Supreme Court of Kentucky

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

DERRICK GRAHAM, *et al.*, *Plaintiffs-Appellants,*

v. On Appeal from Franklin Circuit Court,
Case No. 22-CI-00047

MICHAEL ADAMS, *et al.*, *Defendants-Appellees.*

BRIEF OF THE PUBLIC INTEREST LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS - APPELLEES

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Certificate of Service

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; (5) Michael P. Abate, Casey L. Hinkle, William R. Adams, Kaplan Johnson Abate & Bird LLP, 710 W. Main Street, 4th Floor, Louisville, KY 40202.

/s/ Mark H. Metcalf

STATEMENT OF POINTS AND AUTHORITIES

PURPOSE OF BRIEF AND INTRODUCTION

This case comes in the wake of the United States Supreme Court's decision *Moore v. Harper*, No. 21-1271, 2023 U.S. LEXIS 2787 (U.S. Jun. 27, 2023), and presents a unique opportunity for this Court to demonstrate judicial restraint while reviewing Kentucky's districting plans. In *Rucho v. Common Cause*, the United States Supreme Court found that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." 139 S.Ct. 2484, 2506-07 (2019). The *Rucho* court described what the appellees sought in that case as "an unprecedented expansion of judicial power." *Id.* at 2507. It opined:

> We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.

Id. Just as the *Rucho* court refused to make a ruling that would expand the judiciary's role to determine "when political gerrymandering has gone too far," *id.* at 2488, thereby making itself the arbiter of partisanship and inviting case after case on the issue; so should this Court refuse as well. The Kentucky Supreme Court has never taken on that role and should not do so now.

ARGUMENT

I. *MOORE V. HARPER* DID NOT CREATE A SUPER-REVIEW POWER FOR STATE COURTS SUCH THAT THE STATE COURTS COULD CREATE OR ADOPT STANDARDS OUTSIDE THE LAW TO APPLY TO THE REDISTRICTING PLAN.

The recent United States Supreme Court decision *Moore v. Harper* is instructive in determining this Court's proper and limited role in the analysis of the instant case. In that case, "[s]everal groups of plaintiffs challenged North Carolina's congressional districting map as an

impermissible partisan gerrymander." *Moore*, 2023 U.S. LEXIS 2787 at *10. The Court found that when state legislatures prescribe the rules concerning federal elections such as they do in redistricting, they remain subject to the ordinary exercise of state judicial review. *Id.* at *51.

In so doing, the United State Supreme Court reaffirmed traditional judicial review principles and was careful to point out how judicial review of redistricting plans should be based on *ordinary* principles, not new or novel ones. The Court used the term "ordinary" again and again to emphasize that it was merely allowing normal judicial review principles to apply to state courts when deciding cases implicating the Elections Clause, and was not assigning any particular or extraordinary power to review. *See, e.g.*, *Moore*, 2023 U.S. LEXIS 2787 at *30 (finding that the "Elections Clause does not insulate state legislatures from the *ordinary* exercise of state judicial review.") (emphasis added), *40 (finding that "the exercise of such authority in the context of the Elections Clause is subject to the *ordinary* constraints on lawmaking in the state constitution.") (emphasis added), *46-47 (referencing the conclusion "that the Elections Clause does not exempt state legislatures from the *ordinary* constraints imposed by state law") (emphasis added), *48-49 (discussing whether another court "exceeded the bounds of *ordinary* judicial review to an extent that its interpretation violated the Electors Clause") (emphasis added), *49-50 (holding that "state courts may not transgress the *ordinary* bounds of judicial review") (emphasis added), *51 (finding that "state courts may not so exceed the bounds of *ordinary* judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures") (emphasis added).

Indeed, the Court was quick to point out that "state courts do not have free rein." *Moore*, 2023 U.S. LEXIS 2787 at *46. "[T]he Elections Clause expressly vests power to carry out its provisions in 'the Legislature' of each State, a deliberate choice that this Court must respect." *Id.* at *47. The Court held specifically "that state courts may not transgress the ordinary bounds of

judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections." *Id.* at *49-50. And while the court fell short of adopting a test by which state court interpretations of state law can be measured in cases implicating the Elections Clause, it was adamant that it did not want state courts taking on the role of state legislatures. *Id.* at *49.

Moore established that ordinary judicial review by state courts of state election laws, including districting plans, is permissible, but extraordinary review is not. Conjuring newfangled or novel limits on the state legislature may constitute the exercise of judicial action that would offend *Moore*. The Court's use of the term "ordinary" six times indicates the Court's intention to allow merely typical judicial review in this context, and not to create unlimited judicial review for state courts where courts are free to create and adopt tests and standards for review of elections laws divorced from well-established principles and established jurisprudence in that state. To do so would be outside the bounds of "ordinary judicial review" and prohibited by the United States Supreme Court's ruling in *Moore*.

II. KENTUCKY DOES NOT RECOGNIZE A CLAIM FOR PARTISAN GERRYMANDERING, AND TO CREATE SUCH A CLAIM NOW WOULD BE AN UNPRECEDENTED, EXTRAORDINARY EXPANSION OF POWER.

In the instant case, Appellants seek to establish a new claim in Kentucky – a claim for partisan gerrymandering. This is a novel and newfangled argument that has no basis in existing and well-established jurisprudence in this state. Appellants do so by arguing that Kentucky's Constitution prohibits partisan gerrymandering – specifically, the "free and equal" clause, the equal protection clauses, the freedom of speech and assembly clauses, the clause prohibiting absolute and arbitrary power, and the section related to how counties can be split in districts. *See generally* Brief of Appellants (Jun 26, 2023). Yet none of these constitutional provisions are new, nor have there been any recent novel interpretations of these provisions to districting plans. In fact, the jurisprudence on this issue is that partisan gerrymandering does *not* offend the tenets or principles of the Kentucky Constitution:

> the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm. Unconstitutional discrimination in reapportionment occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voters' influence on the political process as a whole. *Davis v. Bandemer*, 478 U.S. 109, 131-133, 106 S. Ct. 2797, 2810, 92 L. Ed. 2d 85 (1986) (plurality opinion).

Jensen v. Ky. State Bd. of Elections, 959 S.W.2d 771, 776 (Ky. 1997). And federal law has reached the same conclusion:

> while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, "a jurisdiction may engage in constitutional political gerrymandering." *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (citing *Bush v. Vera*, 517 U. S. 952, 968 (1996); *Shaw v. Hunt*, 517 U.S. 899, 905 (1996) (Shaw II); *Miller v. Johnson*, 515 U. S. 900, 916 (1995); Shaw I, 509 U.S., at 646). *See also Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) (recognizing that "[p]olitics and political considerations are inseparable from districting and apportionment")

Rucho, 139 S.Ct. at 2497 (internal citations truncated).

Appellants ask this Court to deny the clear jurisprudence on this issue, and to reinterpret the Kentucky Constitution in order to create a novel claim for partisan gerrymandering. This "constitutionalizing" of issues best suited for resolution by the legislature is an enterprise fraught with danger. As the former Supreme Court Justice White once remarked in regards to the Federal Constitution, "decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation." *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 787 (1986) (White, J., dissenting). Such an interpretation would be extraordinary, and outside the bounds of the Supreme Court's clear intention in *Moore* that any judicial review of elections regulations must be "ordinary" and not arrogate the power vested in state legislatures in Article I, Section 4, of the Federal Constitution. *Moore*, *49-50.

Appellants essentially seek to task this Court with determining how much representation particular political parties deserve, presumably based on the votes of their supporters, and to determine a districting plan to achieve that end. But the drawing of legislative districts is a role reserved exclusively for the state legislature. U.S. CONST. art. 1, § 4. *See also Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013). And this Court is not equipped to apportion political power as a matter of fairness. "There is a difference between what is perceived to be unfair and what is unconstitutional" and this Court's "only role" is to determine what is unconstitutional. *Jensen*, 959 S.W.2d at 776. As the United States Supreme Court determined in *Rucho* when addressing whether federal courts could take up the issue of partisan gerrymandering,

> There are no legal standards discernible in the [Federal] Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would

> be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts.

Rucho, 139 S.Ct. at 2500.

Partisan gerrymandering, and the cries of unfairness that come with it, are not new. The practice was known in the colonies before American was an independent nation, and there were accusations of it in the very first congressional elections. *Rucho*, 139 S.Ct. at 2494. Yet throughout the many cycles of redistricting in Kentucky's history, this Court has never interpreted the Kentucky Constitution in such a way as to prohibit the practice. Excessive partisanship in districting may lead to results that seem unjust, but not constitutionally so. Not every slight has a judicial solution. This Court is not well suited to reallocate political power between political parties with no plausible grant of authority in the Constitution and no legal standards to limit and direct its decisions. This Court is only authorized to determine legality, and the Kentucky Constitution does not require proportional representation for political parties. To interpret the Constitution otherwise would be an extraordinary review of the text that inappropriately expands the judiciary's role in the elections process contrary to the United States Supreme Court's recent holding in *Moore*.

CONCLUSION

For the reasons stated, the judgment of the Franklin Circuit Court should be affirmed.

Respectfully submitted,

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WORD COUNT CERTIFICATE

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/s/ Mark H. Metcalf