COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION 2
CASE NO. 22-CI-00047

DERRICK GRAHAM, et al. **PLAINTIFFS**

v.

MICHAEL ADAMS, et al. **DEFENDANTS**

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Filed 22-CI-00047 06/15/2022 Amy Feldman, Franklin Circuit Clerk

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Plaintiffs Derrick Graham, Mary Lynn Collins, Jill Robinson, Joseph Smith, Katima Smith-Willis, and the Kentucky Democratic Party ("Plaintiffs") submit these Proposed Findings of Fact and Conclusions of Law for the Court's consideration.

PROPOSED FINDINGS OF FACT

1. During the 2022 legislative session, Kentucky's General Assembly passed new legislative maps for the State House of Representatives (HB 2) and Congressional (SB 3) districts. The maps created by HB 2 were first made public on December 30, 2021, just days before the legislative session began. (VR 4/5/22, 4:12:00 – 4:12:50). SB 3 was revealed on the Senate floor on the first day of session. By the fifth day of session, HB 2 and SB 3 passed the general assembly almost entirely along party lines. (VR 4/5/22, 4:12:15 – 4:13:30).

2. Governor Beshear vetoed both HB 2 and SB 3 on January 19, 2022, because he believed they are "unconstitutional political gerrymander[s]." The Governor vetoed HB 2 because it "appears designed to deprive certain communities of representation" in part by "excessively split[ting] counties including Fayette, Boone, Hardin, and Campbell, and carv[ing] up other counties such as Jefferson and Warren for partisan reasons, contrary to the Kentucky Constitution." HB 2 Veto Message; HB 2 Map (DEX 1[1], Tab 1).

3. Governor Beshear vetoed SB 3, in part because it "re-draws the First Congressional District to wind across hundreds of miles, from Franklin to Fulton County" and is plainly "not designed to provide fair representation to the people of Kentucky and was not necessary because of population changes." SB 3 Veto Message3; SB 3 Map (DEX 1, Tab 11).

[1] These Findings of Fact and Conclusions of Law adopts the Plaintiff's citation convention citing Plaintiff's Exhibits as "PEX __" and Defendants' Exhibits as "DEX __."

4. The next day the General Assembly overrode Governor Beshear's vetoes—again, almost entirely along party lines. At that time, HB 2 and SB 3 became effective by virtue of their "emergency clause." (*See* HB 2 attached to Complaint as Exhibit A; SB 3 attached to Complaint as Exhibit C).

5. Plaintiffs filed their lawsuit challenging HB 2 and SB 3 that same day. Later in the legislative session, the Democratic minority introduced its own state house redistricting proposal—HB 191—which was not adopted by the General Assembly but is used by Plaintiffs as a comparator to HB 2 to demonstrate that it is possible to draw a more Constitutionally sound redistricting map.

I. Kentucky House apportionment plan (HB 2)

6. HB 2 is the General Assembly's attempt to draw new legislative maps for the Kentucky state house after belatedly receiving population statistics from the United States Census delayed by the COVID-19 pandemic. Plaintiffs challenge the apportionment plan under both Section 33 of the Kentucky Constitution, which sets forth certain rules for creating districts, and as an unconstitutional partisan gerrymander that violates Sections 1, 2, 3, and 6 of the Kentucky Constitution.

1. Section 33 requirements

7. Section 33 of the Kentucky Constitution spells out specific requirements that Kentucky's legislative map drawers must follow when reapportioning our Commonwealth:

> The first General Assembly after the adoption of this Constitution shall divide the State into thirty-eight Senatorial Districts, and one hundred Representative Districts, as nearly equal in population as may be without dividing any county, except where a county may include more than one district, which districts shall constitute the Senatorial and Representative Districts for ten years. Not more than two counties shall be joined together to form a Representative District: Provided, in doing so the principle requiring every district to be as nearly equal in population as may be shall not be violated. At the expiration of that time, the General Assembly shall then, and every ten years thereafter, redistrict the State according to this rule, and for the purposes expressed in this section. If, in making

> said districts, inequality of population should be unavoidable, any advantage resulting therefrom shall be given to districts having the largest territory. No part of a county shall be added to another county to make a district, and the counties forming a district shall be contiguous.

Ky. Const. § 33.

8. As relevant to this case, Section 33 mandates that mapmakers must not: (1) split counties, unless they are large enough to contain more than one district; (2) create districts that contain more than two counties; and (3) create districts by adding a part of one county to another.

9. From the first redistricting challenge under the 1891 constitution, Kentucky courts have recognized that these commands cannot be literally observed in every instance while creating 100 districts of roughly equal population from among Kentucky's 120 counties. *See Ragland v. Anderson*, 100 S.W. 865, 866-67 (Ky. 1907).

10. To reconcile these competing constitutional prerogatives, the *Ragland* Court held that Section 33's mandates must be followed unless absolutely "necessary in order to effectuate that equality of representation which the spirit of the whole section so imperatively demands." *Ragland*, 100 S.W. at 870 (emphasis added).

11. Kentucky courts have never retreated from that well-reasoned rule emphasizing the framers' insistence on maintaining county integrity during redistricting. *Legislative Research Commission v. Fischer*, 366 S.W.3d 905, 912 (Ky. 2012) ("*Fischer IV*").

12. Kentucky courts have adopted a black-letter rule that each of its state house districts must be within +/- 5% of the "ideal" district population. The parties agree the "ideal" district contains 45,058 Kentuckians,[2] and that each district created by HB 2 is within 5% of the ideal.

[2] This number is obtained by dividing Kentucky's population (4,505,800) by the number of legislative districts (100).

13. Kentucky courts also have held that, to satisfy Section 33, a map must split the fewest number of counties possible. The parties agree that the minimum number of counties that must be split to draw a House map with 100 districts within 5% of the ideal population is 23 counties. These splits are required either because the counties' populations are too large to fit within a single house district or because the geograpghy and population of the counties requires an additional split to join it with an adjacent county.

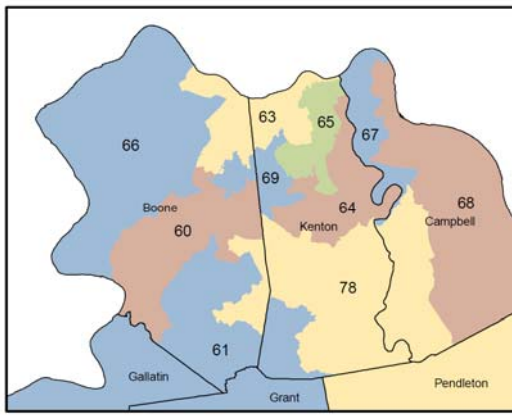
14. The parties disagree, however, on whether Section 33 imposes any additional requirements on mapmakers. For example, Plaintiffs note that HB 2 splits counties far more times than necessary to comply with Kentucky's population equality rules. (VR 4/5/22, 11:08:42 – 11:13:49). Specifically, HB 2 splits those 23 counties a total of 80 times. (VR 4/5/22, 3:38:28 – 3:38:41; *see also* DEX 1, Tab 1). HB 191, by contrast splits those 23 counties only a total of 60 times. *Id.*

15. As a result, several counties are split more times than is necessary to achieve population equality. The effected counties are: Fayette (8 instead of 7), Boone (5 instead of 3), Hardin (4 instead of 2-3), Campbell (2 instead of 1), Madison (3 instead of 2), Bullitt (2 instead of 1), Christian (2 instead of 1), McCracken (3 instead of 1-2), Oldham (2 instead of 1), Pulaski (4 instead of 1), Laurel (5 instead of 1-3), Pike (3 instead of 1), and Jessamine (3 instead of 1) Counties. (*See* DEX 1, Tab 1 (A range of required splits is provided for some counties because changes to the district splits in one county have a spillover effect into other counties.)).

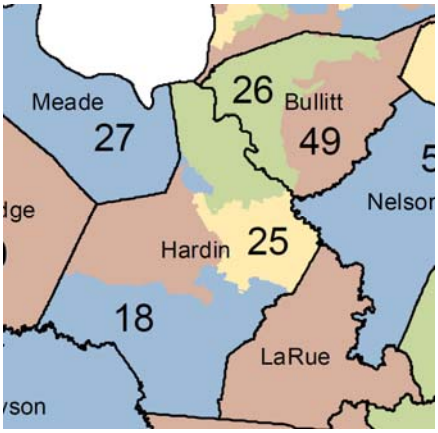
16. Plaintiffs also note that Section 33 states that "[n]o part of a county shall be added to another county to make a district." Ky. Const. § 33. HB 2 creates 45 districts that violate this rule: District Nos. 1, 2, 3, 5, 6, 8, 10, 14, 16, 18, 19, 22, 26, 27, 33, 37, 39, 45, 48, 52, 55, 56, 61, 63, 69, 71, 73, 78, 80, 82, 83, 85, 86, 87, 88, 89, 90, 91, 92, 94, 95, 96, 97, 98, and 100. (VR 4/5/22,

3:39:29 – 3:40:48). HB 191, by contrast, only creates only 31 multi-county districts. (VR 4/5/22, 3:40:48 – 3:41:10; PEX 4).

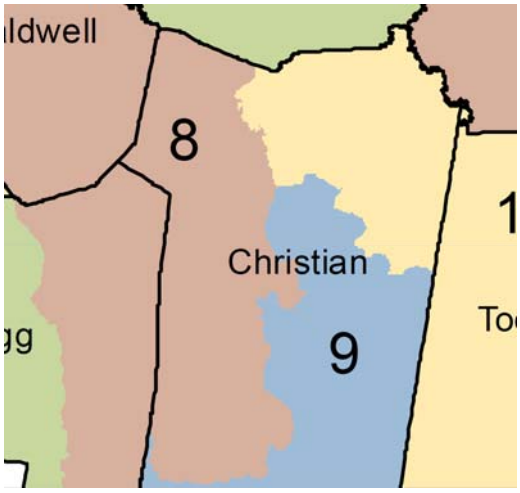
17. The following maps of Northern Kentucky (Boone, Kenton, and Campbell), Bullitt/Hardin, Christian, Fayette, McCracken, and Pike Counties illustrate how the HB 2's authors unconstitutionally divided counties and joined multiple portions of one county with neighboring ones in violation of Section 33:



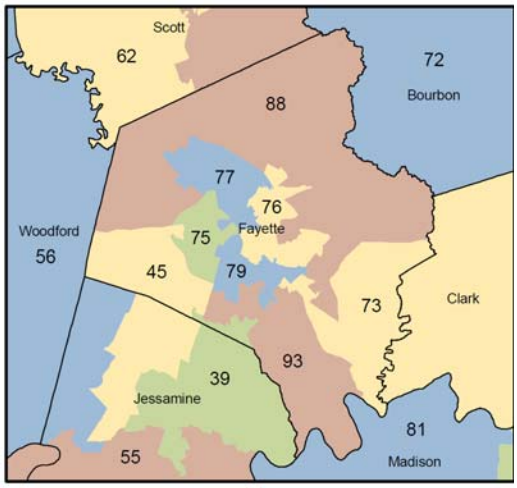
Northern Kentucky



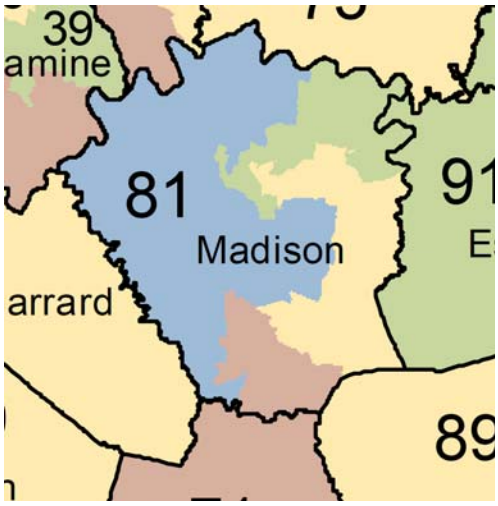
Bullitt/Hardin



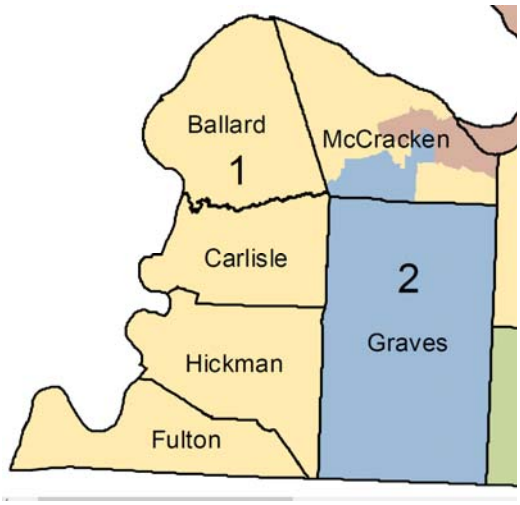
Christian



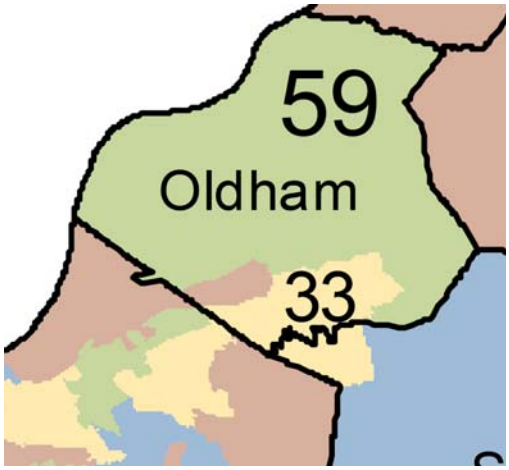
Fayette



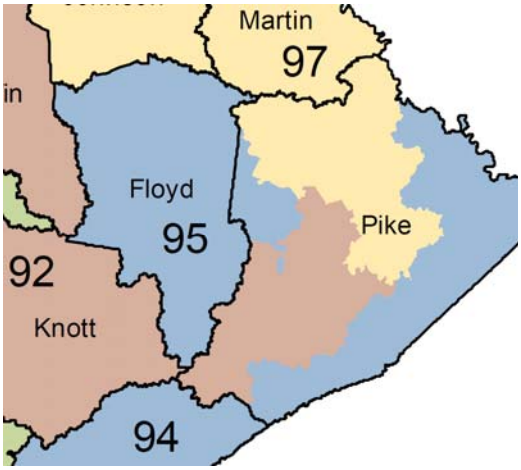
Madison



McCracken



Oldham



Pike

Source: Exh. 1, Tab 1 (HB 2 Map).

18. Pike County is a useful exemplar. Pike County is divided into four districts, all of which take small portion of the county and pair it with neighboring counties to form a district. That pattern repeats itself in Madison County, which HB 2 divides among 4 districts dominated by

surrounding counties. The result is the elimination of arguably the most competitive House district in the Commonwealth and replacing it with three safe Republican seats. (VR 4/6/22, 3:54:45).

19. Plaintiffs also note that Section 33 mandates that "[n]ot more than two counties shall be joined together to form a Representative District." Ky. Const. § 33. Thirty-one times HB 2 combines more than two counties in a single district: District Nos. 1 (5), 6 (3), 8 (3), 12 (4), 14 (3), 16 (3), 21 (4), 22 (3), 24 (3), 33 (3), 47 (4), 52 (3), 55 (3), 56 (3), 61 (3), 70 (4), 71 (4), 74 (3), 78 (4), 80 (3), 83 (3), 84 (3), 89 (5), 90 (3), 91 (3), 92, (3), 93 (3), 94 (3), 96 (3), 97 (3), 99 (3). (VR 4/5/22 3:41:22 – 3:41:30). By contrast, HB 191 contained only 23 districts with more than two counties. (VR 4/5/22 3:41:30 – 3:41:28; PEX 4). (Once again, this is sometimes necessary due to the populations of certain counties and the separate constitutional requirement that all counties in a district be contiguous).

20. These facts are not in dispute. Defendants do not contest that HB 2 contains dozens of violations of the text of Section 33, as just summarized. They simply contend that the Kentucky Supreme Court would overlook those violations because the map achieves the required population variance while splitting the fewest number of counties possible. For reasons explained below, that argument is wrong.

2. Partisan gerrymandering evidence

21. Plaintiffs also challenge HB 2 as an "extreme partisan gerrymander." To prove their claim, they presented several objective statistical metrics attempting to measure HB 2's and SB 3's partisan fairness and bias. This evidence overwhelmingly suggests that HB 2's and SB 3's drafters succeeded in drawing legislative maps that maximize the electoral gains of the Republican Party.

a. Dr. Imai's Simulation Analysis

22. Plaintiffs introduced evidence from Dr. Kosuke Imai of Harvard University. Dr. Imai is a highly regarded researcher in the field of political science. His work has been published in the field's preeminent peer-reviewed journals and is in the top 1% of most frequently cited research since 2018. (VR 4/5/22, 10:24:20 – 10:25:58, 10:29:26 – 10:29:55; PEX 1 (listing Dr. Imai's publications on pp. 3-12)). Dr. Imai was elected by his peers to serve as President of the Society for Political Methodology, the premier academic society for scholars from around the globe who use statistics and machine learning to study political science. (VR 4/5/22, 10:30:01 – 10:30:59).

23. Both of Defendants' expert witnesses praised Dr. Imai and his methodology as the foremost authority in the field of partisan gerrymandering analysis. (VR 4/5/22, 10:49:24 – 10:49:51; VR 4/7/22, 11:51:42 – 11:54:30; VR 4/7/22, 5:01:09; VR 4/7/22, 4:16:25, 4:16:40; PEX 7). Dr. Imai's expertise has never been challenged in court. (VR 4/5/22, 10:50:31 – 10:51:39, 10:51:40 – 10:51:54).

24. Dr. Imai uses Monte Carlo simulation algorithms—which he developed and are now widely used (including by one of Defendants' experts)—to generate a representative set of 10,000 possible redistricting maps under a specified set of criteria. (PEX 2, pp. 6-7; VR 4/5/22, 10:31:32 – 10:37:46). This allows one to evaluate the properties of an enacted map by comparing them against those of the simulated maps. (*Id.*). If the proposed plan unusually favors one party over another when compared to the ensemble of simulated maps, this serves as empirical evidence that the proposed plan is a partisan gerrymander. (*Id.*). Statistical analysis then allows one to quantify the degree to which the proposed plan is extreme relative to the ensemble of simulated plans in terms of partisan outcomes. (*Id.*).

25. A primary advantage of the simulation-based approach is its ability to account for the political and geographic features that are specific to each state, including spatial distribution of voters and configuration of administrative boundaries—sometimes referred to as a state's "political geograpghy." (PEX 2, p. 7; VR 4/5/22, 10:38:30 – 10:40:43).

26. Simulation methods can also incorporate each state's redistricting rules. (*Id.*).

27. Dr. Imai's simulation-based approach therefore allows one to compare a proposed plan to a representative set of alternate districting plans subject to Kentucky's administrative boundaries, political geography, and constitutional requirements. (*Id.*).

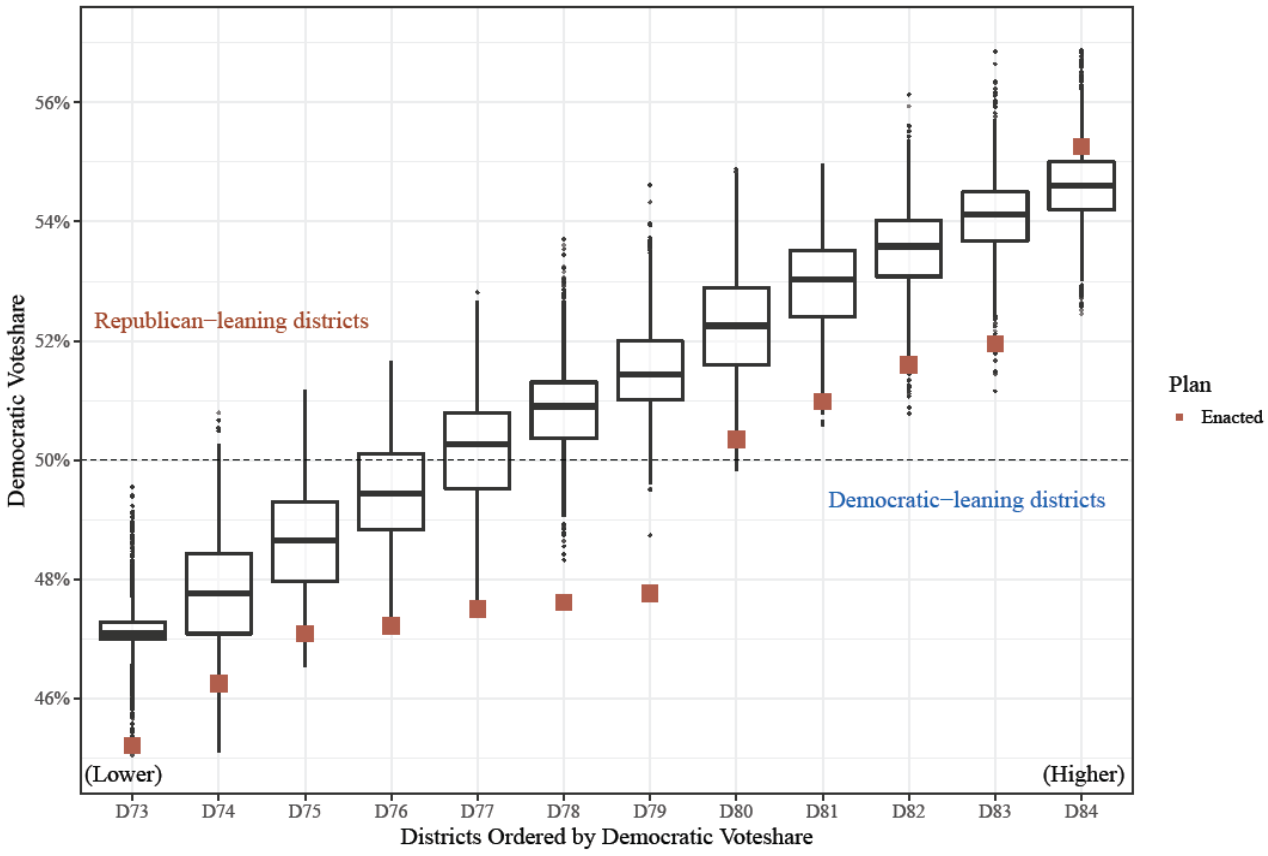
28. Over the last 10 years, simulation methods have become the dominant way to evaluate redistricting plans. (VR 4/5/22, 10:37:47 – 10:40:43).

29. These simulation algorithms are not designed to generate thousands of maps that would actually be enacted by policy makers. (VR 4/5/22, 10:35:47 – 10:36:49). Rather, the primary goal of the simulation-based approach is to evaluate a specific proposed or enacted plan for partisan bias or other concerns. (*Id.*; *see also* VR 4/7/22, 12:33:35 – 12:33:58).

30. Here, Dr. Imai used a simulation algorithm to generate 10,000 simulated state House plans which all satisfy the criteria set forth in Section 33—*i.e.*, 100 geographically contiguous districts with population deviation not to exceed +/-5% and minimizing the number of county splits. (PEX 2, pp. 21-22). Dr. Imai evaluated the partisan lean of districts created by HB 2 compared to the simulated House plans using data from the 8 most recent state-wide elections for which precinct-level voting data is available: the 2016 Presidential and U.S. Senate elections, and 2019 elections for Governor, Attorney General, Secretary of State, Auditor, Treasurer, and Agricultural Commissioner. (PEX 2, p. 24; VR 4/5/22, 10:55:19 – 10:59:01). That averaging is important because it provides a general measure of partisanship, not specific to any particular

candidate or race. Accordingly, it is standard practice in simulation analysis. (VR 4/5/22, 2:07:57 – 2:08:40, 2:09:40).

31. Dr. Imai ordered each district under the enacted House plan by its Democratic vote share (based on the average of the 8 elections identified above), from the district with the lowest Democratic vote share to the one with the highest. (PEX 2, pp. 11-13; VR 4/5/22, 11:21:20 – 11:29:01). Dr. Imai then conducted the same operation on each of the 10,000 simulated House plans by sorting its districts according to their Democratic vote shares. (*Id.*). Dr. Imai then compared the distribution of district level Democratic vote share between the simulated and enacted House plans. That comparison can be seen in Figure 3 of his report:



32. Here, a red square represents the Democratic vote share of each ordered district under the enacted plan, focusing on a total of 12 districts, ranging from the district with the 73rd

lowest Democratic vote share (denoted by "D73") to the one with the 84th lowest (denoted by "D84"). (*Id.*). These ordered districts were selected because their vote shares are the closest to the 50% threshold represented by the graph's dotted horizontal line. (*Id.*).

33. In this boxplot, the box represents the range that contains 50% of the simulated data, and the horizontal line represents the median value. (*Id.*). The vertical lines that come out of the box (called "whiskers") represent the typical range of data. (*Id.*). Any data points falling outside of these lines, including those indicated by black dots, are considered outliers. (*Id.*).

34. The above boxplot shows a clear pattern with respect to the partisan bias of HB 2. Under the enacted plan, there exists a large jump of about 2.6 percentage points between the Republican-leaning district with the highest Democratic vote share (D79) and the Democratic-leaning district with the lowest Democratic vote share (D80). (*Id.*). That gap is known as a "signature of gerrymandering" in the academic literature (Herschlag et al. 2020), and it serves as empirical evidence for efforts to make Republican-leaning districts safer while reducing the Democratic advantage of Democratic-leaning districts. (*Id.*).

35. In contrast, the simulated House plans do not exhibit such a discontinuous gap. In fact, the boxplots change smoothly from the lowest district-level Democratic vote share (D73) to the highest (D84) within this figure. (*Id.*).

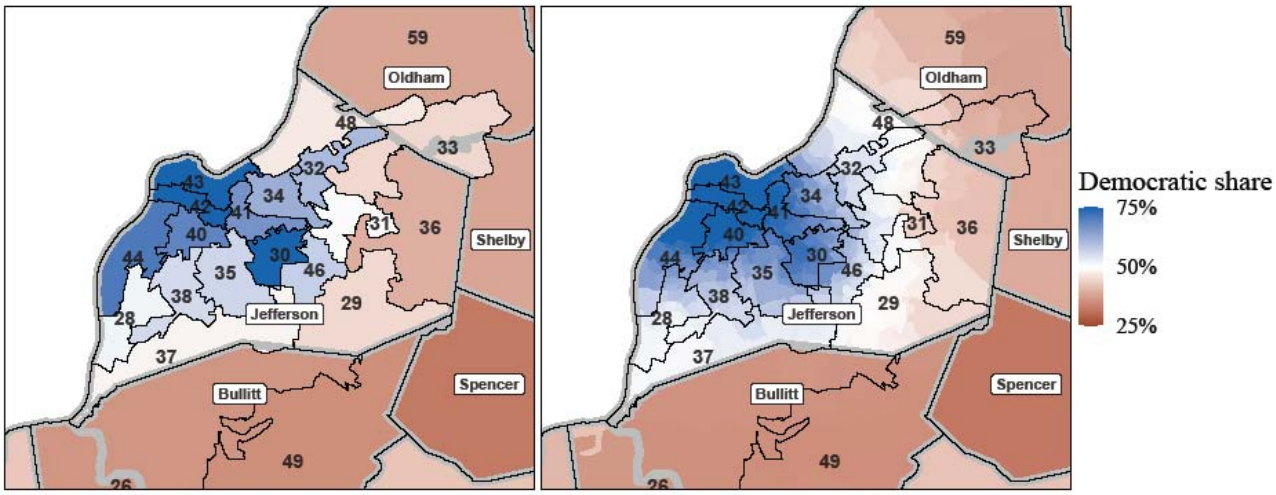
36. Furthermore, when compared to the simulated House plans, the enacted House plan has more Republican-leaning districts (i.e., those below the 50% threshold) while reducing the number of the Democratic-leaning districts (i.e., those above the 50% threshold). (*Id.*). Under a majority of the simulated House plans, ordered districts D77, D78, and D79 have a Democratic majority. Yet, the enacted plan makes these ordered districts Republican-leaning by a more than 2 percentage point margin. (*Id.*). Indeed, none of the 10,000 simulated House plans have a lower

Democratic vote share for these three ordered districts than the enacted House plan, proving that the enacted plan is a clear statistical outlier. (*Id.*).

37. Finally, Dr. Imai's Figure 3 also shows that the enacted House plan makes the Republican-leaning districts safer while reducing the vote share margin of the Democratic-leaning districts. (*Id.*). Under the enacted House plan, Republican-leaning ordered districts D73, D74, D75, and D76 have much lower Democratic vote share than most simulated House plans, making these districts safer for the Republican party. (*Id.*). In contrast, Democratic-leaning ordered districts D80, D81, D82, and D83 have much lower Democratic vote share, leading to less safe districts for the Democratic party. (*Id.*). This asymmetric treatment of Republican-leaning and Democratic-leaning districts represents clear empirical evidence that HB 2 was drafted to maximize the political representation of the Republican party—particularly in the crucial districts that might otherwise be competitive. (*Id.*)

38. Dr. Imai also conducted a local analysis of Kentucky's two largest cities (Louisville and Lexington), where he observed that HB 2' pattern of combining Democratic voters in urban areas with Republican voters in suburban and rural areas to create more Republican-leaning districts. (VR 4/5/22, 11:31:48 – 11:32:20).

39. Jefferson County is the home to Louisville, where voters generally lean towards the Democratic Party, while the precincts closer to the county border with neighboring Oldham, Shelby, Spencer, and Bullitt Counties are more Republican-leaning. Dr. Imai compared how these areas are treated under HB 2 with his set of simulated House maps, as shown in Figure 4 of his report:



40. The left map of Figure 4 presents the district-level vote share under the enacted House plan. (PEX 2, pp. 13-15; VR 4/5/22, 11:33:06 – 11:38:45). Under the enacted House plan, Districts 33 and 48 spill over into the neighboring Oldham County to make them safe Republican districts. (*Id.*). Specifically, the enacted House plan turns District 33 into a safe Republican district (the average Democratic vote share of about 45%) by combining the Republican-leaning areas in east Louisville (*i.e.*, Lyndon and Anchorage) with Republican strongholds in Oldham County (*i.e.*, Pewee Valley and South Crestwood). (*Id.*). Similarly, the enacted House plan makes District 48 Republican-leaning (the average Democratic vote share of about 47%) by, again, combining the Republican areas in east Louisville (*i.e.*, Indian Hills and Glenview) with a part of Oldham County where many Republican voters live (*i.e.*, the north of Crestwood). (*Id.*).

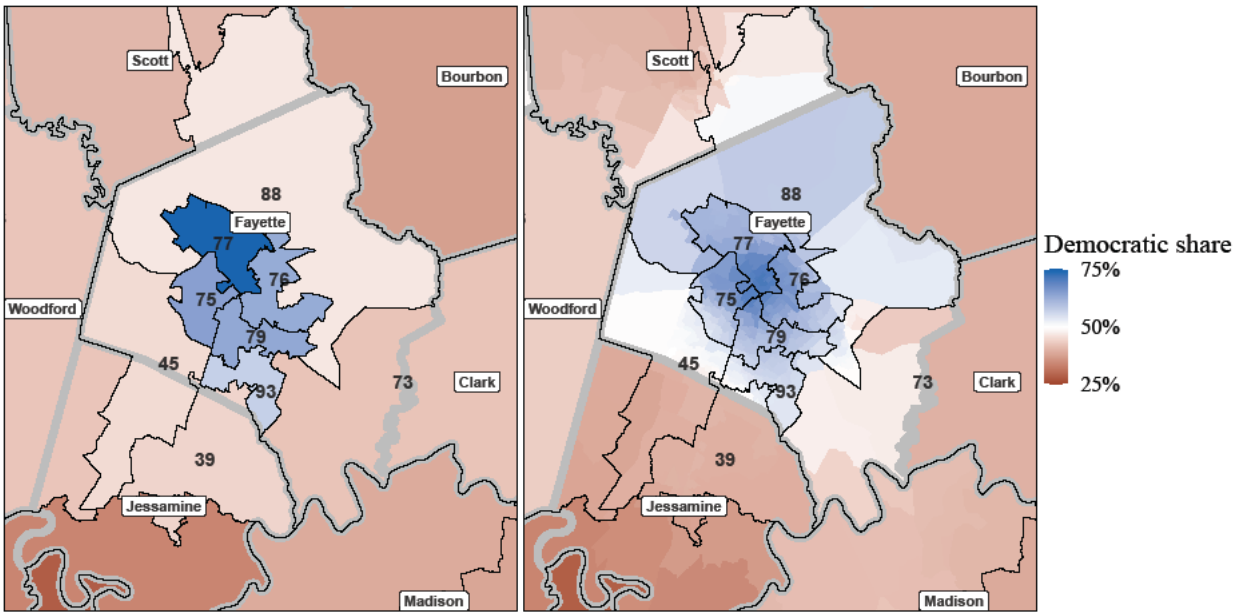
40. The right map of Figure 4 shows the expected two-party vote share of districts to which each precinct belongs under Dr. Imai's simulated House plans. (*Id.*). The map shows that the parts of District 33, which belong to Jefferson County, are likely to be part of a much more competitive district under the simulated House plans (indicated by white color) than under the enacted House plan. (*Id.*).

41. Furthermore, the parts of District 48 which belong to Jefferson County are likely to be part of either a slightly Democratic-leaning district, in the case of east Louisville (indicated by light blue color), or a more competitive district in the case of precincts near the county border (indicated by white color). (*Id*.).

42. Thus, Dr. Imai's analysis of Jefferson County shows that the enacted House plan creates additional safe Republican districts by combining some voters who live in Jefferson County with many Republican voters from neighboring counties. (*Id*.).

43. Finally, District 37 of the enacted House plan connects strongly Republican-leaning precincts located along the border between Jefferson and Bullitt Counties to create a Republican-leaning district with the Democratic vote share of about 48%. (*Id*.). Under the simulated House plans, however, these areas are expected to belong to a Democratic-leaning district. (*Id*.). It is also worth noting that some of the precincts, which are included in Districts 29 and 36, are expected to be part of a much more competitive district under the simulated House map when compared to HB 2's map. (*Id*.).

44. The pattern was repeated in Fayette County. Voters in the city center generally lean towards the Democratic party, whereas the precincts located on the border with Woodford, Scott, Bourbon, Clark, and Madison have many Republican voters. Dr. Imai compared how these areas are treated under HB 2 with his set of simulated House maps, as shown in Figure 5 of his report:



45. The left map of Figure 5 presents the district-level Democratic vote share under the enacted House plan. (PEX 2, pp. 15-16; VR 4/5/22, 11:39:35 – 11:43:20). The enacted House plan divides a large number of Democratic voters into four districts located near the city center. (*Id.*). District 77 has the largest Democratic vote share of about 76.2%, followed by Districts 75 (64.4%), 79 (63.4%), and 76 (62.8%), all of which are packed with many Democratic voters. (*Id.*).

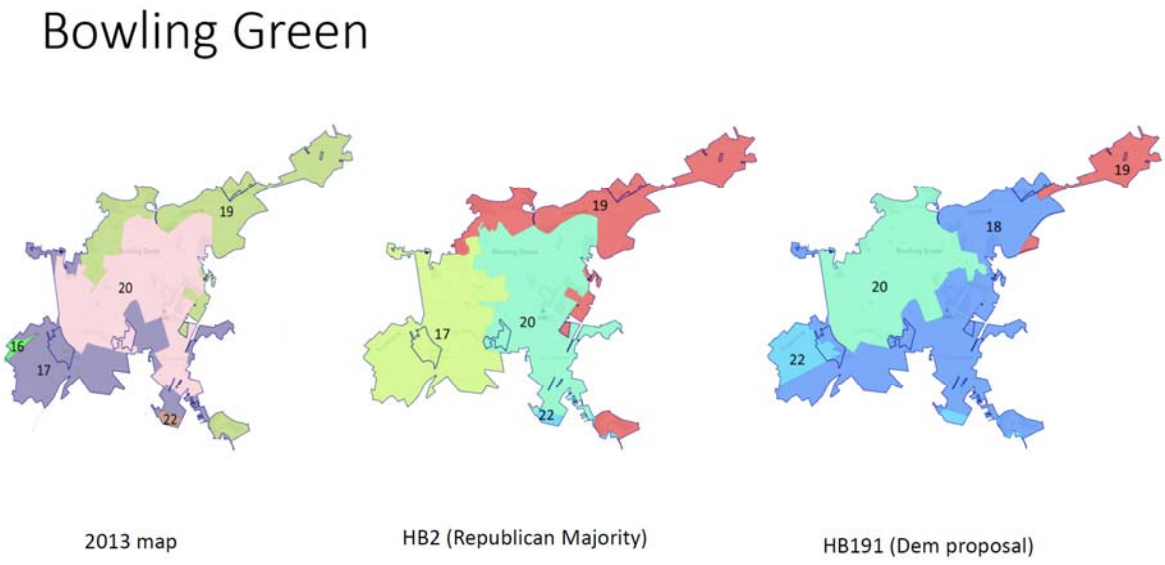
46. In contrast, the enacted House plan makes District 88 safely Republican by combining the Republican-leaning precincts on the county border with Republican strongholds from the neighboring Scott County (likely violating Section 33 in the process). (*Id.*). Similarly, the enacted House plan makes District 45 strongly lean toward the Republican party (Democratic vote share of about 45.3%) by taking some Democratic-leaning and Republican-leaning precincts of Fayette County and combining them with strongly Republican-leaning precincts from the neighboring Jessamine County. (*Id.*).

47. The right map of Figure 5 shows the expected two-party vote share of district to which each precinct belongs under the simulated House plans. (*Id.*). Under the simulated House

plans, the precincts in the northern part of Fayette County are more likely to belong to Democratic districts while the enacted House plan assigns these precincts to District 88, which strongly leans towards the Republican party. (*Id.*). Similarly, the precincts in the southwest corner of Fayette County belong to a much more competitive district under the simulated House plans than under the enacted plan, which assign these precincts to District 45. (*Id.*). Dr. Imai's analysis of Fayette County shows that the enacted plan packs Democratic voters in a small number of districts and creates additional safe Republican districts by combining some voters who live in Fayette County with many Republican voters from neighboring counties. (*Id.*).

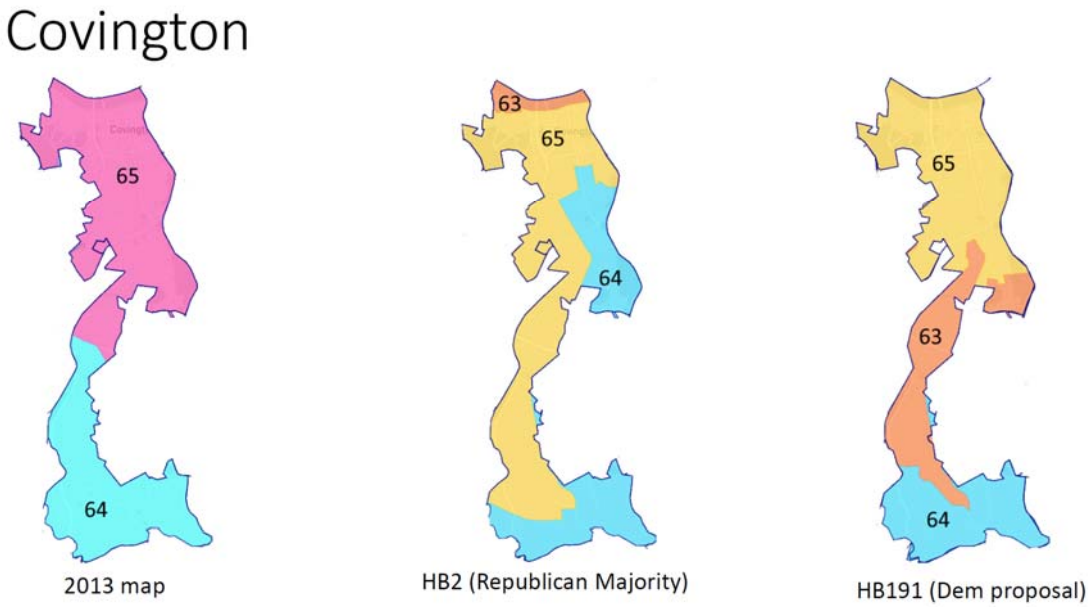
48. HB 2's drafters repeated this pattern in cities across the Commonwealth to great effect. For example, the City of Bowling Green has historically been wholly within the 20th legislative district. But HB 2 disregards this historic consideration and cracks the city down the middle, dividing it between Districts 17 and District 20. (VR 4/5/22, 3:44:19 – 3:44:31). The effect is to convert District 20—historically "a Democratic performing district" (VR 4/5/22, 3:45:19 – 3:45:30)—into an uncompetitive district where Republicans hold a 10-point advantage. (VR 4/5/22, 3:45:30).

49. This swing is particularly troubling because District 20's population grew since the 2010 census; therefore, the district could have "condensed" to protect the Bowling Green's community of interest and allow its voters to translate their votes into representation. (VR 4/5/22, 3:34:30 – 3:45:42). Instead, HB 2's drafters broke the city in two to maximize their partisan advantage:



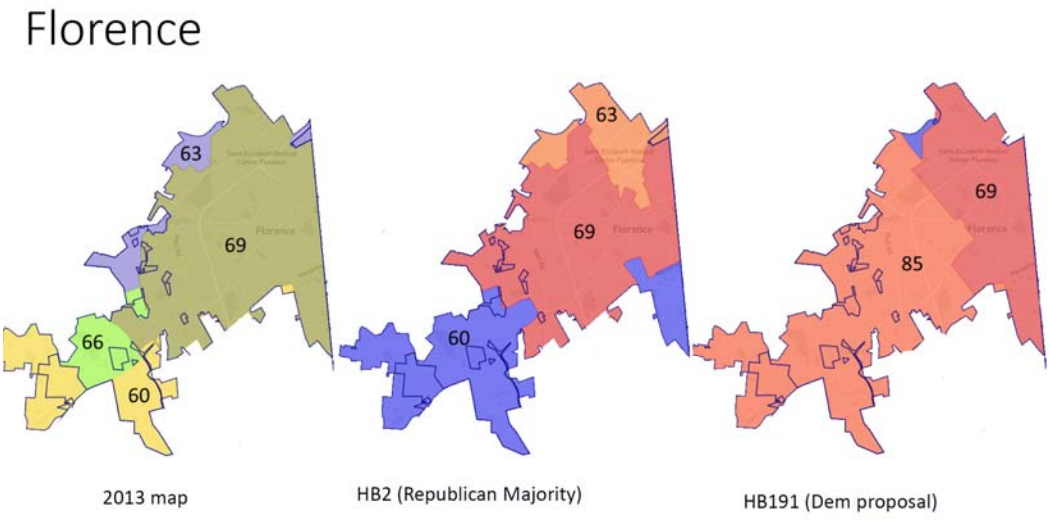
(PEX 3, p. 1).

50. In Northern Kentucky, District 65, currently represented by a Democrat, was redrawn to swing the district from a 10-point Democratic advantage to a 10-point Republican advantage. (VR 4/5/22, 3:47:31 – 3:47:44). This swing was achieved by cracking the City of Covington into several districts to dilute its Democratic voters by pairing them with neighboring suburban and rural districts. Most of downtown Covington is in District 65, which now extends "outside the City of Covington and deep into parts of Kenton County that are not a similar community to downtown Covington." (VR 4/5/22, 3:47:06 – 3:47:31). The map also lops off Covington's precincts closest to the Ohio River and joins them with the heavily Republican 63rd District. There is seemingly no explanation for such a bizarre division of Covington's voters, except the maximization of the Republican partisan advantage in the State House.



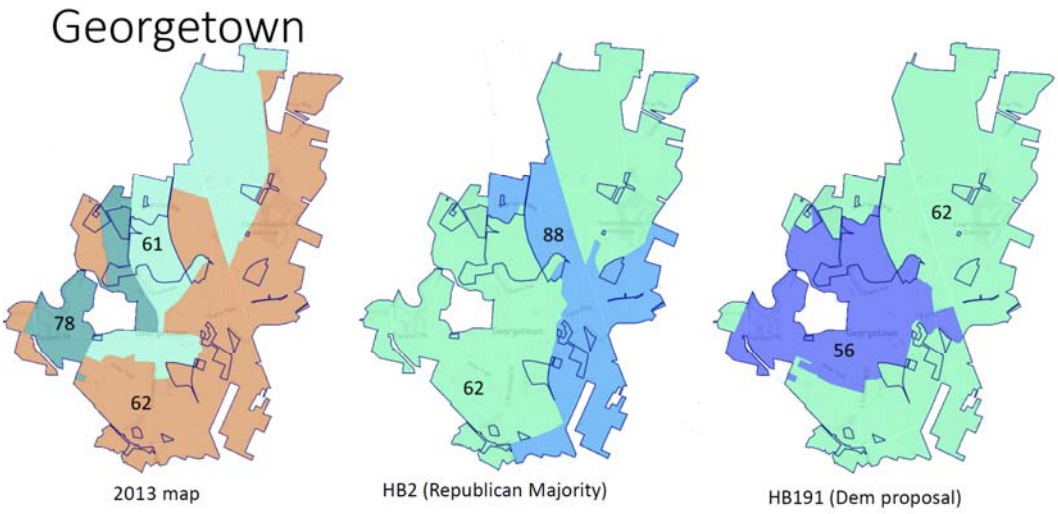
(PEX 3, p. 2).

51. HB 2 also divides the City of Erlanger into three separate districts—Districts 63, 69, and 64. Historically, Erlanger has remained mostly intact within a single district. HB 2 "pushes that district…out of Erlanger, where it has been pretty much the heart of Erlanger as you can see in the 2013 map." (VR 4/5/22, 3:49:30 – 3:49:51).



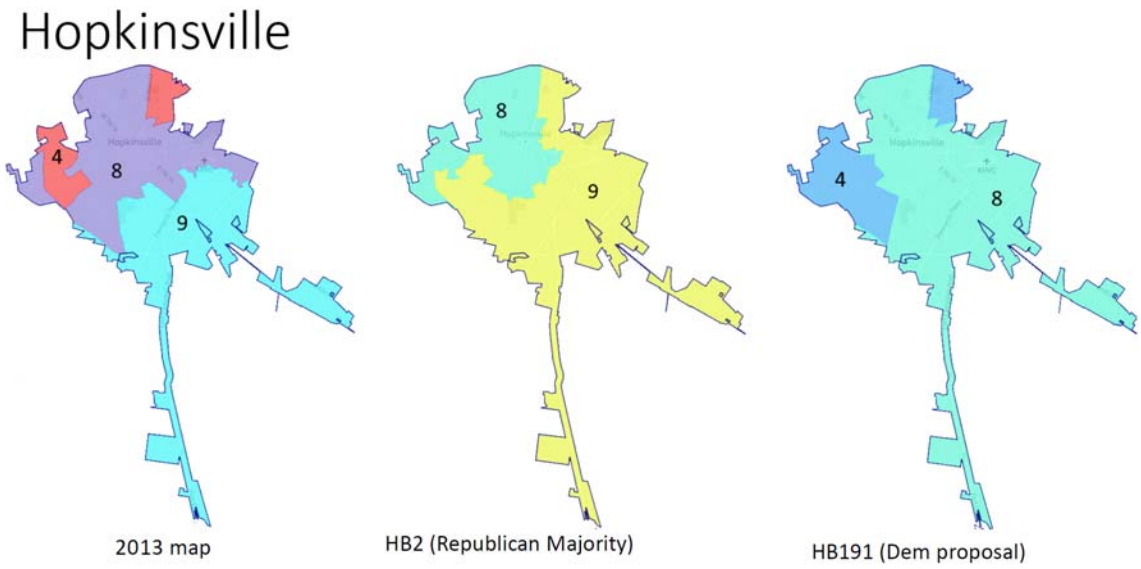
(PEX 3, p. 4).

52. HB 2 divides the City of Georgetown in half. District 88 now divides the city's northern and southern halves, creating two heavily Republic districts. District 88, which was previously wholly within Fayette County, now "becomes significantly more Republican performing." (VR 4/5/22, 3:51:50 – 3:52:03).

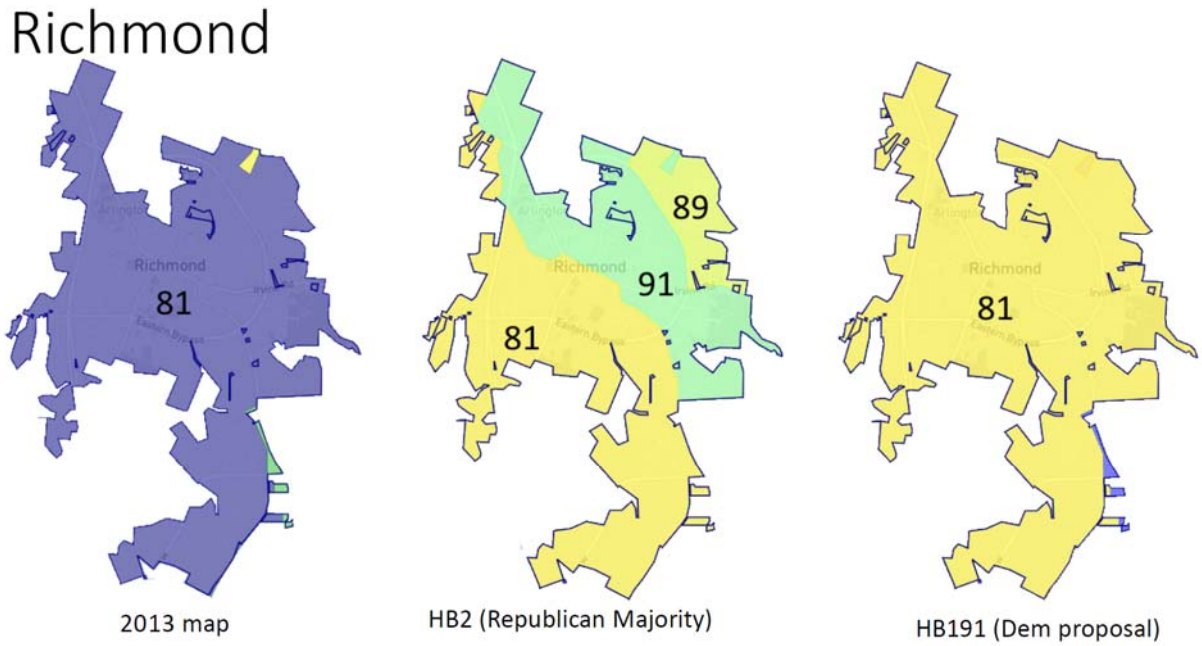


53. HB 2 similarly divides Hopkinsville in two. In doing so, it separates precincts Walnut Street 1 and Walnut Street 2 into two districts. These precincts are the most Democratic performing precincts in Christian County and are majority African American. (VR 4/5/22, 3:53:15 – 3:53:43).

54. As a result, Hopkinsville is split into two heavily Republican districts—Districts 8 and 9. By contrast, HB 191—just one alternative proposal—keeps Hopkinsville almost entirely intact in District 8 and creates a competitive plurality Black district. (VR 4/5/22, 3:53:44 – 3:54:06).



55. The last example, the City of Richmond, has historically been "wholly contained within the 81st House District for decades." (VR 4/5/22, 3:54:18 – 3:54:30). HB 2 commits multiple violations of Section 33 by splitting Richmond into three "and taking pieces of the City…and then tacking them on to counties outside of Madison County." (VR 4/5/22, 3:54:47 – 3:55:03). This change morphs the 81st—one of Kentucky's most competitive districts, decided by less than one percent of the vote in 2018 and 2016 (VR 4/5/22, 3:54:31 – 3:53:44)—into "three solidly Republican districts." (VR 4/5/22, 3:55:5 – 3:55:19).



b. Dr. Caughey's partisan bias analysis

56. Plaintiffs also offered testimony from Dr. Devin Caughey, a tenured professor of Political Science at the Massachusetts Institute of Technology ("MIT"). Dr. Caughey's expertise is in the areas of political representation, measuring public opinion, and the role of elections in linking public preferences to government outputs, particularly at the state level. (VR 4/6/22, 10:09:50 – 10:10:50).

57. Like Dr. Imai—Dr. Caughey is eminently qualified to provide the Court expertise in this matter. Before joining MIT's faculty in 2012, Dr. Caughey earned his undergraduate degree in History at Yale University; obtained an M.Phil in Historical Studies at Cambridge University in England; and went on to earn both a master's degree and PhD in Political Science from the University of California-Berkeley. (*See* PEX 5).

58. Dr. Caughey has published two books: one on representation in the one-party south, and another on statistical methods to be used in forecasting and public opinion surveys. (PEX 5; VR 4/6/22, 10:11:48 – 10:12:11). He will be publishing a third book this year surveying state

politics since the 1930s, looking at how state legislatures have responded to public opinion. *Id*. In addition, Dr. Caughey has published 16 peer-reviewed academic articles on a range of subjects. (PEX 5).

59. One of Dr. Caughey's areas of expertise is the study of partisan gerrymandering in state legislative elections and its consequences on policies enacted as a result of those elections. (VR 4/6/22, 10:15:30 – 10:16:35).

60. He has served as an expert witness in three other partisan gerrymandering cases—once in Oregon, and twice in Pennsylvania. (VR 4/6/22, 10:57:40 – 10:59:16). Again, given these qualifications, it is unsurprising Dr. Caughey's testimony has never been excluded by a court. This Court finds no reason to do so here. Quite the opposite, Dr. Caughey's expertise has proven valuable to the Court's assessment of HB 2 and SB 3.

61. Dr. Caughey conducted his analysis in part using "Plan Score." Plan Score is a publicly available website that uses past election data and a prediction algorithm to make predictions about state legislative races and use that projection to calculate the expected Efficiency Gap, Declination, and other metrics of partisan gerrymandering. (VR 4/6/22, 10:41:25 – 10:49:30).

62. Plan Score is a publicly available and transparent platform that allows any user to upload legislative maps and assess their partisan bias. Though it is designed for use by the general public, Plan Score uses sophisticated statistical analysis, including multi-level Bayesian prediction models, to evaluate legislative maps and produce partisan bias metrics.

63. Dr. Caughey explained two basic strategies that state legislatures can use to engage in political gerrymandering, which he defined as a way for a political party "to maximize the number of seats that one's own party wins subject to the number of votes they are likely to earn statewide"—otherwise known as the party's "seat share." (VR 4/6/22, 10:23:00 – 10:23:31).

64. First, mapmakers can engage in what is known as "cracking," where they take the supporters of the opposing party and spread them evenly across districts that are nevertheless a majority for the party drawing the maps. (VR 4/6/22, 10:24:11 – 10:24:30).

65. Mapmakers also can engage in "packing," where they take the "supporters of the opposing parties and pack them into a few hyper-lopsided districts." (VR 4/6/22, 10:24:31 – 10:24:51).

66. Often, as here, both methods are used in conjunction to maximize partisan gains statewide. (VR 4/6/22, 10:24:52 – 10:24:55).

67. There are many objective metrics that can measure partisan gerrymandering. One of those metrics, known as the "Efficiency Gap," measures how efficient each party is at translating votes into seats. (See PEX 6 § 4.2; VR 4/6/22, 10:50:10 – 10:54:05).

68. The Efficiency Gap compares the number of "wasted" votes for each party—that is, the number of votes cast for a losing candidate. (VR 4/6/22, 10:50:30 – 10:51:49). If one party's votes are being wasted at a lower rate than its opponent's, that is an advantage because it has a chance of winning more seats with comparatively fewer votes. *Id*. This metric is useful because it can quantify the extent voters have been packed and cracked into districts designed to waste their votes. (VR 4/6/22, 10:52:25 – 10:53:35).

69. The Efficiency Gap has become one of the "generally accepted metrics for evaluating the partisan fairness of a redistricting plan." *Carter v. Chapman*, 270 A.3d 444, 458 (Pa. 2022); *see also Harper v. Hall*, 868 S.E.2d. 499, 547 (N.C. 2022). Moreover, while there is no definitive Efficiency Gap score that, if exceeded, constitutes *per se* partisan gerrymandering, political scientists generally agree that an Efficiency Gap over 7-8% (especially when corroborated by other objective measures of partisan gerrymandering) is a sign that voters have been

systemically packed and cracked into districts to minimize their expected seat share. (VR 4/6/22, 11:44:25 – 11:46:00).

70. Analyzing HB 2 under this metric, Dr. Caughey calculated it "is likely to waste 13.4 percentage points more Democratic votes than Republican votes." (PEX 6, § 5.1.1). That 13.4% Efficiency Gap means HB 2 gives the Republican party an extra 13 seats on top of what would normally be considered a "winner's bonus." (VR 4/6/22, 11:21:25 – 11:21:58). This result is "[a]n extremely large efficiency gap…relative to what you see in other states at other times." (VR 4/6/22, 11:22:26 – 11:22:33).

71. Indeed, HB 2 is "more favorable toward Republicans than 99% of all plans that have ever been scored by Plan Score." (VR 4/6/22, 11:22:45 – 11:23:05). That makes HB 2 an extreme statistical outlier that cannot be explained away by Kentucky's political geography. In fact, the only evidence in the record on this point suggests that HB 2 is significantly more pro-Republican than other states with higher levels of partisan sorting between urban and rural areas. (VR 4/6/22, 11:24:55 – 11:29:30).

72. Dr. Caughey also evaluated HB 2's "Declination." (PEX 6, § 4.4; VR 4/6/22, 10:54:05 – 10:56:40). To measure this statistic, one creates a plot of all the legislative districts, arranged by the percentage of vote share expected for one party. (VR 4/6/22, 10:54:25 – 10:55:00).

73. Then, starting from the point on the graph where each party is expected to win 50% of the two-party vote, a political scientist would create two trend lines—one through the middle of each party's expected vote share "cloud" (represented by the point estimates on the plot). (PEX 6, § 4.4).

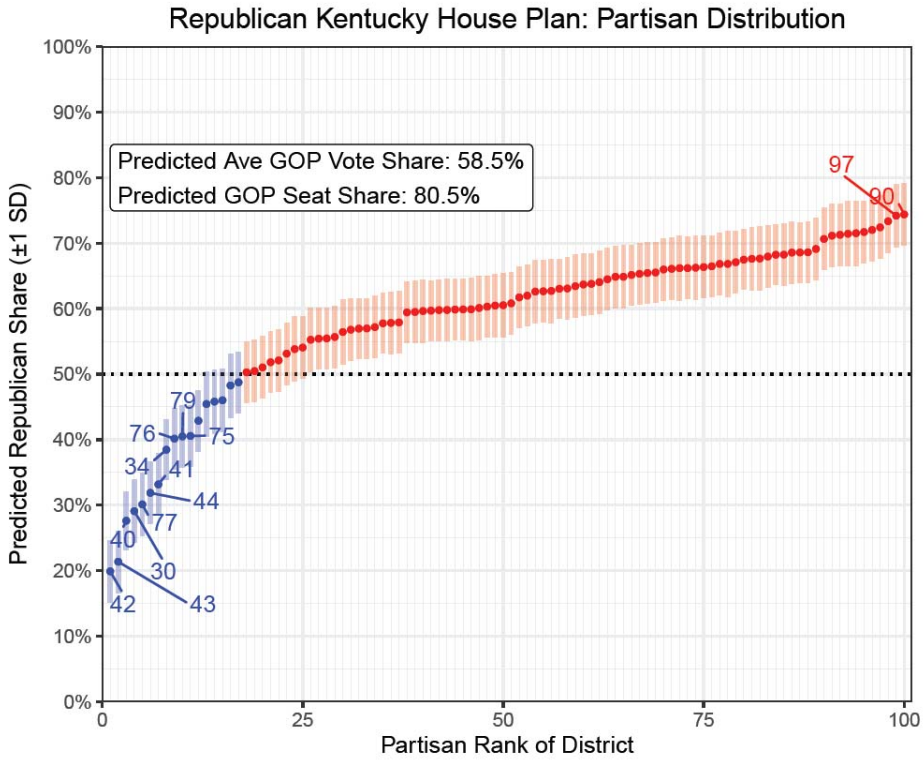
74. To find the declination, one measures the angle between the two trend lines. A non-gerrymandered map would not produce a sharp angle between the two lines; the expected vote

share plot will increase smoothly from left to right. (VR 4/6/22, 10:54:45 – 10:55:20). As the angle between the lines increases, however, it signals gerrymandering because the majority party has packed many of the opposition's voters into a few heavily concentrated districts but spread the rest (and its own) across a larger number of districts where the majority party's votes will translate into more seats. (VR 4/6/22, 10:55:21 – 10:56:40).

75. Importantly, Efficiency Gap and Declination are highly correlated, but do not always point in the same direction. (VR 4/6/22, 10:56:41 – 10:57:36). When they do point in the same direction, like here, a court can have far more confidence in the conclusion that a map is a result of gerrymandering.

76. Dr. Caughey found that HB 2's Declination, like its Efficiency Gap, is "off the charts." (VR 4/6/22, 11:46:44). The Declination shows that HB 2's pro-Republican bias of this plan is larger than the bias in 98% of all historical plans scored by Plan Score (PEX 6, § 5.1.1).

77. This extreme declination can be seen visually in the plot below by the radically different "tails" at the respective ends of the graph. The red dots ascend gradually in a smooth line upward from 50% expected Republican vote share. By contrast, the blue dots form a line that drops precipitously down to the bottom of the graph. The angle (or decline) between those two lines is very steep, hence a significant declination score.

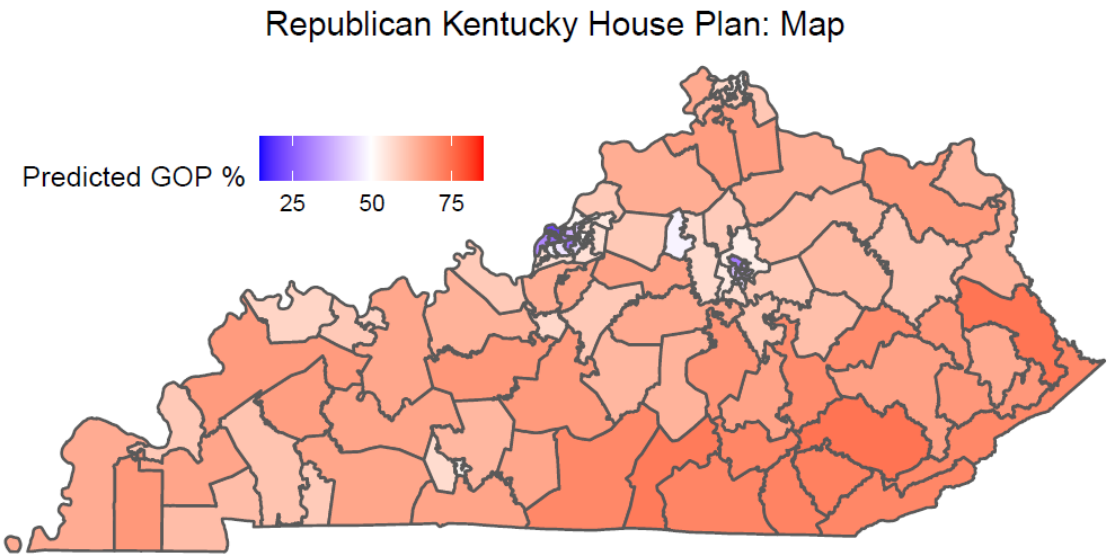


78. This plot also reflects HB 2's extreme partisan asymmetry. (VR 4/6/22, 11:13:45 – 11:20:36). Indeed, under HB 2, an election with a perfect 50/50 partisan vote split would produce a large Republican majority of approximately 60 seats. (VR 4/6/22, 11:17:45 – 11:18:50).

79. The plot also shows that HB 2 largely eliminates competitive races for state House in Kentucky. Only 7 of the 100 seats give either party at least a 25% chance of winning. (PEX 6, § 5.1; VR 4/6/22, 11:34:15 – 11:35:29). Thus, more than 90% of Kentuckians will live in a District where their Representative will almost certainly be chosen in the dominant party's primary.

80. Dr. Caughey also plotted each district's likely Republican vote share. On the following map a darker the shade of red or blue, means the more likely the district is to vote for Republican and Democratic candidates, respectively. This map shows that there may well be no Democratic representatives in the Kentucky House of Representatives outside of Louisville, Lexington, and—perhaps—Frankfort, a portion of which "leans" Democratic under this plan. That

result is confirmed by the city-by-city analysis conducted above that shows HB 2 systematically cracking urban Democrats into districts with suburban and rural Republican voters.



(PEX 6, § 5.1).

81. Dr. Imai's and Dr. Caughey's analyses left little doubt that HB 2 creates a durable, structural advantage for Republican candidates that has never been matched in Kentucky or any other state. (VR 4/6/22, 16:20:55 – 16:21:03).

* * * * *

82. Importantly, Defendants did not attempt to affirmatively rebut any of Dr. Imai's or Dr. Caughey's opinions with respect to HB 2's partisan bias. Although they retained two experts, neither offered an opinion that HB 2 was not a partisan gerrymander. They simply attempted—unsuccessfully—to poke holes in Plaintiffs' analysis.

83. The Court finds it telling—and curious—that Defendants did not ask their experts to opine on HB 2's partisan bias. That conspicuous silence only reinforces Dr. Imai's and Dr. Caughey's conclusions.

II. Congressional apportionment plan (SB 3)

84. Plaintiffs also challenge the Congressional map created by SB 3 as an unconstitutional partisan gerrymander and an exercise of arbitrary and absolute power prohibited by Section 2 of Kentucky's Constitution.

85. Plaintiffs' gerrymandering argument relied, once again, on simulation analysis from Dr. Imai. He evaluated SB 3's Congressional map using the same simulation algorithm approach that he applied to the state House map. (PEX 2, pp. 16-17; VR 4/5/22, 12:00:04 – 12:03:15). The results are striking.

86. SB 3's First District is less compact that 99% of simulated plans that contain Franklin County. (*Id.*). The amoeba-like district stretches from Fulton County along the Commonwealth's southern border before jutting upwards at an almost 90-degree angle to encompass half of central Kentucky, stretching as far north as Franklin County.

87. To illustrate its absurdity: driving the most direct route through the district from Fulton to Franklin counties will carry the driver through the 1st district into the 2nd (Muhlenberg county), then into the 4th (in Nelson County), before returning briefly to the 1st (Anderson County), crossing into the 6th (Anderson to Mercer to Anderson to Woodford County) and then, finally, back to the 1st District (Franklin County).

88. Dr. Imai's analysis also revealed that District 1 was drawn to achieve partisan ends. His simulation analysis shows that the 35% Democratic vote share in the enacted 1st District is lower than more than 99% of simulated districts containing Franklin County, making the enacted 1st District an extreme outlier. (PEX 2, pp. 17-18; VR 4/5/22, 12:10:05 – 12:12:00). By contrast, Dr. Imai's maps that kept the historical pairing of Franklin and Fayette counties intact produced an average Democratic vote share of 47.8%. Like HB 2, it appears SB 3's drafters' goal was to eliminate the Republican party's political competition across the Commonwealth.

89. Again, Defendants chose not to introduce any affirmative evidence to rebut Dr. Imai's testimony regarding partisan fairness; they opted instead only to levy critiques at his methods. But for reasons explained below, those critiques fell flat.

90. Defendants did, however, attempt to justify the 1st district's bizarre shape by harkening back to the 30-year old map intended to protect former Congressman representing the 2nd District, William Natcher, who was a resident of Bowling Green. (VR 4/7/22, 12:22:16 – 12:24:10, 12:27:25 – 12:27:50). This argument proves that the 1st district's unusual shape was not necessary to preserve any longstanding communities of interest but was, instead, a relic of a former political era.

91. Defendants' experts offered testimony that undermined this claim in any event. Mr. Trende agreed that simulation analysis was meant to remove partisan considerations that have informed previous maps. (VR 4/7/22, 12:24:11 – 12:25:25).

92. Dr. Voss, moreover, testified that he experimented with Dr. Imai's simulation algorithm to conduct several "regional analyses" that attempted to account for certain historical features of Kentucky maps. To do so, Dr. Voss placed "soft constraints" on Dr. Imai's simulation algorithm that instructed the algorithm to attempt to keep certain regions intact, if possible. (VR 4/7/22, 4:51:35 – 4:54:10). His results are illuminating. When Dr. Voss instructed the algorithm to keep Warren, Daviess, and Bullitt Counties together (rather than the entire 2nd District), Franklin County almost never appears in the First District. If you "leave the simulation" alone, Franklin County "won't end up in the First" District. (VR 4/7/22, 4:53:15 – 4:53:23).

93. In short, SB 3 sacrifices the residents of more than a dozen counties in service of the map drawers' partisan aims. The map bisects Anderson County, splitting its population

between the 1st and 6th Districts. It also moves the entirety of Washington County into the 1st District, whereas most of it was previously attached to the more compact, adjacent 2nd District.

94. If this pattern holds, in 2030, the First District may very well stretch from Fulton County to the Ohio River.

LEGAL STANDARD

95. The 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. *See Fischer IV*, 366 S.W.3d at 910; *Fischer v. State Bd. of Elections*, 879 S.W.2d 475, 475-476 (Ky. 1994) ("*Fischer II*"); *Ragland*, 100 S.W. at 866-67.

96. "[W]here the matter is plain that the Constitution has been violated, then the courts cannot escape the duty of so declaring whenever the matter is brought to their attention." *Ragland*, 100 S.W. at 867. "[N]o matter how distasteful it may be for the judiciary to review the acts of a co-ordinate branch of the government their duty under their oath of office is imperative." *Id.*

97. The Court is not relieved of its duty to decide the merits of Plaintiffs' constitutional challenges by the so-called "independent state legislature" doctrine. That doctrine was rejected by the U.S. Supreme Court in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 817-18 (2015) ("Nothing in [Article I] instructs, nor has this Court ever held, that a state legislature may [regulate] the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution.").

98. Even its backers admit that the theory would need to be "resuscitate[d]" by the U.S. Supreme Court in light of "many precedents that appear to be in tension with it." Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1, p. 14 (Fall 2020).

99. And in any event, it has been rightly debunked as inconsistent with the original meaning of the Constitution, Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. 445 (2022), and ridiculed in academic literature as being preposterous, dangerous, and antidemocratic, Miriam Seifter, *Countermajoritarian Legislatures*, Columbia L. R. Vol. 121 (2021); Jason Marisam, *The Dangerous Independent State Legislature Theory*, Michigan St. L. R. (2022); Vikram Amar and Akhil Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 Supreme Court Review (forthcoming).

100. Moreover, and contrary to Defendants' contention, Section 33 is not the only provision of Kentucky's Constitution relevant to Plaintiffs' partisan gerrymandering challenges. Because there is no conflict between Section 33 and other provisions that Plaintiffs invoke (Sections 1, 2, 3, and 6), the Court must consider each of the relevant challenges on its own merits. *Holbrook v. Knopf*, 847 S.W.2d 52, 55 (Ky. 1992) (more specific provision controls only when there is conflict between two competing rules).

CONCLUSIONS OF LAW

I. Plaintiffs Have Standing to challenge HB 2 and SB 3

101. "To sue in a Kentucky court the plaintiff must have the requisite constitutional standing, which is defined by three requirements: (1) injury, (2) causation, and (3) redressability." *Overstreet v. Mayberry*, 603 S.W.3d 244, 252 (Ky. 2020).

102. To establish injury, the alleged injury must be "'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Id*. (quoting *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 409 (2013)). A concrete injury is one that "actually exist[s]." *Id*. (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, (2016)). Actual injuries may

be "threated or imminent" if the plaintiff can show the threatened injury is "certainly impending." *Id*. (citations omitted).

103. Defendants' assertion that no one has standing to challenge HB 2 and SB 3 is meritless. "Kentucky courts have recognized the rights of citizens to bring suits to challenge the wrongful exercise of government power." *Bluegrass Pipeline Co. v. Kentuckians United to Restrain Eminent Domain, Inc.*, 478 S.W.3d 386, 391 (Ky. App. 2015) (citing, *inter alia*, *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 201 (Ky. 1989)).

104. This includes the right to bring challenges alleging that an apportionment Plan does not comply with the requirements of Section 33 of the Kentucky constitution, like the one Plaintiffs bring here.

105. Indeed, since the earliest redistricting challenges under Kentucky's 1891 Constitution, it has been clear that "[e]very citizen, taxpayer, and voter has an undoubted right to have the districts for representatives and senators created in accordance with the Constitution." *Stiglitz v. Schardien*, 40 S.W.2d 315, 317 (Ky. 1931).

106. The Court reached this conclusion because "[t]he discrimination" created by unconstitutional districts "is just as real and just as wrong whether it be based upon a denial of representation to one locality or be founded upon excessive representation given to another. Indeed, it necessarily operates to bring about both results, and in either case the constitutional standard of equality is destroyed." *Id*.

107. Thus, a claim that a map is unconstitutional cannot be limited to just one district because "the rights of the whole state are lined up with the representation of the several districts." *Id*. at 318. Hence, "[t]he people are entitled to have the districts defined in accordance with the Constitution." *Id.* at 317.

108. Kentucky courts have repeatedly allowed plaintiffs to bring Section 33 challenges seeking to enjoin *entire* legislative maps containing districts that do not comply with the Kentucky Constitution. *See e.g.*, *Fischer IV,* 366 S.W.3d 905 (hearing challenge to challenge to entire House redistricting map from individual legislators elected in specific districts.); *Stiglitz*, 40 S.W.2d at 317-318; *Ragland*, 100 S.W. 865 (enjoining the entirety of the first map drawn under the 1891 constitution at request of plaintiffs in Butler, Edmonson, and Ohio Counties).

109. Defendants' contrary standing argument lacks merit. It would gut the Supreme Court's longstanding holding that "[e]very citizen, taxpayer, and voter has an undoubted right to have the districts for representatives and senators created in accordance with the Constitution." *Stiglitz*, 40 S.W.2d at 317.

110. If Defendants were correct that a plaintiff had to live in a district drawn with a Section 33 violation to bring such a claim—for example, one that has been formed by taking part of a county and combining it with another—then only a small fraction of Kentucky's citizens would have the right to bring suit to challenge blatant Section 33 violations.

111. For that same reason, Defendants' proposed new standing rule is likely to lead to chaos. If a plaintiff could only sue over their own districts, no effective state-wide challenge could be mounted. This would raise the prospect of dozens of simultaneous lawsuits across the Commonwealth, creating the potential for conflicting rulings and requiring both the challengers and the state to run back and forth, duplicating resources to try a single claim. That makes no sense at all, as the Kentucky Supreme Court recognized nearly 100 years ago in finding that a violation of Section 33 in one district necessarily impacts the rest of the state. *See Stiglitz*, 40 S.W.2d at 317.

3. KDP has individual standing to challenge HB 2 and SB 3

112. The KDP has standing to challenge HB 2 and SB 3 on its own behalf. "There is no question that an association may have standing in its own right to seek judicial relief from injury

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to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

113. Indeed, federal and state courts routinely find that state political parties and non-profit organizations have the requisite constitutional standing to bring voting-rights challenges on their own behalf. *See e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (affirming political party has standing to challenge voter ID law); *Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring) (explaining how standing analysis applies to political parties and similar organizations in a partisan gerrymandering case); *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1076 (S.D. Ohio 2019), *vacated and remanded on other grounds by Chabot v. Ohio A. Philip Randolph Inst.*, 140 S. Ct. 102 (2019); *League of Women Voters of Mich. v. Johnson*, 352 F. Supp. 3d 777, 801 (E.D. Mich. 2018), *vacated in part on other grounds by League of Women Voters of Michigan v. Johnson*, 2018 WL 10096237 (6th Cir. Dec. 20, 2018); *Common Cause v. Lewis*, 2019 WL 4569584, at *112 (N.C. Super. Sept. 3, 2019) ("the [North Carolina Democratic Party] has such a personal stake in the outcome of the controversy that it has standing" under "the federal standing requirements of (1) injury, (2) causation, and (3) redressability.").

114. Here the passage of HB 2 and SB 3 has caused legally cognizable injury that grants the KDP standing. HB 2 unquestionably increases the number of Republican-leaning districts. It also makes those Republican-leaning districts safer while reducing the number of Democratic leaning districts and making those districts less safe. (VR 4/5/22, 11:21:20 – 11:29:01).

115. The Republican supermajority's attempt to artificially reduce the number of Democratic Representatives through partisan gerrymandering will make it extremely difficult for the Democratic Party to recruit, elect, and retain representatives to the Kentucky House. This, in

turn, will have profound consequences for the policy-making process, even if Democrats are unlikely to attain a majority.

116. House Majority Caucus Leader Derrick Graham, a Plaintiff in this litigation, testified that even in the minority, each additional lost seat reduces the Democratic Caucus' ability to negotiate legislation. (VR 4/6/22, 4:24:20 – 4:25:35).

117. Indeed, just last session, a bill to fund charter schools in Kentucky recently passed by the slimmest of margins in the House, with 51 votes in favor (the exact number needed to pass), with 46 votes against. (*Id.*). Thus, a swing of even a single vote can make a material difference in the outcome of votes like this.

118. KDP's injuries go beyond the policy-making process. HB 2 systematically draws Democratic voters out of competitive districts and packs them into a small number of overwhelmingly Democratic-leaning districts. Under HB 2, only 7 of the 100 House Districts give either party at least a 25% chance of winning. (VR 4/6/22, 11:34:15 – 11:35:29). The map establishes a hard floor for Republicans—and a hard ceiling for Democrats—that cannot be breached. Accordingly, more than 90% of state House elections will be decided in each Party's primaries.

119. Such extreme gerrymandered districts will make it difficult for KDP to recruit candidates, raise money, and train volunteers outside of Louisville and Lexington. Indeed, already several candidates recruited by KDP to run for the State House in 2022 were intentionally drawn out of their previous competitive districts and into districts that strongly favor Republicans. (VR 4/5/22, 4:01:10 – 4:01:25; VR 4/6/22, 4:26:30 – 4:28:24). The result is that 41 seats will go uncontested in the 2022 election. (VR 4/6/22, 4:26:40 – 4:27:22).

120. The elimination of almost all competitive races across the Commonwealth will mean fewer elected Democrats, which in turn will reduce KDP's ability to promote its policy agenda, recruit volunteers, and raise funds to support its activities. (VR 4/5/22, 4:07:18 – 4:08:45).

121. These deficits are likely to compound over the 10-year lifespan of HB 2, thereby hindering the ability of KDP and its members to compete even in the statewide races the Republican supermajority cannot gerrymander, thereby threatening to cut Democrats out of the redistricting process entirely in 2030.

4. KDP has associational standing to challenge HB 2 and SB 3

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

123. KDP's members—registered Democratic voters who appear in every State House and Congressional District across the Commonwealth—have standing to sue in their own right. *See Common Cause v. Lewis*, 2019 WL 4569584 at 294. To establish associational standing, KDP need only show that "at least one member of the association" has "standing to sue in his or her own right." *Interactive Gaming Council v. Commonwealth ex rel. Brown*, 425 S.W.3d 107, 114 (Ky. Ct. App. 2014).

124. As explained above, "[e]very citizen, taxpayer, and voter has an undoubted right to have the districts for representatives and senators created in accordance with the Constitution." *Stiglitz*, 40 S.W.2d at 317. This confers standing on every member of the KDP to challenge the

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unconstitutional maps created by HB 2 and SB 3. That is why courts routinely find that political parties and similar organizations have associational standing to bring partisan gerrymandering claims on behalf of their members. *See e.g.*, *Smith v. Boyle*, 959 F. Supp. 982 (C.D. Ill. 1997) (finding associational standing because "the Illinois Republican Party's members in Cook County would have standing to sue…[its] purpose is to elect their candidates to office; therefore, the interest which it seeks to protect is germane to the organization's purpose), *affirmed,* 144 F.3d 1060 (7th Cir. 1998); *Common Cause v. Lewis*, 2019 WL 4569584; *League of Women Voters of Mich.*, 373 F. Supp. 3d at 933, 937-38; *Ohio A. Philip Randolph Inst.*, 373 F. Supp. 3d at 1072-73; *Common Cause v. Rucho,* 318 F. Supp. 3d 777 (M.D.N.C. 2018) (holding that the North Carolina Democratic Party had standing to bring a partisan gerrymandering claim on behalf of its members), *vacated on other grounds,* 139 S. Ct. 2484 (2019).

125. Defendants misstate the law by arguing that KDP must point to specific party members to bring this case. Because all KDP members are harmed by the Republican gerrymander, KDP is not required to identify by name the specific members that have standing to sue in their individual capacities to establish associational standing. *See City of Ashland v. Ashland F.O.P. No. 3, Inc.*, 888 S.W.2d 667 (Ky. 1994) (finding that because all members of the police force could claim injury, the Fraternal Order of Police possessed associational standing without identifying individual members).

126. Plaintiffs have presented ample evidence that HB 2's extreme partisan gerrymander has injured every Democratic voter across the Commonwealth. As explained below, Plaintiffs' experts (Drs. Imai and Caughey) demonstrated how the HB 2 and SB 3 systematically crack and pack Democratic voters to minimize Democratic representation in the State House and the United States Congress.

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5. All individual plaintiffs have standing to challenge HB 2 and SB 3.

127. Kentucky Courts have long held that "[e]very citizen, taxpayer, and voter has an undoubted right to have the districts for representatives and senators created in accordance with the Constitution." *Stiglitz*, 40 S.W.2d at 317. There can be "no doubt of the right of the plaintiff[s] to invoke the power of the court to protect [their] constitutional rights." *Id*.

128. That is particularly true of Plaintiff Derrick Graham—the Minority Caucus Chair. Courts routinely find standing for elected representatives challenging unconstitutional legislative apportionment plans that reduce their influence in the legislative process, including just 10 years ago when Kentucky's Republican House Leadership challenged the 2010 reapportionment map. *See Fischer IV,* 366 S.W.3d at 908; *see also*, *Nat'l Wildlife Fed'n v. Burford*, 676 F. Supp. 271 (D.D.C. 1985) ("Legislators have standing to challenge objective diminution of their influence in the legislative process.") (collecting cases).

129. Representative Graham clearly articulated the effects of HB 2 and SB 3 at trial. HB 2's extreme partisan gerrymandered map was designed to reduce Democratic influence in the State House. That "matters both in terms of democracy and Democratic principles, but it also matters in terms of running for office…[and] its about policy." (VR 4/6/22, 4:24:20 – 4:25:11). With fewer representatives Democrats cannot "work with the other side developing policy. Because if [Democrats] don't have enough members to negotiate" they cannot influence the policy-making process. (VR 4/6/22. 4:24:40 – 4:25:11).

130. Representative Graham provided two recent examples: a recently passed historic racing bill that required significant Democratic support, and a recently passed charter school bill that narrowly passed without any Democratic support. (VR 4/6/22, 4:25:11 – 4:25:35). HB 2 is designed to remove Representative Graham and his Democratic colleagues from this process entirely, by drawing a legislative map with the sole goal of reducing Democratic membership in

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the General Assembly as much as possible. Representative Graham certainly has the right to challenge that unconstitutional act in court.

131. The individual plaintiffs have established standing to challenge SB 3, too. All individual plaintiffs reside in the enacted maps First Congressional District—a bizarre amoeba shaped district that stretches over 370 miles from Franklin to Fulton Counties. The First District was drawn this way solely to achieve the naked partisan aims of the Republican Party of Kentucky. The district is less compact, and more Republican-leaning than 99% of Dr. Imai's 10,000 simulated districts containing Franklin County. (PEX 2, pp. 17-18; VR 4/5/22, 12:10:05 – 12:12:00).

132. By contrast, simulated maps that keep the historical pairing of Franklin and Fayette Counties are significantly more competitive, with an average Democratic vote share of 47.8% *Id*. SB 3 will have a material impact on Franklin County voters and dilute the power of their vote by placing them in a heavily Republican District with far-flung rural counties with which they have little in common. (VR 4/6/22, 4:29:33 – 4:33:00); (VR 4/6/22, 4:45:25 – 4:50:42). There is no doubt that these plaintiffs have standing to challenge that unconstitutional act.

II. HB 2 Violates Section 33 of the Kentucky Constitution

133. "The dominant political subdivision in Kentucky is the county." *Fischer II*, 879 S.W.2d at 478. For many Kentuckians, their county is their "primary political subdivision and point of geographic identity." *Id.*

134. The Kentucky Constitution recognizes the importance of counties by requiring their preservation in the drafting of apportionment plans for the state House and Senate:

> The first General Assembly after the adoption of this Constitution shall divide the State into thirty-eight Senatorial Districts, and **one hundred Representative Districts, as nearly equal in population as may be without dividing any county, except where a county may include more than one district**, which districts shall constitute the Senatorial and Representative Districts for ten years. **Not more than two counties shall be joined together to form a Representative District**:

> Provided, in doing so the principle requiring every district to be as nearly equal in population as may be shall not be violated. At the expiration of that time, the General Assembly shall then, and every ten years thereafter, redistrict the State according to this rule, and for the purposes expressed in this section. If, in making said districts, inequality of population should be unavoidable, any advantage resulting therefrom shall be given to districts having the largest territory. **No part of a county shall be added to another county to make a district, and the counties forming a district shall be contiguous**.

Ky. Const. § 33 (emphasis added).

135. The text of this section lays down three separate rules meant to protect county integrity, a principle "of at least equal importance" to population equality under Section 33. *Fischer II*, 879 S.W.2d at 477. Mapmakers must not: (1) split counties, unless they are large enough to contain more than one district; (2) create districts that contain more than two counties; and (3) create districts by adding a part of one county to another.

136. Over time, Kentucky courts have recognized that these commands cannot be literally observed in every instance while creating 100 house districts of roughly equal population from among Kentucky's 120 counties.

137. The courts have been consistent, however, that any deviations from these principles must "be *necessary* . . . to effectuate that equality of representation which the spirit of the whole section imperatively demands." *Ragland*, 100 S.W. at 870 (emphasis added).

138. Kentucky's Supreme Court has ever "retreat[ed] from the importance of county integrity." *Fischer IV*, 366 S.W.3d at 912. On the contrary, the Court has continued to reaffirm that it is "not free to disregard the drafters' intent to preserve county integrity by striking the provision from Section 33," even if it can no longer be observed in *every* instance. *Id.* at 913. Simply put, "[p]reservation of county integrity" was the "paramount consideration" of Section 33's drafters and must "be balanced with population equality to accommodate both." *Fischer II*, 879 S.W.2d at 479.

139. HB 2 defies this constitutional command by splitting 23 counties 80 times, (VR 4/5/22, 3:38:31)—*far more* splits than necessary to accommodate "one person, one vote" principles.

140. HB 191, by contrast, splits 23 counties only 60 times while remaining safely within the facially constitutional 5% population deviation standard. (VR 4/5/22, 3:38:45; PEX 4).

141. HB 191 thus proves HB 2's 20 additional county splits are not necessary to achieve equal representation principles and therefore are constitutionally impermissible under Section 33, *Ragland*, and *Fischer II*. *See Fischer IV*, 366 S.W.3d at 915 (existence of alternate redistricting plans shows that population equality and county integrity can be balanced in a plan better designed to serve both interests).

142. HB 2's methods for dividing and combining counties resulted in dozens of other unnecessary violations of specific prohibitions in Section 33.

143. For example, Section 33 states that "[n]ot more than two counties shall be joined together to form a Representative District." Ky. Const. § 33. Deviations from this rule are permitted only if "*necessary* in order to effectuate that equality of representation . . . ." *Ragland*, 100 S.W. at 870 (emphasis added).

144. HB 2 violates this command on 31 separate occasions (VR 4/5/22, 3:41:26). Thos districts are: Nos. 1 (5 counties) 6 (3), 8 (3), 12 (4), 14 (3), 16 (3), 21 (4), 22 (3), 24 (3), 33 (3), 47 (4), 52 (3), 55 (3), 56 (3), 61 (3), 70 (4), 71 (4), 72 (3), 74 (3), 78 (4), 80 (3), 83 (3), 84 (3), 89 (5), 90 (3), 91 (3), 92 (3), 94 (3), 96 (3), 97 (3), 99 (3). (*See also* DEX 1, Tab 1).

145. These excessive multi-county districts were not "necessary" to achieve population equivalence. HB 191 proves the point; it created maps within the required +/- 5% population deviation range containing only 23 districts formed from parts of 3 or more counties (not

coincidentally, the minimum number of county splits required). (VR 4/5/22, 3:41:33; PEX 4). HB 2's excess constitutional violations cannot be attributed to the need to achieve population equality.

146. Section 33 also requires that "[n]o part of a county shall be added to another county to make a district . . . ." Ky. Const. § 33. Once again, HB 2 flagrantly violates this rule. Indeed, nearly half the districts in HB 2—45 in all—were built by violating this rule: District Nos. 1, 2, 3, 5, 6, 8, 10, 14, 16, 18, 19, 22, 26, 27, 33, 37, 39, 45, 48, 52, 55, 56, 61, 63, 69, 71, 73, 78, 80, 82, 83, 85, 86, 87, 88, 89, 90, 91, 92, 94, 95, 96, 97, 98, and 100. (VR 4/5/22, 3:39:29 – 3:40:48).

147. Many of these violations are shown above with relevant excerpts of the House map (HB 2).

148. Once again, HB 191 proves this was not necessary to achieve population equality; it would have created districts that cross county lines only 31 times. (VR 4/5/22, 3:41:00; PEX 4).

149. In many instances, the mapmakers committed multiple, intentional violations of Section 33 in the same county. Pike County is a perfect example: it is divided into four separate districts, all of which take a portion of Pike County and pair it with a neighboring county to form a district. Three of those four (District Nos. 92, 94, and 97) also contain at least three counties in them, violating Section 33 in two distinct ways. Similar "double" violations of Section 33 may be found in 23 districts: 1, 6, 8, 14, 16, 22, 33, 52, 55, 56, 61, 71, 78, 80, 83, 89, 90, 91, 92, 94, 96, 97, 100. (*See* DEX 1, Tab 1). (By contrast, HB 191 had only 13 "double" violations of Section 33 (PEX 4)).

150. Even Defendants' expert, Dr. Voss, agreed that if Section 33 requires the legislature to split counties only when necessary to achieve population equality, HB 3 is unconstitutional (VR 4/7/22 4:21:01 – 4:21:16). Likewise, Dr. Voss agreed that if Section 33 requires the minimum number of multi-split counties whose remainders are paired it with other counties to make districts,

HB 3 is unconstitutional because map drawers "definitely could have" drawn fewer multi-split counties. (4/7/22, 4:20:05 – 4:20:33).

151. Defendants' Section 33 argument rests on a flawed legal premise: that the Kentucky Supreme Court has reduced Section 33 to a "dual mandate": achieve population equivalency (+/- 5% from the "ideal" district population) while splitting the minimum number of counties possible. That argument misreads the Supreme Court's precedent.

152. The Kentucky Supreme Court has never addressed the precise question presented here: is the legislature free to ignore the text of the Constitution, and commit dozens of unnecessary violations of Section 33's specific commands, so long as it maintains population equivalence and splits the fewest number of total counties?

153. *Fisher II* did not justify that practice. There, the Court was called upon to balance the competing requirements of minimizing county splitting and population equivalence. The enacted House plan had a narrower population deviation (0.04%) than the challenger's alternative but split far more counties (48 vs. 29). *Fischer II*, 879 S.W.2d at 476.

154. Consequently, the Court's opinion only focused only on those two aspects of Section 33, holding that "as between the competing concepts of population equality and county integrity, the latter is of at least equal importance." *Id.* at 477. Nothing in that holding can be read to suggest that the Court did not care if the legislature gratuitously violated county integrity principles in ways not contemplated by that case. Nor did *Fischer II* purport to interpret "county integrity" for all purposes.

155. *Jensen*, on which Defendants place primary reliance, also does not answer this question. In that case, the "Appellant premise[d] his constitutional challenge on the fact that the 1996 Act does not create a whole House district within the boundaries of either Pulaski County or

Laurel County, even though both counties have populations large enough to accommodate a whole district." *Jensen*, 959 S.W.2d 771, 773 (Ky. 1997). The challenger asked the Supreme Court to "reconsider *Fischer II* and interpret Section 33 to require the division of a minimum number of counties *only after each county large enough to contain a whole district is awarded the maximum number of whole districts which can be accommodated by its population*." *Id.* (emphasis added).

156. The Supreme Court rejected the argument that each county large enough to have a district must get one because "that requirement was not included in the language of Section 33." *Id.* at 775.

157. That the party (and attorneys) challenging the adopted plan in *Jensen* may have advanced similar arguments as do Plaintiffs here (Def. Br., pp. 18-21) is a red herring. What matters is what the Supreme Court *held*. It refused to impose a new requirement on the legislature that was found nowhere in Section 33's text.

158. Here, by contrast, Plaintiffs seek only to challenge the General Assembly's failure to comply with express constitutional prohibitions.

159. *Fischer IV* also does not support Defendants' arguments. On the contrary, it supports Plaintiffs' case. In *Fischer IV*, the Legislative Research Commission asked the Supreme Court to reverse itself on two questions of law it previously decided: (1) that Section 33 requires the General Assembly to divide the fewest number of counties possible and (2) that Section 33 allows the General Assembly to exceed the +/- 5% population tolerance so long as the total variance between the largest and smallest district was less than 10%. *See Fischer IV*, 366 S.W.3d at 908. The Court declined to do so, finding that its duty was to follow the text of the Constitution "to the greatest extent possible" while still achieving population equality. *Id.* at 913.

160. Other Supreme Court cases reinforce that same requirement. In expounding upon the meaning of Section 33, *Fischer II* looked to the "highly persuasive" Tennessee Supreme Court decision in *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983), interpreting a "virtually indistinguishable" provision of the Tennessee Constitution. 879 S.W.2d at 479. The Kentucky Supreme Court approvingly cited *Lockert* as "direct[ing] adoption of a plan which *crossed as few county lines as possible* within federal constitutional guidelines for equal representation." *Id.* (emphasis added). *Lockert* had held that the constitutional language does not "sanction a single county line violation not shown to be necessary" to avoid a breach of equal representation requirements. *Lockert*, 656 S.W.2d at 839. As a result, *Lockert* struck down a map that "crosse[d] the county lines of fifty-seven counties *and [made] at least nine additional unnecessary and constitutional divisions of those counties*." *Id*. at 841-2 (emphasis added).[3]

161. The roots of this requirement go back even further. During the very first reapportionment after Section 33 was adopted, the Court struck down a map as violating its provisions. In the course of doing so, it noted that three or more counties could be combined to form a district only when "*necessary* . . . to effectuate that equality of representation which the spirit of the whole section imperatively demands." *Ragland*, 100 S.W. at 870 (emphasis added).

162. HB 191 proves that HB 2's numerous violations of Section 33 were not necessary to achieve population equality. That proposal shows it is possible to draw a legislative map that satisfies the Kentucky Constitution's population requirement while dividing Kentucky's counties 20 times fewer than HB 2; crossing county lines to form districts 14 times fewer; and forming

[3] Specifically, the Court held that because "[t]he [l]egislature can devise a Senate plan which complies with the one person, one vote requirement and divides only three counties, and does so only three times…the Legislature must enact a Senate plan which divides only three counties and does so only three times." *Lockert* at 844.

districts containing parts of three or more counties 8 fewer times. Because Defendants have not—and cannot—offer any rationale for dozens of unnecessary constitutional violations, Section 33 is hereby declared unconstitutional and will be permanently enjoined.

III. HB 2 and SB 3 Are Unconstitutional Partisan Gerrymanders

A. Kentucky's Constitution forbids partisan gerrymanders

1. Section 6's guarantee of a "free and equal" election prohibits partisan gerrymandering

163. Although the US Supreme Court has found no "plausible grant of authority in the United States Constitution" for federal courts to police partisan gerrymandering, it has been clear that holding does "not condemn complaints about redistricting to echo into a void." *Rucho*, 139 S. Ct. at 2507. Rather, the Court expressly left the issue to the states to address with "[p]rovisions in state statutes and *state constitutions* that can provide standards and guidance for state courts to apply." *Id*. (emphasis added).

164. Section 6 of the Kentucky Constitution contains just such a rule. It mandates that "[a]ll elections shall be free and equal." Ky. Const. § 6. A free and equal election is one that "is public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him." *Queenan v. Russell*, 339 S.W.2d 475, 477 (Ky. 1960) (internal citations omitted). Section 6 is essential to fulfill "the very purpose of elections," that is "to obtain a full, fair, and free expression of the popular will upon the matter, whatever it may be, submitted to the people for their approval or rejection." *Wallbrecht v. Ingram*, 175 S.W. 1022, 1026 (Ky. 1915).

165. In the three years since *Rucho*, states with constitutions containing nearly identical "free election" clauses have applied their state constitutions to circumscribe strike down gerrymanders like the kind presented by HB 2 and SB 3.

166. Most importantly, the Pennsylvania Supreme Court applied its commonwealth's free and equal clause[4] to overturn a partisan-gerrymandered map. *See League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018). That court interpreted "the plain and expansive sweep of the words 'free and equal'" to be "indicative of the framers' intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government." *Id.* at 804. The court found this "interpretation is consistent with both the historical reasons for the inclusion of this provision in our Commonwealth's Constitution and the meaning we have ascribed to it through our case law." *Id.*

167. Ultimately, the Pennsylvania Supreme Court held that "[b]y placing voters preferring one party's candidates in districts where their votes are wasted on candidates likely to lose (cracking), or by placing such voters in districts where their votes are cast for candidates destined to win (packing), the non-favored party's votes are diluted." *Id.* at 814. "It is axiomatic that a diluted vote is not an equal vote, as all voters do not have an equal opportunity to translate their votes into representation." *Id.* The court found this was not only "the antithesis of a healthy representative democracy," but a violation of the constitutional requirement that "each and every

[4] Article I, § 5 of the Pennsylvania Constitution states: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

Pennsylvania voter must have the same free and equal *opportunity* to select his or her representatives." *Id.* (emphasis in original).

168. In the current redistricting cycle, the Pennsylvania Supreme Court reaffirmed its interpretation of the state's free and equal elections clause as a bulwark against partisan gerrymandering. *See Carter v. Chapman*, 270 A.3d 444, 458 (Pa. 2022).

169. These Pennsylvania Supreme Court decisions are particularly persuasive because Kentucky's free and equal election clause is identical to Pennsylvania's. That is not an accident; the drafters of Kentucky's Bill of Rights "borrowed almost verbatim from the Pennsylvania Constitution of 1790." *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992), *overruled on separate grounds by Calloway County Sheriff's Dep't v. Woodall*, 607 S.W.3d 557 (Ky. 2020). Thus, "decisions of the Supreme Court of Pennsylvania, when interpretating provisions of the Pennsylvania Constitution similar to that of the Kentucky Constitution, are very persuasive to the Courts of the Commonwealth and should be given as much deference as any non-binding authority receives." *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459 (Ky. 1998).

170. Pennsylvania is not the only state to interpret its free elections clause to prohibit partisan gerrymandering. The North Carolina Supreme Court also recently held that its free elections clause[5] prohibits partisan gerrymandering, too. *See Harper v. Hall*, 868 S.E.2d 499 (Feb. 14, 2022). The Court noted that the free elections clause was "intended to end 'the dilution of the right of the people of [the] Commonwealth to select representatives to govern their affairs,' and to codify an 'explicit provision[] to establish protections of the right of the people to fair and equal representation in the governance of their affairs.'" *Id.* at 540 (quoting *League of Women Voters v. Commonwealth*, 645 Pa. 1, 104 (2018)). The Court held there was "no doubt" that "elections are

[5] Article I, §10 of the North Carolina Constitution states: "All elections shall be free."

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not free if voters are denied equal voting power in the democratic processes which maintain our constitutional system of government." *Id.* at 542. "When the legislature denies to certain voters this substantially equal voting power, including when the denial is on the basis of voters' partisan affiliation, elections are not free and do not serve to effectively ascertain the will of the people." *Id.*[6]

171. Other courts have rejected partisan gerrymandering under state constitutional provisions, too. During this redistricting cycle, Both New York and Ohio's highest courts have struck down plans that violated their state's prohibitions on partisan gerrymandering. *See Harkenrider v. Hochul*, 2022 WL 1236822, at *10 (N.Y. Apr. 27, 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, __ N.E.3d. __, 2022 WL 1113988 (Ohio Apr. 14, 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, __ N.E.3d __, 2022 WL 110261 (Ohio Jan. 12, 2022).

172. The extreme partisan gerrymandering in HB 2 and SB 3 is precisely the kind of odious dilution of votes the free and equal clause was designed to end. By placing voters that prefer "one party's candidates in districts where their votes are wasted on candidates likely to lose (cracking)" or "placing such voters in districts where their votes are cast for candidates destined to win (packing)," Kentucky's Republican legislators have sought to "dilute[] the votes of those

[6] During the previous redistricting cycle, a three-judge panel struck down a map that was "designed, specifically and systemically, to maintain Republican majorities in the state House and Senate." *Common Cause v. Lewis*, 2019 WL 4569584, at *112 (N.C. Super. Sept. 3, 2019). Through surgical packing and cracking of voters within communities of interest, North Carolina's legislature, like Kentucky's, sought to maximize partisan gain and "entrench politicians in power" betraying "a fundamental distrust of voters by serving the self-interest of political parties over the public good." *Id*. at *110. The result is a map that "dilute[s] and devalue[s] votes of some citizens compared to others." *Id.* Elections conducted under such maps "are not free" because "partisan actors [have] ensured from the outset that it is nearly impossible for the will of the people—should that will be contrary to the will of the partisan actors drawing the maps—be expressed through their votes for State legislators." *Id*. at *112.

who in prior elections voted for the party not in power to give the party in power a lasting electoral advantage." *League of Women Voters,* 178 A.3d at 116-117. Put simply, HB 2 and SB 3 are unconstitutional because "a diluted vote is not an equal vote." *Id*.

173. Defendants are wrong to assert that Section 6 is confined only to "election-day interferences with the vote-placement and vote-counting processes." As just explained, Section 6's text and history make clear that the provision was intended to safeguard Kentuckians' rights to be free from any law that would undermine their free and equal *opportunity* to select his or her representatives." *League of Women Voters, 178 A.3d at 814* (emphasis in original).

174. Moreover, Kentucky Courts have applied Section 6 more expansively than Defendants claim. In *Burns v. Lackey*, 186 S.W. 909 (Ky. 1916), for example, the Court reversed the outcome of an election under Section 6 because of the alleged undue influence of a political organization comprised of many of the communities' Black residents that pledged to vote together as a block. Crucially, it did so even though "[t]here [was] no claim that physical violence was practiced at the election, or that any voter who was not in the ordinary sense a legal voter cast a ballot." *Burns*, 186 S.W. at 914.

175. Similarly, in *Queenan*, 339 S.W.2d 475, the Court used Section 6 to strike down an absentee ballot law because Jefferson and other populous counties were disadvantaged by provisions in the statute requiring certain procedures for counting and recording absentee ballots.

176. In light of the text and history of Section 6 of the Kentucky Constitution, and interpretations of identical language by the Supreme Courts of Pennsylvania and North Carolina, the Court concludes that Section 6 of the Kentucky Constitution prohibits partisan gerrymandering as a practice incompatible with free and equal elections.

2. Partisan gerrymandering violates the guarantee of equal protection set forth in Sections 1, 2, and 3 of Kentucky's Constitution

177. Kentuckians are guaranteed equal protection of the law by Sections 1, 2, and 3 of their Constitution. *Zuckerman v. Bevin*, 565 S.W.3d 580, 594 (Ky. 2018). These provisions have long been interpreted to require that every citizen's vote carries the same voting power. *See Fischer IV*, 366 S.W.3d at 910; *cf. also Asher v. Arnett*, 280 Ky. 347, 132 S.W.2d 772, 776 (1939) ("equal" comprehends the principle that every elector has the right to have their vote "counted for all it is worth," and that, when cast, their vote "shall have the same influence as that of any other voter").

178. As the North Carolina Supreme Court recently noted, the right to equal voting power "necessarily encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views." *Harper*, 868 S.E.2d. at 544.

179. Thus, "when on the basis of partisanship the General Assembly enacts a districting plan that diminishes or dilutes a voter's opportunity to aggregate with likeminded voters to elect a governing majority—that is, when a districting plan systematically makes it harder for one group of voters to elect a governing majority than another group of voters of equal size—the General Assembly unconstitutionally infringes upon that voter's fundamental rights to vote on equal terms and to substantially equal voting power." *Id.*; *see also Common Cause v. Lewis*, 2019 WL 4569584, at *113.

180. Moreover, because the right to vote is a fundamental right, laws regulating the vote are subject to strict scrutiny under the equal protection clauses. *See Mobley v. Armstrong*, 978 S.W.2d 307, 309 (Ky. 1998), *as modified* (Oct. 22, 1998).

3. Partisan gerrymandering violates the Kentucky Constitution's freedom of speech and assembly clauses.

181. Section 1 of the Kentucky Constitution provides that all Kentuckians shall have the inalienable rights of "freely communicating their thoughts and opinions" and "assembling together

in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance . . ..” Ky. Const. § 1(4) & (6).

182. Voting for the candidate of one’s choice and associating with the political party of one’s choice are core means of political expression protected by Kentucky’s freedom of speech and assembly clauses. *See Associated Industries of Kentucky v. Commonwealth*, 912 S.W.2d 947, 952 (Ky. 1995) (Section 1 of Kentucky’s Constitution is “designed to protect the rights of citizens in a democratic society to participate in the political process of self-government.”).

183. Because HB 2 and SB 3 burden constitutionally protected expression and association, they are subject to strict scrutiny. *Associated Indus. of Kentucky v. Com.*, 912 S.W.2d 947, 952 (Ky. 1995).

184. As the North Carolina Supreme Court recently held, “[p]artisan gerrymandering violates the freedoms of speech and association and undermines their role in our democratic system.” *Harper*, 868 S.E.2d. at 545-546. Partisan gerrymandering “penalize[s] people for the exercise of their protected rights.” *Id.* at 546. “When legislators apportion district lines in a way that dilutes the influence of certain voters based on their prior political expression—their partisan affiliation and their voting history—it imposes a burden on a right or benefit, here the fundamental right to equal voting power on the basis of their views.” *Id.*

185. Moreover, “[w]hen the General Assembly systematically diminishes or dilutes the power of votes on the basis of party affiliation, it intentionally engages in a form of viewpoint discrimination and retaliation that triggers strict scrutiny.” *Harper*, 868 S.E.2d. at 546. “This practice subjects certain voters to disfavored status based on their views, undermines the role of free speech and association in formation of the common judgment, and distorts the expression of

the people's will and the channeling of the political power derived from them to their representatives in government based on viewpoint." *Id.*

B. There are multiple, reliable ways of measuring partisan gerrymandering

186. Defendants contend that there are no reliable ways to assess claims of partisan gerrymandering. That very claim has been rejected by numerous state courts considering such claims under their state constitutions.

187. Courts have recognized that "computer modeling and statistical analyses have garnered acceptance as evidence of partisan intent." *Harkenrider*, 2022 WL 1193180, at *3. Indeed, "[t]he development of such metrics in this and future cases is precisely the kind of reasoned elaboration of increasingly precise standards the United States Supreme Court utilized in the one-person, one-vote context." *Harper*, 868 S.E.2d at 549.

188. For example, it is now standard for courts considering partisan gerrymandering claims to rely on simulation analysis like the one conducted by Dr. Imai in this case. *See, e.g.*, *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822, at *3 (N.Y. Apr. 27, 2022) (finding partisan gerrymander based on simulation analysis performed by Sean Trende, Defendants' expert in this case); *Harper v. Hall*, 868 S.E.2d 499, 516 (N.C. 2022) (finding partisan gerrymander based on simulation analysis); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, __ N.E.3d ___, 2022 WL 110261, at *23 (Ohio Jan. 12, 2022) (relying on simulation analysis by Dr. Imai to find Ohio's map unconstitutionally gerrymandered).

189. Indeed, over the last 10 years, simulation methods have become one of the dominant ways to evaluate redistricting plans. (VR 4/5/22, 10:37:47 – 10:40:43).

190. This kind of evidence is powerful because "[t]he fact that the adopted plan is an outlier among 5,000 simulated plans is strong evidence that the plan's result was by design."

League of Women Voters of Ohio v. Ohio Redistricting Comm'n, __N.E.3d __, 2022 WL 354619, at *9 (Ohio Feb. 7, 2022) (quotation marks and citation omitted).

191. Moreover, there are other partisan bias metrics that courts can use to evaluate how biased an apportionment plan is in favor of a particular party. For example, the Pennsylvania Supreme Court recently described the Efficiency Gap—one of the metrics Plaintiffs cite here—as a "generally accepted metric[] for evaluating the partisan fairness of a redistricting plan." *Carter*, 270 A.3d at 458.

192. Likewise, the North Carolina Supreme Court observed that "there are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander." *Harper*, 868 S.E.2d. at 547. "In particular, mean-median difference analysis; efficiency gap analysis; close-votes, close-seats analysis; and partisan symmetry analysis may be useful in assessing whether the mapmaker adhered to traditional neutral districting criteria and whether a meaningful partisan skew necessarily results from [a state's] unique political geography." *Id.*

193. Importantly, "[t]he efficiency gap, like other measures of partisan symmetry, 'is not premised on strict proportional representation, but rather on the notion that the magnitude of the winner's bonus should be approximately the same for both parties.'" *Id.* at 548-549. Thus, a map need not guarantee each party a proportionate share of the seats; at the same time, it cannot make it impossible for a party to achieve the same success as their opponent if their positions swapped.

194. Use of these quantitative methods is appropriate because direct evidence of partisan intent, "such as an admission by the map drawers that they intended to favor a certain political party. . . . is rare and certainly not required" to prove a constitutional violation. *Harkenrider v. Hochul*, 2022 WL 1193180, at *4 (N.Y. 4th App. Div. Apr. 21, 2022), *aff'd as modified*, 2022 WL

1236822 (N.Y. Apr. 27, 2022), *and leave to appeal denied*, 2022 WL 1233958 (N.Y. Apr. 27, 2022).

195. Simulation analysis and partisan bias metrics are particularly compelling where—as here—they are "corroborated by the inference of gerrymandering evident 'by application of simple common sense' from the enacted map itself and its likely effects on particular districts." *Id.* at *5 (citing *Adams v. DeWine*, 2022 WL 129092, ¶ 4 (Ohio Jan. 14, 2022)).

196. Thus, the Court has little trouble concluding that HB 2 and SB 3 represent unconstitutional partisan gerrymanders. Here, every marker of partisan bias in the record—simulation analysis, the Efficiency Gap, Declination, and Partisan Symmetry—all point in the same direction. They establish that HB 2 and SB 3 are extreme partisan gerrymanders that violate Kentucky's Constitution.

C. Plaintiffs have shown sufficient evidence of partisan gerrymandering

197. The record is replete with evidence that HB 2 and SB 3 constitute partisan gerrymanders. That includes the testimony of Plaintiffs' two expert witnesses, Dr. Imai and Dr. Caughey, "corroborated by the inference of gerrymandering evident 'by application of simple common sense' from the enacted map itself and its likely effects on particular districts." *Id.*

1. Dr. Imai's Analysis

198. First, Plaintiffs offer the advanced simulation analysis of Dr. Imai. The Court admitted Dr. Imai as an expert without objection at the hearing. (VR 4/5/22, 10:51:40 – 10:51:54).

199. Nevertheless, Defendants now suggest in their post-trial brief that Dr. Imai's opinions should be disregarded for failure to satisfy KRE 702. Defendants waived this argument by failing to object to Dr. Imai's testimony at the hearing. *Smith v. Commonwealth*, 2004 WL 535975, at *4-5 (Ky. Mar. 18, 2004).

200. In any event, that argument lacks merit. Dr. Imai's testimony easily satisfies KRE 702.

201. To be admissible under KRE 702, expert testimony must "must be both relevant and reliable." *Kurtz v. Commonwealth*, 172 S.W.3d 409, 412 (Ky. 2005).

202. Dr. Imai's testimony is plainly relevant to this case. "The consideration of relevance has been described as one of 'fit.'" *Goodyear Tire and Rubber Company v. Thompson*, 11 S.W.3d 575, 578 (Ky. 2000). Here, Dr. Imai's testimony fits this case precisely. Indeed, he used the well-respected software program that he developed—"Redist"—to create 10,000 simulated Kentucky maps for the house and congressional districts. That analysis was precisely tailored to the issues in this case.

203. The "[r]eliability of proffered expert testimony is a preliminary question of fact reserved for the trial court." *Id.* "'The consideration of reliability entails an assessment into the validity of the reasoning and the methodology upon which the expert testimony is based.'" *Id.* (quoting *Goodyear Tire and Rubber Company v. Thompson*, 11 S.W.3d 575, 578 (Ky. 2000)). The inquiry "is a flexible one." *Id.* (quotation marks and citation omitted). The list of factors spelled out in *Daubert v. Merrell Dow Pharmaceuticals. Inc.*, 509 U.S. 579 (1993), and *Mitchell v. Commonwealth*, 908 S.W.2d 100 (1995), *overruled on other grounds*, *Fuaate v. Commonwealth*, 993 S.W.2d 931 (1999), "neither necessarily nor exclusively applies to all experts or in every case." *Goodyear Tire and Rubber Co.*, 11 S.W.3d at 577. "Rather, the law grants [the trial] court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination." *Id.* (quoting *Kumho Tire Company v. Carmichael*, 527 U.S. 137, 140-141 (1999)).

204. Here, the Court has no trouble finding that Dr. Imai's testimony is reliable. As noted above, simulation analysis has become a well-recognized method for determining whether apportionment plans are based on partisanship and race, rather than neutral redistricting criteria. And Dr. Imai's testimony has been cited numerous times by courts finding unconstitutional partisan gerrymanders. *See, e.g.*, *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, __ N.E.3d __, 2022 WL 354619 (Ohio Feb. 7, 2022); *Adams v. DeWine*, __ N.E.3d __, 2022 WL 129092 (Ohio Jan. 14, 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, __ N.E.3d __, 2022 WL 110261 (Jan. 12, 2022).

205. Even Defendants' experts acknowledged Dr. Imai's expertise in the field of redistricting simulation. Indeed, Mr. Trende, Defendants' expert in simulation analysis, uses Dr. Imai's software for his own work and has been allowed to offer expert testimony in other cases *using Dr. Imai's methods*. *See Harkenrider*, 2022 WL 1236822, at *3.

206. On certain issues discussed below, Defendants' experts take issue with certain aspects of Dr. Imai's work. The Court finds that Dr. Imai's analysis is more credible than that of Defendants' experts, and therefore assigns more weight to it.

207. Dr. Imai has impeccable academic and professional credentials, and an excellent reputation as a leader in the field of simulation analysis and political methodology. Sean Trende, by contrast, has not even earned a PhD. And Dr. Voss, while holding a doctoral degree, had never performed a simulation analysis prior to this case, nor published any research on partisan gerrymandering.

208. Moreover, in a recent case where they went "head-to-head," the Ohio Supreme Court credited Dr. Imai's reasoned opinions over Mr. Trende's attempts to poke holes in them without offering any alternative way to measure partisan bias. *See League of Women Voters of*

Ohio, 2022 WL 110261, at *27 ("Trende questions the metrics used by petitioners' experts to measure partisan bias, opining that it is not clear what this court must infer from those metrics. Trende does not, however, offer an alternative way to measure partisan bias. More importantly, he does not offer testimony rebutting Dr. Rodden's or Dr. Imai's evidence that it is possible for the commission to draw a district plan that is compliant with Article XI and that does not favor Republican candidates so heavily.")

209. Dr. Imai presented undisputed evidence that HB 2 contains the "signature of gerrymandering," in so far as it makes Republican-leaning districts safer while reducing the Democratic advantage of Democratic-leaning districts. (PEX 2, pp. 11-13; VR 4/5/22, 11:21:20 – 11:29:01). That evidence can be seen most clearly in his "box plot" graph, which shows that the General Assembly specifically targeted those districts that otherwise would have been the most competitive to maximize the Republican party's chances of holding borderline Republican seats and pick up borderline Democratic ones.

210. If non-partisan redistricting criteria, such as preserving communities of interest, are the reason HB 2 is a statistical outlier compared to Dr. Imai's simulated plans, then the impact of those criteria would not so consistently and systematically favor one political party. What Dr. Imai observed, in contrast, is that HB 2 shows a clear pattern of partisan bias in favor of the Republican Party. (PEX 2, pp. 11-16; VR 4/5/22, 11:21:20 – 11:43:20).

211. Dr. Imai's local analysis of Louisville and Lexington, also undisputed by Defendants' experts, likewise reveals a pattern of packing Democratic voters into a small number of districts and combining Democratic voters in urban areas with Republican voters in rural areas to create more Republican-leaning districts. (PEX 2, pp. 13-16; VR 4/5/22, 11:33:06 – 11:43:20).

212. Dr. Imai's opinion that HB 2 constitutes a partisan gerrymander was not rebutted or even addressed by Defendants' expert witnesses. Indeed, Defendants' two witnesses both testified they were not asked to opine on the map's fairness. (VR 4/7/22, 16:15:19 – 16:15:30; 4/7/22, 12:16:50 – 12:17:52).

213. The bizarre shape of the 1st District in SB 3 also has partisan implications. Dr. Imai found that the 35% Democratic vote share in the enacted 1st District is lower than more than 99% of simulated Congressional districts containing Franklin County, making the enacted 1st District an extreme outlier. (PEX 2, pp. 17-18; VR 4/5/22, 12:10:05 – 12:12:00).

214. Defendants' attempts to undermine Dr. Imai's simulation analysis fall flat. Defendants' principal criticism of Dr. Imai is that he failed to instruct his algorithms to simulate plans that look just like the enacted plans. But that is not the point of simulation analysis. The purpose of using simulation algorithms to evaluate an enacted plan is to generate an ensemble of simulated plans which satisfy the legal requirements for an enacted plan but eliminate all partisan considerations a real-life politician may consider in developing an enacted plan. This ensemble can then be used to test whether characteristics of the enacted plan are a product of legal requirements for the plan, or instead the result of some other factor.

215. If the comparison reveals significant variations from the ensemble of simulated plans, it is possible to test whether those variations consistently favor one political party over another. If so, that is empirical evidence that the enacted plan is the product of partisan gerrymandering.

216. Defendants' own expert has used simulations like these—based on Dr. Imai's software—to offer opinions that a reapportionment plan is gerrymandered. *See, e.g.*, *Harkenrider*, 2022 WL 1236822, at *3.

217. Defendants also criticize Dr. Imai's purported "failure" to consider Kentucky's historical Congressional maps in his evaluation of SB 3. Defendants contend that SB 3 must be accepted as the natural evolution of a map drawn to protect Congressman William Natcher, who died in 1994. (VR 4/7/22, 12:22:16 – 12:24:10, 12:27:25 – 12:27:50). But that criticism misses the mark because the beginnings of the hook-like shape for the 1st District had its roots in partisan considerations. As both Dr. Imai and Mr. Trende explained, it is improper to inject partisan criteria into an algorithm used to test for the influence of partisan bias. (VR 4/5/22, 11:57:20 –11:58:30; *see also* VR 4/7/22, 12:24:11 – 12:25:25 (Mr. Trende agreeing that if you are using the simulation algorithm to test for partisan bias, "you should not instruct the simulations to adhere to partisan criteria.")).

218. Defendants also criticize Dr. Imai for allowing a 0.1% population deviation in his simulation models for Kentucky's Congressional maps. But that critique lacks merit. The state's own witness has used a variance 10 times that large in his own simulation analyses. (*See* PEX 7, pp. 9-10; VR 4/7/22, 11:55:22 – 11:58:53 (Trende testifying that a population tolerance of +/- 1.0% is reasonable and consistent with peer reviewed work and expert testimony that has been accepted by other courts)). And both Dr. Imai and Mr. Trende agree that some population tolerance is necessary for the proper functioning of the simulation algorithm, and the size of population tolerance is driven by the size of voting precincts in the jurisdiction under analysis. (VR 4/5/22, 11:50:58 –11:52:50, 12:05:38 – 12:10:00; VR 4/7/22, 11:55:22 – 11:58:53). In any event, the population tolerance used by Dr. Imai had no material impact on his analysis. (VR 4/5/22, 12:05:38 – 12:10:00 (Dr. Imai explaining that he recreated the simulated plans generated by Dr. Voss's "pinching" of the population tolerance, re-analyzed the metrics on which he offered expert

opinions regarding SB 3, and determined that pinching the population tolerance did not materially impact any of his conclusions)).

219. Defendants also critique Dr. Imai's use of election data from Kentucky's 2016 Presidential and U.S. Senate elections, and 2019 elections for Governor, Attorney General, Secretary of State, Auditor, Treasurer, and Agricultural Commissioner. However, Dr. Imai explained that it is not proper in a simulation analysis to use election results from prior Kentucky House races because they were based on previous district boundaries. (VR 4/5/22, 10:57:43). His simulation appropriately used these races to assess partisanship because they are the most recent state-wide elections for which precinct-level voting data is available. (PEX 2, p. 24; VR 4/5/22, 10:55:19 – 10:59:01). Averaging results from multiple state-wide elections provides a general measure of partisanship, not specific to any particular candidate or race, and is the standard approach in simulation analysis. (VR 4/5/22, 2:07:57 – 2:08:40, 2:09:40 – 2:09:52; *see also* PEX 7, p. 12 (Mr. Trende's report in New York litigation, which also aggregates results from recent state-wide elections in New York as a measure of partisanship)).

220. Simply put, none of Defendants' myriad arguments undermined the credibility and reliability of Dr. Imai's testimony. His credentials are top-notch and his analysis in this case adhered to widely accepted methodologies. The Court credits his views on HB 2 and SB 3.

2. Dr. Caughey's Analysis

221. As with Dr. Imai, the Court rejects Defendants' attacks on Dr. Caughey's qualification to serve as an expert in this case.

222. Dr. Caughey is a preeminent political scientist, having won numerous national awards for his scholarship. He has achieved tenure at MIT, where he teaches advance-level courses on a wide variety of topics, including on tools to quantify partisan gerrymandering. Dr. Caughey testified for hours about his credentials and methods, carefully answering numerous questions on

direct and cross that demonstrated his expertise in the subject area. Defendants' argument that "any lay witness" could do what Dr. Caughey did is meritless.

223. Dr. Caughey's testimony easily satisfies the relevance prong of KRE 702. Like Dr. Imai, his analysis was created for this very case, based on the map created by HB 2.

224. The Court also finds Dr. Caughey's testimony to be reliable under the "flexible" analysis set forth in *Goodyear Tire*, 11 S.W.3d at 578.

225. As noted above, courts have recognized numerous methods for quantifying partisan bias, including the very kinds of methods Dr. Caughey used in this case: Partisan Symmetry, Efficiency Gap, and Declination. *See, e.g.*, *Carter*, 270 A.3d at 458 (calling Efficiency Gap a "generally accepted metric[] for evaluating the partisan fairness of a redistricting plan"); *Harper*, 868 S.E.2d. at 547 (listing Efficiency Gap and Partisan Symmetry among the "multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander").

226. Moreover, and as with Dr. Imai, the Court finds Dr. Caughey's testimony more credible than Defendants' attempts to undercut it. Dr. Caughey withstood hours of cross-examination that tried, but failed, to undermine his core opinions about HB 2's partisan bias.

227. Further, his testimony demonstrated that he possessed greater knowledge about the ways of measuring partisan bias, and the academic literature supporting that field, and Plan Score's Bayesian multi-level prediction methodology, than either of Defendants' experts.

228. Dr. Caughey's analysis demonstrates that the state House map, HB 2, gives Republicans a large and durable majority. Indeed, that pro-Republican bias is larger than any he has ever seen. (VR 4/6/22, 16:20:55 – 16:21:03).

229. Dr. Caughey established that HB 2 starts from a basic asymmetry: it has a structural bias of almost 10 seats in Republican's favor even if the statewide vote split 50-50. (VR 4/6/22, 11:17:45 – 11:18:50). That is an unconstitutional partisan bias.

230. Although the free and equal elections clause does not require that each party receive a proportional share of seats to match its vote share, it does entitle voters "to have substantially the same opportunity to electing a supermajority or majority of representatives as the voters of the opposing party would be afforded if they comprised [the same] percent of the statewide vote share in that same election." *Harper*, 868 S.E.2d at 549. HB 2 fails that basic test.

231. Efficiency Gap analysis also shows HB 2 is an extreme outlier. Recently, the highest courts of both Pennsylvania and North Carolina—two states with Free Elections clauses nearly identical to Kentucky's—have recognized that Efficiency Gap is among the "generally accepted metrics for evaluating the partisan fairness of a redistricting plan," *Carter*, 270 A.3d at 458; *see also Harper*, 868 S.E.2d. at 547.

232. Courts and social scientists have recognized "that an efficiency gap above 7% in any districting plan's first election year will continue to favor that party for the life of the plan." *Harper*, 868 S.E.2d. at 548 (quoting *Whitford v. Gill*, 218 F. Supp. 3d 837, 905 (W.D. Wis. 2016) *rev'd on other grounds* 138 S. Ct. 1916 (2018)); *see also* VR 4/6/22, 11:44:25 – 11:46:00 (many political scientists consider an Efficiency Gap of 7-8% as a sign of gerrymandering).

233. Here, the Efficiency Gap—13.4%—is nearly *twice* that figure. HB 2 is likely to give Republicans more than 80% of the seats in the state house with less than 60% of the vote. (VR 4/6/22, 11:09:05 – 11:09:25). It is unsurprising, then, that the Efficiency Gap metric shows this plan to be a more extreme Republican gerrymander that 98% of all pro-Republican plans ever enacted. (*See* PEX 6, § 5.1.1, Table 1; VR 4/6/22, 11:22:45 – 11:23:05).

234. Likewise, the map's Declination score proves that Democrats are far more packed into the districts they are favored to win, on average, than Republicans are. (*See* PEX 6, § 5.1.1, Table 1). Indeed, Dr. Caughey was not even aware a declination number could be as high, in the real world, as HB 2's is. (VR 4/6/22, 11:29:35 – 11:29:42).

235. Taken together, these metrics demonstrate that HB 2 "perhaps the most extreme advantage for one—either party in a legislative map that [Dr. Caughey has] ever seen." (VR 4/06/22, 16:21:15).

236. Defendants' attacks on Dr. Caughey and his methodology do not undermine his opinion's credibility.

237. First, Defendants seriously misunderstand how Plan Score works. Defendants are wrong to claim that "Plan Score does not rely on state election returns to predict state legislative races . . . . Instead, Plan Score compares apples to oranges by *relying on presidential election returns* from across the country to predict state legislative races." Def. Br., p. 53 (emphasis added).

238. In fact, Dr. Caughey explained that Plan Score uses state-house election results, congressional election results, *and* presidential returns to predict state-house races. (VR 4/6/22, 10:43:50 – 10:46:20; VR 4/6/22, 14:45:15 – 14:46:50). The presidential election data is used to increase the accuracy of legislative forecasts in districts where legislative elections were uncontested and/or distorted by the incumbency advantage. Ultimately, the model estimates the state- and cycle-specific relationship between district-level presidential vote and congressional or legislative vote share, and then predicts the relevant congressional or legislative race for proposed districts by aggregating the precinct-level data. Plan Score does *not* simply use presidential results to predict state-house races.

239. The reliability of Dr. Caughey's opinion is not undermined by the fact that Plan Score uses 2016 presidential returns in Kentucky, instead of 2020 returns, because no precinct-level data is available for that recent contest (due to mail-in voting during the pandemic).

240. Dr. Caughey was able to testify "to a high degree of confidence it didn't make very much difference" that Plan Score used 2016 instead of 2020 presidential election results in Kentucky to make forward-looking projections for state House races. (VR 4/6/22, 13:45:05). That is not only because the share of the two-party vote won by Donald Trump was not appreciably different across the two cycles (VR 4/7/22, 16:30:15 – 16:30:59), but also because the Plan Score model is "trained" on the same data that it uses to make the forward-looking projection. (VR 4/6/22, 13:46:40 13:46:50). Notably, Defendants made no attempt to *quantify* this supposed weakness in the projection model.

241. Defendants also made no attempt to quantify their claim that Dr. Caughey's choice to run his analysis without considering incumbency status somehow affected the reliability of the projections. Dr. Caughey explained during his testimony that using the "open seat" option is the standard option for evaluating new plans in political science because (1) it is not obvious whether current incumbents will run in the future and, if they do, in which (new) district; and (2) political scientists are generally interested in the baseline partisanship of a district, not the performance of a specific candidate who may or may not run in future elections. (VR 4/6/22, 13:40:45 – 13:42:05).

242. Defendants' arguments about Plan Score's analysis of the 2013 maps also misstates the record in this case. Defendants include a misleading table showing the purported difference between the 2013 maps using the "old" and "new" models, implying that the "new" model, by itself, would make the map look 10 seats worse for Democrats. *See* Def. Br., p. 56 n. 27. But the "0" efficiency gap for the 2013 map was what Plan Score's old model would have predicted *at the*

time for the period from 2014-2020, based on prior election results, at a time when Democrats controlled the state house. (VR 4/6/22, 11:37:30 – 11:38:10). The "new" analysis of the 2013 map is what Defendants got by running those same districts through the new model in 2022, based on the intervening state house, congressional, and presidential elections, and attempting to project forward over the next 10 years. Those are not apples to apples comparisons. (VR 4/6/22, 11:39:30 – 11:40:15).

243. Likewise, Defendants misstate the import of Plan Score's analysis of HB 191 (the Democratic proposal). As Defendants' own expert noted, that alternative plan does not represent the most favorable map Democrats could have drawn for themselves. *See* DEX 32 (Voss Report), p. 23 ("Obviously the Democrats knew that their opposition party dominated the General Assembly, so they were not going to propose a pro-Democratic map . . . . . This proposal will not be their dream map.").

244. There is thus no evidence of Defendants' new—and unsupported—claim that HB 191 proves the baseline for the state is an Efficiency Gap of 10. *See* Def. Br., p. 56. On the contrary, Defendants' own expert reports refute that claim.

245. Mr. Trende ran a series of "sensitivity analyses" that considered the Efficiency Gaps of the various house map simulations Dr. Imai's software produced (all of which meet the legal requirements of Section 33). *See* DEX 30, pp. 44-48. In the simulations based on the vote share of Donald Trump in 2016, even when "perturbed" to assume Democratic candidates would do up to five points better or worse, there are *essentially no plans* with an Efficiency Gap of 10 or more. *See* DEX 30, pp. 44, 45, 47. The relevant number (-0.10) typically does not even appear on the horizontal axis. That proves that Kentucky's "political geography" does not require an Efficiency Gap anywhere near what HB 2 produces.

246. Regardless, even if HB 2 only moved the needle by three to four seats, that would be a material difference; "it's what takes this efficiency gap off the charts." 4/6/22, 11:33:27 – 11:33:32). Moreover, even one vote can decide important policy matters on which the Republican caucus is not unified, as happened this year on a controversial education bill that passed by a single vote. (VR 4/6/22, 4:25:11 – 4:25:35).

247. Indeed, the Ohio Supreme Court recently found a gerrymander on an even smaller scale to be unconstitutional. *See, e.g.*, *Adams v. DeWine*, __ N.E.3d __, 2022 WL 129092 (Oh. Jan. 14, 2022) ("Dr. Imai's conclusion that the enacted plan will result in, on average, 2.8 more Republican seats than are warranted, shows that the General Assembly's decision to shift what could have been—under a neutral application of Article XIX—Democratic-leaning areas into competitive districts, *i.e.*, districts that give the Republican Party's candidates a better chance of winning than they would otherwise have had in a more compactly drawn district, resulted in a plan that unduly favors the Republican Party and unduly disfavors the Democratic Party.").

248. Equally misguided is Defendants' complaint that Dr. Caughey conducted his analysis based on Plan Score's most updated prediction model. As Dr. Voss conceded, there is nothing nefarious about Plan Score attempting to update its model to make the best predictions possible; that is what political scientists should try to do. (VR 4/7/22, 16:39:20 – 16:39:25).

249. Moreover, there is no serious question in this case that the new model is likely to be far more accurate than the old one—it shows Democrats losing, rather than gaining, a handful seats in the upcoming House elections.

250. Defendants' expert in Kentucky politics, Dr. Voss, had no answer when asked to explain how the Democrats could be expected to gain seats (as the old model predicts) when HB 2 specifically targeted the districts of several incumbent Democrats, including Reps. Patty Minter

(Bowling Green), Buddy Wheatley (Covington), and Cherlynn Stevenson (Lexington), Angie Hatton and Ashley Laferty (Eastern Kentucky), and Charlie Miller (Louisville), among many others. (VR 4/7/22, 16:33:15 – 16:36:00, 16:38:30 – 16:39:19).

251. Finally, Defendants offer nothing to combat Dr. Caughey's testimony concerning HB 2's Declination or Partisan Symmetry—other reliable measures of partisan gerrymandering. Both of those analyses showed that the map has a strong structural bias in favor of Republicans. Indeed, it would give them a 10-seat advantage even if the statewide vote share between the parties were tied. (VR 4/6/22, 11:17:45 – 11:18:50).

252. Simply put, everyone understands that HB 2 targeted certain incumbent Democratic seats to disadvantage those candidates and favor Republican challengers. This Court declines to stick its head in the sand and pretend no one can know what HB 2 will do. *See Southworth v. Commonwealth*, 435 S.W.3d 32, 45 (Ky. 2014) ("[L]ogic, like common sense, 'must not be a stranger in the house of the law.'" (quoting *Cantrell v. Kentucky Unemployment Ins. Commission*, 450 S.W.2d 235, 237 (Ky.1970)).

3. "Simple common sense" confirms the expert analysis.

253. These quantitative analyses are "corroborated by the inference of gerrymandering evident 'by application of simple common sense' from the enacted map itself and its likely effects on particular districts." *Harkenrider*, 2022 WL 1193180, at * 5 (citing *Adams v. DeWine*, 2022 WL 129092, ¶ 4 (Ohio Jan. 14, 2022)).

254. Indeed, a lay examination of the districts created by HB 2 and SB 3 makes apparent that the map drawers' primary purpose was to maximize Republican partisan advantage at the expense of constitutional priorities such as compactness and communities of interest. There can be no other explanation for the Rorschach-like districts that snake through communities of interest across the Commonwealth, surgically dividing voters by their partisan preferences.

255. As demonstrated in the Court's factual findings above—with corresponding maps—HB 2 takes bisects the cities of Bowling Green, Covington, Georgetown, Hopkinsville, and Richmond, among others, to take districts that were once Democratic, or at least competitive, and make them safely Republican. These map-drawing choices make it entirely probable that there will be no democratic representatives outside Louisville and Lexington (and perhaps Frankfort).

256. Even lay witnesses could predict as much without the benefit of this expert analysis. Rep. Jason Nemes, one of the strongest defenders of HB 2, made this same prediction in a Tweet sent shortly after the May 17, 2022 primaries. Rep. Nemes predicted that Democrats are likely to win only 18 seats—just as Plan Score's "new" model predicts—and that the majority of them will be in Louisville:

257. Taken together, this expert and common-sense evidence all tells the same story: HB 2 was created for the express purpose of favoring Republican candidates and disfavoring Democratic ones. In the process it reduced the number of theoretically competitive districts to a miniscule number and entrenched the Republican supermajority for the remainder of the decade—if not beyond.

258. Indeed, Democrats would still be badly outnumbered even if they earned the same number of votes as Republicans. That is the definition of an unfree and unfair election process.

4. The Commonwealth Offered No Evidence to Rebut Plaintiffs' Showing

259. "Once a plaintiff shows that a map infringes on their fundamental right to equal voting power under the free elections clause and equal protection clause or that it imposes a burden on that right based on their views such that it is a form of viewpoint discrimination and retaliation based on protected political activity under the free speech clause and the freedom of assembly clause, the map is subject to strict scrutiny and is presumptively unconstitutional and 'the government must demonstrate that the classification it has imposed is necessary to promote a compelling governmental interest.'" *Harper*, 868 S.E.2d at 387 (citation omitted).

260. In this case, Plaintiffs have shown that HB 2 and SB 3 violate their right to free and fair elections, equal protection, and free speech and assembly for reasons just explained. Thus, the maps are presumptively unconstitutional and the burden shifts to Defendants to show that the maps are necessary to promote a compelling government interest.

261. Here, Defendants did not even *try* to meet that burden. In fact, the evidence of partisan bias summarized above is the only evidence in the record on the issue. The Commonwealth did not attempt to prove that its maps showed no partisan bias.

262. Indeed, it did not even ask its experts to evaluate the maps' partisan fairness. (VR 4/7/22, 16:15:19 – 16:15:30; 4/7/22, 12:16:50 – 12:17:52). Rather, the Commonwealth simply tried—unsuccessfully—to cast doubt on Plaintiffs' evidence.

263. Like the Ohio Supreme Court, this Court finds that Defendants' attempt to cast doubt upon Plaintiffs' partisan bias analysis, without offering any partisan fairness analysis of their own, is fatal to their defensive strategy. *See League of Women Voters of Ohio*, 2022 WL 110261, at *27 ("Trende questions the metrics used by petitioners' experts to measure partisan bias . . . . Trende does not, however, offer an alternative way to measure partisan bias.").

IV. HB 2 and SB 3 violate the Constitution's ban on arbitrary exercise of absolute power.

264. "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." Ky. Const. § 2. This constitutional guarantee "is a curb on the legislative as well as on any other public body or public officer in the assertion or attempted exercise of political power." *Sanitation Dist. No. 1 of Jeff. Co. v. City of Louisville*, 308 Ky. 368, 375 (Ky. 1948). Thus, the General Assembly is just as bound by Section 2 as is any other state actor.

265. In applying this provision, the Supreme Court has held that "[w]hatever is contrary to democratic ideals, customs and maxims is arbitrary." *Kentucky Milk Marketing v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985). "Likewise, whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people is arbitrary." *Id.* "If . . . the consequences are so unjust as to work a hardship, judicial power may be interposed to protect the rights of persons adversely affected." *Id.*

266. Kentucky courts have invoked Section 2 to strike down laws that violate these basic guarantees of due process and equal protection. *See, e.g.*, *Kentucky Milk Marketing*, 691 S.W.2d at 900 (milk marketing statute "is an arbitrary exercise of power by the General Assembly over the lives and property of free men"); *General Electric v. American Buyers Cooperative*, 316 S.W.2d 354, 361 (Ky. Ct. App. 1958) (state price-fixing law arbitrary in violation of Section 2); *Sanitation Dist. No. 1*, 308 Ky. at 375 (annexation bill imposed such onerous terms on City of Louisville as to be arbitrary).

267. That same result is warranted here. HB 2 and SB 3 are nothing less than raw assertions of political power. HB 2 permanently entrenches the Republican supermajority by making the votes for their Democratic opponents meaningless in large swathes of the state.

268. HB 3, for its part, is pure irrationality; it creates a snakelike district that stretches from the Mississippi River to the state Capitol in order to preserve the "core" of a district originally drawn to protect the political power of a legislator that died 30 years ago, without ever getting to run in the district created for him (William Natcher). As a result, the residents of Franklin County will now share representation with residents of far Western Kentucky, with whom they have little in common. (VR 4/6/22, 4:45:15 – 4:46:36).

269. Even the Commonwealth's expert in Kentucky politics conceded after running thousands of simulations that if you simply tried to keep Bowling Green and Owensboro together without attempting to preserve the entire 2nd district, Frankfort would virtually never end up paired with Western Kentucky. (VR 4/7/22, 4:53:15 – 4:53:23). There is thus no *logical* justification for the harms created by SB 3.

270. Simply put, the mapmakers sacrificed the residents of more than a dozen counties (including Franklin, Washington, and half of Anderson County) to preserve the shape of a district created for a politician who died three decades ago without even getting the chance to run in that district. The result is pure arbitrariness, made possible only by the absolute control one party wielded over the redistricting process.

V. Plaintiffs Are Entitled to a Permanent Injunction Against HB 2 and SB 3.

271. "[I]ndisputably, the courts do have and have readily exercised the enormous power of the injunction in suits alleging the unconstitutionality of legislative acts." *Beshear v. Haydon Bridge Co.*, 416 S.W.3d 280, 298 (Ky. 2013).

272. Thus, in light of the Court's finding that HB 2 and SB 3 are unconstitutional, the Court will permanently enjoin the use of those maps in future election cycles. *See, e.g.*, *Fischer II*, 879 S.W.2d at 481 (declaring map unconstitutional under Section 33 and "remand[ing] to the trial court with directions to enter a declaratory judgment in conformity herewith and with directions

to permanently enjoin the conduct of any election pursuant to the district boundaries set forth in KRS Chapter 5 after January 3, 1995"); *Stiglitz*, 239 Ky. 799 (affirming holding that unconstitutional maps are void and cannot be used in current election cycle); *Ragland*, 125 Ky. 141 (affirming holding that unconstitutional maps are void and cannot be used in future election cycles); *see also Commonwealth, Cabinet for Health & Family Services, ex rel. Meier v. Claycomb*, 566 S.W.3d 202, 206 (Ky. 2018) (affirming permanent injunction of statute that violated Section 14 of the Kentucky Constitution).

273. For reasons explained above, Plaintiffs have shown a "probability of irreparable injury." *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978). After all, "[w]hen constitutional rights are threatened or impaired, irreparable injury is presumed." *Ohio State Conference of the Nat'l Ass'n for the Advancement of Colored People v. Husted*, 768 F.3d 524, 560 (6th Cir. 2014) (citations omitted). And Kentucky's highest court has long held that "[e]very citizen, taxpayer, and voter has an undoubted right to have the districts for representatives and senators created in accordance with the Constitution." *Stiglitz*, 40 S.W.2d at 317.

274. Likewise, there can be no question that Plaintiffs have "presented a substantial question as to the merits." *Maupin*, 575 S.W.2d at 699. Indeed, they have proven it at a hearing featuring expert testimony.

275. Finally, there is no question that "the equities are in favor of issuance" of a permanent injunction. *Id.* The Commonwealth has no interest in enforcing an unconstitutional statute. *See Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 988 F.3d 329, 344 (6th Cir. 2021) ("As for the final factor—the public interest—it should go without saying that the public has no interest in the enforcement of an unconstitutional law."); *EMW Women's Surgical Ctr. v. Meier*, 373 F. Supp.

3d 807, 826 (W.D. Ky. 2019) ("Finally, as to the public interest, it is well-established that the public has no interest in the enforcement of an unconstitutional law.").

276. Thus, based on the conclusions of law noted above, this Court will enter a permanent injunction against HB 2 and SB 3.

Tendered By:

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2022 I filed a copy of the foregoing with the Court's electronic filing system which caused a copy to be served on all counsel of record.

/s/ Michael P. Abate
Counsel for Plaintiffs

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