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' POST-HEARING BRIEF

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INTRODUCTION

This redistricting case calls upon the Court to consider the constitutionality of the apportionment plans adopted by the Kentucky General Assembly to control the next decade of elections for members of Congress and the Kentucky House of Representatives. This Court must "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." *Ragland v. Anderson*, 100 S.W. 865, 866-67 (Ky. 1907); *see also Watts v. O'Connell*, 247 S.W.2d 531, 532 (Ky. 1952). Here, the new apportionment plans are unconstitutional for two primary reasons; they must be permanently enjoined.

First, the Kentucky House map repeatedly violates Section 33 of the Kentucky Constitution, which protects "county integrity" in numerous ways. Among other things, that Section commands that the legislature draw "one hundred Representative Districts, as nearly equal in population as may be *without dividing any county*, except where a county may include more than one district"; that "[n]ot more than two counties shall be joined together to form a Representative District"; and that "[n]o part of a county shall be added to another county to make a district." Ky. Const. § 33 (emphasis added). The new Kentucky House map, HB 2, violates the first prohibition by splitting 23 counties a total of 80 times; violates the second prohibition 31 times; and violates the third 45 times.

This map is a clear violation of Section 33's guarantee of "county integrity," which is of "at least equal importance" as the requirement that districts have roughly equal populations. *Fischer v. State Bd. of Elections*, 879 S.W.2d 475, 477 (Ky. 1994) ("*Fischer II*"). Indeed, the last time the Kentucky Supreme Court considered a redistricting challenge, it reaffirmed that it "did not retreat from the importance of county integrity" in its jurisprudence. *Legislative Research*

Commission v. Fischer, 366 S.W.3d 905, 912 (Ky. 2012) ("*Fischer IV*"). Thus, Section 33's explicit commands can only be violated where doing so is "*necessary* in order to effectuate that equality of representation which the spirit of the whole section so imperatively demands." *Ragland*, 100 S.W. at 870 (emphasis added).

The record demonstrates that the new House map violates Section 33 *far more times* than was necessary to achieve the degree of population equality required by the US and Kentucky Constitutions. To see why, the Court need look no further than the competing map proposed by Democratic representatives; it would have split counties 20 fewer times, created three (or more)-county districts 8 fewer times, and joined a portion of one county to another to form a district 14 fewer times. These numbers prove that HB 2's excessive county splitting and joining was not *necessary* to achieve population equality; rather, it was a targeted strategy to maximize partisan political advantage. But *that* is not a valid reason to override the Constitution's clear prohibitions.

The Section 33 argument in this case boils down to a simple question: if the mapmakers keep the total number of counties split to a minimum, are they otherwise free to disregard the Constitution's specific prohibitions on creating districts that cross county lines or contain more than two counties? To ask that question is to answer it because that is not how Constitutions work. Just because the mapmaker must *sometimes* violate Section 33 to create roughly equal-sized districts does not mean they can pick and choose how often to follow its unambiguous commands.

Second, both the Kentucky House and U.S. Congressional maps are unconstitutional partisan gerrymanders forbidden by, among other things, the "free and equal" elections clause in the Kentucky Constitution's Bill of Rights. *See* Ky. Const. § 6. In a partisan gerrymander, the party in control of the legislature—here, the Republican party—uses that power to draw districts in a manner that entrenches their own power and prevents the minority party from electing candidates

of its choice. Using advanced computer technology and reams of voter data, these legislators can pick their voters and ensure their own re-election at the expense of their political rivals and the health of the democracy.

The United States Supreme Court has declared partisan gerrymandering an "unjust" practice "incompatible with democratic principles."' *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) (quoting *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015)). Recently, state courts in New York, North Carolina, Ohio, and Pennsylvania have applied their state constitutions to safeguard the rights of the people to choose their representatives, rather than the other way around. Two of those states—Pennsylvania and North Carolina—have constitutional guarantees of free and equal elections that mirror Kentucky's (and, indeed, were the inspiration for it). That provision was designed to ensure that Kentucky's elections "obtain a full, fair, and free expression of the popular will upon the matter, whatever it may be." *Wallbrecht v. Ingram*, 175 S.W. 1022, 1026 (Ky. 1915).

That outcome is impossible under HB 2 and SB 3 because "partisan actors [have] ensured from the outset that it is nearly impossible for the will of the people—should that will be contrary to the will of the partisan actors drawing the maps—be expressed through their votes for State legislators." *Common Cause v. Lewis*, 2019 WL 4569584, at *112 (N.C. Super. Sept. 3, 2019). Moreover, HB 2 and SB 3's surgical packing and cracking of voters into districts designed to weaken the electoral power of a disfavored party makes it more difficult for Democrats (and independents) to petition their representatives for relief. This practice violates the fundamental rights of Kentuckians enshrined in Sections 1, 2, and 3 of the Kentucky Constitution.

FACTUAL BACKGROUND

During the 2022 regular session, Kentucky's General Assembly passed new maps for the State House of Representatives (HB 2) and Congressional (SB 3) districts. These unconstitutional maps were the product of a secretive, highly partisan process orchestrated by Kentucky's Republican super-majority without any input from their Democratic colleagues, the Governor, or the public.

Prior to the 2022 legislative session, Republican map drawers worked behind closed doors to develop maps designed to maximize their partisan advantage. These maps were kept from the public until the last possible moment—HB 2 was released on December 30, 2021, just days before the start of the legislative session. (VR 4/5/22, 4:12:00 – 4:12:50). SB 3 was first made public on the Senate floor on the first day of session. On that day, Republicans also moved to bypass the legislative process by unilaterally altering the General Assembly's rules to limit debate and stifle all criticism of their partisan maneuvering. By the fifth day of session, Republican supermajorities had muscled HB 2 and SB 3 through both the House and Senate almost entirely along party lines. (VR 4/5/22, 4:12:15 – 4:13:30).

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

[1] *Available at* https://apps.legislature.ky.gov/record/22rs/hb2/veto.pdf.

[2] This brief cites Plaintiff's Exhibits as "PEX __" and Defendants' Exhibits as "DEX __."

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

The next day, Republican super majorities overrode the Governor's vetoes—again, almost entirely along party lines. At that time, HB 2 and SB 3 became effective by virtue of their "emergency clause[s]." (*See* HB 2 attached to Complaint as Exhibit A; SB 3 attached to Complaint as Exhibit C). Plaintiffs filed suit that same day to challenge the maps.

I. House Bill 2

A. Section 33 Factors

The "ideal" population of a Kentucky House district—the total population of Kentucky divided by 100—is 45,058. To comply with "one person, one vote" equal protection principles of the U.S. Constitution, the population of every Kentucky House district must be within 5% of the ideal. (VR 4/5/22, 3:31:30 – 3:31:18); *Fischer II*, 879 S.W.2d at 479. To satisfy this requirement, 23 Kentucky counties must be divided or split either because their populations are too large to fit within a single House district or because the geography and population of the counties requires an additional split to join it with an adjacent county. Both HB 2 and the competing Democratic proposal, House Bill 191 ("HB 191") meet that constitutional minimum by splitting 23 counties. (VR 4/5/22, 3:33:10 – 3:34:12).

After clearing that minimum constitutional hurdle, however, the maps took radically different approaches to redistricting. HB 2's drafters appear to have treated that total-counties-split metric as the *only* restriction imposed by the Constitution. HB 2 aggressively splits the multi-

[3] *Available at* https://apps.legislature.ky.gov/record/22rs/sb3/veto.pdf.

district counties created by the map far more times than is necessary to achieve population equivalence. (VR 4/5/22, 11:08:42 – 11:13:49 (testimony from Dr. Kosuke Imai based on simulation analysis described below, establishing that HB 2 contains more multi-splits than necessary and, indeed, is a statistical outlier in terms of multi-split counties)).

In total, HB 2 splits Kentucky counties 80 times. (VR 4/5/22, 3:38:28 – 3:38:41; *see also* DEX 1, Tab 1). By comparison, HB 191 only split 23 counties 60 times (many of these splits were required to split counties with the largest populations into districts approximating the ideal size). (VR 4/5/22, 3:38:46 – 3:38:57; PEX 4). Along the way, HB 2 excessively splits Fayette (8 instead of 7), Boone (5 instead of 3), Hardin (4 instead of 2-3), Campbell (2 instead of 1), Madison (3 instead of 2), Bullitt (2 instead of 1), Christian (2 instead of 1), McCracken (3 instead of 1-2), Oldham (2 instead of 1), Pulaski (4 instead of 1), Laurel (5 instead of 1-3), Pike (3 instead of 1), and Jessamine (3 instead of 1) Counties. (*See* DEX 1, Tab 1 (A range of required splits is provided for some counties because changes to the district splits in one county have a spillover effect into other counties.)). Even the Commonwealth's expert conceded that HB 2 would be unconstitutional if a Court were to conclude that Section 33 required mapmakers to minimize the number of multi-split counties. (VR 4/7/22, 4:20:27 – 4:21:15).

Perhaps most egregiously, HB 2's drafters appeared to believe that so long as they split only 23 counties, the other prohibitions in Section 33 become irrelevant. But Section 33 is clear: "[n]o part of a county shall be added to another county to make a district." Ky. Const. § 33. HB 2 violates this provision 45 separate times: District Nos. 1, 2, 3, 5, 6, 8, 10, 14, 16, 18, 19, 22, 26, 27, 33, 37, 39, 45, 48, 52, 55, 56, 61, 63, 69, 71, 73, 78, 80, 82, 83, 85, 86, 87, 88, 89, 90, 91, 92, 94, 95, 96, 97, 98, and 100. (VR 4/5/22, 3:39:29 – 3:40:48). That is far more than necessary to satisfy "one person, one vote" principles; HB 191, by comparison, only created 31 multi-county

districts. (VR 4/5/22, 3:40:48 – 3:41:10; PEX 4). As discussed in greater detail below, sometimes these brazen violations poached just 1 or 2 precincts from a neighboring county; other times, entire populous counties were carved up and paired with less populated, surrounding counties to diminish the power of the split county's voters.

Similarly, Section 33 provides that "[n]ot more than two counties shall be joined together to form a Representative District." Ky. Const. § 33. Once again, HB 2 violates this provision with abandon, far more than was necessary to achieve population equivalence—the only recognized basis for violating this provision. *See Ragland*, 100 S.W. at 870 ("more than two counties may be joined in one district, *provided it be necessary* in order to effectuate that equality of representation") (emphasis added). Thirty-one times HB 2 combines more than two counties in a single district: District Nos. 1 (5), 6 (3), 8 (3), 12 (4), 14 (3), 16 (3), 21 (4), 22 (3), 24 (3), 33 (3), 47 (4), 52 (3), 55 (3), 56 (3), 61 (3), 70 (4), 71 (4), 74 (3), 78 (4), 80 (3), 83 (3), 84 (3), 89 (5), 90 (3), 91 (3), 92, (3), 93 (3), 94 (3), 96 (3), 97 (3), 99 (3). (VR 4/5/22 3:41:22 – 3:41:30). By contrast, HB 191 proved that a map could be drawn with only 23 districts with more than two counties. (VR 4/5/22 3:41:30 – 3:41:28; PEX 4). (Once again, this is *sometimes* necessary due to the populations of certain counties and the separate constitutional requirement that all counties in a district be contiguous).

B. Partisan Gerrymandering

HB 2 also represents a clear partisan gerrymander in favor of the Republican party. Indeed, advanced simulation analysis shows that the partisan skew of the maps can only be seen as an intentional choice made by map makers intent on advantaging one party over another. Moreover, according to several metrics that courts have accepted as reliable indicators of partisan bias, HB 2 is an extreme outlier.

1. Dr. Imai's Simulation Analysis

Plaintiffs introduced evidence from Dr. Kosuke Imai, who opined that 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. (VR 4/5/22, 11:21:20-11:29:01).

Qualifications. Dr. Imai has a master's degree in Statistics and Ph.D. in Political Science from Harvard University. (VR 4/5/22, 10:22:47 – 10:28:03; PEX 1 (Dr. Imai's C.V.)). He began his academic career at Princeton University, where he taught quantitative analysis, served as the founding director of Princeton's Program in Statistics and Machine Learning, and achieved tenure. (*Id.*). Dr. Imai was then recruited to join the faculty at Harvard, where he teaches as a tenured professor jointly appointed to the departments of Political Science and Statistics, the first such joint appointment in the history of Harvard University. (*Id.*). Dr. Imai's main areas of research include computational social science and developing computational algorithms to address and study social problems such as redistricting. (VR 4/5/22, 10:28:04 – 10:28:45).

It would be difficult to identify a more highly regarded researcher in the field of political science. Dr. Imai's work has been published in over 70 articles in peer-reviewed journals and he has been recognized by Clarviate Analytics as being in the top 1% of most frequently cited researchers since 2018. (VR 4/5/22, 10:24:20 – 10:25:58, 10:29:26 – 10:29:55; PEX 1 (listing Dr. Imai's publications on pp. 3-12)). Dr. Imai was elected by his peers to serve as President of the Society for Political Methodology, the premier academic society for scholars from around the globe who use statistics and machine learning to study political science. (VR 4/5/22, 10:30:01 – 10:30:59).

Dr. Imai is a leader in the field of using simulation algorithms to evaluate partisan bias in redistricting plans. Starting in 2014, Dr. Imai was one of the first to use Monte Carlo algorithms

to generate an ensemble of redistricting plans. (PEX 2, p. 5 (Dr. Imai's Expert Report)). Dr. Imai has since written several methodological articles on redistricting simulation algorithms. (Fifield, Higgins, et al. 2020; Fifield, Imai, et al. 2020; McCartan and Imai 2020; Kenny et al. 2021 (full citations in PEX 1)). Dr. Imai leads the Algorithm-Assisted Redistricting Methodology Project (ALARM; https://alarm-redist.github.io/) at Harvard, which studies how algorithms can be used to improve legislative redistricting practice and evaluation. (PEX 2, p. 5). Dr. Imai also developed an open-source software package titled "redist" that allows researchers and policy makers to implement these cutting-edge simulation methods. (VR 4/5/22, 10:47:24 – 10:49:23). The redist software package has been downloaded more than 30,000 times. (*Id.*).

Dr. Imai has been accepted by courts in Alabama, Ohio, South Carolina, and Pennsylvania as an expert on using simulation algorithms to test for partisan gerrymandering. (VR 4/5/22, 10:50:31 – 10:51:39; PEX 1 (listing case numbers for Dr. Imai's prior expert engagements on pp. 25-26)). Other expert witnesses, including Defendants' rebuttal expert Sean Trende, have used his redist software and methodological approach as the basis for expert opinions which have been accepted by other courts. (VR 4/5/22, 10:49:24 – 10:49:51; VR 4/7/22, 11:51:42 – 11:54:30; PEX 7 (Mr. Trende's report in New York litigation which uses Dr. Imai's software)). Defendants' other rebuttal expert, Dr. Stephen Voss, testified that he has "the greatest respect" for Dr. Imai (VR 4/7/22, 5:01:09) and described Dr. Imai's code and methodology as "completely transparent" and "very beautiful." (VR 4/7/22, 4:16:25, 4:16:40). Dr. Imai's expert qualifications have never been challenged. (VR 4/5/22, 10:50:31 – 10:51:39, 10:51:40 – 10:51:54).

Methodology. Redistricting simulation algorithms generate a representative set of alternative plans under a specified set of criteria. (PEX 2, pp. 6-7; VR 4/5/22, 10:31:32 – 10:37:46). This allows one to evaluate the properties of a proposed plan by comparing them against those of

the simulated plans. (*Id.*). If the proposed plan unusually favors one party over another when compared to the ensemble of simulated plans, this serves as empirical evidence that the proposed plan is a partisan gerrymander. (*Id.*). Furthermore, statistical theory allows one to quantify the degree to which the proposed plan is extreme relative to the ensemble of simulated plans in terms of partisan outcomes. (*Id.*).

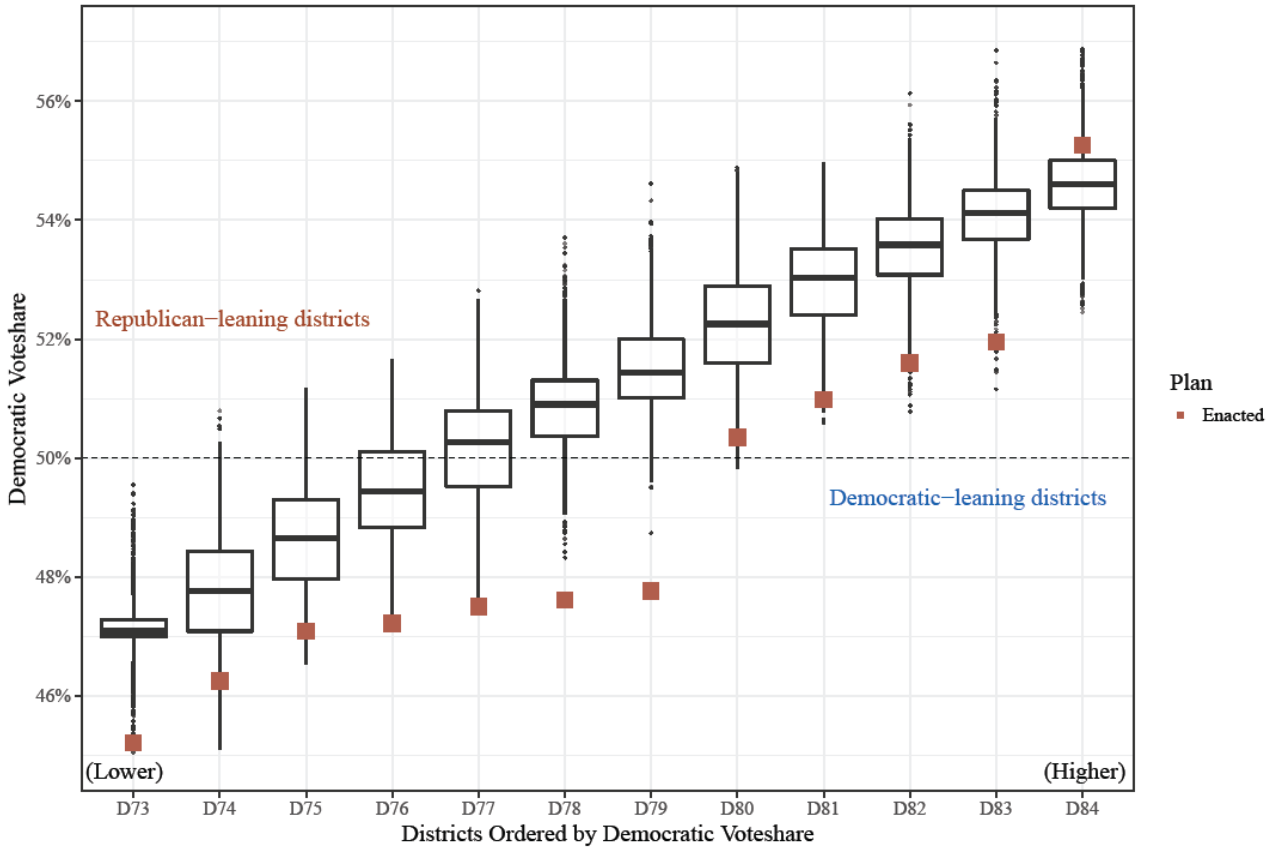
A primary advantage of the simulation-based approach is its ability to account for the political and geographic features that are specific to each state, including spatial distribution of voters and configuration of administrative boundaries. (PEX 2, p. 7; VR 4/5/22, 10:38:30 – 10:40:43). Simulation methods can also incorporate each state's redistricting rules. (*Id.*). The simulation-based approach therefore allows one to compare a proposed plan to a representative set of alternate districting plans subject to Kentucky's administrative boundaries, political geography, and constitutional requirements. (*Id.*). Over the last 10 years, simulation methods have become the dominant way to evaluate redistricting plans. (VR 4/5/22, 10:37:47 – 10:40:43).

Simulation algorithms are not designed to generate thousands of maps that would satisfy extraconstitutional political concerns and therefore would realistically be enacted by policy makers. (VR 4/5/22, 10:35:47 – 10:36:49). The primary goal of the simulation-based approach is to evaluate a specific proposed or enacted plan for partisan bias or other concerns. (*Id.*; see also VR 4/7/22, 12:33:35 – 12:33:58 (Defendants' expert, Mr. Trende, admitting that the "core purpose" of simulation analysis is to evaluate an enacted plan)).

Analysis of HB 2. To evaluate Kentucky's state House map, Dr. Imai used a simulation algorithm to generate 10,000 simulated House plans which all satisfy the criteria in Kentucky's constitution, i.e. 100 geographically contiguous districts with population deviation not to exceed +/-5%, and minimizing the number of county splits. (PEX 2, pp. 21-22). Dr. Imai evaluated the

partisan lean of districts created by HB 2 compared to the simulated House plans using data from the 8 most recent state-wide elections for which precinct-level voting data is available: the 2016 Presidential and U.S. Senate elections, and 2019 elections for Governor, Attorney General, Secretary of State, Auditor, Treasurer, and Agricultural Commissioner. (PEX 2, p. 24; VR 4/5/22, 10:55:19 – 10:59:01). 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)).

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



In Figure 3, a red square represents the Democratic vote share of each ordered district under the enacted plan, focusing on a total of 12 districts, ranging from the district with the 73rd lowest Democratic vote share (denoted by "D73") to the one with the 84th lowest (denoted by "D84"). (*Id.*). These ordered districts are selected because their vote shares are among the closest to the 50% threshold (dotted horizontal line). (*Id.*). Dr. Imai used a boxplot to represent the distribution of Democratic vote share for each corresponding ordered district under the simulated House plans. (*Id.*) In a boxplot, the box represents the range that contains 50% of the simulated data whereas the horizontal line represents the median value. (*Id.*). The vertical lines that come out of the box (called "whiskers") represent the typical range of data. (*Id.*). Any data points falling outside of these lines, including those indicated by black dots, are considered outliers. (*Id.*).

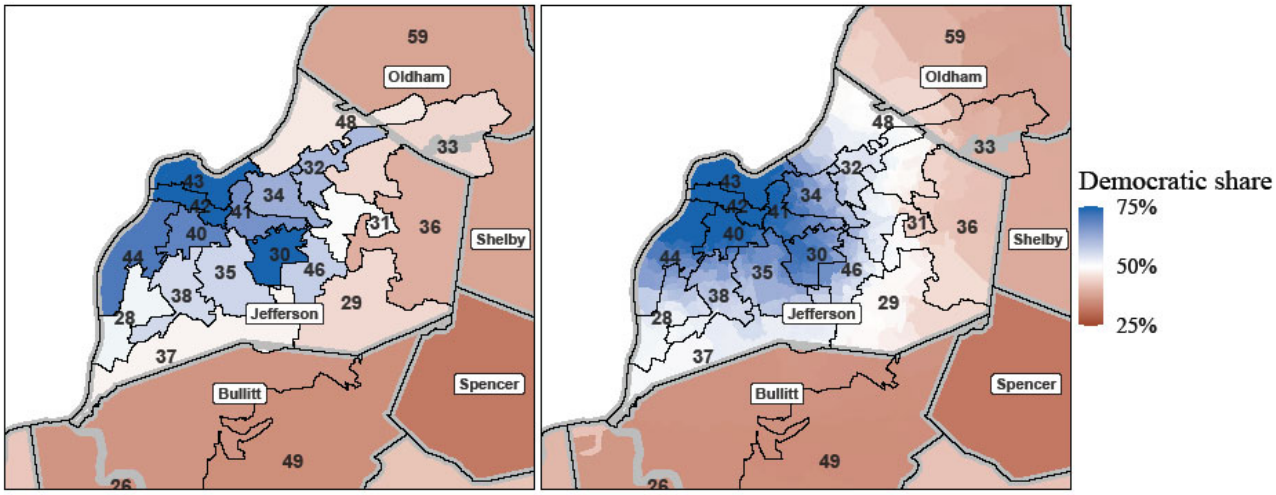
Figure 3 shows a clear pattern with respect to the partisan bias of HB 2. Under the enacted plan, there exists a large jump of about 2.6 percentage points between the Republican-leaning district with the highest Democratic vote share (D79) and the Democratic-leaning district with the lowest Democratic vote share (D80). (*Id.*). Such a gap, known as a "signature of gerrymandering" in the academic literature (Herschlag et al. 2020), serves as empirical evidence for efforts to make Republican-leaning districts safer while reducing the Democratic advantage of Democratic-leaning districts. (*Id.*). In contrast, the simulated House plans do not exhibit such a discontinuous gap. In fact, the boxplots change smoothly from the lowest district-level Democratic vote share (D73) to the highest (D84) within this figure. (*Id.*).

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

Finally, Dr. Imai's Figure 3 also shows that the enacted House plan makes the Republican-leaning districts safer while reducing the vote share margin of the Democratic-leaning districts. (*Id.*). Under the enacted House plan, Republican-leaning ordered districts D73, D74, D75, and D76 have much lower Democratic vote share than most simulated House plans, making these districts safer for the Republican party. (*Id.*). In contrast, Democratic-leaning ordered districts D80, D81, D82, and D83 have much lower Democratic vote share, leading to less safer districts for the

Democratic party. (*Id.*). This asymmetric treatment of Republican-leaning and Democratic-leaning districts represents clear empirical evidence that the enacted House plan favors the Republican party—particularly in the crucial districts that might otherwise be competitive. (*Id.*).

Dr. Imai also conducted a local analysis of Kentucky's two largest cities (Louisville and Lexington), where he observed that HB 2 has a pattern of combining Democratic voters in urban areas with Republican voters in rural areas to create more Republican-leaning districts. (VR 4/5/22, 11:31:48 – 11:32:20). Jefferson County is the home to Louisville, where voters generally lean towards the Democratic Party, while the precincts closer to the county border with neighboring Oldham, Shelby, Spencer and Bullitt Counties are more Republican-leaning. Dr. Imai compared how these areas are treated under HB 2 with his set of simulated House maps, as shown in Figure 4 of his report:



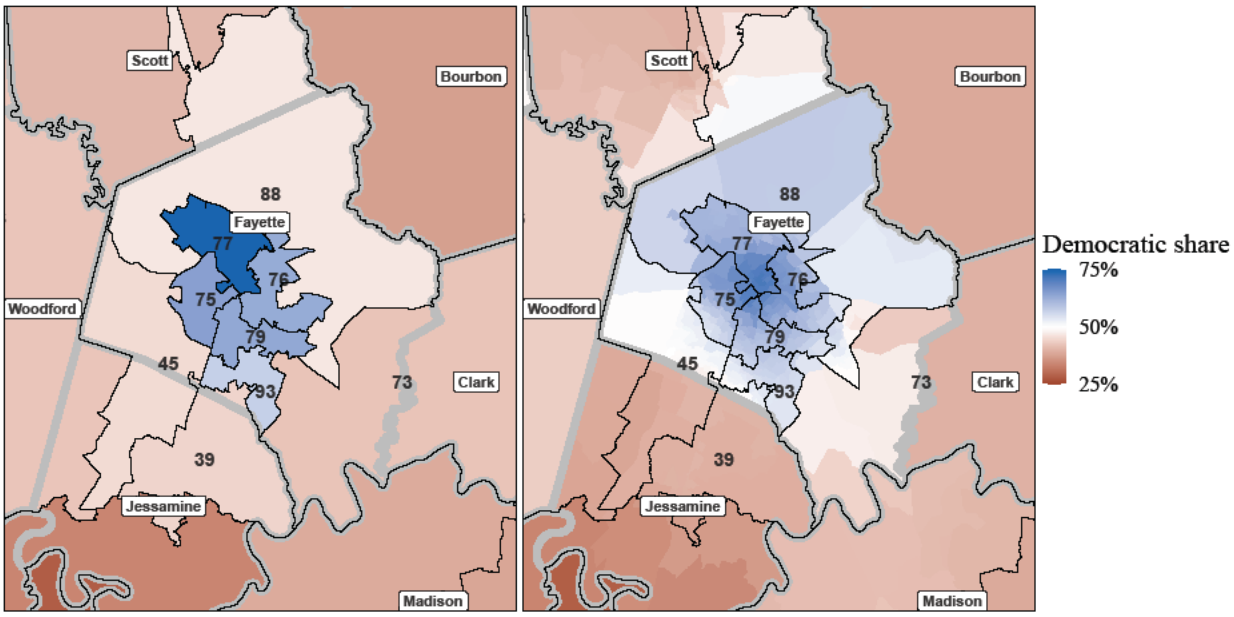
The left map of Figure 4 presents the district-level vote share under the enacted House plan. (PEX 2, pp. 13-15; VR 4/5/22, 11:33:06 – 11:38:45). Under the enacted House plan, Districts 33 and 48 spill over into the neighboring Oldham County to make them safe Republican districts. (*Id.*). Specifically, the enacted House plan turns District 33 into a safe Republican district (the average Democratic vote share of about 45%) by combining the Republican-leaning areas in east

Louisville (e.g., Lyndon and Anchorage) with Republican strongholds in Oldham County (e.g., Pewee Valley and South Crestwood). (*Id.*). Similarly, the enacted House plan makes District 48 Republican-leaning (the average Democratic vote share of about 47%) by, again, combining the Republican areas in east Louisville (e.g., Indian Hills and Glenview) with a part of Oldham County where many Republican voters live (e.g., the north of Crestwood). (*Id.*).

The right map of Figure 4 shows the expected two-party vote share of district to which each precinct belongs under the simulated House plans. (*Id.*). The map shows that the parts of District 33, which belong to Jefferson County, are likely to be part of a much more competitive district under the simulated House plans (indicated by white color) than under the enacted House plan. (*Id.*). Furthermore, the parts of District 48, which belong to Jefferson County, are likely to be part of either a slightly Democratic-leaning district in the case of east Louisville (indicated by light blue color) or a more competitive district in the case of precincts near the county border (indicated by white color). (*Id.*). Thus, Dr. Imai's analysis of Jefferson County shows that the enacted House plan creates additional safe Republican districts by combining some voters who live in Jefferson County with many Republican voters from neighboring counties. (*Id.*).

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

Dr. Imai observed the same pattern in Fayette County, home to Lexington, Kentucky's second-largest city. Voters in the center city generally lean towards the Democratic party, whereas the precincts located on the border with Woodford, Scott, Bourbon, Clark, and Madison have many Republican voters. Dr. Imai compared how these areas are treated under HB 2 with his set of simulated House maps, as shown in Figure 5 of his report:



The left map of Figure 5 presents the district-level Democratic vote share under the enacted House plan. (PEX 2, pp. 15-16; VR 4/5/22, 11:39:35 – 11:43:20). The enacted House plan divides a large number of Democratic voters into four districts located near the city center. (*Id.*). District 77 has the largest Democratic vote share of about 76.2%, followed by Districts 75 (64.4%), 79 (63.4%), and 76 (62.8%), all of which are packed with many Democratic voters. (*Id.*). In contrast, the enacted House plan makes District 88 safely Republican by combining the Republican-leaning precincts on the county border with Republican strongholds from the neighboring Scott County. (*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 right map of Figure 5 shows the expected two-party vote share of district to which each precinct belongs under the simulated House plans. (*Id.*). Under the simulated House plans, the precincts in the northern part of Fayette County are more likely to belong to Democratic districts while the enacted House plan assigns these precincts to District 88, which strongly leans towards the Republican party. (*Id.*). Similarly, the precincts in the southwest corner of Fayette County belong to a much more competitive district under the simulated House plans than under the enacted plan, which assign these precincts to District 45. (*Id.*). Thus, Dr. Imai's analysis of Fayette County shows that the enacted plan packs Democratic voters in a small number of districts and creates additional safe Republican districts by combining some voters who live in Fayette County with many Republican voters from neighboring counties. (*Id.*).

Dr. Imai's testimony that HB 2 constitutes a partisan gerrymander is undisputed. Neither of Defendants' two expert witnesses offered any rebuttal of Dr. Imai's opinions with respect to the partisan bias in HB 2, and neither of Defendants' experts offered any affirmative opinion that HB 2 is *not* a partisan gerrymander.

2. Dr. Caughey's Partisan Bias Analysis

HB 2 also was analyzed by Dr. Devin Caughey, a tenured professor of Political Science at the Massachusetts Institute of Technology ("MIT"). After examining multiple measures of partisan bias, Dr. Caughey concluded that 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).

Qualifications. Dr. Caughey is a highly qualified political scientist with expertise in political representation, measuring public opinion, and the role of elections in linking public preferences to government outputs, particularly at the state level. (VR 4/6/22, 10:09:50 –

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10:10:50). Dr. Caughey earned his undergraduate degree in History at Yale University; obtained an M.Phil in Historical Studies at Cambridge University in England; and went on to earn both a master's degree and PhD in Political Science from the University of California-Berkeley. (*See* PEX 5 (Caughey CV)). Dr. Caughey joined MIT's faculty in 2012. *Id.* Over the past decade, he rose through the ranks to become a tenured professor at the University. *Id.*

Dr. Caughey has published two books—one on representation in the one-party south, and another on statistical methods to be used in forecasting and public opinion surveys. (PEX 5; VR 4/6/22, 10:11:48 – 10:12:11). He will be publishing a third book this year surveying state politics since the 1930s, looking at how state legislatures have responded to public opinion. *Id.* In addition, Dr. Caughey has published 16 peer-reviewed academic articles on a range of subjects. (PEX 5). Dr. Caughey has received numerous prestigious awards for his academic research. His PhD dissertation was awarded the Walter Dean Burnham Award for the best dissertation in the field of Politics and History from the American Political Science Association ("APSA"). (*Id.*, p. 5). The following year, his paper *Dynamic Representation in the American States, 1960-2012*, earned the APSA's award for best paper on state politics and policy. (*Id.*). Two years later, his paper *Dynamics of State Policy Liberalism* won the APSA State Politics Section Best Journal Article Award. And his first book, *The Unsolid South*, won the APSA's Political Organizations and Parties Section's Leon Epstein Outstanding Book award. *(Id.).*

A significant portion of Dr. Caughey's academic work is dedicated to the study of partisan gerrymandering issues in state legislative elections and its consequences on policies enacted as a result of those elections. (VR 4/6/22, 10:15:30 – 10:16:35). Among other things, he has published a peer-reviewed paper in the Election Law Journal that looks at the representational effects of partisan gerrymandering. (VR 4/6/22, 10:15:35 – 10:16:22). He also has a chapter in his

forthcoming book dedicated to the same subject, including the historical analysis of malapportionment. *Id.* In addition, Dr. Caughey teaches undergraduate and graduate courses that cover topics such as partisan gerrymandering and methods for quantifying it. (VR 4/6/22, 10:40:35 – 10:41:27).

Dr. Caughey has served as an expert witness in three other partisan gerrymandering cases. (VR 4/6/22, 10:57:40 – 10:59:16). He wrote a report and testified before a special master in Oregon in litigation concerning that state's congressional redistricting plan. (VR 4/6/22, 10:58:10 – 10:58:20). He also authored two expert reports in Pennsylvania, one for litigation concerning the congressional map—in which he testified—and another for the redistricting commission considering proposals for the state senate map. (VR 4/6/22, 10:58:21 – 10:59:59). Dr. Caughey has never been excluded as an expert—indeed, his qualifications have never been challenged (prior to this case). (VR 4/6/22, 10:59-05 – 10:59:16).

Political Gerrymandering Metrics. Dr. Caughey explained two basic strategies that state legislatures can use to engage in political gerrymandering, which he defined as a way for a political party "to maximize the number of seats that one's own party wins subject to the number of votes they are likely to earn statewide," known as the party's "seat share." (VR 4/6/22, 10:23:00 – 10:23:31). First, mapmakers can engage in what is known as "cracking," where they take the supporters of the opposing party and spread them evenly across districts that are nevertheless a majority for the party drawing the maps. (VR 4/6/22, 10:24:11 – 10:24:30). Mapmakers can also engage in "packing," where they take the "supporters of the opposing parties and pack them into a few hyper-lopsided districts." (VR 4/6/22, 10:24:31 – 10:24:51). Combining these two methods is a classic strategy for achieving a partisan gerrymander. (VR 4/6/22, 10:24:52 – 10:24:55).

To identify partisan gerrymanders, political scientists like Dr. Caughey can use a variety of empirical metrics. One of those metrics, known as the "Efficiency Gap," measures how efficient each party is at translating votes into seats. (*See* PEX 6 § 4.2; VR 4/6/22, 10:50:10 – 10:54:05). It compares the number of "wasted" votes for each party—that is, the number of votes cast for a losing candidate. (VR 4/6/22, 10:50:30 – 10:51:49). If one party's votes are being wasted at a higher rate than its opponent's, that is an advantage because it has a chance of winning more seats with comparatively fewer votes. *Id.* This metric can quantify the packing and cracking because it would help identify if, for example, the Republican majority packed a large share of Democratic voters into a small number of districts while simultaneously creating a large number of moderate Republican districts. (VR 4/6/22, 10:52:25 – 10:53:35).

Courts have found the Efficiency Gap to be one of the "generally accepted metrics for evaluating the partisan fairness of a redistricting plan." *Carter v. Chapman*, 270 A.3d 444, 458 (Pa. 2022); *see also Harper v. Hall*, 868 S.E.2d. 499, 547 (N.C. 2022) (recognizing Efficiency Gap as one of the "reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander"). As a rule of thumb, many political scientists consider an Efficiency Gap of 7-8% as a sign of gerrymandering; that is a large and substantial advantage that is likely to endure over an entire redistricting cycle. (VR 4/6/22, 11:44:25 – 11:46:00).

A second measure that political scientists use to measure partisan gerrymandering is the "declination." (PEX 6, § 4.4; VR 4/6/22, 10:54:05 – 10:56:40). To measure this statistic, a political scientist creates a plot of all the legislative districts, arranged by the percentage of vote share expected for one party. (VR 4/6/22, 10:54:25 – 10:55:00). Then, starting from the point on the graph where each party is expected to win 50% of the two-party vote, a political scientist would create two trend lines—one through the middle of each party's expected vote share "cloud"

(represented by the point estimates on the plot). (PEX 6, § 4.4). To find the declination, a political scientist would measure the angle between the two trend lines. In the absence of gerrymandering, one would not expect to see much of an angle between the two lines; the expected vote share plot should increase smoothly from left to right. (VR 4/6/22, 10:54:45 – 10:55:20). As the angle between the lines increases, however, it signals gerrymandering because the majority party has packed many of the opposition's voters into a few heavily concentrated districts but spread the rest (and its own) across a larger number of districts, where the majority party's votes will translate into more seats. (VR 4/6/22, 10:55:21 – 10:56:40).

These gerrymandering metrics are highly correlated, but do not always point in the same direction. (VR 4/6/22, 10:56:41 – 10:57:36). When they do point in the same direction, a political scientist can have far more confidence in the conclusion that a map is a result of gerrymandering. *Id.*

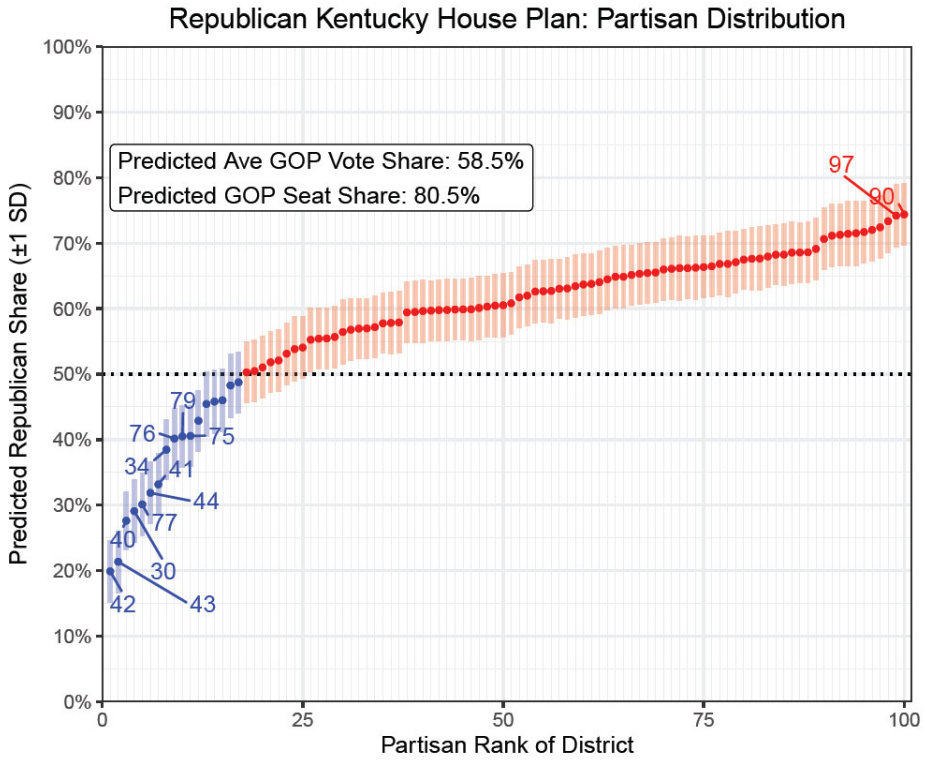
Analysis of HB 2. Prof Caughey used these metrics to analyze HB 2, the state House map. Professor Caughey conducted his analysis using "Plan Score," a publicly available website that uses past election data and a prediction algorithm to make predictions about state legislative races and use that projection to calculate the expected Efficiency Gap, declination, and other metrics of partisan gerrymandering. (VR 4/6/22, 10:41:25 – 10:49:30).

Dr. Caughey is very familiar with Plan Score and its methodology. His closest academic collaborator, Dr. Chris Warshaw, helped design the website. (VR 4/6/22, 10:49:00 – 10:49:15). Dr. Caughey himself teaches Plan Score's model for predicting state legislative races in his advanced PhD level course in Bayesian measurement models. (VR 4/6/22, 10:41:00 – 10:41:20). As part of that teaching experience, he requested—and reviewed—the website's source code. (VR 4/6/22, 10:48:20 – 10:48:45).

Dr. Caughey identified several advantages to using Plan Score in a case like this. First, he noted that it is a "state of the art" political science approach to the problem of identifying partisan bias in redistricting plans; it's "exactly what political scientists would do" to make this assessment. (VR 4/6/22, 10:41:45 – 10:41:59). At the same time, it is both transparent in its methodology and free to use, meaning that legislators, voters, and even courts can now see data that was once the province of only academics and political operatives. Moreover, Dr. Caughey noted, Plan Score has already collected, and validated, and merged a vast amount of underlying historical election data. (VR 4/6/22, 16:14:45 – 16:15:37). Similarly, the extensive underlying code has already been drafted, tested, validated, and debugged. *Id.* Particularly because it is the same Bayesian projection model that he would build from scratch, Dr. Caughey testified that he would not hesitate to use Plan Score again to evaluate a future map. (VR 4/6/22, 11:04:43 – 11:04:56, 16:14:45).

Plan Score's predictive model expects Republican candidates to "win 58.5% of the statewide vote but carry 80.5% of the state house seats." (PEX 6, § 5.1; *see also* VR 4/6/22, 11:09:05 – 11:09:25). As a result, Republicans are expected to earn a seat margin (*e.g.*, expected seats above 50%) of 30.5% on a vote margin of only 8.5%. (PEX 6, § 5.1). "This ratio of seat share to vote share is substantially larger than the usual winner's bonus, which in symmetrical districting plans is rarely larger than 3." *Id.* Indeed, in a winner-take-all system like Kentucky's, the winner's bonus is usually no more than 2:1 or 3:1. (VR 4/6/22, 11:11:35 – 11:13:43).

Using the data from Plan Score's predictive model, Dr. Caughey created a plot showing the expected Republican vote share in each of the 100 districts created by HB 2. Those districts with an expected Republican vote share at or above 50% were colored red, whereas districts with an expected Republican vote share of 50% were colored blue:



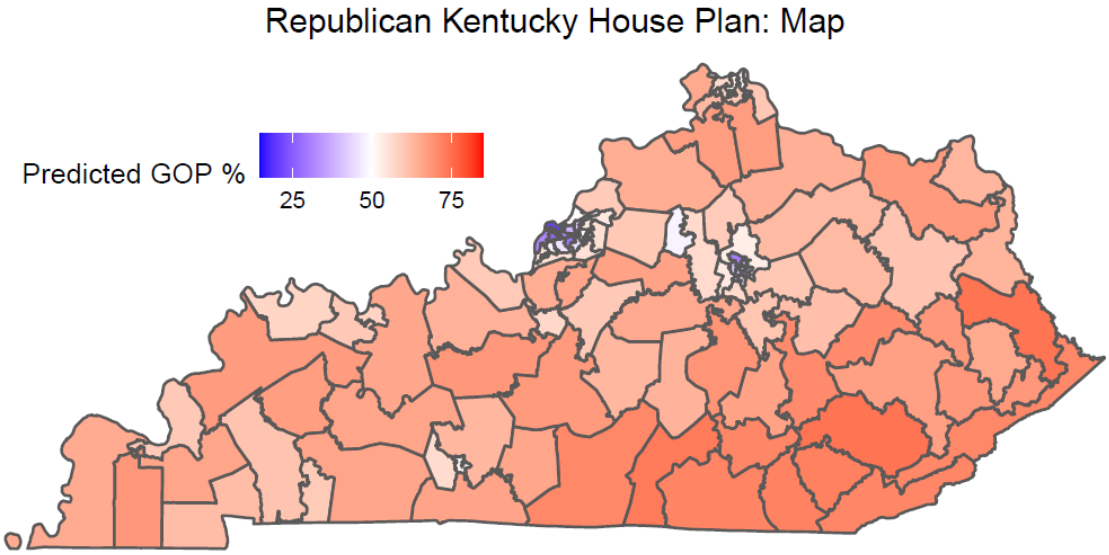
(*See* PEX 6, § 5.1).

Dr. Caughey testified how this plot shows that the map is not "symmetrical." (VR 4/6/22, 11:13:45 – 11:20:36). Indeed, should the parties split the vote 50-50, Republicans would still have "a very large structural advantage"—and in particular "a very large seat majority." (VR 4/6/22, 11:20:25 – 11:20:36). As Dr. Caughey noted, even if the dotted line were raised 8.5% across the board (bringing the expected Republican vote share down to exactly 50%), Republicans would still expect to control approximately 60 seats. (VR 4/6/22, 11:17:45 – 11:18:50).

The plot also shows that HB 2 does not create many competitive districts clustered near the 50% expected vote line. Indeed, Prof. Caughey calculated that only 7 of the 100 seats give either party at least a 25% chance of winning. (PEX 6, § 5.1; VR 4/6/22, 11:34:15 – 11:35:29). Thus, HB 2 gives Republicans a hard floor—and Democrats a hard ceiling—that cannot

realistically be breached. As a result, more than 90% of the state House elections will be decided in each Party's primaries, moving the elected officials further away from the political center.

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



(PEX 6, § 5.1).

After determining the likely vote share across elections in HB 2's districts, Dr. Caughey calculated HB 2's partisan fairness metrics. First, he looked at the Efficiency Gap. Based on Plan Score's electoral projections, HB 2 "is likely to waste 13.4 percentage points more Democratic votes than Republican votes." (PEX 6, § 5.1.1). That 13.4% Efficiency Gap means HB 2 gives the Republican party an extra 13 seats on top of what would normally be considered a "winner's bonus." (VR 4/6/22, 11:21:25 – 11:21:58). This result is "[a]n extremely large efficiency gap just relative to what you see in other states at other times." (VR 4/6/22, 11:22:26 – 11:22:33). Indeed,

it is "more favorable toward republicans than 99% of all plans that have ever been scored by Plan Score—enacted plans—and also . . . larger in absolute value than 98% of plans" even including pro-Democratic gerrymanders. (VR 4/6/22, 11:22:45 – 11:23:05). That makes it an extreme statistical outlier for either party. (VR 4/6/22, 11:23:15 – 11:23:22).

Dr. Caughey also assessed HB 2's declination. (PEX 6 § 5.1.1). Once again, the HB 2 was off the charts in terms of its declination. Dr. Caughey has never seen a declination this high and even noted that, when he first saw the results of the declination score (0.83) he "didn't know it could go that high" in the real world (the theoretical maximum is just below 90 degrees, or .90) (VR 4/6/22, 11:29:35 – 11:29:42). The declination shows that the "pro-Republican bias of this plan is larger than the bias (in favor of either party) of 97–98% of historical plans." (PEX 6, § 5.1.1). While difficult to believe, it is relatively easy to see why HB 2's declination is so high. The plot above, from Dr. Caughey's Report, shows radically different "tails" for the respective ends of the graph. The red dots ascend gradually in a smooth line upward from 50% expected Republican vote share. By contrast, the blue dots form a line that drops precipitously down to the bottom of the graph. The angle between those two lines is very steep.

Dr. Caughey's analysis left little doubt that HB 2 creates a durable, structural advantage for Republican candidates. Whereas there is usually some uncertainty in the metrics based on forecasts, Dr. Caughey was over "over 99% sure that the declination and Efficiency Gap will be in a pro-Republican direction regardless of electoral scenario." (VR 4/6/22, 11:36:24 – 11:36:30). Indeed, both metrics were literally "off the charts" in terms of the Republican advantage they conveyed. (VR 4/6/22, 11:46:44). Dr. Caughey declared it 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).

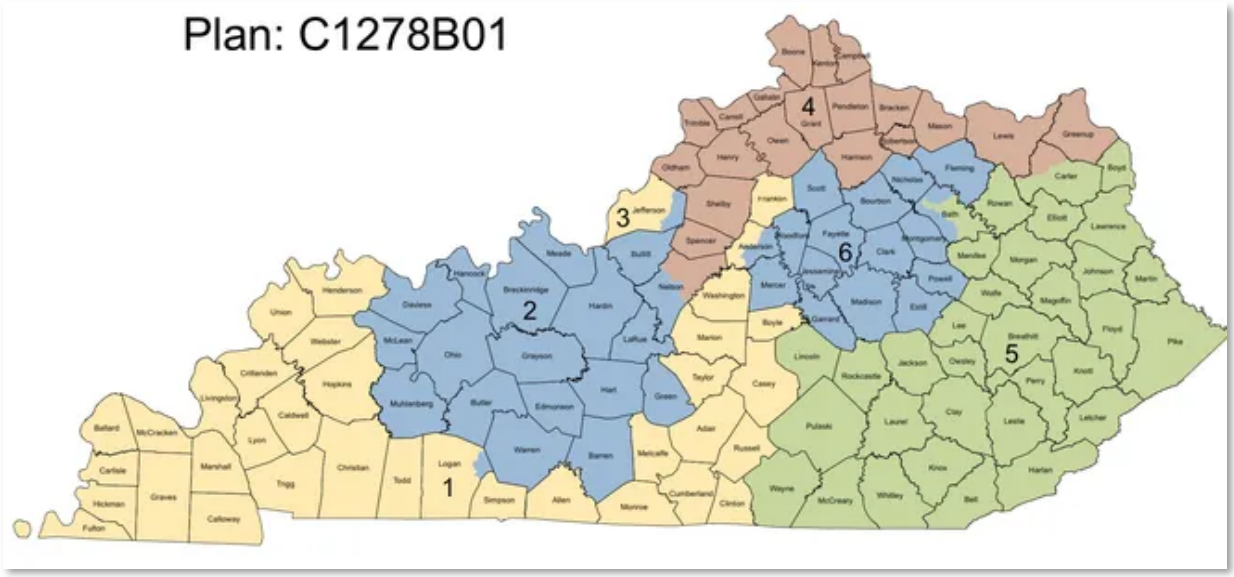
3. Effect of HB 2 on Plaintiffs

Artificially reducing the number of Democratic Representatives in the Kentucky House has policy-making consequences, even if Democrats are unlikely to attain a majority. House Minority Caucus Chair Rep. Derrick Graham, a Plaintiff in this litigation, testified that every seat matters for increasing the Democratic Caucus' ability to negotiate legislation. (VR 4/6/22, 4:24:20 – 4:25:35). Moreover, not all legislation passes along party lines. As a recent example, 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.*). In those kinds of votes, even a single Representative could have made a material difference.

Drawing Democrats out of competitive races across the state will also have disastrous consequences for the Kentucky Democratic Party ("KDP") and its members. These gerrymandered districts mean the party will be less able to recruit candidates, raise money, and train volunteers outside of the largest urban areas of the state. (VR 4/5/22, 4:06:33 – 4:07:15). Indeed, several candidates recruited by KDP to run in 2022 were drawn out of their previous 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). There also will be fewer elected officials in many areas of the state, who traditionally are very active in promoting the KDP's mission, identifying candidates for office, and raising funds to support the Party's activities. (VR 4/5/22, 4:07:18 – 4:08:45). Each of those deficits, likely to compound over time, will hinder ability of the KDP and its members to compete even in the statewide races the Republican supermajority cannot gerrymander. (VR 4/5/22, 4:08:58 – 4:09:18).

II. Senate Bill 3

"One look at [SB 3] reveals what those who drafted it in secret were trying to hide: the redistricting plan is a political gerrymander." SB 3 Veto Message. "Most egregiously, SB 3 re-draws the first Congressional district to wind across hundreds of miles from Franklin to Fulton County." *Id.*



(DEX 1, Tab 11).

To illustrate the absurdity of the First District: if one chose to drive the full length of the district, staying entirely within its borders, it would require driving approximately 370 miles and would take approximately 6 hours and 45 minutes. Even driving from Franklin to Fulton County by the most direct route—via I-69 to the Western Kentucky Parkway to the Bluegrass Parkway to Hwy. 127—would take almost 4 and half hours; along the way, the driver would pass from the 1st district into the 2nd (Muhlenberg county), then into the 4th (in Nelson County), before returning briefly to the 1st (Anderson County), crossing into the 6th (Anderson to Mercer to Anderson to Woodford County) and then, finally, back to the 1st District (Franklin County).

This patently irregular gerrymander was not necessary to accommodate the Commonwealth's population changes. Plaintiffs' expert witness, Dr. Imai, evaluated the Congressional map created by SB 3 using the same simulation algorithm approach that he applied to the state House map. (PEX 2, pp. 16-17; VR 4/5/22, 12:00:04 – 12:03:15). Dr. Imai found that the 1st District in the enacted plan is less compact than districts containing Franklin County in more than 99% of the simulated plans generated without consideration of partisan interests. (*Id.*). In other words, Franklin County would belong to a much more compact district under the simulated Congressional plans than the enacted Congressional plan. (*Id.*).

Defendants' principal critique of Dr. Imai's analysis of SB 3 is that he "failed" to consider historical Congressional maps which reflect the beginnings of the hook-like shape for the 1st District that was made far more extreme by SB 3. Defendant's expert Sean Trende testified that the hook-like shape started based on a desire to protect the Congressman representing the 2nd District, William Natcher, who was a resident of Bowling Green. (VR 4/7/22, 12:22:16 – 12:24:10, 12:27:25 – 12:27:50). The historical shapes of the 1st and 2nd Districts thus appear to have been driven by partisan aims. Dr. Imai recognized this possibility when he testified that historical maps may themselves be the product of partisan gerrymandering, which it would be improper to inject 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.")). In other words, including partisan criteria in the simulation algorithm will bias the results of the analysis.

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 Congressman Natcher (who died in 1994) is more important than the history of keeping Franklin and Fayette Counties in the same district.

Defendants' other expert proved how unusual it is to place Franklin County in the 1st District as SB 3 does. As part of his expert report, Dr. Voss conducted several "regional analyses" that attempted to account for certain historical features of Kentucky maps. To do so, Dr. Voss placed "soft constraints" on Dr. Imai's simulation algorithm that instructed the algorithm to attempt to keep certain regions intact, if possible. (VR 4/7/22, 4:51:35 – 4:54:10). His results are illuminating. When Dr. Voss instructed the algorithm to keep Warren, Daviess, and Bullitt Counties together (rather than the entire 2nd District), Franklin County almost never appears in the First District. If you "leave the simulation" alone, Franklin County "won't end up in the First" District. (VR 4/7/22, 4:53:15 – 4:53:23).

The bizarre shape of the enacted 1st District appears to have been done to achieve nakedly partisan objectives. Dr. Imai's simulation analysis establishes that the 35% Democratic vote share in the enacted 1st District is lower than more than 99% of simulated districts containing Franklin County, making the enacted 1st District an extreme outlier. (PEX 2, pp. 17-18; VR 4/5/22, 12:10:05 – 12:12:00). It is possible to draw a Congressional map that keeps Franklin County in the same district as Fayette County, as has historically been the case. Indeed, Dr. Imai's simulation algorithm produced 3,785 such maps without any constraint imposed on the algorithm intended to achieve that objective. (*Id.*). In that sub-set of simulated maps, the average Democratic vote share of the district containing Franklin County is 47.8%. (*Id.*).

SB 3 created a perception among some members of the public that map drawers were motivated to allow Representative Jamie Comer, who primarily resides in Frankfort although he represents the 1st District, to actually live within his District. *See* Joseph Gerth, (op-ed) *Congressional Redistricting Plan Puts Rep. Jamie Comer's Wants Above Kentuckians' Needs*, Louisville Courier Journal (Jan. 7, 2022). Defendants did nothing to refute or even address that perception at the bench trial in this matter.

By going out of its way to move Franklin County into the 1st District, SB 3 intentionally dilutes the votes of Democratic voters in Franklin County by attaching them to heavily Republican, far-away counties at the western edge of the Commonwealth that will certainly cancel out their votes. (VR 4/6/22, 4:31:24 – 4:32:43, 4:46:25 – 4:47:45). In doing so, SB 3 separates Franklin County from the rest of the central Kentucky likely for the first time in the history of the Commonwealth (VR 4/7/22, 12:29:35)—and certainly the first time in living memory. (VR 4/6/22, 4:29:41 – 4:30:24, 4:41:16 – 4:41:40). The map gratuitously combines Franklin County with predominantly rural and agricultural counties as far as 300 miles away that have very different social, economic, and cultural interests. (VR 4/6/22, 4:29:41 – 4:30:24, 4:31:03 – 4:32:43, 4:44:42 – 4:46:03).

Put another way, SB 3 sacrifices the residents of more than a dozen counties in service of the map drawer's partisan aims. Franklin, Anderson, and Washington counties bear the brunt of SB 3's malfeasance. The map bisects Anderson County, splitting its population between the 1st and 6th Districts. It also moves the entirety of Washington County into the 1st District, whereas most of it was previously attached to the more compact, adjacent 2nd District. These counties were used as pawns to achieve the partisan ends of the Republican Party at the expense of the voters of Central Kentucky. SB 3 can only be seen for what it is: an arbitrary and improper gerrymander

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designed to dilute Democratic votes and make it easier for two Republican incumbents to win on their home turf.

LEGAL STANDARD

The question of whether a redistricting plan is constitutional is a matter for the courts to decide; it is not a political question left solely to the legislature's prerogative. *See Fischer IV*, 366 S.W.3d at 910; *Fischer II*, 879 S.W.2d. at 475-76; *Ragland*, 100 S.W. at 866-67. "[W]here the matter is plain that the Constitution has been violated, then the courts cannot escape the duty of so declaring whenever the matter is brought to their attention." *Ragland*, 100 S.W. at 867. "[N]o matter how distasteful it may be for the judiciary to review the acts of a co-ordinate branch of the government their duty under their oath of office is imperative." *Id.*

ARGUMENT

I. HB 2 Violates Section 33 of the Kentucky Constitution.

"The dominant political subdivision in Kentucky is the county." *Fischer II*, 879 S.W.2d at 478. For many Kentuckians, their county is their "primary political subdivision and point geographic identity." *Id.* The county's priority of place is reflected in Kentucky's constitutional parameters for legislative reapportionment:

> The first General Assembly after the adoption of this Constitution shall divide the State into thirty-eight Senatorial Districts, and **one hundred Representative Districts, as nearly equal in population as may be without dividing any county, except where a county may include more than one district**, which districts shall constitute the Senatorial and Representative Districts for ten years. **Not more than two counties shall be joined together to form a Representative District**: Provided, in doing so the principle requiring every district to be as nearly equal in population as may be shall not be violated. At the expiration of that time, the General Assembly shall then, and every ten years thereafter, redistrict the State according to this rule, and for the purposes expressed in this section. If, in making said districts, inequality of population should be unavoidable, any advantage resulting therefrom shall be given to districts having the largest territory. **No part of a county shall be added to another county to make a district, and the counties forming a district shall be contiguous**.

Ky. Const. § 33 (emphasis added).

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

Over time, Kentucky courts have recognized that these commands cannot be literally observed in every instance while creating 100 districts of roughly equal population from among Kentucky's 120 counties. The courts have been consistent, however, that any deviations from these principles must "be *necessary* . . . to effectuate that equality of representation which the spirit of the whole section imperatively demands." *Ragland*, 100 S.W. at 870 (emphasis added). Though acknowledging this overriding federal constitutional "one person, one vote" requirement from cases like *Baker v. Carr*, 369 U.S. 186 (1962), Kentucky's Supreme Court has not "retreat[ed] from the importance of county integrity." *Fischer IV*, 366 S.W.3d at 912. On the contrary, the Court has continued to reaffirm that it is "not free to disregard the drafters' intent to preserve county integrity by striking the provision from Section 33" completely, even if it can no longer be observed in *every* instance. *Id.* at 913. Simply put, "[p]reservation of county integrity" was the "paramount consideration" of Section 33's drafters and must "be balanced with population equality to accommodate both." *Fischer II*, 879 S.W.2d at 479.

HB 2 defies this constitutional command by splitting 23 counties 80 times, (VR 4/5/22, 3:38:31)—*far more* total splits than necessary to accommodate constitutional "one person, one vote" principles. HB 191, by contrast, splits 23 counties only 60 times while remaining safely within the facially constitutional 5% population deviation standard. (VR 4/5/22, 3:38:45; PEX 4).

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HB 191 thus proves HB 2's 20 additional county splits are not necessary to achieve equal representation principles and therefore are constitutionally impermissible under Section 33, *Ragland*, and *Fischer II*. *See Fischer IV*, 366 S.W.3d at 915 (existence of alternate redistricting plans shows that population equality and county integrity can be balanced in a plan better designed to serve both interests). Importantly, these facts are not in dispute. Defendants' expert, Dr. Voss, agrees that if Section 33 requires the legislature to split counties only when necessary to achieve population equality, HB 3 is unconstitutional (VR 4/7/22 4:21:01 – 4:21:16). Likewise, Dr. Voss agreed that if Section 33 requires the minimum number of multi-split counties whose remainders are paired it with other counties to make districts, HB 3 is unconstitutional because map drawers "definitely could have" drawn fewer multi-split counties. (4/7/22, 4:20:05 – 4:20:33).

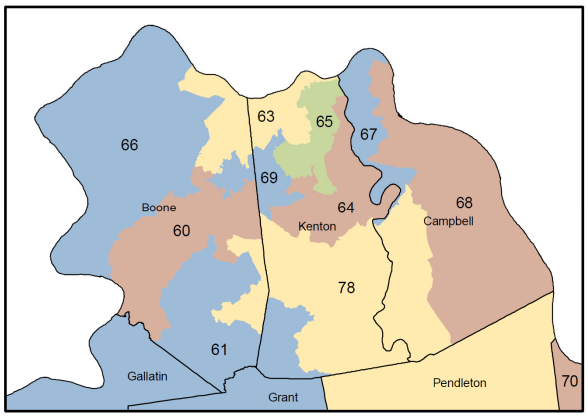
But it is not just the total number of times that HB 2 splits counties that makes it unconstitutional under Section 33. Rather, the way that HB 2 divides up counties shows that the mapmakers routinely violated Section 33 more than necessary to achieve population equivalence.

First, Section 33 states that "[n]ot more than two counties shall be joined together to form a Representative District." Ky. Const. § 33. Deviations from this rule are permitted only if "*necessary* in order to effectuate that equality of representation . . . ." *Ragland*, 100 S.W. at 870 (emphasis added). HB 2 violates this command on 31 separate occasions (VR 4/5/22, 3:41:26). Thos districts are: Nos. 1 (5 counties) 6 (3), 8 (3), 12 (4), 14 (3), 16 (3), 21 (4), 22 (3), 24 (3), 33 (3), 47 (4), 52 (3), 55 (3), 56 (3), 61 (3), 70 (4), 71 (4), 72 (3), 74 (3), 78 (4), 80 (3), 83 (3), 84 (3), 89 (5), 90 (3), 91 (3), 92 (3), 94 (3), 96 (3), 97 (3), 99 (3). (*See also* DEX 1, Tab 1). These excessive multi-county districts were not "necessary" to achieve population equivalence. HB 191 proves the point; it created maps within the required +/- 5% population deviation range containing only 23 districts formed from parts of 3 or more counties (not coincidentally, the minimum number of

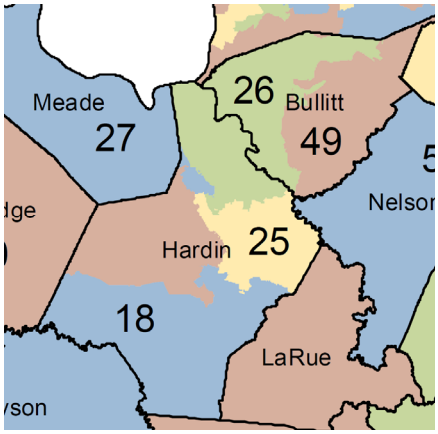
county splits required). (VR 4/5/22, 3:41:33; PEX 4). HB 2's extra violations of this rule must be seen for what they are: the consequence of the mapmakers' decision to excessively divide counties purely for partisan gain, without regard for the Constitution's actual text.

Second, Section 33 also requires that "[n]o part of a county shall be added to another county to make a district . . . ." Ky. Const. § 33. Once again, HB 2 flagrantly violates this rule to pursue its partisan ends. Indeed, nearly half the districts in HB 2—45 in all—were built by violating this rule: District Nos. 1, 2, 3, 5, 6, 8, 10, 14, 16, 18, 19, 22, 26, 27, 33, 37, 39, 45, 48, 52, 55, 56, 61, 63, 69, 71, 73, 78, 80, 82, 83, 85, 86, 87, 88, 89, 90, 91, 92, 94, 95, 96, 97, 98, and 100. (VR 4/5/22, 3:39:29 – 3:40:48). And once again, HB 191 proves 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).

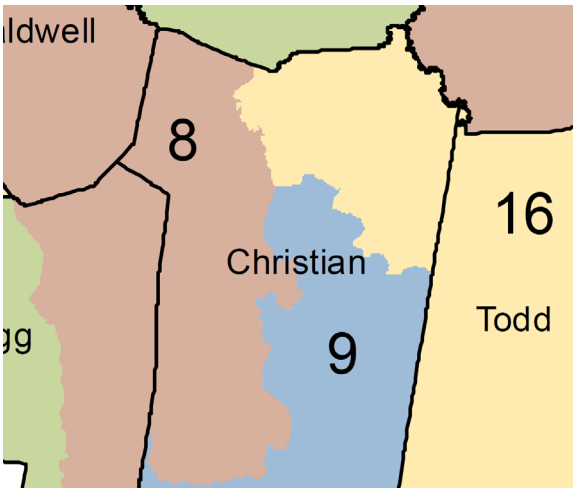
To take just a few examples, the following maps of Northern Kentucky (Boone, Kenton, and Campbell), Bullitt/Hardin, Christian, Fayette, McCracken, and Pike Counties show how the mapmakers aggressively—and unnecessarily—carved up counties, joining multiple portions of one county with neighboring ones:



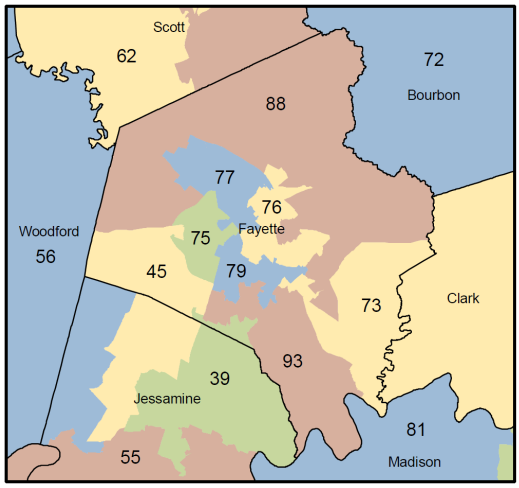
Northern Kentucky



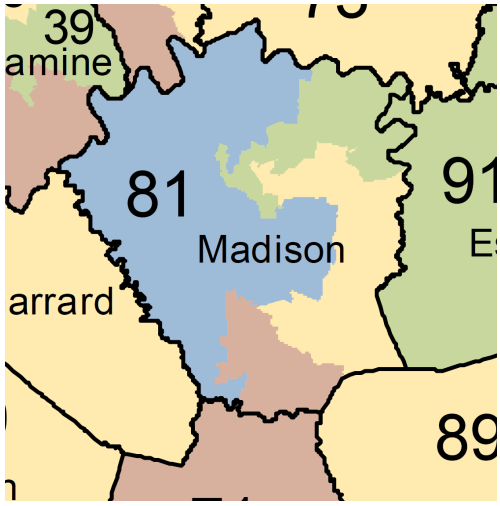
Bullitt/Hardin



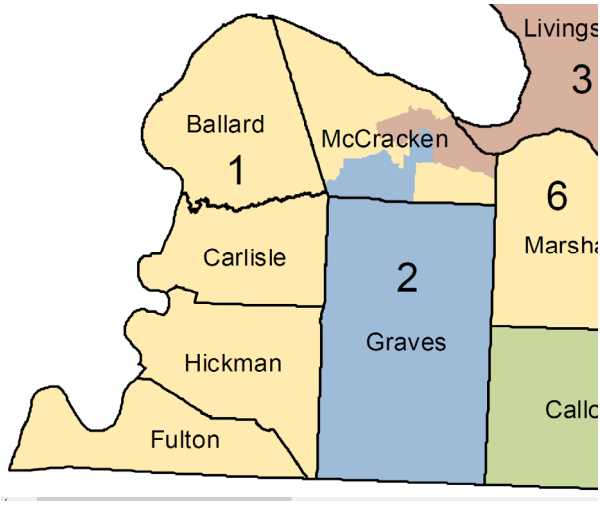
Christian



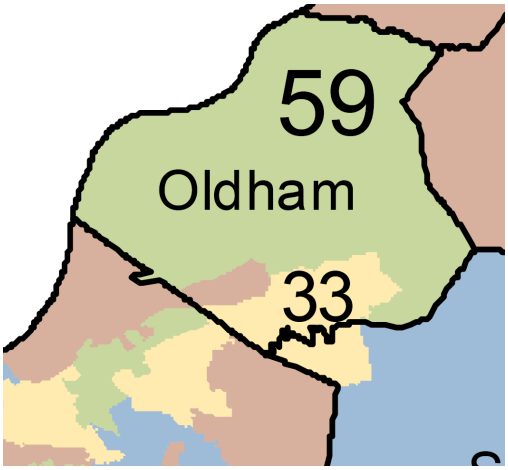
Fayette



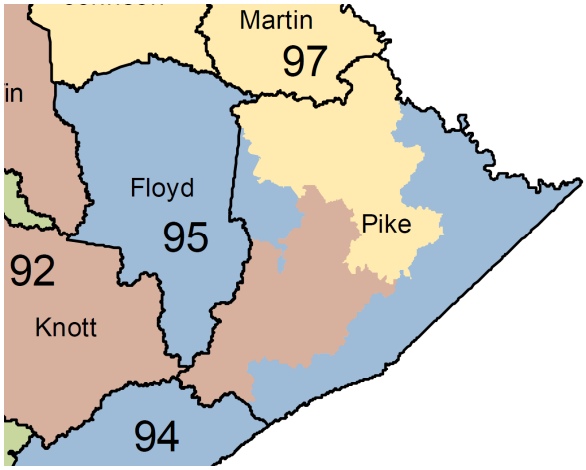
Madison



McCracken



Oldham



Pike

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

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

Fischer II confirms that HB 2's flagrant violations of these commands fly in the face of Section 33's text and purpose. In expounding upon the meaning of Section 33, the Court looked to the "highly persuasive" Tennessee Supreme Court decision in *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983), interpreting a "virtually indistinguishable" provision of the Tennessee Constitution. *Fischer II*, 879 S.W.2d at 479. The Kentucky Supreme Court approvingly cited *Lockert* as "direct[ing] adoption of a plan which *crossed as few county lines as possible* within federal constitutional guidelines for equal representation." *Id.* (emphasis added). *Lockert* had held that the constitutional language does not "sanction a single county line violation not shown to be necessary" to avoid a breach of equal representation requirements. *Lockert,* 656 S.W.2d at 839. As a result, *Lockert* struck down a map that "crosse[d] the county lines of fifty-

seven counties *and [made] at least nine additional unnecessary and constitutional divisions of those counties*." *Id*. at 841-2 (emphasis added).[4]

Since *Fischer II*, the Kentucky Supreme Court has affirmed that county integrity may only be compromised in service of equal population principles. In *Jensen v. Kentucky State Board of Elections*, 959 S.W.2d 771, 776 (Ky. 1997), the Court declined to "reconsider *Fischer II* and interpret Section 33 to require the division of the minimum number of counties *only after* each county large enough to contain a whole district is awarded the maximum number of districts its population would permit." *Id*. at 774 (emphasis added). The Court declined to create this new constitutional rule because it would have required the Court to accept a map that divided more than the minimum possible number of counties and distributed population "slightly greater than . . . plus-or-minus 5%." *Id*. at 774. The *Jensen* Court was rightfully unwilling to run roughshod over both of Section 33's competing concerns—population equality and county integrity—without clear constitutional authority to do so. Thus, Section 33 requires mapmakers to respect both population equality and county integrity unless those goals collide, when "the requirement of approximate equality of population must control." *Id*.

But those principles are not at odds here. HB 191 proves it is possible to draw a legislative map that satisfies the Kentucky Constitution's equal representation requirements while dividing Kentucky's counties 20 times fewer than HB 2; crossing county lines to form districts 14 times fewer; and forming districts containing parts of three or more counties 8 fewer times. That is dispositive of the issue because from the first legislative reapportionment, Section 33 has been

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

understood to allow deviations from county integrity principles only when "*necessary* . . . to effectuate that equality of representation which the spirit of the whole section imperatively demands." *Ragland*, 100 S.W. at 870 (emphasis added).

Defendants will no doubt argue that the Kentucky Supreme Court has confined the concept of "county integrity" to the total number of counties split, without consideration of how many times the counties are then subdivided, whether portions of those counties are added to neighboring counties to form new districts, or if portions of more than two counties are combined to form districts. They are likely to cite language from *Fischer IV* or *Jensen* suggesting that county integrity is preserved "by dividing the fewest possible number of counties." *Fischer IV*, 366 S.W.3d at 912. Put another way, Defendants are likely to argue that so long as they divide the fewest number of total counties, they can ignore the actual words in Section 33. That must be their argument; the maps the legislature enacted make sense no other way.

That argument is wrong, however. *Fischer IV* makes clear that the "Court did not retreat from the importance of county integrity in *Jensen*." *Fischer IV*, 366 S.W.3d at 912. Rather, *Jensen* simply rejected the argument that every county large enough to have its own district *must* get one. *Jensen* disagreed because doing so would do *more* violence to the text of Section 33 as it would require mapmakers to split an additional eight counties—something the Kentucky Constitution expressly forbids (unless necessary to achieve population equality). That is why *Fischer IV* went out of its way to note the Court was "not free to disregard the drafters' intent to preserve county integrity by striking the provision from Section 33"; it must, instead, give effect to both the words and spirit of Section 33 to the maximum extent possible. *Id.* at 913. That is precisely what Plaintiffs ask here.

There can be no doubt that Section 33 was meant to prevent the very kind of partisan gerrymander at issue here. Kentucky's constitutional framers adopted Section 33 specifically to restrict "the Legislature" from "gerrymander[ing] or residistrict[ing] the State according to their own wishes or their own caprices." 1890-1891 *Kentucky Constitutional Debates*, Volume 4, p. 4610.[5] Their solution—"a safeguard against such a state of affairs"—was to adopt an amendment to what is now Section 33 that "prohibits the uniting of more than two counties into one district." *Id*. This amendment was necessary to "end the very great injustice" of unequal representation "that would otherwise be done to various counties" by the Legislature, *id.*—and was in fact attempted, unsuccessfully, in *Ragland* and *Stiglitz v. Schardien*, 40 S.W.2d 315 (1931).

HB 2 has proven these concerns astonishingly prescient; over 130 years later, a legislative supermajority has sacrificed county integrity once again to maximize its partisan advantage. Fortunately, our constitutional framers drafted Section 33 "as a safeguard against such a move, and to protect the entire people of the State." *Kentucky Constitutional Debates*, Volume 4, p. 4610. Their foresight warrants declaratory and injunctive relief from HB 2's excessive and unconstitutional county splitting and joining to achieve an extreme partisan gerrymander.

II. HB 2 and SB 3 Are Unconstitutional Partisan Gerrymanders

A. HB 2 and SB 3 Violate Kentucky's Free and Equal Elections Clause

1. Kentucky's Constitution Guarantees a "Free and Equal" Election

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

[5] *Available at*: http://digital.library.louisville.edu/cdm/search/collection/law/searchterm/constitution/field/title/mode/all/conn/and/order/date

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*, 175 S.W. at 1026.

The Free and Equal Elections Clause is one of the Kentucky Constitution's clauses that is more detailed and specific than the federal Constitution. There is no similar counterpart in the United States Constitution. Thus, while the United States Supreme Court has derided "highly partisan" legislative maps as "unjust" and "incompatible with democratic principles," it has found no "plausible grant of authority in the United States Constitution" to federal courts to address the issue. *Rucho*, 139 S. Ct. at 2507. But that does "not condemn complaints about redistricting to echo into a void." *Id*. Rather, the Court expressly left the issue to the states to address with "[p]rovisions in state statutes and *state constitutions* that can provide standards and guidance for state courts to apply." *Id*. (emphasis added).

Since *Rucho*, states with constitutions containing nearly identical free and equal election clauses as Kentucky's Section 6 have applied their state constitutions to circumscribe severe partisan gerrymanders like the kind presented by HB 2 and SB 3. The North Carolina Supreme Court recently reaffirmed that the state's free elections clause[6] prohibits partisan gerrymandering. *See Harper v. Hall*, 868 S.E.2d 499 (Feb. 14, 2022). The Court noted that the free elections clause was "intended to end 'the dilution of the right of the people of [the] Commonwealth to select representatives to govern their affairs,' and to codify an 'explicit provision[] to establish

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

protections of the right of the people to fair and equal representation in the governance of their affairs.'" *Id.* at 540 (quoting *League of Women Voters v. Commonwealth*, 645 Pa. 1, 104 (2018)). The Court held there was "no doubt" that "elections are 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.*[7]

Similarly, the Pennsylvania Supreme Court recently applied its commonwealth's free and equal clause[8] to overturn its legislature's extremely partisan gerrymandered map. *See League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018); *see also Carter*, 270 A.3d at 445-458 (reaffirming partisan gerrymandering holding from *LWV* case). Notably, Kentucky's free and equal election clause is identical to Pennsylvania's because the drafters of Kentucky's Bill of Rights "borrowed almost verbatim from the Pennsylvania Constitution of 1790." *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992), *overruled on separate grounds by Calloway County Sheriff's Dep't v. Woodall*, 607 S.W.3d 557 (Ky. 2020). Accordingly, "decisions of the Supreme

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

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

Court of Pennsylvania, when interpretating provisions of the Pennsylvania Constitution similar to that of the Kentucky Constitution, are very persuasive to the Courts of the Commonwealth and should be given as much deference as any non-binding authority receives." *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459 (Ky. 1998).

Pennsylvania's Constitution, when adopted in 1776, was widely viewed as "the most radically democratic of all the early state constitutions." *League of Women Voters,* 178 A.3d at 100. Its free and equal elections clause "mandates clearly and unambiguously, and in the broadest possible terms, that all elections conducted in this Commonwealth must be 'free and equal.'" *Id*. at 101. Its "broad and wide sweep" is meant to "strike not only at privacy and partiality in popular elections, but also corruption, compulsions, and other undue influences…[it] exclude[s] not only all invidious discriminations between individual electors, but also between different sections or places in the State." *Id*. (quoting Charles R. Buckalew delegate to Pennsylvania 1873 Constitutional Convention). The free and equal clause "guarantees our citizens an equal right… to elect their representatives…[and] translate their votes into representation." *Id*. This guarantee was essential "to end, once and for all, the primary cause of popular dissatisfaction which undermined the governance of Pennsylvania"—that is, "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 lived, and the religious and political beliefs to which they adhered." *Id*. at 108.

Other courts have rejected partisan gerrymandering under state constitutional provisions, too. During this election cycle, Both New York and Ohio's courts have struck down plans that violated their state's prohibitions on partisan gerrymandering. *See Harkenrider v. Hochul*, 2022 WL 1236822, at *10 (N.Y. Apr. 27, 2022); *League of Women Voters of Ohio v. Ohio Redistricting*

Comm'n, __ N.E.3d. __, 2022 WL 1113988 (Ohio Apr. 14, 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, __ N.E.3d __, 2022 WL 110261 (Ohio Jan. 12, 2022).

The extreme partisan gerrymandering in HB 2 and SB 3 is precisely the kind of odious dilution of votes the free and equal clause was designed to end. By placing voters that prefer "one party's candidates in districts where their votes are wasted on candidates likely to lose (cracking)" or "placing such voters in districts where their votes are cast for candidates destined to win (packing)," Kentucky's Republican legislators have sought to "dilute[] the votes of those who in prior elections voted for the party not in power to give the party in power a lasting electoral advantage." *League of Women Voters,* 178 A.3d at 116-117. Put simply, HB 2 and SB 3 are unconstitutional because "a diluted vote is not an equal vote." *Id*.

2. The Record Contains Ample Evidence of Partisan Gerrymandering

It is well-established that partisan gerrymandering can be proven by circumstantial evidence, including simulation analysis and the use of partisan bias metrics, such as the Efficiency Gap and Declination. Direct evidence of partisan intent, "such as an admission by the map drawers that they intended to favor a certain political party. . . . is rare and certainly not required" to prove a constitutional violation. *Harkenrider v. Hochul*, 2022 WL 1193180, at *4 (N.Y. 4th App. Div. Apr. 21, 2022), *aff'd as modified*, 2022 WL 1236822 (N.Y. Apr. 27, 2022), *and leave to appeal denied*, 2022 WL 1233958 (N.Y. Apr. 27, 2022) (citing *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 2022 WL 110261 ¶ 117 (Oh. Jan. 12, 2022)). Thus, courts have recognized that "computer modeling and statistical analyses have garnered acceptance as evidence of partisan intent." *Harkenrider*, 2022 WL 1193180, at *3. And such analyses have been "corroborated by the inference of gerrymandering evident 'by application of simple common sense' from the enacted map itself and its likely effects on particular districts." *Id.* at * 5 (citing *Adams v. DeWine*, 2022 WL 129092, ¶ 4 (Ohio Jan. 14, 2022)).

Here, the evidence is more than sufficient to establish that HB 2 and SB 3 constitute partisan gerrymanders. Dr. Imai presented undisputed evidence that HB 2 contains the "signature of gerrymandering," in so far as it makes Republican-leaning districts safer while reducing the Democratic advantage of Democratic-leaning districts. (PEX 2, pp. 11-13; VR 4/5/22, 11:21:20 – 11:29:01). That evidence can be seen most clearly in his "box plot" graph, which shows that the General Assembly specifically targeted those districts that otherwise would have been the most competitive to maximize the Republican party's chances of holding borderline Republican seats and pick up borderline Democratic ones. Dr. Imai's local analysis of Louisville and Lexington, also undisputed by Defendants' experts, likewise reveals a pattern of packing Democratic voters into a small number of districts and combining Democratic voters in urban areas with Republican voters in rural areas to create more Republican-leaning districts. (PEX 2, pp. 13-16; VR 4/5/22, 11:33:06 – 11:43:20).

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

Further, Dr. Caughey's analysis demonstrates that the state House map gives Republicans a large and durable majority that is more pro-Republican than any legislative redistricting proposal he has ever seen. (VR 4/6/22, 16:20:55 – 16:21:03). The map starts from a basic asymmetry: it has a structural bias of almost 10 seats in Republican's favor even if the statewide vote split 50-50. (VR 4/6/22, 11:17:45 – 11:18:50).

On top of that, Efficiency Gap analysis shows HB 2 is an extreme outlier. Recently, the highest courts of both Pennsylvania and North Carolina—two states with Free Elections clauses

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nearly identical to Kentucky's—have recognized that Efficiency Gap is among the "generally accepted metrics for evaluating the partisan fairness of a redistricting plan," *Carter*, 270 A.3d at 458; *see also Harper*, 868 S.E.2d. at 547 ("[T]here 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" (emphasis added)). Moreover, courts and social scientists have recognized "that an efficiency gap above 7% in any districting plan's first election year will continue to favor that party for the life of the plan." *Harper*, 868 S.E.2d. at 548 (quoting *Whitford v. Gill*, 218 F. Supp. 3d 837, 905 (W.D. Wis. 2016) *rev'd on other grounds* 138 S. Ct. 1916 (2018)); *see also* VR 4/6/22, 11:44:25 – 11:46:00 (many political scientists consider an Efficiency Gap of 7-8% as a sign of gerrymandering).

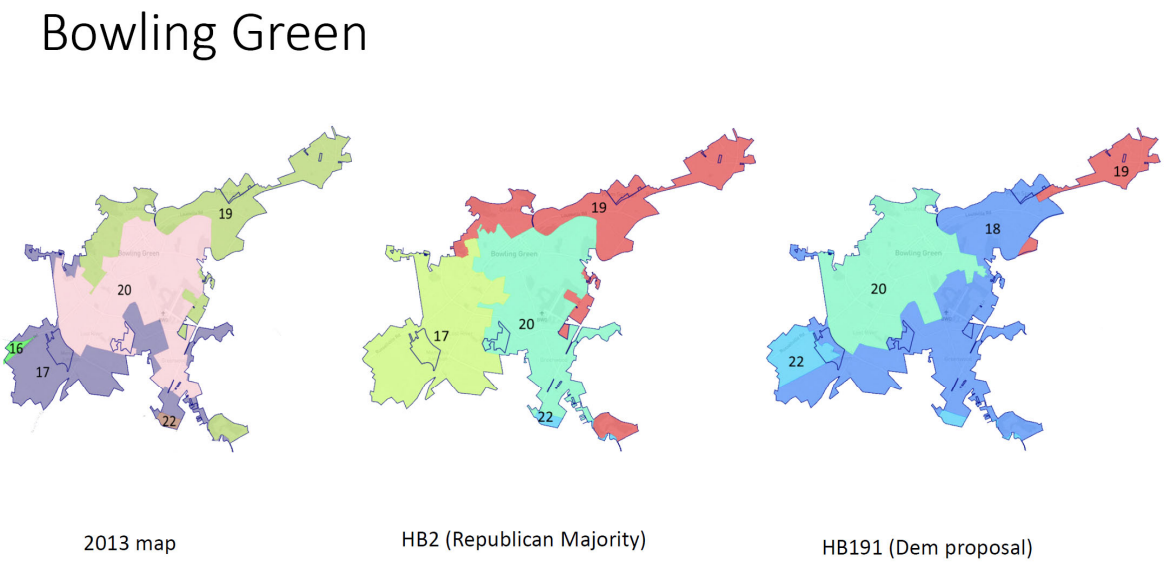
Here, the Efficiency Gap—13.4%—is nearly *twice* that figure. HB 2 is likely to give Republicans more than 80% of the seats in the state house with less than 60% of the vote. (VR 4/6/22, 11:09:05 – 11:09:25). It is unsurprising, then, that the Efficiency Gap metric shows this plan to be a more extreme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

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

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

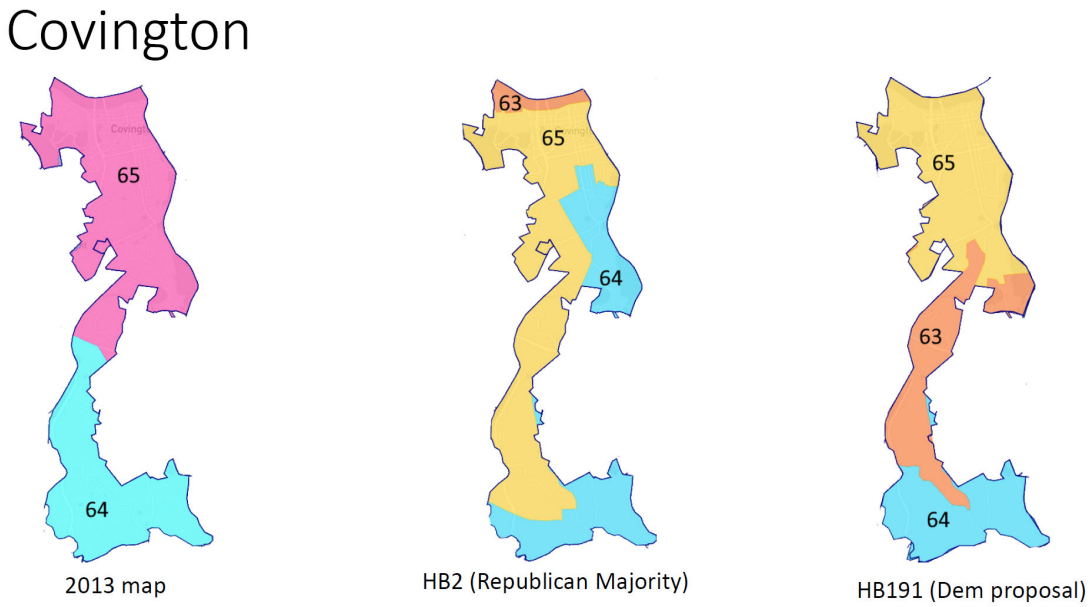
These quantitative analyses are also "corroborated by the inference of gerrymandering evident 'by application of simple common sense' from the enacted map itself and its likely effects on particular districts." *Harkenrider*, 2022 WL 1193180, at * 5 (citing *Adams v. DeWine*, 2022 WL 129092, ¶ 4 (Ohio Jan. 14, 2022)). Indeed, a lay examination of the districts created by HB 2 and SB 3 makes apparent that the map drawers' primary purpose was to maximize Republican partisan advantage at the expense of constitutional priorities such as compactness and communities of interest. There can be no other explanation for the Rorschach-like districts that snake through communities of interest across the Commonwealth, surgically dividing voters by their partisan preferences.

To take just one example, the City of Bowling Green has historically been wholly within the 20th legislative district and has elected a Democrat every election since at least 1976. But HB 2 does not include a district that is wholly within Bowling Green and instead cracks the city "right down the middle between District 17 and District 20." (VR 4/5/22, 3:44:19 – 3:44:31). The effect is to convert District 20—historically "a Democratic performing district" (VR 4/5/22, 3:45:19 – 3:45:30)—into an uncompetitive district where Republicans hold a 10-point advantage. (VR 4/5/22, 3:45:30). This swing is particularly egregious because District 20's population grew since the 2010 census; therefore, the district should have "condensed" to protect the Bowling Green's community of interest and allow its voters to translate their votes into representation. (VR 4/5/22, 3:34:30 – 3:45:42). That is what HB 191 does. HB 2, by contrast, "shifted" district 20 and drew three unrepresentative districts that all lean heavily Republican. (VR 4/5/22, 3:34:30 – 3:45:42).



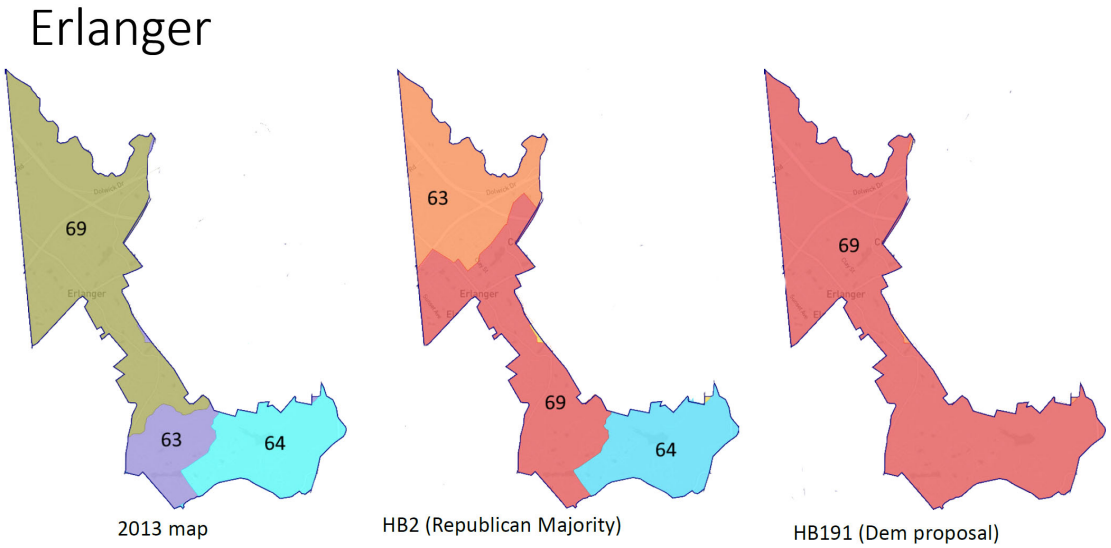
(PEX 3, p. 1).

The same pattern repeats in Northern Kentucky, too. District 65, currently represented by Rep. Buddy Wheatley, was redrawn to swing the district from a 10-point Democratic advantage to a 10-pint Republican advantage. (VR 4/5/22, 3:47:31 – 3:47:44). This swing was achieved by cracking the City of Covington into several districts to dilute its Democratic voters by pairing them with neighboring suburban and rural districts. Most of downtown Covington is in District 65, which now extends "outside the City of Covington and deep into parts of Kenton County that are not a similar community to downtown Covington." (VR 4/5/22, 3:47:06 – 3:47:31). The map also lops off Covington's precincts closest to the Ohio River and joins them with the heavily Republican 63rd District. There is no possible explanation for this such a bizarre division of the city of Covington except to maximize Republican partisan advantage. HB 191, by contrast, proves that it is possible to protect Covington's community of interest by keeping the City intact within the 65th District.



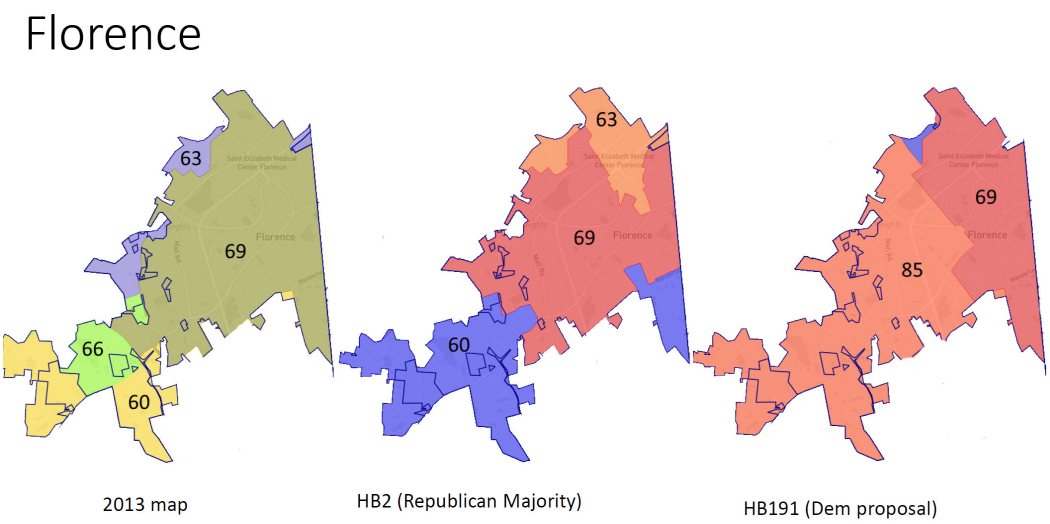
(PEX 3, p. 2).

HB 2 also divides the City of Erlanger into three separate districts—Districts 63, 69, and 64. Historically, Erlanger has remained mostly intact within a single district. HB 2 "pushes that district…out of Erlanger, where it has been pretty much the heart of Erlanger as you can see in the 2013 map." (VR 4/5/22, 3:49:30 – 3:49:51). HB 191, by contrast, keep the City of Erlanger entirely intact.



(PEX 3, p. 3).

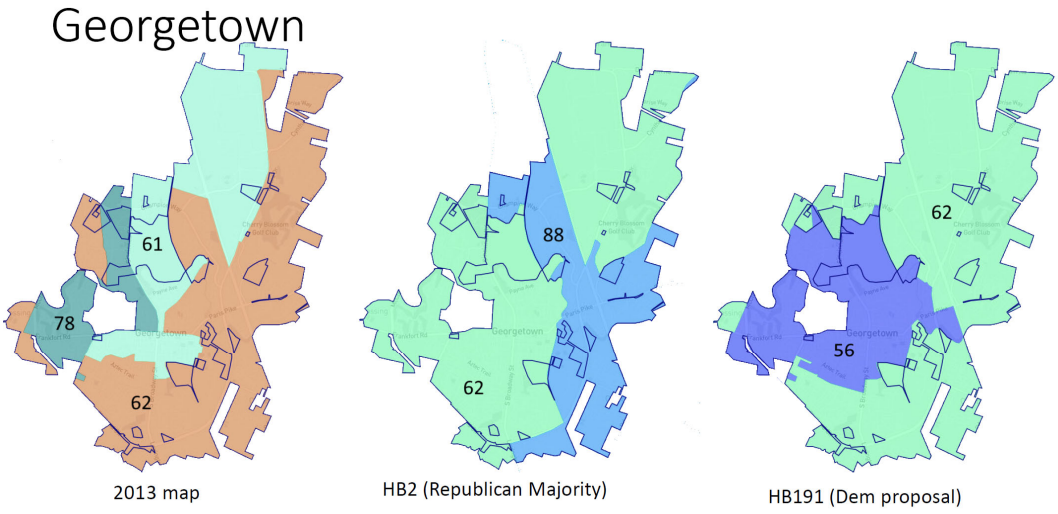
Similarly, HB 2 carves the City of Florence into three districts. Historically, Florence has remained mostly intact in a single district with surrounding rural districts encroaching on the outskirts of the city. HB 2 rejected this approach and divides the city roughly into thirds, creating three districts—all "significantly more Republican performing" than the 2013 map. (VR 4/5/22, 3:50:40-52).



(PEX 3, p. 4).

HB 191 proves that the General Assembly could have adopted a map that retained the "geographical and social cohesion" of Northern Kentucky while preserving substantial Republican majorities. *League of Women Voters*, 178 A.3d at 814. But instead, these communities were sacrificed for the illegitimate purpose of maximizing partisan advantage. Put another way, HB 2 is Kentucky Republicans' attempt to use their present majority to "manipulate[] district boundaries, to the greatest extent possible, to control the outcomes of individual races so as to best ensure their continued control of the legislature." *Common Cause v. Lewis*, 2019 WL 4569584, at *112.

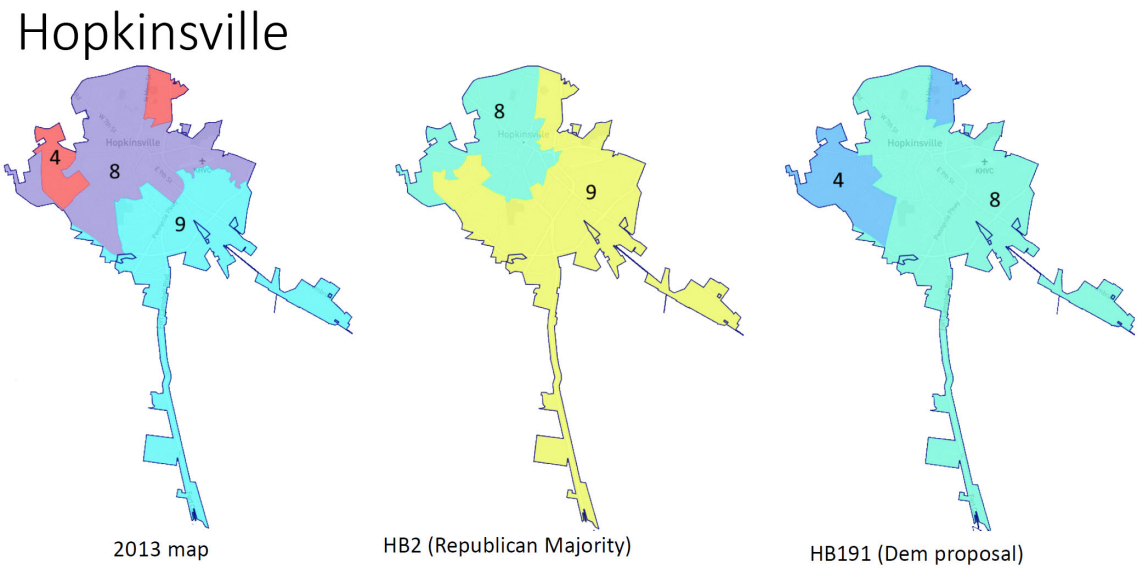
This pattern is repeated across the Commonwealth to great effect. HB 2 draws a spike through the heart of the City of Georgetown. The spike divides Georgetown in half and uses district 88 to divide the city's northern and southern halves—creating two unrepresentative heavily Republican districts. District 88, which was previously wholly within Fayette County, now "becomes significantly more Republican performing." (VR 4/5/22, 3:51:50 – 3:52:03). By contrast, HB 191 is drawn to "maintain contiguity by placing most of [the City] in District 56 and the outlying portions in District 62." (VR 4/5/22, 3:52:09 – 3:52:25). Instead of two heavily Republican districts, HB 191 produces one competitive district (D54) and one Republican leaning district (D62) (VR 4/5/22, 3:52:28 – 3:52:44) that preserves the areas communities of interest and allows Georgetown's voters a "free and equal *opportunity* to select his or her representatives." *League of Women Voters*, 178 A.3d at 814.



(PEX 3, p. 5).

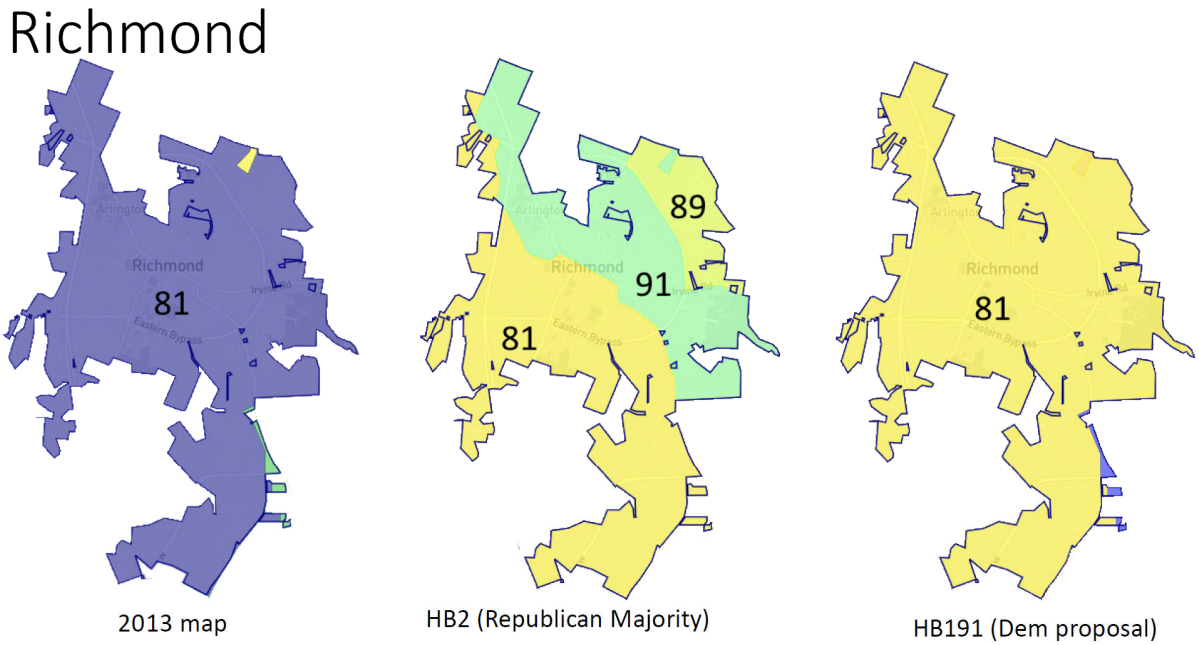
Similarly, HB 2 cracks the City of Hopkinsville in two. In doing so, it unnecessarily separates precincts Walnut Street 1 and Walnut Street 2 into two districts. These precincts are the most Democratic performing precincts in Christian County and are majority African American. (VR 4/5/22, 3:53:15 – 3:53:43). As a result, Hopkinsville is split into two heavily Republican

districts—Districts 8 and 9. HB 191 keeps Hopkinsville almost entirely intact in District 8 and creates a competitive plurality Black district. (VR 4/5/22, 3:53:44 – 3:54:06).



(PEX 3, p. 6).

Finally, HB 2 divides Richmond into three heavily Republican districts despite the City having been "wholly contained within the 81st House District for generations." (VR 4/5/22, 3:54:18 – 3:54:30). HB 2 commits multiple violations of Section 33 by splitting Richmond into three "and taking pieces of the City…and then tacking them on to counties outside of Madison County." (VR 4/5/22, 3:54:47 – 3:55:03). This change morphs the 81st—one of Kentucky's most competitive districts, decided by less than one percent of the vote in 2018 and 2016 (VR 4/5/22, 3:54:31 – 3:53:44)—into "three solidly Republican districts." (VR 4/5/22, 3:55:5 – 3:55:19). By contrast, HB 191 protects the "geographical and social cohesion" (*League of Women Voters*, 178 A.3d at 814)) of Richmond by keeping it intact within a single district that retains a slight Republican advantage but is significantly more competitive. remains majority Republican but is significantly more competitive.



(PEX 3, p. 7).

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

The evidence of partisan bias summarized above is the only evidence in the record on the issue. The Commonwealth did not attempt to prove that its maps showed no partisan bias. Indeed, it did not even ask its experts to evaluate the maps' partisan fairness. (VR 4/7/22, 16:15:19 – 16:15:30; 4/7/22, 12:16:50 – 12:17:52). Rather, the Commonwealth simply tried to cast doubt on Plaintiffs' evidence, hoping the Court would ignore it.

For example, the Commonwealth repeatedly attacked Dr. Imai's simulation analysis because it was not designed to produce thousands of redistricting plans that could be enacted as-is, even though its own expert used those very same simulation techniques in another case and conceded that is not the point of simulation analysis. (PEX 7; VR 4/7/22, 12:33:35 – 12:33:58 (Defendants' expert, Mr. Trende, admitting that the "core purpose" of simulation analysis is to evaluate an enacted plan)). Similarly, the state's expert (Dr. Voss) lodged critiques about the population variance that he was forced to "update" during his live testimony because of a

mathematical error in his calculations that Dr. Imai highlighted in his testimony. (VR 4/7/22, 14:57:52 – 14:59:20). Mr. Trende withdrew his criticism of Dr. Imai's compactness parameter when cross-examined regarding that critique. (VF 4/7/22, 12:40:05 – 12:42:18). Neither expert offered any rebuttal of Dr. Imai's opinions with respect to the partisan bias or gave an affirmative opinion that the enacted plans are *not* partisan gerrymanders.

Likewise, the Commonwealth spent hours assailing the use of measures like the Efficiency Gap, even though courts have called it a "generally accepted metric[ ] for evaluating the partisan fairness of a redistricting plan," *Carter*, 270 A.3d at 458, and a "reliable way[ ] of demonstrating the existence of an unconstitutional partisan gerrymander," *Harper*, 868 S.E.2d. at 547. Likewise, the Commonwealth attempted to argue that any measure of partisan bias was due to Kentucky's supposedly unique "political geography," even though the evidence in the record demonstrates that Kentucky is not unique in having its democratic voters clustered in urban areas (PEX 10)—and is in fact below average compared to other states. (VR 4/6/22, 11:24:53 – 11:29:15). And neither of the Commonwealth's experts had much—if anything—to say about the "off the charts" declination score that the map produced. (VR 4/7/22, 16:40:33; VR 4/7/22, 12:45:14 – 12:45:40).

Thus, the only affirmative evidence in the record shows that HB 2 and SB 3 are partisan gerrymanders. This Court should find that the enacted plans violate Section 6 of the Kentucky Constitution and permanently enjoin their application to future elections.

B. HB 2 and SB 3's Partisan Gerrymandering Violates Equal Protection Principles in Kentucky's Constitution.

Kentuckians are guaranteed equal protection of the law by Sections 1, 2, and 3 of their Constitution. *Zuckerman v. Bevin*, 565 S.W.3d 580, 594 (Ky. 2018). HB 2 and SB 3 violate this guarantee by drawing redistricting maps with the purpose and effect of increasing and entrenching Republican control of the General Assembly and Kentucky's Congressional delegation.

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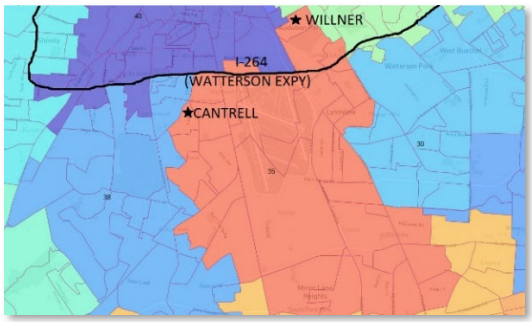
Kentucky's Constitution has been interpreted to require that every citizen's vote carries the same voting power. *See Fischer IV*, 366 S.W.3d at 910; *see also Asher v. Arnett*, 280 Ky. 347, 132 S.W.2d 772, 776 (1939) ("equal" comprehends the principle that every elector has the right to have their vote "counted for all it is worth," and that, when cast, their vote "shall have the same influence as that of any other voter"). As the North Carolina Supreme Court recently noted, the right to equal voting power "necessarily encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views." *Harper*, 868 S.E.2d. at 544. 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 the right to vote is a fundamental right, laws regulating the vote 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)).

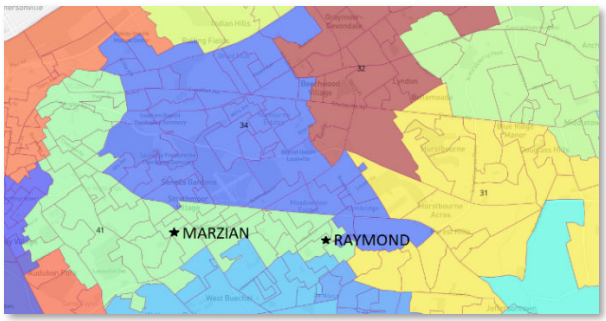
To establish a discriminatory purpose or intent, Plaintiffs need not show that the discriminatory purpose is "express or appear[s] on the face of the statute." *Washington v. Davis*, 426 U.S. 229, 241 (1976). Rather, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts." *Id.* at 242.

The United States Supreme Court has recognized certain purposes for which a state redistricting body may consider political data or partisan consideration when drawing legislative districts. For example, a legislature may, under appropriate circumstances, draw district lines to avoid the pairing of incumbents. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). A mapmaker may consider partisan data "to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." *Gaffney* , 412 U.S. at 752. Or it may use political data to draw district lines that respect municipal boundaries or maintain communities of interest. *Abrams v. Johnson*, 521 U.S. 74, 100 (1997).

HB 2 and SB 3's gerrymandering is not an attempt to achieve any of these legitimate objectives; quite the opposite. The Republican super majorities have intentionally shirked these goals in order to maximize their partisan gains. HB 2 plainly goes out of its way to pair Democratic incumbents in Jefferson County, as shown below (including, where necessary, drawing a district across a major Interstate Highway: I-264, the "Watterson Expressway"). Pairing these incumbents was entirely unnecessary and created two open districts without an incumbent in Jefferson County. (VR 4/5/22, 4:03:50 – 4:04:48).



Dist. 35 (Pairing Willner and Cantrell)



Dist. 41 (Pairing Marzian and Raymond)

That is markedly different than HB 2's pairing of Republican incumbents, which were unavoidable given population losses in those regions. (VR 4/5/22, 4:05:25 – 4:05:25).

As shown above, HB 2 also divides communities of interest in Bowling Green, Covington, Erlanger, Hopkinsville, Richmond, and Florence. The resulting map exaggerates the existing Republican majority in Kentucky and eliminates almost all of Kentucky's competitive House Districts—particularly outside the state's two largest cities. Under HB 2 it will be mathematically impossible for Kentucky Democrats to elect representatives and "participate in the decision-making process of government." *Lewis*, 2019 WL 4569584, at *116 (internal quotation omitted). This will not be for lack of Democratic voters in a particular area, but due to HB 2 and SB 3's cracking and packing of those voters in a way that dilutes the power of Democratic votes.

SB 3, for its part, ignores the interests of voters in Franklin, Anderson, and Washington Counties by combining them in a snake-like district that stretches hundreds of miles to the Southwest. The resulting districts unconstitutionally dilute the voting power of voters in those counties by pairing those voters with voters in counties with whom they have little in common. Franklin County is part of Central Kentucky and shares geographic, economic, and social bonds with its neighbors in Central Kentucky. The new First District will likely be dominated by regions in Western Kentucky that have little in common with voters in Franklin County, who justifiably feel they have been disenfranchised by SB 3. (VR 4/6/22, 4:45:15 – 4:46:36).

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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)).

This distortion of voting power will insulate representatives elected from districts created by HB 2 and SB 3 from the popular will and remove all incentives to respond to Democratic portions of their constituencies. *See Reynolds*, 377 U.S. at 565 ("Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsible to the popular will."). When a district is created solely to effectuate the interests of one group, the elected official from that district is "more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *See Shaw v. Reno*, 509 U.S. 630, 648 (1993) (in the context of racial gerrymandering). As such, HB 2 and SB 3 have the effect of depriving Democratic voters of equal voting power.

Because Plaintiffs have made 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 assert that the General Assembly—and more specifically, its Republican supermajority—can go as far as it wants in favoring one party over another.

C. HB 2 and SB 3's Partisan Gerrymandering Violates the Kentucky Constitution's Freedom of Speech and Freedom of Assembly Clauses.

Section 1 of the Kentucky Constitution provides that all Kentuckians shall have the inalienable rights of "freely communicating their thoughts and opinions" and "assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance . . .." Ky. Const. § 1(4) & (6).

Voting for the candidate of one's choice and associating with the political party of one's choice are core means of political expression protected by Kentucky's freedom of speech and assembly clauses. *See Associated Industries of Kentucky v. Commonwealth*, 912 S.W.2d 947, 952 (Ky. 1995) (Section 1 of Kentucky's Constitution is "designed to protect the rights of citizens in a democratic society to participate in the political process of self-government."). Voting provides citizens a direct means of expressing support for a candidate and his views. *See Buckley v. Valeo*, 424 U.S. 1, 21 (1976). Indeed, "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders"—including, of course, the right to "vote." *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014) (plurality op.). Because HB 2 and SB 3 burden constitutionally protected expression and association, they are subject to strict scrutiny. *Associated Indus. of Kentucky v. Com.*, 912 S.W.2d 947, 952 (Ky. 1995).

As the North Carolina Supreme Court recently held, "[p]artisan gerrymandering violates the freedoms of speech and association and undermines their role in our democratic system." *Harper*, 868 S.E.2d. at 545-546. Partisan gerrymandering "penalize[s] people for the exercise of their protected rights." *Id.* at 546. "When legislators apportion district lines in a way that dilutes the influence of certain voters based on their prior political expression—their partisan affiliation

and their voting history—it imposes a burden on a right or benefit, here the fundamental right to equal voting power on the basis of their views." *Id.*

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.* It is "axiomatic," however, that the government may not infringe on protected activity based on an individual's viewpoint. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

Viewpoint discrimination is most insidious where, as here, the targeted speech is political. *Citizens United v. FEC*, 558 U.S. 310, 340-41 (2010). The government may not burden the "speech of some elements of our society in order to enhance the relative voice of others" in electing officials. *McCutcheon*, 572 U.S. at 207. After all, "[i]f a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books." *Board of Education v. Pico*, 457 U.S. 853, 870 (1982).

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. They analyzed the voting histories of every precinct in Kentucky, identified precincts that favor Democratic candidates, and then singled out the voters in

those precincts for disfavored treatment by packing and cracking them into districts with the aim of diluting their votes ensuring they will never elect a majority. That is textbook viewpoint discrimination.

The fact that Democratic voters can still cast ballots under gerrymandered maps changes nothing. The government unconstitutionally burdens speech where it renders disfavored speech less effective, even if it does not ban such speech outright. *See Common Cause v. Lewis*, 2019 WL 4569584, at *121. "It is thus no answer to say that petitioners can still be 'seen and heard"' if the burdens placed on their speech "have effectively stifled petitioners' message." *McCullen v. Coakley*, 573 U.S. 464, 489-90 (2014). The sorting of Plaintiffs and other Democratic voters because of their disfavored political views has burdened their speech by making their votes less effective. In other words, the packing and cracking reflected in HB 2 and SB 3 ensure that Democratic voters "do not have an equal opportunity to translate their votes into representation." *League of Women Voters*, 178 A.3d at 814.

D. HB 2 and SB 3's Partisan Gerrymandering Impermissibly Retaliates Against Voters Based on Their Exercise of Protected Speech.

HB 2 and SB 3 violate the freedom of speech and assembly clauses for an independent reason. In addition to forbidding discrimination, those clauses also bar retaliation based on protected speech and expression. 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).

In order to state a retaliation claim under the First Amendment a plaintiff must show that: "1) [s/he] engaged in constitutionally protected speech; 2) [s/he] was subjected to adverse action

or was deprived of some benefit; and 3) the protected speech was a 'substantial' or a 'motivating factor' in the adverse action." *Mendez v. University of Kentucky Bd. of Trustees*, 357 S.W.3d 534, 546 (Ky. Ct. App. 2011) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). Plaintiffs satisfy each of those elements here. HB 2 and SB 3 takes adverse action against Plaintiffs based on their constitutionally protected speech (*i.e.*, voting for Democratic candidates in past elections) by diluting the weight of their votes and adversely affecting their ability to associate effectively. 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").

III. HB 2 and SB 3 violate the Constitution's ban on arbitrary exercise of absolute 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. Both HB 2 and SB 3 violate this right to be free from arbitrary and absolute power by making the will of the voters of Kentucky subservient to the desire of the Republican supermajority to be re-elected, in perpetuity.

Perhaps the clearest violation of Section 2 can be seen in the shape of the 1st Congressional District—an irregularly shaped elongated district stretching from Fulton County on the Mississippi River to this Court's chambers. That District forces residents of Franklin County to 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). It also will sever important community ties built over the years between Frankfort's civic organizations and federal representatives who live near them. (VR 4/6/22, 4:46:35 – 4:50:02).

A legislative action is unconstitutionally arbitrary "if there is no rational connection between that action and the purpose for which the body's power to act exists." *City of Louisville*

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v. McDonald, 470 S.W.2d 173, 178 (Ky. 1971). The 1st District was not drawn in the bizarre snake-like shape created by SB 3 for any *legitimate*—or even rational—state purpose. Even the state's own expert on Kentucky politics testified that, in the simulations he ran, there was no need to put Franklin County in the 1st District even if the legislature wanted to keep the core of the existing 2nd District intact. (VR 4/7/22, 4:53:15 – 4:53:23).

The mapmakers sacrificed the residents of Franklin, Washington, and half of Anderson County to draw a winding district that meanders, snake-like, for nearly 400 miles across the state. Whatever the reason, the result is pure arbitrariness, made possible only by the absolute control one party wielded over the redistricting process. Fortunately, the Constitution empowers citizens to stand up and challenge such acts.

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

"[I]ndisputably, the courts do have and have readily exercised the enormous power of the injunction in suits alleging the unconstitutionality of legislative acts." *Beshear v. Haydon Bridge Co.*, 416 S.W.3d 280, 298 (Ky. 2013). Thus, should the Court conclude that HB 2 and/or SB 3 is unconstitutional, it should permanently enjoin the use of those maps in future election cycles. *See, e.g.*, *Fischer II*, 879 S.W.2d at 481 (declaring map unconstitutional under Section 33 and "remand[ing] to the trial court with directions to enter a declaratory judgment in conformity herewith and with directions to permanently enjoin the conduct of any election pursuant to the district boundaries set forth in KRS Chapter 5 after January 3, 1995"); *Stiglitz v. Schardien*, 239 Ky. 799 (1931) (affirming holding that unconstitutional maps are void and cannot be used in current election cycle); *Ragland*, 125 Ky. 141 (affirming holding that unconstitutional maps are void and cannot be used in future election cycles); *see also Commonwealth, Cabinet for Health & Family Services, ex rel. Meier v. Claycomb*, 566 S.W.3d 202, 206 (Ky. 2018) (affirming permanent injunction of statute that violated Section 14 of the Kentucky Constitution).

Permanently enjoining statutes declared unconstitutional after a merits hearing makes perfect sense. See CR 65.01. In such cases, there is no question that the plaintiff has shown a "probability of irreparable injury," *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978)[9]; after all, "[w]hen constitutional rights are threatened or impaired, irreparable injury is presumed." *Ohio State Conference of the Nat'l Ass'n for the Advancement of Colored People v. Husted*, 768 F.3d 524, 560 (6th Cir. 2014) (citations omitted). And Kentucky's highest court has long held that "[e]very citizen, taxpayer, and voter has an undoubted right to have the districts for representatives and senators created in accordance with the Constitution." *Stiglitz*, 40 S.W.2d at 317.

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

Finally, there is no question that "the equities are in favor of issuance" of a permanent injunction. *Id.* The Commonwealth has no interest in enforcing an unconstitutional statute. *See Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 988 F.3d 329, 344 (6th Cir. 2021) ("As for the final factor—the public interest—it should go without saying that the public has no interest in the enforcement of an unconstitutional law."); *EMW Women's Surgical Ctr. v. Meier*, 373 F. Supp. 3d 807, 826 (W.D. Ky. 2019) ("Finally, as to the public interest, it is well-established that the public has no interest in the enforcement of an unconstitutional law."). Thus, upon a finding that HB 2 and/or SB 3 is unconstitutional, a permanent injunction is warranted.

[9] Although *Maupin* is frequently cited for the standard for a temporary injunction, that opinion made clear it was tracing the relevant factors back to cases that "dealt with permanent injunctive relief," because "the reasoning of those cases is equally applicable to temporary injunctive relief." *Maupin*, 575 S.W.2d at 698.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 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/ *Casey L. Hinkle*
Counsel for Plaintiffs