IN THE SUPREME COURT OF KANSAS

SCOTT SCHWAB, Kansas Secretary of State, in his official capacity,

and

MICHAEL ABBOTT, Wyandotte County Election Commissioner, in his official capacity,

Petitioners,

v.

THE HONORABLE BILL KLAPPER, in his official capacity as a District Court Judge, Twenty-Ninth Judicial District,

and

THE HONORABLE MARK SIMPSON, in his official capacity as a District Court Judge, Seventh Judicial District,

Respondents.

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

Plaintiffs in Wyandotte County District Court Case 2022-CV-89 and Respondents under Kansas Supreme Court Rule 9.01(a)(1),

and

Case No. 124849
(Original Action)

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 in Wyandotte County District Court Case 2022-CV-90 and Respondents under Kansas Supreme Court Rule 9.01(a)(1),

and

SUSAN FRICK, LAUREN SULLIVAN, DARRELL LEA, and SUSAN SPRING SCHIFFELBEIN,

Plaintiffs in Douglas County District Court Case 2022-CV-71 and Respondents under Kansas Supreme Court Rule 9.01(a)(1).

MEMORANDUM IN SUPPORT OF FIRST AMENDED PETITION IN MANDAMUS AND QUO WARRANTO

Petitioners, Kansas Secretary of State Scott Schwab and Wyandotte County Election Commissioner Michael Abbott, submit this memorandum in support of their First Amended Petition in Mandamus and Quo Warranto. For the reasons set forth below, Petitioners request that mandamus and quo warranto relief be granted and that they receive such other and further relief as the Court deems just and proper.

INTRODUCTION

For the first time in Kansas history, lawsuits have been filed in state court asking a state district court judge to hold that redistricting legislation for federal congressional maps violates the Kansas Constitution. There is a good reason these lawsuits find no support in precedent: Neither the federal nor the Kansas Constitution authorizes state courts to pass on the validity of federal congressional maps, and certainly not under the legal theories the Plaintiffs in the recently filed cases advance.

Earlier this year, the Kansas Legislature enacted Substitute for Senate Bill 355 (SB 355). SB 355 sets the boundaries for Kansas's four congressional districts following the 2020 Census. The Kansas Legislature enacted SB 355 pursuant to its grant of authority in the Elections Clause to the U.S. Constitution to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4. Numerous Plaintiffs have filed lawsuits in Kansas district court, asserting that the districts established in SB 355 are unconstitutional under the Kansas Constitution. Their primary claim is that the districts are unfair: they constitute a political gerrymander and confer too much political advantage on Republicans at the expense of Democrats. Some Plaintiffs also allege that SB 355, in rigging the districts politically, also unconstitutionally diluted the votes of minority voters in Kansas.

Petitioners ask this Court to exercise its original jurisdiction in this case because Plaintiffs' lawsuits in the district courts are not viable under either the

U.S. Constitution or the Kansas Constitution. The Elections Clause commits the redistricting power to state legislatures, and no Kansas law—either statutory or constitutional—gives the state courts any role in evaluating the validity of duly enacted redistricting plans. Even if the district courts had jurisdiction to entertain Plaintiffs' challenges, those challenges do not assert any viable claims. Plaintiffs' political gerrymandering claim is not justiciable under the Kansas Constitution. No judicially manageable standard for evaluating such claims exists, Kansas courts have not historically entertained such claims, and the Kansas Constitution has nothing at all to say about political gerrymandering. The U.S. Supreme Court reached a similar conclusion with respect to the U.S. Constitution, *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-07 (2019), and its logic applies with equal force here. Furthermore, a claim of unconstitutional vote dilution requires proof of discriminatory purpose, which Plaintiffs have failed to allege. For all these reasons, the district courts may not proceed with Plaintiffs' lawsuits, and this Court should exercise its original jurisdiction to order the district courts to dismiss the lawsuits.

STATEMENT OF FACTS

Petitioners have fully set forth the facts of this case in their First Amended Petition in Mandamus and Quo Warranto, and they hereby incorporate them into this Memorandum in Support by reference.

ARGUMENT

I. The Court Should Exercise Its Original Jurisdiction Over This Proceeding.

This redistricting case raises exceptionally important questions of constitutional interpretation that must be decided before this year's upcoming elections may proceed. As such, there is "little difficulty fitting this case within [this Court's] discretionary boundaries for consideration of an original action." *Bd. of Cty. Comm'rs of Johnson Cty. v. Jordan*, 303 Kan. 844, 850, 370 P.3d 1170 (2016).

Article 3, Section 3, of the Kansas Constitution grants this Court original jurisdiction over proceedings in mandamus and quo warranto. "An action in quo warranto seeks to prevent the exercise of unlawfully asserted authority." *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 656, 367 P.3d 282 (2016). An action in mandamus seeks "to compel some . . . person to perform a specified duty, which duty results from the office, trust, or official station of the party to whom the order is directed, or from operation of law." *State ex rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45, 52, 687 P.2d 622 (1984) (quoting K.S.A. 60-801).

This Court's original jurisdiction over proceedings in mandamus and quo warranto is "discretionary and concurrent" with that of the lower courts. *Ambrosier v. Brownback*, 304 Kan. 907, 909, 375 P.3d 1007 (2016). The existence of an adequate remedy at law does not prevent this Court from exercising its original jurisdiction. *See Comprehensive Health of Planned Parenthood v. Kline*, 287 Kan. 372, 405, 197 P.3d 370 (2008) ("[T]his court has discretion to exercise its original jurisdiction even if relief also is available in the district court."); *Schmidt*, 303 Kan.

at 656-57. Rather, when a case "presents an issue of great public importance and concern, the court may exercise its original jurisdiction . . . and settle the question." *Jordan*, 303 Kan. at 849 (quoting *Stephan*, 236 Kan. at 52). That is all the more so when the case seeks to "secure a speedy adjudication of questions of law for the guidance of state officers." *Ambrosier*, 304 Kan. at 910 (quoting *Kansas Bar Ass'n v. Judges of the Third Judicial Dist.*, 270 Kan. 489, 498, 14 P.3d 1154 (2000)).

Notably, this Court has historically exercised its original jurisdiction in redistricting cases. *See Harris v. Anderson*, 196 Kan. 450, 412 P.2d 457 (1966) (*Harris II*) (assessing the validity of a state House of Representative redistricting scheme under this Court's original jurisdiction); *Harris v. Anderson*, 194 Kan. 302, 400 P.2d 25 (1965) (same); *cf. Taylor v. Kobach*, 300 Kan. 731, 334 P.3d 306 (2014) (exercising original jurisdiction in elections dispute about whether candidate for U.S. Senate properly withdrew his name from the ballot before the general election). As this Court has explained, the validity of a legislatively enacted redistricting scheme is "a subject of great public interest." *Harris II*, 196 Kan. at 449. This Court should once again exercise its original jurisdiction in this redistricting case for three primary reasons.

First, this case "presents an important public question of statewide importance appropriate for this court's attention in the first instance." *Ambrosier*, 304 Kan. at 910. This Court has time and again reiterated that it "may properly entertain [an] action in quo warranto and mandamus if it decides the issue is of sufficient public concern." *Schmidt*, 303 Kan. at 657 (quoting *Stephan*, 236 Kan. at

53); *see also, e.g.*, *Kelly v. Legislative Coordinating Council*, 311 Kan. 339, 344, 460 P.3d 832 (2020); *State ex rel. Schmidt v. Kelly*, 309 Kan. 887, 890, 441 P.3d 67 (2019); *Jordan*, 303 Kan. at 849-50; *Schmidt*, 303 Kan. at 657. Where "the essential purpose of the proceeding is to obtain an authoritative interpretation of the law for the guidance of public officials," *Mobil Oil Corp. v. McHenry*, 200 Kan. 211, 239, 436 P.2d 982 (1968), this Court may—and does—"exercise its original jurisdiction" and "settle the question," *Berst v. Chipman*, 232 Kan. 180, 183, 653 P.2d 107 (1982).

There can be no doubt this case involves questions of great public concern. This Court has expressly acknowledged that the drawing of district lines is "a subject of great public interest." *Harris II*, 196 Kan. at 449; *cf. Taylor*, 300 Kan. at 733 (noting the "necessity for an authoritative ruling" given the impending election). Indeed, the "drawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 416 (2006) (opinion of Kennedy, J.). Under the U.S. Constitution, that solemn task is committed to the Kansas Legislature. *See* U.S. Const. art. I, § 4. The Kansas Legislature earlier this year performed that task in enacting SB 355 and drawing the congressional district boundaries under which congressional elections will be carried out in Kansas for the next decade. Issues implicating the validity of those maps—and whether they may be subjected to extra-constitutional attack—are profoundly important.

Second, these important questions "require[] a speedy adjudication." *Long v. Bd. of Cty. Comm'rs of Wyandotte Cty.*, 254 Kan. 207, 212, 864 P.2d 724 (1993). In deciding to exercise its original jurisdiction, this Court has "previously considered judicial economy, the need for speedy adjudication of an issue, and avoidance of needless appeals." *Ambrosier*, 304 Kan. at 909; *see also, e.g.*, *Landrum v. Goering*, 306 Kan. 867, 870-71, 397 P.3d 1181 (2017); *Jordan*, 303 Kan. at 850. Indeed, this Court has explained that "use of mandamus to secure a speedy adjudication of questions of law for the guidance of state officers and official boards in the discharge of their duties is *common* in this state." *Ambrosier*, 304 Kan. at 910 (emphasis added) (quoting *State ex rel. Smith v. State Highway Comm'n*, 132 Kan. 327, 334-35, 295 P. 986 (1931)).

Time is of the essence in resolving the issues presented in this case, as the 2022 election cycle is fast approaching. The candidate filing deadline for the primary election is June 1, 2022. *See* K.S.A. 25-205.[1] The primary election itself is on August 2, 2022. K.S.A. 25-203(a). And the general election is on November 8, 2022. K.S.A. 25-101(a). This Court should exercise its original jurisdiction to settle the important legal questions involved in a timely manner. Expeditious confirmation of congressional district lines benefits candidates seeking to run in congressional districts, state officials responsible for administering congressional elections in those districts, and constituents who will want to know the

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

congressional district in which they will reside. Furthermore, if this Court "declines to exercise jurisdiction in this action, it will be faced with the identical issue in a subsequent appeal from an action before the district court." *Stephan*, 236 Kan. at 53. It is doubtless better to settle these legal questions now when they can be given adequate consideration rather than in a last minute, emergency appeal perhaps only days before the filing deadline.

Third, the significant questions presented in this case are purely legal and do not require any fact-finding. This Court has historically exercised its original jurisdiction to provide an "authoritative interpretation of law," *Jordan*, 303 Kan. at 849, and to settle "issues of law," *Long*, 254 Kan. at 212; *see also State ex rel. Stephan v. Parrish*, 257 Kan. 294, 296, 891 P.2d 445 (1995); *Stephan*, 236 Kan. at 58; *Mobil Oil*, 200 Kan. at 242. The issues here are similar. They present pure questions of law, and primarily of constitutional interpretation.

In sum, this Court should exercise its original jurisdiction over this action and provide an "early, immediate, and final resolution . . . of the important legal issues presented." *State ex rel. Tomasic v. Unified Gov't of Wyandotte Cty.*, 265 Kan. 779, 787, 962 P.2d 543 (1998).

II. Relief Should Be Granted Because The District Courts May Not Entertain The Plaintiffs' Challenges.

Relief is warranted in this case for several reasons. *First*, it would be unconstitutional for the district courts to consider challenges to congressional district maps. The Elections Clause of the U.S. Constitution assigns to "the Legislature" of Kansas the power to prescribe the "Times, Places and Manner of

holding Elections." U.S. Const. art. I, § 4. The Kansas Legislature has enacted SB 355 pursuant to that grant of authority, and the state courts may not constitutionally invalidate, alter, or amend that law. Neither the Kansas Constitution nor any Kansas statute gives the courts a role in the congressional redistricting process. *Second*, political gerrymandering claims are nonjusticiable under the Kansas Constitution. Such claims present political questions that are beyond the reach of Kansas courts. The Kansas Constitution has nothing to say about political gerrymandering, nor does it provide any manageable standard for evaluating such claims. *Third*, Plaintiffs have not adequately alleged a claim for racial vote dilution under the Kansas Constitution. For all these reasons, this Court should instruct the district courts to dismiss Plaintiffs' lawsuits.

A. Kansas State Courts May Not Entertain Challenges To Legislatively Enacted Congressional District Maps.

Relief is warranted in this case because the district courts lack authority to adjudicate the validity of SB 355. Such adjudication would violate the Elections Clause of the U.S. Constitution and would exceed the redistricting authority given to the courts in the Kansas Constitution.

The Elections Clause of the U.S. Constitution entrusts to "the Legislature" of each state the power to set the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4. This includes the power to adopt congressional redistricting schemes. *See, e.g.*, *Rucho*, 139 S. Ct. at 2495-96; *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 813 (2015). Recognizing that the state legislatures may "undermin[e] fair

representation, including through malapportionment," the Framers also provided for a check on the power of the state legislatures to draw congressional districts. *Rucho*, 139 S. Ct. at 2495. The Elections Clause provides that "Congress may at any time by Law make or alter such Regulations" as adopted by the state legislatures. U.S. Const. art. I, § 4. The Elections Clause thus assigns the task of congressional redistricting "to the state legislatures, expressly checked and balanced by the Federal Congress." *Rucho*, 139 S. Ct. at 2496. There is no "indication that the Framers had ever heard of courts" playing a role in checking the redistricting power of state legislatures. *Id.*

The word "Legislature" was "not one 'of uncertain meaning when incorporated into the Constitution.'" *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)). The U.S. Supreme Court has interpreted the Elections Clause to mean that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking." *Ariz. State Legislature*, 576 U.S. at 808. Those prescriptions "may include the referendum and the Governor's veto." *Id.* But in Kansas, they do not include the review of the state courts. For state courts to exercise such a role would violate the Elections Clause. *Cf. Mauldin v. Branch*, 866 So. 2d 429, 433-34 (Miss. 2003) ("*[N]o* Mississippi court has jurisdiction to draw plans for congressional redistricting" because Mississippi's "statutes clearly provide that the *only* governmental entity in th[e] state that is authorized to draw congressional districts is the Legislature.").

Notably, while the Kansas Constitution does not assign state courts any role in the *congressional redistricting* process, it does assign state courts a role in the *state legislative redistricting* process. Under Article 10, Section 1, of the Kansas Constitution, this Court must determine the validity of any state legislative district map that the Legislature enacts. Within 15 days of the Legislature's passage of state legislative district lines, "the attorney general shall petition the supreme court of the state to determine the validity thereof." Kan. Const. art. 10, § 1(b). Within 30 days of the filing of that petition, this Court must enter its judgment determining whether the state legislative district lines are valid. *Id.* If this Court rules that the reapportionment act is valid, then that judgment "shall be final until the legislative districts are again reapportioned." *Id.* art. 10, § 1(e). But if this Court rules that the reapportionment act is invalid, then the Legislature "shall enact a statute of reapportionment conforming to the judgment of the supreme court within 15 days." *Id.* art. 10, § 1(b). The Kansas Constitution's omission of any similar review provision for congressional district maps is telling. The fact that the Kansas Constitution provides for judicial review of legislative maps but not federal congressional maps demonstrates that the Kansas Constitution does not permit state courts to determine the validity of congressional maps.

Permitting state courts to "correct[] . . . all election district lines drawn for partisan reasons would commit . . . state courts to unprecedented intervention in the American political process.'" *Rucho*, 139 S. Ct. at 2498 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in the judgment)).

"[U]nder the U.S. Constitution, the state courts do not have a blank check to rewrite state election laws for federal elections." *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay). Indeed, the "provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election." *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1, 2 (2020) (Alito, J., concurring in denial of motion to expedite); *see also Democratic Nat'l Comm.*, 141 S. Ct. at 29 (Gorsuch, J., concurring in denial of application to vacate stay) ("The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules.").

This does not mean that congressional maps enacted by the Kansas Legislature will go unchecked. As explained above, "the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause." *Rucho*, 139 S. Ct. at 2508. Dissatisfied Kansas voters "may seek Congress' correction of regulations prescribed by state legislatures." *Ariz. State Legislature*, 576 U.S. at 824. And "Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering." *Rucho*, 139 S. Ct. at 2495; *id.* at 2508 ("[T]he avenue for reform established by the Framers, and used by Congress in

the past, remains open."). Furthermore, federal courts have the authority in "two areas—one-person, one-vote and racial gerrymandering"—to address "at least some issues that could arise from a State's drawing of congressional districts." *Id.* at 2495-96.[2] The U.S. Constitution provides specific avenues for the review of congressional district maps. State court is not one of them.

In sum, the Kansas Constitution does not give state courts any role in assessing the validity of congressional redistricting plans. And a state court's adjudication of the validity of SB 355—a legislatively enacted congressional redistricting plan—would violate the federal Elections Clause.

B. Political Gerrymandering Claims Are Not Justiciable Under The Kansas Constitution.

Even if Kansas state courts could entertain challenges to congressional district maps, relief is nonetheless warranted in this case because the district courts lack authority to decide claims of political gerrymandering under the Kansas Constitution. As under the U.S. Constitution, "partisan gerrymandering claims present political questions beyond the reach of" Kansas courts under the Kansas Constitution. *Rucho*, 139 S. Ct. at 2506-07.

A "political question is required to be left unanswered by the judiciary, *i.e.*, is 'nonjusticiable.'" *Gannon v. State*, 298 Kan. 1107, 1135, 319 P.3d 1196 (2014). This requirement "is based upon the doctrine of separation of powers and the relationship between the judiciary and the other branches or departments of

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

government." *Leek v. Theis*, 217 Kan. 784, 813, 539 P.2d 304 (1975). In *Baker v. Carr*, the U.S. Supreme Court "identified and set forth six characteristics or elements one or more of which must exist to give rise to a political question." *Gannon*, 298 Kan. at 1137 (quoting *Leek*, 217 Kan. at 813). Those factors are:

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

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

Applying the *Baker v. Carr* standards, the U.S. Supreme Court recently confirmed that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Rucho*, 139 S. Ct. at 2506-07. The Court explained that "[a]mong the political question cases [it] has identified are those that lack 'judicially discoverable and manageable standards for resolving [them].'" *Id.* at 2494 (quoting *Baker*, 369 U.S. at 217). Political gerrymandering cases, the Court

concluded, fit squarely within that category of cases. "[T]here are no legal standards discernible in the Constitution" for adjudicating political gerrymandering claims, "let alone limited and precise standards that are clear, manageable, and politically neutral." *Id.* at 2500. "Any judicial decision on what is 'fair' in this context would be an 'unmoored determination' of the sort characteristic of a political question." *Id.* (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)). The Court emphasized that "it is not even clear what fairness looks like in this context." *Id.* Nor is it clear how courts might "answer the determinative question: 'How much is too much?'" *Id.* at 2501.

As the Court explained, "asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise." *Id.* at 2503-04. This is in part because voters may "prefer one candidate over another" for any number of reasons, and "their preferences may change." *Id.* at 2503. The Court stressed that redistricting has long been "a critical and traditional part of politics in the United States." *Id.* at 2498 (quoting *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring in the judgment)). "To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities." *Id.* at 2497.

Plaintiffs invite Kansas courts to find (for the first time) in the Kansas Constitution what the U.S. Supreme Court could not find in the U.S. Constitution. This Court should decline that invitation. As under the U.S. Constitution, "[u]nder

the Kansas case-or-controversy requirement, courts require that . . . issues not present a political question." *Gannon*, 298 Kan. at 1119. And as under the U.S. Constitution, a case that "lack[s] . . . judicially discoverable and manageable standards for resolving it" presents nonjusticiable political questions under the Kansas Constitution. *Leek*, 217 Kan. at 813 (quoting *Baker*, 369 U.S. at 217). Political gerrymandering cases fit squarely within this category.

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

The redistricting process—committed to the political branches—necessarily contains "an element of discretion." *Harris v. Shanahan*, 192 Kan. 183, 205, 387 P.2d 771 (1963). And the exercise of that discretion necessarily has political

consequences. The "choice to draw a district line one way, not another, always carries some consequence for politics, save in a mythical State with voters of every political identity distributed in an absolutely gray uniformity." *Vieth*, 541 U.S. at 343 (Souter, J., dissenting). Furthermore, this Court has recognized that "safely retaining seats for the political parties" is a "legitimate political goal" in redistricting. *Stovall I*, 273 Kan. at 722 (citing *Easley v. Cromartie*, 532 U.S. 234, 239 (2001)). A new redistricting scheme "may pit incumbents against one another or make very difficult the election of the most experienced legislator." *Stovall II*, 273 Kan. at 734 (quoting *Gaffney*, 412 U.S. at 753). It is not the role of the courts to override the discretionary determinations of the political branches and "declare [a] reapportionment plan void because it allegedly creates inconvenience, is unfair, or is inequitable." *In re Stephan*, 251 Kan. 597, 609, 836 P.2d 574 (1992).

There is no manageable standard by which Kansas courts can adjudicate political gerrymandering claims. "[I]t is not even clear what fairness looks like in this context," nor is it clear how to determine how much unfairness "is too much." *Rucho*, 139 S. Ct. at 2500-01. One reason for this is that claims of political gerrymandering are necessarily based on predictions about how voters will act in future elections. But "[p]olitical affiliation is not an immutable characteristic." *Vieth*, 541 U.S. at 287 (plurality opinion). "[V]oters can—and often do—move from one party to the other." *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring). And "even within a given election, not all voters follow the party line." *Vieth*, 541 U.S. at 287 (plurality opinion). As this Court has explained, it "is difficult if not impossible

to consider political profiles in apportionment cases for the profiles depend in large part on voting patterns which change with the personalities of the candidates." *House Bill No. 2620*, 225 Kan. at 839. Voters' preferences "depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations." *Rucho*, 139 S. Ct. at 2503. Recognizing a political gerrymandering claim would require this Court "to indulge a fiction—that partisan affiliation is permanent and invariably dictates how a voter casts every ballot." *Johnson v. Wis. Elections Comm'n*, 399 Wis. 2d 623, 657, 967 N.W.2d 469 (2021).

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

This lack of historical precedent is all the more striking given that "[p]artisan gerrymandering is nothing new" in Kansas. *Id.* at 2494. Indeed, the practice of considering politics in districting dates back to the drawing of the very first state representative district lines in Kansas. The 1859 Wyandotte Convention not only gave birth to the Kansas Constitution, it also drew the first legislative districts in Kansas. Those districts—drawn by the Framers of the Kansas Constitution—were adopted over strident objections of political gerrymandering. One opponent of the apportionment scheme argued that it would "so gerrymander as to disenfranchise all the Democratic counties except two . . . in order to secure an overwhelming Republican majority in the Legislature." Wyandotte Convention Proceedings at 478. Another opponent proposed in jest that the Convention simply pass a resolution stating that "every species of political skullduggery must be resorted to" and "regard for the interests of the Republican party and disregard for the interests of the people, be followed throughout this apportionment." *Id.* at 479-80. One observer of the proceedings noted that "[a] most exciting discussion occurred . . . over the apportionment article, which the Democrats denounced as a 'gerrymander.'" *Id.* at 670 (App. C-2). Another observer recorded that the apportionment scheme "caused [such a] great feeling at the time [that] the Democrats in and out of the convention howled like a Marshall county cyclone." *Id.* at 660 (App. C). And a formal protest against the apportionment charged that it was a "mere political scheme" because it grouped "counties antagonistic in interest . . . without the shadow of excuse or reason, save only to secure the triumph of the Republican party, as in the case of

Johnson and Wyandotte counties being attached to Douglas county." *Id.* at 518-19. This "history is not irrelevant." *Rucho*, 139 S. Ct. at 2496. It shows that the Framers of the Kansas Constitution "were aware of electoral districting problems." *Id.* Yet it contains no hint that the courts or the Kansas Constitution had any role to play in policing partisan considerations, nor "any indication that the Framers had ever heard of courts doing such a thing." *Id.* Rather, the Framers' experience in drawing Kansas's first legislative district lines indicates that they fully understood that "districting inevitably has and is intended to have substantial political consequences." *Stovall II*, 273 Kan. at 734 (quoting *Gaffney*, 412 U.S. at 753).

There is also no "specific language" in the Kansas Constitution that could provide a manageable standard for adjudicating political gerrymandering claims. *Gannon*, 298 Kan. at 1151. Plaintiffs allege three primary bases for their political gerrymandering claims in the Kansas Constitution: the guarantee of equal protection (Kan. Const. Bill of Rights, §§ 1-2), the right to vote (Kan. Const. Bill of Rights, §§ 1-2, 20; art. 5, § 1), and the freedoms of speech and assembly (Kan. Const. Bill of Rights, §§ 3, 11). None of these constitutional provisions, however, has anything to say about political gerrymandering.

First, Plaintiffs assert that political gerrymandering violates equal protection. The Kansas Constitution provides that "[a]ll men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness," and "[a]ll political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal

protection and benefit. Kan. Const. Bill of Rights, §§ 1-2. To the extent these provisions address equal protection, they are "given much the same effect" as the Equal Protection Clause of the Fourteenth Amendment. *See State ex rel. Tomasic v. Kansas City*, 230 Kan. 404, 426, 636 P.2d 760 (1981).[3]

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

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

Constitution's equal protection guarantee "does not supply judicially manageable standards for resolving purely political gerrymandering claims." *Id.* Other courts have concluded similarly under their own constitutions' equal protection guarantees. *See Johnson v. Wisconsin Elections Comm'n*, 399 Wis. 2d 623, 657, 967 N.W.2d 469 (2021); *Pearson v. Koster*, 359 S.W.3d 35, 41-42 (Mo. 2012).[4]

Second, Plaintiffs assert that political gerrymandering violates their right to vote. The Kansas Constitution provides that "[e]very citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she seeks to vote shall be deemed a qualified elector." Kan. Const. art. 5, § 1. But the "right to vote does not imply that political groups have a right to be free from discriminatory impairment of their group voting strength." *Bandemer*, 478 U.S. at 150 (O'Connor, J., concurring in the judgment). As the Supreme Court of Missouri recognized under its own constitution, "the right to vote" does not "protect[] the right of members of a political party to not have their votes 'diluted' by a map that rearranges districts and eliminates a seat for one political party." *Pearson*, 359 S.W.3d at 43. The Supreme Court of Wisconsin has similarly explained that under a political gerrymander, "[v]oters retain their freedom to choose among

[4] While other states have recognized political gerrymandering claims, they have often done so on the basis of unique language in their own states' constitutions that does not appear in the Kansas Constitution. *See, e.g.*, *Adams v. DeWine*, 2022-Ohio-89 (relying on Article XIX, Section 1(C)(3)(a) of the Ohio Constitution). Notably, the Kansas Bill of Rights was modeled after the Ohio Bill of Rights, *see State v. Petersen-Beard*, 304 Kan. 192, 210, 377 P.3d 1127 (2016), but Ohio had to amend its Constitution to include a provision specifically prohibiting partisan gerrymandering for such claims to be recognized.

candidates irrespective of how district lines are drawn." *Johnson*, 399 Wis. 2d at 657.

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

In sum, political gerrymandering claims present political questions that are not justiciable under the Kansas Constitution. Kansas courts "have no license to reallocate political power between the two major political parties, with no plausible

grant of authority in the Constitution, and no legal standards to limit and direct their decisions." *Rucho*, 139 S. Ct. at 2507.

C. Plaintiffs Have Failed To Allege A Claim Of Racial Vote Dilution Under The Kansas Constitution

Even if Kansas state courts could entertain challenges to congressional district maps, relief is still warranted in this case for the additional reason that the *Rivera* and *Alonzo* Plaintiffs have not made out a claim for intentional racial vote dilution under the Kansas Constitution. As explained above, the equal protection aspect of Sections 1 and 2 of the Kansas Constitution's Bill of Rights are "given much the same effect" as the Equal Protection Clause of the Fourteenth Amendment. *Tomasic*, 230 Kan. at 404. The Equal Protection Clause "prohibits intentional 'vote dilution'—'invidiously . . . minimiz[ing] or cancel[ing] out the voting potential of racial or ethnic minorities.'" *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (quoting *Mobile*, 446 U.S. at 66-67 (plurality opinion)).

To make out an intentional vote dilution claim, a plaintiff must "demonstrate that the challenged practice has the purpose and effect of diluting a racial group's voting strength." *Shaw v. Reno*, 509 U.S. 630, 649 (1993). Discriminatory purpose "implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). "[V]olition" or "awareness of consequences" is not enough. *Id.* In evaluating equal protection claims based on race in the context of congressionally enacted maps, this Court has historically limited its review to the

briefing and the record before the Legislature at the time of enactment. *See, e.g.*, *Stovall II*, 273 Kan. at 732-33 (considering the maps, briefing and exhibits, submitted statements, and census data); *Stovall I*, 273 Kan. at 717 (considering the maps, briefing and exhibits, submitted statements, and "other relevant official records"). The same would presumably hold true for congressional district maps.

The *Rivera* and *Alonzo* Plaintiffs have utterly failed to allege an unconstitutional racial vote dilution claim because—even if they allege discriminatory effect—their petitions are devoid of any concrete allegations of discriminatory intent. The *Rivera* plaintiffs allege only that the Legislature "consciously divid[ed] the minority communities of Wyandotte County," Pet. ¶ 146, *Rivera v. Schwab*, 2022-CV-89 (Wyandotte County D. Ct.), and the *Alonzo* Plaintiffs baldly allege that SB 355 "intentionally discriminates on the basis of race," Pet. ¶ 8, *Alonzo v. Schwab*, 2022-CV-90 (Wyandotte County D. Ct.); *see also id.* ¶¶ 89-90, 124-25. But Plaintiffs have made no specific allegations that the Kansas Legislature enacted SB 355 "'because of,' not merely 'in spite of,' its adverse effects upon" any racial group. *Feeney*, 442 U.S. at 279. Indeed, Plaintiffs expressly allege that the map was drawn for political—not racial—purposes. The *Rivera* Plaintiffs articulated the theory clearly: minority voters were deprived of the right to elect candidates of their choice "[b]ecause minority voters in Kansas prefer Democrats"—not because of their race. Pet. ¶ 145, *Rivera*, 2022-CV-89; *see also* Pet. ¶ 124, *Alonzo*, 2022-CV-90 (alleging that SB 355 dilutes the voting power of minorities by

moving voters from a less Republican district into "an overwhelmingly Republican district").[5]

The U.S. Supreme Court has warned that "courts must 'exercise *extraordinary caution* in adjudicating claims that a State has drawn district lines on the basis of race,'" particularly where—as here—"the voting population is one in which race and political affiliation are highly correlated." *Easley*, 532 U.S. at 242 (citation omitted); *see* Pet. ¶ 145, *Rivera*, 2022-CV-89 ("There is significant racially polarized voting throughout the state."); Pet. ¶ 88, *Alonzo*, 2022-CV-90 ("[M]inority voters in the Kansas City metropolitan area strongly prefer Democratic candidates."). "If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify . . . ." *Bush v. Vera*, 517 U.S. 952, 968 (1996) (plurality opinion). Absent concrete allegations of discriminatory intent, the *Rivera* and *Alonzo* Plaintiffs' racial vote dilution claims must be dismissed.

* * *

The district courts cannot be permitted to proceed with Plaintiffs' lawsuits. The district courts lack the authority to adjudicate the validity of congressional

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[5] *See also, e.g.*, Pet. ¶ 2, *Rivera*, 2022-CV-89 ("[T]he Republican caucus's intention for Kansas's congressional plan was plain"—they wanted to "draw four Republican congressional [districts]."); *id.* ¶ 113 (alleging "the legislature's intent to subjugate the state's neutral redistricting criteria to partisan considerations"); Pet. ¶ 4, *Alonzo*, 2022-CV-90 ("The Enacted Plan was deliberately designed to consistently and efficiently elect exclusively Republicans to Congress . . . ."); *id.* ¶ 77 ("The Enacted Plan achieves its intended result: it minimizes the ability of Kansas Democrats to elect a representative to Congress.").

maps under both the Elections Clause to the U.S. Constitution and the Kansas Constitution. Even if they could adjudicate the validity of congressional maps, the district courts still could not entertain Plaintiffs' claims. Plaintiffs' political gerrymandering claims are not justiciable under the Kansas Constitution. And Plaintiffs have utterly failed to allege a claim of racial vote dilution under the Kansas Constitution. This Court should accordingly order the district courts to dismiss the lawsuits.

CONCLUSION

This Court should exercise original jurisdiction over Petitioners' First Amended Petition in Mandamus and Quo Warranto and grant the requested relief.

Respectfully submitted,

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I certify that on March 3, 2022, the above document was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and copies were mailed and emailed to:

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