Kentucky Supreme Court

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

DERRICK GRAHAM, *et al.* — *Appellants*

v. On Appeal from
Franklin Circuit Court, No. 21-CI-2234

SECRETARY OF STATE MICHAEL ADAMS, *et al.* — *Appellees*

AMICUS CURIAE BRIEF OF SPEAKER OF THE HOUSE DAVID W. OSBORNE AND SENATE PRESIDENT ROBERT STIVERS

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CERTIFICATE OF SERVICE

In accordance with RAP 30(B), on July 11, 2023, the undersigned filed this brief with the Court's electronic filing system which caused a copy to be served on all counsel of record. The undersigned also served copies of the brief via U.S. Mail on (1) Hon. Thomas Wingate, Franklin Circuit Court, 222 St. Clair St., Frankfort, KY 40601; (2) Victor Maddox, Heather Becker, Alex Magera, Aaron Silletto, Office of Attorney General, 700 Capital Avenue, Suite 118, Frankfort, KY 40601; (3) Taylor Brown, Kentucky State Board of Elections, 140 Walnut Street, Frankfort, KY 40601; (4) Jennifer Scutchfield, Office of the Secretary of State, 700 Capital Avenue, Suite 152, Frankfort, KY 40601; and (5)Michael Abate, Casey Hinkle, Rick Adams, Kaplan Johnson Abate & Bird LLP, 710 W. Main Street, 4th Floor, Louisville, KY 40202. Undersigned counsel further certifies that the appellate record was not removed from the Franklin Circuit Clerk.

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STATEMENT OF PURPOSE AND ISSUES PRESENTED

The purpose of the Speaker Osborne and President Stivers is to impress on the Court that redistricting is neither an optional nor an easy task, and that the discretion that the General Assembly has in performing it is actually quite limited. The brief will address the following:

1. The General Assembly has the authority as Kentucky's legislature to prescribe the "Times, Places, and Manner of holding elections" under Article I, § 4, cl. 1 of the U.S. Constitution, and have both the obligation and authority to "redistrict the State" every ten years as required by Section 33 of the Kentucky Constitution.
2. The General Assembly scrupulously adhered to this Court's precedents interpreting Section 33's requirements for reapportioning legislative districts.
3. No fair reading of Section 6 of the Constitution could reveal a prohibition on the consideration of political concerns in drawing redistricting maps. To add this new criterion would make the task all but impossible.
4. The General Assembly did not improperly serve political interests in HB 2 or SB 3.

INTRODUCTION

Appellants' new-found aversion to partisan gerrymandering is not a reaction to partisan politics; rather, it is itself a naked exercise in partisan politics, attempting to co-opt the judicial branch into preserving the political power the voters have denied them. The Constitution has not regulated the use of political considerations in reapportionment for this Commonwealth over at least the last 132 years, but the argument has become fashionable now precisely because the partisan makeup of state legislature has shifted. Suddenly, venerable constitutional provisions are read to contain prohibitions against the use of political party affiliation in redistricting. Appellants offer no evidence of partisan *intent* and scant little "evidence" – all of it in the form of novel statistical models - of partisan *effect* in the drawing of these maps. The General Assembly and its new majority, undertaking the responsibility for the first time, scrupulously adhered to this Court's precedents interpreting Section 33's requirements for reapportioning legislative districts.

Both the United States Constitution and the Kentucky Constitution assign the redistricting power to the state legislatures – which are, of course, political bodies. While redistricting has long been the subject of criticism, courts have respected the legislature's role and, other than with enumerated constitutional criteria and statutes forbidding racial discrimination, refrained from entering this political arena. As the partisan makeup of many state legislatures shifted in the last 15 years, however, the courts have suddenly become the battlefield on which

these political battles are waged. But both precedent and common sense dictate that courts should maintain their respect for the legislature's role in the redistricting process.

Appellants argue that "[s]ince *Rucho*,[1] many states have cited their own constitutions as a basis to prohibit partisan gerrymandering." That may be true, but with the egregious exception of Pennsylvania, those courts have cited modern *constitutional amendments* to those state constitutions that have explicitly regulated the use of partisan affiliation in redistricting. *Infra*, p. 5, n. 4. Appellants ask this Court, however, to discover a prohibition on excessive partisanship hidden somewhere in the words "free"and "equal." In the stark absence of any textual support in the Constitution, Appellants seek to substitute the political judgments of Appellants, or judges, for curtail the judgment and discretion of the legislative branch..

The goal of the Legislative *Amici* is to impress on the Court that redistricting is neither an optional nor an easy task, and the discretion that the General Assembly has in performing it is actually quite limited. After taking into account the redistricting criteria that actually do exist in the text of the law - equal population, county integrity, contiguity, etc. – it is difficult to accommodate any other considerations, partisan or otherwise. The movement of one precinct in Nelson County can reverberate to Pike County, implicating what counties must be

[1] *Rucho v. Common Cause*, 588 U.S. ___, 139 S. Ct. 2484 (2019).

split and how, and which incumbents are unavoidably paired. It is monumentally difficult to draw maps respecting all of these criteria, and then craft and pass legislation in time to avoid conducting an election under maps that reflect old Census data and are definitionally unconstitutional.

Given the numerous criteria the General Assembly is required to follow, if the Court allows Appellants to invent a new and amorphous criterion– a criterion this Court and its predecessor have rejected - it may be that compliant maps could only be drawn by computers and algorithms, if at all. "Nor is the goal of fair and effective representation furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands...." *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973). That is not, however, what our Constitution demands. It demands that the *General Assembly* draw the maps, entrusting the process to legislative discretion rather than algorithms or machines.

Appellants can employ all imaginable statistical machinations, but cannot overcome the fact that voters elected Republicans to 75 out of 100 seats in the state House under maps drawn by and for Democrats. It being inconceivable that the current majority would not have gained seats even under a perfectly neutral map, the increase from 75 to 80 seats is weak evidence at best of partisan effect, much less "extreme" partisan effect. Appellants furthermore have presented this Court with no evidence of partisan intent to justify intrusion into a prerogative constitutionally assigned to the General Assembly. This Court should appreciate

the General Assembly's good-faith and well-executed adherence to its precedent, and decline Appellants' invitation.

ARGUMENT

I. THE CONSTITUTION GIVES DISCRETION TO THE GENERAL ASSEMBLY IN REDISTRICTING

"State legislatures are the tried-and-true redistricting entity. Given the power to redistrict by the U.S. Constitution, legislatures have held this responsibility since the nation's founding." Williams, Ben, Redistricting: It's All Over but the Suing, National Council of State Legislatures, September 15, 2022.[2] Kentucky's Constitution likewise entrusts redistricting solely to the General Assembly. "Section 33 assigns to the legislature the duty to reapportion itself." *Jensen v. Kentucky State Bd. of Elections*, 959 S.W.2d 771, 773 (Ky. 1997) (emphasis added). Ky. Section 33 sets forth requirements that must be followed, but otherwise leaves the matter to the General Assembly's discretion. "Reapportionment of congressional districts in the State is a question vested in the discretion of the General Assembly and one with which courts are not concerned. ... except where the redistricting does violence to some provision of the Constitution or an Act of Congress. *Watts v. O'Connell*, 247 S.W.2d 531, 532 (Ky. 1952).

"It is also a textbook law that where legislative discretion is present, the judiciary will be reluctant to interfere... The separation of powers doctrine of the

[2] https://www.ncsl.org/state-legislatures-news/details/redistricting-its-all-over-but-the-suing

Kentucky Constitution underpins and buttresses these legal theories." *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 209 (Ky. 1989)(citations omitted). This is not to argue that the judicial branch has no role in review of redistricting acts, or that the General Assembly should be free of the restraints of the constitutional text. But there is a difference between what is perceived to be unfair and what is unconstitutional. See *Jensen at 776*. The courts' role is to ascertain whether a particular redistricting plan passes constitutional muster, not whether a better plan could be crafted. *See id.* After all, "[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney*, 412 U.S. at 753.

The General Assembly does not reapportion the legislative districts on a whim; rather, it does so because it is commanded to do so by two Constitutions. Those documents require that the maps be redrawn every ten years *by the legislature*. To that political branch of our state government was given the task of redistricting. Inherent in that charge is that politics will play a role (as it necessarily does with virtually every legislative process); nonetheless, the Framers put the obligation on the General Assembly rather than another branch of government.

A. POLITICAL CONSIDERATIONS ARE INHERENT IN REDISTRICTING

"Apportionment is primarily a political and legislative process." *Jensen*, 959 S.W.2d at 776 (citing *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973)). "To hold that legislators cannot take partisan interests into account when drawing district lines

would essentially countermand the Framers' decision to entrust districting to political entities." *Rucho* at 2501. Redistricting is a political process, and it must be remembered that "politics" is not a dirty word (other than when it is applied to institutions apolitical by design such as the court). Politics when applied to the legislature is, rather than a curse-word, the process by which policy is developed, consensus reached, compromise formed, and coalitions united in those with differing interests.

"[I]n addressing the constitutional restraints under which the Legislature acted in these matters, this Court must also be cognizant of the political considerations surrounding legislative decisions..." *State ex rel. Cooper v. Tennant*, 730 S.E.2d 368, 378 (2012), citing *Gaffney*, 412 U.S. at 753. As long as the districts comply with the constitutional requirements of contiguity, compactness, and equality of population... a court must respect the political determinations of the General Assembly...." *Pearson v. Koster*, 359 S.W.3d 35, 39–40 (Mo. 2012) (en banc).

B. KENTUCKY'S FREE AND EQUAL CLAUSE DOES NOT PROHIBIT THE GENERAL ASSEMBLY TAKING INTO ACCOUNT POLITICAL CONSIDERATIONS

Never has it been held that "All elections shall be free and equal" in Section 6 of the Kentucky Constitution prohibits political considerations in reapportionment. Section 6 does not mention redistricting, or political parties. Kentucky's highest court has answered the question of this clause's meaning:

"When the question arises, the *single inquiry* will be: Was the election free and equal, in the sense that no substantial number of persons entitled to vote and who offered to vote were denied the privilege?" *Wallbrecht v. Ingram*, 175 S.W. 1022, 1026-27 (Ky. 1915) (emphasis added). The *sole* inquiry is whether substantial numbers of eligible voters were denied the privilege. There is no inquiry regarding proportional political power, or even - under this clause - fairness in representation.

Those concerns were dealt with by the Framers in Section 33 of our Constitution, through requirements such as equal population, preservation of counties, and contiguity. Noticeably missing is any attempt to prohibit the consideration of party affiliation in redistricting. Any reading of Section 6 that encompasses political considerations in reapportionment would stray well beyond what the text can support. This Court is well aware of the perils of discovering new and major doctrines in simple phrases. As someone might say, 'the framers of our Constitution did not hide elephants in mouseholes.'"

The US Supreme Court declined to recognize a prohibition on use of political affiliation in redistricting. Though it found the issue to be non-justiciable, the *Rucho* Court addressed the distinction between the failure to find a prohibition on use of partisanship in the U.S. Constitution, and the Florida Supreme Court striking down a redistricting plan[3] under the Fair Districts Amendment to the

[3] *League of Women Voters of Florida v. Detzner*, 172 So.3d 363 (2015)

Florida Constitution. "The dissent wonders why we can't do the same.... The answer is that there is no 'Fair Districts Amendment' to the Federal Constitution." *Rucho* at 2507 . There is also no "Fair Districts Amendment" in the Kentucky Constitution – and this Court should not discover one.

Other states have considered similar language in their constitutions and came to the same result as the Kentucky courts– "free and equal" is not a prohibition on partisanship in redistricting or even "extreme" partisanship in redistricting. North Carolina so held quite recently:

> Based upon its plain meaning as confirmed by its history and by this Court's precedent, the free elections clause means a voter is deprived of a "free" election if (1) a law prevents a voter from voting according to one's judgment, or (2) the votes are not accurately counted. Thus, we hold that the meaning of the free elections clause, based on its plain language, historical context, and this Court's precedent, is that voters are free to vote according to their consciences without interference or intimidation. Appellants' partisan gerrymandering claims do not implicate this provision.

Harper v. Hall, 886 S.E.2d 393, 439 (N.C. 2023) (citations omitted); but see *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (finding, in the absence of a constitutional provision prohibiting partisan gerrymandering, such a prohibition in its "free and equal elections" clause.

II. ANY REMEDY FOR PARTISANSHIP IN REDISTRICTING MUST BE THROUGH LEGISLATION OR CONSTITUTIONAL AMENDMENT

With the exception of Pennsylvania, those courts (including those cited by Appellants) that have found a prohibition on partisan gerrymandering in their state constitutions have cited modern *constitutional amendments* that have prohibited partisan gerrymandering – not "free and equal" elections clauses.[4] Legislatures in some states lacking constitutional prohibitions have imposed limits upon themselves through statute. See, e.g., Iowa Code § 42.4(5) (2016); Del. Code Ann., Tit. xxix, § 804 (2017). If Kentuckians feel that partisanship in redistricting is a problem that needs to be remedied, they can demand of their elected representatives change in the form of statutory limitations or constitutional amendments. Numerous states have proved that those changes are achievable

[4] (Alaska Const. art. VI, §§ 6, 8, eff. 1/3/1999, Redistricting Board to avoid "partisan political influence on redistricting"); N.Y. Const. art. III, § 4 "Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties."); (Ohio Const. Art. XI, §6, eff. 1/1/2021 implementing independent redistricting commission prohibiting drawing districts "primarily to favor or disfavor a political party"); Fla. Const., Art. III, § 20(a), eff. adopted 2010("No …district shall be drawn with the intent to favor or disfavor a political party or an incumbent."); Mo. Const., Art. III, § 3 ("Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. 'Partisan fairness' means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency."); See Colo. Const., Art. V, §§ 44, 46; Mich. Const., Art. IV, § 6.

The world did not end because the now-minority controlled the redistricting process for decades. Voters continued to exercise the franchise, and their will was not frustrated due to partisan factors. The election that finally flipped House majority control was not questioned as being anything other than "free and equal."

This case represents a perfect opportunity for this Court to reaffirm the importance of the separation of powers, comity, and judicial restraint. That legislative redistricting could deprive the citizenry of free and equal elections was not contemplated since the adoption of our present Constitution until the current majority had its chance to draw the maps for the first time. The surest way for this Court to convince legislators and voters alike that redistricting is unfairly partisan would be to change the rules only now that, and only because, the other party is in charge. If Kentucky is to change its centuries-old tradition and its interpretations of Sections 6 and 33, it should do so through the policymaking process.

A. BROADENING SECTION 6 TO PROHIBIT POLITICAL CONSIDERATIONS IN REDISTRICTING EXCEEDS THE BOUNDS OF JUDICIAL REVIEW

The U.S. Supreme Court recently made clear that State courts should respect the authority of their state legislatures when interpreting election laws:

> [S]tate courts do not have free rein. ...[T]the Elections Clause expressly vests power to carry out its provisions in "the Legislature" of each State, a deliberate choice that this Court must respect. As in other areas

> where the exercise of federal authority or the vindication of federal rights implicates questions of state law, we have an obligation to ensure that state court interpretations of that law do not evade federal law.

Id. The Court recalled that Chief Justice Rehnquist declined to give effect to interpretations of Florida election laws by the Florida Supreme Court that "impermissibly distorted them beyond what a fair reading required," noted "areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law." *Id.*, quoting *Bush v. Gore*, 531 U.S. 98, 114 (2000) (Rehnquist, J., joined by Thomas and Scalia, JJ., concurring). Applying that standard, Kavanaugh wrote that in reviewing state court interpretations of state law, federal courts "necessarily must examine the law of the State as it existed prior to the action of the [state] court." Moore v. Harper, 600 U.S. ___, No. 21-1271 (June 27, 2023) (Kavanaugh, J., concurring) , p .3)

One would have to think that the *Moore* Court's admonition against "transgressing the traditional bounds of judicial review" is pointed directly at the Pennsylvania Supreme Court's decision in *League of Women Voters v.Commonwealth*, supra. From a guarantee that elections be "free" and "equal," the Pennsylvania Supreme Court inferred detailed requirements that districts be compact and contiguous and not divide any county or city except where necessary to ensure equality of population. It also inferred a statewide proportionality requirement for congressional districts. The Court then disregarded all of the

proposed redistricting plans and enacted its own plan instead. The Pennsylvania court brazenly substituted what it saw as a partisan *legislative* redistricting for partisan *judicial* redistricting.

It is important to note that Kentucky Constitution Section 33 explicitly includes those criteria (contiguity, county integrity, equal population) that the Pennsylvania Constitution did not – belying Appellants' argument that Kentucky's Section 6 was modeled on the Pennsylvania constitution. Kentucky's Framers not only recognized that these criteria could not be inferred from Section 6, they also recognized that these criteria would provide the necessary check on the excessive use of political considerations in drawing the districts.

To read a prohibition into Kentucky's §6, this Court would have to disregard its precedent, ascribe a novel meaning to clear words, impose by judicial fiat what other states have done by constitutional amendment, disregard the robust separation of powers, and abandon any deference to the General Assembly's right as a co-equal branch of government. Such a dramatic course may well "transgress the ordinary bounds of judicial review such that [state courts] arrogate to themselves the power vested in state legislatures to regulate federal elections." *Moore v. Harper*, No. 21-1271, 2023 WL 4187750, at *15 (U.S. June 27, 2023). This Court should not follow Pennsylvania's example. Section 6 cannot fairly be read to prohibit political considerations in reapportionment. This court must respect section 33's delegation of the redistricting process to the General Assembly.

III. NEITHER HOUSE BILL 2 NOR SENATE BILL 3 ARE EXCESSIVELY PARTISAN

A. THE GENERAL ASSEMBLY ASSIDUOUSLY FOLLOWED ALL REQUIREMENTS SET FORTH IN DECISIONS OF THIS COURT

To prevail, Appellants must remove any doubt that "free and equal" elections means that "extreme" partisan maps are unconstitutional - and also prove that the maps are in fact extremely partisan beyond whatever after-the-fact standard the Court adopts. Appellants can do neither. "In considering the constitutionality of a legislative enactment, such as a redistricting plan, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative, and executive branches. A court must apply every reasonable construction in order to sustain the enactment's constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the enactment. *State ex rel. Cooper v. Tennant*, 730 S.E.2d 368, 376 (2012) (declining to recognize a prohibition on partisan gerrymandering). This wisdom from our neighboring state has also long guided Kentucky courts: "The Court is bound to resolve "any doubt in favor of constitutionality rather than unconstitutionality." *Teco/Perry Cty. Coal v. Feltner*, 582 S.W.3d 42, 45 (Ky. 2019) (citations omitted).

The General Assembly drew the maps in accordance with this Court's holdings on the constitutional requirements. There is no showing that the General Assembly subordinated the considerations of equal population or maintaining counties to other concerns. When the Constitution mandates a goal for the General Assembly, "[i]t is their decision how best to achieve" that goal. The courts "only

decide the nature of the constitutional mandate." *Rose* at 212. In numerous decisions, this Court and its predecessor have set forth the criteria that the Constitution demands of the legislature in crafting redistricting legislation. The districts drawn came within the population deviations of *Fischer II*, and the maps split the fewest number of counties possible to be split as required by *Jensen*. As the Trial Court stated:"Turning back to *Jensen*, the Kentucky Supreme Court specifically held that the General Assembly is not constitutionally prohibited from dividing the minimum number of counties multiple times. 959 S.W.2d at 776." See Opinion and Order, pp. 48-49 (R. 1879-1880). The districts are furthermore contiguous, and comply with the Voting Rights Act.

This was not an easy accomplishment, particularly given that no one in the now-majority party had ever previously been in the majority when maps were drawn. This Court has recognized the evolving difficulty of reapportionment. "[W]hat we thought was scarcely conceivable *has been proven to be unavoidable*...No one now suggests that any redistricting plan could be drafted without some such multiple divisions." *Jensen at 776.* (emphasis added). It should not be too much to hope that this Court would appreciate and respect the copious work the General Assembly did to comply with the Court's mandates. The Court should not add - after the fact - another, higher hurdle for the General Assembly to overcome. The Court should not, when other states have done so by constitutional amendments and legislation, inject a new judicial criterion into the redistricting process.

B. THERE IS NO EVIDENCE OF INTENT TO DISCRIMINATE ON THE BASIS OF PARTY AFFILIATION

The General Assembly is left to wonder what standard of proof it is to anticipate in trying to draw maps that comply with the constitutional mandates and also how to prove a negative - the absence of excessive partisanship. Is the standard of proof intent of partisan discrimination, or actual discriminatory result?

As proof of an alleged intent to achieve an "extreme" result, Appellants rely upon a tweet from a *former* legislator who was not involved to any degree in drawing the current maps and had never gone through redistricting as a member of the majority party. The former Speaker congratulated his longtime staffer and friend on successfully navigating a complex process - from which Appellants want this court to infer intent in the minds of 75 legislators to disadvantage the minority such that the elections were not "free and equal." Setting aside the well-known canons of statutory interpretation prohibiting the inference of legislative intent from remarks by *current* legislators, this tweet is by no means competent evidence of an improper intent on the part of the General Assembly.

C. STATISTICAL MODELS ARE WEAK EVIDENCE AT BEST OF A PARTISAN OUTCOME FROM REDISTRICTING

Appellants complain that the 80 seat supermajority must have been the result of an "extreme" partisan gerrymander. They ignore the fact that in 2022, 75

Republicans were elected under the old maps drawn by Democrats. The 2013 maps had been so gerrymandered that any fair revision would have improved the map for the now-majority party. They had drawn HD 67 *through the river* to pick up more of their "contiguous" voters. It is to expected that when those advantages disappear, even under maps drawn by the most neutral and dispassionate arbiter the previously disadvantaged party would gain seats.

To justify creating a new criterion making the redistricting process even more complex, and leaving even less of the historical and traditional discretion for the General Assembly, at the very least the Court should be faced with some novel and outrageous beyond-the-pale conduct on the part of the General Assembly. That did not, however, happen.

The trend was overwhelmingly for the new majority well before HB 2 and SB 3. Appellants saw their entrenched majorities slowly begin to erode in a pattern that accelerated in 2016 resulting into massive gains in voter support and legislative representation for the Republican Party. The Democratic majority in the state House had tried to stave off this political migration with the redistricting maps they drew in 2013, but clearly failed. Even the tardily proposed 2022 House minority map, HB 191, resulted in additional majority--favoring districts.

Elections conducted under the 2013 House map took Republicans from a 46-seat minority to a 75-seat super majority. That was <u>not</u> the result of 2022 redistricting. They gained 18 seats in 2016, 14 seats in 2020, and 5 seats in 2022. One might even conclude that through their own partisan gerrymandering the

minority put more seats at risk in attempting to preserve their former majority. It is impossible to deny that the historic and powerful partisan voting trend in Kentucky House elections predates the constitutionally mandated redistricting.

Appellants' witnesses testified to the notion that their party having lost the majority in the House would dissuade candidates from wanting to run for office, and make it more difficult to get financial and volunteer support for candidates that do choose to run in certain districts. That testimony, however, neglects to consider other obvious factors. For instance the loss of the privileges of the majority, not only comforts such as seating and office assignments but also the ability to set policy, could easily account for that lack of enthusiasm – enthusiasm that had clearly been lacking on the part of the voters prior to HB 2 and SB 3. Somehow having maps drawn to preserve the Democrat majority did not dissuade GOP candidates from running and eventually winning the majority. It was a long and hard road. Many who languished long in the minority were no longer around to enjoy the benefits of being the majority. But they listened to Kentuckians, campaigned hard on the issues Kentuckians valued, and succeeded. They did not need to change the rules – they responded to and fought for their voters.

Appellants ask this Court to make a guess as how many districts should be affected. Without "extreme" partisan gerrymandering, would an acceptable gain be two seats, three seats, or four seats? "The 'central problem' is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is 'determining when political gerrymandering has gone too far.'" *Rucho*, quoting *Vieth v. Jubelirer*,

541 U.S. 267, 296 (plurality opinion). The inability to answer that question is the reason these cases are nonjusticiable in federal court under *Rucho*, and the reason this Court likewise should decline to open this new front in electoral "lawfare. There is no evidence of the "extreme" use of partisanship resulting from this legislation that cannot easily be attributed to other factors.

D. APPELLANTS' "WASTED VOTES" ANALYSIS WOULD ULTIMATELY MAKE OUR POLITICAL SYSTEM UNRECOGNIZABLE

In emphasizing so-called "wasted votes," Appellants are playing with fire, although they do not deign to say so. A "wasted vote," they say, is any vote "cast for a losing candidate." Brief of Appellants at 26. This reflects the idea that losing an election by 10,000 votes is no worse than losing by one. In fact, they might add that every vote for a *winning* candidate after the one vote he or she needs to win is also "wasted," in that winning an election by 10,000 votes is no better than winning by one. As the following analysis will demonstrate, however, Appellants' quest to avoid wasted votes would ultimately make our political system unrecognizable, not only to the founders, but also to us.

To be sure, one can devise a political system that avoids wasted votes. In fact, such systems are common, although not in the Anglo-American world. Proportional representation is routine in Europe, where people often vote for parties, rather than individuals. Thus, if 15% of voters vote for Party X, 15% of the seats in the legislature are held by members of Party X. No wasted votes.

Of course, this is not our system. Like the United Kingdom, our overwhelming tradition is "single-member districts" with "first-past-the-post elections." The meaning of a "single-member district" is fairly obvious. Meanwhile, a "first-past-the-post election" (the words are from horse racing) is one where the person with the most votes wins, even if he or she does not garner an actual majority. The virtue of combining single-member districts with first-past-the-post elections is that they virtually guarantee a two-party system, and thus virtually guarantee that one party will be able to form a majority and govern. This principle is well known. Also well known (because it constitutes the flip-side of this principle) is the fact that proportional representation is strongly correlated with a proliferation of minority parties and the need to form coalitions, a common pathology on the Continent and a virtually unknown one in the United States. As the political scientist Bruce Cain has noted, "[o]ne of the strongest arguments for a geographically based, simple plurality system such as the one in the U.S. is that by preventing the proliferation of small parties, it increases the strength of the winning party." Bruce E. Cain, The Reapportionment Puzzle 50 (1984). As for continental systems, he had the following to say:

> Proportional representation (PR) systems, by contrast, give each group above a certain threshold size its share of seats. This tends to cause the number of parties in the political system to proliferate and

> to give extreme groups a public forum. *Governments in PR systems tend to be coalitional, because no one party has enough seats to form a legislative majority by itself.*

Id. (emphasis added). Thus, in advocating against "wasted votes," Appellants are questioning the fabric of our political system.

Appellants might object that they do not oppose single-member districts or first-past-the-post elections, but they could only reach that position by making the untenable claim that the Constitution somehow enshrines the right of the Democratic and Republican Parties to exist as political institutions. This is obviously not true. Otherwise, we would still be voting for Federalists and Democrat-Republicans. Over time, people change their affiliations. Parties are fired. Parties split. New parties emerge. This is the longitudinal cycle of our system. If Appellants were to argue that only *their* wasted votes matter, or only the wasted votes of Democrats and Republicans matter, they would necessarily be denigrating people who do not affiliate with a party, or who would happily join a new party if one were to emerge. Our political tradition abhors this notion. Notably, the last member of the Supreme Court of the United States who actually ran for and served in a state legislature, Justice O'Connor, recognized this:

> If members of the major political parties are protected by the Equal Protection Clause from dilution of their voting strength, then members of every identifiable group that possesses distinctive interests and tends to vote on the basis of those interests should be able to bring similar claims. Federal courts will have no alternative but to attempt to recreate the complex process of legislative apportionment in the context of adversary litigation in order to reconcile the competing claims of political, religious, ethnic, racial, occupational, and socioeconomic groups. Even if there were some way of limiting such claims to organized political parties, the fact remains that the losing party or the losing group of legislators in every reapportionment will now be invited to fight the battle anew in federal court.

Davis v. Bandemer, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment).[5] As a matter of practical, common sense, therefore, this Court should stand by its previous determination that claims of partisan redistricting are simply not actionable under our Constitution.

[5]Justice O'Connor even served as Majority Leader in the Arizona State Senate.

CONCLUSION

Constitution §33 commands *the legislature* to reapportion every decade. This Court has recognized in past decisions the difficulty of reapportioning in modern Kentucky. The question in this case is not whether the General Assembly drew the best or fairest maps possible; rather, it is whether the Constitution demands fealty to a requirement never before contemplated in its meaning. This Court should not assume, in the absence of any evidence, any bad-faith intent on the part of the institution of the General Assembly, which complied with every requirement this court has found that the Constitution demands. Those criteria forced difficult choices, some favoring the majority and some favoring the minority. Those hard choices are both the right and the obligation of the institution of the General Assembly as established in our Constitution, no matter which political party has an advantage.

WORD COUNT CERTIFICATE

This document complies with the word limit of RAP 31(G)(2)(c) because, excluding the parts of the document exempted by RAP 15(D) and 31(G)(5), this document contains [5,231] words.

/s/ D. Eric Lycan