

# Free to Gerrymander the Free State: How *Rivera v. Schwab* Guarantees Partisan Gerrymandering in Kansas.

Lindsay N. Kornegay

*In Rivera v. Schwab, the Kansas Supreme Court held that partisan gerrymandering issues constitute nonjusticiable political questions in Kansas because state law does not provide discernible standards for adjudication. Because the Kansas Legislature is unlikely to enact laws prohibiting partisan gerrymandering—and because a federal remedy does not currently exist—Rivera v. Schwab essentially guarantees a continuation of partisan gerrymandering in Kansas.*

## I. INTRODUCTION

*Rivera v. Schwab* may become one of the most consequential election law cases in Kansas history. The Kansas Supreme Court's holding that partisan gerrymandering constitutes a nonjusticiable political question<sup>1</sup> effectively closes the door to remedying the issue of congressional partisan gerrymandering in Kansas. Because the state legislature has little incentive to codify protections against partisan gerrymandering—and because the U.S. Supreme Court has also prohibited federal courts from weighing in on the issue<sup>2</sup>—legislators have free license to draw partisan congressional maps that increase the power of the dominant political party and to deny fair representation to those in the minority political party. In a nation with widening partisan divisions<sup>3</sup> and legislatures that fail to proportionally represent constituents,<sup>4</sup> *Rivera* adds fuel to the ongoing existential threat to democracy.

---

1. *Rivera v. Schwab*, 512 P.3d 168, 187 (Kan. 2022).

2. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (holding that partisan gerrymandering questions present nonjusticiable political questions for federal courts absent a source of federal law that provides discernable standards for adjudicating partisan gerrymandering claims).

3. Michael Dimock & Richard Wike, *America is Exceptional in the Nature of its Political Divide*, PEW RSCH. CTR. (Nov. 13, 2020), <https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide/> [https://perma.cc/JN8A-UWYL].

4. Julia Kirschenbaum & Michael Li, *Gerrymandering Explained*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained> [https://perma.cc/P29E-8QHQ] (last updated Aug. 12, 2021).

## II. BACKGROUND

### A. *Substitute for Senate Bill 355 and Ad Astra 2*

The U.S. Constitution and federal law require the reapportionment of congressional districts every ten years due to updated population information compiled from the U.S. Census.<sup>5</sup> As a result of the 2020 U.S. Census, the Republican-dominated Kansas legislature began the process of redrawing Kansas's congressional map.<sup>6</sup> In 2022, after surviving proposed amendments by legislators and a veto by Democratic Governor Laura Kelly, the Kansas legislature enacted Substitute for Senate Bill 355, which contained the newly redrawn congressional map referred to as "Ad Astra 2."<sup>7</sup> Ad Astra 2 created two profound changes to Kansas's congressional districts. First, Ad Astra 2 split Wyandotte County into two separate districts, District 2 and District 3.<sup>8</sup> Second, Ad Astra 2 separated the City of Lawrence from the rest of Douglas County in District 2 by placing Lawrence into District 1.<sup>9</sup>

As a result of these changes, numerous plaintiffs filed suit to challenge the enactment of Ad Astra 2.<sup>10</sup> The Court consolidated several of these cases into one action.<sup>11</sup> Plaintiffs essentially alleged that the enactment of Ad Astra 2 violated constitutional safeguards meant to protect against racial gerrymandering and partisan gerrymandering.<sup>12</sup> Wyandotte County is the most racially diverse county in Kansas and largely favors the Democratic Party.<sup>13</sup> Petitioners alleged that "cracking"<sup>14</sup> Wyandotte County into two separate congressional districts diluted the political power of both racial minority voters and Democratic voters.<sup>15</sup> Petitioners also alleged that Ad Astra 2 created impermissible partisan gerrymandering by removing Lawrence from the rest of the Douglas County district and placing Lawrence into District 1.<sup>16</sup> District 1 is a vast, rural, Republican-dominated

---

5. U.S. CONST. art. I, § 2, cl. 3; 2 U.S.C. § 2a(a).

6. *Rivera*, 512 P.3d at 173.

7. *Id.* at 173–74.

8. *Id.* at 175.

9. *Id.*

10. *Id.* at 174.

11. *Id.* at 173.

12. *Id.* at 174–75.

13. *QuickFacts* *Wyandotte County, Kansas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/wyandottecountykansas> [<https://perma.cc/NY5Q-3ZQV>] (last visited Jan. 19, 2023); KAN. SEC'Y OF STATE, PARTY COUNT REPORT FOR JURISDICTIONS (2022), <https://sos.ks.gov/elections/22elec/2022-08-01-Voter-Registration-Numbers-by-County.pdf> [<https://perma.cc/9CZ7-ELCF>].

14. In a political context, "cracking" is defined as splitting "groups of people with similar characteristics, such as voters of the same party affiliation, across multiple districts." Kirschenbaum & Li, *supra* note 4. This has the effect of diluting voting strength. *Id.*

15. *Rivera*, 512 P.3d at 175.

16. *Id.* at 174.

district that has little in common with Lawrence—a predominately Democratic area and the sixth largest city in Kansas.<sup>17</sup>

Plaintiffs alleged that the partisan gerrymandering created by Ad Astra 2 violated numerous provisions of the Kansas Constitution.<sup>18</sup> After hearing arguments from plaintiffs and state election officials, the district court agreed with plaintiffs that Ad Astra 2 was an act of unconstitutional partisan gerrymandering; violating state constitutional rights to equal protection, the right to vote, and the right to free speech and assembly.<sup>19</sup> In its ruling, the district court also addressed the justiciability of partisan gerrymandering claims.<sup>20</sup> The court held that federal law does not preclude states from undertaking questions of partisan gerrymandering and that partisan gerrymandering does not fall under the political question doctrine.<sup>21</sup>

One of the defendant's primary arguments was that partisan gerrymandering constituted a political question because of a *Baker* factor—providing no judicially discoverable and manageable standards for resolution.<sup>22</sup> The district court held that partisan gerrymandering claims *do* have discoverable and manageable standards, determining that the Kansas Constitution provides a source for such standards and that state courts could further define such standards to enforce the state constitution.<sup>23</sup> The Court also held that other states offered applicable models of discoverable and manageable standards.<sup>24</sup> Using these models from other states, and interpreting the Kansas Constitution, the district court created a standard by which to adjudicate partisan gerrymandering claims. Specifically, the Court held that:

[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

---

17. KAN. SEC'Y OF STATE, *supra* note 13; *QuickFacts Lawrence City, Kansas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/map/lawrencecitykansasKS/PST045221> [<https://perma.cc/E8B4-634G>] (last visited Jan. 19, 2023).

18. *Rivera*, 512 P.3d at 174.

19. *Rivera v. Schwab*, No. 2022-CV-000089, slip op. at 177–87 (Kan. Dist. Ct. Apr. 25, 2022) [hereinafter District Court Order].

20. *Id.*

21. *Id.* at 165–77.

22. *Id.* at 165; *Baker v. Carr*, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." (emphasis added)).

23. District Court Order, *supra* note 19, at 166–72.

24. *Id.*

congressional plan will have the desired effect of substantially diluting disfavored party members' votes.<sup>25</sup>

### B. Partisan Gerrymandering in Federal Courts

A central focus of *Rivera* is whether partisan gerrymandering issues lay beyond a court's purview as nonjusticiable political questions. To fully understand *Rivera* and a state court's ability to decide partisan gerrymandering questions, one must first understand the history of partisan gerrymandering questions within federal courts and the reasons why federal courts have implicitly encouraged state courts to address the issue.

The U.S. Supreme Court has a rocky history of determining whether partisan gerrymandering cases present nonjusticiable political questions. In the 1986 opinion of *Davis v. Bandemer*, the Court held that political gerrymandering cases are justiciable under the Equal Protection Clause.<sup>26</sup> In 2004, however, the Court attempted to reverse course.<sup>27</sup> In *Vieth v. Jubelirer*, a plurality held that challenges to partisan gerrymandering constitute nonjusticiable political questions because, invoking one of the infamous *Baker* factors,<sup>28</sup> "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged."<sup>29</sup> Justice Kennedy concurred in the judgment dismissing the case due to a lack of judicially discernible or manageable standards but declined to adopt the plurality's position that courts could *never* develop such standards.<sup>30</sup>

Fifteen years after *Vieth*, the Court achieved a majority of Justices concluding that federal courts currently have no authority to determine issues of partisan gerrymandering.<sup>31</sup> In *Rucho v. Common Cause*, the Court explained that federal courts may not undertake questions of partisan gerrymandering because the Elections Clause of the U.S. Constitution reserves to lawmakers the authority to determine the manner in which to conduct congressional elections.<sup>32</sup> Because Congress has not enacted

---

25. *Id.* at 173.

26. *Davis v. Bandemer*, 478 U.S. 109, 125 (1986), *overruled by* *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

27. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

28. *See Baker*, 369 U.S. at 217 (outlining six factors that may create a nonjusticiable political question). Although the *Baker* factors provide an essential component to any discussion about the political question doctrine, legal scholars and courts alike often criticize the factors as "useless in identifying what constitutes a political question." ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 142 (6th ed. 2019).

29. *Jubelirer*, 541 U.S. at 281.

30. *Id.* at 306 (Kennedy, J., concurring).

31. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019).

32. *Id.* at 2495 (citing U.S. CONST. art. I, § 4, cl. 1).

discernable standards for federal courts to follow, the Court concluded that federal courts may not decide partisan gerrymandering issues.<sup>33</sup>

The Elections Clause primarily delegates power to the states to prescribe the manner of congressional elections, but the Elections Clause also reserves to Congress the ability to enact election laws that act as a check on state power.<sup>34</sup> The Court explained that although the Elections Clause allows state and federal legislatures to enact laws addressing partisan gerrymandering, neither the U.S. Constitution nor any current federal statute creates manageable standards that federal courts may use to adjudicate partisan gerrymandering claims.<sup>35</sup> Because the Court determined that no federal source of law created judicially discernible and manageable standards to adjudicate partisan gerrymandering questions, the Court held that partisan gerrymandering issues lay beyond the purview of federal courts.<sup>36</sup>

The Court concluded that state and federal lawmakers remain free to enact laws addressing partisan gerrymandering and that courts may address partisan gerrymandering if lawmakers enact standards and guidance for courts to apply.<sup>37</sup> Thus, until the Federal Congress enacts discernible standards for federal courts to review partisan gerrymandering, federal courts will be unable to adjudicate on this issue. The fact remains that state courts may review state laws for discernable factors to consider partisan gerrymandering, which brings the discussion to Kansas law and the case of *Rivera v. Schwab*.

### III. COURT'S DECISION

On direct appeal, the Kansas Supreme Court reversed the district court by determining that partisan gerrymandering constitutes a nonjusticiable political question for Kansas courts.<sup>38</sup> Although the Kansas Supreme Court agreed with the district court that federal law did not bar state review of matters concerning reapportionment of congressional districts,<sup>39</sup> the Court held that a lack of judicially discernable standards for adjudication rendered partisan gerrymandering claims nonjusticiable political questions.<sup>40</sup>

To support its assertion, the Court analyzed the Kansas Constitution and other sources of Kansas state law to locate a source of standards by

---

33. *Id.* at 2508 (detailing how Congress has repeatedly attempted to pass legislation to address partisan gerrymandering but how every attempt to pass such legislation has failed).

34. *Id.* at 2495–96.

35. *Id.*

36. *Id.* at 2506–07.

37. *Id.* at 2507.

38. *Rivera v. Schwab*, 512 P.3d 168, 187 (Kan. 2022).

39. *Id.* at 178.

40. *Id.* at 187.

which to adjudicate partisan gerrymandering claims. Although the plaintiffs and district court relied on multiple provisions of the Kansas Constitution to protect against partisan gerrymandering, the Kansas Supreme Court held that any possible protection against partisan gerrymandering would be grounded only in the equal protection provisions of Section 2 of the Kansas Constitution's Bill of Rights.<sup>41</sup> The Court noted that previous Kansas case law permitted legislatures to use partisan considerations when drawing district lines.<sup>42</sup> The Court concluded that nowhere in the Kansas Constitution, state statute, and state case law were justiciable standards created for Kansas courts to evaluate partisan gerrymandering claims.<sup>43</sup>

#### IV. COMMENTARY

The Kansas Supreme Court stated that its decision did not render it "complicit" in partisan gerrymandering.<sup>44</sup> It is difficult to understand, though, how *Rivera* does not act as a license for Kansas legislators in the majority party to use partisan gerrymandering to safeguard their seats and to increase their party's representation in the legislature. In his concurrence in part and dissent in part, Justice Rosen makes the direly important and accurate assessment that the *Rivera* majority opinion "promises future legislatures that they may with impunity divide and subdivide voters' interests to further the purposes of whichever party is in a position to seize absolute control."<sup>45</sup>

The majority in *Rivera* seems to suggest that the solution to partisan gerrymandering lies within standards that the legislature could enact through codified law.<sup>46</sup> However, expecting legislators to enact laws that limit partisan gerrymandering presents an unlikely solution to the problem. This proposed solution to partisan gerrymandering is akin to asking the fox to guard the hen house—why would politicians enact laws that act against their own interests and the interests of their political allies?

To support the conclusion that legislators have little desire to codify laws protecting against partisan gerrymandering, one only needs to look to the history of such proposed laws in both the federal and state legislatures. For example, in every year since 2005, the U.S. Congress has introduced, but failed to pass, the Fairness and Independence Act, which "would require every State to establish an independent commission to adopt redistricting

---

41. *Id.* at 178, 180.

42. *Id.* at 182.

43. *Id.* at 187.

44. *Id.* at 177.

45. *Id.* at 194 (Rosen, J., concurring in part and dissenting in part).

46. *Id.* at 184.

plans" and which "would prohibit consideration of voting history" or "political party affiliation" in redistricting.<sup>47</sup>

Similarly, the Kansas State Legislature has a recent history of rejecting prohibitions on partisan gerrymandering. Prior to the creation of Ad Astra 2, the Kansas Legislature's bipartisan Redistricting Advisory Committee had adopted a set of guidelines known as the Proposed Guidelines and Criteria for 2022 Congressional and State Legislative Redistricting.<sup>48</sup> These guidelines established a set of criteria and goals for redistricting, including the creation of a redistricting map that had "neither the purpose nor effect of diluting minority voting strength."<sup>49</sup> However, although the House Committee on Redistricting adopted the proposed guidelines, the House rejected them, as did the Senate Committee on Redistricting and the Senate as a whole.<sup>50</sup> Therefore, the guidelines were not viewed as a source of binding law by which a court could derive standards to adjudicate partisan gerrymandering claims.<sup>51</sup>

Despite this history of both the federal and state congresses rejecting prohibitions on partisan gerrymandering, one could argue that voters should only elect politicians that will serve to enact laws curtailing partisan gerrymandering. This presents another improbable resolution, though. Partisan gerrymandering is an important issue, but numerous other political issues will likely take higher priority in the minds of voters. Partisan gerrymandering is a matter of great concern, but issues surrounding the economy, gun policies, violent crime, and healthcare reasonably weigh heavily on the minds of voters and overshadow any partisan gerrymandering concerns.<sup>52</sup>

Additionally, unlike states such as California or Colorado, Kansas does not allow citizens to directly propose laws or constitutional amendments to prohibit partisan gerrymandering.<sup>53</sup> Constitutional amendments may appear on Kansas voting ballots, such as the recent "Value Them Both" Amendment that proposed amending the state constitution to explicitly assert that Kansans had no state constitutional right to abortion.<sup>54</sup> However,

---

47. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019).

48. *Rivera*, 512 P.3d at 173.

49. *Id.* at 173–74.

50. *Id.* at 174.

51. *Id.* at 186–87.

52. *Abortion Rises in Importance as a Voting Issue, Driven by Democrats*, PEW RSCH. CTR. (Aug. 23, 2022), <https://www.pewresearch.org/politics/2022/08/23/midterm-election-preferences-voter-engagement-views-of-campaign-issues/> [<https://perma.cc/SM93-4HYL>] (explaining that the economy, gun policies, violent crime, and healthcare are the top issues motivating voters for the 2022 midterms).

53. *Initiative and Referendum Processes*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-processes> [<https://perma.cc/U55E-PYSQ>] (last visited Jan. 12, 2023).

54. State of Kansas Official Primary Election Ballot Constitutional Amendment, KAN. SEC'Y OF STATE, <https://sos.ks.gov/elections/22elec/2022-Primary-Election-Constitutional-Amendment-HCR-5003.pdf> [<https://perma.cc/DHJ3-RWHT>] (last visited Jan. 19, 2023).

legislatures must first propose such constitutional amendments and Kansans may not directly propose laws or constitutional amendments through citizen initiatives.<sup>55</sup> Therefore, Kansas citizens may not directly enact laws allowing state courts to adjudicate partisan gerrymandering claims.

A further hindrance to resolving partisan gerrymandering is that the Kansas Supreme Court is unlikely to deviate from its holding in *Rivera*. Stare decisis practically guarantees that partisan gerrymandering will continue to constitute a nonjusticiable political question absent a new source of law that plainly lays out discernable standards for adjudication. Because the Kansas Legislature is unlikely to create a new source of law for explicitly discernable standards, the Kansas Supreme Court and the lower courts of Kansas will presumably follow the holding of *Rivera* for the foreseeable future.

Since courts are unlikely to deviate from the holding of *Rivera*, and since the legislature is unlikely to codify protections against partisan gerrymandering, what can Kansans expect the next time that the legislature redraws congressional maps in 2030? Observing *Rivera*, the Republican-dominated Kansas legislature will likely feel emboldened to create congressional maps that are even more partisan than Ad Astra 2. The Ad Astra 2 map may come to pass as quaint partisanship in comparison to the next congressional map after the 2030 census.

## V. CONCLUSION

Although it is an unsatisfying prediction, *Rivera v. Schwab* creates no practical solution to partisan gerrymandering in Kansas. *Rivera* feels particularly ominous at a time when the news cycle frequently depicts attempts of election subversion, from reminders of the January 6th insurrection<sup>56</sup> to the rise of political candidates who promote false election claims.<sup>57</sup> Although the Kansas Supreme Court claimed that it did not endorse partisan gerrymandering,<sup>58</sup> the *Rivera* opinion follows a trend of practices that attempt to unfairly strip power from the will of voters. In a time of vast distrust of political processes, *Rivera* further undermines democracy by effectively preserving partisan gerrymandering in Kansas.

---

55. See KAN. CONST. art. 14, § 1 (stating that although Kansan electors may vote on a constitutional amendment, the Kansas Legislature must first propose the amendment).

56. See Barbara Sprunt, *The Jan. 6 Committee Has Voted to Subpoena Trump. Here's What Else Happened*, NPR (Oct. 13, 2022, 5:25 PM), <https://www.npr.org/2022/10/13/1125333531/jan-6-hearing-recap-takeaways-trump-subpoena> [<https://perma.cc/CYX6-HW2A>].

57. See Kate Sullivan, *Kari Lake Doesn't Commit to Accepting Arizona Election Result if She Loses*, CNN, <https://www.cnn.com/2022/10/16/politics/kari-lake-arizona-election-katie-hobbs-cnn/index.html> [<https://perma.cc/SLL5-2BDJ>] (last updated Oct. 16, 2022, 1:12 PM).

58. *Rivera v. Schwab*, 512 P.3d 168, 177 (Kan. 2022).