To: Jonathan Cervas, Ph.D. & Bernard Grofman, Ph.D.

From: Scott Matsuda

Date: 10/7/2022

Case Briefing **[KANSAS]**

|  |  |
| --- | --- |
| **Citation** | * Rivera v. Schwab, 512 P.2d 168 (Kan. 2022). |
| **Judicial Breakdown / Partisan or Nonpartisan** | * Justice Stegall (R) wrote the 4-3 opinion, joined by Chief Justice Luckert (R), and Justices Wall (D), and Wilson (D);   + Justice Rosen (D) filed a concurrence in part, and dissent in part.   + Justice Biles (D) filed a concurrence in part, and dissent in part, joined by Justices Rosen and Standridge (D).[[1]](#footnote-1) |
| **Procedural History** | * Shortly after the adoption of Sub. SB 355 (SB 355), plaintiffs sued in state court to enjoin the use of SB 355 in the upcoming elections.   + The Rivera Plaintiffs and the Alonzo Plaintiffs alleged that SB 355 was a partisan and racial gerrymander, diluting minority votes in violation of several provisions of the Kansas Constitution.   + Two weeks later, the Frick Plaintiffs sued alleging that SB 355 was an unconstitutional partisan gerrymander. * After denying the Defendants’ petition for mandamus and quo warranto, the court consolidated the three cases in Wyandotte County. * On 4/25/2022, the district court held that SB 355 violated 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 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 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 "[was] an intentional, effective partisan gerrymander.”   + The district court permanently enjoined KS’ 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 the KS Supreme Court. |
| **Disposition** | * Reversed and injunction order lifted. |
| **Facts** | * In 2021, the KS Legislature began the process of preparing to redraw KS’ four congressional districts according to the 2020 Census. * Subsequently, the Legislature's bipartisan Redistricting Advisory Group adopted the Guidelines[[2]](#footnote-2) and the Senate and House Redistricting Committees received presentations on the Guidelines at initial meetings in January 2022.   + However, only the House Committee on Redistricting adopted the Guidelines—the Senate Committee on Redistricting did not; and, neither the House nor the Senate as a whole adopted the Guidelines. * On 1/20/2022, SB 355 was introduced in the Senate, and referred to the Committee on Redistricting.   + On 1/21/2022, several proposed amendments to the plan introduced on the Senate floor were rejected, and the Senate passed SB 355 on by a vote of 26 to 9.   + The bill was sent to the House on 1/24/2022, passed the House Redistricting Committee, and reached the House floor on 1/25/2022.   + After several motions to amend were rejected, the House passed the bill by a vote of 79 to 37. * SB 355 was then enrolled and presented to Governor Kelly on 1/27/2022.   + Governor Kelly vetoed the bill on 2/4/2022, and, initially, the motion to override the veto failed, and the veto was sustained.   + However, upon a motion to reconsider, the Senate voted to override the veto 27 to 11, and the House 85 to 37. * Subsequently, SB 355 took effect upon publication in the Kansas Register on 2/10/2022. |
| **Issue(s) or**  **Question(s)**  **Presented** | * (1) Whether claims of partisan gerrymandering are justiciable; and * (2) Whether Ad Astra 2 discriminates against minority voters. |
| **The Rule(s)** | * Kan. Const. Bill of Rights, § 2.   + "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." * Political Question Doctrine   + 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.   + The Court must determine whether there exists clear, neutral, and "judicially discoverable and manageable standards.” |
| **Holding(s)** | * (1) Court held “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[,]” and therefore the question presented was nonjusticiable as a political question. * (2) Court held that plaintiffs did not establish the elements of their race-based claims and therefore could not show that Ad Astra 2 discriminated against minority voters.[[3]](#footnote-3) |
| **Rationale** | * Court found that it had jurisdiction to hear Plaintiffs’ claims, rejecting AG’s independent state legislature theory.   + The U.S. Supreme Court has never embraced this view of the Elections Clause, and, in recent years, the Supreme Court has continued to reject similar arguments.   + Court “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.” * Any line drawing, even one that violates equal protection guarantees,[[4]](#footnote-4) does not infringe on a standalone right to vote, the right to free speech, or the right to peaceful assembly.   + "[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." *Rucho*.   + "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." *Harper v. Hall* (Newby, C.J., dissenting). * The Legislature is constitutionally permitted to consider partisanship when drawing district lines, consistent with longstanding United States Supreme Court precedent.   + The district court cannot write [this] hard truth[] out of existence with the fiat power of its judicial pen. * Claims of excessive partisan gerrymandering are nonjusticiable in Kansas, because the question then becomes a political one: “how much is too much?”   + 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.     - “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.” *Rucho*.   + “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 to the justiciability issue.[[5]](#footnote-5)     - Because KS has not adopted such standards, it “cannot follow the decisions of other state supreme courts . . . 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.’”   + Although plaintiffs have proposed a variety of different metrics for measuring "fairness" and answering the "how much is too much" question, . . . none of these metrics have a foundation in Kansas law—either statutory enactment or constitutional text.     - Further, those metrics “assume too much” by presuming to understand what “fairness” is. *Id.* at 185–86.   + “In the absence of statutory or constitutional standards in Kansas . . . 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.” |
| **Arguments of Parties** | * 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." * Rivera Plaintiffs   + 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.   + Also argued that Ad Astra 2 impermissibly split Kansas' four Native American reservations into two districts. * Frick Plaintiffs   + Alleged 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’s Bill of Rights §§ 1, 2, 3, 11, 20, and Article 5, § 1.   + Contend that Ad Astra 2 was developed in secret, rushed through the legislative process, and contradicts established redistricting guidelines. * Defendants   + Claimed the Elections Clause of the United States Constitution bars any state court from considering the validity of legislatively enacted congressional district maps (i.e., independent state legislature theory). |
| **Concurring in Part, Dissenting in Part: Rosen, J.** | * “The dominant political party in our Legislature recently reapportioned Kansas congressional districts in such a manner as to dilute—or eliminate—the voting rights of racial minorities as well as to propel this state's national political power toward a monolithic single-party system.   + The majority of our court today gives its stamp of approval to this assault on the democratic system and the constitutional backbone of our democracy.   + Because I cannot countenance the subversion of the democratic process to create a one-party system of government in this state and to suppress the collective voice of tens of thousands of voters, I dissent.”   + “As the Legislature has distorted and contorted the political map in order to monopolize the position of one political party, the majority opinion distorts and contorts legal reasoning and constitutional theory to uphold racial discrimination and political chicanery.” * “Early in its opinion, the majority quickly and matter-of-factly pronounces that ‘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.’ With these few taps on a keyboard, the majority denies Kansans the very thing our founders envisioned: a people's government that fervently guards the people's equal benefit from and access to the law. . . .”   + The first thing about section 2's text that the majority ignores is the most obvious: it is different from the text in the Fourteenth Amendment.     - This—"[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"—is not the same as this—"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."     - One is a positive conferral of rights; the other is framed in the negative.   + Kansas also ratified its Section 2 in 1859, nine years before the ratification of the Fourteenth Amendment; the historical origins and context also make it plain that the declarations have separate meanings. * “I would have . . . concluded that [Section 2] is a rich and generous declaration that guarantees the people of Kansas protections that are broader than those found in the federal Equal Protection Clause. This reflection would support the legal framework and conclusion my dissenting colleagues present today: Ad Astra 2's invidious discrimination against people based on past political speech and race certainly presents a justiciable question and clearly violates the protections enshrined in the Kansas Constitution [emphasis added].” |
| **Concurring in Part, Dissenting in Part: Biles, J., joined by Rosen and Standridge, J.J.** | * These circumstances cry out for judicial review.   + The district court's factual findings lay bare how this "Ad Astra 2" legislation intentionally targets fellow Kansans because of their voting history, their prior expression of political views, their political affiliations, and the color of their skin. * “I can't abide by the majority's decision to look the other way by invoking the political question doctrine for the first time in this context. And when I apply the legal analysis to the established facts, I don't like what I see. I also would apply a state-based analysis to the race-based claims under the Kansas Constitution. I would affirm the district court although my rationale differs in a few places.” * It is important to appreciate the judicial bait-and-switch that has happened.   + First, the U.S. Supreme Court held in a recent 5-4 decision that federal courts must avoid partisan gerrymandering claims from the various states. *Rucho*. But in doing so, the Court's majority noted state courts were still available to stand guard against constitutional mischief.   + Plaintiffs here dutifully followed *Rucho*'s prompt and brought their case against Ad Astra 2 to state court, even though federal court is where these issues had been heard in our state over the past several decades.   + Then, the majority slams the courthouse door shut by declaring: "[W]e 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 [congressional] district lines." * If these issues were political questions without manageable judicial standards, why would our court so consistently have bothered to even acknowledge its concern about partisan gerrymandering over so many prior decades?   + The majority remains silent about that, but the answer is obvious from the caselaw. Our court has had no difficulty seeing its job as protecting constitutional rights when redistricting comes around beyond just doing the population math. (Dissent cites various cases where the judiciary intervened. *Id.* at 206–07.)     - “The majority cannot square its retreat on this issue with our court's nine reapportionment cases since 1963.”   + The answer to the majority's question of how much is too much is straightforward: partisan gerrymandering is "too much" when partisanship motivated the state action in question when there is no other legitimate rationale driving the outcome.     - Viewed in this manner, our court's role is confined not to determining the best policy, but to deciding whether the Legislature's discretionary decisions can be explained by a lawful government aim. * The District Court did not “go rogue.” It adopted a traditional equal protection framework firmly founded in our caselaw—triggered by its initial determination that the questioned state action, i.e., Ad Astra 2's enactment, resulted from the intentional targeting of constitutionally protected activities.   + The district court concluded "the Kansas Constitution's equal protection, free speech and assembly, and suffrage provisions provide manageable standards to adjudicate partisan gerrymandering claims."   + It further noted, "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."   + And the court added, "[W]hile federal courts may be unable to hear partisan gerrymandering claims under the federal Constitution, the Kansas Constitution allows this [state] Court to hear those claims." * “In updating district lines, the levers of government were not operated to achieve permissible ends, even with some tolerance for incidental, political benefits. And lacking an appropriate government interest to justify its effects, Ad Astra 2 deprives Kansans the equal protection of the laws of this state.” * [As a note, the Dissent’s discussion of racial gerrymandering and racial vote dilution was excluded, as beyond the scope of our review.] |
| **Notes/**  **Reactions** | * N/a. |

1. The political party designations of the judges were obtained via Google desktop searches, which may not be entirely accurate. [↑](#footnote-ref-1)
2. The Guidelines are a set of principles that set forth "traditional redistricting criteria" substantively the same as those used in the 2012 redistricting cycle. Its priorities included: (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. [↑](#footnote-ref-2)
3. As a note, I excluded from this brief the court’s rationale as to the question of racial gerrymandering and racial vote dilution, as it was beyond the scope of our review. [↑](#footnote-ref-3)
4. The majority also held that the district court erred in concluding that federal equal protection standards were inapplicable to the plaintiffs’ section 2 (of the Kansas Bill of Rights) arguments because "Kansas's guarantee of equal benefit 'affords separate, adequate, and greater rights than the federal Constitution.'" Instead, the majority held that the “equal protection guarantees contained in section 2 [of the Kansas Bill of Rights] are coextensive with the same equal protection guarantees enshrined in the Fourteenth Amendment.” [↑](#footnote-ref-4)
5. The KS court cites the Constitutions of FL, NC, OH, MD, MI, MO, IA, NY, and CO as states that have codified clear standards for determining extreme partisan gerrymandering. *Rivera*, 512 P.3d at 183, 186. [↑](#footnote-ref-5)