judicial review when considering partisan gerrymandering claims or decry any lack of manageable judicial standards. It looked under the hood for the evidence before validation.

Similarly, that same year when addressing state House redistricting, our court again acknowledged the reality that "politics and political considerations are inseparable from districting and apportionment," but again it did not let that end the constitutional inquiry. See *In re House Bill No. 2620*, 225 Kan. 827, Syl. ¶ 4 ("Substantially equal districts may be invidiously discriminatory because they were organized in such a way as to minimize or cancel out the voting strength of racial or political elements of the voting population."). Our court held: "[A]ll courts generally agree that lack of contiguity or compactness raises immediate questions as to political gerrymandering and possible invidious discrimination which should be satisfactorily explained by some rational state policy or justification." 225 Kan. 827, Syl. ¶ 6. Finally, the court noted: "No claim or suggestion has been made by anyone that the shaping of the districts was for the purpose of minimizing or cancelling the voting strength of any racial or political element of the voting population." 225 Kan. at 835.

There would be no purpose to our court mentioning these potential claims and expressing its willingness to consider invidious discrimination in all its forms if the court believed that kind of analysis was beyond its reach as the majority now claims. The majority cannot square its retreat on this issue with our court's nine reapportionment cases since 1963. None have

suggested these claims fall outside the judicial sphere for further inquiry. See *In re Substitute for House Bill 2492*, 245 Kan. 118, 125, 775 P.2d 663 (1989) ("None of the persons appearing here challenge the apportionment legislation now before us on the basis that it dilutes the vote of rural or urban voters, or other specific groups of voters, or that the districts created deviate impermissibly from 'perfect' population."); *In re House Bill No. 3083*, 251 Kan. 597, Syl. ¶ 6 ("Lack of contiguity or compactness raises immediate questions about political gerrymandering and possible invidious discrimination that should be satisfactorily explained by some rational state policy or justification."); *In re 2002 Substitute for House Bill 2625*, 273 Kan. 715, 44 P.3d 1266 (2002) (same); and *In re 2002 Substitute for House Bill 256*, 273 Kan. 731, Syl. ¶ 4, (same); see also *Harris*, 192 Kan. at 207 ("[A]n apportionment act, as any other act of the legislature, is subject to the limitations contained in the Constitution, and where such act exceeds the bounds of authority vested in the legislature and violates the limitations of the Constitution, it is null and void and it is the duty of courts to so declare.").

The majority also appears stymied at the first step of the equal protection analysis, i.e., determining whether Ad Astra 2 discriminates against similarly situated Kansans. It seems vexed with the conundrum that to "begin evaluating whether an alleged partisan gerrymander is unconstitutional, we would first need to determine what our baseline definition of 'fairness' is." Slip op. at 33. The majority says it is troubled by what it views as the lack of a discernable, legal test for deciding when "how much" political gerrymandering

becomes "too much." Slip op. at 32. The majority goes on to point out that various "other states have solved this problem by codifying such clear standards in their laws." Slip op. at 33. But are they really so clear?

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

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

Said differently, the answer to the majority's question of how much is too much is straightforward: partisan gerrymandering is "too much" when partisanship motivated the state action in question when there is no other legitimate rationale driving the outcome.

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

Viewed in this manner, our court's role is confined not to determining the best policy, but to deciding whether the Legislature's discretionary decisions can be explained by a lawful government aim. See *Gannon v. State*, 298 Kan. 1107, 1150, 319 P.3d 1196 (2014) (holding constitutional provision requiring Legislature to provide suitable financing for public K-12 schools supplied judicially discoverable and manageable standards for court review of Legislature's decision-making). In *Rucho*, the dissenting justices noted courts

across the country had already formulated such a standard. They argued this standard eschews "judge-made conception[s] of electoral fairness" by using the state's own redistricting criteria as a baseline, requiring "difficult showings relating to both purpose and effects," and thereby invalidating "the most extreme, but only the most extreme, partisan gerrymanders." *Rucho*, 139 S. Ct. at 2516 (2019) (Kagan, J., dissenting).

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

Substantial competent evidence supports the factual findings

Recall that the district court's ultimate conclusion about Ad Astra 2's unconstitutionality is not grounded in the fact that the legislation was shrouded in secrecy, had no bipartisan support, minimized substantive public input, failed to adhere to traditional guideposts for neutral redistricting, enacted with lightning speed, showed flashes of partisanship, was initially unsettling even to members of the majority party, or followed promises of a prominent majority-party state legislator to achieve four majority-party congressional districts. Rather, these are just symptoms all pointing to a fatal diagnosis in keeping with our caselaw. See *In re House*

Bill No. 3083, 251 Kan. 597, Syl. ¶ 6 ("Lack of contiguity or compactness raises immediate questions about political gerrymandering and possible invidious discrimination that should be satisfactorily explained by some rational state policy or justification.").

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

- The contrast between the minimal population shifts required versus the much larger shifts that occurred is poorly explained.
- Ad Astra 2 creates noncompact and irregularly shaped districts despite neutral guidelines to the contrary.
- Ad Astra 2 contains numerous unnecessary political subdivisions splits, breaks up geographically compact communities of interest, and fails to preserve the cores of existing districts.
- Kansas' political geography does not explain Ad Astra 2's partisan bias. The map's partisan bias "goes beyond any 'natural' level of electoral bias caused by Kansas' political geography or the political composition of the State's voters."
- In addition to carving up communities with significant commonality, Ad Astra 2 pairs several far-flung communities that share little in common, like the City of Lawrence into CD 1. And in CD 3, Ad Astra 2 splits Wyandotte

County and pairs its southern portion with Johnson, Miami, Franklin, and Anderson Counties. As a result, a large portion of the Kansas City metro area is now paired with rural areas in southern Johnson County, as well as Miami, Franklin, and Anderson Counties.

- Ad Astra 2 cannot be justified by the purported desire to keep Johnson County whole within a single congressional district to elevate a supposed community of interest constituting the entirety of Johnson County over preserving the Kansas City metro area. The argument that Ad Astra 2 is the product of a desire to keep Johnson County whole is a post hoc rationalization.

- The district lines in the areas around Kansas City and Lawrence show clear signs of purposeful redistribution of Democratic voters between districts to prevent them from effectively achieving majority status.

- Ad Astra 2 consistently places Kansans across the northeast part of the state in districts that are far more Republican than their neighborhoods.

- Ad Astra 2 was designed intentionally and effectively to maximize Republican advantage in the state's congressional delegation and amounts to an extreme, intentional pro-Republican outlier at the statewide level.

- Three of the four districts in Ad Astra 2 are extreme statistical partisan outliers. The

partisan compositions of the enacted congressional districts containing Kansas City, Topeka, Shawnee, and Lawrence are extreme pro-Republican partisan outliers compared to the simulated districts produced using the Guidelines and traditional redistricting principles.

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

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

Conclusions of law regarding partisan gerrymandering

Applying the law to these facts demonstrates Ad Astra 2 violates Kansans' right to equal protection of

the laws. Our court's three-step equal protection analysis is well known:

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

Combined with the indisputable reality that Ad Astra 2 moves far more individuals than necessary and disregards traditional criteria for compactness and communities of interest, the plaintiffs' expert witness

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

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

with the discussion of manageable judicial standards, Ad Astra 2 fails any test of scrutiny. To be sure, Ad Astra 2's intentional disparate treatment of Kansans based on past political speech is most certainly not even rationally related to a legitimate government interest.

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

Defendants attempt to offer non-partisan justifications for Ad Astra 2, but to no avail. Their excuses are not supported by the evidentiary record. They argue the map achieves population equality; "keeps all incumbents in their current districts"; "keeps all but [four] of Kansas' 105 counties whole"; and "honors communities of interest across Kansas." But these rationalizations run headlong into the facts found by the district court. Population equality was necessary, yet the Legislature took this as a license to move any number of people it wanted, and hundreds of equally drawn alternative districts showed achieving

mathematical precision was easily attainable without this most drastic redesign. Defendants fail to adequately explain this. Also, a map splitting more than three counties was shown to be a statistical outlier and contributed to the district court's conclusion that Ad Astra 2 in fact does not honor communities of interest. And while the incumbents may all continue to reside in their same districts, the evidence recited by the district court showed a motivating intent was to destroy the incumbency of Kansas' lone Democratic representative. In the end, the district court considered all rationales offered and explicitly concluded, the "asserted pretextual justifications for Ad Astra 2 . . . cannot withstand scrutiny."

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

In updating district lines, the levers of government were not operated to achieve permissible ends, even with some tolerance for incidental, political benefits. And lacking an appropriate government interest to justify its effects, Ad Astra 2 deprives Kansans the equal protection of the laws of this state.

RACE-BASED DISCRIMINATION DILUTING MINORITY VOTING STRENGTH

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

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

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

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

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

political elements of the voting population." *Whitcomb*, 403 U.S. at 165 (citing *Fortson*, 379 U.S. at 439, and *Burns*, 384 U.S. at 88). And the language used in these cases suggests discriminatory *effects* could support a finding of unconstitutional vote dilution.

But in 1980, a plurality of the United States Supreme Court diverged from the *Whitcomb* line of cases and held racially discriminatory laws violated the Constitution only if the laws were enacted with *intent* to discriminate. *City of Mobile v. Bolden*, 446 U.S. 55, 65-70, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980). The Court also held section 2 of the VRA mirrored this constitutional standard. 446 U.S. at 60-61. In response to the *Bolden* plurality, Congress amended section 2 of the VRA in 1982 to expressly ban any voting practice having a discriminatory *effect*, even if the practice was enacted for a nondiscriminatory purpose. Pub. L. 97-205, § 3, 96 Stat. 131, 134 (1982). This amended section 2 invalidated the *Bolden* discriminatory intent standard of proof for statutory racial vote-dilution claims. And because the new statutory discriminatory "results test" created a lower threshold to prove racial vote-dilution claims, almost all such claims have since been brought under the VRA.

But as reflected in *Rogers v. Lodge*, 458 U.S. 613, 102 S. Ct. 3272, 73 L. Ed. 2d 1012 (1982), the 1982 VRA amendment left *Bolden*'s intent requirement untouched in the context of constitutional racial vote-dilution claims. The *Rogers* Court held constitutional minority dilution claims are "subject to the standard of proof generally applicable to Equal Protection Clause cases." 458 U.S. at 617. The Court also held precedent

"made it clear that in order for the Equal Protection Clause to be violated, 'the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.'" 458 U.S. at 617 (citing *Washington v. Davis*, 426 U.S. 229, 240, 96 S. Ct. 2040, 48 L. Ed. 2d 597 [1976], and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S. Ct. 555, 50 L. Ed. 2d 450 [1977]). As for *Washington* and *Arlington Heights*, the Court noted:

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

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

> "'Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.' Thus determining the existence of a discriminatory purpose 'demands a sensitive inquiry into such circumstantial and

> direct evidence of intent as may be available.'" 458 U.S. at 618 (citing *Arlington Heights*, 429 U.S. at 266).

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

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

findings, and ultimately found Ad Astra 2 intentionally dilutes minority votes and violates the Kansas Constitution.

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

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

of discriminatory *effect*, the *Gingles* Court used this three-part test to connect the effect of the multi-member scheme to the potential remedy: a single-member district map.

The underlying concepts making up the *Gingles* test are not constitutionally based and do not resemble the traditional tiers of scrutiny generally applied to analyze constitutional claims. Instead, *Gingles* involved a section 2 VRA challenge to a North Carolina legislative redistricting plan which created certain multi-member districts with significant, although not predominant, African-American populations. Plaintiffs sought smaller single-member districts, some of which would have effective majorities of African-American voters. Relying exclusively on the language of amended section 2 (eliminating the intent requirement to establish a statutory violation) and the legislative history preceding the 1982 amendments, the *Gingles* plurality consolidated the statutory vote-dilution inquiry into a three-part test followed by a factual examination of the totality of the circumstances. But as a precondition to examining the totality of the circumstances, the Court held plaintiffs had to show (1) the bloc of minority voters was "sufficiently large and geographically compact" enough to constitute a majority in a single-member district; (2) the minority voters must be "politically cohesive"; and (3) the white majority must vote sufficiently as a bloc to defeat minority-preferred candidates. 478 U.S. at 50-51.

Simply put, the *Gingles* test does not apply in cases, like the one here, when the vote-dilution claim is based on traditional equal protection principles. *Gingles*

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

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

(unpublished opinion), which is a VRA case and inapplicable to my analysis.

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

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

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

in a racial gerrymandering claim. See *Rogers*, 458 U.S. at 616-19.

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

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

But despite the parties' agreement on the proper standard of proof under the Kansas Constitution, the majority concludes defendants are wrong and that plaintiffs' racial gerrymander claim necessarily fails because of a lack of evidence showing "that race was the *predominant* factor motivating the Legislature's decision to place a significant number of voters inside

or outside of a particular district." Slip op. at 47. In support of its conclusion, the majority relies on the racial gerrymander "predominant factor" test from the U.S. Supreme Court's *Miller* opinion.

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

The *Miller* Court repeatedly cited the legal principles from *Arlington Heights* but ultimately carved out a special exception to the motivating factor test to create a new predominant factor threshold for racial gerrymandering. The *Miller* Court substantially increased the standard of proof to trigger strict

scrutiny in race discrimination voting cases without explanation or justification. And in trying to figure out why the *Miller* Court increased the *Arlington Heights* burden of proof for racial gerrymander claims, one commentator reasoned:

> "*Arlington Heights* states a rule for laws intended to burden members of historically disadvantaged groups, and *Miller* states a rule for laws intended to benefit such groups. The district challenged in *Miller* was drawn for the purpose of electing a black representative, not a white one. In such a case, a racially allocative motive might provoke strict scrutiny only when that motive eclipses all others and becomes predominant. In a case where the intent to discriminate against African Americans was a motivating factor in the drawing of a district, strict scrutiny might apply under the principle of *Arlington Heights*." Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 545-47 (2003).

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

equal protection guarantees of the Kansas Constitution.

Let's begin with the text: Section 1 of the Kansas Constitution Bill of Rights provides that "[a]ll men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Section 2 provides that "[a]ll political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit."

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

As a general rule, a plaintiff who challenges a facially neutral law as a violation of equal protection must prove discriminatory intent and effect. See *Arlington Heights*, 429 U.S. at 264-65; *Washington*, 426 U.S. at 244-45. In the context of race discrimination, the definition of intent is self-evident: it occurs when a state engages in conduct with an intent (or motive) to discriminate against its citizens based on race. In my view, there is no justification in the Kansas

Constitution for failing to strictly scrutinize laws on a showing that discriminatory intent based on race was a motivating factor for government action. To hold otherwise allows the government to enact laws motivated by race that deny its citizens equal protection of the laws without providing a compelling reason for doing so.

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

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

> "(1) whether the redistricting plan has a more negative effect on minority voters than white voters,
> "(2) whether there were departures from the normal legislative process,

> "(3) the events leading up to the enactment, including whether aspects of the legislative process impacted minority voters' participation,
> "(4) whether the plan substantively departed from prior plans as it relates to minority voters, and
> "(5) any historical evidence of discrimination that bears on the determination of intent."

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

> "impact of the official action,"
> "historical background of the decision,"
> "specific sequence of events leading up to the challenged decision,"
> "[d]epartures from the normal procedural sequence," and
> "legislative or administrative history." 429 U.S. at 266-68.

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

Substantial competent evidence supports the factual findings

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

The district court found, "Ad Astra 2 treats minority votes significantly less favorably than white voters" in CD 2 and CD 3, even when controlling for partisan affiliation. The plaintiffs' expert, Dr. Loren Collingwood, testified Ad Astra 2 treats minority Democrats even less favorably than it treats white Democrats by removing minority voters from CD 3 and into CD 2 at a rate of two to one.

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

Dr. Collingwood's report highlighted how Ad Astra 2 achieved this result—by intentionally separating a portion of Wyandotte County from CD 3 into CD 2 that is 66.21% minority, over three times the total minority

voting age population in CD 3. To replace these voters, Ad Astra 2 adds counties that are 90.3% white. Dr. Collingwood testified Ad Astra 2 is among the starkest cuts along racial lines he has ever seen. And the district court found his testimony credible.

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

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

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

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

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

And from this, the district court concluded,

> "These factors together all point to the conclusion that the Legislature intended the result it achieved—districts drawn sharply along racial lines. All of this evidence—the serious and unique negative treatment of minority Democrats versus white Democrats and white Republicans, the stark racial divide evident in the map, the procedural and substantive deviations in the adoption of the plan, the Legislature's awareness of the map's effect on

> minority voters, and the statistical unlikelihood that Ad Astra 2's distribution of minority voters would have occurred absent intent—persuade the Court that the totality of the testimony and evidence, as well as the inferences fairly drawn therefrom, establish that Ad Astra 2 was motivated at least in part by an intent to dilute minority voting strength."

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

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

Counsel sought to justify the map's features based on a legislative intent to keep Johnson County in a single congressional district as a community of interest. But the district court concluded a desire to keep Johnson County whole did not justify shifting 46% of the Black population and 33% of the Hispanic population out of CD 3 and compensating for that population loss by adding counties southwest of Johnson County that are 90.3% white. And as noted previously, the district court rejected the Johnson County justification in the partisan gerrymandering context as well.

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

Finally, it is important to comment on Justice Rosen's separate dissent in which he makes a solid case for taking a more expansive view of the protections offered to Kansans by section 2 of our Bill of Rights beyond those the majority embraces under federal Fourteenth Amendment jurisprudence. In my view, it is unnecessary here to incorporate his analysis to

invalidate Ad Astra 2 for the reasons explained. In this litigation, all parties agreed intentional discrimination is prohibited by our Kansas Constitution Bill of Rights, and neither the text of our Constitution nor our state caselaw adopts a contrary view. But Justice Rosen's reasoning remains quite sound, if unnecessary under these facts. Regardless, his dissent simply bolsters my condemnation of Ad Astra 2.

CONCLUSION

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

When asked about this at oral argument, the Solicitor General said, "We think it is a relevant fact that the case was decided by an elected partisan judge." Adding, "And it is the case that in this case the plaintiffs chose to file the case in a district where the . . . partisan elected judges are all members of the Democratic Party." He then made the point, "The district judge . . . basically wholesale adopted the

findings and facts and conclusions of law that were submitted by the plaintiffs. . . . He essentially made virtually every ruling on contested issues of fact and law in favor of the plaintiffs."

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

The Solicitor Division represents the State in civil and criminal appeals. From my experience, it does so professionally. And I would be the first to concede inartful or foolish things are said in high-profile litigation. But make no mistake, this is playing with dangerous stuff. It has no place as advocacy in a Kansas courtroom without a very solid factual foundation that is wholly lacking here. See *MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc.*, 157 F.3d 956, 963 (2d Cir. 1998) ("It is intolerable for a litigant, without any factual basis, to suggest that a judge cannot be impartial because of his or her race and political background."); see also *State v. Logan*, 236 Kan. 79, 88, 689 P.2d 778 (1984) (holding it would be "too far-reaching" to conclude judge had a "prosecution bias" because judge's son worked in a district attorney's

office); *Higganbotham v. Oklahoma ex rel. Oklahoma Transp. Com'n*, 328 F.3d 638, 644 (10th Cir. 2003) (finding judge's recusal not warranted even though judge's son was married to governor's daughter, judge and governor were of the same political party, and governor was instigating political force behind the dispute); *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002) (affirming trial judge's decision *not* to recuse even though judge was an Episcopal Church member and defendant was an Episcopal church.); *Karim-Panahi v. U.S. Congress*, 105 Fed. Appx. 270, 274-75 (D.C. Cir. 2004) (unpublished opinion) (affirming denial of recusal based on allegations judge was "biased because of her 'political-religious connections' and her alleged loyalty to those who selected, confirmed and appointed her"); *United States ex rel. Hochman v. Nackman*, 145 F.3d 1069, 1076-77 (9th Cir. 1998) (fact judge contributed to law school alumni association at university affiliated with medical clinic did not require recusal in action by clinic employees alleging false claims by clinic administrators); *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1117 (4th Cir. 1988) (judge's past Sierra Club membership before appointment did not require recusal from case in which Sierra Club was a party); *United States v. State of Ala.*, 828 F.2d 1532, 1543 (11th Cir. 1987) (preappointment views expressed by judge as a political figure and state senator did not indicate he prejudged the legal question).

For the reasons explained, I would affirm the district court ruling invalidating Ad Astra 2. It violates plaintiffs' right to equal protection of the laws by targeting them and other similarly situated Kansans

by intentionally diluting their voting strength, without any other appropriate, evidence-backed rationale to explain the redistricting choices made. Moreover, Ad Astra 2 unconstitutionally discriminates against Kansans by using race as a motivating factor in drawing the district lines.

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

APPENDIX B

IN THE TWENTY-NINTH JUDICIAL DISTRICT
WYANDOTTE COUNTY DISTRICT COURT
CIVIL DEPARTMENT

Case No. 2022-CV-000089

(Consolidated with 2022-CV-000090 and 2022-CV-000071)

[Filed: April 25, 2022]

FAITH RIVERA, DIOSSELYN TOT-VELASQUEZ, KIMBERLY WEAVER, PARIS RAITE, DONNAVAN DILLON, and LOUD LIGHT,	)
Plaintiffs,	)
v.	)
SCOTT SCHWAB, in his official capacity as Kansas Secretary of State, and MICHAEL ABBOTT, in his official capacity as Election Commissioner of Wyandotte County, Kansas,	)
Defendants.	)
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,

Plaintiffs,

v.

SCOTT SCHWAB, Kansas Secretary of State and Kansas Chief Election Officer, in his official Capacity, and MICHAEL ABBOTT, Wyandotte County Election Commissioner, in his official capacity,

Defendants.

SUSAN FRICK, LAUREN SULLIVAN, DARRELL LEA, And SUSAN SPRING SCHIFFFELBEIN,

Plaintiffs,

v.

SCOTT SCHWAB, Kansas Secretary of State and Kansas Chief Election Officer, in his official Capacity, and JAMIE SHEW, Douglas County Clerk, in his official capacity,

Defendants.

[*The Table of Contents Has Been Omitted for Printing Purposes*]

DECISION

In three consolidated lawsuits, the plaintiffs, whom are a number of concerned Kansas citizens, asked the court to decide if the Kansas Legislature has exceeded its constitutional authority in redistricting Kansas' four congressional districts by configuring the districts in a manner that results in a partisan (political) and/or racial gerrymander. The defendants retort no impermissible gerrymander has occurred. Moreover, if it has, the Legislature can redistrict in any manner it sees fit and the courts are powerless to stop its actions.

Perhaps it is first important to discover why the Kansas Courts are asked to enter this arena. We live in a time where advancing one point of view is more important than creating a functioning government that serves all its citizens. Truth has become amorphous to be shaped according to the speaker's perspective. Science has become more dependent upon who is supporting the research than on scientific method.

Eighteenth century French philosopher Montesquieu wrote: When a people have good morals the laws become simple.[1]

The song "Every Step of the Way," written by Michael Shrieve and sung by Steve Walsh, begins with:

> Well they called the flat plains Kansas a long,
> long time ago.
> When they'd seen the gates of glory and the fire

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[1] Montesquieu: Book XIX. Of Laws in Relation to the Principles Which Form the General Spirit, Morals, and Customs of a Nation

down below
The many great decisions of the people in this place
You could tell the strength within them, you could see it in their face.

How strong are Kansans? Strong enough to expect nothing more than a level playing field devoid of partisan advantage for one group of Kansans. Strong enough for the merits of the issue to be the deciding factor. Strong enough to make their political decisions based upon the content of a candidate's character rather than the color of their political party.

This court suggests most Kansans would be appalled to know how the contest has been artificially engineered to give one segment of the political apparatus an unfair and unearned advantage.

What type of democracy do Kansans wish to live in? Let's first define democracy:

1) Government by the people, exercised either privately or through elected representatives.

2) A social condition of equality and respect for the individual within the community (the American Heritage Dictionary of the English Language)

Or perhaps as defined by President Lincoln in his ineffable Gettysburg address: "A government of the people, by the people and for the people..."

Kansans can choose a democracy that is:

Inclusive vs. Exclusive,

Listening vs. Silencing,

Deliberative vs. Dogmatic

What will they choose?

Riding along the Kansas highways with my family as a child, my father would often stop to help a stranded motorist. He did not pick and choose who merited assistance and if there was ever any hesitancy, one look from my mother removed all doubt. One day he even stopped on the way to my uncle's (his brother's) funeral. Not on this occasion, nor on any other, did he ever inquire about age, race, ethnicity, gender, or political affiliation. He simply listened attentively to the misfortunate driver and did his best to help them find a solution.

Is tolerance a weakness or strength? Are Kansans strong enough in their beliefs to be able to consider other points of view? To listen is not to agree. To acknowledge is not to adopt. To discuss does not require changing one's view. The exchange of perspectives may bring new or unknown evidence that leads to change, or it may simply lead to respectful discourse and disagreement. Do Kansans seek a homogeneous or a diverse state? Which makes Kansas stronger?

Can we teach our children the values we cherish and yet allow them to gain knowledge of other ways of thinking without worrying their choices may not align with ours? Can we teach our children how to reason and think, not what to think? If not, what is our concern, the weakness in our values or the strength of others' beliefs? Our children must be free to discuss any issues with us without fear of rejection, judgment

or condemnation. If they are not, where will they go to look for answers to their questions? Should they choose a way different from our own, have we still not accomplished the most important of responsibilities by nurturing strong, independent, open-minded and thoughtful Kansans?

When our grandchildren rise to positions of power and reflect upon what we have done, let it be with pride and not embarrassment. May they never question "Of what were they so afraid?"

At my uncle's funeral, others may have wondered why my father's tie was askew, his shirt a little wrinkled, his hands scraped and soiled, yet I was never prouder to stand by him with his scraped hand around mine. Judgment without knowledge can be the most insidious and unconscionable form of discrimination. A little knowledge, compassion, and understanding can be powerful things.

The Buddha says the only consistent thing in the universe is change. One does not have to be a Buddhist to realize change is always taking place. There is certainly opportunity to disagree about change, as in its speed, its direction, and its impact. We must not be naïve enough to believe change can be prevented by suppressing its voice. Is it better to consider change through the calm (sometimes), deliberative legislative debate our constitution requires or shall we wait for those whose voice has been suppressed to burst forth in frustration?

Courts in all cases are tasked in doing what is right. This case is not different. Alas, the rub becomes what

is right. Let's define right as just. Once again trusting The American Heritage Dictionary:

2) Consistent with moral right, fair, equitable

3) Properly due or merited

4) Valid within the law legitimate

6) Sound, well founded

How does a court determine what is right? The foundation is built upon the constitutions of the United States and Kansas, statutes (as enacted by the legislature) and precedent (prior decided cases). Always the most important consideration, however, are all the unique facts of each case. Because facts change, the law must be flexible enough to be applied rationally to the case under consideration.

Courts do not always get it right. This court's decision will be reviewed by the Kansas Supreme Court and although this court strives to make the correct decision, the Kansas Supreme Court will have the final say. This court is less concerned with agreement (some will, some will not) and would rather inform Kansans how the decision was made.

The courts of Kansas are made of men and women who are to fairly and impartially apply the law to the facts and reach a just result. They are not or should not be Democrats or Republicans. They should be independent jurists, which most are. How fair and impartial often depends upon which side of the issue a person believes in. Some cases are easy in that most agree with the outcome. Some are difficult in that

many do not agree. Decisions are not right or wrong based upon public opinion but based upon applying the current law to the facts proven in court, and a thoughtful and intelligent analysis of these issues fairly and without bias. When this occurs a judge has done their job well no matter what the decision.

Additionally, do not confuse the attorneys with the issues. Attorneys are paid advocates who present their clients' points of view. They may be wholeheartedly in agreement with their clients' positions, but it is not a necessary requirement. Don't dislike the lawyers; dislike the issues. The court commends the attorneys on both sides of this case for their professionalism, cooperation and outstanding legal skills under extremely difficult circumstances.

Defendants named in this case are here because of their governmental positions. None were directly involved in the legislative redistricting process. They are not to be blamed or congratulated.

The Kansas Legislature is tasked constitutionally and is responsible for the redistricting process here at issue. The legislature is made up of hard working, decent Kansas men and women representing the citizens of Kansas and their political party and under ideal conditions, both.

Cases may be decided upon procedural issues. In this case, did the court have the inherent power to consider the issues and did plaintiffs properly plead or bring the issues to the court's attention? Here the district court has decided both of these requirements were met by all plaintiffs. It would be disingenuous not

to note substantial disagreements exist in the legal community regarding justiciability of these types of cases. As noted, the Kansas Supreme Court will ultimately resolve these issues.

Cases meeting all procedural requirements will then be adjudicated upon the merits or the substance of the lawsuit. Which answers the question, are the plaintiffs entitled to the relief they have requested? Did they prove their case and does the court have the ability to do what they ask?

What follows is the court's decision regarding legislative redistricting (SB 355, Ad Astra 2). Whether it was performed in conformity with the Kansas Constitution or does it run afoul of those requirements by being an improper and unallowable partisan (political) or racial gerrymander?

Defendants asked the Court to ignore 40 years of precedent and somewhat disingenuously claim the guidelines the legislature appeared to use were not binding in any sense and so may be ignored.

In *O'Sullivan* (infra) the federal court in its sitting as a three judge panel (Logan Tenth Circuit Judge, Rogers and Kelly District Judges) applying guidelines similar to the current ones established the following considerations in redistricting:

1) Preserve county and municipal boundaries

2) Do not split the large minority population in Wyandotte County

3) Compact and continuous districts

4) The loadstar keeping communities of major common economic, social and cultural interests together. That required keeping Wyandotte and Johnson County together as a major socio-economic unit of the greater Kansas City area with the ties that bind them together economically, politically and culturally significantly greater than those that divide them.

Thirty years later in *Essex* (infra) again a federal court three judge panel (Briscoe Chief Judge Tenth Circuit, Vratil, Chief District Judge and Lungstrum, District Judge) again held:

1) Do not split Wyandotte County and divide its large minority population

2) Keep the major socio-economic unit of Wyandotte and Johnson County together

3) Keep Lawrence and Douglas County together.

For defendants to overcome the court's reasoning in both *O'Sullivan* and *Essex* they must show that reasoning was flawed, or conditions have changed to an extent the rationale no longer applies. Defendants have done neither. All they have shown is Wyandotte County and all of Johnson County cannot remain together, but they have not proven any change of socio-economic interest between Wyandotte County, Johnson County, and the surrounding metropolitan area. No proof of why Wyandotte County's large minority population should now be broken up nor any reason to separate Lawrence from Douglas County.

Defendants' rightfully question what is the applicable burden of proof that applies and what elements must be proven to appropriately adjudicate this case.

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 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 (*Hill v. Stone,* 421 US 289, 44 L 2d 172, 95 S. Ct. 1637 reh. denied 422 US 1029 (1975). No presumption of validity burden of proof shifted to defendant. Classification must be "necessary to serve a compelling state interest" or it is unconstitutional. See also *Crowe by and thru Crowe v. Wigglesworth,* 623 F.Supp. 699 (D Kan. 1985) 702-703. 1) rational basis or reasonable relationship test, 2) substantial relationship or means – scrutiny test, and 3) strict scrutiny – same standards.

Plaintiffs argue strict scrutiny must apply here and the court acknowledges it is the proper standard to apply but notes the plaintiffs' evidence is so compelling

applying any of the three above mentioned tests that plaintiffs would prevail whether the burden was plaintiffs or had shifted to the defendants. Justice Fatzer opinion in *Harris v. Shanahan,* 192 Kan. 183, 387 P.2d 771 (Kan. 1963) pages 206-207 says it well:

> There should be no misunderstanding as to the function of this court in the case at bar. It is sometimes said that courts assume a power to overrule or control the action of the people's elected representative in the legislature. That is a misconception. First, the duty of reapportionment is legislative in nature and is committed by the Constitution to the legislature, and courts cannot make a reapportionment themselves. Second, conforming to concepts inherent in American republican form of government, the Constitution of Kansas distributes the powers of government to three distinct and separate departments, i.e., the Executive, Legislature, and Judicial.
>
> The judiciary interprets, explains and applies the law to controversies concerning rights, wrongs, duties and obligations arising under the law and has imposed upon it the obligation of interpreting the Constitution and of safeguarding the basic rights reserved thereby to the people. In this sphere of responsibility courts have no power to overturn a law enacted by the legislature within constitutional limitations, even though the law may be unwise, impolitic or unjust. The remedy in such a case [192 Kan. 207] lies with the people. But when

> legislative action exceeds the boundaries of authority limited by our Constitution, and transgressed 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. (Quality Oil Co. v. E. I. Du Pont De Nemours & Co., 182 Kan. 488, 493, 322 P.2d 731) However delicate that duty may be, we are not at liberty to surrender, or to ignore, or to waive it.

As this is legislation regulating a fundamental right (voting), the burden of proof is defendants to show the legislative redistricting passes strict scrutiny. The elements are therefore self-evident, does Ad Astra2 present a compelling state interest justifying the redistricting as drawn.

Regarding the applicability of the guidelines, if the legislature wished to redistrict Kansas without guidelines although unadvisable and extremely unusual the court can find no authority they were required to have guidelines. What the legislature cannot do is announce they have guidelines, pretend to follow those guidelines and then proclaim they are not bound by them after the citizens of Kansas have relied upon the legislature's representations that these are the rules. Holding otherwise would make the whole process a meaningless ruse and destroy the citizens faith in their legislature.

FINDINGS OF FACT IN FRICK

A. Plaintiff Susan Frick is a resident of Douglas County and the City of Lawrence and is a registered Democratic voter. She intends to remain a resident of Douglas County and a Democratic voter for the foreseeable future, including the scheduled primary and general elections in 2002. She believes that her vote is diluted by Ad Astra 2. Declaration of Susan Frick, PX 192.

B. Plaintiff Lauren Sullivan is a resident of Douglas County and the City of Lawrence and is a registered Democratic voter. She intends to remain a resident of Douglas County and a Democratic voter for the foreseeable future, including the scheduled primary and general elections in 2002. She believes that her vote is diluted by Ad Astra 2. Testimony of Lauren Sullivan, April 6, 2022, vol. 1, p. 49 l. 2 – p. 51 l. 7 (hereinafter references to Ms. Sullivan's testimony will include page and line citations).

C. Plaintiff Susan Spring Schiffelbein is a resident of Douglas County and is a registered Democratic voter. She intends to remain a resident of Douglas County and a Democratic voter for the foreseeable future, including the scheduled primary and general elections in 2002. She believes that her vote is diluted by Ad Astra 2. Declaration of Susan Spring Schiffelbein, PX 193.

D. Plaintiff Darrell Lea is a resident of Douglas County and the City of Lawrence and is a registered Democratic voter. He intends to remain a resident of Douglas County and a Democratic voter for the