COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CASE NO. 22-CI-00047
Electronically filed

DERRICK GRAHAM, JILL ROBINSON, MARY LYNN COLLINS, KATIMA SMITH-WILLIS, JOSEPH SMITH, and THE KENTUCKY DEMOCRATIC PARTY

Plaintiffs

v.

MICHAEL ADAMS, in his official capacity as Secretary of State of the Commonwealth of Kentucky, and KENTUCKY STATE BOARD OF ELECTIONS

Defendants

and

COMMONWEALTH OF KENTUCKY

Intervening Defendant (*motion pending*).

MOTION TO DISMISS OF SECRETARY OF STATE ADAMS AND THE COMMONWEALTH OF KENTUCKY

> *Apportionment is primarily a political and legislative process. Our only role in this process is to ascertain whether a particular redistricting plan passes constitutional muster, not whether a better plan could be crafted.*

Jensen v. Ky. State Bd. of Elections, 959 S.W.2d 771, 776 (Ky. 1997) (internal citation omitted).

> *To the extent that political considerations concerning the political impact of this reassignment on the majority party are involved, the Court notes that this is a political process and that it is appropriate to take political concerns into consideration so long as they do not impair the nonpartisan voting rights of the public.*

Fischer v. Grimes, No. 12-CI-109, Temporary Injunction Order at 14 (Franklin Cir. Ct. Feb. 7, 2012).

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Secretary of State Michael Adams, in his official capacity, and the Commonwealth of Kentucky move pursuant to CR 12.02(a) and (f) to dismiss Plaintiffs' Complaint in its entirety. Their claims fail as a matter of law.

INTRODUCTION

This case asks whether the Court should adopt a novel, never-before-recognized test for judging the constitutionality of Kentucky's House and Congressional districts, *or* whether the Court should apply the straightforward test affirmed time and again by the Supreme Court. The question answers itself.

For nearly thirty years, Kentucky has had a clear body of controlling law governing decennial redistricting. *See Fischer v. State Bd. of Elections*, 879 S.W.2d 475, 478–79 (Ky. 1994) (*Fischer II*). The Court's "only role in this process is to ascertain whether a particular redistricting plan passes constitutional muster, not whether a better plan could be crafted." *Jensen v. Kentucky State Bd. of Elections*, 959 S.W.2d 771, 776 (Ky. 1997). A plan enacted by the General Assembly that "make[s] full use of the maximum constitutional population variation" and "divide[s] the fewest possible number of counties" is constitutional. *Id.* (cleaned up).

The Kentucky Supreme Court reaffirmed these principles in its most recent redistricting decision, expressly rejecting the Legislative Research Commission's arguments that the rules established by *Fischer II* and *Jensen* should be overruled or modified. *Legislative Research Comm'n v. Fischer*, 366 S.W.3d 905, 911–16 (Ky. 2012)

(*Fischer IV*). And this Court has consistently adhered to these canons. "Once constitutional requirements are met, whatever plan is adopted is then a pure matter of legislative function and, pursuant to Sections 28 and 33 of the Kentucky Constitution, belongs under the purview of the General Assembly."[1]

Because there is no claim in Plaintiffs' Complaint that HB 2 and SB 3 make improper use of the population variability limits, and because Plaintiffs concede that HB 2 "splits 23 counties, which is constitutionally required,"[2] the state House districts created by HB 2 are constitutional under Kentucky precedent. And so, too, are the Congressional districts created by SB 3. Federal law requires Congressional districts to be drawn affording "one-person, one-vote." The Congressional districts created by SB 3 are nearly perfect—within one person. The Kentucky Supreme Court has never added further constraints to Congressional apportionment or disagreed with the idea that "reapportionment of congressional districts in the State is a question vested in the discretion of the General Assembly and one with which courts are not concerned." *Watts v. O'Connell*, 247 S.W.2d 531, 532 (Ky. 1952). The Court's only role is to follow precedent and dismiss Plaintiffs' Complaint in its entirety.

BACKGROUND

After receiving 2020 Census data in late summer of 2021, the General Assembly undertook its constitutional duty of apportioning representation at its first

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1 *Jensen v. Kentucky State Bd. of Elections*, 96-CI-00071, Conclusions of Law ¶ 9 (Franklin Cir. Ct. Mar. 20, 1996); *see also, Fischer v. Grimes*, 12-CI-109, Order at 4 (Franklin Cir. Ct. Feb. 7, 2012) ("The duty of this Court is to apply the binding precedents that control the application of Section 33."); *id.* at 14 (Redistricting "is a political process."). These opinions and orders are attached to this response.

2 Compl. ¶ 45.

opportunity in the 2022 legislative session.[3] No one can dispute that new Congressional district boundaries were required under the "one-person, one-vote" rule in light of major population shifts in the Commonwealth. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969) ("Since 'equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives,' the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality." (citations omitted) (alteration in original)). Using 2020 Census data, the old, repealed Congressional districts would range in population from 693,381 to 784,273—a range of 90,892.[4]

Likewise, no one can dispute that new state House district boundaries were constitutionally required. *See Fischer IV*, 366 S.W.3d at 910 (explaining that the state and federal constitutions require "approximately equal numbers of voters to avoid diluting the weight of individual votes in larger districts, which would infringe upon that citizen's right to fair and effective representation"). Using 2020 Census data, the old, repealed state House districts would range in population from 35,299 in old District 87, a deviation of 21.66% less than the ideal district, to 56,575 in old District

[3] The 2020 census data was delayed due to the COVID-19 pandemic. S*ee generally* 2020 Census Delays and the Impact on Redistricting, NATIONAL CONFERENCE OF STATE LEGISLATURES (Sept. 10, 2021), *available at* https://www.ncsl.org/research/redistricting/2020-census-delays-and-the-impact-on-redistricting-637261879.aspx.

[4] This data is publicly available on the LRC website and may be considered on a motion to dismiss. *See Fox v. Grayson*, 317 S.W.3d 1, 3, 18 n.82 (Ky. 2010). The statistical data is available at: https://legislature.ky.gov/Public%20Services/GIS%20contents/Plan%20Data%20for%2012RS%20HB302%20%28CH302C02%29.pdf.

60, a deviation of 25.56% more than the ideal district (for a total range of 21,276, or 47.2% from most to least populous).[5] These are far beyond the + or – 5% threshold for state constitutional purposes, *see Fischer IV*, 366 S.W.3d at 911, and the acceptable less than 10% deviation under federal equal protection case law, *see Brown v. Kentucky Legislative Research Comm'n*, 966 F. Supp. 2d 709, 717 & n.2 (E.D. Ky. 2013).

SB 3 creates new Congressional boundaries, and HB 2 creates new state House boundaries, each with district populations squarely within applicable thresholds. The new Congressional districts differ in population by only one person.[6] The new state House districts are from 4.86% (District 57) under the ideal district population to 4.84% over the ideal district population (District 52).[7]

STANDARD OF REVIEW

When considering a motion to dismiss under CR 12.02, "the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true." *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. App. 1987) (citing *Ewell v. Central City,* 340 S.W.2d 479 (Ky. 1960)). "The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Mims v. W.-S.*

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[5] This data is publicly available on the LRC website at: https://legislature.ky.gov/Public%20Services/GIS%20contents/Plan%20Data%20for%2013SS%20HB2%20%28HH001M01%29.pdf.

[6] This data is publicly available on the LRC website at: https://apps.legislature.ky.gov/recorddocuments/note/22RS/sb3/RS.pdf.

[7] This data is publicly available on the LRC website at: https://legislature.ky.gov/Public%20Services/GIS%20contents/Plan%20Data%20for%2022RS%20HB1%20%28HH002C03%29.pdf.

Agency, Inc., 226 S.W.3d 833, 835 (Ky. App. 2007) (quoting *James v. Wilson*, 95 S.W.3d 875, 883–84 (Ky. App. 2002)).

When asking a court to declare a law unconstitutional, the moving party must overcome a "strong presumption of constitutionality" to prevail. *See Wynn v. Ibold, Inc.*, 969 S.W.2d 695, 696 (Ky. 1998). Any doubt as to the law's validity must be resolved "in favor of [its] constitutionality." *Teco/Perry Cnty. Coal v. Feltner*, 582 S.W.3d 42, 45 (Ky. 2019); *see also Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 806 (Ky. 2009) ("[W]hen we consider [a statute], we are obligated to give it, if possible, an interpretation which upholds its constitutional validity." (cleaned up)).

ARGUMENT

Plaintiffs' claims all fail as a matter of law. Kentucky's straightforward test for constitutional challenges to state legislative districts asks only two questions. Here, it is undisputed that both requirements are met.

And as for Congressional redistricting, given the near mathematical precision of SB 3, reapportionment is not a question for the courts. *O'Connell*, 247 S.W.2d at 532.

Applying the law to the undisputed facts, the Court should dismiss the action in its entirety. Plaintiffs ask the Court to go further and to recognize a new claim for partisan gerrymandering. But Kentucky's highest court has already declined to do so. *See Jensen*, 959 S.W.2d at 776. And for good reason: the *Jensen* Court recognized that reapportionment is a legislative and political exercise limited only by the test for

population variability and, for General Assembly districts, splitting the fewest possible number of counties. There ends the Court's role. Going any further means the Court would be adjudicating nonjusticiable political questions. *Jensen* made this clear 25 years ago. Kentucky courts have no jurisdiction to entertain political questions, and therefore must dismiss such claims. *See Bevin v. Beshear*, 563 S.W.3d 74, 81 (Ky. 2018).

Even if the Court considers the Plaintiffs' partisan gerrymandering claims, they fail as a matter of law. The claims are extra-constitutional. Section 33 is Kentucky's redistricting provision, and no other section of Kentucky's Constitution has ever been read to impose redistricting-related requirements on the General Assembly. This Court should deny Plaintiffs' invitation to invent new, extra-constitutional limits.

At bottom, Plaintiffs ask this Court to do something never done before in Kentucky law—both ban the consideration of partisan interests in redistricting and recognize the viability of a so-called "partisan gerrymandering" theory to invalidate a General Assembly apportionment plan. Because the law is so clear, the Court should grant this Motion to Dismiss.

I. House Bill 2 and Senate Bill 3 have indisputably met Kentucky's current tests for the constitutionality of apportionment.

Our high court has established an exceedingly clear test for constitutional challenges to state legislative redistricting: a redistricting plan passes constitutional muster "by (1) maintaining a population variation that does not exceed the ideal legislative district by -5 percent to +5 percent and (2) dividing the fewest number of

counties possible." *Fischer IV*, 366 S.W.3d at 911. Based on 2020 Census data, the ideal population of a state House district is 45,058. Compl. ¶ 44. The range of population in the districts established by HB 2 is 42,866 to 47,241, for a deviation of -4.86% to 4.84%.[8]

Plaintiffs do not dispute these numbers. Accordingly, the first prong of our Supreme Court's test is met. As for the second prong of the test, Plaintiffs also do not dispute that it is met. "Redistricting requires a minimum of 23 counties to be divided or split . . . . HB 2 splits 23 counties, which is constitutionally required by Section 33 as interpreted by the Kentucky Supreme Court." Compl. ¶ 45.

And as for the Congressional districts' compliance with the one-person, one-vote rule, almost perfect mathematical precision exists with respect to equality of population among the six districts—there is a difference of only one person.[9]

The Court's inquiry can—and must—end there. *See Fischer v. Grimes*, 12-CI-109, Order at 4 (Franklin Cir. Ct. Feb. 7, 2012) ("The duty of this Court is to apply the biding precedents that control the application of Section 33."). The Kentucky Supreme Court has told us time and again the test for redistricting, and there is no dispute that it is met. Plaintiffs have invented and pleaded novel causes of action.

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[8] *See* Legislative Research Commission, House Bill 2 Population Deviation Data, *available at* https://legislature.ky.gov/Public%20Services/GIS%20contents/Plan%20Data%20for%2022RS%20HB1%20%28HH002C03%29.pdf.

[9] Legislative Research Commission, Senate Bill 3 Population Deviation Data, *available at* https://legislature.ky.gov/Public%20Services/GIS%20contents/Plan%20Data%20for%2022RS%20SB3%20%28C1278B01%29.pdf.

But these novel theories contravene established constitutional law, and their adoption would be for the Kentucky Supreme Court. This Court's job is to apply the constitution as it has been authoritatively interpreted in the current test and dismiss the Complaint for failure to state a claim.

II. Plaintiffs' "extreme partisan gerrymandering" claims present nonjusticiable political questions that Kentucky courts must dismiss for lack of subject-matter jurisdiction.

Plaintiffs' overarching theory is that HB 2 and SB 3 are unlawful due to "extreme partisan gerrymandering."[10] No Kentucky court has ever found that a partisan gerrymandering theory gives rise to a violation of our Constitution. This makes sense because, unlike the straightforward test followed in Kentucky, such a theory asks the Court to decide a nonjusticiable political question.

A. The Kentucky Constitution prohibits courts from exercising jurisdiction over nonjusticiable political questions.

The Kentucky Constitution prohibits Kentucky courts from exercising jurisdiction over nonjusticiable causes. *See Commonwealth v. Sexton,* 566 S.W.3d 185, 195 (Ky. 2018) ("We have recognized the *justiciable causes* phrase [in Ky. Const. § 112(5)] as a constitutional limitation on Kentucky courts' judicial power[.]" (emphasis in original)). One of the "major justiciability doctrines" is "the political-question doctrine." *Id.* at 193. If an asserted cause of action presents a "political question,"

[10] The theory that the challenged apportionment maps were based on partisan gerrymandering forms the basis for every single one of Plaintiffs' claims. *See* Compl. ¶¶ 12, 14–15, 17–18, 46, 50, 52–75, 80–89, 94–97, 104, 107, 110, 115, 118–19, 124–25, 128–30. Therefore, all of Plaintiffs' claims rise and fall on the validity of this one theory.

then Kentucky courts have no constitutional authority to entertain that cause of action and must dismiss it. *See Beshear*, 563 S.W.3d at 81.

The political question doctrine "holds that the judicial branch 'should not interfere in the exercise by another department of a discretion that is committed by a textually demonstrable provision of the Constitution to the other department,' *Fletcher v. Commonwealth*, 163 S.W.3d 852, 860 (Ky. 2005), or seek to resolve an issue for which it lacks judicially discoverable and manageable standards, *Vieth v. Jubelirer*, 541 U.S. 267, 276 (2004)." *Beshear*, 563 S.W.3d at 81. As explained below, this standard is plainly met here.

B. Redistricting is textually committed to the General Assembly by the Kentucky Constitution.

No one disputes that Section 33 of the Kentucky Constitution commits redistricting of the Kentucky House of Representatives to the General Assembly. Likewise, no one disputes that federal law leaves matters related to the "times, places, and manner of holding elections for Senators and Representatives" to the States. U.S. Const. art. I, §§ 2, 4; 2 U.S.C. § 2a(c). And because of the intentional absence of provisions in the Kentucky Constitution constraining the General Assembly's discretion over Congressional apportionment, Kentucky's high court has recognized that the apportionment of Congressional districts "is a question vested in the discretion of the General Assembly and one with which courts are not concerned,"

O'Connell, 247 S.W.2d at 532, subject only to ensuring compliance with the one-person, one-vote rule.[11]

The power to reapportion legislative districts is one exercised by the General Assembly through its ability to make laws under Section 29 of the Kentucky Constitution. Nowhere in the Kentucky Constitution are the courts provided a textually demonstrable role in drawing legislative boundaries. Accordingly, legislative redistricting is a political question placed under the purview of the General Assembly, *see Jensen*, 959 S.W.2d at 776 ("Apportionment is primarily a political and legislative process."), and the only role for a court is to ensure that explicitly listed constitutional requirements are met.[12]

C. Partisan gerrymandering claims lack any judicially discoverable and manageable standards.

The Kentucky Constitution does not recognize partisan gerrymandering as a justiciable question. Plaintiffs would have this Court answer constitutional questions by applying amorphous concepts of fairness, excessiveness, and extremism. By what standard are those concepts measured? The beauty of Kentucky's existing test—and the reason the current test exists and does not present a nonjusticiable political

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[11] Subsequent case law introduced the one-person, one-vote standard, and courts have a duty to judge compliance with this standard. Here, Plaintiffs do not challenge that this standard is met.

[12] To be clear, Kentucky courts have a role in a redistricting challenge, albeit a limited one. For the General Assembly's districts, that role is to ensure that Section 33's population equality and county splitting requirements are met. And for Kentucky's Congressional districts, that role is to ensure compliance with the one-person, one-vote rule.

question—is that the test is straightforward and not subject to debate. In other words, it is grounded in the text of the Constitution and is an objective, not subjective, inquiry. Is the population among the districts appropriately balanced? Are the fewest number of counties split? These questions are answered with simple math. And both our Supreme Court and this Court have held that once these questions are answered, everything else is a matter for the General Assembly.

Just three years ago, the United States Supreme Court held that partisan gerrymandering cases present a nonjusticiable political question. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) ("We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts."). The Court did so because partisan gerrymandering claims lack judicially discoverable and manageable standards. *Id.* at 2506–07. Kentucky courts reached that conclusion decades ago.

1. Precedent makes clear that the Kentucky Supreme Court already follows the rationale of *Rucho v. Common Cause*.

Kentucky courts have the same obligation as federal courts to hear only justiciable cases. *Sexton*, 566 S.W.3d at 195. Although the Kentucky Supreme Court has not considered a reapportionment case since *Rucho*, the Court has already broadly endorsed the same reasoning. The examples are legion.

Start with *Jensen*. As the *Jensen* Court itself noted, the appellant in *Jensen* complained that the General Assembly apportioned Pulaski and Laurel counties along partisan lines: "Appellant [Jensen] suggests in his brief that the multiple divisions of Pulaski County and Laurel County are the result of partisan

gerrymandering, since both counties consist primarily of registered Republicans and the 1996 House of Representatives was controlled by a Democratic majority." *Id.* at 776. Yet *Jensen* rejects any assertion that Section 33 provides any strictures on apportionment other than population and county splits:

> [T]he mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect representatives of its choice does not render that scheme unconstitutionally infirm. . . . There is a difference between what is perceived to be unfair and what is unconstitutional. Apportionment is primarily a political and legislative process. *Our only role in this process is to ascertain whether a particular redistricting plan passes constitutional muster, not whether a better plan could be crafted*.

959 S.W.2d at 776 (citations omitted) (emphasis added). So the Supreme Court rejected "fairness" as a test for constitutional muster, and reaffirmed that the reapportionment process is a legislative and political exercise, specifically rejecting the invitation to impose a test that would prevent consideration of partisanship. Instead, the Court measured the reapportionment plan in *Jensen* by just two objective standards: "This plan satisfies the constitutional requirements of Section 33 and the mandate of *Fischer II* 'to make full use of the maximum constitutional population variation as set forth herein [plus-or-minus 5%] and divide the fewest possible number of counties.'" *Id.* (quoting *Fischer II*, 879 S.W.2d at 479). In other words, the Court in *Jensen* refused to read into the Kentucky Constitution a prohibition against partisan gerrymandering despite being asked to so.[13] *See id*.

[13] The appellant in *Jensen* specifically argued that Section 33 "is part of the organic pact that binds the people of 120 counties together, and it simply does not permit the kind of 'all's fair in war and politics' approach to redistricting—where

But that's not all. Our high court is also on the record as stating:

- "The Kentucky Constitution makes no reference to any political party." *Mann v. Cornett*, 445 S.W.2d 853, 858 (Ky. 1969)
- "The Constitution is not concerned with election returns, but contemplates equal representation based upon population and territory." *Stiglitz v. Schardien*, 40 S.W.2d 315, 321 (Ky. 1931), *superseded by statute on other grounds as recognized by Fischer v. State Bd. of Elections*, 847 S.W.2d 718, 721 (Ky. 1993) (*Fischer I*).
- "[R]eapportionment of congressional districts in the State is a question *vested in the discretion of the General Assembly and one with which courts are not concerned*. With this we are in full accord except where the redistricting does violence to some provision of the Constitution or an Act of Congress." *O'Connell*, 247 S.W.2d at 532 (emphasis added).

These pronouncements follow from the fact that the framers of the 1891 Kentucky Constitution entrusted the process of apportionment to a political and legislative body—the General Assembly. And the framers decided to subject the state reapportionment process only to the enumerated constraints in Section 33 of the Kentucky Constitution, while at the same time placing no constraints on Congressional reapportionment. Neither the text nor purpose behind the enactment

might makes right—that the Appellees urge." *Jensen* Appellant Br. 9, 17–18. The appellant also argued that the "Kentucky Constitution . . . does not permit the General Assembly to sacrifice unfavored counties—coincidentally those dominated by the political minority—in favor of other counties." *Id*. at 21–22. The Court disagreed.

of any of the provisions of the Kentucky Constitution that Plaintiffs point to provide "judicially manageable standards for deciding . . . claims" grounded in a theory alleging partisan gerrymandering. *Rucho*, 139 S. Ct. at 2491. In other words, claims grounded in a theory of partisan gerrymandering present political questions beyond the reach of Kentucky courts because "'[j]udicial action must be governed by *standard*, by *rule*,' and must be 'principled, rational, and based upon reasoned distinctions' found in the Constitution or laws," and "[j]udicial review of partisan gerrymandering does not meet those basic requirements." *Id*. at 2507 (internal citation omitted).

The Court in *Jensen* recognized the simple truth about partisan gerrymandering claims twenty years before the United States Supreme Court: Such "claims present political questions beyond the reach of the . . . courts." *Rucho*, 139 S. Ct. at 2506–07. Plaintiffs' partisan gerrymandering theory—which underlies all of their claims—presents only one option for this Court: dismissal.

2. There are no judicially discoverable or manageable standards for free and equal election, equal protection, free speech, freedom of association, or arbitrary action claims related to partisan gerrymanders.

Without a textual basis in Section 33 of the Kentucky Constitution, Plaintiffs are left to resort to more general constitutional provisions concerning freedom of speech and association (Section 1), arbitrary state power (Section 2), equal protection (Section 3), and free and equal elections (Section 6). None of these provisions provide textual standards by which to judge partisan gerrymandering claims.

"Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence;" in other words, "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation." *Rucho*, 139 S. Ct. at 2499. But these notions are not protected under Kentucky's Constitution. *Mann*, 445 S.W.2d at 858 ("[T]he Kentucky Constitution makes no reference to any political party."). And neither does the Kentucky Constitution provide for statewide elections for members of the General Assembly or United States Congress along party lines.

The United States Supreme Court could not find a judicially manageable standard by which to judge a partisan gerrymandering claim under any of the same theories presently advanced by the Plaintiffs in this case. *See Rucho*, 139 S. Ct. at 2499–2500 (rejecting a claim grounded in "fairness" concerns on the basis that the Court could not formulate a "'clear, manageable and politically neutral' test for fairness" because "it is not even clear what fairness looks like in this context"); at 2501–04 (rejecting a test grounded in equal protection because "[i]t hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support"); at 2504–05 (rejecting a test grounded in First Amendment principles because "[t]he plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district"). Therefore, it refused to assert an "unprecedented expansion of judicial power" to entertain such a claim. *Id*. at 2507.

So too has the Kentucky Supreme Court refused to declare such an unprecedented expansion of judicial power. *See Jensen*, 959 S.W.2d at 776; *see also Fischer v. Grimes*, 12-CI-109, Order at 4 (Franklin Cir. Ct. Feb. 7, 2012) ("The duty of this Court is to apply the binding precedents that control the application of Section 33."). As Kentucky's highest court has recognized, "[i]t is important to bear in mind that '[s]ection two of our Constitution does not rule out policy choices which must be made by government. Many times these choices are in reality political actions and if they are not otherwise in conflict with constitutional principles they do not violate section two as being arbitrary.'" *City of Lebanon v. Goodin*, 436 S.W.3d 505, 519 (Ky. 2014) (citation omitted); *see also id.* at 516–17 ("It is not consonant with our scheme of government for a court to inquire into the motives of legislators." (cleaned up)).

Sections 1, 2, 3, and (as explained below) 6 of the Kentucky Constitution provide no judicially manageable standards by which to adjudicate what Plaintiffs call "extreme" or "excessive" partisan gerrymandering. *See* Compl. ¶¶ 94–97; 112–19; 120–25; 126–31. After examining the *Rucho* Court's rationale for rejecting these theories, and based on its own precedent, the Kentucky Supreme Court would surely conclude that the Kentucky Constitution similarly fails to provide judicially discoverable or manageable standards to adjudicate partisan gerrymandering claims.

III. Should the Court exercise jurisdiction, Plaintiffs lose on the merits.

Apart from the utter lack of merit of each claim due to their reliance on a failed partisan gerrymandering theory, Plaintiffs' claims fail on their own accord.

A. Plaintiffs' reliance on the Kentucky Bill of Rights is barred by canons of constitutional interpretation.

Section 33 is the only provision in the Kentucky Constitution that constrains the General Assembly's discretion in apportioning representation in that body. A basic canon of construing constitutional provisions is that "to the extent that two constitutional provisions overlap . . . , specific provisions control over general provisions." Francis C. Amendola, et. al., 16 C.J.S. Constitution Law § 101 (Nov. 2021 update). Kentucky has adopted this canon. *See Holbrook v. Knopf*, 847 S.W.2d 52, 55–56 (Ky. 1992). In *Holbrook,* our Supreme Court ignored the challengers' invoking Section 1 after finding that Section 10 spoke more specifically to the issue before the Court. *Id*. at 55–56.

Because the Supreme Court's pronouncement concerning the primacy of specific provisions over general provisions applies here, Plaintiffs' reliance on the general provisions of Sections 1, 2, 3 and 6 must fail in light of the specific provisions of Section 33. And of course Plaintiffs' invoking the more specific Section 33 must fail because, as fully explained below, the Supreme Court has made clear that only two constraints exist on the discretion provided to the General Assembly: the five percent population deviation rule and the requirement to divide the fewest number of counties necessary to comply with that rule. *Jensen*, 959 S.W.2d at 776; *Fischer IV*, 366 S.W.3d at 911–16.

As for Plaintiffs invoking *any* provisions of the Kentucky Constitution to support their Congressional apportionment challenge, our Supreme Court has never applied any specific constraints on the General Assembly's discretion in apportioning

such representation specifically because of the absence of any detailed constitutional constraints on Congressional apportionment in the Kentucky Constitution. This is true even when faced with the opportunity to do so in apportionment challenges invoking Section 6. *See Watts v. Carter*, 355 S.W.2d 657, 658–59 (Ky. 1962); *see also Watts v. O'Connell*, 247 S.W.2d at 532–33. And after refusing to place a one-person, one-vote constraint on Congressional apportionment under Section 6,[14] it is difficult to see our Supreme Court using any provision in the Kentucky Constitution to impose any constraints on Congressional apportionment. *See Alcoholic Beverage Control Bd. v. Taylor Drug Stores, Inc.*, 635 S.W.2d 319, 322–23 (Ky. 1982) (declining to review a Ky. Const. §§ 1 and 2 challenge to alcohol and beverage statutes after previously upholding their validity in *Reeves v. Simons*, 160 S.W.2d 149 (Ky. 1942), which involved other, more specific provisions of the Kentucky Constitution).

Interpreting the Kentucky Constitution in the way Plaintiffs suggest would countermand our Supreme Court's decisions on constitutional interpretation.

B. Kentucky law does not recognize a cause of action for invalidating an apportionment plan grounded in a theory of "excessive" division of counties or joining of parts of counties to other counties (Count II).

Contrary to what Plaintiffs claim, the Supreme Court *has* addressed, and rejected, the assertions that "the legislature can[not] aggressively over-split counties solely to achieve partisan ends," Compl. ¶¶ 73, 104, or "combine [too many] part[s] of one county with another county or counties," Compl. ¶¶ 108–11. *See Jensen*, 959

[14] To be clear, Congressional apportionment is still subject to the one-person, one-vote rule pursuant to the Equal Protection Clause of the United States Constitution.

S.W.2d at 776 (rejecting argument that Section 33 was violated because of the "multiple divisions of Pulaski County and Laurel County" and attachment to other counties purportedly as a "result of partisan gerrymandering").

The appellant in *Jensen* put the issue of "excessive county splitting" squarely before the Supreme Court. *See generally Jensen* Appellant Br. ii, 1–22, attached hereto. The Introduction to the brief states, "The Appellant contends that the act violates Section 33 of the Kentucky Constitution by making multiple divisions of counties or parts of counties…." *Id.* at ii. The opening paragraph of the Statement of the Case declares that "the Act carves both counties into five segments and attaches each of those segments to other counties or part of counties." *Id.* at 1. The Argument asserts that "by subjecting Laurel and Pulaski Counties to multiple subdivisions, the General Assembly has passed an unconstitutional Act under Section 33." *Id.* at 15; *see also id.* at 6–15.

The appellant in *Jensen* also put the issue of "excessive county joinder" squarely before the Supreme Court. *Id.* at ii, 1–22. More specifically, the Appellant Brief argued that the divided parts of Pulaski and Laurel counties were unnecessarily joined with other counties to form districts. *Id.* at 3, 4 (displaying redistricting map at issue, which shows the joining of the divided parts of Pulaski and Laurel counties onto other counties), 12 ("Laurel and Pulaski Counties . . . are each divided into five separate fragments. All that is left of these large and growing counties—counties incidentally dominated by the minority party in the legislature—is dismembered pieces inartfully attached as appendages to other districts, in some cases districts

centered on counties far removed from Laurel or Pulaski."), 18 ("As a result of . . . unfettered legislative discretion, the residents of a county may be shipped off to as many districts as the General Assembly chooses…."), 21 ("Of all the counties in all the plans, only Laurel and Pulaski County under the Act are sliced into multiple segments while being deprived of a district to which they are entitled.").

Still, the *Jensen* Court rejected the argument that Section 33 provides any further strictures on legislative apportionment than *Fischer II* had enumerated:

> [Appellant's] assertion ignores the fact that Christian County, hardly a [bastion] of Republicanism, also was subjected to multiple divisions without being awarded a whole district within its boundaries. Nevertheless, the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm.

Jensen, 959 S.W.2d at 776. So the Court in *Jensen* squarely rejected the arguments Plaintiffs present here—that the Kentucky Constitution prohibits the "excessive splitting of several of Kentucky's most populous counties into more districts than are necessary," Compl. ¶ 99, and the "not necessary" joinder of "part[s] of one county with another county or counties," Compl. ¶ 109. The Court rejected those arguments because "the mandate of *Fischer II* [is] 'to make full use of the maximum constitutional population variation . . . [plus-of-minus 5%] and divide the fewest possible number of counties,'" *Jensen*, 959 S.W.2d at 776 (quoting *Fischer II*, 879 S.W.2d at 479), nothing more. And, importantly, the Supreme Court of Kentucky reaffirmed that holding in *Fischer IV*, 366 S.W.3d at 911–16.

C. In addition to relying on the novel theory of partisan gerrymandering, Plaintiffs' claims based on violations of

Sections 1, 2, 3, and 6 of the Kentucky Constitution have no basis in law.

Put simply, Plaintiffs' claims require interpreting the Kentucky Constitution in ways our governing document has never been interpreted and, in some cases, in ways that have been explicitly rejected.

1. Section 6 does not support a partisan gerrymandering claim (Count I).

Section 6 of the Kentucky Constitution states, in total, "All elections shall be free and equal." The import of Section 6 is clear and has been since it first became a part of Kentucky's Constitution—Section 6 stands as a guard against the deprivation of an individual's ability to cast a vote at the ballot box and have that vote counted. "When the question arises, the single inquiry will be: Was the election free and equal, in the sense that no substantial number of persons entitled to vote and who offered to vote were denied the privilege?" *Wallbrecht v. Ingram*, 175 S.W. 1022, 1027 (Ky. 1915). Section 6 "has been construed to mean that the voter shall not be physically restrained in his right to vote." *Hatcher v. Meredith*, 173 S.W.2d 665, 669 (Ky. 1943) (citation omitted).[15] Such a view comports with the text of Section 6 and the

[15] *See, e.g., Johnson v. May*, 203 S.W.2d 37, 39 (Ky. 1947) ("We have consistently held that under . . . Section [6] an election is not free and equal if a substantial number or percentage of qualified electors are deprived of their right to vote."); *Robertson v. Hopkins County*, 56 S.W.2d 700, 701 (Ky. 1933) ("Section 6 of our Constitution declares that all elections shall be free and equal. . . . [S]uch a declaration means 'that the voter shall not be physically restrained in the exercise of his right of franchise, by either civil or military authority, and that every voter shall have the same right as any other voter.' Or, as expressed [elsewhere]: 'All regulations of the election franchise . . . must be reasonable, uniform and impartial.'"); *Commonwealth v. McClelland*, 83 Ky. 686, 693 (Ky. 1886) ("Elections are free and equal only when all who possess the requisite qualifications are afforded a reasonable opportunity to vote

discussion surrounding Section 6's creation.[16] As the delegates to the constitutional convention explained, the concept of "free and equal" elections originated in 17th century England to prevent the English King from ignoring the results of an election and the King's Sheriffs from refusing to allow groups of people to physically place a vote at the ballot box. *See* 1890 Constitutional Debates at 670, 729–30.

So both the record of the constitutional debates and the controlling precedent make clear that Section 6 guarantees the ability to cast a vote and have it counted. The few times that Section 6 has been asserted outside of this context have proven completely unsuccessful. Most relevant are *O'Connell* and *Carter*. *O'Connell* dealt with a challenge to a reapportionment of Congressional districts based on the one-person, one-vote rule. 247 S.W.2d at 531. The challenger argued that Section 6 required the court to find the reapportionment scheme unconstitutional "because the first district contains 304,978 people while the third has 484,615." *Id*. at 532–33. But Kentucky's highest court refused to find that scheme unconstitutional. *Id*. *Carter* dealt with essentially the same challenge. 355 S.W.2d at 658. There, the challenger pointed out an even greater disparity in the populations of certain congressional districts—"350,839 in the First (including 20 counties) to 610,947 in the Third (consisting of Jefferson County alone)." *Id*. Yet despite that population disparity, Kentucky's highest court refused to declare the map unconstitutional under Section

without being molested or intimidated, and when the polls are in each county and in each precinct alike free from the interference or contamination of fraudulent voters.").

[16] Relevant passages may be found in the 1890 Constitutional Debates at 670, 729, 764, 945, 1938, 2036, 2043.

6. *Id*. at 658–59. If Kentucky's highest court refused to read into Section 6 a one-person, one-vote requirement sufficient to strike down a reapportionment plan with a population variation of 260,000 among two districts, on what basis would the Court have to read in a partisan gerrymandering prohibition?

Indeed, long ago, Kentucky's highest court refused to read partisanship rights into Section 6. *Purnell v. Mann*, 48 S.W. 407, 408 (Ky. 1898), *overruled on other grounds by Pratt v. Breckinridge*, 65 S.W. 136, 140–41 (Ky. 1901). The challenged statutory scheme in *Purnell* created a "State Board of Election Commissioners" that was elected by the General Assembly. 48 S.W. at 408. The challenger brought a Section 6 claim, "argu[ing] that . . . to maintain 'equality' [under Section 6] it is necessary that leading parties should be [a part of] selecting officers of election." *Id*. at 409. Kentucky's highest court rejected the claim, holding that Section 6 did not encompass claims of partisan disadvantage, and that such claims are non-justiciable:

> [C]an this court determine that an election law is unconstitutional and void for the sole reason it does not provide for selection of election officers of different political parties? The constitution of 1792, that of 1799, and that of 1850 each contained a bill of rights, in which was the mandate that all elections should be free and equal; but no statute requiring officers of elections to be of different political parties was ever passed until 1858. So, if the argument of counsel be sound, there was not a valid election law in this state until 66 years after it was founded. *Whether such provision is necessary or conducive to securing free and equal elections is a question purely of legislative discretion, about which the constitution is silent, and in regard to which it is not the province or right of the court to decide.*

Id. (emphasis added). The Court noted the difficulty in creating a law to "fully accomplish the object of wholly devesting the appointment of election officers from party bias or influence." *Id*. at 409–10. And "[i]t would, therefore, be futile for this

court, *even if the subject was within its proper sphere*, to pronounce a statute void because defective in that respect, when the law thereby revised is little, if any, less so." *Id*. at 410 (emphasis added). *Purnell* reveals a simple truth about Section 6—concern for and protection of partisan interests is simply not part of Section 6.

Plaintiffs place a lot of stock in a Pennsylvania case that opened the door to partisan gerrymandering claims. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 814 (Pa. 2018). But the Pennsylvania Supreme Court explained what it perceived as a long history of Pennsylvania cases that apply the "free and equal" clause to situations other than physical constraints on voting. Kentucky does not have that history as our high court has made clear. Moreover, the decision was issued prior to *Rucho* and the Pennsylvania Supreme Court did not address justiciability.

Regardless, other states, like Kentucky, find that their respective constitutions have nothing to do with partisan concerns, and leave partisan redistricting concerns to the state legislature. *See Johnson v. Wisconsin Elections Comm'n*, 967 N.W.2d 469, 482 (Wis. 2021) ("The simplicity of the one person, one vote principle, its textual basis in our constitution, and its long history stand in sharp contrast with claims that courts should judge maps for partisan fairness, a concept untethered to legal rights. The parties have failed to identify any judicially manageable standards by which we could determine the fairness of the partisan makeup of districts, nor have they identified a right under the Wisconsin Constitution to a particular partisan configuration. Because partisan fairness presents a purely political question, we will not consider it."); *State ex rel. Cooper v. Tennant*, 730 S.E.2d 368, 390 (W. Va. 2012)

("[T]his Court will not intrude upon the province of the legislative policy determinations to overturn the Legislature's redistricting plan based upon the assertion of partisan gerrymandering. . . . Gerrymandering, in and of itself, is not unconstitutional and has clearly been deemed acceptable in legislative redistricting decisions."); *Pearson v. Koster*, 359 S.W.3d 35, 40–42 (Mo. 2012) (declining to review a partisan gerrymandering claim); *In re Legislative Districting of State*, 805 A.2d 292, 321–22 (Md. 2002) ("[S]o long as the plan does not contravene the constitutional criteria, that it may have been formulated in an attempt to preserve communities of interest, to promote regionalism, to help or injure incumbents or political parties, or to achieve other social or political objectives, will not affect its validity.").

In Kentucky, the text and intent of Section 6 is clear—protect the physical ability of a Kentuckian to place a vote and have that vote counted. *See Hatcher*, 173 S.W.2d at 669. Section 6 is not a vehicle through which Plaintiffs may bring an action grounded in a theory of partisan gerrymandering.

2. Kentucky's equal protection guarantee is not implicated here (Count III).

As previously described, Plaintiffs' ground their Kentucky equal protection claim in their overarching theory of partisan gerrymandering. Compl. ¶¶ 112–19. Plaintiffs fail to cite a single Kentucky decision supporting such a use of Kentucky's equal protection principle. This is unsurprising considering "[t]he Kentucky Constitution makes no reference to any political party." *Mann*, 445 S.W.2d at 858; *see also Stiglitz*, 40 S.W.2d at 321 ("The Constitution is not concerned with election returns, but contemplates equal representation based upon population and

territory."), *superseded by statute on other grounds as recognized by Fischer I*, 847 S.W.2d at 721.

Plaintiffs cannot articulate a plausible equal protection claim. Of course, "the right to vote is a fundamental right." Compl. ¶¶ 116. But "[i]t hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support." *Rucho* 139 S. Ct. at 2501. As *Rucho* recognized, it is impossible to bring a successful party affiliation equal protection claim. "Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence . . . . It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship." *Id*. at 2502.

Count III fails for the additional reason that it does not state a claim upon which relief can be granted because no Kentucky court has ever recognized a right to political party representation in the General Assembly or in Kentucky's seats in the United States House of Representatives proportional to a political party's share of statewide support. Indeed, "such a claim is based on a 'norm that does not exist' in [Kentucky's state and U.S. House of Representatives] electoral system—'statewide elections for representatives along party lines.'" *Id*. at 2499 (citation omitted).

3. Free speech and the right of assembly are not implicated in any constitutional manner (Count IV).

Plaintiffs also ground their Section 1 free speech and right of association claim in their theory of partisan gerrymandering. Compl. ¶¶ 120–25. Again, Plaintiffs fail

to cite a single Kentucky decision supporting such a use of Section 1. More bluntly, such a claim fails for the simple reason the HB 2 and SB 3 provide "no restrictions on speech, association, or any other [Section 1] activities." *Rucho*, 139 S. Ct. at 2504; *see also Gingerich v. Commonwealth*, 382 S.W.3d 835, 840 (Ky. 2012) (reading Section 1 as coterminous with the First Amendment because "it is linguistically impossible for language to be more inclusive than that in the First Amendment").

Moreover, Plaintiffs' First Amendment theory would have this Court conclude that "any level of partisanship in districting . . . constitute[s] an infringement of their First Amendment rights." *Rucho*, 139 S. Ct. at 2504. Such a theory directly contradicts the decision of the framers of the Kentucky Constitution "to entrust districting to political entities," *Id.* at 2497, *i.e.*, the General Assembly here. That same decision on the part of the framers of the United States Constitution led the Court in *Rucho* to recognize that "[i]t would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Id.* at 2504 (quotation marks and citation omitted). And if the Plaintiffs contend that some level of partisanship in redistricting is acceptable under Section 1, how does one determine when the consideration of partisanship goes too far: "How much of a decline in voter engagement is enough to constitute a First Amendment burden? How many door knocks must go unanswered? How many petitions unsigned? How many calls for volunteers unheeded?" *Id.*

Plaintiffs' claims find no foothold in Section 1 of the Kentucky Constitution.

4. Section 2 of the Kentucky Constitution is not implicated here (Count V).

Section 2 cannot be used as a catch-all provision to strike down the General Assembly's exercise of discretion on matters with which they have been entrusted: "It is important to bear in mind that '[s]ection two of our Constitution does not rule out policy choices which must be made by government. Many times these choices are in reality political actions and if they are not otherwise in conflict with constitutional principles they do not violate section two as being arbitrary.'" *Goodin*, 436 S.W.3d at 519 (alteration in original) (citation omitted).

As noted, Section 33 is the only provision in the Kentucky Constitution that constrains the General Assembly's discretion in apportioning representation in that body. And the Supreme Court of Kentucky has made clear that only two constraints exist on the discretion provided to the General Assembly: reapportionment plans such as HB 2 that comply with the five percent population deviation rule and divide the fewest number of counties necessary to comply with that rule are constitutional. *Jensen*, 959 S.W.2d at 776; *Fischer IV*, 366 S.W.3d at 911–16. Regarding Congressional apportionment, the Supreme Court of Kentucky has never veered from the longstanding principle that apportionment of districts "is a question vested in the discretion of the General Assembly and one with which courts are not concerned," *O'Connell*, 247 S.W.2d at 532, subject only to ensuring compliance with the one-person, one-vote rule. Plaintiffs do not contend that the maps at issue here stray from those principles. As such, Count V fails because Section 2 of the Kentucky Constitution does not place additional constraints on the General Assembly's exercise

of discretion once the General Assembly has abided by those aforementioned principles. *See Goodin*, 436 S.W.3d at 519.[17]

*** *** ***

Plaintiffs simply stand no chance at succeeding on the merits of their claims.

CONCLUSION

The Court should grant the Motion to Dismiss.

Respectfully submitted,

Daniel Cameron
ATTORNEY GENERAL

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[17] Plaintiffs make a last-ditch allusion to a due process violation in one paragraph of their Complaint, *see* Compl. ¶ 131, but fail to identify any processes or procedures by which the General Assembly was bound to abide that were skirted.

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NOTICE OF HEARING

With leave of court, please take notice that this motion will be heard by Division II of the Franklin Circuit Court on February 10, 2022, at 10:00 a.m., or as soon thereafter as counsel may be heard.

CERTIFICATE OF SERVICE

I certify that on February 4, 2022, a copy of the above was filed electronically with the Court and served through the Court's electronic filing system on counsel of record and additionally by email as indicated below:

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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO. 96-CI-00071

THOMAS L. JENSEN — PLAINTIFF

v.

KENTUCKY STATE BOARD OF ELECTIONS
and SECRETARY OF STATE OF KENTUCKY,
JOHN Y. BROWN, III
and
ATTORNEY GENERAL OF KENTUCKY
ALBERT B. CHANDLER III — DEFENDANTS

INTERVENING DEFENDANT

Consolidated with 96-CI-0076

JODY RICHARDS, as a Member of the Kentucky House of Representatives of the Commonwealth of Kentucky;

JODY RICHARDS, as the Speaker of the House of Representatives of the Commonwealth of Kentucky on behalf of the House of Representatives of the Commonwealth of Kentucky;

JODY RICHARDS, as Speaker of the House of Representatives of the Commonwealth of Kentucky and as Co-Chair on behalf of the House of Representatives of the Commonwealth of Kentucky and on behalf of the Legislative Research Commission;

THE LEGISLATIVE RESEARCH COMMISSION, for and on behalf of the Kentucky House of Representatives of the Commonwealth of Kentucky — PLAINTIFFS

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JOHN Y BROWN, III, Secretary of State of
the Commonwealth of Kentucky;

STATE BOARD OF ELECTIONS;

ALBERT B. CHANDLER, III, Attorney General
of the Commonwealth of Kentucky;

JEFFERSON COUNTY BOARD OF ELECTIONS;

REBECCA JACKSON, Jefferson County Clerk;

JAMES M. VAUGHN, Jefferson County Sheriff;

WARREN COUNTY BOARD OF ELECTIONS;

YVONNE GUY, Warren County Clerk;

JERRY GAINES, Warren County Clerk DEFENDANTS

JUDGMENT

The plaintiff, Thomas L. Jensen, in 96-CI-00071, and the plaintiffs, Jody Richards, in his various capacities, and the Legislative Research Commission, in 96-CI-0076, have moved the Court for a declaratory judgment on the constitutional validity of the Redistricting Act of 1996 ("the 1996 Act").

The Court has considered the factual record and the briefs of the parties, and makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On January 11, 1996, Governor Paul E. Patton signed into law the Act of 1996 which redistricts the Commonwealth into 100 representative districts.

2. The population information used by the legislature in that redistricting plan was the 1990 census data. Based upon that census, the 1990 population of Kentucky was

3,685,296 persons.

3. There are 120 counties in the Commonwealth of Kentucky.

4. The Kentucky Supreme Court addressed the General Assembly's first attempt at redistricting with the 1990 census data in three separate cases. In *Fischer v. State Board of Elections*, Ky., 847 S.W.2d 718 (1993) (*"Fischer '93*) the Court determined that Campbell County was an appropriate venue for that particular action. In *Fischer v. State Board of Elections*, Ky., 879 S.W.2d 475 (1994) (*"Fischer" '94*) the Supreme Court ruled that the General Assembly's attempt at redistricting with the 1990 census was unconstitutional. In *State Board of Elections v. Fischer*, Ky., 910 S.W.2d 245 (1995) (*"Fischer '95"*) the Supreme Court affirmed the Permanent Injunction issued by the Campbell Circuit Court on November 23, 1994, in determining that the State Board of Elections could not conduct an election to fill a vacancy in the legislature.

5. In August, 1995, Governor Brereton Jones vetoed the second attempt of the General Assembly to redistrict the Commonwealth into 100 representative districts.

6. In the 1996 Regular Session of the General Assembly, three different redistricting plans were filed as House Bills ("HB"): HB 1, HB 164 and HB 350. Based upon the facts adduced in this proceeding, HB 1 can fairly be characterized as the "majority" plan, and HB 164 as the "minority" plan. HB 350 was filed and introduced by the plaintiff, Thomas L. Jensen ("Rep. Jensen"). Rep. Jensen is a member of the House of Representatives of the General Assembly representing District 85. Rep. Jensen is a citizen of Laurel County.

7. The redistricting plan as embodied in HB 1 was eventually passed, with amendments, by both the House of Representatives and the Senate, and was signed into law

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by Governor Paul Patton on January 11, 1996. This redistricting act is now codified at KRS 5.200- 5.300.

8. Following the 1996 Act becoming law, the plaintiff, Jody Richards ("Speaker Richards") issued writs for special elections to be conducted in House districts located in Jefferson and Warren counties. The Defendant, John Y. Brown, III, Secretary of State of Kentucky ("Secretary Brown"), and the Defendant, the Kentucky State Board of Elections ("Board of Elections"), have now undertaken their various statutory duties to conduct both these special elections as well as the May, 1996, primary elections.

9. The case before this Court is a consolidation of two separate actions. 96-CI-00071 was brought by Rep. Jensen in which he asks the Court to rule that the 1996 Act is unconstitutional and the Secretary of State and the Board of Elections enjoined from performing their various statutory duties in conjunction with the 1996 Act. In Civil Action No. 96-CI-0076, which was filed by Speaker Richards in his various capacities and the Legislative Research Commission, Speaker Richards requests that this Court rule as a matter of law that the 1996 Act is constitutional. This Court has previously denied Rep. Jensen's request for temporary injunctive relief which would have enjoined the Secretary of State and the Board of Elections from performing their statutory duties under the 1996 Act.

CONCLUSIONS OF LAW

Based upon the findings of fact, this Court makes the following conclusions of law:

1. The constitutional requirements for a redistricting plan are contained in Section 33 of the Kentucky Constitution. This section provides:

> The first General Assembly after the adoption of this Constitution shall divide the State into thirty-eight Senatorial Districts, and one hundred Representative

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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 jointed 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 populations 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.

2. In addition to the state requirements of a redistricting plan, there are also federal constitutional requirements – principally revolving around the legal doctrine of "one man – one vote." In *Gatsby v. Cummings*, 412 U.S. 735 (1973) and *Conner v. Finch*, 431 U.S. 407 (1977), the United States Supreme Court set forth the general rule that a state's legislative redistricting enjoys a presumption of validity so long as the maximum population deviation between districts does not exceed +/- 5% if such a deviation is in furtherance of a state policy. Although in redistricting plans enacted by the states of Virginia and Wyoming, population deviations greater than +/- 5% were upheld in Federal forums as they furthered a state policy of preservation of the integrity of political subdivisions (counties), the Supreme Court of Kentucky has declared that "population equality under Section 33 may be satisfied by a variation which does not exceed -5% to +5% from an ideal district." *Fischer '94*, 879 S.W.2d at 479.

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3. A fair reading of *Fischer '94* in conjunction with the *Fischer '95* and Section 33 of the Constitution provides five requirements which a redistricting plan must meet to be held constitutional. These are as follows:

> 1. The legislature is to redistrict the Commonwealth into 38 senate and 100 representative districts every 10 years (Section 33).
>
> 2. Counties which form a legislative district must be contiguous (*Fischer '94*, 879 S.W.2d at 477, n.4 (citing Section 33)).
>
> 3. More than two counties may be joined together to create one legislative district for the purpose of achieving population equality (*Fischer '94*, 879 S.W.2d at 477 (citing *Ragland v. Anderson*, and *Combs v. Matthews)* (citations omitted)).
>
> 4. There must be substantial equality of representation for all citizens of Kentucky (*Fischer '94*, 879 S.W.2d at 477 (citing *Ragland v. Anderson* (citations omitted)).
>
> 5. The legislature is to make full use of the maximum constitutional population variation as articulated by the Kentucky Supreme Court in *Fischer '94*, and to divide the fewest possible number of counties (*Fischer '95, 910 S.W.2d* at 246, n.1 (citing *Fischer '94*)).

These are the criteria this Court must use in determining whether the 1996 Act passes constitutional scrutiny. Rep. Jensen argues that where a county has sufficient population to form a district(s) within its boundaries then at least one district must be given to that county. However, there is no such requirement contained in Section 33, or its interpretive caselaw, or which this Court can infer from those authorities.

4. The 1996 Regular Session of the General Assembly redistricted the Commonwealth of Kentucky into 100 representative districts by its passage of the 1996 Act using the 1990 census data. The 1996 Act meets the first requirement.

5. In those districts in which one or more counties are joined to form a legislative

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district in the 1996 Act, those counties are in fact contiguous, and are so joined together in order to achieve population equality (a +/- 5% variation). Thus, the 1996 Act satisfies the second and third requirements.

6. The 1996 Act achieves substantial equality of representation for all the citizens of Kentucky in the redistricting of the 100 representative districts. Since many, if not all, of these districts vary from the ideal district population, there must be a state policy which is furthered. This Court finds that the division of the minimum number of counties (22) is such an interest furthered by the 1996 Act.

In order to achieve perfect population equality among the 100 districts, the General Assembly would need to draw the districts so that exactly 36,853 citizens were contained therein. This is the ideal district determined by simple arithmetic: total Kentucky population divided by 100. Using the "ideal" figure, again using simple arithmetic, it is clear that the +- 5% population variation requires a district to comprise no fewer than 35,010 citizens and no more than 38,696 citizens. These are the precise figures required of the General Assembly to use in redistricting by the Kentucky Supreme Court in *Fischer '94*.

All of the 100 house districts drawn in the 1996 Act comply with the +/- 5% variation rule. Although it has been argued by Rep. Jensen that a greater population variance is allowable under federal jurisprudence, it is equally clear from *Fischer '94* that the Kentucky Supreme Court rejected a population variance greater than +/- 5%. Thus, the 1996 Act meets the fourth requirement.

7. The last constitutional requirement mandates the General Assembly to "divide the fewest possible number of counties" while making full use of the maximum constitutional

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population variation (+/- 5%). Based upon the 1990 census data and the geography of the Kentucky county system, "the fewest possible number of counties" which are to be divided can be specifically determined. This figure is 22.

There are 20 counties which, based upon their population, must be divided: Jefferson, Fayette, Kenton, Hardin, Daviess, Campbell, Warren, Pike, Christian, McCracken, Boone, Madison, Boyd, Pulaski, Bullitt, Hopkins, Franklin, Floyd, Laurel and Henderson. All of these counties have a population in excess of 36,853. Since these counties must be split, portions of these divided counties are available to the legislature to add to other counties that are not themselves large enough to form a district so as to avoid additional county splits.

Due to the geographical location of these 20 counties within the Commonwealth, there are two counties, Bell and Calloway, which must be split since they cannot be joined with another whole county to form a district with the permissible population variation. As a matter of mathematics, using the number of counties, the number of districts which must be formed and the populations of the 120 counties it is possible to determine that 22 is the fewest possible number of counties which can be split in a redistricting plan while maintaining the permissible population variation of +/- 5%.

The 1996 Act divides 22 counties. This is the fewest possible number of counties which may be split while making full use of the +/- population variation. The 1996 Act satisfies the fifth, and last, requirement.

8. Footnote 5 of *Fischer '94* states as follows:

> We recognize that the division of some counties is probable and have interpreted Section 33 to permit such division to achieve population requirements. However, we can scarcely conceive of a circumstance in which a county or part thereof which lacks

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> sufficient population to constitute a district would be subjected to multiple divisions.

Fischer '94, 879 S.W.2d at 479.

It can reasonably be stated that a redistricting plan "violates" Footnote 5 where either a county which has sufficient population to contain a district(s) is divided more than once after the district(s) is (are) given, or a county which does not have sufficient population to form a district is divided more than once. An examination of the 1996 Act indicates that seven such counties or parts thereof, are subjected to multiple divisions. These are: Daviess, McCracken, Pulaski, Laurel, Fayette, Leslie and Hopkins. However, the other two redistricting plans presented in evidence, HB 164 and HB 350, also contain Footnote 5 "violations." HB 164 subjects Daviess, Whitley, Fayette and Graves counties, or parts thereof, to multiple division; and, HB 350 subjects Hardin, McCracken and Trigg counties to such multiple divisions. Additionally, HB 164 splits Pulaski County four (4) times and Laurel County three (3) times. HB 350 splits Pulaski County three (3) times and Laurel County twice, but splits eight (8) additional counties not split under HB 1. Therefore, there is no evidence before this Court to indicate that a redistricting plan can be enacted without causing such multiple divisions to a county or part thereof, and still comply with the mandate of *Fischer '94.*

9. From the evidence presented it appears that any redistricting plan which meets the *Fischer '94* requirements of equality, population, and the splitting of a minimum number of counties will have some "Footnote 5 violations." Once constitutional requirements are met, whatever plan is adopted is then a pure matter of legislative function and, pursuant to Sections 28 and 33 of the Kentucky Constitution, belongs under the purview of the General Assembly.

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JUDGMENT

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ADJUDGED as follows:

1. Rep. Jensen's Motion for Declaratory Judgment that the 1996 Act be deemed unconstitutional, and for the various equitable remedies prayed for, is DENIED;

2. Speaker Richards and the Legislative Research Commission's Motion for a Declaratory Judgment that the 1996 Act is constitutional is, hereby, GRANTED, and judgment shall be so entered; and,

3. The parties shall bear their own costs and attorneys fees.

This the 20th day of March, 1996.

ROGER L. CRITTENDEN
JUDGE, FRANKLIN CIRCUIT COURT

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Hon. Robert W. Kellerman
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Hon. Representative Thomas L. Jensen
House of Representatives
Kentucky State Capitol
Frankfort, KY 40601

Appendix
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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 12-CI-109

JOSEPH M. FISCHER, et al. — **PLAINTIFFS**
and
DAVID B. STEVENS, M.D., et al. — **INTERVENING PLAINTIFFS**

V.

TEMPORARY INJUNCTION
UNDER CR 65.04 AND PARTIAL DECLARATION OF RIGHTS

ALISON LUNDERGAN GRIMES,
in her official capacity as
Secretary of State for the Commonwealth
of Kentucky, et seq. and — **DEFENDANTS**
LEGISLATIVE RESEARCH COMMISSION — **INTERVENING DEFENDANT**

This action is before the Court on the motions of the Plaintiffs and Intervening Plaintiffs for a Temporary Injunction under CR 65.04. The Plaintiffs filed this action to challenge the constitutionality of the House re-districting plan adopted by the Kentucky General Assembly in House Bill 1, which was signed into law by the Governor on January 20, 2011. The Court held a hearing on January 30, 2012 at which all original parties were represented by counsel. The Court granted the motion of David Stevens, Jack Stephenson, Marcus McGraw and Senator Kathy Stein to intervene under CR 24.01. The Intervening Defendants raise a similar challenge the provisions of House Bill 1 for re-districting of the Kentucky Senate.

The Court then granted a restraining order under CR 65.03 to preserve the *status quo* pending its decision on the motion for temporary injunction. The Court's restraining order prohibits the Secretary of State for implementing the filing deadline for legislative offices Tuesday, February 7, 2012. After the Court granted the Intervening Plaintiffs the right to participate, the Legislative Research Commission filed a motion to intervene pursuant to KRS

5.005, which the Court also granted. The Court further set this action for an evidentiary hearing and further argument on Monday, February 6, 2012.

The Court heard evidence and argument at the hearing on February 6, 2012, and being sufficiently advised, IT IS ORDERED the motions of the plaintiffs and intervening plaintiffs for a temporary injunction under CR 65.04 is GRANTED for the reasons set forth below.

DISCUSSION

This action presents a challenge to the new districts that the General Assembly adopted for House and Senate districts in House Bill 1 of the 2012 General Assembly. The Kentucky Supreme Court has established an authoritative interpretation of the requirements of Section 33 of the Kentucky Constitution for redistricting of legislative districts in Fischer v. State Board of Elections, 879 S.W.2d 475 (Ky. 1994)[1]. The Fischer case was subsequently revisited in Jensen v. State Board of Elections, 959 S.W.2d 771 (Ky. 1997), which dealt with the application of Section 33 to the multiple divisions of a single county. Jensen recognized that any plan that maintains county integrity and population equality, as interpreted by the Supreme Court, is bound to result in multiple divisions of some counties. Nevertheless, the central ruling of Fischer II has remained in force, and must be applied by this Court. As the Court held in Jensen, the constitutional mandate of Section 33 requires a redistricting plan "to make full use of the maximum constitutional population variation as set forth herein [plus or minus 5%] and divide the fewest possible number of counties." 959 S.W.2d at 776.

The uncontested evidence before this Court demonstrates that the House and Senate Districts adopted in House Bill 1 fail on both counts. At least one House District and one Senate District exceed the "maximum constitutional population variation" set forth in Fischer II. Both

[1] This case or Fischer II, was preceded by Fischer v. State Board of Elections, 847 S.W.2d 718 (Ky. 1992), which dealt with venue questions (Fischer I). *See also* State Board of Elections v. Fischer, 910 S.W.2d 245 (Ky. 1996) dealing with application of the redistricting rulings to special elections during this time frame (Fischer III).

the House and the Senate plans adopted in House Bill 1 divide more counties than "the fewest possible number of counties." Accordingly, this Court is required to apply this binding precedent and hold that the legislative redistricting provisions of House Bill 1 violate Section 33 of the Kentucky Constitution, as construed by the Kentucky Supreme Court.

The Legislative Research Commission has advanced strong arguments that Section 33 of the Kentucky Constitution should be construed in a more flexible manner, to give the legislature greater discretion in the difficult task of balancing the competing, and sometimes inconsistent, constitutional values of population equality and county integrity. Whatever merit those arguments may have, they must be addressed to the Kentucky Supreme Court. This Court remains bound by that Court's decision in Fischer II.

It is apparent that the Supreme Court's ruling in Fischer II has had unintended consequences. In Fischer II, the Supreme Court stated that "We recognize that the division of some counties is probable and have interpreted Section 33 to permit such division to achieve population requirements. However, we can scarcely conceive of a circumstance in which a county or part thereof which lacks sufficient population to constitute a district would be subjected to multiple divisions." *Id.,* 879 S.W.2d 479, fn 5. A short time later, after the legislature struggled to draw a plan that complied with Fischer II, the Court in Jensen was forced to observe that "In fact, what we thought was scarcely conceiveable has been proven to be unavoidable." 959 S.W.2d at 776.

This demonstrates the real tension between the competing values of county integrity and population equality that continues today. It is a concern of this Court that the Fischer II mandate *requires* the legislature to "make maximum use" of the 10% population variance it approved in that case. As a result, each new redistricting plan post-Fischer II must begin the decennial

period with a 10% deviation in the population of districts, and this variation is virtually certain to increase with each passing year as a result of normal demographic trends and the movement of people from rural to urban areas. Accordingly, Fischer II seems to guarantee districts that over time will violate the 10% variation standard even more quickly, because it *starts* with a 10% variation.

Likewise, Fischer II is based on the Supreme Court's belief that county integrity and population equality can always be reconciled, but it is apparent from the proceedings in this case that the constitutional value of population equality is significantly impaired by the requirement to preserve county integrity. The Supreme Court's view of the importance of county integrity in Fischer II appears rooted in the history of the county unit, and fails to recognize that at the time of the adoption of the 1891 constitution, the county was the central unit of government for basic government services such as roads, education, mental health, and social welfare. *See e.g.,* Ireland, *The County in Kentucky History* (University Press of Kentucky, 1976), *Little Kingdoms* (University Press of Kentucky, 1977). In today's world of government, all of those functions now reside primarily with state government, rather than county government. All of these considerations militate in favor of giving greater weight to population equality than county integrity when those values clash, as they inevitably do[2]. Those considerations, however, must be addressed to the Kentucky Supreme Court, not to a trial court that is required to apply the binding precedent of Fischer II.

The duty of this Court is to apply the binding precedents that control the application of Section 33. Under the controlling precedents, the provisions of House Bill 1 simply fail to pass constitutional muster.

[2] It appears that the text of Section 33 itself requires that greater weight be given to population equality, in that it qualifies the provision on maintaining county integrity with the expressed command that "Provided, in doing so the principle requiring every district to be as nearly equal in population as may be shall not be violated."

FINDINGS OF FACT

1. Under the population data from the 2010 U.S. Census relied upon by the General Assembly in redrawing its district lines in House Bill 1, the ideal district for the House of Representatives would include 43, 394 people, and the ideal district for the Senate would include 114,194 people. The ideal district is composed of the total population of Kentucky reflected in the 2010 census, divided by 100 for the House of Representatives and divided by 38 for the Senate.

2. The Districts for the House and Senate established in House Bill 1 contain variations from the ideal population for House and Senate Districts. House District (HD) 24 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. In the House of Representatives, 15 districts (HD 47, 52, 58, 60, 62, 63, 64, 66, 68,69, 78, 80, 83, 88, and 100) include a variance of 5%, the maximum variance allowed under Fischer v. State Board of Elections,, 879 S.W.2d 475 (Ky. 1994). (*See* Exhibit 3 to the Complaint, LRC Population Summary Report, January 10, 2012).

3. House Bill 1 divides 28 counties in districts for the House of Representatives, and 5 counties for Senate districts.

4. House Floor Amendment 1 to House Bill 1 provides for a redistricting that divides only 24 counties. Senate Floor Amendment 1 to House Bill 1 provides for a redistricting that divides only 4 counties.

5. House Bill 1 provides an overall range of deviation for House Districts of 10%, and an overall range of deviation for Senate Districts of 9.84%. *See* LRC Population Summary Report, *Id.* Plaintiffs have argued that this level of variance between the least populous

district and the most populous district exceeds the constitutional requirements for House Districts. It is undisputed that House Bill 1 sets those variances at, or near, the constitutionally permissible limits for both House and Senate.

6. The Plaintiffs have identified at least one House District, HD 80, that has been designed in such a manner as to raise a substantial question as to whether that district complies with the requirement of Section 33 that "the counties forming a district shall be contiguous." House District 80 contains a one mile wide strip that runs from the Casey County border, through the northwestern corner of Pulaski County, to the Rockcastle County border. This strip of Pulaski County contains only 1882 residents. (*See* LRC's Answers to the Court's Questions, filed 2/6/12).

7. Former Senate District 13, in which Intervening Plaintiffs Stevens, Stephenson, McGaw vote and reside, and which is represented by Intervening Plaintiff Senator Kathy Stein, was located entirely within Fayette County prior to the enactment of House Bill 1, which re-located Senate District 13 to the northeastern Kentucky counties of Bath, Fleming, Harrison, Lewis, Mason, Montgomery, Nicholas and Robertson Counties. The vast majority of the geographic territory that constituted the former SD 13, and almost all the voters who resided there, have been re-assigned by House Bill 1 to SD 4, which formerly was located in Western Kentucky and is represented by Sen. Dorsey Ridley of Henderson.

8. The Fayette county voters of the former SD 13 elected a senator in the election of 2008, and absent the enactment of House Bill 1, would elect a senator in 2012. All odd numbered Senate Districts are on the ballot in 2012, and all even numbered Senate Districts are on the ballot in 2014.

9. By virtue of the enactment of House Bill 1, and the reassignment of the voters in the geographic territory that formerly constituted SD 13 to SD 4, the voters who reside in that territory will be denied the right to vote for and elect a Senator for 2 additional years, from 2012 (when the election would have been held prior to House Bill 1, to 2014 when it would be held if House Bill 1 is allowed to take effect).

10. In Fayette County alone, 113,724 citizens who resided in the former territory of SD 13, were reassigned to SD 4 by House Bill 1. (LRC Exhibit 1, Hearing 2/6/12).

11. House Bill 1 further provides that a statewide total of 351,394 citizens and residents were transferred from odd numbered districts (for which senators were elected in 2008, and for which elections will be held this November) to even numbered districts (for which senators were elected in 2010 and elections will be held in November, 2014). (LRC Exhbit 1, Hearing 2/6/12).

12. In addition to the wholesale reassignment of the voters of former SD 13 to SD 4, House Bill 1 also reassigns the voters of 9 other counties[3] *in their entirety* from odd numbered Senate Districts to even numbered Senate Districts.

13. By virtue of this reassignment, virtually all of the residents and voters of the former SD 13 in Fayette County, and in the other 9 counties that were transferred *en masse*, will be denied the right to vote for and elect a senator to represent them for two additional years, and will be represented for two entire legislative sessions in the Senate by a person not elected by the voters of the district, but assigned to them by legislative fiat.

[3] Boyd, Breathitt, Casey, Estill, Gallatin, Johnson, Magoffin, Powell, Pulaski and Russell Counties are all reassigned from odd numbered districts to even number districts. ***See*** *LRC Exhibit 1, id.*

CONCLUSIONS OF LAW

1. The decision of the Kentucky Supreme Court in Fischer v. State Board of Elections, 879 S.W.2d 799 (Ky. 1984) provides that under Section 33 of the Kentucky Constitution, the General Assembly may enact a redistricting plan in which the population variation "does not exceed -5% to +5% from an ideal legislative district." *Id.* at 479.
2. Fischer further provides that the General Assembly is obligated to "formulate a plan which reduces to the minimum the number of counties which must be divided between legislative districts. … 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." *Id.*
3. House Bill 1 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%. The right of the plaintiffs and intervening plaintiffs to proportional representation under Section 33 of the Kentucky Constitution, as construed by the Kentucky Supreme Court in Fisher, *id.*, has been violated by the provisions of House Bill 1.
4. House Bill 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.
5. 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

forming a district shall be contiguous." There is no controlling case law on this issue, and the issue requires further proof and briefing on the merits before the Court can render a final decision.

6. The Intervening Plaintiffs have raised a substantial issue of law regarding whether their transfer from SD 13 to SD 4 has unconstitutionally impaired their right to vote for and elect a senator. The Court is not aware of, and the parties have not cited, any controlling legal authority on this issue. In Anggelis v. Land, 371 S.W.2d 857 (Ky. 1963), the former Court of Appeals rejected a claim that the Redistricting Act of 1963, dividing the 13th Senate District into two districts (12 and 13), created a vacancy in the office of Senator from the 12th district. No claim was raised that the Act denied or abridged the right of any citizens to vote on the election of their senator. Rather, Anggelis rejected an attempt by the sitting Senator in the 13th district to obtain by mandamus a certificate of nomination "as Democratic nominee, for the office of State Senator from the Twelfth Senatorial District of Kentucky." *Id.* at 858. Having been moved out of his district, he sought to be re-elected by judicial action rather than standing for election in the newly established district. Anggelis did not challenge the re-districting at all. It appears that the Senator elected by the voters in all of Fayette County for the 13th District continued to serve until the next election for an odd numbered district, and the voters who were re-assigned to an even numbered district were able to elect a new senator at the first election after the 1963 redistricting. Thus no citizen was assigned to be represented by a senator who had never been elected by the voters of that geographic area, nor was the right of any citizen to vote for a senator delayed.

7. Senator Stein seeks no such relief here, but rather, she and her constituents maintain that by transferring the geographic territory of former SD 13 (an odd numbered district that will be subject to election this year) to SD 4 (an even numbered district that will not be subject to election until 2014), that House Bill 1 denies and abridges their right to elect a senator, and, as a practical matter extends the term of the Senator representing them from 4 years to 6 years because the last election for senator in that geographic territory was in 2008, and the next election will be held until 2014.

8. The Court has not found, nor have the parties cited, any controlling legal authority that addresses the question of whether an entire senatorial district can be transferred from an odd numbered district to an even numbered district, when such a transfer results in a delay of 2 years in the right of those citizens to elect a senator. The Court concludes that this alleged abridgement of the voting rights of the Intervening Plaintiffs is a substantial question of law that merits a full adjudication on the merits.

9. In deciding whether to grant injunctive relief, this Court is required to weigh the competing equities, including the public interest. Maupin v. Stansbury, 575 S.W.2d 695 (Ky. App. 1978). This balancing of competing interests is also required in connection with cases that allege the impairment of the right to vote. *See, e.g.* Burdick v. Takushi, 504 U.S. 428 (1992). Here, the Court finds that the "character and the magnitude" of the asserted impairment of the right to vote is substantial, and the public interest requires preservation of the *status quo* pending a final judgment.

10. Having found a violation of the rights of the Plaintiffs and Intervening Plaintiffs, the Court must address the question of remedies. Here, the Court recognizes that there are substantial competing interests. The last redistricting completed by the General

Assembly was enacted into law in 2002 (*see* 2002 Ky. Acts., c. 1). Accordingly, we are in the 10th year of that plan, and a new census was completed last year, showing that the districts are substantially out of balance. Thus, there is no question that the legislature is under an obligation to complete re-districting as soon as possible. The question before the Court then, is whether the November 2012 elections should be conducted under the district boundaries that preceded the enactment of House Bill 1, or whether the Court should redraw legislative district line, or require the legislature to redraw those lines (and extend all necessary deadlines to do so).

11. The Court finds and concludes that there is no constitutional or statutory deadline that requires that legislative district lines be redrawn prior to the November 2012 election. In fact, the case law on redistricting is replete with cases that demonstrate that the decennial redistricting required by Section 33 has been only loosely observed. *See* Combs v. Matthews, 364 S.W.2d 647 (Ky. 1963), Stiglitz v. Schardien, 239 Ky. 799, 40 S.W.2d 315 (Ky. 1931), Ragland v. Anderson, 125 Ky. 141, 100 S.W. 865 (Ky. 1907).

12. If the Court allows the district lines established in House Bill 1 to take effect immediately, it is uncontested that virtually all of the citizens and voters of the former SD 13 (at least 113,000 citizens) will be represented in not one, but two full annual sessions of the General Assembly (the 2013 and 2014 sessions) by a senator who does not live in the district, and has no political, social, economic or other connection to the community he has been assigned to represent. Those citizens and voters will be represented in the Senate by a Senator from another area of the state who has been politically assigned to this task. Those citizens and voters will be denied the right to

select their own senator for another two years, although they otherwise would be able to vote for a senator this November.

13. Likewise it appears that there are hundreds of thousands of citizens and voters who are similarly situated to the Intervening Plaintiffs. LRC Exhibit 1 documents that there are 350,394 persons who have been moved from odd numbered districts to even numbered districts, and thereby will be delayed by 2 years in their right to vote for a senator. It is true that LRC Exhibit 1 indicates that 400,667 persons were moved from an even numbered to an odd numbered district, and thereby will be able to vote for a senator 2 years sooner than they would have if they remained in an even numbered district. But the Court can find no basis for holding that the law allows the General Assembly the right to delay one citizen's right to vote for a senator by advancing the right of other citizens' vote for a senator.

14. The Court can find no basis in law or precedent for the wholesale transfer of virtually an entire Senate District from an odd-numbered district to an even numbered district, in a manner that delays the right of the voters of the district to elect a senator by two years. No such law or precedent has been cited to the Court. The Court recognizes that Senate Districts have been re-assigned to new geographic territory, and that to some degree such re-assignments are necessary to address shifts in population. Such transfers of districts to new territory have been upheld by Opinions of the Attorney General. *See OAG 82-18 and OAG 82-55.* But there are no reported cases in which this issue has been decided, and no prior redistricting legislation in which a challenge has been brought by voters who claim their right to vote for a senator has been impaired. Again, this Court concludes that these issues warrant a full

adjudication on the merits, and it is necessary to maintain the *status quo* pending a final adjudication because in the absence of injunctive relief "the acts of the adverse party will tend to render such final judgment ineffectual." CR 65.04(1). Maupin v. Stansbury, *supra.*

15. In balancing the equities, the Court is mindful that the current districts are out of balance and must be redrawn to comply with the "one person, one vote" mandate of federal and state law. But the question before the Court is one of timing. The Court notes that the uncontested evidence in this case demonstrates that House Bill 1 itself violates with the mandate of Section 33 for proportional representation because it includes districts in both House and Senate that exceed the maximum 5% variation. The Court further finds as yet undisputed evidence that as many as 351,394 persons will be legislatively re-assigned under House Bill 1 from districts that are required to elect a senator this year to districts that will not hold an election until 2014. Those citizens, for two full annual sessions of the General Assembly (2013 and 2014) would be assigned to senators who do not reside in the districts they represent and who have no meaningful ties to those communities. The Court therefore concludes that the redistricting cure of House Bill 1 is worse than the malapportionment disease that it is legally required to remedy, at least for the next two years. In these circumstances, the public interest demands that the Court grant injunctive relief to maintain the *status quo* pending a full adjudication on the merits.

16. The Court finds and concludes that there is no Kentucky case on point deciding whether the impairment of the Intervening Plaintiffs' voting rights reflected in House Bill 1 constitutes a violation of the guarantee of due process and equal protection of

the law under Sections 2 and 3 of the Kentucky Constitution. However, the Court notes that other jurisdictions have found equal protection violations in similar circumstances. As explained by a three judge federal District Court in Wisconsin,

> "every new reapportionment plan creates a situation that results in 'holdover' Senators and the temporary disenfranchisement of some residents for a two-year period. .. The temporary disenfranchisement of citizens is constitutionally tolerated under either of two related theories. Due to the complexities of the reapportionment process, a temporary loss of voting rights (the cases speak of a 'delay' in the right to vote) is tolerated when it is an 'absolute necessity' or when it is 'unavoidable.'" Republican Party of Wisconsin v. Election Board, 585 F.Supp. 603 (E.D. Wis. 1984), *vacated and remanded* Wisconsin Elections Board v. Republican Party of Wisconsin, 469 U.S. 1081 (1984).[4]

17. The re-assignment of geographic territory of the former SD 13 to an even numbered district is neither "an absolute necessity" nor "unavoidable." On the record before this Court, it appears to be an arbitrary decision without a rational basis. To the extent that political considerations concerning the political impact of this re-assignment on the majority party are involved, the Court notes that this is a political process and it is appropriate to take political concerns into consideration so long as they do not impair the nonpartisan voting rights of the public. Here, the public's right to elect a senator has been delayed for 2 years, and in conducting the balancing test required under Burdick *supra,* the Court can see no countervailing rational basis or valid reason to re-assign the former SD 13 to an even numbered district, thereby delaying the right of those citizens to vote on the election of their senator. No such rational basis has been advanced thus far in the litigation.

[4] The U.S. Supreme Court granted an order staying the lower court's ruling, apparently because of time constraints that would make the mechanics of running the 1984 election difficult or impossible. 469 U.S. 812. After the November election was held under the legislatively adopted plan, rather than the judicially imposed plan, the action became moot, and the Supreme Court vacated the lower court's decision and directed dismissal of the complaint.

CONCLUSION

For the reasons stated above, IT IS ORDERED AND ADJUDGED as follows:

1. The defendant Allison Lundergan Grimes, in her capacity as Secretary of State of the Commonwealth of Kentucky, and the Kentucky State Board of Elections, and all agents, employees and others acting in concert with them, are hereby ENJOINED under the provisions of CR 65.04 from implementing the districts for the Kentucky House of Representatives and Kentucky Senate that are set forth in House Bill 1, enacted by the 2012 General Assembly;
2. Until the General Assembly passes redistricting legislation that complies with all applicable constitutional requirements to revise the districts in effect under KRS 5.005 (2011), as enacted by 2002 Ky. Acts, c. 1, the elections for the House and Senate shall be conducted with the legislative district boundaries in effect immediately prior to the enactment of House Bill 1 for both the House of Representatives and the Senate.
3. The filing deadline set forth in KRS 118.165 shall be extended through 4:00 p.m. on Friday, February 10, 2012 to allow all candidates and potential candidates the opportunity to make the required candidacy filings under the temporary injunction issued by this Court, with the legislative districts required by this Court's ruling;
4. The motion of the Legislative Research Commission to intervene as a matter of right is GRANTED under CR 24.01 and KRS 5.005(1).
5. This is a final and appealable judgment on the claim set forth in Count I of the Complaint filed by Plaintiffs Fischer, Hoover, King, Todd and Gaydos for violation

of their rights under Section 33 of the Kentucky Constitution regarding the population variance of greater than 5%, and the failure to divide "the fewest possible number of counties." It is also a final and appealable judgment on the claim set forth in Count I of the Intervening Complaint filed by Intervening Plaintiffs Stevens, Stephenson, McGraw and Stein for violation of their rights under Section 33 of the Kentucky Constitution regarding the population variance of greater than 5% and the failure to divide "the fewest possible number of counties." Those claims of the plaintiffs and intervening plaintiffs under Fischer v. State Board of Elections, 879 S.W.2d 475 (Ky. 1994) constitute a facial challenge to the constitutionality of House Bill 1 under Section 33 of the Kentucky Constitution, and there is no just cause for delay in the entry of this judgment on the facial challenge to the constitutionality of House Bill 1. *See* CR 54.02

6. The Court RESERVES ruling on all other claims and defenses, pending the filing of Answers, completion of discovery, and briefing on the merits. Accordingly, this Order is an interlocutory order on all other claims of the Plaintiffs[5] and the Intervening Plaintiffs[6].

7. The bond previously set for the issuance of the restraining order under CR 65.03 ($200), which was posted by the Plaintiffs, shall remain in effect and serve as the bond for the temporary injunction.

[5] Lack of contiguity under Section 33, State and Federal Equal Protection, State and Federal Freedom of Association, 42 U.S.C. Sec. 1983, and Declaratory and Injunctive Relief under KRS 418.040)
[6] Equal Protection, Freedom of Association, Violation of Term of Office, 42 U.S.C. Sec. 1983, and Declaratory and Injunctive Relief.

IT IS SO ORDERED this 7th day of February, 2012, at 3:00 p.m. EST.

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division 1

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IN THE SUPREME COURT OF KENTUCKY
NO. 96-SC-291-T

THOMAS L. JENSEN — APPELLANT

v.

BRIEF OF APPELLANT THOMAS L. JENSEN

KENTUCKY STATE BOARD OF ELECTIONS
and SECRETARY OF STATE OF KENTUCKY,
JOHN Y. BROWN, III and ATTORNEY GENERAL
OF KENTUCKY, ALBERT B. CHANDLER III

FILED
JUN 25 1996
CLERK
SUPREME COURT

and

JODY RICHARDS as a Member of the Kentucky House
of Representatives and as Speaker of the House of
Representatives on behalf of the House of Representatives
and the Legislative Research Commission, and
THE LEGISLATIVE RESEARCH COMMISSION, et al. — APPELLEES

CIVIL RULE 76.12(6) CERTIFICATE

I certify that the record on appeal was returned to the Clerk of the Franklin Circuit Court on June 24, 1996, and I further certify that a copy of this Brief was served via first class mail, postage prepaid on June 24, 1996 to the following: Scott White, Office of Attorney General, P.O. Box 2000, Frankfort, KY 40602; David L. Yewell, 322 Frederica Street, Owensboro, KY 42301; Samuel D. Hinkle, IV, 2650 Providian Center , Louisville, KY 40202; Ms. Rebecca Jackson, Jefferson County Clerk, 527 West Jefferson Street, Louisville, KY 40202; James M. Vaughn, Jefferson County Sheriff, 531 Court Place, Louisville, KY 40202; Mr. Jerry Gaines, Warren County Sheriff, P.O. Box 807, Bowling Green, KY 42101; Warren County Board of Elections, 429 East Tenth Street, Bowling Green, KY 42101; Jefferson County Board of Elections, 810 Barret Avenue, Louisville, KY 40204; Ms. Yvonne Guy, Warren County Clerk, P.O. Box 478, Bowling Green, KY 42102; Ms. Janice Marshall, Franklin Circuit Clerk, Frankfort, KY 40601; and Hon. Roger L. Crittenden, Franklin Circuit Court, Frankfort, KY 40601.

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Counsel for Appellant, Thomas L. Jensen

I. INTRODUCTION

This case challenges the constitutionality of House Bill 1, an act which provided for legislative redistricting in Kentucky in 1996 and, in so doing, completely destroyed the integrity of Laurel and Pulaski Counties as political units. The Appellant contends that the act violates Section 33 of the Kentucky Constitution by making multiple divisions of counties or parts of counties which have insufficient population to form a legislative district in their own right and by failing to provide at least one legislative district entirely within the borders of counties which have sufficient population to include an entire district.

II. STATEMENT OF POINTS AND AUTHORITIES

III. STATEMENT OF THE CASE

The question raised by this appeal is whether House Bill 1 providing for legislative redistricting in Kentucky (the "Act") is unconstitutional in light of its total destruction of the integrity of Laurel and Pulaski Counties as political entities. The Act does not provide for a House district within the borders of either of these counties, though each county has a sufficient population to comprise a district. Instead, the Act carves both counties into five segments and attaches each of those segments to other counties or parts of other counties.

The Kentucky Constitution requires redistricting every ten years. Section 33 governs redistricting and reads in its entirety as follows:

> **§ 33. Senatorial and representative districts.** -- 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 the 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.

(Certified Record on Appeal in Franklin Circuit Court Civil Action No. 96-CI-00071, at 107, hereafter "R: ____"). (Emphasis added).

The Act was the product of this Court's rejection of the General Assembly's prior redistricting effort. In *Fischer v. State Board of Elections*, Ky., 879 S.W.2d 475 (1994)

("*Fischer*") (Appendix 1) this Court invalidated the 1991 Legislative Redistricting Act, principally because that act did not comply with the mandate of Section 33 of the Kentucky Constitution regarding county integrity. (R: 107-8).

The 1991 redistricting act had divided 48 counties, essentially paying no heed to county integrity. The concern addressed by the Court in *Fischer*, given the redistricting plan there at issue, was the division of more counties than necessary to harmonize the dual constitutional principles of population equality and county integrity. Finding the 1991 act's disregard of county integrity unconstitutional, this Court made a special point to instruct the Legislature that it "could scarcely conceive" of a constitutional plan that "subjected" any county to "multiple divisions." *Fischer* at 479, fn. 5 ("Footnote 5") (R: 108).

The effective date of the decision in *Fischer* was delayed until January 3, 1995, at which time the districts created by the 1991 act were dissolved.[1]/ (R: 108). In 1996, the General Assembly again undertook to redistrict, and passed the Act, which became law on January 11, 1996. A copy of the Act is attached as Appendix 3, and an LRC map reflecting county lines and district boundaries under the Act is attached as Appendix 4. (R: 108).

Ostensibly in light of this Court's guidance in *Fischer*, the Act creates new legislative districts. It is based on census data obtained from the 1990 census, giving

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[1]/In *State Board of Elections v. Fischer*, Ky., 910 S.W.2d 245 (1995) ("*Fischer 1995*") (Appendix 2), this Court affirmed an injunction against the conduct of special elections absent a new and constitutional redistricting plan. In *Fischer 1995*, this Court again reiterated its concern for respecting the integrity of county lines when the residents of a county are sufficient in number to comprise a complete House district. *Id.* at 246.

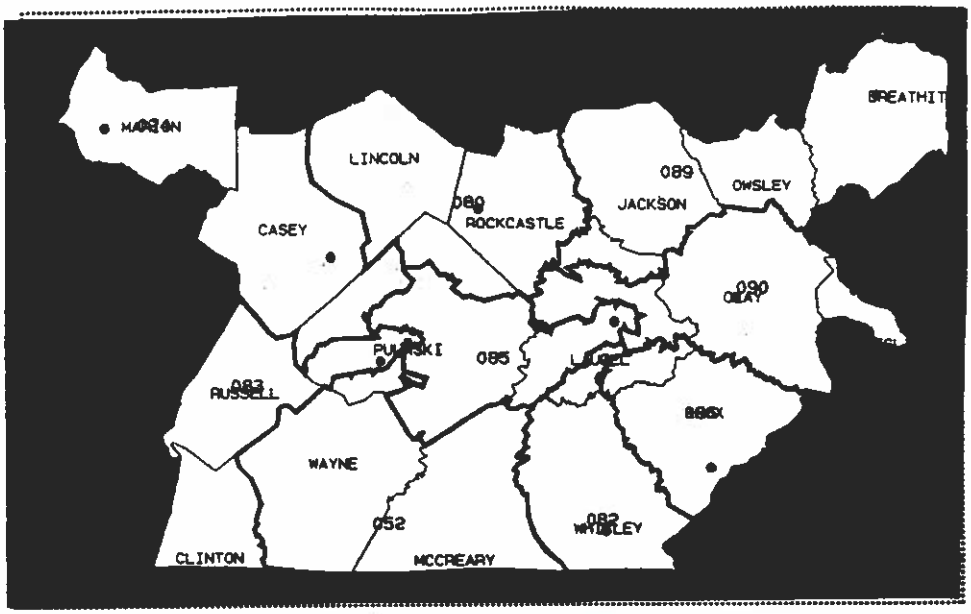
Kentucky a population of 3,685,296. With 100 House districts, the ideal population for a House district is 36,853 people.

According to the same census data, Laurel County had a population of 44,438. Pulaski County had a population of 49,489 people. Expressed differently, Laurel County had a population equal to 121% of the ideal House district. Pulaski County had a population equal to 134% of the ideal House district. Consequently, Laurel County and Pulaski County each had significantly greater populations than necessary to accommodate a House district entirely within the geographic boundaries of the county. (R: 109).

Nevertheless, neither Laurel County, nor Pulaski County contains a House district. Instead, the Act subjects Laurel County to multiple divisions which place the territory of the county into five separate House districts. In each of these five separate areas, the people of Laurel County constitute a minority of the population in the House districts to which they have been apportioned. (R: 109-10).

Similarly, the Act divides the territory of Pulaski County into five separate House districts. In each of these five separate districts, the people of Pulaski County constitute a minority of the population in the districts to which they have been apportioned, except for the newly created 85th District, in which they are combined with a portion of the population of Laurel County. (R: 109-10).

A glance at the LRC map showing the House districts in the affected areas graphically demonstrates the result of the Act.



*SOURCE: LRC map of House Bill 1, Appendix 4.

Although not enacted by the General Assembly, on January 2, 1996, Representative Danny R. Ford introduced House Bill 164 (Appendix 5). Like the Act, House Bill 164 also divides 22 counties. But unlike the Act, House Bill 164 provides at least one House district within the boundaries of every county with population sufficient to form one or more House districts. (R: 110).

On January 23, 1996, Jensen introduced House Bill 350 with amendment (Appendix 6). The redistricting plan proposed with House Bill 350 provided each county in the Commonwealth, including Laurel and Pulaski, with the full number of House districts that it could contain within its borders based on a comparison of its total population to the ideal House district population of 36,853. House Bill 350 split a total of 30 counties, consisting of the 20 counties with a population greater than or equal to 105%

of the population of an ideal House district and 10 additional counties. Unlike the Act, however, House Bill 350 subjected no county to multiple divisions "except where a county may include more than one district."

The Act, House Bill 164, and House Bill 350 (as well as other plans set forth in the context of the *Fischer* litigation which respect county integrity to a greater degree than does the Act) all provide for House districts with populations between 95% and 105% of the ideal House district. Consequently, each of the possible redistricting plans that have been considered provides substantially equal representation, and satisfies the equal population mandate of Section 33 of the Constitution.

But of the Act, House Bill 164, and House Bill 350, as well as each of the plans considered in *Fischer*, ***only*** the Act destroys the integrity of counties ***both*** by failing to provide for a district wholly within the borders of each county having sufficient population to comprise one, and by subjecting counties to multiple divisions even though they have sufficient population for a complete district. (R: 110-11).

Jensen is a citizen and resident of Laurel County, Kentucky as well as a member of the General Assembly. He filed this action in the Franklin Circuit Court on January 11, 1996 seeking a declaration that the Act violates Section 33 of the Kentucky Constitution. (R: 1-7).

Speaker Richards and the other Appellees also filed their action on January 11, 1996. They seek a declaration that the Act is constitutional. (Certified Record on Appeal in Action No. 96-CI-00076, at 1-19). The two suits were consolidated (Action No. 96-CI-00076, at R: 20-22) and the parties filed cross motions for declaratory judgment and waived oral argument. (R: 103; 223).

On March 20, 1996, the Franklin Circuit Court upheld the constitutionality of the Act and entered its Findings of Fact, Conclusions of Law, and Judgment which granted a declaratory judgment for the Appellees and denied a declaratory judgment to Jensen. (R: 270). Jensen filed a Notice of Appeal (R: 281) and thereafter sought transfer to this Court pursuant to CR 74.02. Transfer was granted on May 23, 1996.

IV. ARGUMENT

> ***Since the earliest days of the Commonwealth, Kentuckians have looked to their home county as the basic unit of government. For more than 200 years, the county has been the heart of their political lives. This Court has recently described this historical emphasis on the county as "rich and compelling." But despite this history -- and despite the command to preserve county lines that has been a part of our Constitution for more than 100 years -- the General Assembly has passed, and the Governor has signed into law, a legislative redistricting bill that cuts out the political heart of both Laurel County and Pulaski County.***

In *Fischer*, this Court held that Section 33 of the Kentucky Constitution requires the maximum respect for county integrity in the redistricting process consistent with the coordinate constitutional mandate of "substantial equality of representation." *Id.* at 477. The Court took pains to point out that Section 33 thus forbids multiple divisions of counties -- or parts of counties -- which have insufficient population to form a legislative district in their own right. *Id.* at 479 (permitting division of such counties or parts of counties only *between* districts, not *among* districts) and at Footnote 5 (declaring the "multiple division" of any such counties or parts of any counties to be "scarcely conceivable").

But the Act makes ***exactly*** such "multiple divisions" not only of Laurel and Pulaski Counties, but also of those parts of these counties too small to comprise a

complete district. Moreover, Section 33 expressly prohibits the division of any county except where a county may include more than one district. Laurel and Pulaski Counties each have sufficient population to have a House district entirely within their borders. But with the Act, the General Assembly has divided both Laurel and Pulaski Counties multiple times while also denying either county any whole district. And the General Assembly did so even though it had before it two alternate redistricting plans which not only provided for substantial equality of population, but also accorded greater respect for the twin constitutional principles of county integrity by including a district entirely within each county having adequate population.

Thus, the Act violates Section 33 in one or both of the following ways:

1. The Act makes multiple divisions of counties and parts of counties which have insufficient population to form a legislative district in their own right, in complete disregard of Footnote 5.

2. The Act does not provide a district entirely within each county with sufficient population to include an entire district, in direct violation of Section 33.

The Act's two-fold assault on the constitutional principle of county integrity is in utter disregard for the Constitution's "absolute command" to respect that integrity which was so recently stated by this Court. The Act is therefore unconstitutional and the House districts created by it are invalid.

A. The Unconstitutional "Multiple Divisions"

Section 33 of the Kentucky Constitution vests the General Assembly with the responsibility of creating legislative districts every ten years. But even as it vests that responsibility, it conditions the legislature's power by commanding respect for dual principles: respect for county integrity and substantially equal representation. In *Fischer,*

the Supreme Court painstakingly reviewed the history of redistricting in Kentucky and laid down clear principles to the General Assembly with regard to the requirements of the dual mandates.

With regard to population equality, *Fischer* set forth a careful analysis not only of federal constitutional requirements for reapportionment of Congressional districts as articulated in decisions since *Baker v. Carr*, 369 U.S. 186 (1962), but also of the significantly different requirements applied to redistricting of state legislatures. In constitutional terms, federal reapportionment is controlled by Article 1, Section 2 of the United States Constitution, which permits only *de minimis* deviations in the size of congressional districts. Thus, "one citizen, one vote." But in the context of state legislative redistricting, the *de minimis* rule does not apply. Districts are permitted to vary substantially in population if the deviation is necessary to satisfy other important state policies. The deviations in the size of state legislative districts are evaluated not by the "one citizen, one vote" standard, but by the far more flexible equal protection provisions of the Fourteenth Amendment. *Mahan v. Howell*, 410 U.S. 315, 319 (1972). As this Court noted, states are free "to allow significant deviation from strict 'one man, one vote' principles, absent invidious discrimination, to achieve important state policy." *Fischer* at 478.

Taking note of these important differences, this Court affirmed in *Fischer* that preservation of county boundaries in the redistricting process is a policy important to the Commonwealth of Kentucky, just as the United States Supreme Court had acknowledged it to be for Virginia in *Mahan*. In fact, in *Mahan* the Supreme Court specifically concluded that the preservation of political subdivision lines such as counties may be

justified on a variety of grounds, including ***"that of insuring some voice to political subdivisions, as political subdivisions."*** *Id.* at 321, quoting *Reynolds v. Sims*, 377 U.S. 533, 580 (1964). (Emphasis added). Among the other possible reasons for guaranteeing the preservation of county lines in a state constitution, the Supreme Court observed, is that "a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering... ." *Id.*

Recognizing this body of law, the *Fischer* court noted that deviations of as much as 89% in the size of state legislative districts have been upheld against federal constitutional challenge. *Fischer* at 479. The *Fischer* court also favorably noted a Tennessee redistricting plan providing for as much as 14% populations deviation which was enacted under a constitutional provision nearly identical to Kentucky's. And the Court in *Fischer* commented with approval on the 16.4% percent deviation upheld for Virginia's redistricting by the United States Supreme Court in *Mahan*. Consequently, it is impossible to conclude that the *Fischer* court meant to conclusively prohibit population deviations of more than +5% or -5%. Rather, deviations of this magnitude must be considered presumptively valid under Section 33, just as they satisfy federal requirements of population equality.

This is especially clear given that the *Fischer* decisions were not focused primarily on defining the contours of the substantial population equality element of the Constitution. Instead, the *Fischer* decisions were primarily about restoration of the corresponding constitutional command that county integrity be maintained in the process of redistricting. In fact, the *Fischer* court declared that it sought to "restore the balance between competing constitutional concepts," and noted that such balance had been lost

when the Court in prior decisions had undertaken to impose equal legislative representation. *Id.* at 479. Explaining the Court's decisions earlier this century by reference to the dramatic population disparities involved in the districts challenged in *Ragland v. Anderson*, 125 Ky. 141, 100 S.W.2d 865 (1907) and *Stiglitz v. Schardien*, 239 Ky. 799, 40 S.W.2d 315 (1931), the *Fischer* court plainly sought to reinvigorate the mandate of Section 33 that legislature districts not be created without regard to the preservation of the county fundamental unit of political life in Kentucky.

In the *Fischer* litigation this Court noted that no one had challenged the redistricting on the basis of under-representation or invidious discrimination. So the *Fischer* court made plain its intent to re-establish respect for county integrity as a constitutional concern of at least as much importance as population equality: "At this juncture we seek to restore the integrity of our most basic political subdivision and assure that natural and historical boundary lines are observed as intended by the constitution." *Fischer* at 479. In fact, given the Court's declaration that the preservation of county integrity is of at least as much importance as is substantial equality of representation, *Fischer* at 477, it is plain that the Act strikes an impermissible balance between the two mandates, exhalting equality while ignoring the preservation of county integrity.

Just as in *Fischer*, no one in this litigation has challenged the Act on the basis of equality of representation. And so the question before the Court is whether an Act that dismembers two populous counties -- effectively removing them from the political map of the Commonwealth -- can stand in light of the constitutional mandate to respect county integrity.

To make certain that the General Assembly understood how to constitutionally exercise its redistricting responsibility following the invalidation of the districts created in 1991 the *Fischer* court provided this very specific direction to the General Assembly in exercising the power granted it under Section 33:

> We recognize that the division of some counties is probable and have interpreted Section 33 to permit such division to achieve population requirements. ***However, we can scarcely conceive of a circumstance in which a county or part thereof which lacks sufficient population to constitute a district would be subjected to multiple divisions.***

Fischer, 879 S.W.2d at 479, footnote 5. (Emphasis added).

Jensen's first constitutional argument therefore turns on whether Section 33 and this Court's decision in *Fischer* mean what they say. This Court plainly guided the General Assembly in its redistricting efforts following the dissolution of the invalidated legislative districts of the 1991 act. To make clear the constitutional limitation on the power of the legislature -- and almost certainly to avoid the very problem the Act now presents -- the Court admonished the General Assembly not to subdivide any county or part of a county that was too small to constitute a district in its own right.[2]/ Wholly disregarding this admonition, the General Assembly has flouted the Court's direction that it could "scarcely conceive" of a constitutionally valid plan that provided for multiple divisions of a county.

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[2]/In *Fischer 1995*, this Court observed that it had expected in 1994 when it decided *Fischer* that its opinion concerning this "fundamental constitutional principle" would be followed in a timely manner. By then, seventeen months had passed. It is now more than two years since the *Fischer* opinion, but we are no closer to a legislative redistricting act that respects this "fundamental principle" of county integrity than we were then.

With the Act, the General Assembly has abused its power. It has divided each of Laurel and Pulaski Counties multiple times: not once; not twice; not three times; not even four times. These counties are each divided into five separate fragments. The result is that nothing of the body politic of either Laurel or Pulaski County remains. All that is left of these large and growing counties -- counties incidentally dominated by the minority party in the legislature -- is dismembered pieces inartfully attached as appendages to other districts, in some cases districts centered on counties far removed from Laurel or Pulaski.

The issue not directly addressed in *Fischer* was, of course, the wholesale destruction of county integrity through "multiple divisions" in a plan that otherwise "divided the minimum number of counties" while providing substantial equality of representation. Still, while *Fischer* did not directly confront the issue -- because the 1991 act did not so brazenly carve up any county as does the 1996 Act -- the Court anticipated the problem, and gave clear guidance to the General Assembly. The Court declared that the "total destruction of county integrity" is not permitted. ***And it declared in straightforward terms that the General Assembly's duty was to enact a plan that "restore[s] the integrity of our most basic political subdivision and assure[s] that natural and historic boundary lines are observed as intended by the Constitution."*** *Fischer* at 479. Sadly, with this Act, the General has not only failed to do so, it has mocked the Court's intentions at the same time.

In passing the Act, the General Assembly seemed not to heed the lessons from the Tennessee experience in redistricting. Nor did the Franklin Circuit Court have any regard for it. Yet that state's effort to resolve a similar problem involving a constitutional

provision nearly indistinguishable from our own is instructive. Indeed, this Court's direction to the legislature in *Fischer* to strike a proper balance between the twin mandates of Section 33 followed immediately after its analysis of the Tennessee Supreme Court's decisions in *State ex rel. Lockert v. Crowell*, 631 S.W. 2d 702 (Tenn.1983) (*Crowell I*) (Appendix 7) and 656 S. W.2d 836 (Tenn. 1983) (*Crowell II*) (Appendix 8).

In *Crowell I*, the Tennessee Supreme Court provided an extensive analysis of the law, and rejected a redistricting plan that failed to comply with a state constitutional mandate nearly identical to Kentucky's regarding the integrity of county lines.

In *Crowell II*, the Tennessee Supreme Court explained the proper balance between the goal of substantial equality of representation and respect for county integrity, a balance achieved by approving population deviations of up to 14%.

> Our interpretation of the proof in this record is that it may be very difficult to keep the total deviation in either body below 10%..., but that appropriate State limits can be attained without exceeding 14% total deviation for Federal equal protection requirements. ***If the Legislature proceeds in good faith, and puts compliance with Federal and State Constitutions above political considerations and the resulting plan has a 13.6% or 14.0% deviation, we believe it will be safe from attack, although admittedly it will not have the de minimis presumption that a 10% plan would have...*** . The result is that we raise the 10% limit to 14% total deviation, applicable to both the Senate and the House.

Crowell II at 844. (Emphasis added).

Importantly, the Tennessee Supreme Court denigrated the kind of blind, mechanistic adherence to population equality in disregard of county lines essentially adopted by the Franklin Circuit Court. Its opinion in *Crowell II* is particularly instructive, because that Court did face the issue not directly decided in *Fischer*, *i.e.*, the

fragmentation of counties. After noting that the Tennessee legislation had been drafted primarily to minimize population deviation, the Tennessee Supreme Court declared:

> ***In this Court's opinion . . . the committee were pursuing a completely erroneous objective not required by a proper interpretation of the United States Supreme Court cases applying the one person, one vote mandate.***
> ....
> A state constitutional mandate that county boundaries be preserved in reapportioning the Legislature has been recognized by the United States Supreme Court as a legitimate, rational state policy that will justify deviations from population equality.... ***Thus it is clear that the Legislature overemphasized achieving near perfection in responding to the one person, one vote federal mandate, where it collides with the State Constitutional mandate against attaching fractional parts of counties to another county or counties to form a Senatorial district.***

Crowell II, 656 S.W.2d at 840. (Emphasis added).

The Tennessee Supreme Court specifically rejected an effort to subject counties to multiple divisions in order to achieve some precise notion of equality of representation, concluding that such a plan was neither required by the Federal Constitution nor permitted by the State Constitution. This Court has said as much in *Fischer*. Yet just as the Tennessee legislature pursued a "completely erroneous objective," so did our General Assembly in passing the Act.

In Tennessee -- as in Kentucky -- there were alternative redistricting plans introduced that plainly demonstrated that it was possible to meet the goals of both the Federal and State Constitutions in assuring substantial equality of representation while also avoiding the needless destruction of basic political subdivisions as political units. *Crowell II*, 656 S.W.2d at 840-41. In *Fischer*, this Court noted that the constitutional provisions in question are "virtually indistinguishable," and that the two states share a common boundary and heritage. *Id.* at 479. The Tennessee cases this Court found

"highly persuasive" in 1994 are even more persuasive today, with the focus on the fragmentation and multiple division of counties.

In this case, the record is clear that alternative plans are available that satisfy all of the requirements of both the State and Federal Constitutions, without the need to dissect Laurel County, Pulaski County, or any county. House Bill 164 divides that same number of counties as does the Act, but it gives at least one whole district to each county with sufficient population to contain one. House Bill 350 divides more counties, but avoids multiple divisions and provides each county with the full complement of representatives its population would receive if the 10% population deviation factor is taken as an absolute maximum. Of course, any number of constitutional plans is possible if the General Assembly accepts *Fischer's* teaching that rigid mathematical adherence to a 10% deviation factor is not mandatory, and adopts a more flexible approach that respects both the state's history and Constitution. Regardless of alternative plans, however, by subjecting Laurel and Pulaski Counties to multiple subdivisions, the General Assembly has passed an unconstitutional Act under Section 33.

B. The Unconstitutional Denial of a Single District to Each County Having Sufficient Population to Include One.

The Act is unconstitutional for another reason as well: It fails to provide a single district within the boundaries of Laurel or Pulaski Counties although each has sufficient population to include one.

This Court never suggested in *Fischer* that it was attempting to resolve all issues that might ever be raised under Section 33, and any suggestion that *Fischer* provides a compete analysis of the meaning and implications of Section 33 of the Constitution for

redistricting is simply unfounded. In fact, when the Supreme Court identified the portion of Section 33 with which it was concerned in *Fischer*, 879 S.W.2d at 477, it specifically omitted any reference to the language in Section 33 which is dispositive of Jensen's second constitutional argument. That language prohibits county division "except where a county may include more than one district." And though it was not at issue in *Fischer*, this language provides a separate and distinct basis for declaring the Act unconstitutional in this case. Put simply, this part of Section 33 bars the General Assembly from dividing Laurel County or Pulaski County without also providing that each county receives a complete district entirely within its boundaries.

In *Fischer*, this Court quoted the debates from the constitutional convention of 1890, pointing out that the convention did not want "any county divided unless it is entitled to two representatives." *Id.* at 477. But rather than respect either the framer's concern or this Court's concern for county integrity, the General Assembly has acted in complete derogation of the "absolute command," and has instead totally destroyed the county integrity of two large and important counties. The resulting Act is therefore unconstitutional.

In *Fischer 1995*, this Court again emphasized the importance of county-based representation. In barring a special election in a Jefferson County district under the unconstitutional plan invalidated in *Fischer*, the Court took "comfort in the knowledge that Jefferson County presently has 17 representatives ...." *Fischer 1995* at 245. In the Court's view, representation in the General Assembly ***for*** residents of counties ***by*** residents of their county was clearly an important consideration.

Regarding this limitation on the General Assembly's power, in the proceedings below the Appellees took the position that the Constitution's clear language really only prohibits county division except where a county includes two or more districts, not one or more. But if the framers of the Constitution had meant to prohibit county division "except where a county may include ***two or more*** districts" -- as the Appellees contend -- they could easily have done so. Yet they did not. Pulaski County's population amounts to 1.34 ideal districts. Laurel County's amounts to 1.21 ideal districts. Does "more than one district" really mean "two or more districts?" Is 1.34 more than 1, and is 1.21 more than 1? Each contains a population exceeding the maximum permitted by equal population considerations. Thus, each must include at least one full House district.

Plainly, the Appellees place primary emphasis on the constitutional mandate of substantial population equality at the expense of county integrity. As noted above, there is considerable latitude in satisfying the population equality mandate. This Court will surely take ***no*** comfort in seeing that the citizens of Pulaski and Laurel Counties are denied the representative that the number of their population would entitle them to, in deference to an abstract concern for equality of population and the unfettered will of the majority.

Constitutions, after all, are charters ***from*** the people ***to*** their government, and while the majority in the legislature often prevails, the charter of government serves to limit the majority's power. This is true of both the Kentucky and the federal Bill of Rights, and it is true of Section 33. That section is part of the organic pact that binds the people of 120 counties together, and it simply does not permit the kind of "all's fair in war and politics" approach to redistricting -- where might makes right -- that the

Appellees urge. *See Reynolds v. Sims*, 377 U.S. 533, 581 (1964) (noting that "a State may legitimately desire to construct districts along political subdivision lines to deter the possibility of gerrymandering....").

The language of Section 33 of the Constitution prohibiting the division of any county "except where a county may include more than one district," is at the heart of the claim made in this litigation. But the notion the Appellees advanced below, that the language is somehow "permissive" by its use of the word "may," is not rooted in the Constitution itself, and, moreover, is totally at odds with this Court's explanation of the relationship between county integrity and population equality.

If the Appellees are correct, it means that unless the General Assembly -- as a matter of grace -- decides to award a county at least two districts, then it is at liberty to totally destroy the integrity of the county. It may do this by not only denying the county one full district, but also by fragmenting the county into as many segments as the majority in the General Assembly may see fit. Of course, in doing so, the legislature would be wholly unmindful of the Supreme Court's declared intent to ***restore*** the integrity of our most basic political unit.

As a result of that unfettered legislative discretion, the residents of a county may be shipped off to as many districts as the General Assembly chooses, even though they far exceed the number that would entitle their county to one full district. In other words, despite a constitutional provision clear on its face, and a Supreme Court decision meant to reinvigorate respect for county integrity and ***assure*** that natural boundaries are respected, the Appellees will now use a narrow reading of *Fischer* to ***totally eliminate***

unfavored counties as political entities. This is a result that simply cannot be supported by a fair reading the Constitution or of this Court's decisions.

Speaking in an earlier era, our Supreme Court in *Stiglitz v. Schardien*, 40 S.W.2d at 315, and *Ragland v. Anderson*, 100 S.W.2d at 865, plainly emphasized equality of population within districts. If equality of representation were the only concern, or even the ***primary*** concern, as it was in *Stiglitz* and *Ragland*, the Act might do just fine. Yet in *Fischer*, the modern Supreme Court has just as plainly expressed a view that *Stiglitz* and *Ragland* went too far in their effort to impose equality in representation. As the *Fischer* court noted, the battle for equality has been won. *Fischer* at 479. Now the battle is to "restore the balance between competing constitutional concepts, a constitutional balance which was diminished or lost when the court undertook to enforce equal legislative representation." *Id.*

In this litigation, Jensen asks the Court to give meaning to the Supreme Court's command for respect of county integrity and to Section 33's language prohibiting county division "except where a county may include more than one district." Hoping to suggest some dilemma for the Court, the Appellees argue that this would somehow "permit the complete destruction of population guidelines." (R: 146). But why? The Appellees concede that House Bill 164 is constitutional, (R: 160, 167) and that bill surely does not destroy population guidelines. The same is true for House Bill 350. Both avoid the impermissible division of any county that may include more than one district under accepted population guidelines. Counties entitled to representation as coherent entities receive it -- just as the Constitution commands and the *Fischer* court contemplated.

And just as hollow is the Appellees' argument that the relief Jensen seeks would do to the residents of other counties what House Bill 1 has done to the residents of Pulaski and Laurel Counties. (R: 146 at footnote 2). This sauce-for-the-goose-is-sauce-for-the-gander argument would be effective if the facts gave it any force. But they don't.

Under each of the alternative plans in question, all counties -- unlike Laurel County or Pulaski County under the Act -- receive at least one entire district if they have sufficient population. Under the Act, Laurel and Pulaski Countians receive no district within their county. It is this inclusion of at least one district within the county which gave this Court comfort when barring special elections under the invalidated districts created by the 1991 act. Only the Act deprives any county entitled to a district by population from having that district.

The Appellees evidently take the position that it is not possible to comply with the Constitution in creating a redistricting plan for Kentucky. Thus, Representative Stumbo of Floyd County, the Majority Floor leader, made the following admission on the House floor during debate on the Act:

> [I]t is impossible to comply with all of the provisions of Section 33 on the Constitution because as I did state, in my judgment, all of and or part of that section is antiquated.
> ....
> ***[House Bill 1] doesn't comply with all of ....strict compliance of the ... the constitutional...requirements contained in Section 33 because it simply is not possible***.

Rep. Stumbo went on to acknowledge that the Act raises an issue that was not raised by the plans held unconstitutional in *Fischer*.

> I think that there are other issues raised, that will be raised, in regards to other parts of this section that were not addressed in the *Fischer* plan....***[T]here are other issues contained in Section 33 which the Court***

> ***may find credence with that they did not address in the Fischer plans.*** And, I guess that's a long winded way of saying we may not have seen the end of this issue yet.

(Transcript of House debate produced by the Public Information Office of the LRC at recorder counter number 2485 through 2568, January 4, 1996, R: 59). (Emphasis added).

Majority Leader Stumbo was correct that the Act could be challenged on constitutional grounds not raised in *Fischer*. But he was incorrect in stating that the mandates of Section 33 as explained in *Fischer* could not be met. Of all the counties in all the plans, only Laurel County and Pulaski County under the Act are sliced into multiple segments while being deprived of a district to which they are entitled by population. If this Court's declaration that county integrity is of ***at least*** equal importance with population equality means anything, and if its declaration that it sought 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" has any force at all, the Act cannot stand.

V. CONCLUSION

Both the language of Section 33 of the Kentucky Constitution and this Court's teachings concerning it in *Fischer* plainly require equal respect for the principles of substantial equality of representation and the preservation of county integrity. In the words of the Constitution, counties are not to be divided "except where a county may include more than one district." In the words of the Supreme Court, the "total destruction of county integrity" is unacceptable. *Fischer* at 479.

The Kentucky Constitution declares the preservation of county lines in the redistricting process to be an important state policy. It does not permit the General

Assembly to sacrifice unfavored counties -- coincidentally those dominated by the political minority -- in favor of other counties. This is especially true where, as here, alternative plans satisfy the constitutional requirements, providing for the preservation of county integrity while also guaranteeing that each county entitled by its population to a district receives that district. The Court should therefore conclude that the Act violates Section 33 of the Constitution of Kentucky and issue appropriate declaratory and equitable relief, including directions to the General Assembly, to develop a constitutional redistricting plan with all deliberate speed.

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