COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2022-SC-0522

DERRICK GRAHAM, et al. PLAINTIFFS-APPELLANTS

v. Appeal From
Franklin Circuit Court
Case No. 22-CI-00047

MICHAEL ADAMS, et al. DEFENDANTS-APPELLEES

BRIEF ON BEHALF OF *AMICUS CURIAE* PROFESSOR JOSHUA A. DOUGLAS

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CERTIFICATE OF SERVICE

I certify that on July 11, 2023, this brief was filed with the Clerk, Kentucky Supreme Court, and copies served via U.S. Mail on: Hon. Thomas D. Wingate, Franklin Circuit Court, 222 St. Clair St., Frankfort, KY 40601; Michael P. Abate, Casey L. Hinkle, William R. Adams, 710 W. Main Street, 4th Floor, Louisville, KY 40202; Victor Maddox, Heather Becker, Alex Magera, Aaron Silletto, Office of Attorney General, 700 Capital Avenue, Suite 118, Frankfort, KY 40601; Taylor Brown, Kentucky State Board of Elections, 140 Walnut Street, Frankfort, KY 40601; Jennifer Scutchfield, Office of the Secretary of State, 700 Capital Avenue, Suite 152, Frankfort, KY 40601.

s/ Jamie K. Neal
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STATEMENT OF POINTS AND AUTHORITIES

PURPOSE AND INTEREST OF *AMICUS CURIAE*

Professor Joshua A. Douglas is the Ashland, Inc.-Spears Distinguished Research Professor of Law at the University of Kentucky J. David Rosenberg College of Law. Professor Douglas writes and teaches in the areas of constitutional law, election law, voting rights, and civil procedure, and he has researched and written specifically about voting rights under state constitutions. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89 (2014); *State Judges and the Right to Vote*, 77 Ohio St. L.J. 1 (2016); *Election Law and Litigation: The Judicial Regulation of Politics* (Aspen 2014, second edition 2021) (with Edward B. Foley & Michael J. Pitts). The Pennsylvania Supreme Court relied upon his scholarship in its decision to invalidate a partisan gerrymander under the "Free and Equal Elections Clause" of its state constitution. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018). Professor Douglas has a professional interest in ensuring that state constitutional jurisprudence properly accounts for the history of Kentucky's Free and Equal Elections Clause (Ky. Const. § 6) and for the Clause's role in securing core structural protections against legislative manipulation of electoral processes.

Kentucky's Constitution guarantees that "[a]ll elections shall be free and equal." Ky. Const. § 6. This provision, venerated as a "sacred clause" at the 1890-91 constitutional convention, is a linchpin of Kentucky's system of government. Each of the state's four constitutions has included this core principle, and it is as foundational as the Constitution's guarantee that absolute and arbitrary power does not exist in a republic. The Clause demands that electoral processes fairly and neutrally translate the popular will into representation and political power. When legislators stack the deck by manipulating district

lines, they deny Kentuckians the free and equal elections that their Constitutions have continually promised for over 230 years. This understanding of Kentucky's Free and Equal Elections Clause accords with the Kentucky Constitution's underlying structural principles, historical context, this Court's jurisprudence, and persuasive authority. This Court should therefore reverse the Circuit Court's ruling and hold that the Free and Equal Elections Clause prohibits extreme partisan gerrymandering.

ARGUMENT

I. PARTISAN GERRYMANDERING CONTRAVENES THE KENTUCKY CONSTITUTION'S CORE STRUCTURAL PRINCIPLES.

Under Kentucky Constitution § 6, "All elections shall be free and equal." This "Free and Equal Elections Clause" is a foundational principle of the state constitution. Consistent with the Kentucky Constitution's core commitments to popular self-rule and limited government, the Clause serves to check legislative schemes that manipulate district lines for partisan gain.

A. A Constitution Premised on Popular Sovereignty Does Not Condone Partisan Gerrymandering.

A cramped construction of the Free and Equal Elections Clause that leaves gerrymandering unredressed is at odds with the Kentucky Constitution's bedrock commitment to popular sovereignty and democratic self-government. The Free and Equal Elections Clause is no mere window dressing. Instead, it operates in conjunction with other provisions to ensure that the people remain firmly in control of a government that must respect their rights and pursue their interests. The Circuit Court's narrow reading of the Clause would render it to mere surplusage.

Read holistically, the Kentucky Constitution resolutely guarantees the right of Kentuckians to govern themselves and requires lawmakers, as elected agents, to act for the people. The Constitution expressly confers the right to vote, Ky. Const. § 145, safeguards it against "all undue influence thereon, from power, bribery, tumult or other improper practices," *id.* § 150, and offers additional protections for voters, *see id.* § 147 (requirement of secret ballot); *id.* § 148 (requirement that employers give voters at least four hours off to vote); § 149 (privilege from arrest during voting). These multiple layers of voting protections confirm that Kentucky's constitutional system ultimately depends on the people's ability to translate their preferences into representation that fairly reflects their collective will.

The Kentucky Constitution's Bill of Rights likewise serves in large part to proscribe abuses of power that threaten self-rule. After confirming that "all" individuals are "free and equal" and have "inherent and inalienable" rights to life, liberty, and property, among others, Ky. Const. § 1, the Kentucky Constitution uniquely declares that "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." *Id*. § 2; *see Kentucky Milk Mktg. and Antimonopoly Com'n v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985) (explaining that § 2 is "a curb on the legislature … in the assertion or attempted exercise of political power" and that "[w]hatever is contrary to democratic ideals, customs, and maxims is arbitrary"). Instead, "[a]ll political power is inherent in the people," and "free governments are founded on their authority and instituted for their peace, safety, happiness and the protection of property." Ky. Const. § 4. The Constitution then proceeds to identify and enshrine a series of rights that are preconditions to democratic self-governance, including religious liberty, *id.* § 5;

freedom of speech and press, *id*. § 8; and, crucially, free elections, *id.* § 6. The Constitution explains that the powers delegated to the citizens' elected representatives are subordinate to the Bill of Rights and that all laws contrary thereto "shall be void." *Id.* § 26.

Collectively, these provisions reveal that a fundamental premise of Kentucky's constitutional system—indeed, its ultimate touchstone—is rule by the people. That principle offers the proper lens for understanding and applying the Free and Equal Elections Clause. Construing the Clause to promote popular self-rule by checking extreme partisan gerrymandering and the representational inequalities and distortions that come with it is far more faithful to the Kentucky Constitution's democratic structure and values than the Circuit Court's alternative interpretation. *Cf.* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Colum. L. Rev. 859 (2021) (noting that the animating force of state constitutions is a "democracy principle" that prioritizes popular sovereignty). A proper construction of Kentucky's Constitution must give force to the broad protections for voters that it contains. *Cf.* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 129 (2014) ("[S]tate constitutions go well beyond the U.S. Constitution in granting voting rights. Judicial interpretation should follow suit.").

B. The Constitution's Drafters and Ratifiers, Who Were Gravely Concerned About Legislative Abuses of Power, Did Not Give Lawmakers Carte Blanche to Manipulate District Lines.

The Kentucky Constitution's commitment to popular self-rule goes hand in hand with its rejection of unchecked legislative power. Those who drafted and ratified the 1891 Constitution debated the meaning of its terms amid high-profile episodes of governmental corruption and capture. One convention delegate, connecting the concerns of public

corruption to the "sacred clause" guaranteeing free and equal elections, stressed that the people had demanded "[p]urity and economy in every branch of the government." 1890-91 Debates, Vol. I at 452 (Oct. 7, 1890).

Accordingly, the drafters of Kentucky's Constitution took great care to cabin legislative authority. *See* Robert M. Ireland, *The Kentucky State Constitution*, 15 (2d ed. 2013) ("A major thrust of the convention of 1890 … concerned the drafting of provisions that limited the legislature."). The Constitution is premised on the notion that those who are elected to do the people's business must remain their faithful agents. This foundational principle explains why, in addition to adopting a detailed Bill of Rights and multiple protections for suffrage, the Constitution's drafters placed a litany of substantive and procedural limitations on the legislature, such as capping the length of legislative sessions, precluding an array of local and special legislation, and more. *See id.* at 15-16 (summarizing the restrictions).

All of these provisions aim to keep the people in the driver's seat. As this Court's predecessor recognized, "under our theory of government," the people "are sovereign and in them alone is vested the power to abridge or restrict that sovereignty." *Furste v. Gray*, 42 S.W.2d 889, 890 (Ky. 1931). An interpretation of the Kentucky Constitution that hands lawmakers unfettered power to manipulate electoral districts for partisan advantage is directly contrary to the document's central preoccupation with the dangers of legislative overreach and its commitment to keeping government dependent on the people. Instead, through the Free and Equal Elections Clause, the Kentucky Constitution provides a vital safeguard against this particularly pernicious form of legislative mischief.

II. UNDERSTOOD IN ITS HISTORICAL CONTEXT, KENTUCKY'S FREE AND EQUAL ELECTIONS CLAUSE IS AN ANTI-GERRYMANDERING PROVISION.

Reading the Free and Equal Elections Clause to constrain extreme partisan gerrymandering accords not only with the Kentucky Constitution's overarching structure, but also with history. From the seventeenth century forward, Free Elections Clauses have stood as safeguards against anti-democratic mischief. Historical evidence shows that the earliest Kentucky Constitutions included the Clause to prohibit legislative abuses of the electoral process. *Cf. Commonwealth v. Ky. Jockey Club,* 38 S.W.2d 987, 992 (Ky. 1931) (explaining that "the meaning, purpose, and reach" of the Constitution's terms "must be deduced from the intention they express considered in the light of the history that pertains to the subject"). The Circuit Court agreed that Kentucky's Free and Equal Elections Clause limits some forms of partisan manipulation, such as "election day interferences with vote-placement and vote-counting processes," (R. 1887), but the Circuit Court too narrowly read the Clause to hold that it does not apply to partisan gerrymandering.

A. The Principle of "Free Elections" Embodied in the English Bill of Rights of 1689 Prohibited Government Manipulation of Electoral Districts.

Kentucky's Free and Equal Elections Clause traces its lineage back to Pennsylvania's state constitution and ultimately to the English Bill of Rights Act of 1689. About a century before Kentuckians first approved a Constitution in 1792 stating that all elections "shall be free and equal," Parliament declared that all elections "ought to be free." The Circuit Court acknowledged this lineage but missed the crucial point that the original English free elections provision encompassed government manipulation of electoral districts, incorrectly suggesting instead that it concerned only election-day interferences with voting. (R. 1883-85).

In the 1680s, King Charles II was eager to gain the upper hand over his Whig opposition and pack Parliament with Tory loyalists. He opted to revive a seldom-used royal power to revise or revoke municipal corporate charters for boroughs (towns and cities). Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause,* 73 Ala. L. Rev. 221, 258-59, 267-77 (2021). Through this prerogative, the Crown altered municipal charters to limit or deny the franchise for large swaths of residents in some boroughs to suppress votes for opposition candidates, while in other boroughs the Crown unscrupulously extended the franchise to non-residents so as to dilute the opposition's voting power. *Id*. at 268-69.

Using the same prerogative, the Crown could also control how much parliamentary representation, if any, each borough would receive. The Crown invoked this power to deplete the opposition's ranks by removing or withholding boroughs' rights to return members to Parliament. *See id*. at 269. The Whig stronghold of London, for instance, had its charter revoked and could not send representatives to Parliament for five years in the 1680s. *See id.* at 273-74, 283. The Crown simultaneously sought to pack Parliament with allies by creating new boroughs, often small ones, that had the same representation as larger boroughs. *See id.* at 269-77. This practice further diluted the opposition's power. *See id*. King Charles's successor, James II, used the same maneuver to approve forty-four new boroughs in the lead-up to the first Parliamentary elections under his rule. *Id.* at 275.

Ultimately, the abuse of this prerogative contributed to James's downfall and to the Glorious Revolution and the English Bill of Rights—including its decree that elections "ought to be free." *See id.* at 281-89. Despite the Circuit Court's suggestion otherwise, delegates to Kentucky's 1890-91 constitutional convention knew and understood this

history. Delegate Knott, whom the Circuit Court quoted as stating that the English provision addressed the stationing of soldiers at polling locations, (R. 1883-84), subsequently clarified his historical account and expressly connected the Crown's manipulation of electoral districts to the concept of "free and equal" elections:

> Consequently, when it became necessary to pack the House of Commons in the interest of the Crown, the Sheriffs, taking advantage of the indefinite terms of the [royal writ to hold an election], selected such boroughs as they saw proper, and omitted others, producing as a natural consequence the grossest inequality of representation. They, moreover, interfered with the conduct of elections in a variety of other ways, depriving large numbers of the elective franchise who were entitled to it, and permitting others to exercise it who were not. **These wholesale abuses gave rise to a number of statutes providing that elections should be free–that electors should not be prevented from exercising the franchise–and equal–that it should not be left to the power of the Sheriff to determine what boroughs were entitled to representation, but there should be an equality among them in that respect.** … During the reign of James II, these outrages became … so flagitious and oppressive that they became among the leading causes of the Revolution.

1890-91 Debates, Vol. I at 729 (Oct. 21, 1890) (emphasis added).[1] Thus, the Framers of Kentucky's 1891 Constitution knew that the free elections principle encompassed much more than election-day interferences with voting.[2] They further recognized that the free

[1] Delegate Knott had proposed changing the Free and Equal Elections Clause to read: "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." 1890-91 Debates, Vol. I at 731. The Convention rejected his proposal, keeping the Clause's language as it reads today and therefore signifying an intent to reject a limitation of the Free and Equal Elections Clause to election-day interferences with voting. *Cf. Ky. Jockey Club,* 38 S.W.2d at 993 (finding the Convention's rejection of an amendment as "authoritative" of the Convention's intent).

[2] Additional evidence from the debates reinforces the conclusion that the delegates understood the Clause as expansive. An exchange between Delegate McDermott, who sought to narrow the Free and Equal Elections Clause to prohibit "all undue influence [on

elections principle guaranteed more than just population equality among districts.[3] Instead, they understood that it was also about manipulating boundaries and representation to weaken the opposition's power and give the upper hand to loyalists—concepts that mirror the ills of modern partisan gerrymandering.

B. As Imported to the United States, the "Free Elections" Principle Encompassed Freedom from Partisan Districting Abuses.

When the American founders established state governments, they looked to the English Bill of Rights for inspiration. The first eleven states to adopt constitutions (in 1776-1777), which included the highly influential Pennsylvania and Virginia constitutions, all had free elections provisions. *See* Ross, *supra*, at 289 n.475. As new states joined the Union, they continued to include these provisions through an ongoing process of constitutional borrowing. The framers of Kentucky's 1792 constitution borrowed the bill of rights "almost verbatim" from Pennsylvania's 1790 Constitution, including the provision declaring that "[a]ll elections shall be free and equal." Ken Gormley and Rhonda

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the privilege of free suffrage] from power, bribery, tumult, or other improper practices," and Delegates Rodes and Burnham, who represented the views of the committee that proposed retaining the language that "[a]ll elections shall be free and equal," shows that the broader reading won out. 1890-91 Debates, Vol. I at 946 (Oct. 29, 1890). Burnham described the meaning of the word "equal" as "a good deal broader" than McDermott's alternative language. *Id.* Rodes, agreeing with Burnham, explained that "equal" is "a broad word" that "meant a great deal," including "freedom from intimidation" and "fairness." *Id.* at 948; *see also id.* at 438 ("the word 'equal' which implies 'equality,' just and honorable dealing, should stand; and let no one strike it out."). Following this exchange, the convention rejected McDermott's proposal. *Id.* at 948. It later adopted a separate amendment—now Section 150—that incorporated McDermott's language.

[3] The Framers of the 1891 Constitution addressed the issue of population equality among districts in a constitutional provision separate from the Free and Equal Elections Clause. *See* Ky. Const. § 33.

G. Hartman, *The Kentucky Bill of Rights: A Bicentennial Celebration*, 80 Kentucky L.J. 1, 4, 35 (1991).

The influence of Pennsylvania's Free and Equal Elections Clause on Kentucky's almost identically-worded Clause is especially important because Pennsylvania's provision has a rich history that likely would have been familiar to the framers and ratifiers of Kentucky's early constitutions. Pennsylvania enacted its first two Free Elections Clauses (in the state's 1776 and 1790 constitutions) in response to laws that diluted the voting power of citizens based on geography, religion, and political beliefs. *See League of Women Voters of Pa.*, 178 A.3d 737, 804-09 (Pa. 2018). The 1776 Clause, which parroted the English phrasing that "all elections ought to be free," reacted to the colonial assembly's deliberate efforts to underrepresent the City of Philadelphia and western Pennsylvania in the colonial government, which caused much strife pre-statehood. *Id.*

In 1790, Pennsylvania adopted a new constitution in an effort to curb the partisan rancor and severe governmental dysfunction that beset the state in its early years. That constitution reflected a compromise: One faction benefitted from the bicameral legislature and chief executive it preferred, while the other faction was guaranteed—in part through a "free and equal" elections clause—"popular elections in which the people's right to elect their representatives in government would be equally available to all, and would, hereinafter, not be intentionally diminished by laws that discriminated against a voter based on his social or economic status, geography of his residence, or his religious and political beliefs." *Id.* at 808. Thus, as the Pennsylvania Supreme Court explained, Pennsylvania's Free and Equal Elections Clause has long stood firmly against legislative schemes that manipulate the allocation of representation, including based on political beliefs. *Id.* at 808-

09. Kentuckians incorporated this principle into their own Constitution just two years later. *See* 1792 Kentucky Constitution, art. XII, § 5.

By the time of Kentucky's 1890-91 constitutional convention, the Pennsylvania Supreme Court had affirmatively construed that state's Free and Equal Elections Clause to bar legislative schemes to dilute the power of disfavored voters. In *Patterson v. Barlow*, 60 Pa. 54, 75 (1869)—a case known to Kentucky's 1890-91 constitutional convention delegates, *see* 1890-91 Debates, Vol. I at 670 (Oct. 17, 1890)—the Court explained that the Clause required the legislature to "arrange all the qualified electors into suitable districts, and make their votes equally potent in the election; so that some shall not have more votes than others, and that all shall have an equal share in filling the offices of the Commonwealth." *Id. Patterson* involved a voter registration requirement, not a districting plan, which makes it especially notable that the Court nevertheless identified the Clause as a safeguard against districting abuses.

This history confirms that Kentucky's Free and Equal Elections Clause stands as a bulwark against partisan gerrymandering. Just as Pennsylvanians understood their clause to embrace principles of fair representation, so, too, did the framers and ratifiers of Kentucky's Constitution. And just as the original Free Elections Clause repudiated a seventeenth century scheme to stymie Whigs and pack Parliament with Tory-loyalists, Kentucky's Clause bars the twenty-first century analog that the Circuit Court found the Defendants to have committed.

III. KENTUCKY PRECEDENT BOLSTERS THE CONCLUSION THAT THE FREE AND EQUAL ELECTIONS CLAUSE BARS PARTISAN GERRYMANDERING.

The Circuit Court's narrow reading of the Free and Equal Elections Clause also gives short shrift to this Court's rich free elections jurisprudence. Although this Court has never ruled on whether the Clause prohibits partisan gerrymandering, the Court has applied the Clause to a wide range of election-related laws and practices, resulting in perhaps the most well-developed free elections jurisprudence of any state with a similar provision. *See Gunaji v. Macias*, 31 P.3d 1008, 1016 (N.M. 2001) ("Kentucky has the most developed jurisprudence of any state on what the clause means in relation to ballot problems.").

Applying the Clause, this Court (and its predecessor, the Court of Appeals) has issued the following rulings, among others: It struck down voting practices that failed to accommodate illiterate voters. *Rogers v. Jacob*, 11 S.W. 513 (Ky. 1889). It invalidated restrictive voter registration-related requirements, *City of Owensboro v. Hickman*, 14 S.W. 688 (Ky. 1890); *Perkins v. Lucas*, 246 S.W. 150 (Ky. 1922), as well as restrictive absentee voting requirements, *Queenan v. Russell*, 339 S.W.2d 475 (Ky. 1960). It invalidated a law that effectively prevented some residents from voting in a local school election. *Robertson v. Hopkins County*, 56 S.W.2d 700 (Ky. 1933). It ordered local officials to provide more voting locations. *Smith v. Kelly*, 58 S.W.2d 621 (Ky. 1933). It threw out election results due to ballot shortages, *Hocker v. Pendleton*, 39 S.W. 250 (Ky. 1897), ballot printing errors, *Lakes v. Estridge*, 172 S.W.2d 454 (Ky. 1943); *Hillard v. Lakes*, 172 S.W.2d 456 (Ky. 1943); *Ferguson v. Rohde*, 449 S.W.2d 758 (Ky. 1970), and the failure to adequately provide for voter registration, *Early v. Rains*, 89 S.W. 289 (Ky. 1905). And it rejected the disenfranchisement penalty contained in a vague and overly broad bribery statute,

explaining that "the right of citizens to involve themselves in the election process" is "[a]mong the most fundamental of constitutional rights." *Commonwealth v. Foley*, 798 S.W.2d 947, 950, 953 (Ky. 1990), *overruled in part on other grounds Martin v. Com.*, 96 S.W.3d 38 (2003). Notably, these rulings construed the Clause more broadly than just "election day interferences with vote-placement and vote-counting processes," (R. 1887). This Court has never shied away from holding that election laws and practices violate the Free and Equal Elections Clause.

Synthesizing what by 1939 was already a wealth of free and equal elections decisions, this Court's predecessor, the Court of Appeals, described the "broad rule" of free and equal elections—noting that it protects voters but not a candidate's right to appear on the ballot—in terms that should also apply to egregious partisan gerrymandering. *Asher v. Arnett*, 132 S.W.2d 772 (Ky. 1939). The Court explained that the Clause contains an anti-vote dilution principle: "The guaranty, therefore, means 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.* at 776 (citation omitted). The Court further recognized that the Clause protects voters from both direct and *indirect* impediments to their ability to participate in the political process and from subversions of their constitutional rights. *Id.* And, incorporating a treatise that the 1891 Constitution's framers also heavily relied upon, the Court noted that election laws must be "impartial" or else they are void. *Id.* (quoting Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union,* 1370 (8th ed. 1903)). Kentucky's Free and Equal Elections Clause thus stands as a constitutional barrier to vote dilution, direct and indirect impediments to

political participation, and biased, one-sided election laws. Consistent with these foundational principles, the Clause also prohibits partisan gerrymandering.

IV. PERSUASIVE AUTHORITY FROM OTHER STATES CORRECTLY RECOGNIZES THAT FREE ELECTIONS CLAUSES CONSTRAIN PARTISAN GERRYMANDERING.

The Circuit Court's failure to apply the Free and Equal Elections Clause to partisan manipulation of electoral districts is also at odds with precedent in other states with similar clauses. Courts in several states have recently invoked their Free Elections Clauses to reject both Democratic and Republican gerrymanders.

As previously described, the Pennsylvania Supreme Court has long recognized that its Free and Equal Elections Clause prohibits legislative manipulation of electoral districts. *See Patterson*, 60 Pa. at 75. In 2018, the Court applied this precedent and expressly held that its Clause bars partisan gerrymandering. In *League of Women Voters of Pa.,* the Court explained that the "plain and expansive sweep" of the Clause's words were "indicative of the framers' intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government." 178 A.3d at 804. According to the Court, the Free and Equal Elections Clause "provides the people of this Commonwealth an equally effective power to select the representative of his or her choice[] and bars the dilution of the people's power to do so." *Id.* at 814. This Pennsylvania ruling is particularly significant given the shared text and history of the Pennsylvania and Kentucky clauses. As this Court has recognized, "decisions of the Supreme Court of Pennsylvania, when interpreting provisions of the

Pennsylvania Constitution similar to that of the Kentucky Constitution, are very persuasive to the Courts of the Commonwealth and should be given as much deference as any non-binding authority receives." *Yeoman v. Com., Health Pol'y Bd.*, 983 S.W.2d 459, 473 (Ky. 1998).

Pennsylvania is not alone. In 2022, a Maryland Circuit Court invalidated a congressional redistricting plan as an unlawful partisan gerrymander (favoring Democrats) under the state's Free Elections Clause (which provides that elections shall be "free and frequent"), among other provisions. *See Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194 (Md. Cir. Ct. Mar. 25, 2022). Examining the Clause's history, as well as case law "broadly interpret[ing]" the Clause in other contexts, the court concluded that it "afford[s] a greater protection" to Maryland voters "than is provided under the Federal Constitution." *Id*. at *14. According to the court, a "pivotal goal" of the Clause is "to protect the right of political participation in Congressional elections," and the challenged redistricting plan violated this right by "suppress[ing] the voice of Republican voters." *Id.* at *14, *46.

North Carolina presents a more complicated story, but the better reading of recent case law supports a broader construction of the Free and Equal Elections Clause. In February 2022, the North Carolina Supreme Court rejected congressional and state legislative district plans as unlawful partisan gerrymanders (favoring Republicans) under the state constitution's Free Elections, Equal Protection, Free Speech, and Freedom of Assembly Clauses. *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022). As to the Free Elections Clause, which provides that "[a]ll elections shall be free," the court provided a thorough historical analysis. The Court correctly traced the Clause's lineage to the English Bill of

Rights and noted the "key principle" that it prohibits manipulating district lines to dilute votes for electoral gain. *Id.* at 373. The Court examined other states' experiences with free elections clauses, including Pennsylvania's. *Id.* 373-74. And, consistent with the state constitution's core commitment to popular sovereignty, the Court emphasized that "elections are not free if voters are denied equal voting power in the democratic processes which maintain our constitutional system of government." *Id.* at 376.

Unlike Kentucky, which has a rich history of a nonpartisan judiciary, judges are elected in partisan races in North Carolina. Earlier this year, shortly after the North Carolina Supreme Court's composition changed based on the November 2022 election, the court took the unprecedented step of "rehearing" *Harper*, even though the prior decision was only a few months old and there had been no change in the underlying law or facts. It then reversed itself. *Harper v. Hall,* 886 S.E.2d 393 (N.C. 2023). Expressly mimicking the U.S. Supreme Court's decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), the North Carolina Supreme Court's new majority held that partisan gerrymandering claims present nonjusticiable political questions. Addressing the Free Elections Clause, the new majority agreed that the English Bill of Rights influenced the Clause but nevertheless construed the Clause narrowly to apply only when a law "prevents a voter from voting according to one's judgment" or "votes are not accurately counted." *Id.* at 439. This conclusion is historically dubious, and the case's highly unusual posture undermines its persuasive value. Significantly, the Court's analysis is also distinguishable because Kentucky's Free and Equal Elections Clause, unlike North Carolina's, derives from Pennsylvania's Clause, which, according to its adopters, bars legislative machinations that dilute the power of disfavored voters. Moreover, the North Carolina Supreme Court's new

decision to follow the U.S. Supreme Court's federal constitutional jurisprudence ignores the significant textual differences between the U.S. and state constitutions. Essentially, the North Carolina ruling renders the state constitution's broader allocation of voter rights and protections superfluous. *See* Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. at 129.

Beyond these cases, several more state courts have, like Kentucky's, long interpreted their states' Free Elections Clauses to embrace anti-vote dilution principles. These rulings are contrary to the Circuit Court's conclusion that Kentucky's Clause is limited to election-day interferences with vote-placement and vote-counting processes. For instance, the Illinois Supreme Court explained in *People v. Hoffman* that the guarantee that "elections shall be free and equal" means, in part, that "the vote of every elector is equal in its influence upon the result to the vote of every other elector; when each ballot is as effective as every other ballot." 5 N.E. 596, 599 (Ill. 1886). Notably, delegates to the Kentucky 1890-91 convention expressly referenced the Illinois Supreme Court's *Hoffman* decision when discussing a Free and Equal Elections Clause for Kentucky. *See* 1890-91 Debates, Vol. I at 670-71 (Oct. 17, 1890). The high courts of Indiana and Oregon have conveyed similar understandings. *See Oviatt v. Behme,* 147 N.E.2d 897, 901 (Ind. 1958) ("The constitutional provision that 'all elections shall be free and equal' means that 'the vote of every elector is equal in its influence upon the result to the vote of every other elector'."); *Ladd v. Holmes*, 66 P. 714, 718 (Or. 1901) ("Every elector has the right to have his vote count for all it is worth, in proportion to the whole number of qualified electors desiring to exercise their privilege."). Thus, while these courts have not yet specifically applied their Free Elections Clauses to partisan gerrymandering, they have embraced the

underlying logic of such claims and are contrary to the Circuit Court's narrow interpretation of the Kentucky Constitution.[4] Consistent with these rulings, this Court should hold that Kentucky's Free and Equal Elections Clause guarantees to Kentuckians of all partisan stripes the right to exert electoral influence on equal terms, free from the distortions of doctored electoral districts.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully urges this Court to reverse the Circuit Court's ruling and hold that Kentucky's Free and Equal Elections Clause (Ky. Const. § 6) prohibits partisan gerrymandering.

[4] While not involving claims brought under free elections clauses, the highest courts of several other states have recently held that their state constitutions prohibit partisan gerrymandering. *Matter of 2021 Redistricting Cases*, 528 P.3d 40, 57-58, 92 (Alaska 2023) (holding that partisan gerrymandering is unconstitutional under the Alaska Constitution's equal protection clause); Order, *3-4, *Grisham v. Van Soelen*, No. S-1-SC-39481, (N.M. S. Ct. July 5, 2023) (holding that partisan gerrymandering claims are justiciable under the New Mexico Constitution's equal protection clause). These cases reinforce the idea that state constitutions go beyond the U.S. Constitution in protecting voters against partisan gerrymandering. *See Rucho,* 139 S. Ct. at 2507 ("Our conclusion [that partisan gerrymandering claims are nonjusticiable under the U.S. Constitution] does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. . . . Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.").

Respectfully submitted,

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