SUPREME COURT OF KENTUCKY
Case No. 2023-SC-0139

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

Petitioners,

v.

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

Respondents.

On Petition for Supervisory Writ

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, BLACK LIVES MATTER LOUISVILLE, AND KENTUCKY EQUAL JUSTICE CENTER IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE

The **American Civil Liberties Union** (ACLU) is a nationwide, non-profit, non-partisan organization with approximately 1.6 million members. The ACLU is dedicated to the principles of liberty and equality embodied in the U.S. and state Constitutions and our nation's civil rights laws, and has litigated voting rights cases such as *Allen v. Milligan*, 143 S. Ct. 1487 (2023), and *Reynolds v. Sims*, 377 U.S. 533 (1964).

The **American Civil Liberties Union of Kentucky** is a statewide affiliate of the ACLU. It is dedicated to protecting the civil rights and civil liberties of Kentuckians, including their right to vote in free and fair elections. *E.g., Herbert v. Kentucky State Bd. Elections*, No. 13-25-GFVT-WOB-DJB (E.D. Ky. filed May 5, 2021).

Black Lives Matter Louisville is a local collective of Kentuckians working to support and protect Black and Brown communities. BLM Louisville emerged in 2016 during a wave of deadly racial injustice that harmed communities of color. BLM Louisville opposes political gerrymanders, which exacerbate disconnects between legislators and historically Black, Brown, and low-income neighborhoods and undermine representation of these communities.

The **Kentucky Equal Justice Center** (KEJC) is a non-profit organization devoted to representing Kentuckians living in poverty, including those whose ability to fully participate in our democracy is undermined by Kentucky's electoral processes. *See, e.g., Lostutter v. Beshear*, No. 6:18-cv-277 (E.D. Ky. filed Oct. 29, 2018). Placing KEJC's clients in gerrymandered districts severely hinders their political participation.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves "extreme" partisan gerrymanders that violate some of the most fundamental rights guaranteed by the Kentucky Constitution. *See Graham v. Adams* (Op.), No. 22-CI-00047 at 10 (Ky. Cir. Ct. Nov. 10, 2022). In fact, the evidence is so "abundantly clear," the trial court was "compelled" to conclude that House Bill 2 (HB2) and Senate Bill 3 (SB3) are political gerrymanders. Op. at 39-40. HB2, which created district lines for the Kentucky House of Representatives, is "off the charts" and contains a "pro-Republican bias larger" than an expert "has ever seen." Op. at 40. Similarly, SB3 created a U.S. congressional district that is less compact than "99% of the simulated plans" and is "an extreme outlier" in suppressing voters based on their political views. Op. at 10, 41.

As the trial court found, Defendants selectively applied their redistricting principles to neutralize the voting power of one political party. Op. at 43-44. Such gerrymandering serves no purpose except "to maximize partisan gains statewide," Op. at 40, and, contrary to the lower court's legal conclusions, violates multiple provisions of the Kentucky Constitution.

First, by treating voters differently based on the views they have expressed at the polls, Defendants infringe upon fundamental freedom of speech and deny Kentuckians the ability to associate effectively with one another and with their preferred parties and candidates. *Champion v. Commonwealth*, 520 S.W.3d 331, 338 (Ky. 2017); *Mobley v. Armstrong*, 978 S.W.2d 307, 309 (Ky. 1998); *Assoc. Indus. of Ky. v. Commonwealth*, 912 S.W.2d 947, 952 (Ky. 1995).

Second, by burdening the fundamental right to vote and by discriminating against voters without any legitimate public purpose, Defendants have violated the principles of

equal protection embodied in Sections 1, 2, and 3 of the Kentucky Constitution. *Zuckerman v. Bevin*, 565 S.W.3d 580, 594 (Ky. 2018); *Mobley*, 978 S.W.2d at 309.

Finally, by denying voters the ability to choose their own representatives and entrenching a political supermajority, Defendants have violated Section 2's bar against "arbitrary and absolute power"—Kentucky's unique protection against legislation that violates "democratic ideals, customs and maxims." *Sanitation Dist. No. 1 v. City of Louisville*, 213 S.W.2d 995, 1000 (Ky. 1948). The text and history of Section 2 show that delegates to the 1890 Constitutional Convention were chiefly concerned with abuses of political power by a legislative majority, including through partisan gerrymandering, and Section 2 was intended to guard against such anti-democratic efforts.

ARGUMENT

I. PARTISAN GERRYMANDERING IS SUBJECT TO STRICT SCRUTINY UNDER THE KENTUCKY CONSTITUTION'S PROTECTIONS FOR FREE SPEECH AND ASSOCIATION

Partisan gerrymandering infringes on Kentuckians' right to free speech and association in the political process and warrants strict scrutiny. Through HB2 and SB3, Defendants discriminate against Kentuckians based on their protected political expression: districts were cracked and packed based on voters' political alignment and voting behavior. The Kentucky Constitution's plain text, this Court's precedent, historical evidence from the 1890 Constitutional Convention, and persuasive authority from sister states all indicate that partisan gerrymandering violates Kentuckians' speech and association rights, which are broader than the First Amendment and protect the right to vote.

A. The Kentucky Constitution Provides Broad Protection for Speech and Association.

The Kentucky Constitution sets forth expansive free speech and associational rights for Kentuckians, beyond those guaranteed by the First Amendment. Constitutional analysis begins with the text. *See Williams v. Wilson*, 972 S.W.2d 260, 268 (Ky. 1998). Section 1(4) of the Kentucky Constitution secures the inalienable right to "freely communicat[e] [one's] thoughts and opinions." Ky. Const. § 1(4). Section 8 in turn ensures that "[e]very person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty." *Id.* § 8. And lastly, Section 1(6) ensures that all Kentuckians enjoy the right to "assembl[e] together in a peaceable manner for their common good, and [to] apply[] to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance." *Id.* § 1(6). These broadly constructed provisions reach all regulations that may burden or inhibit free speech and association.

Speech and associational rights in Kentucky extend beyond the First Amendment. *See Blue Movies, Inc. v. Louisville/Jefferson Cnty. Metro Gov't*, 317 S.W.3d 23, 32 (Ky. 2010) (holding that an associational right "exists in the Commonwealth under our state Constitution" even though U.S. Supreme Court "has rejected the notion"); *see also Champion,* 520 S.W.3d at 334 n.7 (suggesting that "Section 1's free-speech provision [may] afford[] a greater protection independent of the First Amendment"); *Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 312 (Ky. 2010) (stating that Section 8 "may compel . . . greater protection to speech than the First Amendment").

In *Blue Movies*, this Court ruled that the right to associate with others includes the freedom to engage in select forms of consensual touching, "such as a handshake or a pat

on the back," as these are "a social custom and an integral part of our culture." 317 S.W.3d at 31. The Court relied on historical context from Kentucky's 1890 Constitutional Convention, including delegate remarks, and contemporaneous judicial precedent, all of which indicated that the Framers intended expansive associational rights to be incorporated within "an individual's right to personal liberty." *Id.* at 31. Thus, the Court ultimately found a distinct right to "free association" under the Kentucky Constitution that is broader than the federal right. *Id.* at 31-32.

B. The Kentucky Constitution Protects Political Expression and Association, which Encompass the Right to Vote for Candidates and Parties of the Voter's Choice.

The broad speech and associational rights under the Kentucky Constitution extend to political expression and association, including voting. Meaningful political participation, including the manner in which Kentuckians express themselves politically at the polling booth or beyond, is at the core of protected speech. *See, e.g., Assoc. Indus.*, 912 S.W.2d at 952 (noting that 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"); *cf.* Ky. Const. § 8 ("Every person may freely and fully speak, write and print on any subject.").

The right to vote is inextricably intertwined with—and at the heart of—protections for political speech and association. "Free communication of political speech allows [individuals] to become fully informed on the issues and personalities in order to intelligently exercise their right to vote." *Ky. Registry of Election Fin. v. Blevins*, 57 S.W.3d 289, 294 (Ky. 2001). Thus, the expansive public forum for political speech under Kentucky's Constitution is designed to facilitate the franchise and the democratic process. "[T]he right of the qualified voter to cast an effective vote is among our most precious

freedoms," and failing to protect that right would undermine the ultimate purpose of political speech. *See Ahrens v. Fendley*, No. 2022-CA-1485-MR, 2023 WL 2939968 at *7 (Ky. Ct. App. Apr. 14, 2023) (quoting *Heleringer v. Brown*, 104 S.W.3d 397, 405 (Ky. 2003) (Stumbo, J., concurring); *see also Johnson v. May*, 203 S.W.2d 37, 39 (Ky. 1947) ("The very purpose of elections is to obtain a full, fair, and free expression of the popular will."). Accordingly, both the right to vote and the right to political expression underlying the exercise of that right are fundamental. *See, e.g.*, *Mobley*, 978 S.W.2d at 309 (recognizing "fundamental right[s] such as the right to privacy or the right to vote"); *Assoc. Indus.*, 912 S.W.2d at 953 (noting that lobbying regulations "burden[ed] the exercise of fundamental rights" to petition and freedom of association).

Although empowered to apportion congressional and legislative districts, the legislature must still operate within constitutional limits and cannot discriminate against Kentuckians based on how they exercise their right to political expression. *See Moore v. Harper*, No. 21-1271, 2023 WL 4187750, at *14 (U.S. June 27, 2023) ("[S]tate legislatures remain bound by state constitutional restraints when exercising authority under the Elections Clause."); *Fischer v. Grimes*, No. 12-CI-00109, slip op. at 14 (Ky. Cir. Ct. Feb. 7, 2012) (explaining that political considerations cannot "impair the nonpartisan voting rights of the public"), https://redistricting.lls.edu/wp-content/uploads/KY-fischer-20120207-opinion.pdf.

C. Partisan Gerrymandering Infringes Upon Fundamental Rights of Speech and Association and Cannot Survive Strict Scrutiny.

When a Kentuckian joins a political party or votes for a particular candidate, they are exercising their right to political association and expression. However, partisan gerrymandering unconstitutionally prevents Kentuckians from organizing themselves in

order to participate meaningfully in the political process. As Petitioners alleged, HB2 and SB3 constitute viewpoint discrimination, because they prevent disfavored voters from meaningfully participating in the democratic process—both by making their votes less effective and by unduly burdening their ability to assemble based on their political affiliation. *See* Op. at 39-44. Viewpoint discrimination is odious because it implies "different rules and different procedures for different forms of protected speech." *See Champion*, 520 S.W.3d at 338; *see also Reed v. Town of Gilbert*, 576 U.S. 155, 168 (2015) (defining viewpoint discrimination as "the regulation of speech based on the specific motivating ideology or the opinion or perspective of the speaker") (internal quotations omitted).

Content-based encroachments on free speech and association therefore demand strict scrutiny. *Champion*, 520 S.W.3d at 335 (finding content-based regulations "presumptively unconstitutional"). The standard is consistent with the Kentucky Constitution's broad protections for free speech and association, which center on the inalienable "right of freely communicating [one's] thoughts and opinions." Ky. Const. § 1(4). And as determined in sister state courts, such as in Pennsylvania, these freedoms should be read as more expansive than their federal analogs. *See, e.g.*, *Pap's A.M. v. City of Erie*, 812 A.2d 591, 596, 603 (Pa. 2002) (finding similar provision in Pennsylvania Constitution "affords greater protection for speech and conduct than does the First Amendment" because "'[c]ommunication' obviously is broader than 'speech.'"); *DePaul v. Commonwealth*, 969 A.2d 536, 590 (Pa. 2009) (reaffirming that strict scrutiny applies to regulation of protected expression under Kentucky Constitution even though federal law required only intermediate scrutiny). Similarly, a Maryland court recently held that

partisan gerrymandering violated the state's free speech provision, which contains language nearly identical to Kentucky's Section 8 and is construed to be broader than the federal right. *Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194, at *18 (Md. Cir. Ct. Mar. 25, 2022); *see* Md. Const. Decl. of Rts. art. 40 ("[E]very citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects.").

This case is clear: HB2 and SB3 are obvious gerrymanders that divide communities based on their political preferences—and Defendants do not offer any legitimate public purpose for doing so, let alone a compelling one. Op. at 39-44. That infringement on Kentuckians' fundamental rights to speak and associate as they choose cannot survive strict scrutiny (or any level of scrutiny). It is the state's burden to demonstrate that the challenged laws are narrowly tailored to achieve a compelling state interest, and this Court will "not presume [a] problem exists" to save a challenged law from unconstitutionality. *Champion*, 520 S.W.3d at 338. Because freedom of expression "need[s] breathing space to survive, government may regulate in the area only with narrow specificity." *Martin v. Commonwealth*, 96 S.W.3d 38, 59 (Ky. 2003). HB2 and SB3 do not come close to satisfying that stringent standard.

II. PARTISAN GERRYMANDERING VIOLATES KENTUCKY'S GUARANTEE OF EQUAL PROTECTION

Partisan gerrymandering violates the right to equal protection, embodied in Sections 1, 2, and 3 of the Kentucky Constitution. *Zuckerman*, 565 S.W.3d at 594. Under Kentucky law, "[s]trict scrutiny applies to a statute challenged on equal protection grounds if the classification used adversely impacts a fundamental right or liberty explicitly or implicitly protected by the Constitution." *Beshear v. Acree*, 615 S.W.3d 780, 815-16 (Ky. 2020).

A. The Right to Vote Is a Fundamental Right and Demands Strict Scrutiny.

As explained *supra* Part I, the right to vote is fundamental. *See Mobley*, 978 S.W.2d at 309. Indeed, this Court has long recognized that equal protection under the Kentucky Constitution reaches classifications affecting the right to vote: the "word 'equal' comprehends the principle that every elector has the right to have his vote counted for all it is worth in proportion to the whole" and that the elector "shall have the same influence as that of any other voter." *Asher v. Arnett*, 132 S.W.2d 772, 776 (Ky. 1939). HB2 and SB3 treat voters unequally by diminishing the influence of voters for one political party such that they do not have the same influence or political representation as voters of another party. Partisan gerrymanders like HB2 and SB3 impair the fundamental right to vote in several respects and are subject to strict scrutiny.

As an initial matter, partisan gerrymandering cuts to the heart of ballot access. If voters for a disfavored political party cannot meaningfully aggregate their votes to win elections, those voters lack "the same influence as that of any other voter" and an equal protection violation is manifest. *Asher*, 132 S.W.2d at 776. That is the case under HB2 and SB3. The trial court found "under HB2 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)," in a state with 120 counties. Op. at 13 (emphasis added). Under HB2's distorted scheme, only seven of the 100 seats are even competitive, which has the effect of entrenching incumbents regardless of their responsiveness to constituents' needs and concerns. *Id.* at 13. A voter does not truly have ballot access when legislative maps predetermine elections.

Partisan gerrymanders further upend the democratic balance by depriving thousands of voters across the Commonwealth of a ballot "counted for all it is worth in proportion to the whole." *Asher*, 132 S.W.2d at 776. The trial court found that HB2 is expected to waste "13.4% more of Democratic votes than Republic votes" resulting in Republicans winning "an extra thirteen [] seats on top of what would normally be considered a 'winner's bonus'" under HB2. Op. at 12. Contrary to the trial court's legal conclusion, such manipulation of the impact of a Republican vote versus a Democratic vote constitutes vote dilution. *Cf.* Op. at 58 ("'[V]ote dilution' to trigger an equal protection claim occurs only when the one-person, one-vote rule is not respected or when racial gerrymandering occurs.").

The trial court also misreads precedent in finding that partisan gerrymandering does not implicate equal protection. Citing *Jensen v. Ky. State Board of Elections,* it held 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." *See* Op. at 57 (citing 959 S.W.2d 771, 776 (Ky. 1997)).

That application of *Jensen* is incorrect for multiple reasons. First, *Jensen* did not concern Kentuckians' right to equal protection. *Jensen* addressed Section 33 of the Kentucky Constitution, which bars the division of counties between or among legislative districts. *See* Op. at 57. Second, the quote from *Jensen* is dicta and should not be followed: it is not central to the holding and relies on a since-overturned federal case addressing the *federal* Equal Protection clause. *See Jensen*, 959 S.W.2d at 776 (citing *Davis v. Bandemer*, 478 U.S. 109 (1986)). Third, the trial court ignores the *Jensen* court's next sentence, that

unconstitutional discrimination occurs "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." 959 S.W.2d at 776 (citing *Bandemer*, 478 U.S. at 131-33). Such degradation of political influence has occurred here, and the bare claim that apportionment is a political process does not insulate the legislature from constitutional review.

Even under the trial court's articulation of the deferential *Jensen* standard, HB2 and SB3 constitute an impermissible partisan gerrymander. The lower court's fact-finding shows that HB2 and SB3 go far beyond "mak[ing] it more difficult" for voters to select a representative of their choice. *Jensen*, 959 S.W.2d at 776. The trial court found that SB3 "is a partisan gerrymander aimed at diluting the Democratic vote share . . . based on rationale that was not applied across all districts." Op. at 43-44. The court also acknowledged that "[c]hanges in technology have given a political party the ability to essentially guarantee itself a supermajority for the lifespan of an apportionment plan." *Id.* at 50. And as explained *supra*, the gerrymanders at issue are likely the most extreme in Kentucky's history and, contrary to popular will, create at least a thirteen-seat advantage in the state House alone. If the *Jensen* test is whether 'consistent degradation' will occur, *see* 959 S.W.2d at 776, then HB2 and SB3, which will "essentially guarantee" political supermajorities, clear that standard with ease, Op. at 50.

B. HB2 and SB3 Do Not Satisfy Even Rational Basis Review.

Having already failed strict scrutiny, the challenged laws even fail the least rigorous standard of review. *Mobley*, 978 S.W.2d at 309. Under rational basis review, a statute is upheld only if it is "rationally related to a legitimate state interest." *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455, 466 (Ky. 2011). This Court has emphasized that such review

is not a rubber stamp. *See id.* at 469 ("[R]ational basis standard, while deferential, is certainly not demure."). Moreover, classifications based on "a bare . . . desire to harm a politically unpopular group" are necessarily irrational and arbitrary. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446-47 (1985); *see also Commonwealth Nat. Res. & Env't Prot. Cabinet v. Kentec Coal Co.*, 177 S.W.3d 718, 726 (Ky. 2005) (defining arbitrary classifications as "essentially unjust and unequal or exceed[ing] the reasonable and legitimate interests of the people").

Defendants have never advanced a legitimate governmental purpose—much less a compelling one—for the partisan gerrymander, nor is one discernible. The only proffered rationale across both maps was an expert's unsubstantiated suggestion that the Second District's boundaries in SB3 were drawn to protect a congressman whom in fact had "passed away in March 1994." Op. at 41-42. While reapportionment is a political process in which a variety of social, economic, or regional interests may be considered, it is abundantly clear that neither discrimination against voters based on viewpoint or residence nor the promotion of the private, political fortunes of certain candidates advances a "public" purpose. *Cf. Henry Fisher Packing Co. v. Mattox*, 90 S.W.2d 70 (Ky. 1936) (holding that discrimination between resident and nonresident defendants lacks rational basis). Accordingly, HB2 and SB3 fail regardless of the level of scrutiny applied.

III. PARTISAN GERRYMANDERING ENTRENCHES ABSOLUTE POWER AND VIOLATES DEMOCRATIC PRINCIPLES PRESERVED IN SECTION 2 OF THE KENTUCKY CONSTITUTION.

According to Section 2, the Kentucky Constitution's "pole star," "[a]bsolute and arbitrary power . . . exists nowhere in a republic, not even in the largest majority." *Bruner v. City of Danville*, 394 S.W.2d 939, 941 (Ky. 1965). This Court has repeatedly explained that this provision prohibits state action that is "contrary to democratic ideals, customs and

maxims." *E.g.*, *Bd. of Educ. of Ashland v. Jayne*, 812 S.W.2d 129, 131 (Ky. 1991); *Ky. Milk Mktg. & Antimonopoly Comm'n v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985); *Sanitation,* 213 S.W.2d at 999-1000. Section 2 therefore operates as "a curb on the legislature['s] . . . exercise of political power," particularly when such power is wielded against a powerless minority—precisely the case with partisan gerrymandering. *See Kroger*, 691 S.W.2d at 899. Although Section 2 is "broad enough to embrace the traditional concept[] of . . . equal protection of the law," this Court has recognized that Section 2 goes beyond equal protection and authorizes a separate claim against arbitrary and absolute power. *Id.* at 899-900 (striking down milk pricing law as "an arbitrary exercise of power by the General Assembly over the lives and property of free men").

A. Section 2's Central Purpose Is to Curtail the Existence of An All-Powerful, Unaccountable Legislature, Including the Use of Anti-Democratic Devices Such as Partisan Gerrymandering.

Section 2's prohibition against "absolute and arbitrary power" is governed by its text and history. *See Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557, 572 -73 (Ky. 2020). Here, contemporaneous definitions of those words, as well as the historical record from the 1890 Constitutional Convention, confirm that the delegates sought to guard against the legislature wielding despotic power. *See* William G. Webster & William A. Wheeler, *A Dictionary of the English Language: Explanatory, Pronouncing, Etymological, and Synonymous* 3 (1895) (defining "absolute" as "freed or loosed from any limitation or condition"); *id.* at 23 (defining "arbitrary" to mean "despotic"); *see also id.* (exemplifying both words in the sentence: "When a ruler has absolute, unlimited, or arbitrary power, he is apt to be capricious, if not imperious, tyrannical, and despotic.").

Legal scholars have concluded that "[t]he central issue in the constitutional convention of 1890 was the limitation of legislative power." John David Dyche, *Section 2*

of the Kentucky Constitution—Where Did It Come From and What Does It Mean?, 18 N. Ky. L. Rev. 503, 509 (1991). In fact, "[m]ost of the delegates to the constitutional convention" sought to restrain "the almost unlimited power of the General Assembly." *Id.* One historian described the Framers of the 1890 Constitution as being "obsessed with distrust and fear . . . of the legislature." *Id.*

Section 2 was in turn viewed by the delegates as a bulwark against absolute legislative power. *Id.* at 510. An effort to strike the provision failed, as the protection against arbitrary and absolute power was regarded as "the very first and most important" right reserved by the people. *Id.* at 511. Consistent with the text of Section 2, which forbids the wielding of absolute power even by "the largest majority," the delegates were concerned about the political control that a majority might otherwise have over "a helpless minority." *Id.* at 510-11. Accordingly, any interpretation of Section 2 must be consistent with the delegates' "primary focus," which was to "accord[] maximum protection to individual rights." *Id.* at 512.

Records of the 1890 Convention further confirm that partisan gerrymandering in particular contravenes the democratic norms that the Framers sought to protect. Delegate L.T. Moore, whose remarks have been relied upon by this Court to inform constitutional interpretation, declared that the legislature ought not to apportion districts "according to politics or for private interests" and that redistricting should instead do "justice to all sections of the State." 1890-91 Ky. Const. Debates 4403 (1891); *see Woodall*, 607 S.W.3d at 571; *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 206 (Ky. 1989). Similar remarks were made by Delegate Clardy, who denounced political gerrymandering as "not fair, for every portion [of the state] should be represented fairly and justly according to

voters." 1890-91 Ky. Const. Debates at 3976. And yet another, Delegate Young, decried the "stench" of the "miserable Republican gerrymandering" of New York, which should not be replicated in Kentucky. *Id.* at 3984. This Court recently relied heavily on Mr. Young's remarks and found them "dispositive" of the Framers' intent on a matter of constitutional interpretation. *See Ky. CATV Ass'n Inc. v. City of Florence,* 520 S.W.3d 355, 360, 361 (Ky. 2017). As those clear statements from key delegates indicate, the Framers conceived of a right to be represented fairly, regardless of politics, and any contrary effort to suppress voting power based on voters' political activity or affiliation fits comfortably within the historical scope of "absolute and arbitrary power" forbidden by Section 2.

B. Partisan Gerrymandering Violates This Court's Longstanding Interpretation of Section 2.

"Section 2 of [the Kentucky] Bill of Rights is unique, [with] only the Constitution of Wyoming having a like declaration." *Sanitation,* 213 S.W.2d at 999. As this Court has recognized, the text incorporates "a good definition of constitutional government" and "is the affirmance of fundamental principles recognized throughout the federal and state constitutions and sanctioned by the laws of all free people." *Id.* at 1000; *see also Commonwealth v. Foley,* 798 S.W.2d 947, 950, 953 (Ky. 1990) (holding that election law that was "repugnant to the concept of free elections" violated Section 2), *overruled on other grounds by Martin v. Commonwealth,* 96 S.W.3d 38 (Ky. 2003); *Gorin v. Karpan,* 775 F. Supp. 1430, 1436 (D. Wyo. 1991) (interpreting identical provision in Wyoming Constitution as safeguarding "the right to vote and the right to equality among voters"). Partisan gerrymandering violates those fundamental principles. *See Arizona State Legislature v. Arizona Indep. Redistricting Comm'n,* 576 U.S. 787, 791 (2015).

The distinguishing feature of a constitutional government recognized by courts, including around the time of the 1890 Convention, is "the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies." *Duncan v. McCall*, 139 U.S. 449, 461 (1891). Only then can the government's actions "be said to be those of the people themselves" and, therefore, legitimate. *Id.*

Partisan gerrymandering flips that principle of representative government on its head. As the lower court was "compelled" to conclude, HB2 deliberately "cracked and packed" Democratic voters in order "to create additional Republican safe districts." Op. at 39. As a result, "only seven (7) out of the one hundred (100) [House] districts" are electorally competitive, and eighty of the 100 seats are reliably Republican. *Id.* at 13. Similarly, SB3 "dilut[ed] the Democratic voter share by creating an uncompact First District." *Id.* at 43-44. Rather than allowing voters to choose their representatives, legislators in the majority party have chosen their voters and created seats where they would be safe from political accountability—and denied a voice to voters with opposing views. And in doing so, the state has distorted the composition of legislative bodies, denying Kentuckians the representative government to which they are entitled under Section 2.

This Court has also explained that Section 2 forbids "political activity discrimination." *Cf. Jayne*, 812 S.W.2d at 132. Here, the trial court expressly found, as a factual matter, that "SB 3 is a partisan gerrymander aimed at diluting the Democratic vote share . . . based on rationale that was not applied across all districts." Op. at 43-44. And under HB2, "Democratic electors have been cracked and packed into districts to ensure

more seats for Republicans." *Id.* at 40. The "political activity discrimination" here could not be more clear-cut: the Republican majority in the General Assembly has diluted the power of Kentuckians based on their support for Democrats, while at the same time strengthening the voting power of Republican voters and using technology to effectively "guarantee" itself a supermajority. *Id.* at 50.

In holding that partisan gerrymanders do not violate Section 2, the trial court committed multiple errors. First, the lower court ignored the history and intent of Section 2. The court concluded that partisan gerrymandering is not unconstitutional, simply because "apportionment is a political process." Op. at 62. However, the "political" nature of legislation does not absolve it of constitutional limits and is in fact why Section 2—a tool designed to curb abuses of political power—applies here. *Sanitation*, 213 S.W.2d at 999-1000 (invalidating annexation statute under Section 2 even though "all matters in relation to annexation are political acts" and are "within the power and discretion of the Legislature as the political department of the government").

Second, the lower court misapplied this Court's finding in *Jensen,* a Section 33 case. *See* Op. at 62. In *Jensen,* the Court explained that there was no disparate treatment between Republican and Democratic counties, as both were "subjected to multiple divisions without being awarded a whole district within its boundaries." 959 S.W.2d at 776. Here, as a factual matter, the trial court concluded that the legislature failed to uniformly apply its redistricting rationale. Op. at 43-44. That unjustified disparity is forbidden by Section 2, which is a distinct legal question from the Section 33 issue in *Jensen. See Kroger*, 691 S.W.2d at 899 ("Unequal enforcement of the law, if it rises to the level of conscious violation of the principle of uniformity, is prohibited by this Section.").

Even if courts were somehow required under *Jensen* to defer to the legislature's political judgment, an approach wholly inconsistent with Section 2's purpose, the trial court failed to apply the correct standard. As this Court has explained, even in a highly deferential posture, Section 2 at minimum requires an inquiry into whether "there is a legitimate basis for the policy" and whether the policy choice is "reasonable" and "effectuate[s] an authentic public purpose." *Jasper v. Commonwealth*, 375 S.W.2d 709, 711-12 (Ky. 1964). For the reasons explained *supra* Part II.B, partisan gerrymandering is purely a power grab, and the entrenchment of partisan power (to the sole benefit of candidates and political parties' private interests) over the will of voters is not a legitimate government purpose.

Finally, the trial court erred in rejecting Plaintiffs' Section 2 claim by failing to consider the specific features of the current redistricting scheme. Citing a historical example of Democrats losing political power in the state, the court concluded that there is no Section 2 violation because "it is possible for the opposing party to gain control of the General Assembly under a map crafted for partisan advantage." Op. at 62-63. However, the question of arbitrary and absolute power is "one of degree and must be based on the facts of a particular case." *Kroger*, 691 S.W.2d at 899. That Democrats once lost power despite their past gerrymandering efforts is irrelevant, because that occurred under an entirely different set of district maps. Here, the record shows that the gerrymanders at issue are far more extreme and "more favorable towards Republicans than 99% of all enacted plans that have ever been scored." Op. at 10, 12, 40-41. At minimum, this case should be remanded for the trial court to consider whether, given the egregious nature of the discrimination against voters based on their political views here, the challenged districts

violate the "democratic ideals, customs and maxims" safeguarded by Section 2. *Kroger*, 691 S.W.2d at 899.

CONCLUSION

The Court should grant the petition for supervisory writ and hold that HB2 and SB3 violate the Kentucky Constitution.

July 11, 2023

Respectfully submitted,

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* *Pro hac vice* certification submitted; motion to proceed *pro hac vice* forthcoming