No. 22-125092-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

FAITH RIVERA, et al., TOM ALONZO, et al., SUSAN FRICK, et al.,
Plaintiffs-Appellees,

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-Appellants,

JAMIE SHEW, in his official capacity as Douglas County Clerk,
Defendant-Appellee.

BRIEF OF APPELLANTS

Appeal from the District Court of Wyandotte County
Honorable Bill Klapper, District Judge
District Court Case No. 22-CV-89 (consolidated with 22-CV-90
and Douglas County Case No. 22-CV-71)

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NATURE OF THE CASE

This case is a state constitutional challenge to the Kansas Legislature's redistricting legislation creating new districts for members of the U.S. House of Representatives. The case comes to this Court on appeal from an unprecedented district court order. For the first time in Kansas history, a court has invalidated a congressional district map duly enacted by the democratically elected Legislature, holding that "political gerrymandering" violates an assortment of provisions of the Kansas Constitution, which have never before been understood to even apply.

Congressional redistricting is political by design. The U.S. and Kansas Constitutions wisely entrust this task to the political actors in the Kansas Legislature. The Legislature, not the state judiciary, is designed and equipped to make the political determinations that cannot be avoided when drawing district lines. The state judiciary should not substitute its judgment for that of the Legislature. Requiring courts to review redistricting plans for political fairness forces them to make political decisions without any manageable legal standards, and transfers power over those decisions from the people's elected representatives to "experts" and judges. The Kansas Constitution provides no standard for parsing good political choices from bad ones. Nor does it provide any standard for determining how much political power rightfully belongs to each party.

The question in this case is: Who decides? Who decides whether a congressional district map is the right map: the democratically elected representatives who are accountable to the people of Kansas, or a judiciary

dependent on its apolitical design?

The district court determined that it was the arbiter of political fairness in redistricting. The district court wielded this extraordinary power under the auspices of "democracy." (J.A. VI, 7.) But make no mistake: The district court's decision is a loss for democracy, not a win. SB 355 is the result of the democratic process. And with the stroke of a pen, a single judge has undone the entirety of that process.

If allowed to stand, the district court's ruling will have untold future consequences. Having now entered the fray, Kansas courts are all but certain to be pulled into political battles in every redistricting cycle to come. This Court should reverse the district court and keep the independent judiciary out of the "political thicket." *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality op.).

STATEMENT OF THE ISSUES

I. Does the district court's decision violate the U.S. Constitution's Elections Clause?

II. Do political gerrymandering claims present political questions that are not justiciable under the Kansas Constitution?

III. Did the district court err in holding SB 355 unconstitutional?

STATEMENT OF FACTS

A. A supermajority of the Kansas Legislature enacts SB 355.

"[E]very ten years, the Kansas legislature must draw new districts for the United States Congress . . . ." *Essex v. Kobach*, 874 F. Supp. 2d 1069, 1073 (D. Kan. 2012); *see* U.S. Const. art. I, §§ 2, 4.

The Kansas Legislature began the process of redrawing those districts

according to the 2020 Census in 2021. Although not legally required to, the House and Senate Committees on Redistricting jointly held a listening tour of town hall meetings across Kansas. (J.A. XIX, 2-7.) All of the meetings were live-streamed, and the public was invited to submit written or oral testimony (or both). (J.A. XIX, 2-7.) Fourteen meetings were held in fourteen cities in August. (J.A. XIX, 5-7.) And four additional meetings were held virtually in November. (J.A. XIX, 2-4.)

This year, the Kansas Legislature passed Substitute for Senate Bill 355 (SB 355) to redraw Kansas's four congressional districts based on the 2020 Census. (J.A. XVII, 289, 295.) SB 355 adopted the "Ad Astra 2" map. (J.A. XVII, 17.) There was extensive debate about the bill in both houses of the Legislature. (J.A. XVII, 4-5.) Members of the public also testified both for and against it. (J.A. XIX, 135-48; XXVI, 172-93.) Both houses of the Legislature ultimately passed the bill by overwhelming majorities. (J.A. XVII, 289, 295.) The Governor vetoed the bill. (J.A. XVII, 170.) The Legislature then overrode that veto by the required two-thirds majorities in each house. (J.A. XVII, 285-86.) SB 355 took effect upon publication in the Kansas Register on February 10, 2022.

The Legislature drew the congressional districts in SB 355 to be used in the upcoming 2022 elections. The candidate filing deadline for the primary election is June 1. *See* K.S.A. 25-205.[1] The primary election itself is on August 2. *See* K.S.A. 25-203(a). And the general election is on November 8. *See* K.S.A. 25-101(a).

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[1] K.S.A. 25-205(h)(2) contains a limited extension of the filing deadline to June 10 "[i]f new boundary lines are [not] defined and districts established in the manner prescribed by law" until after May 10.

B. The district court strikes down SB 355.

As soon as the Legislature enacted SB 355, Plaintiffs sued to enjoin the use of SB 355 in the upcoming elections. The Plaintiffs in *Rivera v. Schwab* and *Alonzo v. Schwab* sued Defendants Kansas Secretary of State Scott Schwab and Wyandotte County Election Commissioner Michael Abbott in Wyandotte County on February 14 alleging that SB 355 is a political gerrymander and dilutes minority votes in violation of a long list of provisions of the Kansas Constitution. (J.A. I, 22-105.) Two weeks later, the Plaintiffs in *Frick v. Schwab* sued Defendants Schwab and Douglas County Clerk Jamie Shew in Douglas County also alleging that SB 355 is an unconstitutional political gerrymander. (J.A. VII, 5-18.) This Court consolidated the three cases in Wyandotte County. (J.A. VII, 81-82.)

Immediately after those cases were filed, Defendants Schwab and Abbott petitioned for mandamus and quo warranto in this Court seeking dismissal of the cases on the ground that the district court lacked jurisdiction to entertain them. This Court denied the petition, holding that mandamus and quo warranto were not available remedies. *See Schwab v. Klapper*, 315 Kan. 150, 154-55, 505 P.3d 345 (2022). The Court "emphasize[d]" that it did "not reach, consider, or take any position on the merits of the underlying claims." *Id.* at 155.

Defendants promptly moved to dismiss the cases for three primary reasons: *First*, the district court lacked the authority to entertain them under the Elections Clause to the U.S. Constitution, which vests the redistricting authority in the Kansas "Legislature." U.S. Const. art. I, § 4. *Second*, political gerrymandering claims present political questions that are not justiciable under the Kansas

Constitution. *Third*, Plaintiffs had failed to allege the intent element of their racial vote dilution claim. (J.A. II, 107-72; VII, 19-46.)

The district court denied Defendants' motions after a hearing on March 28. The court recognized that there was no "similar case as this one." (J.A. VIII, 76.) "[I]n no case ha[ve] the Kansas [c]ourts found political gerrymandering," and "[o]ther states have said no, that the court should not consider these type[s] of claims." (J.A. VIII, 77, 82.) The district court recognized that the U.S. Supreme Court too had declined to decide political gerrymandering claims because they are "too hard." (J.A. VIII, 83.) But "if the [f]ederal [c]ourts won't do it," the district court asked, "who will do it?" (J.A. VIII, 83.) Without articulating any standard for adjudicating them, or identifying any constitutional provision political gerrymandering might violate, the district court allowed Plaintiffs' claims to proceed. (J.A. VIII, 83.)

After an extremely expedited discovery schedule, (J.A. II, 226-31), trial began on April 4, (J.A. IX, 1). By the parties' stipulation, the full legislative record was admitted into evidence. (J.A. IV, 56-61.) That record includes the 2020 Census data, as well as transcripts and videos of the legislative proceedings on SB 355. (J.A. XVII; XVIII; XXIII; XXIV; XXV; XXVI; XIX.)

Plaintiffs presented testimony from two legislators who voted against SB 355, three Kansans who dislike SB 355, and six political science professors. Democratic Senator Ethan Corson (former executive director of the Kansas Democratic Party) and Democratic Representative Tom Burroughs testified about how Democrats were

unsuccessful in stopping SB 355 from passing. (J.A. X, 205-68; XI, 6-38.) Three residents of Wyandotte and Douglas Counties testified about how they were displeased with SB 355's treatment of their counties. (J.A. XI, 39-60; XII, 105-17; XIII, 48-58.)[2] And the political science professors presented various models and methodologies for measuring political fairness. One methodology was Professor Jowei Chen's proprietary "simulated map" methodology, which purported to measure political fairness by comparing SB 355 to one thousand hypothetical maps generated by an algorithm he wrote. (J.A. X, 112-204; J.A. XV, 88-120.) Another was Professor Christopher Warshaw's "efficiency gap" model, which originated in a 2014 academic journal and attempts to measure how many votes each party would "waste" in future elections under SB 355. (J.A. XI, 61-214.)

At the close of Plaintiffs' case, Defendants moved for judgment. (J.A. XIV, 5-14.) The district court again denied Defendants' motion. (J.A. XIV, 6.) The court acknowledged that Defendants "raise some compelling arguments": "[W]hat is the standard to be applied? What are the elements that the court should use in determining whether that standard has been met by the plaintiffs or not?" (J.A. XIV, 22-23, 25 (noting that identifying a standard is "a struggle").) Although the district court still did not provide any such standard, it allowed Plaintiffs' cases to proceed because, in the district court's view, that is "what good government is all about." (J.A. XIV, 25-26.)

Defendants then presented testimony from three professors of their own.

[2] The transcript in J.A. XII misidentifies the day as April 6 rather than April 5.

Professor Alan Miller testified that the efficiency gap is a seriously flawed metric that relies on inaccurate assumptions about voting behavior and does not provide "a workable test" in a state with only four congressional seats. (J.A. XIV, 84-172; XIX, 115.) Professor John Alford testified that SB 355 made only modest changes to the political and racial composition of congressional districts in Kansas. (J.A. XV, 11-88; XIX, 21-30.) And Professor Brad Lockerbie testified that traditional districting criteria do not lend themselves to precise definition and that the Third District remains competitive under SB 355. (J.A. XIV, 27-84; XIX, 58-69.) Trial concluded with closing arguments on April 11. (J.A. XVI, 5-40.)

On April 25, the district court held that SB 355 violates the Kansas Constitution as both a political and a racial gerrymander. The court saw its "task[]" as "doing what is right." (J.A. VI, 9.) And the district court determined that "what is right" in this case is to level the political "playing field." (J.A. VI, 6, 9.) The court adopted Plaintiffs' proposed findings of fact and conclusions of law nearly verbatim. (*Compare* J.A. VI, 1-209, *with* J.A. V, 1-201.)

First, the district court determined that the Elections Clause of the U.S. Constitution "does not bar state court judicial review of congressional redistricting plans." (J.A. VI, 154.)

Second, weaving together six separate constitutional provisions, the district court held "that partisan gerrymandering claims are justiciable under the Kansas Constitution." (J.A. VI, 166, 178-87 (citing Kan. Const. Bill of Rights §§ 1, 2, 3, 11, 20; *id.* art. 5, § 1).) The court again recognized that "Defendants rightfully question

what is the applicable burden of proof that applies and what elements must be proven to appropriately adjudicate this case." (J.A. VI, 12.) As the court noted, this Court has never articulated "clear rules" for political gerrymandering claims. (J.A. VI, 174.) Nor did the district court provide any. The court believed it "neither necessary nor prudent" to "articulat[e] a bright-line standard" for political gerrymandering claims. (J.A. VI, 188.) Rather, it "suffice[d] for the Court's purposes that a standard exists" for "the case at bar." (J.A. VI, 187, 189.) Relying on "opinions of the highest courts in other states" rather than the text of the Kansas Constitution, the district court created its own test: (1) "the Legislature acted with the purpose of achieving partisan gain by diluting the votes of disfavored-party members" and (2) the map "will have the desired effect of substantially diluting disfavored-party members' votes." (J.A. VI, 173, 187.) In applying this test, the district court relied on assorted "partisan fairness metrics" and "'neutral criteria.'" (J.A. VI, 189 (citation omitted).)

Third, the district court determined that SB 355 is unconstitutional. The court first determined that SB 355 is "an intentional and effective partisan gerrymander." (J.A. VI, 195.) It then held that SB 355 could not satisfy strict scrutiny, which it said to be "applicable in cases of suspect classification including voting." (J.A. VI, 12, 194-95.) The court also determined that SB 355 unconstitutionally dilutes minority votes. (J.A. VI, 195-206.) It acknowledged that the elements of such a claim—and whether they include discriminatory intent—is an "issue of first impression." (J.A. VI, 195.) But it again declined to resolve the

issue based on its determination that SB 355 both "intentionally and effectively dilutes minority votes." (J.A. VI, 206.)

The district court permanently enjoined Kansas's election officials "from preparing for or administering any primary or general congressional election under Ad Astra 2." (J.A. VI, 208.) And it further ordered that the "Legislature shall enact a remedial plan in conformity with this opinion as expeditiously as possible." (J.A. VI, 208.)

ARGUMENTS AND AUTHORITIES

The district court's decision must be reversed for three reasons: *First*, its invalidation of SB 355 violates the U.S. Constitution's express vesting of the redistricting power in the Kansas "Legislature." U.S. Const. art. I, § 4. *Second*, Plaintiffs' political gerrymandering claims present nonjusticiable political questions that are constitutionally committed to the Kansas Legislature, have no discernible and manageable standards for resolution, and are impossible to decide without making discretionary policy determinations. *Third*, even assuming the district court had jurisdiction, SB 355 is not an unconstitutional political gerrymander and does not unconstitutionally dilute minority votes.

I. The district court's decision violates the U.S. Constitution's Elections Clause.

The Elections Clause of the U.S. Constitution delegates the authority to draw congressional districts to the Kansas "Legislature." *Id*. The district court held that this provision "does not bar state court judicial review of congressional redistricting plans." (J.A. VI, 154.) That holding runs headlong into the express text of the U.S.

Constitution and U.S. Supreme Court precedents interpreting that text. This Court reviews jurisdictional determinations and constitutional interpretations de novo. *Bd. of Johnson Cty. Comm'rs v. Jordan*, 303 Kan. 844, 858, 370 P.3d 1170 (2016); *Gannon v. State*, 298 Kan. 1107, 1136, 319 P.3d 1196 (2014).

A. The Elections Clause bars Kansas courts from invalidating legislatively enacted congressional district maps.

"The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2496 (2019). The text of the Elections Clause is clear: The "Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof." U.S. Const. art. I, § 4 (emphasis added). It is also clear in assigning a check on that power to "the Congress," which "may at any time by Law make or alter such Regulations." *Id.* This constitutional text "provides that state legislatures"—not "state judges"—"bear primary responsibility for setting election rules." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay). And when the state legislature missteps, the authority to correct it lies with Congress.

The word "Legislature" was "not a term of uncertain meaning when incorporated into the Constitution." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). "[E]very state constitution from the Founding Era that used the term legislature defined it as a distinct multimember entity comprised of representatives with the

authority to enact laws." Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 Nw. U. L. Rev. Online 131, 147 & n.101 (2015). The text of the Elections Clause thus "specifies a particular organ of a state government, and [courts] must take that language seriously." *Moore v. Harper*, 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting from the denial of application for stay).

That the state "Legislature" does not include the state courts is also clear from the text of the U.S. Constitution, which repeatedly distinguishes between state legislatures and state governments as a whole. *See, e.g.*, U.S. Const. art. I, § 2; *id.* § 3; *id.* art. II, § 1; *id.* art. IV, § 3; *id.* art. VI. The Framers' intentional use of different terms reveals that the Elections Clause's cabined reference to the state "Legislature[s]" unambiguously excludes the power to regulate federal elections from state courts, which are not a part of the legislative process.

The U.S. Supreme Court has interpreted the Elections Clause accordingly. According to the Court's precedents, the Elections Clause delegates the power to regulate federal elections to states' lawmaking bodies. "[R]edistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 808 (2015); *see also Smiley v. Holm*, 285 U.S. 355, 367 (1932) ("[T]he exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments."). Those lawmaking prescriptions may include the Governor through approval or veto, *see Smiley*, 285 U.S. at 368, the people through referendum, *see Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916), and an

independent commission resulting from a ballot initiative, *Ariz. State Legislature*, 576 U.S. at 813-14.

But Kansas's "prescriptions for lawmaking" do not include the judiciary. The Kansas Constitution vests "[t]he legislative power of this state" in the Kansas Legislature, Kan. Const. art. 2, § 1, and gives the Governor a role in either approving or vetoing laws the Legislature has made, *id.* § 14. "[T]he three law-making powers" in Kansas, then, are "the house, the senate, and the governor." *Harris v. Shanahan*, 192 Kan. 183, 194, 387 P.2d 771 (1963). The Kansas Constitution does not give any lawmaking authority to the judiciary. Rather, it prohibits "impos[ing] a legislative function upon the judiciary." *Copeland v. Kansas State Bd. of Examiners in Optometry*, 213 Kan. 741, 743, 518 P.2d 377 (1974); *see also, e.g.*, *State v. Johnson*, 61 Kan. 803, 60 P. 1068, 1074 (1900) ("[T]he making of laws" is "a power which can never be reposed in or exercised by the judiciary.").

The judiciary's role as the "sole arbiter of the question whether an act of the legislature is invalid under the Constitution of Kansas" cannot defeat the Elections Clause. *Harris*, 192 Kan. at 207.[3] The power to regulate federal elections is not an inherent state power. Rather, "electing representatives to the National Legislature was a new right, arising from the [U.S.] Constitution itself." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995). When the Legislature exercises its

[3] Notably, this Court in *Harris* reviewed a *state legislative* district map under the Kansas Constitution. 192 Kan. at 187 ("This action attacks the apportionment of the senate and house of representatives of the Kansas legislature."). This Court has never reviewed a *congressional* district map under the Kansas Constitution.

congressional redistricting authority, it is not acting "under the authority given it by the people of the State, but by virtue of a direct grant of authority made" under the U.S. Constitution. *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (per curiam). Because "[t]his power is conferred upon the legislatures of the states by the constitution of the United States," it "cannot be taken from them or modified by their state constitutions." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (citation omitted). 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 for the conduct of a fair election." *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1, 2 (2020) (statement of Alito, J.).

This Court recognized as much in *Parsons v. Ryan*, 144 Kan. 370, 60 P.2d 910 (1936), when it reviewed a law enacted pursuant to the Legislature's authority under the U.S. Constitution's substantially-identically worded Electors Clause.[4] The Court was "not persuaded" that "all election laws are but exercises of the police power and as such subject to constitutional restrictions." *Id.* at 912. As it explained, "the Federal Constitution commands the state Legislature to direct the manner of choosing electors." *Id.* Once the Legislature has done so, the "manner selected by the Legislature *may not be set aside by the courts*." *Id.* (emphasis added). If the election law "is to be changed, it must be by the Legislature, not by this court." *Id.*

[4] The Electors Clause vests the power to regulate presidential elections in the state legislatures. It provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ." U.S. Const. art. II, § 1.

Other state courts have also recognized that state constitutions may not "impose a restraint upon the power of prescribing the manner of holding [federal] elections which is given to the legislature by the constitution of the United States." *In re Plurality Elections*, 15 R.I. 617, 8 A. 881, 882 (1887); *see, e.g.*, *State ex rel. Beeson v. Marsh*, 150 Neb. 233, 246, 34 N.W.2d 279 (1948); *Commonwealth ex rel. Dummit v. O'Connell*, 298 Ky. 44, 50, 181 S.W.2d 691 (Ct. App. 1944); *In re Opinions of Justices*, 45 N.H. 595, 605 (1864); *State v. Williams*, 49 Miss. 640, 665-66 (1873); *cf. Mauldin v. Branch*, 866 So. 2d 429, 433-34 (Miss. 2003). So too have federal courts. *See, e.g.*, *Carson v. Simon*, 978 F.3d 1051, 1059-60 (8th Cir. 2020) (per curiam); *PG Pub. Co. v. Aichele*, 902 F. Supp. 2d 724, 747-48 (W.D. Pa. 2012).

Specific provisions of the Kansas Constitution reaffirm that the Kansas judiciary may not undo the legislative process of congressional redistricting. Article 10, Section 1 contains a mechanism for this Court's review and approval of *state legislative* maps—but not of *congressional* maps. Under that provision, this Court must determine the validity of any state legislative district map that the Legislature enacts. The fact that the Kansas Constitution provides for judicial approval of state legislative maps but not congressional maps demonstrates that the Kansas Constitution has not vested the judiciary with any authority to determine the validity of congressional district maps. That authority stems from the U.S. Constitution, has been delegated by the U.S. Constitution to the Kansas Legislature, and has not been reallocated by any Kansas law.

B. The district court's contrary reasoning is wrong.

The district court determined that it had jurisdiction despite the Elections

Clause for four reasons, none of which is persuasive.

First, the district court feared that the Elections Clause "would wreak havoc on Kansas elections." (J.A. VI, 162.) Those fears are overblown. The U.S. Constitution provides multiple federal avenues for review of congressional redistricting. Federal courts have authority in "two areas—one-person, one-vote and racial gerrymandering"—to address problems in congressional redistricting. *Rucho*, 139 S. Ct. at 2495. And, as explained above, "the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause." *Id.* at 2508; *see supra* 10. Dissatisfied voters "may seek Congress' correction of regulations prescribed by state legislatures." *Ariz. State Legislature*, 576 U.S. at 824. That check is not meaningless. Congress has exercised it in the past—including to constrain congressional redistricting.[5]

Dissatisfied Kansas voters may also seek relief through political channels in Kansas. They may vote out the proponents of SB 355 in the upcoming election. They may also seek to exercise the state's legislative power by amending the Kansas Constitution to specifically address any perceived problem with political gerrymandering, as the people in many other states have. *See* Kan. Const. art. 14;

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[5] *See, e.g.*, Act of Nov. 15, 1941, ch. 470, § 1, 55 U.S. Stat. 761 (providing for statewide elections and thereby mooting political gerrymandering concerns); Act of Aug. 8, 1911, ch. 5, § 3, 37 U.S. Stat. 13 (requiring that districts be "composed of a contiguous and compact territory"); Act of Jan. 16, 1901, ch. 93, § 3, 31 U.S. Stat. 733 (same); Act of Feb. 7, 1891, ch. 116, § 3, 26 U.S. Stat. 735 (requiring that districts be "composed of contiguous territory"); Act of Feb. 25, 1882, ch. 20, § 3, 22 U.S. Stat. 5 (same); Act of Feb. 2, 1872, ch. 11, § 2, 17 U.S. Stat. 28 (same); Act of July 14, 1862, ch. 170, 12 U.S. Stat. 572 (same); Act of June 25, 1842, ch. 47, § 2, 5 U.S. Stat. 491 (same).

infra 16 & n.6. Using these constitutionally available avenues to address political gerrymandering would not "fundamentally upend election administration in Kansas." (J.A. VI, 154.) But a court undoing the Legislature's enactment of a congressional map weeks before the candidate filing deadline most certainly does.

Second, the district court purported to rely on "extensive U.S. Supreme Court precedent." (J.A. VI, 154.) That reliance is misplaced. The district court stressed recent dicta from the U.S. Supreme Court that "state constitutions can provide standards and guidance for state courts to apply" to political gerrymandering. *Rucho*, 139 S. Ct. at 2507. The Supreme Court gave as an example Florida's Fair Districts Amendment, which expressly forbids "the intent to favor or disfavor a political party" in congressional redistricting. *Id.* at 2508 (quoting Fla. Const. art. III, § 20(a)). Other states have adopted similar express constitutional amendments. *See, e.g.*, N.Y. Const. art. 3, § 4(c)(5) (prohibiting drawing congressional districts "for the purpose of favoring or disfavoring . . . political parties"); Ohio Const. art. XIX, § 1(C)(3)(a) (prohibiting drawing congressional districts to "unduly favor[] or disfavor[] a political party").[6]

Kansas has not. Indeed, as the court recognized, the "Kansas Constitution is silent as to congressional redistricting." (J.A. VI, 175.) That the people of Kansas

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[6] *See also* Cal. Const. art. XXI, § 2(e) (prohibiting drawing congressional districts with "the purpose of favoring or discriminating against . . . [a] political party"); Colo. Const. art. V, § 44.3(4)(a) (prohibiting congressional districts "drawn for the purpose of protecting . . . any political party"); Mich. Const. art. IV, § 6(13)(d) (prohibiting drawing congressional districts to "provide a disproportionate advantage to any political party"); Wash. Const. art. 2, § 43(5) (prohibiting congressional districts "drawn purposely to favor or discriminate against any political party").

could choose to forbid certain redistricting practices in the Kansas Constitution does not mean that they *have* in fact done so. Express constitutional provisions of the sort the Supreme Court identified—through which the state legislature has clearly brought the state judiciary into the congressional redistricting process—differ in kind from the general constitutional provisions the court relied on here. Whereas the former may constitute a delegation to the courts of at least a portion of the state legislature's redistricting power, the latter do not.

The other precedents the district court relied on simply establish that—as explained above—"redistricting is a *legislative* function, to be performed in accordance with the State's prescriptions for *lawmaking*." *Ariz. State Legislature*, 576 U.S. at 808 (emphasis added); *see supra* 11-12. In *Hildebrant*, the referendum was "contained within the legislative power." 241 U.S. at 568. In *Smiley*, the governor's approval was part of "the method which the state has prescribed for legislative enactments." 285 U.S. at 367. So too in *Koenig v. Flynn*, 285 U.S. 375, 379 (1932), and *Carroll v. Becker*, 285 U.S. 380, 381-82 (1932). And in *Arizona State Legislature*, the ballot initiative process and resulting independent commission were a part of "the State's prescriptions for lawmaking." 576 U.S. at 808.[7] The constitutional provisions the court relied on here do not provide "prescriptions for lawmaking," *id.*—which concludes either with the Governor's approval or with the

[7] The district court also relied on other inapposite precedents. *Wesberry v. Sanders*, 376 U.S. 1 (1964), was about *federal* court review—not *state* court review. And the challengers brought their claim under the *federal* Constitution—not the *state* constitution. *Id.* at 3. In *Growe v. Emison*, 507 U.S. 25 (1993), the Elections Clause issue here was not even raised.

Legislature's override of the Governor's veto, Kan. Const. art. 2, § 14.

Third, the district court suggested that Congress has required that congressional district maps comply with state constitutions. (J.A. VI, 158-60.) The court cited 2 U.S.C. § 2a(c), which provides that states must be "redistricted in the manner provided by the law thereof." The district court emphasized the absence of any reference to the state "legislature." (J.A. VI, 159.) But the reason for that was "[t]o accommodate" states that "had supplemented the representative legislature mode of *lawmaking* with a direct *lawmaking* role for the people, through the processes of initiative . . . and referendum." *Ariz. State Legislature*, 576 U.S. at 809 (emphasis added). It was not to provide any role for the state judiciary—a non-lawmaking body—in the redistricting process. In any event, as explained below, no provision of the Kansas Constitution bars political gerrymandering. *See infra* 29-33.

Fourth, the district court suggested that the Elections Clause was in tension with the Fourteenth Amendment's Reduction Clause. (J.A. VI, 160-61.) That clause states that "when the right to vote at any election for the choice of . . . Representatives in Congress . . . is denied . . . or in any way abridged, . . . the basis of representation [in the state] shall be reduced." U.S. Const. amend. XIV, § 2. The clause mentions neither redistricting nor state courts—and evinces no intent to alter the balance of power under the Elections Clause. Tellingly, the district court cited no case—from any jurisdiction—interpreting the Reductions Clause as it did here. And the primary case it relied on clearly stated that the power to regulate federal elections "is conferred upon the legislatures of the states by the constitution

of the United States, and cannot be taken from them or modified by their state constitutions." *McPherson*, 146 U.S. at 35 (citation omitted). Furthermore, as explained below, political gerrymandering does not abridge Kansans' right to vote. *See infra* 31-32.

Having set aside the straightforward text of the Elections Clause, the district court compounded its error by ordering that the Legislature (which is not even a party to this case) "*shall enact* a remedial plan in conformity with this opinion as expeditiously as possible." (J.A. VI, 208 (emphasis added).) The district court's aggrandizing command to the Legislature of when and how to exercise its federally delegated authority to regulate federal elections even more directly violates the Elections Clause. It also violates the Kansas Constitution's system of separated powers, which forbids the "usurpation by one branch of government of the powers of another branch of government." *Gannon*, 298 Kan. at 1196; *see also Solomon v. State*, 303 Kan. 512, 525, 364 P.3d 536 (2015).

II. Political gerrymandering claims present political questions that are not justiciable under the Kansas Constitution.

The district court broke new constitutional ground in this case by holding that "partisan gerrymandering claims are justiciable under the Kansas Constitution." (J.A. VI, 166.) That holding is reviewed de novo, *Gannon*, 298 Kan. at 1136, and it warrants reversal by this Court. The Framers did not understand political gerrymandering to violate the Kansas Constitution, and no court has ever understood political gerrymandering to violate the Kansas Constitution. Rather, *political* gerrymandering claims present nonjusticiable *political* questions.

A. Political gerrymandering is as old as Kansas itself, and neither the Founders nor this Court ever understood it to violate the Kansas Constitution.

Political gerrymandering in Kansas "is nothing new. Nor is frustration with it." *Rucho*, 139 S. Ct. at 2494. Political gerrymandering dates back to Kansas's founding. The 1859 Wyandotte Convention not only gave birth to the Kansas Constitution, it also drew the first legislative districts in Kansas. Those districts were the subject of a vigorous fight over political gerrymandering that "caused [such a] great feeling at the time [that] the Democrats in and out of the convention howled like a Marshall county cyclone." Wyandotte Convention Proceedings at 660 (App. C); *see also id.* at 670 (App. C-2) ("A most exciting discussion occurred . . . over the apportionment article, which the Democrats denounced as a 'gerrymander.'").

One critic of the proposed apportionment argued that it would "so gerrymander as to disfranchise all the Democratic counties except two . . . in order to secure an overwhelming Republican majority in the Legislature." *Id.* at 478. Another proposed in jest that the Convention simply pass a resolution stating that "every species of political skullduggery must be resorted to" and that "regard for the interests of the Republican party and disregard for the interests of the people, be followed throughout this apportionment." *Id.* at 479-80. A formal protest against the apportionment charged that it was a "mere political scheme unworthy [of] the dignity of th[e] Convention" because it grouped "counties antagonistic in interest . . . without the shadow of excuse or reason, save only to secure the triumph of the Republican party." *Id.* at 518-19.

Critics of Kansas's first district lines at the Wyandotte Convention decried

them as "unjust and unfair," "partisan," and "unworthy [of] the dignity of this Convention." *Id.* at 476, 478, 519. But none thought to claim that the new district lines violated any provision of the Kansas Constitution they had just written.

"The meaning of a Constitution is fixed when it is adopted, and afterwards, when the courts are called upon to interpret it, they cannot assume that it bears any different meaning." *State ex rel. Dawson v. Sessions*, 84 Kan. 856, 115 P. 641, 642 (1911). Rather, courts must "consider the circumstances attending its adoption and what appears to have been the understanding of the people when they adopted it." *Solomon*, 303 Kan. at 523 (citation omitted); *see also, e.g.*, *State ex rel. Stephan v. Finney*, 254 Kan. 632, 654, 867 P.2d 1034 (1994) ("[T]he primary duty of the courts is to look to the intention of the makers and adopters of that provision."); *State ex rel. Frizzell v. Highwood Serv., Inc.*, 205 Kan. 821, 825-26, 473 P.2d 97 (1970) (similar); *State ex rel. Anderson v. Fadely*, 180 Kan. 652, 659, 308 P.2d 537 (1957) (similar). The circumstances surrounding the Kansas Constitution's adoption plainly reflect the Framers' understanding that political gerrymandering does not violate the Kansas Constitution.

This Court has similarly never held that a political gerrymander violates the Kansas Constitution. Over the past several decades, this Court has faced multiple charges that state legislative apportionment plans amount to political gerrymanders. *See In re Stephan* (*Stephan III*), 251 Kan. 597, 607-09, 836 P.2d 574 (1992) (rejecting claim of political "gerrymandering"); *In re Stephan* (*Stephan I*), 245 Kan. 118, 128, 775 P.2d 663 (1989) (rejecting claim that "political considerations

prevailed"); *In re House Bill No. 2620*, 225 Kan. 827, 837-40, 595 P.2d 334 (1979) (rejecting claims of "political gerrymandering"); *In re Senate Bill No. 220*, 225 Kan. 628, 635-37, 593 P.2d 1 (1979) (rejecting claim of "partisan political gerrymandering"). But as the district court correctly recognized, this Court "has never held a redistricting plan unconstitutional on partisan gerrymandering grounds." (J.A. VI, 174.)

To the contrary, this Court has repeatedly indicated that political gerrymandering claims are not fit for judicial resolution. That is because "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) (citation omitted); *see also Stephan I*, 245 Kan. at 128; *House Bill No. 2620*, 225 Kan. at 840. Redistricting "must be formulated primarily by the legislative process with all of its political trappings and necessary compromises." *Senate Bill No. 220*, 225 Kan. at 634; *see also Stephan III*, 251 Kan. at 605. As such, "[p]olitics and political considerations are inseparable from districting and apportionment." *Stephan I*, 245 Kan. at 128 (citation omitted); *see also House Bill No. 2620*, 225 Kan. at 840. This Court has also indicated that political gerrymandering claims are "speculative at best," and that it would be "difficult if not impossible" to adjudicate such claims because political "profiles depend in large part on voting patterns which change with the personalities of the candidates," *House Bill No. 2620*, 225 Kan. at 839-40.

This "history is not irrelevant." *Rucho*, 139 S. Ct. at 2496. The point is not

that political gerrymandering is old. The point is that political gerrymandering has never been understood to violate the Kansas Constitution.

The district court recognized a novel political gerrymandering claim in the Kansas Constitution in part because "federal courts have retreated from applying federal constitutional standards in the context of partisan gerrymandering." (J.A. VI, 170.) The district court misapprehended the history of political gerrymandering claims in federal court. The U.S. Supreme Court did not retreat from adjudicating political gerrymandering claims in *Rucho*. Rather, like this Court prior to this case, the Supreme Court prior to *Rucho* had "never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years" and "considerable efforts" to discern such a claim. *Rucho*, 139 S. Ct. at 2498, 2507 (citation omitted).

B. Political gerrymandering claims present political questions.

Article 3, Section 1 of the Kansas Constitution vests in the judiciary "[t]he judicial power of this state." That power encompasses "cases and controversies." *Solomon*, 303 Kan. at 521. But it does not encompass "political question[s]." *Gannon*, 298 Kan. at 1119. Under the Kansas Constitution, "a political question is required to be left unanswered by the judiciary, *i.e.*, is 'nonjusticiable.'" *Id.* at 1135. This requirement "is based upon the doctrine of separation of powers and the relationship between the judiciary and the other branches or departments of government." *Leek v. Theis*, 217 Kan. 784, 813, 539 P.2d 304 (1975).

This Court regularly "consider[s] federal law when analyzing justiciability."

Gannon, 298 Kan. at 1119. In assessing whether a case presents a nonjusticiable political question, this Court applies the U.S. Supreme Court's "*Baker v. Carr* factors." *Id.* at 1138; *see also, e.g.*, *Kansas Bldg. Indus. Workers Comp. Fund v. State*, 302 Kan. 656, 668, 359 P.3d 33 (2015); *Leek*, 217 Kan. at 813-16. Those factors set forth characteristics, any "one or more of which must exist to give rise to a political question." *Gannon*, 298 Kan. at 1137 (citation omitted). Among them are: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department," (2) the "lack of judicially discoverable and manageable standards," and (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Leek*, 217 Kan. at 813 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

All three of these factors point in the same direction in this case: Claims of political gerrymandering present nonjusticiable political questions.

1. Congressional redistricting is constitutionally committed to the Kansas Legislature.

The task of congressional redistricting is constitutionally "commit[ted] . . . to a coordinate political department." *Id.* (quoting *Baker*, 369 U.S. at 217). Redistricting is "one of the most intensely partisan aspects of American political life." *Rucho*, 139 S. Ct. at 2507. The Framers of the U.S. Constitution wisely entrusted this politically fraught task to political actors. The Elections Clause delegates the redistricting authority to the Kansas "Legislature"—as checked by the U.S. Congress. U.S. Const. art. I, § 4; *see supra* 10-14. The U.S. Constitution's express delegation of the redistricting authority to state legislatures (checked by the

federal legislature) reflects the Framers' view that redistricting is a political task to be performed by politically accountable actors—not by the independent judiciary. The Framers did not envision courts inserting themselves into this political process. For a court to "hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities." *Rucho*, 139 S. Ct. at 2497.

2. There are no judicially discoverable and manageable standards for resolving political gerrymandering claims.

Political gerrymandering claims present nonjusticiable political questions for the additional reason that there is a "lack of judicially discoverable and manageable standards for resolving" them. *Leek*, 217 Kan. at 813 (quoting *Baker*, 369 U.S. at 217). No court in Kansas has ever articulated such a standard. As the district court recognized, this Court has never "give[n] clear rules for resolving" political gerrymandering claims. (J.A. VI, 174.) Nor could the district court in this case. (J.A. VI, 188 (deeming a "bright-line standard . . . neither necessary nor prudent").)

Other high courts across the country have similarly come up short in trying to divine a discernible and manageable standard for such claims. Applying the same *Baker v. Carr* factors this Court applies, the U.S. Supreme Court recently held that political gerrymandering claims present nonjusticiable political questions under the U.S. Constitution. *See Rucho*, 139 S. Ct. at 2506-07. As the Court explained, the lack of a judicially manageable standard was not a result of the limited "reach of [the Court's] competence" but rather of the fact that courts "have no commission to allocate political power and influence in the absence of a constitutional directive or

legal standards to guide [them] in the exercise of such authority." *Id.* at 2508; *see also Johnson v. Wis. Elections Comm'n*, 399 Wis. 2d 623, 649-50, 967 N.W.2d 469 (2021); *State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 605-07, 730 S.E.2d 368 (2012); *Pearson v. Koster*, 359 S.W.3d 35, 42 (Mo. 2012).[8]

Courts' failure to discern standards for political gerrymandering claims is not due to any lack of judicial intellect or imagination. Rather, it is due to the nature of political gerrymandering claims—which are thoroughly political, based on impossible predictions, and without textual basis in the Kansas Constitution.

a. Political gerrymandering claims are unavoidably political.

A major problem with attempting to adjudicate political gerrymandering claims is that such claims are political to their core. Redistricting is "root-and-branch a matter of politics." *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality op.). It "inevitably has and is intended to have substantial political consequences." *Stovall II*, 273 Kan. at 734 (citation omitted). Redistricting, then, will be "inseparable" from "[p]olitics and political considerations"—no matter who does it. *Stephan I*, 245 Kan. at 128 (citation omitted). Judicial redistricting will still be

[8] While some courts have discerned standards, those standards are rooted at least in large part in constitutional provisions that find no counterpart in the Kansas Constitution. *See, e.g.*, *Harkenrider v. Hochul*, 2022 WL 1236822, at *9-11 (N.Y. Apr. 27, 2022) (relying on N.Y. Const. article III, § 4(c)(5)); *Harper v. Hall*, 2022-NCSC-17, ¶¶ 133-41 (relying on N.C. Const. art. I, § 10); *Adams v. DeWine*, 2022-Ohio-89, ¶¶ 30-40 (relying on Ohio Const. art. XIX, § 1(C)(3)(a)); *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1, 97-117, 178 A.3d 737 (2018) (relying on Pa. Const. art. 1, § 5); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 373-76 (2015) (relying on Fla. Const. art. III, § 20(a)).

political redistricting. Only judges, unlike the members of the Legislature, are not political actors. Judges "have neither the expertise nor the authority to evaluate these policy judgments." *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007).

Forcing courts into the intensely political process of redistricting not only requires them to decide matters beyond judicial competence, it also threatens the public's perception of judicial independence. "Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *State v. Smith*, 308 Kan. 778, 788-89, 423 P.3d 530 (2018) (citation omitted); *see also Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 445-46 (2015) ("The judiciary's authority . . . depends in large measure on the public's willingness to respect and follow its decisions."). Forcing judges to play referee between the political parties in the political process risks leading the public to question their impartiality. That is all the more so where, as here, the judge was elected by partisan election as a member of the party in whose favor the call went.[9]

b. Elections are notoriously unpredictable.

Another fundamental problem with adjudicating political gerrymandering claims is that, because they are based on allegations that a certain district will result in unfavorable outcomes for members of one political party, they necessarily

[9] Judge Bill Klapper was elected in 2018 as a member of the Democratic party. *See* Defts' Resp., *In re Joint Request of Seventh Judicial Dist. & Twenty-Ninth Judicial Dist.*, No. 124927 (Mar. 18, 2022). He is up for reelection this year. *See Become a Judge Through Election*, Kansas Judicial Branch, https://www.kscourts.org /Judges/Become-a-Judge-(2) (last visited May 2, 2022) (noting that elected "judges run for office every four years on a partisan ballot").

rely on predictions about elections and voting behavior. But as the district court recognized at trial—and experience has borne out—nobody "perhaps in the entire world is qualified to predict who will win the next election." (J.A. XV, 33.) Courts are no more skilled in the psychic arts. For courts to "strike down apportionment plans on the basis of their prognostications as to the outcome of future elections . . . invites 'findings' on matters as to which neither judges nor anyone else can have any confidence." *Rucho*, 139 S. Ct. at 2503 (quoting *Davis v. Bandemer*, 478 U.S. 109, 160 (1986) (O'Connor, J., concurring in the judgment)).

One reason elections are notoriously difficult to predict is that "[p]olitical affiliation is not an immutable characteristic." *Vieth*, 541 U.S. at 287 (plurality op.). "[V]oters can—and often do—move from one party to the other or support candidates from both parties." *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring in the judgment). And "even within a given election, not all voters follow the party line." *Vieth*, 541 U.S. at 287 (plurality op.). Many others are unaffiliated. Recognizing a political gerrymandering claim would require this Court "to indulge a fiction—that partisan affiliation is permanent and invariably dictates how a voter casts every ballot." *Johnson*, 399 Wis. 2d at 657.

Another reason elections are difficult to predict is that local politics matter. As this Court has long recognized, it "is difficult if not impossible to consider political profiles in apportionment cases for the profiles depend in large part on voting patterns which change with the personalities of the candidates." *House Bill No. 2620*, 225 Kan. at 839. Voters' preferences "depend on the issues that matter to

them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations." *Rucho*, 139 S. Ct. at 2503.[10]

c. There is no standard in the Kansas Constitution.

Perhaps the most glaring problem with attempting to adjudicate political gerrymandering claims is that the Kansas Constitution does not provide any judicially discoverable and manageable standards.[11] The district court laid out three separate theories as to how partisan gerrymandering violates six separate provisions of the Kansas Constitution. (J.A. VI, 178-87.) But none of those provisions provides a manageable standard for answering the unanswerable question of how much politics in redistricting is too much.

First, the district court primarily relied on Sections 1 and 2 of the Kansas Constitution's Bill of Rights (as "reinforce[d]" by Section 20) in holding that political gerrymandering violates equal protection. (J.A. VI, 178-82.) Neither of those provisions mentions redistricting or gerrymandering, nor provides any way to measure political fairness. Rather, they broadly provide that "[a]ll men are

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[10] Even those who draw politically gerrymandered districts can get it wrong. Political gerrymanders can—and do—fail. *See, e.g.*, Larry Alexander & Saikrishna B. Prakash, *Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering*, 50 Wm. & Mary L. Rev. 1, 43-44 (2008).

[11] Notably, the Kansas Bill of Rights was modeled after the Ohio Bill of Rights. *See State v. Petersen-Beard*, 304 Kan. 192, 210, 377 P.3d 1127 (2016). Ohio recently amended its constitution to include a provision specifically prohibiting "pass[ing] a plan that unduly favors or disfavors a political party." Ohio Const. art. XIX, § 1(C)(3)(a). This indicates that the pre-amendment Ohio Bill of Rights—which inspired the Kansas Bill of Rights—did not prohibit the practice.

possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness," and "[a]ll political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit." Kan. Const. Bill of Rights, §§ 1-2.

The district court's holding appears to be that any level of partisan motivation in redistricting unconstitutionally "deprives voters of substantially equal voting power." (J.A. VI, 181.) But this Court has already determined that this cannot be the standard. Some political consideration in redistricting is inevitable, understandable, and constitutionally permissible. Redistricting "inevitably has and is intended to have substantial political consequences." *Stovall II*, 273 Kan. at 734 (citation omitted). Indeed, this Court has proclaimed "safely retaining seats for the political parties" a "legitimate political goal" in redistricting. *In re Stovall* (*Stovall I*), 273 Kan. 715, 722, 44 P.3d 1266 (2002). "A partisan gerrymandering claim cannot ask for the elimination of partisanship." *Rucho*, 139 S. Ct. at 2502.

The district court's reasoning is rooted in a desire for proportional representation—that is, the idea that people are entitled to have their political party achieve representation at a level commensurate to its share of statewide support. But this Court has already rejected this as a standard. Proportional representation "is not required by the cases interpreting the constitution." *Senate Bill No. 220*, 225 Kan. at 637. "[N]ot every majority in a state will be able to elect a majority of its senators." *Id.* If the law were otherwise, there would be "simply no clear stopping point to prevent the gradual evolution of a requirement of roughly

proportional representation for every cohesive political group." *Bandemer*, 478 U.S. at 147 (O'Connor, J., concurring in the judgment); *Johnson*, 399 Wis. 2d at 654 ("Constitutional law does not privilege the 'major' parties; if Democrats and Republicans are entitled to proportional representation, so are numerous minor parties."). That problem is very real in Kansas, where unaffiliated voters comprise a larger share of Kansas's electorate than Democratic voters. (J.A. XVIII, 189.) Are unaffiliated voters also entitled to proportional representation? And if so, by whom?

In reaching its contrary holding, the district court suggested that the Kansas Constitution's equal protection guarantee is greater than the U.S. Constitution's. (J.A. VI, 178.) This Court's precedents disagree. The equal protection aspects of Sections 1 and 2 are "given much the same effect" as the Fourteenth Amendment's Equal Protection Clause. *State ex rel. Tomasic v. Kansas City*, 230 Kan. 404, 426, 636 P.2d 760 (1981). This Court has held as much in the specific context of redistricting. *See Stephan III*, 251 Kan. at 606 ("declin[ing]" to adopt a "stricter standard" for equal protection than what "is required by the United States Supreme Court"). The cases the district court cited arose in distinct and inapposite contexts. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019), did not address the equal protection aspect of Sections 1 and 2 of the Kansas Constitution's Bill of Rights, which Plaintiffs rely on here. And *Farley v. Engelken*, 241 Kan. 663, 740 P.2d 1058 (1987), involved the particular context of Section 18 of the Kansas Constitution's Bill of Rights, which has no federal constitutional counterpart.

Second, the district court relied on Article 5, Section 1 of the Kansas

Constitution (in addition to Sections 1 and 2 of the Kansas Constitution's Bill of Rights) in holding that political gerrymandering infringes the right to vote. (J.A. VI, 182-83.) Like Sections 1 and 2 of the Bill of Rights, Article 5, Section 1 has nothing to say about redistricting or gerrymandering. It merely provides 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." Kan. Const. art. 5, § 1. That text provides no standard to measure political fairness.

Article 5, Section 1 also does not suffice as a standard because district lines do not alter voting power. People remain free to vote for their chosen candidate, and their vote counts on equal terms with every other Kansan's. The right to vote does not give political parties the right to be free from "impairment of their group voting strength." *Bandemer*, 478 U.S. at 150 (O'Connor, J., concurring in the judgment). Other state high courts have reached similar holdings. *See Johnson*, 399 Wis. 2d at 657 ("Voters retain their freedom to choose among candidates irrespective of how district lines are drawn."); *Pearson*, 359 S.W.3d at 42-43.

Third, the district court relied on Sections 3 and 11 of the Kansas Constitution's Bill of Rights in holding that political gerrymandering is a free speech and assembly violation. (J.A. VI, 183-87.) Yet again, neither constitutional provision makes any mention of redistricting or gerrymandering, nor provides any standard. They instead provide that "all persons may freely speak, write or publish their sentiments on all subjects," and guarantee Kansans "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, 11.

The district court's holding again appears to prohibit any level of political motivation—or consideration of "disfavored party" status, (J.A. VI, 184)—in redistricting. For the reasons explained above, that is not the law. *See supra* 30. But even more fundamentally, political gerrymandering does not abridge speech and associational rights. Regardless where district lines are drawn, Kansans remain free to speak, to assemble, to consult, and to instruct or petition their government. District lines do not prevent Kansans from "forming political parties, voicing support for their candidates of choice, and casting votes for those candidates." (J.A. VI, 186.) Voters remain "free to engage in those activities no matter what the effect of a plan may be on their district." *Rucho*, 139 S. Ct. at 2504. Speech and associational rights "guarantee the freedom to participate in the political process; they do not guarantee a favorable outcome." *Johnson*, 399 Wis. 2d at 659.

d. The district court's test is unmanageable.

Absent any judicially discernible and manageable standard in any of the six constitutional provisions it relied on, the district court invented its own test, good for this case only: A political gerrymander exists where (1) "the Legislature acted with the purpose of achieving partisan gain by diluting the votes of disfavored-party members" and (2) "the challenged congressional plan will have the desired effect of substantially diluting disfavored-party members' votes." (J.A. VI, 173.) Both elements of the district court's test are flawed.

First, the district court's test has as an element political "purpose." (J.A. VI, 173.) But district maps are drawn by politicians, and politicians always act with some political purpose. As explained above, this Court has long recognized that some political intent in redistricting is constitutionally permissible and by design inevitable. *See supra* 30. Because some degree of political purpose is permissible, the question becomes: "How much is too much?" *Rucho*, 139 S. Ct. at 2501. That question is not answered by the district court's test, nor could it be answered by any court without making fraught determinations about political fairness and how much representation each party deserves.

Further highlighting the unworkability of the district court's intent element is the evidence that the district court sought to evaluate it. The district court repeatedly observed that "[n]o legislator took the stand to testify" in defense of SB 355. (J.A. VI, 140, 142.) And before trial, Plaintiffs similarly sought information about SB 355's enactment from current legislators, legislative staffers, lobbyists, an expected congressional candidate, and other political figures. (J.A. I, 106-246; II, 1-106, 182-209.) Asking legislators to testify in court or provide information about the give-and-take of the political process is dubious not only as a matter of good government, but also as a constitutional matter. Article 2, Section 22 of the Kansas Constitution provides that legislators "shall not be questioned elsewhere" regarding "any speech, written document or debate in either house."

Second, the district court's test has an element of political "effect." (J.A. VI, 173.) This element, much like the intent element, ignores the reality that political

acts taken by political actors will necessarily have political effects. It also leaves unanswered the question of how much political effect is too much. Because political effect is inevitable in redistricting, how are courts to determine what the baseline acceptable level of political effect is? And how much political effect beyond that level is constitutionally tolerable? The district court provided no answer. Nor did it explain how it might accurately predict the political effects of a particular map in future elections. *See supra* 27-29.

Grasping for some clarity in the political morass, the district court relied on assorted social science methodologies that purport to measure partisan fairness. But none of those methodologies—which were themselves cherry-picked from an even larger collection of available methodologies—supplies the sort of judicially manageable standard the Kansas Constitution requires.

As a baseline matter, how are to courts to determine which political science methodologies the Constitution imposes in a particular case? Political science is a dynamic field plagued by notoriously high margins of error.[12] Academics are always proposing new methodologies for measuring political fairness and modifying old methodologies. There is no way for a court assessing an alleged constitutional violation to identify which of those methodologies properly measures that violation. The standard for a constitutional claim cannot be whether the plaintiff is able to identify some methodology that delivers the desired result.

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[12] *See* Edmund L. Andrews, *The margin of error is bigger than you think*, Stanford Engineering (Mar. 6, 2018), https://engineering.stanford.edu/magazine/article/margin-error-bigger-you-think.

The methodologies the district court relied on here also are not manageable standards. Professor Warshaw's "efficiency gap" methodology, for instance, relies on fundamental misunderstandings about how elections work. That model relies on past statewide election results, and assumes that the same voters will vote in the same way in future congressional elections. (J.A. XIV, 94-95; XIX, 91.) But voter turnout is not a given, and "voting patterns . . . change with the personalities of the candidates." *House Bill No. 2620*, 225 Kan. at 839. The efficiency gap also treats as "wasted" every vote cast for a losing candidate and every excess vote cast for a winning candidate. (J.A. XIV, 121-25; XIX, 91-98.) But votes cast for a losing candidate may encourage the winner to adopt more moderate, centrist positions, while an overwhelming victory may do the opposite.

The efficiency gap is also prone to false positives—meaning that it erroneously identifies "fair" maps as political gerrymanders. Here, for example, Kansas's 2012 congressional map had a pro-Republican efficiency gap of 15.6%. (J.A. VI, 87-88.) This exceeds Professor Warshaw's "[m]aybe 15 percent" threshold for an "extreme" partisan gerrymander. (J.A. XI, 175.) The 2012 map, however, was drawn by an apolitical federal three-judge panel. *See Essex*, 874 F. Supp. 2d at 1084-89, 1095. A metric that misidentifies political gerrymandering like this does not provide a manageable standard for adjudicating political gerrymandering.

"[T]raditional redistricting criteria" also are not the panacea the district court would have them be. (J.A. VI, 187.) A number of those criteria—including compactness, contiguity, recognition of communities of interest, preserving the cores

of old districts, and keeping political subdivisions whole—were identified in a document produced by the Legislature's Redistricting Advisory Group. (J.A. XVII, 14; XI, 11.) The district court relied on these "Guidelines," and faulted the Legislature for not adhering to them. (J.A. VI, 14.) But as explained below, the Legislature did adhere to the Guidelines. *See infra* 41-43. And in any event, the Guidelines are not the law. Only the House Committee on Redistricting adopted the Guidelines. (J.A. XXIII, 207.) The Senate Committee on Redistricting did not, the House itself did not, and the Senate did not. *See* Kan. Const. art. 2, §§ 13, 14 (requiring bicameralism and presentment for legislation). Senator Corson and Representative Burroughs both recognized at trial that the Guidelines are not codified in Kansas law. (J.A. X, 249 (not in "Kansas statutes"); J.A. XI, 33 (not in "the Kansas Constitution").) Struggling to characterize their authority, Senator Corson called them, "sort of a promise to the people." (J.A. X, 245.) But a sort of promise is not a judicially discernible and manageable standard.

Furthermore a number of traditional districting criteria are not capable of precise definition, making them unmanageable as standards. How is a court to define a "cultural community of interest," for example? And when is a district no longer "compact"? These are "squishy" concepts not capable of judicial measurement. (J.A. X, 67.) Furthermore, not all traditional districting criteria can be fully honored in every map. The determinations which criteria must yield to others do not lend themselves to manageable determination by courts. Rather, they are discretionary, political choices that have been entrusted to the Kansas

Legislature. *See, e.g.*, *Graham v. Thornburgh*, 207 F. Supp. 2d 1280, 1296-97 (D. Kan. 2002) ("Nor is the court in a position to weigh the relative importance or deservedness of particular communities of interest.").

Further rendering traditional redistricting criteria an unmanageable standard is the fact that they too result in false positives. Traditional districting criteria and politics are unavoidably intertwined. Even lines drawn according to purportedly neutral criteria "always carr[y] some consequence for politics." *Vieth*, 541 U.S. at 343 (Souter, J., dissenting). "[C]ompactness and contiguity 'cannot promise political neutrality'" as voters of various political persuasions are not uniformly distributed across Kansas. *Rucho*, 139 S. Ct. at 2500 (quoting *Vieth*, 541 U.S. at 308-09 (Kennedy, J., concurring in the judgment)). Political "packing and cracking, whether intentional or no, are quite consistent with adherence to compactness and respect for political subdivision lines." *Vieth*, 541 U.S. at 298 (plurality op.). And the identification of communities of interest entails some consideration of "economical, *political* and cultural interests." *Harris*, 192 Kan. at 205 (emphasis added); *see Essex*, 874 F. Supp. 2d at 1086 (same).

Finally, a "simulated map methodology" such as Professor Chen's also does not provide a judicially manageable standard. That methodology attempts to measure political fairness through comparison to other, hypothetical maps. But once again, all such a methodology shows is that one map is more political than other maps produced by a particular algorithm. It does not guide courts in determining how political is too political. Furthermore, courts are rightfully "wary

of adopting a constitutional standard that invalidates a map based on . . . a hypothetical state of affairs." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 420 (2006) (op. of Kennedy, J.). Hypothetical worlds rarely reflect the real one. That was true of Professor Chen's methodology, which did not account for or seek to keep together economic, social, and cultural communities of interest. (J.A. VI, 34.)

3. Political gerrymandering claims require courts to make policy determinations on matters of legislative discretion.

Political gerrymandering claims also present nonjusticiable political questions because it would be "impossib[le]" to decide a political gerrymandering claim "without an initial policy determination of a kind clearly for nonjudicial discretion." *Leek*, 217 Kan. at 813 (quoting *Baker*, 369 U.S. at 217). Partisan gerrymandering claims require policy determinations at every step in the process. The essence of the claim is that a particular redistricting map is too political and should be made less political. Such claims ask courts to "make their own political judgment about how much representation particular political parties *deserve*" and then to "reallocat[e] power and influence between political parties." *Rucho*, 139 S. Ct. at 2499, 2502. Courts must determine whether and to what extent the map is political. And if the map is political, then the court must then determine if it is too political. These blatantly political determinations are unavoidable in adjudicating political gerrymandering claims.

These political determinations also implicate matters of legislative discretion. District lines can be drawn in an almost infinite number of ways, and deciding among those ways is a matter of legislative discretion. The Legislature must

evaluate "the location of boundaries, the shape, area, and other relevant factors" including "economical, political and cultural interests." *Harris*, 192 Kan. at 205. This is a "most difficult" task in which the Legislature "must have discretion to exercise the political judgment necessary to balance competing interests." *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

Redistricting decisions will involve discretionary, political determinations no matter who makes them. The Framers entrusted this deeply political task to the political branches of government. There is no reason for this Court to disregard that design and dive headfirst into the "political thicket." *Colegrove*, 328 U.S. at 556 (plurality op.).

III. The district court erred in holding SB 355 unconstitutional.

Even assuming the district court had jurisdiction, reversal is still warranted because SB 355 is not an unconstitutional political gerrymander and does not unconstitutionally dilute minority votes. This Court "applies a de novo standard of review" to the district court's ruling of unconstitutionality. *Barrett ex rel. Barrett v. Unified Sch. Dist. No. 259*, 272 Kan. 250, 255, 32 P.3d 1156 (2001).

A. SB 355 is not an unconstitutional political gerrymander.

Even if there were an identifiable constitutional line for political gerrymandering, SB 355 would not cross it. Under SB 355, the Third Congressional District still favors the Democratic candidate. And the Legislature had reasonable, nonpartisan grounds for drawing district lines where they did.

First and foremost, SB 355 does not prevent a Democrat from being elected to Congress. To the contrary, multiple redistricting authorities predict that the Third

District under SB 355 leans Democratic. (J.A. VI, 134.) PlanScore—a website maintained by a subset of Plaintiffs' own counsel (at the Campaign Legal Center)—predicts a 62% likelihood that a Democrat will win the next election in the new Third District. (J.A. XVIII, 244-45.)[13] And the Princeton Gerrymandering Project predicts that the Democratic vote share in the new Third District is 52.4%—and that Democrats are therefore favored to win one out of four seats under SB 355. (J.A. XIV, 38-39; XIX, 62.) This is notable given that Kansas has a strong Republican majority, and that the Kansas Legislature has a Republican supermajority. (J.A. VI, 17, 93.) A map in which one out of four districts leans Democratic in a heavily Republican state is not an unlawful pro-Republican gerrymander.

Furthermore, the Legislature had legitimate reasons for drawing the district lines where it did. The district court incorrectly disregarded these reasons as "argument[s] by lawyers" that "are not evidence." (J.A. VI, 139.) In fact, all of these reasons were given by the Legislature itself in the course of SB 355's enactment, and the full legislative record was admitted as evidence at trial. *See supra* 5.

SB 355 achieves exact population equality: 734,470 people in each district. (J.A. XVII, 24.) This satisfies the constitutional guarantee that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). And SB 355's districts are

[13] The Campaign Legal Center appears to have since deleted this information. *See* Campaign Legal Center, *Kansas—U.S. House*, https://planscore.campaignlegal.org/kansas/#!2020-plan-ushouse-eg (last visited May 2, 2022).

contiguous and compact. (J.A. XVII, 25.)

SB 355 keeps all incumbents in their current districts, and all of them would still have won under SB 355 in 2020. (J.A. XVIII, 172.) SB 355 also keeps 86% of Kansans in their current districts. (J.A. VI, 191.) The fact that a political science professor may be able to draw a hypothetical map that keeps more Kansans in their current districts is not grounds for this Court to "substitute its judgment for that of another equal branch of the government." *Stephan III*, 251 Kan. at 609.

SB 355 keeps all but 4 of Kansas's 105 counties whole. (J.A. XVII, 27.)[14] While SB 355 divides Wyandotte County, the Legislature had no way to keep all of Wyandotte County with all of Johnson County based on the 2020 Census. (J.A. XXIV, 144.) The total population of the two counties is 779,108, which exceeds the 734,470 limit for population equality. (J.A. XVII, 27; XXIII, 210; XXVIII, 74.) The Legislature had to either separate the two counties, divide Wyandotte County, divide Johnson County, or divide both counties. The Legislature simply chose the second of these options, explaining that Johnson County had never before been split and is where the bulk of Kansas's population growth has occurred in the last decade. (J.A. XXIV, 20, 92, 98.)

SB 355 honors communities of interest across Kansas. Identifying and recognizing communities of interest is a discretionary task that involves sensitive

[14] SB 355 initially split just three counties, like the 2012 federal court-drawn map. (J.A. XVIII, 16, 171.) It was later amended to split a fourth county so that the Kickapoo Reservation could be kept whole in the same congressional district. (J.A. XXIV, 109-10.)

political determinations. "[I]nnumerable districts ideal for particular communities can be constructed if each is considered in isolation; but, when the entire state is divided into a specified number of districts, that which may appear ideal for one place" may appear unideal for any number of other places. *Stephan III*, 251 Kan. at 608. No congressional map will be ideal for every community of interest, and the Legislature must be able to exercise its discretion in weighing those communities.

The Legislature here recognized several important communities of interest: The First District reunites the University of Kansas and Kansas State University, which the Kansas Board of Regents had previously urged. (J.A. XVIII, 171; XXIV, 144.) The Second District is home to several military bases, including Ft. Riley, Ft. Leavenworth, Forbes Field, and the Kansas National Guard. (J.A. XVIII, 171.) The Third District keeps Johnson County—Kansas's largest county and the "economic engine" of Kansas City—whole within the same district. (J.A. XVIII, 171; XXV, 114-15, 219.) And the Fourth District maintains Wichita and surrounding communities in the same district. (J.A. XVIII, 171.)

The district court fundamentally misapprehended the nature of the redistricting process when it disregarded all these reasons and instead suggested that the Kansas Legislature had to adhere to the reasons behind the maps drawn by federal courts in *O'Sullivan v. Brier*, 540 F. Supp. 1200 (D. Kan. 1982), and *Essex*, 874 F. Supp. 2d 1069, unless it could show "that reasoning was flawed" or that "conditions have changed." (J.A. VI, 12.) A map drawn by a federal court (out of necessity) does not become precedent that binds the state Legislature in every

future redistricting cycle. The members of the Legislature are from Kansas, represent Kansans, and know their communities. That is why the U.S. Constitution charges them—not the federal or state courts—with drawing district maps by exercising their legislative discretion. Courts may not "substitute [their] judgment for that of the legislature." *Stephan I*, 245 Kan. at 129.

For these reasons, the district court erred in holding SB 355 to be an unconstitutional political gerrymander. It compounded that error by holding that "the burden of proof is [on] defendants to show the legislative redistricting passes strict scrutiny." (J.A. VI, 14.) The district court was wrong to apply strict scrutiny on the ground that "voting" is a "suspect classification." (J.A. VI, 12.) To the extent the court applied strict scrutiny because it believed this case implicates a fundamental right, *Thompson v. KFB Ins. Co.*, 252 Kan. 1010, 1017, 850 P.2d 773 (1993), that too was error. The district court's just-recognized right against political gerrymandering is "not deeply rooted in [Kansas's] history and tradition." *State v. Ryce*, 303 Kan. 899, 952, 368 P.3d 342 (2016); *see supra* 20-23. Rational basis scrutiny would therefore apply, and SB 355 easily satisfies that standard.

B. SB 355 does not unconstitutionally dilute minority votes.

The district court erroneously held that SB 355 dilutes minority votes in violation of the equal protection aspects of Sections 1 and 2 of the Kansas Constitution's Bill of Rights. (J.A. VI, 195.) As the district court recognized, the elements of such a claim under the Kansas Constitution is an "issue of first impression." (J.A. VI, 195.) But the equal protection aspects of Sections 1 and 2 of the Kansas Constitution's Bill of Rights are "given much the same effect" as the

Equal Protection Clause of the Fourteenth Amendment, *Tomasic*, 230 Kan. at 426, including in the redistricting context, *Stephan III*, 251 Kan. at 606; *see supra* 31.

The elements of a racial vote dilution claim under the Equal Protection Clause are established: That clause "prohibits *intentional* 'vote dilution'—'invidiously . . . minimiz[ing] or cancel[ing] out the voting potential of racial or ethnic minorities.'" *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (citation omitted) (emphasis added)). To make out such a claim, a plaintiff must "demonstrate that the challenged practice has the *purpose* and *effect* of diluting a racial group's voting strength." *Shaw v. Reno*, 509 U.S. 630, 649 (1993) (emphasis added); *see also Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (plurality op.) ("[L]egislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities.").

A racial vote dilution claim under the Kansas Constitution, then, requires (1) discriminatory intent and (2) discriminatory effect. Neither is present here.

1. SB 355 does not have a discriminatory intent.

Discriminatory intent "implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). "[V]olition" or "awareness of consequences" is not enough. *Id.*

The U.S. Supreme Court has warned courts to "'exercise *extraordinary caution* in adjudicating claims that a State has drawn district lines on the basis of race,'" especially where "the voting population is one in which race and political

affiliation are highly correlated." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (citation omitted). Where "district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify." *Bush v. Vera*, 517 U.S. 952, 968 (1996) (plurality op.). Drawing lines for partisan reasons is not drawing lines for racial reasons, even if "the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999).

The U.S. Supreme Court's admonition of extreme caution looms large in this case. As the district court found, Kansas's racial geography "mirror[s] geographic differences in the state's partisan breakdown." (J.A. VI, 127.) This means that a district line drawn for political reasons can easily resemble a district line drawn for racial reasons. Professor Patrick Miller testified that "race and partisanship" in Kansas "go hand in hand" such that "speaking of them as if they are two separate things is really an artificial division." (J.A. XII, 74.) But under the Kansas Constitution, they are and must be separate. Whereas racial discrimination plainly is not a constitutional goal in redistricting, "safely retaining seats for the political parties" is. *Stovall I*, 273 Kan. at 722.

Plaintiffs offered no direct evidence that the Legislature enacted SB 355 *because of* race. Neither of the legislators who testified at trial said that, and Plaintiffs pointed to nothing in the legislative record saying that. (J.A. X, 205-67; XI, 6-38.) Rather, the district court divined discriminatory intent from four other types of evidence. None—either alone or together—suffices to prove discriminatory

purpose.

First, the district court relied on evidence that SB 355 has a "negative effect on minority voters." (J.A. VI, 197.) This reasoning risks collapsing the second element of a vote dilution claim (effect) into the first element (intent). SB 355 does not have a discriminatory effect. *See infra* 48-50. But even if it did, maps drawn with a nondiscriminatory purpose (such as politics) can sometimes have an effect on minority voters. *See supra* 45-46. Plaintiffs therefore did not show "a clear pattern, unexplainable on grounds other than race." *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

Second, the district court relied on evidence that "the Legislature was keenly aware of how the map affected minority voters, yet decided to enact it anyway." (J.A. VI, 206.) But as explained above, "awareness of consequences" is not enough to prove discriminatory intent. *Feeney*, 442 U.S. at 279; *see also Shaw v. Hunt*, 517 U.S. 899, 905 (1996) ("[A] legislature may be conscious of the voters' races without using race as a basis for assigning voters to districts."). Indeed, "[r]edistricting legislatures will . . . almost always be aware of racial demographics." *Miller*, 515 U.S. at 916.

Third, the district court relied on evidence regarding "the process of enacting" SB 355. (J.A. VI, 199, 201-02.) But SB 355 was enacted "according to the usual procedures." *Arlington Heights*, 429 U.S. at 269. The district court did not find that "the applicable legislative rules and constitutional and statutory law concerning the enactment of legislation were not followed or were in some way violated." *Stephan*

III, 251 Kan. at 603. The district court's primary criticism appears to be that the process was "hurried." (J.A. VI, 200.) But that "the legislative process relative to reapportionment moved with dispatch" is not a procedural irregularity. *Stephan III*, 251 Kan. at 603. Nor is the fact that "greater opportunity for comment . . . could have been provided." *Id.*

Fourth, the district court relied on historical evidence of discrimination in Kansas—particularly in the construction of Interstate 70, along which SB 355 divides Wyandotte County. (J.A. VI, 203-05.) "[U]nless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value." *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987); *Mobile*, 446 U.S. at 74 (plurality op.) ("[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful."). Interstate 70 was constructed in 1956. (J.A. XX, 216.) Even if the highway's constructors had racial motivations, that does not establish racial motivation on the part of the 2022 Legislature.

2. SB 355 does not have a discriminatory effect.

The district court determined that SB 355 is unconstitutional because it "dilute[s] minority voting strength." (J.A. VI, 206.) Vote dilution occurs when a map "minimize[s] or cancel[s] out the voting potential of racial or ethnic minorities." *Miller*, 515 U.S. at 911 (citation omitted). SB 355 does not do that.

Under SB 355, "minority representation [is not] diluted by fracturing, packing, or other methods of gerrymandering of political boundaries."[15] *Stephan III*,

[15] Fracturing occurs when a map "dilute[s] a minority group's voting strength by dividing such a group among numerous representative districts." *Stovall I*, 273 Kan.

251 Kan. at 610. Rather, the overall racial composition of districts remains relatively unchanged. The new First District is 25.4% minority, whereas the old one was 26.6% minority. The new Fourth District is 30.4% minority, exactly like the old one. While the Second and Third Districts saw some change, they largely swapped minority compositions. The new Second District is 30.2% minority, whereas the old Third District was 32.4%. On the flipside, the new Third District is 25% minority whereas the old Second District was 20.9% minority. (J.A. XX, 224.)

The district court's theory instead was that SB 355 dilutes minority votes by moving minority voters from the old Third District—where white "crossover" voters would vote with them to elect Democrats—to the new Second District—where white Republicans will not. (J.A. VI, 197-99.) But the Kansas Constitution does not require that minority voters have "the most potential, or the best potential, to elect a candidate by attracting crossover voters." *Bartlett v. Strickland*, 556 U.S. 1, 15 (2009) (plurality op.). Minority voting power is not diluted when minority voters are moved from one district where they comprise a one-third sub-majority to another district where they also comprise a one-third sub-majority. There has been no change in minority voting power; minority voters lacked the voting power to elect their preferred candidate in both districts. That the relocated minority voters are no longer paired with likeminded white voters does not change that fact. Those minority voters "have the same opportunity to elect their candidate as any other

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at 720. And packing occurs when a map "'pack[s]' as many members of [a minority] group into one district as possible and, thus, dilute[es] the minority group's bloc voting strength in adjacent districts." *Id.*

political group with the same relative voting strength." *Id.* at 20.

The district court's crossover theory is not only wrong, it is also in tension with basic equal protection principles. Under the U.S. Constitution's Fourteenth Amendment, state legislatures "may not use race as the predominant factor in drawing district lines" without "a compelling reason." *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017). Compliance with the Voting Rights Act (VRA) is a compelling reason. *Id.* at 1464. But the VRA does not require crossover districts. *Bartlett*, 556 U.S. at 25-26. Requiring the Legislature to draw crossover districts with the very purpose of achieving a threshold minority population risks running afoul of the Fourteenth Amendment.

The district court's crossover theory boils down to a claim that minority Democrats are now paired with white Republicans who might vote differently from them—which in turn boils down to a political gerrymandering claim. It is no surprise, then, that the claim suffers from all the same infirmities as a political gerrymandering claim. Asking courts to identify "crossover districts" would put them "in the untenable position of predicting many political variables and tying them to race-based assumptions. The Judiciary would be directed to make predictions or adopt premises that even experienced polling analysts and political experts could not assess with certainty, particularly over the long term." *Bartlett*, 556 U.S. at 17. That is not a task the independent judiciary can or should take on.

CONCLUSION

The judgment of the district court should be reversed.

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I certify that on May 2, 2022, the above brief was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and a copy was electronically mailed to:

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