To: Jonathan Cervas, Ph.D. & Bernard Grofman, Ph.D.

From: Scott Matsuda

Date: 11/29/2022

Case Briefing **[KY]**

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| **Citation** | * *Graham v. Adams*, No. 22-CI-00047 (Ky. Cir. Ct. Nov. 10, 2022). |
| **Judicial Breakdown / Partisan or Nonpartisan** | * Franklin Cir. Ct. Judge Thomas D. Wingate[[1]](#footnote-1) issued the opinion. |
| **Procedural History** | * On 1/20/2022, 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.   + 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 KY Constitution.     - Additionally, Plaintiffs contend that HB 2 violates Section 33 of the KY 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 KY Constitution. * On 1/27/2022, the Commonwealth of KY, 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 and entered on 2/10/2022. * On 1/28/2022, Plaintiffs moved for injunctive relief to enjoin the use of HB 2 and SB 3 in the 2022 election cycle.   + On 2/4/2022, the Commonwealth filed a crossclaim and counterclaim, challenging the constitutionality of the prior 2012/2013 districts and asking the court to permanently enjoin the use of those apportionment plans in any future election.   + Additionally, on 2/4/2022, the Commonwealth and Secretary Adams jointly filed a Motion to Dismiss. * On 2/10/2022, the Court heard oral argument.   + By Order entered 2/17/2022, the Court denied the Commonwealth’s and Secretary Adams’ Motion to Dismiss finding that it was premature.   + Additionally, by separate Order entered 2/17/2022, 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.” * A bench trial was held on 4/5–4/7/2022.   + At trial, Plaintiffs offered 10 exhibits into evidence and the Commonwealth offered 35 exhibits.   + Additionally, Plaintiffs proffered expert testimony from 2 witnesses: Dr. Kosuke Imai[[2]](#footnote-2) and Dr. Devin Caughey,[[3]](#footnote-3) and lay testimony from three 3 witnesses: Representative Derrick Graham, Jill Robinson, and Trey Heineman (*see* lay testimony at pp. 18–24).   + In rebuttal, the Commonwealth proffered expert testimony from 2 witnesses: Sean Trende[[4]](#footnote-4) and Dr. Stephen Voss.[[5]](#footnote-5) |
| **Disposition** | * Judgment affirming the constitutionality of HB 2 and SB 3. |
| **Facts** | * The 2020 Census determined that KY’s population is 4,505,836.   + Thus, KY is entitled to 6 Congressional representatives.     - The ideal population for the 6 Congressional Districts is 750,973 people.   + Section 33 of the KY Constitution establishes 100 state House Districts     - The ideal population for the 100 [house] districts is 45,058 people. * The General Assembly passed HB 2 (maps for state house districts) on 1/8/2022, and it was then delivered to Governor Andy Besehar.   + On 1/19/2022, the Governor vetoed HB 2 opining that the redistricting plan is an unconstitutional partisan gerrymander, excessively splits counties, and dilutes the voices of certain minority communities.   + The General Assembly overrode the Governor’s veto on 1/20/2022, and HB 2 became effective immediately. * Similarly, SB 3 (maps for congressional districts) was passed and delivered to the Governor on 1/8/2022.   + On 1/19/2022, the Governor 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.   + The General Assembly overrode the Governor’s veto on 1/20/2022, and SB 3 became effective immediately. |
| **Issue(s) or**  **Question(s)**  **Presented** | * (1) Whether House Bill 2 and Senate Bill 3 were partisan gerrymanders. * (2) Whether the Kentucky Constitution expressly prohibits partisan gerrymandering. |
| **The Rule(s)** | * Standing   + The *Sexton* Court adopted the *Lujan* test and 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.” * Associational Standing   + At the federal level, the United States Supreme Court has established three requirements that must be met to demonstrate associational standing:     - (1) its members would otherwise have standing to sue in their own right;     - (2) the interests it seeks to protect are germane to the organization’s purpose; and     - (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit.   + (Note: Although the Kentucky Supreme Court had not formally adopted the second and third prongs of the federal test for associational standing, because the Kentucky Democratic Party had met the first element for associational standing, the Court felt compelled to assess whether the Kentucky Democratic Party met the remaining elements, and determined that they had done so.) * Presumed Constitutionality of Acts of the General Assembly   + Acts of the General Assembly are given a “strong presumption of constitutionality.”   + A party challenging a duly enacted statute by the General Assembly is faced with the burden of proving the challenged act unconstitutional.     - In order to declare an act unconstitutional, the constitutional violation “must be clear, complete and unmistakable.”     - The Court is bound to resolve “any doubt in favor of constitutionality rather than unconstitutionality.” * Ky. Const.   + **§1** – Free Speech/Disfavored Status Based on Political Affiliations     - 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. . . .”   + **§2** – Arbitrary Exercise of Power     - “Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.”   + **§3** – Equal Protection     - All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as provided in this Constitution, and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment.   + **§6** – Free Elections     - “All elections shall be free and equal.”   + **§33** – Population Equality and County Integrity     - 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. |
| **Holding(s)** | * (1) Court held that House Bill 2 and Senate Bill 3 were partisan gerrymanders. * (2) However, the Court held that although HB 2 and SB 3 were partisan gerrymanders, Plaintiffs failed to plead cognizable claims that HB 2 and SB 3 violate Sections 1, 2, 3, 6, or 33 of the Kentucky Constitution, because the Kentucky Constitution does not expressly prohibit partisan gerrymandering and does not require the General Assembly to minimize the number of times that the required split counties are further divided. |
| **Rationale** | * **Plaintiffs’ claims are justiciable.**   + 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.   + 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).   + 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).   + “[T]he 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.” ’ ” * **Plaintiffs have standing to challenge HB 2 and SB 3. *See id.* at 26–38.**   + There are over one hundred 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. *See Ragland v. Anderson*, 100 S.W. 865 (Ky. 1907); *Stiglitz v. Schardien*, 40 S.W.2d 315 (Ky. 1931).   + “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.” *Stiglitz*, 40 S.W.2d at 317–18. * **HB 2 is a Partisan Gerrymander.**   + 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 also confirmed that under HB 2, Democratic electors in Jefferson and Fayette Counties have been cracked and packed to create additional Republican safe districts.   + Second, 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.     - 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.   + Third, 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. * **SB 3 is a Partisan Gerrymander.**   + 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.   + 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; 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 years.       * 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 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.         + 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.       * Dr. Voss also 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. * **Notwithstanding, the Kentucky Constitution does not expressly prohibit partisan gerrymandering.**   + **Section 33 Claim, Population Equality and 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.       * The *Jensen* 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.”       * Thus, the *Jensen* Court held that under Section 33 of the Kentucky Constitution there is no prohibition against partisan gerrymandering or excessively dividing the split counties.     - The Court must evaluate HB 2 under the standard set for Section 33 challenges.       * HB 2 divides exactly 23 counties (the minimum number of counties that must be divided) and each district is within the +/- 5% range of the required 45,058 people.     - Although Plaintiffs have demonstrated that HB 2 is a partisan gerrymander and that HB 2 excessively splits the 23 counties more times than necessary, Kentucky Supreme Court precedent, in this Court’s eyes, does not prohibit such.   + **Section 6 Claim, Free Elections**     - Section 6 has no analogue in the federal Constitution, which signals it was crafted to ensure greater protection for Kentuckians.       * 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.       * 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 adoption of the phrase from the English Declaration of Rights.         + “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 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.       * 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.       * 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.     - 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.     - 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.   + **Equal Protection Claims, Sections 1, 2, and 3.**     - 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.         + “[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.         + 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.   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.   * + - Plaintiffs do not challenge that the population variation of these districts is unconstitutional, and Plaintiffs have not alleged that SB 3 is a racial gerrymander; therefore, HB 2 and SB 3 do not violate the Kentucky Constitution’s guarantee of equal protection.   + **Section I Claim, Free Speech/Disfavored Status Based on Political Affiliation.**     - The Court appreciates the opinion issued by the North Carolina Supreme Court [of which Plaintiffs heavily rely], 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.     - 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.     - Accordingly, the Court must reject Plaintiffs’ Section 1 claim.   + **Section II Claim, Unconstitutional Arbitrary Exercise of Power.**     - 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.       * The Kentucky Constitution does not explicitly forbid the consideration of partisan interests in apportioning representation.     - 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.     - 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.       * 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. * **Commonwealth’s crossclaim and counterclaim is rendered moot.**   + Court holds that the Commonwealth is not entitled to judgment on its crossclaim and counterclaim because, given the holding in this Opinion and Order [affirming the constitutionality of HB 2 and SB 3], the Commonwealth’s crossclaim and counterclaim is moot as it pertains to the relief sought, is not otherwise independently ripe for review, and this Court does not issue advisory opinions. |
| **Arguments of Parties** | * 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.   + 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.   + 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. * 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.   + 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.     - Partisan gerrymandering creates the same harm as malapportionment by giving certain electors’ votes more power than others.     - 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.     - 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.     - 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. |
| **Notes/**  **Reactions** | * N/a. |

1. Information regarding Judge Wingate’s political affiliation was not available via a desktop search. Wingate was reelected without opposition in 2014 in a nonpartisan election, winning an eight-year term which expires on 1/1/2023. *See Thomas D. Wingate*, Ballotpedia, <https://ballotpedia.org/Thomas_D._Wingate> (last visited Nov. 29, 2022). [↑](#footnote-ref-1)
2. Dr. Imai used Monte Carlo simulation algorithms to generate a representative set of possible redistricting maps under a specified set of criteria. Dr. Imai testified that his analysis shows that HB 2 makes Democratic leaning districts more competitive while Republican leaning districts become safer; he testified that this clearly demonstrates that HB 2 is a partisan gerrymander. He also opined that SB 3’s First District was less compact than 99% of the simulated plans. *Id.* at 5–10. [↑](#footnote-ref-2)
3. Dr. Caughey conducted his analysis in part using a publicly available website, PlanScore (which calculates efficiency gap, declination, and other metrics). He stated that HB 2 uses both packing and cracking to maximize partisan gains statewide. Dr. Caughey concluded that HB 2 is the most extreme advantage for a party in a legislative map that he has ever seen. *Id.* at 10–13. [↑](#footnote-ref-3)
4. 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.” 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.” *Id.* at 13–16. [↑](#footnote-ref-4)
5. Dr. Voss used Planscore to review and respond to Dr. Caughey’s testimony. Dr. Voss stated that Kentucky naturally has a higher Efficiency Gap based on its political geography, but did not find any material inaccuracies in Dr. Caughey’s work; he 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. As to SB3, 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.”  *Id.* at 16–18. [↑](#footnote-ref-5)