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.

THE COMMONWEALTH OF KENTUCKY'S POST-TRIAL RESPONSE BRIEF

House Bill 2 and Senate Bill 3 ("HB 2 and SB 3") are constitutional apportionment plans. Plaintiffs have brought this legal challenge to have both bills declared invalid. But Plaintiffs did not do their homework before filing suit, as Kentucky precedent is not on their side. And after a trial, neither are the facts. For all of the reasons advanced at trial and in the Commonwealth's post-trial opening brief, this Court must uphold the constitutionality of HB 2 and SB 3. In further response to the Plaintiffs' opening brief, the Commonwealth states as follows.

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ARGUMENT[1]

First, Plaintiffs lack standing to maintain this lawsuit. Their claims fail for this very basic reason. Second, controlling Kentucky precedent construing Section 33 is decidedly against the Plaintiffs. The same is true for Plaintiffs' Kentucky Bill of Rights claims. Instead of facing these facts, Plaintiffs advance a series of statements of the law that the Kentucky Supreme Court has *never* endorsed. *See* Pls.' Opening Br. 1–2. But as a trial court, this Court is duty-bound to apply controlling precedent. Doing so is fatal to Plaintiffs' claims.

I. Plaintiffs do not have constitutional standing to maintain this lawsuit.

Plaintiffs' opening brief confirms that they do not possess the requisite constitutional standing to maintain this lawsuit. *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018) ("The facts necessary to establish standing . . . must not only be alleged at the pleading stage, but also proved at trial.").

1. Plaintiffs' first attempt at asserting an injury sufficient for constitutional standing is to point to the "policy-making consequences" that will result from HB 2. Pls.' Opening Br. 26. But "influencing the legislature's overall 'composition and policymaking'" is not the kind of "individual and personal injury of the kind required for [constitutional] standing." *Gill*, 139 S. Ct. at 1931. Plaintiffs' alleged inability to influence policymaking is "the kind of undifferentiated, generalized grievance about the conduct of government that [courts] have refused to countenance in the past." *Id.*

[1] Plaintiffs have offered no opposition to the Commonwealth's cross-claim. The Court should enter judgment in the Commonwealth's favor. Commonwealth's Opening Br. 70.

(citation omitted); *see also Ward v. Westerfield*, --- S.W.3d ---, 2022 WL 1284024, at * (Ky. Apr. 28, 2022) (non-final) ("[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." (citation omitted)).

2. Next, Plaintiffs speculate about HB 2's effects on the Kentucky Democratic Party. Pls.' Opening Br. 26. But, to the extent that the injuries the KDP claims could even suffice as injuries for constitutional standing purposes, Plaintiffs have not shown that it is HB 2 that caused the KDP's alleged injuries or that this Court could redress those alleged injuries. *Commonwealth Cabinet for Health and Family Servs., Dep't for Medicaid Servs. v. Sexton by and through Appalachian Reg'l Healthcare, Inc.*, 566 S.W.3d 185, 196 (Ky. 2018) ("[F]or a party to sue in Kentucky, the initiating party must have the requisite constitutional standing to do so, defined by three requirements: (1) injury, (2) causation, and (3) redressability. In other words, 'A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' . . . 'The injury must be 'fairly' traceable to the challenged action, and relief from the injury must be 'likely' to follow from a favorable decision.'" (citations omitted)).

As the Commonwealth showed in its opening brief, Commonwealth's Opening Br. 6–8, the KDP's ability "to recruit candidates, raise money, and train volunteers outside of the largest urban areas of the state[,]" Pls.' Opening Br. 26, hinges entirely on the free will of third parties to choose to run in an election, donate money, and volunteer. When actions rest within the hands of third parties, the causal chain is

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broken, and the Court cannot redress a party's injuries. *See, e.g., Golden v. Zwickler*, 394 U.S. 103, 109 (1969); *Warth v. Seldin*, 422 U.S. 490, 505–07 (1975).

Causation and redressability also pose problems for Plaintiffs' claimed injuries of allegedly having "several candidates recruited by KDP to run in 2022 . . . drawn out of their previous districts and into districts that strongly favor Republicans." Pls.' Opening Br. 26. To start, politicians have no entitlement to run in a particular district, so such a claimed injury is not a "personal injury" sufficient for constitutional standing purposes. More importantly, the redrawing of districts did not prevent any member of the Kentucky Democratic Party from running for office in 2022.[2] The Kentucky Democratic Party could have fielded candidates in every single 2022 race. The fact that it did not can be attributed to candidates simply choosing not to run, and these free-willed choices break the causation and redressability chains.

Just as important, the record shows that the KDP's claimed injuries here can be attributed to its own downbound trajectory in Kentucky politics—the KDP's reality has nothing to do with HB 2. VR 4-5-2022 at 4:47:55–58:16 (discussing candidate

[2] The KDP completely failed to demonstrate otherwise with competent evidence. *See* Candidate Filings with the Office of Secretary of State, *available at* https://web.sos.ky.gov/CandidateFilings/default.aspx?id=12 (showing John Pennington now running in the 24th District, Martina Jackson now running in the 91st District, and Derek Penwell now running in the 31st District); VR 4-5-2022 at 4:01:01–02:21 (never identifying why Suzanne Kugler decided not to run in a different district, like the three other candidates identified above); VR 4-5-2022 at 4:04:55–05:25 (attributing the decision of Mary Lou Marzian to not run for office as stemming from *her* decision to step down after many years of service to the Commonwealth, and attributing the decision of Representative Cantrell to not run for reelection as stemming from *her* desire not to run against a fellow incumbent and from her potential Kentucky Court of Appeals ambitions).

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quality, the impact on the party holding the White House in off-year elections, and the downward trajectory of the KDP since 2016). Awarding the Plaintiffs their desired relief as to HB 2 will not redress Plaintiffs' alleged injuries here. The Plaintiffs' injuries are both self-imposed and irremediable by judicial intervention.

3. As for SB 3's claimed impact on Plaintiffs, they only generally claim that SB 3 "intentionally dilutes the votes of Democratic voters in Franklin County by attaching them to heavily Republican, far-away counties at the western edge of the Commonwealth that will certainly cancel out their votes." Pls.' Opening Br. 30. But Plaintiffs' own evidence reveals that Franklin County's Democratic votes would have no impact on Kentucky's Congressional delegation: One in seven of Imai's simulated maps would elect six Republicans to represent Kentucky in Congress, and *none* of Imai's maps would be expected to yield a four-to-two Republican-to-Democrat Congressional delegation no matter which Congressional district Franklin County is in. VR 4-7-22 at 10:48:12–53:14; Commonwealth's Exhibit 30 at 36–38. If Franklin County's Democratic votes would have no impact on Kentucky's Congressional delegation, then it cannot be said that the alleged dilution of those votes caused any redressable injury.

Not only that, but the only Plaintiffs that even discussed SB 3 were Representative Derrick Graham and Frankfort resident Jill Robinson, and neither claimed an injury based on partisan vote dilution. Instead, Graham testified only to the "social, political, and economic differences" between Franklin County and other counties in the First Congressional District and how it may be "difficult" for a

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congressman or woman to represent the interests of Franklin County in that district. VR 4-6-2022 at 4:28:20–32:44. Similarly, Robinson only speculated about the potential difficulty a member of Congress may have representing Franklin County in the First Congressional District. VR 4-6-2022 at 4:40:20–4:52:25. Again, their testimony is complete speculation because they have no idea how effective a future Congressman or woman will be in representing Franklin County. But more importantly, Graham and Robinson never testified as to how that difficulty would affect them personally. *Overstreet v. Mayberry*, 603 S.W.3d 244, 252 (Ky. 2020) ("[A]n injury must be 'concrete, particularized, and actual or imminent' . . . . For an injury to be 'particularized,' it must affect the plaintiff in a personal and individual way.' . . . For an injury to be concrete, it must 'actually exist.' . . . 'Allegations of *possible* future injury' are not sufficient." (citations omitted)). Setting aside Graham and Robinson's speculative, impersonal testimony, no Plaintiff offered any testimony about how SB 3 will actually affect him or her.

One more point. Plaintiffs cite Robinson's testimony to purportedly support the assertion that the configuration of the First Congressional District in SB 3 "will sever important community ties built over the years between Frankfort's civic organizations and federal representatives who live near them." Pls.' Opening Br. 61 (citing VR 4/6/22, 4:46:35–50:02). But that misrepresents Robinson's testimony. All Robinson discussed was how effective Representative Barr was at assisting women's shelters in Franklin County and how she "didn't know how" a representative from western Kentucky could have "as easy of an effective relationship." VR 4-6-2022 at

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4:46:35–4:50:02. It is complete speculation to believe that the representative of the First Congressional District could not just as effectively (if not more effectively) represent the interests of Frankfort's civic organizations.[3] Moreover, no civic organization in Frankfort is a party to or provided any testimony in this case,[4] so there is no basis for the Court to find that such organizations join in or endorse Robinson's speculation.

* * *

Because Plaintiffs failed to prove a concrete, particularized, or redressable injury caused by or traceable to either HB 2 or SB 3, they lack standing to challenge those apportionment plans. *See also* Commonwealth's Opening Br. 3–13.

II. Plaintiffs' Section 33 claim fails.

Instead of grappling with Section 33's controlling dual mandate test established by the Kentucky Supreme Court almost 30 years ago, *Fischer v. State Bd. of Elections*, 879 S.W.2d 475, 479 (Ky. 1994) ("*Fischer II*") ("The mandate of Section 33 is to make full use of the [+/-5%] population variation . . . and divide the fewest possible number of counties."), Plaintiffs attack HB 2 by relying on two pre-dual mandates cases, *Ragland v. Anderson*, 100 S.W. 865 (Ky. 1907), and *Stiglitz v. Schardien*, 40 S.W.2d 315 (Ky. 1931), and by mischaracterizing what the Kentucky Supreme Court has said in *Fischer II*, *Jensen*, and *Fischer IV*. Pls.' Opening Br. 1–2,

[3] Even as Plaintiffs' assert that Franklin County will somehow go unrepresented, they oddly complain about the First Congressional District being represented by a Franklin County resident. Pls.' Opening Br. 30.

[4] There is no indication that Robinson purported to speak on behalf of any organization she mentioned during her testimony.

31–39. In doing so, Plaintiffs seek for this Court to overrule *Fischer II, Jensen, Fischer IV,* and *Wantland*, *see* Commonwealth's Opening Br. 16-24, and concede that the only possible way for them to have a plausible Section 33 claim is if current Kentucky Supreme Court jurisprudence is changed—something this Court cannot do.

1. Let's be clear: The Kentucky Supreme Court has already provided its authoritative interpretation of Section 33 in our post-"one person, one vote" legal landscape. Section 33 means that the legislature is required "to make full use of the [+/-5%] population variation . . . and divide the fewest possible number of counties." *Fischer II*, 879 S.W.2d at 479. That's it. It is undisputed that under that test, HB 2 complies in every respect with Section 33.

And if Plaintiffs complain that the controlling precedent is not textual, neither is their alternative reading. Plaintiffs concede this. Pls.' Opening Br. 32 ("Over time, Kentucky courts have recognized that [Section 33's] commands cannot be literally observed in every instance while creating 100 districts of roughly equal population from among Kentucky's 120 counties."). Plaintiffs' attempt to impose a general "minimization" or "unnecessary" requirement applying to all of Section 33's proscriptions is not a reading of that provision's text—it is an addition to it.

The good news for this Court is that the Supreme Court has provided its authoritative interpretation of Section 33 over the course of the previous three redistricting cycles. *Fischer II, Jensen*, and *Fischer IV* are the controlling authority. *See also Wantland v. Ky. State Bd. of Elections*, No. 2004–CA–00508–MR, 2005 WL 1125070, *1–3 (Ky. May 13, 2005) (adhering to the dual mandate even when asked to

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change it in the exact way Plaintiffs here request). These cases: (1) clearly establish the dual mandate test for constitutional muster; (2) reject the notion—identical to that offered by Plaintiffs—that, unless it is "necessary" to do so, a county may not be split several times once it has been split, parts of counties cannot be attached to others, and three or more counties cannot be joined; and (3) foreclose the argument that further changes to the meaning of Section 33 are either prudent or compelled. They provide the parameters within which the General Assembly has the exclusive power to create legislative districts. This Court is not empowered to decide whether a "better" plan could have been enacted. *Jensen v. Ky. State Bd. of Elections*, 959 S.W.2d 771, 776 (Ky. 1997). All it has to do is apply the dual mandate laid out for it by the Kentucky Supreme Court. And because there is no dispute that HB 2 satisfies the dual mandate here, there is no merit to Plaintiffs' Section 33 claim.

2. Plaintiffs' reliance on *Ragland* and *Stiglitz* is flawed.

Starting with *Ragland*, at issue there was the constitutionality of an apportionment plan with malapportioned districts resulting from the combination of whole counties. 100 S.W. at 865–67. To combat this malapportionment, the challenger to the apportionment plan invoked the portion of Section 33 stating: "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." *Id*. at 866–68; *see also* Ky. Const. § 33. The *Ragland* Court read this portion of Section 33 to mean that "more than two counties may be joined in one district, provided it be necessary in order to effectuate

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that equality of representation which the spirit of the whole section so imperatively demands." *Id.* at 870. In other words, all the *Ragland* Court did was read and apply the plain text of one statement in Section 33 that allows the General Assembly to join more than two counties but only if doing so would effectuate equality of population among districts.

Plaintiffs read the aforementioned pronouncement in *Ragland* as establishing a general rule that *all* of Section 33's mandates are subject to such a "necessity" rule. Pls.' Opening Br. 2, 32–33, 38–39. That is not only a bad reading of Section 33, but it is also a bad reading of *Ragland*. The text of Section 33 does not allow, for example, parts of counties to be joined with other counties only when necessary—it prohibits such joining of parts of counties to others in totality. Ky. Const. § 33 ("No part of a county shall be added to another county to make a district.").[5] But this portion of Section 33 was not at issue in *Ragland*, so *Ragland* has nothing to say about extending a "necessity" rule to it or any of the other blanket prohibitions in Section 33 for that matter. So contrary to what Plaintiffs represent, *Ragland* did not establish a rule that *all* of Section 33's mandates could be disregarded if necessary, let alone *only* if necessary.

The same problem exists with Plaintiffs' reference to *Stiglitz*.[6] Pls.' Opening Br. 39. The same issue of malapportioned districts at issue in *Ragland* was at issue

[5] This provision is incapable of being given effect following the one-person, one-vote rule.

[6] *Stiglitz* was eventually superseded by statute on a proper party question not at issue here, as recognized in *Fischer I. Fischer v. State Bd. of Elections*, 847 S.W.2d 718, 721 (Ky. 1993).

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in *Stiglitz*, 40 S.W.3d at 318–21. All Kentucky's high court did in *Stiglitz* was apply the portion of Section 33 calling for districts to be "nearly equal in population as may be." *Id*; *see also* Ky. Const. § 33. Kentucky's high court in *Stiglitz* made no general pronouncements about the "necessity" rule that Plaintiffs advocate for here.

As it relates to both cases, again, the Section 33 problem in both *Ragland* and *Stiglitz* was a violation of the equality of population requirement, not anything relating to county integrity. So the only precedential pronouncement about Section 33 that Kentucky's highest court made in those cases was about the importance of equality of population and how the General Assembly must ensure that state apportionment adheres to the equality of population requirement. In other words, Kentucky's highest court in *Ragland* and *Stiglitz* did not make any precedential pronouncements about county integrity whatsoever. Indeed, the Kentucky Supreme Court in *Fisher II* recognized that *Ragland* and *Stiglitz* are population equality cases only and actually had to depart from the equality of population pronouncements made in those cases because the Court felt like those cases could be read to "sacrifice[]" the county integrity requirement:

> By the 1906 apportionment, a voter in Spencer County exercised in the Legislature more than seven times the influence of a voter in Ohio, Butler or Edmonson counties. Holding such gross violation of the requirements of Section 33 unconstitutional, the Court in *Ragland* . . . declared that there must be equality of representation to the greatest extent practicable. The Court also held that nothing in Section 33 forbade the joinder of two counties to create one district for the purpose of achieving population equality. Since its rendition, *Ragland* has been understood to require substantial equality of representation for all citizens of Kentucky . . . .

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> A generation after *Ragland*, the Court revisited the issue of legislative apportionment in *Stiglitz* . . . .
>
> Holding the apportionment unconstitutional, the Court concluded that no attempt had been made to comply with the constitutional requirement of population equality. . . .
>
> The parties agree that *Ragland* and *Stiglitz* place primary emphasis upon population equality among legislative districts. . . .
>
> There is no fundamental impediment to a full accommodation of the dual mandates of Section 33 of the Constitution of Kentucky. Within reasonable limits, . . . our decisions in *Ragland* and *Stiglitz* do not command perfect population equality at the total expense of county integrity. . . .
>
> This opinion is not a relaxation of the principle of equal representation. We merely seek to restore the balance between competing constitutional concepts, a balance which was diminished or lost when the Court undertook to enforce equal legislative representation. While *Ragland* and *Stiglitz* use strong language, it is no wonder when one considers the state of affairs which then prevailed. The battle for population equality in representation is now over and the Constitution has prevailed.

Fischer II, 879 S.W.2d at 477–79. So to the extent that Plaintiffs attempt to read *Ragland* and *Stiglitz* as having made any pronouncements about the importance of county integrity, *Fischer II* counsels against that position.

Not only that, but the Kentucky Supreme Court in *Stiglitz* recognized that Section 33 is not concerned with the "matter of partisan strategy." *Stiglitz*, 40 S.W.2d at 321. While fixing "[e]quality of representation . . . based upon population" is a "dut[y] imposed upon the General Assembly by section 33 of the Constitution, . . . [t]he Constitution is not concerned with election returns." *Id*. That is because "equal representation is not merely a matter of partisan strategy. It rises above any question of party, and reaches the very vitals of democracy itself." *Id*. *Stiglitz* recognizes that

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as long as a state apportionment plan complies with Section 33's population equality "rule of approximation[,]" the Court will not manufacture constitutional authority and step outside the bounds of the separation of powers principle to consider complaints about that apportionment plan regarding the "matter of partisan strategy." *Id*.

But regardless of any of the aforementioned, the Kentucky Supreme Court (and Kentucky Court of Appeals) have made clear what the requirements of Section 33 are in today's post-"one person, one vote" world: "Section 33 imposes a dual mandate that Kentucky's state legislative districts be substantially equal in population and preserve county integrity. A reapportionment plan satisfies these two requirements by (1) maintaining a population variation that does not exceed the ideal legislative district by [+-5%] and (2) dividing the fewest number of counties possible." *Legislative Research Comm'n v. Fischer*, 366 S.W.3d 905, 911 (Ky. 2012) ("*Fischer IV*"). This is all that Section 33 requires. *See also Jensen*, 879 S.W.2d at 776; *Fischer II*, 879 S.W.2d at 479; *Wantland*, 2005 WL 1125070, at *2 ("The constitution requires only that the General Assembly divide as few counties as possible. Within that constraint, which counties to divide and how to arrange the resulting pieces are matters of legislative discretion.").

We know this not simply from what the Kentucky Supreme Court has specifically said but also from the arguments that it has rejected. The same reading of Section 33 that Plaintiffs seek to have this Court adopt was rejected in *Jensen*. The *Jensen* Appellant Brief makes clear that Plaintiffs' arguments were before the *Jensen*

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Court. *See* Commonwealth's Mot. Dismiss at 20–21, filed on Feb. 4, 2022 (explaining how the *Jensen* Appellant Brief squarely put before the Kentucky Supreme Court the issues of excessive post-split county splitting, excessive attachment of parts of counties to others, and excessive joinder of three or more counties). More importantly, the *Jensen* opinion makes clear, as well, that the Court addressed and rejected these arguments. *Jensen*, 959 S.W.2d at 773 (rejecting the apportionment plan challenger's reliance on HB 164).[7] And for good measure, relying on this very resolution of the issue by the *Jensen* Court, the Kentucky Court of Appeals has rejected Plaintiffs' reading of Section 33 here, as well. *Wantland*, 2005 WL 1125070, at *1–3 (rejecting an apportionment challenger's complaint that Bullitt County was divided more than necessary and its parts unnecessarily added to other districts, including to districts that unnecessarily joined three or more counties).

At the end of the day, much like with their other claims, Plaintiffs have no Kentucky precedent on their side. *Ragland* and *Stiglitz* were population equality cases that, in fact, gave short shrift to Section 33's county integrity requirement, as *Fischer II* notes. But more importantly, the Kentucky Supreme Court cast aside any Section 33 requirement purported to be imposed by *Ragland* and *Stiglitz* in favor of its current dual mandate test, a test that has governed Section 33 reapportionment for almost 30 years.

[7] Recall that HB 164 showed that in the challenged apportionment plan Pulaski and Laurel counties were divided more times than necessary, had their parts attached to other counties more times than necessary, and were joined in districts with three or more counties more than necessary. *See* Commonwealth's Opening Br. 18–20.

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3. Apart from attempting to rely on pre-"one person, one vote" cases, Plaintiffs attempt to invoke general statements from post-"one person, one vote" cases. But when they do so, they take those statements entirely out of context.

More specifically, Plaintiffs cite *Fischer II* and *Fischer IV* for *general* pronouncements in those cases about the importance of county integrity. Pls.' Opening Br. 1–2, 31–33, 36–39. Yet in doing so, Plaintiffs completely gloss over how the Kentucky Supreme Court *specifically* defined the county integrity requirement of the Section 33 dual mandate. *Fischer IV*, 366 S.W.3d at 911 ("Section 33 imposes a dual mandate that Kentucky's state legislative districts be substantially equal in population and preserve county integrity. A reapportionment plan satisfies these two requirements by (1) maintaining a population variation that does not exceed the ideal legislative district by [+/-5%] and (2) *dividing the fewest number of counties possible*." (emphasis added)); *Fischer II*, 879 S.W.2d at 479 ("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*." (emphasis added)); *see also Jensen*, 959 S.W.2d at 776 (reaffirming the dual mandate and specific definition of county integrity).

The only other case cited by Plaintiffs in an attempt to support their Section 33 argument is *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983). Pls.' Opening Br. 36–37. Plaintiffs point to *Fischer II*'s citation of that case. Pls.' Opening Br. 36; *see also Fischer II*, 879 S.W.2d at 479 (citing *Lockert*). But whatever test Plaintiffs believe resulted from the Tennessee Supreme Court's decision in *Lockert*,

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it was obviously rejected in *Fischer II*. Instead, *Fischer II* outlined a specific and limited dual mandate by which the General Assembly was to abide in apportioning state representation: "The mandate of Section 33 is to make full use of the [+/-5%] population variation . . . and *divide the fewest possible number of counties*." *Fischer II*, 879 S.W.2d at 479 (emphasis added). Nor was *Lockert* persuasive to the *Jensen* Court, which, as has been discussed at length by the Commonwealth, rejected the same application that Plaintiffs seek to apply here. Commonwealth's Opening Br. 18–20; Defs.' Joint Mot. Dismiss at 20–21, filed Feb. 4, 2022; *Jensen* Appellant Br. at 13–15, Exhibit to Joint Mot. Dismiss filed Feb. 4, 2022. More importantly, what Plaintiffs fail to acknowledge but must surely recognize is that their Section 33 claim is *Jensen* (and *Wantland*) all over again, which are dispositive of that claim. Commonwealth's Opening Br. 18–22.

* * *

Plaintiffs ask this Court to change the controlling authority dual mandate of Section 33 for a redistricting plan to meet constitutional muster as announced by the Kentucky Supreme Court. This is something that this Court knows it cannot do. *See* Commonwealth's Opening Br. 16–24. This Court is bound by nearly 30 years of consistent precedent that repeatedly renders Plaintiffs' claims meritless.

III. Plaintiffs' Section 6 claim fails.

With 130 years of robust Kentucky precedent against them on their Section 6 claim, Plaintiffs can only cherry-pick from that case law general pronouncements, taken out of context to attempt to support their position. Additionally, they rely on

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the flawed decisions of out-of-state courts. But it is easy to see through Plaintiffs' smokescreen and conclude what Kentucky law has made plain since the 19th Century: Section 6 of the Kentucky Constitution has nothing to do with state or Congressional apportionment.

1. Plaintiffs try to invoke the U.S. Supreme Court's statement in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) that "[p]rovisions in . . . state constitutions can provide standards and guidance for state courts to apply" in an attempt to argue that Kentucky's Constitution provides such standards. Pls.' Opening Br. 40. But as the Commonwealth explained in its opening brief, the Kentucky Constitution contains nothing akin to the provisions that the *Rucho* Court pointed to as examples of state constitutions providing standards for partisan gerrymandering claims. *Rucho*, 139 S. Ct. at 2507–08 (citing provisions in constitutions from Florida, Colorado, Michigan, and Missouri that explicitly prohibit considering partisan interests in apportionment)[8]; *see also* Commonwealth's Opening Br. 30.

No provision in the Kentucky Constitution has ever been held by the Kentucky Supreme Court to provide any constitutional standard in apportioning Congressional representation, nor has any provision (outside of Section 33) regarding state apportionment. Indeed, quite the opposite, Kentucky law has long held that the

[8] These types of constitutional amendments are recent phenomena in state constitutions. Fla. Const. Art. 3, § 20 (enacted in 2010); Colo. Const. Art. V, §§ 44, 46 (enacted in 2018); Mich. Const. Art. IV, § 6 (enacted in 2018); Mo. Const. Art. III, § 3 (enacted in 2018); *see also* Ohio Const. Art. XI (enacted in 2015).

Kentucky Constitution includes no concern for election results or partisan interests.[9] Plaintiffs essentially concede this by citing only to Section 33 cases to support their assertion that "[t]he question of whether a redistricting plan is constitutional is a matter for the courts to decide; it is not a political question left solely to the legislature's prerogative." Pls.' Opening Br. 31 (citing *Fischer IV*, *Fischer II*, and *Ragland*).

2. Consider next the ways in which Plaintiffs continue to take statements made by the Kentucky Supreme Court about Section 6 out of context.

Plaintiffs first cite *Wallbrecht v. Ingram*, 175 S.W. 1022, 1026 (Ky. 1915), asserting that Section 6 "was designed to ensure that Kentucky's elections 'obtain a full, fair, and free expression of the popular will upon the matter, whatever it may be.'" Pls.' Opening Br. 3; *see also id.* at 40. But all the quoted language in *Wallbrecht* meant to convey is a prohibition against election-day interferences with the vote-placement and vote-counting processes. Because that was all that was at issue in *Wallbrecht*, 175 S.W. at 1024 ("The contention that the election was not free and equal is rested on the ground that at three precincts in the county a sufficient number of ballots were not furnished to permit all the persons legally entitled to vote in these

[9] *See Jensen*, 959 S.W.2d at 776 (rejection the assertion that Section 33 is concerned with partisan fairness in state apportionment plans); *Watts v. Carter*, 355 S.W.2d 657, 658–59 (Ky. 1962) (refusing to entertain allegations of gerrymandering in a Congressional apportionment plan); *Stiglitz*, 40 S.W.2d at 321 (noting that the Kentucky Constitution is not concerned with the "matter of partisan strategy"); *Richardson v. McChesney*, 108 S.W. 322, 323–24 (Ky. 1908) (refusing to find any Kentucky constitutional standards whatsoever that govern Congressional apportionment in Kentucky); *cf. Mann v. Cornett*, 445 S.W.2d 853, 858 (Ky. 1969) ("The Kentucky Constitution makes no reference to any political party.").

precincts to cast their votes."). Simply put, *Wallbrecht* had nothing to do with apportionment. Nor did *Queenan v. Russell*, 339 S.W.2d 475 (Ky. 1960), the only other Kentucky precedent Plaintiffs cite. *Id.* at 476–77 (adjudicating the constitutionality of a statute that effectively prevented absentee voters from voting at all); Pls.' Opening Br. 39–40.

This is the totality of Kentucky authority that Plaintiffs rely on in their opening brief for their Section 6 claim. Plaintiffs fail to not only cite any Section 6 precedent supporting their claim, but they also fail to cite to any Kentucky authority that views Section 6 as anything more than a prohibition against election-day interferences with the vote-placement and vote-counting processes. *See* Commonwealth's Opening Br. 36–38.

3. Realizing that they can find no support for their Section 6 argument in the text of Section 6, the 1890–91 Kentucky Constitutional Debates, and Kentucky precedent, Plaintiffs turn out of necessity to flawed out-of-state precedent.

To start, Plaintiffs point to decisions from New York, North Carolina, Ohio, and Pennsylvania only. Pls.' Opening Br. 3, 40–43. But, as Plaintiffs readily point out, Pls.' Opening Br. 3, 42, the constitutions of New York and Ohio explicitly prohibit partisan gerrymandering, which is not the case in Kentucky. *See generally* N.Y. Const. Art. III, §§ 4–5-B; Ohio Const. Art. XI. So Plaintiffs are left with the decisions of the Pennsylvania and North Carolina high courts. And those decisions turned constitutional analysis on its head.

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Take first the deeply flawed decision of the North Carolina high court. *See generally Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022). Under the North Carolina Constitution, "the General Assembly possesses plenary power as well as responsibilities explicitly recognized in the text." *Id.* at 572 (Newby, C.J., dissenting). Just like the Kentucky Court of Justice's responsibility of ensuring that apportionment plans for the state house adhere to the dual mandate of Section 33, "[t]he role of the [North Carolina] judiciary through judicial review is to decide challenges regarding whether a redistricting plan violates the . . . four enumerated objective limitations on the General Assembly's redistricting authority" laid out in the North Carolina Constitution. *Id.* But instead of correctly reading the four explicitly enumerated constraints on apportionment as the only constraints, the majority in *Harper* added their own requirement not found anywhere in the text of the North Carolina Constitution: "The majority seriously errs by suggesting the General Assembly needs an express grant of authority to redistrict for partisan advantage. Under our state constitution, the opposite is true; absent an express prohibition, the General Assembly can proceed." *Id.* In other words, when a constitution allocates a task to a specific branch of government and outlines specific constraints in accomplishing that task, all the other details that go into accomplishing that task are textually left to the discretion of that branch. *Jensen*, 959 S.W.2d at 776 ("Apportionment is primarily a political and legislative process. Our only role in this process is to ascertain whether a particular [state] redistricting plan passes constitutional muster [under the dual mandate test of Section 33], not whether

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a better plan could be crafted."); *Richardson*, 108 S.W. at 323 ("[I]n the matter of congressional districts we find nothing in our state Constitution to guide us. There is nowhere any limitation upon the power of the Legislature, and it would be assuming authority this court does not possess if we undertook to control a coordinate department of the government in the performance of a power vested exclusively in it.").

The failure of the majority in *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), to recognize this fundamental principle of constitutional interpretation is even worse. At issue in that case was the constitutionality of Pennsylvania's Congressional redistricting plan only, not a state plan. *Id.* at 741. Despite recognizing that "[n]either [the Free and Equal Elections Clause], nor any other provision of [the Pennsylvania] Constitution, articulates explicit standards which are to be used in the creation of congressional districts[,]" *id.* at 814, the majority nonetheless superimposed the Pennsylvania Constitution's enumerated constraints on state apportionment (*i.e.*, Pennsylvania's Ky. Const. § 33 analogue) into the Free and Equal Elections Clause so as to constrain Congressional apportionment, *id.* at 815–17. The majority then added a constraint found nowhere in the text of the Pennsylvania Constitution, not even in Pennsylvania's Ky. Const. § 33 analogue: "When . . . it is demonstrated that, in the creation of congressional districts, the[] neutral criteria [of Pennsylvania's Section 33 equivalent] have been subordinated, in whole or in part, to extraneous considerations such as

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gerrymandering for unfair partisan political advantage, a congressional redistricting plan violates" the Free and Equal Elections Clause. *Id*. at 817.

In sum, the majority in *League of Women Voters* "engraft[ed] into the Pennsylvania Constitution criteria for the drawing of congressional districts when the framers chose not to include such provisions despite unquestionably being aware of both the General Assembly's responsibility for congressional redistricting and the dangers of gerrymandering." *Id*. at 827 (Baer, J., concurring and dissenting in part). Just like the majority in *Harper*, the majority in *League of Women Voters* engaged in a rewrite of a constitution and failed to recognize that constitution's textual commitment of the responsibility of Congressional apportionment to the discretion of the legislature. By any measure, both *Harper* and *League of Women Voters* represent willful exercise of judicial power without regard to the text of the constitutional provisions involved or the separation of powers fundamental to our form of government. *See Sibert v. Garrett*, 246 S.W. 455, 457 (Ky. 1922) ("Perhaps no state forming a part of the national government of the United States has a Constitution whose language more emphatically separates and perpetuates what might be termed the American tripod form of government than does our Constitution[.]"); *see also* Commonwealth's Opening Br. 25–29 (discussing the independent state legislature doctrine).

As a final point, Plaintiffs point to two Kentucky decisions that they think suggest that Kentucky courts are to be more persuaded by Pennsylvania decisions than other nonbinding court decisions. Pls.' Opening Br. 41–42 (citing

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Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992), *overruled on separate grounds by Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557 (Ky. 2020); *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459 (Ky. 1998)). In *Yeoman*, however, the Kentucky Supreme Court explicitly refused to rely on Pennsylvania authority after finding that the Kentucky statute at issue there was "facially valid" so "no further authority [wa]s required to make this determination." *Yeoman*, 983 S.W.2d at 473. Moreover, citing the same passage Plaintiffs cite from *Wasson*, the *Yeoman* Court broke no new ground in recognizing that "decisions of the Supreme Court of Pennsylvania . . . should be given as much deference as any non-binding authority receives." *Id*. (citing *Wasson*, 842 S.W.2d at 498). In other words, *Yeoman* and *Wasson* simply stand for the unremarkable assertion that Pennsylvania high court decisions are to be treated as no more or less influential as any other nonbinding court decision. And this means that when the Pennsylvania high court has rendered a decision as deeply flawed as its *League of Women Voters* case, Kentucky courts should pay no attention to it. *See Beshear v. Acree*, 615 S.W.3d 780, 805 n.30 (Ky. 2020) (refusing to consider persuasive authority because the "[Kentucky Supreme] Court's North Star is our own Kentucky Constitution, the language used and the tripod structure erected for Kentucky government.").

* * *

At the end of the day, the totality of support for Plaintiffs' Section 6 attack on HB 2 is *Harper* (because a state apportionment plan was not at issue in *League of Women Voters*) and for Plaintiffs' attack on SB 3 is *Harper* and *League of Women*

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Voters. These decisions are unfaithful to the constitutions they interpret, but more importantly, they are not the law in Kentucky. *See also Pearson v. Koster*, 359 S.W.3d 35, 42–43 (Mo. 2012) (refusing to read into the Missouri Constitution's Free and Equal Elections Clause any prohibition against the consideration of partisan interests in apportionment). Plaintiffs are able to point to no support in Kentucky law for their Section 6 claim here, *see* Commonwealth's Opening Br. 13–16, 24–40, which is dispositive of that claim.

IV. Plaintiffs' Equal Protection claim fails.

Kentucky has never recognized the existence of a partisan gerrymandering claim, let alone one manufactured from equal protection principles.

1. As an initial matter, Plaintiffs, once again, cite Kentucky precedent out of context.

For their assertion that "Kentucky's Constitution has been interpreted to require that every citizen's vote carries the same voting power," Plaintiffs purport to cite in support *Fischer IV* and *Asher v. Arnett*, 132 S.W.2d 772 (Ky. 1939). Pls.' Opening Br. 54; *see also id*. at 57. Of course each citizen's vote carries the same weight as it pertains to the one-person, one-vote principle. But *Fischer IV* and *Asher* provide no support for Plaintiffs' assertion in the context of their novel partisan gerrymandering claim, something that becomes obvious upon further examination of those cases in context:

> Section 33 of the Kentucky Constitution and equal protection principles under the Fourteenth Amendment of the United States Constitution require that every citizen's vote carries the same voting power. *This is referred to in federal law as the 'one person, one vote' principle*.

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> Constituencies must include 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.

Fischer IV, 366 S.W.3d at 910 (emphasis added). In other words, equal protection principles address equality of voting power only as it pertains to population equality, not partisan vote balance. We know this because that is *exactly* what the U.S. Supreme Court, the same Court that established the concept of equality of voting power grounded in equal protection principles, said in *Rucho*, 139 S. Ct. at 2501–04.

Neither did *Asher* purport to lay any groundwork for a partisan gerrymandering claim rooted in equal protection principles. *Asher* was a Section 6 case, and apportionment was not at issue. *Asher*, 132 S.W.2d at 775–76. What was at issue in *Asher* was the constitutionality of a statute that created a deadline for submitting nominating petitions in advance of an election. *Id*. at 773. That deadline was missed in *Asher* and Kentucky's highest court upheld the statute because "the requirement found in many State constitutions that all elections shall be free and equal has never been held to be a limitation upon the power of the Legislature to enact reasonable regulations for the naming of candidates by political parties and groups of voters." *Id*. at 775. Like every other Section 6 case, *Asher* had nothing to do with apportionment. It provides no foundation for a partisan gerrymandering claim rooted in equal protection principles, which were not even at issue there.

So Plaintiffs' reliance on *Fischer IV* and *Asher* for the notion that the equal protection principles of Kentucky's Constitution apply to their claims of partisan vote dilution is wholly misplaced.

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The only other Kentucky precedent that Plaintiffs rely on is *Mobley v. Armstrong*, 978 S.W.2d 307 (Ky. 1998), and they cite this case as alleged support for the invocation of strict scrutiny. Pls.' Opening Br. 54. But *Mobley* was not even a case concerned with voting—it was a right to candidacy case. *Mobley*, 978 S.W.2d at 308–09. More importantly, Plaintiffs provide no support for their assertion that in Kentucky the right of an individual to vote encompasses the supposed right of a political party to have districts drawn in a way to make them competitive in elections. *See Harper*, 868 S.E.2d at 586–87 (Newby, C.J., dissenting).

2. Finding no support for a partisan gerrymandering equal protection claim in Kentucky law, Plaintiffs' only attempt to provide such a framework is to point to the test offered by Justice Kagan in dissent in *Rucho*. Pls.' Opening Br. 54.

To start, the *Rucho* Court rejected Justice Kagan's proposed test, "The [Kagan] dissent would have us line up all the possible maps drawn using [a State's own districting criteria] according to the partisan distribution they would produce. Distance from the 'median' map would indicate whether a particular districting plan harms supporters of one party to an unconstitutional extent." *Id.* at 2505. But as the *Rucho* majority pointed out, Justice Kagan's test begs the question: "How much political motivation and effect is too much?[] Would twenty percent away from the median map be okay? Forty percent? Sixty percent? Why or why not?" *Id.* (citation omitted). Why or why not indeed, for no such test can be found anywhere in the Constitution or case law in Kentucky.

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Even if this Court were to somehow believe Justice Kagan's test applies here, Plaintiffs would still not win. Although Justice Kagan thought the question of partisan gerrymandering to be justiciable, she made clear that even in her minority view, only "*[e]xtreme* partisan gerrymandering . . . violates the Constitution." *Id.* at 2514–15 (Kagan, J., dissenting) (emphasis added). As Justice Kagan emphasized:

> I'll give the majority this one—and important—thing: It identifies some dangers everyone should want to avoid. Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other. And judges should not be striking down maps left, right, and center, on the view that every smidgen of politics is a smidgen too much. Respect for state legislative processes—and restraint in the exercise of judicial authority—*counsels intervention in only egregious cases.*

Id. at 2515–16 (emphasis added). In an attempt to effectuate that strict principle, Justice Kagan articulated her test, which is supposed to be rarely applied to strike down a reapportionment plan, as follows:

> 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.

Id. at 2516 (citations omitted). Plaintiffs here do not even come close to making that kind of showing.

Consider the showing made in *Rucho*. The challengers to the maps there presented overt, explicit evidence of partisan gerrymandering being a predominant purpose in the drawing of those maps:

> To remind you of some highlights: North Carolina's redistricting committee used "Partisan Advantage" as an official criterion for drawing district lines. And from the first to the last, that committee's chair (along with his mapmaker) acted to ensure a 10–3 partisan split, whatever the statewide vote, because he thought that "electing Republicans is better than electing Democrats." For their part, Maryland's Democrats—the Governor, senior Congressman, and State Senate President alike—openly admitted to a single driving purpose: flip the Sixth District from Republican to Democratic.

Id. at 2517. Nothing remotely like such evidence exists here. Indeed, HB 2 pits the same number of Republican incumbents against each other as it does Democrats. VR 4-5-2022 at 4:03:36–05:30. One would think that a map drawn along party lines would do no such thing. And SB 3 conforms closely to the historical contours of the Congressional districts enacted when the KDP controlled half the General Assembly and the Governor's office. VR 4-7-2022 at 10:25:06–27:06, 10:39:40–42:32, 10:54:38–58:02; Commonwealth's Exhibit 30 at 7–14, 38–41; *see also Cooper v. Harris*, 137 S. Ct. 1455, 1492 (2017) (Alito, J., concurring) ("In order to understand [a] mapmaker's approach, the first element to be kept in mind is that the basic shape of [a district i]s legitimately taken as a given. When a new census requires redistricting, it is a common practice to start with the plan used in the prior map and to change the boundaries of the prior districts only as needed to comply with the one-person, one-vote mandate and to achieve other desired ends. This approach honors settled expectations and, if the prior plan survived legal challenge, minimizes the risk that the new plan will be overturned."); *see also id*. at 1463–64 (Justice Kagan's majority opinion noting that it would be permissible for "other factors" such as "partisan advantage" to predominate over racial considerations in apportionment). The only

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significant change to the prior map that Plaintiffs complain of was the moving of Franklin and Anderson counties to the First Congressional District, a change that the evidence shows did not generate *any* meaningful partisan advantage. VR 4-5-2022 at 1:41:22–42:38, 3:23:53–25:19 (Imai's simulations showing that the Congressional district containing Franklin County yielded on average a Democratic vote share around 43%.); VR 4-7-22 at 10:48:12–53:14 (outlining how one in seven of Imai's simulated maps would elect six Republicans to represent Kentucky in Congress and how *none* of Imai's maps would be expected to yield a four-to-two Republican-to-Democrat Congressional delegation); Commonwealth's Exhibit 30 at 36–38 (same); Commonwealth's Exhibit 32 at 5 ("The vast bulk of [Imai's] simulations are no more favorable to the Democrats than the enacted plan."); VR 4-7-2022 at 2:52:30–55:58 (same).

Regarding the second step of Justice Kagan's analysis, she utilized the "extreme outlier approach." *Id.* at 2518. It is difficult to see how HB 2 is an "extreme outlier" when the difference in expected party seat share between HB 2 and HB 191, the Democratically drawn alternative to HB 2, is between two and four seats, Commonwealth's Opening Br. 57, with the Republican party expected to elect a supermajority to both houses of the General Assembly under any scenario. Similarly, it is difficult to see how SB 3 is an "extreme outlier" when *all* of Imai's simulated Congressional maps would be expected to yield at least a five-to-one Republican-to-Democrat Congressional delegation. *Id.* at 62. Not only that, but some 1,400 of Imai's simulated maps generated without regard for partisan interest—one in seven—show

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that the General Assembly could have created a Congressional map in a way to produce a 6-0 Republican delegation. *Id.*

Even if Justice Kagan's personal test had the force of law, maps such as those created by HB 2 and SB 3 would easily fall outside its prohibition, for they display none of the partisan animus that was present in the plans at issue in *Rucho*.

Finally, as for the third step, although it is academic because Plaintiffs failed completely to satisfy the first two steps, HB 2 does not split precincts. Commonwealth's Opening Br. 65–66. And SB 3 preserves the historical configuration of Kentucky's Congressional districts while improving the overall compactness of five out of six of the districts, *id.* at 66–67, even as it satisfies the near mathematical population precision required by federal law.

So even if a Kentucky court were so inclined to find that a partisan gerrymandering equal protection claim to be justiciable, Plaintiffs have not made the requisite showing here.

3. It is important to point out that the only support for Plaintiffs' assertion that a partisan gerrymandering claim can be rooted in equal protection principles is the decision of the fractured North Carolina Supreme Court in *Harper*. Not even the Pennsylvania high court in *League of Women Voters* would go so far as to root a partisan gerrymandering claim in equal protection principles. 178 A.3d at 766, 802 n.63 (noting that the Congressional apportionment plan challengers there brought a state equal protection claim but refusing to address it). And the Commonwealth has already pointed out why a partisan gerrymandering equal protection claim does not

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pass muster, including for the reasons stated by the dissenting opinion in *Harper*. Commonwealth's Opening Br. 14–16, 24–33, 41–43, 64–67.

As a final point, Plaintiffs cite U.S. Supreme Court cases in an attempt to support their partisan gerrymandering equal protection claim. Pls.' Opening Br. 55, 57. But that same Court has explicitly rejected the existence of such a claim. *Rucho*, 139 S. Ct. at 2501–04.

* * *

One flawed and controversial split decision from North Carolina is all Plaintiffs can rely on to support their assertion of a partisan gerrymandering equal protection claim. In the face of all of the authority to the contrary, Commonwealth's Opening Br. 14–16, 24–33, 41–43, 64–67, Plaintiffs' equal protection claim must fail. *See also Pearson*, 359 S.W.3d at 40–42 (refusing to create a partisan gerrymandering equal protection claim under Missouri's equal protection principles).

V. Plaintiffs' Section 1 claims fail.

Again, Kentucky has never recognized the existence of a partisan gerrymandering claim, let alone one manufactured from Section 1 principles.

1. It is important to first note that Plaintiffs cite numerous U.S. Supreme Court cases in an attempt to support their traditional and retaliatory Section 1 partisan gerrymandering claims. Pls.' Opening Br. 58–61. Again, this is the same Court that rejected the existence of a partisan gerrymandering claim grounded in free speech and assembly principles. *Rucho*, 139 S. Ct. at 2504–05; *see also Associated Indus. of Ky. v. Commonwealth*, 912 S.W.2d 947, 953 (Ky. 1995) ("We are not convinced in this

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case that the freedoms of petition and association under the Kentucky Constitution should be afforded a broader scope or a different analysis than the corresponding rights under the United States Constitution."); *Commonwealth v. Foley*, 798 S.W.2d 947, 952 (Ky. 1990) ("While the Court's decision in *Hartlage* was based on the First Amendment to the Constitution of the United States, we are of the opinion that in context the views expressed therein reflect a proper interpretation of Section 1(4) of the Constitution of Kentucky and so hold."), *overruled on other grounds by Martin v. Commonwealth*, 96 S.W.3d 38, 55–56 (Ky. 2003).

2. Just like with Plaintiffs' partisan gerrymandering equal protection claim, the only decision that supports their partisan gerrymandering claim grounded in free speech and assembly principles is *Harper*. Pls.' Opening Br. 58–61. Not only has such a claim never been recognized in Kentucky, another high court has rejected the existence of such a claim. *Johnson v. Wis. Elections Comm'n*, 967 N.W.2d 469, 485–88 (Wis. 2021); *see also Harper*, 868 S.E.2d at 587–88 (Newby, C.J., dissenting) (explaining why the principles of free speech and assembly do not provide for a partisan gerrymandering claim rooted in such principles).

3. The *Rucho* Court succinctly explained why any partisan gerrymandering claim rooted in Section 1 principles fails: "[T]here are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district." *Rucho*, 139 S. Ct. at 2504. Without restrictions, Plaintiffs' Section 1 rights are simply not implicated. *See also Johnson*, 967 N.W.2d at 487. And

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although Plaintiffs attempt to invoke Kentucky's Section 1 employment discrimination framework to govern their Section 1 retaliation claim, Pls.' Opening Br. 60–61, "it is apparent that a person of ordinary firmness would not refrain from expressing a political view out of fear that the General Assembly will place his residence in a district that will likely elect a member of the opposing party." *Harper*, 868 S.E.2d at 452; *see also Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (noting that one of the elements of a First Amendment retaliation claim is that the complained-of action "would deter a person of ordinary firmness from continuing to engage in that conduct"). No Plaintiff testified to the contrary.

But more importantly, the structure itself of the Kentucky Constitution demonstrates that a partisan gerrymandering claim cannot be grounded in free speech or assembly principles, or any of the other Kentucky Bill of Rights provisions Plaintiffs invoke for that matter. Section 33 of the Kentucky Constitution is the only provision that places constraints on the General Assembly's discretion to apportion, and it only restricts state house district apportionment at that. Sound constitutional interpretation counsels that the Framers of the Kentucky Constitution did not hide constraints on state apportionment in other general provisions. Commonwealth's Opening Br. 14, 24–29. Moreover, Section 33 explicitly and textually assigns state apportionment to the General Assembly. Prohibiting a political body from considering partisan interests in apportionment would fail to respect this structural decision of the Framers. *Id*. at 15–16, 44–45; *cf. Jensen*, 959 S.W.2d at 776. Nor would Plaintiffs' asserted Kentucky Bill of Rights claims respect Kentucky's districting system.

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Commonwealth's Opening Br. 30. And such claims improperly require the Kentucky Court of Justice to engage in policymaking. *Id.* at 31–33.

* * *

Again, one flawed split decision from North Carolina is all Plaintiffs can rely on to support their assertion of partisan gerrymandering Section 1 claims. In the face of all of the authority to the contrary, Commonwealth's Opening Br. 14–16, 24–33, 44–45, 67–69, Plaintiffs' Section 1 claim must fail.

VI. Plaintiffs' Section 2 claim fails.

Much like before, Plaintiffs fail to cite to any authority whatsoever for their assertion that Section 2 should apply to render HB 2 and SB 3 unconstitutional.

1. Section 2 of the Kentucky Constitution does not operate to render unconstitutional legitimate exercises of General Assembly discretion. *City of Lebanon v. Goodin*, 436 S.W.3d 505, 516–19 (Ky. 2014). As just explained, the structure of the Kentucky Constitution and the decision of the Framers to place apportionment in the hands of the General Assembly is proof that the General Assembly, Kentucky's policymaking body, has full discretion over apportionment, subject only to the Kentucky Supreme Court's dual mandate Section 33 test for state apportionment. Commonwealth's Opening Br. 14–16, 24–33. Not only that, but Kentucky precedent supports the notion that courts do not inquire into whether the General Assembly entertained partisan interests in apportioning representation. *See, e.g., Jensen*, 959 S.W.2d at 776 (rejecting complaint about consideration of partisan interests in state apportionment); *Stiglitz*, 40 S.W.2d at 321 (implicitly acknowledging that

consideration of partisan interests in state apportionment is permissible); *Watts*, 355 S.W.2d at 658–59 (refusing to limit the General Assembly's discretion in apportioning Congressional representation); *Richardson*, 108 S.W. at 323 (same).

2. Plaintiffs make a number of assertions that are irrelevant and are not supported by the record.

First, Plaintiffs criticize the aesthetics of SB 3. Pls.' Opening Br. 56, 61–62. But as the Kentucky Supreme Court has explicitly noted, the Kentucky Constitution is not concerned with such considerations. *Carter*, 355 S.W.2d at 659 (speaking for the Court, Justice Palmore noted that the Court "cannot hold that the legislative discretion in this regard is limited by considerations purely esthetic").

Second, Plaintiffs claim, without support, that HB 2 and SB 3 will "mak[e] the will of the voters of Kentucky subservient to the desire of the Republican supermajority to be re-elected, in perpetuity." Pls.' Opening Br. 61. But voting preferences in Kentucky are not stagnant, VR 4-6-2022 at 4:50:56–51:20, and Republicans were able to obtain supermajorities under apportionment plans chiefly architected by Democrats for *their* own partisan advantage. VR 4-5-2022 at 4:31:50–44:40, 5:09:10–10:50, 5:25:50–37:51, 5:45:10–48:23 (evidence of gerrymandering by Democratic Party in 2013 State House map); *see also* 5:42:00–44:50 (evidence of gerrymandering by Democratic Party in 2012 Congressional map).[10]

[10] Plaintiffs' reference to "in perpetuity" follows from Caughey's assertion that the so-called efficiency gap he parroted from PlanScore is "durable." This underscores only how little expertise Caughey and PlanScore brought to bear here, since PlanScore itself found that the 2014 map for the General Assembly was well-balanced, with an

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Third, as highlighted before, Plaintiffs mischaracterize Robinson's testimony when they assert that the configuration of SB 3 "will sever important community ties built over the years between Frankfort's civic organizations and federal representatives who live near them." Pls.' Opening Br. 61. Robinson said nothing of the sort. She merely discussed how effective Representative Barr was at assisting women's shelters in Franklin County and how she "didn't know how" a representative from, for example, Paducah, could have "as easy of an effective relationship." VR 4-6-2022 at 4:46:35–4:50:02. This is a far cry from asserting that Frankfort's civic organizations will be completely cut off from effective Congressional representation, which is also complete speculation. Plaintiffs also make this assertion disingenuously because at the same time that they criticize the configuration of SB 3 as partisan for allegedly having benefitted a Franklin County resident, that Franklin County resident will likely be representing them in Congress.

Finally, Plaintiffs disagree with the General Assembly's public policy choice to adhere to Kentucky's historical Congressional district configuration. Pls.' Opening Br. 27, 56, 61–62. Plaintiffs say that "SB 3 redraws the first Congressional district to wind across hundreds of miles from Franklin to Fulton County." *Id*. at 27 (quoting Governor Beshear's veto message). Not true. The First District is a natural extension of a plan in place since the mid-90's. While honoring the historical configuration, the

efficiency gap of near zero. Commonwealth's Exhibit 27. Even so, in just two election cycles, that map produced a supermajority for Republicans (64-36) that was due solely to shifting voter preferences. Commonwealth's Exhibit 1, Tab 27 (2017 General Assembly Directory Showing a 64-seat Republican majority in the House).

General Assembly also improved the overall compactness of five out of six districts and maintained the cores of existing districts, all with better population statistics than any of Imai's simulations are even capable of creating. *See* VR 4-7-2022 at 10:25:06–27:06, 10:39:40–42:32, 10:54:38–58:02 (Commonwealth's expert Sean Trende explaining how SB 3 tracks the historical progression of Kentucky's Congressional districts); Commonwealth's Exhibit 30 at 7–14, 38–41 (same); Commonwealth's Exhibit 32 at 10–15 (Voss's expert report demonstrating the same); Commonwealth's Exhibit 32 at 6 & Table 2 (Voss noting that "every other Kentucky congressional district becomes more compact under the enacted plan than it was during the last decade"); VR 4-5-2022 at 11:50:26–52:50, 3:17:48–18:52; VR 4-7-2022 at 2:57:08–59:49.

Plaintiffs say that it was unnecessary to put Franklin County in the First Congressional District "even if the legislature wanted to keep the core of the existing 2nd District intact." Pls.' Opening Br. 56, 61–62. But Plaintiffs never identify what they believe "the core of the existing 2nd District" to be, so it is impossible to know the effects of the proposed Second Congressional District they envision. Indeed, since Plaintiffs have not proffered a suggested alternative Congressional plan, it is easy for them to criticize isolated SB 3 decisions made by the General Assembly at the same time that Plaintiffs evade any real scrutiny for the mapmaking choices they would make and the effects of those choices. Plaintiffs complain that "more than a dozen counties" were somehow "sacrificed", all "in service of the map drawer's partisan

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aims."[11] Pls.' Opening Br. 30. Plaintiffs do not identify the "more than a dozen counties" but continue by claiming that Franklin, Anderson, and Washington counties "bear the brunt of SB 3's malfeasance." *Id.* But Plaintiffs cite to nothing in the record to support their assertion that placing these counties in a different Congressional district would yield better partisan results for them. *See* VR 4-7-22 at 10:48:12–53:14 (outlining how one in seven of Imai's simulated maps would elect six Republicans to represent Kentucky in Congress and how *none* of Imai's maps would be expected to yield a four-to-two Republican-to-Democrat Congressional delegation). Plaintiffs complain that driving end-to-end of the First District would take four and a half hours (an addition of 30 minutes over the First District in the 2013 map). Pls.' Opening Br. 27. But this is irrelevant to the issue before the Court. Our constitution does not contain timed travel requirements to pass constitutional muster.

Population shifts throughout the Commonwealth meant that Congressional districts had to be altered. Commonwealth's Exhibit 1, Tab 16; Joint Mot. Dismiss at 3–4, filed on 02/04/2022. All of Plaintiffs' arguments perfectly capture the problem

[11] A bizarre statement, considering that the current configuration was a product of Democratic partisan politics, intended in part to insulate William Natcher, a Democrat, from competition. *See* 01/05/22 Kentucky Senate State & Local Government Committee Hearing at 11:43:50–11:47:20, available at https://www.ket.org/legislature/archives/?nola=WGAOS+023003&stream=aHR0cHM6Ly81ODc4ZmQxZWQ1NDIyLnN0cmVhbWxvY2submV0L3dvcmRwcmVzcy9fZGVmaW5zdF8vbXA0OndnYW9zL3dnYW9zXzAyMzAwMy5tcDQvcGxheWxpc3QubTN1OA%3D%3D; 01/07/22 Kentucky House Elections, Constitutional Amendments & Intergovernmental Affairs Committee Hearing at 12:02:40–12:15:15, available at https://www.ket.org/legislature/archives/?nola=WGAOS+023015&stream=aHR0cHM6Ly81ODc4ZmQxZWQ1NDIyLnN0cmVhbWxvY2submV0L3dvcmRwcmVzcy9fZGVmaW5zdF8vbXA0OndnYW9zL3dnYW9zXzAyMzAxNS5tcDQvcGxheWxpc3QubTN1OA%3D%3D.

with Plaintiffs' entire lawsuit. No matter how the General Assembly apportioned Kentucky's State House and Congressional maps, someone was likely to be unhappy. Indeed, the League of Women Voters believed that the fairest Congressional map would put Franklin County in the Fourth Congressional District with Northern Kentucky. League of Women Voters of Kentucky, *Statement of President Frances Wagner on the Release of Recommended Maps for Kentucky Redistricting*, (Dec. 6, 2021) available at: https://perma.cc/ZY6R-AHSQ. This would seem to pose the same problem for Plaintiffs who complain of being put in a district with individuals "with whom they have little in common." Pls.' Opening Br. 61. Simply put, Plaintiffs would have been unhappy in any district other than the Sixth Congressional District. But they have no constitutional right to remain there. Even worse, Plaintiffs ignore the effects on other Kentucky counties and their Congressional district placement if the General Assembly is forced to retain Franklin County in the Sixth Congressional District.

The General Assembly was entitled to adhere to the historical configuration of Kentucky's Congressional Districts. VR 4-7-2022 at 10:25:06–27:06, 10:39:40–42:32, 10:54:38–58:02 (Commonwealth's expert Sean Trende explaining how SB 3 tracks the historical progression of Kentucky's Congressional districts); Commonwealth's Exhibit 30 at 7–14, 38–41 (same); Commonwealth's Exhibit 32 at 10–15 (Voss's expert report demonstrating the same). Not only that, on balance, SB 3 favors compactness. Commonwealth's Exhibit 32 at 6 & Table 2 (Voss noting that "every other Kentucky congressional district becomes more compact under the enacted plan than it was

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during the last decade"). And for good measure, not one precinct in HB 2 is split, compared to HB 191 which splits 24. Commonwealth's Opening Br. 65–66. It would be untenable to hold that either apportionment plan here is unconstitutional under Section 2.

* * *

No Kentucky court has ever struck down an apportionment plan under Section 2 of the Kentucky Constitution, or any other provision within the Kentucky Bill of Rights for that matter. This Court need not be the first because the General Assembly did not arbitrarily exercise its duly authorized discretion in configuring HB 2 and SB 3.

VII. Plaintiffs failed to prove "extreme partisan gerrymandering."

From the start of this case, Plaintiffs have claimed that the General Assembly engaged in "extreme partisan gerrymandering" in their enactment of HB 2 and SB 3. Compl. ¶¶ 1, 5. But Plaintiffs have failed to meet their burden of proving any such thing. In fact, apparently everyone agrees that Republicans will increase their numbers in the state House in the upcoming election. The only question is by how much.

Republicans currently hold 75 seats in the House of Representatives. HB 2 is likely to deliver a modest number of additional seats to the Republican Party—something that should be unsurprising to even the most casual observer of Kentucky politics in the past decade. VR 4-5-2022 at 4:47:55–58:16 (discussing candidate quality, the impact on the party holding the White House in off-year elections, and

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the downward trajectory of the KDP since 2016); VR 4-6-2022 at 3:40:36–41:34, VR 4-5-2022 at 5:16:35–17:48 (PlanScore predicting that HB 2 would yield 80 Republican seats in the House and that HB 191 would yield 76 Republican seats in the House); VR 4-5-2022 at 1:40:55–41:20, 3:21:22–22:24 (Imai's simulations producing 76 districts that should expect a democratic vote share at least below 49%); VR 4-5-2022 at 1:41:20–42:40, 3:24:00–25:20 (Imai's maps yielding on average a 43% Democratic vote share, and a Republican representative, for the district containing Franklin County and an expected five-to-one Republican-to-Democrat Congressional seat vote share).

Instead, Plaintiffs insist that because the General Assembly is currently controlled by the Republican Party that, *ipso facto*, the Republican Party is benefited by HB 2 and SB 3. Not so. Plaintiffs complain that HB 2 and SB 3 were drawn up "behind closed doors" to "maximize their partisan advantage" and that the bills were "kept from the public until the last possible moment." Pls.' Opening Br. 4. But these complaints are hollow and have no legal force. In reality, HB 2 and SB 3 are the result of the regular process for drafting and introducing apportionment bills.[12]

[12] Something that at least one Plaintiff has acknowledged. "Guest columnist: Public involvement could play a part in redistricting process", by Mary Lynn Collins, available at https://perma.cc/VTX4-B3P2 (Sept. 30, 2021) ("In the past, redistricting has often been done behind closed doors, often in the dead of night."); *see also* VR 4-5-2022 at 4:56:20–50 (Hieneman acknowledging that the apportionment process when Democrats were in charge of the General Assembly followed a similar track as the creation of HB 2).

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Take the last redistricting cycle as an example. In 2012, the House leadership, then controlled by Democrats, introduced 2012 HB 1 on the very first day of session. 2012 HB 1 passed the House 9 days later, on January 12.[13] No public hearings were held.[14] And 2012 HB 1 passed the House along party lines.[15] The Senate passed 2012 HB 1 on January 18, and Democratic Governor Beshear signed the apportionment plan into law on January 20. A total of 17 days passed from the date the bill was introduced to the date it was signed into law.[16] After 2012 HB 1 was invalidated in February 2012 for failing to abide by the simple dual mandate, the Governor failed to call a special session in 2012 and the General Assembly failed to consider a new apportionment plan during its next regular session.

The General Assembly only went back to work on a new House apportionment plan at a special session in August 2013. 2013 HB 1 followed a similar path as its predecessor. 2013 HB 1 was introduced on August 19, 2013 and passed both chambers

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[13] The legislative history for 2012 HB 1 is available at https://apps.legislature.ky.gov/record/12rs/hb1.html.

[14] League of Women Voters, "KY League Releases Report on Redistricting" February 15, 2018, available at https://perma.cc/9E7M-5DC4 ("The last redistricting process was also rushed, with bills moving so quickly that citizens had little chance to participate. The 2012 redistricting bills for the state House and Senate were written, amended, voted on by both houses, and signed by the governor in the first 18 days of the regular session").

[15] The vote history for 2012 HB 1 is available at https://apps.legislature.ky.gov/record/12rs/hb1/vote_history.pdf.

[16] The legislative history for 2012 HB 1 is available at https://apps.legislature.ky.gov/record/12rs/hb1.html. Ultimately, 2012 HB 1 was invalidated because it split 28 counties, even though the minimum number of split counties allowable by the Constitution in the 2012 apportionment cycle was 24. *Fischer IV*, 366 S.W.3d at 911–12.

on August 23—five days later.[17] Again, no public hearings were held.[18] Plaintiffs make no showing of any constitutional or statutory obligation for the General Assembly to follow a different process. And they point to no legal significance to the process they embraced when they were in control but now find objectionable.

HB 2 and SB 3 are a product of the normal legislative process of reapportionment. In fact, the record demonstrates that SB 3 is simply an extension of the historical progression of Kentucky's Congressional map since 1992. For its part, HB 2 is no more partisan than the law it replaced.

In an attempt to prove that HB 2 constitutes an "extreme partisan gerrymandering," Plaintiffs proffer essentially three sets of evidence: (1) Imai's simulations, (2) Caughey's PlanScore "analysis," and (3) Hieneman's lay witness examination of HB 2. As for SB 3, Plaintiffs rely on Imai's simulations only.

A. Lay witness evidence about HB 2.

Plaintiffs complain that the aesthetics of HB 2 must be indicative of extreme partisan gerrymandering. Pls.' Opening Br. 46–52. The Court can look for itself at

[17] The legislative history for 2013 HB 1 is available at https://apps.legislature.ky.gov/record/13ss/hb1.html.

[18] League of Women Voters, "KY League Releases Report on Redistricting" February 15, 2018, available at https://perma.cc/9E7M-5DC4 ("The 2013 special session lasted just five days. Moving that quickly meant a bare minimum of committee meetings, no public hearings and no opportunity for public input. This lack of transparency invites a lack of confidence and allows voters to wonder whether they are choosing their legislators or legislators are choosing their constituents.").

and compare HB 2,[19] HB 191,[20] and the 2013 State House map.[21] Who can possibly say which map is more aesthetically pleasing? In any event, as Justice Palmore wisely noted, aesthetics do not matter. *Carter*, 355 S.W.2d at 659. And as the Commonwealth has already outlined, Plaintiffs' attempt to point to HB 2's configuration of selected cities as somehow indicative of "extreme partisan gerrymandering" fails. Commonwealth's Opening Br. 46–51, 56.

Take first Plaintiffs' complaint about Bowling Green. Plaintiffs assert that "the City of Bowling Green has historically been wholly within the 20th legislative district." Pls.' Opening Br. 46. By what metric? The Court can see for itself how the 2013 State map treated Bowling Green, and the sneak peek is that Bowling Green was not even close to "wholly within the 20th legislative district."[22] Moreover, Plaintiffs' complaint about HB 2 "cracking" the City of Bowling Green perfectly captures how subjective their argument is. Just look at how HB 191 and the 2013 State House map "crack" Bowling Green. Commonwealth's Opening Br. 47–48. Not only that, but it is actually HB 191 that is arguably a gerrymander, as it creates two safe seats, one for Republicans and one for Democrats, against the 2013 State House

[19] Available at https://davesredistricting.org/maps#viewmap::8eed4db7-46cd-4e09-a179-c0a7e821a963.
[20] Available at https://davesredistricting.org/maps#viewmap::4db76010-8b41-4dd1-87b0-ee2ed6718fd2.
[21] Available at https://davesredistricting.org/maps#viewmap::d67e61e7-6983-46ff-8dea-db089d78af65.
[22] In viewing the 2013 State House Map at https://davesredistricting.org/maps#viewmap::d67e61e7-6983-46ff-8dea-db089d78af65, if the Court opens the "Overlays" Tab on the left-hand side of the map screen, the Court can choose "City Lines" and see for itself how many districts the City of Bowling Green lies within under that map (it is 6).

map and HB 2 that contain heavily Republican districts and one competitive district. Commonwealth's Opening Br. 48. These sorts of problems exist with every single one of Plaintiffs' attacks on the configuration of cities under HB 2.

Look at Plaintiffs' attack on HB 2's configuration of Covington next. Again, their aesthetic attack on the look of Covington is completely subjective and self-evident. *Compare, supra,* FNs 19, 20, and 21. Not only that, but HB 2 and HB 191 treat Covington in the exact same way—one competitive and two safe seats for Republicans. Commonwealth's Opening Br. 48–49. And as before, Plaintiffs' aesthetic and political complaints about the cities of Erlanger and Florence make no sense. Plaintiffs have not articulated a way to configure Erlanger and Florence to make any district encompassing them politically competitive for Democrats. Commonwealth's Opening Br. 49. This same oddity exists in Plaintiffs' aesthetic and political complaints about Georgetown. The configuration of Georgetown within the 2013 State House map awards Republicans three safe seats. Commonwealth's Opening Br. 49. But both HB 2 and HB 191 contain a safe Republican seat and a competitive one, with the competitive seat in HB 2 actually being *more* competitive than the one in HB 191. Commonwealth's Opening Br. 49–50.

As for Hopkinsville, Hieneman admitted that HB 2's splitting of Hopkinsville into only two districts is an improvement upon the 2013 State House map. VR 4-5-2022 at 5:37:31–51. Although HB 191 creates a competitive district out of the two districts over which Hopkinsville is split, that district still leans Republican. Commonwealth's Opening Br. 50. And as for the configuration of Richmond, both the

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2013 State House map and HB 191 should likely result in a Republican victory there. Commonwealth's Opening Br. 50.

Plaintiffs appear to criticize the aesthetics of other areas of HB 2. Pls.' Opening Br. 34–36. But by what metric are the aesthetics of HB 191 better, and what do aesthetics alone tell a map viewer?[23] Plaintiffs specifically point only to HB 2's configuration of districts surrounding and encompassing Pike County as somehow evidence of partisanship in the configuration of HB 2. Pls.' Opening Br. 36. Yet, similar to Plaintiffs' baffling argument about Erlanger and Florence, a brief look at HB 191 on Dave's Redistricting reveals that the districts encompassing and surrounding Pike County are all expected to handily vote Republican.[24]

And population changes required the new districts to be drawn as they are. For example, Plaintiffs complain about Districts 29, 33, 36, 37, and 48. But District 29 had a population deviation of +7.16% following the 2020 census. Commonwealth's Exhibit 1, Tab 14. It was required to shed population. The same was true for District 33, with a population deviation of +5.19%, for District 36, with a population deviation of +24.98%, and for District 48, with a population deviation of +8.50%. *Id*. Conversely, District 37 could accept population, as its population variance was -4.19%. *Id*. These

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[23] *See generally* HB 191 on Dave's Redistricting, available at: https://davesredistricting.org/maps#viewmap::4db76010-8b41-4dd1-87b0-ee2ed6718fd2.

[24] Scrolling down to the "Composite 2012–2019" data in the data box on the right side of the map screen shows that a Republican would be expected to win any district in the region by roughly a two-thirds majority. HB 191 on Dave's Restricting available at: https://davesredistricting.org/maps#viewmap::4db76010-8b41-4dd1-87b0-ee2ed6718fd2.

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population shifts necessitated new district lines which by and large preserved the cores of existing districts. For instance, District 36 (formerly District 10) maintained the same county boundaries, shedding its more populous interior precincts. District 33 maintained its extension into Oldham County, adding a portion of Shelby County out of population necessity (Shelby County, for the first time, exceeded the ideal population, requiring a county split).[25] District 48 remains largely unchanged from the prior apportionment map; it previously extended into Oldham County, and still does, just a different part. The political make-up of Oldham County has not changed; it was and remains a Republican stronghold. District 37 remedied a prior badly drawn district, reuniting communities of interest along the Bullitt County line. And District 29 was drawn to accommodate the population changes in Districts 36 and 37, expanding east and into more Republican areas out of necessity. And as for Plaintiffs' enduring concern for the sanctity of the Watterson Expressway in Jefferson County, nearly every complained of district that crosses I-264 now also did so under the 2013 apportionment plan. *See* Pls.' Opening Br. 55–56. In reality, Plaintiffs are simply dissatisfied with where the 2022 General Assembly chose to draw the district boundary lines. Their dissatisfaction is no reason to invalidate two lawful apportionment plans.

Finally, Plaintiffs inexplicably complain about the fact that the same number of Republican incumbents were pitted against the same number of Democratic

[25] The splitting of Shelby County, which was necessary, allowed for preservation of a distinct community of interest straddling the Shelby-Oldham county line. VR 4-5-2022 at 3:04:38–06:26.

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incumbents. Pls.' Opening Br. 55–56. But where is the partisan advantage in an apportionment plan that pits the same number of Republicans against each other as it does Democrats? And to the extent that Plaintiffs assert that the Republicans were matched because of population changes while the Democrats were matched unnecessarily, their real complaint seems to be that HB 2 provides less protection for incumbents than they would prefer. Again, whether and to what extent the General Assembly chooses to protect incumbent members in redistricting is a matter left to the exclusive discretion of the General Assembly. Plaintiffs' complaint amounts to nothing more than the proposition that they would have made different choices.

In sum, Plaintiffs' attacks on the aesthetics of HB 2 are completely subjective, and Plaintiffs have failed to prove that HB 2's configuration of the cities they complain about result in any real partisan advantage, let alone an "extreme" one. Plaintiffs have not demonstrated that HB 2 is an extreme partisan gerrymander, if such a thing were even actionable under Kentucky law.

B. Caughey

Following their lay witness testimony, Plaintiffs offered Devon Caughey, PhD as an expert witness. The first problem with Caughey's testimony is that Caughey did not offer even a scintilla of relevant and reliable expertise—a significant problem for an expert witness. *See* KRE 702 (Only "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" will "a witness [be] qualified as an expert[.]"). Instead, the only testimony about alleged "extreme partisan gerrymandering" in HB 2 that Caughey

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relayed was what a public website called PlanScore told him. VR 4-6-2022 at 10:33:14–28, 1:29:40–32:50, 1:35:15–37:25, 1:40:04–15. And that website, PlanScore, does not require expertise to use. In fact, PlanScore prides itself on being publicly available and extremely user-friendly to the average person. VR 4-6-2022 at 10:42:08–43:17, 2:56:20–3:00:19, 3:01:00–08:28; Plaintiffs' Exhibit 6. So at best, Caughey is a messenger who relayed information that any lay witness could have relayed just as well. For all of these reasons, as well as those advanced in the Commonwealth's Opening Brief at 52–57, the Court should give Caughey's testimony very little weight for its failure to meet the requisites of KRE 702. *City of Owensboro v. Adams*, 136 S.W.3d 446, 449–52 (Ky. 2004) (outlining the applicability of KRE 702 to bench trials and noting that expert testimony can still be disregarded in a bench trial for failing to meet the KRE 702 requisites).

Moreover, Caughey's professional background in no way qualified him to serve as an expert witness for Plaintiffs' claims. Take Caughey's history of publications. *See* Pls.' Opening Br. 18. Less than a handful of his publications concern topics germane to his offered testimony. *See* Pls.' Exhibit 5 at 2–7; VR 4-6-2022 at 10:29:20–32:30. While Caughey claims to know and work closely with one of PlanScore's founders, Christopher Warshaw, that is not the same as being an expert in his own right. Moreover, through Caughey's alliance with Warshaw, Caughey has reviewed the under-the-hood code employed by PlanScore, *see* Pls.' Opening Br. 21—relevant evidence which Caughey withheld from the Commonwealth and its experts after the

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Commonwealth properly propounded discovery on the Plaintiffs seeking that very code.

And Caughey's impartiality in this case is questionable at best. He has only ever testified on behalf of Democrats. VR 4-6-2022 at 11:00:50–01:05. So it makes sense that he would use a website like PlanScore, which has deep-rooted connections to the Democratic Party and its cadre of hired experts in partisan gerrymandering cases. VR 4-6-2022 at 10:48:46–49:15, 1:06:57–27:30. But PlanScore is an unreliable partisan tool. A peer-review of PlanScore could possibly quash such indications of bias, but there is no evidence of such a review ever having been done with respect to the objectivity and reliability of PlanScore. VR 4-6-2022 at 3:47:50–52:55. At bottom, PlanScore is a recently developed website that has not been peer-reviewed. It has not been tested, validated, or vetted, not by Caughey or any other witness testifying at trial in this case. PlanScore doesn't even find itself reliable, reporting only a 68% confidence rating for its "projections." VR 4-6-2022 at 11:07:20–08:50, 1:46:56–50:25; Commonwealth's Exhibit 15 at 6. As the Commonwealth showed in its opening brief, PlanScore reports multiple results on the same redistricting plan depending on the model used. Commonwealth's Opening Br. 55–57. PlanScore, and Caughey's testimony based on it, is not a reliable, scientific tool upon which this Court, or any Court, should ever rely.

Even without its political bias, PlanScore is plainly unreliable, especially in its application to this case. *See* KRE 702 (Expert witness testimony must be "the product of reliable principles and methods" and must be "applied . . . reliably to the facts of

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the case."). Caughey repeatedly demonstrated that he knows nothing about Kentucky politics or Kentucky's political geography. VR 4-6-2022 at 10:30:42–31:38, 10:34:34–35:40, 1:22:38–24:10, 1:31:21–31:55, 1:42:13–21, 1:53:00–30, 2:49:40–50, 2:55:17–56:26, 3:09:32–17:32, 3:34:35–38:42, 3:45:10–47:30, 4:01:40–03:05. Plaintiffs note that Caughey criticized the sharp drop in his declination graph caused by Districts 40, 41, 42, 43, and 44 in Louisville's West End. Pls.' Opening Br. 22–23. Apparently blind to reality, neither Caughey nor PlanScore have an answer for how some districts that Caughey identifies as "most partisan" have to be drawn that way based on Kentucky's natural geography. VR 4-6-2022 at 3:13:00–15:45 (discussing Districts 42 and 43, located in Louisville's West End, bounded on two sides by a river, and functionally incapable of being drawn any less Democratic), 3:34:45–38:08. In sum, instead of considering state-specific election nuances, PlanScore attempts to predict the amount of partisanship in a map by focusing on national elections and comparisons between states with different data. VR 4-6-2022 at 1:43:52–44:40; *see also* VR 4-7-2022 at 11:03:00–04:32 (expert testimony about partisan fairness metrics paying no attention to the underlying geography of a state); Commonwealth's Exhibit 32 at 22 (expert testimony about the efficiency gap failing to consider political geography). In doing so, PlanScore compares apples to oranges. In fact, Imai testified that traditional partisan bias metrics, like partisan symmetry, partisan fairness, the efficiency gap, and declination should not be compared across states or even within a state compared to itself over time. *See* VR 4-5-2022 at 10:38:28–40:44.

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Caughey's PlanScore "analysis" becomes even more incredible when reviewed closely. PlanScore also does not account for state-specific redistricting laws in analyzing an apportionment plan. VR 4-6-2022 at 3:38:15–42. Nor does PlanScore, or Caughey for that matter, consider specific nuances about Kentucky elections and politics. VR 4-6-2022 at 10:30:40–31:05, 10:34:00–35:42; *see* KRE 702 (Expert testimony must be "based upon sufficient facts or data."). PlanScore then compiles and compares various partisan metrics and spits out a plan-specific report. The end game of PlanScore is to generate some sort of quantitative metric for analyzing an apportionment plan's partisanship. Here, those two metrics are the efficiency gap and the declination, which are the only two available metrics "in states that aren't extremely competitive" like Kentucky. VR 4-6-2022 at 10:49:44–50:08. But PlanScore's own creators, Caughey himself, and many other scholars refute the veracity of the efficiency gap and declination as reliable diagnostic tools for detecting partisan gerrymandering in uncompetitive states like Kentucky and in predicting sustainable party advantage under an apportionment plan. VR 4-6-2022 at 2:14:50–20:35, 2:28:20–53:46, 3:55:05–57:30; Commonwealth's Exhibit 18; Commonwealth's Exhibit 24. This includes Plaintiffs' other expert witness, Kosuke Imai. VR 4-5-2022 at 10:38:28–40:44. The efficiency gap, for example, is "too easily fooled" in part because it cannot detect when a partisan divide is caused intentionally or, like in Kentucky, by natural geography. VR 4-6-2022 at 2:36:08–42:46; VR 4-7-2022 at 10:59:45–11:10:27. And declination, for example, cannot screen for basic and

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traditional redistricting criteria, like compactness or political geography, and purely looks to the partisan effects of a map. VR 4-6-2022 at 2:52:10–53:46.

PlanScore (and, because he simply parroted Plan Score's findings, Caughey) relies on metrics like the efficiency gap and declination, but both metrics deliver absurd results. They disfavor competitive districts and amount to mandating proportional representation, something neither the federal nor the Commonwealth's constitution calls for. Not only that, but depending on the election data used, the models yield entirely distinct results. The efficiency gap and declination are not reliable and do not accurately detect partisan gerrymandering. Perhaps that is why Justice Roberts referred to metrics like these as "sociological gobbledygook."[26]

Finally, further analyzing Kentucky's partisan make-up, Caughey criticizes Kentucky for having an inherent partisan advantage for Republicans. *See* Pls.' Opening Br. 23 (noting that if Republicans won 50% of the statewide vote, Republicans could still expect to receive 60 seats in the House of Representatives). That criticism is nonsensical as it comports with the winner's bonus theory advanced by Caughey himself. VR 4-6-2022 at 11:11:55–18:50. Plaintiffs complain that future Kentucky elections will be won and lost at primary. Pls.' Opening Br. 24. This is not new. Plaintiffs complain that HB 2 does not afford the political parties of this state enough competitive elections. In the same breath, they advance an unreliable partisan fairness metric that would itself penalize those same competitive races, with

[26] Transcript of oral argument in *Gill v. Whitford*, 138 S. Ct. 1916 (2018), available at https://perma.cc/5S28-35XW at 40.

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close districts delivering high efficiency gaps and uncompetitive districts delivering low efficiency gaps. VR 4-6-2022 at 2:32:00–40:28. Too easily fooled indeed.

* * *

Caughey's testimony, and his reliance on PlanScore, fail to realize the political reality in Kentucky. What's clear is that Kentucky is a conservative state and its voters have been trending that way for a decade or more. Under HB 191—the map introduced by members of the Democratic Party—Republicans are expected to obtain 76 seats in the House (as opposed to 80 under HB 2, VR 4-6-2022 at 3:40:35–3:41:32), a slight uptick from the 75 seats they have now. VR 4-5-2022 at 5:16:35–17:50. Facts like the aforementioned suggest that HB 2 is a natural product of Kentucky-specific traits and not "extreme partisan gerrymandering."

C. Imai

Finally, Plaintiffs offered the expert testimony of Kosuke Imai, PhD. Plaintiffs paint Imai's work as objective and detached. It's anything but. A major problem with Imai's work for this case is that it is riddled with his own subjective value judgments and choices—as opposed to deferring to the policy makers who enact apportionment plans. *See* Commonwealth's Opening Br. 58–60. As for the constraints he chose to input for this case for his HB 2 analysis, Imai relied on Plaintiffs' flawed Section 33 interpretation, VR 4-5-2022 at 2:00:10–40; *see also* VR 4-5-2022 at 5:17:25–19:18 (Hieneman determining for himself what Section 33 requires without any legal opinion), and failed to consider a plethora of other traditional redistricting criteria

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and Kentucky-specific nuances, VR 4-5-2022 at 2:01:32–03:40, 2:18:57–23:15, 3:05:36–06:22. A more complete summary of Imai's methodology follows.

To create his ensemble for his HB 2 analysis, Imai used his Markov Chain Monte Carlo algorithm, which starts with a particular map and randomly merges and splits adjacent districts until the desired ensemble is created. VR 4-5-2022 at 10:40:43–42:54, 10:45:28–47. Imai instructed his MCMC algorithm to generate a total of 100 contiguous districts, set the population deviation to be +/-5%, and he instructed his algorithm to generate compact districts. He also instructed his algorithm to minimize the number of county boundary splits. In addition, Imai instructed his algorithm to have fewer districts with more than two counties and fewer counties with more than two districts. VR 4-5-2022 at 11:02:10–04:15. Though he testified that the input criteria have to be carefully chosen, VR 4-5-2022 at 1:55:47–56:03, Imai willfully ignored dozens of traditional redistricting criteria at the instruction of counsel, instead considering only a flawed legal analysis of what Section 33 of our Constitution requires. VR 4-5-2022 at 2:00:11–40 ("Yeah. So the interpretation of the section 33, I did … on Counsel."); VR 4-5-2022 at 2:01:32–03:40 (not considering race, communities of interest, where schools are, where churches are, where neighborhoods are, the locations of county seats, major transportation coordinators, natural boundaries like rivers or mountains, where incumbents or candidates live, preventing double bunking, continuity of representation, or core retention). More specifically, Imai instructed his algorithm to generate an ensemble using the following criteria: (1) a county split constraint at a level of ten; (2) a county multi-split avoidance

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constraint at a level of seven; and (3) a custom constraint at a level of ten. Imai could not explain the significance of a constraint level of 10 or 7, but he acknowledged that he alone chose those values to accomplish his desired end. VR 4-5-2022 at 1:57:37–2:00:11. Using these criteria, after burn-in and thinning, Imai analyzed the data for only 10,000 (out of an infinite number of those possible) simulated House district plans. VR 4-5-2022 at 11:05:58–07:05.

Once Imai generated his simulation ensemble, he began his analysis. He began with county splits. He confirmed that all of the simulated maps in his ensemble also have 23 split counties. Imai then turned to his analysis of multi-split counties, which further focused on how the split counties were split (i.e., was a split county split once, twice, etc). VR 4-5-2022 at 11:08:40–09:22. Imai testified that HB 2 has 18 counties that are split multiple times (into more than two districts) whereas his ensemble has 15 such counties, on average, with a range from 13-17. VR 4-5-2022 at 11:09:52–10:32. From this data, Imai opined that HB 2 "unnecessarily splits a greater number of counties into more than two districts." VR 4-5-2022 at 11:10:32–10:58. Similarly, Imai analyzed the number of House districts that include part of more than two counties. Imai opined that under HB 2 there are 31 districts containing more than two counties whereas under his simulated ensemble, there are 24 such districts, with a range from 21-30. VR 4-5-2022 at 11:11:40–12:28.

Plaintiffs report that Imai's analysis of HB 2 conclusively shows that HB 2 violates Section 33 and is an outlier in terms of multi-splits. Pls.' Opening Br. 6–7. Plaintiffs fail to acknowledge that Imai's own constraints, which relied on faulty legal

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analysis, forced this result. Additionally, Plaintiffs falsely assert that Imai's methodology takes into consideration a state's unique political geography. Pls.' Opening Br. 10. As was made clear on cross-examination, VR 4-5-2022 at 2:01:32–03:40, Imai considered precious little beyond his forced constraints. Finally, Plaintiffs falsely report that all of the simulated maps in Imai's simulation ensemble create 100 geographically contiguous districts with population deviation not to exceed +/-5% and minimize the number of county splits. *Id*. They omit the other extra-constitutional criteria with which Imai mandated compliance. Because Imai's entire simulation was generated using criteria that are not required by Kentucky law, it is unreliable, unrepresentative, and inconclusive. These faulty underpinnings undermine Imai's entire analysis and conclusion. For all of these reasons, as well as those advanced in the Commonwealth's Opening Brief at 57–63, the Court should give Imai's testimony very little weight for its failure to meet the requisites of KRE 702. *City of Owensboro*, 136 S.W.3d at 449–52.

And just like with his analysis of HB 2, Imai had to make subjective determinations about compactness and the preservation of historical configurations in conducting his analysis to obtain his ensemble results about SB 3. VR 4-5-2022 at 11:52:50–53:23, 11:57:20–28, 11:59:03–12, 3:07:56–09:05. To create his ensemble for his SB 3 analysis, Imai used his Sequential Monte Carlo algorithm, which starts from a blank slate and randomly generates districts according to certain predetermined criteria until one complete simulated map is created, and then the algorithm starts anew on the next simulated map. VR 4-5-2022 at 10:40:43–42:54, 10:45:28–47,

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11:49:51–50:25. Imai instructed his algorithm to consider two very basic constraints: contiguity and population equality. He instructed his algorithm to create six contiguous districts using an overall population deviation of +/-0.1%. VR 4-5-2022 at 11:50:25–58. Imai acknowledged that using a +/-0.1% population deviation would allow for a deviation in population between 700 to 800 people. VR 4-5-2022 at 11:50:58–51:25. Imai is not able to instruct his algorithm to generate districts with perfect equality. VR 4-5-2022 at 11:51:30–52:50. He instructed his algorithm to generate districts prioritizing compactness. VR 4-5-2022 at 11:52:30–53:22. Similar to his HB 2 analysis, for his SB 3 analysis, Imai culled his ensemble to 10,000 plans through burn-in and thinning. VR 4-5-2022 at 11:55:30–56.

Once Imai generated his simulation ensemble, he began his analysis of SB 3. Plaintiffs report that Imai "found that the 1st District in the enacted plan is less compact than districts containing Franklin County in more than 99% of the simulated plans generated without consideration of partisan interests." Pls.' Opening Br. 28. Narrowly focusing on the compactness of a single district ignores the bizarre, inexplicable, and unrealistic choices Imai's ensemble favors. For instance, consider Imai map 617 (Commonwealth's Exhibit 30 at 18). It creates lengthy districts similar to the ones Plaintiffs' complain about. Or Imai map 935 (Commonwealth's Exhibit 30 at 19), which splits Louisville, joining portions of Jefferson County with highly conservative Bullitt County (something Imai's simulations do nearly a third of the time). Imai map 385 (Commonwealth's Exhibit 30 at 20) does violence to nearly all six of Kentucky's Congressional districts by pairing Louisville and Bullitt counties,

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placing Scott County in a district with Bowling Green, and adding Lexington to the district that contains Bell County. In this map, Franklin County is paired with the northern Kentucky suburbs. Imai map 1367 (Commonwealth's Exhibit 30 at 24) again splits Louisville and adds part of Jefferson County to a district that winds down the long western border, joins Lexington in a district that touches the Tennessee border, and splits Eastern Kentucky in half. The bizarreness of Imai map 2052 (Commonwealth's Exhibit 30 at 28) speaks for itself. The examples are unrealistic and endless.

But Franklin County belonging to a more compact district is not what Plaintiffs' complain about or desire. They want to be in the Sixth Congressional District, and specifically one that includes Fayette County. Imai's ensemble routinely fails to deliver Plaintiffs what they want. *See* VR 4-7-2022 at 3:06:00–07:16; Commonwealth's Exhibit 32 at 9–10 (Voss report noting that Franklin County is separated from Fayette County and out of the Sixth Congressional District in 62.1% of Imai's simulations). Neither can this litigation redress Plaintiffs' alleged injury in that regard by mandating placement of Franklin County in the Sixth Congressional District. *See Jensen*, 959 S.W.2d at 773 (refusing to abide by the apportionment plan challenger's request to have the Court simply order that a different state apportionment plan be adopted, as that would violate the separation of powers); *Richardson*, 108 S.W. at 323 (refusing to review a challenged Congressional apportionment plan at all).

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In reality, SB 3, and all of the historical maps upon which it was based, are fully consistent with the U.S. and Kentucky Constitutions. The federal Constitution's only constraint on the General Assembly in reapportionment is near-exact population equality, *see Evenwel v. Abbott*, 578 U.S. 54, 59 (2016), which SB 3 provides. The Kentucky Constitution imposes no limitations on Congressional reapportionment. *Richardson*, 108 S.W. at 323. SB 3, and all of the historical maps upon which it was based, observe traditional redistricting criteria, and on balance introduce limited changes to the existing map.

The same cannot be said for Imai's SB 3 simulated ensemble. In fact, Imai expressly disregarded Kentucky's historical maps, implying that the historical maps are themselves gerrymanders. Plaintiffs cling to one aspect of the historical maps—the pairing of Fayette and Franklin County. Pls.' Opening Br. 28. They do so without realizing that reapportionment necessarily involves difficult choices. Plaintiffs only look to history when it helps them. They prefer Fayette and Franklin Counties being paired together, citing history, but ignore that doing so would require separating other historically joined counties and regions of the Commonwealth.

Concerning the partisan implications of HB 2 and SB 3, Imai admitted that, regarding his HB 2 analysis, 76 of his ordered districts should expect a Democratic vote share below 49%. VR 4-5-2022 at 1:40:55–41:20, 3:21:22–22:24. He had no idea how many Republicans currently hold seats in the House of Representatives. VR 4-5-2022 at 2:15:06–36. He also admitted that, concerning his SB 3 analysis, the average Democratic vote share for the simulated district containing Franklin County was 43%

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(as opposed to the 35% under SB 3).[27] VR 4-5-2022 at 1:41:22–42:38, 3:23:53–25:19. Not only that, one in seven of Imai's simulated maps would elect six Republicans to represent Kentucky in Congress, and *none* of Imai's maps would be expected to yield a four-to-two Republican-to-Democrat Congressional delegation. VR 4-7-22 at 10:48:12–53:14; Commonwealth's Exhibit 30 at 36–38. These conclusions do not support a finding of partisan bias. They support very little, if any, change in partisanship over the current reality. Results like these hardly prove "extreme partisan gerrymandering."

* * *

Plaintiffs fail to connect the dots. They allege that because Republicans are in control and because counties and cities are divided differently than they have been in the past that the endgame must be political advantage. They provide no evidence though to support their specious theory.

D. The Commonwealth's Experts

Contrary to Plaintiffs assertion that the Commonwealth did not offer expert testimony to rebut Imai's opinions about HB 2 being a gerrymander, Pls.' Opening Br. 17, the Commonwealth proffered two rebuttal expert witnesses on the third day of trial, Sean P. Trende and Dr. Stephen Voss. Both witnesses easily demonstrated the severe weaknesses in the Plaintiffs' proof, severely undermining Plaintiffs' experts' analysis and conclusions.

[27] Plaintiffs instead choose to focus on a subset of simulated maps that occur only one-third of the time—those maps that keep Fayette and Franklin Counties together. *See* Pls.' Opening Br. 29. But those maps are not the norm. Pls.' Exhibit 2 at 18.

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Sean Trende, a highly qualified elections analyst and avid student of Congressional redistricting, testified regarding Imai's simulation method. The Court qualified Trende as an expert in political science and gerrymandering. VR 4-5-2022 at 10:20:12–18. Trende testified that he was asked to review the work of Imai and Caughey. Commonwealth's Exhibit 30.

Beginning with Imai's SB 3 analysis, Trende used Imai's data to recreate Imai's simulations and generate visual representations of the redistricting plans in Imai's ensemble. VR 4-7-2022 at 10:25:00–26:04. Trende noted that Kentucky's Congressional districts "have retained, what we call district cores, the same basic idea that corresponds to Kentucky's political geographies since the '90s." *Id*. Having had prior experience studying Kentucky's historical Congressional maps, Trende readily observed the bizarre and inexplicable maps that Imai's simulation method produced. VR 4-7-2022 at 10:38:02–42:36, 10:54:38–58:04 (Trende explaining how SB 3 tracks the historical progression of Kentucky's Congressional districts); Commonwealth's Exhibit 30 at 7–14, 38–41 (Trende's expert report evidencing the same); Commonwealth's Exhibit 32 at 10–15 (Voss's expert report demonstrating the same). Imai's failure to account for this mapmaking principle, in part, led to the creation of "bizarre" and "inexplicable" comparison maps for which Imai generated partisanship data. VR 4-7-22 at 10:26:18–28:50, 10:36:20–37:08, 10:38:05–47:00; Commonwealth's Exhibit 30 at 14–35, Appendix A. Trende attributed the bizarre and inexplicable choices in Imai's ensemble to a defect in Imai's presuppositions: Imai didn't follow the same rules as the map makers. "[W]ith redistricting simulations, if

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you want to draw the conclusion that politics was responsible for the shape of the map, you really have to control for other considerations. You need to make sure that you're drawing from the same distribution or the same ideas the map makers had in mind, except without any political information plugged in." VR 4-7-2022 at 10:26:04–27:06. "If you don't have all the rules in place that the map makers were using, and those rules that you didn't include have political effects, then it might be the rules that you didn't include that are producing the results at hand." VR 4-7-2022 at 10:27:06–28:50. Without a one-to-one comparison on rules being considered by the map makers and the simulation algorithm, then "you don't have a representative sample," *id*., and any inferences drawn from the sampling are substantially weakened. VR 4-7-2022 at 10:36:21–37:08 (testifying that conclusions based on a unrepresentative sample of simulations would be unreliable); VR 4-7-2022 at 10:39:40–47:00 (testifying that the inference that politics is what explains the shape of the current Kentucky maps is substantially weakened).[28] As a result, Imai's algorithms generate simulations that fail to do the basic things that all of Kentucky's Congressional redistricting maps have done for over 40 years. *Id*. (concluding that Imai's simulations are not a representative sample of what a reasonable map drawer in Kentucky would draw when drawing without respect to politics). Regardless, even when not accounting for Kentucky's historical progression of Congressional districts, *on average*, the district containing Franklin County in Imai's Congressional district

[28] All of Trende's critiques are equally applicable to Imai's HB 2 analysis.

simulations yielded an uncompetitive Democratic vote share around 43%. VR 4-5-2022 at 1:41:22–42:38, 3:23:53–25:19.

Trende's simple point became even more evident when he froze the Second District as enacted in SB 3—exactly like Republican and Democratic map makers have done for over 40 years. VR 4-7-2022 at 10:54:38–55:48. The third map in Trende's ensemble produces a map nearly identical to SB 3. VR 4-7-2022 at 10:55:49–56:33. When this simple map drawing rule is respected, the partisanship of the district that includes Franklin County is well below where Democrats would ever reasonably expect to win an election. VR 4-7-2022 at 10:56:40–57:20.

Turning to Caughey's state House district analysis, Trende testified that the efficiency gap is unreliable because "in some states, the political geography just naturally results in a circumstance where it becomes hard to draw districts for one party or the other in certain regions." VR 4-7-2022 at 10:59:50–11:00:35. And Kentucky is one of them. VR 4-7-2022 at 11:00:35–01:46 ("This is a precinct map of Kentucky shaded red to blue, there's just these massive precincts covering most of the land area of the state where you just cannot draw Democratic districts. It's not that Democrats don't live there; you just can't draw a district that will tend to elect a Democrat to the State House. And so, all those votes for Democratic candidates are going to be wasted votes in those circumstances. . . But, you know, the vast land area of the state and most of the population of the state just lives in an area where it's hard to draw a democratic district[.]"). In fact, an efficiency gap of 13.4 in Kentucky is just what Trende expected to find. VR 4-7-2022 at 11:01:46–02:14. But, because

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partisan fairness metrics like the efficiency gap pay no attention to the underlying geography of a state, Trende testified they are of little use in a partisan gerrymandering analysis. VR 4-7-2022 at 11:03:00–04:26. To prove his point, Trende calculated the efficiency gap of all of Imai's simulated maps and compared it in relation to HB 2 across the field of election returns Imai averaged. He found that HB 2 and Imai's ensemble were fairly comparable under each election result. VR 4-7-2022 at 11:04:26–06:55; Commonwealth's Exhibit 30 at 44–48. And because the efficiency gap is a fragile metric, VR 4-7-2022 at 11:07:15–24, Trende perturbed (or adjusted the losing party's vote share incrementally) the election results to test the strength of his conclusion. After perturbing the election results 5% in each direction, Trende concluded that Kentucky's political geography just naturally wastes Democratic votes. VR 4-7-2022 at 11:10:08–14; Commonwealth's Exhibit 30 at 44–48. So, whatever large means for the efficiency gap metric in other states, it's just normal in Kentucky. VR 4-7-2022 at 11:10:20–26 ("And that just makes a large efficiency gap unremarkable, whatever large means.").

Concerning the partisan breakdown of Imai's simulated Congressional maps, Trende testified that SB 3 is predicted to elect 5 Republicans and 1 Democrat to Kentucky's Congressional delegation. VR 4-7-2022 at 10:48:12–51:14. He also testified that approximately one in seven of Imai's simulated maps would elect 6 Republicans to represent Kentucky in Congress. *Id*. None of Imai's maps would be expected to yield a 4-2 Congressional delegation. *Id*.

Having actually participated in drawing a redistricting map, VR 4-7-2022 at 10:15:20–17:02, (recall that Trende was appointed by the Virginia Supreme Court in 2021 to help create the reapportionment plans now in effect in that state) Trende noted how "intense" and "time-consuming" it is to draw sensible districts. He noted that "drawing them with the responsibility that they were going to be law was – actually surprised me how difficult it was." *Id*. Imai's simulation method, based on defining a few general parameters and running a mathematical algorithm, simply does not account for the real-world decision-making that goes into crafting a redistricting plan—Congressional or state—in Kentucky.

Dr. Stephen Voss, a highly qualified political methodologist and professor at the University of Kentucky, testified regarding Imai's simulation method and Caughey's conclusions. The Court qualified Voss as an expert in elections, Southern and Kentucky politics, and voting behavior. VR 4-7-2022 2:47:39–48:00. Voss testified that he was asked to review and respond to the work of Imai and Caughey and to assess the extent to which there were any errors or concerns with the methodologies employed. Commonwealth's Exhibit 32. He offered opinions on both the Congressional and state House redistricting plans enacted into law.

Voss began his testimony on the Congressional map, SB 3, by offering a simple proposition: "The vast bulk of [Imai's] simulations are no more favorable to the Democrats than the enacted plan." Commonwealth's Exhibit 32 at 5); VR 4-7-2022 2:52:43–56:03 ("People debate what they think partisan gerrymandering is, but one common definition is that the party drawing the maps tried to improve their situation

in terms of Congress. Imai's own simulations do not suggest that the Republicans improved their expected number of seats compared to what a typical map from his process would've done."). In other words, Voss testified that SB 3 is not a partisan gerrymander, because it fails the most basic definition of what a gerrymander is.

Similar to Trende, Voss criticized Imai's simulations for being unrealistic. Voss developed six criteria to streamline his analysis of Imai's ensemble. VR 4-7-2022 at 3:01:58–02:40. For example, Voss first looked at the "best" map for Democrats. VR 4-7-2022 at 3:02:41–03:07. But that map bisects Metro Louisville, carving off a heavily Democratic area (the West End and southwestern Jefferson County) and tacking it onto the Second District, which dilutes the black vote in Jefferson County. VR 4-7-2022 at 3:01:58–04:16. And where does Franklin County fall in that map? Outside the Sixth District (where Franklin County finds itself almost two-thirds of the time in Imai's ensemble), in the Fourth District. VR 4-7-2022 at 3:05:55–06:26, 3:06:38–07:00. From this, and other carefully selected maps, Voss ultimately concluded that there was no support, whatsoever, for the proposition that taking Franklin County out of the Sixth District represents a partisan gerrymander, because Imai's purportedly apolitical ensemble does it nearly two-thirds of the time. VR 4-7-2022 at 3:12:36–58.

And even though Imai's simulations produce the exact same partisan results as SB 3, Imai took a materially different path to create his ensemble. Namely, he allowed for a greater population variance than real plans typically do—0.1%. VR 4-7-2022 at 2:57:08–42. But this choice was a function of the method, not a necessary

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allowance that can or should be made. VR 4-7-2022 at 2:57:42–59:49 (explaining that Imai's algorithms cannot tolerate less than a .1% population deviation because the basic building blocks of the method are precincts, which cannot be split, resulting in less realistic maps).

Turning to Caughey's work, Voss analyzed HB 2. Voss explored the PlanScore model and replicated Caughey's analysis. VR 4-7-2022 at 3:19:46–20:20. Voss used the PlanScore website to assess the 2013 redistricting plan under which the current General Assembly was elected, the Democrats' proposed plan this cycle (HB 191), and the enacted plan (HB 2). *See* Commonwealth's Exhibit 22 (HB 2, new model); Exhibit 25 (2014 plan, new model), Exhibit 27 (2014-2020 plan report, old model), Exhibit 33 (HB 2, old model), Exhibit 34 (HB 191, new model), and Exhibit 35 (HB 191, old model); VR 4-7-2022 at 3:25:16–42:00. He ran each report using both the new and old model offered by PlanScore. Each model yields different results. After this exercise, what is clear is that, regardless of the plan or the model, Kentucky clearly has a baseline, unavoidable efficiency gap of at least 9.6%. Further, the estimated seat shares, regardless of the plan or model, demonstrate that Kentucky is a deeply Republican state that should expect to continue electing a Republican supermajority, regardless of where district lines are drawn.

While Plaintiffs were dismissive that Kentucky's political geography dictates the results identified by Plaintiffs' experts, *see* Pls.' Opening Br. 53, based on little more than a superficial mention in a book by a non-testifying author itself acknowledging the significance of political geography, Voss and Trende repeatedly

identified Kentucky's political geography as the key source driving the increased Republican seat share. Trende is a recognized national expert on voting and elections analysis. Voss is a self-declared Independent and essentially the dean of political science in Kentucky. Both agree that the residential patterns and physical geography of Kentucky (e.g., some 90% Democrat voters in Louisville's West End, physically constrained by the Indiana border and adjacent to other similarly Democratic neighborhoods) result in Kentucky's natural electoral advantage for Republicans. Indeed, the KDP itself must admit this, if only to itself, else its own plan for the General Assembly map, HB 191, would not display an efficiency gap of 10.7% (9.6% under the old PlanScore model). Commonwealth's Opening Br. 56. If it is mathematically impossible for Kentucky Democrats to elect representatives of their choice, *see* Pls.' Opening Br. 56, it is not because of HB 2 or SB 3. Both Plaintiffs' experts agree that Kentuckians should expect to be represented by no fewer than 76 Republicans in the next state House of Representatives and 5 Republicans in the Congressional Delegation. Thus, according to Plaintiffs' own experts, it is not mathematically possible, under *any* bill, for Kentucky Democrats to elect a significant number of representatives of their choice.

* * *

Overshadowing everything that Plaintiffs have attempted to offer this Court in support of their partisan gerrymandering theory of the case is the fact that Plaintiffs' own proof leads to results not much different from those of HB 2 and SB 3

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and yields nothing close to an "extreme" partisan advantage. Commonwealth's Opening Br. 55–57, 62–64.

CONCLUSION

The Commonwealth is entitled to judgment in its favor on all of Plaintiffs' claims and on the Commonwealth's cross-claim. The Court should dismiss Plaintiffs' claims with prejudice, enter judgment for the Commonwealth, and award the Commonwealth costs. CR 54.04.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 15, 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:

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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.

COMMONWEALTH OF KENTUCKY'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

On April 5-7, 2022, the Court held a bench trial at which the parties presented evidence on the Plaintiffs' claims. At the conclusion of the bench trial, the Court directed the parties to file post-trial opening briefs on May 16, 2022 and post-trial response briefs on June 15, 2022. The Court also directed the parties to contemporaneously file proposed findings of fact and conclusions of law. Consistent with the Court's direction, the Commonwealth tenders the following proposed findings of fact and conclusions of law for the Court's consideration:

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PROPOSED FINDINGS OF FACT

1. After receiving necessary Census data in late summer of 2021, the General Assembly undertook its constitutional duty of apportioning representation by enacting HB 2 and SB 3, and other statutes not at issue here, at its first opportunity in the 2022 legislative session.[1]
2. The 2020 Census determined that Kentucky's total population is 4,505,836.[2]
3. Using this population total, the Census Bureau determined that Kentucky is entitled to six representatives.[3]
4. The ideal population for each of the six Congressional districts in Kentucky is 750,973 people (*i.e.*, total population divided by number of Congressional districts).
5. 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]
6. The specific population of each district, and the variance from the ideal district, is as follows:[5]

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1 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://perma.cc/QDR2-6EXP.

2 Commonwealth's Exhibit 1, Tabs 18, 19.

3 Commonwealth's Exhibit 1, Tab 18, 19.

4 Commonwealth's Exhibit 1, Tab 16.

5 Commonwealth's Exhibit 1, Tab 16.

District	Population	Over or Under Ideal Population	Percentage Deviation from Ideal Population
1	719,139	-31,834	-4.24%
2	778,648	+27,675	+3.69%
3	756,852	+5,879	+0.78%
4	773,543	+22,570	+3.01%
5	693,381	-57,592	-7.67%
6	784,273	+33,300	+4.43%

7. At the state level, Kentucky has 100 state representatives. *See* Ky. Const Sec. 33.

8. The ideal population of these 100 districts is 45,058 people. (*i.e.*, total population divided by number of representative districts).

9. 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 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). These variations are not within the required +/-5% threshold for state constitutional purposes and are far beyond the less than 10% overall deviation acceptable under federal equal protection case law.[6]

[6] Commonwealth's Exhibit 1, Tab 14.

10. The General Assembly addressed these population disparities by passing new state House and Congressional district boundaries during its 2022 regular session.

11. The General Assembly passed HB 172 to extend the candidate filing deadline to January 25, 2022 to allow for additional time to pass new apportionment plans. HB 172 became law on January 6, 2022. 2022 Ky. Acts ch. 1. Additionally, the General Assembly passed HB 2, to establish new state House districts, and SB 3, to establish new Congressional districts. 2022 Ky. Acts ch. 7; 2022 Ky. Acts ch. 8.

12. HB 2 was introduced in the House on January 4, 2022. HB 2 received its first reading on January 4, 2022, its second reading on January 5, 2022, and its third and final reading on January 6, 2022. HB 2 passed the House by a vote of 71-19 on January 6, 2022 and was received in the Senate the same day. HB 2 received its first Senate reading on January 6, 2022, its second Senate reading on January 7, 2022, and its third and final Senate reading on January 8, 2022. HB 2 passed the Senate by a vote of 23-10 on January 8, 2022 and was delivered to the Governor the same day. The Governor vetoed HB 2 on January 19, 2022, and the Generally Assembly voted to override the Governor's veto on January 20, 2022. Due to its emergency clause, HB 2 became effective on January 20, 2022.[7]

[7] The legislative history for 2022 HB 2 is available at https://apps.legislature.ky.gov/record/22rs/hb2.html.

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13. SB 3 was introduced in the Senate on January 4, 2022. SB 3 received its first reading on January 4, 2022, its second reading on January 5, 2022, and its third and final reading on January 6, 2022. SB 3 passed the Senate by a vote of 28-4 on January 6, 2022 and was received in the House on the same day. SB 3 received its first House reading on January 6, 2022, its second House reading on January 7, 2022, and its third and final House reading on January 8, 2022. SB 3 passed the House by a vote of 65-25 on January 8, 2022 and was delivered to the Governor the same day. The Governor vetoed SB 3 on January 19, 2022, and the Generally Assembly voted to override the Governor's veto on January 20, 2022. Due to its emergency clause, SB 3 became effective on January 20, 2022.[8]

14. HB 191, the Democratic-sponsored House of Representatives reapportionment plan, was introduced in the House on January 4, 2022. HB 191 failed to receive a reading in the House.[9]

15. Prior redistricting plans were passed under a similar timeline as HB 2 and SB 3.

16. In 2012, the House leadership, then controlled by Democrats, introduced 2012 HB 1 on the very first day of session. 2012 HB 1 passed the House 9 days later,

[8] The legislative history for 2022 SB 3 is available at https://apps.legislature.ky.gov/record/22rs/sb3.html.

[9] The legislative history for 2022 HB 191 is available at https://apps.legislature.ky.gov/record/22rs/hb191.html.

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on January 12, 2012.[10] No public hearings were held.[11] And 2012 HB 1 passed the House along party lines.[12] The Senate passed 2012 HB 1 on January 18, 2012, and Democratic Governor Beshear signed the apportionment plan into law on January 20, 2012. A total of 17 days passed from the date the bill was introduced to the date it was signed into law.[13] After 2012 HB 1 was invalidated for failing to abide by the simple dual mandate, the General Assembly went back to work in 2013 on a new House apportionment plan. 2013 HB 1 followed a similar path as its predecessor. 2013 HB 1 was introduced on August 19, 2013 and passed both chambers on August 23, 2013—five days later.[14] Again, no public hearings were held.[15]

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[10] The legislative history for 2012 HB 1 is available at https://apps.legislature.ky.gov/record/12rs/hb1.html.

[11] *See also* League of Women Voters, "KY League Releases Report on Redistricting" February 15, 2018, available at https://perma.cc/9E7M-5DC4 ("The last redistricting process was also rushed, with bills moving so quickly that citizens had little chance to participate. The 2012 redistricting bills for the state House and Senate were written, amended, voted on by both houses, and signed by the governor in the first 18 days of the regular session").

[12] The vote history for 2012 HB 1 is available at https://apps.legislature.ky.gov/record/12rs/hb1/vote_history.pdf.

[13] The legislative history for 2012 HB 1 is available at https://apps.legislature.ky.gov/record/12rs/hb1.html. Ultimately, 2012 HB 1 was invalidated because it violated both parts of Section 33's dual mandate. *Legislative Research Comm'n v. Fischer*, 366 S.W.3d 905, 911–16 (Ky. 2012) (*Fischer IV*). The law split 28 counties, even though the minimum number of split counties allowable by the Constitution in the 2012 apportionment cycle was 24. *Id.* And the population variances in the law exceeded +/-5%. *Id.*

[14] The legislative history for 2013 HB 1 is available at https://apps.legislature.ky.gov/record/13ss/hb1.html.

[15] *See also* League of Women Voters, "KY League Releases Report on Redistricting" February 15, 2018, https://perma.cc/9E7M-5DC4 ("The 2013 special session lasted just five days. Moving that quickly meant a bare minimum of committee meetings, no public hearings and no opportunity for public input. This lack of transparency

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17. 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.[16] 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).[17]

18. The Supreme Court of Kentucky 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%.[18]

19. 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

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invites a lack of confidence and allows voters to wonder whether they are choosing their legislators or legislators are choosing their constituents.").

16 Commonwealth's Exhibit 1, Tab 12.

17 Commonwealth's Exhibit 1, Tab 15.

18 Commonwealth's Exhibit 1, Tab 15.

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required by Section 33 as interpreted by the Kentucky Supreme Court." Compl. ¶ 45.

20. Plaintiffs filed the instant lawsuit on January 20, 2022. They filed a stand-alone, unverified complaint. They did not seek emergency injunctive relief to enjoin the January 25, 2022 filing deadline despite having averred imminent irreparable injury "particularly in light of the upcoming filing deadline" for those seeking to run for office under the new maps. Compl. ¶ 79.

21. Plaintiffs allowed the January 25 filing deadline to come and go without filing a motion for a temporary restraining order or any affidavit in support of their complaint, despite averring that "Plaintiffs' rights are being violated and they will suffer immediate and irreparable harm through implementation of HB 2 and SB 3 for the May 2022 primary election, including with respect to the current candidate filing deadline…." Compl. ¶ 135.

22. Plaintiffs' overarching theory is that HB 2 and SB 3 are unlawful due to "extreme partisan gerrymandering." Plaintiffs challenge HB 2 and SB 3 under five separate sections of our Constitution—Sections 1, 2, 3, 6, and 33.

23. No Kentucky court has ever found that a partisan gerrymandering theory gives rise to a violation of our Constitution. There has never been a successful challenge to a Congressional apportionment scheme in Kentucky history.

24. On January 28, 2022, after the filing deadline for filing for office in the districts created by HB 2 and SB 3 had already expired, Plaintiffs filed a motion for temporary injunction. The Court heard the Plaintiffs' motion on February 10,

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2022. Thereafter, the Court denied the motion and set the matter for a bench trial.

25. HB 2 and SB 3 have remained in effect during the pendency of this lawsuit.

26. Candidates have filed their candidacies under the new districts and have withdrawn, where applicable, from the old. And on January 31, 2022, the Secretary of State conducted a lottery to draw ballot positions, a significant component of the election process that candidates who have filed and qualified for the ballot have a right to rely on. The Commonwealth's primary election was successfully held on May 17, 2022. *See* KRS 118.025(3). The Commonwealth's election machinery is well advanced and is marching forward to the General Election under HB 2 and SB 3—maps which respect the strictures of the United States Constitution and the Kentucky Constitution.

27. At the trial, the parties offered two stipulations: 1) HB 2 splits 23 counties, which is the minimum number of counties that must be split to comply with population variation constitutional requirements; and 2) All material on the Legislative Research Commission's website and the Kentucky State Board of Elections website is admissible.

28. Additionally, the Plaintiffs offered 10 exhibits into evidence, and the Commonwealth offered 35 exhibits into evidence.

29. The Plaintiffs proffered expert testimony from two witnesses, Kosuke Imai and Devon Caughey, and lay testimony from three witnesses.

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30. In rebuttal, the Commonwealth proffered two expert witnesses, Sean Trende and Stephen Voss.

31. At trial, only two of the individual Plaintiffs and a representative from the Kentucky Democratic Party, individually and as an association, offered testimony. Their collective testimony makes clear that all of the Plaintiffs have failed to prove the requisite constitutional standing to challenge HB 2.

32. Plaintiffs Mary Lynn Collins, Katima Smith-Willis, and Joseph Smith provided no testimony and therefore have not proven that they have the requisite constitutional standing to challenge either HB 2. The same goes for Plaintiff Jill Robinson who explicitly disclaimed any challenge to HB 2. VR 4-6-22 at 4:51:25–38 ("I'm not concerned about those house systems. . . . I'm here to address the congressional.").

33. None of the individual Plaintiffs reside in a state house district that they have identified as presenting a specific constitutional violation. Plaintiffs' Complaint identified all individual Plaintiffs as residing within what is now District 57. Compl. ¶¶ 20–24. But Plaintiffs have never identified District 57 as a district affected by the General Assembly's purported Section 33 violations or purported consideration of partisan interests in apportionment. *See* VR 4-5-2022 at 3:39:20–40:46; Compl. ¶¶ 14 n.1, 49.

34. The only individual Plaintiff that provided testimony relevant to HB 2 was Representative Derrick Graham. But he never testified to any injuries that he personally would suffer because of HB 2. *See* VR 4-6-2022 at 4:24:10–28:18

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(alleging that HB 2 *generally* affects "democracy[,] . . . running for office, . . . recruitment, . . . funds that you need in order for a candidate to run[,] . . . [and] policy").

35. Trey Hieneman testified as a representative of the Kentucky Democratic Party. The KDP seeks to assert standing on its own behalf and on behalf of its members under the doctrine of associational standing. Both efforts fail.

36. KDP has failed to establish that any of its individual members would have standing in their own right because KDP never specifically identified any of its members.

37. KDP identified its membership once, in its Complaint, where it generally characterized its members as "an association of Democratic voters and politicians seeking to help Democrats win elections in Kentucky[.]" Compl. ¶ 25.

38. The standing of a voter to challenge the configuration of a district within which he or she lives is not automatic. The KDP cannot purport to represent the interests of Democratic voters in Kentucky without specifically identifying at least one voter with a concrete and particularized injury resulting from HB 2.

39. All of the individual Plaintiffs lack standing in their own right, as well. Robinson expressly disclaimed any challenge to HB 2. VR 4-6-2022 at 4:51:25–38. And Graham, as explained, never identified a concrete and particularized injury resulting from District 57, the district where he lives, nor have Plaintiffs

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ever specifically identified District 57 (also where Robinson lives) as an allegedly problematic district.

40. KDP also failed to advance proof that KDP's alleged injury—its dramatic, self-inflicted decline in Kentucky politics—is caused by HB 2. Nor is there any evidence that it is an injury that is redressable by striking down an otherwise constitutional law.

41. KDP alleges that HB 2 injures it because it will lack a cohesive network of elected representatives outside of certain, specific regions: Without a "candidate[] or . . . elected leader[] in a particular region[,] . . . [y]ou have no one to carry your message and carry your banner." VR 4-5-2022 at 4:07:04–07:23. KDP speculates that the source of this claimed injury is HB 2's purported effects on Democratic candidate recruitment, incumbents, fundraising, volunteerism, and competitiveness that only *potentially* make it more difficult for the KDP to spread its message. *See* VR 4-5-2022 at 4:00:05–13:58.

42. KDP fails to connect the dots between these allegations and HB 2.

43. When KDP asserts that HB 2 allegedly affects Democratic candidate recruitment, incumbents, fundraising, volunteerism, and competitiveness in future elections, it fails to appreciate that all of these acts depend on the decisions and actions of third parties.

44. The KDP also complains that HB 2 has had a negative impact on candidate recruitment. But HB 2 did not stop at least three of KDP's recruits from re-

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filing to run for office in a different district. Candidate Filings with the Office of Secretary of State, *available at* https://web.sos.ky.gov/CandidateFilings/default.aspx?id=12 (showing John Pennington now running in the 24th District, Martina Jackson now running in the 91st District, and Derek Penwell now running in the 31st District); VR 4-5-2022 at 4:01:01–02:21 (never identifying why Suzanne Kugler decided not to run in a different district, like the three other candidates identified above); VR 4-5-2022 at 4:04:55–05:25 (attributing the decision of Mary Lou Marzian to not run for office as stemming from *her* decision to step down after many years of service to the Commonwealth, and attributing the decision of Representative Cantrell to not run for reelection as stemming from *her* desire not to run against a fellow incumbent and from her potential Kentucky Court of Appeals ambitions).

45. KDP's representative, Trey Hieneman, who serves as KDP's political director testified that he had previously been unaware of KRS 118.105, a statute that allows a political party to substitute a candidate after another candidate withdraws from an election. Hieneman testified he became aware of the statute upon receiving correspondence from the Secretary of State's office informing KDP of its option. VR 4-5-2022 at 5:50:00–51:46. It is remarkable that someone in Hieneman's role would have been unaware of such a statute while also claiming, on behalf of the party, that KDP is harmed by HB 2, a source external to KDP and its recruitment challenges.

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46. Not only that, but the proof in this case demonstrates that the KDP failed to be competitive in races long before HB 2. The KDP's downturn is due to its own failed electoral efforts and strategy over at least the previous three election cycles—factors that have *nothing* to do with map-drawing. VR 4-5-2022 at 4:47:55–58:16 (discussing candidate quality, the impact on the party holding the White House in off-year elections, and the downward trajectory of the KDP since 2016).

47. At trial, only two of the individual Plaintiffs offered testimony concerning SB 3. Their collective testimony makes clear that all of the Plaintiffs have failed to prove the requisite constitutional standing to challenge SB 3.

48. Plaintiffs Collins, Smith-Willis, Smith, and KDP's representative, provided no testimony whatsoever as to the impact of SB 3 on them or, in the case of KDP, the people that KDP purports to represent. Only Plaintiffs Graham and Robinson testified about SB 3. But Graham and Robinson provided no testimony about how SB 3 affects them personally.

49. As it relates to SB 3, Graham testified only to the "social, political, and economic differences" between Franklin County and other counties in the First Congressional District and how it may be "difficult" for a congressman or woman to represent the interests of Franklin County in that district. VR 4-6-2022 at 4:28:20–32:44.

50. Graham did not purport to represent the interests of Franklin County as a whole in this lawsuit, and he never identified how he, personally, is or would be affected by SB 3 in any concrete or particularized way.

51. Neither did Robinson. *See* VR 4-6-2022 at 4:40:20–4:52:25. Just like Graham, Robinson speculated about the potential difficulty a member of Congress may have representing Franklin County in the First Congressional District, but, just like Graham, she never articulated how that difficulty would affect her personally. All Robinson discussed was how effective Representative Barr has been at assisting women's shelters in Franklin County and how she "didn't know how" a representative from western Kentucky could have "as easy of an effective relationship." VR 4-6-2022 at 4:46:35–4:50:02. It is complete speculation to believe that the representative of the First Congressional District could not just as effectively (if not more effectively) represent the interests of Frankfort's civic organizations.[19] Moreover, no civic organization in Frankfort is a party to or provided any testimony in this case,[20] so there is no basis for the Court to find that such organizations join in or endorse Robinson's speculation.

[19] Even as Plaintiffs' assert that Franklin County will somehow go unrepresented, they oddly complain about the First Congressional District being represented by a Franklin County resident.

[20] There is no indication that Robinson purported to speak on behalf of any organization she mentioned during her testimony.

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52. Graham and Robinson's testimony is complete speculation because they have no idea how effective a future Congressman or woman will be in representing Franklin County.

53. As for SB 3's claimed impact on Plaintiffs, they only generally claim that SB 3 "intentionally dilutes the votes of Democratic voters in Franklin County by attaching them to heavily Republican, far-away counties at the western edge of the Commonwealth that will certainly cancel out their votes." Pls.' Opening Br. 30. But the only Plaintiffs that even discussed SB 3 were Representative Derrick Graham and Frankfort resident Jill Robinson, and neither claimed an injury based on partisan vote dilution.

54. Despite the fact that KDP and the individual Plaintiffs failed to establish the requisite standing, the KDP's representative additionally offered testimony about its "extreme partisan gerrymandering" theory.

55. Hieneman relayed his "analysis" of how HB 2 purportedly split some of Kentucky's cities and the way those splits compared to the 2013 State House map and HB 191's splitting of those cities. VR 4-5-2022 at 3:43:25–55:30.

56. To do this, he took publicly available data on the LRC's website, uploaded that data to the Dave's Redistricting website, and read off the results the website produced. VR 4-5-2022 at 3:34:35–35:35, 3:42:20–43:20, 5:11:10–42, 5:21:54–24:35.

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57. As fleshed out during Hieneman's cross examination, his "analysis" is subjective and can yield different results depending on the lens through which the analyzer views apportionment at the city level. *See id.*

58. For example, start with Bowling Green. Hieneman testified that under the 2013 map, "by and large, District 20 encompasses downtown Bowling Green." VR 4-5-2022 at 3:43:52–44:10. But the city limits of Bowling Green were entirely disregarded by the 2013 State House map; parts of Bowling Green are located within six of the seven districts Democrats drew within Warren County.[21] Consider also the 2013 map's jellyfish-like configuration of the districts in Warren County. Sometimes, it is not even clear how districts connected with one another; one has to scroll deeply into the 2013 map to reveal, for example, the connection of District 19 above Delafield and Hardcastle. Finally, the amount of downtown Bowling Green that the 2013 map's District 20 actually encompasses is a completely subjective measure. It could just as easily be said that the 2013 map's configuration of Districts 19 and 20 crack the city of Bowling Green.

59. So when Hieneman alleges that HB 2 "cracks the City of Bowling Green," what he really means is that HB 2 divides Bowling Green differently from how the

[21] The 2013 State House Map is available on Dave's Redistricting. https://davesredistricting.org/maps#viewmap::d67e61e7-6983-46ff-8dea-db089d78af65. While on the map page, in the "Overlays" section on the bottom left-hand side of the screen, there is a "City Lines" box that can be checked which shows a city's limits. Scrolling in to the city of Bowling Green shows that it is part of six different districts (Districts 1, 16, 17, 19, 20, 22).

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2013 State House map cracked Bowling Green. And from how HB 191 (the Democratic alternative map) cracks Bowling Green, for that matter.[22] Under HB 191, Bowling Green is split into four different districts (18, 19, 20, 22), with Districts 18 and 20 most evidently cracking the city right down the middle.

60. But, Hieneman alleges, HB 2's purported cracking of Bowling Green is worse than the 2013 State House map or HB 191's because of Democrats' disadvantage in Bowling Green under HB 2. But there is really no such disadvantage. Hieneman defined a competitive district (a district where either party could win) as one with a ten percent or less difference in potential vote share. VR 4-5-2022 at 4:11:06–11:20. To the extent there is even a legitimate way to predict future election results, of the six districts encompassing Bowling Green under the 2013 State House plan, only District 20 is a competitive district, as the rest heavily favor Republicans.[23] District 20 remains a competitive district in HB 2.[24] With this context, it is actually HB 191—and *not* HB 2—that is arguably a gerrymander because it creates two safe seats,

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[22] HB 191 and the way in which it cracks Bowling Green can be seen at https://davesredistricting.org/maps#viewmap::4db76010-8b41-4dd1-87b0-ee2ed6718fd2. Again, the city limits of Bowling Green can be viewed by checking the "City Limits" box in the "Overlays" section at the bottom left-hand side of the map page, then scrolling into the city of Bowling Green.

[23] The statistics to support this statement come directly from viewing the 2013 map on Heineman's chosen source, Dave's Redistricting. A breakdown of composite vote share between 2012 and 2019 can be viewed by hovering over each district and scrolling down to the "Composite 2012-2019" Section on the bottom-right of the map page. https://davesredistricting.org/maps#viewmap::d67e61e7-6983-46ff-8dea-db089d78af65.

[24] https://davesredistricting.org/maps#viewmap::8eed4db7-46cd-4e09-a179-c0a7e821a963 (according to the "Composite 2012-2019" vote share section).

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one for Republicans and one for Democrats, against two maps containing heavily Republican districts and one competitive district.[25]

61. These sorts of problems exist with all of Hieneman's grievances regarding city splits. Take Covington next. Under the 2013 State House map, Covington is split in two districts, a safe Republican district and a safe Democratic district.[26] HB 2 splits Covington into three districts, one competitive and two safe for Republicans, which, interestingly, is exactly what the Democratic-drawn HB 191 does.[27]

62. Hieneman's complaint about HB 2's treatment of Erlanger and Florence is odd. Under the 2013 State House map and HB 191, neither Erlanger or Florence are part of any competitive districts, nor are any of the districts surrounding these two cities competitive—they are all heavily Republican.[28] It makes no sense for Hieneman to complain about any purported "cracking" of Erlanger and Florence when there is no configuration of a district or districts containing

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[25] https://davesredistricting.org/maps#viewmap::4db76010-8b41-4dd1-87b0-ee2ed6718fd2 (scrolling over the HB 191 Bowling Green districts and viewing the "Composite 2012-2019" vote share section for each).

[26] https://davesredistricting.org/maps#viewmap::d67e61e7-6983-46ff-8dea-db089d78af65 (scrolling over the 2013 State House map Covington districts and viewing the "Composite 2012-2019" vote share section for each).

[27] *Compare* https://davesredistricting.org/maps#viewmap::8eed4db7-46cd-4e09-a179-c0a7e821a963 (HB 2 Covington split and "Composite 2012-2019" vote share stats), *with* https://davesredistricting.org/maps#viewmap::4db76010-8b41-4dd1-87b0-ee2ed6718fd2 (HB 191 Covington split and "Composite 2012-2019" vote share stats).

[28] https://davesredistricting.org/maps#viewmap::d67e61e7-6983-46ff-8dea-db089d78af65 (2013 State House map showing Districts 60, 61, 63, 64, 66, and 69 as safe Republican seats); https://davesredistricting.org/maps#viewmap::4db76010-8b41-4dd1-87b0-ee2ed6718fd2 (HB 191 showing Districts 60, 63, 64, 66, 69, 70, and 85 as safe Republican seats).

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or surrounding Erlanger or Florence that could make Democrats competitive there.

63. Now look at Georgetown. Under the 2013 State House map, Georgetown contains three safe Republican seats.[29] Both HB 2 and HB 191 contain a safe Republican seat and a competitive one, with the competitive seat in HB 2 actually being *more* competitive than the one in HB 191.[30]

64. Consider Hopkinsville next. Under the 2013 State House map, Hopkinsville is split into three safe Republican districts.[31] Hieneman admitted that HB 2's splitting of Hopkinsville into only two districts is an improvement upon the 2013 State House map. VR 4-5-2022 at 5:37:31–51. And although HB 191 creates a competitive district out of the two districts over which Hopkinsville is split, that district still leans Republican.[32]

65. Finally, consider Richmond. Although the 2013 State House map affords a competitive district encompassing most of Richmond, that district still leans

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[29] https://davesredistricting.org/maps#viewmap::d67e61e7-6983-46ff-8dea-db089d78af65 (scroll in to Georgetown and view the "Composite 2012-2019" vote share for each district encompassing Georgetown).

[30] *Compare* https://davesredistricting.org/maps#viewmap::8eed4db7-46cd-4e09-a179-c0a7e821a963 (HB 2 map of Georgetown showing District 88 as within a 4.7% competitiveness margin), *with* https://davesredistricting.org/maps#viewmap::4db76010-8b41-4dd1-87b0-ee2ed6718fd2 (HB 191 map of Georgetown showing District 57 as within a 7.2% competitiveness margin).

[31] https://davesredistricting.org/maps#viewmap::d67e61e7-6983-46ff-8dea-db089d78af65 (scroll in to Hopkinsville and view the "Composite 2012-2019" vote share for each district encompassing Hopkinsville).

[32] https://davesredistricting.org/maps#viewmap::4db76010-8b41-4dd1-87b0-ee2ed6718fd2 (scroll in to Hopkinsville and view the "Composite 2012-2019" vote share for each district encompassing Hopkinsville).

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Republican.[33] The same goes for HB 191, which actually makes that district less competitive.[34]

66. All Hieneman really does with his "analysis" is compare the district lines of a few cities as between HB 2, the 2013 State House map, VR 4-5-2022 at 4:31:50–44:40, 5:09:10–10:50, 5:25:50–37:51, 5:45:10–48:23 (evidence of gerrymandering by Democratic Party in 2013 State House map); *see also* 5:42:00–44:50 (evidence of gerrymandering by Democratic Party in 2012 Congressional map), and a failed alternative map in HB 191. As explained above, a critical look at that comparison hardly reveals partisan gerrymandering at all, let alone "extreme partisan gerrymandering." At best, it is quibbling about where to draw the necessary lines to split a city.

67. Next, Plaintiffs offered Imai as an expert witness concerning both HB 2 and SB 3. For his work in this case, Imai used two separate algorithms to generate a series of simulated redistricting plans and compared the results, called an ensemble, to HB 2 and SB 3. To operate Imai's algorithms, one must know hundreds of pages of complex computer programming language and software. *See* Commonwealth's Exhibits 2, 3, and 4. Redistricting by simulation analysis is not for the lay person.

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[33] https://davesredistricting.org/maps#viewmap::d67e61e7-6983-46ff-8dea-db089d78af65 (scroll in to Richmond and view the "Composite 2012-2019" vote share for each district encompassing Richmond).

[34] https://davesredistricting.org/maps#viewmap::4db76010-8b41-4dd1-87b0-ee2ed6718fd2 (showing District 81 as an almost 2% less competitive district).

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68. The chief problem with Imai's work for this case is that it is riddled with his own subjective value judgments and choices—as opposed to deferring to the policy makers who enact apportionment plans. First, there are an "impossible" or "astronomical" number of apportionment plans that can be devised in Kentucky, including a far greater amount than the 10,000 maps Imai narrowed down here. VR 4-5-2022 at 10:34:20–35:46, 1:42:40–43:20. In other words, Imai, who has only ever testified on behalf of Democrats, VR 4-5-2022 at 10:52:25–49, has to subjectively choose from essentially an infinite number of maps the small set of maps to which he will compare HB 2 and SB 3 to determine the extent of the partisanship in those apportionment plans.

69. Imai also subjectively chooses from a pool of several different applicable complex algorithms by which to create his comparison maps, in addition to the constraints that he forces the comparison maps to abide by, like contiguity and compactness. VR 4-5-2022 at 10:32:52–34:21, 10:40:43–42:54, 10:45:14–31. And there is no consensus about which type of algorithm is better for a particular type of analysis; instead, the analyzer has to make a subjective call about which algorithm is best depending upon the analyzer's interpretation of the uniqueness of a state and its apportionment rules. VR 4-5-2022 at 11:00:46–02:11; *see* KRE 702 (Expert witness testimony must be "based upon sufficient facts or data[,]" "the product of reliable principles and methods[,]" and must be "applied . . . reliably to the facts of the case."). Without Imai's own

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subjective choices and sophisticated knowledge of computer simulations, his simulation method is not able to be employed.

70. Indeed, for this case, Imai chose to analyze HB 2 using what he calls the Markov Chain Monte Carlo algorithm. VR 4-5-2022 at 10:40:44–42:54, 10:45:29–47. His proffered reason for this choice was Kentucky's "complicated restrictions on how the county splits . . . should be done." VR 4-5-2022 at 10:45:47–47:03, 11:00:46–02:11. Interestingly, however, Imai himself has criticized the Markov Chain Monte Carlo algorithm's proficiency in appropriately taking into account such constraints in generating comparator apportionment plans. VR 4-5-2022 2:48:22–3:04:33. As for the constraints he chose to input for this case, Imai relied on Plaintiffs' flawed Section 33 interpretation, VR 4-5-2022 at 2:00:10–40; *see also* VR 4-5-2022 at 5:17:25–19:18 (Hieneman determining for himself what Section 33 requires), and failed to consider a plethora of other traditional redistricting criteria and Kentucky-specific nuances, VR 4-5-2022 at 2:01:32–03:40, 2:18:57–23:15, 3:05:36–06:22.

71. Moreover, the subjectivity of the constraints Imai chose was most evident with his explanation of why he set different constraints at different "levels." VR 4-5-2022 at 1:57:03–2:00:30.

72. To create his ensemble for his HB 2 analysis, Imai used his Markov Chain Monte Carlo algorithm, which starts with a particular map and randomly merges and splits adjacent districts until the desired ensemble is created. VR 4-5-2022 at 10:40:43–42:54, 10:45:28–47. Imai instructed his MCMC algorithm

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to generate a total of 100 contiguous districts, set the population deviation to be +/-5%, and he instructed his algorithm to generate compact districts. He also instructed his algorithm to minimize the number of county boundary splits. In addition, Imai instructed his algorithm to have fewer districts with more than two counties and fewer counties with more than two districts. VR 4-5-2022 at 11:02:10–04:15. Though he testified that the input criteria have to be carefully chosen, VR 4-5-2022 at 1:55:47–56:03, Imai willfully ignored dozens of traditional redistricting criteria at the instruction of counsel, instead considering only a flawed legal analysis of what Section 33 of our Constitution requires. VR 4-5-2022 at 2:00:11–40 ("Yeah. So the interpretation of the section 33, I did … on Counsel."); VR 4-5-2022 at 2:01:32–03:40 (not considering race, communities of interest, where schools are, where churches are, where neighborhoods are, the locations of county seats, major transportation coordinators, natural boundaries like rivers or mountains, where incumbents or candidates live, preventing double bunking, continuity of representation, or core retention). More specifically, Imai instructed his algorithm to generate an ensemble using the following criteria: (1) a county split constraint at a level of ten; (2) a county multi-split avoidance constraint at a level of seven; and (3) a custom constraint at a level of ten. Imai could not explain the significance of a constraint level of 10 or 7, but he acknowledged that he alone chose those values to accomplish his desired end. VR 4-5-2022 at 1:57:37–2:00:11.

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73. Imai's analysis began with county splits. He confirmed that all of the simulated maps in his ensemble also have 23 split counties. Imai then turned to his analysis of multi-split counties, which further focused on how the split counties were split (i.e., was a split county split once, twice, etc). VR 4-5-2022 at 11:08:40–09:22. Imai testified that HB 2 has 18 counties that are split multiple times (into more than two districts) whereas his ensemble has 15 such counties, on average, with a range from 13-17. VR 4-5-2022 at 11:09:52–10:32. From this data, Imai opined that HB 2 "unnecessarily splits a greater number of counties into more than two districts." VR 4-5-2022 at 11:10:32–10:58. Similarly, Imai analyzed the number of House districts that include part of more than two counties. Imai opined that under HB 2 there are 31 districts containing more than two counties whereas under his simulated ensemble, there are 24 such districts, with a range from 21-30. VR 4-5-2022 at 11:11:40–12:28.

74. Plaintiffs report that Imai's analysis of HB 2 conclusively shows that HB 2 violates Section 33 and is an outlier in terms of multi-splits. Pls.' Opening Br. 6–7. Plaintiffs fail to acknowledge that Imai's own constraints, which relied on faulty legal analysis, forced this result.

75. Imai then turned to analyzing the partisanship of HB 2's districts. To do so, he used the 2016 Presidential and U.S. Senate and 2019 state constitutional officer races in an attempt to capture voter behavior for U.S. and Kentucky House races to make a prediction about the partisanship of an area. VR 4-5-

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2022 at 10:55:10–57:44, 2:06:52–07:25, 2:07:58–09:51, 3:06:38–07:50. In doing so, he created aggregate election returns for an election that never happened instead of analyzing each real election in isolation. Not only that, but even within the election data Imai uses he does not account for election-specific nuances, like candidate quality. *Id.*

76. Even so, the important thing to note from Imai's testimony is that, on average, the 10,000 State House maps he generated produced 76 districts that should expect a Democratic vote share at least below 49%. VR 4-5-2022 at 1:40:55–41:20, 3:21:22–22:24.

77. Imai then turned to SB 3. It is hard to give any credence to Imai's analysis of Congressional maps when it is impossible for him to instruct his algorithms to match the mathematical precision of the one-person, one-vote rule and the General Assembly's adherence to it. VR 4-5-2022 at 11:50:26–52:50, 3:17:48–18:52; VR 4-7-2022 at 2:57:08–59:49.

78. And just like with his analysis of HB 2, Imai had to make subjective determinations about compactness and the preservation of historical configurations in conducting his analysis to obtain his ensemble results about SB 3. VR 4-5-2022 at 11:52:50–53:23, 11:57:20–28, 11:59:03–12, 3:07:56–09:05.

79. To create his ensemble for his SB 3 analysis, Imai used his Sequential Monte Carlo algorithm, which starts from a blank slate and randomly generates districts according to certain predetermined criteria until one complete simulated map is created, and then the algorithm starts anew on the next

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simulated map. VR 4-5-2022 at 10:40:43–42:54, 10:45:28–47, 11:49:51–50:25. Imai instructed his algorithm to consider two very basic constraints: contiguity and population equality. He instructed his algorithm to create six contiguous districts using an overall population deviation of +/-0.1%. VR 4-5-2022 at 11:50:25–58. Imai acknowledged that using a +/-0.1% population deviation would allow for a deviation in population between 700 to 800 people. VR 4-5-2022 at 11:50:58–51:25. Imai is not able to instruct his algorithm to generate districts with perfect equality. VR 4-5-2022 at 11:51:30–52:50. He instructed his algorithm to generate districts prioritizing compactness. VR 4-5-2022 at 11:52:30–53:22. Similar to his HB 2 analysis, for his SB 3 analysis, Imai culled his ensemble to 10,000 plans through burn-in and thinning. VR 4-5-2022 at 11:55:30–56.

80. Importantly, Imai did not account for mapmakers in Kentucky "retain[ing] the same . . . district cores . . . that correspond to Kentucky's political geographies since the '90s." VR 4-7-2022 at 10:25:06–27:06; *see also* VR 4-7-2022 at 10:39:40–42:36, 10:54:38–58:04 (Trende explaining how SB 3 tracks the historical progression of Kentucky's Congressional districts); Commonwealth's Exhibit 30 at 7–14, 38–41 (Trende's expert report evidencing the same); Commonwealth's Exhibit 32 at 10–15 (Voss's expert report demonstrating the same). Imai's failure to account for this mapmaking principle, in part, led to the creation of "bizarre" and "inexplicable" comparison maps for which Imai

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generated partisanship data. VR 4-7-2022 at 10:26:18–28:50, 10:36:20–37:08, 10:38:05–47:00; Commonwealth's Exhibit 30 at 14–35, Appendix A.

81. Regardless, even when not accounting for Kentucky's historical progression of Congressional districts, *on average*, the district containing Franklin County in Imai's Congressional district simulations yielded an uncompetitive Democratic vote share around 43%. VR 4-5-2022 at 1:41:22–42:38, 3:23:53–25:19.

82. Not only that, one in seven of Imai's simulated maps would elect six Republicans to represent Kentucky in Congress, and *none* of Imai's maps would be expected to yield a four-to-two Republican-to-Democrat Congressional delegation. VR 4-7-2022 at 10:48:12–53:14; Commonwealth's Exhibit 30 at 36–38.

83. In other words, Imai's algorithmic method produces maps that would have the Democrats lose at least one seat in the 2022 state House elections and gain no seats in the 2022 Congressional elections—results that are only marginally different (in the state House case) from HB 2 and no different (in the Congressional case) from SB 3. *See also* Commonwealth's Exhibit 32 at 5 ("The vast bulk of [Imai's] simulations are no more favorable to the Democrats than the enacted plan."); VR 4-7-2022 at 2:52:30–55:58. Results like do not prove "extreme partisan gerrymandering."

84. Because Imai's entire simulation was generated using criteria that are not required by Kentucky law, it is unreliable, unrepresentative, and inconclusive. These faulty underpinnings undermine Imai's entire analysis and conclusions.

For all of these reasons, as well as those advanced in the Commonwealth's Opening Brief at 57–63, the Court affords Imai's testimony very little weight for its failure to meet the requisites of KRE 702. *City of Owensboro v. Adams*, 136 S.W.3d 446, 449–52 (Ky. 2004) (outlining the applicability of KRE 702 to bench trials and noting that expert testimony can still be disregarded in a bench trial for failing to meet the KRE 702 requisites).

85. On the second day of trial, Plaintiffs offered Caughey as an expert witness. Caughey only testified as to HB 2.

86. The first problem with Caughey's purported "expert" testimony is that Caughey did not actually employ any expertise in analyzing HB 2. Instead, Caughey did exactly what Hieneman did in this case—input information into a website and relayed its results. VR 4-6-2022 at 10:33:14–28, 1:29:40–32:50, 1:35:15–37:25, 1:40:04–15. The only testimony about alleged "extreme partisan gerrymandering" in HB 2 that Caughey relayed was what a public website called PlanScore told him.

87. And that website, PlanScore, does not require expertise to use. In fact, PlanScore prides itself on being publicly available and extremely user-friendly to the average person. VR 4-6-2022 at 10:42:08–43:17, 2:56:20–3:00:19, 3:01:00–08:28; Plaintiffs' Exhibit 6. So at best, Caughey is a messenger who relayed information that any lay witness could have relayed just as well.

88. Caughey's professional background in no way qualified him to serve as an expert witness for Plaintiffs' claims. Take Caughey's history of publications.

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See Pls.' Opening Br. 18. Less than a handful of his publications concern topics germane to his offered testimony. *See* Pls.' Exhibit 5 at 2–7; VR 4-6-2022 at 10:29:20–32:30. While Caughey claims to know and work closely with one of PlanScore's founders, Christopher Warshaw, that is not the same as being an expert in his own right. Moreover, through Caughey's alliance with Warshaw, Caughey has reviewed the under-the-hood code employed by PlanScore, *see* Pls.' Opening Br. 21—relevant evidence which Caughey withheld from the Commonwealth and its experts after the Commonwealth properly propounded discovery on the Plaintiffs seeking that very code.

89. For these reasons, the Commonwealth moved to exclude Caughey as an expert witness under the *Daubert* standard. *See* KRE 702 (Only "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" will "a witness [be] qualified as an expert[.]").

90. Caughey is not an impartial witness. He is a Democratic expert for hire. He has only ever testified on behalf of Democrats. VR 4-6-2022 at 11:00:50–01:05.

91. So it makes sense that he would use a website like PlanScore, which has deep-rooted connections to the Democratic Party and its cadre of hired experts in partisan gerrymandering cases. VR 4-6-2022 at 10:48:46–49:15, 1:06:57–27:30.

92. PlanScore is an unreliable partisan tool. A peer-review of PlanScore could possibly quash such indications of bias, but there is no evidence of such a review ever having been done with respect to the objectivity and reliability of

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PlanScore. VR 4-6-2022 at 3:47:50–52:55. At bottom, PlanScore is not peer-reviewed. It has not been tested, validated, or vetted, not by Caughey or any other witness testifying at trial in this case. PlanScore doesn't even find itself reliable, reporting only a 68% confidence rating for its "projections."

93. Even without its political bias, PlanScore is plainly unreliable, especially in its application to this case. *See* KRE 702 (Expert witness testimony must be "the product of reliable principles and methods" and must be "applied . . . reliably to the facts of the case.").

94. Part of the way that PlanScore evaluates the amount of partisanship in an apportionment plan is to predict the vote breakdown of each district. VR 4-6-2022 at 10:44:12–30. But PlanScore does not rely on state election returns to predict state legislative races—despite Caughey noting the importance of the election results relied upon for measuring partisanship in an apportionment plan. VR 4-6-2022 at 10:32:50–35:42, 1:15:10–30. Instead, PlanScore compares apples to oranges by relying on presidential election returns from across the country to predict state legislative races. VR 4-6-2022 at 10:33:30–34:00, 1:15:10–16:28, 1:37:50–38:25; Commonwealth's Exhibit 15. And in Kentucky, this means reliance on exclusively the 2016 presidential election return because Kentucky is one of two states for which there is no 2020 precinct level data for presidential elections. VR 4-6-2022 at 1:43:20–44:40.

95. Caughey was unaware if PlanScore ever correctly predicted an election result in Kentucky, VR 4-6-2022 at 1:22:35–24:07, 1:58:00–18, and that PlanScore is

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32% unsure of its ability to forecast the partisanship in a Kentucky map, VR 4-6-2022 at 11:07:20–08:50, 1:46:56–50:25. PlanScore's inability to accurately predict Kentucky election results is just one example of why its purported import here is, at best, questionable.

96. PlanScore also does not account for state-specific redistricting laws in analyzing an apportionment plan. VR 4-6-2022 at 3:38:15–42. Nor does PlanScore, or Caughey for that matter, consider specific nuances about Kentucky elections and politics. VR 4-6-2022 at 10:30:40–31:05, 10:34:00–35:42; *see* KRE 702 (Expert testimony must be "based upon sufficient facts or data."). Caughey repeatedly demonstrated that he knows nothing about Kentucky politics for Kentucky's political geography. For example, neither Caughey nor PlanScore have an answer for how some districts that Caughey identifies as "most partisan" have to be drawn that way based on Kentucky's natural geography. VR 4-6-2022 at 3:13:00–15:45 (discussing Districts 42 and 43, located in Louisville's West End and functionally incapable of being drawn any less Democratic), 3:34:45–38:08. In sum, instead of considering state-specific election nuances, PlanScore attempts to predict the amount of partisanship in a map by focusing on national elections and comparisons between states with different data. VR 4-6-2022 at 1:43:52–44:40; *see also* VR 4-7-2022 at 11:03:00–04:32 (expert testimony about partisan fairness metrics paying no attention to the underlying geography of a state); Commonwealth's

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Exhibit 32 at 22 (expert testimony about the efficiency gap failing to consider political geography).

97. The end game of PlanScore is to generate some sort of quantitative metric for analyzing an apportionment plan's partisanship. Here, those two metrics are the efficiency gap and the declination, which are the only two available metrics "in states that aren't extremely competitive" like Kentucky. VR 4-6-2022 at 10:49:44–50:08. But PlanScore's own creators, Caughey himself, and many other scholars refute the veracity of the efficiency gap and declination as reliable diagnostic tools for detecting partisan gerrymandering in uncompetitive states like Kentucky and in predicting sustainable party advantage under an apportionment plan. VR 4-6-2022 at 2:14:50–20:35, 2:28:20–53:46, 3:55:05–57:30; Commonwealth's Exhibit 18; Commonwealth's Exhibit 24. This includes Plaintiffs' other expert witness, Kosuke Imai. VR 4-5-2022 at 10:38:28–40:44. The efficiency gap, for example, is "too easily fooled" in part because it cannot detect when a partisan divide is caused intentionally or, like in Kentucky, by natural geography. VR 4-6-2022 at 2:36:08–42:46; VR 4-7-2022 at 10:59:45–11:10:27. And declination, for example, cannot screen for basic and traditional redistricting criteria, like compactness or political geography, and purely looks to the partisan effects of a map. VR 4-6-2022 at 2:52:10–53:46.

98. Caughey and PlanScore rely on metrics like the efficiency gap and declination, but both metrics deliver absurd results. They disfavor competitive districts and

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amount to mandating proportional representation. Not only that, but depending on the election data used, the models yield entirely distinct results. The efficiency gap and declination are not reliable and do not accurately detect partisan gerrymandering.

99. In attempting to generate the efficiency gap and declination of a specific apportionment plan, PlanScore users can choose one of two models through which to run PlanScore's analysis. VR 4-6-2022 at 1:59:00–2:00:32. Predictably, using a different model yields different results because each is focused on a different set of presidential election results. VR 4-6-2022 at 2:00:32–01:20. For this case, Caughey also elected to use the model that assumes no incumbents running in a district, so his end results inappropriately do not consider another Kentucky-specific factor that can turn an election—incumbent advantage. VR 4-6-2022 at 1:41:42–43:30. And, unsurprisingly, the PlanScore result Caughey chose to report is the highest, and thus the most favorable for Plaintiffs of all models and all plans.

100. In the end, it is difficult to make anything of the results Caughey reported from PlanScore. PlanScore expects about 80 districts to go Republican under HB 2. VR 4-6-2022 at 3:40:35–41:30. As previously mentioned, PlanScore reports that under HB 191, the Democratic-drawn alternative to HB 2, 76 districts will go Republican. VR 4-5-2022 at 5:16:35–17:48. PlanScore scores HB 2 as having a 13.4 pro-Republican efficiency gap (but an 11.5 pro-Republican efficiency gap under the old PlanScore model) and HB 191 as

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having a 10.7 pro-Republican efficiency gap (and a 9.6 pro-Republican efficiency gap under the old PlanScore model). VR 4-6-2022 at 11:32:28–33:06; Commonwealth's Exhibits 22, 33, 34, and 35.[35]

101. Although he characterizes the 13.4 HB 2 efficiency gap obtained from PlanScore's new model as an outlier, Caughey offered no opinion as to what the baseline efficiency gap in Kentucky is. This is a critical omission, considering that it seems to be impossible to have an apportionment plan in Kentucky with an efficiency gap less than 10.[36] VR 4-6-2022 at 11:36:55–38:14, 11:39:28–41, 2:03:00–55, 3:57:55–4:01:35; Commonwealth's Exhibits 25, 26, 27, 28. In fact, a high efficiency gap in Kentucky is exactly what one should expect. VR 4-7-2022 at 11:01:47–03:00.

102. For all of these reasons, the Court affords Caughey's testimony very little weight for its failure to meet the requisites of KRE 702. *Adams*, 136 S.W.3d at 449–52.

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[35] The variation in efficiency gaps that PlanScore produces, depending on the model used, was confirmed by one of the Commonwealth's expert witnesses, Stephen Voss, as shown here:

	2013 House map	HB 191	HB 2
Old model score	0	9.6	11.5
New model score	9.8	10.7	13.4

See Commonwealth's Exhibits 22, 25, 26, 27, 33, 34, 35; VR 4-7-2022 at 3:19:45–42:00.

[36] Recall that Caughey found a Democratic-drawn map in Oregon with an efficiency gap of 8.5 as evidencing a "*moderate* pro-Democrat bias", while at the same time finding a Republican-drawn map in Pennsylvania with an efficiency gap of 6.6 as being "*strongly* biased in favor of the Republican party." VR 4-6-2022 at 10:57:45:13–58:58, 2:07:35–14:02.

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103. Caughey's testimony, and his reliance on PlanScore, fail to realize the political reality in Kentucky. What's clear is that Kentucky is a conservative state and its voters have been trending that way for a decade or more.

104. Even accepting everything about PlanScore, its results, and Caughey's reporting of them as fair and valid, Plaintiffs still failed to show "extreme partisan gerrymandering" in HB 2 for a very simple reason: If the State House elections were to occur today under HB 2 and HB 191, PlanScore predicts that HB 2 would yield 80 Republican seats in the House (71 Republican seats in the House under the old PlanScore model) and that HB 191 would yield 76 Republican seats in the House (69 Republican seats in the House under the old PlanScore model). VR 4-6-2022 at 3:40:35–41:32; VR 4-5-2022 at 5:16:35–17:48; Commonwealth's Exhibits 25, 26, 27, 28. It is inconceivable that an apportionment plan that yields only four more seats in the supermajority when compared to a plan drawn by an opposing party constitutes an "extreme partisan gerrymander[]."

105. The Plaintiffs' evidence does not support their claims that HB 2 and SB 3 are extreme partisan gerrymanders. Plaintiffs have failed to prove that HB 2 and SB 3 come even close to constituting "extreme partisan gerrymanders." VR 4-6-2022 at 3:40:36–41:34, VR 4-5-2022 at 5:16:35–17:48 (PlanScore predicting that HB 2 would yield 80 Republican seats in the House and that HB 191 would yield 76 Republican seats in the House); VR 4-5-2022 at 1:40:55–41:20, 3:21:22–22:24 (Imai's maps generated producing 76 districts that should

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expect a democratic vote share at least below 49%); VR 4-5-2022 at 1:41:20–42:40, 3:24:00–25:20 (Imai's maps yielding on average a 43% Democratic vote share for the district containing Franklin County and an expected five-to-one Republican-to-Democrat Congressional seat vote share).

106. This conclusion is most evidenced by the fact that under HB 191—the map introduced by members of the Democratic Party—Republicans are still expected to obtain 76 seats in the House (as opposed to 80 under HB 2, VR 4-6-2022 at 3:40:35–3:41:32), a slight uptick from the 75 seats they have now. VR 4-5-2022 at 5:16:35–17:50. Not to mention the fact that HB 2 pits the same number of Democratic incumbents against each other as it does Republicans. VR 4-5-2022 at 4:03:36–4:05:30. And if it is true that the number of would-be competitive districts in HB 2 only drops to nine as opposed to seventeen in HB 191, VR 4-5-2022 at 4:10:50–11:20, then something other than HB 2 must explain why the Democratic Party fielded candidates in only 57 House races out of a potential 100 for the 2022 election cycle. VR 4-5-2022 at 4:02:35–54. Hieneman's testimony and facts like the aforementioned suggest that HB 2 is a natural product of Kentucky-specific traits and not "extreme partisan gerrymandering."

107. Similarly, it is difficult to see how SB 3 is an "extreme outlier" when *all* of Imai's simulated Congressional maps would be expected to yield at least a five-to-one Republican-to-Democrat Congressional delegation. *Id.* at 62. Not only that, but some 1,400 of Imai's simulated maps generated without regard

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for partisan interest—one in seven—demonstrate that the General Assembly could have created a Congressional map in a way to produce a 6-0 Republican delegation. *Id*.

108. Taken at face value, Plaintiffs' experts in their own right failed to offer proof to support Plaintiffs' "extreme partisan gerrymandering" theory. The Commonwealth's rebuttal witnesses went even further, undermining the opinions advanced by Plaintiffs' experts.

109. Sean Trende, a highly qualified elections analyst and avid student of congressional redistricting, testified regarding Imai's simulation method. The Court qualified Trende as an expert in political science and gerrymandering. VR 4-5-2022 at 10:20:12–18. Trende testified that he was asked to review the work of Imai and Caughey. Commonwealth's Exhibit 30. Having reviewed Trende's CV, report, and testimony, the Court finds him to be a credible expert witness and affords his testimony and opinions great weight.

110. Beginning with Imai's SB 3 analysis, Trende used Imai's data to recreate Imai's simulations and generate visual representations of the redistricting plans in Imai's ensemble. VR 4-7-2022 at 10:25:00–26:04.

111. Trende noted that Kentucky's congressional districts "have retained, what we call district cores, the same basic idea that corresponds to Kentucky's political geographies since the '90s.'" *Id*. Having had prior experience studying Kentucky's historical congressional maps, Trende readily observed the bizarre

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and inexplicable maps that Imai's simulation method produced. VR 4-7-2022 at 10:38:02–39:40.

112. Trende explained that Imai did not account for mapmakers in Kentucky "retain[ing] the same . . . district cores . . . that correspond to Kentucky's political geographies since the '90s.'" VR 4-7-2022 at 10:25:06–27:06; *see also* VR 4-7-2022 at 10:39:40–42:36, 10:54:38–58:04 (Trende explaining how SB 3 tracks the historical progression of Kentucky's Congressional districts); Commonwealth's Exhibit 30 at 7–14, 38–41 (Trende's expert report evidencing the same); Commonwealth's Exhibit 32 at 10–15 (Voss's expert report demonstrating the same).

113. Imai's failure to account for this mapmaking principle, in part, led to the creation of "bizarre" and "inexplicable" comparison maps for which Imai generated partisanship data. VR 4-7-2022 at 10:26:18–28:50, 10:36:20–37:08, 10:38:05–47:00; Commonwealth's Exhibit 30 at 14–35.

114. For instance, consider Imai map 617 (Commonwealth's Exhibit 30 at 18). It creates lengthy districts similar to the ones Plaintiffs' complain about. Or Imai map 935 (Commonwealth's Exhibit 30 at 19), which splits Louisville, joining portions of Jefferson County with highly conservative Bullitt County (something Imai's simulations do nearly a third of the time. Imai map 385 (Commonwealth's Exhibit 30 at 20) does violence to nearly all six of Kentucky's Congressional districts by pairing Louisville and Bullitt counties, placing Scott County in a district with Bowling Green, and adding Lexington to the district

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that contains Bell County. In this map, Franklin County is paired with the northern Kentucky suburbs. Imai map 1367 (Commonwealth's Exhibit 30 at 24) again splits Louisville and adds part of Jefferson County to a district that winds down the long western border, joins Lexington in a district that touches the Tennessee border, and splits Eastern Kentucky in half. The bizarreness of Imai map 2052 (Commonwealth's Exhibit 30 at 28) speaks for itself. The examples are unrealistic and endless.

115. Trende attributed the bizarre and inexplicable choices in Imai's ensemble to a defect in Imai's presuppositions: Imai didn't follow the same rules as the map makers. "[W]ith redistricting simulations, if you want to draw the conclusion that politics was responsible for the shape of the map, you really have to control for other considerations. You need to make sure that you're drawing from the same distribution or the same ideas the map makers had in mind, except without any political information plugged in." VR 4-7-2022 at 10:26:04–27:06. "If you don't have all the rules in place that the map makers were using, and those rules that you didn't include have political effects, then it might be the rules that you didn't include that are producing the results at hand." VR 4-7-2022 at 10:27:06–28:50. Without a one-to-one comparison on rules being considered by the map makers and the simulation algorithm, then "you don't have a representative sample," *id.*, and any inferences drawn from the sampling are substantially weakened. VR 4-7-2022 at 10:36:21–37:08 (testifying that conclusions based on an unrepresentative sample of

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simulations would be unreliable); VR 4-7-2022 at 10:39:40–47:00 (testifying that the inference that politics is what explains the shape of the current Kentucky maps is substantially weakened).[37]

116. As a result, Imai's algorithms generate simulations that fail to do the basic things that all of Kentucky's Congressional redistricting maps have done for over 40 years. *Id.* (concluding that Imai's simulations are not a representative sample of what a reasonable map drawer in Kentucky would draw when drawing without respect to politics). Regardless, even when not accounting for Kentucky's historical progression of Congressional districts, *on average*, the district containing Franklin County in Imai's Congressional district simulations yielded an uncompetitive Democratic vote share around 43%. VR 4-5-2022 at 1:41:22–42:38, 3:23:53–25:19.

117. Trende's simple point became even more evident when he froze the Second District as enacted in SB 3—exactly like Republican and Democratic map makers have done for over 40 years. VR 4-7-2022 at 10:54:38–55:48. The third map in Trende's ensemble produces a map nearly identical to SB 3. VR 4-7-2022 at 10:55:49–56:33; *see also* Commonwealth's Exhibit 30 at 41. When this simple map drawing rule is respected, the partisanship of the district that includes Franklin County is well below where Democrats would ever reasonably expect to win an election. VR 4-7-2022 at 10:56:40–57:20.

[37] All of Trende's critiques are equally applicable to Imai's HB 2 analysis.

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118. Turning to Caughey's state House district analysis, Trende testified that the efficiency gap is unreliable because "in some states, the political geography just naturally results in a circumstance where it becomes hard to draw districts for one party or the other in certain regions." VR 4-7-2022 at 10:59:50–11:00:35. And Kentucky is one of them. VR 4-7-2022 at 11:00:35–01:46 ("This is a precinct map of Kentucky shaded red to blue, there's just these massive precincts covering most of the land area of the state where you just cannot draw Democratic districts. It's not that Democrats don't live there; you just can't draw a district that will tend to elect a Democrat to the State House. And so, all those votes for Democratic candidates are going to be wasted votes in those circumstances. . . But, you know, the vast land area of the state and most of the population of the state just lives in an area where it's hard to draw a democratic district[.]").

119. In fact, an efficiency gap of 13.4 in Kentucky is just what Trende expected to find. VR 4-7-2022 at 11:01:46–02:14. But, because partisan fairness metrics like the efficiency gap pay no attention to the underlying geography of a state, Trende testified they are of little assistance in a partisan gerrymandering analysis. VR 4-7-2022 at 11:03:00–04:26. To prove his point, Trende calculated the efficiency gap of all of Imai's simulated maps and found that HB 2 fell well within the reasonable distribution of Imai's simulations when compared by efficiency gap metrics. VR 4-7-2022 at 11:04:26–06:55. And because the efficiency gap is a fragile metric, VR 4-7-2022 at 11:07:15–24,

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Trende perturbed (or adjusted the losing party's vote share incrementally) the election results to test the strength of his conclusion. After perturbing the election results 5% in each direction, Trende concluded that Kentucky's political geography just naturally wastes Democratic votes. VR 4-7-2022 at 11:10:08–14. So, whatever large means for the efficiency gap metric, it's just normal in Kentucky. VR 4-7-2022 at 11:10:20–26 ("And that just makes a large efficiency gap unremarkable, whatever large means.").

120. Concerning the partisan breakdown of Imai's simulated Congressional maps, Trende testified that SB 3 is predicted to elect 5 Republicans and 1 Democrat to Kentucky's Congressional delegation. VR 4-7-2022 at 10:48:12–51:14. He also testified that approximately one in seven of Imai's simulated maps would elect 6 Republicans to represent Kentucky in Congress. *Id*. None of Imai's maps would be expected to yield a 4-2 Congressional delegation. *Id*.

121. Trende is the only testifying expert witness to have actually drawn operative redistricting plans. He was appointed by the Supreme Court of Virginia just last year to do so. *See* Commonwealth's Exhibit 30 at 4; VR 4-7-2022 at 10:15:20–17:02. Having actually participated in drawing a redistricting map, VR 4-7-2022 at 10:15:20–17:02, Trende noted how "intense" and "time-consuming" it is to draw sensible districts. He noted that "drawing them with the responsibility that they were going to be law was—actually surprised me how difficult it was." *Id*. Imai's simulation method simply does

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not account for the real-world decision-making that goes into crafting a redistricting plan—Congressional or state—in Kentucky.

122. Stephen Voss, a highly qualified political methodologist and professor at the University of Kentucky, testified regarding Imai's simulation method and Caughey's conclusions. The Court qualified Voss as an expert in elections, Southern and Kentucky politics, and voting behavior. VR 4-7-2022 2:47:39–48:00. Voss testified that he was asked to review and respond to the work of Imai and Caughey and to assess the extent to which there were any errors or concerns with the methodologies employed. Commonwealth's Exhibit 32. He offered opinions on both the Congressional and House redistricting plans enacted into law. Having reviewed Voss's CV, report, and testimony, the Court finds him to be a credible expert witness and affords his testimony and opinions great weight.

123. Voss began his testimony on the Congressional map, SB 3, by offering a simple proposition: "The vast bulk of [Imai's] simulations are no more favorable to the Democrats than the enacted plan." Commonwealth's Exhibit 32 (page 5); VR 4-7-2022 2:52:43–56:03 ("People debate what they think partisan gerrymandering is, but one common definition is that the party drawing the maps tried to improve their situation in terms of Congress. Imai's own simulations do not suggest that the Republicans improved their expected number of seats compared to what a typical map from his process would've

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done."). In other words, Voss testified that SB 3 is not a partisan gerrymander, because it fails the most basic definition of what a gerrymander is.

124. Similar to Trende, Voss criticized Imai's simulations for being unrealistic. Voss developed six criteria to streamline his analysis of Imai's ensemble. VR 4-7-2022 at 3:01:58–02:40. For example, Voss first looked at the "best" map for Democrats. VR 4-7-2022 at 3:02:41–03:07. But that map bisects Metro Louisville, carving off a heavily Democratic area (the West End and southwestern Jefferson County) and tacking it onto the Second District, which dilutes the black vote in Jefferson County. VR 4-7-2022 at 3:01:58–04:16. And in that map, Franklin County falls outside the Sixth District (where Franklin County finds itself almost two-thirds of the time in Imai's ensemble), in the Fourth District. VR 4-7-2022 at 3:05:55–06:26, 3:06:38–07:00. From this, and other carefully selected maps, Voss ultimately concluded that there was no support, whatsoever, for the proposition that taking Franklin County out of the Sixth District represents a partisan gerrymander, because Imai's purportedly apolitical ensemble does it nearly two-thirds of the time. VR 4-7-2022 at 3:12:36–58.

125. And even though Imai's simulations produce the exact same partisan results as SB 3, Imai took a materially different path to create his ensemble. Namely, he allowed for a greater population variance than real plans typically do—0.1%. VR 4-7-2022 at 2:57:08–42. But this choice was a function of the method, not a necessary allowance that should be made. VR 4-7-2022 at

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2:57:42–59:49 (explaining that Imai's algorithms cannot tolerate less than a 0.1% population deviation because the basic building blocks of method are precincts, which cannot be split, resulting in less realistic maps).

126. Turning to Caughey's work, Voss analyzed HB 2. Voss explored the PlanScore model and replicated Caughey's analysis. VR 4-7-2022 at 3:19:46–20:20. Voss used the PlanScore website to assess the 2013 redistricting plan, the Democrats' proposed plan this cycle (HB 191), and the enacted plan (HB 2). *See* Commonwealth's Exhibit 22 (HB 2, new model); Commonwealth's Exhibit 25 (2014 plan, new model), Exhibit 27 (2014-2020 plan report, old model), Exhibit 33 (HB 2, old model), Exhibit 34 (HB 191, new model), and Exhibit 35 (HB 191, old model); VR 4-7-2022 at 3:25:16–42:00. He ran each report using both the new and old model offered by PlanScore. Each model yields different results. After this exercise, what is clear is that, regardless of the plan or the model, Kentucky clearly has a baseline, unavoidable efficiency gap of at least 9.6%. Further, the estimated seat shares, regardless of the plan or model, demonstrate that Kentucky is a deeply Republican state that should expect to continue electing a Republican supermajority, regardless of where district lines are drawn.

127. While Plaintiffs were dismissive that Kentucky's political geography dictates the results identified by Plaintiffs' experts, *see* Pls.' Opening Br. 53, Voss and Trende repeatedly identified Kentucky's political geography as the key source driving the increased Republican seat share. If it is mathematically

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impossible for Kentucky Democrats to elect representatives of their choice, *see* Pls.' Opening Br. 56, it is not because of HB 2 or SB 3. Both of Plaintiffs' experts agree that Kentuckians should expect to be represented by no fewer than 76 Republicans in the state House of Representatives and 5 Republicans in the Congressional Delegation. Thus, according to Plaintiffs' own experts, it is not mathematically possible, under *any* bill, for Kentucky Democrats to elect a significant number of representatives of their choice.

128. Apportionment is an inherently political process, and HB 2 and SB 3 are lawful exercises of the legislative apportionment power. Both apportionment plans adhere to traditional redistricting criteria.

129. For instance, HB 2 does not split precincts. [38] Contrast this with HB 191, the only alternative apportionment plan Plaintiffs have proffered, which splits 24 precincts. Commonwealth's Exhibit 10 (bottom of the "Analyze" tab on HB 191's Dave's Redistricting page, *available at* https://davesredistricting.org/maps#ratings::4db76010-8b41-4dd1-87b0-ee2ed6718fd2). Indeed, Hieneman acknowledged that the General Assembly

[38] Viewing HB 2 on Dave's Redistricting reveals this fact. By going to the "Analyze" Tab at https://davesredistricting.org/maps#viewmap::8eed4db7-46cd-4e09-a179-c0a7e821a963, and scrolling all the way to the bottom of the page, the analysis of HB 2 notes that just a single precinct is split. But this is an error. Upon going back to the "Map" Tab, pulling the "Tools" dropdown bar at the top center of the map screen, and clicking "Find Precinct Splits," it is revealed that what Dave's thinks is a split precinct in District 69 is a glitch in the program. Once this glitch is revealed, it is clear that HB 2 splits no precincts. Contrast this with HB 191's splitting of 24 precincts. https://davesredistricting.org/maps#ratings::4db76010-8b41-4dd1-87b0-ee2ed6718fd2 (click the "Analyze" Tab and scroll to the bottom of the page).

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was entitled to utilize the "mapmaking principle" of not splitting precincts. VR 4-5-2022 at 5:20:42–21:05.

130. Indeed, HB 2 pits the same number of Republican incumbents against each other as it does Democrats. VR 4-5-2022 at 4:03:36–05:30. One would think that a map drawn along party lines would do no such thing.

131. And population changes required the new districts to be drawn as they are. For example, Plaintiffs complain about Districts 29, 33, 36, 37, and 48. But District 29 had a population deviation of +7.16% following the 2020 census. Commonwealth's Exhibit 1, Tab 14. It was required to shed population. The same was true for District 33, with a population deviation of +5.19%, for District 36, with a population deviation of +24.98%, and for District 48, with a population deviation of +8.50%. *Id*. Conversely, District 37 could accept population, as its population variance was -4.19%. *Id*. These population shifts necessitated new district lines which by and large preserved the cores of existing districts. For instance, District 36 (formerly District 10) maintained the same county boundaries, shedding its more populous interior precincts. District 33 maintained its extension into Oldham County, adding a portion of Shelby County out of population necessity (Shelby County, for the first time, exceeded the ideal population, requiring a county split). District 48 remains largely unchanged from the prior apportionment map; it previously extended into Oldham County, and still does, just a different part. The political make-up of Oldham County has not changed; it was and remains a Republican

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stronghold. District 37 remedied a prior badly drawn district, reuniting communities of interest along the Bullitt County line. And District 29 was drawn to accommodate the population changes in Districts 36 and 37, expanding east and into more Republican areas out of necessity. In reality, Plaintiffs are simply dissatisfied with where the 2022 General Assembly chose to draw the district boundary lines. Their dissatisfaction is no reason to invalidate two lawful apportionment plans.

132. Plaintiffs criticize the aesthetics of SB 3. Pls.' Opening Br. 56, 61–62. But as the Kentucky Supreme Court has explicitly noted, the Kentucky Constitution is not concerned with such considerations. *Watts v. Carter*, 355 S.W.2d 657, 659 (Ky. 1962) (speaking for the Court, Justice Palmore noted that the Court "cannot hold that the legislative discretion in this regard is limited by considerations purely esthetic").

133. SB 3 preserves as much as possible the historical configuration of the Commonwealth's Congressional districts. VR 4-7-2022 at 10:25:06–27:06, 10:39:40–42:32, 10:54:38–58:02 (Commonwealth's expert Sean Trende explaining how SB 3 tracks the historical progression of Kentucky's Congressional districts); Commonwealth's Exhibit 30 at 7–14, 38–41 (same). The only significant change to the prior map Plaintiffs complain of was to move Franklin and Anderson counties to the First District, a change that the evidence shows did not generate *any* meaningful partisan advantage.

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134. Moreover, on balance, SB 3 favors compactness. Voss noted that "every other Kentucky congressional district becomes more compact under the enacted plan than it was during the last decade[.]" *See* Commonwealth's Exhibit 32 at 6 & Table 2.

135. SB 3 also only deviates in population from district-to-district by one person, a goal Kentucky map drawers have strived to attain in at least the last three rounds of redistricting. Commonwealth's Exhibit 1 (Tab 12, SB 3 population statistics); https://apps.legislature.ky.gov/record/12RS/hb302/RS.pdf (2012 congressional redistricting statistics); https://apps.legislature.ky.gov/record/02rs/HB1.htm (2001 HB 1 Plan Statistics, click on "RS" hyperlink link at the top). Notably, Plaintiffs failed to proffer *any* alternative Congressional plan, let alone a comparable one, as the districts in Imai's maps deviate by as much as 700 to 800 people. VR 4-5-2022 at 11:50:26–52:50.

136. No matter how the General Assembly apportioned Kentucky's State House and Congressional maps, someone was likely to be unhappy. Indeed, the League of Women Voters believed that the fairest Congressional map would put Franklin County in the Fourth Congressional District with Northern Kentucky. League of Women Voters of Kentucky, *Statement of President Frances Wagner on the Release of Recommended Maps for Kentucky Redistricting*, (Dec. 6, 2021) available at: https://perma.cc/ZY6R-AHSQ. This would seem to pose the same problem as SB 3 supposedly does for Plaintiffs

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who complain of being put in a district with individuals "with whom they have little in common." Pls.' Opening Br. 61. Simply put, Plaintiffs would likely have been unhappy in any district other than the Sixth Congressional District. But they have no constitutional right to remain there.

PROPOSED CONCLUSIONS OF LAW

The Plaintiffs must overcome a "strong presumption of constitutionality" to prevail on their challenges to the constitutionality of HB 2 and SB 3. *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). This requires the challenger to show a constitutional violation that is "clear, complete and unmistakable." *Ky. Indus. Util. Customers, Inc. v. Ky. Utils. Co.*, 983 S.W.2d 493, 499 (Ky. 1998). The Plaintiffs are unable to meet this burden.

In part, the Plaintiffs are unable to meet their burden because they lack standing to maintain their challenges. No Plaintiff offered testimony, beyond rank speculation, that either HB 2 or SB 3 will cause a concrete and personal injury. Certainly no Plaintiff offered any evidence that any alleged injury would be redressable by this Court awarding any Plaintiff his or her desired relief. As for the KDP, it also fails to tie any alleged harm to HB 2 or SB 3 for purposes of establishing causation. Because each Plaintiff lacks standing to maintain its challenge, the Court lacks jurisdiction to adjudicate the merits of Plaintiffs' claims. But even if Plaintiffs did have standing, turning to the merits of Plaintiffs claims, they fair no better.

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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. Ky. 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."[39]

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

[39] *Jensen v. Ky. 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.").

HB 2 "splits 23 counties, which is constitutionally required,"[40] 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).

HB 2 and SB 3 are constitutional apportionment plans. HB 2 satisfies the Supreme Court's dual mandate that a redistricting plan split the minimum number of counties and contain a population variance of +/-5% of the ideal population. SB 3 satisfies federal equal protection by being as close to mathematical perfection as possible.

Applying current Census population data to the previous maps enacted in 2012 (Congressional) and 2013 (State house) would plainly violate both tests. *See Evenwel v. Abbott*, 578 U.S. 54, 59 (2016) ("States must draw congressional districts with populations as close to perfect equality as possible." (citation omitted)); *Fischer IV*, 366 S.W.3d at 911 ("Well before federal 'one person, one vote' principles were applied to the states, Kentucky's highest court interpreted Section 33 of the Kentucky

40 Compl. ¶ 45.

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Constitution to prioritize 'substantial equality of representation' over county integrity.")

Plaintiffs have invented and pleaded novel causes of action. But these novel theories contravene established constitutional law. This Court's job is to apply the Constitution as it has been authoritatively interpreted in the current test. Applying that test compels the Court to deny the Plaintiffs relief and dismiss the Complaint for failure to state a claim. *See* Feb. 7, 2022 Order Denying Pls.' Mot. TI at 9 ("The Court understands its role as a co-equal branch of Kentucky's government but the Court refuses to serve as the ringmaster of a three-ring circus . . . .").

As a final matter, there is no dispute that the now-repealed state House (2013 HB 1) and Congressional (2012 HB 302) apportionment plans are unconstitutional, so the Court grants the Commonwealth's counterclaim and cross-claim and will permanently enjoin those now-repealed plans from taking effect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 15, 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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