Rockcastle, with part of another even further removed, Madison, and does so with the sort of approach the Supreme Court has called a subterfuge in other contexts and that the Plaintiffs call the Pulaski Strip. That strip runs through the territory it covers without regard to political lines, dividing towns, precincts, school districts and any other civic unit in its path. It does so without regard to the county integrity or the rights of the citizens it covers. Its only purpose is to allow a map that has at least a fingertip of Pulaski County touching both Casey County and Rockcastle County.

This is not contiguity within any meaning understood by the drafters of the Kentucky Constitution, or within the meaning of the Kentucky Supreme Court. Instead, this is total disregard for the "immutable" character of districts formed from contiguous counties that insure

the sort of representation the framers intended, while precluding the kind of political shenanigans HB 1 displays. The Supreme Court had no occasion to consider the "contiguous" element of Section 33 in *Fischer II*, but there can be little doubt that districts as bizarrely shaped as District 80 and District 89 represent the sort of subterfuge Section 33 was intended to preclude.

HB 1 VIOLATES THE "ONE PERSON, ONE VOTE" REQUIREMENT OF THE EQUAL PROTECTION CLAUSE BECAUSE THE POPULATION DEVIATIONS ARE NOT SUPPORTED BY A RATIONAL STATE POLICY.

Defendants contend that because the apportionment plan for the Kentucky House has a total population variation of 10.00%, it is presumed to be valid as a matter of law, and Plaintiffs' Equal Protection Claim must therefore be dismissed. That argument, however, ignores the Supreme Court's rulings on the basic principle of representative democracy, that of one person, one vote, while misrepresenting the controlling standard.

Under Supreme Court precedent, states are required to "make an honest and good faith effort to construct districts ... as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). *Every* deviation from population equality must advance a rational state interest. While the Supreme Court recognized in *Brown v. Thomson*, 462 U.S. 835 (1983), 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 reaffirm that "the ultimate inquiry...is whether the legislature's plan 'may reasonably be said to advance [a] rational state policy." 462 U.S. 835, 843 (1983) (emphasis added) (citations omitted). *Brown*, therefore, still requires states to prove that population deviations are rational and justified.

Defendants' reading of *Brown* as establishing a threshold of 10% before a claim can even be made obliterates the goal of strict population equality --0% variation -- enunciated in *Reynolds*. Indeed, the United States Supreme Court has made this plain in *Cox v. Larios*, 124 S.

Ct. 2806, 2807-08 (1984), a decision that both Defendants and Speaker Stumbo manage to ignore in their initial filings in opposition to injunctive relief. In *Cox*, an 8-1 majority of the Court affirmed the decision of a three-judge panel holding that Georgia's 2002 redistricting of that state's legislature violated the Equal Protection Clause of the 14th Amendment, even though the total deviation was less than 10%. Justice Stevens, concurring, stated that "the District Court correctly held that the drafters' desire to give an electoral advantage to certain regions of the State and to certain incumbents (but not incumbents as such) did not justify the conceded deviations from the principle of one person, one vote." *Cox*, 124 S. Ct. at 2807. (Stevens concurring.)

Of course, in this case, HB 1 would not even come within any such "safe harbor" had the Court adopted it, because HB 1's population deviation is not "less than 10%". According to the Verified Complaint, the deviation is actually 10.0013287, or more than 10%. But even the Defendants and Speaker Stumbo concede that HB 1 has a population deviation of 10.00%, a number that simply does not meet even *Brown's* "less than 10%" characterization as "minimal". As well the Defendants have conceded that a deviation of less than 10% is needed for a redistricting plan to enjoy any presumption of validity under the Equal Protection Clause. (Initial Response to Plaintiffs' Motion and Memorandum in Support For Temporary Injunction, at 15) ("Subsequent cases have established that "as a general matter," *deviation of less than ten percent* is acceptable. *Brown v. Thomson*, 462 U.S. 835, 842 (1983) "(emphasis added)").

A number of United States District Courts, as well as the Fourth Circuit, have specifically rejected the argument made by Defendants, See *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996); *Hulme v. Madison County*, 188 F.Supp. 2d 1041, 1047 (S.D. Ill. 2001); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F.Supp. 1022, 1031-32 (D. Md.

1994); see also, *Licht v. Quattrochi*, 449 A.2d 887 (R.I. 1982) (5% overall deviation invalidated); *Licht v. Quattrochi*, CA No. 82-1494 (R.I. Super.Ct., 1982) (1% deviation appeared to be the limit to the Court); *Farnum v. Burns*, 561 F.Supp. 83 (D.R.I., 1983) (5.6% deviation invalidated); *White v. Crowell*, 434 F.Supp. 1119 (W.D. Tenn., 1977) (political considerations insufficient to justify deviation over 5%.)

In *Daly*, the Fourth Circuit addressed the burden of proof issue outlined in *Brown* and explained:

> The 10% *de minimis* threshold recognized in *Brown* does not completely insulate a state's districting plan from attack of any type. Instead, the level serves as the determining point for allocating the burden of proof in a one person, one vote case...If the maximum *deviation is less than 10%,* the population disparity if considered *de minimis* and the plaintiff cannot rely on it alone to prove invidious discrimination or arbitrariness...In other words, for *deviations below 10%,* the state is entitled to a presumption that the apportionment plan was the result of an "honest and good faith effort to construct districts... as nearly of equal population as practicable." *Reynolds v. Sims*, 377 U.S. at 577. However, this is a rebuttable presumption.

Daly, 93 F.3d at 1220 (emphasis added).

With their concession that the population deviation of HB 1 is not less than 10%, Defendants and Speaker Stumbo have also conceded that the burden of proof is on them to prove that the House plan was not tainted by arbitrariness or discrimination, but was justified by a rational state policy. To suggest, as Defendants do, that plaintiffs have failed to provide competent evidence that the House redistricting plan was created pursuant to any improper motive, (Defendants' Initial Response at 15), is simply whistling past the graveyard. Defendants' own memorandum demonstrates that only plans with deviations less than 10% enjoy any presumption of validity, and HB 1 is not such a plan. More important, Defendants Initial

Response, like Speaker Stumbo's, acts as if *Cox* – and its holding that redistricting plans with deviations of less than 10% are nonetheless unconstitutional if the deviations are not based on a rational state policy but are instead designed to punish the incumbents of one party, or to prefer the voters and candidates of one party on the basis of where they live within a state – was never decided.

Regardless, *Cox* makes plain that a plan that is justified by political desires to protect incumbents of one party while targeting those of the minority, or by efforts to overpopulate districts of the minority while underpopulating districts of the majority, is unconstitutional. In *Cox*, the district court specifically found that a plan no different in substance from HB 1 violated the Equal Protection Clause of the 14th Amendment. The district court stated:

> An examination of the entire record also leads us to find that the other major cause of the deviations in both plans was an intentional effort to allow incumbent Democrats to maintain or increase their delegation, primarily by systematically underpopulating the districts held by incumbent Democrats, by overpopulating those of Republicans, and by deliberately pairing numerous Republican incumbents against one another.

Larios v. Cox , 330 F. Supp. 2d 1320, 1329 (N.D. Ga. 2004), *aff'd, Cox v. Larios*, 124 S.Ct. 2806 (2004).

In his concurring opinion, joined by Justice Breyer, Justice Stevens explained the Supreme Court's rationale in affirming the district court's decision that Georgia's plan, with its population deviation of 9.98% (less than the 10.00% of HB 1) nevertheless violated the one person, one vote principles of the Equal Protection Clause. Because the plan found unconstitutional on Equal Protection grounds under the federal constitution was so similar to the plan adopted with HB 1, the following extended excerpt from the concurring opinion in *Cox* is helpful:

> The drafters' efforts at selective incumbent protection "led to a significant overall partisan advantage for Democrats in the electoral maps," with "Republican-leaning districts ... vastly more overpopulated as a whole than Democratic-leaning districts," and with many of the large positive population deviations in districts that paired

> Republican incumbents against each other. *Id.,* at 1331. ***The District Court found that the population deviations did not result from any attempt to create districts that were compact or contiguous, or to keep counties whole, or to preserve the cores of prior districts.*** *Id.,* at 1331–1334. Rather, the court concluded, "the population deviations were designed to allow Democrats to maintain or increase their representation in the House and Senate through the underpopulation of districts in Democratic-leaning rural and inner-city areas of the state and through the protection of Democratic incumbents and the impairment of the Republican incumbents' reelection prospects." *Id.,* at 1334. ***The District Court correctly held that the drafters' desire to give an electoral advantage to certain regions of the State and to certain incumbents (but not incumbents as such) did not justify the conceded deviations from the principle of one person, one vote.*** See *Reynolds v. Sims,* 377 U.S. 533, 565–566, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (regionalism is an impermissible basis for population deviations); *Gaffney v. Cummings,* 412 U.S. 735, 754, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) ("[M]ultimember districts may be vulnerabl[e] if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized"). See also *Reynolds,* 377 U.S., at 579, 84 S.Ct. 1362 (explaining that the "overriding objective" of districting "must be substantial equality of population among the various districts" and that deviations from the equal-population principle are permissible only if "incident to the effectuation of a rational state policy"). ***In challenging the District Court's judgment, appellant invites us to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than 10 percent, within which districting decisions could be made for any reason whatsoever. The Court properly rejects that invitation.*** After our recent decision in *Vieth v. Jubelirer,* 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004), the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength.

Cox, 124 S.Ct. at 2807-08 (Stevens, concurring)(emphasis added).

Justice Stevens also quoted the district court on the evidentiary value of the lack of compactness and contiguity, and the inference of improper motive that could properly be drawn from oddly shaped districts:

> Although "[t]he numbers largely speak for themselves," ***the District Court found that the shapes of many of the newly created districts supplied further evidence that the plans' drafters "inten[ded] not only to aid Democratic incumbents in getting re-elected but also to oust many of their Republican incumbent counterparts."*** *Id.,* at 1330. The court noted, for example, that a Republican senator had been "drawn into a district with a Democratic incumbent who ultimately won the 2002 general election, while an open district was drawn within two blocks of her residence," that two of the most senior Republican senators had been drawn into the same district, and that a Republican House member "who was generally disliked by several of the Democratic incumbent[s] was paired with another representative in an attempt to unseat him." *Ibid.* ***Moreover, many of the districts that paired***

> ***Republicans were both oddly shaped and overpopulated, "suggesting that the districts were drawn to force Republican incumbents to run against each other and to draw in as many Republican voters as possible in the process."*** *Ibid.*

Id. At 2807(emphasis added).

Nearly all of these irrational, arbitrary or discriminatory factors and motives are evident in HB 1 as well. The proof will show that contiguous House Districts 1 through 6, with heavy Democrat registration, are significantly under populated, with a total under population of negative 21.89%. Conversely, contiguous House districts 52, 80, 83, 85, 86 and 89, with heavy Republican registration, are significantly overpopulated, with a total overpopulation of +29.97%. Urban and suburban districts with a majority Republican registration, such as House districts 60, 63, 64, 68 and 69 are heavily overpopulated. Conversely, urban and suburban districts with a majority Democrat registration, such as 44, 28, 38, 35, 43, and 67, are substantially under populated. At least one Republican incumbent, Rep. Dossett in House District 9, had his district drawn so that the new district line runs between his home and his mailbox, leaving his residence outside his new district. In one district, House District 17, three incumbent Republican legislators were moved to a single district, guaranteeing that two of them will not return to the General Assembly.

Beyond all this, the bizarre shapes of Districts 80 and 89 cannot be justified by any rational state policy, and are the product of impermissible arbitrariness and discrimination. See *Karcher v. Dagget*, 462 U.S. 725, 758 (1983) (Stevens, J., concurring) ("As with the numerical standard, it seems fair to conclude that drastic departures from compactness are a signal that something may be amiss."). The Court has already seen that District 80 offends the traditional notion of compactness and contiguity that has animated Kentucky's Section 33 since the dawn of the progressive era. District 89 joins two counties that have never been connected, and that are

remote in terms of social, economic and political life. Even driving from the county seats of Jackson County and McCreary County –the two principal counties contained in District 89 – can take two or more hours. Justice Stevens explained that the district court in *Cox* correctly inferred from such bizarrely shaped districts the taint of arbitrariness that doomed the Georgia plan, and HB 1 can fare no better on this score.

In support of its holding, the *Daly* Court also cited the Supreme Court's decision in *Gaffney,* where the Supreme Court specifically recognized that "State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment." *Gaffney*, 412 U.S. at 751. Similarly, in *Hulme v. Madison County*, 188 F.Supp. 2d 1041 (S.D. Ill. 2001), the United States District Court for the Southern District of Illinois rejected the assertion that *Brown* established "that an apportionment plan with a maximum population deviation under 10% is immune from Constitutional attack." *Hulme*, 188 F.Supp. at 1047. Citing *Reynolds*, the *Hulme* court ruled that "a plaintiff may prove a prima facie violation of the Fourteenth Amendment by an apportionment plan with a population deviation of less than 10% if he can produce further evidence to show that the apportionment process had a taint of arbitrariness or discrimination." *Hulme*, 188 F.Supp. at 1047 (internal citations and quotations omitted). Plaintiffs have already produced evidence of such taint, evidence of the sort that led the *Larios* court to find a plan similar to HB 1 unconstitutional. The Larios court found:

> 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. "Full and effective participation by all citizens in state government requires ... that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less." *Reynolds,* 377 U.S. at 565, 84 S.Ct. at 1383.

Larios, 330 F. Supp. 2d at 1327(emphasis in original).

The Amended Verified Complaint provides ample evidence of the same taint of arbitrariness and discrimination that caused an eight member majority of the Supreme Court to affirm the district court in *Cox.* It is Plaintiffs' intention to prove that the goal of HB 1, insofar as the House was concerned, was to protect incumbent Democrats and punish incumbent Republicans, to increase Democrat political performance and to dilute the vote of Republican voters. As well, Plaintiffs intend to prove that this goal is neither a constitutional nor rational state policy.

THE HARM TO PLAINTIFFS IS IRREPARABLE AND IMMEDIATE.

There is no doubt that the denial of the constitutional right to equal contiguous districts that respect the integrity of Kentucky's counties is irreparable and substantial. The Kentucky Supreme Court has highlighted the importance of Section 33, and the right that it protects: "In substance and in form, the county unit is at the heart of economic, social and political life in Kentucky". *Fischer II,* 879 S.W. 2d at 478. Consequently, with its holding in that case, the Court declared its intent: "At this juncture, we seek to restore the integrity of our most basic political subdivision and assure that natural and historic boundary lines are observed as intended by the Constitution." Nothing could be more substantial than the deprivation of the right to vote

on equal terms with other citizens, or the denigration of the right to representation due to the construction of a district that connects remote counties that are not contiguous, through the use of the subterfuge of a sliver of territory or an irrational amalgamation of census blocks. And given that the deadline is now set to expire at 4:30 p.m. on February 7, 2012, the injury is surely immediate.

As well, the Amended Verified Complaint provides ample evidence to issue an injunction on the Equal Protection Clause claim. The LRC certified documents received for the first time at 2:00 p.m. on February 3, 2012 provide still more, and the affidavits submitted or to be submitted make the conclusion obvious. And because the population deviation present in HB 1 is not less than 10%, the burden is on the Defendants, or the LRC, to prove that the populations variations are supported by a rational state policy, as required by *Reynolds v. Sims, Brown v. Thompson, Cox v. Larios* and other consistent cases. This is a burden the Defendants and the LRC cannot meet, and the injunction should be issued to prevent the irreparable harm that would result from of Kentucky conducting elections for the Kentucky House of Representatives using districts that are violative of both the Kentucky and the United States Constitution.

There is simply no other evidence that needs to be considered, presented or verified in order for the Court to enter a temporary injunction under CR 65.04. HB 1 is facially invalid under Section 33 of the Kentucky Constitution. HB 1 is in violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution. And because it is undisputed that the population deviation in HB 1 is not less than 10%, the plan enacted with HB 1 is entitled to no presumption of validity. Instead, the burden to prove that it was not the result of arbitrariness or discrimination but was supported by a rational state policy falls squarely on the defenders of the law, whoever they may be. It is Defendants and the Speaker who have failed to

offer the Court any evidence to support their rhetoric, and who face an evidentiary issue due to the complete absence of rebuttal evidence in their opposition. And the records - certified by the LRC - simply prove the Plaintiffs' case. For these reasons, Plaintiff's Motion for Temporary Injunction should be granted without further delay.

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Certificate of Service

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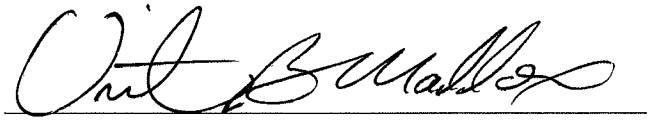

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