No. 22-807

IN THE

Supreme Court of the United States

THOMAS C. ALEXANDER, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE SOUTH CAROLINA SENATE, *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 OF *AMICI CURIAE* HISTORIANS IN SUPPORT OF APPELLEES AND AFFIRMANCE

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are 30 historians and legal scholars who have spent their careers studying the history of the U.S. South, especially the history of South Carolina, race relations, and election laws.

Amici file this brief to provide the Court with the historical context in which the present dispute over South Carolina's redistricting arises. As *Amici* will explain, the map at issue, which draws electoral lines that minimize the Black vote, is just the latest chapter in a long history of *de jure* and *de facto* discrimination against Black voters in South Carolina. Although Appellants attempt to camouflage their current efforts as political gerrymandering, that is nothing more than misdirection. The history of South Carolina demonstrates that the political party disfavored by Black voters has repeatedly sought to diminish the power of the Black vote through racial gerrymandering and other improper means. South Carolina's history also shows that Black voters in South Carolina tend to vote as a bloc. Accordingly, any attempt to gerrymander on racial grounds will necessarily also have a partisan impact. Attempts to elevate those partisan effects—and hide the role race played in Appellants' districting—cannot absolve the current redistricted map, which is drawn with the purpose and effect of diminishing the Black vote. History, along with other record evidence, provides ample support for the District Court's finding that

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici* made a monetary contribution to its preparation or submission.

Congressional District 1 as drawn in the map at issue is unconstitutional.

The names and affiliations of the historians signing this brief can be found in Appendix A.[2] *Amici* respectfully submit that the historical context provided here is one important source that will aid the Court in resolving this important appeal.

SUMMARY OF ARGUMENT

The question before the Court—whether South Carolina's redistricting plan constitutes unconstitutional racial discrimination—must be viewed in the context of South Carolina's long history of racial discrimination in politics. That history traces back to the post-Civil War Reconstruction era, when the Democratic Party (which, at the time, was hostile to Black political participation) employed numerous improper methods to prevent Black residents from participating in the political process. Those methods included intimidation, murder, blocking access to polls, stuffing ballot boxes, and diminishing the impact of Black votes through racial gerrymandering. Unfortunately, those methods proved successful. After initially winning various political offices in 1868, Black leaders were violently or illicitly ousted from office from the late 1870s until the 1890s. The electoral maps were then gerrymandered to make it difficult or impossible for Black officials to be elected

[2] Individuals' institutional affiliations are included for identification purposes only and do not constitute or reflect institutional endorsement.

in the future. Racial gerrymandering has been a fixture in South Carolina politics ever since.

An infamous example of South Carolina's racial gerrymandering was the so-called "boa constrictor" district in 1882, which wriggled its way through various counties to create one congressional district that was 82% Black while severely curtailing Black voting power in the other six districts. Orville Vernon Burton, et al., *The Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990*, at 193–94 (Chandler Davidson & Bernard Grofman eds., 1994) (hereinafter, "*Quiet Revolution*"). As shown below, that much-maligned map of 1882 bears an uncanny resemblance to the current map that was struck down by the District Court. The subsequent 1893 congressional map once again manipulated district lines around Charleston to minimize Black political power. Together with unequally applied voting requirements, intimidation, and outright violence, racial gerrymandering has been used throughout South Carolina's history to diminish the power of Black voters.

Appellants ignore that history and deny its relevance. *See generally* Appellants' Br. But this Court and others have recognized that history can provide insight into the goals and motivations of government actors. A close study of South Carolina's history, combined with the evidence proffered by Appellees below, leads to the inexorable conclusion that the implemented map at issue was drawn to harm Black voters. The aphorism that those who do not learn from history are doomed to repeat it is apt here. The undersigned *Amici* urge this Court to

consider the history recounted below and prevent Appellants from trenching upon the voting rights of Black South Carolinians with its gerrymandered map.

The history of South Carolina is relevant in another way. It shows that Black voters in South Carolina have always tended to vote as a bloc in favor of whichever party is more responsive to their issues and concerns. As a result, a racial gerrymander in South Carolina invariably will have partisan effects. In other words, by weakening the power of Black voters, a map will also necessarily reduce the power of the party the Black voting bloc supports. The upshot is that Appellants cannot justify their current racial gerrymander by citing its impacts on, or their stated intent to impact, Democratic voters. That the map at issue diminishes the votes of Democratic voters is a *result* of the racial gerrymander, not a basis for upholding the map.

ARGUMENT

I. SOUTH CAROLINA'S LONG HISTORY OF DISENFRANCHISING BLACK RESIDENTS INFORMS THE PRESENT DISPUTE.

A. History Shows Continuous Incentives and Opportunities to Engage in Racial Gerrymandering, Even When Party Loyalties Change.

The District Court correctly observed that the long history of both political parties in South Carolina suppressing the Black vote is relevant when considering whether Appellants' current redistricted map was drawn with a discriminatory intent.

JSA.18a–19a.[3] As this Court has explained, the historical context in which a governmental decision is made can support a finding that the decision was made with an intent to discriminate. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). To be sure, historical evidence alone may be insufficient to impugn a decision made by a current legislature. *See City of Mobile v. Bolden,* 446 U.S. 55, 74 (1980). But here, history is only one part of the story. Appellees also provided robust statistical and expert evidence demonstrating that South Carolina's redistricted map was drawn with the purpose of minimizing the voting power of Black South Carolinians. In conjunction with that evidence, a showing of a "history of race discrimination and recent patterns of official discrimination, combined with the racial polarization of politics" in South Carolina is "particularly relevant" to a finding of discriminatory intent. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 223 (4th Cir. 2016).

As a general matter, evidence that a legislative body has historically acted with discriminatory intent can show that the same legislative body has done so again. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (citing *Arlington Heights*, 429 U.S. at 266). As this Court has observed, "a series of official actions taken for invidious purposes" can support a finding that a later decision was likewise tainted. *Arlington Heights*, 429 U.S. at 267. For example, in *United States v. Charleston*

[3] The Jurisdictional Statement Appendix is abbreviated as "JSA." The Joint Appendix is abbreviated as "JA."

County, the court invalidated an at-large election system that "unlawfully exacerbate[d] the disadvantaged political posture inherited by generations of African-Americans through centuries of institutional discrimination." 316 F. Supp. 2d 268, 271 (D.S.C. 2003), *aff'd*, 365 F.3d 341 (4th Cir. 2004). Although the court ultimately did not find an intent to discriminate there, it considered various historical developments in its analysis, including South Carolina's 1895 Constitution, which imposed a literacy test, a poll tax, and disenfranchisement for certain crimes purported to be commonly committed by Black citizens, *id.* at 286 n.23; the fact that "African Americans have suffered a pronounced and protracted history of past discrimination," *id.* at 282; and the reality that "[d]uring the first half of the twentieth century, African-American citizens in Charleston, as in other areas of South Carolina, were subject to segregation laws which had a discriminatory effect on most aspects of their lives," *id.*

The political history of South Carolina shows that legislators exposed to the same incentives and opportunities tend to act in similar ways. *See N.C. State Conf. of NAACP*, 831 F.3d at 223–24 ("A historical pattern of laws producing discriminatory results provides important context for determining whether the same decisionmaking body has also enacted a law with discriminatory purpose."). Neither the Democratic nor the Republican party has had a monopoly on racial discrimination. Historically, however, when a party supported almost entirely by White citizens has found itself challenged by a party disproportionately supported by Black citizens, racial

gerrymandering has proven a predictable means for that party to take and maintain control.

Since Reconstruction, White-supported legislative bodies have been enabled by the party in power to minimize, marginalize, or eliminate the political participation of Black South Carolinians. For example, in a case where the court had to redistrict because the legislature and the governor could not agree on new maps, the court observed that submissions from elected officials, though not enacted, "dr[ew] lines without regard to any factor except skin color and possibly political affiliation" and that another official submission had "no apparent purpose other than capturing as many black persons . . . as possible within a closed area" and contained districts with a "bizarre shape" lacking "any distinct community of interest, apart from race." *Burton ex rel. Republican Party v. Sheheen*, 793 F. Supp. 1329, 1366 (D.S.C. 1992), *vacated sub nom. Statewide Reapportionment Advisory Comm. v. Theodore*, 508 U.S. 968 (1993), *and vacated sub nom. Campbell v. Theodore*, 508 U.S. 968 (1993). During the creation and signing into law of the present map, in 2021 and 2022, the legislature was similarly enabled as Republicans controlled majorities in both the Senate and the House of South Carolina. JSA.21a.

Appellants' contention that their gerrymander is simply based in politics flies in the face of historical fact. *See* Appellants' Br. 13–14. As this Court has explained, "the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics." *Cooper v. Harris*, 581 U.S. 285, 308

n.7 (2017). Throughout South Carolina's post-Reconstruction history, both parties repeatedly have used race to achieve and retain power as discussed in detail below. *See* Point II, *infra.*

Neither major political party is above reproach. Prior to the 1960s, it was the Democratic Party that sought to weaken the power of the Black vote. President Kennedy's 1960 victory over Nixon marked the second consecutive Democratic president who was at least rhetorically committed to passing far-reaching civil rights legislation, which was realized during the Johnson administration through the enactment of the Civil Rights Acts of 1964 and 1965. Alexander P. Lamis, *The Two-Party South*, 16–17 (1984); Numan V. Bartley, *The New South*, 1945-1980 ch. 7 (1995).

The passage of both acts had dramatic consequences for South Carolina politics. In the 1964 presidential election, South Carolina White residents revolted openly against the national Democratic ticket—to the Republican Party's gain. Although Republicans in Congress did not oppose the Civil Rights Acts, Republicans campaigning for office in the U.S. South, including South Carolina, did. *See, e.g.*, *Carolina Crowds Hail Goldwater,* N.Y. Times, Nov. 1, 1964; *see also* JA.338–39. White South Carolinians voted overwhelmingly as a bloc for the Republican presidential nominee in 1964, Barry Goldwater, enabling him to win 59% of South Carolina's vote, while Black South Carolinians voted overwhelmingly

for Johnson.[4] The dramatic shift was first noticed by activists on the ground, and later widely recognized.[5]

In short, while the political parties in South Carolina may have shifted over time, race consistently and impermissibly has been used to achieve partisan objectives. A majority party cannot crack voters out of a district based on their race and attempt to excuse itself simply by claiming that the race tends to vote for political opponents. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019) (citation omitted) ("If district lines were drawn for the purpose of separating racial groups, then they are subject to strict scrutiny because race-based decisionmaking is inherently suspect.").

[4] Student Non-Violent Coordinating Committee, *The Negro Vote: An Analysis* (Nov. 1964), https://www.crmvet.org/docs/64snccva.htm.

[5] According to Esau Jenkins, a preacher and civil rights activist, nearly all Whites on Wadmalaw Island voted for Goldwater. Orville Vernon Burton, Report for *Moultrie v. Charleston County Council, C.A. No. 9–01562 11*, at 20 (hereinafter, "Moultrie Report"). Jenkins contended that it was the African Americans on places like Wadmalaw and Johns Islands that voted for Johnson and the Democrats in 1964. *Id.* Jenkins's observations were confirmed by a 1966 University of South Carolina Governmental Review study, which noted that in South Carolina "all of the predominantly Negro precincts, except one . . . gave majorities to President Johnson in 1964." *Id.*

B. The Long History of Bloc Voting by Black Citizens Has Intensified the Incentive to Gerrymander Based on Race.

History shows that Black voters in South Carolina generally vote as a unified bloc. Until the enactment of the 1960s Civil Rights Acts, those who were able to vote tended overwhelmingly to support Republican candidates; since then, however, they have voted overwhelmingly for Democrats. Regardless of the favored party, however, the vote tends to be unified. That creates a strong incentive for the party in power to engage in racial gerrymandering. *McCrory*, 831 F.3d at 222.

The South Carolina legislature has been aware of the number and proportion of Black voters in each district, as well as the strong link between their common experiences and concerns, which created racial bloc voting patterns. As early as 1950, the Charleston News and Courier cautioned White South Carolinians about the increasing strength of the Black bloc vote. Moultrie Report, *supra* note 5, at 22. One editorial asked if officeholders in South Carolina would "henceforth be elected in primaries in which negroes as a bloc shall cast the deciding vote?" *Id.* White Charlestonians were warned by the News and Courier, "it is as well to face as certain that the herded or 'bloc' vote of negroes will be much larger in future primaries." *Id.*

In an analysis of 130 South Carolina elections from 1972 to 1985 in which a Black candidate ran against a White candidate, an average of 90% of White voters cast their ballots as a bloc for White candidates;

Black voters were almost as cohesive, voting for candidates of their own race 85% of the time. James W. Loewen, *Racial Bloc Voting and Political Mobilization in South Carolina*, 19 Rev. Black Pol. Econ. 23, 26 (1990). A study of primary and general elections in South Carolina concluded that race was often a proxy for party identification. *Id.* at 33. The U.S. Department of Justice ("DOJ") has also referred to evidence of bloc voting in 38 separate objections under Section 5 of the Voting Rights Act of 1965 ("VRA"), 52 U.S.C. §§ 10301 *et seq.*, between 1974 and 1992. *See Statewide Reapportionment Advisory Comm. v. Theodore*, Case No. 91-3310-1, Pls.' Ex. 120 (D.S.C.) (compilation of DOJ objection letters).

The federal courts have also recognized the reality of Black bloc voting. *See, e.g.*, *Jackson v. Edgefield Cnty. Sch. Dist.*, 650 F. Supp. 1176, 1198 (D.S.C. 1986) ("[T]he legal significance of racial bloc voting is such that the degree of its persistence and severity indicates that race still is a predominant influence over the electorate's preferences."); *United States v. Bd. of Comm'rs of Colleton Cnty.*, 509 F. Supp. 1329, 1332 (D.S.C. 1981) ("[T]he results of the latest referendum tend to confirm the existence of the racial bloc-voting . . ., since they show a split along racial lines, with blacks favoring single-member districts and whites favoring at-large elections." (quoting the Attorney General's office's letter)); *Smith v. Beasley*, 946 F. Supp. 1174, 1202 (D.S.C. 1996) ("In South Carolina, voting has been, and still is, polarized by race. This voting pattern is general throughout the state . . . ."); *United States v. Charleston Cnty.*, 318 F. Supp. 2d 302, 312 (D.S.C. 2002); *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 641

(D.S.C. 2002) ("Voting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary elections and general elections. Statewide, Black citizens generally are a highly politically cohesive group and Whites engage in significant White-bloc voting. Indeed, this fact is not seriously in dispute."); *United States v. Charleston Cnty.*, 316 F. Supp. 2d 268, 297, 304 (D.S.C. 2003), *aff'd sub nom. United States v. Charleston Cnty., S.C.*, 365 F.3d 341, 353 (4th Cir. 2004) ("Thus even controlling for partisanship in Council elections, race still appears to play a role in the voting patterns of White and minority voters in Charleston County.").

The proposed map at issue here reflects a recognition that Black voters tend to vote in a bloc, while White voters tend to vote together against the Black voters' preferred candidate. Duchin Expert Report, ECF No. 434-3 in *S.C. State Conf. of NAACP v. Alexander*, Case No. 21-cv-03302 (D.S.C. Sept. 9, 2022), at 25. Bloc voting by Black voters creates an obvious present-day incentive for the Republican legislature to gerrymander along racial lines because "[i]t is the political cohesiveness of the minority groups that provides the political payoff for legislators who seek to dilute or limit the minority vote." *McCrory*, 831 F.3d at 222. The cohesiveness of the Black vote in South Carolina also undercuts the legislature's argument that its map was merely intended to undermine the votes of Democrats. Appellants' Br. at 27–30. The map disadvantages Democrats only because it targets Black voters, who—right now—tend to vote as a bloc for the Democratic candidate. The evidence proffered in Point II, *infra*,

shows that the map was drawn with the intent to diminish the votes of Black residents. Appellants cannot evade that conclusion simply by citing the map's effects on Democrats, given that Black citizens vote as a bloc for Democrats.

To the contrary, South Carolina's long history of efforts to suppress the Black vote underscores the importance of those voters to South Carolina's politics. Black voters have been targeted so often in South Carolina precisely because they can change the outcome of elections. Here, the incentive for Appellants to move Black voters out of Congressional District 1 was especially strong given the "competitive nature" of the district."[6] Appellants correctly believed that a shift in Black Voting-Age Population ("BVAP") in Congressional District 1 from 23% to 17% could assure continued Republican control over Congressional District 1.

II. THE MAP AT ISSUE IS THE LATEST IN A LONG HISTORY OF EFFORTS BY POLITICAL PARTIES TO SUPPRESS THE BLACK VOTE.

Throughout South Carolina's history, the party disfavored by Black voters has undertaken various and often extreme measures to prevent Black citizens from voting and to weaken the power of their votes through racial gerrymandering. This is not a Republican or a Democratic phenomenon. At various

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[6] South Carolina House of Representatives Judiciary Committee, Ad Hoc Redistricting Committee, Meeting of Dec. 16, 2021 (SCGA Online Video Archive at 8:30, 15:30, 42:00).

points in history, both parties have suppressed the Black vote. The redistricted map enacted by the South Carolina legislature is just the latest effort to target Black voters.

A. White Democrats Used Violence and Legislation to Curtail Black Political Participation After the Civil War.

Immediately following the Civil War, South Carolina's Constitution expressly limited the right to vote and hold office to free White men over the age of 21, excluding all Black South Carolinians. S.C. Const. 1865, art I., §§ 13, 14; *id.* art. IV. South Carolina's General Assembly also enacted laws regulating the political activities of "persons of color" and barring them from "social or political equality with white persons." *See, e.g.*, S.C. Acts of 1865, No. 4730, at 271.

In 1868, a new state Constitution granted every adult male the right to vote "without distinction of race, color, or former condition." S.C. Const. 1868, art. VIII, § 2. However, Black women were not granted the franchise until much later. U.S. Const. amend. XIX. That Constitution also established a board of commissioners elected by the voters as the governing authority for each county. S.C. Const. 1868, art. 4, § 19; James L. Underwood, *The Constitution of South Carolina, II: The Journey Toward Local Self-Government* 47–50 (1989); Laughlin McDonald, *An Aristocracy of Voters: The Disenfranchisement of Blacks in South Carolina*, 37 S.C. L. Rev. 557, 560 (1986). As a result, Black representatives controlled a majority of seats in the South Carolina lower house and won elections as

lieutenant governor, secretary of state, and state treasurer, as well as various local offices. *Quiet Revolution* at 192; Eric Foner, *Freedom's Lawmakers: A Directory of Black Officeholders During Reconstruction* 100 (1993). In fact, from 1871 to 1875, Black representatives constituted a majority of South Carolina's delegation in the House of Representatives. Paul Finkelman, *The Necessity of the Voting Rights Act of 1965 and the Difficulty of Overcoming Almost a Century of Voting Discrimination*, 76 La. L. Rev. 181, 203 (2015).

That success was short-lived, however, because White leaders began resorting to violence to keep Black South Carolinians out of the voting booth. Orville Vernon Burton, Report on South Carolina Legislative Delegation System *Vander Linden v. South Carolina*, Case No. 2-91-3635-1 (1995) (hereinafter "Vander Linden Report") at 5. Those violent acts included the outright murder of seven Black state legislators between 1868 and 1876. *Id.* In the Black-controlled town of Hamburg, White Democrats brought a cannon and several-hundred armed horsemen to do battle with a Black militia, killing six (four by firing squad) and pillaging the homes and shops of the town's Black residents and their White allies. *Id.* Violence was so severe in nine counties that the federal government intervened in 1871 and declared martial law, making hundreds of arrests. *Id.* In 1876, over 700 armed and mounted White Democrats clad in red shirts (including future governor Benjamin Tillman) seized control of the Edgefield County courthouse and, despite the presence of federal troops, prevented Black citizens from voting. *Id.* at 6.

Once Democrats took control of the South Carolina legislature, they used new tactics to disenfranchise Black voters. For example, in 1882, a new law required all citizens to reregister or face permanent disenfranchisement but permitted local registrars (all White Democrats) wide discretion to enfranchise any White voter who neglected to reregister. *See* S.C. Acts of 1882, No. 717, at 1110. Initially, the legislature also proposed a literacy test. J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* 35 (1999) (hereinafter "*Colorblind Injustice*"). This plan was then finessed to avoid inadvertently disenfranchising White voters by mandating a quasi-literacy test that required ballots to be deposited into each of eight ballot boxes, one for each office voted upon in state elections. S.C. Acts of 1882, No. 717, at 1110. Election officials could then shift the positions of the boxes, so illiterate voters would not know where to place their ballots without assistance. J. Morgan Kousser, *The Shaping of Southern Politics* 87–91 (1974). Election officials could then decide which voters to assist. *Id.*

All of these tactics were successful: In the 1880 election, as many as 58,000 Black citizens had voted in South Carolina, but by 1888 the number was fewer than 14,000. William J. Cooper, Jr., *The Conservative Regime: South Carolina*, 1877–1890 (1968).[7]

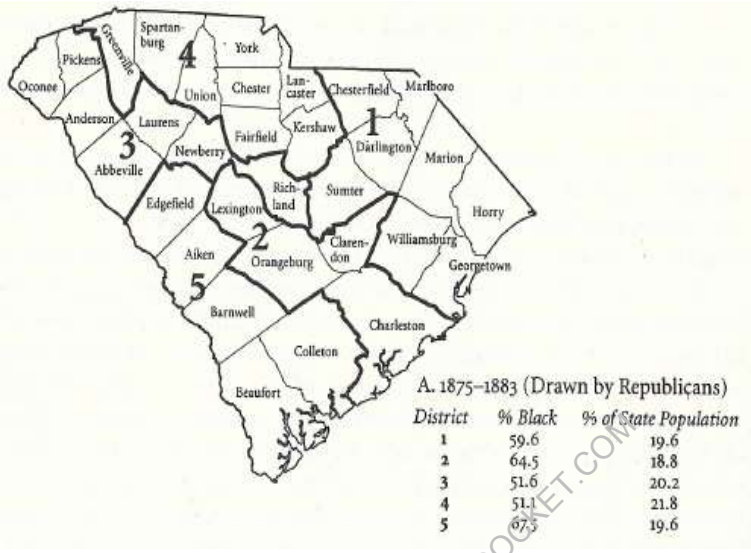
[7] At the same time, local election leaders also engaged in rampant election fraud, including stuffing ballot boxes so that the number of votes often exceeded the number of voters. *See*

B. Racial Gerrymandering Has Long Been Employed in South Carolina to Weaken the Black Vote.

In addition to violence and disenfranchisement, for more than one hundred years political parties in South Carolina have been racially gerrymandering voting districts to diminish the power of Black voters.

From 1867 to 1875, South Carolina was 59% Black, and the Black population was divided roughly equally among South Carolina's congressional districts. *Colorblind Injustice* at 27. As demonstrated by the 1875 map (reproduced below), the districts each had a reasonable shape that generally followed county lines.

Chester H. Rowell, A Historical and Legal Digest of Contested Election Cases in the House of Representatives of the United States from the First to the Fifth-sixth Congress, 1789-1901, H. Doc. 56-510, U.S. Congressional Series Set no. 4172 (1901). White leaders also used the court system to bring lawsuits. *Id*. One such lawsuit alleged that federal troops protecting Black voters were intimidating Democrats. *Id*. at 384.



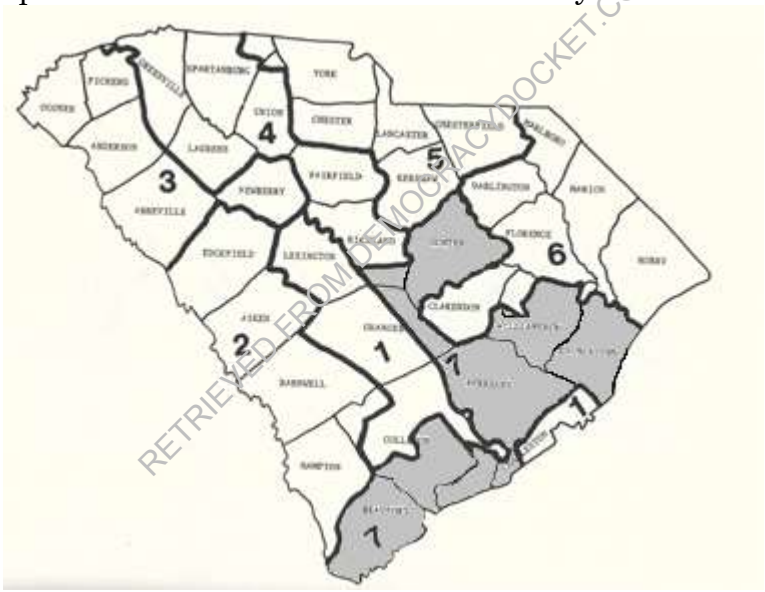
Colorblind Injustice, *supra* 16, at 28, fig. 1.2 (1875 Republican-drawn map).[8]

The 1875 map was drafted by a Republican-controlled legislature, which had the support of Black voters. *Id.* at 27. However, the successful efforts to suppress Black voters discussed above swept the Democratic party into power a few years later. *Id.* In 1882, Democrats employed racial gerrymandering to pack Black voters into a single malapportioned district where Black residents made up the vast majority of the population, thereby diluting Black voting strength in the rest of South Carolina. *Id.*

This gerrymandering strategy resulted in the contorted Seventh District, popularly referred to as the "boa constrictor" district and reproduced below.

[8] All maps are reproduced in a larger size in Appendix B.

Id. at 26–28. Even to the untrained eye, the district is grotesquely drawn. The Seventh District was 82% Black, containing all of the precincts with Black majorities that could be strung together with the faintest connection of contiguous territory. *Id.* at 27. From its northernmost point, the city of Columbia, Richland County, the district twisted down to the coast. Vander Linden Report, *supra* 15, at 7. It divided six counties along the way and incorporated most Black neighborhoods in Charleston. *Id.* From the southwest, the district started in Beaufort and split Colleton and Berkeley counties.

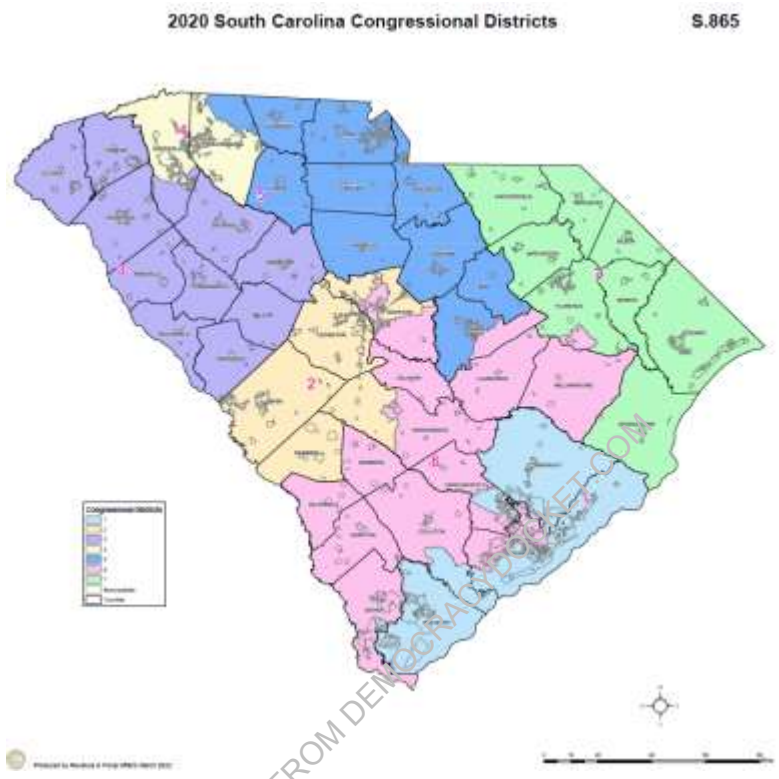


Stanley B. Parsons et al., *United States Congressional Districts, 1883-1913*, at 278 (1990) (hereinafter "Congressional Districts") (with the seventh district shaded).

The Seventh District was not alone in its contorted shape. The First District jutted down

through the Seventh, almost running directly to the water. *Id.* This newly drawn First District was only 38% Black. *Colorblind Injustice* at 28, fig. 1.2. The two districts essentially split each other in two with the noncontiguous remainder of the First District containing most of the geographic area of Charleston at that time. *Id.*

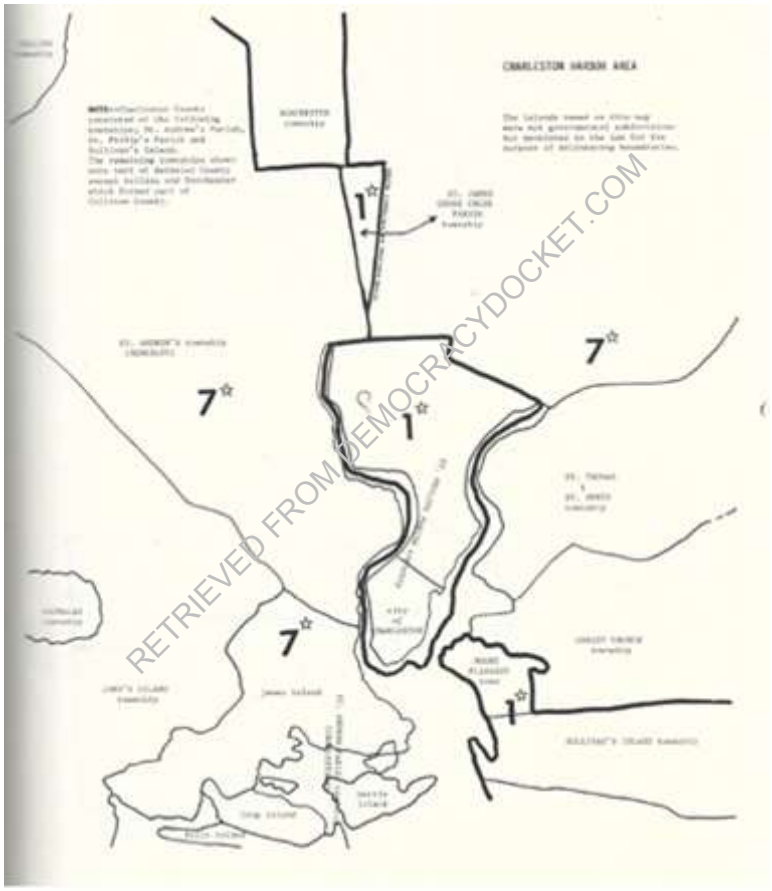
South Carolina's current legislature—which apparently took a page out of the 1882 playbook—endeavors to limit Black political power to a single district. The Sixth District at issue in this case bears a strong resemblance to the "boa constrictor" district of 1882. *Compare* South Carolina Revenue and Fiscal Affairs Office, *2020 South Carolina Congressional Districts S.865* (2022), https://rfa.sc.gov/sites/default/files/2022-04/Statewide_Congressional.pdf., *with* Congressional Districts, *supra* 19, at 278. Like the Seventh District in 1882, the Sixth District begins in Beaufort County; splits Colleton and Charleston counties; and runs from a split Richland County down almost to the coast. *Id.* Then, as now, the way the counties are splintered correlates with the location of Black residents. *See Colorblind Injustice*, *supra* 16, at 27; Appellees' Br. at 10–11.



South Carolina Revenue and Fiscal Affairs Office, *2020 South Carolina Congressional Districts S.865* (2022), https://rfa.sc.gov/sites/default/files/2022-04/Statewide_Congressional.pdf.

The 1882 map's treatment of the Black neighborhoods in the Charleston area is almost identical to how the city is divided in today's map. *Compare with Colorblind Injustice* at 27; Appellees' Br. 10-11. In 1882, the Democrats sliced Charleston's Black neighborhoods away from their White counterparts. Vander Linden Report, *supra* 15, at 7. Despite the townships sharing communities of interest and only being separated by a small river, the

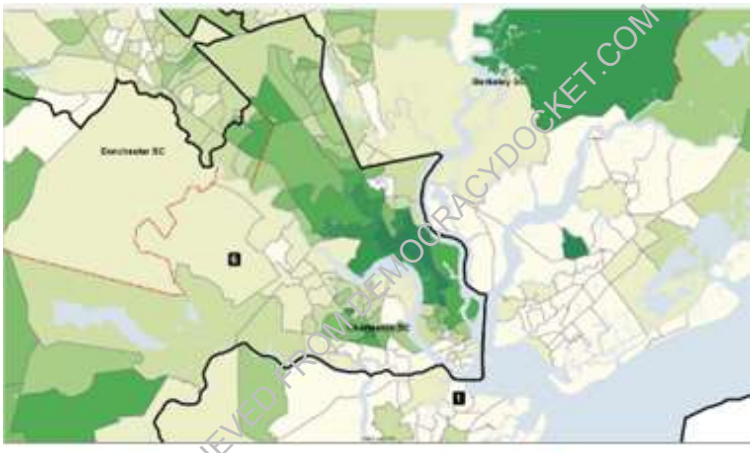
first district in 1882 split St. Andrews township and John's Island township (on the left of the map below) from St. James Goose Creek Parish township and St. Thomas and St. Denis township (on the right) by entirely accreting St. Philips Parish township and the City of Charleston in the center.



1883 Charleston Harbor Area zoom in of US Congressional Districts, 1883-1913. Stanley B. Parsons, et al., *United States Congressional Districts, 1883-1913* (1990).

Congressional Districts, *supra* 19, at 278.

The current map takes a similar approach in carving up the Charleston area. The current First District is noncontiguous and is severed by the Sixth District. JA.164–65. It is impossible to move by land from Mount Pleasant (named Christ Church township in 1882) to James Island without going through the sixth district. *See also* Congressional Districts, *supra* 19, at 275.



S.865: Close-up of Charleston, shaded to reflect precinct-level BVAP. *See NAACP v. Alexander*, 2010 Census Data and 2020 Census Data, CX No. 1, ECF No. 473 (Court-ordered data).

Pls.' Closing Demonstratives, ECF No. 489 in *S.C. State Conf. of NAACP v. Alexander*, No. 21-cv-03302 (D.S.C. Nov. 5, 2022), at 15.

By 1893, through a combination of racial gerrymandering and disenfranchisement, Black representation in the South Carolina congressional

delegation had been reduced to one congressional district seat held by George Washington Murray—unsurprisingly in the Seventh "boa constrictor" District. Vander Linden Report, *supra* 15, at 7.

South Carolina governor Benjamin Tillman nevertheless compared the Black vote to a "frozen serpent" who could be at any time "warmed into life" and "sting us whenever some more White rascals, native or foreign, come here and mobilize the ignorant Blacks." Vander Linden Report, *supra* 15, at 15. In 1893, the White Democratic legislature again redrew the congressional map, this time in an attempt to defeat Congressman Murray. The legislature redistricted Murray's seat from the seventh to the first district, splitting off the Black concentrations in Berkeley, Orangeburg, Sumter, and Richland Counties and adding new, less heavily Black areas to his new district. Congressional Districts, *supra* 19, at 281. While Murray was able to hold onto his seat in the 1894 election, he lost in 1896 as a result of the redistricting and the disenfranchisement of Black voters. *See* Rowell, *supra* note 7, at 543–46.

C. South Carolina Political Parties Continued to Disenfranchise Black Voters into the Twentieth Century.

In 1895, South Carolina held a new constitutional convention with the express purpose of disenfranchising Black voters. The chairman of the convention, Robert Aldrich, addressed the convention and proclaimed that the Constitution of 1868 had been "made by aliens, negroes, and natives without character, all the enemies of South Carolina, and was

designed to . . . overturn our civilization . . . it is your duty . . . to so fix your election laws that . . . Anglo-Saxon supremacy [will be] preserved." Journal of the Constitutional Convention of the State of South Carolina, remarks of Chairman Robert Aldrich at 2 (Sept. 10, 1895). This new constitution came with action by the legislature that included various disenfranchisement tools, including a literacy test, poll tax, proof of payments of all other taxes, and a 'petty crimes' provision disenfranchising those convicted of crimes that Whites believed Black people frequently committed. *See* Moultrie Report, *supra* note 5, at 7. Following the ratification of the new constitution, former Governor and then-United States Senator Ben Tillman proclaimed that, "[t]he Whites have absolute control of the government, and we intend at any hazard to retain it." Moultrie Report, *supra* 5, at 8 (quoting Francis Butler Simkins, *Pitchfork Ben Tillman* 289–91 (1944)). In 1895, the South Carolina Democratic Executive Committee also prohibited Black voters from voting in primaries. *See Elmore v. Rice*, 72 F. Supp. 516, 519 (E.D.S.C. 1947), *aff'd*, 165 F.2d 387 (4th Cir. 1947).

The effect of South Carolina's disenfranchising legislation was profound: By around 1940, only 1,500 Black South Carolinians were registered to vote. *See* Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* 488 (1944).

Still, South Carolina legislators may have felt threatened when the U.S. Supreme Court overturned the all-White primary in 1944. *See Smith v. Allwright*, 321 U.S. 649, 661–62 (1944). That year, the Democratic Party adopted rules excluding Black

voters from its primary elections. Moultrie Report, *supra* note 5, at 8. The South Carolina House of Representatives also passed a resolution denouncing the "amalgamation of the White and Negro races by a co-mingling of the races upon any basis of equality." Moultrie Report, *supra* note 5, at 9 (quoting Journal of the House of Representatives of the 2d Session of the 85th General Assembly of the State of South Carolina being the Regular Session, at 569–70 (Feb. 29, 1944)). It further resolved an affirmation of "our belief in and our allegiance to established White supremacy as now prevailing in the South" and pledged "lives and our sacred honor to maintain it, whatever the cost, in War and Peace." *Id.*

In 1947, the NAACP sued to open the Whites-only primary and won. *Elmore*, 72 F. Supp. at 528. The Democratic Party responded by adopting new rules requiring voters to swear that they "believe[d] in and w[ould] support the social (religious) and educational separation of races," until that requirement was likewise struck down the following year. *See Brown v. Baskin*, 78 F. Supp. 933, 937, 942 (E.D.S.C. 1948); *Brown v. Baskin*, 80 F. Supp. 1017, 1020 (E.D.S.C. 1948), *aff'd*, 174 F.2d 391 (4th Cir. 1949).

D. Disenfranchisement of Black Voters Has Continued in Recent Years.

Government policy aimed at diminishing the Black vote in South Carolina is hardly ancient history. Governmental bodies at the state and local levels continue to employ methods such as gerrymandering,

annexation,[9] and voter suppression to diminish the voting power of Black residents. The redistricted map at issue is just the latest example of such an effort.

1. Annexation

Annexing adjacent White-majority areas to alter the racial composition of a municipality has long been used to prevent Black South Carolinians from electing the candidates of their choice. For example, in 1960, Charleston annexed predominantly White areas west of the Ashley River, which added 12,521 people to the city (a population increase of over 10%), nearly everyone White. *See* Moultrie Report, *supra* note 5, at 37. The annexation was done solely to ensure that Whites would maintain their political power in the city. *Id.* It represented the first time that Charleston had expanded since 1849, and it more than doubled the geographic size of the city.[10] The annexations successfully changed the population of Charleston from majority Black to majority White.[11]

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[9] Municipal annexation is the legal process by which a city or other municipality adds land, and usually population, by incorporating neighboring areas to its boundaries. Jack Rabin, *Encyclopedia of Public Administration and Public Policy* 47 (2003).

[10] Steve Bailey, *Charleston's Annexation Wars Are Over—The Suburbs Won*, Post and Courier (Apr. 7, 2018, updated Sept. 14, 2020), https://www.postandcourier.com/opinion/commentary/charleston-s-annexation-wars-are-over-the-suburbs-won/article_abcc813c-380c-11e8-bff1-37f34766ba1b.html.

[11] Letter from J. Stanley Pottinger, Assistant Att'y Gen., Civ. Rights Div., U.S. Dep't of Justice, to Morris D. Rosen, Corporation Counsel (Sept. 20, 1974),

In 1974, the DOJ objected to a proposed annexation in McClellanville because it would have excluded an area with a high concentration of Black residents who wished to be part of the annexation.[12] The DOJ stated that it would reconsider its objection if the town held a meeting with local Black residents, ascertained their views on annexation, and sent the minutes of that meeting to the DOJ.[13] The letter recounted that "town officials ha[d] made clear to [the Black residents] that any formal request for annexation of the area would be rejected, primarily because the addition of the residents of the area would serve to dramatically alter the racial composition of the town's present predominantly white population."[14]

The DOJ objected to another annexation in Charleston County in 1994. The DOJ observed that the area's repeated annexation of White areas while refusing to annex Black areas had led to "'doughnut

https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-1160.pdf.

[12] Letter from J. Stanley Pottinger, Assistant Att'y Gen., Civ. Rights Div., U.S. Dep't of Justice, to Philip A. Middleton, Attorney, Town of McClellanville, S.C. (May 6, 1974), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-1090.pdf.

[13] *Id.*

[14] *Id.*

holes' formed by the city's prior annexation of surrounding territory."[15]

2. At-Large Voting

While the passage of the VRA dramatically increased Black political participation, it also led to reactionary attempts to weaken the voting power of Black residents through at-large voting. At-large voting was effective in diluting the Black vote because the preferred candidate of the Black community would usually have to run head-to-head against a White candidate supported by the White majority. Moultrie Report, *supra* 5, at 33. For example, Charleston County's at-large election system, enacted in 1969 and unique for such a populous county, elected only three Black county councilmembers between 1970 and 2003.[16] *Charleston Cnty.*, 316 F. Supp. 2d at 274. This at-large election system remained in place until 2003, when it was finally struck down for deliberately diminishing minority voting strength in violation of Section 2 of the VRA. *See Charleston*

[15] Letter from Deval L. Patrick, Assistant Att'y Gen., Civ. Rights Div., U.S. Dep't of Justice, to James E. Gonzales, Gonzalez & Gonzalez (Oct. 17, 1994), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-2040.pdf.

[16] "In a pure at-large system, all candidates would compete with each other for the seats up for election, and all voters could cast as many votes as there were seats at issue. If five seats were open, for example, the five candidates with the most votes would win. This allowed a group of voters to engage in 'single-shot' voting, or casting one vote for the same candidate and not casting any of their remaining votes for candidates competing with that preferred candidate." JA.317.

Cnty., 316 F. Supp. 2d at 304, *aff'd sub nom. United States v. Charleston Cnty.,* 365 F.3d 341 (4th Cir. 2004) (holding that "severe voting polarization, minimal minority electoral success, and an uncommonly large voting district" combined with "evidence … of depressed political participation as a result of pervasive past discrimination in education and employment and past discrimination touching the right to vote" supported a finding that the at-large system violated Section 2).

A number of counties in South Carolina—including Sumter, Edgefield, Colleton, Horry, and Chester—also opted for at-large elected systems to weaken the effect of the Black vote in the wake of the VRA. Moultrie Report, *supra* 5, at 37.

In *United States v. Georgetown County School District,* the United States filed a complaint alleging violations of Section 2 of the VRA based on the at-large methods of electing the Georgetown County School Board. 2008 WL 11511707, at *1 (D.S.C. Mar. 21, 2008). The county, despite being 38.6% Black, had zero Black school board members. *Id.*, Complaint, ECF No. 1 ¶¶ 8, 20. Recognizing that there was a "strong likelihood" that the DOJ would prevail in proving its Section 2 claim, the Georgetown County School District agreed to largely discontinue the at-large election method and institute a mostly single-member district system. *Georgetown*, 2008 WL 11511707, at *2.

3. Drawing of Local District Lines

Districting, the modification of political boundary lines, has been used to weaken Black voting strength at all levels of South Carolina's government, even at the *local* level.[17] In 1975, the City of Charleston submitted four city council districting plans to the DOJ. *Id.* Charleston's top-three picks were all convoluted systems that the DOJ found would undermine Black voting strength. *Id.* Indeed, despite Charleston having a 44% Black population at the time, the first-, second-, and third-choice plans of the Charleston government would have only resulted in councils comprised of 16%, 33%, and 33% Black members, respectively. *Id.* The DOJ's objections resulted in the city ultimately adopting a single-member district system.[18] The change resulted in 50% of the next council being comprised of Black members. *Charleston Election Increases Blacks on City Council to 50%*, N.Y. Times, Dec. 10, 1975, at 31.

[17] Letter from J. Stanley Pottinger, Assistant Att'y Gen., Civ. Rights Div., U.S. Dep't of Justice, to Morris D. Rosen, Corp. Counsel (Feb. 18, 1975), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30SC-1090.pdf.

[18] Letter from J. Stanley Pottinger, Assistant Att'y Gen., Civ. Rights Div., U.S. Dep't of Justice, to Morris D. Rosen, Corp. Counsel (May 13, 1975), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-1200.pdf.

4. Other Attempts to Disenfranchise

Other South Carolina elections policies have targeted Black voters. Take voter identification laws, for example. The DOJ found that minority registered voters were 20% more likely to lack a photo ID that complied with South Carolina's 2011 proposed voter ID law.[19] South Carolina officials ultimately modified the ID requirements in response to the DOJ's complaint. *See South Carolina v. United States*, 898 F. Supp. 2d 30, 32 (D.D.C. 2012).

"Black voters in South Carolina have also endured extremely long wait times due to a combination of poor election administration, polling place closures," and other issues. JA.345; *see also* Mark A. Posner, *Current Conditions of Voting Rights Discrimination in South Carolina*, *Leadership Conference on Civil and Human Rights* 4 (Aug. 16, 2021). Until May of 2022, South Carolina refused to allow no-excuse absentee voting or early in-person voting for all voters—one of only 15 states to do so. JA.345.

[19] Letter from Thomas E. Perez, Assistant Att'y Gen., Civ. Rights Div., U.S. Dep't of Justice, to C. Havird Jones, Jr., Assistant Dep. Att'y Gen. (Dec. 23, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_111223.pdf.

E. The Implemented Map Is the Latest Attempt to Target Black Voters in South Carolina.

When viewed through the lens of history, it is unsurprising that the South Carolina legislature would draw its redistricted maps in a manner that undermines Black voting power. If fully enfranchised, Black voters would wield tremendous power in South Carolina politics, and they currently tend to vote as a bloc against the party controlling South Carolina's legislature. Under similar circumstances, the party in power in South Carolina has almost continuously sought to disenfranchise Black voters and to blunt the impact of their vote.

In the case below, Appellees proffered significant evidence showing that the intent behind South Carolina's redistricted map was to weaken the Black vote in the first district. Among other things, Appellees presented statistical evidence showing that the resulting racial composition of the first district could not have been a coincidence and can only be explained by deliberate decisions to move Black voters out of the district. *See, e.g.,* JA.50–53. The testimony credited by the panel below provides additional support for that conclusion. *See, e.g.*, JA.137–138. In conjunction with Appellees' evidence, South Carolina's long history of political parties seeking to weaken the power of Black voters provides further support for the decision below. Like the infamous 1882 map, the map at issue here reflects a concerted effort to restrict Black representation to one congressional district. This tragic history underscores that the panel did not commit clear error in

concluding that the redistricting was motivated by discriminatory intent.

CONCLUSION

For the foregoing reasons, the undersigned *Amici* urge this Court to affirm the decision below.

August 18, 2023

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — LIST OF *AMICI*

The list of *Amici* is as follows:

Orville Vernon Burton
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Distinguished Professor of History
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University Distinguished Teacher/Scholar
Professor of History and African American Studies
University of Illinois

Professor Dan T. Carter
Professor Emeritus
University of South Carolina

Professor Joseph Crespino
Department of History
Emory College of Arts and Sciences

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Professor of History
Florida Southern College

Adam H. Domby
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Paul Finkelman
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Professor Terence Finnegan
William Paterson University

Gaines M. Foster
Professor Emeritus
Louisiana State University

Professor Glenda Elizabeth Gilmore
Peter V & C Vann Woodward
Professor Emeritus of History
Yale University

Carmen V. Harris
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Professor J. William Harris
Professor of History, Emeritus
University of New Hampshire

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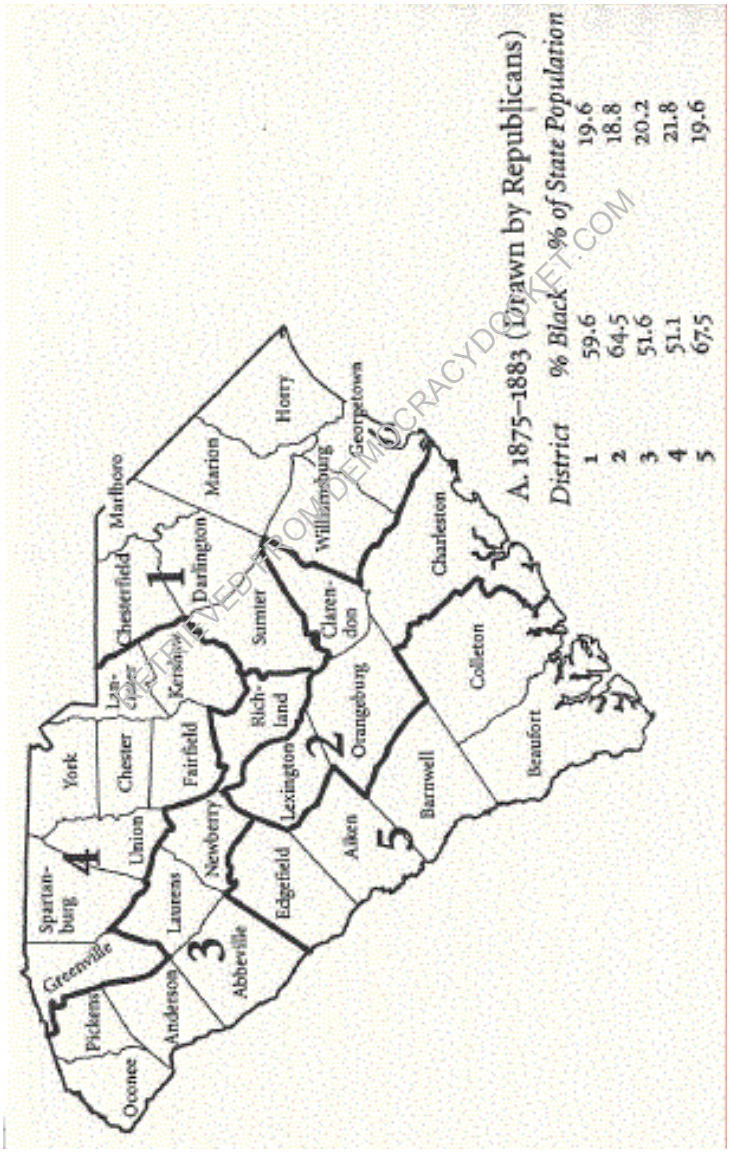
The Citadel

Dr. J. Mills Thornton
Professor Emeritus of History
University of Michigan

Professor Louis E. Venters
Francis Marion University

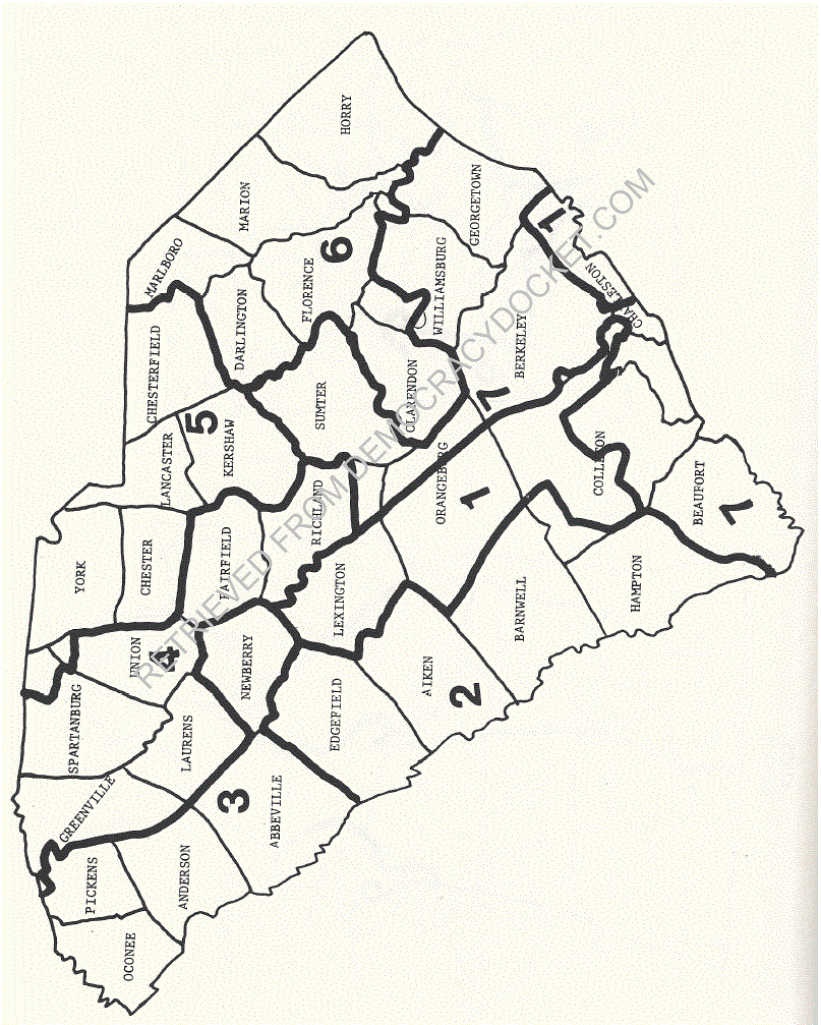
APPENDIX B — SOUTH CAROLINA CONGRESSIONAL MAPS

1875 (Drawn by Republicans)



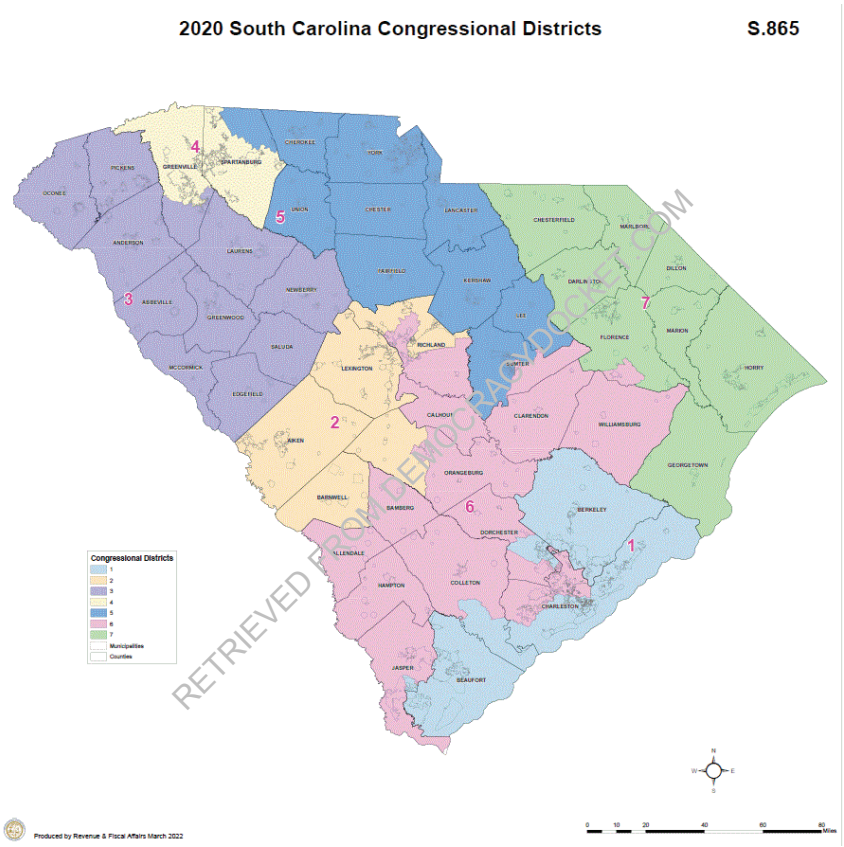
Appendix B

"Boa Constrictor" Seventh Congressional District - 1882



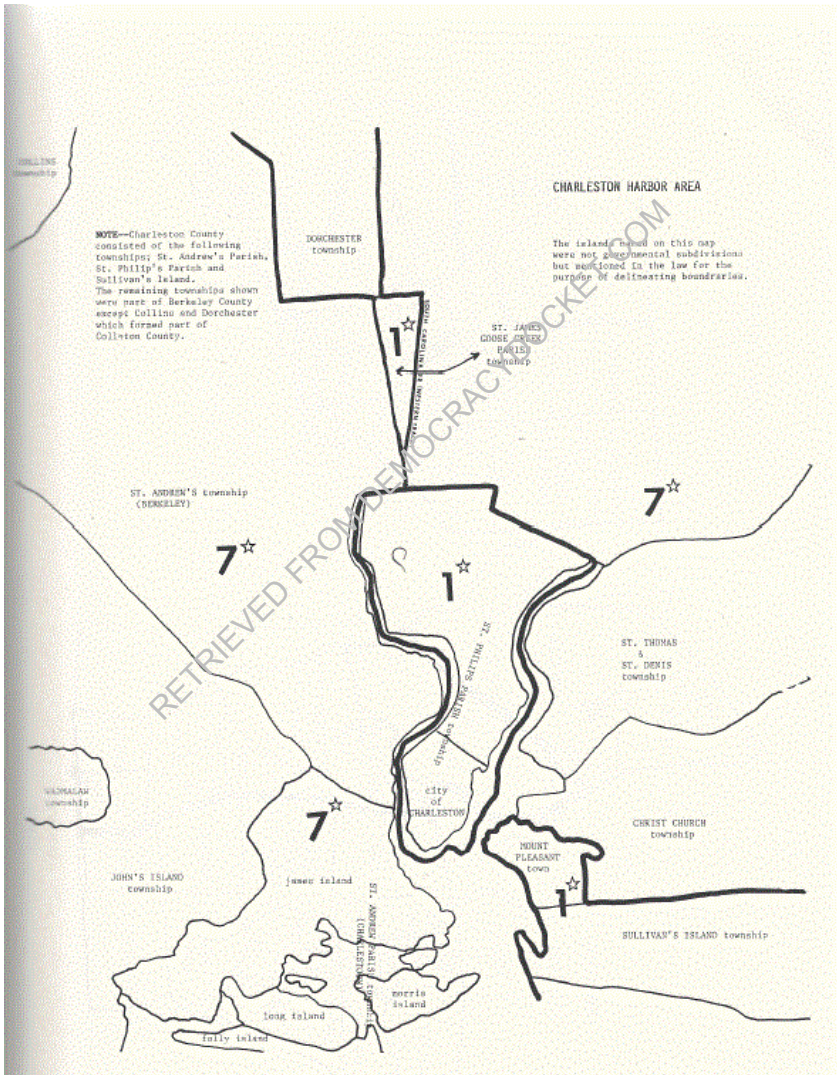
Appendix B

2020 South Carolina Congressional Districts



Appendix B

1882 Map – Charleston



Appendix B

Charleston County Enacted Map