ELECTRONICALLY FILED
2022 Mar 07 PM 4:16
CLERK OF THE WYANDOTTE COUNTY DISTRICT COURT
CASE NUMBER: 2022-CV-000090

IN THE DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS
CIVIL COURT DIVISION

TOM ALONZO, SHARON AL-UQDAH, AMY CARTER, CONNIE BROWN COLLINS, SHEYVETTE DINKENS, MELINDA LAVON, ANA MARCELA MALDONADO MORALES, LIZ MEITL, RICHARD NOBLES, ROSE SCHWAB, AND ANNA WHITE,	)	
Plaintiffs,	)	
v.	)	**Case No. 2022-CV-90**
SCOTT SCHWAB, Kansas Secretary of State, in his official capacity,	)	
and	)	
MICHAEL ABBOTT, Wyandotte County Election Commissioner, in his official capacity,	)	
Defendants.	)	

MOTION TO DISMISS PLAINTIFFS' PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF AND MANDAMUS

Defendants, Kansas Secretary of State Scott Schwab and Wyandotte County Election Commissioner Michael Abbott, move to dismiss Plaintiffs' Petition for lack

of subject-matter jurisdiction and failure to state a claim. *See* K.S.A. 60-212(b)(1) and (6).

Plaintiffs ask this Court—for the first time in Kansas history—to hold that the Legislature's redrawing of federal congressional maps violates the Kansas Constitution. There is good reason this lawsuit finds no support in precedent: Neither the U.S. Constitution nor any exercise of the state's lawmaking power, including the Kansas Constitution, authorizes state courts to invalidate federal congressional maps—and certainly not under the legal theories Plaintiffs advance. The Elections Clause commits the redistricting power to state legislatures. No Kansas law—either statutory or constitutional—gives the state courts any role in evaluating the validity of duly enacted congressional redistricting plans. The Elections Clause "would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election." *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1, 2 (2020) (statement of Alito, J.).

Even if this Court had jurisdiction to entertain Plaintiffs' challenges, those challenges do not assert any viable claims. Plaintiffs primarily claim that the districts drawn in Substitute for Senate Bill 355 (SB 355) are politically unfair because they confer too much political advantage on Republicans at the expense of Democrats. Once again, Plaintiffs ask this Court to do something Kansas courts have never done. The Kansas Supreme Court has never held that a redistricting

map constitutes a political gerrymander in violation of the Kansas Constitution. And once again, there is good reason for this lack of precedent: Political gerrymandering claims are simply not justiciable. Redistricting is "one of the most intensely partisan aspects of American political life." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). That intensely political task has been constitutionally committed to the political branches of our government. This Court's novel recognition of a political gerrymandering claim under the Kansas Constitution would commit "state courts to unprecedented intervention in the American political process." *Id.* at 2498 (citation omitted). And once courts enter the "political thicket," *Colegrove v. Green*, 328 U.S. 549, 556 (1946), they will remain entangled.

Plaintiffs have also failed to allege an unconstitutional racial vote dilution claim, and Defendant Abbott is not a proper defendant in this litigation. For all these reasons, this Court should dismiss Plaintiffs' case.

STATEMENT OF FACTS

The Kansas Legislature is responsible for redrawing the boundaries of Kansas's congressional districts every ten years based on the most recent decennial census. *See* U.S. Const. art I, §§ 2, 4; *Essex v. Kobach*, 874 F. Supp. 2d 1069, 1073 (D. Kan. 2012).

Earlier this year, the Kansas Legislature passed SB 355. SB 355 adopted the "Ad Astra 2" congressional map, which draws the lines for the four congressional

districts Kansas has been allocated based on the 2020 Census.[1] Governor Laura Kelly vetoed the bill. The Legislature overrode her veto by the required two-thirds majorities in each house: The Senate voted 27-11 to override on February 8, 2022, and the House of Representatives voted 85-37 to override on February 9, 2022. SB 355 took effect with its publication in the Kansas Register on February 10, 2022.

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

As the "Chief state election official," K.S.A. 25-2504, the Secretary of State is responsible for overseeing these elections and administering Kansas's election laws. The Secretary of State has appointed the Wyandotte County Election Commissioner. K.S.A. 19-3419. "In Kansas, the secretary of state exercises significant control over election commissioners." *Fish v. Kobach*, 2016 WL 6125029, at *2 (D. Kan. Oct. 20, 2016). Among other things, the Secretary of State determines the "form and content" of instructions given to the election commissioners—"including procedures for complying with federal and state laws and regulations."

---

[1] The Ad Astra 2 map is available on the Kansas Legislative Research Department's website at http://www.kslegresearch.org/KLRD-web/Publications/Redistricting/2022-Plans/M3_AdAstra_2-packet.pdf.

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

K.S.A. 25-124. The election commissioners "shall operate under the general supervision of the secretary of state and shall comply with the statutes, rules and regulations and standards and directives that relate to the registration of voters and the conduct of elections." K.S.A. 19-3424(a).

On February 18, 2022, Defendants Schwab and Abbott filed a Petition in Quo Warranto and Mandamus in the Kansas Supreme Court seeking the dismissal of this case and others raising the same constitutional challenges to SB 355. The Kansas Supreme Court denied the petition on March 4, 2022, because it determined that mandamus and quo warranto are not available remedies in this situation. *See Schwab v. Klapper*, No. 124,849, slip op. (Kan. Mar. 4, 2022). The Court "emphasize[d]" that it did "not reach, consider, or take any position on the merits" of Plaintiffs' claims. *Id.* at 8; *accord* Kansas Supreme Court Rule 9.01(b) (2022 Kan. Ct. R. p. 64) (stating that dismissal "is not an adjudication on the merits" when "adequate relief appears to be available in a district court"). The Court also "encourage[d] the parties" in this case to work "to expeditiously resolve the legal questions." *Schwab*, slip op. at 8.

ARGUMENT

Dismissal is warranted for several reasons. *First*, this Court lacks jurisdiction. Neither the U.S. Constitution nor any exercise of the state's lawmaking power, including the Kansas Constitution, authorizes state courts to invalidate federal congressional maps. *Second*, Plaintiffs have failed to state any claim upon which relief may be granted. Plaintiffs assert several political gerrymandering

claims under the Kansas Constitution, all of which are nonjusticiable. Plaintiffs' racial vote dilution claim also fails because Plaintiffs have failed to allege the elements of that claim. *Third*, Defendant Abbott should be dismissed because he is not a proper defendant in this case.

I. This Court Lacks Jurisdiction Over Plaintiffs' Challenge To The Constitutionality Of SB 355.

This case should be dismissed because this Court lacks jurisdiction to adjudicate the constitutionality of SB 355. *See* K.S.A. 60-212(b)(1). Such adjudication would violate the Elections Clause of the U.S. Constitution.

The Elections Clause entrusts to "the Legislature" of each state the power to set the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4. This includes the power to adopt congressional redistricting schemes. *See, e.g.*, *Rucho*, 139 S. Ct. at 2495-96; *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 813 (2015). Recognizing that the state legislatures may "undermin[e] fair representation, including through malapportionment," the Framers also provided for a check on the power of the state legislatures to draw congressional districts. *Rucho*, 139 S. Ct. at 2495. The Elections Clause provides that "Congress may at any time by Law make or alter such Regulations" as adopted by the state legislatures. U.S. Const. art. I, § 4. The Elections Clause thus assigns the task of congressional redistricting "to the state legislatures, expressly checked and balanced by the Federal Congress." *Rucho*, 139 S. Ct. at 2496.

When the Kansas Legislature enacts a congressional redistricting scheme, it "is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made" under the Elections Clause. *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (per curiam). This is because "electing representatives to the National Legislature was a new right, arising from the Constitution itself." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995). "[A]ny state authority to regulate election to [congressional] offices could not precede their very creation by the Constitution," so "such power 'had to be delegated to, rather than reserved by, the States.'" *Cook v. Gralike*, 531 U.S. 510, 522 (2001) (quoting *U.S. Term Limits*, 514 U.S. at 804). The Elections Clause is the source of the state's powers to regulate congressional elections. And that provision "does not assign these powers holistically to the state governments but rather pinpoints a particular branch of state government—'the Legislatures thereof.'" *Wise v. Circosta*, 978 F.3d 93, 104 (4th Cir. 2020) (Wilkinson and Agee, JJ., dissenting).

The word "Legislature" was "not one 'of uncertain meaning when incorporated into the Constitution.'" *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)). "[E]very state constitution from the Founding Era that used the term legislature defined it as a distinct multimember entity comprised of representatives." *Ariz. State Legislature*, 576 U.S. at 828 (Roberts, C.J., dissenting) (citation omitted); *see also* The Federalist No. 27 (Alexander Hamilton) (defining "the State legislatures" as "select bodies of men"). There is no "indication that the Framers had ever heard of courts" playing a role in

setting election rules. *Rucho*, 139 S. Ct. at 2496. Rather, the Constitution's use of "the term 'legislature' unambiguously excludes the power to regulate federal elections from state courts and executive-branch officials." *Wise*, 978 F.3d at 112 (Wilkinson and Agee, JJ., dissenting).[3] As Justice Gorsuch recently explained, the "Constitution provides that state legislatures—not federal judges, *not state judges*, not state governors, not other state officials—bear primary responsibility for setting election rules." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay) (emphasis added).

The U.S. Supreme Court has interpreted the Elections Clause to mean that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking." *Ariz. State Legislature*, 576 U.S. at 808. Those lawmaking prescriptions "may include the referendum and the Governor's veto." *Id.* But in Kansas, they do not include the review of the state courts. The Kansas Constitution vests "[t]he legislative power of this state" in the Kansas Legislature, Kan. Const. art. 2, § 1, and gives the Governor a role in either approving or vetoing laws the Legislature has made, *id.* § 14. "[T]he three law-making powers" in

[3] The U.S. Constitution repeatedly "distinguish[es] between state legislatures and the State governments as a whole." *Wise*, 978 F.3d at 112 (Wilkinson and Agee, JJ., dissenting); *see, e.g.*, U.S. Const. art. I, § 2 (distinguishing between "State" and "State Legislature"); *id.* art. I, § 3 (distinguishing between "State" and "the Legislature thereof"); *id.* art. II, § 1 (distinguishing between "State" and "the Legislature thereof"); *id.* art. IV, § 3 (distinguishing between "States" and "Legislatures of the States"); *id.* art. VI (distinguishing between "States" and "State Legislatures").

Kansas, then, are "the house, the senate, and the governor." *Harris v. Shanahan*, 192 Kan. 183, 194, 387 P.2d 771 (1963). No provision of the Kansas Constitution nor any Kansas statute reassigns any redistricting lawmaking authority to the courts. *Cf. Mauldin v. Branch*, 866 So. 2d 429, 433-34 (Miss. 2003) ("*[N]o* Mississippi court has jurisdiction to draw plans for congressional redistricting" because Mississippi's "statutes clearly provide that the *only* governmental entity in th[e] state that is authorized to draw congressional districts is the Legislature.").

Notably, while the Kansas Constitution does not assign state courts any role in the *congressional redistricting* process, it does assign state courts a "special task" in the *state legislative redistricting* process. *In re Stephan* (*Stephan I*), 245 Kan. 118, 124, 775 P.2d 663 (1989). Under Article 10, Section 1, of the Kansas Constitution, the Kansas Supreme Court must determine the validity of any state legislative district map that the Legislature enacts. And if the Kansas Supreme Court rules that the reapportionment act is invalid, then the Legislature "shall enact a statute of reapportionment conforming to the judgment of the supreme court within 15 days." Kan. Const. art. 10, § 1(b). The Kansas Constitution contains no similar provision for judicial review of congressional district maps. The fact that the Kansas Constitution provides for judicial review of legislative maps but not federal congressional maps demonstrates that the Kansas Constitution has not assigned state courts any authority to determine the validity of congressional district maps. *See Prouty v. Stover*, 11 Kan. 235, 239 (1873) ("The maxim that *the express mention*

of one thing implies the exclusion of another is as applicable to constitutions as to any other instrument.").

Nor can that role be found in the courts' general authority to interpret the Kansas Constitution. The term "Legislature" in the Elections Clause may encompass *legislative* actors in the process of *legislating*, but it does not encompass *non-legislative* actors exercising *non-legislative* functions—like state courts interpreting general substantive provisions of a state constitution. While the Elections Clause requires the "Legislature" to legislate "in the *manner* prescribed by the State Constitution," it "does not necessarily follow that . . . the scope of [the legislature's] enactment on the indicated subjects is also limited by the provisions of the State Constitution." *Commonwealth ex rel. Dummit v. O'Connell*, 298 Ky. 44, 50, 181 S.W.2d 691 (1944) (emphasis added). To the contrary, because "[t]his power is conferred upon the legislatures of the states by the constitution of the United States," it "cannot be taken from them or modified by their state constitutions." *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (citation omitted); *cf. Palm Beach*, 531 U.S. at 76-77 (vacating a state-court order on this basis under the similarly worded Electors Clause). The Elections Clause "would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election." *Boockvar*, 141 S. Ct. at 2 (statement of Alito, J.). The Kansas Constitution recognizes this by giving the Kansas Supreme Court review over legislative maps but not over congressional

maps. But even if there were a "conflict between the [Kansas] Constitution and the Elections Clause, the State Constitution must give way." *Ariz. State Legislature*, 576 U.S. at 827 (Roberts, C.J., dissenting).

The Kansas Supreme Court's opinion in *Parsons v. Ryan*, 144 Kan. 370, 60 P.2d 910 (1936), explains why the courts have no role to play in evaluating laws governing federal elections. In that case, the Kansas Supreme Court reviewed a law that the Kansas Legislature had enacted pursuant to its authority under the U.S. Constitution's Electors Clause.[4] Just as the Elections Clause does for congressional elections, the Electors Clause delegates the power to regulate the election of presidential electors to the state "Legislature." U.S. Const. art II, § 1. The challengers in *Parsons* argued that "all election laws are but exercises of the police power and as such subject to constitutional restrictions" under the Kanas Constitution. *Parsons*, 60 P.2d at 912. The Kansas Supreme Court was "not persuaded." *Id.* As the Court explained, "the Federal Constitution commands the state Legislature to direct the manner of choosing electors." *Id.* Once the Kansas Legislature has done so, the "manner selected by the Legislature *may not be set aside by the courts*" based on restrictions in the Kansas Constitution. *Id.* (emphasis added). If the election law "is to be changed, it must be by the Legislature, not by th[e] court." *Id.* The same is true of SB 355 under the Elections Clause.

[4] The Electors Clause provides that "[e]ach State shall appoint, in such Manner as *the Legislature thereof* may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. Const. art. II, § 1 (emphasis added).

Numerous other state supreme courts interpreting both the Elections and Electors Clauses have recognized that a state constitution may not "impose a restraint upon the power of prescribing the manner of holding [federal] elections which is given to the legislature by the constitution of the United States." *In re Plurality Elections*, 15 R.I. 617, 8 A. 881, 882 (1887); *see, e.g.*, *State ex rel. Beeson v. Marsh*, 150 Neb. 233, 246, 34 N.W.2d 279 (1948) (A Nebraska Constitution "provision may not operate to 'circumscribe the legislative power' granted by the Constitution of the United States."); *Dummit*, 298 Ky. at 50 (rejecting the notion that legislatively enacted election rules may be "limited by the provisions of the State Constitution"); *Wood v. State*, 169 Miss. 790, 142 So. 747, 755 (1932) (Ethridge, J., specially concurring) ("The Constitution having given Congress the power to make laws and alter laws, by implication, necessarily excludes every other power than Congress from disturbing what the state Legislature has enacted."); *In re Opinions of Justices*, 45 N.H. 595, 605 (1864) ("[T]he legislature, under the Constitution of the United States which gives them authority to prescribe the place of holding elections for Representatives in Congress, exercise[s] that authority untrammeled by the provision of the State constitution."); *State v. Williams*, 49 Miss. 640, 665-66 (1873) (holding that the Mississippi Constitution could not limit the state legislature's authority under the Elections Clause to determine when congressional elections would be held); *cf. McClendon v. Slater*, 554 P.2d 774, 776 (1976) (noting the only limits on legislative power were in the federal constitution and the state's "'initiative' and the 'referendum' processes").

So too have federal courts. *See, e.g.*, *Carson v. Simon*, 978 F.3d 1051, 1060 (8th Cir. 2020) ("A legislature's power in this area is such that it 'cannot be taken from them or modified' even through 'their state constitutions.'" (citation omitted)); *PG Pub. Co. v. Aichele*, 902 F. Supp. 2d 724, 748 (W.D. Pa. 2012) (The legislature's "authority is not circumscribed by the Pennsylvania Constitution.").

Pursuant to the Elections Clause, "the state courts do not have a blank check to rewrite state election laws for federal elections." *Democratic Nat'l Comm.*, 141 S. Ct. at 34 n.1 (Kavanaugh, J., concurring in denial of application to vacate stay). For state courts to exercise such authority would contravene the Framers' choice to give the power to regulate federal elections to the state "Legislature"—the branch of state government that is most responsive to the people. The Framers frequently recognized that the legislature is the branch of state government that is most democratically accountable. *See, e.g.*, Federal Farmer No. 12, Jan. 12, 1788 ("[S]o far as regulations as to elections cannot be fixed by the constitution, they ought to be left to the state legislatures, they coming far nearest to the people themselves . . . ."); Brutus No. 4, Nov. 29, 1787 (explaining that in "the state legislatures, . . . the people are not only nominally but substantially represented"). Courts inserting themselves into the congressional redistricting process would be "unaccountable entities stripping power from the legislatures." *Wise*, 978 F.3d at 104 (Wilkinson and Agree, JJ., dissenting).

This does not mean that congressional maps enacted by the Kansas Legislature will go unchecked. As explained above, "the Framers gave Congress the

power to do something about partisan gerrymandering in the Elections Clause." *Rucho*, 139 S. Ct. at 2508. Dissatisfied Kansas voters "may seek Congress' correction of regulations prescribed by state legislatures." *Ariz. State Legislature*, 576 U.S. at 824. And "Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering." *Rucho*, 139 S. Ct. at 2495 (listing multiple federal statutes, including several aimed at curbing gerrymandering); *see id*. at 2508 ("[T]he avenue for reform established by the Framers, and used by Congress in the past, remains open."). Furthermore, federal courts have the authority in "two areas—one-person, one-vote and racial gerrymandering"—to address "at least some issues that could arise from a State's drawing of congressional districts." *Id.* at 2495-96.[5] The U.S. Constitution provides specific avenues for the review of congressional district maps. State court is not one of them.

In sum, this Court's adjudication of the validity of SB 355—a legislatively enacted congressional redistricting plan—would violate the Elections Clause. The case should be dismissed for lack of jurisdiction.

II. Plaintiffs Fail To State A Claim Upon Which Relief Can Be Granted.

Plaintiffs raise two types of claims. Their first, second, and third claims assert various bases for a political gerrymandering claim under the Kansas Constitution, and their fourth claim asserts unconstitutional racial vote dilution under the Kansas Constitution. Neither type of claim is viable. Political

[5] In 28 U.S.C. § 2284, Congress specifically provided for review of "the apportionment of congressional districts" by a panel of three federal judges.

gerrymandering claims are not justiciable under the Kansas Constitution, and Plaintiffs have failed to allege unconstitutional racial vote dilution. All of Plaintiffs' claims should be dismissed pursuant to K.S.A. 60-212(b)(1) and (6).

A. Plaintiffs' Political Gerrymandering Claims Are Nonjusticiable.

Even if this Court could entertain Plaintiffs' challenge to SB 355, dismissal of Plaintiffs' political gerrymandering claims would nonetheless be warranted. As under the U.S. Constitution, "partisan gerrymandering claims present political questions beyond the reach of" Kansas courts under the Kansas Constitution. *Rucho*, 139 S. Ct. at 2506. Because they are nonjusticiable, Plaintiffs' political gerrymandering claims should be dismissed.

A "political question is required to be left unanswered by the judiciary, *i.e.,* is 'nonjusticiable.'" *Gannon v. State*, 298 Kan. 1107, 1135, 319 P.3d 1196 (2014). This requirement "is based upon the doctrine of separation of powers and the relationship between the judiciary and the other branches or departments of government." *Leek v. Theis*, 217 Kan. 784, 813, 539 P.2d 304 (1975). In *Baker v. Carr*, the U.S. Supreme Court "identified and set forth six characteristics or elements one or more of which must exist to give rise to a political question." *Gannon*, 298 Kan. at 1137 (quoting *Leek*, 217 Kan. at 813). Those factors are:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of

> embarrassment from multifarious pronouncements by various departments on one question.

Leek, 217 Kan. at 813 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). The Kansas Supreme Court "has previously applied the *Baker v. Carr* factors" in assessing whether a case presents a nonjusticiable political question. *Gannon*, 298 Kan. at 1138; *see also, e.g.*, *Kansas Bldg. Indus. Workers Comp. Fund v. State,* 302 Kan. 656, 668, 359 P.3d 33 (2015) ("[W]e will continue to view the political question doctrine through *Baker*'s lens."); *Leek*, 217 Kan. at 813-16 (also applying the *Baker* factors to find a political question nonjusticiable).

Applying the *Baker v. Carr* standards, the U.S. Supreme Court recently confirmed that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Rucho*, 139 S. Ct. at 2506-07. The Court stressed that redistricting has long been "a critical and traditional part of politics in the United States." *Id.* at 2498 (quoting *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring in the judgment)). "To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities." *Id.* at 2497.

The Court explained that "[a]mong the political question cases [it] has identified are those that lack 'judicially discoverable and manageable standards for resolving [them].'" *Id.* at 2494 (quoting *Baker*, 369 U.S. at 217). Political gerrymandering cases, the Court concluded, fit squarely within that category of cases. "[T]here are no legal standards discernible in the Constitution" for

adjudicating political gerrymandering claims, "let alone limited and precise standards that are clear, manageable, and politically neutral." *Id.* at 2500. "Any judicial decision on what is 'fair' in this context would be an 'unmoored determination' of the sort characteristic of a political question." *Id.* (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)). The Court emphasized that "it is not even clear what fairness looks like in this context." *Id.* Nor is it clear how courts might "answer the determinative question: 'How much is too much?'" *Id.* at 2501. As the Court explained, "asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise." *Id.* at 2503-04. This is in part because voters may "prefer one candidate over another" for any number of reasons, and "their preferences may change." *Id.* at 2503.

Plaintiffs invite this Court to find (for the first time) in the Kansas Constitution what the U.S. Supreme Court could not find in the U.S. Constitution. This Court should decline that invitation. As under the U.S. Constitution, "[u]nder the Kansas case-or-controversy requirement, courts require that . . . issues not present a political question." *Gannon*, 298 Kan. at 1119. And as under the U.S. Constitution, a case that "lack[s] . . . judicially discoverable and manageable standards for resolving it" presents nonjusticiable political questions under the Kansas Constitution. *Leek*, 217 Kan. at 813 (quoting *Baker*, 369 U.S. at 217). Political gerrymandering cases fit squarely within this category.

As the Kansas Supreme Court has reiterated time and again, "[t]he reality is that districting inevitably has and is intended to have substantial political consequences." *In re Stovall* (*Stovall II*), 273 Kan. 731, 734, 45 P.3d 855 (2002) (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)); *see also Stephan I*, 245 Kan. at 128; *In re House Bill No. 2620*, 225 Kan. 827, 840, 595 P.2d 334 (1979). Redistricting "must be formulated primarily by the legislative process with all of its political trappings and necessary compromises." *In re Senate Bill No. 220*, 225 Kan. 628, 634, 593 P.2d 1 (1979). "Politics and political considerations are" therefore "inseparable from districting and apportionment." *House Bill No. 2620*, 225 Kan. at 840 (quoting *Gaffney*, 412 U.S. at 753). Put simply, the "opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." *Rucho*, 139 S. Ct. at 2498 (quoting *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring in the judgment)).

The redistricting process—committed to the political branches—necessarily contains "an element of discretion." *Harris*, 192 Kan. at 205. And the exercise of that discretion necessarily has political consequences. The "choice to draw a district line one way, not another, always carries some consequence for politics, save in a mythical State with voters of every political identity distributed in an absolutely gray uniformity." *Vieth v. Jubelirer*, 541 U.S. 267, 343 (2004) (Souter, J., dissenting). Even "traditional criteria such as compactness and contiguity 'cannot promise political neutrality,'" as "'a decision under these standards would

unavoidably have significant political effect, whether intended or not.'" *Rucho*, 139 S. Ct. at 2500 (quoting *Vieth*, 541 U.S. at 308-09 (Kennedy, J., concurring in the judgment)). Furthermore, the Kansas Supreme Court has recognized that "safely retaining seats for the political parties" is a "legitimate political goal" in redistricting. *In re Stovall* (*Stovall I*), 273 Kan. 715, 722, 44 P.3d 1266 (2002) (citing *Easley v. Cromartie*, 532 U.S. 234, 239 (2001)). A new redistricting scheme "may pit incumbents against one another or make very difficult the election of the most experienced legislator." *Stovall II*, 273 Kan. at 734 (quoting *Gaffney*, 412 U.S. at 753). It is not the role of the courts to override the discretionary determinations of the political branches and "declare [a] reapportionment plan void because it allegedly creates inconvenience, is unfair, or is inequitable." *In re Stephan* (*Stephan II*), 251 Kan. 597, 609, 836 P.2d 574 (1992); *see Stephan I*, 245 Kan. at 128 ("Though we might have drawn district lines differently, we cannot substitute our judgment for that of the legislature.").

There is no manageable standard by which Kansas courts can adjudicate political gerrymandering claims. "[I]t is not even clear what fairness looks like in this context," nor is it clear how to determine how much unfairness "is too much." *Rucho*, 139 S. Ct. at 2500-01. One reason for this is that claims of political gerrymandering are necessarily based on predictions about how voters will act in future elections. And those predictions are difficult to make. *See House Bill No. 2620*, 225 Kan. at 840 (deeming political gerrymandering accusations "speculative

at best" because "[t]ime alone will tell . . . whether a Republican representative will replace one of the two Democratic representatives").

To make matters more complicated, "[p]olitical affiliation is not an immutable characteristic." *Vieth*, 541 U.S. at 287 (plurality opinion). "[V]oters can—and often do—move from one party to the other." *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring in the judgment). And "even within a given election, not all voters follow the party line." *Vieth*, 541 U.S. at 287 (plurality opinion). As the Kansas Supreme Court has explained, it "is difficult if not impossible to consider political profiles in apportionment cases for the profiles depend in large part on voting patterns which change with the personalities of the candidates." *House Bill No. 2620*, 225 Kan. at 839. Voters' preferences "depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations." *Rucho*, 139 S. Ct. at 2503. Recognizing a political gerrymandering claim would require this Court "to indulge a fiction—that partisan affiliation is permanent and invariably dictates how a voter casts every ballot." *Johnson v. Wis. Elections Comm'n*, 399 Wis. 2d 623, 657, 967 N.W.2d 469 (2021).

The results of past elections are not always helpful "to predicting future ones." *Harper v. Hall*, 2022-NCSC-17, ¶ 247 (Newby, J., dissenting). For courts to "strike down apportionment plans on the basis of their prognostications as to the outcome of future elections or future apportionments invites 'findings' on matters as

to which neither judges nor anyone else can have any confidence." *Bandemer*, 478 U.S. at 160 (O'Connor, J., concurring in the judgment).

There are no "historical precedents to delineate judicially discoverable and manageable standards for resolving the issues at bar." *VanSickle v. Shanahan*, 212 Kan. 426, 439, 511 P.2d 223 (1973). While the Kansas Supreme Court has previously faced charges that state legislative redistricting maps constituted improper political gerrymanders, it has "never struck down a partisan gerrymander as unconstitutional." *Rucho*, 139 S. Ct. at 2507; *see Senate Bill No. 220*, 225 Kan. at 637 ("The objection to the bill on the ground that there was partisan political gerrymandering in redistricting the senatorial districts does not reveal a fatal constitutional flaw absent a showing of an equal protection violation."); *House Bill No. 2620*, 225 Kan. at 837-41 (rejecting "political gerrymandering" challenges); *Stephan II*, 251 Kan. at 607 (same); *Stephan I*, 245 Kan. at 128 (same). What Plaintiffs seek is "an unprecedented expansion of judicial power." *Rucho*, 139 S. Ct. at 2507.

This lack of historical precedent is all the more striking given that "[p]artisan gerrymandering is nothing new" in Kansas. *Id.* at 2494. Indeed, the practice of considering politics in districting dates back to the drawing of the very first state representative district lines in Kansas. The 1859 Wyandotte Convention not only gave birth to the Kansas Constitution, it also drew the first legislative districts in Kansas. Those districts—drawn by the Framers of the Kansas Constitution—were adopted over strident objections of political gerrymandering. One opponent of the

apportionment scheme argued that it would "so gerrymander as to disenfranchise all the Democratic counties except two . . . in order to secure an overwhelming Republican majority in the Legislature." Wyandotte Convention Proceedings at 478. Another opponent proposed in jest that the Convention simply pass a resolution stating that "every species of political skullduggery must be resorted to" and "regard for the interests of the Republican party and disregard for the interests of the people, be followed throughout this apportionment." *Id.* at 479-80. One observer of the proceedings noted that "[a] most exciting discussion occurred . . . over the apportionment article, which the Democrats denounced as a 'gerrymander.'" *Id.* at 670 (App. C-2). Another observer recorded that the apportionment scheme "caused [such a] great feeling at the time [that] the Democrats in and out of the convention howled like a Marshall county cyclone." *Id.* at 660 (App. C). And a formal protest against the apportionment charged that it was a "mere political scheme" because it grouped "counties antagonistic in interest . . . without the shadow of excuse or reason, save only to secure the triumph of the Republican party, as in the case of Johnson and Wyandotte counties being attached to Douglas county." *Id.* at 518-19. This "history is not irrelevant." *Rucho*, 139 S. Ct. at 2496. It shows that the Framers of the Kansas Constitution "were aware of electoral districting problems." *Id.* Yet it contains no hint that the courts or the Kansas Constitution had any role to play in policing partisan considerations, nor "any indication that the Framers had ever heard of courts doing such a thing." *Id.* Rather, the Framers' experience in drawing Kansas's first legislative district lines indicates that they fully understood

that "districting inevitably has and is intended to have substantial political consequences." *Stovall II*, 273 Kan. at 734 (quoting *Gaffney*, 412 U.S. at 753).[6]

There is also no "specific language" in the Kansas Constitution that could provide a manageable standard for adjudicating political gerrymandering claims. *Gannon*, 298 Kan. at 1151. Plaintiffs allege three primary bases for their political gerrymandering claims in the Kansas Constitution: the guarantee of equal protection (Kan. Const. Bill of Rights, §§ 1-2), the right to vote (Kan. Const. art. 5, § 1), and the freedoms of speech and assembly (Kan. Const. Bill of Rights, §§ 3, 11). None of these constitutional provisions, however, has anything to say about political gerrymandering.

First, Plaintiffs assert that political gerrymandering violates equal protection. Pet. ¶¶ 110-14. The Kansas Constitution provides that "[a]ll men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness," and "[a]ll political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit." Kan. Const. Bill of Rights, §§ 1-2. To the extent these provisions address equal protection, they are "given much the same effect" as the

---

[6] Nor is the idea that political gerrymandering presents a political question new in Kansas. A 1958 publication exploring areas for constitutional revision in Kansas explained that "[t]he courts treat the matter of reapportionment as a political question, not subject to judicial review." William H. Cape, Constitutional Revision in Kansas 29 (1958); *see also* Walter E. Sandelius & Ray L. Nichols, Constitutional Revision in Kansas: The Issues 4 (1960) (noting proposals for constitutional amendments to give "a court or an appointive or elective board" a role in redistricting).

Equal Protection Clause of the Fourteenth Amendment. *State ex rel. Tomasic v. Kansas City*, 230 Kan. 404, 426, 636 P.2d 760 (1981).[7]

Plaintiffs argue that SB 355 violates the Kansas Constitution's equal protection guarantee because it targets Democrats for differential treatment. Pet. ¶¶ 113-14. That argument is unavailing. "It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support." *Rucho*, 139 S. Ct. at 2501. To the contrary, equal protection does not give people the "right to have a 'fair shot' at winning." *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 205 (2008). Nor does it "require proportional representation as an imperative of political organization." *Mobile v. Bolden*, 446 U.S. 55, 75-76 (1980) (plurality opinion); *see Senate Bill No. 220*, 225 Kan. at 637 ("[N]ot every majority in a state will be able to elect a majority of its senators."). Were it otherwise, "then members of every identifiable group that possesses distinctive interests and tends to vote on the basis of those interests should be able to bring similar claims." *Bandemer*, 478 U.S. at 147 (O'Connor, J., concurring in the judgment). There would be "simply no clear stopping point to prevent the gradual evolution of a requirement of roughly proportional representation for every cohesive political group." *Id*. The Kansas

[7] *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019), created a broader fundamental right to abortion than provided by the federal Constitution, but that case did not address the equal protection aspect of these provisions.

Constitution's equal protection guarantee "does not supply judicially manageable standards for resolving purely political gerrymandering claims." *Id.* Other courts have concluded similarly under their own constitutions' equal protection guarantees. *See Johnson*, 399 Wis. 2d at 656-58; *Pearson v. Koster*, 359 S.W.3d 35, 41-42 (Mo. 2012); *cf. Harper*, 2022-NCSC-17, ¶ 295 (Newby, J., dissenting) ("[P]artisan gerrymandering has no significant impact upon the right to vote on equal terms under the one-person, one-vote standard.").[8]

Second, Plaintiffs assert that political gerrymandering violates their right to vote. Pet. ¶¶ 118-20. The Kansas Constitution provides that "[e]very citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she seeks to vote shall be deemed a qualified elector." Kan. Const. art. 5, § 1. But the "right to vote does not imply that political groups have a right to be free from discriminatory impairment of their group voting strength." *Bandemer*, 478 U.S. at 150 (O'Connor, J., concurring in the judgment). As the Supreme Court of Missouri recognized under its own constitution, "the right to vote" does not "protect[] the right of members of a political party to not have their

[8] While other states have recognized political gerrymandering claims, they have often done so on the basis of unique language in their own states' constitutions that does not appear in the Kansas Constitution. *See, e.g.*, *Adams v. DeWine*, 2022-Ohio-89 (relying on Article XIX, Section 1(C)(3)(a) of the Ohio Constitution, which was recently added and expressly provides that "[t]he general assembly shall not pass a plan that unduly favors or disfavors a political party or its incumbents"). Notably, the Kansas Bill of Rights was modeled after the Ohio Bill of Rights. *See State v. Petersen-Beard*, 304 Kan. 192, 210, 377 P.3d 1127 (2016). That Ohio recently amended its constitution to include a provision specifically prohibiting partisan gerrymandering suggests that the pre-amendment Ohio Bill of Rights—which served as the basis for the Kansas Bill of Rights—did not prohibit the practice.

votes 'diluted' by a map that rearranges districts and eliminates a seat for one political party." *Pearson*, 359 S.W.3d at 43. The Supreme Court of Wisconsin has similarly explained that under a political gerrymander, "[v]oters retain their freedom to choose among candidates irrespective of how district lines are drawn." *Johnson*, 399 Wis. 2d at 657; *cf. Harper*, 2022-NCSC-17, ¶ 295 (Newby, J., dissenting) ("[A]n effort to gerrymander districts to favor a political party does not alter *voting power* . . . .").

Third, Plaintiffs assert that political gerrymandering violates their rights to free speech and assembly. Pet. ¶ 115-17. The Kansas Constitution provides that "all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights," and guarantees to the people "the right to assemble, in a peaceable manner, to consult for their common good, to instruct their representatives, and to petition the government, or any department thereof, for the redress of grievances." Kan. Const. Bill of Rights, §§ 3, 11. Once again, these provisions are silent on political gerrymandering. SB 355 contains "no restrictions on speech, association, or any other First Amendment activities." *See Rucho*, 139 S. Ct. at 2504. Plaintiffs remain "free to engage in those activities no matter what the effect of a plan may be on their district." *Id.*; *see Johnson*, 399 Wis. 2d at 659 ("Nothing about the shape of a district infringes anyone's ability to speak, publish, assemble, or petition."). As the Wisconsin Supreme Court recognized in holding political gerrymandering claims not cognizable under the Wisconsin Constitution's free speech and assembly protections, "[a]ssociational rights guarantee the freedom

to participate in the political process; they do not guarantee a favorable outcome." *Johnson*, 399 Wis. 2d at 659; *cf. Harper*, 2022-NCSC-17, ¶ 298 (Newby, J., dissenting) ("Partisan gerrymandering plainly does not place any restriction upon the espousal of a particular viewpoint.").

Underscoring that political gerrymandering claims present political questions unfit for judicial determination is the fact that there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Leek*, 217 Kan. at 813 (quoting *Baker*, 369 U.S. at 217). As explained above, the U.S., Constitution charges "the Legislature" of Kansas with drawing congressional district lines. U.S. Const. art. I, § 4. Similarly, the Kansas Constitution assigns the task of redistricting to the Legislature. Kan. Const. art. 2, § 1; *id.* art. 10, § 1; *see also Johnson*, 399 Wis. 2d at 655 (finding that a similar provision in the Wisconsin Constitution "unequivocally assigns the task of redistricting to the legislature"). And as the U.S. Supreme Court has emphasized time and again, "redistricting is a legislative function." *Ariz. State Legislature*, 576 U.S. at 808.

In sum, political gerrymandering claims present political questions that are not justiciable under the Kansas Constitution. Redistricting is "one of the most intensely partisan aspects of American political life," and has accordingly been committed to "political entities." *Rucho*, 139 S. Ct. at 2497, 2507. The courts "have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions." *Id.* at 2507.

B. Plaintiffs Fail To Allege A Racial Vote Dilution Claim.

Petitioners' racial vote dilution claim should likewise be dismissed because they have failed to adequately allege that claim. *See* K.S.A. 60-212(b)(6).

Plaintiffs assert their racial vote dilution claim under Sections 1 and 2 of the Kansas Constitution's Bill of Rights. Pet. ¶¶ 121-25. As explained above, the equal protection aspects of those provisions are "given much the same effect" as the Equal Protection Clause of the Fourteenth Amendment. *Tomasic*, 230 Kan. at 426; *see Stephan II*, 251 Kan. at 606 ("[W]e decline" to "establish a stricter standard for the allowable percentage of deviation in state reapportionment than is required by the United States Supreme Court" under the Equal Protection Clause.). The Equal Protection Clause "prohibits intentional 'vote dilution'—'invidiously . . . minimiz[ing] or cancel[ing] out the voting potential of racial or ethnic minorities.'" *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (quoting *Mobile*, 446 U.S. at 66-67 (plurality opinion)).

To make out an intentional vote dilution claim, a plaintiff must "demonstrate that the challenged practice has the *purpose* and effect of diluting a racial group's voting strength." *Shaw v. Reno*, 509 U.S. 630, 649 (1993) (emphasis added); *see also Mobile*, 446 U.S. at 66 ("[L]egislative apportionments could violate the Fourteenth Amendment if their *purpose* were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities." (emphasis added)). Discriminatory purpose "implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in

spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). "[V]olition" or "awareness of consequences" is not enough. *Id.*; *see also Hunt v. Cromartie*, 526 U.S. 541, 557 (1999) (Stevens, J., concurring) ("[T]hat the legislature was conscious of [race] when it enacted this apportionment plan . . . is not sufficient to invalidate the district.").[9]

Plaintiffs have utterly failed to allege an unconstitutional racial vote dilution claim because—even if they allege discriminatory effect—their petition is devoid of any concrete allegations of discriminatory intent. Plaintiffs baldly allege that SB 355 "intentionally discriminates on the basis of race." Pet. ¶ 8; *see also id.* ¶¶ 89-90, 124-25. Plaintiffs have made no concrete allegations that the Kansas Legislature enacted SB 355 "'because of,' not merely 'in spite of,' its adverse effects upon" any racial group. *Feeney*, 442 U.S. at 279. Indeed, Plaintiffs acknowledge that the map was drawn for political—not racial—purposes. *See* Pet. ¶ 124 (alleging that SB 355 dilutes the voting power of minorities by moving voters from a less Republican district into "an overwhelmingly Republican district"); *see also id.* ¶ 4 ("The Enacted Plan was deliberately designed to consistently and efficiently elect exclusively Republicans to Congress . . . ."); *id.* ¶ 77 ("The Enacted Plan achieves its intended

[9] In evaluating race-based challenges to state legislative maps, the Kansas Supreme Court has historically limited its review to the briefing and the record before the Legislature at the time of enactment. *See, e.g.*, *Stovall II*, 273 Kan. at 732-33 (considering the maps, "other relevant official records," briefing and exhibits, and submitted statements); *Stovall I*, 273 Kan. at 717 (same). The record would presumably be similarly limited in this case.

result: it minimizes the ability of Kansas Democrats to elect a representative to Congress.").

The U.S. Supreme Court has warned that "courts must 'exercise *extraordinary caution* in adjudicating claims that a State has drawn district lines on the basis of race,'" particularly where "the voting population is one in which race and political affiliation are highly correlated." *Easley*, 532 U.S. at 242 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). As Plaintiffs themselves acknowledge, that is the case here. Pet. ¶ 88 ("[M]inority voters in the Kansas City metropolitan area strongly prefer Democratic candidates."). "If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify . . . ." *Bush v. Vera*, 517 U.S. 952, 968 (1996) (plurality opinion). Absent concrete allegations of discriminatory intent, Plaintiffs' racial vote dilution claim must be dismissed.

III. Defendant Abbott Must Be Dismissed Because He Is Not A Proper Defendant.

Should any of Plaintiffs' claims survive, Defendant Abbott should be dismissed from this case because he is not a proper defendant. Plaintiffs in this case seek to enjoin Defendants from "from administering, preparing for, or moving forward with the 2022 primary and general elections for Congress using the Enacted Plan" and to compel Defendants "to perform their official duty in a manner that comports with the Kansas Constitution." Pet. at 34. But such relief could issue against Defendant Schwab only—not against Defendant Abbott. Defendant Schwab is the "Chief state election official." K.S.A. 25-2504. And in this role, he "exercises

significant control over election commissioners" like Defendant Abbott. *Fish*, 2016 WL 6125029, at *2. Defendant Schwab instructs Defendant Abbott on how to "comply[] with federal and state laws and regulations" in conducting elections. K.S.A. 25-124. And Defendant Abbott "shall comply with the . . . rules and regulations and standards and directives that relate to the registration of voters and the conduct of elections" that Defendant Schwab issues. K.S.A. 19-3424(a). Defendant Schwab—not Defendant Abbott—determines how elections are to proceed in compliance with Kansas law, including any legislatively enacted congressional map. As such, Defendant Abbott should be dismissed from this case.

CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiffs' Petition for Declaratory and Injunctive Relief and Mandamus. Defendants respectfully request expedited consideration of this Motion to Dismiss. If it would aid the Court and if time permits, Defendants would welcome the opportunity to present oral argument.

Respectfully submitted,

OFFICE OF ATTORNEY GENERAL
DEREK SCHMIDT

By: /s/ Brant M. Laue
Derek Schmidt, #17781
Attorney General of Kansas
Jeffrey A. Chanay, #12056
Chief Deputy Attorney General
Brant M. Laue, #16857
Solicitor General of Kansas
Dwight R. Carswell, #25111
Deputy Solicitor General
Shannon Grammel, #29105
Deputy Solicitor General
Kurtis K. Wiard, #26373
Assistant Solicitor General

Memorial Bldg., 2nd Floor
120 SW 10th Avenue
Topeka, Kansas 66612-1597
Tel: (785) 296-2215
Fax: (785) 291-3767
Email: jeff.chanay@ag.ks.gov
brant.laue@ag.ks.gov
dwight.carswell@ag.ks.gov
shannon.grammel@ag.ks.gov
kurtis.wiard@ag.ks.gov

Attorneys for Defendants Scott Schwab and Michael Abbott

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2022, the above Motion to Dismiss 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.

/s/ Brant M. Laue
Brant M. Laue