No. 22-___

IN THE

Supreme Court of the United States

THOMAS C. ALEXANDER, ET AL.,
Appellants,

v.

THE SOUTH CAROLINA STATE CONFERENCE OF THE NAACP, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of South Carolina

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

The three-judge district court never mentioned the presumption of the South Carolina General Assembly's good faith, analyzed Congressional District 1 as a whole, or examined the intent of the General Assembly as a whole. It also disregarded the publicly available election data used to draw District 1 and legislator testimony demonstrating that politics and traditional districting principles better explain District 1 than race. And it never identified an alternative map that achieved the General Assembly's political objectives while similarly adhering to traditional criteria.

The court nonetheless held that a portion of District 1 is racially gerrymandered and discriminatory, and therefore permanently enjoined elections there. After an eight-day trial featuring more than twenty witnesses and hundreds of exhibits, the court rested this holding on its brief questioning of the experienced nonpartisan map drawer and its conclusion that he used a racial target as a proxy for politics in District 1. Plaintiffs did not pursue that theory at trial, and the court never explained why the General Assembly would use race as a proxy to draw lines for political reasons when it could (and did) use election data directly to do the job.

The questions presented are:

1. Did the district court err when it failed to apply the presumption of good faith and to holistically analyze District 1 and the General Assembly's intent?

2. Did the district court err in failing to enforce the alternative-map requirement in this circumstantial case?
3. Did the district court err when it failed to disentangle race from politics?
4. Did the district court err in finding racial predominance when it never analyzed District 1's compliance with traditional districting principles?
5. Did the district court clearly err in finding that the General Assembly used a racial target as a proxy for politics when the record showed only that the General Assembly was aware of race, that race and politics are highly correlated, and that the General Assembly drew districts based on election data?
6. Did the district court err in upholding the intentional discrimination claim when it never even considered whether—let alone found that—District 1 has a discriminatory effect?

PARTIES TO THE PROCEEDINGS AND RELATED PROCEEDINGS

Appellants are Thomas C. Alexander, in his official capacity as President of the South Carolina Senate; Luke A. Rankin, in his official capacity as Chairman of the South Carolina Senate Judiciary Committee; G. Murrell Smith, Jr., in his official capacity as Speaker of the South Carolina House of Representatives; Chris Murphy, in his official capacity as Chairman of the South Carolina House of Representatives Judiciary Committee; Wallace H. Jordan, in his official capacity as Chairman of the South Carolina House of Representatives Elections Law Subcommittee; Howard Knapp, in his official capacity as Executive Director of the South Carolina State Election Commission; and John Wells, JoAnne Day, Clifford J. Edler, Linda McCall, and Scott Moseley, in their official capacities as members of the South Carolina Election Commission. Appellants were defendants before the three-judge district court of the U.S. District Court for the District of South Carolina. The initial complaint also named as a defendant Henry D. McMaster, in his official capacity as Governor of South Carolina, but the operative complaint did not.

Appellants Alexander and Rankin are the "Senate Appellants." Appellants Smith, Murphy, and Jordan are the "House Appellants." The remaining Appellants are the "State Election Commission Appellants."

Appellees are the South Carolina State Conference of the National Association for the Advancement of Colored People (NAACP) and Taiwan Scott. Appellees were plaintiffs before the three-judge district court.

The relevant orders are:

S.C. State Conf. of the NAACP v. Alexander, No. 3:21-cv-3302 (D.S.C. Jan. 6, 2023) (findings of fact, conclusions of law, judgment, and injunction).

S.C. State Conf. of the NAACP v. Alexander, No. 3:21-cv-3302 (D.S.C. Feb. 4, 2023) (order denying stay pending appeal).

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INTRODUCTION

Redistricting is "primarily the duty and responsibility of the State." *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (internal citation omitted). Because "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," federal courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Id.* at 915-16. "[T]he good faith of a state legislature must be presumed," and "States must have discretion to exercise the political judgment necessary to balance competing interests," *id.*, including the "political considerations" that are "inseparable from districting," *Rucho v. Common Cause*, 139 S. Ct. 2484, 2497 (2019).

The three-judge panel abandoned all pretext of extraordinary caution in this case. In striking down an isolated portion of South Carolina Congressional District 1 as a racial gerrymander, the panel never even mentioned the presumption of the General Assembly's "good faith." *Miller*, 515 U.S. at 915. It also never analyzed District 1 "as a whole," *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 192 (2017), or inquired into the intent of the General Assembly "as a whole," *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349-50 (2021). The result is a thinly reasoned order that presumes bad faith, erroneously equates the purported racial effect of a single line in Charleston County with racial predominance across District 1, and is riddled with "legal mistake[s]" that improperly relieved Plaintiffs of their "demanding" burden to prove that race was the "predominant consideration" in District 1. *Cooper*

v. Harris, 581 U.S. 285, 309, 318-19 (2017). This Court should note probable jurisdiction and reverse.[1]

The panel recognized that the Republican-controlled General Assembly "sought to create a stronger Republican tilt" in District 1, a Republican-majority district that had elected a Democratic representative in 2018 in "a major political upset." App.21a. Extraordinary caution therefore was "especially appropriate" here, "where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (*Cromartie II*). The panel did not manage that. Plaintiffs adduced no "direct evidence of a racial gerrymander" and instead "needed to rely on evidence of forgone alternative[]" maps to prove their claims. *Cooper*, 581 U.S. at 321. But the Enacted Plan was the *only* plan presented at trial that achieved the General Assembly's political objective. App.525a. *Each* of Plaintiffs' alternative maps "harm[ed]" that objective by turning District 1 into a majority-Democratic district. *Cooper*, 581 U.S. at 321. Plaintiffs therefore failed to show that "race *rather than* politics *predominantly* explained" District 1, *Cromartie II*, 532 U.S. at 243 (emphasis in original), and the panel's failure to reject their claims on that

[1] Because the State Election Commission Appellants have consistently taken no position on the merits of the litigation, they defer to their co-appellants on the merits. The State Election Commission Appellants believe that this jurisdictional statement presents serious issues that must be resolved before conducting any other congressional election in South Carolina.

basis warrants reversal, *see id.* at 258; *Cooper*, 581 U.S. at 321.

In addition to that fatal flaw, the panel never undertook the "formidable task" of conducting "a sensitive inquiry into all circumstantial and direct evidence of intent to assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines." *Cooper*, 581 U.S. at 308. Instead, it myopically focused on the purported racial effect in Charleston County, even though any such effect is insufficient to disentangle race and politics. *Cromartie II*, 532 U.S. at 243. Moreover, it ignored the voluminous evidence that disproved its preferred conclusion of racial predominance.

For example, the 2020 election data used to draw the Enacted Plan was publicly available online throughout the redistricting process and was admitted into evidence. App.495a. The panel did not even mention that data, thereby disregarding that the General Assembly achieved its political goal by increasing District 1's Republican vote share by 1.36 percentage points. App.156a, 431a, 446a. The panel also disregarded that this change in District 1's political composition dwarfed the change in its racial composition, since its black voting-age population (BVAP) increased by 0.16 percentage points. App.156a-157a, 430a, 452a. Thus, politics more readily explains the Enacted Plan's changes to District 1 than race, but the panel ignored that.

The panel also ignored the obvious political explanation, confirmed by the 2020 election data, for maintaining the Charleston County split. It never

mentioned that Charleston County has been split in every congressional districting plan since 1994, including the 2002 court-drawn plan and the 2011 Benchmark Plan upheld against racial gerrymandering claims in an opinion this Court summarily affirmed. *See Backus v. South Carolina*, 857 F. Supp. 2d 553, 560 (D.S.C.), *aff'd*, 568 U.S. 801 (2012). It also never mentioned that Charleston County, unlike neighboring counties, is majority-Democratic, or that the Enacted Plan follows partisan patterns to move heavily Democratic areas of Charleston County out of District 1. And it even ignored testimony from the Enacted Plan's sponsor and the Senate Majority Leader explaining that the continuation of the Charleston County split was based on politics and traditional criteria, not race.

The panel's errors did not end there. Plaintiffs' "demanding" burden was to prove that the General Assembly "subordinated" traditional criteria to "racial considerations." *Cooper*, 581 U.S. at 291, 319. The panel improperly lowered that burden when it ignored that the Enacted Plan complies with, rather than subordinates, traditional criteria across District 1 and in Charleston County. It nowhere mentioned that the Enacted Plan, including in District 1 and Charleston County, adheres to—and even outperforms all of Plaintiffs' alternatives on—several traditional criteria the General Assembly elevated, such as core preservation, maintenance of communities of interest, and incumbent protection. Nor did it mention that, in Charleston County, the Enacted Plan repaired all five split voting tabulation districts (VTDs) and conformed the district line to the county boundary and natural geographic features.

The panel thus reached its conclusion only by injecting legal error at every turn, crafting its own record, and ignoring the lion's share of the evidence. The thrust of its order is its (erroneous) conclusion that the map drawer used a racial target as a proxy for politics in drawing District 1. That conclusion is "'infect[ed]'" with the panel's myriad "'errors of law'" and "cannot stand." *Abbott v. Perez*, 138 S. Ct. 2305, 2326 (2018). It also makes no sense: whereas race is *highly* correlated with politics, election data is *perfectly* correlated with politics. The panel never tried to explain why the General Assembly would use race as a *proxy* for politics when it could (and did) use election data *directly* for politics.

If left uncorrected, the panel's decision would place state legislatures in an impossible bind: it would improperly turn the purported racial *effect*, in a single line, of pursuing political goals and traditional criteria into racial *predominance* across an entire district. The Court should note probable jurisdiction and reverse.

To ensure clarity for the 2024 election cycle, Appellants respectfully request that the Court schedule oral argument for no later than October 2023 and issue a decision by January 1, 2024. Appellants reserve the right to seek a stay of the district court's injunction if appellate proceedings remain pending in early 2024. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam); *Merrill v. Milligan*, 142 S. Ct. 879 (2022).

OPINION BELOW

The district court's order under review is available at 2023 WL 118775 and App.9a-49a. Its order clarifying the injunction is available at App.1a-8a.

JURISDICTION

The district court, empaneled under 28 U.S.C. § 2284(a), issued its order on January 6, 2023. App.49a. It clarified its injunction on February 4, 2023. App.8a. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

Under the Fourteenth Amendment's Equal Protection Clause, no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Under the Fifteen Amendment, "[t]he right of citizens of the United States to vote shall not be denied or abridged . . . by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.

STATEMENT

A. South Carolina Redistricting After the 2000 and 2010 Censuses.

Almost thirty years ago, in 1994, the General Assembly enacted into law a congressional districting plan that split Charleston County between Districts 1 and 6. *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 664-66 & n.29 (D.S.C. 2002) (three-judge court). During the next districting cycle, following an impasse, a three-judge panel drew a new

plan. *Id.* at 664. That plan maintained the Charleston County split. *Id.* at 666 n.29.

In 2011, the General Assembly adopted an updated districting plan (the "Benchmark Plan") to account for population changes revealed by the 2010 Census and the apportionment of a seventh congressional district to the State. *Backus*, 857 F. Supp. 2d at 557. The Benchmark Plan maintained the Charleston County split. The Department of Justice precleared, and a three-judge court upheld, that plan. *Id.* at 557-70. This Court summarily affirmed. 568 U.S. 801.

With the exception of one election, the Benchmark Plan yielded a 6-1 Republican-Democrat congressional delegation over the next decade. District 1 consistently elected a Republican representative until 2018, when white Democrat Joe Cunningham was elected in "a major political upset." App.21a. In 2020, District 1 returned to form, narrowly electing Republican Nancy Mace and favoring the Republican candidate for President by a margin of 53.03% to 46.97%. App.21a, 431a. Five other districts elected Republican representatives each year and favored the Republican candidate for President in 2020. App.431a. Only District 6 elected a Democratic representative—Congressman Jim Clyburn—and favored the Democratic candidate for President. App.17a, 431a.

B. South Carolina Redistricting After the 2020 Census.

The 2020 Census results revealed that the Benchmark Plan had become malapportioned. App.16a-17a. Although five districts had "relatively small" deviations from the ideal size of 731,203

persons, Districts 1 and 6 had "significant" deviations due to population shifts away from predominantly African-American areas and toward coastal areas over the preceding decade. App.16a-17a, 428a. District 1 was overpopulated by 11.99% (87,689 persons) and neighboring District 6 was underpopulated by 11.59% (84,741 persons). App.17a.

The General Assembly developed an updated districting plan via an open and robust process. The Senate and House adopted similar, publicly accessible redistricting guidelines, established websites and email addresses for public input, made redistricting data and plans publicly available, and held numerous public hearings. *See* App.15a-16a, 20a-21a, 495a. Thousands of citizens actively participated, providing hours and thousands of pages of testimony. Plaintiffs and others proposed plans for the General Assembly's consideration, including Plaintiffs' "NAACP Plan 1" and "NAACP Plan 2" and the "League of Women Voters Plan." *See* App.22a.

To develop a new plan, the Senate relied on Will Roberts, an "experienced cartographer" and nonpartisan staffer who has worked in state government for nearly two decades and was entrusted to advise the panel in *Backus*. App.23a. Under the Senate's open-door policy, any member could request a map drawn to her specifications; Mr. Roberts drew maps for Republican and Democratic senators, often aiming to achieve political results at their request. *See* App.80a-81a, 87a-89a, 97a-100a.

Mr. Roberts also drew a plan based upon a submission on behalf of Congressman Clyburn. *See* App.23a-24a. This plan (named the "Milk Plan" after

South Carolina's official beverage) maintained a split of Charleston County and reduced District 1's BVAP to 15.48%. App.120a, 123a, 492a. The Milk Plan generated a 54.3% Republican vote share in District 1. *See* App.493a.

At no time during the drafting of any plan did Mr. Roberts draw lines based on race. App.92a. Instead, he drew maps based on election data and traditional criteria. App.93a-97a, 100a-102a, 105a, 132a-133a, 150a-153a. In November 2021, starting with the Benchmark Plan and relying "heavily" on the Milk Plan, Mr. Roberts developed the "Senate Staff Plan," App.104a-106a, 128a, which aimed to preserve district cores, accommodate the requests of Congressman Clyburn and other legislators, adhere to traditional criteria, and make District 1 more Republican-leaning, *see* App.105a, 128a-134a.

After the Senate held a subcommittee meeting and received public input on the Senate Staff Plan, Mr. Roberts and the Senate staff drafted Senate Amendment 1 under the direction and sponsorship of Senator Chip Campsen. App.136a-137a. That amendment modestly "modifi[ed]" the Senate Staff Plan and ultimately became the Enacted Plan. *See* App.128a, 137a. Senator Campsen confirmed at trial that he never considered race or reviewed racial data while Senate Amendment 1 was drawn. App.345a-346a. Mr. Roberts drew several plans for Senator Campsen; for each, he reported to the senator the political and population data for District 1, but never any racial data. App.140a-143a, 487a-489a.

Senator Campsen "sought to create a stronger Republican tilt" in District 1, App.21-22a, while

"honoring" traditional criteria, App.334a. He preferred to make whole in District 1 Beaufort and Berkeley Counties, both of which are majority-Republican and had been split in the Benchmark Plan. App.354a-356a. Senator Campsen noted at trial the "very strong [local] sentiment" to reunify Beaufort, and public support for unifying Berkeley, in District 1. App.320a.

Senator Campsen also confirmed at trial that he preferred to keep Charleston County (his home county) split between Districts 1 and 6. For one thing, the combined populations of Beaufort, Berkeley, and Charleston exceed the ideal district population, so placing them together in District 1 would have violated the one-person, one-vote requirement. App.356a. For another, placing Charleston County entirely in District 1 yields a "majority Democratic district, based upon the political data we had." App.337a. Senator Campsen also explained that having two representatives for Charleston County—particularly one Republican and one Democrat—"benefit[s] the local community" on "bread-and-butter things" like "influence with the incumbent administration" and port maintenance. App.337a-339a. He noted: "Jim Clyburn has more influence with the Biden Administration perhaps than anyone in the nation, because he probably wouldn't be president if it weren't for Jim Clyburn." App.338a. He continued: "I'm tickled to death that Jim Clyburn represents Charleston County." App.37a. Public input also supported keeping Charleston County split.

Senate Majority Leader Shane Massey testified at trial that partisanship was "one of the most important factors" in the Enacted Plan. App.265a. He testified

that it would have been "political malpractice" to pass a plan that improved Democratic chances in District 1 and that the Republican-majority General Assembly was "not going to sacrifice the 1st." App.276a-279a. Senator Campsen and Senator Massey both testified that, for political reasons, the General Assembly would not have passed a plan that did not preserve District 1 as a majority-Republican district. App.22a, 276a-279a, 331a.

Senate Amendment 1 achieved the General Assembly's political goal by increasing District 1's Republican vote share by 1.36 percentage points. App.156a, 431a, 446a. It did so by moving "strong Republican performing" areas (such as from Beaufort, Berkeley, and Dorchester Counties) into District 1, App.22a, while moving heavily Democratic areas (including certain VTDs in Charleston County) out of District 1, *see* App.198a. District 1's BVAP increased by 0.16 percentage points under Senate Amendment 1. App.156a-157a, 430a, 452a.

Senate Amendment 1 was released to the public on January 11, 2022. Democratic Senator Richard Harpootlian released a competing proposal, Senate Amendment 2a. App.22a. Following public input, committee hearings, and floor debate, the Senate voted to adopt Senate Amendment 1 and table Senate Amendment 2a. The House adopted Senate Amendment 1 on January 26, 2022, and the Governor signed it into law that day. App.16a.

C. Plaintiffs' Challenge and the Decision Below.

Having failed to convince the General Assembly to adopt their preferred plans, Plaintiffs turned to the

courts. Their operative complaint asserted two claims against Enacted Districts 1, 2, and 5: racial gerrymandering (Count One) and intentional vote-dilution (Count Two). App.10a; *see* Third Am. Compl. ¶¶ 160-173, Dist. Ct. Dkt. 267 ("Compl."). Plaintiffs disclaimed any challenge to District 6. App.55a. They also did not allege in their complaint or at trial that the General Assembly had adopted a "racial target" in District 1. *See* Compl.

Following robust discovery—including discovery of internal legislative documents and testimony the panel refused to recognize as privileged—and an eight-day trial, the panel issued it decision on January 6, 2023. App.9a-49a. The panel rejected the challenges to Districts 2 and 5 and to the lines between Districts 1 and 6 in Jasper and Dorchester Counties. App.35a-36a, 43a, 45a-46a. The panel nonetheless declared that, only in Charleston County, District 1 is racially gerrymandered and discriminatory. App.42a-46a, 48a.

The panel identified no direct evidence of a racial gerrymander and did not disentangle race from politics. Instead, it pointed to the purported racial effect in Charleston County, without considering District 1 as a whole. App.25a-26a. Moreover, touting its own "close questioning" of Mr. Roberts, the panel concluded that he used a racial "target" in District 1 as a proxy for politics. App.23a, 25a. It further held that Plaintiffs' intentional discrimination claim is subject to the same standard as their racial gerrymandering claim and, thus, ruled for Plaintiffs on Count Two. App.45a-46a. The panel issued a "permanent injunction" against conducting elections

in District 1 until it "approve[s]" a new plan. App.47a-48a.

The panel's order followed one judge's statements in closing argument that:

- Prejudged his own theory of liability: "And I asked Mr. Roberts — I'd figured it out already."
- Made himself a witness on matters outside the record: "I know Mr. Roberts very well. He's helped me in a case I tried in this court. I've sat with him at the computer. I know him. . . . [H]e knows more at the precinct level than any living person in South Carolina."
- Presumed bad faith: "[T]here's an old statement that when you see a turtle on top of a fence post, you know someone put it there. And, you know, this is not an accident."

App.415a, 418a-419a, 421a.

Appellants filed a notice of appeal and a motion to stay on January 27, 2023. App.3a, 50a. Eight days later, the panel delayed remedial proceedings pending this appeal. App.8a.

REASONS FOR NOTING PROBABLE JURISDICTION

The panel below never applied the presumption of "good faith," *Miller*, 515 U.S. at 915, analyzed District 1 "as a whole," *Bethune-Hill*, 580 U.S. at 192, or examined the intent of the General Assembly "as a whole," *Brnovich*, 141 S. Ct. at 2349-50. These fundamental errors alone warrant reversal—and irredeemably tainted the panel's analysis at every turn. *First*, the panel improperly relieved Plaintiffs of the alternative-map requirement. *See Cromartie II*,

532 U.S. at 258; *Cooper*, 581 U.S. at 321. *Second*, the panel failed to hold Plaintiffs to their burden to "disentangle race from politics" in District 1. *Cooper*, 581 U.S. at 308. *Third*, the panel misapplied the predominance standard and failed to require Plaintiffs to show that District 1 "subordinated" traditional criteria to race. *Id.* at 291. *Fourth*, the totality of the evidence establishes that the panel clearly erred in finding predominance. *Finally*, the panel erred in upholding Plaintiffs' intentional discrimination claim without mentioning, much less enforcing, the requirement that the challenged lines impose a "disproportionately adverse effect" on African-Americans. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

This Court should note probable jurisdiction and reverse.

I. The Panel Failed To Apply The Presumption Of Good Faith And To Holistically Analyze District 1 And The General Assembly's Intent.

The panel never applied the presumption of "good faith," *Miller*, 515 U.S. at 915, analyzed District 1 "as a whole," *Bethune-Hill*, 580 U.S. at 192, or examined the intent of the General Assembly "as a whole," *Brnovich*, 141 S. Ct. at 2349-50; *see* App.9a-49a. These errors predestined the outcome because they wrongly equated the purported racial *effect* in Charleston County with a racially predominant *purpose* across District 1. App.24a-34a; *see Cromartie II*, 532 U.S. at 243; *infra* Parts II-V. Each of these errors warrants reversal. *See Abbott*, 138 S. Ct. at 2326.

In fact, the panel presumed bad faith and ignored the record as a whole when it disregarded the uncontroverted direct evidence of the General Assembly's intent, excused Plaintiffs' failure to adduce an adequate alternative plan, ran roughshod over the obvious political explanation for District 1 and the challenged line, ignored the Enacted Plan's compliance with traditional principles, and even invented a racial target out of whole cloth. *See infra* Parts II-V.

Tipping its hand, the panel acknowledged that it was driven by "doubt on the present-day validity" not of District 1 but of *District 6*, which has a 45.6% BVAP and is home to Congressman Clyburn. App.19a. The panel claimed that Benchmark District 6 was "designed to satisfy the then-existing Section 5 non-retrogression requirements." App.19a. Asserting that the Benchmark Plan "utilized race conscious line drawing" to split Charleston County between Districts 1 and 6, the panel "question[ed]" whether this alleged "racial division of Charleston County residents" is "legally justifiable" after *Shelby County v. Holder*, 570 U.S. 529 (2013). App.27a. The panel thus pulled out all the stops to justify a judicial "end" to the "division of Charleston County." App.27a, 46a.

But *Shelby County* offered no occasion for the panel's preferred course. To start, Appellees *eschewed* any challenge to District 6, so the panel's invented theory cannot sustain its decision. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). Moreover, the Charleston County split "adhered to traditional . . . principles" and did not reflect race-conscious line-drawing. *Backus*, 857 F. Supp. 2d at 560. And, regardless, *Shelby County* did not open the

floodgates to claims that declining to redraw a Voting Rights Act district constitutes a racial gerrymander. To the contrary, that reading would treat such districts *differently* because of their racial composition and render race the "predominant factor" motivating their treatment. *Cooper*, 581 U.S. at 291. *Shelby County* did not obligate the 2022 General Assembly to undo the 2011 General Assembly's compliance with the then-*lawful* mandate of Section 5. *Compare Abbott*, 138 S. Ct. at 2324 (even "past discrimination" does not "condemn governmental action that is not itself unlawful"). If anything, the panel's proposal to jettison the Charleston County split in order to end a "racial division" would be "race conscious" action, App.26a-27a, that subordinates traditional criteria.

The panel was compelled to conjure its own theory of the case because Appellees' theory is untenable. Appellees do not challenge District 6 or seek a majority-African-American district. Instead, they seek a race-conscious plan that deliberately increases District 1's BVAP from around 17% to 21% (or higher) and performs worse on traditional criteria than the Enacted Plan, *see* App.22a; *infra* Part IV, in the name of providing a district where African-American Democratic voters can combine with white Democratic voters to elect a Democratic representative, Compl. ¶ 171. The General Assembly's decision not to create such a district reflects a *lack* of racial predominance and *compliance* with the Constitution. *Supra* Part VI.

The panel concluded otherwise only by abandoning the presumption of good faith and the holistic analysis this Court's precedents require. These errors infected its opinion at every turn. *See infra* Parts II-VI. Moreover, if allowed to stand, its opinion would inject

greater race-consciousness into redistricting by fashioning both a post-*Shelby County* obligation to redraw districts that complied with the Voting Right Act at the time of their adoption and an entitlement to crossover Democratic districts under the guise of the Constitution's prohibition on racial gerrymandering. Reversal is warranted.

II. The Panel Erred In Disregarding The Alternative-Map Requirement.

A plaintiff alleging a racial gerrymander bears the "demanding" burden to show that "race *rather than* politics *predominantly* motivated" adoption of the challenged district. *Cromartie II*, 532 U.S. at 243. But because "racial identification is highly correlated with political affiliation," "political and racial reasons are capable of yielding similar oddities in a district's boundaries." *Cooper*, 581 U.S. at 308. Moreover, "a jurisdiction may engage in constitutional political [line-drawing], even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (*Cromartie I*); *see Bush v. Vera*, 517 U.S. 952, 968 (1996) (plurality op.) ("there is no racial classification to justify" when "lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race").

Thus, a plaintiff "must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles [and] br[ing] about significantly greater racial balance" compared to the challenged plan. *Cromartie II*, 532

U.S. at 258. This Court unanimously agreed in *Cooper* that "only" one kind of "alternative," an alternative map, can "carry the day" and satisfy this requirement in cases where the plaintiff has "meager direct evidence of a racial gerrymander." *Cooper*, 581 U.S. at 322; *see also id.* at 335 (Alito, J., joined by Roberts, C.J., and Kennedy, J., concurring in judgment in part and dissenting in part) (an "alternative map" should be required except in the most "exceptional" cases).

As the panel acknowledged, the General Assembly "sought to create a stronger Republican tilt" in District 1. App.21a. Plaintiffs offered no "direct evidence of a racial gerrymander" and therefore "needed to rely on forgone alternatives." *Cooper*, 581 U.S. at 322. But Plaintiffs' inadequate alternatives *foreclosed* their claims. Even though Plaintiffs introduced undisputed evidence that race and political affiliation are highly correlated in South Carolina, App.58a-62a, *none* of their alternative plans achieved the General Assembly's "political objective[]." *Cromartie II*, 532 U.S. at 258. To the contrary, *each one* "harm[s]" that objective by turning District 1 into a majority-Democratic district. *Cooper*, 581 U.S. at 322; App.460a, 486a, 525a.

Moreover, Plaintiffs' alternative plans are not as "consistent with traditional districting principles" as the Enacted Plan. *Cromartie II*, 532 U.S. at 258. They all fail to protect incumbents and to preserve the cores of each district and communities of interest as well as the Enacted Plan. *See infra* Part IV.

The panel's only mention of Plaintiffs' failure to "provide[] an alternative map" misconstrued the law:

it thought that an alternative map is relevant only to illustrate a "remedy" for the alleged violation. App.46a. It therefore missed that an alternative map is required to *prove* the alleged violation—either in all cases, *Cooper*, 581 U.S. at 335 (Alito, J., concurring in judgment in part and dissenting in part), or at least in cases, like this one, involving no "direct evidence of a racial gerrymander," *id.* at 321 (majority op.). Thus, while the *Cooper* majority opined that challengers are not always required to produce "one particular form of proof to prevail," it reinforced the alternative-map requirement in circumstantial cases rather than silently overruling it. *Id.* at 319, 321; *see Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.").

The panel also misconstrued the law when it suggested Plaintiffs were not bound by the alternative-map requirement because, in its view, "a constitutionally compliant plan . . . can be designed without undue difficulty." App.46a. But a constitutionally compliant plan, without more, provides no indication of whether "race *rather than* politics *predominantly* explains" the challenged plan. *Cromartie II*, 532 U.S. at 243. Rather, the plaintiff's alternative must isolate race as the explanatory variable in the challenged plan by controlling for "political objectives" and "traditional" criteria. *Id.* at 258. Only such an alternative can "disprove a State's contention that politics drove a district's lines [by showing] that [it] had the capacity to accomplish all its partisan goals without moving so many members of a minority group." *Cooper*, 581 U.S. at 317.

Moreover, the panel's excusing of the alternative-map requirement because such a map can be drawn "without undue difficulty," App.46a, turns the "demanding" burden of proof on its head, *Cooper*, 581 U.S. at 319. That providing an alternative map is easy is a reason to *require* one. *See id.* at 337 (Alito, J., concurring in judgment in part and dissenting in part). The panel's "undue difficulty" excuse is not only wrong, but nonsensical. Reversal is warranted.

III. The Panel Failed To Disentangle Race From Politics.

"As a result of those redistricting realities" that race and politics are "highly correlated," "a trial court has a formidable task" in a case involving competing racial and political explanations for the challenged district. *Cooper*, 581 U.S. at 308. "It must make a sensitive inquiry into all circumstantial and direct evidence of intent to assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines." *Id.* (internal quotations omitted). Only in this way can a court properly determine that "race *rather than* politics" predominantly motivated the legislature. *Cromartie II*, 532 U.S. at 243; *see Cooper*, 581 U.S. at 308.

The panel shirked its "formidable task" and never "disentangle[d] race from politics" in District 1 as a whole or even in Charleston County. *Cooper*, 581 U.S. at 308. While the panel pointed to the alleged racial effect in Charleston County (which it mischaracterized, *see infra* Part IV), it never engaged the voluminous evidence readily "[]explain[ing] on grounds" of politics District 1 and the line in Charleston County, *Cromartie II*, 532 U.S. at 242.

For example, the panel disregarded Senator Campsen's testimony that he never considered race or reviewed racial data and outlining his political reasons for District 1 and the Charleston County split. App. 345a, 346a, 319a-321a, 354a-357a. Moreover, the panel never mentioned Senator Massey's trial testimony *at all*. It therefore ignored Senator Campsen's and Senator Massey's testimony that the Republican-controlled General Assembly never would have enacted, for obvious political reasons, any plan that turned District 1 into a majority-Democratic district. *See* App.265a, 276a, 331a, 332a, 352a. And the panel ignored evidence that some House members understood that the Senate would only support a plan with at least a 53.5% Republican vote share in District 1, which is a political target—*not* a racial target. *See* App.497a.

Thus, "[t]he only direct evidence" demonstrated that the General Assembly's "intent was legitimate," and it was "not proper" for the panel to ignore it. *Abbott*, 138 S. Ct. at 2327. And there is more. The panel also disregarded the 2020 election data, which confirms the political explanation for District 1 "as a whole." *Bethune-Hill*, 580 U.S. at 192. It therefore ignored that the political effect of the changes in District 1 (a 1.36 percentage-point increase in Republican vote share) is much greater than any racial effect (a 0.16 percentage-point increase in BVAP). App.430a-431a, 446a-452a. Moreover, that none of Plaintiffs' alternatives achieves the General Assembly's political objective both dooms their claims, *see supra* Part II, and evinces that the General Assembly's "intent" in selecting the Enacted Plan was political, not racial, *Cooper*, 581 U.S. at 308.

Even in Charleston County, the panel ignored the election data showing that the district line "correlate[s] with" the General Assembly's "political" goals, *Bush*, 517 U.S. at 968 (plurality op.), and is readily "[]explainable on grounds other than race," *Cromartie II*, 532 U.S. at 242. Specifically:

- Charleston County is 56.6% Democratic;
- The portion of Charleston County that the Enacted Plan moved from District 1 to District 6 is 58.8% Democratic, nearly twelve percentage points higher than Benchmark District 1 as a whole;
- The Enacted Plan's changes reduced the Democratic vote share in the District 1 portion of Charleston County by more than 3 percentage points;
- The portion of Charleston County in Enacted District 6 is 64.6% Democratic; and
- The portion of Charleston County in Enacted District 1 is only 49.2% Democratic.

App.198a, 495a, 567a.

The panel also mentioned certain Charleston County VTDs that the Enacted Plan moved from District 1 to District 6—the Deer Park, Ladson, Lincolnville, and St. Andrews VTDs. App.26a n.7. It noted those VTDs' racial makeup but never their political makeup, let alone that moving those VTDs "correlate[s] with" the General Assembly's "political" objective. *Bush*, 517 U.S. at 968 (plurality op.). In fact, *all* of those VTDs have a higher Democratic vote share than BVAP percentage. App.545a-567a. And the panel disregarded that:

- The Deer Park, Ladson, and Lincolnville VTDs are majority-Democratic, ranging from 53.1% to 71.6% Democratic, App.566a, so moving them to District 6 advanced the goal of making District 1 more Republican-leaning.
- The St. Andrews VTDs, which comprise the West Ashley area, are 57% Democratic (and have a BVAP of only 19.59%), App.545a-567a; Dist. Ct. Dkt. 473, so removing them from District 1 makes that district more Republican-leaning.

The panel's invocation of the analyses of two of Plaintiffs' putative expert witnesses, App.30a-32a, actually underscores its failure to disentangle race from politics. As Dr. Imai admitted, his analysis did not consider politics. App.406a-407a, 409a-410a, 412a. It necessarily does nothing to "disentangle race from politics." *Cooper*, 581 U.S. at 308.

Dr. Ragusa's analysis is also fatally flawed. He ignored several traditional criteria, including core preservation and contiguity, and therefore treated as "excluded" from District 1 VTDs that were not close to the district line. App.498a-508a. He made no attempt to establish that those VTDs "were located near enough to District 1[]'s boundaries or each other for the legislature as a practical matter to have drawn [District 1's] boundaries to have included them, without sacrificing other important political goals." *Cromartie II*, 532 U.S. at 247. His analysis thus "offers little insight into the legislature's true motive." *Id.* at 248.

Moreover, Dr. Ragusa (like the panel) focused on the total number of African Americans residing in a

VTD. App.508a-509a. But because VTDs vary in size, VTDs with the same number of African Americans vary widely in their BVAP percentage. Thus, a VTD's BVAP percentage is more probative than its total African-American population for determining the effect of moving it on a district's racial composition. App.408a. Dr. Ragusa's "partisanship" analysis is similarly flawed because he examined VTDs based on total Democratic votes rather than percentage. App.502a. And his proposed comparison of VTDs' racial and vote totals is apples-to-oranges because one reflects total population while the other reflects voter turnout. App.502a.

Finally, the panel's contrived conclusion that Mr. Roberts employed a racial target is not only erroneous, *see infra* Part V, but also reinforces its "legal mistake" in failing to disentangle race from politics, *Cooper*, 581 U.S. at 309. This Court has never upheld a finding of a racial target without direct evidence or a legislator's admission that a target existed. *See id.* at 316-18; *Bethune-Hill*, 580 U.S. at 192. Even then, the Court has required proof that any racial target had "a direct and significant impact" on the challenged district's configuration. *Cooper*, 581 U.S. at 300.

The panel, however, abandoned these rules—and thus vitiated the governing standards. Indeed, because "'[r]acial identification is highly correlated with political affiliation[,]'" *id.* at 308, a court could *always* attempt to infer a racial target from lines that "correlate with" race and politics, *Bush*, 517 U.S. at 968 (plurality op.). And drawing such a conclusion without any direct evidence or a showing of substantial impact rewrites the burden of proof.

Instead of presuming good faith and requiring Plaintiffs to prove that "race *rather than* politics *predominantly* explains" District 1, *Cromartie II*, 532 U.S. at 243, the panel presumed bad faith and collapsed race and politics. Reversal is required.

IV. The Panel Misconstrued The Predominance Standard.

A. The panel also improperly lowered Plaintiffs' demanding burden to prove that "the legislature subordinated" traditional criteria to race. *Cromartie I*, 526 U.S. at 547. Indeed, as part of its quest to end the "division of Charleston County," App.27a, the panel disregarded that District 1 complies with, rather than "subordinate[s]," traditional criteria, *Cromartie I*, 526 U.S. at 547.

First, the panel ignored that the Benchmark Plan "adhered to traditional race-neutral principles." *Backus*, 857 F. Supp. 2d at 560. The General Assembly logically used the Benchmark Plan as a starting point and preserved high percentages of the cores of the Benchmark Districts, including 92.78% of District 1's core. *See id.* (preserving district cores is a traditional principle); *see also Cooper*, 581 U.S. at 338 (Alito, J., concurring in judgment in part and dissenting in part). None of Plaintiffs' alternatives preserves more than 76.04% of District 1's core. App.453a, 461a, 468a, 479a. In fact, the Enacted Plan preserves a higher percentage of the core of *every* district than *every* alternative Plaintiffs proposed. App.439a.

The General Assembly's preservation of cores also demonstrates compliance with other criteria. Under South Carolina law, preserving district cores is "the

clearest expression" possible of the General Assembly's respect for "communities of interest" because cores "necessarily incorporate the state's other recognized interests in maintaining political boundaries . . . as well as other natural and historical communities of interest." *Colleton Cnty. Council*, 201 F. Supp. 2d at 649. The panel mentioned none of this—or that Plaintiffs' alternatives, by preserving less of district cores, show less respect for "communities of interest" than the Enacted Plan. *Id.*

Second, the Enacted Plan actually improves upon the constitutional Benchmark Plan's compliance with traditional principles, reducing the number of split counties from 12 to 10 and split VTDs from 65 to 13. App.432a, 447a.

Third, the General Assembly complied with traditional principles in Charleston County, as Senator Campsen testified. *See* App.342a, 356a.

- The Benchmark Plan split the Charleston Peninsula, and the Enacted Plan made it whole.
- The Benchmark Plan split the coastal Charleston community of interest, and the Enacted Plan made it whole.
- The Enacted Plan repaired all 5 split VTDs in Charleston County.
- The Enacted Plan follows the Charleston-Dorchester county line to include Deer Park, Lincolnville, and Ladson in District 6.
- The Enacted Plan conforms the line in Charleston County to natural geographic

> features, including the Cooper River, Stono River, Ashley River, and Wappo Creek.

App.195a, 263a, 432a-438a, 447a-449a, 478a.

Fourth, the Enacted Plan is the only plan that keeps District 1 majority-Republican and maintains the 6-1 partisan composition in the congressional delegation. Thus, it is the only plan that complies with the principles of protecting incumbents, *see Bush*, 517 U.S. at 964 (plurality op.), and preserving "partisan advantage," *Cooper*, 581 U.S. at 291; *see Cromartie I*, 526 U.S. at 547; App.542a (communities of interest based on "politics" and "voting behavior"); *supra* Parts II-III.

B. The panel never analyzed District 1's compliance with traditional criteria as a whole, focusing instead on its erroneous conclusion of a racial target. App.33a-34a; *see infra* Part V. But even if its racial-target theory were defensible, it still was required to find that the General Assembly "subordinated" traditional criteria to race. *Bethune-Hill*, 580 U.S. at 187; *see id.* at 190 ("[T]his Court to date has not affirmed a predominance finding . . . without evidence that some district lines deviated from traditional principles."); *Cooper*, 581 U.S. at 300 ("direct and significant impact" rule). The best the panel could muster was its suggestion that the line in Charleston County "subordinat[es]" the principles of "maintenance of constituencies, minimizing divisions of counties, and avoidance of racial gerrymandering." App.29a. This suggestion is multiply flawed.

First, District 1 as a whole "maint[ains] constituencies," App.29a, by retaining 92.78% of

District 1's core, outperforming all of Plaintiffs' alternative plans, App.439a, 479a.

Moreover, the uncontested data ignored by the panel belie its conclusion that race motivated the alleged departure from "maintenance of constituencies" in District 1. App.29a. The Enacted Plan treated African-American voters and white voters in District 1 *exactly the same*. As the panel noted, the African-American population of District 1 was around 17.8%, *see* App.29a—and so was the net population that the Enacted Plan moved out of District 1. In equalizing District 1's population, the Enacted Plan moved a net of 87,690 people (140,489 minus 52,799) from District 1 to District 6, of whom 15,389 (35,629 minus 20,240)—or 17.5%—were African American. App.439a, 443a-444a. Accordingly, the Enacted Plan moved African Americans *and* white people out of District 1 virtually in lockstep with the racial demographics of District 1 as a whole. If anything, the Enacted Plan favored African-American voters because it moved far more white people than African Americans out of District 1 and *increased* District 1's BVAP. App.428a-430a, 450a-452a. Thus, far from "exil[ing]" African Americans from District 1, App.34a, the Enacted Plan treated all voters of all races the same by maintaining district cores and making changes for race-neutral reasons.

Nor does the panel's suggestion that the line in Charleston County departs from traditional principles withstand scrutiny. After all, the Enacted Plan's perpetuation of the decades-long Charleston County split *complies* with "maintenance of constituencies." App.29a. Ending that split, as the panel suggested

and Plaintiffs' alternative plans all do, is a starker departure from "maintenance of constituencies" than the Enacted Plan. App.29a.

Anyway, the panel's suggestion that the continued split of Charleston County evinces a racial purpose, App.26a-28a, cannot stand. In the first place, the panel's assertion that the Enacted Plan moved "over 30,000 African Americans" from District 1 to District 6 in "Charleston County," App.26a, ignores the Enacted Plan's moves across District 1 as a whole, which on net treated African Americans no differently (or even slightly better) than white voters. It also ignores that, even in Charleston County, the Enacted Plan moved out of District 1 far more white people—approximately 78,000 total—than African Americans. App.552a.

Moreover, the panel's fixation on the relative BVAP percentages of the District 1 and District 6 portions of Charleston County disregards the demographic changes revealed by the 2020 Census. Between the Benchmark Plan's enactment and the 2020 Census, Charleston County's BVAP decreased from 27.7% to 22.1%. Dist. Ct. Dkt. 473. The panel did not account for that decrease when it emphasized that "the percentage of African Americans in Charleston County in District No. 1 fell from 19.8% at the time of enactment of the 2011 Plan to 10.3% in the 2022 plan." App.27a. It also never mentioned that the corresponding drop in the District 6 portion of Charleston County was *even greater*: the BVAP percentage there fell from 49.9% in the Benchmark Plan to 31.2% in the Enacted Plan. Dist. Ct. Dkt. 473. Thus, the BVAP disparity between the District 6 and District 1 portions of Charleston County *shrank* under

the Enacted Plan: from 30.1 percentage points in the Benchmark Plan under the 2010 Census (49.9% vs. 19.8%) to only 20.9 percentage points in the Enacted Plan under the 2020 Census (31.2% vs. 10.3%).[2]

That leaves the panel's observation that "79% of Charleston County's African-American population was placed in" District 6 and "21% was placed into" District 1. App.27a. Even on their own, these numbers are not probative. *See Cromartie II*, 532 U.S. at 249; *Cromartie I*, 526 U.S. at 551; *Miller*, 515 U.S. at 920 (a "plan that concentrates members of [a racial] group in one district and excludes them from others may reflect wholly legitimate purposes"). They lose all meaning in the context of District 1 as a whole, where the Enacted Plan treated African-American and white voters the same and even *increased* the BVAP percentage.

Second, the panel's suggestion that the Enacted Plan violates the principle of "minimizing divisions of counties" reflects its mistaken belief that the General Assembly was obligated (by *Shelby County* or otherwise) to undo the Charleston County split. App.29a. Moreover, the panel again ignored District 1 as a whole: the Enacted Plan *repaired* the splits of Beaufort and Berkeley Counties from the constitutional Benchmark District 1. And, as explained, keeping Charleston County split achieved

[2] The panel nowhere explained the math behind its suggestion that the African-American population in the City of Charleston in District 1 saw a "drop of 77%." App.27a n.10. In addition to failing to account for demographic changes between 2010 and 2020, this figure appears to be wrong or a "distorted picture . . . created by dividing one percentage by another." *Brnovich*, 141 S. Ct. at 2345.

Senator Campsen's policy goals while adhering to traditional principles. App.337a, 356a. Whatever the panel's view of these trade-offs, the General Assembly, not the panel, wields the "discretion to exercise the political judgment necessary to balance" these "competing interests," and its "good faith" in doing so "must be presumed." *Miller*, 515 U.S. at 915.

Finally, the panel's suggestion that the Enacted Plan's changes in Charleston County subordinate the principle of "avoid[ing] racial gerrymandering," App.29a, simply begs the question.

The panel rested its predominance finding on cherry-picked circumstances, not on "a sensitive inquiry into all" evidence. *Cooper*, 581 U.S. at 308. Its failure to perform that "formidable task" and apply the exacting predominance standard is a "legal mistake" warranting reversal. *Id.* at 309; *see Abbott*, 138 S. Ct. at 2326.

V. The Panel Clearly Erred In Finding Racial Predominance.

Even if the panel had not committed legal errors, *see supra* Parts I-IV, the Court still should reverse because the record evidence—whether reviewed "extensive[ly]" or otherwise—leaves "the definite and firm conviction" that the panel erred in finding predominance, *Cromartie II*, 532 U.S. at 243.

At the threshold, the evidence discussed above that the panel ignored, *supra* Parts I-IV, demonstrates its "mistake" in finding racial predominance, *see Cromartie II*, 532 U.S. at 242. The panel's only other finding is its conclusion that Mr. Roberts employed a racial target as a proxy for politics in District 1. The panel never explained how this alleged target could be

imputed to the General Assembly "as a whole." *Brnovich*, 141 S. Ct. at 2349-50; *see also id.* at 2350 ("The 'cat's paw' theory has no application to legislative bodies."). In all events, the panel's regrettable attempt to impugn the "experienced" and nonpartisan Mr. Roberts, App.23a, cannot withstand scrutiny.

First, the panel asserted that a 17% African-American racial target was necessary "to produce the desired partisan tilt" in District 1. App.23a. Nothing in the record supports that assertion; in fact, the record *contradicts* it. The "desired partisan tilt" was much more easily and accurately produced by drawing the line in Charleston County based on the 2020 election data. Indeed, whereas race is *highly* correlated with politics, election data is *perfectly* correlated with politics. The panel never explained *why* the General Assembly would use race as a *proxy* for politics instead of election data *directly* for politics.

Second, the panel believed that "Senator Campsen's announced intention to include Berkeley and Beaufort Counties whole in Congressional District No. 1, as well as portions of Dorchester County, presented a challenging problem for Roberts as he attempted to complete the Charleston County portion of the district to produce a congressional district with a Republican tilt." App.24a. Once again, the panel cited no record support. None exists: the availability of sub-precinct election data made drawing Republican-leaning versions of District 1 along Senator Campsen's parameters an easy task. Mr. Roberts drew several such plans; each time he conveyed them to Senator Campsen, he noted political data, but *never* racial data. App.88a, 98a.

Moreover, the decision to include Berkeley County "whole in Congressional District No. 1," App.24a, disproves the panel's theory. Berkeley County has a higher African-American population percentage than Charleston County. Dkt 473. Thus, had the Enacted Plan used a racial target as a proxy for politics, it would have excluded Berkeley rather than Charleston from District 1. That it instead included Republican-majority Berkeley and excluded a majority-Democratic portion of Charleston underscores that the General Assembly drew lines based on politics and traditional principles, not race.

Third, the panel opined that Mr. Roberts did not respect communities of interest and "abandoned his least change approach and the Clyburn staff model" in Charleston County. App.25a-26a. But the panel misanalyzed the Enacted Plan's compliance with traditional criteria. *Supra* Parts I-IV. Moreover, any departure from respecting communities of interest or maintaining district cores does not establish that those principles were "subordinated" to race, *Cooper*, 581 U.S. at 292, instead of politics or other traditional principles, *see supra* Parts I-IV. Mr. Roberts explained all this to the panel. Far from "fail[ing] to provide the Court with any plausible explanation" for the line in Charleston County, App.29a, he gave an explanation of politics and traditional principles that the panel ignored, App.193a-195a.

Any departures from the Clyburn staff model likewise are consistent with politics and traditional criteria. *Supra* Parts I-IV. Moreover, the Clyburn staff model kept District 1 majority-Republican and moved more African Americans out of District 1—and resulted in a lower BVAP in District 1—than the

Enacted Plan. App.452a, 490a-493a. Thus, it did *more* of what the panel claims tainted the Enacted Plan with racial predominance than the Enacted Plan did. *Compare* App.452a.

Fourth, the panel expressed suspicion at the "coincidence" that the African-American population percentages in Benchmark District 1 and Enacted District 1 are nearly identical. App.29a. That "coincidence," of course, is entirely consistent with the Enacted Plan's preservation of 92.78% of District 1's core. The panel should have presumed "good faith" in any coincidence, *Miller*, 515 U.S. at 915, but presumed just the opposite. In all events, that "coincidence" *disproves* the existence of a racial target. Benchmark District 1 elected a Democratic representative in 2018 at the 17.8% African-American population level—so that level *harmed* the General Assembly's political goal. Accordingly, if the General Assembly had used race as a proxy for politics, it would not have aimed to *replicate* that level but rather to *lower* it. Instead, it adopted a plan that increased District 1's Republican vote share and its BVAP. Thus, any "coincidence" underscores that the General Assembly's concern in District 1 was politics, not race.

Fifth, the panel invoked the alleged racial effect of the Enacted Plan's changes to Charleston County, and claimed that Mr. Roberts agreed that those changes were "dramatic." App.34a. But any such effects do not prove a predominant racial "purpose[]." *Cooper*, 581 U.S. at 299; *see supra* Parts I-IV.

Finally, the panel faulted Mr. Roberts for his "in-depth knowledge of racial demographics in South Carolina," pointing to its questioning of him regarding

the Deer Park area. App.29a-30a. Mr. Roberts explained that he checked Deer Park's racial make-up only after allegations that the Senate Staff Plan racially gerrymandered that area. App.252a. Moreover, he did not know the racial demographics of other areas the panel asked about. App.254a. And he testified regarding the political composition of not only the Deer Park VTDs, but also the Lincolnville, Ladson, and St. Andrews VTDs, App.136a, 196a-197a, 260a-261a. Thus, Mr. Roberts had even *better* knowledge of the State's political demographics than its racial demographics—yet the panel ignored his political explanation for District 1. App.29a-30a.

Anyway, any mere "awareness" of race is not enough: a map drawer (and a legislature) is "almost always" "aware" of race when drawing district lines, but "it does not follow that race predominate[d]." *Miller*, 515 U.S. at 916; *see Bethune-Hill*, 580 U.S. at 187; *Cromartie I*, 526 U.S. at 551. The panel clearly erred. *See Cromartie II*, 532 U.S. at 241-43.

VI. The Panel Erred In Failing To Enforce The Discriminatory Effect Element.

The panel analyzed Plaintiffs' intentional discrimination claim under the same "predominant motivation" standard as the racial gerrymandering claim. App.43a-45a. Thus, because the panel erred in finding predominance, *supra* Parts I-V, its ruling on Count Two cannot stand.

The panel also erred in another way: it completely ignored the discriminatory effect element of an intentional discrimination claim. *See* App.43a-45a. That element required proof that the Enacted Plan has a "disproportionately adverse effect" upon some

citizens based on their race, *Feeney*, 442 U.S. at 274, compared to "similarly situated" citizens, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-40 (1985). The panel's failure to address this element requires reversal.

Moreover, the panel could not have found a discriminatory effect even if it had tried. Plaintiffs faulted the General Assembly for not drawing District 1 to enable African-American voters to form a coalition with white crossover voters to "elect" Democratic candidates or "influence" elections. Compl. ¶ 171. This theory of discriminatory effect fails because there is no "right to form political coalitions." *Bartlett v. Strickland*, 556 U.S. 1, 15 (2009) (plurality op.). "A redistricting plan that does not adversely affect a minority group's potential to form a majority in a district, but rather diminishes its ability to form a political coalition with other racial or ethnic groups, does not result in vote dilution on account of race." *Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004).

Indeed, members of two groups are similarly situated only if they are "alike" in "all relevant respects." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Voters' political affiliations are obviously relevant to redistricting, which is "inseparable" from "[p]olitics." *Rucho*, 139 S. Ct. at 2497. Thus, Plaintiffs bore the burden to prove that the Enacted Plan has a "disproportionately" adverse effect on African-American voters, *Feeney*, 442 U.S. at 279, compared to "similarly situated" white voters *of the same political affiliation*, *City of Cleburne*, 473 U.S. at 439-40.

But Plaintiffs did not—and could not—carry this burden because the Enacted Plan affects African-American Democrats and "similarly situated" white Democrats *in exactly the same way*. *Id.* The Enacted Plan limits the ability of *all* Democrats—African-American and white—to form coalitions in District 1 (and, conversely, improves the ability of *all* Republicans—regardless of race—to do the same). In fact, there are likely *just as many or more* white Democrats as African-American Democrats in District 1, confirming that the Enacted Plan bears equally on comparable members of both races. *See* App.428a-431a (in 2020, District 1's Democratic vote share was 47% and its BVAP only 16.56%). There is no discriminatory effect. *See Feeney*, 442 U.S. at 279; *City of Cleburne*, 473 U.S. at 439-40.

CONCLUSION

The Court should note probable jurisdiction and reverse by January 1, 2024.

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Respectfully submitted,

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