SUPREME COURT OF KENTUCKY
CASE NO. 2012-SC-91-T
ON APPEAL FROM

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

LEGISLATIVE RESEARCH COMMISSION — MOVANT

v.

JOSEPH M. FISCHER, ET AL. — RESPONDENTS

RESPONDENTS/INTERVENING PLAINTIFFS RESPONSE TO THE LEGISLATIVE RESEARCH COMMISSION'S MOTION FOR INTERLOCUTORY RELIEF PURSUANT TO CR 65.09

I. Introduction

The Respondents, David B. Stevens, M.D., David O'Neill, Jack Stevenson, Marcus McGraw, and Kathy Stein (collectively, "Senator Stein"), oppose the granting of the interlocutory relief sought by the Movant.[1] There simply is no factual or legal basis to support such an extraordinary remedy.

As a prefatory comment, it is worth noting that this Motion does not seek a review of the partial Declaratory Judgment entered by the Franklin Circuit Court. *Temporary Injunction under 65.04 and Partial Declaration of Rights, February 7, 2012.* The partial Judgment, in and of itself, renders HB 1 void and unconstitutional. And so, the Circuit Court properly enjoined the Secretary of State from conducting elections using the HB 1 legislative districts.

---

[1] If this action remains here, the operable rule is CR 65.07; if transferred, then CR 65.09. Also, on February 13, 2012, we filed a Response to Motion to Transfer in which we state that we have no objection to transfer of both the direct appeal and the Motions.

Despite this, it appears that the Movant, the Legislative Research Commission ("LRC"), is seeking to avoid a speedy analysis by this Court of whether HB 1 complies with Section 33. Instead, the LRC seeks dissolution of the Injunction by attacking the Circuit Court's conclusion of law that Senator Stein's challenge to HB 1 which is premised upon the wholesale move of Senate District 13 (SD-13) satisfied the requirements of CR 65 relief. *Injunction,* ¶¶ 6-17, citing *Maupin v. Stansbury,* 575 S.W.2d 695 (Ky. App. 1978). This is odd.

The Notice of Appeal filed by LRC seeks review of the Circuit Court "judgment," or the declaration that HB 1 violates Section 33. *Notice of Appeal, filed February 10, 2012).* But, instead of seeking emergency relief based on the appeal of that judgment, the LRC's CR 65.07 Motion is premised solely on the SD-13 challenge. That seems to be why the Court of Appeals promotes transfer of, we think, *only* the pending Motions. *See, Order Recommending Transfer at 2* (Ky. App., No. 2012-CA-264-I, February 13, 2012). The only "interlocutory" portion of the LRC appeal is the attack on the Circuit Court's conclusion of law regarding SD-13. This conclusion of law does not reach the merits, is hardly the single basis for the injunctive relief granted by the Circuit Court, and merely recites that the evidence in the Record would, itself, support CR 65 relief.

However, even making the leap that the Circuit Court erred[2] in the SD-13 conclusion of law, that is of no avail to LRC. It would result in nothing more than a pyrrhic victory, and a waste of time. *This is because the Injunction declares as a matter of fact and law that HB 1 is unconstitutional under Section 33.* To conduct elections of state legislative officers using the HB 1 districts would be an affront to both the Constitution and an orderly appellate process.

The LRC in its Motion claims that the Circuit Court has engaged in an "unprecedented use of the power of an injunction to resolve a political question." *Motion for Interlocutory Relief,*

[2] We do not concede this point.

at 3. Not true. As the Circuit Court filings plainly indicate, the LRC defended the SD-13/SD-4 flip by arguing that Senator Stein's challenge to HB 1 presented a non-justiciable political question. However, that legal issue has not been adjudicated by the Circuit Court. Indeed, based on the non-severability clause in HB 1, such a resolution is, presently, moot given that the Court has already struck down HB 1. *See, Commonwealth v. Hughes,* 873 S.W.2d 828, 829 (Ky. 1994).

That is itself ample basis for the issuance of the 65.03 relief here.[3]

II. Relevant facts and procedural history.

In its current regular session, the Kentucky General Assembly re-districted the Commonwealth's legislative and judicial districts by enacting House Bill I ("HB 1"), which was signed by the Governor and became law on January 20, 2012. Though un-codifed as of yet, HB 1 supplants KRS 5.100 *et seq.* (Senate Districts), KRS 5.200 *et seq.* (House Districts), and KRS 21A.010 *et seq.* (Supreme Court Districts).[4] HB 1 drew districts using the 2010 Census Redistricting Data. HB 1 provided a filing deadline of January 31, 2012, at 4:00 p.m., for legislative races.

---

[3] As a tactical matter, Senator Stein has not yet decided how to proceed with the claim as to SD-13. Given that HB 1 did not enact a severability clause and notwithstood KRS 446.090, the partial declaratory judgment entered by the Circuit Court which is now pending in the Court of Appeals has the practical effect of rendering the entirety of HB 1 void. So, it is not necessary for the Circuit Court to even reach the issue of SD-13. Regardless, given the past proclivity of the General Assembly to play games with district numbers, it may be worthwhile to resolve the issue. If so, Senator Stein will proceed with a CR 56 motion, and the Circuit Court can determine if that issue is now a non-justiciable quest for an advisory opinion. *In re: Constitutionality of House Bill No. 222,* 90 S.W.2d 692, 693 (Ky. 1936).

[4] The supplanted House and Senate Districts were drawn using 2000 Census Data. *KRS 5.010(c).* The Supreme Court Districts had not been re-drawn since 1991. *Acts 1991 (2nd Ex. Sess.), ch. 2, §1 (eff. December 20, 1991).* The pre-judicial reform Court of Appeals has held that the population variation principal of "one person, one vote" in re-districting does not apply to judicial districts. *State Bar Ass'n v. Taylor,* 482 S.W.2d 574 (Ky. 1972). Though there is no direct authority regarding the application of the "one person, one vote" rule to Kentucky Supreme Court Districts, the General Assembly in HB-1 did provide population variations for all seven districts. All but District 4 is within the +/-5% permitted variation of *Fischer II* and *Jensen,* as well as the 10% federal safe harbor of *Baker v. Carr.* See, *HB 1, Intervening Plaintiffs Consolidated Exhibit 1, HB 1 (2012) Materials, specifically population chart by district.* Regardless, given the "non-severability" section contained in HB 1, the re-districting of the Supreme Court is also void under the Injunction. *HB 1, Section 143.*

On January 26, 2012, Plaintiff filed a Verified Complaint challenging the constitutionality of HB 1 on a number of grounds. The only challenge pertinent to the scope of the appeal as Noticed by the LRC is the claim that HB 1 violates Section 33 of the Kentucky Constitution as definitively applied by this Court in the series of cases which examined the redistricting plans using the 1990 Census Redistricting Data.[5]

On January 30, 2012, Senator Stein also challenged HB 1's drawing of the Senate Districts as violative of Section 33. [6]

On January 31, 2012, the Circuit Court entered a Restraining Order enjoining the Secretary of State from certifying legislative candidates and other administration duties until February 7, 2012. A hearing was held on February 6, 2012, on the motions for injunctive relief. At this time, in addition to the Verified Complaints, each group of Respondents and the Movant introduced various records from the LRC regarding the debate and passage of HB 1. On February 7, 2012, the Circuit Court entered a Temporary Injunction under CR 65.04 and a Partial Declaration of Rights, and held that, on its face, HB 1 violated Section 33 by failing to divide the fewest number of counties while making full use of the "permissible population variation" amongst districts of +/- 5%. This was its duty under Section 33 and *Fischer II/Jensen.* And, as we previously discussed, the LRC filed its Notice of Appeal in the Court of Appeals. But, the

---

[5] These are: *Fischer v. Board,* 847 S.W.2d 718 (Ky. 1993) *("Fischer I"); Fischer v. Board,* 879 S.W.2d 475 (Ky. 1994) *("Fischer II"); Board v. Fischer,* 910 S.W.2d 245 (Ky. 1995) *("Fischer III"); and, Jensen v. Board,* 959 S.W.2d 771 (Ky. 1997) *("Jensen").*

[6] Though, as we have pointed out, Senator Stein also premised her challenge on the claim that the wholesale movement of Senate District 13 out of Fayette County to a territory in northeastern Kentucky was unconstitutional under Sections 1, 2, 6, 30 and 31, and replacing SD 13's former territory with Senate District 4. The change from odd to even numbering meant that persons residing within former SD-13 would be in a district of six years rather than four years. Unlike the Respondents challenges under Section 33, the Circuit Court has yet to rule on the merits of that claim. *Verified Complaint, Count 3; and, Temporary Injunction and Partial Declaration of Rights, February 7, 2012, ¶¶ 6-17.*

LRC has since taken no further steps to pursue substantive arguments that the Circuit Court's judgment holding that HB 1 is facially unconstitutional was error.[7]

On February 13, 2012, the LRC filed with the Kentucky Court of Appeals a Motion for Interlocutory Relief Pursuant to CR 65.07 and a Motion for Emergency Relief Pursuant to CR 65.07(6), and filed with the Kentucky Supreme Court a Motion for Transfer and Advance pursuant to CR 74.02 and a Motion for Emergency Relief pursuant to CR 65.07(6) and CR 65.09(8). The LRC argues in its Motions that the Temporary Injunction issued by the Circuit Court should be dissolved, and the 2012 legislative elections should proceed pursuant to the districts set forth in HB 1 enacted in 2012.

That is the procedural status of the matter now before this Court.

III. Argument

In order to prevail on a motion for interlocutory relief, the Movant must establish that the trial court abused its discretion. *Board of Regents of Murray State University v. Curris*, 620 S.W.2d 322 (Ky. App. 1981). The following elements are to be considered by the Circuit Court in granting or denying a temporary injunction: (1) whether the Movant has clearly shown that immediate and irreparable harm will occur pending trial on the merits; (2) whether the equities are in favor of the Movant; and (3) whether the complaint raises a serious question on the merits. *Maupin v. Stansbury*, 575 S.W.2d 695 (Ky. App. 1978).

The LRC argues that it is entitled to interlocutory relief on the grounds that the Circuit Court abused its discretion by entering a temporary injunction requiring the use of the pre-HB 1 legislative districts based on the claim that the renumbering of SD-13 violated the Kentucky

[7] The LRC could have teed up the Section 33 issue by filing a motion under CR 65.08. However, LRC has chosen to leave that judgment for the normal appellate processes . . . seeming to believe that final and appealable judgment is not of an emergent nature. That appeal is docketed differently in the Court of Appeals as No.2012-CA-266.

Constitution. The LRC claims that the Circuit Court ignored the square holding of *Anggelis v. Land*, 371 S.W.2d 857 (Ky. 1963). Not only does the LRC request that this Court provide it with interlocutory relief, it is asking this Court to then substantively enter an order requiring that the 2012 elections be conducted pursuant to a legislative scheme the Circuit Court deemed facially unconstitutional, on the grounds that HB 1 is bound to be more constitutional than the redistricting legislation enacted in 2002.

The LRC's argument that the Franklin Circuit Court's abused its discretion proceeds from a false starting point, which is that the Franklin Circuit Court's basis for entry of the Injunction was the renumbering of Senate District 13. The LRC ignores the explicit language of the Franklin Circuit Court's Temporary Injunction. The Circuit Court *made it clear* that the basis for the Temporary Injunction was that HB 1 violated the permitted population deviation of +/- 5% and minimal county splits designated by this very Court.

It is worth visiting the actual language of the Circuit Court:

> 5. This is a final and appealable judgment on the claim set forth in Count I 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 the 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 and the Intervening Plaintiffs.

The LRC's disregard of the Circuit Court's central basis for entry of the Injunction in paragraph 1 of its Conclusions, illustrates how the LRC is attempting to use 65.07 to bypass the Circuit Court's future ruling on the merits of whether renumbering of a district in the fashion of SD-13 in HB 1 violates the Kentucky Constitution. LRC is, essentially, requesting that an appellate court enter a substantive ruling on this issue before it is fully visited by the Circuit Court.

To be sure, should this Court grant the relief sought, then it will need to reach in some measure the issue of whether the move of SD 13 is itself unconstitutional - - - a claim not litigated. This is particularly troublesome given that the finding that Senator Stein's challenge was sufficient in and of itself to serve as a basis for CR 65 relief is *not the sole basis for enjoining the use of the HB 1 districts.* Given the procedural nature of this action, this Court should decline to grant the Motion and instead permit the Circuit Court to proceed to reach the merits of that issue.[8]

The LRC correctly notes that in *Fischer II*, the Court delayed the effective date of its order so as to not disturb, mid-stride, the 1994 election cycle. Indeed, by the time that *Fischer II* was rendered, June, 2004, primary elections on the legislative districts held unconstitutional under Section 33 had taken place. In some of those, the primary actually decided the general election due to no partisan opposition. To not postpone the effective date of *Fischer II* would have truly created a chaotic electoral season. *Id.* at 481. As this Court noted then, the "immediate effectiveness of [*Fischer II*] would disrupt the orderly process of electing Representatives and Senators in 1994."

---

[8] See note 3, *supra.*

However, the sound public policy reasons for this Court choosing delay in *Fischer II* – the invalidation of scores of legislative races conducted in May, 1994 - do not exist here. Elections in the 2012 cycle have not yet been conducted. There is no proof in the Record that adherence to the Circuit Court's Injunction will be difficult to implement by election officials.[9] Simply said, the LRC's attempt to bootstrap the application of remedy in *Fischer II* to this set of facts is contrary to both settled case law and the realities on the ground as disclosed in the Record. The LRC's request that this Court enter injunctive relief requiring that the 2012 elections be conducted pursuant to a legislative scheme the Circuit Court deemed facially unconstitutional is bizarre.

This we know from the Record. The General Assembly knew full well the limitations on its political power to re-district. The Fischer II/Jensen authority has been settled law for fifteen years. The Record is inescapable that HB 1 violates the "central holding" of those cases: there are districts that exceed +/-5% and more counties than necessary are split in both the House and Senate plans. The Circuit Court could not have abused its discretion by following that settled precedent.

The General Assembly is at this very moment in regular session. Based on its Notice of Appeal and filed Motions, the LRC is apparently in no rush for this Court to revisit its modern application of Section 33 to the re-districting process. Given how quickly it was able to act on the Congressional Districts in passing HB 302 (2012), it strains credulity for the General Assembly to seek an equitable remedy caused by the consequences of its own arrogance and inaction. *The General Assembly created its own mess.* To now claim that the Circuit Court abused its discretion in following settled law in declaring HB 1 unconstitutional and enjoining

---

[9] The Circuit Court has already addressed the so-called "chaos" issue raised by the Secretary of State and Board of Elections. *See, Temporary Injunction under 65.04 and Partial Declaration of Rights, February 7, 2012.*

elections using those unconstitutional districts, is, frankly, a remarkable example of chutzpah by an institution that, in this context, has been the acme of hubris .

The Kentucky authority on this issue strongly favors denial of the Motion.

In *Adams v. Bosworth*, 102 S.W. 861 (Ky. 1907), the court held that apportionment of the state into certain senatorial districts having stood unchallenged for 13 years, was not sufficient to declare those districts invalid under Section 33. This Court's holding in *Fischer III*, is recent authority that the relief the LRC requests here is not obtainable. In *Fischer III*, upon the resignation of a member of the state House, the State Board of Elections sought an amendment to the permanent injunction to permit a special election to fill the vacancy. The Circuit Court denied stating that "[i]f it had been the intent of the Supreme Court [in *Fischer II*] to permit the 1991 district to continue in place until the end of the 1994-1996 term, it could have said so. . . The clear language and spirit of the Supreme Court Opinion indicates that once the present legislature took office last January [1995] it would be incumbent upon the General Assembly to remedy the problem associated with the voided districts, including the potential problem of a resignation." *Id.* at 246.

On appeal, this Court affirmed, and reiterated that "[o]ur opinion declared the unconstitutionality of the 1991 Legislative Reapportionment Act. Upon our determination that such was unconditional, there is no legal theory whereby it or any portion of it could be used to establish a district for the purpose of filling a vacancy." *Id.* at 246. This Court stated in *Jenson* that "[o]ur only role in this process is to ascertain whether a particular redistricting plan passes constitutional muster, not whether a better plan could be crafted." *Id.* at 776.

The LRC's request for relief would require this Court to ignore established law and take up the issue of the constitutionality of HB 1 *sue sponte* without that issue being presented

properly by a CR 65 motion or direct appeal via a transfer motion . . . neither of which it has sought. Again, this Court in determining whether to grant an equitable remedy should pay close heed to the conduct of the requesting party. Here, the LRC, as agent of the General Assembly, should not profit from its own misjudgments and tactical errors.

One other point worth making given the Motion's suggestion that it is better to use the unconstitutional districts in HB 1 than the old districts that likely are out of whack in population variance (but, which were valid at enactment in 2002). Like *Fischer II,* the issue of whether it is permissible to operate under an old redistricting plan until a constitutional redistricting plan can be passed after a decennial census has been addressed in other jurisdictions. *Reynolds v. Sims*, 377 U.S. 533 (1964) and *Political Action Conference of Illinois v. Chicago board of Election Commissioners,* 976 F.2d 335 (7th Cir. 1992). In *PAC of Illinois,* the Seventh Circuit stated that

> Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth. Reallocation of legislative seats every 10 years coincides with the prescribed practice in 41 of the States, often honored more in the breach than the observance, however. . . . Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial period and also to the development of resistance to change on the part of some incumbent legislators. In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation.
>
> These words demonstrate that the Illinois statutory scheme for reapportionment passes constitutional muster. Illinois requires decennial redistricting that tracks the figures from the most recent census. That Chicago elects its aldermen to serve four-year terms causing a temporary delay in the implementation of the new census data every twenty years does not transform Illinois' scheme into an unconstitutional procedure. As the above excerpt from Reynolds makes clear, decennial reapportionment satisfies the Constitution, even though there undoubtedly will be "some

> imbalance" in the population of each district towards the end of the decennial period.
>
> The plaintiffs, however, do not subscribe to this interpretation of Reynolds. "The problem," write the plaintiffs, "is that it focuses on a formality--drawing a new ward map--and not on the result that redistricting is supposed to influence--legislative representation." Plaintiffs' Brief at 30. According to the plaintiffs, the Illinois redistricting scheme violates the logic of Reynolds by its failure to implement the 1990 census data immediately into the 1991 elections:
>
> When the Supreme Court in *Reynolds v. Sims* wrote that redistricting every ten years is a constitutional minimum, it could not have meant that a municipality could redistrict every ten years, but avoid the effects of redistricting by delaying elections based on the new map until four years after redistricting takes place.

Id. at 339.

Moreover, as plainly seen from this Court's re-districting jurisprudence found in *Ragland v. Anderson,* 100 S.W. 865 (Ky. 1907), *Adams v. Bosworth,* 102 S.W. 861, (Ky. 1907), *and Stiglitz v. Schardien,* 40 S.W.2d 315, 320 (Ky. 1931)[10], this Court has consistently approved the short term use of older legislative districts. This is particularly true in our context where the newer replacement districts are unconstitutional from the outset. To suggest in the face of this authority that the Circuit Court acted in an "unprecedented" fashion is wrong and discloses a lack of understanding of Kentucky's legislative history.[11]

As the Circuit Court here noted, there is no deadline for the General Assembly to re-district when new Census data becomes available. *Temporary Injunction and Partial Declaration of Rights, ¶ 11.* The remedy to compel re-districting is to go to Court to have old districts

---

[10] *Stiglitz* also is an excellent source for Kentucky's history of re-districting from 1891 to 1931. That history, as well as the holding in Stiglitz makes it plain that using old districts until new, constitutional districts are enacted is appropriate.

[11] It is likewise plain that the Courts in those cases well understood the consequence of using older districts on population variation

deemed unconstitutional under either the federal or state equal protection principle of "one person, one vote." This has not occurred here.

Indeed, rather than asking this Court to hold its nose and suborn the use of these new, unconstitutional districts, the General Assembly should either use its time to enact a constitutional plan as it did with the six Congressional Districts or promote to the front of the line the real issue animating this litigation – the present efficacy of *Fischer II/Jensen*. Instead, we are mired in prematurely litigating the yet-to-be-decided SD-13 issue.

Conclusion

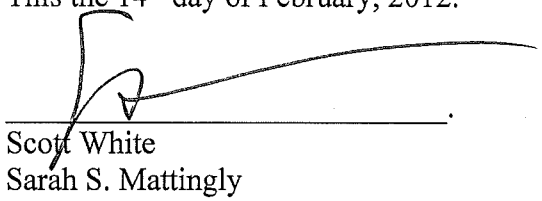
The issue that needs to be resolved via this appeal is the present efficacy of this Court's well-settled application of Section 33. The attempt by the LRC to somehow avoid that determination by turning the Court's attention instead to a *de facto* request for an advisory opinion by improvidently seeking a review of the district renumbering issue cannot be allowed.

Imagine, should this Court dissolve the injunction by holding that the Circuit Court abused its discretion in finding that the SD-13 issue satisfied the elements of CR 65 relief *and* permitted the election cycle to proceed on what are now unconstitutional districts, then the resolution of the Section 33 issue is no more than an advisory opinion. That is both improper, and a dangerous road to open.

Fischer II is no more authority for this type of "temporary" relief than it is for saying the permissible population variance is +/-10%. *Fischer II* permitted the use of the old districts because of the unique timing of its rendering. That circumstance is absent here.

With respect, Senator Stein requests that the CR 65.07 (65.09) Motion be denied.

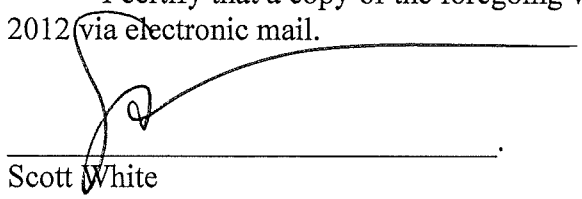
This the 14th day of February, 2012.



Scott White
Sarah S. Mattingly
Morgan & Pottinger, P.S.C.
133 W. Short Street
Lexington, KY 40507
859.226-5288 (DIRECT)
859.255-2038 (FAX)
tsw@m-p.net

Certificate of Service

I certify that a copy of the foregoing was served on all counsel of Record on February 14, 2012 via electronic mail.



Scott White