No. 22-807

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

BRIEF FOR APPELLANTS

WILLIAM W. WILKINS
ANDREW A. MATHIAS
MAYNARD NEXSEN PC
104 S. Main Street, Suite 900
Greenville, SC 29601

MARK C. MOORE
HAMILTON B. BARBER
MICHAEL A. PARENTE
MAYNARD NEXSEN PC
1230 Main Street, Suite 700
Columbia, SC 29201

Counsel for House Appellants

JOHN M. GORE
Counsel of Record
JOSEPH P. FALVEY
RYAN M. PROCTOR
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939
jmgore@jonesday.com

ROBERT E. TYSON, JR.
VORDMAN CARLISLE TRAYWICK, III
ROBINSON GRAY STEPP & LAFFITTE, LLC
Post Office Box 11449 (29211)
Columbia, SC 29201

Counsel for Senate Appellants

(counsel continued on inside cover)

(continued from front cover)

M. ELIZABETH CRUM
MICHAEL R. BURCHSTEAD
BURR & FORMAN LLP
Post Office Box 11390
Columbia, SC 29211

Counsel for State Election Commission Appellants

QUESTIONS PRESENTED

1. Did the district court commit legal or clear error in concluding that South Carolina Congressional District 1 is an unconstitutional racial gerrymander?

2. Did the district court err in concluding that the South Carolina General Assembly engaged in unconstitutional intentional race discrimination in enacting District 1?

PARTIES TO THE PROCEEDING

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.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES v
INTRODUCTION 1
OPINION BELOW 7
JURISDICTION 7
CONSTITUTIONAL PROVISIONS INVOLVED 7
STATEMENT 8
A. South Carolina Redistricting Before The 2020 Census 8
B. South Carolina Redistricting After The 2020 Census 9
C. Enacted District 1 15
D. Appellees Challenge The Enacted Plan 19
E. The District Court Invalidates District 1 22
SUMMARY OF ARGUMENT 23
ARGUMENT 24
I. THE PANEL LEGALLY ERRED IN DETERMINING THAT RACE PREDOMINANTLY MOTIVATED DISTRICT 1 27
A. The Panel Erroneously Disregarded The General Assembly's Politics Defense 27

1. The Panel Failed To Enforce The Alternative-Map Requirement 28

2. The Panel Failed To Disentangle Race And Politics 30

B. The Panel's Racial Target Theory Is Legally Erroneous 33

C. The Panel Misapplied The Subordination Rule 37

D. The Panel Misinterpreted *Shelby County* 42

II. THE PANEL COMMITTED CLEAR ERROR IN FINDING THAT RACE PREDOMINANTLY MOTIVATED DISTRICT 1 45

A. The Panel's Attempt To Impugn Nonpartisan Staff Fails 47

B. The Panel Relied Upon Flawed Putative Expert Analyses 50

III. THE PANEL'S DETERMINATION THAT DISTRICT 1 IS INTENTIONALLY DISCRIMINATORY CANNOT STAND 52

CONCLUSION 55

TABLE OF AUTHORITIES

Page(s)

CASES

Abbott v. Perez,
138 S. Ct. 2305 (2018).....1-2, 4, 5, 23, 27, 30, 34, 37-38, 42-44

Allen v. Milligan,
143 S. Ct. 1487 (2023).....5, 20, 50

Anderson v. Bessemer City,
470 U.S. 564 (1985).....47

Backus v. South Carolina,
857 F. Supp. 2d 553 (D.S.C. 2012)....2, 5, 8, 15, 18, 42, 43

Backus v. South Carolina,
568 U.S. 801 (2012).....2, 8

Bartlett v. Strickland,
556 U.S. 1 (2009).....7, 54-55

Baumgartner v. United States,
322 U.S. 665 (1944).....46

Bethune-Hill v. Va. State Bd. of Elecs.,
580 U.S. 178 (2017) 5, 25, 32, 37-39, 42, 50, 52

Brnovich v. Dem. Nat'l Comm.,
141 S. Ct. 2321 (2021).....3, 36

Bush v. Vera,
517 U.S. 952 (1996).....27, 35

City of Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985).....53, 55

Colleton Cnty. Council v. McConnell,
201 F. Supp. 2d 618 (D.S.C. 2002).....8, 18

Concrete Pipe & Prods. v. Constr. Laborers Pension Tr., 508 U.S. 602 (1993).....45

Cooper v. Harris,
581 U.S. 285 (2017)...1-4, 15, 18, 24-35, 37, 42, 44, 48-49

Dan's City Used Cars, Inc. v. Pelkey,
569 U.S. 251 (2013).....35

Dobbs v. Jackson Women's Health Org.,
142 S. Ct. 2228 (2022).....46

Easley v. Cromartie,
532 U.S. 234 (2001) ...1, 3, 5, 25, 28-33, 37, 41, 45, 46, 51

Hunt v. Cromartie,
526 U.S. 541 (1999).....27, 41, 44, 50

McCleskey v. Kemp,
481 U.S. 279 (1987).....35

Miller v. Johnson,
515 U.S. 900 (1995).....1, 3, 6, 24, 35, 41, 49, 50

Nordlinger v. Hahn,
505 U.S. 1 (1992).....55

Pers. Adm'r of Mass. v. Feeney,
442 U.S. 256 (1979).....53, 55

Rucho v. Common Cause,
139 S. Ct. 2484 (2019) 1, 3, 7, 35, 55

Shaw v. Hunt,
517 U.S. 899 (1996) 24

Shaw v. Reno,
509 U.S. 630 (1993) 6

Shelby County v. Holder,
570 U.S. 529 (2013) 5, 44

Sinkfield v. Kelley,
531 U.S. 28 (2000) 43

U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC,
138 S. Ct. 960 (2018) 46

United States v. Sineneng-Smith,
140 S. Ct. 1575 (2020) 42

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,
429 U.S. 252 (1977) 20, 53

Wis. Right to Life, Inc. v. FEC,
546 U.S. 410 (2006) 45

CONSTITUTIONAL AND STATUTORY AUTHORITIES

U.S. Const. amend. XIV 7

U.S. Const. amend. XV 8

28 U.S.C. § 1253 7

28 U.S.C. § 2284 7

INTRODUCTION

Redistricting "is primarily the duty and responsibility of the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). 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." *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995). "[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 … inseparable from districting," *Rucho v. Common Cause*, 139 S. Ct. 2484, 2497 (2019).

Appellees challenged South Carolina Congressional District 1 not under Section 2 of the Voting Rights Act (VRA), but instead as racial gerrymandering and intentional vote dilution in violation of the Fourteenth Amendment. Appellees' challenge imposed a "demanding" burden to prove that race was the General Assembly's "predominant consideration" in District 1 such that it "subordinated" traditional districting principles to race. *Cooper v. Harris*, 581 U.S. 285, 291, 318-19 (2017). Moreover, because race and politics are "highly correlated" in South Carolina, *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (*Cromartie II*), the three-judge panel below was required to perform the "formidable task" of conducting a "sensitive inquiry into all circumstantial and direct evidence of intent to assess whether [Appellees] managed to disentangle race from politics and prove that the former drove [District 1's] lines," *Cooper*, 581 U.S. at 308.

Appellees offered no direct evidence that race motivated the Enacted Plan. To the contrary, "the only direct evidence" demonstrated—and circumstantial evidence confirmed—that the General Assembly's "intent was legitimate" because it used politics and traditional principles, not race, to draw District 1. *Abbott*, 138 S. Ct. at 2327.

In 2012, this Court summarily affirmed an opinion upholding South Carolina's prior plan—the "Benchmark Plan"—against racial gerrymandering and intentional vote dilution challenges because it "adhered to traditional race-neutral principles." *Backus v. South Carolina*, 857 F. Supp. 2d 553, 560, 567 (D.S.C.), *sum. aff'd*, 568 U.S. 801 (2012). Following the 2020 Census, the General Assembly adopted a new plan—the "Enacted Plan"—that "change[d] the boundaries of the [Benchmark Districts] only as needed to comply with the one-person, one-vote mandate and to achieve other desired ends." *Cooper*, 581 U.S. at 338 (Alito, J., concurring in judgment in part and dissenting in part). As even the panel acknowledged, the Republican-controlled General Assembly's goal was to "create a stronger Republican tilt" in District 1. Juris. Stat. App. ("JSA").21a. The Enacted Plan achieved that goal by moving majority-Republican voting tabulation districts (VTDs) into, and majority-Democratic VTDs out of, District 1 based on their political composition.

The Enacted Plan is the only plan presented at trial that achieved the General Assembly's political goal: it increased District 1's Republican vote share by 1.36 percentage points, from 53.03% to 54.39%, while *all* of Appellees' alternative plans turn District 1 into a majority-Democratic district. Enacted District 1 also

performs strongly—and outperforms *all* of Appellees' alternatives—on the race-neutral criteria of preserving cores, respecting communities of interest, and protecting incumbents. And Enacted District 1 improves upon the constitutional Benchmark Plan's performance on several traditional criteria such as unifying counties, communities of interest, and VTDs.

This evidence establishing the political and race-neutral explanation for District 1 is the end of the case. *See Cooper*, 581 U.S. at 308, 318-19; *Cromartie II*, 532 U.S. at 242. The panel, however, largely ignored this evidence, entangled rather than disentangled race and politics, and committed a variety of other reversible "legal mistake[s]" in striking down District 1. *Cooper*, 581 U.S. at 309.

At the threshold, the panel never mentioned the presumption of "good faith," failed to exercise "extraordinary caution," *Miller*, 515 U.S. at 915-16, and never assessed the intent of the General Assembly "as a whole," *Brnovich v. Dem. Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021). Instead, it invented a racial target theory that Appellees did not plead or pursue at trial and that rested on nothing but the correlation between race and politics. Yet it is precisely because that correlation is insufficient to prove racial gerrymandering that courts must "disentangle race from politics." *Cooper*, 581 U.S. at 308. Otherwise, courts could *always* purport to infer racial predominance or a racial target from lines that correlate with both race and politics—and thereby insert themselves into *political* disputes under the guise of enforcing the Constitution's prohibition on *racial* gerrymandering. *See id.*; *Cromartie II*, 532 U.S. at 242; *see also Rucho*, 139 S. Ct. 2484.

That, unfortunately, is what the panel did here. The panel concluded that the General Assembly "needed" to apply a 17% African-American racial target in District 1 not to achieve any racial goal, but instead to achieve its political goal. JSA.23a. The panel, however, never acknowledged the direct testimony or detailed election data in the record, which *disproved* any "need" to use race as a proxy for politics. The only support the panel cited for the purported existence of a racial target was nonexistent "charts" and counsel's demonstrative showing that race and politics are highly correlated in South Carolina. *Id.* Thus, far from "disentangl[ing] race from politics," *Cooper*, 581 U.S. at 308, the panel used the correlation between the two to justify judicial creation of a majority-Democratic district.

This failure to disentangle race and politics led to other "legal mistake[s]." *Id.* at 309. For one thing, the panel relieved Appellees of their burden, in this circumstantial-evidence case, to present an "alternative[]" map that accomplishes the General Assembly's "political objective" while removing the alleged racial predominance. *Id.* at 321-22. For another, it incorrectly "shift[ed] the burden" of proof to the General Assembly. *Abbott*, 138 S. Ct. at 2325. And it presumed legislative bad faith: the panel never explained *why* the General Assembly would adopt a legally risky racial target—which only *partially* correlates with politics—to achieve its political goal when it could (and did) use election data—which *perfectly* correlate with politics—to do the job.

The panel made clear that it sought to "end" the "division of Charleston County" between Districts 1 and 6 and found that "the Charleston County portion

of [District 1]" is racially gerrymandered. JSA.27a, 29a, 46a. But its "divorc[ing]" of Charleston County "from the rest" of District 1 flunked the "holistic analysis" required in racial gerrymandering cases, *Bethune-Hill v. Va. State Bd. of Elecs.*, 580 U.S. 178, 191-92 (2017), particularly since it *rejected* Appellees' other challenges to District 1, JSA.34a-36a. In all events, the Charleston County split does not "subordinate[]" traditional principles to race, *Bethune-Hill*, 580 U.S. at 187: it has existed for decades, was specifically upheld as "adhere[nt] to traditional race-neutral principles" in *Backus*, 857 F. Supp. 2d at 560, and was maintained in the plan proposed by Democratic Congressman Jim Clyburn, who represents part of Charleston County. Moreover, the Enacted Plan's moves of VTDs in Charleston County are readily "[]explainable on grounds" of politics and traditional principles. *Cromartie II*, 532 U.S. at 242.

The panel also misread this Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), to require States to overhaul districts originally drawn to comply with the VRA—and to intentionally treat such districts differently than others based on race. It further erred when it impugned the "experienced," "nonpartisan" mapdrawer, JSA.23a, 80a, and relied on putative expert analyses that did not "accurately represent[] the districting process," *Allen v. Milligan*, 143 S. Ct. 1487, 1512 (2023). And it legally erred in upholding the intentional discrimination claim.

Each of these errors alone means the panel's opinion "cannot stand." *Abbott*, 138 S. Ct. at 2326. Unlike plaintiffs in *Allen* and other cases before this Court concerning the post-2020 redistricting cycle,

Appellees here brought no claim under Section 2 and no claim, under the VRA or otherwise, that District 1 should be majority-African-American. Instead, Appellees invoked the Equal Protection Clause and *Shaw v. Reno*, 509 U.S. 630 (1993), to enlist the federal courts in a partisan battle to turn a 16.72%-black-voting-age-population (BVAP), majority-Republican district into a 21%-BVAP, majority-Democratic district. This Court has found racial gerrymanders in rare cases where districts were explainable "only" by a desire to "segregate" voters based on race. *Id.* at 642, 644-45. But Appellees and the panel stretched *Shaw*'s prohibition on irregular race-based districts to a garden-variety district readily explainable by traditional criteria and politics. The General Assembly's decision *not* to use race to draw district lines reflects a *lack* of racial predominance and discrimination. The panel's contrary conclusion turns the Fourteenth Amendment and this Court's case law on their head.

If left uncorrected, the panel's holding would place States in an impossible bind by exposing them to potential racial gerrymandering liability whenever they decline to make majority-white, modestly-majority-Republican districts majority-Democratic. And it would invite federal courts to micromanage political disputes in countless such districts across the country under the guise of superintending the fine-tuning of their racial composition. Nothing in the Constitution's prohibition on *racial* discrimination supports such a "serious intrusion" on States' *race-neutral* districting decisions, *Miller*, 515 U.S. at 915, in the name of uniting litigants in crossover districts

with their *partisan* allies, *see Rucho*, 139 S. Ct. 2484; *Bartlett v. Strickland*, 556 U.S. 1 (2009) (plurality op.).

The Court should reverse by January 1, 2024, to ensure that the State may use its lawful redistricting plan for the 2024 election cycle.[1]

OPINION BELOW

The district court's order and injunction under review are available at JSA.9a-49a and 2023 WL 118775. Its order delaying remedial proceedings pending this appeal is available at JSA.1a-8a.

JURISDICTION

The district court, empaneled under 28 U.S.C. § 2284(a), issued its order on January 6, 2023. JSA.49a. Following a timely notice of appeal, JSA.50a, this Court noted probable jurisdiction on May 15, 2023. 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 Fifteenth Amendment, "[t]he right of citizens of the United States to vote shall not be denied or abridged

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

… by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.

STATEMENT

A. South Carolina Redistricting Before The 2020 Census.

Almost thirty years ago, in 1994, the General Assembly enacted a congressional districting plan that split Charleston County between Districts 1 and 6. *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 663-66 & n.29 (D.S.C. 2002). In 2002, a three-judge panel drew a new plan that maintained the Charleston County split. *Id.*

In 2011, the General Assembly adopted the Benchmark Plan, which maintained the Charleston County split. *Backus*, 857 F. Supp. 2d at 557; JSA.433a. The Department of Justice precleared the plan, and the *Backus* court upheld it against racial gerrymandering and intentional vote dilution challenges because the General Assembly "demonstrat[ed] that [it] adhered to traditional race-neutral principles." 857 F. Supp. 2d at 557-60. This Court summarily affirmed. 568 U.S. 801.

Except for one election, the Benchmark Plan yielded a 6-1 Republican-Democrat delegation over the next decade. District 1 consistently elected a Republican until 2018, when it elected white Democrat Joe Cunningham in "a major political upset." JSA.21a. District 1 returned to form in 2020, narrowly electing Republican Nancy Mace and favoring the Republican candidate for President by a margin of 53.03% to 46.97%. JSA.21a, 431a. Districts 2 through 5 elected Republicans in each

election and favored the Republican candidate for President in 2020. JSA.431a. District 6 consistently elected a Democratic representative—Congressman Clyburn—and favored the Democratic candidate for President in 2020. JSA.17a, 431a.

B. South Carolina Redistricting After The 2020 Census.

According to the 2020 Census results, five districts had developed "relatively small" deviations from the ideal size of 731,203 persons, but Districts 1 and 6 had "significant" deviations due to population shifts away from predominantly rural African-American areas and toward urban predominantly white coastal areas. JSA.16a-17a. District 1 was overpopulated by 87,689 persons (11.99%) and neighboring District 6 was underpopulated by 84,741 persons (11.59%). JSA.17a, 428a. The 2020 Census results also revealed changes in South Carolina's racial demographics. The statewide African-American population percentage decreased from 28.2% to 25.9%. JA.411. Charleston County experienced a more dramatic decrease, from 30.0% to 23.2%. JA.411-412.

The General Assembly developed an updated districting plan via an open and robust process. The Senate and House adopted similar, publicly accessible redistricting guidelines that set out legal requirements and numerous traditional criteria, including contiguity, compactness, core preservation, communities of interest, and incumbency protection. *See* JSA.423a-427a, 539a-544a. The Senate and House established websites and email addresses for public input, made redistricting data and plans publicly available, and held numerous public

hearings, facilitating the participation of thousands of citizens. *See* JSA.15a-16a, 495a; JA.268-291. Appellees and others proposed plans to the Senate and House, including Appellees' "NAACP Plan 1" and "NAACP Plan 2" and the "League of Women Voters Plan." *See* JSA.22a.

Both the Senate and House prepared and publicly released draft maps. *See* JSA.16a. The House prepared and released several maps, including House Plans 1 and 2. JSA.137a. The legislative process ultimately resulted in adoption of the Senate-drawn map.

To draw that map, 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 *Backus* panel. JSA.23a, 80a. Under the Senate's open-door policy, Mr. Roberts drew maps for Republican and Democratic senators alike, often aiming to achieve their requested political results. *See* JSA.80a-82a, 87a-89a, 97a-100a. As he did so, he drew lines based on data from the 2020 Presidential election and traditional criteria—never race. JSA.92a-97a, 100a-102a, 105a, 131a-133a, 144a-145a, 150a-153a.

Mr. Roberts developed the "Senate Staff Plan" in November 2021. JSA.104a-106a. He "start[ed] with the benchmark map," which he does "[e]very single time" he "create[s] a new redistricting plan." JSA.104a.

To determine which VTDs to move, Mr. Roberts first turned to a draft map he received from a staffer for Congressman Clyburn that reflected Congressman

Clyburn's preferred configuration for District 6. JSA.113a-115a, 128a. Mr. Roberts drew the statewide "Milk Plan" (named for the State's official beverage) incorporating that version of District 6. JSA.23a-24a, 120a, 127a. The Milk Plan kept Charleston County split, generated a 54.33% Republican vote share in District 1, and reduced District 1's BVAP from 16.56% to 15.48%. JSA.123a, 492a-493a.

The Senate Staff Plan "originated from" and relied "[h]eavily" on the Milk Plan. JSA.23a-24a, 128a. The Senate Staff Plan aimed to preserve district cores, accommodate the requests of Congressman Clyburn and other legislators, adhere to traditional criteria, and "create a stronger Republican tilt to" District 1. JSA.21a; *see* JSA.104a-105a, 128a-134a. Mr. Roberts achieved this political goal in part by moving the West Ashley and Deer Park areas of Charleston County out of District 1. JSA.131a. The Senate Staff Plan yielded a 54.73% Republican vote share and 16% BVAP in District 1. JA.292; Supp. App. ("SA").318a.

The Senate redistricting subcommittee held a hearing on the Senate Staff Plan that same month. JSA.134a. Former Congressman Cunningham criticized the plan, claiming (incorrectly) that it was drawn "by a partisan hack in Washington, D.C." JA.295 at 16:45-17:12. He also asserted the plan "make[s] no sense unless, of course, the *sole* purpose … is to make it harder for a Republican to lose." *Id.* at 11:40-11:50, 15:59-16:23 (emphasis added). He further alleged that the plan "divid[es] communities based upon the color of their skin." *Id.* at 20:38-20:44. That last accusation confused Mr. Roberts and his staff; as Mr. Roberts testified at trial, they "didn't look at race when making modifications" and "were looking

at strictly political data." JSA.135a. Nevertheless, to investigate the allegations, Mr. Roberts and his staff "look[ed] at the racial makeup of the areas which [they] had moved" and concluded that Mr. Cunningham's racial allegations were "incorrect." JSA.136a.

After the subcommittee meeting and other public input, Mr. Roberts drafted House Plan 2 Senate Amendment 1 under Senator Chip Campsen's sponsorship. JSA.136a-137a. That amendment "modifi[ed]" the Senate Staff Plan and ultimately became the Enacted Plan. JSA.128a, 137a.

Mr. Roberts drew Senate Amendment 1 based upon the "2020 Presidential election results" and traditional principles. JSA.93a-97a, 139a-152a. He specifically denied drawing any lines based upon race, using a racial target, using race as a proxy for politics, or using politics as a proxy for race. JSA.139a-145a. He discussed race in Senate Amendment 1 only with counsel for the Senate—never with any legislator—and only after the plan was drawn. JSA.145a.

Senator Campsen confirmed at trial that he never considered race or reviewed racial data while Senate Amendment 1 was being drawn. JSA.345a-346a. When Mr. Roberts drew plans for Senator Campsen, he reported to the senator the political and population data for District 1, but never any racial data. JSA.98a, 139a-145a, 487a-489a.

Senator Campsen's decision-making was "based on politics and traditional districting principles." JSA.353a. He "sought to create a stronger Republican tilt to" District 1, JSA.21-22a, while "honoring" other race-neutral criteria, JSA.333a-334a. He preferred to

make whole in District 1 Beaufort and Berkeley Counties, both of which are majority-Republican and were split in the Benchmark Plan. JSA.22a, 354a-356a. Senator Campsen noted at trial "very strong [local] sentiment" to unify Beaufort County, and public support for unifying Berkeley County, in District 1. JSA.320a.

The one-person, one-vote mandate and traditional criteria also supported preserving the split of Charleston County (Senator Campsen's home county, JSA.344a). First, unifying Beaufort, Berkeley, and Charleston Counties in District 1 would exceed the ideal district population and therefore violate the one-person, one-vote requirement. JSA.356a, 432a-433a. Second, unifying Charleston County in District 1 would yield a "majority Democratic district." JSA.337a; *see* JSA.496a (House member text messages confirming that including all of Charleston County in District 1 makes it impossible to "pull the first red"). Third, as Senator Campsen testified, having both a Republican and a Democrat represent Charleston County "benefit[s] the local community" on "bread-and-butter things" like port maintenance and "influence with the incumbent administration." JSA.337a-339a. He explained: "Jim Clyburn has more influence with the Biden Administration perhaps than anyone in the nation," and "I am tickled to death that Jim Clyburn represents Charleston County." JSA.338a, 371a. Public input likewise supported keeping Charleston County split. JA.268-291.

Senate Majority Leader Shane Massey confirmed at trial that partisanship was "one of the most important factors" and the Republican majority was "not going to sacrifice the 1st." JSA.265a, 300a. He stated that

improving Democratic performance in District 1 would have been "political malpractice." JSA.276a-279a. Senators Massey and Campsen both testified that the General Assembly would pass only a plan that kept District 1 majority-Republican. JSA.276a-279a, 331a. And, like Senator Campsen, Senator Massey denied that race played any role in his decision-making. JSA.280a.

That politics permeated the drawing process "wasn't a secret," JSA.352a, and legislators across the board acknowledged the political goals behind Senate Amendment 1. Senator Margie Bright Matthews, an African-American Democrat who opposed the plan, stated in a floor exchange with Senator Campsen that "we're not going to get into the racial gerrymandering thing because you and I both know in Charleston it matters not about your race. It is just that you went by how those folks voted," including in "West Ashley." JA.296 at 3:19:20-3:19:35. She continued: "Senator, … I really appreciate you agreeing with me that our opposition … is not about racial." *Id.* at 3:21:42-3:22:11. Instead, it was about "packing" Democratic voters into District 6 "to make [District 1] more electable but with Trump numbers." *Id.*

The evidence adduced by the House clearly confirms this. Appellant Representative Wallace "Jay" Jordan, who chaired the House's Ad Hoc Committee on Redistricting, testified at trial that the goal of the Enacted Plan was to "pull the first red"—*i.e.*, to make District 1 "better" for Republicans. JA.215-218; Tr.1775-1779; JSA.496a. The House also introduced into evidence text messages between Chairman Jordan and another House member documenting their contemporaneous understanding

that the Senate would support only a plan with at least a 53.5% Republican vote share in District 1, which is a political target—*not* a racial target. *See* JSA.497a; JA.215-218.

Senate Amendment 1 was released to the public on January 11, 2022. Democratic Senator Richard Harpootlian released a competing proposal, Senate Amendment 2a. JSA.22a. The General Assembly adopted Senate Amendment 1, and the Governor signed it into law on January 26, 2022. JSA.16a.

C. Enacted District 1.

The Enacted Plan largely preserved District 1 from the constitutional Benchmark Plan. *See Cooper*, 581 U.S. at 338 (Alito, J., concurring in judgment in part and dissenting in part) ("basic shape … was legitimately taken as a given"); *Backus*, 857 F. Supp. 2d at 560 (Benchmark Plan "adhered to traditional race-neutral principles"). Its changes to District 1 "create[d] a stronger Republican tilt," JSA.21a, and complied with other traditional principles.

Politics – Districtwide. The Enacted Plan achieves the General Assembly's political goal by moving "strong Republican performing" VTDs in Beaufort, Berkeley, and Dorchester Counties from District 6 to District 1 and strong Democratic VTDs in Charleston County from District 1 to District 6. JSA.22a, 565a-567a; *infra* pp.16-17. As part of reducing its population to achieve equal population, District 1 shed a net of 25,673 Democratic voters—approximately 42% more than the net of 18,136 Republican voters it shed. JSA.431a, 446a. The result is a 1.36-percentage-point increase in its Republican vote share to 54.39%. JSA.431a, 446a.

All of Appellees' proposed alternatives—Senate Amendment 2a, both NAACP plans, and the League of Women Voters Plan—harm the General Assembly's political goal by turning District 1 into a majority-Democratic district, with Democratic vote shares ranging from 51.7% to 52.6%. JSA.525a.

Politics – Charleston County. The Charleston County VTDs that the Enacted Plan moved from District 1 to District 6 had approximately 43% more Democratic voters (36,888) than Republican voters (25,830). JSA.565a-567a. Those included the St. Andrews VTDs that comprise West Ashley. JSA.195a-196a, 565a-566a. West Ashley is home to 81,718 residents, JA.412, more than half of the 140,489 people whom the Enacted Plan moved from District 1 to District 6, JSA.443a. West Ashley is majority-Democratic with a Democratic vote share of 56.98%, JSA.566a, more than 10 percentage points higher than Benchmark District 1's 46.97% Democratic vote share, JSA.431a. It is also predominantly white, with an African-American population percentage of only 20.2%, JA.412, less than 2.5 percentage points higher than Benchmark District 1's percentage, JSA.429a. Thus, moving West Ashley to District 6 both made District 1 more Republican-leaning and had a greater impact on District 1's political composition than its racial composition.

The Enacted Plan also moved out of District 1 VTDs in Deer Park, Ladson, and Lincolnville that range from 53.1% to 71.6% Democratic. JSA.566a.

In sum, the Charleston County VTDs moved out of District 1 are 58.8% Democratic, JSA.567a, nearly 12

percentage points higher than Benchmark District 1, JSA.431a. Those moves reduced the Democratic vote share in the District 1 portion of Charleston County by more than 3 percentage points to approximately 50%, while resulting in an approximately 65% Democratic vote share in the District 6 portion of the county. *See* JSA.198a, 495a.

Racial Effect. The Enacted Plan moved a net of 87,690 people from District 1 to District 6, of whom 15,389—or 17.5%—were African American. JSA.439a, 443a-444a. That population virtually mirrored the racial composition of Benchmark District 1, which had a total African-American population of 17.78%. JSA.429a. The result was a 0.16-percentage-point *increase* in District 1's BVAP percentage, from 16.56% to 16.72%, JSA.430a, 452a, and a 1.36-percentage-point *decrease* in its Democratic vote share, JSA.431a, 446a.

In fact, Enacted District 1 has a higher BVAP percentage than Congressman Clyburn's proposal and a nearly identical Republican vote share. *Supra* pp. 11, 15. Appellees' alternative plans propose increasing District 1's BVAP to between 21.2% and 34.9%. SA.142a.

According to Appellees' figures, the Enacted Plan moved 123,521 Charleston County residents from District 1 to District 6. JSA.552a. Of these, 78,117 were white and 29,401 were African American. *Id.* The Enacted Plan moved more Democratic voters (36,888) than African Americans (29,401) in Charleston County from District 1 to District 6. JSA.567a.

Traditional Districting Principles. The Enacted Plan preserves 92.78% of District 1's core—significantly more than Appellees' proposed alternatives, which preserve between only 52.23% and 76.04% of District 1's core. JSA.439a, 453a, 461a, 468a, 479a. In fact, the Enacted Plan retains more of the core of *every* district than each of Appellees' alternatives. JSA.439a-445a, 453a-459a, 461a-477a, 479a-485a.

Preserving District 1's core advanced the General Assembly's compliance with other traditional principles under South Carolina law. For one, preserving cores is "the clearest expression" possible of respect for "communities of interest." *Colleton Cnty.*, 201 F. Supp. 2d at 649. For another, preserving cores protects incumbents by "keeping incumbents' residences in districts with their core constituents." *Backus*, 857 F. Supp. 2d at 560. By preserving more of the core of District 1—and *every* district—than all of Appellees' alternatives, the Enacted Plan outperforms Appellees' alternatives on these criteria as well.

Moreover, because the Enacted Plan is the only plan that keeps District 1 majority-Republican, it outperforms all of Appellees' plans on the traditional principle of preserving "partisan advantage." *Cooper*, 581 U.S. at 291.

The Enacted Plan also improves upon the constitutional Benchmark Plan's compliance with several traditional criteria. It unites in District 1 (i) Beaufort and Berkeley Counties, JSA.146a; (ii) the Sun City community of interest, a change supported by Senator Bright Matthews, JSA.78a, 117a-178a,

252a; and (iii) the Sea Islands community of interest and the Gullah-Geechee heritage corridor, JSA.179a, 336a-337a, 399a. Statewide, it reduces the number of split counties from 12 to 10 and split VTDs from 65 to 13. JSA.432a, 447a. In District 1, it reduces the number of split counties from 5 to 4 and split VTDs affecting population from 10 to 7. JSA.432a-434a, 447a-448a.

Enacted District 1's compliance with traditional principles—and improvements upon the Benchmark Plan—are evident in Charleston County, where it makes the Charleston Peninsula whole, JSA.195a, reunites the coastal Charleston community of interest, *id.*, and repairs all 5 split VTDs, JSA.434a, 448a-449a. The Enacted District 1-6 line also follows the Charleston-Dorchester boundary to move Deer Park, Lincolnville, and Ladson VTDs to District 6, JSA.194a, and conforms to natural geographic features, including the Cooper, Stono, and Ashley Rivers, and Wappo Creek, JSA.193a-196a, 263a.

D. Appellees Challenge The Enacted Plan.

Having failed to convince the General Assembly to adopt their preferred plans, Appellees turned to the courts. Their operative complaint asserted two constitutional claims against Districts 1, 2, and 5: racial gerrymandering (Count One) and intentional vote dilution (Count Two). JSA.10a; *see* JA.59-61. Appellees disclaimed any challenge to District 6 and any VRA claims. JSA.55a; JA.59-61. They also did not allege in their complaint or at trial anything about a "racial target." *See* JA.5-63.

Even though legislator testimony may be compelled only in "extraordinary instances" and even then

"frequently will be barred by privilege," *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977), the panel refused to uphold legislative privilege, Dkt. 153, 299. Appellees therefore engaged in searching discovery of internal documents and testimony from legislators and staff of both the Senate and the House. Despite this broad discovery, the presiding judge recognized during closing arguments that Appellees lacked any direct evidence of racial intent and instead had to rely on "circumstantial evidence." JSA.417a-418a.

Appellees offered at trial the testimony of four putative experts—Drs. Kosuke Imai, Moon Duchin, Jordan Ragusa, and Baodong Liu. Their analyses did not "accurately represent[] the districting process" because they "ignored certain traditional districting criteria" and did not replicate the "myriad considerations" in redistricting. *Allen*, 143 S. Ct. at 1512-13.

Drs. Imai and Duchin. As they did in *Allen*, Drs. Imai and Duchin performed simulation analyses that "ignored certain traditional districting criteria." 143 S. Ct. at 1512. Dr. Imai ignored core preservation, politics, avoiding VTD splits, and preserving communities of interest. JA.251-256. His simulation plans also contravene the one-person, one-vote requirement because they have a total population deviation of 0.1% (approximately 730 people). SA.29a. And he acknowledged that his analysis does not decouple race and politics, address "what intent the General Assembly had," or try "to figure out why the mapmaker drew the map a certain way." JA.244-245, 255.

Dr. Duchin's algorithms likewise ignored politics, core preservation, incumbency protection, avoiding VTD splits, and respecting certain communities of interest. JA.102-103, 116-124. They also violated the one-person, one-vote rule by permitting population deviations of up to 1% (approximately 7,300 people). SA.178a; JSA.16a.

Dr. Ragusa. Dr. Ragusa used a "county envelope" methodology purporting to analyze the VTDs included in or excluded from each district. He assumed that every VTD in a county contained at least partially in a district was available to be included in the district—regardless of the VTD's location or proximity to the district line. JSA.503a; JA.191. Dr. Ragusa concluded that "race was an important factor" in District 1. JSA.509a.

Dr. Ragusa's model, however, ignored contiguity, compactness, core preservation, avoiding political subdivision splits, and preserving communities of interest, and he admitted that he could not "authoritatively speak to" "[i]ntent." JA.197; JSA.501a-507a. Rather, all he purported to "speak to is effects," specifically that "race was an effect in the design of" the Enacted Plan. JA.197. In addition to District 1, his model concluded that race was a "significant factor" in Districts 3 and 6, which Appellees did not challenge, and Districts 2 and 5, where the panel rejected Appellees' challenges. JSA.507a-513a.

Dr. Liu. Dr. Liu attempted to use "race and party" data to analyze the movement of VTDs into and out of Districts 1 and 2, SA.91a-102a, 113a, but he ignored many traditional criteria, including core preservation,

compactness, contiguity, and incumbency protection, JA.147-149. He also relied on flawed data provided by Appellees' counsel, which he never verified. JA.142-144.

Appellees also presented at trial the testimony of several community members and legislators, including Senator Bright Matthews. *E.g.*, JA.86, 127-129, 152, 156, 159.

E. The District Court Invalidates District 1.

At closing argument, the presiding judge made several statements that:

- Revealed that he had developed, and prejudged, his racial target theory: "And I asked Mr. Roberts—I'd figured it out already."
- Referred to matters outside the record: "I know Mr. Roberts very well. He's helped me in a case I tried in this court. … [H]e knows more at the precinct level than any living person in South Carolina."
- Showed a failure to presume good 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."

JSA.415a-421a.

The panel issued its decision on January 6, 2023. It rejected the challenges to Districts 2 and 5 and to the Jasper and Dorchester County portions of District 1. JSA.35a-36a, 43a, 45a-46a. It also found that the General Assembly's objective in District 1 was "to create a stronger Republican tilt." JSA.21a. It nevertheless held that race predominantly motivated

District 1, asserting that a "17% African American target" was used as a proxy for politics and that "the Charleston County portion of [District 1]" is racially gerrymandered. JSA.23a, 25a, 29a, 42a-43a. The panel further ruled for Appellees on their intentional discrimination claim, holding that it is subject to the same standard as their racial gerrymandering claim. JSA.45a-46a.

The panel issued a "permanent injunction" against conducting elections in District 1 until it "approve[s]" a new plan. JSA.47a-48a. Appellants filed a notice of appeal and a motion to stay on January 27, 2023. JSA.3a, 50a. Eight days later, the panel denied a stay and delayed remedial proceedings pending this appeal. JSA.8a.

SUMMARY OF ARGUMENT

The panel's invalidation of District 1 is "infect[ed]" with myriad "errors of law" and fact and "cannot stand." *Abbott*, 138 S. Ct. at 2326.

I. The panel legally erred in determining that race predominantly motivated District 1.

A. The panel erroneously disregarded the General Assembly's politics defense. The panel failed to hold Appellees to their burdens to present an adequate alternative map and to prove that race rather than politics drove District 1.

B. The panel erred in adopting its racial target theory. The panel ignored the direct evidence disproving any racial target, improperly inferred a racial target from the correlation between race and politics, failed to presume the General Assembly's good faith, and shifted the burden to the General Assembly.

C. The panel misapplied the subordination rule when it failed to analyze District 1 as a whole and ignored District 1's compliance with traditional criteria.

D. The panel misinterpreted this Court's precedent when it suggested that *Shelby County* obligated the General Assembly to undo the decades-long Charleston County split.

II. The panel's racial predominance finding rests on clear factual errors.

A. The panel's regrettable attempt to impugn the experienced nonpartisan mapdrawer contradicts the record.

B. The panel's reliance on putative expert analyses that ignored multiple traditional criteria was misplaced.

III. Under the panel's own framework, Appellees' intentional discrimination claim fails with the racial gerrymandering claim. Moreover, the General Assembly's decision not to create a Democratic crossover district is not intentional race discrimination.

ARGUMENT

A court adjudicating claims of racial discrimination in redistricting must exercise "extraordinary caution" and "presume[]" the legislature's "good faith." *Miller*, 515 U.S. at 915-16.

Accordingly, in racial gerrymandering cases, courts must hold plaintiffs to their "demanding" burden, *Cooper*, 581 U.S. at 319, to prove that race was the legislature's "dominant and controlling consideration" in the challenged district, *Shaw v. Hunt*, 517 U.S. 899,

905 (1996). Moreover, particular judicial caution "is especially appropriate … 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." *Cromartie II*, 532 U.S. at 242. In such cases, plaintiffs must prove that "race *rather than* politics *predominantly* explains" the challenged district. *Id.* at 243. The trial court's "formidable task" is to "make a sensitive inquiry" into all of the record evidence to determine whether "the plaintiffs have managed to disentangle race from politics and prove that the former drove [the] district's lines." *Cooper*, 581 U.S. at 308.

"[T]he basic unit of analysis for racial gerrymandering claims in general, and for the racial predominance inquiry in particular, is the district." *Bethune-Hill*, 580 U.S. at 191-92. "The ultimate object of the inquiry" is "the legislature's predominant motive for the design of the district as a whole." *Id.* Thus, a court must conduct a "holistic analysis" of the district, "consider all of the [district's] lines," "take account of the districtwide context," and "not divorce any portion of the lines—whatever their relationship to traditional principles—from the rest of the district." *Id.*

Faithful adherence to these rules leads to only one conclusion: Appellees failed to carry their demanding burden. *First*, District 1 is easily "[]explainable on grounds" of politics. *Cromartie II*, 532 U.S. at 242. The Enacted Plan increases District 1's Republican vote share by 1.36 percentage points and is the only plan presented at trial that achieves the goal of

"creat[ing] a stronger Republican tilt to" District 1. JSA.21a; *supra* pp.15-16.

Second, far from subordinating traditional principles, the Enacted Plan complies with them. Enacted District 1 complies with—and outperforms all of Appellees' alternatives on—several criteria, including preserving cores, respecting communities of interest, protecting incumbents, and preserving "partisan advantage." *Cooper*, 581 U.S. at 291; *supra* pp.18-19. Enacted District 1 also improves on the constitutional Benchmark Plan's compliance with traditional principles in the district as a whole and in Charleston County. *Supra* pp.18-19.

Third, the Enacted Plan does not discriminate against any voters based on race. The Enacted Plan's changes to District 1 were race-neutral, not racial. The Enacted Plan moved VTDs into and out of District 1 based on their political composition and traditional criteria, not their racial composition. The General Assembly's political and race-neutral decision to preserve a Republican majority and not to create a Democratic crossover district is not intentional race discrimination. *Supra* pp.10-19.

The panel struck down District 1 only by disregarding this Court's settled rules for evaluating racial discrimination claims. The panel never even *mentioned*, let alone applied, the presumption of good faith. Instead, as the presiding judge indicated, the panel presumed bad faith. *See* JSA.421a (citing "a turtle on top of a fence post"). The panel improperly disregarded the General Assembly's politics defense, invented an erroneous racial target theory, failed to analyze District 1 as a whole, misread *Shelby County*,

committed clear error, and mistakenly excused Appellees from proving intentional discrimination. Each of these errors independently warrants reversal.

I. THE PANEL LEGALLY ERRED IN DETERMINING THAT RACE PREDOMINANTLY MOTIVATED DISTRICT 1.

The panel's conclusion that District 1 is a racial gerrymander is "infect[ed]" with myriad "errors of law," each of which merits reversal. *Abbott*, 138 S. Ct. at 2326.

A. The Panel Erroneously Disregarded The General Assembly's Politics Defense.

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. But "a jurisdiction may engage in constitutional political [line-drawing], even if … the most loyal Democrats [are] black Democrats and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (*Cromartie I*). "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." *Bush v. Vera*, 517 U.S. 952, 968 (1996) (plurality op.).

The panel found that the General Assembly "sought to create a stronger Republican tilt to" District 1, JSA.21a, and even acknowledged that race and politics are "highly correlated" in South Carolina, *Cooper*, 581 U.S. at 308; *see* JSA.22a-23a (noting that BVAP levels in various versions of District 1 correlated with a "Republican tilt," "toss up district," or "Democratic tilt"). Yet it failed to hold Appellees to

their "demanding" burden to show that "race *rather than* politics *predominantly*" motivated District 1. *Cromartie II*, 532 U.S. at 243. To the contrary, it *relieved* Appellees of their burden to present an adequate alternative map and never conducted the "sensitive inquiry" to ensure that Appellees "disentangle[d] race from politics." *Cooper*, 581 U.S. at 308.

1. The Panel Failed To Enforce The Alternative-Map Requirement.

When "racial identification correlates highly with political affiliation, the [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." *Cromartie II*, 532 U.S. at 258. This Court unanimously agreed in *Cooper* that "only maps" showing that the legislature could have accomplished its "political objective" while "redistrict[ing] differently" can "carry the day" in cases "in which the plaintiffs ha[ve] meager direct evidence." 581 U.S. at 321-22; *see id.* at 336 (Alito, J., concurring in judgment in part and dissenting in part) (an "alternative map" should be required except in the most "exceptional" cases).

Appellees offered no direct evidence of racial predominance, *see* JSA.417a-418a, and therefore "needed to rely on … foregone alternatives" to prove their claims, *Cooper*, 581 U.S. at 322. Yet Appellees failed to present an adequate alternative map: *none* of their alternatives achieved the General Assembly's "political objective[]." *Cromartie II*, 532 U.S. at 258. To the contrary, *each one* "harm[ed]" that objective by

making District 1 majority-Democratic. *Cooper*, 581 U.S. at 322; *supra* p.16.

Moreover, Appellees' alternatives are not as "consistent with" traditional principles as the Enacted Plan. *Cromartie II*, 532 U.S. at 258. All fail to preserve cores and communities of interest and to protect incumbents as well as Enacted District 1. *Supra* pp.18.

The panel, however, excused Appellees from the alternative-map requirement. The panel's only mention of the requirement misconstrued the law: it thought that an alternative map is relevant solely to the "remedy." JSA.46a. It therefore missed that an alternative map is required to *prove* a violation in cases involving only "meager" —or, as in this case, *no*—"direct evidence of a racial gerrymander." *Cooper*, 581 U.S. at 322. Thus, while *Cooper* opined that challengers in direct-evidence cases are not required to produce "one particular form of proof to prevail," it reinforced the alternative-map requirement in circumstantial-evidence cases. *Id.* at 319, 321.

The panel also misconstrued the law when it waived the alternative-map requirement because "a constitutionally compliant plan … can be designed without undue difficulty." JSA.46a. A constitutionally compliant plan, without more, provides no indication whether "race *rather than* politics *predominantly* explains" the challenged plan. *Cromartie II*, 532 U.S. at 243. Rather, the alternative must isolate race as the explanatory variable in the challenged district by controlling for "political objectives" and "traditional" criteria. *Id.* at 258. Only

such an alternative can "disprove" a politics defense. *Cooper*, 581 U.S. at 317.

Finally, that an alternative map allegedly can be drawn "without undue difficulty," JSA.46a, is a reason to *require* one, *see Cooper*, 581 U.S. at 337 (Alito, J., concurring in judgment in part and dissenting in part). The panel's failure to enforce the alternative-map requirement demands reversal.

2. The Panel Failed To Disentangle Race And Politics.

Even if the alternative-map requirement were inapplicable here, the Court still should reverse because the panel otherwise failed to enforce Appellees' burden to "disentangle race from politics." *Cooper*, 581 U.S. at 308. In fact, the panel's analysis was the exact opposite of the "sensitive inquiry into all circumstantial and direct evidence of intent" required to assess whether race rather than politics predominantly "drove" District 1. *Id.*

To start, the panel simply ignored voluminous evidence "[]explain[ing] on [political] grounds" District 1 and even the line in Charleston County. *Cromartie II*, 532 U.S. at 242. The "only direct evidence" of intent presented at trial demonstrated that the General Assembly's "intent was legitimate." *Abbott*, 138 S. Ct. at 2327; *supra* pp.10-15. The panel not only "discounted this direct evidence," *Abbott*, 138 S. Ct. at 2327; it largely disregarded it. The panel did not mention Senator Campsen's testimony that he never considered race or reviewed racial data while the Enacted Plan was being drawn, or his testimony outlining his political and race-neutral reasons for District 1 and maintaining the Charleston County

split. *Supra* pp.12-14. It also never mentioned Senator Massey's testimony *at all*. It therefore ignored Senator Campsen's and Senator Massey's testimony that the General Assembly never would have enacted, for obvious political reasons, any plan that made District 1 majority-Democratic. *Supra* pp.13-14. And it ignored Representative Jordan's testimony that the Enacted Plan's goal was "to pull the first red" and his text messages establishing that the General Assembly had a *political* target in District 1. *Supra* pp.14-15.

Turning to Mr. Roberts, the panel dismissed as not "plausible" his testimony that he used politics and traditional principles rather than race to draw lines. JSA.29a; *infra* pp.47-50. But it offered nothing to support this conclusory dismissal. It offered no suggestion that District 1 is "unexplainable on grounds" of politics, *Cromartie II*, 532 U.S. at 242, or that the changes to District 1 do not correlate with politics or "create a stronger Republican tilt to" the district, JSA.21a. Nor could it: the Enacted Plan increased District 1's Republican vote share by 1.36 percentage points. *Supra* p.15. Likewise, the panel never suggested that the General Assembly could have "achieved its legitimate political objective[] in alternative ways," *Cromartie II*, 532 U.S. at 258, since *all* of Appellees' alternatives "harm[]" that objective, *Cooper*, 581 U.S. at 322; *supra* p.16.

These facts underscore that the General Assembly's "intent" was political and race-neutral. *Cooper*, 581 U.S. at 308. The panel, however, did not mention any of them. *See* JSA.9a-49a. Instead, it myopically focused on an alleged "racial gerrymander of Charleston County." JSA.24a-34a. This "divorc[ing]"

of a single county from District 1 "as a whole" was itself legal error. *Bethune-Hill*, 580 U.S. at 192. Indeed, the panel's own findings that race did not predominate in the other two District 1 counties Appellees challenged, Jasper and Dorchester, *see* JSA.34a-36a, underscore that Appellees' challenge fails on a "holistic analysis," *Bethune-Hill*, 580 U.S. at 192.

In all events, even in Charleston County, the panel assessed only the evidence of an alleged racial effect, JSA.24a-34a, and therefore ignored that Charleston County has been split for decades and that the challenged line is readily "[]explainable on grounds" of politics and traditional principles, *Cromartie II*, 532 U.S. at 242. In fact, the Enacted Plan's moves of Charleston County VTDs from District 1 to District 6—including the more than 81,000 residents of majority-Democratic and predominantly white West Ashley—are even *more* consistent with the General Assembly's political and race-neutral goals than an alleged use of race. *Supra* pp.16-19. Indeed, the Enacted Plan moved more Democratic voters (36,888) than African Americans (29,401) in Charleston County from District 1 to District 6. *Supra* pp.16-17.

The Enacted Plan's changes in Charleston County were therefore integral to "creat[ing] a stronger Republican tilt to" District 1. JSA.21a. The panel's "legal mistake[s]" in ignoring these facts and failing to perform the "sensitive inquiry" into whether Appellees "disentangle[d] race from politics" warrant reversal. *Cooper*, 581 U.S. at 308-09.

B. The Panel's Racial Target Theory Is Legally Erroneous.

Rather than holding Appellees to their demanding burden, the panel employed a racial target theory that Appellees neither pleaded nor pursued at trial. According to the panel, a 17% African-American racial target was used as a proxy for politics in District 1. JSA.22a-23a, 33a. This theory rests on multiple legal errors.

First, rather than "*dis*entangl[ing] race from politics," *Cooper*, 581 U.S. at 308 (emphasis added), the panel *hyper*entangled them. Rigorous enforcement of a plaintiff's disentanglement burden is essential where, as here, race and politics are highly correlated. *Id.*; *Cromartie II*, 532 U.S. at 242. Otherwise, courts could *always* purport to infer racial predominance or a racial target from district lines that have both political and (alleged) racial effects. *See Cooper*, 581 U.S. at 308.

That is precisely what the panel did here. The record contains no direct evidence—instead, only *denials*—that anyone involved in the Enacted Plan used race to draw lines. *Supra* pp.10-15. The panel nonetheless reverse-engineered a racial target based on nothing more than the correlation between race and politics.

The panel suggested that two "[a]nalyses of partisan voting patterns . . . demonstrat[ed] the need to limit the African American population … to produce the desired partisan tilt" and "resulted in a target of 17% African American population." JSA.22a-23a. But no such "analyses" exist anywhere. The first purported "analysis" does not exist at all: there are no

"Charts 2.1, 2.2" in Dr. Duchin's report. JSA.23a (citing Plaintiffs' Exhibit 67 (SA.124a-196a)). The other purported "analysis" is a closing demonstrative used by Senate Appellants' counsel. JSA.23a (citing Dkt. 491-1 at 21 (JA.83)). That demonstrative is not evidence and made no suggestion of any (nonexistent) racial target in any event. Instead, it was titled "Plaintiffs Seek A Crossover District 1" and showed the BVAP levels and political performance of various alternative versions of District 1, JA.83, as the panel essentially acknowledged, *see* JSA.22a-23a (noting only that the "analyses" indicated that BVAP levels in various versions of District 1 correlated with different political "tilt[s]"). In other words, it recounted record evidence of the correlation between race and politics animating Appellees' claims, not that the General Assembly "need[ed]"—let alone *used*—a racial target to accomplish its political goal. JSA.23a. The panel thus inferred a racial target from the undisputed correlation between race and politics, when its "formidable task" was to "disentangle" the two. *Cooper*, 581 U.S. at 308.

Second, the panel's racial target theory failed to presume the General Assembly's good faith—or even its rationality. The panel concluded that the General Assembly "need[ed]" to use a racial target to achieve its political goals, JSA.23a, even though detailed, sub-precinct election data—which the panel *never* mentioned—were readily available (and were used) for the job, *see* JSA.90a, 93a-95a-99a. Rather than presuming the General Assembly's "good faith," the panel assumed the worst. *Abbott*, 138 S. Ct. at 2324; *see McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (declining to "infer a discriminatory purpose" where

the evidence was merely consistent with such a purpose).

Moreover, the panel's theory makes no sense. Whereas race *partially* correlates with politics, *Cooper*, 581 U.S. at 308, election data *perfectly* correlate with politics. And whereas using race incurs serious legal risk, as the General Assembly well knew, JSA.280a, 346a, 358a, a legislature is "free" to use "political data" to draw lines for political goals "regardless of its awareness of its racial implications," *Bush*, 517 U.S. at 968 (plurality op.); *see Rucho*, 139 S. Ct. 2484. Yet the panel never explained *why* anyone would use a racial target as a legally risky *proxy* for politics when the mapdrawer could (and did) use election data *directly* for politics. *See* JSA.90a, 93a-99a. Muddying the waters even further, the panel also suggested that the General Assembly engaged in some kind of two-way proxy that also used "partisanship as a proxy for race." JSA.33a. If the presumption of good faith means anything, it requires federal courts to presume that legislatures are "rational" and do not pursue their objectives via risky, race-based methods when superior, race-neutral options are readily available. *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 265 (2013).

At minimum, "extraordinary caution" and "the presumption of good faith" required the panel to explain why a legislature would choose an illegal Rube Goldberg mechanism to reach a legitimate end. *Miller*, 515 U.S. at 916. But the panel did not come close. For one thing, it never disclosed *who* it believed had adopted, authorized, and applied a racial target. *See* JSA.23a-34a. It also never disclosed who among the Senate and House witnesses—all of whom denied

under oath making decisions based on race, *supra* pp.10-15—allegedly testified falsely, *see* JSA.23a-34a. And it never explained how the alleged racial target and intent could be imputed to individual legislators or the General Assembly "as a whole." *Brnovich*, 141 S. Ct. at 2350 ("The 'cat's paw' theory has no application to legislative bodies.").

Nor did the panel recognize that its 17% racial target theory is irreconcilable with the General Assembly's political goal. District 1 had elected a Democratic representative in 2018 at the 17% African-American population level, *see* JSA.439a—so that level *harmed* the General Assembly's political goal of improving Republican electoral fortunes. Thus, if the General Assembly had used race as a proxy for politics, it would not have aimed to *replicate* that level but to *lower* it.

The panel also overlooked that the General Assembly's decision to include Berkeley County "whole" in District 1, JSA.24a, disproves its theory. Berkeley County has a higher African-American population percentage than Charleston County. JA.412. Thus, had the Enacted Plan used race as a proxy for politics, it would have excluded Berkeley rather than Charleston from District 1. That it instead included majority-Republican Berkeley and excluded a majority-Democratic portion of Charleston underscores that politics, not a racial target, motivated the General Assembly.

Third, the panel's racial target theory incorrectly "shift[ed] the burden" of disentangling race and politics to Appellants. *Abbott*, 138 S. Ct. at 2325. Although that burden rested squarely with Appellees,

see Cooper, 581 U.S. at 308; *Cromartie II*, 532 U.S. at 241-42, the panel shifted it to Appellants by equating the correlation between race and politics with a racial target. After all, unable to dispute that correlation, the *only* way Appellants could have convinced the panel that no racial target existed would have been to "disentangle race from politics" themselves and prove that politics "drove [the] lines" in Charleston County. *Cooper*, 581 U.S. at 308. That is exactly backwards.

* * *

The implications of these errors cannot be overstated. This Court has never upheld a finding of a racial target without direct evidence such as a legislator's admission. *See id.* at 316-18; *Bethune-Hill*, 580 U.S. at 192. But under the panel's approach, federal courts could find a racial target absent any such direct evidence based on nothing but the widespread correlation between race and politics—even where, as here, all of the direct evidence disproves racial predominance and politics readily explains the challenged lines. The various "legal error[s]" in the panel's racial target theory require reversal. *Abbott*, 138 S. Ct. at 2313.

C. The Panel Misapplied The Subordination Rule.

Appellees' ultimate burden was to prove that the General Assembly "subordinated" race-neutral principles to race. *Bethune-Hill*, 580 U.S. at 187. And because redistricting is "primarily the duty and responsibility of the State," the panel was required to defer to the State's redistricting policy choices and trade-offs. *Abbott*, 138 S. Ct. at 2316.

The panel disregarded these precepts as the Enacted Plan complies with, rather than subordinates, traditional criteria. As explained, Enacted District 1 outperforms *all* of Appellees' alternatives—and improves upon the judicially upheld Benchmark Plan—on crucial criteria, including in Charleston County. *Supra* p.26.

Unable to dispute any of these facts, the panel did not even engage them. To the contrary, it barely attempted to show that Enacted District 1 subordinated traditional criteria to race. The best it could muster was the suggestion that the line in Charleston County effects a racial gerrymander by "subordinat[ing]" the principles of "maintenance of constituencies, minimizing divisions of counties, and avoidance of racial gerrymandering." JSA.29a.

At the threshold, however, this "divorce" of Charleston County "from the rest of" District 1 is reversible error. *Bethune-Hill*, 580 U.S. at 192.

Regardless, the panel's suggestion that the Enacted Plan subordinates traditional criteria to race is multiply flawed.

First, District 1 as a whole "maint[ains] constituencies," JSA.29a, by retaining 92.78% of its core, outperforming all of Appellees' alternatives, *supra* p.18. Moreover, any alleged departure from "maintenance of constituencies," JSA.29a, in District 1 is more readily explained by politics than race: the Enacted Plan moved African-American and white individuals out of District 1 almost in lockstep with Benchmark District 1's racial composition while removing approximately 43% more Democrats than Republicans. *Supra* pp.16-17. Thus, far from

"exil[ing]" African Americans, JSA.34a, the Enacted Plan "exiled" *Democratic voters of all races* from District 1, including in Charleston County, *supra* pp.15-17. Enacted District 1 is race-neutral, not racially predominant.

The panel's reach for a racially predominant failure to "maint[ain] constituencies" in Charleston County, JSA.29a, fails too. The Enacted Plan's perpetuation of the Charleston County split "maintains constituencies" recognized in every plan since 1994, including a court-drawn plan. Thus, ending that split, as the panel suggested, is a starker departure from "maintenance of constituencies" than the Enacted Plan.

The panel nonetheless cited three sets of figures regarding the purported racial effect of the Enacted Plan's moves in Charleston County, but none proves a racially predominant "purpose" even in Charleston County, let alone in District 1 "as a whole." *Bethune-Hill*, 580 U.S. at 189, 192. The panel, moreover, misstated the effect in Charleston County, where the Enacted Plan is more readily explainable on grounds of politics and traditional principles than race. *Supra* pp.16-18, 26, 32.

For example, the panel noted that the Enacted Plan's moves shifted approximately "30,000 African Americans" in "Charleston County" from District 1 to District 6, JSA.26a, 29a, without mentioning that the moves involved even more Democratic voters (36,888) and white individuals (78,117 total), and *all* of majority-Democratic, predominantly white West Ashely. *Supra* pp.16-17.

Moreover, the panel's mention of the African-American population percentages of the District 1 and District 6 portions of Charleston County, *see* JSA.27a-28a, disregards the nearly 7-percentage-point decrease in Charleston County's African-American population percentage revealed by the 2020 Census, *supra* p.9. The panel did not account for that decrease when it stated that "the percentage of African Americans in Charleston County in [District 1] fell from 19.8% at the time of enactment of the 2011 Plan to 10.3% in the 2022 plan." JSA.27a. It also never mentioned that the corresponding drop in the District 6 portion of Charleston County was even larger: from 53.9% in the Benchmark Plan to 33.3% in the Enacted Plan. JA.411-412. Thus, in fact, the African-American population percentage disparity between the District 6 and District 1 portions of Charleston County *shrank* under the Enacted Plan: from 34.1 percentage points in the Benchmark Plan under the 2010 Census (53.9% vs. 19.8%) to only 23 percentage points in the Enacted Plan under the 2020 Census (33.3% vs. 10.3%). *Id.*

The panel's contention that "79% of Charleston County's African-American population was placed into" District 6 and "21% was placed into" District 1, JSA.27a, bears clarification. The Enacted Plan did not "place" 100% of Charleston County's African-American population into one district or another. Rather, it *left* significant African-American populations in Districts 1 and 6, where they had resided in the Benchmark Plan, and moved only some populations as part of its race-neutral changes in Charleston County. And the panel's figures are not probative even at face value: even starker racial

disparities in split counties existed in *Cromartie I* and *II*, and this Court reversed racial gerrymandering findings in both cases. *See* 526 U.S. at 548 & n.4, 551-52; 532 U.S. at 242-43.

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. JSA.29a; *see infra* pp.42-45. Moreover, the panel again ignored District 1 as a whole, where the Enacted Plan reduced the total number of split counties and *repaired* the Beaufort and Berkeley splits from the constitutional Benchmark Plan. *Supra* pp.18-19. That wholly permissible treatment of Beaufort and Berkeley Counties meant that Charleston County *had* to remain split to comply with the one-person, one-vote mandate. *Supra* p.13. And, as explained, keeping Charleston County split achieved Senator Campsen's political and policy goals while adhering to traditional principles. *Supra* pp.13, 39. 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. Maintaining the longstanding, constitutional split of Charleston County was not racial gerrymandering.

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

The panel's failure to conduct a "holistic analysis" of, *Bethune-Hill*, 580 U.S. at 192, and to "respect[]," *Abbott*, 138 S. Ct. at 2316, the General Assembly's application of traditional principles are "legal mistake[s]" warranting reversal, *Cooper*, 581 U.S. at 309.

D. The Panel Misinterpreted *Shelby County*.

Finally, the panel legally erred when it suggested that *Shelby County* renders the Enacted Plan unconstitutional. The panel acknowledged that it was driven by "doubt" not about District 1 but about *District 6*, which has a 45.9% BVAP, JSA.452a, is home to Congressman Clyburn, and was upheld as "adhere[nt] to traditional race-neutral principles" in *Backus*, 857 F. Supp. 2d at 560. But according to the panel, the 2011 General Assembly designed Benchmark District 6 and maintained the Charleston County split by "utiliz[ing] race conscious line drawing" to "satisfy the then-existing Section 5 non-retrogression requirements." JSA.19a, 26a-27a. By "effectively eliminating" those requirements, the panel asserted, *Shelby County* "cast doubt" on the "present-day validity" of District 6 and raised a "fair question" whether the alleged "racial division of Charleston County residents" remains "legally justifiable" today. *Id.* The panel accordingly faulted the General Assembly for "doubling down" on the Charleston County split in the Enacted Plan. JSA.27a.

This reasoning is flawed on multiple levels. To start, Plaintiffs expressly *eschewed* any challenge to District 6, *see* JSA.55a, so the panel's self-invented "theory of the case" cannot sustain its decision, *United*

States v. Sineneng-Smith, 140 S. Ct. 1575, 1579, 1581 (2020).

Moreover, the panel's premise is wrong: far from "utiliz[ing] race conscious line drawing," JSA.26a, the 2011 General Assembly "adhered to traditional race-neutral principles" in drawing Benchmark District 6, *Backus*, 857 F. Supp. 2d at 560. At minimum, the 2022 General Assembly reasonably relied on the ruling of a federal court (summarily affirmed by this Court) that District 6 was constitutional. *See Abbott*, 138 S. Ct. at 2324-26 ("good faith" attached to legislature's reliance upon court-approved plans).

Furthermore, any use of race in *Benchmark* District 6 would not render unconstitutional *Enacted* District 6. *Id.* at 2324 (even "finding of past discrimination" does not "condemn governmental action that is not itself unlawful"). And even if District 6 were unconstitutional, that would "not prove" a constitutional infirmity in "neighboring" District 1. *Sinkfield v. Kelley*, 531 U.S. 28, 30-31 (2000) (per curiam).

In all events, the panel's reading of *Shelby County* is untenable: it would require States to discriminate against voters and districts based on race. Under the panel's reading, *Shelby County* placed no constraints on the General Assembly's preservation of the Benchmark Districts' shape and lines, *except* in District 6. In other words, the panel read *Shelby County* to require States to single out and overhaul districts originally drawn to comply with the VRA, even when traditional principles support maintaining them. JSA.19a-20a, 26a-27a.

Nothing in *Shelby County* supports this result. The decision held only that Congress could not impose the "extraordinary" preclearance requirement on States based on outdated findings. 570 U.S. at 557. It did not hold or imply that the districts approved by that process suddenly became discriminatory. States are free to retain VRA districts on equal terms with all other districts and in accordance with traditional districting principles. And when they do so, they remain entitled to the presumption of good faith. *Abbott*, 138 S. Ct. at 2324.

The panel's reading, by contrast, would put *Shelby County* at odds with the Fourteenth Amendment. The equal treatment of *all* voters and districts regardless of race is the touchstone of that amendment's prohibition on racial gerrymandering and discrimination. *See Cromartie I*, 526 U.S. at 546-47; *Cooper*, 581 U.S. at 291. Yet the panel would require States to engage in intentional discrimination that would render race the "predominant factor" for VRA districts. *Cooper*, 581 U.S. at 291. For example, the panel's proposal to subordinate traditional districting principles to end the alleged "racial division" in Charleston County would be precisely the sort of "race conscious" action the Fourteenth Amendment exists to stop. JSA.26a-27a.

The panel's reading, moreover, would make *Shelby County* self-defeating. The decision ended a regime where some—but only some—States' redistricting plans were presumptively invalid. 570 U.S. at 535. But the panel's reading would perpetuate these "drastic departure[s] from basic principles of federalism" and "equal sovereignty." *Id.* Under that reading, States not formerly covered by Section 5

would be free to retain districts based on traditional criteria, but formerly covered States would be obligated to consciously alter the racial balance of lines drawn to comply with Section 5.

Shelby County did not obligate the 2022 General Assembly to undo the 2011 General Assembly's lawful line-drawing nor license federal courts to require States to abandon race-neutral principles (only) in (former) VRA districts. Having "misinterpreted" this Court's precedent, the decision below cannot stand. *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410, 411 (2006) (per curiam).

II. THE PANEL COMMITTED CLEAR ERROR IN FINDING THAT RACE PREDOMINANTLY MOTIVATED DISTRICT 1.

In all events, the Court should reverse because the panel "clearly err[ed]" in finding that race was the General Assembly's predominant motivation. *Cromartie II*, 532 U.S. at 258.

Clear-error review is no rubber stamp in racial gerrymandering cases, where this Court remains "aware" that plaintiffs' burden "is a demanding one." *Id.* at 241. Thus, a clear error is shown merely by "a degree of certainty" that Appellees failed to prove predominance under that high standard. *Concrete Pipe & Prods. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 622-23 (1993). And, even when "there is evidence to support" the decision below, a clear error exists if "on the entire evidence [the Court] is left with the definite and firm conviction that a mistake has been committed." *Id.* at 622.

"[E]xtensive" review is also warranted because this Court is "the only court of review" and the "key

evidence consisted primarily of documents and expert testimony," with credibility evaluations playing no "role." *Cromartie II*, 532 U.S. at 243; *see* JSA.33a (vaguely referencing "credibility" but making no credibility determinations).

Moreover, a predominance finding is not a typical factual finding about, say, "who did what." *U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 & n.4 (2018). Rather, it represents a "broadly social judgment[]" about the degree to which race rather than other factors drove a multi-member legislative body to enact a law, *Baumgartner v. United States*, 322 U.S. 665, 670-71 (1944)—an exceedingly "hazardous" inquiry, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2256 (2022). Thus, a predominance finding and its "foundation" warrant closer review than a "simpl[e]" finding of fact. *Baumgartner*, 322 U.S. at 670-71.

Under any proper formulation of the standard of review, the panel clearly erred here. Its disregard of the extensive evidence of the General Assembly's political and race-neutral motivation, indefensible racial target theory, and failure to analyze District 1 as a whole, *supra* pp.25-42, each demonstrate clear error, *see Cromartie II*, 532 U.S. at 257.

On top of all that, the panel committed two other clear errors: its regrettable accusation against the nonpartisan mapdrawer and its reliance on flawed putative expert analyses.

A. The Panel's Attempt To Impugn Nonpartisan Staff Fails.

The panel implied that Mr. Roberts used a racial target as a proxy for politics. JSA.29a-30a. This implication is not only regrettable but plainly wrong.

First, the panel asserted that a 17% African-American racial target was necessary "to produce the desired partisan tilt" in District 1. JSA.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 lines based on the 2020 election data made publicly available during the redistricting process, admitted at trial, and ignored by the panel. *Supra* pp.34-35. Indeed, that is precisely what Mr. Roberts said he did. *Supra* p.10. The panel's assertion that a racial target was "needed" makes no sense. *See Anderson v. Bessemer City*, 470 U.S. 564, 575-77 (1985) ("illogical" factual inference alone warrants reversal).

Second, the panel stated that "Senator Campsen's announced intention to include Berkeley and Beaufort Counties whole in [District 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." JSA.24a. Once again, the panel cited no record support. Once again, 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. JSA.88a, 98a.

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. JSA.25a-26a. But the panel misanalyzed the Enacted Plan's compliance with traditional principles, including in Charleston County. *Supra* pp.37-42. Moreover, any departure from preserving cores or communities of interest does not establish that those principles were "subordinated" to race instead of politics and other traditional principles. *Cooper*, 581 U.S. at 291. Mr. Roberts explained all of this to the panel. JSA.193a-199a. Far from "fail[ing] to provide the Court with any plausible explanation" for the line in Charleston County, JSA.29a, he gave an explanation of politics and traditional principles that it ignored.

Any departures from the Clyburn staff model—including the move of West Ashley to District 6—are likewise consistent with politics and traditional principles. *Supra* pp.16-17, 32, 38-41. 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. *Supra* pp.11, 17. It thus did *more* of what the panel claims tainted the Enacted Plan with racial predominance than the Enacted Plan did.

Fourth, the panel expressed suspicion at the "coincidence" of the African-American population percentages in Benchmark District 1 and Enacted District 1. JSA.29a. That "coincidence," of course, is

entirely consistent with the Enacted Plan's preservation of 92.78% of District 1's core. *Supra* p.18. And in any coincidence the panel should have presumed "good faith" rather than the opposite. *Miller*, 515 U.S. at 915. In all events, as explained, this "coincidence" *disproves* a racial target because the 17% African-American population level *contravened* the General Assembly's political goal. *Supra* p.36.

Fifth, the panel claimed that Mr. Roberts agreed, on its questioning, that the Enacted Plan's changes in Charleston County were "dramatic" and "'created tremendous disparity' in the placement of African Americans within [Districts 1 and 6] in Charleston County." JSA.34a. But even "dramatic" changes or effects, without more, do not prove subordination of traditional principles to race or predominant racial "purpose[]." *Cooper*, 581 U.S. at 292, 299; *supra* pp.40-41.

Finally, the panel faulted Mr. Roberts for his "in-depth knowledge of the racial demographics in South Carolina," pointing to its questioning regarding the Deer Park area. JSA.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. JSA.135a, 197a. Moreover, he did not know the precise racial demographics of other areas the panel asked about. JSA.254a. And he testified regarding the political composition not only of the Deer Park VTDs, but also the Lincolnville, Ladson, and St. Andrews VTDs. JSA.136a, 196a-197a. 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.

Anyway, mere "awareness" of race is not enough: a map drawer (and a legislature) is "almost always" "aware" of race, 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 551-52. The panel clearly erred.

B. The Panel Relied Upon Flawed Putative Expert Analyses.

The panel also invoked the analyses of two of Appellees' putative expert witnesses—Drs. Imai and Ragusa—suggesting that they "support … a finding that race predominated over all other factors in" District 1. JSA.30a-32a. This suggestion was "misplaced," *Allen*, 143 S. Ct. at 1512: as Drs. Imai and Ragusa admitted, their analyses did not even *attempt* to control for "all" factors involved in redistricting. Rather, they "ignored" multiple factors and, thus, did not "accurately represent[] the districting process." *Id.*

Dr. Imai's algorithm did not account for politics, core preservation, and other criteria, and it violated the one-person, one-vote rule. *Supra* p.20. As for the criteria he *did* consider, Dr. Imai assigned weighted "strengths" that did not approximate those accorded by the General Assembly. JA.258-260. Dr. Imai conceded that his method neither "replicate[d] a legislature's process for drawing a map" nor examined whether the General Assembly "actually used race to draw the [E]nacted [P]lan." JA.229, 244-245.

Dr. Ragusa did not control for contiguity, compactness, core preservation, avoiding political

subdivision splits, or preserving communities of interest. *Supra* p.21. His county-envelope methodology made no attempt to establish that any 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; *supra* p.21. His analysis therefore "offers little insight into the legislature's true motive." *Cromartie II*, 532 U.S. at 248.

Indeed, Dr. Ragusa admitted that he could not "authoritatively speak to" the General Assembly's "[i]ntent," but purported only to "speak to … effects." JA.197. But even on effects, his analysis was unreliable: it concluded that race was a "significant factor" in five of the Enacted Plan's seven districts, JSA.507a-513a, including two districts (3 and 6) Appellees did not challenge, JSA.10a, and two districts (2 and 5) where the panel *rejected* their challenges, JSA.40a-41a.

The panel nonetheless indicated that "Dr. Ragusa's findings were particularly probative regarding changes in the Charleston County portion of [District 1], where ten of the eleven VTDs with African American populations of 1,000 or more were moved to Congressional District No. 6." JSA.32a. This is clearly wrong. Of the ten Charleston County VTDs in District 6 with African-American populations of 1,000 or more, three (Charleston 12, Charleston 15, and North Charleston 10) *already* were in District 6 in the Benchmark Plan. *See* Dkt. 473. The Enacted Plan therefore did *not* "move[]" them. JSA.32a.

The other seven are located in Deer Park, Lincolnville, and Ladson. *See* Dkt. 473. As explained, the movement of those VTDs is more readily explained by politics and traditional principles than race. *Supra* p.11, 16-19, 32. Furthermore, Dr. Ragusa (like the panel) focused on the total number of African-American voters residing in a VTD, JSA.508a-509a, 514a, even though VTDs vary in size and BVAP *percentage* is a more probative metric for determining the effect of moving a VTD on a district's racial composition, JSA.408a. So, too, did Dr. Ragusa's "partisanship" analysis examine total Democratic votes rather than percentages. JSA.502a. And his proposed comparison of VTDs' racial make-up and vote totals is apples-to-oranges because one reflects total population while the other reflects voter turnout. *Id.*

In all events, any discussion of seven (or even ten) VTDs is not the "holistic analysis" required to evaluate Appellees' claims. *Bethune-Hill*, 580 U.S. at 192. The Court should reverse on Count I.

III. The Panel's Determination That District 1 Is Intentionally Discriminatory Cannot Stand.

The panel also erred when it ruled for Appellees on Count Two. JSA.45a. The panel evaluated Appellees' intentional discrimination claim under the "predominance standard" applicable to racial gerrymandering claims. *Id.* Thus, under the panel's framework, Appellees' intentional discrimination claim fails with the racial gerrymandering claim. *Supra* Parts I-II.

Appellees contend that they may prevail on an intentional discrimination claim merely by showing that race was "a motivating factor" in the challenged district. JA.61. The panel rejected that contention. JSA.43a-45a. Regardless, the intentional discrimination claim fails on Appellees' terms for at least two reasons.

First, as detailed above, race was not even *a* factor, let alone a motivating factor, in the adoption of the Enacted Plan, District 1, or even the changes in Charleston County. *Supra* Parts I-II. Appellees have no direct evidence of racially discriminatory intent. JSA.417a-418a. Their allegation of "circumstantial evidence [that] raises a strong inference of a discriminatory purpose," JA.61, rings hollow. The record does not suggest any "historical background," "sequence of events," or "[d]epartures from the normal procedur[es]" establishing an "invidious discriminatory purpose." *Arlington Heights*, 429 U.S. at 266-67. To the contrary, it reveals an open and robust process characterized by "public hearings," "web sites," "citizen[]" participation, and written guidelines that largely preserved District 1 and made changes based on politics and other traditional principles. JSA.15a-16a, 20a-21a; *supra* pp.9-19.

Second, the panel failed to address the essential discriminatory effect element, which required Appellees to prove that the Enacted Plan had a "disproportionately adverse effect" upon some citizens based on their race, *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272, 279 (1979), compared to "similarly situated" citizens, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). This failure alone requires reversal.

Moreover, Appellees' theory of discriminatory effect is untenable. Appellees contend that the map must enable African-American voters to form a coalition with white crossover voters to "elect" Democratic candidates or "influence" elections in District 1. JA.61. Thus, on Appellees' view, Congressman Clyburn's preferred plan has a discriminatory effect because it results in a nearly identical Republican vote share and lower BVAP in District 1 compared to the Enacted Plan. *Supra* p.17.

In all events, an alleged failure to create a majority-white crossover district is not tantamount to vote dilution—intentional or otherwise—when, as now, the challenged district was drawn based upon politics and traditional criteria, not race. *Bartlett*, 556 U.S. at 15-18 (plurality op.). Because "[m]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground," not even prophylactic Section 2 "grants special protection to a minority group's right to form political coalitions." *Id.* at 15.

Neither does the Constitution. In fact, reading the Fourteenth Amendment as Appellees suggest would inject *greater* race consciousness into redistricting by *requiring* jurisdictions to fine-tune the racial composition of majority-white districts to create Democratic crossover districts. *See id.* And it would undermine "the need for workable standards and sound judicial and legislative administration," including by placing courts "in the untenable position of predicting many political variables and tying them to race-based assumptions." *Id.* at 17. That legislatures may decline to create Democratic crossover districts for *political* and *other race-neutral*

reasons is a commonplace fact of political life—not *racial* discrimination. *See id.*; *Rucho*, 139 S. Ct. 2484.

Indeed, the Enacted Plan had no discriminatory effect. 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, to show a discriminatory effect, Appellees had 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*, *Cleburne*, 473 U.S. at 439-40.

Appellees can show no such thing because majority-white Enacted District 1 affects African-American Democrats in the exact same way it affects white Democrats. The Enacted Plan limits the ability of *all* Democrats—African-American and white—to elect their preferred candidate in District 1. In fact, there are likely *just as many or more* white Democrats as African-American Democrats in the 16.72%-BVAP District 1 that yielded a 45.6% Democratic vote share in the 2020 Presidential election. *See* JSA.430a-431a, 446a. The General Assembly's race-neutral decision not to convert District 1 from a majority-Republican district into a majority-Democratic district is not racial discrimination.

CONCLUSION

The Court should reverse by January 1, 2024.

July 7, 2023

Respectfully submitted,

WILLIAM W. WILKINS
ANDREW A. MATHIAS
MAYNARD NEXSEN PC
104 S. Main Street, Suite 900
Greenville, SC 29601

MARK C. MOORE
HAMILTON B. BARBER
MICHAEL A. PARENTE
MAYNARD NEXSEN PC
1230 Main Street, Suite 700
Columbia, SC 29201

Counsel for House Appellants G. Murrell Smith, Jr., Chris Murphy, and Wallace H. Jordan

M. Elizabeth Crum
Michael R. Burchstead
BURR & FORMAN LLP
Post Office Box 11390
Columbia, SC 29211

Counsel for State Election Commission Appellants Howard Knapp, John Wells, Joanne Day, Clifford J. Edler, Linda McCall, and Scott Moseley

JOHN M. GORE
Counsel of Record
JOSEPH P. FALVEY
RYAN M. PROCTOR
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939
jmgore@jonesday.com

ROBERT E. TYSON, JR.
VORDMAN CARLISLE TRAYWICK, III
ROBINSON GRAY STEPP & LAFFITTE, LLC
Post Office Box 11449 (29211)
Columbia, SC 29201

Counsel for Senate Appellants Thomas C. Alexander and Luke A. Rankin