Supreme Court of Kentucky

CASE NO. 2012-SC-91-T

ON APPEAL FROM
COURT OF APPEALS
2012-CA-266
FRANKLIN CIRCUIT COURT, DIV. I
CIVIL ACTION NO. 12-CI-00109

LEGISLATIVE RESEARCH COMMISSION — MOVANT

v.

JOSEPH M. FISCHER, et al. — RESPONDENTS

RESPONDENTS'/PLAINTIFFS' RESPONSE TO LRC MOTION FOR INTERLOCUTORY RELIEF PURSUANT TO CR 65.07

I. INTRODUCTION

The Respondents (Plaintiffs below) oppose the LRC Motion for Interlocutory Relief (the "LRC Motion") on multiple grounds. The Franklin Circuit Court did not abuse its discretion. Because the LRC is not "a party adversely affected" by the temporary injunction issued by the Franklin Circuit Court, the Motion seeks relief that the LRC has no standing to request.

Beyond that, the relief sought by the LRC, apparently on behalf of the Secretary of State and the Board of elections, would effectively deny the constitutional right of the Plaintiffs and all citizens of the Commonwealth to have elections using districts that comply with the clear mandate of this Court and the Kentucky Constitution. To support its motion, the LRC relies on a so-called "federal maximum population deviation of 10%", one that is found nowhere in federal law, while suggesting a conflict between federal Equal Protection principles and this Court's settled rule for constitutional redistricting that simply does not exist.

This Court should deny the LRC Motion pursuant to CR 65.07, for all the reasons outlined above and explained in detail below.

II. FACTUAL AND LEGAL HISTORY OF THE DISPUTE

Section 33 of the Kentucky Constitution ("Section 33") provides:

> The first General Assembly after the adoption of this Constitution shall divide the State into thirty-eight Senatorial Districts, and *one hundred Representative Districts, as nearly equal in population as may be without dividing any county, except where a county may include more than one district,* which districts shall constitute the Senatorial and Representative Districts for ten years. Not more than two counties shall be joined together to form a Representative District: Provided, In doing so *the principle requiring every district to be as nearly equal in population as may be shall not be violated.* At the expiration of that time, the General Assembly shall then, *and every ten years thereafter, redistrict the State according to this rule*, and for the purposes expressed in this section. If, in making said districts, inequality of population should be unavoidable, any advantage resulting therefrom shall be given to districts having the largest territory. *No part of a county shall be added to another county to make a district, and the counties forming a district shall be contiguous.* (Emphasis added).

In 1994 the Supreme Court interpreted and applied Section 33 of the Kentucky Constitution as follows:

> There is no fundamental impediment to a full accommodation of the dual mandates of Section 33 of the Constitution of Kentucky. Within reasonable limits, federal law is no barrier and our decisions in *Ragland* and *Stiglitz* do not command perfect population equality at the total expense of county integrity. *Population equality under Section 33 may be satisfied by a variation which does not exceed −5% to +5% from an ideal legislative district.* By simple arithmetic, and using the ideal district population figures relied upon by the General Assembly for the 1991 Reapportionment Act, this would mean that no House district could have fewer than 35,010 citizens nor more than 38,696 citizens, and no Senate district could have fewer than 92,132 citizens nor more than 101,830 citizens. *Using these parameters, the General Assembly can formulate a plan which reduces to the minimum the number of counties which must be divided between legislative districts.* One such plan was placed in evidence and there may be others which are equal or superior to it. *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.*

Fischer v. State Bd. of Elections, 879 S.W.2d 475, 479 (Ky. 1994) ("*Fischer II*") (emphasis added). *Fischer II* thus established a clear, certain, and easy-to-apply rule for simultaneously honoring the corresponding constitutional mandates of county integrity and population equality. *See* OAG 96-1, 1996 WL 73927 (Ky.A.G.), *4-5 (explaining methodology of redistricting post-*Fischer II* and opining that plans that divide the minimum number of counties and keep population of each district within 5% of ideal are constitutional).

Importantly, as the *Fischer II* Court made clear, the rule laid down in that case is not a function of federal law. It is a product of Section 33 of the Kentucky Constitution. "Federal law is no barrier," the Court said, but it does not provide the authority for the obligation of the General Assembly to respect both relative equality of population and integrity of counties. Population equality is an organic element of Section 33 of the Kentucky Constitution. Redistricting requires "one hundred Representative districts, as nearly equal in population as may be without dividing any county..." And for more than 100 years, Section 33 has been interpreted to require "substantial equality of representation for all citizens of Kentucky." *Fischer II*, 879 S.W. 2d at 477. This understanding developed decades before federal one person, one vote principles.

One year after *Fischer II*, the Court reiterated the central holding of that case when it decided *State Board of Elections v. Fischer*, 910 S.W. 2d 245 (Ky. 1995) (*Fischer III*). Two years after that, the Court again reiterated the same two-part test for constitutional redistricting, without change. *Jensen v. State Board of Elections*, 959 S.W. 2d 771, 774 (Ky. 1997) ("*Fischer II* then held that after satisfying the requirement of approximate equality of population, the next priority of a reapportionment plan is the preservation of county integrity, which is accomplished by dividing the fewest possible number of counties."). A plan that satisfies both elements of the

Fischer II test is constitutional under Section 33. A plan that fails either element of the test is unconstitutional. *Jensen,* 959 S.W.2d at 774-75.

The two-part test for constitutionality under Section 33 consistently applied by this Court provides certainty, by allowing the General Assembly and the public at large to know with mathematical precision the fewest possible number of counties that must be divided. At the same time, it gives the General Assembly flexibility to adjust population within well-defined parameters. Almost eighteen years after the rule was announced there is still no "fundamental impediment to a full accommodation of the dual mandates of Section 33 of the Constitution of Kentucky." Indeed, the record below is replete with redistricting plans introduced in the 2012 session of the Kentucky General Assembly that satisfy both of the constitution's mandates by dividing only 24 counties, the minimum number necessary to keep Kentucky House of Representative districts within a population variation which does not exceed −5% to +5% from the 43,394 population of the "ideal" House district. *See, e.g.*, HB 248 (Plaintiffs' Exhibit 7 below), HB 284 (Plaintiffs' Exhibit 3), HB 292 (Plaintiffs' Exhibit 4), HB 318 (Plaintiffs' Exhibit 5), and HB 370 (Plaintiffs' Exhibit 6)[1]. HB 292, for example, divides only 24 counties, while limiting the overall population variation to 6.93% compared to the 10.00% of HB 1. As well, HB 292 divides only 7 precincts, while HB 1 divides 246 precincts.

There was never any mystery or dispute during the 2012 redistricting process that 24 counties is the fewest possible number of counties to be divided for purposes of Section 33 of the Constitution. HB 1 became law because the Kentucky General Assembly was simply not willing to carry out its constitutional redistricting duty in conformity with the Constitution, as interpreted

[1] Copies of these constitutional House redistricting plans are available on the CD containing Plaintiffs' Exhibits below that is filed with this motion.

and applied by this Court. Yet there is no dispute that because 28 counties are split, HB 1 fails to divide the fewest possible number of counties for purposes of House of Representatives districts. As well, there is no dispute that HB 1 includes population variations that exceed plus or minus 5%. House District 24 varies by 5.38%, while Senate District 8 varies by 5.52%. The court below so found, and no party challenges those findings.

III. PROCEDURAL HISTORY

Plaintiffs brought this action in Franklin Circuit Court asserting various state and federal claims as to HB 1.[2] After two hearings and the development of a largely undisputed factual record, the Franklin Circuit Court issued the Injunction and Judgment. In Conclusion No. 5 at pp. 15-16 of the Injunction and Judgment, the Circuit Court issued "a final and appealable judgment" on the claim set forth in Count I of Plaintiffs' Amended Verified Complaint 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." The Franklin Circuit Court reserved ruling on Plaintiffs' other claims, including those for violations of the contiguous counties clause of Section 33, and the federal and state equal protection and freedom of association.[3]

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[2] Plaintiffs' claims are: Count I – Violation of Section 33 of Ky. Const.; Count II – Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Sections 2, 3, and 6 of the Kentucky Constitution; Count III – Violation of freedom of association guaranteed by the First and Fourteenth Amendments to the United States Constitution and Section 1 of the Kentucky Constitution; Count IV – Violation of U.S.C. § 1983; and Count VI – Declaratory and Injunctive Relief.

[3] These remaining claims are similar to those in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) *aff'd*, 542 U.S. 947, 124 S. Ct. 2806, 159 L. Ed. 2d 831 (2004) (despite overall population deviation of less than 10%, Georgia state legislative redistricting plans violated equal protection because they were not an attempt to effectuate a rational state policy but were systematically and intentionally created (1) to allow rural southern Georgia and inner-city Atlanta to maintain their legislative influence even as their rate of population growth lags behind that of the rest of the state; and (2) to protect Democratic incumbents).

The Franklin Circuit Court then turned to the question of an appropriate remedy, stating as follows in Conclusion of Law No. 10 at p. 11 of the Injunction and Judgment:

> 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[s], or require the legislature to redraw those lines (and extend all necessary deadlines to do so).

The Franklin Circuit Court answered this question in Conclusion No. 2, which orders that the 2012 elections for the House and Senate be conducted with the "old" legislative district boundaries drawn in 2002 and in effect prior to HB 1.

IV. THE LRC LACKS STANDING TO SEEK INTERLOCUTORY RELIEF FROM THE TEMPORARY INJUNCTION UNDER CR 65.07.

The LRC lacks standing to seek interlocutory relief from the temporary injunction granted by the Franklin Circuit Court because it is not a party adversely affected by the injunction. CR 65.07(1) is clear:

> When a Circuit Court by interlocutory order has granted, denied, modified, or dissolved a temporary injunction, *a party adversely affected* may within 20 days after the entry thereof move the Court of Appeals for relief from such order. (Emphasis added).

The LRC Motion itself makes plain that the LRC is not such an adversely affected party. The LRC concedes that the temporary injunction by the Franklin Circuit Court enjoined other state officials, not the LRC or any of its officers, employees, agents. For that matter, the temporary injunction did not even enjoin any member of the legislative branch of the government, for which the LRC may be considered a proxy. The LRC concedes that the enjoined state election officials are the Secretary of State and the Board of Elections. (LRC Motion at 7). Each of the state election officials adversely affected by the temporary injunction, the Secretary of State and

the Board of Elections, was a party defendant below. Each is represented by counsel in these proceedings, and neither has sought relief pursuant to CR 65.07, or filed any appeal.

Further, the LRC admits that it intervened in the action below on a limited basis. "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". (LRC Motion at 6). The "limited appearance" that the LRC entered makes clear that the LRC was a party below only for the purpose of defending the constitutionality of HB 1. "The Legislative Research Commission, without waiving immunity in this or any pending or future case, hereby enters its appearance *for the limited purpose of asserting any interest that the legislative branch may have in this declaratory judgment action, under KRS 418.075(4)*". (LRC Motion to Intervene, filed in Franklin Circuit Court February 2, 2012, at 1 (emphasis added)).

In the proceedings below, the LRC argued below that "House Bill 1 does not 'clearly offend' Section 33 nor any other constitutional limitations". (LRC Memorandum of Law, Franklin Circuit Court, February 3, 2012, at 8). And it concluded thus: "For the foregoing reasons, the Court should enter final judgment dismissing, with prejudice, all the claims of the Plaintiffs and Intervening Plaintiffs, and declaring the rights of the parties by declaring that House Bill 1 is constitutional." (*Id.*). True to is limited appearance, the LRC's Memorandum of Law to the Circuit Court was limited to a defense of the constitutionality of the law.

The Secretary of State and the Board of Elections, on the other hand, vigorously opposed the motion for a temporary injunction in the Circuit Court. In fact, leaving the defense of the constitutionality first to the Speaker of the House (at the January 30, 2012 hearing) and then to the LRC (following the entry of the restraining order on January 31, 2012), the Secretary and the Board of Elections expressly took no position on the constitutionality of HB 1. Rather, they

argued that no equitable relief should be granted, and sought to defeat the motion. Consequently, it is the Secretary of State and the Board of Elections who are the parties below adversely affected by the temporary injunction. For CR 65.07 purposes, it is only these parties -- the "enjoined state officials" in the language of the LRC Motion -- who have standing to seek relief under the rule.

The proposition that the LRC, as a stand-in for the legislative branch, cannot also stand in the shoes of the Secretary of State or Board of Elections seems so straightforward that citation to authority would be unnecessary. The Secretary of State is a constitutional officer, part of the Executive branch of government. KRS 14.010. The Board of Elections is an administrative agency, KRS 117.015, with the Secretary as its Chairman, again effectively part of the executive branch. The LRC nowhere explains by what right or authority it seeks relief pursuant to CR 65.07 for the possible grievances of the elected Secretary of State or an administrative executive branch agency that she chairs.

In similar circumstances, courts find a lack of standing *See, e.g., Déjà vu of Cincinnati, LLC v. Union Tp. Bd. of Trustees*, 411 F.3d 777, 798-99 (6th Cir. 2005) (Attorney General of Ohio could not seek reversal of an injunction when the enjoined parties did not move to dissolve the injunction because Attorney General's right to seek appellate review "is limited by his status as an intervenor"); *City of Chicago v. Chicago Rapid Transit Co.*, 284 U.S. 577 (1931) (city of Chicago could not appeal an injunction where the parties that were enjoined –the Illinois Commerce Commission and the state Attorney General – had not appealed); *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Atty for Western Div. of Michigan*, 369 F.3d 960, 963-63 (6th Cir. 2004) (state could not appeal injunction because it had not joined in the United States' motion for preliminary injunction below).

The Circuit Court did not issue an injunction that adversely affects the LRC or the legislative branch in any way. When the Circuit Court issued its declaratory judgment, LRC filed its notice of appeal from that judgment, which the LRC moved to transfer to this Court. The LRC's motion to transfer that appeal is properly before this Court. Only the Secretary of State and the Board of Elections have standing to move for relief under CR 65.07, and so the LRC motion should be denied.

V. THE LRC CANNOT MEET THE ABUSE OF DISCRETION STANDARD OF REVIEW.

A party requesting an appellate court to dissolve an injunction under CR 65.07 must show that the trial court abused its discretion. In *Maupin v. Stansbury*, this Court stated that "injunctive relief is basically addressed to the sound discretion of the trial court. Unless a trial court has abused that discretion, this Court has no power to set aside the order below." 575 S.W.2d 695, 697-98 (Ky. 1978); *see also Kentucky High School Athletic Ass'n v. Edwards*, 256 S.W.3d 1, 3 (Ky. 2008) (citing *National Collegiate Athletic Ass'n v. Lasege*, 53 S.W.3d 77 (Ky. 2001) (holding that interlocutory review by the Supreme Court is appropriate in student athlete eligibility matters where the trial court abuses its discretion); *Colston Investment Co. v. Home Supply Co.*, 74 S.W.3d 759, 768 (Ky. App. 2001); and *Bd. of Regents of Murray State University v. Curris*, 620 S.W.2d 322 (Ky. App. 1981). In its most recent discussion of the abuse of discretion standard, this Court has made the stringency of the standard clear:

> And as we have noted in the past, "[t]he test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."

Miller v. Eldridge, 146 S.W.3d 909, 914 (Ky. 2004), citing *Goodyear Tire and Rubber Co. v. Thompson,* Ky., 11 S.W.3d 575, 581 (Ky. 2000) .

This is a standard the LRC cannot meet, for the Circuit Court's temporary injunction was based on undisputed facts, a clearly correct application of controlling authority, and a proper consideration of the equities. In the proceedings below, Defendants the Secretary of State and Board of Elections took the position that the Franklin Circuit Court should "prescribe a framework that will permit the 2012 primary election for state Senators and State Representatives to proceed toward a May 22, 2012 primary." (*See* Defendants' Supplemental Response in Opposition to Injunction Relief, Franklin Circuit Court, February 3, 2012 at 2). In that regard, the Secretary argued on February 3, 2012 that the Circuit Court "was only days away from possibly impairing the entire primary election process...." *Id.* And the Secretary's proof below was that "the May 22 primary election may proceed if the candidate filing deadline and drawing for ballot position occur no later than Tuesday, February 21, 2012". (Affidavit of Mary Sue Helm, paragraph 8).

Perhaps more problematic, drawing new district lines involves creating new precincts. Precinct boundaries may not cross state senatorial or House districts. KRS 117.055. Yet HB 1 divides 246 precincts (Political Subdivision Split Report for HB 1 prepared by LRC, part of Exhibit 1 below).[4] The Secretary and Board of Elections offered the affidavit of the Franklin County Clerk establishing that "[i]f the legislative districts ultimately adopted split any precincts, many counties will likely require substantial time to re-draw precinct boundaries to comply with KRS 117.055 (HB 1 permitted 45 days to complete this process)". (Affidavit of Guy Zeigler, paragraph 6). HB 1was enacted

[4] For comparison, one of the facially constitutional plans in the record, HB 292, only divides 7 precincts.

January 20, 2012 so that as of February 17, 2012 only 19 of the 45 days needed to complete the precinct division process remain.[5]

Well aware of all of this, the Franklin Circuit Court did exactly what the Secretary and the Board of Elections asked. It established a "framework that will enable these Defendants and the county clerks to proceed and the 2012 General Assembly elections to be held during the pendency of this lawsuit." (Defendants' Supplemental Response, at 6). That framework requires that no new precincts be created, because it uses existing districts. That framework changes no deadlines beyond the short delay in the filing deadline that expired February 10, 2012. And with its Supplemental Order issued February 14, 2012, the Circuit Court "noted that it finds nothing in the temporary injunction or declaratory relief that restrains or enjoins the Secretary from taking all necessary and appropriate steps to move forward with the primary election set for May 22, 2012 consistent with the temporary injunction." (Supplemental Order of Franklin Circuit Court, at 1). After a motion by the Secretary, the Circuit Court specifically clarified his Injunction and Judgment, noting that the state election officials adversely affected by the injunction may conduct any ballot position drawing called for by statute, may certify candidates as required by statute, and "may take any other necessary or appropriate action to ensure that the May, 2010 primary election is conducted according to schedule." *Id.*

[5] The day after the Injunction and Judgment was issued, the state Board of Elections delivered a memorandum to each of the county clerks, advising them of the injunction. In the memorandum, the Board noted that it had previously directed the county clerks to deliver their precinct establishment orders to the Board not later than February 9, 2012. Evidently, this was the judgment of the Board of the schedule needed to meet the deadline outlined in the Zeigler affidavit. A copy of the Board of Elections memo is attached to this Response as Exhibit A.

Given the care with which the Injunction and Judgment was drafted, the undisputed facts on which it was based, the clarity of the controlling legal authority, and the accommodation of the injunction to the concerns of the adversely affected state election officials, it is impossible to conclude that the LRC – a party that intervened for a limited purpose and that is not adversely affected by the injunction or enjoined in any respect - could satisfy the stringent standard for abuse of discretion articulated by this Court in *Miller*.

VI. LRC'S MOTION MISPERCEIVES THE BASIS FOR THE INJUNCTION AND IGNORES THE COUNTY INTEGRITY ELEMENT.

Ignoring the county integrity aspect of the Circuit Court's holding, the LRC declares that "the Franklin Circuit Court entered a final judgment declaring House Bill 1 unconstitutional for those violations of the 5% rule and made the judgment appealable under CR 54.02". (LRC Motion at 8). In fact, the Circuit Court specifically concluded that HB 1 was facially unconstitutional not only because the law "fails to comply with the 'maximum constitutional population variation as set forth in *Fischer*", (Conclusion of Law No. 3) but also because it "fails to comply with the mandate of *Fischer II* 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." (Conclusion of Law No. 4) (Injunction and Judgment at 8).

The LRC goes to great lengths to diminish the importance of the conclusion that HB 1 is facially unconstitutional because it divides more counties than necessary. Worse, the LRC suggests without basis that the injunction it seeks to dissolve was issued solely to protect the rights of the Intervening Plaintiffs. According to LRC, "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." (LRC Motion at 9). Further, the LRC suggests to this Court that the Circuit Court focused "exclusively" on the issue of Senate district 13, and issued its injunction without concern or regard for the rights of the Plaintiffs below. (*Id.*). According to the LRC, in deciding that the equities favored granting the Plaintiffs and Intervening Plaintiffs a temporary injunction, the Circuit Court's finding that HB 1 violated both the county integrity element and the plus or minus 5% element of the Constitution was irrelevant.

In fact, the Circuit Court specifically found that the remedy of an injunction was appropriate for both Plaintiffs and Intervening Plaintiffs. "Having found a violation of the rights of Plaintiffs and Intervening Plaintiffs, the Court must address the question of remedies." (Injunction and Judgment at 10). After noting the uncontested evidence that HB 1 "itself violates 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 noted further evidence that thousands of people would be "assigned to senators who do not reside in the districts they represent...." (Injunction and Judgment at 13).

It was in light of having found a violation of the rights of *both* the Plaintiffs and the Intervening Plaintiffs, *a violation that included the division of too many counties*, and in light of uncontested evidence that HB 1 violates the constitution because it exceeds the maximum population variation in *both* the House and the Senate, that the Circuit Court issued its injunction. "In these circumstances, the public interest demands that the Court grant injunctive relief to maintain the status quo pending a full adjudication of the merits." (*Id.*)

LRC also fails to acknowledge that the Circuit Court found that "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'". (Injunction and Judgment, Finding of Fact No. 5, at 6). The Circuit Court therefore expressly reserved ruling on this element of Count I of the Amended Verified Complaint pending further pleading, discovery and briefing. (Injunction and Judgment, Conclusion No. 6 at 16).[6]

Thus, it is peculiar to say the least that the LRC could suggest that the injunction was based solely on concern for the rights of the Intervening Plaintiffs, or that it was focused exclusively on the Senate districts.

The LRC statements are no oversight. LRC hopes to raise a substantial question on its motion regarding the merits of the Intervening Plaintiffs claims, but is flummoxed on the Plaintiffs' claims. The Circuit Court plainly did not abuse its discretion in issuing the injunction, for the facts are the facts, and the law is clear. In *Fischer II*, this Court held that population equality and county integrity are the dual mandates of Section 33 and that the "language is uncomplicated and leads immediately to the conclusion that as between the competing concepts of population equality and county integrity, the latter is of at least equal importance." *Fischer II*,

[6] The record below shows that House District 80 joins Casey County with Rockcastle County through the use of a subterfuge referred to in the Verified Complaint as the Pulaski Strip. The record demonstrates that at its only point of contact with Rockcastle County, that strip comes down to a small speck of Pulaski County, one that contains only five voters. *See* Plaintiffs Exhibits 8 and 10, the LRC map of the Pulaski County portion of District 80 and the affidavit of Mark Vaught, attached to this Response as Exhibits B and C, respectively. And District 89 connects McCreary and Jackson counties with a zigzagging stretch through the heart of Laurel County. *See* Plaintiffs Exhibit 9, the LRC map of the Laurel County portion of District 89, attached to this Response as Exhibit D. The Circuit Court found that the Plaintiffs evidence raised a substantial question concerning the constitutionality of HB 1 on this ground as well, another reason to maintain the status quo. In addition, the Plaintiffs below challenge HB 1 for violation of federal Equal Protection under the 14th Amendment and freedom of association under the 1st Amendment, claims over which the Circuit Court retains jurisdiction.

879 S.W 2d at 477. The Court noted that at least since *Ragland v Anderson*, 125 Ky. 141, 100 S.W. 865 (1907), the Constitution of the Commonwealth "has been understood to require substantial equality of representation of all citizens of Kentucky...." *Id.* The state constitutional standard was fashioned not to superimpose federal law upon our constitution but to establish an independent state standard that has definite, non-rolling parameters, which are necessary to mathematically determine the "fewest number of counties" that must be divided, while also defining our state constitutional mandate that population among the districts be "as nearly equal in population as may be". This Court's interpretation of Section 33, articulated in *Fischer II*, reiterated in *Fischer III* and reaffirmed in *Jensen v. Kentucky State Board of Elections,* 959 S.W. 2d 771 (1997), sensibly provides an absolute standard, one that can always be reconciled with federal law that considers overall deviations of less than 10%, when justified by the consistent application of a rational state policy such as the preservation of county integrity, to be *de minimis*.

And the record below proves that there is no tension with federal law, and there are no "unintended consequences" of the *Fischer II* holding insofar as compliance with population equality is concerned. Quite the contrary, *Fischer II* provides a clear rule for simultaneously honoring the corresponding constitutional mandates of county integrity and population equality, while complying in every respect with federal standards. At every step of the legislative process leading up to HB 1's passage, the General Assembly was aware of this Court's teachings concerning Section 33, and of the clear and certain two part test for constitutional muster laid down in *Fischer II.* With HB 1, the General Assembly simply chose to disregard this consistent line of cases, just as the LRC chooses to disregard those aspects of the Circuit Court's Injunction and Judgment that make clear that the injunction was issued to protect not only the Intervening

Plaintiffs but also the Plaintiffs. *Fischer II, Fischer III* and *Jensen* represent an insurmountable barrier to the legislative branch's preference for passing an unconstitutional law and then holding elections with it nonetheless. The record below and the findings of fact, conclusions of law and injunction itself represent the same barrier to the LRC's CR 65.07 motion.

The legislative record is actually remarkable on this point. In prior redistricting efforts, the General Assembly has sought guidance from the Attorney General. In 1996, Kentucky's Attorney General was asked for an opinion regarding the constitutionality of a redistricting bill. After analyzing the Supreme Court interpretations of Section 33 in *Fischer II, Fischer III* and earlier cases, Attorney General Chandler concluded that Section 33 "requires that legislative districts be redrawn by dividing the smallest possible number of counties while keeping population variation within plus-or-minus 5% of an ideal district." OAG 96-1, at *3.

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

Once that number was determined, the Attorney General simply looked at the map provided to it by the LRC, along with the text of the bill. (OAG 96-1, at *5). By examining the

map, the Attorney General confirmed that the plan divided 22 counties -- the fewest number possible. And because no districts exceeded the ideal district by more than 5%, the plan was constitutional. This is the same analysis announced by this court in *Fischer II* and followed by this Court in *Jensen*.

Here, the same mathematical precision outlined by the Attorney General and mandated by this Court lead to the indisputable conclusion that 24 counties is the fewest possible that may be divided. The Circuit Court so found, after the LRC refused to stipulate to this obvious fact. (Injunction and Judgment, at page 8, Conclusion of Law No. 4). Anyone interested need only look at the LRC map for HB 1 to conclude that HB 1 divides 28 counties. Anyone interested can look to the Political Subdivision Report prepared by LRC, and entered into the record below as part of Plaintiffs' Exhibit 1. That report confirms that HB 1 divides 28 counties. The Political Subdivision Report for HB 248 (Pl.'s Exhibit 7 below), for HB 284 (Pl.'s Exhibit 3 below), for HB 292 (Pl.'s Exhibit 4 below), for HB 318 (Pl.'s Exhibit 5 below) and for HB 370 (Pl.'s Exhibit 6 below) and for the floor amendment show that each of those bills divides 24 counties, and that each, unlike HB 1, includes population deviations within plus or minus 5%.

One is left to wonder why the leadership of the General Assembly did not simply look at the LRC maps, Population Summary Report, and the Political Subdivision Split Report, before it enacted HB 1. There was extensive floor debate in the General Assembly, and opponents of HB 1 read directly from the opinion in *Fischer II*, warning that the bill was facially unconstitutional. During committee hearings on the bill on January 11, 2012, Speaker Stumbo declared as follows in connection with a discussion about the *Fischer II* test of constitutional muster:

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

The Speaker's statement can be found on the KET website linked on the LRC website. http://www.ket.org/cgi-bin/cheetah/watch_video.pl?nola=WGAOS+013020&altdir=&template. The Court may take judicial notice of it, along with Speaker Stumbo's disregard for settled constitutional law. Well aware of the directive from this Court, the Speaker was unmoved.

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

> 81:13 – "I would submit to you that the word possible means what you can get passed and what you can get done in light of all the circumstances."
>
> 81:38 – "My interpretation of that is possible means what you can pass in light of the spirit of the document. What you can pass that makes sense in the modern world. What you can pass through this body and the Senate and get signed into law."

The Speaker's statement can be found on KET website linked on the LRC website. http://www.ket.org/cgi-bin/cheetah/watch_video.pl?nola=WGAOS+013028&altdir=&template. The Court may take judicial notice of it.

Despite the clarity of this Court in a series of cases between 1994 and 1997 that are the controlling authority in Kentucky, the LRC insisted below that the "fewest number possible" of divided counties simply means the fewest number that a majority decide suits their political purposes. (*See* LRC Memo filed in Franklin Circuit Court on February 3, 2012, at 4). Effectively, the LRC argued below that the "directive from the court", in the Speaker's words, was just "to split as few counties as probably are practical".

And despite an unmistakable bright line test of constitutional muster --"maximum constitutional population variation of plus-or-minus 5%" -- the LRC insisted below that districts

with population variations of 5.38% and 5.52% are constitutional because these numbers are "only slightly" over 5%, again for political purposes. Of course, in *Jensen* this Court expressly considered and rejected the same argument. 959 S.W. 2d at 774.

Now that the Franklin Circuit Court has rejected the LRC's view of the law, the LRC seeks nonetheless via CR 65.07 to have the General Assembly rewarded for its willful disregard for the Constitution. It seeks extraordinary relief, under the abuse of discretion standard, by asking this Court to dissolve the Circuit Court's injunction and order that the enjoined state officials -- who took no position on the merits of the constitutional challenge but who got the framework they asked for, one that will permit the 2012 primary election for state Senators and State Representatives to proceed toward a May 22, 2012 primary -- be able to go forward with elections using districts that have been declared facially unconstitutional. This Court need not and ought not to endorse a process built on such political expediency, and on such contempt both for this Court's authoritative interpretation of Section 33 and for the constitutional rights of 4.3 million Kentuckians.

VII. THE INJUNCTION AND JUDGMENT CORRECTLY INVALIDATES HB 1 AND BALANCES THE EQUITIES AND NEED NOT BE DISTURBED.

In the proceedings below, after concluding that HB 1 was facially unconstitutional, and that substantial questions concerning constitutionality had been raised on other claims, the Circuit Court was effectively presented with four options. One: Remand the matter to the General Assembly with directions to enact a constitutional plan in time for elections. Two: Impose a constitutional plan itself, either by selecting from the many constitutional plans in the record or creating a new plan of its own, in time for elections. Three: Order future elections, including the 2012 elections, to be conducted using the existing districts enacted in 2002, while

remanding the matter to the General Assembly to allow it to enact a constitutional plan on its own schedule. Four: Permit the 2012 elections to be conducted using the HB 1 districts the court had just adjudicated to be unconstitutional.

The fourth option is the course urged by LRC, and the Circuit Court wisely chose to reject that approach. And while the remedy the Circuit Court chose is not the remedy the Plaintiffs requested, it was plainly within the court's authority.

Further, despite the LRC's suggestion to the contrary, Plaintiffs have never sought "to bring the elections process to a complete halt, on the basis of their challenge to the constitutionality of the House districts in House Bill 1". (LRC Motion at 2). Quite the opposite, Plaintiffs have sought the assistance of the Kentucky Court of Justice to see to it that the elections scheduled for May 22, 2012 and November 6, 2012 go forward on schedule. The LRC Motion to dissolve the injunction would guarantee that the citizens of Kentucky are forced to hold elections using districts found to be unconstitutional. To avoid that, Plaintiffs specifically asked the court to remand the matter to the General Assembly with instructions to enact a law that satisfies constitutional mandates. If the General Assembly fails to do its constitutional duty, Plaintiffs asked the court to take up the matter, and draw constitutional districts. (Amended Verified Complaint, paragraph 73).

Any suggestion by the LRC that it is somehow a violation of separation of powers for the judiciary to remand to the legislature for enactment of a new plan, with a deadline to accomplish that, after which the court will adopt a constitutional plan on behalf of the citizens of the state, is completely meritless. From the earliest days of the United States Supreme Court's involvement in state legislative redistricting, that court has encouraged courts to allow state legislatures the opportunity to enact constitutional redistricting laws, but to see to it that if they refuse,

constitutional elections will proceed nonetheless. In *Scott v. Germano*, 381 U.S. 407 (1965), the Supreme Court of the United States explained:

> The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.

381 U.S. at 409. *Accord*, *Growe v. Emison*, 507 U.S. 25, 34 (1993) ("Today we renew our adherence to the principles expressed *Germano*...."); *Stephenson v. Bartlett*, 355 N.C. 354, 362, 562 S.E.2d 377, 384 (2002) (per curiam), *quoting Scott v. Germano,* 381 U.S. 407, 409, 85 S.Ct. 1525, 14 L.Ed.2d 477, 478 (1965) ("[I]t is well within the power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan."); *Larios v. Cox* , 330 F. Supp. 2d 1320, 1357 (N.D. Ga. 2004), *aff'd, Cox v. Larios*, 124 S.Ct. 2806 (2004) ("We retain jurisdiction of this action, however, in order to permit the Georgia General Assembly to submit to the court, by no later than *March 1, 2004,* enacted plans for reapportionment of the state House and Senate that are acceptable to the legislature and consistent with this opinion. [*Larios* was decided February 10, 2004.] We urge the General Assembly to use this opportunity to adopt new plans.").

Thus, it is clear that when a state legislature cannot or will not do its duty, the courts can step in. *Reynolds,* 377 U.S. at 585–87, 84 S.Ct. at 1393–94 (approving the district court's decision to first give legislature opportunity to adopt plan, and then, when legislature failed to act effectively in remedying constitutional deficiencies, to implement interim court-ordered plan). As the Supreme Court observed, "once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds*, 377 U.S. at 585, 84 S.Ct. at 1393. In this case, HB 1 has been adjudicated to be

unconstitutional, and the Circuit Court correctly enjoined any further elections under the invalid plan.

This approach is not unusual.[7] But neither is the Circuit Court's decision to enjoin elections using the plan just adjudicated to be unconstitutional, and to order the upcoming elections be conducted with the existing districts unusual. As the LRC itself notes, this has been the case in Kentucky, in *Ragland* and in *Stiglitz*. Other state supreme courts order the same remedy, most recently the Pennsylvania Supreme Court with its January, 2012 decision invalidating the redistricting plan for that state, remanding it to the commission with instructions to prepare a constitutional plan, and ordering that the 2012 elections would go forward with the existing districts originally enacted in 2001. *Holt v. 2011 Legislative Reapportionment Com'n*, 7

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[7] *See, e.g., Mississippi State Conference of N.A.A.C.P. v. Barbour*, No. 3:11-cv-00159 (S.D. Miss. May 16, 2011), summarily aff'd, 132 S. Ct. 542 (2011) (remanded to legislature with instructions that court would draw the state maps if the legislature failed to do so); *Missouri ex rel. Teichman v. Carnahan*, No. SC92237 (Mo. Jan. 17, 2012) (striking down state redistricting because plan split too many counties and remanded to the Governor to appoint new commission to draw Senate lines); *Twin Falls County v. Idaho Comm'n on Redistricting*, No. 39373-2011 (Idaho Jan. 16, 2012) (striking down the state redistricting plan because plan split too many counties and remanded to the commission to redraw maps); *In re Reapportionment of the Colorado General Assembly*, No. 2011SA282 (Colo. Nov. 15, 2011) (striking down state redistricting plan because plan split too many counties and remanded to the commission to state districts) (Supreme Court later approved redrawn districts); *Solomon v. Abercrombie*, No. SCPW-11-0000732 (Haw. Jan. 6, 2012) (ordered state commission to draft a new plan); *Jefferson County Comm'n v. Tennant*, No. 2:11-cv-00989 (S.D. W.Va. Jan. 4, 2012) (trial court gave legislature until January 17 to draw constitutional congressional maps or the court would draw the maps); *Desena v. State of Maine*, No. 1:11-cv-00117 (D. Me. Nov. 1, 2011) (remanding congressional redistricting to the legislature because there was time to draw constitutional maps); *In re 2011 Redistricting Cases* (was *Riley v. Alaska Redistricting Board*), No. 4FA-11-2209CI (Alaska Super. Ct., 4th Dist. Feb. 3, 2012) (remanding to redistricting board to redraw the state districts); *In re Petition of Reapportionment Comm'n,* No. SC 18907 (Conn. Feb. 10, 2012) (approving maps drawn by special master appointed by the Supreme Court); *Hippert v. Ritchie*, No. A110152 (Minn. June 1, 2011) (Minnesota Supreme Court appointed five-judge redistricting panel to draw districts that will take affect if legislature does not enact constitutional plan) (panel is currently drawing maps); *Maestas v. Hall*, No. 33, 386 (N.M. Feb. 10, 2012) (New Mexico remanded to trial court with instructions regarding drawing state legislative districts); *Smith v. Hosemann*, No. 3:01-cv-00855 (S.D. Miss. Dec. 30, 2011) (court adopted new congressional redistricting plan since legislature had not acted); *Moreno v. Gessler*, No. 11cv3461 (Denver Dist. Ct. Nov. 10, 2011) (Colorado Supreme Court affirmed trial court's drawing of congressional maps on December 5, 2011); Perry v. Perez, 565 U.S. ___ (2012), Nos. 11-713, 11-714, and 11-715 (Supreme Court recognizing the duty of the district court to redistrict the state while legislature-approved plan was awaiting preclearance under the Voting Rights Act).

MM 2012, 2012 WL 360584 (Pa. Jan. 25, 2012) (upon finding "new" districts unconstitutional the court ordered 2001 legislative reapportionment plan to remain in effect until a constitutional plan is approved).

Notably, the Pennsylvania Supreme Court's decision was challenged in federal court, on the grounds that holding elections using old districts after a new census has been completed was a denial of equal protection. In an action seeking to enjoin the use of the old districts for the 2012 election, the United States District Court the Eastern District of Pennsylvania rejected that argument -- the same argument LRC offers to this Court. *Pileggi v. Aichele*, CIV.A. 12-0588, 2012 WL 398784 (E.D. Pa. Feb. 8, 2012). The district court's discussion of the balance of the equities is instructive here:

> In sum, the Pennsylvania Supreme Court has directed that, in lieu of a constitutional revised reapportionment plan, the 2012 election should proceed using the 2001 Plan. At this time, there has been no action taken to change the date of the primary. We can only speculate as to whether or when there will be a constitutionally approved reapportionment plan based upon the 2010 census. Because there is presently no alternative plan, if we issue a temporary restraining order and request a three-judge panel, the primary election certainly will not occur as required by statute. Depending on what happens with the LRC, Pennsylvania voters could be disenfranchised. *See Diaz v. Silver,* 932 F.Supp. 462, 468–69 (E.D.N.Y.1996) (listing cases holding that, because there does not appear to be any alternative redistricting plan readily available, the harm to the public in delaying either the primary or the general election, or even changing the rules as they now stand, substantially outweighs the likely benefit to the plaintiffs of granting a preliminary injunction). A delayed election this year could deprive Pennsylvania voters of their right to choose delegates to the National Conventions and their candidate for the Presidency of the United States. *Cf. Graves,* 2011 WL 3503133, at *14 (noting deprivation of voters' right to replace public officials whose terms are soon to expire).

Pileggi, 2012 WL at *22.

Considering all the factors, the district court concluded that as follows:

> Under these unique circumstances, we are compelled to conclude that *the election should proceed under the only-existing plan, the 2001 Plan.* The granting of a

> temporary restraining order at this juncture would make no sense. Clearly, it would not be in the public interest.

Id. (emphasis added).

Here, the Circuit Court reached the same conclusion. And here, as in Pennsylvania, granting the LRC motion to dissolve the injunction, so that the upcoming elections might be run under the unconstitutional plan while this Court considers the LRC plea to overrule *Fischer II,* would make no sense and would clearly not be in the public interest. Rather, as the Circuit Court has ordered, the May 22, 2012 primary election process should "proceed using the only-existing plan", the 2002 plan, just as the *Pileggi* court concluded.

This Court's decision in 1994 to delay the effective date of its decision in *Fischer II* is no support for the LRC's extraordinary position. The situation in 1994 was dramatically different. *Fischer II* was decided June 23, 1994. The primary elections in 1994 had been conducted fully one month prior to that decision. Precinct lines had been established by the county clerks. Certified candidates had run for election and won the right to compete in the general election. The election process was in fact, "fully underway", as the LRC half-heartedly suggests the process somehow was in this case the moment HB 1 was enacted, even before the filing deadline had arrived. (See LRC Motion at 5).

This Court's prudential decision to delay the effective date of its June 23, 1994 decision declaring the 1991 redistricting law unconstitutional made perfect sense when the election process was so far advanced. The Court explained that when elections had already occurred under the unconstitutional act in question, the court need not create chaos by declaring the underlying law unconstitutional and voiding the completed elections. *Fischer II*, 879 S.W.

2d at 480-81, *quoting Ragland v. Anderson*, 100 S.W.865, 870 (Ky. 1907). *Stiglitz v. Schardien*, 239 Ky. 799, 40 S.W. 2d 315, 320 (1931), was to the same effect.

This approach is consistent with federal law as well, notwithstanding the LRC's parenthetical suggestion that the one person, one vote principles of the Equal Protection clause somehow changed the law. (LRC Motion at 8, n.3). In a case involving legislative redistricting of the Nashville, Tennessee city council, the Sixth Circuit noted that under the Equal Protection clause, "mathematical equality in representation is not required at all times during the census and election cycles". *French v. Boner,* 963, F. 2d. 890 (6th Cir. 1992). The court noted that other considerations besides mathematical equality are at play and explained:

> For these reasons the Supreme Court has never drawn hard and fast rules about the length of terms or how long after a decennial census year new elections under the new census must be conducted. The principles of mathematical equality and majority rule are important, but we should not allow them to outweigh all other factors in reviewing the timing of elections.

Id. at 892. Citing *Reynolds v. Sims*, the Sixth Circuit noted that the Supreme Court has endorsed holding elections using old districts where "an impending election is imminent and a state's election machinery is already in progress...." *Id.*

Of course, in the court below, as in this Court, the LRC has taken the position that Kentucky's election process was "fully underway" when the Injunction and Judgment was issued. And the state election officials responsible for seeing to it that the process proceeds on schedule are in no way impeded from making sure that it continues. (See Supplemental Order, February 14, 2012). Given the proof offered by the Defendants below and relied on by the Circuit Court, dissolving the injunction (or staying the judgment) would have exactly the disruptive effect the state election officials have sought to avoid, and that the Circuit Court wisely precluded.

Fischer II surely does not require elections in districts that have just been adjudicated unconstitutional simply because "upon the enactment of [the unconstitutional] HB 1 into law", (LRC Motion at 5), the election process was nominally underway. If that were the case, the General Assembly could always pass an unconstitutional redistricting law, then claim that the process was "underway" with the passage, and guarantee that new elections would be conducted with unconstitutional districts. One is reminded of the criminal defendant convicted of murdering his parents who then pleads for mercy because he is an orphan.

VIII. THE LRC MOTION MISPERCEIVES FEDERAL EQUAL PROTECTIONLAW AND THE REQUIREMENT OF POPULATION EQUALITY FOR STATE LEGISLATIVE DISTRICTS.

The fundamental premise of the LRC Motion, and the LRC attack on the Injunction and Judgment, is that *Fischer II* and its dual mandate under Section 33 are somehow in conflict with federal equal protection principles, and somehow unduly restrictive of legislative discretion regarding population equality among districts. According to the LRC, while *Fischer II* requires districts to be within plus or minus 5% of the ideal district, so as to permit the division of the fewest number of counties possible, federal law somehow would provide greater flexibility if only the legislature were free from the *Fischer II* yoke. According to the LRC, "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*).[8] (LRC Motion at 10). And because, according to the LRC, the holding in *Fischer II* was an exercise in judicial arrogance -- a decision in which this Court "exceeded its writ", according to the LRC below -- abandoning it now would allegedly permit the General Assembly to divide as many counties as it finds expedient, while permitting

[8] The Circuit Court has retained jurisdiction over Plaintiffs' claim that HB 1 violates the equal protection clause, awaiting proof and briefing.

relative population deviations that exceed the 5% permitted by Section 33 and *Fischer II*. (See LRC Memorandum of Law in Franklin Circuit Court, at 4: "LRC respectfully submits that the General Assembly has complied with that requirement [of *Fischer II*] by dividing what – in the opinion of the General Assembly – is the fewest number of counties that should be divided while attaining the paramount goal of equality of representation").

According to LRC's logic, abandoning *Fischer II* would somehow allow the General Assembly to create districts with relative population deviations of as much as 10%. Thus, LRC suggests that *Fischer II* should be overruled and the county integrity clause of Section 33 declared a dead letter. With this skewed logic and disdain for this Court's constitutional jurisprudence begun in *Fischer II*, LRC seeks to revive the flagrantly unconstitutional HB 1, which divides 28 counties purely for the political preferences of the majority, not in pursuit of any rational state policy, while exceeding the maximum constitutional population variation in both the House and the Senate plans.

a) THERE IS NO FEDERAL "MANDATE" OR "SAFE HARBOR" FOR OVERALL DEVIATIONS AS HIGH AS THOSE IN HB 1.

Throughout its motion, LRC asserts incorrectly that there is some acknowledged "10% maximum population deviation required by federal one-person, one-vote case law interpreting the Equal Protection Clause of the Unites States Constitution." (LRC Motion at 2). The LRC has no basis for offering this assertion, for it is demonstrably false. There is no "10% maximum population deviation required by" federal law. Similarly, there is no "federal Constitutional mandate of 10%". (LRC Motion at 2). And there is surely no federal mandate "which is achieved by HB 1 (2012)", as LRC wrongly declares. (*Id.*).

Under Supreme Court precedent, states are required to "make an honest and good faith effort to construct districts ... as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). *Every* deviation from population equality must advance a rational state interest, and preservation of county integrity has long been recognized by the Supreme Court as the sort of rational state policy that can justify population deviations. In contrast, where population deviations are not supported by such legitimate interests but, rather, are tainted by arbitrariness or discrimination, they cannot withstand constitutional scrutiny. *See Roman v. Sincock,* 377 U.S. 695, 710, 84 S.Ct. 1449, 1458, 12 L.Ed.2d 620 (1964).

The phrase "10% maximum population deviation" used by the LRC at page 2 of its Motion and similar phrases elsewhere apparently is seemingly derived from *Brown*. But the Supreme Court never said anything about a 10% population deviation being permitted. What it said was this: "Our decisions have established, as a general matter, that an apportionment plan *with a maximum population deviation under 10%* falls within this category of minor deviations". *Id.* at 842 (emphasis added).

The LRC's false premise is repeated throughout its Motion. LRC attempts to justify these assertions with footnote 4 to its brief, but the principal authority relied on there is a secondary source that has no precedential value. And when LRC cites to the United States Supreme Court's decision in *Brown* for the proposition that "federal law creates a safe harbor if the maximum population deviation between the least populous county[9] and the most populous county is 10% or less", it fails to offer any jump cite to the stated proposition. This is not surprising, for *Brown* is no support for the proposition. There is no federal safe harbor for districts with overall deviations of "10% or less". While the Supreme Court recognized in *Brown*

[9] Presumably, LRC means to say "least populous district."

that "as a general matter" an apportionment plan with a maximum population deviation *less than 10%* falls into the category of minor deviations, the Court went on to reaffirm that "the ultimate inquiry...is whether the legislature's plan 'may reasonably be said to advance [a] rational state policy." 462 U.S. 835, 843 (1983) (emphasis added) (citations omitted). *Brown*, therefore, requires that states keep overall population deviations below 10% if they want to enjoy a presumption of constitutional validity, and to prove that *any* population deviations are justified by the faithful adherence to a rational state policy if challenged.

Consequently, the LRC is wrong when it suggests that there is some "10% safe harbor" for redistricting plans with overall deviations of "10% or less". See e.g., *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996); *Hulme v. Madison County*, 188 F.Supp. 2d 1041, 1047 (S.D. Ill. 2001); *Marylanders for Fair Representation, Inc. v. Schaefer,* 849 F.Supp. 1022, 1031-32 (D. Md. 1994); see also, *Licht v. Quattrochi*, 449 A.2d 887 (R.I. 1982) (5% overall deviation invalidated); *Licht v. Quattrochi*, CA No. 82-1494 (R.I. Super.Ct., 1982) (1% deviation appeared to be the limit to the Court); *Farnum v. Burns*, 561 F.Supp. 83 (D.R.I., 1983) (5.6% deviation invalidated); *White v. Crowell*, 434 F.Supp. 1119 (W.D. Tenn., 1977) (political considerations insufficient to justify deviation over 5%.).

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

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

> practicable." *Reynolds v. Sims*, 377 U.S. at 577. However, this is a rebuttable presumption.

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

Thus, the practical implication of *Brown* for redistricting litigation involves the burden of proof. Redistricting plans that keep their overall population deviations *under* 10% enjoy a presumption of validity. The burden of proving the plan unconstitutional falls on the challengers. Redistricting plans that display overall population deviations of *10% or more* enjoy no presumption of validity, and the burden of showing that the deviation from equality is the result of a rational state policy is on the government.

The difference between"10% or less", offered by the LRC as justification for its entire CR 65.07 Motion, and "less than 10%", articulated by the United States Supreme Court, is important. Ordinarily, legislative districts must be nearly identical in population, as is the case in congressional redistricting. But because states often have important concerns for county integrity or other political subdivision integrity, the Supreme Court has held that deviations less than 10% are permitted *if* they are in furtherance of a rational state policy such as the preservation of county integrity

Brown thus makes two propositions clear. First, there is no "10% federal maximum population deviation mandate"; no "safe harbor" for plans with population deviations of "10% or less" and no "federal 10% rule". There is only a presumption of validity for plans with overall population deviations under 10%. *Brown*, 462 U.S. at 842. But HB 1 is not such a plan. The overall population deviation present in HB 1 is simply not "under 10%". It is at best exactly 10.00%, but even this is too high to come within any *de minimis* standard for federal equal protection law. The LRC is just wrong when it tells this Court that "House Bill 1 complies with

the federal maximum population deviation of 10%...." (LRC Motion at 10), because "10.00%" is not "less than 10%".

Second, *Brown* and subsequent cases make clear that unless there is a rational state policy involved – such as an consistent, nondiscriminatory policy to preserve county integrity – then there is no permissible population deviation under federal equal protection law. This proposition flows directly from *Reynolds v. Sims*, 377 U.S. 533 (1964), where the Supreme Court explained the only circumstances in which deviation from strict population equality is justified:

> So long as the divergences from a strict population standard are based on *legitimate considerations incident to the effectuation of a rational state policy* some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. But neither history alone, nor economic or other sorts of group interest, are permissible factors in attempting to justify disparities from population–based representation.

Id. at 579-80 (emphasis added). Thus, to the extent that the LRC seeks to justify HB1 by reference to a federal standard more flexible than plus or minus 5%, or by reference to a "10% maximum population deviation" under federal law, it can do so only while standing by Kentucky's interest in dividing the fewest possible counties possible.

b) ONLY THE COUNTY INTEGRITY CLAUSE OF SECTION 33 AND THIS COURT'S RULE IN *FISCHER II* AMOUNT TO THE RATIONAL STATE POLICY NEEDED TO JUSTIFY ANY DEVIATION FROM POPULATION EQUALITY.

Overruling *Fischer II* and abandoning the county integrity clause of Section 33 would remove any justification for even the slightest population deviation between districts, and would completely undercut the LRC's proffered rationale for its Motion. The "ultimate inquiry" in judging any deviation from equality – *of any magnitude* – is whether the legislature's plan "may reasonably be said to advance [a] rational state policy", such as a consistently applied policy of preserving county integrity. *Brown v. Thomson*, 462 U.S. 835, 843 (1983) *quoting Mahan v.*

Howell, 410 U.S. 315, 328 (1973). Only the rational state policy of preserving county integrity embodied in Section 33 of the Constitution allows Kentucky or any other state to create districts with overall population deviations of less than 10% while enjoying a presumption of validity for federal equal protection analysis.

If Kentucky were to abandon the clear, easy to apply, dual mandate of *Fischer II* and declare the preservation of county integrity irrelevant for redistricting purposes, federal constitutional law would bar *any* population deviation, and would instead require near perfect equality, just as it does now for congressional redistricting. And because the "keystone" of the Kentucky Constitution *is* equality – "equality of men, equality of representation, equality of burden and equality of benefits" – absent the concern for county integrity, this Court would doubtless have little difficulty concluding that Kentucky's own constitution would require the same. See *Ragland*, 100 S.W. at 869.

To support its logically and legally flawed argument, the LRC endorses the Circuit Court's unfounded notion that *Fischer II* has the unintended consequence of diluting compliance with the federal one-person, one-vote standard. (LRC Motion at 8). In fact, the unintended consequences the Circuit Court alluded to are absent. From its earliest jurisprudence on the subject of redistricting, the Supreme Court has recognized that preservation of county lines justifies some inequality in population among districts if faithfully and indiscriminately pursued. *Fischer II* does not collide with that jurisprudence. The Supreme Court of the United States has determined the even-handed pursuit of some state policies, like preserving county integrity, can be accommodated within the context of the Equal Protection clause. This Court has determined that the dual mandates of Section 33 – county integrity and substantial equality of population – can be accommodated as well.

The moment Kentucky abandons the rational state policy of preserving county integrity -- and dissolving the injunction, permitting elections under HB 1 and overruling *Fischer II* would do exactly that -- any deviation from strict population equality in redistricting is unconstitutional under federal law.

Indeed, the United States Supreme Court has made this plain in *Cox v. Larios*, 124 S. Ct. 2806, 2807-08 (1984). In *Cox*, an 8-1 majority of the Court summarily affirmed the decision of a three-judge panel holding that Georgia's 2002 redistricting of that state's legislature violated the equal protection clause of the 14th Amendment, *even though* the overall deviation - 9.98% - was *less than 10%* (and, notably, less than that found in HB 1).

Addressing the so-called safe harbor, the three judge panel noted: "Indeed, the very fact that the Supreme Court has described the ten percent rule in terms of "prima facie constitutional validity" unmistakably indicates that 10% is not a safe harbor". *Larios v. Cox* , 330 F. Supp. 2d 1320, 1340-41 (N.D. Ga. 2004), *aff'd, Cox v. Larios*, 124 S.Ct. 2806 (2004). LRC knows this[10], and its effort to elide the difference between "less than 10%" –which the Supreme Court endorses as creating a rebuttable presumption of constitutional validity-- and "10% or less" – a phrase the LRC invents but the Supreme Court never uses -- is intentional, but unavailing.

Because Supreme Court decisions have treated overall population deviations of less than 10% as requiring no proof that a rational state policy supports them, while placing the burden of proving a rational state policy on states whose plans exhibit overall deviations of 10% or more, thoughtful state legislatures typically take great care to keep overall deviations below 10%, if

[10] Of course, in this case, HB 1 would not even come within any such "safe harbor" had the Supreme Court ever announced one, because HB 1's population deviation is not "less than 10%". According to the Verified Complaint, the deviation is actually 10.0013287, or more than 10%. But even the LRC concedes that HB 1 has a population deviation taken to two decimal points of 10.00%, a number that simply does not meet even *Brown's* "less than 10%" characterization as "minimal".

only to create a presumption of validity. In *Larios*, the Georgia legislature kept its overall population deviations to 9.98% in both the House and Senate redistricting plans, and kept relative deviations to within plus or minus 5%.[11] The three judge panel of the District Court nevertheless found the plan unconstitutional because the deviations were not justified by any rational state policy, such as the preservation of county integrity. 330 F. Supp. 2d at 1348. The *Larios* court explained the rule:

> The plaintiffs argue that none of these considerations can account for the 9.98% population deviations in either the House Plan or the 2002 Senate Plan, and the defendant does not contradict this assertion. Indeed, the defendant has not attempted to justify the population deviations because of compactness, contiguity, respecting the boundaries of political subdivisions, or preserving the cores of prior districts. And the record evidence squarely forecloses the idea that *any* of these legitimate reasons could account for the deviations.

330 F. Supp. 2d at 1349-50)(emphasis in original). Absent proof of a rational justification, the court concluded: "Quite simply, [the redistricting plans] violate the Equal Protection clause". Id.

That decision was summarily affirmed by the Supreme Court. In his concurring opinion, joined by Justice Breyer, Justice Stevens explained the Supreme Court's rationale. Because the plan in *Cox* found unconstitutional on Equal Protection grounds under the federal constitution was so similar to the plan adopted with HB 1, the following extended excerpt from the concurring opinion in *Cox* is helpful:

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

[11] For reasons that were not made clear below, Kentucky's General Assembly chose not to keep the overall population deviation below 10%, thereby forfeiting any presumption of constitutional validity and assuming the burden of proving the deviation is the result of a consistently applied rational state policy. This is a burden the LRC will be unable to meet in the Circuit Court.

> and with many of the large positive population deviations in districts that paired Republican incumbents against each other. *Id.*, [330 F.Supp.2d] at 1331. ***The District Court found that the population deviations did not result from any attempt to create districts that were compact or contiguous, or to keep counties whole, or to preserve the cores of prior districts.*** *Id.*, at 1331–1334. Rather, the court concluded, "the population deviations were designed to allow Democrats to maintain or increase their representation in the House and Senate through the underpopulation of districts in Democratic-leaning rural and inner-city areas of the state and through the protection of Democratic incumbents and the impairment of the Republican incumbents' reelection prospects." *Id.*, at 1334. ***The District Court correctly held that the drafters' desire to give an electoral advantage to certain regions of the State and to certain incumbents (but not incumbents as such) did not justify the conceded deviations from the principle of one person, one vote.*** See *Reynolds v. Sims,* 377 U.S. 533, 565–566, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (regionalism is an impermissible basis for population deviations); *Gaffney v. Cummings,* 412 U.S. 735, 754, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) ("[M]ultimember districts may be vulnerabl[e] if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized"). See also *Reynolds,* 377 U.S., at 579, 84 S.Ct. 1362 (explaining that the "overriding objective" of districting "must be substantial equality of population among the various districts" and that ***deviations from the equal-population principle are permissible only if "incident to the effectuation of a rational state policy"). In challenging the District Court's judgment, appellant invites us to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than 10 percent, within which districting decisions could be made for any reason whatsoever. The Court properly rejects that invitation.*** After our recent decision in *Vieth v. Jubelirer,* 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004), the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength.

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

The thoughtful opinion of the three judge district court panel in *Larios v. Cox*, and the summary affirmance and concurring opinion of Justice Stevens amount to a devastating rebuttal to nearly every element of the LRC rationale for overruling *Fischer II* and dissolving the injunction. Unlike the LRC-drafted HB 1, the Georgia plan found unconstitutional in *Cox* actually had overall population deviations of less than 10%, —and so should have found refuge in the "10% safe harbor" the LRC imagines. Yet it found no refuge. It was found unconstitutional precisely because it could not be justified by any consistently applied, rational state policy of preserving county integrity or any other policy. In this case, the Kentucky

legislature has never offered any rational state policy to justify the 10.00% overall population deviations displayed by HB 1, or the 5.38 and 5.52% relative population deviations. Only fidelity to a consistent policy of preserving county integrity could justify the population deviations found in HB 1, and the record below is clear that the law fails in that critical respect.

And yet the LRC argues to this Court that somehow federal Equal Protection case law creates a safe harbor for redistricting plans that have population deviations of 10% or less, even when the only justification ever offered for the deviations from equality is that the plan represents, in the words of the Speaker of the House, "what you can pass through this body and the Senate and get signed into law." Worse, the LRC offers this Court its version of the "10% federal mandate", or the "10% safe harbor" without ever alluding to the Supreme Court's longstanding jurisprudence requiring that every deviation from population equality be backed by a consistently applied, even-handed rational state policy. See, in particular, footnote 4 to the LRC Motion, omitting any mention of the Supreme Court's rational state policy analysis. (LRC Motion at 10). As well, the LRC ignores *Cox*, which the Respondents (the Plaintiffs below) included in their Verified Complaint and briefed below. (Verified Complaint, ¶ 25).

So the LRC's attack on the Injunction and Judgment collapses of its own weight. The justification LRC offers for HB 1's overall deviation of 10% and its violation of the plus or minus 5% rule of *Fischer II* is that federal law somehow provides a "safe harbor", or somehow "mandates" a "maximum population deviation of 10%". While these propositions are demonstrably false, *Reynolds*, 377 U.S. at 579-580; *Brown*, 462 U.S. at 842; *Cox*, 124 S.Ct. 2806, they become absurd once LRC argues that *Fischer II* should be overruled, and the county integrity clause of Section 33 of the Kentucky Constitution should be declared a nullity. Only the consistent application of a policy to preserve county integrity, i.e, *Fischer II's* mandate, or

some other rational state policy such as even-handed incumbent protection, justifies any deviation at all. But HB 1is not faithful to *Fischer II* or to Section 33, does not feature even-handed incumbent protection, and no other rational state policy has ever been suggested to support the population deviations of HB 1.

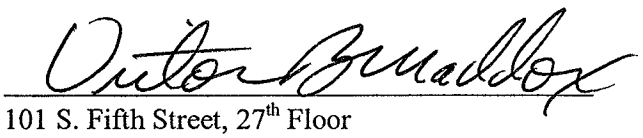
CONCLUSION

LRC's Motion has no legal or logical support. Far from allowing greater flexibility in population deviation in the absence of *Fischer II* and Section 33, federal Equal Protection law would permit no population deviations *at all* unless the LRC could offer some other rational state policy to justify the deviations. None has ever been suggested, and certainly none was demonstrated in the court below. This Court's rule in *Fischer II* and its harmonization of Section 33 with federal law is time tested, easy to apply and certain in its results. To abandon it in favor of the amorphous standard suggested by the LRC, simply to save HB 1, would be folly.

The LRC Motion should be denied.

Respectfully submitted,

FULTZ MADDOX HOVIOUS & DICKENS PLC
Victor B. Maddox
John David Dyche
Jennifer Metzger Stinnett
Jason M. Nemes



101 S. Fifth Street, 27th Floor
Louisville, Kentucky 40202-3116
(502) 588-2000

Counsel for Respondents

CERTICATE OF SERVICE

I certify that on February 17, 2012, I caused a copy of this Response to Motion to Stay Pending Appeal to be served by electronic mail: David Tachau, Dustin B. Meek, Jonathan T. Salomon, and Katherine E. McKune, TACHAU MEEK PLC, 3600 National City Tower, 101 S. Fifth Street, Louisville, Kentucky 40202-3120; Anita M. Britton, BRITTON OSBORNE JOHNSON PLLC, 200 W. Vine St., Suite 800, Lexington, Kentucky 40507; Scott White, 133 W. Short Street, Lexington, KY 40507; Scott White and Sarah S. Mattingly, MORGAN & POTTINGER, P.S.C., 133 W. Short Street, Lexington, Kentucky 40507; Sheryl G. Snyder, FROST BROWN TODD LLC, 400 West Market Street, Suite 3200, Louisville, Kentucky 40202; Laura H. Hendrix, General Counsel, Legislative Research Commission, State Capitol Annex, Room 104, Frankfort, Kentucky 40601.

Counsel for Respondents

EXHIBIT A

COMMONWEALTH OF KENTUCKY
STATE BOARD OF ELECTIONS
SECRETARY OF STATE ALISON LUNDERGAN GRIMES
CHIEF ELECTION OFFICIAL FOR THE COMMONWEALTH

MEMORANDUM

SBE 12-07

TO: County Clerks → *Via: E-mail and Facsimile*

FROM: Alison Lundergan Grimes, Chief Election Official, and
Maryellen Allen, Interim Acting Executive Director

DATE: February 8, 2012

RE: *Fischer, et al. v. Grimes, et al.*, Franklin Circuit Court, Civil Action No. 12-CI-009

On January 20, 2012, Governor Steve Beshear and the General Assembly enacted House Bill 1 ("HB 1"), the 2012 Redistricting Act. Section 142 of HB 1 requires that, if the 2012 Redistricting Act made changes to the representative and/or senatorial districts in your county, you change precinct boundaries in your county accordingly. Section 142 required that this process, including obtaining the State Board of Elections' approval of your proposed precinct establishment order, be completed by no later than 45 days after the enactment of HB 1. In order to meet that 45-day deadline, the State Board of Elections requested that you provide your proposed precinct establishment orders to the State Board of Elections no later than February 9, 2012.

Yesterday, February 7, 2012, Judge Phillip Shepherd, Franklin Circuit Court, entered a temporary injunction that enjoins the State Board of Elections from implementing the districts for state Senate and state House of Representatives that were established in HB 1. Thus, pursuant to the Court's February 7th temporary injunction order, the State Board of Elections cannot currently approve any proposed precinct establishment orders as contemplated by § 142 of HB 1. Nor does any other source grant the State Board of Elections authority to approve precinct boundary modifications.

Accordingly, until further notice, please **do not send to the State Board of Elections any proposed precinct establishment orders.** Consistent with the Court's order, any such orders tendered to the State Board of Elections will be returned without any action being taken on them.

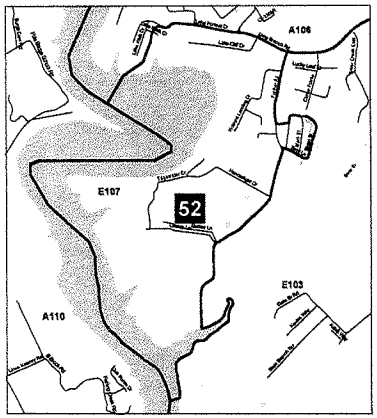
We understand and appreciate that you have made significant efforts to timely redraw precinct boundaries to comply with HB 1. Please retain the work you have done, as it may be useful to you in the future. In the meantime, feel free to contact the staff at the State Board of Elections 502-573-7100 with any questions.

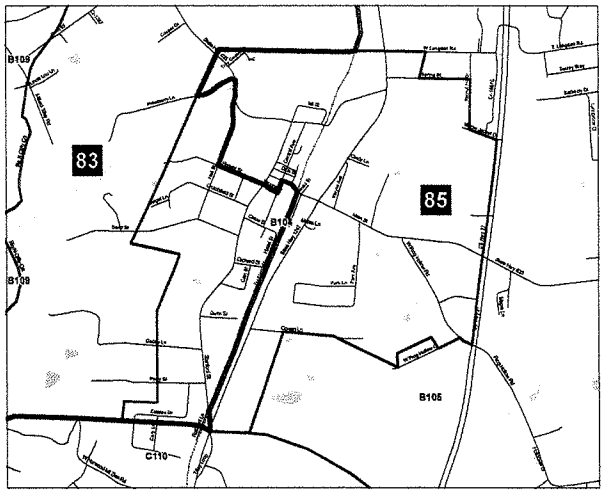
140 WALNUT STREET
FRANKFORT, KY 40601-3240

Kentucky
AN EQUAL OPPORTUNITY EMPLOYER M/F/D

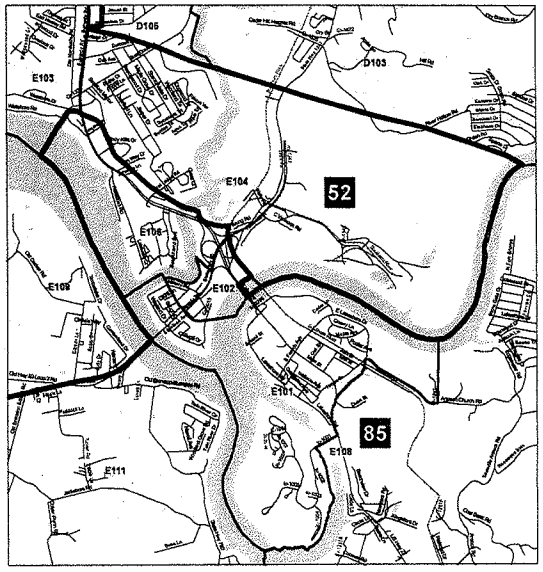
(502) 573-7100
FAX (502) 573-4369 OR (502) 696-1952
WEBSITE: www.elect.ky.gov

EXHIBIT B





Pulaski County House Districts and Precincts
(HH001C04)



Map by Kentucky Legislative Research Commission
Geographic Information Systems Office
Room 78, Capitol Annex
Frankfort, Kentucky 40601
502-564-8100
gis@lrc.ky.gov

January 13, 2011

This Map was created from various sources.
LRC does not guarantee its accuracy.

Printed with State funds

EXHIBIT C

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

JOSEPH M. FISCHER, et al. PLAINTIFFS

v.

ALISON LUNDERGAN GRIMES, et al. DEFENDANTS

AFFIDAVIT

The affiant, being first duly sworn, states as follows from his personal knowledge:

1. My name is Mark H. Vaught, and I am a citizen of Pulaski County, Kentucky.

2. I currently serve on the Pulaski County Board of Elections, and, in that capacity, I have knowledge of the precincts in Pulaski County, including those that are related to House District 80.

3. The attached maps were created by me in connection with my responsibilities as a member of the Pulaski County Board of Elections.

4. Exhibit A, entitled Eubank Base, shows the city of Eubank and the precinct as it existed before and after the enactment of HB 1.

5. Exhibit B, entitled C114 North Goodhope 28N SBE, shows the far northern portion of Pulaski County, including the connection between Rockcastle County and Pulaski County.

6. Exhibit C, entitled 80 Distances, shows the length of the connection between Casey County and Pulaski County and between Pulaski County and Rockcastle County.

7. Exhibit D, entitled 80th Base, shows the new House District 80 compared to the magisterial district.

8. There are 5 voters who live in Pulaski County between the tri-county line and the southern border of House District 80 where Pulaski County and Rockcastle County connect, as shown on the map in Exhibit B.

9. There are no state maintained roads that connect Casey County to Rockcastle County, such that one would be required to leave House District 80 to drive from Casey County to Rockcastle County.

Further affiant sayeth naught.

Mark H. Vaught

State of Kentucky)
)
County of Pulaski)

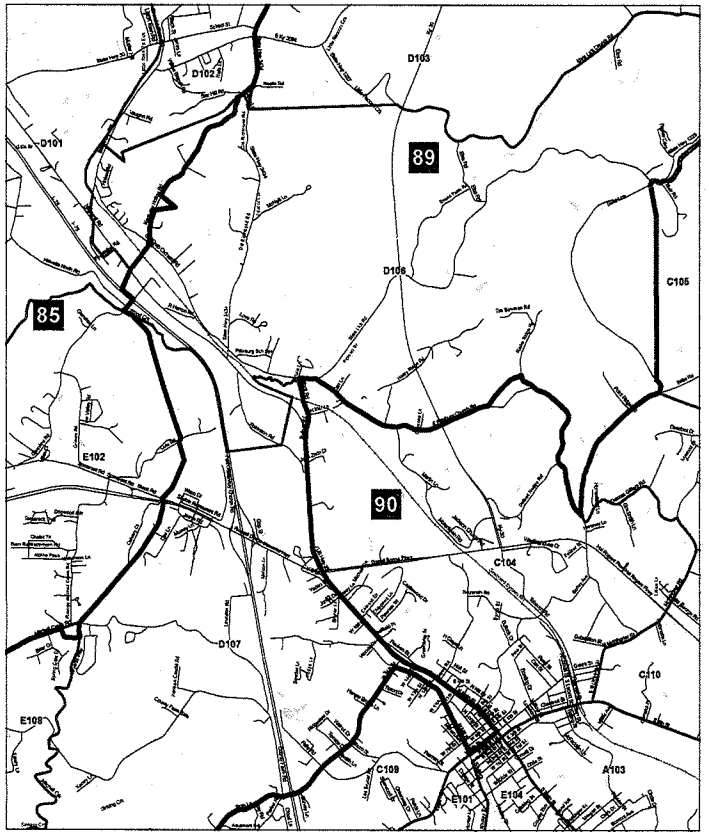
Subscribed and sworn to before me this 3 day of February 2012 by Mark H. Vaught.

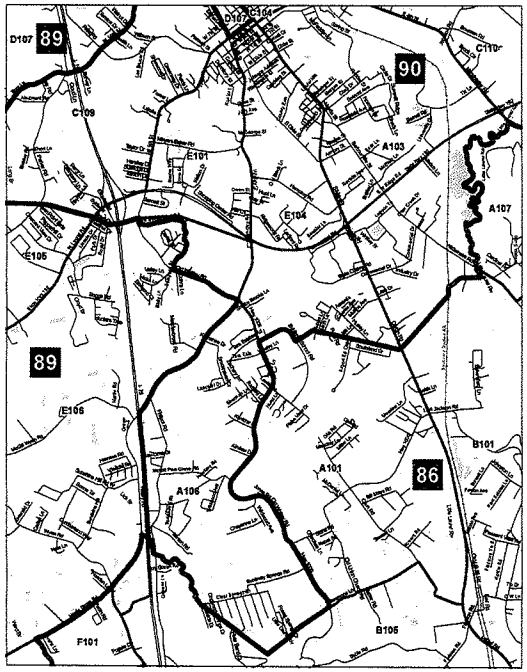
Notary Public

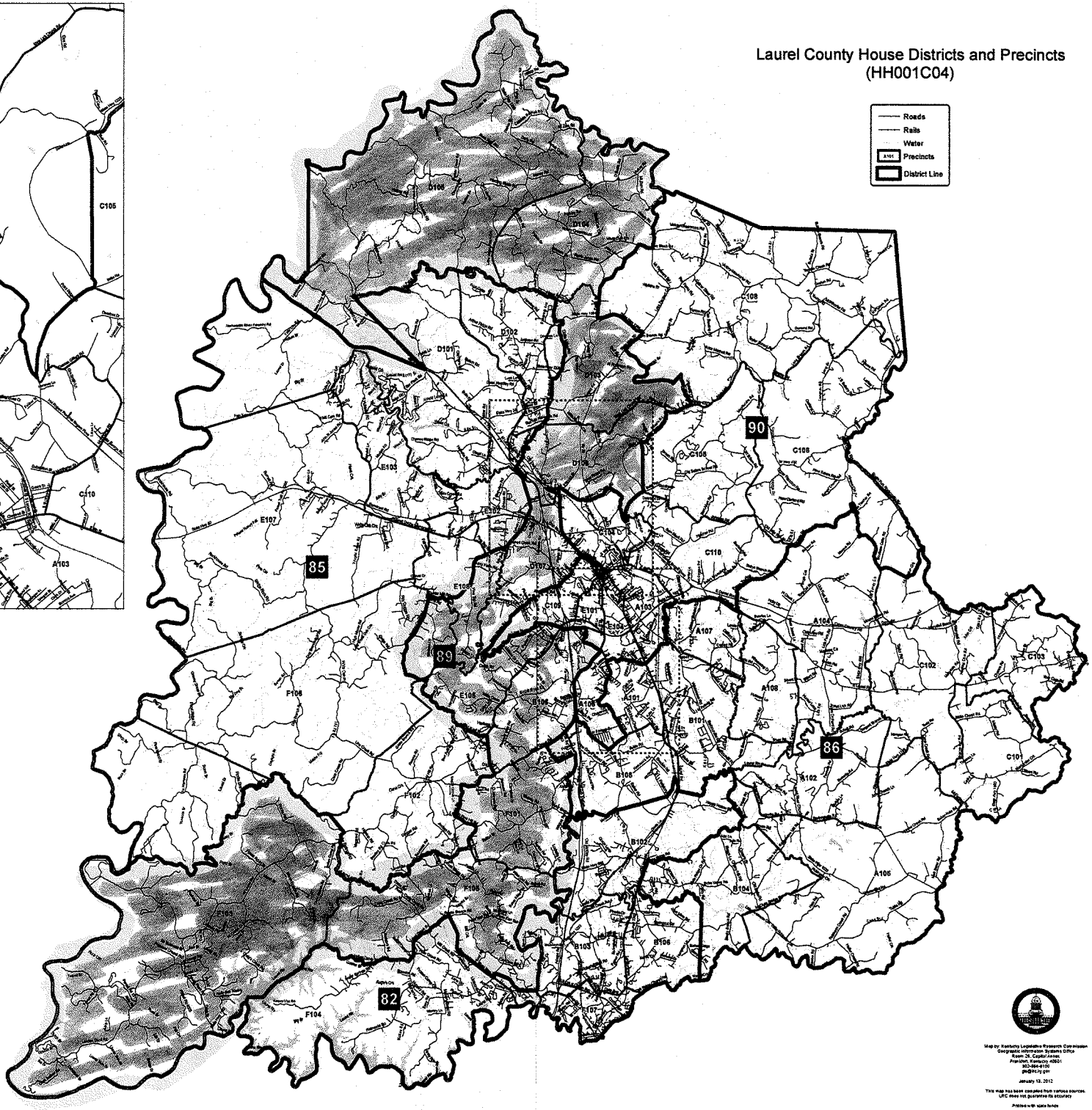
My commission expires: 2/24/14

EXHIBIT D

Laurel County House Districts and Precincts
(HH001C04)







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January 13, 2012