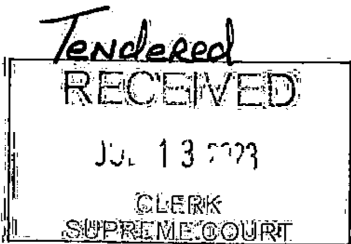
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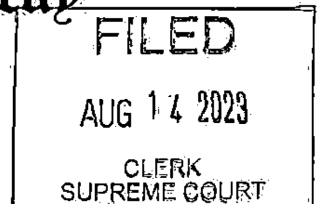
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No. 2022-SC-0522

DERRICK GRAHAM, ET AL.,

Appellants,

v.

SECRETARY OF STATE MICHAEL ADAMS, ET AL.,

Appellees.

Transfer from Court of Appeals No. 2022-CA-1403
and Franklin Circuit Court No. 22-CI-00047

**BRIEF OF AMICUS CURIAE
THE NATIONAL REPUBLICAN REDISTRICTING TRUST
IN SUPPORT OF APPELLEES**

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Andrew D. Watkins (No. 98196)
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK, PLLC
15405 John Marshall Highway
Haymarket, Virginia 20169
Phone: (540) 341 - 8808
Fax: (540) 341 - 8809
Counsel for Amicus Curiae
The National Republican Redistricting Trust

Certificate of Service

I certify that on July 11, 2023, a copy of this Brief was served via U.S. mail to: Michael Patrick Abate, Casey Leigh Hinkle, William Richard Adams II, Kaplan Johnson Abate & Bird LLP, 710 W. Main St., 4th Floor, Louisville, KY 40202; Taylor Austin Brown, Kentucky State Board of Elections, 140 Walnut Street, Frankfort, Kentucky 40601; Matthew Franklin Kuhn, Victor Bruce Maddox, Heather Lynn Becker, Alexander Y. Magera, Office of the Attorney General, 700 Capital Avenue, Suite 118, Frankfort, Kentucky 40601; Michael Gene Adams, Jennifer Schwartz Scutchfield, Michael Rollin Wilson, Office of the Secretary of State, 700 Capital Avenue, Suite 152, Frankfort, Kentucky 40601; and Honorable Thomas D. Wingate, Franklin Circuit Court, 222 St. Clair Street, Frankfort, KY 40601. The record on appeal has not been withdrawn.

/s/ Andrew D. Watkins

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PURPOSE OF BRIEF & SUMMARY OF THE ARGUMENT

This Court must reject the invitation to discern a partisan gerrymandering standard where none exists. To do otherwise would expand the outer bounds of Kentucky's Constitution beyond any reasonable reading and shoulder Kentucky courts with the hefty and unreasonable responsibility of wading into the partisan waters of redistricting.

Kentucky courts—who, like all courts, are ill-equipped to predict partisan preferences, the dynamic opinions of voters, and the results of future elections—should not be tasked with attempting to transcend ordinary judicial review in order to conjure a partisan gerrymandering standard where none exists within the Kentucky Constitution. The political leanings of Kentucky voters are amorphous and never stationary, even shifting within the same election. Consequently, questions of political fairness belong with the peoples' representatives in the General Assembly; not with the courts. To declare otherwise would transform Kentucky's judiciary from neutral arbiter to partisan actor; ironically, placing Kentucky courts into the center of the very political process plaintiffs brought this case to circumvent.

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What's more, state judiciaries do not have "free rein" to "arrogate to themselves the power vested in state legislatures." *Moore v. Harper*, No. 21-1271, 2023 U.S. LEXIS 2787, at *46 (June 27, 2023). They "may not so exceed the bounds of ordinary judicial review" when applying state constitutional constraints "as to unconstitutionally intrude upon" the legislature's role in

enacting its redistricting prerogatives. *Id.* at *51. This caution is especially apt where, as here, a state constitution provides no standard against which to measure the legislature's exercise of its authority. To wit, Kentucky courts have *never* interpreted the Kentucky Constitution to address questions of partisanship in the redistricting process. Yet, plaintiffs call on this Court to do so today by stretching the language of Kentucky's Constitution beyond what any fair reading allows. Accepting this lure would only increase future chaos and uncertainty in the political process. Recent examples from other states' ill-considered forays into this area provide a cautionary tale of the dangers lurking when the judiciary claims for itself such a role in the political process of redistricting.

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Luckily, Kentucky's Constitution contains a bulwark against such misadventures: an emphatic separation of powers between the departments of government. Contrasted with a nonexistent standard for partisan redistricting claims, Kentucky courts have developed a robust separation of powers doctrine based on the clear text of Kentucky's Constitution. Perhaps more so than any other state in the union, Kentucky's Constitution demands that no department of state government exercise the powers properly belonging to another. While this guard does not erode judicial review, it cautions this Court from striking down an act of the General Assembly absent a clear expression that such action violates the Kentucky Constitution. No such plain violation appears in this case.

This Court should, therefore, affirm the trial court only so far as it correctly found that no claim against partisan gerrymandering exists under Kentucky's Constitution. Questions of partisanship in the redistricting process are purely political in nature and are best left exclusively to the General Assembly.

ARGUMENT

I. Partisan Preferences Are Constantly Shifting In Kentucky, Leaving Its Courts Especially Ill-Equipped To Address Questions Of Political Fairness In Redistricting That Are Best Answered By Political Actors In The General Assembly.

History has shown that partisanship and voter preferences are never static; they can, and do, change over time. Kentucky voters, especially, embody this truism. Voters throughout the Commonwealth have repeatedly demonstrated that they are not automatons who blindly vote for party candidates, but instead are conscientious actors who vote their own unique preferences. The dynamic and unpredictable actions of voters leave the courts, in particular, supremely unqualified to predict partisan swings and electoral outcomes. As the experiences of other states reveal, when the judiciary attempts to undertake the folly of election forecasting it places the courts in the unenviable position of appearing as just another political actor.

Because Courts are especially ill-equipped to predict shifts in partisanship and election results, they lack the tools to craft a standard for addressing partisan gerrymandering. This is truer still when, as here, no

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standard exists under the Kentucky Constitution by which to measure such claims.

A. Partisanship In Kentucky Is Constantly Changing And Voter Preferences Remain Neither Static Nor Always Reflective Of Their Partisan Affiliation.

Partisan gerrymandering claims, instinctually, rely on the fallacy that "groups with a certain level of political support should enjoy a commensurate level of political power and influence." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019). Political fairness in the redistricting process is often "[e]xplicitly or implicitly" defined as ensuring that "one party" is able "to translate statewide support into seats in the legislature." *Id.* But this has never been the rule in Kentucky. As this Court has long acknowledged: "[T]he 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." *Jensen v. Ky. State Bd. of Elections*, 959 S.W.2d 771, 776 (Ky. 1997). And, this is for good reason. Such a standard would be wholly unworkable; particularly in a state like Kentucky where the electorate is fluid.

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That "each vote must carry equal weight" in the electoral context "does not mean that each party must be influential in proportion to its number of supporters." *Rucho,* 139 S. Ct. at 2501. Such a pronouncement is born of pragmatism and reality. The alternative would force courts to define fairness by predicting the moving target of the electorate. But what barometer should

they use when voters are not so easily pigeonholed? In Kentucky, for example, political leanings shift within the same election. Even the experts in this case could not agree on an appropriate metric against which to measure partisan outcomes. While some experts proposed incorporating data from the 2016 Presidential election to gauge partisanship, another declared such data to be "an outlier" and "extreme." *Graham v. Adams*, No. 22-CI-00047, slip op. at 6, 15-17 (Franklin Co. Nov. 10, 2022) [hereinafter Wingate Op.].

This disagreement comes into sharper focus when examining the history of partisan outcomes in Kentucky. Since 1971, for example, Republicans have won a total of only two gubernatorial elections out of thirteen that have been conducted. *See* National Governors Association, Former Governors–Kentucky.[1] Until the end of the 20th Century, Kentucky Republicans never held an outright majority of seats in Kentucky's State Senate. Associated Press, *Kentucky Senator Turns To G.O.P.*, Tipping Scale, N.Y. Times (Aug. 24, 1999).[2] And Democrats maintained a majority in the State House for nearly 100 years until they lost control in 2017. Tom Loftus, *GOP Takes KY House In Historic Shift*, Courier Journal (Nov. 9, 2016);[3] *see also* Wingate Op. at 62-63 ("The Democratic Party long controlled Kentucky's General Assembly and was responsible for crafting the apportionment

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[1] *Available at* https://www.nga.org/former-governors/kentucky.
[2] *Available at* https://www.nytimes.com/1999/08/24/us/national-news-briefs-kentucky-senator-turns-to-gop-tipping-scale.html.
[3] *Available at* https://www.courier-journal.com/story/news/politics/elections/kentucky/2016/11/08/control-kentucky-house-up-grabs/93344114.

scheme that resulted in the current legislative makeup. Thus, proving that political preferences in Kentucky are not stagnant and that it is possible for the opposing party to gain control of the General Assembly under a map crafted for partisan advantage."). Prior to the most recent statewide elections in 2019—where Republicans won every statewide office except the governorship—Kentucky had not elected a Republican Attorney General since 1948. *See* National Association of Attorneys General, Kentucky Former Attorneys General.[4] And, since 1924, only five Republicans have held the office of Secretary of State. *See* Kentucky Secretary of State, Secretaries of State Biographies.[5]

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Put simply: despite its national reputation as a Republican bastion, Kentucky has been anything but at the state level. Indeed, even at the federal level, as recently as 1996 a Democratic candidate for President carried the Commonwealth. *See* Commonwealth of Kentucky, State Board of Elections, Election Results.[6] Bill Clinton's 1992 and 1996 successes in Kentucky were themselves a shift from the previous three Presidential elections where Kentucky voters supported the Republican nominees George H.W. Bush and Ronald Reagan. *Id.*

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[4] *Available at* https://www.naag.org/attorneys-general/past-attorneys-general/kentucky-former-attorneys-general. *See also Daniel Cameron Becomes Kentucky's First African American Attorney General*, WKYT (Dec. 17, 2019), https://www.wkyt.com/content/news/Daniel-Cameron-to-be-sworn-in-as-Kentucky-AG-566270141.html.

[5] *Available at* https://web.sos.ky.gov/ofx/secsofstate.

[6] *Available at* https://elect.ky.gov/results/Pages/default.aspx.

This history should sufficiently serve to caution against thrusting Kentucky's judiciary into the role of partisan pundit attempting to predict electoral outcomes. But there is still another reason that counsels against parsing a judicial standard in this arena. Even if voter preferences were wholly correlated to partisan identity, political affiliation in Kentucky remains a poor stand-in for electoral results. That is because partisan registration in Kentucky is a lagging and ineffective indication of electoral outcomes, leaving in doubt what metric courts could use to gauge the partisanship of a particular district configuration.

In the first instance, there are many Kentucky voters which "do not identify as members of the Republican or Democratic parties." Wingate Op. at 58. Additionally, as the trial court affirmed "although many Kentucky electors may identify as a Republican or Democrat, they may still choose to vote for a candidate of the opposing party." Wingate Op. at 58. As recent election data from 2019 proves, voters "that typically vote Republican, [] are willing, for certain reasons, to vote Democratic." Wingate Op. at 17. Moreover, despite recent Republican victories at the state level, Democrats held an edge in voter registration in the Commonwealth until just last year. As one Kentucky newspaper remarked:

> Republicans now surpass Democrats in registered voters for the first time.
>
> ***

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> Just 40 years ago, Democrats made up 68% of registered voters in Kentucky, more than doubling the 28% registered Republican. While Republicans have made significant electoral gains since the 1980s — particularly dominating federal races — they were slower to make gains in voter registration, as many in rural parts of the state remained registered Democrats to vote in local primaries, where the party still dominated.[7]

Even today, according to the most recent data put out by the Secretary of State, Republicans only account for 45.90% of registered voters, while Democrats account for 44.05%. Commonwealth of Kentucky, State Board of Election, Registration Statistics (June 2023).[8] A difference of less than 65,000 registered voters statewide. *Id.*

Courts simply do not have the tools to predict electoral results. And, even if they could gauge partisan trends, political identity and election outcomes do not correlate in a state like Kentucky.

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B. Wading Into Claims Of Partisan Gerrymandering Only Places Courts In The Unenviable Position Of Appearing Like Political Actors Rather Than Unbiased Fact Finders.

The redistricting process is, at its core, "primarily a political and legislative process." Jensen, 959 S.W.2d at 776. Thus, the political considerations involved in crafting electoral districts following each decennial census are best left to the elected representatives that comprise Kentucky's General Assembly. Not only are they in the best position—as those most

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[7] Joe Sonka, *New Voter Registration Totals Make Kentucky Political History, As GOP Dominance Continues*, Courier Journal (July 15, 2022), https://www.courier-journal.com/story/news/politics/2022/07/15/kentucky-gop-surpasses-democrats-in-party-registration-for-first-time/65374311007.

[8] *Available at* https://elect.ky.gov/Resources/Pages/Registration-Statistics.aspx.

accountable to Kentucky voters—to address any partisan concerns, but their lawmaking carries the weight of legislative legitimacy. Prudence advises against needlessly shouldering the judiciary with "political, not legal, responsibility" in a "process that often produces ill will and distrust." *Rucho*, 139 S. Ct. at 2498-99. Without a clear standard to gauge between constitutional and unconstitutional partisan gerrymandering, Kentucky courts would be walking "into the most heated partisan issues" unarmed. *Id.* (quotation omitted).

This Court should heed the lessons of neighboring jurisdictions. Reading into Kentucky's Constitution the expansive partisan gerrymandering standard plaintiffs seek would commit Kentucky's courts "to unprecedented intervention in the American political process," and place them at the center of an acrimonious process. *Id.* at 2498 (quotation omitted). This is not the role for an impartial judiciary. Instead, Kentucky courts should continue down the wise and considered course this Court has so far charted when considering partisan redistricting claims. Recognizing that it is not the judiciary's role to determine "whether a better plan"—a so-called fairer plan—"could be crafted," but only to "ascertain whether a particular redistricting plan passes constitutional muster," under the express provisions of Kentucky's Constitution. *Jensen*, 959 S.W.2d at 776; *see id.* at 773-76 (considering a challenge under Section 33's express directive to minimize county divisions in districting plans).

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Put simply, Kentucky's Constitution contains no plain mandate limiting partisan considerations in the redistricting process. Just because the political party out of power "perceive[s]" a districting plan "to be unfair" does not make it "unconstitutional." *Jensen*, 959 S.W.2d at 776. And, this is for good reason. As Kentucky's modern history has shown well, electoral certainties are never certain. Complaints of an "unfair" redistricting process—like any objections to the legislative process—are best redressed by appealing to the state's electorate. But plaintiffs here are attempting to shortcut the labors required for such an effort by having this Court secure for them political outcomes they cannot achieve through the ordinary legislative process. Accepting such an invitation would imprudently render Kentucky's judiciary another political player in the redistricting process.

II. If This Court Exceeds The "Ordinary Bounds" Of Judicial Review To Conjure A Partisan Gerrymandering Standard Out Of Whole Cloth It Will Upend Stability And Inject Chaos And Uncertainty Into Kentucky's Redistricting Process.

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This Court's reversal of the long held position that the Kentucky Constitution does not limit partisan gerrymandering would "transgress the ordinary bounds of judicial review." *See Moore*, 2023 U.S. LEXIS 2787, at *49-50. Such a decision would subject Kentucky courts to further scrutiny and open the door to boundless litigation over Kentucky's districting process. Other states' misadventures in this regard should ward off Kentucky from following a similar course.

A. Kentucky Courts Have Never Understood The Kentucky Constitution To Address Partisan Gerrymandering.

Historically, the great focus of Kentucky courts in redistricting cases has been to ensure each vote carries equal weight as guaranteed by the Kentucky Constitution. *See Legislative Research Comm'n v. Fischer*, 366 S.W.3d 905, 912-13 (Ky. 2012) (noting "the concern for population equality overrides the maintenance of county integrity," but the Kentucky Constitution still "require[es] reapportionment plans divide the mathematically fewest number of counties possible"); *Stiglitz v. Schardien*, 40 S.W.2d 315, 321 (Ky. 1931) ("The Constitution is not concerned with election returns, but contemplates equal representation based upon population and territory."); *Ragland v. Anderson*, 100 S.W. 865, 869-870 (Ky. 1907). At the same time, this Court has been firm in dismissing arguments of partisan gerrymandering. *Jensen*, 959 S.W.2d at 776. Despite this clear precedent, plaintiffs are before this Court with a grab bag of new theories for finding a partisan gerrymandering claim. But this does not change the simple truth—as understood by Kentucky courts for nearly half-a-century—that the Kentucky Constitution does not address partisan gerrymandering.

Principally, plaintiffs want Kentucky to follow in the unwise footsteps of other jurisdictions and read into the Free and Equal Elections Clause of the Kentucky Constitution a meaning that does not exist. Ky. Const. § 6 ("All elections shall be free and equal."). Alternatively, they would cobble together a partisan gerrymandering standard from provisions in the Kentucky

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Constitution that provide for equal protection of the law. *D.F. v. Codell*, 127 S.W.3d 571, 575 (Ky. 2003) ("Citizens of Kentucky are entitled to equal protection of the law under the 14th Amendment of the United States Constitution and Sections 1, 2, and 3 of the Kentucky Constitution.").

But novelty does not translate to merit. And each of plaintiffs' theories immediately crumbles when examined in its historical context. During the 1890-91 constitutional debates, for example, the Free and Equal Elections Clause—present in each of Kentucky's Constitutions—was the subject of much discussion as to whether its meaning was sufficiently clear. Delegate McDermott expressed a fear that the simple phrase "all elections shall be free and equal" could lead to judicial chicanery. 1890-91 Debates at 670-71. He admonished his fellow delegates that such "misleading terms ... may be held to mean anything a Court may choose to declare." *Id.* And, he proposed several amendments he hoped would prevent "general and vague" language from being "easily distorted [] by Courts to destroy useful legislation by the General Assembly." *Id.* at 945.

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In response, Delegate Rodes observed:

> We have had this particular clause in all three Constitutions. We have never had any difficulty about its explanation hitherto. We certainly know the meaning of the word 'free.' We know what the word 'equal' means. It means that nobody shall have any paramount superiority or claim at the poll against any other man. You cannot make it clearer. The more we dabble with it the muddier we make it.

Id. at 946. And Delegate Burnam explained, that all this language was intended to confer was that elections are to be "free from violence, intimidation and fraud on the part of election officers, bullies or military force, or those acting with them" and "equal in the sense that votes are to be counted and not weighed—that all honest electors shall have equal opportunities to cast their ballots and have them counted." *Id.* at 632. Ultimately, the majority of delegates believing the clause was not susceptible to misunderstanding by the judiciary, it remained unchanged.

Kentucky's courts have also consistently applied this provision over the years with an understanding that it prohibits interference with voting procedures and has nothing to do with the districting process. As far back as 1886, it was understood 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 all precincts are "freed from the interference or contamination of fraudulent voters." *Commonwealth v. McClelland*, 83 Ky. 686, 693 (1886). Continuing into the 20th Century, Kentucky's courts have remained committed to the notion that the Constitution's mandate of "free and equal" elections means that "every person entitled to vote shall have the right to do so." *Wallbrecht v. Ingram*, 175 S.W. 1022, 1026 (Ky. 1915).

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Consistent with this plain understanding, whenever the question of a free and equal election is raised "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." *Id.* at 1027. More concretely, as articulated for more than a century by Kentucky's judiciary, the clear objective of the Free and Equal Elections clause, is a command that: "[T]he voter shall not be physically restrained in the exercise of his right of franchise by either civil or military authority, and that every voter shall have the same right as any other voter." *Asher v. Arnett*, 132 S.W.2d 772, 775 (Ky. 1939) (quoting *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914)); *see also id.* at 776 (listing Kentucky cases that are "[i]n harmony with the foregoing interpretations of the constitutional provision").

Partisan gerrymandering claims fair no better under an equal protection analysis. Equal protection claims are a means of preventing "governmental decision makers from treating differently persons who are in all relevant respects alike." *Codell*, 127 S.W.3d at 575 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)). But Kentucky courts also recognize that "as a practical matter, nearly all legislation differentiates in some manner between different classes of persons." *Id.* Accordingly, equal protection has never been held to require partisan proportionality in the districting process. To the contrary. In *Jensen*, this Court slammed the door on equal protection as a basis for partisan gerrymandering claims explaining that simply because a redistricting plan "makes it more difficult for a particular group in a

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particular district to elect the representatives of its choice" does not mean it is constitutionally deficient. 959 S.W.2d at 776.

In short, Kentucky courts have never understood this state's constitution to contain a partisan gerrymandering claim.

B. An Abrupt Change Now Would Go Beyond The Ordinary Exercise Of Judicial Review And Result In Kentucky's Judiciary Seizing The Lawmaking Power For Itself.

Since shortly after the Founding Era in American History, Courts have assumed a principal role in ensuring legislative enactments are constitutionally firm. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). That is because any "act of the legislature, repugnant to the constitution, is void." *Id.* at 177. But judicial review is not limitless. *Moore*, 2023 U.S. LEXIS 2787, at *46 ("state courts do not have free rein"). Courts must stay within the "ordinary bounds of judicial review" so as not to risk "arrogat[ing] to themselves the power vested in state legislatures." *Id.* at *49-50.

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Alexander Hamilton, writing in Federalist No. 78, defended the role of judicial review to "preserve[]" a "limited Constitution[,] ... one which contains certain specified exceptions to the legislative authority." Federalist No. 78. Illustrative of these specified constitutional limits were commands that a legislature "shall pass no bills of attainder, no ex-post-facto laws, and the like." *Id.* Hamilton argued that judicial review comprises a "duty ... to declare all acts contrary to the *manifest tenor* of the Constitution void." *Id.* (emphasis

added). Such a role, he asserted, was crucial to the safeguarding "of particular rights or privileges." *Id.*

To that end, Hamilton understood the ordinary bounds of judicial review as fidelity to the plain text of a constitutional document. *See* Arthur E. Wilmarth Jr., Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic, 72 Geo. Wash. L. Rev. 113, 140-41 n.160 (2003) ("reference to the 'manifest tenor' of the Constitution suggests a primary focus on the Constitution's text"). Similarly, several Justices of the United States Supreme Court have explained their view that the ordinary bounds of judicial review should not "impermissibly distort[]" legislative enactments "beyond what a fair reading require[s]," nor should it "transcend[] the limits of reasonable statutory interpretation. *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring); *id.* at 133 (Souter, J., dissenting); *see also Moore*, 2023 U.S. LEXIS 2787, at *52-53 (Kavanaugh, J., concurring).

All these elucidations on the exercise of judicial review share a similar vein. Before a court can declare a statutory enactment unconstitutional, it must find it repugnant to the plain terms of a constitutional proscription. As Justice Marshall first delineated the bounds of judicial review, it demands a "fair construction" of the terms employed in constitutional text; focusing on the "natural meaning" of the "words themselves." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-38 (1810).

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A fair construction of the plain terms of each constitutional provision advanced by plaintiffs has long disclaimed any partisan gerrymandering claim. Kentucky courts have, for decades, exercised judicial review to shun any reading of a partisan gerrymandering standard into the Kentucky Constitution. To reverse course now and formulate a counter textual partisan gerrymandering standard—when the relevant constitutional text has not been amended since 1891—would "intrude upon the role specifically reserved to [the] state legislature[]," and "exceed the bounds of ordinary judicial review." *Moore*, 2023 U.S. LEXIS 2787, at *51.

C. North Carolina Provides A Cautionary Tale Of What Can Result When a State Court Unadvisedly Wades Into The Partisan Redistricting Process.

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North Carolina was faced recently with a choice not dissimilar to the one Kentucky faces today. In 2021, after release of the decennial census data, the North Carolina General Assembly adopted new maps for its state house and congressional districts. *See Harper v. Hall (Harper I)*, 868 S.E.2d 499, 513 (N.C. 2022), *overruled by Harper v. Hall (Harper III)*, 886 S.E.2d 393 (N.C. 2023). These maps were shortly challenged as partisan gerrymanders in violation of North Carolina constitutional provisions analogous to the ones plaintiffs advance here. *Id.* Following a trial, the three-judge lower court concluded the maps were "partisan outliers." *Id.* at 515. But, it reasoned, redistricting is "an inherently political process ... left to the General Assembly," and the North Carolina "Constitution does not address

limitations on considering partisan advantage in the application of its discretionary redistricting decisions." *Id.* at 524-25.

The North Carolina plaintiffs appealed the trial court's decision, and the North Carolina Supreme Court, in a 4-3 decision, reversed. Rejecting its own judicial precedent that had implicitly shunned adoption of a partisan gerrymandering claim, the North Carolina Supreme Court manufactured a partisan gerrymandering standard that did not exist under its state constitution. *Id.* at 534 (claiming defendants "misread" North Carolina Supreme Court precedent that held "[t]he General Assembly may consider partisan advantage"); *cf. id.* at 575 (Newby, C.J., dissenting) ("The majority, however, fails to recognize that at least some partisan considerations are permitted" under our precedent). The *Harper I* Court emphatically declared "the only way that partisan gerrymandering can be addressed is through the courts." *Id.* at 509. The result of its decision, however, was to needlessly plunge its state into a multi-year judicial nightmare brimming with rancorous despair.

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The North Carolina General Assembly attempted to enact new district maps. *Id.* at 559. But these maps too faced constitutional challenge. *Harper v. Hall (Harper II)*, 881 S.E.2d 156 (N.C. 2022), *withdrawn and superseded by Harper III*, 886 S.E.2d 393 (N.C. 2023). However, the partisan gerrymandering "standard" announced by the North Carolina Supreme Court proved wholly indecipherable by everyone involved in the process. Although

the *Harper I* Court had expressed "potential statistical measures" for complying with its conceived standard, the *Harper II* Court now explained other "contextual" evidence (such as passage of district maps "on strict party-line votes") could still support a partisan gerrymandering claim. *Id.* at 161, 170, 175, 178.

But the North Carolina electorate had grown weary of its court's ill-advised trespass into the political districting process. In November 2022—between when *Harper II* was argued in October 2022 and decided in December 2022—North Carolina voters took to the polls and flipped the Supreme Court's majority from a partisan 4-3 makeup in favor of Democrats, to a 5-2 makeup favoring Republicans.[9] The new North Carolina Supreme Court quickly agreed to rehear *Harper II*, and in April 2023, the North Carolina Supreme Court vacated its short-lived partisan gerrymandering precedent, taking North Carolina courts out of the business of assessing political fairness. *See Harper III*, 886 S.E.2d 393.

Describing the imprudence of its predecessor court, the *Harper III* majority explained that *Harper I* and *Harper II* had created a partisan gerrymandering claim without "defin[ing] how much partisan gerrymandering is too much." *Id.* at 400. Instead, as the *Harper II* opinion revealed, the previous majorities had fashioned "a standard that only four

[9] Hannah Schoenbaum, *Republicans Retake Control of North Carolina Supreme Court*, AP (Nov. 9, 2022), https://apnews.com/article/north-carolina-state-courts-supreme-court-government-and-politics-176517442f012865f93d56e9c2827755.

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justices know and understand." *Id.* In its quest to define partisan fairness, the North Carolina Supreme Court had fashioned a standard "riddled with policy choices," and entirely absent from the North Carolina Constitution. *Id.* Ultimately, after three years of senseless litigation, the *Harper III* Court found such a standard to be neither "judicially discoverable" nor "manageable." *Id.* at 400-01.[10]

III. Uniquely, Kentucky's Robust Separation Of Powers Doctrine Demands A Clear Constitutional Violation Before This Court Intrudes On Powers Unmistakably Belonging To The Legislative Department.

There is another reason this Court should refrain from intruding on the legislature's prerogative to draw district maps. Kentucky's separation of powers doctrine demands restraint before the judiciary meddles in powers commanded to the legislative department. The Kentucky Constitution dictates:

> The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.
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> ***

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[10] If the state litigation was not enough, following the decision in *Harper I* the legislative defendants petitioned the United States Supreme Court for certiorari, which was ultimately granted. *Moore v. Harper*, 142 S. Ct. 2901 (2022) (granting petition for writ of certiorari). As the North Carolina Supreme Court considered *Harper II* and *Harper III*, the Supreme Court of the United States would hear oral arguments and ultimately render its opinion in *Moore v. Harper*, No. 21-1271, 2023 U.S. LEXIS 2787 (June 27, 2023).

> No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Ky. Const. §§ 27 and 28. Read together, these two constitutional provisions have been recognized as embodying perhaps the strongest separation of powers doctrine in the nation. *See Sibert v. Garrett*, 246 S.W. 455, 457 (Ky. 1922). Indeed, the contours of Kentucky's separation of powers doctrine—set apart from that of the national government—is reinforced by an "affirmative prohibition against one department exercising powers properly belonging to the others." *Id.*

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Of course, this strong separation "does not destroy the power of the courts to pronounce an act unconstitutional when its enactment is either expressly or by necessary implication inhibited and subversive of the purposes and intention of the makers of the [Kentucky] constitution," but it necessitates a restrained approach. *Id.* at 458. Key to determining an act of the legislature to be unconstitutional is violation of an "express provision" and "plain mandate" of the Kentucky Constitution. *Stiglitz*, 40 S.W.2d at 320-21 ("[I]t is within the province and the power of the courts to declare void and ineffective for any purpose all acts of the General Assembly in violation of an express provision of the Constitution. ... The plain mandate of the Constitution has been disregarded."); *see also Ragland*, 100 S.W. at 866-67 ("[I]f the question as to whether or not the legislation is inimical to the Constitution be doubtful, it will always be decided in favour [sic] of the

constitutionality of the law. But where the matter is plain that the Constitution has been violated, then the courts cannot escape the duty of so declaring[.]").

However, the text and history of Kentucky's Constitution contain no clear expression against partisan gerrymandering. On the contrary, in Kentucky, the process of enacting district maps is reserved nearly exclusively to the legislative department:

> We can think of no act of government that is more legislative in character than the fixing of boundaries for electoral purposes. Only in the most extreme instance of a persistent failure or refusal by the constituted legislative authority to do it could a court of law enter the political thicket for the necessary protection of constitutional rights guaranteed to the citizenry.
>
> ***
>
> [T]he establishment of boundaries for [electoral] districts clearly falls within the area of legislative discretion and cannot be delegated to a judicial officer or body.
>
> *Fawbush v. Bond*, 613 S.W.2d 414, 415 (Ky. 1981).

Under Kentucky's separation of powers doctrine, this delegation requires the judicial department to exercise self-restraint when reviewing the legislature's districting decisions. This Court should continue to reject the intrusion on legislative power that a partisan fairness standard—which the text of Kentucky's Constitution cannot bear—would represent.

CONCLUSION

Kentucky courts must continue to reject invitations to exercise the power to pass judgment on the political fairness of legislatively enacted

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district maps. Hesitancy in this arena is not only prudent; it is also in accord with the ordinary bounds of judicial review and Kentucky's strong separation of powers.

The trial court should be affirmed.

Respectfully submitted,

/s/ Andrew D. Watkins
Andrew D. Watkins (No. 98196)
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK, PLLC
15405 John Marshall Highway
Haymarket, Virginia 20169
Phone: (540) 341 - 8808
Fax: (540) 341 - 8809
awatkins@holtzmanvogel.com

Counsel for Amicus Curiae
The National Republican Redistricting Trust

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/s/ Andrew D. Watkins
Andrew D. Watkins (No. 98196)
Counsel for Amicus Curiae
The National Republican Redistricting Trust

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