No. 22-501

In the
Supreme Court of the United States

TOM ALONZO, ET AL.,
Petitioners,

v.

SCOTT SCHWAB, KANSAS SECRETARY OF STATE, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review the Kansas Supreme Court's interpretation of the Kansas Constitution.

2. Whether Kansas's new congressional district map violates Section 2 of the Kansas Constitution's Bill of Rights.

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JURISDICTION

This Court lacks jurisdiction. Petitioners suggest that jurisdiction exists under 28 U.S.C. § 1257. Pet. 1. But as explained below, this case raises only state-law questions. *See infra* 12-18. The Kansas Supreme Court's decision did not call into question "the validity of a treaty or statute of the United States"; did not assess the validity of a state statute "on the ground of its being repugnant to the Constitution, treaties, or laws of the United States"; and did not involve "any title, right, privilege, or immunity . . . set up or claimed under the Constitution or the treaties or statutes of . . . the United States." 28 U.S.C. § 1257(a).

INTRODUCTION

Petitioners ask this Court to review the Kansas Supreme Court's interpretation and application of the Kansas Constitution to a Kansas law. This Court does not have jurisdiction to do so. Nor would review be warranted even if it did.

Petitioners deliberately designed this case to be entirely a creature of state law. Petitioners challenged Kansas's new congressional district map on several state-law grounds. They are currently focused on their claim that the map intentionally dilutes minority votes. But they also brought multiple other claims asserting that the map was an anti-Democrat political gerrymander. Since federal courts cannot review political gerrymandering claims, *see Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-07 (2019), Petitioners brought their challenges under the Kansas

Constitution in state court. And to ensure that they remained in their chosen forum, Petitioners brought only state-law claims. As Petitioners explained, they "d[id] not allege any federal cause of action." J.A. I, 26 n.1.[1]

Now, having lost their state-law claims in state court, Petitioners are more amenable to a federal forum. But this case does not involve a federal question. Petitioners stress that the Kansas Supreme Court was "guided by" this Court's precedents interpreting similar provisions of the U.S. Constitution. App. 27. But that does not change the jurisdictional analysis. This Court lacks jurisdiction to review a state court's interpretation of the state constitution, even if the court's interpretation was influenced by federal precedent.

Even if jurisdiction were not lacking, this Court's review would still be unwarranted. Petitioners allege at most a very shallow split on an underdeveloped area of law. And there is no error apparent in the Kansas Supreme Court's opinion.

STATEMENT

A. The Kansas Legislature Drew New Congressional Districts.

After each decennial census, "States must redistrict to account for any changes or shifts in

[1] Citations to "J.A." are to the parties' Joint Appendix before the Kansas Supreme Court.

population." *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003). In 2022—following the 2020 Census—the Kansas Legislature passed Substitute for Senate Bill 355 (SB 355). That law adopted the "Ad Astra 2" map for Kansas's four congressional districts.

The 2020 Census revealed that the bulk of Kansas's population growth had occurred in Johnson County—which contains a number of Kansas City suburbs.[2] Under Kansas's prior congressional district map, Johnson County was a part of the Third District, along with the entirety of Wyandotte County and part of Miami County. J.A. XVII, 280. However, by 2020, Kansas's population had grown such that Johnson County and Wyandotte County could not be kept together in their entirety in the same district. The two counties now have a combined population of 779,108 people, and the ideal population needed to satisfy one-person, one-vote principles is 734,470 people. J.A. XVII, 27; XXIII, 210; XXVIII, 74. To accommodate Kansas's population growth in the Third District, the Legislature therefore had to either separate the two counties, carve off parts of both counties, carve off part of Johnson County, or carve off part of Wyandotte County. J.A. XXV, 157.

The Legislature chose the latter option in SB 355. As members of the Legislature explained at the time, Johnson County had never before been split in Kansas's history. J.A. XXIV, 20, 92, 192. Wyandotte

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[2] The 2020 Census results for Kansas are available at https://www.census.gov/library/stories/state-by-state/kansas-population-change-between-census-decade.html.

County had. J.A. XVIII, 172. House Minority Whip Stephanie Clayton—from Johnson County—further explained that Johnson County is the "economic engine of Kansas City." J.A. XXV, 219. And Chairman of the House Redistricting Committee Chris Croft pointed out that Johnson County is Kansas's "largest county." J.A. XXV, 115. As Senate President Ty Masterson put it, Johnson County is the "core" of the Third District. J.A. XXIV, 192. The Legislature divided Wyandotte County roughly along its two most obvious dividing lines: Interstate-70 and the Kansas River. J.A. XXIV, 92; XXV, 115. This dividing line approximately tracks the line drawn by the three-judge panel that drew Kansas's state senatorial districts in 2012. J.A. XVIII, 5-7.[3]

SB 355 was enacted after much public comment and legislative debate. Although not legally required to do so, the House and Senate Committees on Redistricting jointly held a listening tour of town hall meetings across Kansas. App. 8. All of the meetings were live-streamed, and the public was invited to submit written or oral testimony (or both). J.A. XIX, 2-7. Fourteen meetings were held in fourteen cities across Kansas in August. App. 8. And four additional meetings were held virtually in November. App. 8. There was extensive debate about the bill in both houses of the Legislature. J.A. XVII, 4-5. Members of the public also testified both for and against it. J.A. XIX, 135-48; XXVI, 172-93.

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[3] Kansas's prior congressional district map was drawn by a federal three-judge panel because the Legislature deadlocked and was unable to enact a map itself. *See Essex v. Kobach*, 874 F. Supp. 2d 1069, 1073 (D. Kan. 2012).

Both houses of the Legislature ultimately passed the bill by overwhelming majorities. App. 9-10. The Governor vetoed the bill, but the Legislature overrode that veto by the required two-thirds majority in each house. App. 10.

B. Petitioners Challenged the New Congressional Districts Under the Kansas Constitution.

Days after SB 355 took effect, Petitioners filed suit under the Kansas Constitution in state court to enjoin the use of the new map in the upcoming election cycle. App. 10. Petitioners first alleged that SB 355 is a political gerrymander that violates Sections 1, 2, 3, and 11 of the Kansas Constitution's Bill of Rights as well as Article 5, Section 1 of the Kansas Constitution. J.A. I, 52-53 (Counts One, Two, and Three), 94-102 (Counts One, Two, Three, and Four). Petitioners argued that SB 355 "was deliberately designed to consistently and efficiently elect exclusively Republicans to Congress, and specifically to prevent Democratic voters in the Kansas City Metro Area from electing their preferred candidate, currently Congresswoman Sharice Davids." J.A. I, 23. Petitioners predicted that under SB 355, "Kansas will likely find itself represented in Congress by four Republicans and zero Democrats." J.A. I, 24.

Petitioners also alleged that, "[i]n addition to its extreme partisan bias," SB 355 intentionally dilutes minority votes in violation of Sections 1 and 2 of the Kansas Constitution's Bill of Rights as well as Article 5, Section 1 of the Kansas Constitution. J.A. I, 25; *see*

id. at 54 (Count Four), 102-04 (Count Five). Petitioners argued in particular that the division of Wyandotte County had resulted in some minority voters being moved into a new district where fewer white voters also preferred the minority-preferred candidate. This, Petitioners suggested, violated the Kansas Constitution.

Petitioners did not bring a Fourteenth Amendment claim. In fact, Petitioners were crystal clear that they "allege[] causes of action only under the state Constitution, and do[] not allege any federal cause of action." J.A. I, 26 n.1; *see* J.A. I, 62 ("The claims advanced herein arise exclusively under the Kansas state constitution."). Of particular relevance here, Petitioners argued that "[i]rrespective of the U.S. Constitution, [SB 355] constitutes unlawful racial discrimination in violation of Sections 1 and 2 of the Kansas Constitution's Bill of Rights." J.A. I, 54. Petitioners advanced their race-based claim "under the Kansas state constitution only." J.A. I, 104.

C. The District Court Enjoined Use of the New Map Under the Kansas Constitution.

Petitioners' cases were consolidated and assigned to a district court judge in Wyandotte County. The State moved to dismiss Petitioners' lawsuits, and the district court denied the motion on March 28, 2022. App. 13; J.A. II, 107-72. After an extremely expedited discovery schedule, the district court held a trial from April 4 through 11. App. 13; J.A. IX-XVI.

The district court ultimately held that SB 355 violates the Kansas Constitution both because it is an unconstitutional political gerrymander and because it unconstitutionally dilutes minority votes. In doing so, the court adopted Petitioners' proposed findings of fact and conclusions of law nearly verbatim. *Compare* App. 135-392, *with* J.A. V, 1-201. The district court made only a handful of minor changes in the body of the opinion and added a brief introduction and a brief conclusion. App. 137-47, 390-91.

Having adopted all of Petitioners' factual findings, the district court held that Petitioners prevailed on all of their claims. The district court first held that the Elections Clause of the U.S. Constitution did not bar its review of SB 355 "*solely* under the Kansas Constitution." App. 328. The court then held that political gerrymandering claims are justiciable under the Kansas Constitution and that SB 355 is an unconstitutional political gerrymander. App. 336-76.

With respect to Petitioners' race-based claims, the court held that SB 355 "dilutes minority votes in violation of the Kansas Constitution's equal rights and political power clauses." App. 376 (citing Kan. Const. Bill of Rights, §§ 1-2). The court "clearly and expressly decide[d] Plaintiffs' racial vote dilution claims exclusively under Sections 1 and 2 of the Kansas Bill of Rights." App. 376. The court acknowledged that the elements of a vote dilution claim under the Kansas Constitution is an "issue of first impression." App. 376. But it declined to decide what exactly those elements are because it determined that SB 355 both "intentionally and effectively dilutes minority votes."

App. 390. The district court determined that SB 355 intentionally dilutes minority votes because: (1) SB 355 has a more negative effect on minority voters than white voters, (2) SB 355's enactment was quick, (3) the Legislature's listening tour was inadequate, (4) SB 355 differs from prior congressional district maps, and (5) Interstate-70 has a racial history. App. 379-88.

Having held that SB 355 "unconstitutionally violates Plaintiffs' rights as protected by Sections 1, 2, 3, and 11 of the Kansas Bill of Rights and Article V, Section 1 of the Kansas Constitution," the district court ordered that "the Legislature shall enact a remedial plan" that did not violate the Kansas Constitution. App. 391-92.

D. The Kansas Supreme Court Reversed Under the Kansas Constitution.

The State appealed directly to the Kansas Supreme Court, which reversed the district court.[4] Like the district court, the Kansas Supreme Court emphasized the purely state-law nature of this case. It observed that "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." App. 62. That tactic, the court concluded, failed.

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[4] In Kansas, appeals from district court decisions holding a Kansas statute unconstitutional are taken directly to the Kansas Supreme Court. *See* Kan. Stat. Ann. § 60-2101(b).

The Kansas Supreme Court began by noting the deficiencies in the district court's factual findings. App. 15-16. As the court observed, "many of the district court's found facts are not stated in the form of a pure factual finding." App. 15. Rather, they "assume within them an unstated and unquestioned legal standard" and "are permeated with and tainted by erroneous legal conclusions." App. 15-16. With respect to Petitioners' race-based claims in particular, the Kansas Supreme Court noted that the "district court generally incorporated and credited plaintiffs' suggested findings of fact," which in turn "simply summarize[d] plaintiffs' expert testimony." App. 60. The "district court made very few specific findings of fact of its own to directly justify its holdings." App. 60. The Kansas Supreme Court noted that this Court has deemed such so-called "fact-finding . . . insufficient to support a claim for vote dilution." App. 61 (citing *Johnson v. De Grandy*, 512 U.S. 997, 1015-16 (1994)).

The Kansas Supreme Court agreed with the district court, however, that it had jurisdiction to review SB 355's validity under the Kansas Constitution, the U.S. Constitution's Elections Clause notwithstanding. App. 18-22. The court noted "recent statements of skepticism from individual Supreme Court justices," but it explained that it was "bound to follow United States Supreme Court precedent on questions of federal law." App. 20-21.

Turning to the merits of Petitioners' claims, the Kansas Supreme Court reversed the district court. The Kansas Supreme Court first reversed the district court on Petitioners' political gerrymandering claims,

holding that such claims are "nonjusticiable as . . . political question[s]." App. 45.

The Kansas Supreme Court also reversed the district court on Petitioners' race-based claims. The Kansas Supreme Court determined that the district court "applied the wrong legal standards" to the race-based claims. App. 45 (formatting altered). It held that the equal protection guarantee of Section 2 of the Kansas Constitution is "coextensive" with that of the U.S. Constitution. App. 46. Thus, the court noted, it would be "guided by" this Court's case law in interpreting that guarantee. App. 46.

The Kansas Supreme Court explained that "section 2 [of the Kansas Constitution Bill of Rights] protects against targeted minority voter dilution which occurs when a legislative body invidiously discriminates against a minority population to minimize or cancel out the potential power of the minority group's collective vote." App. 47. The court specified that such a claim has two elements: discriminatory effect—that is, the "harm caused by vote dilution," App. 52—and "discriminatory intent," App. 56.

In assessing discriminatory effect, the Kansas Supreme Court looked for guidance to this Court's precedents parsing the analogous element of a claim brought under Section 2 of the Voting Rights Act (VRA)—the context in which "most vote dilution claims now arise." App. 54. Proving such an effect requires a threshold showing that:

> (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single member district; (2) that the group is politically cohesive; and (3) there exists sufficient bloc voting by the white majority in the new allegedly diluted districts to usually defeat the preferred candidate of the politically cohesive minority bloc.

App. 52 (citing *Growe v. Emison*, 507 U.S. 25, 39-40 (1993)).

The Kansas Supreme Court ultimately determined that Petitioners had failed to satisfy the discriminatory effect element, so it had no "need . . . to engage the discussion of intent." App. 56. As the court explained, Petitioners "did not present evidence in support of—nor did the district court find—that the minority group is sufficiently large and geographically compact to constitute a majority in a single member district." App. 60. Without this showing, the court concluded, "there neither has been a wrong nor can [there] be a remedy." App. 52 (quoting *Growe*, 507 U.S. at 40-41).

The Kansas Supreme Court accordingly reversed the district court and lifted the injunction. App. 62-63. The 2022 election therefore proceeded under SB 355, and Congresswoman Davids won reelection in the new Third District by more than 12%—a greater margin than she had won by in the old Third District in 2020.[5]

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[5] *Compare* Kansas Secretary of State, *2022 General Election Official Vote Totals* 1, https://www.sos.ks.gov/elections

REASONS FOR DENYING THE WRIT

I. This Court Lacks Jurisdiction to Review the Kansas Supreme Court's Interpretation of the Kansas Constitution.

This Court's "certiorari jurisdiction over decisions from state courts derives from 28 U.S.C. § 1257." *Illinois v. Gates*, 462 U.S. 213, 217 (1983). Section 1257, as relevant here, provides for this Court's jurisdiction over final state court judgments in cases that involve a federal constitutional challenge to the validity of a state statute or the assertion of a right or privilege under the federal Constitution. 28 U.S.C. § 1257(a). This Court has long emphasized the importance of the "federal question ha[ving] been both raised and decided in the state court below." *Gates*, 462 U.S. at 218. And the burden of making that important showing lies with the party seeking to invoke this Court's jurisdiction—here, Petitioners. *See Gorman v. Washington Univ.*, 316 U.S. 98, 101 (1942).

Petitioners cannot show that the federal question they now pose was either raised or decided below. Petitioners deliberately raised only state-law claims, and the Kansas Supreme Court thus decided those claims exclusively under the Kansas Constitution. That the Kansas Supreme Court was "guided by," App.

/22elec/2022-General-Official-Vote-Totals.pdf (last visited Feb. 14, 2023) (showing Representative Davids winning by 12.18%), *with* Kansas Secretary of State, *2020 General Election Official Vote Totals* 1, https://www.sos.ks.gov/elections/20elec/2020_General_Official_Vote_Totals.pdf (last visited Feb. 14, 2023 (showing Representative Davids winning by 10.06%).

27, this Court's Fourteenth Amendment precedents when interpreting a similar provision of the Kansas Constitution is not enough to somehow conjure up jurisdiction. At the very least, the serious jurisdictional concerns here—which this Court would need to grapple with before reaching the merits—make this case a poor vehicle to consider the question presented.

A. The Kansas Supreme Court Decided Only a Question of State Law.

Petitioners frame this case as one involving "the Fourteenth Amendment" to the U.S. Constitution. Pet. i. But Petitioners at no prior point in this case raised a federal question. In fact, Petitioners consistently insisted that they "allege[] causes of action only under the state Constitution, and do[] not allege any federal cause of action." J.A. I, 26 n.1; *see also* J.A. I, 62 ("Plaintiffs do not seek relief from this court under the United States constitution or any federal statute."). Plaintiffs pled their claims "[i]rrespective of the U.S. Constitution," J.A. I, 31-33, and repeatedly emphasized that they "advance [their] claim[s] under the Kansas state constitution only," J.A. I, 97, 99, 100, 102, 104.

This was a deliberate pleading strategy: The bulk of Petitioners' attacks against SB 355 sounded in political gerrymandering. But this Court in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), held that political gerrymandering claims are not justiciable in federal courts. *Id.* at 2506-07. To overcome that federal jurisdictional barrier, Petitioners were left to

pursue such claims in state court. And to ensure that they remained in their chosen venue, Petitioners pursued their claims—including their other, race-based claims—under only the Kansas Constitution. *See, e.g.*, 28 U.S.C. § 1441(a) (allowing removal of a civil case from state court to federal court if the federal court would have jurisdiction); 28 U.S.C. § 1331 (providing for federal-question jurisdiction in federal court). Put simply, Petitioners designed this case to involve no federal questions so that they could pursue their preferred challenges to SB 355.

Having been asked to decide only state-law claims, the Kansas Supreme Court resolved those claims entirely as a matter of state law. The Kansas Supreme Court explained that it was deciding Petitioners' "claims that Ad Astra 2 violates the Kansas Constitution." App. 7. And it "held that, on the record before [it], [Petitioners] have not prevailed on their claims that Sub. SB 355 violates the Kansas Constitution." App. 8. The Kansas Supreme Court emphasized the state-law "manner in which [Petitioners] chose to litigate this case." App. 62. Petitioners, "[e]ager to reshape the legal landscape of redistricting in Kansas," had "put their proverbial eggs in an uncertain and untested basket of novel state-based claims." App. 7, 62. Those claims, however, were "foreclose[d]" by "the text of the Kansas Constitution [and] the precedents of" the Kansas Supreme Court. App. 7, 62.

The district court too stressed that Petitioners' claims "arise solely under the Kansas Constitution." App. 337 n.18. It thus "therefore clearly and expressly

decide[d] Plaintiffs' racial vote dilution claims exclusively under Sections 1 and 2 of the Kansas Bill of Rights." App. 376. The district court emphasized that it relied on this Court's precedents merely for "guidance" and was not bound by them. App. 337 n.18; *see id.* at 376 (citing *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)).

At no point in this case was the Fourteenth Amendment in play, and at no point in this case did any court decide a Fourteenth Amendment claim. This Court, "where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court." *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940). It should do so again here.

B. Petitioners' Jurisdictional Argument Fails.

Petitioners spend just a few sentences attempting to explain why this Court has jurisdiction over the Kansas Supreme Court's interpretation and application of the Kansas Constitution. But their argument falls short.

In their jurisdictional statement, Petitioners cite 28 U.S.C. § 1257 with no explanation of how that statute gives this Court jurisdiction. As relevant here, that statute provides jurisdiction only "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws *of the United States*," or "where any title, right, privilege, or immunity is

specially set up or claimed under the Constitution or the treaties or statutes *of . . . the United States*." *Id.* at § 1257(a) (emphasis added). Because Petitioners challenged Kansas's new congressional map only under the Kansas Constitution, and asserted rights only under the Kansas Constitution, this statute does not apply by its plain terms.

Petitioners assert that this Court has jurisdiction because the Kansas Supreme Court "based its ruling on its understanding of the Fourteenth Amendment." Pet. 33. They cite just one case in support of this theory of jurisdiction: this Court's opinion in *Michigan v. Long*, 463 U.S. 1032 (1983). *See* Pet. 2 n.1.

Long, however, involves this Court's "adequate and independent state ground" doctrine, which is not at issue here. In *Long*, the state court based its ruling on *both* the state constitution and the U.S. Constitution. 463 U.S. at 1037. There was, in other words, a holding under federal law. The issue before this Court was whether the state-law holding was independent of the federal-law holding. The state court below had "referred twice to the state constitution in its opinion, but otherwise relied exclusively on federal law." *Id.* at 1037. Because it was "not clear from the opinion itself that the state court relied upon an adequate and independent state ground," this Court presumed "the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1041-42.

This case is different. It does not even implicate the "adequate and independent state ground" doctrine

because, unlike *Long*, it does not involve both state-law and federal-law claims. Rather, the Kansas Supreme Court decided only claims under the Kansas Constitution. The U.S. Constitution was not asserted or invoked as a ground—independent or otherwise—for the court's decision.

The fact that the Kansas Supreme Court was "guided by" this Court's Fourteenth Amendment precedents, App. 27, does not vest this Court with jurisdiction. The Kansas Supreme Court did not believe that it was bound to follow this Court's interpretation of the federal Constitution in construing corresponding provisions of the Kansas Constitution. Rather, it voluntarily decided that it would "adopt" particular standards from those precedents. App. 48; *see also* App. 27 (citing *State v. Wilson*, 168 P. 679, 682 (Kan. 1917) (explaining that this Court's precedents are "highly persuasive with respect to similar provisions of state Constitutions"). Even if this Court were to agree with Petitioners' understanding of the Fourteenth Amendment, this Court would have no jurisdiction to reverse the Kansas Supreme Court's interpretation of the Kansas Constitution. *See Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 626 (1875). At most, this Court could clarify the meaning of the Fourteenth Amendment based on speculation that the Kansas Supreme Court might then decide to alter its interpretation of the Kansas Constitution. But such a clarification would be no more than an advisory opinion.

C. At the Very Least, the Jurisdictional Question Is a Vehicle Problem.

This thorny jurisdictional question is at minimum a serious vehicle defect. Whether this Court has jurisdiction to review the case before it is a threshold question that must be answered before the Court can proceed to the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 98 (1998) (stressing "the necessity of determining jurisdiction before proceeding to the merits"). Before deciding Petitioners' Fourteenth Amendment question, then, this Court would first have to satisfy itself that this case in fact involves a federal question that gives rise to jurisdiction.

The necessity of that analysis—and the sensitive federal balance it implicates—would complicate this Court's review. *See Long*, 463 U.S. at 1040 (highlighting the importance of "[r]espect for the independence of state courts"). And a decision to entertain the jurisdictional question would risk inviting a flood of petitions for certiorari from all manner of state-court proceedings. *See Colorado v. Nunez*, 465 U.S. 324, 328-29 (1984) (Stevens, J., concurring). Should the Court wish to address the Fourteenth Amendment question Petitioners now press, it should wait for a case that actually presents that question without any threshold jurisdictional impediment.

II. Even If This Court Had Jurisdiction, Review Would Not Be Warranted.

Even if jurisdiction were not lacking, certiorari still would not be warranted. The Kansas Supreme Court correctly held that Petitioners failed to demonstrate a discriminatory effect. And the alleged split on the question presented, even assuming the Kansas Supreme Court had decided a Fourteenth Amendment claim, involves a shallow 1-1 division among appellate courts on an underdeveloped legal question. That question warrants further percolation. Nor would the question presented affect the ultimate outcome of this case, as Petitioners have also failed to show that the Kansas Legislature acted with a racially discriminatory purpose.

A. The Kansas Supreme Court's Decision Is Correct and Consistent with This Court's Precedents.

As the Kansas Supreme Court explained, a vote dilution claim under Equal Protection Clause requires a showing of both discriminatory intent and discriminatory effect. App. 56. The Kansas Supreme Court chose to "adhere to" this same standard when applying the equal protection guarantees found in the Kansas Constitution and determined that Petitioners had not satisfied it. App. 46. That decision is correct and—even assuming it raises a Fourteenth Amendment question—fully consistent with this Court's precedents.

The Kansas Supreme Court correctly determined that Petitioners had not shown a discriminatory effect. App. 60-62. Unconstitutional vote dilution "occurs when a legislative body invidiously discriminates against a minority population to minimize or cancel out the potential power of the group's collective vote." App. 52 (citing *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018)). This mirrors the discriminatory effect required for a showing of vote dilution under Section 2 of the Voting Rights Act. *See Thornburg v. Gingles*, 478 U.S. 30, 48 (1986) (asking whether a map "minimize[s] or cancel[s] out [minority voters'] ability to elect their preferred candidates"). In that context, this Court has established a three-part threshold for assessing whether a discriminatory effect exists. *See Growe v. Emison*, 507 U.S. 25, 39-40 (1993).

The Kansas Supreme Court found that framework useful for assessing the presence of a discriminatory effect under the Kansas Constitution. *See* App. 52-56. And it ultimately determined that Petitioners failed at the first step of the framework, as they "did not present evidence in support of—nor did the district court find—that the minority group is sufficiently large and geographically compact to constitute a majority in a single member district." App. 60. As this Court has explained, "unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 50 n.17.

Petitioners argue that this framework for identifying discriminatory effect has "no relevance to

the Equal Protection" Clause. Pet. 20-22. Not so. As the Kansas Supreme Court explained, Section 2 claims "are undergirded by the same equal protection principles that preexist the VRA and simultaneously protect against unlawful minority vote dilution." App. 54 (citing *Holder v. Hall*, 512 U.S. 874, 893 n.1 (1994) (Thomas, J., concurring) ("[P]rior to the amendment of the Voting Rights Act in 1982, 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*." (citations omitted))).

Until 1980, vote dilution claims were governed by a "results test." *See Gingles*, 478 U.S. at 35. That test focused only on discriminatory effect and did not require proof of discriminatory intent. *Id.* (citing *White v. Regester*, 412 U.S. 755 (1973), as an example of this approach). In 1980, this Court rejected the results test and held that both Section 2 and the Fourteenth Amendment require proof of discriminatory intent in addition to proof of discriminatory effect. *See Mobile v. Bolden*, 446 U.S. 55, 61-70 (1980). "[L]argely [in] response" to that holding, Congress in 1982 "revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to [re]establish as the relevant legal standard the 'results test.'" *Gingles*, 478 U.S. at 35. After the 1982 amendments, Fourteenth Amendment vote dilution claims still require proof of both discriminatory effect and intent, whereas Section 2 claims require only proof of discriminatory effect.

This history shows that the post-*Mobile* amendments to Section 2 were aimed at eliminating the intent element of a statutory vote dilution claim, not at altering the effect element. *See* Luke P. 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, 70-72 (2006) ("[I]t is important to note that the standard *Gingles* developed was not conceived of as a break from the pre-*City of Mobile* constitutional standard, but rather as a continuation of a suspended project of giving content to the test for vote dilution."). The 1982 amendments were meant make Section 2 more—not less—permissive than the constitutional standard for vote dilution. *See Johnson v. DeSoto Cty. Bd. of Comm'rs*, 204 F.3d 1335, 1344-45 (11th Cir. 2000).

Gingles itself underscores the "strong conceptual link" between discriminatory effect under Section 2 and discriminatory effect under the Fourteenth Amendment. McLoughlin, *supra*, at 72. The *Gingles* framework was supported by citations to this Court's Fourteenth Amendment precedents setting out the meaning of discriminatory effect in that context. *See* 478 U.S. at 50-51 (citing, *e.g.*, *Rogers v. Lodge*, 458 U.S. 613 (1982); *Whitcomb v. Chavis*, 403 U.S. 124 (1971)). And it also has roots in a law review article that proposed a standard for assessing constitutional (rather than statutory) vote dilution. *Gingles*, 478 U.S. at 50-51 (citing James U. Blacksher & Larry T. Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden, 34 Hastings L.J. 1 (1982)). The use of this proposed constitutional standard in the Section 2

context suggests that Section 2 is concerned with the same sort of discriminatory effect as the Constitution.

Petitioners argue that the Kansas Supreme Court's decision is contrary to dicta from the three-Justice plurality's opinion in *Bartlett v. Strickland*, 556 U.S. 1 (2009). Pet. 28-32. But the plurality in *Bartlett* merely stated that the intentional destruction of "otherwise effective crossover districts . . . would raise serious *questions* under" the Fourteenth Amendment. 556 U.S. at 24 (emphasis added). The plurality explicitly did not address whether a showing of intent would affect the analysis. *Id.* at 20 ("We therefore need not consider whether intentional discrimination affects the *Gingles* analysis."). But even if the plurality had spoken to this issue, dicta from a plurality decision—made in passing, with no explanation—is not precedential.

B. This Case Does Not Implicate a Split Fit for This Court's Immediate Resolution.

Petitioners suggest that "lower courts are split over whether *Gingles* prong one applies to Fourteenth Amendment intentional discrimination claims." Pet. 22 (formatting altered). This case does not implicate that split because it does not involve a Fourteenth Amendment intentional discrimination claim. But in any event, Petitioners' alleged split is overblown.

Petitioners point to just two appellate courts—the Kansas Supreme Court here and the Ninth Circuit—that have allegedly decided the issue. Petitioners halfheartedly suggest that the Eleventh Circuit is also

a part of their asserted conflict. Pet. 26-28. But as Petitioners are quick to note, the Eleventh Circuit "ultimately did not formally decide the question." Pet. 27. Petitioners therefore allege at most a 1-1 conflict among appellate courts on their question presented. Any disagreement between those courts is shallow and necessarily new such that further percolation would be warranted.

Percolation would be particularly valuable in this context, as the lower courts have not yet had much opportunity to address the contours of Fourteenth Amendment vote dilution claims. As multiple courts have noted, intentional vote dilution claims are a "relatively undeveloped" area of law. *League of United Latin American Citizens v. Abbott*, 601 F. Supp. 3d 147, 160 (W.D. Tex. 2022); *see Harding v. Cty. of Dallas, Texas*, 948 F.3d 302, 312-13 (5th Cir. 2020) ("[T]he role that § 2 and *Gingles* play in intentional vote dilution claims as opposed to results-only claims is somewhat unsettled." (quoting *Perez v. Abbott*, 253 F. Supp. 3d 864, 942 (W.D. Tex. 2017))); *Cano v. Davis*, 211 F. Supp. 2d 1208, 1248 (C.D. Cal. 2002) ("[T]he effects standard for an intentional vote dilution claim is uncertain, largely because of a dearth of precedent. The cases provide little direct authority as to the requisite degree of dilutive effect for an intentional discrimination claim under either the constitution or the statute."), *aff'd*, 537 U.S. 1100 (2003).

Review would be particularly ill-advised in this case because the parties did not brief the subject of the alleged split—whether "*Gingles* prong one applies to Fourteenth Amendment intentional discrimination

claims," Pet. 22—until the motion for reconsideration stage, after the Kansas Supreme Court had issued its decision. And the Kansas Supreme Court denied Petitioners' motion for rehearing in a one-line order with no opinion. App. 393. Additional briefing in another case actually presenting the question may more fully flesh out the nuances of the issue in a way that would ultimately prove helpful to this Court.

As Justice Ginsburg explained, "when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting); *see also Maslenjak v. United States*, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring) ("[T]he experience of our thoughtful colleagues on the district and circuit benches, could yield insights (or reveal pitfalls) we cannot muster guided only by our own lights."). This Court's consideration of the question presented is not warranted at this time.

C. The Premise of Petitioners' Argument—that This Case Involves Intentional Discrimination—Is Wrong.

Petitioners' argument is premised on the theory that this case involves intentional minority vote dilution. But it is not plausible that the Kansas Legislature enacted SB 355 with a racially discriminatory purpose. Petitioners' claims would therefore fail regardless of the answer to the question presented.

Discriminatory intent requires "that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part '*because of*,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (emphasis added). And this Court has demanded that courts "exercise *extraordinary caution* in adjudicating claims that a State has drawn district lines on the basis of race," especially where "the voting population is one in which race and political affiliation are highly correlated." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (internal quotation marks omitted). Drawing lines for partisan reasons is not drawing lines for racial reasons, even if "the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact." *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (emphasis omitted).

The evidence in this case did not establish that the Legislature enacted SB 355 *because* it would disfavor minority voters. In finding otherwise, the district court relied heavily on evidence regarding the process of SB 355's enactment. *See* App. 381-85. But SB 355 was enacted "according to the usual procedures." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 269 (1977). There is no evidence that any constitutional provision, law, or legislative rule governing the enactment of legislation was violated. *Cf.* App. 23. The district court also suggested that SB 355 is less favorable to minority voters than it is to white voters. App. 379-81. But even if it were, the Legislature's "awareness of consequences" is not enough to prove discriminatory intent, *Feeney*, 442

U.S. at 279, particularly when (as Petitioners argued below) redistricting was allegedly influenced by political considerations and partisan affiliation highly correlates with race. *See Cromartie*, 526 U.S. at 551. The district court further noted that SB 355 departed from prior congressional district maps. App. 385-86. But this is not the first time Wyandotte County has been divided. *See supra* 4. And departures from the 2012 map are hardly surprising given that a federal court—rather than the Legislature—drew that map. *See supra* 4 n.3. Finally, the district court suggested that Interstate-70, which roughly tracks SB 355's division of Wyandotte County, is "racially divisive." App. 387. But Interstate-70 was constructed in the 1950s. J.A. XX, 216. And "unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value." *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987).

As Petitioners note, the Kansas Supreme Court did "not review the district court's finding of intentional discrimination" because it determined that Petitioners had not proven discriminatory effect. Pet. 19. But the Kansas Supreme Court did repeatedly criticize the insufficiency and incorrectness of the district court's factual findings generally, App. 16 ("[T]he lower court's findings of fact are permeated with and tainted by erroneous legal conclusions."), and with respect to their race-based claims in particular, App. 60 ("[T]he district court made very few specific findings of fact of its own to directly justify its holdings . . . ."). Were this case to be returned to the Kansas Supreme Court to review the district court's finding of intent, there is

every reason to believe that finding would not pass muster.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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