No. 2022-SC-0522

In the Kentucky Supreme Court

DERRICK GRAHAM, JILL ROBINSON, MARY LYNN COLLINS, KATIMA SMITH-WILLIS, JOSEPH SMITH, and THE KENTUCKY DEMOCRATIC PARTY,

Plaintiffs-Appellants,

v.

MICHAEL ADAMS, in his official capacity as Secretary of State, and THE KENTUCKY STATE BOARD OF ELECTIONS,

Defendants-Appellees.

APPEAL FROM FRANKLIN CIRCUIT
COURT CASE NO. 22-CI-0047

BRIEF OF *AMICUS CURIAE* CAMPAIGN LEGAL CENTER IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CERTIFICATE OF SERVICE

In accordance with RAP 30(B), on July 11, 2023, the undersigned filed a brief with the Court's electronic filing system which caused a copy to be served on all counsel of record. An amended brief correcting the certificate of service was filed with the Court by the undersigned on July 13, 2023. The undersigned also served copies of this brief via email or U.S. mail on July 13, 2023 on the following:

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STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION AND INTEREST OF *AMICUS*

Amicus curiae Campaign Legal Center ("CLC") is a nonpartisan, nonprofit organization dedicated to advancing democracy through law. CLC has litigated numerous redistricting cases, including *Gill v. Whitford*, 138 S. Ct. 1916 (2018), and *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). CLC also has expertise in state constitutional partisan gerrymandering cases, serving as lead counsel in Utah and Kansas and filing *amicus* briefs in New Hampshire, New York, Maryland, Ohio, and North Carolina. *See LWV of Utah v. Utah Legislature*, No. 220901712 (Utah 3d Dist. Ct. Nov. 22, 2022), tinyurl.com/9pd8ktnt; *Rivera v. Schwab*, 512 P.3d 168 (Kan. 2022).

CLC draws on this expertise and perspective from across various states to discuss the application of Kentucky's Free Elections Clause in this case and the justiciability of partisan gerrymandering claims.

ARGUMENT

I. Partisan Gerrymandering Violates the Free Elections Clause.

Kentucky's Free Elections Clause broadly requires that "[a]ll elections shall be free and equal." Ky. Const. § 6. This protection of Kentucky's electoral process extends beyond just interference with casting a ballot, contrary to the circuit court's misunderstanding. R.1883. Text, precedent, history, and persuasive sister state caselaw all support the conclusion that the Free Elections Clause seeks to prevent government manipulation of the electoral process inherent in partisan gerrymandering.

A. The Free Elections Clause's text bars partisan gerrymandering.

The text of the Free Elections Clause prohibits partisan gerrymanders. An election is not "free" when its results are predetermined by manipulated district lines, nor is it "equal" when gerrymandering artificially diminishes the electoral strength of certain voters and amplifies the influence of others.

The original public meaning of the Clause's key terms supports this conclusion. At Kentucky's founding, Samuel Johnson's authoritative dictionary defined "free" as "[i]nvested with franchises; possessing any thing without vassalage; admitted to the privileges of any body" and "[n]ot bound by fate; not necessitated." Samuel Johnson, A Dictionary of the English Language (10th ed. 1792), tinyurl.com/2k96ypyw. Partisan gerrymandering violates this original meaning. It divests certain voters of a meaningful franchise, subordinating their electoral power to a state of vassalage to a political party in control of the redistricting process that gerrymanders to dictate election results.

This same essential meaning of "free" carried to Kentucky's 1890-91 Constitutional Convention. Around that time, "free" was defined as "[u]nconstrained; having power to follow the dictates of his own will;" and "[n]ot despotic; assuring liberty; defending individual rights against encroachment by any person or class; instituted by a free people; said of governments, institutions, etc." Black's Law Dictionary (1st ed. 1891). Other definitions included "determining ones' own course of action; not dependent; at liberty" and "[n]ot under an arbitrary or despotic government; ... enjoying political liberty." Webster's Complete Dictionary of the English Language (1886).

Additionally, "equal" was understood to mean "[i]n just proportion," and "[i]mpartial; neutral." Johnson, *supra* (1792). And, as pertinent here, it was defined as "not unduly inclining to either side; dictated or characterized by fairness; unbiased." Webster's, *supra* (1886). "Free" was also understood to contain an inherent equality component, meaning "[o]pen to all citizens alike" and in which voters equally "[e]njoy[] full civic rights." William C. Anderson, A Dictionary of Law (1889); Black's, *supra* (1891). Accordingly, free and equal are intrinsically linked terms as used in the Free Elections Clause, establishing core equality and anti-manipulation principles. *See LWV of Pa. v. Commonwealth* ("*LWVPA*"), 178 A.3d 737, 802-18, 825 (Pa. 2018) (applying identical Pennsylvania provision as an intertwined term). Other decisions, including in this Court, have likewise indicated that free elections must be equal, and vice versa. *Ragland v. Anderson*, 100 S.W. 865, 869-70 (Ky. 1907); *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).

The use of "elections" also reinforces that the Clause protects the whole electoral process, not just interference with casting ballots. Elections have long been defined to entail the full "process in which people vote to choose a person ... to hold an official position" and the "process of electing." *LWV of Utah*, No. 220901712 at 27 (collecting dictionaries). And courts have reinforced that "elections" include the complete "system of choosing or electing officers." *State v. Hirsch*, 24 N.E. 1062, 1063 (Ind. 1890); *accord Speed v. Crawford*, 60 Ky. 207, 211 (1860) (examining meaning of "election").

With these meanings, the constitutional command that "elections shall be free and equal" requires that the complete *electoral process*, including but not limited to casting a ballot, is "characterized by fairness" to reach "unbiased" results through the voters' "power to follow the dictates of [their] own will" rather than the manipulations of an "arbitrary or despotic government" power. Partisan gerrymandering is the antithesis of these guarantees.

Intratextual analysis further confirms that the Free Elections Clause extends beyond interference with casting ballots. For instance, Section 145 of the Constitution already guarantees the right to vote by providing that Kentuckians who meet certain qualifications "shall be a voter." Ky. Const. § 145. Other provisions then protect voters from interference with their casting a ballot. *Id.* §§ 149 (privilege from arrest), 150 (protection against coercion). The Free Elections Clause must mean something more—it was designed to also prevent the type of anti-democratic perversion of the electoral process inherent in partisan gerrymandering.

B. Precedent supports broadly applying the Free Elections Clause.

This Court's precedent further supports that the Free Elections Clause guards against government distortions of the electoral process, not only interference with voting. The Court long ago set the Clause's foundation in *Wallbrecht v. Ingraham*, recognizing its critical role in achieving "the very purpose of elections ... 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." 175 S.W. 1022, 1026 (Ky. 1915). It further reinforced that the provision prevents "conditions, *from whatever*

cause they arose, that prevent[] the free and equal expression of the will of the people." *Id.* at 1027 (emphasis added).

Since *Wallbrecht*, the Court has also reasoned that, *in addition to* protecting voters' equal "right to cast his ballot and have it honestly counted," the Free Elections Clause also ensures elections are "public and open to all qualified electors alike" and that "every voter has the same right as any other voter." *Queenan v. Russell*, 339 S.W.2d 475, 477 (Ky. 1960). The provision guarantees a fair electoral process in which Kentuckians' votes "when cast, shall have the same influence as that of any other voter" and that "[a]ll regulations of the election franchise ... must be reasonable, uniform and impartial." *Asher v. Arnett*, 132 S.W.2d 772, 776 (Ky. 1939) (citations omitted).

Accordingly, the Court has applied the Free Elections Clause to protect the electoral process even when "[t]here [was] no claim that physical violence was practiced at the election, or that any voter who was not in the ordinary sense a legal voter cast a ballot." *Burns v. Lockey*, 186 S.W. 909, 914 (Ky. 1916); *see also Ferguson v. Rohde*, 449 S.W.2d 758, 760 (Ky. 1970) (candidate ballot access); *Queenan*, 339 S.W.2d at 477 (disparate absentee voting opportunities). In *Skain v. Milward*, for example, the Court evaluated on the merits a claim that redistricting in Lexington, among other alleged election problems, violated the command that "elections must be free and equal." 127 S.W. 773, 775 (Ky. 1910). The Court did not question that the Free Elections Clause applied but instead rejected the claim in part because the

election officials "all appear to have tried to do their duty faithfully and impartially." *Id.*[1]

Beyond overlooking this precedent, the circuit court conflated how this Court has often applied the Free Elections Clause *in practice* (to prohibit restrictions on casting ballots) with the *principles* it establishes (barring distortions and inequalities in the electoral process). R.1885-87. But the Kentucky Constitution is "designedly broad, made so for the purpose of covering and meeting every condition that may arise ... to prevent the substantially fair and free expression of the will of the people." *Scholl v. Bell*, 102 S.W. 248, 255 (Ky. 1907). Partisan gerrymandering violates this "core principle of republican government ... that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n* ("*AIRC*"), 576 U.S. 787, 824 (2015) (quotations omitted). As it did in the malapportionment context, the Court's task here is to apply the Constitution's principles to prevent a violation, regardless of whether it has previously done so. *Ragland*, 100 S.W at 868-70. The need for the judiciary to prohibit the manipulation of elections is equally urgent here as it was in that environment because partisan gerrymandering simply provides more sophisticated tactics to similarly "arbitrarily oppress[]" voters and "den[y them] equality of representation." *Id.* at 869-70.

[1] Additionally, in *Adams v. Bosworth*, the Court rejected a Free Elections Clause challenge concerning redistricting because of laches, without any suggestion that such claims are categorically beyond the Clause's protections. 102 S.W. 861, 862 (Ky. 1907).

C. History bolsters applying the Free Elections Clause against partisan gerrymandering.

The history of Free Elections Clauses in general—and Kentucky's in particular—confirms that the provision restrains partisan gerrymandering.

First, the context in which the original Free Elections Clause arose in seventeenth-century England informs its enduring meaning. At that time, parliamentary elections were corrupted to serve the Crown through the creation of "rotten boroughs," where politicians distorted electoral districts and their compositions to predetermine results. Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 Ala. L. Rev. 221, 256, 269 (2021); J. Jones, *The Revolution of 1688 in England* 35-36 (1972). In addition to using coercion and patronage to boost favored candidates, rotten boroughs were skewed to contain only voters guaranteed to support the King's party patrons, and often were devised with dramatically varying populations. Ross, *supra*, at 269; *Wesberry*, 376 U.S. at 14.

Predetermining elections through these practices was "striking proof of the decay in the representative system" at the time. William Carpenter, *The People's Book: Comprising their Chartered Rights and Practical Wrongs* 406 (1831), tinyurl.com/4suj98eu. During the Glorious Revolution, Englishmen sought to improve the system by enshrining, in familiar language, the guarantee that "Election of Members of Parliament ought to be free." Bill of Rights, 1688, 1 W. & M., c.2 (Eng.), tinyurl.com/yckkayw6. This provision was seen as a solution to stop the King's effort

to "manipulate the law" in his "campaign to pack Parliament" by ensuring an impartial electoral process. Jones, *supra*, at 318; *accord* Ross, *supra*, at 221-22, 289.

England's Free Elections Clause failed to be fully enforced at the time given ongoing local corruption and the Crown's continued broad, unilateral governmental authority. Jones, *supra*, at 326-31. But its core principles endured and regained prominence in early American history. Ross, *supra*, at 289. For example, Alexander Hamilton explicitly decried "the destruction of the right of free election" in England that was the result of parliamentary elections "stigmatized with the appellation of rotten boroughs" as "the true source of the corruption which has so long excited the severe animadversion of zealous politicians and patriots." 2 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 264 (J. Elliott ed., 1876), tinyurl.com/2z2fxrr8 ("*Debates*"). Numerous states—including Kentucky following Pennsylvania's model—acted to prevent similar electoral manipulation by adopting a Free Elections Clause in their initial charters and clarifying that "*all elections* shall be free and equal." Ky. Const. art. XII, § 5 (1792) (emphasis added).

By "transplant[ing]" this Free Elections Clause into the Kentucky Constitution, the Framers intended to "bring[] the old soil with it" by retaining the provision's historical meaning. *Stokeling v. United States*, 139 S. Ct. 544, 551 (2019); *accord Stivers v. Beshear*, 659 S.W.3d 313, 318 (Ky. 2022) (deriving constitutional meaning from English Bill of Rights origins). The democratic dysfunction of the rotten boroughs system is the historical cognate for modern-day partisan gerrymandering,

and the historical purpose of the Free Elections Clause to ensure an impartial electoral process reinforces its application to prevent gerrymandered maps today.

Second, the historical context in which the Free Elections Clause was reenacted in Kentucky's current Constitution also informs its meaning. *Posey v. Commonwealth*, 185 S.W.3d 170, 192 (Ky. 2006). The 1890-91 Convention arose at a time of great "[c]oncern for limiting the powers of the legislature." *Tabler v. Wallace*, 704 S.W.2d 179, 183 (Ky. 1985). The revised Constitution sought to reinforce structures to prevent legislative corruption and capture by special interests like railroad monopolies. *Zuckerman v. Bevin*, 565 S.W.3d 580, 589-92 (Ky. 2018). On this background, it would make little sense for Kentuckians to have devised a Constitution that gives the legislators they sought to restrain limitless authority to expand and retain their power through gerrymandering.

Third, while the circuit court heavily relied on statements from only two delegates to limit the Free Elections Clause, those isolated and defeated views are by no means dispositive. *See id.* at 591. The proper constitutional inquiry is to examine "how the words of the document would have been understood by a competent and reasonable speaker of the language at the time of the document's enactment." John McGinnis & Michael Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 Nw. U. L. Rev. 751, 761 (2009). The provision's plain text, its well-understood English origins, and the circumstances of its reenactment seeking to restrain legislators better illuminate its meaning rather than the often undetermined views of a handful of delegates.

Regardless, the circuit court misreads the 1890-91 Convention Debates, which instead support Appellants. Numerous delegates indicated that the Free Elections Clause protects the electoral process from manipulation beyond interference with voting. For example, Delegate Rodes expressed the prevailing view that the provision protects Kentuckians' core "political rights" by ensuring that "no one has [] superiority" in affecting the political process, which must be marked by "fairness" and "equality, just, and honorable dealing." Ky. Const. Debates, Vol. 1, at 438, 768-69. Other delegates stressed, in accord with the desire to protect the people's sovereignty against the influence of special interests, that the Free Elections Clause would ensure "power is inherent in the people" such that "all governments derive their just power from the consent of the governed." *Id.* at 764-66 (Delegate Rodes); *accord id.* at 496 (Delegate Allen reinforcing that the Clause upholds the social compact); *id.* at 452 (Delegate Pettit explaining the "sacred" provision prevented "corruption" of the electoral process).

Even the views of the delegates the circuit court relies on—Knott and McDermott—show that the Free Elections Clause, as it was reenacted, applies to prevent distortions and inequality in the political process. Delegate Knott explicitly tied the meaning of Kentucky's provision to its English origins, detailing the precursor efforts "to pack" parliament by skewing elections in "such boroughs as they saw proper" to "produc[e] as a natural consequence the grossest inequality of representation." *Id.* at 729-30. While Delegate Knott also recounts the "other ways" the King corrupted elections, such as "depriving large numbers of the elective

franchise who were entitled to it," he first emphasized the manipulation of boroughs as the concern that animated the original Free Elections Clause. *Id.* Additionally, Delegate McDermott's statements, central to the circuit court, were made in support of his proposed but rejected amendments that sought to further specify in the text that all "votes shall have equal weight." *Id.* at 946. The Convention rejected this additional verbiage because the term "free and equal" already contained this equal-weight rule but in "simpler" language providing "broader" protections. *Id.* (Delegate Burnham); *accord id.* at 750 (Delegate Hanks).

Overall, the Free Elections Clause history indicates that it is designed to reach beyond casting votes to prevent electoral manipulation and inequality, including from partisan gerrymandering.

D. Persuasive sister state decisions apply equivalent Free Elections Clauses to bar partisan gerrymandering.

Sister state caselaw supports applying the Free Elections Clauses to prohibit extreme partisan gerrymandering.

Because Kentucky largely copied its Bill of Rights from Pennsylvania, the Pennsylvania Supreme Court's interpretations of its antecedent Free Elections Clause are particularly instructive. *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 473 (Ky. 1998). In 2018, the *LWVPA* Court concluded that Pennsylvania's near-identical provision should be given "the broadest interpretation, one which governs all aspects of the electoral process" to guarantee that voters have "equally effective power to select the representative of his or her choice." 178 A.3d at 814. Analyzing text, history, precedent, and principles of judicial review, the *LWVPA* Court held that

an "election corrupted by extensive, sophisticated gerrymandering and partisan dilution of votes is not 'free and equal.'" *Id.* at 821. The Pennsylvania Supreme Court reinforced this analysis and holding in *Carter v. Chapman*, 270 A.3d 444, 462, 470 (Pa. 2022). These decisions provide strong support that Kentucky's provision—with the same text and history as Pennsylvania—also restrains partisan gerrymandering.

Moreover, decisions in Utah and Maryland that thoroughly evaluate those states' Free Elections Clauses also bolster the provision's application here. *See LWV of Utah*, No. 220901712 at 25-38; *Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194, *12-14, 46 (Md.Cir.Ct. Mar. 25, 2022).[2]

The outlier is the North Carolina Supreme Court's reversal of its recent precedent in *Harper v. Hall* ("*Harper III*"), 886 S.E.2d 393 (N.C. Apr. 28, 2023). *Harper III* arose from peculiar circumstances. After a change in partisan composition of the supreme court, the court overruled several of its recent election law decisions, including concerning partisan gerrymandering. *Id.* at 449-52 (Earls, J., dissenting). That reversed course gets the Free Elections Clause wrong. Without support, the *Harper III* majority equates the provision with the federal article I, section 4 Elections Clause and views the two in lockstep. *Id.* at 408 & n.6, 416. But, as the circuit court here correctly noted, § 6 "has no analogue in the federal Constitution, which signals it was crafted to ensure greater protection for Kentuckians." R.1883.

[2] An appeal is pending in *LWV of Utah*, with argument scheduled for July 11, 2023. The New Hampshire Supreme Court will also soon decide whether that State's Free Elections Clause applies to partisan gerrymandering. *Brown v. Scanlan*, No. 2022-0629 (N.H.) (argued May 11, 2023).

At any rate, the *Harper III* dissent has the better of the argument analyzing the constitutional language, rejecting the majority's "distorted picture of ... historical understanding," and correctly applying precedent. 886 S.E.2d at 456-59 (Earls., J., dissenting).[3]

In sum, text, precedent, history, and sister state cases all indicate that extreme partisan gerrymanders violate the Free Elections Clause.

II. Partisan Gerrymandering Claims Are Justiciable and the Court Intervening is Necessary to Correct the Dysfunction in the Democratic Process.

The trial court properly reached the merits because partisan gerrymandering claims are justiciable like any other redistricting case. The judiciary's role to protect the rights of citizens and ensure the proper functioning of Kentucky's democratic process is especially urgent here.

A. Precedent establishes this Court's jurisdiction.

While Kentucky law provides that redistricting is a legislative prerogative in the first instance, that does not obviate this Court's judicial review or obligation to uphold voters' rights by serving as the "final arbiter of the meaning of the Kentucky Constitution." *Commonwealth v. Reed*, 647 S.W.3d 237, 255 (Ky. 2022) (Minton, J.,

[3] For example, the *Harper III* court erroneously reasoned that the original Free Elections Clause's failure to immediately cure the rotten boroughs in England indicates it was not designed to do so. 886 S.E.2d at 437 & n.21. But lack of enforcement does not equate to lack of a right. If this reasoning were applied to the Fourteenth and Fifteenth Amendments, for example, one would conclude that the persistence of Jim Crow meant those amendments was not intended to eradicate racial discrimination in voting. That is not so. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 669 (1966) (courts "have never been confined to historic notions of equality").

concurring) (collecting cases). The Kentucky Constitution provides that "all laws ... contrary to this Constitution, shall be void." Ky. Const. § 26. And it is this Court's "imperative" and unflagging "duty" to uphold voters' rights against the manipulation of electoral districts. *Ragland*, 100 S.W. at 867. To leave unconstitutional partisan gerrymandering unremedied would "breach the social compact which binds us one to another." *Fischer v. State Bd. of Elections*, 879 S.W.2d 475, 475-76 (Ky. 1994).

Decades of precedent refute any justiciability challenge because "[a]ny doubt as to this Court's right and duty to review the constitutionality of legislative apportionment was long ago laid to rest." *Id.* at 476; *see also Legislative Rsch. Comm'n v. Fischer*, 366 S.W.3d 905, 919 (Ky. 2012); *Combs v. Matthews*, 364 S.W.2d 647, 648 (Ky. 1963); *Ragland*, 100 S.W. at 867. The Court has routinely upheld voters' rights against unlawful redistricting because "no matter how distasteful it may be for the judiciary to review the acts of a co-ordinate branch of the government," the Court's constitutional "duty ... is imperative." *Fischer*, 879 S.W.2d at 476 (quoting *Ragland*, 100 S.W. at 867).

Thus, the Court's task here is to apply its precedents and constitutional principles to "simply uphold[]" the judicial "duty faithfully to interpret the Kentucky Constitution." *Legislative Rsch. Comm'n*, 366 S.W.3d at 911. Kentuckians have a well-recognized "right to fair and effective representation," which means that "every citizen's vote carries the same voting power." *Id.* at 910. And when partisan gerrymandering is used to "arrange" the "electoral system ... in a manner that will consistently degrade a voter's or group of voters' influence on the political process as

a whole," the Court's role is to prevent such distortions. *Jensen v. State Bd. of Elections*, 959 S.W.2d 771, 776 (Ky. 1997) (citing *Davis v. Bandemer*, 478 U.S. 109, 131-33 (1986) (plurality)).

B. Persuasive authority favors exercising jurisdiction over partisan gerrymandering claims.

Federal courts have rerouted partisan gerrymandering cases to state courts to be litigated under state constitutions, which multiple courts have applied to prevent the manipulation of the electoral process. Although the U.S. Supreme Court in *Rucho* acknowledged that "[partisan] gerrymandering is 'incompatible with democratic principles,'" it ruled that federal Article III "case or controversy" constraints made the issue "beyond the reach of the *federal courts*." 139 S. Ct. at 2506-07 (quoting *AIRC*, 576 U.S. at 791) (emphasis added). But that decision interpreting Article III does not dictate this Court's justiciability determinations. *See Parker v. Commonwealth*, 440 S.W.3d 381, 388 (Ky. 2014); *Commonwealth v. Sexton*, 566 S.W.3d 185, 193 (Ky. 2018). Federal justiciability doctrines do not apply "even when [state courts] address issues of federal law"—much less when this Court addresses Kentucky's own Constitution. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989); *accord Sweezy v. Wyman*, 354 U.S. 234, 255 (1957) (same for separation-of-powers doctrines).

Indeed, the *Rucho* Court itself reassured that the unavailability of federal review "does not condone excessive partisan gerrymandering" or "condemn complaints about districting to echo into a void" because "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply."

139 S. Ct. at 2507. And the Court reinforced in a partisan gerrymandering case that "state legislature[s] may not create congressional districts independently of requirements imposed by the state constitution" and enforced through state judicial review. *Moore v. Harper*, No. 21-1271, 600 U.S. ___, slip op. at 18 (June 27, 2023) (quotations omitted).

Accordingly, numerous state courts have applied state constitutional provisions to derive judicially manageable partisan gerrymandering standards. In some states, courts have applied new citizen-initiated constitutional provisions to limit gerrymandering.[4] In other states, often those like Kentucky that lack robust citizen initiative opportunities, courts have barred gerrymandering by engaging in their time-tested role of applying broader constitutional mandates to specific contexts. *See, e.g., LWVPA*, 178 A.3d at 820.[5] Also, at the time of Kentucky's constitutional drafting, state courts in Wisconsin, Michigan, and Indiana exercised jurisdiction over redistricting disputes to prevent the legislature from drawing districts of unequal size and with boundaries designed for partisan ends because "[i]f the remedy for these great public wrongs cannot be found in this court, it exists

[4] *See Harkenrider v. Hochul*, 197 N.E.3d 437, 453-54 (N.Y. 2022); *LWV of Ohio v. Ohio Redistricting Comm'n*, 167 Ohio St. 3d 255, 288-93 (Ohio 2022); *Adams v. DeWine*, 167 Ohio St. 3d 499, 510-20 (Ohio 2022); *LWV of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015); *In re Colo. Indep. Legislative Redistricting Comm'n*, 513 P.3d 352, 355 (Colo. 2021).

[5] *See* Order at 2-3, *Grisham v. Republican Party of New Mexico*, No. S-1-SC-39481 (N.M. July 5, 2023), tinyurl.com/yxc5vypz (opinion forthcoming); *Matter of 2021 Redistricting Cases*, 528 P.3d 40, 92-94 (Alaska 2023); *LWV of Utah*, No. 220901712 at 10-20; *Szeliga*, 2022 WL 2132194, at *45-46.

nowhere." *Attorney Gen. v. Cunningham*, 51 N.W. 724, 729-30 (Wis. 1892); *id.* at 735-37 (Pinney, J., concurring).[6]

Again, the North Carolina Supreme Court's reversal in *Harper III* is a distinguishable outlier. North Carolina has a distinct redistricting history that does not match up with Kentucky's history, where this Court has repeatedly upheld Kentuckians' rights against unlawful redistricting. *Cf. Harper III*, 886 S.E.2d at 418-19. Unlike Kentucky, North Carolina's Constitution also exempts redistricting from the regular lawmaking process by explicitly barring gubernatorial veto. *Id.* And, unlike here, North Carolina statutes purport to limit judicial review. *Id.* at 419-20. Regardless, the *Harper III* dissent is more persuasive in establishing the propriety of exercising judicial review over redistricting disputes. *Id.* at 463-66, 472-75 (Earls, J., dissenting).

C. Judicial review is key to safeguarding the democratic process.

Judicial review in this area is critical. Extreme partisan gerrymandering affronts the basic premise of American government: that democratic "power is in the people over the Government, and not in the Government over the people." 4 Annals of Cong. 934 (1794) (Madison). But "because gerrymanders benefit those who control the political branches," and "enables politicians to entrench themselves in power against the people's will," it is rarely susceptible to political solutions. *Whitford*, 138

[6] *See Giddings v. Blacker*, 52 N.W. 944, 946-47 (Mich. 1892) (requiring "honest and fair" redistricting); *id.* at 947-48 (Morse, C.J., concurring) (decrying "unequal and politically vicious" districts); *Parker v. Powell*, 32 N.E. 836, 842 (Ind. 1892) (denouncing "evils" of "gerrymander[ing]"); *id.* at 846 (Elliot, J., concurring) (similar).

S. Ct. at 1935 (Kagan, J., concurring). Rather, it is often "only the courts [who] can do anything to remedy the problem." *Id.* Indeed, "unblocking stoppages in the democratic process is what judicial review ought preeminently to be about" and the denial of an effective vote "seems the quintessential stoppage." John Hart Ely, *Democracy and Distrust* 116-36 (1980).

Partisan gerrymandering undermines democracy in three principal ways: creating extreme asymmetry in the ability to translate votes to seats, reducing competitiveness and increasing partisan polarity, and impairing democratic accountability.

First, partisan gerrymandering enables the line-drawing party to secure far more seats in the legislative body than would be expected based on statewide vote share. *See* Nicholas Stephanopoulos & Eric McGhee, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 Stan. L. Rev. 1503, 1506 (2018). Such extreme asymmetry goes against what the Framers envisioned for the American system of representative government. John Adams argued that to prevent "the unfair, partial, and corrupt elections" that marked the English electoral system, the "equal interest[] among the people should have equal interest[]" in the American system of representation. John Adams, *Thoughts on Government* 403 (1776), *reprinted in* 1 *American Political Writing During the Founding Era: 1760-1805* (Hyneman & Lutz eds., 1983). Hamilton shared a similar sentiment: "The true principle of a republic is, that the people should choose whom they please to govern them." *Debates, supra,* at 257. Thus, as Madison urged, "it is essential to liberty that

the government in general should have a common interest with the people, so it is particularly essential that" elected representatives "should have an immediate dependence on, and an intimate sympathy with, the people." Federalist No. 52, at 295 (Rossiter ed., 1961); *accord id.* Nos. 37, 39, 56.

Second, partisan gerrymandering eliminates political competition to maximize safe seats. Stephanopoulos, *supra*, at 1506. The latest redistricting cycle stood out for its near-complete elimination of competitive congressional elections. Reid Epstein, *'Taking the Voters Out of the Equation': How the Parties Are Killing Competition*, N.Y. Times (Feb. 6, 2022). This lack of competitive districts undermines median voters' ability to translate their votes into effective representation.

Competition tempers the desire of political parties to run ideologically extreme candidates because of the need to win moderate voters, which drives representatives to better represent the political "community as a whole." Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 627-28 (2002). Without it, the primary becomes determinative and often benefits more extreme candidates who attract more ideological voters. *Whitford*, 138 S. Ct. at 1940 (Kagan, J., concurring). As a result, pragmatic solutions on which both parties can agree—and which many voters favor—become politically untenable. Brief of *Amici Curiae* Bipartisan Group of Current & Former Members of Congress, *Gill v. Whitford*, No. 16-1161, 2017 WL 4311097, at *10-11 (U.S. Sept. 5, 2017).

These hyper-polarized conditions are precisely what the Framers feared from a two-party system: the "mischiefs of faction" and the "instability, injustice, and

confusion [it] introduced," which are the "mortal diseases under which popular governments have everywhere perished." Federalist No. 10, at 77 (Madison). Gerrymandering is the epitome of faction run amok: a classic case of "the public good [being] disregarded" by parties operating in a designed echo chamber of anti-competition. *Id.* It leaves policy to be dictated "not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority," *id.*, and "enable[s] the representatives of the people to substitute their will," Federalist No. 78, at 467 (Hamilton).

Third, gerrymandering reduces popular accountability. It insulates representatives from their voters, enabling politicians to select voters they think will most reflexively reelect the favored candidates and then divide or overconcentrate the remaining voters. Stephanopoulos, *supra*, at 1506. Where politicians can effectively choose their voters, gerrymandering "[a]t its most extreme ... amounts to 'rigging elections.'" *Whitford*, 138 S. Ct. at 1940 (Kagan, J., concurring) (citation omitted).

Gerrymandered legislative bodies of ideologically extreme representatives become less responsive to their constituents and more handcuffed by partisan gridlock. Such lack of accountability and responsiveness is repugnant to Kentucky's foundational tenet that "[a]ll power is inherent in the people, and all free governments are founded on their authority." Ky. Const. § 4. It compromises the guarantees that "[e]quality of representation is a vital principle of democracy" and "[i]nequality of representation is a tyranny to which no people worthy of freedom will tamely submit." *Ragland*, 100 S.W. at 869.

Modern technology has made these negative effects of partisan gerrymandering worse. While map-drawers previously used manual processes relying on imperfect and incomplete data, today's lines are drawn using sophisticated artificial intelligence programs and super-computing capabilities, combined with granular data of voters' mostly static partisan preferences. *See* Sarah M.L. Bender, *Algorithmic Elections*, 121 Mich. L. Rev. 489, 511-13 (2022). Thus, while partisan gerrymandering is not new, "gerrymanders [are] far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides." *Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting). Simply put: "These are not your grandfather's—let alone the Framers'—gerrymanders." *Id.*

Thus, although some level of partisanship may have been tolerated in prior redistricting cycles, the precision with which gerrymandering occurs today subverts democracy. The Kentucky Constitution does not countenance such results.

CONCLUSION

The Court should hold that extreme partisan gerrymandering presents a justiciable dispute and violates Kentucky's Free Elections Clause.

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Respectfully submitted,

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