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No. 22-125092-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

FAITH RIVERA et al., TOM ALONZO et al., SUSAN FRICK et al.,
Plaintiffs-Appellees,

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-Appellants,

JAMIE SHEW, in his official capacity as Douglas County Clerk,
Defendant-Appellee.

ALONZO AND *RIVERA* PLAINTIFFS-APPELLEES' REPLY IN SUPPORT OF MOTION FOR REHEARING

Appeal from the District Court of Wyandotte County
Honorable Bill Klapper, District Judge
District Court Case No. 22-CR-89 (consolidated with No. 22-CV-90
and Douglas County Case No. 22-CF-71)

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***ALONZO* AND *RIVERA* PLAINTIFFS-APPELLEES' REPLY IN SUPPORT OF MOTION FOR REHEARING**

Plaintiffs moved for rehearing on a narrow question: whether intentionally eliminating a performing crossover district for the purpose of reducing minority voting power violates the Kansas Constitution. As a factual matter, the court below found, and Defendants do not dispute, that Ad Astra 2 eliminates an effective crossover district. Minority voters could elect their candidates of choice under the prior plan and cannot under the new plan. Yet Defendants claim that depriving minority voters of the opportunity to elect their preferred candidates does not have "a dilutive effect on minority votes." Resp. to *Alonzo* & *Rivera* Pls.-Appellees' Mot. for Rehearing ("Resp.") 6. In their view, the U.S. Supreme Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), stands for the proposition that a redistricting plan cannot have a discriminatory effect under *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), unless the plan eliminates a majority-minority district. Resp. 6–9. That illogical view—which is inconsistent with a wealth of caselaw applying traditional equal protection principles to claims of intentional minority vote dilution—is wrong.

ARGUMENT

The U.S. Supreme Court, the Ninth Circuit Court of Appeals, and numerous three-judge federal district courts have each concluded that *Gingles*'s majority-minority requirement does not apply to intentional racial vote dilution claims, and *not one* federal appellate court or three-judge federal district court panel has held otherwise. As required under *Arlington Heights*, the district court here found "that Ad Astra 2 intentionally *and*

effectively dilutes minority votes," and those findings are entitled to great deference. J.A. VI, 206 (emphasis added). The motion for rehearing should be granted.

I. Defendants' position is contrary to U.S. Supreme Court, circuit court, and three-judge district court precedent.

As Plaintiffs' motion for rehearing explains, the vast weight of federal authority addressing intentional racial vote dilution recognizes that intentionally dismantling a performing crossover district violates equal protection principles. *See Alonzo & Rivera* Pls.-Appellees' Mot. for Rehearing ("Mot.") 6–14. Defendants do not meaningfully engage with this caselaw, instead brushing aside the U.S. Supreme Court's only guidance on the issue in favor of an Eleventh Circuit decision that expressly did "not resolve" the question. *Johnson v. DeSoto Cnty. Bd. of Comm'rs*, 204 F.3d 1335, 1345 (11th Cir. 2000). *Johnson* stands in sharp contrast to the opinions of seven justices of the U.S. Supreme Court, a three-judge panel of the Ninth Circuit, and numerous three-judge courts consisting of federal district and circuit court judges from across the country. It cannot bear the weight Defendants place upon it.

Defendants appropriately recognize that "it is the U.S. Supreme Court—not the lower federal courts—that is the ultimate arbiter of the meaning of the federal Constitution." Resp. 11. Indeed. But the only U.S. Supreme Court case addressing the question at issue here explained that "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (plurality opinion). The Court therefore explicitly held

that the majority-minority requirement that applies to claims arising under Section 2 of the Voting Rights Act ("VRA") "*does not apply* to cases in which there is intentional discrimination against a racial minority." *Id.* at 20 (emphasis added). The four dissenting justices went further, characterizing the idea that "the invidious and intentional fracturing of crossover districts in order to harm minority voters would not state a claim" as "absurd." *Id.* at 42 n.5 (Souter, J., dissenting). All told, seven justices agreed that the majority-minority requirement does not apply to intentional racial discrimination claims, and this Court is bound to follow that guidance in interpreting federal law. Defendants' request that this Court disregard *Bartlett* is irreconcilable with the U.S. Supreme Court's role as "the ultimate arbiter of the meaning of the federal Constitution"—and that request is made all the more peculiar by Defendants' simultaneous defense of *Bartlett*'s holding that a numerical majority is required to satisfy the first *Gingles* precondition. Resp. 11.

Lower federal courts have either independently concluded that intentional discrimination claims are not subject to *Gingles*'s majority-minority requirement or recognized that *Bartlett* compels as much. To this day, *every single* federal circuit court of appeals and three-judge district court panel that has actually ruled on whether *Gingles* applies in the context of intentional racial discrimination claims has held that it does not. *See Garza v. County of Los Angeles*, 918 F.2d 763, 769–71 (9th Cir. 1990); *LULAC v. Abbott*, No. 121CV991LYJESJVB, 2022 WL 1410729, at *11–12 (W.D. Tex. May 4, 2022) (three-judge court); *Perez v. Abbott*, 253 F. Supp. 3d 864, 944 (W.D. Tex. 2017) (three-judge court); *Texas v. United States*, 887 F. Supp. 2d 133, 162–66 (D.D.C. 2012) (three-judge court), *vacated on other grounds*, 570 U.S. 928 (2013); *Comm. for Fair &*

Balanced Map v. Ill. State Bd. of Elections, 835 F. Supp. 2d 563, 581 (N.D. Ill. 2011) (three-judge court).

The cases Defendants invoke are not to the contrary. Defendants principally rely on *Johnson* for the proposition that proving a violation of the VRA is a necessary predicate to proving an intentional discrimination claim under the U.S. Constitution, *see* Resp. 9, even though *Johnson* did "not resolve this question," 204 F.3d at 1344. On top of expressly disclaiming the holding for which Defendants cite it, *Johnson* poses a host of additional problems for Defendants. To begin, *Johnson* was decided before *Bartlett*, and thus before the U.S. Supreme Court had held that *Gingles*'s first precondition requires demonstrating the possibility of a majority-minority district. *Id.* at 1346 n.24. So even if the *Johnson* court had held that a plaintiff must first prove a VRA violation in order to prove a constitutional violation, it would not have followed that its holding required a plaintiff to prove that a majority-minority district could be drawn. Moreover, *Johnson* recognized that its discussion of the relationship between effects claims under the VRA and intent claims under the U.S. Constitution took place "[i]n the absence of Supreme Court direction." *Id.* at 1344. *Bartlett* provided that direction. Finally, *Johnson*'s reasoning "was grounded expressly in the VRA and not the Constitution." *LULAC*, 2022 WL 1410729, at *12. For all these reasons, *Johnson* cannot overcome the bounty of U.S. Supreme Court, circuit court, and three-judge district court decisions cutting against it.

Defendants' remaining authorities take them even further afield. Most are pre-*Bartlett* decisions offering no more than speculation on how the question might be resolved. *See Reyes v. City of Farmers Branch*, No. 3:07-CV-900-O, 2008 WL 4791498,

at *19 (N.D. Tex. Nov. 4, 2008) ("It is *unclear* whether a plaintiff . . . can establish a constitutional vote dilution claim where a Section 2 VRA claim has failed.") (emphasis added); *Lee Cnty. Branch of NAACP v. City of Opelika*, 748 F.2d 1473, 1478 n.7 (11th Cir. 1984) ("[I]f the plaintiffs cannot prevail under the generally more easily proved 'results' standard of section 2, it is *unlikely* that they could prevail on their constitutional claims[.]") (emphasis added); *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002) (three-judge court) (pre-*Bartlett*). *Martinez*, moreover, addressed a claim of intentional *partisan* vote dilution—not racial vote dilution. 234 F. Supp. 2d at 1324. For obvious reasons, the concept of crossover voting does not apply in the context of partisanship, and in any event, there is no "bright line prohibition" on partisan districting, Op. 26, but there surely is on racially discriminatory districting, *see, e.g.*, *Rogers v. Lodge*, 458 U.S. 613, 617 (1982).[1]

Defendants' last two cases fare even worse. Defendants rely on the district court decision in *Lowery v. Governor of Georgia*, but fail to mention that the Eleventh Circuit affirmed "on different grounds than the district court" and "express[ed] no opinion on the district court's basis for the dismissal or regarding any other issue raised in this case," depriving the lower court's discussion of legal force. 506 F. App'x 885, 886 (11th Cir. 2013) (per curiam). Similarly, the court in *Tyson v. Town of Homer* admitted that an intentional racial vote dilution claim was not properly before it because "it [was] not entirely clear to the Court whether Plaintiffs intended to make" an intentional

[1] The reasoning in *Martinez*, which applies to partisan gerrymandering, also does not survive the Supreme Court's decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), which held that partisan gerrymandering presents a nonjusticiable political question under the U.S. Constitution.

discrimination claim and the plaintiffs had "not pled [] 'discriminatory intent.'" No. 2:21-CV-00077-RWS, 2021 WL 8893039, at *9 & n.9 (N.D. Ga. July 2, 2021). That decision also placed misguided reliance on the district court opinion in *Lowery*, notwithstanding the Eleventh Circuit's affirmance on other grounds. *Id.* All told, it is unclear whether any of the lower court cases upon which Defendants rely (and that actually reached a conclusion on this issue) are even good law. And they certainly exhibit far less analysis than the U.S. Supreme Court, circuit court, and three-judge district court decisions Plaintiffs cite.

Defendants' only defense of the reasoning in these cases is that the *Gingles* "factors find their origin in Fourteenth Amendment vote dilution cases." Resp. 7. But it is the *Senate Factors* adopted in *Gingles*—not its *preconditions*—that find their origin in the intentional vote dilution cases that preceded the 1982 Amendments to the VRA. *See Rogers*, 458 U.S. at 624 (applying factors from *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc)); *White v. Regester*, 412 U.S. 755, 766–67 (1973) (applying factors that would become *Zimmer* factors).[2] The *Gingles* preconditions, by contrast—including the majority-minority requirement established in *Bartlett*—find their origins in a law review article written *after* the 1982 Amendments. *See Gingles*, 478 U.S. at 50 n.17 (citing James U. Blacksher & Larry T. Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden*: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 Hastings L.J. 1, 55–56 (1982)). The authors of that article were clear that they sought to design a test that could

[2] *Gingles* itself attributed the Senate Factors to "the analytical framework of *White v. Regester*, as refined and developed by the lower courts, in particular by the Fifth Circuit in *Zimmer v. McKeithen*." 478 U.S. at 36 n.4 (citation omitted).

be used “regardless of the lawmakers’ motives” and recognized that “[o]ther measures of unconstitutionality already recognized by federal courts should, of course, continue to be available as well.” Blacksher & Menefee, *supra*, at 50 n.319. These sources make clear that *Gingles* has no place in intentional discrimination claims.

And it makes sense that the evidentiary threshold for a discriminatory results claim under Section 2 of the VRA is more demanding than a showing of discriminatory effects in the context of an intentional discrimination claim under the Fourteenth Amendment. Congress rejected “a pure disparate-impact regime” when it amended Section 2 in 1982, passing a “compromise” bill that required plaintiffs to demonstrate *more than* some baseline “discriminatory effects” alone. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2341 & n.14 (2021). In an intentional discrimination case like this one, however, *any* discriminatory effect, “even if not overwhelming,” is unlawful. *See N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 231 & n.8 (4th Cir. 2016). And it would be both improper and illogical to adapt *Gingles*’s preconditions to intentional racial discrimination claims under the Constitution: If Defendants were correct that the *Gingles* preconditions apply to intentional vote dilution claims, it would give legislatures carte blanche to engage in flagrantly discriminatory redistricting against a minority group so long as the group’s population is not large or concentrated enough to comprise over 50% of eligible voters in a given district. As the numerous federal courts that have rejected Defendants’ position have confirmed, that simply cannot be the law.

II. The district court found both discriminatory effect and intent, and those findings are entitled to substantial deference.

As the foregoing discussion indicates, a claim of unconstitutional racial vote dilution is subject not to the requirements set forth in *Gingles*, but "to the standard of proof generally applicable to Equal Protection Clause cases." *Rogers*, 458 U.S. at 617. That standard comes from *Arlington Heights*, which the parties appear to agree provides the proper framework for this case. *See* Resp. 9–10. The district court conducted a searching "totality of the circumstances" inquiry that subsumed the *Arlington Heights* factors and concluded "that Ad Astra 2 intentionally *and* effectively dilutes minority votes." J.A. VI, 196, 206 (emphasis added). Those factual findings are subject to substantial competent evidence review, and under that deferential standard, the district court should be affirmed.

A. Ad Astra 2 has a dilutive effect on minority voting power.

"[T]he showing of injury in cases involving discriminatory intent need not be as rigorous as in effects cases." *Garza*, 918 F. 2d at 771. So, as discussed above, "when discriminatory purpose (intentional vote dilution) is shown, a plaintiff need not satisfy the first *Gingles* precondition to show discriminatory effects." *Perez*, 253 F. Supp. 3d at 944. Instead, the plaintiff need only make "*some* showing of injury . . . to assure that the district court can impose a meaningful remedy." *Garza*, 918 F.2d at 771; *accord LULAC*, 2022 WL 1410729, at *12; *Perez*, 253 F. Supp. 3d at 944. After all, "any racial discrimination in voting is too much." *Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

Ad Astra 2 intentionally dismantles a previously performing crossover district for minority voters, J.A. VI, 118, which, contrary to Defendants' contention, "has a dilutive

effect on minority votes," Resp. 6. Under the prior plan, minority voters in Congressional District ("CD") 3, together with white crossover voters, could successfully elect their candidates of choice. The district court found that, under the prior plan, racially polarized voting existed in CD 3, but that white bloc voting in CD 3 was less extreme than in other Kansas congressional districts. J.A. VI, 112, 115. Approximately 40% of white voters in CD 3 crossed over to support minority-preferred candidates, enabling minority voters to elect their preferred candidates in most elections. J.A. VI, 115, 117. So although minority voters "could not dictate electoral outcomes independently" in CD 3, "they could elect their candidate of choice nonetheless" because they were "numerous enough and their candidate attract[ed] sufficient cross-over votes from white voters." *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993).

Ad Astra 2, however, breaks apart the coalition minority voters had forged in CD 3, depriving Plaintiffs of the opportunity to elect their preferred candidates in CD 2 *or* CD 3. The plan achieves its goal by cracking minority voters in Wyandotte and Johnson Counties, shifting a greater percentage of minorities to CD 2, where they are submerged among white voters who overwhelmingly oppose their preferred candidates, and at the same time reducing their vote share in CD 3 to deplete their coalition.

Specifically, Ad Astra 2 needlessly moves over 45,000 minority voters from CD 3 to CD 2, increasing CD 2's minority voting-age population by nearly one-third to almost 150,000, or 26.7% of the district's total voting-age population (up from 18.4% under the prior congressional plan). J.A. XXI, 107. But the district court found that racially polarized voting is "far more extreme" in the new CD 2 than in the prior CD 3: "[O]nly 28.6% of

white voters [in the new CD 2] vote for the minority candidate of choice." J.A. VI, 116. Under these conditions, minority voters are unable to elect their candidate of choice in *any* election. J.A. VI, 117.

Meanwhile, in CD 3, Ad Astra 2 reduces the minority voting-age population from over 170,000 to less than 125,000, reducing the minority share of the voting-age population from 29% to 22.1%. J.A. XXI, 107. The population Ad Astra 2 adds to CD 3 to replace the minorities it moves out is 90.3% white. J.A. VI, 199. By increasing the overall percentage of white voters in CD 3—where racially polarized voting already existed, albeit to a more moderate extent—minority voters will now be unable to elect their candidates of choice in most elections, decreasing the success of minority-preferred candidates by at least two-thirds. J.A. VI, 117–18.

In response to this analysis, Defendants claim that Plaintiffs cannot have been harmed because the map "leav[es] the overall racial composition of districts in Kansas relatively unchanged." Resp. 5. That is no answer, however, because the injury Plaintiffs seek to remedy is not the deprivation of an absolute voting share in some arbitrary district, but the intentional destruction of a specific coalition that effectively performed to elect minority-preferred candidates. Ad Astra 2 targeted Plaintiffs' coalition—not minority vote share in isolation—and it is that coalition that Plaintiffs seek to restore. And in any event, the U.S. Supreme Court has expressly and repeatedly explained that a vote dilution injury in one district cannot be offset by vote concentration in another. *See LULAC v. Perry*, 548 U.S. 399, 429 (2006) (plurality opinion) (citing *Shaw v. Hunt*, 517 U.S. 899, 917 (1996)).

In short, Ad Astra 2 replaces a congressional plan that effectively performed for minority voters in CD 3 with a plan in which the 45,000 minority voters moved from CD 3 to CD 2 now have *no* opportunity to elect their preferred candidates due to racially polarized voting, while the approximately 125,000 minority voters who remain in CD 3 have a substantially less likely chance of electing their preferred candidates for the same reason. That plainly dilutes minority voting power and supplies "*some* showing of injury," *Garza*, 918 F. 2d at 771, as the effects prong of *Arlington Heights* requires.

B. Ad Astra 2 was enacted with discriminatory intent.

The district court found, as a matter of fact, that Ad Astra 2 "intentionally" dilutes minority votes. J.A. VI, 206. The proper standard of review for that finding is "substantial competent evidence," which Defendants do not dispute. Op. 45; *id.* at 62, 98 (Rosen, J., concurring in part and dissenting in part); *see also* Resp. 11–12; *State v. Pham*, 281 Kan. 1227, 1237, 136 P.3d 919 (Kan. 2006) (district court's finding of intentional discrimination is a "factual" one). Under that standard, the district court's finding of intentional discrimination is entitled to "great deference." *State v. Talkington*, 301 Kan. 453, 461, 345 P.3d 258 (Kan. 2015). And, as Plaintiffs explained in their motion, the district court correctly concluded that Ad Astra 2 was motivated, at least in part, by the purpose of diluting minority votes. Mot. 18–21.

Defendants ignore most of the district court's extensive factual findings and make no attempt to explain why this Court should disturb those findings under the deferential standard of review applicable here. *See* Resp. 11–12. They instead address only two pieces of evidence that the district court considered and mischaracterize them both.

First, Defendants suggest that the "Legislature's 'awareness of consequences is not enough to prove discriminatory intent.'" *Id.* at 12 (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). But they ignore that, in the same decision, the U.S. Supreme Court explained that "the inevitability or foreseeability of consequences . . . bear[s] upon the existence of discriminatory intent," and that where "the adverse consequences of a law upon an identifiable group" are clear, "a strong inference that the adverse effects were desired can reasonably be drawn." *Feeney*, 442 U.S. at 279 n.25. Indeed, consequences are the "'important starting point' for assessing discriminatory intent under *Arlington Heights*" because "people usually intend the natural consequences of their actions." *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 487 (1997) (quoting *Arlington Heights*, 429 U.S. at 266). Moreover, Defendants' argument appears to concede that Ad Astra 2 *does* in fact have an "adverse effect on minority voters," undermining their claim that Plaintiffs failed to satisfy *Arlington Heights* for lack of injury. Resp. 12. And regardless, the district court relied upon far more than consequences to reach its finding of intent. *See* J.A. VI, 197–206; Mot. 18–21.

Second, Defendants critique the district court's consideration of Highway 70's racially divisive history. The district court carefully explained, however, that "the motivation[] behind the location and construction of I-70 *does not on its own* establish that the Legislature had invidious intent in drawing Ad Astra 2," but found that it remained "noteworthy because the racial divide along the highway is widely known in Kansas, and would have been an obvious implication to those developing and enacting the plan." J.A. VI, 204 (emphasis added). The court's language refers to the legislators' *present-day*

knowledge of the historical racial divide, which appropriately served as one of several facts informing the court's conclusion that "attempts to justify the stark racial divide in Ad Astra 2 based upon [the] neutral explanation[]" that it follows I-70 "are pretext." *Id.*

Defendants say nothing at all about the remaining evidence the district court weighed in reaching its discriminatory intent finding. The district court considered the evidence—including and exceeding the evidence called for in *Arlington Heights*—all "together," and concluded "that Ad Astra 2 intentionally . . . dilutes minority votes." J.A. VI, 206. That finding warrants great deference, and Defendants have offered no reason to disturb it.

CONCLUSION

For the foregoing reasons, the *Alonzo* and *Rivera* Plaintiffs' motion for rehearing should be granted.

Respectfully submitted,

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I certify that on August 16, 2022, a true and correct copy of this Motion was filed using the Court's electronic filing system which will serve all parties. On the same day a copy was electronically mailed to:

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