Received: 2022-SC-0522 08/25/2023
Filed: 2022-SC-0522 08/28/2023
Kelly L. Stephens, Clerk
Supreme Court of Kentucky

Supreme Court of Kentucky

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

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

Court of Appeals, Nos. 2022-CA-1403, -1451
v. Franklin Circuit Court, No. 22-CI-00047

MICHAEL ADAMS, in his official capacity as Secretary of State, *et al.* *Appellees, Cross-Appellants*

OPENING BRIEF FOR THE COMMONWEALTH OF KENTUCKY

VICTOR B. MADDOX (No. 43095)
Deputy Attorney General
MATTHEW F. KUHN (No. 94241)
Solicitor General
HEATHER L. BECKER (No. 94360)
Executive Director
ALEXANDER Y. MAGERA (No. 97708)
Assistant Solicitor General

Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
(502) 696-5300
victor.maddox@ky.gov
matt.kuhn@ky.gov
heather.becker@ky.gov
alexander.magera@ky.gov

Counsel for the Commonwealth of Kentucky

Certificate of Service

I certify that a copy of this brief was served by U.S. mail on August 25, 2023, upon Michael P. Abate, Casey L. Hinkle, William R. Adams, Kaplan Johnson Abate & Bird LLP, 710 W. Main St., 4th Floor, Louisville, Kentucky 40202; Taylor Brown, Kentucky State Board of Elections, 140 Walnut Street, Frankfort, Kentucky 40601; Michael G. Adams, Jennifer Scutchfield, Michael R. Wilson, Office of the Secretary of State, 700 Capital Ave., Suite 152, Frankfort, Kentucky 40601; Bridget M. Bush, R. Kent Westberry, Hunter Rommelman, Landrum & Shouse LLP, 220 W. Main St., Suite 1900, Louisville, Kentucky 40202; Hon. Thomas Wingate, Franklin Circuit Court, 222 St. Clair St., Frankfort, Kentucky 40601. I further certify that the record was returned before the submission of this brief.

/s/ Alexander Y. Magera

INTRODUCTION

Both the United States and Kentucky Constitutions assign to the Kentucky General Assembly the duty of dividing the Commonwealth into Congressional and State representative districts. Every ten years, the General Assembly completes this important districting duty. But because it is impossible to create districts that please everyone, the displeased routinely resort to the courts.

Before this Court is the latest round of this never-ending political fight, the rules of which have been in place for decades (some, over a century). But the only way the Kentucky Democratic Party and the other challengers can prevail is to convince this Court to read the Kentucky Constitution in ways it has explicitly said it would *not*—as constitutionalizing a political party's perception of fairness and as requiring a new test to govern State House districting under Section 33 of the Kentucky Constitution. As it has at every opportunity, this Court should (again) refrain from entering the partisan districting battle because "[t]he bench should have no stain of politics upon it." 1890–91 Kentucky Constitutional Convention Debates at 4415–16.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth looks forward to addressing the Court at oral argument on September 19, 2023.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The General Assembly did its job.

Every ten years, the federal government determines, based on population, each State's number of Congressional representatives. U.S. Const. art. I., § 2; U.S. Const. amend. XIV, § 2; *see generally* 2 U.S.C. § 2a. The Elections Clause, U.S. Const. art. I, § 4, then instructs "state legislatures" to redraw their Congressional districts. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 414 (2006); *Moore v. Harper*, 143 S. Ct. 2065, 2074 (2023). Similarly, Section 33 of the Kentucky Constitution requires a decennial redrawing of Kentucky's State House districts by the General Assembly.

Census data is vital to these duties. Federal and state law require maintaining population equality across districts. Pursuant to the "one-person, one-vote principle," "States must draw congressional districts with populations as close to perfect equality as possible." *Evenwel v. Abbott*, 578 U.S. 54, 59–60 (2016). For Kentucky's State House districts, "[p]opulation equality . . . may be satisfied by a variation which does not exceed -5% to +5% from an ideal legislative district." *Fischer v. State Bd. of Elections*, 879 S.W.2d 475, 479 (Ky. 1994) (*Fischer II*); *see also Brown v. Ky. Legis. Rsch. Comm'n*, 966 F. Supp. 2d 709, 717 (E.D. Ky. 2013) (identifying federal rules for population equality across State legislative districts).

Kentucky received necessary Census data in the late summer of 2021. TR

533. That data showed that the districts created by Kentucky's 2012 Congressional and 2013 State House districting plans had become grossly and unconstitutionally malapportioned. DEX 1, Tabs 10, 13, 15, 16; TR 504–05, 534–35, 1050. Because the General Assembly was out of session when it received that data, it had to work quickly at its first opportunity, the start of its 2022 regular session, to enact constitutional districting plans to govern the 2022 election cycle. The short turn-around even required the General Assembly to push back the candidate-filing deadline in that election cycle so candidates could file paperwork in the appropriate district. 2022 Ky. Acts ch. 1 (HB 172). The General Assembly's timeline here tracked with the timeline of past General Assemblies, controlled by Democrats, in enacting districting plans.[1] TR 1747–48.

By overwhelming margins, the General Assembly passed House Bill 2 (Kentucky's State House districting plan) and Senate Bill 3 (Kentucky's Congressional districting plan) over Governor Beshear's vetoes. It is undisputed that both plans are constitutional under controlling precedent because they comply with population-equality rules, with HB 2 also "divid[ing] the fewest possible *number of* counties." *Fischer II*, 879 S.W.2d at 479 (emphasis added); Appellant Br. 5–6; DEX 1, Tabs 1, 2, 11, 17; TR 508.

[1] Though it complained about the timing of the legislation, the KDP never asked Governor Beshear to call a special session to allow the General Assembly to complete its work sooner. VR 04/05/22, 4:57:30–58:18.

The KDP asks the judiciary to do the job of the legislature.

On January 20, 2022, the Kentucky Democratic Party, a democratic State House representative, and four Kentucky voters siding with them (collectively, the "KDP") sued to have SB 3 and HB 2 declared unconstitutional. TR 1–35. Their claims can be grouped into two categories. First, with respect to HB 2, they advocate for a test rejected 25 years ago for examining the constitutionality of State House maps under Section 33 of the Kentucky Constitution. TR 28–30. Second, they advocate for the creation of a "partisan gerrymandering" claim, also rejected both over a century ago and again 90 years later. TR 27–28, 30–34. The KDP believes that such a claim arises from one of the following: (1) Section 6 of Kentucky's Constitution; (2) Kentucky's equal-protection doctrine; (3) Kentucky's free speech and assembly clauses; or (4) Section 2 of Kentucky's Constitution. *Id.*

The Commonwealth, through Attorney General Daniel Cameron, intervened as a defendant. TR 306–11, 652–53. The Secretary of State (a named defendant) and the Commonwealth then moved to dismiss the case. TR 501–30. They explained that the KDP's claims have no basis in precedent and would require overruling several cases to survive. *Id.* The Commonwealth also asserted a counterclaim and cross-claim to preclude the use of the grossly malapportioned and unconstitutional 2012 Congressional and 2013 State House districting plans in any future elections. TR 423–29. Throughout the trial court proceedings,

Judge Wingate made clear that he wanted to build a complete record for this Court. *See, e.g.*, VR 04/06/22, 10:38:25–45 ("[T]he simple fact is I want to make a record for the Supreme Court."). So he denied the motion to dismiss and ordered a bench trial. TR 683–85, 782–83.

The trial revealed several key facts. First, HB 191, the Democrats' alternative House districting plan, was still expected to yield about 77 Republican seats—two more than the 75 House seats Republicans had won under the Democrats' 2013 State House map, and only three fewer than the 80 House seats Republicans just won. VR 04/06/22, 3:40:35–41:32; VR 04/05/22, 5:16:35–17:48; DEX 34 ("Predicted 23% D/77% R seat share."). Second, it is impossible to create a Congressional districting plan in Kentucky that yields less than a 5–1 Republican seat share; yet Republicans could have drawn a map that would likely have given them all six seats. VR 04/07/22, 10:48:12–53:13, 2:52:30–55:58; DEX 30 at 36–38. These critical points are fatal to the KDP's legal theory that HB 2 and SB 3 are "extreme partisan gerrymanders." TR 2–3. Finally, even a cursory examination of HB 2's complained-of configuration of particular cities reveals no partisan advantage for Republicans; if anything, it is HB 191 and the 2013 State House districting plan that arguably constitute Democratic gerrymanders of Kentucky's cities. VR 04/05/22, 5:25:50–41:31; TR 1026–30. Despite these facts (and others), Judge Wingate found HB 2 and SB 3 to be "partisan gerrymander[s]." TR 1870–75.

Nevertheless, Judge Wingate correctly concluded "that the Kentucky Constitution does not expressly prohibit partisan gerrymandering in redistricting." TR 1875. After examining Kentucky's Constitution, Judge Wingate could find no support in it for such a claim. TR 1883–94. As for the KDP's Section 33 claim, Judge Wingate recognized that "[s]ince . . . 199[4], the 'dual mandate' of population equality and county integrity has held strong. The Kentucky Supreme Court has continued to uphold or strike down House redistricting plans solely based on whether the plan (1) splits the minimum number of counties required and (2) keeps a population variation between +/-5%." TR 1879–80. Since the KDP's Section 33 claim required changing that dual mandate, Judge Wingate rejected that claim. TR 1875–81.

Judge Wingate's upholding of HB 2 and SB 3 as constitutional mooted the Commonwealth's counterclaim and cross-claim.[2] TR 1901. The KDP appealed, TR 1904, and the Commonwealth cross-appealed, Cross-Appeal TR 1–2, which were transferred here.

[2] The Commonwealth's cross-appeal is of this portion of the judgment. The KDP, however, no longer seeks reinstatement of the old Congressional and State House plans. Appellant Br. 68. Regardless, the Court should preclude any future reinstatement of these indisputably unconstitutional old plans. TR 1050.

ARGUMENT

Judge Wingate got it exactly right when he concluded that the KDP's partisan-gerrymandering and Section 33 claims have no basis in Kentucky law.

Since 1994, this Court has applied a two-part test governing Section 33 claims challenging State House districting plans: "The mandate of Section 33 is to make full use of the maximum constitutional population variation [of +/-5% from an ideal legislative district] and divide the fewest possible number of counties." *Fischer II*, 879 S.W.2d at 479. A State House plan that meets this mandate, like HB 2, "passes constitutional muster." *Jensen v. Ky. State Bd. of Elections*, 959 S.W.2d 771, 776 (Ky. 1997). This Court has refused to alter that "dual mandate" each time it has been asked. *Id.*; *Legis. Rsch. Comm'n v. Fischer*, 366 S.W.3d 905, 911 (Ky. 2012) (*Fischer IV*). It should do the same here.

Similarly, for both Kentucky's State house and Congressional plans, this Court has refused to find that the Kentucky Constitution gives rise to a partisan-gerrymandering claim. *Jensen*, 959 S.W.2d at 776; *Richardson v. McChesney*, 108 S.W. 322, 323 (Ky. 1908); *see also Watts v. Carter*, 355 S.W.2d 657, 658–59 (Ky. 1962) (disclaiming the authority to strike down the "geographic monstrosity" that was the 1962 Congressional districting act (citation omitted)). Against this precedent, the KDP believes a flawed Pennsylvania high court decision should control here. But "this Court's North Star is our own Kentucky Constitution" and our own history and precedent. *Beshear v. Acree*, 615 S.W.3d 780, 805 n.30 (Ky. 2020); *see*

also e.g., *Harper v. Hall*, 886 S.E.2d 393, 409–49 (N.C. 2023) (refusing to recognize a partisan-gerrymandering claim). So while the KDP spends most of its brief attempting to prove that HB 2 and SB 3 are extreme partisan gerrymanders (even though the record is against them), it has offered no legal principle to show why that matters.

Kentucky's nonpartisan judiciary has repeatedly refrained from inserting itself into possibly the most partisan issue imaginable. This Court should affirm.

I. Judge Wingate correctly rejected the KDP's Section 33 claim.

For almost 30 years now, this Court's direction to the General Assembly for creating a constitutionally sound State House districting plan has been clear: "The mandate of Section 33 is to make full use of the maximum constitutional population variation [of +/-5% from an ideal legislative district] and divide the fewest possible number of counties." *Fischer II*, 879 S.W.2d at 479. There is no dispute that HB 2 complies with that mandate. Appellant Br. 5–6. And because HB 2 "divide[s] the smallest number of counties necessary to comply with the 5 percent rule," it "fully complies with Section 33 of the Kentucky Constitution." *Fischer IV*, 366 S.W.3d at 916.

That being the case, the KDP's only hope here is to get that mandate *changed*. Three times litigants have asked the Court to do that, and three times this Court has stood firm. *Jensen*, 959 S.W.2d at 776; *Fischer IV*, 366 S.W.3d at 911; *see also Wantland v. Ky. State Bd. of Elections*, 2005-SC-0386 (Ky. May 10, 2006)

(denying discretionary review of *Wantland v. Kentucky State Board of Elections*, 2004-CA-000508-MR, 2005 WL 1125070 (Ky. App. May 13, 2005) (unpublished), which rejected attempts to change the dual mandate). Nothing is different this time. The KDP has offered no reason for this Court to abandon precedent. *See Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 469 (Ky. 1998) ("Unlike some jurisdictions, stare decisis has real meaning to this Court.").

History and precedent are not on its side. So instead, the KDP proffers an atextual reading of Section 33. The KDP would undercut this Court's credibility by dragging it into a highly partisan arena to try and remedy the KDP's self-inflicted political failures. All this Court must do is adhere to the test that it has employed for almost 30 years and affirm Judge Wingate's finding that HB 2 does not violate Section 33.

A. History and precedent interpreting Section 33 support Judge Wingate's ruling.

State House districting under Section 33 has had a long and tortured history in Kentucky. In 1994 though, this Court laid down a clear test for the General Assembly to follow: "The mandate of Section 33 is to make full use of the maximum constitutional population variation [of +/-5% from an ideal legislative district] and divide the fewest possible number of counties." *Fischer II*, 879

S.W.2d at 479. It took almost all of Kentucky's history—through four constitutions and several cases over the course of over 100 years—to achieve this clarity. There is no reason to backtrack now.

1. Kentucky's districting rules have been hotly debated for centuries. Our first three constitutions all had different State House districting rules, 1792 Ky. Const. art. I, § 6; 1799 Ky. Const. art. II, §§ 5, 6; 1850 Ky. Const. art. II, §§ 5, 6, and sparked spirited debate, 1799 Kentucky Constitutional Convention Debates at 9–10, 40; 1849 Kentucky Constitutional Convention Debates at 444–620.[3] The debate about what eventually became Section 33 went the same way. 1890–91 Debates at 3789, 3807–39, 3962–89, 4384–4430, 4444–52, 4609–30, 5900–04.

The Convention's Committee of the Whole and many delegates proposed various rules ranging from adhering to the 1850 Constitution's districting rules to what eventually became Section 33. *Id.* at 3789, 3962, 4385–88. These competing proffered rules sparked heated debate over the amount of discretion to give the General Assembly over districting and the rules by which to guide that body. *Id.* at 3807–39, 3963–89. Delegate Clardy, for example, championed the equality-of-population principle so as to combat gerrymandering. *Id.* at 3976.

[3] *See* https://uknowledge.uky.edu/ky_cons_conventions/ and https://catalog.hathitrust.org/Record/001144015 for all debates.

Delegate Hopkins, instead, tried to come up with an equitable solution to redistrict "according to population and territory," but recognized the inherent difficulty in doing so: "I do not believe this Convention will ever settle [the issue of districting]; and, in attempting to do so, it looks like we are merely sowing seed which will brood disaster to our work before it is over." *Id.* at 3981. A resolution to have the Committee of the Whole ensure that any districting rules "have due regard to population and territory" was proposed, which Delegate Buckner supported. *Id.* at 3983. To ensure Louisville received its just representation according to its population, Delegate Young warned the convention to stay away from New York's districting rules, which allowed the legislature to gerrymander without due regard for equality of population among districts. *Id.* at 3984–85. Delegate Spalding reported that the Committee's main recommendation tried to provide for "equal and uniform" representation "based upon territory and population," but "found it utterly impracticable to do that. The population of the State is so unequally distributed that it is utterly impossible to take territory into consideration, except in a general way; and further, [the main] report was not satisfactory to all of the Committee." *Id.* at 4389.

At one point, Delegate L.T. Moore offered an amendment that allocated the duty of districting to the executive branch if the General Assembly abdicated its duty. *Id.* This only sparked more debate and less progress. Well into the Convention, Delegate Johnston recognized that the convention was going nowhere:

It was still left with "an original report, half a dozen substitutes, and a lot of amendments." *Id.* at 4389–90. Yet worries about the Commonwealth's districting principles, whether the General Assembly would do its job, and how counties would be treated versus inequality of population among districts remained at the forefront of the debate. *Id.* at 4390–94.

Delegate C.T. Allen tried to focus the convention on the task at hand. Prophetically, he explained that no matter what they did accusations of gerrymandering would always exist:

> [N]o matter how earnestly or how fairly we may [apportion], we will be accused by somebody of gerrymandering the State. You cannot satisfy everybody . . . . I doubt whether you can get a majority to agree. . . . I may claim that my county should be attached to a certain other county, and somebody will object to it, and we will be in almost interminable wrangle on that question alone. . . . We can lay down the principle upon which it shall be done, and then allow the Legislature to work out the geography of the case.
>
> [I]f we undertake to go into the apportionment of this State, we will find ourselves in the predicament the Legislature found itself in 1880 . . . . We never did agree, and we had to fight it out like Kilkenny cats. . . . [Y]ou will be perfectly astonished at your inability to agree upon the apportionment of this State. Let us content ourselves while laying down the principle upon which the State shall be apportioned, and leave it to the next Legislature to work out the geography of it.

Id. at 4394–95. Briefly, the delegates noted progress. *Id.* at 4394–400. But this step forward was short-lived, as the convention fell back into heated debate over the principles by which districting should be conducted. *Id.* at 4402–05.

Almost all the Framers, however, did agree that districting is a legislative function. *Id.* at 4413–14. Delegate Rodes proposed to get the "Judges of the Court of Appeals" involved, which was apparently how it was "done already in the State of Pennsylvania." *Id.* at 4414. But this proposal was met with fierce resistance from many delegates. Delegate C.T. Allen asked pointedly, "How many Judges of the Court of Appeals would be willing to do that the year before the time comes around for him to be elected?" *Id.* at 4414. Delegate Washington summed up his disagreement, too:

> *This is essentially a legislative function.* It has been so regarded and so treated, I believe, during our entire history, and very properly. It should be left with the people in General Assembly. The Governor, as head of the executive branch of the government, should have nothing to do with it. Neither should the Auditor have any thing to do with it; nor the Treasurer, nor anybody except the immediate representatives of the people. This, to my mind, is self-evident. . . . *As respects the Judiciary, it is even more clear, if possible, that it should have no sort of connection with a matter of this kind*, which always, whether we would have it so or not, involves considerations of a more or less political nature. The bench should have no stain of politics upon it.
>
> . . . Let us leave it with the Representatives of the people, where it belongs. . . . [T]he General Assembly can and will properly attend to this matter. But if, for any reason, it should fail in that regard, then let the Governor, as he is authorized to do, call them back to their post of duty for that specific purpose.

Id. at 4415–16 (emphasis added). Delegates Whitaker and Bullitt agreed. *Id.* at 4416–17.

Once it was agreed that districting was for the General Assembly, the discussion fell back on the principles that should govern it. One principle was Delegate May's proposed amendment that "[n]o fraction of a county shall be added to any other than an adjacent county in the apportionment of representation." *Id.* at 4420. The purpose of that amendment, which Delegate Bronston acknowledged, was to ensure "that if a county has to be divided, that that part cut off ought to be added to an adjacent county."[4] *Id.* at 4423.

Another principle was Delegate Hopkins's "amendment . . . providing that not more than two counties should be joined together to form a legislative district." *Id.* at 4428. He wanted to provide for equal population as much as possible, but his priority was preventing the joining of more than two counties. *Id.* at 4429, 4609–12; *see also id.* at 4450 (Delegate Jonson confirming that "there is no part of the State in which two counties adjoining cannot be made to constitute a district with the requisite population."). Yet Delegate Johnston's amendment to that amendment won in the end, championing population equality: "Provided, that the principle requiring every district to be as nearly equal in population as may be shall not be violated." *Id.* at 4613–14.

[4] The KDP gives the credit to Delegate Mackoy for proposing the final, retooled language of the amendment making its way into Section 33: "No part of a county shall be added to another county to make a district." Appellant Br. 43–44. But, as explained below, the one-person, one-vote rule makes it impossible to effectuate that language.

Debate continued about the principles that should govern districting. *Id.* at 4614–19. Indeed, Delegate Ramsey essentially believed that the General Assembly would never truly be prevented from gerrymandering unless districting was based first on the creation of primary districts, as in the 1850 Kentucky Constitution.[5] *Id.* at 4619–20. But that sentiment did not win out, as the concept of primary districts is nowhere to be found in Section 33. Even after the final version of the constitution was being adopted, delegates were still debating the content of Section 33. *Id.* at 5900–04.

In the end, one thing that most delegates agreed on was that the judiciary should stay far away from districting to remain free from its "stain of politics." *Id.* at 4414–17. But this was the only sentiment that garnered more than a bare majority. It is baffling that, in the face of all this heated and widespread debate, the KDP believes it has proffered a test that captures the Framers' sentiment. Even more so since for over 100 years Kentucky's high court struggled to settle on a particular interpretation of Section 33.

2. The struggle began with *Ragland v. Anderson*, 100 S.W. 865 (Ky. 1907). There, challengers to a State districting plan alleged it was unconstitutional under Section 33 because it "not only in many instances joins more than two counties

[5] The KDP incorrectly attributes these remarks to Delegate Twyman. Appellant Br. 42–43.

together to form a representative district . . . but many of the districts are grossly and outrageously unequal in population." *Id.* at 865 (quotation marks omitted). The challengers therefore invoked the rule of Section 33 that "[n]ot more than two counties shall be joined together to form a Representative District: Provided, In doing so the principle requiring every district to be as nearly equal in population as may be shall not be violated."

Kentucky's high court found the plan's districts unconstitutionally malapportioned. *Id.* at 868. But the Court did not pinpoint specific numbers, recognizing only that "equality of representation is [not] to be made mathematically exact" and "requires [only] that equality in the representation of the state which an ordinary knowledge of its population and a sense of common justice would suggest." *Id.* at 869.

The *Ragland* Court mostly focused on the equality-of-population principle but did say a few words about the challengers' other argument "that section 33 forbids more than two counties to be joined in one district." *Id.* at 870. "Without elaboration," it disagreed and was "of [the] opinion that more than two counties may be joined in one district, provided it be necessary in order to effectuate that equality of representation which the spirit of the whole section so imperatively demands." *Id.* So the *Ragland* Court believed that the not-more-than-two-coun-

ties rule should be interpreted as prohibiting the joining of more than two counties unless necessary to achieve equality of population. But again, the Court did not define the outer limits of what it meant by equality of population.

Whatever the KDP may think, Appellant Br. 44, 50, *Ragland* did not establish a general principle that *any* deviation from the text of Section 33 must be considered "necessary" to be constitutional. It couldn't have made such a pronouncement since it dealt only with Section 33's not-more-than-two-counties rule. *Ragland*'s only pronouncement, therefore, is that more than two counties can be joined to form a district only if necessary to effectuate equality of population. As explained below, that rule does not actually track the text of Section 33. This is presumably why that rule did not last.

Next came *Stiglitz v. Schardien*, 40 S.W.2d 315 (Ky. 1931). There, Kentucky's high court again struck down a State House districting plan with grossly malapportioned districts. *Id.* at 318–20. The *Stiglitz* Court reiterated that "[e]xactitude is not to be expected. Approximation is the rule erected by the Constitution, but the legislature may not escape the duty of approximation imposed by the Constitution on the ground that mathematical precision is not attainable." *Id.* at 319.

Importantly, the *Stiglitz* Court also recognized that the Kentucky Constitution places no constraints on considering partisan interests in districting. As it stated, "[t]he failure to give a county or a district equal representation is not

merely a matter of partisan strategy." *Id.* at 321. In other words, so long as population among districts is equal enough, the Court is not concerned with the majority political party organizing districts in ways to increase its odds of remaining in power. That's because "[t]he Constitution is not concerned with election returns, but contemplates equal representation based upon population and territory." *Id.*

At bottom, *Ragland* and *Stiglitz* arose because of grossly malapportioned State House districts created by the General Assembly. This explains why those decisions "use strong language" about "the principle of equal representation." *Fischer II*, 879 S.W.2d at 479. But even that strong language did not end the debate about the principles that should govern State House districting in the Commonwealth.

3. The 1960s required this Court to again weigh in on Section 33 because the U.S. Supreme Court announced its "one-person, one-vote principle," which set federal thresholds for disparities in population equality across State legislative districts. *Evenwel*, 578 U.S. at 58–60. Kentucky's high court first dealt with this principle and its impact on Section 33 in *Combs v. Matthews*, 364 S.W.2d 647 (Ky. 1963). But the *Combs* Court did not really expound on that impact. What the *Combs* Court did do is erode *Ragland*'s "necessity" rule: "It is our conclusion that the General Assembly . . . may include more than two (2) counties in a representative district if *it* deems that it is necessary in order to effect a reasonable

equality of representation among districts." *Id.* at 649 (emphasis added). So, in a shift from *Ragland*, the *Combs* Court interpreted Section 33's not-more-than-two-counties rule as affording the General Assembly more discretion in including more than two counties in a representative district so as to effectuate greater population equality across districts.

But the real shift came in *Fischer II*. At issue there was the constitutionality of a State House plan. *Fischer II*, 879 S.W.2d at 476. That plan effectuated greater equality of population, while an alternative plan divided fewer counties; both plans met the +/-5% rule. *Id.* The trial court in *Fischer II* found the plan constitutional. *Id.* Importantly, this Court took no issue with the fact that "the trial court considered 'various political factors' such as 'community of interest, voter registration, voter participation habits, and residence of incumbent legislators' as valid in the reapportionment paradigm." *Id.* Instead, this Court took issue only with the trial court "[giving] its highest priority to population equality and relegat[ing] county integrity to a decidedly diminished status." *Id.* After examining Section 33's text and the debates, this Court found that "as between the competing concepts of population equality and county integrity, the latter is of at least equal importance." *Id.* at 477–79.

Note exactly how *Fischer II* defined "population equality" and "county integrity." For the former, "[p]opulation equality under Section 33 may be satisfied

by a variation which does not exceed -5% to +5% from an ideal legislative district." *Id.* at 479. For the latter, "[t]he mandate of Section 33 is to make full use of the maximum constitutional population variation as set forth herein and *divide the fewest possible number of counties*." *Id.* (emphasis added); *see also id.* ("Using the[population variation] parameters, the General Assembly can formulate a plan which reduces to the minimum *the number of counties which must be divided* between legislative districts." (emphasis added)). The *Fischer II* Court's "dual mandate" elegantly simplified the issue of State House districting into a two-part test that reflects the true text and history of Section 33 in light of the one-person, one-vote principle, which now makes adherence to some of Section 33's mandates "untenable." *Id.* at 478–79.

Because "[t]he dominant political subdivision in Kentucky is the county," *id.* at 478, much of Section 33 is about preserving county integrity. But following much of Section 33's text is simply not possible in light of the one-person, one-vote principle. For example, not even the KDP asserts that it is possible to create a districting plan that complies with federal population equality thresholds across state legislative districts without adding parts of counties to others. *But see* Ky. Const. § 33 ("No part of a county shall be added to another county to make a district."). And the *Fischer II* Court itself recognized that counties must be divided to create districts that no longer remain entirely within the divided county to comply with such thresholds. 879 S.W.2d at 478–79; *but see* Ky. Const. § 33 ("The

. . . General Assembly . . . shall divide the State into . . . one hundred Representative Districts . . . without dividing any county, except where a county may include more than one district.").

Yet at the same time that Section 33 constrains the General Assembly in some ways, it also endows the General Assembly with great discretion. The text places no limitation on the number of times the same county is divided, as long as the divisions create districts entirely within that county. *See id.* (placing no limit on the amount of times a county can be divided to "include more than one district"). The text also does not prohibit the joining of two or more counties to form a district, as long as equality of population among districts is furthered. *See id.* ("Not more than two counties shall be joined together to form a Representative District: Provided, In doing so the principle requiring every district to be as nearly equal in population as may be shall not be violated.").

So *Fischer II*'s dual mandate respects both the principle of county integrity and the General Assembly's discretion in districting. Since many of Section 33's county-integrity pronouncements can no longer be effectuated because of the one-person, one-vote principle, the dual mandate ensures that county integrity is preserved but without constraining the General Assembly in ways that body was never meant to be constrained. That is presumably why this mandate has stood

the test of time, even when litigants offered other interpretations of Section 33, including the same atextual interpretation that the KDP offers here.[6]

4. Consider first that atextual interpretation. The KDP starts by offering the following principles: "Mapmakers must not: (1) split counties, unless they are large enough to contain more than one district; (2) create districts that contain more than two counties; or (3) create districts by adding a part of one county to another." Appellant Br. 4–5, 41. It then purports to add in an "excessive" or "unnecessary" requirement to these principles, meaning that the General Assembly cannot *unnecessarily* split the same county multiple times, cannot *unnecessarily* join more than two counties together, and cannot *unnecessarily* add parts of counties to other counties. Appellant Br. 44–47. But these proffered rules are atextual.

First, there is no text that says a particular county cannot be "unnecessarily" divided. Instead, Section 33 states that the "General Assembly . . . shall divide the State into . . . one hundred Representative Districts . . . without dividing any county, except where a county may include more than one district." So the text of Section 33 imposes no limitation on the number of times a county can be divided as long as those divisions create districts entirely within that

[6] Even *Fischer II*'s dual-mandate garnered dissent, *see Fischer II*, 879 S.W.2d at 481–82 (Wintersheimer, J., dissenting, joined by Reynolds, J.), reflecting the fact that it is impossible to fashion districting rules that satisfy everyone.

county. The KDP's first proffered rule ignores the General Assembly's discretion in that regard.

Second, nothing in Section 33 says that more than two counties cannot be "unnecessarily" joined. Rather, "[n]ot more than two counties shall be joined together to form a Representative District: Provided, In doing so the principle requiring every district to be as nearly equal in population as may be shall not be violated." So the General Assembly has discretion to join more than two counties if it is effectuating equality of population among districts in doing so. In other words, this portion of Section 33 merely asks whether the General Assembly's joining of more than two counties *can be said to have* furthered equality of population among districts. But the KDP's proffered test perverts this meaning by asking whether the General Assembly *was compelled* to join more than two counties together to effectuate equality of population among districts. So the KDP's second proffered rule does not track the text of Section 33 but imposes an invented condition that, again, constrains the General Assembly's textually awarded discretion.

Finally, there is no text that says the General Assembly cannot "unnecessarily" add parts of counties to other counties. Instead, "[n]o part of a county shall be added to another county to make a district." Ky. Const. § 33. So under *no* circumstances shall any part of a county be added to another county. All agree that this provision can no longer be effectuated because of the one-person, one-

vote rule. But the point is that the KDP's third proffered rule of no "unnecessary" additions of parts of counties is not found in the text of Section 33.

At bottom, the KDP's proffered Section 33 rules do not track the text of that section. This is one of the reasons why this Court has already rejected them.

5. Just three years after *Fischer II*, a litigant came forth advocating for a change to the dual mandate. In *Jensen*, a disappointed member of the House minority challenged the 1996 districting law, trying to get this Court to adopt the same Section 33 test that the KDP here proffers. 959 S.W.2d at 772. This Court rejected that effort then, just as it should now.

The *Jensen* Court started by reaffirming the dual mandate: "In *Fischer II*, we held that Section 33 mandates that reapportionment be accomplished by dividing the fewest number of counties possible while maintaining a maximum variation of [+/-]5% from the ideal population of a legislative district." *Id.* Not to be deterred, Representative Tom Jensen, a Republican from Laurel County, claimed that the 1996 districting law, House Bill 1, violated Section 33 because of how it treated Laurel and Pulaski counties. *Id.* at 773.

Representative Jensen offered House Bill 164 as a constitutional alternative, under which Pulaski and Laurel Counties were divided fewer times, their

parts were joined with multiple districts fewer times, and they comprised a district with three or more counties fewer times than under HB 1.[7] Importantly, HB 164 achieved all of this while still complying with the dual mandate. *See id.* So in other words, in arguing that HB 1 was unconstitutional, Representative Jensen "point[ed] to House Bill 164 as proof" that the General Assembly could create a State House plan compliant with the dual mandate resulting in fewer (1) divisions of the same county, (2) attachments of parts of counties to other counties, and (3) districts with three or more counties. *See id.*; *see also* TR 472–96 (Jensen's Appellant Brief). Sound familiar? *See* Appellant Br. 44–46 (advocating for the same requirements).[8]

[7] *Compare* TR 1289–300, 1389–406 (1996 HB 164 dividing Pulaski County over Districts 52, 53, and 83 and Laurel County over Districts 84, 85, and 86), *with* 1996 HB 1, https://legislature.ky.gov/Public%20Services/GIS%20contents/96HouC.pdf (dividing Pulaski and Laurel Counties among five different districts each); *compare* TR 1289–300, 1394–96, 1405–06 (1996 HB 164 placing Pulaski County in a district with three or more counties two times (Districts 52, 53) and Laurel County in such a district two times (Districts 84, 86)), *with* 1996 HB 1, https://legislature.ky.gov/Public%20Services/GIS%20contents/96HouC.pdf (placing Pulaski County in a district with three or more counties four times (Districts 24, 52, 80, 83) and placing Laurel County in such a district two times (Districts 89, 90)).

[8] To no avail, Representative Jensen even attempted to use *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983), in the same way the KDP does here. *Compare* TR 487–89, *with* Appellant Br. 47–48. But "this Court's North Star is our own Kentucky Constitution." *Beshear*, 615 S.W.3d at 805 n.30. More directly, even a cursory examination of Tennessee's Constitution reveals how differently it treats districting from Kentucky's Constitution. *Compare* Tenn. Const. art. 2, § 4 (permitting "substantial[] equal population" among districts), *with* Ky. Const. § 33 (requiring districts "as nearly equal in population" as possible); *compare* Tenn.

The *Jensen* Court itself recognized that Representative Jensen was attempting to get it to change the dual mandate in the exact way that the KDP here proffers. *Id.* at 773–74. The Court explicitly addressed the argument "that if a county has a population sufficient to contain a whole district within its boundaries, Section 33 requires that a whole district be created within those boundaries." *Id.* at 773. With its discussion of HB 164, the Court acknowledged that Representative Jensen's proposed rule was asking the Court to adopt a plan with fewer county divisions, fewer attachments of counties to other counties, and fewer counties being placed in a district with three or more counties, all while complying with the dual mandate. *See id.* at 774. This acknowledgement is also evidenced by the *Jensen* Court's callback to *Fischer II*'s infamous footnote 5, where this Court stated it could "scarcely conceive of a circumstance in which a county or part thereof which lacks sufficient population to constitute a district would be subjected to multiple divisions." *Id.* at 776 (quoting *Fischer II*, 879 S.W.2d at 479 n.5).

But instead of using that footnote to define county integrity, the *Jensen* Court dismissed it, stating that the *Fischer II* Court "did not hold in footnote 5 that such is constitutionally prohibited." *Id.* That was because what was stated in

---

Const. art. 2, § 5 (providing that "no county shall be divided in forming . . . a district," period), *with* Ky. Const. § 33 (providing that districts should be created "without dividing any county, *except where a county may include more than one district* (emphasis added)). The KDP does not even try to articulate how any out-of-state constitution is instructive here. Appellant Br. 48–49.

that footnote and what Representative Jensen was asking the Court to do—to constitutionalize prohibiting the General Assembly from *unnecessarily* (1) dividing a county multiple times, (2) attaching parts of that county to others, and (3) joining that county in three or more districts, like Pulaski and Laurel Counties were—did not come from "the language of Section 33," as previously discussed. *Id.* at 776. Nor were these requirements a part of the dual mandate announced by *Fischer II*. *Id.* So, just like in *Fischer II*, the *Jensen* Court adhered to the dual mandate because it imposes no atextual restraints on the General Assembly at the same time that it effectuates county integrity, specifically, by limiting the total number of counties divided.

Even Justice Lambert's dissent recognized that Representative Jensen was arguing for the same Section 33 rules that the KDP here proposes. In reference to Pulaski and Laurel Counties, Justice Lambert noted that under Section 33 "a county or counties may not be divided at all or any more than is necessary to achieve population requirements." *Id.* at 777 (Lambert, J., dissenting). But that reading of Section 33 garnered only two votes. Instead, the *Jensen* Court stood firm on the dual mandate and upheld the constitutionality of HB 1 because it satisfied "the mandate of *Fischer II* 'to make full use of the maximum constitutional population variation as set forth herein [i.e., +/- 5%] and divide the fewest possible *number of* counties.'" *Id.* at 776 (emphasis added).

Importantly, the *Jensen* Court also explicitly rejected the existence of a partisan-gerrymandering claim under the Kentucky Constitution. Representative Jensen argued "that the multiple divisions of Pulaski County and Laurel County are the result of partisan gerrymandering, since both counties consist primarily of registered Republicans and the 1996 House of Representatives was controlled by a Democratic majority." *Id.* This Court found, though, that "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." *Id.* The KDP might think that the consideration of partisan interests in formulating districts is unfair, but "[t]here is a difference between what is perceived to be unfair and what is unconstitutional." *Id.* Because "[a]pportionment is primarily a political and legislative process," the Court's "only role in this process is to ascertain whether a particular redistricting plan passes constitutional muster, not whether a better plan could be crafted." *Id.* And once the Court determines that a State House plan satisfies the dual-mandate test, its job has ended. *Id.*

Eight years later, in *Wantland*, litigants again sought to change this Court's dual mandate in the exact same way the KDP here proposes. At issue in *Wantland* was a State House districting plan that "assigned segments of Bullitt County to four different legislative districts." 2005 WL 1125070, at *1. The challengers there noted that three of those four districts contained three or more counties.

Id. So just like here, the challengers in *Wantland* argued that the 2002 districting plan unnecessarily (1) divided a county, (2) attached parts of that county to other counties, and (3) combined three or more counties in a district. The *Wantland* Court even recognized that the challengers were making the same argument "as did the appellants in *Jensen*." *Id.*; *see also id.* at *2 (noting that the Kentucky Supreme Court "[a]ddress[ed] the same concerns in *Jensen*").

The *Wantland* Court made short work of the challengers' arguments. Speaking on the county-integrity requirement, it stated that "[t]he constitution requires only that the General Assembly divide as few counties as possible. *Within that constraint, which counties to divide and how to arrange the resulting pieces are matters of legislative discretion.*" *Id.* at *2 (emphasis added). And even though one of the districts at issue was "a snaking, poorly shaped, and regrettable House District that may have been better fashioned," the *Wantland* Court recognized that there was no constitutional significance to it. *Id.* (citation omitted). It recognized that "the Court's 'only role in this process is to ascertain whether a particular redistricting plan passes constitutional muster, not whether a better plan could be crafted.'" *Id.* (citation omitted).

The *Wantland* Court rejected outright the challengers' definition of county integrity, concluding "[i]n sum, in *Jensen* our Supreme Court upheld a reapportionment scheme that subjected several counties to multiple divisions such as

Bullitt County has been subjected to by the 2002 House reapportionment," defining county integrity only as the "divi[sion of] more counties than necessary." *Id.* at *3. The *Wantland* Court adhered to the dual mandate, and this Court apparently saw no problem with that. *Wantland*, 2005-SC-0386 (denying discretionary review).

Even all of this history, however, did not stop litigants from, once again, asking this Court to change its dual mandate in *Fischer IV*. At issue there was the constitutionality of 2012 House Bill 1. *Fischer IV*, 366 S.W.3d at 908. After the trial court found that plan unconstitutional pursuant to the dual mandate, the LRC asked this Court to change the dual mandate. *Id.* But this Court did not do so.

The *Fischer IV* Court examined the relationship between Section 33 and the one-person, one-vote principle. *Id.* at 910–16. It highlighted that "Section 33 imposes a dual mandate that Kentucky's state legislative districts be substantially equal in population and preserve county integrity." *Id.* at 911. And importantly, "[a] reapportionment plan satisfies these two requirements by (1) maintaining a population variation that does not exceed the ideal legislative district by [+/-]5 percent and (2) dividing the fewest number of counties possible." *Id.* The Court's adherence to the dual mandate reflected its recognition of its limited role in this process: "[W]e are not selecting a better legislative redistricting plan but simply upholding our duty faithfully to interpret the Kentucky Constitution." *Id.*

Overall, the *Fischer IV* Court "harmonize[d] the dual mandates to the greatest extent possible" by finding that "[t]he *Fischer II* Court appropriately balanced the[] goals" of population equality and county integrity in requiring only that "reapportionment plans *divide the mathematically fewest number of counties possible*." *Id.* at 913 (emphasis added); *see also id.* at 911 n.17 (noting that the *Jensen* Court stood firm on this requirement). No matter how many times litigants have tried to get this Court to change its dual mandate, it has held firm: "The General Assembly must divide the smallest number of counties necessary to comply with the 5 percent rule. But dividing the fewest number of counties while achieving greater population equality fully complies with Section 33 of the Kentucky Constitution." *Id.* at 916.

B. There is no reason to depart from the dual mandate.

Kentucky courts have a "strong and longstanding commitment to stability in the law." *Gasaway v. Commonwealth*, 671 S.W.3d 298, 328 (Ky. 2023). It is, in fact, this Court's "duty . . . to maintain stability and consistency in the law." *Id.* Only when there "is a compelling and urgent reason to depart" from the principle of stare decisis will this Court do so. *Id.* (citation omitted). *Gasaway* tracks the factors the U.S. Supreme Court has identified in determining whether to depart from established precedent. *See Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009) (examining the "workability" of the rules fashioned, "the antiquity of the prece-

dent," "the reliance interests at stake," and "whether the decision was well reasoned"); *see also Gasaway*, 671 S.W.3d at 321–29 (overruling precedent because it was "wrongly decided," it involved "the freedom from unreasonable searches and seizures[, which] is among the most cherished liberties of our people," and since "any reliance upon [that precedent] appears to be minimal"). All factors support adhering to this Court's dual mandate.

To start, the KDP does not even allege error in the dual mandate, nor does it attack the quality of the reasoning of the decisions fashioning and adhering to that mandate. Instead, it simply argues that the dual mandate does not actually represent the totality of rules concerning State House districting. But, as just explained, that's wrong. It is also not an attempt to argue error.

The workability of the dual mandate cannot be overstated. The test is simple, clear, and durable. The General Assembly knows exactly what it needs to do to fashion a constitutional State House districting plan: "The General Assembly must divide the smallest number of counties necessary to comply with the 5 percent rule. But dividing the fewest number of counties while achieving greater population equality fully complies with Section 33 of the Kentucky Constitution." *Fischer IV*, 366 S.W.3d at 916. And there is no suggestion that the dual mandate negatively affects other areas of the law.

Finally, the reliance interests created by the dual mandate weigh most heavily in favor of upholding it. Districting in accordance with the dual mandate

is first and foremost the prerogative of the General Assembly. And for almost 30 years now, Kentucky law has provided a clear, judicially manageable measuring stick for reviewing State House districting plans. When the General Assembly districted the Commonwealth last year, it did so based on the rules of the road that this Court has provided and reaffirmed. To change these clear rules after the fact, when the Court has previously refused to do so, would inflict profound damage on the normal give-and-take between the legislative and judicial departments.

The Court has correctly held firm to the dual mandate for good reason. With yet another adherence to the dual mandate, future challengers will (hopefully) be deterred from using Kentucky's judiciary for political gain. Implicit in the Court's decisions for the past 30 years is the recognition that if it continues to change districting requirements, litigants will continue to come to it decade after decade asking for more changes. That is especially true here because the KDP's proposed test completely ignores a great deal of Section 33.

The KDP pays no mind to the statement in Section 33 that, "If, in making said districts, inequality of population should be unavoidable, any advantage resulting therefrom shall be given to districts having the largest territory." Ky. Const. § 33. Nor does it discuss Section 33's contiguity requirement. Neither does it try to close the disparity in population across districts that the +/-5% threshold allows. And as described earlier, the KDP's test is atextual—it ignores

the parts of Section 33 endowing the General Assembly with discretion and manufactures constraints that are not there. Adopting the KDP's test would bring about a continuous cycle of Section 33 claims brought by districting plan challengers alleging a better reading of Section 33 than whatever the Court announces prior to that challenge.

There is also no proof that it is even possible to comply with the KDP's proffered test. The KDP has not shown that its own map does not unnecessarily divide counties, join parts of counties to others, and join three or more counties together—all it did here was offer a plan that did those things *fewer* times than HB 2. So is it even possible for the KDP's three "unnecessary" rules to be harmonized with each other? What happens, for example, if it takes a certain amount of county divisions to minimize the joining of parts of counties to others, but county divisions can be lessened by joining more parts of counties to other counties? Which "unnecessary" rule trumps? Nowhere has the KDP attempted to prove that HB 191 effectuates the minimum number of county divisions, joining of parts of counties to others, and grouping of three or more counties in a district to prove that it has offered the Court a functional rule.

Because politics is so intertwined with this issue, no one would be completely happy with whatever new test the Court might devise. But by once again adhering to the dual mandate, this Court will further effectuate the clarity and stability it brought to an issue that has been hotly debated since Kentucky's first

constitution. And in so adhering, this Court will prevent litigants from turning it into a partisan body. Because that is all this case is about—a disappointed political minority seeking to gain partisan power. "Apportionment is primarily a political and legislative process," *Jensen*, 959 S.W.2d at 776, and the more this Court involves itself in that process, the more its "immaculate coat" will be "stain[ed by] politics," 1890–91 Debates at 4415–16.

The Court should emphatically reject the KDP's contentions and affirm Judge Wingate's finding that HB 2 does not violate Section 33 of the Kentucky Constitution.

II. Judge Wingate correctly rejected the KDP's partisan-gerrymandering theories.

No Kentucky court has ever recognized a partisan-gerrymandering claim. On this point, the Commonwealth and the KDP agree. Even worse for the KDP, several Kentucky high court cases have concluded the opposite—that the Kentucky Constitution has nothing to say about prohibiting the consideration of partisan interests in districting. That's why the only authority the KDP relies on for its assertion that the Kentucky Constitution provides for a partisan-gerrymandering claim is one decision from the high court of Pennsylvania that dealt with one provision in the Pennsylvania Constitution applied to Pennsylvania's Congressional map. This is not the makings of a persuasive argument.

Judge Wingate's holding rejecting the KDP's arguments here is consistent with the text of the Kentucky Constitution, Kentucky's history, and Kentucky high court precedent. This aspect of the judgment below should be affirmed.

A. A partisan-gerrymandering claim presents a nonjusticiable political question.

Partisan-gerrymandering claims used to be brought in federal court because the U.S. Supreme Court's "partisan gerrymandering cases . . . 'le[ft] unresolved whether such claims may be brought.'" *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019) (citation omitted). Districting activists had hope that the U.S. Supreme Court would one day recognize their theories. But in *Rucho*, the Supreme Court shut that door. *See id.* at 2508. Other state high courts have done the same. *See, e.g., Harper v. Hall*, 886 S.E.2d 393, 416–43 (N.C. 2023); *Johnson v. Wis. Elections Comm'n*, 967 N.W.2d 469, 482–92 (Wis. 2021); *Pearson v. Koster*, 359 S.W.3d 35, 38–43 (Mo. 2012). This issue is no less of a nonjusticiable political question here.

1. At issue in *Rucho* were two "congressional districting maps" that were alleged to be "unconstitutional partisan gerrymanders" pursuant to "the First Amendment[and] the Equal Protection Clause." *Rucho*, 139 S. Ct. at 2491. The *Rucho* Court recognized that it "ha[d] not previously struck down a districting plan as an unconstitutional partisan gerrymander, and ha[d] struggled without success over the past several decades to discern judicially manageable standards

for deciding such claims." *Id.* And if a court is unable to find "judicially discoverable and manageable standards for resolving" a claim, then "the claim is said to present a 'political question' and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction." *Id.* at 2494 (citations omitted).

This Court has recognized that principle. Just like the federal doctrine, Kentucky's political-question doctrine "holds that the judicial branch 'should not interfere in the exercise by another department of a discretion that is committed by a textually demonstrable provision of the Constitution to the other department,' or seek to resolve an issue for which it lacks judicially discoverable and manageable standards." *Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74, 81 (Ky. 2018) (citations omitted).

The *Rucho* Court set out to determine "whether there is an 'appropriate role for the Federal Judiciary' in remedying the problem of partisan gerrymandering—whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere." *Rucho*, 139 S. Ct. at 2494 (citation omitted). It first recognized that "[p]artisan gerrymandering is nothing new. Nor is frustration with it." *Id.* But after examining the history of partisan gerrymandering, the *Rucho* Court found that "[a]t no point was there a suggestion that the federal courts had a role to play. Nor was there any

indication that the Framers had ever heard of courts doing such a thing." *Id.* at 2496.

Yet litigants "have nevertheless . . . called upon [the judiciary] to resolve a variety of questions surrounding districting." *Id.* Even "[e]arly on, doubts were raised about the competence of the federal courts to resolve those questions." *Id.* That's because of the structural problem that a partisan-gerrymandering claim runs into, the same structural problem the KDP runs into here: "To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities." *Id.* at 2497. Because of that structural decision to place districting in the hands of the legislature, as Kentucky's Constitution undeniably does, "[t]he 'central problem' is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is determining when political gerrymandering has gone too far.'" *Id.* (citations omitted). And after recounting the historical struggle courts have had in determining judicially manageable standards for such a claim, *id.* at 2497–98, the *Rucho* Court dug deeper into that struggle:

> Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature. But such a claim is based on a "norm that does not exist" in our electoral system—"statewide elections for representatives along party lines."

Id. at 2499. In other words, "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation." *Id.* But if the Framers of the U.S. and Kentucky Constitutions thought that legislative representation should be based on proportional party vote, they would have set up a system that took statewide party-based votes and allocated legislative seats accordingly. Instead, what has always existed is the districting system we use today, a system antithetical to a statewide system.

Because this structural decision precludes proponents of partisan-gerrymandering claims from "claim[ing] that the Constitution requires proportional representation outright, [they then] inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end." *Id.* But "fairness" is not a "judicially manageable standard." *Id.* (citation omitted). And "it is not even clear what fairness looks like in this context." *Id.* at 2500.

If fairness "mean[s] a greater number of competitive districts," that "could be a recipe for disaster." *Id.* Under a districting system that makes races as close to 50/50 as possible, one political party could easily win a supermajority of seats despite a 50/50 statewide vote share. Or maybe fairness means "yielding to the gravitational pull of proportionality and engaging in cracking and packing[] to ensure each party its 'appropriate' share of 'safe' seats." *Id.* (citation omitted). But

this "approach . . . comes at the expense of competitive districts and of individuals in districts allocated to the opposing party." *Id.* Fairness in this context also could mean "adherence to 'traditional' districting criteria," which include "maintaining political subdivisions, keeping communities of interest together, and protecting incumbents." *Id.* But those considerations can actually "enshrine[] a particular partisan distribution." *Id.* And simply adhering to "compactness and contiguity 'cannot promise political neutrality.'" *Id.* (citation omitted). Indeed:

> Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the 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.

Id. The issue raises more questions than it answers:

> And it is only after determining how to define fairness that you can even begin to answer the determinative question: "How much is too much?" At what point does permissible partisanship become unconstitutional? If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria? Should a court "reverse gerrymander" other parts of a State to counteract "natural" gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.

> If a court instead focused on the respective number of seats in the legislature, it would have to decide the ideal number of seats for each party and determine at what point deviation from that balance went too far. If a 5-3 allocation corresponds most closely to statewide vote totals, is a 6-2 allocation permissible, given that legislatures have the authority to engage in a certain degree of partisan gerrymandering? Which seats should be packed and which cracked? Or if the goal is as many competitive districts as possible, how close does the split need to be for the district to be considered competitive? Presumably not all districts could qualify, so how to choose?

Id. at 2501. Part of the calculus also must include election-results prediction: "Judges must forecast with unspecified certainty whether a prospective winner will have a margin of victory sufficient to permit him to ignore the supporters of his defeated opponent (whoever that may turn out to be)." *Id.* at 2503. So "[j]udges not only have to pick the winner—they have to beat the point spread," an impossible feat:

> Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes. . . . [A]sking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.[9]

[9] HB 2's District 88, which was supposedly gerrymandered to create a "safe" Republican district, TR 1839–40, chose a Democrat this past election cycle, *see* https://elect.ky.gov/results/2020-2029/Pages/2022.aspx.

Id. at 2503–04; *see also Harper*, 886 S.E.2d at 428–31 (pointing out other problems); *Johnson*, 967 N.W.2d at 482–85 (same).

In sum, "[e]ven assuming the court knew which version of fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation." *Rucho*, 139 S. Ct. at 2501. The KDP does not even attempt to grapple with any of these points. This itself shows that partisan-gerrymandering claims "are 'unguided and ill suited to the development of judicial standards,' and 'results from one gerrymandering case to the next would likely be disparate and inconsistent.'" *Id.* (citations omitted).

2. While the *Rucho* Court noted that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply," 139 S. Ct. at 2507, consider the sources it identified. They include constitutional amendments providing for a state demographer, *id.* (citing Mo. Const. art. III, § 3), or multimember commissions, *id.* (citing Colo. Const. art. V, §§ 44, 46; Mich. Const. art. IV, § 6); *see also* Alaska Const. art. 6, § 8; N.Y. Const. art. 3, § 5-b; Ohio Const. art. XI, § 1. They also include constitutional amendments and statutes "outright prohibit[ing] partisan favoritism in redistricting." *Rucho*, 139 S. Ct. at 2507–08 (citing Fla. Const. art. III, § 20(a); Iowa Code § 42.4(5); Del. Code Ann., tit. 29, § 804).

The KDP identifies no similar provisions in Kentucky's Constitution. Instead, it relies on provisions that this Court has long held have nothing to say about partisan gerrymandering or even districting in general. But in the end, the judiciary "ha[s] no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide [it] in the exercise of such authority." *Id.* at 2508.

B. The well-settled meaning of the Kentucky Constitution defeats the KDP's claims.

The KDP's arguments do not square with basic principles of constitutional interpretation.

When a provision in Kentucky's Constitution addresses a specific issue in a specific way, that provision controls over any general provision alleged to have anything else to say about that issue. *See Holbrook v. Knopf*, 847 S.W.2d 52, 55–56 (Ky. 1992) (ignoring the appellants' reliance on Section 1 of the Kentucky Constitution after finding that Section 10 more specifically spoke to the relevant issue before rejecting that challenge); Francis C. Amendola, et. al., 16 C.J.S. Constitutional Law § 101 (Aug. 2023 update) ("[T]o the extent that two constitutional provisions *overlap* or conflict, specific provisions control over general provisions." (emphasis added) (footnote omitted)); *see also Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557, 567–72 (Ky. 2020) (noting the dangers of grafting different constitutional provisions together).

Just as important, Kentucky courts are skeptical of interpretations of constitutional provisions that upset longstanding understandings of their meaning. *See Grantz v. Grauman*, 302 S.W.2d 364, 367 (Ky. 1957) ("This construction is in accord with the actual, practical construction that has been given [to a certain section of Kentucky's Constitution] by the people for the last 65 years. Practical construction of an ambiguous law by administrative officers continued without interruption for a very long period is entitled to controlling weight."); *Gayle v. Owen Cnty. Ct.*, 83 Ky. 61, 69 (Ky. 1885) ("[T]his right or power in the Legislature has been too long conceded to be now regarded as an open question."); *Police Comm'rs v. City of Louisville*, 66 Ky. 597, 606 (Ky. 1868) ("We need scarcely say, that the almost, if not universal practice, in all cities and towns of this State, . . . has been so long uncomplainingly acquiesced in, and recognized in so many various ways by legislative enactment and judicial construction, as to permanently fix it as a constitutional mode.").

Kentucky's Constitution specifically addresses the issue of districting—but only in Section 33. And even though the Framers were aware of partisan gerrymandering, they said *nothing* in Section 33 about ensuring fair political party representation. Yet the KDP believes that after 100-plus pages of debates over Section 33's districting rules, the delegates tucked away in other constitutional provisions secret constraints, with no textual, historical, or precedential support, against partisan gerrymandering that were to be discovered for the first time 130

years after the adoption of Kentucky's Constitution. They continue to maintain this absurd position *even though* this Court has rejected the notion that partisan interests cannot be considered in State House districting. *Jensen*, 959 S.W.2d at 776; *see also Stiglitz*, 40 S.W.2d at 321.

And the Court has been just as blunt concerning Congressional districting. In *Richardson v. McChesney*, 108 S.W. 322, 322 (Ky. 1908), Kentucky's high court dealt with challenges to Congressional districting plans. The challengers there claimed "that the population of the districts is grossly unequal; the effect being to deny to the Republican Party . . . a fair and equal representation in the distribution of the state into congressional districts" and "that the state was 'Gerrymandered' in the interest of the Democratic Party." *Id.* at 323.

But Kentucky's high court categorically disclaimed *any* authority to interfere with the General Assembly's discretion in districting the Commonwealth's Congressional districts:

> [I]t is not within the power of the courts to control the legislative department in the creation of congressional districts. There is no mention of congressional districts in the Constitution of the state; nor is there in that instrument any direction to the General Assembly as to how the districts shall be laid off. *In the matter of dividing the state into congressional districts the Legislature, at least so far as the power and authority of this court extends, is supreme. This court has no control over its action.* It would be exceeding the power granted us to undertake to revise or annul a legislative act relating to a subject over which the Legislature has absolute control. . . . We have no authority to pass judgment upon its acts. . . . If, in the matter of dividing the state into congressional districts, this court should undertake to declare invalid the division made by the legislative department, it would

> simply result in setting up our judgment against the judgment of the members elected for the purpose of performing this duty. We would be putting up our opinion against those in whom the exclusive right to regulate this matter has been lodged, and be arrogating to ourselves wisdom, honesty, and fairness superior to those charged by law with the control of these matters. . . . But in the matter of congressional districts we find nothing in our state Constitution to guide us. *There is nowhere any limitation upon the power of the Legislature, and it would be assuming authority this court does not possess if we undertook to control a coordinate department of the government in the performance of a power vested exclusively in it.*

Id. at 323 (emphasis added).

Just as this Court disclaimed any constitutional concern with considering partisan interests in State districting in *Jensen* and *Stiglitz*, it did the same with Congressional districting in *Richardson*. The KDP has no response to these decisions.

One last point. The U.S. Supreme Court just rejected a theory, known as the independent state legislature doctrine, that stood for the proposition that "the Elections Clause insulates state legislatures from review by state courts for compliance with state law." *Moore*, 143 S. Ct. at 2079, 2081. The Court, however, noted that "state courts do not have free rein." *Id.* at 2088. That's because "the Elections Clause expressly vests power to carry out its provisions in 'the Legislature' of each State, a deliberate choice that this Court must respect." *Id.* (quoting U.S. Const. art. I, § 4). So state courts must be careful not to "exceed the bounds of ordinary judicial review" in interpreting state law governing the issue of districting. *Id.* at 2090. Accepting the KDP's contentions here would do just

that. There is no suggestion in the history or text of the Kentucky Constitution that the Court has a role to play in superintending partisan interests in districting. For the Court to do so would simply be a raw exercise of judicial power.

1. Section 6 does not concern partisan gerrymandering.

Section 6 of the Kentucky Constitution says, in total, "All elections shall be free and equal." The meaning of that provision has been clear since its enactment. Judge Wingate correctly "conclude[d] that Section 6 of the Kentucky Constitution does not prohibit partisan gerrymandering because it does not apply to apportionment, but rather to interferences with the vote-placement and vote-counting process." TR 1886–87.

a. The text of Section 6 has not changed across Kentucky's four constitutions. 1792 Ky. Const. art. XII, § 5; 1799 Ky. Const. art. X, § 5; 1850 Ky. Const. art. XIII, § 7; 1892 Ky. Const. § 6. Unlike the text of Section 33, which clearly applies to the creation of "districts" and "redistrict[ing]," Ky. Const. § 33, the text of Section 6 applies to "elections," Ky. Const. § 6, the actual "[a]ct of choosing by vote a person to fill an office, . . . as by ballot, uplifted hands, or viva voce; . . . hence, the regular exercise of its function by an electorate," Webster's New International Dictionary of the English Language Based on the International Dictionary of 1890 and 1900, 706 ("election"); *see also Election*, Black's Law

Dictionary (1st ed. 1891) ("The selection of one man from among several candidates to discharge certain duties in a state."). The text of Section 6 itself, then, focuses on the ability to actually place a vote.[10]

It appears Kentucky's high court first articulated the meaning of the predecessor to Section 6 in *Leeman v. Hinton*, 62 Ky. 37 (Ky. 1863). *Leeman* involved a dispute between two individuals who both believed they were entitled to be the McCracken County Clerk after an election. *Id.* at 38–39. One of the litigants tried invoking Section 6, to no avail, because, focusing on the act of voting itself, the litigant "ha[d] not alleged that the election was controlled by military force," which was the totality of the meaning the Court ascribed to Section 6's predecessor. *Id.* at 44.

Four years before Kentucky's current constitution was debated, Kentucky's high court again dealt with what is now Section 6, this time to challenge a "law requiring qualified voters to be registered before the day of election, as a

[10] Amici point to no Kentucky source indicating that the word "election" encompasses anything more than the vote-placement and vote-counting processes. CLC Amicus Br. 3–4 (citing *Speed v. Crawford*, 60 Ky. 207, 211 (Ky. 1860) (noting that "election" encompasses the "selection of an officer" that "is referred to the people")). Indeed, the meanings of "election," "free," and "equal" as used in Section 6 have since become clear, as discussed below. And the fact that other constitutional provisions speak about "election[s]" and voting rights, *id.* at 4; *see also* Douglas Amicus Br. 3, at the same time that Section 33 does not use those words shows that the Framers knew exactly what they were talking about when discussing "elections" versus "redistrict[ing]."

condition of the exercise of their right of suffrage." *Commonwealth v. McClelland*, 83 Ky. 686, 689 (Ky. 1886). But the *McClelland* Court upheld the law since, again focusing on the act of voting itself, it could "not perceive how the constitutional privilege of a qualified voter is taken from him when he is afforded a reasonable opportunity before the election to register." *Id.* at 698. The Court made sure to outline the meaning of Section 6: "Elections 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." *Id.* at 693.

So Section 6 was meant to prevent interference with the vote-placement and vote-counting processes. In light of the aforementioned crystal-clear rulings, the Framers were very much aware of this meaning, and, unlike with Section 33, there was not much debate over Section 6.

The only real discussion was over Delegate McDermott's proposed amendment of that provision to say: "All elections shall be free from intimidation, and all legal votes shall be of equal weight." 1890–91 Debates at 670. His fear was that this "fair definition of the old phrase . . . may be distorted hereafter, if it is left unexplained." *Id.* So he explained that Section 6 "was borrowed from the Declaration of Rights, which, [on] January 23, 1689, the English people promulgated when they deposed James II and elevated William and Mary to the

throne." *Id.* And, as identified in *Leeman*, their purpose in doing so was clear: "They meant simply that no troops should intimidate the voters." *Id.* Delegate McDermott expressed concern that the judiciary might distort the meaning of Section 6 without clearer language. *Id.* at 670–71. He even pointed to *McClelland* as an example of the proper interpretation of Section 6. *Id.* at 671. But he was worried after "hav[ing] heard prominent lawyers in th[e] Convention and [a judge from Pennsylvania's high court] declare [*McClelland*] wrong." *Id.*

Sharing Delegate McDermott's concerns, Delegate Knott also clarified the meaning of Section 6. He first recounted the "violent controversy" that occurred surrounding the appointment of the See of Canterbury. *Id.* at 729. King John of England did not like the chosen appointee, so he "disregarded the consecration of the primate, fiercely refused to permit him to set foot upon English soil, and wreaked his vengeance upon the monks who had elected him by driving them from the kingdom and confiscating their estates." *Id.* "To prevent a repetition of that, and a recurrence of similar acts of lawless oppression which had taken place during the reign of Henry II, the clergy . . . [and] the discontented barons" made sure to include in the "Magna Charta, the first and most conspicuous clause of

which contained a grant to Almighty God of freedom of elections in the Church of England."[11] *Id.*

After that, "when the Commons had grown to be an estate of the realm, elections were held, as they continued to be, in pursuance of royal writs issued to the Sheriffs, who were commanded to hold an election of two knights for the shire, two citizens for each city, and two burgesses for each borough in his bailiwick." *Id.* But importantly, "when it became necessary to pack the House of Commons in the interest of the Crown, the Sheriffs, taking advantage of the indefinite terms of the precept, *selected such boroughs as they saw proper, and omitted others, producing as a natural consequence the grossest inequality of representation*." *Id.* (emphasis added). In other words, the Sheriffs were preventing large groups of the English from voting at all by prohibiting them from sending any representatives whatsoever, i.e., an interference with the vote-placement process by taking away an individual's right to vote for any representation.

The Sheriffs "interfered with the conduct of elections in a variety of other ways[to] depriv[e] large numbers of the elective franchise who were entitled to it[] and permit[] others to exercise it who were not." *Id.* Allowing non-eligible voters to vote is likewise an interference with the vote-counting process, as votes

[11] Section 6, therefore, traces back even further than amici represent. CLC Amicus Br. 7–8; Douglas Amicus Br. 6.

that should not be counted are being counted. And so "[t]hese wholesale abuses gave rise to a number of statutes providing that elections should be free—that electors should not be prevented from exercising the franchise—and equal—that it should not be left to the power of the Sheriff to determine what boroughs *were entitled to representation*, but there should be an equality among them in that respect."[12] *Id.* at 729–30 (emphasis added).

Delegate Knott recalled examples of Section 6 violations that had occurred in Kentucky: "Within the memory of every Delegate on this floor, our own State . . . has been the scene of outrages against the sacred privilege that would have made the most unscrupulous despot that ever disgraces the throne of England . . . hang his head in shame." *Id.* at 730. Kentuckians "ha[d] seen . . . nearly every polling place within its limits surrounded by an armed soldiery," as "[t]he military satrap dictated who should be candidates for office, and the subaltern was the sole judge as to who should be permitted to cast his ballot

[12] Amici criticize the "handful of delegates" who spoke about Section 6 and their recounting of history, CLC Amicus Br. 9, but they cannot deny that no Delegate spoke of any other meaning. There is no indication from the Framers that Section 6 was meant to preclude consideration of partisan interests in districting. Professor Douglas's historical recounting confirms that the Crown would "limit or deny the franchise," "remov[e] or withhold[] boroughs' rights to return members to Parliament," and give voting power to individuals who should not have it. Douglas Amicus Br. 7. Again, these are interferences with the vote-placement process by precluding a voter from voting at all and the vote-counting process by counting votes that should not be counted.

in the election of every officer of the Commonwealth from Governor down." *Id.* Delegate Knott relayed that "[i]n many places elections were totally forbidden, and in numberless instances [many] were turned from the polls and deprived of the highest prerogative of the sovereign citizen." *Id.*

Such abuses were not confined just to the "military power" though. *Id.* at 731. "[L]ong since the war [Kentucky] ha[s] seen the elective franchise prostrated and trampled in the dust by civil authority." *Id.* Civil authorities had "violated [Section 6] in the most atrocious manner by swarms of deputy marshals, many of them selected from the offscourings of society, . . . selected and appointed to crowd about the polls and intimidate the honest voter under the pretext of enforcing the law in order to insure a fair election." *Id.* To capture the "protect[ion of] voters from an armed mob, or other lawless body who might throng the polls for the purpose of carrying an election by intimidation and force," Delegate Knott proposed that "the Convention . . . address this plain, emphatic, unmistakable language: No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage by those entitled to vote at any election authorized by law." *Id.* (emphasis omitted).

Later, Delegate McDermott reiterated his concern that Section 6 "as it appears in the present Bill of Rights, is general and vague, and may be easily distorted hereafter by Courts to destroy useful legislation by the General Assembly." *Id.* at 945. So he continued to vouch for his amendment so as not to leave

"needless problems to the Courts." *Id.* Otherwise, "[v]ague expression causes confusion of thought[,] . . . accomplishes nothing, or gives to the Courts absolute power to legislate upon any matter that comes up hereafter." *Id.*

But Delegate Rodes, who seemed to speak for the sentiment of the Convention on that point, noted that Delegate McDermott's amendment was simply unnecessary:

> 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 (emphasis added). As to Delegate McDermott's concern about the judiciary distorting Section 6's meaning, Delegate Rodes noted that, regardless of what may befall Pennsylvania, "we have had . . . great Judges . . . , and we have had them to pass on all manner of laws, and we have had . . . good lawyers in the State of Kentucky . . . , and we have never found any difficulty with it." *Id.* According to Delegate Rodes, there has never been any controversy as to the meaning of Section 6, and "we have had no difficulties" in "determining the law." *Id.*

Within that discussion, Delegate Burnam noted that the word "equal" should be interpreted to also encompass "uniformity," meaning that the manner in which elections are conducted should be "equal":

> Now, there is involved in the word ["equal"], according to my idea, the idea also of uniformity. I think that elections ought to be held not one day in one county, and two days or three days in another county. They ought to be equal in that sense. They ought not to be during certain hours in one county and different hours in another. They ought to be equal in that respect.

Id. Delegate McDermott disagreed with the notion that Section 6 encompassed uniformity in that way and used that disagreement to continue to push for his amendment. *Id.* at 947. Yet he acknowledged that the same Section 6 language has been "in three Constitutions of the State." *Id.* And in the end, the Framers seemed to agree with Delegate Rodes that "we have had [Section 6] in three consecutive Constitutions of the State of Kentucky, and have had it for a long time, and there has been no particular difficulty about it." *Id.* at 948.

So Section 6 remained the same simply because the Framers were already aware of its unquestionable meaning—that there should be no interference with the vote-placement and vote-counting processes, which were to be promoted by uniform laws. *See also id.* at 1938 (Delegate Mackoy noting that Section 6 has been construed "to mean that [elections] shall be of equal length."); *id.* at 2021–52 (lengthy discussion about ballot practices invoking Section 6). But *no delegate* ever discussed *any constraints* Section 6 may have imposed on considering partisan interests in districting.

The KDP (and amici) cite to a few comments by Delegate Rodes and others in purported support of their position. Appellant Br. 57; CLC Amicus Br.

10. But Delegate Rodes' cited comments fall exactly in line with the rule Judge Wingate identified. If one Kentuckian's vote "counts two, while [another's] only counts one," *id.* (quoting 1890–91 Debates at 768–69), that's an interference with the vote-counting process because placed votes are not being counted correctly. What Delegate Rodes' colorful comments, and the colorful comments of any other delegate relied upon, *see also* CLC Amicus Br. 10–11; Douglas Amicus Br. 4–5, 8–9, do not entail is any suggestion that Section 6 sets constraints on considering partisan interests in districting.

b. The Delegates who chose to trust the judiciary to ascertain the correct meaning of Section 6 have been proven right.

Soon after the enactment of Kentucky's current constitution, each time Kentucky's high court dealt with challenges invoking Section 6, it confirmed that Section 6 does not concern the consideration of partisan interests in districting. In *Purnell v. Mann*, Kentucky's high court asked itself, "can this court determine that an election law is unconstitutional and void for the sole reason it does not provide for selection of election officers of different political parties?" 48 S.W. 407, 409 (Ky. 1898), *overruled on other grounds by Pratt v. Breckinridge*, 65 S.W. 136, 140–41 (Ky. 1901). The argument was made "that, to make elections free and equal, in meaning of that section, it is not sufficient that all who possess the requisite qualifications are afforded a reasonable opportunity to vote without being molested or intimidated, but to maintain 'equality' *it is necessary that leading*

parties should be recognized in selecting officers of election." *Id.* (emphasis added). But the *Purnell* Court rejected that argument: "Whether such provision is necessary or conducive to securing free and equal elections is a *question purely of legislative discretion, about which the constitution is silent, and in regard to which it is not the province or right of the court to decide*." *Id.* (emphasis added). Thus, very early on, Kentucky's high court recognized that Section 6 secured no protections for political party representation.

Other early cases continued to confirm that Section 6 simply does not concern the consideration of partisan interests in districting. *See, e.g., Early v. Rains*, 89 S.W. 289, 291 (Ky. 1905) (reaffirming *McClelland* in the context of a voter-registration challenge); *Orr v. Kevil*, 100 S.W. 314, 317 (Ky. 1907) (stating, in an election challenge, that the "right of a free and equal election . . . secures to every deserving citizen the right to cast his ballot in accordance with his will and choice, and have it counted as cast"); *Scholl v. Bell*, 102 S.W. 248, 256 (Ky. 1907) (concluding that disfranchisement violates Section 6, with "'disfranchised voters' . . . necessarily mean[ing] (1) persons denied the right, by whatever means, to vote; (2) persons permitted to vote, but whose votes, by reason of fraud, violence, or other wrong, have not been counted at all, or have not been counted as cast"); *Ford v. Hopkins*, 132 S.W. 542, 543 (Ky. 1910) (rejecting a Section 6 challenge to an election where Republicans induced a candidate to run as a Democrat

to take away votes from another candidate, since "[a]n election is a means furnished the people by the state to select their public servants, and we do not see how the people are injured or deprived of any right when an opportunity to make a choice from all the candidates is fairly presented to them").

In these decisions, Section 6 extended simply to the sanctity of the vote-placement and vote-counting processes. And as it did in the trial court, the KDP continues to rely on cases that not only fail to support their position but fall right in line with that rule.

Wallbrecht v. Ingram involved "[t]he contention that the election was not free and equal . . . on the ground that at three precincts in the county a sufficient number of ballots were not furnished to permit all the persons legally entitled to vote in these precincts to cast their votes." 175 S.W. 1022, 1024 (Ky. 1915). Any of *Wallbrecht*'s pronouncements about Section 6, then, were made in that context. Consider also the portions of *Wallbrecht* omitted by the KDP (and amici) in their proper context:

> *Strictly speaking, a free and equal election is an election at which every person entitled to vote may do so if he desires* . . . . The very purpose of elections is 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; *and when any substantial number of legal voters are, from any cause, denied the right to vote, the election is not free and equal, in the meaning of the Constitution.*
>
> . . . The constitutional provision is mandatory. *It applies to all elections, and no election can be free and equal, within its meaning, if any substantial number of persons entitled to vote are denied the right to do so.* . . . When the

> question arises, *the single inquiry will be: Was the election free and equal, in the sense that no substantial number of persons entitled to vote and who offered to vote were denied the privilege?*

Id. at 1026–27 (emphasis added); *see also id.* at 1027 (reaffirming *McClelland* and *Early*); *Johnson v. May*, 203 S.W.2d 37, 39 (Ky. 1947) (reaffirming *Early* and *Wallbrecht*); *Gross v. West*, 283 S.W.2d 358, 360 (Ky. 1955) (reaffirming *Wallbrecht*).

The same is true of the KDP's reliance on *Burns v. Lackey*, 186 S.W. 909 (Ky. 1916). That case involved a conspiracy "by means of fraud, intimidation bribery, and violence, and by using money, illegally, wrongfully, and improperly to influence the voters" to vote for a particular candidate. *Id.* at 912. This involved luring African Americans "to take an oath and to sign their names to said oath in blood" to vote for that candidate. *Id.* This kind of interference with the vote-placement process is obviously a Section 6 violation because it precludes voters from exercising their free will in that process. But what this has to do with districting according to partisan interests is unclear.[13]

[13] The KDP (and amici) would have this Court adopt verbatim whatever Pennsylvania says about its own version of Section 6. But "no state . . . has a Constitution whose language more emphatically separates and perpetuates what might be termed the American tripod form of government than does out Constitution." *Sibert v. Garrett*, 246 S.W. 455, 457 (Ky. 1922). The Pennsylvania high court in *League of Women Voters v. Commonwealth*, 178 A.3d 737, 817 (Pa. 2018), ignored the significance of its constitution's structural placement of the duty of districting in the hands of its legislature, a partisan body, by finding unconstitutional any map that considers partisan interests "in whole or in part," *see also id.* at 827 (Baer, J., concurring and dissenting in part) (point out other errors). Moreover, other high courts have recognized the extensive development of Section 6 jurisprudence by this Court, *see Gunaji v. Macias*, 31 P.3d 1008, 1016 (N.M. 2001), so Pennsylvania

As Section 6 precedent developed, its meaning continued to remain clear. *Robertson v. Hopkins County*, 56 S.W.2d 700 (Ky. 1933), dealt with an act that gave one group the right to vote for a county school superintendent but excluded another group, even though neither group would be affected by the choice of superintendent. In striking down that law, Kentucky's high court stated:

> Section 6 . . . means "that the 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." [And], "All regulations of the *election franchise* . . . must be reasonable, uniform and impartial."

Id. at 701 (emphasis added).

Again, the "election franchise" here is the ability of everyone in the same voting district to be able to actually place a vote for the individual representing that voting district: "It should not require argument to demonstrate that, if the voters of school districts which are independent of the county school system are permitted to vote for the county superintendent, all of the voters of such districts should be accorded that privilege, otherwise we have a discrimination that cannot be justified." *Id.*; *see also, e.g.*, *Grauman v. Jefferson Cnty. Fiscal Ct.*, 171 S.W.2d 36, 37

---

should really be looking here for instruction. Indeed, this Court is not afraid to "reject . . . the Pennsylvania courts' expansive view" of its own constitution, particularly when that court makes erroneous decisions. *See Blue Movies, Inc. v. Louisville/Jefferson Cnty. Metro Gov't*, 317 S.W.3d 23, 29 (Ky. 2010); *see also Yeoman*, 983 S.W.2d at 473 (stating that Pennsylvania high court decisions "should be given as much deference as any non-binding authority receives," meaning those decisions are no more persuasive than any other out-of-state decision) (citing *Commonwealth v. Wasson*, 842 S.W.2d 487, 498 (Ky. 1992)).

(Ky. 1943) (reaffirming *Robertson* in a lawsuit about voting machines); *Hatcher v. Meredith*, 173 S.W.2d 665, 669 (Ky. 1943) ("We see nothing in connection with the proposed amendment which will obstruct any voter from freely and equally exercising the elective franchise. This section has been construed to mean that the voter shall not be physically restrained in his right to vote.").

Kentucky's high court in *Asher v. Arnett*, 132 S.W.2d 772 (Ky. 1939), a decision dealing with candidate-registration laws, summarized the meanings ascribed to Section 6, which continue to reflect the fact that Section 6 has nothing to do with considering partisan interests in districting. First, Section 6 "means that the 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." *Id.* at 775 (quotation marks omitted). Second:

> [E]lections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.

Id. at 775–76 (quotation marks omitted); *see also Queenan v. Russell*, 339 S.W.2d 475, 477 (Ky. 1960) (reaffirming *Asher* in a lawsuit about a voter absentee law); *Ferguson v. Rohde*, 449 S.W.2d 758, 760 (Ky. 1970) (interference with the vote-placement and counting processes when voters were precluded from placing a

vote for a particular candidate who by law should have been on the ballot).[14] Finally, Section 6 "means that the 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. [And], all regulations of the *election franchise* . . . must be reasonable, uniform and impartial." *Id.* at 776 (cleaned up) (emphasis added). Note how none of these meanings have anything to do with considering partisan interests in districting. *See also Mann v. Cornett*, 445 S.W.2d 853, 858 (Ky. 1969) (reaffirming *Robertson* and *Asher* and finding that "[t]he Kentucky Constitution makes no reference to any political party").

c. There have been few attempts to invoke Section 6 in a districting challenge. Notably, none dealt with State House maps. This is presumably because litigants have recognized that Section 33's specific constraints control State House districting, so invoking Section 6 to challenge such districting would run afoul of the interpretive principle that specific constitutional provisions control over the general. This is more evidence that Section 33 is the only provision in Kentucky's Constitution that has anything to say about State House districting.

Districting plan challengers have never successfully invoked Section 6. In *Moore v. City of Georgetown*, 105 S.W. 905, 906 (Ky. 1907), "the board of council of

[14] All of the Section 6 decisions cited by Professor Douglas obviously apply to (and only to) interferences with the vote-placement and vote-counting processes. Douglas Amicus Br. 12–13.

Georgetown . . . divid[ed] the city into four wards," and it was argued "that the population of the wards was grossly unequal, and the representation from the several wards in the council was not fairly distributed according to population." While the dissenting opinion believed this violated Section 6, *id.* at 908, the majority found no such violation.

The majority acknowledged that "[i]f there was constitutional or legislative expression upon the subject indicating a purpose that equality of apportionment or representation must be observed in the division of cities of the fourth class into wards, and the election of councilmen therefrom, we would feel obliged to sustain the appellants in their efforts to annul the ordinance assailed." *Id.* at 906. But because there is an "absence of such direction or adjudication upon the subject," it concluded "that it was intended both by the Constitution and the Legislature that the people of these minor municipalities should be left free to exercise a discretion in the division of the city into wards and the election of councilmen therefrom." *Id.*; *see also id.* at 907.

That same year, as previously discussed, Kentucky's high court continued this sentiment in *Richardson*, finding "that it is not within the power of the courts to control the legislative department in the creation of congressional districts."[15] 108 S.W. at 323.

[15] Amici misleadingly characterize *Skain v. Milward*, 127 S.W. 773 (Ky. 1910), as a Section 6 districting case. CLC Amicus Br. 5. But the Section 6 allegation there

A Section 6 argument to a districting challenge did not arise again until *Watts v. O'Connell*, 247 S.W.2d 531 (Ky. 1952). There, Kentucky's high court dealt with a Congressional districting plan's grossly malapportioned districts. *Id.* at 532–33. But the *O'Connell* Court reaffirmed the principle that "reapportionment of congressional districts in the State is a question vested in the discretion of the General Assembly and one with which courts are not concerned" and found that Section 6 had nothing to say about malapportioned Congressional districts. *Id.*

Nothing changed ten years later in *Watts v. Carter*, 355 S.W.2d 657 (Ky. 1962). There, Kentucky's high court, led by Chief Justice Palmore, dealt with a Section 6 claim to the 1962 Congressional districting act's grossly malapportioned districts. *Id.* at 658. Additionally, the Fourth Congressional District was described as "a geographic monstrosity resembling a goose with its head in the urban counties of Grant [Boone?], Campbell and Kenton and its long neck stretched along the [Ohio] river counties with its body comprised of the rural areas of South-Central Kentucky." *Id.* (alterations in original) (quotation marks omitted). But the *Carter* Court found no reason to invoke Section 6. Nor was

was that the population disparities among the Lexington precincts created a situation where "so many voters in the different precincts . . . were unable to register, and many of those who registered were unable to vote." *Id.* at 776. If districting precludes Kentuckians from voting at all, that becomes an interference with the vote-placement process.

there a violation stemming from the "legislative choice and prerogative" to organize the Fourth Congressional District in the way that it was—"legislative discretion in this regard is [not] limited by considerations purely esthetic." *Id.* at 659.

All of these decisions are devastating for the KDP, which has no answer to them. The KDP has no text, history, or precedent to support its belief that Section 6 precludes the consideration of partisan interests in districting. On top of that, neither the KDP nor any amici even attempt to proffer judicially manageable standards by which to adjudicate a Section 6 partisan-gerrymandering claim.[16] Judge Wingate correctly concluded that Section 6 takes no account of partisan interests.

2. Kentucky's equal-protection doctrine does not concern partisan gerrymandering.

No Kentucky court has ever even hinted that Kentucky's equal-protection doctrine gives rise to a partisan-gerrymandering claim. Even out-of-state decisions are against the KDP here. *See, e.g., Rucho*, 139 S. Ct. at 2496–97, 2501–02; *Harper*, 886 S.E.2d at 439–42; *Pearson*, 359 S.W.3d at 40–42.

This Court has interpreted Kentucky's equal-protection doctrine to provide for the same protections as that of the U.S. Constitution. *See, e.g., Woodall*,

[16] Nowhere do amici propose a test by which this Court could adjudicate a Section 6 claim, much less address the justiciability problems pointed out in *Rucho*. *See generally* CLC Amicus Br.; Douglas Amicus Br.

607 S.W.3d at 568. So a decision like *Rucho* is instructive here. But even if Kentucky's equal-protection doctrine were to provide more protection than that of its federal counterpart, the KDP has no solution for the inherent problems with attempting to craft judicially manageable standards by which to adjudge an equal-protection partisan-gerrymandering claim.

The *Rucho* Court explained why there are only two recognized equal-protection-based districting claims—one based on equality of population and the other to preclude race-based gerrymandering—and why these claims cannot provide the requisite guidance here. Unlike population-equality and race-based gerrymandering claims, "[p]artisan gerrymandering claims have proved far more difficult to adjudicate." *Rucho*, 139 S. Ct. at 2496–97. This is because "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.'" *Id.* at 2497 (citation omitted). This, again, goes back to the structure of the U.S. and Kentucky Constitutions—the Framers created a system of voting *districts*, not one of statewide proportional representation, and placed the responsibility of fashioning those districts in the hands of partisan actors, knowing that partisan interests would play a role in that duty. Population-equality and race-based gerrymandering claims do not suffer from this basic problem that partisan-gerrymandering claims do.

While "the one-person, one-vote rule is relatively easy to administer as a matter of math[, t]he same cannot be said of partisan-gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly." *Id.* at 2501. Indeed, "[i]t hardly follows from th[e one-person, one-vote] principle . . . that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support." *Id.* And the idea of "'vote dilution' in the one-person, one-vote" context "refers to the idea that each vote must carry equal weight," i.e., the idea that "each representative must be accountable to (approximately) the same number of constituents." *Id.* But "[t]hat requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters," especially since courts are "not responsible for vindicating generalized partisan preferences." *Id.* (citation omitted); *see also Harper*, 886 S.E.2d at 441 ("[A]n effort to gerrymander districts to favor a political party does not alter individual *voting power* so long as each voter is permitted to (1) vote for the same number of representatives as voters in other districts, and (2) vote as part of a constituency that is similar in size to that of the other districts.").

Racial-gerrymandering cases also cannot supply the standards for partisan gerrymandering claims because "racial and political gerrymanders" should not be

"subject to precisely the same constitutional scrutiny." *Id.* at 2502. "[O]ur country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion." *Id.* (citation omitted). More fundamentally, "[u]nlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails." *Id.* Racial-gerrymandering claims "ask[] instead for the elimination of a racial classification." But "[a] partisan gerrymandering claim cannot ask for the elimination of partisanship." *Id.*

The KDP (and amici) have no response to any of these points or to the general reasons previously discussed for why partisan-gerrymandering claims are nonjusticiable. All they do is cite *Fischer IV* (a Section 33 case) and *Asher* (a case involving candidate-registration laws). But nowhere do these cases say that the concept of "vote dilution" encompasses "a person . . . hav[ing] his political party achieve representation in some way commensurate to its share of statewide support." *Rucho*, 139 S. Ct. at 2501. More directly, *Asher*'s pronouncements about equality pertain to the "election franchise," not the districting process. 132 S.W.2d at 776.

The KDP (and amici) also do not even try to articulate a standard by which this Court could adjudge an equal-protection claim based on partisan gerrymandering. Even if they did, they fail to consider that HB 2 does not split precincts. TR 1045–46. Contrast this with HB 191, the KDP's alternative districting plan, which splits 24. *Id.*; DEX 10. The KDP admitted that the General Assembly is entitled to use that "mapmaking principle," VR 04/05/22, 5:20:02–21:35, which should serve as one justification for the configuration of HB 2, especially since there is no proffered alternative map that achieves this goal.

The KDP also fails to consider that SB 3 actually preserves as much as possible the historical configuration of the Commonwealth's Congressional districts, VR 04/07/22, 10:25:06–27:06, 10:39:40–42:32, 10:54:38–58:02; DEX 30 at 7–14, 38–41, and favors compactness, DEX 32 at 6 & Table 2 ("[E]very other Kentucky congressional district becomes more compact under the enacted plan than it was during the last decade[.]"). The KDP offered no real alternative Congressional plan, let alone a comparable one, since their simulated maps all have districts that deviate in population from each other by as much as 700 to 800 people.[17] VR 04/05/22, 11:50:26–52:50; *see Evenwel*, 578 U.S. at 59 (requiring "perfect" population equality across districts).

[17] Although the KDP believes that placing Franklin County in any other Congressional district besides the same one as Fayette County is unjustified, the League of Women Voters of Kentucky champions a map that does just that. TR 1744 (placing Franklin County in the Fourth Congressional district with northern

This Court should not radically change the meaning of equal protection to encompass a partisan-gerrymandering claim. The KDP and amici point to no text, history, or precedent to support their position, nor do they supply any judicially manageable standards from which this Court can work.

3. Kentucky's free speech and association principles do not concern partisan gerrymandering.

No Kentucky court has ever recognized Kentucky's free speech and association principles as giving rise to a partisan-gerrymandering claim. Indeed, *no* court has done so, *see, e.g.*, *Rucho*, 139 S. Ct. at 2504–05; *Harper*, 886 S.E.2d at 442–43; *Johnson*, 967 N.W.2d at 485–88, which is why the KDP can do no better than rely on a general pronouncement from one Kentucky case and a series of inapplicable U.S. Supreme Court cases. Appellant Br. 65–66. The argument is a nonstarter.

To start, *Associated Industries of Kentucky v. Commonwealth*, 912 S.W.2d 947, 949–50 (Ky. 1995), is not a districting case—it is a case about lobbying laws. It also holds that Kentucky's First Amendment equivalent provides the same amount of protection as the First Amendment. *Id.* at 952. This invokes *Rucho*,

Kentucky counties). Similarly, two-thirds of the 10,000 maps proffered by one of the KDP's experts places Franklin County in the Fourth Congressional district. VR 04/07/2022 at 3:05:45–07:00.

which explicitly found that First Amendment principles do not give rise to a partisan gerrymandering claim.

"To begin, there are no restrictions on speech, association, or any other First Amendment activities" in districting plans that are claimed to be partisan gerrymanders. *Rucho*, 139 S. Ct. at 2504. So it's hard to say that a Kentuckian's free-speech rights are even implicated here. Moreover, proffered "First Amendment test[s] simply describe[] the act of districting for partisan advantage," and "[u]nder that theory, any level of partisanship in districting would constitute an infringement of . . . First Amendment rights." *Id.* But that cannot be right because the KDP's proffered way to solve the problem of partisan gerrymandering is to partisan gerrymander—reform the districts created by HB 2 and SB 3 to give Democrats a better chance to win seats. Again, "[a] partisan gerrymandering claim cannot ask for the elimination of partisanship," *id.* at 2502, so the KDP's only proffered solution is to double down on partisan gerrymandering. And, like before, the KDP's proffered claim here disrespects the structure of the Kentucky Constitution that places districting in the hands of a partisan body.

So the question then becomes, "when [does] partisan activity go[] too far[?]" *Id.* at 2504. But attempting to ascertain a standard under that principle raises just as many questions as before: "How much of a decline in voter engagement is enough to constitute a First Amendment burden? How many door knocks must go unanswered? How many petitions unsigned? How many calls

for volunteers unheeded?" *Id.* Like before, the KDP and amici have no answers to those questions or any of the other justiciability questions raised by a partisan-gerrymandering claim.

The KDP's retaliation theory also does not work here because of its second element, which requires that "an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct." *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999); *see also Carpenter v. Kenney*, No. 2020-CA-0954, 2022 WL 5265070, at *7 (Ky. App. Oct. 7, 2022) (unpublished) (noting that Kentucky courts follow the *Thaddeus-X* test). The KDP does not explain when partisan gerrymandering rises to the level of constituting an "adverse action." As before, it cannot be that the simple act of partisan gerrymandering itself constitutes an adverse action. Moreover, "[i]t is apparent that a person of ordinary firmness would not refrain from expressing a political view out of fear that the General Assembly will place his residence in a district that will likely elect a member of the opposing party." *Harper*, 886 S.E.2d at 442–43.

Again, there is no text, history, or precedent supporting the KDP's or amici's argument that Kentucky's free speech and association principles have anything to say about the consideration of partisan interests in districting. And they proffer no judicially manageable standards for the Court to work from.

4. Section 2 does not concern partisan gerrymandering.

Finally, as many litigants do, the KDP (and amici) attempt to invoke Section 2 as a catchall provision to support a partisan-gerrymandering claim against SB 3 only, should none of their other theories work. But, like elsewhere, Section 2 is not a fount of judicially manageable standards by which to adjudge such a claim. All the KDP does is proffer a test based purely on aesthetics without any comparable alternative plan and without considering SB 3's adherence to compactness and the historical configuration of Kentucky's Congressional districts. At bottom, the KDP complains about "considerations purely esthetic" in how one Congressional district was configured, which cannot limit "legislative discretion in this regard." *Carter*, 355 S.W.2d at 658.

Section 2 "does not rule out policy choices which must be made by government." *City of Lebanon v. Goodin*, 436 S.W.3d 505, 519 (Ky. 2014) (citation omitted). When "these choices are in reality political actions [that] are not otherwise in conflict with constitutional principles[,] they do not violate section two as being arbitrary." *Id.* (citation omitted). And Kentucky's high court has made clear that "nowhere" in the Kentucky Constitution is there "any limitation upon the power of the Legislature" to apportion Congressional districts, "and it would be assuming authority this court does not possess if [it] undertook to control a coordinate department of the government in the performance of a power vested exclusively in it." *Richardson*, 108 S.W. at 323.

The KDP and amici offer no alternative plan, no standards, no textual support, no historical support, and no precedent to support the assertion that Section 2 has anything to say about the consideration of partisan interests in districting.[18] That is not the makings of a successful Section 2 claim.

C. The KDP did not prove that HB 2 and SB 3 are partisan gerrymanders.

The KDP spends most of its brief attempting to prove that HB 2 and SB 3 are partisan gerrymanders before explaining how this Court can even adjudicate that issue. Only after clearing that hurdle do we even get to the issue of whether HB 2 and SB 3 are, in fact, partisan gerrymanders. But the KDP fails to make that showing, as well.

Although the KDP attempts to hide behind the usual deference given to a trial court under the clear-error standard, that standard "does not inhibit an appellate court's power to correct . . . a finding of fact that is predicated on a misunderstanding of the governing rule of law." *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984). The circuit court found HB 2 and SB 3 to be partisan gerrymanders, but it never provided a standard by which to adjudge partisan gerrymandering. Without such a standard to measure the facts by, the circuit court's discussion of whether HB 2 and SB 3 are partisan gerrymanders is

[18] The portions of the Debates the amici cite concern Section 33. ACLU Br. 14–15. Amici cite no districting case involving Section 2.

imbedded with an error of law. So if it even reaches this issue, this Court should take a fresh look at the evidence presented in this case. Once it does, it becomes clear that the KDP did not show HB 2 and SB 3 are partisan gerrymanders, whatever that means.

In any event, the trial court clearly erred in giving any credence to the KDP's proof. The entirety of that proof comes down to the eyeball test and the prevailing theories of political science percolating in the faculty lounges at two Boston universities. Surely the Framers did not intend for such subjective opinion to dictate how the General Assembly fulfills its constitutional duty. The Court should not allow Kentucky's districting process to be dictated by "sociological gobbledygook." Oral Argument Transcript at 40, *Gill v. Whitford*, 138 S. Ct. 1916 (2018), https://perma.cc/5S28-35XW.[19]

[19] To start, it is difficult to say that any of the challengers here actually *proved* the requisite constitutional standing to maintain this action. TR 983–93, 1707–12; *see City of Pikeville v. Ky. Concealed Carry Coalition, Inc.*, 671 S.W.3d 258, 265–67 (Ky. 2023) (noting that litigants must "produce sufficient proof" of standing). The only plaintiffs that even testified about SB 3 were Graham and Robinson. But Graham never testified about how SB 3's alleged partisanship affects him personally, and Robinson disclaimed caring about ensuring partisan fairness within a districting plan. *See Ward v. Westerfield*, 653 S.W.3d 48, 53 (Ky. 2022) (holding that "voters and citizens" still must show "a concrete and particularized injury"); VR 04/06/22, 4:21:50–52:25; TR 1861–84 (identifying Graham's generalized grievances and failing to note any desire of Robinson to ensure a map's partisan fairness). The only plaintiffs testifying about HB 2 were Graham and a KDP representative. But again, Graham never testified about HB 2 affecting him in a personal way. *See* VR 04/06/22, 4:21:50–38:55; TR 1861–62 (identifying Graham's generalized grievances). And the KDP, whose representative testified

1. The KDP first uses an eyeball test to attack HB 2. It flashes the Court pictures of the configuration of some of Kentucky's House districts to try and paint those configurations in a bad light. The Commonwealth encourages the Court to compare HB 2[20] with the Democrats' 2013 State House Map[21] and the Democrats' current HB 191.[22] How could anyone possibly argue that any one map looks better or worse than the others?

At bottom, the KDP's attempt to manipulate the Court's view about HB 2 in this way is irrelevant. The question here is whether HB 2's configurations help Republicans win more than Democrats, which has nothing to do with the way a map looks but rather what it may yield. If there is even a legitimate way to

---

about HB 2 only, has "causation and redressability" problems. *See Ky. Unemployment Ins. Comm'n v. Nichols*, 635 S.W.3d 46, 52 (Ky. 2021). The proof at trial showed that the KDP's downturn is due to (1) the "independent action[s] of . . . third part[ies]," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), i.e., individuals choosing for themselves not to associate with or otherwise support the KDP, and (2) the KDP's own failed electoral efforts and strategy. VR 04/05/2022, 4:47:55–58:16. Nor did the KDP, as an association, *show* that one of its members had the requisite constitutional standing to maintain an action here. *See City of Pikeville*, 671 S.W.3d at 265–67.

[20] Available at https://davesredistricting.org/maps#viewmap::8eed4db7-46cd-4e09-a179-c0a7e821a963. There are many tools and metrics from Dave's Redistricting, the website used by the KDP's witness who testified about these configurations, that the Court can use to examine all three maps. VR 04/05/22, 3:34:35–35:35, 3:42:20–43:20, 5:11:10–12:40, 5:21:54–24:35.

[21] Available at https://davesredistricting.org/maps#viewmap::d67e61e7-6983-46ff-8dea-db089d78af65.

[22] Available at https://davesredistricting.org/maps#viewmap::4db76010-8b41-4dd1-87b0-ee2ed6718fd2.

predict future election results, the KDP has failed to show that *any* of the configurations complained of actually yield a partisan advantage for Republicans.

Although it includes several snippets of the configuration of various counties, the KDP complains about the configurations of Pike and Madison only. Appellant Br. 7–9. Yet there is no configuration of Pike County that will yield any competitive district arising from that county—a Republican is expected to win by at least 26 percentage points in every single district encompassing Pike County in all three maps.[23] Note that the KDP's representative testified at trial that a competitive political district is a district with a 10% or less difference in potential party vote share. VR 04/05/22, 4:11:06–20. As for Madison County, which supposedly contained the "most competitive House district in the Commonwealth" before HB 2, Appellant Br. 9, the Democratically drawn HB 191 creates a greater-than five-percentage-point victory for Republicans in one district, surrounded by two districts expected to result in 26 percentage-point victories for Republicans. This just shows that Kentucky's natural political geography heavily favors Republicans, and it would take a *Democratic* gerrymander to make competitive districts.

[23] The statistics to support the statements like this made throughout this section come directly from viewing the three maps on Dave's Redistricting. *See, supra*, fns. 20, 21, 22. A breakdown of composite vote share between 2016 and 2020 can be viewed by hovering over each district and viewing the "Composite 2016-2020" Section on the bottom-right of the map page. *See also* TR 1026–30.

Similarly, consider the configuration of the cities about which the KDP complains. Appellant Br. 20–23. Of the six districts encompassing Bowling Green under the 2013 State House plan, only District 20 is a competitive district, as the rest heavily favor Republicans.[24] District 20 remains a competitive district in HB 2. It is actually HB 191 that is more of a gerrymander because it creates two safe seats, one for Republicans and one for Democrats, against two maps containing heavily Republican districts and one competitive district.

As for Covington, under the 2013 State House map, it is split in two districts—a safe Republican district and a safe Democratic district. HB 2 splits Covington into three districts, one competitive and two safe for Republicans—the same exact thing that the Democrat-drawn HB 191 does. Under the 2013 State House map, Georgetown contains three safe Republican seats. Both HB 2 and HB 191 contain a safe Republican seat and a competitive one, with the competitive seat in HB 2 actually being *more* competitive than the one in HB 191. Finally, although the 2013 State House map affords a competitive district encompassing most of Richmond (which also snakes down to encompass part of Berea), that

[24] Again, for the support for statements like these, *see, supra*, fn. 23 and VR 04/05/22, 5:25:50–41:31 (discussion of the configuration of Kentucky's cities).

district still leans Republican. The same goes for HB 191, which actually makes that district less competitive.[25]

Cutting through the KDP's smokescreen, it's clear that the KDP is blind to Kentucky's current political climate and geography.[26] The current climate is why Republicans went from having 46 seats in the House in 2015 to 75 in 2021—all under the 2013 State House plan drawn by Democrats.[27] VR 04/05/22, 4:31:50–44:40, 5:09:10–10:50, 5:25:50–37:51, 5:45:10–48:23, DEXs 8 & 9 (evidence of gerrymandering by Democratic Party in 2013 State House map); *see also* 5:42:00–44:50 (same with respect to the 2012 Congressional map). It is why Republicans were expected to gain even more seats in 2022 under both HB 2 *and* HB 191—two under HB 191 and five under HB 2. VR 04/06/22, 3:40:35–41:32; VR 04/05/22, 5:16:35–17:48; DEX 34 (HB 191 "Predicted 23% D / 77% R seat share"). And it is why the Democratically gerrymandered 2013 State House map, HB 2, and the Democratically drawn HB 191 are all nonsensically alleged to be

---

[25] The KDP no longer complains about HB 2's treatment of Erlanger and Florence, presumably because it realizes there is no way to create competitive districts for Democrats around those two cities. TR 1029. Neither does it complain about Hopkinsville, which the KDP's representative admitted is treated better in HB 2. VR 04/05/22, 5:37:31–51.

[26] The KDP's complaints about particular districts, like Districts 29, 33, 36, 37, and 38, also ignore the population changes that required a shifting of the boundaries of those districts. TR 1751–52.

[27] *See* https://legislature.ky.gov/LRC/Publications/Pages/GA-Directories.aspx for the partisan breakdown of the General Assembly since 2010.

Republican gerrymanders according to the KDP's own metrics. *Compare* DEXs 25, 26 (2013 State House map), *with* DEXs 34, 35 (HB 191), *and* DEXs 22, 33 (HB 2); VR 04/07/22, 3:25:16–42:00.

So either the KDP's metrics are flawed (and they are) or they confirm that Kentucky's political climate and geography now naturally heavily favor Republicans (and they do). The KDP proffered Professor Devin Caughey to testify about those metrics, namely, what is termed the "Efficiency Gap" and "Declination," and the website, called PlanScore, that uses them. The initial problem with the KDP's strategy here is that Caughey's and PlanScore's impartiality are questionable at best—Caughey has only ever testified on behalf of Democrats, and PlanScore, which has never been reviewed for objectivity and reliability, has deep-rooted connections to the Democratic Party. VR 04/06/22, 10:48:46–11:01:05, 1:06:57–27:30, 3:47:50–52:55. PlanScore itself admits that it is 32% unsure of its ability to forecast the partisanship within a Kentucky map, and Caughey was unsure if PlanScore had ever correctly predicted the results of a Kentucky election cycle before. VR 04/06/22, 11:07:20–08:50, 1:22:35–24:07, 1:46:56–50:25, 1:58:00–18.

This unreliability presumably comes from the fact that all PlanScore does is predict how a particular district in Kentucky will vote based entirely on the results of the 2016 presidential election. VR 04/06/22, 10:32:50–35:42, 10:44:12–30, 1:15:10–16:28, 1:37:50–38:25, 1:43:20–44:40. Similarly, PlanScore

does not account for state-specific districting laws, geography, political geography, or other specific nuances about Kentucky elections and politics in analyzing the partisanship within a districting plan. VR 04/06/22, 10:30:40–31:05, 10:34:00–35:42, 1:43:52–44:40, 3:38:15–42; VR 04/07/22, 11:03:00–04:32; DEX 32 at 22. Neither Caughey nor PlanScore have an answer for how some districts that Caughey identifies as "most partisan" must be drawn that way based on Kentucky's natural geography. VR 04/06/22, 3:13:00–15:45 (discussing Districts 42 and 43, which are functionally incapable of being drawn any less Democratic), 3:34:45–38:08; *see also* TR 1756 (noting the same geographical problems with Districts 40, 41, and 44).

Nevertheless, the KDP still relies on PlanScore's calculation of HB 2's alleged "Efficiency Gap" and "Declination" to try and prove its partisanship. But even those two metrics are not reliable indicators here, as PlanScore's own creators, *both* of the KDP's experts, and many other scholars refute their veracity as reliable diagnostic tools for detecting partisan gerrymandering in uncompetitive states like Kentucky and in predicting sustainable party advantage under a districting plan. VR 04/05/22, 10:38:28–40:44; VR 04/06/22, 10:49:44–50:08, 2:14:50–20:35, 2:28:20–53:46, 3:55:05–57:30; DEXs 18, 24.

That's because the efficiency gap cannot detect when a partisan divide is caused intentionally or, like in Kentucky, by natural geography. VR 04/06/22,

2:36:08–42:46; VR 04/07/22, 10:59:45–11:10:27; DEX 30 at 44–48. And declination cannot screen for basic and traditional districting criteria, like compactness or political geography. VR 04/06/22, 2:52:10–53:46. So these metrics do not consider, for example, that HB 2 pits the same number of Democratic incumbents against each other as it does Republicans. VR 04/05/22, 4:03:36–4:05:30. Nor do these metrics explain why the Democratic Party fielded candidates in only 57 House races out of a potential 100 for the 2022 election cycle. VR 04/05/22, 4:02:30–54.

Adding to the flawed nature of PlanScore is the fact that a user can choose between one of two models by which to attempt to ascertain the partisanship of a map. VR 04/06/22, 1:59:00–2:00:32. Predictably, using a different model yields different results because each is focused on a different set of presidential election results. VR 04/06/22, 2:00:32–01:20. For this case, Caughey elected to use the model that assumes no incumbents running in a district, so his end results inappropriately do not consider incumbent advantage. VR 04/06/22, 1:41:42–43:30. And, unsurprisingly, the PlanScore result Caughey chose to report is the highest, and thus the most favorable for the KDP of all models and all plans.

What's worse, PlanScore's metrics and its data prove the Commonwealth's point—Kentucky's current political climate and geography naturally heavily favors Republicans. The KDP asserts that an "Efficiency Gap over 7-8% . . . is a sign that voters have been systematically packed and cracked into

districts to minimize their expected seat share."[28] Appellant Br. 26. How, then, do they explain the fact that the 2013 State House map has an efficiency gap of 9.8% under PlanScore's old model and 10.6% under PlanScore's new model? DEXs 25 (old model), 26 (new model)? Did the Democrats "systematically pack[] and crack[]" the 2013 State House plan in favor of the Republicans? Consider also that HB 191's efficiency gap is 9.6% under the old model and 10.7% under the new model—is the Democrats' alternative to HB 2 a systematic Republican gerrymander? DEXs 35 (old model), 34 (new model).

The better explanation is simply that a high efficiency gap, one no less than 10%, is exactly what one should expect in Kentucky. VR 04/06/22, 11:36:55–38:14, 11:39:28–41, 2:03:00–55, 3:57:55–4:01:35; VR 04/07/2022, 11:01:46–03:00; DEXs 25, 26, 28. And although the KDP alleges that HB 2 is "more favorable toward Republicans than 99% of all plans that have even been scored by PlanScore," Appellant Br. 27, that is exactly the case with HB 191 and the 2013 State House map. DEXs 26 (2013 State House map "favoring Republicans in >99% of predicted scenarios"), 34 (same with respect to HB 191).

[28] Note that Caughey found a Democratic-drawn map in Oregon with an efficiency gap of 8.5 as evidencing a "*moderate* pro-Democrat bias," while at the same time finding a Republican-drawn map in Pennsylvania with an efficiency gap of 6.6 as being "*strongly* biased in favor of the Republican party." VR 04/06/22, 10:57:45–58:58, 2:07:35–14:02.

The KDP's claims have always been based on allegations of "extreme partisan gerrymandering." TR 2–3. But Kentucky's natural political climate and geography heavily favor Republicans right now. The difference between HB 2 and HB 191 is three House seats that still give the Republicans well over a supermajority. VR 04/06/22, 3:40:35–41:32; VR 04/05/22, 5:16:35–17:48; DEX 34 ("predicted 23% D/77% R seat share" under HB 191). How HB 2 can be considered an extreme partisan gerrymander is a mystery.

The only other attempt the KDP made at proving that HB 2 is a partisan gerrymander is to rely on Professor Kosuke Imai's simulation analysis. It is unclear what value this analysis has since Imai himself admitted that the 10,000 hypothetical districting plans he generated are not intended to be "take[n] . . . and then enact[ed] . . . as a map." VR 04/05/22, 10:36:16–49.

The other main problem with Imai's work is that it is riddled with his own subjective value judgments and choices. First, there are an "impossible" or "astronomical" number of districting plans that can be devised in Kentucky. VR 04/05/22, 10:34:20–35:46, 1:42:40–43:20. Imai, who has only ever testified on behalf of Democrats, VR 04/05/22, 10:52:25–49, has to subjectively choose from essentially an infinite number of maps the small set to which he will compare HB 2 (and SB 3) to determine the extent of the partisanship in those districting plans. Imai also subjectively chooses from a pool of several different applicable algorithms by which to create his comparison maps, in addition to the

constraints that he forces the comparison maps to abide by, like contiguity and compactness. VR 04/05/22, 10:32:52–34:21, 10:40:43–42:54, 10:45:14–31. And there is no consensus about which type of algorithm is better for a particular type of analysis; instead, the analyzer has to make a subjective call about which algorithm is best depending upon the analyzer's interpretation of the uniqueness of a state and its districting rules. VR 04/05/22, 11:00:46–02:11. Without Imai's own subjective choices, his simulation method is not able to be employed.

For this case, Imai chose to analyze HB 2 using what he calls the Markov Chain Monte Carlo algorithm. VR 04/05/22, 10:40:44–42:54, 10:45:29–47. His proffered reason for this choice was Kentucky's "complicated restrictions on how the county splits . . . should be done." VR 04/05/22, 10:45:47–47:03, 11:00:46–02:11. Interestingly, however, Imai himself has criticized the Markov Chain Monte Carlo algorithm's proficiency of appropriately taking into account such constraints in generating comparator districting plans. VR 04/05/22, 2:48:22–3:04:33. As for the constraints he chose to input for this case, Imai relied on the KDP's flawed Section 33 interpretation, VR 04/05/22, 2:00:10–40; *see also* VR 04/05/22, 5:17:25–19:18, and failed to consider a plethora of other traditional districting criteria and Kentucky-specific nuances, VR 04/05/22, 2:01:32–03:40, 2:18:57–23:15, 3:05:36–06:22. Moreover, the subjectivity of the constraints Imai chose was most evident with his explanation of why he set different constraints at different "levels." VR 04/05/22, 1:57:03–2:00:30.

The important thing to note from Imai's testimony is that, on average, the 10,000 State House maps he generated produced 76 districts that should expect a Democratic vote share at least below 49%. VR 04/05/22, 1:40:55–41:20, 3:21:22–22:24. So Imai's simulation analysis produces maps purportedly producing results that are only marginally different from HB 2.

The KDP would have this Court defer to the subjective opinions of two out-of-state political scientists and a website rather than the judgment of the General Assembly. And to the KDP, it does not matter how flawed those opinions are and how little they consider Kentucky's specific political climate, geography, and other nuances. Nor does it matter that the Republican rise in Kentucky occurred most prominently under a map drawn by Democrats. The best the KDP can do is complain about a three-seat difference between HB 2 and HB 191 and argue that HB 2 provides a "durable, structural advantage for Republican candidates." Appellant Br. 31. But a three-to-four-seat difference in no way shows "extreme partisan gerrymandering." TR 2–3. And the fact that Republicans were able to obtain an almost 30-seat swing in the House under the gerrymandered-by-Democrats 2013 State House plan shows that there is simply no such thing as a "durable" districting plan. Voters in Kentucky have simply shifted their preferences over the last decade.

2. The only way the KDP attempted to show that SB 3 is a partisan gerrymander is to rely on Imai's flawed simulation analysis. Just like with HB 2, Imai

had to make subjective determinations about compactness and the preservation of historical configurations in conducting his SB 3 analysis. VR 04/05/22, 11:52:50–53:23, 11:57:20–28, 11:59:03–12, 3:07:56–09:05. And the fact that Imai is analyzing a Congressional map causes even more problems: It is impossible for Imai to instruct his algorithms to match the mathematical precision of the one-person, one-vote rule and the General Assembly's adherence to it. VR 04/05/22, 11:50:26–52:50, 3:17:48–18:52; VR 04/07/22, 2:57:08–59:49.

To be clear, the KDP only asserts that the First Congressional District, not the entire map, was gerrymandered. But as one of the Commonwealth's experts explained, Imai did not account for mapmakers in Kentucky "retain[ing] the same . . . district cores . . . that correspond to Kentucky's political geographies since the '90s." VR 04/07/22, 10:25:06–28:50, 10:36:20–47:00, 10:54:38–58:04 (explaining how SB 3 tracks the historical progression of Kentucky's Congressional districts); DEX 30 at 7–14, 38–41, Appendix A (same); DEX 32 at 10–15 (another expert demonstrating the same). Imai's failure to account for this mapmaking principle, in part, led to the creation of "bizarre" and "inexplicable" comparison maps for which Imai generated partisanship data. VR 04/07/22, 10:26:18–28:50, 10:36:20–47:00; DEX 30 at 14–35. Regardless, even when not accounting for Kentucky's historical progression of Congressional districts, the district containing Franklin County in Imai's Congressional district simulations

yielded an uncompetitive Democratic vote share—*on average*, around 43%. VR 04/05/22, 1:41:22–42:38, 3:23:53–25:19.

It's hard to give any credence to Imai's unrealistic simulated maps. The "best" map for Democrats bisects Metro Louisville, carving off a heavily democratic area (the West End and southwestern Jefferson County) and tacks it onto the Second District. VR 04/07/22, 3:01:58–04:16. And where does Franklin County fall in that map? Outside the Sixth District (where Franklin County finds itself almost two-thirds of the time in Imai's ensemble), in the Fourth District. VR 04/07/22, 3:05:55–07:00. This, and other maps, show that there is no support for the proposition that taking Franklin County out of the Sixth District represents a partisan gerrymander. VR 04/07/22, 3:12:36–58.

Another problem with Imai's work is that, like Caughey, he compares apples with oranges. Imai used the 2016 Presidential and U.S. Senate and 2019 state constitutional officer races to try and capture voter behavior for Kentucky's Congressional races to make a prediction about the partisanship of an area. VR 04/05/22, 10:55:10–57:44, 2:06:52–09:51, 3:06:38–07:50. And Imai's data does not account for election-specific nuances, like candidate quality. *Id.*

Importantly, *on average*, the district containing Franklin County in Imai's Congressional district simulations yielded a Democratic vote share of around 43%. VR 04/05/22, 1:41:22–42:38, 3:23:53–25:19. Moreover, one in seven of Imai's simulated maps would elect *six* Republicans to represent Kentucky in

Congress, and *none* of Imai's maps would be expected to yield a 4–2 Republican-to-Democrat Congressional delegation. VR 04/07/22, 10:48:12–53:14; DEX 30 at 36–38. So Imai's simulation analysis produces maps with purported results that are no different from SB 3. *See also* DEX 32 at 5 ("The vast bulk of [Imai's] simulations are no more favorable to the Democrats than the enacted plan."); VR 04/07/22, 2:52:30–56:03. How SB 3, then, can be considered a partisan gerrymander is unknown.

If there is no possible way to create a Congressional map in Kentucky that yields any more seats for Democrats than one, at the same time that it is very possible to create a map that provides Republicans with all six seats, then a Congressional map that yields a 5–1 Republican-to-Democrat split simply cannot be considered a partisan gerrymander, and certainly not an "extreme" one. *Cf. Richardson*, 108 S.W. at 323 ("[I]t is not within the power of the courts to control the legislative department in the creation of congressional districts."). Just like with respect to HB 2, the KDP just does not like the fact that Republicans are winning in Kentucky, so they are attempting to use this Court to manufacture for them what they could not obtain for themselves—political victories. *Cf. Jensen*, 959 S.W.2d at 776 ("There is a difference between what is perceived to be unfair and what is unconstitutional. Apportionment is primarily a political and legislative process."). But this Court should refrain from "stain[ing]" its "immaculate coat" with "politics." 1890–91 Debates at 4415–16.

CONCLUSION

The Court should affirm.

Respectfully submitted,

/s/ Alexander Y. Magera

VICTOR B. MADDOX (No. 43095)
Deputy Attorney General
MATTHEW F. KUHN (No. 94241)
Solicitor General
HEATHER L. BECKER (No. 94360)
Executive Director
ALEXANDER Y. MAGERA (No. 97708)
Assistant Solicitor General

Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
(502) 696-5300
victor.maddox@ky.gov
matt.kuhn@ky.gov
heather.becker@ky.gov
alexander.magera@ky.gov

Counsel for the Commonwealth of Kentucky

WORD-COUNT CERTIFICATE

This Appellee/Cross-Appellee Brief complies with the word limit of 22,750 under RAP 31(G)(3)(c) because, excluding the parts of the response exempted by RAP 31(G)(5) and 15(D), this document contains 22,584 words.

/s/ Alexander Y. Magera