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 ,
Defendant—Appellants,

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

BRIEF OF APPELLEES SUSAN FRICK, et al.,

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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Oral Argument – 1 Hour for Plaintiffs-Appellees

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STATEMENT REGARDING ORAL ARGUMENT

Appellee Frick Appellees' counsel have consulted with Appellee Alonzo and Rivera Appellees' counsel regarding oral argument. Given that the State Appellants have requested one hour of oral argument, the Plaintiffs-Appellees request at least one hour total of oral argument as well, to be divided and presented in order as follows: (1) Sharon Brett for the Alonzo Appellees, 25 Minutes; (2) Lalitha D. Madduri for the Rivera Appellees, 10 minutes solely on the Independent State Legislature Theory question; and (3) Steve McAllister for the Frick Appellees, 25 Minutes.

NATURE OF THE CASE

Technological advances enable district maps to be drawn with razor-like precision, capable of all-but-guaranteeing a particular political party's success. That this type of "artificial[] engineer[ing]" can build elections with an "unfair and unearned advantage" is a concept District Court Judge Bill Klapper (the "District Judge") suggested would appall most Kansans. (*See* R. VI, 6-7.) Why? Because Kansans expect fairness, and the people's Constitution guarantees Kansans the right to cast votes that are meaningful and of equal weight in free and fair elections. Kan. Const. Bill of Rights §§ 1, 2, 3, 11, 20; Kan. Const. art. V, § 1.

This Court's role is to interpret and apply the people's Constitution, to protect and preserve the people's rights, *Gannon v. State*, 298 Kan. 1107, 1120, 319 P.3d 1196 (2014), which includes these important political and voting rights.

Artificially engineered elections based on purely partisan considerations contravene these rights because they undermine rather than

promote a "democratically elected Legislature" which is "accountable to the people of Kansas." APPELLANTS' BRIEF at 1. *Gannon v. State*, 298 Kan. 1107, 1151, 319 P.3d 1196, 1226 (2014). Appellants rely entirely on arguments this Court should not hear the claims in this case. Perhaps that is because there is no evidence to justify or even explain Ad Astra 2 other than blatant partisan gerrymandering:

1. Appellants have not publicly revealed who drew Ad Astra 2. (R. VI, 25, ¶ 21.)
2. Appellants called no witnesses to explain why Ad Astra 2 was drawn in the manner it was. (R. VI, 140, ¶ 311.)
3. Appellants provided "no evidence justifying [Ad Astra 2's] configuration." (R. VI, 140, ¶ 311.).

Appellants call on this Court to decide three issues: (1) whether the United States Constitution precludes state courts from hearing this case, (2) whether the Kansas Constitution recognizes a partisan gerrymandering claim, and (3) whether the District Court erred in determining that SB 355 violated the Kansas Constitution.

Taking these questions in reverse order: First, the District Court was presented with a mountain of evidence that the Legislature engaged in unprecedented, extreme, and intentional partisan gerrymandering that will be quite effective in future elections. The findings of fact are extensive, unrebutted, and entitled to deference. Second, the District Court's decision includes extensive conclusions of law supporting its ultimate determination that the Kansas Constitution prohibits the unprecedented, intentional partisan gerrymandering revealed in this case. And, third, the federal

constitutional argument, often styled the "Independent State Legislature Theory," has been consistently rejected by the United States Supreme Court for over a century, with cases dating back to 1916 and cases decided as recently as 2019.

Thus, as this appeal comes to this Court, the Court confronts two legal issues subject to de novo review, one federal and one state. The federal issue is insubstantial. The state issue is incredibly important for the future of the people's constitution and is found in various explicit textual provisions of their constitution. Once those issues are properly resolved upon de novo review, the final issue is one of fact, subject to abuse of discretion or clear error review. This is an easy task, as the Appellees presented overwhelming and unrefuted evidence of the constitutional violations in this case, which the District Court found. Those detailed findings of fact are correct and, in any event, not clear error or an abuse of discretion.

STATEMENT OF THE ISSUES

I. Did the District Court abuse its discretion in concluding that the facts presented supported finding that self-interested legislators of the supermajority party engaged in unprecedented, extreme, and intentional partisan gerrymandering that will completely and effectively destroy the influence and meaningfulness of the votes and political participation of significant segments of Kansas citizens for no reason other than partisan gain?

II. Did the District Court err as a matter of law in concluding that the People's Constitution prohibits such unprecedented, extreme, and intentional partisan gerrymandering, given that their constitution explicitly recognizes their inherent and inalienable natural rights, their inherent political power, that government is founded on their authority and for their equal protection and benefit, to allow the people to consult for their common good and instruct their representatives, to speak freely without adverse consequence from their own government, retaining all powers to themselves not delegated, and granting all eligible Kansans a fundamental right to vote?

III. Does the Federal Constitution's Elections Clause, which simply indicates that State Legislatures have initial authority over congressional election regulations in their respective States (as the general lawmaking body), deprive State Courts of their traditional and inherent authority to review state laws for compliance with state constitutional requirements and despite over one hundred years of consistent, emphatic U.S. Supreme Court precedent recognizing that the Elections Clause has no such extraordinary and unprecedented effect?

STATEMENT OF FACTS

The record below is the product of four days of trial before District Judge Bill Klapper in which Plaintiffs-Appellees presented the testimony of several lay witnesses, including Senator Ethan Corson and Representative Tom Burroughs (both Democrats), and six expert witnesses (of which five

testified regarding partisan gerrymandering). Appellants presented only two witnesses, both offered as experts, and provided no rebuttal to the testimony of Appellees' lay witnesses. Judge Klapper credited the testimony of Senator Corson and Representative Burroughs, (R. VI, 22, ¶13, n.2), as well as the testimony of all the Appellees' experts. (R. VI, 65,¶119 (Chen); 74-75, ¶142 (Rodden); 92, ¶193 (Warshaw); 97-98, ¶207 (Miller); 101, ¶217 (Smith).) Judge Klapper issued his decision on April 25, 2022, which included detailed Findings of Fact that included findings that the testimony of these witnesses demonstrated the Legislature's partisan intent and the pro-Republican effect Ad Astra 2 will have with respect to Congressional Districts 2 and 3.

I. The Frick Plaintiffs-Appellees

Appellee Susan Frick is a resident of Douglas County and the City of Lawrence and is a registered Democratic voter. She intends to remain a resident of Douglas County and a Democratic voter for the foreseeable future, including the scheduled primary and general elections in 2002. She believes that her vote is diluted by Ad Astra 2. (R. VI, 14, ¶A.)

Appellee Lauren Sullivan is a resident of Douglas County and the City of Lawrence and is a registered Democratic voter. She intends to remain a resident of Douglas County and a Democratic voter for the foreseeable future, including the scheduled primary and general elections in 2002. She believes that her vote is diluted by Ad Astra 2. Testimony of Lauren Sullivan, April 6, 2022, (R. VI, 14, ¶B.).

Appellee Susan Spring Schiffelbein is a resident of Douglas County and is a registered Democratic voter. She intends to remain a resident of Douglas County and a Democratic voter for the foreseeable future, including the

scheduled primary and general elections in 2002. She believes that her vote is diluted by Ad Astra 2. (R. VI, 15, ¶C.)

Appellee Darrell Lea is a resident of Douglas County and the City of Lawrence and is a registered Democratic voter. He intends to remain a resident of Douglas County and a Democratic voter for the foreseeable future, including the scheduled primary and general elections in 2002. He believes that his vote is diluted in by Ad Astra 2. ((R. VI, 15, ¶D.)

II. The 2020 Census Impact on Redistricting.

The table below shows the results of the 2020 Census and the changes required in the Congressional districts in Kansas to achieve equal population districts (734,470):

District	2020 Census Population	Change in Population
First	700,773	increase by 33,855
Second	713,007	increase by 21,803
Third	792,286	decrease by 58,334
Fourth	731,814	increase by 2,676

(R. VI, 16, ¶K; 17, ¶L.)

III. Former Senate President Susan Wagle Promises Four Republican Congressional Districts.

In enacting a partisan gerrymander, Republican legislators delivered on a campaign promise made by former Senate President Susan Wagle. Shortly before the 2020 election, then-Senate President Wagle told a group of Republican activists and donors that Republican legislators could produce a congressional plan "that takes out Sharice Davids up in the third." She boasted: "[W]e can do that. I guarantee you we can draw four

Republican congressional maps. But we can't do it unless we have a two-thirds majority in the Senate and House." (R. VI, 104-05, ¶227.)

Although Wagle left the Legislature prior to the current redistricting cycle, the Senate President serves as the leader of her party. There is no doubt that many current Republican legislators worked with Wagle and that it is "overwhelmingly likely" that as leader of the Republican caucus, she communicated her policy preferences regarding redistricting to other members of her caucus before her departure. (R. VI, 104-05, ¶228.)

IV. The "Listening Tour" Redistricting Input Process Was a Sham.

Republicans won supermajorities in both chambers of the Kansas Legislature in the 2020 election, securing unilateral control over the decennial congressional redistricting process. They used this power to rush a congressional redistricting plan through the Legislature in an unprecedented departure from ordinary legislative process. In August and November 2021, the House and Senate Redistricting Committees—both controlled by Republican majorities—conducted a "listening tour," purportedly to collect public input on the redistricting process. However, the District Court found that the tour was neither intended nor designed to obtain public input. (R. VI,18, ¶2.)

The Committees announced the dates for the August tour only a week in advance of its start and without consulting the Committees' Democratic members. Senator Corson learned of the sessions only when they were announced to the public, and he testified that both the timing of the sessions (weekdays, middle of the day) and the Committees' short notice made it challenging for members of the public who wanted to attend the sessions to

obtain time off work, secure childcare, and get up to speed on redistricting. (R. VI,18, ¶3.)

Issues of notice were compounded by the tour's schedule. While the 2012 tour took place over a period of four months, the 2022 tour made fourteen stops in just five days. And while sessions in 2012 were each two-and-a-half hours long, the August sessions each lasted only 75 minutes, and in densely populated areas like Johnson County individuals were only given *two minutes* to testify. (R. VI, 18-19, ¶4.)

The sessions were also scheduled largely at inconvenient times, with ten of the fourteen sessions taking place during working hours or during times when children were being let out of school. Moreover, the tour was scheduled, and most tour stops were completed, before the census data governing the 2020 redistricting process became available, creating a serious obstacle to meaningful public input in the state's redistricting process. By contrast, during the 2012 redistricting cycle, the Legislature conducted listening sessions *after* the release of census data. Senator Corson testified that without the census data it was impossible for the public to provide relevant comments on the decisions the Committees would be called upon to make. As just one example, before the census data was released, the public could not have known that the combined populations of Johnson and Wyandotte Counties would be too large to fit in one congressional district. The Republican majority never explained the choice not to wait a few weeks for the data to become available. (R. VI, 19, ¶5.) Unlike the 2012 tour, the 2021 tour took place *before* the Committees adopted any guidelines for the

redistricting process, which also limited the public's ability to provide informed testimony on the topics that would be most helpful to the Committees. This choice has likewise never been explained. (R. VI, 20, ¶7.)

Even when a member of the public was able to overcome these hurdles, the Committees were indifferent to the testimony they heard. The public testimony offered at the August hearings favored keeping the Kansas City metro area whole within a single congressional district. Representative Burroughs testified that a "large majority of the testimony" argued in favor of keeping "the Johnson County and Wyandotte County metropolitan area collectively together." (R. VI, 20,¶8.)

The Republican legislators at the listening sessions were not attentive to this public feedback. In what was "one of the more disrespectful acts [he had] ever seen from elected officials toward members of the public," Senator Corson testified that Republican Committee members routinely "play[ed] on their phones right in front of individuals offering testimony. (R. VI, 20, ¶9.)

The Committees' Republican majorities also limited opportunities for input by legislators during the August tour. After allowing a legislator to testify at a sparsely attended initial hearing in Colby, Republican Committee leadership chose to prohibit testimony by legislators at subsequent stops. Leadership justified this decision by indicating that legislators would have ample opportunity to discuss redistricting once the legislative session began in January—but that opportunity never materialized. (R. VI, 21, ¶11.)

At the Lawrence stop on the listening tour, Senator Marci Francisco, who as the Senator for District 2 represents much of Lawrence, came prepared to testify but the Republicans on the Redistricting Committees refused her. They told her that she would be able to testify before the Senate Redistricting Committee at its hearings later in the process. But when those hearings occurred much later in the process, she was not permitted to testify then either. (R. VI, 16, ¶I).

After the August tour, the Committees conducted four virtual listening sessions on November 22 and November 30, 2021—shortly before and after the Thanksgiving holiday. At the time, the Committees still had not adopted any guidelines governing redistricting. The public testimony offered at these listening sessions did not meaningfully differ from that submitted in August. (R. VI, 21-22, ¶12.)

At no stop during the listening tours was there any testimony about the possibility of moving the City of Lawrence from the Second Congressional District to the First Congressional District. At no time during the Senate Redistricting Committee's discussions concerning redistricting did any

member of the Committee ever raise the possibility of moving the City of Lawrence to the First District. (R. VI, 15, ¶G).

The Committees' listening sessions were no more than a "box-checking exercise," conducted to give the appearance of following past practice when Republican legislators had in fact no interest in public input. (R. VI,22, ¶13.)

V. The Legislature Belatedly Implemented Guidelines to Govern Redistricting.

At their initial meetings on January 12, 2022, the Senate and House Redistricting Committees received presentations from the Legislature's staff on a set of Guidelines and Criteria for 2022 Congressional and State Legislative Redistricting ("Guidelines") that had been adopted by the bipartisan Legislature's Redistricting Advisory Group. There is no evidence the Committees' members expressed opposition to implementing the Guidelines. (R. VI, 22, ¶14).

The Guidelines enumerated several traditional redistricting criteria and were substantively the same as those used in the previous 2012 redistricting cycle. (R. VI, 15-16, ¶15). The Guidelines provided that the 2020 U.S. Decennial Census is the basis, and counties and voting districts are the "building blocks" for district boundaries. The population for each district should be as close to 734,470 as practicable. Moreover, the guidelines suggest that redistricting plans:

- Should not dilute minority voting strength.
- Should be "compact" and "contiguous."
- Must consider community interests, and the core of existing congressional districts should be preserved when considering the communities of interest.

- Whole counties should be kept together, where possible.

(R. VI, 23, ¶16 (listing full text).)

Members of both the House and Senate treated the Guidelines as authoritative principles governing the redistricting process. (R. VI, 23-24, ¶17.) The House Redistricting Committee formally adopted the Guidelines at its January 12, 2022 meeting. Representative Burroughs testified that he understood that legislators should follow the Guidelines, anticipated that legislators would do so, and never heard legislators from either side of the aisle suggest otherwise. House members from both parties subsequently discussed proposed maps, including Ad Astra 2, in terms of their compliance with the Guidelines. (R. VI, 23 ¶18.)

Senators also treated the Guidelines as authoritative. Senators of both parties sought to justify their proposed maps under the Guidelines. Senate President Masterson, for example, had a lengthy debate with Senator Corson in the Senate Redistricting Committee in which he asserted that the original Ad Astra map complied with the Guidelines. During floor debate on Ad Astra 2, Senators, including Senator Masterson, continued to discuss whether the plan complied with the Guidelines and sought to justify the map's features by reference to the Guidelines. (R. VI, 24-25, ¶19.)

When asked by Senator Corson whether he had applied the Guidelines in drafting the Ad Astra map, Senator President Ty Masterson, who was also co-chair of the Senate Redistricting Committee, stated that he had applied the Guidelines as he "perceived them." The Court credited Senator Corson's testimony concerning the conversation, as Senator Masterson did not testify. (R. VI, 16, ¶J.)

VI. Ad Astra 2 was Rushed Through the House and Senate on Largely Party-Line Votes, With No Democratic Support.

The plan that became Ad Astra 2—initially Ad Astra—was introduced in both the House and Senate Redistricting Committees on Tuesday, January 18. (R. VI, 25, ¶20.) Ad Astra 2's map-drawers remain a mystery; Republican sponsors of the map never publicly revealed who drew the plan, despite being asked for that information on multiple occasions during Committee proceedings. (R. VI, 25, ¶21.) After its introduction, both the Senate and House Redistricting Committees set Ad Astra 2, alongside a small number of other proposed maps, for simultaneous hearings on Thursday, January 20—just two days after the maps' introduction. (R. VI, 25,¶22.)

The Senate Redistricting Committee required members of the public who wanted to testify regarding the plan to sign up in person or submit written testimony by 10 a.m. on Wednesday, January 19—the day after the map's introduction and before the map's underlying data were made publicly available. Moreover, the House and Senate Committees scheduled their respective public testimony periods for the same time, forcing potential witnesses to choose between the two proceedings or "bounc[e] between the two." Several members of the public objected to these procedures. (R. VI, 25-26, ¶23.)

The Republican majority forced a vote in the Senate Committee on January 20 – the same day testimony was presented to them. (R. VI, 26,¶¶24-25.) The next day, January 21, Republican Senators rejected several proposed amendments to the plan introduced on the Senate floor. DX 1007-14, 15. A number of Democratic members objected that Ad Astra 2 was a

partisan gerrymander, would dilute the power of minority votes, and had reached the floor through a rushed process. Despite these objections, the full Senate passed Ad Astra 2, after designating the bill an emergency measure. (R. VI, 26-27, ¶26.)

It took roughly 72 hours for the Ad Astra 2 map to be introduced, discussed, and passed. Senator Corson testified that this timeline was "not at all typical"; the only bill he could recall moving with comparable speed was an emergency measure to help municipalities pay unexpectedly large heating bills during the cold snap in February 2021. (R. VI, 27, ¶28.)

The plan moved with similar speed in the House. The bill passed the House Redistricting Committee on January 24, and reached the House floor on January 25. (R. VI, 27, ¶29.)

During floor debate in both chambers, numerous representatives noted that the process by which Ad Astra 2 came to the floor was highly irregular, rushed, nontransparent, and unfair. (R. VI, 28, ¶31.) Representatives also called attention to the fact that the map split known communities of interest, ignored public input, diluted minority votes, and constituted "textbook gerrymandering." (R. VI, 28, ¶32.)

In response to accusations that Ad Astra 2 was a partisan gerrymander and would dilute minority votes, *e.g.,* PX 172 at 27:19-28:24, 30:18-25, 34:12-13, 56:15-16 (transcript of January 25, 2022 House floor debate), Republican Representative Steve Huebert opined that redistricting "is a political process" and that "[g]errymandering" and "partisan politics . . are just things that

happen. They always have and they always will." (R. VI, 28, ¶32.) Ad Astra 2 ultimately passed the House on a largely party-line vote on January 26.

Both Representative Burroughs and Senator Corson testified that the enactment of Ad Astra 2 was highly partisan. (R. VI, 28, ¶33). There was no attempt at bipartisanship or collaboration between the parties. No Republican member ever reached out to Democratic members to work on congressional redistricting. No negotiations occurred between the parties; rather, it was "very clear" from the "very, very early days of the redistricting listening tour" that Republicans had already decided to draw a plan with four Republican districts. (R. VI, 29, ¶34.)

Governor Kelly vetoed Ad Astra 2 on February 3, and the Legislature overrode her veto. (R. VI, 30-31, ¶38-40.)

VII. Expert Testimony Demonstrates the Ad Astra 2 Map is an Intentional, Effective, Partisan Gerrymander.

The Legislature's split of Lawrence from Douglas County cannot be explained by the neutral redistricting criteria set forth in the Guidelines, and has the effect of diluting the votes of Democratic voters in the region. (R. VI, 98, ¶211.)

A. Ad Astra 2 Unnecessarily "Scoops" the Largely Democratic Voting City of Lawrence from the Second District and Deposits it in the Super Majority Republican First District, Diluting Appellees Votes and those of Similarly Situated Voters.

In order to achieve the necessary population balance of the four congressional districts, a net total of 116,668 people, or 3.9% of the population of Kansas had to be moved. But to meet that requirement, the Ad Astra 2 map moves 394,325 people, or 13.4% of the state population. In other

words, Ad Astra 2 moves 337% more Kansans to different congressional districts than necessary to meet district population requirements. The number of counties and people moved to new congressional districts is set forth in PX 139. (R. VI, 17, ¶M.)

Ad Astra 2 unnecessarily transferred population from Douglas County to the Big First. To achieve population equality, the 2020 census required the Legislature to add 33,855 residents to the Big First. But the population of Lawrence is 94,934, roughly *three times* the number of residents needed to balance CD 1. There were a number of different ways the Big First could have been redrawn to add an additional 33,000 votes without splitting Lawrence from Douglas County and while remaining compliant with traditional redistricting factors. (R. VI, 99, ¶214; PX 135 at 11-14.) The Legislature's split of Lawrence from Douglas County could not be explained by neutral redistricting criteria and had the effect of diluting the votes of Democratic voters in the region. (R. VI, 98, ¶211)

Over the last three decades, at no point was any portion of Lawrence or Douglas County ever located in the Big First, which is centered in the rural, western and central parts of the state. Ad Astra 2, however, "scooped" Lawrence out of Douglas County and placed it into the Big First,—a decision, that cannot be explained by compliance with the Guidelines. (R. VI, 98-99, ¶212.) Ad Astra 2 fails to abide by the Guidelines' instruction that communities of interest and the cores of existing districts should be kept whole. By severing Lawrence from Douglas County, Ad Astra 2 divides Douglas County, which is a community of interest, and dismantles the

"core" of the prior configuration of CD 2, which comprises all of Douglas and Shawnee Counties, (R. VI, 99, ¶213.)

The effects of this unnecessary decision are devastating for Lawrence's overwhelmingly Democratic population, placing Lawrence into one of the most Republican districts in the United States. Under the 2012 congressional map, Lawrence's 72.9% Democratic population resided in CD 2, which has a 41%-54.3% Democratic-Republican split. Although CD 2 has not elected a Democrat since 2006, elections in the district have been competitive, making CD 2 a "lean Republican" rather than a "safe Republican" district. Ad Astra 2 dilutes the vote of Lawrence's overwhelmingly Democratic population by placing it in the Big First, which has significantly fewer Democratic voters and is therefore a "safe Republican" district. (R. VI, 99-100, ¶215.)

The consequences of Ad Astra 2's reconfiguration of Lawrence will negatively affect political outcomes for Democratic voters in the city. Because CD 2 is not a safe Republican district, it has hosted heavily-contested elections featuring experienced Democratic candidates who conducted extensive fundraising and mounted strong campaigns, including voter registration and get-out-the-vote efforts in Lawrence and Douglas County. These campaigns have had significant voter engagement effects. Even when well-funded candidates lose, their campaigns help energize voters, boost turnout, and recruit volunteers and can also lead to a culture of participation and volunteerism from which future candidates may be recruited. These close races and the attention CD 2 enjoys as a result helped motivate, register, and turn out [Democratic] voters and volunteers in Lawrence. By placing

Lawrence in the Big First, the Legislature disincentivizes Democratic voter mobilization, voter registration, voter turnout, fundraising, all of the activities that build a political base because the election would not be competitive. (R. VI, 100-01, ¶216.)

The Court found that the Frick Appellees evidence demonstrated the Legislature's partisan intent and the pro-Republican effect Ad Astra 2 will have with respect to CD 2 and the City of Lawrence. (R. VI, 101, ¶217.)

B. Ad Astra 2 Disregards Communities of Interest in Support of Partisan Gains.

Ad Astra 2 ignores "communities of interest" for the purpose of securing maximum Republican advantage. In so doing, Ad Astra 2 pairs together geographically disparate communities that share little in common. (R. VI, 101, ¶218.) By severing Lawrence from Douglas County, Ad Astra 2 "divides Douglas County, which is a community of interest," , and dismantled the "core" of the prior configuration of CD 2, which comprised all of Douglas and Shawnee Counties. (R. VI, 99, ¶213.)

Ad Astra 2 splits the City of Lawrence from the remainder of Douglas County, despite the fact that Douglas County has a joint health department between the city of Lawrence and Douglas County, as well as a joint city, county, planning commission. Douglas County Commissioner Shannon Portillo represents a district that is now split by Ad Astra 2. (R. VI, 103, ¶222.)

Ad Astra 2 places urban Lawrence into the very rural CD 1, which includes counties along the entire Colorado border as well as a large portion of the Oklahoma border. There is no cultural relationship between CD 1 and

the City of Lawrence. (R. VI, 104, ¶225.) Thus, the District Court found that Ad Astra 2 map subordinates communities of interest for partisan gains. (R. VI, 104, ¶226.)

C. Ad Astra 2 cannot be justified by the Legislature's purported desire to reunite Kansas State and the University of Kansas in the same congressional district.

Uniting the University of Kansas and Kanas State University in CD 1 does not justify moving the entirety of Lawrence into the Big First. There is no basis in the legislative record supporting that notion.. At no point during the listening tour sessions in August, the town halls in November, or the legislative hearings in January was there ever a suggestion that the two universities should be joined in a single district. The Kansas Board of Regents—the governing body responsible for overseeing Kansas's public universities—made clear that they had *no position* on redistricting. (R, VI, 142, ¶317.)

No legislator took the stand to testify that combining KU and K State was a justifiable or even non-pretextual goal. (R, VI, 142, ¶318.) Appellants presented no evidence that residents of the two university towns—Lawrence and Manhattan—would have supported their pairing in the same district. Dr. Portillo, a Douglas County resident, County Commissioner, and Associate Dean for Academic Affairs at KU' s Edwards Campus and School of Professional Studies, testified that while Manhattan and Lawrence are "both college towns," they are two "unique college towns." (R. VI, 142-43, ¶318.)

D. Ad Astra 2 cannot be justified by a desire to retain the cores of prior congressional districts.

Ad Astra 2 dramatically reconfigures CD 2 by adding the portion of Kansas City removed from CD 3 and by removing Lawrence. (R. VI, 143, ¶321.) And to the overwhelmingly rural CD 1, Ad Astra 2 inexplicably adds urban Lawrence, bypassing a number of rural counties to scoop Lawrence from CD 2. The significant population shifts caused by Ad Astra 2 are illustrated by the chart below, which highlights population shifts between districts in the previous 2012 congressional plan and Ad Astra 2:

COUNTIES MOVED TO NEW DISTRICTS

COUNTY	OLD CONGRESSIONAL DISTRICT 2012-2022	NEW CONGRESSIONAL DISTRICT IN AD ASTRA 2	RESIDENTS MOVED (2020 CENSUS)
Wyandotte	Third	Second (portion)	112,661
Douglas	Second	First (portion)	94,914
Chase	First	Second	7,523
Geary	First	Second	36,119
Lyon	First	Second	32,179
Marion	First	Second	11,823
Mors	First	Second	5,386
Wabaunsee	First	Second	6,877
Jackson	Second	First	13,249
Jefferson	Second	First	18,974
Marshall	First/Second	First	5,276
Miami	Second/Third	Third	20,495
Franklin	Second	Third	25,643
Anderson	Second	Third	7,877

(R. VI, 143-44, ¶322.)

Thus, in order to move the necessary 33,855 residents to CD 1, Ad Astra 2 inexplicably moves over 134,000 residents, including all 94,934 residents of Lawrence, from 4 counties, into CD 1, necessitating the moving of nearly 100,000 residents, from 5 counties, *out* of CD 1. (Id.)

VIII. Ultimate Findings by the District Court.

From the evidence presented at trial, the District Court found that (a) by splitting Lawrence from Douglas County in CD 2 and placing it instead in CD 1, Ad Astra 2 makes it significantly less likely for Appellees and other Democratic voters who live there to elect candidates of their choice. Under the previous congressional plan, Lawrence's Democratic voters were capable of waging competitive campaigns in CD 2. CD 1, by contrast, has a much larger Republican population, which will thus make congressional elections far less competitive. CD 1 is a strongly and safely Republican district. Even with the addition of heavily Democratic Lawrence to CD 1, the district has an overwhelming 29% Republican advantage. (R. VI, 146-47, ¶330.) (b) Placing Lawrence in the Big First disincentives Democratic voter mobilization, voter registration, voter turnout, fundraising, all of the activities that build a political base because the election would not be competitive. (R. VI, 147, ¶331.) And (c) the Legislature's adoption of the Ad Astra 2 map will have a direct and substantial negative, diluting effect on voters in the City of Lawrence. (R. VI, 17, ¶N.)

ARGUMENT AND AUTHORITIES

I. The Kansas Constitution Prohibits Intentional, Extreme Partisan Gerrymandering That Violates Fundamental Rights the Kansas Constitution Protects.

Appellants feign outrage and shock at ordinary Kansans seeking to hold the Kansas Legislature accountable to the bounds of the state constitution. Yet, a system of fair and equal elections in which all citizens have a meaningful opportunity to participate is foundational to self-government. Appellants appear to argue the District Judge's decision is inherently suspect because it treads new ground, yet Appellants ignore the Kansas Legislature's unprecedented extreme, intentional, and detrimental partisan gerrymandering exposed in this case, actions that violate fundamental rights the Kansas Constitution protects.

Appellants urge this Court to consider the question a purely political one, beyond the reach of the Courts, ignoring well-settled precedent mandating that even democratically elected legislators must act within the confines of the Kansas Constitution. Appellants' brief seeks to distract this Court from the merits of the issue by listing things that the Court has not done. *See e.g.,* APPELLANTS' BRIEF as 19, 21-22. But cases involving political rights and political contexts are not automatically nonjusticiable "political question" cases. *Baker v. Carr*, 369 U.S. 186, 209 (1962) ("the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection 'is little more than a play upon words.'") (quoting *Nixon v. Herndon*, 273 U.S. 536, 540 (1927)).

Appellants attempt to divert attention from the serious constitutional issues here by using sarcasm, engaging in figurative language, ignoring

Kansas law, and relying on simplistic use of limited Kansas history. A key point is their wooden reliance on evidence of partisan gerrymandering during the Wyandotte Convention over one hundred and fifty years ago. Constitutions are not set in stone, with their meaning limited to the understanding and biases of those who framed them. In recognizing a Kansas constitutional right of a woman to choose to terminate her pregnancy despite the existence of 1850s statutes in the Kansas territory prohibiting abortion, the Kansas Supreme Court explained:

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

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

Partisan gerrymandering in 1859 may have been a necessary evil to thwart an even greater abomination, the worst evil of all—slavery in Kansas. That is why Republicans in 1859 were gerrymandering against the interests

of the Democratic Party and that party's pro-slavery goals. After all, Kansas had gone through multiple versions of a state constitution at that point, and one pro-slavery constitution had been presented to Congress. One might perhaps excuse the Republicans of 1859 for engaging in a little partisan gerrymandering to prevent the greatest evil our country has ever known from taking root in Kansas.

The threat of slavery in Kansas is long behind us, but partisan gerrymandering has remained; and in 2022 Republicans took it to unprecedented lengths. This year partisan gerrymandering was not used to fight any evil or pernicious threat to Kansas; instead, it became an abomination itself, a blatant effort behind closed doors to turn Kansas completely red in every congressional district, and every state senate and house district the majority party possibly can. Bleeding Kansas, indeed.

These unprecedented, extreme, and self-interested partisan efforts must fail, however, because of the vision of the Framers of 1859, who used their wisdom to include foundational principles of democracy and natural law to ensure ultimate political power always and must reside in the people of Kansas. The Kansas Constitution does not give ultimate power to a group of legislators or any political party; it does not give that power to the Legislature, nor the Governor. "The Kansas Constitution is the work of the people." *Gannon v. State*, 298 Kan. 1107 Syl. 1 (2014).

Thus, under the Kansas Constitution, "all political power is inherent in the people, all free governments are founded on their authority, and the constitution is their creation." *Gannon v. State*, 298 Kan. 1107, 1170, 319

P.3d 1196, 1236 (2014). But the people's constitution has another important feature relevant here: under Article 3, "[d]etermining whether an act of the legislature is invalid under the people's constitution is solely the duty of the judiciary." *Gannon*, Syl. 1. It is a solemn and sometimes challenging duty, one perhaps not always desired and certainly not sought. But the "judiciary is not at liberty to surrender, ignore, or waive this duty." *Gannon*, Syl. 1. If the Kansas courts ever were to abdicate this sacred duty, which since 1859 they have not, "the people's constitution" would cease to be.

And the Kansas courts are on firm ground here. The Kansas Constitution is strong when it comes to the people's rights in the political process. The Kansas Bill of Rights explicitly makes inalienable the rights to life, liberty, and the pursuit of happiness for all Kansans. It expressly recognizes that all political power is inherent in the people. It explicitly recognizes that government is founded on their authority and instituted for their equal protection and benefit. Yet these emphatic Bill of Rights provisions mean little if the extreme and unprecedented partisan gerrymandering of 2022 is allowed to proceed unchecked by any constitutional constraints whatsoever. The people will have become the servants of the Legislature, the exact opposite of the constitutional commands that they possess all political power and they may "direct their representatives."

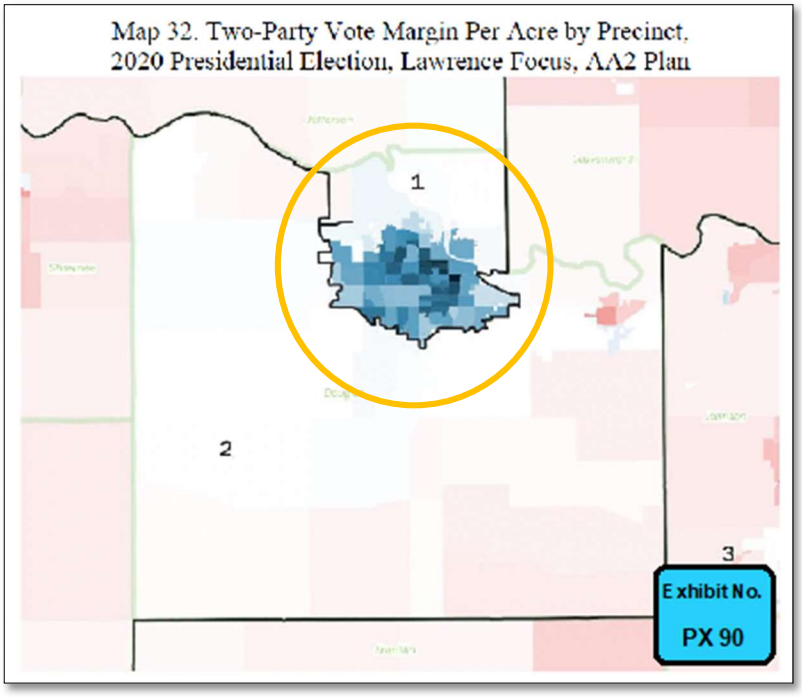
The unprecedented partisan gerrymandering of 2022 is itself the abomination, not a weapon against evil; it puts the 1859 complaints of unfairness to shame. Modern technologies and algorithms can manipulate

voter populations and draw districts with such precision that a party can guarantee itself virtually each and every district it chooses. In Kansas, with a Republican supermajority, that likely means all four congressional seats in spite of the statewide demographics of Democratic and Republican voters. But that same technology also provides courts a means to evaluate partisan gerrymandering, to ensure fairness, and to ensure that all Kansans have a meaningful opportunity to control their institutions of government, to direct their representatives, and to participate in their government by casting meaningful votes that may elect a candidate of their choice.

Appellees' expert Dr. Michael A. Smith, Ph.D, credited by the District Judge, whose factual findings are entitled to deference, readily proves these points. (R. VI, 98-101, ¶¶208-17; 145, ¶324; 146-47, ¶¶330-31.) Dr. Smith testified that the Legislature's split of Lawrence from Douglas County: (1) could not be explained by neutral redistricting criteria, and (2) had the effect of diluting the votes of Democratic voters in the region. (R. VI, 99, ¶215.) First, Dr. Smith testified that the Legislature's split of Lawrence from Douglas County could not be explained by neutral redistricting criteria and had the effect of diluting the votes of Democratic voters in the region. (R. VI, 98, ¶211.) Dr. Smith explained that over the last three decades, at "no point was any portion of Lawrence or Douglas County ever located in the Big First, which is centered in the rural, western and central parts of the state." Ad Astra 2, however, "scooped" Lawrence out of Douglas County and placed it into the Big First—a decision, Dr. Smith concluded, that could not be explained by compliance with the Guidelines. (R. VI, 98, ¶212.) The depiction

of this "scoop" is striking and underscores the razor-like precision of the decision to move Lawrence into the Big First. (VI, 95, ¶202.)

Indeed, Dr. Smith stated that Ad Astra 2's configuration of CD 2 scored poorly on the Polsby-Popper compactness measure, which is "an indication of gerrymandering." Moreover, Dr. Smith explained that Ad Astra 2 fails to abide by the Guidelines' instruction that communities of interest and the cores of existing districts should be kept whole. By severing Lawrence from



Douglas County, Ad Astra 2 "divides Douglas County, which is a community of interest," and dismantled the "core" of the prior configuration of CD 2, which comprised all of Douglas and Shawnee Counties. (R. VI, 99, ¶213.) A final point from Dr. Smith's testimony is how unnecessary the decision to move Lawrence was to the Big First was. (R. VI, 99, ¶214.) To achieve population equality, the 2020 census required the Legislature to add 33,855 residents to the Big First. But the population of Lawrence is 94,934, roughly

three times the number of residents needed to balance CD 1. (R. VI, 99, ¶214.) The Legislature did not need to make this decision; as Dr. Smith testified, "there [were] a number of different ways the Big First could have been redrawn to add an additional 33,000 votes" without splitting Lawrence from Douglas County and while remaining compliant with traditional redistricting factors. (R. VI, 99, ¶214.)

Second, Dr. Smith testified that: (1) Lawrence has a nearly 80% Democratic population, (2) CD2 has a 41%/54/3% Democratic/Republican split, and (3) elections in CD 2 have been "competitive." (R. VI, 99-100, ¶215.) Yet Ad Astra 2 will dilute the competitive vote; further, Dr. Smith testified that scooping Lawrence out of Douglas County will disincentivize mobilizing Democratic voters. Ad Astra 2 is expected to suppress Democratic voter turnout and other forms of political activity. (R. VI, 100, ¶216.)

And the Appellants did essentially nothing to rebut such evidence. (R. VI, 133-37, ¶¶289-301.) At best, Appellants made half-hearted pretextual justifications that withstand no scrutiny. District Judge Klapper found that "[Appellants] asserted pretextual justifications for Ad Astra 2 that cannot withstand scrutiny. Indeed, Defendants offered these justifications ***exclusively through argument by lawyers***, which are not evidence and not through evidence from any witness." (Emphasis added.) (R. VI, 139, ¶307.) Appellants' purported basis for pairing Manhattan with Lawrence was to unite two university towns; however, as Judge Klapper found, Appellants have no evidence that residents of the two university towns—Lawrence and

Manhattan—would have supported their pairing in the same district. (R. VI, 142-43, ¶¶317, 319.)

This decision also unnecessarily separated the University of Kansas ("KU") from its prevalent presence in the Kansas City Metropolitan area. The presence of KU's vast Medical Center complex in Wyandotte County is common knowledge, including its federally funded National Cancer Center, a designation made by the federal government. *See* K.S.A. 60-409(b)(3),(4) (providing that courts may judicially notice facts "so generally known . . . that they cannot reasonably be the subject of dispute" and "propositions of generalized knowledge which are capable of immediate and accurate determination . . ."). KU also operates in Johnson County, home to its Edwards campus, which offers a wide array of programs. KU has substantial interests and connections to the Kansas City region, not to Manhattan or Kansas State University.

District Judge Klapper found that Appellants' expert Dr. Alford actually "*supports* the testimony of [Appellees'] experts that Ad Astra 2 has partisan effects." (Emphasis added.) (R. VI, 137, ¶300.) Moreover, District Judge Klapper set forth the evidence Appellants offered through their three "experts" to rebut the testimony of Appellees' experts, but found that Appellants' experts were, both separately and collectively, "insufficient to rebut the evidence of partisan gerrymandering advanced by [Appellees]." (R. VI, 137, ¶301.)

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

The Ad Astra 2 congressional redistricting map represents unprecedented and extreme partisan gerrymandering that violates the Kansas Constitution's guarantees of equal and inalienable rights, that all political power is inherent in the people and instituted for their equal protection and benefit, the right of the people to consult for the common good and to instruct their representatives, the right to free speech and to vote, and the retention by the people of all power not delegated under the Constitution. Kansas Constitution Bill of Rights Sections §§ 1 ("Equal rights"), 2 ("Political power"), 3 ("Consult for common good and instruct representatives"), 11 ("Liberty of press and speech"), 20 ("Powers retained by people"), and Article V, Section 1 ("Suffrage").

The language of the Constitution, as well as the history and intent of these constitutional provisions, guarantee Appellees the right to a redistricting plan that does not use extreme partisan political gerrymandering. *Hodes & Nauser*, 309 Kan. at 610. Moreover, despite Appellants' unfounded protests, the Kansas courts, and ultimately this Court, has the sacred duty to protect the people's constitution and the people of Kansas from legislative overreach. This includes the right that the vote of every Kansan has a meaningful opportunity to count equally. *Harris v. Shanahan*, 192 Kan. 183, 204, 387 P.2d 771 (1963). When a legislative action is contrary to the constitutional rights of Kansans, we are proud of the tradition of our Kansas courts not shying away from their duty to declare

such laws unconstitutional and preserve the people's constitution. Judicial review is appropriate here to enforce the requirements of the Kansas Constitution which provides more robust protection than the federal Constitution in this context.

B. The Unprecedented, Extreme, Intentional, and Quite Effective Partisan Gerrymandering Here Violates the Kansas Constitution Bill of Rights.

Appellants suggest the Court lacks authority to adjudicate this case because "political gerrymandering claims are 'speculative at best,'" citing *House Bill No. 2620*, 225 Kan. 827 (1979). Dramatic advancements in technology during the four decades since *House Bill No. 2620* was decided, however, have substantially decreased—if not virtually eliminated—any speculation about the effect of precise gerrymandering options and strategies. Appellants also argue that because partisan gerrymandering has never been held to violate the Kansas Constitution, the District Judge "misapprehended" the issues, and the Kansas Constitution can never recognize such a claim.

This Court repeatedly has emphasized the Bill of Rights "'is not to be considered as containing precise limitations upon power but rather only comprehensive statements of general truths; that it is more in the nature of a guide to the legislature, than a test for the courts.'" *Hodes & Nauser*, 309 Kan. at 633 (citing A*tchison Street Rly. Co. v. Mo. Pac. Rly. Co.*, 31 Kan. 660, 664, 3 P. 284 (1884)). The framers of our Bill of Rights guarded specifically against the accumulation of power in the legislative branch. *Hodes & Nauser*, 309 Kan. at 635 (citing *The State v. Wilson*, 61 Kan. 32, 36, 58 P. 981 (1899)). This case represents a threat of the legislative branch accumulating almost

unlimited power to itself at the expense of the executive branch, the judicial branch, and, most fundamentally, the people of Kansas.

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

Underscoring that extreme partisan gerrymandering violates the Kansas Constitution is Section 2 of the Bill of Rights which provides that "All political power is inherent in the people" and is "instituted for their equal protection and benefit." Kansas Constitution Bill of Rights Section 2. How can that provision not be violated by legislation adopting Ad Astra 2, a map that intentionally and effectively renders the votes of large segments of Kansas voters utterly irrelevant and meaningless with nothing but facile pretexts—which the District Judge rejected as a factual matter—to support

it? (R. VI, 120, n. 11; 139, ¶307; 140, ¶311; 139, ¶307; 142, ¶318; 204, ¶491; 205, ¶492.)

Indeed, the Kansas Supreme Court has explained: "Within the express and implied provisions of the Constitution of Kansas every qualified elector of the several counties is given the right to vote for officers that are elected by the people, and he is possessed of equal power and influence in the making of laws which govern him." *Harris*, 192 Kan. at 204. Kansas' congressional delegation can only reflect the will of Kansans if it is elected from districts that provide each Kansan's vote with substantially the same power and meaning. Here, the Kansas Legislature is controlled by a Republican veto-proof supermajority that has intentionally and blatantly manipulated and gerrymandered the boundaries of Kansas' U.S. Congressional Districts on a partisan basis. The Kansas Constitution prohibits such actions; to conclude otherwise one has to ignore several provisions of our Bill of Rights.

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

substantially undermined by intentional partisan gerrymandering to disenfranchise substantial segments of Kansas voters of any meaningful vote or ability to influence representatives or discussion on important public issues in the political process.

There can be no debate that "the Kansas Constitution affords separate, adequate, and greater rights than the federal Constitution." *Farley v. Engelken*, 241 Kan. 663, 671, 740 P.2d 1058 (1987). Indeed, prime examples in this case are Sections 1 and 2 of the Kansas Bill of Rights, which have no counterparts at all in the U.S. Constitution. A further and important provision is Section 3, which guarantees the people the right to consult for the common good and to instruct their representatives. This provision has meaning. In fact, the original proposed language of the U.S. Constitution's First Amendment included a right to "consult for the common good," but that language did not make it into the U.S. Bill of Rights. *See Jones v. City of Opelika*, 319 U.S. 105, 124 n. 6 (1943). Again, the Kansas Constitution provides greater protection than the U.S. Constitution, both explicitly and implicitly.

Despite claiming that Appellants' are "accountable to the people," what Appellants mean is they need only listen to the people who already agree with them. APPELLANTS' BRIEF at 1. The partisan gerrymandering of the congressional map here strikes at the heart of orderly constitutional government, true democracy, and traditional Kansas populist values and traditions. It undermines the equality of votes, deprives many Kansans of their inherent political power, and contravenes even the Legislature's own

self-declared redistricting criteria and non-partisan "Guidelines." Instead of a map that reflect *actual* Kansas, our state ends up with a map that displays extreme partisan favoritism. In the First District that means not "diluting" the votes of Democratic party voters but quite effectively eliminating them altogether. That purposeful and intentional result denies them, denies them the equal protection and benefit of the governmental system, as well as any meaningful opportunity to consult for the common good or to instruct their representatives, given that they will never have any opportunity to elect their preferred representative, influence their positions on important issues, or engage them in debate on important public issues.

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

Perhaps most interesting is Appellants' suggestion that this Court is "inserting [itself]" into the political process, hiding behind the separation of powers to urge the Court to let Ad Astra 2's constitutional violations slide. But Appellees have not called upon the judiciary to re-draw the lines; they have properly asked the courts only to perform their traditional function—evaluate the constitutionality of legislative action, declare it unconstitutional, and the provide the Legislature an opportunity to re-draw the maps in compliance with constitutional requirements. That scenario has played out many times over our Nation's history, and the history of Kansas.

The right to vote under the Kansas Constitution is a bedrock, fundamental right that the Legislature cannot abridge. The Kansas Supreme Court has so recognized for almost 150 years. And unlike in the U.S.

Constitution, it is a right explicitly protected by constitutional text. *See, e.g., Wheeler v. Brady*, 15 Kan. 26, 32 (1875) (emphasis added) ("if said section applies, then this right to vote in every school-district in the township in which an elector resides is a constitutional right, which cannot be abridged by the legislature, or by any other power except the entire people of the state by way of amendment to the constitution."); *State v. Beggs*, 126 Kan. 811, 271 P. 400 (1928) (striking down under the Kansas Constitution a state statute requiring that a voter fill out a form declaring party affiliation before being given a ballot); *State ex rel. Parker v. Corcoran*, 155 Kan. 714, 129 P.2d 999 (1942) (under the Kansas Constitution persons resident in Kansas but employed by the federal government cannot be denied the right to vote in Kansas elections by virtue of their employment status); *Patterson v. Justus*, 173 Kan. 207, 211, 245 P.2d 968 (1952) ("'The exercise of the franchise is one of the most important functions of good citizenship, and no construction of an election law should be indulged that would disfranchise any voter if the law is reasonably susceptible of any other meaning.' [Citation omitted.]"); *cf. Montoy v. State*, 278 Kan. 769, 120 P.3d 306, 311, supplemented, 279 Kan. 817, 112 P.3d 923 (2005) (Beier, J., concurring) and ("If we were to apply the United States Supreme Court's straightforward pattern of analysis from Rodriguez, we would need to look no further than the mandatory language of these two constitutional provisions. Because they explicitly provide for education, education is a fundamental right." (citing *San Antonio School District v. Rodriguez*, 411 U.S. 1, 33-34 (1973))).

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

This fundamental right long has been understood to mean that every vote must count equally. *Harris*, 192 Kan. at 204. If a Kansas voter "is accorded less representation than he is due under the Constitution, to that extent the government processes fail to record the full weight of his judgment and the force of his will." *Harris*, 192 Kan. at 204. "[A]ny alleged restriction or infringement of that right strikes at the heart of orderly constitutional government and must be carefully and meticulously scrutinized. *Moore v. Shanahan*, 207 Kan. 645, 649, 486 P.2d 506 (1971).

Republican legislators expressly promised, in the fall of 2020, that they would draw maps to eliminate any Democratic congressional seats in Kansas. (*See* R. VI 104, §II(G), ¶¶227-28; 193, ¶465) (discussing Former Senate Pres. Susan Wagle's promise to create "four Republican congressional districts."). The Republican majority in the 2022 Legislature delivered on that promise when they passed the Ad Astra 2 congressional redistricting map. Those legislators in an extreme and unprecedented fashion (both procedurally and

substantively) intentionally and quite effectively diluted (if not completely nullified) the votes of Democratic, independent, and third-party voters in the City of Lawrence in terms of possibly electing Democratic members of Congress. (R. VI, 99, ¶215) (summarizing Appellees' expert opinion about Ad Astra diluting votes in Lawrence).

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

Appellants argue that *any* judicial review, by Kansas state courts, of the constitutionality of SB 355 "violates the U.S. Constitution's express vesting of the redistricting power in the Kansas 'Legislature.'" Br. at 9 (citing U.S. Const. art. I, § 4). This argument—that the Kansas Legislature's enactment of a congressional redistricting map can *never* be reviewed by any Kansas court—has been flatly rejected by the U.S. Supreme Court time and time again. Kansas law also contradicts Appellants' claim. Indeed, as is true of any other state law, Kansas courts have the authority to review the validity of SB 355 under the Kansas Constitution. The U.S. Constitution does not and cannot limit—much less eliminate—that inherent constitutional authority of the Kansas courts.

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

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

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the

> Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

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

For over a century, the U.S. Supreme Court has rejected the "independent state legislature" fantasy that Appellants propound. The best Appellants can do is cite individual Justices expressing some interest in the notion; they have not a single precedent or case holding that a state legislature's redistricting laws are immune from review by the state's own courts for validity under the state's constitution. And with good reason—there are no such cases, only explicit precedent to the contrary.[1]

In *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916), the Court considered a state constitutional amendment granting veto power by popular-vote referendum. *Ohio ex rel. Davis*, 241 U.S. at 566. When the Ohio legislature "passed an act redistricting the state for the purpose of congressional elections" and a popular vote rejected that act, state election officers sued on the theory that "the referendum vote was not and could not

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

be part of the legislative authority of the state" under the Elections Clause of the U.S. Constitution. *Ohio ex rel. Davis*, 241 U.S. at 566-567. The U.S. Supreme Court disagreed, finding "conclusive" the Ohio Supreme Court's determination that "the referendum constituted a part of the state Constitution and laws, and was contained within the legislative power." *Ohio ex rel. Davis*, 241 U.S. at 567-68. The Court held that, "nothing in [federal statutory law] or in [the Elections Clause] operated to the contrary." *Ohio ex rel. Davis*, 241 U.S. at 567. In short, a referendum of the people authorized by the Ohio Constitution validly overturned the Ohio Legislature's redistricting act. If Appellants' theory were correct, *Ohio ex rel. Davis* would be wrongly decided.

The U.S. Supreme Court went further in *Smiley v. Holm*, 285 U.S. 355 (1932), a case Appellants cite in support of their "independent state legislature" theory. Br. at 11. But far from supporting Appellants' radical theory, *Smiley* underscores that state legislatures do not operate independently from state constitutional requirements when they are drawing congressional district lines under the Elections Clause. As Appellants acknowledge, the *Smiley* Court held that when a state legislature engages in redistricting under the Elections Clause, it is "making law[]" and thus must act "in accordance with the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367. But Appellants fail to note the rest of the Court's opinion, in which it found "no suggestion in [the Elections Clause] of an attempt to endow the Legislature of the state with power to enact laws *in any manner other than that in which the Constitution*

of the state has provided that laws shall be enacted." *Smiley*, 285 U.S. at 367-68 (emphasis added). In other words, when "making [congressional redistricting] law," as with any other state law, state legislatures cannot flout the state constitution. Nothing in the Elections Clause renders the state constitution meaningless.

Therefore, in *Smiley*, because the Minnesota Constitution required the governor's approval for all state laws, the governor's approval was necessary for congressional redistricting laws. The Elections Clause did not authorize the Legislature to act independently of state constitutional requirements. *Smiley*, 285 U.S. at 368-60. Again, if Appellants' "theory" is correct, then *Smiley* was wrongly decided. But it was not—state and federal courts must determine what the relevant state constitution requires when properly asked to evaluate congressional redistricting laws.

The Supreme Court has not wavered from its consistent understanding of the Elections Clause. Contrary to Appellants' citations to recent concurrences and dissents from some individual Justices, a majority of the Supreme Court has reaffirmed these basic principles in recent years. In 2015, the Court soundly and expressly rejected the argument that a state legislature was immune from state constitutional requirements when engaged in congressional redistricting. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), the Court's holding was explicit: "Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections *in defiance of*

provisions of the State's constitution." *Ariz. State Legis.*, 576 U.S. at 817-18 (emphasis added). Even the dissent, which Appellants misguidedly attempt to rely upon, agreed that when a state legislature "prescribes election regulations" under the Elections Clause, it is "required to do so within the ordinary lawmaking process." *Ariz. State Legis.*, 576 U.S. at 841 (Roberts, C.J., dissenting).

Most recently, in 2019, the Court reconfirmed that state courts may review state laws governing federal elections to determine compliance with a state's constitution. In *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), the Court held that *federal* courts could not review partisan gerrymandering challenges under the *federal* Constitution, but the Court importantly made clear it did "not condone excessive partisan gerrymandering" and it did not "condemn complaints about districting to echo into a void." *Rucho*, 139 S.Ct. at 2506-07. The Court went out of its way to observe that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply" to partisan gerrymandering claims, including in cases involving congressional redistricting.

The Court cited as an example a case from the Supreme Court of Florida, which "struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution." *Rucho*, 139 S.Ct. at 2506-07. Such an observation by the Court in *Rucho* would have been pointless if the Court believed the Elections Clause exempted state legislatures' congressional redistricting laws from state judicial review for compliance with state constitutional requirements.

Absolutely pointless, frivolous, and utterly misleading. Nonsensical in fact, if Appellants' theory is correct.

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

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

Perhaps recognizing that the U.S. Supreme Court has never adopted the "independent state legislature" fantasy, Appellants offer the alternative argument that even if redistricting laws are subject to "Kansas's 'prescriptions for lawmaking,'" those prescriptions "do not include the judiciary." APPELLANTS' BRIEF at 12. Appellants thus claim that Kansas courts can only review redistricting laws if the Kansas Constitution *specifically* "give[s] any lawmaking authority to the judiciary." APPELLANTS' BRIEF at 12.

Appellants' invitation to narrow arbitrarily their already unsupported standard is equally unpersuasive and unsupported by either federal or Kansas law. The U.S. Supreme Court long has held that when a state legislature engages in redistricting under the Elections Clause it is "making law[]" and thus must act "in accordance with the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367; *see also Ariz. State Legis.*, 576 U.S. at 841 (Roberts, C.J., dissenting) (when a state

legislature "prescribes election regulations" under the Elections Clause, it is "required to do so within the ordinary lawmaking process").

Appellants attempt to distinguish this long line of precedent by arguing that *Rucho*'s discussion of the Florida Supreme Court decision involved a state constitutional amendment that expressly mentions congressional redistricting. *See* APPELLANTS' BRIEF at 16. According to Appellants, "[e]xpress 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." APPELLANTS' BRIEF at 17. But there is no apparent or logical reason this distinction should make a difference. Even assuming a state constitution explicitly limits partisan gerrymandering, how does that answer the question whether a state legislature (under the Elections Clause) or the state courts (exercising traditional powers of judicial review) enforce such a provision?

To be clear, *none* of the U.S. Supreme Court cases cited above, and relied on by the District Judge, adopted Appellants' alternative, narrower view. No U.S. Supreme Court decision has *ever* held that state courts can only review the (state) constitutionality of congressional redistricting laws if the state constitution expressly mentions congressional redistricting. And for good reason: the Court, time and time again, has held that congressional redistricting laws are subject to the same processes as any other law. If Kansas courts can review the validity of any other law under the Kansas Constitution, they certainly can review the constitutionality SB 355 too.

And Appellants must concede, if being remotely candid, that Kansas courts can and do review the constitutionality of other laws, including state redistricting laws. APPELLANTS' BRIEF at 14 (citing Kan. Const., Art. 10, § 1). The argument, then, boils down to a claim that because the Kansas Constitution does not explicitly mention *congressional* redistricting Kansas courts lack *jurisdiction* to review the state constitutionality of congressional redistricting. This argument, however, confuses the *jurisdiction* issue with *the merits* of a claim. As this Court is aware and as demonstrated in the section of this brief addressing partisan gerrymandering under the Kansas Constitution, a right need not be mentioned *explicitly* to be protected by the Kansas Constitution. If that were the standard, under Appellants' argument Kansas courts would have lacked *jurisdiction* to even *reach the merits* of myriad potential substantive constitutional claims that Kansans have asserted, and the Kansas courts have recognized under the Kansas Constitution over time. It is one thing to hold ultimately that the Kansas Constitution does not recognize a particular claim; it is quite another to hold that a Kansas court has no *jurisdiction* to consider whether such a claim even exists.

Appellants' reliance on *Parsons v. Ryan*, 144 Kan. 370, 60 P.2d 910 (1936), fares no better. The Court in *Parsons* did not reach the sweeping holding that Appellants claim, that congressional election laws are *never* "'subject to constitutional restrictions.'" APPELLANTS' BRIEF at 13. In reviewing a state law specifying deadlines for the nomination of presidential electors, the Court stated:

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

60 P.2d at 912.

Parsons does not bear the weight Appellants attempt to load on it. First, the case involved Article II, section 1 of the U.S. Constitution, not the Elections Clause. 60 P.2d at 910. Second, the dispute was simply over the setting of a *deadline* for filing papers to serve as an elector; the Legislature had chosen a date, and the Court declined to substitute its judgment of a different date. *Id.* Third, understood in context, the Court's passing mention of whether the election law was "unconstitutional" appears to refer to the *Federal Constitution*, because the Appellees had argued that "the Federal Constitution requires they shall appear on the general ballot." *Id.* at 912. Regardless, even if the Court were discussing the Kansas Constitution, this passing reference is not a prohibition on *any and all* state constitutional challenges to state laws regarding federal elections. In fact, an equally sound if not better reading of the case is that the Court *did* review the Kansas law under the Kansas Constitution and found it *constitutional*.

Further, Appellants' own argument—that congressional redistricting laws are immune from state judicial review—has been undermined by the Kansas Legislature itself. In this Court, Appellants argue Kansas courts can only review congressional redistricting laws if there are "[e]xpress constitutional provisions . . . through which the state legislature has clearly brought the state judiciary into the congressional redistricting process." Br. at 17.[2] Although not a constitutional provision, the Kansas Legislature recently did just that—by *acknowledging* that *all* state election laws are subject to at least some level of state court review. In the 2021 Regular Session, the Kansas Legislature enacted K.S.A. § 25-125, which purports to make "election laws" the exclusive domain of the Kansas Legislature (perhaps in an attempt to codify, under state law, the "independent state legislature" theory the U.S. Supreme Court has rejected). But even Section

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[2] In the district court, Appellants made a somewhat different argument. There, they argued Kansas courts could only review congressional redistricting laws if "the Kansas Constitution" or "*any Kansas statute* reassigns any redistricting lawmaking authority to the courts." (emphasis added). Because they apparently overlooked K.S.A. § 25-125—which does just that—and prefer to wish it away, Appellants now claim the Kansas Constitution is the only authority that matters.

The distinction between constitution and statute, like Appellants' whole argument, is nonsense. The Kansas Legislature can very well "br[ing] the state judiciary into the congressional redistricting process" by enacting a statute. In fact, that realistically is *the only way* the Kansas Legislature could do what Appellants claim it must do. The Kansas Legislature cannot by itself easily or quickly produce an amendment to the Kansas Constitution. This is just another effort by Appellants to aggrandize the Legislature and empower it to reign supreme—over the other branches of government, the Kansas Constitution, and the people of Kansas. *See supra* Section I.A.

25-125 notably hedges its bets, recognizing the constitutional role of the Kansas courts:

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

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

Under U.S. Supreme Court precedent and Kansas law, Kansas courts have the jurisdiction and authority to review the Kansas Legislature's enactment of congressional redistricting laws under the Kansas Constitution. Appellants' argument is an audacious attempt to strip Kansas courts of the fundamental power of judicial review under the Kansas Constitution that

over a century of U.S. Supreme Court precedent and Kansas law recognize. Appellants' lawless theory—fantasy really—must be rejected.

CONCLUSION

The unprecedented, extreme, intentional, and targeted partisan gerrymandering proven in this case stripped non-Republican voters in the City of Lawrence of their fundamental rights under the Kansas Constitution, including any opportunity to have "equal power and influence in the making of laws which govern [them]." *Harris*, 192 Kan. at 204. This Court should affirm the District Judge's thorough, thoughtful, and well-reasoned decision which is supported both by facts entitled to deference and law rooted in the Kansas Constitution.

The people's constitution—and the people—deserve no less.

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Respectfully,

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