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

AMICI CURIAE BRIEF OF JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF APPELLANTS

T. RUSSELL NOBILE
Counsel of Record
Judicial Watch, Inc.
P.O. Box 6592
Gulfport, MS 39506
(202) 527-9866
rnobile@judicialwatch.org

ROBERT D. POPPER
ERIC W. LEE
JUDICIAL WATCH, INC.
425 Third Street, SW
Washington, D.C. 20024
(202) 646-5172
rpopper@judicialwatch.org

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

H. CHRISTOPHER COATES
LAW OFFICES OF H.
CHRISTOPHER COATES
934 Compass Point
Charleston, SC 29412
Phone: (843) 609-7080
curriecoates@gmail.com

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IDENTITY AND INTERESTS OF AMICI CURIAE[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. Judicial Watch regularly files amicus curiae briefs and lawsuits related to these goals.

As part of its election integrity mission, Judicial Watch has a substantial interest in the proper enforcement of constitutional provisions and laws concerning voting and redistricting, and has participated in such cases both as counsel for parties and as amici in this and other courts. *See Parrott v. Lamone*, No. 16-588; *Parrott v. Lamone*, No. C-02-CV-21-001773 (Circuit Court Anne Arundel Cnty., Md. 2021); *Rucho v. Common Cause*, No. 18-422; *Benisek v. Lamone*, No. 17-333; *Evenwel v. Abbott*, No. 14-940; *Brnovich v. Democratic National Committee*, No. 19-1257; *North Carolina v. N.C. State Conf. of the NAACP*, No. 16-833.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse

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[1] Amici state that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

areas of study. AEF regularly files amicus curiae briefs as a means to advance its purpose and has appeared as an amicus curiae in this Court on many occasions.

Amici submit the ruling from the three-judge panel in the United States District Court for the District of South Carolina fundamentally disregards this Court's precedent and respectfully request this Court reverse and render judgment for Appellants.

SUMMARY OF ARGUMENT

This case arises from the reapportionment of South Carolina's Congressional districts following the 2020 Census. A three-judge panel sitting in the United States District Court for the District of South Carolina struck down the State's redistricting plan. On the basis of meager evidence and attenuated inferences, the panel found that race predominated in the design of CD1 in Charleston County.

The panel's decision is likely the weakest racial gerrymandering claim ever to prevail. In the absence of any direct evidence of racial intent, the panel mistook evidence that the South Carolina legislature was aware of race as evidence that race predominated in the design of CD1. It concluded that the South Carolina legislature's redistricting staff must have used racial data to assign precincts in Charleston County, despite overwhelming direct evidence that the staff relied on electoral performance data.

The panel found that a the failure to make a minor change to a district's African American population—specifically, the failure to raise it from 17% to 21%—was sufficient to establish a violation of the Equal Protection Clause. The panel accorded this slight difference great weight by opining that it "tilted" the overall partisan balance in the district from Democrat to Republican. The panel erred both by assigning legal significance to this "tilt" and by assuming the legal relevance of "crossover" districts, in which a small racial minority joins a larger majority to favor a single party candidate. The panel also erred by focusing almost exclusively on Charleston County's African American residents, despite this Court's jurisprudence holding that racial gerrymandering claims must be addressed on a district-wide basis.

The panel's decision intertwined considerations of race and politics in a way that is contrary to the Court's settled jurisprudence. If not reversed, the panel's decision will have a disastrous effect on the future, judicial review of redistricting plans.

ARGUMENT

The Panel's Decision Badly Misapplied the Governing Requirement That Plaintiffs Show That Race Predominated in Drawing the Challenged District.

I. The Governing Standard is Demanding.

The Equal Protection Clause "prevents a State, in the absence of 'sufficient justification,' from 'separating its citizens into different voting districts on the basis of race.'" *Cooper v. Harris*, 581 U.S. 285, 291 (2017) (citation omitted). Accordingly, a district plan is subject to challenge as a racial gerrymander, and must ultimately satisfy the test of strict scrutiny, if "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U. S. 900, 916 (1995). "That entails demonstrating that the legislature 'subordinated' other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to 'racial considerations.'" *Cooper*, 581 U.S. at 291 (quoting *Miller*, 515 U.S. at 916).

"That burden of proof, [the Court] ha[s] often held, is 'demanding.'" *Cooper*, 581 U.S. at 319 (citing *Easley v. Cromartie*, 532 U.S. 234, 241 (2001)). "Race must not simply have been '*a* motivation for the drawing of a majority minority district,' … but 'the "*predominant* factor" motivating the legislature's districting decision.'" *Easley*, 532 U.S. at 241 (citations omitted). "Plaintiffs must show that a

facially neutral law is unexplainable on grounds other than race." *Id*. at 241-242 (citations and internal quotations omitted).

Although the "legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors," that "sort of race consciousness does not lead inevitably to impermissible race discrimination." *Shaw v. Reno*, 509 U.S. 630, 646 (1993); *see Miller*, 515 US at 916 ("Redistricting legislatures will … almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process." (citations omitted)). The difficulty of distinguishing between "being aware" and "being motivated" by racial considerations, "together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race." *Id.*

II. The Evidence Relied on by the Panel Falls Far Short of the Showing Required Under the Equal Protection Clause.

Charitably stated, the decision below is likely the weakest racial gerrymandering claim ever to prevail. Amici agrees with Appellants' discussion of the evidence and adopts all of it here. Amici wishes to further emphasize the following critical points.

A. There is Neither Direct Evidence Nor a Plausible Motive for the Use of Race as a Proxy for Partisanship.

While direct evidence is not a legal prerequisite, cases finding that racial considerations predominated when districts were drawn typically have relied on strong direct evidence of specific racial targets. *See Cooper*, 581 U.S. at 299 ("Uncontested evidence in the record shows that the State's mapmakers, in considering District 1, purposefully established a racial target: African-Americans should make up no less than a majority … Senator Rucho and Representative Lewis were not coy in expressing that goal."); *Miller*, 515 U.S. at 917-18 (affirming race predominated based on DOJ correspondence directing black "maximization" to obtain Section 5 preclearance); *Abbott v. Perez*, 138 S. Ct. 2305, 2334 (2018) ("Texas does not dispute that race was the predominant factor"); *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 192 (2017) (noting legislators used an express racial target of 55% BVAP); *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 267 (2015) (finding "Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets").

By contrast, the defense witnesses in this case uniformly and repeatedly disavowed any use of race in the course of pursuing their partisan redistricting goals. The arguably tendentious and leading cross examination of a non-partisan staffer, who previously had drawn maps for both Democrats and Republicans, by a member of the panel is no

substitute for the strong direct evidence typically seen in racial gerrymandering cases. The panel found the staffer's claims that he did not consider race "hollow" in light of his "detailed knowledge" of South Carolina's racial demographics. App. 28a-30a. The panel is plainly confusing "awareness" with "predominance," which this Court has repeatedly warned against. In any case, doubt about the staffer's credibility is not direct evidence that race predominated in the Generally Assembly's decision to adopt CD1.

Indeed, there is an irreconcilable contradiction at the heart of the panel's findings: there is simply no reason to use racial data as a *proxy* for partisan data when partisan data is itself accurate and available. Unless the panel believed that staffers designed CD1 with pure racial animus that overrode any other motive, including partisan advantage—and its most severe findings do not suggest that is the case—there is no incentive to use second-order data (*viz.*, VTD demographics) to measure performance when first-order data is equally available. As Appellants put it,

> the panel's theory makes no sense. Whereas race partially correlates with politics … election data perfectly correlate with politics. And … using race incurs serious legal risk …. [T]he 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.

App. Br. at 35.

B. No Racial Gerrymander Should be Found Where an Allegedly Injured Minority Group Comprises Much Less than a Majority of a Preferred District.

In this case, if Appellees prevail, the black voting-age population of the challenged district will increase from about 17% to about 21%. App. Br. at 6; *see* App. 22a-23a. The panel found this small difference to be legally relevant because of evidence showing that "a district in the range of 17% African American produced a Republican tilt, a district in the range of 20% produced a 'toss up district,' and a plan in the 21–24% range produced a Democratic tilt." App. 23a.

The tendency to produce a Democratic or Republican "tilt" depends, of course, on the predicted voting proclivities of all of the other voters in the district who are not African American. Electoral districts where the voting patterns of a racial minority can combine with the voting patterns of the majority to produce the outcome the minority prefers are called "crossover" districts.[2]

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[2] *See Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (defining crossover districts). Crossover districts are one of three kinds of districts where groups who comprise a minority of a district's voters have been alleged on occasion to have some sort of legal right to have the district created. The other two are "coalition" districts, where different minority groups may combine to form a majority, and "influence" districts where a minority group

There are sound reasons for rejecting the notion that a crossover or any other sub-majority district should have legal relevance. To begin with, a racial gerrymandering claim depends on a showing that "race was the predominant factor motivating the legislature's decision to place a *significant number* of voters within or without a particular district." *Miller*, 515 U. S. at 916 (emphasis added). A group of voters who could not form a majority is not a "significant number." (Wherever that line is put down, moreover, it is clear that the numbers at issue in *this* case do not qualify as significant.) Stated another way, if race was truly a "predominant factor" in the creation of (or refusal to create) a district, it must be the case that a majority was established (or destroyed) on that basis.

Sub-majority districts, by contrast, require courts to examine the value of purely *political* alliances, among groups who may have little else in common. The only thing the different racial groups within a crossover or coalition district may share is the intention to vote for the same party—to be candid, the intention to vote for a Democrat. There are no judicially manageable standards for determining when a court should order such relief, let alone how such a district should be created or enforced. As the Court reasoned in rejecting the use of crossover districts in the context of Section 2 of the Voting Rights Act, courts "'are inherently ill-equipped' to 'make decisions based on highly political judgments'

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constitutes an influential minority. *Id*. All three are referred to herein as "sub-majority" districts.

of the sort that crossover-district claims would require." *Bartlett*, 556 U.S. at 17 (citations omitted).

> The Judiciary would be directed to make predictions or adopt premises that even experienced polling analysts and political experts could not assess … For example … What percentage of white voters supported minority-preferred candidates in the past? How reliable would the crossover votes be in future elections? What types of candidates have white and minority voters supported together[?] … Were past crossover votes based on incumbency and did that depend on race? What are the historical turnout rates among white and minority voters[?] … Those questions are speculative …

Id.

Shaw, *Miller*, *Bethune-Hill*, and *Cooper* all involved racial gerrymander challenges to majority-minority districts. Indeed, aside from the panel's decision in this case, the undersigned counsel are not aware of any case where a successful challenge to a racial gerrymander involved a district containing less than a majority of minority voters. The Court should reverse the panel's decision and explicitly reject its approach.

C. Charleston County's Split Within CD1 Is Not Probative of Racial Predominance.

Citing *Shelby County v. Holder*, 570 U.S. 529 (2013), the panel opined that was a "fair question" regarding whether the "continued racial division of Charleston County" was "legally justified." App. 26a-27a. This is a peculiar finding for several reasons.

First, it was the United States District Court for the District of South Carolina, where this panel sat, that originally ordered this "racial division." *Colleton Cty. Council v. McConnell*, 201 F. Supp. 2d 618, 664-65 (D.S.C. 2002). Second, county splits are not inherently racial, especially if they are part of a court order. Third, elimination of the split meant the removal of then-Majority Whip Congressman James Clyburn from Charleston County. There are many legal, practical, and political reasons why the General Assembly might keep portions of Congressman Clyburn's CD6 in Charleston County. It is reasonable to believe that even Democratic voters in Charleston County may be disturbed to find that they are no longer represented by a powerful congressman. Moreover, the only record evidence is from Congressman Clyburn's staff, who suggested that he preferred that Enacted CD6 keep part of Charleston County. App. 123a.

In any event, the panel committed reversible error by focusing so heavily on the split in Charleston County. As the Court explained in *Bethune-Hill*, "the basic unit of analysis for racial gerrymandering

claims in general, and for the racial predominance inquiry in particular, is the [challenged] district. Racial gerrymandering claims proceed 'district-by-district.'" 580 U.S. at 191 (citations omitted). Because the "ultimate object of the inquiry … is the legislature's predominant motive for the design of the district as a whole," a court "must consider all of the lines of the district at issue … [and] take account of the districtwide context." *Id.* at 192.

III. The Connection the Panel Drew Between Politics and Race, If Taken Seriously, Would Have Disastrous Consequences Concerning Judicial Review of the Redistricting Process.

With all respect, the panel has committed a grave error. Its decision, if not corrected, threatens to conflate the racial and political concerns that are always present in redistricting disputes in a way that could impair the perceived legitimacy of the judicial branch.

To summarize: the panel found as a matter of law that race predominated in the drawing of a congressional district, in a way that violated the Equal Protection Clause of the U.S. Constitution, because a staffer, reviewing only partisan data, drew a district in which African American voters comprised 17%, rather than 21%-24%, of the electorate, with the result that its electoral profile "tilted" Republican rather than "tilting" Democrat. No matter how this decision is qualified, explained, or "spun" by officials or judges, legislators will draw a single lesson from it.

And they will not be wrong, at least insofar as they wish to limit their risk of losing a lawsuit in which they are charged with racial discrimination. The lesson is that it is safer to draw districts with Democratic majorities. It is riskier to draw districts with Republican majorities.

As a further consequence, partisan Democrats will draw the conclusion that it is worth challenging any Republican congressional district with even a small minority population. And they will not be wrong—indeed, it might be professional negligence not to try. How small a minority population? It is hard to predict, but the ceiling starts at 17%.

It is easy to see how the courts could be inundated with this kind of litigation, and forced to address a raft of unmanageable questions. Are correlations between race and politics presumptions, and are they rebuttable? Can they establish a prima facie case? Does the burden of proof shift? How much of a correlation between race and partisanship is required? Does the Latino vote correlate sufficiently with the Democratic Party to allow similar, "Alexander"-type claims? Are any criteria other than partisanship considered "safe"? Do legislatures need to find redistricting consultants who have no familiarity with the racial distribution of local residents?

Finally, the public will draw its own conclusions, when it sees that a party that routinely draws half of the national vote has been placed in a

legally disadvantageous position under the U.S. Constitution.

CONCLUSION

For the foregoing reasons, amici curiae respectfully request the Court reverse and render judgment for Appellants.

Respectfully submitted,

T. RUSSELL NOBILE
Counsel of Record
JUDICIAL WATCH, INC.
P.O. Box 6592
Gulfport, MS 39506
(202) 527-9866
rnobile@judicialwatch.org

ROBERT D. POPPER
ERIC W. LEE
JUDICIAL WATCH, INC.
425 Third Street, SW
Suite 800
Washington, DC 20024
(202) 646-5172

H. CHRISTOPHER COATES
LAW OFFICES OF H. CHRISTOPHER COATES
934 Compass Point
Charleston, SC 29412
Phone: (843) 609-7080
curriecoates@gmail.com

Attorneys for Amici