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CASE NUMBER: 2022-CV-000071

IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS
CIVIL COURT DEPARTMENT

SUSAN FRICK, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 2022-CV-71
	)	
SCOTT SCHWAB, et al.,	)	Division 4
	)	
Defendants.	)	K.S.A. Chapter 60

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

I. The Kansas Constitution Prohibits Intentional Partisan Gerrymandering Designed to Violate Fundamental Rights the Kansas Constitution Protects

A system of fair and equal elections in which all citizens have a meaningful opportunity to participate is foundational to self-government. Defendant Schwab, the official charged with ensuring fair and equal elections across Kansas, nonetheless moves to dismiss Plaintiffs' constitutional claim here by relying largely on federal cases and some select history from the 1859 Wyandotte Convention, both interesting and telling choices.

First, what matters for the Kansas constitutional claim, as demonstrated below, is Kansas law, not federal law.

Second, reliance on the partisan gerrymandering of the Wyandotte Convention highlights an essential point. Constitutions are not set in stone, with their meaning limited to the understanding and biases of those who framed them. In recognizing a Kansas constitutional right of a woman to choose to terminate her

pregnancy despite the existence of 1850s statutes in the Kansas territory prohibiting abortion, the Kansas Supreme Court explained:

> We no longer live in a world of separate spheres for men and women. True equality of opportunity in the full range of human endeavor is a Kansas constitutional value, and it cannot be met if the ability to seize and maximize opportunity is tethered to prejudices from two centuries ago. Therefore, rather than rely on historical prejudice in our analysis, we look to natural rights and apply them equally to protect all individuals.

Hodes & Nauser v. Schmidt, 309 Kan. 610, 659-660, 440 P.3d 461 (2019). *Cf. Obergefell v. Hodges*, 576 U.S. 644, 664 (2015) ("The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insights reveal discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.").

Partisan gerrymandering in 1859 may have been a necessary evil to thwart an even greater abomination, the worst evil of all—slavery in Kansas. That is why Republicans in 1859 were gerrymandering against the interests of the Democratic Party and that party's pro-slavery goals. After all, Kansas had gone through multiple versions of a state constitution at that point, and one pro-slavery constitution actually had been presented to Congress. One might excuse the Republicans of 1859 for engaging in a little partisan gerrymandering to prevent the greatest evil our country has ever known from taking root in Kansas.

But the threat of slavery in Kansas is long behind us and yet partisan gerrymandering has remained. Today's 2022 Republicans use partisan gerrymandering not to fight any evil or pernicious threat to Kansas; instead, they have turned partisan gerrymandering itself into the abomination, using it in a blatant effort to turn Kansas completely red in *every* congressional district, and *every* state senate and house district they possibly can, to achieve a supermajority—a veto-proof margin in the Legislature. Bleeding Kansas, indeed.

Their partisan, self-interested, and undemocratic efforts must fail, however, in light of the wisdom of the Framers of 1859, who used their wisdom to include foundational principles of democracy and natural law to ensure ultimate political power resides in the *people of Kansas*. The Kansas Constitution does not give ultimate power to a group of legislators or any political party; it does not give that power to the Legislature, nor the Governor. But it does give power to the courts of Kansas to ensure Kansans are protected. The Kansas Bill of Rights makes inalienable the rights to life, liberty, and the pursuit of happiness for all Kansans. And it expressly recognizes that all political power is inherent in the people. The government is founded on their authority and instituted for their equal protection and benefit. Yet these explicit Bill of Rights provisions mean little if modern partisan gerrymandering—of the sort in which the 2022 Kansas Republican-dominated Legislature now has engaged—is allowed to proceed unchecked by any rational power. The people will have become the servants of the Legislature, the

exact opposite of the constitutional command that they may "direct their representatives."

Today's partisan gerrymandering is *the abomination*, not a weapon against evil; it puts the 1859 complaints of unfairness to shame. Modern technologies and algorithms can manipulate voter populations and draw districts with such precision that a party can guarantee itself any district it chooses, and in Kansas at least, a supermajority of the Legislature and very likely all four congressional seats in spite of the statewide demographics of Democratic and Republican voters. But that same technology provides courts a means to evaluate partisan gerrymandering, to ensure fairness, and to ensure that all Kansans have a meaningful opportunity to control their institutions of government and participate in their government by casting meaningful votes with a realistic chance to direct their representatives, representatives they have had a meaningful opportunity to choose.

A. The Kansas Constitution Guarantees Kansans the Equal and Inalienable Right to Control Their Institutions of Government, Including a Meaningful Right to Vote

The Ad Astra 2 congressional redistricting map represents partisan gerrymandering that violates the Kansas Constitution's guarantees of equal and inalienable rights, that all political power is inherent in the people and instituted for their equal protection and benefit, the right of the people to consult for the common good and to instruct their representatives, the right to free speech and to vote, and the retention by the people of all power not delegated under the Constitution. Kansas Constitution Bill of Rights Sections §§ 1 ("Equal rights"), 2 ("Political power"), 3 ("Consult for common good and instruct representatives"), 11

("Liberty of press and speech"), 20 ("Powers retained by people"), and Article V, Section 1 ("Suffrage"). The plain language of the Constitution, as well as the history and intent of these constitutional provisions, guarantee Plaintiffs the right to a redistricting plan that does not use partisan political gerrymandering. *Hodes & Nauser*, 309 Kan. at 610. Moreover, despite Defendant Schwab's unfounded protests, the Kansas courts, and ultimately the Kansas Supreme Court, bears an unavoidable, sacred duty to protect the constitutional rights of Kansans from legislative overreach. This includes the Kansas constitutional right to ensure that every vote counts equally. *Harris v. Shanahan*, 192 Kan. 183, 204, 387 P.2d 771 (1963). When a legislative action is contrary to the constitutional rights of Kansans, the courts cannot shy away from their duty to declare and protect Kansans from such unconstitutional legislative intrusions. Thus, this Court must act to ensure Kansans' constitutional rights are respected. Judicial review is appropriate here to enforce the requirements of the Kansas Constitution which provides more expansion protection than the federal Constitution in this context.

B. The Intentional Partisan Gerrymandering Here Violates the Kansas Constitution Bill of Rights

The Kansas Supreme Court has repeatedly reiterated that the Bill of Rights "'is not to be considered as containing precise limitations upon power but rather only comprehensive statements of general truths; that it is more in the nature of a guide to the legislature, than a test for the courts.'" *Hodes & Nauser*, 309 Kan. at 633 (citing *Atchison Street Rly. Co. v. Mo. Pac. Rly. Co.*, 31 Kan. 660, 664, 3 P. 284 (1884)). The framers of our Bill of Rights guarded specifically against the

accumulation of power in the *legislative branch*. *Hodes & Nauser*, 309 Kan. at 635 (citing *The State v. Wilson*, 61 Kan. 32, 36, 58 P. 981 (1899)). This case represents a threat of the legislative branch accumulating power to itself at the expense of the *executive branch*, the *judicial branch*, and, most fundamentally, the *people of Kansas*.

The Kansas Constitution promises Kansans "equal and inalienable natural rights." Kansas Constitution Bill of Rights, Section 1. Section 1 is enforceable protection against legislation that impedes on Kansans individual rights. *Hodes & Nauser*, 309 Kan. at 635 (citing *Wilson*, 61 Kan. at 36). Section 1 of the Kansas Constitution Bill of Rights provides Kansans with substantive and judicially enforceable rights. It affirms the equality of men and, among other things, guarantees the right to enjoy life, liberty, and other unenumerated natural rights. *Hodes & Nauser*, 309 Kan. at 631 (citing *Lockean Natural Rights guarantees*, 93 Tex. L. Rev. at 1305-06, 1444-48). Critically, and "contrary to [Defendants'] argument, at the time the Kansas Bill of Rights was written and ratified in 1859, provisions like section 1 were widely accepted as guaranteeing natural rights enforceable via court proceedings." *Hodes & Nauser*, 309 Kan. at 632 (citing *Lockean Natural Rights guarantees*, 93 Tex. L. Rev. at 1364-82).

Underscoring that partisan gerrymandering violates the Kansas Constitution is Section 2 of the Bill of Rights which provides that "All political power is inherent in the people" and is "instituted for their equal protection and benefit." Kansas Constitution Bill of Rights Section 2. How can that provision not be violated by

legislation adopting Ad Astra 2, a map that clearly and intentionally renders the votes of large segments of Kansas voters utterly irrelevant and meaningless? Indeed, the Kansas Supreme Court has explained: "Within the express and implied provisions of the Constitution of Kansas every qualified elector of the several counties is given the right to vote for officers that are elected by the people, and he is possessed of equal power and influence in the making of laws which govern him." *Harris*, 192 Kan. at 204.. Kansas' congressional delegation can only reflect the will of Kansans if it is elected from districts that provide one person's vote with substantially the same power as every other Kansans' vote. Here, the Kansas Legislature is controlled by a Republican veto-proof supermajority that has intentionally and blatantly manipulated and gerrymandered the boundaries of Kansas' U.S. Congressional Districts on a partisan basis. The Kansas Constitution either prohibits such actions, or else one has to ignore several provisions of our Bill of Rights.

Sections 3 (guaranteeing the right to consult for common good and to instruct representatives), 11 (guaranteeing inviolate liberty of press and speech), and 20 (providing that all powers not expressly delegated are retained by people) of the Kansas Constitution Bill of Rights further underscore the unconstitutionality of the Republican supermajority's actions. Kansans have the constitutional right to consult for their common good and to instruct their representatives under the Kansas Constitution Bill of Rights Section 3. Additionally, Kansans have the right to speak freely on political matters under the Kansas Constitution Bill of Rights

Section 11, and the Constitution reserves all powers not granted to government to the people of Kansas in Kansas' Constitution Bill of Rights Section 20. All these guarantees are very directly and substantially undermined by intentional partisan gerrymandering to disenfranchise substantial segments of Kansas voters of any meaningful vote or ability to influence representatives or debate on issues in the political process.

There can be no debate 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). Indeed, prime examples in this case are Sections 1 and 2 of the Kansas Bill of Rights, which have *no counterparts* at all in the U.S. Constitution. But a further and important provision is Section 3, which guarantees the people the right to consult for the common good and to instruct their representatives. This provision must have meaning. In fact, the original proposed language of the U.S. Constitution's First Amendment included a right to "consult for the common good," but that language did not make it into the U.S. Bill of Rights. *See Jones v. City of Opelika*, 319 U.S. 105, 124 n. 6 (1943). Again, the Kansas Constitution provides greater protection than the U.S. Constitution, both explicitly and implicitly.

The partisan gerrymandering of the congressional map here strikes at the heart of orderly constitutional government, true democracy, and traditional Kansas populist values and traditions. It undermines the equality of votes, deprives many Kansans of their inherent political power, and contravenes even the Legislature's

own self-declared redistricting criteria and non-partisan "Guidelines." Instead, Kansas ends up with a map that displays extreme partisan favoritism, in the First District not even "diluting" but really "eliminating" the votes of Democratic party voters, denying them equal protection and benefit of the governmental system, as well as any meaningful opportunity to consult for the common good or to instruct their representatives, given that they will never have any real opportunity to elect their preferred representative, influence their positions on important issues, or engage them in public debate.

C. The Partisan Gerrymandering Here Violates the Fundamental, Inalienable, and Equal Right of All Kansans to a Meaningful Right to Vote

The right to vote under the Kansas Constitution is a fundamental right that the Legislature cannot abridge. The Kansas Supreme Court has so recognized for almost 150 years. *See, e.g.*, *Wheeler v. Brady*, 15 Kan. 26, 32 (1875) (emphasis added) ("if said section applies, then this right to vote in every school-district in the township in which an elector resides is a constitutional right, *which cannot be abridged by the legislature*, or by any other power except the entire people of the state by way of amendment to the constitution."); *State v. Beggs*, 126 Kan. 811, 271 P. 400 (1928) (striking down under the Kansas Constitution a state statute requiring that a voter fill out a form declaring party affiliation before being given a ballot); *State ex rel. Parker v. Corcoran*, 155 Kan. 714, 129 P.2d 999 (1942) (under the Kansas Constitution persons resident in Kansas but employed by the federal government cannot be denied the right to vote in Kansas elections by virtue of their employment status); *Patterson v. Justus*, 173 Kan. 207, 211, 245 P.2d 968 (1952)

(“‘The exercise of the franchise is one of the most important functions of good citizenship, and no construction of an election law should be indulged that would disfranchise any voter if the law is reasonably susceptible of any other meaning.’ [Citation omitted.]”); *cf. Montoy v. State*, 278 Kan. 769, 120 P.3d 306, 311, *supplemented*, 279 Kan. 817, 112 P.3d 923 (2005) (Beier, J., concurring) and (“If we were to apply the United States Supreme Court’s straightforward pattern of analysis from *Rodriguez*, we would need to look no further than the mandatory language of these two constitutional provisions. Because they explicitly provide for education, education is a fundamental right.” (citing *San Antonio School District v. Rodriguez*, 411 U.S. 1, 33-34 (1973))).

Article 5, § 1 of the Kansas state constitution reads that “[e]very citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she seeks to vote *shall* be deemed a qualified elector. . .” (Emphasis added). The Kansas Supreme Court has made it clear that under “the express and implied provisions of the Constitution of Kansas every qualified elector of the several counties is given the right to vote for officers that are elected by the people, and *he is possessed of equal power and influence* in the making of laws which govern him.” *Harris*, 192 Kan. at 204 (emphasis added).

This fundamental right long has been understood to mean that every vote must count equally. *Harris*, 192 Kan. at 204. If a Kansas voter “is accorded less representation than he is due under the Constitution, to that extent the government processes fail to record the full weight of his judgment and the force of his will.”

Harris, 192 Kan. at 204. "[A]ny alleged restriction or infringement of that right strikes at the heart of orderly constitutional government and must be carefully and meticulously scrutinized. *Moore v. Shanahan*, 207Kan. 645, 649, 486 P.2d 506 (1971).

Republican legislators expressly promised, in the fall of 2020, that they would draw maps to eliminate any Democratic congressional seats in Kansas. Pet. ¶ 5. They delivered on that promise in early 2022 when they passed the Ad Astra 2 congressional redistricting map. Republican legislatures, therefore, intentionally diluted (if not completely nullified) the votes of Democratic, independent, and third-party voters of Douglas County and the influence their votes may have in possibly electing Democratic members of Congress through Ad Astra 2. Pet. ¶ 7. This type of intentional, targeted, partisan gerrymander strips non-Republican voters in Douglas County of their fundamental right to vote and their right, guaranteed by the Kansas Constitution, to have "equal power and influence in the making of laws which govern [them]." *Harris*, 192 Kan. at 204. The Court must strike down the Ad Astra 2 map to protect these fundamental rights.

II. State Courts Have Jurisdiction to Review Redistricting Laws and Ensure They Comply with Their State's Constitution

Defendant Schwab argues that "this Court lacks jurisdiction to adjudicate the constitutionality of SB 355" because "[s]uch adjudication would violate the Elections Clause of the U.S. Constitution." Mot. at 5. This argument—that the Kansas Legislature's enactment of a congressional redistricting map can *never* be reviewed by any Kansas court—has been flatly rejected by the U.S. Supreme Court time and

time again. Kansas law also contradicts Defendant's claim. Indeed, as is true of any other state law, Kansas courts have the authority to review the validity of SB 355 under the Kansas Constitution. The U.S. Constitution does not and cannot limit—much less eliminate—that inherent constitutional authority of the Kansas courts.

A. The United States Supreme Court Over A Century Ago Rejected The "Independent State Legislature" Fantasy

According to Defendant, the Elections Clause of the U.S. Constitution bars any Kansas court from reviewing SB 355 under the Kansas Constitution. The Defendant relies on Article I, Section 4 of the U.S. Constitution which states:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Defendant claims "the Legislature" means *only* the Kansas Legislature, wholly independent from any review by the state courts. He could not be more wrong. As with any other law, the Kansas judiciary has the power to review the constitutionality (under the Kansas Constitution) of Kansas laws governing congressional elections.

For over a century, the U.S. Supreme Court has rejected the "independent state legislature" fantasy that Defendant propounds. The best Defendant can do is cite individual Justices expressing some interest in the notion; he has not a single precedent or case holding that a state legislature's redistricting laws are immune

from review by the state's own courts for validity under the state's constitution. And with good reason—there are no such cases, only explicit precedent to the contrary.[1]

In *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916), the Court considered a state constitutional amendment granting veto power by popular-vote referendum. *Ohio ex rel. Davis*, 241 U.S. at 566. When the Ohio legislature "passed an act redistricting the state for the purpose of congressional elections" and a popular vote rejected that act, state election officers sued on the theory that "the referendum vote was not and could not be part of the legislative authority of the state" under the Elections Clause of the U.S. Constitution. *Ohio ex rel. Davis*, 241 U.S. at 566-567. The U.S. Supreme Court disagreed, finding "conclusive" the Ohio Supreme Court's determination that "the referendum constituted a part of the state Constitution and laws, and was contained within the legislative power." *Ohio ex rel. Davis*, 241 U.S. at 567-68. The Court held that, "nothing in [federal statutory law] or in [the Elections Clause] operated to the contrary." *Ohio ex rel. Davis*, 241 U.S. at 567. In short, a referendum of the people authorized by the Ohio Constitution validly overturned the Ohio Legislature's redistricting act. If Defendant's theory were correct, such a result would be barred by the U.S. Constitution.

The U.S. Supreme Court went further in *Smiley v. Holm*, 285 U.S. 355 (1932), a case that Defendant cites. Mot. at 6. But far from supporting Defendant's theory, *Smiley* underscores that state legislatures do not operate independently

[1] *See generally* Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, U. Ill. Coll. of L. Research Paper No. 21-02 at 37-45 (Feb. 24, 2022) (forthcoming, 2021 Supreme Court Review), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3731755.

from state constitutional requirements even when they are drawing congressional district lines under the Elections Clause. Rather, when a state legislature engages in redistricting under the Elections Clause, it is "making law[]" and thus must act "in accordance with the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367. The Court found "no suggestion in [the Elections Clause] of an attempt to 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 that laws shall be enacted." *Smiley*, 285 U.S. at 367-68. Thus, because the Minnesota Constitution required the governor's approval for all state laws, the governor's approval was necessary even for congressional redistricting laws. The Elections Clause did not authorize the Legislature to act independently of state constitutional requirements. *Smiley*, 285 U.S. at 368-60. Again, this decision would be incorrect if Defendant's "theory" is correct, and obviously courts—state and federal—may have to determine what the relevant state constitution requires.

The Supreme Court has not wavered from its understanding of the Elections Clause and has reaffirmed these basic principles in recent years. In 2015, the Court again soundly and expressly rejected the argument that a state legislature was immune from state constitutional requirements when engaged in congressional redistricting. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), the Court's holding was explicit: "Nothing 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." *Arizona Independent Redistricting Commission*, 576 U.S. at 817-18. Even the dissent, which Defendant misguidedly attempts to rely upon, agreed that when a state legislature "prescribes election regulations" under the Elections Clause, it is "required to do so within the ordinary lawmaking process." *Arizona Redistricting Commission*, 576 U.S. at 841 (Roberts, C.J., dissenting).

Most recently, in 2019, the Court again confirmed that state courts may review state laws governing federal elections to determine compliance with a state's constitution. Although in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), the Court held that *federal* courts could not review partisan gerrymandering challenges under the *federal* Constitution, the Court made clear it did "not condone excessive partisan gerrymandering" nor did it "condemn complaints about districting to echo into a void." *Rucho*, 139 S.Ct. at 2506-07. Notably, the Court went out of its way to observe that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply" to partisan gerrymandering, including in cases involving congressional redistricting. The Court cited as an example a case from the Supreme Court of Florida, which "struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution." *Rucho*, 139 S.Ct. at 2506-07. Such an observation by the Court in *Rucho* would have been pointless if the Court believed the Elections Clause exempted state legislatures' congressional redistricting laws from state judicial review for compliance with state constitutional requirements. Absolutely pointless,

frivolous, and utterly misleading. Nonsensical in fact, if Defendant's theory is correct.

But that observation was none of those things because a century-plus of U.S. Supreme Court precedent has been consistent and clear: contrary to Defendant's fantastical claim, Kansas courts have "jurisdiction to adjudicate the constitutionality" of Kansas congressional redistricting laws under the Kansas Constitution.

B. Kansas Law Authorizes Kansas Courts to Review the Legislature's Congressional Redistricting Laws

Perhaps recognizing that the U.S. Supreme Court has never adopted his "independent state legislature" fantasy, Defendant offers the alternative argument that even if redistricting laws are subject to "the State's prescription for lawmaking," "in Kansas, [those prescriptions] do not include the review of the state courts." Mot. at 7. Defendant thus claims that Kansas courts can only review redistricting laws if the Kansas Constitution or a Kansas statute *specifically* "reassigns any redistricting lawmaking authority to the courts." Mot. at 7-8.

Defendant's arbitrarily narrow standard is unsupported by either federal or Kansas law. The U.S. Supreme Court long has held that when a state legislature engages in redistricting under the Elections Clause it is "making law[]" and thus must act "in accordance with the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367; *see also Arizona Independent Redistricting Commission*, 576 U.S. at 841 (Roberts, C.J., dissenting) (when a state legislature "prescribes election regulations" under the Elections Clause, it is

"required to do so within the ordinary lawmaking process"). In other words, the Kansas Legislature's redistricting laws are subject to the same processes as any other law. If Kansas courts can review the validity of any other law under the Kansas Constitution, they certainly can review the constitutionality SB 355 too.

And Defendant must concede, if being remotely candid, that Kansas courts can and do review the constitutionality of other laws, including state redistricting laws. Mot. at 8 (citing Kan. Const., Art. 10, § 1). The argument, then, boils down to a claim that because the Kansas Constitution does not explicitly mention *congressional* redistricting Kansas courts lack *jurisdiction* to review the state constitutionality of congressional redistricting. This argument, however, confuses the *jurisdiction* issue with *the merits* of a claim. As this Court is aware and as demonstrated in the section of this brief addressing partisan gerrymandering under the Kansas Constitution, a right need not be mentioned *explicitly* to be protected by the Kansas Constitution. If that were the standard, under Defendant's argument Kansas courts would have lacked *jurisdiction* to even *reach the merits* of myriad potential substantive constitutional claims that Kansans have asserted, and the Kansas courts have recognized under the Kansas Constitution over time. It is one thing to hold ultimately that the Kansas Constitution does not recognize a particular claim; it is quite another to hold that a Kansas court has no *jurisdiction* to consider whether such a claim even exists.

Defendant's reliance on *Parsons v. Ryan*, 144 Kan. 370, 60 P.2d 910 (1936), fares no better. The Court in *Parsons* did not reach the sweeping holding that

Defendant claims, that congressional election laws are *never* "'subject to constitutional restrictions' under the Kan[s]as Constitution." Mot. at 10. In reviewing a state law specifying deadlines for the nomination of presidential electors, the Court stated:

> [T]he Federal Constitution commands the state Legislature to direct the manner of choosing electors. The Legislature has provided an orderly way for the selection of candidates for presidential electors, and that it saw fit to have them chosen in the same manner as candidates for United States Senator, Representative in Congress, and every state, county, and township officer cannot be urged as discriminatory, unfair, illegal, or unconstitutional. The manner selected by the Legislature 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. In this case the limitation is because of failure to file in time. In other cases, it might be because the nomination papers did not contain a sufficient number of signers, or because, under certain circumstances, requisite fees were not tendered and paid.

60 P.2d at 912.

Parsons does not bear the weight Defendant attempts to load on it. First, the case involved Article II, section 1 of the U.S. Constitution, not the Elections Clause. Second, the dispute was simply over the setting of a *deadline* for filing papers to serve as an elector; the Legislature had chosen a date, and the Court declined to substitute its judgment of a different date. Third, understood in context, the Court's passing mention of whether the election law was "unconstitutional" appears to refer to the *Federal Constitution*, because the plaintiffs had argued that "the Federal Constitution requires they shall appear on the general ballot." *Parsons*, 60 P.2d at 912. Regardless, even if the Court were discussing the Kansas Constitution, this passing reference is not a prohibition on *any and all* state constitutional challenges to state laws regarding federal elections. In fact, an equally sound if not better

reading of the case is that the Court *did* review the Kansas law under the Kansas Constitution and found it *constitutional*.

In any event, the Kansas Legislature, in a recent, ironic twist, has seemingly *acknowledged* that *all* state election laws are subject to at least some level of state court review. In the 2021 Regular Session, the Kansas Legislature enacted K.S.A. § 25-125, which purports to make "election laws" the exclusive domain of the Kansas Legislature (perhaps in an attempt to codify, under state law, the "independent state legislature" theory the U.S. Supreme Court has rejected). But even Section 25-125 notably hedges its bets, recognizing the constitutional role of the Kansas courts:

> (d) *Nothing in this section shall be construed to limit or otherwise restrict the judicial branch of state government in the exercise of any powers granted by article 3 of the constitution of the state of Kansas*.
>
> (e) If any provision of this section or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the other provisions or applications of the section that can be given effect without the invalid provision or application, and, to this end, the provisions of this section are severable.

K.S.A. § 25-125(d)-(e) (emphasis added). Given that (1) over a century of U.S. Supreme Court cases confirm that congressional redistricting laws are subject to the same state constitutional requirements as any other law and (2) Article 3 of the Kansas Constitution gives Kansas courts the jurisdiction, duty, and obligation to review the constitutionality of Kansas laws, subsection (d) operates to explicitly *preserve* the Kansas judiciary's jurisdiction over congressional redistricting laws. Without commenting on the "validity" of Section 25-125 itself, subsection (e) further

expressly contemplates that Kansas courts have the authority to "h[o]ld invalid" "any provision of" Section 25-125, itself an election law.

Kansas courts have the jurisdiction and authority to review the Kansas Legislature's enactment of congressional redistricting laws under the Kansas Constitution. Defendant's argument is an audacious attempt to strip Kansas courts of the fundamental power of judicial review under the Kansas Constitution that over a century of U.S. Supreme Court precedent and Kansas law long have recognized. Defendant's lawless theory—fantasy really—must be rejected.

III. Conclusion

First, the Kansas Constitution prohibits partisan gerrymandering. Plain and simple. No principle in the Kansas Constitution is more fundamental than our Framers' desire to prevent Legislative overreach. And modern partisan gerrymandering is an overreach of the worst sort, a true abomination. The Kansas Constitution empowers, indeed compels, our courts to stop such chicanery.

Second, the Federal Elections Clause does not bar state court review of a State Legislature's congressional redistricting plan. That argument is belied by over a century of U.S. Supreme Court precedent, logic, and common sense. The so-called "Independent State Legislature Theory" is a lawless fantasy. It does not withstand scrutiny under established constitutional analysis and provides no basis to dismiss this case.

We respectfully beseech the Court to deny Defendant's motion to dismiss and do its duty. For all Kansans. And for Kansas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2022, I electronically filed the foregoing with the Clerk of the District Court's electronic filing system, which will serve all registered participants.

/s/ Mark P. Johnson

Mark P. Johnson