No. 22-___

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

PETITION FOR A WRIT OF CERTIORARI

Sharon Brett
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF KANSAS
6701 W. 64th St., Ste. 210
Overland Park, KS 66202

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
915 15th St. NW
Washington, DC 20005

Cecillia D. Wang
Dale E. Ho
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
125 Broad Street
New York, NY 10004

Paul M. Smith
Mark P. Gaber
Counsel of Record
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Ste. 400
Washington, DC 20005
(202) 736-2200
mgaber@campaignlegal.org

Elisabeth S. Theodore
R. Stanton Jones
John A. Freedman
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001

Counsel for Alonzo Petitioners

(Additional Counsel Listed on Inside Cover)

November 23, 2022

Abha Khanna
Jonathan P. Hawley
ELIAS LAW GROUP LLP
1700 7th Ave., Ste. 2100
Seattle, WA 98101

Barry Grissom
Jake Miller
GRISSOM MILLER LAW FIRM, LLC
1600 Genessee Street
Suite 460
Kansas City, MO 64102

Lalitha D. Madduri
Henry J. Brewster
Spencer W. Klein
Joseph N. Posimato
ELIAS LAW GROUP LLP
10 G Street NE, Ste. 600
Washington, DC 20002

Counsel for Rivera Petitioners

QUESTION PRESENTED

Does the Fourteenth Amendment prohibit intentional racial discrimination in redistricting where the minority voters discriminated against are not sufficiently numerous to form a majority of eligible voters in a single-member district?

PARTIES TO THE PROCEEDING

The following were plaintiffs in the district court, appellees in the Kansas Supreme Court, and are Petitioners in this Court:

Tom Alonzo, Sharon Al-Uqdah, Amy Carter, Connie Brown Collins, Sheyvette Dinkens, Melinda Lavon, Ana Marcela Maldonado Morales, Liz Meitl, Richard Nobles, Rose Schwab, and Anna White ("Alonzo Petitioners").

Faith Rivera, Diosselyn Tot-Velasquez, Kimberly Weaver, Paris Raite, Donnavan Dillon, and Loud Light ("Rivera Petitioners").

The following were plaintiffs in the district court and appellees in the Kansas Supreme Court:

Susan Frick, Lauren Sullivan, Darrell Lea, Susan Spring Schiffelbein ("Frick Plaintiffs").

The following were defendants in the district court, appellants in the Kansas Supreme Court, and are Respondents in this Court:

Scott Schwab and Michael Abbott.

The following was a defendant in the district court and an appellee in the Kansas Supreme Court:

Jamie Shew.

CORPORATE DISCLOSURE STATEMENT

Petitioner Loud Light has no parent corporation and no publicly held company owns 10% or more in corporate stock.

STATEMENT REGARDING RELATED PROCEEDINGS

There are no pending proceedings that are directly related to the case in this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutional and Statutory Provisions

OPINIONS BELOW

The opinion of the Kansas Supreme Court is reported at 512 P.3d 168 and is reprinted in the Appendix to the Petition ("App.") at 1. The order of the Kansas Supreme Court denying rehearing is unreported and is reprinted at App. 393. The opinion of the Wyandotte County District Court is unreported and is reprinted at App. 135.

JURISDICTION

The Kansas Supreme Court issued its opinion on June 21, 2022. Petitioners' timely motion for rehearing was denied on August 26, 2022. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o 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." U.S. Const. amend. XIV, § 1.

The Equal Protection Clause of the Kansas Constitution, which the Kansas Supreme Court has held to be coextensive with that of the Fourteenth Amendment, 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." Kan. Const. Bill of Rights § 2.

INTRODUCTION

The Kansas Supreme Court, interpreting its state constitutional guarantee of equal protection as coterminous with the Fourteenth Amendment,[1] held that intentional racial discrimination in redistricting is unconstitutional only if it prevents the formation of a majority-minority district. Under this conception of the Fourteenth Amendment, where minority voters are fewer in number or more dispersed, states have carte blanche to intentionally discriminate against them in drawing districts—even if the legislature announced that it acted specifically to disadvantage minority voters. This intolerable rule would apply across most of the country, given the relatively small number of areas with sufficiently numerous and concentrated minority populations.

In reaching this erroneous result, the court below conflated the statutory requirements a plaintiff must satisfy to advance a statutory discriminatory *results* claim under Section 2 of the Voting Rights Act ("VRA") with the equal protection principles that apply to constitutional *intentional* vote dilution claims under the Fourteenth Amendment. The court did not disagree with the district court's factual finding, based upon substantial evidence, that the Legislature split Wyandotte County (home to Kansas City) along starkly racial lines in order to eliminate the ability of minority voters to continue electing their preferred

---

[1] This Court has jurisdiction to review a state supreme court's interpretation of federal law that dictates its interpretation of state law. *See, e.g.*, *Michigan v. Long*, 463 U.S. 1032, 1043-44 (1983).

candidate; the court simply held that it was irrelevant because those voters were insufficiently numerous to constitute a majority-minority district. Because the minority voters who were moved had previously joined with white voters in their old district to elect their preferred candidate, the court held, it was constitutionally permissible to intentionally discriminate against them.

The decision below deepens an existing split of authorities on this question. The Ninth Circuit and multiple three-judge federal courts have held that intentional racial discrimination in redistricting violates the Fourteenth Amendment regardless of whether the victims are sufficiently numerous and compact to constitute a majority-minority district. The Kansas Supreme Court and the Eleventh Circuit, by contrast, treat the statutory VRA majority-minority-district requirement as a prerequisite for constitutional intentional racial discrimination claims under the Fourteenth Amendment.

The Kansas Supreme Court and Eleventh Circuit's rule, which permits intentional discrimination as long as a minority group is small enough, is contrary to this Court's plurality decision in *Bartlett v. Strickland*, which emphasized that the majority-minority showing required for Section 2 discriminatory results claims "does not apply to cases in which there is intentional discrimination against a racial minority." 556 U.S. 1, 20 (2009). The Kansas Supreme Court's decision also leads to perverse results. Under such an approach, so long as a minority group comprises less than a majority of a district, a

legislature could expressly declare that a redistricting plan is designed to disadvantage minority voters and favor white voters without running afoul of the Equal Protection Clause.

Nothing in the Constitution immunizes intentional racial discrimination merely because of the size of the minority population being targeted. The Equal Protection Clause protects *everyone*. If anything, the smaller the group the more they need constitutional protection in a majoritarian system. Although a showing that the intended discrimination had a discriminatory *effect* is necessary to prove a violation, the Constitution draws no bright-line numerical threshold. Here, it was undisputed that the bulk of Kansas City's minority voters were shifted to a district in which they will have no chance of electing their preferred candidate, converting the State's most competitive district from the most diverse to the least diverse. The district court found that minority Democrats were treated worse than both Republicans *and* white Democrats; they were surgically targeted for electoral irrelevance. This is precisely the sort of intended discriminatory effect the Constitution forbids.

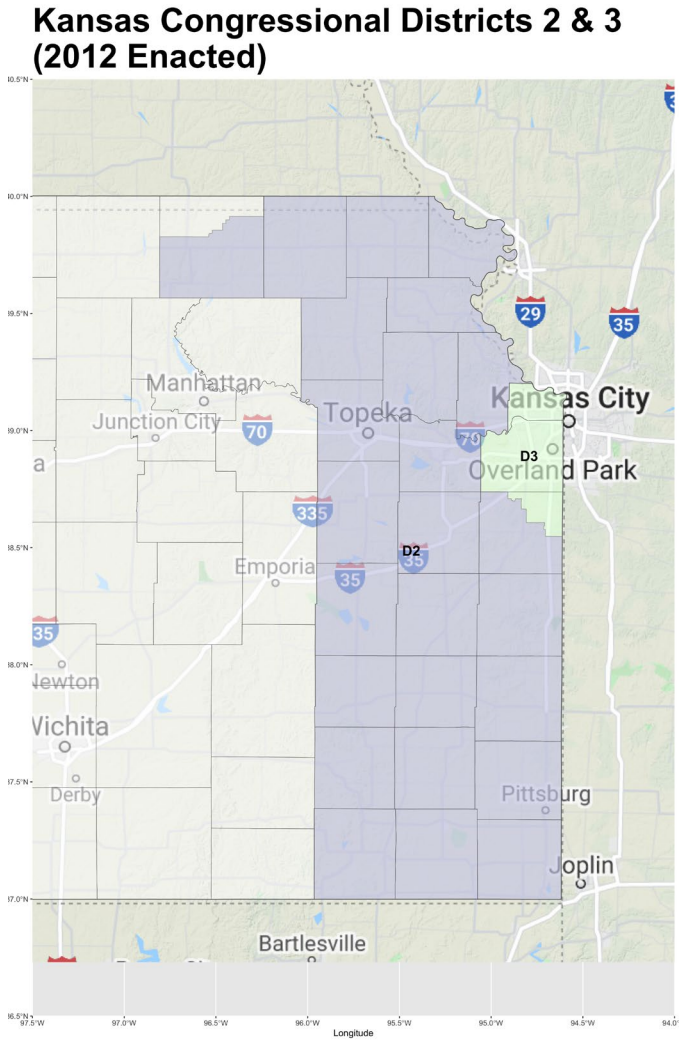
The Kansas Supreme Court's conception of the Fourteenth Amendment is wholly foreign to this Court's jurisprudence and the text and history of the Equal Protection Clause and warrants this Court's review. Indeed, the court's error in greenlighting intentional racial discrimination is so egregious that summary reversal is warranted.

STATEMENT OF THE CASE

I. Factual Background

Prior to the 2022 Kansas redistricting, Congressional District 3 ("CD3") had the largest minority population of any Kansas district. App. 386. It included all of Wyandotte County—home to Kansas City, Kansas and its large minority population—as well as the Kansas City suburbs in Johnson County. App. 283-84. In the 2018 and 2020 elections, the district's voters elected Democratic Congresswoman Sharice Davids, a Native American and the only minority member of Kansas's congressional delegation. App. 317-18. Although minorities constituted less than a majority of the district's voters, a sufficient number of white voters cast their ballots for the minority-preferred candidate for the district to reliably perform as a "crossover" district.[2] App. 273. The district in its pre-2022 configuration is shown below in green, with neighboring CD2 shown in purple:

[2] As this 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).



PX 127.[3]

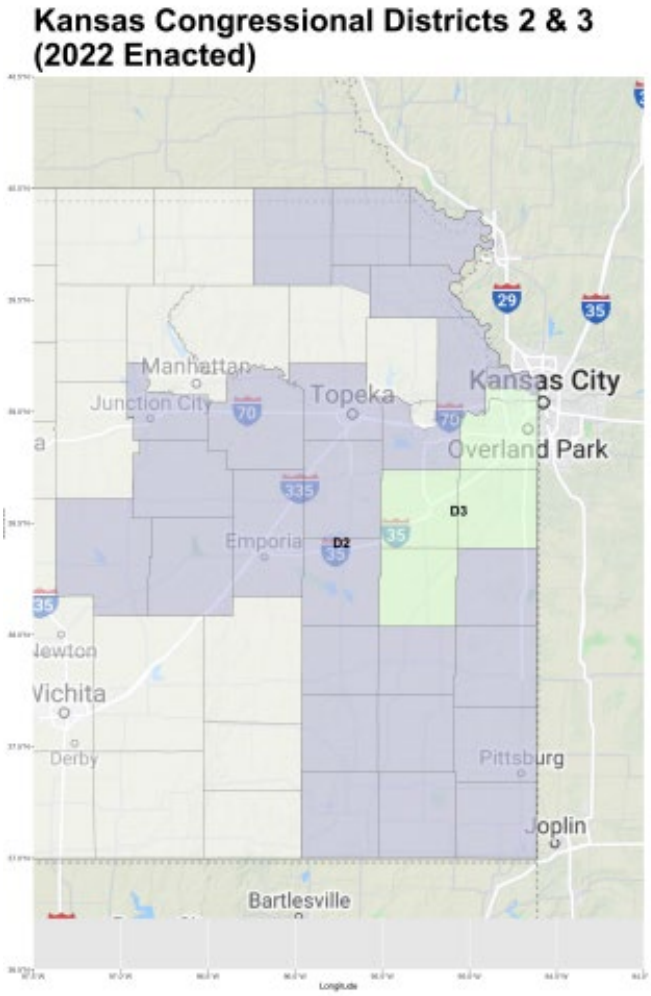
The 2020 Census revealed that CD3 was overpopulated by 58,334 people. App. 151. Kansas's

[3] "PX" refers to Plaintiffs' exhibits filed in the district court.

remaining three districts were underpopulated by amounts ranging from 2,676 people to 33,855 people. App. 151.

On January 18, 2022—five months after the Census data was released—the legislative leadership introduced its congressional redistricting proposal in the House and Senate redistricting committees. App. 161. The leadership refused to say who actually drew the map. App. 162. After minor changes, the plan passed both chambers of the legislature just three weeks later. App. 164-65. The map, named "Ad Astra 2,"[4] made substantial changes to the configuration of congressional districts in eastern Kansas, as shown below:

[4] The name was based on Kansas's state motto, "ad astra per aspera," which is Latin for "to the stars through difficulties."

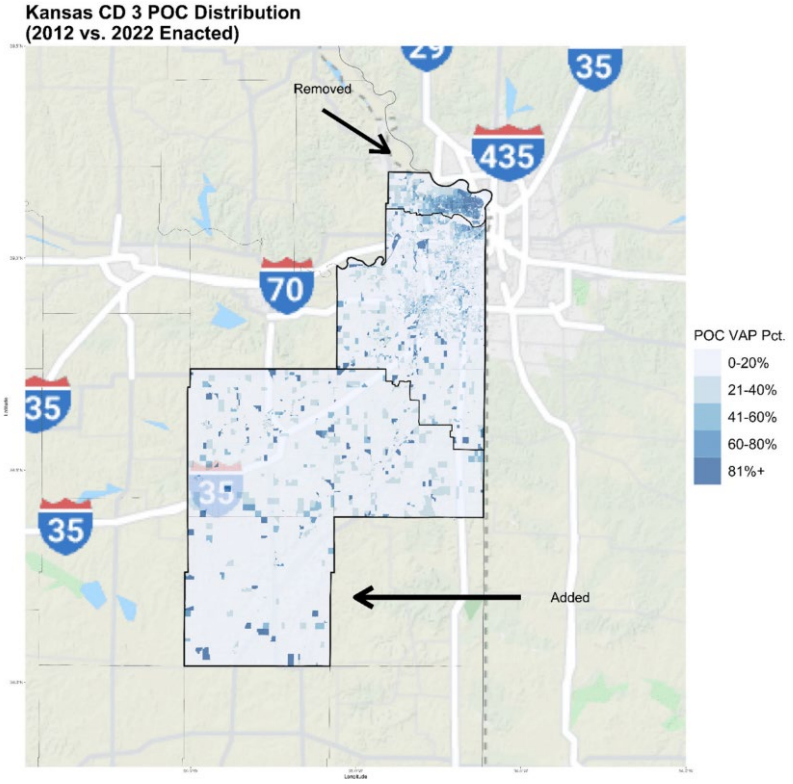


PX 128.

These changes went far beyond what was needed to balance population among the districts. For example, in order to resolve CD3's 58,334-person overpopulation, the plan removed 112,661 Wyandotte County residents, predominantly minorities, from

CD3—nearly twice the needed number—and then added 54,845 largely white people from rural Miami, Franklin, and Anderson Counties. App. 309, 381.

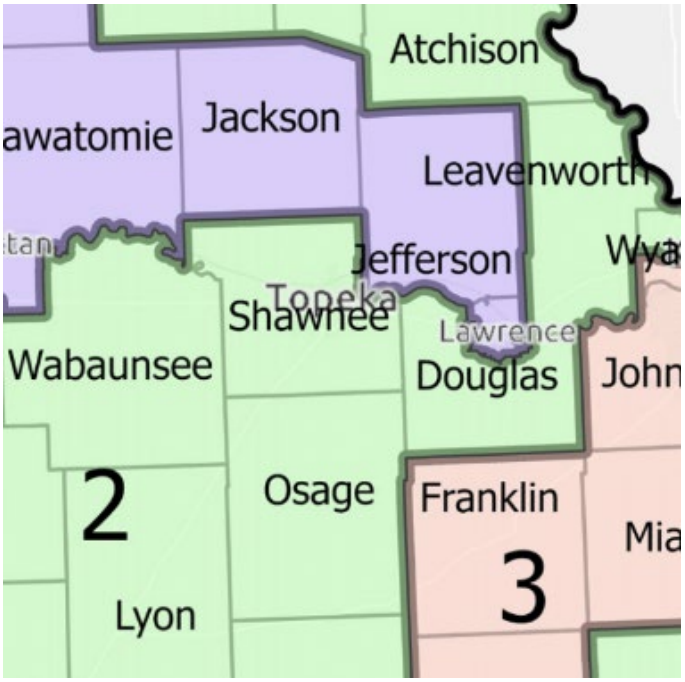
The map split Wyandotte County starkly along racial lines, with its substantial minority population shifted into CD2 and replaced in CD3 by rural white voters to the south. The map below illustrates these changes, with minority population reflected in blue:



PX 130.

The voting age population of the portion of Wyandotte County removed from CD3 is 66.2% non-

white and just 33.8% white. App. 381. By contrast, the voting age population of the rural areas added to CD3 is 90.3% white. App. 381. These changes transformed CD3 from Kansas's most racially diverse district to the state's *least* racially diverse district. App. 386. This mirrored CD2, which with the addition of Wyandotte County's substantial minority population moved from being Kansas's least racially diverse district to its most racially diverse district. App. 380. At the same time, however, the legislature surgically removed the city of Lawrence from CD2—a university town whose voters heavily support minority-preferred candidates—ensuring that the new CD2 would not function as a crossover district for its new minority population. App. 213. A close-up image of Lawrence carved from the district and placed in CD1—which extends to the Colorado border and is overwhelmingly non-minority—is shown below:



PX 11. This manipulation resulted in the serpentine appearance of the new CD2.

The legislative process was unusually rushed. When the plan was introduced on January 18, 2022, the House and Senate Redistricting Committees announced that they would conduct simultaneous hearings on the maps in both bodies just two days later—on January 20, 2022. App. 162. Members of the public who wished to testify before the Senate committee were required to sign up or submit written testimony by 10 a.m. on January 19, 2022—*one day* after the map was publicly released. App. 162. Because the House and Senate hearing were scheduled for the same day and time, members of the public had to either choose which hearing to attend or

attempt to "bounc[e] between the two." App. 162-63.

During the January 20, 2022, Senate hearing, members expressed concern about the map's treatment of minority voters. App. 163. Despite these objections, the Senate designated the bill an "emergency measure"—without explaining the nature of the supposed emergency—and passed it on January 21, 2022, roughly 72 hours after the map was first introduced. App. 164. In the House, the bill passed the Redistricting Committee on January 24, 2022, was debated on January 25—despite objections by members that the map diluted minority voting strength, App. 165—and passed the House the next day on January 26. App. 166.

Governor Laura Kelly vetoed the bill on February 3, 2022. App. 167. Governor Kelly objected that "[w]ithout explanation, this map shifts 46% of the Black population and 33% of the Hispanic population out of the third congressional district . . . . [and] replace[s] [it with] . . . counties that are more rural to the south and west of the core of the Kansas City metropolitan area." App. 167. She explained that alternatives were available that protected the core of existing districts "without diluting minority communities' voting strength." App. 167-68.

The Republican-led legislature, which had veto-proof majorities in both chambers, set a Senate override vote for February 7. App. 168. But when the vote was called, fewer than two-thirds voted in favor of overriding the veto, and the Senate leadership instituted a two-and-a-half hour "call of the Senate" during which senators were confined to their chairs as

the leadership scrambled to respond to the override failure. App. 168. Ultimately, leadership abandoned its pressure campaign for the day, with Senate President Masterson switching his vote to "no" to allow him to seek reconsideration. App. 168. The next day, a sufficient number of senators voted to override the veto. App. 169. The House overrode the veto the following day, February 9, in a similarly delayed process after several Republican members initially voted no but ultimately were prevailed upon to change their votes. App. 169-70.

II. District Court Proceedings

Three sets of plaintiffs filed suit in Kansas state court in cases consolidated before the Twenty-Ninth Judicial District, Wyandotte County District Court before Chief Judge Bill Klapper. The *Alonzo* and *Rivera* plaintiffs alleged that, *inter alia*, the map's treatment of Wyandotte County's minority voters was intentional racial discrimination and violated the equal protection guarantee of the Kansas Constitution. App. 376; *see* Kan. Const. Bill of Rights §§ 1, 2. After conducting a bench trial with expert and lay testimony and receiving hundreds of exhibits, the district court ruled that the legislature had intentionally discriminated against minority voters because of their race in adopting the Ad Astra 2 plan.

In concluding that the plan had been adopted with racially discriminatory intent, the district court applied a framework nearly identical to the one this Court adopted in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977). *See, e.g.*, App. 377-78 (considering

discriminatory effect of the plan, procedural and substantive irregularities, the sequence of events leading to the enactment of the bill, and any relevant historical discrimination).

First, the district court concluded that the plan "treats minority voters significantly less favorably than white voters." App. 379. The court found that voting in eastern Kansas was racially polarized, but that the prior version of CD3 functioned as a performing crossover district for minority voters because enough white voters in that district, notwithstanding generally polarized voting, cast their ballots for minority-preferred candidates. App. 379-80. In the new version of CD2, however—where the bulk of Wyandotte County's minority voters were moved—few white voters engage in crossover voting. App. 379-80. As a direct consequence, the district court concluded, "these minority voters now have virtually no opportunity of ever electing their preferred candidate." App. 379.

The district court explained that this treatment of minority voters was not synonymous with disfavoring Democrats because the map "treats minority Democrats even less favorably than it treats white Democrats." App. 379.

> Ad Astra 2 also reduces the chances white Democratic voters in CD 3 have of electing their preferred candidate, but these white voters, by contrast, at least retain an *occasional* possibility of doing so. In this way, by shifting minority Democrats into CD 2, but leaving white Democrats in CD 3, Ad

> Astra disfavors minority voters even when controlling for partisan affiliation.

App. 379 (emphasis in original).

This conclusion was supported by expert testimony, which showed that the minority-preferred candidates prevailed in 75% of elections featuring racially polarized voting in the prior version of CD3, 25% of elections in the new version of CD3, and 0% of elections in the new version of CD 2 that is now home to Wyandotte County's minority voters. App. 380. The district court credited the expert testimony of Dr. Loren Collingwood, who testified that the slicing of Wyandotte County was "among the starkest cuts along racial lines that he has ever seen in his professional work." App. 381 (internal quotation marks omitted).

Second, the district court found that the legislative process for adopting Ad Astra 2 "was characterized by multiple departures from the ordinary legislative process," App. 381, including the truncated listening tour, the time limits on testimony imposed only in communities with significant minority populations, the simultaneously and rapidly scheduled House and Senate hearings, and the veto session chaos. App. 382-893. The court credited testimony from a state senator who could identify "only one other instance in which important legislation was passed on such a hurried timeline—an actual emergency related to municipal funding" following a weather emergency. App. 382.

Third, the court concluded that these and other procedural irregularities disproportionately affected

minority Kansans. App. 383. For example, during the listening tours, the court found, "minority residents near Kansas City were afforded less time to speak than white, rural voters in listening tour stops in western parts of the state." App. 384.

Fourth, the court found that Ad Astra 2 substantively departed from prior plans in how it treated minority voters. Notably, the court concluded that for "ninety of the last one hundred years" the Kansas City metropolitan area "and its large minority population" had been maintained in "a single congressional district." App. 385. Yet Ad Astra 2 abruptly ended that tradition.

Fifth, the court found that minority voters in northern Wyandotte County lived in a region "that historically has been disinvested," and that the effects of historic discrimination fell most severely upon minorities living north of I-70. App. 387. The district court found that although legislative leadership sought to explain the racial divide in Ad Astra 2 as based solely on the location of I-70 as a natural boundary, "attempts to justify the stark racial divide in Ad Astra 2 based upon neutral explanations are pretext." App. 387. The court explained that I-70 was constructed in its particular location to "maintain residential segregation" by separating Wyandotte County's minority and white population. App. 388. While the court reasoned that the location of I-70 "does not on its own establish that the Legislature had invidious intent in drawing Ad Astra 2, it is noteworthy because the racial divide along the highway is widely known in Kansas, and would have

been an obvious implication to those developing and enacting the plan." App. 388. Given that knowledge, and the availability of countless other highways and features that could have served as a dividing line, the court found that "the proffer of I-70 as the explanation for why Ad Astra 2 splits Wyandotte County starkly along racial lines is a pretextual explanation." App. 388.

The district court also found other evidence supported a finding of intentional racial discrimination. The court credited the testimony of each of Plaintiffs' multiple expert witnesses, whose analysis established with concrete data the discriminatory intent and effect of the plan. App. 389.

In sum, the district court explained that

> 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 departures 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.

App. 390.

III. Kansas Supreme Court Proceedings

The Kansas Supreme Court reversed in a 4-3 decision—without ever reviewing the district court's finding of intentional discrimination. App. 56.[5] First, the court held that the equal protection guarantees of Section 2 of the Kansas Constitution's Bill of Rights are "coextensive with the equal protection guarantees afforded under the Fourteenth Amendment to the United States Constitution," App. 27, and thus "Kansas courts shall be guided by United States Supreme Court precedent in interpreting and applying the equal protection guarantees of the Fourteenth Amendment to the federal Constitution" when applying Kansas's parallel provision. App. 27. In doing so, the court recognized that the Fourteenth Amendment applies to two types of claims regarding race and redistricting: a racial gerrymandering claim alleging the predominant use of race in redistricting and a racial vote dilution claim based upon invidious discrimination "to minimize or cancel out the potential power of the minority group's collective vote." App. 47.[6] "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 Bill of Rights." App. 47-

---

[5] Under Kansas law, appeals from district court orders finding state statutes unconstitutional must be filed with the Kansas Supreme Court. *See* Kan. Stat. Ann. § 60-2101(b).

[6] Plaintiffs alleged only the latter type of claim in this case.

48.

The court then reasoned that it need not review the district court's finding of intentional discrimination. App. 56. This was so, the court held, because even assuming the Kansas legislature acted with racially discriminatory intent, no equal protection claim could succeed unless plaintiffs could also satisfy the three preconditions for statutory discriminatory results claims under Section 2 of the Voting Rights Act, as set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986). App. 56. Because plaintiffs had not proffered a *Gingles* prong one illustrative majority-minority district, the court held that plaintiffs could not show that there had been a constitutionally cognizable discriminatory effect—even if the purpose of the legislation was to discriminate on the basis of race, and even if the effect was to shift minority voters into a district where they had no chance of electing their preferred candidate. App. 56.

The dissenting justices would have affirmed the district court's finding of intentional racial discrimination. They reasoned that the majority was wrong to import this Court's statutory Voting Rights Act framework for discriminatory results into the distinct Fourteenth Amendment analysis, and that instead this Court's precedent required application of the *Arlington Heights* framework and traditional equal protection principles to a claim of intentional discrimination—precisely what the district court had done. App. 124-25. The dissenting justices concluded that the district court's robust factual analysis

provided "substantial competent evidence" warranting deference to its fact finding. App. 129.

Plaintiffs filed a timely motion for reconsideration, which the court denied. App. 393.

REASONS TO GRANT THE PETITION

The Kansas Supreme Court's decision greenlights intentional race discrimination in redistricting whenever the victims of the discrimination are not sufficiently numerous and compact to constitute a majority-minority district. The district court found that Kansas City's minority voters were intentionally shifted out of CD3 and into CD2 at least in part to dilute their voting strength, and it was undisputed that, because of this shift, these minority voters would no longer be able to elect their preferred candidate. But the Kansas Supreme Court ruled that this discriminatory intent and effect did not violate the Constitution solely because the targeted minority group was too small to form a numerical majority of a congressional district. This reasoning would equally immunize a legislature that openly proclaimed its intent to draw districts that dilute Black, Hispanic, or other minority voting influence. The decision invites intentional race discrimination against smaller minority populations, and warrants reversal on that ground alone.

The decision also deepens an existing split over whether this Court's statutory framework for Voting Rights Act claims—particularly the *Gingles* prong one majority-minority district requirement—applies to constitutional intentional racial discrimination claims. The Ninth Circuit and several three-judge

federal courts have held that the *Gingles* prong one precondition applies only to discriminatory *results* claims under Section 2 of the Voting Rights Act, and that intentional racial discrimination is unconstitutional regardless of the number of minority voters who can be drawn into a single member district. The Kansas Supreme Court reached the opposite holding, and in doing so joins the Eleventh Circuit's suggestion that the *Gingles* prong one requirement applies to intentional race discrimination claims under the Fourteenth Amendment.

Moreover, the Kansas Supreme Court's decision conflicts with *Bartlett*. In *Bartlett*, the plurality required a showing of a potential majority-minority district for discriminatory results claims under Section 2 of the VRA, but expressly stated that its holding did not extend to intentional discrimination claims. Indeed, the Court observed that the intentional destruction of a performing crossover district—by definition one lacking a majority of minority voters—"would raise serious questions under both the Fourteenth and Fifteenth Amendments." 556 U.S. at 24. Yet the Kansas Supreme Court has categorically rejected any such claims.

Finally, the Fourteenth Amendment's protection against intentional racial discrimination in redistricting is an issue of profound importance. The court below ruled that as long as minorities are sufficiently few in number or dispersed, legislatures are free to intentionally (and even openly)

discriminate against them on the basis of race. But while the relative size of a minority group is relevant to a statutory claim based on *results*, it has no relevance to the Equal Protection right to be free of *intentional* race discrimination. If "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," *Parents Involved in Community Schools. v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007), then the Kansas Supreme Court's decision has to be wrong. Allowing such an invitation to intentional racial discrimination to stand is intolerable. The Court should grant review and reverse.

I. The lower courts are split over whether *Gingles* prong one applies to Fourteenth Amendment intentional discrimination claims.

A. The Ninth Circuit and multiple three-judge district courts have held that *Gingles* prong one does not apply to intentional discrimination claims.

The Ninth Circuit and multiple three-judge federal courts have correctly held that intentional race discrimination claims do not require showing that a group of minority voters is sufficiently large and compact to form a majority of a district. In *Garza v. County of Los Angeles*, 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 fact that at the time the redistricting was conducted, "there could be no single-member district with a majority of minority voters." 918 F.2d 763, 769 (9th Cir. 1990). The Ninth Circuit affirmed: "[w]e 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 noted that "the County had adopted its current reapportionment plan at least in part with the intent to fragment the Hispanic population." *Id.* at 770. And it explained that this was sufficient because "the plaintiffs' claim is not, as in *Gingles*, merely one alleging disparate impact of a seemingly neutral electoral scheme. Rather, it is one in which the plaintiffs have made out a claim of intentional dilution of their voting strength." *Id.* The Ninth Circuit acknowledged that an intentional discrimination claim requires plaintiffs to "show that they have been injured as a result," but stressed that minority populations can be injured by intentional vote dilution regardless of their size and concentration. *Id.* As the court explained,

> [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 the equal protection principles embodied in the fourteenth amendment.

Id. at 771.

Multiple three-judge federal courts adjudicating intentional vote dilution claims have reached the same conclusion, holding that *Gingles*'s numerical threshold requirement is irrelevant to intentional vote dilution claims. In May 2022, 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 such claims. *See League of United Latin Am. Citizens v. Abbott* ("*LULAC*"), No. 3:21-CV-259-DCG-JES-JVB, 2022 WL 1410729, at *11 (W.D. Tex. May 4, 2022). Like the Ninth Circuit, the *LULAC* court recognized that an intentional discrimination claim still requires a showing of some form of discriminatory effect, but ruled that "[p]laintiffs may show discriminatory effect *without* making a full *Gingles* showing." *Id.* It noted that "*Gingles* and its progeny do not articulate general legal principles for intentional discrimination but, instead, offer an interpretation of one section of the VRA." *Id.*

The *LULAC* court explained that "[t]he intentional-vote-dilution analysis . . . 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) (emphasis added). 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*, in which this Court explained that the intentional destruction of a crossover district may 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.*

Other three-judge federal courts have similarly ruled that intentional discrimination claims—whether brought under the Fourteenth Amendment or the Voting Rights Act—do not require a *Gingles* prong one majority-minority district showing, so long as plaintiffs show that the targets of the intentional discrimination were treated less favorably. *See, e.g.*, *Perez v. Abbott*, 253 F. Supp. 3d 864, 944 (W.D. Tex. 2017) (rejecting argument that statutory VRA intentional discrimination claims required satisfying first *Gingles* prong); *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 . . . ."); *Texas v. United States*, 887 F. Supp. 2d 133, 159-66 (D.D.C. 2012) (applying *Arlington Heights* framework to conclude that Texas's congressional and state senate plans were the result of unlawful purposeful discrimination, including a state senate district with a combined 33% Black and Hispanic voting population), *vacated on other grounds*, 570 U.S. 928 (2013).

B. The Kansas Supreme Court and the Eleventh Circuit have ruled that *Gingles* prong one applies to intentional race discrimination claims.

Splitting with the Ninth Circuit and these three-judge district courts, the Kansas Supreme Court held that the majority-minority requirement of *Gingles* prong one applies with equal force to Fourteenth Amendment intentional race discrimination claims in the redistricting context. The Eleventh Circuit has agreed with this reasoning.

In the decision below, the Kansas Supreme Court reasoned that the *Gingles* preconditions that govern discriminatory results claims under Section 2 of the Voting Rights Act "are undergirded by the same equal protection principles that preexist the VRA and simultaneously protect against unlawful minority vote dilution." App. 54. Departing from the Ninth Circuit's holding that the *Gingles* majority-minority requirement applies "only in a case where there has been no proof of intentional dilution of minority voting strength," *Garza*, 918 F.2d at 769, the Kansas Supreme Court held that petitioners' intentional "minority vote dilution [claims] 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." App. 60.

The court relied on precedent from the Eleventh Circuit and its district courts concluding that *Gingles* prong one applies to intentional discrimination claims

under the equal protection clause. App. 55. In *Johnson v. DeSoto County Board of Commissioners*, the Eleventh Circuit held that the plaintiffs had no viable VRA Section 2 results claims because they had failed to prove that a majority-minority district could be drawn. Considering the plaintiffs' alternative Fourteenth Amendment intentional discrimination claim, the court observed that "we doubt that any plaintiff, challenging an electoral system like DeSoto County's, can establish a constitutional vote dilution claim where his section 2 claim has failed." 204 F.3d 1335, 1344 (11th Cir. 2000). The court reasoned that "section 2 was intended to be more permissive than the constitutional standard," and thus "question[ed], as a legal proposition, whether vote dilution can be established under the Constitution when the pertinent record has not proved vote dilution under the more permissive section 2." *Id.* at 1344-45.

The court ultimately did not formally decide the question because the plaintiffs had not preserved their constitutional arguments in the district court, but multiple district courts in the Eleventh Circuit have relied on *Johnson* to hold that equal protection claims must satisfy *Gingles* prong one. *See, e.g.*, *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) (concluding that "the requirements to establish that vote dilution has occurred (separate from any discriminatory intent) are the same under both [the VRA and the Fourteenth Amendment]"); *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.").

In short, there is a clear conflict. Some courts have correctly concluded that intentional race discrimination violates the Equal Protection Clause as long as those targeted because of their race have had their ability to elect candidates of their choice diminished, while others have imported the different and more stringent statutory requirement for discriminatory results from *Gingles*, thus permitting intentional race discrimination whenever the victims are insufficiently numerous or compact as to constitute a majority-minority district.

II. The Kansas Supreme Court's decision is contrary to this Court's *Bartlett* decision.

The Court should also grant certiorari because the Kansas Supreme Court decided an important constitutional question in a way that is not just wrong, but actually invites openly invidious discrimination. The court's decision cannot be reconciled with *Bartlett* or basic constitutional principles.

In *Bartlett*, this Court considered whether Section 2 of the Voting Rights Act could require the drawing of crossover districts. *Id.* at 6, 12. This Court held that "as a *statutory* matter, § 2 does not mandate creating or preserving crossover districts," *id.* at 23 (emphasis added), and thus "[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," *id.* at 26.

In so holding, the *Bartlett* plurality was careful to twice distinguish discriminatory *results* 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). The Court explained that "evidence of intentional discrimination 'tends to suggest that the jurisdiction is not providing an equal opportunity to minority voters to elect the representative of their choice, and it is therefore unnecessary to consider the majority-minority requirement before proceeding to the ultimate totality of circumstances analysis.'" *Id.* (quoting Brief for United States as *Amicus Curiae* at 14).[7]

Second, the Court noted 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. A crossover district is by definition one in which minority voters are *not* a majority of eligible voters, but nonetheless have an opportunity to elect representatives of their choice. *Bartlett*, 556 U.S. at 13. If, as the *Bartlett* plurality explained, the intentional destruction of a performing crossover

---

[7] The United States's *amicus* brief was referring to intentional discrimination claims brought pursuant to the Voting Rights Act, which are governed by the statute's totality of circumstances test.

district violates the Fourteenth and Fifteenth Amendments, then proving that a majority-minority district could be drawn cannot possibly be a threshold requirement for a constitutional claim. And given the four dissenting justices' view that there was no numerical threshold requirement for Section 2 discriminatory results claims, seven justices in *Bartlett* made clear that at the very least intentional discrimination claims need not clear a numerical population threshold in order to be heard.

This approach accords with the Constitution and common sense: the purpose of the Fourteenth Amendment is to prohibit the government from intentionally disadvantaging minorities because of their race. Intentionally drawing district lines to reduce the likelihood that minority voters will succeed in electing their preferred candidate is textbook discrimination. And where a state *intentionally dilutes* a minority group's ability to influence election outcomes, members of that group have been injured, no matter how sizable or compact the minority group is. Targeting Black voters to ensure that they have less influence over the outcome of an election is an injury even if Black voters are a minority in the district. The discriminatory intent and effect necessary for a constitutional equal protection violation do not turn, therefore, on whether the *Gingles* prong one test can be satisfied. To constitutionalize Section 2's statutory test as the court below did is to free up rampant intentional race discrimination wherever a minority is small or dispersed, with the impact of diluting their votes and withholding from them the ability to elect—and be

represented by—their preferred candidate.[8]

The rule adopted by the Kansas Supreme Court and applied in the Eleventh Circuit would change the meaning of the Equal Protection Clause's prohibition on intentional discrimination based upon the context in which the discrimination occurs. In no other area of equal protection jurisprudence is intentional discrimination permitted so long as the number of victims is small. For example, when a juror is struck from the jury pool based on her race, that constitutes a form of intentional racial discrimination, with a racially discriminatory effect. *Batson v. Kentucky*, 476 U.S. 79, 85 (1986). Whether there is a cognizable discriminatory effect does not turn on whether the jury pool contained enough minority jurors to control the outcome of the jury deliberations. Nor does it turn on whether the defendant can establish that the struck juror would have voted to acquit.

Nothing in this Court's precedent or the Fourteenth Amendment's text or history supports the Kansas Supreme Court's conception of when intentional racial discrimination offends the Constitution.

---

[8] 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 discrimination is *intended*, the Fourteenth Amendment is violated so long as the enacted map reduces the likelihood that the targeted minority voters will be able to elect a candidate of their choice in their new district.

III. This case presents an important issue that warrants the Court's review and is an excellent vehicle to resolve the split of authorities.

This case presents an important issue that warrants this Court's review and is an excellent vehicle to resolve it. One of the Constitution's most important mandates is the prevention of intentional racial discrimination and potential violations of that prohibition elicit this Court's most searching review. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236 (1995). And the Equal Protection Clause's prohibition against intentional racial discrimination is at its pinnacle in the electoral context, because as this Court has explained, the right to vote is "preservative of all rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

The rule adopted by the Kansas Supreme Court and applied in the Eleventh Circuit would make intentional racial discrimination *constitutional* in the vast majority of redistricting settings. There are relatively few places where there are enough geographically concentrated minority voters to form a majority of an electoral district. *See, e.g.*, Br. of *Amici Curiae* Professors Jowei Chen, Christopher S. Elmendorf, Nicholas O. Stephanopoulos, and Christopher S. Warshaw at 6-7, *Merrill v. Milligan*, Nos. 21-1086, 21-1087 (July 18, 2022) (noting the infrequency of Section 2 liability findings). The Kansas Supreme Court's conception of the Fourteenth Amendment would give license to legislators to purposefully discriminate based upon race *wherever*

its target is not sizable enough to constitute a majority. In most of the country, it would be perfectly lawful for legislators to openly express overtly racially discriminatory motives—and to implement discriminatory designs to dilute minority votes—and the Constitution would have nothing to say about it. In a pluralist democracy that demands equal protection for all, regardless of race, that result is plainly intolerable.

This case is also a strong vehicle to address the question. The issue of whether the Fourteenth Amendment only prohibits intentional discrimination in redistricting that blocks the creation of majority-minority districts was squarely decided below, with the Kansas Supreme Court explicitly basing its ruling on its understanding of the Fourteenth Amendment. There are no procedural obstacles to this Court resolving it. And the district court found substantial evidence of both a discriminatory intent and effect, making the determination on this legal question critical to the disposition below.

This Court's intervention is warranted to correct the Kansas Supreme Court's profound error on this fundamental legal principle. And the error is so egregious that the case may be appropriate for summary reversal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

November 23, 2022

Respectfully submitted,

Sharon Brett
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF KANSAS
6701 W. 64th St., Ste. 210
Overland Park, KS 66202

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
915 15th St. NW
Washington, DC 20005

Cecillia D. Wang
Dale E. Ho
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
125 Broad Street
New York, NY 10004

Counsel for Alonzo Petitioners

Abha Khanna
Jonathan P. Hawley
ELIAS LAW GROUP LLP
1700 7th Ave., Ste. 2100
Seattle, WA 98101

Barry Grissom
Jake Miller
GRISSOM MILLER LAW FIRM, LLC
1600 Genessee Street
Suite 460
Kansas City, MO 64102

Counsel for Rivera Petitioners

Paul M. Smith
Mark P. Gaber
Counsel of Record
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Ste. 400
Washington, DC 20005
(202) 736-2200
mgaber@campaignlegal.org

Elisabeth S. Theodore
R. Stanton Jones
John A. Freedman
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001

Lalitha D. Madduri
Henry J. Brewster
Spencer W. Klein
Joseph N. Posimato
ELIAS LAW GROUP LLP
10 G Street NE, Ste. 600
Washington, DC 20002