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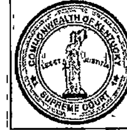

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In the Kentucky Supreme Court

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

APPEAL FROM FRANKLIN CIRCUIT COURT
CASE NO. 22-CI-00047

APPELLANTS' REPLY BRIEF

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CERTIFICATE OF SERVICE

In accordance with RAP 30(B), on September 29, 2023, the undersigned filed this brief with the Court's electronic filing system which caused a copy to be served on all counsel of record. The undersigned also served copies of the brief via U.S. Mail on (1) Hon. Thomas Wingate, Franklin Circuit Court, 222 St. Clair St., Frankfort, KY 40601; (2) Victor Maddox, Heather Becker, Alex Magera, Aaron Silletto, Office of Attorney General, 700 Capital Avenue, Suite 118, Frankfort, KY 40601; (3) Taylor Brown, Kentucky State Board of Elections, 140 Walnut Street, Frankfort, KY 40601; (4) Jennifer Scutchfield, Office of the Secretary of State, 700 Capital Avenue, Suite 152, Frankfort, KY 40601. Undersigned counsel further certifies that it did not retrieve the appellate record from the Franklin Circuit Clerk.

s/ Michael P. Abate

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INTRODUCTION

Following a three-day trial, the Franklin Circuit Court held that the State House (HB 2) and Congressional maps (SB 3) adopted during the 2022 Kentucky legislative session were partisan gerrymanders. Nevertheless, the court concluded that it was powerless to do anything to remedy that harm.

This Court must now decide whether a majority party in the legislature is free to rig the system of elections to entrench itself in power. There is no serious dispute that is what the General Assembly did. The only question is whether, in this age of rapidly advancing technology, this Court will continue to honor "the social compact which binds us one to another," *Fischer v. State Bd. of Elections*, 879 S.W.2d 475, 475 (Ky. 1994) ("*Fischer II*"), by standing up for the rights of voters that have no other way to prevent their elected representatives from usurping the power the people gave them.

What Appellants ask is not the radical proposal that the Commonwealth hysterically contends. Nor will it exceed this Court's judicial role or tarnish its non-partisan reputation. On the contrary, in reapportionment cases this Court has always been an independent actor that applied the Constitution's language without fear or favor. That is all that Appellants ask here. This Court should hold that the legislature must follow the text of Section 33 of the Constitution when it can. And it should hold that an election rigged to systematically favor one party over its opponent is not "free and equal" but is, instead, an exercise of "[a]bsolute and arbitrary power." The Court should vacate the judgment

below and remand with instructions to send the maps back to the General Assembly to draw new, constitutional, maps.

ARGUMENT

I. This Court has the Authority and Duty to Consider the Constitutionality of the 2022 State House and Congressional Apportionment Plans.

The central theme of the Commonwealth's brief is that this Court has no role to play in evaluating the policy decisions made by the General Assembly during the redistricting process. Indeed, it goes so far as to suggest that if this Court were to strike down the maps as impermissibly gerrymandered, that would exceed the bounds of judicial power. *See* Appellee Br., pp. 45-46.

These arguments fly in the face of more than a century of Kentucky precedent. Virtually every time a reapportionment case reached this Court, the legislature has argued that redistricting is an inherently political process, and this Court must therefore defer to the General Assembly's policy choices. Each time, this Court has disagreed, reaffirming that it "must apply the Constitution, even to declare the failure of the General Assembly to discharge its constitutional duty." *Fischer v. State Bd. of Elections*, 879 S.W.2d 475, 475 (Ky. 1994) ("*Fischer II*") (citing *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989)). "[T]o do otherwise would breach the social compact which binds us one to another and would amount to an abdication of judicial responsibility." *Id.* at 475-476.

Indeed, "[a]ny doubt as to [a] Court's right and duty to review the constitutionality of legislative apportionment was long ago laid to rest in

Ragland v. Anderson, 100 S.W. 865 (Ky. 1907)." *Fischer II*, 879 S.W.2d at 476. There, the legislative defendants insisted "that the question involved here is political, and not judicial, and that the courts have not jurisdiction to review the acts of the General Assembly in the matter." *Ragland*, 100 S.W. at 866. The Court flatly rejected that argument: "To this we cannot agree. It is for the courts to measure the acts of the General Assembly by the standard of the Constitution, and if they are clearly and unequivocally in contravention of its terms, it becomes the duty of the judiciary to so declare." *Id.* at 866-867. "[N]o matter how distasteful it may be for the judiciary to review the acts of a co-ordinate branch of the government their duty under their oath of office is imperative." *Id.* at 867. That principle remains as true today as it was more than a century ago. *See, e.g.*, *Legislative Research Commission v. Fischer*, 366 S.W.3d 905, 911 (Ky. 2012) (*"Fischer IV"*) ("We do not violate the separation of powers doctrine by finding House Bill 1 unconstitutional.").

The same rule applies to review of congressional districts. In *Watts v. O'Connell*, the Secretary of State argued "that congressional redistricting is a political question and one not justiciable by the courts." 247 S.W.2d 531, 532 (Ky. 1952). The Court disagreed, noting that although "reapportionment of congressional districts in the State is a question vested in the discretion of the General Assembly," it remained the case that "where the redistricting does violence to some provision of the Constitution or an Act of Congress" courts must step in: "'When the Legislature has exceeded its legitimate powers by

enacting laws in conflict with the Constitution or that are prohibited by it, we have not hesitated to interpose the veto power lodged in the judiciary for the purpose of preserving the integrity of the organic law under which all departments of the state government were created and live, and to which all of them owe obedience.'" *Id.* (citing *Richardson v. McChesney*, 108 S.W. 322, 323 (Ky. 1908)); *see also Watts v. Carter*, 355 S.W.2d 657, 658 (Ky. 1962) (applying Section 6 of Kentucky's constitution to a congressional redistricting plan).

The Commonwealth tries to turn *Watts* and *Richardson* into cases that preclude this court's review, by arguing that they place "aesthetic" choices off-limits to judges. Appellee Br., pp. 44-45, 63-64. But that misrepresents both the law and the facts. The actual holdings of both *Watts* and *Richardson*—that the legislature had discretion to draw unconstitutionally malapportioned (*e.g.*, politically gerrymandered) congressional maps—was squarely rejected by the U.S. Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962).

Moreover, the evidence presented in this case was not merely "aesthetic"; rather, Appellants offered expert statistical and other evidence that "compelled" the trial court to conclude the maps were, in fact, gerrymandered. R. 1870 (state house map), R. 1872 (congressional map). And just this past year, in *Moore v. Harper*, the Supreme Court rejected the "independent state legislature" theory and reaffirmed, once again, that "[a] state legislature may not create congressional districts independently of requirements imposed by the state constitution with respect to the enactment

of laws." *Moore v. Harper*, 600 U.S. 1, 18 (2023) (cleaned up). As the Court explained, "when legislatures make laws, they are bound by the provisions of the very documents that give them life." *Id.* at 19.

These cases reaffirm a basic proposition of American law, clear since *Marbury v. Madison*: the legislature is not above the law. *See Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74, 82 (Ky. 2018). That is especially true in Kentucky, where "the object which, above all others, was sought to be attained by the adoption of the new [1891] constitution, was the placing of a check upon the power of the legislative branch." *Pratt v. Breckinridge*, 65 S.W. 136, 142 (1901). "It is a matter of history" that the 1891 Constitution was "a check upon the abuse of legislative power." *Id. see also*, Robert M. Ireland, *The Kentucky State Constitution*, 15 (2d ed. 2013) ("A major thrust of the convention of 1890 ... concerned the drafting of provisions that limited the legislature."). "Those that voted for [the Constitution] did so in the belief, everywhere proclaimed, that it would stop abuse of legislative power... [and act] as a shield to the citizen against legislative usurpation, encroachment, and abuse." *Id.* at 142-43. "It is not believable that the men who under such circumstances voted for the adoption of the instrument thought for a moment that they were clothing the legislature with a power so enormous and so tyrannous" as the unchecked ability to gerrymander its majority into power in perpetuity. *Id.* at 143.

II. Plaintiffs Have Standing to Bring These Challenges.

The Commonwealth devoted just a single footnote to Appellants' standing, making the half-throated assertion that "it is difficult to say that any of the challengers here actually *proved* the requisite constitutional standing to maintain this action." Appellee Br., p. 74 n.19. If a standing defense could be waived, the Commonwealth's meager argument would have done it. However, because this Court must satisfy itself that Appellants have standing, Appellants will explain why this Court should affirm the Franklin Circuit Court's well-reasoned standing decision, which correctly applied the test for standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), and longstanding Kentucky law. *See* R. 1857-1869.

"To sue in a Kentucky court the plaintiff must have the requisite constitutional standing, which is defined by three requirements: (1) injury, (2) causation, and (3) redressability." *Overstreet v. Mayberry*, 603 S.W.3d 244, 252 (Ky. 2020). The alleged injury must be "'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Id.* (quoting *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 409 (2013)). Injuries may be "threated or imminent" if the plaintiff can show the threatened injury is "certainly impending." *Id.* (citations omitted).

A. The Individual Appellants Have Standing.

Since the earliest redistricting challenges under Kentucky's 1891 Constitution, it has been clear that "[e]very citizen, taxpayer, and voter has an undoubted right to have the districts for representatives and senators created

in accordance with the Constitution." *Stiglitz v. Schardien*, 40 S.W.2d 315, 317 (Ky. 1931). That is because "[t]he discrimination" created by unconstitutional districts "is just as real and just as wrong whether it be based upon a denial of representation to one locality or be founded upon excessive representation given to another. Indeed, it necessarily operates to bring about both results, and in either case the constitutional standard of equality is destroyed." *Id.* The Court recognized that the unconstitutionality of a map is not limited to just one district because "the rights of the whole state are lined up with the representation of the several districts." *Id.* at 318. Thus, there can "no doubt of the right of the plaintiff[s] to invoke the power of the court to protect [their] constitutional rights." *Id.* at 318.

Kentucky courts have never deviated from this common-sense rule and have repeatedly allowed plaintiffs to bring challenges seeking to enjoin *entire* legislative maps containing districts that do not comply with the Kentucky Constitution. *See e.g.*, *Fischer IV*, 366 S.W.3d at 908-09 (hearing challenge to entire House redistricting map from individual legislators elected in specific districts); *Stiglitz*, 40 S.W.2d at 317-318; *Ragland*, 100 S.W. at 870 (enjoining the entirety of the first map drawn under the 1891 constitution at request of plaintiffs in Butler, Edmonson, and Ohio Counties).

Appellant Derrick Graham—the Minority Caucus Chair—has even more grounds to challenge the State House map. Courts routinely find standing for elected representatives challenging unconstitutional legislative

apportionment plans that reduce their influence in the legislative process, including just 10 years ago when Kentucky's Republican House leadership challenged the 2010 reapportionment map. *See Fischer IV,* 366 S.W.3d at 908; *see also, Nat'l Wildlife Fed'n v. Burford,* 676 F. Supp. 271 (D.D.C. 1985) ("Legislators have standing to challenge objective diminution of their influence in the legislative process.") (collecting cases). Representative Graham explained that gerrymandering "matters both in terms of democracy and Democratic principles, but it also matters in terms of running for office...[and] its about policy." (VR 4/6/22, 4:24:20 – 4:25:11); *see also* VR 4/6/22. 4:24:40–4:25:11 (with fewer representatives, Democrats cannot "work with the other side developing policy. Because if [Democrats] don't have enough members to negotiate" they cannot influence the policy-making process.).

Representative Graham and the other individual Appellants have established standing to challenge SB 3, too. All individual Appellants reside in the enacted map's First Congressional District—a bizarre amoeba shaped district that stretches over 370 miles from Franklin to Fulton Counties. The First District (and its "Comer Hook") was drawn this way solely to achieve the naked partisan aims of the Republican Party of Kentucky. The district is less compact, and more Republican-leaning than 99% of 10,000 simulated districts containing Franklin County. (PEX 2, pp. 17-18; VR 4/5/22, 12:10:05 – 12:12:00). SB 3 will have a material impact on Franklin County voters and dilute the power of their vote by placing them in a heavily Republican District with far-

flung rural counties with which they have little in common. (VR 4/6/22, 4:29:33 – 4:33:00); (VR 4/6/22, 4:45:25 – 4:50:42).

The Kentucky Supreme Court's 2022 opinion in *Ward v. Westerfield*, 653 S.W.3d 48 (Ky. 2022), *reh'g denied* (Sept. 22, 2022), did not change the well-established principles of standing that apply in redistricting cases. That case involved a challenge by Kentucky citizens to Marsy's Law, a constitutional amendment providing certain rights to crime victims. The Court held that the citizen challengers did not have standing, either as voters or taxpayers, because they had only "generalized grievances" and asserted harms that are shared equally by all citizens of the Commonwealth. *Id.* at 52-58. The Court explicitly distinguished the challengers' standing with the standing that could be asserted in a redistricting case, by noting that the complaint was "devoid of any mention of Appellants being harmed *as voters*." *Id.* at 53 (emphasis added). And, driving home the distance between *Ward* and this case, the Court distinguished the standing allegations in *Ward* from those in *Stiglitz*. *Id.* at 56-57 (emphasizing that *Stiglitz*'s holding that individuals have standing to challenge legislative reapportionment plans was based on their status as "citizens and voters" and not the individuals' status as taxpayers). As in *Stiglitz*, Appellants are not asserting taxpayer standing. Instead, they are challenging the legislature's enactment of electoral maps based on their status as voters. *See Stiglitz*, 40 S.W.2d at 317. Thus, they have standing.

B. KDP has Individual and Associational Standing.

"There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Federal and state courts routinely find that state political parties and similar organizations have the requisite constitutional standing to bring voting-rights challenges on their own behalf. *See e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (affirming political party has standing to challenge voter ID law); *Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring) (explaining how standing analysis applies to political parties and similar organizations in a partisan gerrymandering case); *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1076 (S.D. Ohio 2019), *vacated and remanded on other grounds by Chabot v. Ohio A. Philip Randolph Inst.*, 140 S. Ct. 102 (2019); *League of Women Voters of Mich. v. Johnson*, 352 F. Supp. 3d 777, 801 (E.D. Mich. 2018), *vacated in part on other grounds by League of Women Voters of Michigan v. Johnson*, 2018 WL 10096237 (6th Cir. Dec. 20, 2018); *Common Cause v. Lewis*, 2019 WL 4569584, at *112 (N.C. Super. Sept. 3, 2019) (The North Carolina Democratic Party "has such a personal stake in the outcome of the controversy that it has standing").

Here, the passage of HB 2 and SB 3 has caused legally cognizable injury to KDP that can only be remedied by a Court. As the trial court explained, the evidence showed that "HB 2 and SB 3 have caused [KDP] injury by intentionally diluting the power of Democratic votes to impact Democratic

recruitment, fundraising, policy, negotiations, and the Kentucky Democratic Party's overall purpose and existence." R. 1867. That finding was based, among other things, on testimony showing that HB 2 and SB 3 create more Republican-leaning seats, while making them safer, and fewer Democratic-leaning seats, while making them less safe (VR 4/5/22, 11:21:20–11:29:01), as well as testimony showing that even in the minority, each additional lost seat reduces the Democratic Caucus' ability to negotiate legislation. (VR 4/6/22, 4:24:20 – 4:25:35).

This harm was not speculative. Indeed, already several candidates recruited by KDP to run for the State House in 2022 were intentionally drawn out of their previous competitive districts and into districts that strongly favor Republicans. (VR 4/5/22, 4:01:10 – 4:01:25; VR 4/6/22, 4:26:30 – 4:28:24). The result is that 41 seats went uncontested in the 2022 election. (VR 4/6/22, 4:26:40 – 4:27:22). The elimination of almost all competitive races across the Commonwealth will certainly mean fewer elected Democrats, which in turn will reduce KDP's ability to promote its policy agenda, recruit volunteers, and raise funds to support its activities. (VR 4/5/22, 4:07:18 – 4:08:45). These deficits will only compound over the 10-year lifespan of HB 2, hindering the ability of KDP and its members to compete even in the statewide races the Republican supermajority cannot gerrymander, thereby threatening to cut Democrats out of the redistricting process entirely in 2030.

KDP also possesses associational standing. An association has standing to bring suit on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit." *Bailey v. Pres. Rural Roads of Madison Cnty., Inc.*, 394 S.W.3d 350, 356 (Ky. 2011); *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977)). Each of these factors is easily met here.

To establish associational standing, KDP need only show that "at least one member of the association" has "standing to sue in his or her own right." *Interactive Gaming Council v. Commonwealth ex rel. Brown,* 425 S.W.3d 107, 114 (Ky. App. 2014). Here, KDP's members—registered Democratic voters, who reside in every State House and Congressional District—have standing. As noted above, "[e]very citizen, taxpayer, and voter has an undoubted right to have the districts for representatives and senators created in accordance with the Constitution." *Stiglitz,* 40 S.W.2d at 317. This confers standing on every member of the KDP to challenge the unconstitutional maps created by HB 2 and SB 3.

For this same reason, courts routinely find that political parties and similar organizations have associational standing to bring partisan gerrymandering claims on behalf of their members. *See e.g., Smith v. Boyle,* 959 F. Supp. 982 (C.D. Ill. 1997) (finding associational standing because "the

Illinois Republican Party's members in Cook County would have standing to sue...[its] purpose is to elect their candidates to office; therefore, the interest which it seeks to protect is germane to the organization's purpose), *affirmed,* 144 F.3d 1060 (7th Cir. 1998); *Common Cause v. Lewis,* 2019 WL 4569584, at *294; *League of Women Voters of Mich.*, 373 F. Supp. 3d at 933, 937-38; *Ohio A. Philip Randolph Inst.*, 373 F. Supp. 3d at 1072-73; *Common Cause v. Rucho,* 318 F. Supp. 3d 777 (M.D.N.C. 2018) (holding that the North Carolina Democratic Party had standing to bring a partisan gerrymandering claim on behalf of its members), *vacated on other grounds,* 139 S. Ct. 2484 (2019).

Because all KDP members are harmed by the Republican gerrymander, KDP is not required to identify by name the specific members that have standing to sue in their individual capacities to establish associational standing. *See City of Ashland v. Ashland F.O.P. No. 3, Inc.*, 888 S.W.2d 667 (Ky. 1994) (finding that because all members of the police force could claim injury, the Fraternal Order of Police possessed associational standing without identifying individual members). Here, the trial court correctly concluded that Appellants presented ample evidence that HB 2's extreme partisan gerrymander has injured every Democratic voter across the Commonwealth. R. 1868-1869.

Finally, KDP's presence in this lawsuit renders irrelevant the federal requirement that "a plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must establish standing by showing he lives in an

allegedly 'cracked' or 'packed' district." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2492 (2019) (citing *Gill*, 138 S.Ct. at 1931). KDP has members in every corner of the state, including every district that has been gerrymandered.

III. The State House Plan Violates Section 33 of the Constitution.

Section 33 of the Constitution imposes six specific rules on the General Assembly when drawing state house districts every 10 years. The legislature must create 100 districts (1) "as nearly equal in population as may be"; (2) "without dividing any county"; (3) "not more than two counties shall be joined"; (4) any advantage must be given "to districts having the largest territory"; (5) "no part of a county shall be added to another county to make a district"; and (6) "the counties forming a district shall be contiguous." Ky. Const. § 33.

The Commonwealth does not dispute that HB 2 violates the plain text of Section 33 dozens more times than was required to achieve population equivalence. Nor could it, because HB 191, the Democratic proposal introduced during the 2022 General Assemble session, proves that a map with fewer constitutional violations could be drawn. Dr. Imai's analysis proved it, too; it showed that 10,000 maps with a population variance of +/- 5% could be drawn while (1) splitting the fewest number of counties (23); (2) creating fewer counties with three or more districts in them (*e.g.*, multi-split counties) and (3) creating fewer districts that combined more than two counties (multi-county districts). *See* PEX 2, pp. 3, 9 (Fig. 1), 10 (Fig. 2). HB 2 also gratuitously

crossed county lines to take a portion of one county and combine it with another. (VR 4/5/22, 3:41:00; PEX 4).

Given these undisputed facts, it is curious—to say the least—that the Commonwealth accuses *Appellants* of offering an "atextual reading" of Section 33. *See* Appellee Br., p. 8. Equally curious is the Commonwealth's inaccurate contention that it is "undisputed" HB 2 complies with this Court's prior Section 33 precedent. *Id.* at 2. These mischaracterizations of Appellants' argument seem to flow from the Commonwealth's most fundamental error: the argument that this Court has "elegantly simplified" Section 33 to mean just two things: so long as an apportionment plan splits the fewest number of total counties, and stays within 5% of the ideal population in all districts, the legislature is free to carve up Kentucky's counties however it likes. Appellee Br., p. 19. In other words, the Commonwealth argues that this Court has excised four of the six requirements of Section 33.

That is of course not true. No court has the power to delete provisions from the Constitution, as this Court has recognized in its Section 33 jurisprudence. In *Fischer IV*, for example, this Court reiterated its duty to follow the text of the Constitution "to the greatest extent possible" while still achieving population equality, and declared it was "not free to disregard the drafters' intent to preserve county integrity by striking the provision from Section 33." 366 S.W.3d at 913. Likewise, in *Ragland*, the Court held that Section 33's prohibition on creating districts from more than two counties can

only give way if "it be *necessary* in order to effectuate that equality of representation which the spirit of the whole section so imperatively demands." *Ragland*, 100 S.W.2d at 870 (emphasis added).[1]

These cases make clear that the "dual mandate" the Commonwealth rests upon is merely shorthand for how this Court has balanced *two* of the six competing commands of Section 33: population equivalence and total counties split. This Court has never said that so long as those two requirements are met, the other four become irrelevant. On the contrary, its most recent redistricting decision made clear that it is ***not*** "impossible to prove a reapportionment plan is unconstitutional if it complies with the 5 percent rule." *Fischer IV*, 366 S.W.3d at 915.

Jensen v. Kentucky State Bd. of Elections, 959 S.W.2d 771 (Ky. 1997), does not win the case for the Commonwealth. In *Jensen*, the "Appellant premise[d] his constitutional challenge on the fact that the 1996 Act does not create a whole House district within the boundaries of either Pulaski County or Laurel County, even though both counties have populations large enough to accommodate a whole district." *Id.* at 773. The plaintiff there asked the Supreme Court to "reconsider *Fischer II* and interpret Section 33 to require the

[1] The Commonwealth is wrong to argue that *Combs v. Matthews*, 364 S.W.2d 647 (Ky. 1963), somehow overrules *Ragland*. *Combs* was not about an enacted plan; it was a dispute about whether the legislature could even meet to draw a new plan after failing to do so for more than two decades. Moreover, *Fischer IV*—which came 50 years after *Combs*—reaffirmed that the legislature must follow the text of § 33 "to the greatest extent possible." 366 S.W.3d at 913.

division of a minimum number of counties *only after each county large enough to contain a whole district is awarded the maximum number of whole districts which can be accommodated by its population.*" *Id.* (emphasis added). This Court rejected the argument that each county large enough to have a district must get one because "that requirement was not included in the language of Section 33." *Id.* at 775.

Against that backdrop, it is easy to see why *Jensen* does not resolve the question presented here—whatever the similarities between the maps in question.[2] This Court will search the *Jensen* decision in vain for any sentence stating that *Fischer II* (or any other case) somehow exempted the General Assembly from its obligations to follow the express mandates of the Constitution as much as possible. But even if *Jensen* did stand for that proposition (as the Circuit Court believed), it must be abrogated because no court is free to countenance gratuitous violations of the Constitution's language.

In its attempt to stretch the holding of *Jensen* to fit its purposes, the Commonwealth ignores more recent guidance from this Court about what the legislature *must* do if it wishes to violate the commands of Section 33: it "has

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[2] That the plaintiff (and his attorneys) in *Jensen* may have advanced *some* arguments similar to Plaintiffs' here (Appellee Br., pp. 23-24) is a red herring. What matters is what this Court *held*, and it declined to take those arguments head-on. Moreover, the Commonwealth is incorrect to suggest that Appellants argue for the "every-county-big-enough-to-have-a-district-gets-one" theory, like the plaintiff in *Jensen*. (*Id.* at 25). Appellants never made that argument, which—as this Court held—has no basis in the text of Section 33.

the burden of proving that the plan consistently advances a rational state policy." *Fischer IV*, 366 S.W.3d at 915. That means the legislature must show that its map-drawing philosophy "advances a rational state policy" that is "both consistently applied throughout the redistricting plan and *has a neutral effect*." *Id.* (emphasis added). Here, the Commonwealth did not even *attempt* that showing. Instead, it simply cited *Jensen* and claimed it did not have to.[3]

The unpublished decision in *Wantland v. Kentucky State Board of Elections*, No. 2004-CA-000508-MR, 2005 WL 1125070 (Ky. App. May 13, 2005), also does not control this case. The appellants there appeared to contend that the mere fact that their county was subjected to multiple divisions violated Section 33. *See id.* at *1. There is no suggestion in the Court's unpublished decision that appellants could show—as Plaintiffs have here—that the apportionment plan unnecessarily violates multiple textual prohibitions in Section 33, and does so across the entire state.

Simply put, the General Assembly must follow the plain language of Section 33 where it can. It is undisputed that HB 2 violates the plain text of Section 33 dozens more times than necessary, without any "rational state policy" justifying those departures. The trial court's ruling upholding the plan nonetheless must be reversed.

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[3] The closest the Commonwealth comes to defending its mapmaking philosophy is to point out that HB 2 splits fewer precincts than HB 191. That may be true, but it's irrelevant. Precincts are not mentioned in Section 33 because the 1891 Constitution's framers chose to make counties the "dominant political subdivision in Kentucky." *Fischer II*, 879 S.W.2d at 478.

IV. The Maps Are Unconstitutional Partisan Gerrymanders.

A. Section 2's Prohibition on Absolute and Arbitrary Power Forbids Partisan Gerrymandering.

In this Commonwealth, "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, *not even in the largest majority*." Ky. Const. § 2 (emphasis added). HB 2 and SB 3 violate the plain text of this provision because the legislature used its majority to assert absolute and arbitrary power over the citizens of Kentucky by rigging elections in favor of the Republican party.

When the shoe was on the other foot, the New Mexico Supreme Court recently held that partisan gerrymandering by the legislature's Democratic majority was incompatible with that state's guarantee that all power must be derived from the citizens: "[W]e fail to see how all political power would be 'vested in and derived from the people,'" the court explained, "if the will of an entrenched political party were to supersede the will of New Mexicans." *Grisham v. Van Soelen*, 2023 WL 6209573, at *9 (N.M. Sept. 22, 2023).

The same is true here. The circuit court found that "HB 2's partisan skew is not due to Kentucky's political geography, but due to the cracking and packing of Democratic electors in districts to allow Republicans to maximize partisan gains statewide." R. 1871. Likewise, it found that the Congressional map created by SB 3 is "purely irrational and creates an uncompact and noncontiguous district (the First District)." R. 1872. And, contrary to the Commonwealth's argument, Appellants' complaints about SB 3 are not "based

purely on aesthetics." Appellee Br., p. 72. Rather, SB 3 has consequences that have nothing to do with the strange shape of the First District: It separates Franklin County from neighboring counties in the Bluegrass Region of Kentucky, placing it in a district with the far western parts of the state, with which Franklin County has little in common. It also means that Western Kentucky is represented by an individual who lives in Frankfort, far removed—in distance, time, and culture—from their region of the state.

That kind of partisan gerrymandering is "unjust....and incompatible with democratic principles." *Rucho v. Common Cause,* 139 S. Ct. 2484, 2507 (2019) (citing *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n,* 576 U.S. 787, 792 (2015)). Because it is "contrary to democratic ideals," it, in turn, violates Section 2. *Kentucky Milk Marketing v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985).

The Commonwealth's short response to Appellants' Section 2 claim relies on *Richardson v. McChesney,* 108 S.W. 322 (1908), and *Watts v. Carter,* 355 S.W.2d 657 (Ky. 1962). The Commonwealth argues that these cases place the General Assembly's decisions about Congressional redistricting beyond the power of a court to review. Putting aside that is no answer to Appellants' challenge to HB 2, the reasoning of *Richardson* and *Watts*—two cases that allowed partisan gerrymandering in the form of malapportionment—was squarely overruled by *Baker v. Carr,* 369 U.S. 186 (1962), which held that Congressional redistricting plans *are* subject to judicial review. Those cases

also are inconsistent with subsequent Supreme Court caselaw requiring that one person's voting power must be roughly equivalent to another person's voting power within the same state. *See Reynolds v. Sims*, 377 U.S. 533 (1964).

HB 2 and SB 3 are arbitrary exercises of power with no rational connection to what should be the purpose of redistricting: ensuring the citizens of Kentucky are fairly represented in the State House and Congress. This is an extreme case where the Court must intervene to protect the citizens of Kentucky from the arbitrary decision of policymakers who acted based on improper motives, sacrificing the residents of more than a dozen counties in service of the map drawers' partisan aims.

B. Section 6 Prohibits Partisan Gerrymandering, Too.

Section 6 states "[a]ll elections shall be free and equal." Ky. Const. § 6. This broad mandate fulfills "the very purpose of elections"–that is, "to obtain a full, fair, and free expression of the popular will upon the matter, whatever it may be, submitted to the people for their approval or rejection." *Wallbrecht v. Ingram*, 175 S.W. 1022, 1026 (Ky. 1915). And it addresses "conditions, *from whatever cause they arose*, that prevent the free and equal expression of the will of the people." *Id.* at 1027 (emphasis added).

Elections that are rigged in favor of one party are not "free" or "equal." Rather, partisan gerrymanders like HB 2 and SB 3 "dilute[] the votes of those who in prior elections voted for the party not in power to give the party in power a lasting electoral advantage." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 814 (2018) ("*LWV*"). And "[i]t is axiomatic that

a diluted vote is not an equal vote." *Id.* For Kentucky's government "to operate as intended, each and every [Kentucky] voter must have the same free and equal opportunity to select his or her representatives." *Id.* The "free and equal elections" clause is our Constitution's "bulwark against the adverse consequences of partisan gerrymandering." *Id.*

1. Section 33 is a Floor, not a Ceiling, of Constitutional Protection.

The Commonwealth mistakenly argues that because Section 33 expressly addresses redistricting, that is the only constitutional provision that is relevant. *See* Appellee Br., p. 43. That is not how constitutional interpretation works, however. "If one constitutional provision addresses a subject in general terms, and another addresses the same subject with more detail, the two provisions should be harmonized if possible, but *if there is any conflict*, the special provision will prevail." 16 C.J.S. Constitutional Law § 101 (emphasis added)); *see also Holbrook v. Knopf*, 847 S.W.2d 52, 55 (Ky. 1992) ("*[I]f there is any 'conflict'* between a provision dealing with a subject in general terms and another dealing with a part of the same subject in a more detailed way, if the two cannot be harmonized, 'the latter will prevail.'" (emphasis added; quoting Sutherland, Statutory Construction, Volume 2B, Sec. 51.05)). Here, there is no conflict between Sections 6 and 33: The former provides a general guarantee of free and equal elections, while the latter provides specific safeguards for ensuring that districts are drawn to respect the framers' concern for county integrity.

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The Pennsylvania Supreme Court held just that in *League of Women Voters*. There, it held that its constitution's specific redistricting rules "provide a 'floor' of protection for an individual against the dilution of his or her vote in the creation of such districts." *LWV*, 178 A.3d at 817. "When, however, it is demonstrated that, in the creation of congressional districts, these neutral criteria have been subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage, a congressional redistricting plan violates" Pennsylvania's "free and equal" elections clause, too. *Id.*; *see also Carter v. Chapman*, 270 A.3d 444, 457, *cert. denied sub nom. Costello v. Carter*, 143 S. Ct. 102 (2022) ("We explained that these traditional core criteria provide a 'floor' of protection against the dilution of one's vote and that the subordination of these criteria to extraneous considerations, such as partisan gerrymandering, is unconstitutional.").

Just as in Pennsylvania's constitution, Sections 6 and 33 work together to limit the General Assembly during the reapportionment process. Section 33 is the Constitutional floor; it creates specific rules that prohibit the General Assembly from unnecessarily crossing county lines and unevenly dividing the population when creating State House districts. These specific rules were created to prevent "miserable" gerrymandering from taking hold in Kentucky. Ky. Const. Debates, Vol 4, p. 4620. Without these specific geographic restrictions, the 1891 Convention feared gerrymandering—"a byword and a stench in the nostrils of every free man in this country"—would debase

Kentucky's elections with the partisan schemes of an unaccountable legislature. Ky. Const. Debates, Vol 4. P. 4620.

Section 6 serves a broader purpose. Its general guarantees of freedom and equality in *all* elections assures Kentucky's elections will be marked by "equality, just and honorable dealing," "uniformity," and "fairness." Ky. Const. Debates, Vol. 1, pp. 438, 947. The General Assembly must comply with the Constitution's specific *and* general rules when apportioning the state into legislative districts.

2. Section 6 Guarantees All Kentucky Elections Remain Free and Equal "in every sense."

In arguing for a narrow construction of Section 6, the Commonwealth repeats the misleading version of Kentucky constitutional history that was adopted by the circuit court. It insists that the 1891 Constitution's broad guarantee of "free and equal" elections was only intended as "a prohibition against election-day interferences with the vote-placement and vote-counting processes." Appellee Br., p. 55. But that is not what the constitutional debates reveal.

Rather, the 1891 Constitutional Convention clearly expressed its intent to match the "broad and wide sweep" of Pennsylvania's identical Free and Equal Elections Clause. *LWV*, 178 A.3d at 809. The delegates speaking in favor of the Free and Equal Elections Clause emphasized the merit of its broad, general language that can be applied to all manner of unequal elections.

First, the delegates resisted attempts to strike the word "equal" from the clause altogether. *See* Ky. Const. Debates, Vol 1, p. 438 (Mr. Rodes: "I think I heard one intelligent gentleman from Louisville say 'equal' ought to be struck out...the word "equal," which implies equality, just and honorable dealing should stand; and let no man strike it out. That is my voice, and I believe the voice of this convention.").

Then, the delegates debated whether to stick with a broad "free and equal" clause like the one eventually adopted, or to replace it, with a narrower clause that would have prohibited only the kind of election-day interferences that the Commonwealth argues are at the heart of Section 6. But that argument lost the day at the convention.

Remarkably, the Commonwealth relies on a statement from Delegate Burnham to argue that "free and equal" elections are simply those that are "uniform." Appellee Br., pp. 53-54. But their selective quotation omits the most important parts of his statement, reprinted in **bold** below:

> Mr. Burham: **The word "equal," in its application here, is a good deal broader than the gentleman proposes.** Now, there is involved in the word, according to my idea, the idea also of uniformity... I think that these words, "that all elections shall be free from intimidation from the power of military force," would be covered by that single word; **and every other difficulty growing out of what I have said about the lack of uniformity will be all embraced by the word "equal," so far from desiring a large number of words in the Bill of Rights the fewer and the simpler, the better.**

Ky. Const. Debates, Vol 1, p. 946 (emphasis added). Delegate Rodes joined Burnham's call for broad constitutional protections ensuring not just

"uniformity," but also "fairness" and "freedom" for Kentucky's elections. He sparred with Delegate McDermott, who preferred a narrower Section 6 that prevented only physical interference with voting:

> Mr. Rodes: I did not say [equal] was uniform. ***It embraces more than that.***
>
> Mr. McDermott: You do think it means uniformity?
>
> Mr. Rodes: Yes, ***and I think it means more than that.***
>
> Mr. McDermott: The Supreme Court of this State has decided it did not mean uniformity.
>
> Mr. Rodes: I say it does mean uniform—it means that, ***and it means more than that.***
>
> ...
>
> Mr. Rodes: As to my differing from [Mr. Burnham], I don't understand that I do...[Mr. Burnham] said the word **'equal' was a broad word, and meant a great deal; meant fairness, freedom from everything else that would secure-**

Id. at 947 (emphasis added). Rodes was interrupted by Delegate McDermott. But immediately after Delegates Burnham and Rodes' speeches in favor of "broad" protections for free and equal elections the Convention rejected Delegate McDermott's amendment proposing to narrow Section 6 to the physical-interference-only definition the Commonwealth asks this Court to adopt. *Id.*

The Convention's decision to reject a narrow elections clause is "authoritative" of its intent. *Commonwealth v. Kentucky Jockey Club*, 38 S.W.2d 987, 993 (Ky. 1931). The Commonwealth twists this history, equating Delegates Rodes' and Burnham's support for a broad constitutional guarantee

with Delegate McDermott's failed physical-interference-only amendment they stridently—and successfully—opposed. Appellee Br. pp. 53-55.

The history of free elections clauses confirms the Convention understood it was creating broad constitutional protections against all manner of election malfeasance. As explained by Amici Professor Joshua Douglas and the Campaign Legal Center, Kentucky's Free and Equal Elections Clause traces its lineage to Pennsylvania's Constitution and, ultimately, the English Bill of Rights. Douglas Br., p. 6. The first free elections clause was a response to the Crown's manipulation of parliamentary district boundaries and the creation of "rotten boroughs" designed to maximize Loyalist representation in Parliament and frustrate the Crown's political opposition—the Whigs'—ability to translate votes into representation in Parliament. Douglas Br., p. 6-7; CLC Br., p. 7. King James' abuse of parliamentary apportionment contributed to the Glorious Revolution and, ultimately, the English Bill of Rights' decree that all elections "ought to be free." Douglas Br. at 7; CLC Br. at 7.

The 1891 Convention understood this history. Even Delegate Knott—upon whom the Commonwealth relies—recounted this history to the delegates and connected the Crown's manipulation of election districts to the concept of "free and equal" elections. *See* Ky. Const. Debates, Vol. 1 at 729 ("These wholesale abuses gave rise to a number of statutes providing that elections should be...equal—that it should not be left to the power of the Sheriff to

determine what boroughs were entitled to representation, but there should be an equality among them in that respect.").

The Convention was also guided by the development of free elections clauses in the Revolutionary Era. The first eleven states to adopt constitutions—including Kentucky's constitutional models, Pennsylvania and Virgina—all included a free elections clause. Douglas Br., p. 9 (*citing* Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause,* 73 Ala. L. Rev. 221, 258-59, 267-77 (2021). Kentucky's decision to follow Pennsylvania is especially significant because Pennsylvania enacted its Free and Equal Elections Clause specifically to respond to its legislature's malapportionment schemes that diluted the votes of citizens based on "the region of the state in which they lived, and the religious and political beliefs to which they adhered." *LWV* at 108. Moreover, the delegates debated *Patterson v. Barlow*, 60 Pa 54, 75 (Pa. 1869), which thirty years prior declared that Pennsylvania's Free and Equal Elections Clause requires the legislature "to arrange all the qualified electors into suitable districts, and make their votes *equally potent in the election*; so that some shall not have more votes than others, and that all shall have an equal share in filling the offices of the Commonwealth." (emphasis added) *See* Ky. Const. Debates Vol. 1 at 670. They also discussed *People v. Hoffman*, 116 Ill. 587, 599 (1886), which held that "[e]lections are equal when the vote of every elector is equal in its influence upon the result to the vote of every other elector; when

each ballot *is as effective as every other ballot.*" (emphasis added). *Id.* at 670-671.

These debates prove that the delegates understood that a broad "free and equal" elections clause prohibited far more than just the narrow anti-interference provision the Commonwealth wishes they had adopted. Under the history and cases known to the delegates at the time, Section 6 is easily broad enough to encompass partisan gerrymandering claims.

3. The Commonwealth Also Misstates Kentucky's Section 6 Caselaw.

Kentucky courts have applied Section 6 to void all manner of unequal election schemes beyond the physical interference with voting. Around the time of the Convention, this Court's predecessor applied Section 6 to strike voting laws that failed to accommodate illiterate voters, *Rogers v. Jacob*, 11 S.W. 513 (Ky. 1889), and created onerous voter-registration requirements, *City of Owensboro v. Hickman*, 14 S.W. 688 (Ky. 1890). Throughout the 20th Century, Kentucky Courts used Section 6 to nullify modern methods of voter suppression that would have been unfamiliar to the framers. *See Queenan v. Russell*, 339 S.W.2d 475 (Ky. 1960) (restrictive absentee voting law); *Smith v. Kelly*, 58 S.W.2d 621 (Ky. 1933) (insufficient number of polling locations); *Early v. Rains*, 89 S.W. 289 (Ky. 1905) (inadequate access to voter-registration). More recently, this Court used Section 6 to strike down a vague and overly broad bribery statute, in part, because "citizens undertake support of candidates and parties and devote their time and money to the causes they support."

Commonwealth v. Foley, 798 S.W.2d 947, 953 (Ky. 1990), *overruled on other grounds by Martin v. Commonwealth,* 96 S.W.3d 38 (Ky. 2003). Statutes that "threaten to undermine the willingness of such persons to get involved" in the electoral process leads directly to "the disenfranchisement of many citizens and an infringement of their rights under Section 6 of the Constitution of Kentucky." *Id.*

As early as 1916, this Court's predecessor applied Section 6 to void an election conducted without physical interference with the casting of ballots. *Burns v. Lackey*, 186 S.W. 909 (Ky. 1916). At issue was a local political group called the "United Protective Association"—comprised of most of Paducah's Black citizens—that pledged to vote together as a block. *Id.* at 910. The Court found this kind of coordination—similar in kind to modern political parties' pledge to support its preferred candidates—violated Section 6 even though "[t]here [was] no claim that physical violence was practiced at the election, or that any voter who was not in the ordinary sense a legal voter cast a ballot." *Id.* at 914. It was enough that a "secret and political" group "organized for the purpose of controlling elections" through "domination", "control", and "manipulation" of voters. *Id.* at 910. *Burns* affirms that Section 6 mandates Kentucky elections remain free of all malign, unequal influence. *See id.* at 915 ("The evils of an occasional success of a minority, if that should sometimes happen in the effort to sustain the fundamental principle of our government, would be but temporary; and in any case would be but slight, in comparison

with the subversion of free government, which would surely follow the continued practice of rendering the freedom of elections a mockery.").

The Commonwealth asks this Court to abandon this history and declare for all time that the General Assembly has an unfettered right to apportion the state solely to maximize partisan advantage. Its best cases for this radical departure from precedent were decided before the United States Supreme Court established one-person, one-vote standards in *Baker v. Carr*. *See* Appellee Br., p. 6. Since *Baker,* this Court has rejected 3 of the last 4 maps it has considered. The lone exception was *Jensen*, but even that case affirmed that "[u]nconstitutional discrimination in reapportionment occurs only when the *electoral system* is arranged in a manner that will *consistently degrade a voter's or group of voter's influence on the political process as a whole*." 959 S.W. 2d at 776 (emphasis added). As the circuit court found, "[t]hat is exactly what Plaintiffs allege that HB 2 and SB 3 do." R. 1882.[4]

This Court should not (and cannot) abandon the field now that legislative majorities can deploy "sophisticated, ever-evolving technology which makes it more feasible than ever to gather specific data about voters and to utilize that data to tailor durably biased maps" even while nominally

[4] The circuit court noted that the case *Jensen* cited for this proposition, *Davis v. Bandemer*, 478 U.S. 109 (1986), was part of a line of federal gerrymandering cases that culminated in *Rucho*. But that does not render this statement irrelevant. *Rucho* made clear that state courts are free to police gerrymandering under their constitutions, and *Jensen* cited *Davis* to make a general statement about when partisan discrimination becomes unconstitutional under Kentucky law—there was no federal claim in that case.

complying with equal population principles. *LWV* at 797; *see also* R. 1881 ("The new technology is a double-edged sword for mapmakers. Changes in technology have given a political party the ability to essentially guarantee itself a supermajority for the lifespan of an apportionment plan. However, these algorithms likewise make it simple to reliably evaluate apportionment plans for partisan bias."). It is this Court's duty to ensure the democratic principle "that the consent of the governed ought to be obtained through representatives chosen at equal, free, and fair elections" survives the era of algorithms. *Stiglitz*, 40 S.W.2d at 321.

4. North Carolina Precedent is Not Persuasive.

The Commonwealth argues this Court should ignore persuasive precedent from the Pennsylvania Supreme Court applying its Constitution's identical Free and Equal Elections clause in favor of North Carolina's recent abrupt reversal of its prior holding voiding gerrymandered legislative maps. Appellee Br., p. 35 (citing *Harper v. Hall*, 886 S.E.2d 393 (N.C. 2023)). This Court should reject the invitation to forever subject Kentuckians to the unchecked caprice of emboldened and entrenched partisan majorities.

Kentucky, like Pennsylvania, included broad guarantees of "free and equal elections" in its Constitution. North Carolina, by contrast, ensures only that "[a]ll elections shall be free." NC Const. § 10. Kentucky's decision to constitutionally mandate equality in all elections means Section 6 extends beyond North Carolina's less ambitious free elections clause. The Convention

intended Kentucky's elections to be "equal in every sense." Ky. Const Debates, Vol. 1, pp. 768-769. And, as explained above, they resisted efforts to strike the word "equal" from the clause. *Id.* at 438

Moreover, North Carolina's Supreme Court is itself unusually partisan. Unlike Kentucky, judges in North Carolina are elected by partisan elections. Earlier this year, shortly after the North Carolina Supreme Court's partisan majority flipped, the new majority took the unprecedented step of "rehearing" *Harper*, even though its decision was just a few months old. The new Republican majority dutifully rubber-stamped legislative maps enacted by a hyper-gerrymandered Republican supermajority. And it did so on the dubious grounds that North Carolina's Free Elections Clause merely mimics the Federal Elections Clause. U.S. Const. Art. I, § 4. Here, the Franklin Circuit Court correctly noted that § 6 "has no analogue in the federal Constitution, which signals it was crafted to ensure greater protection for Kentuckians." R. 1883.

C. Partisan Gerrymandering Claims Have Judicially Manageable Standards

The Commonwealth quotes liberally from the Supreme Court's decision in *Rucho* while attempting to gloss over the holding most relevant here: that state courts are free to address partisan gerrymandering claims under state law. 139 S. Ct. at 2507. The Commonwealth asserts that what the Court really meant by that was that partisan gerrymandering claims can only be decided where state law includes explicit provisions prohibiting partisan

gerrymandering. However, the examples given by the Court in *Rucho* were precisely that: just examples, not an exclusive list of state laws that supply a standard for partisan gerrymandering claims. *See id.* at 2507-2508.

Prior to *Rucho*, the Pennsylvania Supreme Court overturned a partisan gerrymander as a violation of Pennsylvania's "free and equal" election clause. *See LWV*, 178 A.3d at 825. Since *Rucho*, Supreme Courts in New Mexico and Alaska have rejected arguments based on *Rucho* that partisan gerrymandering claims are non-justiciable and have applied general provisions in state constitutions to decide such claims. *See Grisham v. Van Soelen*, 2023 WL 6209573 (N.M. Sept. 22, 2023) (holding that claims of partisan gerrymandering are justiciable under New Mexico's "free and open" election clause and equal protection clause); *Matter of 2021 Redistricting Cases*, 528 P.3d 40, 92 (Alaska 2023) (holding that redistricting plan constituted partisan gerrymander in violation of Alaska's equal protection clause). And Pennsylvania has reaffirmed its pre-*Rucho* constitutional holding. *See Carter v. Chapman*, 270 A.3d 444, 456-458, 470 (Pa. 2022) (analyzing alleged gerrymander under Pennsylvania's "free and equal" elections clause post-*Rucho*).

The evidence in this case is so one-sided in favor of Appellants that the Court need not announce a standard applicable to all future partisan gerrymandering claims to grant Appellants' relief. Indeed, this Court *must* accept the circuit court's fact-finding of gerrymandering absent a finding of clear error. Here, where the state disclaimed any obligation to prove the maps

were fair, there is no competing evidence from which this Court could find clear error (as explained in more detail below).

But if the Court wishes to adopt a standard that will apply in future cases, there are plenty of cases that articulate one. In her dissenting opinion in *Rucho,* Justice Kagan summarized the test applied by multiple courts that have found such claims to be justiciable:

> First, the plaintiffs challenging a districting plan must prove that state officials' ***predominant purpose*** in drawing a district's lines was to entrench their party in power by diluting the votes of citizens favoring its rival. Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by ***substantially diluting*** their votes. And third, if the plaintiffs make those showings, the State must come up with a ***legitimate, non-partisan justification*** to save its map.

139 S. Ct. at 2516 (Kagan, J., dissenting) (emphasis added and citations omitted). Far from being judicially unmanageable, this test is the "sort of thing courts work with every day." *Id.* This test does not require—indeed it does not permit—courts to rely on "their own ideas of electoral fairness." *Id.* at 2509. It provides a remedy only for "egregious" gerrymanders, in recognition that respect for the legislative process requires restraint in the exercise of judicial authority. *Id.* at 2515-2516.

Kentucky's Supreme Court would not be alone in adopting this test post-*Rucho*. New Mexico's Supreme Court recently adopted the test at the behest of a group of plaintiffs—including the state's Republican party—claiming that the state's congressional map diluted Republican votes by packing and cracking them. That court adopted this same three-part framework for

evaluating when permissible partisanship crosses the line into unconstitutional gerrymandering. *See Grisham*, 2023 WL 6209573, at *13-14. Other courts are likely to follow.

This burden-shifting approach is entirely consistent with this Court's holding in *Fischer IV*. As noted above, that case held that it is not impossible to prove that a reapportionment plan is unconstitutional even if it complies with the 5% rule. 366 S.W.3d at 915. Rather, in such cases, "the burden is on the plan's challenger to show it is arbitrary or discriminatory." *Id.* Conversely, where a plan exceeds a +/-5% population variance, "the legislature has the burden of proving that the plan consistently advances a rational state policy." *Id.* To carry that burden, the legislature would be required to prove that its deviations from the rule are "consistently applied throughout the redistricting plan and ha[ve] a neutral effect." *Id.* This burden on the legislature is similar to the burden that would be applied in the third step of this gerrymandering test, in cases where challengers are able to carry their prima facie burden of proving a predominant partisan purpose and substantial vote dilution.

The Commonwealth's argument that there are no judicially manageable standards that can apply to partisan gerrymandering claims is nonsense. Endorsing a blank check to be used by the supermajority in the General Assembly in future redistricting cycles would be an abdication of the role of the judiciary. This Court is not powerless to constrain legislative abuses and,

indeed, must do so where necessary to protect the constitutional rights of Kentucky's citizens.

V. The Trial Court's Findings Are Supported By Substantial Evidence.

The Commonwealth invites this Court to review *de novo* the trial court's factual findings that HB 2 and SB 3 are partisan gerrymanders because those findings were "predicated on a misunderstanding of the governing rule of law." This argument is puzzling because, although the trial court agreed with Appellants as a factual matter, the trial court ultimately adopted the Commonwealth's position regarding the law applicable to claims of partisan gerrymandering. The Commonwealth's argument is also contrary to well-established Kentucky law, which provides that factual findings and evaluations of the credibility and reliability of experts may only be set aside for clear error. *See, e.g., Welch v. Commonwealth*, 563 S.W.3d 612, 615 (Ky. 2018); *Holbrook v. Commonwealth*, 525 S.W.3d 73, 79 (Ky. 2017). There are good reasons for this deferential standard. An appellate court has no opportunity to evaluate the credibility of witnesses and evidence first-hand. Moreover, due to page limit constraints, appellate briefs cannot provide a comprehensive summary of the evidence presented at trial. For these reasons, appellate courts generally defer to the factfinder's assessment of the evidence.

Appellants' opening brief set forth the substantial evidence that supported the trial court's findings that HB 2 and SB 3 constitute partisan gerrymanders. Appellants proved their allegation of partisan gerrymandering

through objective metrics introduced into evidence by credible and highly-qualified expert witnesses. These metrics (Dr. Imai's simulation analysis and Dr. Caughey's testimony regarding efficiency gap, declination, and partisan asymmetry) all point in the same direction, which "compelled" the trial court's factual findings. R. 1870. Contrary to the Commonwealth's protestations that such evidence is unreliable, courts around the country have relied on these same metrics to analyze claims of partisan gerrymandering. *See, e.g.*, *Carter v. Chapman*, 270 A.3d 444, 470 & n.30 (Pa. 2022), *cert. denied sub nom. Costello v. Carter*, 143 S. Ct. 102 (2022) (using efficiency gap analysis to compare competing plans); *Adams v. DeWine*, 195 N.E.3d 74 (Ohio 2022) (relying on simulation analysis conducted by Dr. Imai, efficiency gap, declination, and partisan symmetry analysis).

Against this overwhelming evidence, the Commonwealth chose not to even attempt to prove that HB 2 and SB 3 were *not* the product of partisan considerations. It instead attempted to poke holes in Appellants' evidence through cross-examination and rebuttal experts, but these efforts were largely unsuccessful. Indeed, in important respects, the Commonwealth's experts endorsed the methodology and credibility of Appellants' experts. *See, e.g.*, R. 1874 ("The Commonwealth's other witness, Dr. Voss, actually supported Dr. Imai's testimony). Because there is substantial evidence to support the trial court's findings and no clear error, there is no basis for reversal of the court's

factual findings and assessments of the Appellants' experts' opinions. *See Simms v. Estate of Blake*, 615 S.W.3d 14, 23 (Ky. 2021) (citation omitted).

The Commonwealth is also wrong to attempt to introduce new evidence that was never presented to the trial court. The Commonwealth invites this Court to conduct its own "eyeball" comparison of HB 2, HB 191, and the 2013 house map and repeatedly cites to statistics from a website called Dave's Redistricting (davesredistricting.org) that were never presented to the trial court. *See, e.g.*, Appellee Br., p. 75 & n.23. If the Commonwealth had wanted such evidence to be considered in evaluating Appellants' claims, it should have introduced such evidence through competent witnesses at trial. Having not done so, it is entirely improper for the Commonwealth to attempt to interject new evidence while the case is on appeal. *See, e.g., Oakley v. Oakley*, 391 S.W.3d 377, 380 (Ky. App. 2012) ("an appellate court cannot consider items that were not first presented to the trial court").

Other than this new evidence (which itself would not have changed the trial court's conclusions), the Commonwealth's arguments amount to quibbles that were presented to and correctly rejected by the trial court in light of the overwhelming evidence that HB 2 and SB 3 constitute partisan gerrymanders. For example, the trial court considered and rejected the notion that Kentucky's political geography (where voters live)—and not the map drawers' improper partisan purpose—is responsible for the off-the-charts scores according to objective metrics designed to measure partisan gerrymandering. *See* R. 1871

(finding that because Dr. Imai's simulation analysis accounts for Kentucky's political geography, it shows that partisan skew in the enacted maps is not due to political geography).

The Commonwealth's other critiques were addressed point-by-point in post-trial briefing filed with the trial court (R. 1615-1627). Even after considering these same arguments from the Commonwealth, the court credited Appellants' experts. R. 1870-71. It found Dr. Imai's simulation analysis, in particular, to be "extremely reliable" and gave it "significant weight." R. 1872. Conversely, the court was "unpersuaded by Mr. Trende's testimony" trying to poke holes in Appellants' analysis of the partisan bias of HB 2. R. 1871. It likewise held that "[t]he Commonwealth's experts failed to rebut Dr. Imai's findings" regarding SB 3. R. 1872. And, as noted above, Dr. Voss' testimony "actually supported Dr. Imai's testimony" about SB 3, whereas the court found "Mr. Trende's testimony self-serving and unreliable." R. 1874. There is no basis to disturb these findings by the trial court.

CONCLUSION

For the foregoing reasons, this Court should affirm the Circuit Court's fact-finding that HB 2 and SB 3 are partisan gerrymanders, but reverse its conclusion that the Kentucky Constitution provides no redress for those wrongs. It should vacate the judgement below and remand the case with instructions to send it back to the General Assembly to draw fair maps.

Tendered

Respectfully Submitted,

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/s/ Michael P. Abate