

No. 22-125083-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

PETITION OF DEREK SCHMIDT, ATTORNEY GENERAL,
TO DETERMINE THE VALIDITY OF
SUBSTITUTE FOR SENATE BILL NO. 563
PROVISIONS REAPPORTIONING
STATE LEGISLATIVE DISTRICTS.

**BRIEF OF PETITIONER IN RESPONSE
TO BRIEF OF INTERVENOR
SENATOR THOMAS HOLLAND**

Original Action
Pursuant to Kan. Const. art. 10, § 1(b)

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Attorney General Derek Schmidt previously petitioned this Court to determine that the state senatorial and representative reapportionment contained in Substitute for Senate Bill 563 (Sub SB 563) is valid. Intervenor Senator Thomas Holland has challenged the validity of the senatorial reapportionment only. He alleges that Sub SB 563's enactment was procedurally defective and that two of the senatorial districts drawn in Sub SB 563—Districts 3 and 9—are substantively invalid.

The Attorney General responds to explain why Senator Holland is wrong on both counts. Senator Holland does not allege that any procedural statute or constitutional provision was violated in the process of Sub SB 563's enactment. Rather, his complaints about that process echo complaints this Court has repeatedly rejected in apportionment cases. Senator Holland's substantive challenges are similarly baseless. He attacks discretionary legislative determinations that this Court has historically refused to displace, and he raises a nonjusticiable political gerrymandering claim.

STATEMENT OF THE ISSUES

I. Is the senatorial reapportionment contained in Sub SB 563 procedurally valid?

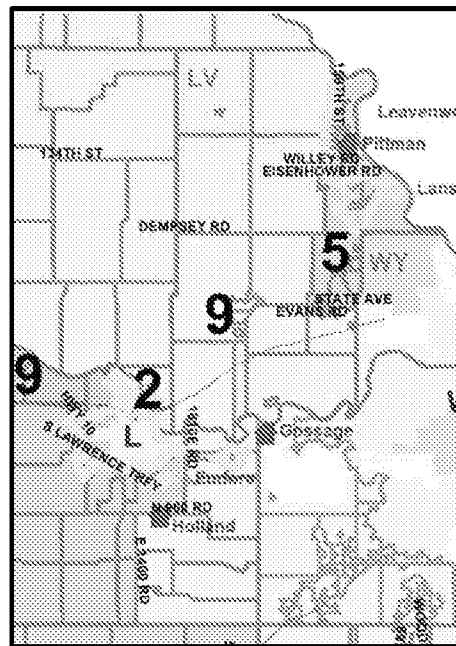
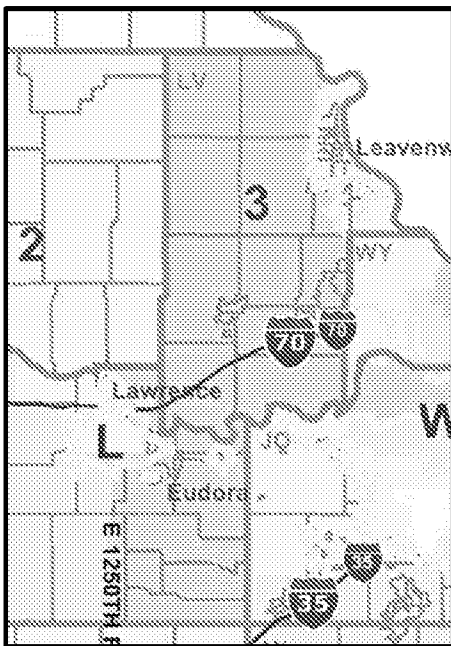
II. Is the senatorial reapportionment contained in Sub SB 563 substantively valid?

STATEMENT OF FACTS

Democratic Senator Thomas Holland has a home address in Baldwin City, Kansas. (Holland Br. App'x 15.) He currently represents District 3 in the Kansas

Senate. (Ex. B, 17.) Under the senatorial reapportionment contained in Sub SB 563, Senator Holland will reside in the new District 9. (*Id.*) District 9 is currently represented by Republican Senator Beverly Gossage, who will remain in District 9 under Sub SB 563. (*Id.*)

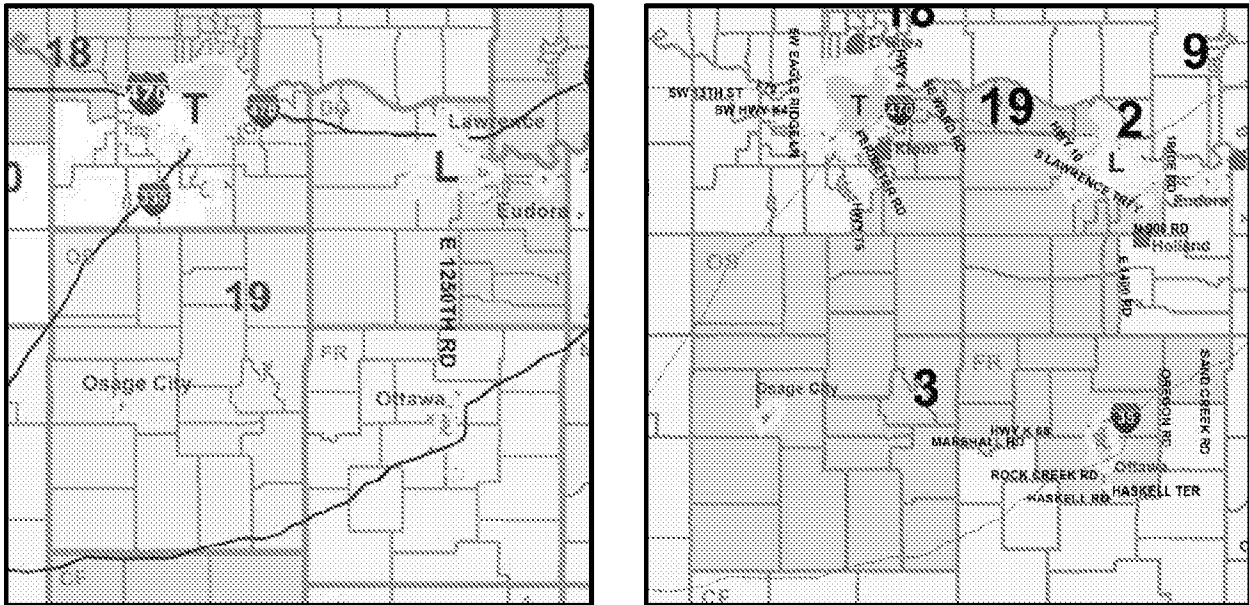
Although Senator Holland's new senatorial district has a different number, it resembles his old senatorial district. Both districts contain large portions of Douglas and Leavenworth Counties. (*Compare* Liberty 3 Map Packet¹ 49, with 2012 Map Packet², Counties by Districts 1.) The maps below show Senator Holland's old district (District 3, on the left in purple) and his new district (District 9, on the right in light blue).



¹ References to the “Liberty 3 Map Packet” are to the map packet for the new senatorial district map, which is available at http://www.kslegresearch.org/KLRD-web/Publications/Redistricting/2022-Plans/Senate/Liberty_3.pdf.

² References to the “2012 Map Packet” are to the map packet for the current senatorial district map, which is available at http://www.kslegresearch.org/KLRD-web/2012LDP/District_Court/m5_district%20court%20-senate/m5_districtcourt-senate.html.

The new senatorial District 3, meanwhile, largely resembles the old senatorial District 19.³ Both districts contain sizeable portions of Douglas, Osage, and Shawnee Counties. (*Compare* Liberty 3 Map Packet 49, *with* 2012 Map Packet, Counties by Districts 1.) The maps below show the old District 19 (on the left in light green) and the new District 3 (on the right in purple):



ARGUMENTS AND AUTHORITIES

Challenges brought by dissatisfied incumbents are not uncommon in reapportionment cases. *See, e.g., In re Stephan (Stephan I)*, 245 Kan. 118, 124, 775 P.2d 663 (1989) (incumbent challenging new district on the grounds that the new

³ Senator Dinah Sykes proposed a conceptual amendment to swap the numbers for the new Districts 3 and 19, and that amendment failed. *See* Minutes of the Senate Redistricting Committee—Mar. 15, 2022 at 4 (approved Apr. 27, 2022) (hereinafter “Mar. 15 SRC Minutes”), http://www.kslegislature.org/li/b2021_22/committees/ctte_s_redistricting_1/documents/minutes/20220315.pdf. Senator Masterson explained that the numbering was requested by the Governor’s office. *See Senate Redistricting Committee 03/15/2022* at 50:50 (Mar. 15, 2022), <https://www.youtube.com/watch?v=o66uZRkqv-U>.

districts were “not compact and contiguous, the identity of existing political subdivisions (counties) was not preserved, political considerations prevailed over stated reapportionment objectives, and the committee could have avoided splitting counties and could have placed more counties entirely in a single district”); *In re Senate Bill No. 220*, 225 Kan. 628, 631-32, 593 P.2d 1 (1979) (incumbent challenging procedure of senatorial reapportionment). Without exception, this Court has rejected such challenges. *See, e.g., Stephan I*, 245 Kan. at 126-29 (upholding representative reapportionment); *Senate Bill No. 220*, 225 Kan. at 632-33, 637 (upholding senatorial reapportionment). Senator Holland’s challenges should similarly be rejected.

I. Sub SB 563 is procedurally valid.

Senator Holland raises “no contention or evidence that the applicable legislative rules and constitutional and statutory law concerning the enactment of legislation were not followed or were in some way violated.” *In re Stephan (Stephan III)*, 251 Kan. 597, 603, 836 P.2d 574 (1992). That has historically been where this Court’s analysis starts and ends. *See In re Stovall (Stovall II)*, 273 Kan. 731, 733, 45 P.3d 855 (2002) (“In the absence of evidence of a violation of constitutional or statutory law, or any evidence that the applicable legislative rules were not followed, we do not find any procedural inadequacies.”); *In re Stovall (Stovall I)*, 273 Kan. 715, 723, 44 P.3d 1266 (2002) (same); *Stephan III*, 251 Kan. at 603 (“The details of the legislative process relative to this bill, as set out in the journals of the Senate and the House of Representatives and previously summarized, indicate no flaws in the procedure by which the bill became law.”); *Stephan I*, 245 Kan. at 121

(“The procedure by which the bill became law appears to comport with all constitutional requirements and we find no procedural deficiencies.”); *In re House Bill No. 2620*, 225 Kan. 827, 841, 595 P.2d 334 (1979) (“All necessary procedural steps were taken” in the “procedure which House Bill No. 2620 followed in arriving on the governor’s desk.”).

Rather than allege any constitutional or statutory violation, Senator Holland complains that various aspects of the process leading up to Sub SB 563’s enactment could have happened differently. But none of his complaints renders Sub SB 563 procedurally invalid.

First, Senator Holland alleges that “procedural violations were readily proved” in a different case involving a different law. (Holland Br. 2.) That is both wrong and irrelevant. The case Senator Holland refers to is currently on appeal to this Court. *See Rivera v. Schwab*, No. 22-125092-S. And as this Court well knows, that case involves the *congressional* reapportionment contained in Substitute for Senate Bill 355 (Sub SB 355)—not the *state legislative* reapportionment contained in Sub SB 563. The two laws were enacted at different times through different processes. Contrary to Senator Holland’s insinuation, the district court in *Rivera* did not find that Sub SB 355’s enactment violated any procedural constitutional provision or statute. But even if it had, a procedural violation in the enactment of a separate law would not bear on the validity of Sub SB 563’s enactment.

Second, Senator Holland charges that the Legislature disregarded redistricting “Guidelines” that were written and published by the Legislature’s

Redistricting Advisory Group. (Holland Br. 3-4.) But the Legislature did follow the Guidelines. *See infra* 10-15. And in any event, the Guidelines are not the law. The traditional redistricting criteria they list are not contained in any provision of the Kansas Constitution or in any Kansas statute. Neither the Senate nor the House passed the Guidelines, and the Governor certainly did not sign the Guidelines into law. *See* Kan. Const. art. 2, §§ 13, 14 (requiring bicameralism and presentment for legislation). Nor did either house adopt the Guidelines as part of its rules. *See id.* § 8 (“Each house shall . . . determine the rules of its proceedings, except that the two houses may adopt joint rules on certain matters and provide for the manner of change thereof.”). Only the House Committee on Redistricting chose to adopt the Guidelines⁴; the Senate Committee on Redistricting did not.⁵ Not following the Guidelines, then, would not amount to any “violation of constitutional or statutory law” that would invalidate Sub SB 563. *Stovall II*, 273 Kan. at 733.

⁴ *See* Minutes of the House Redistricting Committee—Jan. 12, 2022 at 2 (approved Jan. 20, 2022), http://www.kslegislature.org/li/b2021_22/committees/ctte_h_redistricting_1/documents/minutes/20220112.pdf.

⁵ While the Guidelines themselves lack the force of law, the first three Guidelines echo requirements that are codified in state and federal laws. *See* Kan. Const. art. 10, § 1(a) (requiring that reapportionment be “on the basis of the population of the state as established by the most recent census of population taken and published by the United States census bureau”); *Stovall I*, 273 Kan. at 718 (explaining that the U.S. Constitution’s Fourteenth Amendment requires that the Legislature “make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable” (citation omitted)); 52 U.S.C. § 10301 (prohibiting voting procedures that result in discrimination against minority voters); *Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (plurality op.) (holding that the U.S. Constitution’s Fourteenth Amendment prohibits intentional vote dilution). The fourth Guideline does not.

Third, Senator Holland complains that there “was never a transparent, open, democratic, populist, welcome-the-input-of[-]the-people process.” (Holland Br. 3.) This Court has previously rejected such challenges. *See Stephan III*, 251 Kan. at 601 (upholding validity of apportionment act despite complaints that “that there was no opportunity for public comment on the drawing of district lines”). It should do so again here.

As Senator Holland himself acknowledges, the Senate and House Committees on Redistricting held a statewide “listening tour that took place in August and November, 2021.” (Holland Br. 4; *see* AG Memo. in Support 2-3.) Senator Holland decries the listening tour as a “[b]ox-[c]hecking [e]xercise” scheduled by Senate Republicans. (Holland Br. 4.) But the Legislature was not legally required to host that listening tour; it affirmatively chose to host it “to provide opportunities for public testimony on the redistricting process.” *See House and Senate Redistricting Committees 2021* (August), KLRD, <http://www.kslegresearch.org/KLRD-web/Committees/House-Senate-Redistricting-Committees-2021.html> (last visited May 9, 2022).

Senator Holland also criticizes various aspects of the listening tour meetings. He complains that “[m]ost of the tour stops” were held during the daytime on weekdays. (Holland Br. 5.) In fact, nearly one-third of the August meetings (4 of 14) and all of the November meetings (4 of 4) happened in the evening. *See House and Senate Redistricting Committees 2021* (August), KLRD, <http://www.kslegresearch.org/KLRD-web/Committees/House-Senate-Redistricting->

Committees-2021.html (last visited May 9, 2022); *House and Senate Redistricting Committees 2021* (November), KLRD, http://www.kslegresearch.org/KLRD-web/Committees/House-Senate-Redistricting-Committees_November_2021.html (last visited May 9, 2022). Senator Holland’s suggestion that “greater opportunity for comment on the proposed Senate districts could have been provided . . . is not a deficiency that invalidates this enactment on procedural grounds.” *Stephan III*, 251 Kan. at 603.

Apparently confused by the difference between the listening tour and later meetings of the Senate Committee on Redistricting, Senator Holland suggests that because the listening tour occurred before the Liberty 3 map was introduced, “no public testimony was taken, much less considered, after the public had the opportunity to review the proposed maps.” (Holland Br. 5.) That is demonstrably false. The Senate Committee on Redistricting heard testimony from eight members of the public (and also Senator Holland himself) when it was considering the senatorial apportionment now contained in the Liberty 3 map⁶—and even more members of the public submitted written testimony. *See* Mar. 15 SRC Minutes 2-3. The reality is that the Legislature welcomed public input both before and after the map was introduced.

⁶ At the conclusion of the public hearing, the Senate Committee on Redistricting made a minor amendment to move a single precinct in Kansas City from District 4 to District 5, thus replacing the Liberty 2 map with the Liberty 3 map. This change did not affect any of the districts at issue here. *See* Mar. 15 SRC Minutes 3-4.

Fourth, Senator Holland complains that SB 563 “was completely finished” when it was introduced by the Senate Ways and Means Committee on March 14. (Holland Br. 3.) But the introduction of a complete bill is typical and expected. Indeed, it would have been procedurally *irregular* to introduce an incomplete bill. Senator Holland further complains that the “Liberty 3 map which contained the Senate district lines incorporated into Sub SB 563 was prepared in secret by the Republican majority.” (Holland Br. 7.) That is again wrong: The Liberty 3 map was presented publically to the Senate Committee on Redistricting through an amendment by Democratic Senator Dinah Sykes. *See* Mar. 15 SRC Minutes 3 (“Senator Sykes presented Liberty 3, as an amendment to the State Senate Redistricting plan, Liberty 2.”). And the fact that the precursor to the Liberty 3 map was not physically drawn on the Senate floor is hardly remarkable. *See Stephan III*, 251 Kan. at 602 (upholding validity of apportionment act despite complaint that “there was no opportunity for public participation in the drawing of the Senate districts”).

Fifth, Senator Holland notes that Sub SB 563 was enacted “quickly.” (Holland Br. 7-8.) Yet again, this Court has previously rejected such a challenge. This Court’s precedents could not be clearer that the “fact the legislative process relative to reapportionment moved with dispatch . . . is insufficient to invalidate the legislative enactment if no procedural deficiency exists.” *Stephan III*, 251 Kan. at 603. Nor should the legislature be faulted for enacting reapportionment legislation with sufficient time for this Court’s constitutional review process to occur and

conclude before the candidate filing deadline on June 1. *See* Kan. Const. art. 10, § 1(b) (giving the Attorney General 15 days to file a petition after an apportionment act is published and this Court 30 days to determine the act’s validity).

In sum, Senator Holland has not alleged any procedural violation of the Kansas Constitution nor any Kansas statute. “In the absence of evidence of violation of constitutional or statutory law, or any evidence that the applicable legislative rules were not followed,” this Court should determine that Sub SB 563 is procedurally valid. *Stovall I*, 273 Kan. at 723.

II. Sub SB 563 is substantively valid.

Senator Holland also challenges the substantive validity of Sub SB 563 based on the lines drawn for senatorial Districts 3 and 9. Senator Holland does not challenge the lines drawn for any of the other 38 districts. He does not dispute that Sub SB 563 achieves substantial equality of population. (*See* AG Memo. in Support 14-18.) And he does not allege that Sub SB 563 violates Section 2 of the Voting Rights Act. (*See id.* at 24-26.) Instead, Senator Holland challenges senatorial Districts 3 and 9 as (1) not adhering to the Guidelines and (2) being politically motivated. Neither challenge has merit.

A. Senator Holland’s Guidelines-based challenges lack merit.

Senator Holland alleges that senatorial Districts 3 and 9 do not adhere to the Guidelines. (*See* Holland Br. 10-15.) As explained above, the Guidelines are not law. *See supra* 6. But even according to the criteria articulated in the guidelines, none of Senator Holland’s Guidelines-based critiques vitiates Sub SB 563. Senator Holland does not dispute that the map satisfies the first three Guidelines: it is based on the

2020 Census, achieves substantial equality of population, and does not dilute minority votes. (See AG Memo. in Support 14-18, 24-26.) Senator Holland focuses only on the fourth Guideline (which lists various traditional redistricting criteria) and only with respect to Districts 3 and 9.

First, Senator Holland complains that senatorial Districts 3 and 9 are “[n]ot [c]ompact and [c]ontiguous.” (Holland Br. 10.) That is incorrect. (See AG Memo. in Support 18-19.) Both districts are contiguous, and both districts are actually *more* compact than Senator Holland’s old District 3, which was drawn by a federal court in 2012. (Compare Ex. B, 13 (showing that the compactness scores for new Districts 3 and 9 are 0.56 and 0.45, respectively), *with* 2012 Map Packet, Measure of Compactness Report 1 (showing that the compactness score for old District 3 is 0.32).) Senator Holland dislikes that new senatorial Districts 3 and 9 are “multi-sided” rather than some form of “square” or “rectangle.” (Holland Br. 10.) But the law has never required rectangular districts.

Second, Senator Holland observes that senatorial Districts 3 and 9 each contain portions of four different counties, arguing that Sub SB 563 does not respect existing political subdivisions. (Holland Br. 10-11.) But the “mere fact that a political entity, such as a county, is split does not vitiate the act.” *Stephan III*, 251 Kan. at 607-08. Indeed, based on the 2020 Census, county splits were inevitable in reapportioning Kansas’s senatorial districts. (See AG Memo. in Support 20 (explaining that six counties have populations that exceed that of the ideal senatorial district).) Nor does the fact that parts of multiple counties are contained

within the same district invalidate Sub SB 563. It is again mathematically inevitable that a number of Kansas's 40 senatorial districts will contain multiple of Kansas's 105 counties.

The reality is that the senatorial reapportionment in Sub SB 563 exhibits greater respect for existing political subdivisions than the 2012 court-drawn senatorial map did. Whereas the 2012 court-drawn map split 23 counties, Liberty 3 splits just 13 counties. (*Compare* Ex. B, 19, *with* 2012 Map Packet, Political Subdivision Splits Between Districts Report 1.) And whereas the 2012 court-drawn map contained 14 districts with parts of four or more counties, Liberty 3 contains just 12 districts with parts of four or more counties. (*Compare* Liberty 3 Map Packet 49-51, *with* 2012 Map Packet, Counties by Districts 1-3.)

Senator Holland complains that Douglas County is divided into four districts under Sub SB 563. (Holland Br. 11.) But Douglas County is so large that its population (118,785) far exceeds that of the ideal senatorial district (73,447). (Ex. B 12, 19.) And as Senator Holland concedes, Douglas County (which has experienced a 7.2% population increase in the last decade⁷) was already divided into three districts under the 2012 court-drawn map. (Holland Br. 11.) There is no reason for this Court to “substitute [its] judgment for that of the legislature” that Douglas County's population growth (along with the population growth in nearby counties) warranted further dividing an already-divided county. *Stephan I*, 245 Kan. at 129.

⁷ See *Kansas: 2020 Census*, U.S. Census Bureau (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/kansas-population-change-between-census-decade.html>.

Third, Senator Holland dislikes that he (a Democratic incumbent) and Senator Gossage (a Republican incumbent) both now reside in the new senatorial District 9. (Holland Br. 11.) But as this Court has explained, when the “state is redistricted, it is inevitable that some resulting districts will include the residences of more than one incumbent.” *Stephan I*, 245 Kan. at 127. “Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator.” *Stovall II*, 273 Kan. at 734 (citation omitted). That is simply part of the process. (See AG Memo. in Support 23-24.)

That the new senatorial District 9 contains two incumbents is no reason to invalidate Sub SB 563’s senatorial reapportionment. See *Stephan I*, 245 Kan. at 127 (“That fact . . . does not indicate or demonstrate a pattern of invidious discrimination.”). Nor is the fact that one incumbent is a Democrat and the other is a Republican. See *Stovall II*, 273 Kan. at 734 (upholding senatorial apportionment that potentially pitted a Democratic incumbent against a Republican incumbent); *Stovall I*, 273 Kan. at 723 (upholding representative apportionment that potentially pitted Democratic incumbents against Republican incumbents); *Stephan I*, 245 Kan. at 127 (same).⁸

⁸ In any potential contest between Senators Holland and Gossage, Senator Holland has the edge in terms of retained constituents. The new District 9 contains more people from Senator Holland’s current district (32,476 people) than from Senator Gossage’s current district (29,229 people). (See Liberty 3 Map Packet 75.) Whereas just 39.3% of Senator Gossage’s new constituents are her current constituents, 43.7% of Senator Holland’s new constituents are his current constituents. (*Id.*)

Fourth, Senator Holland suggests that senatorial Districts 3 and 9 “break[] up” the community of interest in “Tonganoxie, east and south Lawrence, Eudora and Baldwin City.” (Holland Br. 11-12.) Senator Holland made the very same argument before the Senate Committee on Redistricting, which rejected it. *See* Mar. 15 SRC Minutes 1-3 (noting that Senator Holland opposed the precursor to the Liberty 3 map on the ground that it “separate[d] the communities of interest (Tonganoxie, East and South Lawrence, Eudora and Baldwin City)” that he currently represents). This Court should not “substitute its judgment for that of another equal branch of the government.” *Stephan III*, 251 Kan. at 609.

In any event, the senatorial apportionment in Sub SB 563 respects communities of interest. The new District 9 keeps Tonganoxie, Eudora, and Baldwin City—which Senator Holland indicates share a community of interest, (Holland Br. 12)—together in the same district, (*See* Ex. B, 3; Liberty 3 Map Packet 96, 103, 123). Sub SB 563 also reunites parts of east and south Lawrence with other portions of Lawrence, putting them in the predominantly Lawrence-based new District 2. (*See* Ex. B, 8.) The Kansas Legislature made the reasonable judgment call that east and south Lawrence have more in common with the rest of Lawrence than with cities like Tonganoxie, Eudora, and Baldwin City. Sub SB 563 has also moved parts of eastern Leavenworth County from Senator Holland’s district into the new District 5 with the city of Leavenworth. (*Id.* at 7.) Again, it was hardly unreasonable for the Legislature to conclude that areas just south of Leavenworth form a greater community of interest with Leavenworth itself than with cities like

Tonganoxie, Eudora, and Baldwin City. And as this Court has explained, it is the Legislature’s duty—not this Court’s—to evaluate “the location of boundaries, the shape, area, and other relevant factors” including “economical, political and cultural interests.” *Harris v. Shanahan*, 192 Kan. 183, 205, 387 P.2d 771 (1963).

Fifth, Senator Holland argues that the boundaries of new senatorial Districts 3 and 9 “are neither easy to identify [n]or [easy to] understand.” (Holland Br. 13.) His primary criticisms appear to be that Sub SB 563 “[re]configur[ed]” District 9 and “mov[ed] District 3.” (*Id.* at 13-14.) But reconfiguration of district lines is the whole point of redistricting. And as explained above, Sub SB 563 did not move District 3—it moved numbers. *See supra* 2-3. The law does not require that districts have the same number forever.⁹

B. Senator Holland’s political gerrymandering challenge lacks merit.

Senator Holland argues primarily through incorporation that senatorial Districts 3 and 9 are politically gerrymandered because they potentially pit him (a Democrat) against Senator Gossage (a Republican). (Holland Br. 15-16.) This argument relies primarily on a district court decision that is currently on appeal in this Court. *See Rivera*, No. 22-125092-S.

It is wrong for all the same reasons. Neither the Framers (who accused each other of political gerrymandering) nor this Court (which has before faced claims of

⁹ As noted above, Senator Masterson explained that the particular numbering reflected in Sub SB 563’s senatorial reapportionment was requested by the Governor’s office. *See supra* note 3.

political gerrymandering) ever understood political gerrymandering to violate the Kansas Constitution. *See* Wyandotte Convention Proceedings at 475-81, 518-19. Rather, political gerrymandering claims present “political question[s]” and are therefore “required to be left unanswered by the judiciary, *i.e.*, [are] ‘nonjusticiable.’” *Gannon v. State*, 298 Kan. 1107, 1135, 319 P.3d 1196 (2014). The task of reapportionment is constitutionally committed to the Kansas Legislature. *See* Kan. Const. art. 10, § 1(a) (“[T]he legislature shall by law reapportion the state senatorial districts and representative districts . . .”). There is a “lack of judicially discoverable and manageable standards for resolving” political gerrymandering claims—which are political to their core, rely on notoriously unreliable election predictions, and find no textual basis in the Kansas Constitution. *Gannon*, 298 Kan. at 1138 (citation omitted) (formatting altered); *see also* *Stephan I*, 245 Kan. at 128 (“Politics and political considerations are inseparable from districting and apportionment.” (citation omitted)); *House Bill No. 2620*, 225 Kan. at 839 (“It is difficult if not impossible to consider political profiles in apportionment cases . . .”). And it would be “impossib[le]” to decide a political gerrymandering claim “without an initial policy determination of a kind clearly for nonjudicial discretion.” *Gannon*, 298 Kan. at 1138 (citation omitted).¹⁰

In any event, there is no reason to believe that the senatorial districts drawn in Sub SB 563 are an unfair pro-Republican gerrymander. The senatorial

¹⁰ These arguments are set forth in full in the State’s brief in *Rivera*, and the Attorney General relies on those same arguments here. *See* Br. of Appellants 19-40, *Rivera*, No. 22-125092-S.

reapportionment contained in Sub SB 563 had strong bipartisan support. Nearly half of Kansas’s Democratic Senators (5 of 11) voted for the senatorial reapportionment in Sub SB 563 when the bill initially passed in the Senate.¹¹ That includes the Senate Assistant Minority Leader (Senator Oletha Faust-Goudeau), the Senate Minority Whip (Senator Pat Pettey), and the Senate Caucus Chair (Senator Jeff Pittman). All of those Senators except Senator Pettey again voted for Sub SB 563 after the state Board of Education map was added to the bill.¹²

The senatorial reapportionment in Sub SB 563 also won the votes of nearly all of Kansas’s Democratic Representatives (34 of 39) when the bill initially passed in the House before the state Board of Education map was added by the Conference Committee.¹³ That includes the votes of House Minority Leader (Representative Tom Sawyer), House Assistant Minority Leader (Representative Jason Probst), House Minority Whip (Representative Stephanie Clayton), House Minority Caucus Chair (Representative Barbara Ballard), House Minority Agenda Chair (Representative Brandon Woodard), and House Minority Policy Chair (Representative Rui Xu).

¹¹ See 2022 Senate Journal 1690 (reflecting “Yea” votes from Senators Faust-Goudeau, Hawk, Pettey, Pittman, and Ware).

¹² See 2022 Senate Journal 1850 (reflecting “Yea” votes from Senators Faust-Goudeau, Hawk, Pittman, and Ware).

¹³ See 2022 House Journal 2396-97 (reflecting “Yea” votes from Representatives Alcalá, Amyx, Ballard, Burroughs, Byers, Carlin, Carmichael, Clayton, Curtis, Finney, Gartner, Haswood, Helgerson, Henderson, Highberger, Hoye, Kuether, Meyer, Miller, Neighbor, Ohaebosim, Osman, Poskin, Probst, L. Ruiz, S. Ruiz, Sawyer, Schmidt, Stogsdill, Vaughn, Weigel, Wolfe Moore, Woodard, and Xu).

After enjoying bipartisan support in the Legislature, the senatorial apportionment in Sub SB 563 was then signed into law by the Democratic Governor. This strong bipartisan support in the course of Sub SB 563's enactment cuts sharply against Senator Holland's argument that the senatorial districts drawn in Sub SB 563 are unfairly pro-Republican. *See Stovall II*, 273 Kan. at 735 (upholding senatorial apportionment that "passed the legislature with fairly strong bipartisan support, and . . . has been signed by the Governor"); *Stovall I*, 273 Kan. at 725 (same for representative apportionment).

Senator Holland's political gerrymandering argument is basically that the Liberty 3 map is anti-Democrat because it targets him and he is a Democrat. (Holland Br. 15-16.) Senator Holland has adduced no evidence that the map targets him other than the fact that it puts him in the same district as Senator Gossage. But even if the map did somehow target Senator Holland, he has offered no evidence that he was targeted because he is a Democrat—as opposed to for some other reason. Even assuming Senator Holland is correct, an anti-Senator Holland gerrymander would not necessarily amount to an anti-Democrat gerrymander.

In an attempt to prove political gerrymandering, Senator Holland has attached an "expert report" from Professor Michael Smith. (*See* Holland Br. App'x 19-36.) The Attorney General is not aware of the consideration of any similar reports in any of this Court's prior reapportionment cases. *See, e.g., Stovall II*, 273 Kan. at 733 (considering "the written statements filed, the petition filed by the attorney general, along with its exhibits, and the brief filed by the attorney general"

in addition to “the maps of the senatorial districts provided by the attorney general’s office and . . . other relevant official records”); *Stephan III*, 251 Kan. at 601 (“[W]e examined the petition with its exhibits, the written statements and briefs received from the persons noted above, and the maps of the representative and senatorial districts provided by the attorney general. We also took judicial notice of other relevant official records.”); *Senate Bill No. 220*, 225 Kan. at 632 (considering “the exhibits presented to the legislature” and “relevant official records”).

So too here, Professor Smith’s report should not be considered by this Court. Because this is an original action, there is no opportunity for any party to depose Professor Smith. *See Acord v. Porter*, 58 Kan. App. 2d 747, 769, 475 P.3d 665 (2020) (“A deposition of an expert witness is an opportunity for the parties to inquire about the opinions that are disclosed . . .”), *rev. denied* (Feb. 1, 2021). And because there is no trial, there will be no opportunity to cross-examine Professor Smith.

To the extent the Court does consider Professor Smith’s report, it would also be relevant for this Court to know that Professor Smith has previously written that “no objective definition of gerrymandering is possible.” Michael A. Smith, *A Redistricting Primer*, Midwest Political Science Association (July 7, 2021), <https://www.mpsanet.org/a-redistricting-primer>. As Professor Smith recently testified, there is “no single objective standard to measure” political gerrymandering. J.A. XIII, 36, *Rivera*, No. 22-125092-S. He also testified that the concept of a community of interest is “vague” and not amenable to precise definition. *Id.* at 40.

At bottom, Senator Holland is asking this Court to substitute Professor Smith's views for those of the Legislature. This Court should decline to do so. What matters is not whether a political science professor "might have drawn [legislative] district lines differently," but rather whether the lines drawn by the Kansas Legislature are "constitutionally sound." *Stephan III*, 251 Kan. at 605, 608 (citation omitted). They are, and this Court should accordingly determine that the senatorial reapportionment in Sub SB 563 is substantively valid.

CONCLUSION

This Court should determine that the senatorial reapportionment contained in Sub SB 563 is valid.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 10, 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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