APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 125,092

[Filed June 21, 2022]

FAITH RIVERA et al., TOM ALONZO et al., and SUSAN FRICK et al.,
Appellees,

v.

SCOTT SCHWAB, Kansas Secretary of State, in His Official Capacity, and MICHAEL ABBOTT, Wyandotte County Election Commissioner, in His Official Capacity,
Appellants,
and
JAMIE SHEW, Douglas County Clerk, in His Official Capacity,
Appellee.

SYLLABUS BY THE COURT

1.

The Elections Clause in Article I, Section 4 of the United States Constitution does not bar this court from

reviewing reapportionment legislation for compliance with the Kansas Constitution.

2.

In this case, the gravamen of plaintiffs' claims sound in equal protection. While the other provisions of the Kansas Constitution relied upon by plaintiffs and the district court—Kan. Const. Bill of Rights, §§ 1, 3, 11, 20; art. 5, § 1—protect vital rights, they do not provide an independent basis for challenging the drawing of district lines.

3.

Section 2 of the Kansas Constitution Bill of Rights is the textual grounding and location of our Constitution's guarantee of equal protection to all citizens.

4.

The equal protection guarantees afforded all Kansans by section 2 of the Kansas Constitution Bill of Rights is coextensive with the equal protection guarantees found in the Fourteenth Amendment to the United States Constitution. Therefore, Kansas courts shall be guided by United States Supreme Court precedent interpreting and applying the equal protection guarantees of the Fourteenth Amendment when we are called upon to interpret and apply the coextensive equal protection guarantees of section 2 of the Kansas Constitution Bill of Rights.

5.

The use of partisan factors in district line drawing is not constitutionally prohibited.

6.

In the absence of express standards codified in either the Kansas Constitution or in Kansas law constraining or limiting the Legislature's use of partisan factors in drawing district lines, we can discern no judicially manageable standards by which to judge a claim that the Legislature relied too heavily on the otherwise lawful factor of partisanship when drawing district lines. As such, the question presented is a political question and is nonjusticiable, at least until such a time as the Legislature or the people of Kansas choose to codify such a standard into law.

7.

Government decision-making based predominantly on race is antithetical to the principles of equal protection enshrined in both the Fourteenth Amendment and in section 2 of the Kansas Constitution Bill of Rights. Section 2 prohibits the drawing of district boundaries on the basis of race unless the Government can show that its action was in furtherance of a compelling state interest and was narrowly tailored to satisfy that interest. Compliance with the federal Voting Rights Act may be a compelling state interest.

8.

The equal protection guarantees found in the Fourteenth Amendment and in section 2 of the Kansas Constitution Bill of Rights protect against two distinct kinds of racial discrimination in the drawing of district lines. First, section 2 protects against racial gerrymandering which occurs when a legislative body uses race as the predominant factor in choosing where

to draw the lines. Second, section 2 protects against targeted minority voter dilution which occurs when a legislative body invidiously discriminates against a minority population to minimize or cancel out the potential power of the minority group's collective vote.

9.

The United States Supreme Court has set forth explicit legal tests to be applied to each of the two distinct kinds of racial discrimination claims that allege a particular legislative line-drawing enactment violates equal protection. We expressly adopt those same tests to apply when those challenges are made under section 2 of the Kansas Constitution Bill of Rights.

10.

When a claim of racial gerrymandering is made, the plaintiffs must show that race was the predominant factor motivating the Legislature's decision to place a significant number of voters inside or outside of a particular district. To make this showing, a plaintiff must prove that the Legislature subordinated lawful, race-neutral districting factors—such as compactness, respect for political subdivisions, and partisan advantage—to unlawful racial considerations.

11.

When a claim of minority vote dilution is made, the plaintiffs must show that (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single member district; (2) the group is politically cohesive; and (3) there exists sufficient bloc voting by the white majority in the new allegedly diluted districts to usually defeat the

preferred candidate of the politically cohesive minority bloc. If a plaintiff fails to establish these three points, there neither has been a wrong nor can there be a remedy. If the plaintiff can establish these three points, the court next inquires whether, as a result of the challenged plan, the plaintiffs do not have an equal opportunity to participate in the political process and to elect candidates of their choice. We review the totality of the circumstances in determining whether a minority group has the opportunity to participate in the political process.

12.

The record below demonstrates that plaintiffs did not ask the district court to apply the correct applicable legal tests to their race-based claims. The district court, in turn, did not apply these legal tests to plaintiffs' race-based claims. Perhaps unsurprisingly then, the district court did not make the requisite fact-findings to satisfy either legal test applicable to plaintiffs' race-based equal protection claims. Therefore, on the record before us, plaintiffs have failed to satisfy their burden to meet the legal elements required for a showing of unlawful racial gerrymandering or unlawful race-based vote dilution.

Appeal from Wyandotte District Court; BILL KLAPPER, judge. Decision announced May 18, 2022. Opinion filed June 21, 2022. Reversed and injunction order is lifted.

Brant M. Laue, solicitor general, argued the cause, and *Kurtis K. Wiard*, assistant solicitor general, *Shannon Grammel*, deputy solicitor general, *Dwight R. Carswell*, deputy solicitor general, *Jeffrey A. Chanay*,

chief deputy attorney general, *Derek Schmidt*, attorney general, *Anthony F. Rupp*, of Foulston Siefkin LLP, of Overland Park, and *Gary Ayers* and *Clayton Kaiser*, of the same firm, of Wichita, were with him on the briefs for appellants.

Stephen R. McCallister, of Dentons US LLP, of Kansas City, Missouri, argued the cause, and *Mark P. Johnson*, *Betsey L. Lasister*, and *Curtis E. Woods*, pro hac vice, of the same firm, were with him on the briefs for appellees Susan Frick et al.

Lalitha D. Madduri, pro hac vice, of Elias Law Group LLP, of Washington, D.C., argued the cause, and *Spencer W. Klein*, pro hac vice, *Joseph N. Posimato*, pro hac vice, of the same firm, *Abha Khanna*, pro hac vice, and *Jonathan P. Hawley*, pro hac vice, of the same firm, of Seattle, Washington, and *Barry R. Grissom* and *Jake Miller*, pro hac vice, of Grissom Miller Law Firm LLC, of Kansas City, Missouri, were with her on the brief for appellees Faith Rivera et al.

Sharon Brett, *Josh Pierson*, and *Kayla DeLoach*, of American Civil Liberties Union Foundation of Kansas, of Overland Park, and *Mark P. Gaber*, pro hac vice, *Richard Samuel Horan*, pro hac vice, and *Orion de Nevers*, pro hac vice, of Campaign Legal Center, of Washington, D.C., *Elisabeth S. Theodore*, *R. Stanton Jones*, and *John A. Freedman*, of Arnold & Porter Kaye Scholer LLP, of Washington, D.C., and *Rick Rehorn*, of Tomasic & Rehorn, of Kansas City, were on the briefs for appellees Tom Alonzo et al.

No appearance by Jamie Shew, appellee.

Edward D. Greim, *Todd P. Graves*, and *George R. Lewis*, of Graves Garrett LLC, of Kansas City, Missouri, were on the brief for amicus curiae Kansas Legislative Coordinating Council.

Teresa A. Woody, of Kansas Appleseed Center for Law and Justice Inc., of Lawrence, was on the brief for amicus curiae Kansas Appleseed Center for Law and Justice Inc.

The opinion of the court was delivered by

STEGALL, J.: In this first-of-its-kind litigation in the state of Kansas, plaintiffs assert unique and novel claims that would bar the Kansas Legislature from enacting congressional district lines such as those at issue in the map colloquially known as "Ad Astra 2." Eager to reshape the legal landscape of redistricting in Kansas, plaintiffs invited the district court to craft new and never before applied legal standards and tests unmoored from either the text of the Kansas Constitution or the precedents of this court. Accepting the invitation, the lower court found the legislative reapportionment in Ad Astra 2 constitutionally deficient as a partisan and racial gerrymander. On review, we find the district court's legal errors fatally undermine its conclusions and, applying the correct legal standards to the facts as found by the lower court, we determine that on the record before us, plaintiffs have not prevailed on any of their claims that Ad Astra 2 violates the Kansas Constitution. Accordingly, we reverse the judgment of the lower court.

FACTUAL AND PROCEDURAL BACKGROUND

The Kansas Legislature is required to redraw Kansas' congressional districts every decade based on population shifts documented in the United States Census. The Legislature fulfilled this duty by passing Substitute for Senate Bill 355 which contained the Ad Astra 2 congressional map. Governor Laura Kelly vetoed the bill, but the Legislature was able to override Governor Kelly's veto, and the bill took effect on February 10, 2022. The new districts gave rise to three lawsuits that were consolidated in Wyandotte County. After a trial, the district court determined that Sub. SB 355 violates the Kansas Constitution. Defendants, who we will refer to as the State, appealed and on May 18 we held that, on the record before us, plaintiffs have not prevailed on their claims that Sub. SB 355 violates the Kansas Constitution. We reversed the judgment and lifted the permanent injunction ordered by the district court. Today, we fully set forth the facts, rationale, and holdings of the court.

Last year, the Kansas Legislature began the process of preparing to redraw Kansas' four congressional districts according to the 2020 Census. Through in-person and virtual meetings, the House and Senate Committees on Redistricting held a listening tour of town hall meetings across the state—14 meetings were held in 14 cities in August 2021, and 4 meetings were held virtually in November 2021.

Also playing a role in the process is the document known as "the Guidelines." The Proposed Guidelines and Criteria for 2022 Congressional and State Legislative Redistricting are a set of principles that set

forth "traditional redistricting criteria" substantively the same as those used in the 2012 redistricting cycle. The Guidelines provide calculations for the correct population metrics to determine district size, as well as general priorities for the Legislature to consider. Those priorities include: (1) basing districts on data from the 2020 Census; (2) crafting districts as numerically as equal in population as practical; (3) the plan should have neither the purpose nor effect of diluting minority voting strength; (4) the districts should be as compact and contiguous as possible; (5) the integrity of existing political subdivisions should be preserved when possible; (6) the plan should recognize communities of interest; (7) the plan should avoid contests between incumbents when possible; and (8) the districts should be easily identifiable and understandable by voters.

The Legislature's bipartisan Redistricting Advisory Group adopted the Guidelines and the Senate and House Redistricting Committees received presentations on the Guidelines at initial meetings in January 2022. Only the House Committee on Redistricting adopted the Guidelines—the Senate Committee on Redistricting did not. And more importantly, neither the House nor the Senate as a whole adopted the Guidelines.

Senate Bill 355 was introduced in the Senate on January 20, 2022, and referred to the Committee on Redistricting. The report of the Senate Committee on Redistricting recommended that Sub. SB 355 be adopted. On January 21, several proposed amendments to the plan introduced on the Senate floor were rejected, and that same day the Senate passed Sub. SB 355 on emergency final action by a vote of 26 to 9. The

bill was sent to the House on January 24, passed the House Redistricting Committee, and reached the House floor on January 25. After several motions to amend were rejected, the House passed the bill by a vote of 79 to 37.

Sub. SB 355 was then enrolled and presented to Governor Kelly on January 27. Governor Kelly vetoed the bill on February 4. Initially, the motion to override the veto failed, and the veto was sustained. But upon a motion to reconsider, the Senate voted to override the veto 27 to 11, and the House 85 to 37. Sub. SB 355 took effect upon publication in the Kansas Register on February 10, 2022.

Shortly thereafter, plaintiffs sued in state court in Wyandotte County to enjoin the use of Sub. SB 355 in the upcoming elections. The plaintiffs in *Rivera v. Schwab* and *Alonzo v. Schwab* sued Kansas Secretary of State Scott Schwab and Wyandotte County Election Commissioner Michael Abbott, alleging that Sub. SB 355 is a partisan and racial gerrymander and dilutes minority votes in violation of several provisions of the Kansas Constitution. Two weeks later, the plaintiffs in *Frick v. Schwab* sued Schwab and Douglas County Clerk Jamie Shew in Douglas County also alleging that Sub. SB 355 is an unconstitutional partisan gerrymander. We will collectively refer to the plaintiffs in the three actions as plaintiffs.

Plaintiffs' petitions brought several claims under the Kansas Constitution. The Alonzo plaintiffs argued that Ad Astra 2 (1) violates Kansas Constitution Bill of Rights sections 1 and 2 "because it targets [plaintiffs] for differential treatment based upon their political

beliefs and past votes"; (2) violates sections 3 and 11 of the Kansas Constitution Bill of Rights because it "discriminates against Kansas Democrats based on their protected political views and past votes, burdens the ability of those voters to effectively associate, and retaliates against Democrats for exercising political speech" by preventing "them from being able to coalesce their votes and elect their preferred candidates who share their political views"; (3) "imposes a severe burden" on plaintiffs' right to vote under Article 5, section 1 by "targeting Democratic voters to prevent them from translating their votes into victories at the ballot box"; and (4) violates equal protection guarantees in sections 1 and 2 of the Kansas Constitution Bill of Rights because it was "created specifically to eliminate the only seat currently held by a minority."

The Rivera plaintiffs similarly claimed violations under the Kansas Constitution citing the right to vote, equal protection, freedom of speech, and freedom of assembly, as well as making claims of racial vote dilution. The Rivera plaintiffs also argued that Ad Astra 2 impermissibly split Kansas' four Native American reservations into two districts.

The Frick plaintiffs allege that the Legislature engaged in partisan gerrymandering by "scooping out" the City of Lawrence from District 2 and adding it to the "Big First." They allege violations of the Kansas Constitution Bill of Rights sections 1, 2, 3, 11, 20, and Article 5, section 1. The Frick plaintiffs, like the Alonzo and Rivera plaintiffs, contend that Ad Astra 2 was developed in secret, rushed through the legislative

process, and contradicts established redistricting guidelines.

Plaintiffs recognized that population growth has made it impossible to keep Wyandotte County and Johnson County in a single district but asserted that it was possible and desirable to preserve Wyandotte County in a single district. They argued that under the new plan, the likely electoral outcomes now "are entirely inconsistent with the statewide preferences of Kansas voters," noting that Democrats received 40% of the votes from 2016 to 2020, but asserting that in future elections Democrats will only have a chance to win 25% of the seats at best, with a likelihood that Democrats may receive no seats at all.

They further asserted that while each plaintiff is currently able to "elect a candidate of their choice in Congressional District [CD] 3," under the new plan, CD 3 is now "cracked," separating a portion of minority voters from "crossover white voters." Plaintiffs allege that these minority voters are now "submerged" in the new CD 2 and CD 3 where "white bloc voting will prevent them from electing their preferred candidates." They assert that minority voters—which comprise 29% of the voting age population in CD 3—are only "able to elect their preferred candidate with assistance from a portion of white voters," because "while white voters in Kansas strongly prefer Republican candidates overall, enough white voters in current District 3 cross over to support minority-preferred Democratic candidates to permit those candidates to prevail."

After plaintiffs filed their lawsuits, Schwab and Abbott petitioned our court for mandamus and quo

warranto seeking dismissal of the cases. We denied the petition, as mandamus and quo warranto were not available remedies. See *Schwab v. Klapper*, 315 Kan. 150, 154-55, 505 P.3d 345 (2022). We then consolidated the three cases in Wyandotte County. Defendants moved to dismiss the cases, which the district court denied after a hearing. After an expedited discovery schedule, trial began on April 4, 2022. At the close of plaintiffs' case, defendants moved for judgment, which the district court again denied.

On April 25, 2022, the district court held that Sub. SB 355 violates the Kansas Constitution as both a partisan and a racial gerrymander. Alongside photographs of legislators looking at their phones during their listening tours, the district court first stated that Ad Astra 2 was created in secret and "pushed through the Legislature" on "largely party-line votes" and "with no Democratic support." The court took issue with the fact that the "map-drawers remain a mystery," and the court pointed to testimony from a Senator indicating that it "is not common" for a bill to move so quickly out of committee.

The district court found that a net total of 116,668 people, or 3.9% of Kansas' population, had to be moved to meet population requirements, but noted that Ad Astra 2 moves 394,325 people, or 13.4% of the state population—significantly more than necessary to meet district population requirements.

The court further stated that "the map split known communities of interest, ignored public input, diluted minority votes, and constituted 'textbook gerrymandering.'" The court found that "Ad Astra 2

was designed intentionally and effectively to maximize Republican advantage," relying on expert testimony to conclude that the plan "is an intentional, effective partisan gerrymander." The court, again relying on expert testimony, found that "partisan intent predominated over the Guidelines and traditional redistricting criteria in the drawing of Ad Astra 2 and is responsible for the Republican advantage" in Ad Astra 2. The district court found that plaintiffs' experts' use of statewide elections "to measure the partisanship of simulated and enacted districts is a reliable methodology," and concluded that "Ad Astra 2's districts are less compact than they would be under a map-drawing process that adhered to the Guidelines and prioritized the traditional districting criterion of compactness."

The district court, again crediting expert testimony, found that "Ad Astra 2 was designed to give Republicans a partisan advantage, and that the enacted plan exhibits extreme pro-Republican bias that cannot be explained by Kansas's political geography or by adherence to the Guidelines or traditional redistricting criteria." The court credited expert testimony that asserted splitting Lawrence from Douglas County diluted the votes of Democratic voters in the region and found that the experts' evidence demonstrated "that Ad Astra 2 disregards communities of interest in support of partisan gains."

In addition to its findings regarding partisan factors, the district court also stated that "Ad Astra 2 has high levels of racial dislocation" and concluded that the plan "intentionally and effectively dilutes the

voting power of Wyandotte County's minority communities." The court again credited plaintiffs' experts that testified that "racial minorities were moved among districts far more often than white Kansans and that they were divided between districts in a way that contravenes Kansas's racial geography and dilutes minority voting strength." The court further found that the new plan "has the effect of eliminating a performing minority crossover district," resulting in a "particularly pronounced" impact on minority Democratic voters "because the plan treats Democratic minority voters considerably worse than it treats white Democratic and white Republican voters."

The court also credited expert testimony that Ad Astra 2 "negatively impacts the state's Native American community" because the new plan places the Prairie Band Potawatomi reservation into the first district, whereas under the prior plan, all four Native American reservations in Kansas were in the second district. In sum, the court concluded that "Ad Astra 2's dilution of Democratic voting power will obstruct Plaintiffs' ability to elect and support their candidates of choice."

It is critical at this juncture to stop and observe that many of the lower court's fact-findings embed a form of question begging as to what—exactly—is the legal measuring stick doing the work behind the finding. Put another way, many of the district court's found facts are not stated in the form of a pure factual finding. Instead, they assume within them an unstated and unquestioned legal standard. For example, what counts as "treat[ing] Democratic minority voters considerably

worse than . . . white Democratic and white Republican voters"? By what standard is the district court measuring an "intentional[] and effective[] dilut[ion]" of the minority vote? As we will explain at greater length below, when a district court mixes questions of law and fact like this, disentangling them may be impossible on review. This is especially true when it is clear—as it is here—that the lower court's findings of fact are permeated with and tainted by erroneous legal conclusions.

In any event, after these mixed conclusions of fact and law, the lower court then held the Kansas Constitution "prohibit[s] partisan gerrymandering" to any degree. The court believed it "neither necessary nor prudent" to "articulat[e] a bright-line standard" for political gerrymandering claims. Rather, it "suffice[d] for the Court's purposes that a standard exists" for the present case. Relying on "opinions of the highest courts in other states"—rather than the text of the Kansas Constitution—the district court created its own test: (1) "the Legislature acted with the purpose of achieving partisan gain by diluting the votes of disfavored-party members" and (2) the map "will have the desired effect of substantially diluting disfavored-party members' votes." In applying this test, the district court relied on what it discerned as "partisan fairness metrics" and "neutral criteria." Applying this test, the lower court found Ad Astra 2 to be an impermissible "intentional and effective partisan gerrymander" and concluded that Sub. SB 355 could not satisfy strict scrutiny.

The lower court then turned to plaintiffs' race-based claims. Acknowledging that such claims sound in equal

protection, the district court held that the Kansas Constitution "affords separate, adequate, and greater" equal protection guarantees "than [does] the federal Constitution." Following this, the district court devised and applied its own five factor test to decide that Ad Astra 2 was an impermissible racial gerrymander that also unconstitutionally diluted minority votes in violation of the Kansas Constitution. It acknowledged that the elements of such a claim—and whether they include a showing of discriminatory intent—is an "issue of first impression." But it declined to decide whether a showing of intent was required because it determined Ad Astra 2 both "*intentionally* and effectively dilutes minority votes." Under the legal tests crafted by the district court, this was sufficient, in its view, to find Ad Astra 2 violates the Kansas Constitution.

The district court permanently enjoined Kansas' election officials "from preparing for or administering any primary or general congressional election under Ad Astra 2." And it further ordered that the "Legislature shall enact a remedial plan in conformity with this opinion as expeditiously as possible." The State immediately appealed to this court.

DISCUSSION

On appeal, the parties spar over several questions: (1) whether the Elections Clause bars state courts from reviewing reapportionment legislation for compliance with state law; (2) what standards this court should use when interpreting and applying the relevant provisions in the Kansas Constitution; (3) whether claims of partisan gerrymandering are justiciable; and

(4) whether Ad Astra 2 discriminates against minority voters. We consider each issue below.

But before doing so, we observe that while respecting the dissenters' disagreements with our constitutional reasoning and conclusions, rhetoric describing this outcome as a "stamp of approval" or "complicit" is out of place. Just because a court declines to overrule a legislative enactment does not mean the court has rubber stamped, endorsed, or somehow participated in that enactment. Indeed, "[c]ourts are only concerned with the legislative power to enact statutes, not with the wisdom behind those enactments. When a legislative act is appropriately challenged as not conforming to a constitutional mandate, the function of the court is . . . merely to ascertain and declare whether legislation was enacted in accordance with or in contravention of the constitution—and not to approve or condemn the underlying policy." *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, 348-49, 789 P.2d 541 (1990), *abrogated on other grounds by Miller v. Johnson*, 295 Kan. 636, 289 P.3d 1098 (2012), and *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 442 P.3d 509 (2019).

I. We Have Jurisdiction to Hear Plaintiffs' Claims

The Attorney General claims the Elections Clause of the United States Constitution bars any state court from considering the validity of legislatively enacted congressional district maps. The Elections Clause provides:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4.

The State frames its argument as a complete jurisdictional bar, arguing broadly that "when the state legislature missteps, the authority to correct it lies with Congress." We are unpersuaded. The United States Supreme Court has never embraced this view of the Elections Clause. In 1932, the Supreme Court examined whether the Elections Clause "invest[ed] the legislature with a particular authority" which would "render[] inapplicable the conditions which attach to the making of state laws." *Smiley v. Holm*, 285 U.S. 355, 365, 52 S. Ct. 397, 76 L. Ed. 795 (1932). The Court concluded that "the exercise of the authority must be in accordance with the method which the State has prescribed for legislative enactments," finding "no suggestion in the [Elections Clause] of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State has provided that laws shall be enacted." 285 U.S. at 367-68.

And in recent years, the Supreme Court has continued to reject similar arguments. See *Rucho v. Common Cause*, 588 U.S. ___, 139 S. Ct. 2484, 2495-96, 204 L. Ed. 2d 931 (2019) (rejecting the argument that "through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions

that only Congress can resolve"); *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787, 817-18, 135 S. Ct. 2652, 192 L. Ed. 2d 704 (2015) ("Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."). In fact, the Supreme Court's recent decision in *Rucho* expressly contemplates state court review of congressional reapportionment schemes for compliance with state law. 139 S. Ct. at 2507 (in a congressional redistricting challenge, the Court declined to find that partisan gerrymandering violated the U.S. Constitution, but noted that "state statutes and state constitutions can provide standards and guidance for state courts to apply").

The Attorney General points us to a few recent statements of skepticism from individual Supreme Court justices toward this body of law. In 2021, the Supreme Court denied a petition for certiorari in *Republican Party of Pennsylvania v. Degraffenreid*, 592 U.S. ___, 141 S. Ct. 732, 209 L. Ed. 2d 164 (2021). The decision resulted in two dissenting opinions. Justice Thomas expressed that "petitioners presented a strong argument that the Pennsylvania Supreme Court's decision violated the Constitution by overriding 'the clearly expressed intent of the legislature'" because "the Federal Constitution, not state constitutions, gives state legislatures authority to regulate federal elections." 141 S. Ct. at 733 (Thomas, J., dissenting). Justice Alito, joined by Justice Gorsuch, pointed out that the Elections Clause—which confers on state

legislatures 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." 141 S. Ct. at 738 (Alito, J., dissenting). The following year, Justice Alito again dissented from the denial of an application for stay, joined by Justices Thomas and Gorsuch. *Moore v. Harper*, 595 U.S. ____, 142 S. Ct. 1089, 212 L. Ed. 2d 247 (2022) (Alito, J., dissenting). He expressed similar concern with the growing issue over the proper interpretation of the Elections Clause. Justice Kavanaugh agreed with Justice Alito's position that the Court should review the Elections Clause issue. 142 S. Ct. 1089 (Kavanaugh, J., concurring).

But these statements are not controlling law—the justices making them do not even purport to make this claim. And we cannot accept the Attorney General's invitation to ground our rulings on speculation concerning the future direction of Supreme Court jurisprudence. Instead, we are bound to follow United States Supreme Court precedent on questions of federal law. See *Arizona v. Evans*, 514 U.S. 1, 8-9, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) ("[S]tate courts . . . are *not* free from the final authority of" the Supreme Court when interpreting the U.S. Constitution); *State v. Tatro*, 310 Kan. 263, 272, 445 P.3d 173 (2019) ("[T]his court must follow the United States Supreme Court's interpretation of the United States Constitution."). We therefore conclude that we are not jurisdictionally barred from reviewing reapportionment

legislation for compliance with the Kansas Constitution.

II. THE GOVERNING LAW

1. Anti-gerrymandering claims sound in equal protection

The gravamen of plaintiffs' claims sound in equal protection. While the other provisions of the Kansas Constitution relied upon by the plaintiffs and the district court—Kan. Const. Bill of Rights, §§ 1, 3, 11, 20; art. 5, § 1—protect vital rights, they do not provide an independent basis for challenging the drawing of district lines.

Equal protection is at the heart of both partisan and racial gerrymandering or vote dilution claims. See *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 413-14, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006) (*LULAC*) (federal equal protection challenge to congressional redistricting map as unconstitutional partisan gerrymander); *Gill v. Whitford*, 585 U.S. ___, 138 S. Ct. 1916, 1925-26, 201 L. Ed. 2d 313 (2018) (same, despite allegations of violations of federal rights to free speech); *Rucho*, 139 S. Ct. at 2491 (same, despite allegations of violations of the Elections Clause, First Amendment, and Article I); *Shaw v. Reno*, 509 U.S. 630, 642, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993) (federal equal protection challenge to congressional redistricting map as unconstitutional racial gerrymander); *Miller v. Johnson*, 515 U.S. 900, 903-04, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995) (same).

Throughout this litigation, plaintiffs and the district court have attempted to decorate and enhance their

claims with various citations to rights found in other provisions in the Kansas Constitution, including the right to vote, and rights to free speech and association. Kan. Const. Bill of Rights, §§ 1, 3, 11, 20; art. 5, § 1. Plaintiffs and the district court also recite "procedural defects" in the process of drafting Sub. SB 355—including allegations that the listening tour was simply a box-checking exercise; Ad Astra 2 was adopted with unseemly rapidity; Ad Astra 2 was created in secret by Republicans; and the Legislature ignored the Guidelines. These procedural claims echo the concerns raised in *In re Validity of Substitute Senate Bill 563*, 315 Kan. ___ (2022) (No. 125,083 this day decided). As we determined there, however, such complaints do not rise to the level of constitutional objections. Therefore, the basis of each of plaintiffs' claims remains foundationally grounded in equal protection guarantees.

The district court began with a discussion of plaintiffs' equal protection claims under sections 1 and 2 of the Kansas Constitution Bill of Rights, stating that "partisan gerrymandering deprives voters of '*equal power* and influence in the making of laws which govern'" them and asserting that the "goal of partisan gerrymandering is to eliminate the people's authority over government by giving different voters vastly *unequal political* power." (Emphases added.) The court then turned to the right to vote under Article 5, section 1, framing it in equal protection terms. It explicitly styled its analysis under equal protection, stating that "the right to vote is secured by *Sections 1 and 2* of the Kansas Bill of Rights and by Article 5, Section 1 . . . ." (Emphasis added.) The court relied on sections 1 and 2

of the Kansas Constitution Bill of Rights in defining the right to vote as the right to have "'equal legislative representation.'"

Similarly, the lower court conflated the rights to free speech and assembly with the right to equal protection. First the district court claimed that partisan gerrymandering singles out a "specific class" of voters for "disfavored treatment." Then, the district court held that "[w]hen the state engages in gerrymandering to negate that party's power, it has the effect of 'debilitat[ing]' the *disfavored party* and 'weaken[ing] its ability to carry out its core functions and purposes.'" (Emphasis added.) This analysis is again steeped in equal protection principles.

At bottom, plaintiffs assert a variety of constitutional rights but the sole mechanism relied on for judicial enforcement of those rights is the constitutional guarantee of equal protection—a fact the district court effectively understood. *Any line drawing*, even one that violates equal protection guarantees, does not infringe on a stand-alone right to vote, the right to free speech, or the right to peaceful assembly. See *Rucho*, 139 S. Ct. at 2504 ("[T]here are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district."); see also *Harper v. Hall*, 380 N.C. 317, 448, 868 S.E.2d 499 (2022) (Newby, C.J., dissenting) ("The fundamental right to vote on equal terms simply means that each vote should have the same weight. . . . [P]artisan gerrymandering has no significant impact

upon the right to vote on equal terms under the one-person, one-vote standard. . . . Partisan gerrymandering plainly does not place any restriction upon the espousal of a particular viewpoint."), *petition for cert. docketed* March 21, 2022.

2. Section 2 of the Kansas Constitution Bill of Rights is the textual grounding and location of our Constitution's guarantee of equal protection to all citizens

Traditionally we have held that under the Kansas Constitution Bill of Rights, sections 1 and 2 offer the same guarantees of due process and equal protection as provided in the Fourteenth Amendment of the United States Constitution. *Farley v. Engelken,* 241 Kan. 663, 667, 740 P.2d 1058 (1987) (Sections 1 and 2 of the Kansas Constitution Bill of Rights "are given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law."). At times our court has attempted to distinguish between the two sections as providing equal protection for "individual rights" (Section 1) and "political rights" (Section 2). See *State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22 (2005) ("Section 1 applies in cases . . . when an equal protection challenge involves individual rights."); *Atchison Street Rly. Co. v. Mo. Pac. Rly. Co.*, 31 Kan. 660, Syl. ¶ 3, 3 P. 284 (1884) ("Section 2 is devoted to matters of a political nature.").

We have recently clarified that Kansas' section 1 has no textual counterpart in the U.S. Constitution and therefore has its own independent meaning and effect. See *Hodes & Nauser, MDs v. Schmidt,* 309 Kan. 610,

624, 440 P.3d 461 (2019) ("[T]his side-by-side comparison reveals, section 1 contains the following words not found in the Fourteenth Amendment: 'All men are possessed of equal and inalienable natural rights.' In fact, no provision of the United States Constitution uses the term 'natural rights' . . . . "); 309 Kan. at 688 (Biles, J., concurring) ("As both the majority and dissent point out, section 1 of the Kansas Constitution Bill of Rights differs from any federal counterpart . . . ."); 309 Kan. at 763 (Stegall, J., dissenting) (Recognizing section 1 provides unique protections different from the federal Constitution: "[o]f course, the language of the Declaration does not carry 'the force of organic law' in the federal Constitution as it does in Kansas.").

After our decision in *Hodes* (giving a substantive rights effect to section 1), it is clear that the textual grounding of equal protection guarantees contained in the Kansas Constitution Bill of Rights is firmly rooted in the language of section 2, which states:

> "All 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. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency." Kan. Const. Bill of Rights, § 2.

Even though *Hodes* changed the way in which we interpret section 1, it has not changed our historical and fundamental interpretation of the scope of equal

protection found in section 2. That is to say, section 2 is "given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law." See *Farley*, 241 Kan. at 667; *State ex rel. Tomasic v. Kansas City, Kansas Port Authority*, 230 Kan. 404, 426, 636 P.2d 760 (1981); *State v. Wilson*, 101 Kan. 789, 795-96, 168 P. 679 (1917). Put even more clearly, the equal protection guarantees found in section 2 are coextensive with the equal protection guarantees afforded under the Fourteenth Amendment to the United States Constitution. Compare U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."); with Kan. Const. Bill of Rights § 2 ("[A]ll free governments are . . . instituted for [the people's] equal protection and benefit."). Therefore, Kansas courts shall be guided by United States Supreme Court precedent interpreting and applying the equal protection guarantees of the Fourteenth Amendment of the federal Constitution when we are called upon to interpret and apply the coextensive equal protection guarantees of section 2 of the Kansas Constitution Bill of Rights.

III. PLAINTIFFS' PARTISAN GERRYMANDERING CLAIMS

1. The political question doctrine

In addressing plaintiffs' claim that Ad Astra 2 is an impermissible partisan gerrymander, we are confronted first with what has come to be known as the "political question doctrine." This legal rule guiding judicial decision-making is nearly as old as the Republic, going all the way "back to the great case of

Marbury v. Madison." § 15 "Case or Controversy"—Political Questions, 20 Fed. Prac. & Proc. Deskbook § 15 (2d ed.).

There, Chief Justice John Marshall "expressed the view that the courts will not entertain political questions even though the questions involve actual controversies." § 15 "Case or Controversy"—Political Questions, 20 Fed. Prac. & Proc. Deskbook § 15. The Court in *Marbury* held that the executive branch (and by extension, the legislative branch) is vested "with certain important political powers" and those branches are accountable only to their "country"—that is the voters—and to their "own conscience" because the "subjects are political." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66, 2 L. Ed. 60 (1803).

As the political question doctrine developed, it became clear that in certain circumstances a respect for the coequal and coordinate executive and legislative branches of government demanded that the judicial branch admit itself not competent to rule on matters purely political. That is, the "political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations" that are inextricable from the exercise of political discretion vested in the political branches of government. 16 C.J.S. Constitutional Law § 392.

Judges called on to determine when the political question doctrine is implicated must ask themselves—among other things—whether the controversy is capable of resolution within the competency of the judicial branch. That is, do the traditional tools of judging—such as clear, neutral, and

"judicially discoverable and manageable standards"—exist as a compass against which to measure the true north of any controversy? *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). Or, would judges be left to simply substitute their own "initial policy determination" for that of the other branches? 369 U.S. at 217.

If resolving a controversy is outside the scope of the competence of the judiciary, it is said to be "nonjusticiable"—that is, it is a matter committed by the structure of our Constitution to the legislative or executive branches of government. And these branches are ultimately accountable both to the voters and their own conscience. And while common sense and history may not be able to speak to the effect of conscience on political decision-makers, democratic accountability wielded by voters is woven into the very fabric of our government and will—undoubtedly—have its say in the matter.

This outcome is not an unfortunate accident or a mistake in our constitutional structure, but rather "a consequence of the separation of powers among the legislative, executive, and judicial branches." *Gannon v. State*, 298 Kan. 1107, 1119, 1136-37, 319 P.3d 1196 (2014). And this very separation of powers is one of the surest timbers guaranteeing that the house of liberty stands firm and lasts across the centuries amid the swirling winds of any particular political issue *du jour*.

2. Partisanship in district line drawing is permissible

Plaintiffs do suggest the application of a clear standard to this dispute. They simply claim that partisan gerrymandering is verboten under Kansas law. That is, they claim that any consideration by the Legislature of partisan factors in deciding where to draw district lines is offensive to constitutional principles. They ask Kansas courts to adopt a bright line standard of zero tolerance and mandate that only politically neutral factors be used by the Legislature. And the district court agreed, holding that the Kansas Constitution "prohibit[s] partisan gerrymandering."

The dissent takes issue with this characterization. While ultimately, how we characterize plaintiffs' political gerrymandering claims does not impact our analysis, it is helpful to understand exactly why such a bright line rule is attractive. In fact, at oral argument, counsel for the Frick plaintiffs defined "political gerrymandering" as *any* line drawing "with party in mind." In response to the question, "How is partisan gerrymandering a legitimate government function?" counsel for plaintiffs responded, "I don't think it is legitimate. . . .To say that it's gone on for a long time and it seems inevitable doesn't mean it's legitimate at all. . . . I don't think that partisan gerrymandering has a legitimate interest."

If this was the law in Kansas, resolving claims of partisan gerrymandering would indeed be justiciable. A bright line prohibition is certainly a judicially manageable standard. But this has never been the law in Kansas, and in reaching its conclusion the district

court completely ignored our large body of caselaw on this subject. For we have regularly and repeatedly held that the Legislature is constitutionally permitted to consider partisanship when drawing district lines. And this rule is consistent with longstanding United States Supreme Court precedent.

Over four decades ago we wrote: "'Politics and political considerations are inseparable from districting and apportionment.'" *In re House Bill No. 2620*, 225 Kan. 827, 840, 595 P.2d 334 (1979) (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753, 93 S. Ct. 2321, 37 L. Ed. 2d 298 [1973]). We have repeatedly recognized the reality that the "'political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. . . . [I]t requires no special genius to recognize the political consequences of drawing a district line along one street rather than another.'" *In re House Bill No. 2620*, 225 Kan. at 840 (quoting *Gaffney*, 412 U.S. at 753). Considering these hard political truths inherent in the redistricting process, we reached the inescapable conclusion that the "'reality is that districting inevitably *has and is intended to have* substantial political consequences.'" (Emphasis added.) *In re House Bill No. 2620*, 225 Kan. at 840 (quoting *Gaffney*, 412 U.S. at 753). The district court cannot write these hard truths out of existence with the fiat power of its judicial pen. Our precedent (and prudent judgment) counsels a more modest approach to questions that touch the core constitutional principle of separation of powers and the ongoing dictate that the coordinate departments of government accord one another the due and proper

respect expected and owed under our unique constitutional arrangements.

Given this, if the redistricting process is intended to have "substantial political consequences" it is no surprise that our court has consistently rejected pleas to establish a bright line prohibition on politics in the redistricting process. *In re 2002 Substitute for Senate Bill 256*, 273 Kan. 731, 734, 45 P.3d 855 (2002). For example, we have described the legislative goal of "safely retaining seats for the political parties" as a "legitimate political goal." *2002 Substitute for House Bill 2625*, 273 Kan. 715, 722, 44 P.3d 1266 (2002). In 1989, we rejected the claim that legislatively drawn lines were unlawful because "political considerations prevailed over stated apportionment guidelines" on the grounds that "any plan would . . . have adverse consequences for incumbents who are pitted against each other." *In re Substitute for House Bill No. 2492*, 245 Kan. 118, 128, 775 P.2d 663 (1989). In yet another redistricting case, we plainly held that objections to legislative line drawing on the mere assertion that "there was partisan political gerrymandering in redistricting" could never "reveal a fatal constitutional flaw" without more. *In re Senate Bill No. 220*, 225 Kan. 628, 637, 593 P.2d 1 (1979).

The United States Supreme Court, too, has never suggested partisanship is unlawful if it touches the legislative redistricting process. In fact, the opposite. In *Vieth v. Jubelirer* the Court wrote the United States Constitution "clearly contemplates districting by political entities" and the process "unsurprisingly . . . turns out to be root-and-branch a matter of politics."

541 U.S. 267, 285-86, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004). As such, "*partisan districting is a lawful and common practice* [which] means that there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation." (Emphasis added.) 541 U.S. at 285-86. The operative principle is clear.

And while the plurality holding of *Vieth* (that partisan gerrymandering claims are nonjusticiable) did not gain majority support on the Court until 2019 in *Rucho*, there has long been widespread agreement among justices across the spectrum that partisan factors are *legitimate considerations in the districting process*. For example, in dissent in *Vieth*, Justice Stephen Breyer wrote that using "purely political boundary-drawing factors" can "find justification in . . . desirable democratic ends" even though it may be "harmful to the members of one party." 541 U.S. at 360 (Breyer, J., dissenting).

This principle is commonplace in the United States Supreme Court's redistricting jurisprudence. "We have never denied that apportionment is a political process, or that state legislatures could pursue legitimate secondary objectives as long as those objectives were consistent with a good-faith effort to achieve population equality at the same time." *Karcher v. Daggett*, 462 U.S. 725, 739, 103 S. Ct. 2653, 77 L. Ed. 2d 133 (1983). In a decision written by Justice Elena Kagan the Court described "partisan advantage" as a legitimate consideration in district line drawing on an equal footing with other traditional considerations such as "compactness" and "respect for political subdivisions."

Cooper v. Harris, 581 U.S. ____, 137 S. Ct. 1455, 1464, 197 L. Ed. 2d 837 (2017); see also *Easley v. Cromartie*, 532 U.S. 234, 239, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001) (recognizing that "the creation of a safe Democratic seat" was a "constitutional political objective"); *Gaffney*, 412 U.S. at 753-54 (legislatures may validly "work with . . . political . . . data" and may "seek . . . to achieve the political or other ends of the State, its constituents, and its officeholders").

We need not belabor the point.

3. Claims of excessive partisan gerrymandering are nonjusticiable in Kansas

Given that the Legislature may appropriately and lawfully consider partisan factors in redistricting, at the heart of a claim of partisan gerrymandering is not merely that partisan factors were used, but rather that they were used "too much." The lower court at one point appears to acknowledge this by quoting our prior caselaw declining to find excessive partisan gerrymandering in any previous case. The district court plausibly drew the lesson from these decisions that we had reached the "merits" of older partisan gerrymandering claims. But this overreads those decisions. In fact, our predecessors never actually had to ask the crucial question—how much is too much? And are there any manageable and neutral judicial standards by which judges can decide that question without resort to our own partisan biases?

These are not new questions for courts and judges. In *LULAC*, the Court put the matter succinctly when it described the plaintiff's insurmountable problem in

trying to articulate "a standard for deciding *how much partisan dominance is too much*." (Emphasis added.) 548 U.S. at 420. This is precisely the problem today's plaintiffs cannot overcome. This is because a "permissible intent—securing partisan advantage—does not become constitutionally impermissible . . . when that permissible intent 'predominates.'" *Rucho*, 139 S. Ct. at 2502-03.

Essentially, the *Rucho* Court struggled to know whether there can ever be "too much" of a legitimate legislative purpose in the process of state law-making. Its answer, in sum, was—*maybe*, but without codified law to guide judges in knowing when too much partisanship becomes so unfair as to offend constitutional principles, the question cannot be answered. In the parlance of justiciability, the question presents no "'clear, manageable and politically neutral'" judicial standard. 139 S. Ct. at 2500.

The Court explained further that:

> "[I]t is not even clear what fairness looks like in this context. There is a large measure of 'unfairness' in any winner-take-all system. Fairness may mean a greater number of competitive districts. Such a claim seeks to undo packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. As Justice White has pointed out, '[i]f all or most of the districts are competitive . . . even a narrow statewide

preference for either party would produce an overwhelming majority for the winning party in the state legislature.'

"On the other hand, perhaps the ultimate objective of a 'fairer' share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its 'appropriate' share of 'safe' seats. Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party.

"Or perhaps fairness should be measured by adherence to 'traditional' districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents. But protecting incumbents, for example, enshrines a particular partisan distribution. And the 'natural political geography' of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts. As Justice Kennedy has explained, traditional criteria such as compactness and contiguity 'cannot promise political neutrality when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not.'

"Deciding among just these different visions of fairness (you can imagine many others) poses

> basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is 'fair' in this context would be an 'unmoored determination' of the sort characteristic of a political question beyond the competence of the federal courts. [Citations omitted.]" 139 S. Ct. at 2500.

We find the reasoning of *Rucho* persuasive and expressly adopt it here. But that does not end the inquiry at the state level.

Rucho declared that it "is vital in such circumstances that the Court act only in accord with especially clear standards . . . [because] '[w]ith uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.'" 139 S. Ct. at 2498. And while *Rucho* could discern no such "especially clear standards" in federal law, the Court left open the possibility that such standards might exist under state law. As such, *Rucho* held that while claims of political gerrymandering were nonjusticiable political questions at the federal level, such claims may be justiciable at the state level.

We agree with the Court's characterization of its holding—that it "does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void." 139 S. Ct. at 2507. This is because states are free to adopt

clear standards expressly setting limits on partisan gerrymandering. Such clear standards can, the Court readily acknowledged, provide courts with the necessary tools to adjudicate claims of excessive partisan gerrymandering. The *Rucho* court pointed to Florida as a good example: "In 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution." 139 S. Ct. at 2507. The Court then noted that "[t]he dissent wonders why we can't do the same. The answer is that there is no 'Fair Districts Amendment' to the Federal Constitution. *Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply*." (Emphasis added.) 139 S. Ct. at 2507.

And that brings us squarely to the question we must now answer: Are claims of excessive partisan gerrymandering justiciable under the Kansas Constitution? Whether a claim is nonjusticiable because it may be a political question is a question of law over which we exercise unlimited review. *Gannon*, 298 Kan. at 1118, 1136.

We described Kansas' political question doctrine in *Gannon*, 298 Kan. at 1119, 1136-37. *Gannon* explained that Article II, Section 2 of the United States Constitution limits the judicial power to "Cases" or "Controversies."

> "But because Article 3 of the Kansas Constitution does not include any 'case' or 'controversy' language, our case-or-controversy requirement stems from the separation of

powers doctrine embodied in the Kansas constitutional framework. That doctrine recognizes that of the three departments or branches of government, '[g]enerally speaking, the legislative power is the power to make, amend, or repeal laws; the executive power is the power to enforce the laws, and the judicial power is the power to interpret and apply the laws *in actual controversies*.' (Emphasis added.) And Kansas, not federal, law determines the existence of a case or controversy, *i.e.*, justiciability. But this court is not prohibited from considering federal law when analyzing justiciability.

"Under the Kansas case-or-controversy requirement, courts require that (a) parties have standing; (b) issues not be moot; (c) issues be ripe, having taken fixed and final shape rather than remaining nebulous and contingent; and (d) *issues not present a political question*. . . .

. . . .

"The United States Supreme Court has held: 'The nonjusticiability of a political question is primarily a function of the separation of powers.' In other words, it is an acknowledgment of 'the relationship between the judiciary and the other branches or departments of government.' . . .

"As a result, '[t]he governments, both state and federal, are divided into three departments, each of which is given the powers and functions appropriate to it. Thus a dangerous

> concentration of power is avoided, and also the respective powers are assigned to the department best fitted to exercise them.' As a consequence of the separation of powers among the legislative, executive, and judicial branches, '[q]uestions in their nature political . . . can never be made in this court.' [Citations omitted.]" (Emphasis added.) 298 Kan. at 1119, 1137.

To determine if a political question exists, we look for the presence of one or more of the six characteristics established by the United States Supreme Court in *Baker*, 369 U.S. at 217. We will dismiss a case as nonjusticiable because it is a political question only if at least one of these characteristics "is inextricable from the case" before us. 369 U.S. at 217. Here we are concerned exclusively with the *Rucho* question—is there a judicially discoverable and manageable standard in Kansas law that will guide a court in resolving any claim of excessive partisan gerrymandering? And unlike in Florida and other of our sister states that have codified limits on partisan gerrymandering, in Kansas the answer (for now) must be no.

As explained above, the lower court here adopted the most extreme version of plaintiffs' arguments—that any consideration of partisanship in district line drawing is constitutionally prohibited—and in so doing avoided the justiciability problem. That legal starting point is, however, demonstrably wrong.

Given this, the plaintiffs here have also proposed a variety of different metrics for measuring "fairness"

and answering the "how much is too much" question. But none of these metrics have a foundation in Kansas law—either statutory enactment or constitutional text. Plaintiffs denounce the Legislature's drawing of Ad Astra 2, criticizing it as an "abomination"; as giving an "unfair and unearned advantage" to Republicans; as being "devastating" for Lawrence Democrats; and because it "disincentivizes Democratic voter mobilization, voter registration, voter turnout, [and] fundraising," among other things. But as one author has put it, "[s]uch criticism assumes too much. One cannot consider gerrymandering the antithesis of fair representation unless one adopts some definition of fair representation in the first place." Moore, *A "Frightful Political Dragon" Indeed: Why Constitutional Challenges Cannot Subdue the Gerrymander*, 13 Harv. J.L. & Pub. Pol'y 949, 971 (1990). "Just as no configuration of boundary lines can claim to be natural or inherently just, so too no seat-to-vote ratio can claim to be natural or inherently just." 13 Harv. J.L. & Pub. Pol'y at 973.

In other words, before we can even begin evaluating whether an alleged partisan gerrymander is unconstitutional, we would first need to determine what our baseline definition of "fairness" is. And as the *Rucho* Court explained, deciding among different proposed metrics of fairness poses questions that are political, not legal. Any decisions made about redistricting—even if made by a neutral, independent court—would inherently involve making an initial policy determination. See *Gaffney*, 412 U.S. at 753-54 (noting that the Court has not "attempted the impossible task of extirpating politics from what are

the essentially political processes of the sovereign States").

Several other states have solved this problem by codifying such clear standards in their laws. Some states have mandated at least some of the traditional districting criteria for their mapmakers, and others have outright prohibited partisan favoritism in redistricting. See, e.g., Ohio Const. art. 11, § 6 (directing the Ohio redistricting commission to draw compact districts in a way that "correspond[s] closely to the statewide preferences of the voters of Ohio" and avoid drawing plans "primarily to favor or disfavor a political party"); Md. Const. art. III, § 4 (directing the Legislature to give "[d]ue regard" to "boundaries of political subdivisions" when drawing districts); Mich. Const. art. 4, § 6 (establishing an independent redistricting commission and requiring the commission to abide by specific procedural steps as well as a set of substantive criteria, including that the districts be "geographically contiguous"; "reflect the state's diverse population and communities of interest"; "reflect consideration of county, city, and township boundaries"; "be reasonably compact"; "not provide a disproportionate advantage to any political party"; and not "favor or disfavor an incumbent"); Mo. Const. art. III, § 3 ("Districts shall be [designed] in a manner that achieves both partisan fairness and, secondarily, competitiveness . . . . 'Partisan fairness' means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency."); Iowa Code § 42.4(5) (2016) ("No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of

Congress, or other person or group."); N.Y. Const. art. III, § 4 ("Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties. The commission shall consider the maintenance of cores of existing districts, of pre-existing political subdivisions, including counties, cities, and towns, and of communities of interest."); Colo. Const. art. V, § 44 ("The practice of political gerrymandering, whereby congressional districts are purposefully drawn to favor one political party or incumbent politician over another, must end.").

Kansas is substantially different from states having codified a constitutional duty to prohibit partisan gerrymandering. And we likewise differ from still other states that—lacking a clear constitutional mandate—have nevertheless discerned clear standards in their case precedent. See *Harper v. Hall*, 380 N.C. 317, 364, 385, 389, 868 S.E.2d 499 (2022) (discussing history of reapportionment litigation in North Carolina, noting N.C. Const. art. II, §§ 3, 5 incorporates "traditional neutral" principles of reapportionment but "does not include 'partisan advantage'" and the state's past gerrymandering cases provide "ample guidance as to possible bright-line standards that could be used to distinguish presumptively constitutional redistricting plans from partisan gerrymanders"); *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (recognizing vote dilution theory in reapportionment dispute).

Unlike these states, Kansas has not adopted such standards. For this reason, we cannot follow the

decisions of other state supreme courts—such as the North Carolina Supreme Court in *Harper*, a decision relied on heavily by plaintiffs and the lower court—that have found their states to be within the *Rucho* exception of states with "statutes and . . . constitutions" that "provide standards and guidance for state courts to apply." *Rucho*, 139 S. Ct. at 2507. In the absence of statutory or constitutional standards in Kansas—or even standards in our case precedent—plaintiffs point to the substantive content of the Guidelines and ask us to find standards of "fairness" there. But as already mentioned, the Legislature has never adopted the Guidelines. They certainly are not found in our Constitution. As such, the Guidelines are not "actual rules"—which is to say they are not law. *Apodaca v. Willmore*, 306 Kan. 103, 136, 392 P.3d 529 (2017) (Stegall, J., dissenting) (describing the legal difference between guidelines and rules).

During one Senator's testimony at trial, he struggled to articulate how much authority the Guidelines carried—he described them as "sort of a promise to the people." At most, the Guidelines represent a "promise" made only by the House Committee on Redistricting (the only formal committee of legislators to actually adopt them). And in any event, internal operating procedures of the Legislature—and the Guidelines cannot even go so far as to claim this status—are not binding authority that can give rise to a legal challenge that courts can adjudicate. See *Nixon v. United States*, 506 U.S. 224, 236, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993) (declining to "open[] the door of judicial review to the procedures used by the Senate").

Considering all of this, we conclude that until such a time as the Legislature or the people of Kansas choose to follow other states down the road of limiting partisanship in the legislative process of drawing district lines, neither the Kansas Constitution, state statutes, nor our existing body of caselaw supply judicially discoverable and manageable standards "for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral." *Rucho*, 139 S. Ct. at 2500. We hold that the question presented is nonjusticiable as a political question, at least until such a time as the Legislature or the people of Kansas choose to codify such a standard into law.

IV. PLAINTIFFS' RACE-BASED CLAIMS

1. The district court applied the wrong legal standards to evaluate plaintiffs' racial discrimination claims

In addition to claims of partisan gerrymandering, plaintiffs also alleged that the Legislature engaged in unconstitutional race-based discrimination when it enacted Ad Astra 2. Such claims brought under federal law arise under the Fourteenth Amendment's equal protection guarantees. See, e.g., *Cooper*, 137 S. Ct. at 1463 ("The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans."); *Miller*, 515 U.S. at 904 (the "central mandate" of the Equal Protection Clause of the Fourteenth Amendment is "racial neutrality in governmental decisionmaking"); *Shaw*, 509 U.S. at 641 (recognizing that minority vote dilution "schemes violate the Fourteenth Amendment when they are

adopted with a discriminatory purpose and have the effect of diluting minority voting strength").

As we have already explained, we will adhere to equal protection precedent from the United States Supreme Court when applying the coextensive equal protection guarantees found in section 2 of the Kansas Constitution Bill of Rights. The district court, however, concluded that the federal equal protection standards were inapplicable because "Kansas's guarantee of equal benefit 'affords separate, adequate, and greater rights than the federal Constitution.'" In doing so, the district court erred because, as explained above, the equal protection guarantees contained in section 2 are coextensive with the same equal protection guarantees enshrined in the Fourteenth Amendment. The lower court then compounded this legal error by crafting its own set of "five non-exclusive factors"—unmoored from precedent—for examining racial gerrymandering and minority voter dilution claims:

> "(1) whether the redistricting plan has a more negative effect on minority voters than white voters, (2) whether there were departures from the normal legislative process, (3) the events leading up to the enactment, including whether aspects of the legislative process impacted minority voters' participation, (4) whether the plan substantively departed from prior plans as it relates to minority voters, and (5) any historical evidence of discrimination that bears on the determination of intent."

In support of this newly articulated test, the district court provided just one citation to *Jones v. Kansas*

State University, 279 Kan. 128, 145, 106 P.3d 10 (2005). But *Jones* has no connection to redistricting, tests for racial discrimination, discriminatory intent, or the like. The page in *Jones* the district court cited to is merely a recitation of our familiar "fundamental rule" governing statutory interpretation "that the intent of the legislature governs if that intent can be ascertained." The district court erred in departing from the well-established and robust legal standards that abound in United States Supreme Court caselaw governing race-based claims made in redistricting challenges.

2. Section 2 protects against two distinct types of race-based decision-making by the Legislature in drawing district lines

Government decision-making on the basis of race is antithetical to the principles of equal protection enshrined in both the Fourteenth Amendment and in section 2 of the Kansas Constitution Bill of Rights. The equal protection guarantees found in section 2, like the Fourteenth Amendment, protect against two distinct kinds of racial discrimination in the drawing of district lines. First, section 2 protects against racial gerrymandering which occurs when a legislative body uses race as the predominant factor in choosing where to draw the lines. Second, section 2 protects against targeted minority voter dilution which occurs when a legislative body invidiously discriminates against a minority population to minimize or cancel out the potential power of the minority group's collective vote. The United States Supreme Court has set forth explicit legal tests to be applied to each of these distinct claims,

and we expressly adopt those same tests to apply when those challenges are made under section 2 of the Kansas Constitution Bill of Rights.

First, a plaintiff bringing a racial gerrymandering claim must demonstrate at the outset "that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *Cooper*, 137 S. Ct. at 1463. Determining which redistricting factor predominates presents a "most delicate task" for courts, *Miller*, 515 U.S. at 905, because "crucially, political and racial reasons are capable of yielding similar oddities in a district's boundaries. That is because, of course, 'racial identification is highly correlated with political affiliation.'" *Cooper*, 137 S. Ct. at 1473. As the Supreme Court has expressly recognized:

> "The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller*, 515 U.S. at 916.

A plaintiff can cross this threshold by showing that the Legislature subordinated lawful, race-neutral districting factors—such as compactness, respect for political subdivisions, and partisan advantage—to unlawful racial considerations. *Cooper*, 137 S. Ct. at

1463-64; see also *Bush v. Vera*, 517 U.S. 952, 971-73, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996) (finding that the "extreme and bizarre" shape, paired with "overwhelming evidence that that shape was essentially dictated by racial considerations of one form or another" "reveal that political considerations were subordinated to racial classification" because they were "unexplainable in terms other than race"); *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. ___, 137 S. Ct. 788, 798, 197 L. Ed. 2d 85 (2017) ("'[T]he constitutional violation' in racial gerrymandering cases stems from the 'racial purpose of state action, not its stark manifestation.' The Equal Protection Clause does not prohibit misshapen districts. It prohibits unjustified racial classifications." [Citation omitted.]); *Shaw*, 509 U.S. at 643 ("Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'").

Plaintiffs "may make the required showing through 'direct evidence' of legislative intent, 'circumstantial evidence of a district's shape and demographics,' or a mix of both." *Cooper*, 137 S. Ct. at 1463-64; see *Hunt v. Cromartie*, 526 U.S. 541, 549-50, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999).

Once plaintiffs have established that race was the predominant factor in how the lines were drawn, the burden shifts to the State to demonstrate that the legislation is narrowly tailored to achieve a compelling interest. *Cooper*, 137 S. Ct. at 1464; *Bethune-Hill*, 137 S. Ct. at 800-01; *Vera*, 517 U.S. at 958, 962 ("Strict scrutiny does not apply merely because redistricting is

performed with consciousness of race. . . . For strict scrutiny to apply, traditional districting criteria must be *subordinated to race*."). Compliance with the federal Voting Rights Act may be a compelling state interest. *Cooper*, 137 S. Ct. at 1459 ("This Court has long assumed that one compelling interest is compliance with the Voting Rights Act of 1965 [VRA or Act]. When a State invokes the VRA to justify race-based districting, it must show [to meet the 'narrow tailoring' requirement] that it had 'good reasons' for concluding that the statute required its action.").

Other evidence that the Court has considered probative and significant in applying its "predominant factor" test has included direct testimony that racial quotas were set as goals to be met by the legislative body. See *Vera*, 517 U.S. at 969-70 ([T]he "testimony of state officials . . . affirmed that 'race was the primary consideration in the construction of District 30.'"). The Court also often looks to the shapes of the districts to see if it is "exceedingly obvious" that the drawing of the lines was a deliberate attempt to draw minority groups in or out of the district. See *Miller*, 515 U.S. at 917 ("[T]he drawing of narrow land bridges to incorporate within the district outlying appendages containing nearly 80% of the district's total black population was a deliberate attempt to bring black populations into the district."). But even a bizarre shape is not sufficient by itself; rather, it is a relevant factor because "it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale." *Bethune-Hill*, 137 S. Ct. at 798. Therefore the Court, when considering shape, has done so in conjunction

with all other relevant factors to see if their combination is "'unexplainable in terms other than race.'" *Vera*, 517 U.S. at 972.

Additional factors the Court has examined in making this inquiry have included the racial densities in the population; whether testimony of state officials affirm that race was the primary consideration in the construction of a district; if the districting software used by the State provides only racial data at the block-by-block level; if there were "bizarre district lines" which were "tailored perfectly to maximize minority population" but were "far from the shape that would be necessary to maximize the Democratic vote" in the district; if the State had compiled detailed racial data but made no similar attempts to compile equivalent data regarding other communities; and if there were any conflicts or inconsistencies between the enacted plan and traditional redistricting criteria. *Miller*, 515 U.S. at 917; *Vera*, 517 U.S. at 967-73; *Bethune-Hill*, 137 S. Ct. at 799.

The Court has emphasized that in considering this kind of evidence, courts should examine whether "the legislature 'placed' race 'above traditional districting considerations in determining *which* persons were placed *in appropriately apportioned districts*'"—or "[i]n other words, if the legislature must place 1,000 or so additional voters in a particular district in order to achieve an equal population goal, the 'predominance' question concerns *which* voters the legislature decides to choose, and specifically whether the legislature predominately uses race as opposed to other, 'traditional' factors when doing so." *Alabama*

Legislative Black Caucus v. Alabama, 575 U.S. 254, 273, 135 S. Ct. 1257, 191 L. Ed. 2d 314 (2015).

Second, a plaintiff may bring a minority voter dilution claim under section 2 of the Kansas Constitution Bill of Rights. This occurs when a legislative body invidiously discriminates against a minority population to minimize or cancel out the potential power of the group's collective vote. *Abbott v. Perez*, 585 U.S. ____, 138 S. Ct. 2305, 2314, 201 L. Ed. 2d 714 (2018). The harm caused by vote dilution "arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district." *Gill*, 138 S. Ct. at 1931.

The evidentiary threshold for bringing a minority vote dilution claim in a single-member district is necessarily high. Plaintiffs bringing such a claim must first show three "threshold conditions": (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single member district; (2) that the group is politically cohesive; and (3) there exists sufficient bloc voting by the white majority in the new allegedly diluted districts to usually defeat the preferred candidate of the politically cohesive minority bloc. *Growe v. Emison*, 507 U.S. 25, 39-40, 113 S. Ct. 1075, 122 L. Ed. 2d 388 (1993) (citing *Gingles*, 478 U.S. at 50-51). If a plaintiff fails to establish these three points, "there neither has been a wrong nor can [there] be a remedy." 507 U.S. at 40-41.

If all three preconditions are established, the next step is to consider the "totality of circumstances" to determine whether, as a result of the challenged plan,