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