redistricting plan, like "any other act of the legislature, is subject to the limitations contained in the Constitution" and to legal challenge by Kansas residents and looked to the equal protection guarantees of Sections 1 and 2 of the Kansas Bill of Rights to provide substantive guidance in determining the challenged map's constitutionality. *Id.* at 204-05, 207. *Harris* thus confirms that state constitutional challenges, like this one, to the validity of redistricting plans are justiciable.

400. *Harris* also demonstrates Kansas courts' ability to define manageable standards for applying constitutional protections in the redistricting context. Interpreting an earlier version of the Kansas Constitution that allocated state legislative seats by county, the Court concluded that constitutional equality norms embodied by Sections 1 and 2 of the Kansas Bill of Rights required that the seats be allocated using the method of equal proportions (the same algorithm used to distribute seats in the U.S. House of Representatives among the states). *See id.* at 204-05, 207-13. The redistricting provisions at issue did not use the word "equal," let alone reference the method of equal proportions. *See id.* at 201-02. Rather, the Kansas Supreme Court discerned manageable standards based on the Kansas Constitution's equal protection provisions to ensure that those provisions remained enforceable in the redistricting context. Similarly, in this case, the Court concludes that the Kansas Constitution's equal protection, free speech and assembly, and suffrage provisions provide manageable standards to adjudicate partisan gerrymandering claims.

401. Decisions from outside the redistricting context reaffirm this conclusion. As the Kansas Supreme Court has recognized, "courts are frequently called upon, and adept at defining and applying various, perhaps imprecise, constitutional standards," *Gannon*, 298 Kan. at 1155, and "[t]he judiciary is well accustomed" to doing so, *id.* at 1149 (quoting *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 778 (Tex. 2005)); *see also id.* (recognizing that constitutional provisions that are "imprecise" are nonetheless "not without content" (quoting *Neeley*, 176 S.W.3d at 778)). *Gannon*, for instance, concluded that the state courts could define manageable standards to enforce the Kansas Constitution's requirement that the Legislature "make suitable provision for finance of the educational interests of the state." Kan. Const. art. 6, § 6(b); *see Gannon*, 298 Kan. at 1149-51. The court explained that although the "Kansas Constitution clearly leaves to the legislature the myriad of choices available to perform its constitutional duty" to provide suitable educational funding, "when the question becomes whether the legislature has actually performed its duty, that most basic question is left to the courts to answer under our system of checks and balances." *Gannon*, 298 Kan. at 1151. In the same way, while the Legislature may enjoy broad discretion in the redistricting process, that discretion is not unlimited: the Kansas Constitution requires state courts to determine whether a redistricting plan violates residents' and voters' fundamental rights. *See, e.g.*, *Harris*, 192 Kan. at 206-07. And the key provisions here—involving equality, free speech, and suffrage—have long been the basis of litigation in state courts, from which Kansas courts can draw and provide

manageable standards. *See infra* COL § III (discussing constitutional provisions' applicability to partisan gerrymandering). Partisan gerrymandering claims brought under those provisions are therefore justiciable.

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

403. Indeed, Kansas courts' duty to safeguard state constitutional protections is strongest where, as here, the federal courts have retreated from enforcing those protections' federal counterparts. "[S]tate courts have relied upon their own state constitutions to depart from United States Supreme Court decisions deviating or retreating from a broader rule of constitutional law." *State v. Scott*, 286 Kan. 54, 95-96, 183 P.3d 801 (2008), *overruled on other grounds by State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016); *see, e.g.*, *State v. McDaniel*, 228 Kan. 172, 184-85, 612 P.2d 1231 (1980). *McDaniel*,

for example, held that a federal Supreme Court decision that "retreat[ed]" from earlier holdings by reducing the scope of Eighth Amendment protections "force[d] [the Kansas Supreme] Court to reconsider its reliance" on federal precedent in applying Section 9 of the Kansas Bill of Rights. 228 Kan. at 184-85. The Court concluded that the Kansas Constitution provides heightened protections against cruel and unusual punishment guided by the former, more expansive federal standards that existed before the U.S. Supreme Court's retreat. *See id.* at 185.

404. As in *McDaniel*, federal courts have retreated from applying federal constitutional standards in the context of partisan gerrymandering—and invited state courts to step in. Kansas courts can and should mitigate the consequences of this retreat by enforcing state constitutional protections. Such an approach was encouraged by the Supreme Court itself, which noted that its holding in *Rucho* did not "condemn complaints about districting to echo into a void," because "state constitutions can provide standards and guidance for state courts to apply." 139 S. Ct. at 2507.

405. Moreover, other states' supreme courts have successfully adjudicated partisan gerrymandering claims under their state constitutions, providing a model for this Court. Kansas courts routinely look to the jurisprudence of sister states for guidance in interpreting constitutional language. *See, e.g.*, *Gannon*, 298 Kan. at 1135, 1149-55. Doing so in this case buttresses the Court's conclusion that partisan gerrymandering claims are justiciable, as numerous other state courts have already accepted *Rucho*'s

invitation to adjudicate such claims. The supreme courts of Florida, North Carolina, Ohio, and Pennsylvania have all applied their state constitutions to protect against partisan gerrymandering in congressional and legislative redistricting. *See Detzner*, 172 So. 3d at 371-72; *Harper*, 868 S.E.2d at 559; *Adams v. DeWine*, ___ N.E.3d ___, Nos. 2021-1428 & 2021-1449, 2022 WL 129092, at *1-2 (Ohio Jan. 14, 2022); *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1, 128, 178 A.3d 737 (2018); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, ___ N.E.3d ___, Nos. 2021-1193, 2021-1198, & 2021-1210, 2022 WL 110261, at *1 (Ohio Jan. 12, 2022). These decisions—several of which relied on broad constitutional text not specific to redistricting—demonstrate that state courts can discern the manageable standards necessary to hear partisan gerrymandering claims.[19]

406. Specifically, the North Carolina Supreme Court recently held that partisan gerrymandering of congressional or state legislative maps violates the North Carolina Constitution's equal protection, free speech, freedom of assembly, and free elections clauses. *Harper*, 868 S.E.2d at 559. The court determined that each of these clauses—including the first three, under

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[19] Indeed, the Kansas Constitution "can be traced through prior state constitutions to the English Bill of Rights," Kirk Redmond & David Miller, *The Kansas Bill of Rights: "Glittering Generalities" or Legal Authority*, J. Kan. Bar Ass'n, Sept. 2000, at 18, 20 (2000), the same document on which the Pennsylvania and North Carolina constitutions are based, *see Harper*, 868 S.E.2d at 540. These decisions are thus of particular value in interpreting the Kansas Constitution.

whose Kansas equivalents the claims in this case arise—independently provides "manageable judicial standards" to govern partisan gerrymandering claims. *Id.* Those North Carolina constitutional provisions do not offer more detailed language or substantive guidance than do their Kansas equivalents; for example, the relevant portion of North Carolina's equal protection clause provides only that "[n]o person shall be denied the equal protection of the laws." *Id.* at 511 (quoting N.C. Const. art. I, § 19); *cf.* Kan. Const. Bill of Rights, § 2 (more explicitly discussing "political power"). Rather, the North Carolina court recognized that pursuant to the state judiciary's "fundamental [and] sacred dut[y]" to "protect[] the constitutional rights of the people . . . from overreach by the General Assembly," courts could discern a manageable framework for adjudicating partisan gerrymandering claims—a framework that could be further developed "in the context of actual litigation." *Harper*, 868 S.E.2d at 510, 547-50 (quoting *Reynolds v. Sims*, 377 U.S. 533, 578 (1964)).

407. Thus, the court held that a redistricting plan constitutes a partisan gerrymander—and is therefore subject to strict scrutiny—if "it deprives a voter of his or her right to substantially equal voting power," as demonstrated by "direct [or] circumstantial evidence" that "the plan makes it systematically more difficult for [the] voter to aggregate his or her vote with other likeminded voters, thus diminishing or diluting the power of that person's vote on the basis of his or her views." *Harper*, 868 S.E.2d at 552, 559. The court declined to give an exhaustive list of evidence that would satisfy this burden—although it noted that, if

necessary, it could have selected one of various bright-line statistical tests offered by experts in that case. *See id.* at 547-49. Instead, it simply recognized the overwhelming evidence of the challenged maps' partisan skew. *See id.* at 547-49, 553-57.

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

409. These decisions demonstrate that state courts can successfully adjudicate partisan gerrymandering

claims under state constitutions, even where the relevant constitutional text does not provide explicit standards for evaluating such claims. Like the Pennsylvania and North Carolina supreme courts, this Court can discern the necessary manageable standards—indeed, in Kansas, it is "the duty of courts" to do so. *Harris*, 192 Kan. at 207.

410. As discussed below, *see* COL § III, the Court concludes that partisan gerrymanders are subject to strict scrutiny pursuant to the Kansas Constitution's guarantees of equal protection, free speech and assembly, and suffrage. Building on precedent from sister states, the Court determines that at minimum, a congressional plan constitutes a partisan gerrymander subject to strict scrutiny where the Court finds, as a factual matter, (1) that the Legislature acted with the purpose of achieving partisan gain by diluting the votes of disfavored-party members, and (2) that the challenged congressional plan will have the desired effect of substantially diluting disfavored-party members' votes. *See Harper*, 868 S.E.2d at 552, 559 (recognizing unconstitutional gerrymander based on effect on voting power); *League of Women Voters of Pa.*, 645 Pa. at 122 (finding unconstitutional gerrymander where traditional criteria were subordinated to partisan considerations).

411. The ample evidence of Ad Astra 2's intentional, extreme partisan bias makes the factfinding in this case straightforward, demonstrating the judicially manageable nature of the inquiry. The Court therefore concludes that judicially manageable standards for adjudicating partisan gerrymandering claims exist,

and this *Baker* factor does not render such claims nonjusticiable.

Adjudicating partisan gerrymandering claims does not require policy determinations based on nonjudicial discretion.

412. Hearing Plaintiffs' partisan gerrymandering claims also would not require the Court to make "an initial policy determination of a kind clearly for nonjudicial discretion." *Kan. Bldg. Indus.*, 302 Kan. at 668 (quoting *Baker*, 369 U.S. at 217). Rather, the Kansas Supreme Court has recognized that while the Legislature enjoys broad discretion in redistricting matters, "[t]he exercise of [that] discretion . . . by the [L]egislature in enacting an apportionment law must be limited to the standards provided in our Constitution." *Harris*, 192 Kan. at 205. Accordingly, it is the "duty" of Kansas courts to ensure that redistricting takes place within constitutional bounds. *Id.* at 207. Applying the Constitution in this way to cabin the Legislature's discretion is *precisely* the judicial role—not a policy determination.

413. Decisions from the Kansas Supreme Court considering partisan gerrymandering claims while reviewing state legislative reapportionment plans underscore this point. Although the Court has never held a redistricting plan unconstitutional on partisan gerrymandering grounds, it has repeatedly indicated that partisan gerrymandering claims are cognizable under the Kansas Constitution, and that the allegations in past cases failed *on the merits* because the challengers—unlike Plaintiffs here—had failed to offer evidence substantiating their claims. *See In re*

Stephan, 251 Kan. 597, 607, 836 P.2d 574 (1992) ("No evidence has been offered that would indicate the size and shape of House District 47 was engineered to cancel out the voting strength of any cognizable group or locale."); *In re Senate Bill No. 220*, 225 Kan. 628, 637, 593 P.2d 1 (1979) (concluding that challengers had failed to "show[]" an unconstitutional gerrymander); *In re House Bill No. 2620*, 225 Kan. 827, 834-35, 595 P.2d 334 (1979) (concluding that "no claim or showing of gerrymandering . . . ha[d] been made"). Although these decisions did not discuss the gerrymandering allegations at great length—likely because of the lack of supporting evidence—or give clear rules for resolving future claims, none suggested that the Court lacked jurisdiction to consider the allegations. Instead, each indicated that the Legislature's discretion in redistricting is not boundless, and that Kansas courts have jurisdiction to hear partisan gerrymandering claims.

414. The Court concludes that this *Baker* factor does not render Plaintiffs' partisan gerrymandering claims nonjusticiable

Redistricting matters are not textually committed to the Legislature.

415. The next *Baker* factor is similarly inapplicable: No "textually demonstrable constitutional commitment of [congressional redistricting] to [a] coordinate [branch]" prevents this Court from adjudicating Plaintiffs' partisan gerrymandering claims. *Kan. Bldg. Indus.*, 302 Kan. at 668 (quoting *Baker*, 369 U.S. at 217). The Kansas Constitution is silent as to congressional redistricting; nothing in its text commits

authority over congressional redistricting entirely to another branch.

416. The fact that Article 10 of the Kansas Constitution explicitly provides for judicial review of state legislative maps does not change this conclusion or suggest that Kansas courts are powerless to review congressional plans—in fact, it proves the opposite. First, the Constitution's treatment of the courts' role in each type of redistricting process parallels its treatment of the Legislature's role: the document explicitly describes the Legislature's authority in state legislative reapportionment, *see id.* art. 10, § 1, but is silent as to congressional redistricting. That contrast does not mean that the Legislature has no power over congressional redistricting, and it similarly does not preclude judicial review in this context. Instead, it indicates only that the Constitution leaves congressional redistricting to the state's ordinary lawmaking process of enactment by the Legislature and ordinary review by the state courts. *Cf. Harris*, 192 Kan. at 207. Second, before the current version of Article 10 was adopted in the 1980s, *Harris* explained that state courts have a "duty" to ensure that redistricting plans comply with the Kansas Constitution even in the absence of an explicit judicial review provision. 192 Kan. at 207. The current review provision provides a streamlined process for carrying out that duty in the state legislative context, *see* Kan. Const. art. 10, § 1(b)-(e), but its adoption does not change the fact that as in *Harris*, courts can adjudicate redistricting cases under the longstanding substantive constitutional provisions involved here. Article 10 thus

does nothing to limit this Court's power to hear this case.

417. Finally, to the extent Defendants argue this factor applies because of the federal Constitution's Elections Clause, the argument fails for two reasons. First, as explained above, *see supra* COL § II.A, the Elections Clause does not prevent this Court from adjudicating challenges to congressional plans. Second, justiciability in this Court—including the applicability of the political question doctrine—is a matter of Kansas law. *See e.g., Gannon*, 298 Kan. at 1119. The federal Elections Clause is therefore irrelevant to this Court's jurisdiction under the Kansas Constitution.

418. The Court concludes that this *Baker* factor does not render Plaintiffs' partisan gerrymandering claims nonjusticiable.

The remaining* Baker *factors do not bar adjudication of partisan gerrymandering claims.

419. Defendants have not argued that the other three *Baker* factors—"the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," "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," *Kan. Bldg. Indus.*, 302 Kan. at 668 (quoting *Baker*, 369 U.S. at 217)—render Plaintiffs' claims nonjusticiable, and with good reason: none applies in this case. These three factors all reflect the same basic idea: that some issues so firmly belong to the political

branches that courts cannot interfere. But the Kansas Supreme Court has recognized that redistricting is not such an issue; rather, "an apportionment act, as any other act of the legislature, is subject to the limitations contained in the Constitution, and where such act . . . violates the limitations of the Constitution, it is null and void and it is the duty of courts to so declare." *Harris*, 192 Kan. at 207. Partisan gerrymandering claims raise no more concerns about respect for coordinate branches, adherence to political decision making, or multifarious pronouncements than the malapportionment claims adjudicated in *Harris*—or other redistricting claims, like racial gerrymandering or vote dilution, that courts routinely hear.

420. Ultimately, to conclude that partisan gerrymandering claims are nonjusticiable would render the Bill of Rights "little more than a compilation of glittering generalities"—a result the Kansas Supreme Court has consistently rejected for over a century. *Atchison St. Ry. Co. v. Missouri Pac. Ry. Co.*, 31 Kan. 660, 3 P. 284, 286 (1884); *see, e.g.*, *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 633-38, 440 P.3d 461 (2019) (per curiam) (reaffirming that Kansas Bill of Rights is independent source of enforceable constitutional rights). Instead, the Kansas Constitution "limit[s] the power of the legislature, and no act of that body can be sustained which conflicts with [it]." *Atchison St. Ry. Co.*, 3 P. at 286. The Court will therefore carry out its "duty" to determine whether the challenged congressional plan "violates the limitations of the Constitution." *Harris*, 192 Kan. at 207.

III. The intentional, effective partisan gerrymandering in Ad Astra 2 violates the Kansas Constitution.

421. Plaintiffs argue that Ad Astra 2 constitutes a partisan gerrymander in violation of the Kansas Constitution. Specifically, Plaintiffs argue that Ad Astra 2 violates the equal protection guarantees of Sections 1 and 2 of the Kansas Bill of Rights; the right to vote under Sections 1 and 2 of the Kansas Bill of Rights and Article 5, Section 1 of the Kansas Constitution; the right to free speech and assembly under Sections 11 and 3, respectively, of the Kansas Bill of Rights; and the right to be free from retaliation for the exercise of their free speech rights, similarly secured under Section 11 of the Kansas Bill of Rights.[20] The Court addresses each of these claims in turn.

A. The Kansas Constitution guarantees the right to equal protection, and partisan gerrymandering infringes on this right.

422. For the reasons set forth below, the Court concludes that partisan gerrymandering violates the equal protection guarantees of Sections 1 and 2 of the Kansas Bill of Rights. Section 1 provides that "[a]ll

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[20] The *Frick* Plaintiffs also invoke Section 20 of the Kansas Bill of Rights in their Petition. Section 20 of the Kansas Bill of Rights reinforces and brings home the other rights, protections, and principles enumerated and discussed herein. Section 20 makes clear two fundamental and critical principles: (1) the "enumeration of rights shall not be construed to impair or deny others retained by the people"; and (2) "all powers not herein delegated remain with the people." Section 20 is not a nullity; it enervates the many specific Bill of Rights provisions that precede it.

men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Kan. Const. Bill of Rights, §§ 1. Section 2 guarantees that "[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." *Id.* § 2. In interpreting the equal protection guarantees enshrined in the Kansas Constitution, the Kansas Supreme Court has emphasized that "the Kansas Constitution affords separate, adequate, and greater rights than the federal Constitution." *Farley v. Engelken*, 241 Kan. 663, 671, 740 P.2d 1058 (1987).

423. The Kansas Supreme Court has explained that Sections 1 and 2 incorporate broad protections for political equality in redistricting—protections that prohibit partisan gerrymandering. Under the Kansas Constitution, "every qualified elector . . . is given the right to vote for officers . . . [and] is possessed of equal power and influence in the making of laws which govern him," and "[i]nsofar as he is accorded less representation than is his due under the Constitution, to that extent the governmental processes fail to record the full weight of his judgment and the force of his will." *Harris*, 192 Kan. at 204. Applying the guarantee of equality enshrined in Sections 1 and 2, *Harris* concluded that seats in the Legislature must be apportioned among counties based on their populations with "as close an approximation to exactness as possible." *Id.* at 205. Like the malapportionment redressed in *Harris*, partisan gerrymandering deprives voters of "equal power and influence in the making of laws which govern [them]." *Id.* at 204. By design, the

practice "strategically exaggerates the power of voters who tend to support the favored party while diminishing the power of voters who tend to support the disfavored party." *Adams*, 2022 WL 129092, at *1. Like malapportionment, partisan gerrymandering is thus inconsistent with equal protection under Sections 1 and 2.

424. The text of Section 2 also indicates that the Kansas Constitution provides strong protections for political equality and against partisan gerrymandering. In determining the scope of state constitutional provisions, the Kansas Supreme Court examines the constitutional text. *See, e.g.*, *Hodes & Nauser*, 309 Kan. at 623-25. And Section 2's text focuses explicitly on *political* equality: it recognizes that "[a]ll political power is inherent in the people" and that "all free governments are founded on their authority, and are instituted for their equal protection." *Cf. Stephens v. Snyder Clinic Ass'n*, 230 Kan. 115, 128, 631 P.2d 222 (1981) ("Section 2 of the Kansas Bill of Rights has been construed as referring solely to political privileges and not to those relating to property rights."). The goal of partisan gerrymandering is to eliminate the people's authority over government by giving different voters vastly *unequal* political power. *See, e.g.*, *Adams*, 2022 WL 129092, at *1. Section 2, with its textual focus on political equality, thus proscribes partisan gerrymandering.

425. Decisions from sister states buttress this conclusion. North Carolina's equal protection clause similarly "provides greater protection . . . than the federal Constitution." *Harper*, 868 S.E.2d at 543. In a

recent ruling concerning that state's congressional and state legislative maps, the North Carolina Supreme Court concluded that the state's equal protection right included a right to "substantially equal voting power." *Id.* (quoting *Stephenson v. Bartlett*, 355 N.C. 354, 379, 562 S.E.2d 377 (2002)) When the state engages in partisan gerrymandering, the court explained, it infringes on that right. *Id.* at 544. This is because the right to an equal voting power "necessarily encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views." *Id.* Partisan gerrymandering diminishes and dilutes citizens' "votes on the basis of party affiliation" and thereby "deprives voters in the disfavored party of the opportunity to aggregate their votes to elect such a governing majority." *Id.* The court concluded that this interpretation "is most consistent with the fundamental principles in our Declaration of Rights of equality and popular sovereignty—together, political equality." *Id.*

426. The Court finds that reasoning persuasive for a number of reasons.

427. First, the constitutions of Kansas and North Carolina share a common ancestor: Both trace their lineage back to the English Bill of Rights. *See* Redmond & Miller, *supra* note 19, at 20; *Harper*, 868 S.E.2d at 540.

428. Second, as in North Carolina, the right to vote is fundamental under the Kansas Constitution. As the Kansas Supreme Court has held:

> The right to vote in any election is a personal and individual right, to be exercised in a free and unimpaired manner, in accordance with our Constitution and laws. The right is [preservative] of other basic civil and political rights, and is the bedrock of our free political system. Likewise, it is the right of every elector to vote on amendments to our Constitution in accordance with its provisions. This right is a right, not of force, but of sovereignty. It is every elector's portion of sovereign power to vote on questions submitted. Since the right of suffrage is a fundamental matter, any alleged restriction or infringement of that right strikes at the heart of orderly constitutional government and must be carefully and meticulously scrutinized.

Moore v. Shanahan, 207 Kan. 645, 649, 486 P.2d 506 (1971); *see also Harris v. Anderson*, 194 Kan. 302, 303, 400 P.2d 25 (1965) ("[T]he right to vote for the candidate of one's choice is of the essence of the [representative] form of government, and . . . 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964))).

429. Third, the North Carolina Constitution contains analogous provisions to Sections 1 and 2 of the Kansas Bill of Rights, which, read in conjunction, guarantee political equality—and the opinion described above use that guarantee as a basis for their conclusions. *See Harper*, 868 S.E.2d at 544 (citing N.C. Const. art. I, §§ 1-2) ("Our reading of the equal

protection clause is most consistent with the fundamental principles in our Declaration of Rights of equality and popular sovereignty—together, political equality.").

430. This Court agrees with the reasoning of *Harper* and concludes that the equal protection guarantee of the Kansas Bill of Rights secures the right to substantially equal voting power. *See Gannon*, 298 Kan. at 1135, 1149-55 (looking to constitutions of sister states as aids in interpreting Kansas Constitution).

431. The Court also holds that partisan gerrymandering—the drawing of district lines to dilute the votes of those likely to vote for a disfavored party—deprives voters of substantially equal voting power. This is because voters cannot be said to enjoy an equal vote when they live in districts that the State has drawn in such a manner that negates voters' "representational influence." *Harper*, 868 S.E.2d at 544. Instead, the State has created classes of favored and disfavored voters, allowing voters of one party to elect their candidates of choice while denying that same right to voters of another. The Kansas Constitution, which recognizes citizens' right to political equality, stands as a bulwark against such legislative misconduct.

B. The Kansas Constitution guarantees the right to vote, and partisan gerrymandering infringes on this right.

432. For similar reasons, partisan gerrymandering violates the Kansas Constitution's protection of the right to vote.

433. The right to vote is secured by Sections 1 and 2 of the Kansas Bill of Rights and by Article 5, Section 1 of the Kansas Constitution, the latter of which 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." The Kansas Supreme Court has recognized that the right to vote is "fundamental" under the Kansas Constitution, and "any alleged restriction or infringement of that right strikes at the heart of orderly constitutional government, and must be carefully and meticulously scrutinized." *Moore*, 207 Kan. at 649. Additionally, the Kansas Supreme Court has recognized that the Kansas Bill of Rights secures natural rights that go beyond what is guaranteed by the United States Constitution. *See Hodes & Nauser*, 309 Kan. at 624-27.

434. This fundamental right to vote encompasses the right to "substantially equal voting power and substantially equal legislative representation." *Harper*, 868 S.E.2d at 544 (quoting *Stephenson*, 355 N.C. 354 at 382 (2002)); *see State v. Beggs*, 126 Kan. 811, 271 P. 400, 402 (1928) (holding that the Kansas Constitution prohibits legislation that will "directly or indirectly, deny or abridge . . . or unnecessarily impede the exercise of th[e] right" to vote (citation omitted)).

435. When voters of one class have their votes diluted for the benefit of another, voters do not enjoy substantially equal voting power. Accordingly, partisan gerrymandering offends Kansans' right to vote, secured to them by Sections 1 and 2 of the Bill of Rights and Article 5, Section 1 of the Kansas Constitution.

C. The Kansas Constitution guarantees the right to Free Speech and Assembly, and partisan gerrymandering infringes on this right.

436. This Court also concludes that partisan gerrymandering violates the rights to free speech and assembly, secured by Sections 3 and 11 of the Kansas Bill of Rights.

437. Section 11 provides that "all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights." Section 3 states that "[t]he people have 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."

438. These provisions offer broad protection for free speech and association. Indeed, the provisions' text demonstrates that they offer broader protections than does the federal First Amendment. *See, e.g.*, *Hodes & Nauser*, 309 Kan. at 623-25 (comparing constitutional texts and concluding from comparison that Kansas Constitution confers broader individual rights). Section 3, for example, expressly grants individuals the rights "to consult for their common good" and "to instruct

their representatives." The First Amendment does not contain this language; an earlier draft of the provision included a right to "consult for the common good," but that language was removed before enactment. *Jones v. City of Opelika*, 319 U.S. 105, 124 n.6 (1943) (Reed, J., dissenting). In other words, the Kansas Constitution includes a unique textual focus on collective speech about matters of public concern (consultation "for the common good") and political speech (the right of the people to "instruct their representatives"). These unique features underscore the Constitution's protection against partisan gerrymandering.

439. The Court concludes that partisan gerrymandering violates this protection in at least three related, but independent, ways. First, partisan gerrymandering unconstitutionally discriminates against members of the disfavored party based on viewpoint. Second, partisan gerrymandering unlawfully burdens disfavored-party members' freedom of association. Third, partisan gerrymandering unlawfully retaliates against disfavored-party members for engaging in protected political speech and association.

440. As the Kansas Supreme Court has recognized, the right to free speech is "among the most fundamental personal rights and liberties of the people." *Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 234, 689 P.2d 860 (1984). Discrimination on the basis of viewpoint is the very antithesis of free speech, and as a result "[d]iscrimination against speech based on its message is presumptively unconstitutional." *Roeder v. Kan. Dep't of Corr.*, No.

113,239, 2016 WL 556281, at *3 (Kan. App. 2016) (per curiam) (unpublished opinion); *see also Harper*, 868 S.E.2d at 546 ("[V]iewpoint discrimination . . . triggers strict scrutiny."); *State v. Smith*, 57 Kan. App. 2d 312, 318, 452 P.3d 382 (2019) ("It is well-established that content-based speech restrictions are presumptively invalid.").

441. Partisan gerrymandering constitutes viewpoint discrimination in violation of Section 11. When map-drawers craft gerrymandered districts, they single out a specific class of voters for disfavored treatment based simply on the viewpoints those voters express. Thus, when the legislature "systemically diminishes or dilutes the power of votes on the basis of party affiliation," it engages in the very type of viewpoint discrimination that Section 11 prohibits. *Harper*, 868 S.E.2d at 546.

442. Likewise, partisan gerrymandering violates the right to freedom of association, which is secured by the right to free speech under Section 11 and to free assembly under Section 3. The Kansas Bill of Rights describes associational rights that are even broader than those recognized under the U.S. Constitution: While the First Amendment to the U.S. Constitution recognizes the right "peaceably to assemble, and to petition the Government for a redress of grievances," the Kansas Constitution goes still further, with text that goes right to the heart of partisan gerrymandering: "The people have the right to . . . instruct their representatives." Kan. Const. Bill of Rights, § 3; *see also Harper*, 868 S.E.2d at 544 (finding that partisan gerrymandering violated state

constitutional provision protecting right of citizens to "instruct their representatives" (quoting N.C. Const. art. I, § 12)). This right sits at the core of Kansans' associational freedom: Section 2 makes clear that the government derives its power from the people, and Section 3 grants the people the right to hold it accountable. Partisan gerrymandering throws this structure into disarray by wresting power from the people and erecting structures that impede the accountability of their representatives.

443. It is of no moment that citizens living in gerrymandered districts may nonetheless vote for candidates of their choice or coordinate across siloed jurisdictions, because the cracking of Democratic communities across districts creates a significant associational burden. In our democracy, "citizens form parties to express their political beliefs and to assist others in casting votes in alignment with those beliefs." *Harper*, 868 S.E.2d at 545 (quoting *Libertarian Party of N.C. v. State*, 365 N.C. 41, 49, 707 S.E.2d 199 (2011)). When 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." *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *122 (N.C. Super. Ct. Sept. 3, 2019) (alterations in original) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1939 (2018) (Kagan, J., concurring)). In other words, partisan gerrymandering renders political association an exercise in futility. This leads to more voters feeling demoralized, which in turn entrenches the favored party, making the associational harms still

worse. *See generally* Daniel P. Tokaji, *Gerrymandering and Association*, 59 Wm. & Mary L. Rev. 2159 (2018).

444. Finally, partisan gerrymandering constitutes unconstitutional retaliation against members of a disfavored party for their engagement in protected political activity. The State engages in impermissible retaliation when plaintiffs can establish that (1) they were engaged in a constitutionally protected activity; (2) the State's actions adversely affected the protected activity; and (3) the State's adverse action was substantially motivated by plaintiffs' exercise of their constitutional rights. *See, e.g.*, *Grammer v. Kan. Dep't of Corr.*, 57 Kan. App. 2d 533, 538, 455 P.3d 819 (2019); *Rebarchek v. Farmers Coop. Elevator & Mercantile Ass'n*, 272 Kan. 546, 553, 35 P.3d 892 (2001) (discussing burden-shifting approach in retaliatory discharge context).

445. Partisan gerrymandering satisfies all three of these elements. First, as described above, voters seek to engage in protected activities, including exercising their right to free speech and assembly by forming political parties, voicing support for their candidates of choice, and casting votes for those candidates. Second, partisan gerrymandering burdens these rights by reducing the voting power of members of the disfavored party, discriminating against members of that party on the basis of their viewpoints, and burdening their ability to associate by obstructing their political organizations. Third, the State's actions are motivated by voters' exercise of their constitutional rights: Partisan gerrymanderers move voters for the disfavored party into different districts precisely

because those voters are likely to engage in protected conduct.

446. For the foregoing reasons, the Court concludes that partisan gerrymandering violates Kansans' rights to free speech and free association and constitutes retaliation against protected activity. Each of these three grounds constitutes a separate and independent basis under which partisan gerrymandering violates the Kansas Constitution.

D. Ad Astra 2 is a partisan gerrymander that violates the foregoing constitutional rights.

447. Having concluded that partisan gerrymandering violates the Kansas Constitution, the Court now turns to what standard should be applied to adjudicate the case at bar.

448. The Court draws from opinions of the highest courts in other states—including Pennsylvania and North Carolina—to determine how it may adjudicate claims of partisan gerrymandering.

449. Consider first the Pennsylvania Supreme Court's 2018 decision under that state's Free Elections Clause. That court held that plaintiffs may successfully prove a partisan gerrymander by showing that the map subordinates traditional redistricting criteria (for instance, , compactness and preservation of political subdivisions) "to the pursuit of partisan political advantage." *League of Women Voters of Pa.*, 645 Pa. at 122-23. Nevertheless, it made clear that this was not "the exclusive means by which" a constitutional violation could be shown. *Id.* at 122. As advances in

map-drawing continue apace, the court recognized, mapmakers may be able to "engineer congressional districting maps, which, although minimally comporting with these neutral 'floor' criteria, nevertheless operate to unfairly dilute the power of a particular group's vote for a congressional representative." *Id.*; *cf. Reynolds*, 377 U.S. at 578 ("What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment.").

450. The North Carolina Supreme Court held that the State engages in impermissible partisan gerrymandering when plaintiffs can show that the challenged map makes it "systematically more difficult for a voter to aggregate his or her vote with other likeminded voters, thus diminishing or diluting the power of that person's vote on the basis of his or her views." *Harper*, 868 S.E.2d at 552. This can be shown

> using a variety of direct and circumstantial evidence, including but not limited to: median-mean difference analysis; efficiency gap analysis; close-votes-close seats analysis, partisan symmetry analysis; comparing the number of representatives that a group of voters of one partisan affiliation can plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect; and comparing the

> relative chances of groups of voters of equal size who support each party of electing a supermajority or majority of representatives under various possible electoral conditions.

Id. at 552-53. The court emphasized that "[e]vidence that traditional neutral redistricting criteria were subordinated to considerations of partisan advantage" is particularly weighty evidence that a districting plan has been gerrymandered. *Id.* at 553. Like the Pennsylvania Supreme Court, the *Harper* court found it unnecessary and inadvisable to "identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander." *Id.* at 547.

451. The Court agrees with the North Carolina and Pennsylvania Supreme Courts that articulating a bright-line standard for adjudicating all partisan gerrymandering claims is neither necessary nor prudent. As the U.S. Supreme Court has stated in a different—but related—context, the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination." *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960) (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). If courts are to successfully protect citizens against unconstitutional redistricting practices, they must fashion a doctrine capable of adapting to new and inventive methods as they arise. It therefore suffices for the Court's purposes that a standard exists by which such claims can be adjudicated in the present case.

452. That said, the Court will apply the standards articulated by the North Carolina Supreme Court in *Harper* and by the Pennsylvania Supreme Court in *League of Women Voters of Pennsylvania.*

453. Accordingly, in adjudicating partisan gerrymandering claims, this Court asks whether the challenged map makes it "systematically more difficult for a voter to aggregate his or her vote with other likeminded voters, thus diminishing or diluting the power of that person's vote on the basis of his or her views." *Harper*, 868 S.E.2d at 552. In making this determination, the Court will look to partisan fairness metrics, including the efficiency gap analysis. The Court will also consider whether "neutral criteria," including those enumerated in the Guidelines, "have been subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage." *League of Women Voters of Pa.*, 645 Pa. at 122; *see also Harper*, 868 S.E.2d at 547 (noting that examining "whether [a] mapmaker adhered to traditional neutral districting criteria" is "reliable way[] of demonstrating the existence of an unconstitutional partisan gerrymander"); *cf. Clarno v. Fagan*, No. 21CV40180, 2021 WL 5632371, at *7 (Or. Special Jud. Panel Nov. 24, 2021) (denying partisan gerrymandering claim where "enacted map . . . resulted from a robust deliberative process and careful application of neutral criteria").

454. Applying these standards to Ad Astra 2, the map displays clear signs that it dilutes the votes of Democratic Kansans. Ad Astra 2 achieves this by cracking communities of Democratic voters, drawing

unnaturally shaped districts that run roughshod over communities of interest, and pairing far-flung communities throughout the state. The result is a map heavily biased in favor of Republican candidates and incumbents.

455. Ad Astra 2 complies with almost no traditional redistricting principles, including those in the Guidelines, with the exception of obtaining population equality across the four districts.

456. **Racial Vote Dilution.** The Guidelines state that "Redistricting plans will have neither the purpose nor effect of diluting minority voting strength." PX 137 at 2 (Guideline No. 3). As discussed in Section IV below, Ad Astra 2 has both the purpose and effect of diluting minority voting strength. It therefore plainly does not comply with this Guideline.

457. **Compactness and Contiguousness.** The Guidelines also require that districts be "as compact as possible and contiguous." PX 137 at 2 (Guideline No. 4.a). As described above, Dr. Rodden found that Ad Astra 2 had the lowest plan-wide compactness score across all plans he analyzed on every measure of compactness he considered. *See supra* FOF § II.B. Dr. Chen found that every one of his 1,000 simulated maps was significantly more compact than Ad Astra 2. *See supra* FOF § II.A. A simple lay examination of the map is in accord with this conclusion: CDs 1 and 2 in particular appear sprawling and misshapen, and given the previously compact structure of CD 3—which, due to population growth, should have shrunk in size, not grown—the district's new, more sprawling shape

evinces malintent. Ad Astra 2 does not comply with this Guideline.

458. **Communities of Interest.** The Guidelines next provide that "[t]here should be recognition of communities of interest. Social, cultural, racial, ethnic, and economic interests common to the population of the area, which are probable subjects of legislation should be considered." PX 137 at 2 (Guideline No. 4.b). The evidence presented at trial similarly demonstrates a remarkable failure to comply with this Guideline. Expert and lay witnesses detailed how Ad Astra 2 needlessly splits the Kansas City metro area and extracts Lawrence from Douglas County. *See, e.g.*, *supra* FOF § II.F. In so doing, Ad Astra 2 pairs urban communities with far-flung rural communities, thereby pairing Kansans who share little in common beyond being Kansans. It is therefore equally clear that the drafters of Ad Astra 2 paid no heed to this principle.

459. **Core Retention.** The Guidelines next state that "[t]he core of existing congressional districts should be preserved when considering the communities of interest to the extent possible." PX 137 at 2 (Guideline No. 4.c). Dr. Rodden found that only 86% of Kansas residents remain in their previous districts, despite the fact that Dr. Rodden was able to draw a map that retained 97% of people in their former districts. *See supra* FOF § II.B. Additionally, Ad Astra 2 relocates more Black, Hispanic, and Native American Kansans than any of the comparator plans. *See supra* FOF § II.B. Dr. Chen found that CD 3 in Ad Astra 2 does worse on core retention than 64% of his simulated maps even though the simulations were not drawn

with core retention in mind. *See supra* FOF § II.A. Ad Astra 2 does not retain the cores of previous congressional districts.

460. **Subdivision Splits.** Finally, the Guidelines provide:

> Whole counties should be in the same congressional district to the extent possible while still meeting [the equal population requirement]. County lines are meaningful in Kansas and Kansas counties historically have been significant political units. Many officials are elected on a countywide basis, and political parties have been organized in county units. Election of the Kansas members of Congress is a political process requiring political organizations which in Kansas are developed in county units. To a considerable degree most counties in Kansas are economic, social, and cultural units, or parts of a larger socioeconomic unit. These communities of interest should be considered during the creation of congressional districts.

PX 137 at 2 (Guideline No. 4.d).

461. As Dr. Rodden and Dr. Chen found, Ad Astra 2 splits more counties than any comparator plan or any simulated map. Among these counties are Wyandotte and Douglas Counties, two of the largest and most diverse in the state. Ad Astra 2 also creates other subdivision splits that, especially when viewed in reference to comparator plans, appear harmful and unnecessary. For example, Dr. Rodden found that Ad

Astra splits 14-15 more voting tabulation districts than other plans, and 5 additional cities and towns, including Kansas City and Lawrence. *See supra* FOF § II.B. Dr. Chen also found that Ad Astra 2 splits far more VTDs than is necessary. *See supra* FOF § II.A. Ad Astra 2 does not keep subdivisions whole to the extent possible.[21]

462. Deviation from these neutral criteria is evidence of the Legislature's partisan intent. Drs. Warshaw, Miller, and Rodden all concluded in their analyses that as a result of these decisions, Republicans are more likely to win a higher number of seats in Ad Astra 2 than in any comparator plan. *See supra* FOF § II.B-D. For example, Dr. Warshaw found that despite Democrats receiving on average 41% of the votes statewide, Democrats are likely to receive *only 9%* of the seats over the next 10 years. *See supra* FOF § II.C. None of the other plans submitted to the Legislature during the latest round of redistricting—nor, for that matter, the state's previous congressional plan—exhibits this level of Republican bias. *See supra* FOF § II.C.

463. Indeed, the extreme pro-Republican bias of the map was confirmed through several different expert methodologies. Dr. Chen's simulations demonstrated that Ad Astra 2's least Republican district, CD 3, is more heavily Republican than the least Republican district in 99.6% of Dr. Chen's 1,000 simulated plans

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[21] The only remaining Guidelines require maps to be based on the 2020 census and achieve population equality. Ad Astra 2 complies with these—and *only* these—requirements.

that adhere to the Guidelines. *See supra* FOF § II.A. Ad Astra 2 is also one of only 2.2% of plans that do not contain a single district that leans Democratic. *See supra* FOF § II.A.

464. And applying the efficiency gap to Ad Astra 2, Dr. Warshaw found that the map's Republican bias stood out against not only other maps submitted to the Legislature, but also the previous congressional plan and an array of historical plans. *See supra* FOF § II.C. Dr. Chen's simulations put Ad Astra 2's outlier status into even starker relief: In the 1,000 simulations Dr. Chen ran, only 1.2% of simulations had an efficiency gap greater than or equal to Ad Astra 2's. *See supra* FOF § II.A. The overwhelming majority of plans fell between 2% and 12%; Ad Astra 2 scored 33.9%. *See supra* FOF § II.A.

465. Documentary and lay evidence further supports that the partisan effects of Ad Astra 2 were the consequence of intentional gerrymandering. Beginning with Senator Wagle's late-2020 comments about creating four Republican congressional districts, the record leading up to Ad Astra 2's passage reflects a single-minded desire to maximize Republican advantage. Most notable among these pieces of evidence is the rushed and opaque process that led to Ad Astra 2's passage. *See supra* FOF §§ I, II.G. As courts adjudicating partisan gerrymandering claims have recognized, "[a] map-drawing process may support an inference of predominant partisan intent." *League of Women Voters of Ohio*, 2022 WL 110261, at *24; *see also Detzner*, 172 So. 3d at 374 ("[I]f evidence exists to demonstrate that there was an entirely

different, separate process that was undertaken contrary to the transparent effort in an attempt to favor a political party or an incumbent in violation of the Florida Constitution, clearly that would be important evidence in support of the claim that the Legislature thwarted the constitutional mandate." (citation omitted)).

466. Participants in the legislative process leading up to Ad Astra 2's passage testified that it was a process in which the public was given little notice of meetings and little time to testify; Republicans unilaterally scheduled meetings without redistricting guidelines in place or census data to guide mapmaking; and maps were rushed through at considerable speed with no input from or consultation with the minority party. *See supra* FOF § I. Senator Corson testified that the only instance in which he saw legislation move through the Senate at such speed was following the 2021 cold snap when it became necessary to get emergency funds to Kansas cities in order for them to pay utility bills. Hr'g Tr. Day 1 Vol. 2 at 222:2-25. No such exigency existed here. The process that led to Ad Astra 2's passage leads to a strong inference of partisan intent.

467. The Court has no difficulty finding, as a factual matter, that Ad Astra 2 is an intentional, effective pro-Republican gerrymander that systemically dilutes the votes of Democratic Kansans. *See supra* FOF § II. The Court notes that its conclusions in this regard are based on evidence similar to that relied on by other state courts adjudicating partisan gerrymandering claims, including expert testimony about the plan's

extreme partisan bias, *e.g.*, *League of Women Voters of Pa.*, 645 Pa. at 126-28; *Harper*, 868 S.E.2d at 547-49; *Adams*, 2022 WL 129092 at *14; expert testimony about the plan's deviations from neutral redistricting criteria, *e.g.*, *League of Women Voters of Pa.*, 645 Pa. at 124; *Harper*, 868 S.E.2d at 548; *Adams*, 2022 WL 129092 at *10–11; expert examination of district features, *e.g.*, *League of Women Voters of Pa.*, 645 Pa. at 126; and lay witness testimony about irregularities in the process leading to the plan's adoption, *e.g.*, *League of Women Voters of Ohio*, 2022 WL 110261, at *24-25.

468. Accordingly, the Court reviews Ad Astra 2 under strict scrutiny. *Harper*, 868 S.E.2d at 554–55. Defendants have not shown that Ad Astra 2 is narrowly tailored to a compelling governmental interest, and therefore the map fails strict scrutiny. Partisan advantage is neither a compelling nor a legitimate governmental interest. Rather, given an infringement of Plaintiffs' fundamental right to substantially equal voting power, Defendants must show that the map is narrowly tailored to meet traditional neutral districting criteria, including those expressed in the legislative committees' own Guidelines or other neutral principles. Here, Defendants failed to make that showing or a showing that Ad Astra 2 is narrowly tailored to advance some compelling nonpartisan goal. Accordingly, Ad Astra 2 fails strict scrutiny.

469. In light of the foregoing, the Court concludes that Ad Astra 2 constitutes an intentional and effective partisan gerrymander in violation of Sections 1, 2, 3,

11, and 20 of the Kansas Bill of Rights, as well as Article V, Section 1 of the Kansas Constitution.

IV. The intentional, effective racial vote dilution in Ad Astra 2 violates the Kansas Constitution.

470. Ad Astra 2 is also unconstitutional on the independent and distinct ground that it dilutes minority votes in violation of the Kansas Constitution's equal rights and political power clauses. Kan. Const. Bill of Rights, §§ 1, 2. Kansas's guarantee of equal benefit "affords separate, adequate, and greater rights than the federal Constitution." *Farley*, 241 Kan. at 671; *see also Hodes & Nauser*, 309 Kan. at 638. The Court therefore clearly and expressly decides Plaintiffs' racial vote dilution claims exclusively under Sections 1 and 2 of the Kansas Bill of Rights. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

471. While the Kansas Constitution's broader solicitude against racial discrimination likely means that a showing of intent is not required to establish a violation of Sections 1 and 2 of the Bill of Rights, the Court need not resolve this issue of first impression. The parties agree that *intentional* racial discrimination is unlawful under the Kansas Constitution, and the Court concludes that Ad Astra 2 *intentionally* and effectively dilutes minority votes.

472. Intentional racial vote dilution violates the Kansas Constitution's guarantee of equal rights and equal benefit of political power. For a districting plan to constitute unlawful, intentional racial vote dilution, racial discrimination need not be the sole motivating

factor, or even the primary motivation behind the law. Rather, it suffices to invalidate the plan if racial vote dilution was *a* purpose behind the plan, even if there were other motivating factors, such as partisanship. *Cf. Robinson v. United States*, 878 A.2d 1273, 1284 (D.C. 2005) (noting that racial discrimination need not be sole motive and is improper if it was an influence in the decision-making process even if other nonracial considerations also played a role).

473. While discriminatory effect alone does not prove intent, "discriminatory impact can support an inference of discriminatory intent or purpose." *Holmes v. Moore*, 840 S.E.2d 244, 256 (N.C. Ct. App. 2020) (emphasis in original); *see also Jones v. Kansas State Univ.*, 279 Kan. 128, 145, 106 P.3d 10 (2005). Indeed, direct evidence of intent is not required. *See Jones*, 279 Kan. at 145; *Holmes*, 840 S.E.2d at 255 (noting that outright admissions of discriminatory intent are now rare and other circumstantial evidence must be assessed). This Court instead considers the totality of the circumstances to determine the Legislature's intent. *See Jones*, 279 Kan at 145 (noting that historical background, circumstances surrounding passage, and the purpose to be accomplished are among considerations in legislative intent); *see also Holmes*, 840 S.E.2d at 254-55 (noting that discriminatory effect, the historical background, procedural departures from the norm, and the events surrounding the enactment are relevant to ascertaining whether legislation was infected by intentional racial discrimination).

474. Moreover, racial animus or *racist* sentiments are not required showings in an intentional racial discrimination claim. *See, e.g., Garza v. County of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring) (noting that a white homeowner in an all-white neighborhood who harbors no racial animus still intentionally discriminates if he agrees not to sell his home to minorities in order to maintain higher property values in the neighborhood); *id.* ("Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.").

475. Thus, vote dilution is intentional and unlawful if the Legislature had as one objective the dilution of minority voters' ability to elect their preferred candidates, even in the absence of actual racial prejudice.

476. The Court identities five non-exclusive factors that are particularly relevant to determining intent: (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. *See Jones*, 279 Kan. at 145. The Court holds that in this case, consideration of

these factors compels the conclusion that the Legislature acted with discriminatory intent.

A. Ad Astra 2 has a more negative effect on minority voters than white voters in CD 2 and CD 3.

477. First, Ad Astra 2 treats minority votes significantly less favorably than white voters. Minority voters' preference for Democratic candidates does not mean that the redistricting plan's treatment of Democratic voters is synonymous with its treatment of minority voters. On the contrary, Dr. Collingwood testified that Ad Astra 2 treats minority Democrats even less favorably than it treats white Democrats. Hr'g Tr. Day 3 Vol. 1 at 142:23-143:14 (Collingwood). Although under the prior plan CD 3 had a minority voting age population ("VAP") of 29%, the portion of Wyandotte County the new plan exports to CD 2 is two-thirds minority by voting age—meaning Ad Astra 2 disproportionately removes minority voters from CD 3 at a rate of 2 to 1. PX 122 at 10, 14 (Collingwood Rep.). These minority voters now have virtually no opportunity of ever electing their preferred candidate. Hr'g Tr. Day 3 Vol. 1 at 100:17-21 (Collingwood); PX 122 at 7-8 (Collingwood Rep.). Ad Astra 2 also reduces the chances white Democratic voters in CD 3 have of electing their preferred candidate, but these white voters, by contrast, at least retain an *occasional* possibility of doing so. PX 122 at 8 (Collingwood Rep.). In this way, by shifting minority Democrats into CD 2, but leaving white Democrats in CD 3, Ad Astra 2 disfavors minority voters even when controlling for partisan affiliation. Hr'g Tr. Day 3 Vol. 1 at 143:11-

144:7 (Collingwood). And it is beyond dispute that the map treats these voters less favorably than white Republicans, who are now likely to elect their preferred candidates in all four congressional districts.

478. Ad Astra 2's dilutive effect is most evident from the performance analysis Dr. Collingwood conducted. CD 3 performed as a crossover district for minority voters under the prior plan. PX 122 at 7-8 (Collingwood Rep.); Hr'g Tr. Day 3 Vol. 1 at 99:5-8 (Collingwood). As Dr. Collingwood demonstrated, minority voters in CD 3 successfully elected their candidate of choice in 75% of the elections in which RPV existed under the prior plan. PX 122 at 7-8 (Collingwood Rep.); Hr'g Tr. Day 3 Vol. 1 at 99:5-8 (Collingwood). But Ad Astra 2 moves over 45,000 minority voters out of CD 3 into CD 2. PX 122 at 10 (Collingwood Rep.). In CD 2, these voters cannot elect their candidate of choice in *any* of the elections in which RPV is present—Ad Astra 2 completely dilutes their votes. PX 122 at 7-8 (Collingwood Rep.). Similarly, the 120,000 minority voters who remain in CD 3 are now able to elect their candidate of choice in only 25% of the elections in which RPV is present—a performance rate 200% lower than the prior CD 3. PX 122 at 7-8, 10 (Collingwood Rep.). This movement of minority votes into CD 2 ensures that minority votes are diluted in *both* CD 2 and CD 3 under Ad Astra 2.

479. Dr. Collingwood's demographic analysis illustrates the surgical manner in which Ad Astra 2 achieves this result. In Figure 8 of his report, depicted below, Dr. Collingwood illustrates that although CD 2 and CD 3 now have minority VAPs of 26.7% and 22.1%

respectively, PX 122 at 10 (Collingwood Rep.), the portion of Wyandotte County separated from CD 3 into CD 2 is 66.21% minority—over three times the total minority VAP in CD 3, PX 122 at 14-15 (Collingwood Rep.). To replace these voters, Ad Astra 2 adds counties to the southwest of Johnson County that are 90.3% white. PX 122 at 14 (Collingwood Rep.). Dr. Collingwood testified that this makes Ad Astra 2 among the starkest cuts along racial lines that he has "ever seen" in his professional work. Hr'g Tr. Day 3 Vol. 1 at 104:8-11 (Collingwood).

B. Ad Astra 2 was enacted under an abnormal legislative process.

480. Second, the process of enacting Ad Astra 2 was characterized by multiple departures from the ordinary legislative process. The Legislature conducted a listening tour, but announced it only a week in advance, completed 14 stops within just five days, and held ten of the fourteen sessions during working hours. Hr'g Tr. Day 1 Vol. 2 at 206:21-207:5, 209:8-10 (Corson). For comparison, the 2012 tour lasted for four months. Hr'g Tr. Day 1 Vol. 2 at 209:1-4 (Corson). The 2022 tour also took place *before* the release of U.S. Census data, depriving the public of a full opportunity to provide meaningful input and adding to the appearance that the tour was merely a box-checking exercise. Hr'g Tr. Day 1 Vol. 2 at 210:22-24 (Corson); Hr'g Tr. Day 2 Vol. 1 at 9:14-15 (Burroughs). Critically, at this point the public could not yet have known that Wyandotte and Johnson Counties could no longer fit within a single congressional district. Hr'g Tr. Day 2 Vol. 1 at 9:20-23 (Burroughs). Moreover, in the more

populous communities, members of the public were limited to providing two minutes of testimony, a constraint Senator Corson could not recall having occurred previously in the legislative process. Hr'g Tr. Day 1 Vol. 2 at 267:3-14 (Corson).

481. The procedural irregularities persisted once the legislative session began. The Senate and House Redistricting Committees simultaneously introduced Ad Astra 2 on Tuesday, January 18. Hr'g Tr. Day 1 Vol. 2 at 220:14-19 (Corson); Hr'g Tr. Day 2 Vol. 1 at 12:24-13:4 (Burroughs). They each held hearings on the bills just two days later, before the data underlying the maps was publicly available, and at the same time, which prevented members of the public from attending both hearings. Hr'g Tr. Day 1 Vol. 2 at 220:19-221:2 (Corson); Hr'g Tr. Day 2 Vol. 1 at 13:18-25 (Burroughs). At the hearings, all but one witness testified against the plan. Hr'g Tr. Day 1 Vol. 2 at 221:3-6 (Corson). Nevertheless, the Senate passed the map in an emergency session and on a largely party-line vote 72 hours after it was introduced. Hr'g Tr. Day 1 Vol. 2 at 221:9-11 (Corson); DX 1007-11. The House followed suit just days later. Hr'g Tr. Day 2 Vol. 1 at 20:212-17 (Burroughs); DX 1007-5. Senator Corson testified that he was aware of only one other instance in which important legislation was passed on such a hurried timeline—an actual emergency related to municipal funding following the cold snap of February 2021. Hr'g Tr. Day 1 Vol. 2 at 221:25-222:9 (Corson).

482. This hurried and publicly opaque process continued even after Governor Kelly vetoed the bill. After an initial attempt to override the veto failed in

the Senate, Republican leadership confined Senators to their seats for nearly three hours while they whipped votes. *See* PX 162 at 54:00-3:24:55 (recording of Feb. 7, 2022 Senate veto override session). Ultimately, leadership was forced to hold a failed vote, but Senator Masterson joined the "no" votes as a means of preserving his ability to call for reconsideration. DX 1007-4; PX 162. The next day, Republicans successfully flipped the remaining holdouts, after a "thuggish," Hr'g Tr. Day 1 Vol. 2 at 231:20-22 (Corson), series of "backroom deals," PX 760 at 7. The House passed the bill the next day. *See* PX 174 at 18 (noting vote changes); PX 163 at 43:00-1:45:00 (recording of February 9, 2022 House veto override session) (showing hour-long delay from calling of override vote to conclusion of vote, during which Representatives were confined to their seats). The series of procedural departures attendant to the passage of Ad Astra 2 point to a discriminatory intent in its adoption.

C. Several aspects of the legislative process that led to Ad Astra 2 impacted minority voters' participation.

483. Third, the legislative process excluded minority voters in particular. As discussed, the 2020 U.S. Census data revealed that for the first time that Wyandotte County—home to Kansas's largest concentration of minority voters—and Johnson County could no longer remain in a single congressional district. This made it particularly important for Wyandotte County residents to provide input on the redistricting cycle. But the legislature foreclosed this opportunity. Instead, the body conducted its listening

tour before this information became public, and then offered no meaningful opportunity for further public participation in the process. *See* Hr'g Tr. Day 1 Vol. 2 at 210:22-24, 220:19-221:2 (Corson); Hr'g Tr. Day 2 Vol. 1 at 9:14-15, 13:18-25 (Burroughs).

484. The scheduling of the listening tour sessions—all during the work day—made it particularly difficult for minority voters to testify. The Court notes that Stacy Noel, executive director of the Kansas African American Affairs Commission, a state-level agency, said in her testimony at the listening session in Kansas City on August 12, 2021 that even she had to request approval from her boss to leave work to testify at the hearing at 1:30 p.m.[22]

485. Moreover, Republican leadership scheduled each listening tour stop for 75 minutes, regardless of the stop's location within the state, meaning that minority residents near Kansas City were afforded less time to speak than white, rural voters at the listening tour stops in the western part of the state. Hr'g Tr. Day 1 Vol. 2 at 209:11-210:13 (Corson). Northeast Kansas voters, including minority voters from Wyandotte County, were given only two minutes to testify, which according to Senator Corson was "not nearly enough time . . . to adequately explain" their views and is "at the far, far short end" of time allotments for witnesses at a legislative hearing. Hr'g Tr. Day 1 Vol. 2 at 209:25-210:13, 267:3-14 (Corson).

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[22] Redistricting Committee Listening Tour Recording at 6:45:00 (Kansas City, Aug. 12, 2021), http://sg001-harmony.sliq.net/00287/Harmony/en/PowerBrowser/PowerBrowserV2/20210812/-1/11587.

486. Significantly, when the public did voice its support for preserving Wyandotte County during the legislative session, its input was resoundingly ignored. Hr'g Tr. Day 1 Vol. 2 at 221:3-6 (Corson). Ultimately, the bill was "greased to go," and the minority communities most impacted had no chance to stop it. Hr'g Tr. Day 2 Vol. 1 at 17:14-24 (Burroughs).

D. Ad Astra 2 substantively departed from prior plans as it relates to minority voters.

487. Fourth, the plan is an unprecedented departure from prior plans in its treatment of minority voters. Indeed, "Wyandotte and Johnson Counties have been in the same district in their entirety for ninety of the last one hundred years," preserving the Kansas City Metropolitan Area and its large minority population in a single congressional district for generations. PX 58 at 3, 31 (P. Miller Rep.).

488. Courts in previous redistricting cycles have explicitly recognized the need to keep Wyandotte County in a single district to avoid unlawful dilution of its minority voting strength. *See O'Sullivan v. Brier*, 540 F. Supp. 1200, 1204 (D. Kan. 1982) (three-judge court) ("[S]plitting the large minority population of Wyandotte County between two districts is undesirable unless compelled by some significant reason. Minorities find it difficult to make their views count in a political system in which majorities rule; being able to maintain block voting strength in areas where they live closely together, as in Wyandotte County, helps them make their voices felt."); *Essex v. Kobach*, 874 F. Supp. 2d 1069, 1086 (D. Kan. 2012) (per curiam) (three-judge

court) ("The Court also agrees with *O'Sullivan* that Wyandotte County should be placed in a single district so that the voting power of its large minority population may not be diluted.").

489. Under Ad Astra 2, however, the district lines are carefully tailored to split the heart of metro Kansas City—and with it nearly a century of tradition—along its most densely minority neighborhoods. PX 122 at 14-15 (Collingwood Rep.). The map transplants over 45,000 minority voters in metro Kansas City from CD 3 to CD 2, cracking apart a performing crossover district so that minority voters on both sides of the line can no longer elect their candidate of choice. PX 122 at 10 (Collingwood Rep.). CD 3, previously home to the state's largest minority population, now has the smallest minority population of any congressional district in the state. Hr'g Tr. Day 3 Vol. 1 at 104:22-25 (Collingwood). Not only is the one of the starkest divides along racial lines that Dr. Collingwood testified he had ever seen, it is a stark departure from the state's historic treatment of minority voters. Hr'g Tr. Day 3 Vol. 1 at 104:8-11 (Collingwood).

E. The history of socioeconomic disparities along racial lines, particularly along the I-70 divide in Wyandotte County, bears on the Court's assessment of the proffered rationale for Ad Astra 2's stark racial divide.

490. Dr. Edwards testified to the socioeconomic disparities and inequities experienced by Wyandotte County's minority residents. She explained that "[t]he northern part of Wyandotte County"—where the