

IN THE SUPREME COURT OF KANSAS

In re JOINT REQUEST OF THE)
SEVENTH JUDICIAL DISTRICT)
AND THE TWENTY-NINTH) Case No. 124927
JUDICIAL DISTRICT TO)
CONSOLIDATE MULTIDISTRICT)
LITIGATION PURSUANT TO)
K.S.A. 60-242(c))
_____)

RESPONSE TO JOINT REQUEST

On March 14, 2022, the Seventh Judicial District (Douglas County) and the Twenty-Ninth Judicial District (Wyandotte County) jointly filed a request with this Court to consolidate *Frick v. Schwab*, 2022-CV-71 (Douglas County D. Ct.), *Rivera v. Schwab*, 2022-CV-89 (Wyandotte County D. Ct.), and *Alonzo v. Schwab*, 2022-CV-90 (Wyandotte County D. Ct.).¹ This response is filed on behalf of Scott Schwab, who is a defendant in all three cases, and Michael Abbott, who is a defendant in the *Rivera* and *Alonzo* cases (collectively, Defendants).

Defendants agree that consolidation of these three cases is warranted. These cases plainly “aris[e] out of the same transaction or occurrence or series of transactions or occurrences”—namely, the Kansas Legislature’s enactment of SB 355. K.S.A. 60-242(c)(1). And consolidation will “promote the just and efficient conduct of the actions.” *Id.*

¹ The Wyandotte County District Court on its own motion and without objection from the parties consolidated the *Rivera* and *Alonzo* actions. See Journal Entry of Consolidation, *Rivera*, 2022-CV-89 (Mar. 10, 2022).

Given that consolidation is to occur in “one of the counties in which an action is pending,” *id.*, Defendants respectfully request that this Court consolidate the cases in Douglas County. Litigating these cases in Wyandotte County would present unique and sensitive issues that could undermine public confidence in any outcome. “[C]ourts must strive to avoid ‘even the appearance’ of bias.” *St. David’s Episcopal Church v. Westboro Baptist Church, Inc.*, 22 Kan. App. 2d 537, 556, 921 P.2d 821 (1996). And a high risk of the appearance of bias would arise if a judge elected through the political process as a member of a political party—as all of the judges in Wyandotte County are—were asked in these unprecedented cases to “reallotat[e] power and influence between political parties.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019). To avoid that risk, this Court should order the cases to be consolidated in Douglas County. But in making such a ruling, this Court should make clear that it is not ruling on the propriety of a subsequent transfer to Shawnee County, as Defendants have requested in all three cases.

I. This Court should consolidate the cases in Douglas County.

This Court should consolidate the cases in Douglas County. Under K.S.A. 60-242(c)(1), this Court may consolidate “civil actions arising out of the same transaction or occurrence or series of transactions or occurrences” in “one of the counties in which an action is pending.” The *Frick* action is pending in Douglas County, and the *Rivera* and *Alonzo* actions are pending in Wyandotte County. This Court should choose Douglas County for consolidation.

Fundamental to our system of justice is that “courts must strive to avoid ‘even the appearance’ of bias.” *St. David’s Episcopal Church*, 22 Kan. App. 2d at 556; *cf.* Kansas Supreme Court Rule 601B, Kansas Code of Judicial Conduct, Canon 1, Rule 1.2 (2022 Kan. S. Ct. R. 493) (requiring that judges avoid even “the appearance of impropriety”). An “appearance of bias to an informed, objective observer might exist” even where “actual bias” does not. *State v. Smith*, 308 Kan. 778, 789, 423 P.3d 530 (2018) (quoting *Mejia v. United States*, 916 A.2d 900, 903 (D.C. 2007)). This Court has explained that “[b]oth the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.” *Id.* at 788-89 (quoting *Williams v. Pennsylvania*, 579 U.S. 1, 16 (2016)). Recognizing that elected judges may in some situations require particular attention to ensure the appearance of impartiality, the United States Supreme Court has even applied First Amendment speech protections differently to review of government regulation of elected judges’ campaigns than to election campaigns of non-judicial candidates. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433 (2015). As that Court has recognized, the “judiciary’s authority . . . depends in large measure on the public’s willingness to respect and follow its decisions.” *Id.* at 445-46. “The concept of public confidence in judicial integrity” is undoubtedly “genuine and compelling.” *Id.* at 447.

The risk of the appearance of bias is especially high in these exceptional cases, which are political to their core. Plaintiffs challenge the result of a once-in-a-decade political process as being too political to be constitutional. They argue that

the congressional district map drawn in SB 355 is too favorable to Republicans and not favorable enough to Democrats. Because the map confers too much of a political advantage on Republicans, Plaintiffs insist, the courts must set the map aside and require that the Kansas Legislature (or even the court itself) draw a new map that is more favorable to Democrats. In short, Plaintiffs ask the court to involve itself in “one of the most intensely partisan aspects of American political life,” to “make [its] own political judgment about how much representation particular political parties *deserve*,” and then to “reallocat[e] power and influence between political parties.” *Rucho*, 139 S. Ct. at 2499, 2502, 2507.

Consolidation of these highly politically sensitive cases in Wyandotte County risks the appearance of bias. Whereas the district judges in Douglas County are appointed,² judges in Wyandotte County are elected by partisan ballot.³ See *Ambrosier v. Brownback*, 304 Kan. 907, 913, 375 P.3d 1007 (2016) (describing “partisan election” of some Kansas judges). Wyandotte County judges run in political elections in which they openly affiliate themselves with and run as members of political parties. And in Wyandotte County all of the currently serving judges ran for office as members of the same political party, the very party that these cases claim to have been unconstitutionally disadvantaged by the actions of

² Kansas Judicial Branch, *Become a Judge Through Merit Selection*, <https://www.kscourts.org/Judges/Become-a-Judge/District-Judge-Merit-Selection> (last visited Mar. 18, 2022).

³ Michael G. Abbott, *Directory of Elected Officials—2022* at 9-10 (Jan. 4, 2022), <https://static1.squarespace.com/static/56606b47e4b0b9403ad6ff96/t/61d46a00167756546a6463d1/1641310720839/Directory+of+Elected+Officials+2022.pdf>.

the Legislature, which is itself controlled by the opposing party. There is more than a small risk that a reasonable member of the public may question whether an elected judge—who has openly affiliated with and run for judicial office as a member of a political party—can impartially “relocat[e] power and influence between political parties.” *Rucho*, 139 S. Ct. at 2502; cf. *Williams-Yulee*, 575 U.S. at 447 (“[T]he mere possibility that judges’ decisions may be motivated by the desire to repay campaign contributions is likely to undermine the public’s confidence in the judiciary.” (citation omitted)). This is not to suggest that elected judges are incapable of acting as neutral arbiters. But the acute risk of the public misperceiving the court’s actions in these unique, high-profile cases counsels strongly in favor of consolidation in Douglas County, where the district judges are selected in a nonpartisan fashion.⁴

II. This Court should make clear that it is not ruling on the propriety of transfer to Shawnee County.

As previously noted, Defendants have moved to transfer all of the cases to Shawnee County, and those motions are still pending. *See* Mot. to Transfer, *Rivera*, 2022-CV-89 (Mar. 11, 2022); Mot. to Transfer, *Frick*, 2022-CV-71 (Mar. 14, 2022). This Court should make clear that its consolidation order is not a ruling on Defendants’ transfer motions or on the propriety of transfer to Shawnee County.

⁴ Even this Court describes elected judges as having been selected in a “partisan” fashion. *See* Kansas Judicial Branch, *Become a Judge Through Election*, [https://www.kscourts.org/Judges/Become-a-Judge-\(2\)](https://www.kscourts.org/Judges/Become-a-Judge-(2)) (last visited Mar. 18, 2022).

Rather, as the Court should instruct, the question of transfer to Shawnee County will remain for the District Court to consider after consolidation.⁵

As Defendants explain in their transfer motions, the only proper defendant in these cases is Defendant Schwab—Kansas’s “Chief state election official.” K.S.A. 25-2504. Defendant Schwab is the only official who is ultimately responsible for ensuring that the upcoming elections are administered in accordance with the law, including under SB 355. He instructs Defendant Abbott and Douglas County Clerk Jamie Shew (the second defendant in the *Frick* case) how to “comply[] with federal and state laws and regulations” in conducting elections—including any legislatively enacted congressional map. K.S.A. 25-124. And Defendant Abbott and Shew must “comply with the . . . rules and regulations and standards and directives that relate to the registration of voters and the conduct of elections” that Defendant Schwab issues. K.S.A. 19-3424(a). As such, it is only against Defendant Schwab that Plaintiffs’ requested relief could lie. *See* Joint Request at 4 (explaining that Plaintiffs in all three cases seek to enjoin state officials from “conducting elections in conformity with S.B. 355”).

Because Defendant Schwab is the only proper defendant in these cases, Shawnee County is the appropriate venue. Under K.S.A. 60-602(2), an “action against a public officer for an act done or threatened to be done by such officer by virtue or under color of his or her office, or for neglect of his or her official duties,”

⁵ It is also possible this Court’s general supervisory and administrative authority would allow this Court to order these cases transferred and consolidated in Shawnee County. *See* Kan. Const. art. 3, § 1.

“must be brought in the county in which the cause, or some part thereof arose.” A cause “arise[s] in the county where the official acts constituting the basis of the action were performed.” *Freund v. State Comm’n of Revenue & Taxation*, 156 Kan. 109, 112, 131 P.2d 678 (1942). When the “acts for which the [plaintiffs] seek redress were performed by state officials in Shawnee county by virtue of their offices, and the acts and orders necessary for affirmative relief must necessarily be done and performed in the state capitol at Topeka in Shawnee county,” venue is proper in Shawnee County. *Id.*; see also, e.g., *Bartell v. State Highway Comm’n*, 191 Kan. 539, 542, 382 P.2d 334 (1963); *Provident Mut. Life Ins. Co. of Philadelphia v. State Highway Comm’n*, 155 Kan. 351, 353, 125 P.2d 346 (1942); *Verdigris River Drainage Dist. No. 1 v. City of Coffeyville*, 149 Kan. 191, 192, 200, 86 P.2d 592 (1939); *City of Coffeyville v. Wells*, 137 Kan. 384, 386, 20 P.2d 477 (1933).

That is precisely the case here. All of the official acts upon which the cases are based were performed in Shawnee County. The Kansas Legislature enacted SB 355 at the State Capitol in Shawnee County. And Defendant Schwab directs congressional elections from his office in Shawnee County. Because the totality of the official acts that give rise to the claims in these cases occurred in Shawnee County, Shawnee County is where venue properly lies under K.S.A. 60-602(2). This Court should make clear that its consolidation order is not to be construed to the contrary.

III. Conclusion

For these reasons, this Court should consolidate these cases in Douglas County District Court and make clear that it is not ruling on the propriety of transfer to Shawnee County District Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2022, the above Response to Joint Request 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. Copies were also emailed to:

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