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.

REPLY 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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Plaintiffs rely primarily on the evidence presented at trial and the findings of fact adopted by the district court. But evidence and findings of fact only make out a constitutional claim if they meet the constitutional standard. And there is no constitutional standard for political gerrymandering claims, which present a nonjusticiable political question. This Court should reverse.

ARGUMENTS AND AUTHORITIES

I. Political gerrymandering claims present nonjusticiable political questions.

A. Political gerrymandering has never been understood to violate the Kansas Constitution.

As Defendants have explained, political gerrymandering in Kansas dates back to the drafting of the Kansas Constitution, yet none of the Founders expressed any understanding that the practice violated their new Constitution. (Op. Br. 20-21.) Plaintiffs identify no evidence from the Wyandotte Convention indicating otherwise. The *Rivera* and *Alonzo* Plaintiffs dispute that there was *in fact* political gerrymandering at the Wyandotte Convention. (*Rivera* & *Alonzo* Br. 20-21.) But the point is not whether gerrymandering in fact happened. The point is that none of those who perceived a political gerrymander charged that it violated the Kansas Constitution they had just written. That silence speaks volumes about the Constitution's original public meaning.

The *Frick* Plaintiffs, meanwhile, acknowledge that there is "evidence of partisan gerrymandering during the Wyandotte Convention." (*Frick* Br. 23.) But they suggest that gerrymandering was "excus[able]" because it was a "necessary evil" at the time. (*Id.* at 23-24.) The suggestion that the Legislature may violate

constitutional rights (as Plaintiffs insist political gerrymandering does) when its intentions are pure is troubling.

The *Frick* Plaintiffs insist that "[c]onstitutions are not set in stone, with their meaning limited to the understanding" of those who framed them. (*Id.* at 23.) Put simply, that is not how constitutional interpretation works. "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) (emphasis added). This Court's task is not to give the text of the Kansas Constitution some new meaning that it or Plaintiffs would prefer. Rather, it is to "consider the circumstances attending [the Constitution's] adoption and what appears to have been the understanding of the people when they adopted it." *Solomon v. State*, 303 Kan. 512, 523, 364 P.3d 536 (2015) (citation omitted).

Plaintiffs have not identified any case in which this Court (or any other) has held that a political gerrymander violates any provision of the Kansas Constitution. Plaintiffs instead overread this Court's apportionment cases as determining that political gerrymandering claims are "cognizable." (*Rivera* & *Alonzo* Br. 21.) This Court has never held that. Rather, this Court has indicated that such claims are deeply political, speculative, and impossible to measure. (Op. Br. 21-22.) The fact remains that this Court has never articulated or applied any legal standard to adjudicate such a claim. And like the U.S. Supreme Court, this Court has "never struck down a partisan gerrymander as unconstitutional—despite various requests

over the past 45 years." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).

B. Political gerrymandering claims present political questions.

The *Frick* Plaintiffs all but ignore this Court's political question precedents, dismissing the issue as a "distract[ion] . . . from the merits." (*Frick* Br. 22.) But the Kansas Constitution's political question doctrine is not a distraction; it is fundamental to maintaining the proper constitutional "relationship between the judiciary and the other branches or departments of government." *Leek v. Theis*, 217 Kan. 784, 813, 539 P.2d 304 (1975).

The *Rivera* and *Alonzo* Plaintiffs grapple with this Court's political question doctrine. They concede that, under the Kansas Constitution, this Court applies the same *Baker v. Carr* factors the U.S. Supreme Court applied in *Rucho*. (*Rivera* & *Alonzo* Br. 12.) But they incorrectly suggest that those factors yield a different conclusion in this case.

1. Congressional redistricting is constitutionally committed to the Legislature.

Plaintiffs argue that congressional redistricting is not constitutionally committed to the Legislature because the U.S. Constitution rather than the Kansas Constitution commits that power to the Legislature. (*Id*. at 13.) That is misguided. The Kansas Constitution's separation of powers requires that the judiciary not interfere with tasks that are constitutionally committed to another branch. *Leek*, 217 Kan. at 813. It is no less a violation of the separation of powers for the judiciary to interfere in a task the U.S. Constitution commits to the Legislature than for the judiciary to interfere in a task the Kansas Constitution commits to the Legislature.

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

Plaintiffs acknowledge that the district court did not identify any single governing standard for political gerrymandering claims. (J.A. VI, 188.) Nor do they dispute that the Kansas Constitution makes no mention of either gerrymandering or congressional redistricting. Plaintiffs also do not dispute that redistricting is inherently political, and that voting behavior is unpredictable. (*Rivera* & *Alonzo* Br. 16-17 & n.1.) Plaintiffs instead argue that the district court's intent-and-effect test is manageable in this case and that the Kansas Constitution's text contains multiple hooks for a political gerrymandering claim. Both arguments fail.

First, Plaintiffs argue that the district court's intent-and-effect test is workable on these particular facts. (*Id.* at 13-16.) That argument is misguided. As an initial matter, that is not how constitutional law works. The Kansas Constitution does not provide for bespoke legal standards articulated only after the alleged constitutional violation (and in this case, after the entire trial) occurs. Such a system would make it impossible for people—and in the case of redistricting, the Legislature—to ensure that their actions comply with constitutional guarantees. And it would provide courts with scant guidance in determining how to craft the case-specific standard to be applied.

Furthermore, the district court's intent-and-effect test is not a manageable standard. Plaintiffs do not dispute that redistricting is inherently political. (*Id.* at 16.) Nor do they offer any counter to the reality that a political task performed by political actors will necessarily involve both political motivations and political

effects. (Op. Br. 34-35.) Plaintiffs suggest that "[j]udicial factfinding about legislative intent is routine." (*Rivera* & *Alonzo* Br. 18.) But judicial factfinding about a legislature's *political* intent is not. Evaluating racially discriminatory intent is different. Racial intent is not inherent in redistricting, and the Kansas Constitution does not tolerate racially discriminatory intent. Political intent is inherent in redistricting, and even Plaintiffs accept that some political intent in redistricting is lawful. (*Id*. at 18.) While an intent element may be workable in some contexts, it is not in the context of political gerrymandering.

Plaintiffs also argue that courts can now predict the political effects of congressional maps with the help of new technologies and developing political science theories. (*Frick* Br. 1; *Rivera* & *Alonzo* Br. 16-17.) But those new technologies in turn rely on information (such as past voting behavior) that is not reliable in predicting future voting behavior. That technology has improved does not mean that the data it uses has. As even Plaintiffs acknowledge, it remains "undoubtedly true that voters may change preferences in the future." (*Rivera* & *Alonzo* Br. 17 n.1.) In this respect, the intent-and-effect standard is a far cry from the numerical population equality standard set forth in *Harris v. Shanahan*, 192 Kan. 183, 204-05, 387 P.2d 771 (1963). A district's population is quantifiable and measurable. The political effect a map will have in a future election with unidentified candidates implicating unknown issues is not.

Furthermore, Plaintiffs do not provide any judicially manageable criteria by which courts can determine how much political intent or effect is too much. (Op. Br.

34-35.) Measuring political effects would require courts to decide how much political power should optimally belong to each political party, but Plaintiffs identify no legal standard by which courts can make this determination.

Plaintiffs also do not identify which of the countless political science theories that exist provides the proper constitutionally-rooted standard for adjudicating the effect of political gerrymandering. Plaintiffs insist their cherry-picked theories work in this case. (*Rivera* & *Alonzo* Br. 28-29.) But even their experts concede that they will not work in every case. (*See, e.g.*, J.A. XI, 84-86, XIII, 46-47.) The standard for a constitutional violation cannot be whether the plaintiff can cite a newly developed political science theory that produces their desired outcome.

Second, Plaintiffs argue that six provisions of the Kansas Constitution suffice to provide standards for adjudicating political gerrymandering. The *Rivera* and *Alonzo* Plaintiffs suggest that the existence of a constitutionally-rooted standard is a merits issue rather than a justiciability issue. (*Rivera* & *Alonzo* Br. 17-18.) In fact, this Court logically looks to constitutional text when attempting to determine constitutional standards. *See Gannon v. State*, 298 Kan. 1107, 1150, 319 P.3d 1196 (2014) (relying on the term "suitable" in the Kansas Constitution). And here, there is no constitutional text that provides any standard for political gerrymandering.[1]

[1] The courts in the Pennsylvania and North Carolina cases Plaintiffs rely so heavily on divined their standards in large part from constitutional provisions that have no counterpart in the Kansas Constitution. *See Harper v. Hall*, 2022-NCSC-17, ¶¶ 133-41 (relying on N.C. Const. art. I, § 5); *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1, 97-117, 178 A.3d 737 (2018) (relying on Pa. Const. art. I, § 5). That those courts found standards based on different text says nothing about whether a standard exists based on the text of the Kansas Constitution.

Plaintiffs argue that the Kansas Constitution's Bill of Rights guarantees a right to "equal political power." (*Rivera* & *Alonzo* Br. 2.) The phrase "equal political power" appears nowhere in the Kansas Constitution's Bill of Rights. Rather, the Kansas Constitution guarantees "equal power" through "substantially equal legislative districts based upon the state's population." *Harris*, 192 Kan. at 204-05 (holding that Kansans have a right to "equality of representation" such that they may not be "accorded less representation" than other Kansans). SB 355 achieves this equality of voting power with four districts with exactly equal populations.[2]

What Plaintiffs really ask this Court to recognize is not the right to a vote that counts on equal terms with other votes but rather the right to a vote that has an equal chance of succeeding. That is hardly a judicially manageable or measurable standard. And the Kansas Constitution does not and has never guaranteed a right to an equal chance of political success. *See In re Senate Bill No. 220*, 225 Kan. 628, 637, 593 P.2d 1 (1979) (explaining that it is not constitutionally required that "every majority in a state . . . be able to elect a majority of its senators"). If such a right were to exist, Plaintiffs have no answer to the lack of any logical stopping point. (Op. Br. 30-31.) Plaintiffs have nothing to say about Kansas's many unaffiliated voters (who outnumber registered Democrats) and what it would

[2] Although this Court's decision in *Farley v. Engelken* did not decide a Section 18 claim, the Court applied heighted scrutiny because a Section 18 right to remedy was at issue and because of "the political powerlessness of the class of future medical malpractice victims," which resembled other suspect classes. 241 Kan. 663, 672, 740 P.2d 1058 (1987). And as Defendants have explained, *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019), did not involve the Kansas Bill of Rights' equal protection aspects.

mean for them to have equal political power. (J.A. XVIII, 189.)

Plaintiffs also suggest that the right to vote guarantees that every vote "count equally." (*Frick* Br. 30, 37; *see Rivera* & *Alonzo* Br. 24.) But as explained above, this also does not provide a standard for measuring political gerrymandering. A gerrymandered map will not cause votes to be counted unequally so long as its districts are of equal size. All of the districts will still have identical populations, and each qualified voter will still get one vote that is worth just as much as the vote of any other qualified voter.

Plaintiffs also seek to root a standard for political gerrymandering in the associational rights guaranteed in the Kansas Bill of Rights. (*Frick* Br. 30; *Rivera* & *Alonzo* Br. 24-27.) To be clear, Defendants dispute all three of the district court's theories why these rights might be violated by political gerrymandering. All three theories are grounded in the idea that considering a voter's voting behavior in redistricting violates that voter's associational rights. But as Defendants have explained, this Court has long held that some level of political consideration in redistricting is inevitable and permissible. (*See* Op. Br. 30.) Plaintiffs suggest the district court's intent-and-effect test still allows for some political consideration in redistricting (*Rivera* & *Alonzo* Br. 26.) But they do not square that notion with their assertion that political motivation constitutes viewpoint discrimination. A standard which appears to itself be in some tension with the Kansas Constitution does not amount to a judicially discernible standard.

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

Plaintiffs do not dispute that "[p]olitics and political considerations are inseparable from districting." *In re Stephan*, 245 Kan. 118, 128, 775 P.2d 663 (1989) (citation omitted). A court second-guessing the Legislature's redistricting choices, then, will inherently involve political judgment calls. Political gerrymandering claims identify a political problem (political unfairness) and seek a political remedy (a more politically favorable map). (Op. Br. 39.) Such claims by their nature require political determinations that are properly within the Legislature's redistricting discretion—and not within the ken of the Kansas judiciary.

Plaintiffs argue that the intent-and-effect test the district court used here did "not require a court to assess how much representation a party 'deserves.'" (*Rivera* & *Alonzo* Br. 20.) But determinations about how much representation particular parties should have is an inherent determination in evaluating whether the political effect of a map is acceptable. The evidence Plaintiffs relied on at trial spoke precisely to the issue of how much representation each of the major parties should have. (*See, e.g.*, J.A. XI, 158; XX, 232.)

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

Plaintiffs emphasize that this Court accords deference to the district court's factual findings. (*Frick* Br. 2; *Rivera* & *Alonzo* Br. 2.) But the district court's holding that SB 355 is unconstitutional based on those findings is entitled to de novo review. *See Barrett ex rel. Barrett v. Unified Sch. Dist. No. 259*, 272 Kan. 250, 255, 32 P.3d 1156 (2001). And because that holding is erroneous, it should be reversed.

A. SB 355 is not an unconstitutional political gerrymander.

Notably, Plaintiffs do not defend the district court's determination that the Legislature can only depart from prior federal court-drawn maps if it can show that those courts' "reasoning was flawed" or that "conditions have changed." (J.A. VI, 12.) Nor do Plaintiffs defend the district court's determination that the Legislature had to comply with the Guidelines as a legal matter. (J.A. VI, 14.) Plaintiffs also acknowledge that Democrats can still win the Third District under SB 355. (*Rivera* & *Alonzo* Br. 30-31.)

Plaintiffs suggest that SB 355's noncompliance with traditional districting criteria reveals it to be a political gerrymander. (*Id.* at 31-34.)[3] But none of Plaintiffs' experts accounted for all of those criteria in their analyses. And the Legislature explained repeatedly throughout the legislative record how SB 355 does adhere to traditional redistricting criteria. (Op. Br. 41-43.) These are not "post hoc rationalization[s]." (*Rivera* & *Alonzo* Br. 32 (citation omitted).) They were articulated by the Legislature contemporaneous with SB 355's enactment.

The *Rivera* and *Alonzo* Plaintiffs suggest that, if SB 355 were truly not politically motivated, the community of interest in Wyandotte and northern Johnson Counties should have been kept whole. (*Id.* at 32-33.) But it is inevitable in redistricting that some communities of interest will be split. *See In re Stephan*, 251 Kan. 597, 608, 836 P.2d 574 (1992). The Legislature determined that it was better

[3] Plaintiffs do not suggest that traditional districting criteria themselves provide a manageable standard for adjudicating political gerrymandering claims, nor do they address all the inherent problems such a standard would entail. (Op. Br. 36-38.)

to split Wyandotte County than Johnson County for numerous nonpolitical reasons articulated in the legislative record. (*See, e.g.*, J.A. XVIII, 175; XIX, 139; XXIV, 20, 42, 92, 98; XXV, 219-20.)

The *Frick* Plaintiffs, meanwhile, believe that the inclusion of Lawrence in the First District does not comply with their interpretation of the traditional redistricting criteria. (*Frick* Br. 26-29.) The Legislature interpreted those criteria differently and explained multiple times in the legislative record why the new First District comports with traditional redistricting criteria. (*See, e.g.*, J.A. XVIII, 171-72; XXIV, 46-47, 50; XXV, 115.)

Plaintiffs' primary evidence of political effect are a handful of political science methodologies that suggest that SB 355—even though it still draws a competitive district for Democrats—leans more Republican than political scientists expected. (*Rivera* & *Alonzo* Br. 28-29.) But that SB 355 is not as favorable to Democrats as hypothetical maps created by political science professors does not make SB 355 an unconstitutional political gerrymander. By any standard, a map passed in a heavily Republican state by a Republican supermajority in which one of four seats is still competitive for Democrats is not an unconstitutional political gerrymander.

B. SB 355 does not unconstitutionally dilute minority votes.

The district court's factual findings do not satisfy the constitutional standards for racially discriminatory intent or dilutive effect.[4] This Court reviews

[4] Even if discriminatory intent or effect were factual findings, the district court's holding would not be supported by substantial competent evidence for the reasons discussed below.

that question of constitutionality de novo, *see supra* 9, and it should reverse here.

First, Plaintiffs argue that the district court properly found discriminatory intent based on the fact that minority voters were moved, perceived irregularities in SB 355's enactment, and Interstate 70's racial history. (*Rivera* & *Alonzo* Br. 35-37.) But even combined, that evidence does not satisfy the legal standard for discriminatory intent: Plaintiffs must show that the Legislature enacted SB 355 "'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). The evidence the district court relied on does not establish that the Legislature enacted SB 355 *because of* the law's adverse effect on minority voters.

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). Plaintiffs have nothing to say about this admonition and do not dispute that race and political affiliation are highly correlated in Kansas. Indeed, their witnesses testified as much. (*See, e.g.*, J.A. XIII, 89.) Especially in light of the caution that is called for, the findings of the district court do not suffice to prove that the Legislature enacted SB 355 *because of* any racial effect.

Second, Plaintiffs argue that the movement of some minority voters from the old Third District to the new Second District has the effect of diluting minority voting strength. (*Rivera* & *Alonzo* Br. 40-42.) That argument is flawed. SB 355 does

not "intentionally destroy[]" any crossover district. (*Id.* at 40.) The Third District remains competitive for Democrats—and ample record evidence indicates it leans Democrat. (*See* Op. Br. 40-41.) Minority voting strength is not diminished because minority voters are paired with new white voters who vote differently from them. In both the old Third District and the new Second District, minority voters enjoyed "the same opportunity to elect their candidate as any other political group with the same relative voting strength." *Bartlett v. Strickland*, 556 U.S. 1, 20 (2009).[5]

III. The district court's decision violates the Elections Clause.

Plaintiffs insist that the Kansas judiciary has the power to review the constitutionality of congressional district maps just as it has the power to review "any other law." (*Frick* Br. 39, 44.) But a congressional redistricting law is not any ordinary law. Whereas the typical legislative enactment (including a state legislative apportionment act) is adopted pursuant to Kansas's inherent state powers, a congressional redistricting law is enacted pursuant to power the Legislature has been delegated by the U.S. Constitution. (*See* Op. Br. 12-13.)[6]

That is why Plaintiffs' reliance on *Harris* is misplaced. Discussing state legislative apportionment, this Court in *Harris* noted that "an apportionment act, as

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[5] That *Bartlett* was a Voting Rights Act case does not render its logic flawed. The question both there and here was whether a law had a dilutive effect. *Bartlett*, 556 U.S. at 8-9.

[6] Plaintiffs rely heavily on recent academic writings disagreeing with Defendants' interpretation of the Elections Clause. (*Rivera* & *Alonzo* Br. 42-44.) Other academic writings agree with Defendants. *See, e.g.*, Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1 (2021); James C. Kirby, Jr., *Limitations on the Power of State Legislatures Over Presidential Elections*, 27 Law & Contemp. Probs. 495 (1962).

any other act of the legislature, is subject to the limitations contained" in the Kansas Constitution. 192 Kan. at 207. But a state legislative apportionment act stems from Kansas's inherent powers; a congressional redistricting law does not.

Plaintiffs fail to appreciate the difference between state constitutional provisions setting forth requirements for the *manner* of lawmaking (bicameralism, presentment, veto, etc.) and state constitutional provisions limiting the substance of legislative enactments. The Supreme Court has held that a legislature's drawing of congressional district lines must comply with the former. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 808 (2015). But it "does not necessarily follow that . . . the scope of [the legislature's] enactment on the indicated subjects is also limited by the provisions of the State Constitution." *Commonwealth ex rel. Dummit v. O'Connell*, 298 Ky. 44, 50, 181 S.W.2d 691 (1944). Plaintiffs also fail to appreciate the difference between state constitutional provisions that specifically mention congressional redistricting and those that do not. (*Frick* Br. 44; *Rivera* & *Alonzo* Br. 44.) Specificity is relevant not because one type of provision has less force than the other but because specific provisions evince an intent to delegate the Legislature's redistricting authority that general provisions do not.

The U.S. Supreme Court has not "rejected" the straightforward interpretation of the plain language of the Elections Clause. (*Frick* Br. 39; *see Rivera* & *Alonzo* Br. 44-46.) To the contrary, a per curiam Court vacated a court order that appeared to suggest a state constitution's "right to vote" provision "could, consistent with [the U.S. Constitution,] 'circumscribe the legislative power'" to

regulate federal elections. *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 77 (2000). The Court in *Bush* in turn relied on an early Supreme Court case similarly holding that the Constitution's use of the term "Legislature" was "a limitation upon the state in respect of any attempt to circumscribe the legislative power." *McPherson v. Blacker*, 146 U.S. 1, 25 (1892). Plaintiffs, meanwhile, have not cited a single precedent from the U.S. Supreme Court holding that state courts may set aside congressional redistricting laws based on general state constitutional provisions that say nothing about either gerrymandering or redistricting.[7]

Plaintiffs argue that this "case represents a threat of the legislative branch accumulating almost unlimited power to itself at the expense of" the other branches of government and the people themselves. (*Frick* Br, 31-32.) In fact, this Court's unprecedented intervention in the congressional redistricting process would represent a threat of the judiciary accumulating a power it has never before exercised at the expense of the democratically elected branches of our government—and of the Kansans who elect them. This Court should adhere to its solemn duty to interpret the U.S. and Kansas Constitutions as written and decline to exercise the extraordinary power Plaintiffs urge it to exercise.[8]

CONCLUSION

The judgment of the district court should be reversed.

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[7] K.S.A. 25-125(d) speaks only of "powers granted by article 3 of the constitution of the state of Kansas," not of powers granted by the U.S. Constitution.

[8] Plaintiffs cite no authority from any jurisdiction adopting their novel interpretations of the Fourteenth Amendment's Reductions Clause and federal statutes. (*Rivera* & *Alonzo* Br. 46-48; *see* Op. Br. 18-19.)

Respectfully submitted,

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I certify that on May 12, 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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