

IN THE SUPREME COURT OF THE STATE OF KANSAS

PETITION OF DEREK SCHMIDT,)
Attorney General, TO DETERMINE)
THE VALIDITY OF SUBSTITUTE)
FOR SENATE BILL 563 PROVISIONS))
REAPPORTIONING STATE)
LEGISLATIVE DISTRICTS)
_____)

Original Action No. _____

**MEMORANDUM IN SUPPORT OF PETITION TO DETERMINE
THE VALIDITY OF SUBSTITUTE FOR SENATE BILL 563
PROVISIONS REAPPORTIONING STATE LEGISLATIVE DISTRICTS**

The Attorney General of the State of Kansas, Derek Schmidt, submits this Memorandum in Support of his Petition to Determine the Validity of Substitute for Senate Bill 563 Provisions Reapportioning State Legislative Districts (Sub SB 563). For the reasons set forth below, Attorney General Schmidt requests that this Court determine that the state legislative reapportionment contained in Sub SB 563 is valid.¹

Factual and Procedural Background

“State reapportionment of legislative districts is the task of local legislatures or of those organs of state government selected to perform it.” *In re House Bill No. 2620*, 225 Kan. 827, 841, 595 P.2d 334 (1979) (citing *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973)). This Court has long recognized that “the duty of reapportionment is legislative in nature and is committed by the Constitution to the legislature.”

¹ Sub SB 563 also adopted the “Apple 7” map for Board of Education districts. Because Article 10, Section 1(b) requires the Attorney General to petition this Court to determine the validity of “legislative districts” only, the Board of Education map contained in Sub SB 563 is beyond the scope of the Attorney General’s petition.

Harris v. Shanahan, 192 Kan. 183, 206, 387 P.2d 771 (1963). The provisions of the Kansas Constitution currently in effect to govern legislative reapportionment were adopted by constitutional amendment in 1974 and require the Kansas Legislature “[a]t its regular session” in 2022 to “by law reapportion the state senatorial districts and representative districts” according to the most recent federal census. Kan. Const. art. 10, § 1(a).

The most recent federal census is the 2020 Census. According to the 2020 Census, Kansas has a total population of 2,937,880. This represents a population increase of 84,762 people since the last census was completed. This population growth occurred almost entirely in Kansas’s urban areas. Whereas 80 counties in Kansas saw a decrease in population between 2010 and 2020, Kansas’s most populous counties grew in population. This includes Johnson County (which grew by 65,684 people), Sedgwick County (which grew by 25,459 people), Wyandotte County (which grew by 11,740 people), and Douglas County (which grew by 7,959 people). *See generally Kansas: 2020 Census*, U.S. Census Bureau (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/kansas-population-change-between-census-decade.html>.

Kansas by law has 40 senatorial districts and 125 representative districts. *See* Kan. Const. art. 2, § 2; K.S.A. 4-101. The Kansas Legislature began the process of preparing to redraw those districts according to the 2020 Census in 2021. Through a combination of in-person and virtual meetings, the House and Senate Committees on Redistricting jointly held a listening tour of 18 town hall meetings

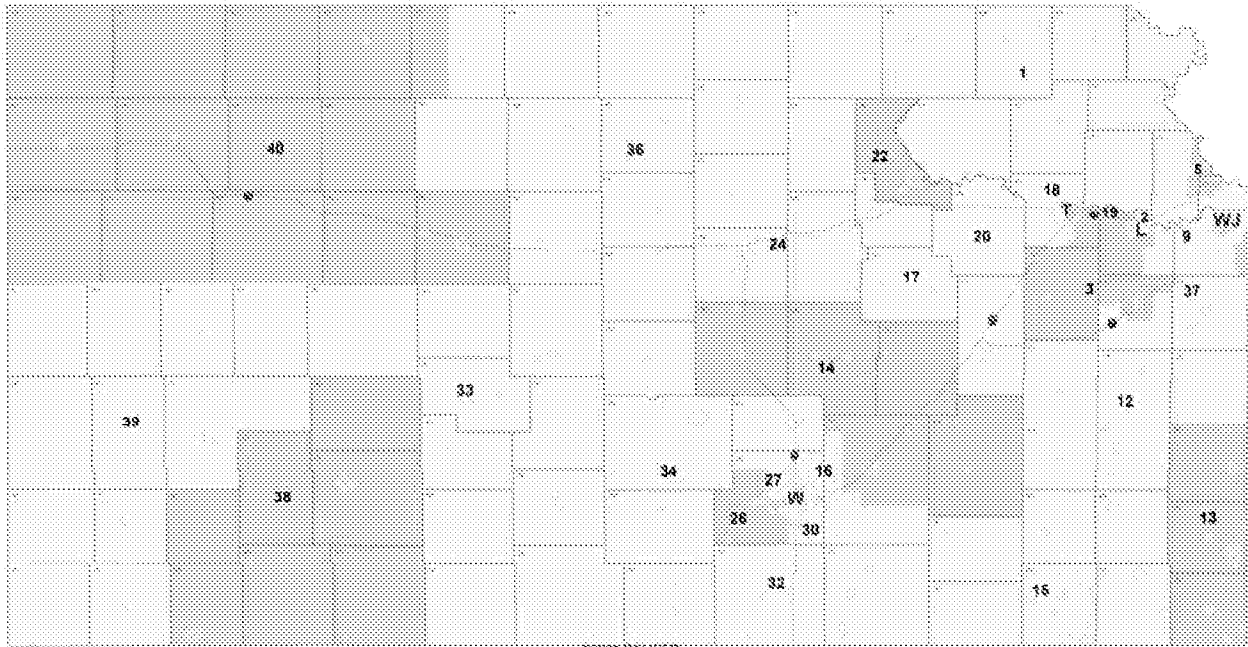
across Kansas. All of the meetings were live-streamed, and the public was invited to submit written or oral testimony (or both).

The listening tour occurred in two rounds: The first round consisted of 14 meetings held during the week of August 9, 2021. Meetings were held in: (1) Manhattan; (2) Salina; (3) Hays; (4) Colby; (5) Garden City; (6) Dodge City; (7) Hutchinson; (8) Wichita; (9) Chanute; (10) Pittsburg; (11) Overland Park; (12) Kansas City; (13) Leavenworth; and (14) Lawrence. *See generally House and Senate Redistricting Committees 2021 (August)*, KLRD, <http://www.kslegresearch.org/KLRD-web/Committees/House-Senate-Redistricting-Committees-2021.html> (last visited Apr. 24, 2022). The second round consisted of four meetings held virtually during the last two weeks in November. Members of the public also had the option to participate in these meetings in person at locations made available in: (1) Atchison, Mayetta, Ottawa, and Independence; (2) Emporia, Great Bend, Liberal, and McPherson; (3) Newton and El Dorado; and (4) Stilwell and Bonner Springs. *See generally House and Senate Redistricting Committees 2021 (November)*, KLRD, http://www.kslegresearch.org/KLRD-web/Committees/House-Senate-Redistricting-Committees_November_2021.html (last visited Apr. 25, 2022).

At its regular session in 2022, the Kansas Legislature enacted Sub SB 563 to reapportion Kansas's senatorial and representative districts. Sub SB 563 is attached to the Petition as Exhibit A. Members of the public had the opportunity to and did testify both in writing and orally with respect to these maps while they were under consideration in the Legislature. Because this Court must evaluate the

procedural validity of Sub SB 563 pursuant to Article 10, Section 1(b) of the Kansas Constitution, further details of Sub SB 563’s procedural history are provided in part II.A below.

Sub SB 563 enacted the “Liberty 3” map for state senatorial districts. That map is attached as Exhibit B.² It divides Kansas’s 40 senatorial districts as follows:

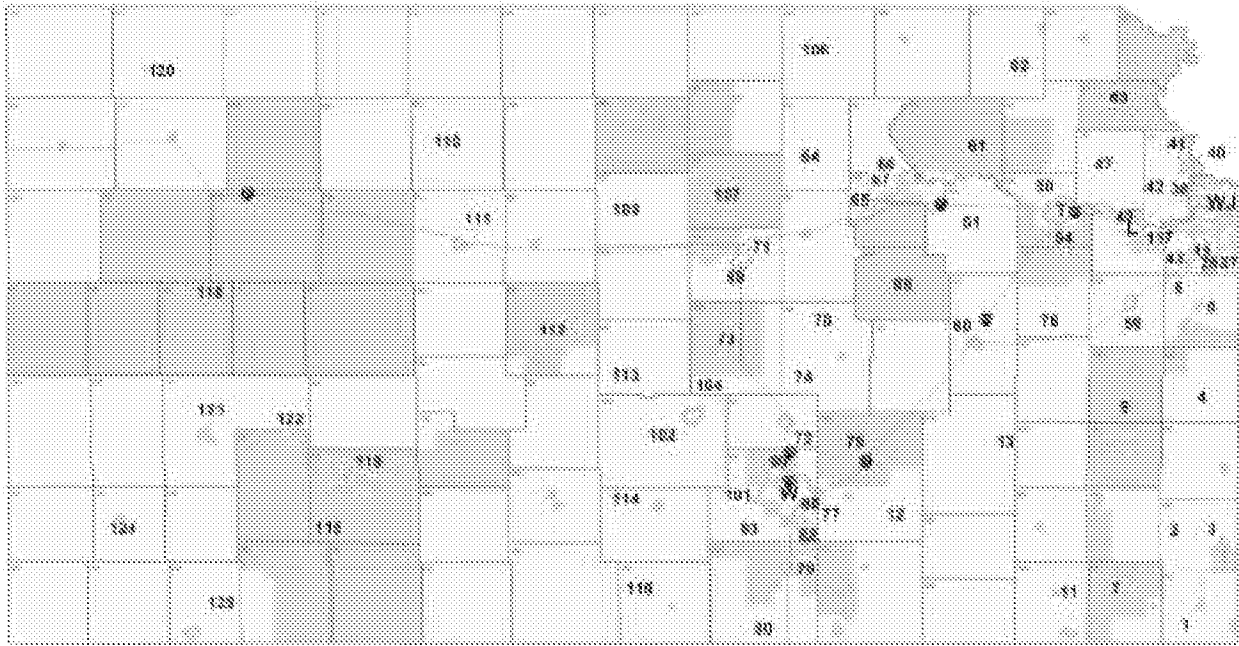


Sub SB 563 also enacted the “Free State 3F” map for state representative districts. That map is attached as Exhibit C.³ It divides Kansas’s 125 representative

² The full “map packet” for the Liberty 3 map is available on the Kansas Legislative Research Department’s website at http://www.kslegresearch.org/KLRD-web/Publications/Redistricting/2022-Plans/Senate/Liberty_3.pdf. In addition to the map itself, a map packet includes various data related to the map—including district populations, the county composition of districts, racial and ethnic demographics of districts, compactness measures, comparisons of new and former districts, the new districts of incumbents, and a list of split political subdivisions.

³ The full map packet for the Free State 3F map is available on the Kansas Legislative Research Department’s website at http://www.kslegresearch.org/KLRD-web/Publications/Redistricting/2022-Plans/House/Freestate_3F-packet.pdf.

districts as follows:



The Governor signed Sub SB 563 into law on April 15, 2022. Sub SB 563 became effective upon its publication in the Kansas Register on April 21. *See* 41 Kan. Reg. 666 (Apr. 21, 2022).⁴

On April 25, Attorney General Schmidt has petitioned this Court to determine the validity of the legislative apportionment contained in Sub SB 563.

Discussion and Legal Authorities

I. The Kansas Constitution requires that the Kansas Legislature, the Attorney General, and this Court each perform specified roles in legislative reapportionment.

Every ten years, Kansas's senatorial and representative districts must be redrawn. *See* Kan. Const. art. 10, § 1(a). Both the Kansas Legislature and the

⁴ This issue of the Kansas Register is available on the Secretary of State's website at <https://www.kssos.org/publications/Register/Volume-41/PDF/Vol-41-No-16-April-21-2022.pdf>.

Attorney General are assigned duties in this constitutional process. The Kansas Legislature performed that duty by enacting Sub SB 563, and Attorney General Schmidt performs that duty by bringing this action as required by Article 10, Section 1(b) of the Kansas Constitution to determine the validity of the 2022 reapportionment.

A. The Kansas Constitution requires the Kansas Legislature to reapportion the state legislative districts every decade.

Pursuant to Article 10, Section 1(a) of the Kansas Constitution, “at its regular session every tenth year” after 1992, the Kansas Legislature “shall by law reapportion the state senatorial districts and representative districts.”

Apportionment is to be done “on the basis of the population of the state as established by the most recent census of population taken and published by the United States census bureau.” Kan. Const. art. 10, § 1(a).⁵ The Kansas Constitution also requires that “[b]ills reapportioning legislative districts shall be published in the Kansas register immediately upon final passage and shall be effective for the next following election of legislators and thereafter until again reapportioned.” *Id.*

The Kansas Legislature fulfilled its constitutional duty this year. The Kansas

⁵ The Kansas Constitution previously required that Kansas’s total population as reported by the most recent census be adjusted in two ways: (1) to “exclude nonresident military personnel stationed within the state and nonresident students attending colleges and universities within the state,” and (2) to “include military personnel stationed within the state who are residents of the state and students attending colleges and universities within the state who are residents of the state in the district of their permanent residence.” *See* 2019 Kan. Sess. Laws 1228-29 (SCR 1605). Kansas voters eliminated that requirement in 2019 with the Kansas Eliminate Revision of Census Population Amendment. *See id.*

Legislature apportioned both Kansas’s senatorial and representative districts based on the 2020 Census in Sub SB 563. The Secretary of State published Sub SB 563 in the Kansas Register on April 21, 2022, as required by the Kansas Constitution. *See* 41 Kan. Reg. 666; Kan. Const. art.10, § 1(a).

B. The Kansas Constitution requires the Attorney General to petition this Court to review the validity of state legislative apportionment acts.

Under Article 10, Section 1(b) of the Kansas Constitution, “[w]ithin 15 days after the publication” of an apportionment act in the Kansas Register, “the attorney general shall petition the supreme court of the state to determine the validity thereof.” The Attorney General must petition even if there is a “lack of objection” to the maps. *In re Stovall (Stovall II)*, 273 Kan. 731, 733, 45 P.3d 855 (2002); *see also In re Stovall (Stovall I)*, 273 Kan. 715, 717, 44 P.3d 1266 (2002) (same). The Attorney General’s petition initiates an “original action” that is not “an adversary proceeding.” *In re Senate Bill No. 220*, 225 Kan. 628, 629-30, 593 P.2d 1 (1979); *see also House Bill No. 2620*, 225 Kan. at 828 (similar).

After the Attorney General files his petition, this Court “shall enter its judgment” within “30 days.” Kan. Const. art. 10, § 1(b); *see In re Stephan (Stephan II)*, 251 Kan. 595, 596, 833 P.2d 1017 (1992) (“[T]he constitution requires this court to enter judgment within 30 days from the filing of the petition.”). If this Court determines that the apportionment act is valid, then that judgment “shall be final until the legislative districts are again reapportioned” in 2032. Kan. Const. art. 10, § 1(e). If this Court determines that the apportionment act is invalid, then “the legislature shall enact a statute of reapportionment conforming to the judgment of

the supreme court within 15 days.” *Id.* § 1(b). The Attorney General must then again petition this Court “to determine the validity” of the new apportionment act. *Id.* § 1(c).

Attorney General Schmidt has fulfilled his constitutional duty by filing this Petition requesting that the Court determine that the legislative reapportionment contained in Sub SB 563 is valid.

II. This Court should determine that Sub SB 563 is valid.

As previously explained, “article 10 of the Kansas Constitution requires this court to determine the validity of the reapportionment act.” *Stovall I*, 273 Kan. at 719. The Kansas Constitution “does not define ‘valid,’ nor does it specify any criteria for determining the validity of a reapportionment act.” *Id.* This Court therefore had to devise its own definition of “valid”: “[T]he reapportionment act must be valid as to the procedure in which it became law and as to the substance of the apportionment itself to meet the constitutional requirements.” *Id.*; *see also Stovall II*, 273 Kan. at 733 (similar); *In re Stephan (Stephan III)*, 251 Kan. 597, 601, 836 P.2d 574 (1992) (similar); *In re Stephan (Stephan I)*, 245 Kan. 118, 121, 775 P.2d 663 (1989) (similar); *House Bill No. 2620*, 225 Kan. at 841 (similar); *Senate Bill No. 220*, 225 Kan. at 632 (similar).

As this Court has repeated in the legislative apportionment context, “[l]egislation is presumed to be constitutional.” *Stovall II*, 273 Kan. at 735; *see also Stovall I*, 273 Kan. at 725 (same); *Harris*, 192 Kan. at 191 (“[T]here is a presumption that laws passed by the legislature are valid and constitutional . . .”). And the “propriety and wisdom of legislation are exclusively matters for legislative

determination.” *Stephan III*, 251 Kan. at 609. “State reapportionment of legislative districts is the task of local legislatures or of those organs of state government selected to perform it.” *House Bill No. 2620*, 225 Kan. at 841 (citing *Gaffney*, 412 U.S. at 751). This Court may not “substitute its judgment for that of another equal branch of the government.” *Stephan III*, 251 Kan. at 609; see *Stephan I*, 245 Kan. at 129 (“[W]e cannot substitute our judgment for that of the legislature.”). “In the absence of a constitutional violation,” then, “this court is not at liberty to declare [a] reapportionment plan void because it allegedly creates inconvenience, is unfair, or is inequitable.” *Stephan III*, 251 Kan. at 609.

Prior to this year, this Court has reviewed the validity of apportionment acts pursuant to Article 10, Section 1(b) of the Kansas Constitution six times. See *Stovall II*, 273 Kan. 731 (2002 Senate reapportionment); *Stovall I*, 273 Kan. 715 (2002 House of Representatives reapportionment); *Stephan III*, 251 Kan. 597 (1992 Senate and House of Representatives Reapportionment); *Stephan I*, 245 Kan. 118 (1989 House of Representatives reapportionment); *House Bill No. 2620*, 225 Kan. 827 (1979 House of Representatives reapportionment); *Senate Bill No. 220*, 225 Kan. 628 (1979 Senate reapportionment). Each time, the Court has determined the act to be valid. See *Stovall II*, 273 Kan. at 736; *Stovall I*, 273 Kan. at 725; *Stephan III*, 251 Kan. at 612; *Stephan I*, 245 Kan. at 129; *House Bill No. 2620*, 225 Kan. at 842; *Senate Bill No. 220*, 225 Kan. at 637.⁶

⁶ “[T]he qualified electors of Kansas adopted” the judicial review process in Article 10, Section 1(b) of the Kansas Constitution at “the general election held on August 6, 1974.” *Senate Bill No. 220*, 225 Kan. at 628; see 1974 Kan. Sess. Laws 1533-34

Sub SB 563 is similarly valid, both procedurally and substantively.

A. Sub SB 563 is procedurally valid.

In determining the procedural validity of an apportionment act, this Court asks whether “the applicable legislative rules and constitutional and statutory law concerning the enactment of legislation were not followed or were in some way violated.” *Stephan III*, 251 Kan. at 603; *see also Stovall II*, 273 Kan. at 733 (“In the absence of evidence of a violation of constitutional or statutory law, or any evidence that the applicable legislative rules were not followed, we do not find any procedural inadequacies.”); *Stovall I*, 273 Kan. at 723 (same). When it comes to Sub SB 563, the answer to that question is no.⁷

The Attorney General is unaware of any procedural violations in the enactment of Sub SB 563 and is similarly unaware of any procedural violations that have been alleged. “All necessary procedural steps were taken” in the enactment of Sub SB 563. *Stephan I*, 225 Kan. at 841; *see also House Bill No. 2620*, 225 Kan. at 841 (same).

The Senate Committee on Ways and Means introduced SB 563 on March 14,

(HCR 1059). Prior to that amendment, this Court had invalidated legislative apportionment schemes on the ground that they violated the Fourteenth Amendment’s guarantee of population equality. *See Harris v. Anderson*, 194 Kan. 302, 310-11, 400 P.2d 25 (1965) (“The Fourteenth Amendment has been so construed to require that we hold, as we now do, that the existing apportionment plan of the Kansas House of Representatives is unconstitutional as violating the Equal Protection Clause of the amendment.”); *Harris*, 192 Kan. at 208 (“On its face the act offends fundamental concepts inherent in our republican form of government and makes out a prima facie case of unequal representation . . .”).

⁷ The procedural history of Sub SB 563 is available on the Kansas Legislature’s website at http://www.kslegislature.org/li/b2021_22/measures/sb563/.

2022. *See* 2022 Senate Journal 1659; *see also* Kan. Const. art. 2, § 12 (providing that a bill “may originate in either house”). SB 563 contained an enacting clause. *See* Kan. Const. art. 2, § 20 (“The enacting clause of all bills shall be ‘Be it enacted by the Legislature of the State of Kansas:’”). And as its title reflects, SB 563 dealt with a single subject—namely, state legislative reapportionment. *See* Kan. Const. art. 2, § 16 (“No bill shall contain more than one subject The subject of each bill shall be expressed in its title.”).

After it was introduced, Sub 563 was referred by the Senate Vice President (under the authority of the Senate President) to the Senate Committee on Redistricting. *See* 2022 Senate Journal 1661. The report of the Senate Committee on Redistricting recommended that Sub SB 563 be adopted. *See id.* at 1674. Sub SB 563 substituted the Liberty 3 map for senatorial districts for the prior “Liberty 2” map. On April 16, the Senate Committee of the Whole adopted the report of the Senate Committee on Redistricting and then proceeded to debate Sub SB 563. *See id.* Further amendments to Sub SB 563 were proposed, and all were rejected. *See id.* Sub SB 563 was considered on final action on March 17. *See id.* at 1690. The Senate passed Sub SB 563 by a vote of 28 to 8. *See id.*; *see* Kan. Const. art. 2, § 10 (“The affirmative and negative votes upon the final passage of every bill . . . shall be entered in the journal.”).

The House of Representatives then received Sub SB 563 from the Senate. *See* House Journal 1872. Sub SB 563 was referred to the Committee of the Whole on March 22. *See id.* at 2268. On a motion by Representative Ralph, the Committee of

the Whole amended Sub SB 563 on March 23. *See id.* at 2291-2396. The amendment added the Free State 3F map for representative districts. That same day, on an emergency motion by Representative Hawkins, Sub SB 563 was advanced to final action. *See id.* at 2396; *see also* Kan. Const. art. 2, § 15 (“No bill shall be passed on the day that it is introduced, unless in case of emergency declared by two-thirds of the members present in the house where a bill is pending.”). The House passed Sub SB 563 as amended by the House by a vote of 112 to 9. *See* 2022 House Journal 2396-97.

On March 28, the Senate nonconcurred in the House’s amendments and requested a Conference Committee be appointed. *See* 2022 Senate Journal 1807-08. The House acceded. *See* 2022 House Journal 2407. The President of the Senate and Speaker of the House appointed their respective chamber’s members of the Conference Committee. *See* 2022 Senate Journal 1808; 2022 House Journal 2407. The Conference Committee issued its report on March 30.⁸ *See* 2022 Senate Journal 1849-50; 2022 House Journal 2476-77. That same day, the Senate adopted the Conference Committee report by a vote of 29 to 11, *see* 2022 Senate Journal 1850, and the House adopted it by a vote of 83 to 40, *see* 2022 House Journal 2477; *see also* Kan. Const. art. 2, § 13 (“A majority of the members . . . of each house, voting in the affirmative, shall be necessary to pass any bill.”).

⁸ The Conference Committee report added the Apple 7 map for state Board of Education districts. That map had previously been passed by the Senate as SB 577. More information about SB 577 can be found on the Kansas Legislature’s website at http://www.kslegislature.org/li/b2021_22/measures/sb577/.

Sub SB 563 was then enrolled and presented to the Governor on April 8. *See* Kan. Const. art. 2, § 14(a) (“Within ten days after passage, every bill shall be signed by the presiding officers and presented to the governor.”). The Governor signed Sub SB 563 into law on April 15. *See also id.* (“If the governor approves a bill, he shall sign it.”). And the Secretary of State published Sub SB 563 in the Kansas Register on April 21. *See* 41 Kan. Reg. 666; *see also* Kan. Const. art. 10, § 1(a) (An apportionment act “shall be published in the Kansas register immediately upon final passage.”); *id.* art. 2, § 19 (“No act shall take effect until the enacting bill is published as provided by law.”).

There is no evidence of procedural irregularity in the Legislature’s enactment of Sub SB 563. Nor is there any “evidence that legislative meetings or actions were conducted in secret.” *Stovall I*, 273 Kan. at 723. Any absence of “greater opportunity for comment” does not render an apportionment act invalid. *Stephan III*, 251 Kan. at 603. Nor does the fact that “the legislative process relative to reapportionment moved with dispatch.” *Id.* Put simply, “no procedural deficiency exists.” *Id.*

B. Sub SB 563 is substantively valid.

This Court’s “substantive review of the reapportionment legislation addresses the following: Does [the reapportionment legislation] violate the ‘one person-one vote’ principle? Do the reapportioned House and Senate districts impermissibly split political entities and communities of interest? Does the reapportionment legislation violate section 2 of the federal Voting Rights Act?” *Id.* With respect to Sub SB 563, the answer to all three questions is again no.

1. Sub SB 563 achieves substantial equality of population.

“The constitutional principle underlying reapportionment litigation is founded on fourteenth amendment equal protection concepts.” *Senate Bill No. 220*, 225 Kan. at 633. That principle “has been popularized as ‘one person-one vote.’” *Id.* It applies to “both houses” of the Kansas Legislature. *Stovall I*, 273 Kan. at 718 (citing *Reynolds v. Sims*, 377 U.S. 533, 577 (1964)). And it requires that a state “make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.” *Id.* (quoting *Reynolds*, 377 U.S. at 577); *see also Stephan III*, 251 Kan. at 604 (“In the context of reapportionment, equal protection requires one person’s vote to be worth as much as another person’s vote to the extent district population apportionment will permit.”).

The one person-one vote principle does not require “mathematical exactness,” *Stovall I*, 273 Kan. at 718, or “mathematical perfection,” *Harris v. Arizona Indep. Redistricting Comm’n*, 578 U.S. 253, 258 (2016). Rather, there need only “be substantial equality of population.” *House Bill No. 2620*, 225 Kan. at 841; *see also Harris v. Anderson*, 194 Kan. 302, 304, 400 P.2d 25 (1965) (same). As this Court has recognized in the context of legislative reapportionment, “the machinery of government would not work if it were not allowed a little play in its joints.” *Stovall I*, 273 Kan. at 718 (quoting *Reynolds*, 377 U.S. at 577 n.57).

Courts measure compliance with the Fourteenth Amendment’s one person-one vote principle “based upon population deviation[s].” *Stephan I*, 245 Kan. at 126; *see also, e.g., Stovall II*, 273 Kan. at 733-34; *Stovall I*, 273 Kan. at 723; *Stephan III*,

251 Kan. at 604-05; *House Bill No. 2620*, 225 Kan. at 831; *Senate Bill No. 220*, 225 Kan. at 634. An apportionment plan’s population deviation is “the sum of the greatest percentage above the ideal [district population] and the greatest percentage below the ideal [district population].” *Senate Bill No. 220*, 225 Kan. at 634; *see also Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 n.2 (2016) (“Maximum population deviation is the sum of the percentage deviations from perfect population equality of the most- and least-populated districts.”). The “ideal district” population is calculated “by dividing the total population of the state . . . by the number of [legislative] districts drawn by the reapportionment act.” *Senate Bill No. 220*, 225 Kan. at 634; *see also, e.g., Stovall II*, 273 Kan. at 733 (similar); *Stovall I*, 273 Kan. at 723 (similar).

Population deviations of up to 10% are considered “minor” and are presumptively valid. *Stephan III*, 251 Kan. at 605-06; *see also, e.g., Stovall I*, 273 Kan. at 718 (explaining that this Court has “acknowledg[ed] a permissible total deviation of 10% from an ‘ideal’ district”); *House Bill No. 2620*, 225 Kan. at 832 (“A 5% Deviation over and a 5% Deviation under the ideal district population appears to be the line drawn by the federal courts.”). Such minor deviations “are permitted without justification unless there is established a convincing violation of equal protection of voting rights.” *House Bill. No. 2620*, 225 Kan. at 830; *see also Harris*, 578 U.S. at 259 (“[W]e have refused to require States to justify deviations of 9.9%.”); *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (“[M]inor deviations” do not “require justification by the State.” (citation omitted)). That threshold is met “only rarely, in

unusual cases.” *Harris*, 578 U.S. at 259.

Population deviations of more than 10%, meanwhile, “must be justified by a rational state policy.” *Senate Bill No. 220*, 225 Kan. at 634; *see also, e.g., Stephan I*, 245 Kan. at 126 (“[L]arger deviations [a]re permissible when resulting from implementation of a rational state policy.”); *House Bill No. 2620*, 225 Kan. at 830 (“Even a significant variation from the ideal district population may be justified by establishing there is a rational state policy basis for such deviation.”). Rational state policies might include compactness, contiguity, natural boundaries, physical barriers, respect for political subdivisions, preservation of the core of prior districts, use of high population precincts, and avoiding contests between incumbents. *See, e.g., Harris*, 578 U.S. at 258; *Brown*, 462 U.S. at 842; *Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *Stovall I*, 273 Kan. at 719; *House Bill No. 2620*, 225 Kan. at 832.

The “fact that other redistricting maps might have been drawn with lower deviations is irrelevant to [this Court’s] inquiry.” *Stovall II*, 273 Kan. at 733; *see also Stovall I*, 273 Kan. at 719 (“[I]t is immaterial that districts could have been drawn with smaller percentage deviations . . .”). As the Court has explained, a “fair and reasonable apportionment of the legislative districts of the whole state must be formulated primarily by the legislative process with all of its political trappings and necessary compromises.” *Stephan III*, 251 Kan. at 605 (quoting *Senate Bill No 220*, 225 Kan. at 634). What matters is not whether this Court “might have drawn [legislative] district lines differently,” but rather whether the lines drawn by the Kansas Legislature are “constitutionally sound.” *Id.* at 605, 608 (quoting *Senate*

Bill No 220, 225 Kan. at 634).

The legislative districts drawn in Sub SB 563 are constitutionally sound. Both legislative district maps have population deviations less than 10% and are therefore “presumed valid for Fourteenth and Fifteenth Amendment purposes.” *Stovall I, 273 Kan. at 723.*

Starting with senatorial districts, based on Kansas’s total population of 2,937,880, the ideal district population is 73,447. The largest senatorial district under Sub SB 563 is District 5 located in Leavenworth and Wyandotte Counties. District 5 has a population of 76,345, or 3.95% above the ideal district population. The smallest senatorial district is District 3 located in Douglas, Franklin, Osage, and Shawnee Counties. District 3 has a population of 70,949, which is 3.4% below the ideal district population. This means that the Liberty 3 map has a population deviation of 7.35%. Notably, this is lower than the population deviations of the most recent senatorial district map upheld by this Court. *See Stovall II, 273 Kan. at 734 (9.27%).* And it is comparable to the population deviations of earlier senatorial district maps upheld by this Court. *See Stephan III, 251 Kan. at 606 (6.89%); Senate Bill No. 220, 225 Kan. at 634 (6.5%).*

Turning to representative districts, based on Kansas’s total population of 2,937,880, the ideal district population is 23,503. The largest representative district is District 44 located in Douglas County. District 44 has a population of 24,346, which is 3.59% above the ideal district population. The smallest representative district is District 112 located in Barton County. District 112 has a population of

22,577, which is 3.94% below the ideal district population. This means that the Free State 3F map has a population deviation of 7.53%. This too is lower than the population deviations of prior representative district maps upheld by this Court. *See Stovall I*, 273 Kan. at 723 (9.95%); *Stephan III*, 251 Kan. at 606 (9.72%); *Stephan I*, 245 Kan. at 125 (10%); *House Bill No. 2620*, 225 Kan. at 831 (9.9%).

2. Sub SB 563’s districts are contiguous, compact, and do not improperly split political entities or communities of interest.

In evaluating the validity of state legislative apportionments, this Court has previously assessed “whether the reapportioned districts are compact and contiguous or split political entities and communities of interest.” *Stephan III*, 251 Kan. at 606. Sub SB 563’s districts are both contiguous and compact, and they impermissibly split neither political entities nor communities of interest. Other qualities of Sub SB 563’s legislative districts confirm their validity.

Although there is “no requirement imposed by federal law of contiguity and compactness of congressional districts,” *House Bill No. 2620*, 225 Kan. at 834, this Court’s “review of the substantive validity of the reapportionment legislation” has sometimes evaluated “whether the districts are compact and contiguous as drawn,” *Stovall II*, 273 Kan. at 735. Once again, though, even if this Court “might have drawn district lines differently, [it] cannot substitute [its] judgment for that of the legislature.” *Stephan I*, 245 Kan. at 128; *see Stephan III*, 251 Kan. at 607 (upholding validity of representative apportionment with a district that “lack[ed] a certain compactness or contiguity”). This Court has upheld reapportionment acts where the districts drawn “are reasonably contiguous and compact.” *House Bill No. 2620*, 225

Kan. at 841; *see also Stephan I*, 245 Kan. at 127 (“fairly contiguous and compact”).

All of the districts in both Liberty 3 and Free State 3F are contiguous. And they are also “reasonably . . . compact.” *House Bill No. 2620*, 225 Kan. at 841. One common measure of compactness is the Reock score, which compares each district to a circle. That score ranges from 0 to 1. The higher the score, the more compact the district. The average Reock score for Liberty 3’s districts is 0.42, and the average Reock score for Free State 3F’s districts is 0.45. Both scores indicate compactness. *See, e.g., Essex v. Kobach*, 874 F.2d 1069, 1089-94 (D. Kan. 2012) (drawing senatorial district map with average Reock score of 0.45 and representative district map with average Reock score of 0.46⁹); *Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections*, 835 F. Supp. 2d 563, 570 (N.D. Ill. 2011) (noting expert testimony “that low compactness is . . . equal or less than .15 on the Reock measure”).

This Court’s review of apportionment acts has also included a determination whether the “integrity of the political subdivisions of the state has been preserved in arriving at the district boundaries.” *House Bill No. 2620*, 225 Kan. at 841. But the “mere fact that a political entity, such as a county, is split does not vitiate the act.” *Stephan III*, 251 Kan. at 607-08; *see also Stovall I*, 273 Kan. at 725; *Stephan I*,

⁹ The Reock scores of the senatorial and representative district maps are available on the Kansas Legislative Research Department’s website at http://www.kslegresearch.org/KLRD-web/2012LDP/District_Court/m5_district%20court%20-senate/63-m5_districtcourt-senate-compact.pdf and http://www.kslegresearch.org/KLRD-web/2012LDP/District_Court/m5_district%20court-house/63-districtcourt-house-compact.pdf.

245 Kan. at 129 (“The fact that other plans could be devised which might avoid dividing certain counties into two or more districts does not give us cause to reject the plan adopted by the legislature.”). Rather, an apportionment act is valid where those political entities that are split “appear to have been divided because of population considerations, not because of any improper motive.” *Stephan I*, 245 Kan. at 127; *see also House Bill No. 2620*, 225 Kan. at 833 (approving apportionment act where, “[a]fter studying the counties which have been split between two districts, it appears in each case the split was necessary in order to equalize a district population”).

Sub SB 563 does not improperly divide political subdivisions. Both Liberty 3 and Free State 3F divide very few counties, and none of those counties appears to have been divided with any improper motive.

Starting with Liberty 3’s senatorial districts, that map keeps 92 counties whole. It divides only 13 counties into more than one district. Six of those counties (Johnson, Sedgwick, Shawnee, Wyandotte, Douglas, and Leavenworth Counties) had to be split because they have populations that exceed that of the ideal district—some many times over. And all but two of the 13 counties (Franklin and Sumner Counties) were split in the federal court-drawn 2012 senatorial district map. Liberty 3 also splits a similar number of counties as prior apportionment acts upheld by this Court. *See, e.g., Stephan III*, 251 Kan. at 608 (“For the most part, the senatorial districts established in the reapportionment plan respect the integrity of existing political subdivisions of the state—the county boundary lines.”); *House Bill*

No. 2620, 225 Kan. at 833 (“A large majority of the counties were placed entirely within a district.”); *cf. Essex*, 874 F. Supp. 2d at 1129-68 (23 counties split¹⁰). The counties split in Liberty 3 appear to have been divided to achieve population equality.

Turning to Free State 3F’s representative districts, that map keeps 67 counties whole. It divides just 38 counties into more than one district. Twenty-four of those counties had to be split because they have populations that exceed that of the ideal district. And all but five of the 38 counties (Cloud, Edwards, Jefferson, Meade, and Pratt Counties) were split in the federal court-drawn 2012 senatorial district map. Free State 3F also splits fewer counties than other representative apportionments upheld by this Court. *See, e.g., Stephan III*, 251 Kan. at 608 (48 counties divided); *Stephan I*, 245 Kan. at 127 (“[a]pproximately half of the counties” split); *cf. Essex*, 874 F. Supp. 2d at 1193-1257 (50 counties split¹¹). Once again, the counties split in Free State 3F appear to have been divided to achieve population equality.

Sub SB 563 also does not improperly divide communities of interest. In reviewing apportionment acts, this Court has previously evaluated “whether the

¹⁰ A full list of the counties split under this map are available on the Kansas Legislative Research Department’s website at http://www.kslegresearch.org/KLRD-web/2012LDP/District_Court/m5_district%20court%20-senate/36-m5_districtcourt-senate-split.pdf.

¹¹ A full list of the counties split under this map are available on the Kansas Legislative Research Department’s website at http://www.kslegresearch.org/KLRD-web/2012LDP/District_Court/m5_district%20court-house/36-districtcourt-house-split.pdf.

reapportioned districts . . . split . . . communities of interest.” *Stephan III*, 251 Kan. at 606. But the “fact that other plans could be devised that might avoid dividing certain communities . . . does not, by itself, give [this Court] cause to reject the plan adopted by the legislature.” *Id.* at 609. As this Court has recognized, “innumerable districts ideal for particular communities can be constructed if each is considered in isolation.” *Id.* at 608. But “when the entire state is divided into a specified number of districts, that which may appear ideal for one place or another must be subordinated to the goal of fair and reasonable apportionment of the whole state.” *Id.* This Court “cannot substitute [its] judgment for that of the legislature.” *Id.*; see also *Graham v. Thornburgh*, 207 F. Supp. 2d 1280, 1296-97 (D. Kan. 2002) (“Nor is the court in a position to weigh the relative importance or deservedness of particular communities of interest.”).

Other qualities of Sub SB 563 confirm its substantive validity. Sub SB 563 “preserv[es] the cores of prior districts.” *Stovall I*, 273 Kan. at 719. It is apparent that the Kansas Legislature made an effort to retain as many current legislative districts as possible. Liberty 3 creates just two new districts that have no incumbent Senator (Districts 19 and 35). This is comparable to the number of new districts other senatorial apportionment plans approved by this Court have created. See *Stovall II*, 273 Kan. at 734 (one new district); cf. *Essex*, 874 F.2d at 1089-93 (four new districts¹²). Free State 3F creates just three new districts that have no

¹² A list of the new districts under this map are available on the Kansas Legislative Research Department’s website at http://www.kslegresearch.org/KLRD-web/2012LDP/District_Court/m5_district%20court%20-senate/61-m5_districtcourt-

incumbent Representative (Districts 30, 78, and 117). This too is fewer than the number of new districts other representative apportionment plans approved by this Court have created. *See Stovall I*, 273 Kan. at 723 (four new districts); *cf. Essex*, 874 F. Supp. 2d at 1193 (25 new districts).

Sub SB 563 mostly avoids pitting incumbents against each other. The existence of potential incumbent contests does not render an apportionment plan invalid. As this Court has recognized, “[w]hen a state is redistricted, it is inevitable that some resulting districts will include the residences of more than one incumbent.” *Stephan I*, 245 Kan. at 127. “Redistricting may pit incumbents against one another or make very difficult election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.” *Stovall II*, 273 Kan. at 734 (quoting *Gaffney*, 412 U.S. at 753).

Liberty 3 creates only two districts with multiple Senate incumbents, one of which involves two Republicans (District 14) and the other of which involves one Democrat and one Republican (District 9). This is comparable to the number of districts with multiple incumbents other senatorial maps upheld by this Court have involved. *See, e.g., Stovall II*, 273 Kan. at 734 (one district with a Democrat and a Republican); *cf. Essex*, 874 F. Supp. 2d at 1089-93 (three districts with multiple Republicans and one district with a Democrat and a Republican¹³). Free State 3F,

senate-incumb.pdf.

¹³ A list of the new districts of incumbents under this map are available on the Kansas Legislative Research Department’s website at http://www.kslegresearch.org/KLRD-web/2012LDP/District_Court/m5_district%20court%20-senate/61-m5_districtcourt-

meanwhile, creates just three districts with multiple House incumbents, each of which involves two Republicans (Districts 49, 69, and 118). This is fewer than the number of districts with multiple incumbents other representative maps upheld by this Court have involved. *See, e.g., Stovall II*, 273 Kan. at 734 (two districts with multiple Democrats and two districts with a Democrat and a Republican); *Stephan I*, 245 Kan. at 127 (three districts with multiple Democrats, one district with multiple Republicans, and two districts with a Democrat and a Republican); *cf. Essex*, 874 F. Supp. 2d at 1193 (two districts with multiple Democrats, fourteen districts with multiple Republicans, and seven districts with both Democrats and Republicans).

3. Sub SB 563 complies with Section 2 of the Voting Rights Act.

This Court’s “final consideration concerns section 2 of the federal Voting Rights Act.” *Stephan III*, 251 Kan. at 610. That law “prohibits any ‘standard, practice or procedure,’ including redistricting plans, that result[s] in discrimination against minority voters.” *Stovall I*, 273 Kan. at 720 (quoting 42 U.S.C. § 1973). Its “focus[is] on equal political opportunity and political effectiveness,” and its “purpose is to create minority opportunity districts, not maximization of minority voting strength.” *Id.*

Section 2 generally provides that “minority representation may not be diluted by fracturing, packing, or other methods of gerrymandering of political boundaries.”

Stephan III, 251 Kan. at 610. Fracturing occurs when an apportionment plan “dilute[s] a minority group’s voting strength by dividing such a group among numerous representative districts.” *Stovall I*, 273 Kan. at 710. And packing occurs when an apportionment plan “pack[s]’ as many members of [a minority] group into one district as possible and, thus, dilute[es] the minority group’s bloc voting strength in adjacent districts.” *Id.*

“In a lawsuit alleging a violation of section 2 of the Voting Rights Act, the test is whether ‘as a result of a challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.’” *Stephan III*, 251 Kan. at 610 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986)); *see also Wis. Legislature v. Wis. Elections Comm’n*, 142 S. Ct. 1245, 1248 (2022) (per curiam). Courts applying this test “are to review the ‘totality of the circumstances.’” *Stovall I*, 273 Kan. at 720 (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1024 (1994)). In doing so, it is important to “keep in mind that the Equal Protection Clause of the Fourteenth Amendment prohibits the excessive and unjustified use of race in redistricting.” *Id.* at 720-21 (citing *Shaw v. Reno*, 509 U.S. 630, 632 (1993)); *see Wis. Legislature*, 142 S. Ct. at 1248 (per curiam) (“Under the Equal Protection Clause, districting maps that sort voters on the basis of race ‘are by their very nature odious.’” (citation omitted)). While “race may be a motivating factor in drawing a particular representative district,” it “may not be the predominant factor.” *Stovall I*, 273 Kan. at 721. “When the race-based factors outweigh the traditional race-neutral districting principles, the district is

considered to be an unlawful racially gerrymandered district.” *Id.* at 722.

Traditional race-neutral districting principles include compactness, contiguity, adherence to political subdivisions, respect for communities of interest, incumbency protection, and safely retaining seats for a political party. *See id.*

With respect to Sub SB 563, there is “no evidence that the legislature has engaged in unacceptable techniques such as gerrymandering of district boundaries, fracturing, or packing minority districts in redrawing the House and Senate districts.” *Stephan III*, 251 Kan. at 612. And there is no evidence of “invidious discrimination against any group of the state’s citizens which would impermissibly impair their constitutionally protected right to vote.” *House Bill No. 2620*, 225 Kan. at 841. This Court should therefore “conclude that none of the Kansas [legislative] districts created in [Sub SB 563] appear to violate the provisions of the Voting Rights Act.” *Stovall II*, 273 Kan. at 735.

Conclusion

This Court should determine that the state legislative reapportionment contained in Sub SB 563 is valid.

Respectfully submitted,

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