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,
Defendants-Appellants,

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

ALONZO AND *RIVERA* PLAINTIFFS-APPELLEES' MOTION FOR REHEARING

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

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TABLE OF CONTENTS AND AUTHORITIES

INTRODUCTION

Pursuant to Rule 7.06 of the Kansas Rules of Appellate Procedure, the *Alonzo* and *Rivera* Plaintiffs respectfully move for rehearing of the portion of the Court's June 21, 2022 decision addressing the *Alonzo* and *Rivera* Plaintiffs' claim that Ad Astra 2 intentionally dilutes minority voting power in violation of Section 2 of the Kansas Bill of Rights. As explained below, this Court held that it interprets the Kansas Constitution's equal protection guarantee and its prohibition against intentional racial discrimination consistent with the Fourteenth Amendment. However, the test that it adopted to consider Plaintiffs' intentional discrimination claims is contrary to the legal test and principles that the U.S. Supreme Court and other federal courts have applied to such claims under the U.S. Constitution.

This motion does not extend to the Court's holding with respect to partisan gerrymandering. Plaintiffs realize that should they succeed in this motion, relief in time for the upcoming election is likely infeasible.

BACKGROUND

The district court found as a matter of fact that the Legislature intentionally discriminated against minority voters by purposefully dismantling Congressional District ("CD") 3 to prevent it from continuing to function as an effective "crossover district"[1] in which minority-preferred candidates could prevail. *E.g.*, J.A. VI, 105, 120. The district

[1] As the U.S. Supreme Court has explained, a "crossover district" is one in which minority voters are less than a majority of the voting population, but where a sufficient portion of white voters "cross over" to support the minority-preferred candidate to allow that candidate to prevail. *See Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (plurality opinion).

court also found as a matter of fact that the Legislature's actions in this regard were not solely motivated by partisanship, but rather had as at least one purpose racial discrimination. J.A. VI, 206.

In reaching that conclusion, the district court applied a legal framework for assessing intentional racial discrimination claims under Section 2 of the Kansas Bill of Rights that is nearly identical to the framework that federal courts apply to intentional discrimination claims under the Fourteenth Amendment, including redistricting claims. *Compare* J.A. VI, 197 (applying intentional discrimination standard nearly identical to that of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-68 (1977)),[2] *with*, *e.g.*, *LULAC v. Abbott*, ___ F. Supp. 3d ___, No. 3:21-cv-259, 2022 WL 1410729, at *12-23 (W.D. Tex. May 4, 2022) (three-judge court) (considering intentional vote dilution claim regarding Texas state senate district under *Arlington Heights* framework); *Perez v. Abbott*, 253 F. Supp. 3d 864, 955-62 (W.D. Tex. 2017) (three-judge

[2] Specifically, the court identified "five non-exclusive factors that are particularly relevant to determining intent":

> (1) [W]hether the redistricting plan has a more negative effect on minority voters than white voters, (2) whether there were departures from the normal legislative process, (3) the events leading up to the enactment, including whether aspects of the legislative process impacted minority voters' participation, (4) whether the plan substantively departed from prior plans as it relates to minority voters, and (5) any historical evidence of discrimination that bears on the determination of intent.

J.A. VI, 197. Under *Arlington Heights*, the relevant factors are (1) "[t]he impact of the official action" and whether it "bears more heavily" on minorities, (2) the "historical background of the decision," (3) the "specific sequence of events leading up to the challenged decision," (4) "[d]epartures from the normal procedural sequence," (5) "[s]ubstantive departures," and (6) "legislative . . . history." 429 U.S. at 266-68.

court) (invaliding Texas's Dallas/Fort Worth-area congressional districts as intentionally discriminatory in violation of Fourteenth Amendment under *Arlington Heights* framework); *Texas v. United States*, 887 F. Supp. 2d 133, 159-66 (D.D.C. 2012) (three-judge court) (applying *Arlington Heights* framework to conclude that Texas's congressional and state senate plans were result of unlawful purposeful discrimination, including state senate district with combined 33% Black and Hispanic voting population), *vacated on other grounds*, 570 U.S. 928 (2013).

On appeal, this Court reversed. First, the Court 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." Op. at 36. Then, rather than applying the U.S. Supreme Court's and federal courts' framework for adjudicating *intentional* vote dilution cases under the Fourteenth Amendment (*i.e.*, *Arlington Heights*), this Court instead held that the proper federal law framework is the test for discriminatory *effects* claims under the Voting Rights Act ("VRA"), a federal statute. Op. at 41-42. This Court thus held that intentional racial discrimination is unconstitutional only if it blocks the creation of a *majority-minority* district. Op. at 41-42.

The State Defendants had not advanced the framework adopted by the Court, and instead argued that the proper legal framework was the *Arlington Heights* test for ascertaining the presence of discriminatory intent by the Legislature. Appellants' Br. 44-48 (explaining that a "racial vote dilution claim under the Kansas Constitution . . . requires (1) discriminatory intent and (2) discriminatory effect" and repeatedly citing *Arlington Heights*). The parties thus largely agreed on the legal framework; the State simply disputed

whether the district court's factual findings were sufficient to support its finding of intentional discrimination under that framework. *See id.* As a result, no party had the opportunity or reason to provide briefing on this Court's decision to import the statutory test for VRA claims into the constitutional analysis for intentional racial discrimination claims, and the Court thus lacked the benefit of the parties' contribution to its analysis.

ARGUMENT

The Court should grant rehearing because (1) its decision interprets federal law but is contrary to the U.S. Supreme Court's precedent rejecting a majority-minority requirement for intentional vote dilution claims under the Fourteenth Amendment; (2) its decision is contrary to the Ninth Circuit's and multiple three-judge federal district courts' precedents on point; (3) the *Arlington Heights* framework together with generally applicable Fourteenth Amendment intentional discrimination principles govern the legal claim at issue in this case; and (4) the district court applied the correct legal test and its factual findings of intentional discrimination and discriminatory effects are supported by substantial evidence.

Plaintiffs address the difference in federal law between intent and effects claims below, but it is worth noting at the outset the (sometimes subtle) distinctions between the four types of federal legal claims related to race and redistricting.

First, a plaintiff can allege discriminatory *effects*—even where a legislature did not intend to discriminate—in violation of Section 2 of the VRA. *Thornburg v. Gingles*, 478 U.S. 30 (1986), provides the framework for these claims.

Second, a plaintiff can allege discriminatory *intent* in violation of Section 2 of the VRA. As explained below, courts eliminate the majority-minority *Gingles* requirement for these claims, but otherwise assess the totality of the circumstances pursuant to the statutory text. *See infra*.

Third, a plaintiff can allege a "racial gerrymandering" or "*Shaw*" claim, where race was the predominant consideration in redistricting in violation of the Equal Protection Clause of the Fourteenth Amendment. *See generally Shaw v. Reno*, 509 U.S. 630 (1993). These claims do not turn on an invidious motivation—even if race predominates to benefit minorities, it can be unlawful if not supported by a compelling justification. Because the consideration of race challenged in *Shaw* cases is not done for nefarious reasons, plaintiffs must meet a high burden of showing predominance.

Fourth, and key here, a plaintiff can allege intentional racial discrimination in violation of the Fourteenth and Fifteenth Amendments. These claims are adjudicated under the *Arlington Heights* framework and the traditional equal protection principles that apply to any intentional discrimination claim. And because the consideration of race as a tool to *dilute* minority votes is an invidious motivation, race need not *predominate* to trigger liability; even if an intent to discriminate on the basis of race is just *one* of many motivations, the plan is unconstitutional. *See infra*.

Plaintiffs in this case raised only the fourth type of claim—intentional racial discrimination—under Section 2 of the Kansas Bill of Rights rather than under the Fourteenth Amendment. Although this Court announced its intent to interpret the two

provisions identically, its treatment of Fourteenth Amendment law is erroneous under U.S. Supreme Court and federal court precedent.

I. This Court's holding is contrary to the U.S. Supreme Court's *Bartlett* decision.

This Court held that the permissibility of intentional racial discrimination under the federal Constitution (and thus the Kansas Constitution) turns on the *Gingles* majority-minority district requirement, but that holding is contrary to the U.S. Supreme Court's decision in *Bartlett v. Strickland*, 556 U.S. 1 (2009) (plurality opinion). There, the Court considered whether Section 2 of the VRA could require the drawing of crossover districts. *Id.* at 6, 12; *see supra* note 1 (defining "crossover district"). The Court held that "as a *statutory* matter, § 2 does not mandate creating or preserving crossover districts," and thus that "[o]nly when a geographically compact group of minority voters could form a majority in a single-member district has the first *Gingles* requirement been met." 556 U.S. at 23, 26 (emphasis added).[3] The Court's holding was based on the statutory text, which requires an equal opportunity "to elect" candidates. *Id.* at 14. The Court reasoned that for discriminatory results to be cognizable under the statute, the minority group must have the potential to "elect [a] candidate based on their own votes and without assistance from others." *Id.*

[3] *Gingles* set forth three "preconditions" a plaintiff must meet to make out a colorable claim of racial vote dilution under Section 2's effects test. *See* 478 U.S. at 50. The minority group must be (1) numerous enough to constitute a majority in a reasonably compact district; (2) politically cohesive; and (3) able to show that majority voters typically vote as a bloc to defeat minority-preferred candidates. *Id.* at 50-51.

In so holding, the Court was careful to twice distinguish discriminatory *effects* cases from discriminatory *intent* cases. First, the Court expressly stated that "[o]ur holding *does not apply* to cases in which there is *intentional discrimination* against a racial minority." *Id.* at 20 (emphasis added). In doing so, the Court adopted the reasoning advanced in the U.S. Department of Justice's *amicus* brief, noting that "evidence of discriminatory intent tends to suggest that the jurisdiction is not providing an equal opportunity to minority voters to elect the representatives of their choice, and it is therefore unnecessary to consider the majority-minority requirement before proceeding to the ultimate totality of circumstances analysis." *Id.* (internal quotation marks omitted).

Second, the Court explained that "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, *that would raise serious questions under both the Fourteenth and Fifteenth Amendments.*" *Id.* at 24 (emphasis added). This is precisely what Plaintiffs alleged at trial and the district court found—as a matter of fact to which deference is owed on appeal—that the Legislature did in dismantling CD 3. *See, e.g.*, J.A. VI, 203 ("The map transplants over 45,000 minority voters in metro Kansas City from CD 3 to CD 2, cracking apart a performing crossover district so that minority voters on both sides of the line can no longer elect their candidate of choice.").

This Court's holding is in direct conflict with *Bartlett*. *Contra* Op. at 36 ("We will adhere to equal protection precedent from the United States Supreme Court when applying the coextensive equal protection guarantees found in section 2 of the Kansas Constitution Bill of Rights."). Definitionally, a crossover district is one in which minority voters are *not*

a majority of eligible voters. *Bartlett*, 556 U.S. at 13. If, as the *Bartlett* plurality explained, the intentional destruction of a performing crossover district violates the Fourteenth and Fifteenth Amendments, then proving that a majority-minority district could be drawn cannot possibly be a required showing. That is why the U.S. Supreme Court was careful to emphasize that its holding about majority-minority districts "does not apply to cases in which there is intentional discrimination against a racial minority." *Id.* at 20. And while *Bartlett* was a plurality decision, the four dissenting justices would have applied an even more lenient standard. In their view, Section 2 of the VRA *required* the drawing of crossover districts, and they thus necessarily agreed that at the very least the intentional destruction of such a district would violate the Fourteenth and Fifteenth Amendments, which the VRA was enacted to enforce. *See id.* at 27 (Souter, J., dissenting). Seven Justices of the Supreme Court in *Bartlett* therefore agreed that intentionally destroying a crossover district can be unlawful, rejecting the contention that the first *Gingles* precondition is a barrier to prevailing on an intentional vote dilution claim under the federal Constitution.

As explained in more detail below, that approach accords with the U.S. Constitution and common sense. The purpose of the Fourteenth Amendment is to prohibit the government from seeking to intentionally disadvantage minorities. Intentionally drawing lines based on race, when those lines have the effect of preventing minority voters from continuing to elect their preferred candidates, is textbook discrimination. The

discriminatory intent and effect necessary for a constitutional violation are present regardless of whether a statutory vote dilution claim could be advanced.[4]

Growe v. Emison, 507 U.S. 25 (1993), which this Court cited as support for its conclusion that *Gingles* applies to Fourteenth Amendment intentional vote dilution claims, Op. at 44, is not to the contrary. *Growe* considered a Section 2 VRA claim, not a Fourteenth Amendment claim. *See, e.g.*, 507 U.S. at 27, 38, 42. The *Bartlett* Court did not view itself as constrained by *Growe* when it addressed *Gingles*'s irrelevance to intentional vote dilution claims.

II. The Court's holding is contrary to precedent from the Ninth Circuit and multiple three-judge district courts.

The Court's holding is contrary to case law from the Ninth Circuit as well as multiple three-judge federal courts.[5] In *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), the district court concluded that the County intentionally discriminated against Hispanic voters by "intentionally fragmenting the Hispanic population among the various districts in order to dilute the effect of the Hispanic vote in future elections and preserve incumbencies of the Anglo members of the Board of Supervisors," notwithstanding the

[4] There is nothing inconsistent with the different showings for the constitutional and statutory vote dilution claims. Congress could require a greater showing to invalidate a redistricting plan based solely upon its disparate impact in the absence of evidence of discriminatory intent. But where the discrimination was *intended*, the Fourteenth Amendment is violated so long as the intended discriminatory event *occurs* (*i.e.*, the new district prevents the targeted minority voters from electing their preferred candidates).

[5] When a plaintiff challenges the constitutionality of a statewide or congressional redistricting plan in federal court, the case is heard by a three-judge district court, which must include at least one judge from the relevant circuit court of appeals, and any appeal is filed directly with the U.S. Supreme Court, which has mandatory jurisdiction to rule on the appeal. *See* 28 U.S.C. §§ 1253, 2284.

fact that at the time the redistricting was conducted, "there could be no single-member district with a majority of minority voters." *Id.* at 769. The Ninth Circuit affirmed: "We hold that, to the extent that *Gingles* does require a majority showing, it does so only in a case where there has been no proof of intentional dilution of minority voting strength." *Id.*

The Ninth Circuit highlighted the district court's conclusion that

> the County had adopted its current reapportionment plan *at least in part with the intent to fragment the Hispanic population* . . . . Thus, the plaintiffs' claim [was] not, as in *Gingles*, merely one alleging disparate impact of a seemingly neutral electoral scheme. Rather, it [was] one in which the plaintiffs ha[d] made out a claim of intentional dilution of their voting strength.

Id. at 770 (emphasis added). Indeed, the court noted that

> [t]o impose the requirement the County urges would prevent any redress for districting which was deliberately designed to prevent minorities from electing representatives in future elections governed by that districting. This appears to us to be a result wholly contrary to Congress' intent in enacting Section 2 of the Voting Rights Act and contrary to the equal protection principles embodied in the fourteenth amendment.

Id. at 771. The court likewise rejected the County's challenge to the sufficiency of the evidence underlying the district court's intent finding, holding that even though preserving incumbents was the primary goal of the map-drawers, "the court also found that they chose fragmentation of the Hispanic voting population as the avenue by which to achieve this self-preservation. The supervisors intended to create the very discriminatory result that occurred." *Id.* Citing *Arlington Heights*, the court explained that "discrimination need not be the sole goal in order to be unlawful." *Id.*[6]

[6] Judge Kozinski concurred, explaining that racial animus is not a necessary showing in a Fourteenth Amendment intentional discrimination claim. As an example, he explained that

Finally, the Ninth Circuit explained that "[e]ven where there has been a showing of intentional discrimination, plaintiffs must show that they have been injured as a result. Although the showing of injury in cases involving discriminatory intent need not be as rigorous as in effects cases, *some* showing of injury must be made . . . ." *Id.* The court found it a sufficient injury that "the supervisors' intentional splitting of the Hispanic core resulted in a situation in which Hispanics had less opportunity than did other county residents to participate in the political process and elect legislators of their choice." *Id.*

In its contrary holding, this Court reasoned that "we have found no decision in which a federal appeals court has concluded that redistricting, although not in violation of section 2, unconstitutionally dilutes minority voting strength." Op. at 44 (internal quotation marks and citation omitted). But the Ninth Circuit in *Garza* held precisely that,[7] and the U.S. Supreme Court cited *Garza*'s holding in explaining in *Bartlett* that the majority-minority requirement did not apply to intent cases. *See Bartlett*, 556 U.S. at 20 (citing *Garza*, 918 F.2d at 771); *see also Rogers v. Lodge*, 458 U.S. 613, 622-28 (1982) (affirming invalidation

a homeowner who harbors "no ill feelings toward minorities" but who joins a pact not to sell his home to minorities in order to avoid lower property values in the neighborhood has "engaged in intentional racial and ethnic discrimination[.] . . . Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood." *Id.* at 778 n.1 (Kozinski, J., concurring).

[7] By the time the *Garza* case was tried at the end of the challenged redistricting cycle, a majority-Hispanic district could be drawn, but the court expressly affirmed the finding of intentional discrimination at the time of the plan's adoption, when no such district could be drawn. 918 F.2d at 771.

of redistricting plan under U.S. Constitution for intentional racial vote dilution without applying VRA or *Gingles* preconditions).[8]

Multiple three-judge federal courts adjudicating intentional vote dilution claims have likewise rejected the application of *Gingles*'s majority-minority district requirement to intentional vote dilution claims. In May of this year, a three-judge court hearing a Fourteenth Amendment intentional vote dilution claim against a Texas state senate district ruled that *Gingles* does not apply to constitutional intentional discrimination challenges. *See LULAC*, 2022 WL 1410729, at *11. The *LULAC* court recognized that an intentional discrimination claim still requires a showing of discriminatory effect, but ruled that "[p]laintiffs may show discriminatory effect *without* making a full *Gingles* showing. . . . *Gingles* and its progeny do not articulate general legal principles for intentional discrimination but, instead, offer an interpretation of one section of the VRA. *Gingles* itself reached that interpretation by relying heavily on legislative history and scholarship interpreting the VRA." *Id.*

[8] Likewise, a three-judge district court ruled in 2012 that the Texas Legislature acted with an unlawful intent to discriminate by cracking minorities apart and dismantling a district from which minority voters, with the support of a portion of white crossover voters, elected state senator Wendy Davis. *Texas*, 887 F. Supp. 2d at 162-66. Black and Hispanic voters constituted 33.4% of the district's eligible voters, *id.* at 162, but applying the *Arlington Heights* factors, the court concluded that the legislature's cracking of that minority population was the product of unlawful intentional discrimination, *id.* at 163-66. Although the decision was vacated on other grounds following the Supreme Court's invalidation of the VRA's preclearance formula in *Shelby County v. Holder*, 570 U.S. 529 (2013), the Fifth Circuit sitting *en banc* cited the case as "factually relevant as a contemporary example of State-sponsored discrimination based on the finding of a three-judge federal court," *Veasey v. Abbott*, 830 F.3d 216, 257 n.54 (5th Cir. 2016) (en banc). And just this year, another three-judge court—itself applying *Arlington Heights* to an intentional racial vote dilution claim—reiterated that assessment. *LULAC*, 2022 WL 1410729, at *18.

The *LULAC* court further explained that "[t]he intentional-vote-dilution analysis, meanwhile, is derived from the Constitution, and the *Arlington Heights* framework deployed in that analysis states merely that effects are discriminatory when they 'bear[] more heavily on one race than another.'" *Id.* (quoting *Arlington Heights*, 429 U.S. at 266). The court noted that "[i]ncorporating the *Gingles* framework into the intentional-vote-dilution analysis, thereby constitutionalizing the *Gingles* factors, would thus be an unnatural result, and it is not one this Court accepts." *Id.* The court reasoned that its conclusion adhered to *Bartlett*, where the plurality explained that the intentional destruction of a crossover district might violate the Fourteenth and Fifteenth Amendments. *Id*. at *12. "Under that reasoning, it must be possible for a state to violate the Constitution by dismantling a district that does not meet all three *Gingles* requirements." *Id.*

The *LULAC* court also rejected Texas's invocation of the Eleventh Circuit's decision in *Johnson v. DeSoto County Board of Commissioners*, 204 F.3d 1335 (11th Cir. 2000), which this Court cited as support for its holding in this case, Op. at 44. The *LULAC* court explained that *DeSoto* "was grounded expressly in the VRA and not the Constitution. . . . That circuit's later decisions have thus required Section 2 plaintiffs alleging discriminatory intent to make a *Gingles* showing. But *DeSoto*'s reasoning strongly suggests that the requirement is strictly statutory, so inapplicable to the constitutional theory here." *LULAC*, 2022 WL 1410729, at *12 (citations omitted). Likewise, the *LULAC* court noted that the Ninth Circuit's *Garza* decision "addressed the issue more squarely"

and that the Eleventh Circuit "did not have the benefit of the Supreme Court's guidance in *Bartlett* when it decided" *DeSoto* and subsequent cases. *Id.* at *12 & n.7.[9]

This Court's decision is not only contrary to the U.S. Supreme Court's decision in *Bartlett*, the Ninth Circuit's decision in *Garza*, and multiple decisions of three-judge federal courts,[10] but is also incompatible with the equal protection clauses of both the U.S. and Kansas Constitutions. Under this Court's ruling, the Legislature could enact a redistricting plan during legislative proceedings in which map-drawers expressed overtly racially discriminatory motives for how particular lines were drawn and *not* violate Kansans' right to equal protection of law under the federal and state constitutions.[11]

[9] Consistent with *Bartlett*, three-judge federal courts adjudicating statutory intent claims under the VRA likewise agree that the majority-minority requirement of *Gingles* does not apply even in the absence of a constitutional claim. *See Perez*, 253 F. Supp. 3d at 944 (rejecting argument that statutory VRA intentional discrimination claims required satisfying first *Gingles* precondition); *Comm. for a Fair & Balanced Map v. Ill. Bd. of Elections*, No. 1:11-CV-5065, 2011 WL 5185567, at *4 (N.D. Ill. Nov. 1, 2011) ("[T]he first *Gingles* factor is appropriately relaxed when intentional discrimination is shown . . . .").

[10] Moreover, the U.S. Department of Justice, to which Congress granted enforcement power under the VRA, *see* 52 U.S.C. § 10308(d), has consistently and repeatedly taken the position—cited approvingly by the U.S. Supreme Court in *Bartlett*—that the possibility of a majority-minority district is not a required showing in intentional discrimination claims, whether advanced under the VRA or the Fourteenth Amendment. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Affirmance at 14, *Bartlett*, 556 U.S. 1 (No. 07-689), https://www.justice.gov/sites/default/files/osg/briefs/2008/01/01/2007-0689.mer.ami.pdf; United States' Opposition to Texas's Motion to Dismiss at 17-18, *LULAC v. Abbott*, No. 3:21-cv-259 (W.D. Tex. Jan. 24, 2022), ECF No. 161 (attached in Appendix 2); Opposition to the State's and Intervenors' Motions to Dismiss at 19-22, *United States v. Georgia*, No. 1:21-cv-02575 (N.D. Ga. Aug. 11, 2021), ECF No. 58 (attached in Appendix 2).

[11] Such a motivation might, for example, be one of three equally weighted legislative aims so, although it would remain clear racial discrimination, it could not be disposed of under the U.S. Supreme Court's racial gerrymandering doctrine. *See supra* at 5.

That is not—and *cannot*—be the law, federal, Kansas, or otherwise. Such direct evidence of outright racial animus is not a necessary showing to invalidate a redistricting plan as intentionally discriminatory, *see infra* Part III, but the example places in sharp relief the error of the Court's holding.

III. Fourteenth Amendment intentional vote dilution cases are adjudicated under the *Arlington Heights* framework, which the district court substantially applied here.

A. *Arlington Heights* and traditional equal protection principles, not *Gingles*, govern Fourteenth Amendment intentional vote dilution claims.

As Defendants acknowledged in their brief, Appellants' Br. 44-48, federal courts assess claims of intentional racial vote dilution under the Fourteenth Amendment using the *Arlington Heights* framework, consistent with principles of law generally applicable to any intentional discrimination claim. *See City of Mobile v. Bolden*, 446 U.S. 55, 66-67 (1980) (plurality opinion) (explaining that *Arlington Heights* framework for assessing unconstitutional intentional discrimination applies to vote dilution claims "just as it does to other claims of racial discrimination"); *Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018) (citing *Arlington Heights* for framework for Fourteenth Amendment intentional discrimination test for redistricting challenge); *supra* Background Section (collecting cases applying *Arlington Heights* to intentional vote dilution claims).

Several principles guide courts' consideration of whether a redistricting plan constitutes intentional vote dilution in violation of the Fourteenth Amendment. First, as discussed above, "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions

under both the Fourteenth and Fifteenth Amendments." *Bartlett*, 556 U.S. at 24. In assessing those serious questions, "'racial discrimination need only be one purpose, and not even a primary purpose,' of an official action for a violation to occur." *Veasey v. Abbott*, 830 F.3d 216, 230 (5th Cir. 2016) (en banc) (quoting *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009)). "[D]iscriminatory intent need not be proved by direct evidence." *Rogers*, 458 U.S. at 618. Rather, "direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of [the legislature's] actions may be considered." *Brown*, 561 F.3d at 433. As the *en banc* Fifth Circuit has explained,

> [i]n this day and age we rarely have legislators announcing an intent to discriminate based upon race, whether in public speeches or private correspondence. To require direct evidence of intent would essentially give legislatures free rein to racially discriminate so long as they do not overtly state discrimination as their purpose and so long as they proffer a seemingly neutral reason for their actions. This approach would ignore the reality that neutral reasons can and do mask racial intent, a fact we have recognized in other contexts that allow for circumstantial evidence.

Veasey, 830 F.3d at 230.

Although discriminatory purpose "implies more than intent as volition or intent as awareness of consequences," "the inevitability or foreseeability of consequences . . . bear[s] upon the existence of discriminatory intent." *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 & n.25 (1979). Where "the adverse consequences of a law upon an identifiable group" are clear, "a strong inference that the adverse effects were desired can reasonably be drawn." *Id.* at 279.

As the *Arlington Heights* Court explained, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such

circumstantial and direct evidence as may be available." 429 U.S. at 266. "The impact of the official action"—"whether it 'bears more heavily on one race than another'"—"may provide an important starting point." *Id.* (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). From there, the Court "set out five nonexhaustive factors to determine whether a particular decision was made with a discriminatory purpose": "(1) the historical background of the decision, (2) the specific sequence of events leading up to the decision, (3) departures from the normal procedural sequence, (4) substantive departures, and (5) legislative history, especially where there are contemporary statements by members of the decision-making body." *Veasey*, 830 F.3d at 230-31 (internal quotation marks omitted); *see also Arlington Heights*, 429 U.S. at 267-68. These factors "cannot be analyzed mechanically" and cannot be "reduced to a scorecard." *LULAC*, 2022 WL 1410729, at *23. Finally, plaintiffs claiming intentional discrimination "need not prove race-based hatred or outright racism, or that any particular legislator harbored racial animosity or ill-will towards minorities because of their race." *Perez v. Abbott*, 253 F. Supp. 3d 864, 948 (W.D. Tex. 2017); *see also supra* note 6.

A plaintiff must also show a discriminatory effect, but it is not the rigorous showing required for a standalone discriminatory effects claim under the VRA. Rather, there must be "some showing" of harm. *Garza*, 918 F.2d at 771. The *Garza* court found that the fragmentation of Hispanics created less opportunity that they could elect their preferred candidates to the County Board of Supervisors. *Id*. The *LULAC* court found a discriminatory effect sufficient for an intent claim because the plan "disperse[d] the district's minority voters . . . such that the candidates they support[ed were] far less likely

to win election." 2022 WL 1410729, at *13. And in *Perez*, the court concluded that the dispersal of minority voters "kept [them] at levels in which they [could not] elect representatives of their choice." 253 F. Supp. 3d at 962.

To the extent this Court interprets the Kansas Constitution's equal protection guarantee and its prohibition against intentional racial discrimination consistent with the Fourteenth Amendment, these are the legal principles that govern this case.

B. The district court applied the correct legal framework, and its factual finding of intentional discrimination is supported by substantial evidence.

The legal framework the district court applied is substantially identical to the *Arlington Heights* framework and general principles of Fourteenth Amendment law discussed above. *See supra* note 2; J.A. VI, 195-97 (articulating principles and *Arlington Heights* factors federal courts apply to Fourteenth Amendment vote dilution claims, as explained *supra* Part III.A). The district court thus did not "appl[y] the wrong legal standard" "unmoored from precedent." Op. at 36. Rather, it applied the same legal standards that federal courts apply to Fourteenth Amendment intentional vote dilution claims.

The district court's factual findings of discriminatory intent and effects were supported by substantial evidence. Indeed, the evidence was as or more compelling than the facts upon which federal courts have found or affirmed findings of intentional vote dilution in other cases. In *Garza*, the Ninth Circuit affirmed a finding of intentional vote dilution notwithstanding the district court's determination that "the Supervisors appear to have acted primarily on the political instinct of self-preservation" because the district court

had also found that the Supervisors "chose fragmentation of the Hispanic voting population as the avenue . . . to achieve this self-preservation." 918 F.2d at 771 (internal quotation marks omitted). In *Texas*, a three-judge district court found that dismantling a state senate district with a combined Black and Hispanic voting population of 33.4% was intentionally discriminatory even where "[t]here [wa]s no direct evidence" of invidious intent. 887 F. Supp. 2d at 163. The court thus considered the "circumstantial evidence" under the "*Arlington Heights* factors," noting that the new plan diminished the electoral chances of the minority-preferred candidates, that the drawing of the maps was conducted secretly with only certain senators informed of the process, that the plan was "a *fait accompli*" by the time it was in committee, and that the process for adoption differed from prior redistricting cycles. *Id.* at 163-66.

Here, the district court's findings were even more extensive. The court found that the Legislature intentionally carved Wyandotte County's minority communities out of CD 3, converting it from the district with the largest minority population of the state's four congressional districts to the district with the smallest. J.A. VI, 203. In turn, Wyandotte County's minority voters were placed in CD 2, which the Legislature designed to ensure that it would never elect a candidate preferred by minority voters. J.A. VI, 197-98. In this manner, the district court found that the Legislature treated minority Democrats even worse than white Democrats and far worse than white Republicans: While CD 3 would be somewhat competitive and provide the occasional chance for its Democrats (now predominantly white) to prevail, the predominantly minority Democrats exported into CD 2 forever lost their opportunity to elect their preferred candidates. J.A. VI, 120-21, 197-98.

The district court emphasized several key facts that provided compelling circumstantial evidence that "Ad Astra 2 does not dilute minority votes by mistake." J.A. VI, 205. The court noted that one of Plaintiffs' experts, whose testimony the court expressly credited and adopted, characterized the map as "among the starkest cuts along racial lines that he ha[d] 'ever seen,'" with minority voters located north of the new district line and white voters to the south. J.A. VI, 197-99. The district court also found that "Ad Astra 2 was enacted under an abnormal legislative process" that rushed the bill through the Legislature at a speed usually reserved for emergency legislation and stymied meaningful public input. J.A. VI, 199-200. It found further that the irregularities in the legislative process had a particularly pronounced effect on minority voters in Wyandotte County, who "were given only two minutes to testify," far less than "white, rural voters at the listening tour stops in the western part of the state." J.A. VI, 201-02.

The district court also deemed it significant that Ad Astra 2's treatment of minority voters was an "unprecedented departure from prior plans," splitting the Kansas City metropolitan area for only the second time in one hundred years. J.A. VI, 202. The court found the nature of this split particularly "noteworthy because the racial divide along the highway [dividing CD 2 from CD 3] is widely known in Kansas, and would have been an obvious implication to those developing and enacting the plan." J.A. VI, 204. The court thus concluded, based upon its assessment of the testimony and evidence, that the supposedly neutral explanation proffered by legislative sponsors—that they had coincidentally selected as the dividing line the one highway that also separated racial groups—was "pretext." J.A. VI, 204.

Finally, the district court considered evidence on top of the "non-exclusive" factors, including the extensive legislative discussion of the plan's effects on minority voters; the fact that CD 3's minority voting-age population is a significant statistical outlier compared to Plaintiffs' expert's race-blind simulations; and the fact that the line itself, based on a simple visual inspection of where minority and white Kansans live, evinces an intent to "surgically target[] the most heavily minority areas." J.A. VI, 205. Together, this and other evidence convinced the court "that the Legislature intended the result it achieved—districts drawn sharply along racial lines" that "intentionally and effectively dilute[] minority votes."

The district court's factual findings far exceed the substantial evidence threshold.

CONCLUSION

For the foregoing reasons, the *Alonzo* and *Rivera* Plaintiffs' motion for rehearing should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 12, 2022, a true and correct copy of this Motion was filed using the Court's electronic filing system which will serve all parties. On the same day a copy was electronically mailed to:

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APPENDIX 1: OPINION OF THE COURT

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 125,092

FAITH RIVERA et al., TOM ALONZO et al., and SUSAN FRICK et al.,
Appellees,

v.

SCOTT SCHWAB, Kansas Secretary of State, in His Official Capacity,
and MICHAEL ABBOTT, Wyandotte County Election Commissioner,
in His Official Capacity,
Appellants,
and
JAMIE SHEW, Douglas County Clerk,
in His Official Capacity,
Appellee.

SYLLABUS BY THE COURT

1.

The Elections Clause in Article I, Section 4 of the United States Constitution does not bar this court from reviewing reapportionment legislation for compliance with the Kansas Constitution.

2.

In this case, the gravamen of plaintiffs' claims sound in equal protection. While the other provisions of the Kansas Constitution relied upon by plaintiffs and the district court—Kan. Const. Bill of Rights, §§ 1, 3, 11, 20; art. 5, § 1—protect vital rights, they do not provide an independent basis for challenging the drawing of district lines.

3.

Section 2 of the Kansas Constitution Bill of Rights is the textual grounding and location of our Constitution's guarantee of equal protection to all citizens.

4.

The equal protection guarantees afforded all Kansans by section 2 of the Kansas Constitution Bill of Rights is coextensive with the equal protection guarantees found in the Fourteenth Amendment to the United States Constitution. Therefore, Kansas courts shall be guided by United States Supreme Court precedent interpreting and applying the equal protection guarantees of the Fourteenth Amendment when we are called upon to interpret and apply the coextensive equal protection guarantees of section 2 of the Kansas Constitution Bill of Rights.

5.

The use of partisan factors in district line drawing is not constitutionally prohibited.

6.

In the absence of express standards codified in either the Kansas Constitution or in Kansas law constraining or limiting the Legislature's use of partisan factors in drawing district lines, we 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 district lines. As such, the question presented is a political question and is nonjusticiable, at least until such a time as the Legislature or the people of Kansas choose to codify such a standard into law.

7.

Government decision-making based predominantly on race is antithetical to the principles of equal protection enshrined in both the Fourteenth Amendment and in section 2 of the Kansas Constitution Bill of Rights. Section 2 prohibits the drawing of district boundaries on the basis of race unless the Government can show that its action was in furtherance of a compelling state interest and was narrowly tailored to satisfy that interest. Compliance with the federal Voting Rights Act may be a compelling state interest.

8.

The equal protection guarantees found in the Fourteenth Amendment and in section 2 of the Kansas Constitution Bill of Rights protect against two distinct kinds of racial discrimination in the drawing of district lines. First, section 2 protects against racial gerrymandering which occurs when a legislative body uses race as the predominant factor in choosing where to draw the lines. Second, section 2 protects against targeted minority voter dilution which occurs when a legislative body invidiously discriminates against a minority population to minimize or cancel out the potential power of the minority group's collective vote.

9.

The United States Supreme Court has set forth explicit legal tests to be applied to each of the two distinct kinds of racial discrimination claims that allege a particular legislative line-drawing enactment violates equal protection. We expressly adopt those same tests to apply when those challenges are made under section 2 of the Kansas Constitution Bill of Rights.

10.

When a claim of racial gerrymandering is made, the plaintiffs must show that race was the predominant factor motivating the Legislature's decision to place a significant number of voters inside or outside of a particular district. To make this showing, a plaintiff must prove that the Legislature subordinated lawful, race-neutral districting factors—such as compactness, respect for political subdivisions, and partisan advantage—to unlawful racial considerations.

11.

When a claim of minority vote dilution is made, the plaintiffs must show that (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single member district; (2) the group is politically cohesive; and (3) there exists sufficient bloc voting by the white majority in the new allegedly diluted districts to usually defeat the preferred candidate of the politically cohesive minority bloc. If a plaintiff fails to establish these three points, there neither has been a wrong nor can there be a remedy. If the plaintiff can establish these three points, the court next inquires whether, as a result of the challenged plan, the plaintiffs do not have an equal opportunity to participate in the political process and to elect candidates of their choice. We review the totality of the circumstances in determining whether a minority group has the opportunity to participate in the political process.

12.

The record below demonstrates that plaintiffs did not ask the district court to apply the correct applicable legal tests to their race-based claims. The district court, in turn, did not apply these legal tests to plaintiffs' race-based claims. Perhaps unsurprisingly then, the district court did not make the requisite fact-findings to satisfy either legal test applicable to plaintiffs' race-based equal protection claims. Therefore, on the record

before us, plaintiffs have failed to satisfy their burden to meet the legal elements required for a showing of unlawful racial gerrymandering or unlawful race-based vote dilution.

Appeal from Wyandotte District Court; BILL KLAPPER, judge. Decision announced May 18, 2022. Opinion filed June 21, 2022. Reversed and injunction order is lifted.

Brant M. Laue, solicitor general, argued the cause, and *Kurtis K. Wiard*, assistant solicitor general, *Shannon Grammel*, deputy solicitor general, *Dwight R. Carswell*, deputy solicitor general, *Jeffrey A. Chanay*, chief deputy attorney general, *Derek Schmidt*, attorney general, *Anthony F. Rupp*, of Foulston Siefkin LLP, of Overland Park, and *Gary Ayers* and *Clayton Kaiser*, of the same firm, of Wichita, were with him on the briefs for appellants.

Stephen R. McAllister, of Dentons US LLP, of Kansas City, Missouri, argued the cause, and *Mark P. Johnson*, *Betsey L. Lasister*, and *Curtis E. Woods*, pro hac vice, of the same firm, were with him on the briefs for appellees Susan Frick et al.

Lalitha D. Madduri, pro hac vice, of Elias Law Group LLP, of Washington, D.C., argued the cause, and *Spencer W. Klein*, pro hac vice, *Joseph N. Posimato*, pro hac vice, of the same firm, *Abha Khanna*, pro hac vice, and *Jonathan P. Hawley*, pro hac vice, of the same firm, of Seattle, Washington, and *Barry R. Grissom* and *Jake Miller*, pro hac vice, of Grissom Miller Law Firm LLC, of Kansas City, Missouri, were with her on the briefs for appellees Faith Rivera et al.

Sharon Brett, *Josh Pierson*, and *Kayla DeLoach*, of American Civil Liberties Union Foundation of Kansas, of Overland Park, and *Mark P. Gaber*, pro hac vice, *Richard Samuel Horan*, pro hac vice, and *Orion de Nevers*, pro hac vice, of Campaign Legal Center, of Washington, D.C., *Elisabeth S. Theodore*, *R. Stanton Jones*, and *John A. Freedman*, of Arnold & Porter Kaye Scholer LLP, of Washington, D.C., and *Rick Rehorn*, of Tomasic & Rehorn, of Kansas City, were on the briefs for appellees Tom Alonzo et al.

No appearance by Jamie Shew, appellee.

Edward D. Greim, *Todd P. Graves*, and *George R. Lewis*, of Graves Garrett LLC, of Kansas City, Missouri, were on the brief for amicus curiae Kansas Legislative Coordinating Council.

Teresa A. Woody, of Kansas Appleseed Center for Law and Justice Inc., of Lawrence, was on the brief for amicus curiae Kansas Appleseed Center for Law and Justice Inc.

The opinion of the court was delivered by

STEGALL, J.: In this first-of-its-kind litigation in the state of Kansas, plaintiffs assert unique and novel claims that would bar the Kansas Legislature from enacting congressional district lines such as those at issue in the map colloquially known as "Ad Astra 2." Eager to reshape the legal landscape of redistricting in Kansas, plaintiffs invited the district court to craft new and never before applied legal standards and tests unmoored from either the text of the Kansas Constitution or the precedents of this court. Accepting the invitation, the lower court found the legislative reapportionment in Ad Astra 2 constitutionally deficient as a partisan and racial gerrymander. On review, we find the district court's legal errors fatally undermine its conclusions and, applying the correct legal standards to the facts as found by the lower court, we determine that on the record before us, plaintiffs have not prevailed on any of their claims that Ad Astra 2 violates the Kansas Constitution. Accordingly, we reverse the judgment of the lower court.

FACTUAL AND PROCEDURAL BACKGROUND

The Kansas Legislature is required to redraw Kansas' congressional districts every decade based on population shifts documented in the United States Census. The Legislature fulfilled this duty by passing Substitute for Senate Bill 355 which contained the Ad Astra 2 congressional map. Governor Laura Kelly vetoed the bill, but the Legislature was able to override Governor Kelly's veto, and the bill took effect on February 10, 2022. The new districts gave rise to three lawsuits that were consolidated in

Wyandotte County. After a trial, the district court determined that Sub. SB 355 violates the Kansas Constitution. Defendants, who we will refer to as the State, appealed and on May 18 we held that, on the record before us, plaintiffs have not prevailed on their claims that Sub. SB 355 violates the Kansas Constitution. We reversed the judgment and lifted the permanent injunction ordered by the district court. Today, we fully set forth the facts, rationale, and holdings of the court.

Last year, the Kansas Legislature began the process of preparing to redraw Kansas' four congressional districts according to the 2020 Census. Through in-person and virtual meetings, the House and Senate Committees on Redistricting held a listening tour of town hall meetings across the state—14 meetings were held in 14 cities in August 2021, and 4 meetings were held virtually in November 2021.

Also playing a role in the process is the document known as "the Guidelines." The Proposed Guidelines and Criteria for 2022 Congressional and State Legislative Redistricting are a set of principles that set forth "traditional redistricting criteria" substantively the same as those used in the 2012 redistricting cycle. The Guidelines provide calculations for the correct population metrics to determine district size, as well as general priorities for the Legislature to consider. Those priorities include: (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.

The Legislature's bipartisan Redistricting Advisory Group adopted the Guidelines and the Senate and House Redistricting Committees received presentations on the Guidelines at initial meetings in January 2022. Only the House Committee on Redistricting adopted the Guidelines—the Senate Committee on Redistricting did not. And more importantly, neither the House nor the Senate as a whole adopted the Guidelines.

Senate Bill 355 was introduced in the Senate on January 20, 2022, and referred to the Committee on Redistricting. The report of the Senate Committee on Redistricting recommended that Sub. SB 355 be adopted. On January 21, several proposed amendments to the plan introduced on the Senate floor were rejected, and that same day the Senate passed Sub. SB 355 on emergency final action by a vote of 26 to 9. The bill was sent to the House on January 24, passed the House Redistricting Committee, and reached the House floor on January 25. After several motions to amend were rejected, the House passed the bill by a vote of 79 to 37.

Sub. SB 355 was then enrolled and presented to Governor Kelly on January 27. Governor Kelly vetoed the bill on February 4. Initially, the motion to override the veto failed, and the veto was sustained. But upon a motion to reconsider, the Senate voted to override the veto 27 to 11, and the House 85 to 37. Sub. SB 355 took effect upon publication in the Kansas Register on February 10, 2022.

Shortly thereafter, plaintiffs sued in state court in Wyandotte County to enjoin the use of Sub. SB 355 in the upcoming elections. The plaintiffs in *Rivera v. Schwab* and *Alonzo v. Schwab* sued Kansas Secretary of State Scott Schwab and Wyandotte County Election Commissioner Michael Abbott, alleging that Sub. SB 355 is a partisan and racial gerrymander and dilutes minority votes in violation of several provisions of the Kansas Constitution. Two weeks later, the plaintiffs in *Frick v. Schwab* sued Schwab and

Douglas County Clerk Jamie Shew in Douglas County also alleging that Sub. SB 355 is an unconstitutional partisan gerrymander. We will collectively refer to the plaintiffs in the three actions as plaintiffs.

Plaintiffs' petitions brought several claims under the Kansas Constitution. The 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."

The Rivera plaintiffs similarly 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. The Rivera plaintiffs also argued that Ad Astra 2 impermissibly split Kansas' four Native American reservations into two districts.

The Frick plaintiffs allege 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 Bill of Rights sections 1, 2, 3, 11, 20, and Article 5, section 1. The Frick plaintiffs, like the Alonzo and Rivera plaintiffs,

contend that Ad Astra 2 was developed in secret, rushed through the legislative process, and contradicts established redistricting guidelines.

Plaintiffs recognized that population growth has made it impossible to keep Wyandotte County and Johnson County in a single district but asserted that it was possible and desirable to preserve Wyandotte County in a single district. They argued that under the new plan, the likely electoral outcomes now "are entirely inconsistent with the statewide preferences of Kansas voters," noting that Democrats received 40% of the votes from 2016 to 2020, but asserting that in future elections Democrats will only have a chance to win 25% of the seats at best, with a likelihood that Democrats may receive no seats at all.

They further asserted that while each plaintiff is currently able to "elect a candidate of their choice in Congressional District [CD] 3," under the new plan, CD 3 is now "cracked," separating a portion of minority voters from "crossover white voters." Plaintiffs allege that these minority voters are now "submerged" in the new CD 2 and CD 3 where "white bloc voting will prevent them from electing their preferred candidates." They assert that minority voters—which comprise 29% of the voting age population in CD 3—are only "able to elect their preferred candidate with assistance from a portion of white voters," because "while white voters in Kansas strongly prefer Republican candidates overall, enough white voters in current District 3 cross over to support minority-preferred Democratic candidates to permit those candidates to prevail."

After plaintiffs filed their lawsuits, Schwab and Abbott petitioned our court for mandamus and quo warranto seeking dismissal of the cases. We denied the petition, as mandamus and quo warranto were not available remedies. See *Schwab v. Klapper*, 315 Kan. 150, 154-55, 505 P.3d 345 (2022). We then consolidated the three cases in Wyandotte County. Defendants moved to dismiss the cases, which the district court

denied after a hearing. After an expedited discovery schedule, trial began on April 4, 2022. At the close of plaintiffs' case, defendants moved for judgment, which the district court again denied.

On April 25, 2022, the district court held that Sub. SB 355 violates 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 first 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 took issue with the fact that the "map-drawers remain a mystery," and the court pointed to testimony from a Senator indicating that it "is not common" for a bill to move so quickly out of committee.

The district court found that a net total of 116,668 people, or 3.9% of Kansas' population, had to be moved to meet population requirements, but noted that Ad Astra 2 moves 394,325 people, or 13.4% of the state population—significantly more than necessary to meet district population requirements.

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 "is an intentional, effective partisan gerrymander." The court, again relying on expert testimony, found that "partisan intent predominated over the Guidelines and traditional redistricting criteria in the drawing of Ad Astra 2 and is responsible for the Republican advantage" in Ad Astra 2. The district court found that plaintiffs' experts' use of statewide elections "to measure the partisanship of simulated and enacted districts is a reliable methodology," and concluded that "Ad Astra 2's districts are less compact than they

would be under a map-drawing process that adhered to the Guidelines and prioritized the traditional districting criterion of compactness."

The district court, again crediting expert testimony, found that "Ad Astra 2 was designed to give Republicans a partisan advantage, and that the enacted plan exhibits extreme pro-Republican bias that cannot be explained by Kansas's political geography or by adherence to the Guidelines or traditional redistricting criteria." The court credited expert testimony that asserted splitting Lawrence from Douglas County diluted the votes of Democratic voters in the region and found that the experts' evidence demonstrated "that Ad Astra 2 disregards communities of interest in support of partisan gains."

In addition to its findings regarding partisan factors, the district court also stated that "Ad Astra 2 has high levels of racial dislocation" and concluded that the plan "intentionally and effectively dilutes the voting power of Wyandotte County's minority communities." The court again credited plaintiffs' experts that testified that "racial minorities were moved among districts far more often than white Kansans and that they were divided between districts in a way that contravenes Kansas's racial geography and dilutes minority voting strength." The court further found that the new plan "has the effect of eliminating a performing minority crossover district," resulting in a "particularly pronounced" impact on minority Democratic voters "because the plan treats Democratic minority voters considerably worse than it treats white Democratic and white Republican voters."

The court also credited expert testimony that Ad Astra 2 "negatively impacts the state's Native American community" because the new plan places the Prairie Band Potawatomi reservation into the first district, whereas under the prior plan, all four Native American reservations in Kansas were in the second district. In sum, the court concluded

that "Ad Astra 2's dilution of Democratic voting power will obstruct Plaintiffs' ability to elect and support their candidates of choice."

It is critical at this juncture to stop and observe that many of the lower court's fact-findings embed a form of question begging as to what—exactly—is the legal measuring stick doing the work behind the finding. Put another way, many of the district court's found facts are not stated in the form of a pure factual finding. Instead, they assume within them an unstated and unquestioned legal standard. For example, what counts as "treat[ing] Democratic minority voters considerably worse than . . . white Democratic and white Republican voters"? By what standard is the district court measuring an "intentional[] and effective[] dilut[ion]" of the minority vote? As we will explain at greater length below, when a district court mixes questions of law and fact like this, disentangling them may be impossible on review. This is especially true when it is clear—as it is here—that the lower court's findings of fact are permeated with and tainted by erroneous legal conclusions.

In any event, after these mixed conclusions of fact and law, the lower court then held the Kansas Constitution "prohibit[s] partisan gerrymandering" to any degree. The court believed it "neither necessary nor prudent" to "articulat[e] a bright-line standard" for political gerrymandering claims. Rather, it "suffice[d] for the Court's purposes that a standard exists" for the present case. Relying on "opinions of the highest courts in other states"—rather than the text of the Kansas Constitution—the district court created its own test: (1) "the Legislature acted with the purpose of achieving partisan gain by diluting the votes of disfavored-party members" and (2) the map "will have the desired effect of substantially diluting disfavored-party members' votes." In applying this test, the district court relied on what it discerned as "partisan fairness metrics" and "neutral criteria."

Applying this test, the lower court found Ad Astra 2 to be an impermissible "intentional and effective partisan gerrymander" and concluded that Sub. SB 355 could not satisfy strict scrutiny.

The lower court then turned to plaintiffs' race-based claims. Acknowledging that such claims sound in equal protection, the district court held that the Kansas Constitution "affords separate, adequate, and greater" equal protection guarantees "than [does] the federal Constitution." Following this, the district court devised and applied its own five factor test to decide that Ad Astra 2 was an impermissible racial gerrymander that also unconstitutionally diluted minority votes in violation of the Kansas Constitution. It acknowledged that the elements of such a claim—and whether they include a showing of discriminatory intent—is an "issue of first impression." But it declined to decide whether a showing of intent was required because it determined Ad Astra 2 both "*intentionally* and effectively dilutes minority votes." Under the legal tests crafted by the district court, this was sufficient, in its view, to find Ad Astra 2 violates the Kansas Constitution.

The district court permanently enjoined Kansas' 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 this court.

DISCUSSION

On appeal, the parties spar over several questions: (1) whether the Elections Clause bars state courts from reviewing reapportionment legislation for compliance with state law; (2) what standards this court should use when interpreting and applying the relevant provisions in the Kansas Constitution; (3) whether claims of partisan

gerrymandering are justiciable; and (4) whether Ad Astra 2 discriminates against minority voters. We consider each issue below.

But before doing so, we observe that while respecting the dissenters' disagreements with our constitutional reasoning and conclusions, rhetoric describing this outcome as a "stamp of approval" or "complicit" is out of place. Just because a court declines to overrule a legislative enactment does not mean the court has rubber stamped, endorsed, or somehow participated in that enactment. Indeed, "[c]ourts are only concerned with the legislative power to enact statutes, not with the wisdom behind those enactments. When a legislative act is appropriately challenged as not conforming to a constitutional mandate, the function of the court is . . . merely to ascertain and declare whether legislation was enacted in accordance with or in contravention of the constitution—and not to approve or condemn the underlying policy." *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, 348-49, 789 P.2d 541 (1990), *abrogated on other grounds by Miller v. Johnson*, 295 Kan. 636, 289 P.3d 1098 (2012), and *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 442 P.3d 509 (2019).

I. WE HAVE JURISDICTION TO HEAR PLAINTIFFS' CLAIMS

The Attorney General claims the Elections Clause of the United States Constitution bars any state court from considering the validity of legislatively enacted congressional district maps. The Elections Clause provides:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4.

The State frames its argument as a complete jurisdictional bar, arguing broadly that "when the state legislature missteps, the authority to correct it lies with Congress." We are unpersuaded. The United States Supreme Court has never embraced this view of the Elections Clause. In 1932, the Supreme Court examined whether the Elections Clause "invest[ed] the legislature with a particular authority" which would "render[] inapplicable the conditions which attach to the making of state laws." *Smiley v. Holm*, 285 U.S. 355, 365, 52 S. Ct. 397, 76 L. Ed. 795 (1932). The Court concluded that "the exercise of the authority must be in accordance with the method which the State has prescribed for legislative enactments," finding "no suggestion in the [Elections Clause] of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State has provided that laws shall be enacted." 285 U.S. at 367-68.

And in recent years, the Supreme Court has continued to reject similar arguments. See *Rucho v. Common Cause*, 588 U.S. ___, 139 S. Ct. 2484, 2495-96, 204 L. Ed. 2d 931 (2019) (rejecting the argument that "through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve"); *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787, 817-18, 135 S. Ct. 2652, 192 L. Ed. 2d 704 (2015) ("Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."). In fact, the Supreme Court's recent decision in *Rucho* expressly contemplates state court review of congressional reapportionment schemes for compliance with state law. 139 S. Ct. at 2507 (in a congressional redistricting challenge, the Court declined to find that partisan gerrymandering violated the U.S. Constitution, but noted that "state statutes and state constitutions can provide standards and guidance for state courts to apply").

The Attorney General points us to a few recent statements of skepticism from individual Supreme Court justices toward this body of law. In 2021, the Supreme Court denied a petition for certiorari in *Republican Party of Pennsylvania v. Degraffenreid*, 592 U.S. ___, 141 S. Ct. 732, 209 L. Ed. 2d 164 (2021). The decision resulted in two dissenting opinions. Justice Thomas expressed that "petitioners presented a strong argument that the Pennsylvania Supreme Court's decision violated the Constitution by overriding 'the clearly expressed intent of the legislature'" because "the Federal Constitution, not state constitutions, gives state legislatures authority to regulate federal elections." 141 S. Ct. at 733 (Thomas, J., dissenting). Justice Alito, joined by Justice Gorsuch, pointed out that the Elections Clause—which confers on state legislatures the authority to make rules governing federal elections—"would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election." 141 S. Ct. at 738 (Alito, J., dissenting). The following year, Justice Alito again dissented from the denial of an application for stay, joined by Justices Thomas and Gorsuch. *Moore v. Harper*, 595 U.S. ____, 142 S. Ct. 1089, 212 L. Ed. 2d 247 (2022) (Alito, J., dissenting). He expressed similar concern with the growing issue over the proper interpretation of the Elections Clause. Justice Kavanaugh agreed with Justice Alito's position that the Court should review the Elections Clause issue. 142 S. Ct. 1089 (Kavanaugh, J., concurring).

But these statements are not controlling law—the justices making them do not even purport to make this claim. And we 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. See *Arizona v. Evans*, 514 U.S. 1, 8-9, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) ("[S]tate courts . . . are *not* free from the final authority of" the Supreme Court when interpreting the U.S. Constitution); *State v. Tatro*, 310 Kan. 263, 272, 445

P.3d 173 (2019) ("[T]his court must follow the United States Supreme Court's interpretation of the United States Constitution."). We therefore conclude that we are not jurisdictionally barred from reviewing reapportionment legislation for compliance with the Kansas Constitution.

II. THE GOVERNING LAW

1. Anti-gerrymandering claims sound in equal protection

The gravamen of plaintiffs' claims sound in equal protection. While the other provisions of the Kansas Constitution relied upon by the plaintiffs and the district court—Kan. Const. Bill of Rights, §§ 1, 3, 11, 20; art. 5, § 1—protect vital rights, they do not provide an independent basis for challenging the drawing of district lines.

Equal protection is at the heart of both partisan and racial gerrymandering or vote dilution claims. See *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 413-14, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006) (*LULAC*) (federal equal protection challenge to congressional redistricting map as unconstitutional partisan gerrymander); *Gill v. Whitford*, 585 U.S. ___, 138 S. Ct. 1916, 1925-26, 201 L. Ed. 2d 313 (2018) (same, despite allegations of violations of federal rights to free speech); *Rucho*, 139 S. Ct. at 2491 (same, despite allegations of violations of the Elections Clause, First Amendment, and Article I); *Shaw v. Reno*, 509 U.S. 630, 642, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993) (federal equal protection challenge to congressional redistricting map as unconstitutional racial gerrymander); *Miller v. Johnson*, 515 U.S. 900, 903-04, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995) (same).

Throughout this litigation, plaintiffs and the district court have attempted to decorate and enhance their claims with various citations to rights found in other provisions in the Kansas Constitution, including the right to vote, and rights to free speech and association. Kan. Const. Bill of Rights, §§ 1, 3, 11, 20; art. 5, § 1. Plaintiffs and the district court also recite "procedural defects" in the process of drafting Sub. SB 355—including allegations that the listening tour was simply a box-checking exercise; Ad Astra 2 was adopted with unseemly rapidity; Ad Astra 2 was created in secret by Republicans; and the Legislature ignored the Guidelines. These procedural claims echo the concerns raised in *In re Validity of Substitute Senate Bill 563*, 315 Kan. ___ (2022) (No. 125,083 this day decided). As we determined there, however, such complaints do not rise to the level of constitutional objections. Therefore, the basis of each of plaintiffs' claims remains foundationally grounded in equal protection guarantees.

The district court began with a discussion of plaintiffs' equal protection claims under sections 1 and 2 of the Kansas Constitution Bill of Rights, stating that "partisan gerrymandering deprives voters of '*equal power* and influence in the making of laws which govern'" them and asserting that the "goal of partisan gerrymandering is to eliminate the people's authority over government by giving different voters vastly *unequal political* power." (Emphases added.) The court then turned to the right to vote under Article 5, section 1, framing it in equal protection terms. It explicitly styled its analysis under equal protection, stating that "the right to vote is secured by *Sections 1 and 2* of the Kansas Bill of Rights and by Article 5, Section 1 . . . ." (Emphasis added.) The court relied on sections 1 and 2 of the Kansas Constitution Bill of Rights in defining the right to vote as the right to have "'equal legislative representation.'"

Similarly, the lower court conflated the rights to free speech and assembly with the right to equal protection. First the district court claimed that partisan gerrymandering singles out a "specific class" of voters for "disfavored treatment." Then, the district court

held that "[w]hen the state engages in gerrymandering to negate that party's power, it has the effect of 'debilitat[ing]' the *disfavored party* and 'weaken[ing] its ability to carry out its core functions and purposes.'" (Emphasis added.) This analysis is again steeped in equal protection principles.

At bottom, plaintiffs assert a variety of constitutional rights but the sole mechanism relied on for judicial enforcement of those rights is the constitutional guarantee of equal protection—a fact the district court effectively understood. *Any line drawing*, even one that violates equal protection guarantees, does not infringe on a stand-alone right to vote, the right to free speech, or the right to peaceful assembly. See *Rucho*, 139 S. Ct. at 2504 ("[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."); see also *Harper v. Hall*, 380 N.C. 317, 448, 868 S.E.2d 499 (2022) (Newby, C.J., dissenting) ("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."), *petition for cert. docketed* March 21, 2022.

2. Section 2 of the Kansas Constitution Bill of Rights is the textual grounding and location of our Constitution's guarantee of equal protection to all citizens

Traditionally we have held that under the Kansas Constitution Bill of Rights, sections 1 and 2 offer the same guarantees of due process and equal protection as provided in the Fourteenth Amendment of the United States Constitution. *Farley v. Engelken*, 241 Kan. 663, 667, 740 P.2d 1058 (1987) (Sections 1 and 2 of the Kansas Constitution Bill of Rights "are given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law.").

At times our court has attempted to distinguish between the two sections as providing equal protection for "individual rights" (Section 1) and "political rights" (Section 2). See *State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22 (2005) ("Section 1 applies in cases . . . when an equal protection challenge involves individual rights."); *Atchison Street Rly. Co. v. Mo. Pac. Rly. Co.*, 31 Kan. 660, Syl. ¶ 3, 3 P. 284 (1884) ("Section 2 is devoted to matters of a political nature.").

We have recently clarified that Kansas' section 1 has no textual counterpart in the U.S. Constitution and therefore has its own independent meaning and effect. See *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 624, 440 P.3d 461 (2019) ("[T]his side-by-side comparison reveals, section 1 contains the following words not found in the Fourteenth Amendment: 'All men are possessed of equal and inalienable natural rights.' In fact, no provision of the United States Constitution uses the term 'natural rights' . . . . "); 309 Kan. at 688 (Biles, J., concurring) ("As both the majority and dissent point out, section 1 of the Kansas Constitution Bill of Rights differs from any federal counterpart . . . ."); 309 Kan. at 763 (Stegall, J., dissenting) (Recognizing section 1 provides unique protections different from the federal Constitution: "[o]f course, the language of the Declaration does not carry 'the force of organic law' in the federal Constitution as it does in Kansas.").

After our decision in *Hodes* (giving a substantive rights effect to section 1), it is clear that the textual grounding of equal protection guarantees contained in the Kansas Constitution Bill of Rights is firmly rooted in the language of section 2, which states:

> "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." Kan. Const. Bill of Rights, § 2.

Even though *Hodes* changed the way in which we interpret section 1, it has not changed our historical and fundamental interpretation of the scope of equal protection found in section 2. That is to say, section 2 is "given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law." See *Farley*, 241 Kan. at 667; *State ex rel. Tomasic v. Kansas City, Kansas Port Authority*, 230 Kan. 404, 426, 636 P.2d 760 (1981); *State v. Wilson*, 101 Kan. 789, 795-96, 168 P. 679 (1917). Put even more clearly, 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. Compare U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."); with Kan. Const. Bill of Rights § 2 ("[A]ll free governments are . . . instituted for [the people's] equal protection and benefit."). Therefore, Kansas courts shall be guided by United States Supreme Court precedent interpreting and applying the equal protection guarantees of the Fourteenth Amendment of the federal Constitution when we are called upon to interpret and apply the coextensive equal protection guarantees of section 2 of the Kansas Constitution Bill of Rights.

III. PLAINTIFFS' PARTISAN GERRYMANDERING CLAIMS

1. The political question doctrine

In addressing plaintiffs' claim that Ad Astra 2 is an impermissible partisan gerrymander, we are confronted first with what has come to be known as the "political question doctrine." This legal rule guiding judicial decision-making is nearly as old as the Republic, going all the way "back to the great case of *Marbury v. Madison*." § 15 "Case or Controversy"—Political Questions, 20 Fed. Prac. & Proc. Deskbook § 15 (2d ed.).

There, Chief Justice John Marshall "expressed the view that the courts will not entertain political questions even though the questions involve actual controversies." § 15 "Case or Controversy"—Political Questions, 20 Fed. Prac. & Proc. Deskbook § 15. The Court in *Marbury* held that the executive branch (and by extension, the legislative branch) is vested "with certain important political powers" and those branches are accountable only to their "country"—that is the voters—and to their "own conscience" because the "subjects are political." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66, 2 L. Ed. 60 (1803).

As the political question doctrine developed, it became clear that in certain circumstances a respect for the coequal and coordinate executive and legislative branches of government demanded that the judicial branch admit itself not competent to rule on matters purely political. That is, 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.

Judges called on to determine when the political question doctrine is implicated must ask themselves—among other things—whether the controversy is capable of resolution within the competency of the judicial branch. That is, do the traditional tools of judging—such as clear, neutral, and "judicially discoverable and manageable standards"—exist as a compass against which to measure the true north of any controversy? *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). Or, would judges be left to simply substitute their own "initial policy determination" for that of the other branches? 369 U.S. at 217.

If resolving a controversy is outside the scope of the competence of the judiciary, it is said to be "nonjusticiable"—that is, it is a matter committed by the structure of our Constitution to the legislative or executive branches of government. And these branches are ultimately accountable both to the voters and their own conscience. And while common sense and history may not be able to speak to the effect of conscience on political decision-makers, democratic accountability wielded by voters is woven into the very fabric of our government and will—undoubtedly—have its say in the matter.

This outcome is not an unfortunate accident or a mistake in our constitutional structure, but rather "a consequence of the separation of powers among the legislative, executive, and judicial branches." *Gannon v. State*, 298 Kan. 1107, 1119, 1136-37, 319 P.3d 1196 (2014). And this very separation of powers is one of the surest timbers guaranteeing that the house of liberty stands firm and lasts across the centuries amid the swirling winds of any particular political issue *du jour*.

2. Partisanship in district line drawing is permissible

Plaintiffs do suggest the application of a clear standard to this dispute. They simply claim that partisan gerrymandering is verboten under Kansas law. That is, they claim that any consideration by the Legislature of partisan factors in deciding where to draw district lines is offensive to constitutional principles. They ask Kansas courts to adopt a bright line standard of zero tolerance and mandate that only politically neutral factors be used by the Legislature. And the district court agreed, holding that the Kansas Constitution "prohibit[s] partisan gerrymandering."

The dissent takes issue with this characterization. While ultimately, how we characterize plaintiffs' political gerrymandering claims does not impact our analysis, it is helpful to understand exactly why such a bright line rule is attractive. In fact, at oral

argument, counsel for the Frick plaintiffs defined "political gerrymandering" as *any* line drawing "with party in mind." In response to the question, "How is partisan gerrymandering a legitimate government function?" counsel for plaintiffs responded, "I don't think it is legitimate. . . .To say that it's gone on for a long time and it seems inevitable doesn't mean it's legitimate at all. . . . I don't think that partisan gerrymandering has a legitimate interest."

If this was the law in Kansas, resolving claims of partisan gerrymandering would indeed be justiciable. A bright line prohibition is certainly a judicially manageable standard. But this has never been the law in Kansas, and in reaching its conclusion the district court completely ignored our large body of caselaw on this subject. For we have regularly and repeatedly held that the Legislature is constitutionally permitted to consider partisanship when drawing district lines. And this rule is consistent with longstanding United States Supreme Court precedent.

Over four decades ago we wrote: "'Politics and political considerations are inseparable from districting and apportionment.'" *In re House Bill No. 2620*, 225 Kan. 827, 840, 595 P.2d 334 (1979) (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753, 93 S. Ct. 2321, 37 L. Ed. 2d 298 [1973]). We have repeatedly recognized the reality that the "'political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. . . . [I]t requires no special genius to recognize the political consequences of drawing a district line along one street rather than another.'" *In re House Bill No. 2620*, 225 Kan. at 840 (quoting *Gaffney*, 412 U.S. at 753). Considering these hard political truths inherent in the redistricting process, we reached the inescapable conclusion that the "'reality is that districting inevitably *has and is intended to have* substantial political consequences.'" (Emphasis added.) *In re House Bill No. 2620*, 225 Kan. at 840 (quoting *Gaffney*, 412 U.S. at 753). The district court cannot write these hard truths out of existence with the fiat power of its judicial pen. Our

precedent (and prudent judgment) counsels a more modest approach to questions that touch the core constitutional principle of separation of powers and the ongoing dictate that the coordinate departments of government accord one another the due and proper respect expected and owed under our unique constitutional arrangements.

Given this, if the redistricting process is intended to have "substantial political consequences" it is no surprise that our court has consistently rejected pleas to establish a bright line prohibition on politics in the redistricting process. *In re 2002 Substitute for Senate Bill 256*, 273 Kan. 731, 734, 45 P.3d 855 (2002). For example, we have described the legislative goal of "safely retaining seats for the political parties" as a "legitimate political goal." *2002 Substitute for House Bill 2625*, 273 Kan. 715, 722, 44 P.3d 1266 (2002). In 1989, we rejected the claim that legislatively drawn lines were unlawful because "political considerations prevailed over stated apportionment guidelines" on the grounds that "any plan would . . . have adverse consequences for incumbents who are pitted against each other." *In re Substitute for House Bill No. 2492*, 245 Kan. 118, 128, 775 P.2d 663 (1989). In yet another redistricting case, we plainly held that objections to legislative line drawing on the mere assertion that "there was partisan political gerrymandering in redistricting" could never "reveal a fatal constitutional flaw" without more. *In re Senate Bill No. 220*, 225 Kan. 628, 637, 593 P.2d 1 (1979).

The United States Supreme Court, too, has never suggested partisanship is unlawful if it touches the legislative redistricting process. In fact, the opposite. In *Vieth v. Jubelirer* the Court wrote the United States Constitution "clearly contemplates districting by political entities" and the process "unsurprisingly . . . turns out to be root-and-branch a matter of politics." 541 U.S. 267, 285-86, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004). As such, "*partisan districting is a lawful and common practice* [which] means that there is almost *always* room for an election-impeding lawsuit contending that

partisan advantage was the predominant motivation." (Emphasis added.) 541 U.S. at 285-86. The operative principle is clear.

And while the plurality holding of *Vieth* (that partisan gerrymandering claims are nonjusticiable) did not gain majority support on the Court until 2019 in *Rucho*, there has long been widespread agreement among justices across the spectrum that partisan factors are *legitimate considerations in the districting process*. For example, in dissent in *Vieth*, Justice Stephen Breyer wrote that using "purely political boundary-drawing factors" can "find justification in . . . desirable democratic ends" even though it may be "harmful to the members of one party." 541 U.S. at 360 (Breyer, J., dissenting).

This principle is commonplace in the United States Supreme Court's redistricting jurisprudence. "We have never denied that apportionment is a political process, or that state legislatures could pursue legitimate secondary objectives as long as those objectives were consistent with a good-faith effort to achieve population equality at the same time." *Karcher v. Daggett*, 462 U.S. 725, 739, 103 S. Ct. 2653, 77 L. Ed. 2d 133 (1983). In a decision written by Justice Elena Kagan the Court described "partisan advantage" as a legitimate consideration in district line drawing on an equal footing with other traditional considerations such as "compactness" and "respect for political subdivisions." *Cooper v. Harris*, 581 U.S. ____, 137 S. Ct. 1455, 1464, 197 L. Ed. 2d 837 (2017); see also *Easley v. Cromartie*, 532 U.S. 234, 239, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001) (recognizing that "the creation of a safe Democratic seat" was a "constitutional political objective"); *Gaffney*, 412 U.S. at 753-54 (legislatures may validly "work with . . . political . . . data" and may "seek . . . to achieve the political or other ends of the State, its constituents, and its officeholders").

We need not belabor the point.

3. Claims of excessive partisan gerrymandering are nonjusticiable in Kansas

Given that the Legislature may appropriately and lawfully consider partisan factors in redistricting, at the heart of a claim of partisan gerrymandering is not merely that partisan factors were used, but rather that they were used "too much." The lower court at one point appears to acknowledge this by quoting our prior caselaw declining to find excessive partisan gerrymandering in any previous case. The district court plausibly drew the lesson from these decisions that we had reached the "merits" of older partisan gerrymandering claims. But this overreads those decisions. In fact, our predecessors never actually had to ask the crucial question—how much is too much? And are there any manageable and neutral judicial standards by which judges can decide that question without resort to our own partisan biases?

These are not new questions for courts and judges. In *LULAC*, the Court put the matter succinctly when it described the plaintiff's insurmountable problem in trying to articulate "a standard for deciding *how much partisan dominance is too much*." (Emphasis added.) 548 U.S. at 420. This is precisely the problem today's plaintiffs cannot overcome. This is because a "permissible intent—securing partisan advantage—does not become constitutionally impermissible . . . when that permissible intent 'predominates.'" *Rucho*, 139 S. Ct. at 2502-03.

Essentially, the *Rucho* Court struggled to know whether there can ever be "too much" of a legitimate legislative purpose in the process of state law-making. Its answer, in sum, was—*maybe*, but 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. In the parlance of justiciability, the question presents no "'clear, manageable and politically neutral'" judicial standard. 139 S. Ct. at 2500.

The Court explained further that:

"[I]t is not even clear what fairness looks like in this context. There is a large measure of 'unfairness' in any winner-take-all system. Fairness may mean a greater number of competitive districts. Such a claim seeks to undo packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. As Justice White has pointed out, '[i]f all or most of the districts are competitive . . . even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature.'

"On the other hand, perhaps the ultimate objective of a 'fairer' share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its 'appropriate' share of 'safe' seats. Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party.

"Or perhaps fairness should be measured by adherence to 'traditional' districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents. But protecting incumbents, for example, enshrines a particular partisan distribution. And the 'natural political geography' of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts. As Justice Kennedy has explained, traditional criteria such as compactness and contiguity 'cannot promise political neutrality when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not.'

"Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. 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. [Citations omitted.]" 139 S. Ct. at 2500.

We find the reasoning of *Rucho* persuasive and expressly adopt it here. But that does not end the inquiry at the state level.

Rucho declared that it "is vital in such circumstances that the Court act only in accord with especially clear standards . . . [because] '[w]ith uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.'" 139 S. Ct. at 2498. And while *Rucho* could discern no such "especially clear standards" in federal law, the Court left open the possibility that such standards might exist under state law. As such, *Rucho* held that while claims of political gerrymandering were nonjusticiable political questions at the federal level, such claims may be justiciable at the state level.

We agree with the Court's characterization of its holding—that it "does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void." 139 S. Ct. at 2507. This is because states are free to adopt clear standards expressly setting limits on partisan gerrymandering. Such clear standards can, the Court readily acknowledged, provide courts with the necessary tools to adjudicate claims of excessive partisan gerrymandering. The *Rucho* court pointed to Florida as a good example: "In 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution." 139 S. Ct. at 2507. The Court then noted that "[t]he dissent wonders why we can't do the same. The answer is that there is no 'Fair Districts Amendment' to the Federal Constitution. *Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply*." (Emphasis added.) 139 S. Ct. at 2507.

And that brings us squarely to the question we must now answer: Are claims of excessive partisan gerrymandering justiciable under the Kansas Constitution? Whether a claim is nonjusticiable because it may be a political question is a question of law over which we exercise unlimited review. *Gannon*, 298 Kan. at 1118, 1136.

We described Kansas' political question doctrine in *Gannon*, 298 Kan. at 1119, 1136-37. *Gannon* explained that Article II, Section 2 of the United States Constitution limits the judicial power to "Cases" or "Controversies."

> "But because Article 3 of the Kansas Constitution does not include any 'case' or 'controversy' language, our case-or-controversy requirement stems from the separation of powers doctrine embodied in the Kansas constitutional framework. That doctrine recognizes that of the three departments or branches of government, '[g]enerally speaking, the legislative power is the power to make, amend, or repeal laws; the executive power is the power to enforce the laws, and the judicial power is the power to interpret and apply the laws *in actual controversies*.' (Emphasis added.) And Kansas, not federal, law determines the existence of a case or controversy, *i.e.*, justiciability. But this court is not prohibited from considering federal law when analyzing justiciability.
>
> "Under the Kansas case-or-controversy requirement, courts require that (a) parties have standing; (b) issues not be moot; (c) issues be ripe, having taken fixed and final shape rather than remaining nebulous and contingent; and (d) *issues not present a political question*. . . .
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> . . . .
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> "The United States Supreme Court has held: 'The nonjusticiability of a political question is primarily a function of the separation of powers.' In other words, it is an acknowledgment of 'the relationship between the judiciary and the other branches or departments of government.' . . .

> "As a result, '[t]he governments, both state and federal, are divided into three departments, each of which is given the powers and functions appropriate to it. Thus a dangerous concentration of power is avoided, and also the respective powers are assigned to the department best fitted to exercise them.' As a consequence of the separation of powers among the legislative, executive, and judicial branches, '[q]uestions in their nature political . . . can never be made in this court.' [Citations omitted.]" (Emphasis added.) 298 Kan. at 1119, 1137.

To determine if a political question exists, we look for the presence of one or more of the six characteristics established by the United States Supreme Court in *Baker*, 369 U.S. at 217. We will dismiss a case as nonjusticiable because it is a political question only if at least one of these characteristics "is inextricable from the case" before us. 369 U.S. at 217. Here we are concerned exclusively with the *Rucho* question—is there a judicially discoverable and manageable standard in Kansas law that will guide a court in resolving any claim of excessive partisan gerrymandering? And 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 explained above, the lower court here adopted the most extreme version of plaintiffs' arguments—that any consideration of partisanship in district line drawing is constitutionally prohibited—and in so doing avoided the justiciability problem. That legal starting point is, however, demonstrably wrong.

Given this, the plaintiffs here have also proposed a variety of different metrics for measuring "fairness" and answering the "how much is too much" question. But none of these metrics have a foundation in Kansas law—either statutory enactment or constitutional text. Plaintiffs denounce the Legislature's drawing of Ad Astra 2, criticizing it as an "abomination"; as giving an "unfair and unearned advantage" to Republicans; as being "devastating" for Lawrence Democrats; and because it

"disincentivizes Democratic voter mobilization, voter registration, voter turnout, [and] fundraising," among other things. But as one author has put it, "[s]uch criticism assumes too much. One cannot consider gerrymandering the antithesis of fair representation unless one adopts some definition of fair representation in the first place." Moore, *A "Frightful Political Dragon" Indeed: Why Constitutional Challenges Cannot Subdue the Gerrymander*, 13 Harv. J.L. & Pub. Pol'y 949, 971 (1990). "Just as no configuration of boundary lines can claim to be natural or inherently just, so too no seat-to-vote ratio can claim to be natural or inherently just." 13 Harv. J.L. & Pub. Pol'y at 973.

In other words, before we can even begin evaluating whether an alleged partisan gerrymander is unconstitutional, we would first need to determine what our baseline definition of "fairness" is. And as the *Rucho* Court explained, deciding among different proposed metrics of fairness poses questions that are political, not legal. Any decisions made about redistricting—even if made by a neutral, independent court—would inherently involve making an initial policy determination. See *Gaffney*, 412 U.S. at 753-54 (noting that the Court has not "attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States").

Several other states have solved this problem by codifying such clear standards in their laws. Some states have mandated at least some of the traditional districting criteria for their mapmakers, and others have outright prohibited partisan favoritism in redistricting. See, e.g., Ohio Const. art. 11, § 6 (directing the Ohio redistricting commission to draw compact districts in a way that "correspond[s] closely to the statewide preferences of the voters of Ohio" and avoid drawing plans "primarily to favor or disfavor a political party"); Md. Const. art. III, § 4 (directing the Legislature to give "[d]ue regard" to "boundaries of political subdivisions" when drawing districts); Mich. Const. art. 4, § 6 (establishing an independent redistricting commission and requiring the commission to abide by specific procedural steps as well as a set of substantive criteria,

including that the districts be "geographically contiguous"; "reflect the state's diverse population and communities of interest"; "reflect consideration of county, city, and township boundaries"; "be reasonably compact"; "not provide a disproportionate advantage to any political party"; and not "favor or disfavor an incumbent"); Mo. Const. art. III, § 3 ("Districts shall be [designed] in a manner that achieves both partisan fairness and, secondarily, competitiveness . . . . 'Partisan fairness' means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency."); Iowa Code § 42.4(5) (2016) ("No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group."); N.Y. Const. art. III, § 4 ("Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties. The commission shall consider the maintenance of cores of existing districts, of pre-existing political subdivisions, including counties, cities, and towns, and of communities of interest."); Colo. Const. art. V, § 44 ("The practice of political gerrymandering, whereby congressional districts are purposefully drawn to favor one political party or incumbent politician over another, must end.").

Kansas is substantially different from states having codified a constitutional duty to prohibit partisan gerrymandering. And we likewise differ from still other states that—lacking a clear constitutional mandate—have nevertheless discerned clear standards in their case precedent. See *Harper v. Hall*, 380 N.C. 317, 364, 385, 389, 868 S.E.2d 499 (2022) (discussing history of reapportionment litigation in North Carolina, noting N.C. Const. art. II, §§ 3, 5 incorporates "traditional neutral" principles of reapportionment but "does not include 'partisan advantage'" and the state's past gerrymandering cases provide "ample guidance as to possible bright-line standards that could be used to distinguish presumptively constitutional redistricting plans from partisan gerrymanders"); *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (recognizing vote dilution theory in reapportionment dispute).

Unlike these states, Kansas has not adopted such standards. For this reason, we cannot follow the decisions of other state supreme courts—such as the North Carolina Supreme Court in *Harper*, a decision relied on heavily by plaintiffs and the lower court—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." *Rucho*, 139 S. Ct. at 2507. In the absence of statutory or constitutional standards in Kansas—or even standards in our case precedent—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. They certainly are not found in our Constitution. As such, the Guidelines are not "actual rules"—which is to say they are not law. *Apodaca v. Willmore*, 306 Kan. 103, 136, 392 P.3d 529 (2017) (Stegall, J., dissenting) (describing the legal difference between guidelines and rules).

During one Senator's testimony at trial, he struggled to articulate how much authority the Guidelines carried—he described them as "sort of a promise to the people." At most, the Guidelines represent a "promise" made only by the House Committee on Redistricting (the only formal committee of legislators to actually adopt them). And in any event, internal operating procedures of the Legislature—and the Guidelines cannot even go so far as to claim this status—are not binding authority that can give rise to a legal challenge that courts can adjudicate. See *Nixon v. United States*, 506 U.S. 224, 236, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993) (declining to "open[] the door of judicial review to the procedures used by the Senate").

Considering all of this, we conclude 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." *Rucho*, 139 S. Ct. at 2500. We hold that the question presented is nonjusticiable as a political question, at least until such a time as the Legislature or the people of Kansas choose to codify such a standard into law.

IV. PLAINTIFFS' RACE-BASED CLAIMS

1. The district court applied the wrong legal standards to evaluate plaintiffs' racial discrimination claims

In addition to claims of partisan gerrymandering, plaintiffs also alleged that the Legislature engaged in unconstitutional race-based discrimination when it enacted Ad Astra 2. Such claims brought under federal law arise under the Fourteenth Amendment's equal protection guarantees. See, e.g., *Cooper*, 137 S. Ct. at 1463 ("The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans."); *Miller*, 515 U.S. at 904 (the "central mandate" of the Equal Protection Clause of the Fourteenth Amendment is "racial neutrality in governmental decisionmaking"); *Shaw*, 509 U.S. at 641 (recognizing that minority vote dilution "schemes violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength").

As we have already explained, we will adhere to equal protection precedent from the United States Supreme Court when applying the coextensive equal protection guarantees found in section 2 of the Kansas Constitution Bill of Rights. The district court, however, concluded that the federal equal protection standards were inapplicable because "Kansas's guarantee of equal benefit 'affords separate, adequate, and greater rights than the federal Constitution.'" In doing so, the district court erred because, as explained above, the equal protection guarantees contained in section 2 are coextensive with the same equal protection guarantees enshrined in the Fourteenth Amendment. The lower

court then compounded this legal error by crafting its own set of "five non-exclusive factors"—unmoored from precedent—for examining racial gerrymandering and minority voter dilution claims:

> "(1) whether the redistricting plan has a more negative effect on minority voters than white voters, (2) whether there were departures from the normal legislative process, (3) the events leading up to the enactment, including whether aspects of the legislative process impacted minority voters' participation, (4) whether the plan substantively departed from prior plans as it relates to minority voters, and (5) any historical evidence of discrimination that bears on the determination of intent."

In support of this newly articulated test, the district court provided just one citation to *Jones v. Kansas State University*, 279 Kan. 128, 145, 106 P.3d 10 (2005). But *Jones* has no connection to redistricting, tests for racial discrimination, discriminatory intent, or the like. The page in *Jones* the district court cited to is merely a recitation of our familiar "fundamental rule" governing statutory interpretation "that the intent of the legislature governs if that intent can be ascertained." The district court erred in departing from the well-established and robust legal standards that abound in United States Supreme Court caselaw governing race-based claims made in redistricting challenges.

2. Section 2 protects against two distinct types of race-based decision-making by the Legislature in drawing district lines

Government decision-making on the basis of race is antithetical to the principles of equal protection enshrined in both the Fourteenth Amendment and in section 2 of the Kansas Constitution Bill of Rights. The equal protection guarantees found in section 2, like the Fourteenth Amendment, protect against two distinct kinds of racial discrimination in the drawing of district lines. First, section 2 protects against racial gerrymandering which occurs when a legislative body uses race as the predominant factor in choosing where to draw the lines. Second, section 2 protects against targeted minority

voter dilution which occurs when a legislative body invidiously discriminates against a minority population to minimize or cancel out the potential power of the minority group's collective vote. The United States Supreme Court has set forth explicit legal tests to be applied to each of these distinct claims, and we expressly adopt those same tests to apply when those challenges are made under section 2 of the Kansas Constitution Bill of Rights.

First, a plaintiff bringing a racial gerrymandering claim must demonstrate at the outset "that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *Cooper*, 137 S. Ct. at 1463. Determining which redistricting factor predominates presents a "most delicate task" for courts, *Miller*, 515 U.S. at 905, because "crucially, political and racial reasons are capable of yielding similar oddities in a district's boundaries. That is because, of course, 'racial identification is highly correlated with political affiliation.'" *Cooper*, 137 S. Ct. at 1473. As the Supreme Court has expressly recognized:

> "The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller*, 515 U.S. at 916.

A plaintiff can cross this threshold by showing that the Legislature subordinated lawful, race-neutral districting factors—such as compactness, respect for political subdivisions, and partisan advantage—to unlawful racial considerations. *Cooper*, 137 S. Ct. at 1463-64; see also *Bush v. Vera*, 517 U.S. 952, 971-73, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996) (finding that the "extreme and bizarre" shape, paired with "overwhelming evidence that that shape was essentially dictated by racial considerations of one form or another" "reveal that political considerations were subordinated to racial classification"

because they were "unexplainable in terms other than race"); *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. ___, 137 S. Ct. 788, 798, 197 L. Ed. 2d 85 (2017) ("'[T]he constitutional violation' in racial gerrymandering cases stems from the 'racial purpose of state action, not its stark manifestation.' The Equal Protection Clause does not prohibit misshapen districts. It prohibits unjustified racial classifications." [Citation omitted.]); *Shaw*, 509 U.S. at 643 ("Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'").

Plaintiffs "may make the required showing through 'direct evidence' of legislative intent, 'circumstantial evidence of a district's shape and demographics,' or a mix of both." *Cooper*, 137 S. Ct. at 1463-64; see *Hunt v. Cromartie*, 526 U.S. 541, 549-50, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999).

Once plaintiffs have established that race was the predominant factor in how the lines were drawn, the burden shifts to the State to demonstrate that the legislation is narrowly tailored to achieve a compelling interest. *Cooper*, 137 S. Ct. at 1464; *Bethune-Hill*, 137 S. Ct. at 800-01; *Vera*, 517 U.S. at 958, 962 ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. . . . For strict scrutiny to apply, traditional districting criteria must be *subordinated to race*."). Compliance with the federal Voting Rights Act may be a compelling state interest. *Cooper*, 137 S. Ct. at 1459 ("This Court has long assumed that one compelling interest is compliance with the Voting Rights Act of 1965 [VRA or Act]. When a State invokes the VRA to justify race-based districting, it must show [to meet the 'narrow tailoring' requirement] that it had 'good reasons' for concluding that the statute required its action.").

Other evidence that the Court has considered probative and significant in applying its "predominant factor" test has included direct testimony that racial quotas were set as goals to be met by the legislative body. See *Vera*, 517 U.S. at 969-70 ([T]he "testimony of state officials . . . affirmed that 'race was the primary consideration in the construction of District 30.'"). The Court also often looks to the shapes of the districts to see if it is "exceedingly obvious" that the drawing of the lines was a deliberate attempt to draw minority groups in or out of the district. See *Miller*, 515 U.S. at 917 ("[T]he drawing of narrow land bridges to incorporate within the district outlying appendages containing nearly 80% of the district's total black population was a deliberate attempt to bring black populations into the district."). But even a bizarre shape is not sufficient by itself; rather, it is a relevant factor because "it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale." *Bethune-Hill*, 137 S. Ct. at 798. Therefore the Court, when considering shape, has done so in conjunction with all other relevant factors to see if their combination is "'unexplainable in terms other than race.'" *Vera*, 517 U.S. at 972.

Additional factors the Court has examined in making this inquiry have included the racial densities in the population; whether testimony of state officials affirm that race was the primary consideration in the construction of a district; if the districting software used by the State provides only racial data at the block-by-block level; if there were "bizarre district lines" which were "tailored perfectly to maximize minority population" but were "far from the shape that would be necessary to maximize the Democratic vote" in the district; if the State had compiled detailed racial data but made no similar attempts to compile equivalent data regarding other communities; and if there were any conflicts or inconsistencies between the enacted plan and traditional redistricting criteria. *Miller*, 515 U.S. at 917; *Vera*, 517 U.S. at 967-73; *Bethune-Hill*, 137 S. Ct. at 799.

The Court has emphasized that in considering this kind of evidence, courts should examine whether "the legislature 'placed' race 'above traditional districting considerations in determining *which* persons were placed *in appropriately apportioned districts*'"—or "[i]n other words, if the legislature must place 1,000 or so additional voters in a particular district in order to achieve an equal population goal, the 'predominance' question concerns *which* voters the legislature decides to choose, and specifically whether the legislature predominately uses race as opposed to other, 'traditional' factors when doing so." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 273, 135 S. Ct. 1257, 191 L. Ed. 2d 314 (2015).

Second, a plaintiff may bring a minority voter dilution claim under section 2 of the Kansas Constitution Bill of Rights. This occurs when a legislative body invidiously discriminates against a minority population to minimize or cancel out the potential power of the group's collective vote. *Abbott v. Perez*, 585 U.S. ____, 138 S. Ct. 2305, 2314, 201 L. Ed. 2d 714 (2018). The harm caused by vote dilution "arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district." *Gill*, 138 S. Ct. at 1931.

The evidentiary threshold for bringing a minority vote dilution claim in a single-member district is necessarily high. Plaintiffs bringing such a claim must first show three "threshold conditions": (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single member district; (2) that the group is politically cohesive; and (3) there exists sufficient bloc voting by the white majority in the new allegedly diluted districts to usually defeat the preferred candidate of the politically cohesive minority bloc. *Growe v. Emison*, 507 U.S. 25, 39-40, 113 S. Ct. 1075,

122 L. Ed. 2d 388 (1993) (citing *Gingles*, 478 U.S. at 50-51). If a plaintiff fails to establish these three points, "there neither has been a wrong nor can [there] be a remedy." 507 U.S. at 40-41.

If all three preconditions are established, the next step is to consider the "totality of circumstances" to determine whether, as a result of the challenged plan, plaintiffs do not have an equal opportunity to participate in the political process and to elect candidates of their choice. *LULAC*, 548 U.S. at 425-26; see *Gingles*, 478 U.S. at 46; *2002 Substitute for House Bill 2625*, 273 Kan. at 720. Plaintiffs must establish that the totality of the circumstances shows that they lack equal opportunity before they can prevail on a vote dilution claim. *Bartlett v. Strickland*, 556 U.S. 1, 11-12, 24, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009) ("[O]nly when a party has established the [three] requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances. . . . Majority-minority districts are only required if all three . . . factors are met . . . .").

Evidence the Court has considered probative and significant in applying these standards to a minority voter dilution claim has included the list of factors contained in the Senate Report on the 1982 amendments to the Voting Rights Act, which includes considering the (1) history of voting-related discrimination in the state; (2) the extent to which voting in the elections of the state is racially polarized; (3) the extent to which the state has used voting practices tending to enhance opportunity for discrimination against the minority group; (4) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (5) the use of overt or subtle racial appeals in political campaigns; and (6) the extent to which members of the minority

group have been elected to public office in the jurisdiction. *LULAC*, 548 U.S. at 426; *Johnson v. De Grandy*, 512 U.S. 997, 1010 n.9, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994); *Gingles*, 478 U.S. at 36-38.

We note that while most vote dilution claims now arise in the context of the federal Voting Rights Act, they are undergirded by the same equal protection principles that preexist the VRA and simultaneously protect against unlawful minority vote dilution. See *Holder v. Hall*, 512 U.S. 874, 893 n.1, 114 S. Ct. 2581, 129 L. Ed. 2d 687 (1994) (Thomas, J., concurring) (explaining that "prior to the amendment of the Voting Rights Act in 1982, [vote] dilution claims typically were brought under the Equal Protection Clause. . . . The early development of our voting rights jurisprudence in those cases provided the basis for our analysis of vote dilution under the amended § 2 in *Thornburg v. Gingles*, 478 U.S. 30 [1986]."); see also McLoughlin, *Section 2 of the Voting Rights Act and City of Boerne: The Continuity, Proximity, and Trajectory of Vote-Dilution Standards*, 31 Vt. L. Rev. 39, 75-76 (2006) ("[A] strong conceptual link exists between the constitutional and statutory standards because dilutive effect is understood as essentially the same in both systems. Even if constitutional vote-dilution suits require additional proof of intent, the relationship between *Gingles*, *Rogers*, and the 1982 Amendments indicates that the injury targeted by the statute is identical to the constitutional injury with respect to the meaning of diminished clout in voting . . . . [T]he Court has never had an unconstitutional vote-dilution case involving single-member districts . . . [b]ut *Gingles* suggests that at minimum, its concept of diluted voting clout is no different from what the Court would look for in examining discriminatory effects in a constitutional vote-dilution case."); Pitts, *Georgia v. Ashcroft: It's the End of Section 5 As We Know It (and I Feel Fine)*, 32 Pepp. L. Rev. 265, 310-11 (2005) ("[T]he Section 2 standard strongly resembles the constitutional standard for proving unconstitutional vote dilution. . . . [T]he evidentiary factors considered under both the constitutional and statutory standards are nearly, though by no means precisely, identical.").

The dissent contends the three "threshold conditions" required to show race-based vote dilution are only a function of the Voting Rights Act and are unnecessary if an equal protection vote dilution claim is made. We disagree. First, this understanding is at odds with the Court's guidance in *Growe*. Second, we have found no decision in which a federal appeals court has concluded that redistricting, "although not in violation of section 2, unconstitutionally dilutes minority voting strength." *Johnson v. DeSoto County Bd. of Comm'rs*, 204 F.3d 1335, 1344 (11th Cir. 2000). Thus, federal courts have continued to apply the three "threshold conditions" required for a vote dilution claim under the VRA to similar claims asserted under the Equal Protection Clause. 204 F.3d at 1344 ("[T]he Supreme Court, historically, has articulated the same general standard, governing the proof of injury, in both section 2 and constitutional vote dilution cases."); *Lowery v. Deal*, 850 F. Supp. 2d 1326, 1331-32 (N.D. Ga. 2012), *aff'd on other grounds sub nom. Lowery v. Governor of Georgia*, 506 F. Appx. 885 (11th Cir. 2013) (unpublished opinion); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1326 (S.D. Fla. 2002) ("[E]ven though *Gingles* did not involve an equal protection claim, the three factors were derived by the Court from the principles set forth in the vote dilution cases brought under the Equal Protection Clause. We therefore conclude that the three preconditions have always been and remain elements of constitutional vote dilution claims."). If anything, the dissent's analysis, and the authority it relies upon, suggests a vote dilution claim asserted under the Equal Protection Clause requires a more rigorous showing than required under the VRA because the Equal Protection Clause requires a showing of discriminatory intent in addition to establishing the three "threshold conditions," while the VRA does not. *Lowery*, 850 F. Supp. 2d at 1331. Because plaintiff's claims fail here at the threshold, however, we need not engage the discussion of intent.

3. On this record, plaintiffs have not established the elements of their race-based claims

Having established the clear elements plaintiffs must prove to prevail on their racial gerrymandering and minority vote dilution claims under section 2, we turn to evaluating the district court's findings of fact to determine whether plaintiffs have in fact prevailed on their claims under either standard. We note here that it appears plaintiffs have principally pursued a claim of unlawful minority vote dilution. Counsel for the Alonzo plaintiffs explicitly acknowledged this at oral argument. Reviewing the record, however, plaintiffs do also allege racial discrimination in the way the Legislature treated minority communities in Douglas County and in our Native American communities. Additionally, because of the way the district court decided plaintiffs' race-based claims on standards unrelated to federal equal protection law, there is a lack of clarity concerning which of plaintiffs' claims—precisely—is being addressed by the district court's ruling. Because of this, giving plaintiffs the benefit of the doubt, we will review the lower court's findings to determine whether they support either of the two kinds of race-based claims that may be brought under section 2.

We review the findings of fact under the substantial competent evidence standard, disregarding any conflicting evidence or other inferences that might be drawn from the evidence. We exercise unlimited review over the conclusions of law based on those findings. *Gannon*, 305 Kan. at 881. In this unique instance, however, where the district court made findings of fact under a misperception of what the appropriate legal test would be, it will come as no surprise that the findings of fact do not match those required under the controlling legal frameworks. Even so, we will take the district court's findings at face value rather than delve into their evidentiary support (or lack thereof) and simply ask whether they are sufficient for the plaintiffs to have prevailed on their claims under the correct legal standard.

a. Plaintiffs have not established a racial gerrymandering claim

The record below demonstrates that plaintiffs did not ask the district court to find that the Legislature used race as the predominant factor in choosing where to draw the lines. The district court, in turn, did not apply this standard to plaintiffs' claim of racial gerrymandering. The district court—after erroneously holding that federal Fourteenth Amendment standards did not apply in the context of section 2—declined to answer whether intent is a required element of a racial discrimination claim under the Kansas Constitution Bill of Rights, concluding instead that "vote dilution is intentional . . . even in the absence of actual racial prejudice" "if the Legislature had as one objective the dilution of minority voters."

As we have described, however, for plaintiffs to prevail on a claim of racial gerrymandering, they must have shown that the Legislature used race as the *predominant factor* in drawing districts. The Supreme Court has clearly stated that if the evidence merely shows that the Legislature considered partisan factors "along with" race when it drew the lines, this, without more, "says little or nothing about whether race played a *predominant* role." *Easley*, 532 U.S. at 253.

Plaintiffs, like the district court, made much of the fact that partisan considerations dominated the Legislature's map-drawing process, but failed to present any evidence that race was the predominant factor guiding the Legislature's decisions. The district court expressly adopted conclusions from plaintiffs' expert witnesses that "partisan intent predominated" in the drawing of the districts. The district court found that the "Legislature acted with discriminatory intent," but did so only after crafting a test that did not test for predominant intent at all. The court failed to conduct the appropriate "'sensitive inquiry'" to assess whether plaintiffs "managed to disentangle race from politics and prove that the former drove a district's lines." *Cooper*, 137 S. Ct. at 1473;

see also *Easley*, 532 U.S. at 245 ("A legislature trying to secure a safe Democratic seat is interested in Democratic voting behavior. Hence, a legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African-American precincts, but the reasons would be political rather than racial."); *Shaw*, 509 U.S. at 646 ("[T]he legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination. . . . [W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes. The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions."); *Cooper*, 137 S. Ct. at 1490 (Alito, J., concurring) (pointing out the "often-unstated danger where race and politics correlate: that the federal courts will be transformed into weapons of political warfare. Unless courts 'exercise extraordinary caution' in distinguishing race-based redistricting from politics-based redistricting, . . . they will invite the losers in the redistricting process to seek to obtain in court what they could not achieve in the political arena. If the majority party draws districts to favor itself, the minority party can deny the majority its political victory by prevailing on a racial gerrymandering claim. Even if the minority party loses in court, it can exact a heavy price by using the judicial process to engage in political trench warfare for years on end.").

The district court did not find that race was the predominant factor motivating the Legislature's decision to place a significant number of voters inside or outside of a particular district. We therefore conclude that on the record before us, plaintiffs have failed to satisfy their burden to meet the legal elements required for a showing of racial gerrymandering.

b. Plaintiffs have not established a minority vote dilution claim

Plaintiffs' claims of minority vote dilution fail at the very first step, because the record below shows that they did not present evidence in support of—nor did the district court find—that the minority group is sufficiently large and geographically compact to constitute a majority in a single member district. The district court did not conduct this analysis, and the numbers in the Ad Astra 2 map suggest that this first condition may very well be impossible to meet. In fact, plaintiffs admit in their petition that "minority voters constitute less than a majority of voters in current District 3" and require "the support of a portion of white voters who cross over to support the minority-preferred candidate."

The district court simply did not apply the proper test or make the requisite findings of fact to satisfy the standards necessary to prove a claim of minority vote dilution. The district court generally incorporated and credited plaintiffs' suggested findings of fact. However, the district court made very few specific findings of fact of its own to directly justify its holdings, instead simply summarizing plaintiffs' expert testimony. In a similar scenario, the U.S. Supreme Court has concluded this type of fact-finding was insufficient to support a claim for vote dilution:

> "[P]laintiffs urge us to put more weight on the District Court's findings of packing and fragmentation, allegedly accomplished by the way the State drew certain specific lines . . . . The District Court, however, made no such finding. Indeed, the propositions the court recites on this point are not even phrased as factual findings, but merely as recitations of testimony offered by plaintiffs' expert witness. While the District Court may well have credited the testimony, the court was apparently wary of adopting the witness's conclusions as findings. But even if one imputed a greater significance to the accounts of testimony, they would boil down to findings that several of [the] district lines separate portions of Hispanic neighborhoods, while another district line draws several

> Hispanic neighborhoods into a single district. This, however, would be to say only that lines could have been drawn elsewhere, nothing more. But some dividing by district lines and combining within them is virtually inevitable and befalls any population group of substantial size." *De Grandy*, 512 U.S. at 1015-16.

Even if, as the Court contemplated in *De Grandy*, we "imputed a greater significance to the accounts of testimony" and fully accept the district court's crediting of one of plaintiffs' expert's analysis that Ad Astra 2 has a "dilutive effect on the ability of minority voters to elect their preferred candidates," this statement skips several steps along the analytical path. Had the district court conducted a proper inquiry, it may have never even gotten that far in its analysis because the very first condition—which again, requires the minority group to be sufficiently large and geographically compact to constitute a majority in a single member district—very likely would have been fatal to the plaintiffs' claims. See *Growe*, 507 U.S. at 40-41 ("[T]here neither has been a wrong nor can [there] be a remedy" if plaintiffs fail to establish the three preconditions.).

Accordingly, we conclude that on the record before us, plaintiffs have failed to satisfy their burden to meet the legal elements required for a showing of unlawful race-based vote dilution.

CONCLUSION

The manner in which plaintiffs chose to litigate this case—and the district court's willingness to follow them down the primrose path—has a great deal to do with our decision today. Plaintiffs put their proverbial eggs in an uncertain and untested basket of novel state-based claims, hoping to discover that the Kansas Constitution would prove amenable. But the constitutional text and our longstanding historical precedent foreclose those claims. In the future, should the people of Kansas choose to codify clear standards limiting partisan gerrymandering, or should future plaintiffs be able to properly establish

the elements legally required to show unlawful racial discrimination in the redistricting process, Kansas courthouse doors will be open. For now, the legal errors permeating the lower court's decision compel us to reverse its judgment.

Reversed and injunction order is lifted.

* * *

ROSEN, J., concurring in part and dissenting in part: 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.

In turning a blind eye to this full-scale assault on democracy in Kansas, the majority blithely ignores the plain language of this state's Constitution. The majority upholds a legislative decision that does nothing to benefit the people or provide equal protection to the citizens of this state, considerations our Constitution expressly demands. Furthermore, the majority opinion undermines the very basis of legislative districting, apportioning voting districts in a blatant attempt to homogenize the state. 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.

The precedent today's opinion sets threatens to institutionalize division of voting districts on the basis of race, or of religion, or of gender, with no hope of constitutional protection. The majority is thus complicit not only in the current power grab, it also 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.

I do not reject the majority opinion out of sympathy for one party or another or for one population or another. I reject it because it is constitutionally unsound. I fully join Justice Biles in his concurring in part and dissenting in part opinion and his legal analysis and his conclusion that Ad Astra 2 violates the Kansas Constitution. To that opinion, I add one of my own so that I may highlight my fervent disagreement with the majority's decision to tie the equal protection guarantees in section 2 of the Kansas Constitution Bill of Rights to the federal Constitution.

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." Slip op. at 22. 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—regardless of what the narrower-in-scope central power has to say about it. I will highlight the error in the majority's minimal reasoning and explain why section 2 provides protections that are broader than those in the Fourteenth Amendment.

Section 2 of the Kansas Constitution Bill of Rights is as follows:

> "Political power; privileges. 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."

The relevant portion of the Fourteenth Amendment to the United States Constitution is as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The majority looks at these provisions and proclaims that the equal protection guarantees found within are coextensive. To get to that epic conclusion, it relies on one sentence offered in a 1917 Kansas case and repeated in a smattering of cases, each time without even a hint of analysis. In *State v. Wilson*, 101 Kan. 789, 795-96, 168 P. 679 (1917), this court unceremoniously noted that sections 1 and 2 of the Kansas Bill of Rights are "given much the same effect as the clauses of the Fourteenth Amendment relating to due process of law and equal protection." For this proposition, it cited to *Winters v. Myers*, 92 Kan. 414, 140 P. 1033 (1914). But the court in *Winters* never held that section 2 and the Fourteenth Amendment are given the same effect. Rather, it observed that the Ohio Constitution has a provision with the same language as section 2 and that there is *similar* language in a clause of the Fourteenth Amendment. The court then described caselaw from both jurisdictions, among others, before independently addressing the equal protection issue before it. *Winters*, 92 Kan. at 421-28.

Nonetheless, the language in *Wilson* was repeated in cases in which parties launched Fourteenth Amendment claims alone and when parties invoked the Kansas Bill

of Rights alongside a Fourteenth Amendment claim. See, e.g., *State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22 (2005); *State ex rel. Tomasic v. Kansas City, Kansas Port Authority*, 230 Kan. 404, 426, 636 P.2d 760 (1981); *Henry v. Bauder*, 213 Kan. 751, 752-53, 518 P.2d 362 (1974); *Railroad and Light Co. v. Court of Industrial Relations*, 113 Kan. 217, 228-29, 214 P. 797 (1923). Importantly, however, in none of these cases does it appear the parties claimed that the Kansas Constitution Bill of Rights offers different or broader protections than the Fourteenth Amendment. Thus, in none of these cases did the court question whether Kansas affords separate protections and instead defaulted to the status quo.

This practice was routine for the time. "For all practical purposes, independent state constitutionalism did not exist before the 1970s." Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 Penn St. L. Rev. 783, 797 (2011). Commentors have theorized this was largely a result of "constitutional universalism," or a "belief that all American constitutions are drawn from the same set of universal principles of constitutional self-governance." Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 Roger Williams U.L. Rev. 109, 117 (1998). In the judicial context, this belief resulted in "a lack of judicial attention to or discussion of the constitutional text, case authority, framers' intent, or relevant history [and] indiscriminate borrowing from other jurisdictions . . . and from the common law." 4 Roger Williams U.L. Rev. at 117. And later in the 20th century, sole reliance on the Fourteenth Amendment became a strategic decision. "The U.S. Supreme Court recognized many of the rights it did between the 1940s and the 1960s *because* many state courts (and state legislatures and state governors) resisted protecting individual rights, most notably in the South but hardly there alone." Sutton, Jeffery, J., 51 Imperfect Solutions: States and the Making of American Constitutional Law, 14 (2018). Thus, litigants eschewed the advancement of any state constitutional claims to take advantage of the federal rights expansion.

In the late 1970s, however, after a near-decade of continuous individual rights recognition came to an end, an era of "independent state constitutionalism in the area of individual rights and liberties came of age." 115 Penn St. L. Rev. at 798. An approach coined "The New Judicial Federalism" took hold during this period, and marked a time when state courts took a deeper look at their own constitutions and "interpreted their . . . rights provisions to provide more protection than the national minimum standard guaranteed by the Federal Constitution." Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. Ann. Surv. Am. L. 211, 211 (2003). Justice William Brennan recognized this as "'probably the most important development in constitutional jurisprudence of our times.'" Williams, *The New Judicial Federalism in Ohio: The First Decade*, 51 Clev. St. L. Rev. 415, 416 (2004) (quoting Justice William J. Brennan, Jr., Special Supplement, State Constitutional Law, NAT'L L.J., Sept. 29, 1986, at S1).

Our court appeared to follow this trend beginning in 1984 in *Farley v. Engelken*, 241 Kan. 663, 667, 740 P.2d 1058 (1987). Curiously, the majority here cites *Farley* as supportive of its position not once, but twice. In *Farley*, this court considered an equal protection challenge to legislation that implicated the right to a remedy for insured or otherwise compensated medical malpractice plaintiffs but not other tort plaintiffs. True to the majority's quotation, *Farley* initially repeats the resolution that section 2 and the Fourteenth Amendment are "given much the same effect." 241 Kan. at 667. However, later in its reasoning it clarifies "*as hereinafter demonstrated, the Kansas Constitution affords separate, adequate, and greater rights than the federal Constitution.*" (Emphasis added.) 241 Kan. at 671. The court reached that conclusion by relying on earlier caselaw that had applied a heightened standard to a similar equal protection challenge and by observing that the right to a remedy is independently protected by the Kansas Constitution, thus making it deserving of scrutiny higher than rational basis under the Kansas Constitution. The court acknowledged that the "United States Supreme Court has

applied heightened scrutiny to very limited classifications," but explained "we are interpreting the Kansas Constitution and thus are not bound by the supremacy clause of the federal Constitution." 241 Kan. at 674.

The majority here conveniently avoids addressing this precedent-setting portion of the *Farley* opinion, likely because it threatens to topple the jenga-style analysis it has constructed. The majority has offered nothing beyond *Farley* and the other cases that reflexively repeated the line from *Wilson* to bind Kansas' section 2 to the Fourteenth Amendment and federal court decisions. The opinion takes a moment to ensure the reader that our decision in *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 624, 440 P.3d 461 (2019), which interpreted section 1 of the Kansas Constitution to offer protections not found in the federal Constitution, does not bind our interpretation of section 2, but that is the extent of the analysis.

Instead of offering a sound interpretation of section 2, the majority uses a few sentences to tie equal protection guarantees in section 2 to those in the Fourteenth Amendment for now and the future. Legal analysts have described this approach as "prospective lockstepping," i.e., when a court "announces that not only for the instant case, but also in the future, it will interpret the state and federal clauses the same." Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 Wm. & Mary L. Rev. 1499, 1509 (2005). Commenters have identified numerous problems with this practice. Among those is that resulting opinions "decide too much and . . . go beyond the court's authority to adjudicate cases" by "purport[ing] to foresee, and to attempt to control, the future." 46 Wm. & Mary L. Rev. at 1521. Justice Robert Utter of the Supreme Court of Washington has likened this to a judicial constitutional amendment without a constitutional convention. *State v. Smith*, 117 Wash. 2d 263, 282, 814 P.2d 652 (1991) (Utter, J., concurring). Another defect with the practice is the reality that it "reduces state constitutional law to a

redundancy and greatly discourages its use and development." Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 804 (1992); see also *Harris v. Anderson*, 194 Kan. 302, 314, 400 P.2d 25 (1965) (Fatzer, J., dissenting) ("[a]cquiescence in decisions of the Supreme Court" should not go so far as to "engender[] a docile submission" or "become a servile abasement"). This reduction into irrelevance threatens a most grave consequence: the elimination of the constitutional protections our founders envisioned. As Judge Jeffrey Sutton of the Sixth Circuit has explained, state courts cannot rely on the U.S. Constitution to vindicate individual rights protected in state constitutions because "[f]ederalism considerations may lead the U.S. Supreme Court to underenforce (or at least not to overenforce) constitutional guarantees in view of the number of people affected and the range of jurisdictions implicated." 51 Imperfect Solutions at 175.

I could continue at length about the problems with the majority's lack of analysis and its chosen approach. Instead, I turn to what it should have tackled in the first place: an examination of the Kansas Constitution.

The district court in this case, relying on *Farley*, ruled that "Kansas's guarantee of equal benefit 'affords separate, adequate, and greater rights than the federal Constitution.'" See 241 Kan. at 671. I agree. But I go beyond *Farley* to get there, starting with the text of section 2.

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." I do not mean to oversimplify things; it really is that simple. See Linde, *E Pluribus, Constitutional*

Theory and State Courts, 18 Ga. L. Rev. 165, 182 (1984) (state court is responsible for reaching its own conclusion about state constitutional provisions regardless of whether identical language exists in the federal Constitution, but "[a] textual difference" between the two "makes this easier to see").

The details in the differences between these provisions are even more illuminating. Section 2 describes a free government that is instituted for the people's equal protection and benefit. In contrast, the Fourteenth Amendment prohibits states from denying anyone equal protection of laws. One is a positive conferral of rights; the other is framed in the negative. See *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 894, 179 P. 3d 366 (2008) (observing that the federal Constitution grants "negative rights—*i.e.*, rights which the government may not infringe," while "state constitutions, including Kansas', grant negative rights" *and* "positive rights, *i.e.*, rights that entitle individuals to benefits or actions by the state"). The Supreme Court of Vermont has observed the same distinction between its equal benefit clause and the Fourteenth Amendment. As originally written, the Vermont provision proclaimed, "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family or set of men, who are a part only of that community. . . ." *Baker v. State*, 170 Vt. 194, 207, 744 A.2d 864 (1999). In comparing this provision to the federal Equal Protection Clause, the Vermont Supreme Court had this to say:

> "The first point to be observed about the text is the affirmative and unequivocal mandate of the first section, providing that government is established for the common benefit of the people and community as a whole. Unlike the Fourteenth Amendment, whose origin and language reflect the solicitude of a dominant white society for an historically-oppressed African-American minority (no state shall 'deny' the equal protection of the laws), the Common Benefits Clause mirrors the confidence of a homogeneous, eighteenth-century group of men aggressively laying claim to the same rights as their peers in Great Britain or, for that matter, New York, New Hampshire, or the Upper Connecticut River Valley.

. . . .

". . . . The affirmative right to the 'common benefits and protections' of government and the corollary proscription of favoritism in the distribution of public 'emoluments and advantages' reflect the framers' overarching objective 'not only that everyone enjoy equality before the law or have an equal voice in government but also that everyone have *an equal share in the fruits of common enterprise*.' . . . Thus, at its core the Common Benefits Clause expressed a vision of government that afforded every Vermonter its benefit and protection and provided no Vermonter particular advantage. [Citations omitted.]" *Baker*, 170 Vt. at 208-09.

Like the Vermont Constitution, section 2 describes an "affirmative right" to equal protections and benefits. And, like the Vermont Supreme Court, I understand this to be a broader conferral of rights than that which results from the proscription of denying citizens equal protection of the law. The history surrounding this text confirms my understanding.

Kansans ratified the Kansas Constitution, including the section 2 we know today, in 1859. This was nine years before the ratification of the Fourteenth Amendment. *Hodes*, 309 Kan. at 624. There is no discussion of section 2's meaning or origins in the record of the Wyandotte Constitutional Convention that produced the Constitution. See Proceedings and Debates of the Kansas Constitutional Convention (Drapier ed., 1859), *reprinted in* Kansas Constitutional Convention 187, 286, 575, 599 (1920). But it was quite surely based on other, earlier constitutions. See Mauer, *State Constitutions in a Time of Crisis: The Case of the Texas Constitution of 1876*, 68 Tex. L. Rev. 1615, 1617 (1990) (the writing of state constitutions has been largely an imitative art). Section 2 is nearly identical to a provision in the 1851 Ohio Constitution: "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same." Ohio Const. art. I, § 2. And both

Kansas and Ohio's Constitutions model the 1776 Virginia Declaration of Rights and the 1776 Pennsylvania Constitution. Both proclaimed that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community." Va. Const. Bill of Rights, art. I, § 3; Pa. Const. Bill of Rights, art. V; *Stolz v. J & B Steel Erectors, Inc.*, 155 Ohio St. 3d 567, 575, 122 N.E.3d 1228 (2018) (Fischer, J., concurring) (observing Ohio provision is like Virginia and Pennsylvania provisions). This lineage helps trace at least part of the origins of our section 2 back to 1776, when the original colonies were writing the first state constitutions. See Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 Rutgers L.J. 911, 913 (1993).

Legal commenters point out that provisions like these are common to state constitutions. See Bulman-Pozen & Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 870, 892 (2021) (describing similar provisions, including that found in Colorado's Constitution: "all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole"). This category of constitutional decrees focuses first on what is to be the source of all political power—the people. The early drafters had recently declared independence from the British government and its attempt to crush local community rule, and their desire to stay independent and self-governed is reflected in these provisions. See Linzey & Brannen, *A Phoenix from the Ashes: Resurrecting a Constitutional Right of Local, Community Self-Government in the Name of Environmental Sustainability*, 8 Ariz. J. Envtl. L. & Pol'y 1, 16 (2017). In naming the people as the source of all government power, they "established popular sovereignty as that state's legal cornerstone." Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457, 477 (1994). The provisions detail not just the source of power, but the ends of that power—the common good. 119 Mich. L. Rev. at 892.

In dedicating the people's power to the common good, the earliest framers "condemned special treatment of individuals and classes." 119 Mich. L. Rev. at 892. As the United States continued to form, the constitutional commitment to the common good intensified. In the decades leading to Kansas' admission to the union, state legislatures had begun to stray from the peoples' objectives and started to prioritize the interests of the few. 119 Mich. L. Rev. at 892. In response, various states adopted constitutional amendments that placed specific restrictions on legislative acts. This reaction continued in a more general form in the 1840s and 1850s, when states began adopting constitutional equality guarantees to curb the perceived favoritism. 119 Mich. L. Rev. at 893; James Willard Hurst, The Growth of American Law: The Law Makers 241 (1950). ("The persistent theme of the limitations written into state constitutions after the 1840's was the desire to curb special privilege.").

It was against this backdrop that both Ohio and Kansas drafted their first constitutions. Quite notably, their political power provisions were written to guarantee not just protection and benefit for the common good, but *equal* protection and benefit. This indicates a strong dedication to the longevity of popular sovereignty and a prohibition against government action that results in special favor to the few. This casts a broad and generous net in the equal protection arena.

The Fourteenth Amendment has a radically different conception story. It was ratified in 1868, three years after the end of the Civil War. Its drafters were not concerned "with favoritism" or "the granting of special privileges for a select few," but with the still widespread discrimination against formerly enslaved persons and African Americans generally. *Matter of Compensation of Williams*, 294 Or. 33, 42, 653 P.2d 970 (1982). Although the Thirteenth Amendment abolished the legal practice of slavery in 1865, it made no guarantee of citizenship or civil rights to Black people in America. *Dred Scott* still loomed over the land, as did *Barron v. The Mayor and City Council of Baltimore*, 32

U.S. 243, 250-51, 8 L. Ed. 672 (1833), which held that the federal Bill of Rights did not apply to the states. As a result, southern states were able to systematically deny rights to Black people. The Fourteenth Amendment was Congress' direct response to these continuing human rights abuses. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment's Original Meaning*, 49 Conn. L. Rev. 1069, 1083-86 (2017); Shaman, *The Evolution of Equality in State Constitutional Law*, 34 Rutgers L.J. 1013, 1052 (2003) ("As envisioned by its framers, the central purpose of the Equal Protection Clause was to eliminate hostile discrimination against the newly freed slaves.").

The text and the historical distinction between the origins of section 2 and the Fourteenth Amendment make it plain that the declarations have separate meanings. While the federal provision's devotion to ensuring civil rights for Black people in America is an important and historic part of our legal history, its concept is less broad than that of section 2. Like the Vermont Supreme Court has described its counterpart clause, section 2 represents a constitutional guarantee that "the law uniformly afford[s] every [Kansan] its benefit, protection, and security so that social and political preeminence [will] reflect differences of capacity, disposition, and virtue, rather than governmental favor and privilege." *Baker*, 170 Vt. at 211.

The majority has decided to ignore the plain text and the history of our section 2. I would not have done so. Rather, at the plaintiffs' prompting, I would have given it the full examination and analysis the people of Kansas deserve and concluded that it 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.

* * *

BILES, J., concurring in part and dissenting in part: I agree the federal Elections Clause does not jurisdictionally bar this court from considering the validity of legislatively enacted congressional district maps under the Kansas Constitution. But I agree with little else in the majority opinion, so I dissent from the rest.

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. One such finding declares, "Ad Astra 2 relocates more Black, Hispanic, and Native American Kansans than any of the comparator plans, *meaning the changes in district boundaries were focused on areas with large minority populations*." (Emphasis added.) Other findings hold the Ad Astra 2 design contains noncompact and irregularly shaped districts, unnecessarily splits political subdivisions (cities and counties), breaks up geographically compact communities of interest, and fails to preserve the cores of former districts. Yet the majority believes most of these injustices are beyond the reach of mere judges, while conceding only that the mathematical calculations and limited race dilution issues are in our judicial wheelhouse.

The district court's findings plainly implicate state-based constitutional rights, so an appellate court's first duty should be to decide whether they are supported by substantial competent evidence. After that, the legal analysis is garden-variety stuff. This court said as much nearly 45 years ago. See *In re House Bill No. 2620*, 225 Kan. 827, Syl. ¶ 4, 595 P.2d 334 (1979) ("Substantially equal [legislative] districts may be

invidiously discriminatory because they were organized in such a way as to minimize or cancel out the voting strength of racial or political elements of the voting population."). So why doesn't the majority fully engage?

Our state's founding and its traditions teach us that government is at its worst when those at the helm stop treating people like neighbors. And the district court explicitly found the "asserted pretextual justifications for Ad Astra 2 . . . cannot withstand scrutiny." This means the State's explanations about why this legislation does what it does don't hold water. So what should be the appropriate judicial response when state action appears to cross constitutional boundaries and the government's excuses are lame? Retreat is not the answer. See Kansas Const. art. 3, § 1 ("The judicial power of this state shall be vested exclusively in one court of justice."). Courts must intervene because a desire to harm politically disfavored groups is not a legitimate government interest and our duty is to the Constitution.

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. Let's begin with what happened.

FACTUAL BACKGROUND

This stage was set 10 years ago when there was a failure to enact a new congressional redistricting plan after the Governor and Legislature could not agree on one. This required a federal district court to step in and fill the void. See *Essex v. Kobach*, 874 F. Supp. 2d 1069 (2012). But over the next decade, population shifts made the federal court's design inconsistent with applicable one person/one vote principles, so

revision became necessary. And to achieve equal populations among our state's four congressional districts, minimal shifts of about 116,000 people would have done the trick. Each congressional district needed 734,470 people. This table makes that point:

District	2020 Census Population	Change Required
First	700,773	+ 33,855
Second	713,007	+ 21,803
Third	792,286	-58,334
Fourth	731,814	+2,676
		Net Shift Needed: 116,668 people (3.9% of state's population)

But Ad Astra 2 does so much more. It moves 394,325 people into new congressional districts—or 13.4% of our state's population. Said differently, for every Kansan the Legislature needed to move, it transferred more than three. And as the district court found, "[t]his significant shift of population between districts was not the necessary result of population changes within the state between 2010 and 2020, nor the result of Kansas'[] political geography." Ad Astra 2 affected 14 Kansas counties in this way:

County	Old Districts 2012-2022	New Districts Ad Astra 2	Residents Moved (2020 Census data)
Wyandotte	Third	Second (portion)	112,661
Douglas	Second	First (portion)	94,934
Geary	First	Second	36,379
Lyon	First	Second	32,179
Franklin	Second	Third	25,643
Miami	Second/Third	Third	20,495
Jefferson	Second	First	18,974

Jackson	Second	First	13,249
Marion	First	Second	11,823
Anderson	Second	Third	7,877
Chase	First	Second	2,572
Wabaunsee	First	Second	6,877
Morris	First	Second	5,386
Marshall	First/Second	First	5,276

Even a casual observer would wonder what possibly motivates this much population transfer to our election-year landscape—especially when a traditional guidepost for neutral redistricting calls for retaining core districts. See, e.g., The Proposed Guidelines and Criteria for 2022 Kansas Congressional and State Legislative Redistricting, subsection 4(c) ("The core of existing congressional districts should be preserved when considering the communities of interest to the extent possible."); see also *Essex*, 874 F. Supp. 2d at 1089 ("The Court's plan most effectively furthers state goals of creating compact and contiguous districts, preserving existing districts, maintaining county and municipal boundaries and grouping together communities of interest.").

The district court noted Ad Astra 2 preserves just 86% of the former districts' cores, while a "least-change plan" adhering to the legislative redistricting committee guidelines for core retention retained 97%. This disregard for core retention is strikingly illustrated by how Ad Astra 2 surgically scoops out the densely populated City of Lawrence from Douglas County to submerge it in a new congressional district stretching as far west as Colorado and encompassing a large portion of the Oklahoma border. The rest of Douglas County stays in CD 2. The district court ultimately found based on the evidence before it that, "Ad Astra 2 cannot be justified by a desire to retain the cores of prior congressional districts."

Plaintiffs filed suit alleging this intentional government action violated their rights protected by sections 1, 2, 3, 11, and 20 of the Kansas Constitution Bill of Rights and article V, section 1 of the Kansas Constitution. The district court agreed with plaintiffs in a 209-page decision after a four-day trial. And except for the extraordinary time considerations that expedite this case, the analysis is straightforward and for half a century familiar territory for Kansas courts.

THE PARTISAN GERRYMANDERING CLAIMS

At the outset, it is necessary to understand what we are talking about. The district court's central holdings concern what it labels and defines as "partisan gerrymandering." The important part is the definition. It is too simplistic to just think of this as Republicans being mean to Democrats (or vice versa), or to trivialize what happened with an "Elections Have Consequences" bromide. The majority falls victim to that in my view when it mischaracterizes this case as seeking something that is unattainable—an absolute prohibition against any partisanship in the legislative process. Slip op. at 24 (stating plaintiffs "claim that any consideration by the Legislature of partisan factors in deciding where to draw district lines is offensive to constitutional principles"). Plaintiffs' claims and this case do no such thing. The district court made clear it was ruling on something much more substantial and sweeping than political bickering.

The district court showed its hand early. It broadly defined the elements of "partisan gerrymandering" as: (1) the Legislature acting with the purpose of achieving partisan gain by diluting the votes of disfavored-party members, and (2) the enacted congressional plan having the desired effect of substantially diluting disfavored-party members. It then fleshed out the gravity of what it was looking for by noting the goal of partisan gerrymandering "is to eliminate the people's authority over government by

giving different voters vastly *unequal* political power." And it explained how the harm occurs:

> "[I]n at least three related, but independent ways. First, partisan gerrymandering unconstitutionally discriminates against members of the disfavored party based on viewpoint. Second, partisan gerrymandering unlawfully burdens disfavored-party members' freedom of association. Third, partisan gerrymandering unlawfully retaliates against disfavored-party members for engaging in protected political speech and association."

The court then narrowed its focus even further, to make this about government retaliation. It said:

> "The State engages in impermissible retaliation when plaintiffs can establish that (1) they were engaged in a constitutionally protected activity; (2) the State's actions adversely affected the protected activity; and (3) the State's adverse action was substantially motivated by plaintiffs' exercise of their constitutional rights."

Ultimately, the district court held:

> "Partisan gerrymandering satisfies all three of these elements. First, as described above, voters seek to engage in protected activities, including exercising their right to free speech and assembly by forming political parties, voicing support for their candidates of choice, and casting votes for those candidates. Second, partisan gerrymandering burdens these rights by reducing the voting power of members of the disfavored party, discriminating against members of that party on the basis of their viewpoints, and burdening their ability to associate by obstructing their political organizations. Third, the State's actions are motivated by voters' exercise of their constitutional rights: Partisan gerrymanderers move voters for the disfavored party into different districts precisely because those voters are likely to engage in protected conduct."

I share the district court's singular focus. This is about targeted government action against disfavored Kansans based on how they exercise their constitutional rights. And in that regard, I have been haunted by this 64-year-old passage on associational rights written by Justice John Marshall Harlan II in a unanimous decision:

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. [Citations omitted.]" *National Ass'n for Advancement of Colored People v. Alabama*, 357 U.S. 449, 460-61, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958).

Partisan gerrymandering assaults these associational freedoms and their related constitutional protections. But before diving into those details, let's first consider the majority's decision to disembark before doing even that much by ruling plaintiffs' claims on partisan gerrymandering do not present a justiciable case or controversy.

The political question doctrine

It is important to appreciate the judicial bait-and-switch that has happened. First, the United States Supreme Court held in a recent 5-4 decision that federal courts must avoid partisan gerrymandering claims from the various states. *Rucho v. Common Cause*, 588 U.S. ___, 139 S. Ct. 2484, 2499-500, 204 L. Ed. 2d 931 (2019). But in doing so, the Court's majority noted state courts were still available to stand guard against constitutional mischief. 139 S. Ct. at 2507 ("Our conclusion does not condone excessive

partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. . . . Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.").

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. See, e.g., *Essex*, 874 F. Supp. 2d 1069*; State ex rel. Stephan v. Graves*, 796 F. Supp. 468 (1992); *O'Sullivan v. Brier,* 540 F. Supp. 1200 (1982). Plaintiffs' redeployment to state court might explain why the *Rivera* majority labels this case as "first-of-its-kind litigation." Slip op. at 6. But that's a misnomer because their underlying redistricting claims are traditional in context—despite the majority's tagging them as "unique and novel." Slip op. at 6; see, e.g., *In re 2002 Substitute for Senate Bill 256*, 273 Kan. 731, Syl. ¶ 4, 45 P.3d 855 (2002) ("Lack of contiguity or compactness of districts in reapportionment legislation raises immediate questions as to political gerrymandering and possible invidious discrimination which should be satisfactorily explained by some rational state policy or justification."); *In re House Bill No. 3083*, 251 Kan. 597, 607, 836 P.2d 574 (1992) (same); *In re House Bill No. 2620*, 225 Kan. 827, Syl. ¶ 4 (even substantially equal legislative districts may be invidiously discriminatory if organized to minimize or cancel out the voting strength of racial or political elements of the voting population).

But the *Rivera* 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." Slip op. at 2, Syl. ¶ 6. And the discouraging by-product is judicial passivity at precisely a moment when a Kansas court has held the rights of Kansans guaranteed by our state Constitution are in the balance. It should go without saying this is not a time to stand down. See, e.g., *Harris v. Shanahan*, 192 Kan. 183, 206-

07, 387 P.2d 771 (1963) ("[W]hen 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. . . . However delicate that duty may be, we are not at liberty to surrender, or to ignore, or to waive it.").

Nor does brushing aside plaintiffs' redistricting claims here conform to how our court has viewed redistricting issues over many decades. The district court considered our prior caselaw and observed we have had no qualms since at least 1963 in expressing a willingness to confront these politically sensitive issues when the evidence justified it, citing *Harris*, 192 Kan. at 207 ("It is axiomatic that an apportionment act, as any other act of the legislature, is subject to the limitations contained in the [Kansas] Constitution, and where such act . . . violates the limitations of the Constitution, it is null and void and it is the duty of courts to so declare."). The district court then explained:

> "Kansas courts routinely determine manageable standards to enforce broad constitutional language—including in the redistricting context. And other states' supreme courts have successfully adjudicated similar claims under their state constitutions, offering a model for this Court to apply. *Indeed, the ample evidence of Ad Astra 2's extreme, intentional partisan bias makes this an easy case.*" (Emphasis added.)

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."

The district court then set out its decision-making criteria for the nonrace-based claims: a congressional plan constitutes a partisan gerrymander when "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 congressional plan will have the desired effect of substantially diluting disfavored-party members' votes." The court also detailed how its analytical approach paralleled previous state caselaw:

> "Decisions from the Kansas Supreme Court considering partisan gerrymandering claims while reviewing state legislative reapportionment plans underscore this point. Although the Court has never held a redistricting plan unconstitutional on partisan gerrymandering grounds, it has repeatedly indicated that partisan gerrymandering claims are cognizable under the Kansas Constitution, and that the allegations in past cases failed *on the merits* because the challengers—unlike Plaintiffs here—had failed to offer evidence substantiating their claims. *See In re [House Bill No. 3083]*, 251 Kan. 597, 607, 836 P.2d 574 (1992) ('No evidence has been offered that would indicate the size and shape of House District 47 was engineered to cancel out the voting strength of any cognizable group or locale.'); *In re Senate Bill No. 220*, 225 Kan. 628, 637, 593 P.2d 1 (1979) (concluding that challengers had failed to 'show[]' an unconstitutional gerrymander); *In re House Bill No. 2620*, 225 Kan. 827, 834-35, 595 P.2d 334 (1979) (concluding that 'no claim or showing of gerrymandering . . . ha[d] been made'). Although these decisions did not discuss the gerrymandering allegations at great length—likely because of the lack of supporting evidence—or give clear rules for resolving future claims, none suggested that the Court lacked jurisdiction to consider the allegations. Instead, each indicated that the Legislature's discretion in redistricting is not boundless, and that Kansas courts have jurisdiction to hear partisan gerrymandering claims."

This tied back to the district court's earlier explanation as to how it thought the legal analysis should unfold:

> "The court views the plaintiffs' claims as constitutional equal protection actions and finds guidance in *Farley v. Engelken*, 241 Kan. 663, 740 P.2d 1058 (Kan. 1987) pages 669-670, where three levels of scrutiny are established increasing with the importance of the right or interest involved and the sensitivity of the classification.
>
> "In level of scrutiny from least to most: 1) rational or reasonable basis test—act presumed constitutional plaintiffs' burden to show—classification is 'irrelevant' to achievement of the state's goal, 2) heighten[ed] scrutiny—which requires the legislation to 'substantially' foster a legitimate state purpose. There must be a greater justification and a direct relationship between the classification and the state's goal, 3) strict scrutiny—applicable in cases of suspect classification including voting. No presumption of validity burden of proof shifted to defendant. Classification must be 'necessary to serve a compelling state interest' or it is unconstitutional. [Citations omitted.]"

My point is simply that 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. This classic framework is standard fare: (1) Plaintiffs establish a state action and its purpose or intent; (2) plaintiffs establish the state action's adverse effects on them; and, if they successfully make those showings, then (3) the State must come up with an appropriate justification for its actions subject to the applicable level of scrutiny based on the rights claimed to be injured. See, e.g., *In re Weisgerber*, 285 Kan. 98, 104, 169 P.3d 321 (2007) (equal protection violation must include demonstration that plaintiffs' treatment resulted from a "'deliberately adopted system'" that results in "intentional systematic unequal treatment"); see also *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (explaining that equal protection claims alleging disproportionate racial impact from facially neutral legislation require "[p]roof of racially discriminatory intent or purpose"); *Washington v. Davis*, 426 U.S. 229, 244-

45, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976) (proof of discriminatory racial purpose necessary to make out equal protection claim). And the district court's application of this framework is just as ordinary. Let's explore that.

Consider first how our court has viewed its role when addressing redistricting cases before today. The Kansas Constitution's article 10, section 1 directs this court's determination every 10 years of what that article describes as "the validity" of state Senate and House legislative reapportionments. But the single word "validity" offers little or no textual guidance. Yet, this court over many years has consistently summarized its analytical role as: "For a reapportionment act of the legislature to be valid it must be valid both as to the procedure by which it became law and as to the substance of the apportionment itself to satisfy the constitutional requirements." *In re Senate Bill No. 220*, 225 Kan. 628, Syl. ¶ 2, 593 P.2d 1 (1979). But what does this second factor ("the substance of the apportionment itself") mean?

This court has repeatedly explained this substance factor includes much more than just mathematical precision for one person/one vote principles and safeguarding against race-based prejudice. It encompasses other equal protection canons as well. See *In re House Bill No. 2620*, 225 Kan. 827, Syl. ¶ 4 ("Substantially equal districts may be invidiously discriminatory because they were organized in such a way as to minimize or cancel out the voting strength of racial or political elements of the voting population."); *In re House Bill No. 3083*, 251 Kan. 597, Syl. ¶ 6 ("Lack of contiguity or compactness raises immediate questions about political gerrymandering and possible invidious discrimination that should be satisfactorily explained by some rational state policy or justification."); *In re 2002 Substitute for Senate Bill 256*, 273 Kan. 731, Syl. ¶ 4 (same).

And even before article 10 included an explicit role for the court in the redistricting process, this court referenced equal protection's arbitrary and capricious

standard as something the court would watch out for. In *Harris v. Anderson*, 196 Kan. 450, 456, 412 P.2d 457 (1966), the court noted:

> "When the [state reapportionment] Act is viewed as a whole, it is apparent that the legislature acted neither arbitrarily nor capriciously. On the contrary, the Act represents a diligent, earnest and good-faith effort on the part of the Kansas legislature to comply with this court's previous order to reapportion [the House to achieve equal-populated districts required by *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct 1362, 12 L. Ed. 2d 506 (1964)]."

So why would the application of state equal protection principles be any different today? It can't be just because this case concerns congressional district reapportionment and article 10 is silent about those districts. Our court has previously mentioned even that possibility when it said, "*The area of a congressional district* should be reasonably contiguous and compact under a proper apportionment plan and, if not, a satisfactory explanation should be given by the proponents of the plan *so as to remove any question of gerrymandering and invidious discrimination*." (Emphases added.) *In re House Bill No. 2620*, 225 Kan. at 834.

Plaintiffs' claims align with our prior caselaw despite the majority's assurance that "plaintiffs invited the district court to craft new and never before applied legal standards and tests unmoored from either the text of the Kansas Constitution or the precedents of this court." Slip op. at 5. Plaintiffs allege, and have successfully proven, that their government targeted them with this new legislation because of how they have exercised their constitutionally protected rights of political association and their right to vote, and because of the color of their skin. And they showed Ad Astra 2 accomplishes this by restructuring the method of selecting our representatives in Congress through the dismemberment of their neighborhoods, their cities, their counties, and their communities

of interest. The purpose, of course, was to dilute their power to vote to effectively enhance the vote of others.

Plaintiffs' claims are not "unmoored" from how our court previously viewed its role in patrolling the reapportionment landscape to protect constitutional rights. See *In re House Bill No. 2620*, 225 Kan. 827, Syl. ¶ 6 ("[A]ll courts generally agree that lack of contiguity or compactness raises immediate questions as to political gerrymandering and possible invidious discrimination."); *In re House Bill No. 3083*, 251 Kan. at 607 (same); and *In re 2002 Substitute for Senate Bill 256*, 273 Kan. 731, Syl. ¶ 4 (same). 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. It even said as much before the Kansas Constitution spelled out any explicit role for the court as it does now. See Kan Const. art. 10, § 1; *Harris*, 192 Kan. at 191. The *Harris* court struck down the 1963 apportionment of state senate districts based on failures in the constitutional process for enrolling bills and population equality. But in doing so, it acknowledged legislative discretion in redistricting remained subject to judicial limitations and expectations:

> "The exercise of discretion *and good faith by the legislature* in enacting an apportionment law must be limited to the standards provided in our Constitution and not to some other which the Constitution has not fixed. This is not to say, however, that there is not an element of discretion involved in the enactment of any legislative apportionment. Subject to the requirement of equal population provided by Article 10, Section 2, the location of boundaries, the shape, area, and other relevant factors are proper considerations for the

> legislature in the enactment of such a statute. *Indeed, geographical considerations are necessarily attendant in the accomplishment of this purpose for the resulting districts should, where possible be compact and contain a population and area as similar as may be in its economical, political and cultural interests, all as determined by the legislature in its discretion, not acting arbitrarily or capriciously*." (Emphases added.) 192 Kan. at 205.

So in this very early reapportionment case, in addition to simple mathematical calculations our court embedded its concerns for legislative good faith, district compactness, and maintenance of communities of interest (economic, political, and cultural), as well as an absence of arbitrary and capricious legislative conduct. And it warned,

> "[W]hen 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.* In the final analysis, this court is the sole arbiter of the question whether an act of the legislature is invalid under the Constitution of Kansas." (Emphasis added.) 192 Kan. at 207.

In other words, our court did not need other legislative enactments or more explicit constitutional direction to find its judicial path for ensuring protection of constitutional rights in the redistricting process. And there is more.

Two years later, this court repeated its caution against arbitrary and capricious legislative action in reapportionment. See *Harris v. Anderson*, 194 Kan. 302, 311, 400 P.2d 25 (1965). A year after that, the court paid homage to compactness and communities of interest as positive and neutral reapportioning guideposts in *Harris v. Anderson*, 196 Kan. 450, 453, 412 P.2d 457 (1966) ("The districts created by the Act are compact and contain a population and area as similar as may be in their economical, political and cultural interests."). This 1966 case ultimately held: "When the Act is viewed as a whole,

it is apparent that the legislature acted neither arbitrarily nor capriciously." 196 Kan. at 456.

In 1974, the people amended the constitutional reapportionment article to specify that our court affirmatively determine the "validity" of legislation drawing new state senate and house districts. L. 1974, ch. 457, § 1. And in 1979 this court acted under the amended article's mandate. See *In re Senate Bill No. 220*, 225 Kan. at 633 ("The law is simple; its application is difficult."). It is a fair summary to say the court recognized a reality to the "political trappings" inherent in the legislative process of reapportionment. 225 Kan. at 634. But even so, the court did not surrender its judicial review function regarding "political gerrymandering"; it still expected justifications tied to legitimate state interests to explain where lines were drawn, such as preserving cities and counties, maintaining communities of interest, and preserving local economic interests, e.g., farming. 225 Kan. at 637. Ultimately, the court concluded: "The objection to the bill on the ground that there was partisan political gerrymandering in redistricting the senatorial districts does not reveal a fatal constitutional flaw *absent a showing of an equal protection violation. No such showing has been made*." (Emphasis added.) 225 Kan. at 637. Again, the point here is that our court did not simply abandon its judicial review when considering partisan gerrymandering claims or decry any lack of manageable judicial standards. It looked under the hood for the evidence before validation.

Similarly, that same year when addressing state House redistricting, our court again acknowledged the reality that "politics and political considerations are inseparable from districting and apportionment," but again it did not let that end the constitutional inquiry. See *In re House Bill No. 2620*, 225 Kan. 827, Syl. ¶ 4 ("Substantially equal districts may be invidiously discriminatory because they were organized in such a way as to minimize or cancel out the voting strength of racial or political elements of the voting population."). Our court held: "[A]ll courts generally agree that lack of contiguity or

compactness raises immediate questions as to political gerrymandering and possible invidious discrimination which should be satisfactorily explained by some rational state policy or justification." 225 Kan. 827, Syl. ¶ 6. Finally, the court noted: "No claim or suggestion has been made by anyone that the shaping of the districts was for the purpose of minimizing or cancelling the voting strength of any racial or political element of the voting population." 225 Kan. at 835.

There would be no purpose to our court mentioning these potential claims and expressing its willingness to consider invidious discrimination in all its forms if the court believed that kind of analysis was beyond its reach as the majority now claims. The majority cannot square its retreat on this issue with our court's nine reapportionment cases since 1963. None have suggested these claims fall outside the judicial sphere for further inquiry. See *In re Substitute for House Bill 2492*, 245 Kan. 118, 125, 775 P.2d 663 (1989) ("None of the persons appearing here challenge the apportionment legislation now before us on the basis that it dilutes the vote of rural or urban voters, or other specific groups of voters, or that the districts created deviate impermissibly from 'perfect' population."); *In re House Bill No. 3083*, 251 Kan. 597, Syl. ¶ 6 ("Lack of contiguity or compactness raises immediate questions about political gerrymandering and possible invidious discrimination that should be satisfactorily explained by some rational state policy or justification."); *In re 2002 Substitute for House Bill 2625*, 273 Kan. 715, 44 P.3d 1266 (2002) (same); and *In re 2002 Substitute for House Bill 256*, 273 Kan. 731, Syl. ¶ 4, (same); see also *Harris*, 192 Kan. at 207 ("[A]n apportionment act, as any other act of the legislature, is subject to the limitations contained in the Constitution, and where such act exceeds the bounds of authority vested in the legislature and violates the limitations of the Constitution, it is null and void and it is the duty of courts to so declare.").

The majority also appears stymied at the first step of the equal protection analysis, i.e., determining whether Ad Astra 2 discriminates against similarly situated Kansans. It seems vexed with the conundrum that to "begin evaluating whether an alleged partisan gerrymander is unconstitutional, we would first need to determine what our baseline definition of 'fairness' is." Slip op. at 33. The majority says it is troubled by what it views as the lack of a discernable, legal test for deciding when "how much" political gerrymandering becomes "too much." Slip op. at 32. The majority goes on to point out that various "other states have solved this problem by codifying such clear standards in their laws." Slip op. at 33. But are they really so clear?

Among the examples the majority cites are various permutations of prohibitions on district maps which are drawn "primarily to favor or disfavor a political party." Ohio Const. art. 11, § 6; Colo. Const. art. V, § 44; see also Mich. Const. art. 4, § 6; N.Y. Const. art. 3, § 4. But how is a "favor" or "disfavor" standard less squishy than our Kansas caselaw going back more than half a century? That caselaw establishes the Legislature may not engage in "invidious" partisan gerrymandering, or that districts may not be "organized in such a way as to minimize or cancel out the voting strength of racial or political elements of the voting population . . . ." *In re House Bill No. 2620*, 225 Kan. 827, Syl. ¶ 4. And we have said when the facts indicate improper partisan gerrymandering may be present, the legislation "should be satisfactorily explained by some rational state policy or justification." *In re 2002 Substitute for Senate Bill 256*, 273 Kan. 731, Syl. ¶ 6.

What our caselaw shows is that when redistricting has a discriminatory effect on Kansas voters because of partisan affiliation or voting preferences, this violates equal protection of the laws as guaranteed by the Kansas Constitution if that action cannot withstand the appropriate level of scrutiny for the plan, i.e., if the Legislature intentionally discriminated against individuals whose viewpoints it disfavored without an

adequate governmental reason to explain what it did. Said differently, 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.

These standards can happily coexist with the inescapable truth that legislators entrusted by their fellow Kansans with drawing electoral districts will act to some degree in self-interest. But this obnoxious political reality does not make partisanship a legitimate government interest that justifies sweeping state action to suppress citizens' voting strength and split up their communities simply because they hold differing political viewpoints. It reflects that when there is discretion to modify voting districts within a vast range of possible outcomes, an adequate government rationale must defend the chosen path. Our Constitution must not permit discretion to become a tool for abuse of government power, allowing improper motives to prevail over all reason and be dominated by improper criteria for modifying district lines to achieve population equalization.

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. See *Gannon v. State*, 298 Kan. 1107, 1150, 319 P.3d 1196 (2014) (holding constitutional provision requiring Legislature to provide suitable financing for public K-12 schools supplied judicially discoverable and manageable standards for court review of Legislature's decision-making). In *Rucho*, the dissenting justices noted courts across the country had already formulated such a standard. They argued this standard eschews "judge-made conception[s] of electoral fairness" by using the state's own redistricting criteria as a baseline, requiring "difficult showings relating to both purpose and effects," and thereby invalidating "the most extreme, but only the most

extreme, partisan gerrymanders." *Rucho*, 139 S. Ct. at 2516 (2019) (Kagan, J., dissenting).

This rule against naked partisan discrimination is deeply embedded in our state's existing redistricting caselaw as previously discussed. I agree with the district court that adjudication of the partisan gerrymandering claims made here is not barred by the political question doctrine. And I agree with the district court's analysis of the remaining factors from *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

Substantial competent evidence supports the factual findings

Recall that the district court's ultimate conclusion about Ad Astra 2's unconstitutionality is not grounded in the fact that the legislation was shrouded in secrecy, had no bipartisan support, minimized substantive public input, failed to adhere to traditional guideposts for neutral redistricting, enacted with lightning speed, showed flashes of partisanship, was initially unsettling even to members of the majority party, or followed promises of a prominent majority-party state legislator to achieve four majority-party congressional districts. Rather, these are just symptoms all pointing to a fatal diagnosis in keeping with our caselaw. See *In re House Bill No. 3083*, 251 Kan. 597, Syl. ¶ 6 ("Lack of contiguity or compactness raises immediate questions about political gerrymandering and possible invidious discrimination that should be satisfactorily explained by some rational state policy or justification.").

Defendants do little to dispute the evidentiary support for the district court's findings. But let's note the essential ones for the partisan gerrymandering claim:

- The contrast between the minimal population shifts required versus the much larger shifts that occurred is poorly explained.

- Ad Astra 2 creates noncompact and irregularly shaped districts despite neutral guidelines to the contrary.
- Ad Astra 2 contains numerous unnecessary political subdivisions splits, breaks up geographically compact communities of interest, and fails to preserve the cores of existing districts.
- Kansas' political geography does not explain Ad Astra 2's partisan bias. The map's partisan bias "goes beyond any 'natural' level of electoral bias caused by Kansas' political geography or the political composition of the State's voters."
- In addition to carving up communities with significant commonality, Ad Astra 2 pairs several far-flung communities that share little in common, like the City of Lawrence into CD 1. And in CD 3, Ad Astra 2 splits Wyandotte County and pairs its southern portion with Johnson, Miami, Franklin, and Anderson Counties. As a result, a large portion of the Kansas City metro area is now paired with rural areas in southern Johnson County, as well as Miami, Franklin, and Anderson Counties.
- Ad Astra 2 cannot be justified by the purported desire to keep Johnson County whole within a single congressional district to elevate a supposed community of interest constituting the entirety of Johnson County over preserving the Kansas City metro area. The argument that Ad Astra 2 is the product of a desire to keep Johnson County whole is a post hoc rationalization.
- The district lines in the areas around Kansas City and Lawrence show clear signs of purposeful redistribution of Democratic voters between districts to prevent them from effectively achieving majority status.
- Ad Astra 2 consistently places Kansans across the northeast part of the state in districts that are far more Republican than their neighborhoods.

- Ad Astra 2 was designed intentionally and effectively to maximize Republican advantage in the state's congressional delegation and amounts to an extreme, intentional pro-Republican outlier at the statewide level.
- Three of the four districts in Ad Astra 2 are extreme statistical partisan outliers. The partisan compositions of the enacted congressional districts containing Kansas City, Topeka, Shawnee, and Lawrence are extreme pro-Republican partisan outliers compared to the simulated districts produced using the Guidelines and traditional redistricting principles.
- Ad Astra 2's dilution of Democratic voting power will obstruct plaintiffs' ability to elect and support their candidates of choice.

Each of these findings is supported by the evidentiary record. They demonstrate Ad Astra 2 intentionally treats arguably indistinguishable classes of Kansas citizens differently. Namely, citizens and communities whose voting histories reflect support for non-Republican candidates have been redistributed across congressional districts to dilute those voters' effectiveness in future elections. See *Harper v. Hall*, 380 N.C. 317, 379, 868 S.E.2d 499 (2022) (discussing potential equal protection violation arising from "classifying voters on the basis of partisan affiliation so as to dilute their votes"). And this dilution is demonstrated by the court's finding, amply supported by plaintiffs' credible expert testimony, that Ad Astra 2 is not only an intentional and effective partisan gerrymander, but also an extreme partisan outlier compared to hundreds of simulated plans based on politically neutral redistricting criteria.

Conclusions of law regarding partisan gerrymandering

Applying the law to these facts demonstrates Ad Astra 2 violates Kansans' right to equal protection of the laws. Our court's three-step equal protection analysis is well known:

> "[1] When the constitutionality of a statute is challenged on the basis of an equal protection violation, the first step of analysis is to determine the nature of the legislative classifications and whether the classifications result in arguably indistinguishable classes of individuals being treated differently. . . . [2] After determining the nature of the legislative classifications, a court examines the rights which are affected by the classifications. The nature of the rights dictates the level of scrutiny to be applied—either strict scrutiny, intermediate scrutiny, or the deferential scrutiny of the rational basis test. [3] The final step of the analysis requires determining whether the relationship between the classifications and the object desired to be obtained withstands the applicable level of scrutiny.
>
> "In regard to the first step . . . an individual complaining of an equal protection violation has the burden to demonstrate that he or she is 'similarly situated' to other individuals who are being treated differently [by the Legislature.] [Citations omitted.]" *In re A.B.*, 313 Kan. 135, 145, 484 P.3d 226 (2021).

Combined with the indisputable reality that Ad Astra 2 moves far more individuals than necessary and disregards traditional criteria for compactness and communities of interest, the plaintiffs' expert witness testimony that Ad Astra 2 would have produced the same partisan outlier patterns in statewide elections from 2016 to 2020 is telling. It shows Ad Astra 2 targets individuals and their communities who voted against Republican candidates in past races for political resettlement across the state's four congressional districts. Its impact is to harm the disfavored Kansans by denying them the acknowledged benefits from adherence to neutral redistricting guidelines like the preservation of communities of interest. And this was all done to prevent these individuals' potential, future votes against Republican candidates from harming the electoral chances of preferred future candidates. This violates state constitutional protections.

Free speech principles under the First Amendment to the United States Constitution and section 11 of the Kansas Constitution Bill of Rights typically would dictate that governmental viewpoint discrimination triggers strict scrutiny, which requires the law be narrowly tailored to serve a compelling government interest if it is to be upheld. See, e.g., *Reed v. Town of Gilbert, Arizona*, 576 U.S. 155, 163-64, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015) (strict scrutiny applies to both content-based regulation and facially content-neutral regulation that either "cannot be 'justified without reference to the content of the regulated speech'" or "were adopted by the government 'because of disagreement with the message [the speech] conveys'"); *Unified School Dist. No. 503 v. McKinney*, 236 Kan. 224, 235, 689 P.2d 860 (1984) (restriction on private speech subject to strict scrutiny). But we need not be as stringent as strict scrutiny here because, in keeping with the discussion of manageable judicial standards, Ad Astra 2 fails any test of scrutiny. To be sure, Ad Astra 2's intentional disparate treatment of Kansans based on past political speech is most certainly not even rationally related to a legitimate government interest.

This redesign goes far beyond attempting to safely retain the current partisan balance in the Kansas congressional delegation. See *In re 2002 Substitute for Senate Bill 256*, 273 Kan. at 722 (describing "safely retaining seats for the political parties" as a "legitimate political goal"). Indeed, the district court found Ad Astra 2 intentionally discriminates against voters on a partisan basis, noting the need to equalize district populations cannot explain the discrimination when Ad Astra 2 moves more than three voters to new districts for every one required by the math. And plaintiffs' expert testimony credibly showed the map's discriminatory effect cannot be explained by adherence to neutral criteria.

Defendants attempt to offer non-partisan justifications for Ad Astra 2, but to no avail. Their excuses are not supported by the evidentiary record. They argue the map achieves population equality; "keeps all incumbents in their current districts"; "keeps all but [four] of Kansas' 105 counties whole"; and "honors communities of interest across Kansas." But these rationalizations run headlong into the facts found by the district court. Population equality was necessary, yet the Legislature took this as a license to move any number of people it wanted, and hundreds of equally drawn alternative districts showed achieving mathematical precision was easily attainable without this most drastic redesign. Defendants fail to adequately explain this. Also, a map splitting more than three counties was shown to be a statistical outlier and contributed to the district court's conclusion that Ad Astra 2 in fact does not honor communities of interest. And while the incumbents may all continue to reside in their same districts, the evidence recited by the district court showed a motivating intent was to destroy the incumbency of Kansas' lone Democratic representative. In the end, the district court considered all rationales offered and explicitly concluded, the "asserted pretextual justifications for Ad Astra 2 . . . cannot withstand scrutiny."

People have a protected right to associate themselves with others of like-mind, and to voice their political opinions at the ballot box. See section 11 of the Kansas Constitution Bill of Rights. And when they do, they should not be treated dismissively or negatively by their government. What we are left with are facts demonstrating an intent to treat some voters differently based on the historical exercise of these constitutional rights. The facts show Ad Astra 2 was the vehicle for this governmental action, and no other rational, legitimate explanation for this treatment was or can be mustered.

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.

RACE-BASED DISCRIMINATION DILUTING MINORITY VOTING STRENGTH

The district court also invalidated Ad Astra 2 under the Kansas Constitution because it unconstitutionally, intentionally drew districts along racial lines and intentionally diluted the votes of racial minorities. The court held that under Ad Astra 2, "the district lines are carefully tailored to split the heart of metro Kansas City—and with it nearly a century of tradition—along its most densely minority neighborhoods." The map, the court continued, "surgically targets the most heavily minority areas" by moving more than 45,000 minority voters in metro Kansas City from CD 3 to CD 2, giving CD 3—previously home to Kansas' largest minority population—the smallest minority population of any congressional district in Kansas. The district court found defendants' neutral explanations for this stark racial divide between CD 2 and CD 3 were pretextual.

Today, the majority overturns that decision because it says plaintiffs failed to show either of two things. First, CD 3 is a majority-minority single member district, which is required under federal law to bring a minority vote-dilution claim. See *Thornburg v. Gingles*, 478 U.S. 30, 50-51, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986) (To state a claim for voter dilution under the Voting Rights Act, "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."). And second, that the Legislature used race as a predominant factor in choosing where to draw new district lines.

Regarding the first, the *Gingles* preconditions do not apply here because plaintiffs bring this action *under the Kansas Constitution*, not the federal Voting Rights Act. And in my review, the district court properly applied the equal protection principles set forth in section 2 of the Kansas Constitution Bill of Rights.

Congress enacted the Voting Rights Act of 1965 to legislatively enforce the Fifteenth Amendment to the United States Constitution and end the denial of the right to vote based on race. Pub. L. No. 89-110, 79 Stat. 437 (1965), as amended, 52 U.S.C. § 10301 et seq. (2018). The language in section 2 of the VRA closely tracked the language of the Fifteenth Amendment: "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 79 Stat. 437.

Although the VRA's section 2 provided a basis for vote-dilution claims when passed in 1965, the United States Supreme Court generally continued to analyze vote-dilution claims under constitutional equal protection principles instead of the VRA over the next decade. See *Whitcomb v. Chavis*, 403 U.S. 124, 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971); *Burns v. Richardson*, 384 U.S. 73, 86 S. Ct. 1286, 16 L. Ed. 2d 376 (1966); *Fortson v. Dorsey*, 379 U.S. 433, 85 S. Ct. 498, 13 L. Ed. 2d 401 (1965). Under these decisions, a voting district would be unconstitutional under the Fourteenth Amendment to the United States Constitution if the facts developed in a case established the district, as drawn, would "minimize or cancel out the voting strength of racial or political elements of the voting population." *Whitcomb*, 403 U.S. at 165 (citing *Fortson*, 379 U.S. at 439, and *Burns*, 384 U.S. at 88). And the language used in these cases suggests discriminatory *effects* could support a finding of unconstitutional vote dilution.

But in 1980, a plurality of the United States Supreme Court diverged from the *Whitcomb* line of cases and held racially discriminatory laws violated the Constitution only if the laws were enacted with *intent* to discriminate. *City of Mobile v. Bolden*, 446 U.S. 55, 65-70, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980). The Court also held section 2 of the VRA mirrored this constitutional standard. 446 U.S. at 60-61. In response to the

Bolden plurality, Congress amended section 2 of the VRA in 1982 to expressly ban any voting practice having a discriminatory *effect*, even if the practice was enacted for a nondiscriminatory purpose. Pub. L. 97-205, § 3, 96 Stat. 131, 134 (1982). This amended section 2 invalidated the *Bolden* discriminatory intent standard of proof for statutory racial vote-dilution claims. And because the new statutory discriminatory "results test" created a lower threshold to prove racial vote-dilution claims, almost all such claims have since been brought under the VRA.

But as reflected in *Rogers v. Lodge*, 458 U.S. 613, 102 S. Ct. 3272, 73 L. Ed. 2d 1012 (1982), the 1982 VRA amendment left *Bolden*'s intent requirement untouched in the context of constitutional racial vote-dilution claims. The *Rogers* Court held constitutional minority dilution claims are "subject to the standard of proof generally applicable to Equal Protection Clause cases." 458 U.S. at 617. The Court also held precedent "made it clear that in order for the Equal Protection Clause to be violated, 'the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.'" 458 U.S. at 617 (citing *Washington v. Davis*, 426 U.S. 229, 240, 96 S. Ct. 2040, 48 L. Ed. 2d 597 [1976], and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S. Ct. 555, 50 L. Ed. 2d 450 [1977]). As for *Washington* and *Arlington Heights*, the Court noted:

> "Neither case involved voting dilution, but in both cases the Court observed that the requirement that racially discriminatory purpose or intent be proved applies to voting cases by relying upon, among others, *Wright v. Rockefeller*, 376 U.S. 52, 84 S. Ct. 603, 11 L. Ed. 2d 512 (1964), a districting case, to illustrate that a showing of discriminatory intent has long been required in all types of equal protection cases charging racial discrimination." 458 U.S. at 617 (citing *Arlington Heights*, 429 U.S. at 265; *Washington*, 426 U.S. at 240).

The *Rogers* Court also made clear discriminatory intent can be proved by both direct evidence and circumstantial evidence:

> "'Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.' Thus determining the existence of a discriminatory purpose 'demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" 458 U.S. at 618 (citing *Arlington Heights*, 429 U.S. at 266).

The *Rogers* Court ultimately affirmed the lower courts' conclusion that a county's system of electing its Board of Commissioners at large was maintained with a discriminatory purpose. And the Court found the courts below properly considered the extensive circumstantial evidence of illegal purpose even absent direct evidence of intent to dilute minority votes. *Rogers* appears to be the last Supreme Court decision applying the standard for unconstitutional minority vote dilution, but it remains valid today and adheres to entrenched equal protection constitutional principles.

Here, plaintiffs allege—and the district court found—Ad Astra 2 intentionally dilutes minority votes in violation of the Kansas Constitution's equal protection and political power clauses. Kan. Const. Bill of Rights, §§ 1, 2. The district court began by observing that this court has construed the equal protection guarantees in section 2 to be broader than the equal protection guarantees found in the Fourteenth Amendment of the United States Constitution. The district court said this "likely means that a showing of intent is not required to establish a violation of Sections 1 and 2 of the Bill of Rights." But the court held it did not need to decide if section 2 had broader protections because "the parties agree that intentional racial discrimination is unlawful under the Kansas Constitution." And then, just like the United States Supreme Court in *Rogers*, the district court considered a host of relevant factors, made particularized factual findings, and ultimately found Ad Astra 2 intentionally dilutes minority votes and violates the Kansas Constitution.

The majority rejects the district court's analysis, holding the lower court applied the wrong legal standard. It insists the correct legal standard is described in *Gingles*, although it readily concedes the vote dilution claim in *Gingles* was based solely on the 1982 amendments to the federal VRA. And the majority summarily dismisses any distinction by declaring that both the constitutional and statutory claims "are undergirded by the same equal protection principles that preexist the VRA and simultaneously protect against unlawful minority vote dilution." Slip op. at 43. The majority relies on what amounts to a fleeting comment in a concurring opinion by Justice Clarence Thomas to hold the *Gingles* precondition test, which the Court developed pursuant to and based on the statutory language of the 1982 amendments to the VRA, is the correct legal standard to apply in this Kansas Constitution-based minority vote-dilution case. I disagree.

Both the analysis and the holding in *Gingles* are wholly grounded in the 1982 amendments to the VRA. 478 U.S. at 37-38 (noting the district court decided the statutory racial vote-dilution claim brought under the VRA did not reach appellees' *constitutional* claims). The Court emphasized the distinction between a constitutional claim and a statutory claim by pointing out the success of a VRA claim does not depend on an "intent to discriminate against minority voters." 478 U.S. at 44. And since the VRA requires only a showing of discriminatory *effect*, the *Gingles* Court used this three-part test to connect the effect of the multi-member scheme to the potential remedy: a single-member district map.

The underlying concepts making up the *Gingles* test are not constitutionally based and do not resemble the traditional tiers of scrutiny generally applied to analyze constitutional claims. Instead, *Gingles* involved a section 2 VRA challenge to a North Carolina legislative redistricting plan which created certain multi-member districts with significant, although not predominant, African-American populations. Plaintiffs sought smaller single-member districts, some of which would have effective majorities of

African-American voters. Relying exclusively on the language of amended section 2 (eliminating the intent requirement to establish a statutory violation) and the legislative history preceding the 1982 amendments, the *Gingles* plurality consolidated the statutory vote-dilution inquiry into a three-part test followed by a factual examination of the totality of the circumstances. But as a precondition to examining the totality of the circumstances, the Court held plaintiffs had to show (1) the bloc of minority voters was "sufficiently large and geographically compact" enough to constitute a majority in a single-member district; (2) the minority voters must be "politically cohesive"; and (3) the white majority must vote sufficiently as a bloc to defeat minority-preferred candidates. 478 U.S. at 50-51.

Simply put, the *Gingles* test does not apply in cases, like the one here, when the vote-dilution claim is based on traditional equal protection principles. *Gingles* applies only when a vote-dilution claim is made under the 1982 amendments to the VRA, which by the very language of the statute requires only a showing of discriminatory *effect* resulting from the challenged practice when considering the totality of the circumstances. The majority disagrees, asserting the distinction between an equal protection vote-dilution claim without a precondition requirement and a VRA vote-dilution claim with a precondition requirement is at odds with the Court's guidance in *Growe v. Emison*, 507 U.S. 25, 39-40, 113 S. Ct. 1075, 122 L. Ed. 2d 388 (1993) (citing *Gingles*, 478 U.S. at 50-51). But *Growe* is a straightforward VRA section 2 case and does not consider the separate and distinct equal protection vote-dilution claim. In *Growe*, the Supreme Court held the *Gingles* preconditions for establishing a vote-dilution claim with respect to a multimember districting plan are also necessary to establish a vote-fragmentation claim with respect to a single-member district. In so ruling, the Court determined aggrieved voters had failed to establish their VRA claim. Again, the Court analyzed the claim under the VRA and did not consider a separate and distinct equal protection vote-dilution claim.

The two other cases cited by the majority to support its assertion fare no better. The majority cites first to *Johnson v. DeSoto County Bd. of Comm'rs*, 204 F.3d 1335, 1344 (11th Cir. 2000), which stands for the legal proposition that both constitutional vote-dilution claims and VRA vote dilution claims require a showing that discriminatory intent *caused* injury. I agree. The majority also generally cites to *Lowery v. Governor of Georgia*, 506 F. Appx. 885 (11th Cir. 2013) (unpublished opinion), which is a VRA case and inapplicable to my analysis.

I would find the district court properly applied the constitutional vote-dilution analysis based on its finding of intentional race discrimination and its analysis under equal protection principles set forth in section 2 of the Kansas Constitution Bill of Rights.

At this point, we should pause to note the majority identifies two kinds of racial discrimination in redistricting prohibited by the equal protection guarantees found in section 2 of our Bill of Rights: (1) minority vote dilution; and (2) racially motivated gerrymandering. And as the plaintiffs clarified during oral arguments, their claim is intentional minority vote dilution. But the majority analyzes racially motivated gerrymandering anyway, and in doing so mistakenly concludes the Kansas Constitution is indistinguishable from the federal VRA. Again, I disagree.

Historically, minority vote dilution and racial gerrymandering cases were distinct because the constitutionally based dilution line of cases did not, under earlier interpretations by the United States Supreme Court, require a showing of intent, while a racial gerrymander did contemplate a showing of intent. See *Whitcomb*, 403 U.S. at 165 (citing *Fortson*, 379 U.S. at 439, and *Burns*, 384 U.S. at 88) (suggesting discriminatory effects were enough to support a finding of unconstitutional vote dilution). And as explained above, a racial vote-dilution claim brought under the Constitution (unlike the

VRA) must now include proof of discriminatory intent, much like the intent required in a racial gerrymandering claim. See *Rogers*, 458 U.S. at 616-19.

But despite all of this, an important difference remains—racial vote-dilution claims require only that discriminatory intent be a motivating factor. On the other hand, racial gerrymandering claims, which are not at issue here, in some cases require race to be the predominant factor. See *Miller v. Johnson*, 515 U.S. 900, 916, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995); *Arlington Heights*, 429 U.S. at 265-66.

Here, the district court found Ad Astra 2 intentionally dilutes minority voting power in violation of sections 1 and 2 of the Kansas Constitution Bill of Rights. On appeal, defendants do not dispute a redistricting plan that intentionally discriminates based on race violates the Kansas Constitution. And defendants agree the intent element is satisfied if race was a factor motivating the redistricting. In other words, race need not be the only factor or even the predominant factor. As defendants say in their brief, intentional racial discrimination occurs if race "at least in part" motivated the plan. They also acknowledge discriminatory intent may be proved by either direct evidence or indirect circumstantial evidence, and evidence of racial animus is unnecessary.

But despite the parties' agreement on the proper standard of proof under the Kansas Constitution, the majority concludes defendants are wrong and that plaintiffs' racial gerrymander claim necessarily fails because of a lack of evidence showing "that race was the *predominant* factor motivating the Legislature's decision to place a significant number of voters inside or outside of a particular district." Slip op. at 47. In support of its conclusion, the majority relies on the racial gerrymander "predominant factor" test from the U.S. Supreme Court's *Miller* opinion.

To the extent racial *gerrymandering* is even an issue presented, I disagree with the majority's conclusion that *Miller* applies to this case. Based on United States Supreme Court precedent before the VRA, I would hold equal protection guarantees under the Kansas Constitution require strict scrutiny when purposeful discrimination based on race is a *motivating* factor for official state action. See *Arlington Heights*, 429 U.S. at 265-66. Under *Arlington Heights*, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 429 U.S. at 265. And consistent with the traditional constitutional legal standards relied on by both parties here, *Arlington Heights* made clear a plaintiff asserting an equal protection claim need not "prove that the challenged action rested solely on racially discriminatory purposes" or even that racial discrimination was "the 'dominant' or 'primary' [purpose]." 429 U.S. at 265. Rather, plaintiffs need only show "proof that a discriminatory purpose has been a motivating factor in the decision" to trigger strict scrutiny. 429 U.S. at 265-66.

The *Miller* Court repeatedly cited the legal principles from *Arlington Heights* but ultimately carved out a special exception to the motivating factor test to create a new predominant factor threshold for racial gerrymandering. The *Miller* Court substantially increased the standard of proof to trigger strict scrutiny in race discrimination voting cases without explanation or justification. And in trying to figure out why the *Miller* Court increased the *Arlington Heights* burden of proof for racial gerrymander claims, one commentator reasoned:

> "*Arlington Heights* states a rule for laws intended to burden members of historically disadvantaged groups, and *Miller* states a rule for laws intended to benefit such groups. The district challenged in *Miller* was drawn for the purpose of electing a black representative, not a white one. In such a case, a racially allocative motive might provoke strict scrutiny only when that motive eclipses all others and becomes predominant. In a case where the intent to discriminate against African Americans was a motivating factor in the drawing of a district, strict scrutiny might apply under the principle of *Arlington*

Heights." Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 545-47 (2003).

Unlike *Miller*, the racial gerrymander claim addressed by the majority alleges Ad Astra 2 was passed to burden members of historically disadvantaged groups—not to benefit them. So there is no justification here to impose the higher "predominant factor" standard of proof. I do not dispute *Miller*'s "predominant factor" standard is the prevailing law in federal Fourteenth Amendment equal protection jurisprudence under the circumstances presented in that case. But as the analysis below shows, this predominant factor standard cannot prevail under the equal protection guarantees of the Kansas Constitution.

Let's begin with the text: Section 1 of the Kansas Constitution Bill of Rights provides that "[a]ll men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Section 2 provides that "[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."

Over 130 years ago, the court held, "The bill of rights is something more than a mere collection of glittering generalities." *Atchison Street Rly. Co. v. Mo. Pac. Rly. Co.*, 31 Kan. 660, Syl. ¶ 1, 3 P. 284 (1884). These rights are "binding on legislatures and courts, and no act of the legislature can be upheld which conflicts with their provisions, or trenches upon the political truths which they affirm." 31 Kan. 660, Syl. ¶ 1. Simply put, increasing the burden of proof—from showing race as a motivating factor to a predominant factor—in race discrimination voting cases conflicts with the equal rights protections in the Kansas Constitution.

As a general rule, a plaintiff who challenges a facially neutral law as a violation of equal protection must prove discriminatory intent and effect. See *Arlington Heights*, 429

U.S. at 264-65; *Washington*, 426 U.S. at 244-45. In the context of race discrimination, the definition of intent is self-evident: it occurs when a state engages in conduct with an intent (or motive) to discriminate against its citizens based on race. In my view, there is no justification in the Kansas Constitution for failing to strictly scrutinize laws on a showing that discriminatory intent based on race was a motivating factor for government action. To hold otherwise allows the government to enact laws motivated by race that deny its citizens equal protection of the laws without providing a compelling reason for doing so.

I would hold plaintiffs need only show "proof that a discriminatory purpose has been a motivating factor in the decision" because the federal predominant factor standard used by the majority infringes on the equal protection provisions of the Kansas Constitution. See *Arlington Heights*, 429 U.S. at 265-66. And again, defendants are on board with this standard of proof because their primary argument on appeal is that the district court improperly 'collaps[ed]' the intent and effect elements by considering the plan's racially discriminatory effects as evidence of racially discriminatory intent."

Consistent with the legal analysis in *Arlington Heights*, the district court considered various factors to determine whether plaintiffs satisfied their burden to prove intentional race discrimination—that race was a motivating factor when drawing the district lines for Ad Astra 2. The district court's intent analysis considered "the totality of the circumstances," with a focus on five "particularly relevant" factors:

> "(1) whether the redistricting plan has a more negative effect on minority voters than white voters,
> "(2) whether there were departures from the normal legislative process,
> "(3) the events leading up to the enactment, including whether aspects of the legislative process impacted minority voters' participation,

"(4) whether the plan substantively departed from prior plans as it relates to minority voters, and

"(5) any historical evidence of discrimination that bears on the determination of intent."

The majority criticizes the district court's consideration of these factors, calling them "unmoored from precedent"; but the United States Supreme Court in *Arlington Heights* identified most of those factors as ones to consider when deciding when race is a motivating factor for government action. 429 U.S. at 266 ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."). This analysis involves inquiry into factors such as the

"impact of the official action,"

"historical background of the decision,"

"specific sequence of events leading up to the challenged decision,"

"[d]epartures from the normal procedural sequence," and

"legislative or administrative history." 429 U.S. at 266-68.

The factors used by the district court track with United States Supreme Court precedent and are proper considerations for determining racial discriminatory intent under section 2 of the Kansas Constitution Bill of Rights.

Substantial competent evidence supports the factual findings

Let's now turn to defendants' argument that the district court's factual findings of racially discriminatory intent and effect are not supported by substantial competent evidence.

The district court found, "Ad Astra 2 treats minority votes significantly less favorably than white voters" in CD 2 and CD 3, even when controlling for partisan

affiliation. The plaintiffs' expert, Dr. Loren Collingwood, testified Ad Astra 2 treats minority Democrats even less favorably than it treats white Democrats by removing minority voters from CD 3 and into CD 2 at a rate of two to one.

Dr. Collingwood conducted a performance analysis that showed Ad Astra 2's dilutive effect. Under the prior 2012 federal court map, minority voters in CD 3 successfully elected their candidate of choice in 75% of the elections in which racially polarized voting (RPV) existed. But by moving 45,000 minority voters out of CD 3 into CD 2, Ad Astra 2 completely dilutes their vote, preventing them from electing their candidate of choice in any election in which RPV is present. And the 120,000 minority voters remaining in CD 3 can only elect their candidate of choice in 25% of the elections in which RPV is present. This means Ad Astra 2 dilutes minority votes in both CD 2 and CD 3.

Dr. Collingwood's report highlighted how Ad Astra 2 achieved this result—by intentionally separating a portion of Wyandotte County from CD 3 into CD 2 that is 66.21% minority, over three times the total minority voting age population in CD 3. To replace these voters, Ad Astra 2 adds counties that are 90.3% white. Dr. Collingwood testified Ad Astra 2 is among the starkest cuts along racial lines he has ever seen. And the district court found his testimony credible.

The district court also found Ad Astra 2 "substantively departed from prior plans as it relates to minority voters," recognizing that Wyandotte and Johnson Counties have been in the same district in their entirety for 90 of the last 100 years. And courts in previous redistricting cases explicitly recognized the need to keep Wyandotte County in a single district to avoid dilution of its minority voting strength. See *Essex v. Kobach*, 874 F. Supp. 2d 1069, 1086 (D. Kan. 2012); *O'Sullivan v. Brier*, 540 F. Supp. 1200, 1204 (D. Kan. 1982).

Under Ad Astra 2, the district court found "the district lines are carefully tailored to split the heart of metro Kansas City—and with it nearly a century of tradition—along its most densely minority neighborhoods." And it went on to detail how the map "surgically targets the most heavily minority areas" by moving more than 45,000 minority voters in metro Kansas City from CD 3 to CD 2, giving CD 3—previously home to Kansas' largest minority population—the smallest minority population of any congressional district in the state.

The district court also found defendants' neutral explanations for the stark racial divide between CDs 2 and 3 pretextual. And it held Ad Astra 2 does not dilute minority votes by mistake. In other words, it was intentional.

The district court relied on the following additional evidence of racially discriminatory intent:

- Dr. Collingwood's analysis showing voting in Kansas is racially polarized with minority voters favoring Democratic candidates.
- Dr. Jowei Chen generated 1,000 race-blind plans that showed 94.9% of the neutral plans had a higher minority population than the most Democratic district in Ad Astra 2.
- Dr. Jonathan Rodden analyzed Ad Astra 2 and found minority voters moved between districts at a much higher rate than non-minority voters and placed minority voters in districts with much lower minority populations than would have occurred under neutral redistricting criteria.
- Remarks during legislative debate revealing the Legislature was "keenly aware" of how the map would affect minority voters.

And from this, the district court concluded,

> "These factors together all point to the conclusion that the Legislature intended the result it achieved—districts drawn sharply along racial lines. All of this evidence—the serious and unique negative treatment of minority Democrats versus white Democrats and white Republicans, the stark racial divide evident in the map, the procedural and substantive deviations in the adoption of the plan, the Legislature's awareness of the map's effect on minority voters, and the statistical unlikelihood that Ad Astra 2's distribution of minority voters would have occurred absent intent—persuade the Court that the totality of the testimony and evidence, as well as the inferences fairly drawn therefrom, establish that Ad Astra 2 was motivated at least in part by an intent to dilute minority voting strength."

To summarize, substantial competent evidence supports the district court's factual finding that Ad Astra 2 was motivated by an intent to discriminate because of race to dilute minority voting strength. And from this juncture, the inquiry now turns to whether the record contains evidence to justify the discriminatory purpose of the law. This means the burden shifts to the State to demonstrate the legislation is narrowly tailored to achieve a compelling interest. See *Loving v. Virginia*, 388 U.S. 1, 11, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (racial classifications are suspect and subject to the "most rigid scrutiny"); *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) (same); *Farley v. Engelken*, 241 Kan. 663, 667, 740 P.2d 1058 (1987) (same).

Plaintiffs' race discrimination allegations were front and center at trial, but defendants offered no witness testimony or other evidence to demonstrate Ad Astra 2 was narrowly tailored to achieve a compelling interest. Defendants' attorneys did, however, appear to offer one race-neutral justification for splitting Wyandotte County in the manner that it did, although their argument is not evidence.

Counsel sought to justify the map's features based on a legislative intent to keep Johnson County in a single congressional district as a community of interest. But the

district court concluded a desire to keep Johnson County whole did not justify shifting 46% of the Black population and 33% of the Hispanic population out of CD 3 and compensating for that population loss by adding counties southwest of Johnson County that are 90.3% white. And as noted previously, the district court rejected the Johnson County justification in the partisan gerrymandering context as well.

Based on the findings of fact, I agree with the district court's conclusion. I find no evidence in the record from which to conclude Ad Astra 2's intentional discrimination to dilute minority voting strength based on race was narrowly tailored to achieve a compelling state interest. And the only race-neutral justification for Ad Astra 2 shown by the evidence is an intent to engage in partisan vote dilution, which is an invidious form of discrimination that could not justify the law. And absent the necessary showing, I would affirm the district court's conclusion that Ad Astra 2 does not survive the appropriate level of scrutiny and must be redrawn.

Finally, it is important to comment on Justice Rosen's separate dissent in which he makes a solid case for taking a more expansive view of the protections offered to Kansans by section 2 of our Bill of Rights beyond those the majority embraces under federal Fourteenth Amendment jurisprudence. In my view, it is unnecessary here to incorporate his analysis to invalidate Ad Astra 2 for the reasons explained. In this litigation, all parties agreed intentional discrimination is prohibited by our Kansas Constitution Bill of Rights, and neither the text of our Constitution nor our state caselaw adopts a contrary view. But Justice Rosen's reasoning remains quite sound, if unnecessary under these facts. Regardless, his dissent simply bolsters my condemnation of Ad Astra 2.

CONCLUSION

Before wrapping up, I need to mention one other thing bothering me: the Solicitor General commented in his brief about Judge Klapper's political party affiliation as a Democrat. The Solicitor General noted Judge Klapper was elected as a district court judge in Wyandotte County in 2018 as a member of the Democratic Party and would be up for reelection this year. His suggestion seemed to be this was somehow relevant within the totality of the circumstances. He went on write that "forcing judges to play referee" with politicians inevitably leads to questions about their impartiality, and "all the more so where, as here, *the judge was elected by partisan election as a member of the party in whose favor the call went*." (Emphasis added.)

When asked about this at oral argument, the Solicitor General said, "We think it is a relevant fact that the case was decided by an elected partisan judge." Adding, "And it is the case that in this case the plaintiffs chose to file the case in a district where the . . . partisan elected judges are all members of the Democratic Party." He then made the point, "The district judge . . . basically wholesale adopted the findings and facts and conclusions of law that were submitted by the plaintiffs. . . . He essentially made virtually every ruling on contested issues of fact and law in favor of the plaintiffs."

Curiously, there was no mention a Republican governor initially appointed Judge Klapper to the district court bench to fill a mid-term vacancy in September 2013. He was then elected to full terms in both 2014 and 2018. And I would think if an argument like this had any proper purpose, this missing background might be meaningful. But to be clear, there is nothing in this court record or anything written by any member of this court raising any credible notion Judge Klapper ruled as he did based on political sympathies instead of his good-faith view of the evidence and the law.

The Solicitor Division represents the State in civil and criminal appeals. From my experience, it does so professionally. And I would be the first to concede inartful or foolish things are said in high-profile litigation. But make no mistake, this is playing with dangerous stuff. It has no place as advocacy in a Kansas courtroom without a very solid factual foundation that is wholly lacking here. See *MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc.*, 157 F.3d 956, 963 (2d Cir. 1998) ("It is intolerable for a litigant, without any factual basis, to suggest that a judge cannot be impartial because of his or her race and political background."); see also *State v. Logan*, 236 Kan. 79, 88, 689 P.2d 778 (1984) (holding it would be "too far-reaching" to conclude judge had a "prosecution bias" because judge's son worked in a district attorney's office); *Higganbotham v. Oklahoma ex rel. Oklahoma Transp. Com'n*, 328 F.3d 638, 644 (10th Cir. 2003) (finding judge's recusal not warranted even though judge's son was married to governor's daughter, judge and governor were of the same political party, and governor was instigating political force behind the dispute); *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002) (affirming trial judge's decision *not* to recuse even though judge was an Episcopal Church member and defendant was an Episcopal church.); *Karim-Panahi v. U.S. Congress*, 105 Fed. Appx. 270, 274-75 (D.C. Cir. 2004) (unpublished opinion) (affirming denial of recusal based on allegations judge was "biased because of her 'political-religious connections' and her alleged loyalty to those who selected, confirmed and appointed her"); *United States ex rel. Hochman v. Nackman*, 145 F.3d 1069, 1076-77 (9th Cir. 1998) (fact judge contributed to law school alumni association at university affiliated with medical clinic did not require recusal in action by clinic employees alleging false claims by clinic administrators); *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1117 (4th Cir. 1988) (judge's past Sierra Club membership before appointment did not require recusal from case in which Sierra Club was a party); *United States v. State of Ala.*, 828 F.2d 1532, 1543 (11th Cir. 1987) (preappointment views expressed by judge as a political figure and state senator did not indicate he prejudged the legal question).

For the reasons explained, I would affirm the district court ruling invalidating Ad Astra 2. It violates plaintiffs' right to equal protection of the laws by targeting them and other similarly situated Kansans by intentionally diluting their voting strength, without any other appropriate, evidence-backed rationale to explain the redistricting choices made. Moreover, Ad Astra 2 unconstitutionally discriminates against Kansans by using race as a motivating factor in drawing the district lines.

ROSEN, and STANDRIDGE, JJ., join the foregoing concurring and dissenting opinion.

APPENDIX 2: UNPUBLISHED OPINIONS AND BRIEFS

2022 WL 1410729
Only the Westlaw citation is currently available.
United States District Court, W.D. Texas, El Paso Division.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al., Plaintiffs,

v.

Greg ABBOTT, in his official capacity as Governor of the State of Texas, et al., Defendants.

Roy Charles Brooks, et al., Plaintiffs,

v.

Greg Abbott, in his official capacity as Governor of the State of Texas, et al., Defendants.

No. 3:21-CV-259-DCG-JES-JVB [Lead Case], No. 1:21-CV-991-LY-JES-JVB [Consolidated Case]
|
Signed 05/04/2022

Synopsis

Background: Voting rights organizations brought action alleging that Texas' redistricting map for state senate was result of intentional vote dilution and racial gerrymander, in violation of Fourteenth and Fifteenth Amendments. Plaintiffs moved for preliminary injunction.

Holdings: A three-judge panel of the District Court held that:

plaintiffs were not likely to succeed on merits of their claim that redistricting map was result of intentional vote dilution or racial gerrymander;

alleged violation of plaintiffs' equal protection rights constituted irreparable harm; and

public interest and balance of equities did not favor issuance of preliminary injunction.

Motion denied.

PRELIMINARY-INJUNCTION MEMORANDUM OPINION AND ORDER

David C. Guaderrama, Jeffrey V. Brown, United States District Judge, Jerry E. Smith, United States Circuit Judge

***1** This case concerns a district of the Texas Senate centered in southern Tarrant County. Until recently, Senate District ("SD") 10 was contained entirely within Tarrant County. But as part of the recent redistricting, the Texas Legislature redrew the district, removing portions of Tarrant County and adding seven rural counties. The new district is significantly more Republican and significantly more Anglo.

Plaintiffs seek a preliminary injunction barring Texas from using the newly enacted map in the 2022 election cycle. Though Plaintiffs have also alleged that the new map has discriminatory effects that violate Section 2 of the Voting Rights Act ("VRA"), they do not press that theory in seeking this injunction. Instead, they advance two overlapping theories: The legislature engaged in intentional dilution of minority voting power, and it engaged in racial gerrymandering.

This three-judge Court conducted a four-day hearing involving thirteen witnesses and 175 exhibits to assess Plaintiffs' request for preliminary relief. As explained below, Plaintiffs have not made the showings necessary to entitle them to a preliminary injunction.

Most importantly, they have not demonstrated a likelihood of success on the merits—although the new senate map may disproportionately affect minority voters in Tarrant County, and though the legislature may at times have given pretextual reasons for its redistricting decisions, Plaintiffs have pointed to no evidence indicating that the legislature's true intent was racial. On the remaining preliminary-injunction factors, Plaintiffs have demonstrated that they would suffer an irreparable injury, but they have failed to demonstrate that either the balance of equities or the public interest weighs in their favor.

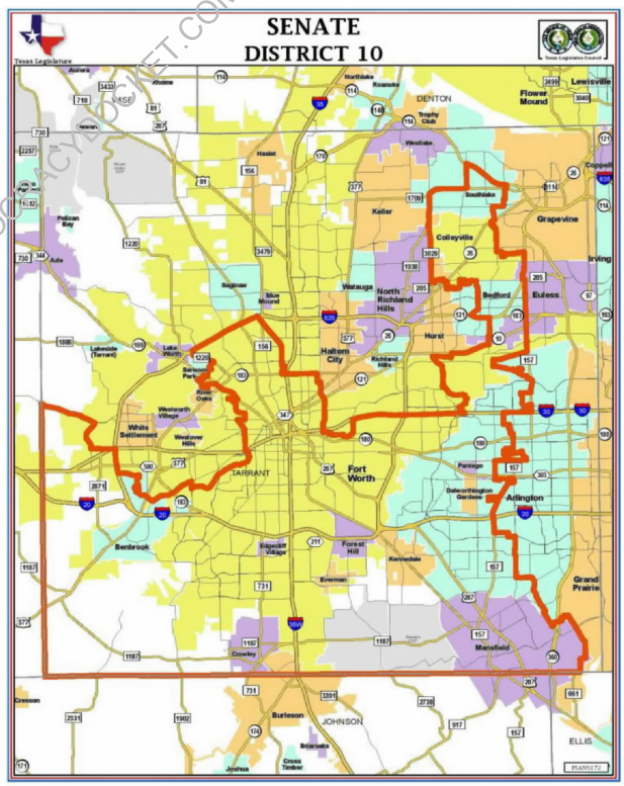
Because Plaintiffs have failed to carry their burden, the Court DENIES a preliminary injunction. Also, having considered Plaintiffs' Rule 65(a)(2) motion to consolidate these preliminary findings with a final merits determination, the Court DENIES that motion as well.

CONTENTS

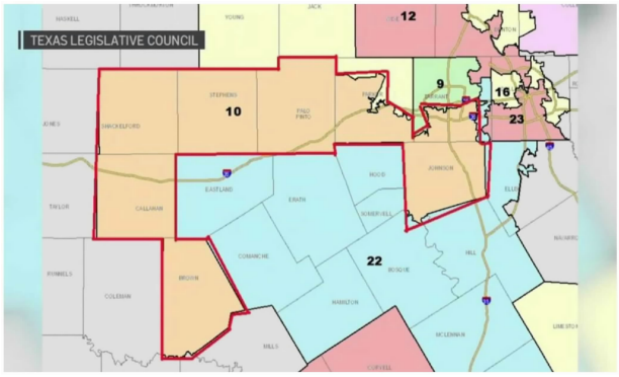
I. BACKGROUND

A. Senate District 10

***2** SD 10 is one of thirty-one districts that elect members of the Texas Senate. Benchmark SD 10 (that is, the district as it existed per the 2010 census) was entirely within Tarrant County, as shown below:



The new SD 10, however, is, to say the least, more geographically dispersed—in addition to a reduced portion of Tarrant County, in the northeast corner of the district, the district includes all or part of seven less-populous counties to the south and west. The new SD 10 is shown below:



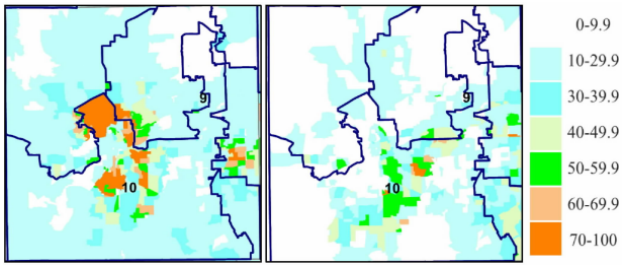
The district is currently represented by Senator Beverly Powell, a Democrat, and has experienced partisan swings for at least two decades. It was once a Republican bastion, and initially remained one after the 2001 redistricting cycle, when it was redrawn to roughly its benchmark borders. But in 2008, it elected Senator Wendy Davis, a Democrat. The seat then flipped back to Republicans in 2014, and flipped yet again in 2018, when Senator Powell was elected. The district's recent electoral history is summarized in Defendants' Exhibit 17:

Raw Data*

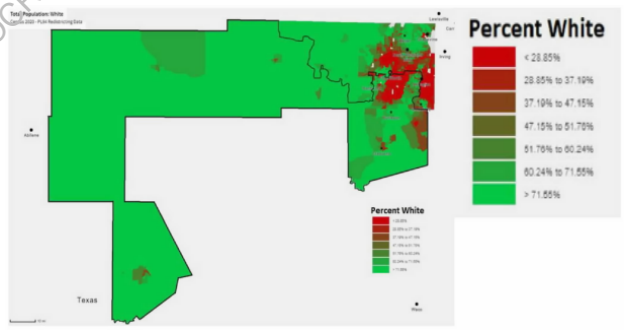
Year	R	D	Margin (R)
2002	58.7	39.9	18.8
2004	59.3	40.1	19.2
2008	47.5	49.9	-2.4
2012	48.9	51.1	-2.2
2014	52.8	44.7	8.1
2018	48.2	51.7	-3.5

In addition to its partisan performance, benchmark SD 10 is notable, for this Court's purposes, for its racial and ethnic makeup. According to the 2015–2019 ACS,[1] a source credited by both parties, benchmark SD 10 is 61.5% minority and 39.5% Anglo; more specifically, it is 32.2% Hispanic, 21.5% Black, and 5.7% Asian. Its voting age population ("VAP") is 43.9% Anglo, 28.8% Hispanic, 20.3% Black, and 5.5% Asian. Its *citizen* voting age population ("CVAP") is 53.9% Anglo, 20.4% Hispanic, 20.9% Black, and 3.6% Asian. Pls' Ex. 44 at 4. The district was thus not majority-minority by CVAP according to the five-year ACS figures, but the parties dispute whether it may have since become majority-minority. The Court returns to that dispute below.

Plaintiffs' Exhibits 66 and 68 illustrate the Hispanic (left) and Black (right) population distribution, measured by VAP, overlaid on the benchmark map of Tarrant County:



***3** As the Court noted above, the new SD 10, compared to the benchmark, is both significantly more Republican and significantly more Anglo. The counties appended to Tarrant County are populated mostly by rural Anglos who tend by a large margin to vote Republican. Pls.' Ex. 44 at 10. With those voters added to the district and many in the Fort Worth area removed, the district's 2020 presidential election result would have been quite different. President Biden won 53.1% of the vote in the benchmark district, but President Trump would have won 57.2% under the new map. Defs.' Ex. 11, 16. In terms of race, the new district is still only 49% Anglo, compared to 28.2% Hispanic, 17.7% Black, and 3.4% Asian. But Anglos constitute 53.3% of VAP and 62.2% of CVAP. Pls.' Ex. 44 at 6. Plaintiffs' Exhibit 44 provides a visualization of the Anglo population's distribution in the new district:



B. Previous Litigation

SD 10 has been subject to redistricting litigation before. Most notably for our purposes, the district was the sole state senate district at issue in a 2012 decision by the U.S. District Court for the District of Columbia. *See Texas v. United States*, 887 F. Supp. 2d 133, 162 (D.D.C. 2012) (three-judge court), *vacated on other grounds*, 570 U.S. 928, 133 S.Ct. 2885, 186 L.Ed.2d 930 (2013) (hereinafter "*Texas Preclearance Litig.*"). That court refused to allow Texas to redraw SD 10 along lines similar to the current plan. *See id.* at 163–66.

That case was decided under the "preclearance" framework established by Section 5 of the VRA. Under that framework, which has since been invalidated, *see Shelby County v. Holder*, 570 U.S. 529, 557, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013), certain states, including Texas, were required to

seek preapproval for changes to their election rules, including redistricting. Importantly, the states seeking preclearance bore the burden to show that their proposed changes were nondiscriminatory. *See Texas Preclearance Litig.*, 887 F. Supp. 2d at 163.

In the 2012 decision, the three-judge district court concluded that Texas had not carried its burden to show that the redrawing of SD 10 was enacted without discriminatory intent. *Id.* at 166. In reaching that conclusion, the court considered emails, procedural omissions, and differing treatment of senators from majority-minority districts, suggesting that supporters of the redrawing acted secretively and were not in fact open to outside input on the new senate map. *See id.* at 163–66. That court's decision applied a legal standard different from the one at issue here, and this Court, of course, is not bound by its findings of fact. But the decision was public knowledge, and it would plausibly have been known to many of those who served in the Texas Senate when it was decided.

On the other hand, SD 10 featured less prominently in the series of redistricting cases heard last decade by a different three-judge court within this district. Notably, the district was not at issue in *Perez v. Abbott*, 253 F. Supp. 3d 864 (W.D. Tex. 2017) (three-judge court). That decision concerned Texas's federal congressional map rather than its state senate map. *See id.* at 873. Thus, though the court found impermissible racial discrimination in the drawing of congressional districts around Fort Worth, *see id.* at 938, it did not address SD 10, and its decision is not part of SD 10's litigation history.

C. The 2021 Redistricting Process

The details of Texas's redistricting process are key to this Court's analysis of whether the legislature acted with discriminatory intent. So the Court revisits that process below. This introductory section is only a high-level summary.

The Texas Legislature ordinarily conducts redistricting during its regular session immediately following the release of the U.S. Census data. But this year, the COVID–19 pandemic delayed that release by several months. So on September 7, 2021, which was promptly after the census data was made public, Governor Abbott called a special thirty-day session of the legislature to consider reapportionment beginning on September 20. Defs.' Ex. 25.

***4** But legislators had been discussing potential district lines long before that. Of particular note are three meetings between the staffs of Democratic Senator Powell, who represents SD 10, and Republican Senator Joan Huffman, who chaired the redistricting committee.

The first meeting occurred on February 12, 2020, between staffers for both senators. Pls.' Ex. 22 at 1. Rick Svatora, deputy chief of staff to Senator Powell, took handwritten notes. *Id.* According to those notes, Sean Opperman, chief of staff to Senator Huffman, told his counterparts to expect "very little change" because SD 10 was already close to ideal size. Pls.' Ex. 23 at 2.

The second meeting, which included both senators and members of their staffs, occurred on November 19, 2020. Pls.' Ex. 6 at 2. There, Garry Jones, chief of staff to Senator Powell, recalls that either Opperman or Senator Huffman acknowledged that SD 10 was majority-minority. *Id.*

The third meeting was September 14, 2021, after Governor Abbott had called the special session, between both senators and staff, including Anna Mackin, special counsel to Senator Huffman and an attorney with experience representing Texas in redistricting litigation. *Id.* at 3. At that meeting, Senator Huffman and her staff revealed their plans to redraw SD 10 by adding several rural counties. Pls.' Ex. 2 at 2.

Senator Powell objected and, as part of her argument against the plan, handed the participants copies of maps of the district shaded to indicate the distribution of racial groups. *Id.* at 2–3. As she did so, Senator Powell read aloud the headers of each map; Senator Huffman looked at each map and asked that all present initial and date the maps, which they did. *Id.* at 3. Jones recalls Mackin's remarking that the conversation was making her "uncomfortable." Pls.' Ex. 6 at 4. In addition to those meetings, Senator Powell and her staff sent various letters and emails to Senator Huffman and her staff, and to the Senate more generally, detailing the racial implications of the proposed changes to SD 10. Pls.' Ex. 11.

Senator Huffman, meanwhile, insisted that she was not considering race at all in her redistricting decisions. During an October 4 hearing, she remembered the September 14 meeting differently from the way Plaintiffs describe it—she claimed that she had looked at the racially shaded maps for "less than a second" and that when she realized each had racial data, she "turned it over flat and ... said, 'I will not look at this.' " Pls.' Ex. 41 at 17.

Senator Powell and Jones expressly contradict that narrative. Similarly, Opperman responded to an email from Jones to say that he had closed the attachments immediately after realizing they contained racial data. Pls.' Ex. 12. Senator Huffman admitted she was aware that "there are minorities that live all over this state" but insisted she "blinded [her]self to that as [she] drew these maps." Pls.' Ex. 41 at 21. After drawing the maps, she ensured that they underwent a legal compliance check to avoid violating the VRA. *Id.* at 8.

Senator Huffman's office then released the full Senate plan on September 18. Pls.' Ex. 15. But she then announced amendments significantly affecting the shape of SD 10 on September 23, the day before a scheduled public hearing on the Senate plan. Defs.' Ex. 58 at 4–5. During that hearing, on September 24, Senator Huffman stated,

> ***5** My goals and priorities in developing these proposed plans include first and foremost abiding by all applicable law, equalizing population across districts, preserving political subdivisions and communities of interest when possible, preserving the cores of previous districts to the extent possible, avoiding pairing incumbent members, achieving geographic compactness when possible, and accommodating incumbent priorities also when possible.

Id. at 2. Plaintiffs draw attention to the absence of "partisan advantage" from her list of considerations. At that hearing and subsequent ones, many members of the public testified, including prominent individuals from benchmark SD 10 who complained of the reduction in minority voting strength. Pls.' Ex. 16 at 2–20.

On September 28, the committee rejected an amendment that would have restored benchmark SD 10. Pls.' Ex. 54 at 10–13. Meanwhile, Senator Huffman claimed that "addressing partisan considerations" had been one of her redistricting criteria. Defs.' Ex. 62 at 2. Later, during an October 4 floor debate, Senator Huffman described the race-neutral process related above and again listed the criteria she used—without mentioning partisanship. Pls.' Ex. 41 at 7. But there, Senator Powell was asked by a fellow Democrat, "Do you believe that your district is being intentionally targeted for elimination as it being a Democratic trending district?" She answered, "Absolutely, absolutely." Pls.' Ex. 41 at 49.

The Senate passed Senator Huffman's plan as amended, but one Republican voted against it. *Id.* at 66. That was Senator Kel Seliger, who chaired the Senate redistricting committee in the last round of districting but who is now at odds with many in his own party. Defs.' Ex. 40. Senator Seliger explains his choice by claiming that the stated redistricting criteria (not including partisanship) were "pretext" and that "it was obvious to [him]" that the redrawing of SD 10 violated the VRA and the Constitution. Pls.' Ex. 1 at 2–3. Senator Seliger later clarified, however, that his main objection to SB 4 concerned the redrawing of his own district—SD 31—rather than SD 10. R. at 4:48–49. Meanwhile, three Democrats—Senators Hinojosa, Lucio, and Zaffirini—voted for the plan but signed a statement claiming that the redrawing of SD 10 violated the VRA. Pls.' Ex. 40 at 5–6.

SB 4 proceeded to the House, where it passed on a compressed time schedule, despite the objections of various Democratic representatives. Defs.' Ex. 60 at 237–56, 279. Defendant Governor Abbott signed the bill into law.

D. Procedural History

This action is one of several consolidated before this three-judge court. The first was filed on October 18, 2021, by the League of United Latin American Citizens (LULAC), along with other organizations. Dkt. 1. The *LULAC* plaintiffs are individual voters and a coalition of organizations that seek an injunction against the maps for the State House, State Senate, Congress, and State Board of Education. Dkt. 1. The *LULAC* plaintiffs argue that the newly enacted plans would violate their civil rights by unlawfully diluting the voting strength of Hispanics. Dkt. 1. Because the suit challenges the apportionment of congressional and state legislative districts, a three-judge court was convened in that action under 28 U.S.C. § 2284(b). Dkt. 3.

This case was filed on November 3 in a separate division of the same federal district. *Brooks v. Abbott*, No. 1:21-cv-991 (W.D. Tex.). On November 19, the Court issued an order consolidating *LULAC* with six additional cases,[2] including the case involving the *Brooks* plaintiffs' challenge to SD 10. Dkt. 16.

***6** Meanwhile, on November 15, Texas filed its first motion to dismiss the *LULAC* plaintiffs, in part arguing that Section 2 of the VRA does not confer a private cause of action. Dkt. 12 at 16. Then, on November 19, Texas moved to dismiss another group of plaintiffs, including the organization Voto Latino, again arguing in part that Section 2 of the VRA does not confer a private cause of action. Dkt. 22 at 1.

The *Brooks* plaintiffs moved for a preliminary injunction as to SD 10 on November 24. Dkt. 39. They contend that the

legislature unlawfully broke up a minority crossover district. *Id.* at 3–5. Texas moved to dismiss the *Brooks* plaintiffs' claims on November 29, maintaining that the complaint did not allege facts sufficient to show the legislature's discriminatory intent, Dkt. 43 at 10–13, or facts to maintain a disparate-impact claim, *id.* at 2–10.

On November 30, the United States submitted a Statement of Interest under 28 U.S.C. § 517, expressing its support for the availability of a private cause of action to enforce Section 2 of the VRA. Dkt. 46 at 1. On December 3, this Court partially denied Texas's motion to dismiss the *LULAC* plaintiffs for want of a private cause of action, concluding that, under current caselaw, Section 2 includes a private cause of action. Dkt. 58 at 1–2.

The Court held the *Brooks* plaintiffs' motion for a preliminary injunction in abeyance on December 2 to conduct a scheduling conference, Dkt. 56 at 1–2, which occurred on December 7, Dkt. 76. That same day, the court set a briefing schedule for the *Brooks* plaintiffs' motion for a preliminary injunction. Dkt. 70 at 1–2. The following day, the Court set a hearing date for the motion to be on January 25, 2022. Dkt. 77.

The Court dismissed the complaint of another plaintiff, Damon Wilson, on December 3, 2021, for lack of standing. Dkt. 63 at 1–3. Wilson tried to amend his complaint on December 13. Dkt. 86. Because he failed to request the Court's leave before filing an amended complaint and because he would not have been able to establish a concrete injury-in-fact, the Court struck the amendment and dismissed his action on February 8, 2022. Dkt. 187 at 5.

Texas moved to dismiss two more complaints, those of the *MALC* and *NAACP* plaintiffs, on December 9. Dkts. 80, 82. The next day, the Court consolidated *United States v. Texas*, No. 3:21-CV-299 (W.D. Tex.), with the present case. Dkt. 83. On December 15, the Court consolidated *Fischer v. Abbott*, No. 3:21-CV-306 (W.D. Tex.), with the present case. Dkt. 92.

After receiving proposed scheduling orders from the parties, the Court set the scheduling order for the consolidated cases on December 17. Dkt. 96. A final trial on the merits was set for September 27, 2022. Dkt. 96 at 4. The scheduling order was amended on December 27, 2021, with the trial date changed to September 28, 2022. Dkt. 109.

Texas objected to several of the *Brooks* plaintiffs' preliminary-injunction exhibits on December 20, 2021. Dkt. 103. The *Brooks* plaintiffs timely filed their witness and exhibit lists as well as their designation of expert witnesses on January 7, 2022. Dkts. 129–131. Texas timely filed its witness and exhibit lists and designation of expert witnesses on January 14. Dkts. 140–142. Both sides filed amended exhibit lists on January 24. Dkts. 157, 160. The next day, the *Brooks* plaintiffs filed a second amended list, and the day after that, Texas filed a second amended list. Dkts. 162, 167.

***7** The Court denied Texas's motion to dismiss the *Brooks* plaintiffs' complaint on January 18, holding that they had pleaded plausible discriminatory-effects and discriminatory-intent claims. Dkt. 144 at 1–2.

The parties in the other consolidated actions announced that they would not pursue a preliminary injunction, leaving the *Brooks* plaintiffs as the only parties seeking that relief. The Court held a hearing on the motion for a preliminary injunction from January 25 until January 28. Dkts. 183–186. The Court heard testimony from, among others, two expert witnesses from Plaintiffs, one expert witness from Defendants, and Senators Powell and Huffman. During the hearing, Plaintiffs argued that, if Senator Huffman testified, she would entirely waive her legislative privilege. R. at 5:147–48. Defendants replied that she would not testify as to privileged conversations, but only as to public statements. R. at 5:149–51. The Court determined on the record that she would not categorically waive her privilege by testifying. R. at 5:152.

Meanwhile, the parties raised other objections to one another's exhibits but eventually withdrew all but one of those objections. R. at 8:4–5. The one exception was Plaintiffs' Exhibit 102, a transcript of text messages that Defendants contended was hearsay, had not been properly authenticated, and lacked relevance. *Id.* at 8:4. The Court admitted that exhibit but noted that it would assign it due weight in light of those objections. R. at 9:4.

On February 1, 2022, the Court denied Plaintiffs' motion for a preliminary injunction in a brief order. Dkt. 176 at 3. The Court issued that order promptly to permit the March 1, 2022, primary to be conducted on schedule as designated by statute. The Court promised to state its reasoning "in a forthcoming opinion," *id.*, and does so in the instant memorandum opinion and order.

II. GOVERNING LAW

A. Standard of Review

A plaintiff seeking a preliminary injunction must make four showings: "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). In evaluating those requirements, this Court is mindful that preliminary injunctions are "extraordinary remed[ies] never awarded as of right." *Id.* at 24, 129 S.Ct. 365. Thus, Plaintiffs have the burden of persuasion and are required to "clearly carr[y]" it "on all four requirements." *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 329 (5th Cir. 2005) (quotation omitted).[3]

B. Intentional Vote Dilution and Racial Gerrymandering

***8** Plaintiffs advance two legal theories to demonstrate likelihood of success on the merits: (1) Defendants have engaged in intentional vote dilution; and (2) Defendants have engaged in racial gerrymandering. Plaintiffs do *not* press, at least at this stage, their theory that Defendants have committed a purely statutory violation of Section 2 of the VRA. Understanding the implications of that choice requires a brief review of voting rights caselaw.

The VRA was enacted in 1965. Among its several provisions was Section 5, which has since been invalidated, and Section 2, which is most relevant for our purposes. As initially enacted, that section provided that "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437. In *City of Mobile v. Bolden*, a plurality read that language as having "an effect no different from that of the Fifteenth Amendment." 446 U.S. 55, 61, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) (plurality opinion). And that was a problem for voting-rights plaintiffs, because facially neutral state actions violate the Fifteenth Amendment "only if motivated by a discriminatory purpose." *Id.* at 62, 100 S.Ct. 1490.

Partly in response to that decision, Congress amended Section 2 in 1982, adding a new subsection. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97–205, § 3, 96 Stat. 131, 134, *codified in relevant part at* 52 U.S.C. § 10301. That subsection clarified that a violation was established if "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by" all racial groups such that their "members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

The Supreme Court interpreted that new language in *Thornburg v. Gingles*, to mean that Section 2, unlike the Constitution, could be violated even if a state did not act with a racial motive. 478 U.S. 30, 35, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). The Court also took a broad view of discriminatory effect, such that Section 2 generally requires the creation of legislative districts where a racial minority is (1) large and geographically compact, (2) politically cohesive, and (3) otherwise unable to overcome bloc voting by the racial majority. *See id.* at 50–51, 106 S.Ct. 2752. "*Gingles* claims," as they are sometimes called, are regularly brought by voting-rights plaintiffs today, including Plaintiffs here, who listed a discriminatory-effects claim in their initial complaint. Dkt. 7 Ex. 7 at 27.

But in seeking a preliminary injunction, Plaintiffs do not present their *Gingles* theory. Instead, they rest primarily on a theory of intentional vote dilution—that is, the kind of theory that would have been viable even before the 1982 amendments. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481–82, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997) (explaining the amendments' effect). Such theories are seldom pursued because, at least according to conventional wisdom, they are more difficult to prove than are effects-only Section 2 claims. *See, e.g.*, *Harding v. County of Dallas*, 948 F.3d 302, 313 n.47 (5th Cir. 2020). We do not speculate on why Plaintiffs have made this choice, but we observe that it presents this Court with a relatively undeveloped body of precedent. *See Perez*, 253 F. Supp. 3d at 942.

***9** As distinguished from the more specialized set of doctrines that has arisen from the *Gingles* caseline, intentional-vote-dilution theories call for the application of general constitutional principles. The theoretical origin of those principles is not entirely obvious. Although *Bolden* spoke of the Fifteenth Amendment, *see Bolden*, 446 U.S. at 60–61, 100 S.Ct. 1490 (plurality opinion), *Reno* suggested that both the Fourteenth and Fifteenth Amendments were relevant to the constitutionality of vote dilution, *see Reno*, 520 U.S. at 481, 117 S.Ct. 1491.[4]

Despite that ambiguity, courts evaluating intentional-discrimination claims in the voting-rights context fall back on doctrines established in Equal Protection cases. *See id.* at 481–82, 117 S.Ct. 1491. And in that context, discriminatory purpose means more than awareness of a discriminatory effect—instead, it requires a plaintiff to establish that a state decisionmaker acted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979).

Still, the decisionmaker need not explicitly spell out its invidious goals—a court may sometimes infer discriminatory intent where an act has predictable discriminatory consequences. *See id.* at 279 n.25, 99 S.Ct. 2282; *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009). In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266–68, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), the Court listed five factors that courts may look to in drawing such inferences: (1) discriminatory effect, (2) historical background, (3) the sequence of events leading up to a challenged decision, (4) departures from normal procedure, and (5) legislative history.[5] But the Court stressed that those factors are not exhaustive and that the inquiry is highly sensitive and fact-bound. *See id.* at 266–68, 97 S.Ct. 555.

Turning to Plaintiffs' second theory of liability, the history of racial gerrymandering claims is more straightforward. The seminal case is *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). There, in an attempt to comply with *Gingles*, North Carolina had drawn two unnaturally shaped Black-majority congressional districts. *See id.* at 635–36, 655–56, 113 S.Ct. 2816. The Supreme Court held that the plaintiffs could challenge those districts under the Fourteenth Amendment's Equal Protection Clause insofar as "they rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race." *Id.* at 649, 113 S.Ct. 2816.

***10** The Court has since clarified that, to succeed in such a challenge, plaintiffs must show that race was the "predominant factor" in redistricting, such that "the legislature subordinated traditional race-neutral districting principles ... to racial considerations." *Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). If such a showing is made, the state must demonstrate that its use of race was narrowly tailored to a compelling interest. *See Shaw*, 509 U.S. at 653, 113 S.Ct. 2816.

Shaw began a pattern in which plaintiffs brought racial gerrymandering claims *in opposition to* perceived excesses under *Gingles.* Sometimes those plaintiffs are Republicans who oppose the creation of majority-minority districts that are predicted to favor Democratic candidates. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 957, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion). At other times they are Democrats who fear that states are packing their minority co-partisans into as few districts as possible. *See, e.g.*, *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 260, 135 S.Ct. 1257, 191 L.Ed.2d 314 (2015). As a result, the doctrine associated with racial gerrymandering is relatively easy to disentangle from Section 2 jurisprudence.

But while Plaintiffs' theories may have different origins and tend to be deployed differently, they have strong substantive overlap. Both require Defendants to have acted purposefully to diminish the voting strength of minorities in SD 10, and both are rooted at least partly in the Fourteenth Amendment. Indeed, it would not be impossible to read *Shaw* and later racial-gerrymandering cases as merely elaborating upon the intentional-vote-dilution theory sketched in *Bolden* and *Reno.* But the Fifth Circuit continues to treat intentional vote dilution as a legal harm distinct from racial gerrymandering, *see, e.g.*, *Harding*, 948 F.3d at 312, as does the Supreme Court, *cf. Shaw*, 509 U.S. at 652, 113 S.Ct. 2816; *Abbott v. Perez*, —— U.S. ——, 138 S. Ct. 2305, 2314, 201 L.Ed.2d 714 (2018) (describing the two theories separately). And this Court does so as well.

There are several differences between intentional vote dilution and racial gerrymandering, the most important of which for present purposes is quantitative: Plaintiffs must make a stronger showing to demonstrate racial gerrymandering than to show intentional vote dilution. While intentional discrimination means only that a decisionmaker acted "at least in part" with a discriminatory purpose, *Feeney*, 442 U.S. at 279, 99 S.Ct. 2282, racial gerrymandering requires that the decisionmaker "subordinated" other redistricting considerations to race, *Miller*, 515 U.S. at 916, 115 S.Ct. 2475. Thus, Plaintiffs may show intentional vote dilution merely by establishing that race was *part* of Defendants' redistricting calculus, but to show racial gerrymandering they must go further and prove that race *predominated* over other considerations such as partisanship.[6] If, as we conclude, Plaintiffs fail to make the first showing, they logically cannot make the second.

There are also a few qualitative differences between intentional vote dilution and racial gerrymandering that are less relevant at this stage. The two theories differ in how they conceive of a plaintiff's legal injury.

***11** The injury in an intentional-vote-dilution claim is the same as it is for any other intentional-discrimination claim: The state has subjected minorities to invidious discrimination. *See, e.g.*, *Bolden*, 446 U.S. at 62, 100 S.Ct. 1490 (plurality opinion). The injury inflicted by racial gerrymandering is more abstract. That injury arises when district lines "reinforce[ ] the perception that members of the same racial group ... think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw*, 509 U.S. at 647, 113 S.Ct. 2816. That difference was important to this Court's determination of which Plaintiffs had standing to bring which claims, *see* Dkt. 119 at 3–5, though it does not alter the merits.

Separately, racial gerrymandering has traditionally been subject to a narrow-tailoring defense, while intentional vote dilution has not. *See, e.g.*, *Perez*, 253 F. Supp. 3d at 891, 962 (conducting a narrow-tailoring analysis in the racial-gerrymandering context but not in the intentional-vote-dilution context). The theoretical basis for that difference is less clear, but the Court does not confront that uncertainty here because Defendants have not presented a narrow-tailoring defense to either theory.

Thus, the most relevant distinction between Plaintiffs' two theories at this stage is that, though both require discriminatory intent, racial gerrymandering requires a stronger showing. If Plaintiffs fail to demonstrate a likelihood of success on their intentional-vote-dilution theory, they will automatically fail on their racial-gerrymandering theory. Because the Court concludes that Plaintiffs do fail on their first theory, we do not separately consider the second one.

C. Discriminatory Effect and the Role of *Gingles*

As explained above, this is not a *Gingles* action. But *Gingles* addresses discriminatory effect, which is required for any showing of intentional discrimination. Defendants therefore contend that, in order to prevail, Plaintiffs must show that benchmark SD 10 satisfied the three *Gingles* requirements. Thus, Defendants say, Plaintiffs cannot prevail unless SD 10's minority voters are (1) numerous and compact, (2) vote cohesively, and (3) are systematically outvoted by the surrounding Anglo communities.

We disagree with the Defendants' understanding of the requirements. Plaintiffs may show discriminatory effect *without* making a full *Gingles* showing. As noted above, *Gingles* and its progeny do not articulate general legal principles for intentional discrimination but, instead, offer an interpretation of one section of the VRA. *Gingles* itself reached that interpretation by relying heavily on legislative history and scholarship interpreting the VRA. *See Gingles*, 478 U.S. at 48–51, 106 S.Ct. 2752. As critics of the decision have been quick to point out, it is not clearly rooted in the VRA's plain text and is even further removed from the text of the Constitution. *See, e.g.*, *Holder v. Hall*, 512 U.S. 874, 895–98, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (Thomas, J., concurring in the judgment).

The intentional-vote-dilution analysis, meanwhile, is derived from the Constitution, and the *Arlington Heights* framework deployed in that analysis states merely that effects are discriminatory when they "bear[ ] more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555 (quoting *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)). Incorporating the *Gingles* framework into the intentional-vote-dilution analysis, thereby constitutionalizing the *Gingles* factors, would thus be an unnatural result, and it is not one that this Court accepts.

This conclusion finds support in *Bartlett v. Strickland*, 556 U.S. 1, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009). That case concerned the application of Section 2 of the VRA to "crossover districts"—that is, districts where a minority "is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Id.* at 13, 129 S.Ct. 1231 (plurality opinion). A plurality of the Supreme Court held that Section 2 does not require the creation of crossover districts. *Id.* at 25–26, 129 S.Ct. 1231. It reasoned primarily from the third prong of *Gingles*, which requires that the majority votes in a bloc to defeat minority-preferred candidates. *Gingles*, 478 U.S. at 51, 106 S.Ct. 2752. Because, in a crossover district, a portion of the majority votes with the minority, it cannot be the type of district required by *Gingles*. *See Bartlett*, 556 U.S. at 16, 129 S.Ct. 1231 (plurality opinion).

***12** But the *Bartlett* plurality cautioned in *dictum* that "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Id.* at 24, 129

S.Ct. 1231. The plurality thus concluded both that *Gingles* does *not* require the creation of crossover districts and that the Constitution *might* be violated if a state intentionally destroyed a crossover district. *Id.* Under that reasoning, it must be possible for a state to violate the Constitution by dismantling a district that does not meet all three *Gingles* requirements. Though we are not bound by the *dictum* of a Supreme Court plurality, *Bartlett*'s reasoning provides persuasive authority against applying the *Gingles* framework to intentional-vote-dilution claims.

Defendants maintain that not considering the *Gingles* factors here conflicts with the approach taken by the Eleventh Circuit, but we disagree. The relevant case, *Johnson v. DeSoto County Board of Commissioners*, 72 F.3d 1556 (11th Cir. 1996), was grounded expressly in the VRA and not the Constitution. The *DeSoto* court, relying on *Voinovich v. Quilter*, 507 U.S. 146, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993), reasoned from the key distinction between Section 2 and Fourteenth Amendment redistricting violations: The former do not require intent. *See DeSoto*, 72 F.3d at 1561–62. Because intent is not an element of a Section 2 violation, it followed that intent was not sufficient to establish a Section 2 violation. *See id.* at 1564.

That circuit's later decisions have thus required Section 2 plaintiffs alleging discriminatory intent to make a *Gingles* showing. *See, e.g.*, *Burton v. City of Belle Glade*, 178 F.3d 1175, 1201 (11th Cir. 1999); *see also Thompson v. Kemp*, 309 F. Supp. 3d 1360, 1366–67 (N.D. Ga. 2018) (three-judge court). But *DeSoto*'s reasoning strongly suggests that that requirement is strictly statutory, so inapplicable to the constitutional theory here.[7] Moreover, the Ninth Circuit has addressed the issue more squarely and does not require a *Gingles* showing where intentional discrimination is alleged. *See Garza v. County of Los Angeles*, 918 F.2d 763, 769–71 (9th Cir. 1990). The three-judge panel in Texas's previous redistricting cycle adopted the Ninth Circuit's approach, *see Perez*, 253 F. Supp. 3d at 944 (addressing statutory claims). This Court now does the same.

So, though Plaintiffs must show discriminatory effect to prevail on their intentional-vote-dilution theory, *see Harding*, 948 F.3d at 312, this Court concludes that that discriminatory effect does not require the benchmark district to meet all, or any, of the *Gingles* requirements for a Section 2 district.

III. FINDINGS AND ANALYSIS

A. The *Arlington Heights* Factors

1. Discriminatory Effect

To show a discriminatory effect in the context of intentional vote dilution, Plaintiffs must demonstrate that the redrawing of SD 10 "bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555 (quoting *Washington*, 426 U.S. at 242, 96 S.Ct. 2040). As this Court will explain, experts on both sides agree that voting in SD 10 is racially polarized—the Black and Hispanic electorate tends to vote Democrat, while Anglos tend to vote Republican. Similar patterns exist nationally. Almost any gerrymander that favors Republicans would therefore tend to lessen the voting strength of minorities relative to Anglos, and yet partisan gerrymandering is beyond the power of federal courts to police. *See Rucho v. Common Cause*, —— U.S. ——, 139 S. Ct. 2484, 2506–07, 204 L.Ed.2d 931 (2019). Indeed, almost any gerrymander that favors Democrats would tend to lessen the relative voting strength of Anglos, whose voting rights are no less protected by the Constitution. *See, e.g.*, *Harding*, 948 F.3d at 306.

***13** But this Court is loath to conclude that partisan gerrymandering creates an effectively automatic discriminatory effect for purposes of *Arlington Heights*, and this case does not require the Court to do so. Instead, the Court observes that the redrawing of SD 10 disperses the district's minority voters—irrespective of whether one conceives of them as a coalition—such that the candidates they support are far less likely to win election. Although a *Gingles* theory would require more, the Court concludes that Plaintiffs likely will demonstrate that the action they challenge produces a discriminatory effect. The Court begins by reviewing the testimony of the parties' expert witnesses.

a) Credibility Determinations

First, the Court finds the factual testimony of Plaintiffs' expert, Dr. Barreto, credible. Dr. Barreto is well-versed in conducting Ecological Inference Analysis to analyze racially polarized voting. R. at 2:109. His extensive record of academic research has focused on racial voting patterns. Pls.' Ex. 105 at 1–6. The Court accepted him as an expert without objection. R. at 2:122–23.

Dr. Barreto testified credibly that Black and Hispanic voters overwhelmingly prefer Democratic candidates in general elections. R. at 2:137–38. On direct examination, Dr. Barreto ably explained the methodology behind the figures in his

report highlighting the disparity in general-election voting patterns between Anglo and minority voters. R. at 2:123–43, 3:4–35. Dr. Barreto used publicly available data from the Texas Legislative Council to conduct his analysis. R. at 2:115–16.

The Court is agnostic as to Dr. Barreto's factual determination that benchmark SD 10 is likely a majority-minority district by CVAP today. Pls.' Ex. 44 at 4; R. at 2:113, 3:58. Dr. Barreto explained how SD 10's minority population was rapidly growing before the September 2021 redistricting legislation. Pls.' Ex. 44 at 3. He admitted that the most recent ACS data, which is from 2019, do not reflect that SD 10 is a majority-minority district, R. at 3:70–74, but he credibly hypothesized that, projecting growth forward to today, SD 10 is likely a majority-minority district. Apart from asserting without elaboration that he "did calculations," R. at 3:73–74, he did not offer any mathematical support for that hypothesis, and so we are left to treat it as merely possible.

We give little weight to Dr. Barreto's ultimate conclusions. He maintained, throughout his testimony, that the only relevant factor in determining whether Black and Hispanic citizens vote as a cohesive group is how they vote in general elections. *E.g.*, R. at 3:107–08. Although that may be a defensible position in political science, whether general elections are sufficient to satisfy the legal criterion of voter cohesion is outside Dr. Barreto's stated field of expertise. Though we take his expert opinion into account, and though we agree that voter behavior in general elections is relevant, defining voter cohesion is ultimately a legal question reserved to the Court.

We also note that, as is forgivable in an adversary system, Dr. Barreto showed signs of partiality to his side's position. For instance, Dr. Barreto spoke of Dr. Alford's analysis in strongly negative terms, R. at 3:121, 8:70, but his rebuttal testimony suggested he had exaggerated. Specifically, Dr. Barreto implied that the data provided by Dr. Alford were analytically useless, but the main defect seemed to be a solvable one: Dr. Alford had botched the dataset's key, such that results for the two candidates were swapped. R. at 7:102–03. While that reflects insufficient rigor on Dr. Alford's part, the Court does not accept that it justified Dr. Barreto's hyperbole. Similarly, Dr. Barreto claimed that he had generated "quite different" results using data from the same source as Dr. Alford, R. at 8:70, but Dr. Barreto never explained his own results. The Court observes that Dr. Barreto's testimony, though he is highly qualified and by no means disingenuous, must be viewed critically.

***14** Second, we credit the testimony of Plaintiffs' other expert, Dr. Cortina, that the legislature could have drawn another map, such as the one submitted by Plaintiffs as Alternative Plan 4, that added a Republican-leaning senate district without depriving minority voters in SD 10 of the ability to elect the candidate of their choice. The Court accepted Dr. Cortina, without objection, as an expert on voter behavior. R. at 5:100. His testimony about the Plan 4 map was clear and persuasive as far as it went. But we do not treat that testimony as demonstrating that an alternate map could better or even equally serve the partisan interests the Texas Senate's Republican majority sought to accommodate by redrawing SD 10.

Dr. Cortina testified that he assumed a likely 10% margin of victory rendered a voting district "safe." R. at 5:109–10. He explained that, using the 10% number, both Alternative Plan 4 and Plan 2168 provide Republicans the same number of safe senate districts. R. at 5:113. He added that Alternative Plan 4 would even enable Republicans potentially to carry an additional district. R. at 5:114. As Defendants pointed out, in making his calculations Dr. Cortina looked only at the results from statewide races and only as far back as the 2018 elections. R. at 5:131. Dr. Cortina did not account or purport to account for senate-specific election results going back further than the last few years.

We credit Dr. Cortina's testimony that using his methodology, it is possible to produce a map favorable to Republicans other than Plan 2168. But Dr. Cortina also testified that he did not know which plans were considered by the legislature in September or whether the legislature took into account partisan considerations other than likely margin of victory. R. at 5:136–37. Nothing in his testimony conflicts with Dr. Alford's subsequent testimony that it makes sense for the majority party, when it is attempting to strengthen its hold on a legislative body, first to address swing districts, and that SD 10—of all the State's Senate districts—was the swing district Republicans could most easily convert to Republican-leaning. R. at 7:56–58.

Dr. Cortina also showed admirable restraint in his conclusions. Defendants stressed that Dr. Cortina made no predictions about how the alternative maps would perform in future state senate elections. R. at 5:134. That was despite the fact that, in a more colloquial setting, many would comfortably predict that districts Senator Ted Cruz won by ten points in 2018 will likely elect Republican state senators

in the future. The Court interprets Dr. Cortina's reticence as reflecting a commitment to stating only conclusions that he could establish empirically.

Third, we find the testimony of Dr. Alford—the Defendants' expert—credible. Dr. Alford has long been recognized for his expertise and experience in political science generally, and that expertise extends to redistricting. R. at 7:42–43. He has appeared as an expert witness in previous voting-rights cases and was accepted as an expert in this case without objection. R. at 7:42–43.

Dr. Alford testified that though the Black and Hispanic electorate votes cohesively in general elections—as both prefer Democrats over Republicans—that cohesion is not as evident in primary elections. R. at 7:46–50. The Court gives credit to Dr. Alford's conclusion that primary elections are relevant to analyzing divisions within political coalitions and that partisan affiliation is the main driver of voter behavior in general elections. The Court finds relevant and helpful Dr. Alford's analysis concerning the 2014 Democratic primary in SD 10, in which Black and Anglo voters preferred the Anglo candidate and Hispanic voters preferred the Hispanic candidate. Defs.' Ex. 34 at 4–5. But the Court gives limited weight to Dr. Alford's ultimate suggestion that minority voters in SD 10 do not vote cohesively, R. at 7:49–51, both because Dr. Alford analyzed only one (dated) primary election in arriving at that conclusion, R. 7:48, 77, and, as already mentioned, defining voter cohesion is ultimately a legal question reserved for the Court.

***15** The Court also considers credible Dr. Alford's testimony concerning Alternative Plan 4. He testified that it made sense for the Senate Republican majority to look first to shore up its chance of winning SD 10, given that it was a swing district based in a Republican county. R. at 7:44, 57. Dr. Alford also testified that the Senate Republican majority may have had other legitimate partisan interests, which it sought to serve by redrawing SD 10, that may not have been achieved by another map, such as Plan 4. R. at 7:59, 135–37. The Court also credits Dr. Alford's uncontradicted testimony that, according to the most recent ACS data, SD 10 is not a majority-minority CVAP district, R. at 7:45, though that conclusion does not rule out that the district has become majority-minority since those data were taken in 2019.

The Court also observes that Dr. Alford's apparent digressions into advocacy were more striking than even Dr. Barreto's. Particularly during cross-examination, Dr. Alford tended to go beyond just presenting statistical conclusions: He provided legal and political opinions favorable to Defendants.

Among other things, Dr. Alford expressed moral distaste for the legal theory of political cohesion among minorities, remarking, for instance, that Congressman Marc Veasey, who is Black, had "stole[n]" what was once a Hispanic district. R. at 7:120–21. He also made clear that his conclusions regarding SD 10 resulted from his (or at least his colleagues') analysis of only one election—the 2014 primary. R. at 7:116. Dr. Alford's nonetheless expressed confidence in the conclusion because, he said, it was consistent with wider research on the way the Black and Hispanic electorate votes; he needed only ensure that SD 10 was not a "unicorn." R. at 7:116. While that may be correct, the Court's confidence in Dr. Alford's findings regarding SD 10 is less than it would be if he had conducted a more thorough analysis.

b) CVAP, VAP, and Total Population

As explained above, the precise racial breakdown of SD 10 can be read different ways depending on which population metric one uses and on how one analyzes trends since the latest ACS report. Those differences are important because the destruction of a majority-minority district, particularly one controlled by one racial group, would be a relatively clear discriminatory impact. *Cf. Rogers v. Lodge*, 458 U.S. 613, 616, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982) (noting that at-large election schemes have discriminatory effects because they prevent the existence of majority-minority districts). On the other hand, if a group's share of a district were reduced from, say, 10% to 5%, that group's political power would be weakened in only an abstract sense. The Court considers whether minority groups may be aggregated for this analysis below, but first the Court addresses whether Plaintiffs have carried their burden to show that benchmark SD 10 was majority-minority. We conclude that they have not.

The first question the Court must decide is whether total population, VAP, or CVAP is the relevant metric. We agree with the parties that it is CVAP. The Supreme Court has not always been pellucid on this subject. For instance, the plurality in *Bartlett* referred to VAP, 556 U.S. at 18, 129 S.Ct. 1231, but the dissent characterized the plurality as discussing CVAP, *id.* at 27, 129 S.Ct. 1231 (Souter, J., dissenting). In *Gingles*, meanwhile, the Court used neither term; it may have been thinking in terms of total population. *See Gingles*, 478 U.S. at 50, 106 S.Ct. 2752.

One decision that does navigate that confusion is *LULAC v. Perry*, 548 U.S. 399, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006). In that case, Texas had redrawn a congressional district such that the Hispanic CVAP fell below 50%, even as the total Hispanic population stayed above 50%. *Id.* at 424, 126 S.Ct. 2594. The Court noted that use of CVAP as the relevant metric "fits the language of § 2 because only eligible voters affect a group's opportunity to elect candidates." *Id.* at 429, 126 S.Ct. 2594.

***16** Plaintiffs here press a constitutional theory rather than one based on Section 2, but the reasoning still applies. Both statutory and constitutional cases in this area concern the unequal allotment of political power, and that power depends on numbers of voters rather than total population. Further support lies in the fact that the new SD 10 is *still* majority-minority by total population, Pls.' Ex. 44 at 6, and yet both parties agree that it is less likely to elect minority-preferred Democrats.

If total population is not the correct metric because it does not capture actual voting power, then surely VAP is inferior to CVAP. And indeed, neither party seriously disputes that conclusion. In cross-examining Dr. Barreto, Defendants' counsel pushed the position that CVAP was the appropriate metric, and Dr. Barreto never managed to squarely disagree. R. at 3:65. In the absence of dispute, the Court concludes that CVAP is the best metric currently before the Court for determining racial voting power in SD 10.

The second question is whether benchmark SD 10 was majority-minority by CVAP at the time of redistricting. Dr. Barreto says it was. As proof, he offers only the "steady decline in [the] Anglo share of the district's CVAP, and the lag inherent in the 5-year ACS estimates." Pls.' Ex. 44 at 4.

But Dr. Barreto did not show the work he used to infer that the Anglo population had fallen below 50% by 2021. Pls.' Ex. 44 at 4; R. at 3:73–74, 8:77–78. That omission gives the Court pause. According to the statistics cited by Dr. Barreto, the Anglo share of the district fell from 57.7% in about 2013 to 53.9% in about 2017. Pls.' Ex. 44 at 4.[8]

From those data alone, the Court cannot conclude that benchmark SD 10 is a majority-minority district by CVAP. The Court should not engage in *sua sponte* econometric modeling, and Dr. Barreto's bare conclusion is inadequate, his impressive expertise notwithstanding.

c) Political Cohesiveness

As explained, this Court finds that SD 10 was not majority-minority at the time of redistricting when judged by the most relevant metric. SD 10 is also unlike the prototypical *Gingles* district in another way—no single minority comes close to 50% of CVAP. The Fifth Circuit does allow different minority groups—say, Black and Hispanic voters—to be aggregated to form "coalition districts," provided that those districts meet the other *Gingles* factors. *See Campos v. Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988). The law in the Fifth Circuit is less clear on whether the second *Gingles* factor —political cohesiveness—can be met without considering primary elections, a point that the parties hotly dispute.

But as this Court has noted, in seeking an injunction the Plaintiffs do not present a *Gingles* theory, so they are not required to show that SD 10 meets the *Gingles* requirements. Instead, they rely on the more generic Equal Protection framework in *Arlington Heights*, which finds discriminatory effects more readily.[9] Thus, while the Court appreciatively credits the testimony of Drs. Barreto and Alford about the contexts in which SD 10's minorities do and do not vote for the same candidate, that is the end of the purely factual inquiry.

***17** Whether Black and Hispanic voters in SD 10 are politically cohesive enough to constitute a coalition under *Gingles* and *Campos* is a question of law, and, at least in the Fifth Circuit, the relative legal significance of general and primary elections remains undecided.[10] We have no occasion to make that decision here. Rather, we conclude that Plaintiffs may prevail on this prong by showing a discriminatory impact on either Black or Hispanic voters (or any other racial group), regardless of the level of political cohesion between those groups.

d) Conclusion on Discriminatory Effect

Instead of looking to any of the *Gingles* factors, this Court applies the first factor of *Arlington Heights*, asking whether the redrawing of SD 10 "bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555 (quoting *Washington*, 426 U.S. at 242, 96 S.Ct. 2040). As noted above, that test gives rise to a serious line-drawing problem in the redistricting context because, given that race and partisanship correlate (however unevenly) throughout the United States, almost every reallocation of voting power at the hands of either party will tend to bear more heavily on some races and less on others. But it does not follow

that every redistricting gives rise to discriminatory effect of constitutional dimensions.

Fortunately, the facts of this case are dispositive enough that we need not draw any bright line between discriminatory and nondiscriminatory partisan shifts. Even without concluding that SD 10 is majority-minority and even without attempting to aggregate its different minority groups, it is apparent that the cracking of the district bears more heavily on Black and Hispanic voters[11] than it does on Anglos. Both groups have been reduced as a percentage of the district's CVAP—Blacks from 20.9% to 17% and Hispanics from 20.4% to 17.5%. Pls.' Ex. 44 at 4, 6. And while reductions of that magnitude might be academic in other contexts, in SD 10 they make a substantial difference.

As both parties' experts freely admit, SD 10's Black and Hispanic voters tend to favor Democrats and oppose Republicans. R. at 2:137–38, 7:123–24. Where previously the district often elected Democrats, it is now likely to elect Republicans. Thus, both groups have been substantially diminished in their ability to influence SD 10's elections. Those removed from the district have, of course, been added to other, nearby districts, but those districts are, like the new SD 10, Republican-leaning. Thus, the redrawing of SD 10 results not just in an incremental diminishment in minority voting strength but also in the loss of a seat in which minorities were able to elect candidates they preferred.

***18** When Texas previously attempted to redraw the district along similar lines, a different district court concluded that there was "little question" that the impact was discriminatory within the meaning of *Arlington Heights. Texas Preclearance Litig.*, 887 F. Supp. 2d at 163. That was despite the fact that the district had elected only one Democrat—Senator Davis, in 2008—up to that point. *See id.* at 162–63. Texas had not denied that the redrawing of the district nonetheless constituted discriminatory impact. *Id.* at 164. Here, Defendants *do* deny discriminatory impact, but they do so by relying on the *Gingles* theory that this Court has now rejected. Dkt. 102 at 38–42. Having denied that position, the Court concludes that Plaintiffs will likely be able to demonstrate a discriminatory effect, strengthening an inference of discriminatory intent.

2. Historical Context

The second *Arlington Heights* factor is whether history suggests discriminatory intent. Historical evidence must be "reasonably contemporaneous with the challenged decision." *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). Thus, for purposes of this analysis, this Court is concerned only with Texas's recent history and not with any longer legacy of racial discrimination. But even with that constraint, it is evident that history favors an inference of discriminatory intent.

In every decade since the statute was passed in 1965, federal courts have held that Texas violated the VRA. *Veasey v. Abbott*, 830 F.3d 216, 240 (5th Cir. 2016) (en banc). That includes the most recent redistricting cycle and, most damningly, the 2012 decision holding that, among other violations, Texas had engaged in intentional vote dilution by redrawing SD 10 in a manner similar to that adopted in SB 4. *See Texas Preclearance Litig.*, 887 F. Supp. 2d at 166. As mentioned previously, that case was decided under a now-defunct legal framework and has accordingly been vacated. *See Texas Preclearance Litig.*, 570 U.S. at 928, 133 S.Ct. 2885. But while the decision is not legally binding, and the burden of proof was the opposite of what it is now before this Court, that does not undo the historical significance of that three-judge decision. For that reason, the en banc Fifth Circuit has pointed to the case as demonstrating a "contemporary example[ ] of State-sponsored discrimination." *Veasey*, 830 F.3d at 239.

Defendants' contrary argument is feeble. They point out that "those rulings addressed different maps passed by different legislators, and different map drawers, at different times," Dkt. 102 at 35, but that is what history means. Of course, *these* maps have not been struck down—they have only just been enacted. And as Plaintiffs point out, Senator Huffman was on the 2011 redistricting committee (and Senator Seliger chaired it), suggesting that the principal personalities were not entirely different then. Dkt. 108 at 6. Indeed, Anna Mackin, a staffer for Senator Huffman who played a key role in redrawing SD 10, served as counsel for the defendants in the previous round of redistricting litigation. Pls.' Ex. 25 at 1. If the immediately preceding redistricting cycle is not "reasonably contemporaneous with the challenged decision," *McCleskey*, 481 U.S. at 298 n.20, 107 S.Ct. 1756, then it is difficult to imagine what would be.

The Court does not mean to overstate Texas's history of discrimination within the past decade—for instance, the 2012 decision was reached under a framework that required Texas to prove a negative, *see Texas Preclearance Litig.*, 887 F. Supp. 2d at 166, and *Veasey*, though ruling against the

state on discriminatory effect, reversed the district court's judgment that Texas had acted with discriminatory intent, *see Veasey*, 830 F.3d at 272. Senator Seliger, for one, continues to maintain that the *Texas Preclearance Litigation* court was factually mistaken in its finding of discriminatory intent, and we have no occasion to address that possibility. R. at 4:27. But in terms of proximity and comparability to the passage of SB 4, it is a close match. Plaintiffs will likely show that historical evidence weighs in favor of an inference of discriminatory intent.

3. Sequence of Events

***19** The remaining *Arlington Heights* factors can be difficult to disentangle. The "specific sequence of events leading up to the challenged decision," *Arlington Heights*, 429 U.S. at 267, 97 S.Ct. 555, could, in a case like this, be construed to include both departures from ordinary procedure and legislative history. But for organizational clarity, the Court focuses, in this section, on events that were not part of the formal, public legislative process. Specifically, we concentrate on the private meetings between Senators Powell and Huffman and their staffs, as well as correspondence involving those individuals.

The first meeting occurred on February 12, 2020—well before the release, in August 2021, of the 2020 census data that would guide the legislature's redistricting process. Neither senator was present, but members of both staffs were. Plaintiffs draw attention to this meeting because of statements made by Sean Opperman, a staffer for Senator Huffman, as recorded by Rick Svatora, a staffer for Senator Powell. Specifically, Opperman said that SD 10 was "very close to ideal" population and so there would likely be no major changes to the district. R. at 2:13. To the contrary, the final plan *did* include major changes to SD 10. Svatora thus feels that he was not told the truth during the meeting. R. at 2:24.

The second meeting occurred on November 19, 2020, and was attended by both senators and their staffs. That meeting was short, but one of Senator Powell's staffers remembers that either Opperman or Senator Huffman verbally acknowledged that SD 10 was "majority-minority." Pls.' Ex. 6 at 2. Maps of the district were present, and those maps included boxes with basic racial data, though the maps did not illustrate how racial minorities were distributed throughout the district. Pls.' Ex. 6 at 2.

The third meeting occurred on September 14, 2021, after the 2020 census had been released and the legislature had been called into special session. Both senators and their staffs were present. Senator Huffman unveiled the redrawn SD 10—that version approximated the final configuration of the district in Tarrant County but included a different combination of rural counties. R. at 4:154. Senator Powell testifies that she asked no questions about the map, instead informing Senator Huffman that she "c[ould] clearly see what you're attempting to do here." R. at 4:84. Senator Powell and her staff had come prepared with maps of the benchmark district that highlighted its racial composition. These were handed around and, at Senator Huffman's request, all those present initialed them. R. at 4:129–30. As the discussion went on, Anna Mackin, a member of Senator Huffman's staff, remarked that she felt "uncomfortable." R. at 4:84.

Finally, in addition to these meetings, there were several messages exchanged between Senator Powell's staff and the legislature more broadly. On August 19, 2021, before the last meeting, Opperman sent senate staffers a link to a redistricting Dropbox, which included the maps with basic racial data that had been present at the November 2020 meeting. Pls. Ex. 6 at 2. On September 16, 2021, two days after the meeting in which Senator Huffman unveiled the new map, Senator Powell's staff emailed Senator Huffman's staff with a letter expressing concerns about the plan's racial impact and attachments illustrating those impacts. Pls.' Ex. 6 at 4. Opperman responded to say that he had stopped looking at the documents once he realized they contained racial data. Pls.' Ex. 6 at 5.

We do not find or infer discriminatory intent from those events. It is not inherently suspicious that plans would change in the nineteen months between February 2020 and September 2021, especially when one considers that the census was conducted and its data were released within that timeframe. And even assuming that Senator Huffman's staff withheld information from Senator Powell's staff, that omission would be unsurprising given that the redrawing of SD 10 was deleterious to Senator Powell's political prospects.

***20** Nor is it suspicious that Senator Huffman and her staff were exposed to racial data on SD 10. That exposure does not contradict Senator Huffman's assertion that she willfully "blinded [her]self" to race in drawing the maps. R. at 6:113. And even if Senator Huffman and her staff were fully aware of race in their redistricting,[12] that in itself does not merit any nefarious inference. *See Miller*, 515 U.S. at 916, 115 S.Ct. 2475 ("Redistricting legislatures will ... almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process.").

4. Procedural and Substantive Departures

Now this Court focuses on departures from ordinary legislative procedure in the leadup to the passage of SB 4. The parties agree that redistricting would normally have occurred during a regular, biennial session of the Texas legislature over a longer timeframe but that in this case it occurred within the more limited timeframe of a special session. The parties disagree, of course, about whether the court may infer discriminatory intent from that irregularity.

"Departures from the normal procedural sequence ... might afford evidence that improper purposes are playing a role." *Arlington Heights*, 429 U.S. at 267, 97 S.Ct. 555. But they also might not. During the last round of redistricting litigation, the Court in *Abbott v. Perez*, —— U.S. ——, 138 S. Ct. 2305, 201 L.Ed.2d 714 (2018), reversed a decision of the three-judge district court and touched on a similar point. Specifically, the Texas legislature had enacted redistricting bills in a special session, over a far shorter timeframe than would normally be the case. *See id.* at 2328. But although the three-judge court treated that brevity as an indication that the legislature had acted in bad faith, the Supreme Court disagreed. *See id.* at 2328–29. It pointed out that the legislature "had good reason to believe that" the plans it enacted "were sound," *id.* at 2329, because those plans had been issued by a court, *see id.* at 2327. That innocuous and plausible alternative explanation meant that no nefarious inference could be drawn from the legislature's rush.

The circumstances here are different—the Texas Legislature was not enacting a court-issued senate plan but rather one of its own making—but the situations are alike in that Defendants present alternative explanations for the brevity of the session in which SB 4 was passed. They posit two alternative theories: (1) The legislative process was abbreviated because the COVID–19 pandemic caused a delay in the publication of census results; and (2) the process was abbreviated because Texas Republicans feared that their Democratic colleagues might break quorum, as they had done earlier in 2021 to prevent the passage of an election-reform bill.

The Court finds Defendants' first explanation persuasive. The COVID–19 pandemic has had disruptive effects in many ways. The taking of the 2020 decennial census was one of them. By statute, the Census Bureau was required to publish the results of the census on April 1, 2021. *See* 13 U.S.C. § 141(c). Regular sessions of the Texas Legislature occur once every two years and last for no more than 140 days. Tex. Const. art. III, §§ 5, 24. Those sessions begin "on the second Tuesday in January of each odd-numbered year." Tex. Gov't Code Ann. § 301.001. The legislature may be convened outside that timeframe only in special sessions called by the Governor, which are limited to thirty days. Tex. Const. art. III, § 40.

***21** Ordinarily, those dates and numbers leave the legislature with time to complete redistricting during its regular session. Representative Chris Turner, a witness for Plaintiffs, testified that the redistricting process ordinarily can take about two months—twice as long as a special session. R. at 5:61. So the legislature faced a problem when the Census Bureau, citing challenges caused by the pandemic, delayed publication of the results until after the regular session had already ended. R. at 5:59. The legislature was thus forced to redistrict during a special session, which did not provide the ordinary amount of time.

It was thus unavoidable that the legislature would depart from its ordinary procedures during the 2021 redistricting, for reasons that had nothing to do with discriminatory intent. The Plaintiffs' claim of discriminatory intent stemming from the delay is extraordinarily weak. For Plaintiffs to show that procedural departures here are suggestive of such intent, they must point to some other indication of nefarious purpose. But they have not.

Plaintiffs note that the Texas Senate conducted only limited public hearings about the redrawing of SD 10, Dkt. 39 at 16 (describing a "rushed process"), and that the Senate slightly redrew the district (removing Young County but not altering the district within Tarrant County) before convening to discuss it, R. at 4:138, 156; Dkt. 39 at 18. Plaintiffs also observe that the Texas House spent just one day considering the senate plan, providing significantly less opportunity for public discussion and amendments than would usually be the case. R. at 5:39–43. While those steps may have been atypical, all of them suggest a legislature pressed for time.

Because the Court concludes that the pandemic more than adequately explains Texas Republicans' decision to rush the redistricting process, we need not evaluate Defendants' secondary explanation that Republicans feared Democrats would break quorum.

Plaintiffs point to another procedural irregularity: that Senator Huffman allegedly did not consider race in drawing the new

senate map but later submitted her proposed map to the Texas Attorney General's office, which apparently made no changes to it. Dkt. 108 at 12. But Plaintiffs have not developed that point. Crucially, none of their witnesses testified that the ordinary procedural course was distinct from the one advanced by Senator Huffman.

5. Legislative History

The Court turns finally to statements made on the floor of the legislature before the passage of SB 4. The parties have directed the Court to several hearings and statements that may be relevant. The Court reviews each in turn and, in doing so, is informed primarily by the public record and by the testimony of Senator Powell. Senator Huffman, the other main legislative antagonist, asserted her legislative privilege to the fullest extent possible, with the result that she offered no additional comment on legislative matters beyond those she had made publicly.

First is a pair of committee hearings conducted on September 24 and 25, 2021, to receive input from fellow legislators and the public on the redrawing of SD 10. The committee had very recently released a new proposed SD 10, which would have added additional rural counties without altering the district lines within Tarrant County. R. at 4:138, 156. At the nonpublic hearing, Senator Huffman read from prepared remarks concerning her redistricting methodology:

> My goals and priorities in developing these proposed plans include, first and foremost, abiding by all applicable law, equalizing population across districts, preserving political subdivisions and communities of interest when possible, preserving the cores of previous districts to the extent possible, avoiding pairing incumbent members, achieving geographic compactness when possible, and accommodating incumbent priorities, also when possible.

***22** R. at 4:94.

Then Senator Powell asked Senator Huffman a series of questions about her methods for drawing the maps, implying that the redrawing of SD 10 was unjustifiable on the stated rationales and would have a disproportionate impact on minority voters. Pls.' Ex. 52 at 10–20. The next day, during the public hearing, a number of officials and concerned individuals testified about the redrawing of SD 10; many of them strongly refuted the premise that the redrawn district combined communities of interest. *See generally* Pls.' Ex. 53.

Second is a September 28 hearing of the redistricting committee. There, Senator Huffman again recited her redistricting criteria but this time added "partisan considerations" to the list. R. at 4:112. That hearing is also notable for the committee's rejection of an amendment that would have restored benchmark SD 10. Pls.' Ex. 54 at 13. In opposing that amendment, Senator Huffman restated that her map complied with the VRA and averred that redrawing SD 10 was warranted to balance population. Pls.' Ex. 54 at 11–12.

Third is a senate floor debate on October 4. Senator Huffman yet again recited her list of redistricting criteria, this time not listing partisanship. R. at 4:116–17. Senator Powell then debated Senator Huffman, interrogating her about why she had redrawn SD 10. Senator Huffman's answers were often evasive. For instance, she repeatedly stated that "all" of the redistricting criteria had informed various decisions, without elaboration. R. at 4:126. She also stated at one point that she believed SD 10 "needed population." R. at 4:125. But SD 10 was slightly overpopulated, and Senator Huffman smiled as she claimed otherwise. R. at 4:125.

Senator Powell also asked Senator Huffman about the September 14 meeting at which Senator Huffman had first revealed the planned redrawing of SD 10. Senator Huffman recalled that meeting quite differently from how Senator Powell and Garry Jones recounted it. R. at 4:128. Additionally, Senator Huffman claimed that, despite "hav[ing] an awareness that there are minorities that live all over this state," she had "blinded [her]self to that as [she] drew these maps." R. at 5:10–11. Later in the same debate, Senator Powell engaged in a friendly colloquy with a Democratic colleague. During that colloquy, Senator Powell expressed concerns about the racial consequences of redrawing SD 10, but she also agreed that the district was "absolutely" "being intentionally targeted for elimination as being a Democratic-trending district." R. at 5:26–28.

Finally, the Texas House held a hearing on the senate plan on October 10. Republican Representative Todd Hunter, chairman of the redistricting committee, read a version of Senator Huffman's statements of redistricting criteria. That version did not include partisanship. The House voted on the bill later the same day it had been introduced, minimizing opportunities for public testimony or amendments. R. at 5:39–44; Pls.' Ex. 42 at 12–25.

Plaintiffs stress that supporters of SB 4—they focus primarily on Senator Huffman, though they also mention Chairman

Hunter[13]—generally did not list "partisan advantage" as one of the goals of SB 4. The one notable exception was the September 28 hearing.

***23** As with the nonpublic events preceding passage of SB 4, described above as the "sequence of events," the legislative history suggests that supporters of the bill were less than forthright about their motivations. The redrawing of SD 10 is a transparent attempt to crack a Democratic-leaning district in greater Fort Worth: It is not consistent with principles such as core retention, geographic compactness, or combining communities of interest. Nor does the Court find it likely that the redrawing was necessary for the sake of population equalization—it certainly is not true that the district itself "needed population," and Senator Huffman's smirk suggests that she may well have known as much.

But as with previous prongs, the Court finds that racial discrimination did not motivate the Texas legislature in passing SB 4. Partisan gerrymandering alone cannot support a federal constitutional claim. *See Rucho*, 139 S. Ct. at 2507–08. Plaintiffs have pointed to nothing—no stray remark, secret correspondence, or suspicious omission—that would tend to indicate that Senator Huffman or anyone else acted even partially because of the racial impact of SB 4. Without such evidence, the legislative history of SB 4 does not support the inference that the bill was passed with discriminatory intent.

6. Conclusion on Discriminatory Intent

Though the factors above are organized numerically, the Court stresses again that they cannot be analyzed mechanically. Superficially, the five prongs are split, with three (sequence of events, procedural departures, and legislative history) favoring Defendants and two (discriminatory effect and historical context) favoring Plaintiffs. The *Arlington Heights* inquiry, however, is too sensitive to be reduced to a scorecard. Indeed, inconsistencies in how courts number the *Arlington Heights* factors, *see supra* note 5, would make an additive approach particularly inapposite. Instead, this Court conducts a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including any evidence not captured by the factors listed above. *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555.

The Court pauses, however, to summarize its findings so far regarding the effect of SB 4 and the circumstances of its passage. The Court finds that the enactment of SB 4 had a discriminatory effect; it bore more heavily on the Black and Hispanic voters of SD 10, such that those voters will likely no longer be able to elect the candidates whom they tend to prefer. The recent history is suggestive of discriminatory intent; Texas has a long history of losing redistricting cases, and that history includes a finding of discriminatory intent the last time the state redrew SD 10.

Despite that context, however, the Court finds that the circumstances surrounding the passage of SB 4 do not suggest that the legislature acted with discriminatory intent. The specific sequence of events, departures from ordinary procedure, and legislative history are all consistent with a time-pressed legislature seeking partisan advantage. It is conceivable that the legislature was *also* driven by a hidden racial motive, but the circumstances of SB 4's passage provide no evidence for that conclusion. The bill's discriminatory effect and Texas's litigation history are not enough to make up for that absence.

In sum, this Court concludes that the enumerated *Arlington Heights* factors, when weighed holistically, indicate that Plaintiffs are unlikely to succeed on the merits of their intentional-discrimination claim. They have thus also failed to show a likelihood of success on their racial-gerrymandering claim, which requires even stronger evidence of intent.

The Court reiterates the context in which this finding is made. The Court is not making a final determination on the merits, but, instead, is assessing whether Plaintiffs are *likely* to prevail based on the evidence presented so far. The Court is well aware that extensive discovery is underway in preparation for the trial scheduled for this September. The Court does not foreclose the possibility that new evidence and more complete presentations will result in different findings after trial. Moreover, there are other considerations beyond the impact and history of SB 4 that bear on this Court's inquiry into any discriminatory intent. We turn to those other factors now.

B. Plaintiffs' Alternative Maps

***24** Plaintiffs submit four alternative maps that, they say, achieve Republicans' partisan goals without cracking SD 10. Pls.' Exs. 70, 76, 84, 92. Specifically, those plans give Republicans the same number of seats as SB 4 but ensure that the weakest Republican seat is slightly safer. Dkt. 39 at 40. The Supreme Court has discussed the use of alternative maps in the context of racial gerrymandering, with all nine Justices agreeing that such maps are helpful

evidence of legislative intent. *See Harris*, 137 S. Ct. at 1479 (2017); *id.* at 1491 (Alito, J., dissenting). That commonsense observation extends just as easily to intentional vote dilution. But Defendants naturally dispute that Plaintiffs' proposed maps are probative of the state's intent in redrawing SD 10.

The Court begins by addressing several of Defendants' less-convincing objections. First, they stressed, in their briefing and at the hearing, that Plaintiffs' maps were never presented to the legislature. That uncontradicted factual assertion is true but irrelevant.

Defendants cite several cases for their proposed requirement that alternative maps be proffered, but none of them purports to set forth that condition. *See Harding*, 948 F.3d at 309–11; *Harris*, 137 S. Ct. at 1479; *Easley v. Cromartie*, 532 U.S. 234, 255–56, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001). That absence makes sense given the purpose of alternative maps —they show that "[i]f you were *really* sorting by political behavior instead of skin color (so the argument goes) you would have done—or, at least, could just as well have done —*this*." *Harris*, 137 S. Ct. at 1479. It is not necessary to show that Defendants specifically declined to adopt the alternative plans—rather, the maps illustrate (Plaintiffs say) what a truly partisan legislature *might* have done. And, as Plaintiffs point out, accepting Defendants' conditions for the consideration of maps would impose a perverse burden. It would mean that Plaintiffs were required, between SB 4's proposal and passage, to provide the Texas Senate with a better Republican gerrymander, even as Texas Republicans (as we have seen) were refusing to admit that they were seeking a Republican gerrymander. The Court declines to apply Defendants' proposed test.

Defendants' other objections have shortcomings. Defendants seize on Plaintiffs' failure to include one Republican senator's residence in his district, but that is an apparent oversight that Plaintiffs easily correct in their later maps. Dkt. 102 at 31, Dkt. 108 at 23.

Defendants further suggest that the alternative maps would create a political problem for Republicans by placing Senator Sarah Eckhardt, a Democrat, in a seat where the incumbent Republican hopes to seek higher office, thus allowing Senator Eckhardt to "essentially run as the incumbent." Dkt. 102 at 31. But as Plaintiffs note, their maps would leave Senator Eckhardt in a district with a sizeable Republican advantage, strongly suggesting that a Republican would capture the seat. Dkt. 108 at 22.

Defendants also claim that Plaintiffs "radically realign[ ] Senate districts from nearly end-to-end," but their only examples are the shifting of one county between districts and the shifting of a district border in another county. Dkt. 102 at 32. Even if such objections were more strongly rooted, they still would not form a clear basis for rejecting Plaintiffs' alternative maps. There is no conceivable map that would not be subject to nitpicking on some basis. Maps may nonetheless be useful to show the results that would follow from hypothetical sets of priorities—for instance, an alternative plan could theoretically show what a legislature would have done if its only priority were to maximize the number of districts with more than a certain partisan margin.

***25** But even putting Defendants' narrower objections aside, the Court does not find that Plaintiffs' alternative maps reveal any discriminatory intent on Defendants' part. Though differing in their details, all four of Plaintiffs' proposed maps achieve their allegedly superior partisan outcome in the same way: They crack SD 14, a Democratic bastion located mostly in Travis County, instead of SD 10.

Plaintiffs' theory seems to be that if the legislature truly cared about partisanship and not race, it would have prioritized SD 14 over SD 10. The Court does not buy that logic. According to the Census Bureau, Travis County is about as diverse as Tarrant County—48.9% Anglo (Travis) to 45.3% (Tarrant), by total population. SD 14 itself is 51.9% minority by total population, Pls.' Ex. 57 at 5, less than the 61.5% of benchmark SD 10, R. at 2:138, but still enough that cracking the district would produce about as clear a discriminatory effect.

That the legislature decided to crack one and not the other thus seems to yield no particular inference about the role of race in redistricting or about partisanship's role. If, as Plaintiffs say, cracking SD 14 would have fulfilled Defendants' partisan goals just as well as cracking SD 10, then surely they would have cracked *both* districts. Indeed, because both districts have large minority populations and tend to elect minority-preferred Democrats, a racially motivated legislature might also have cracked both SD 14 and SD 10.

Meanwhile, it is easy to hypothesize countless legally innocuous reasons why the Texas Legislature may have preserved SD 14. SD 10's recent partisan reversals may have made it a more obvious target. The legislature may have wanted SD 14 to function as a vote sink. It may have feared political fallout from destroying a longstanding Democratic

bastion. Indeed, saving SD 14 may even have respected traditional redistricting criteria—Plaintiffs' version of that district is about as unnaturally shaped as is the current SD 10. The Court is thus reluctant to draw any inference of discriminatory intent from Plaintiffs' alternative maps.

The Court also notes that the experts superficially differed about how much partisan advantage a district must have to be considered "safe"—when he analyzed Plaintiffs' alternative maps, Dr. Cortina assumed that a Republican margin above 10% was safe, R. at 5:135, but Dr. Alford vehemently rejected that position, R. at 7:131. The Court does not perceive a factual disagreement here—political safety is not an either/or proposition, and it is plausible that Texas Republicans preferred districts that were even safer than those that would have resulted from Plaintiffs' alternative maps.

This Court rejects Plaintiffs' contentions regarding *dictum* in a ruling of the three-judge court in the preceding redistricting cycle. Plaintiffs point to the aside that "[t]he Legislature could have simply divided Travis County and Austin Democrats among five Republican districts" instead of achieving the same advantage by packing Hispanic voters. *Perez*, 253 F. Supp. 3d at 897. Rather than accept that blank check, Plaintiffs say, Defendants instead chose to repeat the same move—cracking SD 10—that a different district court had deemed intentionally discriminatory. *See Texas Preclearance Litig.*, 887 F. Supp. 2d at 166. But as discussed above, neither decision was controlling: *Texas Preclearance Litigation* was decided under the Section 5 standard, while *Perez* concerned congressional, rather than state senate, districts.

***26** Moreover, even if one accepted that Senator Huffman and her staff had read those opinions, the Plaintiffs' desired inference about *Perez* does not follow. If the legislature attached weight to the *dictum* about Travis County (even in the state senate context), and if cracking that county would have equally served its partisan goals, it surely *would* have cracked SD 14. The same conclusion would follow even if the legislature pursued racial goals exclusively—such a legislature would have cracked SD 10 *and* SD 14, both of which are majority-minority by total population and elect minority-preferred Democrats.

Plaintiffs' desired conclusion follows only if the legislature's primary goal was neither race nor politics, but rather to thumb its nose at the federal judiciary. That is implausible. It is far more likely that the legislature, despite the aside in *Perez*'s discussion of congressional districts, made different decisions about SD 10 and SD 14 for some political reason.

Thus, the Court does not agree that Plaintiffs' alternative plans strengthen an inference of discriminatory intent. Plaintiffs are not required to provide maps at all, *see Harris*, 137 S. Ct. at 1479, and so their failure does not in itself prevent them from succeeding on the merits. But it does mean they are no closer to carrying their burden. Plaintiffs' alternative maps do not meaningfully alter their likelihood of success on the merits.

C. The Presumption of Legislative Good Faith

Finally, although this Court, so far, has attempted to weigh the evidence presented by Plaintiffs evenly, the Court must address the fact that, in this area, the law puts a finger on the scale in favor of Defendants. The legislature is entitled to a presumption that it redistricts in good faith. *See Miller*, 515 U.S. at 915, 115 S.Ct. 2475.

The law is less clear, however, on exactly what the presumption of good faith entails. Plaintiffs aver that they have overcome the presumption by showing that the Texas Legislature's stated reasons for the redrawing of SD 10—such as that the district needed population, or that "all of" Senator Huffman's express redistricting criteria informed the decision—were not the real reasons. R. at 9:14. Under Plaintiffs' theory, the presumption can be overcome even without a showing of racial motive—Plaintiffs need only establish that there was *some* undisclosed motive to the redistricting, even if that motive was unrelated to their claims.

That theory has intuitive force and some precedential support. For instance, *Miller*, 515 U.S. at 916, 115 S.Ct. 2475, formulates the presumption in relation to "traditional race-neutral districting principles." When the Supreme Court has listed those principles, it has not included partisanship. *See, e.g.*, *Rucho*, 139 S. Ct. at 2500. Indeed, even where the Court points out that partisan motivations may defeat racial-gerrymandering claims, it still treats those motivations separately from the "traditional" factors. *See Harris*, 137 S. Ct. at 1473. If partisanship is not a traditional redistricting criterion, and a legislature is shown to have had covert partisan motives as it redistricted, the reasoning goes, then it has not redistricted in good faith.

Plaintiffs have put forth substantial evidence that Senator Huffman was particularly less than forthright in explaining why she had redrawn SD 10 as she had. Defendants now

insist that partisanship was a major part of her motivation, but Senator Huffman did not give that impression on the senate floor. Of the three times she listed her redistricting criteria, partisanship made the list only once, at the September 28 committee meeting. R. at 4:112. When Senator Powell asked Senator Huffman which of her criteria had led to various decisions, such as the extension of SD 10 into several rural counties, Senator Huffman evasively (and unconvincingly) answered, "All of them." R. at 4:125–26.

***27** Senator Huffman gave an account of her September 14 meeting with Senator Powell that differs significantly from the accounts of either Senator Powell or her staffer—Senator Huffman claimed that she looked at the maps with racial shading for "less than a second" before turning them over and saying, "I will not look at this," while the other witnesses describe nothing of the sort. R. at 4:128. At the October 4 hearing, Senator Huffman insisted that SD 10 had been redrawn because "[the committee] believed [it] needed population." R. at 4:125. SD 10 did not need population, and Senator Huffman smirked as she claimed it did.

Senator Huffman did not rebut any of these allegations. Instead, she asserted legislative privilege to the fullest extent possible and therefore declined to answer questions about her motivation. *See, e.g.*, R. at 7:35–36. Though courts may not draw negative inferences from a criminal defendant's assertion of his Fifth Amendment rights, no similar constraint binds our assessment of a civil witness's assertion of legislative privilege. Senator Huffman could have waived her legislative privilege, just as Senator Powell did, and the Court would doubtless be better informed.

This case, however, does not present the same circumstances that led a sister court to deem legislative privilege waived. *See Singleton v. Merrill*, 21-CV-1291, 2021 WL 5979516, at *7 (N.D. Ala. Dec. 16, 2021). Thus, in ruling on the assertion of privilege, this Court declined to take the same step here.[14] R. at 5:152. Nevertheless, the Court interprets Senator Huffman's reticence as strengthening the inference that her previously stated reasons for redrawing SD 10 were, at best, highly incomplete and, at worst, disingenuous.

None of that, however, directly supports the proposition that Senator Huffman and her colleagues acted from *racial* motives. And so the Court finds, on the current state of the record, that they did not. Instead, all of the incongruities pointed out by Plaintiffs are consistent with a Republican legislature's seeking to hide its *partisan* redistricting motives.

There is even some direct evidence of such a motive. As noted, Senator Huffman *did* list partisanship as a guiding principle once, at the September 28 committee meeting. R. at 4:112. When Senator Powell questioned her during the October 4 debate, Senator Huffman mentioned several times that she had viewed maps with "partisan shading" or "partisan numbers." R. at 6:95–97. And Senator Powell at one point agreed with a Democratic colleague that her district was being "targeted for elimination as being a Democratic-trending district," though Senator Powell also discussed race in the same colloquy. R. at 5:26–28.

To be sure, Defendants' current theory would mean that Senator Huffman and her colleagues dramatically understated the role of partisanship in their decisionmaking, and that nondisclosure is frustrating from the standpoint of governmental transparency. But "partisan motives are not the same as racial motives." *Brnovich*, 141 S. Ct. at 2349. Even without applying any presumptions, this Court does not find that any of the Plaintiffs' evidence is *more* consistent with racial motives than it is with exclusively partisan motives.

***28** To act with a primarily partisan motivation while not admitting as much may constitute "bad faith" in a colloquial sense. But the presumption of legislative good faith was articulated, and is often reaffirmed, specifically in the context of alleged racial motivations. *See, e.g.*, *Harris*, 137 S. Ct. at 1474 n.8. Indeed, *Miller* recognized the presumption as applying to allegations of "race-based decisionmaking." 515 U.S. at 915, 115 S.Ct. 2475.

Importantly, reading "good faith" too stringently creates line-drawing problems. As Senator Seliger, Plaintiffs' witness, testified, legislators in Texas give incomplete reasons for their votes "[a]ll the time." R. at 4:60. If that is true (and particularly if it is true of legislators generally), then to conclude that the presumption of good faith is surrendered any time legislators are less than candid about their motivations risks nullifying a presumption that, as the Supreme Court repeatedly has cautioned, is not to be treated lightly. *See, e.g.*, *Perez*, 138 S. Ct. at 2325. Thus, in litigation such as this, there are strong reasons to conclude that the presumption of good faith is overcome only when there is a showing that a legislature acted with an ulterior *racial* motive.

Fortunately, deciding the motion for preliminary injunction does not require this Court to choose among the different possible understandings of "good faith" in the context of

redistricting. That is because Plaintiffs would fail to show a likelihood of success on the merits even if there were no presumption working against them. Overcoming the presumption of legislative good faith would not shift the burden. *Cf. id.* at 2324 (holding that the burden cannot be shifted by a previous finding of discrimination). Instead, it would mean merely that the issue of legislative intent would be resolved according to the ordinary civil-litigation standard. Plaintiffs would thus have to show that the preponderance of the evidence favored the conclusion that the legislature had acted with discriminatory intent.[15] For all the reasons stated above, this Court has determined that Plaintiffs are not likely able to do that.

Plaintiffs have presented substantial evidence that at least one member of the Texas Senate did not fully disclose her reasons for supporting SB 4. But they have not presented evidence that that nondisclosure bore any connection to a racial motive or racial intent. Determining whether Plaintiffs have overcome the presumption of legislative good faith thus depends on how that presumption is defined. But because Plaintiffs fail regardless of whether the presumption applies, this Court need not, and does not, attempt to answer that unsettled question of law.

D. Conclusion on Likelihood of Success

Both of Plaintiffs' theories—intentional vote dilution and racial gerrymandering—require them to show that the legislature acted with discriminatory intent. They may make that showing through circumstantial evidence. But after carefully reviewing the evidence presented so far, the Court concludes that they are unlikely to do so.

The *Arlington Heights* factors do not favor Plaintiffs. Though SB 4 bears more heavily on Black and Hispanic voters in SD 10 than it does on Anglo voters, and though recent history suggests that discriminatory intent is a possibility, the circumstances surrounding the passage of SB 4 are uniformly innocuous, at least from the standpoint of discriminatory intent. Plaintiffs seek to add further circumstantial evidence in the form of alternative maps, but those maps are not persuasive. They demonstrate that there was another racially diverse, Democratic district that the legislature could have cracked and did not—but that fact does not alone suggest that race was a consideration in how SD 10 was drawn.

***29** Because Plaintiffs have failed to show a likelihood of success even under a preponderance-of-the-evidence standard, we need not consider whether their evidence of non-racial disingenuousness is sufficient to overcome the legislature's presumption of good faith. Racial and partisan considerations are difficult to disentangle, *see Harris*, 137 S. Ct. at 1473, but even without applying the presumption of legislative good faith, the preponderance of the evidence weighs against any finding that race played a role in the Texas legislature's redrawing of SD 10. On the evidence currently before the Court, Plaintiffs have failed to show that they are likely to succeed on the merits.

E. The Remaining Preliminary-Injunction Factors

1. Irreparable Harm

If Plaintiffs had shown they were likely to succeed on the merits, they would also have established that they were "likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20, 129 S.Ct. 365. That is because they allege that Defendants have infringed their rights under the Fourteenth and Fifteenth Amendments. *See* Dkt. 39 at 24–25, 41. Violations of those rights inflict irreparable injuries because "the loss of constitutional freedoms 'for even minimal periods of time ... unquestionably constitutes irreparable injury.' " *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) (omission in original) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)).[16]

But even if Plaintiffs had not alleged constitutional injuries, they still could show that they would be likely to suffer an irreparable injury if their claims were meritorious. According to this Court's current schedule, it will not resolve the merits of Plaintiffs' claims until after the November 2022 election. Thus, even if Plaintiffs won on the merits and the Court ordered the "drastic remedy" of "[s]etting aside an election," *Rodriguez v. Bexar County*, 385 F.3d 853, 859 n.2 (5th Cir. 2004),[17] they would be without properly elected representatives until a new election could be organized and held. Since the 88th Legislature's regular session will occur between January and May 2023,[18] at least some—if not all—of the lawmaking activity for this election cycle would likely have occurred before Plaintiffs' new representative could be seated. That is an injury that cannot be compensated with damages, making it irreparable.

For their part, Defendants do not seriously dispute that Plaintiffs have alleged irreparable injuries. Instead, they reiterate their position that Plaintiffs are unlikely to succeed

on the merits of their claims, and Defendants say the Plaintiffs therefore do not face the threat of irreparable injury. Dkt. 102 at 46–47.[19] Because the Court concludes that Plaintiffs are unlikely to succeed on the merits, it agrees with Defendants in some sense. But that is a conclusion based on the merits, not the nature of Plaintiffs' allegation. If they had met their burden on likelihood of success, they would have met it here, too.

2. The Balance of Equities and the Public Interest

***30** Two factors remain. An injunction may issue only if (1) it would not disserve the public interest and (2) the equities favor the movant. *Texas v. United States*, 809 F.3d 134, 150 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (per curiam). Plaintiffs have not satisfied their burden on those factors.

"[T]he balance of harm requirement ... looks to the relative harm to both parties if the injunction is granted or denied." *Def. Distributed v. U.S. Dep't of State*, 838 F.3d 451, 459 (5th Cir. 2016). The public-interest factor looks to "the public consequences [of] employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24, 129 S.Ct. 365 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982)).

Those factors "overlap considerably," so courts often address them together.[20] And in the related context of interim stays, "[t]hese factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). After all, "[w]hen a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws," and the State's "interest and harm" thus "merge with that of the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam) (citing *Nken*, 556 U.S. at 435, 129 S.Ct. 1749). The Court therefore considers both factors together. *See, e.g.*, *Texas*, 809 F.3d at 186–87 (the Fifth Circuit doing the same).

Plaintiffs contend that both factors favor them: Because the redistricting plan "violates Plaintiffs' constitutional rights," "Defendants lack any legitimate interest in enforcing [that] plan." Dkt. 39 at 45. Citing *Reynolds v. Sims*, 377 U.S. 533, 586–87, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), Plaintiffs say that this Court could enjoin the maps despite the then-approaching primary election, Dkt. 108 at 28. Plaintiffs do not posit that Defendants would suffer no harm from an injunction. But they suggest that the burdens of a new election would be minimal because state legislation has "accounted for" the possibility of a delayed election. Dkt. 108 at 29.

Defendants reply first with *Purcell v. Gonzalez*, 549 U.S. 1, 4–5, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) (per curiam), in which the Supreme Court observed that enjoining an election risks "voter confusion" and other costs. That risk only grows "[a]s an election draws closer." *Id.* at 5, 127 S.Ct. 5. The Fifth Circuit has applied *Purcell* rigorously, staying several injunctions during the 2020 election. Dkt. 102 at 48 (collecting cases). Moreover, Defendants convincingly contended that the primary elections were already underway as this Court heard the preliminary-injunction motion, heightening the relevance of *Purcell*'s principle. A delay, Defendants' say, would require election administrators to duplicate their efforts, would increase costs (particularly for small counties), and would require some candidates to change where they seek office. Dkt. 102 at 49. It might further compromise the November 2022 general election. Dkt. 102 at 49. It would confuse voters. Dkt. 102 at 49. And it would "undermine the public's perception of election integrity" by enhancing the risk of tabulation errors and other mistakes, by both voters and election officials. Dkt. 102 at 49.

***31** On this, the Court agrees with Defendants. "[C]ourt changes of election laws close in time to the election are strongly disfavored," *Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564, 567 (5th Cir. 2020) (per curiam), and the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election," *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, —— U.S. ——, 140 S. Ct. 1205, 1207, 206 L.Ed.2d 452 (2020) (per curiam).[21] Those principles apply with equal force in redistricting cases. *See, e.g.*, *Benisek v. Lamone*, —— U.S. ——, 138 S. Ct. 1942, 1944–45, 201 L.Ed.2d 398 (2018) (citing *Purcell*, 549 U.S. at 4–5, 127 S.Ct. 5); *Milligan*, 142 S. Ct. at 879 (Kavanaugh, J., concurring). Granting the requested injunction would flout those commands.

To assess the propriety of an injunction, this Court must "weigh ... considerations specific to election cases." *Purcell*, 549 U.S. at 4, 127 S.Ct. 5. The caselaw identifies several relevant considerations. Foremost are the effects on voters and election administration. "Court orders affecting elections ... can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4–5, 127 S.Ct. 5. An injunction may unduly burden election officials, inflicting massive costs and risking mistakes or disenfranchisement. *Tex. All.*, 976 F.3d at 568. Election

irregularities reduce voters' confidence in the system and diminish election integrity; abrupt changes thus disserve the public interest. *See id.* at 569. We also must mind the principle, oft repeated by the Fifth Circuit, that the public has a powerful interest in the enforcement of "duly enacted law[s]." *Id.* at 568.

This Court finds that those considerations weigh strongly against an injunction. At the hearing, Defendants' witnesses testified that an injunction would overload election officials and confuse and disenfranchise voters. This Court finds those witnesses knowledgeable, compelling, and credible, especially given that Plaintiffs did not attempt to rebut their testimony.

Keith Ingram, the director of the state Elections Division, testified that the March primary was "underway." R. at 7:174. He explained that county officials already had spent months preparing for the election. R. at 7:154. The candidate-filing deadline passed in December, R. at 7:159, and county officials had to program, proof, verify, and mail ballots to meet federal deadlines in January, R. at 7:159–61. Redistricting only added to those burdens. R. at 7:161–62, 164.

Asked whether the election could feasibly be delayed, Ingram replied that a delay was "kind of inconceivable." R. at 7:166. Most concerningly, Ingram testified that up to 100,000 voters had already submitted ballot applications. Some of those applications were rejected; others had been accepted, and some of *those* voters might have already cast their ballots. R. 7:166–67. Unwinding the election would create mass confusion: Voters who had received a ballot would not know whether it would count, and voters who had not received one would not know whether to request a new one or to await the one they had already requested. R. 7:166–67.

Ingram began in his job in 2012, when redistricting delayed an election. R. at 7:151. That delay, he testified, reduced voter trust: Voters "inevitably thought" that moving the election "was a conspiracy on the part of the other team to jerk around their particular candidate." R. 7:167. Ingram suspects the same would occur if this Court enjoined the redistricting maps: "It's very corrosive to the authenticity and legitimacy of the process whenever you change the rules in the middle of the game." R. at 7:173.

***32** Defendants next presented testimony from two county election administrators. Since 2011, Staci Decker has administered elections for Kendall County, a relatively small county in the Texas Hill Country. Record. R. at 8:27. Bruce Sherbet administers elections for Collin County, the state's sixth largest. R. at 8:5–6. Sherbet has nearly fifty years of experience running elections, including almost twenty-five years of service as Dallas County's election administrator. R. at 8:7.

Both Decker and Sherbet testified that much of the work preparing for the March primary was already done. For example, Decker stated that her four-person team had programmed ballots, prepped ballots for mailing to voters, ordered supplies for the election, prepared election-day kits, and contracted for polling locations. R. at 8:30, 32, 43–44. An injunction would require her office to undo much of that work and to mail out new ballots, an expense that Decker says her small county office cannot afford. R. at 8:39–40, 43–44.

Decker substantiated Ingram's concern about voter confusion: In 2012, during the last court-ordered election delay, many voters in her county received multiple ballots, and some of them returned their ballots in the wrong envelopes, which caused their disqualification. R. at 8:49–50. Decker also recalled receiving complaints from voters who did not know when to submit their ballots. R. at 8:50.

Sherbet explained that Collin County was struggling to implement the redistricting plans thanks to supply-chain snarls, new compliance obligations, two special elections, and serious staffing challenges. R. at 8:18–20. Asked whether changing the maps would be "feasible" in time for the March primary, Sherbet responded that any changes would be "very problematic and really confusing." R. at 8:20.

Plaintiffs offer no contrary testimony. They instead press three reasons why this Court should disregard Defendants' showing. All are unconvincing.

First, Plaintiffs suggest that *Reynolds v. Sims* decides this case, because there the Court approved a district court's injunction of a redistricting plan despite an approaching election. Dkt. 108 at 28. But *Reynolds* is distinguishable: The injunction contested there issued several months before the election. *See Reynolds*, 377 U.S. at 542–43, 84 S.Ct. 1362. And the majority stressed that a district court "should consider the proximity of a forthcoming election and .... endeavor to avoid a disruption of the election process." *Id.* at 585, 84 S.Ct. 1362. In fact, the *Reynolds* Court expressly concluded that the injunction imposed no "great difficulty" on the State of

Alabama, a finding that the evidence before this Court cannot support. *Id.* at 586, 84 S.Ct. 1362.

But even if *Reynolds* might permit an injunction here, the past three decades of Supreme Court precedent would not. In the past three years alone, the Court has repeatedly intervened to stay the hand of district courts that have tried to enjoin elections. *See, e.g.*, *Andino v. Middleton*, —— U.S. ——, 141 S. Ct. 9, 208 L.Ed.2d 7 (2020) (mem.); *Clarno v. People Not Politicians Oregon*, —— U.S. ——, 141 S. Ct. 206, 207 L.Ed.2d 1154 (2020) (mem.); *Milligan*, 142 S. Ct. at 879 (mem.). That posture is not nascent; it is decades in the making. *See, e.g.*, *Purcell*, 549 U.S. at 4–5, 127 S.Ct. 5. "[T]he only constant principle than can be discerned from the Supreme Court's recent decisions ... is that its concern about confusion resulting from court changes to election laws close in time to the election should carry the day in the stay analysis." *Veasey v. Perry*, 769 F.3d 890, 897 (5th Cir. 2014) (Costa, J., concurring in the judgment); *see also id.* at 895 (majority opinion) (making the same point). This Court agrees.

***33** *Second*, pointing to Section 41.0075 of the Texas Election Code, Plaintiffs contend that Defendants already have accounted for the prospect of delay. That statute created three sets of election dates; which set would take effect would depend on the date that the Texas legislature enacted a redistricting plan. *See* Tex. Elec. Code § 41.0075(c)(1)–(3).

The Court does not perceive that statute's relevance. As Plaintiffs appear to acknowledge, Dkt. 108 at 29, the point of the statute was to accommodate *legislative* delays in *enacting* a redistricting plan. The law did not, as Plaintiffs suggest, "protect the state and the public's interest in orderly elections should the primary be delayed" for any *other* reason. Dkt. 108 at 29. Once the Texas Legislature enacted a redistricting plan, Section 41.0075 told election administrators and other officials across the state which election dates would apply. It did not create contingencies for other delays. But even if it had, that would not change our analysis. Plaintiffs do not explain why or how the legislature's anticipation of legal challenges to its redistricting plan would mitigate the harms of an injunction to the public's interest in orderly elections when the elections are underway and ballots are in voters' hands.

Third, Plaintiffs cite the Supreme Court's admonition that "injunctive relief is available in appropriate cases to block voting laws from going into effect." Dkt. 108 at 30 (quoting *Shelby County v. Holder*, 570 U.S. 529, 537, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013)). But that prompts the question whether this is an "appropriate case[ ]," and the Supreme Court has made clear that a preliminary injunction so close to an election is *not* appropriate.

The core of Plaintiffs' theory seems to be that because they have a meritorious claim, they meet the balance-of-harms and public-interest factors. *See* Dkt. 108 at 27–28; Dkt. 39 at 45–46. That result does not necessarily follow. Even if Plaintiffs *were* likely to succeed on the merits, the Supreme Court and the Fifth Circuit have stressed that a likelihood of success on the merits does not dictate who prevails under the balance-of-harms and public-interest prongs.[22]

That is not to say that Plaintiffs cannot show, after a trial on the merits, that they are entitled to an injunction. But we must heed the consequences of preliminary relief for the March 2022 primaries. Defendants have established that an injunction would confuse and disenfranchise voters, leave candidates in the lurch, stress already overburdened election administrators, and inflict significant costs that would fall most heavily on the state's smallest counties. Plaintiffs had the burden to overcome that showing. They have not done so.

***34** This Court finds that the balance of harms and the public interest favor Defendants. A preliminary injunction will not issue.

F. Conclusion

Plaintiffs have demonstrated that, absent an injunction, the injury they complain of would be irreparable. But they have not shown that they are likely to succeed on the merits. And they have not established, as to two factors that overlap in this context, either that the balance of equities favors them or that granting an injunction would be in the public interest.

Failure on even one prong is sufficient to conclude that a preliminary injunction shall not issue. *See Planned Parenthood*, 403 F.3d at 329. Thus, a preliminary injunction is inappropriate here, and this Court may not issue one.

IV. PLAINTIFFS' RULE 65(a)(2) MOTION

Plaintiffs have moved to consolidate under Federal Rule of Civil Procedure 65(a)(2), but the Court declines to do so. Both parties made their presentations, and the Court evaluated them, in the context of a limited hearing. As Defendants point out, they were given no warning—until closing statements—that Plaintiffs would move to consolidate, meaning that

Defendants had no opportunity to prepare for a hearing that would result in a final judgment. R. at 9:34. That context also informed several of the Court's evidentiary rulings, most notably the decision to admit, without authentication, Plaintiffs' Exhibit 102, which purports to be a log of private text messages.

Moreover, it is not evident what benefit would follow from consolidation. This memorandum and order reflects the Court's opinion that Plaintiffs are not likely to succeed on either their intentional discrimination or racial gerrymandering claim. Admittedly, a final determination could spare the Court from fruitless relitigation of those theories. But on the other hand, newly discovered evidence or authority could lead to the opposite outcome from the one we predict here. And completely redundant presentations remain unnecessary in light of Rule 65(a)(2)'s stipulation that, "Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial."

We trust that Plaintiffs' interest in presenting an effective case will guide them in deciding whether to return to the theories addressed in this order or to rest entirely on their as-yet untested *Gingles* claim. For all these reasons, we deny Plaintiffs' motion to consolidate this action and to issue a final judgment.

V. CONCLUSION

Plaintiffs' motion for a preliminary injunction is DENIED for failure to show a likelihood of success on the merits and failure to show that the balance of equities and the public interest favor an injunction. Plaintiffs' Rule 65(a)(2) motion to consolidate the motion into one for final judgment is also DENIED.

All Citations

--- F.Supp.3d ----, 2022 WL 1410729

Footnotes

1 ACS stands for "American Community Survey." It is an annual report the Census Bureau produces by sampling roughly 2% of all American households. Though the report is less thorough than the decennial census, which seeks to survey *all* American households, its annuality keeps it more timely. The ACS also collects data, such as citizenship status, that the decennial census does not. Five-year figures like these combine the results of five consecutive ACS reports, producing a result that is less current than the most recent ACS but has a sample size five times larger. R. at 2:118–19, 121.

2 Those cases are (1) *Wilson v. Texas*, No. 1:21-CV-943 (W.D. Tex.); (2) *Voto Latino v. Scott*, No. 1:21-CV-965 (W.D. Tex.); (3) *MALC v. Texas*, No. 1:21-CV-988 (W.D. Tex.); (4) *Brooks v. Abbott*, No. 1:21-CV-991 (W.D. Tex.); (5) *Texas State Conference of the NAACP v. Abbott*, No. 1:21-CV-1006 (W.D. Tex.); and (6) *Fair Maps Texas Action Committee v. Abbott*, No. 1:21-CV-1038 (W.D. Tex.).

3 A recent Supreme Court concurrence has suggested that a higher showing might be required where, as here, a plaintiff seeks to enjoin an impending election. Under that test, Plaintiffs would have to establish that "(i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Merrill v. Milligan*, —— U.S. ——, 142 S. Ct. 879, 881, —— L.Ed.2d —— (2022) (Kavanaugh, J., concurring). But that test is not the law, and even if it were, it would not be necessary to apply it here because the Court concludes that Plaintiffs have failed to make the more traditional showing. Thus, the Court applies the standard four preliminary-injunction requirements.

4 *Compare* *Backus v. South Carolina*, 857 F. Supp. 2d 553, 569 (D.S.C. 2012) (three-judge court) (discussing uncertainty about the Fifteenth Amendment's role), *with* *Prejean v. Foster*, 227 F.3d 504, 519 (5th Cir. 2000) ("[T]he Supreme Court has rejected application of the Fifteenth Amendment to vote dilution causes of action.").

5 The factors are sometimes enumerated differently, including by various panels of the Fifth Circuit. One tally treats procedural and substantive departures from normal procedure as separate prongs, with discriminatory effect as a distinct "starting point." *See, e.g.*, *Rollerson v. Brazos River Harbor Navigation Dist.*, 6 F.4th 633, 639–40 (5th Cir. 2021) (plurality opinion) (quoting *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555). This Court adopts the enumeration listed elsewhere,

see, e.g., *Fusilier v. Landry*, 963 F.3d 447, 463 (5th Cir. 2020), primarily because it better aligns with the parties' briefing. That decision is organizational and has no effect on the underlying legal or factual analysis.

6 *Miller*, 515 U.S. at 916, 115 S.Ct. 2475, stated only that race must subordinate "traditional ... districting principles," a category from which, perhaps naively, partisanship is often omitted. But later decisions clarify that a partisan motive can defeat a racial-gerrymandering claim. *See, e.g.*, *Cooper v. Harris*, —— U.S. ——, 137 S. Ct. 1455, 1464, 197 L.Ed.2d 837 (2017).

7 It is also worth noting that the Eleventh Circuit did not have the benefit of the Supreme Court's guidance in *Bartlett* when it decided *DeSoto* and *Burton.* The Eleventh Circuit decided those cases in 1996 and 1999, respectively, while the Supreme Court decided *Bartlett* in 2009.

8 These are the "midpoint" years of the five-year ACS reports. Dr. Alford stressed, and the Court accepts, that these are not "snapshots" of the years in question, and the Court uses them here only as rough approximations. R. at 7:71.

9 *See Arlington Heights*, 429 U.S. at 269, 97 S.Ct. 555 (stating that the impact of a zoning decision was "arguably" discriminatory because it tended to exclude members of income groups that were more heavily minority); *see also Washington*, 426 U.S. at 245–46, 96 S.Ct. 2040 (referring to the "disproportionate impact" of a test that was passed at a higher rate by Anglos than Blacks).

10 Other courts have reached the issue when evaluating theories other than intentional vote dilution. *Compare, e.g.*, *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 421 (S.D.N.Y.) (per curiam) (three-judge court) (concluding that divergence in primaries defeats a showing of political cohesion), *aff'd*, 543 U.S. 997, 125 S.Ct. 627, 160 L.Ed.2d 454 (2004) (mem.), *with, e.g.*, *Texas Preclearance Litig.*, 887 F. Supp. 2d at 174 (concluding that "shared voting preferences at the primary level would be powerful evidence of a working coalition, but it is not needed to prove cohesion").

11 This is not to suggest that the redrawing of SD 10 does not bear especially heavily on Asians or members of other minority groups. But the impact on Black and Hispanic voters is especially easy to assess because those groups are relatively well-represented in SD 10 and because both parties have focused on those groups in their analysis.

12 And they well might have been. Racial data can remain "fixed in [a mapdrawer's] head" even when they are not present on a computer screen, *Harris*, 137 S. Ct. at 1477, and Senator Huffman and her staff are knowledgeable civil servants who doubtless have some awareness of the state's demographics. Indeed, as noted previously, one member of Senator Huffman's staff was counsel in previous litigation where the racial demographics of Tarrant County were at issue. Pls.' Ex. 25 at 1.

13 Defendants protest that "the legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents." *Brnovich v. Democratic Nat'l Comm.*, —— U.S. ——, 141 S. Ct. 2321, 2350, 210 L.Ed.2d 753 (2021). Thus, Defendants argue, even if Senator Huffman were shown to have acted based on discriminatory intent, it would not follow that the other senators and representatives who voted for it had the same intent, and so Plaintiffs' theory would still fail. We find that reading of *Brnovich* somewhat aggressive—though legislators are not "cat's paw[s]," *id.*, statements of discriminatory intent by a committee chair made during floor debate would doubtless be of some weight in judging the intentions of the body as a whole, particularly at this preliminary stage. And this would seem to be especially true where, as here, the committee chair and her team were solely responsible for drafting the map. But because we do not find evidence of discriminatory intent in Senator Huffman's statements, we decline to examine further the extent to which such intent could have been more broadly attributed.

14 Though the Court declined to adopt the approach taken in *Singleton* because of distinguishable contexts, the Court is nonetheless concerned about the scope of state legislative privilege as Senator Huffman and Defendants conceive of it. State legislative privilege in this context raises serious questions about whether this Court (or any court) could ever accurately and effectively determine intent.

15 *Cf. CIGNA Corp. v. Amara*, 563 U.S. 421, 444, 131 S.Ct. 1866, 179 L.Ed.2d 843 (2011) (noting that preponderance of the evidence is the "default [burden of proof] for civil cases").

16 *See also* 13 Moore's Federal Practice § 65.22 (3d ed.) (noting that the "deprivation of constitutional rights" has "ordinarily been held to be irreparable"), Lexis (database updated Dec. 2021); 11A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2948.1 (3d ed.) ("When an alleged deprivation of a constitutional right is involved ..., most courts hold that no further showing of irreparable injury is necessary."), Westlaw (database updated Apr. 2021).

17 Doing so can be appropriate where the election was conducted in a racially discriminatory manner. *See* *Cook v. Luckett*, 735 F.2d 912, 922 (5th Cir. 1984).

18 *Texas Legislative Sessions and Years*, Legis. Reference Libr. of Tex., http://lrl.texas.gov/sessions/sessionYears.cfm.

19 Defendants purport to offer one argument independently of the likelihood-of-success element, but that theory also contests the merits of Plaintiffs' claims instead of the nature of their claimed injury. *See* Dkt. 102 at 46 (second paragraph).

20 *Texas v. United States*, 524 F. Supp. 3d 598, 663 (S.D. Tex. 2021) (citing *Texas*, 809 F.3d at 187).

21 *See also* *Frank v. Walker*, 574 U.S. 929, 135 S.Ct. 7, 190 L.Ed.2d 245 (2014) (mem.); *Veasey v. Perry*, 574 U.S. 951, 135 S.Ct. 9, 190 L.Ed.2d 283 (2014) (mem.).

22 The Fifth Circuit has "expressly rejected" the idea that courts must presume that the balance of harms favored a plaintiff who has demonstrated a likelihood of success. *Def. Distributed*, 838 F.3d at 457 (quoting *S. Monorail Co. v. Robbins & Myers, Inc.*, 666 F.2d 185, 188 (5th Cir. Unit B 1982)). That principle holds when plaintiffs bring constitutional claims. *Id.* at 458 ("Ordinarily, of course, the protection of constitutional rights *would* be the highest public interest at issue in a case. [But] that is not necessarily true ...."); *see also* *Winter*, 555 U.S. at 23, 129 S.Ct. 365 (holding that the district court should have denied an injunction, despite that court's finding a likelihood of success on the merits, because the plaintiffs' injury "is outweighed by the public interest").

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United States District Court,
N.D. Illinois,
Eastern Division.

COMMITTEE FOR A FAIR AND BALANCED MAP, et al., Plaintiffs

v.

ILLINOIS State BOARD OF ELECTIONS, et al., Defendants.

No. 1:11–CV–5065.
|
Nov. 1, 2011.

Attorneys and Law Firms

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JOHN DANIEL TINDER, Circuit Judge, ROBERT L. MILLER, JR., District Judge, JOAN HUMPHREY LEFKOW, District Judge.

OPINION AND ORDER

***1** Illinois lost one Congressional seat pursuant to the 2010 Census. The Illinois Congressional Redistricting Act of 2011, which became law on June 24, 2011, adopted a map establishing boundaries for the eighteen remaining congressional districts. The plaintiffs in this redistricting challenge contend that the 2011 Map is a product of intentional and illegal vote dilution of Latino voters, particularly in Districts 3, 4, and 5, and an unconstitutional partisan gerrymander against Republican voters statewide, especially in the Chicagoland area and most blatantly in Districts 3 and 11. The defendants are the Illinois State Board of Elections and its members, to which this opinion refers collectively as "the Board of Elections." The plaintiffs are an organization called Committee for a Fair and Balanced Map, six registered voters, and ten incumbent Republican members of Congress, to which this opinion refers collectively as "the Committee." The Board of Elections doesn't dispute the Committee's standing to bring this redistricting challenge.[1]

A.

The court's jurisdiction is based on 28 U.S.C. §§ 1331, 1343, and 1357. The Board of Elections has moved to dismiss the complaint in its entirety. The court's October 12, 2011 opinion and order set forth the factual background; this opinion assumes the reader's familiarity with that opinion, and adds facts only as needed to discuss the complaint and the motion to dismiss.

The first three counts of the Committee's complaint allege that the 2011 Map violates § 2 of the Voting Rights Act, the Equal Protection Clause of the Fourteenth Amendment, and the Fifteenth Amendment. The complaint alleges that the 2011 Map dilutes the votes of Latino voters (including some of the individual plaintiffs) by wedging a "super-majority" unnecessarily into District 4 while reducing the number of Latino votes in Districts 3 and 5—in effect, wasting Latino votes in District 4 and diluting the Latino vote in Districts 3 and 5, where Latinos (the complaint alleges) would have no significant influence in choosing primary and general election candidates of their choice.

1.

For purposes of § 2 of the Voting Rights Act, vote dilution is the practice of reducing the potential effectiveness of a group's voting strength by limiting the group's chances to translate that strength into voting power. *See, e.g., Shaw v. Reno,* 509 U.S. 630, 641, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (*Shaw I*). Racially polarized voting creates the risk that state legislatures may dilute the voting strength of politically cohesive minority groups by manipulating district lines. *See Voinovich v. Quilter,* 507 U.S. 146, 153–154, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993). Vote dilution most often is attempted either by scattering the minority voters among several districts in which a bloc-voting majority can outvote them regularly, or by centralizing them into one or two districts and leaving the other districts relatively free from their influence. *See Johnson v. De Grandy,* 512 U.S. 997, 1007, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994).

Intentional vote dilution through the drawing of district lines violates both § 2 of the Voting Rights Act and the Fourteenth Amendment, *see Rogers v. Lodge,* 458 U.S. 613, 617, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982), and § 2 of the Voting Rights Act also forbids facially neutral districting that has the effect of diluting minority votes. 42 U.S.C. § 1973.

***2** Section 2 provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State ... in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color ... as provided in subsection (b) of this section." 42 U.S.C. § 1973(a). Subsection (b) provides that a violation of subsection (a) "is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State ... are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The 1982 amendments to section 1973 eliminated the requirement of intentional discrimination by substituting a "results" test for the "purpose" test previously imposed by the Supreme Court. *See Ketchum v. Byrne,* 740 F.2d 1398, 1403 (7th Cir.1984).

Generally, a group of plaintiffs must prove three preconditions to prove a § 2 claim: (1) that their minority group is large enough and geographically compact enough to be a majority in a singlemember district, or in more single-member districts than the redistricting plan created; (2) that their minority group is "politically cohesive," meaning that its members vote in a similar fashion; and (3) the majority votes as bloc, allowing majority voters usually to defeat the minority's preferred candidates. *Thornburg v. Gingles,* 478 U.S. 30, 48–51, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). If the plaintiffs satisfy the burden of proving those conditions, the court moves on to decide, based on the totality of the circumstances, whether a § 2 violation has occurred, *see De Grandy,* 512 U.S. at 1011, considering (among other things) the state's history of voting-related discrimination, the degree of racial polarization in voting, and whether and how the state has used voting practices or procedures that facilitate discrimination against the plaintiffs' minority group. *Gingles,* 478 U.S. at 44–45.

The Board of Elections says the Committee's § 2 claim should be dismissed because it doesn't allege the first *Gingles* precondition, which "requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *League of United Latin Am. Citizens v. Perry,* 548 U.S. 399, 430, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*) (quoting *De Grandy,* 512 U.S. at 1008). The Board of Elections also argues that the Committee's complaint only parrots the language of *Gingles* with respect to the second and third precondition. Section 2 claims are district-specific, the Board of Elections says, so the Committee's complaint must (but doesn't) allege that the majority votes enough as a bloc to allow it usually to defeat the Latino voters' preferred candidate in each of the Districts 3 and 5. *Gingles,* 478 F.3d at 51. The Board of Elections also contends that the Committee hasn't alleged any facts relevant to the totality of the circumstances analysis, such as a history of discrimination against Latinos affecting voter turnout or a history of electoral discrimination, a lack of proportionality in the citizen votingage population, or polarized voting specific to Cook County.

***3** The Committee asserts that because it can show intentional discrimination, it doesn't need to follow the *Gingles* test.[2] The Supreme Court has not resolved this issue, but has at least implied that the first *Gingles* precondition may be relaxed where intentional discrimination is shown. In *Bartlett v. Strickland,* 556 U.S. 1, 129 S.Ct. 1231, 1246, 173 L.Ed.2d 173 (2009), the Court held that a "party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent." The Court limited its holding by noting that the case did not involve allegations of intentional and wrongful conduct, and therefore, the Court didn't need to resolve whether "intentional discrimination affects the *Gingles* analysis." *Id.* The Court expressly stated that its holding in that case "does not apply to cases in which there is intentional discrimination against a racial minority." *Id.* (Kennedy, J., plurality); *see also Baird v. Consolidated City of Indianapolis,* 976 F.2d 357, 359 (7th Cir.1992) (implying that intentional discrimination under § 2(a) doesn't require the same analysis as an effects-based claim under § 2(b)); *see also Voinovich,* 507 U.S. at 158 (stating that *Gingles* "cannot be applied mechanically and without regard to the nature of the claim").

The circuit courts that have addressed this issue have taken varying approaches. The Ninth Circuit in *Garza v. County of Los Angeles,* 918 F.2d 763, 769 (9th Cir.1990) held that "to the extent that *Gingles* does require a majority showing,

it does so only in a case where there has been no proof of intentional dilution of minority voting strength." *Id.; see also United States v. Brown,* 561 F.3d 420, 432 (5th Cir.2009) (indicating that discriminatory intent alone will ordinarily be sufficient to prove a § 2 violation). But "[e]ven where there has been a showing of intentional discrimination, plaintiffs must show that they have been injured as a result." *Garza,* 918 F.2d at 771. The court explained that "[a]lthough the showing of injury in cases involving discriminatory intent need not be as rigorous as in effects cases, some showing of injury must be made to assure that the district court can impose a meaningful remedy." *Id.* Plaintiffs must still show that their members had less opportunity than other residents in the district to participate in the political processes and to elect legislators of their choice. *Id.; see also African Am. Voting Rights Legal Defense Fund, Inc. v. Villa,* 54 F.3d 1345, 1357 n. 18 (8th Cir.1995) (approving this approach).

The Eleventh Circuit in *Johnson v. DeSoto County Bd. of Commissioners,* 72 F.3d 1556, 1561–63 (11th Cir.1996), citing to *Voinovich,* 507 U.S. at 154–57 and the plain language of § 2, held that intent alone was insufficient to establish a violation. Although intentional discrimination wasn't shown in *Voinovich,* it was alleged, yet, the Court stated that " § 2 focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the effect of denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter." 507 U.S. at 155. The Court held that plaintiffs can prevail on a claim under § 2 "only if they show that, under the totality of circumstances, the State's apportionment scheme has the *effect* of diminishing or abridging the voting strength of the protected class." *Id.* at 157 (emphasis added); *see also Barnett v. Daley,* 32 F.3d 1196, 1202 (7th Cir.1994) (citing to *Voinovich* and stating that it is "no longer clear that intent plays *any* role in a suit under section 2") (emphasis in original).

***4** The *Johnson* court also looked to the plain language of § 2(a) which states that "[n]o voting qualification or prerequisite to voting or standing, practice, or procedure shall be imposed or applied ... in a manner which *results* in a denial or abridgement of the right ... to vote on account of race or color ...." *Johnson,* 72 F.3d at 1563 (quoting 42 U.S.C. § 1973(a)). The court explained that the "statutory language expressly requires a showing of discriminatory results, and it admits of no exception for situations in which there is discriminatory intent but no discriminatory results." *Id.*.

That doesn't mean, the *Johnson* court reasoned, that intent has no role to play in a § 2 violation. Although the court disagreed that "intent to discriminate lessens the amount of discriminatory results that must be shown [,]" it held that "[i]t is circumstantial evidence of discriminatory results that should be considered in assessing the 'totality of the circumstances.' " *Id.* at 1565. The court explained that "[w]here it can be inferred, as it often can be, that the enactors were in a good position to know the effect their actions would have, the fact that the enactment was motivated by a desire to produce discriminatory results will often be strong, albeit circumstantial, evidence that such results were achieved." *Id.*

While the Ninth and Eleventh Circuits disagree as to the extent of discriminatory results that must be shown when there is discriminatory intent, both agree that even if there is such intent, there still must be some showing of discriminatory effect. Considering these concepts in tandem is a solid form of analysis under the VRA. A showing that the drafters of the plan intended to discriminate very well may lead to the conclusion that the plan had its intended effect, but the other factors in the totality of circumstances test are still relevant in resolving the issue. Therefore, the first *Gingles* factor is appropriately relaxed when intentional discrimination is shown, but the Committee will nevertheless have to show that the plan lessened the Latinos' opportunity to elect a candidate of its choice. We believe for the Committee to show discriminatory effects they will have to prove that the second and third *Gingles* preconditions are established—that the minority group is politically cohesive and that the majority votes as a bloc, allowing the majority voters usually to defeat the minority's preferred candidates. *Gingles,* 478 U.S. at 50–51. It must make this showing on a district specific basis. *Id.*

If the Committee merely proves what is alleged in their complaint, it will face an uphill battle. For starters, it hasn't alleged that the third *Gingles* precondition is established on a districtwide basis, nor have they identified how the Latinos' opportunity to elect a candidate of their choice in Districts 3 and 5 has been affected by the reduction of Latino voting-age population in those districts as a result of an increase in District 4. As the Seventh Circuit has said, "because of both age and the percentage of noncitizens, Latinos must be 65 to 70 percent of the total population in order to be confident of electing a Latino." *Barnett v. City of Chicago,* 141 F.3d 699, 703 (7th Cir.1998) (citing *Ketchum,* 740 F.2d at 1415). "[T]he plaintiff must show that there *is* a feasible alternative to the defendant's map, an alternative that does a better job of

balancing the relevant factors, although the fine-tuning of the alternative can be left to the remedial stage of the litigation." *Barnett,* 141 F.3d at 702 (emphasis in original).

***5** Further, we agree with the Board of Elections that the more appropriate inquiry in this case for the proportionality factor, which is analyzed on a statewide basis, is citizen voting-age population. The Seventh Circuit stated in *Barnett* "that the proper benchmark for measuring proportionality is citizen voting-age population." 141 F.3d at 705. The court reasoned that "citizen voting-age population is the basis for determining equality of voting power that best comports with the policy of [§ 2]." *Id.* at 704. The court further explained that "[n]either the census nor any other policy or practice suggests that Congress wants noncitizens to participate in the electoral system as fully as the concept of virtual representation would allow." *Id.* "The right to vote is one of the badges of citizenship. The dignity and very concept of citizenship are diluted if noncitizens are allowed to vote either directly or by the conferral of additional voting power on citizens believed to have a community of interest with the noncitizens." *Id.*

This position seems to have support from the Supreme Court's decision in *L ULAC,* 548 U.S. at 429. When determining whether District 23 created a Latino opportunity district for purposes of the first *Gingles* condition, the Court stated that the relevant inquiry was citizen voting-age population, not merely voting-age population. *Id.* The Court reasoned that "[t]his approach fits the language of § 2 because only eligible voters affect a group's opportunity to elect candidates." *Id.* Similarly, when discussing proportionality under the totality of circumstances, the Court looked to the citizen voting-age population. *Id.* at 436.

We recognize that it may be difficult for the Committee to make this showing because the 2010 census doesn't include citizenship, but citizen voting-age population can be shown through expert testimony; census data is not required. We also recognize that proportionality is just one factor to consider in the totality of circumstances. This test allows us to consider both census votingage population data and evidence deducing citizen voting-age population.

Despite these infirmities in the Committee's complaint, we don't believe that it must be dismissed under Rule 12(b)(6). The Board of Elections demands more of the Committee's complaint than the law requires. A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations aren't required, but the complaint must contain enough factual matter "to 'state a claim that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)); *see also Morrison v. YTB Int'l, Inc.,* 649 F.3d 533, 538 (7th Cir.2011); *Brooks v. Ross,* 578 F.3d 574, 581 (7th Cir.2009). To plead a plausible claim, a complaint must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 129 S.Ct. at 1949; *see also Swanson v. Citibank, N.A.,* 614 F.3d 400, 404 (7th Cir.2010) ("[T]he plaintiff must give enough details about the subject-matter of the case to present a story that holds together."). "Threadbare recital of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal,* 129 S.Ct. at 1949.

***6** But a complaint needn't specifically plead every element the pleader must prove at trial. *See Reynolds v. CB Sports Bar, Inc.,* 623 F.3d 1143, 1147 (7th Cir.2010) ("[A]lthough the plaintiff is required to plead more than bare legal conclusions to survive a motion to dismiss, once the plaintiff pleads sufficient factual material to state a plausible claim—that is, sufficient to put the defendant on notice of a plausible claim against it—nothing in *Iqbal* or *Twombly* precludes the plaintiff from later suggesting to the court a set of facts, consistent with the well-pleaded complaint, that shows that the complaint should not be dismissed."); *see also Bausch v. Stryker Corp.,* 630 F.3d 546, 560 (7th Cir.2010) (holding that since plaintiffs usually lack enough pre-filing information to identity the precise defect with a product, the precise defect needn't be pleaded in the complaint), *cert. denied,* 132 S.Ct. 498, 2011 WL 3047772 (U.S. Oct.31, 2011). A plaintiff, then, must put enough specifics in the complaint to keep the complaint from being "implausible." The complaint must contain enough in the way of factual allegations to make it more than a "sheer possibility" that the defendant has acted unlawfully. *Iqbal,* 129 S.Ct. at 1949; *accord, In re Text Messaging Antitrust Litigation,* 630 F.3d 622, 629 (7th Cir.2010), *cert denied,* —— U.S. ——, 131 S.Ct. 2165, 179 L.Ed.2d 937 (Apr. 25, 2011) ("[T]hat the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as 'preponderance of the evidence' connote.").

Given the specific allegations in the Committee's complaint, we see nothing implausible about the possibility that the Committee could prove each allegation in the complaint and, consistent with the complaint's allegations, further prove that enough Latino voters could be reassigned within the three districts to create two reasonably compact districts that provide Latinos with an opportunity to elect a candidate of their choice, that there's about as many Latino citizen voters as voting age Latinos, that Latinos are politically cohesive in the challenged area, and that the majority votes as a bloc in the challenged districts to defeat the Latino voter's preferred candidate.

More facts might be alleged, but the Committee's complaint states a § 2 claim that rises above implausibility and gives the Board of Elections ample notice of the nature of the claim. We deny the Board of Election's dismissal motion insofar as it is directed toward Count I of the Committee's complaint.

2.

Count II of the Committee's complaint purports to state a claim for vote dilution under the Fourteenth Amendment, which requires a showing that the redistricting was "conceived or operated as [a] purposeful devic[e] to further racial discrimination." *City of Mobile v. Bolden,* 446 U.S. 55, 66 (1980) (Stewart, J., plurality opinion) (quoting *Whitcomb v. Chavis,* 403 U.S. 124, 149, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971)), "by minimizing, cancelling out or diluting the voting strength of racial elements of the voting population." *Rogers,* 458 U.S. at 617 (quoting *Whitcomb,* 403 U.S. at 149). Courts use a totality of the circumstances analysis in deciding whether a challenged redistricting plan violates either the Fourteenth Amendment or § 2 of the Voting Rights Act. *See Gingles,* 478 U.S. at 36–37; *Rogers,* 458 U.S. at 620–622 and n. 8.

***7** The Board of Elections says Count II is insufficient for the same reasons Count I is insufficient. We disagreed with the Board of Elections as to Count I, for reasons we have already discussed. Because the Board of Elections advances no new reasons to dismiss Count II, we deny the Board of Elections' motion to the extent it is directed to the Fourteenth Amendment vote dilution claim in Count II.

3.

Count III of the Committee's complaint seeks to state a vote dilution claim under the Fifteenth Amendment, section 1 of which provides, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." In its motion to dismiss, the Board of Elections contends that the Fifteenth Amendment "prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote," *Bolden,* 446 U.S. at 65 (plurality opinion), and doesn't apply to vote dilution. (*See* Doc. No. 40, pp. 8–9) (citing *Rice v. Cayetano,* 528 U.S. 495, 513–514, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000); *Reno v. Bossier Parish Sch. Bd.,* 528 U.S. 320, 334 n. 3, 120 S.Ct. 866, 145 L.Ed.2d 845 (2000); *Bolden,* 446 U.S. at 65; *Beer v. United States,* 425 U.S. 130, 142 n. 14, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976); *Osburn v. Cox,* 369 F.3d 1283, 1288 (11th Cir.2004)).

The law isn't as straightforward as the Board of Elections sees it. The language of § 2 of the Voting Rights Act, which forbids intentional vote dilution, "track[s], in part, the text of the Fifteenth Amendment." *Bartlett,* 129 S.Ct. at 1240; *see, e.g., Northcross v. Bd. of Educ. of Memphis City Schs.,* 412 U.S. 427, 428, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973) (stating that the similarity in language of two statutes is "a strong indication that the two statutes should be interpreted *par passu."*). The Supreme Court hasn't decided whether the Fifteenth Amendment applies to vote dilution claims. *Voinovich,* 507 U.S. at 159. The language the Board of Elections cites in *Bossier Parish Sch. Bd.,* 528 U.S. at 334 n. 3, doesn't resolve the issue; it simply keeps the issue undecided. As one court of appeals said, "We simply cannot conclude that the [Supreme] Court's silence and reservation on these issues clearly forecloses Plaintiffs' Fifteenth Amendment claim." *Page v. Bartels,* 248 F.3d 175, 193, n. 12 (3d Cir.2001). Intentionally discriminatory redistricting can violate the Fifteenth Amendment "if done with the purpose of depriving a racial minority group of the right to vote." *Id.* at 193; *see also Hastert v. State Bd. of Elections,* 777 F.Supp. 634, 645 (N.D.Ill.1991). The record doesn't tell us why the Committee wants to proceed to trial on what it contends are two identical counts, but that's not what we have to decide today.

The Committee's complaint, the Board of Elections argues, doesn't assert a plausible claim that the 2011 Map denies the Latino plaintiffs the right to vote. We disagree with the premise of this argument: Fifteenth Amendment plaintiffs needn't allege a complete denial of their right

to vote. The Fifteenth Amendment also prohibits a purposefully discriminatory abridgment of the freedom to vote. *See Mobile v. Bolden,* 446 U.S. at 65 (plurality opinion). The Committee's complaint alleges that the 2011 Map intentionally discriminates against Latino voters and effectively "denies or abridges the right of the Racial Dilution Plaintiffs to vote" by packing District 4 with more Latino voters than necessary to elect their candidate of choice and by reducing the number of Latino voters in Districts 3 and 5. It alleges that Latino voters traditionally and consistently vote cohesively in Cook County; that "[m]any Latino voters in proposed District 4 will see their votes wasted because the Plan intentionally makes those votes unnecessary to elect a candidate of their choice," and that the intentionally diminished numbers in Districts 3 and 5 will keep Latino voters in those districts from having any significant influence in choosing primary and general election candidates. Those allegations amount to a plausible claim under the Fifteenth Amendment of intentional abridgment of some of the plaintiffs' right to vote through vote dilution.

***8** We deny the Board of Elections' motion to dismiss to the extent it seeks dismissal of Count III of the Committee's complaint.

4.

Count IV of the Committee's complaint alleges racial gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. A plaintiff proves an Equal Protection Clause violation in redistricting by showing that race was the legislature's predominant motive in drawing district lines. *Shaw v. Hunt,* 517 U.S. 899, 905, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*); *Miller v. Johnson,* 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). The Board of Elections says Count IV isn't pleaded sufficiently because the Committee's complaint doesn't make enough factual allegations to support its claim that racial considerations trumped traditional districting principles; the complaint even alleges that the redistricting after the 1990 Census created a district shaped and located similarly to the 2011 Map's District 4. Again, the Board of Elections asks more of the complaint than the law requires.

One way a plaintiff can state a claim under the Equal Protection Clause is by alleging that a state redistricting plan, on its face, has no rational explanation except as an effort to separate voters on the basis of race. *Shaw v. Reno,* 509 U.S. 630, 649, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (*Shaw I*). The Committee's complaint makes those allegations with respect to District 4 in ¶¶ 3, 59–68, and 125. The Committee's complaint also alleges in ¶ ¶ 59–62 that previous litigation "established that race—that is, Latino ethnicity—was the predominant consideration in the creation of" a predecessor district that had a very similar shape and was in the same location as the newly adopted District 4. Those allegations are sufficient to state, and put the Board of Elections on notice of, a claim upon which relief plausibly can be granted.

The Board of Elections' motion to dismiss is denied to the extent it is directed toward the Fourteenth Amendment racial gerrymandering claim in Count IV.

5.

The Board of Elections also argues that the Committee has pleaded itself out of court on the first four counts, each of which asserts that intentional discrimination against Latino voters was the primary motive behind the 2011 Map, by including the last two counts, which allege that intentional discrimination against Republican voters was the primary motive behind the 2011 Map. We disagree. Rule 8(d)(3) specifically provides that "[a] party may state as many separate claims or defenses as it has, regardless of consistency." Fed. R. Civ. P. 8(d)(3); *see also Brown v. United States,* 976 F.2d 1104, 1108 (7th Cir.1992).

6.

Counts V and VI allege discrimination, not against Latino voters, but rather against Republican voters statewide, and as noted, especially in the Chicagoland area and most blatantly in Districts 3 and 11. In those counts, the Committee's complaint alleges that the 2011 Map "intentionally and unreasonably dilutes the votes of Republican voters in a manner that gives Republicans a far smaller chance of electing candidates of their choice than would result from traditional, non-partisan redistricting" in violation of the First Amendment (Count V) and Equal Protection Clause of the Fourteenth Amendment (Count VI). The Board of Elections argues that partisan gerrymandering claims are nonjusticiable political questions, and that the Committee hasn't identified a manageable standard for adjudicating its claims. The Committee responds that partisan gerrymandering claims

are justiciable, and that the Board of Elections (as the party seeking dismissal) should have to identify the standard under which it contends these counts are insufficient. The Committee also says its complaint states viable Constitutional claims because it sets forth extensive factual detail about how the 2011 Map discriminates against Republican voters.

***9** The Committee is correct that the Supreme Court, a quarter century ago, rejected the argument that partisan gerrymandering claims are not justiciable, *Davis v. Bandemer,* 478 U.S. 109, 118–127, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986), that the Court had ample opportunity to revisit and reject that position in *Vieth v. Jubelirer,* 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004), and that while four justices rejected the justiciability of such claims, no majority embraced the opportunity, *see LULAC,* 548 U.S. at 414. The Board of Elections argues that no plaintiff has prevailed in a partisan gerrymandering case during that quarter century, but what other plaintiffs might have (or might not have) accomplished tells us nothing about the sufficiency of the Committee's complaint.

We look to Justice Kennedy's concurrence in *Vieth* for resolution of this issue. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (internal quotations marks omitted). Although Justice Kennedy's concurring opinion left open the possibility that such claims may be justiciable, *see Vieth,* 541 U.S. at 306 (Kennedy, J., concurring) ("I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases."), he agreed that the Court's previously announced standards in *Bandemer* (including Justice Powell's "fairness standard" set forth in his concurrence), the standard proposed by the plaintiffs in that case, and those standards set forth by the dissenters, were all unworkable. *Id.* at 308 (acknowledging that the plurality "demonstrate[d] the shortcomings of the other standards that have been considered to date"). Justice Kennedy concluded that a complaint will fail to state a claim if the plaintiffs cannot articulate a justiciable standard. *Id.* at 313 ("[A]ppellants' complaint alleges no impermissible use of political classifications and so states no valid claim on which relief may be granted. It must be dismissed as a result."). That is the narrowest ground for the Court's ruling and the one we are bound to follow.

Generally, as the Committee says in response, a complaint needn't plead a legal theory. *See, e.g., Hatmaker v. Memorial Medical Center,* 619 F.3d 741, 743 (7th Cir.2010) (*Twombly* and *Iqbal* "do not undermine the principle that plaintiffs in federal courts are not required to plead legal theories."), *cert. denied,* —— U.S. ——, 131 S.Ct. 1603, 179 L.Ed.2d 500 (2011); *Aaron v. Mahl,* 550 F.3d 659, 666 (7th Cir.2008); *O'Grady v. Village of Libertyville,* 304 F.3d 719, 723 (7th Cir.2002). But a different approach prevails in the field of partisan gerrymandering because courts haven't been able to agree on the constituent elements of a claim. In its two most recent decisions addressing partisan gerrymandering claims, the Supreme Court lent strong support to the Board of Elections' argument that without an existing workable standard by which to measure such claims, partisan gerrymandering claims are subject to dismissal. *See LULAC,* 548 U.S. at 418 (Kennedy, J., for 3 justices) ("[A] successful claim attempting to identify unconstitutional acts of partisan gerrymandering must ... show a burden, as measured by a reliable standard, on the complainants' representational rights"); *Vieth,* 541 U.S. at 313 (Kennedy, J., concurring) (absent "a standard by which to measure the burden [plaintiff] claim has been imposed on their representational rights, [they] cannot establish that the alleged political classifications burden those same rights").

***10** The Committee notes that *Vieth* was decided before the Supreme Court modified the pleading standard in *Iqbal* and *Twombly.* But that argument gets the Committee nowhere because if anything, *Iqbal* and *Twombly* heightened the pleading standard, *see Twombly,* 550 U.S. at 563 (retooling federal pleading standards; and retiring the oft-quoted formulation that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"), so those decisions only reinforce Justice Kennedy's view that the plaintiffs must set forth a standard by which to judge the plausibility of the plaintiffs' factual assertions.

The Committee's Fourteenth Amendment partisan gerrymandering claim must be dismissed because, with no workable standard yet in existence, the court can't say that its allegations give rise to a plausible claim upon which relief can be granted. *See Perez v. Texas,* No. 11–CA–360–OLGJES–XR, slip op. at 19–22 (W.D.Tex. Sep. 2, 2011) (Exh. A to

the Board of Election's reply [Doc. No. 78–1]) (finding that such claims are justiciable, but "are viable only if there is a reliable legal standard that can be applied in determining the issues," and that the political gerrymandering claims should be dismissed because the plaintiffs "failed to enunciate a reliable standard"); *see also Radogno v. Illinois State Bd. of Elections,* No. 1:11–cv–4884, 2011 WL 5025251, *6 (N.D.Ill. Oct.21, 2011) (dismissing political gerrymandering claim with leave to refile upon finding that such claims are justiciable, but that plaintiffs failed to articulate a workable standard by which to assess that claim).

We surmise that amendment might be futile in light of today's understanding of the law under the Equal Protection Clause. A majority of the Court in *Vieth* rejected all proposed standards (the standards in *Bandemer,* the standard proposed by the plaintiffs in that case, and those standards set forth by the dissenters). *See Vieth,* 541 U.S. at 284–94; *see also id.* at 308 (Kennedy, J., concurring). We too must reject the same standards denounced in *Vieth.* The plurality stated that "the fact that partisan districting is a lawful and common practice means that there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation." *Id.* at 286 (emphasis in original). The plurality further noted that "a person's politics is rarely readily discernible—and *never* as permanently discernible—as a persons' race. Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line." *Id.* at 287 (emphasis in original). Such facts, the plurality found, "make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation and finally to craft a remedy." *Id.; see also LULAC,* 548 U.S. at 417, 423, 483 (no majority opinion for any single criterion of impermissible political gerrymander and thus, no reliable standard to judge claim even though evidence showed that redistricting was done with sole purpose of political gain).

***11** Even under the now rejected *Bandemer* standard, the *Vieth* Court noted that in only one case had a court granted relief on a partisan gerrymandering claim and that was preliminary relief in a case that didn't involve the drawing of district lines. *See Vieth,* 541 U.S. at 279. In *all* other cases addressing such claims, relief has been denied. *See id.* at 279–80 and n. 6 (citing cases).

Nevertheless, heeding Justice Kennedy's pronouncement in *Vieth,* "[t]hat no such standard has emerged in this case should not be taken to prove that none will emerge in the future," *id.* at 311, we will give the Committee until November 7, 2011 to amend its complaint in an effort to articulate a workable and reliable standard for adjudicating their partisan gerrymandering claim and sufficient factual allegations to demonstrate plausibility.

The political gerrymandering claim under the First Amendment found in Count V of the Committee's complaint falls to a different obstacle. The complaint alleges in ¶¶ 131–133 that the 2011 Map "intentionally and unreasonably dilutes the votes of Republicans voters [statewide and in Districts 3 and 11] in a manner that gives Republican voters a far smaller chance of electing candidates of their choice than would result from traditional, non-partisan redistricting," and "burdens and penalizes the Partisan Gerrymander Plaintiffs' exercise of their freedom of association, their right to express political views, and their right to petition the government for redress of grievances," in violation of the First Amendment. The Committee's complaint adds no facts that would make those allegations plausible. The Committee's complaint doesn't make plausible a finding that the 2011 Map infringes Republican voters' rights to associate with each other or with anyone else, or a finding that the 2011 Map burdens Republican voters' rights of free expression, or that the 2011 Map affects Republican voters' rights to petition the government. The Committee's complaint contains a considerable number of allegations to the effect that the 2011 Map will make it more difficult for Republican voters to elect Republican candidates, but that doesn't implicate a First Amendment right. *See Washington v. Finlay,* 664 F.2d 913, 927–28 (4th Cir.1981) ("The first amendment's protection of the freedom of association and of the rights to run for office, have one's name on the ballot, and present one's views to the electorate do not also include entitlement to success in those endeavors."); *see also Radogno v. Illinois State Bd. of Elections,* 2011 WL 5025251, *8 (N.D.Ill. Oct.21, 2011) (dismissing First Amendment political gerrymandering claim, reasoning that the "effects of political gerrymandering on the ability of a political party and its voters to elect a member of the party to a seat ... implicates no recognized First Amendment right") (quoting *Kidd v. Cox,* No. 1:06–CV–997–BBM, 2006 WL 1341302, at *19 (N.D.Ga. May 16, 2006)).

***12** Counts V and VI of the Committee's complaint presently state no claims upon which relief plausibly could be granted. The Board of Elections' motion to dismiss is granted with respect to those counts.

B.

For all of these reasons, the court GRANTS IN PART and DENIES IN PART the defendants' motion to dismiss (Doc. No. 39). The motion is granted with respect to Counts V and VI, and denied with respect to Counts I, II, III, and IV. The plaintiffs may file an amended complaint with respect to their partisan gerrymandering claims on or before November 7, 2011.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 5185567

Footnotes

1 For a plaintiff to have constitutional standing under Article III, "[f]irst, the plaintiff must have suffered an 'injury in fact'-an invasion of a legally protected interest that is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical[.]" Second, there must be a causal connection between the injury and the conduct complained of .... Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'readdressed by a favorable decision.' " *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (citations omitted).

A plaintiff who satisfies the constitutional standing requirements for a vote dilution claim under the Voting Rights Act also satisfies the constitutional standing requirements for such a claim under the Fourteenth and Fifteenth Amendments. *Parker v. Ohio,* 263 F.Supp.2d 1100, 1107 (S.D.Ohio 2003), *aff'd,* 540 U.S. 1013, 124 S.Ct. 574, 157 L.Ed.2d 426 (2003); *see Perry–Bey v. City of Norfolk, Va.,* 678 F.Supp.2d 348, 362 (E.D.Va.2009) (collecting cases). To demonstrate injury in fact, a vote dilution plaintiff must show that he or she (1) is registered to vote and resides in the district where the discriminatory dilution occurred; and (2) is a member of the minority group whose voting strength was diluted. *See Perry–Bey,* 678 F.Supp.2d at 362–65; *Hall v. Virginia,* 276 F.Supp.2d 528, 531–32 (E.D.Va.2003); *Ill. Legislative Redistricting Comm'n v. LaPaille,* 782 F.Supp. 1267, 1271 (N.D.Ill.1991). The Committee has satisfied these requirements. *See* Complt. ¶¶ 11–14. *See Lujan,* 504 U.S. at 560–61.

The Committee has also satisfied the injury in fact requirement for a racial gerrymandering claim under the Fourteenth Amendment. *See* Complt. ¶ 13; *United States v. Hays,* 515 U.S. 737, 744–45, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995) ("Where a plaintiff resides in a racially gerrymandered district, however, the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenged the legislature's action.") (citation omitted). According to the Committee, its injuries were caused by a discriminatory redistricting process, the product of which will be implemented by the Board of Elections, and its requested relief is likely to redress the harm. As such, the Committee has standing to bring Counts I–IV. Counts V and VI are discussed *infra.*

2 Under the Committee's theory, we question whether the standard for addressing their § 2 VRA claim would be any different than the standard applicable to the Fourteenth Amendment vote dilution claim in Count II. In *Barnett v. Daley,* 32 F.3d 1196, 1202 (7th Cir.1994), the court stated that what role, if any, intent plays under § 2 of the VRA needn't be decided because "[i]f the plaintiffs can prove intent, they don't need the Voting Rights Act; they will have a complete remedy under the equal protection clause." We nevertheless address this issue because the Committee can allege overlapping theories of liability.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC), et al., Plaintiffs, v. GREG ABBOTT, et al., Defendants.	Civil Action No. 3:21-cv-259 (DCG-JES-JVB) (consolidated cases)

UNITED STATES' OPPOSITION TO TEXAS'S MOTION TO DISMISS

Table of Contents

Table of Authorities

Cases

Statutes

Rules

Legislative History

INTRODUCTION

In 2021, Texas enacted redistricting plans that discriminate against minority voters, just as it had in every redistricting cycle since the 1970s. Rather than embrace the emergence of a multiracial democracy, the State argues that Section 2 of the Voting Rights Act offers no protection from discriminatory redistricting plans, despite decades of Supreme Court precedent to the contrary. Tex. Mot. 24, ECF No. 111. This remarkable claim—along with Texas's other defenses—must be rejected. Under the Section 2 discriminatory results framework, superficial population majorities do not shield districts from scrutiny, allegations need not offer the specificity of an expert report, and courts are not constrained to examine minority cohesion only in an illustrative or remedial district. Moreover, intentionally discriminatory redistricting plans violate Section 2, and racial discrimination need only be one purpose, and not even the primary one, for a redistricting plan to violate the Act. The State's motion to dismiss should be denied.

PROCEDURAL BACKGROUND

The United States brought this litigation to enforce the Voting Rights Act of 1965. U.S. Compl., *United States v. Texas*, No. 3:21-cv-299 (W.D. Tex. Dec. 6, 2021), ECF No. 1. The Complaint alleges that Texas's 2021 Congressional Plan and 2021 House Plan violate Section 2 of the Act, 52 U.S.C. § 10301. U.S. Compl. ¶¶ 164-166. In the Congressional plan, the United States challenges District 23 in West Texas for its discriminatory purpose and discriminatory result, U.S. Compl. ¶¶ 39-55; the Dallas-Fort Worth (DFW) configuration of districts for its discriminatory purpose, U.S. Compl. ¶¶ 56-75; and the Harris County configuration of districts for its discriminatory result, U.S. Compl. ¶¶ 76-94. In the House plan, the United States challenges District 118 in Bexar County, U.S. Compl. ¶¶ 104-116; District 31 in South Texas,

U.S. Compl. ¶¶ 117-130; and the West Texas configuration of districts, U.S. Compl. ¶¶ 131-146, all for discriminatory results.

The State of Texas and Secretary of State John Scott have moved to dismiss in full. Tex. Mot., ECF No. 111.

STATUTORY BACKGROUND

Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, imposes a "permanent, nationwide ban on racial discrimination in voting." *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013). A violation of Section 2 can "be established by proof of discriminatory results alone." *Chisom v. Roemer*, 501 U.S. 380, 404 (1991); *see also, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 243 (5th Cir. 2016) (en banc). Section 2 therefore prohibits vote dilution, such as the use of redistricting plans that "minimize or cancel out the voting strength of racial [minorities in] the voting population." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (internal citations and quotation marks omitted). Section 2 also prohibits voting laws adopted with discriminatory intent. *See Chisom*, 501 U.S. at 394 n.21; *Fusilier v. Landry*, 963 F.3d 447, 463 (5th Cir. 2020).

In *Gingles*, the Supreme Court set out three preconditions to a vote dilution claim. *See, e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2330-31 (2018). "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. "Second, the minority group must be able to show that it is politically cohesive." *Id.* at 51. "Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate." *Id.* (internal citations omitted). If plaintiffs establish all three preconditions, consideration proceeds to the totality of the circumstances analysis, which

incorporates factors enumerated in the Senate Report that accompanied the 1982 Voting Rights Act Amendments, as well as other relevant evidence. *See Perez*, 138 S. Ct. at 2331; *Gingles*, 478 U.S. at 36-37 (quoting S. Rep. No. 97-417, at 28-29 (1982)); *see also LULAC v. Perry*, 548 U.S. 399, 425-26, 436-41 (2006); *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994).

To prove discriminatory intent, plaintiffs must show that a discriminatory purpose was "a motivating factor" for enacting the challenged law. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977). Determining whether a facially neutral law has a discriminatory purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266; *see also, e.g.*, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021) (applying *Arlington Heights*). Categories of relevant evidence include (1) the impact of the decision; (2) the historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent; (3) the sequence of events leading up to the decision; (4) whether the challenged decision departs, either procedurally or substantively, from the normal practice; and (5) contemporaneous statements and viewpoints held by decisionmakers. *See Arlington Heights*, 429 U.S. at 266-68. Senate Factor evidence is also probative of discriminatory intent. *See Rogers v. Lodge*, 458 U.S. 613, 620-21 (1982).

LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation and quotation marks omitted); *see also Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003) (directing district courts to "accept all well-pleaded facts as true, viewing those facts most favorably to the plaintiff"). Consideration of

information outside the complaint is limited to "documents incorporated into the complaint by reference[] and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). The motion to dismiss must be denied so long as the "plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable." *Iqbal*, 556 U.S. at 678.

ARGUMENT

I. Section 2 of the Voting Rights Act Applies to Redistricting.

As Texas acknowledges, binding precedent forecloses the State's assertion that Section 2 does not apply to redistricting. *See LULAC v. Perry*, 548 U.S. at 425; *De Grandy*, 512 U.S. at 1006; *Growe v. Emison*, 507 U.S. 25, 40 (1993); *Gingles*, 478 U.S. at 34-38, 49-51 (establishing vote dilution test under Section 2 in a redistricting case); *see also* Tex. Mot. 30. "Where, as here, the precedent interprets a statute, *stare decisis* carries enhanced force, since critics are free to take their objections to Congress." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 447 (2015). Section 2's application to redistricting is all the clearer here, since Congress left in place this long-accepted reading of Section 2 when it last amended the Voting Rights Act in 2006. *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 536 (2015) ("When it amended the FHA, Congress was aware of this unanimous precedent. And with that understanding, it made a considered judgment to retain the relevant statutory text.").

II. The United States Has Plausibly Alleged that the Congressional and House Plans Have a Discriminatory Result and Violate Section 2.

The United States has adequately pled that Congressional District 23, the Harris County Congressional configuration, House District 118, House District 31, and the West Texas House configuration violate the Section 2 results test. The United States' Complaint plausibly alleges all three *Gingles* preconditions. First, the Latino communities in these areas are each

"sufficiently large and geographically compact to constitute a majority in" additional districts that would provide them with an opportunity to elect representatives of their choice. *Gingles*, 478 U.S. at 50; *see* U.S. Compl. ¶¶ 55 (CD 23), 91 (Harris), 114 (HD 118), 127 (HD 31), 146 (West Texas). Latino voters in these regions are also politically cohesive because "a significant number of minority group members usually vote for the same candidates." *Gingles* 478 U.S. at 56; *see* U.S. Compl. ¶¶ 46 & 49 (CD 23), 93 (Harris), 115 (HD 118), 128 (HD 31), 144 (West Texas). And bloc voting by Anglo voters in the challenged districts will likely "defeat the combined strength of minority support plus white 'crossover' votes," yielding legally significant racial bloc voting. *Gingles*, 478 U.S. at 56; *see* U.S. Compl. ¶¶ 50 (CD 23), 94 (Harris), 116 (HD 118), 129 (HD 31), 145 (West Texas).

As the Fifth Circuit long ago declared, "it will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* [preconditions] but still have failed to establish a violation of § 2 under the totality of circumstances." *Clark v. Calhoun Cnty.*, 21 F.3d 92, 97 (5th Cir. 1994) (internal citation and quotation marks omitted). The United States has pled sufficient facts to establish the *Gingles* preconditions, as well as sufficient facts under the Senate Factors, U.S. Compl. ¶¶ 14-38, 95-103, 147-60, to establish a Section 2 violation.[1]

A. A District with a Latino Population Majority Can Violate Section 2.

By Texas's own admission, "the United States is 'not precluded, as a matter of law, from seeking to prove'" that a redistricting plan dilutes the voting strength of Latino voters, even when Latinos make up more than 50% of the registered voters in a district. Tex. Mot. 5 (quoting *Salas*

[1] The United States has not alleged that the West Texas House configuration is unlawfully malapportioned, under the theory articulated in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.) (three-judge court), *aff'd*, 542 U.S. 947 (2004). Tex. Mot. 23-24. Instead, the United States has alleged that overpopulation of heavily Latino districts and underpopulation of Anglo-controlled districts contributed to the elimination of a Latino opportunity district in West Texas. U.S. Compl. ¶¶ 139-140, 146.

v. Sw. Tex. Jr. Coll. Dist., 964 F.2d 1542, 1555 (5th Cir. 1992)). This is because "it may be possible for a citizen voting-age majority to lack real electoral opportunity." *LULAC v. Perry*, 548 U.S. at 428. Ignoring its own concession, the State nonetheless contends that a mere Latino population majority immunizes districts from Section 2 claims. Tex. Mot. 3-4, 19-20, 22. But this argument is foreclosed by precedent and runs counter to "the broad remedial purpose of ridding the country of racial discrimination in voting." *Chisom*, 501 U.S. at 403.

The effect of creating a majority-minority district "depends entirely on the facts and circumstances of each case." *Voinovich v. Quilter*, 507 U.S. 146, 154-55 (1993). Thus, the Fifth Circuit "has rejected any *per se* rule that a racial minority that is a majority in a political subdivision cannot experience vote dilution." *Monroe v. City of Woodville* (*Monroe I*), 881 F.2d 1327, 1333 (5th Cir. 1989); *see also Salas*, 964 F.2d at 1550; *Moore v. Leflore Cnty. Bd. of Elec. Comm'rs*, 502 F.2d 621, 624 (5th Cir. 1974); *Zimmer v. McKeithen*, 485 F.2d 1297, 1303 (5th Cir. 1973). "[D]emographics alone do not demonstrate opportunity." *Perez v. Abbott*, 253 F. Supp. 3d 864, 880 (W.D. Tex. 2017) (three-judge court). Instead, "the degree of racially polarized voting and turnout will affect whether an HCVAP-majority district provides opportunity, such that a searching, practical inquiry is required." *Id.* Such scrutiny is particularly warranted in a district such as Congressional District 23, which has been drawn to have a Latino citizen voting age population (CVAP) majority, based on 2015-2019 American Community Survey data, but nevertheless has a 2020 Spanish surname voter registration minority and a 2020 Spanish surname turnout share of only 42.9%. U.S. Compl. ¶ 48.

Similarly, House District 118 has been drawn with a Latino CVAP majority but a 2020 Spanish surname turnout share of 43.9%. U.S. Compl. ¶ 111.[2]

Contrary to Texas's argument, Tex. Mot. 4, 19-20, *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009), does not disturb this precedent or create a safe harbor for majority-minority districts that do not afford actual electoral opportunities. *Bartlett* merely sets a floor for satisfying the first *Gingles* precondition: minority voters must "form a majority" in a potential district. 556 U.S. at 18-19 (distinguishing crossover districts, which craft a population majority from minority voters and likeminded Anglos); *cf.* Tex. Mot. 4 (omitting relevant text). But not every majority-minority district yields an electoral opportunity. *See Abbott v. Perez*, 138 S. Ct. at 2332-33; *see also Voinovich*, 507 U.S. at 154-55 (describing opportunity created when minority voters constitute "a sizeable and therefore 'safe' majority"). This Court should reject the proposed *per se* rule immunizing districts with a majority-minority population from Section 2 scrutiny.

B. A Section 2 Complaint Need Not Provide Illustrative Maps or Statistical Estimates of Voting Behavior.

Texas also erroneously suggests that the United States must plead particularized allegations regarding illustrative maps and statistical estimates of the "level or degree" of minority cohesion. Tex. Mot. 4, 17, 19-22.

[2] Texas is mistaken that the United States has alleged that Congressional District 23 and House District 118 are unlawful under Section 2 purely because they reduce minority population share, under a "retrogression" theory. Tex. Mot. 6, 19. Rather, the diminution of minority voting strength simply reinforces the key allegation that the newly drawn districts deny minority voters equal electoral opportunities. *See Moore*, 502 F.2d at 624; U.S. Compl. ¶¶ 48, 51-52, 104, 111. Similarly, Texas is wrong to characterize the United States' Complaint as alleging that Congressional District 23 has been drawn to "shut[] out minority candidates." Tex. Mot. 6-7. The Voting Rights Act protects voters. Thus, the United States has alleged that Congressional District 23 will not allow Latino *voters* to elect their candidates of choice. U.S. Compl. ¶¶ 50-51.

Detailed information about how the plaintiffs have satisfied the first or second *Gingles* precondition is the province of expert reports, often dependent on discovery, not complaints. *See, e.g.*, *Harper v. City of Chicago Heights*, No. 87-cv-5112, 1994 WL 710782, at *5 (N.D. Ill. Dec. 16, 1994). Rule 8 requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), and Rule 9 requires a party to plead "with particularity" only when alleging fraud or mistake, Fed. R. Civ. P. 9(b). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("Asking for plausible grounds . . . simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [liability]."). Caselaw and prudence confirm that a complaint need not divulge expert analysis to state a claim under Section 2.

Fundamentally, "[p]laintiffs need not gather any expert evidence or serve it on defendants for a claim to be plausible." *Pledger v. Lynch*, 5 F.4th 511, 520 (4th Cir. 2021) (internal citation and quotation marks omitted); *see also, e.g.*, *Contant v. Bank of Am. Corp.*, No. 1:17-cv-3139, 2018 WL 5292126, at *6 (S.D.N.Y. Oct. 25, 2018). Indeed, district courts may decline to rely on expert opinions incorporated in a complaint, which may raise "a myriad of complex evidentiary issues not generally capable of resolution at the pleading stage." *Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 286 (5th Cir. 2006); *see also Ramirez v. Exxon Mobil Corp.*, 334 F. Supp. 3d 832, 839 (N.D. Tex. 2018) ("[I]t is inappropriate to consider expert opinions at the pleading stage."). Imposing statistical pleading mandates and requiring expert evidence at "the pleading stage of litigation" would yield disputes not properly resolved on a motion to dismiss.

Luna v. Cnty. of Kern, No. 1:16-cv-568, 2016 WL 4679723, at *5 (E.D. Cal. Sept. 2, 2016). Resolving those disputes is the province of summary judgment or trial.

Section 2 complaints are no exception to this general rule. *See Chestnut v. Merrill*, 377 F. Supp. 3d 1308, 1313 (N.D. Ala. 2019) (distinguishing between expert evidence required at trial and what is "necessary at the pleading stage"). Thus, "[i]t is no accident that most cases under [S]ection 2 have been decided on summary judgment or after a verdict, and not on a motion to dismiss." *Metts v. Murphy*, 363 F.3d 8, 11 (1st Cir. 2004) (en banc). "[A]t the motion to dismiss stage, the Court is bound to accept Plaintiffs' well-pleaded facts as true and does not require submitting as evidence hypothetical redistricting schemes" to establish the first *Gingles* precondition. *Johnson v. Ardoin*, No. 18-625, 2019 WL 2329319, at *4 (M.D. La. May 31, 2019) (internal quotation marks and citation omitted); *see also, e.g.*, *Chestnut*, 377 F. Supp. 3d at 1313; *Luna*, 2016 WL 4679723, at *4; *Bradley v. Ind. State Elec. Bd.*, 797 F. Supp. 694, 699 (D. Ind. 1992). Similarly, a Section 2 plaintiff need not allege "how vigorously" groups "vote as a bloc over time" to plead the second and third *Gingles* preconditions. *Metts*, 363 F.3d at 12; *see also, e.g.*, *Luna*, 2016 WL 4679723, at *5 (finding sufficient allegation that "Latino voters in Kern County express a preference for Latino candidates"). The State's request for fine-grained analysis at the pleading stage "puts the cart before the horse." *Luna*, 2016 WL 4679723, at *5.[3]

[3] Rapid Latino growth in Harris County—as well as alternative maps that created a new majority-Latino district there—buttress the first *Gingles* precondition. Compl. ¶¶ 76, 89; *see also Johnson v. Ardoin*, 2019 WL 2329319, at *3; *Luna*, 2016 WL 4679723, at *4; *cf.* Tex. Mot. at 15-16. Furthermore, repeat findings of polarized voting in Texas buttress the plausibility of allegations in this case concerning the second and third *Gingles* preconditions. *See, e.g.*, *LULAC v. Perry*, 548 U.S. at 427; *Veasey*, 830 F.3d at 258; *Benavidez v. Irving ISD*, No. 3:13-cv-87, 2014 WL 4055366, at *10-13 (N.D. Tex. Aug. 15, 2014); *Rodriguez v. Harris Cnty.*, 964 F. Supp. 2d 686, 754-55 (S.D. Tex. 2013), *aff'd*, 609 Fed. App'x 255 (5th Cir. 2015); *Perez v. Abbott*, 253 F. Supp. 3d at 946. Although the State suggests that racially polarized voting is distinct from political cohesion, Tex. Mot. 17-18 (quoting *Kumar v. Frisco ISD*, 476 F. Supp. 3d

C. Analysis of Minority Cohesion Is Not Limited to an Illustrative Plan.

Texas next wrongly argues that analysis of cohesion focuses solely on minority voters within a proposed illustrative district. *See* Tex. Mot. at 5, 17-18, 19-20, 21. But no court has ever confined analysis of the second *Gingles* precondition in this manner. *Gingles* itself affirmed a liability finding based on cohesion "in the challenged multi-member districts" and "in the area covered by the challenged single-member Senate District." *Gingles v. Edmisten*, 590 F. Supp. 345, 367-72 (E.D.N.C. 1984) (three-judge court), *aff'd in relevant part*, 478 U.S. 30 (1986).

Moreover, analysis outside of an illustrative district is necessary because "elections involving the particular office at issue will be more relevant than elections involving other offices" when assessing the *Gingles* preconditions. *Magnolia Bar Ass'n v. Lee*, 994 F.2d 1143, 1149 (5th Cir. 1993); *see also, e.g.*, *Clark*, 21 F.3d at 97 (5th Cir. 1994); *Cisneros v. Pasadena ISD*, No. 4:12-cv-2579, 2014 WL 1668500, at *9 (S.D. Tex. Apr. 25, 2014). Analysis of these "endogenous" elections is only possible in the actually existing districts in which they were conducted. Almost by definition, it cannot be performed regarding newly drawn or proposed illustrative districts. *Texas v. United States*, 887 F. Supp. 2d 133, 142-43 (D.D.C. 2012) (three-judge court), *vacated*, 570 U.S. 928 (2013). Thus, courts have consistently analyzed minority cohesion in challenged districts, in earlier configurations, and across the jurisdiction at issue, not merely in proposed illustrative plans. *See, e.g.*, *LULAC v. Perry*, 548 U.S. at 427 (addressing "cohesion among the minority group . . . in District 23"); *Teague v. Attala Cnty.*, 92 F.3d 283,

439, 502 (E.D. Tex. 2020)), the concepts are "similar" and "a showing of racially polarized voting will frequently demonstrate that minority voters are politically cohesive," *Kumar*, 476 F. Supp. 3d at 502-503. *See also Gingles*, 478 U.S. at 56 ("[T]he purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates."). Moreover, the State's argument relies solely on a decision issued after trial. *Kumar*, 476 F. Supp. 3d at 453. At the pleading stage, any allegation of polarization must be construed to incorporate minority cohesion.

289 (5th Cir. 1996); *Monroe v. City of Woodville* (*Monroe II*), 897 F.2d 763, 764 (5th Cir. 1990) (per curiam); *see also* Mem. Op. at 4, ECF No. 144 (finding "plausibly indicat[ion]" of cohesion in preferred candidate success in "several recent elections").

Texas erroneously suggests that a fragment of *Growe v. Emison*, 507 U.S. 25, 40 (1990), invalidates decades of subsequent caselaw. Tex. Mot. 5, 17, 20-21. Applying *Gingles*, *Growe* merely explained that a plaintiff must prove that the minority group "is politically cohesive." 507 U.S. at 40 (quoting *Gingles*, 478 U.S. at 50-51). Because liability turns on the discriminatory result of the challenged district, *Growe* concluded that "the 'minority political cohesion' and 'majority bloc voting' showings are needed to establish that the challenged districting thwarts a distinctive minority vote." *Id.* *Growe* did not limit the analysis to an illustrative district. *See id.* at 37, 41 (holding that plaintiffs had not proven vote dilution "*in a portion* of the city of Minneapolis" because they failed to present evidence "of minority political cohesion . . . in Minneapolis" (emphasis added)). Nor should this Court.[4]

D. Section 2 Liability Does Not Require Absolute Cohesion.

Texas also wrongly suggests that any challenge to a district with a majority-minority population must fail because a minority group offering "uniform[] support" to the same candidates would have an electoral opportunity in any such district. Tex. Mot. 4-6, 20-21.[5] This is just another way to argue that a majority-minority district cannot violate Section 2, and many of the same decisions that foreclose the State's arguments under the first *Gingles* precondition,

[4] The State's argument also fails because plaintiffs are not required to "present[] an alternative district map" at the pleading stage. *Chestnut*, 377 F. Supp. 3d at 1314; *see also* Section II.B, *supra*. Thus, it cannot be that plaintiffs must plead cohesion within such a map.

[5] This focus on cohesion within the challenged district—though correct—contradicts the State's argument that analysis of the second *Gingles* precondition is confined to a proposed illustrative district. *See* Section II.C, *supra*.

see Section II.A, *supra*, undermine this argument as well. *See, e.g.*, *LULAC v. Perry*, 548 U.S. at 428; *Voinovich*, 507 U.S. at 154-55; *Monroe I*, 881 F.2d at 1333.

Texas's argument mistakenly presupposes that satisfying *Gingles*' political cohesion precondition requires that minority voters vote as a bloc with perfect uniformity. It does not. *Gingles* requires only that "a significant number of minority group members usually vote for the same candidates," not that minority voters are a monolith. 478 U.S. at 56; *see also, e.g.*, *Campos v. City of Baytown*, 840 F.2d 1240, 1246 (5th Cir. 1988) (upholding cohesion based on combined minority support as low as 62%); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 501-02 & n.12 (5th Cir. 1987) (upholding cohesion based on mere plurality support in a multicandidate contest); *Gingles v. Edmisten*, 590 F. Supp. at 369 (finding cohesion notwithstanding only 53% support for lesser performing minority-preferred candidates in multimember districts). Moreover, Texas's argument also ignores the fact that "conditions arising from past discrimination tend to depress minority political participation." *LULAC v. Clements*, 999 F.2d 831, 866-67 (5th Cir. 1993) (en banc) (quoting S. Rep. No. 97-417, at 29 n.114).[6] Taken together, this means that even when they constitute a majority of the citizens of voting age in a challenged district, cohesive minority voters may lack a practical opportunity to elect representatives of their choice, whatever abstract arithmetic might suggest.

Texas's arguments under the third *Gingles* precondition essentially restate its flawed argument concerning the second precondition and share its erroneous premises. Tex. Mot. 5-6. The State does not deny that the United States has alleged that Anglo bloc voting will defeat the

[6] To the extent that the State attributes any gap between a population majority and an electoral opportunity to voter apathy, this defense has long been barred. *See Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir. 1984); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139, 145 (5th Cir. 1977) (en banc); *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1569 (11th Cir. 1984).

preferred candidates of most Latino voters in relevant districts; it merely argues that Anglo voters cannot "control" elections in majority-minority districts. Tex. Mot. 5. In fact, the United States alleges that only 42.9% of voters who cast a ballot within the new Congressional District 23 in 2020 had Spanish Surnames. U.S. Compl. ¶ 48 & tbl.1. In House District 118, the comparable figure is 43.9%. U.S. Compl. ¶ 111 & tbl.4. It is Latino voters who are outnumbered in the redrawn districts.[7] And in House District 31, the United States alleges that "extreme bloc voting by Anglo voters will enable them usually to defeat Latino voters' preferred candidates, despite Latino voters making up a majority of the electorate." Compl. ¶ 129.

The fact that Latino legislators offered amendments to some challenged districts does not signal acquiescence to those districts' broader configurations adopted by the Legislature, let alone agreement that bloc voting by Anglo voters cannot defeat a certain demographic concentration of Latino residents in a single-member district. *Cf.* Tex. Mot. 6. Texas would like this Court to focus only on CVAP, which paints an incomplete picture as to whether a district affords Latino voters an opportunity to elect a candidate of choice.[8]

Finally, and only with respect to the Harris County Congressional configuration, Texas wrongly argues that the existence of a minority electoral opportunity in one district in a region is

[7] To the extent that Texas suggests that its own Spanish surname data is inaccurate or a poor proxy for Latino turnout share, Tex. Mot. 19, a motion to dismiss is not the correct vehicle for this argument, which rests on facts and analysis outside of the pleadings. In any case, "experts commonly use Spanish surname databases as the foundation for analysis," relying on the percentage of voters with Spanish surnames on a registration or turnout list as a substitute for self-reported race. *Benavidez v. City of Irving*, 638 F. Supp. 2d 709, 717 & n.7 (N.D. Tex. 2009); *see also, e.g.*, *LULAC v. Perry*, 548 U.S. at 439 (using Spanish surname voter registration as a measure of Latino political strength); *cf. Cataneda v. Partida*, 430 U.S. 482, 486-87, 495 (1977) (relying on Spanish surname data to address jury poll discrimination).

[8] The rationales and motivations behind proposed amendments are outside the scope of the Complaint and have not been presented to the Court. The State's insinuations regarding these issues cannot be considered in the pending motion to dismiss. *See, e.g.*, *Tellabs*, 551 U.S. at 322.

relevant to the third *Gingles* precondition, even when an additional opportunity district might be drawn. Tex. Mot. 18. The fact that Congressional District 36 provides minority voters with an opportunity to elect a candidate of choice because Anglo voters comprise only 15.1 percent of the CVAP in that district says nothing about polarized voting and may itself evince vote dilution in other districts. *See De Grandy*, 512 U.S. at 1007 (describing dilution "by packing [minority voters] into one or a small number of districts to minimize their influence").

III. The United States Has Plausibly Alleged that the Congressional Plan Has A Racially Discriminatory Intent and Violates Section 2.

The United States has also adequately pled that Congressional District 23 and the DFW Congressional configuration are intentionally discriminatory, in violation of Section 2. The United States' Complaint contains allegations in each category of relevant evidence under *Arlington Heights*, which together establish plausible allegations of discriminatory intent. *See* 429 U.S. at 266-68; *see also* Mem. Op. at 4, ECF No. 144 (finding adequate pleading based on comparable allegations). Both District 23 and the DFW configuration have dilutive impacts on minority voting strength. *See Rogers*, 458 U.S. at 617; U.S. Compl. ¶¶ 47, 50-52, 68-75. The history of redistricting in Texas includes intentional discrimination in the same regions using the same techniques, such as creating the "facade of a Latino district" (*i.e.*, a majority-Latino district in which most voters are not Latino). *LULAC v. Perry*, 548 U.S. at 441; *see also* U.S. Compl. ¶¶ 5, 19-21, 39-41, 52-53, 60, 65, 69.[9] The sequence of events includes narrow victories by

[9] Although Texas asserts there may have been "race-neutral reasons" to split precincts around District 23, Tex. Mot. 11, this Court must construe the Complaint at the motion to dismiss stage in the light most favorable to the United States. Moreover, the State misunderstands the United States' relevant allegation. The increase in precinct splits provides additional opportunities for discrimination, and the splits did not merely remove a greater *number* of Latino voters than Anglo voters. Tex. Mot. 12. They removed a greater *share* of the Latino voters in these precincts. U.S. Compl. ¶ 53. Finally, Texas claims that the DFW configuration "does not include anything like the 'lightning bolt' from the 2011 version" based

candidates opposed by most minority voters, new census data establishing remarkable minority growth, and rejection of most alternatives proposed by Latino legislators. *See, e.g.*, *Barnett v. Daley*, 32 F.3d 1196, 1199 (7th Cir. 1994); *see also* U.S. Compl. ¶¶ 1, 3, 18, 46, 56, 64-70, 76, 82, 90.[10] The redistricting process departed from past practice by reducing the number of hearings, excluding expert testimony, failing to provide adequate notice or transparency, and bypassing good faith discussion of the Voting Rights Act. *See Perez v. Abbott*, 253 F. Supp. 3d at 961-62; U.S. Compl. ¶¶ 22-38, 90, 97. Finally, contemporaneous statements make clear that the Congressional plan protects incumbents who did not receive substantial minority support, taking away Latino voters' electoral opportunities for fear that they might exercise them. *See LULAC v. Perry*, 548 U.S. at 440; U.S. Compl. ¶ 51.

A. Intentional Racial Discrimination in Redistricting Violates Section 2.

In arguing that the United States' claim of intentional discrimination against the 2021 Congressional Plan should be dismissed, Texas wrongly contends that "Section 2 does not include an intent test." Tex. Mot. 7, 13.

Once again, the State's argument contravenes decades of settled caselaw. *See, e.g.*, *Chisom*, 501 U.S. at 394 n.21 (plaintiff must prove discriminatory intent or result); *Seastrunk v. Burns*, 772 F.2d 143, 149 & n.15 (5th Cir. 1985) (discriminatory dilution of minority voting power can be proven by intent or result); *see also Brnovich*, 141 S. Ct. at 2334, 2348-49 (analyzing Section 2 intent claim); *Veasey*, 830 F.3d at 229-243 (same); *United States v.*

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on illustrations of Tarrant County alone. Tex. Mot. 14-15. But the 2021 "seahorse" appendage extends into Dallas County as well, similarly submerging minority voters in Anglo-dominated rural districts. U.S. Compl. ¶¶ 65, 71 & fig.4.

[10] Rejected amendments evince the availability of non-discriminatory alternatives, awareness of discriminatory impacts, and a lack of responsiveness to minority communities. *See, e.g.*, *Veasey*, 830 F.3d at 237, 241. *Contra* Tex. Mot. 12. Such evidence bears no relation to mere "conjecture . . . as to the motivations of those legislators supporting the law." *Veasey*, 830 F.3d at 234.

Georgia, No. 1:21-cv-2575, 2021 WL 5833000, at *4 (N.D. Ga. Dec. 9, 2021).

Texas acknowledges, as it must, that the Fifth Circuit has "concluded that 'Congress intended that fulfilling either the more restrictive intent test or the results test would be sufficient to show a violation of [S]ection 2.'" Tex. Mot. 9 (quoting *McMillan v. Escambia Cnty.*, 748 F.2d 1037, 1046 (Former 5th Cir. 1984)). It is not enough for the State to assert that this binding precedent "was wrong." Tex. Mot. 9. As a three-judge district court, this Court is "bound to follow the law of the circuit." *Finch v. Miss. State Med. Ass'n*, 585 F.2d 765, 773 (5th Cir. 1978); *see also, e.g.*, *Russell v. Hathaway*, 423 F. Supp. 833, 835 (N.D. Tex. 1976) (three-judge court) (Higginbotham, J.).

Section 2 has always prohibited, and continues to prohibit, purposeful racial discrimination. Prior to its amendment in 1982, Section 2 prohibited the use of any voting practice or procedure that was enacted (or maintained) for a discriminatory purpose. *See City of Mobile v. Bolden*, 446 U.S. 55, 60-62 (1980) (plurality opinion). The 1982 amendments to Section 2 responded to *City of Mobile* by expanding, not contracting, the methods of proving a violation. *See Johnson v. Governor of Fla.*, 405 F.3d 1214, 1227 (11th Cir. 2005) (en banc). The Senate Report accompanying the 1982 Amendments explained:

> The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose. . . . Plaintiffs must *either prove such intent, or, alternatively*, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.

S. Rep. No. 97-417, at 27 (1982) (emphasis added).[11] And in *Chisom*, the Supreme Court adopted this explanation. *See* 501 U.S. at 394 n.21 (quoting S. Rep. No. 97-417, at 27); *see also,*

[11] The Supreme Court has consistently relied on the 1982 Senate Report to understand and apply this complex statute. *See, e.g.*, *Brnovich*, 141 S. Ct. at 2332; *Gingles*, 478 U.S. at 43 n.7 (recognizing the Senate Report as "the authoritative source for legislative intent").

e.g., *United States v. Brown*, 561 F.3d 420, 432 (5th Cir. 2009) (same); *McMillan*, 748 F.2d at 1046 (same).

B. Section 2 Prohibits Intentional Discrimination Even Where the *Gingles* Preconditions Cannot Be Met.

Texas next argues that any Section 2 intent claim must also incorporate proof of discriminatory effect—which it defines to include proof of the *Gingles* preconditions—which would effectively permit intentional discrimination wherever minority voters are not sufficiently numerous and geographically compact to meet the first *Gingles* precondition. Tex. Mot. 10, 13. However, Section 2 bars "denial or abridgment of the right of *any* citizen of the United States to vote on account of race." 52 U.S.C. § 10301(a) (emphasis added). Intentional vote dilution—the United States' intent claim here—occurs when "the State has enacted a particular voting scheme as a purposeful device 'to minimize or cancel out the voting potential of racial or ethnic minorities,' an action disadvantaging voters of a particular race." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quoting *City of Mobile*, 446 U.S. at 66). The manipulation of district lines to minimize minority voting strength is no less intentional or harmful to minority voters simply because those voters live in smaller communities or less segregated neighborhoods. *Cf. Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) ("The right to vote is personal and is not defeated by the fact that 99% of other people [are not impacted by a challenged law]."). Rather, "any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election." *Chisom*, 501 U.S. at 397. This is the only discriminatory effect that the United States must prove. *See* U.S. Comp. ¶¶ 39, 50, 52, 56, 63-72, 75.

Thus, it is not necessary to prove the first *Gingles* precondition to state a Section 2 intent claim. *See Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 769 (9th Cir. 1990) ("[T]o the extent

that *Gingles* does require a majority showing, it does so only in a case where there has been no proof of intentional dilution of minority voting strength."); *Perez v. Abbott*, 253 F. Supp. 3d at 944 ("This Court agrees that, when discriminatory purpose (intentional vote dilution) is shown, a plaintiff need not satisfy the first *Gingles* precondition to show discriminatory effects"); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 581 (N.D. Ill. 2011) (three-judge court) ("Failing proof of the first *Gingles* factor, [plaintiffs] may show discriminatory effect through circumstantial evidence of discriminatory intent.") This follows from the use of identical standards for Section 2 intent claims and constitutional discriminatory intent claims. *See McMillan*, 748 F.2d at 1046; *cf. Bartlett*, 556 U.S. at 24 (holding, notwithstanding the first *Gingles* precondition, that "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments."). Although federal civil rights statutes may enforce constitutional requirements, they do not change the core requirements to prove a constitutional violation. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). The United States has plausibly pled intentional discrimination that would violate the Constitution and thus Section 2, and this Court should reject the State's invitation to leave minority voters vulnerable to such discrimination.

C. A Potential Partisan Motive Does Not Negate Allegations of Racially Discriminatory Intent.

Finally, Texas erroneously contends that the United States' intentional discrimination claim should be dismissed because the Complaint "suggests that the Legislature was motivated by partisan interests." Tex. Mot. 11-14. That contention ignores the fact that intentional vote dilution occurs where "racial discrimination [is only] one purpose, and not even a primary purpose" underlying a redistricting plan. *Brown*, 561 F.3d at 433; *see also Arlington Heights*,

429 U.S. at 265-66. The presence of other permissible purposes, such as the desire to protect incumbents of a certain political party, does not immunize a plan that also intentionally diminishes minority electoral opportunities. *See, e.g.*, *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016) (recognizing "that racially polarized voting may motivate politicians to entrench themselves through discriminatory election laws"); *Garza*, 918 F.2d at 771 ("The supervisors intended to create the very discriminatory result that occurred. That intent was coupled with the intent to preserve incumbencies, but the discrimination need not be the sole goal in order to be unlawful.").[12]

The Supreme Court's decision in *LULAC v. Perry*, 548 U.S. 399 (2006), illustrates this point well. That case involved Texas's impermissible use of race in the service of its ultimate goal of protecting a vulnerable incumbent, and the Court struck down the 2003 modifications to Texas Congressional District 23 as violating Section 2. *See id.* at 423-43. As the Court explained, after the 2002 election, "it became apparent that District 23 as then drawn had an increasingly powerful Latino population that threatened to oust the incumbent Republican," *id.* at 423, and "[f]aced with this loss of voter support, the legislature acted to protect [the incumbent] by changing the lines—and hence the population mix—of the district," *id.* at 424.[13] "In essence the State took away the Latinos' opportunity because Latinos were about to exercise it." *Id.* at

[12] The partisanship defense available in a racial gerrymandering claim under *Shaw v. Reno*, 509 U.S. 630 (1993), is not available here. A *Shaw* claim requires proof that "race was the predominant factor motivating the legislature's decision." *Miller*, 515 U.S. at 916; *see also Shaw*, 509 U.S. at 649. Such claims are "analytically distinct" from Section 2 intentional discrimination claims. *Shaw*, 509 U.S. at 652.

[13] *See also id.* at 424-25 (describing similar purpose findings by the district court); *id.* at 428 (noting that the "rise in Latino voting power in each successive election, the near-victory of the Latino candidate of choice in 2002, and the resulting threat to the [incumbent] were the very reasons that led the State to redraw the district lines"); *id.* at 435 ("[T]he Latino population of District 23 was split apart particularly because it was becoming so cohesive.").

440. After concluding that Texas had violated Section 2 under the results test, the Court went further, commenting that Texas's use of race to protect a vulnerable incumbent "bears the mark of intentional discrimination that could give rise to an equal protection violation." *Id.*[14]

Texas's "troubling blend of politics and race," *LULAC v. Perry*, 548 U.S. at 442, precludes the clean separation that the State wishes to impose between protection of Republican incumbents and the elimination of minority electoral opportunity. "Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern," *Arlington Heights*, 429 U.S. at 265, and this case is no exception. On a motion to dismiss, this Court cannot reject the United States' allegation of racially discriminatory intent by crediting only the partisan motivations at issue. Even if the facts alleged were "at least equally consistent with a legislature pursing partisan goals," Tex. Mot. 14—and they are not, U.S. Compl. ¶¶ 53, 65, 71 & fig. 4—this Court must construe the allegations in the light most favorable to the United States' claims. This Court should not dismiss the United States' claims of intentional racial discrimination based on Texas's assertion of possible alternative partisan rationales.

CONCLUSION

For the foregoing reasons, Texas's motion to dismiss should be denied.

[14] For examples of other courts finding violations of Section 2 under similar circumstances, *see, e.g.*, *Brown*, 561 F.3d at 433 (holding that the defendants violated Section 2 by manipulating various aspects of the electoral process for the purpose of diluting minority voting strength); *Garza*, 918 F.2d at 769 (holding that the fragmentation of Latino communities to perpetuate incumbencies amounted to intentional discrimination in violation of Section 2); and *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1082, 1109 (N.D. Ill. 1982) (finding intentional discrimination where "requirements of incumbency are so closely intertwined with the need for racial dilution that an intent to maintain a safe, primarily white, district for [a particular incumbent] is virtually coterminous with a purpose to practice racial discrimination").

Date: January 24, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2021, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system, which will send notification of this filing to counsel of record.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF GEORGIA; *et al.*, Defendants, THE REPUBLICAN NATIONAL COMMITTEE; *et al.*, Intervenor-Defendants.	Civil Action No. 1:21-CV-2575-JPB

OPPOSITION TO THE STATE'S AND INTERVENORS' MOTIONS TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

On June 25, 2021, the United States brought suit against the State of Georgia for violating Section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301 ("Section 2"), regarding new election provisions that the United States alleges were adopted with the purpose of denying or abridging the right to vote on account of race. *See* Compl. ¶¶ 159-165 (ECF No. 1). The Supreme Court recently reaffirmed that *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-68 (1977), provides the proper legal framework for addressing purpose-based claims of discrimination under Section 2. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021) (applying *Arlington Heights*).

The United States' complaint alleges a classic violation of Section 2. Against a backdrop of racial polarization in voting, the Georgia legislature adopted the challenged provisions of Georgia Senate Bill 202 (2021) ("SB 202") as Black voters had begun to exercise real political power in the state, and to exercise that power in ways that were at cross-purposes with the state legislative majority. "[I]ntentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose" under Section 2. *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016); *see also League of United Latin American Citizens v. Perry*, 548 U.S. 399, 440 (2006) ("*LULAC*") (finding that a

State "took away . . . Latinos' opportunity [to elect] because Latinos were about to exercise it. This bears the mark of intentional discrimination. . . .").

Yet in their respective motions to dismiss, the State Defendants and Intervenors never even acknowledge or apply the legal standard that actually governs this claim.[1] *See* Defs.' Mot. to Dismiss Compl. (ECF No. 38); Intervenors' Mot. to Dismiss or Alternatively for Summ. J. (ECF No. 39) (together, "Motions to Dismiss"). Throughout its brief, the State raises factual disputes regarding the allegations in the United States' Complaint (inappropriately at the motion to dismiss stage of the proceedings), while ignoring how these same allegations fit within the *Arlington Heights* framework. As detailed below, following the *Arlington Heights* framework, the United States has properly pled a claim under Section 2. The Court should therefore deny the Motions to Dismiss.[2]

[1] The State Defendants include the State of Georgia, the Georgia State Election Board, and Secretary of State Brad Raffensperger (collectively, "the State"). Defendant Intervenors are the Republican National Committee, the National Republican Senatorial Committee, and the Georgia Republican Party, Inc. (collectively, "Intervenors").

[2] As a procedural matter, Intervenors' Motion to Dismiss (ECF No. 39) is improper and should not be considered. Because Intervenors have already filed their responsive pleading, *see* Proposed Intervenor-Defendants' Answer, ECF No. 15-1 (July 6, 2021), they have forfeited their ability to seek dismissal. *See* Fed. R. Civ. P. 12(b) (Motions to Dismiss "must be made before pleading if a responsive pleading is allowed."). Moreover, Intervenors' alternative Motion for Summary

I. BACKGROUND

A. Section 2 of the Voting Rights Act

Section 2 of the VRA protects the right to vote and "prohibits all forms of voting discrimination." *Thornburg v. Gingles*, 478 U.S. 30, 45 n.10 (1986); *see also Brnovich*, 141 S. Ct. at 2333; *Burton v. City of Belle Glade*, 178 F.3d 1175, 1196-98 (11th Cir. 1999). Section 2 imposes a "permanent, nationwide ban on racial discrimination in voting." *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013). Section 2(a) prohibits any state or political subdivision from imposing or applying a "voting qualification," a "prerequisite to voting," or a "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 52 U.S.C. § 10301(a); *see also* 52 U.S.C. § 10303(f)(2). Section 2(b) provides that a violation "is established if, based on the totality of circumstances, . . . the political process leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a racial group] in that its members have less opportunity than other members of

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Judgment is inappropriately premature because discovery has been stayed, and therefore no formal discovery has been conducted by the United States. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (A motion for summary judgment is only proper "after adequate time for discovery.").

the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

As the Supreme Court's decision in *Brnovich* confirms, Section 2 prohibits both practices that have a discriminatory result, *Chisom v. Roemer*, 501 U.S. 380, 404 (1991); *see also Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1329 (11th Cir. 2021) ("*GBM*"), and those adopted with a discriminatory purpose, *see Chisom*, 501 U.S. at 394 n.21; *Brnovich*, 141 S. Ct. at 2334, 2348-49 (analyzing purpose claim separately from results claim). A showing of discriminatory purpose "sufficient to constitute a violation of the [F]ourteenth [A]mendment" is also "sufficient to constitute a violation of [S]ection 2." *McMillan v. Escambia Cnty.*, 748 F.2d 1037, 1046 (Former 5th Cir. 1984).[3] Section 2 purpose claims likewise rely on the assessment of "circumstantial and direct evidence of intent" relevant to constitutional cases. *Arlington Heights*, 429 U.S. at 265-68; *see also Brnovich*, 141 S. Ct. at 2349; *Veasey v. Abbott*, 830 F.3d

[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent former Fifth Circuit decisions handed down by September 30, 1981. *McMillan* was filed in 1977 over a challenged practice in Florida, *see* 748 F.2d at 1039; the 1984 decision is treated as a former Fifth Circuit case given prior proceedings in the case but also is binding Eleventh Circuit precedent. *See Bonner*, 661 F.2d at 1207-08 (describing rules governing such cases).

216, 229-30 (5th Cir. 2016) (en banc); *McCrory*, 831 F.3d at 220-21.

In *Arlington Heights*, the Supreme Court articulated a non-exhaustive list of evidentiary factors that a court may consider to determine whether racially discriminatory purpose was a motivating factor, including: (1) whether the impact of the decision bears more heavily on one racial group than another; (2) the historical background of the decision; (3) the sequence of events leading up to the decision; (4) substantive and procedural departures from the normal decision-making practice; and (5) contemporary statements and actions of key legislators. *Arlington Heights*, 429 U.S. at 266-68. In the Eleventh Circuit, courts have also considered "(6) the foreseeability of the disparate impact; (7) knowledge of that impact, and (8) the availability of less discriminatory alternatives." *GBM*, 992 F.3d at 1321. To prevail on a claim of racially discriminatory purpose under Section 2, a plaintiff must show that such a purpose was one of the motivating factors; the evidence need not show "that the challenged action rested solely on racially discriminatory purposes" or even that the discriminatory purpose "was the 'dominant' or 'primary' one." *Arlington Heights*, 429 U.S. at 265; *see also McCrory*, 831 F.3d at 222 (holding that "targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose"); *Garza v. Cnty. of Los Angeles*, 918 F.2d 763,

771 (9th Cir. 1990) (affirming that fragmenting Hispanic population in pursuit of a non-racial objective was purposeful racial discrimination). Moreover, establishing proof of discriminatory purpose does not require proof of invidious racial animus, but rather simply an intent to disadvantage minority citizens, for whatever reason. *McCrory*, 831 F.3d at 222-23; *Garza*, 918 F.2d at 778 & n.1 (Kozinski, J., concurring and dissenting in part); *see also LULAC*, 548 U.S. at 440. That reason can include a simple desire by the challenged provision's proponents to "entrench themselves" in power. *McCrory*, 831 F.3d at 222.

"Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)); *see also GBM*, 992 F.3d at 1321. At this step, "courts must scrutinize the legislature's *actual* non-racial motivations to determine whether they *alone* can justify the legislature's choices." *McCrory*, 831 F.3d at 221 (citing *Mt. Healthy*, 429 U.S. at 287). As set forth in greater detail later, the United States has pled "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations and internal quotations marks omitted).

B. Overview of the Facts Alleged in the United States' Complaint

The 2020-2021 election cycle in Georgia saw heavily publicized Black voter mobilization efforts, a dramatic increase in Black voters' use of absentee voting, and marked successes by Black voters in electing candidates of choice state-wide. In the immediate aftermath of these events, in March 2021, the Georgia Legislature enacted an omnibus election bill, SB 202. Compl. ¶¶ 1, 81-82, 88, 90-91, 96.

SB 202's Historical Background. Black Georgians undertook substantial efforts in 2018 to harness their political power, encouraging participation by voters of color—including by absentee ballots—and ensuring that voters who waited in long lines (often voters of color) had food and water so they would not become too hungry to remain in line. *Id.* ¶¶ 84-86. Black turnout in Georgia rose in 2018, 2020, and in the 2021 runoff election for U.S. Senate. *Id.* ¶ 83.

In 2020, amid the COVID-19 pandemic, the Secretary of State mailed absentee ballot applications to all active voters prior to the June primary, and absentee voting hit record levels. *Id.* ¶¶ 36-37. Georgia House Speaker David Ralston warned that mailing applications to all active registered voters would "drive up turnout" and that such increased turnout would be "extremely devastating" to election outcomes that he favored. *Id.* ¶ 39.

Black-led mobilization efforts continued in 2020, leading to the popular

perception that Black voter turnout was increasing—driven in large part by absentee voting—and that increased turnout was providing Black voters with increased opportunities to elect candidates of their choice. *Id.* ¶¶ 86, 88-90. That perception was accurate: The November 2020 and January 2021 runoff elections produced historic results, with Georgia electing its first Black U.S. Senator in history and giving its electoral votes to the first person of color to become Vice President. *Id.* ¶¶ 91, 96. This rise in Black political engagement occurred against a backdrop of virulent racial appeals, ranging from racial epithets directed at minority candidates, to death threats against a Black candidate for U.S. Senate, Reverend Raphael Warnock. *Id.* ¶¶ 97-99, 106, 109-110.

The rise in the use of absentee balloting by Black voters was accompanied by unfounded accusations of fraud around the absentee voting process and tabulation of votes and an unprecedented effort to overturn the results of the presidential election. *Id.* ¶¶ 102-05. State and local election officials, including the Secretary of State, consistently debunked allegations of widespread fraud and conducted two statewide recounts pursuant to state law. *Id.* ¶¶ 107-08. A barrage of lawsuits alleging voter fraud, often focusing on counties with significant numbers of Black voters, were unsuccessful but became blueprints for several changes enacted through SB 202. *Id.* ¶ 109.

The Challenged Provisions. The United States challenges seven provisions of SB 202 that it alleges were adopted with the purpose of denying or abridging Black citizens' equal access to the political process, in violation of Section 2:

> (a). the ban on government entities mailing unsolicited absentee ballot request forms to voters (Section 25);
> (b). onerous fines on third party groups that distribute duplicate or follow-up absentee ballot request forms to voters (Section 25);
> (c). the requirement that voters who do not have a [Department of Driver Services] DDS-issued ID number associated with their voter registration record photocopy another form of ID in order to request an absentee ballot and are not permitted to use the last four digits of their Social Security number to verify their identity for such requests (Section 25);
> (d). the new deadline for requesting absentee ballots 11 days before Election Day (Section 25);
> (e). the cutback in the number of drop boxes permitted and the prohibition on using drop boxes after hours and in the days leading up to the election (Section 26);
> (f). the ban on groups providing food and water in a non-partisan way to voters facing long lines at the polls (Section 33); and
> (g). the prohibition on counting most out-of-precinct provisional ballots (Section 34).

Id. ¶ 161 (collectively, the "Challenged Provisions").

Absentee voting. The first five of the Challenged Provisions make absentee voting more difficult. Prior to 2018, Black voters in Georgia were historically less likely to vote absentee than white voters. But Black voters' use of absentee voting

outpaced that of white voters starting in 2018 and continuing in the November 2020 and January 2021 elections. *Id.* ¶¶ 21-22. Black Georgians are also less likely than white Georgians to have DDS-issued ID to request an absentee ballot, and will instead have to provide a photocopy of another form of ID. *Id.* ¶ 54. Black voters have also been more likely than white voters to request an absentee ballot between ten and four days before Election Day—a period now closed to such requests under SB 202. *Id.* ¶¶ 58-59.

Finally, the Challenged Provisions further limit absentee voting by curtailing the availability of drop boxes, which were widely used by voters during the 2020-2021 election cycle, particularly in the counties in the metro-Atlanta area, home to the largest number of Black voters in the state. *Id.* ¶¶ 60-71, 16-17. For example, in the November 2020 and January 2021 elections, Fulton County and Gwinnett County had 38 and 23 drop box locations, respectively; under SB 202, Fulton County will be limited to about eight drop boxes and Gwinnett County will be limited to about six. *Id.* ¶ 71. For the 2020 and January 2021 elections, drop boxes were available until the close of the polls on election day, and many were accessible after business hours in the days leading up to the election; SB 202 limits the use of drop boxes to those times and locations where voters could vote in person (i.e., the registrar's office or an early voting site) and requires that drop

boxes close permanently at the end of the early voting period. *Id.* ¶¶ 60-62, 68-70.

In-person voting. The sixth and seventh Challenged Provisions target in-person voting. SB 202 prohibits giving food and water to persons waiting in line to vote. *Id.* ¶ 72; SB 202 § 33. Long lines for in-person voting have disproportionately plagued polling places in majority-minority neighborhoods. Before passage of SB 202, various groups—frequently Black-led community organizations—distributed food and water to persons waiting in long lines to vote. Compl. ¶¶ 72-73. SB 202 also prevents jurisdictions from counting provisional ballots cast before 5 p.m. on Election Day if voters finds themselves in precincts other than the one to which the voter has been assigned. *Id.* ¶¶ 76-77; SB 202 § 34. Prior to SB 202, for almost 20 years, if a voter cast a provisional ballot in the "wrong" precinct, election officials would count the ballot in any contests where the voter was in the correct district (including for all state-wide offices). Compl. ¶ 76; O.C.G.A. § 21-2-419(c)(2) (2020). Because of higher rates of residential mobility and less access to transportation, Black voters can be expected to cast disproportionately more of these rejected ballots than white voters. Compl. ¶ 80.

Enactment of SB 202. On January 7, 2021—just two days after now-Senator Warnock's historic election—the Georgia House Speaker announced a House Special Committee on Election Integrity. *Id.* ¶ 113. Rather than following

the usual process of referring election bills to the Governmental Affairs Committee, election bills would instead be referred to the Special Committee, chaired by Representative Barry Fleming. *Id.* In a November 2020 op-ed, Rep. Fleming had compared the "always suspect absentee balloting process," to the "shady part of town down near the docks you do not want to wander into because the chance of being shanghaied is significant." *Id.* ¶ 114.

SB 202 originated in the Senate as a three-page bill, introduced on February 17, 2021. *Id.* ¶ 115. On March 3, 2021, the Senate Ethics committee held a hearing on SB 202, described by the committee chair as a "straightforward bill" to address confusion resulting from multiple absentee ballot applications being sent to voters. *Id.* ¶ 116. SB 202—still only three pages—passed out of committee on March 3 and passed the Senate on March 8, with minimal floor debate. *Id.* ¶ 117.

On March 17, Rep. Fleming swapped in a new, 90-page omnibus version of SB 202 for the three-page original bill, at a hearing before his Special Committee, providing little time for review. *Id.* ¶ 118-122. The Special Committee met again the next day, but the bill was still not publicly available on the General Assembly's website. *Id.* ¶¶ 121-122. Most witnesses criticized its provisions, and some pointed to the harmful impact the bill would have on voters of color. One county elections supervisor explained that SB 202 would render drop boxes useless. *Id.*

¶ 123. Witnesses also identified procedural issues with the new bill, including that the bill was not available online and lacked a fiscal note, and that it was difficult to obtain permission to testify remotely. *Id.* ¶ 124. After the intervening weekend, the Special Committee met again on March 22 and, within an hour, voted in favor of the 90-page bill. *Id.* ¶ 125.

Legislators continued to express concerns over the bill—including that the cap on the number of drop boxes would lead to long lines at the polls, especially in Fulton County—but the subsequent House floor debate three days later, on March 25, lasted less than two hours. *Id.* ¶¶ 126-28. Opponents explained that it would suppress the Black vote and that voter fraud concerns were pretextual. *Id.* ¶ 128. Representatives expressed concern that the process was too rushed to understand the fiscal and logistical impacts of the bill, but SB 202 passed the House. Within that same day, the Senate passed the bill and Governor Kemp signed it. *Id.* ¶¶ 129-33. From introduction of the 90-page bill to enactment, the process for considering the full version of SB 202 took eight days. Throughout the entire process, not a single Black legislator voted in favor of SB 202. *Id.* ¶¶ 117-118, 128, 130-132.

II. LEGAL STANDARD UNDER FEDERAL RULE 12(b)(6)

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."

Iqbal, 556 U.S. at 678 (internal citation and quotation marks omitted); *see also Belanger v. Salvation Army*, 556 F.3d 1153, 1155 (11th Cir. 2009) (construing allegations in a complaint "in the light most favorable to the plaintiff"). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable." *Iqbal*, 556 U.S. at 678. Consideration of information outside the face of the complaint is limited to "documents incorporated into the complaint by reference[] and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). In short, a court addressing a motion to dismiss must assume the factual allegations in the complaint are true, must draw all reasonable inferences from those facts in favor of the plaintiff, and must ignore contrary factual assertions made by the movant.

III. ARGUMENT

The United States' complaint alleges facts sufficient to state a claim under Section 2. The briefs supporting the motions to dismiss ignore long-established Section 2 case law and fail to account for the facts pled in the United States' Complaint. Section 2 claims are generally ill-suited for resolution through motions for summary judgment, after full discovery. *See Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1348 (11th Cir. 2015) ("Summary

judgment in these cases presents particular challenges due to the fact-driven nature of the legal tests."); *see also GBM*, 922 F.3d at 1322 n.33 (noting that "[t]he *Arlington Heights* factors require a fact intensive examination of the record"). It is even more true that voting rights claims are ill-suited for resolution through motions to dismiss. *See Metts v. Murphy*, 363 F.3d 8, 11 (1st Cir. 2004) (en banc).

A. A Violation of Section 2 May Be Shown Based on Either a Discriminatory Purpose or a Discriminatory Result

Section 2, as amended in 1982, encompasses both a "purpose" claim and a "results" claim. Longstanding jurisprudence interpreting the VRA refutes the State's attempts to persuade this Court otherwise. *See*, *e.g.*, Defs.' Mot. 5 (arguing that "there is no such thing as an exclusively intentional-discrimination claim under Section 2."). It also fatally undercuts the State's argument that a plaintiff bringing a "purpose" claim must also plead and prove all the elements of a "results" claim.

1. Section 2 has always prohibited, and continues to prohibit, purposeful racial discrimination. Prior to its amendment in 1982, Section 2 prohibited the use of any voting practice or procedure that was enacted (or maintained) for a discriminatory purpose. *See City of Mobile v. Bolden*, 446 U.S. 55, 60-62 (1980) (plurality opinion) (stating that the then-existing version of Section 2 was

coterminous with the Fifteenth Amendment, which is violated when a challenged voting provision is "motivated by a discriminatory purpose").

The 1982 amendments to Section 2 responded to that holding in *City of Mobile* by *expanding*, not *contracting*, the methods of proving a violation. "Recognizing the subtle ways that states often denied racial minorities the right to vote, in 1982, Congress amended Section 2 of the Voting Rights Act so that a plaintiff could establish a violation without proving discriminatory intent." *See Johnson v. Governor of Fla.*, 405 F.3d 1214, 1227 (11th Cir. 2005) (en banc). The amendments clarified that plaintiffs may bring claims under Section 2 based on a discriminatory result, without having to prove a discriminatory purpose. *Id.* at 1227. The Senate Report on the 1982 amendments states:

> The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose. . . . Plaintiffs must *either* prove such intent, *or alternatively*, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.[4]

S. Rep. No. 417, 97th Cong., 2d Sess. 27, reprinted in 1982 U.S. Code Cong. & Ad. News 205 (emphasis added; footnote omitted); *see Chisom*, 501 U.S. at 394

[4] This report is "the authoritative source for legislative intent" concerning the 1982 amendments to the Voting Rights Act. *Gingles*, 478 U.S. at 43 n.7; *see also Brnovich*, 141 S. Ct. at 2332-33 (relying on the report).

n.21; *Johnson*, 405 F.3d at 1227.[5]

The caselaw, including the Supreme Court's most recent Section 2 decision, confirms that Section 2 continues to prohibit practices adopted or maintained for a racially discriminatory purpose. This Term, in *Brnovich*, the Supreme Court treated the plaintiffs' Section 2 results claim and their Section 2 purpose claim as distinct from one another, placing its discussion of the two claims in separate sections of its opinion. *Compare* 141 S. Ct. at 2346-48 (discussing the plaintiffs' results claim) *with id.* at 2648-50 (discussing the plaintiffs' purpose claim). And with respect to the purpose claim, the Court applied the longstanding *Arlington Heights* framework. *Id.* at 2334 (noting plaintiffs brought a discriminatory purpose claim under Section 2); *id.* at 2348-49 (discussing *Arlington Heights*); *see also McMillan*, 748 F.2d at 1046-47.[6]

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[5] Congress used the word "results" to make clear that the Section 2 standard was not intended to be equivalent to the existing retrogressive "effects" test of the preclearance provisions of Section 5. 1982 Senate Report at 68. *Cf.* Amicus Br. of Greater Georgia Action at 14 (ECF No. 40).

[6] The United States has brought numerous challenges to voting practices for having a racial discriminatory purpose under Section 2 since 1982, and the courts have consistently recognized the ability to do so. *See, e.g.*, *Garza*, 918 F.2d at 766 ("Congress amended the Voting Rights Act in 1982 to add language indicating that the Act forbids not only intentional discrimination, but also any practice shown to have a disparate impact on minority voting strength"); *McCrory*, 831 F.3d at 233-235; *Veasey*, 830 F.3d at 230.

The Eleventh Circuit has long recognized that the 1982 amendments merely eliminated the *requirement* of proving discriminatory purpose in a Section 2 case. *See, e.g.*, *Johnson*, 405 F.3d at 1227. As the court explained in *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1553 (11th Cir. 1984), in 1982, "Congress redefined the scope of [S]ection 2 of the Act to forbid not only those voting practices directly prohibited by the Fifteenth Amendment but also any practice 'imposed or applied . . . in a manner which results in a denial or abridgement of the right . . . to vote on account of race or color.'" (emphasis omitted). "Congress intended that fulfilling *either* the more restrictive intent test or the results test would be sufficient to show a violation of [S]ection 2." *McMillan*, 748 F.2d at 1046.

The State's argument to the contrary is illogical: Since its passage in 1965, the VRA has expressly authorized the Attorney General to bring civil suits to enforce the Act, including Section 2. 52 U.S.C. § 10308(d). It cannot be that, as the State asserts, Congress' efforts to strengthen the protections of the VRA in 1982 somehow stripped the Attorney General of his existing ability to prosecute intentional discrimination under the VRA. *See* Defs.' Mot. 5; Amicus Br. of Greater Georgia Action at 13 (ECF No. 40-1).

2. Plaintiffs who bring a Section 2 purpose claim need not also plead and prove a Section 2 results claim. The State's assertion to the contrary, *see* Defs.' Mot. 5-6, misreads the case law. The State's argument relies on an erroneous reading of *Johnson v. DeSoto Cnty. Bd. of Comm'rs*, 72 F.3d 1556 (11th Cir. 1996) ("*DeSoto County I*"), a vote dilution case decided at the merits stage.[7] The principle of *DeSoto County I* and its progeny is not, as the State argues, that a Section 2 purpose claim is only cognizable if the complaint sets forth a Section 2 results claim at the pleadings stage. Rather, *DeSoto County I* reflects the unremarkable proposition that private plaintiffs must prove a redressable injury to sustain a Section 2 claim. *See id.* at 1565 ("For example, where statewide legislation is involved, the legislators may have intended to affect as many county school board elections as possible, but the maximum effect that legislation can have in a particular county will depend upon the racial composition of the county's

[7] Courts have recognized two categories of Section 2 claims. *See Brnovich*, 141 S. Ct. at 2331, 2333 (discussing vote dilution claims and claims about "time, place, or manner voting rules"); *see also Johnson*, 405 F.3d at 1227 n.26 (describing vote dilution and "vote denial" claims). Vote dilution claims challenge methods of election (such as at-large election systems or a redistricting plan) that dilute the ability of minority voters to elect candidates of choice. *See, e.g.*, *Gingles*, 478 U.S. at 47. Claims about vote denial address practices or procedures that are alleged to throw roadblocks in the way of minority voters who seek to participate in the electoral process. *See e.g.*, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 245 (4th Cir. 2014). The United States' claim here is vote denial.

electorate and other factors."). In the context of a *vote dilution* claim, the Eleventh Circuit held that a redressable injury requires proof of the first *Gingles* precondition—i.e., that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50; *see also Johnson v. DeSoto Cnty Bd. of Comm'rs*, 204 F.3d 1335, 1343 (11th Cir. 2000) ("*DeSoto County II*") (affirming the district court's holding that, although the challenged electoral scheme was adopted with discriminatory intent, plaintiffs failed to establish the first precondition). The court required proof of the first *Gingles* precondition because, in a vote dilution case, "[u]nless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 50 n.17.

The State's reliance on *Brooks v. Miller*, 158 F.3d 1230, 1237 (11th Cir. 1998), fares no better. Like *DeSoto County I*, *Brooks* presents a case where claims of intentional vote dilution failed due to the plaintiffs' failure to satisfy the first *Gingles* precondition at the merits stage. Def. Mot. 6. Again, these vote dilution cases are wholly distinct from the vote denial claim brought here. The injury in a vote dilution case is the lack of ability to elect representatives of choice on account of the challenged method of election, *see Gingles*, 478 U.S. at 50 n.17, and

analysis of vote dilution claims is anchored in the three *Gingles* preconditions, *see Brnovich*, 141 S. Ct. at 2337.[8]

In contrast, vote denial claims allege injuries in accessing "the political processes leading to nomination or election," and when, as here, discriminatory purpose is alleged, they are analyzed under the *Arlington Heights* framework. *See Brnovich*, 141 S. Ct. at 2337-38, 2348-49. Here, the United States has alleged that SB 202 erects barriers that will impede many Black voters' efforts to cast a ballot and have that ballot counted. As discussed further below, because of SB 202's restrictions on absentee voting, some voters will encounter new obstacles to obtaining, timely completing, and returning an absentee ballot. Likewise, due to SB 202, others who seek to vote in person will endure long lines without aid in the form of food or water, and some voters who appear at the wrong precinct will be disenfranchised because they are unable to travel to the correct precinct. *See* Section III.B *infra*. Taking the allegations in the Complaint as true, as this Court must, the United States has sufficiently pled that SB 202, enacted with discriminatory purpose, would by design have a profound discriminatory effect on

[8] Indeed, nowhere do *DeSoto I, DeSoto II,* and *Brooks* even cite to *Marengo County,* let alone reject its conclusion that Section 2 encompasses both purpose and results claims. *See* 731 F.2d at 1553.

minority voters. And that injury is redressable through the relief sought in the Complaint (for example, by enjoining the discriminatory provisions).

B. The United States Has Pled Sufficient Facts to Allege Discriminatory Purpose

The Court in *Brnovich* recently reaffirmed that the framework for analyzing a claim of discriminatory purpose is still "the familiar approach outlined in *Arlington Heights*," *Brnovich*, 141 S. Ct. at 2349; *see also GBM*, 992 F.3d at 1321, which requires a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. Courts in this inquiry "evaluate all available direct and circumstantial evidence of intent in determining whether a discriminatory purpose was a motivating factor in a particular decision." *City of Belle Glade*, 178 F.3d at 1189. Notably, neither of the Motions to Dismiss apply *Arlington Heights* to the facts alleged in the Complaint. Rather, both briefs quote, out of context, a phrase from *Brnovich* noting that the District Court had not found evidence that "the legislature as a whole" was motivated by a discriminatory purpose. This phrase did not announce a new standard; rather, it was simply the Court's shorthand way of describing the District Court's conclusion, after it had applied the *Arlington Heights* framework, that Arizona's law was not enacted with a discriminatory purpose. *Brnovich*, 141 S. Ct.

at 2349. In that case, the District Court had found that, on balance, certain discriminatory statements were outweighed by other factors, and the Supreme Court held that that finding was not clearly erroneous. *Id.* at 2248-49.

As outlined below, the Complaint identifies facts relevant to each of the elements identified in *Arlington Heights* as instructive on whether racially discriminatory purpose played a part in a law's enactment: the impact of the Challenged Provisions on Black voters, the historical background and sequence of events leading up to SB 202, substantive and procedural departures during the legislative process, and contemporary statements and actions of key legislators. *Arlington Heights*, 429 U.S. at 266-68. The Complaint also makes detailed allegations as to additional factors identified by the Eleventh Circuit as instructive: the foreseeability of the disparate impact, the knowledge of that impact, and the availability of less discriminatory alternatives. *GBM*, 992 F.3d at 1322.

1. The Challenged Provisions of SB 202 Will Have a Discriminatory Impact on Black Voters.

The five Challenged Provisions related to absentee voting introduce new impediments at every step of the process: obtaining an application, completing and timely submitting the application, and timely returning a completed ballot. These changes were adopted only after Black voters began disproportionately using

absentee voting, and Black voters will be disproportionately impacted by these restrictions, individually and collectively. *See, e.g.,* Compl. ¶¶ 140-146. Black voters are less likely to have the required ID to request an absentee ballot; are more likely to request an absentee ballot during the eliminated period of time to do so; and are disproportionately likely to cast late ballots, so are particularly harmed by the limitations on drop-boxes—especially given the decrease in drop boxes allowed in the metro-Atlanta counties. *See id.* ¶¶ 36-71, 140-146; *see also McCrory*, 831 F.3d at 216 (law that "required in-person voters to show certain photo IDs … which African Americans disproportionately lacked, and eliminated or reduced registration and voting tools that African Americans disproportionately used" found to be enacted with discriminatory purpose).

The limitations on distributing food and water and the prohibition on counting out-of-precinct provisional ballots will also disproportionately harm Black voters, who are more likely to face long lines at their polling places and are more likely to cast an out-of-precinct ballot. Compl. ¶¶ 72-80. These burdens will be compounded by the new restrictions on absentee voting, which will force more Black voters to vote in-person, where they will be more likely than white voters to endure long lines, at the end of which they may find themselves at the wrong precinct and unable to cast a ballot that will be counted because they lack the time

or resources required to go to another precinct. *Id.* ¶ 145.

The burdens of SB 202 also weigh more heavily on Black voters because of socioeconomic conditions linked to past and present race discrimination. Compl. ¶ 146. For example, Black voters are more likely to live in poverty and less likely to have access to the internet and a vehicle than white voters, so it is more difficult for Black voters to access online options for requesting an absentee ballot or to travel to a registrar's office to obtain an absentee ballot application in person. *Id.* ¶ 147. Similarly, it will be disproportionately burdensome for Black voters to travel to the correct precinct after waiting in line at an incorrect precinct.[9]

Citing *Brnovich*, the State dismisses these problems caused by SB 202 as constituting "the usual burdens of voting" and argues that its electoral system is

[9] The United States is *not* relying solely on the impact these provisions will have on Black voters to make its case. Rather, as the Supreme Court has recognized, "[t]he impact of the official action—whether it 'bears more heavily on one race than another' . . . may provide an important starting point" in analyzing whether an "invidious discriminatory purpose was a motivating factor" in the action. *See Arlington Heights*, 429 U.S. at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). Ironically, at least one amicus brief ignores the standard in *Arlington Heights* yet asserts that the Complaint's description of the law's negative impact on Black voters, in light of a history of discrimination and attendant socio-economic disparities, is somehow "offensive." ECF No. 48-1 at 15 n.21.

"equally open" to all.[10] Defs.' Mot. 4. But SB 202 differs markedly from the laws that were challenged in Arizona, in that SB 202 constitutes a concerted, multiprong attack on the ways Black voters cast their ballots:

- By requiring forms of identification for absentee voting that Black voters are less likely to have. Compl. ¶ 54.
- By cutting off days which Black voters have been more likely than white voters to use to request absentee ballots. Compl. ¶¶ 58-59.
- By forbidding officials from mailing absentee ballot request forms to all voters after Black voters had started disproportionately using absentee voting and after the Speaker of the House warned that increased turnout would lead to political outcomes he opposed. Compl. ¶¶ 36-42, 90.
- By needlessly and dramatically cutting the number of drop boxes allowed in counties with large Black populations. Compl. ¶¶ 69-71.

[10] In *Brnovich*, the Supreme Court declined "to announce a test to govern all VRA §2 claims involving rules . . . that specify the time, place, and manner for casting ballots." 141 S. Ct. at 2336. Instead, the Court offered "certain guideposts," *id.*, which it applied in examining the plaintiffs' Section 2 results claim, *id.* at 2336, 2343-48. The Court examined the District Court's rejection of a Section 2 intentional discrimination claim under the *Arlington Heights* framework. *Id.* at 2348. Therefore, the State's assumption that these results claim guideposts all must apply to an intent claim, as well, *see*, *e.g.*, Defs.' Mot. 23, contradicts what the Supreme Court in *Brnovich* actually did when analyzing an intent claim.

- By targeting mobilization efforts encouraging Black participation (whether by sending out absentee ballot request forms or by offering food and water to voters faced with long lines). Compl. ¶¶ 72-75.
- By forbidding voters to cast most out-of-precinct provisional ballots after allowing it for almost two decades. Compl. ¶¶ 76-80.

The cumulative effect of these multiple impacts on Black voters presents a markedly different picture than the two discrete Arizona provisions at issue in *Brnovich*, and these Georgia provisions will work together to have a negative cumulative effect on Black voters. Compl. ¶¶ 139-149, 161-162; *see also* *Arlington Heights*, 429 U.S. at 266 (considering whether the "impact of the official action" bears more heavily "on one race than another").

Take the example of refusals to count out-of-precinct ballots. Georgia permitted out-of-precinct voting for almost two decades, Compl. ¶ 76, Georgia Act 769 (2002); O.C.G.A. §§ 21-2-418, 21-2-419 (2020), providing thousands of voters with an important fail-safe if they found themselves in the wrong precinct. In contrast, the Arizona law examined in *Brnovich* was a longstanding ban on counting out-of-precinct provisional ballots. *Brnovich*, 141 S. Ct. at 2334 (describing Arizona law and noting that some Arizona voters cast ballots in "vote centers" that are not subject to this rule). It is true the Supreme Court upheld a

finding that Arizona's ban did not violate Section 2's results test, and that the United States agreed that there was not a violation of Section 2 based on the factual record in that Arizona case. *Id.* at 2336. *Brnovich*, however, does not foreclose a challenge to Georgia's cutback of its long-standing allowance of the counting of out-of-precinct ballots. And it certainly does not do so at the pleadings stage when the Complaint plausibly alleges that the ban is the product of a racially discriminatory purpose. Under Section 2, the relevant analysis is intensely local, *Gingles*, 478 U.S. at 79, and the factual circumstances in different states can lead to different outcomes.[11]

[11] The motions to dismiss argue that SB 202 is similar to laws enacted in other states, *see* Defs.' Mot. 23; Intervenors' Mot. 7, but ignore that liability depends on "an intensely local appraisal of the design and impact" of the unique factual circumstances of each case. *See Gingles*, 478 U.S. at 79 (quoting *Rogers v. Lodge*, 458 U.S. 613, 622 (1982)). Indeed, a law may be enacted with discriminatory purpose in one state—and have its intended effect there—while the same law could be enacted in another state both with no discriminatory purpose and no such effect. *See, e.g., White v. Regester*, 412 U.S. 755, 765-70 (1973) (striking down multi-member districts in Texas despite allowing such multi-member districts in Indiana in another case because of the different factual circumstances in the different states). Moreover, "*removing* voting tools that have been disproportionately used by African Americans meaningfully differs from not initially implementing such tools." *McCrory*, 831 F.3d at 232; *see, e.g.*, Compl. ¶¶ 39-40, 43-44, 54, 58-59, 69-71, 75, 79-80. The United States routinely brings lawsuits under its statutes, in a wide range of states, where the unique factual circumstances warrant it. *See* https://www.justice.gov/crt/voting-section-litigation#sec2cases; *see also* Compl.,

2. The Historical Background and Sequence of Events Leading to the Passage of SB 202 Provide Evidence of Discriminatory Purpose.

The history of discrimination against Black citizens in Georgia is well-documented and recognized by federal courts, as recently as 2018. *See, e.g., Wright v. Sumter Cnty. Bd. of Elections & Registration*, 301 F. Supp. 3d 1297, 1323-24 (M.D. Ga. 2018); Compl. ¶¶ 30-34. Georgia also has an extensive and judicially recognized history of racially polarized voting, which continues today. Compl. ¶ 136(b); *Georgia State Conf. of NAACP v. Georgia*, 312 F. Supp. 3d 1357, 1360 (N.D. Ga. 2018) ("voting in Georgia is highly racially polarized"). This is a "critical background fact" in a "[Section] 2 discriminatory intent analysis" because racially polarized voting "provide[s] an incentive for intentional discrimination in the regulation of elections."[12] *McCrory*, 831 F.3d at 221-22.

SB 202 was passed in the wake of historic success by Black Georgians in turning out to vote and in electing their candidates of choice. In recent years,

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United States v. Oneida Cnty. Bd. of Elect., 6:21-cv-00793 (N.D.N.Y. July 12, 2021) (National Voter Registration Act and Help America Vote Act claims).

[12] As a result of this history, Black Georgians continue to suffer the effects of official discrimination, including markedly lower socioeconomic conditions relative to white citizens in areas such as income, education, and access to vehicles. Compl. ¶¶ 23-29, 136.

Black voters had become disproportionately more likely to vote absentee than white voters and Black-led voter mobilization efforts (including the increased use of absentee ballots and efforts to encourage hungry voters to stay in long lines) had received prominent press coverage. Compl. ¶¶ 72, 83-86,145. It is exactly those "precise circumstances," Intervenors' Mem. 6 (quoting *GBM*, 992 F.3d at 1325), leading up to SB 202's passage that provide a basis for finding a discriminatory purpose behind the sweeping changes, each of which is more likely to affect Black voters than their white compatriots. *See LULAC*, 548 U.S. at 440 (taking away minority voters' electoral opportunity just as they were about to exercise it "bears the mark of intentional discrimination"); *McCrory*, 831 F.3d at 226 (finding discriminatory purpose where the legislature enacted voting restrictions "in the immediate aftermath of unprecedented African American voter participation in a state with a troubled racial history and racially polarized voting").

Other circumstances leading to the passage of SB 202 that the State and Intervenors largely ignore include an unprecedented campaign to overturn the November 2020 election results, violent threats against election workers, and countless unsuccessful lawsuits, all premised on unfounded accusations of fraud. Compl. ¶¶ 103-111. Legislators who supported SB 202 used voter fraud as a justification for many of its provisions, in the face of warnings about the

disproportionate effects the bill would have on Black voters. The history of SB 202 differs greatly from the photo ID bill at issue in *Greater Birmingham Ministries*, 992 F.3d at 1305, for example, where the historical background included actual, public cases of voter fraud and lacked the very public campaign to overturn the results of an election based on false information.

Brnovich's acknowledgement that voter fraud prevention is a legitimate state interest provides no basis to dismiss the Complaint. *See* Defs.' Mot. 3, Intervenors' Mot. 8. The issue before this Court is not whether fraud prevention *can* provide a legitimate basis for a challenged provision; it is whether, *in this case*, it does. This Court, like the Arizona district court, cannot assess whether the invocation of fraud prevention is "sincere" absent considering the credibility of documentary evidence and witnesses. *Brnovich*, 141 S. Ct. at 2349. The United States has alleged that state-led investigations squarely disproved any basis for believing widespread fraud in Georgia required enacting the provisions in SB 202. Moreover, the results in several lawsuits alleging voter fraud further demonstrated the security of mail-in voting in Georgia. Compl. ¶¶ 102-105, 109-110.

The State's and Intervenors' reliance on state legislative findings, *see, e.g.*, Intervenors' Mot. 7, cannot rebut the allegations of the Complaint at this stage. *See Tellabs, Inc.*, 551 U.S. at 322; *Korematsu v. United States*, 584 F. Supp. 1406,

1415 (N.D. Cal. 1984) (declining to take "judicial notice of the actual findings of [a federal] Commission"). Whether the provisions of SB 202 actually prevent fraud or are mere pretext for discrimination is a factual question for resolution at trial after full discovery.[13]

3. Procedural and Substantive Departures and Statements or Actions of Legislators Provide Evidence of Discriminatory Purpose.

The General Assembly departed from its normal procedure in passing SB 202 by stripping consideration of election bills from the usual standing House committee and giving it to a Special Committee. Compl. ¶ 157. House Speaker David Ralston, who had expressed concerns that mailing absentee applications to all voters would "drive up turnout" and be "extremely devastating" to election outcomes he favored, announced the formation of the Special Committee. *Id.* ¶ 39. The chair of the Special Committee, Representative Fleming, had publicly recognized his goal of making absentee voting harder just after Black voters had

[13] One straw-man argument raised by the State is that finding for the United States would somehow prevent laws to remedy voter fraud. To the contrary, legislatures can act to prevent voter fraud, but they cannot use voter fraud as a pretext to enact racially discriminatory provisions that needlessly throw roadblocks in the way of minority voter participation. The dispute in a Section 2 purpose case is not about fraud or measures that might address fraud in the abstract, but about the purposes for which very specific provisions of this bill came to be, and what effect they will have, in the relevant jurisdiction.

begun to use absentee voting at higher rates than white voters and electing candidates of choice. Other legislators, like Representative Chuck Martin, suggested that the absentee process had become susceptible to "foolishness." *Id.* ¶¶ 114, 122; *see Arlington Heights*, 429 U.S. at 267 (noting that a sudden change in longstanding policy in the face of shifting racial demographics may suggest a discriminatory purpose); *see also McCrory*, 831 F.3d at 222-23; Compl. ¶¶ 136, 154, 164 (noting absence of voter fraud).[14]

The Special Committee received a three-page bill version of SB 202 that involved only duplicate absentee ballot applications and turned it into a 90-page omnibus bill, with little notice to the public or other representatives. Compl. ¶¶ 118-120. Debate on the 90-page bill began before it was publicly available on the legislature's website, *id.* ¶ 121, and the bill's original sponsor flouted standard practice by not presenting the significant changes in the substitute bill, *id.* ¶ 157. Despite concerns expressed regarding procedural issues, the lack of a fiscal note

[14] Despite Intervernors' arguments to the contrary, ECF No. 39-1 at 7, the Complaint does discuss the statements of sitting Georgia legislators during Committee hearings and floor debates regarding SB 202. *See, e.g.*, Compl. ¶¶ 119, 122, 126, 127. Other legislative statements cited in the complaint, *see, e.g.*, Compl. ¶¶ 105, 110-111, 114, were made just before the 2021-2022 Legislative Session and remain connected "to the passage of the actual law in question." *See GBM*, 992 F.3d at 1324.

(despite the inevitable expenditures the bill would entail), and the impact the bill would have on voters of color, SB 202 passed out of the Special Committee five days later. *Id.* ¶¶ 123-127. Two days later, after less than two hours of floor debate in the House, SB 202 passed out of the House, and then was quickly passed in the Senate. *Id.* ¶¶ 128-132. The governor signed it only eight days after the 90-page version was first introduced and less than a week after it became publicly available on the General Assembly's website. Compl. ¶¶ 118-133; *see McCrory*, 831 F.3d at 228 (moving a 57-page bill through the legislature in three days "strongly suggests an attempt to avoid in-depth scrutiny").[15]

[15] Ohio's amicus brief faults the United States for pointing out that SB 202 had no support among Black legislators. ECF No 46-1 at 29. But again, examining the totality of the circumstances surrounding a decision is relevant for the "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. The relevant facts include those who supported and opposed the bill in question. Likewise, multiple briefs incorrectly suggest that the United States has alleged that Georgia legislators are "racist," but such allegations are not required. *McCrory*, 831 F.3d at 222-23; *Garza*, 918 F.2d at 778 & n.1 (Kozinski, J., concurring and dissenting in part); *see also LULAC*, 548 U.S. at 440. Indeed, Supreme Court precedent "does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes" but rather that a discriminatory purpose was "a motivating factor." *Arlington Heights*, 428 U.S. at 265-66.

4. The Disparate Impact of the Challenged Provisions Was Foreseeable, the Legislature Knew of this Impact, and the Legislature Could Have Chosen Less Discriminatory Alternatives.

The United States has also sufficiently pled the additional factors considered by the Eleventh Circuit for intentional discrimination claims. *See GBM*, 992 F.3d at 1322. Given that Black voters use absentee voting at a disproportionately higher rate than white voters, SB 202's limitation on absentee voting will have the foreseeable effect of having a disparate impact on Black voters. Compl. ¶¶ 152, 163. This foreseeable effect is heightened because Black voters are less likely than white voters to have the identification required under SB 202 to apply for an absentee ballot (absent a photocopy of another ID), *id.* ¶ 143; have been more likely than white voters to request an absentee ballot during days now eliminated for requests, *id.* ¶¶ 56-58; and are more likely to be impacted by draconian cuts to drop boxes in the metro-Atlanta area, *id.* ¶¶ 60-71. Similarly, given that efforts to distribute water and food to persons waiting in long lines to vote were frequently run by Black-led community organizations to aid voters at majority-minority polling places, it is foreseeable that a ban on providing such aid would disproportionately affect Black voters. *Id.* ¶¶ 72-73, 135, 138. And given that Black voters have higher rates of residential mobility and less access to

transportation, *id.* ¶ 80, it is also foreseeable that Black voters would be disproportionately impacted by the ban on counting most out-of-precinct provisional ballots, *id.* ¶ 145.

The General Assembly knew of the disparate impact the challenged provisions would have. Black-led mobilization efforts in Georgia that encouraged absentee voting and provided food and water to voters waiting in line were well publicized, and it is reasonable to infer that the General Assembly was aware of these efforts. Compl. ¶¶ 1, 72-75, 81, 85-86. The House Speaker's prediction that an increase in absentee voting would "drive up turnout," which would be "extremely devastating" to election outcomes he favored shows as much. *Id.* ¶ 39. Several witnesses also testified during hearings on SB 202 that the bill would harm Black voters. *Id.* ¶¶ 123, 127-128.

In addition, the legislature had less discriminatory alternatives available to achieve its purported ends. For example, if the State were concerned about ensuring voters' identity, it could have permitted voters to print the last four digits of their social security numbers if they do not have a DDS-issued ID. Compl. ¶¶ 48-49. But it did not. And supporters of SB 202 did not explain during the debate why the use of the last four digits of a voter's social security number was sufficient to verify identity for returning a completed absentee ballot, but not

sufficient to verify identity for requesting an absentee ballot. *Id.* ¶¶ 52, 143. The failure to allow the social security number as an alternative at the absentee ballot application stage can be a consequential choice since it would be widely and easily available to many voters and could mitigate a discriminatory effect.

Similarly, SB 202 dramatically and needlessly cut back the number of drop boxes available in counties in the metro Atlanta area, Compl. ¶¶ 63-71, when the legislature could have chosen a formula for assigning drop boxes that did not result in dramatic cuts, or it could have permitted drop boxes to remain open after business hours up until Election Day as needed, with cameras to address security concerns. *See* State Election Board Rule 183-1-14-0.6-.14; Compl. ¶ 60. The broad prohibition on offering food and water to voters in line could have easily been narrowed to focus on electioneering by prohibiting food or water *in exchange for votes or support for a candidate or party*. Indeed, state law already prohibited soliciting votes "in any manner or by any means or method" within 150 feet of a polling place, which presumably would have covered offering food or water in exchange for voting a certain way. O.C.G.A. § 21-2-414 (2017). But making it illegal for Black-led organizations to provide food and water to encourage people to stay in hours-long lines to vote in Black communities, without advocating for any partisan campaign, *see* Compl. ¶ 75, goes much farther than needed to advance

the State's interest.[16]

5. The Totality of the Circumstances Support a Finding of Discriminatory Purpose.

The State alleges that the United States has not adequately pled the totality of the circumstances, but an examination of the Complaint shows otherwise. In addition to the *Arlington Heights* factors, the Supreme Court held in *Rogers v. Lodge* that courts can rely on the evidentiary factors later listed in the 1982 Senate Report to find that a challenged practice has been adopted or maintained for a racially discriminatory purpose.[17] *See* 458 U.S. 613, 620-21 (1982). Several

[16] In the same vein, the legislature could have addressed duplicate ballot applications without onerous fines of up to $100 per violation, which will chill political mobilization efforts among Black voters, Compl. ¶¶ 35, 43-44, 161, and it could have allowed more time for absentee ballot requests to be processed without stopping all absentee ballot requests 11 days before the election. *Id.* ¶¶ 57-59. Indeed, the dramatic restrictions on drop boxes will only increase the number of late-arriving absentee ballots that will not be counted, *id.* ¶¶ 65-70, which is ostensibly the rationale for the 11-day restriction.

[17] The "Senate Factors," as listed in *Gingles*, 478 U.S. at 44-45, are:

> 1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. The extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot

Senate Factors, as alleged in the Complaint, support a finding of discriminatory purpose. As already explained, *see* Section III.B.2, *supra*, Georgia's history of discrimination against minorities is long standing and well documented (Senate Factor 1), Compl. ¶¶ 30-34, and voting in Georgia continues to be racially polarized (Senate Factor 2), Compl. ¶ 136. "It is the political cohesiveness of the minority groups that provides the political payoff for legislators who seek to dilute

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> provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. Whether political campaigns have been characterized by overt or subtle racial appeals; [and]
>
> 7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

Two additional factors are (1) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and (2) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous. *Id.* at 45.

or limit the minority vote."[18] *McCrory*, 831 F.3d at 222.

The Complaint also alleges that Black Georgians bear the effects of discrimination in various socio-economic areas (Senate Factor 5). Compl. ¶¶ 23-29. In the Eleventh Circuit, it is well-established that "when there is clear evidence of present socioeconomic or political disadvantage resulting from past discrimination . . . the burden is not on the plaintiffs to prove that this disadvantage is causing reduced political participation, but rather is on those who deny the causal nexus to show that the cause is something else." *Solomon* v. *Liberty County*, 166 F.3d 1135, 1147 (11th Cir. 1999), *vacated on other grounds*, 206 F.3d 1054 (11th Cir. 2000) (en banc) (citing *Marengo County Comm'n*, 731 F.2d at 1569 (collecting cases)). The Complaint further alleges that recent contests for statewide and national office in Georgia—including the recent elections preceding passage of SB 202—have included overt and subtle racial appeals (Senate Factor 6). Compl. ¶¶ 97-99. These factors, combined with the *Arlington Heights* framework, can form the basis of a finding of intentional discrimination.

[18] In the context of a results claim for vote denial, *Brnovich* observed that not all of the Senate Factors might be as relevant as they would be in a vote dilution case, but some of the factors, such as racially polarized voting, bear on whether the "minority group members suffered discrimination in the past (factor one) and that effects of that discrimination persist (factor five)." 141 S. Ct. at 2340.

C. Inferences of a Discriminatory Purpose Can Be Drawn from Facially-Neutral Laws

The State and Intervenors argue that because SB 202 is race-neutral on its face, the challenged provisions of SB 202 constitute legitimate, non-discriminatory election administration policies that states are free to pursue without violating Section 2. *See* Defs.' Mot. 14-17; Intervenors' Mot. 7-8, 14-15. That has never been the law. The very purpose of the *Arlington Heights* approach is to determine whether inferences of a discriminatory purpose render a facially neutral law invalid. *Arlington Heights*, 429 U.S. at 265-70.

Nor is this Court restricted to the statements of legislative purpose contained in the text of SB 202 in examining discriminatory purpose. *Contra* Defs.' Mot. 14; Intervenors' Mot. 7-8. If that were the case, lawmakers would be free to enact laws with a discriminatory purpose simply by claiming otherwise. "In instructing courts to consider the broader context surrounding the passage of legislation, the [Supreme] Court has recognized that '[o]utright admissions of impermissible racial motivation are infrequent and plaintiffs must rely on other evidence.'" *McCrory*, 831 F.3d at 221 (quoting *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999)). No halfway adept legislator motivated by a discriminatory purpose would announce that purpose publicly, so public statements by legislative proponents articulating an

ostensibly permissible intent should not be accorded any special weight. *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982).

Moreover, as the Supreme Court recognized in *Arlington Heights*, legislators routinely make decisions that are motivated by multiple concerns, and the evidence need not show "that the challenged action rested solely on racially discriminatory purposes" or even that the discriminatory purpose "was the 'dominant' or 'primary' one." 429 U.S. at 265. "When there is proof that a discriminatory purpose has been a motivating factor in [a] decision," judicial deference to legislators' policy choices "is no longer justified." *Id.* at 265-66. As set forth in the Complaint, the scope and extent of the restrictions the State imposed here—immediately after historic wins by Black-preferred candidates and a dramatic increase in absentee voting among Black voters—further points to discriminatory motives. Compl. ¶¶ 81-100. At this stage of the litigation, these allegations must be taken as true and inferences drawn in the United States' favor.

Whether sufficient evidence exists to overcome any alleged "presumption of legislative good faith," Intervenors' Mot. 5, is an inherently fact-based question best suited for the merits stage of litigation. *See Miller v. Johnson*, 515 U.S. 900, 915-17 (1995); *Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018). Moreover, a very great part of the relevant facts about elections and this bill are uniquely in the

possession of the State, its counties, and its governmental actors. The United States has adequately pled and is entitled to discovery on those claims.[19]

IV. CONCLUSION

As set forth above, the United States has stated a claim upon which relief can be granted pursuant to Section 2 of the VRA, 52 U.S.C. § 10301. Accordingly, the Motions to Dismiss should be denied.

[19] That state legislators may attempt to invoke legislative privilege, *see* Intervenors' Mot. 9, does not foreclose the United States' claim. A state legislator's assertion of legislative privilege is not absolute, particularly where, as here, a compelling federal interest is at stake. *See United States v. Gillock*, 445 U.S. 360, 373 (1980).

Respectfully submitted, this 11th day of August, 2021.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(D)

Pursuant to Local Rule 7.1(D), I certify that the foregoing document was prepared in Times New Roman 14-point font in compliance with Local Rule 5.1(C).

/s/ Rachel R. Evans
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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2021, I electronically filed the foregoing with the clerk of the court using the CM/ECF system, which will send notification of this filing to counsel of record.

/s/ Rachel R. Evans
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