No. 22-807

In The Supreme Court of the United States

THOMAS C. ALEXANDER, *et al.*,
Appellants,

v.

THE SOUTH CAROLINA STATE CONFERENCE OF THE NAACP, *et al.*,
Appellees.

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

BRIEF OF *AMICUS CURIAE* THE NATIONAL REPUBLICAN REDISTRICTING TRUST IN SUPPORT OF APPELLANTS

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BRIEF OF *AMICUS CURIAE* THE NATIONAL REPUBLICAN REDISTRICTING TRUST IN SUPPORT OF APPELLANTS

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The National Republican Redistricting Trust, or NRRT, is the central Republican organization tasked with coordinating and collaborating with national, state, and local groups on a fifty-state congressional and state legislative redistricting effort.

NRRT's mission is threefold. First, it aims to ensure that redistricting faithfully follows all federal constitutional and statutory mandates. Under Article I, Section 4 of the Constitution, it is the State legislatures that are primarily entrusted with the responsibility of redrawing the States' congressional districts. Every citizen should have an equal voice, and laws must be followed in a way that protects the constitutional rights of individual voters.

Second, NRRT believes redistricting should result in districts that are sufficiently compact and preserve communities by respecting municipal and county boundaries, avoiding the forced combination of disparate populations to the extent possible. Such districts are consistent with the principle that legislators represent individuals living within

[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, other than *amicus curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

identifiable communities and not the political parties themselves.

Third, NRRT believes redistricting should make sense to voters. Each American should be able to look at their district and understand why it was drawn the way it was.

SUMMARY OF THE ARGUMENT

The court below paid lip service to the fact that *Shelby County* v. *Holder*, 570 U. S. 529 (2013) "effectively eliminated the non-retrogression requirements of Section 5 of the Voting Rights Act." *South Carolina State Conference of the NAACP* v. *Alexander*, 2023 U. S. Dist. LEXIS 4040, *12 (D.S.C. Jan. 6, 2023). Perhaps disappointed in that precedent ten years on, the court endeavored to un-eliminate the nonretrogression principle, but via a different source—the federal Constitution. The best way to read the opinion below—other errors notwithstanding, see generally Appellant's Brief—is that the court revived a nonretrogression standard through the Fourteenth Amendment, popped it into the first step of the racial gerrymander analysis, and struck down the map on that basis.

That was wrong. And it is wrong not only because it ignored this Court's actual racial predominance precedents, but because the court's approach spins on its head the Fourteenth Amendment's purpose of decoupling race from politics in our political system.

The court conflated race with politics to impose a nonretrogression standard upon South Carolina despite a complete lack of authorization from Congress to do so. Appellants, the South Carolina Legislature ("Legislature"), attempted to create a Congressional District No. 1 (hereinafter referred to as "CD1") that contained more Republican than Democratic voters—a constitutional motive. The court said no: Attempting to reduce the population of Democratic voters within a district is the same thing as an intentional racial gerrymander because in this area of South Carolina Black population and Democratic Party membership are functionally synonymous.[2] Thus the court created a constitutional nonretrogression standard, circumventing Congress.

Amicus submits its perspective will be of considerable help to this Court by exposing the three-judge district court's end run around this Court's rulings in *Shelby County* v. *Holder*, 570 U. S. 529 (2013), *Rucho* v. *Common Cause*, 139 S. Ct. 2484 (2019), and *Bartlett* v. *Strickland*, 556 U. S. 1 (2009), and by pointing to the ways in which cases (and decisions) like these move the nation and the courts further away from, not towards, the central goals of

[2] The partisan preferences of voters and voting blocs evolve over time. See, *e.g.*, Brief for the Republican National Committee and the National Republican Congressional Committee as *Amici Curiae* Supporting Appellants, *Rucho* v. *Common Cause*, No. 18-422, 6–33 (*filed* Feb. 12, 2019), *available at* https://www.supremecourt.gov/DocketPDF/18/18-422/88089/20190212154326236_No.%2018.422%20Brief%20of%20Amicus%20Republican%20National%20Committee%20et%20al..pdf.

the Fourteenth Amendment. As the Court recently reiterated, the "core purpose" of the Equal Protection Clause remains "do[ing] away with all governmentally imposed discrimination based on race." *SFFA* v. *Harvard*, 600 U. S. ____, (slip op., at 14 (quoting *Palmore v. Sidoti*, 466 U. S. 429, 432 (1984)). A nonretrogression standard focuses on the correlation between race and votes—asking whether a decrease in race percentages causes a decrease in the electoral chances of a minority-preferred candidate. This sorts citizens on the basis of their race because of how they might vote and likewise "treat[s] individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." See *id.* (quoting *Miller* v. *Johnson*, 515 U. S. 900, 912 (1995)). This Court should remind the federal courts of the "goal that the Fourteenth and Fifteenth Amendments embody"—a political system in which race no longer matters. *Bartlett*, 556 U. S., at 21 (quoting *Shaw* v. *Reno*, 509 U. S. 630, 657 (1993).

ARGUMENT

I. The court below sidestepped *Shelby County*, this Court's race-vs.-politics predominance precedents, and Congress.

A. *Shelby County* removed statutory nonretrogression.

For years, federal law—in the form of the Voting Rights Act—featured a "nonretrogression principle." The principle mostly arose as a requirement that

States who were subject to preclearance had to meet. States subject to its terms could not decrease a minority population in a particular district such that it resulted in a tilt favoring the non-minority-preferred candidate, because, the policy rationale went, doing so would undo the progress in strengthening minority vote. See *Beer* v. *United States*, 425 U. S. 130, 141 (1976) ("[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."); *Shelby County* v. *Holder*, 570 U. S., at 539 (Congress amended Section 5 to forbid "voting changes with any discriminatory purpose as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, to elect their preferred candidates of choice." (internal quotation marks omitted)); *Ala. Legislative Black Caucus* v. *Alabama*, 575 U. S. 254, 276 (2015) ("Section 5 does not require maintaining the same population percentages in majority-minority districts as in the prior plan. Rather, §5 is satisfied if minority voters retain the ability to elect their preferred candidates.").

But nonretrogression flowed from Section 5, Section 5's enforcement flowed through the coverage formula in Section 4(b), and Section 4(b)'s days were numbered—literally. Although Congress kept reauthorizing the statute, including for twenty-five more years in 2006, it declined to update the formula in Section 4(b). So in *Shelby County*, the Court struck down the coverage formula set forth in Section 4(b) because it was obsolete. 570 U. S., at

556. "The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem." *Id.*, at 534. The "potent" but justified preclearance requirements confronted the "blight of racial discrimination in voting" that had "infected the electoral process in parts of our country for nearly a century." *Id.*, at 545 (citing *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308 (1966)). Times, however, had changed, and the Court reasoned that "'current burdens' must be justified by 'current needs'" and that the coverage formula in Section 4(b) no longer was so justified, based as it was on "decades-old data and eradicated practices." *Id.*, at 550–51. The Court struck it down, saying: "Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions." *Id.*, at 557.

B. The three-judge district court engaged in policymaking by resurrecting a nonretrogression standard through the Equal Protection Clause of the Fourteenth Amendment.

The district court conceded the holding of *Shelby County*, then promptly treated this case as if a nonretrogression standard were still required, this time under the Fourteenth Amendment of the U. S. Constitution. But the proper analysis of this kind of Fourteenth Amendment claim is fundamentally and flatly different from the nonretrogression analysis. "The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans." *Cooper* v. *Harris*, 581 U. S. 285,

291 (2017). When governments are sued for race-sorting in districting, the Court utilizes a two-step analysis: "First, the plaintiff must prove that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *Id.* (quoting *Miller*, 515 U. S., at 916). "That entails demonstrating that the legislature 'subordinated' other factors—compactness, respect for political subdivisions, *partisan advantage*, what have you—to 'racial considerations.'" *Id.* (emphasis added). Second, if racial considerations did in fact predominate over political considerations, the design of the district must withstand strict scrutiny and all that entails. *Id.*, at 292 (citing *Bethune-Hill* v. *Virginia State Bd. of Elections*, 580 U. S. 178, 193 (2017)). Always, the "good faith of [the] state legislature must be presumed." See *Abbott* v. *Perez*, 138 S. Ct. 2305, 2324 (2018) (quoting *Miller*, 515 U. S., at 915).

Proving the legislature's motive was predominantly racial—not political—is "demanding." *Easley* v. *Cromartie*, 532 U. S. 234, 241 (2001) (citing *Miller*, 515 U. S., at 928 (O'Connor, J., concurring)) (hereinafter *Cromartie II*). Race cannot simply be one factor alongside others motivating the legislature's districting decision; it must be the predominant one. *Id.* (citations omitted); see, *e. g.*, *Bush* v. *Vera*, 517 U. S. 952, 968 (1996) ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify[.]"); *Hunt* v. *Cromartie*, 526 U. S. 541, 551 (1999) ("[A] jurisdiction may engage in constitutional

political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the state were *conscious* of that fact.") (hereinafter *Cromartie I*). Essentially, race, not politics, must be the uncompromisable criterion used by the map-drawers. "Plaintiffs must show that a facially neutral law is unexplainable on grounds other than race." *Cromartie II*, 532 U. S., at 241–42 (internal quotation marks omitted).

There is no room in the predominance analysis for nonretrogression. Yet the court below apparently disagreed and neglected the proper analysis of the claim brought, which has long been set forth in this Court's precedents. The result is a judicial run-around to reimpose the nonretrogression standard. But neither this Court nor any other federal court has the power to will its own policy preferences into existence through the Constitution. See *Vieth* v. *Jubelirer*, 541 U. S. 267, 278 (2004) ("The judicial Power created by Article III, § 1, of the Constitution is not *whatever* judges choose to do….") (internal quotations and citations omitted) (plurality op.). Amicus respectfully submits that the cleanest, clearest way to understand how the court below got where it did is that its analysis tracks a nonretrogression analysis rather than a racial predominance standard that decouples race from politics.

The exemplar and dead giveaway of this is the court's laser-focus on percentages of Black population in CD1. See *Alexander*, 2023 U. S. Dist. LEXIS 4040, *21 ("Roberts ultimately removed 62% of the African American residents formerly assigned

to District No. 1 to District No. 6."); see also *Ala. Black Caucus*, 575 U. S. at 276 (Percentage line-drawing is one way to see if districts have retrogressed such that minority populations can no longer elect their candidate of choice). The district court concluded that the State had a racial "target" number underlying this removal.[3] *Alexander*, 2023 U. S. Dist. LEXIS 4040, *20. That conclusion followed from the court's post-hoc analysis of the data presented by Plaintiffs' expert, which the court thought showed "a district in the range of 17% African American produced a Republican tilt, a district in the range of 20% produced a 'toss up

[3] The racial target language is a clear reference to *Cooper* v. *Harris*, 581 U. S. 285 (2017). *Cooper*'s facts and so its holdings find little to no similarity to this case. There, this Court found that the State's mapmakers had in fact established a racial target and that target subordinated other redistricting criteria. *Id.*, at 300. This finding was based on testimony from the legislators' redistricting consultant that policymakers told him to draw the district in a way that would reach a racial target as the "the more important thing[]" over traditional criteria. See *id.* Not so here. The record does not establish that the South Carolina Legislature sought a target percentage of Black voters or residents. The district court assumed there was a target because certain percentages would result in different partisan leans. See *Alexander*, 3:21-cv-03302 at 11 (ECF No. 493 at 11). But this assumption missed the obvious explanation that partisanship, rather than race, motivated the Legislature's decision-making process. This explanation is furthered by the district court's own analysis to reverse engineer the impact of racial demographics on partisanship when the record is clear that partisanship, if anything, predominated. The district court in this way inferred a racial intent in the absence of explicit targeting. Contra *Cooper*, U. S., at 300 (featuring evidence of explicit racial percentage benchmarks by the State).

district,' and a plan in the 21-24% range produced a Democratic tilt."[4] See *id.*, at *17.

That is all relevant information under a nonretrogression standard, as it was in *Alabama Black Caucus*. Under the actual racial predominance standard, not so much. Had the court used the correct standard, those statistics lose their meaning absent a clear showing independently that the actions were "unexplainable on grounds other than race." *Cromartie II*, 532 U. S., at 241–42 (internal quotation marks and citations omitted).

C. Congress, not the courts, can revive a nonretrogression standard and update the coverage formula.

The court below played usurper in reimplementing a nonretrogression standard. The federal Constitution reserves the authority to make or alter state election laws with respect to federal elections to the States in the first instance, then to Congress. See U. S. Const., Art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter

[4] In similar fashion, the panel decision below also seeks to act as an end-run around this Court's decision in *Bartlett* v. *Strickland*, which held, in the Section 2 context, a majority of minority citizens was required before any party could invoke the protections of Section 2. Here, the three-judge court attempted to establish a threshold well below a majority-minority requirement to impose racial requirements in district composition.

such Regulations[.]"). In the rare event the Reconstruction Amendments are violated by States in this context, the federal courts have jurisdiction as a remedial matter, per Congress. See 52 U. S. C. § 10302(c).[5] But nowhere has Congress (or the Constitution, for that matter) manifested an intent for federal courts to exercise this substantial power to enact a policy position that Congress—post-*Shelby County*—has thus far refused to do. The result was an erroneous ruling offending the sovereignty of the State of South Carolina and supplanting the constitutional role of the duly elected South Carolina Legislature—a violation of federalism and violation of separation-of-powers twofer. See *Shelby County*, 570 U. S., at 543 (the "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the states") (citation omitted); *id.* ("[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.") (quoting *Bond* v. *United States*, 564 U. S. 211, 221 (2011)).

Congress may draft another coverage formula based on the current conditions, should it determine

[5] This case has nothing to do with Section 3(c) of the Voting Rights Act, where Congress did, under certain conditions, give authority to the federal courts to "bail-in" jurisdictions into something akin to preclearance. The distinction is that the provisions of Section 3(c) are entirely remedial. That is, there must first be either a Fourteenth or Fifteenth Amendment violation for a court to assume continuing jurisdiction; Section 3(c) is not a mechanism to find a Fourteenth or Fifteenth Amendment violation in the first instance. See 52 U. S. C. § 10302(c). The court below did not cite to or invoke Section 3(c).

a resurrected nonretrogression standard is necessary in the modern era. *Shelby County*, 570 U. S., at 557; see also *id.*, at 542 ("In *Northwest Austin*, we stated that 'the Act imposed current burdens and must be justified by current needs.'") (quoting *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U. S. 193, 203 (2009)).[6] It has been ten years since *Shelby County*, and nothing yet. Maybe this is because the parade of horribles foretold by *Shelby County's* detractors has not happened in any significant way. See generally Nicholas Stephanopoulos, Eric McGhee, & Christopher Warshaw, *Non-Retrogression Without Law*, U. Chi. Leg. Forum (2023) (forthcoming) ("Our primary finding is that

[6] Any such nonretrogression standard, however, would be by its terms "race-based redistricting" insofar as it attaches preferred outcomes as a result of districting to the race of citizens within the proposed district. So even if Congress "could constitutionally authorize race-based redistricting … for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future." *Allen* v. *Milligan*, 599 U. S. ____, (Kavanaugh, J., concurring in part) (slip op. at 4). Any amendments—like Section 2 itself—must have "termination dates, geographic restrictions, or egregious predicates" that "tend to ensure Congress' means are proportionate to ends legitimate." *Id.* (Thomas, J., dissenting) (slip op. at 45) (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 533 (1997)). And as it stands right now, four Justices of this Court have suggested that Section 2's "constitutional footing is problematic." *Id.* at n.21 (suggesting Justice Kavanaugh agrees with dissenting Justices Thomas, Gorsuch, and Barrett on this point); see also *Shelby County*, 579 U. S. at 550–51 ("[A] statute's "current burdens" must be justified by "current needs") (quoting *Northwest Austin Municipal Util. Dist. No. One* v. *Holder*, 557 U. S. 193, 203 (2009). A new nonretrogression standard, made either by Congress or court, would face a steep uphill battle to justify its existence.

there was little retrogression in formerly covered states in the 2020 redistricting cycle.").

II. This Court should use this case to give guidance to district courts distinguishing between real Equal Protection Clause claims and partisan gerrymandering claims in the guise of racial gerrymandering claims.

The lower court's attempt at imposing nonretrogression is not the only notable element of this case flowing from the court's failure to disentangle race and politics. That failure allowed for Appellees' claim to go forward (and succeed) in federal court when it should not have. Indeed, had the court actually disentangled race from politics, it would have concluded that this case is about no more than mundane political maneuvering in redistricting.

The Appellees' Equal Protection claim—like so many others since 2019—is like a ghost in a Scooby-Doo episode, scary (and justiciable) until the mask comes off at the end. Then everyone sees that, under the concealment, it had been a partisan gerrymandering claim the whole time. And partisan-aligned plaintiffs will continue to get away with it, too, unless district courts know how and what to do when these imposter claims land in front of them.

Appellees wanted (and won) a constitutional challenge to a map that would result in the destruction of CD6 and the pouring of Democrat

votes into neighboring districts (turning CD1, for example, into a crossover district likely to elect a White Democrat). The Legislature, when drawing this map, did not want such a result. That's politics as usual. What the Appellees are alleging is partisan gerrymandering, and what they want as remedy are partisan gains for their preferred party. That is a tale as old as redistricting itself.

A. *Rucho* eliminated partisan gerrymandering claims but also reaffirmed that partisan aims may incidentally affect populations.

The holding of *Rucho* v. *Common Cause* is well known to the litigants and the Court: Partisan gerrymandering claims are not justiciable in federal courts, because no judicially manageable standard exists for figuring out how much partisan motivation in districting is too much. 139 S. Ct., at 2508. Some districting claims, however, remain quite justiciable: One-person, one-vote and racial gerrymandering claims still necessitate a "role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts." *Id.*, at 2495–96. That follows from the reality that, unlike partisan gerrymandering claims, a racial gerrymandering claim does "not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship." *Id.*, at 2502. Racial gerrymandering claims are about "individual legal rights," whereas partisan ones are "about group

political interests" and implicate questions of fairness the federal courts cannot answer. See *Gill* v. *Whitford*, 138 S. Ct. 1916, 1933 (2018).

But the door was closed on partisan claims. A State may balance population, irrespective of its racial composition, for a political aim. *Rucho*, 139 S. Ct., at 2500. Politically driven decisions that result in the reduced percentage of a minority group are not cognizable as legal violations under the Constitution. Federal courts are now vested with the responsibility not to confuse partisan gerrymandering with racial gerrymandering no matter the guise under which plaintiffs may bring their claim—in other words, to ensure that plaintiffs do not use claims about race to get into federal court for political gain.

B. Imposter gerrymandering claims have unsurprisingly arisen in response to *Rucho*, including in this case.

Although *Rucho*'s holding is clear, it occasioned those bringing partisan gerrymandering claims to dress them up as one of the types of justiciable claims listed by the Court. Over the last four years, Democrat-aligned plaintiffs have filed lawsuits nearly everywhere Republicans hold the map-drawing pen. Fourteenth Amendment claims have been made in Texas, Florida, and Arkansas. See Compl., *Common Cause* v. *Byrd et al.*, 4:22-cv-109 (N.D. Fla. Mar. 11, 2022); Compl., *The Christian Ministerial Alliance* v. *Thurston et al.*, 4:23-cv-471

(E.D. Ark. May 23, 2023). These cases cry out for a disentanglement of race and politics.[7]

No case in the last few years, however, may be as unabashedly partisan in all respects as the present one. Politics truly was the point for all involved. For its part, the Legislature itself knew what it was about: increasing Republican tilt in CD1. See *Alexander*, 2023 U. S. Dist. LEXIS 4040, *19. The Appellees likewise had partisan goals in bringing suit, hoping that unloading Democrats from CD6 to CD1 would make CD1 Democrat-leaning if enough Democrat votes flowed from one district into the other.

But Appellees, unlike the Legislature, hid the ball. They brought a disguised claim, a partisan gerrymandering claim dressed up in racial terms, and the potential Democrat losses and gains in CD1 desired respectively by the Republicans and Democrats were characterized as racial losses and gains. This was done to circumvent *Rucho*. The lower court took the bait, reasoning in essence that politically driven adjustments that also impact race are constitutional violations, in clear contravention of *Rucho*.

[7] The same dynamic exists in Section 2 cases. Modern vote dilution claims have been used as a one-way ratchet to elect Democrats, not to remedy minority underrepresentation. Party-aligned voters and institutions in Louisiana, Georgia, and Texas have used the VRA to advance the interests of the Democratic Party. See Compl., *Robinson et al.* v. *Ardoin*, No. 3:22-cv-211 (M. D. La. Mar. 30, 2022); Compl., *New Georgia Project et al. v. Raffensperger et al.*, No. 1:21-cv-1229 (N. D. Ga. Mar. 25, 2021); Compl., *Texas State Conference of the NAACP* v. *Abbott et al.*, No. 1:21-cv-1006 (W. D. Tex. Nov. 5, 2021).

Whether in this case or in the others listed, federal courts need to be equipped with the tools to figure out which of these claims are real, and which are not.

C. This Court should give the district courts tools to disentangle race from politics such as requiring plaintiffs to present an alternative map that remedies their alleged harm while still serving the State's asserted political interests.

As one court dealing with this exact problem opined recently, "[I]f a partisan motive is predominant, then a racial motive cannot be." *Simpson* v. *Hutchinson*, 2022 U. S. Dist. LEXIS 193477, at *7–8 (E. D. Ark. 2022) (three-judge district court) (citing *Brnovich* v. *Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2335 (2021) for the proposition that courts ought to "distinguish between partisan and racial motives"). This Court has long held partisan motives as acceptable, prompting district courts to determine which motives are which. See *Cooper*, 581 U. S., at 308 (reaffirming that a State may assert "partisanship as a defense," requiring district courts to make a "sensitive inquiry" into all direct and indirect evidence of intent to figure out if plaintiffs disentangled race from politics and proved that race drove the line-drawing, not politics) (citing *Cromartie I*, 526 U. S., at 547, n. 3 and *Cromartie II*, 532 U. S., at 243). Conflating the motives wipes away this Court's precedents holding them as distinct.

The simplest way to do this is for this Court to reiterate and reinforce the central inquiry of the predominance inquiry to district courts. Courts need to take more seriously the task of disentangling race and politics.

One useful tool could be to require plaintiffs in racial gerrymandering cases to present a legally compliant alternative map that serves the State's proffered political interest. See *Cooper*, 581 U. S., at 317 ("We have no doubt that an alternative districting plan . . . can serve as key evidence in a race-versus-politics dispute."). This Court in *Cooper* did not require such a map, but that flowed from the already-present adequate and explicit evidence of race-based redistricting. See *id.*, at 318. The *Cooper* Court left open the possibility of requiring such a map in the future because in cases having different facts than *Cooper* "a plaintiff will sometimes need an alternative map, as a practical matter, to make his case." *Id.*, at 319; see also *LULAC* v. *Perry*, 548 U. S. 399, 460 (2006) ("[T]he federal court should, as much as possible "follow the policies and preferences of the State," in creating a new map." (quoting *Upham* v. *Seamon*, 456 U. S. 37, 41 (1982)) (internal quotation marks and citations omitted).

Such a map would not fully answer the predominance question, but it makes sense for a district court to at least consider it. Presenting a map helps defeat any notion that plaintiffs are simply seeking partisan gain, because the alternative map serves the Legislature's partisan priorities, not theirs. And it disentangles race from politics, because the alternative map could remedy

the alleged racial harm with no change to the partisan interest. A successfully drawn alternative map thus also serves to seriously undermine, albeit indirectly, the idea that partisan gain was truly the motive for a State, because a State would have had a way to attain the same gains without resorting to race-sorting. It stands to reason that States, if presented with a choice between Map A that gives the legislature its prefered partisan gains and does not sort voters on the basis of race and Map B that gives the same gains but does sort voters on the basis of race, a State would choose Map A to avoid unintentional race sorting. If this Court were to adopt this as an affirmative requirement, it would illuminate for the trial courts the differences between race and politics in these cases.

Consider the absence of such a map in this case. The court below reasoned that a constitutionally compliant plan for CD1 could "be designed without undue difficulty," rendering it unnecessary for Appellees to present an acceptable alternative map.[8] But—if such a map would be required to serve the stated legislative goal of giving CD1 a more

[8] Appellees did offer alternative maps, but they had the opposite effect the South Carolina Legislature hoped to achieve. The maps would make CD1 a Democrat-leaning seat. See *Alexander*, 3:21-cv-03302 at 11 (ECF No. 493 at 11). The percentage of Black citizens in Senator Harpootlian's plan is twenty-one percent, and in the two plans offered by the League of Women Voters the Black percentages are twenty-three and twenty-four percent respectively. The change in the percentage of Black voters in CD1 is miniscule, topping out at a 7 percent difference, but there is a substantial political gain: Democrats could form a political coalition "crossover district" and most likely gain a seat in the U. S. House of Representatives.

Republican tilt—that is not accurate. We, however, cannot know just how difficult it would be to create that map, because the court did not require it. But logic dictates that it would not be so easy. If it were, the Legislature in this case obviously would have done so and avoided any possibility of litigation.

III. The Court should reaffirm the Fourteenth Amendment's core goals by rejecting disguised partisan gerrymandering claims and the district court's "resurrection" of nonretrogression.

The district court's approach pushes this nation towards balkanization because of the consideration of race in the political system, the very ills the Fourteenth Amendment was adopted to ameliorate. The "goal that the Fourteenth and Fifteenth Amendments embody" is a political system in which race no longer matters. *Bartlett*, 556 U. S., at 21 (quoting *Shaw*, 509 U. S., at 657). Racial gerrymandering grinds directly against this, even when done for remedial reasons, because it "may balkanize us into competing racial factions." See *id.* Good intentions notwithstanding, race sorting of voters is perilous and undermines the Reconstruction Amendments. See *id*. The "core purpose" of the Equal Protection Clause remains "do[ing] away with all governmentally imposed discrimination based on race." *SFFA* v. *Harvard*, 600 U. S. ____, (slip op., at 14 (quoting *Palmore v. Sidoti*, 466 U. S. 429, 432 (1984)). Sorting citizens on the basis of their race because of how they might vote likewise "treat[s] individuals as the product of their

race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." See *id.* (slip op., at 30 (quoting *Miller*, 515 U. S., at 912)).

And the Voting Rights Act does not somehow negate or work around the Fourteenth Amendment. True, the VRA has imposed on States requirements beyond the baseline Equal Protection Clause requirements. And further true, these statutory requirements have, in the past, called for racial classifications (e.g., the nonretrogression standard itself). This cuts against the use of race-based standards by the courts. If the Voting Rights Act of all statutes does not now require a nonretrogression requirement, the United States Constitution, which abhors racial classifications, surely does not. The Fourteenth Amendment does not give forth race-based classifications; it yearns to annihilate them. See *id.* (slip op., at 15–16 n.3) (noting that *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944) is not a good model for Equal Protection Clause race jurisprudence).

Partisan gerrymandering claims in the guise of racial gerrymandering claims—with their accompanying goal of partisan gains—make a mockery of the Fourteenth Amendment. With no evidence of racist intent on the part of the State, partisan-aligned plaintiffs bring otherwise-nonjusticiable claims into federal court through the very amendment that works to discontinue uses of race in politics. But these sham claims do just that, using race as a hook to get into federal court.

Appellees' invocation of race to draw favorable lines for political gain moves the nation in the opposite direction of where the Equal Protection Clause points.

The lower court endorsed this misuse of the system, resurrecting nonretrogression by judicial fiat against South Carolina, no doubt in the mind of the court "for remedial reasons." See *Shaw*, 509 U. S., at 657. The court, having no basis in the Voting Rights Act, bent the Fourteenth Amendment backwards to support its goals of imposing an affirmative duty of nonretrogression and guaranteeing the creation of Democratic crossover districts. By conflating race with politics, the three-judge district court has effectively disallowed the South Carolina Legislature from drawing maps based on the Legislature's desire to give CD1 a stronger Republican tilt. The South Carolina Legislature is now forced to consider how many Black voters were removed from the district. That's considering race in politics (in opposition to the Fourteenth Amendment's telos) and reduces Black South Carolinians to their worth as Democrat votes instead of their worth as individuals and citizens.

If this Court does not correct this, other courts may follow suit. Allowing more claims that conflate race and politics in similar ways will further balkanizing us into competing racial factions. We must not be carried further away from the goal of the Fourteenth Amendment, a political system in which race doesn't matter anymore. *Bartlett*, 556 U. S., at 21;*SFFA* v. *Harvard*, 600 U. S. ____, (slip op.,

at 14 (quoting *Palmore v. Sidoti*, 466 U. S. 429, 432 (1984)).

CONCLUSION

For these reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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