

SUPREME COURT OF KENTUCKY

NO. 2012-SC-091-TG

LEGISLATIVE RESEARCH COMMISSION

MOVANT

v. ON APPEAL FROM
COURT OF APPEALS NO. 2012-CA-000266-MR
FRANKLIN CIRCUIT COURT NO. 12-CI-00109
HONORABLE PHILLIP SHEPHERD, JUDGE

JOSEPH M. FISCHER, ET AL.

RESPONDENTS

AND

NO. 2012-SC-092-TG

LEGISLATIVE RESEARCH COMMISSION

MOVANT

v. ON APPEAL FROM
COURT OF APPEALS NO. 2012-CA-000264-I
FRANKLIN CIRCUIT COURT NO. 12-CI-00109
HONORABLE PHILLIP SHEPHERD, JUDGE

JOSEPH M. FISCHER, ET AL.

RESPONDENTS


**BRIEF OF RESPONDENTS ALISON LUNDERGAN GRIMES (IN HER
OFFICIAL CAPACITY AS KENTUCKY SECRETARY OF STATE), THE
KENTUCKY STATE BOARD OF ELECTIONS, AND MARYELLEN ALLEN (IN
HER OFFICIAL CAPACITY AS INTERIM ACTING EXECUTIVE DIRECTOR
OF THE KENTUCKY STATE BOARD OF ELECTIONS)**

Respectfully submitted,

and

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CERTIFICATE OF SERVICE REQUIRED BY CR 76.12(6)

I certify that a copy of this Brief for Respondents was served by first-class mail on February 21, 2012 upon: Victor B. Maddox, John David Dyche, Jennifer Metzger Stinnett, Jason M. Nemes, FULTZ MADDOX HOVIOUS & DICKENS PLC, 2700 National City Tower, 101 S. Fifth Street, Louisville, KY 40202-3116; Scott White, Sarah S. Mattingly, MORGAN & POTTINGER, P.S.C., 133 W. Short St., Lexington, KY 40507; Sheryl R. Snyder, FROST BROWN TODD PLLC, 400 West Market St., Suite 3200, Louisville, KY 40202-3200; Laura Hendrix, General Counsel, Legislative Research Commission, State Capitol, Room 300, 725 Capital Ave., Frankfort, KY 40602; Jack Conway, Sean Riley, ATTORNEY GENERAL, The Capitol Bldg., 700 Capital Ave., Ste. 118, Frankfort, KY 40601; and Hon. Phillip H. Shepherd, Judge, Franklin Circuit Court, 214 St. Clair Street, Frankfort, KY 40601-1857.



Co-counsel for Respondents

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Pursuant to the Court's "Order Granting Transfer, Expediting Briefing, Setting Oral Argument, Denying Stay, Interlocutory and Emergency Relief" of February 17, 2012, Respondents Alison Lundergan Grimes (in her official capacity as Kentucky Secretary of State), the Kentucky State Board of Elections, and Maryellen Allen (in her official capacity as Interim Acting Executive Director of the Kentucky State Board of Elections) (collectively, "Respondents"), submit this brief addressing the relief sought by movant Legislative Research Commission ("LRC").

ARGUMENT

Respondents take no substantive legal position as to the relief sought by LRC. However, as the chief election official of the Commonwealth, the Secretary of State seeks to uphold her sworn oath to "support the Constitution of the United States and the Constitution of this Commonwealth of Kentucky" and to "faithfully execute, to the best of [her] ability, the office of Secretary of State according to law." Ky. Const. § 228. Similarly, the State Board of Elections seeks to meet its statutory mandate to "administer the election laws of the state" KRS 117.015(1).

As the Court is undoubtedly aware, its resolution of these matters will likely affect the ability of Respondents to administer timely primary elections in accordance with Kentucky law. Respondents do not suggest that practical considerations should be elevated above the serious constitutional issues before the Court. However, should the Court ultimately determine that the 2012 primary elections should be conducted using legislative district boundaries other than those in effect immediately before the enactment of House Bill 1, certain problems with regard to the scheduled May 22, 2012 primary elections will arise immediately.

At the same time, Respondents wish to avoid a result by which the Court's resolution of these matters leaves some candidates or potential candidates for legislative offices without time to file for an office for which they are eligible to serve, or to withdraw a filing for an office for which they are ineligible to serve. As a result, should the Court determine that legislative district boundaries other than those in effect immediately before the enactment of House Bill 1 will apply to the 2012 primary elections, Respondents respectfully suggest that the Court extend the filing deadline for General Assembly offices by some short period of time. Respondents further suggest that the Court waive any additional filing fee for General Assembly candidates who have previously paid a filing fee in connection with the 2012 primary elections.

A. In Light Of The Statutorily Prescribed Date For The 2012 Primary Elections, Time Is Of The Essence.

As LRC itself has recognized, “[t]he election process and its set of mandatory statutory deadlines is established to ensure proper and timely elections, and to minimize confusion for the candidates and the voting public.” Motion for Interlocutory Relief Pursuant to CR 65.07 at 5. In furtherance of these same interests, Respondents continue to work towards meeting each of the statutory prerequisites to the primary elections on May 22, 2012 – a date set by statute. *See* KRS 118.025(3). Respondents submit for the Court's consideration the following statutory and practical deadlines related to the 2012 primary election:

- May 22, 2012 – Date of primary elections for nomination of candidates to be voted for at the regular November election. KRS 118.025(3).
- April 7, 2012 – Deadline by which ballots must be mailed to absent uniformed services voters and overseas voters (the offices of President of the United States and United

States Representative will also appear on the 2012 primary ballot). Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), 42 U.S.C. §§ 1973ff to 1973ff-7, as amended by the Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (“MOVE Act”) (45 days before election).

- April 2, 2012 – Deadline for county clerks to print ballots for the primary election. KRS 117.085(5) (50 days before election).
- March 1, 2012 – Date by which county clerks must provide to ballot printers certifications of candidates from the Secretary of State and the county clerks and lists from the counties of the precincts included in each legislative district. *See* Affidavit of Roger Baird, ¶ 5 (attached as “Exhibit A” to Supplemental Response in Opposition to Injunctive Relief dated February 3, 2012 (“Supplemental Response”) and as “Exhibit A” hereto); Affidavit of Guy Zeigler (“Zeigler Aff.”), ¶ 2 (attached as “Exhibit B” to Supplemental Response and as “Exhibit B” hereto).
- February 27, 2012 – Date by which, as a practical matter, Secretary of State must certify to county clerks the name, place, residence, and party of each candidate for office who must run in the primary. Affidavit of Mary Sue Helm, ¶ 6 (attached as “Exhibit C” to Supplemental Response and as “Exhibit C” hereto); *see also* KRS 118.215(1).

In light of the need to certify candidates to the county clerks no later than this coming Monday, February 27, 2012, the Secretary has conducted the required drawing for ballot position. *See* KRS 118.225.¹ Accordingly, unless instructed otherwise by the General Assembly or the Court, the Secretary plans to move forward with certification of

¹ Ordinarily, the date for ballot position drawing and deadline for certification are prescribed by statute. Due to the exceptional circumstances surrounding this year’s primary elections, both the General Assembly and the Franklin Circuit Court granted the Secretary of State discretion to determine the timing of those events for the 2012 primary election. *See* February 14, 2012, Order, at 2; H.B. 302, § 10(2)-(5), 2012 Gen. Assem., Reg. Sess. (Ky. 2012).

General Assembly candidates by close of business on February 27, 2012. Any other course of action will likely compromise the ability of the Secretary of State, State Board of Elections and county officials to timely accomplish the statutory prerequisites to the May 22, 2012 primary.²

B. If The Court Determines That District Boundaries Other Than Those In Effect Immediately Before The Enactment of House Bill 1 Apply, Respondents Suggest That The Court Extend The Filing Deadline And Waive The Statutory Filing Fee For Candidates Who Have Filed Previously.

Should the Court determine that legislative district boundaries other than those in effect immediately before the enactment of House Bill 1 apply to the 2012 primary elections, Respondents suggest that the Court also extend the candidate filing deadline by a short period of time. If such an extension is not granted, candidates who filed or withdrew their filings before 4:00 p.m. on February 10, 2012, in reliance on the Franklin Circuit Court's Temporary Injunction Under CR 65.04 and Partial Declaration of Rights entered February 7, 2012, would be penalized unreasonably.

Respondents suggest that any candidates who have filed for an office in reliance on the Franklin Circuit Court's order of February 7, but who would be ineligible to serve under the district boundaries ultimately determined to be applicable by the Court, will need time to withdraw, obtain the necessary signatures, and re-file in the appropriate district according to the new plan. Similarly, potential candidates eligible to serve in the districts determined to be applicable by the Court – including those who may have

² For example, if the legislative districts ultimately deemed applicable by the Court split any precincts existing immediately before the enactment of House Bill 1, many counties will likely require substantial time to re-draw precinct boundaries to comply with KRS 117.055 and to transfer voter registration records and notify voters of precinct changes pursuant to KRS 116.085(4). See Zeigler Aff. at ¶¶ 2-7.

withdrawn previous filings in reliance on the Franklin Circuit Court's order of February 7
– will need a reasonable opportunity to file or re-file for those offices.

Finally, Respondents suggest that in the event the Court extends the filing deadline, that the Court also waive the statutory \$200 filing fee for any General Assembly candidates who have previously paid the filing fee in connection with the 2012 primary. *See* KRS 118.255.

Respectfully submitted,

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APPENDIX

- A. Affidavit of Roger Baird
- B. Affidavit of Guy Zeigler
- C. Affidavit of Mary Sue Helm

Exhibit A

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

JOSEPH M. FISCHER, *et al.*

PLAINTIFFS

v.

ALISON LUNDERGAN GRIMES,
in her official capacity as Kentucky
Secretary of State, *et al.*

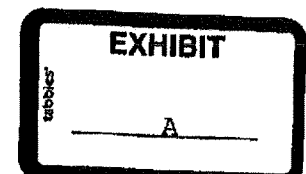
DEFENDANTS

* * * * *

AFFIDAVIT OF ROGER BAIRD

Roger Baird, being above 18 years of age and duly sworn, states:

1. My name is Roger Baird. I am employed as the President of Harp Enterprises Inc. ("Harp"). Harp prints the paper election ballots used by the county clerks in 97 of the 120 counties in Kentucky.
2. Because of Harp's role in the administration of Kentucky's elections, I have been following closely the activities surrounding the 2012 redistricting process. I understand that the Franklin Circuit Court has restrained the Secretary of State and the State Board of Elections from proceeding with the January 31, 2012 filing deadline for candidates for the General Assembly.
3. Pursuant to KRS 117.085(5), election ballots must be printed no later than 50 days prior to the primary election. Because the 2012 primary election is to be held on May 22, 2012, election ballots must be printed by April 2, 2012.
4. Before Harp can print election ballots for any of the 97 counties that rely on it to timely produce their ballots, we require the following information: (1) for offices that file with the Secretary of State's Office, certification of the candidates from the Secretary of State (as



provided to us by the county clerk); (2) for offices that file with the county clerk, certification of the candidates from the county clerk; and (3) a list from the county clerk of the precincts, by name or number, that are included in each legislative district encompassed by their respective county.


5. In order for Harp to print election ballots for use in the May 22 primary election by the April 2, 2012 statutory deadline, we must receive the items identified in Paragraph 4 no later than March 1, 2012.

Further affiant sayeth naught.



ROGER BAIRD

Subscribed and sworn to under penalty of perjury before me by ROGER BAIRD on February 3, 2012.



NOTARY PUBLIC, KY STATE AT LARGE
My Commission expires: 10-15-14
Id. No. 430054

Exhibit B

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

JOSEPH M. FISCHER, *et al.*

PLAINTIFFS

v.

ALISON LUNDERGAN GRIMES,
in her official capacity as Kentucky
Secretary of State, *et al.*

DEFENDANTS

* * * * *

AFFIDAVIT OF GUY ZEIGLER

Guy Zeigler, being above 18 years of age and duly sworn, states:

1. My name is Guy Zeigler. I currently serve as the Franklin County Clerk. The Franklin County Clerk's Office is responsible for a variety of functions, including voter registration and conduction of elections in Franklin County.
2. I understand that Franklin County's vendor for ballot printing, Harp Enterprises, needs certain items from Franklin County no later than March 1, 2012, in order to print ballots for the May 22, 2012, primary. These items include the Secretary of State's certification of candidates, my certification of candidates who file for local offices in Franklin County and a list of precincts, by name or number, that are included in each legislative district encompassing Franklin County.
3. No two precincts may have the same name or number. Accordingly, if the final district boundaries ultimately divide any Franklin County precincts, only one part of the former precinct may retain its current name and number, and the other portion(s) must be assigned a new name and number.

EXHIBIT

tabbies

B

4. In order to provide a precinct list to Harp Enterprises by its March 1, 2012 deadline, I must know the final district boundaries well in advance of that date. The length of time that it will take myself and other county clerks to determine the specific precincts in each legislative district will depend on how many precincts are ultimately moved, and more importantly, split by the final 2012 redistricting plan.

5. Pursuant to KRS 117.055, precinct boundaries may not cross state senatorial or representative districts.

6. If the legislative districts ultimately adopted split any precincts, many counties will likely require substantial time to re-draw precinct boundaries to comply with KRS 117.055. (HB1 permitted 45 days to complete this process.)

7. In addition, if the legislative districts ultimately adopted split any precincts, counties will be required to manually move voters to new precincts and notify them of the changes.

8. The estimated cost of a primary election in Franklin County is \$60,000.

Further affiant sayeth naught.

Dated: February 3, 2012


GUY ZEIGLER

Subscribed and sworn to under penalty of perjury before me by GUY ZEIGLER on February 3, 2012.



NOTARY PUBLIC, KY STATE AT LARGE
My Commission expires: 1-17-13

Exhibit C

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

JOSEPH M. FISCHER, *et al*

PLAINTIFFS

v.

ALISON LUNDERGAN GRIMES,
in her official capacity as Kentucky
Secretary of State, *et al*

DEFENDANTS

* * * * *

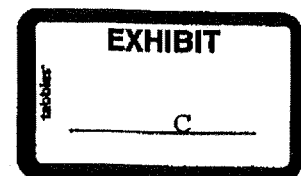
AFFIDAVIT OF MARY SUE HELM

Mary Sue Helm, being above 18 years of age and duly sworn, states:

1. My name is Mary Sue Helm. I am employed in the Office of the Kentucky Secretary of State (the "Secretary") as the Director of Administration and Elections. I have served in that role since Secretary of State Alison Lundergan Grimes was sworn into office in January 2012. With the exception of approximately six months in 2008, I have been continuously employed in the Secretary's Office since 1988.

2. Pursuant to statute, the Secretary's Division of Administration, among other duties, is responsible for certain election procedures and processes in the Commonwealth. The Secretary is the filing official for candidates seeking statewide office or an office voted on by electors from more than one county, for members of Congress, for members of the General Assembly, and for all judicial candidates.

3. I understand that the Franklin Circuit Court has restrained the Secretary and the Board of Elections from proceeding with the January 31, 2012 filing deadline for candidates for the General Assembly.



4 To date, many candidates have already filed for House and Senate races in the legislative districts established by House Bill 1. If the district boundaries adopted by House Bill 1 are changed such that these candidates or their co-signers are no longer residents of the district for which they filed, such candidates will need time to withdraw their filings, obtain necessary signatures and re-file in the appropriate legislative district.

5 Following the candidate filing deadline, pursuant to KRS 118.225, the Secretary must draw to determine the ballot order of the names of candidates for the primary. Although KRS 118.225(2) provides that this drawing is to be held on the Thursday following the candidate filing deadline, it may practically be conducted on the same day but subsequent to the filing deadline.

5. Following the drawing for ballot position, the Secretary is further required to certify certain information to the county clerks. Specifically, for each office for which she is the filing official, the Secretary must, pursuant to KRS 118.215, certify the names of the candidates, their place of residence, and their party, all of which is specified on the nomination papers or the certificates and petitions of nomination. Under KRS 118.215, such certification must occur no later than the second Monday after the filing deadline. After ballot positions are determined, it will take several days for the Secretary and her staff to prepare these certifications.


6. It is my understanding that in order for the great majority of county clerks to provide certain required information by March 1, 2012 to their ballot printing vendor, the Secretary must certify candidates for offices to the county clerks no later than February 27, 2012.

8. Based upon my nearly 25 years of experience working in the Secretary's Office, the May 22 primary election may proceed if the candidate filing deadline and drawing for ballot position occur no later than Tuesday, February 21, 2012.

Further affiant sayeth naught.


MARY SUE HELM

Subscribed and sworn to under penalty of perjury before me by MARY SUE HELM on February 3, 2012.


NOTARY PUBLIC, KY STATE AT LARGE
My Commission expires: 8-19-15 # 449562