Supreme Court of Kentucky

CASE NOS. 2012-SC-0091-T and 2012-SC-0092-T

ON APPEAL FROM
FRANKLIN CIRCUIT COURT, DIVISION I
NO. 2012-CI-00109
HONORABLE PHILLP J. SHEPHERD, JUDGE

LEGISLATIVE RESEARCH COMMISSION — APPELLANT

v.

JOSEPH M. FISCHER, et al. — APPELLEES

BRIEF OF APPELLEES JOSEPH M. FISCHER, JEFF HOOVER, KIM KING, FREY TODD, AND ANTHONY GAYDOS

FULTZ MADDOX HOVIOUS & DICKENS PLC
Victor B. Maddox
John David Dyche
Jennifer M. Stinnett
Jason M. Nemes
101 S. Fifth Street, 27th Floor
Louisville, Kentucky 40202
(502) 588-2000
Counsel for Appellees Fischer, Hoover, King, Todd, and Gaydos

CERTIFICATE

I certify that on February 22, 2012, I served a copy of this Brief by electronic and U. S. Mail to David Tachau, Dustin B. Meek, Jonathan T. Salomon, and Katherine E. McKune, TACHAU MEEK PLC, 3600 National City Tower, 101 S. Fifth Street, Louisville, KY 40202-3120; Anita M. Britton, BRITTON OSBORNE JOHNSON PLLC, 200 W. Vine St., Suite 800, Lexington, KY; 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, KY 40507; Sheryl G. Snyder, FROST BROWN TODD LLC, 400 West Market Street, Suite 3200, Louisville, Kentucky 40202; and Laura H. Hendrix, General Counsel, Legislative Research Commission, State Capitol Annex, Room 104, Frankfort, KY 40601.

Victor B. Maddox

Counsel for Appellees Fischer, Hoover, King, Todd and Gaydos

I. COUNTERSTATEMENT OF POINTS AND AUTHORITIES

II. COUNTERSTATEMENT OF THE CASE

This case presents the question whether a redistricting law that flagrantly disregards this Court's settled principles for complying with both the population equality and the county integrity provisions of Section 33 of the Kentucky Constitution should nevertheless be declared constitutional, and its provisions imposed on the citizens of the Commonwealth. To do so requires needlessly overruling a settled line of controlling authority that provides clarity, flexibility and certainty to the decennial redistricting process, in favor of a standardless approach offered by the Legislative Research Commission ("LRC"). The LRC invites this Court to such activism and overruling of longstanding precedent for no better reason than to salvage a law that abandons fidelity to the Constitution in favor of raw political muscle. At a time when other state supreme courts are adopting Kentucky's sensible approach, the LRC would have this Court retrace its own steps and return to an approach developed before the modern law of redistricting which, when last employed in 1991, saw the constitutional principle of county integrity eliminated altogether.

A. THE CONTROLLING AUTHORITY

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 this Court highlighted the importance of Section 33, and the right that it protects: "In substance and in form, the county unit is at the heart of economic, social and political life in Kentucky". *Fischer v. State Bd. of Elections*, 879 S.W.2d 475, 478 (Ky. 1994) ("*Fischer II*"). Consequently, with its holding in that case, the Court declared its intent: "At this juncture, we seek to restore the integrity of our most basic political subdivision and assure that natural and historic boundary lines are observed as intended by the Constitution." *Id.* at 479.

To accomplish that goal, this 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. ... 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 II, 879 S.W.2d at 479 (emphasis added) (internal citations omitted). *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.

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. *Id.* at 774-75. And although the *Fischer II* Court did not have the opportunity to decide any question concerning the contiguous county clause of Section 33, the Court noted that "we regard this requirement as immutable." *Fischer II*, 879 S.W. 2d at 476, n.4. Section 33 of the Constitution, *Fischer II*, *Fischer III* and *Jensen* are the Controlling Authority in Kentucky for redistricting of the General Assembly.

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 *Fisher II* 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. Just as

important, redistricting requires a balance between population equality and respect for county integrity, *id.* at 479, a balance that *Fischer II* restored.

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. And it is easy to apply, because the fewest possible number of counties that must be divided in every redistricting cycle is determined with simple arithmetic, it can be determined with precision, and once determined, it does not change.

In 1996, Kentucky's Attorney General was asked for an opinion regarding the constitutionality of a redistricting bill. After analyzing the Controlling Authority and earlier cases, Attorney General Chandler had no trouble concluding 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, 1996 WL 73927 (Ky.A.G.) 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." *Id.* 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.

This is the same analysis announced by this court in *Fischer II*, reiterated in *Fischer III*, and followed in every respect by this Court in *Jensen*. Almost eighteen years after the rule was announced by this Court, there is still no fundamental impediment to a full accommodation of the dual mandates of Section 33 of the Constitution of Kentucky

B. PROCEDURAL HISTORY

Plaintiffs brought this action in Franklin Circuit Court asserting various state and federal constitutional challenges to HB 1.[1] Regarding Section 33, the Plaintiffs claimed that HB 1 violated the Constitution for three reasons. First, it failed to comply with the maximum constitutional population deviation of plus or minus 5%. Second, it divided more counties than the fewest possible. Third, it violated the "contiguous county" clause of Section 33 with its creation of House Districts 80 and 89 which contain counties remote from each other connected only by a thin, sparsely populated strip fading to a tiny speck, or by an irrational zigzag. After two hearings and the development of a largely undisputed factual record, the Franklin Circuit Court issued its Temporary Injunction Under CR 65.04 and Partial Declaration of Rights entered February 7, 2012 (the "Injunction and Judgment") from which the LRC appeals.

[1] 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.

In its Findings of Fact, the Circuit Court found that "House District 24 [in HB 1] contains a population of 45,730, a 5.38% variance from the ideal. One Senate District (SD 8) contains a population of 120,498, a variance of 5.52% from the ideal." *See* Injunction and Judgment at 5, Finding of Fact No. 2. Further, the Circuit Court found as a matter of fact that "House Bill 1 divides 28 counties" while other plans in the record divide as few as 24 counties. *Id.* at 5, Finding of Fact No. 3. There is no dispute about these findings.

In its Conclusions of Law, the Circuit Court 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* by virtue of the fact that at least one House District and one Senate District have a population variance greater than 5%," *id.* at 8, Conclusion of Law No. 3, but also because HB 1 "fails to comply with the mandate of *Fischer* to 'divide the fewest possible number of counties' because the record in this case demonstrates that it is possible to divide as few as 24 counties in the House, and as few as 4 counties in the Senate." *Id.* at 8, Conclusion of Law No. 4.

Thus, the Circuit Court concluded as a matter of law that HB 1 was facially unconstitutional because it fails both parts of the two-part test of constitutional muster announced by this Court in *Fischer II*, interpreting Section 33 of the Constitution. This conclusion is plainly correct.[2]

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[2] The Franklin Circuit Court reserved ruling on Appellees' other claims, including those for violations of the contiguous counties clause of Section 33, and the federal equal protection and freedom of association. These federal 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 (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).

Regarding the "contiguous county" clause of Section 33, the Circuit Court found as a matter of fact that House District 80 "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'." *Id.* at 6, Finding of Fact No. 6. The Circuit Court concluded as a matter of law that "the Plaintiffs have raised a substantial issue of law regarding the issue of whether HD 80, and perhaps HD 89, comply with the requirement of Section 33 that counties be contiguous when forming a district." *Id.* at 8-9, Conclusion of Law No. 5.

III. ARGUMENT

There is no dispute that because 28 counties are split, HB 1 fails to divide the fewest possible number of counties for House 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 Circuit Court so found, and no party challenges those findings. The LRC itself published data putting this fact beyond any reasonable doubt, and LRC doubtless concedes the point in its brief to this Court. Nor was there ever any mystery during the 2012 legislative redistricting process that 24 counties is the fewest possible number of counties to be divided for purposes of Section 33 of the Constitution, or that a plan that has a population variation greater than +5% is invalid. 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 and applied by this Court.

A. THE CIRCUIT COURT CORRECTLY FOUND THAT HB 1 VIOLATES THE DUAL MANDATE OF SECTION 33.

In *Fischer II*, this Court held that population equality and county integrity are the dual mandates of Section 33. While the LRC would have this Court return to an interpretation of the Constitution that was developed in the first three decades of the 20th century, the Controlling Authority takes full account of the developments of the last 50 years and concludes as follows: "The foregoing language [of Section 33] 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*, 879 S.W 2d at 477. The *Fischer II* Court had no occasion to consider the contiguous county clause of Section 33. But it noted that it views the requirement of contiguous counties as "immutable." *Id.* at 476, n. 4.

The state constitutional standard was fashioned not to supplant our Constitution with federal law but to establish an independent state standard that has definite 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,* sensibly provides a standard that can always be reconciled with a body of 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*.[3]

[3] At every stage of this litigation, the LRC has misstated the controlling federal Equal Protection standard, claiming without basis that the United States Supreme Court treats overall population deviations of as much

Fischer II thereby harmonizes Section 33 of the Constitution with federal law, while giving full effect to the competing values of the Kentucky Constitution. Despite the LRC's suggestion of some collision between the Controlling Authority and federal law, the record below proves that there is no such collision, or even any tension with federal law. The record is replete with redistricting plans introduced in the 2012 session of the Kentucky General Assembly that satisfy both of the Constitution's Section 33 mandates by dividing only 24 counties, the fewest possible 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 below), HB 292 (Plaintiffs' Exhibit 4 below), HB 318 (Plaintiffs' Exhibit 5 below), and HB 370 (Plaintiffs' Exhibit 6 below).

Thus, the record demonstrates that during the 2012 redistricting process, compliance with this Court's mandate and Section 33 of the Constitution was always possible, and quite easily so. LRC itself published the data for each of the constitutionally-compliant plans identified in the record below, if it did not actually draft them itself. Each of these plans fully complies with *Fischer II* and Section 33. Some of those plans do so with both overall and relative population deviations substantially closer to equality than does HB 1, while avoiding the sort of mapping contortions that are displayed in HB 1's House District 80 and House District 89. HB 292, for example, has an overall population deviation of only 6.93%, compared to the 10.00% of HB 1. And HB 292 has relative population deviations (the deviation of any district from the ideal

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as 10% as *de minimis*. In fact, only overall population deviations of less than 10% are accorded such treatment. *See* discussion *infra* at Part II(E).

district population) of -2.26% to +4.66%, substantially closer to equality than the relative population deviations of -4.62% to +5.38% displayed by HB 1. For good measure, HB 292 divides only 7 precincts, while HB 1 divides 246 precincts.

If this Court's mandate to accommodate both population equality and county integrity in redistricting were at odds with federal Equal Protection law, as LRC suggests, how could it be that a plan, or many plans, that provides greater protection for county integrity also achieves lower overall and lower relative population deviations than the plan the majority in the General Assembly adopted and the LRC defends? And why does the legislature need greater flexibility than the substantial freedom already offered by *Fischer II*, when plans that fully comply with *Fischer II* divide the fewest counties possible while coming substantially closer to population equality than does the plan the LRC defends? As the record shows, full compliance with the Controlling Authority results in closer adherence to federal Equal Protection principles than does the standardless approach the LRC urges. Quite simply, *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. The record below makes this conclusion unavoidable.

Recently, the Appellees/Intervening Plaintiffs described the General Assembly as the "acme of hubris," and for good reason. 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* and applied in *Fischer III* and in *Jensen.* With HB 1, the General

Assembly simply chose to disregard this consistent line of controlling constitutional authority.

The legislative record is actually remarkable on this point. 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, and anyone interested before HB 1 became law needed only look at the LRC map or the Political Subdivision Report prepared by LRC for HB 1 to know that it divides 28 counties. Similarly, the Circuit Court found that HB 1 violated the maximum constitutional population deviation of plus or minus 5%, and anyone interested before HB 1 became law needed only look at the Population Summary Report for HB 1 to know this is so.

One is left to wonder why the leadership of the General Assembly did not simply look at the LRC map, Population Summary Report, and the Political Subdivision Split Report, before it enacted HB 1. The only reasonable conclusion is that the leadership looked but did not care. There was extensive committee and 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, the Speaker of the House 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.[4] The Court may take judicial notice of it, along with the Speaker's disregard for settled constitutional law.

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 the KET website linked on the LRC website.[5] Well aware of the directive from this Court, the Speaker was unmoved. Now, as then, Section 33, *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 Circuit Court correctly so held. Only a decision by this Court to abandon this sensible precedent for no good reason can permit the LRC and the General Assembly to achieve its goal of creating new legislative districts that divide as many counties as the majority deems "practical", that display relative populations deviations of up to double the deviation currently allowed by this Court (increasing from

[4] http://www.ket.org/cgi-bin/cheetah/watch_video.pl?nola=WGAOS+013020&altdir=&template.

[5] http://www.ket.org/cgi-bin/cheetah/watch_video.pl?nola=WGAOS+013028&altdir=&template.

5% to 10%), and that allow the map makers to mock the contiguous county clause of Section 33 while doing so.

The LRC implicitly acknowledges all of this. In the court below, LRC half-heartedly argued that despite the clarity of this Court, and the controlling authority in Kentucky, the "fewest number possible" of divided counties simply means the fewest number that a majority decide suits its 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." This is the "standard" for constitutional muster that LRC would substitute for the clarity, certainty and ease of application offered by *Fischer II* and its progeny. Even as it offered this argument to the Circuit Court, the LRC observed that its real purpose was only to preserve for appellate review the issue "whether the Supreme Court has, or should, overrule *Fischer II.*" *Id.* at 3, n.4.

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%. Indeed, the LRC actually stated as follows: "In sum, the General Assembly has enacted legislation reapportioning the districts in a manner that attains the plus/minus 5% goal, while dividing the fewest possible number of counties that, in the collective judgment of the legislators, were necessary to divide to attain the paramount, equality goal". Only hubris could lead the LRC to declare in the Kentucky Court of Justice that its redistricting plan "attains the plus/minus 5% goal" when everyone can see that it does not. Of course, in *Jensen* this Court expressly

considered and rejected the argument that population deviations only slightly greater than 5% should nevertheless be acceptable. *Jensen*, 959 S.W. 2d at 774. And just as obviously, HB 1 not only divides more counties than necessary, it does so while creating substantially higher relative and overall population deviations than other constitutional plans in the record. Only hubris could lead the LRC to proclaim that its facially unconstitutional plan attains the goal of population equality (which the LRC alone declares is "paramount") when the plan actually presents substantially worse population equality characteristics than other, constitutionally compliant plans in the record. How this "collective judgment of the legislators" can be squared with these facts and the Constitution is beyond rational explanation.

The record below demonstrates that the application of *Fischer II* results in plans closer to population equality with greater respect for county integrity than does whatever "standard" the LRC might have in mind. Abandoning *Fischer II* for the LRC approach would accomplish none of the supposed good LRC offers, while opening the redistricting process to no end of gamesmanship.

B. HB 1 VIOLATES THE CONTIGUOUS COUNTY CLAUSE OF SECTION 33.

House District 80 is overpopulated to the maximum extent possible permitted by *Fischer II*, deviating from the ideal district by + 5%. To achieve this maximum possible deviation, House District 80 combines two counties separated by the county immediately adjacent to each of them, adds a narrow corridor containing less than 1,900 residents along the northern border of a fourth county, includes a tiny speck of that county dipping down from the corridor to make a point of contact with one of the separated counties, and then tacks on part of a fifth county that stretches far to the north. 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 Pulaski Strip contains 1,882 residents and only 1,146 voters, out of a total District 80 population of 45,562. The record demonstrates that at its only point of contact with Rockcastle County, that strip comes down to a tiny speck of Pulaski County, one that contains only five voters. *See* Plaintiffs' Exhibits 8 and 10 below (LRC map of the Pulaski County portion of District 80 and the affidavit of Mark Vaught, respectively). A composite of the LRC-created map for District 80 showing the point of contact between Pulaski County and Rockcastle County, at the tri-county line with Lincoln County is attached to this Brief as Appellee's Demonstrative Exhibit A.

House District 89 deviates from the ideal district by + 4.99%, just a few people shy of the maximum population permitted by *Fischer II.* District 89 connects McCreary and Jackson counties with a zigzagging stretch through the heart of Laurel County. McCreary County is not connected by economics, politics or civics to Jackson County. Driving from the county seat of one county to the other is a trip of several hours, much longer than the trip from say Lexington to Louisville. At its narrowest point, in the City of London, District 89 appears to be no more than one city block wide. *See* Plaintiffs' Exhibit 9 below (LRC map of the Laurel County portion of District 89). A highlighted version of that map is attached to this Brief as Appellees' Demonstrative Exhibit B. The Plaintiffs' Verified Complaint claims that these House districts are not contiguous within the meaning of Section 33 of the Constitution.

Section 33 of the Kentucky Constitution expressly requires that "the counties which form a district shall be contiguous." This Court has noted that "we regard this

requirement as immutable." *Fischer II*, 879 S.W. 2d at 476, n.4. The Court need only look at the map of HB 1 to know that House District 80 is not comprised of counties that are "contiguous" within the meaning of the word for purposes of Section 33. The district has no core. Its counties are contiguous only to the extent that some insignificant part of an even more insignificant part is employed as a sham. *See Reynolds v. Sims,* 377 U.S. 533, 568 (1964) (the apportionment "presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone"). *Cf. Karcher v. Dagget*, 462 U.S. 725, 758 (1983) (Stevens, J., concurring) ("As with the numerical standard, it seems fair to conclude that drastic departures from compactness are a signal that something may be amiss."); *Id.* at 788 (Souter, J., concurring)("Generally, the presumptive existence of such unconstitutional discrimination will be indicated by a districting plan the boundaries of which appear on their face to bear little or no relationship to any legitimate state purpose.").

Casey County is connected to Rockcastle County only by a narrow strip of Pulaski County that comes down to essentially a tiny speck, one that is no more than one mile wide at the Pulaski/Rockcastle border. *See* Plaintiffs' Exhibit 10 below (Affidavit of Mark Vaught). At the other end of the Pulaski Strip, it is apparently impossible to drive from Casey County to Rockcastle County without leaving House District 80, for there is no significant road through the Pulaski Strip from Casey County to Rockcastle County. *Id.* ¶ 9. Only 1,882 people live in the Pulaski County portion of District 80, or 2.85% of the District's population. Yet the District is overpopulated by 5%. In the speck of land of Pulaski County that actually borders Rockcastle County, only five voters are residents. At the far northern end of the District 80, part of Madison County stretches to the suburbs

of Lexington.

This is not a district that is in any meaningful sense composed of contiguous counties. Casey County is not contiguous to Rockcastle County, and the Pulaski Strip, and worse, the fingertip of it that actually touches Rockcastle County, is a subterfuge, one that makes a mockery of the contiguous county clause of the Constitution.

In *Larios v. Cox*, 300 F. Supp.2d 1320, 1350 (N.D. Ga. 2004), the District Court found noted that some of the districts achieved contiguity only by the use of a "touch-point" connection:

> Likewise, there is no indication in this record that a regard for *contiguity* caused the population deviations in the plans. Numerous districts in the House and Senate were kept contiguous only by having them cross bodies of water or by having touch point contiguity. Many of these marginally contiguous districts also had significant population deviations. Notably, the defendant has not attempted to justify the deviations on this basis either. Accordingly, we conclude that the population deviations in the House Plan and the 2002 Senate Plan did not result from an interest in contiguity.

To the same extent, the tiny speck of Pulaski County included in House District 80 at the Pulaski/Lincoln/Rockcastle line is little more than a touch-point.

In the annexation and incorporation context, the Supreme Court has held that Courts look on similar efforts to connect territory with a city as subterfuges or shams. *See Griffin v. City of Robards,* 990 S.W. 2d 634 (Ky. 1999). Why would the Supreme Court have a more stringent standard for deciding whether a small city can annex a nearby strip mall or subdivision than it would for deciding whether the most fundamental aspect of social, economic and political life in Kentucky -- the county -- has been respected, and the individual right of equal suffrage and effective representation has been upheld? The LRC suggested below that it is because municipalities are creatures of

statute, so that their authority must be strictly construed. Perhaps, but the contiguous county clause of Section 33 is part of the organic law of this Commonwealth, an essential element of the compact among the citizens. These Appellees submit that the inclusion of the Pulaski Strip, and the speck of territory that it uses to create a point of contact with Rockcastle County, one that dips just slightly below the tri-county line with Lincoln County apparently for the sole purpose of creating a point of contact with Rockcastle County, demonstrates that the General Assembly recognized the limitation on its power that Section 33's contiguous county clause represents. The General Assembly plainly understood that it could not create a district that included Casey County and Rockcastle without the subterfuge of the Pulaski Strip. And even the Pulaski Strip has no connection to Rockcastle County except at one tiny point of contact. The drafters were forced to reach down one more census block, and include five more voters, to create the touch point between Pulaski County and Rockcastle County. In House District 89, the drafters were less subtle, creating a slashing corridor through one county solely for the purpose of creating marginal contiguity between two otherwise remote counties.

The map of House district 80 that HB 1 creates can only be seen as a cynical effort to ignore the substance of the contiguous county clause while paying constitutional lip service to its intent. The inclusion of a narrow swath of Pulaski County fading to a tiny speck of a connection with Rockcastle County to join it to Casey County and create House District 80 does great violence to the mandate of Section 33 as explained in *Fischer II*. It disregards natural and historic boundaries. It combines two counties that are by no means contiguous, Casey and Rockcastle, with part of another even further removed, Madison, and does so with the sort of approach the Supreme Court has called a

subterfuge in other contexts and that the Appellees call the Pulaski Strip. That strip runs through the territory it covers without regard to political lines, dividing towns, precincts, school districts and any other civic unit in its path. It does so without regard to the county integrity or the rights of the citizens it covers. Its only purpose is to allow a map that has at least a fingertip of Pulaski County touching both Casey County and Rockcastle County.

To the same effect is the map of House District 89, which combines two non-contiguous counties, McCreary and Laurel, by slashing a path through the heart of Laurel County. The detail insert of the district, created by LRC, shows that at its narrowest part in downtown London, the district is as narrow as a single city block.

This is not contiguity within any meaning understood by the drafters of the Kentucky Constitution, or within the meaning of the Kentucky Supreme Court. Instead, this is cavalier disregard for the "immutable" character of districts formed from contiguous counties that insure the sort of representation the framers intended. In the context of pornography, Justice Stewart famously observed that one knows it when one sees it. *Jacobellis v. State of Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 1683, 12 L. Ed. 2d 793 (1964). House Districts 80 and 89 are the redistricting equivalent of pornography. If allowed to survive, and to become precedent for future General Assemblies, the contiguous county clause of Section 33 of the Kentucky Constitution will come in a plain brown wrapper. The Supreme Court had no occasion to consider the "contiguous" element of Section 33 in *Fischer II*, but there can be little doubt that districts as bizarrely shaped as District 80 and District 89 represent the sort of subterfuge Section 33 was intended to preclude.

C. *FISCHER II'S* HARMONIZATION OF STATE AND FEDERAL CONSTITUTIONAL LAW IS FOLLOWED BY OTHER STATES.

The LRC argued below that the plus or minus 5% rule as enunciated in *Fischer II* and later upheld in *Fischer III* and *Jensen,* was a misapplication of the federal rule, which they claim to be a 10% safe harbor. To the contrary, the plus or minus 5% rule is a principled and highly useful standard that respects the federal constitution and the twin mandates of Section 33 of Kentucky's Constitution, which is a commitment to county integrity and "one person, one vote" principles. Other states are in accord.

For example, North Carolina has adopted the same plus or minus 5% standard in an opinion with language strikingly similar to *Fischer II.* In *Stephenson v. Bartlett*, 562 S.E.2d 377 (N.C. 2002), the North Carolina Supreme Court was interpreting that state's "whole county provision", which is a constitutional provision substantially similar to Section 33. The whole county provision required 1) that each district represent, as nearly as possible, an equal number of inhabitants, 2) that each district comprise contiguous territory, 3) that no county shall be divided in the formation of a district, and 4) that, once completed, redistricting is not to recur until the next census. *Id.* at 384. Like the LRC here, the defendants in *Stephenson* argued that the whole county provision was a dead-letter in light of the post-*Reynolds* federal precedent, *id.* at 383-84, and that to enforce the provision without strictly complying with its "no county division" mandate would be tantamount to rewriting the constitution. *Id.* at 391-92. The North Carolina Supreme Court rejected this argument, and held that the whole county provision is not a "legal nullity" simply because it may not be inflexibly applied, because its "beneficial purposes can be preserved consistent with federal law and reconciled with other state constitutional guarantees." *Id.* at 389.

Then the North Carolina gave clear guidelines, as this Court did in *Fischer II*, stating that "[i]n forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within *plus or minus five percent* for purposes of compliance with federal 'one-person, one-vote' requirements." *Id.* at 397 (emphasis added). The Court went on:

> The intent underlying the WCP must be enforced to the maximum extent possible; thus, *only the smallest number of counties necessary to comply with the at or within plus or minus five-percent* 'one-person, one-vote' standard shall be combined, and communities of interest should be considered in the formation of compact and contiguous electoral districts.

Id. (emphasis added). As was true in *Fischer II*, *Stephenson's* holding "accords the fullest effect possible to the stated intentions of the people through their duly adopted State Constitution." *Id.* at 392. In *Stephenson*, the North Carolina Supreme Court adopted the same standard, for the same reasons, as did this Court eight years earlier.

More recently at least five other states this census cycle have declared redistricting plans unconstitutional because they did not properly adhere to "whole county provisions" in their state constitutions. *Holt v. 2011 Legislative Reapportionment Commission*, No. 7 MM 2012, 2012 WL 375298 (Penn. February 3, 2012); *In re Reapportionment of the Colorado General Assembly*, No. 2011SA282, 2011 WL 5830123 (Colo. Nov. 15, 2011) (striking down state redistricting plan because plan split too many counties and remanded to the commission to modify and resubmit state districts); *Twin Falls County v. Idaho Comm'n on Redistricting*, No. 39373, 2012 WL 130416 (Idaho Jan. 16, 2012) (striking down the state redistricting plan because plan split too many counties and remanded to the commission to redraw maps); *Missouri ex rel. Teichman v. Carnahan*, No. SC92237, 2012 WL 135440 (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); *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 part because the unconstitutional plan did not properly respect political boundaries).

In Pennsylvania, since *Reynolds v. Sims*, 377 U.S. 533 (1964), redistricting had allowed little population variation, on the assumption that the trend in federal equal protection law would be toward the strict equality standard of *Baker v. Carr*, 369 U.S. 186 (1962). *See Holt*, 2012 WL 375298, at *41. Effectively adopting the *Fischer II* approach, the Pennsylvania Supreme Court mandated that the legislative reapportionment commission allow more population deviation in order to give "more breathing space for concerns of contiguity, compactness, and the integrity of political subdivisions." *Id.* The *Holt* Court noted that it did not see that the requirements that a redistricting plan honor county subdivisions were "at war, or in tension" with the one-person, one-vote principle. *Id.* at *84-85.

Contrary to the LRC's position here, the *Fischer II* standard is the proper standard to apply to redistricting plans. The plus or minus 5% standard gives the legislature clear guidance and grants proper respect to the dual mandates of Section 33, while complying easily with federal law.

D. LRC'S CONCERN FOR "BALKANIZATION" IS NO REASON TO ABANDON THE CONTROLLING AUTHORITY.

In the Circuit Court, and in its CR 65.07 Motion, the LRC suggested that "balkanization" of mid-sized counties somehow justifies abandoning this Court's sensible and settled *Fischer II* rule. In its motion to transfer, the LRC argued that *Fischer II* denigrates

rather than honors, county integrity because adherence to it requires the unnecessary division of large counties. However, this argument is a regurgitation of the argument this Court already rejected in *Jensen*. In fact, the only issue presented in *Jensen* was whether a county divided once because of population could be divided further. The LRC concedes that this argument was presented in *Jensen* on page 12 of its Motion to Transfer, stating, "In *Jensen*, the plaintiff argued that the principle of 'county integrity' required the General Assembly to allocate a full House district to any county with sufficient population to contain a full House district, rather than splitting the populous counties." The LRC is correct, and it is also correct when it states that this Court rejected that argument because "that requirement was not included in the language of Section 33." *Jensen*, 959 S.W.2d at 775.

So the LRC's argument regarding the effect *Fischer II* has on "balkanization" is simply asking for this Court to reverse *Jensen,* even as the LRC urges this Court to overrule *Fischer II* because *Jensen* somehow repudiated its central holding. Respectfully, the LRC's argument is schizophrenic. On the one hand, LRC argues that *Jensen* overruled *Fischer II*, and this Court should somehow endorse that position. On the other, LRC argues that the central holding of *Jensen* – that Section 33 does not prevent the General Assembly from dividing a county more than once when its population would be sufficient to give it a district of its own – is the evil to be avoided by now overruling *Fischer II*. Respectfully, the LRC position makes no sense.

Furthermore, the LRC does not bring clean hands to its new-found reverence for county integrity. It prays this Court for a reversal of the Controlling Authority because it is somehow too constricted in its ability to protect county integrity, but HB 1 flouts county integrity literally from Paducah to Pikeville.[6] And these splits were made without any legitimate reason. For example, HB 1 split Lewis County, with a population of 13,870, among three districts. The reason for this Lewis County triptych was not because it was necessary to make the plan work, as evinced by the

[6] McCracken County is unnecessarily split among four districts. HB 1 unnecessarily divides Lewis County into three districts, and does the same to Pike County.

numerous alternative redistricting bills introduced in the House and offered into evidence below. Lewis County, which had been in a legislative district with Carter County for many years, was disembodied because a representative from the minority party was elected after the former representative moved to the Senate. Therefore, the LRC's argument that this Court's cases, especially *Fischer II* and *Jensen*, should be overturned is not only wrong on the law, but it grossly misstates the overt intentions of the House of Representative in enacting HB 1, in which county integrity did not play a serious part.

E. THE LRC MISPERCEIVES FEDERAL EQUAL PROTECTION LAW.

The fundamental premise of 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*).[7] *See* LRC's Motion for Interlocutory Relief Under CR 65.07 (hereinafter "LRC's Interlocutory 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,

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

while permitting relative population deviations that exceed the 5% permitted by Section 33 and *Fischer II*. *See* LRC's Memorandum of Law below 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.

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

Throughout its Interlocutory Motion, LRC asserted 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's Interlocutory Motion at 2. This assertion is demonstrably false. There is no "10% maximum population deviation required by" federal law, and no "federal Constitutional mandate of 10%." *Id.* And there is surely no federal mandate "which is achieved by HB 1 (2012)", as LRC wrongly declared. *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 *Reynolds* the Supreme Court explained the only circumstances in which deviation from strict population equality in state legislative redistricting 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). In contrast, where population deviations are not supported by such legitimate interests but, rather, as with HB 1, are tainted by arbitrariness or discrimination, they cannot withstand constitutional scrutiny. *Mahan v. Howell*, 410 U.S. 315, 93 S.Ct. 979 (1973) (adopting for state legislative districts the *Kirkpatrick v. Preisler*, 394 U.S. 526, 89 S. Ct. 1225 (1969), standard that applied to congressional districts, which permitted only "population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown"); *see also 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 Interlocutory Motion and similar phrases elsewhere apparently is seemingly derived

from *Brown v. Thomson*, 462 U.S. 835 (1983). But *Brown* 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 repeated its false premise throughout its Motion, just as it did in the Circuit Court, and will likely repeat it in its brief to this Court. LRC attempts to justify these assertions with footnote 4 to its Motion, but the principal authority relied on there is a secondary source that has no precedential value. And when in footnote 4 the 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 [district] and the most populous [district] 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." In *Brown*, the Supreme Court said simply that as a general matter a maximum population deviation l*ess than 10%* falls into the category of minor deviations for apportionment plans and so is *prima facie* not an equal protection violation. Of course, it is undisputed that the overall population deviation of HB 1 is does not meet the *Brown* test, for it is not less than 10%. And wholly apart from whether a plan's overall deviation is characterized as minor or more substantial, the *Brown* 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) (quoting *Mahan v. Howell*, 410 U.S. 315, 328 (1973)). *Brown*, therefore, requires that states keep overall population

deviations below 10% if they want to enjoy a presumption of constitutional validity, and to support *any* population deviations by the faithful adherence to a rational, consistently applied and nondiscriminatory state policy.

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 is 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. Because the overall population deviation contained in HB 1 is not less than 10%, HB 1 does not meet the *Brown* test for "minor deviations," and the burden will be on the LRC to justify the substantial overall deviation of 10.00%.

The difference between"10% or less," offered by the LRC as justification for its entire appeal, and "less than 10%," articulated by the United States Supreme Court in its Equal Protection jurisprudence, is important. Ordinarily, legislative districts must be nearly identical in population, as is the case in congressional redistricting. *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (quoting *Kirkpatrick v.Preisler*, 394 U.S. 526 (1969)) ("[T]he 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality"). But because states often have important concerns for county integrity or other political subdivision integrity, the Supreme Court has held that some deviations 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" that can justify abandoning this Court's careful decision in *Fischer II*. 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%...[,]" *see* LRC's Interlocutory 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 a consistent, nondiscriminatory policy to preserve county integrity – then there is no permissible population deviation under federal equal protection law. There are of course other rational state policies that could justify overall population deviations of less than 10%. The even-handed protection of incumbent state legislators is one such policy. But HB 1 cannot be justified on that ground either, for it protects only the incumbents of one party, while targeting the incumbents of the minority party for defeat. Neither LRC nor anyone else has ever offered any other possible basis for the population deviations from equality found in HB 1, and the record below is devoid of evidence to justify them.

2. 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.

In *Cox v. Larios*, 524 U.S. 947, 124 S. Ct. 2806, 2807-08 (1984) the United States Supreme Court has made plain that redistricting plans such as HB 1 that cannot be justified by the even-handed effort to effectuate a rational state policy violate the Equal Protection clause, even though they fall within the LRC's supposed safe harbor for

population deviation. 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 in *Larios* 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*, 542 U.S. 947, 124 S.Ct. 2806 (2004). LRC knows this,[8] 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 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

[8] 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."

Senate redistricting plans, and kept relative deviations to within plus or minus 5%.[9] 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 state policy as 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:

> 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," 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

[9] 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.

to this part of the Injunction and Judgment, but the record simply does not support either the Circuit Court's premise or its conclusion.

And at the same time, while the Circuit Court would abandon *Fischer II* so as to achieve redistricting plans with zero population deviation at the outset of the plan, the LRC would have this Court abandon *Fischer II* for the specific purpose of allowing redistricting plans that start with relative population variations of up to 10%. Whatever concern the Circuit Court had with *Fischer II*, its reasoning is no support for the LRC here. In fact, the diametric views of the Circuit Court and the LRC on the degrees of freedom the General Assembly should have in creating relative population deviations at the outset of a decennial redistricting plan is perhaps the strongest argument for the wisdom of this Court and its *Fischer II* mandate. The LRC it seems was right to view *Fischer II* as "Solomonic." *See* LRC's Motion to Transfer at 10.

Fischer II is correct because it harmonizes Kentucky's Constitution with federal law, without creating any tension or conflict. From its earliest jurisprudence on the subject of redistricting, the Supreme Court has recognized that a state's interest in preservation of county lines justifies some inequality in population among districts if the state policy is faithfully and indiscriminately pursued. The Supreme Court of the United States has determined the even-handed pursuit of some state policies 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. 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," *Ragland v. Anderson*, 125 Ky. 141, 100 S.W. 865, 869 (1907) – absent the concern for county integrity, this Court would doubtless have little difficulty concluding that Kentucky's own constitution would require the same.

And yet in its Interlocutory Motion, and perhaps again in the brief it files on the merits, 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 from equality ever offered for the deviations 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 and asserting without basis that "federal one person, one vote standards permit a relative deviation of more than +5% for the most populous district if the overall deviation from the ideal of the least populous district leaves the overall range from the least populous to the most populous at 10% or less." *See* LRC's Interlocutory Motion at 10, n. 4. As well, the LRC simply ignores *Cox*, which the Appellees included in their Verified Complaint and briefed below. *See* 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 demonstrably false. *Reynolds*, 377 U.S. at 579-580; *Brown*, 462 U.S. at 842; *Cox*, 542 U.S. 947, 124 S.Ct. 2806. It becomes 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 from equality at all. But HB 1 is not faithful to *Fischer II* or to Section 33. It does not feature even-handed incumbent protection, and no other rational state policy has ever been suggested to support the population deviations HB 1 contains.

IV. CONCLUSION

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 even-handed, 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. It is an approach that other states have adopted, most recently the Supreme Court of Pennsylvania with its January 2012 opinion harmonizing its own constitution with federal law, and providing the same remedy – 2012 elections using the previously existing districts – as did the Franklin Circuit Court. To abandon the Controlling Authority in this case, including the county integrity clause of the Kentucky Constitution, in favor of the

amorphous standard suggested by the LRC, simply to impose HB 1 on the Commonwealth, would be folly. And to do so at this juncture of the election process would be to infuse chaos.

HB 1 is facially unconstitutional under Section 33 of the Kentucky Constitution. The judgment of the Franklin Circuit Court should be affirmed.

Respectfully submitted,

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

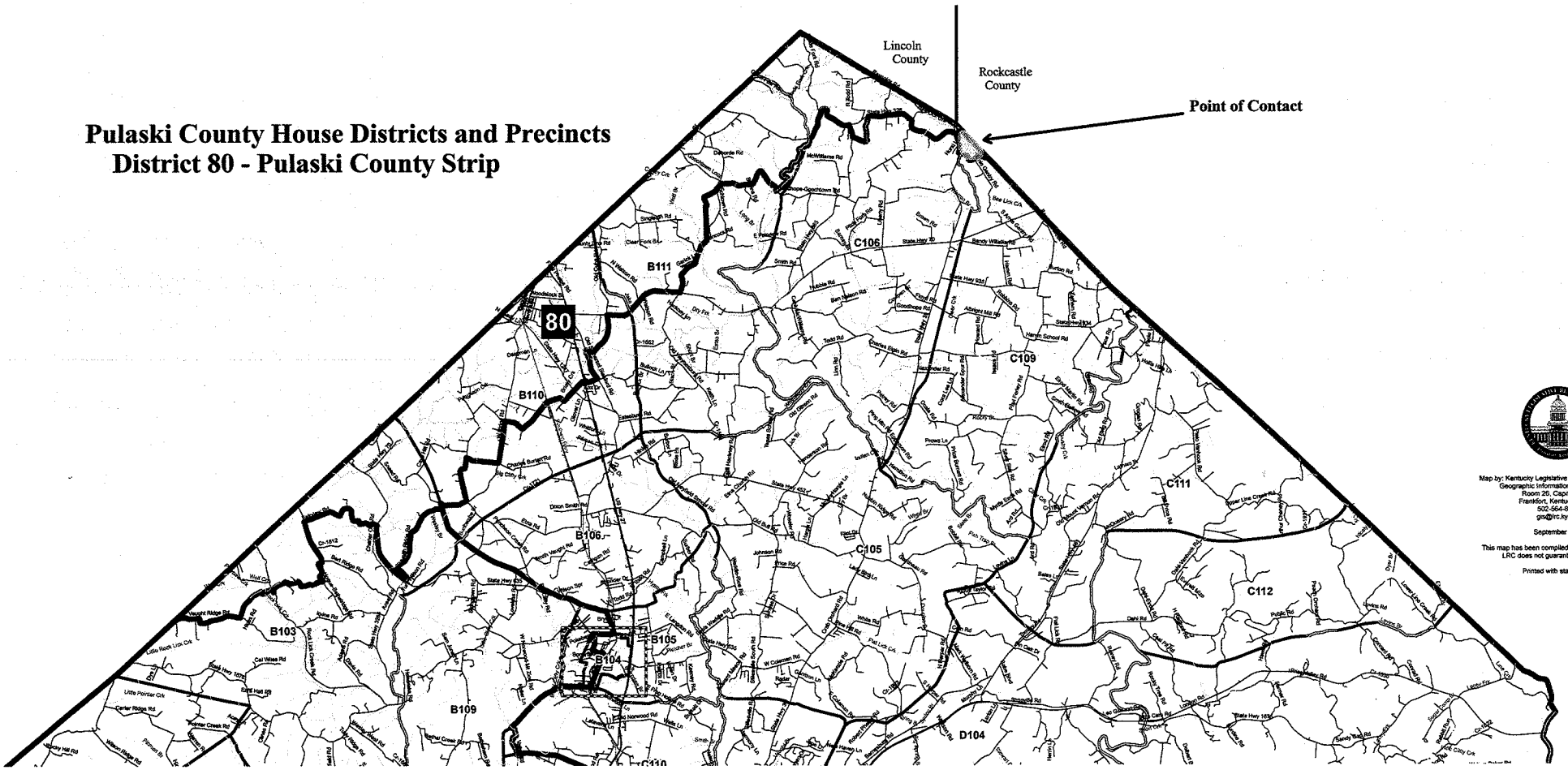
101 S. Fifth Street, 27th Floor
Louisville, Kentucky 40202-3116
(502) 588-2000

Counsel for Appellees Fischer, Hoover, King, Todd and Gaydos

APPENDIX

Appellees' Demonstrative Exhibit A - Composite of the LRC-created map for District 80 showing the point of contact between Pulaski County and Rockcastle County, at the tri-county line with Lincoln County

Pulaski County House Districts and Precincts
District 80 - Pulaski County Strip



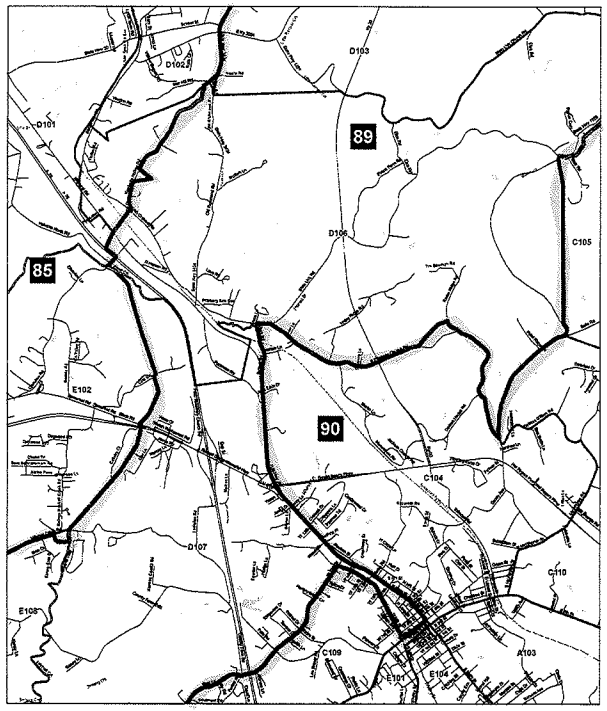
Map by: Kentucky Legislative Research Commission
Geographic Information Systems Office
Room 26, Capitol Annex
Frankfort, Kentucky 40601
502-564-8100
gis@lrc.ky.gov

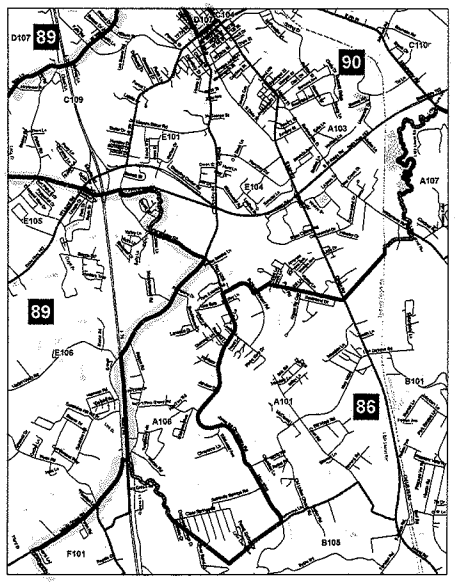
September 2011

This map has been compiled from various sources
LRC does not guarantee its accuracy

Printed with state funds.

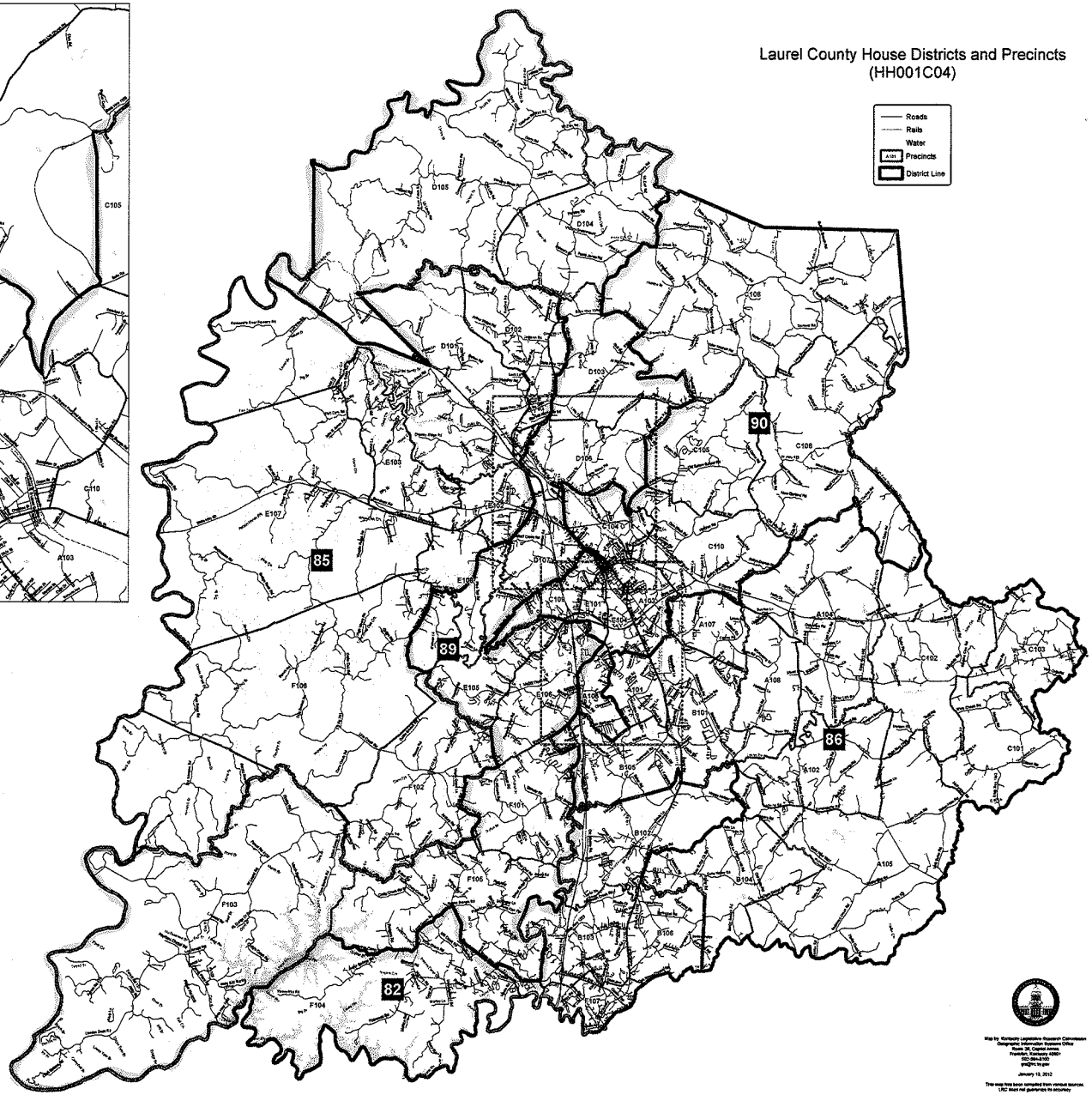
Appellees' Demostrative Exhibit B – Highlighted version of LRC map of the Laurel County portion of District 89





Laurel County House Districts and Precincts (HH001C04)

Roads
Rails
Water
A101 Precincts
District Line



Map for: Kentucky Legislative Research Commission
Geographic Information Systems Office
Room 34, Capitol Annex
Frankfort, Kentucky 40601
502-564-8100
gis@lrc.ky.gov

January 13, 2012

This map has been compiled from various sources. LRC does not guarantee its accuracy.

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