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Supreme Court of Kentucky

Case Nos. 2022-SC-0522, 2023-SC-0139

DERRICK GRAHAM, *et al.*, *Appellants, Cross-Appellees*

Court of Appeals, Nos. 2022-CA-1403, -1451
v. Franklin Circuit Court, No. 22-CI-00047

MICHAEL ADAMS, in his official capacity as Secretary of State, *et al.* *Appellees, Cross-Appellants*

REPLY BRIEF FOR THE COMMONWEALTH OF KENTUCKY

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Certificate of Service

I certify that a copy of this brief was served by U.S. mail on September 29, 2023, upon Michael P. Abate, Casey L. Hinkle, William R. Adams, Kaplan Johnson Abate & Bird LLP, 710 W. Main St., 4th Floor, Louisville, Kentucky 40202; Taylor Brown, Kentucky State Board of Elections, 140 Walnut Street, Frankfort, Kentucky 40601; Michael G. Adams, Jennifer Scutchfield, Michael R. Wilson, Office of the Secretary of State, 700 Capital Ave., Suite 152, Frankfort, Kentucky 40601; Bridget M. Bush, R. Kent Westberry, Hunter Rommelman, Landrum & Shouse LLP, 220 W. Main St., Suite 1900, Louisville, Kentucky 40202; Hon. Thomas Wingate, Franklin Circuit Court, 222 St. Clair St., Frankfort, Kentucky 40601. I also certify that the record was not checked out for the submission of this brief.

/s/ Alexander Y. Magera

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

I. The Court should not change the law.

HB 2 "divid[es] the fewest number of counties" and achieves population equality, so it "fully complies with Section 33." *Legis. Rsch. Comm'n v. Fischer*, 366 S.W.3d 905, 916 (Ky. 2012) (*Fischer IV*). As for SB 3, "it is not within the power of the courts to control the legislative department in the creation of congressional districts." *Richardson v. McChesney*, 108 S.W. 322, 323 (Ky. 1908). These rules should be, once again, reaffirmed.

Section 33. Chief Justice VanMeter and Justice Bisig asked the KDP how it could get around Kentucky's Section 33 precedent and stare decisis. OA 5:30–8:10, 29:21–30:27.[1] The KDP's response was remarkable.

The KDP has consistently advocated for a specific Section 33 test: the dual mandate, plus the least number of 1) county splits, 2) parts of counties attached to others, and 3) three-or-more-county districts. TR 28–30, 1544, 1597; Appellant Br. 4–5, 41. But in light of the Commonwealth's brief, it now proffers, for the first time, some sort of substantial-compliance test with Section 33's alleged "six requirements."[2] OA 7:48–9:14. The KDP's new test is just as atextual,

[1] https://ket.org/program/kentucky-supreme-court-coverage/derrick-graham-et-al-v-secretary-of-state-michael-adams-et-al/

[2] This is the first time the KDP has acknowledged the parts of Section 33 about contiguity and the advantage to geographically larger counties.

unsupported, and unworkable as its previous one, Appellee Br. 7–34, and its inability to stick to a particular set of rules presages the endless bouts of redistricting battles that would result from changing the dual mandate.

Textually, the KDP's "requirement" of, as much as possible, not "dividing any county" ignores the General Assembly's discretion to do so "where a county may include more than one district." Appellee Br. 21–23. Similarly, the KDP's "requirement" of, as much as possible, not joining more than two counties in a district ignores the General Assembly's discretion to do so to effectuate population equality among districts. Appellee Br. 17–18, 21–23.

The KDP referenced *Ragland v. Anderson*, 100 S.W. 865 (Ky. 1907), and *Fischer IV*. But *Ragland* dealt with *actual*, not substantial, compliance with Section 33's not-more-than-two-counties provision. *Id.* at 870. The Democratic Party there interpreted that provision to always "forbid[] more than two counties to be joined in one district." *Id.* But the *Ragland* Court found that the text itself allowed joining more than two counties in a district if necessary to effectuate population equality. That reading of Section 33 did not result from any impossibility of compliance with other mandates or rules. Appellee Br. 14–18.

The KDP referenced out of context *Fischer IV*'s "greatest extent possible" phrase. There, in defending a map noncompliant with the dual mandate, the LRC asked the Court to "replace[]" the county-integrity rule of "*Fischer II* [that] re-

quires division of the fewest number of counties mathematically possible . . . with a good faith requirement to divide only the fewest number of counties as is politically possible." *Fischer IV*, 366 S.W.3d at 911. But this Court refused after concluding that its duty "to preserve county integrity" would be accomplished as follows: "We must harmonize the dual mandates to the greatest extent possible while achieving the overarching goal of population equality. The *Fischer II* Court *appropriately balanced these goals by requiring reapportionment plans divide the mathematically fewest number of counties possible*." *Id.* at 913 (emphasis added). There was no pronouncement that everything in Section 33 must be complied with to the "greatest extent possible." The KDP's interpretation of that phrase cannot be right because the Court explicitly held that "dividing the fewest number of counties while achieving greater population equality fully complies with Section 33." *Id.* at 916.

Abrogating the dual mandate would inevitably lead the Court into the political thicket. The KDP already admitted that "there are times where there are going to be tradeoffs" when the General Assembly cannot achieve the KDP's unspecified and unproven magic minimization-of-Section-33-violations number. OA 30:57–31:35. Yet the KDP could not even concede that it would be permissible to, for example, prioritize minimizing county splits over joining three or more counties in a district. *Id.* Instead, the KDP put it on the Court to make that call. *Id.* The KDP said that the Court should engraft statements taken out of

context from *Fischer IV* to see if the choices the General Assembly made were done "consistently across the state" and if they had an "equal effect." *Id.*

But why should that be the standard? What if you minimize county splits, leading to more three-county districts in one part of the Commonwealth, but you could minimize three-county districts by splitting counties more times elsewhere? Why would that be impermissible? Or, what if you made 10 three-county districts but split counties 30 times to do so, versus splitting counties only 20 times but which results in 20 three-county districts—would that be constitutional? Why or why not? The KDP is simply setting up perpetual redistricting challenges until the Court blesses a map that maximizes Democrat election wins.

Technological advancement was also mentioned. But as the KDP's representative admitted, advanced technology was used in the last Democrat-controlled State House redistricting cycle. VR 04/05/22, 4:31:47–42:00. Consider DEX 8, a close-up of the so-called "Pulaski Strip" in the Democrats' 2013 House map at issue in *Fischer IV*. 366 S.W.3d at 909 n.6; DEX 9 at 14–19. This narrow strip across the northern border of Pulaski County connected to a tiny speck of land containing five voters adjoining Rockcastle County. VR 04/05/22, 4:31:47–42:00; DEX 9 at 14–19. So the Democrats in 2013 managed to organize a map down to the micro level. Similarly, 1997 technology allowed a single representative to produce a map that satisfied the dual mandate while reducing the number of three-county districts, number of times a given county was split, and number

of times parts of counties were joined to others. Appellee Br. 23–27. Yet in both instances, the dual mandate endured. Professor Imai's ensemble algorithm may be new, but there is no evidence that previous technology was inadequate to permit the sort of fine-tuning the KDP claims is constitutionally required.

The record also shows that it is not technology that led to a Republican supermajority in Kentucky's State House. As Chief Justice VanMeter recognized, Republicans went from being a minority to a supermajority across just three elections under a Democrat-drawn State House map. OA 15:15–16:30; Appellee Br. 78. And Kentucky has had no more than one Democrat in Congress for at least a decade. These facts derive from Kentucky's current political geography, not technology.

Finally, the record and recent elections show that the KDP's technology is flawed. The KDP's expert testified, and Judge Wingate accepted, that House District 88 changed from a "safe" Democrat seat to a "safe" Republican seat under HB 2. TR 1839–40. But two days before the circuit court so held, a Democrat won District 88. So much for predictions of "durable" advantages and "safe" seats. Similarly, no amount of technology can currently draw a Congressional map to give Democrats anything more than one Congressional seat. Appellee Br. 4, 87–88. If Kentucky's two major political parties are using technology to attempt to gerrymander their way into election victories, it's either not working or making no difference. *See also Rucho v. Common Cause*, 139 S. Ct. 2484, 2503–

04 (2019) (explaining why fashioning constitutional law around technology "risks basing constitutional holdings on unstable ground outside judicial expertise").

Kentucky has a clear and authoritative body of law governing redistricting. Adhering again to the 26-year-old dual mandate that harmonizes population equality, county integrity, federal law, and legislative discretion will resolve concerns for the integrity of the process and reaffirm this Court's status as an apolitical branch.

Partisan Gerrymandering. Justice Thompson twice gave the KDP a chance to identify any Kentucky precedent supporting its partisan-gerrymandering claims. OA 20:52–23:00. It couldn't do so because this Court has consistently refused to strike down a map based on alleged partisan gerrymandering. Appellee Br. 16–17, 27–29, 43–45, 61–64. The KDP quixotically characterizes HB 2 and SB 3 as "extreme" partisan gerrymanders without even articulating a legitimate standard by which the Court could make such a judgment.

The KDP referenced *Jensen v. Ky. State Bd. of Elections*, 959 S.W.2d 771, 776 (Ky. 1997), for its citation to a U.S. Supreme Court case suggesting that a partisan-gerrymandering claim might be justiciable in some cases. But as Chief Justice VanMeter correctly pointed out, *Rucho* now controls. OA 6:44–7:11. And *Jensen* holds that this Court's role is to determine whether a State House map "passes constitutional muster" by satisfying the dual mandate, nothing more. 959 S.W.2d at 776.

The KDP also referenced the "equal" prong of Section 6. But Section 6 applies to "elections," which is different from the "redistrict[ing]" to which Section 33 applies. Appellee Br. 46–47. And English common law and Kentucky history show that Section 6 applies only to, as Judge Wingate correctly identified, "interferences with the vote-placement and vote-counting process." TR 1886–87; Appellee Br. 47–64.

The KDP suggested that the Delegates' understanding of that history was wrong. But the Delegates' understanding is all that matters. And in any event, the KDP's favored amicus briefs, which depend on one law review article, support the Delegates' understanding of Section 6's history. CLC Br. 7; Douglas Br. 7. That article discusses English kings trying to manipulate parliamentary elections by interfering with the vote-placement and vote-counting processes. Bertrall L. Ross, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 Ala. L. Rev. 221, 266–81 (2021). As the Delegates noted, Appellee Br. 48–55, English kings "assert[ed the] prerogative to determine which municipal corporate boroughs had the authority to return members to Parliament," including by "revok[ing]" and "invalidat[ing]" those boroughs' ability to send representatives, Ross, *supra*, at 266–81. This kind of borough manipulation interfered with the vote-placement and vote-counting processes because it prohibited some voters from voting for any representation *at all*. Appellee Br. 48–55.

What England's Section 6 equivalent did not do was force the English monarch to eliminate the borough system in favor of proportional partisan representation, which is exactly what a partisan-gerrymandering claim "invariably" requires. *Rucho*, 139 S. Ct. at 2499. So even if "equal" could be said to prohibit "vote dilution," nothing supports the idea that "vote dilution" encompasses anything more than the one-person one-vote principle. The Delegates did not understand Section 6 as having anything to say about redistricting in general, let alone proportional partisan representation, given that they never discussed that topic when debating Section 6, while their fierce debate about Section 33 spans almost 200 pages. Appellee Br. 9–14, 48–55. Section 33, not Section 6, is where the Delegates chose to constrain what some may term "borough manipulation."

All that "equal" in Section 6 means is that "regulations of the *election franchise*"—i.e., voting—must be "uniform" across the Commonwealth. Appellee Br. 59–61 (emphasis added). The KDP's (mis)use of general pronouncements about Section 6 from the Delegates and this Court does not translate into a prohibition on partisan gerrymandering. Nor do those general pronouncements address any of the justiciability problems with such a claim. Appellee Br. 35–42, 64–71; *Rivera v. Schwab*, 512 P.3d 168, 178–87 (Kan. 2022). Neither do they address the fact that no Kentucky court has ever declared unconstitutional a State House districting plan based on partisanship alone or a Congressional districting plan at all, *including Congressional plans that were grossly malapportioned and peculiarly shaped*, even

when facing the issue of partisan gerrymandering head on. Appellee Br. 16–17, 27–29, 43–45, 61–64.

The KDP claimed that the U.S. Supreme Court abrogated *Richardson*, *Watts v. O'Connell*, 247 S.W.2d 531 (Ky. 1952), and *Watts v. Carter*, 355 S.W.2d 657 (Ky. 1962). But as Chief Justice VanMeter recognized, the U.S. Supreme Court's redistricting jurisprudence is about what the federal, not Kentucky's, Constitution means. OA 55:30–57:20. Even if it somehow involved both, that would mean *Rucho* controls here.

Finally, the KDP referenced Pennsylvania and New Mexico. But those courts' partisan-gerrymandering tests conflict. Pennsylvania precludes any consideration of partisan interests whatsoever, Appellee Br. 58–59, but New Mexico allows for "some," a "reasonable degree," or a "degree [that] is not egregious in intent and effect." KDP Resp. Br. Ex. 1, ¶¶ 3, 6. The Court should disregard Pennsylvania's stand-alone nonjusticiable standard and erroneous interpretation of its Section 6 equivalent. Appellee Br. 58–59. And the New Mexico standard is taken from Justice Kagan's *Rucho* dissent, a standard that the *Rucho* majority correctly described as "indeterminate and arbitrary" and "not even trying to articulate a [legitimate] standard or rule." 139 S. Ct. at 2505–06; *see also Rivera*, 512 P.3d at 178–87; Appellee Br. 64–69. In examining New Mexico's imponderable standard, it's not hard to agree with *Rucho*'s characterization. And the KDP makes no attempt to show satisfaction of that test.

II. The facts betray the KDP.[3]

As Justice Bisig correctly summarized, "redistricting is a political and legislative function" in which the General Assembly travels on a "big highway" of discretion while the judiciary, the only "one of the three branches that is not political in nature," acts simply as the "guardrails." OA 10:11–12:16. Even if Kentucky law provided an avenue for the KDP's challenges, Justice Bisig correctly identified the struggle with deeming anything about HB 2 and SB 3 "extreme" enough to warrant judicial intervention. *Id.*

The KDP is concerned with only one metric—increasing the number of Democrat legislators. Though as Dr. Stephen Voss (the only expert witness from Kentucky and one with no connection to the Republican party) explained about HB 2: "Court intervention might be able to help [Democrats] out *a bit*, tilting a *handful* of swing House seats their way (eroding the expected GOP supermajority down to, say, 75% of chamber seats)." DEX 32 at 27 (emphasis added). As for SB 3: "Court intervention might . . . increase [Democrats'] expected vote share in a couple of Congressional Districts . . . (increasing the probability of victory from *one very small number to another small number*)." *Id.* (emphasis added). With both

[3] Even a cursory review of the Commonwealth's proof compared with the trial court's findings shows that the trial court did not "take into account" all that "fairly detracts from [the] weight" of the KDP's evidence. *Pierce v. Ky. Galvanizing Co.*, 606 S.W.2d 165, 168 (Ky. App. 1980).

plans however, "if our concern is quality representation for Kentucky voters, judicial tinkering will not move the needle much, and *likely would require more partisan gerrymandering* in certain areas than the enacted plans contain." *Id.* (emphasis added). The KDP has not shown that either plan requires unprecedented judicial intervention.

HB 2. "What map alterations can gain in a few additional Democratic seats, they lose[] in terms of promising territory for Democratic growth – and they risk solidifying the polarization currently seen in the electorate so that it continues to be reinforced in the halls of government." DEX 32 at 27; Appellee Br. 4, 78, 85. Kentucky's political geography currently favors Republicans. The KDP acknowledged that even if Kentucky's popular vote resulted in a 50/50 split, Kentucky's House would still consist of 60 Republicans. OA 25:10–20. That's because of Kentucky's political geography and districting system, and the legislature would have to gerrymander for Democrats to try to eliminate that reality. VR 04/07/22, 10:58:02–11:17:10.

The KDP has complained about HB 2's city configurations. But it dropped its complaints about Erlanger, Florence, and Hopkinsville. Appellee Br. 77–78. The KDP's representative admitted that HB 2 improves the treatment of Bowling Green and Georgetown. VR 04/05/22, 5:25:50–37:20; TR 1559, 1562. Both HB 2 and HB 191 split Covington just three times. TR 1560. And even under the 2013 plan and HB 191, a Republican is expected to win in all districts

encompassing Richmond by at least 3.5–5.1 percent. TR 1030, 1750–51. The KDP also complained about how Districts 33 and 48 cross the Jefferson County line to capture what it calls "rural" (more appropriately termed "suburban") voters, but that is exactly what both those districts did in the Democrat-drawn 2013 State House map. DEX 1, Tab 10. With complaints like these, the KDP and its experts ignore the General Assembly's adherence to traditional redistricting criteria (like the preservation of communities of interest in those districts and HB 2's not splitting of precincts). *See generally* DEX 32 at 5–27; DEX 30 at 7–57 & Appendix A; Appellee Br. 68, 79–88.

This is the same problem with the KDP's more general complaints about HB 2's district configurations. DEX 32 at 16–20. Professor Imai "explicitly instructed his simulation method to minimize [multi-split counties], *stacking the deck against generating a map like the enacted one*." *Id.* at 17 (emphasis added and omitted). So the configurations of the simulated State House districts derive from the constraints Imai chose to implement, constraints that have never controlled State House redistricting. *Id.* at 16–20; DEX 30 at 55. Even then, the simulated maps' total county splits ended up being about the same as or *worse* than HB 2's. PEX 2 at 22 Figure 9. Regardless, "[m]ulti-split counties do not provide meaningful evidence of a partisan gerrymander, and restricting multi-split counties did not force a more-balanced map." DEX 32 at 18. "Without th[at] constraint, the en-

semble actually looks almost exactly like the existing plan." DEX 30 at 55. Deference, then, is owed to Kentucky's General Assembly, not to Boston-based political scientists.

SB 3. "[SB 3] does not help the Republican Party's electoral prospects any more than does the thousands of simulations that Imai's method produces." DEX 32 at 5. Yet the General Assembly could have easily drawn a likely 6–0 Republican Congressional map. *Id.* So the KDP can only point to the aesthetics of the first Congressional district, something with which courts are not concerned. *Carter*, 355 S.W.2d at 659.

Justice Nickell spoke of "traditional [redistricting] criteria," OA 35:00–37:18, criteria that SB 3 considers. Judge Wingate seemingly objected to the testimony of Sean Trende on this point, but Dr. Voss made the same point, perhaps even more pointedly.[4]

The "hook" of the first Congressional district has existed since 1992, when Democrats created it. DEX 32 at 10–15; DEX 30 at 7–14, 38–42. Since then, the shapes of the hook and the districts around it have created district cores capturing communities of interest. *Id.* The Democrats twice extended this hook north into central Kentucky. *Id.* SB 3 simply extends the hook north into two additional counties. *Id.* Because Western Kentucky "lost population relative to

[4] Judge Wingate made no adverse findings against Dr. Voss.

the Golden Triangle," the first Congressional district "needed to move somewhere." DEX 32 at 11. But heading east "would put it on a collision course with the other congressional district that needs to grow in area, the [5]th." *Id.*; DEX 1, Tab 16 (showing the First and Fifth Congressional districts as the only districts losing population). So this population-necessary northern move kept most district cores together. DEX 30 at 7–14, 38–41; DEX 32 at 10–15. It also led to more compact districts overall. DEX 32 at 6 & Table 2. And even if the phrase "Comer hook" were accurate, the "residence of incumbent legislators" is a traditional redistricting criterion. *Fischer v. State Bd. of Elections*, 879 S.W.2d 475, 476 (Ky. 1994) (*Fischer II*). So "the new 1st District is not as odd as the unattractive shape might suggest." DEX 32 at 10 (emphasis omitted).

The KDP proffered no legitimate or realistic alternative Congressional map. Its 10,000 "laboratory-grown simulations" flout the one-person one-vote rule. DEX 32 at 8; Appellee Br. 86. Those simulations, created in a computer lab, do not consider a litany of local nuances and traditional Kentucky redistricting criteria; naturally then, the simulations produced "bizarre" maps that no Kentucky mapmaker would ever draw. *See generally* DEX 32 at 5–27; DEX 30 at 7–57 & Appendix A; Appellee Br. 68, 79–88. When Dr. Voss "tried one final set of Imai-style simulations that incorporated some of the[] real-life contemporary concerns that the General Assembly might have wanted to take into account," like ensuring that the African-American vote is not diluted, those simulations

produced maps much like SB 3. DEX 32 at 13–14. SB 3 simply cannot be labeled an "extreme" partisan gerrymander.

* * *

The constitutional guardrail imposed on State House redistricting is the dual mandate. And as Chief Justice VanMeter correctly identified, the guardrails imposed on Congressional redistricting are the one-person one-vote rule, the Voting Rights Act and other Congressional legislation, and any future amendments to Kentucky's Constitution specifically addressing Congressional redistricting. OA 43:55–46:44. The courts need wade no further into the political thicket. Kentucky doesn't need a redistricting revolution.

CONCLUSION

The Court should affirm.

Respectfully submitted,

/s/ Alexander Y. Magera

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WORD-COUNT CERTIFICATE

This Reply Brief complies with the word limit of 3,500 under RAP 31(G)(3)(b) because, excluding the parts of the response exempted by RAP 31(G)(5) and 15(D), this document contains 3,497 words.

/s/ Alexander Y. Magera