COMMONWEALTH OF KENTUCKY
SUPREME COURT
Nos. 2022-SC-0522, 2023-SC-0139

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

v.

MICHAEL ADAMS, et al., *Appellees, Cross-Appellants*

Petition for Review from Franklin Circuit Court
Hon. Thomas D. Wingate
Civil Action No. 22-CI-00047

BRIEF OF *AMICUS CURIAE* HONEST ELECTIONS PROJECT IN SUPPORT OF APPELLEES

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CERTIFICATE OF SERVICE

I certify that on July 12, 2023, a copy of this brief was served via FedEx Express Delivery on the Clerk of the Kentucky Supreme Court, 700 Capitol Ave., Room 209, Frankfort, KY 40601; Hon. Thomas D. Wingate, Franklin Circuit Court, 222 St. Clair St. Frankfort, KY 40601; and via email on Michael P. Abate, mabate@kaplanjohnsonlaw.com; Casey L. Hinkle, chinkle@kaplanjohnsonlaw.com; William R. Adams, radams@kaplanjohnsonlaw.com; Taylor Brown, TaylorA.Brown@ky.gov; Michael G. Adams, sos.secretary@ky.gov; Jennifer Scutchfield, jscutchfield@ky.gov; Michael R. Wilson, michael.wilson@ky.gov; Bridget M. Bush, bbush@landrumshouse.com; R. Kent Westberry, kwestberry@landrumshouse.com; Hunter Rommelman, hrommelman@landrumshouse.com; Victor B. Maddox, Victor.Maddox@ky.gov; Heather L. Becker, Heather.Becker@ky.gov; Alexander Y. Magera, Alexander.Magera@ky.gov.

Dated: July 12, 2023

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STATEMENT OF POINTS AND AUTHORITIES

PURPOSE OF BRIEF

The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public interest litigation, HEP defends the fair, reasonable measures that legislatures put in place to protect the integrity of the voting process. HEP supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. It has a significant interest in this case, as it implicates the legislature's preeminent role in setting the rules for elections.

Free-elections clauses are common in many state constitutions. A new legal trend has led some courts to adopt novel interpretations of those clauses to constrain partisan redistricting. But those decisions are inconsistent with the text, history, and tradition of Kentucky's Constitution. In this brief, Amicus provides an account of Kentucky's Free Elections Clause, explaining why it does not implicate redistricting.

INTRODUCTION

Since 1792, the Kentucky Constitution has guaranteed that "all elections shall be free and equal." Ky. Const. of 1792, art. XII, §5. In over two centuries, no Kentucky court has ever applied that clause to redistricting. The delegates to Kentucky's 1891 constitutional convention could not have predicted Plaintiffs' lawsuit. When those delegates debated redistricting, no one mentioned the Free Elections Clause. And when they debated the Free

Elections Clause, no one brought up redistricting. The two were not even related.

The argument that the clause allows courts to prohibit partisan-apportionment plans would have stunned the convention delegates. They considered removing or amending the Free Elections Clause out of concern that courts would misapply it to invalidate laws. But, they concluded, the clause had "a common sense, plain meaning" that they could entrust Kentucky's judges to faithfully apply. *Official Report of the Proceedings and Debates in the Convention* 948 (1890-91).

Courts were also quick to recognize the potential for judicial interference in applying those clauses. "The power to regulate elections is a legislative one, and has been exercised by the General Assembly since the foundation of the government." *Winston v. Moore*, 244 Pa. 447, 455 (1914). Meanwhile, both courts and legislatures recognized the inherently political nature of legislative apportionment. After all, "[p]artisan gerrymandering is nothing new." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019). Thus, "[t]o 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." *Id.* at 2497. And *no one* thought that free-elections clauses gave courts the power to decide whether a legislature's apportionment plan unconstitutionally favors one party over another.

The history of these clauses shows that they protect qualified voters who show up at the polls to cast their votes. They have nothing to do with electoral outcomes or the apportionment of districts. Precedent confirms that Kentucky's clause is part of that historical tradition. This Court should remain faithful to that history and precedent and reject Plaintiffs' claim that the Kentucky Constitution allows courts to set aside redistricting laws because of partisan-fairness concerns.

ARGUMENT

I. "Free and equal" elections clauses did not give state courts authority over partisan redistricting.

"[F]ounding-era provisions, constitutional structure, and historical practice" are key to interpreting election regulations. *Moore v. Harper*, No. 21-1271, __ S. Ct. __, 2023 WL 4187750, at *11 (June 27, 2023). Free-elections clauses have their roots in the English Bill of Rights, which declared that "election of members of Parliament ought to be free." The English Bill of Rights, art. VIII (1689). The British Crown had routinely interfered with parliamentary elections by disenfranchising the "free inhabitants" of the towns and cities. Bertrall L. Ross, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 Ala. L. Rev. 221, 267 (2021). The English Bill of Rights was adopted in response to "constrain[] the Crown's unilateral authority" to disenfranchise the electors for members of Parliament. *Id.* at 288.

Later, English common law prohibited voter intimidation and undue influence. Blackstone affirmed that "elections should be absolutely free"—a guarantee designed to "strongly prohibit[]" "all undue influences upon the electors." 1 Blackstone, *Commentaries on the Laws of England* 172. English common law was especially concerned with actions of "executive magistrate[s]" who could "employ[ ] the force, treasure, and offices of the society, to corrupt the representatives, or openly pre-engage the electors, and prescribe what manner of persons shall be chosen." *Id.* To avoid any intimidation by force, English law required that "[a]s soon ... as the time and place of election ... are fixed, all soldiers quartered in the place ... remove, at least one day before the election, to the distance of two miles or more; and not to return till one day after the poll is ended." *Id.* "Riots," which could intimidate voters, "likewise [were] frequently determined to make an election void." *Id.* And to avoid any undue influence from bribery, "[i]f any officer of the excise, customs, stamps, or certain branches of the revenue, presumes to intermeddle in elections, by persuading any voter or dissuading him, he forfeit[ed] and [was] disabled to hold any office." *Id.* And officials—such as "the sheriff or other returning officer"—who were tasked with administering the elections were often required to "tak[e] an oath against bribery." *Id.* at 173.

States adopted free-elections clauses against this backdrop of guarding against *executive* abuses. There is no evidence those guarantees applied to *legislative* actions. Twelve States have clauses with language like Kentucky's

guaranteeing "free and equal" elections: Arizona, Arkansas, Delaware, Illinois, Indiana, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Washington, and Wyoming.[1] Many others have variations on that language guaranteeing that "[a]ll elections shall be free and open," Mont. Const. art. II, §13, or "[a]ll elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage," Utah Const. art. I, §17. History confirms two important features of these clauses.

First, the clauses protected qualified voters engaged in the act of voting. Some States, such as New Hampshire, made that explicit in the text: "All elections ought to be free, and every inhabitant of the State having the proper qualifications has equal right to elect and be elected into office." N.H. Const. art. XI (1792). Other States, such as Kentucky, took a minimalist approach, declaring simply "[t]hat all elections shall be free and equal." Ky. Const. art. XII, §5 (1792). History confirms these clauses protected qualified voters who were voting—they had little to do with other election rules, and nothing to do with redistricting.

Second, the clauses were primarily a grant of authority to state legislatures, not courts. That makes sense, as the U.S. Constitution puts States in charge of setting voter qualifications for congressional elections, U.S. Const.

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[1] Ariz. Const. art. II, §21; Ark. Const. art. 3, §2; Del. Const. art. I, §3; Ill. Const. art. III, §3; Ind. Const. art. 2, §1; Okl. Const. art. III, §5; Ore. Const. art. II, §1; Pa. Const. art. I, §5; S.D. Const. art. VII, §1; Tenn. Const. art. I, §5; Wash. Const. art. I, §19; Wyo. Const. art. I, §27.

art. I, §2, and it charges state legislatures with regulating the "Times, Places and Manner" of congressional elections, *id.* §4. Courts thus deferred to legislative enactments under these clauses, recognizing the judiciary's limited role in elections.

A. Free and equal elections were elections in which only qualified voters could vote.

Beginning with Pennsylvania, free-elections clauses were explicitly linked to voter qualifications. Pennsylvania's 1776 declaration of rights stated that "all elections ought to be free; and that all free men having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or to be elected into office." Pa. Const., ch. I, art. VII (1776). Pennsylvania moved that provision into the body of its 1790 constitution, guaranteeing that "elections shall be free and equal." Pa. Const. art. IX, §5 (1790). James Wilson tied this clause to "the qualifications of electors." 1 *James Wilson, The Legislative Department, Lectures on Law, The Works of James Wilson* 407-11 (Robert Green McCloskey, ed. 1967).

The Pennsylvania Supreme Court confirmed James Wilson's understanding that the clause concerned voter qualifications. In *Patterson v. Barlow*, that court said an "election is free and equal where all of the qualified electors of the precinct are carefully distinguished from the unqualified, and are protected in the right to deposit their ballots in safety, and unprejudiced by fraud." *Patterson v. Barlow*, 60 Pa. 54, 76 (1869). Applying that understanding, the court upheld a special voter registry law in Philadelphia,

explaining that the free-elections clause simply secures the right to vote to qualified voters. *Id.* at 63 (explaining that making an election "unequal" means enacting "different rules as to different classes of persons claiming to vote").

Vermont followed Pennsylvania's lead. In its first constitution, Vermont established that "all elections ought to be free and without corruption." Vt. Const. ch. I, art. VIII (1777). The provision was explicitly tied to voter qualifications, guaranteeing that "all freemen, having a sufficient, evident, common interest with, and attachment to the community" had the right to vote. *Id.* Just a few years later, the council of censors confirmed this meaning. Addressing the people of Vermont, the council explained that Article VIII barred the legislature from giving the state supreme court the power to "dis[en]-franchise a freeman for any evil practice which shall render him notoriously scandalous"—in other words, to disqualify qualified voters. *An Address of the Council of Censors to the People of Vermont (1799-1800), in Records of the Council of Censors of the State of Vt.* 156 (Gillies and Sanford, eds. 1991). Vermont eventually replaced "freemen" with "voters," but otherwise the provision remains unchanged in the State's present constitution.

Delaware was no different. Its 1792 constitution provided that "[a]ll elections shall be free and equal." Del. Const. art. 1, §3 (1792). This language replaced similar language in Delaware's 1776 declaration of rights. Randy Holland, *The Delaware State Constitution, in The Oxford Commentaries on State Constitutions of the United States* 36 (2011). The declaration provided

that "all elections ought to be free and frequent and every freeman, having sufficient evidence of a permanent common interest with, and attachment to the community, hath a right to suffrage." Del. Decl. of Rights, §6 (1776). Again, the "free and equal" language was tied to voter qualifications.

Tennessee followed suit. Tennessee's first constitution provided "[t]hat all Elections shall be free and equal." Tenn. Const. art. XI, §5 (1796). That language was reaffirmed unchanged at the 1835 state constitutional convention. Tenn. Const. art. XI, §5 (1835). When Tennessee amended its constitution again in 1870, it added language confirming that the right to "free and equal" elections was about voter qualifications:

> That elections shall be free and equal and the right of suffrage, as hereinafter established, shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction.

Tenn. Const. art. I, §5 (1870). The Tennessee Supreme Court said that "[s]ection 5 must be read in connection with section 1 of article 4 of the same Constitution," which outlines the qualifications for voters. *Earnest v. Greene Cnty.*, 198 S.W. 417, 417 (Tenn. 1917).

Oregon was later in time, but it followed the States before it. Oregon's first constitution declared in simple terms that "[a]ll elections shall be free and equal." Or. Const. art. II, §1 (1857). The very next section set the qualifications for Oregon voters. *Id.* §2. Interpreting these provisions together, the Oregon Supreme Court held that "the terms 'free' and 'equal,' used as they are, correlatively, signify that the elections shall not only be open and untrammeled

to all persons endowed with the elective franchise, but shall be closed to all not in the enjoyment of such privilege under the constitution." *Ladd v. Holmes*, 66 P. 714, 718 (Or. 1901). Again, the clause preserves the right of qualified voters to vote, and it guards against voting by those who are not qualified.

Illinois was the same. The Illinois Constitution of 1870 guaranteed that "[a]ll elections shall be free and equal." Ill. Const. art. II, §18 (1870). The Illinois Supreme Court adopted the reasoning of the Pennsylvania Supreme Court in *Patterson*, holding that an "election is free and equal when all the qualified electors of the precinct are carefully distinguished, and are protected in the right to deposit their ballots in safety, and unprejudiced by fraud." *People v. Hoffman*, 5 N.E. 596, 611 (Ill. 1886). An "election is not free and equal where the true electors are not separated from the false, where the ballot is not deposited in safety, or where it is supplanted by fraud." *Id.* The clause refers "to the rights of the individual voter." *Id.* at 601. It says nothing about the "uniformity of election procedures." *Id.* Nor does it say anything about apportioning districts—partisan or not.

Arkansas is another good example. The first constitution Arkansas adopted in 1836 declared that "all elections shall be free and equal." Ark. Const. art. II, §5 (1836). Arkansas briefly removed the provision from its post–Civil War constitution in 1868. When it adopted its present-day constitution in 1874, Arkansas added the clause back in, clarifying that it referred to voter qualifications: "Elections shall be free and equal. No power, civil or military,

shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted whereby such right shall be impaired or forfeited, *except for the commission of a felony, upon lawful conviction thereof.*" Ark. Const. art. 3, §2 (1874) (emphasis added). That is, the clause constrained the legislature's ability to disqualify otherwise qualified voters.

Other States enacted language like Arkansas's that prevented "civil or military powers" from interfering with the right to vote. Since 1912, Arizona's constitution has provided that "[a]ll 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." Ariz. Const. art. II, §21 (1912). South Dakota, Oklahoma, Washington, and Wyoming have the same clause in their constitutions. *See* S.D. Const. art. VII, §1; Okla. Const. art. III, §5; Wash. Const. art. I, §19; Wy. Const. art. I, §27. Courts had no trouble interpreting the phrase, which meant that "the elector cannot legally be physically restrained in the exercise of his right by either civil or military authority." *Chamberlin v. Wood*, 88 N.W. 109, 110 (S.D. 1901); *accord Richardson v. Gregg*, 290 P. 190, 193 (Okl. 1930); *State v. Bartlett*, 230 P. 636, 638 (Wash. 1924); *State v. Johnson Cnty. High Sch.*, 5 P.2d 255, 258 (Wyo. 1931); *Winston v. Moore*, 244 Pa. 447, 455 (1914); *People ex rel. Lindstrand v. Emmerson*, 165 N.E. 217, 220 (Ill. 1929).

Even when courts spoke of ensuring "equal influence" in elections, they meant that qualified voters should be protected from the unequal influence of

fraudulent votes. The Oregon Supreme Court, for example, held that a "legal voter is denied his adequate, proportionate share of influence, and the result is that the election, as to him, is unequal," when "persons not legitimately entitled to vote are permitted to do so." *Ladd*, 66 P. at 718. Voter fraud, in other words, "denie[s] the equal influence to which he is entitled with all other qualified electors." *Id.* The Illinois Supreme Court's summary became the frequent refrain of other state courts:

> Elections are free when the voters are subjected to no intimidation or improper influence, and when every voter is allowed to cast his ballot as his own judgment and conscience dictate. Elections are equal when the vote of every elector is equal in its influence upon the result to the vote of every other elector; when each ballot is as effective as every other ballot.

Hoffman, 5 N.E. at 601. The court clarified that the provision "that all elections must be equal does not necessarily mean that there must be uniformity of regulation in regard thereto in all portions of the state." *Id.* at 600. Rather, an "election is not free and equal where the true electors are not separated from the false, where the ballot is not deposited in safety, or where it is supplanted by fraud." *Id.* at 616-17. Equal influence meant nothing more than that "every voter shall have the same right as every other voter." *Chamberlin*, 88 N.W. at 110. No court thought these clauses required elections to produce equal partisan outcomes.

B. State legislatures were responsible for implementing free-elections clauses.

Just as the substance of free-elections clauses was limited, so, too, was the role of courts in implementing these clauses. In asking "how" the "freedom

and equality" of elections is to be secured, the Pennsylvania Supreme Court observed that its "Constitution has given no rule and furnished no guide." *Patterson*, 60 Pa. at 75. Rather, the Constitution "has simply enjoined the duty and left the means of accomplishment to the legislature." *Id.* That was especially true of the legislature's role in "arrang[ing] all the qualified electors into suitable districts." *See id.* "It is, therefore, the duty of the legislature"—not the courts—"to secure freedom and equality by such regulations as will exclude the unqualified, and allow the qualified only to vote." *Id.* at 76.

Other state courts agreed. The high courts of Illinois, Indiana, and Washington all cited *Patterson*, holding that it was "the duty of the legislature to secure freedom and equality by such regulations as will exclude the unqualified and allow the qualified only to vote" under their free-elections clauses. *Hoffman*, 5 N.E. at 611 (citing *Patterson*, 60 Pa. at 76); *see also Simmons v. Byrd*, 136 N.E. 14, 18 (Ind. 1922); *State v. Bartlett*, 230 P. 636, 638 (Wash. 1924). The South Dakota Supreme Court likewise observed that its state constitution "left the right of suffrage at this point to be regulated and governed by such laws as the legislature might deem proper to enact." *Chamberlin*, 88 N.W. at 111. And the Utah Supreme Court held that its free-elections clause is not "self-executing" and "requires the legislature to provide by law for the conduct of elections, and the means of voting, and the methods of selecting nominees." *Anderson v. Cook*, 130 P.2d 278, 285 (Utah 1942).

Courts thus took a modest view of their role in implementing the free-elections clauses. Some state courts applied their clauses to election contests, overturning elections plagued with fraud. *E.g.*, *Emery v. Hennessy*, 162 N.E. 835, 838 (Ill. 1928) ("When the ballot box becomes the receptacle of fraudulent votes, the freedom and equality of elections are destroyed."). Even that modest view, however, was not the norm. The "great majority" of state courts held that "courts may hear election contests only when power is given them by statute," as "[t]he entire subject matter is political," and the "power to deal with it is vested in the General Assembly" alone. *Cundiff v. Jeter*, 2 S.E.2d 436, 438-40 (Va. 1939) (citation omitted) (collecting cases).

Rarer still were cases invalidating state law under these clauses. One hundred and fifty years after Pennsylvania adopted its free-elections clause, the Pennsylvania Supreme Court observed that "no act dealing solely with the details of election matters has ever been declared unconstitutional by this court." *Winston*, 244 Pa. at 455. That was because "ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of government." *Id.* To be sure, the Pennsylvania Supreme Court has since reversed course about the meaning of the Pennsylvania Free Elections Clause, *see League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), but that remains an outlier decision that only proves the rule: for well over two centuries since the late 1700s, no court had invalidated redistricting plans under these clauses.

In sum, history demonstrates the limited role of free-elections clauses. Their primary purpose was to enable state legislatures to set rules regarding voter qualifications. A free and equal election was widely understood as one in which only qualified voters could vote. These clauses also protected voters from violence, intimidation, and undue influence at the polls, although those guarantees often required legislation to be effective—most States would not even allow voters to contest a fraudulent election absent laws authorizing the contest. To that end, state courts deferred to state legislatures when it came to election rules. Even on the edges of their application, courts never read these clauses to restrict the power of state legislatures over redistricting and apportionment.

II. The original meaning of Kentucky's Free Elections Clause does not require partisan balancing in redistricting plans.

The history of Kentucky's Free Elections Clause is bound up with the history of other States' clauses. Kentucky's clause dates to its first constitution, enacted in 1792, guaranteeing that "[a]ll elections shall be free and equal." Ky. Const. of 1792, art. XII, §5. Since 1792, Kentucky has moved the clause to Section 6 of its constitution, but the clause is otherwise unchanged: It said nothing about redistricting in 1792, and it says nothing about redistricting now.

"When interpreting constitutional provisions," this Court looks "first and foremost to the express language of the provision, 'and words must be given their plain and usual meaning.'" *Westerfield v. Ward*, 599 S.W.3d 738,

747 (Ky. 2019). The Court avoids interpretations that "thwart the deliberate purpose and intent of the framers of that instrument." *Id.* at 748 (citation omitted). For that reason, this Court has looked to the ratification debates to determine the meaning of certain provisions. *E.g.*, *Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74, 92 (Ky. 2018) ("Our interpretation of §46 is based in part upon our consideration of the Constitutional Debates of 1891 that preceded the adoption of the present Kentucky Constitution.").

In its 1891 constitutional convention, Kentucky considered the meaning of Section 6. Delegate Edward McDermott feared that the clause "may be easily distorted hereafter by Courts" because it was "general and vague." *Convention Debates*, *supra*, at 945. McDermott pointed to the expansive view of the clause taken by the dissent in *People v. Hoffman*, which he feared could take hold in Kentucky. *Id.* at 670-71. So, McDermott proposed an amendment providing that "[t]he privilege of free suffrage shall be supported by laws regulating elections, and prohibiting under adequate penalties all undue influence thereon from power, bribery, tumult or other improper practices." *Id.* at 946. The delegates rejected the amendment, finding that Kentucky courts had experienced "no difficulties" interpreting the clause. *Id.* Even though litigation may "have arisen about it," a majority of delegates agreed that the clause had "a common sense, plain meaning." *Id.* at 948.

That plain meaning had nothing to do with redistricting. At the time Kentucky adopted the clause, the word "free" meant "uncompelled," or

"unrestrained." *Free*, A Dictionary of the English Language (Samuel Johnson ed., 10th ed. 1792). When the delegates reconsidered the clause, it meant the same thing: "Unconstrained; having power to follow the dictates of his own will." *Free*, Black's Law Dictionary (1st ed. 1891). It also meant to be "able to act without external controlling interference" and not "subjected to physical or moral restriction or control, either absolutely or in one or more particulars." *Free*, The Cent. Dictionary (1895). "Equal," too, was well-understood in 1776 and 1891, meaning "[i]mpartial" or "neutral." *Equal*, A Dictionary of the English Language, *supra*; *accord Equal*, The Cent. Dicionary, *supra*. The plain meaning of these words, well understood for centuries, guarantees free and equal elections by prohibiting external interference that would hinder voters from voting according to their will.

If there were any doubt that the clause does not apply to redistricting, the convention's discussions on legislative apportionment resolve it. In at least four days of fierce debate over legislative apportionment, redistricting, and gerrymandering, no one spoke a word about Section 6. *See Convention Debates, supra*, at 4384-4452, 4609-30. The delegates understood the inherently political nature of setting legislative districts. "[I]f we undertake to lay this State off into Legislative Districts, no matter how earnestly or how fairly we may do it, we will be accused by somebody of gerrymandering the State." *Id.* at 4394. Rather than entering that political fray during the convention, the delegates left redistricting to the legislature. *See* Ky. Const. §33. And to guard

against the legislature's potential "to gerrymander or redistrict the State according to their own wishes or their own caprices," the convention adopted general principles to guide the redistricting process. *Convention Debates, supra*, at 4610. Those principles include, for example, requiring that legislative districts be "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 "counties forming a district shall be contiguous." Ky. Const. §33.

The delegates to the 1891 convention understood the political realities of redistricting. They chose to vest the legislature with authority over redistricting *because of* those political realities, not despite them. The delegates were also realists about the Free Elections Clause. Some feared the courts would interpret Section 6 too broadly, but no one thought the clause constrained the legislature's authority to draw legislative and congressional districts. This lawsuit threatens to vindicate the delegates' fear that courts could misapply the clause to intrude on legislative authority. But in the end, the delegates satisfied themselves that the clause was clear, and judges were reasonable.

For decades, the convention delegates were proven right. Early on, the Kentucky Court of Appeals held that "[e]lections are free and equal only when all who possess the requisite qualifications are afforded a reasonable

opportunity to vote without being molested or intimidated, and when the polls are in each county and in each precinct alike freed from the interference or contamination of fraudulent voters." *Commonwealth v. McClelland*, 83 Ky. 686, 693 (Ky. App. 1886). Later, the court noted its alignment with the view in similar States like Pennsylvania and Illinois, which at the time was "generally accepted as correct." *Asher v. Arnett*, 132 S.W.2d 772, 776 (Ky. App. 1939) (citing *Winston v. Moore*, 244 Pa. 447 (1914)).

Like those States, Kentucky denied the power of courts to determine election contests. The court of appeals held that "courts of equity have no inherent power to try contested elections, but can only exercise such power where it has been conferred by express enactment or necessary implication therefrom." *Bass v. Katterjohn*, 239 S.W. 53, 55 (Ky. App. 1922). In the rare election so plagued by fraud or intimidation, courts had declared elections void under Section 6. *See, e.g.*, *Burns v. Lackey*, 186 S.W. 909, 916 (Ky. App. 1916) (declaring a municipal election void in which an organization of over 1,000 black citizens had been intimidated and coerced into voting for certain candidates); *Hocker v. Pendleton*, 39 S.W. 250, 250 (Ky. App. 1897) (declaring a local election void in which an election clerk ran out of ballots early in the morning of the election and prevented nearly half of the "legal qualified voters" from voting). *But see Wallbrecht v. Ingram*, 175 S.W. 1022, 1028 (Ky. App. 1915) ("The ruling, however, in *Hocker v. Pendleton* ... has not been adhered to in the later cases, and is not in harmony with the weight of authority, which is

that, before an election shall be set aside, it must appear that the result would have been changed if all those who were entitled to vote had voted in favor of the contestants.").

The Court of Appeals at times stretched the boundaries of Section 6, invalidating election regulations that impeded qualified voters' right to vote. *E.g.*, *Smith v. Kelly*, 58 S.W.2d 621 (Ky. App. 1933) (invalidating a law under Section 6 that permitted only one polling place for a school election that was insufficient to permit all voters to cast a ballot); *Perkins v. Lucas*, 246 S.W. 150, 153 (Ky. App. 1922) (reading Section 6 alongside the qualifications clauses in the Kentucky Constitution to invalidate a statute that permitted voters to register only on one day each year); *Queenan v. Russell*, 339 S.W.2d 475, 477-78 (Ky. App. 1960) (invalidating law under Section 6 that effectively prohibited voters in some parts of the State from voting by mail). Even those cases, however, were still "[i]n harmony" with the core principle of the clause, *Asher*, 132 S.W.2d at 776, that "[e]lections are free and equal only when all who possess the requisite qualifications are afforded a reasonable opportunity to vote," *McClelland*, 83 Ky. at 693.

Notwithstanding the outlier cases invalidating state law, in general Kentucky courts deferred to the legislature's role in setting election rules. The court of appeals noted "it is not our prerogative to pass upon the wisdom or unwisdom of legislative enactments," because the constitution "gives the Legislature a wide field for the exercise of its discretion" in setting election

rules. *Asher*, 132 S.W.2d at 775 (quoting *Winston*, 244 Pa. at 455). The court even rejected a Section 6 challenge to a legislative apportionment plan, observing that such challenges are "instituted and prosecuted for the use and benefit of one of the political parties of the State, the adherents of which conceive themselves aggrieved by the alleged denial of fair and equal representation in the legislative department of the state in the apportionment attacked." *Adams v. Bosworth*, 102 S.W. 861, 861 (Ky. App. 1907).

At bottom, Kentucky's history confirms what the delegates to the 1891 convention thought everyone understood. Kentucky's clause preserving free and equal elections gives the Legislature the prerogative to set voter qualifications, protect voters at the polls, and guard against fraud. This State, like most, experienced the natural push and pull of power between the legislative and judicial branches. But even the rare cases striking down laws under Section 6 show the outer boundary of the clause, and not one of those extended to partisan redistricting. That understanding is repeated time and again across States with similar clauses. Indeed, many of those States looked to Kentucky for guidance in interpreting their own clauses. Plaintiffs give this Court no valid reason to change course now.

CONCLUSION

The circuit court correctly held that Section 6 has nothing to do with state or Congressional apportionment. This Court should affirm that portion of the circuit court's order and enter judgment in favor of the Commonwealth.

Dated: July 12, 2023

Respectfully submitted,

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Dated: July 12, 2023

/s/ James Yoder
Counsel for Amicus