COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION No. 22-CI-00047

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

vs.

MICHAEL ADAMS, in his official capacity as Secretary of State of the Commonwealth of Kentucky and THE KENTUCKY STATE BOARD OF ELECTIONS **DEFENDANTS**

and

COMMONWEALTH OF KENTUCKY **INTERVENING DEFENDANT**

OPINION AND ORDER

This matter came before the Court for a bench trial on April 5-7, 2022. Upon review of the parties' pleadings, and having considered the testimony of the witnesses, as well as the exhibits that were placed into evidence, the Court hereby issues this Opinion and Order.

PROCEDURAL HISTORY

Every ten (10) years, in accordance with Section 33 of the Kentucky Constitution, the General Assembly undertakes apportioning representation through new boundaries for state Senatorial and House Districts. Additionally, considering population shifts, every ten (10) years the General Assembly is also tasked with drawing new boundaries for Congressional Districts.

The 2020 Census determined that Kentucky's population is 4,505,836. Commonwealth's Exhibit 1, Tabs 18 and 19. Thus, Kentucky is entitled to six (6)

Congressional representatives. *Id*. The ideal population for each Congressional District in Kentucky is 750,973 people. Section 33 of the Kentucky Constitution establishes one hundred (100) state House Districts with approximate population equality. KY. CONST. § 33. Accordingly, the ideal population for these one hundred (100) districts is 45,058 people. During the 2022 Regular Session, the General Assembly passed new maps for House Districts, House Bill 2 ("HB 2")[1], Senatorial Districts, Senate Bill 2 ("SB 2")[2], and Congressional Districts, Senate Bill 3 ("SB 3")[3] based on data from the 2020 Census.[4]

The General Assembly passed HB 2 on January 8, 2022, and it was then delivered to Governor Andy Besehar. On January 19, 2022, Governor Beshear exercised his constitutional authority and vetoed HB 2 opining that the redistricting plan is an unconstitutional partisan gerrymander, excessively splits counties, and dilutes the voices of certain minority communities. Veto Message, HB 2 (2022RS). The General Assembly overrode Governor Beshear's veto on January 20, 2022, and HB 2 became effective immediately due to the emergency clause contained within. Similarly, SB 3 was passed and delivered to Governor Beshear on January 8, 2022. On January 19, 2022, Governor Beshear exercised his constitutional authority and vetoed SB 3 claiming it was drafted without public input and is an unconstitutional partisan gerrymander noting that the First Congressional District uncharacteristically spans hundreds of miles from Fulton County to Franklin County. Veto Message, SB 3 (2022RS). The General Assembly overrode

[1] KRS 5.201
[2] KRS 5.101
[3] KRS 118B.110
[4] Plaintiffs do not challenge the constitutionality of SB 2, however, the Court notes that SB 2 was passed and delivered to Governor Beshear on January 8, 2022. Governor Beshear failed to veto or sign SB 2, so SB 2 became law without Governor Beshear's signature and became effective immediately due to the emergency clause contained within.

Governor Beshear's veto on January 20, 2022, and SB 3 became effective immediately due to the emergency clause contained within.

On January 20, 2022, Plaintiffs initiated this action against Secretary of State Michael G. Adams ("Secretary Adams") and the Kentucky State Board of Elections ("the SBE") to challenge the constitutionality of HB 2 and SB 3.[5] With respect to HB 2, Plaintiffs allege that HB 2 violates Sections 1, 2, 3, 6, and 33 of the Kentucky Constitution. Plaintiffs state that HB 2 is the result of extreme partisan gerrymandering, which they believe is prohibited under Sections 1, 2, 3, and 6 of the Kentucky Constitution. Additionally, Plaintiffs contend that HB 2 violates Section 33 of the Kentucky Constitution because it excessively splits counties more times than necessary. With respect to SB 3, Plaintiffs assert that it also is the result of extreme partisan gerrymandering and violates Sections 1, 2, 3, and 6 of the Kentucky Constitution.

On January 27, 2022, the Commonwealth of Kentucky, by and through Attorney General Daniel Cameron ("the Commonwealth"), moved to intervene to defend the constitutionality of HB 2 and SB 3. The Commonwealth's *Motion to Intervene* was orally granted at the February 10, 2022, hearing and by Order entered February 10, 2022.

On January 28, 2022, a little over a week after initiating this action, Plaintiffs moved for injunctive relief to enjoin the use of HB 2 and SB 3 in the 2022 election cycle. On February 4, 2022, the Commonwealth filed a crossclaim and counterclaim challenging the constitutionality of House Bill 302 (2012RS) and House Bill 1 (2013SS) (collectively "the 2012/2013 districts"). The Commonwealth alleges the 2012/2013 districts were enacted based on 2010 Census data and therefore violate Section 33 of the Kentucky

[5] The SBE takes no position on this litigation.

Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Commonwealth also filed a *Motion for Temporary and Permanent Injunction* on its crossclaim and counterclaim. Additionally, on February 4, 2022, the Commonwealth and Secretary Adams jointly filed a *Motion to Dismiss*.

The parties appeared before the Court on February 10, 2022, and the Court heard oral argument on Plaintiffs' *Motion for Temporary Injunction* and the Commonwealth's and Secretary Adams' joint *Motion to Dismiss*. By Order entered February 17, 2022, the Court denied the Commonwealth's and Secretary Adams' *Motion to Dismiss* finding that it was premature. Additionally, by separate Order entered February 17, 2022, the Court denied Plaintiffs' *Motion for Temporary Injunction*. The Court determined that "injunctive relief would disrupt the status quo, would unduly harm Secretary Adams and other election officials, and would disserve the public." February 17, 2022, Order at 12. Given the significance of this action, the Court immediately set this matter for a bench trial.

A bench trial was held on April 5-7, 2022. At the trial, the parties offered two (2) stipulations: (1) HB 2 splits twenty-three (23) counties, which is the minimum number of counties that must be split to comply with population variation constitutional requirements; and (2) all material on the Legislative Research Commission's website and the SBE's website is admissible. At trial, Plaintiffs offered ten (10) exhibits into evidence and the Commonwealth offered thirty-five (35) exhibits into evidence. Additionally, Plaintiffs proffered expert testimony from two (2) witnesses: Dr. Kosuke Imai and Dr. Devin Caughey, and lay testimony from three (3) witnesses: Representative Derrick Graham, Jill Robinson, and Trey Heineman. In rebuttal, the Commonwealth proffered expert testimony from two (2) witnesses: Sean Trende and Dr. Stephen Voss.

ANALYSIS

I. Expert Testimony

a. Dr. Kosuke Imai

Plaintiffs presented testimony from Dr. Kosuke Imai. The Court admitted Dr. Imai, without objection, as an expert in computational science and simulation analysis used to evaluate legislative redistricting proposals. Video Record ("VR") 4/5/22, 10:51:40-10:51:53. Dr. Imai used Monte Carlo simulation algorithms to generate a representative set of possible redistricting maps under a specified set of criteria.[6] Plaintiffs' Exhibit 2, pp. 6-7; VR 4/5/22, 10:31:32-10:37:46. This allows one to evaluate the properties of an enacted map by comparing them against those of the simulated maps. *Id*. If the proposed plan unusually favors one party over another when compared to the ensemble of simulated maps, this serves as empirical evidence that the proposed plan is a partisan gerrymander. *Id*. Statistical analysis then allows one to quantify the degree to which the proposed plan is extreme relative to the ensemble of simulated plans in terms of partisan outcomes. *Id*. The simulation-based approach has the ability to account for a state's political and geographic features, including spatial distribution of voters and configuration of administrative boundaries. Plaintiffs' Exhibit 2, p. 7; VR 4/5/22, 10:38:30-10:40:44. Thus, Dr. Imai's method allows one to compare a proposed plan to a representative set of alternate districting plans subject to Kentucky's administrative boundaries, political geography, and constitutional requirements. *Id*. Dr. Imai clarified that these simulation algorithms are not designed to generate thousands of maps that would actually be enacted by policy makers.

[6] Dr. Imai developed these algorithms, and they are widely used by others in the field.

VR 4/5/22, 10:35:47-10:36:49. Instead, their primary purpose is to evaluate a specific proposed or enacted plan for partisan bias or other concerns. *Id*.

i. HB 2

Dr. Imai testified that he used his simulation algorithm to generate 72,000 simulated state House plans. Plaintiffs' Exhibit 2, pp. 21-22; VR 4/5/22, 10:34:20-10:35:46, 11:06:00-11:07:38, 1:42:40-1:43:20. The number of simulated plans that can be devised is astronomical, however, Dr. Imai narrowed the number from 72,000 simulated maps to 10,000 through burning and thinning, which are standard techniques. *Id*. He instructed the algorithm to create one hundred (100) contiguous districts with a population variation not to exceed +/-5%. VR 4/5/22, 11:02:16-11:04:14. He further instructed the algorithm to split the fewest number of counties possible, have fewer multi-split counties, have fewer districts with more than two (2) counties, and fewer counties with multiple districts. *Id*. He did not input any partisan or race data. *Id*. Dr. Imai testified that he did not instruct the algorithm to consider communities of interest, race, school and church locations, neighborhoods, the location of county seats, transportation corridors, natural boundaries like rivers and mountains, incumbent or candidate homes, double bunking, continuity of representation, or core retention of districts. VR 4/5/22, 2:01:33-2:03:40. Dr. Imai stated that he focused on county integrity and splitting as few counties multiple times so the simulation may have those characteristics, especially if they coincide with county boundaries. *Id*.

He evaluated the partisan lean of districts created by HB 2 compared to the simulated state House plans using data from the eight (8) most recent state-wide elections for which precinct-level voting data is available: the 2016 Presidential and United States

Senate elections, and the 2019 elections for Governor, Attorney General, Secretary of State, Auditor, Treasurer, and Agricultural Commissioner. Plaintiffs' Exhibit 2, p. 24; VR 4/5/22, 10:55:12-10:59:00. Dr. Imai stated it is standard practice in simulation analysis to use this method because it provides a general measure of partisanship, not specific to any particular candidate or race. *Id*.; VR 4/5/22, 2:07:57-2:09:50. He stated the point of combining all eight (8) of the recent statewide elections is to get a good idea of partisanship. VR 4/5/22, 2:07:57-2:09:50. Dr. Imai testified that one does not want to rely on one (1) particular race, and it is best to average all of the different races to get a good measure of partisanship. *Id*. He further testified that this system is not a forecasting model to predict outcomes for future elections and is merely used to measure partisanship. VR 4/5/22, 10:59:01-10:59:47. Dr. Imai testified that one cannot cherry pick maps to analyze and critiqued the Commonwealth's experts for doing so. VR 4/5/22, 11:15:15-11:19:30. He testified that to evaluate the simulated maps, one must look at all 10,000 maps and look for an imposed tendency. *Id*.

For his analysis, Dr. Imai ordered each Representative district under HB 2 by its Democratic vote share, based on the above data, from the district with the lowest Democratic vote share to the district with the highest. Plaintiffs' Exhibit 2, pp. 11-13; VR 4/5/22, 11:21:20-11:29:01. Dr. Imai then did the same with each of the 10,000 simulated House plans. *Id*. He compared the distribution of district level Democratic vote share between the simulated plans and HB 2. *Id*. He focused on the nine (9) most competitive districts. *Id*. He testified that there is a drastic "jump" between D79 and D80, which he explained is a signature showing of partisan gerrymandering because it shows how Republican leaning districts have been made safer whereas Democratic leaning districts

are made more competitive. *Id*. He testified that the simulated plans did not have the drastic "jump" like HB 2's partisanship did. Instead, he stated it was a smooth transition between D73 and D84. *Id*. So, in conclusion, Dr. Imai testified that his analysis shows that HB 2 makes Democratic leaning districts more competitive while Republican leaning districts become safer. *Id*. He testified that this clearly demonstrates that HB 2 is a partisan gerrymander. *Id*.

Dr. Imai conducted an analysis of the district divisions in Kentucky's two (2) largest cities: Louisville (Jefferson County) and Lexington (Fayette County). In Louisville/Jefferson County electors typically vote Democratic, but Jefferson County shares borders with many Republican-leaning counties: Oldham, Shelby, Spencer, and Bullitt. Dr. Imai testified that his simulations demonstrate that under HB 2 the districts—specifically Districts 33, 37, and 48—have been drawn to craft more "safe" Republican districts by combining areas in Jefferson County that are likely to be more competitive with Republican safeholds in neighboring counties. Plaintiffs' Exhibit 2, pp. 13-15; VR 4/5/22, 11:33:06-11:38:45. Dr. Imai found this pattern was repeated in Lexington/Fayette County. Plaintiffs' Exhibit 2, p. 15, Figure 5; VR 4/5/22, 11:38:47-11:43:18. In the heart of Fayette County electors typically lean Democratic, but Fayette County shares borders with Woodford, Scott, Bourbon, Clark, and Madison Counties, which have many Republican electors. Dr. Imai opined that HB 2 packs Fayette County's Democratic electors into districts, specifically Lexington's city center, to reduce the Democratic vote share in the surrounding districts. *Id*. He stated that his simulations show that Districts 45 and 88 have taken areas of Fayette County that are likely to be more competitive and combined them

with Republican safeholds in neighboring counties to create additional Republican safe districts. *Id*.

Dr. Imai also testified about his analysis of multi-split counties, which focused on how the split counties were further split. He testified that HB 2 has eighteen (18) counties that are split multiple times (into more than two (2) districts) whereas his ensemble has fifteen (15) such counties on average, with a range from thirteen (13) to seventeen (17). VR 4/5/22, 11:09:52-11:10:32. He then stated that HB 2 has a total number of eighty (80) multi-county splits and on average his simulated plans produced less. Plaintiffs' Exhibit 2, p. 22; VR 4/5/22, 11:12:55-11:13:49. He concluded that HB 2 "unnecessarily splits a greater number of counties into more than two (2) districts." VR 4/5/22, 11:10:32-11:11:38. Similarly, he analyzed the number of Representative districts that include part of more than two (2) counties. *Id*. He stated that under HB 2 there are thirty-one (31) districts containing more than two (2) counties whereas under his simulated ensemble there are twenty-four (24) such districts, with a range from twenty-one (21) to thirty (30). VR 4/5/22, 11:11:40-11:12:28. He testified that this difference is statistically significant, making HB 2 an outlier. *Id*.

ii. SB 3

Dr. Imai also evaluated SB 3's Congressional districts. He testified that he had the algorithm create 10,000 simulated plans and instructed the algorithm to create these simulated plans with six (6) contiguous districts with an overall population deviation of +/-.1% and included a compactness parameter of one (1). Plaintiffs' Exhibit 2, pp. 16-18; VR 4/5/22, 11:50:00-11:55:55. He also stated that he instructed the algorithm to split the fewest number of counties and did not use any race or partisan criteria. *Id*. Dr. Imai testified that

he instructed the algorithm to make the simulated maps the same level of compactness as SB 3 and as a result this has demonstrated that the First District is highly uncompact. VR 4/5/22, 3:09:06-3:11:19. Dr. Imai also criticized the use of "freezing" a district. VR 4/5/22, 11:56:41-11:57:19. He stated that when evaluating compactness, one must be careful with freezing a district because freezing a district has a direct impact on the compactness of surrounding districts. *Id*.

He opined that SB 3's First District is less compact than 99% of the simulated plans. *Id*. Dr. Imai further stated that his simulations demonstrate that the Democratic vote share in SB 3's First District is 35%, which is an extreme outlier as it is lower than more than 99% of simulated districts containing Franklin County. Plaintiffs' Exhibit 2, pp. 17-18; VR 4/5/22, 12:10:05-12:12:00. He testified that the simulated plans place Franklin County in districts with a much higher Democratic vote share than the First District. *Id*. He stated that in the simulated Congressional plans there is an average Democratic vote share of 43.6% in the districts that contain Franklin County. VR 4/5/22, 1:41:23-1:42:37. When asked to keep the historic pairing of Franklin County with Fayette County in the Sixth District, Dr. Imai's simulation produced a Democratic vote share of 47.8%. Plaintiff's Exhibit 2, pp. 17-18.

b. Dr. Devin Caughey

Plaintiffs also offered expert testimony from Dr. Devin Caughey. The Court admitted Dr. Caughey as an expert in political science, particularly in the evaluation of partisan bias in legislative redistricting maps. VR 4/6/22, 10:38:00-10:38:50, 10:59:17-10:59:50. Like Dr. Imai, Dr. Caughey has testified in other state cases concerning allegations of partisan gerrymandering. VR 4/6/22, 10:57:40-10:59:16.

i. HB 2

For this case, Dr. Caughey conducted his analysis in part using a publicly available website, PlanScore. VR 4/6/22, 11:01:36-11:06:29, 2:57:55-3:00:17. He was asked to provide an assessment of the partisan fairness of HB 2 and he testified about his process of using PlanScore. *Id*. PlanScore uses past election data and a prediction algorithm to make predictions about state legislative races and calculate the expected Efficiency Gap, Declination, and other metrics of partisan gerrymandering. VR 4/6/22, 10:41:25-10:49:28. He noted that there is a range of uncertainty built in. VR 4/6/22, 1:35:18-1:36:28. Notably, PlanScore does not rely on state election returns, but uses presidential election returns when making predictions. VR 4/6/22, 10:32:53-10:35:42.

Dr. Caughey opined two (2) basic techniques that map drawers can use to engage in partisan gerrymandering to "maximize the number of seats that one's own party wins subject to the number of votes they are likely to earn statewide." VR 4/6/22, 10:22:58-10:24:54. First, he stated map drawers can use "cracking," where they take the electors of the opposing party and spread them across districts where there is a majority for the party drawing the maps. *Id*. Second, map drawers can use "packing," where they take the electors of the opposing party and pack them into a few "hyper-lopsided districts." *Id*. He stated that it is typical, as he opined was done in HB 2, to use both methods to maximize partisan gains statewide. *Id*.

Dr. Caughey then explained some objective metrics used to measure partisan gerrymandering such as the "Efficiency Gap," which measures how efficient each party is at translating votes into seats. Plaintiffs' Exhibit 6 § 4.2; VR 4/6/22, 10:50:10-10:54:05, 11:23:50-11:24:50. He explained that the Efficiency Gap compares the number of "wasted"

votes for each party (the number of votes cast for a losing candidate) and if one party's votes are being wasted at a lower rate than its opponent's, that is an advantage because the party with lower wasted votes has a chance of winning more seats with comparatively fewer votes. *Id*. Dr. Caughey confirmed that there is no definitive Efficiency Gap score that, if exceeded, constitutes per se partisan gerrymandering, but he noted political scientists generally agree that an Efficiency Gap over 7-8% is a sign that electors have been systematically packed and cracked into districts to minimize their expected seat share. VR 4/6/22, 11:44:25-11:46:00. Dr. Caughey determined that HB 2 "is likely to waste 13.4% more of Democratic votes than Republican votes." Plaintiffs' Exhibit 6 § 5.1.1; VR 4/6/22, 11:20:50-11:21:58. This means that under HB 2, Republicans can expect an extra thirteen (13) seats on top of what would normally be considered a "winner's bonus." *Id*. Dr. Caughey concluded that HB 2 is more favorable towards Republicans than 99% of all enacted plans that have ever been scored by PlanScore. VR 4/6/22, 11:22:45-11:23:21.

Dr. Caughey also explained "Declination" and evaluated HB 2's Declination. To measure Declination, one creates a plot of all the legislative districts, arranged by the percentage of vote share expected for one party. VR 4/6/22, 10:54:09-10:56:42. Next, starting from the point on the graph where each party is expected to win 50% of the two (2) party vote, a political scientist would create two (2) trend lines—a line through each party's expected vote share "cloud." *Id*.; Plaintiffs' Exhibit 6 § 4.4. To find the Declination, one measures the angle between the trend lines. *Id*. A non-gerrymandered map would not produce a sharp angle between the two (2) lines; the expected vote share plot will increase smoothly from left to right. *Id*. Partisan gerrymandering is signaled when the angle between the lines increases because the majority party has packed many of its opponent's electors

into a few heavily concentrated districts and spread the rest across a larger number of districts where the majority's votes will translate into more seats. *Id*. Dr. Caughey concluded that HB 2's Declination is "off the charts," and shows a pro-Republican bias larger than he has ever seen. Plaintiffs' Exhibit 6 § 5.1.1; VR 4/6/22, 11:29:29-11:30:00, 11:46:40-11:45:55.

Dr. Caughey stated that only seven (7) out of the one hundred (100) districts give either party at least a 25% chance of winning. Plaintiffs' Exhibit 6 § 5.1; VR 11:34:16-11:35:29. Dr. Caughey and PlanScore predict over eighty (80) districts to go Republican under HB 2.[7] Plaintiffs' Exhibit 6 § 5.1; VR 4/6/22, 3:40:35-3:41:48. Under the Democrats' proposed map, HB 191, PlanScore predicts about seventy-six (76) districts to go Republican. His conclusions also demonstrate that under HB 2 there may not be any Democrats elected to the state House outside of Fayette County (Lexington) and Jefferson County (Louisville) and possibly Franklin County (Frankfort) (leans Democratic). Plaintiffs' Exhibit 6 § 5.1. In sum, Dr. Caughey concluded that HB 2 is the most extreme advantage for a party in a legislative map that he has ever seen. VR 4/6/22, 4:20:31-4:21:01.

c. Sean Trende

The Commonwealth first elicited expert witness testimony from Sean Trende. The Court admitted Mr. Trende as an expert in political science and gerrymandering. VR 4/7/22, 10:20:12-10:20:37. He stated that in this redistricting cycle he has testified as an expert in Ohio, North Carolina, Maryland, and New York. VR 4/7/22, 10:17:29-10:18:00.

[7] Although the results from the November 8, 2022, election are currently unofficial, the Court takes judicial notice that it has been reported that, as predicted, Republicans have won eighty (80) House districts.

The Commonwealth had asked Mr. Trende to review the works of Drs. Imai and Caughey. Commonwealth's Exhibit 30; VR 4/7/22, 10:20:45-10:21:00.

i. HB 2

Mr. Trende testified that in evaluating HB 2, the Efficiency Gap is unreliable in places like Kentucky because "in some states, the political geography just naturally results in a circumstance where it becomes hard to draw districts for one party or the other in certain regions." VR 4/7/22, 10:59:50-11:01:46. Mr. Trende believed an Efficiency Gap of 13.4% in Kentucky is expected. VR 4/7/22, 11:01:46-11:02:14. But, he continued to discredit its reliability in cases of partisan gerrymandering because of Kentucky's makeup. VR 4/7/22, 11:03:00-11:04:26. Mr. Trende calculated the Efficiency Gap of Dr. Imai's simulated maps and opined that HB 2 fell within what he considered a similar, but admittingly still less, distribution of Dr. Imai's simulations when compared by Efficiency Gap metrics. VR 4/7/22, 11:04:24-11:06:55. He then concluded that Kentucky's political geography naturally wastes Democratic votes. VR 4/7/22, 11:08:30-11:08:40. Finally, for HB 2, he agreed that algorithms do not outright consider communities of interest, race, schools, neighborhoods, county seats, transportation corridors, natural boundaries, where incumbents live, double bunking, continuity of representation, and core retention, but noted that those considerations can be inserted and are also given different priority based on who is drawing the map. VR 4/7/22, 10:32:10-10:35:25.

ii. SB 3

With respect to SB 3, Mr. Trende stated that Kentucky Congressional Districts "have retained what we call district cores, the same basic idea that corresponds to Kentucky's political geographies since the 90s." VR 4/7/22, 10:25:43-10:26:04. He

admitted that the purpose of these simulations is to remove all partisan concerns, but then testified that out of the thousands of possible maps that Dr. Imai's program simulated, that none of them bear resemblance to what a Kentucky map maker would actually draw. VR 4/7/22, 10:26:40-10:28:51. Although Mr. Trende agreed with Dr. Imai that you cannot cherry pick maps, he only offered testimony on a few select maps in an apparent effort to support the theory that SB 3 is not arbitrary. VR 4/7/22, 10:47:02-10:47:59. He opined that SB 3 supports the trend that the First District should not encompass other areas in Western Kentucky in the Second District or continue to stretch east across the lower portion of the Commonwealth, but instead should continue to shoot up through the central part of the state to preserve the Second District for William Natcher. VR 4/7/22, 10:30:00-10:31:55.

Mr. Trende credited the bizarre shape of the First District to an alleged goal of the 1992 General Assembly to protect former Second District Congressman William Natcher, who was a Bowling Green resident and died in early 1994. VR 4/7/22, 10:40:00-10:40:10, 10:54:40 12:22:16-12:24:10, 12:27:25-12:27:50. Mr. Trende did not offer testimony that he had personal knowledge from the 1992 General Assembly that redistricting was done to protect William Natcher. He testified that he personally froze the Second District when running Dr. Imai's simulation. Despite calling Dr. Imai's maps that he reviewed "bizarre" and "inexplicable," Mr. Trende agreed that simulation analysis is meant to remove partisan considerations that have informed previous maps and one should not instruct the algorithm to adhere to partisan criteria. VR 4/7/22, 12:24:11-12:25:25. Mr. Trende stated SB 3 is predicted to elect five (5) Republicans and one (1) Democrat to Kentucky's Congressional delegation. VR 4/7/22, 10:48:12-10:52:54. He testified that one (1) in seven (7) of Dr. Imai's simulated plans would elect six (6) Republicans to represent Kentucky in Congress,

but he only used 2016 Presidential election results to reach this conclusion, unlike Dr. Imai who used data from eight (8) previous statewide elections. *Id*. He then stated that when the Second District is frozen in place none of the simulated maps would be expected to yield two (2) Democrats. VR 4/7/22, 10:57:10-10:57:27.

d. Dr. Stephen Voss

The Commonwealth also offered expert testimony from Dr. Stephen Voss. The Court admitted Dr. Voss as an expert in elections, Southern and Kentucky politics, and voting behavior. VR 4/7/22, 2:47:39-2:48:00. Dr. Voss stated that he was asked to review and respond to the works of Drs. Imai and Caughey and to look for any errors or concerns with the methodologies employed. Commonwealth's Exhibit 32; VR 4/7/22, 2:49:10-2:50:27.

i. HB 2

With respect to HB 2, Dr. Voss used Dr. Caughey's method of PlanScore to assess the 2012/2013 districts, the Democrats' proposed 2022 plan (HB 191), and HB 2. He concluded that Kentucky has a baseline unavoidable Efficiency Gap of at least 9.6% and that Kentucky should continue to expect a Republican supermajority. Dr. Voss opined that HB 191 has an Efficiency Gap of 10.7%. Commonwealth's Exhibit 32, p. 23. Dr. Voss testified that he replicated Dr. Caughey's PlanScore work and noted that the Efficiency Gap is not only based on the lines drawn, but where people live, and therefore a lay person can be misled by results. VR 4/7/22, 3:25:00-3:27:16. He stated that as a result, Kentucky naturally has a higher Efficiency Gap based on its political geography. *Id*. However, he testified that he did not find any material inaccuracies in Dr. Caughey's work. VR 4/7/22, 4:16:50-4:17:28.

Dr. Voss outright disagreed with Mr. Trende's statement that the most reliable data is from the 2016 President election. VR 4/7/22, 3:52:27-3:53:08. Dr. Voss testified that the 2016 Presidential election was an outlier and was where Kentuckians were most Republican, and thus, a good forecast cannot be predicted from an extreme. *Id*. He stated that Dr. Imai used 2019 election data, which is less extreme, and therefore a better indicator. *Id*. He specifically disagreed with Mr. Trende's criticism of including the data from the 2019 gubernatorial election because he stated that data shows where electors reside that typically vote Republican, but are willing, for certain reasons, to vote Democratic. VR 4/7/22, 3:54:00-3:55:17. Dr. Voss testified that there could have been fewer multi-split counties in HB 2 and if the law requires HB 2 to multi-split counties the fewest number of times possible, then HB 2 would violate this. VR 4/7/22, 4:19:49-4:21:14. Dr. Voss also testified that cherry picking maps to critique is bad. VR 4/7/22, 4:17:40-4:18:25.

ii. SB 3

Turning to SB 3, Dr. Voss analyzed some of Dr. Imai's simulations and concluded that "the vast bulk of [Dr. Imai's] simulations are not more favorable to the Democrats than the enacted plan." Commonwealth's Exhibit 32, p. 5; VR 4/7/22, 2:52:43-2:56:00. Dr. Voss examined the "best map" for Democrats to increase their Congressional seats and noted that it would bisect Metro Louisville, which would dilute the Black vote in Jefferson County. VR 4/7/22, 3:01:58-3:04:16. Dr. Voss also stated this is the same strategy that would be used to create the "best map" for Republicans to gain all six (6) seats. *Id*. He noted that Franklin County finds itself outside of the Sixth Congressional District in about 62% of Dr. Imai's simulations. VR 4/7/22, 3:05:55-3:07:00. However, Dr. Voss testified

that when the algorithm is instructed to keep Warren, Daviess, and Bullitt Counties together, rather than gridlocking the entire Second District, Franklin County does not end up in the First District. VR 4/7/22, 4:52:50-4:53:38. In fact, he testified that if the simulation is left alone, Franklin County does not appear in the First District. *Id*. Dr. Voss again disagreed with Mr. Trende's obsession with freezing the Second District "for historical reasons" and said that rooting an analysis too deeply in past precedent and failing to give way to legal requirements and guidelines is an error. VR 4/7/22, 4:54:40-4:55:14. Finally, Dr. Voss stated Dr. Imai's choice of a permitted greater population variance of 0.1% was a function of the method. VR 4/7/22, 2:57:10-2:59:49.

II. Lay Testimony

a. Trey Heineman

Plaintiffs elicited testimony from Trey Heineman, the Political Director for the Kentucky Democratic Party. VR 4/5/22, 3:28:53-3:28:58. He admitted that he is not an expert in redistricting techniques. VR 4/5/22, 5:23:24-5:23:30. He testified that in his role he maintains relationships with interested groups, organizations, and county parties, he is the in-house campaign strategist for several campaigns, and works closely with the Democratic legislative caucuses with recruitment. VR 4/5/22, 3:29:07-3:29:40, 4:44:58-4:45:20. Mr. Heineman stated that in his previous role he advised Kentucky Democratic legislators on redistricting during the 2012 redistricting cycle and in his current role he worked with Democratic legislative leadership to formulate HB 191. VR 4/5/22, 3:30:35-3:32:43, 5:17:36-5:17:47. He opined that HB 191 complied with the +/-5% population variance standard that is required and twenty-three (23) counties (the minimum number of counties) were split. VR 4/5/22, 3:32:49-3:34:37. He also testified that HB 191 minimized

the total number of times counties were divided and how many times three (3) or more counties were aggregated together. *Id*.

He analyzed HB 2 under the same factors he did for HB 191. VR 4/5/22, 3:34:48-3:35:47. He compared each time the twenty-three (23) counties were divided and for example noted McCracken County had parts of four (4) districts, thus was split three (3) times. VR 4/5/22, 3:36:56-3:38:24. He testified that HB 2 split the twenty-three (23) divided counties eighty (80) times and HB 191 split the twenty-three (23) divided counties sixty (60) times. VR 4/5/22, 3:38:30-3:38:55. He stated that he also analyzed the number of times HB 2 took a portion of a county and joined it with a neighboring county to form a district, which was forty-five (45) times, compared to HB 191 which did the same thirty-one (31) times. VR 4/5/22, 3:39:35-3:41:09. Finally, he testified that HB 2 creates a district with three (3) or more counties thirty-one (31) times while HB 191 did so twenty-three (23) times. VR 4/5/22, 3:41:13-3:41:37.

Mr. Heineman testified that he closely examined district layouts in cities (Bowling Green, Covington, Erlanger, Florence, Georgetown, Hopkinsville, and Richmond) under the 2012/2013 districts, HB 2, and HB 191. Plaintiffs' Exhibit 3; VR 4/5/22, 3:42:32-3:3:55:27. He stated that HB 2 divides these cities more times than necessary in ways that intentionally create more Republican districts when the cities/districts were previously Democratic districts or competitive districts. *Id*. He testified that HB 191 kept these districts similar to their historic bounds. *Id*. However, he admitted that the 2012/2013 districts had six (6) different districts in Warren County, but under HB 2 there are four (4). VR 4/5/22, 5:31:19-5:32:05. He testified that under the 2012/2013 districts, Erlanger encompassed three (3) districts, and under HB 2 Erlanger is also in three (3) districts. VR

4/5/22, 5:32:26-5:32:41. Mr. Heineman then testified that under the 2012/2013 districts, Florence had four (4) districts within its bounds and under HB 2 it has three (3) districts. VR 4/5/22, 5:33:25-5:34:01. Next, Mr. Heineman stated that under the 2012/2013 districts, Georgetown had three (3) districts and under HB 2 it has two (2) districts. VR 4/5/22, 5:35:26-5:35:50. He testified that under the 2012/2013 districts, Hopkinsville had three (3) districts and under both HB 2 and HB 191 it has two (2) districts, but he stated that HB 2 dilutes the Black voting population in Hopkinsville. VR 4/5/22, 5:37:31-5:38:20. Finally, Mr. Heineman testified that under the 2012/2013 districts and HB 191, Richmond had one (1) district, but now under HB 2 is has three (3). VR 4/5/22, 5:40:24-5:40:55. However, he testified that you cannot look at these isolated incidents but must look at the map at large to understand the partisan disadvantage. VR 4/5/22, 5:36:58-5:37:06.

He stated that he was involved in candidate recruitment for the 2022 election cycle and worked closely with the Democratic legislative leadership to find leads of interested individuals to run for state representative and that HB 2 impacted recruitment ability for the 2022 elections. VR 4/5/22, 4:00:27-4:01:10, 4:06:35-4:07:22, 4:13:33-4:13:55. He testified that several recruited candidates were drawn out of their districts and the Democratic Party was then left with no candidate for the district. VR 4/5/22, 4:01:12-4:02:21. He stated there are only fifty-seven (57) contested races as a result versus the previous seventy-seven (77) contested races. VR 4/5/22, 4:02:28-4:02:53. Mr. Heineman also testified that because HB 2 has significantly changed the makeup of districts, it has dissuaded Democratic candidates from wanting to run in a district where the results are predetermined. VR 4/5/22, 4:02:56-4:03:27. Mr. Heineman stated that HB 2 makes it more difficult to get financial and volunteer support for candidates that do choose to run in

Republican favored counties. VR 4/5/22, 4:07:24-4:08:29. Yet, Mr. Heineman admitted that in 2021 the Kentucky Democratic Party out fundraised the Kentucky Republican Party, but this was before HB 2 and SB 3 were enacted. VR 4/5/22, 5:49:00-5:49:33.

Mr. Heinenman admitted that HB 191 would still have given Republicans a supermajority, but he emphasized the importance of not excessively splitting counties in order to dilute the votes of Democratic electors in certain areas of the state to impact elections years down the line and policy that comes out of the legislature. VR 4/5/22, 4:09:22-4:10:47, 4:48:100-4:48:19. Mr. Heineman admitted that Democrats have been losing seats in the House, absent HB 2, since 2016. VR 4/5/22, 4:51:52-4:54:18. Mr. Heineman further admitted that Kentucky's geographic makeup, and the tendency for Democrats to congregate more heavily in urban areas and Republicans in rural areas, make some districts impossible to draw any less favorable to a certain party. VR 4/5/22, 4:58:32-5:04:37. But, he also blamed redlining for limiting the ability of where people could historically live. VR 4/5/22, 5:05:17-5:05:57.

With respect to SB 3, Mr. Heineman testified that the Kentucky Democratic Party's concern is the placement of Franklin County and it not being grouped with its historic district of Central Kentucky. VR 4/5/22, 5:42:34-5:43:23. He confirmed that the 2012/2013 districts placed part of Jessamine County in the Second District. VR 4/5/22, 5:43:40-5:43:54.

b. Representative Derrick Graham

Plaintiffs offered testimony from Plaintiff Representative Derrick Graham. Representative Graham stated that he is presently serving as the Representative for the fifty-seventh (57th) District and has served in said capacity for twenty (20) years. VR

4/6/22, 4:22:21-4:22:38. He testified that he is a resident of Franklin County and has been for sixty-four (64) years. 4:22:00-4:22:13. Representative Graham confirmed that he is affiliated with the Kentucky Democratic Party and is the leader of the House Democratic Caucus. VR 4/6/22, 4:22:52-4:22:58. With respect to HB 2, he acknowledged that the Democratic Party is the minority in the House, and he that stated without the ability to elect more Democratic members it the hurts overall recruitment, the ability to raise funds for those on the ballot, policy, and he specifically noted that if a party does not have enough members it hurts the party's ability to negotiate with the opposite party because a few members can make the difference of whether or not a bill passes. VR 4/6/22, 4:24:07-4:26:09.

Representative Graham testified that he personally works to recruit persons to run for office in the House and did so this year. VR 4/6/22, 4:26:18-4:26:44. He stated that out of the one hundred (100) House seats, himself and other members of the Kentucky Democratic Party were only able to recruit fifty-nine (59) people to run, which includes incumbents. VR 4/6/22, 4:26:53-4:27:02. Representative Graham testified that based on his personal involvement with recruitment, HB 2 has directly impacted his and the Kentucky Democratic Party's ability to recruit candidates to run for office. VR 4/6/22, 4:27:28-4:28:18, 4:33:55-4:35:19.

Regarding SB 3, Representative Graham stated SB 3 alters the Congressional District he resides in from the Sixth District to the First District. VR 4/6/22, 4:28:31-4:28:38. He observed how SB 3 is not compact and stated that a person driving from Fayette County (Lexington) to Jefferson County (Louisville) would travel through five (5) of Kentucky's six (6) Congressional Districts. VR 4/6/22, 4:28:51-4:29:04. Accordingly,

he stated that he finds SB 3 very unusual. VR 4/6/22, 4:29:32-4:29:35. He testified that as a resident and elector in Franklin County, he believes SB 3 will negatively impact Franklin County as Franklin County has always shared common interests culturally, socially, and economically with the Sixth District. VR 4/6/22, 4:29:40-4:30:00. He noted that counties in the First District are mainly rural, agricultural counties. VR 4/6/22, 4:30:02-4:30:19. Representative Graham then testified that he believes it will be difficult for someone to represent Western Kentucky and Franklin County given the social, political, and economical differences between the areas. VR 4/6/22, 4:31:00-4:32:00. He stated that, in his opinion, Franklin County voters will have less influence than they have had in their previous Congressional District given the strong Republican lean in the First District and the presence of more Democratic leaning voters in the Sixth District. VR 4/6/22, 4:32:01-4:32:25. Representative Graham stated that although Franklin County does not have a constitutional right to be in the Sixth District, by precedent, and as far as he can remember, Franklin County has always been in the Sixth District. VR 4/6/22, 4:35:43-4:35:55.

c. Jill Robinson

Plaintiffs also offered testimony from Plaintiff Jill Robinson, a resident of Franklin County. VR 4/6/22, 4:40:23-4:40:27, 4:51:20-4:51:22. Ms. Robinson disclaimed concern with HB 2 and focused her testimony on SB 3. VR 4/6/22, 4:51:23-4:51:35. She stated that SB 3 altered the Congressional District in which she resides from Central Kentucky's Sixth District to Western Kentucky's First District. VR 4/6/22, 4:40:39-4:40:13. Ms. Robinson testified that in the over forty (40) years that she has resided in Franklin County, it has always been paired with Fayette County in a Congressional District. VR 4/6/22, 4:41:14-4:41:25. Ms. Robinson stated that she was appalled when she first saw SB 3. VR 4/6/22,

4:41:33-4:41:49. She testified that she considers Franklin County to be part of Central Kentucky. VR 4/6/22, 4:44:40-4:44-44.

Ms. Robinson discussed her significant community involvement and noted that she has always had active contact with her congressman and has worked with Congressman Andy Barr on a project for Franklin County. VR 4/6/22, 4:41:56-4:42:50. Ms. Robinson testified that she believes Franklin County being placed in a Congressional District with far Western Kentucky will harm its ability to ensure adequate representation. VR 4/6/22, 4:46:15-4:46:40. She gave an example of when Franklin County was in the compact and contiguous Sixth District how Congressman Barr was able to send a staff member to Franklin County once a month to speak to any citizen that had a need or wanted to be heard. VR 4/6/22, 4:46:44-4:49:44. She also testified about her work with the Bluegrass Development District and the importance that area development districts were compact and contiguous. VR 4/6/22, 4:44:29-4:46:00. She proclaimed that fairness requires compact and contiguous districts. VR 4/6/22, 4:52:04-4:52:20. Ultimately, the testimony of Ms. Robinson was very passionate and persuasive.

III. Jurisdiction

This Court has jurisdiction and a duty to decide this matter. Moreover, as has been consistently held, Plaintiffs' claims do not present non-justiciable political questions.

> The judiciary has the ultimate power, and the duty, to apply, interpret, define, construe all words, phrases, sentences and sections of the Kentucky Constitution as necessitated by the controversies before it. It is solely the function of the judiciary to do so. This duty must be exercised even when such action serves as a check on the activities of another branch of government or when the court's view of the constitution is contrary to that of other branches, or even that of the public.

Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 209 (Ky. 1989). "The Court's power to determine the constitutional validity of a statute 'does not infringe upon the independence of the legislature.'" *Bevin v. Commonwealth ex rel. Beshear,* 563 S.W.3d 74, 82-83 (Ky. 2018) (quoting *Stephenson v. Woodward,* 182 S.W.3d 162, 174 (Ky. 2005)).

Well over a century ago, Kentucky's highest court rejected the general idea that redistricting is a political question not within the bounds of judicial review. *Ragland v. Anderson*, 100 S.W. 865, 867 (Ky. 1907) ("And no matter how distasteful it may be for the judiciary to review the acts of a co-ordinate branch of the government their duty under their oath of office is imperative."). As recently as the last round of redistricting in 2012, the Kentucky Supreme Court reaffirmed the judiciary's duty to "'ascertain whether a particular redistricting plan passes constitutional muster [.]'" *Legislative Research Comm'n v. Fischer*, 366 S.W.3d 905, 911 (Ky. 2012) (quoting *Jensen v. State Board of Elections*, 959 S.W.2d 771, 776 (Ky. 1997)). In respecting Kentucky's strict separation of powers, the judiciary will never force the General Assembly to adopt a specific redistricting plan, but if an enacted redistricting plan violates a constitutional mandate, it is the judiciary's "constitutional responsibility…to tell them what is the constitutional 'minimum.'" *Rose*, 790 S.W.2d at 494.

Similarly, Kentucky courts have flatly rejected the argument "that congressional redistricting is a political question and one not justiciable by the courts." *Watts v. O'Connell*, 247 S.W.2d 531, 532 (Ky. 1952). The *Watts* Court agreed that the *act* of redistricting is crafted at the discretion of the General Assembly; however, "where the redistricting does violence to some provision of the Constitution or an Act of Congress," it becomes a concern of the judiciary. *Id.* '''When the Legislature has exceeded its legitimate

powers by enacting laws in conflict with the Constitution or that are prohibited by it, we have not hesitated to interpose the veto power lodged in the judiciary for the purpose of preserving the integrity of the organic law under which all departments of the state government were created and live, and to which all of them owe obedience.'" *Id*. (quoting *Richardson v. McChesney*, 108 S.W. 322, 323 (Ky. 1908)). Since *Marbury v. Madison*, it has been clear that it is "the very essence of judicial duty" to interpret the Constitution. 5 U.S. 137, 177 (1803). The Court will not shirk this responsibility.

The Commonwealth asserts that because Section 33 of the Kentucky Constitution sets out specifics for redistricting that the Court cannot consider any other section of the Kentucky Constitution with respect to HB 2. The Court disagrees. When general and specific provisions conflict, specific provisions generally control. However, "[i]f one constitutional provision addresses a subject in general terms, and another addresses the same subject with more detail, the two provisions should be harmonized, if possible, but if there is any conflict, the special provision will prevail." 16 C.J.S. Constitutional Law § 101. Again, the Court emphasizes that it is solely the role of the judiciary to interpret the Kentucky Constitution and determine if such a conflict exists and whether harmonization is possible. Accordingly, the Court holds that Plaintiffs present a justiciable controversy ripe for decision.

IV. Standing

The Commonwealth argues that Plaintiffs lack standing to challenge HB 2 and SB 3. Essentially, the Commonwealth takes the position that Plaintiffs have only offered "generalized grievances" and have failed to offer specific constitutional issues with District 57—the Representative district that all Plaintiffs reside in. Plaintiffs dispute the

Commonwealth's position and assert that they have standing to challenge HB 2 and SB 3. Plaintiffs point to Kentucky's long history of "map challenges" to support this notion and offer that the Commonwealth's argument would set up a "byzantine and formalistic" system where no party would ever have standing to challenge an apportionment plan. Plaintiffs reason that no effective state-wide challenge could be mounted by allowing a plaintiff to only sue over an alleged error in their own district, and would result in dozens of lawsuits with likely conflicting rulings.

a. Individual Standing

Standing is an essential element of a justiciable case or controversy. *Commonwealth Cabinet for Health and Family Servs., Dep't for Medicaid Servs. v. Sexton ex rel. Appalachian Reg'l Healthcare, Inc*., 566 S.W.3d 185, 196 (Ky. 2018). In the pivotal *Sexton* case, the Kentucky Supreme Court concluded that "the existence of a plaintiff's standing is a constitutional requirement to prosecute any action in the courts of this Commonwealth," and it formally adopted the *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) test for standing. *Id*. at 188. Under the *Lujan* test, the plaintiff must have suffered an "injury in fact" which he or she can causally connect to the conduct at issue. *Lujan*, 504 U.S. at 560–61. The injury must be "concrete and particularized" and "either actual or imminent." *Sexton*, 566 S.W.3d at 196 (quoting *Massachusetts v. E.P.A.*, 549 U.S. 497, 517 (2007)). The injury must impact the plaintiff in a "personal and individual way." *Lujan*, 504 U.S. at 560. A plaintiff "must possess a 'direct stake in the outcome' of the case." *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013) (quoting *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 64 (1997)). A general grievance, one which claims injury to the plaintiff and every other citizen, is not a justiciable case or controversy. *Id*. (citing *Lujan*,

504 U.S. at 573-74). In sum, the *Sexton* Court clarified that "for a party to sue in Kentucky, the initiating party must have the requisite constitutional standing to do so, defined by three requirements: (1) injury, (2) causation, and (3) redressability." 566 S.W.3d at 196.

Since the adoption of the *Lujan* test in *Sexton*, the Kentucky Supreme Court has continued to finetune Kentucky's standard to establish standing. In *Overstreet v. Mayberry*, the Kentucky Supreme Court further outlined what qualifies as an "injury" to satisfy the first of the three (3) standing elements. 603 S.W.3d 244 (Ky. 2020). In *Overstreet*, the Court opined that "while an injury may be threatened or imminent, the concept of imminence "cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for [constitutional standing] purposes—that the injury is *certainly impending*.'" *Id*. at 252 (quoting *Clapper v. Amnesty International*, 568 U.S. 398, 409 (2013) (quoting *Lujan*, 504 U.S. at 565, n.2) (internal quotation marks omitted and emphasis in original)). Accordingly, the Kentucky Supreme Court emphasized "that '[a]llegations of *possible* future injury' are not sufficient" to establish injury in fact. *Id*. (citing *Clapper*, 568 U.S. at 409 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (emphasis in original)).[8]

While the Court understands that standing, particularly the element of injury in fact, has recently been at the forefront of Kentucky jurisprudence, the Court finds that standing, again particularly for establishing injury in fact, for cases concerning apportionment can be satisfied by a plaintiff pleading a violation of his or her constitutional rights as a citizen,

[8] The Kentucky Supreme Court stated that "[t]he *Clapper* court also noted by footnote that '[o]ur cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. In some instances, we have found standing based on a "substantial risk" that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm.'" *Id*. at n. 17 (quoting *Clapper*, 568 U.S. at 414 n. 5.).

taxpayer, and voter. In fact, there are over one hundred (100) years of cases that support challenging an apportionment plan as a citizen, taxpayer, and voter and pleading a constitutional violation caused by the apportionment plan establishes the requisite injury to satisfy standing. Starting with *Ragland*, each plaintiff alleged "that he was a citizen, taxpayer, and voter" and the 1906 apportionment plan violated his rights under Section 33 of the Kentucky Constitution. 100 S.W. at 865. In *Stiglitz v. Schardien*, the plaintiffs stated that they were citizens, taxpayers, and voters and the apportionment plan at issue deprived them of equal representation. 40 S.W.2d 315, 317 (Ky. 1931).

The defendants in *Stiglitz* questioned the right of a citizen, taxpayer, and voter to bring an action to challenge an apportionment plan contending that "no pecuniary right is involved." 40 S.W.2d at 317. The *Stiglitz* Court rejected the idea that a person pleading as a citizen, taxpayer, and voter did not possess the right to challenge an apportionment act. Rather, the Court opined "[i]t is settled that the courts, in a proper case, may interpose for the protection of political rights, and the right to be equally represented in the legislative bodies of the state is not only a political but a constitutional right." *Id*. Thus, "[i]f an act of the Legislature infringes the constitutional rights of a citizen, taxpayer, and voter, he may invoke the processes of the courts to prevent the performance of a duty attempted to be imposed by such void act." *Id*. (citing *Hager v. Robinson*, 157 S.W. 1138 (Ky. 1913); *Schardein v. Harrison*, 18 S.W.2d 316 (Ky. 1929); *Ragland v. Anderson*, 100 S.W. 865 (Ky. 1907); *Yates, Clerk v. Collins*, 82 S.W. 282 (Ky. 1904)).

> The basis of the jurisdiction is that the unconstitutional law infringes the right of a citizen to be equally represented, and it does not rest upon any right peculiar to a candidate for office. The primary right of the citizen, taxpayer, and voter to equality of representation in the lawmaking bodies in accordance with the Constitution is of greater dignity than his derivative right to be a candidate or even to be a

> representative…The citizen possess the political as well as pecuniary and personal rights which may be the subject of an action to prevent the operation of unconstitutional legislation. It is not merely the right of the citizen under the Constitution to be fairly represented in the government, but also his right to prevent unequal and unconstitutional discrimination against his own favor of other districts, that enables the court to intervene. Every citizen, taxpayer, and voter has an undoubted right to have the districts for representatives and senators created in accordance with the Constitution…The rights of the whole state are linked up with the representation of the several districts. We entertain no doubt of the right of the plaintiff to invoke the power of the court to protect his constitutional rights.

Id. at 317-18.

The most recent apportionment challenges have had similar set ups. In *Jensen,* the plaintiff offered that he was "a citizen, taxpayer, resident, and qualified voter" and that the 1996 apportionment scheme deprived him of fair representation. *See* Complaint, *Jensen v. Kentucky State Board of Elections,* Franklin Circuit Court Civil Action No. 96-CI-00071. Similarly, in the 2012 redistricting challenge, the plaintiffs stated that they were "citizens, residents, taxpayers, and qualified voters" and the 2012 apportionment plan violated their constitutional rights under Sections 1, 2, 3, 6, and 33 of the Kentucky Constitution along with some federal constitutional violations. *See* Complaint, *Fischer v. Grimes,* Franklin Circuit Court Civil Action No. 12-CI-00109. With all of this in mind, the Court must assess whether each individual plaintiff has standing to bring this action.

i. Representative Derrick Graham

The Court finds that Representative Graham has standing to bring this action. In the Complaint, Representative Graham offers that he "is a resident of Franklin County, a member of the Kentucky Democratic Party, a member of the Kentucky House of Representatives representing District 57, and the current Democratic Minority Caucus Chair." Complaint ¶ 20. On April 6, 2022, Representative Graham testified about the

impact of HB 2 and SB 3 on him. He testified that without the ability to elect more Democratic members it the hurts his ability to recruit persons to run for office as Democrats, impacts his ability to raise funds for those on the ballot, his ability to bring forth policy, and specifically noted that if a party does not have enough members, it hurts the party's ability to negotiate with the opposite party because a few members can make the difference of whether a bill passes or not. VR 4/6/22, 4:24:07-4:26:09. Representative Graham also testified that based on his personal involvement with recruitment, HB 2 directly impacted his and the Kentucky Democratic Party's ability to recruit candidates to run for office. VR 4/6/22, 4:27:28-4:28:18, 4:33:55-4:35:19. Additionally, he stated the negative impact that SB 3 has on him as a resident of Franklin County and as a leader in the Kentucky Democratic Party.

The Court holds that Representative Graham has adequately established a non-generalized injury. As to causation, Representative Graham contends HB 2 and SB 3 have caused him injury by intentionally diluting the power of Democratic votes to impact Democratic recruitment, fundraising, policy, and negotiations. On redressability, Representative Graham seeks a permanent injunction and declaration that HB 2 and SB 3 are unconstitutional. Therefore, the Court holds that Representative Graham has standing to challenge the constitutionality of HB 2 and SB 3.

ii. Jill Robinson

Ms. Robinson has standing to challenge the constitutionality of SB 3. In the Complaint, Ms. Robinson states she "is a Kentucky citizen, taxpayer, qualified voter and resident of Franklin County" and "has supported Democratic candidates for the Kentucky and the United States House of Representatives in the past and anticipates supporting such

candidates in the future." Complaint ¶ 21. At trial she disclaimed any concern with HB 2 and focused her testimony on SB 3. VR 4/6/22, 4:51:23-4:51:35. As to injury, Ms. Robinson stated that she believes Franklin County being placed in a Congressional District with far Western Kentucky will harm its ability to ensure adequate representation. VR 4/6/22, 4:46:15-4:46:40. Generally, her concern is that she will be deprived "of a meaningful opportunity to petition her Congressional Representative." Complaint ¶ 21; VR 4/6/22, 4:46:44-4:49:44.

Ms. Robinson's classification as a Kentucky citizen, taxpayer, qualified voter, and resident of Franklin County coupled with her allegation that SB 3 interferes with her constitutional rights under Sections 1, 2, 3, and 6 of the Kentucky Constitution confers standing on her to challenge SB 3. Ms. Robinson testified about her sincere concerns with SB 3, and although the Commonwealth believes that her grievances with SB 3 do not personally and uniquely impact her as a Kentucky citizen, taxpayer, qualified voter, and resident of Franklin County, the Court disagrees. Dating back to 1907, Kentucky's highest courts have found that pleading a constitutional grievance in this form allows a plaintiff to maintain a viable action to question the validity of an apportionment scheme. "It is not merely the right of the citizen under the Constitution to be fairly represented in the government, but also his right to prevent unequal and unconstitutional discrimination against his own in favor of other districts, that enables the court to intervene." *Stiglitiz*, 40 S.W.2d at 317.

Ms. Robinson also satisfies the second and third elements of constitutional standing. As to causation, Ms. Robinson alleges that SB 3 has caused her injury by intentionally diluting the power of her vote and other Democratic electors which interferes

with her interest in translating her vote into fair representation. On redressability, Ms. Robinson seeks a permanent injunction and declaration that SB 3 is unconstitutional. Accordingly, the Court finds that Ms. Robinson has standing to challenge the constitutionality of SB 3.

iii. Mary Lynn Collins

The Court also holds that Mary Lynn Collins has standing to bring this action. However, the Court must note that Ms. Collins did not testify at trial. In the Complaint, Ms. Collins states she "is a Kentucky citizen, taxpayer, qualified voter and resident of Franklin County" and "has supported Democratic candidates for the Kentucky and the United States House of Representatives in the past and anticipates supporting such candidates in the future." Complaint ¶ 22. She alleges that her "interest in translating her vote into representation under fair and constitutional maps has been prejudiced by…HB 2 and SB 3." *Id*.

Ms. Collins' classification as a Kentucky citizen, taxpayer, qualified voter, and resident of Franklin County coupled with her allegation that HB 2 and SB 3 interfere with her constitutional rights under Sections 1, 2, 3, 6, and 33 of the Kentucky Constitution confers standing on her to challenge HB 2 and SB 3. Again, while the Commonwealth may argue that her grievances with HB 2 and SB 3 do not personally and uniquely impact her, and that any Kentuckian dissatisfied with HB 2 or SB 3 could assert identical injuries to those of Ms. Collins, the Court disagrees. Kentucky's highest courts have found that pleading a constitutional grievance in this form allows a plaintiff to maintain a viable action to question the validity of an apportionment plan because "the rights of the whole state are

linked up with the representation of several districts." *Stiglitiz,* 40 S.W.2d at 317. Thus, the Court concludes that Ms. Collins has standing to challenge HB 2 and SB 3.

iv. Katima Smith-Willis

Additionally, the Court holds that Katima Smith-Willis has standing to challenge HB 2 and SB 3. Ms. Smith-Willis also did not testify at trial. In the Complaint, Ms. Smith-Willis states she "is a Kentucky citizen, taxpayer, qualified voter and resident of Franklin County." Complaint ¶ 23. She disclaims any interest in partisan politics, "but wants the Kentucky House of Representatives to be populated with elected leaders who pursue common sense solutions that benefit all Kentuckians." *Id*. Ms. Smith-Willis believes HB 2 and SB 3 impact her interest in "translating her vote into representation under a fair and constitutional map." *Id*.

Ms. Smith-Willis' classification as a Kentucky citizen, taxpayer, qualified voter, and resident of Franklin County coupled with her allegation that HB 2 and SB 3 interfere with her constitutional rights under Sections 1, 2, 3, 6, and 33 of the Kentucky Constitution gives her standing to challenge HB 2 and SB 3. Like her co-plaintiffs, the Commonwealth contends that her grievances with HB 2 and SB 3 do not personally and uniquely impact her because any Kentuckian dissatisfied with HB 2 or SB 3 could assert identical injuries to those of Ms. Smith-Willis. The Court must disagree given the precedent set by Kentucky's highest courts in apportionment cases. Therefore, the Court holds that Ms. Smith-Willis has standing to challenge HB 2 and SB 3.

v. Joseph Smith

The Court holds that Joseph Smith has standing to challenge HB 2 and SB 3. Mr. Smith did not testify at trial. In the Complaint, Mr. Smith states he "is a Kentucky citizen,

taxpayer, qualified voter and resident of Franklin County" and "has supported Democratic candidates for the Kentucky and the United States House of Representatives in the past and anticipates supporting such candidates in the future." Complaint ¶ 24. He believes that his "interest in translating his vote into representation under fair and constitutional maps has been prejudiced by…HB 2 and SB 3" and SB 3 deprives him "of a meaningful opportunity to petition his Congressional Representative." *Id*.

Mr. Smith's classification as a Kentucky citizen, taxpayer, qualified voter, and resident of Franklin County coupled with his allegation that HB 2 and SB 3 interfere with his constitutional rights under Sections 1, 2, 3, 6, and 33 of the Kentucky Constitution gives him standing to challenge HB 2 and SB 3. Despite the Commonwealth's argument that his grievances with HB 2 and SB 3 do not personally and uniquely impact him because any Kentuckian dissatisfied with HB 2 or SB 3 could assert identical injuries to those of Mr. Smith, the Court disagrees. It has been made clear that "[e]very citizen, taxpayer, and voter has an undoubted right to have the districts for representatives…created in accordance with the Constitution." *Stiglitiz,* 40 S.W.2d at 317. Thus, the Court finds that Mr. Smith has standing to challenge HB 2 and SB 3.

vi. The Kentucky Democratic Party

Finally, the Court holds that the Kentucky Democratic Party has individual standing to bring this action. The Kentucky Democratic Party "is an association of Democratic voters and politicians seeking to help Democrats win elections in Kentucky, including for the Kentucky House of Representatives." Complaint ¶ 25. The Kentucky Democratic Party contends that it presents a cognizable injury because HB 2 and SB 3 will make it extremely difficult for the Kentucky Democratic Party to fulfill its purposes of recruiting, electing,

and retaining Democratic candidates in Kentucky. Further, the Kentucky Democratic Party states that HB 2 and SB 3 impact the policy-making process. At trial, Representative Graham, a member of the Kentucky Democratic Party, confirmed these injuries and noted that if a party does not have enough members, it hurts the party's ability to negotiate with the opposite party because a few members can make the difference of whether or not a bill passes. VR 4/6/22, 4:24:07-4:26:09.

Mr. Heineman testified that he was involved in candidate recruitment for the 2022 election cycle and worked closely with the Democratic legislative leadership to find leads of interested individuals to run for state representative and that HB 2 impacted recruitment ability for the 2022 elections. VR 4/5/22, 4:00:27-4:01:10, 4:06:35-4:07:22, 4:13:33-4:13:55. He stated that several recruited candidates were drawn out of their districts and the Democratic Party was then left with no candidate for the district. VR 4/5/22, 4:01:12-4:02:21. With respect to SB 3, Mr. Heineman testified that the Kentucky Democratic Party's concern is the placement of Franklin County and it not being grouped with its historic district of Central Kentucky. VR 4/5/22, 5:42:34-5:43:23.

The Court finds that the Kentucky Democratic Party has presented a non-generalized grievance. As to causation, the Kentucky Democratic Party contends HB 2 and SB 3 have caused it injury by intentionally diluting the power of Democratic votes to impact Democratic recruitment, fundraising, policy, negotiations, and the Kentucky Democratic Party's overall purpose and existence. On redressability, the Kentucky Democratic Party seeks a permanent injunction and declaration that HB 2 and SB 3 are unconstitutional. Therefore, the Court holds that the Kentucky Democratic Party has standing to bring this action.

b. Associational Standing

The Court holds that the Kentucky Democratic Party also has associational standing to challenge HB 2 and SB 3. At the federal level, the United States Supreme Court has established three (3) requirements that must be met to demonstrate associational standing:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit.

Commonwealth, ex. rel. Brown v. Interactive Media Entertainment and Gaming Association, 306 S.W.3d 32, 38 (Ky. 2010) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977) (internal quotation marks omitted)). Although the Kentucky Supreme Court has not formally adopted the entirety of this three (3) part test, it has held that "at least the first requirement must apply." *Id*.

In *City of Ashland v. Ashland F.O.P No. 3*, 888 S.W.2d 667, 668 (Ky. 1994), the Kentucky Supreme Court found that the Fraternal Order of Police had standing to challenge a city ordinance because its members—the police—had a "real and substantial interest" in striking the ordinance. In this action, the Kentucky Democratic Party's members are registered Democratic leaders and electors in every Representative and Congressional district throughout the Commonwealth that have a "real and substantial interest" in protecting the interests of Democratic electors and helping Democrats win elections in Kentucky. Trey Heineman testified on behalf of the Kentucky Democratic Party and stated that HB 2 has directly impacted the Kentucky Democratic Party's recruitment for the 2022 elections. VR 4/5/22, 4:00:27-4:01:10, 4:06:35-4:07:22, 4:13:33-4:13:55. He also testified that because HB 2 has significantly changed the makeup of districts, it has dissuaded

candidates from wanting to run in a district where the results are predetermined. VR 4/5/22, 4:02:56-4:03:27. Further, with SB 3 the Kentucky Democratic Party has alleged its members in Franklin County have had their votes intentionally diluted by the new Congressional Districts. Additionally, through Representative Graham, the Kentucky Democratic Party has established that "its members would otherwise have standing to sue in their own right." *Interactive Media*, 306 S.W.3d at 38.

Although the Kentucky Supreme Court has not formally adopted the second and third prongs of the federal test for associational standing, because the Kentucky Democratic Party has met the first element for associational standing, the Court feels compelled to assess whether the Kentucky Democratic Party meets the remaining elements. The Court finds that the Kentucky Democratic Party satisfies the second prong as the purpose of the organization is to elect Democratic candidates to office, and influence policy in the Commonwealth, thus the interest it seeks to protect, striking alleged unconstitutional and gerrymandered districts, is germane to the Kentucky Democratic Party's purpose. Finally, the Kentucky Democratic Party has met the third prong because "neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit." *Id*. There can be no dispute that the Kentucky Democratic Party has a real and substantial interest in ensuring its members can continue to be elected throughout the Commonwealth and bring forward policy. Thus, the Kentucky Democratic Party has standing to challenge the constitutionality of HB 2 and SB 3.

V. Acts of the General Assembly are Presumed Constitutional

Acts of the General Assembly are given a "strong presumption of constitutionality." *Wynn v. Ibold, Inc.*, 969 S.W.2d 695, 696 (Ky. 1998). Thus, a party challenging a duly

enacted statute by the General Assembly is faced with the burden of proving the challenged act unconstitutional. *Id*. In order to declare an act unconstitutional, the constitutional violation "must be clear, complete and unmistakable." *Ky. Indus. Util. Customers, Inc. v. Ky. Utils. Co.*, 983 S.W.2d 493, 499 (Ky. 1998). The Court is bound to resolve "any doubt in favor of constitutionality rather than unconstitutionality." *Teco/Perry Cty. Coal v. Feltner*, 582 S.W.3d 42, 45 (Ky. 2019) (citations omitted).

VI. House Bill 2 is a Partisan Gerrymander

Plaintiffs have alleged that HB 2 is a partisan gerrymander that violates Sections 1, 2, 3, 6, and 33 of the Kentucky Constitution. After consideration of the testimony and evidence presented at trial, the Court concludes that HB 2 is a partisan gerrymander. The Court is compelled to reach this conclusion. First, Dr. Imai testified that HB 2 is a partisan gerrymander. After comparing HB 2 to 10,000 simulated plans, and ordering the districts based on Democratic vote share, his analysis showed that HB 2 is an outlier. He noted the drastic "jump" in HB 2 between D79 and D80, which he stated is a signature of partisan gerrymandering because it shows how Republican leaning districts have been made safer whereas Democratic leaning districts have been made more competitive. He also confirmed that under HB 2, Democratic electors in Jefferson and Fayette Counties have been cracked and packed to create additional Republican safe districts. Dr. Imai made this analysis using data from the eight (8) most recent state-wide elections for which precinct-level voting data is available, which he opined is not only standard but also provides a general measure of partisanship, not specific to any particular candidate or race. *Id.*; VR 4/5/22, 2:07:57-2:09:50.

Dr. Caughey's and Dr. Voss's analyses of Kentucky's Efficiency Gap demonstrate that although Kentucky should expect a higher Efficiency Gap given its political geography, under HB 2, the Efficiency Gap is significantly higher. Every expert witness seemed to agree that Kentucky's political geography makes it difficult to draw *some* districts "less Republican." But Dr. Imai's work concludes that HB 2's partisan skew is not due to Kentucky's political geography, but due to the cracking and packing of Democratic electors in districts to allow Republicans to maximize partisan gains statewide. Again, he even specifically looked at Kentucky's most populated Democratic areas and specified districts where HB 2 has packed Democratic electors into a few districts and then combined other Democratic electors with Republican leaning neighboring counties. The Commonwealth did offer expert testimony from Mr. Trende and Dr. Voss to support that HB 2 is not a partisan gerrymander. Mr. Trende took no issue with the high Efficiency Gap in Kentucky and noted that it was what he expected based on Kentucky's political geography. The Court is unpersuaded by Mr. Trende's testimony.

Moreover, after evaluating HB 2's Declination, Dr. Caughey testified that HB 2's Declination is "off the charts," and shows a pro-Republican bias larger than he has ever seen. Plaintiffs' Exhibit 6 § 5.1.1; VR 4/6/22, 11:29:29-11:30:00, 11:46:40-11:45:55. He sufficiently demonstrated that HB 2 is a partisan gerrymander because the angle between the lines on the plot of HB 2's districts does not increase smoothly, but rather at a sharp angle, which supports that Democratic electors have been cracked and packed into districts to ensure more seats for Republicans. VR 4/6/22, 10:54:09-10:56:42.

Based on these findings, and numerous others contained in this Opinion and Order, it is abundantly clear that HB 2 is a partisan gerrymander. Although the Court has found

that HB 2 is a partisan gerrymander, the Court must next determine not whether partisan gerrymandering is morally wrong, but whether the Kentucky Constitution prohibits partisan gerrymandering.

VII. Senate Bill 3 is a Partisan Gerrymander

Turning to SB 3, Plaintiffs argue that SB 3 is a partisan gerrymander and is purely irrational and creates an uncompact and noncontiguous district (the First District). The Court finds that the evidence presented at trial sufficiently demonstrates that SB 3 is a partisan gerrymander. The Court finds Dr. Imai's testimony extremely reliable and gives it significant weight. Dr. Imai's simulations found that SB 3's First District is less compact than 99% of simulated plans that contain Franklin County. Dr. Imai criticized freezing a previously enacted district because freezing a district has a direct impact on the compactness of surrounding districts. Dr. Imai also testified that the Democratic vote share in SB 3's First District is 35%, which is an extreme outlier. His simulations also demonstrated that Franklin County is typically placed in districts with much higher Democratic vote shares with an average Democratic vote share of 43.6%. Dr. Imai's analysis confirmed that when Franklin County is placed in its historic district, the Sixth District, the Democratic vote share is 47.8%.

The Commonwealth's experts failed to rebut Dr. Imai's findings. Mr. Trende, failed to offer any explanation for the uncompact First District besides his belief that the Second District must remain gridlocked for William Natcher. The Court gives no weight to Mr. Trende's testimony. As stated, his testimony oddly focused on "freezing" the Second District in political consideration of a man who passed away in March 1994 and has not represented the Second District for almost thirty (30) years. In fact, Mr. Trende reached

this conclusion absent any personal knowledge that the 1992 General Assembly, and every General Assembly since, has intended to preserve the Second District in perpetuity for William Natcher. In solely focusing on preserving the memory of William Natcher, Mr. Trende gave no consideration to Kentucky's remaining five (5) districts, which share equal importance. Mr. Trende's decision to "freeze" the Second District, which directly borders the First District that Plaintiffs are challenging, truly leaves nowhere for the First District to go other than, as Mr. Trende's ten (10) simulated maps demonstrate, across Southern Kentucky into Central Kentucky. Thus, his analysis is circular as he is imposing his conclusion by virtue of creating a restraint that requires the First District to create a "U" shape around the Second District, as it is in SB 3.

Mr. Trende again debunked his own analysis about the importance of preserving the Second District for William Natcher when he testified that his goal of "freezing" the Second District was to keep Bowling Green (Warren County) and Owensboro (Daviess County) together, but he admitted it was possible to just "freeze" those two counties together without "freezing" all of the Second District, something he admittingly failed to do. VR 4/7/22, 12:44:30-12:45:08.

Mr. Trende also opined on "rules" that the General Assembly has when drawing maps but could not cite to any "rules" and admitted that he had not consulted with any members of the General Assembly, so he did not know what criteria or "rules" they used when drawing SB 3. His "rule" testimony mainly focused on preserving "historical pairings," clearly to support his belief that the Second District must remain as is forever. But his obsession with freezing the entire Second District still falls flat in supporting the validity of SB 3 because he admitted that the "historic pairing" of Owensboro (Daviess

County) and Bowling Green (Warren County) could be done without, to borrow a word from him, "bizarrely" crafting the First District into an uncompact district spanning over 350 miles. Oddly, Mr. Trende did not seem interested in preserving other "historic pairings." Further, his testimony concerning "historic pairings" is unpersuasive because he testified that mapmakers clearly considered communities of interest when drawing SB 3, again without any personal knowledge of that fact, but then admitted that he was unaware of a time that Frankfort (Franklin County) and Lexington (Fayette County) have ever been in different districts. VR 4/7/22, 12:28:55- 12:29:43. He even admitted that it is possible to draw a map that keeps the historic pairing of Frankfort (Franklin County) and Lexington (Fayette County) in a district together while still "freezing" the Second District. VR 4/7/22, 12:30:45-12:30:57. Accordingly, the Court finds Mr. Trende's testimony self-serving and unreliable.

The Commonwealth's other expert witness, Dr. Voss, actually supported Dr. Imai's testimony. Dr. Voss testified that when the algorithm is instructed to keep Warren, Daviess, and Bullitt Counties together, rather than gridlocking the entire Second District, Franklin County does not end up in the First District. VR 4/7/22, 4:52:50-4:53:38. In fact, he testified that if you leave the simulation alone, Franklin County does not appear in the First District. *Id*. Dr. Voss again disagreed with Mr. Trende's obsession with freezing the Second District "for historical reasons" and said that rooting an analysis too deeply in past precedent and failing to give way to legal requirements and guidelines is an error. VR 4/7/22, 4:54:40-4:55:14.

In sum, after consideration of the testimony and evidence offered, it is clear from the record that SB 3 is a partisan gerrymander aimed at diluting the Democratic vote share

by creating an uncompact First District based on rationale that was not applied across all districts.

VIII. The Kentucky Constitution does not Expressly Prohibit Partisan Gerrymandering

Today, the Court holds that although HB 2 and SB 3 are partisan gerrymanders, Plaintiffs have failed to plead cognizable claims that HB 2 and SB 3 violate Sections 1, 2, 3, 6, or 33 of the Kentucky Constitution. An examination of Sections 1, 2, 3, 6, and 33 of the Kentucky Constitution is necessary to understand the Court's conclusion that the Kentucky Constitution does not expressly prohibit partisan gerrymandering in redistricting and does not require the General Assembly to minimize the number of times that the required split counties are further divided.

a. Section 33

Plaintiffs contend that HB 2 repeatedly violates Section 33 of the Kentucky Constitution because it disrupts Section 33's dual mandate of achieving approximate population equality while maintaining county integrity. Plaintiffs believe that Section 33 requires the General Assembly to multi-split counties as few times as possible to maintain county integrity.

Despite Plaintiffs' persuasive argument that Section 33 of the Kentucky Constitution precludes excessively splitting counties more times than necessary, the Court must disagree. In full, Section 33 of the Kentucky Constitution provides:

> The first General Assembly after the adoption of this Constitution shall divide the State into thirty-eight Senatorial Districts, and one hundred Representative Districts, as nearly equal in population as may be without dividing any county, except where a county may include more than one district, which districts shall constitute the Senatorial and Representative Districts for ten years. 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. At the expiration of that time, the General Assembly shall then, and every ten years thereafter, redistrict the State according to this rule, and for the purposes expressed in this section. If, in making said district, inequality of population should be unavoidable, any advantage resulting therefrom shall be given to the district having the largest territory. No part of a county shall be added to another county to make a district, and the counties forming a district shall be contiguous.

Over time, Section 33 has remained at the forefront of Kentucky "map challenges." Kentucky's highest courts have considered the Framers' intent behind Section 33 and how to harmonize its requirements with Kentucky's population and geographic makeup. It is prudent to examine the holdings in some of these cases to understand how Plaintiffs' Section 33 claim fails.

In 1907, Kentucky's highest court confirmed that Section 33, but also democracy, require equality of representation. *Ragland*, 100 S.W. at 869. Although, *Ragland* recognized that perfect equality of representation is unattainable, the Court emphasized the importance of maintaining approximate population equality in each district to ensure all Kentuckians have equal representation in the General Assembly. *Id*.

The Kentucky Supreme Court was faced with a flood of cases stemming from redistricting in the 1990s, the outcomes of which have shaped our present understanding of Section 33's "dual mandate." In *Fischer v. State Board of Elections* ("*Fischer II*"), the Kentucky Supreme Court discussed the importance of county integrity acknowledging that historically the "dominant political subdivision in Kentucky is the county." 879 S.W.2d 475, 478 (Ky. 1994). However, *Fischer II* accepted that it was impossible, given Kentucky's 120 county makeup, to literally follow Section 33 and not divide any county. *Id*. But, *Fischer II* concluded that it was possible to harmonize county integrity and

population equality. Thus, *Fischer II* imposed a rule that permitted the General Assembly to achieve population equality by a variation which does not exceed +/-5% from an ideal legislative district while reducing the minimum number of counties which must be divided to make full use of Section 33's requirements. *Id*. at 479. Also included in *Fischer II* is the infamous "footnote 5," which became the center of *Fischer II*'s notable successor *Jensen v. Kentucky State Board of Elections*, 959 S.W.2d 771 (Ky. 1997). In footnote 5 of *Fischer II*, the Kentucky Supreme Court stated "[w]e recognize that the division of some counties is probable and have interpreted Section 33 to permit such division to achieve population requirements. However, we can 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." 879 S.W.2d at 479, fn. 5.

In *Jensen*, Kentucky's high court was faced with the question of whether a county that has a sufficient population to encompass a whole representative district is entitled to such. Meaning, that such a county could not be divided in ways that would inhibit it from an elected representative who is a resident of the county. The *Jensen* Court cited *Fischer II*'s holding that population equality and county integrity can be harmonized, but also recognized the long held ideal that when they collide, approximate population equality must control. *Id*. at 774 (citing *Combs v. Matthews*, 364 S.W.2d 674 (Ky. 1963); *Stiglitz v. Schardien*, 40 S.W.2d 315 (Ky. 1931); *Ragland v. Anderson*, 100 S.W. 865 (Ky. 1907)). Turning to the issue at hand, Kentucky's high court opined:

> The delegates probably did not foresee that a county with sufficient population to contain a whole district within its borders might not be given such a district. However, regardless of what the delegates may or may not have foreseen, that requirement was not included in the language of Section 33.

Id. at 775. The *Jensen* Court continued its analysis finding that creating a district in each county with sufficient population to contain a whole district would violate the spirit of Section 33 and the holding in *Fischer II* because it would require splitting more counties than necessary. *Id*. The *Jensen* Court was also faced with addressing *Fischer II*'s footnote 5.

> Like the delegates to the 1890 convention, we could not envision that a county with sufficient population to support a whole district within its borders might not be awarded such a district, or that a county or remnant thereof might be subjected to multiple divisions. However, we did not hold in footnote 5 that such is constitutionally prohibited. In fact, what we thought was scarcely conceivable has been proven to be unavoidable…No one now suggests that any redistricting plan could be drafted without some such multiple divisions.

Id. at 776. The Kentucky Supreme Court concluded with "apportionment is primarily a political and legislative process." *Id*.

> Nevertheless, the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm. Unconstitutional discrimination in reapportionment occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voters' influence on the political process as a whole.

Id.

Most recently, in 2012, the General Assembly was again tasked with apportioning Representative, Senatorial, and Congressional districts. As is typical, the outcome was challenged. In *Legislative Research Commission v. Fischer* ("*Fischer IV*"), the Kentucky Supreme Court reaffirmed its "dual mandate" holding from *Fischer II* of county integrity and population equality. 366 S.W.3d 905, 911 (Ky. 2012). In *Fischer IV*, Kentucky's high court was asked to reassess the +/-5% rule for population variation and adopt the federal standard which is more relaxed and generally permits a population variation of +/-10%.

The Kentucky Supreme Court declined to embrace the federal standard opining that Kentucky's +/-5% standard promotes Section 33's goal of approximate population equality. *Id*. at 914. Although, it was noted that Kentucky's +/-5% rule is not an absolute mandate and that staying within or slightly straying outside may still result in unconstitutional or constitutional maps, respectively. *Id*. at 915 ("That is not to say it is impossible to prove a reapportionment plan is unconstitutional if it complies with the 5 percent rule. Staying within a 5 percent deviation from the ideal district is not a safe harbor. But the burden is on the plan's challenger to show it is arbitrary or discriminatory."). Straying from the +/-5% rule places the burden on the legislature to prove the plan "consistently advances a rational state policy." *Id*. In *Fischer IV*, it was determined that the legislature failed to show the 2012 plan "consistently advance[d] a rational state policy" as the goal of preserving county integrity by dividing the fewest number of counties was ignored along with the goal of approximate population equality. *Id*. Thus, the plan was deemed unconstitutional because the population deviations from the +/-5% rule were not done to advance the goal of maintaining county integrity.

Since *Fischer II*'s release in 1992, 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%. Turning back to *Jensen*, the Kentucky Supreme Court specifically held that the General Assembly is not constitutionally prohibited from dividing the minimum number of counties multiple times. 959 S.W.2d at 776. Also in *Jensen*, the Court emphasized that "[t]here is a difference between what is perceived to be unfair and what is unconstitutional"

and "[a]pportionment is primarily a political and legislative process." *Id*. Thus, the Court holds that under Section 33 of the Kentucky Constitution there is no prohibition against partisan gerrymandering or excessively dividing the split counties.

Accordingly, the Court must evaluate HB 2 under the standard set for Section 33 challenges. As the parties have stipulated, the minimum number of counties that must be divided is twenty-three (23). There is also no dispute that the ideal population for each of the one hundred (100) districts is 45,058 people. HB 2 divides exactly twenty-three (23) counites and each district is within the +/-5% range of 45,058 people. Plaintiffs have sufficiently established that HB 2 unnecessarily divides the twenty-three (23) split counties more times than necessary. Dr. Imai testified that HB 2 has eighteen (18) counties that are split multiple times (into more than two (2) districts) whereas his ensemble has fifteen (15) such counties on average, with a range from thirteen (13) to seventeen (17). VR 4/5/22, 11:09:52-11:10:32. He stated that under HB 2 there are thirty-one (31) districts containing more than two (2) counties whereas under his simulated ensemble there are twenty-four (24) such districts, with a range from twenty-one (21) to thirty (30). VR 4/5/22, 11:11:40-11:12:28. Dr. Imai then stated that HB 2 has a total number of eighty (80) multi county splits and on average his simulated plans produced less. Plaintiffs' Exhibit 2, p. 22; VR 4/5/22, 11:12:55-11:13:49. Dr. Imai concluded that HB 2 is a statistical outlier. VR 4/5/22, 11:11:40-11:12:28. Dr. Voss agreed that there could have been fewer multi-split counties in HB 2 and if the law requires HB 2 to divide counties the fewest number of times possible, then HB 2 would violate this. VR 4/7/22, 4:19:49-4:21:14.

Although Plaintiffs have demonstrated that HB 2 is a partisan gerrymander and that HB 2 excessively splits the twenty-three (23) counties more times than necessary,

Kentucky Supreme Court precedent, in this Court's eyes, does not prohibit such. Thus, the Court finds that Plaintiffs have failed to meet their burden that HB 2 violates Section 33 of the Kentucky Constitution.

b. Sections 1, 2, 3, and 6

Although the Court has foreclosed relief under Section 33 of the Kentucky Constitution, Plaintiffs have also alleged that because HB 2 and SB 3 are partisan gerrymanders, the apportionment plans violate Sections 1, 2, 3, and 6 of the Kentucky Constitution.

For well over the last century, apportionment cases have centered on ensuring that the Kentucky Constitution's guarantee of equal power of each elector's vote is upheld. The past century of apportionment cases have all generally concluded that the government can only reflect the will of the people if it is elected from districts that provide the same voting power to all electors.

Plaintiffs argue that partisan gerrymandering creates the same harm as malapportionment by giving certain electors' votes more power than others. Partisan gerrymandering is not a new concept, but rampant changes in technology have made it more prevalent and easier to detect. The new technology is a double-edged sword for mapmakers. Changes in technology have given a political party the ability to essentially guarantee itself a supermajority for the lifespan of an apportionment plan. However, these algorithms likewise make it simple to reliably evaluate apportionment plans for partisan bias.

In *Jensen*, the Court emphasized that "[t]here is a difference between what is perceived to be unfair and what is unconstitutional" and "[a]pportionment is primarily a

political and legislative process." 959 S.W.2d at 776. While the *Jensen* Court acknowledged the partisan nature behind redistricting, the *Jensen* Court did *not* give an explicit blessing that partisan gerrymandering is constitutional. In fact, the Court opined "[u]nconstitutional discrimination in reapportionment occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voters' influence on the political process as a whole." *Id*. That is exactly what Plaintiffs have alleged that HB 2 and SB 3 do.

Although *Jensen*'s citation in support of this finding is to *Davis v. Bandemer*, 478 U.S. 109, 131-33 (1986) [9], which was abrogated by *Rucho v. Common Cause*, 139 S.Ct. 2484, 2493-2508 (2020), *Rucho* held that claims for partisan gerrymandering are nonjusticiable in federal court, but the Court did not foreclose the idea that partisan gerrymanders are prohibited. *Rucho* instead left to the states to look to their own constitutions and laws for prohibitions against partisan gerrymandering. *Id*. at 2507 ("Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply."). The Court can somewhat appreciate the reasoning behind *Rucho*'s decision to throw it to the states to assess partisan gerrymandering under state constitutions. The Kentucky Constitution, like most state constitutions, is much more specific than the United States Constitution. Also, as recognized by the North Carolina Supreme Court, on the state level, it is easier to craft a set of criteria to evaluate an alleged partisan gerrymander than it is on the federal level. *Harper v. Hall*, 868 S.E.2d 499, 533 (N.C. 2022).

[9] *Bandemer* was at the center of *Vieth v. Jubelirer*, 541 U.S. 267 (2004), but Justice Kennedy only joined the judgment of the Court and refused to hold partisan gerrymandering nonjusticiable believing that a manageable standard might emerge.

i. Section 6

Plaintiffs first contend that partisan gerrymandering violates Section 6 of the Kentucky Constitution which declares "[a]ll elections shall be free and equal." KY. CONST. § 6. As has been established, HB 2 and SB 3 are partisan gerrymanders, thus Plaintiffs reason the apportionment plans are unconstitutional under Section 6 of the Kentucky Constitution. Section 6 has no analogue in the federal Constitution, which signals it was crafted to ensure greater protection for Kentuckians. It has been present in each of Kentucky's constitutions. Other states' constitutions have similar provisions to Kentucky's Section 6 that have recently been used to hold partisan gerrymandering unconstitutional. This Court, however, must examine Kentucky precedent and the 1890-91 constitutional debates to find support for Plaintiffs' claim that Section 6 prohibits partisan gerrymandering. Although Plaintiffs present a compelling argument, and the evidence and testimony presented at trial support that HB 2 and SB 3 are partisan gerrymanders, the Court holds that Section 6 of the Kentucky Constitution does not prohibit partisan gerrymandering because Section 6 has nothing to do with state or Congressional apportionment.

The 1890-91 constitutional debates are particularly instructive on the true meaning of Section 6. The Framers, concerned that others might struggle to ascertain the exact meaning of the simple phrase "[a]ll elections shall be free and equal," discussed the adaption of the phrase from the English Declaration of Rights.

> [T]he English people promulgated when they deposed James II and elevated William and Mary to the throne. After complaining that James had sought to subvert the laws and liberties of the kingdom 'by violating the freedom of election of members to serve in Parliament,' they declared 'that election of members of Parliament ought to be free.' Their purpose was clear. They did not mean that all persons

> should have a vote, or that no registration should be required. They meant simply that no troops should intimidate voters.

1890-91 Debates at 670. The Framers long debated the historical roots of Section 6 and whether their intent behind Section 6 could be more clearly expressed. Throughout their discussion, the consensus continued to be that Section 6 be enacted to prohibit election day interferences at polling places that had disgraced English history and had even made way to our great Commonwealth.

> Within the memory of every Delegate on this floor, our own State—the Commonwealth of Kentucky, our glory and our pride—has been the scene of outrages against this sacred privilege that would have made the most unscrupulous despot that ever disgraced the throne of England, from King John to James II, hang his head in shame. You have seen here, in our own State, nearly every polling place within its limits surrounded by an armed soldiery. The 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 in the election of every officer of the Commonwealth from Governor down.
> …
>
> But that is not all. You and I have not only seen the freedom of election interfered with by military power, but long since the war we have seen the elective franchise prostrated and trampled in the dust by civil authority. You have seen it violated in the most atrocious manner by swarms of deputy marshals…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.
> …
>
> But what has been done by one power may hereafter be done by another…Those who are to come after us; those who are to be trusted with power in our government hereafter, may, under the influence of ambition, for the aggrandizement of their own fortunes, or in the blindness of passion, be tempted to rob those who may be opposed to their views of this inestimable heritage, unless it shall be hedged about in such terms as cannot be mistaken by an idiot…I hope the Convention will 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. at 730-31 (emphasis in original). Like Delegate Knott, other delegates proposed different phrases to more clearly explain the intent behind Section 6 because many were worried that the ambiguity of the simple phrase "[a]ll elections shall be free and equal" may lead to a divided judiciary, as had occurred in other states. During the debates, Delegate McDermott proposed clearer language for Section 6 such as: "All elections shall be free from intimidations, and all legal votes shall have equal weight" and "The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting under adequate penalties all undue influence thereon from power, bribery, tumult or other improper practices." *Id*. at 945-46. Ultimately, the Framers decided that everyone understood what "[a]ll elections shall be free and equal" meant. "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." *Id*. at 946. Thus, confident that nobody, most importantly the judiciary, could find the clause ambiguous, it simply remained "[a]ll elections shall be free and equal."

Historically Section 6 has infrequently been raised to challenge acts relating to elections and has never been used to strike down a redistricting plan. Despite its infrequent use, acts governing elections are subject to its requirements. Kentucky's high court has generally construed "free and equal elections" to mean:

> [A]n election is free and equal within the meaning of the Constitution when it is 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 a 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.

Asher v. Arnett, 132 S.W.2d 772, 776 (Ky. 1939). The *Asher* Court took a deeper look at what "equal" means in this sense and opined:

> The word 'equal' comprehends the principle that every elector has the right to have his vote counted for all its worth in proportion to the whole number of qualified electors desiring to exercise their privilege. The guaranty, therefore, mean that every qualified voter may freely exercise the right to cast his vote without restraint or coercion of any kind and that his vote, when cast, shall have the same influence as that of any other voter.

Id. In *Wallbrecht v. Ingram*, Kentucky's then highest court confirmed that Section 6 is meant to convey a prohibition against election-day interferences with the vote-placement and vote-counting processes.

> Strictly speaking, a free and equal election is an election at which every person entitled to vote may do so if he desires…They 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.

175 S.W. 1022, 1026 (Ky. 1915). Kentucky precedent consistently supports that Section 6 has nothing to do with apportionment, but rather prohibition against interferences with the vote-placement and vote-counting process. *See Queenan v. Russell*, 339 S.W.2d 475 (Ky. 1960) (holding a statute that effectively prevented absentee voters from voting at all unconstitutional under Section 6); *Smith v. Kelly*, 58 S.W.2d 621 (Ky. 1933) (holding that only having one (1) polling place that was insufficient to accommodate the number of electors in the time period permitted to vote would violate Section 6); *Perkins v. Lucas*, 246 S.W. 150 (Ky. 1922) (holding that a registration statute which only allowed electors

to register on one (1) day each year violated Section 6 because it deprived electors of the opportunity to register).

The Court understands that partisan gerrymandering challenges have been sweeping the nation and that Plaintiffs want this Court to look at and rely upon decisions made by other states' high courts, but this Court is only concerned with the Kentucky Constitution and what is permitted under it. Defendants classify the opinions of other states' high courts that have struck down redistricting maps based on partisan gerrymandering as "failures," "flawed," and "unfaithful to the state's constitution," but again, this Court has no opinion on the decisions of other states as they are free to interpret their constitutions as they see fit. Accordingly, the Court declines to address the validity or applicability of other states' partisan gerrymandering decisions in this action because the Court finds that the 1890-91 constitutional debates, coupled with Section 6 precedent authored by Kentucky's high courts, satisfactorily lead the Court to conclude 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. Therefore, Plaintiffs do not present a viable claim under Section 6 that HB 2 or SB 3 are unconstitutional because Plaintiffs have not alleged that HB 2 or SB 3 interfere with the vote-placement or vote-counting process.

ii. Equal Protection Under Sections 1, 2, and 3

Moreover, Plaintiffs assert that HB 2 and SB 3 violate Sections 1, 2, and 3 of the Kentucky Constitution. They contend partisan gerrymandering violates the guarantee of equal protection because drawing districts based on partisan affiliation denies certain electors equal voting power and dilutes their votes, preventing them from aggregating their

votes to elect a desired representative. A reviewing court may conclude that partisan gerrymandering claims are cognizable under Sections 1, 2, and 3 of the Kentucky Constitution, but for the reasons provided herein, the Court finds that Plaintiffs' equal protection claim for partisan gerrymandering fails.

"Citizens of Kentucky enjoy equal protection of the law under the 14th Amendment of the United States Constitution and Section 1, 2, and 3 of the Kentucky Constitution." *Zuckerman v. Bevin*, 565 S.W.2d, 594 (Ky. 2018) (citing *D.F. v. Codell*, 127 S.W.3d 571, 575 (Ky. 2003)). "The goal of equal protection provisions is to 'keep [] governmental decisionmakers from treating differently persons who are in all relevant respects alike.'" *Id*. (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)). There are three (3) levels of review for equal protection claims: strict scrutiny, intermediate scrutiny, and rational basis. When a statute affects a fundamental right, it is "sustainable only if the statute is suitably tailored to serve a 'compelling state interest.'" *Steven Lee Enters. v. Varney*, 36 S.W.3d 391, 394 (Ky. 2000). The seldom applied intermediate scrutiny "applies to quasi-suspect classes, such as gender or illegitimacy" and a statute is upheld under this standard if it is "'substantially related to a legitimate state interest.'" *Zuckerman,* 565 S.W.2d at 595 (quoting *Varney*, 36 S.W.3d at 394)). "On the other hand, 'if the statute merely affects social or economic policy, it is subject only to a 'rational basis' analysis.'" *Codell*, 127 S.W.3d at 575 (quoting *Varney*, 36 S.W.3d at 394)).

As mentioned in this Opinion and Order, the Kentucky Supreme Court has made clear 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." *Jensen,* 959 S.W.2d at 776. Although the Court

in *Jensen* was not examining how apportionment was arranged across Kentucky, but only in Pulaski County and Laurel County, the Court cannot find support to apply an equal protection claim in this action because Kentucky has never recognized the existence of a partisan gerrymandering claim. Nor does the Court believe it is the Court's role to craft a judicially manageable standard for such a claim.

To the Court, "vote dilution" to trigger an equal protection claim occurs only when the one-person, one-vote rule is not respected or when racial gerrymandering occurs. Specifically, for example, when each vote cast does not carry equal weight because each representative is not assigned to approximately the same number of electors or when a redistricting map is crafted to intentionally dilute the vote of a racial minority.

Plaintiffs' concern is that their political affiliation is being used to dilute their votes, however, there is no guarantee or even requirement that political parties be ensured representation commensurate to its share of statewide support. The Kentucky Constitution is not concerned with election returns, but rather with equal representation based on population and county lines. Also, to guarantee representation based on statewide party affiliation would ignore unaffiliated electors. Kentucky has electors that do not identify as members of the Republican or Democratic parties. Further, although many Kentucky electors may identify as a Republican or Democrat, they may still choose to vote for a candidate of the opposing party. Nevertheless, the Kentucky Constitution is silent as to the consideration of partisan interests in apportionment, which leads the Court to conclude that such consideration is not prohibited, otherwise, apportionment would not have been assigned to the General Assembly—a political body—but rather to a politically neutral

committee.[10] Historically Kentucky courts have only been concerned with addressing the equality of voting power as it pertains to population and racial equality, not partisan vote balance. The Court will not attempt to craft a judicially manageable standard when Kentucky law has never recognized a viable claim.

The Court will quickly evaluate HB 2 and SB 3 for what the Court believes are the only recognized equal protection claims—population and racial equality—to see if Plaintiffs have raised a plausible equal protection claim. The undisputed ideal population for Kentucky's one hundred (100) house districts is 45,058 people. As set forth in *Fischer II*, the population variation must be between +/-5%. In Section VIII(a) of this Opinion and Order the Court determined that HB 2 meets this requirement of the *Fischer II* test, as well as the first prong (splitting the minimum number of counties necessary). In fact, Plaintiffs do not contend that any of the one hundred (100) districts stray outside of the required +/-5% population variation. Moreover, Plaintiffs have not alleged that HB 2 is a racial gerrymander. Turning to SB 3, the undisputed ideal population for Kentucky's six (6) Congressional districts is 750,973 people. Each of the six (6) Congressional districts contained in SB 3 fit this requirement. District 1 has 750,973 people; District 2 has 750,972 people; District 3 has 750,973 people; District 4 has 750,973 people; District 5 has 750,973 people; and District 6 has 750,972 people. Nevertheless, Plaintiffs do not challenge that the population variation of these districts is unconstitutional. Also, Plaintiffs have not alleged that SB 3 is a racial gerrymander.

[10] The General Assembly has the power to create a politically neutral committee to handle redistricting. However, the Court recognizes that doing so is solely at the discretion of the General Assembly given that the Kentucky Constitution specifically assigns the act of redistricting to the General Assembly.

Thus, the Court concludes Plaintiffs have failed to raise a viable equal protection claim. Kentucky law supports that an equal protection claim can be raised for population or race inequality and Plaintiffs have not alleged such an equal protection violation for HB 2 or SB 3. Instead, Plaintiffs have only raised an unrecognized equal protection violation of partisan gerrymandering, and, as the Court has opined, Kentucky law has never recognized such a claim and there is no judicially manageable standard to measure a partisan gerrymandering claim. Therefore, HB 2 and SB 3 do not violate the Kentucky Constitution's guarantee of equal protection.

iii. Section 1

Next, Plaintiffs argue that as partisan gerrymanders, HB 2 and SB 3 violate Section 1 of the Kentucky Constitution. They assert that partisan gerrymandering targets certain electors and subjects them to disfavored status based on their political affiliation and voting history. Plaintiffs thus allege that partisan gerrymandering violates free speech and association protected by Section 1 of the Kentucky Constitution. Section 1 of the Kentucky Constitution provides that all Kentuckians shall have the inalienable rights of "freely communicating their thoughts and opinions" and "assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance…" KY. CONST. § 1(4) & (6).Voting for the candidate of one's choice and associating with the political party of one's choice are forms of political expression protected by Section 1 of the Kentucky Constitution. *Associated Industries of Kentucky v. Commonwealth*, 912 S.W.2d 947, 952 (Ky. 1995) ("Section 1 of the Kentucky Constitution [is] designed to protect the rights of citizens in a democratic society to participate in the

political process of self-government."). Plaintiffs assert that partisan gerrymandering uses the political affiliation and voting history of electors to crack and pack an opponent's electors into districts to dilute the power and influence of the electors' votes.

Plaintiffs heavily rely on the recent North Carolina Supreme Court opinion in which the majority held that partisan gerrymandering unconstitutionality "imposes a burden on…the fundamental right to equal voting power…when legislators apportion district lines in a way that dilutes the influence of certain voters based on their prior political expression—their partisan affiliation and their voting history." *Harper*, 868 S.E.2d at 546. The Court appreciates the opinion issued by the North Carolina Supreme Court, but that opinion was based on the North Carolina Constitution. Again, the Court must base its findings on the Kentucky Constitution and Kentucky has long recognized that Section 33 of the Kentucky Constitution controls apportionment of state legislative districts. The Kentucky Constitution assigned the duty of apportionment to the General Assembly—a partisan body. Section 33 does not contain a requirement of political neutrality for redistricting, nor does any other section of the Kentucky Constitution. Under HB 2 and SB 3, Democrats, Republicans, Independents, and members of every other political party in Kentucky are still entitled to engage in Section 1 protected activities. Nonetheless, the Kentucky Supreme Court has recognized that "[a]pportionment is primarily a *political* and legislative process," which seemingly defeats any claim that partisan considerations in redistricting are prohibited. *Jensen*, 959 S.W.2d at 776 (emphasis added). Accordingly, the Court must reject Plaintiffs' Section 1 claim and hold that HB 2 and SB 3 do not violate Section 1 of the Kentucky Constitution.

iv. Section 2

Finally, Plaintiffs argue that HB 2 and SB 3 violate Section 2 of the Kentucky Constitution because HB 2 and SB 3 are partisan gerrymanders that were crafted by the General Assembly in an arbitrary exercise of power to ensure a Republican supermajority for the next decade and dilute the votes of Democratic electors. "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." KY. CONST. § 2. "Section 2 of the Constitution is a curb on the legislative as well as on any other public body or public officer in the assertion or attempted exercise of political power." *Sanitation Dist. No. 1 of Jeff. Co. v. City of Louisville*, 213 S.W.2d 995, 1000 (Ky. 1948). In applying Section 2, the Kentucky Supreme Court has held that "[w]hatever is contrary to democratic ideals, customs and maxims is arbitrary." *Kentucky Milk Marketing v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985). "Likewise, whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people is arbitrary." *Id*.

As the Court has noted throughout its analysis of HB 2 and SB 3, there is no doubt that HB 2 and SB 3 are partisan gerrymanders, *but* the Court must recognize that the Kentucky Constitution instills the power of apportionment in the hands of the General Assembly—a political body. As continuously noted throughout this Opinion and Order, the Kentucky Supreme Court has recognized that apportionment is a political process. *Jensen*, 959 S.W.2d at 776. And the Kentucky Constitution does not explicitly forbid the consideration of partisan interests in apportioning representation. The Democratic Party long controlled Kentucky's General Assembly and was responsible for crafting the apportionment scheme that resulted in the current legislative makeup. Thus, proving that

political preferences in Kentucky are not stagnant and that it is possible for the opposing party to gain control of the General Assembly under a map crafted for partisan advantage. The Court again notes that HB 2 complies with Section 33 of the Kentucky Constitution. Because HB 2 complies with Section 33 of the Kentucky Constitution, which provides explicit direction for apportioning state legislative districts, the Court holds that HB 2 does not violate Section 2 of the Kentucky Constitution because it is not arbitrary. Similarly, because SB 3 meets the requirements of population and racial equality, the Court holds that SB 3 does not violate Section 2 of the Kentucky Constitution. There is no doubt that the First District in SB 3 is unusual and not compact, but in *Watts v. Carter*, Kentucky's then highest court disclaimed that the esthetics of an apportionment scheme has any bearing on its constitutionality. 355 S.W.2d 657, 659 (Ky. 1962).

In sum, the Court holds that Section 2 of the Kentucky Constitution is not a mechanism to render unconstitutional legitimate exercises of the General Assembly that are perceived as unfair. *City of Lebanon v. Goodin*, 436 S.W.3d 505, 516-19 (Ky. 2014). It is not the role of this Court to inquire into the motives of the General Assembly when it crafted HB 2 and SB 3. *Id*. The Court respects the Kentucky Constitution's strong separation of powers and given the lack of obvious unconstitutionality to HB 2 and SB 3, the Court will not overstep the explicit role given to the judiciary in assessing the constitutionality of an apportionment scheme by delving into legislative motive.

IX. The Commonwealth's Crossclaim and Counterclaim

The Commonwealth has filed a crossclaim and counterclaim challenging the constitutionality of the 2012/2013 districts (HB 302 (2012RS) and HB 1 (2013SS)). The Commonwealth asks the Court to hold the 2012/2013 districts unconstitutional and

permanently enjoin the use of those apportionment plans in any future election. In support, the Commonwealth argues that applying current Census population data to the 2012/2013 districts plainly shows that the 2012/2013 districts violate provisions of both the Kentucky Constitution and the United States Constitution. The Commonwealth alleges that there is no dispute that the 2012/2013 districts are unconstitutional as no party in this case has disputed the Commonwealth's claim and the record contains sufficient evidence to support the Commonwealth's claim that the 2012/2013 districts are now unconstitutionally malapportioned.

Although no party in this action has disputed the Commonwealth's crossclaim and counterclaim challenging the constitutionality of the 2012/2013 districts, the Court holds that the Commonwealth is not entitled to judgment on its crossclaim and counterclaim because, given the holding in this Opinion and Order, the Commonwealth's crossclaim and counterclaim is moot as it pertains to the relief sought by Plaintiffs, is not otherwise independently ripe for review, and this Court does not issue advisory opinions.

First, the Court holds that the Commonwealth's crossclaim and counterclaim is moot. "'A 'moot case' is one which seeks to get a judgment…upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a *then* existing controversy.'" *Morgan v. Getter*, 441 S.W.3d 94, 98-99 (Ky. 2014) (*quoting Benton v. Clay*, 223 S.W. 1041, 1042 (Ky. 1921) (emphasis in original)). In addition to a declaration that HB 2 and SB 3 are unconstitutional, Plaintiffs seek "[a]n injunction directing Defendants to implement, enforce, and conduct elections for the Kentucky House of Representatives and Congress pursuant to the district maps previously enacted as KRS 5.200, et seq…." Complaint, Jan. 20, 2022, at 35; Motion for Temporary Injunction, Jan.

28, 2022, at 3, 44. The Court initially denied Plaintiffs' requested relief to conduct the 2022 elections for the Kentucky state House and Congress under the 2012/2013 districts in its February 17, 2022, Order denying injunctive relief. Additionally, in this Opinion and Order, the Court has declared HB 2 and SB 3 constitutional. Therefore, the Court concludes that the Commonwealth's crossclaim and counterclaim is moot as it pertains to the relief sought by Plaintiffs.

Nevertheless, the Commonwealth's crossclaim and counterclaim is not ripe for review. This is an action for a Declaration of Rights. This Court has jurisdiction pursuant to KRS. 418.040, which provides:

> In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked.

As a condition precedent, a party seeking a declaration must present an actual controversy for the Court to address.

> The existence of an actual controversy respecting justiciable questions is a condition precedent to an action under the [Declaratory Judgment Act]. The court will not decide speculative rights or duties which may or may not arise in the future, but only rights and duties about which there is a present actual controversy presented by adversary parties, and in which a binding judgment concluding the controversy may be entered.

Foley v. Commonwealth, 306 S.W.3d 28, 31 (Ky. 2010) (citing *Veith v. City of Louisville*, 355 S.W.2d 295, 297 (Ky. 1962) (quoting *Black v. Elkhorn Coal Corp.*, 233 Ky. 588, 26 S.W.2d 481, 483 (1930))) (citations omitted in original); *Nordike v. Nordike*, 231 S.W.3d 733, 739 (Ky. 2007) ("It is a fundamental tenet of Kentucky jurisprudence that courts cannot decide matters that have not yet ripened into concrete disputes. Courts are not

permitted to render advisory opinions.") (citations omitted). "An actual controversy for purposes of the declaratory judgment statute requires a controversy over present rights, duties, and liabilities; it does not involve a question which is merely hypothetical or an answer which is no more than an advisory opinion." *Id*. (quoting *Barrett v. Reynolds*, 817 S.W.2d 439 441 (Ky.1991) (citing *Dravo v. Liberty Nat'l Bank & Trust Co.,* 267 S.W.2d 95 (Ky.1954))). "A declaratory judgment should not or cannot be made as to questions which may never arise or which are merely advisory, or academic, hypothetical, incidental or remote, or which will not be decisive of any present controversy.…The criterion that should govern the courts is not that there is a present controversy but a justiciable controversy over present rights, duties or liabilities." *Dravo,* 267 S.W.2d at 97 (citations omitted). "Further, many of these questions are prematurely raised in [] litigation because of the rather complex inter-workings of the various provisions under challenge." *W.B. v. Commonwealth, Cabinet for Health and Family Services*, 388 S.W.3d 108, 113 (Ky. 2012).

The Court holds that the Commonwealth does not present an "actual controversy" to invoke this Court's jurisdiction under the Declaratory Judgment Act because the Commonwealth's claim that the 2012/2013 districts are unconstitutionally malapportioned is not ripe for review. "Ripeness is a threshold issue: 'Because an unripe claim is not justiciable, the circuit court has no subject matter jurisdiction over it.'" *Berger Family Real Estate, LLC v. City of Covington*, 464 S.W.3d 160, 166 (Ky. Ct. App. 2015) (quoting *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky. Ct. App. 2005)). In *W.B.*, the Cabinet for Health and Family Services initiated an investigation into allegations of child abuse by an individual. 388 S.W.3d at 110. During the administrative proceeding, the individual brought a declaratory action in the Jefferson Circuit Court facially challenging

the constitutionality of the related statutory and regulatory provisions. *Id*. at 109. The Jefferson Circuit Court and the Kentucky Court of Appeals affirmed the constitutionality of the statutes and regulations, but the Kentucky Supreme Court reversed, instead finding that the case was not ripe for review due to the absence of an administrative record. *Id.* at 111. In its holding, the Kentucky Supreme Court emphasized judicial restraint against prematurely deciding constitutional challenges.

> [T]wo of the most fundamental rules applied by the courts when considering constitutional challenges are 'one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'

Id. at 113-14 (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners*, 113 U.S. 33, 39 (1885); *Communist Party of United States v. Subversive Activities Control Board*, 367 U.S. 1, 71-72 (1961)). "The basic rational of the ripeness requirement is 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements[.]'" *Id*. at 114 (quoting *Abbott Labs v. Gardner*, 387 U.S. 136, 148 (1967)). Similarly, the Declaratory Judgment Act "anticipates that there will be occasions when it will not be best to address the controversy at the time of the petition, and so authorizes the courts to defer consideration until the circumstances are more favorable for a resolution of the issue presented[.]" *Id*. at 112; KRS 418.065 ("The Court may refuse to exercise the power to declare rights, duties or other legal relations in any case where a decision under it would not terminate the uncertainty or controversy which gave rise to the action, or in any case where the declaration or construction is not necessary or proper at the time under all the circumstances.").

In this Opinion and Order the Court has affirmed the constitutionality of HB 2 and SB 3 and discussed how such decision renders the Commonwealth's crossclaim and counterclaim moot as it relates to the relief sought by Plaintiffs to reimpose the 2012/2013 districts. Nevertheless, in its crossclaim and counterclaim the Commonwealth generally seeks a declaration that the 2012/2013 districts are unconstitutionally malapportioned to prevent the 2012/2013 districts from being used in any future Kentucky election. But the doctrine of ripeness clearly cautions the Court from deciding the Commonwealth's crossclaim and counterclaim. The 2012/2013 districts were repealed and replaced by the districts contained in HB 2 and SB 3 by the General Assembly during the 2022 Regular Session. Accordingly, the 2012/2013 districts are no longer viable law. The Court understands that the Commonwealth has raised its crossclaim and counterclaim to prevent the 2012/2013 districts from being used in case this Court, or a reviewing court, holds HB 2 and/or SB 3 unconstitutional and reimposes the use of the 2012/2013 districts. However, the Commonwealth's crossclaim and counterclaim is not ripe until that specific trigger occurs.

Again, "'the existence of a justiciable controversy…is a prerequisite to declaratory relief' under KRS Chapter 418." *Id*. The declarations the Commonwealth seeks would compel this Court to evaluate the constitutionality of repealed apportionment plans. Presently, it is unknown if the Commonwealth's crossclaim and counterclaim will ever ripen. Until then, the Commonwealth is seeking an advisory opinion, which this Court is not at liberty to issue. If a reviewing court holds HB 2 and/or SB 3 unconstitutional and the 2012/2013 districts are reimposed, then the Commonwealth's crossclaim and counterclaim will be viable and may prove successful. However, until that time, any challenge to the

2012/2013 districts is premature. As this Court has affirmed the constitutionality of HB 2 and SB 3, the Court must exercise judicial restraint and refrain from addressing the Commonwealth's crossclaim and counterclaim until the claim is ripe.

X. Conclusion

"Apportionment is primarily a political and legislative process." *Jensen*, 959 S.W.2d at 776. The Kentucky Constitution assigns the task of apportionment to the General Assembly—a political body. Plaintiffs have made an admirable effort to prosecute their claims and successfully established at trial that HB 2 and SB 3 are partisan gerrymanders. However, as the Court has thoroughly detailed in this Opinion and Order, the Kentucky Constitution does not explicitly prohibit the General Assembly from making partisan considerations during the apportionment process. The Court acknowledges that other states' constitutions prohibit partisan gerrymandering or assign redistricting to a nonpartisan committee, but this Court's concern is only with the Kentucky Constitution.

First, Section 33 is the specific section of our Constitution that addresses apportionment. Section 33 assigns the duty of apportionment to the General Assembly and sets forth the requirements for state House and Senatorial Districts. Over one hundred (100) years of litigation has resulted in a straightforward baseline "dual mandate" of population equality and county integrity. HB 2 meets these requirements. Second, Section 6 has nothing to do with state or Congressional apportionment. The Court examined the 1890-91 constitutional debates and the handful of Kentucky cases addressing Section 6 to reach this conclusion. Third, the Court concluded that Plaintiffs have raised an unrecognized equal protection claim for partisan gerrymandering with no judicially manageable standard. Fourth, the Court rejected Plaintiffs' Section 1 claim finding that under HB 2 and

SB 3 Plaintiffs are still able to engage in Section 1 protected activities. Fifth, the Court found no merit in Plaintiffs' Section 2 claim given the political nature of redistricting and the Kentucky Constitution's assignment of the task to the General Assembly—a partisan body. Finally, the Court concluded that the Commonwealth's crossclaim and counterclaim is seeking an advisory opinion because the declaration sought is not ripe for review. Further, given the Court's holding that HB 2 and SB 3 are constitutional, the issue of whether the Court would reimpose the 2012/2013 districts is moot.

Plaintiffs "undertook a yeoman's task" in bringing this challenge. *Family Trust Foundation of Kentucky v. Kentucky Horse Racing Commission*, 620 S.W.3d 595, 603 (Ky. 2020) (Keller, J. concurring). Ultimately, however, the Court must base its holding not on what is perceived as being most just or fair, but instead on what is provided for in the Kentucky Constitution. Therefore, as to the claims brought by Plaintiffs, the Court must award judgment in favor of Defendants, Secretary Adams and the SBE and Intervening Defendant, the Commonwealth of Kentucky. Further, the Court must exercise judicial restraint and decline to issue an advisory opinion on the Commonwealth's unripe crossclaim and counterclaim.

WHEREFORE, based the findings and conclusions contained in this Opinion and Order, **IT IS HEREBY ADJUDGED** that House Bill 2 (2022RS) is **CONSTITUTIONAL** and Senate Bill 3 (2022RS) is **CONSTITUTIONAL**. The Court further **HOLDS** that the Commonwealth's crossclaim and counterclaim concerning the constitutionality of House Bill 302 (2012RS) and House Bill 1 (2013SS) is moot as it pertains to Plaintiffs' requested relief and is not otherwise ripe for review, thus the Court declines to issue an advisory opinion.

This order is final and appealable and there is no just cause for delay.

SO ORDERED, this 10th day of November, 2022.

/s/ HON. THOMAS DAWSON WINGATE
electronically signed
11/10/2022 10:10:04 AM ET

THOMAS D. WINGATE
Judge, Franklin Circuit Court

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was mailed, this _____day of November, 2022, to the following:

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