No. 22-501

In the Supreme Court of the United States

TOM ALONZO, *et al.*,

Petitioners,

v.

SCOTT SCHWAB, IN HIS OFFICIAL CAPACITY AS KANSAS SECRETARY OF STATE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Kansas Supreme Court

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Court should grant the petition to resolve the three-decade-long split of authority on whether the Fourteenth Amendment is controlled by the statutory test for vote-dilution claims under the Voting Rights Act ("VRA"). The Kansas Supreme Court incorrectly held that the Fourteenth Amendment permits intentional race discrimination in redistricting so long as minority voters are insufficiently numerous to constitute the majority of a district's voting population. Its decision adds to an existing split of authorities and contradicts this Court's precedent.

In asking the Kansas Supreme Court to deny rehearing, the State observed that "it is the U.S. Supreme Court—not the lower federal courts—that is the ultimate arbiter of the meaning of the federal Constitution." State Br. in Opp'n to Mot. for Reh'g at 11. Indeed. The Court should grant the petition and resolve this issue.

ARGUMENT

I. The Court has jurisdiction to review the Kansas Supreme Court's interpretation of the Fourteenth Amendment.

This case falls squarely within this Court's jurisdiction. The Kansas Supreme Court held that "the equal protection guarantees in section 2 [of the Kansas Bill of Rights] are *coextensive* with the equal protection guarantees afforded under the Fourteenth Amendment to the United States Constitution," App.-27 (emphasis added), and "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," App.-46 (emphasis added). In these situations, the Court has always exercised jurisdiction because this Court is the "final arbiter of the United States Constitution." *Arizona v. Evans*, 514 U.S. 1, 9 (1995).

In *Pennsylvania v. Muniz*, the Court held that it had jurisdiction to review a Pennsylvania state court's interpretation of the state constitutional right against self-incrimination where the state court "explain[ed] that this provision offers a protection against self-incrimination identical to that provided by the Fifth Amendment." 496 U.S. 582, 588 n.4 (1990) (internal quotation marks omitted). Likewise, in *Fitzgerald v. Racing Association of Central Iowa*, this Court held that it had jurisdiction to review an equal-protection decision where the state court explained that it "appl[ies] the same analysis in considering the state equal protection claims as . . . in considering the federal equal protection claim." 539 U.S. 103, 106 (2003). "[I]n such circumstances, we shall consider a state-court decision as resting upon federal grounds sufficient to support this Court's jurisdiction." *Id.*

Here, the Kansas Supreme Court went a step further than just "adhering" to this Court's decisions regarding the "coextensive" Fourteenth Amendment—it actually criticized the district court's reliance on precedent from the Kansas Supreme Court: "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." App.-47. The court then exclusively cited and (mis)interpreted that federal caselaw in arriving at its conclusion that the Fourteenth Amendment contains an unwritten "majority-minority" requirement. *See* App.-52-56 (citing ten federal court decisions). Because the Kansas Supreme Court rested its decision "squarely upon its interpretation of federal law," *Evans*, 514 U.S. 10, this Court has jurisdiction to review and correct it.[1]

The State contends otherwise because Petitioners did not raise a Fourteenth Amendment claim in their complaint, Br. 14, noting that "[t]his Court has long emphasized the importance of the 'federal question ha[ving] been both raised and decided in the state court below,'" *id.* at 12 (quoting *Illinois v. Gates*, 462 U.S. 213, 218 (1983)) (first bracket added). Although those words appear in *Gates*, the State omits the critical passage:

> The apparent rule . . . that a federal claim have been *both* raised and addressed in state court was generally not understood in the literal fashion in which it was phrased. Instead, the Court

[1] This principle is well established. *See, e.g.*, *Oregon v. Guzek*, 546 U.S. 517, 521 (2006) ("We possess jurisdiction to review state-court determinations that rest upon federal law."); *Evans*, 514 U.S. at 10 (this Court had jurisdiction to review Arizona Supreme Court decision that was "based squarely upon [the state court's] interpretation of federal law"); *State Tax Comm'n v. Van Cott*, 306 U.S. 511, 514 (1939) (this Court had jurisdiction to review state supreme court decision where interpretation of state statute was "interwoven" with interpretation of federal constitutional provision).

> developed the rule that a claim would not be considered here unless it had been *either* raised or squarely considered and resolved in state court.

462 U.S. at 218 n.1 (emphases in original). As the *Gates* Court explained, the modern rule is that federal issues "not pressed *or* passed upon" in state court will not be decided. *Id.* at 219 (emphasis added); *see also Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991) ("It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal law issue that the state supreme court actually considered and decided."). It is long settled that this Court's certiorari jurisdiction does not turn on the presence of a federal claim in a plaintiff's complaint. *See Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 815 (1986) ("[E]ven if there is no original district court jurisdiction . . . this Court retains power to review the decisions of a federal issue in a state cause of action."); *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 171-72 (2009) (this Court had jurisdiction to review state supreme court's interpretation of federal law that state court considered to dictate resolution of state statutory claim).

This rule adheres to the jurisdictional statute, which grants this Court jurisdiction over "final judgments or decrees rendered by the highest court of a State . . . where the validity of a statute of any State is drawn into question on the ground of its being repugnant to the Constitution . . . of the United States . . . ." 28 U.S.C. § 1257. The statute's plain text asks *whether* the state statute was adjudged against

federal law by the state supreme court, not *who* asked that it be.

Moreover, contrary to the State's contention, Br. 16, this Court's jurisdiction is on even stronger footing in this case than in the context of the "adequate and independent state grounds" line of cases. *See generally, e.g.*, *Michigan v. Long*, 463 U.S. 1032 (1983). Where the Court takes jurisdiction because the state court has not asserted an adequate and independent state law ground for its decision, this Court's decision interpreting the federal issue may not even influence—let alone dictate—the ultimate resolution of the case on remand. *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 568 (1977) (explaining that reversal of state court's misinterpretation of federal law leaves it "freed to decide . . . these suits according to its own local law"). Here, the Kansas Supreme Court has disclaimed any freedom to interpret its state constitution's equal-protection guarantee.

For that reason, the State's suggestion that this Court's review would result in an "advisory opinion" based upon "speculation" that the Kansas Supreme Court "might" alter its decision on remand, Br. 17, is unfounded. The Kansas Supreme Court could not have been clearer: "[W]e 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." App.-46.

In short, if this Court has jurisdiction when its decision of federal law merely frees a state court to

decide the case differently on remand, then it plainly has jurisdiction when its decision of federal law will indisputably govern the adjudication of Petitioners' claim on remand.

II. The State's jurisdictional argument does not pose a vehicle problem.

The State's (misguided) jurisdictional argument does not pose a vehicle problem. This Court routinely grants certiorari where respondents assert threshold jurisdictional arguments. *See, e.g.*, *Evans*, 514 U.S. at 6; *Office of Hawaiian Affairs*, 556 U.S. at 171; *Long*, 463 U.S. at 1037; *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641 (1998); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 611 (1989).

Even if this Court's jurisdiction were credibly in doubt, that would counsel in favor of granting review. *See, e.g.*, *Brenner v. Manson*, 383 U.S. 519, 522 (1966) (granting certiorari in part "to answer the question concerning our certiorari jurisdiction"). A "clear majority" of state supreme courts follow federal constitutional decisions to interpret their state constitutions. *See* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 Wm. & Mary L. Rev. 1499, 1502 (2004). The Kansas Supreme Court has now joined a number of other state supreme courts in adopting, in the redistricting context at least, a strict "prospective lockstepping" rule—permanently binding its state constitutional jurisprudence to this Court's interpretation of the Fourteenth Amendment's prohibition on intentional vote dilution. App.-70; *see* Williams, 46 Wm. & Mary

L. Rev. at 1509. It then went seriously astray in its understanding of federal law. The scope of this Court's power as the final arbiter of the meaning of federal law—to the extent it is not already clear—is an important question that only this Court can answer.

Finally, the State contends that its jurisdictional argument poses a "sensitive federal balance" that "would complicate this Court's review." Br. 18. But the federalism concerns that might otherwise arise in a case involving the decision of a state supreme court have little relevance here, where the Kansas Supreme Court has outsourced its interpretive role to this Court.

III. The Court should grant review of the Kansas Supreme Court's decision.

A. This Court's review is needed to resolve the split over the application of *Gingles* to the Fourteenth Amendment.

As the petition explains, the lower courts are split on whether the *Gingles* "majority-minority" requirement applies to Fourteenth Amendment intentional vote-dilution claims. The State contends that the split is "overblown" because "just two appellate courts—the Kansas Supreme Court and the Ninth Circuit . . . have allegedly decided the issue." Br. 23. The State downplays the Eleventh Circuit's opinion in *Johnson v. DeSoto County Board of Commissioners*, 204 F.3d 1335 (11th Cir. 2000), but that decision was among the principal bases for the Kansas Supreme Court's decision below. App.-55. Indeed, the State previously heralded *Johnson* as

"most notable" for having "expressly addressed" this issue. State Br. in Opp'n to Mot. for Reh'g 9.

Moreover, the State's focus on the number of appellate courts to decide the question ignores the unique context in which this issue often arises: Statewide redistricting suits raising constitutional claims that are heard by three-judge federal courts without reaching the courts of appeals. *See* 28 U.S.C. § 2284. Those courts have deepened the split of authorities on this issue. *See* Pet. 24-25.

The State also contends that more "percolation" would be somehow beneficial. Br. 24. But this question has percolated for 33 years. *See generally Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990). And the issue has arisen with each decennial redistricting cycle since, as the citations in the State's own brief illustrate. *See* Br. 24 (citing cases from 2001, 2011, and 2021 redistricting cycles). The State does not explain *what* is left to be said in the lower courts. The courts have examined the question and come to different conclusions. Punting this question to next decade will do nothing to make it any less "unsettled." *Id*. Only this Court resolving the split will do that.

Finally, the State contends that the Court should deny review here because the parties did not brief the issue until the motion for rehearing below. *Id*. at 25. But the issue was not briefed because, until the rehearing phase, *the parties agreed* that this Court's *Arlington Heights* intentional-discrimination jurisprudence—or at least a state-law equivalent—governed the case. State's Appellant Br. 44-48.

B. The Kansas Supreme Court's decision is wrong and conflicts with this Court's decisions.

The Kansas Supreme Court's decision is wrong and conflicts with this Court's decisions, as the petition explains. The Fourteenth Amendment's prohibition on intentional discrimination does not vanish when minorities constitute less than a majority of a district's eligible voters.

In the roughly four pages that the State devotes to arguing otherwise, it merely recounts the development of the Section 2 results tests without engaging Petitioners' arguments. Br. 19-23. Most fundamentally, the State offers no reason why it would be unconstitutional to dismantle a 50.01% minority voting-age population district for the purpose of racial discrimination but perfectly constitutional to do the same to a 49.99% minority voting-age population district. The Equal Protection Clause's applicability does not teeter on decimal points.

The State contends that (1) minority voters cannot show a discriminatory effect if they lack "the *potential* to elect representatives," Br. 20 (emphasis in original), (2) the 1982 VRA amendments were intended to be more permissive than the constitutional vote dilution standard, *id.* at 22, and (3) *Gingles* cited Fourteenth Amendment precedent and a law review article that proposed a constitutional vote-dilution standard, *id.* These arguments have no merit.

First, whether a minority group has the potential to elect its preferred representatives does not turn on whether it constitutes a majority of a district's voting population. As this Court has explained, crossover districts containing an effective majority supporting the minority-preferred candidate can allow minority voters an opportunity to elect their candidate of choice and, if they do, comply with the VRA. *See, e.g.*, *Cooper v. Harris*, 581 U.S. 285, 306 (2017); *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018). The "majority-minority" requirement is simply an evidentiary burden for statutory claims—one this Court derived from the text of the VRA, not the Fourteenth Amendment. *See Bartlett v. Strickland*, 556 U.S. 1, 14 (2009) (plurality opinion).[2]

Second, the State's arguments about the 1982 amendments are pure *non sequitur*. It is true that the 1982 VRA Amendments made results-based vote-dilution claims easier to establish in the sense that they overruled this Court's statutory decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). But it does not follow that Congress, by eliminating the intent requirement for *statutory* vote-dilution claims, somehow heightened the discriminatory effects

[2] The State notes in the Fact section of its brief that Congresswoman Sharice Davids was reelected in 2022. Br. 11. The State correctly omits this from its Argument, because it says nothing about the discriminatory effect on the minority voters who were moved out of her district and into one that no one disputes will not provide them an ability to elect their preferred candidates. As the district court concluded, the object of the map is to afford minority Democrats the least voting opportunity in the State—behind both white Republicans and white Democrats. App.-390.

showing for *constitutional* vote-dilution claims. Congress, of course, would not have the power to alter the constitutional test even if it wanted to. Congress's determination in 1982 that the VRA incorporates no discriminatory-intent requirement signals nothing about the proper test for intentional discrimination under the Constitution. In any event, it is not inconsistent for Congress to require plaintiffs, in the absence of any evidence that racial discrimination was *intended*, to demand a greater showing of a discriminatory *effect* for a districting plan to be unlawful. *See Bartlett*, 556 U.S. at 20 (agreeing with the Department of Justice that "evidence of discriminatory intent" shows lack of equal opportunity without need to show potential majority-minority district).

Third, the *Gingles* Court's citation to *Rogers v. Lodge*, 458 U.S. 613 (1982), and a law review article do not create an unwritten exception lurking in the penumbra of the Equal Protection Clause that permits intentional race discrimination against a minority group whose population count is shy of majority status in a district. The portion of *Rogers* cited by *Gingles* simply explains that multimember districts can prevent the election of minority-preferred candidates. *Rogers*, 458 U.S. at 616. And the cited law review article proposed a *change* in constitutional law to abandon the required intent showing for constitutional vote-dilution claims. James U. Blacksher & Larry T. Menefee, *From* Reynolds v. Sims *to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 Hastings L.J. 1, 63 (1982).

Given that meager showing, it is all the more remarkable that the State invites this Court to dismiss as "dicta from a plurality decision," Br. 23, the *Bartlett* Court's controlling explanation that the intentional destruction of a performing crossover district could violate the Fourteenth Amendment, 556 U.S. at 24. This is especially confounding because the *Bartlett* plurality is the source of the majority-minority requirement that the State contends is silently woven into the Equal Protection Clause. Moreover, the State's dismissal of *Bartlett* overlooks that this Court has repeatedly reaffirmed that ruling concerning crossover districts. *See Cooper*, 581 U.S. at 305-06; *Abbott*, 138 S. Ct. at 2315.

C. The district court's intent finding is not at issue in this Court.

The State contends that this Court should decline to review the Kansas Supreme Court's misapprehension of the Fourteenth Amendment because the State disagrees with the district court's factual finding of intentional discrimination. Br. 25-28. But the Kansas Supreme Court never reached the district court's factual finding, and it is not properly before this Court. The State's speculation that the Kansas Supreme Court will reverse the district court's factual finding—to which the state supreme court must afford significant deference—on remand is not a basis to decline to resolve the split of authorities on the important issue of federal law that formed the basis of the court's decision below.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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