

IN THE SUPREME COURT OF KANSAS

FAITH RIVERA, *et al.*,

Plaintiffs-Appellees,

TOM ALONZO, *et al.*,

Plaintiffs-Appellees,

SUSAN FRICK, *et al.*,

Plaintiffs-Appellees,

v.

Case No. 125092

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-Appellants,

JAMIE SHEW, in his official capacity as
Douglas County Clerk,

Defendant.

**RIVERA AND ALONZO PLAINTIFFS-APPELLEES' MEMORANDUM IN
OPPOSITION TO THE KANSAS LEGISLATIVE COORDINATING
COUNCIL'S BRIEF *AMICUS CURIAE***

As noted in Plaintiffs' joint response to the Kansas Legislative Coordinating Council's application to file an amicus brief, the Council urges this Court to consider evidence and arguments never presented to the trial court, and to weigh new testimony on appeal despite the fact that the relevant members of the Council all asserted legislative privilege to block discovery in the proceedings below. Specifically, during discovery, the

Alonzo Plaintiffs served Rep. Ryckman and Sen. Masterson, the Council’s chair and vice chair, with subpoenas for documents related to the challenged congressional plan. J.A. II, 68-80, 94-106. Both refused to comply based on legislative privilege. *See* Ex. A. Rep. Ryckman and Sen. Masterson, as Republican legislative leadership, oversee the work of the Council. The Council’s brief in this Court is therefore an attempted end-run around the legislative privilege these leaders previously invoked, seeking to introduce evidence that is not in the record and to rehash purported justifications for the Ad Astra 2 map that the trial court already found to be pretextual. The Council’s brief goes far beyond the normal scope of amici arguments, and inappropriately uses legislators’ privilege as both a sword and a shield, in violation of settled principles that prevent gamesmanship and promote fairness. *See Seneca Ins. Co. v. Western Claims, Inc.*, 774 F.3d 1272, 1278 (10th Cir. 2014) (prohibiting the use of a privilege as both a “sword and shield”); *see also* J.A. VI, 140, ¶¶ 307, 311.

For the reasons described further below, this Court should disregard the factual arguments contained in the Council’s brief.¹

I. The Council advances arguments based on facts not in the record and in conflict with the trial court’s findings.

The scope of an appellate court’s review of a trial court’s factual findings is limited. On appeal, the appellate court reviews factual findings only to determine whether “the district court made findings of fact which are supported by substantial competent evidence

¹ The second half of the Council’s brief voices support for Defendants’ federal Elections Clause theory. Plaintiffs respond to these arguments in their principal briefs and incorporate those responses here.

and are sufficient to support the conclusions of law.” *Montoy v. State*, 278 Kan. 769, 772, 120 P.3d 306 (2005). When doing so, “[t]his court has consistently held that new evidence cannot be presented for the first time on appeal.” *State v. Miller*, 257 Kan. 844, 848, 896 P.2d 1069 (1995) (citing *Volt Delta Resources, Inc. v. Devine*, 241 Kan. 775, 782, 740 P.2d 1089 (1987)). The reviewing court “does not reweigh evidence, assess the credibility of witnesses, or resolve conflicts in evidence,” and the district court’s factual findings are entitled to “great deference.” *State v. Talkington*, 301 Kan. 453, 461, 345 P.3d 258 (2015).

The Council’s brief attempts to introduce new evidence purporting to show Republican legislators’ interest in public testimony. But uncontroverted record evidence supports the district court’s findings that Republican legislators ignored that testimony. Based on Sen. Corson’s trial testimony, the district court found that “Republican legislators at the listening sessions were not attentive to. . . public feedback” that urged the legislature to keep “the Johnson County and Wyandotte County metropolitan area collectively together.” J.A. VI, 20, ¶¶ 8, 9. Lawmakers were so disinterested in their constituents’ point of view, the court found, that “Republican Committee members routinely ‘play[ed] on their phones right in front of’ individuals offering testimony.” *Id.* at ¶ 9. Indeed, Sen. Corson testified that it was “one of the more disrespectful acts [he had] ever seen from elected officials toward members of the public.” *Id.* (alteration in original). There is nothing in the record to dispute this testimony.²

² Of course, in addition to Sen. Corson’s testimony, the most telling evidence of lawmakers’ disregard for citizen input is the map itself. As the court found, “when the public did voice its support for preserving Wyandotte County during the legislative session, its input was resoundingly ignored.” J.A. VI, 202, ¶ 486.

The Council attempts to override the trial court's factual findings as to the legislative process by making excuses for Republican lawmakers' indifference to public testimony through the introduction of new evidence. Br. of *Amicus Curiae* Legis. Coord. Council, at 3-4. But in doing so, the Council impermissibly relies on evidence outside the record and in conflict with the district court's finding. Specifically, the Council's brief includes an appendix with material never presented to the trial court. *Id.*, Ex. A1, A2. The brief also includes reference to material supposedly presented to committee members. *Id.* at 3 n.2. Neither the appendices nor the presentation material was before the trial court, and any arguments based on this new material should be disregarded. *See, e.g., Miller*, 257 Kan. at 848. Regardless, nothing in the Council's brief changes the fact that the district court's findings "are supported by substantial competent evidence," as described in the district court's opinion and Plaintiffs' principal briefs. *Montoy*, 278 Kan. at 772.

II. The Council's brief is an attempt by Republican legislative leaders to use their legislative privilege as both a sword and a shield.

In its brief, the Council asks this Court to reweigh the evidence by offering justifications and excuses for the enacted map on behalf of the Council's members, including several Republican legislative leaders who invoked legislative privilege to avoid having to participate in this case at the district court. This is legally improper.

The legislators were welcome to waive their legislative privilege and provide documentary evidence, as requested in Plaintiffs' subpoenas served discovery, or alternatively, appear as fact witnesses for Defendants to explain their map in court. But Republican legislative leaders chose not to produce documents or participate as fact

witnesses at trial based on legislative privilege, as was their right. They cannot now, through the Council, use their “unique position” as the law’s drafters “to defend the law on its merits” after already “retreat[ing] behind the shield of legislative privilege.” *League of Women Voters of Fla., Inc v. Lee*, No. 4:21CV186-MW/MAF, 2022 WL 610400, at *1 (N.D. Fla. Jan. 4, 2022). The legislators’ attempt to get additional arguments and statements into the record in this case, while exercising their right *not* to participate in the trial itself, is inappropriate gamesmanship.

The trial court, based on the evidence before it, found that the enacted map is “an intentional and effective partisan gerrymander in violation of Sections 1, 2, 3, 11, and 20 of the Kansas Bill of Rights, as well as Article V, Section 1 of the Kansas Constitution.” J.A. VI, 195, ¶ 469. Likewise, the map “intentionally and effectively dilutes minority votes in violation of the Kansas Constitution’s guarantee of equal protection.” *Id.* at 206, ¶ 496. The trial court reached its conclusion having considered Defendants’ explanations for the map’s effects—explanations that did not include any testimony from lawmakers who supported the map—and the full legislative record. *See* J.A. VI, 139-145, ¶¶ 307-25 (rejecting Defendants’ proposed rationales for the map). Importantly, “Defendant did not call any witness to explain why Ad Astra 2 was drawn in the manner it was” and thus provided no evidence justifying its configuration. J.A. VI, 140, ¶ 311. The court found that the justifications offered for the map by the Defendants’ attorneys, drawn from non-sworn statements made by legislators on the floor of the House and Senate, were pretextual and unsupported. *See* J.A. VI, 120, n. 11; 139, ¶ 307; 140, ¶ 311; 142, ¶ 318; 204-205, ¶ 492.

Republican legislative leaders now try to offer additional evidence to explain themselves via the Council’s brief, without Plaintiffs being able to cross-examine the unsworn assertions made therein. Respectfully, the legislators have forfeited their opportunity to participate in this legal proceeding. The Court should not permit the Council and its members to avoid disclosure by asserting privilege when they wish to hide, only to turn around and waive the privilege when they deem it advantageous. *See Seneca Ins. Co.*, 774 F.3d at 1278 (prohibiting the use of a privilege as both a “sword and shield”).

CONCLUSION

In the guise of an unsworn amicus brief, Republican legislative leadership attempts to introduce additional evidence and offer post-hoc explanations for the Legislature’s actions. Respectfully, the Court should disregard the factual arguments made therein. In addition, for the reasons stated in Plaintiffs’ merits briefs, the Court should reject the Council’s federal Elections Clause arguments.

Respectfully submitted,

**AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF KANSAS**

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CERTIFICATE OF SERVICE

I certify that on May 12, 2022, a true and correct copy of the foregoing was filed using the Court’s electronic filing system which will serve all parties. On the same day a copy was electronically mailed to:

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EXHIBIT A

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March 7, 2022

Via Electronic Mail

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Re: *Alonzo, et al. v. Schwab, et al.*, Objection to Legislative Subpoenas Pursuant to K.S.A. 60-245(c)(2)(B)

Dear Counsel:

We represent the nine Kansas legislators¹ who, over the past few days, were subjected to attempted service of subpoenas for legislative records (the “Subpoenas”). The Subpoenas command the legislators to produce a vast range of documents by 5:00 p.m. today, Monday, March 7, 2022, in Overland Park, Kansas.² We write on behalf of each legislator to object pursuant to K.S.A. 60-245(c)(2)(B). First, none of our clients is subject to any civil process while the legislature is in session. Second, the Subpoenas violate the Speech or Debate Clause of the Kansas Constitution by requesting documents pertaining to the consideration and passage of legislation. Third, the Subpoenas impose an undue burden on the legislators, seek irrelevant materials, and call for attorney-client communications. Finally, the Subpoenas were not properly served. For these reasons, pursuant to K.S.A. 60-245(c)(2)(B), our clients object to the Subpoenas and will not produce any of the requested documents or communications. That said, the legislature has made a wealth of redistricting information, including maps, data, and hearing transcripts, publicly available on its website; details are provided below.

Legislators Are Immune from any Civil Service while the Legislature is in Session

Our clients object to the subpoena because service was attempted while the legislature was in session, in contravention of Article 2, Section 22, of the Kansas Constitution. That section

¹ Our clients are Rep. Chris Croft; Sen. John Doll; Rep. Randy Garber; Rep. Tatum Lee; Senate President Ty Masterson; Sen. Dennis Pyle; House Speaker Ron Ryckman; Sen. Alicia Straub; and Sen. Mark Steffen.

² A few cover letters state that your office will accept production as late as March 9.

provides, “No member of the legislature shall be subject to arrest, except for felony or breach of the peace, in going to or returning from, the place of meeting during the continuance of the session, neither shall he be subject to the service of civil process during the session nor for fifteen days previous to its commencement.” Members of the legislature are simply not subject to the service of civil process during the legislative session, and any attempt to service process upon a legislator during the legislative session is void. *Cook v. Senior*, 3 Kan. App. 278, 45 P. 126 (1896).

The 2022 session of the Kansas Legislature commenced on January 10, 2022, and has not yet adjourned. As a result, service of the Subpoenas is invalid under Article 2, Section 22 of the Kansas Constitution and is void.

The Subpoenas Violate the Speech or Debate Clause of the Kansas Constitution

Even if service had been made during the proper time, the Subpoenas violate the Kansas Constitution because they demand the production of documents and communications pertaining to the consideration and passage of legislation. Article 2, Section 22 of the Kansas Constitution states, “For any speech, written document or debate in either house, the members shall not be questioned elsewhere.” “[T]he purpose of the Speech or Debate Clause is to insure that legislators may perform legislative functions independently, free from outside interference or fear of such interference.” *State v. Neufeld*, 260 Kan. 930, 941, 926 P.2d 1325 (1996). “[T]he Speech or Debate Clause applies to words spoken within chambers and also to committee reports, resolutions, voting, and all things generally done in a legislative session in relation to the business at hand.” *Neufeld*, 260 Kan. at 939–40.

The Subpoenas exclusively call for documents and communications that pertain to the redistricting legislation including the drafting, assessment, negotiation, and adoption of the redistricting legislation as well as the process to override the Governor’s veto of the redistricting legislation. All of these items fall squarely the Speech of Debate Clause of the Kansas Constitution as they directly pertain to the business of the legislative session. By demanding these records and communications, the Subpoenas violate the Speech or Debate Clause contained in Article 2, Section 22 of the Kansas Constitution.

The Subpoenas Impose an Undue Burden and Request Attorney-Client Communications

The Subpoenas also impose an undue burden on our clients. The Subpoenas demand production of a vast array of documents and communications over a period of three years. The production is demanded in just a few business days during a time when the legislators are busy serving the people of Kansas. This burden cannot be justified. Requests focused on individual legislators’ intentions, beliefs, partisan considerations, and other irrelevant factors under the Kansas Constitution do not seek “matter that is relevant to the needs of the case” and that are “proportional to the needs of the case.” K.S.A. 60-226(b)(1).

Finally, the Subpoenas' broad demand for documents and communications also encompass communications protected by the attorney-client privilege. The Subpoenas demand the production of any documents or communications related to the redistricting legislation. Some of these communications are between legislators and staff attorneys and are protected by the attorney-client privilege and work product privilege. Our clients would produce a privilege log in the event all of the other objections are overruled and production becomes a matter of applying the privilege objection.

Service of the Subpoena was Improper

Even if service could have been effectuated and the substantive requests made within the Subpoenas had been proper, most or all of the legislators were not actually served consistent with the Kansas Rules of Civil Procedure. In many cases, it appears that service was attempted through return receipt delivery by the U.S. Postal Service. However, the subpoena was not delivered directly to the legislator. Instead, it was delivered to another person at the legislator's home or business address, or simply left at the home without delivery to anyone.

Service of process may be effectuated through return receipt delivery provided by a commercial courier or delivery service. K.S.A. 60-303(c)(1). When return receipt delivery service is attempted on an individual, the delivery must be addressed to the individual at the individual's dwelling or usual place of abode (or an authorized agent at the agent's usual or designated address). K.S.A. 60-304(a). A party may attempt return receipt delivery service of an individual at a business address only if the party has already filed "a return of service stating that the return receipt delivery to the individual at the individual's dwelling or usual place of abode was refused or unclaimed and that a business address is known for the individual." K.S.A. 60-304(a). Regardless of whether the return receipt delivery service is sent to the individual's dwelling or business, the delivery must be to the individual being served (or their authorized agent). *Fisher v. DeCarvalho*, 298 Kan. 482, 491-92, 314 P.2d 214 (2013); *Cessna Finance Corp. v. VYWB, LLC*, 982 F.Supp.2d 1226, 1231 (D. Kan 2013).

In this instance, return receipt delivery (or attempted delivery at the Capitol) failed to comply with these requirements. First, although Subpoenas were delivered by the United States Postal Service to several legislators' residences, the return receipt delivery was not delivered to the legislator. Instead, it was either left at the home without delivery to any person, or signed for by someone else. K.S.A. 60-303(c)(1) and K.S.A. 60-304(a), however, require return receipt delivery to be *actually delivered to the addressee*, not merely left at a home or given to someone else who answers the door. Second, unnamed individuals appeared at some legislators' Capitol offices and attempted to leave Subpoenas with a secretary or other staffer who may have been present. These assistants are not "an agent authorized by appointment or by law to receive service of process." K.S.A. 60-304(a). Service was simply improper.

Conclusion

For these reasons, pursuant to K.S.A. 60-245(c)(2)(B), our clients object to the Subpoenas and will not produce any of the requested documents or communications. We do note, however, that much of what you request has long been publicly available at www.kslegislature.org. Testimony and numerous maps for the House Committee on Redistricting may be found at http://www.kslegislature.org/li/b2021_22/committees/ctte_h_redistricting_1/. Testimony and numerous maps for the Senate Committee on Redistricting may be found at http://www.kslegislature.org/li/b2021_22/committees/ctte_s_redistricting_1/.

We trust that this will end the matter, but if there will be any additional correspondence, please direct it to us. Of course, we are happy to confer with you should you have any questions or require additional information.

Sincerely,



Edward D. Greim

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