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APPENDIX A

**IN THE SUPREME COURT
OF THE STATE OF KANSAS**

No. 125,092

[Filed June 21, 2022]

FAITH RIVERA et al., TOM ALONZO et al.,)
and SUSAN FRICK et al.,)
Appellees,)
)
v.)
)
SCOTT SCHWAB, Kansas Secretary of)
State, in His Official Capacity, and)
MICHAEL ABBOTT, Wyandotte County)
Election Commissioner, in His Official)
Capacity,)
Appellants,)
and)
JAMIE SHEW, Douglas County Clerk,)
in His Official Capacity,)
Appellee.)

SYLLABUS BY THE COURT

1.

The Elections Clause in Article I, Section 4 of the United States Constitution does not bar this court from

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reviewing reapportionment legislation for compliance with the Kansas Constitution.

2.

In this case, the gravamen of plaintiffs' claims sound in equal protection. While the other provisions of the Kansas Constitution relied upon by plaintiffs and the district court—Kan. Const. Bill of Rights, §§ 1, 3, 11, 20; art. 5, § 1—protect vital rights, they do not provide an independent basis for challenging the drawing of district lines.

3.

Section 2 of the Kansas Constitution Bill of Rights is the textual grounding and location of our Constitution's guarantee of equal protection to all citizens.

4.

The equal protection guarantees afforded all Kansans by section 2 of the Kansas Constitution Bill of Rights is coextensive with the equal protection guarantees found in the Fourteenth Amendment to the United States Constitution. Therefore, Kansas courts shall be guided by United States Supreme Court precedent interpreting and applying the equal protection guarantees of the Fourteenth Amendment when we are called upon to interpret and apply the coextensive equal protection guarantees of section 2 of the Kansas Constitution Bill of Rights.

5.

The use of partisan factors in district line drawing is not constitutionally prohibited.

6.

In the absence of express standards codified in either the Kansas Constitution or in Kansas law constraining or limiting the Legislature's use of partisan factors in drawing district lines, we can discern no judicially manageable standards by which to judge a claim that the Legislature relied too heavily on the otherwise lawful factor of partisanship when drawing district lines. As such, the question presented is a political question and is nonjusticiable, at least until such a time as the Legislature or the people of Kansas choose to codify such a standard into law.

7.

Government decision-making based predominantly on race is antithetical to the principles of equal protection enshrined in both the Fourteenth Amendment and in section 2 of the Kansas Constitution Bill of Rights. Section 2 prohibits the drawing of district boundaries on the basis of race unless the Government can show that its action was in furtherance of a compelling state interest and was narrowly tailored to satisfy that interest. Compliance with the federal Voting Rights Act may be a compelling state interest.

8.

The equal protection guarantees found in the Fourteenth Amendment and in section 2 of the Kansas Constitution Bill of Rights protect against two distinct kinds of racial discrimination in the drawing of district lines. First, section 2 protects against racial gerrymandering which occurs when a legislative body uses race as the predominant factor in choosing where

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to draw the lines. Second, section 2 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.

9.

The United States Supreme Court has set forth explicit legal tests to be applied to each of the two distinct kinds of racial discrimination claims that allege a particular legislative line-drawing enactment violates equal protection. We expressly adopt those same tests to apply when those challenges are made under section 2 of the Kansas Constitution Bill of Rights.

10.

When a claim of racial gerrymandering is made, the plaintiffs must show 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. To make this showing, a plaintiff must prove that the Legislature subordinated lawful, race-neutral districting factors—such as compactness, respect for political subdivisions, and partisan advantage—to unlawful racial considerations.

11.

When a claim of minority vote dilution is made, the plaintiffs must show that (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single member district; (2) 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. If a plaintiff fails to establish these three points, there neither has been a wrong nor can there be a remedy. If the plaintiff can establish these three points, the court next inquires whether, as a result of the challenged plan, the plaintiffs do not have an equal opportunity to participate in the political process and to elect candidates of their choice. We review the totality of the circumstances in determining whether a minority group has the opportunity to participate in the political process.

12.

The record below demonstrates that plaintiffs did not ask the district court to apply the correct applicable legal tests to their race-based claims. The district court, in turn, did not apply these legal tests to plaintiffs' race-based claims. Perhaps unsurprisingly then, the district court did not make the requisite fact-findings to satisfy either legal test applicable to plaintiffs' race-based equal protection claims. Therefore, on the record before us, plaintiffs have failed to satisfy their burden to meet the legal elements required for a showing of unlawful racial gerrymandering or unlawful race-based vote dilution.

Appeal from Wyandotte District Court; BILL KLAPPER, judge. Decision announced May 18, 2022. Opinion filed June 21, 2022. Reversed and injunction order is lifted.

Brant M. Laue, solicitor general, argued the cause, and *Kurtis K. Wiard*, assistant solicitor general, *Shannon Grammel*, deputy solicitor general, *Dwight R. Carswell*, deputy solicitor general, *Jeffrey A. Chanay*,

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chief deputy attorney general, *Derek Schmidt*, attorney general, *Anthony F. Rupp*, of Foulston Siefkin LLP, of Overland Park, and *Gary Ayers* and *Clayton Kaiser*, of the same firm, of Wichita, were with him on the briefs for appellants.

Stephen R. McCallister, of Dentons US LLP, of Kansas City, Missouri, argued the cause, and *Mark P. Johnson*, *Betsey L. Lasister*, and *Curtis E. Woods*, pro hac vice, of the same firm, were with him on the briefs for appellees Susan Frick et al.

Lalitha D. Madduri, pro hac vice, of Elias Law Group LLP, of Washington, D.C., argued the cause, and *Spencer W. Klein*, pro hac vice, *Joseph N. Posimato*, pro hac vice, of the same firm, *Abha Khanna*, pro hac vice, and *Jonathan P. Hawley*, pro hac vice, of the same firm, of Seattle, Washington, and *Barry R. Grissom* and *Jake Miller*, pro hac vice, of Grissom Miller Law Firm LLC, of Kansas City, Missouri, were with her on the brief for appellees Faith Rivera et al.

Sharon Brett, *Josh Pierson*, and *Kayla DeLoach*, of American Civil Liberties Union Foundation of Kansas, of Overland Park, and *Mark P. Gaber*, pro hac vice, *Richard Samuel Horan*, pro hac vice, and *Orion de Nevers*, pro hac vice, of Campaign Legal Center, of Washington, D.C., *Elisabeth S. Theodore*, *R. Stanton Jones*, and *John A. Freedman*, of Arnold & Porter Kaye Scholer LLP, of Washington, D.C., and *Rick Rehorn*, of Tomasic & Rehorn, of Kansas City, were on the briefs for appellees Tom Alonzo et al.

No appearance by Jamie Shew, appellee.

Edward D. Greim, Todd P. Graves, and George R. Lewis, of Graves Garrett LLC, of Kansas City, Missouri, were on the brief for amicus curiae Kansas Legislative Coordinating Council.

Teresa A. Woody, of Kansas Appleseed Center for Law and Justice Inc., of Lawrence, was on the brief for amicus curiae Kansas Appleseed Center for Law and Justice Inc.

The opinion of the court was delivered by

STEGALL, J.: In this first-of-its-kind litigation in the state of Kansas, plaintiffs assert unique and novel claims that would bar the Kansas Legislature from enacting congressional district lines such as those at issue in the map colloquially known as “Ad Astra 2.” Eager to reshape the legal landscape of redistricting in Kansas, plaintiffs invited the district court to craft new and never before applied legal standards and tests unmoored from either the text of the Kansas Constitution or the precedents of this court. Accepting the invitation, the lower court found the legislative reapportionment in Ad Astra 2 constitutionally deficient as a partisan and racial gerrymander. On review, we find the district court’s legal errors fatally undermine its conclusions and, applying the correct legal standards to the facts as found by the lower court, we determine that on the record before us, plaintiffs have not prevailed on any of their claims that Ad Astra 2 violates the Kansas Constitution. Accordingly, we reverse the judgment of the lower court.

FACTUAL AND PROCEDURAL BACKGROUND

The Kansas Legislature is required to redraw Kansas' congressional districts every decade based on population shifts documented in the United States Census. The Legislature fulfilled this duty by passing Substitute for Senate Bill 355 which contained the Ad Astra 2 congressional map. Governor Laura Kelly vetoed the bill, but the Legislature was able to override Governor Kelly's veto, and the bill took effect on February 10, 2022. The new districts gave rise to three lawsuits that were consolidated in Wyandotte County. After a trial, the district court determined that Sub. SB 355 violates the Kansas Constitution. Defendants, who we will refer to as the State, appealed and on May 18 we held that, on the record before us, plaintiffs have not prevailed on their claims that Sub. SB 355 violates the Kansas Constitution. We reversed the judgment and lifted the permanent injunction ordered by the district court. Today, we fully set forth the facts, rationale, and holdings of the court.

Last year, the Kansas Legislature began the process of preparing to redraw Kansas' four congressional districts according to the 2020 Census. Through in-person and virtual meetings, the House and Senate Committees on Redistricting held a listening tour of town hall meetings across the state—14 meetings were held in 14 cities in August 2021, and 4 meetings were held virtually in November 2021.

Also playing a role in the process is the document known as "the Guidelines." The Proposed Guidelines and Criteria for 2022 Congressional and State Legislative Redistricting are a set of principles that set

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forth “traditional redistricting criteria” substantively the same as those used in the 2012 redistricting cycle. The Guidelines provide calculations for the correct population metrics to determine district size, as well as general priorities for the Legislature to consider. Those priorities include: (1) basing districts on data from the 2020 Census; (2) crafting districts as numerically as equal in population as practical; (3) the plan should have neither the purpose nor effect of diluting minority voting strength; (4) the districts should be as compact and contiguous as possible; (5) the integrity of existing political subdivisions should be preserved when possible; (6) the plan should recognize communities of interest; (7) the plan should avoid contests between incumbents when possible; and (8) the districts should be easily identifiable and understandable by voters.

The Legislature’s bipartisan Redistricting Advisory Group adopted the Guidelines and the Senate and House Redistricting Committees received presentations on the Guidelines at initial meetings in January 2022. Only the House Committee on Redistricting adopted the Guidelines—the Senate Committee on Redistricting did not. And more importantly, neither the House nor the Senate as a whole adopted the Guidelines.

Senate Bill 355 was introduced in the Senate on January 20, 2022, and referred to the Committee on Redistricting. The report of the Senate Committee on Redistricting recommended that Sub. SB 355 be adopted. On January 21, several proposed amendments to the plan introduced on the Senate floor were rejected, and that same day the Senate passed Sub. SB 355 on emergency final action by a vote of 26 to 9. The

bill was sent to the House on January 24, passed the House Redistricting Committee, and reached the House floor on January 25. After several motions to amend were rejected, the House passed the bill by a vote of 79 to 37.

Sub. SB 355 was then enrolled and presented to Governor Kelly on January 27. Governor Kelly vetoed the bill on February 4. Initially, the motion to override the veto failed, and the veto was sustained. But upon a motion to reconsider, the Senate voted to override the veto 27 to 11, and the House 85 to 37. Sub. SB 355 took effect upon publication in the Kansas Register on February 10, 2022.

Shortly thereafter, plaintiffs sued in state court in Wyandotte County to enjoin the use of Sub. SB 355 in the upcoming elections. The plaintiffs in *Rivera v. Schwab* and *Alonzo v. Schwab* sued Kansas Secretary of State Scott Schwab and Wyandotte County Election Commissioner Michael Abbott, alleging that Sub. SB 355 is a partisan and racial gerrymander and dilutes minority votes in violation of several provisions of the Kansas Constitution. Two weeks later, the plaintiffs in *Frick v. Schwab* sued Schwab and Douglas County Clerk Jamie Shew in Douglas County also alleging that Sub. SB 355 is an unconstitutional partisan gerrymander. We will collectively refer to the plaintiffs in the three actions as plaintiffs.

Plaintiffs' petitions brought several claims under the Kansas Constitution. The Alonzo plaintiffs argued that Ad Astra 2 (1) violates Kansas Constitution Bill of Rights sections 1 and 2 "because it targets [plaintiffs] for differential treatment based upon their political

beliefs and past votes”; (2) violates sections 3 and 11 of the Kansas Constitution Bill of Rights because it “discriminates against Kansas Democrats based on their protected political views and past votes, burdens the ability of those voters to effectively associate, and retaliates against Democrats for exercising political speech” by preventing “them from being able to coalesce their votes and elect their preferred candidates who share their political views”; (3) “imposes a severe burden” on plaintiffs’ right to vote under Article 5, section 1 by “targeting Democratic voters to prevent them from translating their votes into victories at the ballot box”; and (4) violates equal protection guarantees in sections 1 and 2 of the Kansas Constitution Bill of Rights because it was “created specifically to eliminate the only seat currently held by a minority.”

The Rivera plaintiffs similarly claimed violations under the Kansas Constitution citing the right to vote, equal protection, freedom of speech, and freedom of assembly, as well as making claims of racial vote dilution. The Rivera plaintiffs also argued that Ad Astra 2 impermissibly split Kansas’ four Native American reservations into two districts.

The Frick plaintiffs allege that the Legislature engaged in partisan gerrymandering by “scooping out” the City of Lawrence from District 2 and adding it to the “Big First.” They allege violations of the Kansas Constitution Bill of Rights sections 1, 2, 3, 11, 20, and Article 5, section 1. The Frick plaintiffs, like the Alonzo and Rivera plaintiffs, contend that Ad Astra 2 was developed in secret, rushed through the legislative

process, and contradicts established redistricting guidelines.

Plaintiffs recognized that population growth has made it impossible to keep Wyandotte County and Johnson County in a single district but asserted that it was possible and desirable to preserve Wyandotte County in a single district. They argued that under the new plan, the likely electoral outcomes now “are entirely inconsistent with the statewide preferences of Kansas voters,” noting that Democrats received 40% of the votes from 2016 to 2020, but asserting that in future elections Democrats will only have a chance to win 25% of the seats at best, with a likelihood that Democrats may receive no seats at all.

They further asserted that while each plaintiff is currently able to “elect a candidate of their choice in Congressional District [CD] 3,” under the new plan, CD 3 is now “cracked,” separating a portion of minority voters from “crossover white voters.” Plaintiffs allege that these minority voters are now “submerged” in the new CD 2 and CD 3 where “white bloc voting will prevent them from electing their preferred candidates.” They assert that minority voters—which comprise 29% of the voting age population in CD 3—are only “able to elect their preferred candidate with assistance from a portion of white voters,” because “while white voters in Kansas strongly prefer Republican candidates overall, enough white voters in current District 3 cross over to support minority-preferred Democratic candidates to permit those candidates to prevail.”

After plaintiffs filed their lawsuits, Schwab and Abbott petitioned our court for mandamus and quo

warranto seeking dismissal of the cases. We denied the petition, as mandamus and quo warranto were not available remedies. See *Schwab v. Klapper*, 315 Kan. 150, 154-55, 505 P.3d 345 (2022). We then consolidated the three cases in Wyandotte County. Defendants moved to dismiss the cases, which the district court denied after a hearing. After an expedited discovery schedule, trial began on April 4, 2022. At the close of plaintiffs' case, defendants moved for judgment, which the district court again denied.

On April 25, 2022, the district court held that Sub. SB 355 violates the Kansas Constitution as both a partisan and a racial gerrymander. Alongside photographs of legislators looking at their phones during their listening tours, the district court first stated that Ad Astra 2 was created in secret and "pushed through the Legislature" on "largely party-line votes" and "with no Democratic support." The court took issue with the fact that the "map-drawers remain a mystery," and the court pointed to testimony from a Senator indicating that it "is not common" for a bill to move so quickly out of committee.

The district court found that a net total of 116,668 people, or 3.9% of Kansas' population, had to be moved to meet population requirements, but noted that Ad Astra 2 moves 394,325 people, or 13.4% of the state population—significantly more than necessary to meet district population requirements.

The court further stated that "the map split known communities of interest, ignored public input, diluted minority votes, and constituted 'textbook gerrymandering.'" The court found that "Ad Astra 2

was designed intentionally and effectively to maximize Republican advantage,” relying on expert testimony to conclude that the plan “is an intentional, effective partisan gerrymander.” The court, again relying on expert testimony, found that “partisan intent predominated over the Guidelines and traditional redistricting criteria in the drawing of Ad Astra 2 and is responsible for the Republican advantage” in Ad Astra 2. The district court found that plaintiffs’ experts’ use of statewide elections “to measure the partisanship of simulated and enacted districts is a reliable methodology,” and concluded that “Ad Astra 2’s districts are less compact than they would be under a map-drawing process that adhered to the Guidelines and prioritized the traditional districting criterion of compactness.”

The district court, again crediting expert testimony, found that “Ad Astra 2 was designed to give Republicans a partisan advantage, and that the enacted plan exhibits extreme pro-Republican bias that cannot be explained by Kansas’s political geography or by adherence to the Guidelines or traditional redistricting criteria.” The court credited expert testimony that asserted splitting Lawrence from Douglas County diluted the votes of Democratic voters in the region and found that the experts’ evidence demonstrated “that Ad Astra 2 disregards communities of interest in support of partisan gains.”

In addition to its findings regarding partisan factors, the district court also stated that “Ad Astra 2 has high levels of racial dislocation” and concluded that the plan “intentionally and effectively dilutes the

voting power of Wyandotte County's minority communities." The court again credited plaintiffs' experts that testified that "racial minorities were moved among districts far more often than white Kansans and that they were divided between districts in a way that contravenes Kansas's racial geography and dilutes minority voting strength." The court further found that the new plan "has the effect of eliminating a performing minority crossover district," resulting in a "particularly pronounced" impact on minority Democratic voters "because the plan treats Democratic minority voters considerably worse than it treats white Democratic and white Republican voters."

The court also credited expert testimony that *Ad Astra 2* "negatively impacts the state's Native American community" because the new plan places the Prairie Band Potawatomi reservation into the first district, whereas under the prior plan, all four Native American reservations in Kansas were in the second district. In sum, the court concluded that "*Ad Astra 2*'s dilution of Democratic voting power will obstruct Plaintiffs' ability to elect and support their candidates of choice."

It is critical at this juncture to stop and observe that many of the lower court's fact-findings embed a form of question begging as to what—exactly—is the legal measuring stick doing the work behind the finding. Put another way, many of the district court's found facts are not stated in the form of a pure factual finding. Instead, they assume within them an unstated and unquestioned legal standard. For example, what counts as "treat[ing] Democratic minority voters considerably

worse than . . . white Democratic and white Republican voters”? By what standard is the district court measuring an “intentional[] and effective[] dilut[ion]” of the minority vote? As we will explain at greater length below, when a district court mixes questions of law and fact like this, disentangling them may be impossible on review. This is especially true when it is clear—as it is here—that the lower court’s findings of fact are permeated with and tainted by erroneous legal conclusions.

In any event, after these mixed conclusions of fact and law, the lower court then held the Kansas Constitution “prohibit[s] partisan gerrymandering” to any degree. The court believed it “neither necessary nor prudent” to “articulat[e] a bright-line standard” for political gerrymandering claims. Rather, it “suffice[d] for the Court’s purposes that a standard exists” for the present case. Relying on “opinions of the highest courts in other states”—rather than the text of the Kansas Constitution—the district court created its own test: (1) “the Legislature acted with the purpose of achieving partisan gain by diluting the votes of disfavored-party members” and (2) the map “will have the desired effect of substantially diluting disfavored-party members’ votes.” In applying this test, the district court relied on what it discerned as “partisan fairness metrics” and “neutral criteria.” Applying this test, the lower court found Ad Astra 2 to be an impermissible “intentional and effective partisan gerrymander” and concluded that Sub. SB 355 could not satisfy strict scrutiny.

The lower court then turned to plaintiffs’ race-based claims. Acknowledging that such claims sound in equal

protection, the district court held that the Kansas Constitution “affords separate, adequate, and greater” equal protection guarantees “than [does] the federal Constitution.” Following this, the district court devised and applied its own five factor test to decide that Ad Astra 2 was an impermissible racial gerrymander that also unconstitutionally diluted minority votes in violation of the Kansas Constitution. It acknowledged that the elements of such a claim—and whether they include a showing of discriminatory intent—is an “issue of first impression.” But it declined to decide whether a showing of intent was required because it determined Ad Astra 2 both “*intentionally* and effectively dilutes minority votes.” Under the legal tests crafted by the district court, this was sufficient, in its view, to find Ad Astra 2 violates the Kansas Constitution.

The district court permanently enjoined Kansas’ election officials “from preparing for or administering any primary or general congressional election under Ad Astra 2.” And it further ordered that the “Legislature shall enact a remedial plan in conformity with this opinion as expeditiously as possible.” The State immediately appealed to this court.

DISCUSSION

On appeal, the parties spar over several questions: (1) whether the Elections Clause bars state courts from reviewing reapportionment legislation for compliance with state law; (2) what standards this court should use when interpreting and applying the relevant provisions in the Kansas Constitution; (3) whether claims of partisan gerrymandering are justiciable; and

(4) whether Ad Astra 2 discriminates against minority voters. We consider each issue below.

But before doing so, we observe that while respecting the dissenters' disagreements with our constitutional reasoning and conclusions, rhetoric describing this outcome as a "stamp of approval" or "complicit" is out of place. Just because a court declines to overrule a legislative enactment does not mean the court has rubber stamped, endorsed, or somehow participated in that enactment. Indeed, "[c]ourts are only concerned with the legislative power to enact statutes, not with the wisdom behind those enactments. When a legislative act is appropriately challenged as not conforming to a constitutional mandate, the function of the court is . . . merely to ascertain and declare whether legislation was enacted in accordance with or in contravention of the constitution—and not to approve or condemn the underlying policy." *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, 348-49, 789 P.2d 541 (1990), *abrogated on other grounds by Miller v. Johnson*, 295 Kan. 636, 289 P.3d 1098 (2012), and *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 442 P.3d 509 (2019).

I. WE HAVE JURISDICTION TO HEAR PLAINTIFFS' CLAIMS

The Attorney General claims the Elections Clause of the United States Constitution bars any state court from considering the validity of legislatively enacted congressional district maps. The Elections Clause provides:

“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” U.S. Const. art. I, § 4.

The State frames its argument as a complete jurisdictional bar, arguing broadly that “when the state legislature missteps, the authority to correct it lies with Congress.” We are unpersuaded. The United States Supreme Court has never embraced this view of the Elections Clause. In 1932, the Supreme Court examined whether the Elections Clause “invest[ed] the legislature with a particular authority” which would “render[] inapplicable the conditions which attach to the making of state laws.” *Smiley v. Holm*, 285 U.S. 355, 365, 52 S. Ct. 397, 76 L. Ed. 795 (1932). The Court concluded that “the exercise of the authority must be in accordance with the method which the State has prescribed for legislative enactments,” finding “no suggestion in the [Elections Clause] of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State has provided that laws shall be enacted.” 285 U.S. at 367-68.

And in recent years, the Supreme Court has continued to reject similar arguments. See *Rucho v. Common Cause*, 588 U.S. ___, 139 S. Ct. 2484, 2495-96, 204 L. Ed. 2d 931 (2019) (rejecting the argument that “through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions

that only Congress can resolve”); *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*, 576 U.S. 787, 817-18, 135 S. Ct. 2652, 192 L. Ed. 2d 704 (2015) (“Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State’s constitution.”). In fact, the Supreme Court’s recent decision in *Rucho* expressly contemplates state court review of congressional reapportionment schemes for compliance with state law. 139 S. Ct. at 2507 (in a congressional redistricting challenge, the Court declined to find that partisan gerrymandering violated the U.S. Constitution, but noted that “state statutes and state constitutions can provide standards and guidance for state courts to apply”).

The Attorney General points us to a few recent statements of skepticism from individual Supreme Court justices toward this body of law. In 2021, the Supreme Court denied a petition for certiorari in *Republican Party of Pennsylvania v. Degraffenreid*, 592 U.S. ___, 141 S. Ct. 732, 209 L. Ed. 2d 164 (2021). The decision resulted in two dissenting opinions. Justice Thomas expressed that “petitioners presented a strong argument that the Pennsylvania Supreme Court’s decision violated the Constitution by overriding ‘the clearly expressed intent of the legislature’” because “the Federal Constitution, not state constitutions, gives state legislatures authority to regulate federal elections.” 141 S. Ct. at 733 (Thomas, J., dissenting). Justice Alito, joined by Justice Gorsuch, pointed out that the Elections Clause—which confers on state

legislatures the authority to make rules governing federal elections—”would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election.” 141 S. Ct. at 738 (Alito, J., dissenting). The following year, Justice Alito again dissented from the denial of an application for stay, joined by Justices Thomas and Gorsuch. *Moore v. Harper*, 595 U.S. ___, 142 S. Ct. 1089, 212 L. Ed. 2d 247 (2022) (Alito, J., dissenting). He expressed similar concern with the growing issue over the proper interpretation of the Elections Clause. Justice Kavanaugh agreed with Justice Alito’s position that the Court should review the Elections Clause issue. 142 S. Ct. 1089 (Kavanaugh, J., concurring).

But these statements are not controlling law—the justices making them do not even purport to make this claim. And we cannot accept the Attorney General’s invitation to ground our rulings on speculation concerning the future direction of Supreme Court jurisprudence. Instead, we are bound to follow United States Supreme Court precedent on questions of federal law. See *Arizona v. Evans*, 514 U.S. 1, 8-9, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) (“[S]tate courts . . . are *not* free from the final authority of” the Supreme Court when interpreting the U.S. Constitution); *State v. Tatro*, 310 Kan. 263, 272, 445 P.3d 173 (2019) (“[T]his court must follow the United States Supreme Court’s interpretation of the United States Constitution.”). We therefore conclude that we are not jurisdictionally barred from reviewing reapportionment

legislation for compliance with the Kansas Constitution.

II. THE GOVERNING LAW

1. *Anti-gerrymandering claims sound in equal protection*

The gravamen of plaintiffs' claims sound in equal protection. While the other provisions of the Kansas Constitution relied upon by the plaintiffs and the district court—Kan. Const. Bill of Rights, §§ 1, 3, 11, 20; art. 5, § 1—protect vital rights, they do not provide an independent basis for challenging the drawing of district lines.

Equal protection is at the heart of both partisan and racial gerrymandering or vote dilution claims. See *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 413-14, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006) (*LULAC*) (federal equal protection challenge to congressional redistricting map as unconstitutional partisan gerrymander); *Gill v. Whitford*, 585 U.S. ___, 138 S. Ct. 1916, 1925-26, 201 L. Ed. 2d 313 (2018) (same, despite allegations of violations of federal rights to free speech); *Rucho*, 139 S. Ct. at 2491 (same, despite allegations of violations of the Elections Clause, First Amendment, and Article I); *Shaw v. Reno*, 509 U.S. 630, 642, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993) (federal equal protection challenge to congressional redistricting map as unconstitutional racial gerrymander); *Miller v. Johnson*, 515 U.S. 900, 903-04, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995) (same).

Throughout this litigation, plaintiffs and the district court have attempted to decorate and enhance their

claims with various citations to rights found in other provisions in the Kansas Constitution, including the right to vote, and rights to free speech and association. Kan. Const. Bill of Rights, §§ 1, 3, 11, 20; art. 5, § 1. Plaintiffs and the district court also recite “procedural defects” in the process of drafting Sub. SB 355—including allegations that the listening tour was simply a box-checking exercise; Ad Astra 2 was adopted with unseemly rapidity; Ad Astra 2 was created in secret by Republicans; and the Legislature ignored the Guidelines. These procedural claims echo the concerns raised in *In re Validity of Substitute Senate Bill 563*, 315 Kan. ____ (2022) (No. 125,083 this day decided). As we determined there, however, such complaints do not rise to the level of constitutional objections. Therefore, the basis of each of plaintiffs’ claims remains foundationally grounded in equal protection guarantees.

The district court began with a discussion of plaintiffs’ equal protection claims under sections 1 and 2 of the Kansas Constitution Bill of Rights, stating that “partisan gerrymandering deprives voters of ‘*equal power* and influence in the making of laws which govern” them and asserting that the “goal of partisan gerrymandering is to eliminate the people’s authority over government by giving different voters vastly *unequal political power*.” (Emphases added.) The court then turned to the right to vote under Article 5, section 1, framing it in equal protection terms. It explicitly styled its analysis under equal protection, stating that “the right to vote is secured by *Sections 1 and 2* of the Kansas Bill of Rights and by Article 5, Section 1” (Emphasis added.) The court relied on sections 1 and 2

of the Kansas Constitution Bill of Rights in defining the right to vote as the right to have “equal legislative representation.”

Similarly, the lower court conflated the rights to free speech and assembly with the right to equal protection. First the district court claimed that partisan gerrymandering singles out a “specific class” of voters for “disfavored treatment.” Then, the district court held that “[w]hen the state engages in gerrymandering to negate that party’s power, it has the effect of ‘deblitat[ing]’ the *disfavored party* and ‘weaken[ing]’ its ability to carry out its core functions and purposes.” (Emphasis added.) This analysis is again steeped in equal protection principles.

At bottom, plaintiffs assert a variety of constitutional rights but the sole mechanism relied on for judicial enforcement of those rights is the constitutional guarantee of equal protection—a fact the district court effectively understood. *Any line drawing*, even one that violates equal protection guarantees, does not infringe on a stand-alone right to vote, the right to free speech, or the right to peaceful assembly. See *Rucho*, 139 S. Ct. at 2504 (“[T]here are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district.”); see also *Harper v. Hall*, 380 N.C. 317, 448, 868 S.E.2d 499 (2022) (Newby, C.J., dissenting) (“The fundamental right to vote on equal terms simply means that each vote should have the same weight. . . . [P]artisan gerrymandering has no significant impact

upon the right to vote on equal terms under the one-person, one-vote standard. . . . Partisan gerrymandering plainly does not place any restriction upon the espousal of a particular viewpoint.”), *petition for cert. docketed* March 21, 2022.

2. *Section 2 of the Kansas Constitution Bill of Rights is the textual grounding and location of our Constitution’s guarantee of equal protection to all citizens*

Traditionally we have held that under the Kansas Constitution Bill of Rights, sections 1 and 2 offer the same guarantees of due process and equal protection as provided in the Fourteenth Amendment of the United States Constitution. *Farley v. Engelken*, 241 Kan. 663, 667, 740 P.2d 1058 (1987) (Sections 1 and 2 of the Kansas Constitution Bill of Rights “are given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law.”). At times our court has attempted to distinguish between the two sections as providing equal protection for “individual rights” (Section 1) and “political rights” (Section 2). See *State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22 (2005) (“Section 1 applies in cases . . . when an equal protection challenge involves individual rights.”); *Atchison Street Rly. Co. v. Mo. Pac. Rly. Co.*, 31 Kan. 660, Syl. ¶ 3, 3 P. 284 (1884) (“Section 2 is devoted to matters of a political nature.”).

We have recently clarified that Kansas’ section 1 has no textual counterpart in the U.S. Constitution and therefore has its own independent meaning and effect. See *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610,

624, 440 P.3d 461 (2019) (“[T]his side-by-side comparison reveals, section 1 contains the following words not found in the Fourteenth Amendment: ‘All men are possessed of equal and inalienable natural rights.’ In fact, no provision of the United States Constitution uses the term ‘natural rights’”); 309 Kan. at 688 (Biles, J., concurring) (“As both the majority and dissent point out, section 1 of the Kansas Constitution Bill of Rights differs from any federal counterpart”); 309 Kan. at 763 (Stegall, J., dissenting) (Recognizing section 1 provides unique protections different from the federal Constitution: “[o]f course, the language of the Declaration does not carry ‘the force of organic law’ in the federal Constitution as it does in Kansas.”).

After our decision in *Hodes* (giving a substantive rights effect to section 1), it is clear that the textual grounding of equal protection guarantees contained in the Kansas Constitution Bill of Rights is firmly rooted in the language of section 2, which states:

“All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency.”
Kan. Const. Bill of Rights, § 2.

Even though *Hodes* changed the way in which we interpret section 1, it has not changed our historical and fundamental interpretation of the scope of equal

protection found in section 2. That is to say, section 2 is “given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law.” See *Farley*, 241 Kan. at 667; *State ex rel. Tomasic v. Kansas City, Kansas Port Authority*, 230 Kan. 404, 426, 636 P.2d 760 (1981); *State v. Wilson*, 101 Kan. 789, 795-96, 168 P. 679 (1917). Put even more clearly, the equal protection guarantees found in section 2 are coextensive with the equal protection guarantees afforded under the Fourteenth Amendment to the United States Constitution. Compare U.S. Const. amend. XIV, § 1 (“No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); with Kan. Const. Bill of Rights § 2 (“[A]ll free governments are . . . instituted for [the people’s] equal protection and benefit.”). Therefore, Kansas courts shall be guided by United States Supreme Court precedent interpreting and applying the equal protection guarantees of the Fourteenth Amendment of the federal Constitution when we are called upon to interpret and apply the coextensive equal protection guarantees of section 2 of the Kansas Constitution Bill of Rights.

III. PLAINTIFFS’ PARTISAN GERRYMANDERING CLAIMS

1. *The political question doctrine*

In addressing plaintiffs’ claim that Ad Astra 2 is an impermissible partisan gerrymander, we are confronted first with what has come to be known as the “political question doctrine.” This legal rule guiding judicial decision-making is nearly as old as the Republic, going all the way “back to the great case of

Marbury v. Madison.” § 15 “Case or Controversy”—Political Questions, 20 Fed. Prac. & Proc. Deskbook § 15 (2d ed.).

There, Chief Justice John Marshall “expressed the view that the courts will not entertain political questions even though the questions involve actual controversies.” § 15 “Case or Controversy”—Political Questions, 20 Fed. Prac. & Proc. Deskbook § 15. The Court in *Marbury* held that the executive branch (and by extension, the legislative branch) is vested “with certain important political powers” and those branches are accountable only to their “country”—that is the voters—and to their “own conscience” because the “subjects are political.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66, 2 L. Ed. 60 (1803).

As the political question doctrine developed, it became clear that in certain circumstances a respect for the coequal and coordinate executive and legislative branches of government demanded that the judicial branch admit itself not competent to rule on matters purely political. That is, the “political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations” that are inextricable from the exercise of political discretion vested in the political branches of government. 16 C.J.S. Constitutional Law § 392.

Judges called on to determine when the political question doctrine is implicated must ask themselves—among other things—whether the controversy is capable of resolution within the competency of the judicial branch. That is, do the traditional tools of judging—such as clear, neutral, and

“judicially discoverable and manageable standards”—exist as a compass against which to measure the true north of any controversy? *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). Or, would judges be left to simply substitute their own “initial policy determination” for that of the other branches? 369 U.S. at 217.

If resolving a controversy is outside the scope of the competence of the judiciary, it is said to be “nonjusticiable”—that is, it is a matter committed by the structure of our Constitution to the legislative or executive branches of government. And these branches are ultimately accountable both to the voters and their own conscience. And while common sense and history may not be able to speak to the effect of conscience on political decision-makers, democratic accountability wielded by voters is woven into the very fabric of our government and will—undoubtedly—have its say in the matter.

This outcome is not an unfortunate accident or a mistake in our constitutional structure, but rather “a consequence of the separation of powers among the legislative, executive, and judicial branches.” *Gannon v. State*, 298 Kan. 1107, 1119, 1136-37, 319 P.3d 1196 (2014). And this very separation of powers is one of the surest timbers guaranteeing that the house of liberty stands firm and lasts across the centuries amid the swirling winds of any particular political issue *du jour*.

2. *Partisanship in district line drawing is permissible*

Plaintiffs do suggest the application of a clear standard to this dispute. They simply claim that partisan gerrymandering is verboten under Kansas law. That is, they claim that any consideration by the Legislature of partisan factors in deciding where to draw district lines is offensive to constitutional principles. They ask Kansas courts to adopt a bright line standard of zero tolerance and mandate that only politically neutral factors be used by the Legislature. And the district court agreed, holding that the Kansas Constitution “prohibit[s] partisan gerrymandering.”

The dissent takes issue with this characterization. While ultimately, how we characterize plaintiffs’ political gerrymandering claims does not impact our analysis, it is helpful to understand exactly why such a bright line rule is attractive. In fact, at oral argument, counsel for the Frick plaintiffs defined “political gerrymandering” as *any* line drawing “with party in mind.” In response to the question, “How is partisan gerrymandering a legitimate government function?” counsel for plaintiffs responded, “I don’t think it is legitimate. . . .To say that it’s gone on for a long time and it seems inevitable doesn’t mean it’s legitimate at all. . . . I don’t think that partisan gerrymandering has a legitimate interest.”

If this was the law in Kansas, resolving claims of partisan gerrymandering would indeed be justiciable. A bright line prohibition is certainly a judicially manageable standard. But this has never been the law in Kansas, and in reaching its conclusion the district

court completely ignored our large body of caselaw on this subject. For we have regularly and repeatedly held that the Legislature is constitutionally permitted to consider partisanship when drawing district lines. And this rule is consistent with longstanding United States Supreme Court precedent.

Over four decades ago we wrote: “Politics and political considerations are inseparable from districting and apportionment.” *In re House Bill No. 2620*, 225 Kan. 827, 840, 595 P.2d 334 (1979) (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753, 93 S. Ct. 2321, 37 L. Ed. 2d 298 [1973]). We have repeatedly recognized the reality that the “political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. . . . [I]t requires no special genius to recognize the political consequences of drawing a district line along one street rather than another.” *In re House Bill No. 2620*, 225 Kan. at 840 (quoting *Gaffney*, 412 U.S. at 753). Considering these hard political truths inherent in the redistricting process, we reached the inescapable conclusion that the “reality is that districting inevitably *has and is intended to have* substantial political consequences.” (Emphasis added.) *In re House Bill No. 2620*, 225 Kan. at 840 (quoting *Gaffney*, 412 U.S. at 753). The district court cannot write these hard truths out of existence with the fiat power of its judicial pen. Our precedent (and prudent judgment) counsels a more modest approach to questions that touch the core constitutional principle of separation of powers and the ongoing dictate that the coordinate departments of government accord one another the due and proper

respect expected and owed under our unique constitutional arrangements.

Given this, if the redistricting process is intended to have “substantial political consequences” it is no surprise that our court has consistently rejected pleas to establish a bright line prohibition on politics in the redistricting process. *In re 2002 Substitute for Senate Bill 256*, 273 Kan. 731, 734, 45 P.3d 855 (2002). For example, we have described the legislative goal of “safely retaining seats for the political parties” as a “legitimate political goal.” *2002 Substitute for House Bill 2625*, 273 Kan. 715, 722, 44 P.3d 1266 (2002). In 1989, we rejected the claim that legislatively drawn lines were unlawful because “political considerations prevailed over stated apportionment guidelines” on the grounds that “any plan would . . . have adverse consequences for incumbents who are pitted against each other.” *In re Substitute for House Bill No. 2492*, 245 Kan. 118, 128, 775 P.2d 663 (1989). In yet another redistricting case, we plainly held that objections to legislative line drawing on the mere assertion that “there was partisan political gerrymandering in redistricting” could never “reveal a fatal constitutional flaw” without more. *In re Senate Bill No. 220*, 225 Kan. 628, 637, 593 P.2d 1 (1979).

The United States Supreme Court, too, has never suggested partisanship is unlawful if it touches the legislative redistricting process. In fact, the opposite. In *Vieth v. Jubelirer* the Court wrote the United States Constitution “clearly contemplates districting by political entities” and the process “unsurprisingly . . . turns out to be root-and-branch a matter of politics.”

541 U.S. 267, 285-86, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004). As such, “*partisan districting is a lawful and common practice* [which] means that there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation.” (Emphasis added.) 541 U.S. at 285-86. The operative principle is clear.

And while the plurality holding of *Vieth* (that partisan gerrymandering claims are nonjusticiable) did not gain majority support on the Court until 2019 in *Rucho*, there has long been widespread agreement among justices across the spectrum that partisan factors are *legitimate considerations in the districting process*. For example, in dissent in *Vieth*, Justice Stephen Breyer wrote that using “purely political boundary-drawing factors” can “find justification in . . . desirable democratic ends” even though it may be “harmful to the members of one party.” 541 U.S. at 360 (Breyer, J., dissenting).

This principle is commonplace in the United States Supreme Court’s redistricting jurisprudence. “We have never denied that apportionment is a political process, or that state legislatures could pursue legitimate secondary objectives as long as those objectives were consistent with a good-faith effort to achieve population equality at the same time.” *Karcher v. Daggett*, 462 U.S. 725, 739, 103 S. Ct. 2653, 77 L. Ed. 2d 133 (1983). In a decision written by Justice Elena Kagan the Court described “partisan advantage” as a legitimate consideration in district line drawing on an equal footing with other traditional considerations such as “compactness” and “respect for political subdivisions.”

Cooper v. Harris, 581 U.S. ____, 137 S. Ct. 1455, 1464, 197 L. Ed. 2d 837 (2017); see also *Easley v. Cromartie*, 532 U.S. 234, 239, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001) (recognizing that “the creation of a safe Democratic seat” was a “constitutional political objective”); *Gaffney*, 412 U.S. at 753-54 (legislatures may validly “work with . . . political . . . data” and may “seek . . . to achieve the political or other ends of the State, its constituents, and its officeholders”).

We need not belabor the point.

3. *Claims of excessive partisan gerrymandering are nonjusticiable in Kansas*

Given that the Legislature may appropriately and lawfully consider partisan factors in redistricting, at the heart of a claim of partisan gerrymandering is not merely that partisan factors were used, but rather that they were used “too much.” The lower court at one point appears to acknowledge this by quoting our prior caselaw declining to find excessive partisan gerrymandering in any previous case. The district court plausibly drew the lesson from these decisions that we had reached the “merits” of older partisan gerrymandering claims. But this overreads those decisions. In fact, our predecessors never actually had to ask the crucial question—how much is too much? And are there any manageable and neutral judicial standards by which judges can decide that question without resort to our own partisan biases?

These are not new questions for courts and judges. In *LULAC*, the Court put the matter succinctly when it described the plaintiff’s insurmountable problem in

trying to articulate “a standard for deciding *how much partisan dominance is too much.*” (Emphasis added.) 548 U.S. at 420. This is precisely the problem today’s plaintiffs cannot overcome. This is because a “permissible intent—securing partisan advantage—does not become constitutionally impermissible . . . when that permissible intent ‘predominates.’” *Rucho*, 139 S. Ct. at 2502-03.

Essentially, the *Rucho* Court struggled to know whether there can ever be “too much” of a legitimate legislative purpose in the process of state law-making. Its answer, in sum, was—*maybe*, but without codified law to guide judges in knowing when too much partisanship becomes so unfair as to offend constitutional principles, the question cannot be answered. In the parlance of justiciability, the question presents no “clear, manageable and politically neutral” judicial standard. 139 S. Ct. at 2500.

The Court explained further that:

“[I]t is not even clear what fairness looks like in this context. There is a large measure of ‘unfairness’ in any winner-take-all system. Fairness may mean a greater number of competitive districts. Such a claim seeks to undo packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. As Justice White has pointed out, ‘[i]f all or most of the districts are competitive . . . even a narrow statewide

preference for either party would produce an overwhelming majority for the winning party in the state legislature.’

“On the other hand, perhaps the ultimate objective of a ‘fairer’ share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its ‘appropriate’ share of ‘safe’ seats. Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party.

“Or perhaps fairness should be measured by adherence to ‘traditional’ districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents. But protecting incumbents, for example, enshrines a particular partisan distribution. And the ‘natural political geography’ of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts. As Justice Kennedy has explained, traditional criteria such as compactness and contiguity ‘cannot promise political neutrality when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not.’

“Deciding among just these different visions of fairness (you can imagine many others) poses

basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is ‘fair’ in this context would be an ‘unmoored determination’ of the sort characteristic of a political question beyond the competence of the federal courts. [Citations omitted.]” 139 S. Ct. at 2500.

We find the reasoning of *Rucho* persuasive and expressly adopt it here. But that does not end the inquiry at the state level.

Rucho declared that it “is vital in such circumstances that the Court act only in accord with especially clear standards . . . [because] ‘[w]ith uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.’” 139 S. Ct. at 2498. And while *Rucho* could discern no such “especially clear standards” in federal law, the Court left open the possibility that such standards might exist under state law. As such, *Rucho* held that while claims of political gerrymandering were nonjusticiable political questions at the federal level, such claims may be justiciable at the state level.

We agree with the Court’s characterization of its holding—that it “does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void.” 139 S. Ct. at 2507. This is because states are free to adopt

clear standards expressly setting limits on partisan gerrymandering. Such clear standards can, the Court readily acknowledged, provide courts with the necessary tools to adjudicate claims of excessive partisan gerrymandering. The *Rucho* court pointed to Florida as a good example: “In 2015, the Supreme Court of Florida struck down that State’s congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution.” 139 S. Ct. at 2507. The Court then noted that “[t]he dissent wonders why we can’t do the same. The answer is that there is no ‘Fair Districts Amendment’ to the Federal Constitution. *Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.*” (Emphasis added.) 139 S. Ct. at 2507.

And that brings us squarely to the question we must now answer: Are claims of excessive partisan gerrymandering justiciable under the Kansas Constitution? Whether a claim is nonjusticiable because it may be a political question is a question of law over which we exercise unlimited review. *Gannon*, 298 Kan. at 1118, 1136.

We described Kansas’ political question doctrine in *Gannon*, 298 Kan. at 1119, 1136-37. *Gannon* explained that Article II, Section 2 of the United States Constitution limits the judicial power to “Cases” or “Controversies.”

“But because Article 3 of the Kansas Constitution does not include any ‘case’ or ‘controversy’ language, our case-or-controversy requirement stems from the separation of

powers doctrine embodied in the Kansas constitutional framework. That doctrine recognizes that of the three departments or branches of government, '[g]enerally speaking, the legislative power is the power to make, amend, or repeal laws; the executive power is the power to enforce the laws, and the judicial power is the power to interpret and apply the laws *in actual controversies*.' (Emphasis added.) And Kansas, not federal, law determines the existence of a case or controversy, *i.e.*, justiciability. But this court is not prohibited from considering federal law when analyzing justiciability.

“Under the Kansas case-or-controversy requirement, courts require that (a) parties have standing; (b) issues not be moot; (c) issues be ripe, having taken fixed and final shape rather than remaining nebulous and contingent; and (d) *issues not present a political question*. . . .

. . . .

“The United States Supreme Court has held: ‘The nonjusticiability of a political question is primarily a function of the separation of powers.’ In other words, it is an acknowledgment of ‘the relationship between the judiciary and the other branches or departments of government.’ . . .

“As a result, ‘[t]he governments, both state and federal, are divided into three departments, each of which is given the powers and functions appropriate to it. Thus a dangerous

concentration of power is avoided, and also the respective powers are assigned to the department best fitted to exercise them.’ As a consequence of the separation of powers among the legislative, executive, and judicial branches, ‘[q]uestions in their nature political . . . can never be made in this court.’ [Citations omitted.]” (Emphasis added.) 298 Kan. at 1119, 1137.

To determine if a political question exists, we look for the presence of one or more of the six characteristics established by the United States Supreme Court in *Baker*, 369 U.S. at 217. We will dismiss a case as nonjusticiable because it is a political question only if at least one of these characteristics “is inextricable from the case” before us. 369 U.S. at 217. Here we are concerned exclusively with the *Rucho* question—is there a judicially discoverable and manageable standard in Kansas law that will guide a court in resolving any claim of excessive partisan gerrymandering? And unlike in Florida and other of our sister states that have codified limits on partisan gerrymandering, in Kansas the answer (for now) must be no.

As explained above, the lower court here adopted the most extreme version of plaintiffs’ arguments—that any consideration of partisanship in district line drawing is constitutionally prohibited—and in so doing avoided the justiciability problem. That legal starting point is, however, demonstrably wrong.

Given this, the plaintiffs here have also proposed a variety of different metrics for measuring “fairness”

and answering the “how much is too much” question. But none of these metrics have a foundation in Kansas law—either statutory enactment or constitutional text. Plaintiffs denounce the Legislature’s drawing of Ad Astra 2, criticizing it as an “abomination”; as giving an “unfair and unearned advantage” to Republicans; as being “devastating” for Lawrence Democrats; and because it “disincentivizes Democratic voter mobilization, voter registration, voter turnout, [and] fundraising,” among other things. But as one author has put it, “[s]uch criticism assumes too much. One cannot consider gerrymandering the antithesis of fair representation unless one adopts some definition of fair representation in the first place.” Moore, *A “Frightful Political Dragon” Indeed: Why Constitutional Challenges Cannot Subdue the Gerrymander*, 13 Harv. J.L. & Pub. Pol’y 949, 971 (1990). “Just as no configuration of boundary lines can claim to be natural or inherently just, so too no seat-to-vote ratio can claim to be natural or inherently just.” 13 Harv. J.L. & Pub. Pol’y at 973.

In other words, before we can even begin evaluating whether an alleged partisan gerrymander is unconstitutional, we would first need to determine what our baseline definition of “fairness” is. And as the *Rucho* Court explained, deciding among different proposed metrics of fairness poses questions that are political, not legal. Any decisions made about redistricting—even if made by a neutral, independent court—would inherently involve making an initial policy determination. See *Gaffney*, 412 U.S. at 753-54 (noting that the Court has not “attempted the impossible task of extirpating politics from what are

the essentially political processes of the sovereign States”).

Several other states have solved this problem by codifying such clear standards in their laws. Some states have mandated at least some of the traditional districting criteria for their mapmakers, and others have outright prohibited partisan favoritism in redistricting. See, e.g., Ohio Const. art. 11, § 6 (directing the Ohio redistricting commission to draw compact districts in a way that “correspond[s] closely to the statewide preferences of the voters of Ohio” and avoid drawing plans “primarily to favor or disfavor a political party”); Md. Const. art. III, § 4 (directing the Legislature to give “[d]ue regard” to “boundaries of political subdivisions” when drawing districts); Mich. Const. art. 4, § 6 (establishing an independent redistricting commission and requiring the commission to abide by specific procedural steps as well as a set of substantive criteria, including that the districts be “geographically contiguous”; “reflect the state’s diverse population and communities of interest”; “reflect consideration of county, city, and township boundaries”; “be reasonably compact”; “not provide a disproportionate advantage to any political party”; and not “favor or disfavor an incumbent”); Mo. Const. art. III, § 3 (“Districts shall be [designed] in a manner that achieves both partisan fairness and, secondarily, competitiveness ‘Partisan fairness’ means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency.”); Iowa Code § 42.4(5) (2016) (“No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of

Congress, or other person or group.”); N.Y. Const. art. III, § 4 (“Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties. The commission shall consider the maintenance of cores of existing districts, of pre-existing political subdivisions, including counties, cities, and towns, and of communities of interest.”); Colo. Const. art. V, § 44 (“The practice of political gerrymandering, whereby congressional districts are purposefully drawn to favor one political party or incumbent politician over another, must end.”).

Kansas is substantially different from states having codified a constitutional duty to prohibit partisan gerrymandering. And we likewise differ from still other states that—lacking a clear constitutional mandate—have nevertheless discerned clear standards in their case precedent. See *Harper v. Hall*, 380 N.C. 317, 364, 385, 389, 868 S.E.2d 499 (2022) (discussing history of reapportionment litigation in North Carolina, noting N.C. Const. art. II, §§ 3, 5 incorporates “traditional neutral” principles of reapportionment but “does not include ‘partisan advantage’” and the state’s past gerrymandering cases provide “ample guidance as to possible bright-line standards that could be used to distinguish presumptively constitutional redistricting plans from partisan gerrymanders”); *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (recognizing vote dilution theory in reapportionment dispute).

Unlike these states, Kansas has not adopted such standards. For this reason, we cannot follow the

decisions of other state supreme courts—such as the North Carolina Supreme Court in *Harper*, a decision relied on heavily by plaintiffs and the lower court—that have found their states to be within the *Rucho* exception of states with “statutes and . . . constitutions” that “provide standards and guidance for state courts to apply.” *Rucho*, 139 S. Ct. at 2507. In the absence of statutory or constitutional standards in Kansas—or even standards in our case precedent—plaintiffs point to the substantive content of the Guidelines and ask us to find standards of “fairness” there. But as already mentioned, the Legislature has never adopted the Guidelines. They certainly are not found in our Constitution. As such, the Guidelines are not “actual rules”—which is to say they are not law. *Apodaca v. Willmore*, 306 Kan. 103, 136, 392 P.3d 529 (2017) (Stegall, J., dissenting) (describing the legal difference between guidelines and rules).

During one Senator’s testimony at trial, he struggled to articulate how much authority the Guidelines carried—he described them as “sort of a promise to the people.” At most, the Guidelines represent a “promise” made only by the House Committee on Redistricting (the only formal committee of legislators to actually adopt them). And in any event, internal operating procedures of the Legislature—and the Guidelines cannot even go so far as to claim this status—are not binding authority that can give rise to a legal challenge that courts can adjudicate. See *Nixon v. United States*, 506 U.S. 224, 236, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993) (declining to “open[] the door of judicial review to the procedures used by the Senate”).

Considering all of this, we conclude that until such a time as the Legislature or the people of Kansas choose to follow other states down the road of limiting partisanship in the legislative process of drawing district lines, neither the Kansas Constitution, state statutes, nor our existing body of caselaw supply judicially discoverable and manageable standards “for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral.” *Rucho*, 139 S. Ct. at 2500. We hold that the question presented is nonjusticiable as a political question, at least until such a time as the Legislature or the people of Kansas choose to codify such a standard into law.

IV. PLAINTIFFS’ RACE-BASED CLAIMS

1. *The district court applied the wrong legal standards to evaluate plaintiffs’ racial discrimination claims*

In addition to claims of partisan gerrymandering, plaintiffs also alleged that the Legislature engaged in unconstitutional race-based discrimination when it enacted Ad Astra 2. Such claims brought under federal law arise under the Fourteenth Amendment’s equal protection guarantees. See, e.g., *Cooper*, 137 S. Ct. at 1463 (“The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans.”); *Miller*, 515 U.S. at 904 (the “central mandate” of the Equal Protection Clause of the Fourteenth Amendment is “racial neutrality in governmental decisionmaking”); *Shaw*, 509 U.S. at 641 (recognizing that minority vote dilution “schemes violate the Fourteenth Amendment when they are

adopted with a discriminatory purpose and have the effect of diluting minority voting strength”).

As we have already explained, we will adhere to equal protection precedent from the United States Supreme Court when applying the coextensive equal protection guarantees found in section 2 of the Kansas Constitution Bill of Rights. The district court, however, concluded that the federal equal protection standards were inapplicable because “Kansas’s guarantee of equal benefit ‘affords separate, adequate, and greater rights than the federal Constitution.’” In doing so, the district court erred because, as explained above, the equal protection guarantees contained in section 2 are coextensive with the same equal protection guarantees enshrined in the Fourteenth Amendment. The lower court then compounded this legal error by crafting its own set of “five non-exclusive factors”—unmoored from precedent—for examining racial gerrymandering and minority voter dilution claims:

“(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.”

In support of this newly articulated test, the district court provided just one citation to *Jones v. Kansas*

State University, 279 Kan. 128, 145, 106 P.3d 10 (2005). But *Jones* has no connection to redistricting, tests for racial discrimination, discriminatory intent, or the like. The page in *Jones* the district court cited to is merely a recitation of our familiar “fundamental rule” governing statutory interpretation “that the intent of the legislature governs if that intent can be ascertained.” The district court erred in departing from the well-established and robust legal standards that abound in United States Supreme Court caselaw governing race-based claims made in redistricting challenges.

2. Section 2 protects against two distinct types of race-based decision-making by the Legislature in drawing district lines

Government decision-making on the basis of race is antithetical to the principles of equal protection enshrined in both the Fourteenth Amendment and in section 2 of the Kansas Constitution Bill of Rights. The equal protection guarantees found in section 2, like the Fourteenth Amendment, protect against two distinct kinds of racial discrimination in the drawing of district lines. First, section 2 protects against racial gerrymandering which occurs when a legislative body uses race as the predominant factor in choosing where to draw the lines. Second, section 2 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. The United States Supreme Court has set forth explicit legal tests to be applied to each of these distinct claims,

and we expressly adopt those same tests to apply when those challenges are made under section 2 of the Kansas Constitution Bill of Rights.

First, a plaintiff bringing a racial gerrymandering claim must demonstrate at the outset “that ‘race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.’” *Cooper*, 137 S. Ct. at 1463. Determining which redistricting factor predominates presents a “most delicate task” for courts, *Miller*, 515 U.S. at 905, because “crucially, political and racial reasons are capable of yielding similar oddities in a district’s boundaries. That is because, of course, ‘racial identification is highly correlated with political affiliation.’” *Cooper*, 137 S. Ct. at 1473. As the Supreme Court has expressly recognized:

“The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.” *Miller*, 515 U.S. at 916.

A plaintiff can cross this threshold by showing that the Legislature subordinated lawful, race-neutral districting factors—such as compactness, respect for political subdivisions, and partisan advantage—to unlawful racial considerations. *Cooper*, 137 S. Ct. at

1463-64; see also *Bush v. Vera*, 517 U.S. 952, 971-73, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996) (finding that the “extreme and bizarre” shape, paired with “overwhelming evidence that that shape was essentially dictated by racial considerations of one form or another” “reveal that political considerations were subordinated to racial classification” because they were “unexplainable in terms other than race”); *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. ___, 137 S. Ct. 788, 798, 197 L. Ed. 2d 85 (2017) (“[T]he constitutional violation’ in racial gerrymandering cases stems from the ‘racial purpose of state action, not its stark manifestation.’ The Equal Protection Clause does not prohibit misshapen districts. It prohibits unjustified racial classifications.” [Citation omitted.]); *Shaw*, 509 U.S. at 643 (“Classifications of citizens solely on the basis of race ‘are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.’”).

Plaintiffs “may make the required showing through ‘direct evidence’ of legislative intent, ‘circumstantial evidence of a district’s shape and demographics,’ or a mix of both.” *Cooper*, 137 S. Ct. at 1463-64; see *Hunt v. Cromartie*, 526 U.S. 541, 549-50, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999).

Once plaintiffs have established that race was the predominant factor in how the lines were drawn, the burden shifts to the State to demonstrate that the legislation is narrowly tailored to achieve a compelling interest. *Cooper*, 137 S. Ct. at 1464; *Bethune-Hill*, 137 S. Ct. at 800-01; *Vera*, 517 U.S. at 958, 962 (“Strict scrutiny does not apply merely because redistricting is

performed with consciousness of race. . . . For strict scrutiny to apply, traditional districting criteria must be *subordinated to race*.”). Compliance with the federal Voting Rights Act may be a compelling state interest. *Cooper*, 137 S. Ct. at 1459 (“This Court has long assumed that one compelling interest is compliance with the Voting Rights Act of 1965 [VRA or Act]. When a State invokes the VRA to justify race-based districting, it must show [to meet the ‘narrow tailoring’ requirement] that it had ‘good reasons’ for concluding that the statute required its action.”).

Other evidence that the Court has considered probative and significant in applying its “predominant factor” test has included direct testimony that racial quotas were set as goals to be met by the legislative body. See *Vera*, 517 U.S. at 969-70 ([T]he “testimony of state officials . . . affirmed that ‘race was the primary consideration in the construction of District 30.’”). The Court also often looks to the shapes of the districts to see if it is “exceedingly obvious” that the drawing of the lines was a deliberate attempt to draw minority groups in or out of the district. See *Miller*, 515 U.S. at 917 (“[T]he drawing of narrow land bridges to incorporate within the district outlying appendages containing nearly 80% of the district’s total black population was a deliberate attempt to bring black populations into the district.”). But even a bizarre shape is not sufficient by itself; rather, it is a relevant factor because “it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature’s dominant and controlling rationale.” *Bethune-Hill*, 137 S. Ct. at 798. Therefore the Court, when considering shape, has done so in conjunction

with all other relevant factors to see if their combination is “unexplainable in terms other than race.” *Vera*, 517 U.S. at 972.

Additional factors the Court has examined in making this inquiry have included the racial densities in the population; whether testimony of state officials affirm that race was the primary consideration in the construction of a district; if the districting software used by the State provides only racial data at the block-by-block level; if there were “bizarre district lines” which were “tailored perfectly to maximize minority population” but were “far from the shape that would be necessary to maximize the Democratic vote” in the district; if the State had compiled detailed racial data but made no similar attempts to compile equivalent data regarding other communities; and if there were any conflicts or inconsistencies between the enacted plan and traditional redistricting criteria. *Miller*, 515 U.S. at 917; *Vera*, 517 U.S. at 967-73; *Bethune-Hill*, 137 S. Ct. at 799.

The Court has emphasized that in considering this kind of evidence, courts should examine whether “the legislature ‘placed’ race ‘above traditional districting considerations in determining *which* persons were placed *in appropriately apportioned districts*”—or “[i]n other words, if the legislature must place 1,000 or so additional voters in a particular district in order to achieve an equal population goal, the ‘predominance’ question concerns *which* voters the legislature decides to choose, and specifically whether the legislature predominately uses race as opposed to other, ‘traditional’ factors when doing so.” *Alabama*

Legislative Black Caucus v. Alabama, 575 U.S. 254, 273, 135 S. Ct. 1257, 191 L. Ed. 2d 314 (2015).

Second, a plaintiff may bring a minority voter dilution claim under section 2 of the Kansas Constitution Bill of Rights. This 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. *Abbott v. Perez*, 585 U.S. ____, 138 S. Ct. 2305, 2314, 201 L. Ed. 2d 714 (2018). The harm caused by vote dilution "arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district." *Gill*, 138 S. Ct. at 1931.

The evidentiary threshold for bringing a minority vote dilution claim in a single-member district is necessarily high. Plaintiffs bringing such a claim must first show three "threshold conditions": (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. *Grove 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). If a plaintiff fails to establish these three points, "there neither has been a wrong nor can [there] be a remedy." 507 U.S. at 40-41.

If all three preconditions are established, the next step is to consider the "totality of circumstances" to determine whether, as a result of the challenged plan,

plaintiffs do not have an equal opportunity to participate in the political process and to elect candidates of their choice. *LULAC*, 548 U.S. at 425-26; see *Gingles*, 478 U.S. at 46; *2002 Substitute for House Bill 2625*, 273 Kan. at 720. Plaintiffs must establish that the totality of the circumstances shows that they lack equal opportunity before they can prevail on a vote dilution claim. *Bartlett v. Strickland*, 556 U.S. 1, 11-12, 24, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009) (“[O]nly when a party has established the [three] requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances. . . . Majority-minority districts are only required if all three . . . factors are met . . .”).

Evidence the Court has considered probative and significant in applying these standards to a minority voter dilution claim has included the list of factors contained in the Senate Report on the 1982 amendments to the Voting Rights Act, which includes considering the (1) history of voting-related discrimination in the state; (2) the extent to which voting in the elections of the state is racially polarized; (3) the extent to which the state has used voting practices tending to enhance opportunity for discrimination against the minority group; (4) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (5) the use of overt or subtle racial appeals in political campaigns; and (6) the extent to which members of the minority group have been elected to public office in the jurisdiction. *LULAC*, 548 U.S. at 426; *Johnson v. De*

Grandy, 512 U.S. 997, 1010 n.9, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994); *Gingles*, 478 U.S. at 36-38.

We note that while most vote dilution claims now arise in the context of the federal Voting Rights Act, they are undergirded by the same equal protection principles that preexist the VRA and simultaneously protect against unlawful minority vote dilution. See *Holder v. Hall*, 512 U.S. 874, 893 n.1, 114 S. Ct. 2581, 129 L. Ed. 2d 687 (1994) (Thomas, J., concurring) (explaining that “prior to the amendment of the Voting Rights Act in 1982, [vote] dilution claims typically were brought under the Equal Protection Clause. . . . The early development of our voting rights jurisprudence in those cases provided the basis for our analysis of vote dilution under the amended § 2 in *Thornburg v. Gingles*, 478 U.S. 30 [1986].”); see also McLoughlin, *Section 2 of the Voting Rights Act and City of Boerne: The Continuity, Proximity, and Trajectory of Vote-Dilution Standards*, 31 Vt. L. Rev. 39, 75-76 (2006) (“[A] strong conceptual link exists between the constitutional and statutory standards because dilutive effect is understood as essentially the same in both systems. Even if constitutional vote-dilution suits require additional proof of intent, the relationship between *Gingles*, *Rogers*, and the 1982 Amendments indicates that the injury targeted by the statute is identical to the constitutional injury with respect to the meaning of diminished clout in voting [T]he Court has never had an unconstitutional vote-dilution case involving single-member districts [b]ut *Gingles* suggests that at minimum, its concept of diluted voting clout is no different from what the Court would look for in examining discriminatory effects in a constitutional

vote-dilution case.”); Pitts, *Georgia v. Ashcroft: It’s the End of Section 5 As We Know It (and I Feel Fine)*, 32 Pepp. L. Rev. 265, 310-11 (2005) (“[T]he Section 2 standard strongly resembles the constitutional standard for proving unconstitutional vote dilution. . . . [T]he evidentiary factors considered under both the constitutional and statutory standards are nearly, though by no means precisely, identical.”).

The dissent contends the three “threshold conditions” required to show race-based vote dilution are only a function of the Voting Rights Act and are unnecessary if an equal protection vote dilution claim is made. We disagree. First, this understanding is at odds with the Court’s guidance in *Grove*. Second, we have found no decision in which a federal appeals court has concluded that redistricting, “although not in violation of section 2, unconstitutionally dilutes minority voting strength.” *Johnson v. DeSoto County Bd. of Comm’rs*, 204 F.3d 1335, 1344 (11th Cir. 2000). Thus, federal courts have continued to apply the three “threshold conditions” required for a vote dilution claim under the VRA to similar claims asserted under the Equal Protection Clause. 204 F.3d at 1344 (“[T]he Supreme Court, historically, has articulated the same general standard, governing the proof of injury, in both section 2 and constitutional vote dilution cases.”); *Lowery v. Deal*, 850 F. Supp. 2d 1326, 1331-32 (N.D. Ga. 2012), *aff’d on other grounds sub nom. Lowery v. Governor of Georgia*, 506 F. Appx. 885 (11th Cir. 2013) (unpublished opinion); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1326 (S.D. Fla. 2002) (“[E]ven though *Gingles* did not involve an equal protection claim, the three factors were derived by the Court from the principles

set forth in the vote dilution cases brought under the Equal Protection Clause. We therefore conclude that the three preconditions have always been and remain elements of constitutional vote dilution claims.”). If anything, the dissent’s analysis, and the authority it relies upon, suggests a vote dilution claim asserted under the Equal Protection Clause requires a more rigorous showing than required under the VRA because the Equal Protection Clause requires a showing of discriminatory intent in addition to establishing the three “threshold conditions,” while the VRA does not. *Lowery*, 850 F. Supp. 2d at 1331. Because plaintiff’s claims fail here at the threshold, however, we need not engage the discussion of intent.

3. On this record, plaintiffs have not established the elements of their race-based claims

Having established the clear elements plaintiffs must prove to prevail on their racial gerrymandering and minority vote dilution claims under section 2, we turn to evaluating the district court’s findings of fact to determine whether plaintiffs have in fact prevailed on their claims under either standard. We note here that it appears plaintiffs have principally pursued a claim of unlawful minority vote dilution. Counsel for the Alonzo plaintiffs explicitly acknowledged this at oral argument. Reviewing the record, however, plaintiffs do also allege racial discrimination in the way the Legislature treated minority communities in Douglas County and in our Native American communities. Additionally, because of the way the district court decided plaintiffs’ race-based claims on standards unrelated to federal equal protection law, there is a

lack of clarity concerning which of plaintiffs' claims—precisely—is being addressed by the district court's ruling. Because of this, giving plaintiffs the benefit of the doubt, we will review the lower court's findings to determine whether they support either of the two kinds of race-based claims that may be brought under section 2.

We review the findings of fact under the substantial competent evidence standard, disregarding any conflicting evidence or other inferences that might be drawn from the evidence. We exercise unlimited review over the conclusions of law based on those findings. *Gannon*, 305 Kan. at 881. In this unique instance, however, where the district court made findings of fact under a misperception of what the appropriate legal test would be, it will come as no surprise that the findings of fact do not match those required under the controlling legal frameworks. Even so, we will take the district court's findings at face value rather than delve into their evidentiary support (or lack thereof) and simply ask whether they are sufficient for the plaintiffs to have prevailed on their claims under the correct legal standard.

a. Plaintiffs have not established a racial gerrymandering claim

The record below demonstrates that plaintiffs did not ask the district court to find that the Legislature used race as the predominant factor in choosing where to draw the lines. The district court, in turn, did not apply this standard to plaintiffs' claim of racial gerrymandering. The district court—after erroneously holding that federal Fourteenth Amendment standards

did not apply in the context of section 2—declined to answer whether intent is a required element of a racial discrimination claim under the Kansas Constitution Bill of Rights, concluding instead that “vote dilution is intentional . . . even in the absence of actual racial prejudice” “if the Legislature had as one objective the dilution of minority voters.”

As we have described, however, for plaintiffs to prevail on a claim of racial gerrymandering, they must have shown that the Legislature used race as the *predominant factor* in drawing districts. The Supreme Court has clearly stated that if the evidence merely shows that the Legislature considered partisan factors “along with” race when it drew the lines, this, without more, “says little or nothing about whether race played a *predominant* role.” *Easley*, 532 U.S. at 253.

Plaintiffs, like the district court, made much of the fact that partisan considerations dominated the Legislature’s map-drawing process, but failed to present any evidence that race was the predominant factor guiding the Legislature’s decisions. The district court expressly adopted conclusions from plaintiffs’ expert witnesses that “partisan intent predominated” in the drawing of the districts. The district court found that the “Legislature acted with discriminatory intent,” but did so only after crafting a test that did not test for predominant intent at all. The court failed to conduct the appropriate “sensitive inquiry” to assess whether plaintiffs “managed to disentangle race from politics and prove that the former drove a district’s lines.” *Cooper*, 137 S. Ct. at 1473; see also *Easley*, 532 U.S. at 245 (“A legislature trying to secure a safe Democratic

seat is interested in Democratic voting behavior. Hence, a legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African-American precincts, but the reasons would be political rather than racial.”); *Shaw*, 509 U.S. at 646 (“[T]he legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination. . . . [W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes. The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions.”); *Cooper*, 137 S. Ct. at 1490 (Alito, J., concurring) (pointing out the “often-unstated danger where race and politics correlate: that the federal courts will be transformed into weapons of political warfare. Unless courts ‘exercise extraordinary caution’ in distinguishing race-based redistricting from politics-based redistricting, . . . they will invite the losers in the redistricting process to seek to obtain in court what they could not achieve in the political arena. If the majority party draws districts to favor itself, the minority party can deny the majority its political victory by prevailing on a racial gerrymandering claim. Even if the minority party loses in court, it can exact a heavy price by using the judicial process to engage in political trench warfare for years on end.”).

The district court did not find that race was the predominant factor motivating the Legislature's decision to place a significant number of voters inside or outside of a particular district. We therefore conclude that on the record before us, plaintiffs have failed to satisfy their burden to meet the legal elements required for a showing of racial gerrymandering.

b. Plaintiffs have not established a minority vote dilution claim

Plaintiffs' claims of minority vote dilution fail at the very first step, because the record below shows that they did not present evidence in support of—nor did the district court find—that the minority group is sufficiently large and geographically compact to constitute a majority in a single member district. The district court did not conduct this analysis, and the numbers in the Ad Astra 2 map suggest that this first condition may very well be impossible to meet. In fact, plaintiffs admit in their petition that “minority voters constitute less than a majority of voters in current District 3” and require “the support of a portion of white voters who cross over to support the minority-preferred candidate.”

The district court simply did not apply the proper test or make the requisite findings of fact to satisfy the standards necessary to prove a claim of minority vote dilution. The district court generally incorporated and credited plaintiffs' suggested findings of fact. However, the district court made very few specific findings of fact of its own to directly justify its holdings, instead simply summarizing plaintiffs' expert testimony. In a similar scenario, the U.S. Supreme Court has concluded this

type of fact-finding was insufficient to support a claim for vote dilution:

“[P]laintiffs urge us to put more weight on the District Court’s findings of packing and fragmentation, allegedly accomplished by the way the State drew certain specific lines The District Court, however, made no such finding. Indeed, the propositions the court recites on this point are not even phrased as factual findings, but merely as recitations of testimony offered by plaintiffs’ expert witness. While the District Court may well have credited the testimony, the court was apparently wary of adopting the witness’s conclusions as findings. But even if one imputed a greater significance to the accounts of testimony, they would boil down to findings that several of [the] district lines separate portions of Hispanic neighborhoods, while another district line draws several Hispanic neighborhoods into a single district. This, however, would be to say only that lines could have been drawn elsewhere, nothing more. But some dividing by district lines and combining within them is virtually inevitable and befalls any population group of substantial size.” *De Grandy*, 512 U.S. at 1015-16.

Even if, as the Court contemplated in *De Grandy*, we “imputed a greater significance to the accounts of testimony” and fully accept the district court’s crediting of one of plaintiffs’ expert’s analysis that Ad Astra 2 has a “dilutive effect on the ability of minority voters to elect their preferred candidates,” this statement skips

several steps along the analytical path. Had the district court conducted a proper inquiry, it may have never even gotten that far in its analysis because the very first condition—which again, requires the minority group to be sufficiently large and geographically compact to constitute a majority in a single member district—very likely would have been fatal to the plaintiffs’ claims. See *Grove*, 507 U.S. at 40-41 (“[T]here neither has been a wrong nor can [there] be a remedy” if plaintiffs fail to establish the three preconditions.).

Accordingly, we conclude that on the record before us, plaintiffs have failed to satisfy their burden to meet the legal elements required for a showing of unlawful race-based vote dilution.

CONCLUSION

The manner in which plaintiffs chose to litigate this case—and the district court’s willingness to follow them down the primrose path—has a great deal to do with our decision today. Plaintiffs put their proverbial eggs in an uncertain and untested basket of novel state-based claims, hoping to discover that the Kansas Constitution would prove amenable. But the constitutional text and our longstanding historical precedent foreclose those claims. In the future, should the people of Kansas choose to codify clear standards limiting partisan gerrymandering, or should future plaintiffs be able to properly establish the elements legally required to show unlawful racial discrimination in the redistricting process, Kansas courthouse doors will be open. For now, the legal errors permeating the

lower court's decision compel us to reverse its judgment.

Reversed and injunction order is lifted.

* * *

ROSEN, J., concurring in part and dissenting in part: The dominant political party in our Legislature recently reapportioned Kansas congressional districts in such a manner as to dilute—or eliminate—the voting rights of racial minorities as well as to propel this state's national political power toward a monolithic single-party system. The majority of our court today gives its stamp of approval to this assault on the democratic system and the constitutional backbone of our democracy. Because I cannot countenance the subversion of the democratic process to create a one-party system of government in this state and to suppress the collective voice of tens of thousands of voters, I dissent.

In turning a blind eye to this full-scale assault on democracy in Kansas, the majority blithely ignores the plain language of this state's Constitution. The majority upholds a legislative decision that does nothing to benefit the people or provide equal protection to the citizens of this state, considerations our Constitution expressly demands. Furthermore, the majority opinion undermines the very basis of legislative districting, apportioning voting districts in a blatant attempt to homogenize the state. As the Legislature has distorted and contorted the political map in order to monopolize the position of one political party, the majority opinion distorts and contorts legal

reasoning and constitutional theory to uphold racial discrimination and political chicanery.

The precedent today's opinion sets threatens to institutionalize division of voting districts on the basis of race, or of religion, or of gender, with no hope of constitutional protection. The majority is thus complicit not only in the current power grab, it also promises future legislatures that they may with impunity divide and subdivide voters' interests to further the purposes of whichever party is in a position to seize absolute control.

I do not reject the majority opinion out of sympathy for one party or another or for one population or another. I reject it because it is constitutionally unsound. I fully join Justice Biles in his concurring in part and dissenting in part opinion and his legal analysis and his conclusion that Ad Astra 2 violates the Kansas Constitution. To that opinion, I add one of my own so that I may highlight my fervent disagreement with the majority's decision to tie the equal protection guarantees in section 2 of the Kansas Constitution Bill of Rights to the federal Constitution.

Early in its opinion, the majority quickly and matter-of-factly pronounces that "the equal protection guarantees found in section 2 are coextensive with the equal protection guarantees afforded under the Fourteenth Amendment to the United States Constitution." Slip op. at 22. With these few taps on a keyboard, the majority denies Kansans the very thing our founders envisioned: a people's government that fervently guards the people's equal benefit from and access to the law—regardless of what the narrower-in-

scope central power has to say about it. I will highlight the error in the majority's minimal reasoning and explain why section 2 provides protections that are broader than those in the Fourteenth Amendment.

Section 2 of the Kansas Constitution Bill of Rights is as follows:

“Political power; privileges. All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency.”

The relevant portion of the Fourteenth Amendment to the United States Constitution is as follows:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The majority looks at these provisions and proclaims that the equal protection guarantees found within are coextensive. To get to that epic conclusion, it relies on one sentence offered in a 1917 Kansas case

and repeated in a smattering of cases, each time without even a hint of analysis. In *State v. Wilson*, 101 Kan. 789, 795-96, 168 P. 679 (1917), this court unceremoniously noted that sections 1 and 2 of the Kansas Bill of Rights are “given much the same effect as the clauses of the Fourteenth Amendment relating to due process of law and equal protection.” For this proposition, it cited to *Winters v. Myers*, 92 Kan. 414, 140 P. 1033 (1914). But the court in *Winters* never held that section 2 and the Fourteenth Amendment are given the same effect. Rather, it observed that the Ohio Constitution has a provision with the same language as section 2 and that there is *similar* language in a clause of the Fourteenth Amendment. The court then described caselaw from both jurisdictions, among others, before independently addressing the equal protection issue before it. *Winters*, 92 Kan. at 421-28.

Nonetheless, the language in *Wilson* was repeated in cases in which parties launched Fourteenth Amendment claims alone and when parties invoked the Kansas Bill of Rights alongside a Fourteenth Amendment claim. See, e.g., *State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22 (2005); *State ex rel. Tomasic v. Kansas City, Kansas Port Authority*, 230 Kan. 404, 426, 636 P.2d 760 (1981); *Henry v. Bauder*, 213 Kan. 751, 752-53, 518 P.2d 362 (1974); *Railroad and Light Co. v. Court of Industrial Relations*, 113 Kan. 217, 228-29, 214 P. 797 (1923). Importantly, however, in none of these cases does it appear the parties claimed that the Kansas Constitution Bill of Rights offers different or broader protections than the Fourteenth Amendment. Thus, in none of these cases did the court question

whether Kansas affords separate protections and instead defaulted to the status quo.

This practice was routine for the time. “For all practical purposes, independent state constitutionalism did not exist before the 1970s.” Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 Penn St. L. Rev. 783, 797 (2011). Commentors have theorized this was largely a result of “constitutional universalism,” or a “belief that all American constitutions are drawn from the same set of universal principles of constitutional self-governance.” Gardner, *The Positivist Revolution That Wasn’t: Constitutional Universalism in the States*, 4 Roger Williams U.L. Rev. 109, 117 (1998). In the judicial context, this belief resulted in “a lack of judicial attention to or discussion of the constitutional text, case authority, framers’ intent, or relevant history [and] indiscriminate borrowing from other jurisdictions . . . and from the common law.” 4 Roger Williams U.L. Rev. at 117. And later in the 20th century, sole reliance on the Fourteenth Amendment became a strategic decision. “The U.S. Supreme Court recognized many of the rights it did between the 1940s and the 1960s *because* many state courts (and state legislatures and state governors) resisted protecting individual rights, most notably in the South but hardly there alone.” Sutton, Jeffery, J., 51 *Imperfect Solutions: States and the Making of American Constitutional Law*, 14 (2018). Thus, litigants eschewed the advancement of any state constitutional claims to take advantage of the federal rights expansion.

In the late 1970s, however, after a near-decade of continuous individual rights recognition came to an end, an era of “independent state constitutionalism in the area of individual rights and liberties came of age.” 115 Penn St. L. Rev. at 798. An approach coined “The New Judicial Federalism” took hold during this period, and marked a time when state courts took a deeper look at their own constitutions and “interpreted their . . . rights provisions to provide more protection than the national minimum standard guaranteed by the Federal Constitution.” Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. Ann. Surv. Am. L. 211, 211 (2003). Justice William Brennan recognized this as “probably the most important development in constitutional jurisprudence of our times.” Williams, *The New Judicial Federalism in Ohio: The First Decade*, 51 Clev. St. L. Rev. 415, 416 (2004) (quoting Justice William J. Brennan, Jr., Special Supplement, State Constitutional Law, NAT’L L.J., Sept. 29, 1986, at S1).

Our court appeared to follow this trend beginning in 1984 in *Farley v. Engelken*, 241 Kan. 663, 667, 740 P.2d 1058 (1987). Curiously, the majority here cites *Farley* as supportive of its position not once, but twice. In *Farley*, this court considered an equal protection challenge to legislation that implicated the right to a remedy for insured or otherwise compensated medical malpractice plaintiffs but not other tort plaintiffs. True to the majority’s quotation, *Farley* initially repeats the resolution that section 2 and the Fourteenth Amendment are “given much the same effect.” 241 Kan. at 667. However, later in its reasoning it clarifies “as hereinafter demonstrated, the Kansas Constitution

affords separate, adequate, and greater rights than the federal Constitution.” (Emphasis added.) 241 Kan. at 671. The court reached that conclusion by relying on earlier caselaw that had applied a heightened standard to a similar equal protection challenge and by observing that the right to a remedy is independently protected by the Kansas Constitution, thus making it deserving of scrutiny higher than rational basis under the Kansas Constitution. The court acknowledged that the “United States Supreme Court has applied heightened scrutiny to very limited classifications,” but explained “we are interpreting the Kansas Constitution and thus are not bound by the supremacy clause of the federal Constitution.” 241 Kan. at 674.

The majority here conveniently avoids addressing this precedent-setting portion of the *Farley* opinion, likely because it threatens to topple the jenga-style analysis it has constructed. The majority has offered nothing beyond *Farley* and the other cases that reflexively repeated the line from *Wilson* to bind Kansas’ section 2 to the Fourteenth Amendment and federal court decisions. The opinion takes a moment to ensure the reader that our decision in *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 624, 440 P.3d 461 (2019), which interpreted section 1 of the Kansas Constitution to offer protections not found in the federal Constitution, does not bind our interpretation of section 2, but that is the extent of the analysis.

Instead of offering a sound interpretation of section 2, the majority uses a few sentences to tie equal protection guarantees in section 2 to those in the Fourteenth Amendment for now and the future. Legal

analysts have described this approach as “prospective lockstepping,” i.e., when a court “announces that not only for the instant case, but also in the future, it will interpret the state and federal clauses the same.” Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 Wm. & Mary L. Rev. 1499, 1509 (2005). Commenters have identified numerous problems with this practice. Among those is that resulting opinions “decide too much and . . . go beyond the court’s authority to adjudicate cases” by “purport[ing] to foresee, and to attempt to control, the future.” 46 Wm. & Mary L. Rev. at 1521. Justice Robert Utter of the Supreme Court of Washington has likened this to a judicial constitutional amendment without a constitutional convention. *State v. Smith*, 117 Wash. 2d 263, 282, 814 P.2d 652 (1991) (Utter, J., concurring). Another defect with the practice is the reality that it “reduces state constitutional law to a redundancy and greatly discourages its use and development.” Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 804 (1992); see also *Harris v. Anderson*, 194 Kan. 302, 314, 400 P.2d 25 (1965) (Fatzer, J., dissenting) (“[a]cquiescence in decisions of the Supreme Court” should not go so far as to “engender[] a docile submission” or “become a servile abasement”). This reduction into irrelevance threatens a most grave consequence: the elimination of the constitutional protections our founders envisioned. As Judge Jeffrey Sutton of the Sixth Circuit has explained, state courts cannot rely on the U.S. Constitution to vindicate individual rights protected in state constitutions because “[f]ederalism considerations may lead the U.S. Supreme Court to underenforce (or at

least not to overenforce) constitutional guarantees in view of the number of people affected and the range of jurisdictions implicated.” 51 *Imperfect Solutions* at 175.

I could continue at length about the problems with the majority’s lack of analysis and its chosen approach. Instead, I turn to what it should have tackled in the first place: an examination of the Kansas Constitution.

The district court in this case, relying on *Farley*, ruled that “Kansas’s guarantee of equal benefit ‘affords separate, adequate, and greater rights than the federal Constitution.’” See 241 Kan. at 671. I agree. But I go beyond *Farley* to get there, starting with the text of section 2.

The first thing about section 2’s text that the majority ignores is the most obvious: it is different from the text in the Fourteenth Amendment. This—“[a]ll political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit”—is not the same as this—“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” I do not mean to oversimplify things; it really is that simple. See Linde, *E Pluribus, Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 182 (1984) (state court is responsible for reaching its own conclusion about state constitutional provisions regardless of whether identical language exists in the federal Constitution, but “[a] textual difference” between the two “makes this easier to see”).

The details in the differences between these provisions are even more illuminating. Section 2

describes a free government that is instituted for the people's equal protection and benefit. In contrast, the Fourteenth Amendment prohibits states from denying anyone equal protection of laws. One is a positive conferral of rights; the other is framed in the negative. See *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 894, 179 P. 3d 366 (2008) (observing that the federal Constitution grants "negative rights—*i.e.*, rights which the government may not infringe," while "state constitutions, including Kansas', grant negative rights" and "positive rights, *i.e.*, rights that entitle individuals to benefits or actions by the state"). The Supreme Court of Vermont has observed the same distinction between its equal benefit clause and the Fourteenth Amendment. As originally written, the Vermont provision proclaimed, "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family or set of men, who are a part only of that community . . ." *Baker v. State*, 170 Vt. 194, 207, 744 A.2d 864 (1999). In comparing this provision to the federal Equal Protection Clause, the Vermont Supreme Court had this to say:

"The first point to be observed about the text is the affirmative and unequivocal mandate of the first section, providing that government is established for the common benefit of the people and community as a whole. Unlike the Fourteenth Amendment, whose origin and language reflect the solicitude of a dominant white society for an historically-oppressed African-American minority (no state shall 'deny'

the equal protection of the laws), the Common Benefits Clause mirrors the confidence of a homogeneous, eighteenth-century group of men aggressively laying claim to the same rights as their peers in Great Britain or, for that matter, New York, New Hampshire, or the Upper Connecticut River Valley.

. . . .

“ . . . The affirmative right to the ‘common benefits and protections’ of government and the corollary proscription of favoritism in the distribution of public ‘emoluments and advantages’ reflect the framers’ overarching objective ‘not only that everyone enjoy equality before the law or have an equal voice in government but also that everyone have *an equal share in the fruits of common enterprise.*’ . . . Thus, at its core the Common Benefits Clause expressed a vision of government that afforded every Vermonter its benefit and protection and provided no Vermonter particular advantage. [Citations omitted.]” *Baker*, 170 Vt. at 208-09.

Like the Vermont Constitution, section 2 describes an “affirmative right” to equal protections and benefits. And, like the Vermont Supreme Court, I understand this to be a broader conferral of rights than that which results from the proscription of denying citizens equal protection of the law. The history surrounding this text confirms my understanding.

Kansans ratified the Kansas Constitution, including the section 2 we know today, in 1859. This was nine years before the ratification of the Fourteenth Amendment. *Hodes*, 309 Kan. at 624. There is no discussion of section 2's meaning or origins in the record of the Wyandotte Constitutional Convention that produced the Constitution. See Proceedings and Debates of the Kansas Constitutional Convention (Drapier ed., 1859), *reprinted in* Kansas Constitutional Convention 187, 286, 575, 599 (1920). But it was quite surely based on other, earlier constitutions. See Mauer, *State Constitutions in a Time of Crisis: The Case of the Texas Constitution of 1876*, 68 Tex. L. Rev. 1615, 1617 (1990) (the writing of state constitutions has been largely an imitative art). Section 2 is nearly identical to a provision in the 1851 Ohio Constitution: "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same." Ohio Const. art. I, § 2. And both Kansas and Ohio's Constitutions model the 1776 Virginia Declaration of Rights and the 1776 Pennsylvania Constitution. Both proclaimed that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community." Va. Const. Bill of Rights, art. I, § 3; Pa. Const. Bill of Rights, art. V; *Stolz v. J & B Steel Erectors, Inc.*, 155 Ohio St. 3d 567, 575, 122 N.E.3d 1228 (2018) (Fischer, J., concurring) (observing Ohio provision is like Virginia and Pennsylvania provisions). This lineage helps trace at least part of the origins of our section 2 back to 1776, when the original colonies were writing the first state constitutions. See Wood,

Foreword: State Constitution-Making in the American Revolution, 24 Rutgers L.J. 911, 913 (1993).

Legal commenters point out that provisions like these are common to state constitutions. See Bulman-Pozen & Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 870, 892 (2021) (describing similar provisions, including that found in Colorado's Constitution: "all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole"). This category of constitutional decrees focuses first on what is to be the source of all political power—the people. The early drafters had recently declared independence from the British government and its attempt to crush local community rule, and their desire to stay independent and self-governed is reflected in these provisions. See Linzey & Brannen, *A Phoenix from the Ashes: Resurrecting a Constitutional Right of Local, Community Self-Government in the Name of Environmental Sustainability*, 8 Ariz. J. Envtl. L. & Pol'y 1, 16 (2017). In naming the people as the source of all government power, they "established popular sovereignty as that state's legal cornerstone." Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457, 477 (1994). The provisions detail not just the source of power, but the ends of that power—the common good. 119 Mich. L. Rev. at 892.

In dedicating the people's power to the common good, the earliest framers "condemned special treatment of individuals and classes." 119 Mich. L. Rev. at 892. As the United States continued to form, the

constitutional commitment to the common good intensified. In the decades leading to Kansas' admission to the union, state legislatures had begun to stray from the peoples' objectives and started to prioritize the interests of the few. 119 Mich. L. Rev. at 892. In response, various states adopted constitutional amendments that placed specific restrictions on legislative acts. This reaction continued in a more general form in the 1840s and 1850s, when states began adopting constitutional equality guarantees to curb the perceived favoritism. 119 Mich. L. Rev. at 893; James Willard Hurst, *The Growth of American Law: The Law Makers* 241 (1950). ("The persistent theme of the limitations written into state constitutions after the 1840's was the desire to curb special privilege.").

It was against this backdrop that both Ohio and Kansas drafted their first constitutions. Quite notably, their political power provisions were written to guarantee not just protection and benefit for the common good, but *equal* protection and benefit. This indicates a strong dedication to the longevity of popular sovereignty and a prohibition against government action that results in special favor to the few. This casts a broad and generous net in the equal protection arena.

The Fourteenth Amendment has a radically different conception story. It was ratified in 1868, three years after the end of the Civil War. Its drafters were not concerned "with favoritism" or "the granting of special privileges for a select few," but with the still widespread discrimination against formerly enslaved persons and African Americans generally. *Matter of*

Compensation of Williams, 294 Or. 33, 42, 653 P.2d 970 (1982). Although the Thirteenth Amendment abolished the legal practice of slavery in 1865, it made no guarantee of citizenship or civil rights to Black people in America. *Dred Scott* still loomed over the land, as did *Barron v. The Mayor and City Council of Baltimore*, 32 U.S. 243, 250-51, 8 L. Ed. 672 (1833), which held that the federal Bill of Rights did not apply to the states. As a result, southern states were able to systematically deny rights to Black people. The Fourteenth Amendment was Congress' direct response to these continuing human rights abuses. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment's Original Meaning*, 49 Conn. L. Rev. 1069, 1083-86 (2017); Shaman, *The Evolution of Equality in State Constitutional Law*, 34 Rutgers L.J. 1013, 1052 (2003) ("As envisioned by its framers, the central purpose of the Equal Protection Clause was to eliminate hostile discrimination against the newly freed slaves.").

The text and the historical distinction between the origins of section 2 and the Fourteenth Amendment make it plain that the declarations have separate meanings. While the federal provision's devotion to ensuring civil rights for Black people in America is an important and historic part of our legal history, its concept is less broad than that of section 2. Like the Vermont Supreme Court has described its counterpart clause, section 2 represents a constitutional guarantee that "the law uniformly afford[s] every [Kansan] its benefit, protection, and security so that social and political preeminence [will] reflect differences of capacity, disposition, and virtue, rather than

governmental favor and privilege.” *Baker*, 170 Vt. at 211.

The majority has decided to ignore the plain text and the history of our section 2. I would not have done so. Rather, at the plaintiffs’ prompting, I would have given it the full examination and analysis the people of Kansas deserve and concluded that it is a rich and generous declaration that guarantees the people of Kansas protections that are broader than those found in the federal Equal Protection Clause. This reflection would support the legal framework and conclusion my dissenting colleagues present today: *Ad Astra 2*’s invidious discrimination against people based on past political speech and race certainly presents a justiciable question and clearly violates the protections enshrined in the Kansas Constitution.

* * *

BILES, J., concurring in part and dissenting in part: I agree the federal Elections Clause does not jurisdictionally bar this court from considering the validity of legislatively enacted congressional district maps under the Kansas Constitution. But I agree with little else in the majority opinion, so I dissent from the rest.

These circumstances cry out for judicial review. The district court’s factual findings lay bare how this “*Ad Astra 2*” legislation intentionally targets fellow Kansans because of their voting history, their prior expression of political views, their political affiliations, and the color of their skin. One such finding declares, “*Ad Astra 2* relocates more Black, Hispanic, and Native

American Kansans than any of the comparator plans, *meaning the changes in district boundaries were focused on areas with large minority populations.*” (Emphasis added.) Other findings hold the Ad Astra 2 design contains noncompact and irregularly shaped districts, unnecessarily splits political subdivisions (cities and counties), breaks up geographically compact communities of interest, and fails to preserve the cores of former districts. Yet the majority believes most of these injustices are beyond the reach of mere judges, while conceding only that the mathematical calculations and limited race dilution issues are in our judicial wheelhouse.

The district court’s findings plainly implicate state-based constitutional rights, so an appellate court’s first duty should be to decide whether they are supported by substantial competent evidence. After that, the legal analysis is garden-variety stuff. This court said as much nearly 45 years ago. See *In re House Bill No. 2620*, 225 Kan. 827, Syl. ¶ 4, 595 P.2d 334 (1979) (“Substantially equal [legislative] districts may be invidiously discriminatory because they were organized in such a way as to minimize or cancel out the voting strength of racial or political elements of the voting population.”). So why doesn’t the majority fully engage?

Our state’s founding and its traditions teach us that government is at its worst when those at the helm stop treating people like neighbors. And the district court explicitly found the “asserted pretextual justifications for Ad Astra 2 . . . cannot withstand scrutiny.” This means the State’s explanations about why this legislation does what it does don’t hold water. So what

should be the appropriate judicial response when state action appears to cross constitutional boundaries and the government's excuses are lame? Retreat is not the answer. See Kansas Const. art. 3, § 1 ("The judicial power of this state shall be vested exclusively in one court of justice."). Courts must intervene because a desire to harm politically disfavored groups is not a legitimate government interest and our duty is to the Constitution.

I can't abide by the majority's decision to look the other way by invoking the political question doctrine for the first time in this context. And when I apply the legal analysis to the established facts, I don't like what I see. I also would apply a state-based analysis to the race-based claims under the Kansas Constitution. I would affirm the district court although my rationale differs in a few places. Let's begin with what happened.

FACTUAL BACKGROUND

This stage was set 10 years ago when there was a failure to enact a new congressional redistricting plan after the Governor and Legislature could not agree on one. This required a federal district court to step in and fill the void. See *Essex v. Kobach*, 874 F. Supp. 2d 1069 (2012). But over the next decade, population shifts made the federal court's design inconsistent with applicable one person/one vote principles, so revision became necessary. And to achieve equal populations among our state's four congressional districts, minimal shifts of about 116,000 people would have done the trick. Each congressional district needed 734,470 people. This table makes that point:

District	2020 Census Population	Change Required
First	700,773	+ 33,855
Second	713,007	+ 21,803
Third	792,286	-58,334
Fourth	731,814	+2,676
		<u>Net Shift Needed:</u> 116,668 people (3.9% of state's population)

But Ad Astra 2 does so much more. It moves 394,325 people into new congressional districts—or 13.4% of our state’s population. Said differently, for every Kansan the Legislature needed to move, it transferred more than three. And as the district court found, “[t]his significant shift of population between districts was not the necessary result of population changes within the state between 2010 and 2020, nor the result of Kansas’s political geography.” Ad Astra 2 affected 14 Kansas counties in this way:

<u>County</u>	<u>Old Districts</u> 2012-2022	<u>New Districts</u> Ad Astra 2	<u>Residents Moved</u> (2020 Census data)
Wyandotte	Third	Second (portion)	112,661
Douglas	Second	First (portion)	94,934
Geary	First	Second	36,379
Lyon	First	Second	32,179
Franklin	Second	Third	25,643

Miami	Second/ Third	Third	20,495
Jefferson	Second	First	18,974
Jackson	Second	First	13,249
Marion	First	Second	11,823
Anderson	Second	Third	7,877
Chase	First	Second	2,572
Wabaunsee	First	Second	6,877
Morris	First	Second	5,386
Marshall	First/ Second	First	5,276

Even a casual observer would wonder what possibly motivates this much population transfer to our election-year landscape—especially when a traditional guidepost for neutral redistricting calls for retaining core districts. See, e.g., *The Proposed Guidelines and Criteria for 2022 Kansas Congressional and State Legislative Redistricting*, subsection 4(c) (“The core of existing congressional districts should be preserved when considering the communities of interest to the extent possible.”); see also *Essex*, 874 F. Supp. 2d at 1089 (“The Court’s plan most effectively furthers state goals of creating compact and contiguous districts, preserving existing districts, maintaining county and municipal boundaries and grouping together communities of interest.”).

The district court noted *Ad Astra 2* preserves just 86% of the former districts’ cores, while a “least-change plan” adhering to the legislative redistricting committee guidelines for core retention retained 97%. This disregard for core retention is strikingly illustrated by how *Ad Astra 2* surgically scoops out the

densely populated City of Lawrence from Douglas County to submerge it in a new congressional district stretching as far west as Colorado and encompassing a large portion of the Oklahoma border. The rest of Douglas County stays in CD 2. The district court ultimately found based on the evidence before it that, “Ad Astra 2 cannot be justified by a desire to retain the cores of prior congressional districts.”

Plaintiffs filed suit alleging this intentional government action violated their rights protected by sections 1, 2, 3, 11, and 20 of the Kansas Constitution Bill of Rights and article V, section 1 of the Kansas Constitution. The district court agreed with plaintiffs in a 209-page decision after a four-day trial. And except for the extraordinary time considerations that expedite this case, the analysis is straightforward and for half a century familiar territory for Kansas courts.

THE PARTISAN GERRYMANDERING CLAIMS

At the outset, it is necessary to understand what we are talking about. The district court’s central holdings concern what it labels and defines as “partisan gerrymandering.” The important part is the definition. It is too simplistic to just think of this as Republicans being mean to Democrats (or vice versa), or to trivialize what happened with an “Elections Have Consequences” bromide. The majority falls victim to that in my view when it mischaracterizes this case as seeking something that is unattainable—an absolute prohibition against any partisanship in the legislative process. Slip op. at 24 (stating plaintiffs “claim that any consideration by the Legislature of partisan factors in deciding where to draw district lines is offensive to

constitutional principles”). Plaintiffs’ claims and this case do no such thing. The district court made clear it was ruling on something much more substantial and sweeping than political bickering.

The district court showed its hand early. It broadly defined the elements of “partisan gerrymandering” as: (1) the Legislature acting with the purpose of achieving partisan gain by diluting the votes of disfavored-party members, and (2) the enacted congressional plan having the desired effect of substantially diluting disfavored-party members. It then fleshed out the gravity of what it was looking for by noting the goal of partisan gerrymandering “is to eliminate the people’s authority over government by giving different voters vastly *unequal* political power.” And it explained how the harm occurs:

“[I]n at least three related, but independent ways. First, partisan gerrymandering unconstitutionally discriminates against members of the disfavored party based on viewpoint. Second, partisan gerrymandering unlawfully burdens disfavored-party members’ freedom of association. Third, partisan gerrymandering unlawfully retaliates against disfavored-party members for engaging in protected political speech and association.”

The court then narrowed its focus even further, to make this about government retaliation. It said:

“The State engages in impermissible retaliation when plaintiffs can establish that (1) they were engaged in a constitutionally protected activity;

(2) the State's actions adversely affected the protected activity; and (3) the State's adverse action was substantially motivated by plaintiffs' exercise of their constitutional rights."

Ultimately, the district court held:

"Partisan gerrymandering satisfies all three of these elements. First, as described above, voters seek to engage in protected activities, including exercising their right to free speech and assembly by forming political parties, voicing support for their candidates of choice, and casting votes for those candidates. Second, partisan gerrymandering burdens these rights by reducing the voting power of members of the disfavored party, discriminating against members of that party on the basis of their viewpoints, and burdening their ability to associate by obstructing their political organizations. Third, the State's actions are motivated by voters' exercise of their constitutional rights: Partisan gerrymanderers move voters for the disfavored party into different districts precisely because those voters are likely to engage in protected conduct."

I share the district court's singular focus. This is about targeted government action against disfavored Kansans based on how they exercise their constitutional rights. And in that regard, I have been haunted by this 64-year-old passage on associational rights written by Justice John Marshall Harlan II in a unanimous decision:

“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. [Citations omitted.]” *National Ass’n for Advancement of Colored People v. Alabama*, 357 U.S. 449, 460-61, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958).

Partisan gerrymandering assaults these associational freedoms and their related constitutional protections. But before diving into those details, let’s first consider the majority’s decision to disembark before doing even that much by ruling plaintiffs’ claims on partisan gerrymandering do not present a justiciable case or controversy.

The political question doctrine

It is important to appreciate the judicial bait-and-switch that has happened. First, the United States Supreme Court held in a recent 5-4 decision that

federal courts must avoid partisan gerrymandering claims from the various states. *Rucho v. Common Cause*, 588 U.S. ___, 139 S. Ct. 2484, 2499-500, 204 L. Ed. 2d 931 (2019). But in doing so, the Court’s majority noted state courts were still available to stand guard against constitutional mischief. 139 S. Ct. at 2507 (“Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. . . . Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.”).

Plaintiffs here dutifully followed *Rucho*’s prompt and brought their case against Ad Astra 2 to state court, even though federal court is where these issues had been heard in our state over the past several decades. See, e.g., *Essex*, 874 F. Supp. 2d 1069; *State ex rel. Stephan v. Graves*, 796 F. Supp. 468 (1992); *O’Sullivan v. Brier*, 540 F. Supp. 1200 (1982). Plaintiffs’ redeployment to state court might explain why the *Rivera* majority labels this case as “first-of-its-kind litigation.” Slip op. at 6. But that’s a misnomer because their underlying redistricting claims are traditional in context—despite the majority’s tagging them as “unique and novel.” Slip op. at 6; see, e.g., *In re 2002 Substitute for Senate Bill 256*, 273 Kan. 731, Syl. ¶ 4, 45 P.3d 855 (2002) (“Lack of contiguity or compactness of districts in reapportionment legislation raises immediate questions as to political gerrymandering and possible invidious discrimination which should be satisfactorily explained by some rational state policy or justification.”); *In re House Bill No. 3083*, 251 Kan. 597, 607, 836 P.2d 574 (1992)

(same); *In re House Bill No. 2620*, 225 Kan. 827, Syl. ¶ 4 (even substantially equal legislative districts may be invidiously discriminatory if organized to minimize or cancel out the voting strength of racial or political elements of the voting population).

But the *Rivera* majority slams the courthouse door shut by declaring: “[W]e can discern no judicially manageable standards by which to judge a claim that the Legislature relied too heavily on the otherwise lawful factor of partisanship when drawing [congressional] district lines.” Slip op. at 2, Syl. ¶ 6. And the discouraging by-product is judicial passivity at precisely a moment when a Kansas court has held the rights of Kansans guaranteed by our state Constitution are in the balance. It should go without saying this is not a time to stand down. See, e.g., *Harris v. Shanahan*, 192 Kan. 183, 206-07, 387 P.2d 771 (1963) (“[W]hen legislative action exceeds the boundaries of authority limited by our Constitution, and transgresses a sacred right guaranteed or reserved to a citizen, final decision as to invalidity of such action must rest exclusively with the courts. . . . However delicate that duty may be, we are not at liberty to surrender, or to ignore, or to waive it.”).

Nor does brushing aside plaintiffs’ redistricting claims here conform to how our court has viewed redistricting issues over many decades. The district court considered our prior caselaw and observed we have had no qualms since at least 1963 in expressing a willingness to confront these politically sensitive issues when the evidence justified it, citing *Harris*, 192 Kan. at 207 (“It is axiomatic that an apportionment act, as

any other act of the legislature, is subject to the limitations contained in the [Kansas] Constitution, and where such act . . . violates the limitations of the Constitution, it is null and void and it is the duty of courts to so declare.”). The district court then explained:

“Kansas courts routinely determine manageable standards to enforce broad constitutional language—including in the redistricting context. And other states’ supreme courts have successfully adjudicated similar claims under their state constitutions, offering a model for this Court to apply. *Indeed, the ample evidence of Ad Astra 2’s extreme, intentional partisan bias makes this an easy case.*” (Emphasis added.)

The district court concluded “the Kansas Constitution’s equal protection, free speech and assembly, and suffrage provisions provide manageable standards to adjudicate partisan gerrymandering claims.” It further noted, “The key provisions here—involving equality, free speech, and suffrage—have long been the basis of litigation in state courts, from which Kansas courts can draw and provide manageable standards.” And the court added, “[W]hile federal courts may be unable to hear partisan gerrymandering claims under the federal Constitution, the Kansas Constitution allows this [state] Court to hear those claims.”

The district court then set out its decision-making criteria for the nonrace-based claims: a congressional plan constitutes a partisan gerrymander when “the Court finds, as a factual matter, (1) that the

Legislature acted with the purpose of achieving partisan gain by diluting the votes of disfavored-party members, and (2) that the challenged congressional plan will have the desired effect of substantially diluting disfavored-party members' votes." The court also detailed how its analytical approach paralleled previous state caselaw:

"Decisions from the Kansas Supreme Court considering partisan gerrymandering claims while reviewing state legislative reapportionment plans underscore this point. Although the Court has never held a redistricting plan unconstitutional on partisan gerrymandering grounds, it has repeatedly indicated that partisan gerrymandering claims are cognizable under the Kansas Constitution, and that the allegations in past cases failed *on the merits* because the challengers—unlike Plaintiffs here—had failed to offer evidence substantiating their claims. *See In re [House Bill No. 3083]*, 251 Kan. 597, 607, 836 P.2d 574 (1992) ('No evidence has been offered that would indicate the size and shape of House District 47 was engineered to cancel out the voting strength of any cognizable group or locale.');

In re Senate Bill No. 220, 225 Kan. 628, 637, 593 P.2d 1 (1979) (concluding that challengers had failed to 'show[]' an unconstitutional gerrymander); *In re House Bill No. 2620*, 225 Kan. 827, 834-35, 595 P.2d 334 (1979) (concluding that 'no claim or showing of gerrymandering . . . ha[d] been made'). Although these decisions did not discuss the gerrymandering allegations at great

length—likely because of the lack of supporting evidence—or give clear rules for resolving future claims, none suggested that the Court lacked jurisdiction to consider the allegations. Instead, each indicated that the Legislature’s discretion in redistricting is not boundless, and that Kansas courts have jurisdiction to hear partisan gerrymandering claims.”

This tied back to the district court’s earlier explanation as to how it thought the legal analysis should unfold:

“The court views the plaintiffs’ claims as constitutional equal protection actions and finds guidance in *Farley v. Engelken*, 241 Kan. 663, 740 P.2d 1058 (Kan. 1987) pages 669-670, where three levels of scrutiny are established increasing with the importance of the right or interest involved and the sensitivity of the classification.

“In level of scrutiny from least to most: 1) rational or reasonable basis test—act presumed constitutional plaintiffs’ burden to show—classification is ‘irrelevant’ to achievement of the state’s goal, 2) heighten[ed] scrutiny—which requires the legislation to ‘substantially’ foster a legitimate state purpose. There must be a greater justification and a direct relationship between the classification and the state’s goal, 3) strict scrutiny—applicable in cases of suspect classification including voting. No presumption of validity burden of proof shifted to defendant.

Classification must be ‘necessary to serve a compelling state interest’ or it is unconstitutional. [Citations omitted.]”

My point is simply that the district court did not go rogue. It adopted a traditional equal protection framework firmly founded in our caselaw—triggered by its initial determination that the questioned state action, i.e., Ad Astra 2’s enactment, resulted from the intentional targeting of constitutionally protected activities. This classic framework is standard fare: (1) Plaintiffs establish a state action and its purpose or intent; (2) plaintiffs establish the state action’s adverse effects on them; and, if they successfully make those showings, then (3) the State must come up with an appropriate justification for its actions subject to the applicable level of scrutiny based on the rights claimed to be injured. See, e.g., *In re Weisgerber*, 285 Kan. 98, 104, 169 P.3d 321 (2007) (equal protection violation must include demonstration that plaintiffs’ treatment resulted from a “deliberately adopted system” that results in “intentional systematic unequal treatment”); see also *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (explaining that equal protection claims alleging disproportionate racial impact from facially neutral legislation require “[p]roof of racially discriminatory intent or purpose”); *Washington v. Davis*, 426 U.S. 229, 244-45, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976) (proof of discriminatory racial purpose necessary to make out equal protection claim). And the district court’s application of this framework is just as ordinary. Let’s explore that.

Consider first how our court has viewed its role when addressing redistricting cases before today. The Kansas Constitution's article 10, section 1 directs this court's determination every 10 years of what that article describes as "the validity" of state Senate and House legislative reapportionments. But the single word "validity" offers little or no textual guidance. Yet, this court over many years has consistently summarized its analytical role as: "For a reapportionment act of the legislature to be valid it must be valid both as to the procedure by which it became law and as to the substance of the apportionment itself to satisfy the constitutional requirements." *In re Senate Bill No. 220*, 225 Kan. 628, Syl. ¶ 2, 593 P.2d 1 (1979). But what does this second factor ("the substance of the apportionment itself") mean?

This court has repeatedly explained this substance factor includes much more than just mathematical precision for one person/one vote principles and safeguarding against race-based prejudice. It encompasses other equal protection canons as well. See *In re House Bill No. 2620*, 225 Kan. 827, Syl. ¶ 4 ("Substantially equal districts may be invidiously discriminatory because they were organized in such a way as to minimize or cancel out the voting strength of racial or political elements of the voting population."); *In re House Bill No. 3083*, 251 Kan. 597, Syl. ¶ 6 ("Lack of contiguity or compactness raises immediate questions about political gerrymandering and possible invidious discrimination that should be satisfactorily explained by some rational state policy or

justification.”); *In re 2002 Substitute for Senate Bill 256*, 273 Kan. 731, Syl. ¶ 4 (same).

And even before article 10 included an explicit role for the court in the redistricting process, this court referenced equal protection’s arbitrary and capricious standard as something the court would watch out for. In *Harris v. Anderson*, 196 Kan. 450, 456, 412 P.2d 457 (1966), the court noted:

“When the [state reapportionment] Act is viewed as a whole, it is apparent that the legislature acted neither arbitrarily nor capriciously. On the contrary, the Act represents a diligent, earnest and good-faith effort on the part of the Kansas legislature to comply with this court’s previous order to reapportion [the House to achieve equal-populated districts required by *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct 1362, 12 L. Ed. 2d 506 (1964)].”

So why would the application of state equal protection principles be any different today? It can’t be just because this case concerns congressional district reapportionment and article 10 is silent about those districts. Our court has previously mentioned even that possibility when it said, “*The area of a congressional district should be reasonably contiguous and compact under a proper apportionment plan and, if not, a satisfactory explanation should be given by the proponents of the plan so as to remove any question of gerrymandering and invidious discrimination.*” (Emphases added.) *In re House Bill No. 2620*, 225 Kan. at 834.

Plaintiffs' claims align with our prior caselaw despite the majority's assurance that "plaintiffs invited the district court to craft new and never before applied legal standards and tests unmoored from either the text of the Kansas Constitution or the precedents of this court." Slip op. at 5. Plaintiffs allege, and have successfully proven, that their government targeted them with this new legislation because of how they have exercised their constitutionally protected rights of political association and their right to vote, and because of the color of their skin. And they showed *Ad Astra 2* accomplishes this by restructuring the method of selecting our representatives in Congress through the dismemberment of their neighborhoods, their cities, their counties, and their communities of interest. The purpose, of course, was to dilute their power to vote to effectively enhance the vote of others.

Plaintiffs' claims are not "unmoored" from how our court previously viewed its role in patrolling the reapportionment landscape to protect constitutional rights. See *In re House Bill No. 2620*, 225 Kan. 827, Syl. ¶ 6 ("[A]ll courts generally agree that lack of contiguity or compactness raises immediate questions as to political gerrymandering and possible invidious discrimination."); *In re House Bill No. 3083*, 251 Kan. at 607 (same); and *In re 2002 Substitute for Senate Bill 256*, 273 Kan. 731, Syl. ¶ 4 (same). If these issues were political questions without manageable judicial standards, why would our court so consistently have bothered to even acknowledge its concern about partisan gerrymandering over so many prior decades?

The majority remains silent about that, but the answer is obvious from the caselaw. Our court has had no difficulty seeing its job as protecting constitutional rights when redistricting comes around beyond just doing the population math. It even said as much before the Kansas Constitution spelled out any explicit role for the court as it does now. See Kan Const. art. 10, § 1; *Harris*, 192 Kan. at 191. The *Harris* court struck down the 1963 apportionment of state senate districts based on failures in the constitutional process for enrolling bills and population equality. But in doing so, it acknowledged legislative discretion in redistricting remained subject to judicial limitations and expectations:

“The exercise of discretion and good faith by the legislature in enacting an apportionment law must be limited to the standards provided in our Constitution and not to some other which the Constitution has not fixed. This is not to say, however, that there is not an element of discretion involved in the enactment of any legislative apportionment. Subject to the requirement of equal population provided by Article 10, Section 2, the location of boundaries, the shape, area, and other relevant factors are proper considerations for the legislature in the enactment of such a statute. Indeed, geographical considerations are necessarily attendant in the accomplishment of this purpose for the resulting districts should, where possible be compact and contain a population and area as similar as may be in its economical, political and cultural interests, all as determined by the

legislature in its discretion, not acting arbitrarily or capriciously.” (Emphases added.) 192 Kan. at 205.

So in this very early reapportionment case, in addition to simple mathematical calculations our court embedded its concerns for legislative good faith, district compactness, and maintenance of communities of interest (economic, political, and cultural), as well as an absence of arbitrary and capricious legislative conduct. And it warned,

“[W]hen legislative action exceeds the boundaries of authority limited by our Constitution, *and transgresses a sacred right guaranteed or reserved to a citizen, final decision as to invalidity of such action must rest exclusively with the courts.* In the final analysis, this court is the sole arbiter of the question whether an act of the legislature is invalid under the Constitution of Kansas.” (Emphasis added.) 192 Kan. at 207.

In other words, our court did not need other legislative enactments or more explicit constitutional direction to find its judicial path for ensuring protection of constitutional rights in the redistricting process. And there is more.

Two years later, this court repeated its caution against arbitrary and capricious legislative action in reapportionment. See *Harris v. Anderson*, 194 Kan. 302, 311, 400 P.2d 25 (1965). A year after that, the court paid homage to compactness and communities of interest as positive and neutral reapportioning

guideposts in *Harris v. Anderson*, 196 Kan. 450, 453, 412 P.2d 457 (1966) (“The districts created by the Act are compact and contain a population and area as similar as may be in their economical, political and cultural interests.”). This 1966 case ultimately held: “When the Act is viewed as a whole, it is apparent that the legislature acted neither arbitrarily nor capriciously.” 196 Kan. at 456.

In 1974, the people amended the constitutional reapportionment article to specify that our court affirmatively determine the “validity” of legislation drawing new state senate and house districts. L. 1974, ch. 457, § 1. And in 1979 this court acted under the amended article’s mandate. See *In re Senate Bill No. 220*, 225 Kan. at 633 (“The law is simple; its application is difficult.”). It is a fair summary to say the court recognized a reality to the “political trappings” inherent in the legislative process of reapportionment. 225 Kan. at 634. But even so, the court did not surrender its judicial review function regarding “political gerrymandering”; it still expected justifications tied to legitimate state interests to explain where lines were drawn, such as preserving cities and counties, maintaining communities of interest, and preserving local economic interests, e.g., farming. 225 Kan. at 637. Ultimately, the court concluded: “The objection to the bill on the ground that there was partisan political gerrymandering in redistricting the senatorial districts does not reveal a fatal constitutional flaw *absent a showing of an equal protection violation. No such showing has been made.*” (Emphasis added.) 225 Kan. at 637. Again, the point here is that our court did not simply abandon its

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 *Grove 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 *Grove* is a straightforward VRA section 2 case and does not consider the separate and distinct equal protection vote-dilution claim. In *Grove*, 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); *Higginbotham 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

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 Astra* 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 inadvisable 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

foreseeable future, including the scheduled primary and general elections in 2002. He believes that his vote is diluted in by Ad Astra 2. Declaration of Darrell Lea, PX 759.

E. Defendant Jamie Shew is the County Clerk for Douglas County. In that capacity, he is the official primarily responsible for administering elections in Douglas County. Frick Petition, paragraph 19, and Defendant Shew's Answer, paragraph 19.

F. The Senate Redistricting Committee was chaired by Senator Rick Wilborn. The vice-chair of the Committee was Senate President Ty Masterson. The ranking member, representing the Democratic Party, was Senator Dinah Sykes. Senator Ethan Corson was the other Democratic member of the Committee. PX 194, page 3.

G. At no stop during the listening tours was there any testimony, for or against, the possibility of moving the City of Lawrence from the Second Congressional District to the First Congressional District. At no time during the Senate Redistricting Committee's discussions concerning redistricting was the possibility of moving the City of Lawrence from the Second District to the First District ever raised by any member. Testimony of Ethan Corson, p. 229 l. 21 – p. 231 l. 7.

H. The Legislature's Redistricting Committees adopted redistricting guidelines for the redistricting process in December, 2021. Legislative leadership expressed the intent that the Guidelines were intended to be followed and applied in the redistricting process.

Petition, paragraph 24, and Answer, paragraph 24; PX 137; Testimony of Ethan Corson, p. 213 ll. 3-23.

I. At the Lawrence stop on the listening tour, Senator Marci Francisco, who as the Senator for District 2 represents much of Lawrence, came prepared to testify but the Republicans on the Redistricting Committees refused to allow her to testify. They told her that she would be able to testify before the Senate Redistricting Committee at its hearings later in the process. But when those hearings occurred much later in the process, she was not permitted to testify. Testimony of Ethan Corson, p. 216 l. 6 – 217 l. 11.

J. When asked by Senator Corson whether he had applied the Guidelines in drafting the Ad Astra map, Senator President Ty Masterson, who was also co-chair of the Senate Redistricting Committee, stated that he had applied the Guidelines as he “perceived them.” The Court credits Senator Corson’s testimony concerning the conversation, as Senator Masterson did not testify. Testimony of Ethan Corson, p. 257 l. 23 – p. 258 l. 9.

K. The results of the census showed that the Congressional districts in Kansas had the following populations before redistricting:

- a. First District: 700,773
- b. Second District: 713,007
- c. Third District: 792, 286
- d. Fourth District: 731,814

PX 138, Plan Comparison, Racial Composition and Hispanic Population, page 1.

L. As each of the Congressional Districts were required to have a population of 734,470, the population in each district had to be changed as follows:

- a. First District: increase by 33,855
- b. Second District: increase by 21,803
- c. Third District: decrease by 58,334
- d. Fourth District: increase by 2,676

Declaration of Michael Smith, PX 135, page 11.

M. Thus, a net total of 116,668 people, or 3.9% of the population of Kansas had to be moved to meet the population requirements. To meet that requirement, the Ad Astra 2 map moves 394,325 people, or 13.4% of the state population. In other words, Ad Astra 2 moves 337% more Kansans to different congressional districts than necessary to meet district population requirements. The number of counties and people moved to new congressional districts is credibly set forth in PX 139, a summary demonstrative exhibit offered by Plaintiffs. PX 139.

N. Finally, the Court finds as a matter of fact that the Legislature's adoption of the Ad Astra 2 map has a direct and substantial *effect* on voters in the City of Lawrence.

FINDINGS OF FACT RIVERA AND ALONZO

I. Ad Astra 2 was created in secret and pushed through the Legislature on party-line votes following departures from regular legislative processes.

1. Republicans won supermajorities in both chambers of the Kansas Legislature in the 2020 election, securing unilateral control over the decennial congressional redistricting process. They used this power to rush a congressional redistricting plan through the Legislature in an unprecedented departure from ordinary legislative process.

A. The “listening sessions” conducted by the House and Senate Redistricting Committees in 2021 were inconvenient, brief, and unheeded.

2. In August 2021, the House and Senate Redistricting Committees—both controlled by Republican majorities—conducted a “listening tour,” purportedly to collect public input on the redistricting process. The evidence demonstrates, however, that this tour was neither intended nor designed to obtain public input.

3. The first issue is one of timing: The Committees announced the dates for the tour only a week in advance of its start and without consulting the Committees’ Democratic members. Hr’g Tr. Day 1 Vol. 2 at 205:21-23, 206:21-207:18 (Corson); PX 194 at 4-6 (listing sessions); Hr’g Tr. Day 2 Vol. 1 at 8:14-19, 9:8-10 (Burroughs). Indeed, Senator Ethan Corson learned of the sessions only when they were announced to the

public. Hr'g Tr. Day 1 Vol. 2 at 207:8-12 (Corson). Senator Corson testified that the Committees' short notice made it challenging for members of the public who wanted to attend the sessions to obtain time off work, secure childcare, and get up to speed on redistricting. Hr'g Tr. Day 1 Vol. 2 at 208:3-9, 209:4-8 (Corson); *see also* Hr'g Tr. Day 3 Vol. 1 at 56:18-20 (Sullivan). As Senator Corson explained, this late scheduling suggests that Republican Committee members did not intend the tour to be a meaningful exercise. Hr'g Tr. Day 1 Vol. 2 at 208:11-17 (Corson).

4. Issues of notice were compounded by the tour's schedule. Hr'g Tr. Day 1 Vol. 2 at 209:1-4, 209:11-19 (Corson). The 2012 tour took place over a period of four months; the 2022 tour made fourteen stops in just five days. Hr'g Tr. Day 1 Vol. 2 at 209:1-4 (Corson). And while sessions in 2012 were each two-and-a-half hours long, the August 2012 sessions each lasted only 75 minutes, and in densely populated areas like Johnson County individuals were only given two minutes to testify. Hr'g Tr. Day 1 Vol. 2 at 209:11-210:13 (Corson). As Senator Corson explained, two minutes is "not nearly enough time" for a member of the public "to adequately explain" their views and is "at the far, far short end" of time allotments for witnesses at legislative hearings. Hr'g Tr. Day 1 Vol. 2 at 209:25-210:13, 267:3-14 (Corson).

5. In addition, the sessions were also scheduled largely at inconvenient times, with ten of the fourteen sessions taking place during working hours. Hr'g Tr. Day 1 Vol. 2 at 209:8-10 (Corson); PX 194 at 4-6 (listing sessions' dates and times). Community members were

unable to attend the sessions for these reasons. Hr'g Tr. Day 3 Vol. 1 at 56:21-57:2 (Sullivan); Hr'g Tr. Day 1 Vol. 2 at 266:5-18 (Corson); PX 194 at 5 (showing Overland Park session scheduled for 1:45-3 PM on Thursday, August 12, when school was letting out).

6. Moreover, the tour was scheduled, and most tour stops were completed, *before* the census data governing the 2020 redistricting process became available. Hr'g Tr. Day 1 Vol. 2 at 210:22-24 (Corson); Hr'g Tr. Day 2 Vol. 1 at 9:14-15 (Burroughs). This was a serious obstacle to meaningful public input in the state's redistricting process. *E.g.*, Hr'g Tr. Day 1 Vol. 2 at 210:22-211:11 (Corson). By contrast, during the 2012 redistricting cycle, the Legislature conducted listening sessions *after* the release of census data. Hr'g Tr. Day 1 Vol. 2 at 210:18-21 (Corson). Senator Corson testified that without the census data it was impossible for the public provide relevant comments on the decisions the Committees would be called upon to make or to address the data points Republican legislators would later cite as justifications for those decisions once the data was released. Hr'g Tr. Day 1 Vol. 2 at 210:22-211:11 (Corson). As just one example, before the census data was released, the public could not have known that the combined populations of Johnson and Wyandotte Counties would be too large to fit in one congressional district. Hr'g Tr. Day 2 Vol. 1 at 9:20-23 (Burroughs). The choice not to wait a few weeks for the data to become available this cycle was never explained. Hr'g Tr. Day 1 Vol. 2 at 211:11-14, 214:7-12 (Corson).

7. Unlike the 2012 tour, the 2021 tour also took place before the Committees adopted any guidelines for

the redistricting process, which also limited the public's ability to provide testimony on the topics that would be most helpful to the Committees. Hr'g Tr. Day 1 Vol. 2 at 212:21-213:23 (Corson). This choice has likewise never been explained. Hr'g Tr. Day 1 Vol. 2 at 214:7-12 (Corson).

8. Even when a member of public was able to overcome these hurdles, the Committees were indifferent to the testimony they heard. Representative Tom Burroughs and Senator Corson both indicated that the public testimony offered at the August hearings favored keeping the Kansas City metro area whole within a single congressional district. Representative Burroughs testified that a "large majority of the testimony" argued in favor of keeping "the Johnson County and Wyandotte County metropolitan area collectively together." Hr'g Tr. Day 2 Vol. 1 at 10:7-11 (Burroughs). Senator Corson agreed that the testimony in favor of "keeping the . . . urban suburban part of Wyandotte County in the same congressional district as the urban suburban part of Johnson County" was "overwhelming." Hr'g Tr. Day 1 Vol. 2 at 224:24-225:8 (Corson).

9. But the Republican legislators at the listening sessions were not attentive to this public feedback. Hr'g Tr. Day 1 Vol. 2 at 214:17-22 (Corson). In what Senator Corson described as "one of the more disrespectful acts [he had] ever seen from elected officials toward members of the public," Republican Committee members routinely "play[ed] on their phones right in front of" individuals offering testimony. Hr'g Tr. Day 1 Vol. 2 at 214:22-215:11 (Corson).

10. Senator Corson explained that Plaintiffs' Exhibit 751 shows Senate President Masterson, who ultimately introduced Ad Astra 2, and his Republican colleagues looking at their phones during a listening session in Overland Park, and that Senator Masterson did so "for almost the entire hearing." Hr'g Tr. Day 1 Vol. 2 at 215:12-216:4 (Corson).



11. The Committees' Republican majorities also limited opportunities for input by legislators during the August tour. Hr'g Tr. Day 1 Vol. 2 at 216:5-217:11 (Corson). After allowing a legislator to testify at a sparsely attended initial hearing, Republican Committee leadership chose to prohibit testimony by

legislators at subsequent stops. Hr’g Tr. Day 1 Vol. 2 at 216:5-16 (Corson). Leadership justified this decision by indicating that legislators would have ample opportunity to discuss redistricting once the legislative session began in January—but “that opportunity just never materialized.” Hr’g Tr. Day 1 Vol. 2 at 216:16-217:11 (Corson); *see also* PX 169 at 26:21-29:20 (discussing decision to limit legislator testimony).

12. After the August tour, the Committees conducted four virtual listening sessions on November 22 and November 30, 2021—shortly before and after the Thanksgiving holiday. PX 195 at 1-2 (listing dates); Hr’g Tr. Day 2 Vol. 1 at 10:12-14 (Burroughs). At the time, the Committees still had not adopted any guidelines governing redistricting. Hr’g Tr. Day 1 Vol. 2 at 213:3-9 (Corson). Representative Burroughs testified that the public testimony offered at these listening sessions did not meaningfully differ from that submitted in August. Hr’g Tr. Day 2 Vol. 1 at 10:20-23 (Burroughs).

13. On the whole, Senator Corson characterized the Committees’ listening sessions as a “box-checking exercise,” conducted to give the appearance of consistency with past practice after Republican legislators had in fact already decided to enact a gerrymandered congressional map. Hr’g Tr. Day 1 Vol. 2 at 217:24-218:5, 266:15-22 (Corson).²

² The Court credits the testimony of Senator Corson and Representative Burroughs, both of whom credibly testified about the legislative process.

B. The Legislature belatedly implemented guidelines to govern redistricting.

14. At their initial meetings on January 12, 2022, the Senate and House Redistricting Committees received presentations from the Legislature's staff on a set of Guidelines and Criteria for 2022 Congressional and State Legislative Redistricting ("Guidelines") that had been adopted by the bipartisan Legislature's Redistricting Advisory Group. Hr'g Tr. Day 2 Vol. 1 at 11:7-11 (Burroughs); PX 164 at 16:11-18:18 (Jan. 12, 2022 House Redistricting Committee Hearing); PX 165 at 4:23-7:7 (Jan. 12, 2022 Senate Redistricting Committee Hearing).

15. The Guidelines enumerated several traditional redistricting criteria and were substantively very similar to those used in the previous redistricting cycle; Senator Corson described the changes as "small stylistic tweaks." Hr'g Tr. Day 1 Vol. 2 at 249:11-12 (Corson); *see also* Hr'g Tr. Day 2 Vol. 1 at 11:12-17 (Burroughs). Several of Plaintiffs' experts explained that the Guidelines were a "very typical list of traditional redistricting criteria." Hr'g Tr. Day 1 Vol. 2 at 17:10-17 (Rodden); *accord* Hr'g Tr. Day 1 Vol. 2 at 120:24-121:1 (Chen).

16. The Guidelines provided that:

1. The basis for congressional redistricting is the 2020 U.S. Decennial Census. The "building blocks" to be used for drawing district boundaries shall be Kansas counties and voting districts (VTDs) as described on the official 2020 Redistricting U.S. Census maps.

2. Districts are to be as nearly equal to 734,470 population as practicable.

3. Redistricting plans will have neither the purpose nor the effect of diluting minority voting strength.

4. Subject to guideline No. 2 above:

a. Districts should be as compact as possible and contiguous.

b. There should be recognition of communities of interest. Social, cultural, racial, ethnic, and economic interests common to the population of the area, which are probable subjects of legislation should be considered.

c. The core of existing congressional districts should be preserved when considering the communities of interest to the extent possible.

d. Whole counties should be in the same congressional district to the extent possible while still meeting guideline No. 2 above. County lines are meaningful in Kansas and Kansas counties historically have been significant political units. Many officials are elected on a countywide basis, and political parties have been organized in county units. Election of the Kansas members of Congress is a political process requiring political organizations which in Kansas are developed in county units. To a considerable degree most counties in Kansas are economic, social, and cultural units, or parts of a larger socioeconomic

unit. These communities of interest should be considered during the creation of congressional districts.

PX 137 at 2 (Guidelines).

17. Representative Burroughs and Senator Corson testified that members of both the House and Senate treated the Guidelines as authoritative principles governing the redistricting process. Hr'g Tr. Day 2 Vol. 1 at 11:7-21 (Burroughs); Hr'g Tr. Day 1 Vol. 2 at 256:21-257:6, 257:23-258:9 (Corson).

18. The House Redistricting Committee formally adopted the Guidelines at its January 12 meeting. Hr'g Tr. Day 2 Vol. 1 at 11:7-11 (Burroughs); PX 164 at 23:15-24:2 (Jan. 12, 2022 House Redistricting Committee Hearing). Representative Burroughs testified that he understood that legislators should follow the Guidelines, anticipated that legislators would do so, and never heard legislators from either side of the aisle suggest that the Guidelines could be disregarded. Hr'g Tr. Day 2 Vol. 1 at 11:12-21 (Burroughs). True to Representative Burroughs' understanding, House members from both parties subsequently discussed proposed maps, including Ad Astra 2, in terms of their compliance with the Guidelines. *E.g.*, PX 172 at 59:1-60:10, 97:16-97:10 (statements by Reps. Croft, Miller, and Probst during January 25 House floor debate).

19. Senators also treated the Guidelines as authoritative. Senator Corson testified that members of both parties sought to justify their proposed maps under the Guidelines; Senate President Masterson, for

example, had a lengthy debate with Senator Corson in the Senate Redistricting Committee in which he asserted that the original Ad Astra map³ complied with the Guidelines. Hr’g Tr. Day 1 Vol. 2 at 256:21-257:3, 257:23-258:9 (Corson); *see, e.g.*, PX 168 at 31:24-33:4, 36:21-37:16, 40:18-22 (Jan. 20, 2022 Senate Redistricting Committee Hearing). During floor debate on Ad Astra 2, Senators, including Senator Masterson, continued to discuss whether the plan complied with the Guidelines and sought to justify the map’s features by reference to the Guidelines. *E.g.*, PX 169 at 52:10-21 (statement of Sen. Masterson during January 21, 2022 Senate floor debate). Senator Corson testified that no Senator ever suggested it was not necessary to follow the Guidelines. Hr’g Tr. Day 1 Vol. 2 at 257:23-258:9 (Corson).

C. Ad Astra 2 was rushed through the House and Senate on largely party-line votes, with no Democratic support.

20. The plan that became Ad Astra 2—then known simply as Ad Astra—was initially introduced in both the House and Senate Redistricting Committees on Tuesday, January 18. Hr’g Tr. Day 1 Vol. 2 at 220:14-19 (Corson); Tr. Day 2 Vol. 1 at 12:24-13:4 (Burroughs). Both Representative Burroughs and Senator Corson testified that they became aware of the bill on the same day it was introduced to the public. Hr’g Tr. Day 1 Vol.

³ As discussed below, *see infra* FOF § I.C, Ad Astra 2 revised the original Ad Astra map to avoid splitting the Kickapoo Tribe. The revision did not affect the map’s treatment of Wyandotte County or Johnson County.

2 at 220:8-13 (Corson); Hr'g Tr. Day 2 Vol. 1 at 13:2-4 (Burroughs).

21. Ad Astra 2's map-drawers remain a mystery; Republican sponsors of the map never publicly revealed who drew the plan, Hr'g Tr. Day 2 Vol. 1 at 13:5-6 (Burroughs), despite being asked for that information on multiple occasions during Committee proceedings, *see* PX 168 at 34:22-35:7 (transcript of January 20, 2022 Senate Redistricting Committee hearing); PX 171 at 12:23-13:10 (transcript of January 24, 2022 House Redistricting Committee hearing).

22. After its introduction, both the Senate and House Redistricting Committees set Ad Astra 2, alongside a small number of other proposed maps, for simultaneous hearings on Thursday, January 20—just two days after the maps' introduction. Hr'g Tr. Day 1 Vol. 2 at 220:17-221:3 (Corson); Hr'g Tr. Day 2 Vol. 1 at 13:18-25 (Burroughs); PX 166 at 16:1-4 (transcript of January 18, 2022 House Redistricting Committee hearing); PX 167 at 4:18-5:3 (transcript of January 18, 2022 Senate Redistricting Committee hearing).

23. The Senate Redistricting Committee required members of the public who wanted to testify regarding the plan to sign up to testify in person or submit written testimony by 10 a.m. on Wednesday, January 19—the day after the map's introduction and before the map's underlying data was made publicly available. Hr'g Tr. Day 1 Vol. 2 at 220:19-221:2 (Corson). Moreover, the House and Senate Committees scheduled their respective public testimony periods for the same time, forcing potential witnesses to choose between the two proceedings or “bounc[e] between the

two.” Hr’g Tr. Day 2 Vol. 1 at 13:18-25 (Burroughs). Several members of the public objected to the rushed nature of the proceedings and difficulty of submitting testimony. *E.g.*, PX 168 at 22:16-23:1, 26:1-21 (transcript of January 20, 2022 Senate Redistricting Committee hearing).

24. Of the members of public who were able to overcome these hurdles to attend one or both hearings, Senator Corson testified that all but one testified in opposition to Ad Astra. Hr’g Tr. Day 1 Vol. 2 at 221:3-6 (Corson). Representative Burroughs agreed, offering that a “large majority” opposed the bill. Hr’g Tr. Day 2 Vol. 1 at 14:17-21 (Burroughs).

25. At the January 20 Senate Redistricting Committee hearing, several Senators, including Senator Corson, expressed deep concerns about the bill, particularly its likely impact on minority communities. Hr’g Tr. Day 1 Vol. 2 at 221:6-8 (Corson); *e.g.*, PX 168 at 31:24-38:18 (transcript of January 20, 2022 Senate Redistricting Committee hearing). Nevertheless, after adopting an amendment to address Ad Astra’s splitting the Kickapoo Native American Tribe—and renaming the amended plan Ad Astra 2—the Senate Redistricting Committee voted the bill out of committee. Hr’g Tr. Day 1 Vol. 2 at 221:8-9 (Corson); *see* PX 168 at 99:14-101:10 (introducing and adopting amendment to Ad Astra 2). Senator Corson testified that it “is not common” for a bill to move so quickly out of committee. Hr’g Tr. Day 1 Vol. 2 at 221:8-9 (Corson).

26. The next day, January 21, Republican Senators rejected several proposed amendments to the plan introduced on the Senate floor. DX 1007-14 to -15. A

number of Democratic members objected that Ad Astra 2 was a partisan gerrymander, would dilute the power of minority votes, and had reached the floor through a rushed process. *E.g.*, PX 169 at 7:18-22, 8:5-10, 8:14-22, 8:24-9:1, 10:2-20, 19:21-20:11, 22:4-10, 22:23-25, 23:6-8, 23:16-25, 39:11-25, 46:18-47:3, 53:9-14, 65:5-66:21, 68:21-74:6, 106:21-107:2, 110:2-12 (transcript of January 21, 2022 Senate floor debate).

27. Despite these objections, the full Senate passed Ad Astra 2, after designating the bill an emergency measure, *see* DX 1007-11, on a largely party-line vote on Friday, January 21, Hr’g Tr. Day 1 Vol. 2 at 221:9-11 (Corson); DX 1007-11. Not one Democrat voted for the map. DX 1007-11.

28. A period of roughly 72 hours passed between the introduction of the map and its passage. Hr’g Tr. Day 1 Vol. 2 at 220:14-221:18 (Corson). Senator Corson testified that this timeline was “not at all typical”; the only bill he could recall moving with comparable speed was an emergency measure to help municipalities pay unexpectedly large heating bills during a cold snap in February 2021. Hr’g Tr. Day 1 Vol. 2 at 221:25-222:9 (Corson). Senator Corson further testified that he never received an explanation for why it was necessary to pass the plan so quickly. Hr’g Tr. Day 1 Vol. 2 at 223:1-13 (Corson).

29. The plan moved with similar speed in the House. Representative Burroughs testified that the measure was “greased to go” in committee: it was “quite clear” that “the bill was set to hit the floor in a very short amount of time.” Hr’g Tr. Day 2 Vol. 1 at 17:14-24 (Burroughs). The bill passed the House

Redistricting Committee on January 24, PX 171 at 48:17-49:3 (transcript of January 24, 2022, House Redistricting Committee hearing), and reached the House floor on January 25, *see generally* PX 172 (transcript of January 25, 2022, House floor debate).

30. The House considered several amendments to Ad Astra 2, including Mushroom Rock 2, a plan that like Ad Astra 2, would have kept Johnson County intact along with the eastern part of Wyandotte County and most of Kansas City, Kansas. Hr’g Tr. Day 2 Vol. 1 at 18:4-16, 19:2-8. The House, including Republican leadership, rejected these amendments. Hr’g Tr. Day 2 Vol. 1 at 18:11-12, 19:7-10 (Burroughs).

31. During floor debate in both chambers, numerous representatives noted that the process by which Ad Astra 2 came to the floor was highly irregular, rushed, nontransparent, and unfair. *E.g.*, PX 172 at 14:14-15:11, 31:19-21, 54:13-22, 57:3-10, 121:5-13, 121:23-122:5; (House debate); PX 169 at 20:22-21:4, 21:24-23:25; 26:3-18; 27:12-28:22, 36:21-37:14, 128:4-129:9, 145:19-146:3 (Senate debate). Representatives also called attention to the fact that the map split known communities of interest, ignored public input, diluted minority votes, and constituted “textbook gerrymandering.” *See, e.g.*, PX 172 at 16:6-9, 18:7-12, 19:10-18, 26:16-21, 27:19-28:11, 29:7-15, 30:8-14, 30:18-22, 32:2-10, 32:19-21, 33:19-19-34:2, 36:1-15, 37:8-18, 37:20-25, 38:4-14, 39:15-21, 45:10-15, 54:22-25, 55:2-10, 56:8-10, 89:14-18, 106:6-13 (House debate); PX 169 at 23:1-25:13, 26:3-18, 27:12-28:22, 46:16-47:6, 68:9-74:13, 75:8-78:9, 128:4-134:7, 141:2-19 (Senate debate).

32. In response to accusations that Ad Astra 2 was a partisan gerrymander and would dilute minority votes, *e.g.*, PX 172 at 27:19-28:24, 30:18-25, 34:12-13, 56:15-16 (transcript of January 25, 2022 House floor debate), Republican Representative Steve Huebert opined that redistricting “is a political process” and that “[g]errymandering” and “partisan politics . . . are just things that happen. They always have and they always will.” PX 172 at 20:10-21:8 (transcript of January 25, 2022 House floor debate).

33. Ad Astra 2 ultimately passed the House on a largely party-line vote on January 26. Hr’g Tr. Day 2 Vol. 1 at 20:212-17 (Burroughs); DX 1007-5. Not one Democrat voted for the map. DX 1007-5. Representative Burroughs described the schedule on which it passed as “quite . . . compressed” and not consistent with the House’s usual way of passing important legislation. Hr’g Tr. Day 2 Vol. 1 at 20:18-21:4 (Burroughs).

34. Both Representative Burroughs and Senator Corson testified that the enactment of Ad Astra 2 was highly partisan. Representative Burroughs stated that there was no attempt at bipartisanship or collaboration between the parties. Hr’g Tr. Day 2 Vol. 1 at 21:10-13 (Burroughs). Senator Corson similarly indicated that to the best of his knowledge, no Republican member ever reached out to Democratic members to work on congressional redistricting. Hr’g Tr. Day 1 Vol. 2 at 217:13-19 (Corson). No negotiations occurred between the parties; rather, it was “very clear” from the “very, very early days of the redistricting listening tour” that Republicans had already decided to draw a plan with

four Republican districts. Hr'g Tr. Day 1 Vol. 2 at 217:20-218:5 (Corson).

35. On February 3, Governor Kelly vetoed Ad Astra 2, explaining:

Senate Bill 355, known as Ad Astra 2, does not follow [the Legislature's] guidelines and provides no justification for deviation from those guidelines. Wyandotte County is carved into two separate congressional districts. Without explanation, this map shifts 46% of the Black population and 33% of the Hispanic population out of the third congressional district by dividing the Hispanic neighborhoods of Quindaro Bluffs, Bethel-Welborn, Strawberry Hill, Armourdale and others from Argentine, Turner and the rest of Kansas City, Kansas south of I-70. To replace lost population in the third district, this map adds in counties that are more rural to the south and west of the core of the Kansas City metropolitan area.

Ad Astra 2 also separates the city of Lawrence from Douglas County and inserts urban precincts of Lawrence into the largely rural Big First Congressional District, reducing the strength of communities of interest in Western Kansas and unnecessarily dividing communities of interest in Eastern Kansas.

Several alternatives would allow for the same deviation as Ad Astra 2 while protecting the core of the existing congressional districts and without diluting minority communities' voting

strength. I am ready to work with the Legislature in a bipartisan fashion to pass a new congressional map that addresses the constitutional issues in Senate Bill 355. Together, we can come to a consensus and pass a compromise that empowers all people of Kansas.

Press Release, Office of the Governor, Governor Laura Kelly Vetoes Congressional Redistricting Map, Senate Bill 355 (Feb. 3, 2022), <https://governor.kansas.gov/governor-laura-kelly-vetoes-congressional-redistricting-map-senate-bill-355>; Hr'g Tr. Day 2 Vol. 1 at 21:5-6 (Burroughs).

D. Republican supermajorities overrode the Governor's veto on largely party-line votes.

36. On February 7, 2022, the Senate convened to seek to override Governor Kelly's veto. *See generally* PX 162 (recordings of February 7-8, 2022, Senate veto override sessions). The affirmative vote of 27 senators is necessary to override a veto. *See* Kan. Const. art. 2, § 14(a).

37. After failing to obtain the required 27 votes on the initial roll call, the Senate's Republican leadership instituted a call of the Senate, confining Senators to their seats for roughly two-and-a-half hours while holding the vote open. *See* PX 162 at 54:00-3:24:55 (recording of February 7, 2022, Senate veto override session). Leadership ultimately closed the vote without obtaining the necessary support, and the override failed by a 24-15 vote. DX 1007-4. No Democrat voted

to override the veto. DX 1007-4. At the last moment, Senate President Masterson switched his vote to “no” as a procedural strategy which would allow him to reopen the vote the next day, and the Senate adjourned. PX 162.

38. The next day, on February 8, Senate President Masterson moved to reconsider the prior day’s vote, and following that motion, the Senate voted to override the Governor’s veto on a largely party-line vote. DX 1007-2, 1007-3. Again, not one Democrat voted to override the veto. DX 1007-2.

39. Senator Corson described the Senate override process as “thuggish.” Hr’g Tr. Day 1 Vol. 2 at 231:20-22 (Corson); *see also* Hr’g Tr. Day 1 Vol. 2 at 253:21-25 (Corson) (“[O]bviously, the Republican super majority wanted to ram through this map very quickly.”). On the chamber floor, Senator Dinah Sykes characterized the result of the Senate’s second override vote as the product of “backroom deals,” PX 760 at 7, and Senator David Haley commented that he “hope[d] whomever [sic] got . . . [senators] to change their mind[s] will get what it is they bargained for,” PX 760 at 8.

40. The House voted to override the Governor’s veto on February 9, also on a largely party-line vote, Hr’g Tr. Day 1 Vol. 2 at 231:20-22 (Burroughs); DX 1007-1, and again after a substantial delay as several Republican Representatives initially voted no before reversing course, *see* PX 174 at 18 (noting vote changes); PX 163 at 43:00-1:45:00 (recording of February 9, 2022 House veto override session) (showing hour-long delay from calling of override vote to conclusion of vote, during which Representatives were

confined to their seats). Not one Democrat voted to override the veto. DX 1007-1.

II. Ad Astra 2 was designed intentionally and effectively to maximize Republican advantage in the state's congressional delegation.

41. Using distinct evidence and analyses, Plaintiffs' experts have each concluded that Ad Astra 2 intentionally and successfully gerrymanders Kansas's congressional districts to ensure that Republican candidates will likely win all four of the state's congressional seats. As set forth below, the Court credits and agrees with these conclusions.

A. Evidence presented by Dr. Jowei Chen demonstrates that Ad Astra 2 is an intentional, effective partisan gerrymander.

42. Plaintiffs' expert Dr. Jowei Chen, Ph.D., is a tenured Associate Professor in the Department of Political Science at the University of Michigan, Ann Arbor. PX 31 ¶ 2 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 114:18-21 (Chen).

43. Dr. Chen has extensive experience in redistricting matters. PX 31 ¶¶ 3-4 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 115:3-117:3 (Chen). Dr. Chen has published academic papers on legislative districting and political geography in several peer-reviewed political science journals, including the *American Journal of Political Science*, the *American Political Science Review*, and the *Election Law Journal*. PX 31 ¶¶ 3-4 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 116:16-19

(Chen). His academic areas of expertise include legislative elections, spatial statistics, geographic information systems (GIS) data, redistricting, racial politics, legislatures, and political geography. PX 31 ¶ 3 (Chen Rep.); Hr’g Tr. Day 1 Vol. 2 at 115:3-8 (Chen). He also has expertise in the use of computer simulations in legislative districting and in analyzing political geography, elections, and districting plans. PX 31 ¶ 3 (Chen Rep.); Hr’g Tr. Day 1 Vol. 2 at 115:3-8 (Chen).

44. Dr. Chen has presented expert testimony regarding his simulation methodology in numerous partisan gerrymandering lawsuits, and his analysis has been repeatedly credited and relied upon by the courts in these cases. PX 31 ¶ 4 (Chen Rep.); Hr’g Tr. Day 1 Vol. 2 at 116:20-117:3 (Chen); *see, e.g., Harper v. Hall*, 868 S.E.2d 499, 515-16 (N.C.), *stay denied sub nom. Moore v. Harper*, 142 S. Ct. 1089 (2022); *Adams v. DeWine*, ___ N.E.3d ___, Nos. 2021-1428, 2021-1449, 2022 WL 129092, at *11-13 (Ohio Jan. 14, 2022); *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1, 124, 178 A.3d 737 (2018) (finding “Dr. Chen’s expert testimony” to be “[p]erhaps the most compelling evidence” in invalidating Pennsylvania’s congressional plan as an unconstitutional partisan gerrymander); *Raleigh Wake Citizens Ass’n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333, 344 (4th Cir. 2016) (“The district court clearly and reversibly erred in rejecting Dr. Chen’s expert testimony.”); *League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867, 907 (E.D. Mich.) (“[T]he Court has determined that Dr. Chen’s data and expert findings are reliable.”), *vacated and remanded and other grounds*, 140 S. Ct. 429 (2019); *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 666

(M.D.N.C.) (“Dr. Chen’s simulation analyses not only evidence the General Assembly’s discriminatory intent, but also provide evidence of the [challenged map’s] discriminatory effects.”), *vacated and remanded and other grounds*, 138 S. Ct. 2679 (2018); *City of Greensboro v. Guilford Cnty. Bd. of Elections*, 251 F. Supp. 3d 935, 943 (M.D.N.C. 2017) (relying upon the “computer simulations by Dr. Jowei Chen” to find impermissible partisan intent); *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *18 (N.C. Super. Ct. Sept. 3, 2019) (“The Court gives great weight to Dr. Chen’s findings and, to the extent set forth below, adopts his conclusions.”).

45. The Court accepts Dr. Chen in this case as an expert in redistricting, political geography, and redistricting simulation analysis.

46. Using his computer-simulation methodology, Dr. Chen analyzed whether Ad Astra 2 was a partisan outlier on both statewide and district-by-district bases. PX 31 ¶¶ 6, 51 (Chen Rep.); Hr’g Tr. Day 1 Vol. 2 at 117:17-118:23 (Chen). Dr. Chen also analyzed whether partisan intent predominated in the drawing of Ad Astra 2 and subordinated the traditional redistricting criteria reflected in the Guidelines, such as compactness and avoiding county and voting tabulations district (“VTD”) splits. PX 31 ¶¶ 6, 9, 50 (Chen Rep.); Hr’g Tr. Day 1 Vol. 2 at 117:17-118:23 (Chen).

47. In his academic research on legislative districting, partisan and racial gerrymandering, and electoral bias, Dr. Chen has developed computer-simulation programming techniques that allow him to

produce a large number of nonpartisan redistricting plans that adhere to traditional redistricting criteria using U.S. Census geographies as building blocks. PX 31 ¶ 7 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 119:20-120:12 (Chen). Dr. Chen's simulation process ignores all partisan and racial considerations when drawing districts, in favor of various traditional districting goals, such as equalizing population, avoiding county and Voting Tabulation District (VTD) splits, and pursuing geographic compactness. PX 31 ¶ 7 (Chen Rep.). By comparing an enacted redistricting plan to these randomly generated plans that closely adhere to traditional redistricting criteria, Dr. Chen can assess whether partisan goals motivated a map-drawer to deviate from traditional districting criteria, and whether the enacted plan could be the product of something other than partisan considerations. PX 31 ¶ 7 (Chen Rep.).

48. In his simulation set in this case, Dr. Chen programmed the computer algorithm to create 1,000 independent simulated plans adhering to traditional redistricting criteria listed in the Guidelines: (1) population equality, (2) contiguity, (3) minimizing county splits, (4) minimizing VTD splits, and (5) prioritizing compactness where doing so would not violate an earlier criterion. PX 31 ¶¶ 8, 11 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 119:20-120:12, 120:18-121:1 (Chen); *see also* PX 137 at 2 (Guidelines). Dr. Chen also programmed the algorithm to preserve municipal boundaries where possible, because municipalities are considered communities of interest; preserving municipal boundaries is a traditional redistricting criterion followed around the country even where not

explicitly considered; and, based on Dr. Chen's inspection of Ad Astra 2, the Legislature appeared to have tried to avoid splitting municipalities. PX 31 ¶¶ 8, 11 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 119:20-120:12, 121:2-21 (Chen). Dr. Chen has applied this same technique "many times" while serving as an expert witness in other cases. Hr'g Tr. Day 1 Vol. 2 at 116:20-23 (Chen).

49. The Court finds that Dr. Chen's computer algorithm properly reflected the Guidelines, as well as traditional redistricting principles. The Court further finds that Dr. Chen's interpretation and application of the Guidelines are fully consistent with the Guidelines' text. The Court further finds that Dr. Chen's application of these criteria is consistent with generally accepted redistricting principles and practice.

50. Based on his analysis, Dr. Chen concluded that partisan intent predominated over the Guidelines and traditional redistricting criteria in the drawing of Ad Astra 2 and is responsible for the Republican advantage in the enacted plan. PX 31 ¶¶ 50-52, 67-70 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 117:24-118:23 (Chen). Dr. Chen also found that the plan's Republican advantage was an extreme partisan statistical outlier on every level—statewide, regionally, and on a district-by-district basis—and by every measure analyzed—overall seat share, partisan vote-share ranges, and a widely-used quantitative measure of partisan bias. PX 31 ¶¶ 51-52, 55-58 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 117:24-118:23 (Chen).

51. The Court credits Dr. Chen's findings, finds his analysis and testimony to be reliable, places great

weight on his testimony, and adopts each of his conclusions. During Dr. Chen's live testimony, the Court carefully observed Dr. Chen's demeanor, particularly as he was cross-examined for the first time about his work on this case. He consistently defended his work with careful and deliberate explanations of the bases for his opinions.

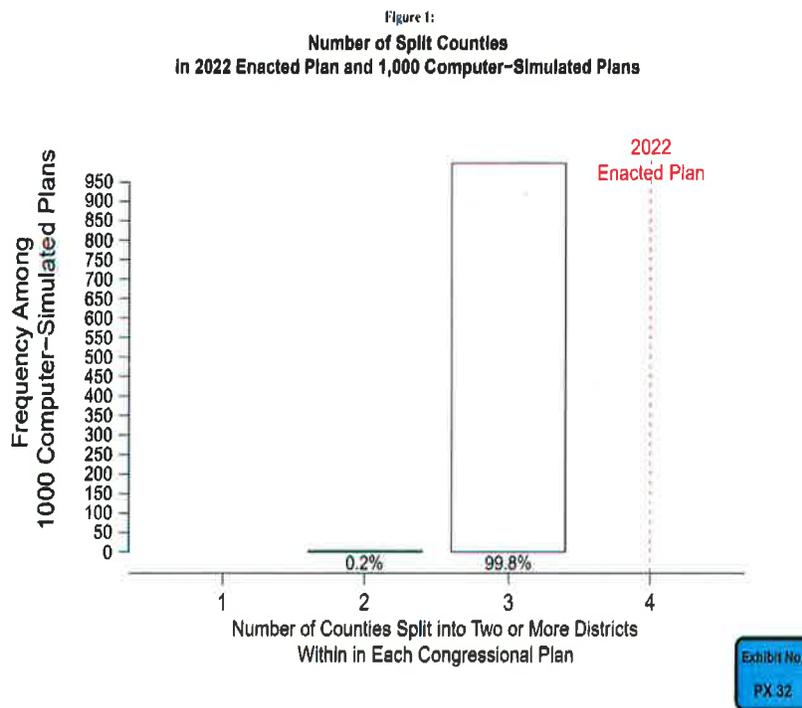
Ad Astra 2 does not adhere to the Guidelines or to traditional redistricting principles.

52. Dr. Chen compared Ad Astra 2 to his 1,000 computer-simulated plans along a number of measures. See PX 31 ¶¶ 13-27 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 146:14-152:18 (Chen).

53. First, Dr. Chen compared the number of counties split by Ad Astra 2 and the simulated plans. Ad Astra 2 splits four counties, including both Douglas and Wyandotte. PX 31 ¶¶ 15-16 & tbl.1 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 147:7-8 (Chen). In Dr. Chen's simulations, no plan split more than three counties, while remaining compliant with the other traditional redistricting criteria incorporated in the algorithm. PX 31 ¶ 17 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 147:15-17 (Chen). Dr. Chen explained that the difference between three and four split counties is "significant": any congressional plan will necessarily divide only a small number of counties, and the extra county split under Ad Astra 2 means that the plan splits 33% more counties than is necessary. Hr'g Tr. Day 1 Vol. 2 at 147:18-148:10 (Chen). Dr. Chen further explained that even if the Legislature had a valid reason to split a particular county, doing so would not prevent it from

drawing a map that splits a total of only three counties. Hr’g Tr. Day 1 Vol. 2 at 196:10-197:7 (Chen).

54. Figure 1 in Dr. Chen’s report, also admitted as Plaintiffs’ Exhibit 32, depicts how the number of counties split by Ad Astra 2 compares to the number of counties split under Dr. Chen’s simulated plans:



55. From this analysis, Dr. Chen concluded that the enacted congressional plan “clearly contains more county splits than one would expect from a map-drawing process prioritizing county boundaries,” as called for by the Guidelines and traditional redistricting principles. PX 31 ¶ 17 (Chen Rep.); see Hr’g Tr. Day 1 Vol. 2 at 147:9-14 (Chen).

56. The Court finds that only three counties needed to be split to achieve a perfectly equally populated plan, and Ad Astra 2's four county splits is an outlier compared to simulated plans generated using traditional redistricting criteria. Defendants proffered that the fourth county was split to avoid splitting the Kickapoo Tribe—but did not explain why one of the other split counties was not then made whole. The Court finds that Ad Astra 2 splits more counties than necessary.

57. Second, Dr. Chen compared the number of VTDs split by Ad Astra 2 and the simulated plans. Dr. Chen found that while the simulated congressional plans split no more than three VTDs, Ad Astra 2 contains 19 VTD splits, including 13 VTD splits that divide the populated portions of the VTD into two different districts. PX 31 ¶¶ 18-19 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 148:11-25 (Chen). Seven of these VTD splits involving population occur in either Douglas County or Wyandotte County. PX 31 tbl.2 (Chen Rep.).

58. Figure 2 in Dr. Chen's report, also admitted as Plaintiffs' Exhibit 33, depicts how the number of populated VTDs split by Ad Astra 2 compares to the number of populated VTDs split under Dr. Chen's simulated plans:

Figure 2:

Comparison of VTDs Split in 2022 Enacted Plan and 1,000 Computer-Simulated Plans

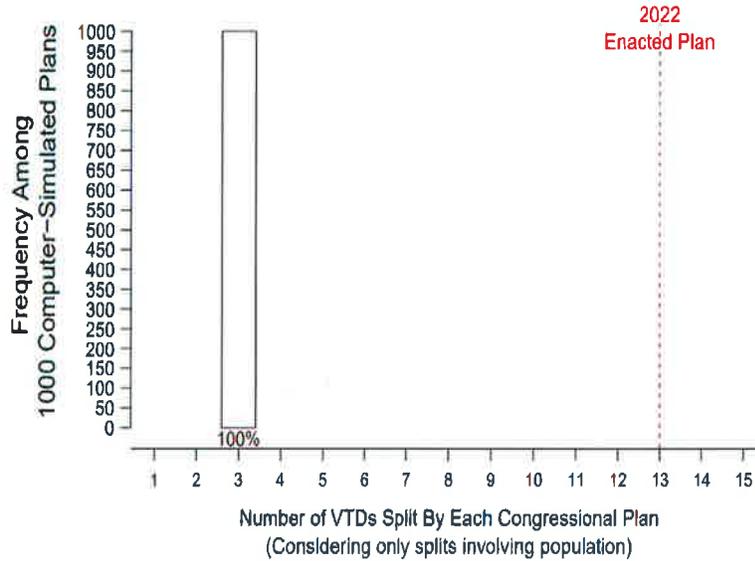


Exhibit No.
PX 33

59. From this analysis, Dr. Chen concluded that Ad Astra 2 splits “far more [VTDs] than is necessary to draw equally populated districts and comply with other traditional districting criteria.” PX 31 ¶ 20 (Chen Rep.); see Hr’g Tr. Day 1 Vol. 2 at 148:21-23 (Chen).

60. The Court finds that Ad Astra 2 fails to follow, and subordinates, the Guidelines’ principle of avoiding the unnecessary splitting of VTDs by splitting far more VTDs than necessary.

61. Third, Dr. Chen compared the compactness of the districts in Ad Astra 2 to the compactness of the districts in each of his 1,000 simulated plans. To

measure compactness, Dr. Chen analyzed the plans' average Reock and Polsby-Popper scores.⁴ PX 31 ¶¶ 22-25 (Chen Rep.); *see* Hr'g Tr. Day 1 Vol. 2 at 149:5-150:2 (Chen). Dr. Chen explained that both measures are commonly used by redistricting practitioners, map-drawers, and scholars to measure compactness. Hr'g Tr. Day 1 Vol. 2 at 149:10-14 (Chen). For both measures, a higher score indicates that a plan's districts are more compact. PX 31 ¶¶ 24-25 (Chen Rep.).

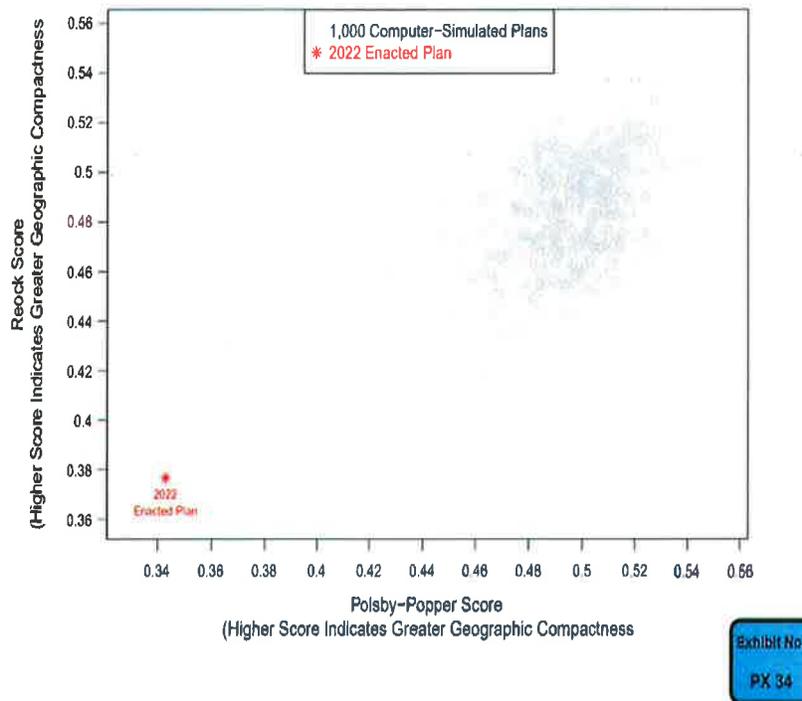
62. Dr. Chen found that using either metric, Ad Astra 2's districts are far less compact than the districts in all 1,000 simulated plans. Ad Astra 2 has an average Polsby-Popper score of 0.343; every simulated plan had a significantly higher average Polsby-Popper score, with a middle 50% range of 0.483 to 0.510 and a maximum score of 0.542. PX 31 ¶ 24 (Chen Rep.); *see* Hr'g Tr. Day 1 Vol. 2 at 149:14-23 (Chen). Similarly, Ad Astra 2 has an average Reock score of 0.377; every simulated plan had a significantly higher average Reock score, with a middle 50% range of 0.469 to 0.502 and a maximum score of 0.538. PX 31 ¶ 25 (Chen Rep.); *see* Hr'g Tr. Day 1 Vol. 2 at 149:14-23 (Chen).

⁴ Dr. Chen's report explained that the "Polsby-Popper score for each individual district is calculated as the ratio of the district's area to the area of a hypothetical circle whose circumference is identical to the length of the district's perimeter." PX 31 ¶ 24 (Chen Rep.). The "Reock score for each individual district is calculated as the ratio of the district's area to the area of the smallest bounding circle that can be drawn to completely contain the district." PX 31 ¶ 25 (Chen Rep.).

63. Figure 3 in Dr. Chen’s report, also admitted as Plaintiffs’ Exhibit 34, depicts how Ad Astra 2’s average Polsby-Popper and Reock scores compare to the average Polsby-Popper and Reock scores of each of the 1,000 simulated plans⁵:

Figure 3:

Comparison of VTDs Split in 2022 Enacted Plan and 1,000 Computer-Simulated Plans on Polsby-Popper and Reock Compactness Scores



64. Dr. Chen testified that Ad Astra 2’s average compactness scores are “just not even close to what’s

⁵ Dr. Chen explained in his testimony that the title of Figure 3 contains a typo; it should refer to geographic compactness rather than to VTD splits. Hr’g Tr. Day 1 Vol. 2 at 150:3-9 (Chen).

reasonably possible.” Hr’g Tr. Day 1 Vol. 2 at 150:10-151:5 (Chen).

65. From this analysis, Dr. Chen concluded that Ad Astra 2 “is significantly less compact . . . than what could reasonably have been expected from a districting process adhering to the compactness requirement in the . . . Guidelines.” PX 31 ¶¶ 24-25 (Chen Rep.); *see* Hr’g Tr. Day 1 Vol. 2 at 149:14-150:2 (Chen).

66. The Court finds that Ad Astra 2 fails to follow, and subordinates, the Guidelines’ principle of drawing compact districts. Ad Astra 2’s districts are less compact than they would be under a map-drawing process that adhered to the Guidelines and prioritized the traditional districting criterion of compactness.

67. Finally, although Dr. Chen did not program the algorithm to consider core retention in drawing simulated plans, he determined that the simulated plans outperform Ad Astra 2 in retaining the cores of congressional districts from the 2012 plan. Hr’g Tr. Day 1 Vol. 2 at 194:8-196:4 (Chen); *see also* PX 137 at 2 (listing core retention as a consideration under the Guidelines). For example, 61% of the simulated plans did a better job of preserving the core of the Third District than did Ad Astra 2, as measured by the share of the population of the old district that remains together in a district under the new plan. Hr’g Tr. Day 1 Vol. 2 at 194:13-195:5, 198:22-199:10 (Chen).

68. From this analysis, Dr. Chen concluded that Ad Astra 2’s pro-Republican partisan bias cannot be explained by an attempt to preserve the cores of the

2012 districts. Hr'g Tr. Day 1 Vol. 2 at 195:6-196:4 (Chen).

69. The Court finds that Ad Astra 2 fails to follow, and subordinates, the Guidelines' principle of preserving the cores of existing congressional districts. Ad Astra 2 does a worse job of retaining the cores of existing districts than would a plan produced by a map-drawing process that adhered to the Guidelines and prioritized the traditional districting criterion of preserving the cores of existing districts.

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

70. To compare the partisanship of his simulated plans to the enacted congressional plan, Dr. Chen used census block-level election results from recent statewide elections in Kansas. PX 31 ¶¶ 28-33 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 121:25-123:20 (Chen). For his analysis, Dr. Chen uses every statewide general election for nonjudicial office from 2016 to 2020, which amounted to the following nine contests: 2016 U.S. President, 2016 U.S. Senator, 2018 Governor, 2018 Attorney General, 2018 Insurance Commissioner, 2018 Secretary of State, 2018 Treasurer, 2020 U.S. President, and 2020 U.S. Senator. PX 31 ¶ 31 (Chen Rep.); see Hr'g Tr. Day 1 Vol. 2 at 121:25-123:20 (Chen). Dr. Chen aggregated the results of these elections into a single composite, referred to as the "2016-2020 Statewide Election Composite." PX 31 ¶ 31 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 121:25-123:20 (Chen).

71. Dr. Chen explained that using statewide elections in this fashion is the established practice

among practitioners, map-drawers, and academics when measuring the partisanship of new districts for several reasons. Hr’g Tr. Day 1 Vol. 2 at 125:3-13 (Chen). First, there are no congressional-level election results available for a new district. Hr’g Tr. Day 1 Vol. 2 at 101:20-102:4 (Chen). Second, past congressional races in old districts may have turned on idiosyncratic factors unique to that race or district that will not affect future races in the new district and that make comparisons across the entirety of a statewide plan difficult. PX 31 ¶ 29 (Chen Rep.); Hr’g Tr. Day 1 Vol. 2 at 125:21-126:19 (Chen). Statewide elections are not affected by unique district-based factors and provide a level statewide basis for comparing new districts’ partisanship. PX 31 ¶ 29 (Chen Rep.); Hr’g Tr. Day 1 Vol. 2 at 125:21-126:19 (Chen). Third, statewide results are “really strongly” correlated with underlying partisanship, including voting patterns in congressional elections. Hr’g Tr. Day 1 Vol. 2 at 125:14-125:21 (Chen); *see* PX 31 ¶ 28 (Chen Rep.). Fourth, Dr. Chen explained that statewide election results are also a more reliable indicator of district partisanship than are partisan voter registration counts, which may lag behind voters’ actual preferences. PX 31 ¶¶ 28, 30 (Chen Rep.).

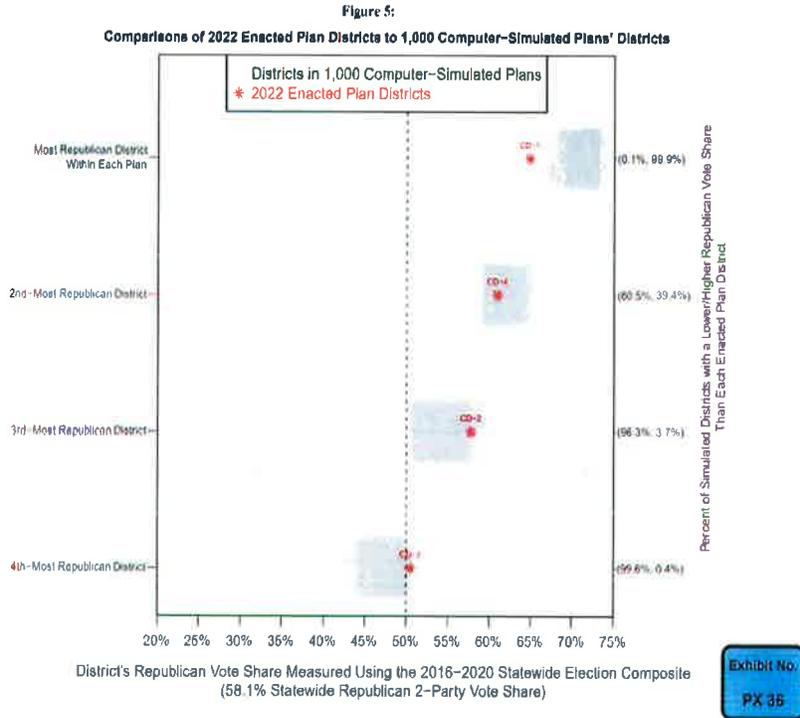
72. By overlaying the 2016-2020 Statewide Election Composite results onto Ad Astra 2, Dr. Chen calculated the Republican share of the votes cast from within each district in Ad Astra 2 and in each simulated plan. PX 31 ¶ 28 (Chen Rep.); Hr’g Tr. Day 1 Vol. 2 at 121:25-123:20 (Chen). Based on these calculations, Dr. Chen directly compared the partisanship of the enacted congressional plan and the simulated plans. PX 31 ¶ 28

(Chen Rep.). Dr. Chen used these comparisons to determine whether the partisanship of individual enacted districts and the partisan distribution of seats in the enacted congressional plan could reasonably have arisen from a nonpartisan redistricting process that adhered to the Guidelines and to traditional redistricting criteria. PX 31 ¶ 30 (Chen Rep.).

73. To measure the partisanship of his simulated districts and the enacted districts, Dr. Chen obtained precinct-level results for the nine elections in the 2016-2020 Statewide Election Composite and aggregated the census block-level results to the district level. PX 31 ¶ 32 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 122:19-123:20 (Chen). Using the census blocks that would comprise a particular district in a given simulation and the actual election results from those census blocks, Dr. Chen calculated the percentage total two-party votes in that simulated district for Republican candidates in the 2016-2020 statewide election contests. PX 31 ¶¶ 32-33 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 122:19-123:20 (Chen).

74. The Court finds that the use of statewide elections by Plaintiffs' experts to measure the partisanship of simulated and enacted districts is a reliable methodology. The Court further credits Dr. Chen's use of the nine elections comprising the 2016-2020 Statewide Election Composite.

75. Figure 5 in Dr. Chen's report, PX 36, compares the partisan distribution of districts in Ad Astra 2 to the partisan distribution of districts in the 1,000 computer-simulated plans:



76. To make this comparison, Dr. Chen first ordered Ad Astra 2's districts from most to least Republican, as measured by Republican vote share using the 2016-2020 Statewide Election Composite, with the most-Republican district in the top row, the second-most-Republican in the second row, and so on. PX 31 ¶ 35 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 127:2-128:10 (Chen). The red stars mark enacted districts under Ad Astra 2 and are labeled with district numbers. PX 31 ¶ 35 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 127:2-128:10 (Chen). Next, Dr. Chen similarly ordered the districts in each simulated plan from most to least Republican and plotted each simulated district's partisanship in the corresponding row; thus, each gray dot represents

a district from one of the 1,000 simulated plans. PX 31 ¶ 35 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 127:2-128:10 (Chen). Each row compares one district from Ad Astra 2 to 1,000 computer-simulated districts based on Republican vote share. PX 31 ¶ 35 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 127:2-128:10 (Chen). The two percentages in parentheses in the right margin of the Figure report the percentage of these 1,000 simulated districts that are less Republican than, and more Republican than, Ad Astra 2's district. PX 31 ¶ 36 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 127:2-128:10 (Chen).

77. As the bottom row of Figure 5 illustrates, the least-Republican (and therefore most-Democratic) district in Ad Astra 2, CD 3, is more heavily Republican than 99.6% of the least-Republican districts (i.e., the most-Democratic districts) in the 1,000 computer-simulated plans. PX 31 ¶ 37 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 128:11-130:4 (Chen). In fact, 98.8% of the simulated plans contained a Democratic-favoring district—that is, a least-Republican district with a Republican vote share of under 50%. PX 31 ¶ 37 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 128:11-130:4 (Chen). Dr. Chen therefore concluded that CD 3 is an extreme partisan outlier. PX 31 ¶ 38 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 129:25-130:4 (Chen).

78. He explained that to achieve this extreme result, Ad Astra 2 cracks Democratic voters to eliminate the Democratic-favoring district that appears in virtually all of the simulated plans. PX 31 ¶ 38 (Chen Rep.). Dr. Chen therefore concluded that CD 3 is an extreme partisan outlier that is more favorable to Republicans

than 99.6% of simulated plans, using a standard 95% threshold for statistical significance. PX 31 ¶ 38 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 129:25-130:4 (Chen).

79. Dr. Chen reached a similar conclusion with respect to the second-most-Democratic district in Ad Astra 2, CD 2, shown in the second-to-last row of Figure 5. PX 31 ¶ 39 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 130:12-131:7 (Chen). Dr. Chen found that CD 2 has a higher Republican vote share (57.8%) than 96.3% of corresponding districts in the 1,000 computer-simulated plans. PX 31 ¶ 39 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 130:12-131:7 (Chen). Thus, almost all such districts in the computer-simulated plans would be less Republican than the enacted plan's CD 2. PX 31 ¶ 39 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 130:12-131:7 (Chen).

80. Based on this analysis, and again using a standard 95% threshold for statistical significance, Dr. Chen concluded that CD 2 is an extreme partisan outlier that is more favorable to Republicans than the corresponding district in 96.3% of the simulated plans. PX 31 ¶ 39 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 131:1-7 (Chen).

81. Dr. Chen explained that since CDs 2 and 3 are more Republican than their simulated counterparts, some other district must be less Republican than its simulated counterparts. PX 31 ¶ 40 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 131:8-15 (Chen). Consistent with this hypothesis, Dr. Chen's analysis—and the top row of Figure 5—showed that CD 1, the most Republican district in Ad Astra 2, exhibits a lower Republican vote share (64.8%) than 99.9% of the most-Republican

districts in the simulated plans, which reflected Republican vote shares of 68%-73%. PX 31 ¶ 41 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 131:17-132:6 (Chen). Dr. Chen explained that Ad Astra 2 achieves this result by moving heavily Democratic Lawrence into CD 1, causing CD 1 to have a Republican vote share significantly lower than 99.9% of the most-Republican districts in the simulated plans. PX 31 ¶ 41 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 131:17-132:6 (Chen). Dr. Chen testified that this move enabled CD 1 to remain safely Republican while simultaneously allowing CDs 2 and 3 to achieve higher Republican vote shares than nearly all of their simulated counterparts. PX 31 ¶ 41 (Chen Rep.). Dr. Chen described this maneuver as "classic . . . cracking." Hr'g Tr. Day 1 Vol. 2 at 132:7-8 (Chen).

82. Based on this analysis, Dr. Chen concluded that CD 1 is also an extreme partisan outlier, again applying a standard 95% significance threshold. PX 31 ¶ 42 (Chen Rep.).

83. In total, Dr. Chen identified three of the four districts in Ad Astra 2 as extreme partisan outliers: CDs 2 and 3 exhibit higher Republican vote shares than nearly all their simulated counterparts, while CD 1 features a Republican vote share lower than 99.9% of its computer-simulated counterparts—but still sufficiently high to leave the district safely Republican. PX 31 ¶ 42 (Chen Rep.).

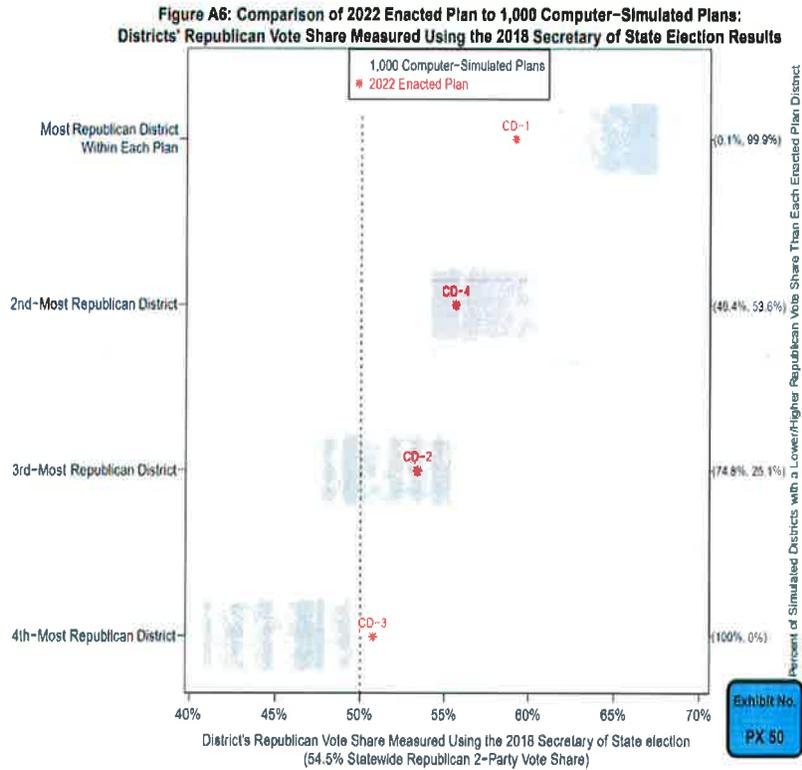
84. To examine whether the partisan compositions of Ad Astra 2's districts remain outliers under a variety of electoral conditions, Dr. Chen repeated this analysis nine separate times, using the results of each of the

nine elections included in the 2016-2020 Statewide Election Composite. PX 31 ¶ 43 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 133:22-142:4 (Chen); *see* PX 45-53 (displaying results of separate analyses). Dr. Chen concluded that the same extreme partisan outlier patterns shown in Figure 5 in the 2016-2020 Statewide Election Composite are present when district partisanship is measured using any of the nine individual statewide elections. PX 31 ¶ 43 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 141:2-142:4 (Chen); *see also* Hr'g Tr. Day 3 Vol. 2 at 65:14-66:1, 66:21-67:1 (Lockerbie) (agreeing that evidence that Ad Astra 2 is a partisan outlier under each individual election would “make [Dr. Chen’s] argument stronger” and support Dr. Chen’s conclusions).

85. For example, Dr. Chen repeated his analysis using the results of the 2018 Secretary of State election, rather than the 2016-2020 Statewide Election Composite, to measure district partisanship. Hr'g Tr. Day 1 Vol. 2 at 141:2-142:4 (Chen); *see* PX 50 (displaying results). The 2018 Secretary of State election resulted in a statewide Republican vote share of 54.5%, Hr'g Tr. Day 1 Vol. 2 at 134:18-21 (Chen); *see* PX 50, making the results slightly more favorable to the Democratic candidate than the overall composite, which features an average Republican vote share of 58.1%, PX 31 ¶ 44 (Chen Rep.).

86. Figure A6 in the appendix to Dr. Chen’s report, also admitted as Plaintiffs’ Exhibit 50, compares the partisan distribution of districts in Ad Astra 2 to the partisan distribution of districts in the 1,000 computer-

simulated plans, with partisanship measured using the results of the 2018 Secretary of State election:



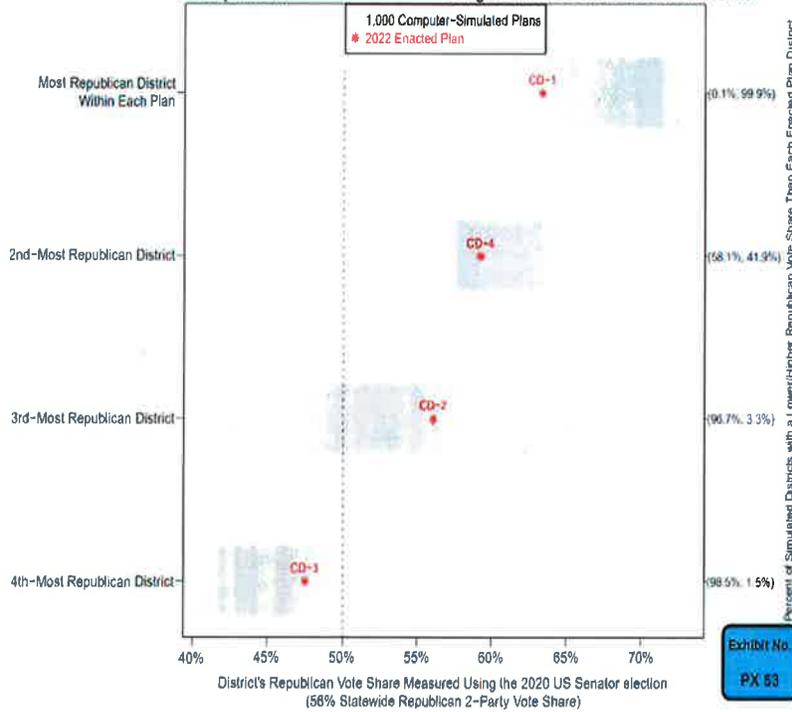
87. Even in this relatively Democratic-favoring electoral environment, all four of the enacted congressional districts favor Republicans. Hr’g Tr. Day 1 Vol. 2 at 134:22-135:7 (Chen). Dr. Chen explained that this result indicates that Ad Astra 2 is a durable plan, under which Republicans would be favored to win each district under a range of electoral conditions. Hr’g Tr. Day 1 Vol. 2 at 135:8-13 (Chen). Dr. Chen further explained that comparing the enacted districts’

partisan compositions to the partisan compositions of districts in the simulated plans showed that CDs 1, 2, and 3 in the enacted plan remain extreme partisan outliers when partisanship is calculated using the 2018 Secretary of State election rather than the multiyear composite. Hr'g Tr. Day 1 Vol. 2 at 135:14-136:17 (Chen). CD 3, for example, is more Republican-leaning than all of its simulated counterparts. Hr'g Tr. Day 1 Vol. 2 at 135:14-136:17 (Chen).

88. Dr. Chen further explained that the same patterns hold when partisanship is measured using the results of the 2020 U.S. Senate election. Hr'g Tr. Day 1 Vol. 2 at 136:18-140:17 (Chen); *see* PX 53 (displaying results).

89. Figure A9 in the appendix to Dr. Chen's report, also admitted as Plaintiffs' Exhibit 53, compares the partisan distribution of districts in Ad Astra 2 to the partisan distribution of districts in the 1,000 computer-simulated plans, with partisanship measured using the results of the 2020 U.S. Senate election:

**Figure A9: Comparison of 2022 Enacted Plan to 1,000 Computer-Simulated Plans:
Districts' Republican Vote Share Measured Using the 2020 US Senator Election Results**



90. Although under this relatively more Democratic-leaning electoral environment, in which the Republican won 56% of the vote, rather than 58.1% as under the composite, enacted CD 3 still exhibits a higher Republican vote share than the least-Republican district in 98.5% of the simulated plans. Hr’g Tr. Day 1 Vol. 2 at 137:1-24 (Chen). Moreover, CDs 1 and 2 display the same partisan-outlier pattern as under the original analysis. Hr’g Tr. Day 1 Vol. 2 at 137:25-138:9, 139:7-140:17 (Chen); PX 53. In particular, CD 2 remains safely Republican despite the fact that the third-least-Republican district is more competitive—or even Democratic-favoring—in 96.7% of the simulated

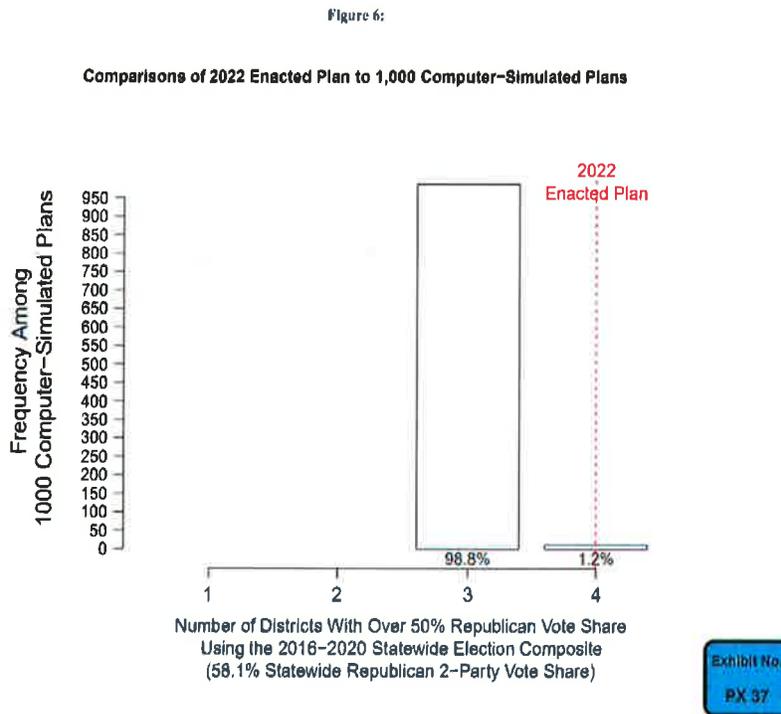
plans. Hr'g Tr. Day 1 Vol. 2 at 138:21-139:6 (Chen); PX 53. As Dr. Chen explained, no redistricting plan can guarantee that a party will win every seat in every electoral environment, but Ad Astra 2 makes each seat as invulnerable as possible for Republicans. Hr'g Tr. Day 1 Vol. 2 at 139:22-140:17 (Chen).

91. After examining Ad Astra 2 using both the 2016-2020 Statewide Election Composite and each of the nine elections contained in the composite individually, Dr. Chen did not find any electoral environment in which CD 3 was not an extreme partisan outlier. Hr'g Tr. Day 4 Vol. 1 at 119:11-15 (Chen).

92. Based on this analysis, Dr. Chen concluded that the same extreme partisan outlier patterns shown in Figure 5 are also present when district partisanship is measured using any of the nine individual statewide elections conducted from 2016 to 2020, rather than the 2016-2020 Statewide Election Composite. PX 31 ¶ 43 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 141:2-142:4 (Chen). Dr. Chen explained that this result shows that Ad Astra 2 is a durable gerrymander, in which CD 3, for example, is relatively more favorable for Republicans than its simulated counterparts would be across a range of electoral environments. Hr'g Tr. Day 1 Vol. 2 at 141:9-142:4 (Chen). In other words, Ad Astra 2 makes CD 3 as invulnerable as possible for Republicans. Hr'g Tr. Day 1 Vol. 2 at 141:9-142:4 (Chen).

93. Dr. Chen also analyzed the number of total Republican-favoring districts in Ad Astra 2, defined as districts having a Republican vote share of over 50%, as measured using the 2016-2020 Statewide Election

Composite. PX 31 ¶ 41 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 132:21-133:21 (Chen). Figure 6 in Dr. Chen's report, also admitted as Plaintiffs' Exhibit 37, displays the distribution of Republican-favoring seats under Ad Astra 2 and under the 1,000 computer-simulated plans:



94. All four districts in Ad Astra 2 favor Republicans, but only 1.2% of the simulated plans feature four Republican-favoring districts; 98.8% include at least one Democratic-favoring district. PX 31 ¶ 41 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 132:21-133:12 (Chen). Based on this analysis, Dr. Chen concluded that compared to the 1,000 simulated plans, Ad Astra 2 is an extreme pro-Republican statistical

outlier, using a standard 95% significance threshold. PX 45, ¶ 41 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 133:13-21 (Chen).

95. In sum, the Court credits Dr. Chen's district-level partisanship analysis of Ad Astra 2. The Court finds Dr. Chen's district-level analysis of Ad Astra 2 to be powerful evidence that Ad Astra 2 is an intentional, effective partisan gerrymander. Moreover, Dr. Chen's analysis of Ad Astra 2 under various electoral outcomes is persuasive evidence that the enacted congressional plan was designed specifically to provide Republicans with the most advantageous congressional map possible. The Court further finds that the number of Republican-leaning districts would be lower, and the partisan compositions of CDs 1, 2, and 3 would be different, under a map-drawing process that adhered to the Guidelines and to traditional redistricting principles but did not include partisan considerations. The Court finds this to be persuasive evidence that Ad Astra 2 was intentionally designed to give Republicans a partisan advantage.

Ad Astra 2 is an extreme partisan statistical outlier as measured by the efficiency gap.

96. Dr. Chen next evaluated Ad Astra 2's partisan bias at the statewide level using the efficiency gap. PX 31 ¶¶ 46-49 & fig.7 (Chen Rep.). As Dr. Chen explained—and as another one of Plaintiffs' experts, Dr. Christopher Warshaw, further documented, *see infra* FOF § II.C—the efficiency gap is a well-established measure of a redistricting plan's partisan bias. PX 31 ¶ 46 (Chen Rep.). The efficiency gap measures the degree to which more Democratic or Republican votes

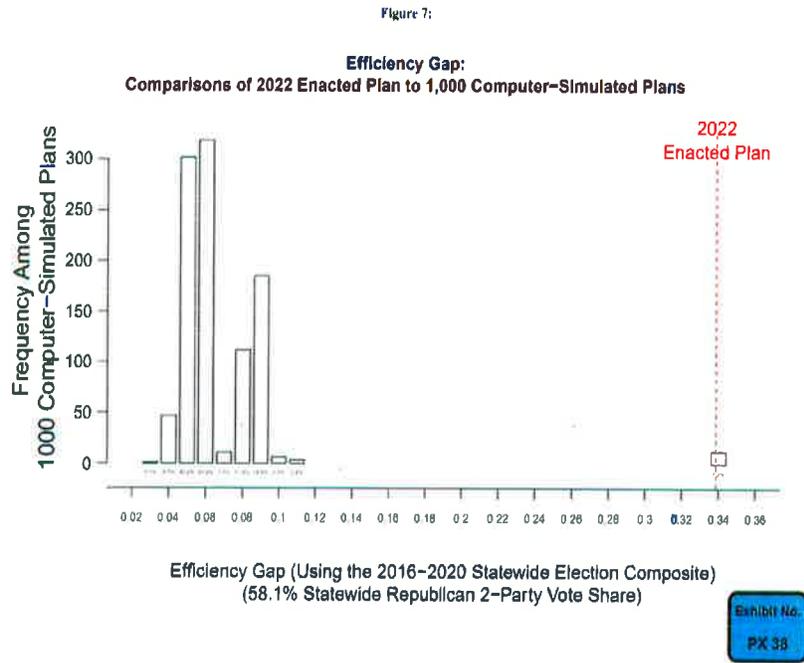
are cast inefficiently across an entire redistricting plan. PX 31 ¶¶ 46-47 (Chen Rep.). The efficiency gap is calculated using the total sum of surplus votes in districts a party won and lost votes in districts where that party lost. PX 31 ¶ 46 (Chen Rep.). In a district lost by a given party, all of the party's votes are considered lost votes; in a district won by a party, only the party's votes exceeding the 50% threshold necessary for victory are considered surplus votes. PX 31 ¶ 46 (Chen Rep.). A party's total inefficiently cast votes for an entire districting plan is the sum of its surplus votes in districts won by the party and its lost votes in districts lost by the party. PX 31 ¶ 46 (Chen Rep.). The efficiency gap is then calculated as total inefficiently cast Democratic votes minus total inefficiently cast Republican votes, divided by the total number of two-party votes cast statewide across all four congressional elections. PX 31 ¶ 46 (Chen Rep.). A positive efficiency gap indicates more inefficiently cast Democratic votes, while a negative efficiency gap indicates more inefficiently cast Republican votes.⁶ PX 31 ¶ 47 (Chen Rep.).

97. Measuring district partisanship using the 2016-2020 Statewide Election Composite, Dr. Chen found that Ad Astra 2 exhibits an efficiency gap of 33.9%, indicating that the plan results in far more inefficiently

⁶ The Court notes that another one of Plaintiffs' experts, Dr. Christopher Warshaw, used the opposite sign convention, with positive efficiency gaps indicating more inefficiently cast Republican votes. PX 105 at 5 (Warshaw Rep.). The choice of signs is a matter of convention and does not substantively affect the analysis.

cast Democratic votes than inefficiently cast Republican votes. PX 31 ¶ 49 (Chen Rep.). Dr. Chen compared Ad Astra 2's efficiency gap with the efficiency gaps of the computer-simulated plans and found that the enacted congressional plan's efficiency gap is larger than the efficiency gaps exhibited by 98.8% of the computer-simulated plans. PX 31 ¶ 49 (Chen Rep.). From this, Dr. Chen concluded that Ad Astra 2 creates an extreme pro-Republican partisan bias that cannot be explained by Kansas' political geography or by adherence to the Guidelines or traditional redistricting criteria. PX 31 ¶ 49 (Chen Rep.).

98. Figure 7 in Dr. Chen's report, also admitted as Plaintiffs' Exhibit 38, displays the distribution of efficiency gaps across the simulated maps and Ad Astra 2:



99. The Court credits Dr. Chen's analysis of Ad Astra 2's statewide partisan bias. The Court finds Dr. Chen's efficiency gap analysis to be persuasive evidence that Ad Astra 2 was designed to give Republicans a partisan advantage, and that the enacted plan exhibits extreme pro-Republican bias that cannot be explained by Kansas's political geography or by adherence to the Guidelines or traditional redistricting criteria. Nevertheless, the Court recognizes that the efficiency gap should be employed with caution in states with four districts. The Court nonetheless concludes that as explained below, *see infra* FOF § II.C, use of a multielection composite (as in Dr. Chen's analysis) allows the reliable use of the efficiency gap to measure partisan bias in Kansas, and further notes that the bulk of Dr. Chen's simulation analysis does not rely on the efficiency gap. The Court agrees with Dr. Chen's testimony, *see Hr'g Tr. Day 4 Vol. 1 at 95:2-8 (Chen)*, that the evidence shows Ad Astra 2 is an extreme partisan outlier unexplainable by adherence to the Guidelines or other traditional districting criteria even without considering any evidence regarding the efficiency gap.

Ad Astra 2 is an extreme partisan statistical outlier at the municipal level.

100. In addition to the above district-level and statewide analyses, Dr. Chen also examined the extent to which partisan bias affected the map-drawing process around specific cities. PX 31 ¶¶ 53-58 & fig.8 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 142:5-146:13 (Chen). Dr. Chen found that Ad Astra 2's treatment of several cities exhibits extreme political bias when

compared to computer-simulated districts in the same regions. PX 31 ¶¶ 53-58 & fig.8 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 142:5-146:13 (Chen).

101. To analyze Ad Astra 2's treatment of Kansas's ten most populous cities, Dr. Chen first identified the district in Ad Astra 2 that contains most of each city's population and computed that district's partisanship using the 2016-2020 Statewide Election Composite. PX 31 ¶ 54 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 142:5-143:7 (Chen). Dr. Chen then repeated this process for each of the 1,000 computer-simulated redistricting plans, first determining which simulated district within each plan contained the majority of the city's population, then computing that district's partisanship. PX 31 ¶ 54 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 143:8-144:8 (Chen). Dr. Chen then plotted the partisanship of the districts containing the majority of each city's population under Ad Astra 2 and each of the simulated redistricting plans in Figure 8 of his report, also admitted as Plaintiffs' Exhibit 39:

Figure 8: Comparison of Individual Districts' Republican Vote Shares in the 2022 Plan and in 1,000 Computer-Simulated Plans

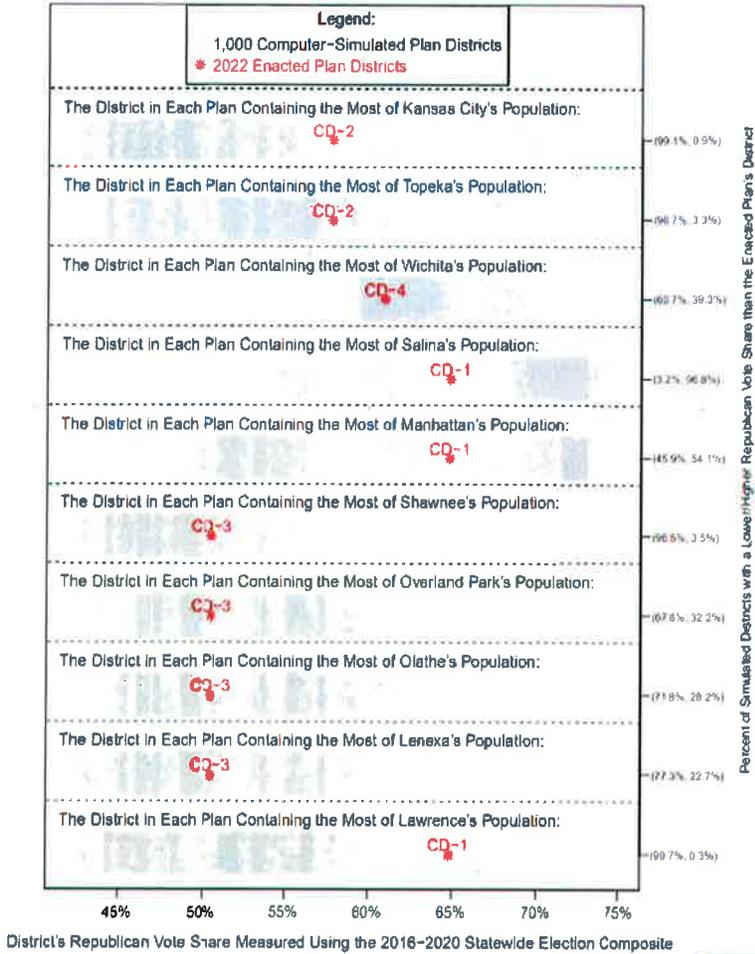


Exhibit No.
PX 39

102. The top row of Figure 8 displays the partisanship of the district in each plan that contains the majority of Kansas City's population. PX 31 ¶ 55 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 142:5-144:8

(Chen). Under Ad Astra 2, the majority of Kansas City's population lives in CD 2, which has a Republican vote share of 57.8%. PX 31 ¶ 55 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 142:5-144:8 (Chen). This result is anomalous compared to the simulated plans' treatment of Kansas City: 99.1% of the simulated plans place the majority of Kansas City's population in a district with a lower Republican vote share, 97.6% place it into a district with a Republican vote share of under 55%, and 83.7% of simulated plans place the city into a Democratic-favoring district. PX 31 ¶ 55 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 143:17-144:8 (Chen).

103. Based on this analysis, Dr. Chen concluded that Ad Astra 2 is an extreme partisan outlier in its treatment of Kansas City. PX 31 ¶ 55 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 144:1-25 (Chen).

104. The second row of Figure 8 shows a similar pattern in Ad Astra 2's treatment of Topeka. Ad Astra 2 assigns the majority of Topeka's population to CD 2, which has a Republican vote share of 57.8%. PX 31 ¶ 56 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 145:3-14 (Chen). Again, this treatment is anomalous compared to the simulated plans' treatment of Topeka; 96.7% of the simulated maps assign the majority of Topeka's population to a district with a lower Republican vote share than Ad Astra 2's CD 2. PX 31 ¶ 56 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 145:3-14 (Chen).

105. Based on this analysis, Dr. Chen concluded that Ad Astra 2 is statistically anomalous in its treatment of Topeka and that Topeka's placement in a district with a Republican vote share of 57.8% cannot be explained by a map-drawing process that adhered to

traditional redistricting criteria. PX 31 ¶ 56 (Chen Rep.).

106. The sixth row of Figure 8 shows the same pattern in Ad Astra 2's treatment of Shawnee. Ad Astra 2 assigns the majority of Shawnee's population to CD 3, a Republican-favoring district with a Republican vote share of 50.6%. PX 31 ¶ 56 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 145:15-19 (Chen). But 96.5% of the simulated plans place the majority of Shawnee's population in districts with lower Republican vote shares than enacted CD 3, and 96.1% of simulated plans place Shawnee in a Democratic-favoring district. PX 31 ¶ 57 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 145:19-25 (Chen).

107. Based on this analysis, Dr. Chen concluded that Ad Astra 2 is statistically anomalous in its treatment of Shawnee and that Shawnee's placement in a Republican-favoring district cannot be explained by a map-drawing process that adhered to traditional redistricting criteria. PX 31 ¶ 56 (Chen Rep.).

108. Finally, the last row of Figure 8 displays the same pattern in Ad Astra 2's treatment of Lawrence. Ad Astra 2 assigns most of Lawrence to CD 1, which has a Republican vote share of 64.8%. PX 31 ¶ 58 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 146:1-7 (Chen). 99.7% of the simulated plans placed Lawrence in a more competitive district, and 36.2% of simulated plans place Lawrence in a Democratic-favoring district. PX 31 ¶ 57 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 146:7-13 (Chen).

109. Based on this analysis, Dr. Chen concluded that Ad Astra 2 is statistically anomalous in its treatment of Lawrence. PX 31 ¶ 58 (Chen Rep.). At trial, Dr. Chen testified that Ad Astra 2 is “a really, really extreme partisan outlier in how it treats Lawrence.” Hr’g Tr. Day 1 Vol. 2 at 146:5-7 (Chen); see PX 31 ¶ 57 (Chen Rep.). Dr. Chen further concluded that this anomalous treatment cannot be explained by a map-drawing process that adhered to traditional redistricting criteria. PX 31 ¶ 56 (Chen Rep.).

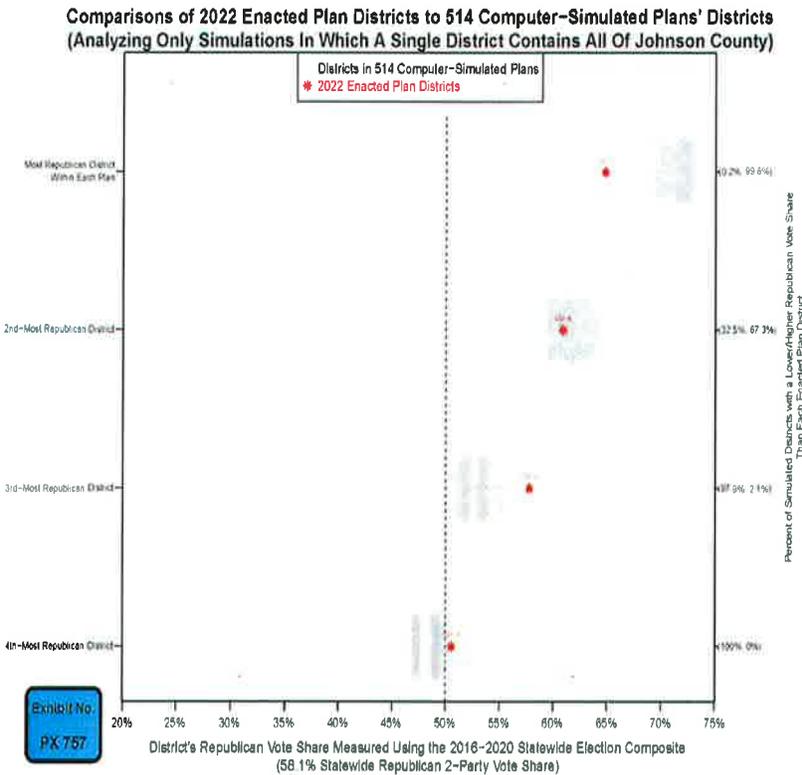
110. The Court credits Dr. Chen’s analysis of the partisan bias reflected in Ad Astra 2’s treatment of Kansas City, Topeka, Shawnee, and Lawrence. The Court finds that the partisan compositions of the enacted congressional districts containing these cities are extreme pro-Republican partisan outliers compared to the simulated districts produced using the Guidelines and traditional redistricting principles. The Court further finds that the partisan compositions of the districts containing these cities would be different under a map-drawing process that adhered to the Guidelines and to traditional redistricting principles. The Court finds this to be persuasive evidence that Ad Astra 2 was intentionally designed to give Republicans a partisan advantage.

Ad Astra 2 remains an extreme partisan outlier compared to simulated plans that preserve Johnson County in a single district.

111. Dr. Chen also examined whether Ad Astra 2 is a partisan outlier when compared specifically to the subset of the 1,000 simulated plans that keep Johnson County intact within a single congressional district.

Hr'g Tr. Day 4 Vol. 1 at 92:7-22 (Chen). Dr. Chen found that 514 of the 1,000 simulated plans do not divide Johnson County. Hr'g Tr. Day 4 Vol. 1 at 92:9-11 (Chen).

112. Plaintiffs' Exhibit 757 compares the partisan distribution of districts in Ad Astra 2 to the partisan distribution of districts in the 514 computer-simulated plans in which Johnson County falls within a single congressional district:



Hr'g Tr. Day 4 Vol. 1 at 92:5-22 (Chen).

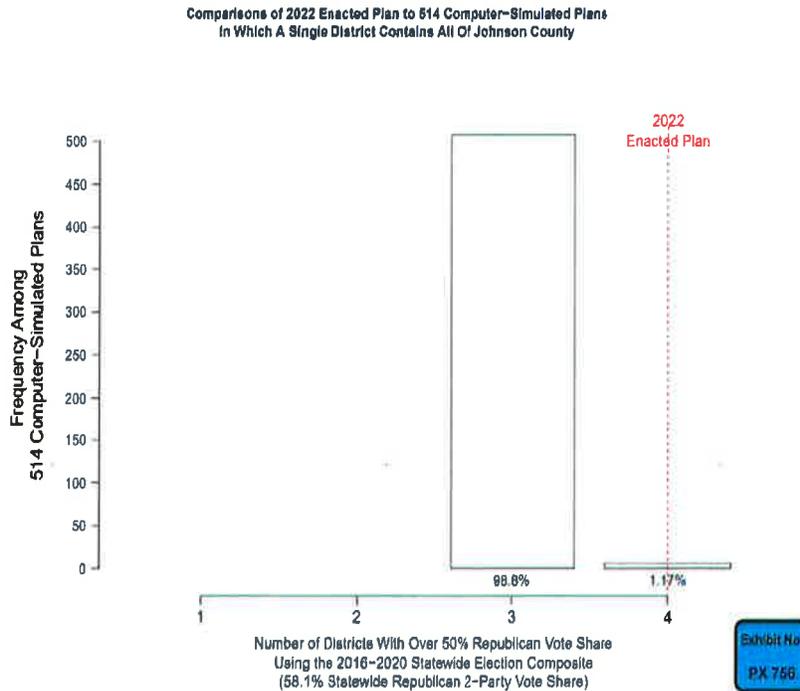
113. Dr. Chen concluded that this chart showed the same pattern as his earlier analysis comparing Ad Astra 2 to the full set of 1,000 simulated plans: even compared only to plans that keep Johnson County intact, the enacted plan remains “an extreme partisan outlier.” Hr’g Tr. Day 4 Vol. 1 at 99:15-25 (Chen).

114. Dr. Chen explained that CD 3 “is still an extreme partisan outlier” compared to the most Democratic districts in these 514 simulated plans. Hr’g Tr. Day 4 Vol. 1 at 93:17-22 (Chen). The most Democratic districts in the 514 simulated plans are almost all Democratic leaning or safely Democratic, with Republican vote shares primarily between 46% and 49%. Hr’g Tr. Day 4 Vol. 1 at 94:8-14 (Chen). Enacted CD 3, with a Republican vote share of 50.5%, is more favorable to Republicans than *every one* of the 514 simulated plans’ most Democratic districts. Hr’g Tr. Day 4 Vol. 1 at 94:16-95:1 (Chen).

115. Dr. Chen further testified that comparing enacted CD 1 to the simulated plans’ most-Republican districts also revealed the same patterns observed using the full set of 1,000 simulations: enacted CD 1 has a lower Republican vote share than 99.8% of the most-Republican districts in the 514 simulated plans that kept Johnson County whole. Hr’g Tr. Day 4 Vol. 1 at 95:9-96:8 (Chen). Indeed, the simulated plans’ most-Republican districts usually have Republican vote shares of roughly 70%, with some as high as 72% or 73%, while enacted CD 1 has a Republican vote share of only roughly 65%. Hr’g Tr. Day 4 Vol. 1 at 96:23-97:1, 97:15-18 (Chen). Dr. Chen concluded that enacted CD 1 “was intentionally drawn to intentionally

remove Republicans,” compared to a redistricting process that complied with traditional districting principles while seeking to keep Johnson County whole. Hr’g Tr. Day 4 Vol. 1 at 96:9-14 (Chen). Dr. Chen explained that removing Republican voters from CD 1—a safe Republican district, even after those voters’ removal—allowed “those Republican voters [to] . . . be used in other districts to increase the Republican vote share of closer districts” like CDs 2 and 3. Hr’g Tr. Day 4 Vol. 1 at 97:15-98:2 (Chen).

116. Plaintiffs’ Exhibit 756 displays the distribution of Republican-favoring seats under Ad Astra 2 and under the 514 computer-simulated plans that keep Johnson County whole within a single district:



Hr'g Tr. Day 4 Vol. 1 at 98:3-22 (Chen).

117. From this analysis, Dr. Chen concluded that Ad Astra 2 remains an extreme partisan outlier at both the district and statewide levels, compared to a redistricting process that follows traditional criteria *and* keeps Johnson County whole. Hr'g Tr. Day 4 Vol. 1 at 99:15-25 (Chen). Dr. Chen concluded that a hypothetical intent by the Legislature to keep Johnson County whole in a single district could not explain the partisan bias in the map. The Court credits Dr. Chen's analysis and conclusion and finds that a desire to keep Johnson County whole cannot explain Ad Astra 2's partisan bias. The Court finds these facts to be persuasive evidence that even if Republican lawmakers created the map from the starting point of keeping Johnson County whole, Ad Astra 2 was still intentionally designed to give Republicans a partisan advantage, and the desire to keep Johnson County whole does not explain the partisan bias inherent in the map. The Court concludes that the argument that Ad Astra 2 is the product of a desire to keep Johnson County whole is a post hoc rationalization.

Kansas's political geography does not explain Ad Astra 2's partisan bias.

118. Dr. Chen testified that Ad Astra 2's partisan bias cannot be explained by Kansas's political geography. PX 31 ¶ 70 (Chen Rep.); Hr'g Tr. Day 1 Vol. 2 at 118:19-23, 151:18-20 (Chen). Dr. Chen programmed a computer algorithm that drew simulated plans using Kansas's unique political geography. PX 31 ¶ 68 (Chen Rep.) As Dr. Chen, explained "the entire premise of conducting districting

simulations is to fully account for Kansas' unique political geography and its political subdivision boundaries and to analyze how the state's political geography affects electoral bias in congressional districting." PX 31 ¶ 68 (Chen Rep.). Thus, the simulation analysis allowed Dr. Chen to identify how much of the electoral bias in the enacted congressional plan is caused by Kansas's political geography and how much is caused by the map-drawer's intentional efforts to favor one political party over the other. PX 31 ¶ 69 (Chen Rep.). Dr. Chen concluded that the enacted congressional plan's partisan bias goes beyond any "natural" level of electoral bias caused by Kansas's political geography or the political composition of the state's voters. PX 31 ¶ 70 (Chen Rep.). The Court credits this analysis and adopts this conclusion. The Court further adopts Dr. Chen's conclusion that this extreme, additional level of partisan bias in the enacted congressional plan can be directly attributed to the map-drawer's intentional efforts to favor the Republican Party. PX 31 ¶ 70 (Chen Rep.).

119. Finally, as discussed in more detail below, *see infra* FOF § IV.A, the Court finds that Defendants offered no meaningful evidence to rebut Dr. Chen's analysis. The Court therefore credits Dr. Chen's analysis in its entirety and finds that it offers persuasive evidence that Ad Astra 2 was designed intentionally and effectively to maximize Republican advantage in Kansas's congressional delegation.

B. Evidence presented by Dr. Jonathan Rodden demonstrates that Ad Astra 2 is an intentional, effective partisan gerrymander.

120. Dr. Jonathan Rodden is a tenured professor of political science at Stanford University and the founder and director of the Stanford Spatial Social Science Lab—a center for research and teaching that focuses on the analysis of geo-spatial data in the social sciences. PX 1 at 3 (Rodden Rep.). His research focuses on political geography and redistricting. Hr’g Tr. Day 1 Vol. 2 at 10:14-18 (Rodden).

121. Dr. Rodden has served as an expert in numerous redistricting matters. PX 1 at 4 (Rodden Rep.); Hr’g Tr. Day 1 Vol. 2 at 11:17-12:14 (Rodden). This cycle, the Ohio Supreme Court credited Dr. Rodden’s analysis in *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, ___ N.E.3d ___, Nos. 2021-1193, 2021-1198, & 2021-1210, 2022 WL 110261 (Ohio Jan. 12, 2022), and *Adams v. DeWine*, ___ N.E.3d ___, Nos. 2021-1428 & 2021-1449, 2022 WL 129092 (Ohio Jan. 14, 2022), two redistricting cases challenging state legislative and congressional maps. PX 1 at 4 (Rodden Rep.); *see, e.g., League of Women Voters of Ohio*, 2022 WL 110261, at *23, *26; *Adams*, 2022 WL 129092, at *10, *12-13. Dr. Rodden drew the congressional plan that was chosen by the Pennsylvania Supreme Court for implementation after the political process in that state failed to produce a plan. *Carter v. Chapman*, No. 7 MM 2022, 2022 WL 549106 (Pa. Feb. 23, 2022); Hr’g Tr. Day 1 Vol. 2 at 12:8-14 (Rodden).

122. The Court accepts Dr. Rodden in this case as an expert in redistricting, political and racial geography, applied statistics, and geographic information systems.

123. For his analysis in this case, Dr. Rodden analyzed Kansas's political geography and applied traditional redistricting criteria, including those encompassed in the Guidelines, to examine Ad Astra 2's configuration. To do this, Dr. Rodden drew two illustrative congressional maps that adhered to traditional redistricting criteria and the Guidelines—a “least-change” map that prioritized the Guideline of core retention, PX 1 at 14-15 & fig.8 (Rodden Rep.); Hr'g Tr. Day 1 Vol. 2 at 23:3-24:10 (Rodden), and a “communities-of-interest” map that allowed for slightly lower core retention to better serve the Guidelines of compactness and respect for communities of interest, PX 1 at 14-16 & fig.9 (Rodden Rep.); Hr'g Tr. Day 1 Vol. 2 at 25:3-23 (Rodden).

124. In analyzing Kansas's political geography and traditional redistricting principles in the context of congressional redistricting, Dr. Rodden explained that it is “rather straightforward to abide by traditional redistricting criteria” and that it “is possible to draw plans that achieve . . . all of the goals that are laid out in [the Guidelines].” Hr'g Tr. Day 1 Vol. 2 at 15:14-16:4 (Rodden). For that reason, he found that the plan enacted by “the legislature seems to abide by a different logic. . . . [I]t's not the kind of map that would emerge from the application of [the Guidelines].” Hr'g Tr. Day 1 Vol. 2 at 15:25-16:4 (Rodden). Specifically, Dr. Rodden explained that the geography of Kansas is

such that minimizing splits of political subdivisions like counties is straightforward and there is no tension between various Guidelines. Hr'g Tr. Day 1 Vol. 2 at 19:3-24 (Rodden). For example, he explained that "compactness and the preservation of communities of interest seem to go together . . . very nicely in this instance." Hr'g Tr. Day 1 Vol. 2 at 19:3-24 (Rodden).

125. Dr. Rodden compared Ad Astra 2 with the prior congressional plan and his illustrative plans on various traditional redistricting criteria contained in the Guidelines, including compactness, preservation of political subdivisions, and core retention. PX 1 at 17-26 (Rodden Rep.). Dr. Rodden's analysis and his illustrative plans demonstrate that adherence to the Guidelines or traditional redistricting criteria cannot explain the configuration of Ad Astra 2. PX 1 at 17-26 (Rodden Rep.); Hr'g Tr. Day 1 Vol. 2 at 28:23-29:4 (Rodden).

126. Of all of the maps Dr. Rodden analyzed, Ad Astra 2 had the lowest compactness scores using four different measures (Reock, Polsby-Popper, Convex Hull, and Schwartzberg), meaning that the prior plan and both of Dr. Rodden's illustrative plans contained more compact districts than Ad Astra 2. PX 1 at 18 tbl.1 (Rodden Rep.). Therefore, an effort to comply with the Guidelines and create compact districts cannot explain the configuration of Ad Astra 2. PX 1 at 18-19 & tbl.1 (Rodden Rep.); Hr'g Tr. Day 1 Vol. 2 at 29:11-30:14 (Rodden).

127. Ad Astra 2 also splits more political subdivisions than any of the comparison plans. It splits one additional county, 14-15 additional voting

tabulation districts, and 5 additional cities and towns, including Kansas City and Lawrence. PX 1 at 19 & tbl.2 (Rodden Rep.). Thus, an effort to comply with the Guidelines and preserve political subdivisions cannot explain the configuration of Ad Astra 2. PX 1 at 19 & tbl.2 (Rodden Rep.); Hr'g Tr. Day 1 Vol. 2 at 32:8-14 (Rodden).

128. Ad Astra 2 fares no better when it comes to core retention. By population, Ad Astra 2 preserves just 86% of the cores of former districts. PX 1 at 26 & tbl.3 (Rodden Rep.). By way of comparison, Dr. Rodden's least-change plan, which adhered to the Guidelines' requirement of core retention, retained 97% of the cores of former districts. PX 1 at 26 & tbl.3 (Rodden Rep.). Thus, to achieve population equality, it was necessary to move only 3% of Kansans between districts. Hr'g Tr. Day 1 Vol. 2 at 24:17-25:2 (Rodden). Moreover, Ad Astra 2 relocates more Black, Hispanic, and Native American Kansans than any of the comparator plans, meaning the changes in district boundaries were focused on areas with large minority populations. PX 1 at 26 & tbl.3 (Rodden Rep.); Hr'g Tr. Day 1 Vol. 2 at 36:18-37:13 (Rodden). As a result, population equality cannot explain the number of people moved among districts in Ad Astra 2.

129. Ad Astra 2 also splits multiple communities of interest in contravention of the Guidelines. PX 1 at 20 (Rodden Rep.); Hr'g Tr. Day 1 Vol. 2 at 32:15-33:18 (Rodden). Most of Lawrence is subsumed in the vast, rural CD 1—the “Big First”—resulting in only an arrow corridor connecting that portion of CD 2 in Ad Astra 2. Hr'g Tr. Day 1 Vol. 2 at 32:15-33:18 (Rodden). The

state's geographically proximate Native American communities are split between two congressional districts. Hr'g Tr. Day 1 Vol. 2 at 32:15-33:18 (Rodden); PX 1 at 20 (Rodden Rep.). Fort Riley—the town *and* the military installation—are split and also separated from Junction City. Hr'g Tr. Day 1 Vol. 2 at 32:15-33:18 (Rodden); PX 1 at 20 (Rodden Rep.). And perhaps most glaringly, Kansas City and Wyandotte County are split between districts, contravening multiple of the Guidelines. Hr'g Tr. Day 1 Vol. 2 at 26:12-27:9 (Rodden); PX 1 at 20 (Rodden Rep.).

130. Ad Astra 2 likewise divides geographically compact and proximate minority groups. PX 1 at 20-24 (Rodden Rep.); Hr'g Tr. Day 1 Vol. 2 at 33:19-35:9 (Rodden). For example, the split of Wyandotte County divides Black and Hispanic communities in the greater Kansas City metro area between CDs 2 and 3. PX 1 at 20-22 & figs. 11 & 12 (Rodden Rep.). Scooping Lawrence out of CD 2 extracts Black and Hispanic voters and submerges them in the vast, less diverse Big First. PX 1 at 20-22 & figs. 11 & 12 (Rodden Rep.). Native American Kansans are similarly dispersed, and one of the state's reservations is split from the other four, despite their geographic proximity. PX 1 at 23 & fig.13 (Rodden Rep.).

131. Dr. Rodden also conducted racial and partisan dislocation analyses. These analyses illuminate the impact the failure to adhere to traditional redistricting criteria and the Guidelines has in terms of both race and partisanship. Hr'g Tr. Day 1 Vol. 2 at 50:17-51:11 (Rodden).

132. The racial dislocation analysis compares the racial composition of a *hypothetical* district or “neighborhood”—comprised of each individual Kansan and their nearest 734,469 neighbors, thus equaling the population of a Kansas congressional district—with the *actual* district in which each individual resides. PX 1 at 26 (Rodden Rep.); Hr’g Tr. Day 1 Vol. 2 at 37:20-39:22 (Rodden). It then asks, for each member of a racial minority group, how many members of that individual’s hypothetical neighborhood are also minorities. PX 1 at 26 (Rodden Rep.); Hr’g Tr. Day 1 Vol. 2 at 37:20-39:22 (Rodden). This captures the extent to which each individual lives in a neighborhood (at the scale relevant for drawing congressional districts) with other minorities. PX 1 at 26 (Rodden Rep.); Hr’g Tr. Day 1 Vol. 2 at 37:20-39:22 (Rodden). Next, for each member of a racial minority, it asks how many members of the district into which they have actually been drawn are also minorities. PX 1 at 26 (Rodden Rep.); Hr’g Tr. Day 1 Vol. 2 at 37:20-39:22 (Rodden). Thus, for each Kansan, the racial dislocation analysis measures the disparity between the minority population share of the assigned district and the share of the individual’s hypothetical neighborhood—which reveals whether the racial composition of the district matches that of the neighborhood. PX 1 at 26-27 (Rodden Rep.); Hr’g Tr. Day 1 Vol. 2 at 37:20-39:22 (Rodden). Gaps between the minority share of a neighborhood and the minority share of a district demonstrate that districts have not been drawn in a way that corresponds to communities of interest and the state’s natural racial geography, meaning the district was configured in a way that pairs together people from areas that have different

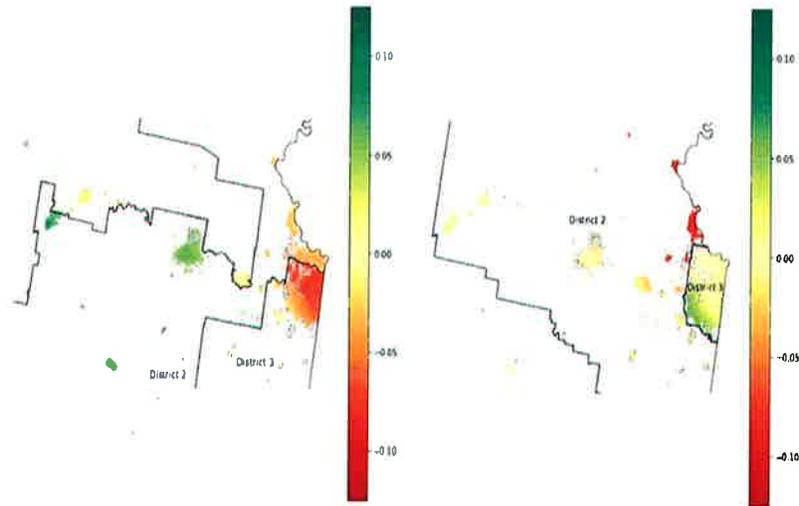
demographic compositions. PX 1 at 26-27 (Rodden Rep.); Hr'g Tr. Day 1 Vol. 2 at 37:20-39:22 (Rodden).

133. Ad Astra 2 has high levels of racial dislocation. Specifically, minority voters who live along the border of CDs 2 and 3 in Wyandotte and Johnson Counties experience high levels of racial dislocation. Hr'g Tr. Day 1 Vol. 2 at 40:17-41:13 (Rodden). Because the line drawn through Wyandotte County divides geographically proximate minority groups to the north and south, minority voters on either side of that line live in districts that have lower minority shares than would be expected if the districts were drawn according to the natural demographics of the area. Hr'g Tr. Day 1 Vol. 2 at 40:17-41:13 (Rodden). In fact, some of those voters live in a district that has a minority share that is *seven percentage points lower* than their neighborhood—a substantial disparity in a state that has a Black population of just about 6% and a Hispanic population about twice that. Hr'g Tr. Day 1 Vol. 2 at 41:4-42:1 (Rodden). By contrast, Dr. Rodden's communities-of-interest map, as well as his least-change map and the prior congressional map, exhibit significantly lower levels of racial dislocation. Hr'g Tr. Day 1 Vol. 2 at 42:2-44:4 (Rodden).

134. These results are depicted in the figures below. The figure on the left, Plaintiffs' Exhibit 20 (a zoomed-in version of Figure 16 in Dr. Rodden's report), depicts racial dislocation levels for all minority groups in Ad Astra 2, while the figure on the right, Plaintiffs' Exhibit 24 (a zoomed-in version of Figure 17 in Dr. Rodden's report), shows racial dislocation levels in Dr. Rodden's communities-of-interest map—which

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preserves Wyandotte County in a single district—for the same groups. Red and orange shading, which features prominently in Ad Astra 2 in Wyandotte and Johnson Counties, indicates high levels of racial dislocation, meaning that minorities in those areas are placed in districts that have much lower proportions of minorities than their neighborhoods. Hr’g Tr. Day 1 Vol. 2 at 40:2-41:13 (Rodden). By comparison, the primarily yellow shading in the communities-of-interest map indicates low levels of racial dislocation, meaning the demographics of the neighborhood match the demographics of the districts. Hr’g Tr. Day 1 Vol. 2 at 42:7-25 (Rodden). The high levels of racial dislocation in Ad Astra 2 result from cracking minority voters between districts—that is, drawing noncompact districts that divide geographically proximate minority communities. Hr’g Tr. Day 1 Vol. 2 at 44:7-22 (Rodden).

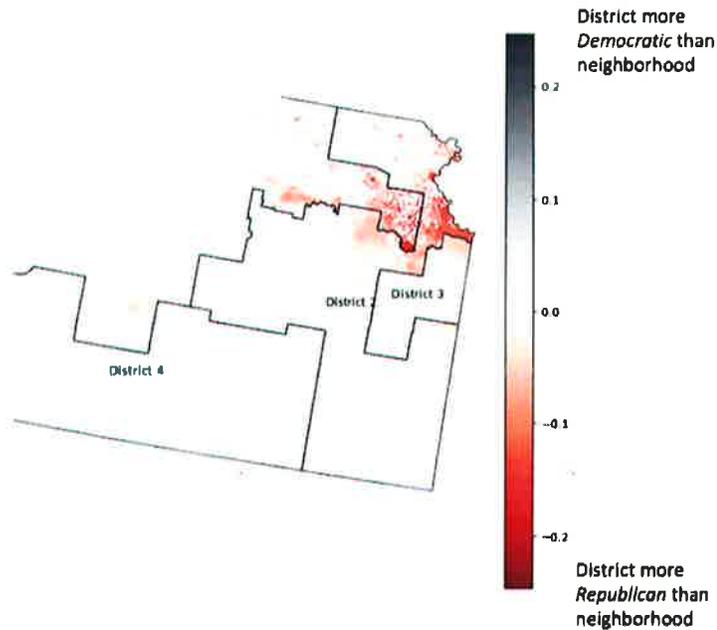


135. All told, Ad Astra 2 has more than double the level of racial dislocation of the previous congressional plan and Dr. Rodden's least-change map, and more than *triple* the level of Dr. Rodden's communities-of-interest map. PX 1 at 30 tbl.4 (Rodden Rep.); Hr'g Tr. Day 1 Vol. 2 at 45:5-46:16 (Rodden). The Third Congressional District, which encompasses half of Wyandotte County, has the highest levels of racial dislocation—nearly *four times higher* than the corresponding district in any of the comparison plans. PX 1 at 30 tbl.4 (Rodden Rep.). This is true for both the Black and Hispanic minority groups in CD 3. PX 1 at 30 tbl.4 (Rodden Rep.).

136. Dr. Rodden's partisan dislocation analysis reveal seven starker results. The partisan dislocation analysis proceeds in the same way as the racial dislocation analysis. Using official precinct-level election results, the analysis compares, for each individual Kansan, the partisanship of their nearest 735,000 neighbors and the partisanship of the district into which they were drawn. Hr'g Tr. Day 1 Vol. 2 at 47:24-48:22 (Rodden). Again, the difference between these two levels of partisanship signifies the degree to which someone has been assigned to a district that differs from their natural neighborhood. Hr'g Tr. Day 1 Vol. 2 at 47:24-48:22 (Rodden). The larger the difference, the greater the disparity between a voter's neighborhood and their district. Hr'g Tr. Day 1 Vol. 2 at 47:24-48:22 (Rodden). The analysis also asks which way this difference trends—more Republican or more Democratic. Hr'g Tr. Day 1 Vol. 2 at 47:24-48:22 (Rodden).

137. The results of this analysis are depicted in the figure below, PX 25 (a zoomed-in version of Figure 18 from Dr. Rodden's report), which focuses on Ad Astra 2 in the eastern part of the state. Red shading indicates that Kansans live in districts that are more Republican than the neighborhoods in which they reside, while gray represents voters who reside in districts that are more Democratic than their neighborhoods. The pattern is clear: Kansans across the northeast part of the state are consistently placed in districts that are far more Republican than their neighborhoods. Hr'g Tr. Day 1 Vol. 2 at 50:10-13 (Rodden).

Democratic vote share of district minus Democratic vote share of nearest 734,496 neighbors



138. Specifically, light red shading in the southern part of Wyandotte County and the northern part of Johnson County indicates that voters in this region reside in a district that is five to six percentage points (or more) Republican than their neighborhoods. Hr’g Tr. Day 1 Vol. 2 at 49:3-20 (Rodden). Kansans who live on the north side of the line that slices Wyandotte County in two reside in an even more Republican district: one that is 10 to 12 percentage points more Republican than their neighborhoods. Hr’g Tr. Day 1 Vol. 2 at 49:21-50:3 (Rodden). And residents of Lawrence end up in a district that is over *20 percentage points* more Republican than their neighborhoods—exactly the effect that would be expected given that Ad Astra 2 scooped Democratic Lawrence out of Douglas County and paired it with a district that stretches across western Kansas to the Colorado border. Hr’g Tr. Day 1 Vol. 2 at 50:3-11 (Rodden).

139. Kansans in the northeastern part of the state are thus dispersed across CDs 1, 2, and 3 in a way that places almost all of them in districts that are five to 25 percentage points more Republican than the neighborhoods in which they reside. PX 1 at 32 fig.18 (Rodden Rep.). The unnaturally Republican nature of CDs 2 and 3 results directly from the contravention of traditional redistricting principles and the Guidelines. Hr’g Tr. Day 1 Vol. 2 at 50:17-51:11 (Rodden).

140. Dr. Rodden’s analysis shows that the configuration of Ad Astra 2 cannot be explained by Kansas’s political geography or compliance with the Guidelines. Ad Astra 2 contains districts that are noncompact and irregularly shaped, includes numerous

unnecessary political subdivisions splits, breaks up geographically compact communities of interests, and fails to preserve the cores of former districts. As a result, it yields four Republican districts and places Kansans across northeast Kansas—and especially in Wyandotte County, Johnson County, and Lawrence—in districts that are far more Republican than can be explained by any neutral map-drawing considerations.

141. Specifically, CD 3, which would have been comfortably Democratic in a configuration that adhered to the Guidelines and traditional redistricting principles, becomes a Republican-leaning district in Ad Astra 2. PX 1 at 33 & fig.19 (Rodden Rep.). Likewise, CD 2, which would have been competitive-but-Republican-leaning in a plan that respected the Guidelines and communities of interest, becomes a solidly Republican district under Ad Astra 2. PX 1 at 33 & fig.19 (Rodden Rep.)

142. The Court credits Dr. Rodden's testimony on the partisan consequences of Ad Astra 2 and concludes that it was enacted intentionally and effectively to diminish the electoral influence of Democratic voters in the state. During Dr. Rodden's live testimony, the Court carefully observed his demeanor, particularly as he was cross-examined for the first time about his work on this case. He consistently defended his work with careful and deliberate explanations of the bases for his opinions.

**C. Evidence presented by Dr. Chris
Warshaw demonstrates that Ad Astra 2
is an intentional, effective partisan
gerrymander.**

143. Plaintiffs' expert Dr. Christopher Warshaw, Ph.D., is a tenured Associate Professor of Political Science at George Washington University. PX 105 at 1 (Warshaw Rep.); Hr'g Tr. Day 2 Vol. 1 at 63:12-16 (Warshaw).

144. Dr. Warshaw's academic research focuses on American politics, with focuses on public opinion, representation, elections, polarization, redistricting, and partisan gerrymandering. PX 105 at 1 (Warshaw Rep.); Hr'g Tr. Day 2 Vol. 1 at 64:4-9 (Warshaw). Dr. Warshaw has written over twenty peer-reviewed papers on these topics, including multiple papers that focus specifically on elections or redistricting, and has a forthcoming book that includes an extensive analysis on the causes and consequences of partisan gerrymandering in state governments. PX 105 at 1 (Warshaw Rep.). Dr. Warshaw's work has appeared in leading peer-reviewed journals, such as the *American Political Science Review*, *Legislative Studies Quarterly*, and the *Election Law Journal*. PX 105 at 1 (Warshaw Rep.); Hr'g Tr. Day 2 Vol. 1 at 66:9-67:7, 67:17-68:9 (Warshaw). In particular, Dr. Warshaw has published two peer-reviewed articles on using the efficiency gap to quantify partisan bias in the redistricting process and examining its consequences for the political process. PX 105 at 1 (Warshaw Rep.); Hr'g Tr. Day 2 Vol. 1 at 67:25-68:9 (Warshaw).

145. Dr. Warshaw has presented expert reports or testimony using the efficiency gap in a number of partisan gerrymandering lawsuits, and his analysis has been consistently credited and relied upon by the courts in these cases. PX 105 at 2-3 (Warshaw Rep.); Hr’g Tr. Day 2 Vol. 1 at 70:12-21 (Warshaw); *see, e.g., Adams v. DeWine*, Nos. 2021-1428, 2021-1449, 2022 WL 129092, at *10-11, *14 (Ohio Jan. 14, 2022) (relying in part on Dr. Warshaw’s analysis in striking down congressional plan as partisan gerrymander); *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1, 127, 178 A.3d 737 (2018) (citing Dr. Warshaw’s testimony as evidence of congressional map’s unconstitutional partisan gerrymandering); *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1026 (S.D. Ohio) (“The Court qualified Dr. Warshaw as an expert in the fields of elections, partisan gerrymandering, polarization, and representation and found his testimony highly credible”), *vacated and remanded and other grounds*, 140 S. Ct. 101 (2019).

146. The Court accepts Dr. Warshaw in this case as an expert in American politics with specialties in political representation, elections, and polarization. During Dr. Warshaw’s live testimony, the Court carefully observed his demeanor, particularly as he was cross-examined for the first time about his work on this case. He consistently defended his work with careful and deliberate explanations of the bases for his opinions.

Dr. Warshaw employed reliable methodologies to analyze partisan bias.

147. To measure the partisanship of districts in Ad Astra 2, as well as the 2012 plan and other plans considered by the Legislature during this redistricting cycle, Dr. Warshaw used a composite of ten recent statewide elections for which precinct-level results were available: 2012 U.S. President, 2016 U.S. President, 2016 U.S. Senator, 2018 Governor, 2018 Attorney General, 2018 Insurance Commissioner, 2018 Secretary of State, 2018 Treasurer, 2020 U.S. President, and 2020 U.S. Senator.⁷ PX 105 at 10-11 & n.6 (Warshaw Rep.); Hr’g Tr. Day 2 Vol. 1 at 91:22-92:10 (Warshaw). To measure the partisanship of a district, Dr. Warshaw aggregated the precinct-level votes for each election to determine the vote share for each party within that district under a given election’s results, then averaged across the ten elections to determine the district’s average partisanship. PX 105 at 10-11 (Warshaw Rep.); Hr’g Tr. Day 2 Vol. 1 at 92:2-10 (Warshaw).

148. Dr. Warshaw explained that the use of statewide election results is appropriate—and standard practice—for evaluating the partisanship of new congressional districts for several reasons. At the most

⁷ Dr. Warshaw explained that he did not include any 2014 elections in his composite because precinct-level results were not available for those races. PX 105 at 3 n.2 (Warshaw Rep.); Hr’g Tr. Day 2 Vol. 1 at 73:10-11 (Warshaw). He further explained that including 2014, a Republican wave year, in his composite would have increased the plan’s pro-Republican bias, as measured using the composite. Hr’g Tr. Day 2 Vol. 1 at 153:10-154:13 (Warshaw).

basic level, there are no congressional-level election results available for a new district. Hr'g Tr. Day 2 Vol. 1 at 93:15-18 (Warshaw). Moreover, precinct-level results are not available for past congressional elections in Kansas, and using statewide elections avoids the need to impute results for uncontested congressional elections and ensures that partisanship estimates are not affected by idiosyncratic district features like incumbency or specific congressional candidates. Hr'g Tr. Day 2 Vol. 1 at 93:12-94:20 (Warshaw). As a result, Dr. Warshaw testified that he is not aware of any political science study that has analyzed a new congressional plan by analyzing past congressional elections. Hr'g Tr. Day 2 Vol. 1 at 93:19-25 (Warshaw); *see also supra* FOF § IIA (describing and approving Dr. Chen's similar use of a statewide composite to evaluate district partisanship). In any event, Dr. Warshaw explained that the statewide composite gives nearly identical results to observed congressional election results in determining the efficiency gap of the 2012 congressional plan, and that his research has shown that there is a strong correlation between efficiency gaps calculated using legislative elections and those calculated using statewide elections. Hr'g Tr. Day 2 Vol. 1 at 89:16-90:1, 155:22-56:9 (Warshaw).

149. The Court reaffirms its earlier finding that the use of statewide elections by Plaintiffs' experts to measure the partisanship of simulated and enacted districts is a reliable methodology. The Court further credits Dr. Warshaw's use of the ten elections comprising his statewide composite.

150. To evaluate the level of partisan bias exhibited by a given plan, Dr. Warshaw used the efficiency gap, a well-established, generally accepted metric of partisan fairness. PX 105 at 3 (Warshaw Rep.).

151. Dr. Warshaw explained that the efficiency gap measures the efficiency with which political parties are able to translate votes into legislative seats; improving this efficiency is the primary goal of redistricting, from a party's perspective. PX 105 at 4-5 (Warshaw Rep.); Hr'g Tr. Day 2 Vol. 1 at 64:18-25 (Warshaw). The efficiency gap captures the packing and cracking that underlie partisan gerrymandering. PX 105 at 6 (Warshaw Rep.).

152. The efficiency gap captures this idea by comparing the number of votes that each party casts inefficiently in a given election. PX 105 at 5 (Warshaw Rep.). In a congressional district in which a party's candidate loses, all votes for that party's candidate are inefficiently cast. PX 105 at 5 (Warshaw Rep.). In a district that a party wins, inefficiently cast votes are those beyond the 50% plus one needed to win. PX 105 at 5 (Warshaw Rep.).

153. The basic formula to calculate the efficiency gap is:

$$EG = \frac{W_R}{n} - \frac{W_D}{n}$$

PX 105 at 5 (Warshaw Rep.). In this formula, EG is the efficiency gap, W_R is the number of inefficiently cast Republican votes, W_D is the number of inefficiently cast Democratic votes, and n is the total number of votes cast in the state. PX 105 at 5 (Warshaw Rep.); Hr’g Tr. Day 2 Vol. 1 at 75:21-76:8 (Warshaw). This measure captures the extent to which one party’s voters are packed and cracked to a greater extent than the other party’s voters, and, because it is expressed as a percentage of the total votes cast, is comparable across time and states. PX 105 at 5 (Warshaw Rep.); Hr’g Tr. Day 2 Vol. 1 at 75:21-76:8 (Warshaw).

154. Table 1 of Dr. Warshaw’s report, also admitted as Plaintiffs’ Exhibit 117, gives a basic example of how to calculate the efficiency gap:

Table 1: Illustrative Example of Efficiency Gap

District	Democratic Votes	Republican Votes
1	75	25
2	40	60
3	40	60
Total	155 (52%)	145 (48%)
Inefficient	104	43

155. In this example, Democrats won a majority of the statewide vote, but only one of the three seats. PX 105 at 5 (Warshaw Rep.). Democrats won the first district with 75 of the 100 votes cast; this means the party inefficiently cast 24 votes beyond the 51 (50% +

1) needed to win the district. PX 105 at 5 (Warshaw Rep.). Democrats lost the second and third districts, so all 80 votes cast for the party across those two districts were inefficiently cast. PX 105 at 5 (Warshaw Rep.). Democrats thus inefficiently cast a total of 104 votes across the plan. PX 105 at 5 (Warshaw Rep.). Republicans inefficiently cast all their votes in the lost first district, but inefficiently cast only 9 votes in each of the second and third districts (60 votes is 9 more than the 51 necessary to win each district). PX 105 at 5 (Warshaw Rep.). Republicans thus inefficiently cast a total of only 43 votes across the plan. PX 105 at 5 (Warshaw Rep.). Applying the formula given above, the efficiency gap is $43/300 - 104/300 = -20\%$. PX 105 at 5 (Warshaw Rep.).

156. This simple formula for the efficiency gap does not account for the possibility that districts may have unequal populations or turnout levels. PX 105 at 5-6 (Warshaw Rep.). To account for this possibility, Dr. Warshaw used an alternative formula for the efficiency gap:

$$EG = S_D^{margin} - 2 * V_D^{margin}$$

PX 105 at 5-6 (Warshaw Rep.); Hr'g Tr. Day 2 Vol. 1 at 81:8-82:12 (Warshaw). In this formula, S_D^{margin} is the Democratic Party's seat margin (its seat share minus 0.5) and V_D^{margin} is the Democratic Party's vote margin, calculated by aggregating the raw vote for Democratic candidates across all districts, dividing by the total raw

vote cast, and subtracting 0.5. PX 105 at 5-6 (Warshaw Rep.); Hr'g Tr. Day 2 Vol. 1 at 81:15-82:7 (Warshaw).

157. Dr. Warshaw explained that he used the second version of the formula for his analysis in this case, as he does in all his academic work and expert reports. Hr'g Tr. Day 2 Vol. 1 at 82:13-15 (Warshaw). The second formula was first proposed in a peer-reviewed article by Eric McGhee. PX 105 at 6 (Warshaw Rep.); *see also* Hr'g Tr. Day 2 Vol. 1 at 82:8-15 (Warshaw).

158. Neither method for calculating the efficiency gap in any way implies that proportional representation is required. Hr'g Tr. Day 2 Vol. 1 at 76:9-11, 82:16-18 (Warshaw).

159. Dr. Warshaw explained that the efficiency gap has several theoretical and empirical properties that make it a good measure of partisan bias. At the theoretical level, the efficiency gap mathematically captures the packing and cracking that serve as the basic tools of partisan gerrymandering. PX 105 at 6 (Warshaw Rep.); Hr'g Tr. Day 2 Vol. 1 at 65:1-12, 82:22-83:5 (Warshaw). Moreover, empirical studies—including research conducted by Dr. Warshaw himself—have validated the efficiency gap's reliability as a measure of partisan bias: First, in states where multiple metrics for partisan bias are potentially available, the efficiency gap correlates strongly with those other metrics. Hr'g Tr. Day 2 Vol. 1 at 65:13-15, 83:6-17, 90:2-5 (Warshaw). Second, Dr. Warshaw's research shows that when party control of the redistricting process changes, the efficiency gap generally shifts in favor of the party taking power—as

one would expect. Hr’g Tr. Day 2 Vol. 1 at 65:16-66:4, 83:22-84:1, 90:6-11 (Warshaw). Third, Dr. Warshaw’s research has shown that bias in the redistricting process, as measured by the efficiency gap, empirically leads to bias in the composition of the relevant legislative body and affects eventual policy outcomes, again indicating that the measure correctly captures partisan bias. Hr’g Tr. Day 2 Vol. 1 at 89:1-15.

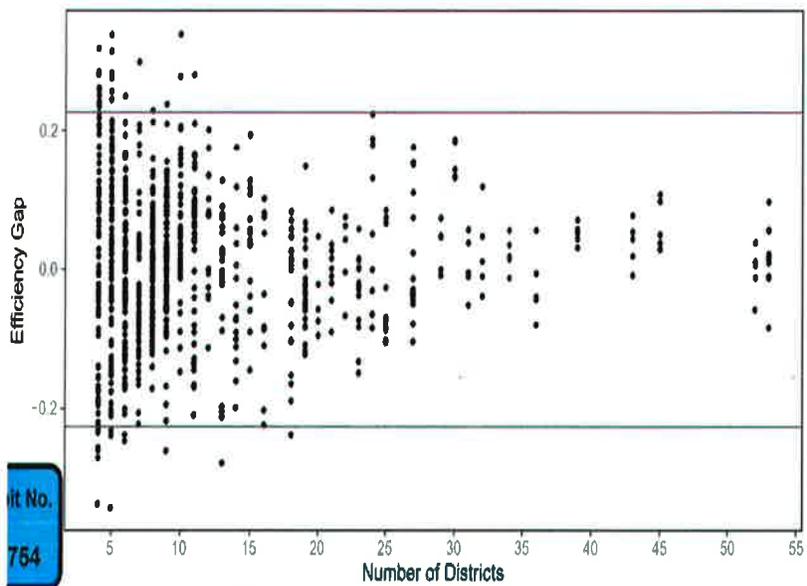
160. Consistent with these advantages, Dr. Warshaw affirmed that the academic literature involving the efficiency gap is “very robust” and that “the consensus of that literature is that . . . the efficiency gap performs very well” as a measure of partisan bias. Hr’g Tr. Day 2 Vol. 1 at 82:19-21, 211:5-14 (Warshaw). Dr. Warshaw also indicated that other social scientists can replicate his methodology and determine whether he made any errors. Hr’g Tr. Day 2 Vol. 1 at 90:21-91:2 (Warshaw).

161. Dr. Warshaw further testified that no court, to his knowledge, had ever ruled that the efficiency gap is not admissible. Hr’g Tr. Day 2 Vol. 1 at 91:3-10 (Warshaw); *see, e.g., Adams*, 2022 WL 129092, at *10-11, *14 (relying in part on Dr. Warshaw’s efficiency-gap analysis in striking down congressional plan as partisan gerrymander).

162. Dr. Warshaw explained that although the efficiency gap can be more volatile in states, like Kansas, with relatively small numbers of congressional seats, he accounted for this concern and checked the robustness of his analysis in several ways. PX 105 at 6 (Warshaw Rep.); Hr’g Tr. Day 2 Vol. 1 at 92:20-93:11, 108:10-13, 168:22-169:11 (Warshaw). First, to smooth

out any volatility in his efficiency-gap calculations, in calculating the efficiency gap for Ad Astra 2 and other proposed or historical Kansas plans, Dr. Warsaw averaged the results of the ten elections included in his statewide composite. PX 105 at 6 (Warsaw Rep.); Hr'g Tr. Day 2 Vol. 1 at 92:20-93:11, 168:22-169:11 (Warsaw). Second, as discussed below, Dr. Warsaw confirmed that his conclusions about the extremity of Ad Astra 2's efficiency gap hold when comparing the plan only to maps from states with four to seven districts.

163. To further demonstrate that the efficiency gap is a reliable measure of partisan bias in Kansas, Dr. Warsaw plotted the historical distribution of efficiency gaps across the country in states with four or more congressional seats, separated by the number of districts per state, in Plaintiffs' Exhibit 754:



Hr'g Tr. Day 2 Vol. 1 at 115:13-116:17 (Warshaw).

164. Dr. Warshaw explained that Exhibit 754 shows that while small states exhibit somewhat more variability in the efficiency gap, the differences between states of different sizes are relatively modest. Hr'g Tr. Day 2 Vol. 1 at 115:22-116:1 (Warshaw). The horizontal lines across the chart mark efficiency gaps of $\pm 22.5\%$ —the level of efficiency gap exhibited by Ad Astra 2. Hr'g Tr. Day 2 Vol. 1 at 116:8-12 (Warshaw). The chart indicates that there are “very, very few elections” that exhibit an efficiency gap of that magnitude, regardless of state size, such that any concern about the variability of the efficiency gaps in small states “really d[id]n't substantially change [Dr. Warshaw's] conclusions at all.” Hr'g Tr. Day 2 Vol. 1 at 116:11-17 (Warshaw).

165. The Court finds that the efficiency gap, as applied by Dr. Warshaw, is a reliable methodology for measuring the partisan bias of Ad Astra 2. The Court therefore credits Dr. Warshaw's analysis and his conclusions based on that methodology. The Court recognizes that the efficiency gap should be employed with caution in states with four districts, and Dr. Warshaw credibly explained how he employed such caution. The Court further notes that the efficiency gap analysis reinforces independent analysis of the partisan bias in the map conducted by other experts, including Dr. Chen's simulation analysis.

Ad Astra 2 exhibits pro-Republican partisan bias at the district level.

166. Dr. Warshaw testified that Ad Astra 2 exhibits signs of partisan bias in its treatment of CD 3 and its construction of district lines in the area around Kansas City and Lawrence.

167. First, Dr. Warshaw measured the partisanship of Ad Astra's CD 3 using his ten-election composite. Dr. Warshaw concluded that the new CD 3 has a Democratic vote share of approximately 47%, compared to a vote share under the 2012 plan of slightly over 50%. PX 105 at 11 (Warshaw Rep.). Dr. Warshaw concluded that as a result, a Democratic candidate would likely win CD 3 only "during a strong Democratic wave year." PX 105 at 11 (Warshaw Rep.).

168. Dr. Warshaw also concluded that none of the other plans the Legislature considered in 2020 cut the Democratic vote share in CD 3 as significantly as the Ad Astra 2 plan. PX 105 at 12-13 (Warshaw Rep.); Hr'g Tr. Day 2 Vol. 1 at 104:16-105:24 (Warshaw). In fact, while Ad Astra 2 decreases the Democratic vote share in CD 3 to 46.9%, only one other plan shrank the Democratic vote share to under 50%. PX 105 at 13 (Warshaw Rep.).

169. Figure 7 in Dr. Warshaw's report, also admitted as Plaintiffs' Exhibit 112, compares the Democratic vote share in CD 3 under Ad Astra 2, the 2012 plan, and the other plans considered by the Legislature during the redistricting process:

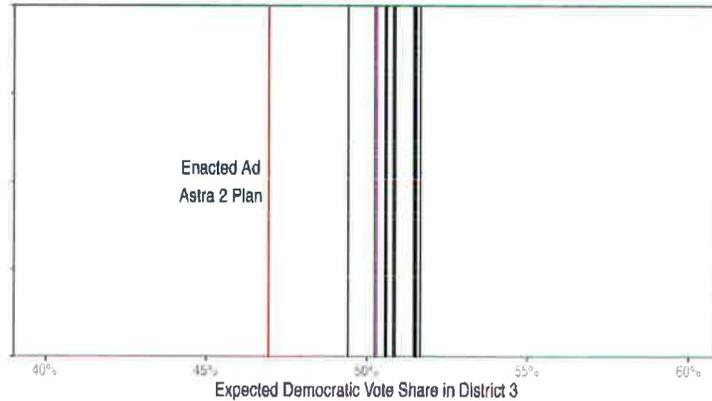


Figure 7: Comparison of Democratic vote share in district 3 in Ad Astra 2 plan (red), 2012-2020 plan (purple), and other potential plans in Kansas (black) based on composite of statewide elections.



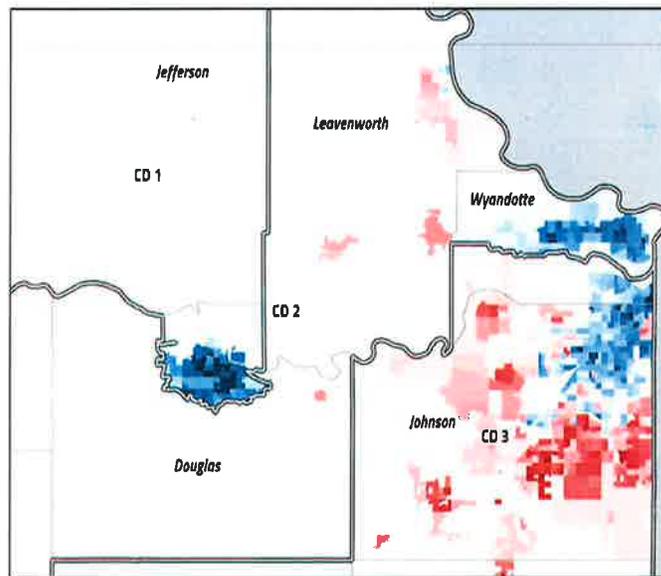
170. As Dr. Warshaw testified, the Figure shows that the Democratic vote share, based on the ten-election composite, is much lower in CD 3 compared to both the 2012 plan and the other plans considered by the Legislature. Hr’g Tr. Day 2 Vol. 1 at 104:16-105:1 (Warshaw).

171. Dr. Warshaw concluded that this difference in Democratic vote share “provides further evidence that the decrease in Democratic performance in [Ad Astra 2] appears to be intentional” and not a result of Kansas’s political geography. PX 105 at 14 (Warshaw Rep.).

172. Dr. Warshaw also analyzed the relationship between the district lines in Ad Astra 2 and the

distribution of Democratic and Republican votes across the state. Hr'g Tr. Day 2 Vol. 1 at 103:2-104:12 (Warshaw); see PX 105 at 7-10 (Warshaw Rep.).

173. Figure 4(b) in Dr. Warshaw's report, also admitted as part of Plaintiffs' Exhibit 109, displays the distribution of votes in the area around Kansas City and Lawrence and the district lines created by Ad Astra 2:



(b) Kansas City Area

Figure 4: Map of District 3 on the Enacted Ad Astra 2 plan. Blue areas are Democratic and red areas are Republican. The shading reflects the margin of votes per hectare.

Exhibit No.
PX 109

174. The shading in the Figure reflects the vote margin per hectare, computed using Dr. Warshaw's ten-election composite; thus, areas with larger pro-Democratic vote margins appear in darker shades of blue, areas with larger pro-Republican vote margins appear in darker shades of red, and areas with lower voting populations or closer vote margins are more lightly shaded. PX 105 at 7-9 & fig.4 (Warshaw Rep.); Hr'g Tr. Day 2 Vol. 1 at 103:2-11 (Warshaw).

175. As Dr. Warshaw explained, this Figure illustrates how Ad Astra 2 cracks Democratic voters between districts. The plan first cracks Democratic voters in northern Wyandotte County (assigned to CD 2) from Democratic voters in Johnson County (assigned to CD 3), such that neither district contains a Democratic majority. Hr'g Tr. Day 2 Vol. 1 at 103:12-23 (Warshaw); *see* PX 105 at 9 (Warshaw Rep.). A more compact district in the Kansas City area would "clearly" have produced a majority-Democratic district. Hr'g Tr. Day 2 Vol. 1 at 103:20-23 (Warshaw).

176. Figure 4(b) also shows how Ad Astra 2 cracks heavily Democratic Lawrence out of CD 2 and into CD 1, which "was necessary in order to . . . ensure that District 2 continued to be a [R]epublican district," since Democratic voters in Lawrence could otherwise have combined with Democratic voters in northern Wyandotte County to produce "a much more closely contested district." Hr'g Tr. Day 2 Vol. 1 at 103:24-104:12 (Warshaw).

177. The Court credits Dr. Warshaw's analysis of the district-level partisan bias of Ad Astra 2. The Court finds that Ad Astra 2 results in a significantly higher

Republican vote share in CD 3 than existed under the 2012 plan or would result under other proposed plans. The Court finds that this increase in Republican vote share cannot be explained by Kansas's political geography. The Court finds that the district lines in the areas around Kansas City and Lawrence show clear signs of cracking Democratic voters between districts to prevent them from achieving majority status. The Court finds these facts to be persuasive evidence that Ad Astra 2 is an intentional, effective partisan gerrymander.

Ad Astra 2 is an extreme, intentional pro-Republican outlier at the statewide level.

178. Dr. Warshaw concluded that Ad Astra 2 exhibits “an extreme level of pro-Republican bias.” PX 105 at 3 (Warshaw Rep.); see Hr’g Tr. Day 2 Vol. 1 at 72:2-13, 116:18-117:6 (Warshaw).

179. Using his ten-election composite, Dr. Warshaw calculated that Ad Astra 2 exhibits an efficiency gap of -22.5%. PX 105 at 12 tbl.2 (Warshaw Rep.); Hr’g Tr. Day 2 Vol. 1 at 96:20-25 (Warshaw).⁸ This efficiency gap is equivalent to a reduction in Democratic representation of approximately one congressional seat per election, and is “much more extreme” than the efficiency gap exhibited by the 2012 plan (-15.6%). Hr’g Tr. Day 2 Vol. 1 at 97:1-16, 105:10-24 (Warshaw).

⁸ Dr. Chen and Dr. Warshaw reached different efficiency gap numbers because they used slightly different election composites. The Court finds that this difference does not affect the credibility or reliability of their results because each used a consistent approach across their respective analyses.

180. To place Ad Astra 2’s partisan bias in context, Dr. Warshaw compared its efficiency gap to historical data on the efficiency gaps of congressional plans with four or more seats since 1972. PX 105 at 12 & tbl.2 (Warshaw Rep.); Hr’g Tr. Day 2 Vol. 1 at 97:17-98:25 (Warshaw). This historical data set includes efficiency gaps for 25 election cycles across 48 years, including about 10,000 individual elections. Hr’g Tr. Day 2 Vol. 1 at 98:2-4 (Warshaw).

181. Table 2 of Dr. Warshaw’s report, also admitted as Plaintiffs’ Exhibit 118, displays the result of this historical comparison:

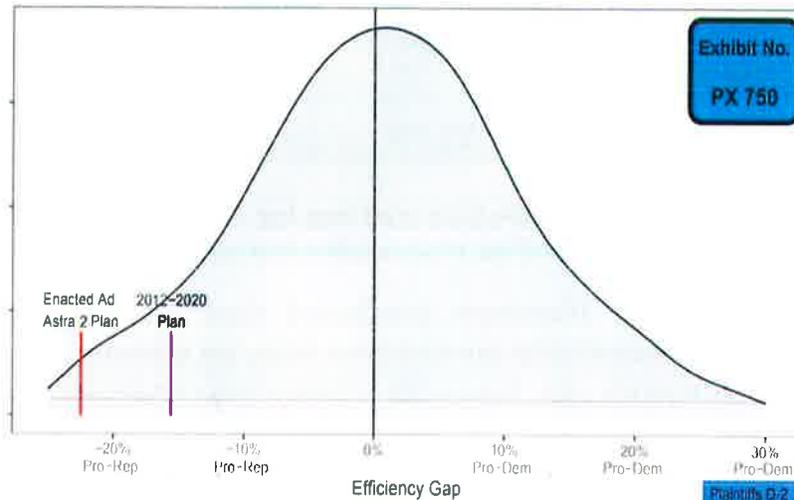
Metric	Value	2012-2020 Composite	
		> Biased than this % Elections	> Pro-Rep. than this % Elections
2012-2020 plan			
Democratic Vote Share	41%		
Democratic Seat Share	16%		
Efficiency Gap	-15.6%	83%	93%
Enacted Ad Astra 2 plan			
Democratic Vote Share	41%		

Democratic Seat Share	9%		
Efficiency Gap	-22.5%	95%	98%

Table 2: Composite bias metrics for Ad Astra 2 plan based on statewide elections

182. Dr. Warshaw concluded that Ad Astra 2 exhibits more extreme partisan bias, as measured by the efficiency gap, than 95% of historical congressional plans with four or more seats, and is more Republican-favoring than 98% of historical plans. PX 105 at 12 & tbl.2 (Warshaw Rep.); Hr'g Tr. Day 2 Vol. 1 at 98:18-25 (Warshaw).

183. Plaintiffs' Exhibit 750 displays this information in graphical form: the chart compares the efficiency gap exhibited by Ad Astra 2 (marked in red) with the historical distribution of efficiency gaps in states with four or more congressional seats:



Hr'g Tr. Day 2 Vol. 1 at 101:4-15 (Warshaw).

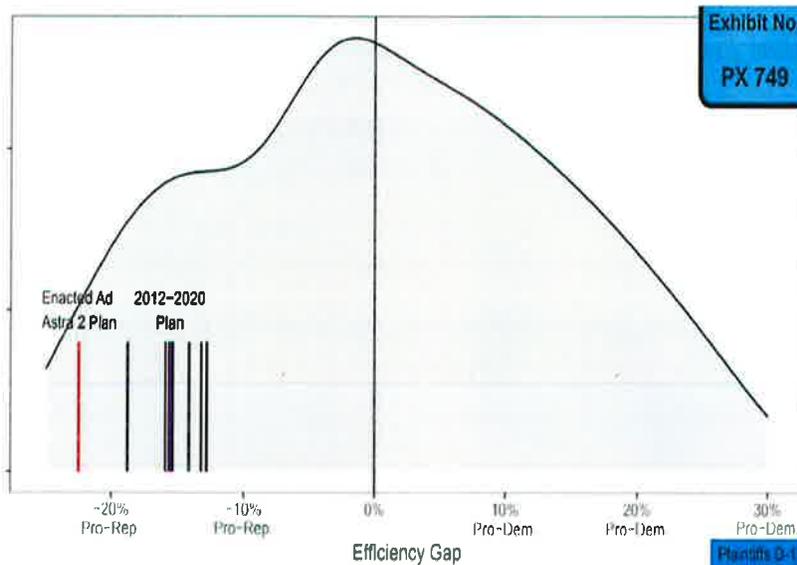
184. Dr. Warshaw explained that Exhibit 750 shows that the average congressional plan over the past fifty years has had an efficiency gap of about 0%, and most plans fall relatively close to 0%; two-thirds land between -10% and 10%, and only a small fraction exhibit efficiency gaps of over 20%. Hr'g Tr. Day 2 Vol. 1 at 101:17-102:10 (Warshaw). This data demonstrates the "historical extremity" of Ad Astra 2's -22.5% efficiency gap. Hr'g Tr. Day 2 Vol. 1 at 102:5-10 (Warshaw).

185. Dr. Warshaw testified that this historical extremity is corroborated even by PlanScore, an online tool cited by Defendants whose methodology projects relatively elevated Democratic vote shares, *see* Hr'g Tr. Day 2 Vol. 1 at 160:16-161:3, 161:11-162:9 (Warshaw), which classifies Ad Astra 2 as exhibiting more extreme partisan bias than 98% of historical plans, Hr'g Tr. Day

2 Vol. 1 at 207:15-208:1 (Warshaw); *see* PX 746 at 4 (PlanScore evaluation of Ad Astra 2). PlanScore, too, thus marks Ad Astra 2 as “an extreme historical outlier [that] is more skewed than the vast, vast majority of plans in history.” Hr’g Tr. Day 2 Vol. 1 at 207:15-08:7 (Warshaw); *see* PX 746 at 4 (PlanScore evaluation of Ad Astra 2).

186. Dr. Warshaw also concluded that Ad Astra 2 remains an extreme historical partisan outlier even when compared only to plans in states with small numbers of congressional districts. Hr’g Tr. Day 2 Vol. 1 at 107:16-108:13, 184:19-185:2 (Warshaw).

187. Plaintiffs’ Exhibit 749 compares the efficiency gap of Ad Astra 2 (marked in red) to the historical distribution of efficiency gaps across states with four to seven congressional districts (displayed in gray):



Hr'g Tr. Day 2 Vol. 1 at 107:13-108:13 (Warshaw).

188. Dr. Warshaw testified that Ad Astra 2 exhibits more extreme partisan bias, as measured by the efficiency gap, than 90% to 91% of historical plans in states with 4 to 6 or 4 to 7 congressional seats. Hr'g Tr. Day 2 Vol. 1 at 184:19-185:2 (Warshaw). This figure shows that Ad Astra 2 remains “historically extreme” no matter what seat threshold applies. Hr'g Tr. Day 2 Vol. 1 at 108:7-13 (Warshaw).

189. Dr. Warshaw also concluded that Ad Astra 2's partisan bias, as measured by the efficiency gap, is “much more extreme” than the partisan bias of both the 2012 map and the other plans considered by the Legislature during the redistricting process. Hr'g Tr. Day 2 Vol. 1 at 105:14-24 (Warshaw); *see* PX 105 at 14-15 & fig.9 (Warshaw Rep.).

190. Figure 9 from Dr. Warshaw's report, also admitted as Plaintiffs' Exhibit 114, compares the efficiency gaps of Ad Astra 2 (in red), the 2012 plan (in purple), and other plans considered by the Legislature during the redistricting process (in black):

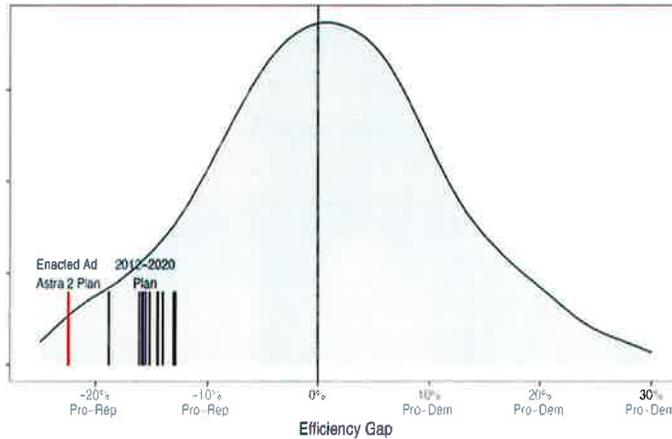


Figure 9: Comparison of efficiency gap on Ad Astra 2 plan, 2012-2020 plan, and other potential plans in Kansas based on composite of statewide elections with other congressional districting plans from 1972-2020 around the country.

Exhibit No.
PX 114

191. Dr. Warshaw concluded that this comparison shows that it is “certainly possible” to draw a Kansas congressional map that does not have the same level of bias as Ad Astra 2. Hr’g Tr. Day 2 Vol. 1 at 105:25-106:4 (Warshaw). In particular, Dr. Warshaw noted that the Mushroom Rock 2 plan considered by the Legislature (included in Figure 9’s comparison) kept Johnson County intact within one congressional district, together with most of the Kansas City metro area, but still exhibited a substantially lower efficiency gap than Ad Astra 2. Hr’g Tr. Day 2 Vol. 1 at 105:14-24, 212:3-213:5 (Warshaw). Indeed, Dr. Warshaw testified that Mushroom Rock 2 was not even the most pro-Republican of the proposed, unenacted plans

marked in black in Figure 9. Hr'g Tr. Day 2 Vol. 1 at 212:3-9 (Warshaw). This shows that it was possible to avoid splitting Johnson County while enacting a plan with a much less pro-Republican efficiency gap than Ad Astra 2's. Hr'g Tr. Day 2 Vol. 1 at 213:1-5 (Warshaw).

192. Dr. Warshaw further concluded that this comparison also indicates that “the intent of the Legislature appears to have been to draw the most extreme plan among the plans they had available to them.” Hr'g Tr. Day 2 Vol. 1 at 106:5-7 (Warshaw).

193. The Court credits Dr. Warshaw's analysis of the partisan bias reflected in Ad Astra 2 as compared to historical congressional plans, and accepts his conclusions. The Court further credits Dr. Warshaw's analysis of the partisan bias reflected in Ad Astra 2 as compared to the 2012 plan and the other plans considered by the Legislature during the redistricting process, and adopts his conclusions. The Court finds that the efficiency gap is a reliable measure of partisan bias in Kansas's congressional plan. The Court further finds that Ad Astra 2 exhibits a historically extreme pro-Republican bias, as measured by the efficiency gap. The Court finds that Dr. Warshaw's analyses provide persuasive evidence that Ad Astra 2's partisan bias was not the result of political geography or, in particular, a desire to keep Johnson County intact. The Court also finds that Ad Astra 2's relatively high level of partisan bias is persuasive evidence that Ad Astra 2 is an intentional, effective partisan gerrymander.

D. Evidence presented by Dr. Patrick Miller demonstrates that Ad Astra 2 is an intentional, effective partisan gerrymander.

194. Dr. Patrick Miller is a tenured associate professor of political science at the University of Kansas. PX 58 at 2 (P. Miller Rep.); Hr'g Tr. Day 2 Vol. 2 at 5:3-4 (P. Miller). In addition to his full-time teaching and researching responsibilities at the University of Kansas ("KU"), Dr. Miller is a policy fellow at the Docking Institute of Public Affairs at Fort Hays State University. PX 58 at 2 (P. Miller Rep.). At both institutions, Dr. Miller teaches courses specifically related to Kansas politics and political geography. PX 58 at 2 (P. Miller Rep.). Dr. Miller also has a specialty in the history of racial discrimination throughout the state, particularly in Wyandotte County, and during his doctoral studies at the University of North Carolina at Chapel Hill, he completed extensive coursework in quantitative research methodologies. PX 58 at 2-3 (P. Miller Rep.).

195. Dr. Miller has been published more than thirty times in peer-reviewed publications that are among the most prestigious in his field. PX 58 at 75-84 (P. Miller Rep.). Scholars in Dr. Miller's field have cited his published research more than 1,000 times. Hr'g Tr. Day 2 Vol. 2 at 6:14-16 (P. Miller).

196. The Court accepts Dr. Miller in this case as an expert in Kansas politics and the political geography of Kansas as well as in the history of racial discrimination in the state of Kansas. Hr'g Tr. Day 2 Vol. 2 at 8:2-11 (P. Miller). At trial the Court indicated that the

testimony of Dr. Miller was relevant and admissible to the claims of both partisan gerrymandering and racial vote dilution. Hr'g Tr. Day 2 Vol. 2 at 3:6-4:18 (P. Miller).

197. Dr. Miller conducted an analysis of Kansas's congressional maps used in elections between 2012 and 2020, as well as the Legislature's recently enacted Ad Astra 2 congressional districting plan. PX 58 at 2 (P. Miller Rep.). Dr. Miller gathered Kansas's census data from the past 60 years and employed quantitative as well as qualitative methods. *See generally* PX 58 (P. Miller Rep.).

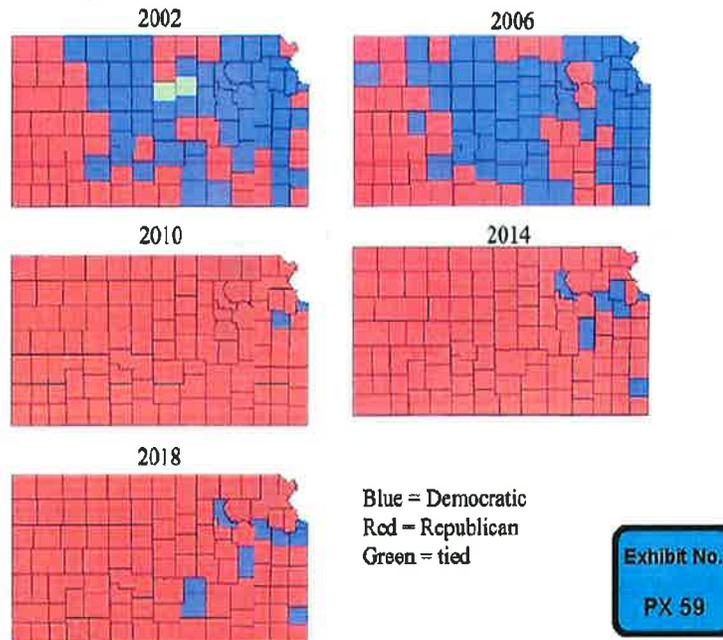
198. Based on his comprehensive and thorough analysis, Dr. Miller concluded that Ad Astra 2 constitutes a partisan gerrymander. *See generally* PX 58 (P. Miller Rep.).

199. After reviewing all statewide elections in Kansas from 2012 to 2020, Dr. Miller concluded that Kansas is not the Republican stronghold it once was. Hr'g Tr. Day 2 Vol. 2 at 10:9-13:8 (P. Miller). While Republicans still garner a majority of the statewide vote, the number of Democratic voters has grown dramatically over the last decade and now constitutes 40 percent of the state's electorate. Hr'g Tr. Day 2 Vol. 2 at 13:9-14:2 (P. Miller).

200. At the same time, support for each party is increasingly geographically segregated; Democrats tend to cluster in urban and suburban areas of the state while Republicans increasingly find their base in the state's rural and exurban areas. Hr'g Tr. Day 2 Vol. 2 at 13:9-14:2 (P. Miller). These trends have only

accelerated in the last decade according to U.S. Census Bureau data and official election returns from the Kansas Secretary of State. Hr'g Tr. Day 2 Vol. 2 at 13:9-14:2 (P. Miller).

Map 1. County-Level Results, Kansas Gubernatorial Elections, 2002-2018

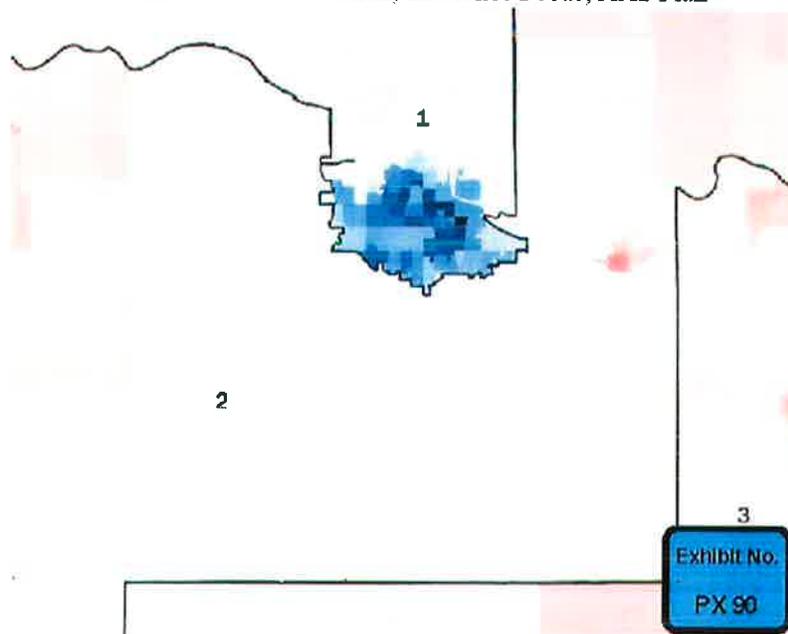


201. Based on these trends, Dr. Miller explained that Democrats are capable of winning statewide offices in Kansas. Of the last five elections for Governor of Kansas, Democrats have prevailed in three contests: in 2002, 2006, and 2018. PX 58 at 6-8 (P. Miller Rep.); PX 61 (P. Miller Map 3); PX 62 (P. Miller Map 4). Dr. Miller's analysis further confirms that the Legislature

created a congressional plan that leans overwhelmingly Republican.

202. *First*, Dr. Miller convincingly showed that Ad Astra 2 carefully scoops the densely populated Democratic stronghold of Lawrence out of Douglas County and CD 2 and places it in the Big First to strengthen the state's Republican advantage. Hr'g Tr. Day 2 Vol. 2 at 50:7-51:19 (P. Miller). The Lawrence "scoop" is depicted in the map below.

Map 32. Two-Party Vote Margin Per Acre by Precinct, 2020 Presidential Election, Lawrence Focus, AA2 Plan

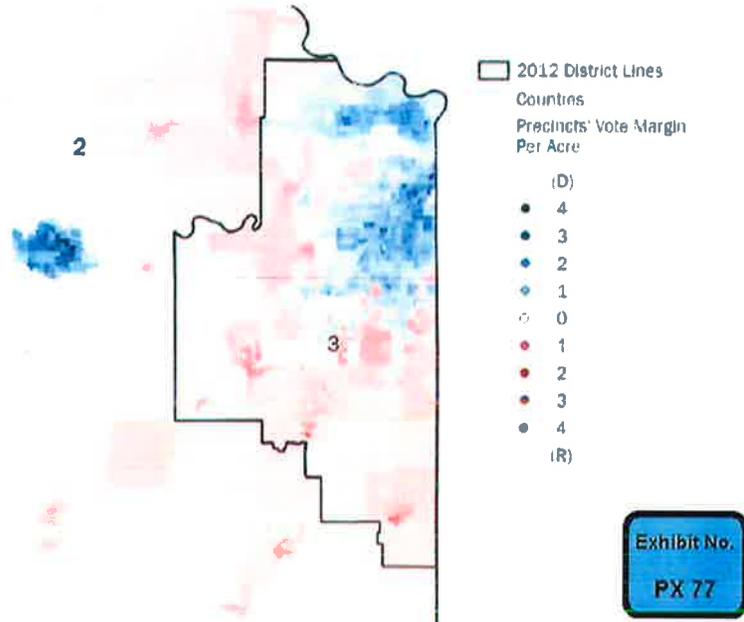


203. This move has two effects: After losing Lawrence, CD 2 "leans so strongly Republican that the votes of Democratic-leaning and minority residents

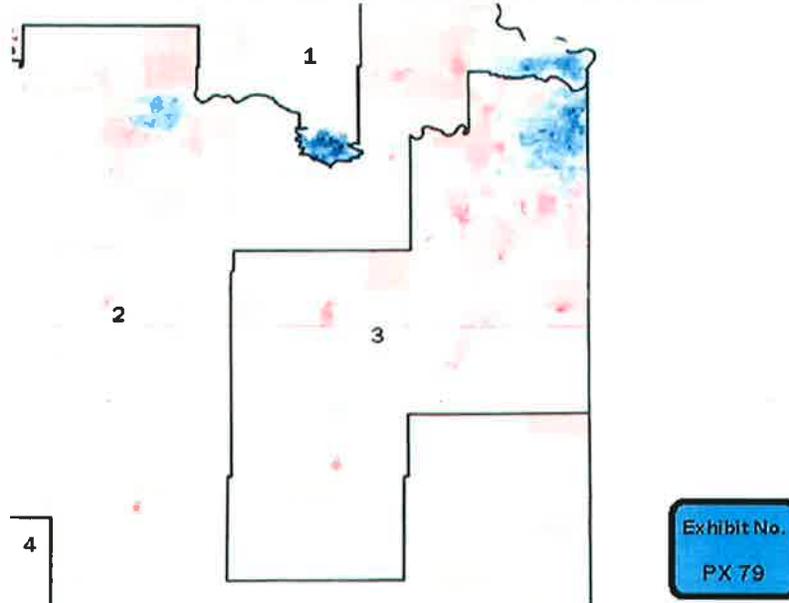
from Wyandotte are diluted to practical electoral irrelevance.” PX 58 at 4 (P. Miller Rep.); *see also* Hr’g Tr. Day 2 Vol. 2 at 47:12-48:4 (P. Miller). Dr. Miller determined that “CD2 would not be a credibly competitive district in congressional races for the next decade.” PX 58 at 54 (P. Miller Rep.). As for Lawrence itself, Ad Astra 2 drowns the city’s Democratic voters in the overwhelmingly Republican Big First, leaving them with effectively no opportunity to influence the district’s electoral outcomes. PX 58 at 62 (P. Miller Rep.).

204. *Second*, Dr. Miller concluded that separating northern Wyandotte County from CD 3 renders that district significantly more Republican and dilutes the votes of Democratic voters “who remain in CD3,” “mak[ing] the plan unrepresentative of the overall partisan composition of Kansas.” PX 58 at 36-41 (P. Miller Rep.). Indeed, under Ad Astra 2, the Republican advantage in CD 3 increases from 1.0% to 6.6% averaged across elections between 2012 and 2020. PX 58 at 36-37 (P. Miller Rep.). The Wyandotte split was shown by Dr. Miller in the two maps below:

Map 19. Two-Party Vote Margin Per Acre by Precinct,
2020 Presidential Election, CD3 Focus, 2012 Plan



Map 21. Two-Party Vote Margin Per Acre by Precinct,
2020 Presidential Election, CD3 Focus, AA2 Plan



205. *Third*, Dr. Miller testified that enacted CDs 1 and 4 are “strongly and safely Republican” districts, both of which contain overwhelming Republican majorities. PX 58 at 62, 68 (P. Miller Rep.); *see also* Hr’g Tr. Day 2 Vol. 2 at 16:22-17:15 (P. Miller).

206. In sum, Dr. Miller concluded that Ad Astra 2 “is not a result of natural packing or geographic clustering, as those factors should actually facilitate . . . a fair partisan map given partisan voting trends in Kansas and how the population is distributed.” PX 58 at 70 (P. Miller Rep.). Instead, an analysis of Ad Astra 2 reveals that its “lines benefit the Republican Party, at the expense of minority Kansas, communities of interest, partisan fairness,” and the traditional

redistricting standards reflected in the Guidelines. PX 58 at 70 (P. Miller Rep.).

207. The Court finds Dr. Miller's analysis sound and convincing and concludes, as it has done with respect to Plaintiffs' other experts, that Ad Astra 2 was drawn intentionally and successfully to benefit Republican candidates and voters. During Dr. Miller's live testimony, the Court carefully observed his demeanor, particularly as he was cross-examined for the first time about his work on this case. He consistently defended his work with careful and deliberate explanations of the bases for his opinions.

E. Evidence presented by Dr. Michael Smith demonstrates that Ad Astra 2 is an intentional, effective partisan gerrymander.

208. Plaintiffs' expert Dr. Michael A. Smith, Ph.D, is a tenured Professor of Political Science and Chair of the Department of Social Sciences, Sociology, and Criminology at Emporia State University. PX 135 at 2 (Smith Rep.); Hr'g Tr. Day 3 Vol. 1 at 8:10-15 (Smith)

209. Dr. Smith's research focuses on state and local politics, including campaigns and elections, election laws, and political history, with particular focus on Kansas and Missouri. Hr'g Tr. Day 3 Vol. 1 at 8:23-9:6 (Smith). Dr. Smith has published journal articles and four books on these topics. PX 135 at 2 (Smith Rep.); Hr'g Tr. Day 3 Vol. 1 at 9:17-10:20 (Smith).

210. The Court accepts Dr. Smith in this case as an expert in Kansas politics and elections and the history thereof.

211. Dr. Smith testified that the Legislature's split of Lawrence from Douglas County could not be explained by neutral redistricting criteria and had the effect of diluting the votes of Democratic voters in the region. PX 135 at 1 (Smith Rep.).

212. Dr. Smith explained that over the last three decades, at "no point was any portion of Lawrence or Douglas County ever located in the Big First, which is centered in the rural, western and central parts of the state." PX 135 at 3-4 (Smith Rep.). Ad Astra 2, however, "scooped" Lawrence out of Douglas County and placed it into the Big First, Hr'g Tr. Day 3 Vol. 1 at 22:16-23:9 (Smith)—a decision, Dr. Smith concluded, that could not be explained by compliance with the Guidelines, *see* PX 135 at 6-10 (Smith Rep.) (summarizing Ad Astra 2's deviations from traditional redistricting principles); Hr'g Tr. Day 3 Vol. 1 at 22:16-26:4 (Smith) (discussing communities of interest); Hr'g Tr. Day 3 Vol. 1 at 26:5-28:4 (Smith) (discussing districts' odd shapes); Hr'g Tr. Day 3 Vol. 1 at 19:11-15, 27:25-30:14 (Smith) (discussing changes to past district boundaries and unnecessary transfer of Kansans between districts).

213. Indeed, Dr. Smith stated that Ad Astra 2's configuration of CD 2 scored poorly on the Polsby-Popper compactness measure, which is "an indication of gerrymandering." PX 135 at 8 (Smith Rep.). Moreover, Dr. Smith explained that Ad Astra 2 fails to abide by the Guidelines' instruction that communities of interest and the cores of existing districts should be kept whole. By severing Lawrence from Douglas County, Ad Astra 2 "divides Douglas County, which is

a community of interest,” PX 135 at 9 (Smith Rep.), and dismantled the “core” of the prior configuration of CD 2, which comprised all of Douglas and Shawnee Counties, PX 135 at 10 (Smith Rep.).

214. On this last point, Dr. Smith also testified that Ad Astra 2 unnecessarily transferred population from Douglas County to the Big First. Hr’g Tr. Day 3 Vol. 1 at 28:5-29:24 (Smith). To achieve population equality, the 2020 census required the Legislature to add 33,855 residents to the Big First. But the population of Lawrence is 94,934, roughly *three times* the number of residents needed to balance CD 1. PX 135 at 11 (Smith Rep.). The Legislature did not need to make this decision; as Dr. Smith testified, “there [were] a number of different ways the Big First could have been redrawn to add an additional 33,000 votes” without splitting Lawrence from Douglas County and while remaining compliant with traditional redistricting factors. Hr’g Tr. Day 3 Vol. 1 at 30:3-14 (Smith).

215. The effects of this unnecessary decision are devastating for Lawrence’s overwhelmingly Democratic population. Dr. Smith testified that Ad Astra 2 places Lawrence into “one of the most Republican districts in the United States.” Hr’g Tr. Day 3 Vol. 1 at 22:16-23:9 (Smith); *see also* PX 135 at 12 (Smith Rep.). Until now, Lawrence’s 72.9% Democratic population resided in CD 2, which has a 41%-54.3% Democratic-Republican split. PX 135 at 12 (Smith Rep.). Although CD 2 has not elected a Democrat, elections in the district have been competitive, making CD 2 a “lean Republican” rather than a “safe Republican” district. PX 135 at 12 (Smith Rep.). Ad Astra 2 dilutes the vote of Lawrence’s

overwhelmingly Democratic population by placing it in the Big First, which has significantly fewer Democratic voters and is therefore a “safe Republican” district. PX 135 at 12 (Smith Rep.).

216. Dr. Smith explained that the consequences of Ad Astra 2’s reconfiguration of Lawrence will negatively affect political outcomes for Democratic voters in the city. Because CD 2 is not a safe Republican district, it has hosted “heavily-contested elections featuring experienced Democratic candidates who conducted extensive fundraising and mounted strong campaigns, including voter registration and get-out-the-vote efforts in Lawrence and Douglas County.” PX 135 at 12-13 (Smith Rep.). These campaigns have had significant voter engagement effects. PX 135 at 13-14 (Smith Rep.); Hr’g Tr. Day 2 Vol. 1 at 31:18-20 (Smith). Even when well-funded candidates lose, “their campaigns help energize voters, boost turnout, and recruit volunteers” and “can also lead to a culture of participation and volunteerism from which future candidates may be recruited.” PX 135 at 14 (Smith Rep.). These close races and the attention CD 2 enjoys as a result “helped motivate, register, and turn out [Democratic] voters and volunteers” in Lawrence. PX 135 at 14 (Smith Rep.). Dr. Smith testified that “[t]he redrawing of Lawrence into a noncompetitive district is predicted to suppress voter turnout and other forms of political activity” by eliminating the residents of Lawrence’s belief “that their candidates have any realistic chance of winning an election.” PX 135 at 14 (Smith Rep.). Dr. Smith put its harply in court: By placing Lawrence in the Big First, the Legislature “disincentiv[izes]” Democratic “voter mobilization,

voter registration, voter turnout, fundraising, all of the activities that build a political base because the election would not be competitive.” Hr’g Tr. Day 3 Vol. 1 at 32:1-32:9 (Smith).

217. The Court credits Dr. Smith’s expert testimony and finds that it supports the foregoing expert evidence demonstrating the Legislature’s partisan intent and the pro-Republican effect Ad Astra 2 will have, particularly with respect to CD 2 and the City of Lawrence. During Dr. Smith’s live testimony, the Court carefully observed his demeanor, particularly as he was cross-examined for the first time about his work on this case. He consistently defended his work with careful and deliberate explanations of the bases for his opinions.

F. Evidence presented by Plaintiffs’ fact and expert witnesses demonstrates that Ad Astra 2 disregards communities of interest in support of partisan gains.

218. The testimony of Plaintiffs’ fact witnesses establishes that Ad Astra 2 runs roughshod over communities of interest for the purpose of securing maximum Republican advantage. In so doing, Ad Astra 2 pairs together geographically disparate communities that share little in common.

219. First, Ad Astra 2 breaks up the Kansas City metro area. Witnesses at trial were in accord that the Kansas side of the Kansas City metro area constitutes a community of interest. Hr’g Tr. Day 1 Vol. 2 Hr’g Tr. Day 1 Vol. 2 at 225:21-226:6 (Corson); Hr’g Tr. Day 2 Vol. 1 at 16:9-17:5 (Burroughs); Hr’g Tr. Day 2 Vol. 1 at

48:8-18 (Edwards). Witnesses described this area as consisting of Wyandotte County and the suburban and urban areas in the northeastern portion of Johnson County. These communities share a great deal in common, with strong overlaps in their “business sector, . . . healthcare facilities,” “transportation, water, and social services,” not to mention the many “people who live in Johnson County and work in Wyandotte County.” Hr’g Tr. Day 1 Vol. 2 at 225:21-226:6 (Corson); *see also* Hr’g Tr. Day 2 Vol. 1 at 16:17-21 (Burroughs) (testifying that the areas “share major hospitals” as well as “transportation corridors,” and noting the “sundown community” that lives in Johnson but works in Wyandotte). In fact, 80% of the educators in Kansas City, Kansas public schools live in Johnson County. Hr’g Tr. Day 2 Vol. 1 at 48:10-18. (Edwards). Additionally, because Wyandotte County does not have a grocery chain, residents are heavily reliant on surrounding communities, including neighboring Johnson County, for groceries. Hr’g Tr. Day 2 Vol. 1 at 47:12-48:7 (Edwards).

220. Expert testimony similarly confirmed that the Kansas City metro area is a community of interest. In discussing the previous congressional plan, Dr. Patrick Miller testified that the former CD 3 reflects the community of interest of the Kansas City metro area, taking account of “all the ways those . . . communities are interrelated.” Hr’g Tr. Day 2 Vol. 2 at 27:21-28:5 (P. Miller). Focusing on Wyandotte County in particular, Dr. Rodden confirmed that the county constitutes not only a community of interest, but also a single “political and social and economic unit[]” given Wyandotte’s unified county and city government. Hr’g Tr. Day 1 Vol.

2 at 25:14-25 (Rodden). When a congressional map splits Wyandotte County, it “split[s] an important American city right down the middle.” Hr’g Tr. Day 1 Vol. 2 at 26:25-27:2 (Rodden). It was for this reason that Dr. Rodden considered “a starting point” for any plan he drafted to “keep Kansas City and Wyandotte together”; it simply “would not have occurred to [him]” to split Wyandotte. Hr’g Tr. Day 1 Vol. 2 at 26:25-27:9 (Rodden).

221. Despite these significant ties within the Kansas City metro area, Ad Astra 2 splits the region in two, dividing Wyandotte County along I-70 and the Kansas River. The result is that major portions of the greater Kansas City area—including the Legends shopping area, Kansas Speedway, KC Park, and Hollywood Casino—are now in CD 2. Hr’g Tr. Day 1 Vol. 2 at 226:20-227:2 (Corson); Hr’g Tr. Day 2 Vol. 1 at 42:17-22 (Edwards). By splitting Wyandotte County alone, Ad Astra 2 divides a county that has had a unified county and city government since 1997. Hr’g Tr. Day 2 Vol. 1 at 41:3-10 (Edwards). It also takes the portion of Wyandotte County that “historically has been disinvested” and separates it from the remainder of the Greater Kansas City area. Hr’g Tr. Day 2 Vol. 1 at 52:7-10 (Edwards). Mildred Edwards, the chief of staff to the Mayor of the Unified Government of Wyandotte County and Kansas City, Kansas, testified that dividing Wyandotte County in this manner is likely to make it more difficult for the city/county government to advocate for federal funds, since a portion of the county will now be represented by a member of Congress with whom the Wyandotte County

unified government has no relationship. Hr'g Tr. Day 2 Vol. 1 at 49:12-20 (Edwards).

222. Additionally, Ad Astra 2 splits the City of Lawrence from the remainder of Douglas County. This is despite the fact that Douglas County has a "joint health department between the city of Lawrence and Douglas County," as well as a "joint city, county, planning commission because [Douglas does] planning from a countywide perspective." Hr'g Tr. Day 2 Vol. 2 at 110:14-20 (Portillo). In her capacity as a Douglas County Commissioner, witness Shannon Portillo represents a district that is now split by Ad Astra 2. Hr'g Tr. Day 2 Vol. 2 at 109:1-7 (Portillo). Portillo testified that the issues on which she advocates are not Lawrence-specific; she handles issues that are countywide. Hr'g Tr. Day 2 Vol. 2 at 110:9-13 (Portillo). Nonetheless, Lawrence and the remainder of Douglas County are now in separate districts.

223. In addition to carving up communities with significant commonality, Ad Astra 2 pairs several far-flung communities that share little in common. In CD 3, as discussed, Ad Astra 2 splits Wyandotte County and pairs its southern portion with Johnson, Miami, Franklin, and Anderson Counties. As a result, a large chunk of the Kansas City metro area is now paired with rural areas in southern Johnson County, as well as Miami, Franklin, and Anderson Counties. Senator Corson, who represents northeast Johnson County, testified that Kansans live in Miami, Franklin, and Anderson Counties precisely because they "don't really prioritize being part of the Kansas City metro and don't see themselves that way," and prefer instead

“a more rural way of life.” Hr’g Tr. Day 1 Vol. 2 at 228:11-20 (Corson).

224. On the other side of the divide between CD 2 and CD 3, the pairings are even more confounding. In CD 2, Ad Astra 2 pairs the portion of Wyandotte County that is north of I-70 with a wide array of counties, stretching from the northeast to southeast corner of the state, and westward out to Marion County. Dr. Edwards testified that residents of northern Wyandotte County share “nothing” in common with other communities in CD 2. Hr’g Tr. Day 2 Vol. 1 at 51:5-14 (Edwards). 1.

225. Likewise, Ad Astra 2 places urban Lawrence into the very rural CD 1, which includes counties along the entire Colorado border as well as a large portion of the Oklahoma border. As Dr. Portillo testified, “we’re all Kansans, . . . but I don’t think there’s a unique kind of cultural relationship between the 1st Congressional District and the city of Lawrence.” Hr’g Tr. Day 2 Vol. 2 at 113:2-5 (Portillo).

226. The Court credits this testimony from numerous fact and expert witnesses for Plaintiffs and finds it persuasive evidence that the Ad Astra 2 map subordinated communities of interest for partisan gains. In particular, the Court finds that this evidence bolsters the empirical and mathematical findings made by Plaintiffs’ experts.

G. Although Former Senate President Susan Wagle was not in the Legislature when Ad Astra 2 was enacted, her comments regarding partisan intent provide additional support for the overwhelming evidence that Ad Astra 2 is an intentional, effective partisan gerrymander.

227. The Court notes that in enacting a partisan gerrymander, Republican legislators delivered on a campaign promise made by former Senate President Susan Wagle. Shortly before the 2020 election, then-Senate President Wagle told a group of Republican activists and donors that Republican legislators could produce a congressional plan “that takes out Sharice Davids up in the third.” PX 150; see Hr’g Tr. Day 1 Vol. 2 at 218:11-219:17 (Corson). She boasted: “[W]e can do that. I guarantee you we can draw four Republican congressional maps. But we can’t do it unless we have a two-thirds majority in the Senate and House.” PX 150; see Hr’g Tr. Day 1 Vol. 2 at 218:11-219:17 (Corson).

228. Although Wagle left the Legislature prior to the current redistricting cycle, Senator Corson offered un rebutted testimony that the Senate President serves as the leader of her party; that many current Republican legislators worked with Wagle; and that it is “overwhelmingly likely” that as leader of the Republican caucus, she communicated her policy preferences regarding redistricting to other members of her caucus. Hr’g Tr. Day 1 Vol. 2 at 259:11-260:5, 260:22-261:14 (Corson).

229. Republican legislators seemed to have gotten the message. Despite repeated warnings during floor debates that Ad Astra 2 was unduly partisan and diluted minority votes, *see, e.g.*, PX 172 at 16:6-9, 18:7-12, 19:10-18, 26:16-21, 27:19-28:11, 29:7-15, 30:8-14, 30:18-22, 32:2-10, 32:19-21, 33:19-19-34:2, 36:1-15, 37:8-18, 37:20-25, 38:4-14, 39:15-21, 45:10-15, 54:22-25, 55:2-10, 56:8-10, 89:14-18, 106:6-13 (House debate); PX 169 at 23:1-25:13, 26:3-18, 27:12-28:22, 46:16-47:6, 68:9-74:13, 75:8-78:9, 128:4-134:7, 141:2-19 (Senate debate), Republican legislators still voted in support.

III. Ad Astra 2 intentionally and effectively dilutes the voting power of Wyandotte County's minority communities.

230. Using distinct evidence and analyses, the analysis of three of Plaintiffs' experts—Drs. Rodden, Collingwood, and Chen—shows that Ad Astra 2 intentionally and successfully dilutes the votes of minority voters in Wyandotte County and northern Johnson County.

A. Evidence presented by Dr. Jonathan Rodden demonstrates that Ad Astra 2 intentionally and effectively dilutes minority votes.

231. As discussed above, Dr. Rodden analyzed the racial implications of Ad Astra 2. *See supra* FOF § II.B. Without restating the details of his analyses, in brief, Dr. Rodden found that racial minorities were moved among districts far more often than white Kansans and that they were divided between districts in a way that

contravenes Kansas’s racial geography and dilutes minority voting strength.

232. For example, Dr. Rodden testified that under Ad Astra 2, minority Kansans were shifted among districts at rates much higher than the overall population. While Ad Astra 2 kept about 86% of all Kansans in the same districts, it kept just 75% of Black Kansans, 83% of Hispanic Kansans, and 79% of Native American Kansans in their former districts. See PX 1 at 26 tbl.3 (Rodden Rep.).

Table 3: Core Preservation in the Enacted Plan and Illustrative Plans as Compared to Prior Plan

	Enacted <u>Plan</u>	Least Change <u>Plan</u>	Community of Interest <u>Plan</u>
Share of total population in the same district	86.46%	96.68%	83.39%
Share of Black population in the same district	74.88%	99.04%	88.39%
Share of Hispanic population in the same district	83.22%	98.47%	90.03%
Share of Native American population in the same district	79.44%	98.50%	81.97%

223. Dr. Rodden's racial dislocation analysis confirmed that the nature of the movement of minority Kansans served to crack those communities among districts, such that minority voters as a whole and individual minority groups were placed in districts that do not match the racial composition of their neighborhoods. *See supra* FOF § II.B. Minority Kansans were consistently divided and placed in districts that are far less diverse than would be expected under a neutral map-drawing process. *See supra* FOF § II.B.

234. The Court credits Dr. Rodden's testimony on the racial consequences of Ad Astra 2 and concludes that it was enacted intentionally and effectively to diminish the electoral influence of minority voters in the state.

B. Evidence presented by Dr. Loren Collingwood demonstrates that Ad Astra 2 intentionally and effectively dilutes minority votes.

235. Dr. Loren Collingwood, Ph.D., is an Associate Professor in the Department of Political Science at the University of New Mexico and the founder of Collingwood Research LLC, a research organization that conducts statistical and demographic analysis of political data for a variety of clients. PX 122 at 2 (Collingwood Rep). Dr. Collingwood has "published two books with Oxford University Press, 39 peer-reviewed journal articles, and nearly a dozen book chapters focusing on sanctuary cities, race/ethnic politics, election administration, and racially polarized voting." PX 122 at 2 (Collingwood Rep). Within the field of

American politics, Dr. Collingwood conducts research and teaches in the areas of political behavior, voting behavior, political methodology, applied statistics, and racially polarized voting (“RPV”). Hr’g Tr. Day 3 Vol. 1 at 68:2-7 (Collingwood).

236. Dr. Collingwood has extensive experience in redistricting litigation, having testified on behalf of parties challenging redistricting plans drawn by both the Republican and Democratic parties. Hr’g Tr. Day 3 Vol. 1 at 74:20-75:2 (Collingwood). Dr. Collingwood has been retained in at least five other redistricting cases to offer analysis of RPV specifically and racial voting patterns more broadly. PX 122 at 2 (Collingwood Rep.). Courts have consistently credited Dr. Collingwood’s work in these cases. Hr’g Tr. Day 3 Vol. 1 at 70:12-17, 96:13-16 (Collingwood).

237. The Court accepts Dr. Collingwood as an expert in American politics, with particular expertise in voting behavior, race and ethnicity, RPV, and political methodology. Hr’g Tr. Day 3 Vol. 1 at 75:13-20 (Collingwood).

238. Dr. Collingwood analyzed the 2012 congressional plan and Ad Astra 2 to determine whether RPV exists in CDs 2 and 3 and to assess whether Ad Astra 2 dilutes the votes of racial minorities. “Racially polarized voting” is a technical term used to describe an electoral environment in which “a majority of voters belonging to one racial/ethnic group vote for one candidate and a majority of voters who belong to another racial/ethnic group prefer the other candidate.” PX 122 at 3 (Collingwood Rep.); Hr’g Tr. Day 3 Vol. 1 at 68:19-69:8 (Collingwood). As

the term RPV is used in Dr. Collingwood's analysis, and in this Court's findings, RPV is an observable fact—not a legal conclusion or standard. Hr'g Tr. Day 3 Vol. 1 at 138:13-139:2 (Collingwood).

239. Dr. Collingwood's RPV analysis relies on aggregating demographic data from U.S. Census data through a method known as "ecological inference." PX 122 at 3 (Collingwood Rep.); Hr'g Tr. Day 3 Vol. 1 at 69:12-80:15 (Collingwood). Defendants assail the reliability of the ecological inference method by invoking an article authored by Dr. Collingwood and others entitled "eiCompare: Comparing Ecological Inference Estimates across EI and EI:R×C." *See* Hr'g Tr. Day 3 Vol. 1 at 61:12-62:17, 106:8-110:21 (Collingwood); DX 1068 (Collingwood article). As counsel for Defendants emphasized during cross-examination of Dr. Collingwood, the article states, in part, that "[e]cological inference is a widely debated methodology" that "has come under fire for being unreliable, especially in the fields of biological sciences, ecology, epidemiology, public health and many social sciences." DX 1068 at 1 (Collingwood article); *see* Hr'g Tr. Day 3 Vol. 1 at 105:8-110:8 (Collingwood). The article also notes that the "challenges surrounding ecological inference are well documented." DX 1068 at 2 (Collingwood article).

240. What Defendants' counsel did not emphasize, however, is the article's explanation that "within the narrow subfield of racial voting patterns in American elections ecological inference is regularly used" and that the "American Constitution Society for Law and Policy explains that ecological inference is one of the

three statistical analyses that must be performed in voting rights research on racial voting patterns.” DX 1068 at 1 (Collingwood article); *see* Hr’g Tr. Day 3 Vol. 1 at 61:12-62:17, 71:3-74:8, 105:8-110:8 (Collingwood). Dr. Collingwood specifically testified that questioning the reliability of ecological inference in the field of American politics was not the purpose of the article, Hr’g Tr. Day 3 Vol. 1 at 73:16-74:4 (Collingwood); that ecological inference is the “go-to standard” in assessing RPV, Hr’g Tr. Day 3 Vol. 1 at 71:19-72:5 (Collingwood); and that it is “definitely” a reliable methodology in that context, Hr’g Tr. Day 3 Vol. 1 at 71:19-72:5 (Collingwood). Dr. Collingwood also testified that he has used ecological inference to produce reports and testimony in other redistricting cases and that courts have accepted and credited his testimony in those cases. Hr’g Tr. Day 3 Vol. 1 at 70:12-17 (Collingwood). Furthermore, Defendants’ own expert, Dr. Alford, agreed that ecological inference is “by far the most widely used technique” in the field, and indeed that it is the “gold standard” for analyzing RPV. Hr’g Tr. Day 4 Vol. 1 at 21:21-25 (Alford). Based on this testimony, and Defendants’ inability to point to any case or academic source questioning the reliability of ecological inference in the field of American politics, the Court finds that ecological inference is a reliable and accurate method for analyzing RPV and racial vote dilution and that Dr. Collingwood used the method reliably. Hr’g Tr. Day 3 Vol. 1 at 66:4-19, 75:11-22 (Collingwood). Using RPV data, derived from ecological inference analysis, the Court can reliably analyze racial voting patterns in districting plans, including in *Ad Astra 2*.

241. Dr. Collingwood evaluated RPV by considering nine statewide elections that took place in Kansas between 2016 and 2020.⁹ Hr’g Tr. Day 3 Vol. 1 at 80:20-81:4 (Collingwood); PX 122 at 3-4 (Collingwood Rep.). Throughout the trial, Defendants criticized Plaintiffs’ experts for relying on statewide election results, or “exogenous elections,” rather than results from congressional elections carried out in the relevant districts themselves, or “endogenous elections,” based on one paragraph of a law review article about partisan (not racial) gerrymandering. *See, e.g.*, Hr’g Tr. Day 1 Vol. 2 at 99:25-108:2 (Rodden). Dr. Collingwood testified, however, that the use of statewide elections is necessary to provide constant and consistent results in an environment where particular congressional districts (for example, CD 3), cover different geographic areas and sets of voters between plans (for example, between the 2012 congressional plan and Ad Astra 2). Hr’g Tr. Day 3 Vol. 1 at 81:6-22 (Collingwood). Using statewide election results, he continued, is “extremely common” in analyzing racial voting patterns and is a “reliable indicator[] of future voting patterns.” Hr’g Tr. Day 3 Vol. 1 at 81:23-82:3, 96:3-9 (Collingwood). Furthermore, Dr. Collingwood testified that “the most proximate round of elections,” which his report used, is “generally going to be the most appropriate” to “get an understanding of how the electorate is now and how it’s going to be in the next couple years.” Hr’g Tr. Day 3

⁹ One sentence in Dr. Collingwood’s report misstates that he analyzed ten statewide elections. PX 122 at 3 (Collingwood Rep.). Dr. Collingwood testified, and the Court accepts, that this was a typographical error that has no bearing on the weight of his testimony. Hr’g Tr. Day 3 Vol. 1 at 80:20-81:4 (Collingwood).

Vol. 1 at 82:6-14 (Collingwood). The Court finds that the statewide election results Dr. Collingwood relied upon are a proper dataset for analyzing RPV.

242. The set of statewide elections upon which Dr. Collingwood’s RPV analysis relies is produced in Table 1 of his report and replicated in Plaintiffs’ Exhibit 131:

Table 1 List of contests analyzed between 2016-2020. The columns list the year, the candidate names, and whether minorities voted cohesively.

Year	Contest	Dem Candidate	GOP Candidate	2012 CD3 POC Cohesion	Enacted CD3 POC Cohesion	Enacted CD2 POC Cohesion
2020	President	Biden	Trump	YES	YES	YES
2020	U.S. Senate	Bollier	Marshall	YES	YES	YES
2018	Governor	Kelly/Rogers	Koback/Hartman	YES	YES	YES
2018	Secretary of State	McClendon	Schwab	YES	YES	YES
2018	Attorney General	Swain	D. Schmidt	YES	YES	YES
2018	Treasurer	Francisco	LaTurner	YES	YES	YES
2018	Insurance Commissioner	McLaughlin	V. Schmidt	YES	YES	YES
2016	President	Clinton	Trump	YES	YES	YES
2016	U.S. Senate	Wiesner	Moran	YES	YES	YES



243. Using this data, Dr. Collingwood analyzed whether RPV existed in three distinct electoral environments: CD 3 under the 2012 congressional plan, CD 2 under Ad Astra 2, and CD 3 under Ad Astra 2. He set the confidence interval throughout his analysis to 95%, which is the generally accepted standard in the field, and which the Court finds appropriate here. Hr’g Tr. Day 3 Vol. 1 at 90:22-93:25 (Collingwood).

244. First, Dr. Collingwood analyzed RPV in CD 3 under the 2012 congressional plan, which is depicted in Figure 1 of his report. PX 122 at 4-5 & fig.1 (Collingwood Rep.). Figure 1 contains two columns and nine rows, with four horizontal bars presented at the intersection of each row and each column. PX 122 at 4-5 & fig.1 (Collingwood Rep.). The column on the left-hand side displays election returns by racial demographic for the candidate preferred by white voters; the column on the right-hand side displays election results by racial demographic for the candidate preferred by minority voters. PX 122 at 4-5 & fig.1 (Collingwood Rep.). The nine rows, identified on the left-hand side of the chart, correspond to the nine statewide elections Dr. Collingwood analyzed. PX 122 at 4-5 & fig.1 (Collingwood Rep.). The four color-coded bars within each row display election returns by racial demographic. PX 122 at 4-5 & fig.1 (Collingwood Rep.). For each election, the Figure shows the relevant candidate's share of the white vote (red), Latino vote (green), Black vote (blue), and total minority vote (purple). PX 122 at 4-5 & fig.1 (Collingwood Rep.).

Figure 1. Racially Polarized Voting assessment statewide, subset to 2012-enacted CD-3, for white, Black, Hispanic, and non-white (all).

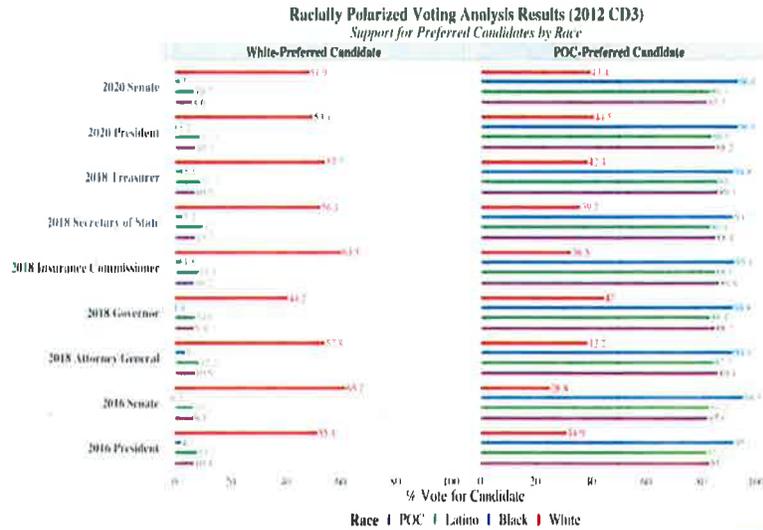


Exhibit No.
PX 123

245. Based on the data depicted in Figure 1, Dr. Collingwood concluded that RPV existed in eight of the nine elections he examined in CD 3 under the prior plan. Hr’g Tr. Day 3 Vol. 1 at 82:23-83:3 (Collingwood); PX 122 at 4 (Collingwood Rep.); PX 123 (Collingwood Rep. Fig. 1). The 2018 gubernatorial election, in which Laura Kelly ran against Kris Kobach—and which Dr. Collingwood described as “a unique circumstance,” Hr’g Tr. Day 3 Vol. 1 at 100:17-19 (Collingwood)—was the only election in which RPV did not exist, Hr’g Tr. Day 3 Vol. 1 at 82:23-83:3 (Collingwood); PX 122 at 4-5 & fig.1 (Collingwood Rep.); PX 123 (Collingwood Rep. Fig. 1).

246. Second, Dr. Collingwood analyzed RPV in CD 2 under Ad Astra 2, which is depicted in Figure 2 of his

report and reproduced in Plaintiffs' Exhibit 124. PX 122 at 6 & fig. 2 (Collingwood Rep.); PX 124 (Collingwood Rep. Fig. 2). Figure 2 follows the same visual presentation as Figure 1 but uses precinct-level data to plot historic election returns onto the newly enacted map. PX 122 at 4, 6 (Collingwood Rep.). Dr. Collingwood concluded that under Ad Astra 2, RPV would exist in CD 2 in all nine of the elections he studied, including the 2018 gubernatorial election. PX 122 at 5-6 & fig.2 (Collingwood Rep.); PX 124 (Collingwood Rep. Fig. 2).

Figure 2. Racially Polarized Voting assessment statewide subset to newly-enacted CD-2, for white, Black, Hispanic, and non-white

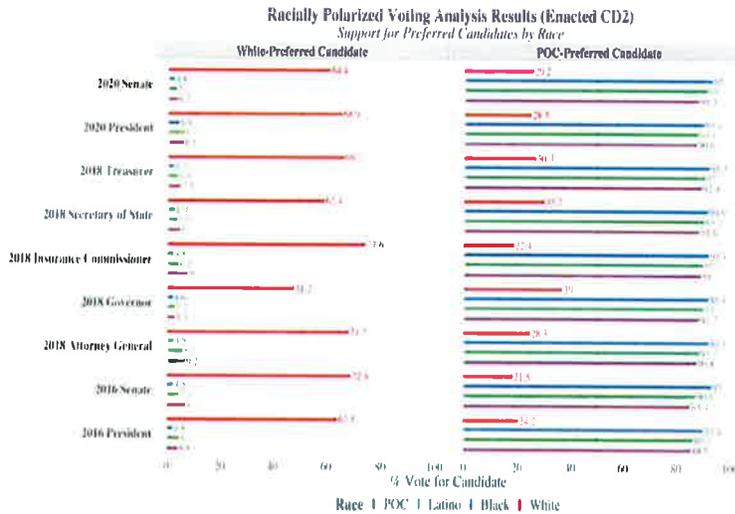


Exhibit No.
PX 124

247. Third, Dr. Collingwood analyzed RPV in CD 3 under Ad Astra 2, which is depicted in Figure 3 of his report and reproduced in Plaintiffs' Exhibit 125. PX 122 at 7 (Collingwood Rep.); PX 125 (Collingwood Rep.

Fig. 3). Figure 3 follows the same visual presentation and methodology as Figure 2. PX 122 at 4, 7 (Collingwood Rep.). Dr. Collingwood concluded that like in the prior CD 3, RPV would exist in eight of nine elections in the new CD 3, with the 2018 gubernatorial election remaining the only exception. Hr’g Tr. Day 3 Vol. 1 at 88:20-89:1 (Collingwood); PX 122 at 7 & fig.3 (Collingwood Rep.); PX 125 (Collingwood Rep. Fig. 3).

Figure 3. Racially Polarized Voting assessment statewide subset to newly-enacted CD-3, for white, Black, Latino, and non-white

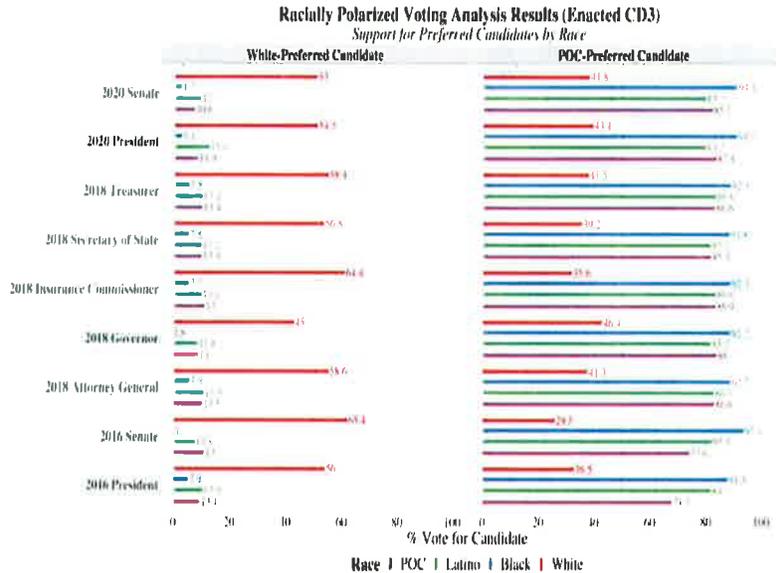


Exhibit No.
PX 125

248. Based on this analysis, Dr. Collingwood concluded that RPV is present in each of the three districts he analyzed—the prior CD 3, the new CD 2, and the new CD 3. The Court credits Dr. Collingwood’s

RPV analysis and finds that RPV exists in CD 3 under the 2012 congressional plan, CD 2 under Ad Astra 2, and CD 3 under Ad Astra 2.

249. The nuances of Dr. Collingwood's RPV analysis have important implications on minority vote dilution, which is discussed more fully in the following section. Under the prior plan, an average of 40% of white voters in CD 3 voted for the minority-preferred candidate. PX 122 at 5 (Collingwood Rep.). This relatively lower level of RPV—combined with a relatively large and cohesive number of minority voters—made the prior CD 3 a performing crossover district for minority voters. Hr'g Tr. Day 3 Vol. 1 at 83:22-84:8 (Collingwood). Under Ad Astra 2, however, CD 3 contains 7% more white voters than under the prior plan, a dynamic that dilutes minority votes even as the overall level of RPV remains relatively constant. PX 122 at 7 (Collingwood Rep.). Ad Astra 2 also moves over 45,000 minority voters to CD 2, PX 122 at 10 (Collingwood Rep.), where only 28.6% of white voters vote for the minority candidate of choice, PX 122 at 5 (Collingwood Rep.), a far more extreme level of RPV than in CD 3, which will prevent minority voters from electing their preferred candidates.

250. Dr. Collingwood conducted a performance analysis as his principal method of determining whether the RPV in CD 2 and CD 3 translates into minority vote dilution under Ad Astra 2. PX 122 at 7-8 (Collingwood Rep.). To conduct the performance analysis, Dr. Collingwood mapped precinct-level election returns onto the maps for each plan, and subset them to the appropriate district boundaries for

each district he analyzes. PX 122 at 4, 7-8 (Collingwood Rep.). He then totaled the number of votes for the white-preferred candidate and the minority-preferred candidate in the relevant district and divided by the total number of votes to reach a vote share for each candidate in each district. PX 122 at 7 (Collingwood Rep.). This is also known as a reconstituted election analysis. *See* PX 122 at 1-2 (Collingwood Rep.).

251. The results of Dr. Collingwood's performance analysis are depicted in Figure 4 of his report and reproduced in Plaintiffs' Exhibit 126. PX 122 at 8 & fig.4 (Collingwood Rep.); PX 126 (Collingwood Rep. Fig. 4). Figure 4 contains four columns and nine rows. PX 122 at 8 & fig.4 (Collingwood Rep.). The columns represent the prior CD 2, the enacted CD 2, the prior CD 3, and the enacted CD 3 respectively. PX 122 at 8 & fig.4 (Collingwood Rep.). The rows indicate the nine statewide elections Dr. Collingwood analyzed, which are identified on the left-hand side of the Figure. PX 122 at 8 & fig.4 (Collingwood Rep.). The two horizontal bars at the intersection of each column and row display the performance analysis for the white-preferred candidate (green) and minority-preferred candidate (purple) for each respective election. PX 122 at 8 & fig.4 (Collingwood Rep.).

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Figure 4. Performance analysis assessment in CD-2 (2012 enacted), CD-2 (2022 enacted), CD-3 (2012 enacted), CD-3 (2022 enacted).

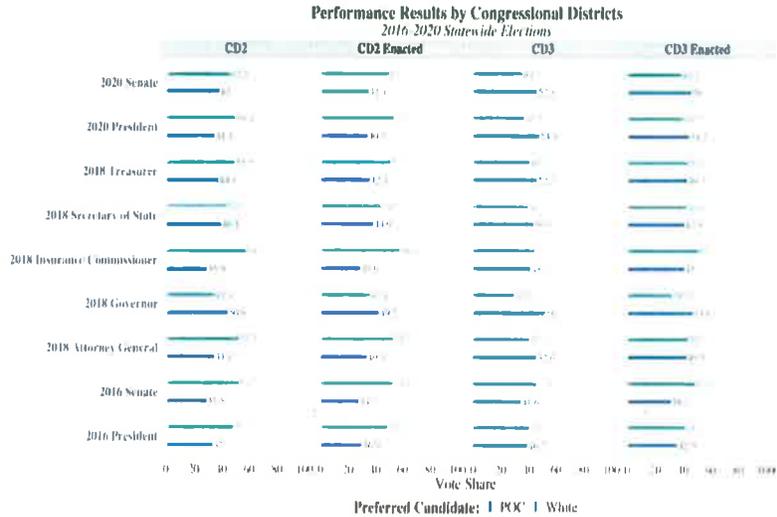


Exhibit No.
PX 128

252. Dr. Collingwood’s performance analysis demonstrates that Ad Astra 2 has an extreme dilutive effect on the ability of minority voters to elect their preferred candidates. This is true for both the minority voters Ad Astra 2 moves from CD 3 into CD 2 and the minority voters who remain in CD 3. Under the prior plan, minority voters in CD 3 were able to elect their candidates of choice in 75% of the elections in which RPV existed, making CD 3 a performing crossover district for minority voters. PX 122 at 7-8 (Collingwood Rep.); Hr’g Tr. Day 3 Vol. 1 at 99:5-8 (Collingwood). Ad Astra 2, however, moves over 45,000 minority voters out of CD 3 into CD 2. PX 122 at 10 (Collingwood Rep.). These new CD 2 voters are no longer able to elect their candidate of choice in any of the elections in which RPV

is present—their votes are completely diluted. PX 122 at 7-8 (Collingwood Rep.). At the same time, Ad Astra 2 leaves a portion of Wyandotte County's minority population in CD 3. PX 122 at 10 (Collingwood Rep.). These voters are now able to elect their candidate of choice in only 25% of the elections in which RPV is present—a performance rate 67% lower than the prior CD 3's. PX 122 at 7-8 (Collingwood Rep.).

253. Ad Astra 2's dilution of minority votes, demonstrated by Dr. Collingwood's performance analysis, has the effect of eliminating a performing minority crossover district. Under the prior plan, CD 3 was a performing crossover district for minority voters. *See, e.g.*, PX 122 at 8 (Collingwood Rep.); Hr'g Tr. Day 3 Vol. 1 at 99:5-8 (Collingwood). But under Ad Astra 2, CD 3 will no longer perform for the minority voters who remain there. *See, e.g.*, PX 122 at 8 (Collingwood Rep.); Hr'g Tr. Day 3 Vol. 1 at 100:6-9 (Collingwood). Likewise, under Ad Astra 2, CD 2 will not perform for minority voters either—despite the significant number of minority voters moved there from the previously performing CD 3.¹⁰ *See, e.g.*, PX 122 at 8 (Collingwood Rep.); Hr'g Tr. Day 3 Vol. 1 at 100:10-101:14 (Collingwood). Indeed, minority voters in CD 2 have even less opportunity to elect their preferred candidates than do white Democrats in CD 3 and white Republicans throughout the state. *See, e.g.*, PX 122 at

¹⁰ This is, in large part, because Ad Astra 2 moves the heavily Democratic city of Lawrence out of CD 2 and into CD 1. PX 122 at 7 (Collingwood Rep.); Hr'g Tr. Day 3 Vol. 1 at 101:17-21 (Collingwood).

8 (Collingwood Rep.); Hr'g Tr. Day 3 Vol. 1 at 101:22-102:4 (Collingwood).

254. Dr. Collingwood reinforced his performance analysis with a demographic analysis that provides further evidence that Ad Astra 2 dilutes minority votes. Figures 5 through 8 in Dr. Collingwood's report depict Dr. Collingwood's demographic analysis, and Table 4 contains additional data underlying the Figures. PX 122 at 11-15 (Collingwood Rep.). Figure 8, in particular, highlights the surgical manner in which Ad Astra 2 excises the census blocks with the most concentrated minority populations from CD 3 into CD 2.

**Kansas CD 3 POC Distribution
(2012 vs. 2022 Enacted)**



255. Using U.S. Census data, Figure 8 depicts block-level demographics for the geographic regions that Ad Astra 2 removes from CD 3, retains in CD 3, and introduces to CD 3. PX 122 at 13-14 (Collingwood Rep.). The more lightly shaded the area, the whiter its population; the more darkly shaded the area, the greater its minority population. PX 122 at 13-14 (Collingwood Rep.). The arrow positioned at the Figure's top left-hand side identifies the portion of Wyandotte County that Ad Astra 2 moves out of CD 3

into CD 2. PX 122 at 13-14 (Collingwood Rep.); Hr’g Tr. Day 3 Vol. 1 at 103-04 (Collingwood). The arrow positioned at the Figure’s bottom right-hand side identifies the counties Ad Astra 2 moves into CD 3 for the first time. PX 122 at 13-14 (Collingwood Rep.); Hr’g Tr. Day 3 Vol. 1 at 103-04 (Collingwood). The middle portion of the Figure contains Johnson County and the portion of Wyandotte County that remains in CD 3 under Ad Astra 2. PX 122 at 13-14 (Collingwood Rep.); Hr’g Tr. Day 3 Vol. 1 at 103:12-104:7 (Collingwood).

256. Figure 8 illustrates that although CD 2 and CD 3 now have minority voting age populations (“VAPs”) of 26.7% and 22.1% respectively, PX 122 at 10 (Collingwood Rep.), the portion of Wyandotte County severed from CD 3 into CD 2 is 66.21% minority—over three times the minority VAP in CD 3 as a whole, PX 122 at 14-15 (Collingwood Rep.). Ad Astra 2 then compensates for this population loss in CD 3 by adding counties from the southwest that are 90.3% white. PX 122 at 14 (Collingwood Rep.). In Dr. Collingwood’s view, this makes Ad Astra 2 among the starkest cuts along racial lines that he has “ever seen” in his professional work. Hr’g Tr. Day 3 Vol. 1 at 104:8-11 (Collingwood).¹¹

¹¹ The Court finds that the legislative proponents’ suggestion that the location of I-70 explains the stark racial division in the map is pretextual. Any number of highways that do *not* split the district along racial lines were available to be selected, and as explained below, the enacted plan departs from 94.9% of Dr. Chen’s simulated plans in its demographic and electoral composition with respect to minority voters.

257. The Court credits Dr. Collingwood's analysis and finds that Ad Astra 2 has an extreme dilutive effect on the vote share of minority voters in both CD 2 and CD 3. The Court further finds that that the minority vote dilution in Ad Astra 2 has the effect of eliminating a performing crossover district for minority voters and replaces it with a plan that will not perform for minority voters in any congressional district. Finally, the Court finds that the racially discriminatory effects of Ad Astra 2 are particularly pronounced—and entirely distinct from its partisan effects—because the plan treats Democratic minority voters considerably worse than it treats white Democratic and white Republican voters.

258. Based on Dr. Collingwood's analysis, the Court concludes that there is persuasive evidence that the Legislature intended to dilute minority voting strength by cracking minority voters in northern Wyandotte into CD 2 and by drowning the minority voters who remain in CD 3 in an overwhelmingly white district. Not only does Dr. Collingwood's analysis provide uncontroverted evidence of minority vote dilution, it is also persuasive evidence the Legislature intended the result it achieved, in light of the reasonable inferences the Court draws from all the direct and circumstantial evidence.

259. First, courts can reach a strong inference that the Legislature intended the natural, foreseeable results of its actions—particularly where has here there is no countervailing evidence to rebut that inference. *See infra* FOF §§ IV, V. As the Court's entire discussion of Dr. Collingwood's analysis makes plain,

his report is replete with evidence that Ad Astra 2 has the effect of diluting minority votes to an extreme degree.

260. Moreover, Ad Astra 2's effect on minority voters was widely discussed in the legislative debate, and Senate President Masterson expressly acknowledged that the plan carved out the largest concentration of minority voters in the state. *See, e.g.*, PX 168 at 31:24-32:8, 67:10-17-73:21 (transcript of January 20, 2022 Senate Redistricting Committee hearing). In an exchange with Senate President Masterson, Senator Corson recited in detail the map's projected impact on minority voters. He explained that the plan would shift 25,240 Black voters and 70,288 Hispanic voters out of CD 3, removing nearly one-half of its Black population and one-third of its Hispanic population. PX 168 at 67:10-17, 68:13-22. He also noted that Kansas's population growth did not require this result. Senator Corson pointed out that an available alternative, the proposed map entitled "United," would actually *increase* CD 3's minority population. PX 168 at 68:23-69:4.

261. In response, the majority party acknowledged Ad Astra 2's dilutive effects. Senate President Masterson, who introduced Ad Astra 2, acknowledged that he was "aware" that Wyandotte County is the state's most diverse county and replied, "I appreciate that" to Senator Corson's figures, but characterized them as "red herrings" and "political arguments." PX 168 at 32:3-8, 70:10, 73:11, 76:15. Minority votes could not be "deprived," in Senator Masterson's view, "when they have the right to vote." PX 168 at 72:1-2. To settle

whether Ad Astra 2's vote dilution was unlawful, Senator Masterson concluded, "I'm sure we'll be able to get that through a court of law and figure that answer." PX 168 at 73:19-21.

262. While awareness alone does not establish invidious intent, it raises a strong inference that the outcome that was achieved was intended, particularly where, as here, the negative effect on the targeted group is so extreme and so foreseeable. Indeed, Dr. Collingwood's demographic analysis underscores the surgical precision with which the Legislature divided Wyandotte County on racial (and not merely partisan) lines. PX 122 at 14 (Collingwood Rep.). The Court finds that the discriminatory effects Dr. Collingwood's report shows are powerful evidence of the Legislature's intent to dilute minority votes.

263. Second, Dr. Collingwood's analysis demonstrates that Ad Astra 2 has substantially more negative effects on minority voters than it does on white voters. In his testimony, Dr. Collingwood explained that although minority voters preferred the Democratic candidate in each election he analyzed, the Court should not mistake that trend for evidence that Ad Astra 2 treats minority Democrats the same way it treats white Democrats. Hr'g Tr. Day 3 Vol. 1 at 142:14-22 (Collingwood). Indeed, Dr. Collingwood testified that Ad Astra 2 treats minority Democrats much less favorably than it treats white Democrats. Hr'g Tr. Day 3 Vol. 1 at 142:23-143:14 (Collingwood). Under Ad Astra 2, minority Democrats in CD 2 have a "very low" chance of electing their candidate of choice; in fact, with the exception of the 2018 gubernatorial

race, enacted CD 2 never performs for minority Democrats. Hr'g Tr. Day 3 Vol. 1 at 100:17-21 (Collingwood); see PX 122 at 7-8 (Collingwood Rep.). Meanwhile, in CD 3, where most of the district's Democrats are white, Democrats have an opportunity to elect their preferred candidate in three of the nine elections Dr. Collingwood analyzed (including the 2018 gubernatorial election). PX 122 at 7-8 (Collingwood Rep.). The result is that by moving minority Democrats into CD 2, and leaving white Democrats in CD 3, Ad Astra 2 dilutes minority votes even when controlling for partisan affiliation—a result that could have been avoided by moving white Democrats or white Republicans from CD 3 to CD 2 instead. Hr'g Tr. Day 3 Vol. 1 at 143:11-144:7 (Collingwood). The Court therefore finds that Ad Astra 2 has a more negative effect on minority voters than on white voters, which is additional evidence of the Legislature's intent to dilute minority voters' political voices.

264. Third, Dr. Collingwood's testimony also makes clear that Ad Astra 2 substantively departs from prior plans as it relates to minority voters. As discussed above, the plan moves over 45,000 minority voters out of CD 3 into CD 2, cracking apart a performing crossover district so that minority voters can no longer elect their candidate of choice in either CD 2 or CD 3. PX 122 at 10 (Collingwood Rep.). To achieve this effect, Ad Astra 2 is drawn with pinpoint precision to move the most densely populated minority census blocks from CD 3 and place them into CD 2. PX 122 at 14-15 (Collingwood Rep.). The result is that Wyandotte County—the state's only majority-minority county—is split for the first time in decades and that CD 3, which

previously had the highest minority population of any congressional district in the state, now has the lowest minority population of any congressional district in the state. Hr'g Tr. Day 3 Vol. 1 at 104:22-25 (Collingwood). In light of this testimony, the Court finds that Ad Astra 2 substantively departs from prior plans as it relates to minority voters, which, again, is evidence that the Legislature intended to dilute the votes of racial and ethnic minorities.

265. The Court credits Dr. Collingwood's findings, finds his analysis and testimony to be reliable, places great weight on his testimony, and adopts each of his conclusions. During Dr. Collingwood's live testimony, the Court carefully observed his demeanor, particularly as he was cross-examined for the first time about his work on this case. He consistently defended his work with careful and deliberate explanations of the bases for his opinions.

C. Evidence presented by Dr. Jowei Chen demonstrates that Ad Astra 2 intentionally and effectively dilutes minority votes.

266. As discussed above, the Court accepts Dr. Chen as an expert in redistricting, political geography, and redistricting simulation analysis. *See supra* FOF § II.A; Hr'g Tr. Day 1 Vol. 2 at 117:4-14 (Chen).

267. Dr. Chen examined whether Ad Astra 2 dilutes minority votes using a computer simulation technique. PX 31 ¶ 71 (Chen Rep.). Dr. Chen's simulation process, which the Court has already explained in depth, *see supra* FOF § II.A, ignores all racial considerations

when drawing districts and instead produces 1,000 simulated maps programmed to adhere to the Guidelines and other “traditional districting criteria.” PX 31 ¶¶ 7-9 (Chen Rep.). Dr. Chen’s simulation of a large number of districting plans that adhere to these criteria enables him to assess whether a particular plan is more dilutive of minority vote share than expected from a plan that solely follows neutral districting criteria in the context of Kansas’s political geography. Hr’g Tr. Day 1 Vol. 2 at 154:19-155:14 (Chen).

268. Dr. Chen assessed the level of minority vote dilution in Ad Astra 2 by comparing the minority VAP in the most-Democratic district under Ad Astra 2 (that is, the district most favorable to the minority-preferred candidate¹²) to the minority VAP in the most Democratic district in each of his 1,000 simulated plans. PX 31 ¶ 72 (Chen Rep.). Under Ad Astra 2, the most-Democratic district is CD 3, which has a Republican vote share of 50.6% and a minority VAP of 22.14%. PX 31 ¶ 73 (Chen Rep.).

269. Figure 13 of Dr. Chen’s report depicts the comparison between the minority VAP of Ad Astra’s CD 3 and the minority VAP in the most-Democratic district in each of Dr. Chen’s 1,000 simulated plans. PX 31 fig.13 (Chen Rep.). In the Figure, the red star represents Ad Astra 2’s most-Democratic district, CD 3, and the 1,000 gray circles represent the most-

¹² In Kansas, the “most-Democratic district” corresponds to the district most likely to elect a minority-preferred candidate. *See, e.g.*, Hr’g Tr. Day 3 Vol. 1 at 119:24-120:3 (Collingwood).

Democratic district in each of the simulated plans. PX 31 ¶ 74 (Chen Rep.). The minority VAP of each district is indicated on the vertical axis and Republican vote share in each district is indicated on the horizontal axis. PX 31 ¶ 74 (Chen Rep.).

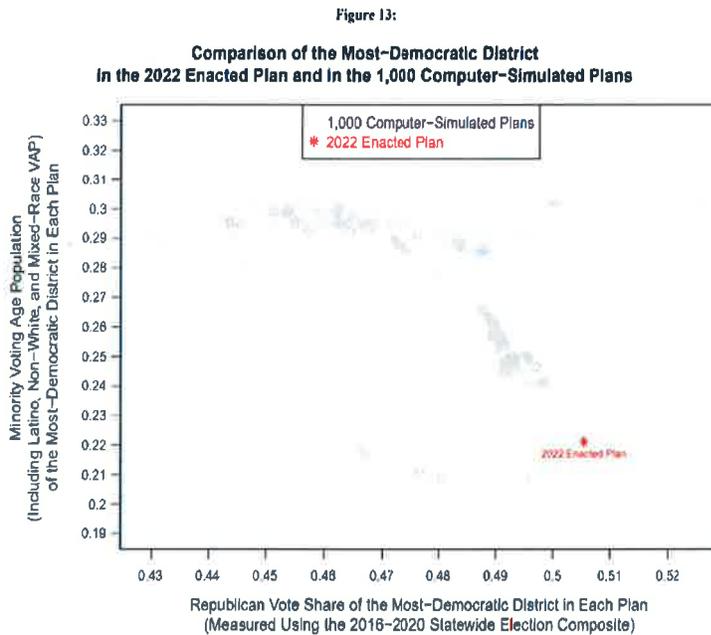


Exhibit No.
PX 31

270. Figure 13 demonstrates that the minority VAP in Ad Astra 2's most-Democratic district is a low-end outlier relative to the minority VAP in the most-Democratic districts in the computer-simulated plans. PX 31 ¶ 75 (Chen Rep.). Whereas most of the simulated districts have minority VAPs between 24% and 30%, CD 3 has a minority VAP of just 22.14%. PX 31 ¶ 74 (Chen Rep.). CD 3's minority VAP "is lower than 94.9%

of the most-Democratic districts in the 1,000 simulated plans.” PX 31 ¶ 74 (Chen Rep.). From this analysis, Dr. Chen concluded that Ad Astra 2 has the effect of diluting minority votes. Hr’g Tr. Day 1 Vol. 2 at 154:19-155:14 (Chen).

271. The Court credits Dr. Chen’s analysis of whether the minority VAP in the most-Democratic district in Ad Astra 2 is an outlier as compared to the most-Democratic districts in plans that adhere to traditional districting criteria. Accordingly, the Court finds that Ad Astra 2 has the effect of diluting minority vote strength by exporting minority voters out of the district in which they have the best opportunity to elect their preferred candidate. Moreover, the Court finds that Dr. Chen’s analysis is compelling evidence that the Legislature intended to dilute minority voting strength. The fact that 94.9% of the simulated plans have a higher minority share in the most Democratic district—the district in which minority voters are likeliest to elect their preferred candidate—than does Ad Astra 2 demonstrates that the removal of minority voters from CD 3 in Ad Astra 2 was purposeful, and not explained by some neutral justification.

D. Evidence presented by Dr. Patrick Miller demonstrates that Ad Astra 2 intentionally and effectively dilutes minority votes.

272. Dr. Miller also analyzed the racial effects of Ad Astra 2. *See generally* PX 58 (P. Miller Rep.).

273. Dr. Miller testified that race is a foundational element of Kansas politics. PX 58 at 13 (P. Miller Rep.); Hr'g Tr. Day 2 Vol. 2 at 16:22-17:15 (P. Miller).

274. The racial composition of the state has changed over the last decade. As of the 2020 census, Kansas has a minority population of at least 25%. Hr'g Tr. Day 2 Vol. 2 at 17:16-18:5 (P. Miller). That figure represents significant growth since the 2010 census, particularly in the state's most populous counties like Douglas, Johnson, and Wyandotte. PX 63 (P. Miller Map 5). Meanwhile, the overall white population of Kansas declined by more than 100,000, or 4.3%. Hr'g Tr. Day 2 Vol. 2 at 18:11-19:21 (P. Miller).

275. Mirroring geographic differences in the state's partisan breakdown, most minority Kansans reside in urban communities, Native American reservations, southwest Kansas, and military communities, whereas the state's white population predominantly resides in more rural regions. PX 58 at 14 (P. Miller Rep.).

276. Kansas has a long history of racial violence and terror. Hr'g Tr. Day 2 Vol. 2 at 16:22-17:15 (P. Miller). Professor Brent Campney conducted extensive research into this history, particularly focusing on the years 1861 to 1927. During that period, Dr. Campney found direct evidence of 37 lynchings, 105 threatened lynchings, 42 racially motivated homicides, 26 killing by police, 26 race riots, and 22 racially motivated muggings. PX 58 at 15-16 (P. Miller Rep.); *see also* Hr'g Tr. Day 2 Vol. 2 at 20:24-21:7 (P. Miller). Nineteen of these incidents occurred in Wyandotte County. PX 58 at 16 (P. Miller Rep.).

277. Kansas also has a long history of racial segregation in its public and private educational facilities and in its residential housing. The seminal U.S. Supreme Court case *Brown v. Board of Education*, 347 U.S. 483 (1954), arose from Topeka's public schools. PX 58 at 16-17 (P. Miller Rep.). And Kansas long saw highly racially segregated residential areas in Wyandotte County and across the state. In the 1930s, the federal Home Owners' Loan Corporation surveyed Wyandotte County and assigned its lowest grade, D, to any neighborhoods that had significant populations of "negroes" or "Mexicans." Hr'g Tr. Day 2 Vol. 2 at 21:8-25:6 (P. Miller); PX 58 at 17-19 (P. Miller Rep.).

278. Kansas's racial discrimination extended even to its infrastructure. Interstate I-70 and its precursor, the Kansas Turnpike, were built by dividing many of these minority neighborhoods, including Argentine, Armourdale, and Rosedale. PX 58 at 17-19 (P. Miller Rep.). In this way, I-70 became a permanent fixture built along, and reinforcing, significant racial scars. PX 58 at 17-19 (P. Miller Rep.). Indeed, I-70 continues to divide minority communities to this day. PX 58 at 21-22 (P. Miller Rep.).

279. Dr. Miller has shown that Ad Astra 2 exacerbates Kansas's racial divisions.

280. He testified that Ad Astra 2 "has a disastrous effect on minority Kansans" in CD 2. PX 58 at 46 (P. Miller Rep.). Although CD 2 becomes more diverse under the new plan, it remains "overwhelmingly White," while the map "simultaneously makes" the district "more Republican." PX 58 at 47 (P. Miller Rep.); *see also* Hr'g Tr. Day 2 Vol. 2 at 31:8-32:9 (P. Miller).

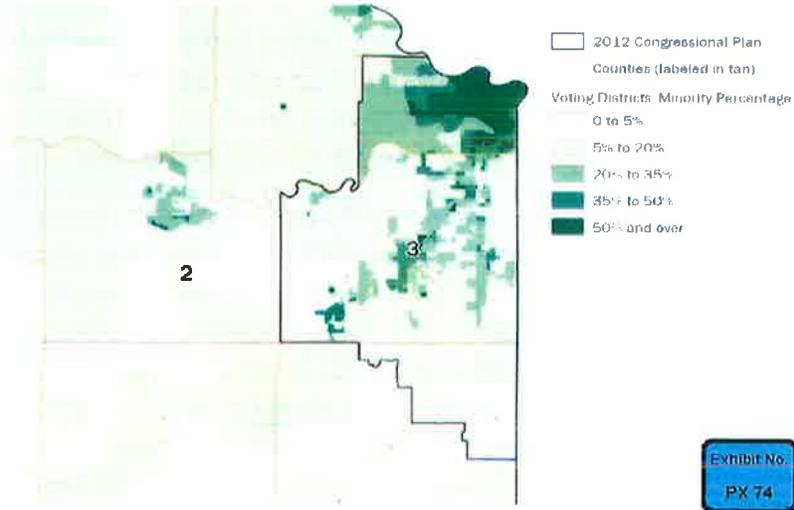
“Indeed, the new CD2 is arguably so Republican-leaning that its new minority, Democratic-leaning residents from northern Wyandotte have no credible chance to meaningfully impact elections in the district. In effect, [Ad Astra 2] neutralizes them to the point of arguable irrelevance.” PX 58 at 47 (P. Miller Rep.).

281. Dr. Miller also explained that Ad Astra 2 negatively impacts the state’s Native American community. Under the prior congressional plan, CD2 contained “all four reservations in Kansas.” PX 58 at 48 (P. Miller Rep.). Ad Astra 2, however, splits this community by separating the Prairie Band Potawatomi reservation into CD 1, further dividing and diminishing the “potential political power” of “this already small population.” PX 58 at 48 (P. Miller Rep.).

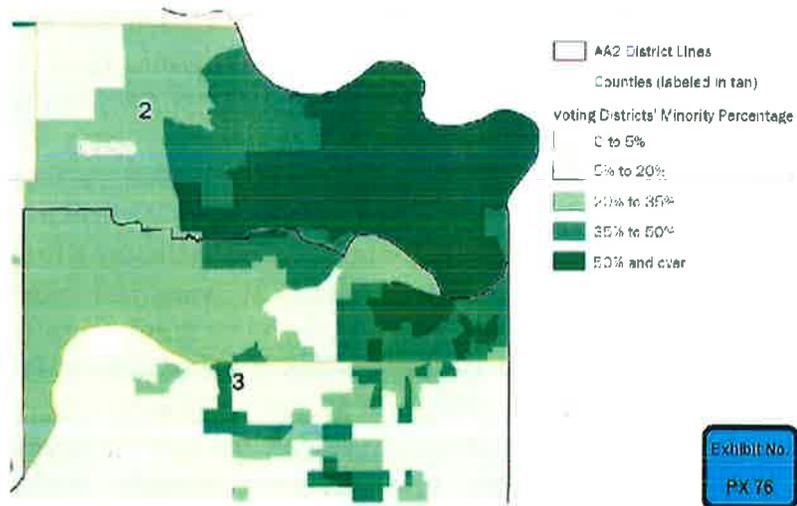
282. Enacted CD 3 is similarly flawed. Since it was drawn in 2012 by the U.S. District Court for the District of Kansas, the district has gone from a relatively reliable Republican district to something much “bluer over the course of the decade.” Hr’g Tr. Day 2 Vol. 2 at 27:6-13 (P. Miller). Ad Astra2 dismantles the district by “crack[ing] Wyandotte County along racial lines and add[ing] significant white populations to CD3—transforming it from the most racially diverse district in Kansas to the least racially diverse.” PX 58 at 38 (P. Miller Rep.); *see also* Hr’g Tr. Day 2 Vol. 2 at 33:23-35:14 (P. Miller). As a consequence, CD 3’s minority voices are now drowned out by the district’s new, overwhelmingly white population. The Wyandotte split is shown by Dr. Miller in the two maps below:

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Map 16. Minority Population Percentage by VTD in 2020 Census, CD3 in 2012 Plan



Map 18. Minority Population Percentage by VTD in 2020 Census, Wyandotte in AA2 Plan



283. The Legislature did not need to make this choice. As Dr. Miller testified, the Legislature could

have made “minimal changes to CD3” that “would have avoided diluting minority voting strength, and in fact would have made CD3 even more diverse than it had previously been.” PX 58 at 36 (P. Miller Rep.).

284. Having diluted minority Kansan’s voting power in CDs 2 and 3, Ad Astra 2 effectively nullifies the minority vote in congressional elections. Dr. Miller testified that given the significant white majorities in CDs 1 and 4, they are not districts “where minority Kansans have significant voting power,” even though CD 4 is now the most diverse district in the state. PX 58 at 62, 67 (P. Miller Rep.).

285. The Court credits Dr. Miller’s testimony on the racial consequences of Ad Astra 2 and concludes that it was enacted intentionally and effectively to diminish the electoral influence of minority voters in the state.

E. Additional evidence provided by fact witnesses supports Plaintiffs’ experts’ analyses that Ad Astra 2 will dilute minority votes.

286. Several fact witnesses for Plaintiffs that live in, work in, or participate in the local government of Wyandotte County offered testimony that supports Plaintiffs’ experts’ statistical and empirical analyses. For example, Representative Tom Burroughs, a witness for Plaintiffs, is a Democratic member of the Kansas House of Representatives where he has represented the South-Central portion of Wyandotte County for twenty-six years. Hr’g Tr. Day 2 Vol. 1 at 7:22-25 (Burroughs). He is also a Commissioner At-Large for District 2 in Wyandotte County, a position he

has held for over four years. Hr'g Tr. Day 2 Vol. 1 at 7:19-21, 8:1-3 (Burroughs). Rep. Burroughs testified that Ad Astra 2 is a "deliberate action[] taken" by the Legislature "to mute" and "disenfranchise members of [his] community," Hr'g Tr. Day 2 Vol. 1 at 15:5-12 (Burroughs), because the map "split[s] [Wyandotte County] right down a main artery of our community and split[s] heavy minority districts," Hr'g Tr. Day 2 Vol. 1 at 15:2-4 (Burroughs). Rep. Burroughs testified that this would have an "a palling [sic] effect. . . . in the majority minority community, it would be very difficult for a minority member of our community to ever run for state or federal office and [they will] have their voices muted when it comes to having interest[s] of theirs presented on either [the] federal [or] state level." Hr'g Tr. Day 2 Vol. 1 at 23:3-9 (Burroughs).

287. Dr. Mildred Edwards, Ph.D., also testified for Plaintiffs. Dr. Edwards is Chief of Staff to Wyandotte County Unified Government Mayor Tyrone Garner and a lifelong Kansan. Hr'g Tr. Day 2 Vol. 1 at 40:9-12, 40:22-23 (Edwards). Dr. Edwards testified that Ad Astra 2, which "divided [Wyandotte C]ounty" along Highway 70, would have a "tremendous negative impact" on the county's minority communities. Hr'g Tr. Day 2 Vol. 1 at 49:2, 50:24-25 (Edwards). Dr. Edwards testified that Wyandotte County is a majority-minority county, and that diversity is an attribute the county "celebrate[s]" and is "most proud of." Hr'g Tr. Day 2 Vol. 1 at 44:11-45:7 (Edwards). Wyandotte County only expects this diversity to grow, because its school age population is even more diverse than the county as a whole. Hr'g Tr. Day 2 Vol. 1 at 46:23-47:11 (Edwards). Dr. Edwards explained that the plan splits Wyandotte

County along racial lines, keeping the whiter, wealthier southern half of Wyandotte County in CD 3, and moving the northern half—which contains “68 percent of the people of color in Wyandotte,” has a median income \$15,000 below that of the southern portion of the county, and “has the greatest need identified”—into CD2. Hr’g Tr. Day 2 Vol. 1 at 42:2-43:13, 49:2-7, 51:18-52:2 (Edwards). This division, she testified, would “devastate the northern part of Wyandotte County.” Hr’g Tr. Day 2 Vol. 1 at 51:15-19 (Edwards), fracturing the symbiotic relationship northern and southern Wyandotte County currently enjoy, Hr’g Tr. Day 2 Vol. 1 at 42:2-44:10 (Edwards), and jeopardizing \$9.5 million in federal funds the county is counting on to serve its minority communities, Hr’g Tr. Day 2 Vol. 1 at 49:8-50:3 (Edwards).

288. The Court credits these fact witnesses’ testimony regarding the communities they serve, and finds their testimony to be additional evidence to support Plaintiffs’ claims that the Ad Astra 2 map intentionally and effectively dilutes minority votes.

IV. Defendants’ experts failed to rebut Plaintiffs’ claims.

289. Defendants offered three expert witness to rebut Plaintiffs’ partisan gerrymandering and racial vote dilution claims, Dr. Brad Lockerbie, Dr. Alan Miller, and Dr. John Alford. Collectively, they testified that Plaintiffs’ experts failed to demonstrate partisan gerrymandering or racial vote dilution in Ad Astra 2. The Court considers their testimony below.

A. Defendants' experts failed to rebut Plaintiffs' partisan gerrymandering claims.

290. Drs. Lockerbie, Miller, and Alford each testified to purported issues with Plaintiffs' experts' partisan gerrymandering analysis. Their central contentions were that Ad Astra 2 contains only a modest level of partisan bias and that Plaintiffs' experts improperly used the efficiency gap as a measure of partisan gerrymandering in Kansas's congressional elections. For the reasons discussed below, the Court agrees that the efficiency gap must be applied with caution in Kansas's congressional elections. It has already concluded, however, that Plaintiffs' experts exercised appropriate care in their use of the efficiency gap, *see supra* FOF § II.C, and it finds that Defendants' experts did not show otherwise. The Court also finds that Defendants' experts did not rebut Plaintiffs' evidence that Ad Astra 2 has an extreme level of partisan bias.

Dr. Brad Lockerbie's conclusions regarding partisan gerrymandering were unpersuasive.

291. Dr. Brad Lockerbie, Ph.D., is a Professor of Political Science at East Carolina University. DX 1059 ¶ 2 (Lockerbie Rep.). The Court admitted Dr. Lockerbie as an expert on partisan and racial gerrymandering, minority vote dilution, and RPV. Hr'g Tr. Day 3 Vol. 2 at 31:7-32:18 (Lockerbie). After reviewing Dr. Lockerbie's report and testimony in this case, the Court finds his opinion unpersuasive.

292. Dr. Lockerbie's most germane testimony was his assertion that Dr. Chen incorrectly concluded that Republicans will win all four congressional districts under Ad Astra 2 and that Ad Astra 2's level of compactness is an extreme outlier. DX 1059 ¶¶ 8-9, 13-17 (Lockerbie Rep.); Hr'g Tr. Day 3 Vol. 2 at 34:21-35:12 (Lockerbie). Although Dr. Lockerbie did not independently analyze the level of partisan bias in Ad Astra 2, he testified that two outside sources, PlanScore and the Princeton Gerrymandering project, anticipate that under Ad Astra 2 CD 3 will have a modest Democratic lean. DX 1059 ¶¶ 13-17 (Lockerbie Rep.); Hr'g Tr. Day 3 Vol. 2 at 38:14-39:8 (Lockerbie). Dr. Lockerbie testified further that although Dr. Chen's compactness analysis was "mathematically correct," Ad Astra 2's compactness scores are higher than the nationwide average, which he "took to be evidence that the state did try to make districts as compact as possible." Hr'g Tr. Day 3 Vol. 2 at 34:25-35:12 (Lockerbie).

293. On cross-examination, Dr. Lockerbie undercut his own conclusions. He suggested that Dr. Chen used a more reliable election composite to project partisanship than does PlanScore or the Princeton Gerrymandering Project, and that Dr. Chen's conclusion may therefore be "better" than the sources Dr. Lockerbie relied upon. Hr'g Tr. Day 3 Vol. 2 at 63:7-64:25 (Lockerbie). He also recognized that comparing compactness scores between states may be inappropriate because a state's shape and political geography limit its potential compactness, a constraint that varies from state to state. Hr'g Tr. Day 3 Vol. 2 at 57:8-59:21 (Lockerbie). Dr. Chen's analysis, he agreed,

showed that Ad Astra 2's compactness, as measured by both Reock and Polsby-Popper scores, was an extreme outlier in the Kansas-specific context. Hr'g Tr. Day 3 Vol. 2 at 59:22-60:20 (Lockerbie). Given this testimony, the Court finds Dr. Lockerbie's opinion that Democrats have an advantage in CD 3 and that Ad Astra 2 is as compact as possible unpersuasive.

294. The Court has considered these and other points raised by Dr. Lockerbie and finds them unpersuasive or insufficient to rebut Plaintiffs' evidence of partisan gerrymandering.

Dr. Alan Miller's conclusions regarding partisan gerrymandering are unpersuasive.

295. Dr. Alan Miller, Ph.D., is an Associate Professor of Law and the Canada Research Chair in Law and Economics at Western University. DX 1061 at 4 (A. Miller Rep.). The Court accepted Dr. Miller as an expert in axiomatic measurement and its application to the efficiency gap. Hr'g Tr. Day 3 Vol. 2 at 92:13-93:5 (A. Miller). For the reasons discussed below, the Court finds that Dr. Miller appropriately suggests the efficiency gap must be used with caution in Kansas congressional elections. The Court finds further, however, that Plaintiffs' experts employed appropriate caution and that Dr. Miller did not suggest otherwise. The Court finds the remainder of Dr. Miller's testimony unpersuasive.

296. Dr. Miller's principal testimony was that, for a variety of reasons, the efficiency gap does not effectively measure partisanship in redistricting

plans.¹³ Dr. Miller predicated this testimony on his article, “Flaws in the Efficiency Gap,” which he published in a student-edited law review and which has not been peer reviewed. Hr’g Tr. Day 3 Vol. 2 at 153:22-54:20 (A. Miller). That article stands in contrast, however, to “robust” peer reviewed scholarship that has “extensively” validated the measure. Hr’g Tr. Day 2 Vol. 1 at 82:19-84:5 (Warshaw). It is further undercut by Dr. Warshaw’s testimony that the efficiency gap is “an excellent metric,” Hr’g Tr. Day 2 Vol. 1 at 84:2-5 (Warshaw), and Defendants’ expert Dr. Alford’s testimony that the efficiency gap is the “best measure” of partisan gerrymandering, Hr’g Tr. Day 4 Vol. 1 at 23:4-10 (Alford). The Court therefore finds Dr. Miller’s opinion that the efficiency gap is a poor measure of partisanship unpersuasive.

297. Dr. Miller also testified that even if the efficiency gap were an appropriate measure of partisan symmetry, it could not be used in states with fewer than seven seats. DX 1061 at 13, 17-26; Hr’g Tr. Day 3 Vol. 2 at 129:16-135:15 (A. Miller). The Court finds Dr. Miller’s testimony persuasive evidence that the efficiency gap must be applied with caution in Kansas. But Dr. Warshaw addressed this concern, observing that although Dr. Miller appropriately “points out a

¹³ Dr. Miller also testified that, even accepting the efficiency gap as a measure of partisan bias, Dr. Warshaw used the incorrect formula to calculate it. Hr’g Tr. Day 3 Vol. 2 at 105:110-23 (A. Miller). The Court finds this unpersuasive in light of the extensive peer-reviewed literature validating Dr. Warshaw’s formula as the standard in the field. Hr’g Tr. Day 2 Vol. 1 at 82:8-15 (Warshaw).

rule of thumb people have used when looking at observed Congressional election results . . . there's certainly no research that has said definitively any bright line, and I don't think anybody to my knowledge has asserted or found that there's no way to use elections below seven seats." Hr'g Tr. Day 2 Vol. 1 at 107:4-12 (Warshaw). Dr. Warshaw explained that the basis for the seven-seat guideline is that election return variance in smaller states can skew observed results in the short-term. Hr'g Tr. Day 2 Vol. 1 at 107:4-7 (Warshaw). Averaging across multiple elections is necessary to stabilize results. Hr'g Tr. Day 2 Vol. 1 at 107:11-12 (Warshaw). The Court finds that Dr. Warshaw credibly justified his methodology, that his methodology produces an appropriate measure of partisan symmetry in Kansas's congressional elections, and that Dr. Miller did not rebut it.

298. The Court has considered these and other points raised by Dr. Miller and finds them unpersuasive or insufficient to rebut Plaintiffs' evidence of partisan gerrymandering.

Dr. John Alford's conclusions regarding partisan gerrymandering are unpersuasive.

299. Dr. John Alford, Ph.D., is a Professor of Political Science at Rice University. Hr'g Tr. Day 4 Vol. 1 at 12:10-18 (Alford). The Court accepted Dr. Alford as an expert in redistricting, racially polarized voting, and vote dilution. Hr'g Tr. Day 4 Vol. 1 at 26:3-15 (Alford). The Court finds that, like Dr. Miller, Dr. Alford counseled appropriate caution in applying the efficiency gap in Kansas, Hr'g Tr. Day 4 Vol. 1 at 46:18-20 (Alford), but that his testimony does not rebut

Dr. Warshaw's application of the efficiency gap. It finds that the remainder of Dr. Alford's testimony as to Ad Astra 2's partisanship supports Plaintiffs' claims.

300. Dr. Alford's central testimony on partisan gerrymandering was that, although Ad Astra 2 "certainly" reflects "evidence of partisanship," it evinces only a "very modest" amount. Hr'g Tr. Day 4 Vol. 1 at 28:10-21 (Alford). He based this conclusion on a review of Plaintiffs' expert reports, which he characterized as reflecting a modest pro-Republican shift in the partisanship of Ad Astra 2 that merely makes CD 3 more competitive. *See, e.g.*, Hr'g Tr. Day 4 Vol. 1 at 39:20-40:3 (Alford). Dr. Alford's testimony, as a factual matter, corroborates Plaintiffs' experts' findings. He confirmed that Ad Astra 2 has a pro-Republican effect that is "compatible with the notion that the majority party is trying to tilt things in their direction." Hr'g Tr. Day 4 Vol. 1 at 81:5, 82:2-4, 82-20-83:3 (Alford). Dr. Alford diverged from Plaintiffs only as to whether the admittedly partisan effect of Ad Astra 2 is so extreme as to be "impermissible." Hr'g Tr. Day 4 Vol. 1 at 60:14-19 (Alford); *see e.g.*, Hr'g Tr. Day 4 Vol. 1 at 83:18-22 (Alford). That is a legal matter for the Court to resolve. As a factual matter, the Court finds that Dr. Alford's testimony supports the testimony of Plaintiffs' experts that Ad Astra 2 has partisan effects.

301. The Court has considered these and other points raised by Dr. Alford and finds them unpersuasive or insufficient to rebut the evidence of partisan gerrymandering advanced by Plaintiffs.

B. Defendants' experts failed to rebut Plaintiffs' racial vote dilution claims.

302. In addition to their testimony on partisan gerrymandering, Drs. Lockerbie and Alford opined on Plaintiffs' racial vote dilution evidence. Dr. Lockerbie, in his testimony, retracted in full his criticisms of Dr. Collingwood, Hr'g Tr. Day 3 Vol. 2 at 56:14-16 (Lockerbie), and offered no criticism of Dr. Miller that is central to Plaintiffs' claims, *see* Hr'g Tr. Day 3 Vol. 2 at 41:3-47:12 (Lockerbie). The Court therefore limits its discussion to Dr. Alford, whose opinions the Court finds unpersuasive for the reasons discussed below.

303. First, Dr. Alford asserted that Plaintiffs failed to demonstrate RPV exists in Kansas. In essence, Dr. Alford testified that Plaintiffs' evidence of RPV was inconclusive because it failed to distinguish between racial and partisan polarization. Hr'g Tr. Day 4 Vol. 1 at 59:18-60:13, 76:15-20, 77:7-17 (Alford). But that is not what Plaintiffs' evidence purported to show. Dr. Collingwood explained that RPV describes an electoral environment in which "a majority of voters belonging to one racial/ethnic group vote for one candidate and a majority of voters who belong to another racial/ethnic group prefer the other candidate." PX 122 at 3 (Collingwood Rep.); Hr'g Tr. Day 3 Vol. 1 at 68:19-69:8, 138:19-22 (Collingwood). RPV, in other words, is "a fact" about voting patterns—not an assessment of causal basis for those patterns. Hr'g Tr. Day 3 Vol. 1 at 138:23-24 (Collingwood). The Court therefore finds that Dr. Alford's testimony does not rebut Dr. Collingwood's conclusion that RPV exists in Kansas.

304. Second, Dr. Alford testified that Ad Astra 2 does not dilute minority votes in Kansas because it does not alter the overall dispersion of minority voters across congressional districts. DX 1057 at 8 (Alford Rep.); see Hr'g Tr. Day 4 Vol. 1 at 53:23-54:3 (Alford). In his view, because the overall "character" of the districts remains the same on a statewide basis, shifting a subset of minority voters between districts could not amount to minority vote dilution. Hr'g Tr. Day 4 Vol. 1 at 55:18-56:7, 59:18-60:13 (Alford).

305. Dr. Alford undermined this position on cross-examination. He testified that to break up a performing cross-over district, a legislature might either remove part of the district's minority population or change the district's composition of white voters to reduce crossover voting. Hr'g Tr. Day 4 Vol. 1 at 55:18-56:7 (Alford). Ad Astra 2 does the former by moving nearly 50,000 minority voters, or 7% of CD 3's total VAP, out of the previously performing CD 3 and into CD 2, which will not perform. PX 122 at 7-8, 10 (Collingwood Rep.). It does the latter by replacing CD 3's displaced minority voters with a population that is over 90% white, making CD 3 unlikely to perform for the nearly 125,000 minority voters who remain there. PX 122 at 7-8, 10 (Collingwood Rep.). The Court therefore finds Dr. Alford's testimony that Kansas's disbursement of minority voters obviates Plaintiffs' claim of minority vote dilution unpersuasive.

306. The Court has considered these and other points raised by Dr. Alford and finds them unpersuasive or insufficient to rebut the evidence of RPV and minority vote dilution advanced by Plaintiffs.

V. Defendants' other justifications for Ad Astra 2 fail.

307. Throughout trial, Defendants asserted pretextual justifications for Ad Astra 2 that cannot withstand scrutiny. Indeed, Defendants offered these justifications exclusively through argument by lawyers, which are not evidence and not through evidence from any witness.

A. Ad Astra 2 cannot be justified by the Legislature's purported desire to keep Johnson County whole within a single congressional district.

308. Defendants suggested that Ad Astra 2's division of Wyandotte County was simply a good faith attempt to keep Johnson County whole. Because Johnson and Wyandotte Counties could not be kept in a single district, the argument went, the Legislature was placed in a bind. *See, e.g.*, Hr'g Tr. Day 1 Vol. 2 at 244:12-245:10 (Corson). And having been forced to split one of the two counties, it chose Wyandotte. *See, e.g.*, Hr'g Tr. Day 1 Vol. 2 at 244:12-245:10 (Corson). This is an inaccurate characterization of the Legislature's decision and cannot explain Ad Astra 2's partisan bias.

309. At the outset, a desire to keep Johnson County whole cannot explain the outsized Republican bias in Ad Astra 2. Dr. Chen found that 514 of his simulated plans kept Johnson County whole (out of a total of 1,000 simulations, the remainder of which split Johnson). PX 757; Hr'g Tr. Day 4 Vol. 1 at 92:-5:22 (Chen). Every single one of the Johnson County-preserving plans created a most-Democratic district

that was more favorable to Democrats, and often significantly more favorable, than Ad Astra 2's CD 3. Hr'g Tr. Day 4 Vol. 1 at 94:8-95:1 (Chen).

310. Examining the map further belies the proffered justification. As Senator Corson pointed out, the Legislature responded to population growth within Wyandotte and Johnson Counties by *expanding* the geographical reach of CD 3 by splitting off a large chunk of Wyandotte County and replacing it with three whole rural counties, two of which were not even part of CD 3 in the previous map. Hr'g Tr. Day 1 Vol. 2 at 258:15-259:10 (Corson). That result is not consistent with a simple desire to choose preserving Johnson over Wyandotte.

311. No legislator took the stand to testify that preserving Johnson County while splitting Wyandotte County was a justifiable or even non-pretextual goal. Defendant did not call any witnesses to explain why Ad Astra 2 was drawn in the manner it was. Therefore, providing no evidence justifying its configuration.

312. Moreover, the single-minded preservation of Johnson County was not what Kansans asked for during the redistricting process. Rather, Senator Corson—who represents part of Johnson County and was present at all but one of the redistricting listening sessions—dismissed the Johnson County-first justification as an “invented post hoc rationale” that does not comport with the “vast, vast majority of the testimony” at the listening tour sessions. Hr'g Tr. Day 1 Vol. 2 at 211:21-212:2 (Corson). Instead, throughout the legislative process, Kansans asked that “the core of the Kansas side of the Kansas City metro area” be kept

whole. Hr'g Tr. Day 1 Vol. 2 at 212:2-9 (Corson); *see also* PX 168 at 4:9-15 (transcript of January 20, 2022 Senate Redistricting Committee hearing) (statement of Mike Taylor); PX 168 at 15:18-25 (statement of Amy Carter); PX 168 at 18:13-20:23 (statement of Connie Brown-Collins).

313. To the extent there was testimony asking that Johnson County be kept whole, almost all of it came at a time when census data was not available and it was not yet clear that Wyandotte and Johnson Counties could not both be kept whole in the same district. Hr'g Tr. Day 1 Vol. 2 at 211:15-212:20 (Corson).

314. Defendants offered no evidence or testimony that a legislature not seeking partisan advantage could or would have concluded that Johnson County is a more important community of interest than the Kansas City metro area.

315. In fact, evidence presented at trial demonstrated that Democratic representative Stephanie Clayton introduced a different map, "Mushroom Rock," that *did* preserve all of Johnson County in a single district. Hr'g Tr. Day 2 Vol. 1 at 18:13-19:11 (Burroughs). Yet Republican leadership still voted against it, Hr'g Tr. Day 2 Vol. 1 at 18:13-19:11 (Burroughs), perhaps because Representative Clayton's plan did not secure the same significant pro-Republican advantage as Ad Astra 2, *see* PX 112 (figure from Dr. Warshaw's report showing that other plans introduced, including Mushroom Rock, had a higher Democratic vote share than Ad Astra 2).

316. Johnson County is demographically and geographically diverse. While northeastern Johnson County is highly urban and suburban, the southern portion is rural. Hr'g Tr. Day 1 Vol. 2 at 229:8-20 (Corson). Unlike residents of the northeastern portion of Johnson County, citizens in the southern portion of the county do not interact with Wyandotte County nearly as much, nor do they share health care, transportation, and other community services to the same degree. Hr'g Tr. Day 1 Vol. 2 at 229:8-20 (Corson). In the absence of any evidence supporting Defendants' argument, the Court concludes that the Legislature did not enact Ad Astra 2 because of a genuine desire to elevate a supposed community of interest constituting the entirety of Johnson County over preserving the Kansas City metro area.

B. Ad Astra 2 cannot be justified by the Legislature's purported desire to reunite Kansas State and the University of Kansas in the same congressional district.

317. Defendants' second purported justification, that Ad Astra 2 unites KU and Kansas State University ("K State") in CD 1, similarly finds no basis in the legislative record. At no point during the listening tour sessions in August, the town halls in November, or the legislative hearings in January was there ever a suggestion that the two universities should be joined in a single district. Hr'g Tr. Day 1 Vol. 2 at 230:9-231:7 (Corson). Indeed, the Kansas Board of Regents—the governing body responsible for overseeing Kansas's public universities—made clear that they had *no*

position on redistricting. Hr’g Tr. Day 1 Vol. 2 at 230:24-231:7 (Corson).

318. No legislator took the stand to testify that combining KU and K State was a justifiable or even non-pretextual goal.

319. Defendants presented no evidence that residents of the two university towns—Lawrence and Manhattan—would have supported their pairing in the same district. Dr. Portillo, a Douglas County resident, County Commissioner, and Associate Dean for Academic Affairs at KU’s Edwards Campus and School of Professional Studies, testified that while Manhattan and Lawrence are “both college towns,” they are two “unique college towns.” Hr’g Tr. Day 2 Vol. 2 at 113:8-10 (Portillo). Lawrence is a city of “about 94,000 people” with a large portion of residents commuting to Kansas City or Topeka on a daily basis. Hr’g Tr. Day 2 Vol. 2 at 113:10-14 (Portillo). Manhattan, on the other hand, is more “isolated as a college community” and “probably dominated a bit more by the university in that space.” Hr’g Tr. Day 2 Vol. 2 at 113:15-19 (Portillo).

C. Ad Astra 2 cannot be justified by a desire to retain the cores of prior congressional districts.

320. Nor can Defendants justify Ad Astra 2 as an attempt to preserve the cores of prior districts. Ad Astra 2 upends the prior CD 3. That district has long been recognized as one with the Kansas side of the Kansas City metro area as its core. *See Essex v. Kobach*, 874 F. Supp. 2d 1069, 1086 (D. Kan 2012) (per

curiam) (three-judge court) (“[T]he entirety of Johnson and Wyandotte Counties should be included in the Third District. Those counties have formed the core of the Third District for decades, and as the Court concluded in [an earlier redistricting decision], they should be placed in the same district because they ‘represent the Kansas portion of greater Kansas City, a major socio-economic unit,’ and the counties’ economic, political and cultural ties are significantly greater than their differences.”) (citation omitted); *O’Sullivan v. Brier*, 540 F. Supp. 1200, 1204 (D. Kan. 1982) (three-judge court) (similar). Ad Astra 2 dramatically reconfigures the district by extracting a large portion of Kansas City and adding two new rural counties, as well as the remainder of Miami County.

321. Ad Astra 2 also dramatically reconfigures CD 2 by adding the portion of Kansas City removed from CD 3 and by removing Lawrence.

322. Finally, in the overwhelmingly rural CD 1, Ad Astra 2 inexplicably adds urban Lawrence, bypassing a number of rural counties to scoop it from CD 2. The significant population shifts caused by Ad Astra 2 are illustrated by the chart below, which highlights population shifts between districts in the previous 2012 congressional plan and Ad Astra 2:

**AD ASTRA 2 MAP:
COUNTIES MOVED TO NEW DISTRICTS**

COUNTY	OLD CONGR- SSIONAL DISTRICT 2012-2022	NEW CONGR- SSIONAL DISTRICT IN AD ASTRA 2	RESI- DENTS MOVED (2020 CENSUS)
Wyandotte	Third	Second (portion)	112,661
Douglas	Second	First (portion)	94,934
Chase	First	Second	2,572
Geary	First	Second	36,379
Lyon	First	Second	32,179
Marion	First	Second	11,823
Morris	First	Second	5,386
Wabaunsee	First	Second	6,877
Jackson	Second	First	13,249
Jefferson	Second	First	18,974
Marshall	First/Second	First	5,276
Miami	Second/Third	Third	20,495

Franklin	Second	Third	25,643
Anderson	Second	Third	7,877

Exhibit No.

PX 139

323. This significant shift of population between districts was not the necessary result of population changes within the state between 2010 and 2020, nor the result of Kansas's political geography. As part of his report, Dr. Rodden drew an illustrative map with core preservation in mind, managing to keep *97 percent* of the state's population in its prior districts, compared to just 86 percent in Ad Astra 2. PX 1 at 26 (Rodden Rep.); Hr'g Tr. Day 1 Vol 2 at 36:2-11 (Rodden).

324. Dr. Smith's core-retention analysis, discussed above, further refutes Defendants' core-retention argument. *See supra* FOF § II.E.

325. Dr. Chen's core-retention analysis, discussed above, further refutes Defendants' core-retention argument. *See supra* FOF § II.A.

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

326. The evidence submitted at trial demonstrates that Ad Astra 2 will make it more difficult for Plaintiffs to elect and support Democratic candidates in Kansas.

327. As explained above, *see supra* FOF § II, the evidence adduced at trial shows that Ad Astra 2 will have the effect of negating Plaintiffs' electoral preferences by placing them in districts where they have a reduced ability to elect their candidates of choice.

Plaintiff	2012 Congressional District	District Under Ad Astra 2
Faith Rivera	CD 3	CD 2
Diosselyn Tot-Velasquez	CD 3	CD 2
Kimberly Weaver	CD 3	CD 2
Paris Raite	CD 2	CD 1
Donnavan Dillon	CD 2	CD 1
Amy Carter	CD 3	CD 3
Ana Maldonado	CD 3	CD 2
Anna White	CD 3	CD 3
Liz Meitl	CD 3	CD 3
Melinda Lavon	CD 2	CD 1
Richard Nobles	CD 3	CD 3
Rose Schwab	CD 3	CD 2
Sharon Al Uqdah	CD 3	CD 2

Sheyvette Dinkens	CD 3	CD 3
Thomas Alonzo	CD 3	CD 2
Sarah Frick	CD 2	CD 1
Sarah Schiffelbein	CD 2	CD 2
Connie Brown Collins	CD 3	CD 2

328. Dr. Miller explained that because of Lawrence’s division from the rest of Douglas County, Ad Astra 2’s CD 2 “leans so strongly Republican that the votes of Democratic-leaning and minority residents from Wyandotte are diluted to practical electoral irrelevance.” PX 58 a t4 (P. Miller Rep.). Indeed, Dr. Miller explained that the residents in the northern portion of Wyandotte County moved to CD 2 “border on electoral irrelevance in the district,” and that CD 2 “is a district where these Democratic-leaning minority voters” in northern Wyandotte County “really don’t have much of a credible chance to impact congressional elections.” Hr’g Tr. Day 2 Vol. 2 at 31:8-32:9, 38:21-39:13 (P. Miller).

329. Dr. Miller also testified that as a consequence of moving northern Wyandotte County from CD 3 to CD 2, Ad Astra 2 makes the former district much more Republican, “dilut[ing] the influence and voting power of” Democratic voters “who remain in CD3 and mak[ing] the plan unrepresentative of the overall partisan composition of Kansas.” PX 58 at 36-41 (P. Miller Rep.). Ad Astra 2 increases the Republican advantage in CD 3 from 1.0% to 6.6% averaged across

elections between 2012 and 2020. PX 58 at 36-37 (P. Miller Rep.). To put this in context, whereas under the prior plan CD 3 voted “Republican seven times in statewide elections and Democratic nine times,” under Ad Astra 2 Republicans would have won 11 of 16 elections during the same period. PX 58 at 36-37 (P. Miller Rep.).

330. The evidence also persuasively shows that by splitting Lawrence from Douglas County in CD 2 and placing it instead in CD 1, Ad Astra 2 makes it significantly less likely for Plaintiffs and their fellow Democratic voters who live there to elect candidates of their choice. Dr. Smith testified that under the previous congressional plan, Lawrence’s Democratic voters were capable of waging competitive campaigns in CD 2. PX 135 at 12 (Smith Report). The First Congressional District, by contrast, has a much larger Republican population, which will thus make congressional elections far less competitive. PX 135 at 14 (Smith Report); *see also* PX 58 at 4 (P. Miller Rep.). This view was corroborated by Dr. Miller, who testified that “CD 1 is a strongly and safely Republican district.” PX 58 at 62 (P. Miller Rep.). In support of this point, Dr. Miller testified that even with the addition of heavily Democratic Lawrence to CD 3, the district has an overwhelming 29% Republican advantage. PX 58 at 62 (P. Miller Rep.).

331. Dr. Smith also testified that by placing Lawrence in the Big First, Ad Astra 2 “disincentive[s]” Democratic “voter mobilization, voter registration, voter turnout, fundraising, all of the activities that build a political base because the election would not be

competitive.” Hr’g Tr. Day 3 Vol. 1 at 31:17-32:9 (Smith).

332. Dr. Warshaw’s analysis of the partisan effect of Ad Astra 2 reached similar conclusions. Dr. Warshaw analyzed the partisan fairness of Ad Astra 2 using the “efficiency gap,” a tool for capturing “the packing and cracking that are at the heart of partisan gerrymanders” by “measur[ing] the extra seats one party wins over and above what would be expected if neither party were advantaged in the translation of votes to seats.” PX 105 at 6 (Warshaw Report); *see also* Hr’g Tr. Day 2 Vol. 1 at 65:1-66:8 (Warshaw). Dr. Warshaw set out to measure the efficiency gap of Kansas’s congressional districting plan by reviewing the configuration of the state’s four congressional districts under Ad Astra 2.

333. Consistent with Plaintiffs’ other experts, Dr. Warshaw testified that Republicans are likely to win all four of Kansas’s new congressional districts. PX 105 at 7-10 (Warshaw Report). He found “that the Ad Astra 2 plan has a very substantial level of pro-Republican bias” and that “the Ad Astra 2 plan is historically extreme relative to the 10,000 Congressional elections” Dr. Warshaw has reviewed from “the past 48 years” and is “also extreme relative to the other plans that Kansas considered in its redistricting process.” Hr’g Tr. Day 2 Vol. 1 at 72:2-13 (Warshaw).

334. In particular, Dr. Warshaw noted that in CDs 1, 2, and 4, Republicans are expected to win above or near 60% of the vote in each district, singling out CD 1 as “overwhelmingly Republican” because “Republicans [there] are likely to win about 66% of the vote in this

district.” PX 105 at 7-8 (Warshaw Rep.). Dr. Warshaw further concluded that because Democratic voters are cracked between CDs 2 and 3, Republicans are likely to win about 53% of the vote in CD 3 as well. PX 105 at 8-9 (Warshaw Rep.). This is a significant change; Ad Astra 2 transformed that district “from being a closely contested slightly [D]emocratic leaning district to being a [R]epublican leaning district.” Hr’g Tr. Day 2 Vol. 1 at 102:21-103:1 (Warshaw).

335. Dr. Warshaw then analyzed how these expected vote shares translated into seats by taking a composite of the state’s previous elections from 2012 to 2020. PX 105 at 10 (Warshaw Rep.). He concluded that while Democrats “win 41% of the votes” statewide, under Ad Astra 2 they would receive only 9% of the seats on average across all statewide elections between 2012 and 2020, PX 105 at 11 (Warshaw Report), which “increases the efficiency gap” of Kansas’s congressional map “to a historically extreme level of [22.5%],” Hr’g Tr. Day 2 Vol. 1 at 96:19-25 (Warshaw). This is nearly a 50% decrease in Democratic seat share from results under the prior congressional map, when, using the same analysis, Democrats would have won 16% of the seats. Hr’g Tr. Day 2 Vol. 1 at 96:19-25 (Warshaw).

336. Contextualizing Ad Astra 2’s efficiency gap, Dr. Warshaw testified that election results under Ad Astra 2 would be “far more extreme than” about 95% of the 10,000 elections he analyzed from last 48 years and 98% more pro-Republican “than . . . previous Congressional elections over the past five decades.” Hr’g Tr. Day 2 Vol. 1 at 98:5-25 (Warshaw).

337. As a result of this Republican advantage, Dr. Warshaw explained, Democratic voters in Kansas, including Plaintiffs, will “have little, if any, voice” in Congress “on important issues.” PX 105 at 15 (Warshaw Report). Partisan gerrymandering will “bias[] the policymaking process in favor of the advantaged party,” “reduce[] the congruence between the public’s preferences and state policies,” “reduce voter turnout,” and even “make[] it less likely voters will visit their congressional office.” PX 105 at 20-21 (Warshaw Rep.).

338. Broadly speaking, Dr. Warshaw’s research has revealed that “partisan gerrymandering . . . substantially harms our democracy and leads to a substantial bias in the political process and in so doing . . . degrades democracy for everyone.” Hr’g Tr. Day 2 Vol. 1 at 72:14-25 (Warshaw).

339. Dr. Rodden agreed with this analysis, adding that by avoiding compliance with its own Guidelines, the Legislature was able to transform CD 3 from a Democratic district into a Republican-leaning district, and turn CD 2 from a competitive district into a solidly Republican district. PX 1 at 32-33 (Rodden Rep.). He testified in summary that under Ad Astra 2, “District 1 ends up being very comfortable a Republican district, District 2 is a comfortable Republican district, and the same thing is true of District 4. District 3 is more competitive but . . . it also is a district which on average has a Republican majority.” Hr’g Tr. Day 1 Vol. 2 at 53:1-9 (Rodden).

340. Based on the weight of this overwhelming evidence, the Court concludes that Ad Astra 2 has a

strong bias in favor of Republican candidates and that as a result, Democratic voters, including Plaintiffs, will have a reduced opportunity to elect candidates of their choice.

VII. Ad Astra 2's dilution of minority voting power will obstruct minority Plaintiffs' ability to elect and support their candidates of choice.

341. The Court finds that Ad Astra 2's dilution of minority votes harms those Plaintiffs who identify as Black or Hispanic/Latinx. Six Plaintiffs—Sharon Al-Uqdah, Connie Brown Collins, Donnavan Dillon, Sheyvette Dinkens, Richard Nobles, and Kimberly Weaver—identify as Black. PX 178, 180, 187, 189-90, 758. Five Plaintiffs—Tom Alonzo, Ana Marcela Maldonado Morales, Paris Raite, Faith Rivera, and Diosselyn Tot-Velasquez—identify as Hispanic or Latinx. PX 176-177, 179, 183, 191.

342. Each Plaintiff (1) identifies as Black or Hispanic/Latinx, (2) has voted consistently in Kansas congressional elections and intends to do so in the future, and (3) prefers to elect Democratic congressional candidates. See PX 176-80, 183, 187, 189-91, 758.

343. Under the 2012 congressional plan, Plaintiffs Alonzo, Al-Uqdah, Brown Collins, Dinkens, Maldonado Morales, Nobles, Rivera, Tot-Velasquez, and Weaver reside in CD 3, *see* PX 176-78, 183, 187, 189-91, 758, which, as Dr. Collingwood's expert testimony established, has allowed minority voters, including

Plaintiffs, to elect the congressional candidate of their choice, Representative Davids, *see supra* FOF § III.B.

344. Under Ad Astra 2, those Plaintiffs who lived in CD 3 under the 2012 plan are cracked between the new CDs 2 and 3. Plaintiffs Alonzo, Al-Uqdah, Brown Collins, Maldonado Morales, Tot-Velasquez, and Weaver now reside in CD 2, while Plaintiffs Dinkens, Nobles and Rivera remain in CD 3. *See* PX 176-78, 183, 187, 189-91, 758. Plaintiffs Dillon and Raite, meanwhile, are moved from CD 2 to CD 1.

345. The Court finds that Ad Astra 2 injures each of these Plaintiffs by diluting their votes and making it less likely that they will be able to elect their candidates of choice. Dr. Collingwood's expert testimony established that the cracking of minority voters between CD 2 and CD 3 means that, unlike the CD 3 created by the 2012 plan, both CD 2 and CD 3 in Ad Astra 2 are unlikely to perform for minority voters, including these Plaintiffs. *See supra* FOF § III.B. Plaintiffs Alonzo, Al-Uqdah, Brown Collins, Dinkens, Maldonado Morales, Nobles, Rivera, Tot-Velasquez, and Weaver are therefore injured by the loss of the opportunity to elect the candidates of their choice under Ad Astra 2.

346. The Court finds that this conclusion is reinforced by Dr. Chen's expert testimony, which established that CDs 2 and 3 under Ad Astra 2 are pro-Republican partisan outliers compared to the corresponding districts in simulated maps generated using traditional redistricting criteria, and that the new CDs 1, 2, and 3 are unlikely to elect the Democratic candidates preferred by these Plaintiffs.

See supra FOF § II.A. This conclusion accords with Dr. Collingwood's determination that the districts in Ad Astra 2 are unlikely to perform for minority voters. All Plaintiffs who identify as Black or Hispanic/Latinx are therefore injured by the loss of the opportunity to elect the Democratic candidates of their choice.

347. The Court also finds that these Plaintiffs are injured by the stigmatizing effects of being assigned to districts based on their membership in minority racial groups.

CONCLUSIONS OF LAW

I. Plaintiffs have standing to challenge Ad Astra 2.

348. Plaintiffs live in gerrymandered districts and have sworn through declarations that they prefer Democratic candidates and intend to vote in the upcoming 2022 elections. *See supra* FOF § VI.

349. Plaintiffs have shown through extensive expert testimony and personal declarations that they now live in districts that were drawn with the intent and effect of favoring Republicans to the disadvantage of Democratic candidates. *See* PX 176-193, 758-59 (Plaintiff declarations); *see supra* FOF §§ II, VI. As a result, Plaintiffs have a severely reduced chance of electing Democratic candidates of their choice to Congress.

350. Plaintiffs have also shown that the districts in which they live have been reconfigured with the intent and effect of suppressing their minority voting strength and the minority voting strength of their communities

by cracking minority voters between districts. *See* PX 176-193, 758-59 (Plaintiff declarations); *see supra* FOF §§ III, VII. Plaintiffs Tom Alonzo, Ana Marcela Maldonado Morales, Paris Raite, Faith Rivera, and Diosselyn Tot-Velasquez identify as Hispanic/Latinx and will have reduced opportunities to elect candidates of their choice as a consequence of Ad Astra 2. PX 176-77, 179, 183, 191 (Plaintiff declarations). Plaintiffs Sharon Al-Uqdah, Connie Brown Collins, Donnavan Dillon, Sheyvette Dinkens, Richard Nobles, and Kimberly Weaver identify as Black and will have reduced opportunities to elect candidates of their choice as a consequence of Ad Astra 2. PX 178, 180, 187, 189-90, 758 (Plaintiff declarations).

351. Because of these injuries and because Plaintiffs live in gerrymandered districts, they have standing to challenge Ad Astra 2 as unconstitutional.

352. The Court also concludes that Plaintiff Loud Light has standing to challenge Ad Astra 2. “An association has standing to sue on behalf of its members when ‘(1) the members have standing to sue individually; (2) the interests the association seeks to protect are germane to the organization’s purpose; and (3) neither the claim asserted nor the relief requested require participation of individual members.’” *Bd. of Cnty. Comm’rs v. Bremby*, 286 Kan. 745, 761, 189 P.3d 494 (2008) (quoting *NEA-Coffeyville v. Unified Sch. Dist. No. 445*, 268 Kan. 384, 387, 996 P.2d 821 (2000) (internal quotation marks omitted)).

353. Plaintiff Loud Light meets this standard. Its mission is to mobilize “Kansas’s youngest voters, with the goal of engraining in them the importance of

remaining civically engaged throughout their adult lives.” PX 181 (Loud Light declaration). And Ad Astra 2 injures Loud Light’s members “[b]y cracking the state’s youth population in Wyandotte, Douglas, Riley, Shawnee, and Geary Counties.” PX 181 (Loud Light declaration).

II. Congressional redistricting plans, like any other legislative action, are subject to judicial review.

D. The U.S. Constitution’s Elections Clause does not bar state court review of congressional redistricting plans under state constitutions.

354. The U.S. Constitution’s Elections Clause provides that “[t]he Times, Places, and Manner of holding Elections for Senators and Republicans, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.” U.S. Const. art. I, § 4.

355. Defendants have argued that this Clause gives a state legislature free rein to enact congressional redistricting plans in defiance of the state’s own constitution, as construed by the state courts. Indeed, according to Defendants, the Elections Clause deprives the state courts of *any role* in evaluating the validity of duly enacted congressional redistricting plans under the state’s own constitution.

356. The Court finds this interpretation of the Elections Clause unpersuasive as a matter of constitutional text and history.

357. At the time of the Founding, the term state “Legislature” was well understood to mean an entity created and constrained by the state’s constitution. See Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State- Legislature Notion and Related Rubbish*, 2021 Sup. Ct. Rev. (forthcoming) (manuscript at 24), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3731755. Numerous Founding-era state constitutions explicitly restricted the actions of state legislatures, including with respect to the regulation of federal elections. See *id.* at 27-30.

358. Consistent with this practice, the U.S. Supreme Court has repeatedly rejected attempts to use the Elections Clause to shield legislatures from state constitutional requirements, holding that “[n]othing in that Clause instructs . . . that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State’s constitution.” *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 817-18 (2015). And it has stated that “[i]t is fundamental that state courts be left free and unfettered by [federal courts] in interpreting their state constitutions,” *Minnesota v. Nat’l Tea Co.*, 309 U.S. 551, 557 (1940).

359. Indeed, Defendants’ interpretation of the Elections Clause would dismantle settled principles of federalism and fundamentally upend election administration in Kansas.

360. For all these reasons, the Court concludes that the Elections Clause does not bar state court judicial review of congressional redistricting plans. The Court

reaches this conclusion following careful analysis of each of Defendants' arguments, as described below.

Defendants' Elections Clause theory ignores extensive U.S. Supreme Court precedent that a state legislature's congressional redistricting legislation is subject to state court judicial review under the state constitution.

361. The argument that the Elections Clause bars state courts from reviewing the validity of congressional redistricting legislation under a state's own constitution "is inconsistent with nearly a century of precedent of the Supreme Court of the United States affirmed as recently as 2015." *Harper v. Hall*, 868 S.E.2d 499, 551 (N.C.), *stay denied sub nom. Moore v. Harper*, 142 S. Ct. 1089 (2022). "It is also repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts, and would produce absurd and dangerous consequences." *Id.*

362. Most recently, the U.S. Supreme Court declared in *Rucho v. Common Cause*, ___ U.S. ___, 139 S. Ct. 2484 (2019), that "[p]rovisions in . . . state constitutions can provide standards and guidance for state courts to apply" in partisan gerrymandering challenges to congressional redistricting plans enacted by state legislatures. *Id.* at 2507 (emphasis added). *Rucho* concerned North Carolina's 2016 congressional plan, and as an example of state courts' power in this realm, the U.S. Supreme Court pointed to another state's supreme court's decision striking down the state's legislatively enacted congressional plan under the state's constitution. *Id.* at 2507 (citing *League of*

Women Voters of Fla. v. Detzner, 172 So.3d 363 (Fla. 2015)).

363. The Supreme Court's recognition that state courts can apply state constitutional provisions to rein in partisan gerrymandering was essential to *Rucho*'s holding: it enabled the Supreme Court to foreclose federal partisan gerrymandering claims while promising that "complaints about districting" would not "echo into a void." *Id.*

364. Even before *Rucho*, "a long line of decisions by the Supreme Court of the United States confirm[ed] the view that state courts may review state laws governing federal elections to determine whether they comply with the state constitution." *Harper*, 868 S.E.2d at 552 (citing cases).

365. Over a century ago, the Supreme Court held that state legislatures may not enact laws under the Elections Clause that are invalid "under the Constitution and laws of the state." *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916).

366. Reaffirming that principle, the Supreme Court held in *Smiley v. Holm*, 285 U.S. 355 (1932), that the Elections Clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided," which may include the participation of other branches of state government. *Id.* at 368. *Smiley* made clear that congressional redistricting legislation must comport with state constitutional requirements, explaining that the Elections Clause does not "render[] inapplicable the conditions which attach to the making

of state laws,” *id.* at 365, including “restriction[s] imposed by state Constitutions upon state Legislatures when exercising the lawmaking power,” *id.* at 369.¹⁴

367. In two companion cases decided the same day as *Smiley*, the Supreme Court reiterated that state courts have authority to strike down legislatively enacted congressional redistricting plans that violate “the requirements of the Constitution of the state in relation to the enactment of laws.” *Koenig v. Flynn*, 285 U.S. 375, 379 (1932); *see also Carroll v. Becker*, 285 U.S. 380, 381–82 (1932) (same).

368. The Supreme Court recently reaffirmed this principle, holding that “[n]othing in [the Elections] Clause instructs, nor has [the Supreme] Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State’s constitution.” *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 817–18 (2015); *see also id.* at 841 (Roberts, C.J., dissenting) (acknowledging that under the Elections Clause, congressional districting legislation remains subject to the “ordinary lawmaking process”).

¹⁴ As in *Smiley*, Kansas Governor Laura Kelly vetoed the congressional plan here pursuant to the gubernatorial veto power under the Kansas Constitution, and the Legislature did not challenge her authority to do so. *See supra* FOF § I. The Court finds no justification to explain why “lawmaking prescriptions” would include the referendum and gubernatorial veto but not judicial review.

369. Not only are state courts authorized to evaluate a congressional redistricting plan's compliance with state constitutional provisions, the Supreme Court's decision in *Grove v. Emison*, 507 U.S. 25 (1993), makes clear that state courts have a *greater* role to play than federal courts in adjudicating congressional redistricting claims. *See id.* at 33 ("The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." (internal quotation marks omitted)).

370. Writing for a unanimous Court, Justice Scalia expressly recognized state courts' role in redistricting—not only to review legislative enactments, but also to craft remedial plans on their own—and held that "[t]he District Court erred in not deferring to the state court's efforts to redraw Minnesota's . . . federal congressional districts." *Id.* at 42. Far from restricting apportionment responsibilities to a state's legislative branch alone, the Supreme Court affirmed that congressional reapportionment may be conducted "though [a state's] legislative *or* judicial branch." *Id.* at 33 (emphasis in original). As a result, the Supreme Court found that the state court's "issuance of its plan (conditioned on the legislature's failure to enact a constitutionally acceptable plan [by a certain date])" was "precisely the sort of state judicial supervision of redistricting [the Court] ha[s] encouraged." *Id.* at 34.

371. In reversing the district court in *Grove*, the Supreme Court explained that the lower court erred by

“ignoring the . . . legitimacy of state *judicial* redistricting.” *Id.* (emphasis in original). Defendants make the same error here.

372. Depriving courts of the power to evaluate the validity of congressional plans also directly conflicts with the Supreme Court’s seminal decision in *Wesberry v. Sanders*, 376 U.S. 1 (1964). In *Wesberry*, the Supreme Court rejected the plurality opinion in *Colegrove v. Green*, 328 U.S. 549 (1946), which had concluded that the Elections Clause’s reference to “Congress” deprives *federal* courts of power to review the validity of congressional plans. *See id.* at 554 (plurality opinion). *Wesberry* explained: “[N]othing in the language of [the Elections Clause] gives support to a construction that would immunize state congressional apportionment laws . . . from the power of courts to protect the constitutional rights of individuals from legislative destruction.” 376 U.S. at 6. In other words, the Court refused to allow voters “to be stripped of judicial protection” by Defendants’ restrictive “interpretation of Article I.” *Id.* at 7.

373. Defendants rely heavily on the unremarkable and uncontested proposition that redistricting is primarily the province of state legislatures. *See, e.g., Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay). But when the Kansas Legislature violates the Kansas Constitution, including in its enactment of congressional redistricting legislation, Kansas courts have the power and duty to exercise judicial review and invalidate the Legislature’s unconstitutional action.

374. Indeed, this Court does not supplant legislative prerogatives when it enforces state constitutional limits any more than the U.S. Supreme Court supplants congressional prerogatives when it invalidates federal statutes for violating the U.S. Constitution. Federal courts regularly invalidate statutes Congress enacts pursuant to its Article I, section 8 powers, *e.g.*, *Iancu v. Brunetti*, ___ U.S. ___, 139 S. Ct. 2294 (2019), and even statutes Congress enacts pursuant to its Elections Clause powers, *e.g.*, *Citizens United v. FEC*, 558 U.S. 310 (2010). When legislatures legislate, they must do so consistently with constitutional restrictions as interpreted and applied by courts. *See generally Marbury v. Madison*, 5 U.S. 137 (1803).

375. This Court concludes that nothing in the Elections Clause restricts Kansas courts' authority to determine whether Ad Astra 2 is valid *solely* under the Kansas Constitution.

In any event, Congress has independently exercised its Elections Clause power to mandate that congressional redistricting plans enacted by state legislatures comply with substantive state constitutional provisions.

376. Regardless of the meaning of "Legislature" in the first part of the Elections Clause, the second part allows Congress "at any time" to make its own regulations related to congressional redistricting. U.S. Const. art. I, § 4. Pursuant to this authority, Congress has mandated that states' congressional redistricting plans comply with substantive state constitutional

provisions. Accordingly, Defendants' Elections Clause theory, even if accepted, would get them nowhere.

377. Under 2 U.S.C. § 2a(c), states must follow federally prescribed procedures for congressional redistricting unless a state, "after any apportionment," has redistricted "in the manner provided by the law thereof."

378. As the U.S. Supreme Court explained in *Arizona State Legislature*, a predecessor to § 2a(c) had mandated those default procedures "unless 'the legislature' of the State drew district lines." 576 U.S. at 809 (quoting, *inter alia*, Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 734). But Congress "eliminated the statutory reference to redistricting by the state 'legislature' and instead directed that" the state must redistrict "in the manner provided by [state] law." *Id.* at 809–11 (emphasis omitted). Congress made that change out of "respect to the rights, to the established methods, and to the laws of the respective States," and "[i]n view of the very serious evils arising from gerrymanders." *Id.* at 810 (alteration in original) (internal quotation marks omitted).

379. And critically, as Justice Scalia explained for the plurality in *Branch v. Smith*, 538 U.S. 254 (2003), the phrase "the manner provided by state law" encompasses substantive restrictions in *state constitutions*: "the word 'manner' refers to the State's substantive 'policies and preferences' for redistricting, as expressed in a State's statutes, constitution, proposed reapportionment plans, or a State's 'traditional districting principles.'" *Id.* at 277–78 (plurality opinion) (citations omitted). Thus, unless a

state's congressional plan complies with the substantive provisions of the state's constitution, § 2a(c)'s default procedures become applicable.

380. In addition to mandating compliance with state constitutions, Congress has authorized state courts to establish remedial congressional districting plans. *Branch* held that 2 U.S.C. § 2c, which requires single-member congressional districts, authorizes both state and federal courts to “remedy[] a failure” by the state legislature “to redistrict constitutionally,” and “embraces action by *state and federal courts* when the prescribed legislative action has not been forthcoming.” 538 U.S. at 270, 272 (majority opinion) (emphasis added). Section 2c “is as readily enforced by courts as it is by state legislatures, and is just as binding on courts—*federal or state*—as it is on legislatures.” *Id.* at 272 (emphasis added).

381. Section 2a(c) also recognizes state courts' power to adopt congressional plans. Its default procedures apply “[u]ntil a State is redistricted in the manner provided by [state] law,” and the *Branch* plurality explained that this “can certainly refer to redistricting by courts as well as by legislatures,” and “when a court, *state or federal*, redistricts pursuant to § 2c, it necessarily does so ‘in the manner provided by [state] law.’” *Id.* at 274 (plurality opinion) (emphasis added).

382. The Supreme Court reaffirmed this interpretation in *Arizona State Legislature*, explaining that, under § 2a(c), “Congress expressly directed that when a State has been ‘redistricted in the manner provided by [state] law’—whether by the legislature,

court decree, or a commission established by the people’s exercise of the initiative—the resulting districts are the ones that presumptively will be used to elect Representatives.” 576 U.S. at 812 (alteration in original) (emphasis added) (citation omitted) (citing *Branch*, 538 U.S. at 274 (plurality opinion)).

383. This Court concludes, therefore, that even if there were doubt whether the Elections Clause permits state courts to review and remedy congressional districting laws under state constitutions it does not matter because Congress has declared that state courts can do so.

Defendants’ Elections Clause theory cannot be reconciled with the Fourteenth Amendment’s Reduction Clause.

384. The Fourteenth Amendment’s Reduction Clause confirms that the U.S. Constitution not only permits but *requires* states’ congressional districting plans to comply with state constitutional provisions protecting voting rights.

385. The Reduction Clause provides that “when the right to vote at any election for . . . Representatives in Congress” is “denied . . . or in any way abridged,” the state’s representation in Congress “shall be reduced” proportionally. U.S. Const. amend. XIV, § 2. In *McPherson v. Blacker*, 146 U.S. 1 (1892), the U.S. Supreme Court held that for purposes of this clause, “[t]he right to vote intended to be protected refers to the right to vote *as established by the laws and constitution of the state.*” *Id.* at 39 (emphasis added);

see also id. at 38 (“The right to vote in the states comes from the states . . .”).

386. *McPherson* thus held that “the right to vote” in federal elections—meaning the right to vote *under the state’s own constitution*—“cannot be denied or abridged without invoking the penalty” of reducing the state’s representation in Congress. *Id.* at 39. These statements were essential to *McPherson’s* holding: the Supreme Court rejected the argument that the Fourteenth Amendment’s Reduction Clause guarantees a *federal* constitutional right to vote in federal elections on the ground that the “right to vote” referenced in the clause instead refers to *state* constitutional (and statutory) rights.

387. The Supreme Court therefore has made clear that state constitutional provisions protecting voting rights *do* apply to voting in congressional elections. And if the Kansas courts determine that *Ad Astra 2* violates the Kansas Constitution, it cannot be that the federal Elections Clause requires Kansas to conduct its congressional elections in a manner that would trigger a reduction in the state’s representation in Congress under the Reduction Clause. Defendants’ Election Clause arguments are likewise unpersuasive here.

Defendants’ Elections Clause theory would wreak havoc on Kansas elections.

388. In addition to the extensive legal infirmities above, construing the Elections Clause to foreclose state court judicial review of state election legislation under state constitutions, as Defendants urge, would fundamentally upend Kansas’s election administration.

389. Presently, Kansas election laws regarding voter registration, ballots, voting, vote-counting, and deadlines, among other things, apply to both state and federal elections. But under Defendants' Elections Clause theory, Kansas's election system would be forced to adopt a chaotic two-track system in which state constitutional provisions constrain the operation of state statutes for state and local elections, but not for federal elections on the same ballot. Not only would this result severely disrupt and confuse the ability for Kansans to participate in the electoral process, "[a]s a practical matter, it would be very burdensome for a State to maintain separate federal and state . . . processes." *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 41 (2013) (Alito, J., dissenting).¹⁵

¹⁵ More still, if adopted nationally, Defendants' interpretation of the U.S. Constitution's Elections Clause would threaten to nullify dozens of state constitutional provisions across the country. Nearly every state's constitution contains provisions affording citizens the affirmative right to vote if they meet specified qualifications. Indeed, at least 24 state constitutions guarantee that "all elections"—including the state's congressional elections—shall be "free," "free and open," or "free and equal." *See, e.g.*, Colo. Const. art. II, § 5; Mo. Const. art. I, § 25; Mont. Const. art. II, § 13; Neb. Const. art. I, § 22; N.C. Const. art. I, § 10; Okla. Const. art. III, § 5; Pa. Const. art. I, § 5. Other states have more recently adopted state constitutional provisions guaranteeing voting rights in all elections, in reliance on the settled principle that state constitutions can provide broader or more specific protections for voting rights than the U.S. Constitution. *See, e.g.*, Cal. Const. art. II, § 5(a); Mich. Const. art. II, § 4. At least 12 state constitutions have provisions that *explicitly* restrict the drawing of congressional districts by providing criteria with which state legislatures must comply in drawing districts. *See, e.g.*, Mo. Const. art. III, § 45. Until now, nobody had even thought to suggest that the state legislatures could enact statutes countermanding these state

390. And what about where state legislatures fail to redistrict at all as occurred in Kansas in 2012? *Growe* ordered deference to state courts on matters of state constitutional compliance in the course of impasse litigation, where the judiciary is called upon to adopt new district maps in the wake of a breakdown in the legislative process. 507 U.S. at 27-29, 42. The U.S. Supreme Court has long endorsed non-legislative map-drawing in this context, *see, e.g., Gaffney v. Cummings*, 412 U.S. 735 (1973) (affirming map adopted by a bipartisan commission after legislative impasse). Furthermore, in other cases in the redistricting context, the U.S. Supreme Court has indicated that settled practice carries substantial weight. *See, e.g., Evenwel v. Abbott*, 578 U.S. 54, 73 (2016) (“What constitutional history and our prior decisions strongly suggest, settled practice confirms.”). Defendants’ theory would upend this long-standing practice and again threaten the ability for voters across the country to vote under constitutional districting schemes.

391. The practical consequences of Defendants’ arguments further support Plaintiffs’ reading of the

constitutional provisions on the theory that they are null and void in congressional elections. But this Court finds that Defendants’ Elections Clause theory would take us there and raise similar questions about the consequences for procedural requirements in state constitutions. May state legislatures ignore constitutional provisions that require a gubernatorial signature or veto override for legislation to be enacted, like in Kansas? May they ignore quorum requirements? Completely freed of the ordinary checks and balances that are essential to liberty, the state legislature would wield unfathomable power. The Court finds it hard to imagine a more direct affront to federalism.

Election Clause: state legislatures maintain *primary* redistricting authority while acknowledging that the map-drawing pen is not without constitutional limits, and that state courts must retain power to order a state legislature to re-draw the map when their first attempt violates the state's own constitution.

The cases cited by Defendants do not support their theory.

392. As support for their interpretation of the Elections Clause, Defendants rely on inapplicable cases, several dissenting opinions, and Article 10, Section 1, of the Kansas Constitution.¹⁶ But these authorities do not support the proposition that the Elections Clause frees the Legislature from constitutional restrictions.

393. Every lower court to have considered the issue since *Smiley* has concluded that the Elections Clause does not bar state courts from invalidating a congressional map under the state's constitution. *See,*

¹⁶ For example, Defendants' Motion to Dismiss relied on *Parsons v. Ryan*, 144 Kan. 370, 60 P.2d 910 (1936). However, *Parsons* did not involve the Elections Clause, or congressional elections, or a claim that a state law violated the state constitution. Instead, *Parsons* merely enforced a straightforward state-law deadline to submit party nominations for presidential electors. *Id.* at 912 ("Because the nomination papers were offered for filing at too late a date, the secretary of state properly refused to receive and file them."). Another cited case, *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), likewise involved presidential elections and did not involve a state court's invalidation of a state election law under the state constitution. Of the cited cases that actually involved the Elections Clause, many pre-date *Smiley*. *See* Defs.' Mot. 12 (citing state court decisions from 1864, 1873, and 1887).

e.g., *Detzner*, 172 So. 3d at 370 & n.2; *Harper*, 868 S.E.2d at 551-52. And this case would hardly be the first time a state court has applied a state constitutional provision to invalidate a congressional plan. *E.g.*, *Harper*, 868 S.E.2d at 553-55, 559 (invalidating 2021 congressional plan under the state constitution); *Moran v. Bowley*, 347 Ill. 148, 162-65, 179 N.E. 526 (1932) (citing cases and applying the Illinois Constitution's free and equal elections clause, pre-*Wesberry*, to require one-person one-vote).

394. Finally, this Court finds that Defendants' reliance on Article 10, Section 1, of the Kansas Constitution is misplaced. That section of the Kansas Constitution provides for the Kansas Supreme Court's automatic review state legislative plans. But that special provision has nothing to say about the Kansas's Supreme Court's jurisdiction over congressional plans. It also has no bearing on whether the *federal* Constitution prohibits state court judicial review of newly enacted congressional plans under other provisions of the state constitution.

E. Partisan gerrymandering claims are justiciable under the Kansas Constitution.¹⁷

395. The Kansas Supreme Court has long recognized Kansas courts' duty to enforce constitutional protections in the redistricting process. "It is axiomatic that an apportionment act, as any other act of the legislature, is subject to the limitations

¹⁷ Defendants do not challenge the justiciability of racial vote dilution claims under the Kansas Constitution.

contained in the [Kansas] Constitution, and where such act . . . violates the limitations of the Constitution, it is null and void and it is the duty of courts to so declare.” *Harris v. Shanahan*, 192 Kan. 183, 207, 387 P.2d 771 (1963). Accordingly, “[e]very citizen and qualified elector in Kansas has an undoubted right to have [redistricting plans] created in accordance with the Kansas Constitution, and has a further right to invoke the power of the courts to protect such constitutional right.” *Id.*

396. Notwithstanding the Court’s “duty” to apply the Kansas Constitution in the redistricting context, Defendants argue that partisan gerrymandering claims present nonjusticiable political questions. The Court disagrees. The political question doctrine is a narrow exception to the judiciary’s general responsibility to adjudicate parties’ claims. *See Kan. Bldg. Indus.*, 302 Kan. at 668 (noting that overbroad application of political question doctrine would undermine constitutional protections). Under Kansas law, for a claim to raise a political question, one or more of the following factors, derived from *Baker v. Carr*, 369 U.S. 186 (1962),¹⁸ must exist:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or

¹⁸ The Court notes that in adjudicating Plaintiffs’ claims, which arise solely under the Kansas Constitution, it cites federal precedents only for the purpose of guidance and does not consider itself bound by those decisions. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

[3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Kan. Bldg. Indus., 302 Kan. at 668 (alterations in original) (quoting *Baker*, 369 U.S. at 217). The Court concludes that none of these factors preclude judicial review in this case.

397. As an initial matter, the Court notes that throughout this litigation, Defendants have relied heavily on case law holding that partisan gerrymandering claims cannot be heard in federal court. But justiciability in Kansas state courts is a question of Kansas law, and federal justiciability requirements do not apply. *Gannon*, 298 Kan. at 1119; *see also, e.g., State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 893, 179 P.3d 366 (2008) (“State courts are not bound by . . . federal justiciability requirements.”). And while the U.S. Supreme Court has held that partisan gerrymandering claims cannot be heard in *federal* court, it has also acknowledged that “*state* constitutions can provide standards and guidance for *state* courts to apply.” *See Rucho*, 139 S. Ct. at 2506-07 (emphasis added). The Court therefore examines whether partisan gerrymandering claims present a

political question under the Kansas Constitution and concludes that they do not. As a result, the Court concludes that partisan gerrymandering claims are justiciable under the Kansas Constitution.

There are judicially discoverable and manageable standards for resolving Plaintiffs' partisan gerrymandering claims.

398. The Court first addresses the second *Baker* factor, on which most of Defendants' arguments in this case have focused. The Court concludes that the Kansas Constitution offers judicially manageable standards for adjudicating partisan gerrymandering claims. Kansas courts routinely determine manageable standards to enforce broad constitutional language—including in the redistricting context. And other states' supreme courts have successfully adjudicated similar claims under their state constitutions, offering a model for this Court to apply. Indeed, the ample evidence of *Ad Astra 2's* extreme, intentional partisan bias makes this an easy case.

399. Kansas courts routinely develop manageable standards to enforce provisions of the state Constitution, including in the redistricting context. Developing manageable standards to enforce state constitutional protections is the ordinary business of Kansas courts, including in the redistricting context. In *Harris*, for example, the Kansas Supreme Court considered claims brought under since-amended Kansas constitutional provisions governing state legislative redistricting that did not provide for judicial review or articulate explicit standards for it. *See* 192 Kan. at 201-02. Nonetheless, *Harris* recognized that a

redistricting plan, like “any other act of the legislature, is subject to the limitations contained in the Constitution” and to legal challenge by Kansas residents and looked to the equal protection guarantees of Sections 1 and 2 of the Kansas Bill of Rights to provide substantive guidance in determining the challenged map’s constitutionality. *Id.* at 204-05, 207. *Harris* thus confirms that state constitutional challenges, like this one, to the validity of redistricting plans are justiciable.

400. *Harris* also demonstrates Kansas courts’ ability to define manageable standards for applying constitutional protections in the redistricting context. Interpreting an earlier version of the Kansas Constitution that allocated state legislative seats by county, the Court concluded that constitutional equality norms embodied by Sections 1 and 2 of the Kansas Bill of Rights required that the seats be allocated using the method of equal proportions (the same algorithm used to distribute seats in the U.S. House of Representatives among the states). *See id.* at 204-05, 207-13. The redistricting provisions at issue did not use the word “equal,” let alone reference the method of equal proportions. *See id.* at 201-02. Rather, the Kansas Supreme Court discerned manageable standards based on the Kansas Constitution’s equal protection provisions to ensure that those provisions remained enforceable in the redistricting context. Similarly, in this case, the Court concludes that the Kansas Constitution’s equal protection, free speech and assembly, and suffrage provisions provide manageable standards to adjudicate partisan gerrymandering claims.

401. Decisions from outside the redistricting context reaffirm this conclusion. As the Kansas Supreme Court has recognized, “courts are frequently called upon, and adept at defining and applying various, perhaps imprecise, constitutional standards,” *Gannon*, 298 Kan. at 1155, and “[t]he judiciary is well accustomed” to doing so, *id.* at 1149 (quoting *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 778 (Tex. 2005)); *see also id.* (recognizing that constitutional provisions that are “imprecise” are nonetheless “not without content” (quoting *Neeley*, 176 S.W.3d at 778)). *Gannon*, for instance, concluded that the state courts could define manageable standards to enforce the Kansas Constitution’s requirement that the Legislature “make suitable provision for finance of the educational interests of the state.” Kan. Const. art. 6, § 6(b); *see Gannon*, 298 Kan. at 1149-51. The court explained that although the “Kansas Constitution clearly leaves to the legislature the myriad of choices available to perform its constitutional duty” to provide suitable educational funding, “when the question becomes whether the legislature has actually performed its duty, that most basic question is left to the courts to answer under our system of checks and balances.” *Gannon*, 298 Kan. at 1151. In the same way, while the Legislature may enjoy broad discretion in the redistricting process, that discretion is not unlimited: the Kansas Constitution requires state courts to determine whether a redistricting plan violates residents’ and voters’ fundamental rights. *See, e.g., Harris*, 192 Kan. at 206-07. And the key provisions here—involving equality, free speech, and suffrage—have long been the basis of litigation in state courts, from which Kansas courts can draw and provide

manageable standards. *See infra* COL § III (discussing constitutional provisions' applicability to partisan gerrymandering). Partisan gerrymandering claims brought under those provisions are therefore justiciable.

402. And in applying broad constitutional language, Kansas courts have not been afraid to deviate from federal justiciability standards. For example, the U.S. Supreme Court has repeatedly declared claims brought under the Guarantee Clause nonjusticiable in federal court. *See, e.g., Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133 (1912). Yet *VanSickle v. Shanahan*, 212 Kan. 426, 511 P.2d 223 (1973), held that at least some claims under the Guarantee Clause remain justiciable in Kansas courts, with the Kansas Constitution supplying the necessary legal standards. *See id.* at 437-38; *see also Gannon*, 298 Kan. at 1156 (reaffirming this holding). Thus, while federal courts may be unable to hear partisan gerrymandering claims under the federal Constitution, the Kansas Constitution allows this Court to hear those claims.

403. Indeed, Kansas courts' duty to safeguard state constitutional protections is strongest where, as here, the federal courts have retreated from enforcing those protections' federal counterparts. "[S]tate courts have relied upon their own state constitutions to depart from United States Supreme Court decisions deviating or retreating from a broader rule of constitutional law." *State v. Scott*, 286 Kan. 54, 95-96, 183 P.3d 801 (2008), *overruled on other grounds by State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016); *see, e.g., State v. McDaniel*, 228 Kan. 172, 184-85, 612 P.2d 1231 (1980). *McDaniel*,

for example, held that a federal Supreme Court decision that “retreat[ed]” from earlier holdings by reducing the scope of Eighth Amendment protections “force[d] [the Kansas Supreme] Court to reconsider its reliance” on federal precedent in applying Section 9 of the Kansas Bill of Rights. 228 Kan. at 184-85. The Court concluded that the Kansas Constitution provides heightened protections against cruel and unusual punishment guided by the former, more expansive federal standards that existed before the U.S. Supreme Court’s retreat. *See id.* at 185.

404. As in *McDaniel*, federal courts have retreated from applying federal constitutional standards in the context of partisan gerrymandering—and invited state courts to step in. Kansas courts can and should mitigate the consequences of this retreat by enforcing state constitutional protections. Such an approach was encouraged by the Supreme Court itself, which noted that its holding in *Rucho* did not “condemn complaints about districting to echo into a void,” because “state constitutions can provide standards and guidance for state courts to apply.” 139 S. Ct. at 2507.

405. Moreover, other states’ supreme courts have successfully adjudicated partisan gerrymandering claims under their state constitutions, providing a model for this Court. Kansas courts routinely look to the jurisprudence of sister states for guidance in interpreting constitutional language. *See, e.g., Gannon*, 298 Kan. at 1135, 1149-55. Doing so in this case buttresses the Court’s conclusion that partisan gerrymandering claims are justiciable, as numerous other state courts have already accepted *Rucho*’s

invitation to adjudicate such claims. The supreme courts of Florida, North Carolina, Ohio, and Pennsylvania have all applied their state constitutions to protect against partisan gerrymandering in congressional and legislative redistricting. *See Detzner*, 172 So. 3d at 371-72; *Harper*, 868 S.E.2d at 559; *Adams v. DeWine*, ___ N.E.3d ___, Nos. 2021-1428 & 2021-1449, 2022 WL 129092, at *1-2 (Ohio Jan. 14, 2022); *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1, 128, 178 A.3d 737 (2018); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, ___ N.E.3d ___, Nos. 2021-1193, 2021-1198, & 2021-1210, 2022 WL 110261, at *1 (Ohio Jan. 12, 2022). These decisions—several of which relied on broad constitutional text not specific to redistricting—demonstrate that state courts can discern the manageable standards necessary to hear partisan gerrymandering claims.¹⁹

406. Specifically, the North Carolina Supreme Court recently held that partisan gerrymandering of congressional or state legislative maps violates the North Carolina Constitution's equal protection, free speech, freedom of assembly, and free elections clauses. *Harper*, 868 S.E.2d at 559. The court determined that each of these clauses—including the first three, under

¹⁹ Indeed, the Kansas Constitution “can be traced through prior state constitutions to the English Bill of Rights,” Kirk Redmond & David Miller, *The Kansas Bill of Rights: “Glittering Generalities” or Legal Authority*, J. Kan. Bar Ass’n, Sept. 2000, at 18, 20 (2000), the same document on which the Pennsylvania and North Carolina constitutions are based, *see Harper*, 868 S.E.2d at 540. These decisions are thus of particular value in interpreting the Kansas Constitution.

whose Kansas equivalents the claims in this case arise—independently provides “manageable judicial standards” to govern partisan gerrymandering claims. *Id.* Those North Carolina constitutional provisions do not offer more detailed language or substantive guidance than do their Kansas equivalents; for example, the relevant portion of North Carolina’s equal protection clause provides only that “[n]o person shall be denied the equal protection of the laws.” *Id.* at 511 (quoting N.C. Const. art. I, § 19); *cf.* Kan. Const. Bill of Rights, § 2 (more explicitly discussing “political power”). Rather, the North Carolina court recognized that pursuant to the state judiciary’s “fundamental [and] sacred dut[y]” to “protect[] the constitutional rights of the people . . . from overreach by the General Assembly,” courts could discern a manageable framework for adjudicating partisan gerrymandering claims—a framework that could be further developed “in the context of actual litigation.” *Harper*, 868 S.E.2d at 510, 547-50 (quoting *Reynolds v. Sims*, 377 U.S. 533, 578 (1964)).

407. Thus, the court held that a redistricting plan constitutes a partisan gerrymander—and is therefore subject to strict scrutiny—if “it deprives a voter of his or her right to substantially equal voting power,” as demonstrated by “direct [or] circumstantial evidence” that “the plan makes it systematically more difficult for [the] voter to aggregate his or her vote with other likeminded voters, thus diminishing or diluting the power of that person’s vote on the basis of his or her views.” *Harper*, 868 S.E.2d at 552, 559. The court declined to give an exhaustive list of evidence that would satisfy this burden—although it noted that, if

necessary, it could have selected one of various bright-line statistical tests offered by experts in that case. *See id.* at 547-49. Instead, it simply recognized the overwhelming evidence of the challenged maps' partisan skew. *See id.* at 547-49, 553-57.

408. The Pennsylvania Supreme Court similarly relied on broad constitutional language in striking down the state's congressional map as a partisan gerrymander in 2018. *See League of Women Voters of Pa.*, 645 Pa. at 128. The court explained that although the Pennsylvania Constitution's Free Elections clause does not provide "explicit standards" for evaluating the constitutionality of congressional districts, deviation from longstanding, widely accepted map-drawing criteria—such as contiguity, compactness, and respect for political subdivisions—can provide evidence that a redistricting plan constitutes a partisan gerrymander. *See id.* at 118-21. Like the North Carolina court, Pennsylvania's high court declined to provide an exhaustive framework for evaluating partisan gerrymandering claims, recognizing that future litigation would allow courts to flesh out the doctrine over time. *See id.* at 122-23. The court held only that one method of proving that a map is an unconstitutional partisan gerrymander is to show that it subordinates traditional neutral redistricting criteria to "extraneous considerations such as gerrymandering for unfair partisan political advantage," and that the facts of the congressional plan at issue clearly showed that type of subordination. *Id.* at 122, 128.

409. These decisions demonstrate that state courts can successfully adjudicate partisan gerrymandering

claims under state constitutions, even where the relevant constitutional text does not provide explicit standards for evaluating such claims. Like the Pennsylvania and North Carolina supreme courts, this Court can discern the necessary manageable standards—indeed, in Kansas, it is “the duty of courts” to do so. *Harris*, 192 Kan. at 207.

410. As discussed below, *see* COL § III, the Court concludes that partisan gerrymanders are subject to strict scrutiny pursuant to the Kansas Constitution’s guarantees of equal protection, free speech and assembly, and suffrage. Building on precedent from sister states, the Court determines that at minimum, a congressional plan constitutes a partisan gerrymander subject to strict scrutiny where the Court finds, as a factual matter, (1) that the Legislature acted with the purpose of achieving partisan gain by diluting the votes of disfavored-party members, and (2) that the challenged congressional plan will have the desired effect of substantially diluting disfavored-party members’ votes. *See Harper*, 868 S.E.2d at 552, 559 (recognizing unconstitutional gerrymander based on effect on voting power); *League of Women Voters of Pa.*, 645 Pa. at 122 (finding unconstitutional gerrymander where traditional criteria were subordinated to partisan considerations).

411. The ample evidence of Ad Astra 2’s intentional, extreme partisan bias makes the factfinding in this case straightforward, demonstrating the judicially manageable nature of the inquiry. The Court therefore concludes that judicially manageable standards for adjudicating partisan gerrymandering claims exist,

and this *Baker* factor does not render such claims nonjusticiable.

Adjudicating partisan gerrymandering claims does not require policy determinations based on nonjudicial discretion.

412. Hearing Plaintiffs' partisan gerrymandering claims also would not require the Court to make "an initial policy determination of a kind clearly for nonjudicial discretion." *Kan. Bldg. Indus.*, 302 Kan. at 668 (quoting *Baker*, 369 U.S. at 217). Rather, the Kansas Supreme Court has recognized that while the Legislature enjoys broad discretion in redistricting matters, "[t]he exercise of [that] discretion . . . by the [L]egislature in enacting an apportionment law must be limited to the standards provided in our Constitution." *Harris*, 192 Kan. at 205. Accordingly, it is the "duty" of Kansas courts to ensure that redistricting takes place within constitutional bounds. *Id.* at 207. Applying the Constitution in this way to cabin the Legislature's discretion is *precisely* the judicial role—not a policy determination.

413. Decisions from the Kansas Supreme Court considering partisan gerrymandering claims while reviewing state legislative reapportionment plans underscore this point. Although the Court has never held a redistricting plan unconstitutional on partisan gerrymandering grounds, it has repeatedly indicated that partisan gerrymandering claims are cognizable under the Kansas Constitution, and that the allegations in past cases failed *on the merits* because the challengers—unlike Plaintiffs here—had failed to offer evidence substantiating their claims. *See In re*

Stephan, 251 Kan. 597, 607, 836 P.2d 574 (1992) (“No evidence has been offered that would indicate the size and shape of House District 47 was engineered to cancel out the voting strength of any cognizable group or locale.”); *In re Senate Bill No. 220*, 225 Kan. 628, 637, 593 P.2d 1 (1979) (concluding that challengers had failed to “show[]” an unconstitutional gerrymander); *In re House Bill No. 2620*, 225 Kan. 827, 834-35, 595 P.2d 334 (1979) (concluding that “no claim or showing of gerrymandering . . . ha[d] been made”). Although these decisions did not discuss the gerrymandering allegations at great length—likely because of the lack of supporting evidence—or give clear rules for resolving future claims, none suggested that the Court lacked jurisdiction to consider the allegations. Instead, each indicated that the Legislature’s discretion in redistricting is not boundless, and that Kansas courts have jurisdiction to hear partisan gerrymandering claims.

414. The Court concludes that this *Baker* factor does not render Plaintiffs’ partisan gerrymandering claims nonjusticiable

Redistricting matters are not textually committed to the Legislature.

415. The next *Baker* factor is similarly inapplicable: No “textually demonstrable constitutional commitment of [congressional redistricting] to [a] coordinate [branch]” prevents this Court from adjudicating Plaintiffs’ partisan gerrymandering claims. *Kan. Bldg. Indus.*, 302 Kan. at 668 (quoting *Baker*, 369 U.S. at 217). The Kansas Constitution is silent as to congressional redistricting; nothing in its text commits

authority over congressional redistricting entirely to another branch.

416. The fact that Article 10 of the Kansas Constitution explicitly provides for judicial review of state legislative maps does not change this conclusion or suggest that Kansas courts are powerless to review congressional plans—in fact, it proves the opposite. First, the Constitution’s treatment of the courts’ role in each type of redistricting process parallels its treatment of the Legislature’s role: the document explicitly describes the Legislature’s authority in state legislative reapportionment, *see id.* art. 10, § 1, but is silent as to congressional redistricting. That contrast does not mean that the Legislature has no power over congressional redistricting, and it similarly does not preclude judicial review in this context. Instead, it indicates only that the Constitution leaves congressional redistricting to the state’s ordinary lawmaking process of enactment by the Legislature and ordinary review by the state courts. *Cf. Harris*, 192 Kan. at 207. Second, before the current version of Article 10 was adopted in the 1980s, *Harris* explained that state courts have a “duty” to ensure that redistricting plans comply with the Kansas Constitution even in the absence of an explicit judicial review provision. 192 Kan. at 207. The current review provision provides a streamlined process for carrying out that duty in the state legislative context, *see Kan. Const.* art. 10, § 1(b)-(e), but its adoption does not change the fact that as in *Harris*, courts can adjudicate redistricting cases under the longstanding substantive constitutional provisions involved here. Article 10 thus

does nothing to limit this Court's power to hear this case.

417. Finally, to the extent Defendants argue this factor applies because of the federal Constitution's Elections Clause, the argument fails for two reasons. First, as explained above, *see supra* COL § II.A, the Elections Clause does not prevent this Court from adjudicating challenges to congressional plans. Second, justiciability in this Court—including the applicability of the political question doctrine—is a matter of Kansas law. *See e.g., Gannon*, 298 Kan. at 1119. The federal Elections Clause is therefore irrelevant to this Court's jurisdiction under the Kansas Constitution.

418. The Court concludes that this *Baker* factor does not render Plaintiffs' partisan gerrymandering claims nonjusticiable.

The remaining Baker factors do not bar adjudication of partisan gerrymandering claims.

419. Defendants have not argued that the other three *Baker* factors—"the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," "an unusual need for unquestioning adherence to a political decision already made," or "the potentiality of embarrassment from multifarious pronouncements by various departments on one question," *Kan. Bldg. Indus.*, 302 Kan. at 668 (quoting *Baker*, 369 U.S. at 217)—render Plaintiffs' claims nonjusticiable, and with good reason: none applies in this case. These three factors all reflect the same basic idea: that some issues so firmly belong to the political

branches that courts cannot interfere. But the Kansas Supreme Court has recognized that redistricting is not such an issue; rather, “an apportionment act, as any other act of the legislature, is subject to the limitations contained in the Constitution, and where such act . . . violates the limitations of the Constitution, it is null and void and it is the duty of courts to so declare.” *Harris*, 192 Kan. at 207. Partisan gerrymandering claims raise no more concerns about respect for coordinate branches, adherence to political decision making, or multifarious pronouncements than the malapportionment claims adjudicated in *Harris*—or other redistricting claims, like racial gerrymandering or vote dilution, that courts routinely hear.

420. Ultimately, to conclude that partisan gerrymandering claims are nonjusticiable would render the Bill of Rights “little more than a compilation of glittering generalities”—a result the Kansas Supreme Court has consistently rejected for over a century. *Atchison St. Ry. Co. v. Missouri Pac. Ry. Co.*, 31 Kan. 660, 3 P. 284, 286 (1884); see, e.g., *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 633-38, 440 P.3d 461 (2019) (per curiam) (reaffirming that Kansas Bill of Rights is independent source of enforceable constitutional rights). Instead, the Kansas Constitution “limit[s] the power of the legislature, and no act of that body can be sustained which conflicts with [it].” *Atchison St. Ry. Co.*, 3 P. at 286. The Court will therefore carry out its “duty” to determine whether the challenged congressional plan “violates the limitations of the Constitution.” *Harris*, 192 Kan. at 207.

III. The intentional, effective partisan gerrymandering in Ad Astra 2 violates the Kansas Constitution.

421. Plaintiffs argue that Ad Astra 2 constitutes a partisan gerrymander in violation of the Kansas Constitution. Specifically, Plaintiffs argue that Ad Astra 2 violates the equal protection guarantees of Sections 1 and 2 of the Kansas Bill of Rights; the right to vote under Sections 1 and 2 of the Kansas Bill of Rights and Article 5, Section 1 of the Kansas Constitution; the right to free speech and assembly under Sections 11 and 3, respectively, of the Kansas Bill of Rights; and the right to be free from retaliation for the exercise of their free speech rights, similarly secured under Section 11 of the Kansas Bill of Rights.²⁰ The Court addresses each of these claims in turn.

A. The Kansas Constitution guarantees the right to equal protection, and partisan gerrymandering infringes on this right.

422. For the reasons set forth below, the Court concludes that partisan gerrymandering violates the equal protection guarantees of Sections 1 and 2 of the Kansas Bill of Rights. Section 1 provides that “[a]ll

²⁰ The *Frick* Plaintiffs also invoke Section 20 of the Kansas Bill of Rights in their Petition. Section 20 of the Kansas Bill of Rights reinforces and brings home the other rights, protections, and principles enumerated and discussed herein. Section 20 makes clear two fundamental and critical principles: (1) the “enumeration of rights shall not be construed to impair or deny others retained by the people”; and (2) “all powers not herein delegated remain with the people.” Section 20 is not a nullity; it enervates the many specific Bill of Rights provisions that precede it.

men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.” Kan. Const. Bill of Rights, §§ 1. Section 2 guarantees 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.” *Id.* § 2. In interpreting the equal protection guarantees enshrined in the Kansas Constitution, the Kansas Supreme Court has emphasized that “the Kansas Constitution affords separate, adequate, and greater rights than the federal Constitution.” *Farley v. Engelken*, 241 Kan. 663, 671, 740 P.2d 1058 (1987).

423. The Kansas Supreme Court has explained that Sections 1 and 2 incorporate broad protections for political equality in redistricting—protections that prohibit partisan gerrymandering. Under the Kansas Constitution, “every qualified elector . . . is given the right to vote for officers . . . [and] is possessed of equal power and influence in the making of laws which govern him,” and “[i]nsofar as he is accorded less representation than is his due under the Constitution, to that extent the governmental processes fail to record the full weight of his judgment and the force of his will.” *Harris*, 192 Kan. at 204. Applying the guarantee of equality enshrined in Sections 1 and 2, *Harris* concluded that seats in the Legislature must be apportioned among counties based on their populations with “as close an approximation to exactness as possible.” *Id.* at 205. Like the malapportionment redressed in *Harris*, partisan gerrymandering deprives voters of “equal power and influence in the making of laws which govern [them].” *Id.* at 204. By design, the

practice “strategically exaggerates the power of voters who tend to support the favored party while diminishing the power of voters who tend to support the disfavored party.” *Adams*, 2022 WL 129092, at *1. Like malapportionment, partisan gerrymandering is thus inconsistent with equal protection under Sections 1 and 2.

424. The text of Section 2 also indicates that the Kansas Constitution provides strong protections for political equality and against partisan gerrymandering. In determining the scope of state constitutional provisions, the Kansas Supreme Court examines the constitutional text. *See, e.g., Hodes & Nauser*, 309 Kan. at 623-25. And Section 2’s text focuses explicitly on *political* equality: it recognizes that “[a]ll political power is inherent in the people” and that “all free governments are founded on their authority, and are instituted for their equal protection.” *Cf. Stephens v. Snyder Clinic Ass’n*, 230 Kan. 115, 128, 631 P.2d 222 (1981) (“Section 2 of the Kansas Bill of Rights has been construed as referring solely to political privileges and not to those relating to property rights.”). The goal of partisan gerrymandering is to eliminate the people’s authority over government by giving different voters vastly *unequal* political power. *See, e.g., Adams*, 2022 WL 129092, at *1. Section 2, with its textual focus on political equality, thus proscribes partisan gerrymandering.

425. Decisions from sister states buttress this conclusion. North Carolina’s equal protection clause similarly “provides greater protection . . . than the federal Constitution.” *Harper*, 868 S.E.2d at 543. In a

recent ruling concerning that state's congressional and state legislative maps, the North Carolina Supreme Court concluded that the state's equal protection right included a right to "substantially equal voting power." *Id.* (quoting *Stephenson v. Bartlett*, 355 N.C. 354, 379, 562 S.E.2d 377 (2002)) When the state engages in partisan gerrymandering, the court explained, it infringes on that right. *Id.* at 544. This is because the right to an equal voting power "necessarily encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views." *Id.* Partisan gerrymandering diminishes and dilutes citizens' "votes on the basis of party affiliation" and thereby "deprives voters in the disfavored party of the opportunity to aggregate their votes to elect such a governing majority." *Id.* The court concluded that this interpretation "is most consistent with the fundamental principles in our Declaration of Rights of equality and popular sovereignty—together, political equality." *Id.*

426. The Court finds that reasoning persuasive for a number of reasons.

427. First, the constitutions of Kansas and North Carolina share a common ancestor: Both trace their lineage back to the English Bill of Rights. *See Redmond & Miller, supra* note 19, at 20; *Harper*, 868 S.E.2d at 540.

428. Second, as in North Carolina, the right to vote is fundamental under the Kansas Constitution. As the Kansas Supreme Court has held:

The right to vote in any election is a personal and individual right, to be exercised in a free and unimpaired manner, in accordance with our Constitution and laws. The right is [preservative] of other basic civil and political rights, and is the bedrock of our free political system. Likewise, it is the right of every elector to vote on amendments to our Constitution in accordance with its provisions. This right is a right, not of force, but of sovereignty. It is every elector's portion of sovereign power to vote on questions submitted. Since the right of suffrage is a fundamental matter, any alleged restriction or infringement of that right strikes at the heart of orderly constitutional government and must be carefully and meticulously scrutinized.

Moore v. Shanahan, 207 Kan. 645, 649, 486 P.2d 506 (1971); *see also Harris v. Anderson*, 194 Kan. 302, 303, 400 P.2d 25 (1965) (“[T]he right to vote for the candidate of one’s choice is of the essence of the [representative] form of government, and . . . ‘the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.’” (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964))).

429. Third, the North Carolina Constitution contains analogous provisions to Sections 1 and 2 of the Kansas Bill of Rights, which, read in conjunction, guarantee political equality—and the opinion described above use that guarantee as a basis for their conclusions. *See Harper*, 868 S.E.2d at 544 (citing N.C. Const. art. I, §§ 1-2) (“Our reading of the equal

protection clause is most consistent with the fundamental principles in our Declaration of Rights of equality and popular sovereignty—together, political equality.”).

430. This Court agrees with the reasoning of *Harper* and concludes that the equal protection guarantee of the Kansas Bill of Rights secures the right to substantially equal voting power. *See Gannon*, 298 Kan. at 1135, 1149-55 (looking to constitutions of sister states as aids in interpreting Kansas Constitution).

431. The Court also holds that partisan gerrymandering—the drawing of district lines to dilute the votes of those likely to vote for a disfavored party—deprives voters of substantially equal voting power. This is because voters cannot be said to enjoy an equal vote when they live in districts that the State has drawn in such a manner that negates voters’ “representational influence.” *Harper*, 868 S.E.2d at 544. Instead, the State has created classes of favored and disfavored voters, allowing voters of one party to elect their candidates of choice while denying that same right to voters of another. The Kansas Constitution, which recognizes citizens’ right to political equality, stands as a bulwark against such legislative misconduct.

B. The Kansas Constitution guarantees the right to vote, and partisan gerrymandering infringes on this right.

432. For similar reasons, partisan gerrymandering violates the Kansas Constitution's protection of the right to vote.

433. The right to vote is secured by Sections 1 and 2 of the Kansas Bill of Rights and by Article 5, Section 1 of the Kansas Constitution, the latter of which provides that "[e]very citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she seeks to vote shall be deemed a qualified elector." The Kansas Supreme Court has recognized that the right to vote is "fundamental" under the Kansas Constitution, and "any alleged restriction or infringement of that right strikes at the heart of orderly constitutional government, and must be carefully and meticulously scrutinized." *Moore*, 207 Kan. at 649. Additionally, the Kansas Supreme Court has recognized that the Kansas Bill of Rights secures natural rights that go beyond what is guaranteed by the United States Constitution. *See Hodes & Nauser*, 309 Kan. at 624-27.

434. This fundamental right to vote encompasses the right to "substantially equal voting power and substantially equal legislative representation." *Harper*, 868 S.E.2d at 544 (quoting *Stephenson*, 355 N.C. 354 at 382 (2002)); *see State v. Beggs*, 126 Kan. 811, 271 P. 400, 402 (1928) (holding that the Kansas Constitution prohibits legislation that will "directly or indirectly, deny or abridge . . . or unnecessarily impede the exercise of th[e] right" to vote (citation omitted)).

435. When voters of one class have their votes diluted for the benefit of another, voters do not enjoy substantially equal voting power. Accordingly, partisan gerrymandering offends Kansans' right to vote, secured to them by Sections 1 and 2 of the Bill of Rights and Article 5, Section 1 of the Kansas Constitution.

C. The Kansas Constitution guarantees the right to Free Speech and Assembly, and partisan gerrymandering infringes on this right.

436. This Court also concludes that partisan gerrymandering violates the rights to free speech and assembly, secured by Sections 3 and 11 of the Kansas Bill of Rights.

437. Section 11 provides that "all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights." Section 3 states that "[t]he people have the right to assemble, in a peaceable manner, to consult for their common good, to instruct their representatives, and to petition the government, or any department thereof, for the redress of grievances."

438. These provisions offer broad protection for free speech and association. Indeed, the provisions' text demonstrates that they offer broader protections than does the federal First Amendment. *See, e.g., Hodes & Nauser*, 309 Kan. at 623-25 (comparing constitutional texts and concluding from comparison that Kansas Constitution confers broader individual rights). Section 3, for example, expressly grants individuals the rights "to consult for their common good" and "to instruct

their representatives.” The First Amendment does not contain this language; an earlier draft of the provision included a right to “consult for the common good,” but that language was removed before enactment. *Jones v. City of Opelika*, 319 U.S. 105, 124 n.6 (1943) (Reed, J., dissenting). In other words, the Kansas Constitution includes a unique textual focus on collective speech about matters of public concern (consultation “for the common good”) and political speech (the right of the people to “instruct their representatives”). These unique features underscore the Constitution’s protection against partisan gerrymandering.

439. The Court concludes that partisan gerrymandering violates this protection in at least three related, but independent, ways. First, partisan gerrymandering unconstitutionally discriminates against members of the disfavored party based on viewpoint. Second, partisan gerrymandering unlawfully burdens disfavored-party members’ freedom of association. Third, partisan gerrymandering unlawfully retaliates against disfavored-party members for engaging in protected political speech and association.

440. As the Kansas Supreme Court has recognized, the right to free speech is “among the most fundamental personal rights and liberties of the people.” *Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 234, 689 P.2d 860 (1984). Discrimination on the basis of viewpoint is the very antithesis of free speech, and as a result “[d]iscrimination against speech based on its message is presumptively unconstitutional.” *Roeder v. Kan. Dep’t of Corr.*, No.

113,239, 2016 WL 556281, at *3 (Kan. App. 2016) (per curiam) (unpublished opinion); *see also Harper*, 868 S.E.2d at 546 (“[V]iewpoint discrimination . . . triggers strict scrutiny.”); *State v. Smith*, 57 Kan. App. 2d 312, 318, 452 P.3d 382 (2019) (“It is well-established that content-based speech restrictions are presumptively invalid.”).

441. Partisan gerrymandering constitutes viewpoint discrimination in violation of Section 11. When map-drawers craft gerrymandered districts, they single out a specific class of voters for disfavored treatment based simply on the viewpoints those voters express. Thus, when the legislature “systemically diminishes or dilutes the power of votes on the basis of party affiliation,” it engages in the very type of viewpoint discrimination that Section 11 prohibits. *Harper*, 868 S.E.2d at 546.

442. Likewise, partisan gerrymandering violates the right to freedom of association, which is secured by the right to free speech under Section 11 and to free assembly under Section 3. The Kansas Bill of Rights describes associational rights that are even broader than those recognized under the U.S. Constitution: While the First Amendment to the U.S. Constitution recognizes the right “peaceably to assemble, and to petition the Government for a redress of grievances,” the Kansas Constitution goes still further, with text that goes right to the heart of partisan gerrymandering: “The people have the right to . . . instruct their representatives.” Kan. Const. Bill of Rights, § 3; *see also Harper*, 868 S.E.2d at 544 (finding that partisan gerrymandering violated state

constitutional provision protecting right of citizens to “instruct their representatives” (quoting N.C. Const. art. I, § 12)). This right sits at the core of Kansans’ associational freedom: Section 2 makes clear that the government derives its power from the people, and Section 3 grants the people the right to hold it accountable. Partisan gerrymandering throws this structure into disarray by wresting power from the people and erecting structures that impede the accountability of their representatives.

443. It is of no moment that citizens living in gerrymandered districts may nonetheless vote for candidates of their choice or coordinate across siloed jurisdictions, because the cracking of Democratic communities across districts creates a significant associational burden. In our democracy, “citizens form parties to express their political beliefs and to assist others in casting votes in alignment with those beliefs.” *Harper*, 868 S.E.2d at 545 (quoting *Libertarian Party of N.C. v. State*, 365 N.C. 41, 49, 707 S.E.2d 199 (2011)). When the state engages in gerrymandering to negate that party’s power, it has the effect of “deblitat[ing]” the disfavored party and “weaken[ing]” its ability to carry out its core functions and purposes.” *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *122 (N.C. Super. Ct. Sept. 3, 2019) (alterations in original) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1939 (2018) (Kagan, J., concurring)). In other words, partisan gerrymandering renders political association an exercise in futility. This leads to more voters feeling demoralized, which in turn entrenches the favored party, making the associational harms still

worse. *See generally* Daniel P. Tokaji, *Gerrymandering and Association*, 59 Wm. & Mary L. Rev. 2159 (2018).

444. Finally, partisan gerrymandering constitutes unconstitutional retaliation against members of a disfavored party for their engagement in protected political activity. The State engages in impermissible retaliation when plaintiffs can establish that (1) they were engaged in a constitutionally protected activity; (2) the State's actions adversely affected the protected activity; and (3) the State's adverse action was substantially motivated by plaintiffs' exercise of their constitutional rights. *See, e.g., Grammer v. Kan. Dep't of Corr.*, 57 Kan. App. 2d 533, 538, 455 P.3d 819 (2019); *Rebarchek v. Farmers Coop. Elevator & Mercantile Ass'n*, 272 Kan. 546, 553, 35 P.3d 892 (2001) (discussing burden-shifting approach in retaliatory discharge context).

445. Partisan gerrymandering satisfies all three of these elements. First, as described above, voters seek to engage in protected activities, including exercising their right to free speech and assembly by forming political parties, voicing support for their candidates of choice, and casting votes for those candidates. Second, partisan gerrymandering burdens these rights by reducing the voting power of members of the disfavored party, discriminating against members of that party on the basis of their viewpoints, and burdening their ability to associate by obstructing their political organizations. Third, the State's actions are motivated by voters' exercise of their constitutional rights: Partisan gerrymanderers move voters for the disfavored party into different districts precisely

because those voters are likely to engage in protected conduct.

446. For the foregoing reasons, the Court concludes that partisan gerrymandering violates Kansans' rights to free speech and free association and constitutes retaliation against protected activity. Each of these three grounds constitutes a separate and independent basis under which partisan gerrymandering violates the Kansas Constitution.

D. Ad Astra 2 is a partisan gerrymander that violates the foregoing constitutional rights.

447. Having concluded that partisan gerrymandering violates the Kansas Constitution, the Court now turns to what standard should be applied to adjudicate the case at bar.

448. The Court draws from opinions of the highest courts in other states—including Pennsylvania and North Carolina—to determine how it may adjudicate claims of partisan gerrymandering.

449. Consider first the Pennsylvania Supreme Court's 2018 decision under that state's Free Elections Clause. That court held that plaintiffs may successfully prove a partisan gerrymander by showing that the map subordinates traditional redistricting criteria (for instance, , compactness and preservation of political subdivisions) "to the pursuit of partisan political advantage." *League of Women Voters of Pa.*, 645 Pa. at 122-23. Nevertheless, it made clear that this was not "the exclusive means by which" a constitutional violation could be shown. *Id.* at 122. As advances in

map-drawing continue apace, the court recognized, mapmakers may be able to “engineer congressional districting maps, which, although minimally comporting with these neutral ‘floor’ criteria, nevertheless operate to unfairly dilute the power of a particular group’s vote for a congressional representative.” *Id.*; *cf. Reynolds*, 377 U.S. at 578 (“What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment.”).

450. The North Carolina Supreme Court held that the State engages in impermissible partisan gerrymandering when plaintiffs can show that the challenged map makes it “systematically more difficult for a voter to aggregate his or her vote with other likeminded voters, thus diminishing or diluting the power of that person’s vote on the basis of his or her views.” *Harper*, 868 S.E.2d at 552. This can be shown

using a variety of direct and circumstantial evidence, including but not limited to: median-mean difference analysis; efficiency gap analysis; close-votes-close seats analysis, partisan symmetry analysis; comparing the number of representatives that a group of voters of one partisan affiliation can plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect; and comparing the

relative chances of groups of voters of equal size who support each party of electing a supermajority or majority of representatives under various possible electoral conditions.

Id. at 552-53. The court emphasized that “[e]vidence that traditional neutral redistricting criteria were subordinated to considerations of partisan advantage” is particularly weighty evidence that a districting plan has been gerrymandered. *Id.* at 553. Like the Pennsylvania Supreme Court, the *Harper* court found it unnecessary and inadvisable to “identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander.” *Id.* at 547.

451. The Court agrees with the North Carolina and Pennsylvania Supreme Courts that articulating a bright-line standard for adjudicating all partisan gerrymandering claims is neither necessary nor prudent. As the U.S. Supreme Court has stated in a different—but related—context, the Constitution “nullifies sophisticated as well as simple-minded modes of discrimination.” *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960) (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). If courts are to successfully protect citizens against unconstitutional redistricting practices, they must fashion a doctrine capable of adapting to new and inventive methods as they arise. It therefore suffices for the Court’s purposes that a standard exists by which such claims can be adjudicated in the present case.

452. That said, the Court will apply the standards articulated by the North Carolina Supreme Court in *Harper* and by the Pennsylvania Supreme Court in *League of Women Voters of Pennsylvania*.

453. Accordingly, in adjudicating partisan gerrymandering claims, this Court asks whether the challenged map makes it “systematically more difficult for a voter to aggregate his or her vote with other likeminded voters, thus diminishing or diluting the power of that person’s vote on the basis of his or her views.” *Harper*, 868 S.E.2d at 552. In making this determination, the Court will look to partisan fairness metrics, including the efficiency gap analysis. The Court will also consider whether “neutral criteria,” including those enumerated in the Guidelines, “have been subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage.” *League of Women Voters of Pa.*, 645 Pa. at 122; *see also Harper*, 868 S.E.2d at 547 (noting that examining “whether [a] mapmaker adhered to traditional neutral districting criteria” is “reliable way[] of demonstrating the existence of an unconstitutional partisan gerrymander”); *cf. Clarno v. Fagan*, No. 21CV40180, 2021 WL 5632371, at *7 (Or. Special Jud. Panel Nov. 24, 2021) (denying partisan gerrymandering claim where “enacted map . . . resulted from a robust deliberative process and careful application of neutral criteria”).

454. Applying these standards to Ad Astra 2, the map displays clear signs that it dilutes the votes of Democratic Kansans. Ad Astra 2 achieves this by cracking communities of Democratic voters, drawing

unnaturally shaped districts that run roughshod over communities of interest, and pairing far-flung communities throughout the state. The result is a map heavily biased in favor of Republican candidates and incumbents.

455. Ad Astra 2 complies with almost no traditional redistricting principles, including those in the Guidelines, with the exception of obtaining population equality across the four districts.

456. **Racial Vote Dilution.** The Guidelines state that “Redistricting plans will have neither the purpose nor effect of diluting minority voting strength.” PX 137 at 2 (Guideline No. 3). As discussed in Section IV below, Ad Astra 2 has both the purpose and effect of diluting minority voting strength. It therefore plainly does not comply with this Guideline.

457. **Compactness and Contiguousness.** The Guidelines also require that districts be “as compact as possible and contiguous.” PX 137 at 2 (Guideline No. 4.a). As described above, Dr. Rodden found that Ad Astra 2 had the lowest plan-wide compactness score across all plans he analyzed on every measure of compactness he considered. *See supra* FOF § II.B. Dr. Chen found that every one of his 1,000 simulated maps was significantly more compact than Ad Astra 2. *See supra* FOF § II.A. A simple lay examination of the map is in accord with this conclusion: CDs 1 and 2 in particular appear sprawling and misshapen, and given the previously compact structure of CD 3—which, due to population growth, should have shrunk in size, not grown—the district’s new, more sprawling shape

evinces malintent. Ad Astra 2 does not comply with this Guideline.

458. Communities of Interest. The Guidelines next provide that “[t]here should be recognition of communities of interest. Social, cultural, racial, ethnic, and economic interests common to the population of the area, which are probable subjects of legislation should be considered.” PX 137 at 2 (Guideline No. 4.b). The evidence presented at trial similarly demonstrates a remarkable failure to comply with this Guideline. Expert and lay witnesses detailed how Ad Astra 2 needlessly splits the Kansas City metro area and extracts Lawrence from Douglas County. *See, e.g., supra* FOF § II.F. In so doing, Ad Astra 2 pairs urban communities with far-flung rural communities, thereby pairing Kansans who share little in common beyond being Kansans. It is therefore equally clear that the drafters of Ad Astra 2 paid no heed to this principle.

459. Core Retention. The Guidelines next state that “[t]he core of existing congressional districts should be preserved when considering the communities of interest to the extent possible.” PX 137 at 2 (Guideline No. 4.c). Dr. Rodden found that only 86% of Kansas residents remain in their previous districts, despite the fact that Dr. Rodden was able to draw a map that retained 97% of people in their former districts. *See supra* FOF § II.B. Additionally, Ad Astra 2 relocates more Black, Hispanic, and Native American Kansans than any of the comparator plans. *See supra* FOF § II.B. Dr. Chen found that CD 3 in Ad Astra 2 does worse on core retention than 64% of his simulated maps even though the simulations were not drawn

with core retention in mind. *See supra* FOF § II.A. Ad Astra 2 does not retain the cores of previous congressional districts.

460. Subdivision Splits. Finally, the Guidelines provide:

Whole counties should be in the same congressional district to the extent possible while still meeting [the equal population requirement]. County lines are meaningful in Kansas and Kansas counties historically have been significant political units. Many officials are elected on a countywide basis, and political parties have been organized in county units. Election of the Kansas members of Congress is a political process requiring political organizations which in Kansas are developed in county units. To a considerable degree most counties in Kansas are economic, social, and cultural units, or parts of a larger socioeconomic unit. These communities of interest should be considered during the creation of congressional districts.

PX 137 at 2 (Guideline No. 4.d).

461. As Dr. Rodden and Dr. Chen found, Ad Astra 2 splits more counties than any comparator plan or any simulated map. Among these counties are Wyandotte and Douglas Counties, two of the largest and most diverse in the state. Ad Astra 2 also creates other subdivision splits that, especially when viewed in reference to comparator plans, appear harmful and unnecessary. For example, Dr. Rodden found that Ad

Astra splits 14-15 more voting tabulation districts than other plans, and 5 additional cities and towns, including Kansas City and Lawrence. *See supra* FOF § II.B. Dr. Chen also found that Ad Astra 2 splits far more VTDs than is necessary. *See supra* FOF § II.A. Ad Astra 2 does not keep subdivisions whole to the extent possible.²¹

462. Deviation from these neutral criteria is evidence of the Legislature's partisan intent. Drs. Warshaw, Miller, and Rodden all concluded in their analyses that as a result of these decisions, Republicans are more likely to win a higher number of seats in Ad Astra 2 than in any comparator plan. *See supra* FOF § II.B-D. For example, Dr. Warshaw found that despite Democrats receiving on average 41% of the votes statewide, Democrats are likely to receive *only* 9% of the seats over the next 10 years. *See supra* FOF § II.C. None of the other plans submitted to the Legislature during the latest round of redistricting—nor, for that matter, the state's previous congressional plan—exhibits this level of Republican bias. *See supra* FOF § II.C.

463. Indeed, the extreme pro-Republican bias of the map was confirmed through several different expert methodologies. Dr. Chen's simulations demonstrated that Ad Astra 2's least Republican district, CD 3, is more heavily Republican than the least Republican district in 99.6% of Dr. Chen's 1,000 simulated plans

²¹ The only remaining Guidelines require maps to be based on the 2020 census and achieve population equality. Ad Astra 2 complies with these—and *only* these—requirements.

that adhere to the Guidelines. *See supra* FOF § II.A. Ad Astra 2 is also one of only 2.2% of plans that do not contain a single district that leans Democratic. *See supra* FOF § II.A.

464. And applying the efficiency gap to Ad Astra 2, Dr. Warshaw found that the map's Republican bias stood out against not only other maps submitted to the Legislature, but also the previous congressional plan and an array of historical plans. *See supra* FOF § II.C. Dr. Chen's simulations put Ad Astra 2's outlier status into even starker relief: In the 1,000 simulations Dr. Chen ran, only 1.2% of simulations had an efficiency gap greater than or equal to Ad Astra 2's. *See supra* FOF § II.A. The overwhelming majority of plans fell between 2% and 12%; Ad Astra 2 scored 33.9%. *See supra* FOF § II.A.

465. Documentary and lay evidence further supports that the partisan effects of Ad Astra 2 were the consequence of intentional gerrymandering. Beginning with Senator Wagle's late-2020 comments about creating four Republican congressional districts, the record leading up to Ad Astra 2's passage reflects a single-minded desire to maximize Republican advantage. Most notable among these pieces of evidence is the rushed and opaque process that led to Ad Astra 2's passage. *See supra* FOF §§ I, II.G. As courts adjudicating partisan gerrymandering claims have recognized, "[a] map-drawing process may support an inference of predominant partisan intent." *League of Women Voters of Ohio*, 2022 WL 110261, at *24; *see also Detzner*, 172 So. 3d at 374 ("[I]f evidence exists to demonstrate that there was an entirely

different, separate process that was undertaken contrary to the transparent effort in an attempt to favor a political party or an incumbent in violation of the Florida Constitution, clearly that would be important evidence in support of the claim that the Legislature thwarted the constitutional mandate.” (citation omitted)).

466. Participants in the legislative process leading up to Ad Astra 2’s passage testified that it was a process in which the public was given little notice of meetings and little time to testify; Republicans unilaterally scheduled meetings without redistricting guidelines in place or census data to guide mapmaking; and maps were rushed through at considerable speed with no input from or consultation with the minority party. *See supra* FOF § I. Senator Corson testified that the only instance in which he saw legislation move through the Senate at such speed was following the 2021 cold snap when it became necessary to get emergency funds to Kansas cities in order for them to pay utility bills. Hr’g Tr. Day 1 Vol. 2 at 222:2-25. No such exigency existed here. The process that led to Ad Astra 2’s passage leads to a strong inference of partisan intent.

467. The Court has no difficulty finding, as a factual matter, that Ad Astra 2 is an intentional, effective pro-Republican gerrymander that systemically dilutes the votes of Democratic Kansans. *See supra* FOF § II. The Court notes that its conclusions in this regard are based on evidence similar to that relied on by other state courts adjudicating partisan gerrymandering claims, including expert testimony about the plan’s

extreme partisan bias, *e.g.*, *League of Women Voters of Pa.*, 645 Pa. at 126-28; *Harper*, 868 S.E.2d at 547-49; *Adams*, 2022 WL 129092 at *14; expert testimony about the plan's deviations from neutral redistricting criteria, *e.g.*, *League of Women Voters of Pa.*, 645 Pa. at 124; *Harper*, 868 S.E.2d at 548; *Adams*, 2022 WL 129092 at *10–11; expert examination of district features, *e.g.*, *League of Women Voters of Pa.*, 645 Pa. at 126; and lay witness testimony about irregularities in the process leading to the plan's adoption, *e.g.*, *League of Women Voters of Ohio*, 2022 WL 110261, at *24-25.

468. Accordingly, the Court reviews Ad Astra 2 under strict scrutiny. *Harper*, 868 S.E.2d at 554–55. Defendants have not shown that Ad Astra 2 is narrowly tailored to a compelling governmental interest, and therefore the map fails strict scrutiny. Partisan advantage is neither a compelling nor a legitimate governmental interest. Rather, given an infringement of Plaintiffs' fundamental right to substantially equal voting power, Defendants must show that the map is narrowly tailored to meet traditional neutral districting criteria, including those expressed in the legislative committees' own Guidelines or other neutral principles. Here, Defendants failed to make that showing or a showing that Ad Astra 2 is narrowly tailored to advance some compelling nonpartisan goal. Accordingly, Ad Astra 2 fails strict scrutiny.

469. In light of the foregoing, the Court concludes that Ad Astra 2 constitutes an intentional and effective partisan gerrymander in violation of Sections 1, 2, 3,

11, and 20 of the Kansas Bill of Rights, as well as Article V, Section 1 of the Kansas Constitution.

IV. The intentional, effective racial vote dilution in Ad Astra 2 violates the Kansas Constitution.

470. Ad Astra 2 is also unconstitutional on the independent and distinct ground that it dilutes minority votes in violation of the Kansas Constitution's equal rights and political power clauses. Kan. Const. Bill of Rights, §§ 1, 2. Kansas's guarantee of equal benefit "affords separate, adequate, and greater rights than the federal Constitution." *Farley*, 241 Kan. at 671; *see also Hodes & Nauser*, 309 Kan. at 638. The Court therefore clearly and expressly decides Plaintiffs' racial vote dilution claims exclusively under Sections 1 and 2 of the Kansas Bill of Rights. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

471. While the Kansas Constitution's broader solicitude against racial discrimination likely means that a showing of intent is not required to establish a violation of Sections 1 and 2 of the Bill of Rights, the Court need not resolve this issue of first impression. The parties agree that *intentional* racial discrimination is unlawful under the Kansas Constitution, and the Court concludes that Ad Astra 2 *intentionally* and effectively dilutes minority votes.

472. Intentional racial vote dilution violates the Kansas Constitution's guarantee of equal rights and equal benefit of political power. For a districting plan to constitute unlawful, intentional racial vote dilution, racial discrimination need not be the sole motivating

factor, or even the primary motivation behind the law. Rather, it suffices to invalidate the plan if racial vote dilution was *a* purpose behind the plan, even if there were other motivating factors, such as partisanship. *Cf. Robinson v. United States*, 878 A.2d 1273, 1284 (D.C. 2005) (noting that racial discrimination need not be sole motive and is improper if it was an influence in the decision-making process even if other nonracial considerations also played a role).

473. While discriminatory effect alone does not prove intent, “discriminatory impact can support an inference of discriminatory intent or purpose.” *Holmes v. Moore*, 840 S.E.2d 244, 256 (N.C. Ct. App. 2020) (emphasis in original); *see also Jones v. Kansas State Univ.*, 279 Kan. 128, 145, 106 P.3d 10 (2005). Indeed, direct evidence of intent is not required. *See Jones*, 279 Kan. at 145; *Holmes*, 840 S.E.2d at 255 (noting that outright admissions of discriminatory intent are now rare and other circumstantial evidence must be assessed). This Court instead considers the totality of the circumstances to determine the Legislature’s intent. *See Jones*, 279 Kan at 145 (noting that historical background, circumstances surrounding passage, and the purpose to be accomplished are among considerations in legislative intent); *see also Holmes*, 840 S.E.2d at 254-55 (noting that discriminatory effect, the historical background, procedural departures from the norm, and the events surrounding the enactment are relevant to ascertaining whether legislation was infected by intentional racial discrimination).

474. Moreover, racial animus or *racist* sentiments are not required showings in an intentional racial discrimination claim. *See, e.g., Garza v. County of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring) (noting that a white homeowner in an all-white neighborhood who harbors no racial animus still intentionally discriminates if he agrees not to sell his home to minorities in order to maintain higher property values in the neighborhood); *id.* (“Your personal feelings toward minorities don’t matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.”).

475. Thus, vote dilution is intentional and unlawful if the Legislature had as one objective the dilution of minority voters’ ability to elect their preferred candidates, even in the absence of actual racial prejudice.

476. The Court identifies five non-exclusive factors that are particularly relevant to determining intent: (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. *See Jones*, 279 Kan. at 145. The Court holds that in this case, consideration of

these factors compels the conclusion that the Legislature acted with discriminatory intent.

A. Ad Astra 2 has a more negative effect on minority voters than white voters in CD 2 and CD 3.

477. First, Ad Astra 2 treats minority votes significantly less favorably than white voters. Minority voters' preference for Democratic candidates does not mean that the redistricting plan's treatment of Democratic voters is synonymous with its treatment of minority voters. On the contrary, Dr. Collingwood testified that Ad Astra 2 treats minority Democrats even less favorably than it treats white Democrats. Hr'g Tr. Day 3 Vol. 1 at 142:23-143:14 (Collingwood). Although under the prior plan CD 3 had a minority voting age population ("VAP") of 29%, the portion of Wyandotte County the new plan exports to CD 2 is two-thirds minority by voting age—meaning Ad Astra 2 disproportionately removes minority voters from CD 3 at a rate of 2 to 1. PX 122 at 10, 14 (Collingwood Rep.). These minority voters now have virtually no opportunity of ever electing their preferred candidate. Hr'g Tr. Day 3 Vol. 1 at 100:17-21 (Collingwood); PX 122 at 7-8 (Collingwood Rep.). Ad Astra 2 also reduces the chances white Democratic voters in CD 3 have of electing their preferred candidate, but these white voters, by contrast, at least retain an *occasional* possibility of doing so. PX 122 at 8 (Collingwood Rep.). In this way, by shifting minority Democrats into CD 2, but leaving white Democrats in CD 3, Ad Astra 2 disfavors minority voters even when controlling for partisan affiliation. Hr'g Tr. Day 3 Vol. 1 at 143:11-

144:7 (Collingwood). And it is beyond dispute that the map treats these voters less favorably than white Republicans, who are now likely to elect their preferred candidates in all four congressional districts.

478. Ad Astra 2's dilutive effect is most evident from the performance analysis Dr. Collingwood conducted. CD 3 performed as a crossover district for minority voters under the prior plan. PX 122 at 7-8 (Collingwood Rep.); Hr'g Tr. Day 3 Vol. 1 at 99:5-8 (Collingwood). As Dr. Collingwood demonstrated, minority voters in CD 3 successfully elected their candidate of choice in 75% of the elections in which RPV existed under the prior plan. PX 122 at 7-8 (Collingwood Rep.); Hr'g Tr. Day 3 Vol. 1 at 99:5-8 (Collingwood). But Ad Astra 2 moves over 45,000 minority voters out of CD 3 into CD 2. PX 122 at 10 (Collingwood Rep.). In CD 2, these voters cannot elect their candidate of choice in *any* of the elections in which RPV is present—Ad Astra 2 completely dilutes their votes. PX 122 at 7-8 (Collingwood Rep.). Similarly, the 120,000 minority voters who remain in CD 3 are now able to elect their candidate of choice in only 25% of the elections in which RPV is present—a performance rate 200% lower than the prior CD 3. PX 122 at 7-8, 10 (Collingwood Rep.). This movement of minority votes into CD 2 ensures that minority votes are diluted in *both* CD 2 and CD 3 under Ad Astra 2.

479. Dr. Collingwood's demographic analysis illustrates the surgical manner in which Ad Astra 2 achieves this result. In Figure 8 of his report, depicted below, Dr. Collingwood illustrates that although CD 2 and CD 3 now have minority VAPs of 26.7% and 22.1%

respectively, PX 122 at 10 (Collingwood Rep.), the portion of Wyandotte County separated from CD 3 into CD 2 is 66.21% minority—over three times the total minority VAP in CD 3, PX 122 at 14-15 (Collingwood Rep.). To replace these voters, Ad Astra 2 adds counties to the southwest of Johnson County that are 90.3% white. PX 122 at 14 (Collingwood Rep.). Dr. Collingwood testified that this makes Ad Astra 2 among the starkest cuts along racial lines that he has “ever seen” in his professional work. Hr’g Tr. Day 3 Vol. 1 at 104:8-11 (Collingwood).

B. Ad Astra 2 was enacted under an abnormal legislative process.

480. Second, the process of enacting Ad Astra 2 was characterized by multiple departures from the ordinary legislative process. The Legislature conducted a listening tour, but announced it only a week in advance, completed 14 stops within just five days, and held ten of the fourteen sessions during working hours. Hr’g Tr. Day 1 Vol. 2 at 206:21-207:5, 209:8-10 (Corson). For comparison, the 2012 tour lasted for four months. Hr’g Tr. Day 1 Vol. 2 at 209:1-4 (Corson). The 2022 tour also took place *before* the release of U.S. Census data, depriving the public of a full opportunity to provide meaningful input and adding to the appearance that the tour was merely a box-checking exercise. Hr’g Tr. Day 1 Vol. 2 at 210:22-24 (Corson); Hr’g Tr. Day 2 Vol. 1 at 9:14-15 (Burroughs). Critically, at this point the public could not yet have known that Wyandotte and Johnson Counties could no longer fit within a single congressional district. Hr’g Tr. Day 2 Vol. 1 at 9:20-23 (Burroughs). Moreover, in the more

populous communities, members of the public were limited to providing two minutes of testimony, a constraint Senator Corson could not recall having occurred previously in the legislative process. Hr'g Tr. Day 1 Vol. 2 at 267:3-14 (Corson).

481. The procedural irregularities persisted once the legislative session began. The Senate and House Redistricting Committees simultaneously introduced Ad Astra 2 on Tuesday, January 18. Hr'g Tr. Day 1 Vol. 2 at 220:14-19 (Corson); Hr'g Tr. Day 2 Vol. 1 at 12:24-13:4 (Burroughs). They each held hearings on the bills just two days later, before the data underlying the maps was publicly available, and at the same time, which prevented members of the public from attending both hearings. Hr'g Tr. Day 1 Vol. 2 at 220:19-221:2 (Corson); Hr'g Tr. Day 2 Vol. 1 at 13:18-25 (Burroughs). At the hearings, all but one witness testified against the plan. Hr'g Tr. Day 1 Vol. 2 at 221:3-6 (Corson). Nevertheless, the Senate passed the map in an emergency session and on a largely party-line vote 72 hours after it was introduced. Hr'g Tr. Day 1 Vol. 2 at 221:9-11 (Corson); DX 1007-11. The House followed suit just days later. Hr'g Tr. Day 2 Vol. 1 at 20:212-17 (Burroughs); DX 1007-5. Senator Corson testified that he was aware of only one other instance in which important legislation was passed on such a hurried timeline—an actual emergency related to municipal funding following the cold snap of February 2021. Hr'g Tr. Day 1 Vol. 2 at 221:25-222:9 (Corson).

482. This hurried and publicly opaque process continued even after Governor Kelly vetoed the bill. After an initial attempt to override the veto failed in

the Senate, Republican leadership confined Senators to their seats for nearly three hours while they whipped votes. *See* PX 162 at 54:00-3:24:55 (recording of Feb. 7, 2022 Senate veto override session). Ultimately, leadership was forced to hold a failed vote, but Senator Masterson joined the “no” votes as a means of preserving his ability to call for reconsideration. DX 1007-4; PX 162. The next day, Republicans successfully flipped the remaining holdouts, after a “thuggish,” Hr’g Tr. Day 1 Vol. 2 at 231:20-22 (Corson), series of “backroom deals,” PX 760 at 7. The House passed the bill the next day. *See* PX 174 at 18 (noting vote changes); PX 163 at 43:00-1:45:00 (recording of February 9, 2022 House veto override session) (showing hour-long delay from calling of override vote to conclusion of vote, during which Representatives were confined to their seats). The series of procedural departures attendant to the passage of Ad Astra 2 point to a discriminatory intent in its adoption.

C. Several aspects of the legislative process that led to Ad Astra 2 impacted minority voters’ participation.

483. Third, the legislative process excluded minority voters in particular. As discussed, the 2020 U.S. Census data revealed that for the first time that Wyandotte County—home to Kansas’s largest concentration of minority voters—and Johnson County could no longer remain in a single congressional district. This made it particularly important for Wyandotte County residents to provide input on the redistricting cycle. But the legislature foreclosed this opportunity. Instead, the body conducted its listening

tour before this information became public, and then offered no meaningful opportunity for further public participation in the process. *See* Hr’g Tr. Day 1 Vol. 2 at 210:22-24, 220:19-221:2 (Corson); Hr’g Tr. Day 2 Vol. 1 at 9:14-15, 13:18-25 (Burroughs).

484. The scheduling of the listening tour sessions—all during the work day—made it particularly difficult for minority voters to testify. The Court notes that Stacy Noel, executive director of the Kansas African American Affairs Commission, a state-level agency, said in her testimony at the listening session in Kansas City on August 12, 2021 that even she had to request approval from her boss to leave work to testify at the hearing at 1:30 p.m.²²

485. Moreover, Republican leadership scheduled each listening tour stop for 75 minutes, regardless of the stop’s location within the state, meaning that minority residents near Kansas City were afforded less time to speak than white, rural voters at the listening tour stops in the western part of the state. Hr’g Tr. Day 1 Vol. 2 at 209:11-210:13 (Corson). Northeast Kansas voters, including minority voters from Wyandotte County, were given only two minutes to testify, which according to Senator Corson was “not nearly enough time . . . to adequately explain” their views and is “at the far, far short end” of time allotments for witnesses at a legislative hearing. Hr’g Tr. Day 1 Vol. 2 at 209:25-210:13, 267:3-14 (Corson).

²² Redistricting Committee Listening Tour Recording at 6:45:00 (Kansas City, Aug. 12, 2021), <http://sg001-harmony.sliq.net/00287/Harmony/en/PowerBrowser/PowerBrowserV2/20210812/-1/11587>.

486. Significantly, when the public did voice its support for preserving Wyandotte County during the legislative session, its input was resoundingly ignored. Hr'g Tr. Day 1 Vol. 2 at 221:3-6 (Corson). Ultimately, the bill was "greased to go," and the minority communities most impacted had no chance to stop it. Hr'g Tr. Day 2 Vol. 1 at 17:14-24 (Burroughs).

D. Ad Astra 2 substantively departed from prior plans as it relates to minority voters.

487. Fourth, the plan is an unprecedented departure from prior plans in its treatment of minority voters. Indeed, "Wyandotte and Johnson Counties have been in the same district in their entirety for ninety of the last one hundred years," preserving the Kansas City Metropolitan Area and its large minority population in a single congressional district for generations. PX 58 at 3, 31 (P. Miller Rep.).

488. Courts in previous redistricting cycles have explicitly recognized the need to keep Wyandotte County in a single district to avoid unlawful dilution of its minority voting strength. *See O'Sullivan v. Brier*, 540 F. Supp. 1200, 1204 (D. Kan. 1982) (three-judge court) ("[S]plitting the large minority population of Wyandotte County between two districts is undesirable unless compelled by some significant reason. Minorities find it difficult to make their views count in a political system in which majorities rule; being able to maintain block voting strength in areas where they live closely together, as in Wyandotte County, helps them make their voices felt."); *Essex v. Kobach*, 874 F. Supp. 2d 1069, 1086 (D. Kan. 2012) (per curiam) (three-judge

court) (“The Court also agrees with *O’Sullivan* that Wyandotte County should be placed in a single district so that the voting power of its large minority population may not be diluted.”).

489. Under Ad Astra 2, however, 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. PX 122 at 14-15 (Collingwood Rep.). The map transplants over 45,000 minority voters in metro Kansas City from CD 3 to CD 2, cracking apart a performing crossover district so that minority voters on both sides of the line can no longer elect their candidate of choice. PX 122 at 10 (Collingwood Rep.). CD 3, previously home to the state’s largest minority population, now has the smallest minority population of any congressional district in the state. Hr’g Tr. Day 3 Vol. 1 at 104:22-25 (Collingwood). Not only is the one of the starkest divides along racial lines that Dr. Collingwood testified he had ever seen, it is a stark departure from the state’s historic treatment of minority voters. Hr’g Tr. Day 3 Vol. 1 at 104:8-11 (Collingwood).

E. The history of socioeconomic disparities along racial lines, particularly along the I-70 divide in Wyandotte County, bears on the Court’s assessment of the proffered rationale for Ad Astra 2’s stark racial divide.

490. Dr. Edwards testified to the socioeconomic disparities and inequities experienced by Wyandotte County’s minority residents. She explained that “[t]he northern part of Wyandotte County”—where the

county's minority population is concentrated—is an area that historically has been disinvested.” Hr’g Tr. Day 2 Vol. 1 at 42:7-14 (Edwards). The residents in that area “have about a \$15,000 difference in median income,” and “the northeast side of Wyandotte” contains “a lot of poverty” and “a lot of aging in terms of the infrastructure as well as our population.” Hr’g Tr. Day 2 Vol. 1 at 42:14-43:1 (Edwards); *accord* Hr’g Tr. Day 2 Vol. 1 at 49:2-7 (Edwards) (“[A]bove Highway 70, again, that is the community that is the most disinvested[,] that has the \$35,000 median income, that has the highest number of people of color, and it has the greatest need identified.”). The southern area of Wyandotte County, by contrast, features “higher income levels” and better access to healthcare and amenities. Hr’g Tr. Day 2 Vol. 1 at 43:2-13, 44:1-10 (Edwards). Consequently, residents of northern Wyandotte County must rely on the southern part of the county for basic resources like grocery stores. Hr’g Tr. Day 2 Vol. 1 at 47:12-48:3 (Edwards).

491. Defendants contend that the stark racial divide between CDs 2 and 3 in Wyandotte County under Ad Astra 2 is explained by the location of I- 70. But the Court concludes, based upon the totality of the evidence and the testimony, that attempts to justify the stark racial divide in Ad Astra 2 based upon neutral explanations are pretext. Indeed, I-70 has itself long been known as racially divisive—literally and figuratively. The highway “separated the more White southern part of Wyandotte from the less White northern part” and “further divided minority-heavy neighborhoods in northern and southern Wyandotte from each other by running through the center of

eastern Wyandotte” PX 58 at 20. The choice to locate I-70 in this manner built on “decades [of] maintaining residential segregation through violence and discriminatory housing policies [which] forged many hyper-White or hyper-Black neighborhoods, and limited the number of racially mixed neighborhoods” in the area. PX 58 at 20. This was a deliberate choice. The highway could have continued due east from Lawrence, a more logical choice, through Johnson County, which was less developed at the time, or further south in Wyandotte County. PX 58 at 20. Instead, its architects deliberately imposed a racial barrier between white and minority communities.

492. While the motivations 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, it is noteworthy because the racial divide along the highway is widely known in Kansas, and would have been an obvious implication to those developing and enacting the plan. Any number of highways—or other natural or manmade features—that do not so closely divide Kansas on the basis of race could have formed a barrier along which to divide a county. In light of all the other direct and circumstantial evidence the Court has weighed, the Court concludes that the proffer of I-70 as the explanation for why Ad Astra 2 splits Wyandotte County starkly along racial lines is a pretextual explanation.

F. Plaintiffs presented other meaningful, circumstantial evidence of racially discriminatory intent.

493. Other experts and lay testimony provide further evidence that the Legislature intended, at least in part, to dilute the voices of minority voters in its drawing of the Ad Astra 2 plan. For example, Dr. Collingwood's analysis showed that voting in Kansas is racially polarized with minority voters favoring Democratic candidates. Dr. Chen's simulations evince a legislative design that intentionally submerges these voters in districts that will not perform for the minority-preferred candidate. Dr. Chen generated a set of 1,000 race-blind plans. His results shows that 94.9% of the neutral plans had a higher minority population share than the most Democratic district in Ad Astra 2. *See supra* FOF § III.C. Dr. Rodden demonstrated that minority voters were moved between districts at a much higher rate than non-minority voters and that Ad Astra 2 cracked minority voters in Wyandotte County, placing them in districts that have much lower minority populations than would have occurred under neutral redistricting criteria. *See supra* FOF §§ II.B, III.A. Dr. Collingwood's minority POC map showing *where* the line separating CDs 2 and 3 was drawn is further compelling evidence of intentional classification on the basis of race, since the map shows that the line surgically targets the most heavily minority areas. *See supra* FOF § III.B. Dr. Miller's race maps demonstrate clear cracking of racially polarized minority groups in Wyandotte County. *See supra* FOF § III.D. In other words, Ad Astra 2 does not dilute minority votes by mistake.

494. Remarks during the legislative debate on the map also demonstrate that the Legislature was keenly aware of how the map affected minority voters, yet decided to enact it anyway. *See, e.g., supra* FOF § I. In fact, Senator Corson prompted an extensive discussion of how the map would dilute minority votes while pushing back against Ad Astra 2 on the Senate floor, and members of the majority party acknowledged the effects on minority voters that Senator Corson described. *See, e.g.,* PX 168 at 65:25-81:17.

495. 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.

496. The Court therefore concludes that Ad Astra 2 intentionally and effectively dilutes minority votes in violation of the Kansas Constitution’s guarantee of equal protection. Kan. Const. Bill of Rights, §§ 1, 2.

In conclusion, let us return to where we began. The future of Kansas democracy rests securely in the wise,

competent, strong hands of the citizens. It is not the province of the court to tell Kansans what their choice should be. Choose wisely and always remember the words of one of our greatest judges. Judge Learned Hand said:

“Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it. And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a ... few...”²³

The court finds and orders as follows:

1. Ad Astra 2 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.
2. Defendants and their respective agents, officers, and employees are permanently enjoined from preparing for or administering any primary or general congressional election under Ad Astra 2.

²³ The “Spirit of Liberty” Speech – Judge Learned Hand – Presented in 1944 during “I AM an American Day”

3. The Legislature shall enact a remedial plan in conformity with this opinion as expeditiously as possible considering the time necessary for the Secretary of State and local election officers to prepare appropriate ballots and related documents. The remedial plan must be prepared in time for all Kansas voters to know in which congressional district they reside.
4. The Court shall retain jurisdiction over the matter to ensure compliance with this order.
5. This Order shall remain in effect until completed or modified by the Kansas Supreme Court.

s/ _____
Bill Klapper
District Court Judge

April 25, 2022

Date

(Certificate of Service omitted in this appendix)

APPENDIX C

[Seal]

Court: Supreme Court

Case Number: 125092

Case Title: FAITH RIVERA, ET AL.,
TOM ALONZO, ET AL.,
SUSAN FRICK, ET AL.,
APPELLEES,

V.

SCOTT SCHWAB, KANSAS
SECRETARY OF STATE, IN HIS
OFFICIAL CAPACITY, AND
MICHAEL ABBOTT,
WYANDOTTE COUNTY
ELECTION COMMISSIONER,
IN HIS OFFICIAL CAPACITY,
APPELLANTS,

AND

JAMIE SHEW, DOUGLAS
COUNTY CLERK, IN HIS
OFFICIAL CAPACITY,
APPELLEE.

Type: Alonzo and Rivera Plaintiffs-
Appellees' Motion for Rehearing

Considered by the Court and denied.

App. 394

SO ORDERED.

/s/ Marla J. Luckert, Chief Justice

Electronically signed on 2022-08-26 11:10:39

