ELECTRONICALLY FILED
2022 Mar 21 PM 9:09
CLERK OF THE WYANDOTTE COUNTY DISTRICT COURT
CASE NUMBER: 2022-CV-000089

IN THE TWENTY-NINTH JUDICIAL DISTRICT
WYANDOTTE COUNTY DISTRICT COURT
CIVIL DEPARTMENT

FAITH RIVERA, DIOSSELYN TOT-VELASQUEZ, KIMBERLY WEAVER, PARIS RAITE, DONNAVAN DILLON, and LOUD LIGHT,

Plaintiffs,

v.

SCOTT SCHWAB, in his official capacity as Kansas Secretary of State, and MICHAEL ABBOTT, in his official capacity as Election Commissioner of Wyandotte County, Kansas,

Defendants.

Case No.: 2022-CV-000089
(Consolidated with 2022-CV-000090)

Division: 6

TOM ALONZO, SHARON AL-UQDAH, AMY CARTER, CONNIE BROWN COLLINS, SHEYVETTE DINKENS, MELINDA LAVON, ANA MARCELA MALDONADO MORALES, LIZ MEITL, RICHARD NOBLES, ROSE SCHWAB, and ANNA WHITE,

Plaintiffs,

v.

SCOTT SCHWAB, Kansas Secretary of State and Kansas Chief Election Officer, in his official capacity, and MICHAEL ABBOTT, Wyandotte County Election Commissioner, in his official capacity,

Defendants.

RIVERA PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION

In *Rucho v. Common Cause*, the U.S. Supreme Court reaffirmed that excessive partisan gerrymandering is "incompatible with democratic principles." 139 S. Ct. 2484, 2506 (2019) (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015)). Despite concluding that adjudication of such claims was outside the *federal* judiciary's limited grant of jurisdiction, the Court expressly noted that *states* can "actively address[] the issue," including through "[p]rovisions in state statutes and state constitutions." *Id*. at 2507. Taking up this mantle, state courts have invalidated partisan gerrymanders under various provisions of their state constitutions—including those ensuring equal protection for all citizens, safeguarding the right to vote, and protecting free speech and assembly. That is precisely what Plaintiffs seek here: vindication, under the corresponding provisions of the Kansas Constitution, of a right that is "[preservative] of other basic civil and political rights, and [] the bed-rock of our free political system." *Moore v. Shanahan*, 207 Kan. 645, 649, 486 P.2d 506 (1971).

Defendants now move to dismiss, leading with an argument that is as audacious as it is indefensible: that the Elections Clause prevents this Court, and *all courts*, from remedying violations of the Kansas Constitution as applied to congressional redistricting. But Defendants' revisionist theory—which relies largely on citations to dissenting opinions and inapposite cases—is irreconcilable with *Rucho* and an unbroken line of U.S. Supreme Court precedent dating back a century, which holds that the Elections Clause does not permit state legislatures to evade the strictures of state constitutions as construed by state courts. Nor can Defendants' theory be squared with federal law *mandating* that congressional districting plans comply with state constitutions and conferring remedial redistricting authority on state courts. This unanimous precedent notwithstanding, Defendants baldly claim that the Kansas judiciary must stand down and allow the Legislature to violate Kansans' constitutional rights, with courts powerless to intervene as

voters are forced to cast their ballots under an unconstitutional congressional plan. No source of authority—not *Rucho*, not the U.S. Constitution, and certainly not the Kansas Constitution—countenances this unjust result.

Defendants' other arguments are wrong in theory and as applied to this case. This matter is justiciable: the Court has the power and obligation to ensure that the constitutional rights of Kansans are protected. And Plaintiffs have stated viable claims for relief, including against Defendant Abbott, who is charged with administering elections in the county at the center of Plaintiffs' claims. For these reasons and those that follow, Defendants' motion to dismiss should be denied, and Plaintiffs should be permitted to present their claims at trial.

BACKGROUND

I. Over the past decade, Kansas became more populated and more diverse.

Between 2010 and 2020, Kansas's population increased by about 3 percent. Petition for Declaratory & Injunctive Relief ("Pet.") ¶ 24. The results of the 2020 decennial census revealed that this growth was concentrated in the state's minority communities and urban areas. *Id.* While the state's white population *declined* over the past ten years, its minority population grew by nearly 30 percent. *Id.* ¶ 25. Meanwhile, the state's urban metro areas expanded rapidly, including the Kansas City area: Wyandotte and Johnson Counties grew by over 7 and 12 percent, respectively. *Id.* ¶ 31. By contrast, the populations of Kansas's rural areas, particularly the counties in the western part of the state, steadily declined. *Id.* ¶ 30.

A consequence of these demographic changes is that the Sunflower State—long a reliable bastion of Republican politics—has become more politically competitive. Elections in Kansas are heavily racially polarized; for example, a *New York Times* exit poll taken during the 2020 presidential election found that white Kansans preferred former President Donald Trump by a margin of 59 to 38 percent, while nonwhite voters supported President Joe Biden by a margin of

62 to 35 percent. *Id.* ¶ 28. Accordingly, as the state's minority populations have grown, so has its Democratic electorate. The result has been closer and more competitive elections. For example, Kansans elected Democratic Governor Laura Kelly in 2018, during a midterm election cycle that also saw healthy competition between the major political parties in two of the state's four congressional districts. *Id.* ¶¶ 35, 39. Notably, Democrat Sharice Davids—an openly LGBTQ Native American—won in the Third Congressional District, which had been held by Republican incumbent Kevin Yoder since 2011, by nearly ten points. *Id.* ¶ 36.

II. Ad Astra 2 was enacted by the Legislature in a rushed, opaque, and politically charged process.

Against this political and demographic backdrop, the Legislature undertook the post-census redistricting required by the U.S. Constitution. The Legislature's true motivations were laid bare early in the process. In the fall of 2020, then-Senate President Susan Wagle promised during a closed-door speech to Republican donors that the Legislature would deliver "a Republican bill that gives us four Republican congressmen, that takes out Sharice Davids in the Third." Pet. ¶ 2. She went on: "We can do that. I guarantee you. We can draw four Republican congressional [districts]." *Id.* As Plaintiffs allege, the redistricting process that followed was far from a model of openness and transparency—and it ultimately delivered on Senator Wagle's promise.

The process began in 2021, with the Legislature's redistricting committees holding 14 listening sessions statewide during the summer and fall. *Id.* ¶¶ 52–53. Republicans consistently touted the purported transparency of the process as illustrated by these listening sessions, but they were often announced with less than 24 hours' notice and held in the middle of the workday, making attendance impossible for many citizens. *Id.* ¶ 53. Still, the message delivered by members of the public during the listening sessions was clear: keep the Kansas City metro area—Wyandotte

County and the northern portions of Johnson County—whole in the Third Congressional District. *Id.* ¶¶ 54–55.

In early January 2022, the redistricting committees turned to the task of drawing their proposed maps and adopted specific criteria to govern the drawing of the congressional plan: (1) the plan "will have neither the purpose nor the effect of diluting minority voting strength"; (2) "[d]istricts should be as compact as possible and contiguous"; (3) "[t]here should be recognition of communities of interest"; (4) "[t]he core of existing congressional districts should be preserved when considering the communities of interest to the extent possible"; and (5) "[w]hole counties should be in the same congressional district to the extent possible" because, among other reasons, "[c]ounty lines are meaningful in Kansas and Kansas counties historically have been significant political units." *Id.* ¶ 56. Although the Legislature accepted map input from the public, Republicans made the submission process strikingly onerous, costly, and time-intensive. *Id.* ¶ 57. Some groups—most notably, the Kansas League of Women Voters—still managed to submit proposed congressional maps. *Id.* ¶ 59.

Republican lawmakers introduced their own preferred congressional map into each chamber's respective redistricting committee in early January, dubbed the "Ad Astra 2" map under the committees' naming convention. *Id.* ¶¶ 50, 60. Republicans zealously guarded the details of the map's origins: throughout the rushed committee hearings, which included questioning by the public, not one Republican would answer direct questions about their preferred map's architects. *Id.* ¶¶ 4, 60, 63. Public testimony was also largely ignored in the map's creation. The legislative record includes the testimony of Dr. Mildred Edwards, chief of staff to the Wyandotte County mayor, who implored the Senate redistricting committee not to split Wyandotte County. *Id.* ¶ 61. Dr. Edwards reminded both committees that Wyandotte County has had a unified government

since 1997, which administers government services across the county. *Id.* Davis Hammet, president of Loud Light—one of the Plaintiffs in this action—spoke about the importance of keeping together in the Second Congressional District the state's elite colleges and universities in Lawrence, Manhattan, Topeka, and Emporia. *Id.* ¶ 62. Neither request was ultimately reflected in Ad Astra 2.

Even though Ad Astra 2 did not take into account clear public testimony, and notwithstanding that opponents of the map outnumbered its proponents by nearly ten to one, Republicans pushed the maps through the redistricting committees, with not one Democratic vote in its favor. *Id.* ¶ 60. And in late January—less than one week after the map was first introduced in the Senate redistricting committee—the Legislature's Republican supermajorities passed Ad Astra 2 into law without a single Democratic vote. *Id.* ¶ 66. Legislators from both parties, however, were vocal in their displeasure with the entire redistricting process. Representative Randy Garber, a Republican from Sabetha, said to local media, "I think our party is being bully-ish about this and not considering everybody else." *Id.* ¶ 64. Democrats agreed: Representative Stephanie Clayton of Johnson County remarked, "I've found the transparency in this process to be about as fake as my eyelashes." *Id.* ¶ 60.

Other Republicans—including some of Ad Astra 2's most significant proponents—openly acknowledged that a partisan game was afoot. Representative Steve Huebert made the point in open debate when describing the creation of the enacted plan: "Gerrymandering, partisan politics, all those different things that are being discussed and talked about right now, are just things that happen." *Id.* ¶ 65. "They always have and they always will," he concluded. *Id*.

Governor Kelly vetoed Ad Astra 2 on February 3. *Id.* ¶ 67. In her veto statement, she highlighted the communities of interest and neighborhoods that were cleaved in half by the

Republicans' map, including Wyandotte County: "Without explanation, this map shifts 46% of the Black population and 33% of the Hispanic population out of the third congressional district by dividing the Hispanic neighborhoods of Quindaro Bluffs, Bethel-Welborn, Strawberry Hill, Armourdale and others from Argentine, Turner and the rest of Kansas City, Kansas south of I-70." *Id.* (quoting *Governor Laura Kelly Vetoes Congressional Redistricting Map, Senate Bill 355*, Office of Governor (Feb. 3, 2022), https://governor.kansas.gov/governor-laura-kelly-vetoes-congressional-redistricting-map-senate-bill-355). Following Governor Kelly's veto, the Republican supermajority resorted to political brinksmanship in the final push to make Ad Astra 2 law. *Id.* ¶ 50. The Republican leadership brought a seriously ill member of their delegation to the floor to cast his vote in favor and resorted to political horse-trading with radical backbenchers to secure support—including a guarantee to advance a bill permitting off-label prescriptions of ivermectin to treat COVID-19 and philosophical exemptions for *all* childhood vaccines. *Id.* ¶¶ 69–70. With these votes secured, the Republican supermajority overrode Governor Kelly's veto on a strict party-line vote, making Ad Astra 2 law on February 9, 2022. *Id.* ¶ 69.

III. Ad Astra 2 is an egregious partisan gerrymander that dilutes minority voting power.

Ad Astra 2 is a careful and deliberate gerrymander, one that dilutes the voting strength of not only the state's Democratic voters, but its minority citizens as well. The telltale signs of impermissible partisan purpose are numerous:

- Ad Astra 2 unnecessarily and inexplicably shifts large numbers of Kansans out of their prior districts, with no population-based need or other legitimate justification, in violation of the Legislature's own redistricting criteria. Pet. ¶¶ 72, 88.

- Ad Astra 2 targets the Democratic Party's most significant strongholds in Wyandotte and Douglas Counties, cracking longstanding Democratic communities of interest and

the minority populations that live there and subsuming them within an expansive, white, rural district. *Id.* ¶¶ 4, 6, 72, 81–87, 89.

- Ad Astra 2 cleaves Wyandotte County notwithstanding its historic placement in a single district, the unified government that serves the entire county, and repeated testimony to keep the county whole. *Id.* ¶¶ 77–79.

- Ad Astra 2 splits most of the university city of Lawrence from the rest of Douglas County and separates Manhattan and Fort Riley from Junction City, despite close geographical and community ties between the two. *Id.* ¶¶ 7, 72, 90–96.

- Ad Astra 2 splits the state's four Native American reservations among two districts. *Id.* ¶¶ 72, 97–99.

- Ad Astra 2 is comprised of meandering, oddly shaped, noncompact districts. *Id.* ¶¶ 4, 72, 100–03.

- Ad Astra 2 does not adhere to the redistricting guidelines the Legislature itself adopted to govern its drawing of a new congressional plan. *Id.* ¶ 72.

- Ad Astra 2 creates three very safe Republican districts and one Republican-leaning district, effectively foreclosing the ability of Democrats to elect their candidate of choice in any district. *Id.* ¶¶ 73–76.

Overall, Ad Astra 2 is replete with textbook examples of "cracking": the deliberate dispersal of voters of a disfavored party across multiple districts in order to minimize the potency of their votes, all at the expense of minority Kansans. *Id.* ¶ 72. The map's treatment of Wyandotte County is particularly suspect: since at least 1923, the county has almost always been kept whole within a single district, *id.* ¶ 5—a configuration that, as a federal court concluded, "maintain[s] block voting strength in areas where [minority groups] live closely together" and "helps them make

their voices felt." *O'Sullivan v. Brier*, 540 F. Supp. 1200, 1204 (D. Kan. 1982) (three-judge court); *accord Essex v. Kobach*, 874 F. Supp. 2d 1069, 1086 (D. Kan. 2012) (per curiam) (three-judge court) ("Wyandotte County should be placed in a single district so that the voting power of its large minority population may not be diluted.").

IV. Plaintiffs initiated this lawsuit to vindicate their fundamental constitutional rights.

Five days after Ad Astra 2 became law, Plaintiffs filed this lawsuit challenging the plan as both a partisan and racial gerrymander in violation of Article 5, Section 1 of the Kansas Constitution and Sections 1, 2, 3, and 11 of the Kansas Bill of Rights. *See generally* Pet. That same day, a separate group of Kansas voters filed a similar challenge in this Court. *See generally* Petition for Declaratory & Injunctive Relief & Mandamus Pursuant to K.S.A. Chapter 60, *Alonzo v. Schwab*, No. 2022-CV-000090 (Wyandotte Cnty. Dist. Ct. Feb. 14, 2022).

Defendants subsequently filed emergency petitions for mandamus and quo warranto with the Kansas Supreme Court, raising many of the same arguments they advance in their pending motion to dismiss; in particular, that certain provisions of the *federal* constitution prevent this (and indeed all) *state* courts from exercising their lawful jurisdiction over these proceedings. In a unanimous opinion, the Kansas Supreme Court denied the petitions, which returned the cases back to this Court. *See Schwab v. Klapper*, No. 124,849, 2022 WL 627748, at *4 (Kan. Mar. 4, 2022). Defendants filed their motion to dismiss shortly thereafter. *See generally* Mot. to Dismiss Pls.' Pet. for Declaratory & Injunctive Relief ("Mot."). On March 10, the Court consolidated this case with the *Alonzo* case. Trial is set to begin in two weeks.

LEGAL STANDARD

"The granting of motions to dismiss has not been favored by [Kansas] courts." *Halley v. Barnabe*, 271 Kan. 652, 656, 24 P.3d 140 (2001). "When a motion to dismiss under K.S.A. 60-212(b)(6) raises an issue concerning the legal sufficiency of a claim, the question must be decided

from the well-pleaded facts of plaintiff's petition." *Id.* (quoting *Ripley v. Tolbert*, 260 Kan. 491, 493, 921 P.2d 1210 (1996)). "The question is whether, in the light most favorable to [plaintiffs] and with every doubt resolved in their favor, the petition states any valid claim for relief." *State ex rel. Slusher v. City of Leavenworth*, 279 Kan. 789, 790, 112 P.3d 131 (2005). The Court is "required to assume that the facts alleged by the plaintiffs are true" and "to make any reasonable inferences to be drawn from those facts." *Halley*, 271 Kan. at 656 (quoting *Noel v. Pizza Hut, Inc.*, 15 Kan. App. 2d 225, 231–32, 805 P.2d 1244 (1991)). Ultimately, the Court must "determine whether those pleaded facts and inferences state a claim, not only on the theory which may be espoused by the plaintiffs, but on *any possible theory* [the Court] can divine." *Id.* (quoting *Noel*, 15 Kan. App. 2d at 231). "Dismissal is justified only when the allegations of the petition clearly demonstrate petitioners do not have a claim." *Slusher*, 279 Kan. at 790.

ARGUMENT

Defendants ask this Court to both misapply the Elections Clause and principles of justiciability *and* ignore the comprehensive and sufficient allegations contained in Plaintiffs' petition. The Court should decline both invitations and deny Defendants' motion to dismiss.

I. The Elections Clause does not foreclose state court judicial review of congressional districting plans under state constitutions.

Defendants argue that the Elections Clause immunizes a legislature's congressional redistricting from state constitutional requirements, and thus bars Kansas courts from reviewing the state's new congressional plan under the Kansas Constitution. Not so: the U.S. Supreme Court has reiterated time and time again that congressional districting must be undertaken consistent with the requirements and limitations of state constitutions as interpreted by state courts. Defendants' position is contrary to more than a century of precedent and cannot be reconciled with decisions made by other state courts over the past few months—including in cases where the U.S. Supreme

Court then rejected emergency stay motions from the states whose congressional maps were invalidated. Based on this unbroken line of precedent, the Court should reject Defendants' unsupported and unsound argument.

A. Defendants' Elections Clause theory ignores precedent dating back a century.

Most recently, the Court declared in *Rucho* that "[p]rovisions in . . . state constitutions can provide standards and guidance for state courts to apply" in partisan gerrymandering challenges to congressional districting plans enacted by state legislatures. 139 S. Ct. at 2507. In concluding that state courts retained the authority denied to the federal judiciary to redress partisan gerrymanders, the Court ensured that complaints about redistricting would not "echo into a void." *Id*.

Even before *Rucho*, an unbroken line of precedent dating back a century confirmed not only that state courts may review state laws governing federal elections to determine whether they comply with state constitutions, but that state courts may even adopt court-drawn congressional plans of their own. In *Smiley v. Holm*, 285 U.S. 355 (1932), the Court held that the Elections Clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided," which may include the participation of other branches of state government. *Id*. at 368. *Smiley* made clear that congressional districting legislation must comport with state constitutional requirements, explaining that the Elections Clause does not "render[] inapplicable the conditions which attach to the making of state laws"—including "restriction[s] imposed by state Constitutions upon state Legislatures when exercising the lawmaking power." *Id*. at 365, 369. In two companion cases decided the same day as *Smiley*, the Court reiterated that state courts have authority to strike down congressional plans that violate "the requirements of the Constitution of the state in relation to the enactment of laws." *Koenig v. Flynn*, 285 U.S. 375, 379 (1932); *accord Carroll v. Becker*, 285 U.S. 380, 381–82 (1932). *Smiley* was neither an outlier nor unprecedented: a decade earlier, the Court held that state legislatures

may not enact laws under the Elections Clause that are invalid "under the Constitution and laws of the state." *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916).

The Court recently reaffirmed this principle, holding that "[n]othing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Ariz. State Legislature*, 576 U.S at 817–18. After all, "state legislation in direct conflict with the State's constitution is void." *Id*. at 818. While the Court split over the definition of "the Legislature," no justice asserted that the Elections Clause immunizes congressional districting legislation from the "ordinary lawmaking process." *Id*. at 841 (Roberts, C.J., dissenting). The Court has thus repeatedly rejected Defendants' theory that the Elections Clause allows state legislatures to subvert their state constitutions in enacting congressional districting laws. Instead, the Court has consistently held the opposite: a state legislature's enactments must comply with the state's constitution. Accordingly, state legislatures may not enact congressional districting plans that violate the state's constitution.

In Kansas, one of the conditions that attaches to the making of state laws is compliance with the Kansas Constitution, as interpreted by the Kansas courts. *See Gannon v. State*, 303 Kan. 682, 737, 368 P.3d 1024 (2016) (per curiam) (reaffirming "the Kansas Supreme Court's authority to review legislative enactments for constitutional compliance and to declare a legislative act unconstitutional" (citing *Atkinson v. Woodmansee*, 68 Kan. 71, 91, 74 P. 640 (1903))). And as the Kansas Supreme Court has repeatedly held, "the Legislature is free to act except as it is restricted by the state Constitution." *Leek v. Theis*, 217 Kan. 784, 802, 539 P.2d 304 (1975); *see also id.* at 800 ("[A]n act of a state legislature on a rightful subject of legislation, is valid unless prohibited by the federal or state constitution."); *accord McPherson v. Blacker*, 146 U.S. 1, 25 (1892) ("The

legislative power is the supreme authority, *except as limited by the constitution of the state*[.]" (emphasis added)).[1]

Not only are state courts authorized to evaluate a congressional districting plan's compliance with state constitutional provisions, but the U.S. Supreme Court's decision in *Growe v. Emison*, 507 U.S. 25 (1993), makes clear that state courts have a significant role to play even in undertaking congressional redistricting when necessary. "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." *Id.* at 33 (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam)). The district court reversed in *Growe* thus erred in "ignoring the . . . legitimacy of state *judicial* redistricting." *Id.* at 34.

Defendants' view that the Elections Clause confines congressional redistricting authority exclusively to state legislatures and Congress also conflicts with *Wesberry v. Sanders*, 376 U.S. 1 (1964). There, the U.S. Supreme Court rejected the plurality opinion in *Colegrove v. Green*, 328 U.S. 549 (1946), which had concluded that the Elections Clause's reference to "Congress" deprives federal courts of power to review congressional maps. *Wesberry*, a seminal redistricting decision, explained, "[N]othing in the language of [the Elections Clause] gives support to a

[1] Defendants' reliance on *McPherson*, *see* Mot. 10, is misguided; that case is entirely consistent with the U.S. Supreme Court's later opinions in *Hildebrant* and *Smiley*. The question in *McPherson* was whether Article II of the U.S. Constitution permitted a legislature's chosen method of selecting presidential electors. There was no claim that the legislature's enactment conflicted with the state constitution; instead, the only question was whether the method the legislature chose was permissible under the *federal* constitution, which the Court decided in the affirmative. Defendants' selective quoting of *McPherson* ignores that the Court found that "[w]hat is forbidden or required to be done by a state is forbidden or required of the legislative power *under state constitutions* as they exist." 146 U.S. at 25 (emphasis added). And in the context of the federal constitutional clause at issue, "[t]he right to vote intended to be protected refers to the right to vote *as established by the laws and constitution of the state*." *Id.* at 39 (emphasis added).

construction that would immunize state congressional apportionment laws . . . from the power of courts to protect the constitutional rights of individuals from legislative destruction." 376 U.S. at 6. This reasoning applies equally to state courts enforcing state constitutional protections, which the Court has emphasized apply with equal measure to congressional districting plans. *See Ariz. State Legislature*, 576 U.S. at 817–18.

Thus, if any uncertainty remained as to the ability of state courts to vindicate their constitutions' protections in the realm of congressional districting, "long and continuous interpretation in the course of official action under the law" removes it. *Smiley*, 285 U.S. at 369; *see also Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) ("'Long settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions.'" (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)). In *Smiley*, the Court noted that fidelity to past practice is especially helpful "in the case of constitutional provisions governing the exercise of political rights, and hence subject to constant and careful scrutiny." 285 U.S. at 369. And there, the Court concluded that "the terms of the [Elections Clause] furnish no such clear and definite support for a contrary construction as to justify disregard of the established practice in the states"—including the application of constitutional strictures to the congressional redistricting process. *Id.* Consistent with *Smiley*, *Hildebrant*, *Arizona State Legislature*, and state court cases that have scrutinized congressional maps, the long-settled practice under the Elections Clause is for state courts to review congressional districting schemes for compliance with state constitutional requirements. *See, e.g.*, *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1, 134 n.79, 178 A.3d 737 (2018) ("[T]o read the federal Constitution in a way that limits our Court in its power to remedy violations of our Commonwealth's Constitution is misguided and directly contrary to

bedrock notions of federalism embraced in our federal Constitution, and evinces a lack of respect for state rights.").

Much of Defendants' argument to the contrary focuses on the unremarkable and uncontested proposition that lawmaking in Kansas, including enacting congressional districting plans, is primarily the province of the Kansas Legislature. *See, e.g.*, Mot. 8 (noting that "the 'Constitution provides that state legislatures . . . bear primary responsibility for setting election rules'" (quoting *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring))); *id.* ("The Kansas Constitution vests '[t]he legislative power of the state' in the Kansas Legislature and gives the Governor a role in either approving or vetoing laws the Legislature has made." (alteration in original) (citation omitted) (quoting Kan. Const. art. 2, §§ 1, 14)). But when the Legislature violates the Kansas Constitution, it is the obligation of Kansas courts to "stand between the people and the legislature" and protect Kansans' constitutional rights. *Gannon*, 303 Kan. at 736. Judicial review is not legislating; rather, it ensures that laws do not run afoul of constitutional protections. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Far from "exalt[ing] the judicial over the legislative," this structure merely reflects that the Kansas Constitution—which is, after all, the source of the Legislature's authority in the first place—"should govern the courts when it conflict[s] with legislation." *Gannon*, 303 Kan. at 737. Kansas courts do not supplant legislative prerogatives when they enforce state constitutional limits any more than the U.S. Supreme Court supplants congressional prerogatives when it invalidates federal statutes for violating the U.S. Constitution. And federal courts regularly invalidate statutes Congress enacts under its Article I, Section 8 powers, *see, e.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), and even under its Elections Clause powers, *see, e.g.*, *Citizens United v. FEC*, 558 U.S. 310 (2010).

In short, when legislatures legislate, they must do so consistent with constitutional requirements, and it is this Court's constitutional duty to ensure that Kansas laws, including congressional redistricting plans, do not run afoul of the Kansas Constitution. *See Gannon*, 303 Kan. at 736.[2]

B. Congress has exercised its authority under the Elections Clause to both require state legislatures to comply with state constitutional requirements and authorize state court remedial plans.

Regardless of the meaning of "the Legislature" in the first part of the Elections Clause, the second part indisputably allows Congress—"at any time"—to make its own regulations related to congressional redistricting. U.S. Const. art. I, § 4, cl. 1. Pursuant to this authority, Congress has mandated that states' congressional districting plans must comply with substantive state constitutional provisions.

Under 2 U.S.C. § 2a(c), states must follow federally prescribed procedures for congressional redistricting until a state, "after any apportionment," has redistricted "in the manner provided by the law thereof." As the U.S. Supreme Court explained in *Arizona State Legislature*, the predecessor statutes to Section 2a(c) had mandated those default procedures "unless '*the legislature*' of the State drew district lines." 576 U.S. at 809 (emphasis added). But Congress "eliminated the statutory reference to redistricting by the state 'legislature' and instead directed that" states must redistrict "*in the manner provided by [state] laws*." *Id.* (emphasis added).

[2] Against this backdrop, Defendants' repeated appeal to Justice Alito's nonprecedential statement in *Republican Party of Pennsylvania v. Boockvar* that the Elections Clause "would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate," 141 S. Ct. 1, 2 (2020) (statement of Alito, J.), has no purchase. The issue here is not whether the Court has independent authority to redistrict under any rules it wishes, but whether it has the authority to review the Legislature's congressional plan for compliance with the Kansas Constitution.

Congress made that change out of "respect to the rights, to the established methods, and to the laws of the respective States," and "[i]n view of the very serious evils arising from gerrymanders." *Id.* at 810 (alteration in original) (quoting 47 Cong. Rec. 3436, 3508). And critically, as Justice Scalia explained for the plurality in *Branch v. Smith*, the phrase "the manner provided by state law" encompasses substantive restrictions contained in state constitutions: "[T]he word 'manner' refers to the State's substantive 'policies and preferences' for redistricting, as expressed in a State's statutes, *constitution*, proposed reapportionment plans, or a State's 'traditional districting principles.'" 538 U.S. 254, 277–78 (2003) (plurality opinion) (emphasis added) (citations omitted) (first quoting *White v. Weiser*, 412 U.S. 783, 795 (1973); and then quoting *Abrams v. Johnson*, 521 U.S. 74, 86 (1997)).

Branch also rejected Defendants' argument that state courts cannot draw congressional plans because only legislatures are authorized to do so, *see* Mot. 9, holding that 2 U.S.C. § 2c, which requires single-member congressional districts, "embraces action by *state and federal courts*" to "remedy[] a failure" by the state legislature "to redistrict constitutionally." *Id.* at 270, 272 (emphasis added). Thus, not only has Congress authorized state courts to review congressional districting plans for compliance with state constitutions, but it has also empowered them to establish remedial congressional districting plans "in the manner provided by [state] law." *Id.* at 274.[3]

[3] Citing *Branch*, the U.S. Supreme Court later reaffirmed this interpretation of Section 2a(c): "Congress expressly directed that when a State has been 'redistricted in the manner provided by [state] law'—whether by the legislature, *court decree*, or a commission established by the people's exercise of the initiative—the resulting districts are the ones that presumptively will be used to elect Representatives." *Ariz. State Legislature*, 576 U.S. at 812 (alteration in original) (emphasis added) (citation omitted).

Ultimately, any question as to whether the first part of the Elections Clause permits state courts to review and remedy congressional districting laws under state constitutions is academic; Congress has expressly declared that state courts can do so.

C. None of Defendants' authorities or arguments contradict this state and federal precedent.

Defendants concede that "the Elections Clause requires the 'Legislature' to legislate 'in the *manner* prescribed by the State Constitution.'" Mot. 10 (quoting *Commonwealth ex rel. Dummit v. O'Connell*, 298 Ky. 44, 50, 181 S.W.2d 691 (1944)). But they proceed to offer the sweeping claim that "the courts have no role to play in evaluating laws governing federal elections." *Id*. at 11. This proposition, staggering in its implications, finds no support in the authorities on which Defendants rely.

Defendants' use of the Kentucky Supreme Court's nonbinding opinion in *Dummit* illustrates the shortcomings of their argument. In line with the U.S. Supreme Court precedent described above, *Dummit* acknowledged that "the legislative process must be completed in the manner prescribed by the State Constitution in order to result in a valid enactment." 298 Ky. at 50. But contrary to Defendants' claim that *Dummit* stands for the proposition that state constitutions cannot substantively restrict election laws, *see* Mot. 10, 12, *Dummit* considered *on the merits* whether a state election law "violate[d] Section 6 of the [Kentucky] Constitution guaranteeing free and equal elections," holding that it did not. 298 Ky. at 54. The court's conclusion in that instance that the challenged law did not violate the Kentucky Constitution hardly undermines the court's jurisdiction to consider the matter in the first place. Indeed, the fact that the state court adjudicated the constitutional claim belies Defendants' reliance on the case.

Nor does *Parsons v. Ryan*, 144 Kan. 370, 60 P.2d 910 (1936), provide support for Defendants' position. The issue in *Parsons* was not whether the Kansas Legislature must comply

with the Kansas Constitution when acting pursuant to its powers under the Electors Clause, but instead whether the Kansas Constitution *prevented* the Legislature from exercising its authority to regulate the selection of presidential electors. *See* 144 Kan. 370, 373–74, 60 P.2d 910 (1936). The Kansas Supreme Court decided that it did not, explaining that "[t]he manner selected by the Legislature [to appoint presidential electors] may not be set aside by the courts *simply because the effect is to limit the number of persons whose names may appear as candidates*." *Id.* at 374 (emphasis added). Tellingly, Defendants omit this critical qualifier. Nothing in *Parsons* contradicts the well-established requirement that when exercising its authority under the Electors or Elections Clause, the Legislature must comply with state constitutional requirements.

Defendants also rely on *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020) (per curiam), but that case had nothing to do with state constitutional limitations on state election laws. Instead, the Eighth Circuit's conclusion that a Minnesota consent decree violated the Electors Clause hinged on the applicability of a specific state statute—and nothing more. Indeed, the court expressly noted that it "d[id] not reach" whether "the Legislature's Article II powers concerning presidential elections can be delegated" to other branches of state government. *Id.* at 1060. *Carson* has no relevance to Defendants' arguments here—and it certainly does not stand for the proposition that the U.S. Constitution bars state courts from invalidating state elections laws under state constitutions.[4]

[4] The remainder of Defendants' authorities either predate *Smiley*, *see* Mot. 12 (citing cases from 1864, 1873, and 1887), or do not stand for the propositions for which they are cited. For example, Defendants rely on *State ex rel. Beeson v. Marsh*, 150 Neb. 233, 34 N.W.2d 279 (1948), and *Wood v. State ex rel. Gillespie*, 169 Miss. 790, 142 So. 747 (1932) (per curiam), for the proposition that the Elections Clause preempts state constitutional restrictions on congressional redistricting. But *Beeson* found it "unnecessary [] to consider whether or not there is a conflict between" the legislative enactment "and the state constitutional provision" at issue. 150 Neb. at 246. And in citing *Wood*, Defendants rely only on a concurring opinion; the *Wood* majority expressly declined to consider whether the issues regarding "the validity of said congressional redistricting act are

Finally, it is irrelevant that state legislative districting schemes are automatically reviewed by the Kansas Supreme Court under Article 10, Section 1 of the Kansas Constitution, but no similar automatic review mechanism exists for congressional plans. Defendants overread this provision, asserting that the automatic review requirement for legislative plans somehow provides that state courts may never review congressional plans. *See* Mot 9. But Article 10, Section 1 is merely a special jurisdictional provision providing immediate review by the Kansas Supreme Court; it neither explicitly nor implicitly strips the state's courts of jurisdiction over constitutional challenges to congressional plans. *Cf.* K.S.A. 20-301 (granting this Court "general original jurisdiction of all matters"). Indeed, this bifurcated review process exists in other states. For example, the Florida Constitution similarly provides for immediate review of legislative plans by the state supreme court but provides no similar mechanism for congressional plans. Florida courts have nevertheless asserted jurisdiction over challenges to congressional plans—and invalidated them for unlawful partisan intent. *See Rucho*, 139 S. Ct. at 2507 (citing *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015)).

Defendants fail to identify a single case holding that the Elections Clause bars state courts from reviewing congressional maps enacted by a state legislature under the state's own constitution. Precedent, practice, and policy speak as one: The Elections Clause does not bar state courts from ensuring that congressional districting plans comply with state constitutional prescriptions. This Court should not be the first to adopt Defendants' repeatedly rejected interpretation of the Elections Clause.

political issues resting solely within and between the legislative branches of the state and federal governments." 169 Miss. at 809.

II. Plaintiffs' partisan gerrymandering claims are justiciable under the Kansas Constitution.

Defendants next argue that Plaintiffs' partisan gerrymandering claims are nonjusticiable in Kansas courts. *See* Mot. 15–27. In Defendants' view, these claims present political questions best left to the Legislature and Governor. But their arguments are at odds with state and federal courts' applications of the political question doctrine—including the U.S. Supreme Court's opinion in *Rucho*, on which Defendants principally rely.

A. *Rucho* does not foreclose Plaintiffs' partisan gerrymandering claims.

Defendants repeatedly invoke *Rucho*, where the U.S. Supreme Court held that partisan gerrymandering claims are nonjusticiable in federal courts. *Rucho*, however, explicitly recognized that state courts can and should assume the mantle of policing impermissible partisan gerrymandering: its conclusion that *federal courts* are unable to adjudicate such claims does not "condemn complaints about districting to echo into a void" precisely because "[p]rovisions in state statutes and *state constitutions* can provide standards and guidance for *state courts* to apply." 139 S. Ct. at 2507 (emphasis added); *see also Harper v. Hall*, No. 413PA21, 2022 WL 496215, at *24 (N.C. Feb. 14, 2022) ("*Rucho* was substantially concerned with the role of federal courts in policing partisan gerrymandering, while recognizing the independent capacity of state courts to review such claims under state constitutions as a justification for judicial abnegation at the federal level."), *stay denied sub nom. Moore v. Harper*, 142 S. Ct. 1089 (2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, Nos. 2021-1193, 2021-1198, 2021-1210, 2022 WL 110261, at *33 (Ohio Jan. 12, 2022) (Brunner, J., concurring) (citing *Rucho* for proposition that "state courts interpreting provisions of *state law* that provide for fair districts were held to be capable of providing that relief" and establishing framework to consider districting violations under Ohio's equal protection clause).

In assessing the justiciability of partisan gerrymandering claims under its state constitution, the North Carolina Supreme Court noted that "simply because the [U.S.] Supreme Court has concluded partisan gerrymandering claims are nonjusticiable in federal courts, it does not follow that they are nonjusticiable in North Carolina courts." *Harper*, 2022 WL 496215, at *24. What is true in North Carolina is true in Kansas. As much as Defendants might hope to effectuate a wholesale adoption of *Rucho*'s reasoning and—above all—its conclusion, whether partisan gerrymandering claims are justiciable under *Kansas* law requires a state- and case-specific inquiry. That inquiry, guided by Kansas caselaw, demonstrates that Plaintiffs' claims are readily and necessarily justiciable.

B. Plaintiffs' partisan gerrymandering claims do not present nonjusticiable political questions.

"In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)). The political question doctrine represents only "a narrow exception to that rule." *Id.* at 195.

Notably, as another state's supreme court has concluded, "merely characterizing a case as political in nature will [not] render it immune from judicial scrutiny" under the political question doctrine. *Malone v. Meekins*, 650 P.2d 351, 356 (Alaska 1982). Throughout their motion, Defendants wield the inherently political nature of redistricting as a cudgel to beat back any attempt at judicial scrutiny. But the mere fact that "districting inevitably has and is intended to have substantial political consequences," *In re Stovall* (*Stovall II*), 273 Kan. 731, 734, 45 P.3d 855 (2002) (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)), does not insulate all districting decisions from judicial review. Instead, the political question doctrine requires a "case-by-case inquiry" that considers "whether a matter has in any measure been committed by the Constitution

to another branch of government, or whether the action of that branch exceeds whatever authority has been committed." *Baker v. Carr*, 369 U.S. 186, 211 (1962).

In determining whether a case presents a political question—and thus satisfies the narrow exception to courts' general adjudicative power—Kansas courts apply the factors outlined by the U.S. Supreme Court in *Baker v. Carr*. *See Kan. Bldg. Indus. Workers Comp. Fund v. State*, 302 Kan. 656, 668, 359 P.3d 33 (2015). Defendants focus on three of these factors: a purported "lack of judicially discoverable and manageable standards for resolving" partisan gerrymandering claims; whether there has been a "textually demonstrable constitutional commitment of the issue to a coordinate political department"; and "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. None of these factors supports Defendants' argument that this case presents a nonjusticiable political question.

1. There are judicially discoverable and manageable standards for resolving Plaintiffs' partisan gerrymandering claims.

Defendants primarily contend that "[p]olitical gerrymandering cases fit squarely within th[e] category" of cases that lack judicially discoverable and manageable standards for resolving them. Mot. 17. They are wrong: "[T]here are sufficient historical precedents to delineate judicially discoverable and manageable standards for resolving the issues at bar." *VanSickle v. Shanahan*, 212 Kan. 426, 439, 511 P.2d 223 (1973). As in other states where courts have adjudicated partisan gerrymandering claims, the Kansas Constitution contains provisions that are meaningfully different from those found in the U.S. Constitution, which provide the protections that Plaintiffs seek to vindicate. And other courts have identified the analytical tools needed to vindicate those protections in judicial proceedings.

a. The Kansas Constitution provides constitutional safeguards against partisan gerrymandering.

Defendants suggest that "Plaintiffs invite this Court to find (for the first time) in the Kansas Constitution what the U.S. Supreme Court could not find in the U.S. Constitution." Mot. 17. There are indeed meaningful and significant differences between the Kansas and U.S. Constitutions, as well as precedent in Kansas and other states with constitutional provisions similar to the ones on which Plaintiffs rely, that provide a foundation for adjudicating partisan gerrymandering claims.

At the outset—and significantly—the Kansas Supreme Court has *never* held that partisan gerrymandering claims are beyond the reach of state courts. To the contrary, the Court has assumed that political gerrymandering would raise constitutional concerns, noting that "all courts generally agree that lack of contiguity or compactness raises immediate questions as to political gerrymandering and possible invidious discrimination." *In re House Bill No 2620*, 225 Kan. 827, 834, 494 P.2d 334 (1979); *accord In re Stephan* (*Stephan II*), 251 Kan. 597, 607, 836 P.2d 574 (1992) (per curiam); *cf. In re Stephan* (*Stephan I*), 245 Kan. 118, 127, 775 P.2d 663 (1989) (recognizing potential claim that "districts were organized in such a way as to impair the voting strength of racial, political, or other [identifiable] segments of the voting population").

Protection against partisan gerrymandering is grounded in the Kansas Constitution, which prohibits the dilution of votes on the basis of partisan affiliation or race. It is no barrier to Plaintiffs' claims that the constitutional provisions on which they rely do not explicitly mention partisan gerrymandering. *Cf.* Mot. 25 n.8. Several states have struck down partisan gerrymanders under the broad guarantees of their respective constitutions, which parallel the Kansas Constitution. *See, e.g.*, *Harper*, 2022 WL 496215, at *1 (holding that congressional plan violated free elections clause, equal protection clause, and free speech and assembly clauses of North Carolina Constitution); *see also League of Women Voters of Ohio*, 2022 WL 110261, at *30 (Brunner, J.,

concurring) (finding that gerrymandered state legislative maps violated state's equal protection clause in addition to other provisions of Ohio Constitution). The Kansas Constitution contains parallel provisions that likewise prohibit egregious partisan gerrymandering.

Equal protection. Plaintiffs claim that, as a partisan gerrymander, Ad Astra 2 violates the equal protection provisions of the Kansas Constitution. *See* Kan. Const. Bill of Rights, §§ 1–2; Pet. ¶¶ 117–23. Defendants mistakenly equate the equal protection standard under the Kansas Constitution with the federal standard under the Fourteenth Amendment. *See* Mot. 23–24. But the Kansas Supreme Court has emphasized that "the Kansas Constitution affords *separate, adequate, and greater* rights than the federal Constitution." *Farley v. Engelken*, 241 Kan. 663, 671, 740 P.2d 1058 (1987) (emphasis added).

The equal protection guarantees of Sections 1 and 2 of the Kansas Bill of Rights prohibit partisan gerrymandering. North Carolina's equal protection clause, *see* N.C. Const. art. I, § 19, like Kansas's equal protection guarantee, in some cases "provides greater protection . . . than the federal Constitution." *Harper*, 2022 WL 496215, at *33. As the North Carolina Supreme Court concluded in interpreting that state's "fundamental principle of equality," the right to equal protection right includes a right to "substantially equal voting power." *Id.* at *33–34. That right

> necessarily encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views. Designing districts in a way that denies voters substantially equal voting power by diminishing or diluting their votes on the basis of party affiliation deprives voters in the disfavored party of the opportunity to aggregate their votes to elect such a governing majority.

Id. at *35. This interpretation, the North Carolina Supreme Court held, "is most consistent with the fundamental principles in our Declaration of Rights of equality and popular sovereignty—together, political equality." *Id.*

Justice Brunner's concurrence in a recent opinion of the Ohio Supreme Court concerning state legislative districts similarly concluded that partisan gerrymandering violates the Ohio Constitution's equal protection clause. *See League of Women Voters of Ohio*, 2022 WL 110261, at *33–37 (Brunner, J., concurring); Ohio Const. art. I, § 2. Justice Brunner explained that an equal protection violation can be found where plaintiffs "demonstrate that those in charge of the redistricting 'acted with an intent to "subordinate adherents of one political party and entrench a rival party in power"'" and "the plan will have the effect of 'diluting the votes of members of the disfavored party'" in a way that cannot be justified on "legitimate legislative grounds." *Id.* at *33–34 (Brunner, J., concurring) (quoting *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1093, 1096 (S.D. Ohio 2019) (three-judge court)). Justice Brunner noted that this interpretation of the state equal protection clause "goes to the fundamental protection of ensuring that state government will continue to be instituted for Ohioans' benefit and equal protection . . . , especially when relating to access to voting and its equal import no matter where a person resides in the state." *Id.* at 33 (Brunner, J., concurring). Notably, as Defendants observe in their motion to dismiss, "the Kansas Bill of Rights was modeled after the Ohio Bill of Rights." Mot. 25 n.8 (citing *State v. Petersen-Beard*, 304 Kan. 192, 210, 377 P.3d 1127 (2016)).

Given the North Carolina and Ohio Constitutions' fidelity to the values of political equality that are also embodied in the Kansas Constitution, the reasoning in these opinions is highly persuasive. *See Gannon*, 298 Kan. at 1139, 1153–54 (taking guidance from other states in applying political question doctrine). Moreover, as in North Carolina, the right to vote is fundamental under the Kansas Constitution. The Kansas Supreme Court has stated in no uncertain terms that

> [t]he right to vote in any election is a personal and individual right, to be exercised in a free and unimpaired manner, in accordance with our Constitution and laws. The right is [preservative] of other basic civil and political rights, and is the bed-rock of our free political system. Likewise, it is the right of every elector to vote on

> amendments to our Constitution in accordance with its provisions. This right is a right, not of force, but of sovereignty. It is every elector's portion of sovereign power to vote on questions submitted. Since the right of suffrage is a fundamental matter, any alleged restriction or infringement of that right strikes at the heart of orderly constitutional government, and must be carefully and meticulously scrutinized.

Moore, 207 Kan. at 649. Like the North Carolina Constitution, the Kansas Constitution protects both the fundamental right to vote and the right to equal protection. It therefore guarantees Kansans the right to substantially equal voting power.

Plaintiffs in turn allege that Ad Astra 2 denies Kansas voters the right to substantially equal voting power in violation of these protections. By packing and cracking voters who are likely to support Democratic candidates, Ad Astra 2 contrives to deprive those voters of the ability to band together to elect their candidates of choice. For example, Ad Astra 2 draws a line through the center of Wyandotte County, splitting Democratic voters and dividing a county that operates under a unified government. *See* Pet. ¶¶ 5–6. Plaintiffs allege that this and other indefensible line-drawing decisions serve no valid purpose. Instead, such decisions were made to dilute the votes of Democratic Kansans by ensuring that Democratic congressional candidates, who receive close to 40 percent of the statewide vote, are likely to lose in each of the state's four districts. *Id.* ¶ 76. This devaluation of votes is a stark and impermissible departure from the principles of political equality embodied in the Kansas Constitution.

Right to vote. For similar reasons, Ad Astra 2 violates Plaintiffs' fundamental right to vote, which is protected under Sections 1 and 2 of the Kansas Bill of Rights and Article 5, Section 1 of the Kansas Constitution. The Kansas Supreme Court has recognized that the right to vote is fundamental. *See Moore*, 207 Kan. at 649. It has also recently held that Section 1 secures natural rights that are broader than and distinct from those recognized under the Fourteenth Amendment to the federal constitution. *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 624–27, 440

P.3d 461 (2019) (per curiam). "The fundamental right to vote includes the right to enjoy 'substantially equal voting power and substantially equal legislative representation.'" *Harper*, 2022 WL 496215, at *37 (quoting *Stephenson v. Bartlett*, 355 N.C. 354, 382, 562 S.E.2d 377 (2002)); *see also League of Women Voters of Ohio*, 2022 WL 110261, at *32 (Brunner, J., concurring) ("Undeniably, '[t]he right to vote includes the right to have one's vote counted on equal terms with others.'" (alteration in original) (quoting *State ex rel. Skaggs v. Brunner*, 120 Ohio St. 3d 506, 516, 900 N.E.2d 982 (2008) (per curiam))).

When a legislature, through partisan gerrymandering, dilutes the votes of some citizens to benefit others, members of the disfavored party do not enjoy substantially equal voting power, and their right to vote is thereby infringed. *See League of Women Voters of Ohio*, 2022 WL 110261, at *32 (Brunner, J., concurring) ("A law . . . that decreases the weight or dilutes the power of a group of citizens' votes relative to their ability to achieve representative influence in the legislature may impermissibly burden th[e] right [to vote] when the outcomes relating to one class of voters are not proportional to the votes cast."). And as alleged throughout Plaintiffs' petition, Ad Astra 2 dilutes the votes of Democrats on the basis of their partisan affiliation. Just as under the Ohio Constitution, "[t]here is no allowance" in the Kansas Constitution "to create a favored (or disfavored) class of voters" or "to favor and entrench the legislative control of one party and disfavor another." *Id.* (Brunner, J., concurring). Ad Astra 2 therefore violates the fundamental right to vote under the Kansas Constitution.

Free speech. Ad Astra 2 also violates Plaintiffs' right to free speech. Section 11 of the Kansas Bill of Rights guarantees that "all persons may freely speak, write or publish their sentiments on all subjects[.]" Kan. Const. Bill of Rights, § 11. The Kansas Supreme Court has recognized that the right to free speech is "among the most fundamental personal rights and

liberties of the people." *Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 234, 689 P.2d 860 (1984). However, when a legislature diminishes the votes of a disfavored party, "it intentionally engages in a form of viewpoint discrimination and retaliation that triggers strict scrutiny." *Harper*, 2022 WL 296215, at *36; *see also McKinney*, 236 Kan. at 227–28 ("Restrictions on free speech are valid only where necessary to protect compelling public interests and where no less restrictive alternatives are available."). And again: that is precisely what the new congressional map does. By singling out Democratic votes for dilution, Ad Astra 2 favors Republican viewpoints over Democratic viewpoints in direct contravention of Section 11.

Ad Astra 2 likewise violates Plaintiffs' right to free assembly, which guarantees "the right to assemble, in a peaceable manner, to consult for their common good, to instruct their representatives, and to petition the government, or any department thereof, for the redress of grievances." Kan. Const. Bill of Rights, § 3. Courts in other states have interpreted the right to free assembly as incorporating a freedom of association that includes the right to form political parties with likeminded citizens and participate freely in those organizations. *See, e.g.*, *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *120 (N.C. Super. Ct. Sept. 3, 2019) (three-judge court) (citing *Feltman v. City of Wilson*, 238 N.C. App. 246, 253, 767 S.E.2d 615 (2014)); *Shane v. Parish of Jefferson*, 209 So. 3d 726, 741 (La. 2015). As the *Harper* court explained, "[w]hen legislators apportion district lines in a way that dilutes the influence of certain voters based on their prior political expression—their partisan affiliation and their voting history—it imposes a burden on a right or benefit, here the fundamental right to equal voting power on the basis of their views," which in turn violates the freedom of association. 2022 WL 496215, at *36. Partisan gerrymandering also has the effect of "debilitat[ing]" the disfavored party and "weaken[ing] its ability to carry out its core functions and purposes." *Common Cause*, 2019 WL

4569584, at *122 (alterations in original) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1939 (2018) (Kagan, J., concurring)). Here, Ad Astra 2 harms the associational rights of voters who cast their ballots for Democrats by diluting their votes. This amounts to a retaliation against these voters for their association with the Democratic Party, one that will likely have the effect of severely hindering the operations of the Democratic Party in the state and making potential Democratic voters less likely to volunteer with or donate to organizations that Plaintiffs belong to or wish to form. Pet. ¶ 136. Ad Astra 2 therefore violates the Kansas Constitution's right to free assembly.[5]

Plaintiffs have thus stated cognizable partisan gerrymandering claims under several provisions of the Kansas Constitution. As other states have recognized, the guarantees of equal protection, suffrage, free speech, and free assembly—apart and in tandem—serve to protect voters from precisely the sort of injury that Ad Astra 2 imposes by diluting the votes of Democratic Kansans and denying them equal participation in the political process. The fact that the Kansas Supreme Court has not yet struck down a partisan gerrymander under these constitutional provisions does not mean that such cases are nonjusticiable, as Defendants suggest; if the lack of precedent for a given claim were sufficient to bar it under the political question doctrine, then new legal theories would never emerge, and the law would be forever calcified. Indeed, if this factor were controlling, *Baker itself* would have had the opposite outcome: prior to that case, a court had never struck down districts as malapportioned. *See* 369 U.S. at 266–67 (Frankfurter, J., dissenting).[6]

[5] The parties in a recent Oregon case similarly agreed that partisan gerrymandering would "violate[] Article 1, sections 8 and 26 of the Oregon Constitution, which guarantee freedom of expression and assembly, respectively." *Clarno v. Fagan*, No. 21CV40180, 2021 WL 5632371, at *7 (Or. Special Jud. Panel Nov. 24, 2021).

[6] Defendants' appeal to the history of the Kansas Constitution is equally unavailing. *See* Mot. 21–23. They point to the proceedings of the state's constitutional convention as evincing the framers'

Ultimately, the reasoning of courts in North Carolina, Pennsylvania, and Ohio applies equally to Kansas and its state constitution: the invidious effects of partisan gerrymandering violate basic constitutional rights.

b. Partisan gerrymandering claims are governed by judicially manageable standards.

The Kansas Constitution thus provides the constitutional basis for Plaintiffs' partisan gerrymandering claims. And the thoughtful, comprehensive rulings of courts in other states provide the toolkit this Court needs to adjudicate these claims.

Four states in particular provide instructive precedent. In Pennsylvania, the commonwealth's supreme court invalidated a congressional map as an unlawful partisan gerrymander after considering "the degree to which neutral criteria"—for example, "compactness, contiguity, and integrity of political subdivisions"—"were subordinated to the pursuit of partisan political advantage." *League of Women Voters of Pa.*, 645 Pa. at 84, 123. In North Carolina, the state's supreme court adopted the detailed factual findings of a three-judge trial court and struck down the state's new congressional and legislative maps because the legislature had "subordinated

toleration of gerrymandering. They do no such thing. While it is true that the convention's Democrats decried the apportionment plan proposed by Republicans as a ploy to entrench Republican candidates, *see, e.g.*, *Proceedings of the Wyandotte Convention* 518–19 (1859), the allegations of gerrymandering were just those: allegations. In response to one such charge, a Republican representative explained that the purported gerrymander was in fact undertaken "for an honest purpose—that large fractions of the ratio of voters might not be disenfranchised on the floor of the Legislature under the Constitution." *Id.* at 479. In other words, the apportionment committee sought to equalize populations among districts to the extent possible. "For gentlemen to come in here and brand that as a fraud," the representative continued, "is inconsistent and uncalled for, and done for buncombe." *Id.* Regardless which side had the stronger position, it is plain that the framers of the Kansas Constitution did *not* seek to enshrine within it the right of a majority party to dilute the voting strength of the minority. And in any event, the proceedings cited by Defendants concerned only *legislative* districting; indeed, there could not have been discussion of congressional districting at the convention since, at the time of Kansas's admission to the Union, it did not have sufficient population for more than one representative. *Id.* at 589–90.

traditional neutral redistricting criteria in favor of extreme partisan advantage by diluting the power of certain people's votes." *Harper*, 2022 WL 496215, at *2.[7] In Ohio, the state's supreme court invalidated the state's recently enacted congressional map because "[t]he evidence overwhelmingly shows that the enacted plan favors the Republican Party and disfavors the Democratic Party to a degree far exceeding what is warranted by [constitutional] line-drawing requirements and Ohio's political geography." *Adams v. DeWine*, Nos. 2021-1428, 2021-1449, 2022 WL 129092, at *9 (Ohio Jan. 14, 2022); *see also League of Women Voters of Ohio*, 2022 WL 110261, at *1 (invalidating state legislative plan in part because it violated constitutional provision requiring that plan "meet[] standards of partisan fairness and proportionality"). And in Oregon, a special five-judge court rejected a partisan gerrymandering challenge after concluding that the state's new congressional map "reflects Oregon's previous congressional maps in both design and effect, resulted from a robust deliberative process and careful application of neutral criteria . . . , and provides no significant partisan advantage to either political party." *Clarno*, 2021 WL 5632371, at *7.

In adjudicating their respective partisan gerrymandering claims, these state courts considered and weighed evidence and arguments that "delineate judicially discoverable and manageable standards for resolving the issues" now before this Court. *VanSickle*, 212 Kan. at 439.

[7] A three-judge state court similarly struck down North Carolina's congressional map in 2019, rejecting the argument that the political question doctrine foreclosed adjudication of the plaintiffs' partisan gerrymandering claims and considering "a detailed record of both the partisan intent and the intended partisan effects of the [] congressional districts." *Harper v. Lewis*, No. 19 CVS 012667, slip op. at 3–4, 12–14 (N.C. Super. Ct. Oct. 28, 2019) (three-judge court); *see also Common Cause*, 2019 WL 4569584, at *132 (striking down North Carolina legislative maps after considering degree to which plans maximized partisan advantage and subordinated neutral criteria).

Expert testimony on partisan effects of maps. Established political science metrics—including mean-median difference analysis, the efficiency gap, the lopsided margins test, and partisan symmetry analysis—can demonstrate the degree to which a map confers an electoral advantage to one political party over another. *See, e.g.*, *League of Women Voters of Pa.*, 645 Pa. at 126–28; *Harper*, 2022 WL 496215, at *37–39; *Adams*, 2022 WL 129092 at *14; *Clarno*, 2021 WL 5632371, at *5–7.[8]

Expert testimony on deviations from neutral redistricting criteria. Large sets of computer-simulated redistricting plans, optimized to perform well on traditional redistricting principles like compactness, contiguity, and subdivision splits, can demonstrate the extent to which adopted maps deviate from the norm and thus subordinate neutral criteria to impermissible ends. *See, e.g.*, *League of Women Voters of Pa.*, 645 Pa. at 124; *Harper*, 2022 WL 496215, at *39; *Adams*, 2022 WL 129092 at *10–11.

Historic boundaries. The degree to which a challenged map reflects historic boundaries might justify a given line-drawing decision, while departures from past practice might demonstrate illicit motive. *See, e.g.*, *Clarno*, 2021 WL 5632371, at *4–5.

Examination of district features. An expert or even lay examination of a plan can reveal whether districts respect regions and political subdivisions or, conversely, "sprawl through [the] landscape" or "contain 'isthmuses' and 'tentacles,'" *League of Women Voters of Pa.*, 645 Pa. at

[8] Significantly, these political science techniques can be effectively employed without "identify[ing] an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander." *Harper*, 2022 WL 496215, at *38. There are, ultimately, "multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander. In particular, mean-median difference analysis; efficiency gap analysis; close-votes, close-seats analysis; and partisan symmetry analysis may be useful in assessing whether the mapmaker adhered to traditional neutral districting criteria and whether a meaningful partisan skew necessarily results from . . . political geography." *Id.*

126—which in turn might demonstrate the extent to which neutral criteria were subordinated to other considerations.

Lay witness testimony. Individuals familiar with the redistricting process can provide testimony as to the legislature's motivations and any irregularities in the adoption of maps, *see, e.g.*, *League of Women Voters of Ohio*, 2022 WL 110261, at *24–25, while individuals with intimate knowledge of a state and its political geography can describe the extent to which districts unite—or divide—minority groups and communities of interest, *see, e.g.*, *Clarno*, 2021 WL 5632371, at *3.

These established sources of evidence, and the cases from which they are derived, demonstrate that there is nothing unusual about courts considering partisan gerrymandering claims. On the contrary, these cases are hardly distinguishable from any other case involving complex facts and expert testimony.[9] The analytical tools employed in Pennsylvania, North Carolina, Ohio, and Oregon can help courts smoke out excessive partisan gerrymanders that "deprive[] citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives." *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting).

[9] The *Rucho* Court's concern, echoed by Defendants, that "asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise," Mot. 17 (quoting *Rucho*, 139 S. Ct. at 2503–04), rings hollow when viewed through this lens. Courts frequently call upon expert testimony to guide their adjudication of unfamiliar issues. Any "instability" in the experts' testimonies can be explored and addressed by opposing parties and the Court. There is nothing unique about political science that places it beyond the ambit of a court's analytical abilities. And again, *Rucho* itself expressly contemplated state court adjudication of partisan gerrymandering challenges. That state courts have done so, both before and after *Rucho*, provides ample proof that state judiciaries are well equipped to consider and decide these types of claims.

Despite this ample precedent, Defendants protest that adjudication of partisan gerrymandering claims is infeasible because they are "necessarily based on predictions about how voters will act in future elections. And those predictions are difficult to make." Mot. 19–21. But Defendants cannot explain away the fact that multiple state courts have successfully addressed partisan gerrymandering claims with the assistance of expert testimony—including the use of partisan indices, aggregated precinct-level election results. Such estimates are reliable and consistently employed by not only courts and expert witnesses, but map-drawers as well. *See, e.g.*, *Ohio A. Philip Randolph Inst.*, 373 F. Supp. 3d at 993 ("[Republican legislators] designed the 2012 map using software that allowed them to predict the partisan outcomes that would result from the lines they drew based on various partisan indices that they created from historical Ohio election data."), *vacated on other grounds sub nom. Chabot v. A. Philip Randolph Inst.*, 140 S. Ct. 102 (2019); *see also Election Results and Data*, Ohio Sec'y of State, https://www.ohiosos.gov/elections/election-results-and-data (last visited Mar. 21, 2022) (indicating that no congressional seats in Ohio as drawn in 2012 map changed parties between 2012 and 2020). If a method of forecasting future election results suffices for legislators who draw gerrymanders, surely it should suffice for a court that invalidates them. Defendants' apparent lack of faith in the methodology employed by political scientists should not discourage this Court from weighing the evidence itself—just like courts in Pennsylvania, North Carolina, Ohio, and Oregon have successfully done.

Ultimately, Plaintiffs ask this Court to do what courts routinely do: accept expert testimony on various objective and subjective factors and make a determination as to whether the challenged action exceeded the bounds of lawful conduct. In essence, the resolution of partisan gerrymandering claims "is a matter of accounting," *Kan. Bldg. Indus. Workers Comp. Fund*, 302 Kan. at 675—evaluating established criteria, considering expert testimony, weighing evidence,

and adjudicating a claim. Plaintiffs do not ask this Court to blaze a new path in the wilderness; "[c]ourts often are called upon to determine whether" congressional districting schemes constitute impermissible partisan gerrymanders, "so that judicially discoverable and manageable standards exist to resolve the question." *Id.*

2. Districting matters are not wholly committed to the Legislature.

Defendants' argument under the next *Baker v. Carr* factor is equally unavailing. There is no textually demonstrable commitment of the issue of partisan gerrymandering of congressional districts to Kansas's political branches—nor any provision of the Kansas Constitution that would otherwise foreclose this Court from engaging in the routine act of judicially reviewing legislative enactments for constitutional compliance.

Defendants' primary argument under this factor is the same as their argument under the Elections Clause: they contend that because the Elections Clause purportedly grants the Legislature—and the Legislature alone—authority over congressional redistricting, partisan gerrymandering claims are nonjusticiable. *See* Mot. 27. But for the reasons discussed above, *see supra* Section I, Defendants' arguments under the Elections Clause are without merit: it has long been recognized that state courts can apply state constitutional protections in the context of congressional districting, the Elections Clause notwithstanding.

3. Plaintiffs' partisan gerrymandering claims do not require policy determinations based on nonjudicial discretion.

Defendants' final argument under the *Baker v. Carr* factors is likewise without merit. Adjudication of this case does not require a legislative policy determination; just because politics is involved in redistricting does not mean that this Court cannot be.

In arguing that this factor weighs in their favor, Defendants cite passages from various Kansas Supreme Court decisions that, when read in isolation, would seem to grant the Legislature

carte blanche to engage in political gerrymandering. *See* Mot. 18–19. But the unremarkable fact that redistricting occurs against a political backdrop, *see, e.g.*, *Stovall II*, 273 Kan. at 734 (noting that "districting inevitably has and is intended to have substantial political consequences" (quoting *Gaffney*, 412 U.S. at 753)), in no way suggests that the Kansas Constitution tolerates the sort of egregious dilution of voting strength that Plaintiffs allege in their petition. And none of these authorities explicitly considered the lawfulness of partisan gerrymandering or the justiciability of partisan gerrymandering claims.

Moreover, the Kansas Supreme Court has repeatedly noted that excessive, unjustified partisanship might violate constitutional protections. *See House Bill No 2620*, 225 Kan. at 834 (cautioning against "political gerrymandering and possible invidious discrimination"); *Stephan II*, 251 Kan. at 607 (same); *In re Stovall* (*Stovall I*), 273 Kan. 715, 725, 44 P.3d 1266 (2002) (same). Indeed, in rejecting a challenge to legislative districts, the Court explained that "[t]he objection to the bill on the ground that there was partisan political gerrymandering in redistricting the senatorial districts does not reveal a fatal constitutional flaw *absent a showing of an equal protection violation*." *In re Senate Bill No 220*, 225 Kan. 628, 637, 595 P.2d 1 (1979) (emphasis added); *see also Stephan II*, 251 Kan. at 609 ("*In the absence of a constitutional violation*, this court is not at liberty to declare the reapportionment plan void because it allegedly creates inconvenience, is unfair, or is inequitable." (emphasis added)). Equal protection violations under the Kansas Constitution based on partisan and racial discrimination are *precisely* what Plaintiffs allege in their petition. *See* Pet. ¶¶ 117–23, 139–47; *see also supra* Section II.B.1.a; *infra* Section III.

At no point in the cases Defendants cite did the Kansas Supreme Court suggest that the judiciary could not entertain these constitutional claims against congressional (or any other) districting plans. To the contrary, it expressly acknowledged that such claims might be brought.

This is, accordingly, an instance where "[t]he State has not shown a textually demonstrable constitutional commitment of the unfettered exercise of the State's police power to the legislature." *Kan. Bldg. Indus. Workers Comp. Fund*, 302 Kan. at 675. Instead, the Court has entertained constitutional challenges to districting plans, notwithstanding the inherently political nature of that process. And no wonder: granting the Legislature untrammeled authority to draw congressional plans that violate Kansans' fundamental rights would create the very "dangerous concentration of power" that the separation of powers—the theory of government undergirding the political question doctrine—is meant to prevent. *VanSickle*, 212 Kan. at 439–40.

4. The remaining *Baker v. Carr* factors support adjudication of partisan gerrymandering claims.

Although not addressed by Defendants, none of the remaining *Baker v. Carr* factors—"the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," "an unusual need for unquestioning adherence to a political decision already made," and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question," 369 U.S. at 217—weighs in favor of a finding of nonjusticiability. These remaining factors reflect the same basic idea: that some issues so firmly belong to the nonjudicial branches of government that courts cannot interfere. Congressional redistricting, and the unconstitutional partisan gerrymandering that can result, are not among those issues.

Courts, including Kansas courts, have adjudicated (or at least acknowledged the viability of) constitutional challenges to districting maps, including those premised on undue partisanship. That redistricting is inherently political is of little moment; "the mere fact that the suit seeks protection of a political right does not mean it presents a political question." *Baker*, 369 U.S. at 209. Given the judicially manageable standards outlined above, "there is no greater danger of

conflict with the positions of the other branches in this case than there would be in other matters wherein the constitutionality of state action is challenged." *VanSickle*, 212 Kan. at 439. "[N]or would a decision on the merits indicate disrespect for a coordinate branch of the government," *id.*; after all, post-*Baker*, the legislative prerogative to undertake redistricting and reapportionment has not stopped courts from striking down maps that are malapportioned, racially gerrymandered, or otherwise suspect.

No matter how vocally Defendants trumpet the political nature of redistricting, or wrongly contend that no judicially manageable standards for partisan gerrymandering claims exist, the fact remains that "the Kansas Supreme Court is the final authority to determine adherence to the Kansas Constitution." *Gannon*, 298 Kan. at 1140; *accord Harris v. Shanahan*, 192 Kan. 183, 206–07, 387 P.2d 771 (1963) ("In the final analysis, this court is the sole arbiter of the question whether an act of the legislature is invalid under the Constitution of Kansas."). Accordingly, the judiciary—this Court included—has an essential role to play in vindicating the protections of the Kansas Constitution, especially where, as here, none of the *Baker v. Carr* factors indicates that the challenged claim is a nonjusticiable political question. Defendants ask this Court to shut the courthouse doors and leave Plaintiffs to petition the Legislature for a political solution that it has every reason to resist. Like the *Baker* Court, this Court should refuse to abdicate its proper role as the guarantor of fundamental constitutional rights.[10]

[10] Even if the Court were to conclude that Plaintiffs' partisan gerrymandering claims constitute nonjusticiable political questions, their petition also raises a racial vote-dilution claim under the Kansas Constitution's equal protection guarantees, *see* Pet. ¶¶ 139–47, and the *Rucho* Court acknowledged that, notwithstanding the Elections Clause or the political question doctrine, "there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts"—including "racial gerrymandering." 139 S. Ct. at 2495–96.

III. Ad Astra 2 dilutes the votes of minority voters in violation of Sections 1 and 2 of the Kansas Bill of Rights.

Plaintiffs have sufficiently pleaded an equal protection claim under the Kansas Constitution based on Ad Astra 2's disparate treatment of the state's minority voters.

In arguing otherwise, Defendants assume—without citation to authority—that the federal standard for a racial vote-dilution claim under the Fourteenth Amendment necessarily applies to Plaintiffs' claim under the Kansas Bill of Rights. *See* Mot. 28. But as discussed above, "the Kansas Constitution affords separate, adequate, and greater rights than the federal Constitution." *Farley*, 241 Kan. at 671. This is not unusual; the equal protection provisions of other states' constitutions similarly provide greater protections than their federal analogue, including the application of heightened scrutiny even where plaintiffs show *only* disparate impact among racial groups. *See, e.g.*, *Fletcher Props., Inc. v. City of Minneapolis*, 947 N.W.2d 1, 19 & n.12 (Minn. 2020) (applying stricter scrutiny under state equal protection clause where "a statutory classification demonstrably and adversely affects one race differently than other races, even if the lawmakers' purpose in enacting the law was not to affect any race differently" (citing *State v. Russell*, 477 N.W.2d 886, 888 n.2, 890 (Minn. 1991))); *State v. Mole*, 149 Ohio St. 3d 215, 221, 74 N.E.3d 368 (2016) (plurality opinion) (recognizing that "the Ohio Constitution is a document of independent force" from U.S. Constitution and that "the guarantees of equal protection in the Ohio Constitution independently forbid [] disparate treatment" even if federal equal protection clause does not).[11]

[11] Defendants cite *Stephan II* for the proposition that the equal protection guarantees of the Kansas Bill of Rights should be applied coextensively with the Fourteenth Amendment. *See* Mot. 28. But the fact that the Kansas Supreme Court declined "to establish a stricter standard for the allowable percentage of deviation in state reapportionment than is required by the United States Supreme Court," *Stephan II*, 251 Kan. at 606, should not suggest that such lockstep interpretation is required in every instance—especially where the Court has expressly noted that the Kansas Constitution's protections are separate and greater than the U.S. Constitution's.

Departure from the more restrictive federal equal protection standard is particularly appropriate where, as here, the racial disparity at issue concerns a fundamental right under the Kansas Constitution. *See Moore*, 207 Kan. at 649 ("[T]he right of suffrage is a fundamental matter[.]"); *see also* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 93–94 (2014) ("Courts that lockstep their state constitutions with the more limited rights inferred within the U.S. Constitution derogate the fundamental and foundational right to vote."). Because "established [Kansas] case law holds that there is a fundamental right of equal access to [the franchise], warranting strict scrutiny of legislative and executive action that is alleged to infringe on that right" is appropriate—whether the disparate treatment at issue "be de facto or de jure in origin." *Collins v. Thurmond*, 41 Cal. App. 5th 879, 896, 258 Cal. Rptr. 3d 830 (2019) (first quoting *O'Connell v. Superior Ct.*, 141 Cal. App. 4th 1452, 1465, 47 Cal. Rptr. 3d 147 (2006); and then quoting *Crawford v. Bd. of Educ.*, 17 Cal. 3d 280, 290, 17 P.2d 28 (1976)); *see also id.* (explaining that, because "California has enshrined the right to education within its own Constitution," school segregation can be remedied under state equal protection clause "*regardless of the cause of such segregation*" (quoting *Crawford*, 17 Cal. 3d at 284)). Under Kansas caselaw, such action would therefore need to "serve some compelling state interest and be narrowly tailored to further that interest." *Hodes & Nauser*, 309 Kan. at 663.

Here, Plaintiffs have clearly alleged that the Legislature's decision to crack the minority communities in Wyandotte and Douglas Counties does not serve any cognizable state interest, let alone a compelling one. Ad Astra 2 "divides the minority communities of Wyandotte County in half, submerging most of them in sprawling and heavily white and Republican District 2." Pet. ¶ 81. The remaining population of "Hispanic and Black voters in Wyandotte are in District 3 and paired with Johnson County, which is a mix of urban, suburban, and rural areas, and heavily rural

Miami, Franklin, and Anderson counties." *Id.* The cracking of these minority communities does not serve any compelling interest; to the contrary, it *disserves* the redistricting guidelines adopted by the Legislature, which required that the new congressional plan shall "have neither the purpose nor effect of diluting minority voting strength." *Id.* ¶¶ 56, 81. As Plaintiffs explain in their petition, multiple courts have found that "Wyandotte County should be placed in a single district *so that the voting power of its large minority population may not be diluted*." *Essex,* 874 F. Supp. 2d at 1086 (emphasis added). As the three-judge court in *O'Sullivan* explained,

> splitting the large minority population of Wyandotte County between two districts is undesirable unless compelled by some significant reason. Minorities find it difficult to make their views count in a political system in which majorities rule; being able to maintain block voting strength in areas where they live closely together, as in Wyandotte County, helps them make their voices felt.

540 F. Supp. at 1204. Ad Astra 2's cracking of minority communities extends beyond the Kansas City metro area: "Without any justification, Ad Astra 2 also divides up the state's Native American reservations, which were formerly unified in a single district." Pet. ¶ 7. Ultimately, Plaintiffs have alleged that no significant reason exists for the improper cracking effectuated by Ad Astra 2. The Legislature's motivation for this decision was "partisan gain," *id.* ¶ 3, not any interest in service of the state's rapidly growing minority communities.

Even if Defendants were correct that the Fourteenth Amendment's racial vote-dilution standard applies under the Kansas Bill of Rights, Plaintiffs have readily pleaded the requisite intent. As the U.S. Supreme Court has explained, the disparate impacts of an official action "may provide an important starting point" when "[d]etermining whether invidious discriminatory purpose was a motivating factor." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). The disparate impact can then be corroborated by other circumstantial evidence of improper intent, including "[t]he historical background of the decision," "[t]he specific sequence of events leading up to the challenged decision," and substantive and procedural

departures. *Id.* at 267. Plaintiffs' petition contains numerous allegations touching on these sources of evidence.

Disparate impact. Ad Astra 2 has the effect of not only cracking the state's minority communities among rural-reaching, overwhelmingly white congressional districts, but also effectively eliminating their ability to elect their candidates of choice to Congress. Significantly, this diminishment in opportunity occurred after a decade in which "Kansas's Hispanic population grew by 27.5 percent" and its Black population "increase[d by] 10.5 percent," all while the state's "white population . . . *declined* . . . [by] 7.1 percent." Pet. ¶ 25. This dynamic was particularly pronounced in Wyandotte County: "While Wyandotte County as a whole grew nearly 7.5 percent, the percentage of the county identifying as white alone fell by 14.3 percent since 2010, while the minority population grew by 10.5 percent. Indeed, the Hispanic community in Wyandotte County grew by 34.1 percent." *Id.* ¶ 26.

Governor Kelly's veto statement underscored Ad Astra 2's disparate and deleterious effect on the state's minority communities:

> Wyandotte County is carved into two separate congressional districts. Without explanation, this map shifts 46% of the Black population and 33% of the Hispanic population out of the third congressional district by dividing the Hispanic neighborhoods of Quindaro Bluffs, Bethel-Welborn, Strawberry Hill, Armourdale and others from Argentine, Turner and the rest of Kansas City, Kansas south of I-70.

Id. ¶ 67 (quoting *Governor Laura Kelly Vetoes Congressional Redistricting Map*, *supra*). As Plaintiffs further noted, use of the I-70 interstate as a dividing line had a particularly fraught racial implication: "Initially built in the 1950s as part of the Kansas Interstate, U.S. Route 24, the portion of I-70 traversing Wyandotte County, divided up minority communities decades ago. Now the county is again divided along the same line, reinforcing those racial scars." *Id.* ¶ 83.

Ad Astra 2's negative and disparate impacts on minority communities extend across the state. When the *Essex* court drew Kansas's congressional map ten years ago, "it placed all four of Kansas's major Native populations in the highly compact former Second District"; Ad Astra 2, by contrast, "splits the state's major reservations between the Second District and the Big First, with three of the four in the former and one in the latter." *Id.* ¶¶ 97–98.

Historical background. As Plaintiffs describe in their petition,

> [s]ince at least 1923, Wyandotte has been kept whole within a single congressional district. A three-judge panel of Kansas federal judges ended the brief exception in the 1970s finding that "splitting the large minority population of Wyandotte County between two districts" was "undesirable," and that the county should be unified so that minority voters could "maintain block voting strength in areas where they live closely together."

Id. ¶ 5 (quoting *O'Sullivan*, 540 F. Supp. at 1204). Ad Astra 2's departure from a century of continuity is further evidence of an intent to dilute the votes of minority Kansans.

Enactment of Ad Astra 2. The petition describes the enactment of Ad Astra 2 as rife with subterfuge and mischief. Plaintiffs allege that Senate President Susan Wagle promised to draw a map that "takes out Sharice Davids in the Third," *id.* ¶¶ 3, 51—a vow to defeat the only minority member of the Kansas congressional delegation. *See id.* ¶ 29. In enacting Ad Astra 2, the Legislature overrode a gubernatorial veto despite strenuous objections "from Kansans all over the state, including many of the leading lights of Kansas's minority communities." *Id.* ¶ 3. Plaintiffs allege that this was a

> rushed, opaque process . . . . In all, only slightly more than a week passed between the introduction of Ad Astra 2 . . . before it arrived at the Governor's desk. Republican legislators tightly controlled debate and designed the process to severely limit public participation. Following Governor Kelly's veto, the Republican supermajority resorted to brazen political brinksmanship in the final push to make Ad Astra 2 law.

Id. ¶ 50. Although "Republicans often touted the 14 listening sessions held throughout the state the previous summer," these "public meetings were frequently announced with less than a day's

notice" and "were often held during the middle of the business day, making attendance difficult for working individuals." *Id.* ¶ 53. Moreover, "[t]o limit map submissions from the public, legislators laid out onerous guidelines for map submissions," "limiting submissions to those who had the resources and expertise to utilize mapping technology" and requiring that "all maps . . . be introduced and sponsored by a sitting committee member." *Id.* ¶ 57. Ultimately, a *Republican* legislator conceded that his "party [was] being bully-ish about [the redistricting process] and not considering everybody else." *Id.* ¶ 64. Democratic Representative Clayton agreed: "I've found the transparency in this process to be about as fake as my eyelashes." *Id.* ¶ 60.

Substantive departures. Lastly, Plaintiffs allege that Ad Astra 2 constituted a departure from the norm for Kansas's congressional districts. The new map "unnecessarily shuffles hundreds of thousands of Kansans between districts, creates non-compact and oddly shaped districts, and splits the two largest Democratic and heavily minority counties in the state: Wyandotte and Douglas." *Id.* ¶ 4. Ad Astra 2's division of the Kansas City metro area is particularly indefensible; although Wyandotte and Johnson Counties could not retain their historic united configuration due to population growth, "Ad Astra 2 divides the metro area through the middle of Kansas City and Wyandotte" rather than "preserv[e] the integrity the Kansas City metro area." *Id.* ¶ 6. Although this line-drawing decision kept Johnson County whole, that county "has far more disparate geography and encompasses distinct communities of interest, unlike entirely urban Wyandotte. . . . It is the[] sparsely populated rural sections of southern Johnson County, not the northern portions of Wyandotte, which should most logically have been removed from the urban Third District to achieve population equality." *Id.*

Taken together, these allegations of procedural and substantive irregularities serve as compelling and sufficient evidence that the Legislature enacted Ad Astra 2 with discriminatory

intent. Contrary to Defendants' arguments, Plaintiffs have sufficiently pleaded that the Legislature was motivated by a discriminatory purpose when it drew a congressional map that cracked the state's growing minority communities and diluted their voting strength. Under either the proper state standard or the federal standard, Plaintiffs have thus pleaded a viable racial vote-dilution claim.

IV. Election Commissioner Abbott is a proper defendant.

Finally, Defendants wrongly contend that Defendant Abbott, the Wyandotte County Election Commissioner, "is not a proper defendant." Mot. 30. The basis for their argument is the assumption that the injunctive relief Plaintiffs seek "could issue against Defendant Schwab only—not against Defendant Abbott"—because the Secretary of State exercises authority over election commissioners. *Id.* at 31. But the only caselaw Defendants cite for this proposition, *Fish v. Kobach*, No. 16-2105-JAR, 2016 WL 6125029 (D. Kan. Oct. 20, 2016), concerned a discovery dispute, not potential liability for election commissioners, and it certainly does not suggest that election commissioners cannot serve as defendants alongside the Secretary of State in voting rights cases. And their argument further ignores Defendants Abbott's significant role in election administration and the effect an order from this Court would have on the exercise of his duties.

As the Wyandotte County Election Administrator, Defendant Abbott has "full and complete power and authority over all elections in the county and shall see that such elections are conducted according to law." K.S.A. 19-3423(a). His responsibilities include, among other duties:

- managing voter registration, *see, e.g.*, K.S.A. 25-2303;
- establishing ward and precinct boundaries and polling places, *see* K.S.A. 19-3424(a)(1), 19-3439, 25-2701;
- printing ballots, *see* K.S.A. 19-3424(a)(4), 25-604;

- administering early voting, *see, e.g.*, K.S.A. 25-1120; and
- overseeing ballot tabulation, *see* K.S.A. 25-1132, 25-1133, 25-2801.

Defendant Abbott thus presides over elections—"full[y] and complete[ly]"—in a jurisdiction where half of Plaintiffs live. *See* Pet. ¶¶ 16–18. Wyandotte County is also the locus of many of Plaintiffs' claims: they allege, for example, that Ad Astra 2 cracks the county between districts for partisan and racial reasons, *see, e.g.*, *id.* ¶¶ 4, 77–89, and divides the community of interest encompassing the Kansas City metro area, which includes Wyandotte County, *see, e.g.*, *id.* ¶¶ 6, 54, 72, 78. By naming Defendant Abbott in this suit, Plaintiffs thus seek to ensure that he carries out his obligations in compliance with the Kansas Constitution—which in turn requires enjoining his enforcement of Ad Astra 2. This remedy would prevent Defendant Abbott from, among other things, producing, distributing, and tabulating ballots that reflect impermissibly gerrymandered congressional districts. In short, Plaintiffs seek to prevent the local official in charge of elections where they live from exercising his duties in a manner forbidden by the Kansas Constitution. Defendant Abbott, who is *directly responsible* for administering elections in Wyandotte County, is therefore a proper defendant in this action.

That Defendant Schwab exercises supervisory authority over Defendant Abbott does not change this calculus, and certainly does not foreclose Plaintiffs' claim against the latter. Defendants cite no caselaw to the contrary, and their entire theory is premised on the erroneous notion that Plaintiffs can name only one defendant *even if* a ruling against a second defendant could also remedy their injury. That is simply not the law, in Kansas or elsewhere.[12]

[12] Indeed, under Defendants' logic, a plaintiff seeking to recover from multiple tortfeasors under a theory of joint and several liability would be able to sue only one defendant, since recovery against any single defendant could afford the plaintiff complete recovery. That is not the law either.

Notably, election commissioners like Defendant Abbott have frequently been named as defendants in statewide redistricting litigation and other election-related cases. Malapportionment cases during the 1960s named as defendants not only the Secretary of State, but also county election officials. *See generally Harris v. Anderson*, 196 Kan. 450, 412 P.2d 457 (1966); *Harris v. Anderson*, 194 Kan. 302, 400 P.2d 25 (1965). Indeed, the litigants sought and secured an injunction against the Secretary of State *and* "various county election officials," barring them "from performing any acts relating to the election of senators and representatives" under the challenged maps. *Harris*, 192 Kan. at 187. Relief has also been granted against county election commissioners to ensure the lawful administration of elections. *See, e.g.*, *Wall v. Harrison*, 201 Kan. 600, 600–02, 443 P.2d 266 (1968) (affirming mandamus relief ordering defendant election commissioner to conduct election as required by Kansas Constitution, not contradictory election statute); *Patterson v. Justus*, 173 Kan. 208, 208–09, 245 P.2d 968 (1952) (requiring election commissioner "to register plaintiff and all other qualified voters . . . who may present themselves for registration pursuant to and in conformity with the laws of this state relating to the registration of persons entitled to exercise the right of suffrage").

Plaintiffs' decision to name the Wyandotte County Election Commissioner as a defendant in this litigation is consistent with precedent, past practice, and basic legal principles. Defendant Abbott remains a proper defendant in this action.

CONCLUSION

Plaintiffs have alleged viable claims in the proper forum against the proper parties. Defendants' motion to dismiss should therefore be denied, and this important case should proceed to trial.

Respectfully submitted this 21st day of March, 2022.

/s/ Barry R. Grissom
Barry Grissom (#10866)
Jake Miller*
GRISSOM MILLER LAW FIRM LLC
1600 Genessee Street
Suite 460
Kansas City, Missouri 64102
(913) 359-0123
barry@grissommiller.com
jake@grissommiller.com

Abha Khanna*
Jonathan P. Hawley*
ELIAS LAW GROUP LLP
1700 Seventh Avenue
Suite 2100
Seattle, Washington 98101
(206) 656-0177
akhanna@elias.law
jhawley@elias.law

Lalitha D. Madduri*
Henry J. Brewster*
Spencer W. Klein*
Joseph N. Posimato*
ELIAS LAW GROUP LLP
10 G Street NE
Suite 600
Washington, D.C. 20002
(202) 968-4518
lmadduri@elias.law
hbrewster@elias.law
sklein@elias.law
jposimato@elias.law

Counsel for Plaintiffs

**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing document was filed this 21st day of March, 2022, in accordance with K.S.A. 60-205 and Kansas Supreme Court Rule 122 via the Wyandotte County District Court Electronic Filing System, which shall send electronic notice of the same to all required parties.

/s/ Barry R. Grissom
Attorney for the Plaintiffs