Supreme Court of Kentucky

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 TO TRANSFER AND ADVANCE

May it please the Court:

Pursuant to CR 74.02, Movant, the Kentucky Legislative Research Commission, by counsel, respectfully moves the Court to transfer this appeal from the Court of Appeals and advance it on the docket for expedited consideration pursuant to CR 76.22.

This appeal presents questions of great and immediate importance to the citizens of the Commonwealth, which merit immediate review by this Court. The Franklin Circuit Court enjoined the Secretary of State and Board of Elections from conducting 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 new apportionment plan unconstitutional, and allowed elections to go forward under the new

apportionment plan that had been declared unconstitutional. *Fischer v. State Bd. of Elections*, 879 S.W.2d 475, 480 (Ky. 1994) (*Fischer II*).[1]

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 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 issues 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

[1] *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).

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.

(Opinion at 10-11.) 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. (*Id.* 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*). And, as the Circuit Court conceded, the 2002 districts do not comply with the one-person, one-vote standard. Thus, the Circuit Court's injunction reflects his policy preference that allowing incumbents in odd-numbered districts to run for reelection from their old districts in 2012 (and procure a new four-year term before this Court can effectively decide this appeal) is more important than equality of representation state-wide.

Moreover, the Circuit Court gave an unduly narrow reading of *Anggelis v. Land*, 371 S.W.2d 857 (Ky. 1963), which is controlling precedent. In that case, the 13th Senate district had encompassed all of Fayette County, but was divided by moving the 12th district from Hardin, Meade and Larue counties[2] to encompass Fayette County outside the Lexington city

[2] *See* Intervening Defendant LRC's Trial Ex. 3.

limits. The Senator elected from the 12th district had two more years to serve on his term, but was not a resident of Fayette County. The plaintiff contended that the incumbent Senator's lack of residence in Fayette County created a vacancy to be filled by a special election. The heart of his contention was 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.

Rejecting that argument, this Court recognized that every redistricting 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. 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. . . . 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). *Anggelis* is, in fact, directly on point. The Circuit Court's decision to ignore *Anggelis* and require elections to be held under the old

malapportioned districts rather than the new districts is an abuse of discretion.[3]

This Court's immediate review of the Legislative Research Commission's appeal would significantly expedite the final resolution of these paramount Constitutional questions, which are properly addressed by this Court. There is no reason to postpone this Court's consideration of those issues. Transfer should be granted. *See, e.g., Jensen v. Kentucky State Bd. of Elections*, 959 S.W.2d 771, 773 (Ky. 1997) (transfer granted in a reapportionment case); *State Bd. of Elections v. Fischer*, 910 S.W.2d 245 (Ky. 1995) (*Fischer III*) (same); *Fischer II*, 879 S.W.2d at 475 (same).

I. COMPLIANCE WITH CR 76.20(3).

A. MOVANT.

The Movant is the Legislative Research Commission (the "Commission").

The Commission is represented by Sheryl G. Snyder, 400 West Market Street, 32nd Floor, Louisville, KY 40202 and Laura H. Hendrix, Legislative Research Commission, State Capitol Annex, Room 104, Frankfort, KY 40601.

B. RESPONDENTS.

The Respondents are 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, the Kentucky State Board of Elections, and Maryellen Allen, in her official capacity as Interim Acting Executive Director of the State Board of Elections.

Joseph M. Fischer, Jeff Hoover, Kim King, Frey Todd and Anthony Gaydos are represented by Victor B. Maddox, John David Dyche, Jennifer Metzger Stinnett, and Jason

[3] The precise facts and holding in *Anggelis* are discussed in greater detail in Movant's Motion for Interlocutory Relief Under CR 65.07, filed concurrently herewith.

Nemes, Fultz Maddox Hovious & Dickens PLC, 2700 PNC Tower, 101 Fifth Street, Louisville, KY 40202-3116.

David B. Stevens, M.D., David O'Neill, Jack Stephenson, Marcus McGraw, and Kathy Stein are represented by Scott White and Sarah Mattingly, Morgan & Pottinger, 133 W. Short Street, Lexington, KY 40507.

Alison Lundergan Grimes, in her official capacity as Kentucky Secretary of State, the Kentucky State Board of Elections, and Maryellen Allen, in her official capacity as Interim Acting Executive Director of the State Board of Elections, are represented by Anita Britton, Britton Osborn Johnson, 200 West Vine Street, Suite 800, Lexington, KY 40507, and David Tachau, Dustin E. Meek, Jonathan T. Salomon, and Katherine McKune, Tachau Meek PLC, 3600 PNC Tower, 101 South Fifth Street, Louisville, KY 40202-3120.

C. JUDGMENT FOR REVIEW.

This case is on appeal to the Kentucky Court of Appeals from the decision of the Franklin Circuit Court in civil case No. 12-CI-00109. A copy of the Circuit Court's February 7, 2012 judgment is attached pursuant to CR 74.02 and CR 76.20(4), as Apx. A. A copy of the Notice of Appeal from so much of that judgment as declared the rights of the parties, and is final and appealable pursuant to CR 54.02, is attached pursuant to CR 74.02(1), as Apx. B. A copy of the Motion for Interlocutory Relief Pursuant to CR 65.07 from so much of the Circuit Court's decision as granted a Temporary Injunction is attached pursuant to CR 74.02 and CR 76.20(4), as Apx. C. No supersedeas bond has been executed. Neither the Movants nor any other party to the proceeding has a petition for rehearing or motion for reconsideration pending in the Court of Appeals.

II. MATERIAL FACTS AND QUESTIONS OF LAW INVOLVED.

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. HB 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 HB 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 HB 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 HB 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 significant Constitutional 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.

III. REASONS WHY THE CASE SHOULD BE TRANSFERRED.

Motions to transfer under CR 74.02 are granted in the discretion of the Supreme Court for cases that are of great and immediate public importance. *See, e.g., Jones v. Forgy*, 750 S.W.2d 434 (Ky. 1988). This case presents important questions presented under the constitutional doctrine of separation of governmental powers, and the decision will significantly impact both Kentucky's 2012 elections for the House and Senate, and future reapportionment acts by the General Assembly. Accordingly, this case plainly meets that standard.

The Circuit Court's decision enjoining the conduct of the 2012 elections under the 2012 reapportionment act is contrary to this Court's most recent precedent. In *Fischer II*, this Court allowed the 1994 election cycle to proceed under the 1991 reapportionment act by

postponing the effect date by which the act was declared unconstitutional, thereby giving the General Assembly ample time to reapportion the districts consistently with the Court's newly rendered opinion. *See Fischer II*, 879 S.W.2d at 480. In contrast to that Solomonic decision, the Circuit Court's injunction requires the General Assembly to either forgo its constitutional right of appeal and enact new reapportionment legislation consistent with the Circuit Judge's opinion – including his opinion concerning changing odd and even-numbered Senate districts – or permit elections to proceed under the 2002 districts, despite the undisputed fact that the 2002 districts no longer comply with one-person, one vote, whereas the 2012 districts satisfy the 10% maximum population deviation under federal Constitutional law.

Indeed, the fact that the federal 10% maximum population deviation allows individual districts to exceed the so-called "ideal" district population by more than 5%[4] illustrates why the Court of Appeals should be bypassed on this appeal. Movant's principal argument on appeal will be that *Fischer II* misapplied governing one-person, one-vote jurisprudence and should be overruled.

Simply stated, § 33 KY. CONST. requires that no county can be split in an apportionment act. *Fischer II* correctly declared that provision unconstitutional under the federal Equal Protection Clause line of cases.[5] In a state such as Kentucky which has more counties that it has House districts, with several of those counties being below the statistical

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[4] *See* footnote 2, *supra*.

[5] While the 1891 Constitutional Convention decided that "the command with respect to the division of any county is absolute," "any such view is now untenable . . . ." 879 S.W.2d at 477, 479. The author of *Fischer II* recognized that the unenforceability of the anti-county-splitting provision in § 33 resulted from application of *Baker v. Carr*, 369 U.S. 186 (1962) and its progeny. *Jensen v. Kentucky State Bd. of Elections*, 959 S.W.2d 771, 777 (Ky. 1997) (Lambert, J., dissenting).

ideal per-district population, and absolute prohibition against splitting counties is void and unenforceable as a violation of the Equal Protection Clause of the U.S. Constitution.[6]

Instead of simply declaring unconstitutional and unenforceable the anti-county-splitting clause in § 33, however, *Fischer II* substituted a different constitutional test:

> 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.

879 S.W.2d at 479. But § 33 does not require the General Assembly to "divide the fewest possible number of counties." It requires the General Assembly to not split any county, at all; a mandate which is indisputably unconstitutional. Accordingly, the majority in *Fischer II* created a new test for protecting county boundaries that is found nowhere in the Constitution. The requirement that an apportionment act must divide the fewest number of counties mathematically possible is a judge-made standard that is not required by the Constitution.

The majority opinion's ode to the importance of counties in the lives of Kentuckians is nothing less than a pronouncement that public policy should protect county integrity as vigorously as possible, subject to the constitutional command of equality. But it is well settled that it is for the General Assembly, not the judiciary, to establish public policy. *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 807 (Ky. 2009) (citing *Commonwealth ex rel. Cowan v. Wilkinson*, 828 S.W.2d 610, 614 (Ky. 1992)).

Moreover, the mathematical mandate apparently required by *Fischer II* results in "county integrity" being denigrated, rather than protected. As the number of less populous

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[6] *See, e.g., Connor v. Finch*, 431 U.S. 407, 418-19 (1977) ("[T]he policy against breaking county boundary lines is virtually impossible of accomplishment in a State where population is unevenly distributed . . . ."); *see also Reynolds v. Sims*, 377 U.S. 533, 581 (1964).

counties that cannot be split is increased, the number of more populous counties that must be split likewise increases. Thus, in the name of protecting "county integrity," *Fischer II* requires larger counties to be balkanized more than would otherwise be necessary to satisfy the "plus or minus 5% rule." In short, *Fischer II* protects smaller counties at the expense of larger counties, leaving "county integrity" in the eye of the beholder.

In *Jensen*, this Court retreated from protecting county integrity at the expense of equality of representation. Indeed, the author of *Fischer II* said in his dissent in *Jensen* that the majority was rejecting the "central holding" in *Fischer II*. 959 S.W.2d at 777 (Lambert, J., dissenting).

In *Jensen*, the plaintiff argued that the principle of "county integrity" required the General Assembly to allocate a full House district to any county with sufficient population to contain a full House district, rather than splitting the populous counties. This Court recognized that the drafters of the compromise embodied in § 33 probably intended the result sought by the plaintiff. Because that result was not mandated by the express language of § 33, however, the Court refused to impose that requirement upon the General Assembly when apportioning House districts:

> The delegates [at the 1891 Convention] probably did not foresee that a county with sufficient population to contain a whole district within its borders might not be given such a district. However, regardless of what the delegates may or may not have foreseen, that requirement was not included in the language of Section 33.

959 S.W.2d at 775.

Of course, the same is true of the *Fischer II* standard requiring splitting the fewest number of counties: "that requirement was not included in the language of Section 33."

In this case, the Franklin Circuit Court candidly critiqued the fallacy in *Fischer II*'s reasoning, and invited this Court to overrule it:

> It is apparent that the Supreme Court's ruling in Fischer II has had unintended consequences. . . . 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 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% valuation.
>
> 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. . . . 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. 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.

(Opinion at 3-4) (footnote omitted) (italics in original).

Because the standard erected by *Fischer II* is not required by the Constitution, the policy question of preserving certain county boundaries is remitted by the doctrine of separation of governmental powers to the General Assembly. Again, *Jensen* is on point:

> Apportionment is primarily a political and legislative process. . . . Our only role in this 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).

Fischer II should therefore be overruled.[7] But, of course, the Court of Appeals cannot overrule *Fischer II*. Consequently, the very nature of Movant's primary argument warrants transfer to this Court.

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[7] "'We have long recognized, of course, that the doctrine of *stare decisis* is less rigid in its application to constitutional precedents' . . . 'because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.'" *Matheney v. Commonwealth*, 191 S.W.3d 599, 621 (Ky. 2006) (Cooper, J., dissenting) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991); *Agostini v. Felton*, 521 U.S. 203, 235 (1997)). "It is thus not only our prerogative but also our duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question. And if the precedent or its rationale is of doubtful validity, then it should not stand.'" *Bright v. Am. Greetings Corp.*, 62 S.W.3d 381, 387 (Ky. 2001) (quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627-628 (1974)).

This Court should transfer this appeal to this Court. This Court should dissolve the Temporary Injunction and permit the 2012 election cycle to proceed using the districts enacted in House Bill 1. *See Fischer II* at 480. The Court could then determine the constitutionality of House Bill 1 according to its customary schedule, while giving the General Assembly ample time thereafter to enact further legislation – if any – necessitated by this Court's decision.

IV. CONCLUSION

For the foregoing reasons, Movant respectfully requests this Court to grant the motion to transfer this appeal to the Kentucky Supreme Court and advance this matter on its docket.

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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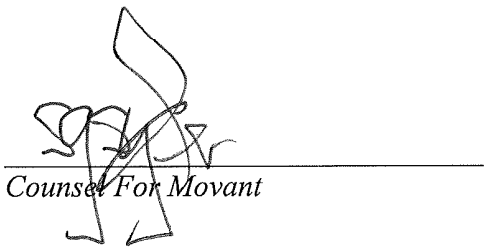

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