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 FOR LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, THE LEADERSHIP CONFERENCE EDUCATION FUND, ASIAN AMERICANS ADVANCING JUSTICE | AAJC, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, CAMPAIGN LEGAL CENTER, DĒMOS, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, AND SOUTHERN COALITION FOR SOCIAL JUSTICE AS AMICI CURIAE IN SUPPORT OF APPELLEES

DAMON T. HEWITT*
JON GREENBAUM
EZRA D. ROSENBERG
DAVID ROLLINS-BOYD
SOFIA FERNANDEZ GOLD
ALEXANDER DAVIS
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street NW, Suite 900
Washington, D.C. 20005

*Admitted in Pennsylvania only. Practice limited to matters before federal courts

ADAM S. GERSHENSON
COOLEY LLP
500 Boylston Street
Boston, MA 02116

JULIE VEROFF
Counsel of Record
KATHLEEN HARTNETT
K.C. JASKI
COOLEY LLP
3 Embarcadero Center
20th Floor
San Francisco, CA 94111
(415) 693-2000
jveroff@cooley.com

ALEXANDER J. KASNER
COOLEY LLP
1299 Pennsylvania Ave., NW
Suite 700
Washington, D.C. 20004

Counsel for Amici Curiae

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INTERESTS OF *AMICI CURIAE*[1]

Amici, the Lawyers' Committee for Civil Rights Under Law ("the Lawyers' Committee") and eight other organizations, are civil rights organizations or lawyers' associations committed to ensuring the protection of the right to vote and eliminating discrimination and inequality in any form.

The Lawyers' Committee was formed at the request of President John F. Kennedy in 1963 and uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have voice, opportunity, and power to make the promises of our democracy real. For the entirety of its history, the Lawyers' Committee has had an active voting rights practice and has fought to ensure that all Americans have an equal opportunity to participate in the electoral process. The Lawyers' Committee has litigated voting rights cases before this Court, including *Shelby County v. Holder*, 570 U.S. 529 (2013); *Arizona v. Inter Tribal Council of Arizona., Inc.*, 570 U.S. 1 (2013); *Young v. Fordice*, 520 U.S. 273 (1997); and *Clark v. Roemer*, 500 U.S. 646 (1991). The Lawyers' Committee has also participated as *amicus curiae* in numerous voting rights cases before this Court, including *Allen v. Milligan*, 143 S. Ct 1487 (2023); *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); *Cooper v. Harris*, 581 U.S. 285 (2017); and *Bethune-Hill v. Virginia State Board of Elections*, 137 S. Ct. 788 (2017). The Lawyers' Committee has a direct interest in this case because it raises important voting rights issues central to the organization's mission.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to this brief's preparation and submission.

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a coalition of over 240 organizations committed to the protection of civil and human rights in the United States. It is the nation's oldest, largest, and most diverse civil and human rights coalition. The Leadership Conference was founded in 1950 by three legendary leaders of the civil rights movement—A. Philip Randolph, of the Brotherhood of Sleeping Car Porters; Roy Wilkins, of the NAACP; and Arnold Aronson, of the National Jewish Community Relations Advisory Council. One of the missions of The Leadership Conference is to promote effective civil rights legislation and policy. The Leadership Conference was in the vanguard of the movement to secure passage of the Civil Rights Acts of 1957, 1960, and 1964; the Voting Rights Act of 1965 and its subsequent reauthorizations; and the Fair Housing Act of 1968.

The Leadership Conference Education Fund ("The Education Fund") is the education and research arm of The Leadership Conference on Civil and Human Rights. The Education Fund's mission is to inform the public not only to achieve civil and human rights, but to make sure those rights endure. By activating the power of the coalition, The Education Fund and its partners can share innovative research and information around the country—and, ultimately, shift the narrative on civil and human rights.

Asian Americans Advancing Justice | AAJC ("Advancing Justice | AAJC") is a national nonprofit organization based in Washington, D.C., and founded in 1991. Advancing Justice | AAJC works to advance and protect civil and human rights for Asian Americans and to promote an equitable society for all. Advancing Justice | AAJC is a leading expert on issues of importance to the Asian American community, including voting rights and the decennial census. Advancing Justice | AAJC works to

promote justice and bring national and local constituencies together through community outreach, advocacy, and litigation.

Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a New York-based national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF has documented both the use of, and the continued need for, protection under the Voting Rights Act of 1965. AALDEF has litigated cases around the country under the language access provisions of the VRA, and seeks to protect the voting rights of language minority, limited English proficient, and Asian American voters. AALDEF has litigated cases that implicate the ability of Asian American communities of interest to elect candidates of their choice, including lawsuits involving equal protection and constitutional challenges to discriminatory redistricting plans. *See, e.g.*, *Favors v. Cuomo*, 881 F. Supp. 2d 356 (E.D.N.Y. 2012); *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997); *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017); Complaint, ECF No. 1, *Detroit Action v. City of Hamtramck*, No. 2:21-cv-11315 (E.D. Mich. June 3, 2021); Complaint, ECF No. 1, *All. of South Asian Am. Labor v. The Bd. of Elections in the City of New York*, No. 1:13- cv-03732 (E.D.N.Y. July 2, 2013); Complaint, ECF No. 1, *Chinatown Voter Education All. v. Ravitz*, No. 1:06-cv-0913 (S.D.N.Y. Feb. 6, 2006).

Campaign Legal Center ("CLC") is a leading nonpartisan election law nonprofit. CLC develops policy on a range of democracy issues. CLC aims to protect Americans' voting rights and secure equal access for historically disenfranchised racial minorities under the Constitution and the Voting Rights Act. CLC has served as

amicus curiae or counsel in numerous voting rights and redistricting cases in this Court, including *Allen v. Milligan*, 143 S. Ct. 1487 (2023); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); *Harris v. Arizona Independent Redistricting Commission*, 578 U.S. 253 (2016); *Evenwel v. Abbott*, 578 U.S. 54 (2016); *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015); and *Shelby County v. Holder*, 570 U.S. 529 (2013). CLC has a demonstrated interest in voting rights and redistricting law.

Dēmos is a movement-oriented think tank committed to racial justice. Dēmos works to build power with and for Black and brown communities through litigation, research, strategic communications, and deep partnerships with grassroots organizations across the country. For more than 20 years, its work has included a focus on addressing fundamental imbalances of political and civic power across the country. Dēmos has a longstanding record of advancing policy solutions to address multiple forms of gerrymandering, including racial and prison-based gerrymandering.

The League of Women Voters of the United States ("LWVUS") is a nonpartisan, grassroots, member organization that encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy. LWVUS was founded in 1920 by leaders of the women's suffragist movement, six months before the ratification of the Nineteenth Amendment. In keeping with its mission, LWVUS has long advocated for fair redistricting across the country. In 2019, LWVUS launched "People Powered Fair Maps" to create fair, transparent, people-powered redistricting processes that ensure maps are drawn fairly and accurately, with all voices considered and equitably

represented. The League of Women Voters is active in several cases in federal court with racial gerrymandering claims. LWVUS has a direct interest in this case because it raises important voting rights issues central to LWV's mission.

Southern Coalition for Social Justice ("SCSJ") is a 501(c)(3) nonprofit organization founded in 2007 in Durham, North Carolina. SCSJ partners with communities of color and economically disadvantaged communities across the South to defend and advance their political, social, and economic rights through legal advocacy, research, and communications. SCSJ's voting rights practice has a multi-pronged approach, including impact litigation, to ensure these communities have an equal opportunity to have their voices heard and votes counted at all levels of government. Since its founding, SCSJ has successfully represented individual and organizational clients in state and federal redistricting cases challenging discriminatory results, intent, and racial gerrymandering. As the South grows more racially diverse, this case presents issues directly tied to SCSJ's interests in fighting for fair representation utilizing the Voting Rights Act and the Fourteenth and Fifteenth Amendments of the U.S. Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants attempt to use this direct appeal to make it more difficult to prove racial gerrymandering claims whenever legislators invoke "partisanship" as a basis for the gerrymander. But this Court has long made clear that partisan ends cannot be achieved via predominantly race-based means. It should reject Defendants' invitation to rewrite that precedent and to erect an even higher bar for

plaintiffs seeking to prove racial gerrymandering claims where partisan goals were involved. This Court should affirm the District Court's conclusion that Congressional District 1 ("CD1") was an impermissible racial gerrymander.

Defendants posit that Plaintiffs must completely separate racial motivation from partisan motivation, but this Court has ruled to the contrary. To make out a racial gerrymandering claim, Plaintiffs need show only that race was used as the predominant means to sort voters, even if as a means of achieving a partisan goal. Simply put, partisan ends do not justify using race as the predominant means to move voters.

Nor do Plaintiffs have to prove their case by direct evidence, as Defendants claim. In redistricting cases as elsewhere, circumstantial evidence in and of itself frequently suffices. A presumption of legislative good faith also does not require a court to uncritically accept a disclaimer of racial motivation. Rather, circumstances such as the configurations of the districts, disregard of other redistricting criteria, and evidence that points to a conclusion that voters of color were moved in significant numbers and ways that white voters were not are sufficient to rebut testimony of lack of racial motivation.

Applying that framework, ample record evidence supports the trial court's thorough factual findings. *Amici* here focus on two factual issues in particular.

First, adverse inferences are appropriately drawn from the legislators' express pre-enactment disavowals that partisanship factored into the line-drawing. These disavowals—and the legislators' about-face on the issue at trial—undercut any presumption that the legislature acted

in good faith in its map-drawing.[2] Further, these disavowals add support to the conclusion that the legislators were hiding something: the use of the illegal means of racial gerrymandering to achieve their partisan goal.

Second, Defendants' reliance on "core retention"—preserving a district's residents from one plan to another—is unsound. This Court has recently and rightly observed that such a justification is of limited value in cases dealing with race, as it is often a means of institutionalizing discrimination. *See Allen v. Milligan*, 143 S. Ct. 1487, 1505 (2023).

Finally, *amici* explain that although the District Court reached the right conclusion on the intentional discrimination claim, it did so for the wrong reason. The District Court incorrectly applied the racial gerrymandering standard to assess Plaintiffs' intentional discrimination claim, but the latter claim requires a distinct analysis in important ways. Whereas a racial gerrymandering claim concerns governmental decision-making where race predominated without a justification satisfying strict scrutiny, an intentional discrimination claim concerns racial discrimination that plays any significant role in governmental decision-making. And whereas a racial gerrymandering claim is concerned with excessive race-consciousness in the redistricting process, an intentional discrimination claim is concerned with actions intended to harm minority groups. Although the District Court misapplied the law in ways that should be clarified, the error in this particular case was harmless, as

[2] Although the District Court credited Defendants' partisanship motive despite their pre-enactment disavowals, it still found that race predominated the legislature's sorting of voters. *See infra* II.A.

the remedy—redrawing of CD1—is the same for either claim.

The Court should affirm the judgment below.

ARGUMENT

I. This Court Should Reject Defendants' Efforts to Transform Partisanship into an Absolute Defense to Racial Gerrymandering Claims.

In defense of South Carolina's congressional redistricting, Defendants and their supporting *amici* take turns suggesting, on the one hand, that race and party must be completely disentangled to prove a racial gerrymandering claim, and on the other hand, that race and party are so correlated that disentanglement is impossible. *See* Appellants' Brief ("Def. Br.") at 27-28, 30-32; *see also* Amicus Brief for National Republican Redistricting Trust ("NRRT Br.") at 13-20; Amicus Brief for Judicial Watch Inc. and Allied Educational Foundation at 4-11; Amicus Brief for Fair Lines America Foundation at 5-15. They go so far as to suggest that Plaintiffs' racial gerrymandering claim in this case is nothing more than a "disguised partisan gerrymandering claim." NRRT Br. at 20. They thus advocate for raising the standard for proving a racial gerrymandering claim, including by arguing that "direct evidence," and not circumstantial evidence standing alone, is needed to support a racial gerrymandering claim. *See* Def. Br. at 34-36.

Defendants and their supporting *amici* have it backwards. Certainly, partisanship and race are increasingly correlated, particularly for Black voters and other voters of color. *See* Stephen Menendian, *Race and Politics: The Problem of Entanglement in Gerrymandering Cases*, 96 S. Cal. L. Rev. 301, 330-31 (2022); Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and*

Voting Rights, 77 Ohio State. L.J. 867, 869 (2016). But the correlation between race and party does not insulate excessive race-based redistricting decisions from judicial scrutiny. Rather, as this Court explained in *Cooper v. Harris*, 581 U.S. 285, 307-310 (2017), it is the very correlation between race and party that *heightens* the need for even closer judicial scrutiny of decisions that are purportedly purely partisan in nature. *Id.* at 308 (explaining that "[g]etting to the bottom of a dispute" over whether racial considerations played a role in redistricting involves "special challenges for a trial court . . . when the State asserts partisanship as a defense" because evidence of "the challenged district's conformity to traditional districting principles loses much of its value" given that political and racial motivations can both produce "bizarre" district shapes, and because "racial identification is highly correlated with political affiliation") (citation omitted). This need is particularly great given the availability of increasingly sophisticated technology allowing legislators to use racial data at the block level to implement subtle but decidedly harmful race-based changes to district lines.

Accordingly, this Court should reject Defendants' plea to make the already difficult process of showing an impermissible racial gerrymander more difficult. It should reaffirm its precedent that plaintiffs need not completely separate race from partisanship goals in order to prove a racial gerrymandering claim, and that using race to achieve partisan goals can constitute a racial gerrymander. Further, this Court should reject Defendants' argument that a racial gerrymandering claim must be proved with direct evidence, rather than circumstantial evidence.

A. Plaintiffs Need Not Prove the Ultimate Goal of the Redistricting Was Racial and Not Political in Order to Prove a Racial Gerrymander.

In redistricting, as in other endeavors, "[t]he end does not justify illegal means." *Sugar Institute v. United States,* 297 U.S. 553, 599 (1936); *see Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (explaining that, in redistricting, the "'means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose'") (quoting *Wygant v. Jackson Bd. Of Ed.*, 476 U.S. 267, 180 (1986) (opinion of Powell, J.)). Thus, this Court has recognized that even though partisan gerrymandering is non-justiciable under the U.S. Constitution, it cannot be achieved by the illegal means of excessively sorting by race. If race is shown to be the predominant tool for sorting voters, strict scrutiny is triggered, and the burden shifts to defendants to show a compelling interest and narrow tailoring. *See Cooper*, 581 U.S. at 291 n.1, 307 n.7; *Miller v. Johnson*, 515 U.S. 900, 914 (1995); *Bush v. Vera*, 517 U.S. 952, 968-970, 972 (1996) (plurality decision).

In *Cooper*, this Court explained that if defendants raise a partisanship defense to a racial gerrymandering claim, district courts must engage in "a sensitive inquiry into all circumstantial and direct evidence of intent to assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines." 581 U.S. at 308 (internal quotations omitted). The Court, however, did *not* say that plaintiffs must also prove that race, and not partisanship, was the ultimate goal in the line-drawing. *See id*. at 308 n.7. To the contrary, the Court explained that a plaintiff succeeds in such a case "even if the evidence reveals that a legislature elevated race to the predominant criterion in order to advance other goals, including political ones." *Id.* at 291 n.1.

The Court also did not hold that a plaintiff must *completely* disentangle race from partisan objectives. Rather, expressly recognizing the high correlation between race and political affiliation, the Court observed that the predominance inquiry is satisfied if plaintiffs prove that "legislators have place[d] a significant number of voters within or without a district predominantly because of their race, *regardless of their ultimate objective* in taking that step." *Id.* at 308 n.7 (emphasis added).

Defendants' argument that *Easley v. Cromartie*, 532 U.S. 234 (2001) ("*Cromartie* II") counsels otherwise is wrong. *See* Def. Br. at 3, 25-27. In *Cromartie* II, this Court held that the plaintiffs had not adequately demonstrated that race was the predominant tool in "the legislature's line-drawing process." *Id.* at 243, 244, 245. But like *Cooper*, *Cromartie* II does not permit legislatures to use race as the predominant tool to sort voters, even for an ultimately partisan purpose—which the trial court found was the case here, relying upon compelling expert testimony. *See* Appellees' Brief ("Pl. Br.") at 33-34, 36.

The approach set forth in *Cromartie* II and *Cooper* conforms with precedent. *See*, *e.g.*, *Miller v. Johnson*, 515 U.S. 900, 914 (1995) (holding the "use of race as a proxy" for "political interest[s]" is "prohibit[ed]"); *Vera*, 517 U.S. at 968-970, 972 (holding that race predominated when a legislature deliberately "spread[] the Black population" among several districts in an effort to "protect[] the Democratic incumbents" and emphasizing that plaintiffs need not prove a "consistent, single-minded effort to 'segregate' voters on the basis of race," and that the fact that "racial data [was] used in complex ways, and for multiple objectives," such as political objectives and protection of incumbents, "does not mean that race did not predominate over other considerations"). *Cooper* and the precedent it follows make clear that "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*, 581 U.S. at 308 n.7. In other words, where the evidence shows that the legislature predominantly used race to achieve a partisan objective, and the legislature's line-drawing cannot be justified by reference to legitimate traditional districting principles, no further proof of disentanglement is required.

This approach makes sense, because the heart of this Court's racial gerrymandering jurisprudence—in accord with Equal Protection Clause canon—is the prohibition against state action based upon racial stereotypes. As Justice O'Connor explained in *Vera*, it cannot be true that "racial stereotyping that we have scrutinized closely in the context of jury service can pass without justification in the context of voting." 517 U.S. at 968; *see also Miller*, 515 U.S. at 911-12 ("When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'"). Indeed, "[i]f the promise of the Reconstruction Amendments, that our Nation is to be free of state-sponsored discrimination, is to be upheld, we cannot pick and choose between the basic forms of political participation in our efforts to eliminate unjustified racial stereotyping by government actors." *Vera*, 517 U.S. at 968-69.

It is even more essential today than in the past for courts to scrutinize whether legislatures are impermissibly using race to advance partisan aims in redistricting. Some legislators may seek to take advantage of their perceived ability to engage in partisan gerrymandering without legal consequence. In this redistricting cycle, lawmakers have defended their cracking and packing of communities of color in urban

areas like Charleston and Atlanta with the mantra of "partisanship." *See* Jurisdictional Statement Appendix ("J.S. App.") 24a-28a (finding the legislature cracked Charleston); Defendants' Brief in Support of Motion for Summary Judgment at 13-14, *Georgia State Conf. of the NAACP v. State of Georgia*, N.D. Ga., No. 21-05338 (Mar. 23, 2022, ECF No. 141-1). This Court should make clear that legislatures cannot misuse *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), to immunize themselves from liability for racial gerrymandering.

Additionally, "[n]ew redistricting software enables pinpoint precision in designing districts," *Gill v. Whitford*, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring), including the use of racial data that is often more precise than political data. *See, e.g.*, *Georgia State Conf. of NAACP v. Georgia*, 312 F. Supp. 3d 1357, 1360-61 (N.D. Ga. 2018). That is because, since 1990, data used in redistricting comes from the census and is provided "down to the street or block-level in any precinct," and thus is "more detailed" than political data, which is usually based on "precinct-wide political affiliation." *Id.*; *see also* Menendian, *supra*, at 339-40 ("The provision of block level census data following the 1990 census means that state legislatures could draw more fine grain political districts based on race than was ever possible using computer programs."). Given the precise data available to legislators, and thus their ability to consider race in service of partisan goals, courts should be especially attentive to the possibility that partisan goals are being achieved via racial targeting.

Contrary to this precedent and reasoning, Defendants and their supporting *amici* argue in favor of even more stringent standards that would require plaintiffs bringing racial gerrymandering claims to prove that the ultimate intent behind the map-drawing was racial and not political, even if race was used to achieve that political purpose. *See,*

e.g., NRRT Br. at 21 (accusing Plaintiffs of putting forth "no evidence of racist intent on the part of the State"); Fair Lines Br. at 6 (contending that a focus on "outcomes, not intent, stands rejected in this Court's precedent"). But that conflates the first step of the racial gerrymandering inquiry—predominance—with an inquiry into motive. And it is not the law. Racial gerrymandering claims are based on the prohibition against race playing a predominant role in the making of governmental choices absent a compelling state interest and narrow tailoring. *Miller*, 515 U.S. at 911-913.[3] The *reason* a legislature relies on race—whether, for instance, to harm a racial group, benefit a racial group, or achieve some other goal such as partisan advantage—is irrelevant to the predominance inquiry.

In sum, this Court should reaffirm that plaintiffs mounting a racial gerrymandering claim satisfy their burden to "disentangle" race from politics when they prove that legislators placed a significant number of persons of color within or outside a district predominantly because of their race—regardless of whether the legislators' goal was partisan advantage.

B. A Racial Gerrymander Can Be Proved Solely by Circumstantial Evidence.

This Court has repeatedly held that circumstantial evidence is sufficient to support a ruling that race so motivated map-drawing decisions as to constitute a racial gerrymander. *See*, *e.g.*, *Miller*, 515 U.S. at 916 ("The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics *or* more direct evidence going to legislative purpose, that race was

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[3] This Court has "long assumed" that one such compelling state interest is compliance with the Voting Rights Act. *Cooper*, 581 U.S. at 292.

the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.") (emphasis added); *Cooper*, 581 U.S. at 291 (explaining that the plaintiff may make the required showing through direct evidence of legislative intent, circumstantial evidence, "or a mix of both"). Circumstantial evidence that legislators used race to achieve partisan objectives could include, for example, evidence that Black Democrats were moved at higher rates than white Democrats or that splits of political subdivisions such as precinct lines affected Black voters more than white voters.

Defendants nevertheless urge this Court to reverse the District Court's substantial findings of fact supporting its conclusion that race was a predominant motivation behind the redistricting because, among other things, there was no "direct evidence" of excessive race-based decision-making. *See* Def. Br. at 34-35. Defendants appear to elevate a presumption of legislative "good faith" to a command that a court accept at face value the testimony of "the Senate and House witnesses—all of whom denied under oath making decisions based on race." Def. Br. at 35-36.

Requiring direct evidence has never been the law, either in redistricting cases or elsewhere. *See, e.g.*, *North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018) (observing that the "[r]esolution of [racial gerrymandering] claims will usually turn upon circumstantial evidence") (citation omitted); 29A Am. Jur. 2d Evid. § 303 ("[C]ourts no longer distinguish between the probative value of direct and circumstantial evidence."); 14a C.J.S. Civil Rights § 791 ("The law generally makes no distinction between circumstantial and direct evidence absent some affirmative indication in a statute."). Even in criminal cases, where facts must be proved beyond a reasonable doubt, this Court has "never questioned the

sufficiency of circumstantial evidence" to support a conviction. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003). Circumstantial evidence is "intrinsically not different from testimonial evidence." *Holland v. United States*, 348 U.S. 121, 140 (1954). "The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" *Desert Palace*, 539 U.S. at 100 (quoting *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 508 n.17 (1957)).

Accordingly, this Court has always treated circumstantial and direct evidence alike in cases dealing with whether an improper factor—such as sex or race—motivated the challenged conduct. *See, e.g.*, *Desert Palace*, 539 U.S. at 100 (providing that in employment discrimination cases, evidence that an employer's explanation for an employment practice is "unworthy of credence" is circumstantial evidence capable of proving discriminatory intent); *Foster v. Chatman*, 578 U.S. 488, 512 (2016) (finding circumstantial evidence sufficient to demonstrate that prosecutor struck jurors based on race, despite prosecutor's testimony to the contrary).

Relying on this precedent, the Fifth Circuit, sitting en banc, recently explained why circumstantial evidence is particularly important in cases dealing with whether governmental action was racially motivated:

> In this day and age we rarely have legislators announcing an intent to discriminate based upon race, whether in public speeches or private correspondence. To require direct evidence of intent would essentially give legislatures free rein to racially discriminate so long as they do not overtly state discrimination as their purpose and so long as they proffer a seemingly neutral

> reason for their actions. This approach would ignore the reality that neutral reasons can and do mask racial intent, a fact we have recognized in other contexts that allow for circumstantial evidence.

Veasey v. Abbott, 830 F.3d 216, 235-236 (5th Cir. 2016) (en banc) (footnote omitted).

Defendants' argument that direct evidence should be required in the racial gerrymandering context ignores this longstanding precedent and extant reality. And the effect of their proposed rule would mean that, absent an unlikely direct statement about relying on race, a legislature's purported use of "race-blind" political data will insulate their maps from judicial review. *See* Alexa Ura, *Republicans say Texas' new political maps are "race blind." To some voters of color, that translates as political invisibility,* Texas Tribune (Oct. 20, 2021, 5:00 AM CT), https://www.texastribune.org/2021/10/20/texas-redistricting-race-discrimination/. But many jurisdictions still experience high levels of residential racial segregation, even in cities, and residential discrimination in urban areas has increased since 1990. *See* Menendian, *supra*, at 330-31. Legislators know the racial demographics of communities in their state—and where voters of color reside—and can use the knowledge in their "head[s]" instead of on their "computer screen[s]" when drawing maps. *Cooper*, 581 U.S. at 315. As a result, circumstantial evidence will often be the most probative evidence to disprove supposedly "race-blind" redistricting.

As the District Court here explained, plaintiffs who provide circumstantial evidence that legislators used race to achieve partisan objectives need not prove by direct evidence that defendants used racial data, and not political data, to prevail on racial gerrymandering claims. *See* J.S. App. 14a ("[C]laims that an experienced map drawer did

not consult racial data in drawing the plan ring 'hollow' when there is considerable circumstantial evidence that a district 'sort[ed] voters on the basis of race' and racial data is 'fixed' in the head of an experienced map drawer.") (quoting *Cooper*, 581 U.S. at 315).[4]

This Court should make clear that neither the mere invocation of the presumption of legislative good faith nor express disclaimers of reliance on racial data end the inquiry. Circumstantial evidence, in and of itself, can be sufficient to prove a racial gerrymander.

II. This Court Should Affirm the Panel's Conclusion That CD1 Was an Impermissible Racial Gerrymander.

The District Court correctly held that race predominated in the decision to redraw CD1 by moving 62% of the former district's Black voters to another district. *See* J.S. App. 21a, 23a, 25a. Far from evincing clear error, that decision comported with the governing law, and applied the relevant facts. As detailed in Plaintiffs' brief, ample evidence supports the District Court's conclusion. *Amici* here focus on two discrete points that support affirmance:

First, the Enacted Plan's lead sponsor in the Senate disclaimed a predominant partisan motivation during the pre-enactment debate, only to testify at trial—along with certain legislators—that partisanship in fact was the goal. The District Court accepted that partisanship was the goal notwithstanding that about-face, and still found that race, rather than party-performance data, predominated in sorting voters. That finding was correct. The strategic

[4] Plaintiffs also presented direct evidence that Defendants considered racial data in drawing maps. *See* Pl. Br. Statement II.C & Argument I.B(3).

reversal undermines the presumption of legislative good faith here and shows that Defendants were advancing their goals via illicit means, as they otherwise would have had no reason to initially disclaim any partisan aim.

Second, as demonstrated below, although core retention can be a permissible redistricting principle, it does not, contrary to Defendants' argument, provide an absolute defense to a racial gerrymandering or intentional discrimination claim. The District Court thus properly did not stop its inquiry into CD1 simply because of some map-to-map continuity.

A. Contemporaneous Legislator Statements Disclaiming Partisan Motivation Undercut the Presumption of Legislative Good Faith.

The District Court credited the lead proponents of the Enacted Plan with seeking to "create a stronger Republican tilt to Congressional District No. 1," J.S. App. 21a, but rejected the claim that partisanship was the predominant motive for how CD1 was redrawn, finding instead that racial motivations predominated. Contemporary statements from the Enacted Plan's lead sponsor disclaiming a predominant focus on partisanship confirm that the District Court's finding was not clearly erroneous.

This Court has made clear that contemporaneous statements from legislators are probative when assessing the motivations for how a redistricting map is drawn. *See, e.g.*, *Cooper*, 581 U.S. at 316 (relying on legislator statements to find that racial, rather than partisan, motivation predominated in redistricting); *Shaw*, 517 U.S. at 906 (examining statements by the "principal draftsman" of the challenged map, who confirmed the overriding aim was to create two districts with effective Black-voting majorities).

Here, Republican Senator George "Chip" Campsen, a member of the Senate Redistricting Subcommittee of the Senate Judiciary Committee and the Enacted Plan's primary sponsor, J.S. App. 21a-22a, assured other Senators during debate on the Plan that partisanship was *not* the predominant motivation for the map. He stated: "Now I also want to address the issue of . . . some allegations of partisan gerrymandering. . . . [T]hat's really not the case." Joint Appendix ("JA") 296 (2:22:10-2:23:11).[5]

At trial, however, Defendants attempted to walk back the assurance that partisanship was not driving the map. Senator Campsen testified that he had "sought to create a stronger Republican tilt to" CD1. J.S. App. 22a. Senate Majority Leader Shane Massey testified that partisanship was "one of the most important factors" in drawing CD1 and the Republican majority was "not going to sacrifice" the district. J.S. App. 265a, 300a.

Taken together, the pre-enactment disclaimers of partisan motivation and Defendants' about-face and post-hoc legal defense at trial undercut the presumption of legislative good faith. They provide powerful circumstantial evidence that Defendants were trying to achieve their partisan aims via improper means—namely, sorting constituents by race without a compelling reason. Otherwise, there would be no reason for Senator Campsen

[5] Republican Representative Wallace H. Jordan, the Chairman of the Election Laws Subcommittee of the House of Representatives, JA 14, also stated that no "outside partisan stuff took place" during the House Redistricting Committee's process for drawing proposed maps, JA 44.

to have assured his fellow Senators that partisanship was not his primary goal.[6]

The contemporary pre-enactment and post-hoc statements here thus support the conclusion that the District Court did not clearly err in rejecting Defendants' argument that partisanship alone predominated and instead finding that race predominated.

B. Core Retention Is Not a Viable Defense.

Before the District Court and again here, Defendants characterize CD1 as built on "traditional districting principles." Def. Br. 18-19. And Defendants claim the District Court erred by failing to account for CD1's success in "preserving cores"—that is, keeping together a high proportion of a district's residents—as compared to CD1's predecessor. Def. Br. 26, 48. By the same token, Defendants invite this Court to second-guess Plaintiffs' experts for "ignor[ing] core preservation" in their analysis. Def. Br. 20.

Defendants would have this Court give more weight to "core preservation" than it can bear. To be sure, traditional districting principles may be a legitimate state objective in the redistricting process. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). Such principles may include contiguousness, respect for existing political boundaries,

[6] Legislators often are not shy about their partisan motivations in redistricting. For example, the Republican co-chair of the North Carolina Assembly's redistricting committee explained in 2016: "We are 'draw[ing] the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [I] d[o] not believe it['s] possible to draw a map with 11 Republicans and 2 Democrats.'" *Rucho*, 139 S. Ct. at 2510 (Kagan, J., dissenting); *see also Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring) ("Whether spoken with concern or pride, it is unfortunate that our legislators have reached the point of declaring that, when it comes to apportionment, 'We are in the business of rigging elections.'") (quoting a North Carolina state senator).

and "preserving the cores of prior districts"—credited to the extent that such "consistently applied legislative policies" are "consistent with constitutional norms" and "nondiscriminatory." *Id.* But among traditional redistricting principles, core preservation poses unique issues, particularly because it is a neutral and nondiscriminatory principle *only* insofar as the prior map on which it relied was neutral and nondiscriminatory. The Court should not grant CD1 deference merely because Defendants purport that CD1 matched its predecessor. (And Defendants' premise is itself faulty, given record evidence that CD1 in fact strayed from the predecessor map. *See* J.S. App. 23a-25a.) The Court should instead credit such preservation as one of several competing principles, of value only to the extent it does not itself mask racial predominance.

1. The Principle of Core Preservation.

Core preservation "refers to the proportion of districts that remain when a State transitions from one districting plan to another." *Allen*, 143 S. Ct. at 1505. It measures the percentage of the benchmark plan's (that is, the predecessor plan's) residents that are included in the new proposed district. *E.g.*, J.S. App. 439a.

While "core preservation" is a permissible redistricting principle that a state may consider in theory, it in fact took on little weight in the South Carolina legislature. *See* Pl. Br. 34-35, 47-48, 59-60. As Plaintiffs' expert Dr. Moon Duchin explained before the District Court, the South Carolina Senate guidelines note that cores "are to be considered. Again, though it's listed as additional considerations. And cores are not even explicitly discussed at all on the House side." JA 114; *see* J.S. App. 423a-427a ("2021 Redistricting Guidelines – South Carolina Senate Judiciary Committee Redistricting Subcommittee"); ECF No. 351-4 ("Bagley Rebuttal Report") at 3 (determining,

based on legislative record, that "lawmakers did not seriously consider issues of core retention . . . until extremely late in the legislative process" and that "legislators generally understood the Enacted Map to constitute significant changes to Congressional district lines").

2. The Limits of Core Preservation.

The Court should decline Defendants' invitation to broadly defer to CD1, as with any district, merely because they assert it furthered core preservation. Indeed, this Court has already identified the limits of the core preservation principle. In *Allen v. Milligan*, the Court observed in the context of a Voting Rights Act Section 2 claim that a new proposed district can score well on a "core retention metric" by "largely mirroring" a prior redistricting plan. 143 S. Ct. at 1505. But the Court declined to hold that a "State's adherence to a previously used districting plan can defeat a § 2 claim." *Id.* As the Court explained, "If that were the rule, a State could immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan." *Id.* Repeating past problems does not clean the slate.

There is no principled reason to apply less skepticism to core preservation in the context of a racial gerrymandering claim (setting aside whether CD1 here even followed core-preservation principles). First, core preservation can lead a redistricting authority to abrogate its own authority. Namely, rather than require that new district boundaries are designed from the ground up with traditional principles in mind, core retention instead presumes that the policy choices of the prior map were lawful and aligned with traditional districting principles. As Mr. Roberts, the director of legislative cartography for the South Carolina Legislative Council, explained:

Q. "Does using the benchmark plan help maintain communities of interest?"

A. "It does, yes."

Q. "How so?"

A. "It would have been choices made by the previous cartographer on what the communities of interest are." J.S. App. 105a.

Second, core retention can mask a racial gerrymander. A district designed with race as the predominant factor can anchor subsequent redistricting. The new map based on the old one may be primarily the result of core preservation, but—or consequently—it was just as much the result of decision to place race at the forefront without a compelling reason. *See Milligan*, 143 S. Ct. at 1505.

Third, core retention can wrongly presume that the demographic breakdown within a district remains static from census to census. While a district map may score well on core preservation because it captures the same boundaries or homes as its predecessor, that tells one little about the inhabitants of those homes (and whether they are now being kept together for a more invidious purpose). As explained in the context of a Section 2 claim but equally applicable here, giving "great weight" to "core retention" would "turn the law upside-down, immunizing" a "longstanding, well-established map, even in the face of a significant demographic shift." *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1016 (N.D. Ala. 2022).

Core preservation thus fails to answer the dispositive question in a racial gerrymandering case: "whether the legislature placed race above traditional districting considerations in determining *which* persons were placed *in appropriately apportioned districts*." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 273 (2015) (cleaned

up) (emphasis in original). Core preservation, in other words, sheds little light on whether "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. Nor is it "directly relevant to the origin of the *new* district inhabitants." *Alabama*, 575 U.S. at 274 (emphasis in original).

Core preservation has particularly serious limitations in claims dealing with racial motivation. Core preservation should therefore not be entitled to deference akin to stare decisis, as Defendants' amicus argues. *See* Amicus Brief for Nancy Mace et al. at 14-16. Instead, as the three-judge panel explained in *Bethune-Hill v. Virginia State Board of Elections*, 141 F. Supp. 3d 505 (E.D. Va. 2015), core retention could be a helpful starting point for consideration, not the end:

> [W]here district lines track a path similar to their predecessor districts or where 'core retention' seems to predominate, courts should also examine the underlying justification for the original lines or original district. Legislators' use of the core retention principle should certainly receive some degree of deference. But, the inquiry in a racial sorting claim examines the basis upon which voters were placed 'within or without a particular district.' *Miller*, 515 U.S. at 916. 'That's the way we've always done it' may be a neutral response, but it is not a meaningful answer.

Id. at 544-45.

* * *

For the reasons set forth above and in Plaintiffs' brief, this Court should affirm the District Court's judgment that CD1 was racially gerrymandered and must be redrawn.

III. The Court Should Reaffirm the Distinction Between Racial Gerrymandering and Intentional Discrimination Claims.

Intentional vote dilution and racial gerrymandering claims are "analytically distinct." *Miller*, 515 U.S. at 911. Here, the District Court improperly conflated racial gerrymandering and intentional vote dilution claims by assuming that success on the former was sufficient to prove success on the latter. J.S. App. 45a. As explained further below, these claims address different harms and so are assessed via different legal standards. That said, if this Court concludes—as it should—that the District Court did not clearly err in holding that CD1 was an impermissible racial gerrymander, it can and should affirm the judgment below without reaching Plaintiffs' vote-dilution claim. That is because the racial-gerrymandering claim and the vote-dilution claim both require the same remedy: that CD1 be redrawn. J.S. App. 46a-48a.

If the Court does not affirm with respect to the racial gerrymandering claim, however, it should not reach the intentional vote dilution claim in the first instance, without the benefit of a lower court's application of the proper standard. Although *amici* agree with Plaintiffs that there is sufficient evidence in the record to support a finding of intentional discrimination under the correct standard, rather than create the record on that issue and undertake the correct analysis in the first instance, this Court should instruct the District Court as to the correct legal standard and remand to the District Court to assess the claim under that standard.

Intentional vote dilution and racial gerrymandering claims are analyzed under discrete frameworks. Intentional vote dilution claims recognize the potential that even where the franchise has been extended fairly in some respects—*e.g.*, consistent with one-person, one-

vote—political majorities can still unlawfully leverage their power to dilute the voting power of racial minorities. Such claims are concerned with the intentional attempt to disadvantage members of one racial group relative to another, *i.e.*, whether "the State has enacted a particular voting scheme as a purposeful device 'to minimize or cancel out the voting potential of racial or ethnic minorities, . . . an action disadvantaging voters of a particular race.'" *Miller*, 515 U.S. at 911 (quoting *Mobile v. Bolden*, 446 U.S. 55, 66 (1980)). Because invidious racial discrimination can never be "just another competing consideration" in government decision-making, it is not necessary to show that the invidious discrimination was the sole, dominant, or primary reason for a decision; rather, a plaintiff need prove only that the "discriminatory purpose" was "a motivating factor in the decision." *Vill. of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977). When such a showing is made, the challenged law will survive only if the defendant can "demonstrate that the law would have been enacted" absent any discriminatory intent. *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

The question in a racial gerrymandering claim, by contrast, is not whether a legislature sought to diminish the electoral power of a racial minority but rather whether the State has relied on race as the predominant "basis for separating voters into districts," *Miller*, 515 U.S. at 911. The reason for using race does not matter—a racial gerrymandering claim can arise even where race is used to aid a minority group or to advance partisan goals. *See Shaw v. Reno*, 509 U.S. 630, 645 (1993); *Cooper*, 581 U.S. at 307-08.

Specifically, a plaintiff bringing a racial gerrymandering claim "must prove that the legislature subordinated traditional race-neutral districting

principles." *Miller*, 515 U.S. at 916. If race "was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," then the State's use of race must satisfy strict scrutiny, regardless of why race was used. *Cooper*, 581 U.S. at 291-92 (citation omitted).

As this Court has explained, the harm of considering race in redistricting arises when race *predominates* in the process, not merely features in it (indeed, redistricting necessarily entails consciousness of racial demographics). The harm from the excessive use of race in redistricting is a collective, expressive one—"[i]t reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." *Shaw*, 509 U.S. at 650. *See also* Richard J. Pildes & Richard G. Niemi, *Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483, 506-07 (1993) (explaining that *Shaw* claims target the harms that result "from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about"). Racial gerrymandering claims "rest[] on the principle that, when government appears to use race in the redistricting context in a way that subordinates all other relevant values, the state has impermissibly endorsed too dominant a role for race. The constitutional harm must lie in this endorsement itself: the very expression of this kind of value reductionism becomes the constitutional violation." *Id.* at 509.

In short, then, intentional discrimination claims are concerned with an act intended to dilute or otherwise injure the voters of a particular racial group, whereas racial gerrymandering claims are concerned with the stigmatic

injury of excessive race-based decision-making. An intentional discrimination claimant must show that racial discrimination was a motivating factor, and a racial gerrymandering claimant must show that race was a predominant consideration. The former requires proof that a group's electoral opportunity was disadvantaged, and the latter does not. And whereas a finding of intentional discrimination shifts the burden to the state to prove that it would have taken the same action absent the discriminatory intent, a finding of racial predominance shifts the burden to the state to prove that its action was narrowly tailored to meet a compelling state interest.

Intentional discrimination and racial gerrymandering claims thus are not interchangeable, and cases involving both claims should not be collapsed into a single inquiry. Courts regularly navigate between these claims, applying their distinct standards without issue. *See, e.g.*, *Petteway v. Galveston Cnty.*, No. 3:22-CV-57, 2023 WL 2782705 (S.D. Tex. Mar. 30, 2023); *Perez v. Abbott*, 253 F. Supp. 3d 864, 947 (W.D. Tex. 2017); *Rodriguez v. Harris Cnty.*, 964 F. Supp. 2d 686, 801 (S.D. Tex. 2013); *Backus v. South Carolina*, 857 F. Supp. 2d 553, 565 (D.S.C.), *aff'd*, 568 U.S. 801 (2012); *Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections*, 835 F. Supp. 2d 563 (N.D. Ill. 2011).

With clarification from this Court, the District Court could no doubt do the same. Accordingly, if this Court were to reach the intentional discrimination claim, it should remand and instruct the District Court to apply the *Arlington Heights* framework to determine whether the legislature intended to injure the voting strength of a minority community and whether that community's voting strength was in fact harmed.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

DAMON T. HEWITT*
JON GREENBAUM
EZRA D. ROSENBERG
DAVID ROLLINS-BOYD
SOFIA FERNANDEZ GOLD
ALEXANDER DAVIS
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street NW, Suite 900
Washington, D.C. 20005
*Admitted in Pennsylvania only. Practice limited to matters before federal courts.

ALEXANDER J. KASNER
COOLEY LLP
1299 Pennsylvania Ave., NW
Suite 700
Washington, D.C. 20004-2400

JULIE VEROFF
Counsel of Record
KATHLEEN HARTNETT
K.C. JASKI
COOLEY LLP
3 Embarcadero Center
20th Floor
San Francisco, CA
94111-4004
(415) 693-2000
jveroff@cooley.com

ADAM S. GERSHENSON
COOLEY LLP
500 Boylston Street
Boston, MA 02116

August 18, 2023

Counsel for Amici Curiae