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' RESPONSE TO DEFENDANTS' POST-HEARING BRIEF

Michael P. Abate
Casey L. Hinkle
William R. Adams
KAPLAN JOHNSON ABATE & BIRD LLP
710 W. Main St., 4th Floor
Louisville, KY 40202
Phone: (502) 416-1630
mabate@kaplanjohnsonlaw.com
chinkle@kaplanjohnsonlaw.com
radams@kaplanjohnsonlaw.com

Counsel for Plaintiffs Derrick Graham, Jill Robinson, Mary Lynn Collins, Katima Smith-Willis, Joseph Smith, and The Kentucky Democratic Party

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INTRODUCTION

Defendants' brief should be seen for what it is: a post-hoc rationalization of an exercise of raw political power by the Republican supermajority in Kentucky's General Assembly. Unsatisfied with a 75-seat majority in the House, the General Assembly drafted a bill that utterly destroys their opponents' ability to compete in the overwhelming majority of districts across the Commonwealth. They did so by targeting all Democratic districts outside of Louisville and Lexington, and by gerrymandering even those metropolitan areas to pack more Democrats into a smaller number of districts, while combining suburban Republicans with rural Republicans in neighboring counties to form safe districts for Republican candidates. They also enacted a Congressional map with a district that snakes from the Mississippi river all the way to the Capitol, pairing Franklin County for the first time with Western Kentucky, without any legitimate basis.

Defendants do not argue that the plans they crafted are *not* gerrymandered. Nor do they argue that their state House plan complies with the text of the Constitution (particularly, Section 33). Instead, they repeatedly argue that no one has the power to even *question* their choices. They begin with the remarkable claim that neither Democratic voters, nor their elected officials, nor the party itself has standing to bring a partisan gerrymandering claim. That argument is as frivolous as it sounds.

Next, Defendants argue that the courts lack the power to adjudicate this case. But that argument flies in the face of a century of Kentucky precedent uniformly holding that Courts have a solemn duty to ensure that the legislature does not run roughshod over the constitutional rights of voters when enacting redistricting plans.

Defendants then argue that even if courts had the power to hear redistricting cases, there are no manageable standards to use in deciding them. But just this year alone, courts in New York,

North Carolina, and Pennsylvania have rejected that precise argument, relying on the very same type of simulation analysis and partisan bias metrics that Plaintiffs invoked in this case to find that maps drawn by legislatures violated state constitutions.

Perhaps most tellingly, Defendants did not offer any affirmative evidence to support their case. They simply tried to poke holes in the analysis of Plaintiffs' experts, who are widely regarded as leaders in the field of partisan gerrymandering analysis. But, as explained below, each of those critiques falls flat.

Simply put, the only evidence in the record shows that HB 2 violates Section 33 of the Kentucky Constitution, that HB 2 and SB 3 are unconstitutional partisan gerrymanders, and that SB 3 is an arbitrary exercise of raw political power by a Republican supermajority. This Court should enter a permanent injunction against the use of either map.

ARGUMENT

I. Plaintiffs Have Standing to Bring This Lawsuit

"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). 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).

Defendants' assertion that no one has standing to challenge HB 2 and SB 3 is frivolous. Every citizen in Kentucky has a right to insist that the legislature follow the Constitution, including Section 33, when enacting maps. Moreover, over a century of Kentucky case law, and numerous

decisions from other states, make clear that political parties and their members have standing to challenge gerrymandered maps. Defendants' contrary arguments would mean that the Republican supermajority is free to do whatever it pleases, to whomever it chooses, without oversight from any other branch of government. Thankfully, that is not the law.

A. All Plaintiffs have standing to challenge HB 2 under section 33.

"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)). 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.

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). That is because "[t]he discrimination" created by unconstitutional districts "is just as real and just as wrong whether it be based upon a denial of representation to one locality or be founded upon excessive representation given to another. Indeed, it necessarily operates to bring about both results, and in either case the constitutional standard of equality is destroyed." *Id*. The court recognized that the unconstitutionality of a map is not limited to just one district because "the rights of the whole state are lined up with the representation of the several districts." *Id*. at 318. Thus, "[t]he people are entitled to have the districts defined in accordance with the Constitution." *Id.* at 317 (emphasis added). In light of these longstanding principles, there can "no doubt of the right of the plaintiff[s] to invoke the power of the court to protect [their] constitutional rights." *Id*. at 318.

Kentucky courts have never deviated from this common-sense rule and have repeatedly allowed plaintiffs to bring Section 33 challenges seeking to enjoin *entire* legislative maps containing districts that do not comply with the Kentucky Constitution. *See e.g.*, *Legislative Research Comm'n v. Fischer* ("*Fischer IV*"), 366 S.W.3d 905 (Ky. 2012) (hearing challenge to entire House redistricting map from individual legislators elected in specific districts.); *Stiglitz*, 40 S.W.2d at 317-318; *Ragland v. Anderson*, 100 S.W. 865 (Ky. 1907) (enjoining the entirety of the first map drawn under the 1891 constitution at request of plaintiffs in Butler, Edmonson, and Ohio Counties).

Defendants' standing argument 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. If Defendants were correct that a plaintiff had to live in a district drawn with a Section 33 violation to bring such a claim (*see* Def. Br., p. 5)—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. Nor could someone simply travel to one of those districts to bring suit to enforce their "undoubted right to have the districts for representatives and senators created in accordance with the Constitution." *Id.* After all, the General Assembly now requires plaintiffs to sue only in the counties where they reside. *See* KRS 5.005(1).

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.

Moreover, if Defendants' standing theory were adopted, it is not at all clear how anyone would have standing to bring a claim like the one in *Fischer IV*, which argued that the legislature violated Section 33 by splitting more than the minimum number of counties; how would a plaintiff prove that their county split was the one that put it over the limit? (Moreover, as noted below, such a claim premised on the mere fact of a county split would appear destined to fail under *Wantland v. Kentucky State Board of Elections*, No. 2004-CA-000508-MR, 2005 WL 1125070 (Ky. App. May 13, 2005)).

These are not minor flaws with Defendants' standing arguments. Rather, they are the whole point. Defendants are trying to set up a system so byzantine and formalistic that no party would ever have standing to challenge the legislature's decisions on redistricting. This Court should reject that attempt and follow the decades of Kentucky cases allowing citizens to come to court and insist that apportionment plans satisfy the state Constitution.

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

Remarkably, Defendants contend that the Kentucky Democratic Party lacks standing to challenge a Republican partisan gerrymander specifically designed to harm the party's electoral prospects and operations. That argument is both factually and legally absurd.

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

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 to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Indeed, federal and state courts routinely find that state political parties and similar organizations have the requisite constitutional standing to bring voting-rights

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

Here, there can be no doubt that the passage of HB 2 and SB 3 has caused legally cognizable injury to KDP that can only be remedied by this Court. It is undisputed that HB 2 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). The Republican supermajority's attempt to artificially reduce the number of Democratic Representatives through extreme 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.

At trial, House Majority Caucus Leader Derrick Graham (also an individual 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). 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.*). Plainly, a swing of even a single vote can make a material difference in the outcome of votes like this. HB 2 is the Republican supermajority's attempt to bypass these kinds of fights by using its present position to permanently snuff out its political opposition.

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.

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). The elimination of almost all competitive races across the Commonwealth will certainly mean fewer elected Democrats, which in turn will reduce KDP's ability to promote its policy agenda, recruit volunteers, and raise funds to support its activities. (VR 4/5/22, 4:07:18 – 4:08:45). These deficits will only compound over the 10-year lifespan of HB 2, hindering the ability of KDP and its members to compete even in the statewide

races the Republican supermajority cannot gerrymander, thereby threatening to cut Democrats out of the redistricting process entirely in 2030.

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

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 easily met here.

KDP's members, all 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). As explained below, "[e]very citizen, taxpayer, and voter has an undoubted right to have the districts for representatives and senators created in accordance with the Constitution." *Stiglitz*, 40 S.W.2d at 317. This confers standing on every member of the KDP to challenge the unconstitutional maps created by HB 2 and SB 3. 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).

Defendants are wrong to assert that KDP cannot sue without joining to the case specific party members. 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). (Moreover, and as noted above, the legislature only permits plaintiffs to bring redistricting challenges in the Circuit Courts where they reside; thus, it would be impossible for KDP—a Frankfort-based organization—to join suit with its members in the dozens of counties with Constitutional violations).

Plaintiffs have presented ample evidence that HB 2's extreme partisan gerrymander has injured every Democratic voter across the Commonwealth. Plaintiffs' experts Drs. Imai and Caughey showed the map systematically cracks and packs Democratic voters to minimize Democratic representation in the State House and the United States Congress. To take just one example, Dr. Imai showed how Republican map drawers carved up Fayette County to maximize their partisan gains. (PEX 2, pp. 15-16; VR 4/5/22, 11:39:35 – 11:43:20). 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.*). In contrast, HB 2 makes

District 88 safely Republican by combining the Republican-leaning precincts on the county border with Republican strongholds from the neighboring Scott County. (*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*.). The Supreme Court has made clear that this kind of packing and cracking "causes [a] vote…to carry less weight than it would carry in another hypothetical district." *Gill v. Whitford*, 138 S. Ct. 1916, 201 L. Ed. 2d 313 (2018). "Voters residing in [these] districts have suffered cognizable harms" because their votes have been diluted. *League of Women Voters of Michigan v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich.), *vacated and remanded on other grounds, Chatfield v. League of Women Voters of Michigan*, 140 S. Ct. 429, 430 (2019). Of course, Democrats live in these districts, allowing KDP to sue on their behalf.

Regarding SB 3, Dr. Imai's analysis proves that the 35% Democratic vote share in the enacted 1st District is lower 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). Plainly, KDP members across the First District have suffered from SB 3's dilution of their vote.

Finally, KDP's presence in this lawsuit undermines Defendants' repeated reliance on *Gill v. Whitford*. KDP has members in every corner of the state, including every district that has been gerrymandered. *Gill*, in contrast, was a case brought by 12 individuals; it did not involve any organizational plaintiffs. *See* 138 S.Ct. at 1923. Here, there is no question that KDP and its members are affected in every district. Moreover, as explained both above and below, Kentucky's highest Court has long recognized that a voter may challenge an entire apportionment plan. *Gill*,

by contrast, is based on a much more cramped notion of a voters' right to sue under federal law. *See id.* at 1930-1931.

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

As explained above, 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*.

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

The other 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). 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). Again, there is no doubt that these plaintiffs have standing to challenge that unconstitutional act.

II. This Court has the power to hear plaintiff's claims

A. Plaintiffs' Claims do Not Present Non-Justiciable Political Questions

Defendants argue that Plaintiffs' claims are nonjusticiable pursuant to the political question doctrine. That argument has been squarely and repeatedly rejected by Kentucky's highest court. Kentucky courts "must apply the Constitution, even to declare the failure of the General Assembly to discharge its constitutional duty." *Fischer v. State Bd. of Elections*, 879 S.W.2d 475, 475 (Ky. 1994) ("*Fischer II*") (citing *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989)). "[T]o do otherwise would breach the social compact which binds us one to another and would amount to an abdication of judicial responsibility." *Id.* at 475-476.

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Indeed, "[a]ny doubt as to [a] Court's right and duty to review the constitutionality of legislative apportionment was long ago laid to rest in *Ragland v. Anderson*, 100 S.W. 865 (Ky. 1907)." *Fischer II*, 879 S.W.2d at 476. In *Ragland*—a case decided shortly after the adoption of Section 33—the legislative defendants insisted "that the question involved here is political, and not judicial, and that the courts have not jurisdiction to review the acts of the General Assembly in the matter." *Ragland*, 100 S.W. at 866. The Court flatly rejected that assertion: "To this we cannot agree. It is for the courts to measure the acts of the General Assembly by the standard of the Constitution, and if they are clearly and unequivocally in contravention of its terms, it becomes the duty of the judiciary to so declare." *Id.* at 866-867. "[N]o matter how distasteful it may be for the judiciary to review the acts of a co-ordinate branch of the government their duty under their oath of office is imperative." *Id.* at 867. That principle remains as true today as it was more than a century ago. *See, e.g.*, *Fischer IV*, 366 S.W.3d at 911 ("We do not violate the separation of powers doctrine by finding House Bill 1 unconstitutional.").

Defendants argue that because Section 33 of Kentucky's Constitution sets forth specific requirements for redistricting the State, that is the only section of Kentucky's Constitution that may be invoked to challenge the constitutionality of HB 2. But that misstates the law. When general and specific provisions *conflict*, specific provisions generally control. *See* 16 C.J.S. Constitutional Law § 101 ("If one constitutional provision addresses a subject in general terms, and another addresses the same subject with more detail, the two provisions should be harmonized if possible, but *if there is any conflict*, the special provision will prevail." (emphasis added)); *Holbrook v. Knopf*, 847 S.W.2d 52, 55 (Ky. 1992) ("*[I]f there is any 'conflict'* between a provision dealing with a subject in general terms and another dealing with a part of the same subject in a more detailed way, if the two cannot be harmonized, 'the latter will prevail.'" (emphasis added;

quoting Sutherland, Statutory Construction, Volume 2B, Sec. 51.05)). Here, there is no conflict between the requirements of Section 33 and the requirements set forth in Kentucky's Bill of Rights—for example, that elections be "free and equal," or the rights to free speech and assembly. Because Section 33 can be harmonized with the requirements of Kentucky's Bill of Rights. As such, there is no basis for the Court to stop its analysis at Section 33.

Section 2 teaches that a legislative majority must not be given unbridled power: "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. Particularly in light of this provision, Kentucky's highest court has repeatedly rejected arguments that challenges to redistricting maps under Ky. Const. § 6 are nonjusticiable political questions. In *Watts v. O'Connell* the Secretary of State argued "that congressional redistricting is a political question and one not justiciable by the courts." 247 S.W.2d 531, 532 (Ky. 1952). The Court disagreed, noting that although "reapportionment of congressional districts in the State is a question vested in the discretion of the General Assembly," it remained the case that "where the redistricting does violence to some provision of the Constitution or an Act of Congress" courts can and must step in. *Id.* "'When the Legislature has exceeded its legitimate powers by enacting laws in conflict with the Constitution or that are prohibited by it, we have not hesitated to interpose the veto power lodged in the judiciary for the purpose of preserving the integrity of the organic law under which all departments of the state government were created and live, and to which all of them owe obedience.'" *Id.* (citing *Richardson v. McChesney*, 108 S.W. 322, 323 (Ky. 1908)); *see also Watts v. Carter*, 355 S.W.2d 657, 658 (Ky. 1962) (applying Section 6 of Kentucky's constitution to a congressional redistricting plan)

These cases reaffirm a basic proposition of American law, clear since *Marbury v. Madison*: the legislature is not above the law. *See Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74, 82 (Ky. 2018). Judicial review is essential to ensuring that apportionment plans enacted by a super-majority of the legislature are consistent with the rights granted to all Kentuckians in the state's Constitution.

B. The legislature's redistricting choices are not sacrosanct

Defendants invoke the so-called "independent state legislature" theory to argue that the Kentucky General Assembly has absolute power to draw congressional redistricting maps, and that SB 3 is not subject to Kentucky's constitution and is therefore unreviewable by this Court. Advocates of the independent state legislature theory argue that it has roots in caselaw from the 1800s, but even they acknowledge that the theory was "summarily 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."). *See* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1, p. 88 (Fall 2020); *see also id.*, p. 14 (acknowledging 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").

The alleged historical roots of the independent state legislature theory have been debunked. *See, e.g.,* Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. 445 (2022) (explaining why the independent state legislature theory is inconsistent with the original meaning of the Constitution and specifically addressing and rejecting many of the key historical arguments made by proponents of the theory). The independent state legislature theory has been described in academic literature as preposterous, dangerous, and

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antidemocratic, and for good reason. *See* 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). Rendering gerrymandered congressional districts untouchable by state constitutions would lead to far more districts that look like SB 3's 1st District, which shocked residents of Franklin County and nearly everyone else who saw the map.

Defendants cite two cases to argue that Kentucky has recognized the independent state legislature theory. But review of those cases dispels any such notion. Defendants' brief includes a lengthy block quote from *Richardson v. McChesney*, 108 S.W. 322 (Ky. 1908), but uses ellipses to omit the key language. The *Richardson* court did not hold that congressional maps enacted by the General Assembly were immune from review under the state constitution. To the contrary, the court recognized that Kentucky's constitution—not the General Assembly—reigns supreme:

> When the Legislature has exceeded its legitimate powers by enacting laws in conflict with the Constitution or that are prohibited by it, we have not hesitated to interpose the veto power lodged in the judiciary for the purpose of preserving the integrity of the organic law under which all departments of the state government were created and live, and to which all of them owe obedience.

Id. at 323. The court upheld the congressional redistricting map enacted by the General Assembly in that case because the court could not find any provision of Kentucky's constitution which guaranteed that congressional districts be equal in population. The U.S. Supreme Court later found that requirement in Article I, § 2 of the federal constitution. *See Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

The other case cited by Defendants is *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691 (Ky. 1944), which addressed a clash between a statute enacted by the General

Assembly to permit soldiers fighting in World War II to vote by absentee ballot and Section 137 of Kentucky's constitution, which had been interpreted to prohibit absentee voting. (Section 137 has since been amended to expressly permit absentee voting.). The court struggled with various legal doctrines before deciding that doubts should be resolved in favor of allowing Kentuckians to exercise their "sacred[]" right to vote. *Id.* at 696. However, with respect to the legal principles at issue, including whether the General Assembly's provision for absentee voting was subject to Section 137 of Kentucky's constitution, the court admitted: "We possess no certainty that our indicated conclusions as to the constitutionality of the Act under consideration are correct." *Id.* Ultimately, the Court's ruling was based not on any firm conviction regarding the interplay of authority between the General Assembly and Kentucky's constitution, but on a desire to "avert the destruction of valuable rights," *i.e.* the right to vote. *Id.* Hardly a ringing endorsement of the independent state legislature theory.

Moreover, in decisions that post-date both *Richardson* and *Dummit*, Kentucky's highest court has rejected the notion that congressional redistricting plans are not subject to review for compliance with Kentucky's constitution:

> Appellee insists that congressional redistricting is a political question and one not justiciable by the courts, and that the trial judge so held. We do not so construe his judgment. He took jurisdiction of the case and upheld the Act because it violated no provision of the State or Federal Constitutions. True, he said reapportionment of congressional districts in the State is a question vested in the discretion of the General Assembly and one with which courts are not concerned. With this we are in full accord *except where the redistricting does violence to some provision of the Constitution* or an Act of Congress.

O'Connell, 247 S.W.2d at 532 (emphasis added; interpreting *Richardson* to be in accord). In the next redistricting cycle, Kentucky's highest court warned the General Assembly that its actions are subject to judicial review:

> In *Watts v. O'Connell*, supra, this court carefully refrained from suggesting that it would not declare an unfair and unequal Congressional apportionment to be

> unconstitutional. To the contrary, it is the duty of the legislature to recognize that a disproportionate representation, whether it results from population changes or from new legislation, can be so flagrant and unwarranted that the duty of the courts to uphold the constitutional rights of equality under the law will override their traditional reluctance to enter the political thicket.

Carter, 355 S.W.2d at 658 (applying Section 6 of Kentucky's constitution to a congressional redistricting plan).

Defendants' attempt to evade judicial review of their actions must be seen for what it is—a brazen declaration that a majority in the General Assembly can do whatever it sees fit and entrench their power in perpetuity by creating electoral maps that gerrymander the minority party out of effective existence. However, the separation of powers among branches of government ensures that the legislature cannot simply do as it wishes. Shirking constitutional review of redistricting plans "would amount to an abdication of judicial responsibility." *Fischer II*, 879 S.W.2d at 476. It is incumbent on the Court to evaluate all grounds for Plaintiffs' constitutional challenge and to exercise the "veto power lodged in the judiciary" if the General Assembly's redistricting plan is found to violate constitutional guarantees. *See O'Connell*, 247 S.W.2d at 532.

III. HB 2 violates Section 33 of Kentucky's Constitution

The most remarkable thing about Defendants' Section 33 argument is what is missing from it: the *text* of that constitutional provision. Not once does their brief quote the relevant language. Rather, Defendants start—and end—their argument by offering a gloss on the small number of prior Kentucky Supreme Court cases that have come before, claiming that those precedents, which addressed different arguments, somehow conclusively interpret Section 33 for all time and purposes.

That is not how constitutional interpretation works. "When interpreting constitutional provisions, we look first and foremost to the express language of the provision, 'and words must be given their plain and usual meaning.'" *Westerfield v. Ward*, 599 S.W.3d 738, 748 (Ky. 2019)

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(citing *Fletcher v. Graham*, 192 S.W.3d 350, 357-58 (Ky. 2006)). Here, there is no dispute that HB 2 violates the plain language of Section 33 far more times than was necessary to achieve population equality:

- Section 33 requires the legislature to create 100 districts of roughly equal population "without dividing any county, except where a county may include more than one district." Ky. Const. § 33. Although HB 2 splits the minimum number of counties necessary (23), it splits counties far more times overall than is necessary to achieve population equality; it contains 80 total county splits, as compared to 60 in HB 191. (VR 4/5/22, 3:38:28 – 3:38:57; *see also* DEX 1, Tab 1; PEX 4).

- Section 33 also states that "[n]ot more than two counties shall be joined together to form a Representative District." Ky. Const. § 33. HB 2 violates this command 31 separate times (VR 4/5/22, 3:41:26). These excessive multi-county districts were not "necessary" to achieve population equivalence; HB 191 contained only 23 districts formed from parts of 3 or more counties. (VR 4/5/22, 3:41:33; PEX 4).

- Section 33 further requires that "[n]o part of a county shall be added to another county to make a district . . . ." Ky. Const. § 33. Nearly half the districts in HB 2—45 in all—were built by violating this rule (VR 4/5/22, 3:39:29 – 3:40:48). Once again, this was not necessary to achieve population equality; HB 191 would have created districts that cross county lines only 31 times. (VR 4/5/22, 3:41:00; PEX 4).

Defendants do not even try to argue that HB 2 complies with the text of the Kentucky Constitution. Instead, they assert that the Kentucky Supreme Court simply wouldn't care about dozens of unnecessary constitutional violations.

The basis of this argument is Defendants' belief that the Kentucky Supreme Court's existing jurisprudence forever reduced Section 33 to a "dual mandate"—that is, a requirement that the legislature split the fewest number of counties possible while, at the same time, keeping population deviations to +/- 5% of the ideal district population. *See, e.g.*, Def. Br., pp. 17-18. And while the Supreme Court has indeed held those are *necessary* conditions for a map to comply with Section 33, it has never said they are *sufficient* in all circumstances to ensure a redistricting plan's constitutionality. To see why that question has never been squarely presented to the Supreme Court, this Court need look no further than the cases that Defendants cite for the remarkable

position that the Supreme Court has read specific and controlling language right out of the Constitution.

First, Defendants rely on *Fischer II*, which they claim established the "dual mandate" of Section 33. Def. Br., p. 17. That case required the Court to balance two competing goals: minimizing county splits vs. minimizing population deviation. 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. It is not surprising, then, that the opinion focused only on those two aspects of Section 33, because they were the only ones relevant to the question: which one takes precedence when they conflict? Indeed, the Court focused only on a subset of the language in Section 33, which it called the "relevant" portion: "The ... General Assembly ... 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...." *Id.* at 477 (quoting Ky. Const. § 33). The Court held that this "uncomplicated" language "leads immediately to the conclusion 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 the Court purport to interpret "county integrity" for all purposes. Thus, *Fischer II* does answer the question presented here: if a plan maintains a +/- 5% population deviation, and splits the fewest number of counties possible, is the legislature free to ignore other express prohibitions in Section 33?

Jensen, on which Defendants place primary reliance, also does not answer this question. 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*. 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). And he relied for his arguments on a bill (HB 350) that he drafted and introduced "after House Bill 1 was enacted and signed into law"—presumably for the purpose of advancing his litigation effort. *Id.* at 774. The challenger then 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). 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.

Against that backdrop, it is easy to see why *Jensen*, like *Fischer II*, does not resolve the question presented here—whatever the similarities between the maps in question. This Court will search the *Jensen* decision in vain for any sentence stating that *Fischer II* (or any other case) somehow exempted the General Assembly from its obligations to follow the express mandates of the Constitution as much as possible, including the obligation not to combine more than two counties to form a district, or to make districts by taking a piece of one county and combining it with another.

The unpublished decision in *Wantland v. Kentucky State Board of Elections*, No. 2004-CA-000508-MR, 2005 WL 1125070 (Ky. App. May 13, 2005), also does not control this case. Although it is not entirely clear from the brief statement of facts in that short opinion, the appellants

there appeared to contend that the mere fact that their county was subjected to multiple divisions violated Section 33. *See id.* at *1. There is no suggestion in the Court's unpublished decision that appellants could show—as Plaintiffs have here—that the apportionment plan gratuitously violates multiple textual prohibitions in Section 33. And, in any event, nothing in *Wantland* suggests that *Jensen* or *Fischer II* directly address the question presented here: whether the General Assembly can ignore Section 33's limitations as long as it splits the fewest number of counties and stays within an acceptable population variance range.

Nor does *Fischer IV* stand for the broad proposition Defendants assert. On the contrary, its reasoning supports Plaintiffs' claims. In that case, the Legislative Research Committee 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. As applied to the facts here, that means minimizing multi-county districts (including three-county districts) as much as possible while maintaining population equality. Those requirements appear right alongside the county-split prohibition in the text of Section 33. Yet Defendants ask this Court to ignore them.

The Supreme Court has recognized for over 100 years that the prohibitions in Section 33 must be abided unless population equivalence requires otherwise. In *Ragland*, the Court held that Section 33's prohibition on creating districts from more than two counties can only give way where "it be necessary in order to effectuate that equality of representation which the spirit of the whole

section so imperatively demands." *Ragland*, 100 S.W.2d at 870. Likewise, in *Fischer IV*, the Court reiterated that it was "not free to disregard the drafters' intent to preserve county integrity by striking the provision from Section 33." *Fischer IV*, 366 S.W.3d at 913. That is precisely what Plaintiffs request here—that the Court apply the express prohibitions of Section 33 as much as possible. This Court should reject Defendants' self-serving gloss on the caselaw in favor of the Constitution's actual words.

IV. HB 2 and SB 3 are partisan gerrymanders that violate the Kentucky Constitution

A. Partisan gerrymandering violates Section 6's guarantee of free and equal elections

1. The "free elections" clauses on which Section 6 is based prohibit partisan gerrymandering.

As explained in Plaintiffs' opening brief, the Supreme Courts of both Pennsylvania and North Carolina have held that their state's "free elections" clauses—on which Kentucky's was based—prohibit the very kind of partisan gerrymandering at issue in this case. *See, e.g.*, *Carter v. Chapman*, 270 A.3d 444, 458 (Pa. 2022); *see also Harper v. Hall*, 868 S.E.2d. 499, 547 (N.C. 2022); *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018). Defendants simply ignore these persuasive precedents, opting instead to repeatedly cite a dissenting opinion from the recent North Carolina decision. *See, e.g.*, Def. Br., 31-33. It is easy to see why they avoid confronting these cases: they establish why gerrymandering claims fit comfortably with Section 6.

Section 6 of the Kentucky Constitution 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).

Partisan gerrymandering is fundamentally incompatible with the notion of a "free and equal" election. Under HB 2 and SB 3, "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 [and Congressional] legislators." *Common Cause v. Lewis*, 2019 WL 4569584, at *112 (N.C. Super. Sept. 3, 2019). That has the effect of "diluting the potency of an individual's ability to select the [] representative of his or her choice." *Carter*, 270 A.3d at 462. And while other Constitutional requirements for reapportionment—such as equality of population, compact and contiguous districts, and the protection of political subdivisions—are important "traditional core criteria" for evaluating the fairness of a legislative map, those provisions are ill-suited to "prevent all forms of vote dilution." *Id*. at 461-2. Modern "advances in map drawing technology and analytical software can potentially allow mapmakers…to engineer [] districting maps, which, although minimally comporting with these traditional core criteria, nevertheless operate to unfairly dilute the power of a particular group's vote." *Id*. Free and equal election clauses—like Section 6—fill this void and allow courts to evaluate legislative maps with "partisan fairness metrics" that "provide tools for objective evaluation of proposed [] redistricting plans to determine their political fairness and avoid vote dilution based on political affiliation." *Id*.

For these same reasons, the North Carolina Supreme Court did precisely what Plaintiffs ask the Court to do here: look to the persuasive rulings of the Pennsylvania courts, on whose

Constitution their free elections clause was based. *See Harper*, 868 S.E.2d at 540. North Carolina followed Pennsylvania's lead which passed its Free Elections Clause "in response to laws that manipulated elections for representatives to Pennsylvania's colonial assembly" 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*. (citing, *League of Women Voters of Pa. v. Pennsylvania*, 645 Pa. 1, 108-9 (2018)). "[North Carolina's] free elections clause was also intended for that purpose." *Id*. The North Carolina Supreme Court had "no doubt" that "elections are 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*.

Like North Carolina, Kentucky followed Pennsylvania in enshrining free and equal elections into our Commonwealth's Constitution. Accordingly, the "decisions of the Supreme Court of Pennsylvania, when interpreting the 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).

Defendants also are wrong to argue that these free and equal elections clauses are limited to "only election-day interferences with the vote-placement and vote-counting processes." Def. Br., p. 36. That assertion cannot be squared with Kentucky jurisprudence, which has applied Section 6 more broadly. 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. "There [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. "[T]he whole contention" before the Court was the propriety of an election that was allegedly altered by the machinations of the local political organization. *Id.* The Court noted that Section 6 claims "*usually* arise[] in cases where by force, intimidation, or the like" has "deprived [voters] of the right of suffrage." *Id*. (emphasis added). But the Court was clear that an election "free from violence" may still violate the guarantees of Section 6. *Id*. at 915.

Similarly, in *Queenan v. Russell*, 339 S.W.2d 475 (Ky. 1960), 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. The Court reiterated Kentucky's traditionally broad approach to Section 6:

> an election is free and equal within the meaning of the Constitution only when it 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.

Id. at 477 (citing *Asher v. Arnett*, 280 Ky. 347, 132 S.W.2d 772). In short, Section 6 guarantees that Election laws passed by the legislature "must be reasonable, uniform and impartial, and must not operate directly or indirectly to deny or abridge the abridge the rights of Citizens to vote." *Id*.

There also is no evidence to suggest the Kentucky's Constitutional framers intended to limit Section 6's application to the exceptionally rare instances where citizens are physically restrained from casting a ballot. If that was their intent, they would have said so. Instead, they followed Pennsylvania's course and adopted the broadest possible language to give Section 6 "a broad and wide sweep" to protect against "all invidious discriminations between individual electors, or classes of electors, but also between different sections or places in the State." *League*

of Women Voters, 178 A.3d at 108-9 (Quoting Pennsylvania Constitutional Convention Delegate Charles R. Buckalew, *An Examination of the Constitution of Pennsylvania. Exhibiting The Derivation and History of Its Several Provisions*, Article I at 10 (1883)). The historical evidence from the era makes clear that a free and equal election is not as limited as Defendants claim. *See Shamburger v. Duncan*, 253 S.W.2d 388, 390-1 (Ky. 1952) ("Courts in construing constitutional provisions will look to the history of the times and the state of existing things to ascertain the intention of the framers of the Constitution.").

Giving Section 6 the cramped reading Defendants suggest would be anathema to Constitutional framers who, like their counterparts in Pennsylvania, sought to "guarantee [their] citizens an equal right…to elect their representatives…[and] translate their votes into representation." *League of Women Voters*, 178 A.3d at 100. The specific purpose of Section 6 is to prevent "the dilution of the right of the people of this Commonwealth to select representatives to govern their affairs based on considerations of the region of the state in which they live[], and the religious *and political beliefs* to which they adhere[]." *Id*. at 108 (emphasis added).

Both "the letter and spirit of [Section 6]" evidence the framers' intent to protect against political machinations of their own era, and others yet to be revealed. *See Kentucky CATV Ass'n, Inc. v. City of Florence*, 520 S.W.3d 355 (Ky. 2017) (Kentucky Courts discern Constitutional framers' intent "both from the letter and spirit of the document"). Like their preferred reading of Section 33, Defendants would deny the framers that prescient decision and inappropriately circumscribe Section 6, rendering it all but meaningless except in the most extreme and overt attempts to restrict voters from casting a ballot. This Court should not adopt such a radical, ahistorical interpretation of Kentucky's Constitutional safeguard of free and fair elections.

2. There are multiple judicially discoverable and manageable standards by which to determine HB 2 and SB 3's extreme partisan gerrymandering.

Defendants rely on *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), to argue that political gerrymandering claims are nonjusticiable due to lack of manageable standards. But *Rucho* was decided under the U.S. Constitution, which lacks provisions like Sections 6 and 33 in the Kentucky Constitution. Moreover, the Court in *Rucho* specifically recognized that States can and should address partisan gerrymandering under State law. *See id.* at 2507 ("Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. . . . Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.").

Defendants also argue that a state must enact a specific prohibition against partisan gerrymandering before a state court can declare extreme partisan gerrymandering violative of the state constitution. But, as noted above, other courts have declared partisan gerrymandering unconstitutional under provisions materially identical to those in Kentucky's Constitution which form the basis of Plaintiffs' claims here. Defendants extensively cite the dissenting opinion in one of those opinions—*Harper v. Hall*, 868 S.E.2d 499, 510-11 (N.C. 2022)—without acknowledging the import of the majority holding. Like Plaintiffs here, the plaintiffs in the North Carolina case challenged congressional and state legislative redistricting plans as violative of the free elections, equal protection, free speech, and freedom of assembly clauses in North Carolina's Constitution. *Id.* The North Carolina Supreme Court held, based on evidence that the plans were the product of partisan gerrymandering, that the plans are "unconstitutional beyond a reasonable doubt" and enjoined the use of the gerrymandered maps in any future elections. *Id.* at 528, 559.

To resolve this case, it is not necessary for the Court to "identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the

existence of an unconstitutional partisan gerrymander." *Id.* at 547 (citing *Reynolds v. Sims*, 377 U.S. 533, 578 (1964) ("What is marginally permissible in one [case] may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of ... apportionment.")). As in *Reynolds*, "[l]ower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation." 377 U.S. at 578. As further discussed below, "there are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander." *Harper*, 868 S.E.2d at 547.

Contrary to Defendants' misrepresentations, Plaintiffs are not attempting to enforce a constitutional guarantee of perfectly proportional representation. Indeed, Plaintiffs' experts acknowledged that, even with constitutional maps, a party's representation in a legislative body will almost never directly correspond to that party's proportional share of the state-wide vote. *See*, *e.g.*, PEX 6, p. 4 (expert report from Dr. Caughey explaining that, "[d]ue to the well-known 'winner's bonus' in majoritarian electoral systems, the majority party in a state usually wins a super-proportional share of seats unless the map is biased strongly against it"). But the advantage gained by Kentucky Republicans through the gerrymandered districts in HB 2 goes well beyond the advantage that can be attributed to a winner's bonus. (VR 4/6/22, 11:11:35 (Dr. Caughey testifying that Republicans are likely to win 8.5% of the votes above 50% but 30.5% of the Kentucky House seat share above 50%)).

Adjudicating a partisan gerrymandering claim does not require the Court to be clairvoyant or accurately predict the results of future elections. The empirical evidence of partisan gerrymandering presented by Plaintiffs' experts is not contingent upon the results of any particular

future election. Regardless of whether an election cycle is good or bad for Democrats or Republicans, or whether there are particular candidates who over- or under-perform their political party, the systematic pro-Republican advantage enshrined in HB 2 would persist. (VR 4/6/22, 11:06:42 (Dr. Caughey describing his opinion with respect to HB 2 as "durable"); VR 4/5/22, 3:24:25 – 3:24:50, 3:35:07 – 3:35:19 (Dr. Imai explaining that his analysis is not a prediction of future election results, nor do his opinions depend on the outcome of future elections)).

In similar circumstances, courts have recognized many data-driven objective standards can provide evidence of partisan gerrymandering. Here, "they all point in the same direction," *Rucho*, 318 F.Supp.3d at 858: HB 2 and SB 3 are unconstitutionally extreme partisan gerrymanders.

As recent technological developments have allowed mapdrawers to separate voters by partisan preference with surgical precision, so to have "numerous metrics [] been developed to allow for objective evaluation of proposed districting plans to determine their partisan fairness." *Carter*, 270 A.3d 444 at 470-471. Some metrics "ascertain a map's responsiveness to voters, evaluating whether a party with a majority of votes is likely to win a majority of seats." *Id*. Others "measure whether and to what extent a map favors one political party" over the other. *Id*. "In utilizing these tools" courts "do not prioritize one metric over another, but rather look wholistically to a plan's performance across assessments." *Id*. Courts across the country have adopted this "data-driven evidence" to evaluate redistricting plans. *Harkenrider v. Hochul*, --- N.Y.S.3d ---- (N.Y.A.D. 4 Dept., 2022)[1]; *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 2022-Ohio-65; *League of Women Voters of Pa*, 645 Pa. at 124-6. They are necessary because "partisan

[1] Notably, some of the data-driven objective measures relied on by the New York Supreme Court were provided by Defendants' expert Sean Trende.

intent, like discriminatory intent, will 'rarely be so obvious or its practices so overt that recognition of it is instant and conclusive.'" *Id*. (quoting *300 Gramatan Ave. Assocs. v. State Div. of Human Rights*, 45 N.Y.2d 176, 379 N.E.2d 1183 (1978)).

This approach is not novel. "[E]videntiary metrics and simulated maps" are routinely offered by litigants in redistricting cases to show "that the legal standard is met." *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1082 (S.D. Ohio 2019).[2] Courts then "apply these metrics, simulated maps, and other evidence" to the standards set forth in the Constitution or statutory law. *Id*. at 1082-3. "When a variety of different pieces of evidence, empirical or otherwise, all point to the same conclusion—as is the case here—courts have *greater* confidence in the correctness of the conclusion." *Id*. (emphasis original). Here, the only evidence in the record makes clear that the maps created by HB 2 and SB 3 are extreme pro-Republican outliers, "and that fact raises further concern about the plan[s'] constitutionality." *Id*.

Courts have not limited their toolbox in other contexts and should not do so here. In other areas of the law, multiple "metrics comfortably coexist." *Id*. For example, in malapportionment cases the Supreme Court "has cited a handful of measures (and sometimes multiple measures in the same case) for population deviation. *Id*. (citing *Karcher v. Daggett*, 462 U.S. 725, 728 (1983) (noting the total deviation between the most and least populous districts and the average deviation, *i.e.*, the average difference between each district's population and the population required for perfect equality); *Gaffney v. Cummings*, 412 U.S. 735, 737 (1973) (using the two measures in *Karcher* and also citing the ratio of the largest district population to the smallest

[2] The Supreme Court vacated and remanded the decision in Ohio A. Philip Randolph Institute after ruling, in *Rucho*, that partisan gerrymandering claims are not reviewable in federal courts. *See Chabot v. Ohio A. Philip Randolph Inst.*, 140 S. Ct. 102 (2019). Nevertheless, the court's reasoning is persuasive in cases like this, which bring such claims as a matter of state constitutional law.

district population); *Mahan v. Howell*, 410 U.S. 315, 319, 320 (1973) (using the same three measures as *Gaffney*, in addition to noting the proportion of the population that could elect a majority of the state house); *Swann v. Adams*, 385 U.S. 440, 442–43 (1967) (using all these measures)). In racial gerrymandering cases under the VRA, courts have utilized at least three metrics to measure racial polarization in voting. *Id*. (citing *United States v. City of Euclid*, 580 F.Supp.2d 584, 596 (N.D. Ohio 2008) ("Statistical evidence of racial bloc voting may be established by three analytical models: homogenous precinct analysis ('HPA'), bivariate ecological regression analysis ('BERA'), and King's ecological inference method ('King's EI method')). Political gerrymandering claims are no different. Courts can, and must, use every tool "in the evidentiary toolbox." *Id*.

In a sleight of hand, Defendants attempt to transform the overwhelming evidence that HB 2 and SB 3 are extreme partisan gerrymanders into a reason to reject Plaintiffs' claims. Because, according to Defendants, the Court must choose between "different visions of fairness" it transforms the choice into a political, rather than legal question. Def. Br., p. 35. But the Court is not required to choose between measures of partisan fairness. When—like here—"all the measures strongly point in the same direction," the Court should rely on that consistency to reach its conclusions. *Householder*, 373 F. Supp at 1085.

Defendants' efforts to convince this Court that no objective standards can effectively measure partisan gerrymandering should be seen for what they are: another attempt to place their political machinations beyond judicial scrutiny. Defendants simply ignore that courts have found measures like the Efficiency Gap and Declination, among others, to be "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 ([T]there are multiple reliable ways of demonstrating the existence of

an unconstitutional partisan gerrymander. 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 North Carolina's unique political geography."). To eschew these widely recognized metrics altogether is to abandon the judicial duty to adjudicate constitutional claims.

B. Section 1: Free Speech

Partisan gerrymandering also violates the Kentucky Constitution's guarantees of free speech and assembly. 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. It also "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.*

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.* Here, the authors of HB 2 and SB 3 "identified[] certain preferred speakers" (Republican voters), while targeting certain "disfavored

speakers" (Plaintiffs and other Democratic voters) for "disfavored treatment" because of disagreement with the views they express when they vote. *Citizens United*, 558 U.S. at 340-41.

HB 2 and SB 3 also retaliate against voters for their protected speech. Courts carefully guard against retaliation by the party in power. *See Elrod v. Burns*, 427 U.S. 347, 356 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990). When patronage or retaliation restrains citizens' freedoms of belief and association, it is "at war with the deeper traditions of democracy embodied in the First Amendment." *Elrod*, 427 U.S. at 357 (quotation marks omitted). Here, Plaintiffs were targeted for disfavored treatment because of a shared marker of political belief—their status as Democratic voters. That suffices. *See Miller v. Johnson*, 515 U.S. 900, 920 (1995) (condemning State's targeting of areas with "dense majority-black populations").

C. Sections 1, 2, 3: Equal Protection

Partisan gerrymandering also violates the guarantee of 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). HB 2 and SB 3 violate this guarantee by drawing redistricting maps with the purpose and effect of artificially increasing and entrenching Republican control of the General Assembly and Kentucky's Congressional delegation.

Equal protection requires that every citizen's vote carry the same weight. *See Fischer IV*, 366 S.W.3d at 910; *see 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"). That right "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. 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.

Because HB 2 and SB 3 implicate Kentuckians' fundamental right to vote, they are subject to strict scrutiny. *See Mobley v. Armstrong*, 978 S.W.2d 307, 309 (Ky. 1998), as modified (Oct. 22, 1998). To evaluate whether a redistricting plan violates equal protection, the Court should consider whether: (1) the map drawers' predominant purpose was to entrench their party in power by diluting the votes of citizens favoring their rival; (2) the map lines have the intended effect by substantially diluting votes of the party not in power; and (3) if there is a legitimate, non-partisan justification for the redistricting plan. *See Lewis*, 2019 WL 4569584, at *114 (citing *Arizona State Legislature*, 576 U.S. at 790); *Rucho*, 139 S. Ct. at 2516 (2019) (Kagan, J., dissenting)).

Here, every piece of evidence in the record points the same way: HB 2 and SB 3 were drafted with discriminatory intent to disenfranchise Kentucky Democrats and entrench the present Republican majority, and they will have that intended effect. Drs. Imai and Caughey have shown conclusively that HB 2 and SB 3 are extreme partisan outliers. HB 2 is more favorable to Republicans than all of Dr Imai's 10,000 simulated House maps. (PEX 2, pp. 11-13; VR 4/5/22, 11:21:20 – 11:29:01). And also more favorable than 99% of all maps ever scored on Plan Score. (VR 4/6/22, 11:22:45 – 11:23:05). Such an extreme Republican advantage cannot be explained by political geography; it is therefore evidence of the majority's intent to pass a map that maximizes its political power. For its part, SB 3 sacrifices the voters of Franklin, Anderson, and Washington

Counties by combining them in a snake-like district that stretches from Fulton to Franklin Counties. The resulting districts unconstitutionally dilute the voting power of voters in those counties by pairing them with voters in counties with whom they have little in common. The result is a 1st District with a 35% Democratic vote share—eliminating the last competitive Congressional district in the Commonwealth. (PEX 2, pp. 17-18; VR 4/5/22, 12:10:05 – 12:12:00). Plainly, SB 3's mapdrawers intended this result.

The "blatant examples of partisanship driving redistricting decisions" throughout HB 2 and SB 3 are unrelated to any legitimate legislative objective. *See Rucho*, 139 S. Ct. at 2505. Indeed, they are incompatible with democratic principles. *See Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion); id., at 316 (Kennedy, J., concurring in judgment); *Ariz. State Legislature*, 576 U.S. at 791. And, they are contrary to the established right of Kentucky voters to have "fair and effective representation." *Fischer IV*, 366 S.W.3d at 910 (citing *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964)).

Because Plaintiffs have made a prima facie showing that HB 2 and SB 3 violate the equal protection guarantees in Kentucky's Constitution, the burden shifts to those defending the laws to prove that a legitimate state interest or other neutral factor justified such discrimination. But here, Defendants made no attempt to prove that HB 2 and SB 3 are narrowly tailored to advance a compelling governmental interest. They simply argue that there are no manageable standards for judging an equal protection claim, and then pivot to quoting the *dissenting* opinion from the recent North Carolina Supreme Court decision in *Harper*. See Def. Br., pp. 41-43. That is nothing more than yet another variation on the theme that this Court has no power to check the Republican supermajority, even if it violates constitutional guarantees.

D. The record demonstrates that HB 2 is an unconstitutional gerrymander

1. Prof. Imai's testimony

Although they retained their own expert with experience in conducting simulations, Defendants did not actually try to prove that HB 2 or SB 3 are not gerrymandered. Instead, they simply tried to undermine the analysis conducted by Dr. Imai. None of those criticisms have merit.

First, and despite registering no objection to Dr. Imai's qualification as an expert witness at the hearing (VR 4/5/22, 10:51:40 – 10:51:54) and conceding in their post-hearing brief that Dr. Imai "brought actual expertise to the Court" (p. 57), Defendants nonetheless suggest 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). Moreover, the argument is baseless. As fully set forth in Plaintiffs' post-hearing brief (pp. 8-17, 28-30), Dr. Imai is a preeminent expert in using simulation algorithms to analyze redistricting plans, is extensively published and peer-reviewed, is extremely well-regarded in his field, and applied methods in this case that are widely used (including by Defendants' rebuttal expert Sean Trende) to offer expert opinions to courts around the country tasked with deciding challenges to redistricting plans.

On the merits, Defendants' principal criticism of Dr. Imai is that he failed to instruct his algorithms to simulate plans that look just like the enacted plans. That type of circular analysis would only serve as a misleading rubber stamp of enacted plans. 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 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. 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.

Defendants mischaracterize Dr. Imai's work by arguing that he "subjectively cho[]se from essentially an infinite number of maps the small set of maps" he compared to the enacted plans. Defendants' Post-Hearing Brief, p. 58. To the contrary, Dr. Imai imposed only those constraints which are legally mandated, and, in the case of the Kentucky House map, used well-established tools of discarding the first 1,000 simulated plans ("burn-in") and random selection of every 6th resulting simulated plan ("thinning") to generate the set of 10,000 simulated plans he compared to the enacted plan. (PEX 2, pp. 21-24; VR 4/5/22, 11:02:13 – 11:04:14, 11:06:00 – 11:07:36, 11:49:51 – 11:55:57). It is Defendants' experts—not Dr. Imai—that engaged in cherry-picking, by plucking a handful of simulated plans from Dr. Imai's ensemble of 10,000 to argue that particular maps would never be enacted by Kentucky lawmakers. As explained by Dr. Imai, one should never draw conclusions about the ensemble of simulated plans by looking at just one or even a handful of simulated plans. The power of the simulation-based approach is the ability to compare an enacted plan to 10,000 simulated plans at once.

Dr. Imai credibly testified based on his considerable expertise and widely accepted methodologies that the Kentucky House map enacted by HB 2 reflects the "signature of gerrymandering," increases the number of Republican-leaning districts, and makes Republican-leaning districts safer while making Democratic-leaning districts less safe. 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 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). Dr. Imai's opinion that HB 2 constitutes a partisan gerrymander was not rebutted or even addressed by Defendants' expert witnesses.

Defendants' experts prefer to talk about Dr. Imai's analysis of the U.S. Congressional map enacted by SB 3, which Dr. Imai opined creates a 1st District that is unusually non-compact and places Franklin County voters in a district that is much more Republican-leaning than the average district containing Franklin County in the simulated plans. (PEX 2, pp. 16-18; VR 4/5/22, 12:00:04 – 12:03:15, 12:10:05 – 12:12:00). 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). The beginnings of the hook-like shape for the 1st District that was made far more extreme by SB 3 therefore had its roots in partisan aims, which are no longer relevant to current Kentucky politics. Moreover, as Dr. Imai 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.")).

Defendants' critiques relating to Dr. Imai's "failure" to consider Kentucky's historical Congressional maps also overlook the fact that Franklin County has historically been paired with Fayette County in the 6th District. (VR 4/7/22, 12:29:11 – 12:29:44). Mr. Trende had no response to the question of why the historical interest in protecting the long-deceased Congressman Natcher is more important than the history of keeping Franklin and Fayette (and/or other central Kentucky) Counties in the same district.

Even so, Plaintiffs have never contended that Franklin County *must* be kept in the 6th District in order to draw a constitutional map. Thus, Defendants' observation that Franklin County is outside the 6th District in two-thirds of Dr. Imai's simulated maps is irrelevant. More relevant is Dr. Voss's testimony that, when the simulation algorithm was instructed to keep Warren, Daviess, and Bullitt Counties together (the alleged "core" of the 2nd District that Defendants claim must be protected), Franklin County almost never appears in the 1st District. Dr. Voss testified that, if you "leave the simulation" alone, Franklin County "won't end up in the 1st" District." (VR 4/7/22, 4:53:15 – 4:53:23). Thus, putting Franklin County in the 1st District was not a natural or inevitable choice by the legislature.

Surprisingly, Defendants' post-trial brief also plows ahead with invoking Dr. Voss's criticism of Dr. Imai's use of a population tolerance of +/- 0.1% because enacted Congressional maps must create districts with absolutely equal population. Dr. Imai and Mr. Trende both testified 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). Dr. Voss acknowledged that imposing a requirement of absolute equality on Dr. Imai's algorithm generated warnings that such a setting would prevent the algorithm from functioning efficiently. (VR 4/7/22, 2:57:52 – 2:59:20). There is a reason why Mr. Trende—who, in contrast to Dr. Voss, has actually offered expert opinions based on simulation algorithms in other cases—did not join in Dr. Voss's critique. Indeed, Mr. Trende used a population tolerance ten times larger than the one used by Dr. Imai in this case when he used simulation algorithms to evaluate New York's Congressional map. (*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)). Most importantly, 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)).

Without citation to any opinions from their expert witnesses or any other authorities, Defendants argue that 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 is a "problem" because it is like "compar[ing] apples with oranges." As Dr. Imai explained, 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). Dr. Imai used the above-referenced election returns 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)).

Defendants also argue that Dr. Imai should have factored in election-specific nuances such as candidate quality. But this would introduce subjectivity in the analysis. Indeed, Defendants' two experts could not agree on which historical races are the best predictors of future elections in Kentucky. (*Compare* VR 4/7/22, 12:00:13 – 12:02:25 (Trende testifying that the 2016 presidential

election result is the best predictor of future elections and the 2019 Bevin-Beshear race for governor should be discounted due to Bevin's poor quality as a candidate) *with* VR 4/7/22, 3:52:30, 3:54:40 (Dr. Voss testifying that the 2016 presidential election was an outlier election when Kentucky voters were at their "most Republican" and the 2019 governor race should not be discounted because it provides "important information" regarding Kentucky's electorate)). Averaging the results of multiple elections avoids this kind of dispute and is therefore a reliable measure of partisanship. (VR 4/5/22, 11:44:26 – 11:49:50).

Finally, Defendants argue that Dr. Imai's opinions are not evidence of *extreme* partisan gerrymandering, because Democrats are already in the minority in Kentucky's state House and U.S. Congressional delegations, which—Defendants argue—would not change under Dr. Imai's average simulated plans. It is important to clarify that simulation algorithms do not predict future election results. Past election returns are used as a measure of partisanship, not future voting behavior. (VR 4/5/22, 10:59:02 – 11:00:42). Indeed, when Defendants cross-examined Dr. Imai regarding the box plot labeled Figure 3 in his report, Dr. Imai stated very clearly: "I don't want this to be interpreted as a prediction of the future election." (VR 4/5/22, 3:24:25 – 3:24:50, *see also* VR 4/5/22, 3:35:07 – 3:35:19). Because Dr. Imai's opinions are not contingent on any prediction of future election results, Dr. Imai's opinions are not diminished by the possibility that Republicans or Democrats might have a "wave" election in any particular year. No matter the political season, the impact of the partisan gerrymandering identified by Dr. Imai would persist in favoring the Republican party.

Despite considerable effort, Defendants failed to land any blows that diminish the credibility of Dr. Imai's testimony. That is because Dr. Imai's credentials are unimpeachable and his analysis in this case adhered to widely accepted methodologies. As other courts have done, this

Court should have no hesitation in relying on Dr. Imai's opinions. *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).

2. Prof. Caughey's testimony

Defendants also lodge numerous attacks at the expert testimony offered by Dr. Caughey. Once again, none has merit.

First, Defendants argue that "Dr. Caughey did not actually employ any expertise in analyzing HB 2." Def. Br., p. 52. That assertion cannot be taken seriously. Dr. Caughey spent hours on the stand explaining his expertise in political science, the Bayesian multi-level modeling that went into his predictive methodology, and quantitative metrics of partisan gerrymandering that he teaches in his advanced MIT courses—including during a lengthy cross-examination that tried, but failed, to discredit his analysis. Time and again, Dr. Caughey used his training and expertise to explain how HB 2 "is perhaps the most extreme advantage for one—either party in a legislative map that I've ever seen." (VR 4/6/22, 16:20:55 – 16:21:03). His expertise and analysis was on full display to this Court and discredits the assertion that "any lay witness" could have done what Dr. Caughey did. Def. Br., p. 52.

That Dr. Caughey utilized an existing software package he knows well and trusts to calculate certain partisan fairness metrics, instead of aggregating the same data (VR 4/6/22, 16:14:45 – 16:15:37) and building the same model from scratch (VR 4/6/22, 10:41:45 – 10:41:59), does not undermine his expertise. He plainly used his expertise to interpret those results and explain them to the Court. Moreover, he did not simply run the model through Plan Score and transcribe its results, as Defendants' counsel suggested. (VR 4/6/22, 13:40:05 – 13:40:15). And in any event, if relying on others' software packages were disqualifying, both of Defendants' experts

must be excluded; they relied on Dr. Imai's simulation software to perform their analyses of the maps in this case (and, in Mr. Trende's case, in others).

Defendants' attack on Dr. Caughey's credibility similarly misses the mark. They try to make much of the fact that Dr. Caughey has only offered expert testimony in support of the "Democratic" side of redistricting cases but ignore his testimony that he would testify for the "Republican" side if there were a state legislative map that was egregiously gerrymandered by a Democratic legislature. (VR 4/6/22, 11:01:00 – 11:01:15). However, that opportunity has not often presented itself, as Dr. Caughey testified to his understanding that most of the litigation during the 2010 redistricting cycle featured challenges to Republican gerrymanders, not Democratic ones. (VR 4/6/22, 13:14:10 – 13:14:20).[3]

Defendants' attempts to undermine Plan Score's predictive model fall equally flat. First, Defendants seriously misstate 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). 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

[3] Defendants likewise miss the mark by trying to paint Dr. Caughey's analyses in Oregon and Pennsylvania as inconsistent with his views here. As Dr. Caughey explained, the Efficiency Gap metric must be understood in context; it matters how confident Plan Score is in its predictions, as well as what the other partisan fairness metrics say. In Oregon, he described the Efficiency Gap as "moderately pro-Democratic" (not "pro-Democrat") because it favored Republicans a quarter of the time and the other partisan fairness metrics were split on whether they favored Republicans or Democrats. Here, by contrast, the Efficiency Gap is *much* larger; it favors Republicans in every electoral scenario; and all partisan bias metrics, as well as Dr. Imai's simulation analysis, point in the same direction.

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.

Defendants also make much of 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). *See* Def. Br., p. 53. This is yet another red herring 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).[4] Moreover, the 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). Thus, 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 likely why Defendants made no attempt to *quantify* this supposed weakness in the projection model.

Likewise, Defendants 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. *See* Def. Br., p. 55. In any event, 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

[4] *Compare* 2020 Official Election Returns, https://elect.ky.gov/results/2020-2029/Documents/2020%20General%20Election%20Results.pdf; 2016 Official Election Returns, https://elect.ky.gov/results/2010-2019/Documents/2016%20General%20Election%20Results.pdf

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). But regardless of the option chosen, there is no question that Plan Score would predict a clear Republican advantage under HB 2.

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).

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."). There is thus no evidence of Defendants' new—and unsupported—claim that 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. 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.

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). 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.").

Equally misguided is Defendants' complaint that Dr. Caughey conducted his analysis based on Plan Score's most updated prediction model. *See* Def. Br., p. 55. As Defendants' own expert 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). 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. 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).

Notably, Defendants did not offer an alternative prediction of what they think the House was likely to look like under HB 2; they simply tried to discount the entire exercise because no one can *guarantee* the result of a future election. But there is no serious dispute that Plan Score's projections are realistic assessments of what is likely to occur. Indeed, recent public statements from Rep. Jason Nemes, one of the strongest defenders of HB 2 (and critics of this lawsuit), prove the point. In a Tweet made 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:

Thus, any attempt to discredit Plan Score's projections as unreliable is nothing more than misdirection asking this Court to ignore political realities.[5]

Finally, Defendants' brief says nothing about Dr. Caughey's testimony concerning HB 2's declination or symmetry—other reliable measures. 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). Defendants don't respond to this unrebutted testimony because they can't.

Simply put, everyone understands that HB 2 targeted certain incumbent Democratic seats to disadvantage those candidates and favor Republican challengers. That is one of the reasons the Governor vetoed it, and the Republican supermajority overrode the veto. This Court need not 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)).

V. SB 3 Violates the Constitution's Prohibition on Arbitrary Exercise of Absolute Power

Defendants' terse Section 2 argument boils down to an assertion that so long as the legislature has the power to enact new maps, how they do it is their business and not subject to judicial review. *See, e.g.*, Def. Br., pp. 41. ("[T]he General Assembly possesses discretion over Congressional and state apportionment. So Section 2 does not prevent the General Assembly from

[5] For example, Defendants glibly assert that Plan Score is "32% unsure of its ability to forecast the partisanship in a Kentucky Map." Def. Br., p. 53. Putting aside that this is not meaningful political science terminology—or an accurate representation of the statistic that Defendants cite—it ignores the larger, more important point: despite some district-level uncertainties, Plan Score's partisan fairness metrics, which take account the uncertainty in the forecasts, indicate an *extremely high level of* certainty that the map, in the aggregate, favors Republicans under any plausible range of election outcomes. (VR 4/6/22, 11:36:30 – 11:36:36).

exercising its duly authorized discretion in considering partisan interests in apportionment."). Once again, this is nothing more than an assertion that the General Assembly has unchecked power to do whatever it wants when it comes to redistricting. But that is not what the Constitution says.

In this Commonwealth, "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, *not even in the largest majority*." Ky. Const. § 2 (emphasis added). 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.

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.*

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).

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. 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 (William Natcher) that died 30 years ago, without ever getting to run in the district created for him. 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). Even the Commonwealth's expert in Kentucky politics conceded 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, other than the raw political ambitions of the Republican supermajority.

CONCLUSION

For the foregoing reasons, this Court should declare HB 2 and SB 3 unconstitutional and permanently enjoin them.

Respectfully submitted,

/s/ Michael P. Abate
Michael P. Abate
Casey L. Hinkle
William R. Adams
KAPLAN JOHNSON ABATE & BIRD LLP
710 W. Main St., 4th Floor
Louisville, KY 40202
Phone: (502) 416-1630
mabate@kaplanjohnsonlaw.com
chinkle@kaplanjohnsonlaw.com
radams@kaplanjohnsonlaw.com

Counsel for Plaintiffs Derrick Graham, Jill Robinson, Mary Lynn Collins, Katima Smith-Willis, Joseph Smith, and The Kentucky Democratic Party

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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