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CLERK OF THE WYANDOTTE COUNTY DISTRICT COURT
CASE NUMBER: 2022-CV-000089

IN THE TWENTY-NINTH JUDICIAL DISTRICT
WYANDOTTE COUNTY DISTRICT COURT
CIVIL DEPARTMENT

FAITH RIVERA, DIOSSELYN TOT-VELASQUEZ, KIMBERLY WEAVER, PARIS RAITE, DONNAVAN DILLON, and LOUD LIGHT,

Plaintiffs,

And

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.

SCOTT SCHWAB, in his official capacity as Kansas Secretary of State, and MICHAEL ABBOTT, in his official capacity as Election Commissioner of Wyandotte County, Kansas,

Defendants.

Case No. 2022-CV-000089

(consolidated with Case No. 2022-CV-000090)

ALONZO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

This lawsuit challenges an enacted congressional districting plan that is a plain and intentional attempt to silence members of one political party, dilute the vote of racial and ethnic minority communities, and entrench political power in the hands of one party for the next decade,

in violation of multiple provisions of the Kansas Constitution. Defendants have moved to dismiss the lawsuit. As set forth below, Defendants' motion should be denied.

INTRODUCTION

In 2020, then-Kansas Senate President Susan Wagle announced the intent of the Legislature's majority party to politically gerrymander the state's congressional districts during the 2021 decennial redistricting process, promising supporters that Republicans would "take[] out Sharice Davids up in the 3rd" and enact a plan with "four Republican" congressional districts despite over 40% of the state's voters preferring Democrats. Pet. ¶¶ 36, 42. Just over a year later, Kansas Republicans delivered. Defying procedural norms, violating the Legislature's own Criteria and Guidelines for Congressional Redistricting, and rejecting the input of Kansans around the state who urged the body to preserve the Kansas City Metro Area, including all of Wyandotte County, in a single congressional district, the Legislature enacted a congressional redistricting plan that radically gerrymanders Kansas's congressional districts on partisan and racial lines to give Republicans control of all four of Kansas's congressional seats. The result is Senate Sub. Bill 355 (the "Enacted Plan" or "Plan"), also known as Ad Astra 2, which became law following a narrow veto override in early February.

The Enacted Plan is a partisan and racial gerrymander that violates the Kansas Constitution's guarantees of equal protection, free speech and assembly, and the right to suffrage. Each of the arguments set forth in Defendants' motion fails, and the motion should be denied.

First, this Court has subject matter jurisdiction over challenges to state election laws under the Kansas Constitution. Defendants argue otherwise under a discredited legal theory known as the "independent state legislature doctrine," which posits that the U.S. Constitution's Elections

Clause precludes state courts from reviewing state laws regulating elections they conduct for their representatives to the federal government. *See* Mot. 6-14. This argument rewrites the original meaning of the term state "Legislature" in Article I, which has always been understood to refer to a body created by and constrained by a state constitution. *Infra* at 12. The U.S. Supreme Court has thoroughly and unequivocally repudiated Defendants' ahistorical and nonsensical understanding of the Elections Clause no fewer than half a dozen times. *See infra* at 13-17. And even if it had not, Congress has exercised its authority under the Elections Clause to mandate that state redistricting plans comply with substantive state constitutional provisions. *Infra* at 17-19. Defendants' near-total reliance on dissenting opinions only confirms this point, and the few majority opinions they do invoke are not to the contrary.

Second, Plaintiffs' partisan gerrymandering claim is justiciable. The Kansas Supreme Court has long recognized its duty to review redistricting legislation under the Kansas Constitution. *Infra* at 23-29. That review is particularly important in this case because the U.S. Supreme Court has delegated adjudication of partisan gerrymandering claims to "state courts" applying "state constitutions." *Rucho v. Common Cause*, ___ U.S. ___, 139 S. Ct. 2484, 2507 (2019). And other states' success in interpreting similar language in their state constitutions in partisan gerrymandering cases offers additional guidance here. *Infra* at 29-34. Despite all this, Defendants argue that Article 10's instruction that the state Supreme Court review state legislative maps precludes state courts from reviewing congressional maps. Mot. 27. But this provision only *confirms* the ability of state courts to review redistricting plans. That the Kansas Constitution leaves congressional redistricting to the ordinary process of bicameralism, presentment, and

judicial review does not somehow relieve state courts of their duty to review redistricting plans under the Kansas Constitution. *Infra* at 34-37.

Third, Plaintiffs adequately allege a partisan gerrymandering claim under the Kansas Constitution. Defendants do not seriously dispute this, resting instead almost exclusively on jurisdictional arguments. *See* Mot. 15-27. Partisan gerrymandering violates at least three distinct protections guaranteed by the Kansas Constitution: the rights to equal protection, free speech and association, and suffrage. To start, the Kansas Equal Rights and Political Power Clauses provide broader protection than the federal Equal Protection Clause, and unlike their federal counterpart, incorporate broad protections for political equality, which are violated by the Enacted Plan's blatant effort to strip voters of one political party of their right to undiluted voting power. *Infra* at 37-41. Partisan gerrymandering also denies the rights to free speech and association enshrined in the Kansas Constitution by engaging in textbook viewpoint discrimination, unconstitutionally burdening freedom of association, and impermissibly retaliating against voters for engaging in political speech. *Infra* at 42-46. Last, partisan gerrymandering impermissibly burdens the right to vote, which the Kansas Constitution expressly recognizes as "a constitutional right" that cannot be "directly or indirectly" denied. *State v. Beggs*, 126 Kan. 811, 271 P. 400, 402 (1928) (citations omitted); *infra* at 47-48.

Fourth, Plaintiffs adequately allege a racial gerrymandering claim. Defendants claim that Plaintiffs have "utterly failed" to allege racially discriminatory intent. Mot. 29. But Plaintiffs' Petition is replete with allegations of discriminatory intent that easily satisfy the notice-pleading standard. *Infra* at 48-49. Indeed, Defendants themselves cite to at least six such instances in

Plaintiffs' Petition, demonstrating that Plaintiffs have met their notice-pleading burden. Mot. 29-30.

Finally, Defendant Abbott is a proper defendant. Citing no authority for the proposition, Defendants contend that Mr. Abbott (the Election Commissioner of Wyandotte County) is an improper defendant because Secretary Schwab has some supervisory authority over him. Mot. 30-31. Defendants do not explain the legal significance of this bureaucratic structure and ignore that Defendant Abbott is statutorily charged with executing a variety of election-related activities, *see* Mot. 30-31, each of which would be unconstitutional if performed under the Enacted Plan, *infra* at 49-52. There is ample precedent for naming election commissioners as defendants in redistricting and election litigation, and it is only natural that Plaintiffs have sought relief against Defendant Abbott to prevent him from implementing an unconstitutional redistricting plan in Wyandotte County, where many of the *Alonzo* Plaintiffs live, and where the effects of the gerrymandered plan will be felt acutely for the next ten years. *Infra* at 50-51.

FACTUAL ALLEGATIONS IN THE PETITION

I. Republican legislators planned to eliminate Democratic representation in Congress.

Kansas's current congressional delegation consists of three Republicans and one Democrat, a distribution that generally reflects statewide political preferences but, if anything, underrepresents growing Democratic support in Kansas. Pet. ¶ 36. Over 40% of Kansans voted for Democrats in the state's presidential, senatorial, and congressional elections in 2020, and the state elected a Democratic Governor by over five points in 2018. Pet. ¶ 36. Despite this level of Democratic support, Kansas has only one Democratic representative in Congress, Sharice Davids,

a Native American woman who was elected by nearly ten points in 2018 and again in 2020. Pet. ¶¶ 33-36.

Just before the 2020 midterm elections, then-Senate President Susan Wagle announced a plan to "take[] out Sharice Davids up in the 3rd." Pet. ¶ 42. Senator Wagle went on to "guarantee" that Republicans could "draw four Republican congressional maps." Pet. ¶ 42. Little more than a year later, the Republican-controlled Legislature did just that, quickly passing the Enacted Plan with minimal public input and unchecked by ordinary legislative procedures. *See* Pet. ¶¶ 43-70.

II. The Legislature rushed through the redistricting process without ordinary procedural guardrails.

The Legislature conducted the 2021 redistricting cycle through a procedurally defective process that discouraged meaningful public input. It held town halls during work hours, with little advance notice, and mostly before the release of U.S. Census data. Pet. ¶¶ 45-46, 49. Nonetheless, over 500 Kansans submitted testimony during the town halls, voicing overwhelming support for preserving the Kansas City Metro Area, and all of Wyandotte County, in a single congressional district. Pet. ¶ 47.

The legislative session convened to begin the formal redistricting process in January 2022, and the procedural irregularities continued. The Senate and House committees held their initial meetings on January 12, 2022, and adopted Guidelines and Criteria for Congressional Redistricting. Pet. ¶ 50. The next week, outside groups and members of the relevant committees in both chambers introduced proposed maps for consideration. Pet. ¶ 53.

The Senate held hearings on the proposed bills 48 hours after introducing them—a time period that, due to Senate rules, left fewer than 24 hours for the public to submit testimony. Pet. ¶ 54. The timing was so tight that the deadline to submit testimony elapsed before the Kansas

Legislative Research Department ("KLRD") released the data underlying the proposed maps, rendering it impossible for the public to provide meaningful input on the proposals. Pet. ¶ 54. Nevertheless, over 85 members of the public testified on the proposals, reiterating the testimony submitted over the summer in favor of preserving the Kansas City Metro Area in Congressional District 3. Pet. ¶ 55.

Even without the underlying data, it was clear that the map violated the Redistricting Committee's own guidelines. For example:

- Congressional Redistricting Guideline 3 provides that "[r]edistricting plans will have neither the purpose nor the effect of diluting minority voting strength," Pet. ¶ 50, but the Enacted Plan divides Wyandotte County, which is 62.7% minority, between congressional districts for the first time in decades, intentionally and effectively diluting minority votes, Pet. ¶¶ 6, 50, 88-93.

- Guideline 4a requires districts to "be as compact as possible and contiguous," Pet. ¶ 50, but the Enacted Plan replaces the relatively compact existing plan with a jigsaw-shaped map that plainly violates this requirement, including a district drawn in the shape of a salamander, Pet. ¶ 78-81.

- Guideline 4b requires "recognition of communities of interest," yet the Enacted Plan splits the Kansas City Metro Area between congressional districts, dividing a metropolitan area that hundreds of pieces of testimony and many of Plaintiffs' own experiences confirm is a well-defined community of interest. Pet. ¶¶ 3, 47, 50, 55, 65, 94-109.

- Guideline 4c requires preserving "the core of existing congressional districts," but despite that requirement the Enacted Plan separates the Kansas City Metro Area, which had been the core of District 3 since 1982. Pet. ¶¶ 50, 80.

Nevertheless, after less than two hours of debate, the Senate Redistricting Committee passed Senate Sub. Bill 355, now the Enacted Plan, out of committee. Pet. ¶ 58. The following day, the Senate held an emergency vote (the justification for which was unexplained) on the Plan and passed it 26-9 with no Democratic support and with one Republican voting against it. Pet. ¶¶ 58-61.

The House followed the Senate's lead in holding pro-forma hearings on proposed plans and passing the Enacted Plan on an expedited basis. Like the Senate, the House accepted proposals at its second committee meeting and scheduled hearings for less than 48 hours later. Pet. ¶¶ 62-64. This posed the same timing problem as the Senate schedule, providing less than 24 hours for the public to submit testimony and closing the window before KLRD released the data underlying the proposed plans. Pet. ¶ 64. The House also scheduled its hearing to take place simultaneously with the Senate hearing, frustrating the public's ability to attend or testify at both hearings. Pet. ¶ 63. The testimony the House committee did receive, like the testimony submitted over the summer and in the Senate hearing, predominantly supported preserving metro Kansas City, including all of Wyandotte County, in a single congressional district. Pet. ¶ 66. This testimony continued along similar lines during the House's second day of hearings, which it held the following day while the Senate passed the Enacted Plan. Pet. ¶ 66. The next week, the House passed the Enacted Plan 79-37 with no Democratic support and with one Republican voting against it. Pet. ¶ 69.

The procedural irregularities increased from there. The week after the Legislature passed the Enacted Plan, Governor Kelly vetoed it. Pet. ¶ 70. She explained that the Plan deviated from the adopted guidelines without justification and unnecessarily diluted minority votes, sending it back to the Legislature for what she hoped would be bipartisan collaboration on a constitutionally sound alternative. Pet. ¶ 70. That was not to be. The next 72 hours featured Senators "hiding" to delay roll call votes while Republican leadership cajoled members to line up behind the Plan, procedural gambits to extend the window for finalizing the override vote, and a *quid pro quo* deal to free a Senate Republican from an investigation by the Kansas Board of Healing Arts in exchange for his support of the bill. Pet. ¶¶ 71-75. Ultimately, the tactics worked, and the Enacted Plan

became law on February 9, 2022, after veto override votes narrowly succeeded in both chambers. Pet. ¶¶ 75-76.

III. The Enacted Plan is an extreme partisan gerrymander.

As Plaintiffs have alleged, the Enacted Plan intentionally maximizes Republican advantage in congressional elections. The Plan moves Democratic voters out of Districts 2 and 3 and redistributes them to districts where they will be unable to elect their preferred candidates, splitting counties, cities, and communities of interest in the process. Pet. ¶¶ 77-81. The Plan contains two key maneuvers. The first is its division of the Kansas City Metro Area between Congressional Districts 2 and 3. Pet. ¶ 80. Rather than preserving the community of interest in metro Kansas City in a single district, the Enacted Plan slices through Wyandotte County, shifting northern Wyandotte County into District 2 and replacing it with more rural, Republican counties to the south of Johnson County. Pet. ¶ 80. The second maneuver involves Douglas County. To ensure that transplanting half of Wyandotte County into District 2 does not turn District 2 Democratic, the Plan also removes the city of Lawrence from its traditional home in District 2—where the rest of Douglas County remains—and places it in the heavily Republican District 1. Pet. ¶¶ 78, 85. The resulting map eliminates the Democratic seat in District 3 while preserving Republican control in Kansas's remaining three districts, producing a 4R-0D map in a state that reliably votes over 40% Democratic. Pet. ¶¶ 36, 78-81.

IV. The Enacted Plan is a racial gerrymander that significantly dilutes minority voting power.

The Enacted Plan is also a racial gerrymander. The Plan dilutes minority voting power by splitting Wyandotte County between District 2 and District 3, undermining minority voters' ability to vote together with white crossover voters to elect their candidate of choice. Under the current

plan, nearly one-third of District 3's residents are minorities, and they are able to elect their candidate of choice, currently Native American Democrat Sharice Davids, by voting together with a subset of white voters in metro Kansas City who, unlike most of the state's white voters, strongly prefer Democratic candidates. Pet. ¶¶ 88, 93. The Enacted Plan "surgically targets" this alliance by splitting Wyandotte County, which is 62.7% minority, between two districts in which their votes are sufficiently diluted to prevent minority voters from electing their preferred candidate. Pet. ¶ 90. The segment of Wyandotte County removed from District 3 under the Enacted Plan is over 70% minority and votes overwhelmingly Democratic, but moving its residents to District 2 submerges them in a District with a 15-point Republican advantage where they will be unable to elect their candidate of choice. Pet. ¶¶ 79, 83. Meanwhile, the Plan replaces these voters by moving into District 3 counties that are over 90% white and that overwhelmingly favor Republican candidates, effectively diluting the power of the minority voters who remain in District 3 under the Enacted Plan and preventing them from electing a Democratic candidate. Pet. ¶¶ 80, 83.

LEGAL STANDARD

"Kansas is a notice-pleading state," and, as a result, "'[d]ismissal [under K.S.A. 60-212(b)(6)] is proper only when the allegations in the petition clearly demonstrate that the plaintiff does not have a claim.'" *Williams v. C-U-Out Bail Bonds, LLC*, 310 Kan. 775, 784, 450 P.3d 330 (2019) (quoting *Steckline Commc'ns, Inc. v. J. Broad. Grp. of Kan., Inc.*, 305 Kan. 761, 768, 388 P.3d 84 (2017)). Accordingly, when considering a motion to dismiss for failure to state a claim, a "court must accept the facts alleged by the plaintiff as true," *Cohen v. Battaglia*, 296 Kan. 542, 546, 293 P.3d 752 (2013), and the motion must fail "if the facts alleged in plaintiffs' . . . petition

and the reasonable inferences arising from them state[] a claim based on their theory 'or any other possible theory.'" *Williams*, 310 Kan. 775 at 784 (quoting *Cohen*, 296 Kan. 542, Syl. ¶ 2).

ARGUMENT

I. The U.S. Constitution's Elections Clause does not bar state court judicial review of congressional redistricting plans under state constitutions.

The U.S. Constitution's Elections Clause provides that "[t]he 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." U.S. Const. art. I, § 4. Defendants contend that this Clause gives a state legislature free rein to enact congressional redistricting plans in defiance of the state's own constitution, as construed by the state courts. According to Defendants, the Elections Clause "commits the redistricting power to state legislatures," and nothing "gives the state courts *any role* in evaluating the validity of duly enacted congressional redistricting plans." Mot. 2 (emphasis added). Defendants further contend that nothing "authorizes state courts to invalidate federal congressional maps" under a state's own constitution. Mot. 2. In their view, then, Kansas courts do not have "*any authority* to determine the validity of congressional district maps" under the Kansas Constitution. Mot. 9 (emphasis added).

To begin with, as prominent constitutional scholars have recently explained, Defendants' interpretation of the Elections Clause is baseless as a matter of constitutional text and history. At the time of the Founding, the term state "Legislature" was well understood to mean an entity created and constrained by the state's constitution. *See* Vikram David Amar & Akhil Reed Amar, *Eradicating* Bush-*League Arguments Root and Branch: The Article II Independent-State-*

Legislature Notion and Related Rubbish, 2021 Sup. Ct. Rev. (forthcoming) (manuscript at 24), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3731755. Numerous Founding-era state constitutions explicitly restricted the actions of state legislatures, including with respect to the regulation of federal elections. *See id.* at 27-30. Under Defendants' Elections Clause theory, all of these early state constitutional provisions were somehow invalid with respect to federal elections, unbeknownst to anyone at the time. Defendants' theory also turns settled principles of federalism on their head. As the U.S. Supreme Court has long held, state courts are "free to serve as experimental laboratories," *Arizona v. Evans*, 514 U.S. 1, 8 (1995), and "[i]t is fundamental that state courts be left free and unfettered by [federal courts] in interpreting their state constitutions," *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940). Yet Defendants' positions would invite intrusive federal court oversight of state court enforcement of state constitutional constraints.

Beyond that, as explained below, Defendants' interpretation of the Elections Clause runs headlong into a mountain of U.S. Supreme Court precedent recognizing that a state legislature's congressional redistricting legislation is of course subject to the strictures of the state's own constitution, as construed by the state's courts. Their theory further ignores that Congress has independently exercised its power under the Elections Clause to mandate that congressional plans comply with state constitutions. It also contradicts other text of the U.S. Constitution confirming that state laws regulating federal elections must comply with state constitutions. And Defendants' theory, if adopted here, would fundamentally upend election administration in Kansas (and every other state, if the theory were adopted nationally). It should be rejected for all these reasons.

A. Defendants' Elections Clause theory ignores extensive U.S. Supreme Court precedent that a state legislature's congressional redistricting legislation is subject to state court judicial review under the state constitution.

Defendants' theory that the Elections Clause bars state courts from reviewing the validity of congressional redistricting legislation under a state's own constitution "is inconsistent with nearly a century of precedent of the Supreme Court of the United States affirmed as recently as 2015." *Harper v. Hall*, 868 S.E.2d 499, 2022 WL 496215, at *41 (N.C. Feb. 14, 2022). "It is also repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts, and would produce absurd and dangerous consequences." *Id.*

Most recently, the Supreme Court declared in *Rucho v. Common Cause* that "[p]rovisions in . . . *state constitutions* can provide standards and guidance for *state courts* to apply" in partisan gerrymandering challenges to congressional redistricting plans enacted by state legislatures. 139 S. Ct. at 2507 (emphases added). *Rucho* concerned North Carolina's 2016 *congressional* plan, and as an example of state courts' power in this realm, the Court pointed to another state's supreme court's decision striking down the state's legislatively enacted *congressional* plan under the state's constitution. *Id.* (citing *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363 (2015)). The Court's recognition that state courts can apply state constitutional provisions to rein in partisan gerrymandering was essential to *Rucho*'s holding: it enabled the Court to foreclose federal partisan gerrymandering claims while promising that "complaints about districting" would not "echo into a void." *Id.*

Even before *Rucho*, "a long line of decisions by the Supreme Court of the United States confirm[ed] the view that state courts may review state laws governing federal elections to determine whether they comply with the state constitution." *Harper*, 2022 WL 496215, at *42

(citing cases). In *Smiley v. Holm*, 285 U.S. 355 (1932), the Supreme Court held that the Elections Clause does not "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," which may include the participation of other branches of state government. *Id*. at 368. *Smiley* made clear that congressional redistricting legislation must comport with state constitutional requirements, explaining that the Elections Clause does not "render[] inapplicable the conditions which attach to the making of state laws," *id*. at 365, including "restriction[s] imposed by state Constitutions upon state Legislatures when exercising the lawmaking power," *id*. at 369.[1]

In two companion cases decided the same day as *Smiley*, the Supreme Court reiterated that state courts have authority to strike down legislatively enacted congressional redistricting plans that violate "the requirements of the Constitution of the state in relation to the enactment of laws." *Koenig v. Flynn*, 285 U.S. 375, 379 (1932); *see also Carroll v. Becker*, 285 U.S. 380, 381-82 (1932) (same). Even before *Smiley*, the Supreme Court held that state legislatures may not enact laws under the Elections Clause that are invalid "under the Constitution and laws of the state." *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916).

The Supreme Court recently reaffirmed this principle, holding that "[n]othing 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 Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S.

[1] As in *Smiley*, Kansas Governor Laura Kelly vetoed the congressional plan here pursuant to the gubernatorial veto power under the Kansas Constitution. Pet. ¶ 70. Defendants offer no principle explaining why "lawmaking prescriptions," Mot. 8, include the referendum and gubernatorial veto but not judicial review.

787, 817-18 (2015); *see also id.* at 841 (Roberts, C.J., dissenting) (acknowledging that under the Elections Clause, congressional districting legislation remains subject to the "ordinary lawmaking process"). In other words, the Court has repeatedly rejected the theory advanced by Defendants here that the Elections Clause shields state legislatures from complying with their state constitutions in enacting congressional redistricting laws. Instead, the Court has consistently held the opposite: a state legislature's congressional plan must comply with the state constitution.

Not only are state courts authorized to evaluate a congressional redistricting plan's compliance with state constitutional provisions, the Supreme Court's decision in *Growe v. Emison*, 507 U.S. 25 (1993), makes clear that state courts have a *greater* role to play than federal courts in adjudicating congressional redistricting claims. "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." *Id.* at 33 (internal quotation marks omitted). Writing for a unanimous Court, Justice Scalia expressly recognized state courts' role in redistricting—not only to review legislative enactments, but also to craft remedial plans on their own—and held that "[t]he District Court erred in not deferring to the state court's efforts to redraw Minnesota's . . . federal congressional districts." *Id.* at 42. Far from restricting apportionment responsibilities to a state's legislative branch alone, the Court affirmed that congressional reapportionment may be conducted "though [a state's] legislative *or* judicial branch." *Id.* at 33 (emphasis in original). As a result, the Court found that the state court's "issuance of its plan (conditioned on the legislature's failure to enact a constitutionally acceptable plan [by a certain date])" was "precisely the sort of state judicial supervision of redistricting [the Court] ha[s] encouraged." *Id.* at 34. In *Growe*, the district court erred in "ignoring the . . .

legitimacy of state *judicial* redistricting." *Id.* (emphasis in original). Defendants make the same error here.

Defendants' view that the Elections Clause confines congressional redistricting authority exclusively to state legislatures and Congress, without judicial review, also conflicts with the Supreme Court's seminal decision in *Wesberry v. Sanders*, 376 U.S. 1 (1964). There, the Supreme Court rejected the plurality opinion in *Colegrove v. Green*, 328 U.S. 549 (1946), which had concluded that the Elections Clause's reference to "Congress" deprives *federal* courts of power to review the validity of congressional plans. *See id.* at 554 (plurality opinion). *Wesberry* explained: "[N]othing in the language of [the Elections Clause] gives support to a construction that would immunize state congressional apportionment laws . . . from the power of courts to protect the constitutional rights of individuals from legislative destruction." 376 U.S. at 6. In other words, the Court refused to allow voters "to be stripped of judicial protection" by Defendants' restrictive "interpretation of Article I." *Id.* at 7.

Much of the authority Defendants rely on stands for the unremarkable and uncontested proposition that redistricting is primarily the province of state legislatures. *See, e.g.*, Mot. 8 (noting that "state legislatures . . . bear primary responsibility for setting election rules" (quoting *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay)). But when the Kansas Legislature violates the Kansas Constitution, including in its enactment of congressional redistricting legislation, Kansas courts have the power and duty to exercise judicial review and invalidate the Legislature's unconstitutional action. Kansas courts do not supplant legislative prerogatives when they enforce state constitutional limits any more than the U.S. Supreme Court supplants congressional

prerogatives when it invalidates federal statutes for violating the U.S. Constitution. Federal courts regularly invalidate statutes Congress enacts pursuant to its Article I, section 8 powers, *e.g.*, *Iancu v. Brunetti*, ___ U.S. ___, 139 S. Ct. 2294 (2019), and even statutes Congress enacts pursuant to its Elections Clause powers, *e.g.*, *Citizens United v. FEC*, 558 U.S. 310 (2010). When legislatures legislate, they must do so consistently with constitutional restrictions as interpreted and applied by courts.

In short, nothing in the Elections Clause restricts Kansas courts' authority to determine whether the Enacted Plan is valid *solely* under the Kansas Constitution.

B. In any event, Congress has independently exercised its Elections Clause power to mandate that congressional redistricting plans enacted by state legislatures comply with substantive state constitutional provisions.

Regardless of the meaning of "Legislature" in the first part of the Elections Clause, the second part allows Congress "at any time" to make its own regulations related to congressional redistricting. U.S. Const. art. I, § 4. Pursuant to this authority, Congress has mandated that states' congressional redistricting plans comply with substantive state constitutional provisions. Accordingly, Defendants' Elections Clause theory, even if accepted, would get them nowhere.

Under 2 U.S.C. § 2a(c), states must follow federally prescribed procedures for congressional redistricting unless a state, "after any apportionment," has redistricted "in the manner provided by the law thereof." As the U.S. Supreme Court explained in *Arizona State Legislature*, a predecessor to § 2a(c) had mandated those default procedures "unless 'the legislature' of the State drew district lines." 576 U.S. at 809 (quoting, *inter alia*, Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 734). But Congress "eliminated the statutory reference to redistricting by the state 'legislature' and instead directed that" the state must redistrict "in the manner provided

by [state] law." *Id.* at 809-11. Congress made that change out of "respect to the rights, to the established methods, and to the laws of the respective States," and "[i]n view of the very serious evils arising from gerrymanders." *Id.* at 810 (alteration in original) (internal quotation marks omitted). And critically, as Justice Scalia explained for the plurality in *Branch v. Smith*, 538 U.S. 254 (2003), the phrase "the manner provided by state law" encompasses substantive restrictions in *state constitutions*: "the word 'manner' refers to the State's substantive 'policies and preferences' for redistricting, as expressed in a State's statutes, constitution, proposed reapportionment plans, or a State's 'traditional districting principles.'" *Id.* at 277-78 (plurality opinion) (citations omitted). Thus, unless a state's congressional plan complies with the substantive provisions of the state's constitution, § 2a(c)'s default procedures kick in.

In addition to mandating compliance with state constitutions, Congress has authorized state courts to establish remedial congressional districting plans. *Branch* held that 2 U.S.C. § 2c, which requires single-member congressional districts, authorizes both state and federal courts to "remedy[] a failure" by the state legislature "to redistrict constitutionally," and "embraces action by *state and federal courts* when the prescribed legislative action has not been forthcoming." 538 U.S. at 270, 272 (majority opinion) (emphasis added). Section 2c "is as readily enforced by courts as it is by state legislatures, and is just as binding on courts—*federal or state*—as it is on legislatures." *Id.* at 272 (emphasis added). Section 2a(c) also recognizes state courts' power to adopt congressional plans. Its default procedures apply "[u]ntil a State is redistricted in the manner provided by [state] law," and the *Branch* plurality explained that this "can certainly refer to redistricting by courts as well as by legislatures," and "when a court, *state or federal*, redistricts

pursuant to § 2c, it necessarily does so 'in the manner provided by [state] law.'" *Id.* at 274 (plurality opinion) (emphasis added).

The Court reaffirmed this interpretation in *Arizona State Legislature*. Under § 2a(c), "Congress expressly directed that when a State has been 'redistricted in the manner provided by [state] law'—whether by the legislature, *court decree*, or a commission established by the people's exercise of the initiative—the resulting districts are the ones that presumptively will be used to elect Representatives." 576 U.S. at 812 (alteration in original) (emphasis added) (citation omitted) (citing *Branch*, 538 U.S. at 274 (plurality opinion)).

In short, any question whether the first part of the Elections Clause permits state courts to review and remedy congressional districting laws under state constitutions is academic because Congress has declared that state courts can do so.

C. Defendants' Elections Clause theory cannot be reconciled with the Fourteenth Amendment's Reduction Clause.

The Fourteenth Amendment's Reduction Clause confirms that the U.S. Constitution not only permits but *requires* states' congressional districting plans to comply with state constitutional provisions protecting voting rights. The Reduction Clause provides that "when the right to vote at any election for . . . Representatives in Congress" is "denied . . . or in any way abridged," the state's representation in Congress "shall be reduced" proportionally. U.S. Const. amend. XIV, § 2. In *McPherson v. Blacker*, 146 U.S. 1 (1892), the U.S. Supreme Court held that, for purposes of this clause, "[t]he right to vote intended to be protected refers to the right to vote *as established by the laws and constitution of the state*." *Id.* at 39 (emphasis added); *see also id.* at 38 ("The right to vote in the states comes from the states . . . ."). *McPherson* thus held that "the right to vote" in federal elections—meaning the right to vote *under the state's own constitution*—"cannot be denied

or abridged without invoking the penalty" of reducing the state's representation in Congress. *Id.* at 39. These statements were essential to *McPherson*'s holding: the Court rejected the argument that the Fourteenth Amendment's Reduction Clause guarantees a *federal* constitutional right to vote in federal elections on the ground that the "right to vote" referenced in the clause instead refers to *state* constitutional (and statutory) rights.

The Supreme Court therefore has made clear that state constitutional provisions protecting voting rights *do* apply to voting in congressional elections. And if the Kansas courts determine that the Enacted Plan violates the Kansas Constitution, it cannot be that the federal Elections Clause requires Kansas to conduct its congressional elections in a manner that would trigger a reduction in the state's representation in Congress under the Reduction Clause.

D. Defendants' Elections Clause theory would wreak havoc on Kansas elections.

In addition to the extensive legal infirmities above, construing the Elections Clause to foreclose state court judicial review of state election legislation under state constitutions, as Defendants urge, would fundamentally upend Kansas's election administration. Presently, Kansas election laws regarding voter registration, ballots, voting, vote-counting, and deadlines, among other things, apply to both state and local elections as well as federal elections. But under Defendants' Elections Clause theory, that could all change, creating a chaotic two-track system in which state constitutional provisions constrain the operation of state statutes for state and local elections, but not for federal elections on the same ballot. For instance, if the Kansas Legislature passed a new election law and the Kansas courts struck it down under the Kansas Constitution, would county clerks and local election administrators be forced to administer an election where the *congressional* race would take place under the newly enacted unconstitutional law, but the

state and local races would not? Not only would this bifurcation confuse voters, but "[a]s a practical matter, it would be very burdensome for a State to maintain separate federal and state . . .processes." *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 41 (2013) (Thomas, J., dissenting).[2]

And what about where state legislatures fail to redistrict at all? *Growe* ordered deference to state courts on matters of state constitutional compliance in the course of impasse litigation, where the judiciary is called upon to adopt new district maps in the wake of a breakdown in the legislative process. 507 U.S. at 27-29, 42. The U.S. Supreme Court has long endorsed non-legislative map-drawing in this context*, see, e.g.*, *Gaffney v. Cummings*, 412 U.S. 735 (1973) (affirming map adopted by a bipartisan commission after legislative impasse). Defendants have no

[2] And, if adopted nationally, Defendants' interpretation of the U.S. Constitution's Elections Clause would threaten to nullify dozens of state constitutional provisions across the country. For example, nearly every state's constitution contains provisions affording citizens the affirmative right to vote if they meet specified qualifications. At least 24 state constitutions guarantee that "all elections"—including the state's congressional elections—shall be "free," "free and open," or "free and equal." *See, e.g.*, Colo. Const. art. II, § 5; Mo. Const. art. I, § 25; Mont. Const. art. II, § 13; Neb. Const. art. I, § 22; N.C. Const. art. I, § 10; Okla. Const. art. III, § 5; Pa. Const. art. I, § 5. Other states have more recently adopted state constitutional provisions guaranteeing voting rights in all elections, in reliance on the settled principle that state constitutions can provide broader or more specific protections for voting rights than the U.S. Constitution. *See, e.g.*, Cal. Const. art. II, § 5(a); Mich. Const. art. II, § 4. At least 12 state constitutions have provisions that *explicitly* restrict the drawing of congressional districts by providing criteria with which state legislatures must comply in drawing districts. *See, e.g.*, Mo. Const. art. III, § 45. Until now, nobody had even thought to suggest that the state legislatures could enact statutes countermanding these state constitutional provisions on the theory that they are null and void in congressional elections. But Defendants' Elections Clause theory would take us there and raise similar questions about the consequences for procedural requirements in state constitutions. May state legislatures ignore constitutional provisions that require a gubernatorial signature for legislation to be enacted, like in Kansas? May they ignore quorum requirements? Completely freed of the ordinary checks and balances that are essential to liberty, the state legislature would wield unfathomable power. It is hard to imagine a more direct affront to federalism.

answer for how their reading of the Elections Clause could allow the adoption of constitutionally apportioned districts where the state legislature fails to enact lawful maps itself. The better reading of the Elections Clause, then, is to recognize that state legislatures maintain *primary* redistricting authority, but the map-drawing pen is not without constitutional limits, and the courts retain power to order a state legislature to re-draw the map when their first attempt violates the state's own constitution.

E. The cases cited by Defendants do not support their theory.

As support for their interpretation of the Elections Clause, Defendants cite a hodgepodge of cases and several dissenting opinions. *See* Mot. 10-13. The dissents, of course, get Defendants nowhere because they are dissents. Nor do Defendants' cited cases support their position. *Parsons v. Ryan*, 144 Kan. 370, 60 P.2d 910 (1936), did not involve the Elections Clause, or congressional elections, or a claim that a state law violated the state constitution. Instead, *Parsons* merely enforced a straightforward state-law deadline to submit party nominations for presidential electors. *Id.* at 912 ("Because the nomination papers were offered for filing at too late a date, the secretary of state properly refused to receive and file them."). Another cited case, *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), likewise involved presidential elections and did not involve a state court's invalidation of a state election law under the state constitution. Of the cited cases that actually involved the Elections Clause, many pre-date *Smiley*. *See* Mot. 12 (citing state court decisions from 1864, 1873, and 1887).

In short, Defendants fail to identify a single case holding that the Elections Clause bars state courts from invalidating a congressional map under the state's own constitution. The reality is that every lower court to have considered the issue since *Smiley* has concluded that the Elections

Clause does not bar state courts from doing so. *See, e.g.*, *Detzner*, 172 So. 3d at 370 & n.2. And this case would hardly be the first time a state court has applied a state constitutional provision to invalidate a congressional plan. *E.g.*, *Harper*, 2022 WL 496215, at *43-45, *49-50 (invalidating 2021 congressional plan under the state constitution); *Moran v. Bowley*, 347 Ill. 148, 162-65, 179 N.E. 526 (1932) (citing cases and applying the Illinois Constitution's free and equal elections clause, pre-*Wesberry*, to require one-person one-vote).

Finally, Defendants' reliance on Article 10, Section 1, of the Kansas Constitution is misplaced. *See* Mot. 9-10. That section of the state constitution, which provides for the Kansas Supreme Court automatically to review and determine the validity of newly enacted state legislative plans, has no bearing whatsoever on the question of whether the *federal* constitution prohibits state court judicial review of newly enacted congressional plans under other provisions of the state constitution. Nor does Article 10, Section 1 exempt congressional districting legislation from other provisions of the state constitution, including those at issue here, as described further below. *See infra* at 34-37.

II. Partisan gerrymandering claims are justiciable under the Kansas Constitution.

Precedent makes clear that the Kansas Constitution provides the manageable standards necessary to adjudicate partisan gerrymandering claims. Longstanding Kansas Supreme Court case law holds that the Kansas Constitution applies to redistricting statutes—even in the absence of an express judicial review provision—and that Kansas courts have both the ability and the duty to determine manageable standards for enforcing the state constitution's requirements. Other states' supreme courts have struck down gerrymandered maps under their state constitutions, providing a model for the Court to apply in this case. This precedent makes clear that the Court

can conduct the straightforward factfinding necessary to resolve Plaintiffs' claims and renders Defendants' counterarguments unpersuasive.

Notably, in arguing that these claims are nonjusticiable, Defendants rely heavily on cases holding that partisan gerrymandering claims cannot be heard in federal court. But justiciability in Kansas state courts is a question of Kansas law, and federal justiciability requirements do not apply. *Gannon v. State*, 298 Kan. 1107, 1119, 319 P.3d 1196 (2014) (per curiam); *see also, e.g.*, *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 893, 179 P.3d 366 (2008) ("State courts are not bound by . . . federal justiciability requirements."). And while the U.S. Supreme Court has held that partisan gerrymandering claims cannot be heard in *federal* court, it has also acknowledged that "*state* constitutions can provide standards and guidance for *state* courts to apply." *See Rucho*, 139 S. Ct. at 2506-07 (emphasis added). The Kansas Constitution provides precisely such standards.

A. Kansas courts routinely develop manageable standards to enforce broad state constitutional language, including in the redistricting context.

The Kansas Supreme Court has long recognized Kansas courts' duty to enforce constitutional protections in the redistricting process. "It is axiomatic that an apportionment act, as any other act of the legislature, is subject to the limitations contained in the [Kansas] Constitution, and where such act . . . violates the limitations of the Constitution, it is null and void and it is the duty of courts to so declare." *Harris v. Shanahan*, 192 Kan. 183, 207, 387 P.2d 771 (1963).[3] Accordingly, "[e]very citizen and qualified elector in Kansas has an undoubted right to

[3] In a footnote, Defendants' motion cites two pre-*Harris* secondary sources for the claim that redistricting is "not subject to judicial review." Mot. 23 n.6 (quoting William H. Cape, *Constitutional Revision in Kansas* 29 (1958)). *Harris* expressly rebuts that assertion.

have [redistricting plans] created in accordance with the Kansas Constitution, and has a further right to invoke the power of the courts to protect such constitutional right." *Id.*

Harris involved claims made under since-amended Kansas constitutional provisions governing state legislative redistricting that did not provide for judicial review or articulate explicit standards for it. *See id.* at 201-02. Nonetheless, *Harris* recognized that a redistricting plan, like "any other act of the legislature, is subject to the limitations contained in the Constitution" and to legal challenge by Kansas residents, and looked to the equal protection guarantees of Sections 1 and 2 of the Kansas Bill of Rights to provide substantive guidance in determining the challenged map's constitutionality. *Harris*, 192 Kan. at 204-05, 207. *Harris* thus confirms that challenges, like this one, to the validity of redistricting plans under the Kansas Constitution are justiciable.[4]

Harris also demonstrates state courts' ability to define manageable standards for applying constitutional protections in the redistricting context. Interpreting an earlier version of the Kansas Constitution that allocated state legislative seats by county, the Court concluded that constitutional equality norms embodied by Sections 1 and 2 of the Kansas Bill of Rights required that the seats be allocated using the method of equal proportions (the same algorithm used to distribute seats in the U.S. House of Representatives among the states). *See id.* at 204-05, 207-13. The redistricting provisions at issue did not use the word "equal," let alone reference the method of equal proportions—which had not even been invented when the Kansas Constitution was ratified. *See id.* at 201-02; *The History of Apportionment in America*, Am. Mathematics Soc'y,

[4] As discussed in more detail below, *see infra* at 34-37, *Harris*'s holding that redistricting claims are justiciable even without an express provision for judicial review rebuts Defendants' assertion that current Article 10's inclusion of a special review provision for state legislative maps renders congressional plans unreviewable.

https://www.ams.org/publicoutreach/feature-column/fcarc-apportion2. Rather, the Kansas Supreme Court discerned manageable standards based on the Kansas Constitution's equal protection provisions to ensure that those provisions remained enforceable in the redistricting context. Similarly, in this case, the Kansas Constitution's equal protection, free speech and assembly, and suffrage provisions provide manageable standards to adjudicate partisan gerrymandering claims.

Decisions from outside the redistricting context reaffirm the ability of Kansas state courts to determine manageable standards to enforce requirements arising under the Kansas Constitution. After all, "courts are frequently called upon, and adept at, defining and applying various, perhaps imprecise, constitutional standards," *Gannon*, 298 Kan. at 1155, and "[t]he judiciary is well accustomed" to doing so, *id.* at 1149 (quoting *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 778 (Tex. 2005)); *see also id.* (recognizing that constitutional provisions that are "imprecise" are nonetheless "not without content" (quoting *Neeley*, 176 S.W.3d at 778)).[5] *Gannon*, for instance, concluded that the state courts could define manageable standards to enforce the Kansas Constitution's requirement that the Legislature "make suitable provision for finance of the educational interests of the state." Kan. Const. art. 6, § 6(b); *see Gannon*, 298 Kan. at 1149-

[5] In applying broad constitutional language, Kansas courts have not been afraid to deviate from federal justiciability standards. For example, the federal Supreme Court has repeatedly declared claims brought under the Guarantee Clause nonjusticiable in federal court. *See, e.g.*, *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133 (1912). Yet *VanSickle v. Shanahan*, 212 Kan. 426, 511 P.2d 223 (1973), held that at least some claims under the Guarantee Clause remain justiciable in Kansas courts, with the Kansas Constitution supplying the necessary legal standards. *See id.* at 437-38; *see also Gannon*, 298 Kan. at 1156 (reaffirming this holding). Thus, while federal courts may be unable to hear partisan gerrymandering claims under the federal Constitution, the Kansas Constitution allows state courts to hear those claims.

51. Although the "Kansas Constitution clearly leaves to the legislature the myriad of choices available to perform its constitutional duty" to provide suitable educational funding, "when the question becomes whether the legislature has actually performed its duty, that most basic question is left to the courts to answer under our system of checks and balances." *Gannon*, 298 Kan. at 1151. In the same way, while the Legislature may enjoy broad discretion in the redistricting process, that discretion is not unlimited: the Kansas Constitution requires state courts to determine whether a redistricting plan violates residents' and voters' fundamental rights.[6] *See, e.g.*, *Harris*, 192 Kan. at 206-07. And the key provisions here—for equality, free speech, and suffrage—all have long been the basis of litigation in state courts, from which Kansas courts can draw and provide manageable standards. *Cf. Gannon*, 298 Kan. at 1151 (acknowledging "the myriad of choices available" to the Legislature under the constitution's school-finance provision). Partisan gerrymandering claims brought under those provisions are therefore justiciable.

[6] Emphasizing the Legislature's discretion, Defendants argue that "'safely retaining seats for . . . political parties' is a 'legitimate political goal' in redistricting," and that courts should not "'declare [a] reapportionment plan void because it allegedly creates inconvenience, is unfair, or is inequitable.'" Mot. 19 (first quoting *In re Stovall*, 273 Kan. 715, 722, 44 P.3d 1266 (2002); and then quoting *In re Stephan*, 251 Kan. 597, 609, 836 P.2d 574 (1992)). These arguments miss the mark. *Stovall* described retaining seats as a legitimate goal under federal law; it did not discuss the Kansas Constitution. *See* 273 Kan. at 722. Moreover, there is a difference in kind between merely considering political factors and focusing on those factors in order to produce an unconstitutional partisan gerrymander. *See, e.g.*, *Harris*, 192 Kan. at 206-07 (observing that the Legislature has some discretion in redistricting but is constrained by the Kansas Constitution). Relatedly, the plaintiffs in these cases do not allege that the Enacted Plan is merely "inconvenient" or "unfair," but that it is *unconstitutional*—a claim that, as *Stephan* recognized, it is the duty of Kansas courts to adjudicate. *See* 251 Kan. at 609 (requiring courts to "measure acts with the yardstick of the constitution"). Thus, to the extent Defendants argue that the Legislature's discretion in redistricting renders this case nonjusticiable, that argument fails as well.

Indeed, this Court's duty to safeguard state constitutional protections is strongest where, as here, the federal courts have retreated from enforcing those protections' federal counterparts. "[S]tate courts have relied upon their own state constitutions to depart from United States Supreme Court decisions deviating or retreating from a broader rule of constitutional law." *State v. Scott*, 286 Kan. 54, 95-96, 183 P.3d 801 (2008), *overruled on other grounds by State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016); *see, e.g.*, *State v. McDaniel*, 228 Kan. 172, 184-85, 612 P.2d 1231 (1980). *McDaniel*, for example, held that a federal Supreme Court decision that "retreat[ed]" from earlier holdings by reducing the scope of Eighth Amendment protections "force[d] [the state supreme] court to reconsider its reliance" on federal precedent in applying Section 9 of the Kansas Bill of Rights. 228 Kan. at 184-85. The court concluded that the Kansas Constitution provides heightened protections against cruel and unusual punishment guided by the former, more expansive federal standards that existed before the U.S. Supreme Court's retreat. *See id.* at 185.

As in *McDaniel*, federal courts have retreated from applying federal constitutional standards in the context of partisan gerrymandering—and invited state courts to step in. While the Supreme Court initially held in *Davis v. Bandemer*, 478 U.S. 109 (1986), that partisan gerrymandering claims are justiciable, *id.* at 125-26, forty years later, the Supreme Court retreated from that view in *Rucho*, *see* 139 S. Ct. at 2506-07. As in *McDaniel*, Kansas courts can and should mitigate the consequences of this reversal by enforcing state constitutional protections. Indeed, even while sounding the retreat in *Rucho*, the Supreme Court called for exactly this response, noting that its holding did not "condemn complaints about districting to echo into a void," because "state constitutions can provide standards and guidance for state courts to apply." *Id.* at 2507. In

sum, enforcing the Kansas Constitution is entirely consistent with Kansas precedent and U.S. Supreme Court holdings.

B. Other states' supreme courts have successfully adjudicated partisan gerrymandering claims under their state constitutions, providing a model for this Court.

Kansas courts routinely look to the jurisprudence of sister states for guidance in interpreting broad constitutional language. *See, e.g.*, *Gannon*, 298 Kan. at 1135, 1149-55. Doing so in this case buttresses the conclusion that partisan gerrymandering claims are justiciable, as numerous other state courts have already accepted *Rucho*'s invitation to adjudicate such claims. The supreme courts of Florida, North Carolina, Ohio, and Pennsylvania have all applied their state constitutions to protect against partisan gerrymandering in congressional redistricting. *See Detzner*, 172 So. 3d at 371-72; *Harper*, 2022 WL 496215, at *49-50; *Adams v. DeWine*, ___ N.E.3d ___, Nos. 2021-1428 & 2021-1449, 2022 WL 129092, at *1-2 (Ohio Jan. 14, 2022); *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1, 128, 178 A.3d 737 (2018). North Carolina's and Ohio's high courts also recently struck down state legislative reapportionment plans under their state constitutions.[7] *See Harper*, 2022 WL 496215, at *49-50; *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, ___ N.E.3d ___, Nos. 2021-1193, 2021-1198, & 2021-1210, 2022 WL 110261, at *1 (Ohio Jan. 12, 2022). The Kansas Constitution "can be traced through prior state constitutions to the English Bill of Rights," *The Kansas Bill of Rights: "Glittering Generalities" or Legal Authority*, 69 J. Kan. Bar Ass'n, 18, 18, 20 (2000), the same document on which the

[7] Prior to *Rucho*, the lower federal courts had also "coalesced around manageable judicial standards to resolve partisan gerrymandering claims." *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting); *see, e.g.*, *Benisek v. Lamone*, 348 F. Supp. 3d 493, 515 (D. Md. 2018) (three-judge panel), *vacated by Rucho*, 139 S. Ct. 2484.

Pennsylvania and North Carolina constitutions are based, *see Harper*, 2022 WL 496215, at *31-32. These decisions—several of which, contrary to Defendants' argument, relied on broad constitutional text not specific to redistricting—thus demonstrate that, just as the Supreme Court explained in *Rucho*, state courts can discern the manageable standards necessary to hear partisan gerrymandering claims and protect citizens' constitutional rights.

For example, the North Carolina Supreme Court recently held that partisan gerrymandering of congressional or state legislative maps violates the North Carolina Constitution's equal protection, free speech, freedom of assembly, and free elections clauses. *Harper*, 2022 WL 496215, at *49. The court determined that each of these clauses—including the first three, under whose Kansas equivalents the claims in this case arise—independently provides "manageable judicial standards" to govern partisan gerrymandering claims. *Id.* Those North Carolina constitutional provisions do not offer more detailed language or substantive guidance than do their Kansas equivalents; for example, the relevant portion of North Carolina's equal protection clause provides only that "[n]o person shall be denied the equal protection of the laws." *Id.* at *3 (quoting N.C. Const. art. I, § 19); *cf.* Kan. Const. Bill of Rights, § 2 (more explicitly discussing "political power"). Rather, the North Carolina court recognized that, pursuant to the state judiciary's "fundamental [and] sacred dut[y]" to "protect[] the constitutional rights of the people . . . from overreach by the General Assembly," courts could discern a manageable framework for adjudicating partisan gerrymandering claims—a framework that could subsequently be further developed "in the context of actual litigation." *Harper*, 2022 WL 496215, at *2, *38-40 (quoting *Reynolds v. Sims*, 377 U.S. 533, 578 (1964)).

Thus, the court held that a redistricting plan constitutes a partisan gerrymander—and is therefore subject to strict scrutiny—if "it deprives a voter of his or her right to substantially equal voting power," as demonstrated by "direct or circumstantial evidence" that "the plan makes it systematically more difficult for [the] voter to aggregate his or her vote with other likeminded voters, thus diminishing or diluting the power of that person's vote on the basis of his or her views." *Id.* at *43, *49. The court declined to give an exhaustive list of evidence that would satisfy this burden—although it noted that, if necessary, it could have selected one of various bright-line statistical tests. *See id.* at *38-40. Instead, it simply recognized the overwhelming evidence of the challenged maps' partisan skew. *See id.* at *38-40, *43-48.

The Pennsylvania Supreme Court similarly relied on broad constitutional language in striking down the state's congressional map as a partisan gerrymander in 2018. *See League of Women Voters of Pa.*, 645 Pa. at 128. The court explained that, although the Pennsylvania Constitution's free-and-equal-elections clause does not provide "explicit standards" for evaluating the constitutionality of congressional districts, longstanding, widely accepted map-drawing criteria—such as contiguity, compactness, and respect for political subdivisions—provide "neutral benchmarks" for determining whether a redistricting plan constitutes a partisan gerrymander. *See id.* at 118-21. Like the North Carolina court, Pennsylvania's high court declined to provide an exhaustive framework for evaluating partisan gerrymandering claims, recognizing that future litigation would allow courts to flesh out the doctrine over time. *See id.* at 122-23. Rather, the court held only that one method of proving that a map is an unconstitutional partisan gerrymander is to show that it subordinates traditional neutral redistricting criteria to "extraneous considerations such

as gerrymandering for unfair partisan political advantage," and that the facts of the congressional plan at issue clearly showed that type of subordination. *Id.* at 121, 128.

These decisions demonstrate that state courts can successfully adjudicate partisan gerrymandering claims under state constitutions, even where the relevant constitutional text does not provide explicit standards for evaluating such claims. Moreover, they render unpersuasive Defendants' argument that discerning and applying such standards is impossible. *See, e.g.*, Mot. 24-25 (citing *Johnson v. Wis. Elections Comm'n*, 399 Wis. 2d 623, 656-58, 967 N.W.2d 469 (2021)). Like the Pennsylvania and North Carolina supreme courts, this Court can discern the necessary manageable standards—indeed, in Kansas, it is "the duty of courts" to do so. *Harris*, 192 Kan. at 207. While bright-line standards based on statistical evidence are available, *see, e.g.*, *Harper*, 2022 WL 496215, at *38-40 (discussing possible bright-line rules), the Court can also choose, like the high courts of sister states, to allow the doctrine to develop over time. All that is necessary to resolve this case is to recognize that the evidence shows (1) that the Legislature acted with the purpose of achieving partisan gain by diluting Democratic votes, and (2) that the Enacted Plan will have the desired effect of substantially diluting Democratic votes. Such a plan cannot comply with the Kansas Constitution.

Past decisions striking down partisan gerrymanders also demonstrate how this Court can rely on expert evidence to conduct the necessary factfinding to administer this standard. Courts have found partisan intent based on redistricting plans' extreme statistical partisan bias, recognizing that that bias is explicable only by the map-makers' intent to pack and crack disfavored-party voters in order to advantage the other party. *See, e.g.*, *Harper*, 2022 WL 496215, at *43-45. To make this showing, plaintiffs demonstrated that the challenged plans were statistical

outliers when compared either to an array of simulated plans or to other enacted maps according to quantitative metrics like the efficiency gap. *See, e.g.*, *id.*; *League of Women Voters of Pa.*, 645 Pa. at 44-59. The courts similarly relied on simulations and statistical measures—like the efficiency gap—offered by the plaintiffs' experts to objectively quantify the challenged plans' partisan effects, *see, e.g.*, *Adams*, 2022 WL 129092, at *10-11; *Harper*, 2022 WL 496215, at *43-45; *League of Women Voters of Pa.*, 645 Pa. at 44-59, and to determine that challenged maps did not comply with traditional neutral redistricting criteria, such as compactness and preservation of political subdivisions, *see, e.g.*, *Harper*, 2022 WL 496215, at *43; *League of Women Voters of Pa.*, 645 Pa. at 123-28. These precedents show, contrary to Defendants' arguments, that courts are perfectly capable of making the necessary factual findings to administer this test.[8]

Courts across the country have readily identified unlawful partisan gerrymanders in recent years because the rigorous intent-and-effect framework restricts judicial intervention to extreme cases like this one. Plaintiffs will usually need to prove intent through statistical evidence that a challenged plan's partisan bias is so significant that it cannot be explained as the product of

[8] Defendants suggest that voting patterns are too unpredictable to allow for judicial resolution of partisan gerrymandering claims, but as numerous courts have recognized, this notion is empirically incorrect: "[P]rograms and algorithms now available for drawing electoral districts have become so sophisticated that it is possible to implement extreme and durable partisan gerrymanders that can enable one party to effectively guarantee itself a supermajority for an entire decade," and those same technologies "make[] it possible to reliably evaluate the partisan asymmetry of such plans." *Harper*, 2022 WL 496215, at *1. Legislatures recognize this fact—taking advantage of predictable voter behavior to ensure favorable electoral outcomes is the entire point of gerrymandering. *See, e.g.*, *id.* Accordingly, courts routinely rely on expert testimony about past and predicted future voting patterns to resolve claims involving gerrymandering, *see, e.g.*, *id.* at *38-48; *Adams*, 2022 WL 129092, at *10-11, and other electoral issues, *see, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 55-58 (1986) (requiring evidence of racial bloc voting to bring vote dilution claim under Section 2 of the Voting Rights Act).

anything other than intentional gerrymandering. This degree of partisan bias will occur only in extreme cases—like this one—providing a limiting principle for future partisan gerrymandering claims.

C. Defendants' other arguments against justiciability are unpersuasive.

Defendants argue that decisions from the Kansas Supreme Court that reference partisan gerrymandering and the explicit judicial review provision for state legislative maps in Article 10 of the Kansas Constitution make partisan gerrymandering claims involving congressional maps nonjusticiable. Mot. 9-10, 21. Not so. Precedent makes clear that partisan gerrymandering claims are justiciable in Kansas courts, and Article 10's judicial review provision does nothing to alter this conclusion.

Decisions from the Kansas Supreme Court considering partisan gerrymandering claims while reviewing state legislative reapportionment plans prove state courts' power to resolve such claims. Defendants cite three such cases, Mot. 21; in each, the Supreme Court rejected the gerrymandering allegations not as presenting nonjusticiable political questions but *on the merits* after concluding that the challengers in those cases—unlike Plaintiffs here—had failed to offer evidence substantiating their claims, *see In re Stephan*, 251 Kan. 597, 607, 836 P.2d 574 (1992) ("No evidence has been offered that would indicate the size and shape of House District 47 was engineered to cancel out the voting strength of any cognizable group or locale."); *In re Senate Bill No. 220*, 225 Kan. 628, 637, 593 P.2d 1 (1979) (concluding that challengers had failed to "show[]" an unconstitutional gerrymander); *In re House Bill No. 2620*, 225 Kan. 827, 834-35, 595 P.2d 334

(1979) (concluding that "no claim or showing of gerrymandering . . . ha[d] been made").[9] Although these decisions did not discuss the gerrymandering allegations at great length—likely because of the lack of supporting evidence—or give clear rules for resolving future claims, none suggested that the court lacked jurisdiction to consider the allegations. Contrary to Defendants' argument, these precedents actually *confirm* that partisan gerrymandering claims are justiciable in Kansas courts.

The fact that Article 10 of the Kansas Constitution explicitly provides for judicial review of state legislative maps also does not suggest that Kansas courts are powerless to review congressional plans—in fact, it proves the opposite. First, the constitution's treatment of the courts' role in each type of redistricting process parallels its treatment of the Legislature's role: the document explicitly describes the Legislature's authority in state legislative reapportionment, *see id.* art. 10, § 1, but is silent as to congressional redistricting.[10] That contrast does not mean that the Legislature has no power over congressional redistricting, and it similarly does not preclude judicial review in this context. Instead, it indicates only that the constitution leaves congressional redistricting to the state's ordinary lawmaking process of enactment by the Legislature and review

[9] *In re Stephan*, 245 Kan. 118, 775 P.2d 663 (1989), also cited by Defendants, did not discuss "partisan gerrymandering" allegations, but rather a state legislative map's treatment of incumbents. *See id.* at 128.

[10] This silence renders unavailing Defendants' cursory argument that the Kansas Constitution includes a "textually demonstrative constitutional commitment of [congressional redistricting] to a coordinate political department." Mot. 27 (quoting *Leek v. Theis*, 217 Kan. 784, 813, 539 P.2d 304 (1975)). The two provisions Defendants cite for this proposition do not reference congressional redistricting. The first—Article 1, § 1—vests the "legislative power" in the Legislature. But, as the Kansas Supreme Court has often explained, legislative acts nonetheless remain subject to judicial review in state court. *E.g.*, *Harris*, 192 Kan. at 207. The second—Article 10, § 1—addresses only *state legislative*, not congressional, redistricting (and, even in that context, explicitly provides for judicial review).

by the state courts. Second, before the current version of Article 10 was adopted in the 1980s, *Harris* explained that state courts have a "duty" to ensure that redistricting plans comply with the Kansas Constitution even in the absence of an explicit judicial review provision. *Harris*, 192 Kan. at 207. The current review provision provides a streamlined process for carrying out that duty in the state legislative context, *see* Kan. Const. art. 10, § 1(b)-(e), but its adoption does not change the fact that, as in *Harris*, courts can adjudicate redistricting cases under the longstanding substantive constitutional provisions involved here. Article 10 thus does nothing to limit this Court's power to hear this case.

All told, Defendants' argument would render the Bill of Rights "little more than a compilation of glittering generalities"—a result the Kansas Supreme Court has rejected time and again for over a century. *Atchison St. Ry. Co. v. Missouri Pac. Ry. Co.*, 31 Kan. 660, 3 P. 284, 286 (1884); *see, e.g.*, *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 633-38, 440 P.3d 461 (2019) (reaffirming that Kansas Bill of Rights is independent source of enforceable constitutional rights). Instead, the Kansas Constitution "limit[s] the power of the legislature, and no act of that body can be sustained which conflicts with [it]." *Atchison St. Ry. Co.*, 3 P. at 286. None of Defendants' justiciability arguments provide a reason to abandon this age-old precept.

III. Plaintiffs adequately allege a partisan gerrymandering claim.

As Plaintiffs' Petition explains, partisan gerrymandering violates the Kansas Constitution's guarantees of equal protection, free speech and association, and suffrage. Defendants offer only cursory arguments to the contrary, *see* Mot. 23-27, and with good reason: constitutional text, history, and precedent all make clear that the Kansas Constitution prohibits partisan gerrymandering.

A. Partisan gerrymandering violates the Kansas Constitution's guarantee of equal protection.

Sections 1 and 2 of the Kansas Bill of Rights "afford[] separate, adequate, and greater [equal protection] rights than the federal Constitution." *Farley v. Engelken*, 241 Kan. 663, 671, 740 P.2d 1058 (1987); *see also Hodes & Nauser*, 309 Kan. at 621-24 (following *Farley* in recognizing that the Kansas Bill of Rights "acknowledges rights that are distinct from and broader than the United States Constitution").[11] Kansas Supreme Court precedent indicates that those broad protections prohibit partisan gerrymandering. Moreover, the provisions' text and history manifest a special concern for *political* equality, to which partisan gerrymandering is anathema. And the language of the Kansas Constitution is similar to that relied on by other state courts that have confirmed that the equal protection clauses in their state constitutions prohibit partisan gerrymandering. Sections 1 and 2 thus protect against partisan gerrymandering.

The Kansas Supreme Court has explained that Sections 1 and 2 incorporate broad protections for political equality in redistricting—protections that prohibit partisan gerrymandering. Under the Kansas Constitution, "every qualified elector . . . is given the right to vote for officers . . . [and] is possessed of equal power and influence in the making of laws which govern him," and "[i]nsofar as he is accorded less representation than is his due under the Constitution, to that extent the governmental processes fail to record the full weight of his judgment and the force of his will." *Harris*, 192 Kan. at 204. Applying the guarantee of equality

[11] Defendants argue that Sections 1 and 2 are generally "'given much the same effect' as the [federal] Equal Protection Clause," Mot. 23-24 (quoting *State ex rel. Tomasic v. Kansas City*, 230 Kan. 404, 426, 636 P.2d 760 (1981)), but do not deny that Kansas courts can—and sometimes do—interpret the Kansas Constitution more broadly than its federal equivalent, *see, e.g.*, *Farley*, 241 Kan. at 671; *Hodes & Nauser*, 309 Kan. at 621-24.

enshrined in Sections 1 and 2, *Harris* concluded that seats in the Legislature must be apportioned among counties based on their populations with "as close an approximation to exactness as possible." *Id.* at 205. Like the malapportionment redressed in *Harris*, partisan gerrymandering deprives voters of "equal power and influence in the making of laws which govern [them]." *Id.* at 204. By design, the practice "strategically exaggerates the power of voters who tend to support the favored party while diminishing the power of voters who tend to support the disfavored party." *Adams*, 2022 WL 129092, at *1. Because this unequal treatments burdens Kansans' fundamental rights to suffrage and free speech and association, *see infra* at 42-48, it is subject to strict scrutiny, *see, e.g.*, *Hodes & Nauser*, 309 Kan. at 663-68—a level of review it cannot survive. Like malapportionment, partisan gerrymandering thus violates equal protection under Sections 1 and 2.

The text of Section 2 also indicates that it provides stronger protections for political equality—and therefore against partisan gerrymandering—than does the Fourteenth Amendment. In determining whether a state constitutional provision provides broader protection than its federal counterpart, the Kansas Supreme Court has compared the constitutions' texts. *See, e.g.*, *id.* at 623-25. Unlike the Fourteenth Amendment's Equal Protection Clause, Section 2 focuses on *political* equality: it recognizes that "[a]ll political power is inherent in the people" and that "all free governments are founded on their authority, and are instituted for their equal protection." *Cf. Stephens v. Snyder Clinic Ass'n*, 230 Kan. 115, 128, 631 P.2d 222 (1981) ("Section 2 of the Kansas Bill of Rights has been construed as referring solely to political privileges and not to those relating to property rights."). The *goal* of partisan gerrymandering is to eliminate the people's authority over government by giving different voters vastly unequal political power. *See, e.g.*, *Adams*, 2022 WL 129092, at *1. Section 2's textual focus on these issues shows that it more directly addresses

partisan gerrymandering than does the federal Equal Protection Clause, and therefore provides broader safeguards against the practice.

The history of the equal protection provisions similarly supports their applicability to partisan gerrymandering. The Kansas Supreme Court has explained that Section 1 derives from the philosophy of John Locke and that Locke's work provides guidance in understanding the provision's meaning. *See Hodes & Nauser*, 309 Kan. at 625-45. With remarkable prescience, Locke observed that "[t]he power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators," John Locke, *Second Treatise of Civil Government* § 141 (1689), and that "there remains still in the people a supreme power to remove or alter the legislative," *id.* § 149. Gerrymandering flies in the face of these principles by depriving voters of any genuine power to select their representatives, instead allowing legislators to lock in a partisan majority. *See, e.g.*, *Adams*, 2022 WL 129092, at *1 ("Gerrymandering is the antithetical perversion of representative democracy . . . [that] locks in the controlling party's political power while locking out any other party or executive office from serving as a check and balance to power."). The Kansas Constitution's history thus further demonstrates that partisan gerrymandering violates Section 1 and Section 2's equal protection guarantee.

Other state courts with equal protection clauses similar to Kansas's have invalidated partisan gerrymanders under state-based equal protection principles. Most recently, the North Carolina Supreme Court held that that state's equal protection clause—which generically provides that "[n]o person shall be denied the equal protection of the laws," N.C. Const. art. I, § 19—"provides greater protections in redistricting cases than the federal constitution" and prohibits

partisan gerrymandering. *Harper*, 2022 WL 496215, at *34; *cf. League of Women Voters of Pa.*, 645 Pa. at 116-17 (noting that "partisan gerrymandering dilutes the votes" of disfavored-party members, and that "[i]t is axiomatic that a diluted vote is not an equal vote"). Like the Kansas Supreme Court in *Harris*, the *Harper* court determined that the state constitution's equal protection clause promised each voter "equal voting power" in selecting representatives, and determined that partisan gerrymandering undermined that promise. *Id.* at *33-35; *see Harris*, 192 Kan. at 204 (explaining that Kansas Constitution guarantees "equal power and influence" to voters). This precedent further supports Section 1 and 2's prohibition of partisan gerrymandering.[12]

Defendants' contention that a partisan gerrymandering claim sounding in equal protection is no more than a request for proportional representation, *see* Mot. 24-25, essentially repackages their justiciability argument that no manageable standard exists to adjudicate partisan gerrymandering claims. But as discussed above, *see supra* at 29-34, state supreme courts have

[12] Indeed, even if the Court concludes that the Kansas Constitution's equal protection provisions are substantively coextensive with the federal Constitution's Equal Protection Clause, partisan gerrymandering is still unconstitutional. The U.S. Supreme Court has recognized that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555. Accordingly, the Court has repeatedly—and unanimously—held that partisan gerrymandering, which works just such a dilution, "is unlawful." *E.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) (plurality opinion) (emphasis omitted); *see id.* at 306-07, 316 (Kennedy, J., concurring in the judgment); *id.* at 317-18, 341 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting). It has never varied from that holding: the bar to federal courts' hearing partisan gerrymandering claims is jurisdictional, not substantive. *See Rucho*, 139 S. Ct. at 2506-07. Even while erecting that bar, *Rucho* acknowledged that "gerrymandering is 'incompatible with democratic principles.'" *Id.* at 2506 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015)). Thus, even if the Court declines to interpret Sections 1 and 2 more broadly than the Fourteenth Amendment's Equal Protection Clause, the Enacted Plan remains unlawful under the Kansas Constitution—and, unlike the federal judiciary, this Court has jurisdiction to redress that violation.

developed manageable standards for adjudicating such claims without demanding proportional representation. Plaintiffs do not seek a proportional share of Kansas's congressional delegation; instead, they demand a map that does not intentionally, unjustifiably dilute the voting power of Kansan Democrats. As Plaintiffs alleged in their Petition, Pet. ¶¶ 110-14, the Kansas Constitution entitles them to such a redistricting plan.

B. Partisan gerrymandering violates the Kansas Constitution's Free Speech and Free Assembly Clauses

Partisan gerrymandering violates the Kansas Constitution's protections for free speech and association for at least three independent reasons. First, partisan gerrymandering unconstitutionally discriminates against members of the disfavored party based on viewpoint. Second, partisan gerrymandering unlawfully burdens disfavored-party members' freedom of association. Third, partisan gerrymandering unlawfully retaliates against disfavored-party members for engaging in protected political speech and association. Defendants do not seriously dispute any of these three claims, Mot. 26-27, all three of which Plaintiffs allege in their Petition, Pet. ¶ 116, but instead rest on the conclusory proposition that "SB 355 contains 'no restrictions on speech, association, or any other First Amendment activities,'" Mot. 26. That is wrong.

First, partisan gerrymandering unlawfully discriminates against disfavored-party members based on viewpoint—a proposition Defendants do not dispute. *See* Mot. 26-27. The right of "all persons" to "freely speak," Kan. Const. Bill of Rights, § 11, is "among the most fundamental personal rights and liberties of the people," *Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 234, 689 P.2d 860 (1984). Prohibiting viewpoint discrimination is elemental to preserving this fundamental right. As such, "[d]iscrimination against speech based on its message is presumptively unconstitutional." *Roeder v. Kansas Dep't of Corr.*, No. 113,239, 2016 WL 556281,

at *3 (Kan. App. 2016) (per curiam) (unpublished decision); *see also Harper*, 2022 WL 496215, at *36 ("[V]iewpoint discrimination . . . triggers strict scrutiny."); *State v. Smith*, 57 Kan. App. 2d 312, 318, 452 P.3d 382 (2019) ("It is well-established that content-based speech restrictions are presumptively invalid."). So when a state legislature "systematically diminishes or dilutes the power of votes on the basis of party affiliation, it intentionally engages in a form of viewpoint discrimination and retaliation that triggers strict scrutiny." *Harper*, 2022 WL 496215, at *36.

As other state courts have recognized, partisan gerrymandering is—by definition—viewpoint discrimination. *See id.* at *36, *49. It assigns increased voting power to members of one political party (*i.e.*, those with preferred views) while rescinding voting power from members of another political party (*i.e.*, those with disfavored views). *See id.* at *36. Even as a practical matter, a map-drawer engineers a partisan gerrymander by "packing" and "cracking" voters based on their history of "preferring one party's candidates" over another's—that is, their record of political speech. *League of Women Voters of Pa.*, 645 Pa. at 116-17. Necessarily, then, the "practice subjects certain voters to disfavored status based on their views." *Harper*, 2022 WL 496215, at *36. Such viewpoint-based discrimination warrants the strictest level of scrutiny.

Second, partisan gerrymandering unlawfully burdens disfavored-party members' freedom of association. Kansans are guaranteed free association through their right to "freely speak," Kan. Const. Bill of Rights, § 11, and their "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," *id.* § 3. Freedom of association is a necessary predicate to preserving these rights and is of the "utmost importance to [a] democratic system." *Harper*, 2022 WL 496215, at *36 (quoting *Libertarian Party of N.C. v. State*, 365 N.C. 41, 49, 707 S.E.2d 199

(2011)). A partisan gerrymander unconstitutionally "undermines the role of free speech and association," and is subject to strict scrutiny on this basis as well. *Id.*

The Kansas Bill of Rights describes a freedom of association even broader than that in the U.S. Constitution. *See, e.g.*, *Hodes & Nauser*, 309 Kan. at 623-25 (comparing provisions' text to determine that Kansas constitutional provision offered broader protection than its federal analogue). To the familiar federal guarantees of the right "peaceably to assemble, and to petition the government for a redress of grievances," U.S. Const. amend. I, the Kansas Constitution adds a clause particularly germane to partisan gerrymandering and not found in the First Amendment: "The people have the right to . . . instruct their representatives." Kan. Const. Bill of Rights, § 3; *see also Harper*, 2022 WL 496215, at *35-36 (partisan gerrymandering violated provision of North Carolina Constitution providing that "[t]he people have a right to . . . instruct their representatives" (alteration in original) (quoting N.C. Const. art. I, § 12)); James A. Gardner, *Devolution and the Paradox of Democratic Unresponsiveness*, 40 S. Tex. L. Rev. 759, 767-68 (1999) (explaining that the "instruct" provision "enhance[s] the responsiveness of state government"). This right is the essence of associational freedom—not only does the government derive its power from the people; the people retain the power to hold it accountable to the popular will. But partisan gerrymandering nullifies voters' ability to select or instruct their representatives and deprives Kansans' associational rights of meaning.

To be sure, members of a political party who have been cracked or packed may continue to vote for candidates of their choice and to coordinate across their siloed jurisdictions. *See* Mot. 26. But the associational *burden* remains. After all, "citizens form parties to express their political beliefs and to assist others in casting votes in alignment with those beliefs." *Harper*, 2022 WL

496215, at *36 (quoting *Libertarian Party*, 365 N.C. at 49). But, under a partisan gerrymander, political association becomes an exercise in futility as members of the disfavored party become increasingly disaffected, recognizing that they are asymmetrically disadvantaged in pooling their political, social, and financial capital to effectively "instruct their representatives" or "petition" them "for the redress of grievances." Kan. Const. Bill of Rights, § 3. This heightened burden works to further entrench the favored party, compounding the associational harm. *See generally* Daniel P. Tokaji, *Gerrymandering and Association*, 59 Wm. & Mary L. Rev. 2159 (2018).

The North Carolina Supreme Court recently recognized that the freedom of association created by that state's Free Speech and Freedom of Assembly Clauses prohibits partisan gerrymandering. *Harper*, 2022 WL 496215, at *35-36. The North Carolina Constitution's Freedom of Assembly Clause is nearly identical to Kansas's, providing that "[t]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances." N.C. Const. art. I, § 12. Interpreting this Clause, the North Carolina Supreme Court explained that partisan gerrymandering "violates the freedom[] of . . . association and undermines [its] role in our democratic system" by disrupting individuals' "association in formation of the common judgment." *Harper*, 2022 WL 496215, at *36. This provided an independent basis for the court's decision to strike down the state's congressional map under the North Carolina Constitution. *See id.* at *37, *49-50. The same reasoning applies here.

Third, partisan gerrymandering unconstitutionally retaliates against disfavored-party members for their protected political activity, another proposition Defendants do not contest. Mot. 26-27. Retaliation is an independent constitutional violation when three conditions are present: (1)

a speaker engages in protected activity; (2) the defendant's retaliatory action adversely affects the protected activity; and (3) there is a causal link between the protected activity and the retaliatory action. *See, e.g.*, *Grammer v. Kan. Dep't of Corr.*, 57 Kan. App. 2d 533, 538, 455 P.3d 819 (2019); *League of Women Voters of Pa.*, 645 Pa. at 65; *see also Rebarchek v. Farmers Coop. Elevator & Mercantile Ass'n*, 272 Kan. 546, 553, 35 P.3d 892 (2001) (discussing First Amendment burden-shifting approach in retaliatory discharge context). Once a plaintiff has shown that a gerrymandered map retaliates against political speech, "the map is subject to strict scrutiny and is presumptively unconstitutional." *Harper*, 2022 WL 496215, at *40.

Partisan gerrymandering satisfies all three elements. First, Plaintiffs' exercise of the rights to vote and to engage in political speech and association is unquestionably protected activity. *See supra* at 42-45; *infra* at 47-48. Unlike its federal counterpart, the Kansas Constitution is explicit that the "right to vote . . . is a constitutional right," *Beggs*, 271 P. at 402 (omission in original) (quoting *Wheeler v. Brady*, 15 Kan. 26, 32 (1875)); *see* Kan. Const. art. 5, § 1. Second, as discussed above, partisan gerrymandering burdens free speech by reducing the voting power of members of the disfavored party and burdens free association by raising the cost of exercising political will; as discussed below, it burdens the right to vote by diluting the voting power of members of the disfavored party. Third, the protected activity (political speech, association, and voting) and the retaliatory action (partisan gerrymandering) are necessarily linked. By its very nature, a partisan gerrymander cracks and packs members of a political party into districts that minimize their ability to translate votes into seats based on their history of participation in the electoral process. The very act of designing a partisan gerrymander necessarily retaliates against disfavored-party members' exercise of their constitutional rights.

In sum, a partisan gerrymander discriminates on the basis of viewpoint, burdens the right to free association, and retaliates against protected political speech. Partisan gerrymandering violates the Kansas Constitution's Free Speech and Free Assembly Clauses on each of these three separate and independent grounds.

C. Partisan gerrymandering violates the right to suffrage under the Kansas Constitution.

Whereas the right to vote is implicit in the U.S. Constitution, *see, e.g.*, *Reynolds*, 377 U.S. at 590, the Kansas Constitution makes explicit that the "right to vote . . . is a constitutional right," *Beggs*, 271 P. at 402 (omission in original) (quoting *Wheeler*, 15 Kan. at 32); *see* Kan. Const. art. 5, § 1. The sanctity of the enumerated right to vote—which is "the essence of the represen[tative] form of government," *Harris v. Anderson*, 194 Kan. 302, 303, 400 P.2d 25 (1965)—prohibits legislation that will "directly or indirectly, deny or abridge . . . or unnecessarily impede the exercise of that right." *Beggs*, 271 P. at 402 (citation omitted); *see also Moore v. Shanahan*, 207 Kan. 645, 649, 486 P.2d 506 (1971); *Provance v. Shawnee Mission Unified Sch. Dist. No. 512*, 231 Kan. 636, 641, 648 P.2d 710 (1982). Legislation that burdens this fundamental right "strikes at the heart of orderly constitutional government, and must be carefully and meticulously scrutinized." *Moore*, 207 Kan. at 649.

Partisan gerrymandering severely burdens the right to vote. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Anderson*, 194 Kan. at 303 (quoting *Reynolds*, 377 U.S. at 555). As other states' supreme courts have recognized, partisan gerrymandering works just such a dilution by "placing voters preferring one party's candidates in districts where their votes are wasted on candidates likely to lose (cracking), or by placing such voters in districts where their

votes are cast for candidates destined to win (packing)." *League of Women Voters of Pa.*, 645 Pa. at 116-17; *see also Harper*, 2022 WL 496215, at *33-35 ("[Partisan gerrymandering] infringes upon [a] voter's fundamental rights to vote on equal terms and to substantially equal voting power."). This dilution "prevent[s] the free exercise of the right of suffrage." *League of Women Voters of Pa.*, 645 Pa. at 81-82 (quoting Pa. Const. art. 1, § 5). The Kansas Constitution prohibits this indirect denial of the right to vote. *See Beggs*, 271 P. at 402.

IV. Plaintiffs adequately allege a racial vote dilution claim.

Plaintiffs' Petition also states a claim for unconstitutional racial vote dilution. Defendants do not dispute that a racial vote dilution claim is cognizable under the Kansas Constitution, arguing only that Plaintiffs failed to sufficiently allege racially discriminatory intent. *See* Mot. 28-30. Not so. A motion to dismiss for failure to state a claim must fail "if the facts alleged in plaintiffs' amended petition and the reasonable inferences arising from them state[] a claim based on their theory 'or any other possible theory.'" *Williams v. C-U-Out Bail Bonds, LLC*, 310 Kan. 775, 784, 450 P.3d 330 (2019) (quoting *Cohen v. Battaglia*, 296 Kan. 542, Syl. ¶ 2, 293 P.3d 752 (2013)). Plaintiffs have pleaded sufficient facts to meet their burden.

Plaintiffs' Petition adequately alleges racially discriminatory intent. The Legislature's motivation is a factual question. *Cf. Williams*, 310 Kan. at 785-86 (noting that whether individuals intended to act unlawfully is a factual question). Here, the Petition specifically alleges, as a factual

matter, that the Enacted Plan reflected the Legislature's "racially discriminatory intent."[13] Pet. ¶ 125; *accord* Pet. ¶ 8 ("[T]he Enacted Plan also intentionally discriminates on the basis of race."). It further describes how "[t]he Enacted Plan intentionally dilutes the voting power of Wyandotte County's minority voters by surgically removing the county's most heavily minority areas from District 3 and placing them in District 2, an overwhelmingly Republican-leaning district" where "Wyandotte County's minority voters will no longer have the ability to elect candidates of their choice." Pet. ¶ 124; *see also* Pet. ¶¶ 7, 88-93. In addition, the Petition alleges that "the Enacted Plan was created specifically to eliminate the only seat currently held by a minority, Representative Davids," Pet. ¶ 124, and describes a legislator's view that "the map deliberately diluted the most racially diverse county in Kansas," Pet. ¶ 56. Further, Plaintiffs allege that minority voters suffer substantially greater impacts than do white Kansans, Pet. ¶¶ 88-93, suggesting an intent to target those voters, and that the Legislature adopted the Enacted Plan through a rushed, irregular process, Pet. ¶¶ 43-76, again raising an inference of unlawful discriminatory intent.

The direct allegation that the Enacted Plan deliberately discriminates based on race and related allegations about its irregular legislative process and effects on minority voters and representation, taken as true, support a reasonable inference that the redistricting plan is the product of racially discriminatory intent.

[13] Contrary to Defendants' suggestion, *see* Mot. 28-29, there is no inconsistency in alleging that the Enacted Plan reflects both partisan and racially discriminatory intents: as the motion acknowledges, discriminatory purpose does not require that a legislature be motivated *only* by racial animus, but that it "select[] or reaffirm[] a particular course of action *at least in part* 'because of' . . . its adverse effects upon an identifiable group." Mot. 27-28 (emphasis added) (quoting *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979)).

V. Plaintiffs properly seek relief against both Defendants.

Defendant Abbott is a proper defendant. County election commissioners have appeared as defendants alongside the Secretary of State in past redistricting litigation. *See, e.g.*, *Harris v. Anderson*, 196 Kan. 450, 412 P.2d 457 (1966) (redistricting case with both Secretary of State and county election commissioners as defendants); *Harris v. Anderson*, 194 Kan. 302, 400 P.2d 25 (1965) (same); *Harris v. Shanahan*, 192 Kan. 183, 187, 387 P.2d 771 (1963) (successfully seeking injunction barring "various county election officials," as well as Secretary of State, from administering elections under allegedly unconstitutional state legislative maps). And courts have granted equitable relief against county election commissioners in other contexts as well. *See, e.g.*, *Wall v. Harrison*, 201 Kan. 600, 600-02, 443 P.2d 266 (1968) (affirming mandamus relief ordering defendant election commissioner to conduct election as required by Kansas Constitution, not contradictory election statute); *Patterson v. Justus*, 173 Kan. 208, 208-09, 213, 245 P.2d 968 (1952) (granting mandamus relief against defendant county election commissioner). In other words, what Defendants allege—without citation—to be improper is actually routine.

Defendants' motion asserts that the requested "relief could issue [only] against Defendant Schwab" because he exercises some supervisory authority over Defendant Abbott. Mot. 30-31. But this authority does nothing to negate the fact that Defendant Abbott directly supervises and administers elections in Wyandotte County, or that this Court could craft a routine equitable remedy ordering Defendant Abbott not to implement the Enacted Plan in Wyandotte County in the course of his duties. Indeed, given Wyandotte County's centrality to the facts and issues in this case, Defendant Abbott is not only a proper defendant but a natural one. Defendants' motion cites no authority that prevents Plaintiffs from seeking relief against multiple defendants, and precedent

confirms that naming an election commissioner as a defendant alongside the Secretary of State is ordinary practice in redistricting litigation.

Plaintiffs have brought standard equitable claims seeking to ensure that Defendant Abbott executes his responsibilities as Wyandotte County's election commissioner within constitutional bounds. By statute, Defendant Abbott "ha[s] full and complete power and authority over all elections in the county" and must "see that such elections are conducted according to law." K.S.A. 19-3423(a). His duties include managing voter registration, *see, e.g.*, *id.* 25-2303; establishing ward and precinct boundaries and polling places, *see id.* 19-3424(a)(1), 19-3439, 25-2701; arranging for ballot printing, *see id.* 19-3424(a)(1), 25-604; administering early voting, *see, e.g.*, *id.* 25-1120; and overseeing ballot tabulation, *see id.* 25-1132 to -1133, 25-2801. Seven *Alonzo* Plaintiffs live in Wyandotte County. *See* Pet. ¶¶ 16-18, 20, 22, 25-26. Defendant Abbott is therefore the county official responsible for administering the elections in which these individuals vote. Plaintiffs seek to ensure that he carries out his obligations in compliance with the Kansas Constitution, and thus *not* in compliance with the Enacted Plan. The remedies sought would prevent Defendant Abbott from, for instance, printing ballots that reflect the Enacted Plan's gerrymandered district lines or counting such ballots thereafter. In other words, Plaintiffs seek perfectly standard-issue relief against a government official who they allege will imminently act in a manner forbidden by the Kansas Constitution. Plaintiffs thus have good reason to seek to ensure that Defendant Abbott conducts future congressional elections in compliance with the Kansas Constitution, rather than under the Enacted Plan.

The fact that Defendant Schwab exercises some supervisory authority over Defendant Abbott does not mean that Plaintiffs have no claim against Defendant Abbott. Defendant Abbott

is directly responsible for administering elections in Wyandotte County—indeed, he has "full and complete power and authority over all elections in the county"—and Plaintiffs seek, among other relief, an order requiring him to carry out his duties in compliance with the Kansas Constitution (and thus "according to law") by not implementing the Enacted Plan. K.S.A. 19-3423(a). The fact that such an order might overlap, as a practical matter, with one directed at Defendant Schwab does not mean that Plaintiffs cannot seek both. By Defendants' logic, a tort plaintiff seeking to recover from multiple tortfeasors under a joint and several liability system would be able to sue only one defendant, since recovery against any one defendant could afford the plaintiff complete relief. But that simply is not the law, and Defendants cite no case requiring Plaintiffs to choose only one defendant in this way.

Plaintiffs thus properly seek relief against both Defendants.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2022, I electronically filed the foregoing with the Clerk of the District Court's electronic filing system which will serve all registered participants, and a copy was also served by email to counsel for the Defendants and counsel for the *Rivera* Plaintiffs.

/s/ Sharon Brett
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