No. 22-125092-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

FAITH RIVERA, et al., TOM ALONZO, et al., SUSAN FRICK, et al.,
Plaintiffs-Appellees,

v.

SCOTT SCHWAB, in his official capacity as Kansas Secretary of State, and MICHAEL ABBOTT, in his official capacity as Election Commissioner of Wyandotte County, Kansas ,
Defendant—Appellants,

JAMIE SHEW, in his official capacity as Douglas County Clerk,
Defendant-Appellant.

REPLY TO BRIEF OF *AMICUS CURIAE* LEGISLATIVE COORDINATING COUNCIL BY APPELLEES SUSAN FRICK, et al.,

Appeal from the District Court of Wyandotte County
Honorable Bill Klapper, District Judge
District Court Case No. 22-CV-89
(consolidated with 22-CV-90 and Douglas County Case No. 22-CV-71)

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INTRODUCTION

Plaintiffs/Appellees Frick, et al., pursuant to Kan. Sup. Ct. R. 6.06(c) offer the following response to the Brief of Amicus Curiae Legislative Coordinating Council ("Amicus Brief"). The LCC's Amicus Brief demonstrates that the Republican Legislature believes itself to be accountable only to Kansans who agree with them and voter input that challenges it is not even considered "voter input." The LCC argues that the procedure followed in approving Ad Astra 2 was "thorough and fair." Because the LCC's argument lacks any support from competent evidence, the Amicus Brief is riddled with logical fallacies. The LCC sets up straw men to give the illusion of a strong position, arguing that affirming District Judge Klapper's decision would "negate the Legislature's exercise" of power and lead to the Court "replac[ing[the Legislature with itself." *AMICUS* BRIEF at 15.

STATEMENT OF FACTS

I. The Legislature Coordinating Council Includes Kansas Legislature Leadership.

The Legislature Coordinating Council ("LCC") is an eight-member council, consisting of the Kansas Legislature Leadership. K.S.A. § 46-1202. The LCC represents the legislature when it is not in session. K.S.A. § 46-1202. Six of its members are Republicans (Speaker of the House Ron Ryckman, Senate President Ty Masterson, Senators Larry Alley and Rick Wilborn, and Representatives Blain Finch and Daniel Hawkins), while two are Democrats (Senator Dinah Sykes and House Minority Leader Tom Sawyer). (*See* Declaration of Tom Sawyer, attached hereto as Appendix A at

App'x 2, ¶2; Declaration of Dinah Sykes, attached hereto as Appendix B, at App'x 3, ¶2.)

II. The Two Democratic Members Were Not Consulted Concerning, and Did Not Vote On Filing the LCC's *Amicus* Brief.

Senator Sykes and Representative Sawyer first learned of the LCC's *Amicus* Brief after the LCC had filed it. (Sawyer Decl. at App'x 2, ¶3; Sykes Decl. at App'x 4, ¶3.) Although the LCC can act upon a "majority vote of five members," the six Republican LCC members did not even bother to discuss the brief with their Democrat councilmembers. Their two votes could not have prevented the LCC from filing the brief, but the Republican members apparently chose to ignore the statutory procedure in obtaining LCC action to file the Brief. (Sawyer Decl. at App'x. 1, ¶¶3-5; Sykes Decl. at App'x 3, ¶¶3-5.). When they believe that following procedure is in their interest, they follow it; when it isn't, they don't.

ARGUMENT AND AUTHORITIES

I. The LCC's *Amicus Curiae* Brief Offers Only Argument, But No Factual Support in the Record to Support its Argument that the Ad Astra 2 Map is the Result of a "Thorough and Fair Process"; Therefore, This Court Can Disregard This Unsubstantiated Argument.

That there was no LCC vote to approve the *Amicus* Brief; that neither LCC Democrat was consulted about the filing of an *amicus* brief in this matter; that neither LCC Democrat was afforded the chance to review a draft or final version of the brief before it was filed, are all further support for the District Court's finding that the process of approving Ad Astra 2 was secretive. On this point the District Judge's findings are unequivocal: "Ad Astra 2 was created in secret." (R. VI, 17, ¶I); the "map drawers remain a

mystery," (R. VI, 25, ¶21);, and the process itself was "nontransparent" (R. VI, 28, ¶31.) The District Judge's detailed findings here are competent and supported by substantial evidence (unrebutted evidence, for that matter). The District Judge carefully set forth the evidence presented that supported the findings, and his findings are supported by uncontroverted expert testimony of Dr. Michael Smith, among other evidence. Dr. Smith's testimony established that Ad Astra 2 "could not be explained by neutral redistricting criteria and had the effect of diluting the votes of Democratic voters." (R. VI, 98, ¶¶211-12.)

Unable to address the evidence supporting the District Court's findings head on, the LCC's first argument is devoted to defending the "process" pursuant to which the Ad Astra 2 Map was birthed, through labels (calling it both "thorough" and "fair") and attorney argument, which are not evidence. The LCC does not even explain which findings – to which this Court owes deference – allegedly lack "competent evidence." *AMICUS* BRIEF at 5-6. The LCC's tactic suffers the same fatal flaw as Appellants' justifications in support of Ad Astra 2 suffered before the District Judge – it is just that – argument, and supporting a position "exclusively through argument by lawyers, which [is] not evidence." (R. VI, 139, ¶307); *Lambert v. Peterson*, 309 Kan. 594, 600, 439 P.3d 317, 321 (2019) ("But arguments of counsel are not evidence."); PIK Civ. 4th 102.04 (instructing jury that the arguments of counsel are not evidence).

II. The Partisan Nature of the Process From Start to (Literally) Finish.

The form and substance of the *AMICUS* BRIEF are further proof of the Appellees' concerns, validated by the District Judge's findings, that "Ad Astra

2 was motivated at least in part by an intent to dilute minority voting strength." (R. VI, 206, ¶¶495-95.) Specifically, the Republican LCC members did not even bother to include the Democratic LCC members in the process. (Sawyer Decl. at App'x 1 ¶¶4, 5; Sykes Decl. at App's 3, ¶¶4, 5.) The two Democrats could not have overridden the majority decision to file the *Amicus* Brief, *see* K.S.A. § 46-1202, but the Republicans should have consulted them. The continued choice not to be transparent with the Democrats is more of the same "opaque process that led to Ad Astra 2's passage," as credibly found by the District Judge. (R. VI, 193, ¶465.) The decision to exclude the Democrats can be explained only as part of a purely intentional, partisan process followed from beginning to end in redistricting.

The LCC goes on to accuse this Court of having "unpredictable priorities" because it is "unelected." *AMICUS* BRIEF at 14. Put another way, the Court is not beholden to any party, so the Republican Legislature cannot count on it to decide case based on partisan considerations. But that is as it should be—the priority of this Court is, as it predictably always has been, is deciding the meaning of laws as applied to real-life situations. *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 682, 440 P.3d 461 (2019). In *Hodes & Nauser*, this Court recognized its "obligation of interpreting the Constitution and of safeguarding the basic rights reserved thereby to the people." 309 Kan. at 610. "[W]when legislative action exceeds the boundaries of authority limited by our Constitution, and transgresses a sacred right guaranteed or reserved to a citizen, final decision as to invalidity of such action must rest exclusively with the courts."[Internal quotations and

citations omitted]). *Hodes & Nauser*, 309 Kan. at 610 (quoting *Harris v. Shanahan*, 192 Kan. 183, 206, 387 P.2d 771 [1963]). Its priority is to "uphold[] and apply[] the Constitution and law of Kansas and the United States." *See* Kansas Judicial Branch, available at https://www.kscourts.org/#:~:text=Judicial%20Branch,Kansas%20and%20the%20United%20States.

The LCC's *Amicus* Brief was intended to support the Appellants' position and to persuade this Court to overturn the District Judge's decision. But the *AMICUS* BRIEF actually exemplifies the process by which the Republican Legislature approved Ad Astra 2, at some point in the secretive and opaque process, led to the a violation of Appellees' rights guaranteed by the Kansas Constitution. Kan. Const. Bill of Rights, §§ 1, 2, 3, and 11; Kan. Const. art V, § 5.

CONCLUSION

Frick Appellees urge that this Court read the LCC's *Amicus* Brief for what it leaves out, which is that the redistricting process has been partisan and secretive from the start. Democratic members of the Legislature and the LCC have been excluded and ignored at every step of the still-secret process. These legislators are also accountable to Kansans, but their Republican colleagues have prevented their involvement, claiming that redistricting is a political process and things just happen this way.

Dated: May 13, 2022

Respectfully,

/s/ Stephen R. McAllister

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CERTIFICATE OF SERVICE

I certify that on May 13, 2022, the above brief was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and a copy was electronically mailed to:

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APPENDIX A

DECLARATION

Tom Sawyer, being of lawful age, swears to the following:

1. My name is Tom Sawyer. I am a member of the Kansas House of Representatives, representing House District 95 in Wichita, Kansas.

2. I am House Minority Leader, and as such I am a member of the legislative leadership. I am also a member of the Legislative Coordinating Council of the Kansas State Legislature. The Legislative Coordinating Council has 8 members and consists of the leadership of the Kansas Legislature. Two members of the Legislative Coordinating Council, Senator Dinah Sykes and I, are Democrats. The other six members, including Speaker of the House Ron Ryckman and Senate President, Ty Masterson, are Republicans.

3. I have learned that the Legislative Coordinating Council authorized the filing of an amicus brief in *Rivera et al. v. Schwab et al.* in the Kansas Supreme Court and that the brief has already been filed.

4. I was not consulted in any way concerning the filing of an amicus brief in the *Rivera* case by any member of the Legislative Coordinating Council or any lawyer purporting to represent the Legislative Coordinating Council, so I was surprised to learn that a brief had been filed. I did not review any draft or final brief before it was filed, nor am I aware of, and I did not participate in, any vote of the members of the Legislative Coordinating Council concerning the brief.

5. To my knowledge Senator Sykes was not consulted in any way concerning the filing of an amicus brief in the *Rivera* case by any member of the Legislative Coordinating Council or any lawyer purporting to represent the Legislative Coordinating Council.

I have read the foregoing and it is true to the best of my knowledge.

Tom Sawyer

Date: 5/10/2022

APPENDIX B

DECLARATION

Dinah Sykes, being of lawful age, swears to the following:

1. My name in Dinah Sykes. I am a member of the Kansas State Senate, representing Senate District 21 in Johnson County, Kansas.

2. I am Senate Minority Leader, and as such I am a member of the legislative leadership. I am also a member of the Legislative Coordinating Council of the Kansas State Legislature. The Legislative Coordinating Council has 8 members and consists of the leadership of the Kansas Legislature. Two members of the Legislative Coordinating Council, Representative Tom Sawyer and I, are Democrats. The other six members, including Speaker of the House Ron Ryckman and Senate President, Ty Masterson, are Republicans.

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5. To my knowledge Representative Sawyer was not consulted in any way concerning the filing of an amicus brief in the *Rivera* case by any member of the Legislative Coordinating Council or any lawyer purporting to represent the Legislative Coordinating Council.

I have read the foregoing and it is true to the best of my knowledge.

Dinah Sykes

Date: 5/10/22