Commonwealth of Kentucky
Court of Appeals

CASE NO._____

ON APPEAL FROM
FRANKLIN CIRCUIT COURT, DIV. I
CIVIL ACTION NO. 12-CI-00109

LEGISLATIVE RESEARCH COMMISSION — **MOVANT**

V.

JOSEPH M. FISCHER; JEFF HOOVER; KIM KING; FREY TODD; ANTHONY GAYDOS; DAVID B. STEVENS, M.D.; DAVID O'NEILL; JACK STEPHENSON; MARCUS MCGRAW; KATHY STEIN; ALISON LUNDERGAN GRIMES, IN HER OFFICIAL CAPACITY AS KENTUCKY SECRETARY OF STATE; KENTUCKY STATE BOARD OF ELECTIONS; MARYELLEN ALLEN, IN HER OFFICIAL CAPACITY AS INTERIM ACTING EXECUTIVE DIRECTOR OF KENTUCKY STATE BOARD OF ELECTIONS — **RESPONDENTS**

MOTION FOR INTERLOCUTORY RELIEF PURSUANT TO CR 65.07

The Legislative Research Commission ("LRC"), by counsel, respectfully moves the Court of Appeals pursuant to CR 65.07 to grant it relief by dissolving the Temporary Injunction entered by the Franklin Circuit Court on February 7, 2012, in Civil Action No. 12-CI-00109 (copy attached as Appendix 1).

The Temporary Injunction enjoined state election officials from conducting elections for members of the Kentucky Senate and House of Representatives using the districts in House Bill 1 (2012), and requiring those 2012 elections to proceed under the

districts in the preexisting apportionment act that was enacted in 2002. Movant agrees that the balance of the equities requires the 2012 legislative elections to proceed according to the statutory schedule, but maintains that Senators and Representatives elected in 2012 should be elected from the districts enacted in 2012.

The districts enacted in 2012 comply with the 10% maximum population deviation required by federal one-person, one-vote caselaw interpreting the Equal Protection Clause of the United States Constitution. It is undisputed that, with the passage of time, the districts enacted in 2002 do not satisfy that standard. Indeed, the overall range of the 2002 House districts is 52.46% and the overall range of the Senate districts is 37.71%, compared to the federal Constitutional mandate of 10%; which is achieved by HB 1 (2012).[1]

Accordingly, despite the Circuit Court's decision that this Court's holding in *Fischer II*[2] (that the apportionment plan must split the fewest counties mathematically possible) is binding precedent, the rights of the voters on a statewide basis are better served by conducting the 2012 elections under the plan that complies with federal one-person, one-vote standards.

Indeed, the Circuit Court did not base its preference for the 2002 districts upon the standard set forth in *Fischer II*. Quite the contrary, he predicated the injunction upon the claim that the rights of certain voters residing in Fayette County are abridged by the reassignment of some of the territory of formerly numbered Senate district 13 to a new district numbered as 4. But the Circuit Court did not enter a final and appealable

[1] These statistics are from public LRC documents of which this Court may take judicial notice.

[2] *Fischer v. State Bd. of Elections*, 879 S.W. 2d 475 (Ky. 1994).

declaratory judgment on those voters' claim. Rather, he determined that their claim "raised a substantial issue of law" (p. 9), but said that he "has not found . . . any controlling legal authority that addresses the question" posed by that claim (p. 10), thereby ignoring the square holding in *Anggelis v. Land*, 371 S.W.2d 857 (Ky. 1963) (*see* pp. 9-12, *infra*). Instead, the Circuit Court reasoned that "the public interest demands that the Court grant injunctive relief to maintain the *status quo* pending a full adjudication on the merits." (p. 13.) In the opinion of the Circuit Court, "it is necessary to maintain the *status quo* pending a final adjudication because in the absence of injunctive relief 'the acts of the adverse party will tend to render such final judgment ineffectual.'" (*Id.* at 13) (quoting CR 65.04(1)). The Circuit Court seems unconcerned that the converse is equally true; by mandating that the elections proceed under the 2002 districts, the Intervening Plaintiffs obtained complete relief on the merits despite the fact that the Circuit Court readily concedes that their claim has not yet been adjudicated. That is an unprecedented use of the power of an injunction to resolve a political question.

Moreover, requiring elections to be held under the old malapportioned districts rather than the new districts changes the *status quo*. It is well settled that "a temporary injunction is an extraordinary remedy . . . ." *Commonwealth ex rel. Cowan v. Wilkinson*, 828 S.W.2d 610, 612 (Ky. 1992). "It is apparent that the issuance of such an injunction constitutes a prejudgment of the controversy before the defendant has had his day in court, and doubtful cases should await final judgment. **This is particularly true when mandatory relief is asked**, as in the present case, which **will change the status quo**." *Oscar Ewing, Inc., v. Melton*, 309 S.W.2d 760, 762 (Ky. 1958) (emphasis added) (internal citation omitted).

The Temporary Injunction issued in this case does not "merely . . . maintain the status quo." *Maupin v. Stansbury*, 575 S.W.2d 695, 698 (Ky. App. 1978). "Actually it would appear that the temporary injunction would change the status quo . . . ." *Cowan*, 828 S.W.2d at 613. Plainly, the *status quo* for the 2012 elections consists of the districts enacted by the 2012 General Assembly for those elections. Enjoining the use of those districts *pendente lite*, and mandating that the election officials instead use the 2002 districts, does not preserve the *status quo*, it changes it.

In order to preserve the *status quo*, this Court decided in *Fischer II* that the 1994 elections should proceed under the apportionment plan it declared unconstitutional. 879 S.W.2d at 480-81. That is consistent with the standard practice of federal courts, which routinely stay pending appeal a declaratory judgment invalidating an apportionment plan. *See, e.g., McDaniel v. Sanchez*, 452 U.S. 130, 136 (1981); *Whitcomb v. Chavis*, 403 U.S. 124, 140 (1971); *Davis v. Mann*, 377 U.S. 678, 684 (1964); *Roman v. Sincock*, 377 U.S. 694, 703 (1964).

The changes in the odd-numbered and even-numbered Senate districts are presumed to be constitutional, and the Circuit Court has not adjudged otherwise. LRC respectfully suggests that the Temporary Injunction changes the *status quo* and effectuates a profound imbalance of the equities while ignoring controlling precedent. That constitutes an abuse of discretion. The Temporary Injunction should be dissolved so that legislative elections in 2012 may proceed under the boundaries enacted by the General Assembly in 2012.

I. Relevant facts and procedural history.

The Kentucky General Assembly acted promptly to redistrict the Commonwealth's legislative and judicial districts by enacting 2012 Regular Session House Bill 1, which was signed by the Governor and became law on January 20, 2012. House Bill 1 contained an emergency clause pursuant to Kentucky Constitution Section 55, thus it became law upon the Governor's signature. The filing deadline of January 31, 2012, at 4:00 p.m., established by KRS 118.165, was not altered by the General Assembly in House Bill 1, nor was any other statutory election deadline.

Candidates for these upcoming elections, which include elections for all 100 members of the House and the 19 members of the Senate in the odd-numbered districts, could now determine their eligibility for election in these new districts upon the effective date of the law and file with the Secretary of State to run for offices in these new districts.

Under the new law, Kentucky began the elections process, which starts with the filing deadline, and continues with the certification of candidates, drawing for ballot position, transmission to the county clerks, preparation and printing of ballots, testing of machines, and training of elections officers. The election process and its set of mandatory statutory deadlines is established to ensure proper and timely elections, and to minimize confusion for the candidates and the voting public. Upon the enactment of House Bill 1 into law, this process was fully underway.

On January 26, 2012, two business days prior to the filing deadline, the Plaintiffs (Respondents), Joseph M. Fischer, Jeff Hoover, Kim King, Frey Todd and Anthony Gaydos filed a Verified Complaint and Motion for Temporary Injunction, and noticed it to be heard on Monday, January 30, 2012, at 10:30 a.m. The Plaintiffs sought a

Temporary Injunction to bring the elections process to a complete halt, on the basis of their challenge of the constitutionality of the House districts in House Bill 1. They asked to enjoin the Secretary of State and the State Board of Elections from certifying any candidates' names as nominees, from certifying the names of candidates to county clerks, from certifying the order of the ballot, "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", and from enforcing the statutory filing deadline. The Respondents David B. Stevens, M.D., David O'Neill, Jack Stephenson, Marcus McGraw, and Kathy Stein, intervened as Plaintiffs to contest the Senate districts in House Bill 1.

On January 31, 2012, at 2 p.m., the Franklin Circuit Court entered a nonappealable Restraining Order enjoining enforcement of the filing deadline until February 7, 2012 at 4:30 p.m. The Court found that the Plaintiffs and Intervening Plaintiffs made a sufficient showing of a violation of their rights, and that the equities favored enjoining the filing deadline in order to preserve the *status quo* and give Plaintiffs and Intervening Plaintiffs a chance to demonstrate their case. The Court then set an additional hearing date for February 6, 2012 to hear the Motion for Temporary Injunction. The Court also permitted the Legislative Research Commission to intervene under KRS 5.005, and accepted its limited appearance, which asserted legislative immunity and privilege.

On February 7, 2012, Franklin Circuit Court issued a Temporary Injunction enjoining election officials from conducting elections for the Kentucky Senate and House of Representatives pursuant to the districts in House Bill 1 and required the 2012 elections to proceed under the districts in the preexisting apportionment plan that had

been enacted in 2002. The Franklin Circuit Court held that the apportionment of both the House and Senate violated § 33 KY. CONST. as construed by this Court in *Fischer II* because it contained districts whose population exceeded the ideal district population by more than 5% and divided more than the fewest number of counties that could possibly be divided while staying within the plus or minus 5% standard of *Fischer II*. The Court also held that the Intervening Plaintiffs had raised a substantial issue by their challenge to the portion of House Bill 1 that moved the Senate district numbered 4 to the territory in which they reside, which had previously been within the Senate district numbered 13. But the Court stated that it needed more evidence to decide whether that change unconstitutionally deprived those voters of the right to vote for a Senator for two more years than if their residence had remained within an odd-numbered district.

The Circuit Court recited that there was no just reason to delay an appeal from its declaratory judgment invalidating House Bill 1 as being in contravention of § 33 KY. CONST. as construed by this Court in *Fischer II*.

The Commission filed a Notice of Appeal from the Circuit Court's February 7, 2012 judgment on February 10, 2012.

II. Grounds on which LRC's claim for relief is based.

The Franklin Circuit Court enjoined the Secretary of State and Board of Elections from conducting legislative elections under the 2012 apportionment plan and required the 2012 legislative elections to occur under the prior (2002) apportionment plan which it replaced. In contrast – in its most recent decision on point – this Court postponed the effectiveness of its decision declaring the 1991 apportionment plan unconstitutional, and allowed the 1994 elections to go forward under the new apportionment plan, even though

it had been declared unconstitutional. *Fischer v. State Bd. of Elections*, 879 S.W.2d 475, 480 (Ky. 1994) (*Fischer II*).[3]

Kentucky undertakes legislative redistricting every 10 years. Exercising its constitutional duty, the General Assembly promptly passed 2012 Regular Session House Bill 1 on January 20, 2012. The statute redistricted the State Senate and State House boundaries, as well as the boundaries for the State Judicial Offices. Plaintiffs challenged the constitutionality of the legislative redistricting plan under both the federal and state Constitutions.

While expressly questioning *Fischer II* for its "unintended consequences" of diluting compliance with the federal one-person, one vote standard (Opinion at 2-3) the Franklin Circuit Court held that it is bound by *Fischer II* and that, under *Fischer II*, the 2012 reapportionment plan for both the Senate and House of Representatives contravenes § 33 KY. CONST. because: (1) each includes a district that exceeds the so-called ideal population of a district by more than 5%; and (2) each divides more than the minimum number of counties that could be divided while also achieving the "plus or minus 5%" standard expressed in *Fischer II*. The Franklin Circuit Court entered a final judgment declaring House Bill 1 unconstitutional for those violations of the 5% rule and made that judgment appealable under CR 54.02.

The Court also said that the number of voters who are moved from odd-numbered to even-numbered Senate districts – specifically the number of voters residing in the territory formerly encompassed by a Senate district numbered 13 and now encompassed

[3] *But see Stiglitz v. Schardien*, 239 Ky. 799, 40 S.W.2d 315, 320 (1931) (permitting elections to occur under the preexisting reapportionment act); *Ragland v. Anderson*, 125 Ky. 141, 100 S.W. 865, 870 (1907) (same) (decided prior to the federal "one person, one vote" jurisprudence).

by a Senate district numbered 4 – raised a "substantial issue of law" concerning the deprivation of those voters' rights, but expressly held that there is not "any controlling legal authority on this issue." Accordingly, the Circuit Court held that more evidence was required before the Court could reach a final decision on that claim.

However, it was the issue related to the odd-numbered Senate districts, not the "plus or minus 5%," that forms the basis for the Circuit Court's injunction requiring the legislative elections to be conducted under the 2002 districts rather than the 2012 districts. The Circuit Court expressly conceded that the 2002 districts are substantially out of compliance with one-person, one-vote:

> The last redistricting completed by the General Assembly was enacted into law in 2002 (*see* 2002 Ky. Acts, c. 1). Accordingly, we are in the 10th year of that plan, and a new census was completed last year, showing that the districts are substantially out of balance.
>
> In balancing the equities, the Court is mindful that the current districts are out of balance and must be redrawn to comply with the "one person, one vote" mandate of federal and state law. But the question for the Court is one of timing.

(Opinion at 10-11, 13.)

The Circuit Court then discussed the number of voters being moved from odd-numbered to even-numbered Senate districts (and vice versa) as the focal point of his remedial analysis. (Opinion at 13-14.) Indeed, the Circuit Court focused particularly upon Senate district 13 in Fayette County. (*Id.* at 14.) Focusing exclusively on this issue, the Circuit Court concluded:

> The Court therefore concludes that the redistricting cure of House Bill 1 is worse than the malapportionment disease that it is legally required to remedy, at least for the next two years.

(*Id.* at 13.)

But House Bill 1 complies with the federal maximum population deviation of 10% (which is not synonymous with the "plus or minus 5%" standard of *Fischer II*).[4] And, as the Circuit Court conceded, the 2002 districts do not. Thus, the Circuit Court's injunction reflects his policy preference that incumbents in odd-numbered districts be allowed to run for reelection from their old districts (and procure a new four-year term before this Court can effectively decide this appeal) over the policy of equality of representation statewide.

Moreover, the Circuit Court gave an unduly narrow reading of *Anggelis v. Land*, which is, indeed, the controlling precedent. 371 S.W.2d 857 (Ky. 1963). In that case, the 13th Senate district, which had encompassed all of Fayette County, was divided by reducing the 13th to encompass the territory inside the Lexington city limits, and moving the 12th district from Meade, Hardin and Larue Counties to encompass Fayette County outside the city limits.[5] The Senator elected from the former 12th district had two more years to serve on his term, but obviously was not a resident of Fayette County. The

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[4] Federal constitutional law apportions Congress according to the Apportionment Clause of the U.S. Constitution, but has a more relaxed standard under the Equal Protection Clause for state legislatures. Since the equal protection inquiry is the relative voting strength between districts, federal law creates a safe harbor if the maximum population deviation between the least populous county and the most populous county is 10% or less. *Brown v. Thomson*, 462 U.S. 835 (1983). The standard textbook recognizes the 10% maximum population deviation is a safe harbor. *See* DANIEL HAYES LOWENSTEIN, RICHARD L. HASEN & DANIEL P. TOKAJI, ELECTION LAW: CASES AND MATERIALS, p. 73 (4th ed. 2008) ("small deviations (up to 10%) at the state level require no justification at all."). It is therefore important to understand that the "maximum population deviation" is **not** the "plus or minus 5%" invented in *Fischer II*. Stating a statistic as plus or minus relative to the so-called "ideal population of a district" is a "relative deviation." REDISTRICTING LAW 2010 (NATIONAL CONFERENCE OF STATE LEGISLATURES) (November 2009), p. 23. The federal 10% rule is not a "relative deviation" but is the "overall range." "The 'overall range' is the difference in population between the largest and smallest districts, expressed either as a percentage or as the number of people. . . . Although the courts normally measure a plan using the statistician's 'overall range,' they almost always call it something else, such as 'maximum deviation.'" *Id.*, pp. 23-24, n. 71 (collecting cases). Accordingly, unlike *Fischer II*, federal one-person, one-vote standards permit a relative deviation more than plus 5% for the most populous district if the relative deviation from the ideal of the least populous district leaves the overall range between the least populous and most populous at 10% or less.

[5] *See* Intervening Defendant LRC's Trial Exhibit 3.

plaintiff contended that the incumbent Senator's lack of residence in Fayette County created a vacancy to be filled by a special election. This Court recognized that the 12th district would be represented for the next two years by a non-resident:

> Admittedly the redistricting has caused an unusual situation in which the Senator representing the Twelfth District neither lives within the boundaries of that District as presently constituted nor was he elected by the people who live within them.

371 S.W.2d at 859. But this Court said the non-residence of the incumbent Senator did not divest him of his office, nor create a vacancy in the 12th district:

> The Act does not abolish the office, nor shorten the term of the Senator presently representing the Twelfth District and it is doubtful whether the Legislature could validly have done so. . . . Contrary to appellant's contention, it is our opinion that the Act did not create a new Twelfth Senatorial District but merely changed the geographic boundaries of that District. Therefore, there is no vacancy in the office of Senator from the Twelfth District.

Id. at 858-59 (citing *Payne v. Davis*, 254 S.W.2d 710 (Ky. 1953).

In *Anggelis*, as in this case, the incumbent senator had two more years to serve on his term. Thus, the voters in the new 12th district would not be voting for a senator for six years – precisely the contention advanced by Intervening Plaintiffs (and accepted by the Franklin Circuit Court) in this case, namely, that if the non-resident represented Fayette County for another two years, "the people of the [12th] District will not be represented in the 1964 Senate." 371 S.W.2d at 858. This Court rejected that argument.

This Court recognized that every reapportionment in Kentucky is impacted by the fact that our Senate has staggered four-year terms. Consequently, in every redistricting in which new boundaries are drawn to adhere to one-person, one-vote, there will be voters who formerly resided in odd-numbered districts who are moved to even-numbered

districts and vice versa.[6] That fact, standing alone, does not deprive those voters of any right:

> Although a Senator is required by Section 32 of the Kentucky Constitution to be a resident of the district from which he is elected, once he is elected he represents generally all the people of the state and specifically all the people of his district as it exists during his tenure in office. Certainly no one would suggest that a Senator represents only those persons who voted for him. **The fact that the persons who are represented by the Senator from the Twelfth District are no longer the ones who elected him indicates there is a hiatus following a redistricting** of the state. . . .
>
> Section 33 of the Kentucky Constitution provides *inter alia* that the Legislature shall redistrict the state every ten years. **The framers of the Constitution must have realized that for two years after each redistricting there would be some persons in the state who would not be represented in the Senate by a Senator of their own choosing.** Apparently the men who framed our Constitution thought that this circumstance was offset by the desirability of maintaining a Senate, in which at least one-half of the members are always experienced men.

371 S.W.2d at 859 (emphasis added); accord, *Republic Party of Oregon v. Keisling*, 959 F.2d 144 (9th Cir. 1992).

Anggelis is, in fact, directly on point. In repeatedly stating that "[t]here is no controlling case law on this issue" (Opinion at 9), the Circuit Court simply misstated the facts in *Anggelis*. The Circuit Court seemed to think that it was the voters in the new 12th district that voted in the 1963 election and that it was the voters in the 13th district who waited two years to vote. The Franklin Circuit Court said:

> It appears that the Senator elected by the voters in all of Fayette County for the 13th District continued to serve until the next election for an odd numbered district, and the voters who were re-assigned to an even numbered district were able to elect a new senator at the first election after the 1963 redistricting. Thus no citizen was assigned to be represented by a senator who had never been elected by the voters of that geographic area, nor was the right of any citizen to vote for a senator delayed.

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[6] For example, in *Anggelis*, parts of Hardin and Meade counties that had been in the 12th district were moved to the new 5th district. *See* Intervening Defendant's Trial Ex. 3.

(Opinion at 9.) But, of course, the true facts are precisely contrary to the Circuit Court's rendition. The voters who were reassigned to the even-numbered 12th district were not able to elect a new senator at the first election after the 1963 redistricting. They were assigned to be represented by a senator who had never been elected by the voters of that geographic area, and who would serve 2 more years. This Court squarely held that result did not implicate the constitutional rights of those voters. The Circuit Court has simply ignored the holding in *Anggelis* by misreading its facts.

It is well settled that a misapplication of the controlling law is inherently an abuse of discretion. *City of Louisville v. Allen*, 385 S.W.2d 179, 184 (Ky. 1964) ("An abuse of discretion may be said to be an error of law"); *Buddenberg v. Buddenberg*, 304 S.W.3d 717, 722 (Ky. App. 2010) ("A trial court abuses its discretion when its decision rests on an error of law . . . ."). These principles apply with equal force to appellate review of a temporary injunction. *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 162 (Ky. 2009) ("The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."); *see also Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772, 790 (5th Cir. 1999) ("A district court abuses its discretion if it . . . relies on erroneous conclusions of law . . . ."). The Circuit Court's decision to ignore this Court's true holding in *Anggelis* is an abuse of discretion.

Moreover, the Circuit Court's decision plainly violates Kentucky's "strictly construed" doctrine of separation of powers.[7] While adherence to one person, one vote

[7] *LRC v. Brown*, 664 S.W.2d 907, 912 (Ky. 1984) (quoting *Arnett v. Meredith*, 121 S.W.2d 36, 38 (Ky. 1938).

presents a justiciable controversy, the actual drawing of the lines in an apportionment plan is a quintessential political question.[8] Indeed, this Court expressly held in *Jensen* that an apportionment map drawn by the judiciary would be unconstitutional, "for the issuance of such an injunction would clearly violate the requirement of separation of powers. Ky. Const., Sections 27, 28, 29. Section 33 assigns to the legislature the duty to reapportion itself." 959 S.W.2d at 773.

Thus, when the Franklin Circuit Court said "the Court can see no countervailing rational basis or valid reason to re-assign the former SD 13 to an even numbered district," (Opinion at 14), it was deciding a political question that is not for the courts to decide. "Apportionment is primarily a political and legislative process. Our only role in the process is to ascertain whether a particular redistricting plan passes constitutional muster, not whether a better plan could be crafted." 959 S.W.2d at 776 (citation omitted).

In sum, by valuing the rights of the voters in the odd-numbered 13th district higher than the principle of population equality state-wide, the Circuit Court's "balancing of the equities" is an abuse of discretion. By ignoring the binding precedent of *Anggelis*, changing the *status quo* and deciding a political question, the decision is an abuse of discretion. The Temporary Injunction should therefore be dissolved.

CONCLUSION

For the foregoing reasons, the Temporary Injunction issued by the Franklin Circuit Court should be dissolved, and the 2012 legislative elections should proceed pursuant to the districts set forth in House Bill 1 enacted in 2012.

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[8] Kentucky adheres to the political question doctrine of nonjusticiability. *Commonwealth ex rel. Stumbo v. Fletcher*, 163 S.W.3d 852, 860 (Ky. 2005).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true copy of the foregoing by electronic mail (copy to follow by U.S. Mail) this 11th day of February, 2012, upon the following:

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APPENDIX 1

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 12-CI-109

JOSEPH M. FISCHER, et al. — PLAINTIFFS
and
DAVID B. STEVENS, M.D., et al. — INTERVENING PLAINTIFFS

V.

TEMPORARY INJUNCTION
UNDER CR 65.04 AND PARTIAL DECLARATION OF RIGHTS

ALISON LUNDERGAN GRIMES,
in her official capacity as
Secretary of State for the Commonwealth
of Kentucky, et seq. and
LEGISLATIVE RESEARCH COMMISSION — DEFENDANTS
INTERVENING DEFENDANT

This action is before the Court on the motions of the Plaintiffs and Intervening Plaintiffs for a Temporary Injunction under CR 65.04. The Plaintiffs filed this action to challenge the constitutionality of the House re-districting plan adopted by the Kentucky General Assembly in House Bill 1, which was signed into law by the Governor on January 20, 2011. The Court held a hearing on January 30, 2012 at which all original parties were represented by counsel. The Court granted the motion of David Stevens, Jack Stephenson, Marcus McGraw and Senator Kathy Stein to intervene under CR 24.01. The Intervening Defendants raise a similar challenge the provisions of House Bill 1 for re-districting of the Kentucky Senate.

The Court then granted a restraining order under CR 65.03 to preserve the *status quo* pending its decision on the motion for temporary injunction. The Court's restraining order prohibits the Secretary of State for implementing the filing deadline for legislative offices Tuesday, February 7, 2012. After the Court granted the Intervening Plaintiffs the right to participate, the Legislative Research Commission filed a motion to intervene pursuant to KRS

5.005, which the Court also granted. The Court further set this action for an evidentiary hearing and further argument on Monday, February 6, 2012.

The Court heard evidence and argument at the hearing on February 6, 2012, and being sufficiently advised, IT IS ORDERED the motions of the plaintiffs and intervening plaintiffs for a temporary injunction under CR 65.04 is GRANTED for the reasons set forth below.

DISCUSSION

This action presents a challenge to the new districts that the General Assembly adopted for House and Senate districts in House Bill 1 of the 2012 General Assembly. The Kentucky Supreme Court has established an authoritative interpretation of the requirements of Section 33 of the Kentucky Constitution for redistricting of legislative districts in Fischer v. State Board of Elections, 879 S.W.2d 475 (Ky. 1994)[1]. The Fischer case was subsequently revisited in Jensen v. State Board of Elections, 959 S.W.2d 771 (Ky. 1997), which dealt with the application of Section 33 to the multiple divisions of a single county. Jensen recognized that any plan that maintains county integrity and population equality, as interpreted by the Supreme Court, is bound to result in multiple divisions of some counties. Nevertheless, the central ruling of Fischer II has remained in force, and must be applied by this Court. As the Court held in Jensen, the constitutional mandate of Section 33 requires a redistricting plan "to make full use of the maximum constitutional population variation as set forth herein [plus or minus 5%] and divide the fewest possible number of counties." 959 S.W.2d at 776.

The uncontested evidence before this Court demonstrates that the House and Senate Districts adopted in House Bill 1 fail on both counts. At least one House District and one Senate District exceed the "maximum constitutional population variation" set forth in Fischer II. Both

[1] This case or Fischer II, was preceded by Fischer v. State Board of Elections, 847 S.W.2d 718 (Ky. 1992), which dealt with venue questions (Fischer I). *See also* State Board of Elections v. Fischer, 910 S.W.2d 245 (Ky. 1996) dealing with application of the redistricting rulings to special elections during this time frame (Fischer III).

the House and the Senate plans adopted in House Bill 1 divide more counties than "the fewest possible number of counties." Accordingly, this Court is required to apply this binding precedent and hold that the legislative redistricting provisions of House Bill 1 violate Section 33 of the Kentucky Constitution, as construed by the Kentucky Supreme Court.

The Legislative Research Commission has advanced strong arguments that Section 33 of the Kentucky Constitution should be construed in a more flexible manner, to give the legislature greater discretion in the difficult task of balancing the competing, and sometimes inconsistent, constitutional values of population equality and county integrity. Whatever merit those arguments may have, they must be addressed to the Kentucky Supreme Court. This Court remains bound by that Court's decision in Fischer II.

It is apparent that the Supreme Court's ruling in Fischer II has had unintended consequences. In Fischer II, the Supreme Court stated that "We recognize that the division of some counties is probable and have interpreted Section 33 to permit such division to achieve population requirements. However, we can scarcely conceive of a circumstance in which a county or part thereof which lacks sufficient population to constitute a district would be subjected to multiple divisions." *Id.*, 879 S.W.2d 479, fn 5. A short time later, after the legislature struggled to draw a plan that complied with Fischer II, the Court in Jensen was forced to observe that "In fact, what we thought was scarcely conceiveable has been proven to be unavoidable." 959 S.W.2d at 776.

This demonstrates the real tension between the competing values of county integrity and population equality that continues today. It is a concern of this Court that the Fischer II mandate *requires* the legislature to "make maximum use" of the 10% population variance it approved in that case. As a result, each new redistricting plan post-Fischer II must begin the decennial

period with a 10% deviation in the population of districts, and this variation is virtually certain to increase with each passing year as a result of normal demographic trends and the movement of people from rural to urban areas. Accordingly, Fischer II seems to guarantee districts that over time will violate the 10% variation standard even more quickly, because it *starts* with a 10% variation.

Likewise, Fischer II is based on the Supreme Court's belief that county integrity and population equality can always be reconciled, but it is apparent from the proceedings in this case that the constitutional value of population equality is significantly impaired by the requirement to preserve county integrity. The Supreme Court's view of the importance of county integrity in Fischer II appears rooted in the history of the county unit, and fails to recognize that at the time of the adoption of the 1891 constitution, the county was the central unit of government for basic government services such as roads, education, mental health, and social welfare. *See e.g.,* Ireland, *The County in Kentucky History* (University Press of Kentucky, 1976), *Little Kingdoms* (University Press of Kentucky, 1977). In today's world of government, all of those functions now reside primarily with state government, rather than county government. All of these considerations militate in favor of giving greater weight to population equality than county integrity when those values clash, as they inevitably do[2]. Those considerations, however, must be addressed to the Kentucky Supreme Court, not to a trial court that is required to apply the binding precedent of Fischer II.

The duty of this Court is to apply the binding precedents that control the application of Section 33. Under the controlling precedents, the provisions of House Bill 1 simply fail to pass constitutional muster.

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[2] It appears that the text of Section 33 itself requires that greater weight be given to population equality, in that it qualifies the provision on maintaining county integrity with the expressed command that "Provided, in doing so the principle requiring every district to be as nearly equal in population as may be shall not be violated."

FINDINGS OF FACT

1. Under the population data from the 2010 U.S. Census relied upon by the General Assembly in redrawing its district lines in House Bill 1, the ideal district for the House of Representatives would include 43, 394 people, and the ideal district for the Senate would include 114,194 people. The ideal district is composed of the total population of Kentucky reflected in the 2010 census, divided by 100 for the House of Representatives and divided by 38 for the Senate.

2. The Districts for the House and Senate established in House Bill 1 contain variations from the ideal population for House and Senate Districts. House District (HD) 24 contains a population of 45,730, a 5.38% variance from the ideal. One Senate District (SD 8) contains a population of 120,498, a variance of 5.52% from the ideal. In the House of Representatives, 15 districts (HD 47, 52, 58, 60, 62, 63, 64, 66, 68,69, 78, 80, 83, 88, and 100) include a variance of 5%, the maximum variance allowed under Fischer v. State Board of Elections,, 879 S.W.2d 475 (Ky. 1994). (*See* Exhibit 3 to the Complaint, LRC Population Summary Report, January 10, 2012).

3. House Bill 1 divides 28 counties in districts for the House of Representatives, and 5 counties for Senate districts.

4. House Floor Amendment 1 to House Bill 1 provides for a redistricting that divides only 24 counties. Senate Floor Amendment 1 to House Bill 1 provides for a redistricting that divides only 4 counties.

5. House Bill 1 provides an overall range of deviation for House Districts of 10%, and an overall range of deviation for Senate Districts of 9.84%. *See* LRC Population Summary Report, *Id.* Plaintiffs have argued that this level of variance between the least populous

district and the most populous district exceeds the constitutional requirements for House Districts. It is undisputed that House Bill 1 sets those variances at, or near, the constitutionally permissible limits for both House and Senate.

6. The Plaintiffs have identified at least one House District, HD 80, that has been designed in such a manner as to raise a substantial question as to whether that district complies with the requirement of Section 33 that "the counties forming a district shall be contiguous." House District 80 contains a one mile wide strip that runs from the Casey County border, through the northwestern corner of Pulaski County, to the Rockcastle County border. This strip of Pulaski County contains only 1882 residents. (*See* LRC's Answers to the Court's Questions, filed 2/6/12).

7. Former Senate District 13, in which Intervening Plaintiffs Stevens, Stephenson, McGaw vote and reside, and which is represented by Intervening Plaintiff Senator Kathy Stein, was located entirely within Fayette County prior to the enactment of House Bill 1, which re-located Senate District 13 to the northeastern Kentucky counties of Bath, Fleming, Harrison, Lewis, Mason, Montgomery, Nicholas and Robertson Counties. The vast majority of the geographic territory that constituted the former SD 13, and almost all the voters who resided there, have been re-assigned by House Bill 1 to SD 4, which formerly was located in Western Kentucky and is represented by Sen. Dorsey Ridley of Henderson.

8. The Fayette county voters of the former SD 13 elected a senator in the election of 2008, and absent the enactment of House Bill 1, would elect a senator in 2012. All odd numbered Senate Districts are on the ballot in 2012, and all even numbered Senate Districts are on the ballot in 2014.

9. By virtue of the enactment of House Bill 1, and the reassignment of the voters in the geographic territory that formerly constituted SD 13 to SD 4, the voters who reside in that territory will be denied the right to vote for and elect a Senator for 2 additional years, from 2012 (when the election would have been held prior to House Bill 1, to 2014 when it would be held if House Bill 1 is allowed to take effect).

10. In Fayette County alone, 113,724 citizens who resided in the former territory of SD 13, were reassigned to SD 4 by House Bill 1. (LRC Exhibit 1, Hearing 2/6/12).

11. House Bill 1 further provides that a statewide total of 351,394 citizens and residents were transferred from odd numbered districts (for which senators were elected in 2008, and for which elections will be held this November) to even numbered districts (for which senators were elected in 2010 and elections will be held in November, 2014). (LRC Exhbit 1, Hearing 2/6/12).

12. In addition to the wholesale reassignment of the voters of former SD 13 to SD 4, House Bill 1 also reassigns the voters of 9 other counties[3] *in their entirety* from odd numbered Senate Districts to even numbered Senate Districts.

13. By virtue of this reassignment, virtually all of the residents and voters of the former SD 13 in Fayette County, and in the other 9 counties that were transferred *en masse*, will be denied the right to vote for and elect a senator to represent them for two additional years, and will be represented for two entire legislative sessions in the Senate by a person not elected by the voters of the district, but assigned to them by legislative fiat.

[3] Boyd, Breathitt, Casey, Estill, Gallatin, Johnson, Magoffin, Powell, Pulaski and Russell Counties are all reassigned from odd numbered districts to even number districts. ***See LRC Exhibit 1, id.***

CONCLUSIONS OF LAW

1. The decision of the Kentucky Supreme Court in Fischer v. State Board of Elections, 879 S.W.2d 799 (Ky. 1984) provides that under Section 33 of the Kentucky Constitution, the General Assembly may enact a redistricting plan in which the population variation "does not exceed -5% to +5% from an ideal legislative district." *Id.* at 479.

2. Fischer further provides that the General Assembly is obligated to "formulate a plan which reduces to the minimum the number of counties which must be divided between legislative districts. ... 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." *Id.*

3. House Bill 1 fails to comply with the "maximum constitutional population variation" as set forth in Fischer by virtue of the fact that at least one House District and one Senate District have a population variance greater than 5%. The right of the plaintiffs and intervening plaintiffs to proportional representation under Section 33 of the Kentucky Constitution, as construed by the Kentucky Supreme Court in Fisher, *id.*, has been violated by the provisions of House Bill 1.

4. House Bill 1 fails to comply with the mandate of Fischer to "divide the fewest possible number of counties" because the record in this case demonstrates that it is possible to divide as few as 24 counties in the House, and as few as 4 counties in the Senate.

5. The Plaintiffs have raised a substantial issue of law regarding the issue of whether HD 80, and perhaps HD 89, comply with the requirement of Section 33 that "counties

forming a district shall be contiguous." There is no controlling case law on this issue, and the issue requires further proof and briefing on the merits before the Court can render a final decision.

6. The Intervening Plaintiffs have raised a substantial issue of law regarding whether their transfer from SD 13 to SD 4 has unconstitutionally impaired their right to vote for and elect a senator. The Court is not aware of, and the parties have not cited, any controlling legal authority on this issue. In Anggelis v. Land, 371 S.W.2d 857 (Ky. 1963), the former Court of Appeals rejected a claim that the Redistricting Act of 1963, dividing the 13th Senate District into two districts (12 and 13), created a vacancy in the office of Senator from the 12th district. No claim was raised that the Act denied or abridged the right of any citizens to vote on the election of their senator. Rather, Anggelis rejected an attempt by the sitting Senator in the 13th district to obtain by mandamus a certificate of nomination "as Democratic nominee, for the office of State Senator from the Twelfth Senatorial District of Kentucky." *Id.* at 858. Having been moved out of his district, he sought to be re-elected by judicial action rather than standing for election in the newly established district. Anggelis did not challenge the re-districting at all. It appears that the Senator elected by the voters in all of Fayette County for the 13th District continued to serve until the next election for an odd numbered district, and the voters who were re-assigned to an even numbered district were able to elect a new senator at the first election after the 1963 redistricting. Thus no citizen was assigned to be represented by a senator who had never been elected by the voters of that geographic area, nor was the right of any citizen to vote for a senator delayed.

7. Senator Stein seeks no such relief here, but rather, she and her constituents maintain that by transferring the geographic territory of former SD 13 (an odd numbered district that will be subject to election this year) to SD 4 (an even numbered district that will not be subject to election until 2014), that House Bill 1 denies and abridges their right to elect a senator, and, as a practical matter extends the term of the Senator representing them from 4 years to 6 years because the last election for senator in that geographic territory was in 2008, and the next election will be held until 2014.

8. The Court has not found, nor have the parties cited, any controlling legal authority that addresses the question of whether an entire senatorial district can be transferred from an odd numbered district to an even numbered district, when such a transfer results in a delay of 2 years in the right of those citizens to elect a senator. The Court concludes that this alleged abridgement of the voting rights of the Intervening Plaintiffs is a substantial question of law that merits a full adjudication on the merits.

9. In deciding whether to grant injunctive relief, this Court is required to weigh the competing equities, including the public interest. Maupin v. Stansbury, 575 S.W.2d 695 (Ky. App. 1978). This balancing of competing interests is also required in connection with cases that allege the impairment of the right to vote. *See, e.g.* Burdick v. Takushi, 504 U.S. 428 (1992). Here, the Court finds that the "character and the magnitude" of the asserted impairment of the right to vote is substantial, and the public interest requires preservation of the *status quo* pending a final judgment.

10. Having found a violation of the rights of the Plaintiffs and Intervening Plaintiffs, the Court must address the question of remedies. Here, the Court recognizes that there are substantial competing interests. The last redistricting completed by the General

Assembly was enacted into law in 2002 (*see* 2002 Ky. Acts., c. 1). Accordingly, we are in the 10th year of that plan, and a new census was completed last year, showing that the districts are substantially out of balance. Thus, there is no question that the legislature is under an obligation to complete re-districting as soon as possible. The question before the Court then, is whether the November 2012 elections should be conducted under the district boundaries that preceded the enactment of House Bill 1, or whether the Court should redraw legislative district line, or require the legislature to redraw those lines (and extend all necessary deadlines to do so).

11. The Court finds and concludes that there is no constitutional or statutory deadline that requires that legislative district lines be redrawn prior to the November 2012 election. In fact, the case law on redistricting is replete with cases that demonstrate that the decennial redistricting required by Section 33 has been only loosely observed. *See* Combs v. Matthews, 364 S.W.2d 647 (Ky. 1963), Stiglitz v. Schardien, 239 Ky. 799, 40 S.W.2d 315 (Ky. 1931), Ragland v. Anderson, 125 Ky. 141, 100 S.W. 865 (Ky. 1907).

12. If the Court allows the district lines established in House Bill 1 to take effect immediately, it is uncontested that virtually all of the citizens and voters of the former SD 13 (at least 113,000 citizens) will be represented in not one, but two full annual sessions of the General Assembly (the 2013 and 2014 sessions) by a senator who does not live in the district, and has no political, social, economic or other connection to the community he has been assigned to represent. Those citizens and voters will be represented in the Senate by a Senator from another area of the state who has been politically assigned to this task. Those citizens and voters will be denied the right to

select their own senator for another two years, although they otherwise would be able to vote for a senator this November.

13. Likewise it appears that there are hundreds of thousands of citizens and voters who are similarly situated to the Intervening Plaintiffs. LRC Exhibit 1 documents that there are 350,394 persons who have been moved from odd numbered districts to even numbered districts, and thereby will be delayed by 2 years in their right to vote for a senator. It is true that LRC Exhibit 1 indicates that 400,667 persons were moved from an even numbered to an odd numbered district, and thereby will be able to vote for a senator 2 years sooner than they would have if they remained in an even numbered district. But the Court can find no basis for holding that the law allows the General Assembly the right to delay one citizen's right to vote for a senator by advancing the right of other citizens' vote for a senator.

14. The Court can find no basis in law or precedent for the wholesale transfer of virtually an entire Senate District from an odd-numbered district to an even numbered district, in a manner that delays the right of the voters of the district to elect a senator by two years. No such law or precedent has been cited to the Court. The Court recognizes that Senate Districts have been re-assigned to new geographic territory, and that to some degree such re-assignments are necessary to address shifts in population. Such transfers of districts to new territory have been upheld by Opinions of the Attorney General. *See OAG 82-18 and OAG 82-55.* But there are no reported cases in which this issue has been decided, and no prior redistricting legislation in which a challenge has been brought by voters who claim their right to vote for a senator has been impaired. Again, this Court concludes that these issues warrant a full

adjudication on the merits, and it is necessary to maintain the *status quo* pending a final adjudication because in the absence of injunctive relief "the acts of the adverse party will tend to render such final judgment ineffectual." CR 65.04(1). Maupin v. Stansbury, *supra.*

15. In balancing the equities, the Court is mindful that the current districts are out of balance and must be redrawn to comply with the "one person, one vote" mandate of federal and state law. But the question before the Court is one of timing. The Court notes that the uncontested evidence in this case demonstrates that House Bill 1 itself violates with the mandate of Section 33 for proportional representation because it includes districts in both House and Senate that exceed the maximum 5% variation. The Court further finds as yet undisputed evidence that as many as 351,394 persons will be legislatively re-assigned under House Bill 1 from districts that are required to elect a senator this year to districts that will not hold an election until 2014. Those citizens, for two full annual sessions of the General Assembly (2013 and 2014) would be assigned to senators who do not reside in the districts they represent and who have no meaningful ties to those communities. The Court therefore concludes that the redistricting cure of House Bill 1 is worse than the malapportionment disease that it is legally required to remedy, at least for the next two years. In these circumstances, the public interest demands that the Court grant injunctive relief to maintain the *status quo* pending a full adjudication on the merits.

16. The Court finds and concludes that there is no Kentucky case on point deciding whether the impairment of the Intervening Plaintiffs' voting rights reflected in House Bill 1 constitutes a violation of the guarantee of due process and equal protection of

the law under Sections 2 and 3 of the Kentucky Constitution. However, the Court notes that other jurisdictions have found equal protection violations in similar circumstances. As explained by a three judge federal District Court in Wisconsin,

> "every new reapportionment plan creates a situation that results in 'holdover' Senators and the temporary disenfranchisement of some residents for a two-year period. .. The temporary disenfranchisement of citizens is constitutionally tolerated under either of two related theories. Due to the complexities of the reapportionment process, a temporary loss of voting rights (the cases speak of a 'delay' in the right to vote) is tolerated when it is an 'absolute necessity' or when it is 'unavoidable.'" Republican Party of Wisconsin v. Election Board, 585 F.Supp. 603 (E.D. Wis. 1984), *vacated and remanded* Wisconsin Elections Board v. Republican Party of Wisconsin, 469 U.S. 1081 (1984).[4]

17. The re-assignment of geographic territory of the former SD 13 to an even numbered district is neither "an absolute necessity" nor "unavoidable." On the record before this Court, it appears to be an arbitrary decision without a rational basis. To the extent that political considerations concerning the political impact of this re-assignment on the majority party are involved, the Court notes that this is a political process and it is appropriate to take political concerns into consideration so long as they do not impair the nonpartisan voting rights of the public. Here, the public's right to elect a senator has been delayed for 2 years, and in conducting the balancing test required under Burdick *supra*, the Court can see no countervailing rational basis or valid reason to re-assign the former SD 13 to an even numbered district, thereby delaying the right of those citizens to vote on the election of their senator. No such rational basis has been advanced thus far in the litigation.

[4] The U.S. Supreme Court granted an order staying the lower court's ruling, apparently because of time constraints that would make the mechanics of running the 1984 election difficult or impossible. 469 U.S. 812. After the November election was held under the legislatively adopted plan, rather than the judicially imposed plan, the action became moot, and the Supreme Court vacated the lower court's decision and directed dismissal of the complaint.

CONCLUSION

For the reasons stated above, IT IS ORDERED AND ADJUDGED as follows:

1. The defendant Allison Lundergan Grimes, in her capacity as Secretary of State of the Commonwealth of Kentucky, and the Kentucky State Board of Elections, and all agents, employees and others acting in concert with them, are hereby ENJOINED under the provisions of CR 65.04 from implementing the districts for the Kentucky House of Representatives and Kentucky Senate that are set forth in House Bill 1, enacted by the 2012 General Assembly;
2. Until the General Assembly passes redistricting legislation that complies with all applicable constitutional requirements to revise the districts in effect under KRS 5.005 (2011), as enacted by 2002 Ky. Acts, c. 1, the elections for the House and Senate shall be conducted with the legislative district boundaries in effect immediately prior to the enactment of House Bill 1 for both the House of Representatives and the Senate.
3. The filing deadline set forth in KRS 118.165 shall be extended through 4:00 p.m. on Friday, February 10, 2012 to allow all candidates and potential candidates the opportunity to make the required candidacy filings under the temporary injunction issued by this Court, with the legislative districts required by this Court's ruling;
4. The motion of the Legislative Research Commission to intervene as a matter of right is GRANTED under CR 24.01 and KRS 5.005(1).
5. This is a final and appealable judgment on the claim set forth in Count 1 of the Complaint filed by Plaintiffs Fischer, Hoover, King, Todd and Gaydos for violation

of their rights under Section 33 of the Kentucky Constitution regarding the population variance of greater than 5%, and the failure to divide "the fewest possible number of counties." It is also a final and appealable judgment on the claim set forth in Count I of the Intervening Complaint filed by Intervening Plaintiffs Stevens, Stephenson, McGraw and Stein for violation of their rights under Section 33 of the Kentucky Constitution regarding the population variance of greater than 5% and the failure to divide "the fewest possible number of counties." Those claims of the plaintiffs and intervening plaintiffs under Fischer v. State Board of Elections, 879 S.W.2d 475 (Ky. 1994) constitute a facial challenge to the constitutionality of House Bill 1 under Section 33 of the Kentucky Constitution, and there is no just cause for delay in the entry of this judgment on the facial challenge to the constitutionality of House Bill 1. *See* CR 54.02

6. The Court RESERVES ruling on all other claims and defenses, pending the filing of Answers, completion of discovery, and briefing on the merits. Accordingly, this Order is an interlocutory order on all other claims of the Plaintiffs[5] and the Intervening Plaintiffs[6].

7. The bond previously set for the issuance of the restraining order under CR 65.03 ($200), which was posted by the Plaintiffs, shall remain in effect and serve as the bond for the temporary injunction.

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[5] Lack of contiguity under Section 33, State and Federal Equal Protection, State and Federal Freedom of Association, 42 U.S.C. Sec. 1983, and Declaratory and Injunctive Relief under KRS 418.040)

[6] Equal Protection, Freedom of Association, Violation of Term of Office, 42 U.S.C. Sec. 1983, and Declaratory and Injunctive Relief.

IT IS SO ORDERED this 7th day of February, 2012, at 3:00 p.m. EST.

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division 1

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