SUPREME COURT OF KENTUCKY

CASE NO. 2012-SC-91-TG
CASE NO. 2012-SC-92-TG

TRANSFER FROM
COURT OF APPEALS 2012-CA-264-I & 2012-CA-266-MR
FRANKLIN CIRCUIT COURT, DIV. I
CIVIL ACTION NO. 12-CI-109
HONORABLE PHILLIP SHEPHERD, JUDGE

LEGISLATIVE RESEARCH COMMISSION — APPELLANT/MOVANT

v.

JOSEPH M. FISCHER, JEFF HOOVER, KIM KING, FREY TODD, ANTHONY GAYDOS, DAVID B. STEVENS, M.D., DAVID O'NEILL, JACK STEPHENSON, MARCUS MCGRAW, KATHY STEIN, ALISON LUNDERGAN GRIMES, in her capacity as Secretary of State, KENTUCKY STATE BOARD OF ELECTIONS, MARYELLEN ALLEN, in her Capacity as Executive Director of the State Board of Elections.

APPELLEES/RESPONDENTS

BRIEF OF APPELLEES/RESPONDENTS DAVID B. STEVENS, M.D., DAVID O'NEILL, JACK STEPHENSON, MARCUS McGRAW, AND KATHY STEIN

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I certify that the Record on Appeal has not been taken from the Clerk of the Franklin Circuit Court by these Appellees and that a copy of this Brief was served via electronic mail to all counsel of Record, and by regular US Mail upon the Clerk of the Franklin Circuit Court and the Clerk of the Kentucky Court of Appeal.

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INTRODUCTION

This is a case in which the Appellant appeals from a Partial Declaration of Rights holding HB 1 (2012), the Reapportionment Act of 2012 that created new legislative and judicial districts based on 2010 Census Data, unconstitutional under Section 33 of the Kentucky Constitution, and enjoining the Appellees, Secretary of State and Kentucky State Board of Elections, from conducting elections employing those unconstitutional districts.

STATEMENT CONCERNING ORAL ARGUMENT

The Court has *sua sponte* set this appeal for oral argument on February 24, 2012, at 10:00 a.m. Each side is allotted 15 minutes. There are three distinct appellee/respondent groupings. Two share the same interest and argument that HB 1 (2012) is unconstitutional as violating the permissible population variance of +/-5% and thereafter divide the fewest possible number of counties under Section 33. Though these Appellees ("Stein Group") will be prepared to use our entire allotment of fifteen minutes, we also are willing to take less time than the Appellees/Respondents Fischer, Hoover, King and Gaydos ("Fischer Group") so as to promote an efficient use of the Court's time.

As noted in our briefing on the motions for intermediate relief, though the Stein Group agree that HB 1 (2012) violates Section 33 as to both the Senate and House plans, the primary complaint the Stein Group has is the movement of Senate District 13 from Fayette County to several northeastern counties which are not contiguous with Fayette. That issue, though as noted by the Circuit Court is on its own sufficient to form a basis for CR 65.04 relief, has yet to be adjudicated below and so is not before this Court. Indeed, depending upon the resolution of the instant appeal, the Stein Group may not need to litigate that issue.

For this reason, we believe our oral argument on the Section 33 issue can defer to large degree to the Fischer Group given the commonality of interest.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On January 19, 2012, the General Assembly completed its decennial constitutional obligation under Section 33 to apportion the Commonwealth into 100 House and 38 Senate districts. *Enact Acts 2012, ch.1, §___, effective January 20, 2012* ("HB 1").[1] It was signed into law by the Governor the next day, January 20, 2012, and as it declared an emergency, it become law on signing. *http://www.lrc.ky.gov/record/12RS/HB1.htm*; and, *HB 1, Section 144.*

The process of re-districting occurs every ten years due to the availability of current population data derived from the decennial federal Census. In the 2012 Session, the General Assembly used population data from the 2010 Census. This evidenced a total Kentucky population of 4,339,367 persons. The "ideal" district by population is then a matter of simple math: for the House, divide total population by 100, and the Senate, divide by 38. This indicates that perfect population distribution is 45,730 persons per House district, and 114,194 per Senate district. *Notice of Filing Exhibits of Stein Group, February 10, 2012, Certificate of Records & Attestation of LRC, Local Mandate Fiscal Impact, Part 2,* and *Population Summary Report.*[2]

With this raw data, the General Assembly then proceeds to draw districts. This legislative power is not unfettered. Both the federal and Kentucky constitutions place explicit, unyielding boundaries upon the exercise of what is, at its heart, a political

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[1] These have yet to be codified; however, HB 1 supplants KRS 5.100 *et seq.*, KRS 5.200 *et seq.*, and KRS 21A.010.

[2] These are a part of HB 1 as introduced. They can also easily be accessed at http://www.lrc.ky.gov/record/12RS/HB1.htm.

process. Though we will deal with these in more detail in the Argument section, the constraints involved in this appeal are[3]:

- Federal:
  - To insure that the "one person, one vote" principle of representative government is protected, the population variance between districts as measured against the "ideal population" must satisfy the Equal Protection Clause of the Fourteenth Amendment, *Baker v. Carr,* 369 U.S. 186 (1962); and,
  - Though there are certain limited exceptions to the rule if the deviation is incident to the effectuation of a rational state policy, to insure that apportionment does not invidiously discriminate on the basis of race or ethnicity and so violate the Equal Protection Clause, a variation of +/-10% is deemed "minor" and is insufficient to make out a prima facie federal case of discrimination, *Brown v. Thompson,* 462 U.S. 835 (1983)[4].
- Kentucky:
  - To promote the policy of "one person, one vote", the population variation amongst districts as measured against the ideal population cannot exceed +/-5%, *Ky. Const. Sec. 33, Fischer v. Board,* 879 S.W.2d 475 (Ky. 1994) ("Fischer II"), and *Jensen v. Board,* 959 S.W.2d 771 (Ky. 1997); and,

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[3] As noted in the Statement of Oral Argument, the Stein Group also challenges HB 1's movement of Senate District 13 as violations of Sections 2, 30, 31, and 33 of the Constitution. The Fischer Group also makes additional challenges dealing with equal protection concerns and non-contiguity. *See, Temporary Injunction Under 65.04 and Partial Declaration of Rights, February 7, 2012, at 8 and 9-14* ("Judgment").

[4] Unlike nearly all southern states and a few others, Kentucky is not required to obtain preclearance of its proposed plan from the Civil Rights Division of the United States Justice Department pursuant to Section 5 of the Voting Rights Act of 1965.

- After making full use of the permissible population variance, the plan must divide the fewest possible number of counties. *Id.*

HB 1 violates *on its face* both of these Section 33 elements in both the Senate and House plans.

HB 1, Part I, allots 45,730 persons to House District 24, or, 2,336 above the ideal population. This results in a deviation of +/-5.38%. The House plan also divides twenty-eight (28) counties, which the proof in the Record shows to be four more than the "fewest possible." *Exhibit A, B & C to Verified Complaint, January 26, 2012; and, Judgment at 5.*

HB 1, Part II, allots 120,498 persons to Senate District 8, or 6,304 above the ideal population. This results in a deviation of +/-5.52%. The House plan also divides five (5) counties. The proof in the Record establishes that five is one more than the "fewest possible." *Notice of Filing Exhibits of Stein Group, February 10, 2012: HB 1, enacted, with reference to the Population Summary and District Map; and, Senate Floor Amendment 1 to HB 1; and, Judgment at 5.*

As the General Assembly went into session on January 2, 2012, there was no secret about the requirements imposed by Section 33 upon a redistricting plan. This area of the law has been *well-settled* since the domino-like litigation that ensued from the re-districting attempts using the 1990 census data. In four opinions between 1993 and 1997, this Court fully analyzed the dual, and at times conflicting, principals of population

equality and preservation of county integrity.[5] In *Fischer II* and *Jensen,* this Court resolved this tension by adopting a bright line rule for the General Assembly to follow:

> In fact, Kentucky was recognized as one of the few states which held prior to *Baker v. Carr,* ***, that in apportioning legislative bodies, equality of population has priority over political subdivision boundaries. *citations omitted.* We reiterated this priority in *Fischer II* when we adopted plus-or-minus 5% as the maximum population variation allowable in creating House and Senate districts. This variation has been recognized as a "minor deviation" insufficient to make out a prima facie case of invidious discrimination. *citations omitted. 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.

Jensen, 959 S.W.2d at 774-75.

We place this brief discussion of the 1990 Census litigation in the "Statement of the Case" rather than awaiting the Argument, because this is settled law for nearly eighteen years. Since *Jensen,* the law has been clear and well understood. There have been no intervening changes in federal jurisprudence. The LRC was a party-appellee, active in every aspect of *Jensen* - from filing its own briefs to participating in oral argument with independent, outside counsel. *Id.,* at 771. The notion that the LRC now needs direction to understand the application of Section 33 upon its re-districting powers is disingenuous.

As a result of HB 1 being signed into law, it could hardly come as a surprise that the instant challenges were filed in Franklin Circuit Court which enjoys sole venue per KRS 5.005(1). After an expedited hearing at which the evidentiary record was made, the Circuit Court entered its Judgment holding that, *on its face*, HB 1 was unconstitutional and enjoined the use of the districts it created.

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[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*").

ARGUMENT

I. The Law is Settled, the Judgment must be Affirmed

This is not a close case. This is also the first time this Court is being called upon to examine a redistricting plan since the 1990 Census plans. KRS 5.100 and 5.200 were unchallenged, *and* complied with the population variation and county integrity requirements of Section 33. *Enact. Acts 1991 (2nd Ex. Sess.), ch. 3, Sec. 39, and ch. 5, Sec. 101, effective January 8, 1992).*

Unless this Court chooses to reverse itself or somehow "modify" its prior holdings, then the Circuit Court must be affirmed. Applying the "central holding" of *Fischer II,* which was reiterated in *Jensen,* the Record is uncontroverted and brooks no other result than that reached below. There are districts in each chamber that are greater than the "maximum population deviation" of +/-5%, and the plan divides too many counties. Game over. *Jensen,* 959 S.W.2d at 772.

The principal of *stare decisis* is well-established in Kentucky law, and it strongly counsels against abandoning the *Fischer II/Jensen* holdings. Certainty in the law is not just a goal, but a bedrock judicial principal. It is designed to protect the law, and our democracy, from the particularities inherent in the ever changing composition of a court as well as temporary societal pressures that evaporate when the moment passes.

This Court has well-stated this rule in our own jurisprudence:

> *Stare decisis* is a doctrine which has real meaning to this Court. When a court of institutional review announces a principle of law to apply to a general set of facts, the doctrine of *stare decisis* requires the court, in the absence of 'sound reasons to the contrary' to adhere to that same principle in future cases where there is a similar factual pattern." *Williams v. Wilson,* 972 S.W.2d 260, 269 (1998) (Stephens, C.J., concurring)*(quoting Hilen v. Hays,* 673 S.W.2d 713, 717 (Ky. 1984)).

Gilbert v. Barkes, 987 S.W.2d 772, 773 (Ky. 1999).[6]

And, even more recently, in *Saleba v. Schrand,* 300 S.W.3d 177 (Ky. 2009), this Court declined to depart from prior established law where the appellant argued that this Court misinterpreted a statute and that the prior holding needed to be reversed:

> This Court reiterated its holding that KRS 311.377(2) does not protect peer review records in medical malpractice suits in *McFall v. Peace, Inc., citation omitted.* Despite this well-established precedent, [appellant] contends that this Court misinterpreted KRS 311.377(2) in *Sisters of Charity Health Systems,* and that "the time has come" for the Court to revisit that decision. We disagree. *Stare decisis* requires this Court to follow precedent set by prior cases, and this Court *will only depart from such established principles when "sound reasons to the contrary" exist. Hilen v. Hays*, 673 S.W.2d 713, 717 (Ky. 1984); *Gilbert v. Barkes*, 987 S.W.2d 772 (Ky. 1999). Although [appellant] contends that this Court's refusal to protect peer review documents in medical malpractice cases frustrates the purpose of the privilege and undermines the greater goal of improving healthcare, *[appellant] has not presented compelling reasons to justify discarding over twenty years of precedent regarding the interpretation of KRS 311.377(2).*

Id., at 183 (emphasis added).

The case *sub judice* is strikingly similar to what confronted the Court in *Saleba.* Like the challenge to the statute in *Saleba* , the Appellant here seeks a change in the interpretation and construction of an act of a political body: a section of the Constitution. Like the challenge in *Saleba*, the precedent was not new – here, the precedent dates to 1994, and was reaffirmed in 1995 and 1997. Like the challenge in *Saleba,* the Appellant is unable to carry the high burden of proving "compelling reasons to justify discarding over [eighteen] years of precedent regarding the interpretation of [Section 33]."

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[6] In its Motion to Transfer and Advance, the Appellant references a dissent which states that the doctrine of *stare decisis* is "less rigid in its application to constitutional precedents." *Id.,* at 13, n. 7. Regardless of that dissent, the Appellant is not absolved from coming forward with *compelling reasons* to reverse *Fischer II/Jensen.* The other case Appellant cites, *Bright v. Am. Greetings Corp,* 62 S.W.3d 381 (Ky. 2001) is not in the opinion of the Court, but from a concurrence of Justice Keller. *Id.,* at 387.

Typically, as here, an appeal of a circuit court decision in a declaratory judgment action is made under the clearly erroneous standard set forth in CR 52.01 as to findings of fact. Conclusions of law are reviewed *de novo*. *Baze v. Rees*, 217 S.W.3d 207, 209-210 (Ky. 2006).

The Circuit Court found as fact that in both chambers more counties than necessary were split after apportioning population; and, that there were districts in each chamber that exceeded the maximum permissible +/-5% variation. From those Findings, the Court then concluded as a matter of law that pursuant to this Court's binding precedent of *Fischer II/Jensen,* HB 1 was unconstitutional under Section 33. *Judgment, FOF ¶¶2, 3, 4, 5, and 6, and COL ¶¶ 1, 2, 3, and 4.*

As noted earlier, the facts are not in dispute on the issue of district population variation and minimal county splits. And, even reviewing the Circuit Court's Conclusions of Law *de novo* there is no error. The only path for Appellant is to convince this Court to revisit and reverse itself in (or, otherwise "modify") *Fischer II/Jensen.* Given that the Appellant has proffered no evidence below, nor was able to articulate any compelling reason to abandon *stare decisis*, then the Circuit Court's decision holds up to *de novo* review.[7]

Here though, the Appellant has offered *no proof* that compelling reasons exist to abandon the principal of *stare decisis*. Moreover, the issue of the continued viability of

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[7] We certainly recognize that acts of the Legislature enjoy a presumption of validity, and are not deemed unconstitutional absent a clear and unmistakable showing that it does not comport with the Constitution. *Star v. Com.,* 313 S.W.3d 30, 37 (Ky. 2010). As seen from the factual findings below, we carried that burden. Given the attack on *Fischer II/Jensen* , the burden changes from the Stein Group and Fischer Group of having to prove unconstitutionality. Now, the burden is on the Appellant to prove compelling reasons to avoid the application of *stare decisis. Saleba,* 300 S.W.3d at 183. As Appellant conceded in its Motion to Transfer, it only wins with a reversal of *Fischer II/Jensen. Motion to Transfer and Promote,* at 13, ("The very nature of Movant's primary argument [reversal] warrants transfer to this Court.").

county integrity as a relevant component of Section 33 was dealt with *thrice* already by this Court: first in *Fischer II,* again in *Fischer III,* and then finally in *Jensen.* Nothing in the interim has occurred to compel reversal of that line of cases.

At the February 6, 2012, hearing in the Circuit Court on the issue now before this Court, the Appellant put forth no evidence that a compelling public policy or legal reason exists to justify abandoning *Fischer II/Jensen.* Instead, the core of the argument of Appellant was extrapolated from the statement in *Jensen* that re-districting is "primarily a political and legislative process," so that matters such as minor deviations from the +/-5% variation and how many counties should be split are political issues for the legislative power. *Memorandum of Law for Legislative Research Commission, filed February 3, 2012, at pp. 4-6; and Jensen,* 959 S.W.2d at 776.

The Appellant is claiming that this Court in *Fischer II/Jensen* either misapprehended federal equal protection law on the "one person, one vote" population variance in ruling on what is permissible under Section 33; or in its construction and application of Section 33, the Court "exceeded" its writ and *de facto* via judicial fiat amended Section 33. *Memorandum of Law for Legislative Research Commission, filed February 3, 2012, at pp. 1-2.*

These are not compelling reasons to abandon the holdings of this Court in *Fischer II/Jensen.* In assessing the constitutionality of the 1990 Census plans and HB 1 using the 2010 Census Data, this Court is obliged to "ascertain whether a particular re-districting plan passes constitutional muster, not whether a better plan could be crafted." That is precisely what this Court did in the 1990s and what the Circuit Court did here. In studying the debates of our Constitution, applying its precedent from earlier re-districting

challenges, and then construing the plain language of Section 33, this Court properly and correctly discharged that duty.

To couch that effort as somehow violating Sections 27 and 28 and intruding on the power of the Legislature is quite a leap beyond settled law on separation of powers. It hardly meets the requirement of showing "compelling reasons." The Appellant in its filing below, and we expect will here, merely rolls out generalities that the power to make public policy is vested in the Legislature. *Id.,* at 3-5, citing *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790 (Ky. 2009). There is no reference to the Debates, no discourse on Kentucky or foreign case law applying a state constitution's redistricting requirements, or even some change in federal law that alters the holdings in *Fischer II/Jensen.*

The separation of powers principal cited below is well known. However, deference to the Legislature in the formulation of public policy does not translate into obliging this Court to abdicate its job to require the Legislature to act within the bounds of the Constitution . . . including Section 33 and its principals of population equality and county integrity. *Commonwealth v. Goldburg*, 180 S.W. 68, 72 (Ky. 1915), ("The judiciary is not at liberty to interfere with authority of legislative branch to enact laws unless the legislation violates directly or by necessary implication some provision of state or federal Constitution").

The application of the rule of *stare decisis* compels affirmance of the Circuit Court. And in doing that, there is no intrusion into the power of the Legislature to make public policy via the enactment of a *constitutional* redistricting plan using 2010 Census data. The Appellant in its filings below and those here (the Motions for intermediate

relief and the Motion to Transfer) fails to articulate compelling reasons for this Court to reverse and retreat from *Fischer II/Jensen.*

II. The Dual Principals of Population Equality And County Integrity are Mandated by Section 33 And Not an Invention by this Court

Stripped to its essence, the argument advanced by the Appellant that this Court got the meaning of Section 33 wrong is that county integrity is *passé* and of no constitutional import. Appellant claims that modern federal jurisprudence on population equality has eroded the constitutional mandate of county integrity to a mere suggestion devoid of constitutional import.

The Appellant is not only wrong, but has ignored both the express analysis of this Court that underpins its holdings, as well as similar situations in sister states that uphold the integrity of *state* constitutional protections of political subdivisions in re-districting plans.

In *Jensen,* this Court most certainly recognized that county integrity retained its vigor under Section 33. But, in doing so, it recognized the primacy of population variation. "In *Fischer II*, we held that 'the mandate of Section 33 is to make full use of the maximum constitutional population variation as set forth herein [+/-5%] and divide the fewest possible number of counties.' citation omitted. In *Fischer III*, ***, we reiterated that this was the central holding . . . . We have long held that when the goals of population equality and county integrity inevitably collide, the requirement of approximate equality of population must control. *citations omitted.*" *Jensen,* 959 S.W.2d at 774.

Despite the entreaties of the appellants in *Jensen* to make county integrity even more robust by asking that the Court forbid the multiple divisions of a county when that county could accommodate a district itself, this Court held to its central holding in *Fischer II and III.* In doing so, this Court recognized the ultimate supremacy of population variation, but also construed Section 33 appropriately to give modern relevance to the framers plain intent to promote county integrity. *Id.,* at 775. So, county integrity has been visited multiple times by this Court; and, its modern application of Section 33 is neither judicial activism nor invention.

An examination of the debates from both 1849 and 1891 plainly evidence the tension between county integrity and population variation, and the plain intent of the framers that effect be given to both. *Grantz v. Grauman,* 302 S.W.2d 364, 367 (Ky. 1957)[8]. The only difference between now and then is that intervening federal and state case law gives primacy to population equality . . . *not* an obliteration of the constitutional principle of county integrity.

In 1849, when there were 100 counties and 100 House districts, the Convention produced a constitution that apportioned as nearly equal as possible amongst ten districts created in the constitution itself, and then sub-apportioned within those districts amongst counties, cities, and towns. *Third Ky. Const., Art. II, Sections 6 and 13 (1850).* The tug between rural and urban, region and region, and anticipated growth and decline resulting from immigration is evident in those Debates. *Report of the Debates and Proceedings of*

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[8] "Another rule of constitutional construction is to give effect to the intent of the framers of the instrument and of the people adopting it. The Constitution should not be construed so as to defeat the obvious intent of its framers if another interpretation may be adopted equally in accordance with the words and sense which will carry out the intent. The intent must be gathered both from the letter and the spirit of the document. The polestar in the construction of Constitutions is the intention of the makers and adopters."

the Convention 1849, pp. 921-22, 953-74, 976-77, 997-1001, 1026-31, 1061, and 1091-94, ("MR. KAVANAUGH [Anderson County]: Mr. President, the effect of the new basis [for calculating population], when the population of the whole state is considered, will be to transfer a part of the political power enjoyed by those counties now receiving the foreign population to the interior, and, in short, to those parts of the state on which that tide is not pouring.", at 957. Ultimately, the concept of the integrity of political subdivisions found a place next to population equality. *Id. at 1026-31, and 1091-94.*

The debate which focused on resolving the tensions between population equality and county integrity was resumed during the Convention of 1890 which produced our current Constitution, the fourth since our Statehood.

In addition to those points noted by this Court in *Jensen*, there can again be little doubt that the framers were intent on maintaining, along with population equality, the integrity of counties. This appreciation of the preeminence of population equality is plain from its rejection of guaranteeing a representative for each county. *2 Proceedings and Debates of the Constitutional Convention of 1890,* at 689-93. Numerous other "county protection" clauses were considered and rejected: increasing Senate districts from 38 to 40 or more (*V. 3,* at 3808-09*);* to retain the division of the state into constitutional districts that guaranteed regional equality as a reaction to allowing the Legislature unfettered discretion (*V.4* at 4610-12, *speech of Mr. Hopkins [Floyd County];* to attempts to constrict the political power of Louisville ("It is not . . . any antagonism to Louisville, but a great principle that I am contending for, that . . . this populous center . . . shall not control, as the Gentleman threatens . . . the destinies of this State . . . .") (*V. 3,* at 3977*).*

The constitutional principles of population equality and county integrity have animated our Commonwealth's legislative apportionment since the First Constitution. *First Ky. Const., Art. I, Sections 4, 5, 6, 8 & 9 (1792); Second Ky. Const., Art. II, Sections 5, 6, 8, 10, 11 & 12(1799).* Other than the resort to "Constitutional Districts" adopted in the Third Constitution in which it is arguable that territory was given superiority[9], the framers have sought to strike balance between the two. That is the *intent* that this Court effected in *Fischer II/Jensen.*

And, this is *precisely* what this Court did in its construction and application of Section 33 to modern apportionment plans. This Court did not "exceed its writ" nor intrude on the power of the General Assembly. *Motion to Transfer and Promote, filed February 13, 2012,* at 11-13. This Court merely gave effect to the well-articulated and long founded principles that our Constitution mandates: county integrity and population equality.

This balancing of competing constitutional themes in state re-districting is hardly confined to Kentucky.

Just this past month, the Pennsylvania Supreme Court wrestled with a proposed plan submitted to it under its constitution.[10] Its approach to political subdivisions is, "[u]nless absolutely necessary [to comply with population equality] no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district." *Pa. Const.. Art II, Section 16.* In rejecting the plan, the court held that it "contains numerous political subdivision splits that are not

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9 *Third Ky. Const., Art. II, Sections 6, 14, & 15 (1850).*

10 In Pennsylvania, a Legislative Redistricting Commission is formed, and devises a plan. Any person can then appeal the plan to the Supreme Court. If the Court finds it defective, then it is remanded to the Commission.

absolutely necessary, and . . . violates the constitutional command to respect the integrity of political subdivisions." *Holt v. 2011 LRC,* consolidation of twelve appeals, No. 7 MM 2012, slip op., decided January 25, 2012, opinion filed February 3, 2012 (Pa. 2012), at 8.[11],[12]

Though there are differences in actual language between Section 33 and Pennsylvania's Section 16, the effect is identical: the promotion at a constitutional level of population equality and political subdivision integrity, with the former receiving priority. Again, like the Pennsylvania plan, it is not enough for a state legislative plan in Kentucky to meet federal constitutional requirements . . . Kentucky's Constitution must too be satisfied. HB 1, though perhaps constitutional from a federal perspective, is not under Section 33.

Similar examples exist in non-commonwealth states. In Idaho, a constitutional state plan must satisfy not only the federal ratio of +/-10%, but only divide counties that are required to satisfy federal population equality. *Bonneville County v. Ysursa,* 129 P.3d 1213, 1220 (Id. 2005). The Idaho Constitution provides that, "[a] county may be divided in creating districts only to the extent it is reasonably determined by statute that counties must be divided to create senatorial and representative districts which comply with the constitution of the United States. A county may be divided into more than one legislative district when districts are wholly contained within a single county." *Idaho Const., Art. III, Sec. 5.* In *Bonneville County,* the court found that the splits were necessary to comport

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[11] At the last re-districting following the 1990 Census, the Pennsylvania court similarly rejected the plan on the grounds that too many unnecessary splits of political subdivisions. *Albert v. 2001 LRC,* 790 A.2d 989, 991 (Pa. 2002).

[12] This Court has previously determined that decisions of the Pennsylvania Supreme Court when interpreting provision of its constitution similar to analogous Kentucky sections is "very persuasive to the Court . . . and should be given as much deference as any nonbinding authority receives." *Commonwealth v. Wasson,* 842 S.W.2d 487, 498 (Ky. 1992).

with population equality. Though there are differences between us and Idaho, again, it is plain that the court in construing its constitution sought to give effect to the dual mandates of equality and territory, with primacy to the former. It is the same as this Court has done in construing Section 33.

We also point the Court to exemplars in:

- Nebraska, where the court voided a plan for failing to adhere to the constitutional mandate to follow county lines "whenever practicable." *Day v. Nelson,* 485 N.W.2d 583, 585 (Ne. 1992); and,
- Colorado, where the court just a few months ago rejected a plan devised by a non-partisan commission for failing to have a reasonable justification for dividing certain counties. *In re Reapportionment of the Colorado General Assembly,* Case No. 11SA282, 2011 Colo. Lexis 894, decided November 15, 2011, non-final version subject to revision. The Colorado Supreme Court in a series of opinions dating to 1982, measures a reapportionment plan in a hierarchy of federal and state criteria, with federal population being preeminent. *Id.,* at 5. The court distilled the state constitutional requirements as "section 47(2) allows the Commission to divide a county only if necessary to meet the equal population requirement of section 46." *Id.,* at 9. Again, like Kentucky, the Colorado court fulfilled its obligation to interpret its constitution to give effect to the constitutional policies of equality and territory – but only after the federal population variance had been satisfied.

The great weight of authority is that it is constitutionally proper for a state to give meaning and effect to its own interests in maintaining the integrity of political subdivisions. The limit on that, obviously, is population equality. This is precisely what this Court has done in the *Fischer/Jensen* line of cases.

The Appellant is just incorrect in stating that this Court must engage in some form of "strict" construction of Section 33. Such a judicial philosophy flies in the face of settled law in a court's duty to review, interpret, construct and apply a section of the Constitution – including Section 33. See, *Grantz,* 302 S.W.2d at 367.

It is a fundamental principle of constitutional interpretation that each and every clause within a constitution has been inserted for a useful purpose. *Runyon v. Smith,* 212 S.W.2d 521 (Ky. 1948) ("[in construing Constitution] there are other important aids to be invoked in helping to clear up any doubts or explain any apparent ambiguities, chief of which is looking at the intent of the framers. In arriving at the proper construction of any specific section we must consider the reason for the provision and the purpose of a convention in adopting it. *citations omitted.* And no part of the Constitution should be construed so as to defeat its substantial purpose or the reasonable intent in adopting it. *citation omitted.* ").

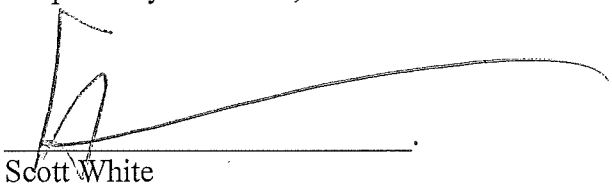
In applying both Kentucky and foreign jurisdiction law, there is no doubt that this Court appropriately interpreted Section 33 in the context of modern re-districting by adopting, *and on two occasions re-affirming,* the central holding of *Fischer II.* In performing that fundamental and critically important judicial function, this Court did not stray beyond its powers. There is no reasonable or logical basis to now reverse, or otherwise constructively reverse via a modification, that holding.

CONCLUSION

The Stein Group carried and met its high burden of proving the unconstitutionality of HB 1 in the Circuit Court. The *only* road to reversal for the Appellant is to convince this Court to abandon its sound holdings in *Fischer II, Fischer III,* and *Jensen.* There exists no compelling reason or rationale to abandon that settled jurisprudence or jettison the principle of *stare decisis*.

The Stein Group respectfully requests that this Court affirm the Franklin Circuit Court's Partial Declaration of Rights, and enjoin the use of the patently unconstitutional House and Senate districts in HB 1.

Respectfully submitted,



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